CORPUS JURIS SECUNDUM

CJS

PRUDENTIA JURIS PERPETUA

CITE BY TITLE AND SECTION

Thus

56 C.J.S. Master and Servant § 5

CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE AMERICAN LAW

AS DEVELOPED BY

ALL REPORTED CASES

By

The Editorial Staffs
of
THE AMERICAN LAW BOOK CO.
and
WEST PUBLISHING CO.

VOLUME LVI

Kept to Date by Cumulative Annual Pocket Parts

Brooklyn, N. Y.
The American Law Book Co.

EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been twofold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of Corpus Juris. When the searcher may wish to consult earlier authorities, a specific reference to Corpus Juris makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined product of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A

A.	Atlantic Reporter
Abb.	Abbott (U.S.)
Abb.Adm.	Abbott's Admiralty (U.S.)
Abb.App.Dec.	Abbott's Appeals Decisions (N.Y.)
Abb.Dec.	Abbott's Decisions (N.Y.)
Abb.N.Cas.	Abbott's New Cases (N.Y.)
Abb.Pr.	Abbott's Practice (N.Y.)
Abb.Pr.N.S.	Abbott's Practice New Series (N.Y.)
A'Beck.Res. Judgm.	A'Beckett's Reserved Judgments (Vict.)
[1917]A.C.	[1917] Appeal Cases (Can.)
[1918]A.C.	Law Reports [1918] Appeal Cases (Eng.)
Acton	Acton (Eng.)
Adams	Adams Reports (N.H.)
Add.	Addison (Pa.)
Add.Eccl.	Addams' Ecclesiastical (Eng.)
A.&E.	Adolphus & Ellis (Eng.)
A.&E.Enc.L.	American & English Encyclopædia of Law
A.&E.Enc.L.&Pr.	American & English Encyclopædia of Law & Practice
Aik.	Aikens (Vt.)
A.K.Marsh.	A. K. Marshall (Ky.)
Ala.	Alabama
Ala.App.	Alabama Appellate Court
Alaska	Alaska
Alb.L.J.	Albany Law Journal
A.L.C.	American Leading Cases
Alc.&N.	Alcott & Napier (Eng.)
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)
Aleyn	Aleyn (Eng.)
Alison Pr.	Alison's Practice (Sc.)
Allen	Allen (Mass.)
Allen (N.B.)	Allen, New Brunswick
Alta.L.	Alberta Law
A.L.R.	American Law Reports
Am.Bankr.	American Bankruptcy (U.S.)
Ambl.	Ambler (Eng.)
A.M.C.	American Maritime Cases
Am.Corp.Cas.	American Corporation Cases
Am.Cr.	American Criminal
Am.D.	American Decisions
Am.&E.Corp.Cas.	American & English Corporation Cases
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series
Am.&Eng.Ency. Law	American and English Encyclopedia of Law
Am.&E.Eq.D.	American & English Decisions in Equity
Am.&Eng.Pat. Cas.	American and English Patent Cases
Am.&Eng.R.R. Cas.	American and English Railroad Cases
Am.Electr.Cas.	American Electrical Cases
Am.&E.R.Cas.	American & English Railroad Cases
Am.&E.R.Cas.N. S.	American & English Railroad Cases New Series
Am.J.Int.L.	American Journal of International Law
Am.L.J.	American Law Journal (Pa.)
Am.L.J.N.S.	American Law Journal New Series (Pa.)
Am.L.Rec.	American Law Record (Ohio)
Am.L.Reg.	American Law Register
Am.L.Reg.N.S.	American Law Register New Series
Am.Law Reg.(O. S.)	American Law Register Old Series
Am.L.Rev.	American Law Review
Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Am.Law Inst.	American Law Institute, Restatement of the Law
Am.Negl.Cas.	American Negligence Cases
Am.Negl.R.	American Negligence Reports
A.M.&O.	Armstrong, Macartney & Ogle (Ir.)
Am.Prob.	American Probate
Am.Prob.N.S.	American Probate New Series
Am.Pr.	American Practice
Am.R.	American Reports
Am.R.&Corp.	American Railroad & Corporation
Am.R.Rep.	American Railway Reports
Am.S.R.	American State Reports
Am.St.R.D.	American Street Railway Decisions
And.	Anderson (Eng.)
Andr.	Andrews (Eng.)
Ann.Cas.	American & English Annotated Cases
Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Anstr.	Anstruther (Eng.)
Anth.N.P.	Anthon's Nisi Prius (N.Y.)
App.D.C.	Appeal Cases (D.C.)
App.Cas.	Law Reports Appeal Cases (Eng.)
App.Div.	Appellate Division (N.Y.)
Ariz.	Arizona
Ark.	Arkansas
Ark.Just.	Arkley's Justiciary (Sc.)
Arn.	Arnold (Eng.)
Arn.&H.	Arnold & Hodges (Eng.)
Ashm.	Ashmead (Pa.)
Aspin.	Aspinall's Maritime Cases (Eng.)
Atk.	Atkyn (Eng.)
Austr.C.L.R.	Commonwealth Law Reports, Australia
Austr.Jur.	Australian Jurist
Austr.L.T.	Australian Law Times

B

Bacon Abr.	Bacon's Abridgment (Eng.)
Bail.Eq.	Bailey's Equity (S.C.)
Bailey	Bailey's Law (S.C.)
B.&Ad.	Barnewall & Adolphus (Eng.)
B.&Ald.	Barnewall & Alderson (Eng.)
Baldw.	Baldwin (U.S.)
Balf.Pr.	Balfour's Practice (Sc.)
Ball&B.	Ball & Beatty (Ir.)
Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
Bann.	Bannister (Eng.)
Bann.&A.	Banning & Arden (U.S.)
Barb.	Barbour (N.Y.)
Barb.Ch.	Barbour's Chancery (N.Y.)
B.&Arn.	Barron & Arnold (Eng.)
Barn.	Barnardiston King's Bench (Eng.)
Barn.Ch.	Barnardiston Chancery (Eng.)
Barnes	Barnes' Practice Cases (Eng.)
Barnes Notes	Barnes' Notes (Eng.)
Batty	Batty (Ir.)
B.&Aust.	Barron & Austin (Eng.)
Baxt.	Baxter (Tenn.)
Bay	Bay (S.C.)
B.&B.	Broderip & Bingham (Eng.)
B.C.	British Columbia

B.&C.	Barnewall & Cresswell (Eng.)
B.&Macn.	Browne & Macnamara (Eng.)
B.D.&O.	Blackham, Dundas & Osborne (Ir.)
Beatty	Beatty (Ir.)
Beav.	Beavan (Eng.)
Beav.&Wal.Ry. Cas.	Beavan & Walford's Railway and Canal Cases (Eng.)
Beav.R.&C.Cas.	English Railway and Canal Cases
Beaw.Lex.Mer.	Beawes Lex Mercatoria (Eng.)
Bee	Bee (U.S.)
Bell.	Bellewe (Eng.)
Bell App.Cas.	Bell's Appeal Cases (Sc.)
Bell Cas.	Bell's Cases (Sc.)
Bell C.C.	Bell's Crown Cases (Eng.)
Bell Comm.	Bell's Commentaries (Eng.)
Bell Sc.Cas.	Bell's Scotch Court of Session Cases
Ben.	Benedict (U.S.)
Benl.	Benloe (Eng.)
Benl.&D.	Benloe & Dallison (Eng.)
B.&H.Cr.Cas.	Bennett & Heard Leading Criminal Cases (Eng.)
Bibb	Bibb (Ky.)
Bing.	Bingham (Eng.)
Bing.N.Cas.	Bingham's New Cases (Eng.)
Binn.	Binney (Pa.)
Biss.	Bissell (U.S.)
Bitt.W.&P.	Bittleson, Wise & Parnell (Eng.)
Black	Black (U.S.)
Blackf.	Blackford (Ind.)
Blackstone Comm.	Blackstone Commentaries
Bla.H.	Henry Blackstone's English Common Pleas (Eng.)
Blair Co.	Blair County (Pa.)
Bland	Bland (Md.)
Bland's Ch.	Bland Chancery (Md.)
Blatchf.	Blatchford (U.S.)
Blatchf.&H.	Blatchford & Howland (U.S.)
Blatchf.PrizeCas.	Blatchford's Prize Cases (U.S.)
Bligh	Bligh (Eng.)
Bligh N.S.	Bligh New Series (Eng.)
B.Mon.	B. Monroe (Ky.)
Bond	Bond (U.S.)
Bouvier.	Bouvier's Law Dictionary
Boyce	Boyce (Del.)
B.&P.	Bosanquet & Puller (Eng.)
B.&P.N.R.	Bosanquet & Puller's New Reports (Eng.)
Bract.	Bracton de Legibus et Consuetudinibus Angliæ
Bradf.Surr.	Bradford's Surrogate (N.Y.)
Brayt.	Brayton (Vt.)
B.R.C.	British Ruling Cases
Brev.	Brevard (S.C.)
Brewst.	Brewster (Pa.)
Brightly	Brightly (Pa.)
Brightly El.Cas.	Brightly's Election Cases (Pa.)
Bro.Ch.	Brown's Chancery (Eng.)
Brock.	Brockenbrough (U.S.)
Brock.Cas.	Brockenbrough's Virginia Cases
Brod.&B.	Broderip & Bingham (Eng.)
Brod.&Fr.	Broderick & Fremantle's Ecclesiastical Cases
Brodix Am.&E. Pat.Cas.	Brodix's American & English Patent Cases
Bro.Just.	Broun's Justiciary (Sc.)
Brook Abr.	Brook's Abridgments (Eng.)
Brook N.Cas.	Brook's New Cases (Eng.)
Brooke N.C.	Brooke's New Cases
Bro.P.C.	Brown's Parliament Cases (Eng.)
Brown Adm.	Brown's Admiralty (U.S.)
Brown, Ch.	Brown's Chancery Cases (Eng.)
Brown Ecc.	Brown Ecclesiastical (Eng.)
Brown N.P.	Brown's Michigan Nisi Prius
Brown,Parl.Cas.	Brown Parliamentary Cases (Eng.)
Browne	Browne (Pa.)
Brown.&L.	Browning & Lushington (Eng.)
Brownl.&G.	Brownlow & Goldesborough (Eng.)
Bruce	Bruce (Sc.)
Brunn.Coll.Cas.	Brunner's Collective Cases (U.S.)
B.&S.	Best & Smith (Eng.)
B.T.A.	Board of Tax Appeals (U.S.)
Buck	Buck (Eng.)
Buller N.P.	Buller's Nisi Prius (Eng.)
Bulstr.	Bulstrode (Eng.)
Bunb.	Bunbury (Eng.)
Burn.	Burnett (Wis.)
Burr.	Burrows (Eng.)
Burr.S.Cas.	Burrows' Settlement Cas. (Eng.)
Busb.	Busbee (N.C.)
Busb.Eq.	Busbee Equity (N.C.)
Bush	Bush (Ky.)
B.W.C.C.	Butterworth's Workmen's Compensation Cases (Eng.)

C

Cab.&E.	Cababe & Ellis (Eng.)
Cai.	Caines (N.Y.)
Cai.Cas.	Caines' Cases (N.Y.)
Cal.	California
Cal.(2d)	California Reports, Second Series
Cal.App.	California Appellate Court
Cal.App.(2d)	California Appellate Reports, Second Series
Cald.	Caldecott (Eng.)
Call	Call (Va.)
Calthr.	Calthrop (Eng.)
Cal.Unrep.Cas.	California Unreported Cases
Cam.Cas.	Cameron's Cases (Can.)
Campb.	Campbell (Eng.)
Canal Zone	Canal Zone Supreme Court
Can.App.Cas.	Canadian Appeal Cases
Can.Cr.Cas.	Canadian Criminal Cases
Can.Exch.	Canadian Exchequer
Can.L.J.	Canada Law Journal
Can.L.J.N.S.	Canada Law Journal New Series
Can.L.T.Occ. Notes	Canadian Law Times Occasional Notes
Can.R.Cas.	Canadian Railway Cases
Can.S.C.	Canada Supreme Court
Cane&L.	Cane & Leigh Crown Cases Reserved (Eng.)
Car.&K.	Carrington & Kirwan (Eng.)
Car.&M.	Carrington & Marshman (Eng.)
Car.&P.	Carrington & Payne (Eng.)
Car.H.&A.	Carrow, Hamerton & Allen (Eng.)
Carp.P.C.	Carpmael Patent Cases (Eng.)
Carter	Carter (Eng.)
Carth.	Carthew (Eng.)
Cartwr.Cas.	Cartwright's Cases (Can.)
Cary	Cary (Eng.)
Cas.	Casey (Pa.)
Cas.t.Hardw.	Cases temp. Hardwicke (Eng.)
Cas.t.Holt	Cases temp. Holt (Eng.)
Cas.t.King	Cases temp. King (Eng.)
Cas.t.Talb.	Cases temp. Talbot (Eng.)
C.B.	Common Bench (Manning, Granger & Scott) (Eng.)
C.B.N.S.	Common Bench New Series (Manning, Granger & Scott New Series) (Eng.)
C.C.A.	Circuit Court of Appeals (U.S.)
C.C.P.A.	Court of Customs and Patent Appeals
Centr.L.J.	Central Law Journal
[1891] Ch.	Law Reports [1891] Chancery (Eng.)
Chamb.Rep.	Chamber (Ont.)
Chandl.	Chandler (Wis.)
Charlt.R.M.	R. M. Charlton (Ga.)
Charlt.T.U.P.	T. U. P. Charlton (Ga.)
Chase	Chase (U.S.)
Ch.Cas.	Cases in Chancery (Eng.)
Ch.Chamb.	Chancery Chambers (U.C.)
Ch.Col.Op.	Chalmers' Colonial Opinions
Ch.D.	Law Reports Chancery Division (Eng.)
Chest.Co.	Chester County (Pa.)
Chev.	Cheves (S.C.)
Chit.	Chitty (Eng.)
Choyce Cas.Ch.	Choyce Cases in Chancery (Eng.)
Ch.Rep.	Chancery Reports (Eng.)
Ch.Sent.	Chancery Sentinel (N.Y.)
Cinc.L.Bul.	Weekly Law Bulletin (Oh.)
Cinc.Super.	Cincinnati Superior Court Reporter (Oh.)
City Ct.R.	City Court Reports (N.Y.)
City Hall Rec.	City Hall Recorder (N.Y.)

Civ.Proc.Rep.	Civil Procedure Reports (N.Y.)
C.J.	Corpus Juris
C.J.Ann.	Corpus Juris Annotations
C.J.S.	Corpus Juris Secundum
C.&K.	Carrington & Kirwan (Eng.)
C.&L.	Connor & Lawson (Ir.)
Cl.App.	Clark's Appeal Cases (Eng.)
Cl.Ch.	Clarke's Chancery (N.Y.)
Clark &F.	Clark & Finnelly (Eng.)
Clark &Fin.N.S.	Clark's House of Lords Cases (Eng.)
Clarke	Clarke's Chancery (N.Y.)
Clarke &S.Dr.Cas.	Clarke & Scully's Drainage Cases (Ont.)
Clarke Ch.	Clarke's Chancery (N.Y.)
Clayt.	Clayton's Reports, York Assizes (Eng.)
C.L.Chamb.	Chamber's Common Law (U.C.)
Clev.L.Rec.	Cleveland Law Record (Oh.)
Clev.L.Rep.	Cleveland Law Reporter (Oh.)
Cl.&F.	Clark & Finnelly (Eng.)
Clif.El.Cas.	Clifford's Southwick Election Cases
Cliff.	Clifford (U.S.)
C.L.R.	Common Law Reports (Eng.)
C.&M.	Carrington & Marshman (Eng.)
C.M.&R.	Crompton, Meeson & Roscoe (Eng.)
Cock.&Rowe.	Cockburn & Rowe's Election Cases
Code Rep.	Code Reporter (N.Y.)
Code Rep.N.S.	Code Reports New Series (N.Y.)
Coff.Prob.	Coffey's Probate (Cal.)
Co.Inst.	Coke's Institutes
Coke	Coke (Eng.)
Col.Cas.	Coleman's Cases (N.Y.)
Col.&C.Cas.	Coleman & Caines' Cases (N.Y.)
Col.C.C.	Collyer's Chancery Cases (Eng.)
Coldw.	Coldwell (Tenn.)
Coll.	Collyer (Eng.)
Col.L.Rep.	Colorado Law Reporter
Col.Law Review	Columbia Law Review
Coll.&E.Bank.	Collier and Eaton's American Bankruptcy Reports
Colles	Colles' Cases in Parliament (Eng.)
Colo.	Colorado
Colo.App.	Colorado Appeals
Colq.	Colquit
Coltm.	Coltman (Eng.)
Comb.	Comberbach (Eng.)
Com.Cas.	Commercial Cases (Eng.)
Com.L.	Commercial Law (Can.)
Comptr.Treas. Dec.	Comptroller Treasury Decisions
Comst.	Comstock (N.Y.)
Comyns	Comyns (Eng.)
Comyns Dig.	Comyns Digest (Eng.)
Con.&Law.	Connor & Lawson (Ir.)
Conf.	Conference Reports (N.C.)
Conn.	Connecticut
Conn.Surr.	Connolly's Surrogate (N.Y.)
Const.	Constitutional Reports (N.C.)
Cooke	Cooke (Eng.)
Cooke	Cooke (Tenn.)
Cooke & A.	Cooke & Alcock (Ir.)
Cook Vice-Adm.	Cook's Vice-Admiralty (L.C.)
Coop.	Cooper's Chancery (Eng.)
Coop.Pr.Cas.	Cooper's Practice Cases (Eng.)
Coop.t.Brough.	Cooper's Cases temp. Brougham (Eng.)
Coop.t.Cott.	Cooper's Cases temp. Cottenham (Eng.)
Coop.t.Eld.	Cooper's Cases *tempore* Eldon (Eng.)
Co.P.C.	Coke's Reports (Eng.)
Corb.&D.	Corbett & Daniell's Election Cases (Eng.)
Court.&Macl.	Courtnay & Maclean (Sc.)
Cow.	Cowen (N.Y.)
Cow.Cr.Rep.	Cowen's Criminal (N.Y.)
Cowp.	Cowper (Eng.)
Cox.Am.T.M.Cas.	Cox's American Trade-Mark Cases
Cox C.C.	Cox's Criminal Cases (Eng.)
Cox Ch.	Cox's Chancery (Eng.)
Cox &Atk.	Cox & Atkinson (Eng.)
C.&P.	Carrington & Payne (Eng.)
C.P.C.	C. P. Cooper's Chancery Practice Cases (Eng.)
C.P.D.	Law Reports Common Pleas Division (Eng.)
Crabbe	Crabbe (U.S.)
Cranch	Cranch (U.S.)
Cranch C.C.	Cranch's Circuit Court (U.S.)
Cranch Pat.Dec.	Cranch's Patent Decisions (U.S.)
Cr.App.	Criminal Appeals (Eng.)
Crawf.&D.	Crawford & Dix (Ir.)
Crawf.&D.Abr. Cas.	Crawford & Dix's Abridged Cases (Ir.)
Cripp's Ch.Cas.	Cripp's Church and Clergy Cases
Cr.L.Mag.	Criminal Law Magazine
Cr.&Ph.	Craig & Phillips (Eng.)
C.Rob.	Christopher Robinson's Admiralty (Eng.)
Cro.Car.	Croke Charles (Eng.)
Cro.Eliz.	Croke Elizabeth (Eng.)
Cro.Jac.	Croke's Reports tempore James (Jacobus) (Eng.)
Cromp.&J.	Crompton & Jervis (Eng.)
Cromp.&M.	Crompton & Meeson (Eng.)
Crosw.Pat.Cas.	Croswell's Collection of Patent Cases (U.S.)
Cr.&Ph.	Craig & Phillips (Eng.)
Ct.Cl.	Court of Claims (U.S.)
Ct.Cust.&Pat. App.	Court of Customs and Patent Appeals
Cunn.	Cunningham (Eng.)
Curt.	Curtis (U.S.)
Curt.Eccl.	Curteis Ecclesiastical (Eng.)
Cush.	Cushing (Mass.)
Cust.A.	United States Customs Appeals
Cyc.	Cyclopedia of Law & Procedure
Cyc.Ann.	Cyclopedia of Law & Procedure Annotations

D

Dak.	Dakota
Dal.C.P.	Dalison's Common Pleas (Eng.)
Dall.	Dallaman's Decisions (Tex.)
Dall.	Dallas (Pa.)
Dall.	Dallas (U.S.)
Dalr.Dec.	Dalrymple's Decisions (Sc.)
Daly	Daly (N.Y.)
Dan.	Daniell (Eng.)
Dana	Dana (Ky.)
Dane Abr.	Dane's Abridgment
Dans.&L.	Danson & Lloyd (Eng.)
D'Anv.Abr.	D'Anver's Abridgment (Eng.)
Dauph.Co.	Dauphin County (Pa.)
Dav.&M.	Davison & Merivale (Eng.)
Davys	Davys (Ir.)
Day	Day (Conn.)
D.B.&M.	Dunlop, Bell & Murray (Sc.)
D.C.	District of Columbia
D.Chipm.	D. Chipman (Vt.)
Deac.	Deacon (Eng.)
Deac.&C.	Deacon & Chitty (Eng.)
Deady	Deady (U.S.)
Dears.&B.	Dearsley & Bell (Eng.)
Dears.C.C.	Dearsley's Crown Cases (Eng.)
Deas & A.	Deas & Anderson (Eng.)
De Gex	De Gex (Eng.)
De G.F.&J.	De Gex, Fisher & Jones (Eng.)
De G.J.&S.	De Gex, Jones & Smith (Eng.)
De G.&J.	De Gex & Jones (Eng.)
De G.M.&G.	De Gex, MacNaghten & Gordon (Eng.)
De G.&Sm.	De Gex & Smale (Eng.)
Del.	Delaware
Del.Ch.	Delaware Chancery
Del.Co.	Delaware County (Pa.)
Dem.Surr.	Demarest's Surrogate (N.Y.)
Den.	Denio (N.Y.)
Den.C.C.	Denison's Crown Cases (Eng.)
Desaus.Eq.	Desaussure (S.C.)
Dev.Ct.Cl.	Devereux's Court of Claims (U.S.)
Dev.L.	Devereux (N.C.)
Dev.&Bat.	Devereux & Battle (N.C.)
Dick.	Dickens (Sc.)
Dill.	Dillon (U.S.)
Dirl.Dec.	Dirleton's Decisions (Sc.)
Disn.	Disney (Oh.)

D.&L.	Dowling & Lowndes (Eng.)
Dods.	Dodson's Admiralty (Eng.)
Dom.L.R.	Dominion Law Reports (Can.)
Donnelly	Donnelly (Eng.)
Dorion	Dorion (L.C.)
Dougl.	Douglas (Eng.)
Dougl.	Douglass (Mich.)
Dougl.El.Cas.	Douglas' Election Cases (Eng.)
Dow	Dow (Eng.)
Dow & Cl.	Dow & Clark (Eng.)
Dow.&L.	Dowling & Lowndes (Eng.)
Dow.N.S.	Dowling, New Series (Eng.)
Dowl.	Dowling's English Bail Court (Practice) Cases
Dowl.P.C.	Dowling's Practice Cases (Eng.)
Dowl.P.C.N.S.	Dowling's Practice Cases New Series (Eng.)
D.&R.	Dowling & Ryland (Eng.)
Draper	Draper (U.C.)
Drew.	Drewry (Eng.)
Drinkw.	Drinkwater (Eng.)
D.&R.Mag.Cas.	Dowling & Ryland's Magistrate Cases (Eng.)
D.&R.N.P.	Dowling & Ryland's Nisi Prius (Eng.)
Dr.&Sm.	Drewry & Smale (Eng.)
Drury	Drury (Ir.)
Dr.&Wal.	Drury & Walsh (Ir.)
Dr.&War.	Drury & Warren (Ir.)
D.&Sw.	Deane & Swabey (Eng.)
Dud.Eq.	Dudley (S.C.)
Dudl.	Dudley (Ga.)
Duer	Duer's Superior Court (N.Y.)
Dunl.B.&M.	Dunlop, Bell & Murray (Sc.)
Dunlop	Dunlop (Sc.)
Dunn.	Dunning (Eng.)
Durie	Durie (Sc.)
Durn.&E.	Durnford & East (Eng.)
Duv.	Duvall (Ky.)
Dyer	Dyer (Eng.)

E

East	East (Eng.)
East.L.R.	Eastern Law Reporter (Can.)
East P.C.	East's Pleas of the Crown (Eng.)
East.T.	Eastern Term (Eng.)
E.&B.	Ellis & Blackburn (Eng.)
E.B.&E.	Ellis, Blackburn & Ellis (Eng.)
E.B.&S.	Ellis, Best & Smith (Eng.)
E.C.L.	English Common Law
Eden	Eden (Eng.)
Edgar	Edgar (Sc.)
Edm.Sel.Cas.	Edmond's Select Cases (N.Y.)
E. D. Smith	E. D. Smith (N.Y.)
Edw.	Edwards (Eng.)
Edw.	Edwards' Chancery (N.Y.)
Edw.Abr.	Edwards' Abridgment of Prerogative Court Cases
Edw.Adm.	Edwards' Admiralty (Eng.)
E.&E.	Ellis & Ellis (Eng.)
Enc.Pl.&Pr.	Encyclopædia of Pleading & Practice
Ency.Law.	American and English Encyclopædia of Law
Eng.Ad.	English Admiralty
Eng.C.C.	English Crown Cases
Eng.Ch.	English Chancery
Eng.Eccl.	English Ecclesiastical Reports
Eng.Ecc.R.	English Ecclesiastical Reports
Eng.Exch.	English Exchequer Reports
Eng.L.&Eq.	English Law & Equity
Eng.Rep.R.	English Reports, Full Reprint
Eng.Ry.&C.Cas.	English Railway and Canal Cases
Eng.&Ir.App.	Law Reports, English and Irish Appeal Cases
Eq.Cas.Abr.	Equity Cases Abridged (Eng.)
Eq.Rep.	Equity Reports (Eng.)
E.R.C.	English Ruling Cases
Esp.	Espinasse's Nisi Prius (Eng.)
Euer	Euer (Eng.)
Exch.	Exchequer (Eng.)
Exch.Cas.	Exchequer Cases (Sc.)
Ex.D.	Law Reports Exchequer Division (Eng.)
Eyre	Eyre's Reports (Eng.)

F

Falc.	Falconer's Court of Sessions (Sc.)
Falc.&F.	Falconer & Fitzherbert (Eng.)
Far.	Farresley (Eng.)
F.Cas.No.	Federal Cases (U.S.)
F.(Ct.Sess.)	Fraser's Court of Sessions Cases (Sc.)
F.	Federal Reporter (U.S.)
F.(2d)	Federal Reporter Second Series
F.R.D.	Federal Rules Decisions
F.Supp.	Federal Supplement
Ferg.Cons.	Ferguson's Consistory (Eng.)
F.&F.	Foster & Finlason (Eng.)
Fish.Pat.Cas.	Fisher's Patent Cases (U.S.)
Fish.Pat.R.	Fisher's Patent Reports (U.S.)
Fish.PrizeCas.	Fisher's Prize Cases (U.S.)
Fitzg.	Fitzgibbon (Eng.)
Fitzh.	Fitzherbert's Abridgment (Eng.)
Fitzh.N.Br.	Fitzherbert's Natura Brevium (Eng.)
Fla.	Florida
Flipp.	Flippin (U.S.)
Fl.&K.	Flanagan & Kelly (Ir.)
Fonb.Eq.	Fonblanque's Equity (Eng.)
Fonbl.	Fonblanque (Eng.)
Fonbl.R.	Fonblanque's English Cases
Forbes	Forbes (Eng.)
Forr.	Forrest (Eng.)
Forrester	Forrester's Cases (Eng.)
Fortesc.	Fortescue (Eng.)
Fost.	Foster (Eng.)
Fost.	Foster (N.H.)
Fost.&Fin.	Foster & Finlason (Eng.)
Fount.Dec.	Fountainhall's Decisions (Sc.)
Fox	Fox Reports (Eng.)
Fox & S.	Fox & Smith (Ir.)
Freem.	Freeman's Chancery (Eng.)
Freem.	Freeman's Chancery (Miss.)
Freem.K.B.	Freeman's King's Bench (Eng.)

G

Ga.	Georgia
Ga.App.	Georgia Appeals
Ga.Dec.	Georgia Decisions
Gale	Gale (Eng.)
Gal.	Gallison (U.S.)
G.Coop.	G. Cooper (Eng.)
G.&D.	Gale & Davidson (Eng.)
Geld.&M.	Geldart & Maddock (Eng.)
Gibb.Surr.	Gibbon's Surrogate (N.Y.)
Giffard	Giffard (Eng.)
Giff.&H.	Giffard and Hemming (Eng.)
Gil.	Gilfillan's Edition (Minn.)
Gilb.	Gilbert's (Eng.)
Gilb.Cas.	Gilbert's Cases (Eng.)
Gilb.C.P.	Gilbert's Common Pleas (Eng.)
Gilb.Exch.	Gilbert's Exchequer (Eng.)
Gill	Gill (Md.)
Gill&J.	Gill & Johnson (Md.)
Gilm.	Gilmer (Va.)
Gilm.&Falc.	Gilmour & Falconer (Sc.)
Gilp.	Gilpin (U.S.)
Glasc.	Glascock (Ir.)
Glyn&J.	Glyn & Jameson (Eng.)
Godb.	Godbolt (Eng.)
Godo.	Godolphin's Abridgment of Ecclesiastical Law
Goeb.	Goebel's Probate Court Cases
Gosf.	Gosford (Eng.)
Gouldsb.	Gouldsborough (Eng.)
Gow	Gow (Eng.)
Gow N.P.	Gow's English Nisi Prius Cases
Grant	Grant's Cases (Pa.)
Grant Ch.	Grant's Chancery (U.C.)
Grant Err.&App.	Grant's Error & Appeal (U.C.)
Gratt.	Grattan (Va.)
Gray	Gray (Mass.)

Green Cr.	Green's Criminal Law (Eng.)
Greene	Greene (Iowa)
Gwill.T.Cas.	Gwillim's Tithe Cases (Eng.)

H

Hadd.	Haddington (Eng.)
Hagg.Adm.	Haggard's Admiralty (Eng.)
Hagg.Cons.	Haggard's Consistory (Eng.)
Hagg.Eccl.	Haggard's Ecclesiastical (Eng.)
Hailes Dec.	Hailes' Decisions (Sc.)
Hale	Hale's Common Law (Eng.)
Hale Ecc.	Hale's Ecclesiastical (Eng.)
Hale P.C.	Hale's Pleas of the Crown (Eng.)
Hall	Hall's Superior Court (N.Y.)
Hall&T.	Hall & Twells (Eng.)
Halsbury L.Eng.	Halsbury's Law of England
Handy	Handy (Oh.)
Han.(N.B.)	Hannay's Reports, New Brunswick
Hard.	Hardin (Ky.)
Hardres	Hardres (Eng.)
Hare	Hare (Eng.)
Harp.Eq.	Harper (S.C.)
Harr.	Harrison's Chancery (Mich.)
Harr.(Del.)	Harrington (Del.)
Harr.(Mich.)	Harrington's Michigan Chancery Reports
Harr.&G.	Harris & Gill (Md.)
Harr.Ch.	Harrison's Chancery (Eng.)
Harr.&H.	Harrison & Hodgins (U.C.)
Harr.&J.	Harris & Johnson (Md.)
Harr.&M.	Harris & McHenry (Md.)
Harr.&R.	Harrison & Rutherford (Eng.)
Harr.&W.	Harrison & Wollaston (Eng.)
Hask.	Haskell (U.S.)
Havil.	Haviland (Pr.Edw.Isl.)
Hawaii	Hawaiian
Hawaii.Fed.	Hawaiian Federal
Hawaiian Rep.	Hawaii Reports
Hawk.P.C.	Hawkins' Pleas of the Crown (Eng.)
Hay.Exch.	Hayes Exchequer (Ir.)
Hayes	Hayes (Ir.)
Hayes&J.	Hayes & Jones (Ir.)
Hay&M.	Hay & Marriott (Eng.)
Hayw.	Haywood (N.C.)
Hayw.	Haywood (Tenn.)
Hayw.&H.	Haywood & Hazelton (U.S.)
Haz.Reg.	Hazard's Register (Pa.)
H.Bl.	Henry Blackstone (Eng.)
H.&C.	Hurlstone & Coltman (Eng.)
Head	Head (Tenn.)
Heisk.	Heiskell (Tenn.)
Hem.&M.	Hemming & Miller (Eng.)
Hempst.	Hempstead (U.S.)
Hen.&M.	Henning & Munford (Va.)
Het.	Hetley (Eng.)
Het.C.P.	Hetley's Common Pleas (Eng.)
H.&H.	Horn & Hurlstone (Eng.)
Hill	Hill (N.Y.)
Hill S.C.	Hill (S.C.)
Hill &Den.	Hill & Denio (N.Y.)
Hill &Den. Supp.	Lalor's Supplement to Hill & Denio's (N.Y.)
Hilt.	Hilton (N.Y.)
Hil.T.	Hilary Term (Eng.)
H.L.Cas.	House of Lords Cases (Eng.)
H.&N.	Hurlstone & Norman (Eng.)
Hob.	Hobart (Eng.)
Hodg.El.	Hodgins' Election (U.C.)
Hodges	Hodges (Eng.)
Hoffm.	Hoffman's Chancery (N.Y.)
Hoffm.Land Cas.	Hoffman's Land Cases (U.S.)
Hog.	Hogan (Ir.)
Holmes	Holmes (U.S.)
Holt Adm.Cas.	Holt's English Admiralty Cases
Holt Eq.	Holt's Equity (Eng.)
Holt K.B.	Holt's King's Bench (Eng.)
Holt N.P.	Holt's Nisi Prius (Eng.)
Home	Home (Sc.)
Hope Dec.	Hope's Decisions (Sc.)
Hopk.	Hopkins' Chancery (N.Y.)
Hopk.Dec.	Hopkins' Decisions (Pa.)
Hopw.&C.	Hopwood & Coltman (Eng.)
Hopw.&P.	Hopwood & Philbrick (Eng.)
Hosea	Hosea (Ohio)
Houst.	Houston (Del.)
Houst.Cr.	Houston's Criminal Cases (Del.)
How.	Howard (U.S.)
How.(Miss.)	Howard (Miss.)
How.A.Cas.	Howard's Appeal Cases (N.Y.)
How.N.P.	Howell's Nisi Prius (Mich.)
How.Pr.	Howard's Practice (N.Y.)
How.Pr.N.S.	Howard's Practice New Series (N.Y.)
How.St.Tr.	Howell's State Trials (Eng.)
Hud.&B.	Hudson & Brooke (Ir.)
Hughes	Hughes (Ky.)
Hughes	Hughes (U.S.)
Hume	Hume's Decisions (Sc.)
Humphr.	Humphreys (Tenn.)
Hun	Hun (N.Y.)
Hurl.&Gord.	Hurlstone & Gordon (Eng.)
Hurl.&W.	Hurlstone & Walmsley (Eng.)
Hutt.	Hutton (Eng.)

I

Idaho	Idaho
Iddings D.R.D.	Iddings Dayton Term Reports
Ill.	Illinois
Ill.App.	Illinois Appellate Court
Ill.Cir.	Illinois Circuit Court
Ind.	Indiana
Ind.App.	Indiana Appellate Court
Ind.T.	Indian Territory
Ins.L.J.	Insurance Law Journal
Int.Com.Commn.	Interstate Commerce Commission
Int.Com.Rep.	Interstate Commerce Reports
Int.Rev.Rec.	Internal Revenue Record
Iowa	Iowa
[1891] Ir.	Law Reports [1891] Irish
Ir.Ch.	Irish Chancery
Ir.C.L.	Irish Common Law
Ir.Eccl.	Irish Ecclesiastical Reports
Ired.	Iredell (N.C.)
Ir.Eq.	Irish Equity
Ir.Law Rep.	Irish Law Reports
Ir.Law &Eq.	Irish Law and Equity Reports
Ir.R.1894.	Irish Law Reports for year 1894
Ir.R.C.L.	Irish Reports Common Law
Ir.R.Eq.	Irish Reports Equity
Irv.Just.	Irvine's Justiciary Cases (Eng.)

J

Jac.	Jacob (Eng.)
Jac.&W.	Jacob & Walker (Eng.)
J.Bridgm.	John Bridgman (Eng.)
J.&C.	Jones & Carey (Ir.)
Jebb &B.	Jebb & Bourke (Ir.)
Jebb C.C.	Jebb's Crown Cases (Ir.)
Jebb&S.	Jebb & Symes (Ir.)
Jeff.	Jefferson (Va.)
Jenk.	Jenkins (Eng.)
J.J.Marsh.	J. J. Marshall (Ky.)
J.&L.	Jones & La Touche (Eng.)
Johns.	Johnson (Eng.)
Johns.	Johnson (N.Y.)
Johns.Cas.	Johnson's Cases (N.Y.)
Johns.Ch.	Johnson's Chancery (N.Y.)
Johns.V.C.	Johnson's English Vice-Chancellors (Eng.)
Johns.&H.	Johnson & Hemming (Eng.)
Jones Exch.	Jones Exchequer (Ir.)
Jones T.	Sir Thomas Jones' English King's Bench Reports
Jones W.	Sir William Jones' English King's Bench Reports
Jones&Spen.	Jones & Spencer (N.Y.)
Journ.Jur.	Journal of Jurisprudence (Pa.)
J.P.	Justice of Peace (Eng.)
Jur.	Jurist (Eng.)
Jur.N.S.	Jurist New Series (Eng.)
Just.L.R.	Justices' Law Reporter (Pa.)

K

Kames Dec.	Kames' Decisions (Sc.)
Kames Elucid.	Kames' Elucidation (Sc.)
Kames Rem.Dec.	Kames' Remarkable Decisions (Sc.)
Kames Sel.Dec.	Kames' Select Decisions (Sc.)
Kan.	Kansas
Kan.App.	Kansas Appeals
Kay	Kay (Eng.)
Kay&J.	Kay & Johnson (Eng.)
[1917]K.B.	Law Reports [1917] King's Bench (Eng.)
Keane &Gr.	Keane & Grant (Eng.)
Keb.	Keble (Eng.)
Keen	Keen (Eng.)
Keilw.	Keilway (Eng.)
Kel.C.C.	Kelyng's Crown Cases (Eng.)
Kelly	Kelly (Ga.)
Kelyng, J.	Kelyng's English Crown Cases
Kelynge, W.	Kelynge's Chancery (Eng.)
Keyes	Keyes (N.Y.)
Keyl.	Keilwey (Eng.)
K.&G.	Keane & Grant (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)
Kirby	Kirby (Conn.)
Knapp	Knapp (Eng.)
Knapp&O.	Knapp & Ombler (Eng.)
Kn.&Moo.	Knapp & Moore (Eng.)
Knox	Knox (N.S.Wales)
Knox&F.	Knox & Fitzhardinge (N.S.Wales)
Kulp	Kulp (Pa.)
Ky.	Kentucky
Ky.Dec.	Kentucky Decisions
Ky.L.	Kentucky Law Reporter
Ky.Op.	Kentucky Opinions

L

La.	Louisiana
La.App.	Louisiana Court of Appeals
La.A.(Orleans)	Court of Appeal, Parish of Orleans
La.Ann.	Louisiana Annual
Lab.	Labatt's District Court (Cal.)
Lack.Jur.	Lackawanna Jurist (Pa.)
Lack.Leg.N.	Lackawanna Legal News (Pa.)
Lack.Leg.Rec.	Lackawanna Legal Record (Pa.)
Lalor	Lalor's Supplement to Hill & Denio (N.Y.)
Lanc.Bar	Lancaster Bar (Pa.)
Lanc.L.Rev.	Lancaster Law Review (Pa.)
Land Dec.	Land Decisions (U.S.)
Lane	Lane (Eng.)
Lans.	Lansing (N.Y.)
Lans.Ch.	Lansing's Chancery Decisions (N.Y.)
Latch	Latch (Eng.)
Law Rep.N.S.	Law Reports New Series (N.Y.)
L.C.	Lower Canada
L.&C.	Leigh & Cave (Eng.)
L.C.Jur.	Lower Canada Jurist
L.C.L.J.	Lower Canada Law Journal
L.C.Rep.S.Qu.	Lower Canada Reports Seignorial Questions
L.D.	Law Dictionary
Ld.Ken.	Lord Kenyon (Eng.)
Ld.Raym.	Lord Raymond (Eng.)
Lea	Lea (Tenn.)
Leach C.C.	Leach's Crown Cases (Eng.)
L.Ed.	Lawyers' Edition United States Supreme Court
Lee Eccl.	Lee's Ecclesiastical (Eng.)
Lee t.Hardw.	Lee temp. Hardwicke (Eng.)
Lef.Dec.	Lefevre's Parliamentary Decisions (Eng.)
Leg.Chron.	Legal Chronicle (Pa.)
Leg.Gaz.	Legal Gazette (Pa.)
Leg.&Ins.R.	Legal & Insurance Reporter (Pa.)
Leg.Int.	Legal Intelligencer (Pa.)
Leg.Op.	Legal Opinions (Pa.)
Leg.Rec.	Legal Record (Pa.)
Lehigh Co.L.J.	Lehigh County Law Journal (Pa.)
Lehigh Val.L.R.	Lehigh Valley Law Reporter (Pa.)
Leigh	Leigh (Va.)
Leigh &C.	Leigh & Cave's English Crown Cases
Leon.	Leonard (Eng.)
Lev.	Levinz (Eng.)
Lew.C.C.	Lewin's Crown Cases (Eng.)
Ley	Ley (Eng.)
L.G.	Law Glossary
Liberian L.	Liberian Law
Litt.	Littell (Ky.)
Litt.	Littleton (Eng.)
Litt.Sel.Cas.	Littell's Select Cases (Ky.)
L.J.Adm.	Law Journal Admiralty New Series (Eng.)
L.J.Bankr.	Law Journal Bankruptcy New Series (Eng.)
L.J.Ch.	Law Journal Chancery New Series (Eng.)
L.J.Ch.O.S.	Law Journal Chancery Old Series (Eng.)
L.J.C.P.	Law Journal Common Pleas New Series (Eng.)
L.J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng.)
L.J.Eccl.	Law Journal Ecclesiastical New Series (Eng.)
L.J.Exch.	Law Journal Exchequer New Series (Eng.)
L.J.Exch.O.S.	Law Journal Exchequer Old Series (Eng.)
L.J.K.B.	Law Journal King's Bench New Series (Eng.)
L.J.K.B.O.S.	Law Journal King's Bench Old Series (Eng.)
L.J.M.C.	Law Journal Magistrate Cases New Series (Eng.)
L.J.M.C.O.S.	Law Journal Magistrate Cases Old Series (Eng.)
L.J.P.C.	Law Journal Privy Council New Series (Eng.)
L.J.P.D.&Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
L.J.P.&M.	Law Journal Probate & Matrimonial New Series (Eng.)
L.J.Q.B.	Law Journal Queen's Bench New Series (Eng.)
L.J.Rep.	Law Journal Reports (Eng.)
Ll.&G.t.Pl.	Lloyd & Goold temp. Plunket (Ir.)
Ll.&G.t.S.	Lloyd & Goold temp. Sugden (Ir.)
Ll.&W.	Lloyd & Welsby (Eng.)
L.&M.	Lowndes & Maxwell (Eng.)
L.M.&P.	Lowndes, Maxwell & Pollack (Eng.)
Loc.Gov.	Local Government (Eng.)
Lofft	Lofft (Eng.)
Longf.&T.	Longfield & Townsend (Ir.)
Low.Can.Seign.	Lower Canada Seignorial Reports
Lowell	Lowell (U.S.)
L.R.	Law Reports (U.S.)
L.R.A.	Lawyers' Reports Annotated
L.R.A.1915A.	Lawyers' Reports Annotated 1915A
L.R.App.Cas.	English Law Reports, Appeal Cases (Eng.)
L.R.A.&E.	Law Reports Admiralty & Ecclesiastical (Eng.)
L.R.A.N.S.	Lawyers' Reports Annotated New Series
L.R.C.C.	Law Reports Crown Cases (Eng.)
L.R.Ch.	Law Reports Chancery Appeal Cases (Eng.)
L.R.C.P.	Law Reports Common Pleas Cases (Eng.)
L.R.Eq.	Law Reports Equity Cases (Eng.)
L.R.Exch.	Law Reports Exchequer Cases (Eng.)
L.R.H.L.	Law Reports House of Lords (English & Irish Appeal Cases)
L.R.H.L.Sc.	Law Reports House of Lords (Scotch Appeal Cases)
L.R.Indian App.	Law Reports Indian Appeals (Eng.)
L.R.Ir.	Law Reports Irish
L.R.P.C.	Law Reports Privy Council (Eng.)
L.R.P.&D.	Law Reports Probate & Divorce (Eng.)
L.R.Q.B.	Law Reports Queen's Bench Cases (Eng.)
L.T.	Law Times (Pa.)
L.T.N.S.	Law Times New Series (Pa.)
L.T.O.S.	Law Times, Old Series (Eng.)

L.T.Rep.N.S.	Law Times Reports New Series (Eng.)
Lush.	Lushington's Admiralty (Eng.)
Lutw.	Lutwyche (Eng.)
Lutw.Reg.Cas.	Lutwyche's Registration Cases (Eng.)
Luz.Leg.Obs.	Luzerne Legal Observer (Pa.)
Luz.Leg.Reg.	Luzerne Legal Register (Pa.)
Lynd.Prov.	Lyndwood's Provinciales

M

MacA.Pat.Cas.	MacArthur's Patent Cases (D.C.)
MacArth.	MacArthur's District of Columbia Reports
MacAr.&M.	MacArthur & Mackey's District of Columbia Reports
Maccl.	Macclesfield (Eng.)
MacFarl.	MacFarlane (Sc.)
Mackey	Mackey's Reports, District of Columbia
Macl.&R.	Maclean & Robinson (Eng.)
Macn.&G.	Macnaghten & Gordon (Eng.)
Macph.	Macpherson (Sc.)
Macph.S.&L.	Macpherson, Shirreff & Lee (Sc.)
Macq.	Macqueen's Scotch Appeal Cases
Madd.	Maddock (Eng.)
Madd.Ch.Pr.	Maddock's Chancery Practice (Eng.)
Malloy	Malloy (Ir.)
Man.	Manitoba Law
Man.El.Cas.	Manning's Election Cases (Eng.)
Man.Exch.Pr.	Manning's Exchequer Practice (Eng.)
Man.Gr.&S.	Manning, Granger, & Scott (Eng.)
Man.L.J.	Manitoba Law Journal
Man.&Ry.	Manning & Ryland (Eng.)
Man.&Ry.Mag. Cas.	Manning & Ryland's Magistrates' Cases (Eng.)
Man.&S.	Manning & Scott (Eng.)
Mann.Unrep.Cas.	Manning's Unreported Cases (La.)
Manson	Manson (Eng.)
Man.t.Wood	Manitoba temp. Wood
March	March (Eng.)
Mar.Prov.	Maritime Province Reports (Can.)
Mars.Adm.	Marsden's Admiralty (Eng.)
Marsh.	Marshall (Eng.)
Marsh.J.J.	J. J. Marshall (Ky.)
Mart.	Martin Old Series (La.)
Mart.(N.S.)	Martin, New Series (La.)
Mart.	Martin (N.C.)
Marv.	Marvel (Del.)
Mart.N.S.	Martin New Series (La.)
Mart.&Y.	Martin & Yerger (Tenn.)
Mason	Mason (U.S.)
Mass.	Massachusetts
Maule &S.	Maule & Selwyn (Eng.)
Mayn.	Maynard (Eng.)
McAll.	McAllister (U.S.)
McC.	McCahon (Kan.)
McClell.	McClelland (Eng.)
McClell.&Y.	McClelland & Younge (Eng.)
McCord.	McCord (S.C.)
McCrary	McCrary (U.S.)
McG.	McGloin (La.)
McLean	McLean (U.S.)
McMul.	McMullan (S.C.)
Md.	Maryland
Md.Ch.	Maryland Chancery
Me.	Maine
Mees.&Ros.	Meeson & Roscoe (Eng.)
Mees.&W.	Meeson & Welsby (Eng.)
Meg.	Megone (Eng.)
Meigs	Meigs (Tenn.)
Menzies Cape of Good Hope	Menzies Cape of Good Hope
Meriv.	Merivale (Eng.)
Metc.	Metcalf (Mass.)
Metc.	Metcalfe (Ky.)
M.&G.	Manning & Granger (Eng.)
M.&H.	Murphy & Hurlstone (Eng.)
Mich.	Michigan
Mich.N.P.	Michigan Nisi Prius
Mich.T.	Michaelmas Term (Eng.)
Miles	Miles (Pa.)
Mill.Const.	Mill's Constitutional (S.C.)
Mill.Dec.	Miller's Decisions (U.S.)
Mills	Mills (N.Y.)
Milw.	Milward (Ir.)
Minn.	Minnesota
Minor	Minor (Ala.)
Misc.	Miscellaneous (N.Y.)
Miss.	Mississippi
Miss.Dec.	Mississippi Decisions
Miss.St.Cas.	Mississippi State Cases
M.&M.	Moody & Malkin (Eng.)
Mo.	Missouri
Mo.App.	Missouri Appeals
Moak	Moak (Eng.)
Mo.A.R.	Missouri Appeals Reporter
Mod.	Modern (Eng.)
Mod.Cas.L.&Eq.	Modern Cases at Law and Equity (Eng.)
Molloy	Molloy (Ir.)
Mon.	Monaghan (Pa.)
Mont.	Montana
Mont.	Montagu (Eng.)
Mont.Bank.Rep.	Montagu's English Bankruptcy Reports
Mont.L.R.	Montreal Law Reports (Can.)
Mont.&A.	Montagu & Ayrton (Eng.)
Mont.&B.	Montagu & Bligh (Eng.)
Mont.&C.	Montagu & Chitty (Eng.)
Mont.D.&DeG.	Montagu, Deacon & De Gex (Eng.)
Montg.Co.	Montgomery County Law Reporter (Pa.)
Mont.&M.	Montagu & McArthur (Eng.)
Montr.Cond.Rep.	Montreal Condensed Reports
Montr.Leg.N.	Montreal Legal News
Montr.Q.B.	Montreal Law Reports Queen's Bench
Montr.Super.	Montreal Law Reports Superior Court
Moody C.C.	Moody's Crown Cases (Eng.)
Moore C.P.	Moore's Common Pleas (Eng.)
Moore Indian App.	Moore's Indian Appeals (Eng.)
Moore K.B.	Moore's King's Bench (Eng.)
Moore P.C.	Moore's Privy Council Old Series (Eng.)
Moore P.C.N.S.	Moore's Privy Council New Series (Eng.)
Moore&S.	Moore & Scott (Eng.)
Moore&W.	Moore & Walker (Tex.)
Mor.Min.Rep.	Morrison's Mining Reports
Morr.	Morris (Iowa)
Morr.Bankr.Cas.	Morrell's Bankruptcy Cases (Eng.)
Morr.St.Cas.	Morris' State Cases (Miss.)
Mosely	Mosely (Eng.)
M.&P.	Moore & Payne (Eng.)
M.&R.	Manning & Ryland (Eng.)
M.&Rob.	Moody & Robinson (Eng.)
M.&S.	Maule & Selwyn (Eng.)
Mun.Corp.Cas.	Municipal Corporation Cases
Munf.	Munford (Va.)
Murph.	Murphey (N.C.)
Murr.	Murray (Sc.)
M.&W.	Meeson & Welsby (Eng.)
Myl.&C.	Mylne & Craig (Eng.)
Myl.&K.	Mylne & Keen (Eng.)
Myr.Prob.	Myrick's Probate (Cal.)

N

Nat.Bankr.Reg.	National Bankruptcy Register (U.S.)
Nat.Corp.Rep.	National Corporation Reporter
Nat.L.Rep.	National Law Reporter
N.B.	New Brunswick
N.Benl.	New Benloe (Eng.)
N.B.Eq.	New Brunswick Equity
N.C.	North Carolina
N.Chipm.	N. Chipman (Vt.)
N.C.Conf.	North Carolina Conference
N.C.T.Rep.	North Carolina Term Reports
N.D.	North Dakota
N.E.	North Eastern Reporter
N.E.(2d)	North Eastern Reporter Second Series
Neb.	Nebraska
Neb.(Unoff.)	Nebraska Unofficial
Nels.	Nelson (Eng.)
Nels.Abr.	Nelson's Abridgment of the Common Law

Nev.	Nevada
Newb.Adm.	Newberry's Admiralty (U.S.)
Newfoundl.	Newfoundland
Newf.Sel.Cas.	Newfoundland Select Cases
New Rep.	New Reports in all Courts (Eng.)
New Sess.Cas.	New Session Cases (Eng.)
New Zeal.L.	New Zealand Law
N.H.	New Hampshire
N.J.Eq.	New Jersey Equity
N.J.Law	New Jersey Law
N.J.L.J.	New Jersey Law Journal
N.J.Misc.	New Jersey Miscellaneous
N.M.	New Mexico
N.&M.	Nevile & Manning (Eng.)
N.&Macn.	Neville & Macnamara (Eng.)
Nolan	Nolan (Eng.)
North.	Northington (Eng.)
North.Co.	Northampton County Reporter (Pa.)
Northum.	Northumberland County Legal News (Pa.)
Northumb.Co.Leg. N.	Northumberland County Legal News (Pa.)
Notes of Cas.	Notes of Cases (Eng.)
Nott & McC.	Nott & McCord (S.C.)
Noy	Noy (Eng.)
N.&P.	Nevile & Perry (Eng.)
N.S.	Nova Scotia
N.S.Dec.	Nova Scotia Decisions
N.S Wales	New South Wales
N.S.Wales L.	New South Wales Law
N.S.Wales L.R.Eq.	New South Wales Law Reports Equity
N.W.	North Western Reporter
N.Y.	New York
N.Y.Ann.Cas.	New York Annotated Cases
N.Y.City Ct.	New York City Court
N.Y.City Ct.Suppl.	New York City Court Supplement
N.Y.Civ.Proc.	New York Civil Procedure
N.Y.Civ.Pr.Rep.	New York Civil Procedure Reports
N.Y.Code Reports, N.S.	New York Code Reports, New Series
N.Y.Cr.	New York Criminal
N.Y.Leg.Obs.	New York Legal Observer
N.Y.L.Rec.	New York Law Record
N.Y.Month.L.Bul.	New York Monthly Law Bulletin
N.Y.S.	New York Supplement
N.Y.St.	New York State Reporter
N.Y.Super.	New York Superior Court
N.Y.Wkly.Dig.	New York Weekly Digest

O

O.Ben.	Old Benloe (Eng.)
O.Bridgm.	Orlando Bridgman (Eng.)
Off.Gaz.	Official Gazette
Ohio	Ohio
Ohio App.	Ohio Court of Appeals
Ohio Cir.Ct.	Ohio Circuit Court
Ohio Cir.Ct.N.S.	Ohio Circuit Court New Series
Ohio Cir.Dec.	Ohio Circuit Decisions
Ohio Dec. (Reprint)	Ohio Decisions (Reprint)
Ohio F.Dec.	Ohio Federal Decisions
Ohio L.J.	Ohio Law Journal
Ohio N.P.	Ohio Nisi Prius
Ohio N.P.N.S.	Ohio Nisi Prius New Series
Ohio O.	Ohio Opinions
Ohio Prob.	Ohio Probate
Ohio S.&C.P.	Ohio Superior & Common Pleas Decisions
Ohio St.	Ohio State
Okl.	Oklahoma
Okl.Cr.	Oklahoma Criminal
Olcott	Olcott (U.S.)
Oliv.B.&L.	Oliver, Beavan & Lefroy (Eng.)
O'M.&H.	O'Malley & Hardcastle (Ir.)
Ont.	Ontario
Ont.A.	Ontario Appeals
Ont.El.Cas.	Ontario Election Cases
Ont.L.	Ontario Law
Ont.L.J.	Ontario Law Journal
Ont.L.J.N.S.	Ontario Law Journal New Series
Ont.Pr.	Ontario Practice
Ont.W.N.	Ontario Weekly Notes
Ont.W.R.	Ontario Weekly Reporter
Op.Atty.-Gen.	Opinions of Attorneys-General (U.S.)
Op.Sol.Dept. Labor	Opinions of the Solicitor for the Department of Labor dealing with Workmen's Compensation
Or.	Oregon
Orleans App.	Orleans Appeals (La.)
Overt.	Overton (Tenn.)
Owen	Owen (Eng.)

P

P.	Pacific Reporter
P.(2d)	Pacific Reporter Second Series
[1891]P.	Law Reports [1891] Probate (Eng.)
Pa.	Pennsylvania State
Pa.Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa.Co.	Pennsylvania County Court
Pa.C.Pl.	Common Pleas (Pa.)
Pa.Dist.	Pennsylvania District
Pa.Dist.&Co.	Pennsylvania District and County
Paige	Paige's Chancery (N.Y.)
Paine	Paine (U.S.)
Pa.L.J.	Pennsylvania Law Journal
Pa.L.Rec.	Pennsylvania Law Record
Pa.L.J.R.	Clark's Pennsylvania Law Journal Reports
Palm.	Palmer (Eng.)
Park.	Parker (Eng.)
Park.Cr.	Parker's Criminal (N.Y.)
Park.Exch.	Parker's Exchequer (Eng.)
Park.Ins.	Parker's Insurance (Eng.)
Pars.Eq.Cas.	Parsons' Equity Cases (Pa.)
Pa.Super.	Pennsylvania Superior Court
Paton App.Cas.	Paton's Appeal Cases (Sc.)
Patrick El.Cas.	Patrick's Election Cases (Can.)
Patt.&H.	Patton & Heath (Va.)
P.D.	Law Reports Probate Division (Eng.)
P.&D.	Perry & Davison (Eng.)
Peake N.P.	Peake's Nisi Prius (Eng.)
Pearce C.C.	Pearce's Reports in Dearsly's (Eng.)
Pearson	Pearson (Pa.)
Peck	Peck (Tenn.)
Peck.El.Cas.	Peckwell's Election Cases (Eng.)
Pennew.	Pennewill (Del.)
Pennyp.	Pennypacker (Pa.)
Penr.&W.	Penrose & Watts (Pa.)
Perry & Kn.	Perry & Knapp Election Cases (Eng.)
Pet.	Peters (U.S.)
Pet.Adm.	Peters' Admiralty (U.S.)
Pet.C.C.	Peters' Circuit Court (U.S.)
Phil.	Phillips (Eng.)
Phil.	Phillip (N.C.)
Phila.	Philadelphia (Pa.)
Philippine	Philippine
Phillim.	Phillimore Ecclesiastical (Eng.)
Pick.	Pickering (Mass.)
Pig.&R.	Pigott & Rodwell (Eng.)
Pig.Rec.	Pigott's Recoveries (Eng.)
Pinn.	Pinney (Wis.)
Pittsb.	Pittsburgh (Pa.)
Pittsb.Leg.J.	Pittsburgh Legal Journal (Pa.)
Pittsb.Leg.J.N.S.	Pittsburgh Legal Journal New Series (Pa.)
P.&K.	Perry & Knapp (Eng.)
Plowd.	Plowden (Eng.)
Pollexf.	Pollexfen (Eng.)
Poph.	Popham (Eng.)
Port.	Porter (Ala.)
Posey	Posey's Unreported Cases (Tex.)
Puerto Rico	Puerto Rico
Puerto Rico Fed.	Puerto Rico Federal
Pow.Surr.	Powers' Surrogate (N.Y.)
P.R.&D.El.Cas.	Power, Rodwell & Dew's Election Cases (Eng.)
Prec.Ch.	Precedents in Chancery (Eng.)
Pr.Edw.Isl.	Prince Edward Island
Price	Price (Eng.)
Price Pr.Cas.	Price's Practice Cases (Eng.)
Prid.&C.	Prideaux & Cole (Eng.)
Prob.[1917]	Law Reports, Probate Division (Eng.)

Prob.Rep.	Probate Reports (Eng.)
Pr.Rep.	Practice Reports (Eng.)
P.Wms.	Peere-Williams (Eng.)
P.U.R.	Public Utilities Reports
Pyke	Pyke (Can.)

Q

Q.B.	Queen's Bench (Adolphus & Ellis New Series) (Eng.)
[1891]Q.B.	Law Reports [1891] Queen's Bench (Eng.)
Q.B.D.	Law Reports Queen's Bench Division (Eng.)
Queensl.J.P.	Queensland Justice of the Peace
Queensl.L.	Queensland Law
Queensl.L.J.	Queensland Law Journal
Que.L.	Quebec Law
Que.Pr.	Quebec Practice
Que.Q.B.	Quebec Official Reports Queen's Bench
Que.Rev.Jud.	Quebec Revised Judicial
Que.Super.	Quebec Official Reports Superior Court
Quincy	Quincy (Mass.)

R

Rand.	Randolph (Va.)
Rap.Jud.Q.C.S.	Rapport's Judiciaries de Quebec Cour Superieure
Rawle	Rawle (Pa.)
R.C.L.	Ruling Case Law
R.&Can.Cas.	Railway & Canal Cases (Eng.)
R.&Can.Tr.Cas.	Railway & Canal Traffic Cases (Eng.)
Redf.	Redfield's Surrogate (N.Y.)
Redf.&B.	Redfield & Bigelow's Leading Cases (Eng.)
Redf.R.Cas.	Redfield's Railway Cases (Eng.)
Redf.Surr.	Redfield's Surrogate (N.Y.)
Reeve Eng.L.	Reeve's English Law
Reports	Reports (Eng.)
Reprint	English Reprint
Rep.t.Finch	Cases temp. Finch (Eng.)
Rep.t.Hard.	Lee's Reports *tempore* Hardwicke (Eng.)
Rep.t.Holt	Reports *tempore* Holt (English Cases of Settlement)
Res.&Eq.Judgm.	Reserved & Equity Judgments (N.S. Wales)
Rev.Crit.	Revue Critique (Can.)
Rev.de Jur.	Revue de Jurisprudence (Can.)
Rev.de Legis.	Revue de Legislation (Can.)
Rev.Leg.	Revue Legale (Can.)
Rev.Leg.N.S.	Revue Legale New Series (Can.)
Rev.Rep.	Revised Reports (Eng.)
R.I.	Rhode Island
Rice	Rice (S.C.)
Rich.	Richardson (S.C.)
Rich.C.P.	Richardson's Practice Common Pleas (Eng.)
Ridg.	Ridgeway's Reports *tempore* Hardwicke (Eng.)
Ridg.Ap.	Ridgeway's Appeal (Ir.)
Ridg.L.&S.	Ridgeway, Lapp & Schoale (Ir.)
Ridg.P.C.	Ridgeway's Parliament Cases (Ir.)
Ridg.t.Hardw.	Ridgeway temp. Hardwicke (Eng.)
Riley	Riley (S.C.)
R.&M.	Ryan & Moody (Eng.)
R.M.Charlt.	R. M. Charlton (Ga.)
Rob.	Robinson (La.)
Rob.	Robinson (Va.)
Robb Pat.Cas.	Robb's Patent Cases (U.S.)
Robert.App.Cas.	Robertson's Appeal Cases (Sc.)
Rob.Eccl.	Robertson's Ecclesiastical (Eng.)
Robin.App.Cas.	Robinson's Appeal Cases (Sc.)
Rob.Wm.Adm.	William Robinson's Admiralty (Eng.)
Rolle	Rolle (Eng.)
Rolle Abr.	Rolle's Abridgment (Eng.)
Rolls Ct.Rep.	Rolls' Court Reports
Rom.Cas.	Romilly's Notes of Cases (Eng.)
Root	Root (Conn.)

Rose	Rose (Eng.)
Ross Lead.Cas.	Ross' Leading Cases (Eng.)
R.&R.	Russell & Ryan Crown Cases (Eng.)
Russ.	Russell (Eng.)
Russ.&C.Eq.Cas.	Russell's & Chesley's Equity Cases (N.S.)
Russ.Eq.Cas.	Russell's Equity Cases (N.S.)
Russ.&Geld.	Russell & Geldert, Nova Scotia
Russ.&M.	Russell & Mylne (Eng.)
Ry.&M.	Ryan & Moody (Eng.)

S

Salk.	Salkeld (Eng.)
Sandf.	Sandford's Superior Court (N.Y.)
Sandf.Ch.	Sandford's Chancery (N.Y.)
Sask.L.	Saskatchewan Law
Saund.	Saunders (Eng.)
Saund.&C.	Saunders & Cole (Eng.)
Sau.&Sc.	Sausse & Scully (Ir.)
S.Austr.L.	South Australia Law
Sav.	Savile (Eng.)
Sawy.	Sawyer (U.S.)
Saxt.	Saxton (N.J.)
Say.	Sayer (Eng.)
S.C.	South Carolina
[1907]S.C.	Court of Session Cases (Sc.)
Scam.	Scammon (Ill.)
S.C.Eq.	South Carolina Equity
Sch.&Lef.	Schoales & Lefroy (Ir.)
[1907]S.C.(J.)	Court of Justiciary Cases (Sc.)
Sc.Jur.	Scottish Jurist
S.C.L.	South Carolina Law
Sc.L.Rep.	Scottish Law Reporter
Scot L.T.	Scot Law Times
Scott	Scott (Eng.)
Scott N.R.	Scott's New Reports (Eng.)
Scr.L.T.	Scranton Law Times (Pa.)
Sc.Sess.Cas.	Scotch Court of Session Cases
S.Ct.	Supreme Court Reporter (U.S.)
S.D.	South Dakota
S.E.	South Eastern Reporter
Searle & Sm.	Searle & Smith (Eng.)
Sel.Cas.Ch.	Select Cases in Chancery (Eng.)
Seld.	Selden's Notes (N.Y.)
Selden	Selden (N.Y.)
Selw.	Selwyn's Nisi Prius (Eng.)
Serg.&R.	Sergeant & Rawle (Pa.)
Sess.Cas.	Court of Session Cases (Eng.)
Shan.	Shannon (Tenn.)
Shaw	Shaw (Sc.)
Shaw&D.	Shaw & Dunlop (Sc.)
Shaw Dec.	Shaw's Digest of Decisions (Sc.)
Shaw, Dunl.&B.	Shaw, Dunlop & Bell (Sc.)
Shaw&M.	Shaw & MacLean (Sc.)
Sheld.	Sheldon (N.Y.)
Shep.Abr.	Sheppard's Abridgment
Sheph.Sel.Cas.	Shepherd's Select Cases (Ala.)
Show.	Shower (Eng.)
Show.P.C.	Shower's Parliament Cases (Eng.)
Sid.	Siderfin (Eng.)
Silv.A.	Silvernail's Appeals (N.Y.)
Silv.Sup.	Silvernail's Supreme (N.Y.)
Sim.	Simons (Eng.)
Sim.N.S.	Simons New Series (Eng.)
Sim.&St.	Simons & Stuart (Eng.)
Skin.	Skinner (Eng.)
Smale&G.	Smale & Giffard (Eng.)
Smith	Smith (Ind.)
Smith	Smith (N.H.)
Smith&B.	Smith & Batty (Ir.)
Smith K.B.	Smith's King's Bench (Eng.)
Smith Lead.Cas.	Smith's Leading Cases (Eng.)
Smith Reg.	Smith's Registration (Eng.)
Sm.&M.	Smedes & Marshall (Miss.)
Sm.&M.Ch.	Smedes & Marshall Chancery (Miss.)
Smythe	Smythe (Ir.)
Sneed	Sneed (Tenn.)
So.	Southern Reporter
Sol.J.	Solicitor's Journal (Eng.)
Sp.	Speers (S.C.)
Spinks	Spinks Admiralty (Eng.)
Spinks	Spinks' Ecclesiastical and Admiralty (Eng.)

Spinks, P.C.	Spinks' Prize Cases (Eng.)
Spottisw.	Spottiswoode (Sc.)
Spottisw.Eq.	Spottiswoode's Equity (Sc.)
Sprague	Sprague (U.S.)
Stair	Stair (Sc.)
Stark.	Starkie Nisi Prius (Eng.)
Stat. at L.	United States Statutes at Large
Stew.	Stewart (Ala.)
Stew.	Stewart's Reports (N.S.)
Stew.&P.	Stewart & Porter (Ala.)
Stockt.Vice-Adm.	Stockton's Vice-Admiralty (N.B.)
Story	Story (U.S.)
Str.	Strange (Eng.)
Strob.	Strobhart (S.C.)
Stuart Vice-Adm.	Stuart's Vice-Admiralty (L.C.)
Stu.M.&P.	Stuart, Milne & Peddie (Sc.)
Style	Style (Eng.)
Sumn.	Sumner (U.S.)
Susq.Leg.Chron.	Susquehanna Legal Chronicle (Pa.)
S.W.	South Western Reporter
S.W.(2d)	South Western Reporter Second Series
Swab.	Swabey's Admiralty (Eng.)
Swab.&Tr.	Swabey & Tristram (Eng.)
Swan	Swan (Tenn.)
Swanst.	Swanston (Eng.)

T

Taml.	Tamlyn (Eng.)
Taney	Taney (U.S.)
Tapp.	Tappan (Oh.)
Taunt.	Taunton (Eng.)
Taylor	Taylor (N.C.)
T.B.Mon.	T. B. Monroe (Ky.)
Tenn.	Tennessee
Tenn.App.	Tennessee Appeals
Tenn.Cas.	Unreported Tennessee Cases
Tenn.Ch.	Tennessee Chancery
Tenn.Ch.A.	Tennessee Chancery Appeals
Tenn.Civ.A.	Tennessee Civil Appeals
Terr.L.	Territories Law (Northwest Territories)
Tex.	Texas
Tex.App.	Texas Court of Appeals
Tex.A.Civ.Cas.	White & Wilson's Civil Cases (Tex.)
Tex.Civ.App.	Texas Civil Appeals
Tex.Cr.	Texas Criminal
Tex.Suppl.	Texas Supplement
Tex.Unrep.Cas.	Posey's Unreported Cases (Tex.)
Thach.Cr.	Thacher's Criminal Cases (Mass.)
Thomps.&C.	Thompson & Cook (N.Y.)
Thomps.Cas.	Thompson's Cases (Tenn.)
Tinw.	Tinwald (Sc.)
T.Jones	Thomas Jones (Eng.)
T.L.R.	Times Law Reports (Eng.)
T.M.R.	Trade Mark Reports
T.&M.	Temple & Mew (Eng.)
Toth.	Tothill (Eng.)
T.R.	Term Reports (Durnford & East) (Eng.)
Transcr.A.	Transcript Appeals (N.Y.)
T.Raym.	Thomas Raymond (Eng.)
Tread.Const.	Treadway Constitutional (S.C.)
Treas.Dec.	Treasury Decisions (U.S.)
Tr.&H.Pr.	Troubat & Haly's Practice (Pa.)
Trint.T.	Trinity Term (Eng.)
Truem.Eq.Cas.	Trueman's Equity Cases (N.B.)
Tuck.Sel.Cas.	Tucker's Select Cases (Newfoundland)
Tuck.Surr.	Tucker's Surrogate (N.Y.)
T.U.P.Charlt.	T. U. P. Charlton (Ga.)
Turn.&R.	Turner & Russell (Eng.)
Tyler	Tyler (Vt.)
Tyrw.	Tyrwhitt (Eng.)
Tyrw.&G.	Tyrwhitt & Granger (Eng.)

U

U.C.	Upper Canada
U.C.Ch.	Upper Canada Chancery
U.C.Cham.	Upper Canada Chamber
U.C.C.P.	Upper Canada Common Pleas
U.C.E.&A.	Upper Canada Error and Appeal
U.C.K.B.	Upper Canada King's Bench Reports
U.C.Q.B.	Upper Canada Queen's Bench
U.C.Q.B.O.S.	Upper Canada Queen's Bench Old Series
U.S.	United States
U.S.Aviation Rep.	Aviation Reports (U.S.)
U.S.C.A.	United States Code Annotated
Utah	Utah

V

Va.	Virginia
Va.Cas.	Virginia Cases
Va.Ch.Dec.	Chancery Decisions (Va.)
Va.Dec.	Virginia Decisions
Van Ness Prize Cas.	Van Ness Prize Cases (U.S.)
Vaugh.	Vaughan (Eng.)
Vaux.	Vaux's Decisions (Pa.)
Vent.	Ventris (Eng.)
Vern.	Vernon's Cases (Eng.)
Vern.Ch.	Vernon's Chancery (Eng.)
Vern.&S.	Vernon & Scriven (Ir.)
Ves.	Vesey Senior (Eng.)
Ves.& B.	Vesey & Beames (Eng.)
Ves.Jr.	Vesey Junior (Eng.)
Ves.Jr.Suppl.	Vesey Junior Supplement (Eng.)
Ves.Suppl.	Vesey Senior Supplement (Eng.)
Vict.	Victorian
Vict.L.	Victorian Law
Vict.L.T.	Victorian Law Times
Vict.Rep.	Victorian Reports
Vict.St.Tr.	Victorian State Trials
Vin.Abr.	Viner's Abridgment (Eng.)
Virgin Islands	Virgin Islands
Vt.	Vermont

W

Walk.	Walker (Pa.)
Walk.	Walker's Chancery (Mich.)
Wall.	Wallace (U.S.)
Wall.C.C.	Wallace (U.S.)
Wall.Jr.	Wallace Junior (U.S.)
Wall.Sr.	Wallace Senior (U.S.)
Wallis	Wallis (Ir.)
Ware	Ware (U.S.)
Wash.	Washington
Wash.	Washington (Va.)
Wash.St.	Washington State
Wash.C.C.	Washington Circuit Court (U.S.)
Wash.T.	Washington Territory
Watts	Watts (Pa.)
Watts&S.	Watts & Sergeant (Pa.)
W.Bl.	William Blackstone (Eng.)
W.C.C.	Minton-Senhouse's Workmen's Compensation Cases (Eng.)
Webb, A'B.& W.I. P.& M.	Webb, A'Beckett, & Williams' Insolvency, Probate, and Matrimonial Reports (Victoria)
Web.Pat.Cas.	Webster's Patent Cases (Eng.)
Welsh	Welsh Registry Cases (Ir.)
Wend.	Wendell (N.Y.)
West	West (Eng.)
West.L.J.	Western Law Journal (Oh.)
West.L.Month.	Western Law Monthly (Oh.)
West.L.R.	Western Law Reporter (Can.)
West.L.T.	Western Law Times (Can.)
West.R.	Western Reporter
West t.Hardw.	West temp. Hardwicke (Eng.)
West.Wkly.	Western Weekly (Can.)
[1917]West.Wkly.	[1917] Western Weekly (Can.)
Whart.	Wharton (Pa.)
Wheat.	Wheaton (U.S.)
Wheel.Cr.	Wheeler's Criminal (N.Y.)
White&T.Lead. Cas.Eq.	White & Tudor's Leading Cases in Equity (Eng.)
Whitm.Pat.Cas.	Whitman's Patent Cases (U.S.)
Wight.	Wightwicke (Eng.)
Wilcox	Wilcox (Pa.)
Willes	Willes (Eng.)
Wilm.	Wilmot's Notes (Eng.)
Wils.	Wilson (Ind.)

Wils.Ch.	Wilson's Chancery (Eng.)
Wils.C.P.	Wilson's Common Pleas (Eng.)
Wils.Exch.	Wilson's Exchequer (Eng.)
Wils.P.C.	Wilson's Privy Council (Eng.)
Wils.&S.	Wilson & Shaw (Sc.)
Winch	Winch (Eng.)
Winst.	Winston (N.C.)
Wis.	Wisconsin
W.Jones	William Jones (Eng.)
W.Kel.	William Kelynge (Eng.)
Wkly.L.Gaz.	Weekly Law Gazette (Oh.)
Wkly.N.C.	Weekly Notes of Cases (Pa.)
Wkly.Rep.	Weekly Reporter (Eng.)
Wms.Saund.	Williams Notes to Saunders' Reports
W.N.	Weekly Notes (Eng.)
Wolf.&B.	Wolferstan & Bristow's Election Cases (Eng.)
Wolf.&D.	Wolferstan & Dew's Election Cases (Eng.)
Woll.	Wollaston (Eng.)
Woodb.&M.	Woodbury & Minot (U.S.)
Woods	Woods (U.S.)
Woodw.	Woodward's Decisions (Pa.)
Woolw.	Woolworth (U.S.)
Words & Phrases	Words & Phrases
Wright	Wright (Oh.)
W.Rob.	William Robinson's Admiralty (Eng.)
Wr.Pa.	Wright (Pa.)
W.Va.	West Virginia
W.W.Harr.	W. W. Harrington
W.W.&D.	Willmore, Wollaston & Davidson (Eng.)
W.W.&H.	Willmore, Wollaston & Hodges (Eng.)
Wyo.	Wyoming
Wythe	Wythe's Chancery (Va.)
Wy.&W.	Wyatt & Webb (Vict.)
Wy.W.&A'Beck.	Wyatt, Webb & A'Beckett (Vict.)

Y

Yates Sel.Cas.	Yates Select Cases (N.Y.)
Y.B.	Year Book (Eng.)
Y.&C.Exch.	Younge & Collyer's Exchequer (Eng.)
Y.&Coll.	Younge & Collyer's Chancery (Eng.)
Yeates	Yeates (Pa.)
Yelv.	Yelverton (Eng.)
Yerg.	Yerger (Tenn.)
Y.&J.	Younge & Jervis (Eng.)
York Leg.Rec.	York Legal Record (Pa.)
Young Adm.	Young's Admiralty Decisions (N.S.)
Younge	Younge Exchequer (Eng.)

LAW REVIEWS AND LAW JOURNALS

A.B.A.Jour.	American Bar Association Journal
Am.J.Int.Law	American Journal of International Law
Am.Law S.Rev.	American Law School Review
B.U.L.Rev.	Boston University Law Review
Brooklyn L.Rev.	Brooklyn Law Review
Calif.L.Rev.	California Law Review
Camb.L.J.	Cambridge Law Journal
Chi-Kent Rev.	Chicago-Kent Review
Colum.L.Rev.	Columbia Law Review
Com.L.J.	Commercial Law Journal
Cornell L.Q.	Cornell Law Quarterly
Detroit L.Rev.	Detroit Law Review
Dick.L.Rev.	Dickinson Law Review
Fed.B.A.J.	Federal Bar Association Journal
Fla.L.J.	Florida Law Journal
Fordham L.Rev.	Fordham Law Review
Geo.Wash.L.Rev.	George Washington Law Review
Geo.L.J.	Georgetown Law Journal
Harv.L.Rev.	Harvard Law Review
Ia.L.Rev.	Iowa Law Review
Idaho L.J.	Idaho Law Journal
Ill.L.Rev.	Illinois Law Review
Ind.L.J.	Indiana Law Journal
J.Am.Jud.Soc.	Journal of the American Judicature Society
J.Comp.Leg.	Journal of the Society of Comparative Legislation
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy
J.Soc.Pub.Teach. Law.	Journal of the Society of Pub. Teachers of Law
John Marshall L. Q.	The John Marshall Law Quarterly
Kan.City L.Rev.	Kansas City Law Review
Kan.St.L.J.	Kansas State Law Journal
Ky.L.J.	Kentucky Law Journal
L.J.	Law Journal
L.Lib.J.	Law Library Journal
Law Ser.Mo.Bull.	University of Missouri Bulletin, Law Series
Law Soc.J.	Law Society Journal
Lincoln L.Rev.	Lincoln Law Review
Marq.L.Rev.	Marquette Law Review
Mass.L.Q.	Massachusetts Law Quarterly
Mercer, Beasley L.Rev.	Mercer, Beasley Law Review
Mich.L.Rev.	Michigan Law Review
Minn.L.Rev.	Minnesota Law Review
Miss.L.J.	Mississippi Law Journal
Neb.L.B.	Nebraska Law Bulletin
N.J.L.J.	New Jersey Law Journal
N.J.L.Rev.	New Jersey Law Review
N.Y.U.L.Q.Rev.	New York University Law Quarterly Review
Notre Dame Law.	Notre Dame Lawyer
N.C.L.Rev.	North Carolina Law Review
Okla.S.B.J.	Oklahoma State Bar Journal
Oreg.L.Rev.	Oregon Law Review
Phil.L.J.	Philippine Law Journal
Rocky Mt.L.Rev.	Rocky Mountain Law Review
St. John's L.Rev.	St. John's Law Review
St. Louis L.Rev.	St. Louis Law Review (now Washington University Law Quarterly)
So.Calif.L.Rev.	Southern California Law Review
Temp.L.Q.	Temple Law Quarterly
Tenn.L.Rev.	Tennessee Law Review
Tex.L.Rev.	Texas Law Review
Tul.L.Rev.	Tulane Law Review
U.Chi.L.Rev.	University of Chicago Law Review
U.Cin.L.Rev.	University of Cincinnati Law Review
U.Detroit L.J.	University of Detroit Law Journal
U.Pa.L.Rev.	University of Pennsylvania Law Review
U. of Pitts.L.Rev.	University of Pittsburgh Law Review
U.Toronto L.J.	University of Toronto Law Journal
Va.L.Rev.	Virginia Law Review
Wash.L.Rev.	Washington Law Review
Wash.U.L.Q.	Washington University Law Quarterly
W.Va.L.Q.	West Virginia Law Quarterly and The Bar
Wis.L.Rev.	Wisconsin Law Review
Yale L.J.	Yale Law Journal

LIST OF TITLES

IN

CORPUS JURIS SECUNDUM

Abandonment
Abatement and Revival
Abduction
Abortion
Absentees
Abstracts of Title
Accession
Accord and Satisfaction
Account, Action on
Accounting
Account Stated
Acknowledgments
Actions
Adjoining Landowners
Admiralty
Adoption of Children
Adulteration
Adultery
Adverse Possession
Aerial Navigation
Affidavits
Affray
Agency
Agriculture
Aliens
Alteration of Instruments
Ambassadors and Consuls
Amicus Curiæ
Animals
Annuities
Appeal and Error
Appearances
Apprentices
Arbitration and Award
Architects
Army and Navy
Arrest
Arson
Assault and Battery
Assignments
Assignments for Benefit of Creditors
Assistance, Writ of
Associations
Assumpsit, Action of
Asylums
Attachment
Attorney and Client
Attorney General
Auctions and Auctioneers
Audita Querela
Bail
Bailments
Bankruptcy
Banks and Banking
Barratry
Bastards
Beneficial Associations
Bigamy
Bills and Notes
Blasphemy
Bonds
Boundaries
Bounties
Breach of Marriage Promise
Breach of the Peace
Bribery
Bridges
Brokers
Building and Loan Associations
Burglary
Business Trusts
Canals
Cancellation of Instruments
Carriers
Case, Action on
Cemeteries
Census
Certiorari
Champerty and Maintenance
Charities
Chattel Mortgages
Citizens
Civil Rights
Clerks of Courts
Clubs
Colleges and Universities
Collision
Commerce
Common Lands
Common Law
Common Scold
Compositions with Creditors
Compounding Offenses
Compromise and Settlement
Concealment of Birth or Death
Conflict of Laws
Confusion of Goods
Conspiracy
Constitutional Law
Contempt
Continuances
Contracts
Contratos
Contribution
Conversion
Convicts
Copyright and Literary Property
Coroners
Corporations
Costs
Counterfeiting
Counties
Court Commissioners
Courts
Covenant, Action of
Covenants
Creditors' Suits
Criminal Law
Crops
Culpa
Curtesy
Customs and Usages
Customs Duties
Damages
Dead Bodies
Death
Debt, Action of

CORPUS JURIS SECUNDUM

VOLUME FIFTY-SIX

MASTER AND SERVANT

This Title includes the relation created by contracts of employment, express or implied; rights, powers, duties, and liabilities of the parties, as between themselves and as to others, incident to the relation; interference of others with the relation; and legal proceedings relating thereto.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

See also descriptive word index in the back of this Volume

See also descriptive word index in the back of this Volume

Sub-Analysis

See also descriptive word index in the back of this Volume

See also descriptive word index in the back of this Volume

See also descriptive word index in the back of this Volume

I. THE RELATION—Continued

C. EMPLOYEE ORGANIZATIONS; DISCRIMINATORY PRACTICES; DETERMINATION OF DISPUTES—Continued

5. *Procedure for Settlement of Disputes*—Continued

b. PARTIES, PROCESS, PLEADING, AND EVIDENCE—Continued

See also descriptive word index in the back of this Volume

I. THE RELATION—Continued

C. Employee Organizations; Discriminatory Practices; Determination of Disputes—Continued

6. *Judicial Enforcement or Review of Orders or Award*—Continued

D. Termination of Relation—p 411

See also descriptive word index in the back of this Volume

See also descriptive word index in the back of this Volume

II. SERVICES AND COMPENSATION—Continued

B. WAGES AND OTHER REMUNERATION—Continued

1. *Right to Compensation*—Continued

See also descriptive word index in the back of this Volume

II. SERVICES AND COMPENSATION—Continued

B. Wages and Other Remuneration—Continued

See also descriptive word index in the back of this Volume

II. SERVICES AND COMPENSATION—Continued

B. Wages and Other Remuneration—Continued

7. Constitutional or statutory Regulations and Penalties—Continued

a. MINIMUM WAGES AND OVERTIME PAY—Continued

See also descriptive word index in the back of this Volume

See also descriptive word index in the back of this Volume

IV. MASTER'S LIABILITY FOR INJURIES TO SERVANT—Continued

B. TOOLS, MACHINERY, APPLIANCES, AND PLACES FOR WORK—Continued

2. *Particular Appliances and Places*—Continued

See also descriptive word index in the back of this Volume

IV. MASTER'S LIABILITY FOR INJURIES TO SERVANT—Continued

B. TOOLS, MACHINERY, APPLIANCES, AND PLACES FOR WORK—Continued

See also descriptive word index in the back of this Volume

See also descriptive word index in the back of this Volume

IV. MASTER'S LIABILITY FOR INJURIES TO SERVANT—Continued

F. Assumption of Risk—Continued

2. *Nature of Risks*—Continued

See also descriptive word index in the back of this Volume

See also descriptive word index in the back of this Volume

See also descriptive word index in the back of this Volume

See also descriptive word index in the back of this Volume

See also descriptive word index in the back of this Volume

See also descriptive word index in the back of this Volume

See also descriptive word index in the back of this Volume

I. THE RELATION

A. DEFINITIONS, AND CREATION AND EXISTENCE OF RELATION

§ 1. Definitions

a. Relation defined generally
b. Particular terms defined
c. Terms compared and distinguished

a. Relation Defined Generally

The relation of master and servant is that which arises out of an express or implied contract of employment between a master or employer on the one hand and a servant or employee on the other.

While the relationship of master and servant is not capable of exact definition and cannot be defined in general terms with substantial accuracy,[1] it may nevertheless be stated broadly that the relation is that which arises out of a contract of employment, express or implied, between a master or employer on the one hand and a servant or employee on the other.[2] The relationship of employer and employee is substantially the same as that of master and servant,[3] but it has been said that the terms "employer" and "employee" make a better designation of the relation in this industrial age,[4] particularly in view of the fact that Americans as a rule do not like the word "servant."[5]

Distinctions between the relationships of agency and master and servant are discussed in Agency § 2 e; those between employer and employee and joint adventurers in Joint Adventures § 1 b (3); and those between landlord and tenant and master and servant in Landlord and Tenant § 6.

b. Particular Terms Defined

Generally speaking a "servant" or "employee" is a person who renders service to another, usually for wages, salary, or other financial consideration, and who in the performance of such service is entirely subject to the direction and control of the other, such other being respectively the "master" or "employer."

He is deemed to be a master who has the superior choice, control, and direction of the servant, and whose will the servant represents not merely in the ultimate result of the work, but in the details.[6] Stated otherwise, a "master" is a principal who employs another to perform service in his affairs and who controls, or has the right to control, such

1. Ill.—Ryan v. Associates Inv. Co. of Illinois, 18 N.E.2d 47, 50, 297 Ill.App. 544.
Mo.—Reiling v. Missouri Ins. Co., 153 S.W.2d 79, 83, 236 Mo.App. 164.
Species of agency
The master and servant relationship is but a species of agency.—Vaughn v. Booker, 8 S.E.2d 603, 217 N.C. 479, 132 A.L.R. 977.

2. Ga.—**Corpus Juris quoted in** Small v. Nugrape Co. of America, 167 S.E. 607, 608, 46 Ga.App. 306.
Mich.—**Corpus Juris cited in** Woch v. Kozakiewicz, 237 N.W. 36, 255 Mich. 32.
Miss.—**Corpus Juris cited in** Texas Co. v. Jackson, 165 So. 546, 550, 174 Miss. 737.
Ohio.—**Corpus Juris quoted in** Ohio Casualty Ins. Co. v. Capolino, App., 65 N.E.2d 287, 290.
Or.—**Corpus Juris quoted in** Jylha v. Chamberlain, 121 P.2d 928, 930, 168 Or. 171.
Tex.—**Corpus Juris quoted in** Alexder Film Co. v. Williams, Civ.App., 102 S.W.2d 514, 516.
Utah.—**Corpus Juris cited in** Gleason v. Salt Lake City, 74 P.2d 1225, 1227, 94 Utah 1.
Contracts of employment see infra §§ 5–11.
"The law of employment, the status of employer and employee, had its origin in the relationship of master and servant, under which the servant performs services for wages or other remuneration under a contract of hire."—Meredith Pub. Co. v. Iowa Employment Security Commission, 6 N.W.2d 6, 12, 232 Iowa 666.

3. U.S.—Pennsylvania Cas. Co. v. Elkins, D.C.Ky., 70 F.Supp. 155, 158.
Mo.—State ex rel. Maryland Casualty Co. v. Hughes, 164 S.W.2d 274, 277, 349 Mo. 1142.
Wis.—Ryan v. Wisconsin Department of Taxation, 8 N.W.2d 393, 396, 242 Wis. 491.

4. Mo.—Kourik v. English, 100 S.W.2d 901, 905, 340 Mo. 367.
"In more recent times the words 'employer and employee' have nearly supplanted the older term of 'Master and servant'. This shift has been due no doubt to the vast increase in the employment of skilled persons in industry."—Ryan v. Wisconsin Department of Taxation, 8 N.W.2d 393, 396, 242 Wis. 491.

5. Mo.—Kourik v. English, 100 S.W.2d 901, 340 Mo. 367.
Wis.—Ryan v. Wisconsin Department of Taxation, 8 N.W.2d 393, 396, 242 Wis. 491.

6. U.S.—Childers v. Commissioner of Internal Revenue, C.C.A.9, 80 F.2d 27, 30.
Ala.—**Corpus Juris cited in** North Alabama Motor Express v. Whiteside, 169 So. 335, 336, 27 Ala.App. 223.
Ark.—Barton-Mansfield Co. v. Bogey, 147 S.W.2d 977, 980, 201 Ark. 860.
Cal.—**Corpus Juris cited in** California Employment Stabilization Commission v. Sacramento Valley Wine Growers Ass'n, 156 P.2d 274, 277, 68 Cal.App.2d 173.
Ga.—**Corpus Juris quoted in** Small v. Nugrape Co. of America, 167 S.E. 607, 608, 46 Ga.App. 306.
Ind.—Standard Oil Co. v. Soderling, 42 N.E.2d 373, 377, 112 Ind.App. 437.
La.—Jordan v. Touro Infirmary, App., 123 So. 726, 729.
Md.—**Corpus Juris quoted in** Vacek v. State, 142 A. 491, 494, 155 Md. 400.
N.Y.—Ramsey v. New York Cent. R. Co., 199 N.E. 65, 66, 269 N.Y. 219, 102 A.L.R. 511—Smith v. Styne & Lachman, 25 N.Y.S.2d 628, 629.
Okl.—Fairmont Creamery Co. of Lawton v. Carsten, 55 P.2d 757, 761, 175 Okl. 592.
Or.—Knapp v. Standard Oil Co. of California, 68 P.2d 1052, 1056, 156 Or. 564.
Tex.—Smith Bros. v. O'Bryan, 94 S.W.2d 145, 148, 127 Tex. 439—Clark v. Lynch, Civ.App., 139 S.W.2d 294, 295—McCombs v. Stewart, Civ.App., 117 S.W.2d 869, 872.
Va.—Jarvis v. Wallace, 123 S.E. 374, 375, 139 Va. 171.
39 C.J. p 33 note 6.
"Master" defined generally see the definition Master.

other's physical conduct in the performance of the service.[7]

"Servant." In its broadest sense the term "servant" includes any person over whom personal authority is exercised[8] or who exerts himself or labors for the benefit of a master or employer;[9] any one who works for, and under the direction or control of, another for salary or wages.[10] In a more restricted sense a servant has been defined to be a person employed to labor for the pleasure or interest of another; especially, in law, one employed to render service or assistance in some trade or vocation, but without authority to act as agent in place of his employer;[11] one who is employed to render personal service to his employer otherwise than in pursuit of an independent calling and who in such service remains entirely under the control and direction of the latter, who is called his master;[12] a person employed to perform service for another in his affairs and who, with respect to his physical

7. Iowa.—Meredith Pub. Co. v. Iowa Employment Security Commission, 6 N.W.2d 6, 11, 232 Iowa 666.
Kan.—Bush v. Wilson & Co., 138 P. 2d 457, 461, 157 Kan. 80—Sims v. Dietrich, 124 P.2d 507, 509, 155 Kan. 310—Garner v. Martin, 122 P. 2d 735, 737, 155 Kan. 12—Houdek v. Gloyd, 107 P.2d 751, 754, 152 Kan. 789—Hurla v. Capper Publications, 87 P.2d 552, 557, 149 Kan. 369.
Mo.—Smith v. Fine, 175 S.W.2d 761, 765, 351 Mo. 1179—Mattan v. Hoover Co., 166 S.W.2d 557, 564, 350 Mo. 506—Skidmore v. Haggard, 110 S.W.2d 726, 729, 341 Mo. 837—Pfeifer v. United Bakers Supply Co., App., 160 S.W.2d 795, 800—Knudsen v. Kansas City Public Service Co., App., 141 S.W.2d 252, 256.
Tex.—R. E. Cox Dry Goods Co. v. Kellog, Civ.App., 145 S.W.2d 675, 679, error refused—Moore v. Roberts, Civ.App., 93 S.W.2d 236, 238, error refused.

8. Ala.—Toranto v. Hattaway, 122 So. 816, 819, 219 Ala. 520.
Mich.—Croff v. De Vries, 234 N.W. 118, 120, 253 Mich. 180.
Va.—Ginter's Ex'r v. Shelton, 45 S. E. 892, 893, 102 Va. 185, 188.
Public servant see the C.J.S. title Officers § 3, also 50 C.J. p 862 notes 16, 17.

9. U.S.—In re Caldwell, D.C.Ark., 164 F. 515—In re Scanlan, D.C.Ky., 97 F. 26, 27.
"A servant in law is any person, male or female, minor or of full age, paid or unpaid, who works for another with his knowledge and consent."—Ryan v. Unsworth, 157 A. 869, 870, 52 R.I. 86.

10. Mo.—Morgan v. Bowman, 22 Mo. 538, 548—Kiser v. Suppe, 112 S.W. 1005, 1007, 133 Mo.App. 19.
Mont.—Jensen v. Barbour, 39 P. 906, 908, 15 Mont. 582.
N.J.—Frank v. Herold, 52 A. 152, 63 N.J.Eq. 443.
N.D.—Minneapolis Iron Store Co. v. Branum, 162 N.W. 543, 547, 36 N. D. 355, L.R.A.1917E 298.
Or.—Shields v. Grace, 179 P. 265, 91 Or. 187, 205.
Tex.—Texas & N. O. R. Co. v. Parsons, Civ.App., 109 S.W. 240, 247, affirmed 113 S.W. 914, 102 Tex. 157, 132 Am.S.R. 857.

11. U.S.—Rendleman v. Niagara Sprayer Co., D.C.Ill., 16 F.2d 122, 124.
Ga.—Corpus Juris quoted in Small v. Nugrape Co. of America, 167 S.E. 607, 608, 46 Ga.App. 306—Zurich General Accident & Liability Ins. Co. v. Lee, 136 S.E. 173, 175, 36 Ga.App. 248.
Me.—Stevens v. Frost, 32 A.2d 164, 167, 140 Me. 1.
Tex.—Oliver v. State, 144 S.W. 604, 616, 65 Tex.Cr. 150.
39 C.J. p 33 note 8.

Corpus Juris cited in support of similar definition of term "employee."—Simmons v. Kansas City Jockey Club, 66 S.W.2d 119, 124, 334 Mo. 99.

Other definitions

(1) One who is engaged, not merely in doing work or services for another, but who is in his service generally on or about the premises or property of his employer, and subject to his direction or control therein, and is generally liable to be dismissed.
U.S.—Campfield v. Lang, C.C.Wis., 25 F. 128, 131.
Mo.—State v. Meyers, 82 Mo. 558, 561, 52 Am.R. 389.

(2) "One who serves or does service voluntarily or involuntarily; a person who is employed by another for menial offices or for other labor, and is subject to his command; a person who labors or exerts himself for the benefit of another, his master or employer; a subordinate helper."—Lajoie v. Rossi, 37 S.W.2d 684, 686, 225 Mo.App. 651—39 C.J. p 33 note 8 [a] (19).

12. Cal.—Western Indemnity Co. v. Pillsbury, 159 P. 721, 723, 172 Cal. 807—Brosius v. Orpheum Theater Co., 60 P.2d 156, 158, 16 Cal.App.2d 61—Berkowitz v. Pelton, 48 P.2d 756, 757, 9 Cal.App.2d 80—Preo v. Roed, 278 P. 928, 930, 99 Cal.App. 372—Giacomini v. Pacific Lumber Co., 89 P. 1059, 1060, 5 Cal.App. 218.
Ga.—Henley v. State, 2 S.E.2d 139, 142, 59 Ga.App. 595.
Ill.—Union Bank of Chicago v. Kalkhurst, 265 Ill.App. 254, 259.
N.Y.—Perry v. Fox, 156 N.Y.S. 369, 370, 93 Misc. 89.
Pa.—McColligan v. Pennsylvania R. Co., 63 A. 792, 793, 214 Pa. 229, 6 L.R.A.,N.S., 544, 112 Am.S.R. 739.
S.D.—Polluck v. Minneapolis & St. L. R. Co., 166 N.W. 641, 642, 40 S.D 186, certiorari denied 39 S.Ct. 6, 248 U.S. 558, 63 L.Ed. 421—Cockran v. Rice, 128 N.W. 583, 585, 26 S.D. 393, Ann.Cas.1913B 570.
39 C.J. p 33 note 8 [a] (10).

Similar definitions

(1) A person who is subject to the control of his employer with respect to the manner in which the details of the work are to be performed.—Lawhon v. St. Joseph Veterinary Laboratories, Mo., 252 S.W. 44, 48—Heisey v. Tide Water Oil Co., Mo. App., 92 S.W.2d 922, 928.

(2) One whose employer has the order and control of work done by him, and who directs or may direct the means as well as the end.—Farmers' Reservoir & Irrigation Co. v. Fulton Inv. Co., 255 P. 449, 450, 81 Colo. 69—Industrial Commission of Colorado v. Bonfils, 241 P. 735, 736, 78 Colo. 306—Arnold v. Lawrence, 213 P. 129, 130, 72 Colo. 528.

(3) One who does work under the direction of another who not only prescribes the nature of his work, but directs, or any moment may direct, the means also, or as it has been put, retains the power of controlling the work.—Powers v. Massachusetts Homœopathic Hospital, Mass., 109 F. 294, 298, 47 C.C.A. 122, 65 L.R.A. 372, certiorari denied 22 S.Ct. 932, 183 U.S. 695, 46 L.Ed. 394.

(4) One who represents the will of the master, not only in the ultimate result of the work, but in the details by which the result is accomplished.—Holleman v. Taylor, 158 S. E. 88, 89, 200 N.C. 618.

(5) Additional definitions.
Ohio.—Pantell v. Shriver-Allison Co., 22 N.E.2d 497, 499, 61 Ohio App. 119, appeal dismissed 19 N.E.2d 901, 135 Ohio St. 164—Snodgrass v. Cleveland Co-op. Coal Co., 167 N. E. 493, 495, 31 Ohio App. 470.

other's physical conduct in the performance of the service.[7]

"Servant." In its broadest sense the term "servant" includes any person over whom personal authority is exercised[8] or who exerts himself or labors for the benefit of a master or employer;[9] any one who works for, and under the direction or control of, another for salary or wages.[10] In a more restricted sense a servant has been defined to be a person employed to labor for the pleasure or interest of another; especially, in law, one employed to render service or assistance in some trade or vocation, but without authority to act as agent in place of his employer;[11] one who is employed to render personal service to his employer otherwise than in pursuit of an independent calling and who in such service remains entirely under the control and direction of the latter, who is called his master;[12] a person employed to perform service for another in his affairs and who, with respect to his physical

7. Iowa.—Meredith Pub. Co. v. Iowa Employment Security Commission, 6 N.W.2d 6, 11, 232 Iowa 666.

Kan.—Bush v. Wilson & Co., 138 P.2d 457, 461, 157 Kan. 80—Sims v. Dietrich, 124 P.2d 507, 509, 155 Kan. 310—Garner v. Martin, 122 P.2d 735, 737, 155 Kan. 12—Houdek v. Gloyd, 107 P.2d 751, 754, 152 Kan. 789—Hurla v. Capper Publications, 87 P.2d 552, 557, 149 Kan. 369.

Mo.—Smith v. Fine, 175 S.W.2d 761, 765, 351 Mo. 1179—Mattan v. Hoover Co., 166 S.W.2d 557, 564, 350 Mo. 506—Skidmore v. Haggard, 110 S.W.2d 726, 729, 341 Mo. 837—Pfeifer v. United Bakers Supply Co., App., 160 S.W.2d 795, 800—Knudsen v. Kansas City Public Service Co., App., 141 S.W.2d 252, 256.

Tex.—R. E. Cox Dry Goods Co. v. Kellog, Civ.App., 145 S.W.2d 675, 679, error refused—Moore v. Roberts, Civ.App., 93 S.W.2d 236, 238, error refused.

8. Ala.—Toranto v. Hattaway, 122 So. 816, 819, 219 Ala. 520.

Mich.—Croff v. De Vries, 234 N.W. 118, 120, 253 Mich. 180.

Va.—Ginter's Ex'r v. Shelton, 45 S.E. 892, 893, 102 Va. 185, 188.

Public servant see the C.J.S. title Officers § 3, also 50 C.J. p 862 notes 16, 17.

9. U.S.—In re Caldwell, D.C.Ark., 164 F. 515—In re Scanlan, D.C.Ky., 97 F. 26, 27.

"A servant in law is any person, male or female, minor or of full age, paid or unpaid, who works for another with his knowledge and consent."—Ryan v. Unsworth, 157 A. 869, 870, 52 R.I. 86.

10. Mo.—Morgan v. Bowman, 22 Mo. 538, 548—Kiser v. Suppe, 112 S.W. 1005, 1007, 133 Mo.App. 19.

Mont.—Jensen v. Barbour, 39 P. 906, 908, 15 Mont. 582.

N.J.—Frank v. Herold, 62 A. 152, 63 N.J.Eq. 443.

N.D.—Minneapolis Iron Store Co. v. Branum, 162 N.W. 543, 547, 36 N.D. 355, L.R.A.1917E 298.

Or.—Shields v. Grace, 179 P. 265, 91 Or. 187, 205.

Tex.—Texas & N. O. R. Co. v. Parsons, Civ.App., 109 S.W. 240, 247, affirmed 113 S.W. 914, 102 Tex. 157, 132 Am.S.R. 857.

11. U.S.—Rendleman v. Niagara Sprayer Co., D.C.Ill., 16 F.2d 122, 124.

Ga.—Corpus Juris quoted in Small v. Nugrape Co. of America, 167 S.E. 697, 698, 46 Ga.App. 396—Zurich General Accident & Liability Ins. Co. v. Lee, 136 S.E. 173, 175, 36 Ga.App. 248.

Me.—Stevens v. Frost, 32 A.2d 164, 167, 140 Me. 1.

Tex.—Oliver v. State, 144 S.W. 604, 616, 65 Tex.Cr. 150.

39 C.J. p 33 note 8.

Corpus Juris cited in support of similar definition of term "employee."—Simmons v. Kansas City Jockey Club, 66 S.W.2d 119, 124, 334 Mo. 99.

Other definitions

(1) One who is engaged, not merely in doing work or services for another, but who is in his service generally on or about the premises or property of his employer, and subject to his direction or control therein, and is generally liable to be dismissed.

U.S.—Campfield v. Lang, C.C.Wis., 25 F. 128, 131.

Mo.—State v. Meyers, 82 Mo. 558, 561, 52 Am.R. 389.

(2) "One who serves or does service voluntarily or involuntarily; a person who is employed by another for menial offices or for other labor, and is subject to his command; a person who labors or exerts himself for the benefit of another, his master or employer; a subordinate helper."—Lajoie v. Rossi, 37 S.W.2d 684, 686, 225 Mo.App. 651—39 C.J. p 33 note 8 [a] (19).

12. Cal.—Western Indemnity Co. v. Pillsbury, 159 P. 721, 723, 172 Cal. 807—Brosius v. Orpheum Theater Co., 60 P.2d 156, 158, 16 Cal.App.2d 61—Berkowitz v. Pelton, 48 P.2d 756, 757, 9 Cal.App.2d 80—Provo v. Roed, 275 P. 928, 930, 99 Cal.App. 372—Giacomini v. Pacific Lumber Co., 89 P. 1059, 1060, 5 Cal.App. 218.

Ga.—Henley v. State, 2 S.E.2d 139, 142, 59 Ga.App. 595.

Ill.—Union Bank of Chicago v. Kalkhurst, 265 Ill.App. 274, 278.

N.Y.—Perry v. Fox, 156 N.Y.S. 369, 370, 93 Misc. 79.

Pa.—McColligan v. Pennsylvania R. Co., 63 A. 792, 793, 214 Pa. 229, 6 L.R.A.,N.S., 544, 112 Am.S.R. 739.

S.D.—Pollock v. Minneapolis & St. L. R. Co., 166 N.W. 641, 642, 40 S.D. 186, certiorari denied 39 S.Ct. 6, 248 U.S. 558, 63 L.Ed. 421—Cochran v. Rice, 128 N.W. 583, 585, 26 S.D. 393, Ann.Cas.1913B 570.

39 C.J. p 33 note 8 [a] (10).

Similar definitions

(1) A person who is subject to the control of his employer with respect to the manner in which the details of the work are to be performed.—Lawhon v. St. Joseph Veterinary Laboratories, Mo., 232 S.W. 44, 48—Heisey v. Tide Water Oil Co., Mo.App., 92 S.W.2d 922, 928.

(2) One whose employer has the order and control of work done by him, and who directs or may direct the means as well as the end.—Farmers' Reservoir & Irrigation Co. v. Fulton Inv. Co., 255 P. 449, 450, 81 Colo. 69—Industrial Commission of Colorado v. Bonfils, 241 P. 735, 736, 78 Colo. 306—Arnold v. Lawrence, 213 P. 129, 130, 72 Colo. 528.

(3) One who does work under the direction of another who not only prescribes the nature of his work, but directs, or any moment may direct, the means also, or as it has been put, retains the power of controlling the work.—Powers v. Massachusetts Homœopathic Hospital, Mass., 109 F. 294, 298, 47 C.C.A. 122, 65 L.R.A. 372, certiorari denied 22 S.Ct. 932, 183 U.S. 695, 46 L.Ed. 394.

(4) One who represents the will of the master, not only in the ultimate result of the work, but in the details by which the result is accomplished.—Holleman v. Taylor, 158 S.E. 89, 89, 200 N.C. 618.

(5) Additional definitions.

Ohio.—Pantell v. Shriver-Allison Co., 22 N.E.2d 197, 199, 61 Ohio App. 119, appeal dismissed 19 N.E.2d 901, 135 Ohio St. 164—Snodgrass v. Cleveland Co-op. Coal Co., 187 N.E. 493, 495, 31 Ohio App. 470.

services of other persons for pay;[25] a person who has another in his employ to do certain things in a regular and successive way;[26] a person or corporation employing workmen.[27] The term may have different meanings in different connections.[28]

The word "employee" imports some sort of continuous service rendered for wages or salary and subject to the direction of the employer as to how the work shall be done.[29] In its broad signification the term is used to designate one who is employed;[30] one who works for an employer or master;[31] a clerk or workman in the service of an employer;[32] one who works for wages or a salary;[33] one who gives his whole time and services to another for a financial consideration;[34] a person hired to work for wages as the employer may direct.[35]

"Employee" has also been defined as a person in constant and continuous service,[36] one who performs services for another for a financial consideration exclusive of casual employment,[37] one whose time and skill are occupied in the business of his employer,[38] and not attending to his own business or pleasure separate and apart from such em-

Iowa.—State v. Foster, 37 Iowa 404, 407.

25. U.S.—**Corpus Juris quoted in** Divine v. Levy, D.C.La., 36 F.Supp. 55, 59.
N.Y.—Matter of Fitzgerald, 45 N.Y.S. 630, 632, 21 Misc. 226.

26. U.S.—**Corpus Juris quoted in** Divine v. Levy, D.C.La., 36 F.Supp. 55, 59.
Del.—State v. Foster, 40 A. 939, 940, 17 Del. 289.

27. U.S.—**Corpus Juris quoted in** Divine v. Levy, D.C.La., 36 F.Supp. 55, 59.
20 C.J. p 1244 note 41.

28. R.I.—Anderson v. Polleys, 165 A. 436, 437, 53 R.I. 182.

29. Wash.—Sills v. Sorenson, 73 P. 2d 798, 801, 192 Wash. 318.
"Employee:"
Defined generally see 30 C.J.S. p 226 note 2–p 231 note 32.
Within National Labor Relations Act see infra § 28 (11).

Similar definitions

(1) An employee is a servant of his master, who employs him and fixes the terms of his compensation, and who can direct and control all of the servant's movements in and about the work, and discharge him ad libitum, unless there is some special agreement which limits his authority.—Angel v. Industrial Commission of Utah, 228 P. 509, 512, 64 Utah 105.

(2) An "employee" is one who contracts to produce a given result, subject to the lawful orders and control of the employer in the means and methods used.—Caraher v. Sears, Roebuck & Co., 200 A. 324, 326, 124 Conn. 409.

(3) An "employee" is one bound, in some degree, to the duty of service and subject to the master's command regarding the method of doing work.—Home Savings & Loan Ass'n v. Carrico, 241 N.W. 763, 765, 123 Neb. 25.

30. Ga.—Atlanta, B. & C. R. Co. v. Cook, 37 S.E.2d 159, 73 Ga.App. 435.
20 C.J. p 1241 note 75.

Similar definitions

Ky.—Grubb v. Coleman Fuel Co., 114 S.W.2d 477, 479, 272 Ky. 847.
Minn.—State ex rel. Gorcyzca v. City of Minneapolis, 219 N.W. 924, 925, 174 Minn. 594.
Mo.—Simmons v. Kansas City Jockey Club, 66 S.W.2d 119, 124, 334 Mo. 99.
20 C.J. p 1241 note 75 [a].

31. U.S.—Carroll v. Social Security Board, D.C.Ill., 44 F.Supp. 790, 791, reversed on other grounds, C.C.A., 128 F.2d 876.
Ill.—Hoebel v. Travelers Ins. Co., 275 Ill.App. 551, 564.
20 C.J. p 1241 note 76.

32. Minn.—State ex rel. Gorczyca v. City of Minneapolis, 219 N.W. 924, 925, 174 Minn. 594.

33. U.S.—Carroll v. Social Security Board, D.C.Ill., 44 F.Supp. 790, 791, reversed on other grounds, C.C.A., 128 F.2d 876.
Conn.—Swiss Cleaners v. Danaher, 27 A.2d 806, 809, 129 Conn. 338.
Ga.—Atlanta, B. & C. R. Co. v. Cook, 37 S.E.2d 159, 73 Ga.App. 435.
Ill.—Hoebel v. Travelers Ins. Co., 275 Ill.App. 551, 564.
Minn.—State ex rel. Gorczyca v. City of Minneapolis, 219 N.W. 924, 925, 174 Minn. 594.
Neb.—Home Savings & Loan Ass'n v. Carrico, 241 N.W. 763, 765, 123 Neb. 25.
Ohio.—Home Indem. Co. of N. Y. v. Village of Plymouth, 64 N.E.2d 248, 250, 146 Ohio St. 96.
20 C.J. p 1241 note 77.

34. Mo.—Daub v. Maryland Casualty Co., App., 148 S.W. 58, 60, certiorari quashed State ex rel. Maryland Casualty Co. v. Hughes, 164 S.W.2d 274, 349 Mo. 1142.
Ohio.—Holmes v. Republic Steel Corp., Com.Pl., 69 N.E.2d 396, 410.

35. U.S.—Campfield v. Lang, C.C. Wis., 25 F. 128, 131.

Similar definitions

(1) One bound to duty of service, subject to master's command as to manner in which work shall be done.—Meredith Pub. Co. v. Iowa Employment Security Commission, 6 N.W.2d 6, 11, 232 Iowa 666.

(2) One who works for, and under control of, another for hire.—Stricker v. Industrial Commission of Utah, 188 P. 849, 851, 55 Utah 603, 19 A.L.R. 1159.

(3) One who works for, and under control of, his employer.—Morgan v. Olmsted-Kirk Co., Tex.Civ.App., 97 S.W.2d 260, 262, error dismissed.

(4) One who works for a salary or wages under directions.—In re Peck, 19 Hawaii 181, 182.

36. Mo.—Daub v. Maryland Casualty Co., App., 148 S.W.2d 58, 60, certiorari quashed State ex rel. Maryland Casualty Co. v. Hughes, 164 S.W.2d 274, 349 Mo. 1142.
Necessity of continuity of service see infra § 2 f.

37. Mo.—Daub v. Maryland Casualty Co., App., 148 S.W.2d 58, 60, certiorari quashed Maryland Casualty Co. v. Hughes, 164 S.W.2d 274, 349 Mo. 1142.
"The word 'employee', which is the correlative of 'employer', is commonly used as signifying continuous service, or as designating a person who gives his whole time and services to another for a financial consideration, or as designating a person who performs services for another for a financial consideration, exclusive of casual employment, or a person in constant and continuous service, or a person having some permanent employment or position, or a person who renders regular and continuous services, not limited to a particular transaction, or a person having a fixed tenure or position."—Daub v. Maryland Casualty Co., Mo. App., 148 S.W.2d 58, 60, certiorari quashed State ex rel. Maryland Casualty Co. v. Hughes, 164 S.W.2d 274, 349 Mo. 1142.

38. U.S.—Texas & P. R. Co. v. Smith, La., 67 F. 524, 527, 14 C.C.A. 509, 31 L.R.A. 321.

ployment;[39] anyone who renders labor or services to another.[40] The term is applicable only to one in the present service of another, and does not embrace one who has at some time been, but no longer is, in the employment of another.[41]

Although the term is often used in referring to deputies and assistants of public officers,[42] in common speech the term is usually applied to clerks, laborers, and persons rendering service in similar capacities;[43] it rarely refers to the higher officers of a corporation or government or to domestic servants,[44] and an "employee" is generally distinguished from an official or officer, or one employed in a position of some authority.[45] Of course, like the term "servant," the term "employee" may have different meanings in different connections.[46]

"Employ," "employed," and "employment." The term "to employ" is not restricted to entering into a master and servant relationship.[47] Similarly, while the word "employed" may be used to describe a master and servant relation,[48] it does not necessarily import every sort of such relation.[49] "Employment" has been defined, on the one hand, as the act of attending to the duties and services of another,[50] and, on the other hand, as the act of hiring.[51]

Other terms. The term "lumping" in the vernacular of members of a trade union is used to designate a method of doing work where the contractor is only the figurehead of the owner who purchases the material and assumes all the responsibility in connection with the contract.[52]

"Straw boss" is a term sometimes applied to a boss without any authority,[53] or one who, in the absence of the real boss, is clothed with authority.[54] A straw boss is a second foreman;[55] a sort of subforeman[56] or superior servant.[57]

c. Terms Compared and Distinguished

The terms "servant" and "employee" are generally held to be synonymous; they have also been compared with, and distinguished from, "laborer" and other terms.

The terms "servant" and "employee" are generally held to be synonymous,[58] although some dis-

39. Or.—Lesser v. Great Lakes Casualty Co., 135 P.2d 810, 814, 171 Or. 174.

40. U.S.—De-Raef Corp. v. U. S., Ct.Cl., 70 F.Supp. 264, 269.
Ga.—Atlanta, B. & C. R. Co. v. Cook, 37 S.E.2d 159, 73 Ga.App. 435.
N.J.—Watson v. Watson Mfg. Co., 30 N.J.Eq. 588, 590.

41. Ind.—Koch v. Wix, 25 N.E.2d 277, 279, 108 Ind.App. 20.

42. Ill.—Helliwell v. Sweitzer, 115 N.E. 810, 812, 278 Ill. 248.
20 C.J. p 1244 note 29.

43. Conn.—Swiss Cleaners v. Danaher, 27 A.2d 806, 809, 129 Conn. 338.
Neb.—Home Savings & Loan Ass'n v. Carrico, 241 N.W. 763, 765, 123 Neb. 25.
Ohio.—Home Indem. Co. of N. Y. v. Village of Plymouth, 64 N.E.2d 248, 250, 146 Ohio St. 96.

44. U.S.—U. S. v. Schlierholz, D.C. Ark., 137 F. 616, 624.
Conn.—Swiss Cleaners v. Danaher, 27 A.2d 806, 809, 129 Conn. 338.
Ohio.—Home Indem. Co. of N. Y. v. Village of Plymouth, 64 N.E.2d 248, 250, 146 Ohio St. 96.
Neb.—Home Savings & Loan Ass'n v. Carrico, 241 N.W. 763, 765, 123 Neb. 25.
20 C.J. p 1244 note 30.

45. U.S.—Carroll v. Social Security Board, D.C.Ill., 44 F.Supp. 790, 791, reversed on other grounds, C.C.A., 128 F.2d 876.
N.H.—Abbott v. Lewis, 88 A. 98, 101, 77 N.H. 94, 98.
20 C.J. p 1244 note 31.
"The term 'employee' is used generally to distinguish one who performs services for another from one who serves the public at large."—Stone v. U. S., D.C.Pa., 55 F.Supp. 230, 233.
"Executive employee"
The term "executive employee" has a general popular and accepted significance differentiating it from ordinary employees, and it carries the idea of supervision of or control over ordinary employees.—Ralph Knight, Inc., v. Mantel, C.C.A.Mo., 135 F.2d 514, 517.

46. U.S.—State Farm Mut. Automobile Ins. Co. v. Brooks, D.C.Mo., 43 F.Supp. 870, 872, reversed on other grounds 136 F.2d 807, certiorari denied 64 S.Ct. 80, 320 U.S. 768, 88 L.Ed. 459.
Mo.—State ex rel. Maryland Casualty Co. v. Hughes, 164 S.W.2d 274, 277, 349 Mo. 1142, quashing certiorari Daub v. Maryland Casualty Co., 148 S.W.2d 58.
R.I.—Anderson v. Polleys, 165 A. 436, 437, 53 R.I. 182.

47. Wash.—Clark v. Housing Authority of Town of Port Orchard, 171 P.2d 217, 221, 25 Wash.2d 419.
Definition of "employ" as used otherwise than in master and servant connection see 30 C.J.S. p 222 note 36—p 225 note 1.

48. Mo.—Daub v. Maryland Casualty Co., App., 148 S.W.2d 58, 60, certiorari quashed State ex rel. Maryland Casualty Co. v. Hughes, 164 S.W.2d 274, 349 Mo. 1142.

49. Mo.—Daub v. Maryland Casualty Co., App., 148 S.W.2d 58, 60, certiorari quashed State ex rel. Maryland Casualty Co. v. Hughes, 164 S.W.2d 274, 349 Mo. 1142.

50. Mo.—State v. Canton, 43 Mo. 48, 51.
20 C.J. p 1245 note 58.
"Employment" defined generally see 30 C.J.S. p 233 note 43—p 235 note 39.

51. N.Y.—People v. Hyde, 89 N.Y. 11, 16.

52. N.Y.—People v. Weinseimer, 102 N.Y.S. 579, 581, 117 App.Div. 603.
"The 'lumper' merely furnishes the labor and acts as superintendent upon an agreed compensation for his services."—People v. Weinseimer, supra.

53. Ill.—Momence Stone Co. v. Groves, 64 N.E. 335, 336, 197 Ill. 88, 91.
60 C.J. p 136 note 2.

54. Ark.—St. Louis & N. A. R. Co. v. Midkiff, 87 S.W. 446, 447, 75 Ark. 263.

55. Tex.—Forge v. Houston & T. C. R. Co., 90 S.W. 1118, 1119, 41 Tex. Civ.App. 81.

56. Ill.—Momence Stone Co. v. Groves, 64 N.E. 335, 336, 197 Ill. 88, 91.

57. Ark.—St. Louis & N. A. R. Co. v. Midkiff, 87 S.W. 446, 447, 75 Ark 263.

58. Cal.—Western Indemnity Co. v. Pillsbury, 159 P. 721, 723, 172 Cal. 807—Brosius v. Orpheum Theater Co., 60 P.2d 156, 158, 16 Cal.App. 2d 61—Darmour Productions Cor-

tinctions have been noted.[59]

The relation between the terms "manufacturer" and "servant" is discussed in Manufactures § 1.

"Laborer" is often used interchangeably with "employee"[60] and "servant;"[61] but it has also been distinguished from the latter,[62] and has been held not to include individuals whose principal efforts are directed to the accomplishment of some mental task, such as ministers, lawyers, doctors, and teachers.[63]

The term "workman" or "workingman" has been compared with,[64] and distinguished from,[65] "employee;" and it has likewise been compared with,[66] and distinguished from,[67] "servant."

§ 2. Essentials of Relation

a. In General

Although various elements may tend to indicate the existence of a master and servant relation, no one fact or circumstance is necessarily conclusive; ordinarily the question is one of fact to be determined from all the circumstances of the case.

Although the authorities have frequently enumerated various elements the presence of which tend to indicate that a given relationship is that of master and servant,[68] it has been pointed out that

poration, 27 P.2d 664, 665, 135 Cal. App. 351—People v. Grier, 128 P.2d 207, 210, 53 Cal.App.2d Supp. 841.
Ga.—Atlanta, B. & C. R. Co. v. Cook, 37 S.E.2d 159, 73 Ga.App. 435.
Mass.—McDermott's Case, 186 N.E. 231, 232, 283 Mass. 74.
N.H.—Wemyss v. Wyoming Valley Paper Co., 172 A. 438, 440, 86 N. H. 587.
N.Y.—Burdo v. Metropolitan Life Ins. Co., 4 N.Y.S.2d 819, 820, 254 App.Div. 26.
Pa.—Carville v. A. F. Bornot & Co., 135 A. 652, 655, 288 Pa. 104.
Tenn.—**Corpus Juris cited in** Sledge v. Hunt, 12 S.W.2d 529, 531, 157 Tenn. 606—Hand v. Cole, 12 S.W. 922, 88 Tenn. 400, 405, 7 L.R.A. 96 —**Corpus Juris cited in** Tennessee Valley Appliances v. Rowden, 146 S.W.2d 845, 848, 24 Tenn.App. 487.
Tex.—Oliver v. State, 144 S.W. 604, 616, 65 Tex.Cr. 150.
Wash.—Sills v. Sorenson, 73 P.2d 798, 801, 192 Wash. 318.
39 C.J. p 33 note 8, p 34 note 10.

59. Mass.—Dermott's Case, 186 N.E. 231, 232, 283 Mass. 74.

60. Ind.—Pendergast v. Yandes, 24 N.E. 724, 124 Ind. 159, 8 L.R.A. 849.
35 C.J. p 926 note 26.

A "farm laborer," as ordinarily understood, is one who labors on a farm in raising crops, or in doing general farm work.—H. Duys & Co. v. Tone, 5 A.2d 23, 28, 125 Conn. 300.

61. La.—State v. Rose, 61 So. 496, 497, 125 La. 462, 26 L.R.A.,N.S., 821.
35 C.J. p 926 note 27.

62. N.Y.—Wakefield v. Fargo, 90 N. Y. 213, 218.

63. Cal.—Universal Pictures Corporation v. Superior Court in and for Los Angeles County, 50 P.2d 500, 501, 9 Cal.App.2d 490.

64. U.S.—In re Crown Point Brush Co., D.C.N.Y., 200 F. 882, 884.
N.Y.—Bowne v. S. W. Bowne Co., 116 N.E. 264, 265, 221 N.Y. 28.

65. N.Y.—Europe v. Addison Amusements, Inc., 131 N.E. 750, 751, 231 N.Y. 105.
71 C.J. p 178 note 78 [b].

66. U.S.—In re Crown Point Brush Co., D.C.N.Y., 200 F. 882, 884.
71 C.J. p 178 note 84 [a].

67. U.S.—In re Greenewald, D.C.Pa., 99 F. 705, 706, 3 Am.Bankr. 696.
71 C.J. p 178 note 84 [b].

68. U.S.—Matcovich v. Anglim, C.C. A.Cal., 134 F.2d 834, certiorari denied 64 S.Ct. 46, 320 U.S. 744, 88 L.Ed. 441—Williams v. U. S., C.C. A.Ill., 126 F.2d 129, certiorari denied 63 S.Ct. 52, 317 U.S. 655, 87 L.Ed. 527—Underwood v. Commissioner of Internal Revenue, C.C.A. 4, 56 F.2d 67—Aberdeen Aerie No. 24 of Fraternal Order of Eagles v. U. S., D.C.Wash., 50 F.Supp. 734, appeal dismissed, C.C.A., Squier v. Seattle Aerie No. 1 of Fraternal Order of Eagles, 142 F.2d 462, affirmed 148 F.2d 655—Kentucky Cottage Industries v. Glenn, D.C. Ky., 39 F.Supp. 642.
Cal.—Empire Star Mines Co. v. California Employment Commission, 168 P.2d 686, 28 Cal.2d 33—Clarke v. Hernandez, App., 179 P.2d 834—Washko v. Stewart, 67 P.2d 144, 20 Cal.App.2d 347.
Ill.—Thiel v. Material Service Corporation, 5 N.E.2d 88, 364 Ill. 539.
Miss.—Texas Co. v. Jackson, 165 So. 546, 174 Miss. 737.
N.J.—Younkers v. Ocean County, 33 A.2d 898, 130 N.J.Law 607.
Ohio.—Pantell v. Shriver-Allison Co., 22 N.E.2d 497, 61 Ohio App. 119, appeal dismissed 19 N.E.2d 901, 135 Ohio St. 164.
Utah.—Intermountain Speedways v. Industrial Commission, 126 P.2d 22, 101 Utah 573—Gleason v. Salt Lake City, 74 P.2d 1225, 94 Utah 1 —Weber County-Ogden City Relief Committee v. Industrial Commission of Utah, 71 P.2d 177, 93 Utah 85.
Wis.—Employers Mut. Liability Ins. Co. v. Brower, 272 N.W. 359, 224 Wis. 485—Town of Eagle v. Industrial Commission, 266 N.W. 274, 221 Wis. 274.

Designation by parties

The existence of the relation of master and servant does not depend on how the parties designate each other; nor is it affected by provisions or stipulations in the contract that their relationship should not be considered that of master and servant.
U.S.—Lee v. Remington Rand, D.C. Cal., 68 F.Supp. 837.
N.Y.—Fidel Ass'n of New York v. Miller, 20 N.Y.S.2d 381, 259 App. Div. 486, affirmed In re Fidel Ass'n of N. Y., 39 N.E.2d 265, 287 N.Y. 626.
Pa.—Commonwealth v. McNelly, Com.Pl., 56 Dauph.Co. 95—Commonwealth v. Wertz, Com.Pl., 53 Dauph.Co. 353.
Utah.—Chatelain v. Thackeray, 100 P.2d 191, 98 Utah 525.
Va.—Unemployment Compensation Commission v. Harvey, 18 S.E.2d 390, 179 Va. 202.

Skill

(1) Even where skill is required, if occupation is one which ordinarily is considered as a function of the regular members of the household or an incident of business establishment of employer there is an inference that actor is a servant.—First Nat. Bank of Oxford v. Mississippi Unemployment Compensation Commission, 23 So.2d 534, 199 Miss. 97.

no one fact or circumstance is necessarily conclusive.[69] Hence, whether an individual is a servant or employee or occupies some other relationship ordinarily is a question of fact,[70] to be determined from all the facts and circumstances of the case.[71] In the absence of a statutory provision to the contrary, working members of a partnership will not be considered employees.[72] In determining whether the relation between parties is that of master and servant rather than some other legal relationship,

(2) **Fact that particular occupation involves technical skill putting control of details beyond capacity of employer does not preclude member of skilled profession from becoming an employee, since the right to control may exist although the ability to do so does not.—Tetting v. Hotel Pfister, 266 N.W. 249, 221 Wis. 141.**

Furnishing transportation

Fact that employee furnished his own transportation does not affect his status as an employee.—Curcic v. Nelson Display Co., 64 P.2d 1153, 19 Cal.App.2d 46.

69. Cal.—Washko v. Stewart, 67 P. 2d 144, 20 Cal.App.2d 347.
Utah.—Weber County-Ogden City Relief Committee v. Industrial Commission of Utah, 71 P.2d 177, 93 Utah 85.

Benefit alone to alleged master does not create the relation of master and servant.—Gleason v. Salt Lake City, 74 P.2d 1225, 94 Utah 1.

70. U.S.—National Campaign Committee v. Rogan, D.C.Cal., 69 F. Supp. 679.
Conn.—Electrolux Corporation v. Danaher, 23 A.2d 135, 128 Conn. 342.
Neb.—Curry v. Bruns, 285 N.W. 88, 136 Neb. 74.
Pa.—Rodgers v. Washington County Inst. Dist., 37 A.2d 610, 349 Pa. 357.

71. U.S.—Walling v. Sanders, C.C.A. Tenn., 136 F.2d 78—National Campaign Committee v. Rogan, D.C. Cal., 69 F.Supp. 679—Riggs v. Standard Oil Co., C.C.Minn., 130 F. 199.
Ill.—Yeates v. Illinois Cent. R. Co., 89 N.E. 338, 241 Ill. 205.
Neb.—Curry v. Bruns, 285 N.W. 88, 136 Neb. 74.
N.J.—Fenwick v. Unemployment Compensation Commission, 38 A.2d 849, 132 N.J.Law 185, reversed on other grounds 44 A.2d 172, 133 N. J.Law 295.
N.Y.—Coffin v. Reynolds, 37 N.Y. 640, 5 Transc.App. 74—People v. Sherman, 10 Wend. 298, 25 Am.D. 563.
Pa.—Rodgers v. Washington County Inst. Dist., 37 A.2d 610, 349 Pa. 357.
Wis.—Sater v. Cities Service Oil Co., 291 N.W. 355, 235 Wis. 32.
Government-soldier relation as not that of master-servant see Army and Navy § 35.

Effect on business practices

In determining whether overriding royalty owners were employers of laborer suing to recover unpaid wages and liquidated damages, although fundamental legal rights may not be sacrificed, where the question is two-sided and sensitively balanced one way or the other, the courts may consider how decision may help or hinder accepted business practices.—Divine v. Levy, D.C.La., 36 F.Supp. 55.

Persons held servants or employees

(1) Lessor of premises.—Johnson Oil Refining Co. v. Gillam, 256 Ill. App. 531.

(2) Physician generally.—Hamilton v. Salopek, 161 P.2d 955, 71 Cal. App.2d 104.

(3) Pieceworker.—Ocean Accident & Guarantee Corporation v. Kennison, 26 P.2d 113, 42 Ariz. 349.

(4) Railroad physician.—New York Cent. R. Co. v. Wiler, 177 N.E. 205, 124 Ohio St. 118.

(5) Share cropper.—Friemel v. Crouch, Tex.Civ.App., 189 S.W.2d 764, refused for want of merit.

(6) Other persons.
Cal.—Grand v. Kasviner, 153 P. 243, 28 Cal.App. 530.
Mo.—State ex rel. Smith v. Joynt, 127 S.W.2d 708, 344 Mo. 686.
N.J.—Micieli v. Erie R. Co., 37 A.2d 123, 131 N.J.Law 427—Gingarelli v. Gingarelli, 11 A.2d 739, 124 N.J. Law 299—Schuman v. Zurawell, 47 A.2d 560, 24 N.J.Misc. 180.
N.Y.—Richardson v. Abendroth, 43 Barb. 162, 164—Vincent v. Bamford, 33 N.Y.Super. 506, 1 J. & S. 506, 12 Abb.Pr.,N.S., 252, 254, 42 How.Pr. 109.
Pa.—Weaver v. Wheaton, 2 Pa.Co. 428, 430, 3 Del.Co. 108.
Tex.—Underberg v. Yates, Civ.App., 194 S.W.2d 277—Golden v. Wilder, Civ.App., 4 S.W.2d 140.
39 C.J. p 35 note 23.

Persons held not servants or employees

(1) Agricultural laborer.—Burgess v. Carpenter, 2 S.C. 7, 10, 16 Am.R. 643.

(2) Expert accountant.—Callan v. Hample, 236 P. 550, 73 Mont. 321.

(3) Officers and managers of corporation.
U.S.—Wells v. Southern M. R. Co., C.C.Minn., 1 F. 270, 272, 1 McCrary 18.
N.Y.—Palmer v. Van Santvoord, 47 N.E. 915, 153 N.Y. 612, 38 L.R.A. 402.
Pa.—Carville v. A. F. Bornot & Co., 135 A. 652, 288 Pa. 104.

(4) Railroad physician.—Quinn v. Kansas City, M. & B. R. Co., 30 S. W. 1036, 94 Tenn. 713, 716, 45 Am. S.R. 767, 28 L.R.A. 552.

(5) Road commissioner.—McManus v. Weston, 41 N.E. 301, 164 Mass. 263, 265, 31 L.R.A. 174.

(6) School teacher.—School Dist. No. 94 of Grant County v. Gautier, 73 P. 954, 13 Okl. 194, 204.

(7) Special officer for theater.—Healey v. Lothrop, 50 N.E. 540, 171 Mass. 263, 264.

(8) Other persons.
U.S.—Sims v. Talbert, D.C.S.C., 52 F.Supp. 688, reversed on other grounds, C.C.A., 143 F.2d 958—Crom v. Cement Gun Co., D.C.Del., 46 F.Supp. 403—Divine v. Levy, D C.La., 36 F.Supp. 55.
Cal.—Parker v. Trefry, 136 P.2d 55, 58 Cal.App.2d 69.
Del.—State v. Conover, 3 Harr. 565.
D.C.—Silverman v. Osborne Register Co., App.D.C., 155 F.2d 879, certiorari denied 67 S.Ct. 126.
La.—McCann v. Todd, 14 So.2d 469, 203 La. 631.
Miss.—Texas Co. v. Wheeless, 187 So. 880, 185 Miss. 799.
Tenn.—Cocking v. Ward, Ch., 48 S.W. 287.
Wash.—Bedgisoff v. Morgan, 162 P. 2d 238, 23 Wash.2d 737, opinion adhered to on rehearing 167 P.2d 422, 24 Wash.2d 971.
39 C.J. p 35 note 23.

72. Mich.—Auten v. Michigan Unemployment Compensation Commission, 17 N.W.2d 249, 310 Mich. 453.

Sharing profits and losses

(1) Contract by which operator of finance company engaged another to manage the business and share the profits and losses was not a contract of employment but created a partnership.—Duvic v. Home Finance Service, La.App., 23 So.2d 790.

(2) Where contractors agreed to pay superintendent a specified sum per month and one-half of profits from construction contracts, which contractors were bound to perform but to which the superintendent was not a party, the superintendent was an employee and not a partner.—Brown v. Neyland, Tex.Civ.App., 161 S.W.2d 833, affirmed in part and reversed in part on other grounds Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 53, modified on other grounds on rehearing 172 S.W.2d 89, 141 Tex. 253.

it is necessary to consider the usual attributes of each.[73] The relationship between parties may be that of employer and employee for one purpose, and some other relationship for other purposes.[74]

b. Contractual Basis of Relation

The relation of master and servant arises out of contract, the assent of both parties being essential.

The relation of master and servant arises out of contract,[75] the assent of both parties being essential, as discussed infra § 5. The relation does not arise between employees and one who has made advances to, or guaranteed the accounts of, the business in which they are employed,[76] or even one who has agreed with the owner to pay the salaries of employees.[77] Nevertheless, it has been held that as to third persons it is not requisite that any actual contract should subsist between two parties to constitute them master and servant, it being sufficient that the work is done by one for the other with the latter's knowledge and assent;[78] and it has also been held that employees working on a day-to-day basis without any contract for any specified period of employment occupy a status rather than a contractual relationship.[79] As to one not a party thereto, a written contract is not conclusive in determining whether the relationship between the parties is that of master and servant.[80]

Effect of servant's agreement with third person. The fact that a servant performing services for his master has entered into an agreement with a third person by which it is provided that he is to be deemed, while so engaged, the servant of the latter, cannot alter the real relation between him and his employer.[81]

c. Right to Enter into Relationship

Any person not under a legal disability is capable of becoming either a master or servant; a person may dispose of his own labor as he wishes provided he does not violate a contract or statute, and an employer has the right freely to contract and to select his employees in the absence of statutory inhibitions.

As a general rule every person of the full age of twenty-one years, and not under any legal disability, is capable of becoming either a master or a

73. U.S.—Yearwood v. U. S., D.C.La., 55 F.Supp. 295.

74. Cal.—Nelson v. Abraham, 177 P.2d 931, 29 Cal.2d 745.
Mass.—Wescott v. Young, 175 N.E. 153, 275 Mass. 82.

75. U.S.—U. S. v. Wholesale Oil Co., C.C.A.Kan., 154 F.2d 745—N. L. R. B. v. Knoxville Pub. Co., C.C.A.6, 124 F.2d 875—Fersing v. Fast, Cust. & Pat.App., 121 F.2d 531—Fleming v. A. H. Belo Corporation, C.C.A.Tex., 121 F.2d 207, affirmed Walling v. A. H. Belo Corporation, 62 S.Ct. 1223, 316 U.S. 624, 86 L.Ed. 1716, rehearing denied 63 S. Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Benway v. Missouri-Kansas-Texas R. Co., D.C.Okl., 26 F.2d 383—Fleming v. Stone. D.C.Ill., 41 F. Supp. 1000, reversed on other grounds, C.C.A., Walling v. Stone, 131 F.2d 461.
Me.—Copp v. Paradis, 157 A. 228, 130 Me. 464.
Minn.—Gonyea v. Duluth, M. & I. R. Ry. Co., 19 N.W.2d 384, 220 Minn. 225—Ledoux v. Joncas, 204 N.W. 635, 163 Minn. 498.
Miss.—Texas Co. v. Jackson, 165 So. 546, 174 Miss. 737.
Mo.—Miller v. St. Louis Realty & Securities Co., App., 103 S.W.2d 510—Hodge v. Feiner, App., 78 S. W.2d 478, affirmed 90 S.W.2d 90, 338 Mo. 268, 103 A.L.R. 483—Lajoie v. Rossi, 37 S.W.2d 684, 225 Mo.App. 651.
N.J.—Winkelstein v. Solitaire, 27 A. 2d 868, 129 N.J.Law 38, affirmed 31 A.2d 843, 130 N.J.Law 158—Maiswinkle v. Penn Jersey Auto Supply Co., 2 A.2d 593, 121 N.J.Law 349.
N.Y.—Goldstein v. State, 9 N.Y.S.2d 799, 256 App.Div. 141—Osborg v. Hoffman, 300 N.Y.S. 690, 252 App. Div. 587, affirmed 19 N.E.2d 924, 280 N.Y. 523—Paulsen v. Kahn, 288 N.Y.S. 622, 248 App.Div. 744—Meo v. Bloomgarden, 261 N.Y.S. 279, 237 App.Div. 325, appeal dismissed 186 N.E. 207, 262 N.Y. 72—Nalli v. Peters, 211 N.Y.S. 411, 213 App. Div. 735, modified on other grounds 149 N.E. 343, 241 N.Y. 177, motion for reargument or to amend remittitur denied 150 N.E.2d 566, 241 N. Y. 587.
N.C.—Holleman v. Taylor, 158 S.E. 88, 200 N.C. 618.
Ohio.—Floyd v. Du Bois Soap Co., 41 N.E.2d 393, 139 Ohio St. 520, reversed on other grounds 63 S. Ct. 159, 317 U.S. 596, 87 L.Ed. 488 —Ohio Cas. Ins. Co. v. Capolino, App., 65 N.E.2d 287.
Okl.—**Corpus Juris quoted in** Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 428, 148 Okl. 107—Hamilton v. Randall, 276 P. 705, 136 Okl. 170—Palmer v. Skelly Oil Co., 263 P. 440, 129 Okl. 32.
Pa.—Steffy v. City of Reading, Com. Pl., 37 Berks Co.L.J. 91, 36 Mun. L.R. 133, affirmed 46 A.2d 182, 353 Pa. 539.
R.I.—Anderson v. Polleys, 165 A. 436, 53 R.I. 182.
Tex.—Wheat v. Texas Co., Civ.App., 159 S.W.2d 238, reversed on other grounds Texas Co. v. Wheat, 168 S.W.2d 632, 140 Tex. 468—Younger Bros. v. Moore, Civ.App., 135 S.W. 2d 780, error dismissed, judgment correct—Carter Publications v. Davis, Civ.App., 68 S.W.2d 640, error refused—West Texas Produce Co. v. Pate, Civ.App., 64 S.W.2d 381.
Wis.—Lincoln County v. Industrial Commission, 279 N.W. 632, 228 Wis. 126—Culbertson v. Kieckhefer Container Co., 222 N.W. 249, 197 Wis. 349.
39 C.J. p 34 note 15.
Essentials of contract see infra § 6.

76. Okl.—**Corpus Juris quoted in** Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 428, 148 Okl. 107.
S.D.—Roberts v. Brown, 153 N.W. 765, 35 S.D. 618.

77. Okl.—**Corpus Juris quoted in** Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 428, 148 Okl. 107.
Pa.—Moffett v. Masontown Glass Co., 39 Pa.Co. 581—Steffy v. City of Reading, Com.Pl., 37 Berks Co.L.J. 91, 36 Mun.L.R. 133, affirmed 46 A. 2d 182, 353 Pa. 539.
39 C.J. p 34 note 18.

78. N.J.—Winkelstein v. Solitare, 27 A.2d 868, 129 N.J.Law 38, affirmed 31 A.2d 843, 130 N.J.Law 158.

79. N.C.—Pearson v. Equitable Life Assur. Soc. of U. S., 194 S.E. 661, 212 N.C. 731.
Commencement and duration of employment generally see infra § 8.

80. Tex.—Gulf Refining Co. v. Rogers, Civ.App., 57 S.W.2d 183.

81. Okl.—**Corpus Juris quoted in** Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 428, 148 Okl. 107.
39 C.J. p 34 note 19.

servant.[82] However, in order that a contract of hiring and service may be legally binding, it is necessary that, at the time such a contract is entered into, the party about to be hired should be free from any other engagement incompatible with that into which he is about to enter; in other words, he must be sui juris.[83] Every person has a legal right to dispose of his own labor as he wishes and to work for whom he pleases;[84] he is at liberty to withhold or give his labor on such terms as he deems proper[85] as long as he does not violate an express contract[86] or statute.[87] In the absence of statutory inhibitions the employer also has the right freely to contract, the right to select his employees, and to conduct his business in any manner satisfactory to himself;[88] and this right has frequently been mentioned as one of the tests to determine whether a master and servant relation exists.[89] Since, as discussed supra subdivision b of this section, the relation of master and servant is purely contractual, it follows that if either party is incapable of contracting there is no mutuality and neither is bound.[90]

d. Direction and Control

(1) In general

(2) Several masters or employers

82. Okl.—Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 148 Okl. 107.

Corporation

(1) A corporation, although it is an artificial invisible being, may be a master or employer with relation to its employees.—Holmes v. Republic Steel Corp., Ohio Com.Pl., 69 N.E.2d 396.

(2) Power of corporation to hire employees see Corporations § 1251.

83. Okl.—Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 148 Okl. 107.

84. U.S.—N. L. R. B. v. Knoxville Pub. Co., C.C.A.6, 124 F.2d 875.
Minn.—Gonyea v. Duluth, M. & I. R. Ry. Co., 19 N.W.2d 384, 220 Minn. 225.
Okl.—**Corpus Juris quoted in** Southland Cotton Oil Co., 299 P. 425, 429, 148 Okl. 107.
39 C.J. p 35 note 21—63 C.J. p 665 note 71.

Nonunion man

A nonunion employee has the same right to protect his family and earn a livelihood as though he were a member of a union, and his right, privilege, and opportunity of joining a union or refusing to join should be protected as any other right which he possesses.—Yellow Cab Operating Co. v. Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, D.C.Okl., 35 F.Supp. 403, reversed on other grounds Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, Okl., v. Yellow Cab Operating Co., C.C.A., 123 F.2d 262.

85. Ala.—Alabama State Federation of Labor v. McAdory, 18 So.2d 810, 246 Ala. 1, certiorari dismissed 65 S.Ct. 1384, 325 U.S. 450, 89 L.Ed. 1725.
Conn.—Cohn & Roth Electric Co. v. Bricklayers', Masons' & Plasterers' Local Union, No. 1, 101 A. 659, 92 Conn. 161, 6 A.L.R. 887.
63 C.J. p 665 note 72.

86. N.Y.—Maisel v. Sigman, 205 N.Y.S. 807, 123 Misc. 714.
63 C.J. p 665 note 73.

87. N.Y.—Maisel v. Sigman, supra.

88. U.S.—Aberdeen Aerie No. 24 of Fraternal Order of Eagles v. U. S., D.C.Wash., 50 F.Supp. 734, appeal dismissed, C.C.A., Squier v. Seattle Aerie No. 1 of Fraternal Order of Eagles, 142 F.2d 462, affirmed 148 F.2d 655.
D.C.—New Negro Alliance v. Sanitary Grocery Co., 92 F.2d 510, 67 App.D.C. 359, reversed on other grounds 58 S.Ct. 703, 303 U.S. 552, 304 U.S. 542, 82 L.Ed. 1012.
Fla.—Paramount Enterprises v. Mitchell, 140 So. 328, 104 Fla. 407.
N.J.—Miller's, Inc., v. Journeymen Tailors Union Local No. 195, 15 A.2d 822, affirmed Miller's Inc., v. Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America, 15 A.2d 824, 128 N.J.Eq. 162, reversed on other grounds Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America v. Miller's Inc., 61 S.Ct. 732, 312 U.S. 658, 85 L.Ed. 1106.
N.Y.—Yablonowitz v. Korn, 199 N.Y.S. 769, 205 App.Div. 440—Schwartz & Benjamin v. Alexanderson, 246 N.Y.S. 422, 138 Misc. 919—Cushman's Sons v. Amalgamated Food Workers' Bakers, Local No. 164, 215 N.Y.S. 401, 127 Misc. 152.
Okl.—**Corpus Juris quoted in** Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 429, 148 Okl. 107.
Or.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 333, 140 Or. 35.
Pa.—Jefferson & Indiana Coal Co. v. Marks, 134 A. 430, 287 Pa. 171, 47 A.L.R. 745.
39 C.J. p 35 note 22—63 C.J. p 658 notes 50, 52.

Open shop

An employer has the right to run his business on the open shop plan and to hire nonunion men.
N.J.—Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 9 A.2d 295, 126 N.J.Eq. 374, reversed on other grounds 8 A.2d 767, 126 N.J.Eq. 318.
N.Y.—Cushman's Sons v. Amalgamated Food Workers' Bakers, Local No. 164, 215 N.Y.S. 401, 127 Misc. 152.
Or.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 333, 140 Or. 35.

As bearing on the validity of closed shop agreements it has been said that, while every man and woman not lawfully incarcerated or otherwise incapacitated has the right to work, not all have the right to require any particular person, firm, or corporation to give them employment as a matter of right of contract between employer and employee.—International Ass'n of Machinists v. State ex rel. Watson, 15 So.2d 485, 153 Fla. 672.

89. Ariz.—Southwest Lumber Mills v. Employment Sec. Commission, 182 P.2d 83.
Ill.—Thiel v. Material Service Corporation, 5 N.E.2d 88, 364 Ill. 539.
Ky.—Klein v. Lakes, 105 S.W.2d 1041, 269 Ky. 43—Summerville v. Waller, 90 S.W.2d 65, 262 Ky. 343.
Me.—Lunt v. Fidelity & Casualty Co. of New York, 28 A.2d 736, 139 Me. 218.
Pa.—Balinski v. Press Pub. Co., 179 A. 897, 118 Pa.Super. 89—O'Donnell v. South Fayette Tp. School Dist., 161 A. 887, 105 Pa.Super. 488—Turner v. Good, Com.Pl., 48 Lanc.L.Rev. 559.
Utah.—Weber County-Ogden City Relief Committee v. Industrial Commission of Utah, 71 P.2d 177, 93 Utah 85.
Va.—Knight v. Peoples Nat. Bank of Lynchburg, 29 S.E.2d 364, 182 Va. 380.

90. Mo.—Hodge v. Feiner, App., 78 S.W.2d 478, affirmed 90 S.W.2d 90, 338 Mo. 268, 103 A.L.R. 483.

(1) In General

The essential characteristic of the master and servant relation is the retention by the employer of the right to direct and control the manner in which the work shall be performed, the right to determine not merely the result but the methods and means by which such result is to be accomplished.

The relation of master and servant exists when, and only when, the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done;[91] and the existence of such right

91. U.S.—Birmingham v. Bartels, C.C.A.Iowa, 157 F.2d 295—Vaughan v. Warner, C.C.A.Pa., 157 F.2d 26—U. S. v. Wholesale Oil Co., C.C.A.Kan., 154 F.2d 745—Glenn v. Standard Oil Co., C.C.A.Ky., 148 F.2d 51—Reconstruction Finance Corporation v. Merryfield, C.C.A.N.H., 134 F.2d 988—Matcovich v. Anglim, C.C.A.Cal., 134 F.2d 834, certiorari denied 64 S.Ct. 46, 320 U.S. 744, 88 L.Ed. 441—Ring v. The Dimitrios Chandris, C.C.A.Pa., 133 F.2d 124—Carroll v. Social Security Board, C.C.A.Ill., 128 F.2d 876—Williams v. U. S., C.C.A.Ill., 126 F.2d 129, certiorari denied 63 S.Ct. 52, 317 U.S. 655, 87 L.Ed. 527—Jones v. Goodson, C.C.A.Okl., 121 F.2d 176—Harlan v. Bryant, C.C.A.Ill., 87 F.2d 170—Childers v. Commissioner of Internal Revenue, C.C.A.9, 80 F.2d 27—McLamb v. E. I. Du Pont De Nemours & Co., C.C.A.N.C., 79 F.2d 966—Commissioner of Internal Revenue v. Modjeski, C.C.A.2, 75 F.2d 468, certiorari denied Modjeski v. Helvering, 55 S.Ct. 924, 295 U.S. 764, 79 L.Ed. 1706—Pennsylvania Cas. Co. v. Elkins, D.C.Ky., 70 F.Supp. 155—Wabash R. Co. v. Finnegan, D.C.Mo., 67 F.Supp. 94—Yearwood v. U. S., D.C.La., 55 F.Supp. 295—**Corpus Juris cited in** Los Angeles Athletic Club v. U. S., D.C.Cal., 54 F.Supp. 702, 704, appeal dismissed, C.C.A., 144 F.2d 352—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363—Aberdeen Aerie No. 24 of Fraternal Order of Eagles v. U. S., D.C.Wash., 59 F.Supp. 734, appeal dismissed, C.C.A., Squier v. Seattle Aerie No. 1 of Fraternal Order of Eagles, 142 F.2d 462, affirmed 143 F.2d 655—Yellow Cab Co. of D. C. v. Magruder, D.C.Md., 49 F.Supp. 605, affirmed, C.C.A., Magruder v. Yellow Cab Co., 141 F.2d 324, 152 A.L.R. 516—Kentucky Cottage Industries v. Glenn, D.C.Ky., 39 F.Supp. 642.

Ala.—**Corpus Juris cited in** Western Union Telegraph Co. v. George, 194 So. 183, 186, 239 Ala. 80—Ex parte Board of School Com'rs of Mobile County, 178 So. 63, 235 Ala. 82—**Corpus Juris quoted in** Greenwald v. Russell, 172 So. 895, 896, 233 Ala. 502—Reed v. Ridout's Ambulance, 102 So. 906, 212 Ala. 428.

Ariz.—Southwest Lumber Mills v. Employment Sec. Commission, 182 P.2d 83—Ocean Accident & Guarantee Corporation v. Kennison, 26 P.2d 113, 42 Ariz. 349—Grabe v. Industrial Commission, 299 P. 1031, 38 Ariz. 322.

Ark.—Crossett Lumber Co. v. McCain, 170 S.W.2d 64, 205 Ark. 631—Arkansas Fuel Oil Co. v. Scaletta, 140 S.W.2d 684, 290 Ark. 645—C. M. Farmer Stave & Heading Co. v. Whorton, 102 S.W.2d 79, 193 Ark. 708—Moaten v. Columbia Cotton Oil Co., 97 S.W.2d 629, 193 Ark. 97.

Cal.—Empire Star Mines Co. v. California Employment Commission, 168 P.2d 686, 28 Cal.2d 33—**Corpus Juris cited in** California Employment Stabilization Commission v. Sacramento Valley Wine Growers Ass'n, 156 P.2d 274, 277, 68 Cal.App.2d 173—Lee v. Nanny, 100 P.2d 832, 38 Cal.App.2d 90—Chinnis v. Pomona Pump Co., 98 P.2d 560, 36 Cal.App.2d 633—Hiner v. Olson, 72 P.2d 890, 23 Cal.App.2d 227, rehearing denied 73 P.2d 945, 23 Cal.App.2d 227—Curcic v. Nelson Display Co., 64 P.2d 1153, 19 Cal.App.2d 46—Los Flores School Dist. v. Industrial Accident Commission, 56 P.2d 581, 13 Cal.App.2d 180—King v. Emerson, 288 P. 1099, 110 Cal.App. 414, adopted 294 P. 768, 110 Cal.App. 414—Charles R. McCormick Lumber Co. v. O'Brien, 266 P. 594, 90 Cal.App. 776—Pilger v. City of Paris Dry Goods Co., 261 P. 328, 329, 86 Cal.App. 277—Connell v. Harris, 138 P. 949, 23 Cal.App. 537.

Conn.—Robert C. Buell & Co. v. Danaher, 18 A.2d 697, 127 Conn. 606—Cumbo v. E. B. McGurk, Inc., 200 A. 328, 124 Conn. 433.

D.C.—Grace v. Magruder, 148 F.2d 679, 80 U.S.App.D.C. 53, certiorari denied 66 S.Ct. 24, 326 U.S. 720, 90 L.Ed. 436.

Ga.—Lokey & Simpson v. Hightower, 196 S.E. 210, 57 Ga.App. 577—Cooper v. Dixie Const. Co., 165 S.E. 152, 45 Ga.App. 420.

Idaho.—**Corpus Juris quoted in** Whalen v. Zinn, 96 P.2d 434, 435, 60 Idaho 722—**Corpus Juris quoted in** Joslin v. Idaho Times Pub. Co., 53 P.2d 323, 328, 56 Idaho 242.

Ill.—Rozran v. Durkin, 45 N.E.2d 180, 381 Ill. 97, 144 A.L.R. 735—Threi v. Material Service Corporation, 5 N.E.2d 88, 364 Ill. 539—Yeates v. Illinois Cent. R. Co., 89 N.E. 338, 241 Ill. 205—Jones v. Standerfer, 15 N.E.2d 924, 296 Ill.App. 145.

Ind.—United States Board & Paper Co. v. Landers, App., 92 N.E. 203, superseded on rehearing on other grounds 93 N.E. 232, 47 Ind.App. 315.

Iowa.—Meredith Pub. Co. v. Iowa Employment Security Commission, 6 N.W.2d 6, 232 Iowa 666—Kaus v. Unemployment Compensation Commission, 299 N.W. 415, 230 Iowa 860—**Corpus Juris quoted in** Hjerleid v. State, 295 N.W. 139, 143, 229 Iowa 818—Reynolds v. Skelly Oil Co., 287 N.W. 823, 227 Iowa 163—State ex rel. Bierring v. Ritholz, 283 N.W. 268, 226 Iowa 70, 121 A.L.R. 1450—Lembke v. Fritz, 272 N.W. 300, 223 Iowa 261.

Kan.—Bush v. Wilson & Co., 138 P.2d 457, 157 Kan. 80.

Ky.—Klein v. Lakes, 105 S.W.2d 1041, 269 Ky. 43—Clendenin v. Colonial Supply Co., 102 S.W.2d 992, 267 Ky. 544—Summerville v. Waller, 90 S.W.2d 65, 262 Ky. 343—Glover's Adm'r v. James, 290 S.W. 344, 217 Ky. 572.

La.—Donovan v. Standard Oil Co. of Louisiana, App., 197 So. 320.

Me.—Lunt v. Fidelity & Casualty Co. of New York, 28 A.2d 736, 139 Me. 218—Case of Dobson, 123 A. 401, 124 Me. 305, 42 A.L.R. 603.

Md.—**Corpus Juris quoted in** Baltimore Transit Co. v. State, to Use of Schriefer, 40 A.2d 678, 683, 184 Md. 250—**Corpus Juris quoted in** Vacek v. State, 142 A. 491, 494, 155 Md. 400—Bentley, Shriver & Co. v. Edwards, 60 A. 283, 100 Md. 652.

Mass.—Griswold v. Director of Division of Unemployment Compensation and Division of Employment Security, 53 N.E.2d 108, 315 Mass. 371—Khoury v. Edison Electric Illuminating Co., 164 N.E. 77, 265 Mass. 236, 60 A.L.R. 1159—Marsh v. Beraldi, 157 N.E. 347, 260 Mass. 225—Chisholm's Case, 131 N.E. 161, 238 Mass. 412.

Mich.—Croff v. De Vries, 234 N.W. 118, 253 Mich. 180.

Minn.—Castner v. Christgau, 24 N.W.2d 228, 222 Minn. 61—Ledoux v. Joncas, 204 N.W. 635, 163 Minn. 498.

Miss.—Texas Co. v. Wheeless, 187 So. 880, 185 Miss. 799—Texas Co. v. Jackson, 165 So. 546, 174 Miss. 737.

Mo.—Atkisson v. Murphy, 179 S.W.2d 27, 352 Mo. 644—Kourik v. English, 100 S.W.2d 901, 340 Mo. 367—Maltz v. Jackoway-Katz Cap Co., 82 S.W.2d 909, 336 Mo. 1000—**Corpus Juris cited in** Simmons v. Kansas

of control has been said to be the really essential element of the relationship.[92] It is the right to ex-

City Jockey Club, 66 S.W.2d 119, 124, 334 Mo. 99—Brenner v. Socony Vacuum Oil Co., 158 S.W.2d 171, 236 Mo.App. 524—Miller v. St. Louis Realty & Securities Co., App., 103 S.W.2d 510—**Corpus Juris cited in** Bernat v. Star-Chronicle Pub. Co., App., 84 S.W.2d 429, 432.

N.J.—Rosenquist v. Brookdale Homes, 41 A.2d 383, 132 N.J.Law 531, reversed on other grounds 44 A.2d 33, 133 N.J.Law 305—Younkers v. Ocean County, 33 A.2d 898, 130 N.J.Law 607—Errickson v. F. W. Schwiers, Jr., Co., 158 A. 482, 108 N.J.Law 481—Giroud v. Stryker Transp. Co., 140 A. 305, 104 N.J.Law 424—Collawn v. 25 North Harrison St. Corporation, 165 A. 91, 11 N.J.Misc. 44.

N.M.—**Corpus Juris cited in** Mendoza v. Gallup Southwestern Coal Co., 66 P.2d 426, 429, 41 N.M. 161.

N.Y.—In re Electrolux Corporation, 30 N.Y.S.2d 972, 262 App.Div. 642, conforming to mandate 36 N.E.2d 633, 286 N.Y. 390, appeal denied 27 N.Y.S.2d 1007, 261 App.Div. 1110, followed in In re Geoghehan, 30 N.Y.S.2d 988, 263 App.Div. 758, reversed on other grounds In re Geoghegan's Claim, 43 N.E.2d 713, 289 N.Y. 565, and In re Riggi, 30 N.Y.S.2d 988, 263 App.Div. 758, reversed on other grounds 43 N.E. 2d 480, 288 N.Y. 440, reversed on other grounds In re Riggi's Claim, 43 N.E.2d 713, 289 N.Y. 567, In re Nowicki, 30 N.Y.S.2d 984, 263 App. Div. 758, reversed on other grounds In re Nowicki's Claim, 43 N.E.2d 713, 289 N.Y. 566—Claim of Miller, 29 N.Y.S.2d 15, 262 App.Div. 385—Hoffman Bros. v. Commercial Union Assur. Co., Limited of London, England, 222 N.Y.S. 641, 221 App.Div. 167, affirmed 162 N.E. 531, 248 N.Y. 578—Horowitz v. Daily Mirror, 258 N.Y.S. 39, 144 Misc. 99, affirmed 261 N.Y.S. 938, 237 App.Div. 876, reargument denied 262 N.Y.S. 919, 238 App.Div. 776.

N.C.—Holleman v. Taylor, 158 S.E. 88, 200 N.C. 618—Aderholt v. Condon, 128 S.E. 337, 189 N.C. 748.

Ohio.—French's Estate v. Glander, 65 N.E.2d 61, 146 Ohio St. 225—Miller v. Metropolitan Life Ins. Co., 16 N.E.2d 447, 134 Ohio St. 289.

Okl.—**Corpus Juris quoted in** Manahan Drilling Co. v. Howard, 72 P. 2d 803, 804, 181 Okl. 124—**Corpus Juris quoted in** Drumright Gas Engine Co. v. Sherrill, 46 P.2d 921, 924, 173 Okl. 147—Utility Coal Co. v. Clark, 41 P.2d 840, 171 Okl. 79—Taylor v. Ferreo, 41 P.2d 839, 171 Okl. 79—Utility Coal Co. v. Rogez, 39 P.2d 60, 171 Okl. 264.

Or.—Knapp v. Standard Oil Co. of California, 68 P.2d 1052, 156 Or. 564—**Corpus Juris quoted in** Fleming v. Ambulance Co., 62 P.2d 1331, 1334, 155 Or. 351.

Pa.—Commonwealth v. Continental Rubber Works, 32 A.2d 878, 347 Pa. 514—Lang v. Hanlon, 157 A. 788, 305 Pa. 378, followed in 157 A. 790, two cases, 305 Pa. 385 and 157 A. 791, 305 Pa. 385—Balinski v. Press Pub. Co., 179 A. 897, 118 Pa.Super. 89—O'Donnell v. South Fayette Tp. School Dist., 161 A. 887, 105 Pa.Super. 488—Bucher v. American Fruit Growers Co., 16 Pa.Dist. & Co. 96—Commonwealth v. Cooper, Com.Pl., 55 Dauph.Co. 428—Commonwealth v. Wysocki, Com.Pl., 55 Dauph.Co. 413—Turner v. Good, Com.Pl., 48 Lanc.L.Rev. 559.

R.I.—Henry v. Mondillo, 142 A. 230, 49 R.I. 261.

S.D.—Hayes v. Battle Creek Power Co., 249 N.W. 629, 61 S.D. 385.

Tenn.—Sitz v. Bryant, 201 S.W.2d 985—National Optical Stores Co. v. Bryant, 181 S.W.2d 139, 181 Tenn. 266—Texas Co. v. Bryant, 152 S.W.2d 627, 178 Tenn. 1, rehearing denied 163 S.W.2d 71, 178 Tenn. 680—**Corpus Juris quoted in** Mayberry v. Bon Air Chemical Co., 26 S.W.2d 148, 150, 160 Tenn. 459—Howell v. Shepherd, App., 196 S.W.2d 849—Tennessee Valley Appliances v. Rowden, 146 S.W.2d 845, 24 Tenn.App. 487.

Tex.—Lone Star Gas Co. v. Kelly, Com.App., 46 S.W.2d 656—Herndon v. Halliburton Oil Well Cementing Co., Civ.App., 154 S.W.2d 163, error refused—**Corpus Juris cited in** City of Waco v. Hurst, Civ.App., 131 S.W.2d 745, 747, error dismissed, judgment correct—McCombs v. Stewart, Civ.App., 117 S.W.2d 869—Southern Underwriters v. Willis, Civ.App., 110 S.W.2d 252, error refused—**Corpus Juris cited in** El Paso Laundry Co. v. Gonzales, Civ. App., 36 S.W.2d 793, 795, error dismissed—Harvey v. Meadowlake Milk Products Co., Civ.App., 27 S. W.2d 299.

Utah.—Intermountain Speedways v. Industrial Commission, 126 P.2d 22, 101 Utah 373—Chatelain v. Thackeray, 100 P.2d 191, 98 Utah 525—Gleason v. Salt Lake City, 74 P.2d 1225, 94 Utah 1—Weber County-Ogden City Relief Committee v. Industrial Commission of Utah, 71 P.2d 177, 93 Utah 85.

Vt.—Le Blanc v. Nye Motor Co., 147 A. 265, 102 Vt. 194, followed in 147 A. 267, 102 Vt. 201.

Va.—Knight v. Peoples Nat. Bank of Lynchburg, 29 S.E.2d 364, 182 Va. 380—Texas Co. v. Zeigler, 14 S.E. 2d 704, 177 Va. 557.

Wash.—McCarty v. King County Medical Service Corp., 175 P.2d 653, 26 Wash.2d 660—Hollingsworth v. Robe Lumber Co., 45 P. 2d 614, 182 Wash. 74—**Corpus Juris quoted in** Thurston County Chapter, American National Red Cross v. Department of Labor & Industries of Washington, 7 P. 2d 577, 579, 166 Wash. 488.

W.Va.—Meyn v. Dulaney-Miller Auto Co., 191 S.E. 558, 118 W.Va. 545—Malcolm v. American Service Co., 191 S.E. 527, 118 W.Va. 637—Craft v. Pocahontas Corporation, 190 S. E. 687, 118 W.Va. 380—Gunnoe v. West Virginia Poultry Co-op. Ass'n, 174 S.E. 691, 115 W.Va. 87, 93 A.L.R. 944—Oakley v. Thornbury, 171 S.E. 426, 114 W.Va. 188—Rogers v. Boyers, 170 S.E. 905, 114 W.Va. 107.

Wis.—J. Romberger Co. v. Industrial Commission, 290 N.W. 639, 234 Wis. 226—State ex rel. Cooper v. Baumann, 286 N.W. 76, 231 Wis. 607—Lincoln County v. Industrial Commission, 279 N.W. 632, 228 Wis. 126—Sprecher v. Roberts, 248 N. W. 795, 212 Wis. 69.

39 C.J. p 35 note 23.

Presumption of right

With regard to question of whether a master and servant or a different relation exists, absence from an agreement of a provision recognizing one party's right of control does not mean that no such right exists, and reservation of right of control is presumed unless the contrary appears.—Kaus v. Unemployment Compensation Commission, 299 N.W. 415, 230 Iowa 860.

92. U.S.—Blankenship v. W. U. Tel. Co., C.C.A.W.Va., 161 F.2d 168—Matcovich v. Anglim, C.C.A.Cal., 134 F.2d 834, certiorari denied 64 S.Ct. 46, 320 U.S. 744, 88 L.Ed. 441—Williams v. U. S., C.C.A.Ill., 126 F.2d 129, certiorari denied 63 S. Ct. 52, 317 U.S. 655, 87 L.Ed. 527—Aberdeen Aerie No. 24 of Fraternal Order of Eagles v. U. S., D. C.Wash., 50 F.Supp. 734, appeal dismissed, C.C.A., Squier v. Seattle Aerie No. 1 of Fraternal Order of Eagles, 142 F.2d 462, affirmed 148 F.2d 655.

Cal.—Brooks v. Johnson, 72 P.2d 194, 22 Cal.App.2d 618—Curcic v. Nelson Display Co., 64 P.2d 1153, 19 Cal.App.2d 46—Counihan v. Lufstufka Bros. & Co., 5 P.2d 694, 118 Cal.App. 602.

Conn.—Electrolux Corporation v. Danaher, 23 A.2d 135, 128 Conn. 342—Robert C. Buell & Co. v. Danaher, 18 A.2d 697, 127 Conn. 606.

D.C.—Grace v. Magruder, 148 F.2d 679, 80 U.S.App.D.C. 53, certiorari denied 66 S.Ct. 24, 326 U.S. 720 90 L.Ed. 426.

ercise such control and not the actual exercise thereof that is determinative.[93] The right to control involves the power to discharge and the existence of this power is essential[94] and constitutes an indicium of the relationship,[95] particularly where the power may be exercised at will and without

Ill.—Kehrer v. Industrial Commission, 6 N.E.2d 635, 365 Ill. 378.
Kan.—Rutkowski v. J. I. Case Threshing Mach. Co., 270 P. 599, 126 Kan. 627.
Miss.—Texas Co. v. Jackson, 165 So. 546, 174 Miss. 737—Crescent Baking Co. v. Denton, 112 So. 21, 147 Miss. 639.
Mo.—Kiser v. Suppe, 112 S.W. 1005, 133 Mo.App. 19.
Neb.—Curry v. Bruns, 285 N.W. 88, 136 Neb. 74.
Pa.—Long v. Eastern Paving Co., 145 A. 71, 295 Pa. 163—Gattas v. Tancredi Coal Co., Com.Pl., 42 Sch.Leg. Rec. 120.
Tex.—Alexander Film Co. v. Williams, Civ.App., 102 S.W.2d 514.
Utah.—Gleason v. Salt Lake City, 74 P.2d 1225, 94 Utah 1.
Wash.—**Corpus Juris cited in** Walter v. Everett School Dist. No. 24, 79 P.2d 689, 691.
W.Va.—Craft v. Pocahontas Corporation, 190 S.E. 687, 118 W.Va. 380.
Wis.—Employers Mut. Liability Ins. Co. v. Brower, 272 N.W. 359, 224 Wis. 485—Town of Eagle v. Industrial Commission, 266 N.W. 274, 221 Wis. 166.

93. U.S.—Birmingham v. Bartels, C.C.A.Iowa, 157 F.2d 295—Williams v. U. S., C.C.A.Ill., 126 F.2d 129, certiorari denied 63 S.Ct. 52, 317 U.S. 655, 87 L.Ed. 527—Yellow Cab Co. of D. C. v. Magruder, D.C.Md., 49 F.Supp. 605, affirmed, C.C.A., Magruder v. Yellow Cab Co., 141 F.2d 324, 152 A.L.R. 516.
Ala.—Ex parte Board of School Com'rs of Mobile County, 178 So. 63, 235 Ala. 82—Norwood Hospital v. Brown, 122 So. 411, 219 Ala. 445.
Ark.—Arkansas Power & Light Co. v. Richenback, 119 S.W.2d 515, 196 Ark. 620.
Cal.—Smith v. Fall River Joint Union High School Dist., 5 P.2d 930, 118 Cal.App. 673.
Conn.—Robert C. Buell & Co. v. Danaher, 18 A.2d 697, 127 Conn. 606—Caraher v. Sears, Roebuck & Co., 200 A. 324, 124 Conn. 409.
D.C.—Grace v. Magruder, 148 F.2d 679, 80 U.S.App.D.C. 53, certiorari denied 66 S.Ct. 24, 326 U.S. 720, 90 L.Ed. 426.
Ill.—Warput v. Reading Coal Co., 250 Ill.App. 450.
Iowa.—Lembke v. Fritz, 272 N.W. 300, 223 Iowa 261.
Kan.—Bush v. Wilson & Co., 138 P. 2d 457, 157 Kan. 80—Mendel v. Fort Scott Hydraulic Cement Co., 78 P.2d 868, 147 Kan. 719.
La.—Olano v. Leathers, App., 2 So. 2d 486.
Mass.—Kingsbury v. Terry, 16 N.E. 2d 48, 300 Mass. 516—Deyette v. Boston Elevated Ry. Co., 7 N.E. 2d 430, 297 Mass. 129—Khoury v. Edison Electric Illuminating Co., 164 N.E. 77, 265 Mass. 236, 60 A. L.R. 1159.
Mich.—Lewis v. Summers, 294 N.W. 82, 295 Mich. 20.
Mo.—Smith v. Fine, 175 S.W.2d 761, 351 Mo. 1179—Russell v. Union Elec. Co. of Mo., 191 S.W.2d 278, 238 Mo.App. 1074—Pfeiffer v. United Bakers Supply Co., App., 160 S.W.2d 795.
N.C.—Lassiter v. Cline, 22 S.E.2d 558, 222 N.C. 271—Aderholt v. Condon, 128 S.E. 337, 189 N.C. 748.
Tex.—Clark v. Lynch, Civ.App., 139 S.W.2d 294.
Utah.—Chatelain v. Thakeray, 100 P. 2d 191, 98 Utah 525.
Va.—Texas Co. v. Zeigler, 14 S.E.2d 704, 177 Va. 557.
Vt.—Le Blanc v. Nye Motor Co., 147 A. 265, 102 Vt. 194, followed in 147 A. 267, 102 Vt. 201.
Wash.—Bill v. Gattavara, 167 P.2d 434, 24 Wash.2d 819.

Want of ability to control, as where technical skill is required in the performance of the work, does not prevent the relationship from being that of master and servant.—Tetting v. Hotel Pfister, 266 N.W. 249, 221 Wis. 141.

Little supervision required

Where the work is not of a character requiring a great deal of supervision, failure to supervise does not change relationship of employer and employee.—Katsinas v. Colgate-Palmolive Peet Co., 20 N.E.2d 127, 299 Ill.App. 347.

94. U.S.—Williams v. U. S., C.C.A. Ill., 126 F.2d 129, certiorari denied 63 S.Ct. 52, 317 U.S. 655, 87 L.Ed. 527.
Ill.—Pioneer Fireproof Constr. Co. v. Hansen, 52 N.E. 17, 176 Ill. 100.
Iowa.—**Corpus Juris quoted in** Hjerleid v. State, 295 N.W. 139, 143, 229 Iowa 818.
Ky.—Messmer v. Bell & Coggeshall Co., 117 S.W. 346, 133 Ky. 19, 19 Ann.Cas. 1.
Me.—Lunt v. Fidelity & Casualty Co. of New York, 28 A.2d 736, 139 Me. 218.
Md.—**Corpus Juris quoted in** Baltimore Transit Co. v. State, 40 A.2d 678, 688, 184 Md. 250—**Corpus Juris quoted in** Vacek v. State, 142 A. 491, 494, 155 Md. 400.
Okl.—**Corpus Juris quoted in** Manahan Drilling Co. v. Howard, 72 P. 2d 802, 804, 181 Okl. 124—**Corpus Juris quoted in** Drumright Gas Engine Co. v. Sherrill, 46 P.2d 921, 924, 173 Okl. 147.
Pa.—Balinski v. Press Pub. Co., 179 A. 897, 118 Pa.Super. 89.
Tex.—**Corpus Juris cited in** City of Waco v. Hurst, Civ.App., 131 S.W. 2d 745, 747, error dismissed, judgment correct—**Corpus Juris cited in** El Paso Laundry Co. v. Gonzales, Civ.App., 36 S.W.2d 793, 795, error dismissed.
Va.—Knight v. Peoples Nat. Bank of Lynchburg, 29 S.E.2d 364, 182 Va. 380.
Wash.—**Corpus Juris quoted in** Thurston County Chapter, American National Red Cross v. Department of Labor & Industries of Washington, 7 P.2d 577, 579, 166 Wash. 488.
63 C.J. p 658 note 51.

95. U.S.—Jones v. Goodson, C.C.A. Okl., 121 F.2d 176—**Corpus Juris cited in** Los Angeles Athletic Club v. U. S., D.C.Cal., 54 F.Supp. 702, 704, appeal dismissed, C.C.A., 144 F.2d 352—Aberdeen Aerie No. 24 of Fraternal Order of Eagles v. U. S., D.C.Wash., 50 F.Supp. 734, appeal dismissed, C.C.A., Squier v. Seattle Aerie No. 1 of Fraternal Order of Eagles, 142 F.2d 462, affirmed 148 F.2d 655—Kentucky Cottage Industries v. Glenn, D.C. Ky., 39 F.Supp. 642.
Ala.—Ex parte Board of School Com'rs of Mobile County, 178 So. 63, 235 Ala. 82.
Ariz.—Southwest Lumber Mills v. Employment Sec. Commission, 182 P.2d 83.
Cal.—Bohanon v. James McClatchy Pub. Co., 60 P.2d 510, 16 Cal.App. 2d 188—Charles R. McCormick Lumber Co. v. O'Brien, 266 P. 594, 90 Cal.App. 776.
Ill.—Thiel v. Material Service Corporation, 5 N.E.2d 88, 364 Ill. 539—Densby v. Bartlett, 149 N.E. 591, 318 Ill. 616, 42 A.L.R. 1406—Yeates v. Illinois Cent. R. Co., 89 N.E. 338, 241 Ill. 205—Balfour v. Dohrn Transfer Co., 65 N.E.2d 624, 328 Ill.App. 163—Warput v. Reading Coal Co., 250 Ill.App. 450.
Ind.—United States Board & Paper Co. v. Landers, App., 92 N.E. 203, superseded on rehearing on other grounds 93 N.E. 232, 47 Ind.App. 315.
Iowa.—**Corpus Juris quoted in** Hjerleid v. State, 295 N.W. 139, 144, 229 Iowa 818—**Corpus Juris cited in** Oswalt v. Lucas County, 270 N. W. 847, 850, 222 Iowa 1099.
Kan.—Rutkowski v. J. I. Case Threshing Mach. Co., 270 P. 599, 126 Kan. 627.

cause;[96] but, while the right to discharge has been said to constitute an unfailing test,[97] it has generally been held not to be conclusive of the question.[98]

In order to constitute a weighty, if not conclusive, factor in determining whether the relationship between parties is that of master and servant, the control of the alleged master must be complete or unqualified;[99] it must be authoritative control[1] reaching into the details of how the work is performed,[2] and must be distinguished from mere suggestion as to detail or necessary coöperation where

Ky.—Klein v. Lakes, 105 S.W.2d 1041, 269 Ky. 43—Summerville v. Waller, 90 S.W.2d 65, 262 Ky. 343—Messmer v. Bell & Coggeshall Co., 117 S.W. 346, 133 Ky. 19, 19 Ann.Cas. 1.

Md.—Corpus Juris quoted in Baltimore Transit Co. v. State, 40 A.2d 678, 688, 184 Md. 250—Corpus Juris quoted in Vacek v. State, 142 A. 491, 494, 155 Md. 400—Bentley, Shriver & Co. v. Edwards, 60 A. 283, 100 Md. 652.

Mo.—Bernat v. Star-Chronicle Pub. Co., App., 84 S.W.2d 429.

N.J.—Younkers v. Ocean County, 33 A.2d 898, 130 N.J.Law 607.

N.Y.—Steiner v. Pleasantville Constructors, 46 N.Y.S.2d 120, 181 Misc. 793, modified on other grounds 49 N.Y.S.2d 42, 182 Misc. 66, affirmed 54 N.Y.S.2d 700, first case, 269 App.Div. 738.

Okl.—Corpus Juris quoted in Manahan Drilling Co. v. Howard, 72 P.2d 802, 804, 181 Okl. 124—Corpus Juris quoted in Drumright Gas Engine Co. v. Sherrill, 46 P.2d 921, 924, 173 Okl. 147—Utility Coal Co. v. Clark, 41 P.2d 840, 171 Okl. 79—Taylor v. Ferreo, 41 P.2d 839, 171 Okl. 79—Utility Coal Co. v. Rogez, 39 P.2d 60, 171 Okl. 264.

Pa.—O'Donnell v. South Fayette Tp. School Dist., 161 A. 887, 105 Pa. Super. 488—Turner v. Good, Com. Pl., 48 Lanc.L.Rev. 559.

Tenn.—Income Life Ins. Co. v. Mitchell, 79 S.W.2d 572, 168 Tenn. 471.

Tex.—Corpus Juris cited in El Paso Laundry Co. v. Gonzales, Civ.App., 36 S.W.2d 793, 795.

Utah.—Intermountain Speedways v. Industrial Commission, 126 P.2d 22, 101 Utah 573—Weber County-Ogden City Relief Committee v. Industrial Commission of Utah, 71 P.2d 177, 93 Utah 85.

Wash.—Corpus Juris quoted in Thurston County Chapter, American National Red Cross v. Department of Labor & Industries of Washington, 7 P.2d 577, 579, 166 Wash. 488.

Wis.—Lincoln County-Industrial Commission, 279 N.W. 632, 228 Wis. 126—Employers Mut. Liability Ins. Co. v. Brower, 272 N.W. 859, 224 Wis. 485—Town of Eagle v. Industrial Commission, 266 N.W. 274, 221 Wis. 166.

39 C.J. p 36 note 25.

"The usual test by which, in common experience, men determine the employer, is to ascertain who has authority on his own account, to 'hire and fire.'"—Walling v. Sanders, C.C.A.Tenn., 136 F.2d 78, 81.

Right to terminate contract

The right to terminate the contract under which the services are being performed is an indication that the relationship is that of master and servant.

Ill.—Kehrer v. Industrial Commission, 6 N.E.2d 635, 365 Ill. 378.

La.—Taylor v. Victoria Nav. Co., App., 176 So. 519.

96. Cal.—California Employment Commission v. Los Angeles Down Town Shopping News Corporation, 150 P.2d 186, 24 Cal.2d 421—Clarke v. Hernandez, App., 179 P.2d 834—California Employment Stabilization Commission v. Lund, 178 P.2d 879, 76 Cal.App.2d 567—California Employment Commission v. Sutton, 158 P.2d 949, 69 Cal.App.2d 181—People v. Grier, 128 P.2d 207, 53 Cal.App.2d Supp. 841.

N.C.—Lassiter v. Cline, 22 S.E.2d 558, 222 N.C. 271.

Pa.—McColligan v. Pennsylvania R. Co., 63 A. 792, 214 Pa. 229, 6 L.R.A.,N.S., 544, 112 Am.S.R. 739.

Tenn.—Knight v. Hawkins, 173 S.W.2d 163, 26 Tenn.App. 448.

Wis.—Town of Eagle v. Industrial Commission, 266 N.W. 274, 221 Wis. 166.

Wyo.—Tharp v. Unemployment Compensation Commission, 121 P.2d 172, 57 Wyo. 486.

Grounds for discharge generally see infra § 42.

Limited or unlimited right

In determining whether relation of master and servant exists, unlimited right of discharge indicates completeness of control; but, where right may be exercised only if employee's work is unsatisfactory, importance of right as factor pointing to authoritative control is diminished.—Winther v. Industrial Accident Commission of California, 60 P.2d 342, 16 Cal.App.2d 131.

97. Ill.—Rozran v. Durkin, 45 N.E.2d 180, 381 Ill. 97, 144 A.L.R. 735.

98. U.S.—U. S. v. Wholesale Oil Co., C.C.A.Kan., 154 F.2d 745.

Ala.—Ex parte Board of School Com'rs of Mobile County, 178 So. 63, 235 Ala. 82.

Cal.—Washko v. Stewart, 67 P.2d 144, 20 Cal.App.2d 347—Bohanon v. James McClatchy Pub. Co., 60 P.2d 510, 16 Cal.App.2d 188.

Ill.—Kehrer v. Industrial Commission, 6 N.E.2d 635, 365 Ill. 378—Balfour v. Dohrn Transfer Co., 65 N.E.2d 624, 328 Ill.App. 163.

Mo.—Rutherford v. Tobin Quarries, 82 S.W.2d 918, 336 Mo. 1171.

W.Va.—Craft v. Pocahontas Corporation, 190 S.E. 687, 118 W.Va. 380.

Even an unlimited right to discharge the person rendering the services is not conclusive.—Northwestern Mut. Life Ins. Co. v. Tone, 4 A.2d 640, 125 Conn. 183, 121 A.L.R. 993.

99. Cal.—Rathbun v. Payne, 68 P.2d 291, 21 Cal.App.2d 49—Bohanon v. James McClatchy Pub. Co., 60 P.2d 510, 16 Cal.App.2d 188—Brosius v. Orpheum Theater Co., 60 P.2d 156, 16 Cal.App.2d 61.

Limited control

There may be a general control arising from an interest in the final result of employment which does not indicate a master and servant relationship, where such right of control relates only to result and is so restricted or limited that it does not apply to manner or means by which work is accomplished.—Coleng v. Ramsdell, 65 P.2d 365, 19 Cal.App.2d 376.

1. Cal.—Western Indemnity Co. v. Pillsbury, 159 P. 721, 172 Cal. 807—People v. Grier, 128 P.2d 207, 53 Cal.App.2d Supp. 841—Winther v. Industrial Accident Commission of California, 60 P.2d 342, 16 Cal.App.2d 131—Brosius v. Orpheum Theater Co., 60 P.2d 156, 16 Cal.App.2d 61.

Iowa.—McDonald v. Dodge, 1 N.W.2d 280, 231 Iowa 325.

2. Cal.—Winther v. Industrial Accident Commission of California, 60 P.2d 342, 345, 16 Cal.App.2d 131.

"Whether the control which an employer has the right to exercise over the manner in which the work is to be performed is best expressed through its modification by the word 'authoritative,' or by the word 'unqualified,' or by the word 'complete,' it is clear from the decisions that it must be a control that reaches into the details of performance and reserves to the employer the right to direct the manner in which these details are to be carried out."—Winther v. Industrial Accident Commission of California, supra.

the work furnished is part of a larger undertaking.[3] In other words, a person beneficially interested in work being performed by another may exercise a certain measure of control for a definite and restricted purpose without incurring the responsibilities or acquiring the immunities of a master with respect to the person so controlled;[4] and the existence of a master and servant relationship will not be inferred from the mere reservation of powers which do not deprive the person doing the work of his right to do the work according to his own initiative as long as he does it in accordance with the contract.[5]

A mere authority to direct the course of a third person's servant is not inconsistent with his remaining the servant of such third person,[6] and the mere reservation of the right to discharge[7] or inspect the work of[8] employees of another will not create the relation where it does not otherwise exist.

(2) Several Masters or Employers

Under some circumstances a person may be the servant of two masters at the same time; and the general servant of one master may, with his consent, be lent to another person and become his servant with respect to a particular transaction or piece of work.

Ordinarily a person cannot be the servant of two masters at the same time.[9] There are, however, exceptions to this rule;[10] and under some circumstances a person may have two different employers concerning whom his rights may differ.[11] Thus a person may be the servant of two masters at one time and as to one act, even though they are not joint employers, provided the service to one does not involve abandonment of the service to the other.[12]

3. Cal.—Western Indemnity Co. v. Pillsbury, 159 P. 721, 172 Cal. 807—People v. Grier, 128 P.2d 207, 53 Cal.App.2d Supp. 841—Brosius v. Orpheum Theater Co., 60 P.2d 156, 16 Cal.App.2d 61.
Iowa.—McDonald v. Dodge, 1 N.W.2d 280, 231 Iowa 325.

4. U.S.—Los Angeles Athletic Club v. U. S., D.C.Cal., 54 F.Supp. 702, appeal dismissed, C.C.A., 144 F.2d 352.
Cal.—Western Indemnity Co. v. Pillsbury, 159 P. 721, 172 Cal. 807—People v. Grier, 128 P.2d 207, 53 Cal.App.2d Supp. 841—Bohanon v. James McClatchy Pub. Co., 60 P.2d 510, 16 Cal.App.2d 188—Winther v. Industrial Accident Commission of California, 60 P.2d 342, 16 Cal.App.2d 131.

Performing to "satisfaction"
A person employed to perform certain work is not necessarily a mere "servant" because employment contract provides that work shall be subject to employer's approval or satisfaction, for such provision is not assumption by employer of right to control employee as to details or methods of doing work, but only enables employer to see that contract is carried out according to plans.
U.S.—Casement v. Brown, Ohio, 13 S.Ct. 672, 148 U.S. 615, 37 L.Ed. 582.
Iowa.—Meredith Pub. Co. v. Iowa Employment Security Commission, 6 N.W.2d 6, 232 Iowa 666.
Tenn.—Powell v. Virginia Const. Co., 13 S.W. 691, 88 Tenn. 692, 17 Am. S.R. 925.
Wash.—Hollingsworth v. Robe Lumber Co., 45 P.2d 614, 182 Wash. 74.

5. Cal.—Mountain Meadow Creameries v. Industrial Accident Commission, 76 P.2d 724, 25 Cal.App.2d 123.
Iowa.—Meredith Pub. Co. v. Iowa Employment Security Commission, 6 N.W.2d 6, 232 Iowa 666.
N.Y.—In re Electrolux Corporation, 30 N.Y.S.2d 972, 262 App.Div. 642, reversed on other grounds 43 N.E.2d 480, 288 N.Y. 440, followed in In re Geoghehan, 30 N.Y.S.2d 988, 263 App.Div. 758, reversed on other grounds In re Geoghegan, 30 N.Y.S.2d 988, 263 App.Div. 758, In re Riggi, 30 N.Y.S.2d 986, 263 App. Div. 758, reversed on other grounds In re Riggi's Claim, 43 N.E.2d 713, 289 N.Y. 567, and In re Nowicki, 30 N.Y.S.2d 984, 263 App.Div. 758, reversed on other grounds In re Nowicki's Claim, 43 N.E.2d 713, 289 N.Y. 566.
Pa.—Joseph v. United Workers Ass'n, 23 A.2d 470, 343 Pa. 636.
Tex.—Kelly v. Lone Star Gas Co., Civ.App., 32 S.W.2d 699, reversed on other grounds Lone Star Gas Co. v. Kelly, Com.App., 46 S.W.2d 656—T. J. Mansfield Const. Co. v. Gorsline, Civ.App., 278 S.W. 485, 486, reversed on other grounds, Com.App., 288 S.W. 1067, rehearing denied 292 S.W. 187.

Checking compliance with contract
The mere fact that the owner reserves the right to inspect or supervise the work in order to see that it is being performed in conformity with the contract, plans, and specifications does not establish the relation of master and servant between such owner and the person doing the work.
Ill.—Vacker v. Yeager, 151 Ill.App. 144.
Tex.—Southern Underwriters v. Willis, Civ.App., 110 S.W.2d 252, error refused—Carter Publications v. Davis, Civ.App., 68 S.W.2d 640, error refused.
Wash.—Bill v. Gattavara, 167 P.2d 434, 24 Wash.2d 819—Seattle Aerie No. 1 of Fraternal Order of Eagles v. Commissioner of Unemployment Compensation and Placement, 160 P.2d 614, 23 Wash.2d 167, motion denied 163 P.2d 921, 23 Wash.2d 167.

6. Miss.—Corpus Juris cited in Louis Werner Sawmill Co. v. Northcutt, 134 So. 156, 158, 161 Miss. 441.
Wash.—Corpus Juris quoted in Thurston County Chapter, American National Red Cross v. Department of Labor & Industries of Washington, 7 P.2d 577, 579, 166 Wash. 488.
39 C.J. p 36 note 26.

7. Ind.—New Albany Forge & Rolling-Mill v. Cooper, 30 N.E. 294, 131 Ind. 363.

8. Ill.—Pioneer Fireproof Constr. Co. v. Hansen, 52 N.E. 17, 176 Ill. 100.

9. Me.—Coffey v. Gayton, 4 A.2d 97, 136 Me. 141.

Joint work
Where two servants engage in joint work, each is servant of own master, although one takes orders as to details from other.—Moss v. Chronicle Pub. Co., 258 P. 88, 201 Cal. 610, 55 A.L.R. 1258.

10. Me.—Coffey v. Gayton, 4 A.2d 97, 136 Me. 141.

11. U.S.—Walling v. Wabash Radio Corp., D.C.Mich., 65 F.Supp. 969.

Different aspects of transaction
The same person may act as an employee of one person in certain aspects of a transaction and as an employee of another in a different part of the business.—Garfield v. Smith, 59 N.E.2d 287, 317 Mass. 674, certiorari denied 65 S.Ct. 1568, 325 U.S. 879, 89 L.Ed. 1995, and D. W. Lines v. Ward, 65 S.Ct. 1569, 325 U.S. 879, 89 L.Ed. 1995.

12. Miss.—Meridian Taxicab Co. v. Ward, 186 So. 636, 184 Miss. 499, 120 A.L.R. 1346.

Servant lent or hired to another. The general servant of one person may be lent to, and become the servant of, another by submitting himself to the direction and control of the other with respect to a particular transaction or piece of work,[13] even though the general employer has an interest in the special work,[14] and in such case the servant remains the general servant of the lender except as to the particular work done for the borrower.[15] However, such a relation between the borrower and the servant is not established unless it appears that the servant has expressly, or by implication, consented to the transfer of his services to the new master,[16] and unless the lender surrenders and the borrower assumes the power of supervision and control.[17]

Where a master gives the labor of his servant to another, the master retaining supervision and control, the lent servant is not the servant of the borrower,[18] but is, while so engaged, the servant of the general master.[19] The determination of whose servant an employee is in a given case depends on who has the right to control him with respect to the work in question[20] and on whether or not such work is within the scope and course of the employment.[21] The servant of a buyer assisting the servant of a seller in setting up machinery on the buyer's premises and under his direction and control is the servant of such buyer while he is so employed, and notwithstanding the contract of sale provides the installation shall be done by the seller.[22]

e. Compensation

The fact of compensation and the manner of pay-

13. U.S.—C. F. Lytle Co. v. Hansen & Rowland, C.C.A.Wash., 151 F.2d 573—New York Casualty Co. v. Young Men's Christian Ass'n, C.C. A.Iowa, 119 F.2d 387, certiorari denied Young Men's Christian Ass'n v. New York Casualty Co., 62 S. Ct. 91, 314 U.S. 648, 86 L.Ed. 519—McLamb v. E. I. Du Pont De Nemours & Co., C.C.A.N.C., 79 F.2d 966.
Cal.—**Corpus Juris cited in** Nichols v. Hitchcock Motor Co., 70 P.2d 654, 659, 22 Cal.App.2d 151.
Ga.—Blakely v. U. S. Fidelity & Guaranty Co., 21 S.E.2d 339, 67 Ga.App. 795.
Kan.—Leathers v. Dillon, 131 P.2d 668, 156 Kan. 132—Garner v. Martin 122 P.2d 735, 155 Kan. 12.
Minn.—Gonyea v. Duluth, M. & I. R. Ry. Co., 19 N.W.2d 384, 220 Minn. 225.
Neb.—**Corpus Juris cited in** Dabelstein v. City of Omaha, 278 N.W. 43, 45, 132 Neb. 710.
Okl.—Wylie-Stewart Machinery Co. v. Thomas, 137 P.2d 556, 192 Okl. 505.
Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Philadelphia Electric Co., 200 A. 18, 331 Pa. 125.
39 C.J. p 36 note 29.
Liability for injuries caused by hired or lent servant see infra § 566.
"One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person, with all the legal consequences of the new relation."—Pennsylvania Cas. Co. v. Elkins, D.C.Ky., 70 F.Supp. 155, 158—Indemnity Ins. Co. of North America v. Malisfski, D.C.Md., 46 F.Supp. 454, 456, affirmed, C.C.A., Malisfski, v. Indemnity Ins. Co. of North America, 135 F.2d 910.

14. Neb.—Westover v. Hoover, 129 N.W. 285, 88 Neb. 201, 19 A.L.R. 215.
39 C.J. p 36 note 30.

15. U.S.—C. F. Lytle Co. v. Hansen & Rowland, C.C.A.Wash., 151 F.2d 573.
Ga.—Blakely v. U. S. Fidelity & Guaranty Co., 21 S.E.2d 339, 67 Ga.App. 795.
Kan.—Leathers v. Dillon, 131 P.2d 668, 156 Kan. 132—Garner v. Martin, 122 P.2d 735, 155 Kan. 12.
Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Philadelphia Electric Co., 200 A. 18, 331 Pa. 125.
"It is now well settled in this state that there may exist at one time the relationship of general employer and a special employer as to one employee."—Rosander v. Market St. Ry. Co., 265 P. 541, 547, 89 Cal.App. 721.

16. U.S.—Christianson v. Western Pacific Packing Co., D.C.Wash., 24 F.Supp. 437.
Minn.—Gonyea v. Duluth, M. & I. R. Ry. Co., 19 N.W.2d 384, 220 Minn. 225.
39 C.J. p 36 note 31.

17. U.S.—C. F. Lytle Co. v. Hansen & Rowland, C.C.A.Wash., 151 F.2d 573—Christianson v. Western Pacific Packing Co., D.C.Wash., 24 F.Supp. 437.
Me.—Moose-A-Bec Quarries Co. v. Eastern Tractor & Equipment Co., 29 A.2d 167, 139 Me. 249.
N.Y.—Wawrzonek v. Central Hudson Gas & Electric Corporation, 12 N.E.2d 525, 276 N.Y. 412.
Pa.—Schaeffer v. Young Bros., Com. Pl., 1 Lebanon 46.
"As long as the employee is furthering the business of his general employer, there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender arises from the mere fact of its division."—Rice-Stix Dry Goods Co. v. Self, 101 S.W.2d 132, 137, 20 Tenn.App. 498.

18. U.S.—Christianson v. Western Pacific Packing Co., D.C.Wash., 24 F.Supp. 437.
N.Y.—Wawrzoneck v. Central Hudson Gas & Electric Corporation, 12 N.E.2d 525, 276 N.Y. 412.
39 C.J. p 36 note 32.

19. Kan.—Leathers v. Dillon, 131 P. 2d 668, 156 Kan. 132.
N.Y.—Wawrzonek v. Central Hudson Gas & Electric Corporation, 12 N. E.2d 525, 276 N.Y. 412.
39 C.J. p 36 note 33.

20. U.S.—Jones v. George F. Getty Oil Co., C.C.A.N.M., 92 F.2d 255.
Ark.—Barton-Mansfield Co. v. Bogey, 147 S.W.2d 977, 201 Ark. 860.
Mich.—Buskirk v. Ide, 4 N.W.2d 504, 302 Mich. 154—Rockwell v. Grand Trunk Western R. Co., 234 N.W. 159, 253 Mich. 144.
Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Philadelphia Electric Co., 200 A. 18, 331 Pa. 125.
Reservation of right of employment of the lent workman is not a decisive factor in determining whether the lent workman becomes the servant of the one to whom he was lent.
U.S.—C. F. Lytle Co. v. Hansen & Rowland, C.C.A.Wash., 151 F.2d 573.
Wash.—McHugh v. King County, 128 P.2d 504, 14 Wash.2d 441—B. & B. Building Materials Co. v. Winston Co., 290 P. 839, 158 Wash. 130.

21. Ga.—Blakely v. U. S. Fidelity & Guaranty Co., 21 S.E.2d 339, 67 Ga.App. 795.

22. Ark.—Arkansas Logging Co. v. Martin, 173 S.W. 184, 116 Ark. 318.
39 C.J. p 36 note 34.

ing it are factors to be considered in determining whether a master and servant relationship exists, but such considerations are not conclusive.

Although it is unquestionably one of the indicia of a contract of employment creating a master and servant relation,[23] the receipt of a stated wage is not essential to create,[24] nor does it necessarily establish the existence of,[25] such a relation; the relationship may exist although the servant neither expects nor is entitled to any compensation.[26] Thus a student is an employee while actually performing service, although without pay,[27] and although the extent and time of his services are at his own pleasure,[28] but when not engaged in such duties he ceases to be an employee,[29] and if he at no time renders service to, or for the benefit of, the alleged employer he is not an employee in the first instance.[30]

The mode of payment may be considered in determining whether the relation of master and servant exists;[31] but it is not sufficient of itself to determine the matter conclusively.[32] A master and servant relationship may exist between two persons even though the servant's compensation is paid by a third person.[33] It has been held that the fact that a servant shares in the profits instead of receiving wages does not negative the existence of a master and servant relation,[34] although it has been pointed out that the sharing of profits and losses is not generally an attribute of an ordinary employment relation.[35] The relationship may exist even

23. U.S.—Pennsylvania Cas. Co. v. Elkins, D.C.Ky., 70 F.Supp. 155—Walling v. Nashville, C. & St. L. Ry., D.C.Tenn., 60 F.Supp. 1004, affirmed, C.C.A., 155 F.2d 1016, certiorari granted 67 S.Ct. 85—Aberdeen Aerie No. 24 of Fraternal Order of Eagles v. U. S., D.C.Wash., 50 F.Supp. 734, appeal dismissed, C.C.A., Squier v. Seattle Aerie No. 1 of Fraternal Order of Eagles, 142 F.2d 462, affirmed 148 F.2d 655.
Ala.—Stith Coal Co. v. Alvis, 141 So. 663, 224 Ala. 603.
Cal.—Bohanon v. James McClatchy Pub. Co., 60 P.2d 510, 16 Cal.App. 2d 188.
Miss.—First Nat. Bank of Oxford v. Mississippi Unemployment Compensation Commission, 23 So.2d 534.
N.Y.—Osborg v. Hoffman, 300 N.Y.S. 690, 252 App.Div. 587, affirmed 19 N.E.2d 924, 280 N.Y. 523.
Utah.—Weber County-Ogden City Relief Committee v. Industrial Commission of Utah, 71 P.2d 177, 93 Utah 85.

24. U.S.—Pennsylvania Cas. Co. v. Elkins, D.C.Ky., 70 F.Supp. 155.
Ala.—Reed v. Ridout's Ambulance, 102 So. 906, 212 Ala. 428.
Me.—**Corpus Juris quoted in** Lunt v. Fidelity & Casualty Co. of New York, 28 A.2d 736, 740, 139 Me. 218.
Mo.—**Corpus Juris cited in** Lajoie v. Rossi, 37 S.W.2d 684, 687, 225 Mo. App. 651—Kiser v. Suppe, 112 S.W. 1005, 133 Mo.App. 19.
Nev.—**Corpus Juris quoted in** Reeder v. Pincolini, 94 P.2d 1097, 1099, 59 Nev. 396.
39 C.J. p 36 note 36.

25. U.S.—Madison v. Phillips Petroleum Co., C.C.A.Tex., 88 F.2d 515, certiorari denied 57 S.Ct. 946, 301 U.S. 703, 81 L.Ed. 1358—Walling v. American Needlecrafts, D.C. Ky., 46 F.Supp. 16, reversed on other grounds, C.C.A., 139 F.2d 60.

26. U.S.—Jones v. Goodson, C.C.A. Okl., 121 F.2d 176—John Hancock Mut. Life Ins. Co. of Boston, Mass., v. Dorman, C.C.A.Cal., 108 F.2d 220—Pennsylvania Cas. Co. v. Elkins, D.C.Ky., 70 F.Supp. 155.
Conn.—Burwell v. Neumann, 32 A.2d 640, 130 Conn. 117.
Ky.—Fournier v. Churchill Downs-Latonia, 166 S.W.2d 38, 292 Ky. 215.
Me.—**Corpus Juris quoted in** Lunt v. Fidelity & Casualty Co. of New York, 28 A.2d 736, 740, 139 Me. 218.
Mo.—**Corpus Juris cited in** Lajoie v. Rossi, 37 S.W.2d 684, 687, 225 Mo. App. 651.
Nev.—**Corpus Juris quoted in** Reeder v. Pincolini, 94 P.2d 1097, 1099, 59 Nev. 396.
N.J.—Winkelstein v. Solitaire, 27 A. 2d 868, 129 N.J.Law 38, affirmed 31 A.2d 843, 130 N.J.Law 158.
Or.—**Corpus Juris cited in** State v. Snell, 121 P.2d 928, 930, 168 Or. 171.
39 C.J. p 36 note 37.

27. Va.—Norfolk & W. R. Co. v. Bondurant, 59 S.E. 1091, 107 Va. 515, 122 Am.S.R. 867, 15 L.R.A., N.S., 443.
39 C.J. p 37 note 38.

28. Ky.—Chesapeake & O. R. Co. v. Harmon, 189 S.W. 1135, 173 Ky. 1, Ann.Cas.1918B 41.

29. Ky.—Chesapeake & O. R. Co. v. Harmon, supra.

30. U.S.—Walling v. Jacksonville Terminal Co., C.C.A.Fla., 148 F.2d 768—Walling v. Nashville C. & St. L. Ry., D.C.Tenn., 60 F.Supp. 1004, affirmed, C.C.A., 155 F.2d 1016, certiorari granted 67 S.Ct. 85.

31. Ala.—Ex parte Board of School Com'rs of Mobile County, 178 So. 63, 235 Ala. 82.
Cal.—Empire Star Mines Co. v. California Employment Commission, 168 P.2d 686, 28 Cal.2d 33—Clarke v. Hernandez, App., 179 P.2d 834.
Ga.—Nichols v. G. L. Hight Motor Co., 10 S.E.2d 439, 63 Ga.App. 155.
Utah.—Intermountain Speedways v. Industrial Commission, 126 P.2d 22, 101 Utah 573.
Wis.—Employers Mutual Liability Ins. Co. v. Brower, 272 N.W. 359, 224 Wis. 485—Town of Eagle v. Industrial Commission, 266 N.W. 274, 221 Wis. 166.

32. U.S.—U. S. v. Wholesale Oil Co., C.C.A.Kan., 154 F.2d 745—MacMillan v. Montecito Country Club, D. C.Cal., 65 F.Supp. 240.
Ala.—Ex parte Board of School Com'rs of Mobile County, 178 So. 63, 235 Ala. 82.
Cal.—Burlingham v. Gray, 137 P.2d 9, 22 Cal.2d 87—Los Flores School Dist. v. Industrial Accident Commission, 56 P.2d 581, 13 Cal.App.2d 180.
Conn.—Caraher v. Sears, Roebuck & Co., 200 A. 324, 124 Conn. 409.
Ga.—Nichols v. G. L. Hight Motor Co., 10 S.E.2d 439, 63 Ga.App. 155.
Ill.—Ozark Minerals Co. v. Murphy, 51 N.E.2d 197, 384 Ill. 94—Kehrer v. Industrial Commission, 6 N.E.2d 635, 365 Ill. 378.
N.Y.—In re Thompson's Estate, 218 N.Y.S. 426, 126 Misc. 91.
Tenn.—Grace v. Louisville & N. R. Co., 89 S.W.2d 354, 19 Tenn.App. 382.
Va.—Unemployment Compensation Commission v. Harvey, 18 S.E.2d 390, 179 Va. 202.

33. U.S.—Jones v. Goodson, C.C.A. Okl., 121 F.2d 176.

34. U.S.—Yearwood v. U. S., D.C. La., 55 F.Supp. 295.
N.Y.—Sloane v. United Feature Syndicate, 238 N.Y.S. 91, 135 Misc. 365.
Okl.—**Corpus Juris cited in** Smittle v. Rutherford, 111 P.2d 480, 482, 188 Okl. 555.
S.D.—Fischer v. Bunch, 16 N.W.2d 541.
39 C.J. p 37 note 41.

35. U.S.—Yearwood v. U. S., D.C. La., 55 F.Supp. 295.

though a part of the consideration for the services is to be paid in a medium other than money,[36] and it has been held that, although all the employees of employer corporation are stockholders, and are paid for their service only by the income of their stock, the relation of master and servant nevertheless exists within the meaning of a statute providing for the safety of employees.[37]

f. Services

The foundation of the master and servant relationship is service rendered by the servant to the master; some continuity of such service is essential, but it need not be uninterrupted or permanent.

The relationship of master and servant is bottomed on services rendered by the servant to the master;[38] but the mere rendition of services by one person to another does not of itself establish the master and servant relationship between them.[39] However, the fact that the agreement of an employee requires other labor than his own for its performance does not prevent him from being an employee where the contract includes his personal services to the full extent thereof.[40] It is not essential that one who has entered into a personal contract of employment with another and given the latter the right to regard him as the actual employer should intend to receive or should have received the benefit of the services of such an employee;[41] the relation of master may be assumed by one who employs another, even though he is an agent merely for the purpose of supervising the work.[42] A person may be held to be in the employ of another, even though, while performing certain services for the employer, he also performs services for himself, thus occupying a dual role.[43]

Continuity. Generally speaking, some continuity of service is essential to the existence of a master and servant relation.[44] Nevertheless it has been held that the relation does not always depend on continuity of actual everyday work,[45] and that one may be the employee of another without being engaged in performing the work of the employer at the moment.[46] The relationship of master and servant does not depend on the mere duration of employment;[47] and it may exist even though the service is not permanent.[48]

Place of work. The fact that the work involved is performed on the premises of the alleged master or employer is an indication that a master and servant relationship exists;[49] but if other tests conclusively determine the existence of a master and servant relationship the place of performance of the servant's duties is immaterial.[50]

Property and tools used. The fact that the tools and equipment of the employer are used in perform-

36. Ga.—Marshall v. Matthews, 100 S.E. 103, 149 Ga. 370.
39 C.J. p 37 note 42.

37. Pa.—In re Employment Places of Labor, 26 Pa.Dist. 67.

38. U.S.—Walling v. Nashville, C. & St. L. Ry., D.C.Tenn., 60 F.Supp. 1004, affirmed, C.C.A., 155 F.2d 1016, affirmed 67 S.Ct. 644, 330 U.S. 158, 91 L.Ed. ——.
Ala.—Reed v. Ridout's Ambulance, 102 So. 906, 212 Ala. 428.
Mass.—Patterson v. Barnes, 60 N.E.2d 82, 317 Mass. 721.
Mo.—Maltz v. Jackoway-Katz Cap Co., 82 S.W.2d 909, 336 Mo. 1000.
N.Y.—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented 33 N.Y.S.2d 764.
W.Va.—Null v. State Compensation Com'r, 35 S.E.2d 359.

Personal service rendered to the alleged employer is an essential characteristic of the relationship.
U.S.—Pennsylvania Cas. Co. v. Elkins, D.C.Ky., 70 F.Supp. 155.
Cal.—Western Indemnity Co. v. Pillsbury, 159 P. 721, 172 Cal. 807—People v. Grier, 128 P.2d 207, 53 Cal.App.2d Supp. 841.
Mo.—Rutherford v. Tobin Quarries, 72 S.W.2d 918, 336 Mo. 1171—Humphrey v. Ownby, App., 104 S.W.2d 398.

39. U.S.—Walling v. American Needlecrafts, D.C.Ky., 46 F.Supp. 16, reversed on other grounds, C.C.A., 139 F.2d 60.

40. N.Y.—Levine v. Rosenschein, 118 N.Y.S. 890, 134 App.Div. 157.
39 C.J. p 37 note 46.

41. N.Y.—Cooper v. Fleischman, 147 N.Y.S. 65, 85 Misc. 1.
39 C.J. p 37 note 47.

42. Minn.—Wyckoff v. Wunder, 119 N.W. 655, 107 Minn. 119.

43. U.S.—Macmillan v. Montecito Country Club, D.C.Cal., 65 F.Supp. 240.

44. Mich.—Klym v. Aetna Life Ins. Co. of Hartford, Conn., 9 N.W.2d 693, 305 Mich. 508—City of Pontiac v. Ducharme, 270 N.W. 754, 278 Mich. 474.
Minn.—State v. City of Minneapolis, 219 N.W. 924, 925, 174 Minn. 594.
20 C.J. p 1242 note 79 [a].

45. U.S.—North Whittier Heights Citrus Ass'n v. N. L. R. B., C.C.A., 109 F.2d 76, certiorari denied 60 S.Ct. 1075, 310 U.S. 632, 84 L.Ed. 1402, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472.
Pa.—Walters v. Commonwealth, 56 Dauph.Co. 245.

46. Mich.—Klym v. Ætna Life Ins. Co. of Hartford, Conn., 9 N.W.2d 693, 305 Mich. 508.

A seasonal employee is considered to be in employer's employ during slack seasons, as such employee is always subject to call whenever there is work to be done.—Bonwit Teller, Inc. v. Marguerite Yvonne, Inc., 48 N.Y.S.2d 356, 183 Misc. 458.

47. Pa.—Lang v. Hanlon, 157 A. 788, 305 Pa. 378, followed in 157 A. 790, two cases, 305 Pa. 385, and 157 A. 791, 305 Pa. 385.

48. Mo.—Kiser v. Suppe, 112 S.W. 1005, 133 Mo.App. 19.

49. Cal.—Empire Star Mines Co. v. California Employment Commission, 168 P.2d 686, 28 Cal.2d 33—Clarke v. Hernandez, App., 179 P.2d 834.
Miss.—First Nat. Bank of Oxford v. Mississippi Unemployment Compensation Commission, 23 So.2d 534, 199 Miss. 97.
Wis.—Employers Mut. Liability Ins. Co. v. Brower, 272 N.W. 359, 224 Wis. 485—Town of Eagle v. Industrial Commission, 266 N.W. 274, 221 Wis. 166.

50. Miss.—Texas Co. v. Jackson, 165 So. 546, 174 Miss. 737.

ing the work is an indication of a master and servant relationship;[51] but the fact that the servant makes use of his own property in performing the services does not prevent the relationship being that of master and servant,[52] and the ownership of the instrumentalities used is immaterial where the relationship is conclusively shown to exist by the application of other tests.[53]

Legality. The relation of master and servant cannot be predicated on an employment that has for its object the prosecution of a business that is unlawful or criminal.[54]

§ 3(1). Independent Contractors and Their Employees

An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of his work; an independent contractor is not a servant, and there is no master and servant relation between his servants and the employer or contractee.

Numerous definitions of the term "independent contractor" have been given by the authorities but they are not essentially different from one another.[55] Within the popular understanding which it imports, the term is wholly descriptive;[56] it serves merely to point out one of a class.[57] In certain phases of the law, however, the expression is used, not merely in a descriptive sense, but as well to designate a relationship, in the presence of which, when established, the law undertakes to prescribe distinctive rights and liabilities.[58]

In the law of master and servant, an "independent contractor" is defined as one who, in rendering services, exercises an independent employment or occupation and represents the will of his employer only as to the results of his work and not as to the means whereby it is accomplished;[59] one who,

51. Cal.—Empire Star Mines Co. v. California Employment Commission, 168 P.2d 686, 28 Cal.2d 33—Clarke v. Hernandez, App., 179 P. 2d 834.
Miss.—First Nat. Bank of Oxford v. Mississippi Unemployment Compensation Commission, 23 So.2d 534, 199 Miss. 97.
Tenn.—Ely v. Rice Bros., 167 S.W.2d 355, 26 Tenn.App. 19.

52. Ala.—**Corpus Juris cited in** North Alabama Motor Express v. Whiteside, 169 So. 335, 337, 27 Ala. App. 223.
Mo.—**Corpus Juris cited in** Lajoie v. Rossi, 37 S.W.2d 684, 685, 225 Mo. App. 651.
39 C.J. p 37 note 45.

53. Miss.—Texas Co. v. Jackson, 165 So. 546, 174 Miss. 737.

54. Colo.—Sagers v. Nuckolls, 32 P. 187, 3 Colo.App. 95.

55. Ill.—Franklin Coal & Coke Co. v. Industrial Commission, 129 N. E. 811, 813, 296 Ill. 329—Bristol & Gale Co. v. Industrial Commission, 126 N.E. 599, 601, 292 Ill. 16.
Miss.—**Corpus Juris cited in** Kisner v. Jackson, 132 So. 90, 91, 159 Miss. 424.
Tex.—**Corpus Juris cited in** Ochoa v. Winerich Motor Sales Co., 94 S.W. 2d 416, 419, 127 Tex. 542.

56. Iowa.—Overhauser v. American Cereal Co., 105 N.W. 113, 115, 128 Iowa 580.

57. Iowa.—Overhauser v. American Cereal Co., supra.

58. Iowa.—Overhauser v. American Cereal Co., supra.

59. U.S.—Blankenship v. W. U. Tel. Co., D.C.W.Va., 67 F.Supp. 265, 267—Biltgen v. Reynolds, D.C.Minn., 58 F.Supp. 909, 911—Kentucky Cottage Industries v. Glenn, 39 F. Supp. 642, 645.
Ala.—Warren Webster & Co. v. Zac Smith Stationery Co., 130 So. 545, 546, 222 Ala. 41.
Ark.—Chapman & Dewey Lumber Co. v. Andrews, 91 S.W.2d 1026, 1027, 192 Ark. 291—Hobbs-Western Co. v. Carmical, 91 S.W.2d 605, 607, 192 Ark. 59.
Cal.—Casselman v. Hartford Accident & Indemnity Co., 98 P.2d 539, 546, 36 Cal.App.2d 700—Phillips v. Larrabee, 90 P.2d 820, 822, 32 Cal. App.2d 720—Curcic v. Nelson Display Co., 64 P.2d 1153, 1155, 19 Cal. App.2d 46—Berkowitz v. Pelton, 48 P.2d 756, 757, 9 Cal.App.2d 80—Weinberg v. Clark, 8 P.2d 164, 165, 120 Cal.App. 362—Slyter v. Clinton Const. Co. of California, 290 P. 643, 645, 107 Cal.App. 348—George v. Chaplin, 279 P. 485, 486, 99 Cal. App. 709—Preo v. Roed, 278 P. 928, 930, 99 Cal.App. 372—May v. Farrell, 271 P. 789, 792, 94 Cal. App. 703—Charles R. McCormick Lumber Co. v. O'Brien, 266 P. 594, 596, 90 Cal.App. 776—Curran v. Earle C. Anthony, Inc., 247 P. 236, 238, 77 Cal.App. 462.
Fla.—Florida Indus. Commission v. State ex rel. Orange State Oil Co., 21 So.2d 599, 604, 155 Fla. 772—Gentile Bros. Co. v. Florida Industrial Commission, 10 So.2d 568, 570, 151 Fla. 857.
Idaho.—Moreland v. Mason, 260 P. 1035, 1037, 45 Idaho 143.
Ill.—Rozran v. Durkin, 45 N.E.2d 180, 182, 381 Ill. 97, 144 A.L.R. 735—Kehrer v. Industrial Commission, 6 N.E.2d 635, 637, 365 Ill. 378—Stellwagen v. Industrial Commission, 195 N.E. 29, 31, 359 Ill. 557—Hartley v. Red Ball Transit Co., 176 N.E. 751, 753, 344 Ill. 534—Dean v. Ketter, 65 N.E.2d 572, 574, 328 Ill.App. 206—Trzaska v. Bigane, 60 N.E.2d 264, 267, 325 Ill. App. 523—Jones v. Standerfer, 15 N.E.2d 924, 927, 296 Ill.App. 145—Live Stock Nat. Bank of Chicago v. Hilberg, 3 N.E.2d 175, 286 Ill. App. 606—Meece v. Holland Furnace Co., 269 Ill.App. 164, 169.
Iowa.—Meredith Pub. Co. v. Iowa Employment Security Commission, 6 N.W.2d 6, 10, 232 Iowa 666—Arne v. Western Silo Co., 242 N. W. 539, 542, 214 Iowa 511.
Ky.—Eastern Const. Co. v. Back, 35 S.W.2d 859, 861, 237 Ky. 505.
La.—Hartwig Moss Ins. Agency v. Board of Com'rs of Port of New Orleans, 19 So.2d 178, 184, 206 La. 395—**Corpus Juris quoted in** Davidson v. American Drug Stores, App., 175 So. 157, 158—**Corpus Juris cited in** Ravare v. McCormick & Co., App., 166 So. 183, 185.
Minn.—Wicklund v. North Star Timber Co., 287 N.W. 7, 10, 205 Minn. 595.
Miss.—Gulf Coast Motor Express Co. v. Diggs, 165 So. 292, 293, 174 Miss. 650—Benjamin v. Davidson-Gulfport Fertilizer Co., 152 So. 839, 840, 169 Miss. 162—Louis Werner Sawmill Co. v. Northcutt, 134 So. 156, 158, 161 Miss. 441—Hutchinson-Moore Lumber Co. v. Pittman, 122 So. 191, 193, 154 Miss. 1.
Mo.—Young v. Sinclair Refining Co., App., 92 S.W.2d 995, 999—Manus v. Kansas City Distributing Corporation, 74 S.W.2d 506, 511, 228 Mo. App. 905—**Corpus Juris quoted in** Greene v. Spinning, App., 48 S.W. 2d 51, 56—Dillard v. Justus, 3 S. W.2d 392, 395, 222 Mo.App. 362.
Mont.—Neyman v. Pincus, 267 P. 805, 809, 82 Mont. 467.
Neb.—Hill Hotel Co. v. Kinney, 295

exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of his work;[60] one who

N.W. 397, 398, 138 Neb. 760—Reeder v. Kimball Laundry, 261 N. W. 562, 563, 129 Neb. 306.

N.Y.—In re Electrolux Corporation, 30 N.Y.S.2d 972, 977, 262 App.Div. 642, reversed on other grounds 43 N.E.2d 480, 288 N.Y. 440. Followed in In re Geoghehan, 30 N.Y.S. 2d 983, 263 App.Div. 758, reversed on other grounds In re Geoghegan's Claim, 43 N.E.2d 713, 289 N.Y. 565, In re Riggi, 30 N.Y.S.2d 988, 263 App.Div. 758, reversed on other grounds In re Riggi's Claim, 43 N.E.2d 713, 289 N.Y. 567, and In re Nowicki, 30 N.Y.S.2d 984, 263 App.Div. 758, reversed on other grounds In re Nowicki's Claim, 43 N.E.2d 713, 289 N.Y. 566.

Ohio.—Post Pub. Co. v. Schickling, 154 N.E. 751, 752, 22 Ohio App. 318, affirmed Schickling v. Post Pub. Co., 155 N.E. 143, 115 Ohio St. 589.

Tenn.—Morgan Lumber Co. v. James, 14 Tenn.App. 305, 311.

Tex.—Laird v. Utilities Ins. Co., Civ. App., 99 S.W.2d 627, 628—T. J. Mansfield Const. Co. v. Gorsline, Civ.App., 278 S.W. 485, 486, reversed on other grounds 288 S.W. 1067, rehearing denied 292 S.W. 187.

Wash.—Seattle Aerie No. 1 of Fraternal Order of Eagles v. Commissioner of Unemployment Compensation and Placement, 160 P.2d 614, 616, 23 Wash.2d 167, motion denied 163 P.2d 921, 23 Wash.2d 167—Miles v. Pound Motor Co., 117 P.2d 179, 184, 10 Wash.2d 492—Washington Recorder Pub. Co. v. Ernst, 91 P.2d 718, 725, 199 Wash. 176, 124 A.L.R. 667—Sills v. Sorenson, 73 P.2d 798, 801, 192 Wash. 318—Hollingsworth v. Robe Lumber Co., 45 P.2d 614, 615, 182 Wash. 74—Blacken v. Everett Bottling Works, 242 P. 1102, 1103, 137 Wash. 502.

39 C.J. p 1315 note 1.

Contract for services

The relation of independent contractor is one of the three relationships in which a contract for the rendition of services will ordinarily result, the other two being partnership and master and servant.—U. S. v. Wholesale Oil Co., C.C.A.Kan., 154 F.2d 745, 747.

Similar definitions

(1) One who is engaged in an independent employment or occupation, responsible to his principal only for the result and not for the manner or means by which it is accomplished.—California Employment Commission v. Los Angeles Down Town Shopping News Corporation, 150 P.2d 186, 187, 24 Cal.2d 421—California Employment Commission v. Sutton, 158 P.2d 949, 953, 69 Cal.App.2d 181.

(2) One who renders the service in the course of an independent employment, or occupation, and represents the employer only as to the results of his work, and not as to the means whereby it is, or is to be, accomplished.

Cal.—Burlingham v. Gray, 137 P.2d 9, 13, 22 Cal.2d 87.

Idaho.—**Corpus Juris cited in** Joslin v. Idaho Times Pub. Co., 53 P.2d 323, 328, 56 Idaho 242.

Ill.—Springer v. Illinois Transit Lines, 48 N.E.2d 206, 318 Ill.App. 403.

Miss.—**Corpus Juris cited in** Kisner v. Jackson, 132 So. 90, 91, 159 Miss. 424.

Mo.—Manus v. Kansas City Distributing Corporation, 74 S.W.2d 506, 509, 228 Mo.App. 905.

31 C.J. p 473 note 26 [b] (4), (8).

(3) Other similar definitions.

U.S.—Radio City Music Hall Corporation v. U. S., D.C.N.Y., 50 F. Supp. 329, 331.

Ariz.—Southwest Lumber Mills v. Industrial Commission of Arizona, 134 P.2d 162, 165, 60 Ariz. 199.

Cal.—Burlingham v. Gray, 137 P.2d 9, 13, 22 Cal.2d 87—Riskin v. Industrial Accident Commission, App., 135 P.2d 11, 12.

La.—Nesmith v. Reich Bros., App., 14 So.2d 325, 326—Hebert v. Blair, App., 142 So. 849, 850.

Tex.—Dallas Railway & Terminal Co. v. Price, Civ.App., 94 S.W.2d 884, 887, affirmed 114 S.W.2d 859, 131 Tex. 319.

31 C.J. p 474 note 26 [b].

60. U.S.—Hardware Mut. Casualty Co. v. Hilderbrandt, C.C.A.Okl., 119 F.2d 291, 297—Underwood v. Commissioner of Internal Revenue, C. C.A.4, 56 F.2d 67, 71—Standard Accident Ins. Co. v. Pennsylvania Car Co., C.C.A.Tex., 49 F.2d 73, 75—Walling v. McKay, D.C.Neb., 70 F.Supp. 160, 173.

Ala.—**Corpus Juris quoted in** Martin v. Republic Steel Co., 146 So. 276, 278, 226 Ala. 209—**Corpus Juris quoted in** Daves v. Rain, 178 So. 59, 62, 28 Ala.App. 54, certiorari granted Ex parte Board of School Com'rs of Mobile County, 178 So. 63, 235 Ala. 82.

Ariz.—Maxey v. Johnson, 242 P. 866, 867, 29 Ariz. 452.

Ark.—Rice v. Sheppard, 168 S.W.2d 198, 199, 205 Ark. 193—Coddington v. Berry Dry Goods Co., 137 S.W. 2d 249, 252, 199 Ark. 1110—Wilson v. Davison, 122 S.W.2d 539, 541, 197 Ark. 99—C. M. Farmer Stave & Heading Co. v. Whorton, 102 S. W.2d 79, 81, 193 Ark. 708—Moaten v. Columbia Cotton Oil Co., 97 S.W.2d 629, 630, 193 Ark. 97—Mississippi River Fuel Corporation v. Morris, 35 S.W.2d 607, 610, 183 Ark. 207—W. H. Moore Lumber Co. v. Starrett, 279 S.W. 4, 8, 170 Ark. 92.

Cal.—Chapman v. Edwards, 24 P.2d 211, 213, 133 Cal.App. 72.

Conn.—Caraher v. Sears, Roebuck & Co., 200 A. 324, 326, 124 Conn. 409—Welz v. Manzillo, 155 A. 841, 843, 113 Conn. 674.

Ind.—City of Gary v. Bontrager Const. Co., 47 N.E.2d 182, 185, 113 Ind.App. 151—Petzold v. McGregor, 176 N.E. 640, 643, 92 Ind.App. 528.

Iowa.—Moorman Mfg. Co. v. Iowa Unemployment Compensation Commission, 296 N.W. 791, 797, 230 Iowa 123—Arne v. Western Silo Co., 242 N.W. 539, 542, 214 Iowa 511.

Kan.—Bush v. Wilson & Co., 138 P.2d 457, 461, 157 Kan. 80—Sims v. Dietrich, 124 P.2d 507, 509, 155 Kan. 310—Mendel v. Fort Scott Hydraulic Cement Co., 78 P.2d 868, 871, 147 Kan. 719.

La.—Hebert v. Blair, App., 142 So. 849, 850.

Md.—Bell v. State, 138 A. 227, 228, 153 Md. 333, 58 A.L.R. 1051.

Mich.—Utley for Use and Benefit of Travelers Ins. Co. v. Taylor & Gaskin, 9 N.W.2d 842, 846, 305 Mich. 561—Holloway v. Nassar, 267 N.W. 619, 621, 276 Mich. 212—Wight v. H. G. Christman Co., 221 N.W. 314, 317, 244 Mich. 208.

Miss.—Hinton & Walker v. Pearson, 107 So. 275, 277, 142 Miss. 50.

Mo.—Atkisson v. Murphy, 179 S.W. 2d 27, 29, 352 Mo. 644—State ex rel. Maryland Casualty Co. v. Hughes, 164 S.W.2d 274, 277, 349 Mo. 1142—Sargent v. Clements, 88 S.W.2d 174, 177, 337 Mo. 1127—Rutherford v. Tobin Quarries, 82 S.W.2d 918, 920, 337 Mo. 1171—Maltz v. Jackoway-Katz Cap Co., 82 S.W.2d 909, 916, 336 Mo. 1000—Coul v. George B. Peck Dry Goods Co., 32 S.W.2d 758, 759, 326 Mo. 870—Heisey v. Tide Water Oil Co., App., 92 S.W.2d 922, 928—Fuqua v. Lumbermen's Supply Co., 76 S.W.2d 715, 719, 229 Mo.App. 210—Ward v. Scott County Milling Co., App., 47 S.W.2d 250, 253—Mattocks v. Emerson Drug Co., App., 33 S.W.2d 142, 144—Clayton v. Hydraulic Press Brick Co., App., 27 S.W.2d 52, 54—Aubuchon v. Security Const. Co., App., 291 S.W. 187, 189—Burgess v. Garvin, 272 S.W. 108, 112, 219 Mo.App. 162.

Neb.—**Corpus Juris quoted in** Rines v. Martel Telephone Co., 255 N.W. 233, 235, 127 Neb. 398.

N.J.—Rosenquist v. Brookdale

engages to perform a certain service for another, according to his own manner and method, free from the control and direction of his employer in all matters connected with the performance of the service, except as to the result of the work.[61] The term has also been defined as meaning one who contracts with another to do something for him, but who is not controlled by the other, or subject to the other's right to control with respect to his physical conduct in the performance of the undertaking;[62]

Homes, 41 A.2d 383, 385, 132 N.J. Law 531, reversed on other grounds 44 A.2d 33, 133 N.J.Law 305—Errickson v. F. W. Schwiers, Jr., Co., 158 A. 482, 483, 108 N.J. Law 481—Gildersleive v. Burlington Textile Mills, 180 A. 497, 13 N.J.Misc. 643.

N.Y.—**Corpus Juris quoted in** Hogan v. Comac Sales, 281 N.Y.S. 207, 213, 245 App.Div. 216.

N.C.—Teague v. Louisville & N. R. Co., 192 S.E. 846, 847, 212 N.C. 33.

Ohio.—**Corpus Juris cited in** Gillum v. Industrial Commission, 48 N.E. 2d 234, 235, 141 Ohio St. 373.

Okl.—Kelly v. Cann, 136 P.2d 896, 900, 192 Okl. 446—Beasley v. Bond, 48 P.2d 299, 310, 173 Okl. 355—Getman-MacDonell-Summers Drug Co. v. Acosta, 19 P.2d 149, 150, 162 Okl. 77—White v. McGee, 11 P.2d 924, 925, 157 Okl. 204—City of Muskogee v. McMurry, 8 P.2d 670, 674, 155 Okl. 203—Riverland Oil Co. v. Chisholm, 287 P. 379, 381, 143 Okl. 120—Tankersley v. Webster, 243 P. 745, 746, 116 Okl. 208.

Tenn.—Texas Co. v. Bryant, 152 S. W.2d 627, 631, 178 Tenn. 1, rehearing denied 163 S.W.2d 71, 178 Tenn. 680—Wardrep v. Houston, 76 S.W.2d 328, 330, 168 Tenn. 170—**Corpus Juris cited in** Copeland v. Cherry, 95 S.W.2d 1275, 1278, 20 Tenn.App. 122—Grace v. Louisville & N. R. Co., 89 S.W.2d 354, 357, 19 Tenn.App. 382.

Tex.—Lone Star Gas Co. v. Kelly, Com.App., 46 S.W.2d 656, 657—**Corpus Juris quoted in** Hoffman v. Houston Clinic, Civ.App., 41 S.W. 2d 134, 139.

Wash.—Scheiber v. Grigsby, 182 P. 2d 745, 746—Bill v. Gattavara, 167 P.2d 434, 442—Carmin v. Port of Seattle, 116 P.2d 338, 343, 10 Wash. 2d 139.

31 C.J. p 473 note 24.

Similar definitions

(1) One who has the right to employ and direct the action of the workmen, independently of the employer and free from any superior authority in him to say how the specified work shall be done or what the laborers shall do as it progresses.

Ala.—**Corpus Juris quoted in** Martin v. Republic Steel Co., 146 So. 276, 278, 226 Ala. 209.

N.Y.—**Corpus Juris quoted in** Hogan v. Comac Sales, 281 N.Y.S. 207, 213, 245 App.Div. 216.

Ohio.—**Corpus Juris cited in** Gillum v. Industrial Commission, 48 N.E. 2d 234, 235, 141 Ohio St. 373.

Tex.—**Corpus Juris quoted in** Hoffman v. Houston Clinic, Civ.App., 41 S.W.2d 134, 139.

31 C.J. p 473 note 25.

(2) One who in the pursuit of an independent business undertakes to do specific work for another person, using his own means and methods without submitting himself to the control of such person in respect to all of its details.

U.S.—Kentucky Cottage Industries v. Glenn, D.C.Ky., 39 F.Supp. 642, 645.

Ark.—Ewing v. City of Helena, 182 S.W.2d 940, 941, 207 Ark. 702.

Ind.—National Veneer & Lumber Co. v. Crisp, App., 72 N.E.2d 576, 577.

Iowa.—Meredith Pub. Co. v. Iowa Employment Security Commission, 6 N.W.2d 6, 10, 232 Iowa 666.

Tex.—Hilgenberg v. Elam, Civ.App., 192 S.W.2d 799, 803, affirmed, Sup., 198 S.W.2d 94—Herndon v. Halliburton Oil Well Cementing Co., Civ.App., 154 S.W.2d 163, 168, error refused—Winerich Motor Sales Co. v. Ochoa, Civ.App., 58 S.W.2d 193.

Wash.—Smith v. Ludwig, 132 P.2d 735, 736, 16 Wash.2d 155.

(3) Other similar definitions.

Cal.—Los Flores School Dist. v. Industrial Accident Commission, 56 P.2d 581, 583, 13 Cal.App.2d 180.

Ind.—Van Drake v. Thomas, 38 N.E. 2d 878, 882, 110 Ind.App. 586—Park Imp. Co. v. Review Board of Unemployment Compensation Division of Dept. of Treasury, 36 N.E.2d 985, 988, 109 Ind.App. 538.

Iowa.—Burns v. Eno, 240 N.W. 209, 210, 213 Iowa 881.

Kan.—Bittle v. Shell Petroleum Corporation, 75 P.2d 829, 833, 147 Kan. 227.

Ky.—Bowen v. Gradison Const. Co., 32 S.W.2d 1014, 1017, 236 Ky. 270—Madisonville, H. & E. R. Co. v. Owen, 143 S.W. 421, 423, 147 Ky. 1.

Minn.—Wicklund v. North Star Timber Co., 287 N.W. 7, 8, 205 Minn. 595.

Mo.—Gorman v. A. R. Jackson Kansas City Showcase Works Co., App., 19 S.W.2d 559, 563.

Neb.—Hill Hotel Co. v. Kinney, 295 N.W. 397, 398, 138 Neb. 760.

N.Y.—Fidel Ass'n of New York v. Miller, 20 N.Y.S.2d 381, 259 App. Div. 486, affirmed In re Fidel Ass'n of N. Y., 39 N.E.2d 265, 287 N.Y. 626.

Ohio.—Post Pub. Co. v. Schickling, 154 N.E. 751, 752, 22 Ohio App. 318, affirmed Schickling v. Post Pub. Co., 155 N.E. 143, 115 Ohio St. 589.

S.D.—Baer v. Armour & Co., 258 N. W. 135, 137, 63 S.D. 299.

Utah.—Gleason v. Salt Lake City, 74 P.2d 1225, 1230, 94 Utah 1.

Va.—Boyd, Higgins & Goforth v. Mahone, 128 S.E. 259, 262, 142 Va. 690.

Wash.—Seattle Ærie No. 1 of Fraternal Order of Eagles v. Commissioner of Unemployment Compensation and Placement, 160 P.2d 614, 23 Wash.2d 167, motion denied 163 P.2d 921, 23 Wash.2d 167—McFarland v. Commercial Boiler Works, 116 P.2d 288, 292, 10 Wash. 2d 81.

31 C.J. p 474 note 26 [b].

61. U.S.—Jones v. Goodson, C.C.A. Okl., 121 F.2d 176, 179—Yearwood v. U. S., D.C.La., 55 F.Supp. 295, 301—Los Angeles Athletic Club v. U. S., D.C.Cal., 54 F.Supp. 702, 704, appeal dismissed 144 F.2d 352.

Ky.—Courier Journal & Louisville Times Co. v. Akers, 175 S.W.2d 350, 352, 295 Ky. 745.

Okl.—Hawk Ice Cream Co. v. Rush, 180 P.2d 154, 156—World Pub. Co. v. Smith, 161 P.2d 861, 863, 195 Okl. 691—Marion Machine, Foundry & Supply Co. v. Duncan, 101 P.2d 813, 814, 187 Okl. 160—Blackwell Cheese Co. v. Pedigo, 96 P.2d 1043, 1044, 186 Okl. 159—Ellis & Lewis v. Trimble, 57 P.2d 244, 177 Okl. 5.

Wash.—**Corpus Juris cited in** Mitchell v. Maytag-Pacific-Intermountain Co., 51 P.2d 393, 397, 184 Wash. 342—Leech v. Sultan Ry. & Timber Co., 297 P. 203, 204, 161 Wash. 426.

62. U.S.—Great American Indemnity Co. v. Fleniken, C.C.A.La., 134 F.2d 208, 212—Dugas v. Nashua Mfg. Co., D.C.N.H., 62 F.Supp. 846, 850, appeal dismissed, C.C.A., 154 F.2d 655—De Bord v. Proctor & Gamble Distributing Co., D.C.Ga., 58 F.Supp. 157, 159, affirmed, C.C. A., 146 F.2d 54.

Iowa.—Meredith Pub. Co. v. Iowa Employment Security Commission, 6 N.W.2d 6, 11, 232 Iowa 666.

Kan.—Houdek v. Gloyd, 107 P.2d 751, 754, 152 Kan. 789—Hurla v. Capper Publications, 87 P.2d 552, 557, 149 Kan. 369—Bittle v. Shell Petroleum Corporation, 75 P.2d 829, 832, 147 Kan. 227.

Miss.—Meridian Taxicab Co. v. Ward, 186 So. 636, 639, 184 Miss. 499, 120 A.L.R. 1346—Crosby Lumber & Manufacturing Co. v. Durham, 179 So. 285, 287, 181 Miss. 559, suggestion of error overruled 179 So. 854, 181 Miss. 559.

Mo.—Foster v. Campbell, 196 S.W.2d

a person employed to perform work on terms that he is to be free from the control of the employer as respects the manner in which the details of the work are to be executed;[63] or one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result.[64] As discussed infra § 3 (2)–3 (9) the characteristics which generally identify an independent contractor are the independent nature of his business, the existence of a contract for the performance of a specified piece of work for a fixed price, the fact that the contractor employs assistants who are under his control and furnishes the necessary materials, and the fact that he has the right to control the work while it is in progress except as to results.

A "contractor" has been defined as a person who, in the pursuit of an independent business, undertakes to do a specific piece[65] or job[66] of work for other persons,[67] using his own means and methods[68] without submitting himself to control as to the petty details.[69] A contractor is distinguished from an employee,[70] and from a workman or workingman;[71] and a distinction is likewise made between a laborer and a contractor.[72]

The relationship of master and servant does not exist between a contractee and an independent contractor[73] nor does such relationship exist between a

147, 151—Smith v. Fine, 175 S.W.2d 761, 765, 351 Mo. 1179—McKay v. Delico Meat Products Co., 174 S.W.2d 149, 156, 351 Mo. 876—Hartwig-Dischinger Realty Co. v. Unemployment Compensation Commission, 168 S.W.2d 78, 81, 350 Mo. 690—Mattan v. Hoover Co., 166 S.W.2d 557, 564, 350 Mo. 506—Corder v. Morgan Roofing Co., 166 S.W.2d 455, 457, 350 Mo. 382—Bass v. Kansas City Journal Post Co., 148 S.W.2d 548, 552, 347 Mo. 681—State ex rel. Chapman v. Shain, 147 S.W.2d 457, 459, 347 Mo. 308—Skidmore v. Haggard, 110 S.W.2d 726, 729, 341 Mo. 837—Becker v. Donahue, App., 168 S.W.2d 960, 965—Pfeifer v. United Bakers Supply Co., App., 160 S.W.2d 795, 800—Knudsen v. Kansas City Public Service Co., App., 141 S.W.2d 252, 257.

Ohio.—Gillum v. Industrial Commission, 48 N.E.2d 234, 237, 141 Ohio St. 373.

Pa.—Bayuk Cigars v. Chesnut, Com.Pl., 57 Dauph.Co. 9.

Tex.—Moore v. Roberts, Civ.App., 93 S.W.2d 236, 238, error refused.

Wash.—**Corpus Juris cited in** Leech v. Sultan Ry. & Timber Co., 297 P. 203, 204, 161 Wash. 426.

Wis.—Ryan v. Wisconsin Department of Taxation, 8 N.W.2d 393, 396, 242 Wis. 491.

63. U.S.—Cimorelli v. New York Cent. R. Co., C.C.A.Ohio, 148 F.2d 575, 578.

Tex.—Smith Bros. v. O'Bryan, 94 S.W.2d 145, 148, 127 Tex. 439—Conner v. Angelina County Lumber Co., Civ.App., 146 S.W.2d 1093, 1094—McCombs v. Stewart, Civ.App., 117 S.W.2d 869, 871—Moreno v. Terminal Bldg. Corporation of Dallas, Civ.App., 59 S.W.2d 898, 899, error refused.

64. Ill.—John Gabel Mfg. Co. v. Murphy, 62 N.E.2d 401, 404, 390 Ill. 455—Ozark Minerals Co. v. Murphy, 51 N.E.2d 197, 199, 384 Ill. 94.

31 C.J. p 473 note 26.

Similar definition

One who undertakes to produce a given result, but so that, in the actual execution of the work, he is not under the order or control of the employer and may use his own discretion in things not specified.

Ill.—Jones v. Standerfer, 15 N.E.2d 924, 927, 296 Ill.App. 145.

N.C.—Kesler Const. Co. v. Dixson Holding Corporation, 175 S.E. 843, 845, 207 N.C. 1.

65. Okl.—**Corpus Juris quoted in** Standard Accident Ins. Co. v. Basolo, 68 P.2d 804, 806, 180 Okl. 261.

Tex.—**Corpus Juris quoted in** Evans v. Bryant, Civ.App., 29 S.W.2d 484, 487—**Corpus Juris quoted in** Overstreet v. McClelland, Civ.App., 13 S.W.2d 990, 991.

13 C.J. p 211 note 57.

66. Okl.—**Corpus Juris quoted in** Standard Accident Ins. Co. v. Basolo, 68 P.2d 804, 806, 180 Okl. 261.

Tex.—**Corpus Juris quoted in** Evans v. Bryant, Civ.App., 29 S.W.2d 484, 487—**Corpus Juris quoted in** Overstreet v. McClelland, Civ.App., 13 S.W.2d 990, 991.

13 C.J. p 211 note 58.

67. Okl.—**Corpus Juris quoted in** Standard Accident Ins. Co. v. Basolo, 68 P.2d 804, 806, 180 Okl. 261.

Tex.—**Corpus Juris quoted in** Evans v. Bryant, Civ.App., 29 S.W.2d 484, 487—**Corpus Juris quoted in** Overstreet v. McClelland, Civ.App., 13 S.W.2d 990, 991.

13 C.J. p 211 note 59.

68. Tex.—**Corpus Juris quoted in** Evans v. Bryant, Civ.App., 29 S.W.2d 484, 487—**Corpus Juris quoted in** Overstreet v. McClelland, Civ.App., 13 S.W.2d 990, 991.

13 C.J. p 211 note 60.

69. Okl.—Standard Accident Ins. Co. v. Basolo, 68 P.2d 804, 806, 180 Okl. 261.

Tex.—Laird v. Utilities Ins. Co., Civ.App., 99 S.W.2d 627, 628—Brigman v. Holt & Bowers, Civ.App., 32 S.W.2d 220, 222, error refused—**Corpus Juris quoted in** Evans v. Bryant, Civ.App., 29 S.W.2d 484, 487, error refused—**Corpus Juris quoted in** Overstreet v. McClelland, Civ.App., 13 S.W.2d 990, 991.

13 C.J. p 211 note 61.

70. U.S.—Vane v. Newcombe, Ind., 10 S.Ct. 60, 132 U.S. 220, 234, 33 L.Ed. 310.

13 C.J. p 212 note 66.

71. U.S.—In re Footville Condensed Milk Co., D.C.Wis., 237 F. 136.

71 C.J. p 178 note 86.

72. N.Y.—Balch v. New York and Oswego Midland R. Co., 46 N.Y. 521, 524.

13 C.J. p 212 note 67.

73. Ala.—Caldwell v. Atlanta, B. & A. R. Co., 49 So. 674, 161 Ala. 395.

Ariz.—Lee Moor Contracting Co. v. Blanton, 65 P.2d 35, 49 Ariz. 130.

N.C.—Greer v. Callahan Const. Co., 130 S.E. 739, 190 N.C. 632.

39 C.J. p 37 note 52, p 1327 note 39.

Law governing master-servant relationship

(1) Generally, independent contractors are not within the purview of the substantive law governing the relations of master and servant.—City of Gary v. Bontrager Const. Co., 47 N.E.2d 182, 113 Ind.App. 151.

(2) Generally, independent contractors are not within the purview of statutes, the scope of which is defined by the generic term "servants," "employees," or "agents," or by some expression which is ordinarily regarded as being applicable to a particular subdivision of the classes of persons connoted by those terms.—Bill v. Gattavara, Wash., 167 P.2d 434.

Principal contractor and independent contractor bear a relationship entirely different from that of employer and employee.—Page v. Koss Const. Co., 245 N.W. 208, 215 Iowa 1388.

contractee and a contractor generally;[74] nor, in the general acceptance of the term, is a servant a contractor,[75] so that, as discussed infra §§ 600–607, a contractee does not owe an independent contractor and its servants the duties of a master and is not liable to them as a master for their injuries in the scope of their employment, and, as discussed infra § 584, a contractee is not a master within the rule of respondeat superior as to the acts of an independent contractor and its servants and as a general rule is not liable to third persons for their torts.

The relation of master and servant does not exist between an employer or contractee and the servants of an independent contractor, or between an independent contractor and the servant of a subcontractor, and he is not responsible as master, either to or for them.[76] If, however, the employer retains or assumes control over the means and method by which the work of a contractor is to be done, the relation of master and servant exists between him and servants of such a contractor,[77] and the mere fact of nominal employment by an independent contractor will not relieve the master of liability where the servant is in fact in his employ.[78] Where an independent contractor is created or is operating as a subterfuge, an employee will be regarded as the servant of the principal employer.[79] Employees of an independent contractor must look to him, rather than to the contractee, for compensation.[80]

§ 3(2). Tests of Independent Contractor Relationship

In determining whether the relationship is that of master and servant or contractee and independent contractor, each case must be determined on its own facts and all the features of the relationship are to be considered.

As discussed supra § 3 (1) an "independent contractor" is generally defined as one who in rendering services exercises an independent employment or occupation and represents his employer only as to the results of his work and not as to the means whereby it is to be done, and the question whether one is a servant or an independent contractor has been considered in many cases,[81] and various tests have been applied in determining it.[82] It has frequently been stated that it is impossible to lay down any hard and fast rule to determine whether a particular relationship is one of master and servant or contractee and independent contractor,[83] and that each case must be determined on its own

Distinguished from "workman"

"Independent contractor" is one who undertakes construction or performance of some unit or branch of larger work, hiring of labor, furnishing of materials and tools, and all that goes into term "contractor," as contrasted with that of mere "workman" or "employee."—O'Connor v. Narragansett Electric Co., 172 A. 889, 891, 54 R.I. 317.

Agent

(1) Words "independent contractor" are used in contrast with word "servant," not with "agent," since both independent contractor and servant are agents of their principal. —Texas Co. v. Mills, 156 So. 866, 171 Miss. 231.

(2) "Agent" and "independent contractor" distinguished see Agency § 2 d.

74. Ala.—Caldwell v. Atlantic, B. & A. R. R. Co., 49 So. 674, 161 Ala. 395, 396.
13 C.J. p 213 note 69.

75. Ala.—Caldwell v. Atlantic, B. & A. R. R. Co., supra.
13 C.J. p 213 note 68.

76. Ky.—**Corpus Juris cited in** Slusher v. Asher, 61 S.W.2d 1057, 1058, 250 Ky. 88.
Mass.—Devlin v. Newfell, 175 N.E. 647, 275 Mass. 279.
N.Y.—Robins Dry Dock & Repair Co. v. Navigazione Libera Triestina S. A., 279 N.Y.S. 257, 154 Misc. 788, affirmed 185 N.E. 698, 261 N.Y. 455, reargument denied 188 N.E. 47, 262 N.Y. 521, certiorari denied Moran Towing & Transp. Co. v. Robins Dry Dock & Repair Co., 54 S.Ct. 72, 290 U.S. 656, 78 L.Ed. 568 and 54 S.Ct. 72, 290 U.S. 657, 78 L.Ed. 569—Chapin-Owen Co. v. Yeoman, 250 N.Y.S. 95, 232 App. Div. 560, motion denied 253 N.Y. S. 568, 233 App.Div. 492.
N.C.—Greer v. Callahan Const. Co., 130 S.E. 739, 190 N.C. 632.
Tex.—**Corpus Juris cited in** Carter Publications v. Davis, Civ.App., 68 S.W.2d 640, 642.
39 C.J. p 38 note 53.

77. U.S.—**Corpus Juris quoted in** Wabash R. R. Co. v. Finnegan, D. C.Mo., 67 F.Supp. 94, 99.
Utah.—**Corpus Juris cited in** Gleason v. Salt Lake City, 74 P.2d 1226, 1230.
39 C.J. p 38 note 54.

78. U.S.—**Corpus Juris quoted in** Wabash R. R. Co. v. Finnegan, D. C.Mo., 67 F.Supp. 94, 99.
39 C.J. p 38 note 55.

79. Tex.—**Corpus Juris cited in** Gulf Refining Co. v. Rogers, Civ.App., 57 S.W.2d 183, 185.
39 C.J. p 38 note 56.

80. Ariz.—Maxey v. Johnson, 242 P. 866, 29 Ariz. 452.

Subcontractor's employees have no contractual relationship with the general contractor, and are not entitled to recover wages from him.—Changas v. C. & W. Construction Co., 279 N.Y.S. 84, 154 Misc. 824.

81. Mont.—**Corpus Juris cited in** Coombes v. Letcher, 66 P.2d 769, 772, 104 Mont. 371.
31 C.J. p 473 note 19, p 475 note 37.

82. U.S.—Whalen v. Harrison, D.C. Ill., 51 F.Supp. 515—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363.
Cal.—**Corpus Juris cited in** Associated Indemnity Corporation v. Industrial Accident Commission, 133 P.2d 698, 700, 56 Cal.App.2d 804.
Kan.—Bush v. Wilson & Co., 138 P. 2d 457, 157 Kan. 80.
Mich.—Utley, for Use and Benefit of Travelers Ins. Co. v. Taylor & Gaskin, 9 N.W.2d 842, 305 Mich. 561.
Miss.—**Corpus Juris cited in** Gulf Refining Co. v. Nations, 145 So. 327, 332, 167 Miss. 315—**Corpus Juris cited in** Kisner v. Jackson, 132 So. 90, 91, 159 Miss. 424.
Ohio.—Gillum v. Industrial Commission, 48 N.E.2d 234, 141 Ohio St. 373.
Tex.—**Corpus Juris cited in** Ochoa v. Winerich Motor Sales Co., 94 S.W. 2d 416, 419, 127 Tex. 542.
W.Va.—**Corpus Juris cited in** Greaser v. Appaline Oil Co., 155 S.E. 170, 171, 109 W.Va. 396.
Wis.—Ryan v. Wisconsin Department of Taxation, 8 N.W.2d 393, 242 Wis. 491.

83. Ark.—**Corpus Juris quoted in**

facts.[84] Among the factors to be considered are whether the contractor is carrying on an independent business; whether the work is part of the employer's general business; the nature and extent of the work; the skill required; the term and duration of the relationship; the right to assign the performance of the work to another; the power to terminate the relationship; the existence of a contract for the performance of a specified piece of work; the control and supervision of the work; the employer's powers and duties with respect to the hiring, firing, and payment of the contractor's servants; the control of the premises; the duty to supply the premises, tools, appliances, material, and labor; and the mode, manner, and terms of payment.[85] Ordinarily no one feature of the relation-

Wright v. McDaniel, 159 S.W.2d 737, 739, 203 Ark. 992.
Cal.—**Corpus Juris cited in** People v. Grier, 128 P.2d 207, 212, 53 Cal. App.2d 841.
Ky.—**Corpus Juris quoted in** Bowen v. Gradison Constr. Co., 32 S.W. 2d 1014, 1019, 236 Ky. 270.
Ill.—Kehrer v. Industrial Commission, 6 N.E.2d 635, 365 Ill. 376—Dean v. Ketter, 65 N.E.2d 572, 328 Ill.App. 206.
Mo.—**Corpus Juris quoted in** Manus v. Kansas City Distributing Corporation, 74 S.W.2d 506, 510, 228 Mo.App. 905.
N.Y.—**Corpus Juris cited in** Mace v. Morrison & Fleming, 44 N.Y.S.2d 672, 674, 267 App.Div. 29—**Corpus Juris cited in** In re Electrolux Corporation, 30 N.Y.S.2d 972, 977, 262 App.Div. 642—**Corpus Juris cited in** Claim of Miller, 29 N.Y.S.2d 15, 17, 262 App.Div. 385.
Ohio.—**Corpus Juris quoted in** Gillum v. Industrial Commission, 48 N.E. 2d 234, 235, 141 Ohio St. 373.
Tenn.—**Corpus Juris quoted in** Knight v. Hawkins, Tenn.App., 173 S.W.2d 163, 166, 26 Tenn.App. 448 —**Corpus Juris quoted in** Copeland v. Cherry, 95 S.W.2d 1275, 1278, 20 Tenn.App. 122.
Va.—Griffith v. Electrolux Corporation, 11 S.E.2d 644, 176 Va. 378.
31 C.J. p 474 note 27.

84. U.S.—Cimorelli v. New York Cent. R. Co., C.C.A.Ohio, 148 F.2d 575—Madisen v. Phillips Petroleum Co., C.C.A.Tex., 88 F.2d 515, certiorari denied 57 S.Ct. 946, 301 U.S. 703, 81 L.Ed. 1358.
Ala.—Moore-Handley Hardware Co. v. Williams, 189 So. 757, 238 Ala. 189.
Ark.—**Corpus Juris quoted in** Wright v. McDaniel, 159 S.W.2d 737, 739, 203 Ark. 992.
Cal.—**Corpus Juris cited in** People v. Grier, 128 P.2d 207, 212, 53 Cal. App.2d 841—Charles R. McCormick Lumber Co. v. O'Brien, 266 P. 594, 596, 90 Cal.App. 776.
Ill.—Kehrer v. Industrial Commission, 6 N.E.2d 635, 365 Ill. 378—Dean v. Ketter, 65 N.E.2d 572, 328 Ill.App. 206—Ryan v. Associates Inv. Co. of Illinois, 18 N.E.2d 47, 297 Ill.App. 544.
Ky.—American Sav. Life Ins. Co. v. Riplinger, 60 S.W.2d 115, 249 Ky. 8—**Corpus Juris quoted in** Bowen v. Gradison Constr. Co., 32 S.W.2d 1014, 1019, 236 Ky. 270.
La.—Taylor v. Victoria Nav. Co., App., 176 So. 519.
Miss.—Life & Casualty Ins. Co. of Tennessee v. Curtis, 165 So. 435, 174 Miss. 768.
Mo.—Sargent v. Clements, 88 S.W.2d 174, 337 Mo. 1127—**Corpus Juris quoted in** Manus v. Kansas City Distributing Corporation, 74 S.W. 2d 506, 510, 228 Mo.App. 905.
N.Y.—**Corpus Juris cited in** Mace v. Morrison & Fleming, 44 N.Y.S.2d 672, 674, 267 App.Div. 29—**Corpus Juris cited in** In re Electrolux Corporation, 30 N.Y.S.2d 972, 977, 262 App.Div. 642—**Corpus Juris cited in** Claim of Miller, 29 N.Y.S.2d 15, 17, 262 App.Div. 385.
Ohio.—**Corpus Juris quoted in** Gillum v. Industrial Commission, 48 N.E.2d 234, 235, 141 Ohio St. 373.
Okl. — Getman-MacDonell-Summers Drug Co. v. Acosta, 19 P.2d 149, 162 Okl. 77.
Tenn.—**Corpus Juris quoted in** Knight v. Hawkins, Tenn.App., 173 S.W.2d 163, 166, 26 Tenn.App. 448 —**Corpus Juris quoted in** Copeland v. Cherry, 95 S.W.2d 1275, 1278, 20 Tenn.App. 122.
31 C.J. p 474 note 28.

Matter of degree

Whether facts of a particular situation give rise to relationship of servant or of independent contractor to one for whom an individual is acting must, to some extent, be a matter of degree.—Barnes v. Indian Refining Co., 134 S.W.2d 620, 280 Ky. 811.

85. U.S.—Cimorelli v. New York Cent. R. Co., C.C.A.Ohio, 148 F.2d 575—Pittsburgh Valve Foundry & Construction Co. v. Gallagher, C. C.A.Ohio, 32 F.2d 436—Wabash R. Co. v. Finnegan, D.C.Mo., 67 F. Supp. 94—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363.
Cal.—California Employment Stabilization Commission v. Lund, 173 P.2d 379, 76 Cal.App.2d 567—**Corpus Juris quoted in** Associated Indemnity Corp. v. Industrial Accident Com'n, 133 P.2d 698, 700, 56 Cal.App.2d 804—**Corpus Juris quoted in** Casselman v. Hartford Accident & Indemnity Co., 98 P.2d 539, 546, 36 Cal.App.2d 700.
Ill.—Ryan v. Associates Inv. Co. of Illinois, 18 N.E.2d 47, 297 Ill.App. 544.
Kan.—Bush v. Wilson & Co., 138 P. 2d 457, 157 Kan. 80—Sims v. Dietrich, 124 P.2d 507, 155 Kan. 310.
Ky.—American Sav. Life Ins. Co. v. Riplinger, 60 S.W.2d 115, 249 Ky. 8.
La.—**Corpus Juris quoted in** Hecker v. Betz, App., 172 So. 816, 819—**Corpus Juris quoted in** Ravare v. McCormick & Co., App., 166 So. 183, 185.
Minn.—Castner v. Christgau, 24 N. W.2d 228, 222 Minn. 61.
Miss.—Texas Co. v. Mills, 156 So. 866, 171 Miss. 231—**Corpus Juris cited in** Gulf Refining Co. v. Nations, Miss., 145 So. 327, 332, 167 Miss. 315—**Corpus Juris cited in** Kisner v. Jackson, 132 So. 90, 91, 159 Miss. 424.
Mo.—Mattan v. Hoover Co., 166 S.W. 2d 557, 350 Mo. 506—State ex rel. Chapman v. Shain, 147 S.W.2d 457, 347 Mo. 308—Sargent v. Clements, 88 S.W.2d 174, 337 Mo. 1127—Maltz v. Jackoway-Katz Cap Co., 82 S.W. 2d 909, 336 Mo. 1000—**Corpus Juris cited in** Miller v. St. Louis Realty & Securities Co., App., 103 S.W.2d 510, 513—**Corpus Juris quoted in** Young v. Sinclair Refining Co., App., 92 S.W.2d 995, 999—Aubuchon v. Security Const. Co., App., 291 S.W. 187.
Ohio.—Gallick v. Ott, App., 51 N.E. 2d 404—Cushman Motor Delivery Co. v. Bernick, 8 N.E.2d 446, 55 Ohio App. 31—Plost v. Avondale Motor Car Co., 8 N.E.2d 441, 55 Ohio App. 22.
Okl. — Getman-MacDonell-Summers Drug Co. v. Acosta, 19 P.2d 149, 162 Okl. 77.
Pa.—Gattas v. Tancredi Coal Co., Com.Pl., 42 Sch.Leg.Rec. 120.
Wis.—Employers Mut. Liability Ins. Co. v. Brower, 272 N.W. 359, 224 Wis. 485—Town of Eagle v. Industrial Commission, 266 N.W. 274, 221 Wis. 166—Kolman v. Dvorak, 262 N.W. 622, 219 Wis. 139.
39 C.J. p 1316 note 2.

Agent

Fact that one performing services for another is latter's agent is not conclusive that he is servant or independent contractor.—Northwestern Mut. Life Ins. Co. v. Tone, 4 A.2d 640, 125 Conn. 183, 121 A.L.R. 998.

ship is determinative,[86] and all are to be taken into consideration in determining whether or not a person is an independent contractor.[87]

Contract. As stated infra § 580, a contractee-independent contractor relationship presupposes a contract between the parties, and, in determining whether the relationship between the parties is that of master and servant or contractee and independent contractor, resort must be made in the first instance to the contract between the parties.[88] If there is

Independence or subservience

In determining whether person performing services for another is "independent contractor" or "servant," true test is degree of independence or subserviency which contract for services would reasonably create.—Davidson v. American Drug Stores, La.App., 175 So. 157.

Payment of social security tax

Fact that employer paid social security tax on salary of one employed as general collector was a circumstance indicative of existence of master-servant relationship, because Social Security Act covers only employees, and the term "employee" does not cover an independent contractor.—Tennessee Valley Appliances v. Rowden, 146 S.W.2d 845, 24 Tenn.App. 487.

Workmen's Compensation Act cases considered

(1) Because the rule of nonliability of an independent contractor is applied to both negligence cases and compensation cases, principles of law applied in compensation cases in determining relation of parties are a guide in negligence cases.—Dean v. Ketter, 65 N.E.2d 572, 328 Ill.App. 206.

(2) Servant or independent contractor within workmen's compensation statutes see the C.J.S. title Workmen's Compensation Acts § 90 et seq, also 71 C.J. p 445 note 19 et seq.

86. U.S.—Cimorelli v. New York Cent. R. Co., C.C.A.Ohio, 148 F.2d 575.
Ark.—**Corpus Juris quoted in** Wright v. McDaniel, 159 S.W.2d 737, 739, 203 Ark. 992.
Cal.—**Corpus Juris cited in** People v. Grier, 128 P.2d 207, 212, 53 Cal. App.2d 841—Rathbun v. Payne, 68 P.2d 291, 21 Cal.App.2d 49.
Ill.—Kehrer v. Industrial Commission, 6 N.E.2d 635, 365 Ill. 378—Becker v. Brummel, 48 N.E.2d 419, 319 Ill.App. 499.
Ky.—**Corpus Juris quoted in** Bowen v. Gradison Constr. Co., 32 S.W.2d 1014, 1019, 236 Ky. 270.
Mo.—**Corpus Juris quoted in** Manus v. Kansas City Distributing Corporation, 74 S.W.2d 506, 510, 228 Mo.App. 905.
N.Y.—**Corpus Juris cited in** Mace v. Morrison & Fleming, 44 N.Y.S.2d 672, 674, 267 App.Div. 29—**Corpus Juris cited in** In re Electrolux Corporation, 30 N.Y.S.2d 972, 977, 262 App.Div. 642—**Corpus Juris cited in** Claim of Miller, 29 N.Y.S. 2d 15, 17, 262 App.Div. 385.
Ohio.—**Corpus Juris quoted in** Gillum v. Industrial Commission, 48 N.E. 2d 234, 235, 141 Ohio St. 373.
Pa.—Walters v. Commonwealth, Com.Pl., 56 Dauph.Co. 245.
Tenn.—**Corpus Juris quoted in** Knight v. Hawkins, 173 S.W.2d 163, 166, 26 Tenn.App. 448—**Corpus Juris quoted in** Copeland v. Cherry, 95 S.W.2d 1275, 1278, 20 Tenn. App. 122.
31 C.J. p 474 note 29.

87. Ark.—**Corpus Juris quoted in** Wright v. McDaniel, 159 S.W.2d 737, 739, 203 Ark. 992.
Cal.—**Corpus Juris cited in** People v. Grier, 128 P.2d 207, 212, 53 Cal. App.2d 841—**Corpus Juris quoted in** Casselman v. Hartford Accident & Indemnity Co., 98 P.2d 539, 546, 36 Cal.App.2d 700—Rathbun v. Payne, 68 P.2d 291, 21 Cal.App.2d 49.
Ill.—Becker v. Brummel, 48 N.E.2d 419, 319 Ill.App. 499.
Ky.—**Corpus Juris quoted in** Bowen v. Gradison Constr. Co., 32 S.W. 2d 1014, 1019, 236 Ky. 270.
La.—Miller v. Wyatt Lumber Mfg. Co., 3 So.2d 565, followed in Wilson v. Wyatt Lumber Mfg. Co., App., 3 So.2d 567 and Hoagland v. Wyatt Lumber Mfg. Co., 3 So.2d 568, two cases—Brown v. Edwards, App., 160 So. 173, followed in Hall v. Edwards, 160 So. 174.
Mo.—**Corpus Juris quoted in** Young v. Sinclair Refining Co., App., 92 S.W.2d 995, 999—**Corpus Juris quoted in** Manus v. Kansas City Distributing Corporation, 74 S.W. 2d 506, 510, 228 Mo.App. 905.
N.Y.—**Corpus Juris cited in** Mace v. Morrison & Fleming, 44 N.Y.S.2d 672, 674, 267 App.Div. 29—**Corpus Juris cited in** In re Electrolux Corporation, 30 N.Y.S.2d 972, 977, 262 App.Div. 642—**Corpus Juris cited in** Claim of Miller, 29 N.Y.S. 2d 15, 17, 262 App.Div. 385.
Ohio.—**Corpus Juris quoted in** Gillum v. Industrial Commission, 48 N.E. 2d 234, 235, 141 Ohio St. 375.
Tenn.—**Corpus Juris quoted in** Knight v. Harkins, Tenn.App., 173 S.W.2d 163, 166, 26 Tenn.App. 448 —**Corpus Juris quoted in** Copeland v. Cherry, 95 S.W.2d 1275, 1278, 20 Tenn.App. 122.
39 C.J. p 1316 note 3—31 C.J. p 474 note 30.

Hours of service

It is not essential to status of independent contractor that he be in actual service at all hours, but test is his status when he is in service under contract.—Grace v. Louisville & N. R. Co., 89 S.W.2d 354, 19 Tenn.App. 382.

88. Ga.—Durham Land Co. v. Kilgore, 194 S.E. 49, 56 Ga.App. 785.
Mass.—Devlin v. Newfel, 175 N.E. 647, 275 Mass. 279.
Mont.—Greening v. Gazette Printing Co., 88 P.2d 862, 108 Mont. 158.
Okl.—World Pub. Co. v. Smith, 161 P.2d 861, 195 Okl. 691—Getman-McDonell-Summers Drug Co. v. Acosta, 19 P.2d 149, 162 Okl. 77.
Wis.—Sprecher v. Roberts, 248 N.W. 795, 212 Wis. 69.

Agreement as whole

Ind.—Van Drake v. Thomas, 38 N. E.2d 878, 110 Ind.App. 586.
Iowa.—Arne v. Western Silo Co., 242 N.W. 539, 214 Iowa 511.

Label placed on relationship by contract

(1) It is the incidents of the relationship as disclosed by the contract, and not the name that the contract gives to the relationship, that is determinative.
U.S.—Cimorelli v. New York Cent. R. Co., C.C.A.Ohio, 148 F.2d 575.
Ala.—Daves v. Rain, 178 So. 59, 28 Ala.App. 54, certiorari granted Ex parte Board of School Com'rs of Mobile County, 178 So. 63, 235 Ala. 82.
Iowa.—Sanford v. Goodridge, 13 N. W.2d 40, 234 Iowa 1036.
Pa.—Commonwealth v. McNelly, Com.Pl., 56 Dauph.Co. 95.
Tenn.—Grace v. Louisville & N. R. Co., 89 S.W.2d 354, 19 Tenn.App. 382.
Utah.—Chatelain v. Thackeray, 100 P.2d 191, 98 Utah 525.
Wash.—Femling v. Star Pub. Co., 81 P.2d 293, 195 Wash. 395, set aside on other grounds 84 P 2d 1008, 195 Wash. 395.

(2) The law looks to substance and not to form of the contract to determine the relationship.—Sanford v. Goodridge, 13 N.W.2d 40, 234 Iowa 1036.

(3) The parties to a contract being presumed to know legal import of contract, an express stipulation that one of the parties was a "contractor" rather than a servant would be taken in connection with entire contract, and not disregarded unless entire contract was inconsistent with stipulation.—Ex parte Board of School Com'rs of Mobile County, 178 So. 63, 235 Ala. 82.

no express contract or if the contract is ambiguous or doubtful, the conduct of the parties[89] and all of the surrounding circumstances[90] may be looked to in determining the relationship of the parties. Moreover, it has been held that in determining the relationship of the parties, their conduct and the surrounding circumstances may be examined, even though there is an express, unambiguous contract, since to hold otherwise would be to invite masters to avoid their liabilities and responsibilities by paper contracts which do not express the true relationship between the parties,[91] but it has been held that this rule applies only where the rights of third persons are involved, and that otherwise the terms of the contract, where clear, are controlling.[92] In many cases, it is broadly stated that whether the relationship is that of master and servant or contractee and independent contractor is to be determined from the terms of the contract, the conduct of the parties, and all of the surrounding circumstances.[93]

Void contract. The fact that a contract establishing a contractee-independent contractor relationship is void for noncompliance with statutory requirements does not change the contractor's relationship from that of an independent contractor to a servant so as to render the owner liable for his negligence.[94]

Independent business. The mere fact that the employee is one who carries on a separate and independent employment does not necessarily make him an independent contractor,[95] although it is a circumstance to be taken into consideration as tend-

(4) Employee held independent contractor notwithstanding words in the contract providing that the company agreed to prosecute the work as an "independent contractor" were stricken from a clause therein.—Wawrzonek v. Central Hudson Gas & Electric Corporation, 12 N.E.2d 525, 276 N.Y. 412.

Social security number

Notation of social security number above caption of written contract fixing codefendant's relationship to company as that of an independent contractor could not of itself determine relationship.—Columbus & G. Ry. Co. v. Robinson, 198 So. 749, 189 Miss. 675.

Interstate Commerce Act provision that services of person engaged within terminal areas transferring interstate shipments from one motor carrier to another are excluded from direct regulation by Interstate Commerce Commission but that services performed by transferrer should be considered to be performed by the carrier, does not alter the legal relation between the parties as fixed by their contract and does not transform the relation of an independent contractor into that of employer and employee.—Albers v. Great Central Transport Corp., 59 N.E.2d 389, 740 Ohio App. 425, affirmed 60 N.E.2d 669, 145 Ohio St. 129.

Contract provision for liability insurance for protection of employer against consequences of contractor's negligence does not negative existence of relation of independent contractor.—Grace v. Louisville & N. R. Co., 89 S.W.2d 354, 19 Tenn.App. 382.

89. Cal.—May v. Farrell, 271 P. 789, 94 Cal.App. 703.
Mo.—Cotton v. Ship-By-Truck Co., 85 S.W.2d 80, 237 Mo. 270.
Wis.—Sprecher v. Roberts, 248 N.W. 795, 212 Wis. 69.

90. Cal.—Charles R. McCormick Lumber Co. v. O'Brien, 266 P. 594, 596, 90 Cal.App. 776.
Mo.—Cotton v. Ship-By-Truck Co., 85 S.W.2d 80, 337 Mo. 270.
Wis.—Sprecher v. Roberts, 248 N.W. 795, 212 Wis. 69.

Right to control

In absence of express stipulation, existence of employer's right to control manner of work must be determined by reasonable inferences from circumstances.—George v. Chaplin, 279 P. 485, 99 Cal.App. 709—May v. Farrell, 271 P. 789, 94 Cal.App. 703.

91. Ala.—W. P. Brown & Sons Lumber Co. v. Crossley, 161 So. 536, 230 Ala. 403, followed in 161 So. 538, 230 Ala. 407.
Conn.—Scorpion v. American-Republican, 37 A.2d 802, 131 Conn. 42.
Ind.—Howe Fire Apparatus Co. v. Humphrey, 46 N.E.2d 259, 113 Ind. App. 167.
La.—Goetschel v. Glassell-Wilson Co., 127 So. 81, 13 La.App. 424.
Mo.—Dagley v. National Cloak & Suit Co., 22 S.W.2d 892, 224 Mo. App. 61.
Okl.—Ottinger v. Morris, 104 P.2d 254, 187 Okl. 517.
Wash.—Femling v. Star Pub. Co., 81 P.2d 293, 195 Wash. 395, set aside on other grounds 84 P.2d 1008, 195 Wash. 395.

Contract provision not controlling

Even provision of written contract which in express terms negatives right of control over one contracting to do work is not conclusive as to existence or nonexistence of relationship of independent contractor.—Russell v. Union Elec. Co. of Mo., 191 S.W.2d 278, 238 Mo.App. 1074.

Nominal employment of independent contractor will not relieve master of liability for injuries to third person, where servant is in fact in his employ.—Goetschel v. Glassell-Wilson Co., 127 So. 81, 13 La.App. 424.

92. Ind.—Howe Fire Apparatus v. Humphrey, 46 N.E.2d 259, 113 Ind. App. 167.

93. U.S.—Eldridge v. McGeorge, C.C.A.Ark., 99 F.2d 835—Gulf Refining Co. v. Brown, C.C.A.Va., 93 F.2d 870, 116 A.L.R. 449—Western Express Co. v. Smeltzer, C.C.A.Ohio, 88 F.2d 94, 112 A.L.R. 74, certiorari denied 58 S.Ct. 17, 302 U.S. 698, 82 L.Ed. 539—Western Express Co. v. Lechlyhtnen, 88 F.2d 94, 112 A.L.R. 74, certiorari denied 58 S.Ct. 17, 302, U.S. 698, 82 L.Ed. 539—Western Express Co. v. Benley, 88 F.2d 94, 112 A.L.R. 74, certiorari denied 58 S.Ct. 17, 302 U.S. 698, 82 L.Ed. 539.
Ark.—Hobbs-Western Co. v. Carmical, 91 S.W.2d 605, 192 Ark. 59.
Mo.—Russell v. Union Elec. Co. of Mo., 191 S.W.2d 278, 238 Mo.App. 1074—Andres v. Cox, 23 S.W.2d 1066, 223 Mo.App. 1139.
Neb.—Reeder v. Kimball Laundry, 261 N.W. 562, 129 Neb. 306.
N.J.—Gildersleive v. Burlington Textile Mills, 180 A. 497, 13 N.J.Misc. 643.
Pa.—Commonwealth v. Wertz, Com. Pl., 53 Dauph.Co. 353.
Tex.—Herndon v. Halliburton Oil Well Cementing Co., Civ.App., 154 S.W.2d 163, error refused.

94. Cal.—Smith v. Dryden, 115 P. 455, 15 Cal.App. 568.
Tex.—**Corpus Juris cited in** Carter Publications v. Davis, Civ.App., 68 S.W.2d 640, 643.

95. Mass.—Brackett v. Lubke, 4 Allen 138, 81 Am.D. 694.
39 C.J. p 1319 note 49.

Fact that employment is for one job only and requires no supervision is not conclusive that workman is an independent contractor.—Kehr-

ing to show that he is an independent contractor,[96] and the fact that he is not engaged in an independent business does not prevent his being an independent contractor.[97] It has been held that the question whether the employee is engaged in an independent business does not depend on whether he is serving one person or many persons.[98]

Assignment of performance. The right to substitute or assign to another the performance of the contract indicates that the contract created a contractee-independent contractor relationship and not a master-servant relationship,[99] and the presence or absence of such right is a factor to be considered in determining the relationship of the parties.[1]

Control of premises. A significant factor in determining whether a master-servant or a contractee-independent contractor relationship exists is the place where the work is to be done.[2] The fact that the work is performed on the employer's premises is indicative of a master-servant relationship,[3] whereas, if the work is performed on premises under the employee's control, it indicates a contractee-independent contractor relationship.[4] However, the fact that the owner of the premises on which work is to be done by an employee retains control thereof does not prevent the employee from being an independent contractor.[5]

The period of employment is a circumstance that may be considered in determining whether the employee is an independent contractor.[6]

§ 3(3). —— Control

The right to control the mode of doing the work is the principal consideration in determining whether one employed is a servant or an independent contractor.

A servant is one who works under his master's direction and control, whereas an independent contractor is engaged to do certain work, but to exercise his own discretion as to the mode and manner of doing it.[7] If the one hired to do the work represents or is subject to the control of the employer as to the means, or as to the mode, manner, and details of the performance of the work, he is a servant and not an independent contractor;[8] but, if he

er v. Industrial Commission, 6 N.E. 2d 635, 365 Ill. 378.

Special skill or calling

Fact that person has distinct occupation or calling or that he is given employment by reason of special skill does not fix his status as independent contractor rather than employee or servant in that particular employment, but, even though employee has peculiar skill and was employed because of such skill, he is "employee" or "servant" if employer retains right to control.—Ochoa v. Winerich Motor Sales Co., 94 S.W.2d 416, 127 Tex. 542, remanding cause, Civ.App., 98 S.W.2d 235.

96. D.C.—Grace v. Magruder, 148 F. 2d 679, 80 U.S.App.D.C. 53, certiorari denied 66 S.Ct. 24, 326 U.S. 720, 90 L.Ed. 426.
39 C.J. p 1319 note 50.

97. Ga.—Yearwood v. Peabody, 164 S.E. 901, 45 Ga.App. 451.

98. Wash.—White v. J. R. Watkins Co., 96 P.2d 456, 1 Wash.2d 466.

99. Mo.—Rutherford v. Tobin Quarries, 82 S.W.2d 918, 922, 336 Mo. 1171—Coul v. George B. Peck Dry Goods Co., 32 S.W.2d 758, 326 Mo. 870.

Right to delegate performance

An "independent contractor" has right to delegate to others the carrying out of the contract.
Cal.—Phillips v. Larrabee, 90 P.2d 820, 32 Cal.App.2d 720.
Va.—Texas Co. v. Zeigler, 14 S.E.2d 704, 177 Va. 557.

1. N.D.—La Bree v. Dakota Tractor & Equipment Co., 288 N.W. 476, 69 N.D. 561.

2. Wash.—Washington Recorder Pub. Co. v. Ernst, 91 P.2d 718, 199 Wash. 176, 124 A.L.R. 667.

3. W.Va.—Knicely v. West Virginia Midland R. Co., 61 S.E. 811, 64 W. Va. 278, 17 L.R.A.,N.S., 370.
39 C.J. p 1321 note 64.

4. Ill.—Jefferson v. Jameson & Morse Co., 46 N.E. 272, 165 Ill. 138.

Part of premises

It is not necessary that the entire and exclusive control of the premises be surrendered to such contractor, it being sufficient that the contractor is in possession of that part of the premises on which the work is to be done with the exclusive control of the work.—Geist v. Rothschild, 90 Ill.App. 324.

5. Va.—Bibb v. Norfolk & W. R. Co., 14 S.E. 163, 87 Va. 711.
39 C.J. p 1321 note 63.

6. Pa.—Bojarski v. M. F. Howlett, Inc., 140 A. 544, 291 Pa. 485.

7. U.S.—MacMillan v. Montecito Country Club, D.C.Cal., 65 F.Supp. 240—In re Ten Eyck Co., D.C.N.Y., 41 F.Supp. 375.
Conn.—Jack & Jill, Inc., v. Tone, 9 A.2d 497, 126 Conn. 114—Northwestern Mut. Life Ins. Co. v. Tone, 4 A.2d 640, 125 Conn. 183, 121 A. L.R. 993—Cumbo v. E. B. McGurk, Inc., 200 A. 328, 124 Conn. 433.
Mass.—Sluzis' Case, 198 N.E. 262, 264, 292 Mass. 351—Marsh v. Beraldi, 157 N.E. 347, 260 Mass. 225.
N.Y.—Hoffman Bros. v. Commercial Union Assur. Co., Limited, of London, England, 222 N.Y.S. 641, 221 App.Div. 167, affirmed 162 N.E. 531, 248 N.Y. 578.
Wis.—Miller & Rose v. Rich, 218 N. W. 716, 195 Wis. 468.

8. U.S.—Cimorelli v. New York Cent. R. Co., C.C.A.Ohio, 148 F.2d 575—Jones v. Goodson, C.C.A.Okl., 121 F.2d 176.
Ark.—Standard Oil Co. of Louisiana v. Chandler, 165 S.W.2d 595, 204 Ark. 895—Arkansas Fuel Oil Co. v. Scaletta, 140 S.W.2d 684, 200 Ark. 645—Moore v. Phillips, 120 S. W.2d 722, 197 Ark. 131—C. M. Farmer Stave & Heading Co. v. Whorton, 102 S.W.2d 79, 193 Ark. 708—Moaten v. Columbia Cotton Oil Co., 97 S.W.2d 629, 193 Ark. 97.
Cal.—Chinnis v. Pomona Pump Co., 98 P.2d 560, 36 Cal.App.2d 633—Casselman v. Hartford Accident & Indemnity Co., 98 P.2d 539, 36 Cal. App.2d 700—Fuller v. Lindenbaum, 84 P.2d 155, 29 Cal.App.2d 227—Hollingsworth v. Pemberton, 31 P. 2d 1063, 138 Cal.App. 261—Charles R. McCormick Lumber Co. v. O'Brien, 266 P. 594, 596, 90 Cal. App. 776.
Fla.—Gulf Refining Co. v. Wilkinson, 114 So. 503, 94 Fla. 664.
Ill.—Darner v. Colby, 31 N.E.2d 950, 375 Ill. 558, mandate conformed to 35 N.E.2d 952, 311 Ill.App. 352—Jones v. Standerfer, 15 N.E.2d 924, 296 Ill.App. 145.
Iowa.—McDonald v. Dodge, 1 N.W.2d 280, 231 Iowa 325.
Mo.—Burgess v. Garvin, 272 S.W. 108, 219 Mo.App. 162.

represents or is subject to the control or direction of the employer only as to the result to be obtained, and is free to follow his own judgment and discretion as to the mode, manner, and details of the performance of the work, he is an independent contractor and not a servant.[9] Nevertheless, the fact

N.C.—Brown v. L. H. Bottoms Truck Lines, 42 S.E.2d 71, 227 N.C. 299—Aderholt v. Condon, 128 S.E. 337, 189 N.C. 748.
Ohio.—Miller v. Metropolitan Life Ins. Co., 16 N.E.2d 447, 134 Ohio St. 289—Snodgrass v. Cleveland Co-op. Coal Co., 167 N.E. 493, 31 Ohio App. 470.
Pa.—Commonwealth v. Continental Rubber Works, 32 A.2d 878, 347 Pa. 514—Tyler v. MacFadden Newspapers Corporation, 163 A. 79, 107 Pa. Super. 106—Kaplan v. Bagrier, 12 Pa.Dist. & Co. 693.
S.D.—Halverson v. Sonotone Corp., 27 N.W.2d 596.
Tenn.—National Optical Stores Co. v. Bryant, 181 S.W.2d 139, 181 Tenn. 266—Tennessee Valley Appliances Co. v. Rowden, 146 S.W.2d 845, 124 Tenn.App. 845—Howell v. Shepherd, App., 196 S.W.2d 849.
Tex.—King v. Galloway, Com.App., 284 S.W. 942—Herndon v. Halliburton Oil Well Cementing Co., Civ.App., 154 S.W.2d 163—Brasher v. Carnation Co. of Texas., Civ. App., 92 S.W.2d 573, error dismissed—Fidelity Union Life Ins. Co. v. McGinnis, Civ.App., 62 S.W.2d 186—Gulf Refining Co. v. Rogers, Civ. App., 57 S.W.2d 183, error dismissed—Maryland Casualty Co. v. Donnelly, Civ.App., 50 S.W.2d 388, error dismissed—Kelly v. Lone Star Gas Co., Civ.App., 32 S.W.2d 699, reversed on other grounds Lone Star Gas Co. v. Kelly, Com.App., 46 S. W.2d 656.
Utah.—Chatelain v. Thackeray, 100 P.2d 191, 98 Utah 525.
W.Va.—Meyn v. Dulaney-Miller Auto Co., 191 S.E. 558, 118 W.Va. 545—Rogers v. Boyers, 170 S.E. 905, 114 W.Va. 107.
39 C.J. p 1317 note 12—31 C.J. p 475 note 33.

General employment

Where one is employed generally to perform certain services, and there is no specific contract to do certain piece of work according to specifications for stipulated sum, it is inferable that employer has retained right to control manner, method, and means of performance of contract, and that employee is not an "independent contractor."—Continental Casualty Co. v. Payne, 194 S.E. 428, 56 Ga.App. 873.

9. U.S.—Vaughan v. Warner, C.C.A. Pa., 157 F.2d 26—U. S. v. Wholesale Oil Co., C.C.A.Kan., 154 F.2d 745—Glenn v. Standard Oil Co., C.C.A.Ky., 148 F.2d 51—Jones v. Goodson, C.C.A.Okl., 121 F.2d 176—Waggaman v. General Finance Co. of Philadelphia, C.C.A.Pa., 116 F.2d 254—Ryan-Richards, Inc., v. Whitesides, C.C.A.Okl., 96 F.2d 826—P. F. Collier & Son Co. v. Hartfeil, C.C.A.Minn., 72 F.2d 625—Howard W. Luff Co. v. Capece, C. C.A.Ohio, 61 F.2d 635—Young v. Wilky Carrier Corporation, D.C.Pa., 54 F.Supp. 912, affirmed, C.C.A., 150 F.2d 764, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477—Walling v. Todd, D.C.Pa., 52 F. Supp. 62, motion denied 3 F.R.D. 490—**Corpus Juris cited in** Schroepfer v. A. S. Abell Co., D.C.Md., 48 F.Supp. 88, 96, affirmed, C.C.A., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060, rehearing denied 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595—Walling v. American Needlecrafts, D.C.Ky., 46 F.Supp. 16, reversed on other grounds, C.C.A., 139 F.2d 60—Kentucky Cottage Industries v. Glenn, D.C.Ky., 39 F.Supp. 642.
Ariz.—Alexander v. Alexander, 76 P. 2d 223, 51 Ariz. 269—Ocean Accident & Guarantee Corporation v. Kennison, 26 P.2d 113, 42 Ariz. 349—Maxey v. Johnson, 242 P. 866, 29 Ariz. 452.
Ark.—Crossett Lumber Co. v. McCain, 170 S.W.2d 64, 205 Ark. 631—Rice v. Sheppard, 168 S.W.2d 198, 205 Ark. 193—Standard Oil Co. of Louisiana v. Chandler, 165 S.W.2d 595, 204 Ark. 895—Arkansas Fuel Oil Co. v. Scaletta, 140 S.W.2d 684, 200 Ark. 645—Froman v. J. R. Kelley Stave & Heading Co., 123 S.W.2d 1081, 197 Ark. 545—Moore v. Phillips, 120 S.W.2d 722, 197 Ark. 131—C. M. Farmer Stave & Heading Co. v. Whorton, 102 S.W.2d 79, 193 Ark. 708—Moaten v. Columbia Cotton Oil Co., 97 S.W.2d 629, 193 Ark. 97—Mississippi River Fuel Corporation v. Young, 67 S.W.2d 581, 188 Ark. 575.
Cal.—**Corpus Juris cited in** People v. Grier, 128 P.2d 207, 212, 53 Cal. App.2d 841—Lee v. Nanny, 100 P. 2d 832, 38 Cal.App.2d 90—Chinnis v. Pomona Pump Co., 98 P.2d 560, 36 Cal.App.2d 633—Brooks v. Johnson, 72 P.2d 194, 22 Cal.App.2d 618—Berkowitz v. Pelton, 48 P.2d 756, 9 Cal.App.2d 80—Slyter v. Clinton Const. Co. of California, 290 P. 643, 107 Cal.App. 348.
Del.—**Corpus Juris cited in** Reardon v. Exchange Furniture Store, 183 A. 330, 332, 7 Harr. 321.
Fla.—Gulf Refining Co. v. Wilkinson, 114 So. 503, 94 Fla. 664.
Ill.—John Gabel Mfg. Co. v. Murphy, 62 N.E.2d 401, 390 Ill. 455—Ozark Minerals Co. v. Murphy, 51 N.E.2d 197, 384 Ill. 94—Darner v. Colby, 31 N.E.2d 950, 375 Ill. 558, mandate conformed to 35 N.E.2d 952, 311 Ill.App. 352—Ryan v. Associates Inv. Co. of Illinois, 18 N.E. 2d 47, 297 Ill.App. 544—Jones v. Standerfer, 15 N.E.2d 924, 296 Ill. App. 145.
Ind.—Gibbons v. Henke, Ind.App., 29 N.E.2d 995, 996, 108 Ind.App. 481.
Iowa.—Sanford v. Goodridge, 13 N. W.2d 40, 234 Iowa 1036—McDonald v. Dodge, 1 N.W.2d 280, 231 Iowa 325—Reynolds v. Skelly Oil Co., 287 N.W. 823, 227 Iowa 163—Hough v. Central States Freight Service, 269 N.W. 1, 222 Iowa 548.
Kan.—Smith v. Brown, 107 P.2d 718, 152 Kan. 758.
Ky.—H. H. Miller Const. Co. v. Collins, 108 S.W.2d 663, 269 Ky. 670—Leachman v. Belknap Hardware & Mfg. Co., 84 S.W.2d 46, 260 Ky. 123—American Sav. Life Ins. Co. v. Riplinger, 60 S.W.2d 115, 249 Ky. 8—Yellow Creek Coal Co. v. Lawson, 16 S.W.2d 1043, 229 Ky. 245.
La.—Crysel v. Gifford-Hill & Co., App., 158 So. 264.
Mass.—Bell v. Sawyer, 47 N.E.2d 1, 313 Mass. 250—Ferguson v. Ashkenday, 29 N.E.2d 828, 307 Mass. 197—Herrick v. City of Springfield, 192 N.E. 626, 288 Mass. 212.
Miss.—Parks v. Lynch, 195 So. 331—Cook v. Wright, 171 So. 686, 177 Miss. 644.
Mont.—Greening v. Gazette Printing Co., 88 P.2d 862, 108 Mont. 158—Harrington v. H. D. Lee Mercantile Co., 33 P.2d 553, 97 Mont. 40—Ulmen v. Schweiger, 12 P.2d 856, 92 Mont. 331.
Mo.—Stein v. Battenfeld Oil & Grease Co., 39 S.W.2d 345, 327 Mo. 804—Mabry v. Swift & Co., App., 145 S.W.2d 163—Miller v. St. Louis Realty & Securities Co., App., 103 S.W.2d 510—Manus v. Kansas City Distributing Corporation, 74 S.W.2d 506, 228 Mo.App. 905—Andres v. Cox, 23 S.W.2d 1066, 223 Mo.App. 1139—Burgess v. Garvin, 272 S.W. 108, 219 Mo.App. 162.
N.Y.—Irwin v. Klein, 3 N.E.2d 601, 271 N.Y. 477—Claim of Miller, 29 N.Y.S.2d 15, 262 App.Div. 335—**Corpus Juris cited in** Mace v. Morrison & Fleming, 44 N.Y.S.2d 672, 674, 267 App.Div. 29.
N.M.—Sucetti v. Jones' Estate, 32 P.2d 815, 38 N.M. 327.
Ohio.—Miller v. Metropolitan Life Ins. Co., 16 N.E.2d 447, 134 Ohio St. 289—Gallick v. Ott, App., 51 N. E.2d 404—Snodgrass v. Cleveland Co-op. Coal Co., 167 N.E. 493, 31 Ohio App. 470.
Okl.—Sawin v. Nease, 97 P.2d 27, 186 Okl. 195—Texas Pipe Line Co.

that a certain amount of freedom of action is inherent in the nature of the work does not necessarily mean that the person employed is an independent contractor rather than a servant.[10]

Principal consideration or test. Although it has been held that the fact that by the contract of employment the employer foregoes the right of control does not make one who is otherwise a mere servant an independent contractor,[11] it has, nevertheless, been very generally held that the right to control the mode of doing the work contracted for is the principal consideration in determining whether one employed is an independent contractor or a servant.[12] A similar expression of the principle is that

of Oklahoma v. Willis, 45 P.2d 138, 172 Okl. 148.

Pa.—Commonwealth v. Continental Rubber Works, 32 A.2d 878, 347 Pa. 514—Joseph v. United Workers Ass'n, 28 A.2d 470, 343 Pa. 636—Pennsylvania Turnpike Commission, to Use of Albright, v. U. S. Fidelity & Guaranty Co., 23 A.2d 416, 343 Pa. 543—Fuller v. Palazzolo, 197 A. 225, 329 Pa. 93—Pennsylvania R. Co. v. Allegheny County, 188 A. 178, 324 Pa. 216—Long v. Eastern Paving Co., 145 A. 71, 295 Pa. 163—Martin v. Wentz, 21 A.2d 444, 145 Pa.Super. 424—Huck-Gerhardt Co. v. Davies, 3 A.2d 963, 134 Pa.Super. 430—Tyler v. MacFadden Newspapers Corporation, 163 A. 79, 107 Pa.Super. 166—O'Donnell v. South Fayette Tp. School Dist., 161 A. 887, 105 Pa. Super. 488.

Tenn.—Howell v. Shepherd, App., 196 S.W.2d 849—Tennessee Valley Appliances v. Rowden, 146 S.W.2d 845, 24 Tenn.App. 487—Grace v. Louisville & N. R. Co., 89 S.W.2d 354, 19 Tenn.App. 382.

Tex.—Herndon v. Halliburton Oil Well Cementing Co., Civ.App., 154 S.W.2d 163—R. E. Cox Dry Goods Co. v. Kellog, Civ.App., 145 S.W.2d 675, error refused—Clark v. Lynch, Civ.App., 139 S.W.2d 294.

Wash.—Patent Scaffolding Co. v. Roosevelt Apartments, 18 P.2d 857, 171 Wash. 507.

W.Va.—Meyn v. Dulaney-Miller Auto Co., 191 S.E. 558, 118 W.Va. 545—Rogers v. Boyers, 170 S.E. 905, 114 W.Va. 107.

39 C.J. p 1317 note 11—31 C.J. p 475 notes 34, 37.

Where owner has no interest in performance of contract except that finished product shall be in accordance with plans and specifications, workman is "independent contractor."—Kesler Const. Co. v. Dixson Holding Corporation, 175 S.E. 843, 207 N.C. 1.

It is fundamental to the existence of "independent contractor" relationship that there be an absolute independence of action on part of contractor in execution of the work assumed by him, and, if contractee has power to interfere with or control manner of execution or performance, then contractor ceases to be independent and his status degenerates into that of an "employee" or "servant."—Coon v. Monroe Scrap Material Co., La.App., 191 So. 607—Olano v. Leathers, La.App., 2 So.2d 486.

Freedom of action

The term "independent contractor" connotes a freedom of action and choice in respect of undertaking.

La.—Gallaher v. Ricketts, App., 187 So. 351, 355, annulled on other grounds 191 So. 713.

Pa.—Silveus v. Grossman, 161 A. 362, 364, 307 Pa. 272.

10. Cal.—Ryan v. Farrell, 280 P. 945, 208 Cal. 200—Graetch v. Dix, 156 P.2d 79, 68 Cal.App.2d 115—Curcic v. Nelson Display Co., 64 P.2d 1153, 19 Cal.App.2d 46.

11. Ohio.—Tiffin v. McCormack, 34 Ohio St. 638, 32 Am.R. 408.

39 C.J. p 1316 note 6.

12. U.S.—Blankenship v. W. U. Tel. Co., C.C.A.W.Va., 161 F.2d 168—Birmingham v. Bartels, C.C.A. Iowa, 157 F.2d 295—Hearst Publications v. N. L. R. B., C.C.A.9, 136 F.2d 608, reversed on other grounds 64 S.Ct. 851, 322 U.S. 111, 88 L.Ed. 1170, rehearing denied 64 S.Ct. 1148, 2 cases, 322 U.S. 769, 88 L.Ed. 1595, N. L. R. B. v. Stockholders Pub. Co., 64 S.Ct. 1148, 322 U.S. 770, 88 L.Ed. 1595, and N. L. R. B. v. Times-Mirror Co., 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595—American Oil Co. v. Fly, C.C.A. Miss., 135 F.2d 491—Jones v. Goodson, C.C.A.Okl., 121 F.2d 176—H. E. Wolfe Const. Co. v. Fersner, C. C.A.S.C., 58 F.2d 27—Underwood v. Commissioner of Internal Revenue, C.C.A., 56 F.2d 67—De Bord v. Proctor & Gamble Distributing Co., D.C.Ga., 58 F.Supp. 157, affirmed, C.C.A., 146 F.2d 54—Whalen v. Harrison, D.C.Ill., 51 F.Supp. 515—Brown v. Minnagas Co., D.C. Minn., 51 F.Supp. 363—In re Ten Eyck Co., D.C.N.Y., 41 F.Supp. 375.

Ala.—Dortch Baking Co. v. Schoel, 194 So. 807, 239 Ala. 266—Lowe v. Pople, 179 So. 536, 235 Ala. 441—W. P. Brown & Sons Lumber Co. v. Crossley, 161 So. 536, 230 Ala. 403, followed in 161 So. 538, 230 Ala. 407—**Corpus Juris quoted in** Martin v. Republic Steel Co., 146 So. 276, 278, 226 Ala. 209—General Exchange Ins. Corporation v. Findlay, 121 So. 710, 219 Ala. 193—**Corpus Juris cited in** Daves v. Rain, 178 So. 59, 62, 28 Ala.App. 54—Great Atlantic & Pacific Tea Co. v. Donaldson, 156 So. 859, 26 Ala.App. 179, certiorari denied 156 So. 865, 229 Ala. 276.

Ark.—Ozan Lumber Co. v. Tidwell, 198 S.W.2d 182—Crossett Lumber Co. v. McCain, 170 S.W.2d 64, 205 Ark. 631—Rice v. Sheppard, 168 S. W.2d 198, 205 Ark. 193—Wilson v. Davison, 122 S.W.2d 539, 197 Ark. 99—C. M. Farmer Stave & Heading Co. v. Whorton, 102 S.W.2d 79, 193 Ark. 708—Moaten v. Columbia Cotton Oil Co., 97 S.W.2d 629, 193 Ark. 97—Hobbs-Western Co. v. Carmical, 91 S.W.2d 605, 192 Ark. 59—Mississippi River Fuel Corporation v. Morris, 35 S.W.2d 607, 183 Ark. 207.

Cal.—Clarke v. Hernandez, App., 179 P.2d 834—Burlingham v. Gray, 137 P.2d 9, 22 Cal.2d 87—**Corpus Juris cited in** People v. Grier, 128 P.2d 207, 212, 53 Cal.App.2d 841—Lee v. Nanny, 100 P.2d 832, 38 Cal.App. 2d 90—Brooks v. Johnson, 72 P.2d 194, 22 Cal.App.2d 618—Curcic v. Nelson Display Co., 64 P.2d 1153, 19 Cal.App.2d 46—Bohanon v. James McClatchy Pub. Co., 60 P.2d 510, 16 Cal.App.2d 188—Winther v. Industrial Accident Commission of California, 60 P.2d 342, 16 Cal.App.2d 131—Thompson v. Robinson-Roberts Co., 56 P.2d 599, 13 Cal.App.2d 166—Chapman v. Edwards, 24 P.2d 211, 133 Cal.App. 72—Weinberg v. Clark, 8 P.2d 164, 120 Cal.App. 362—Curran v. Earle C. Anthony, Inc., 247 P. 236, 77 Cal.App. 462.

Conn.—Bates v. Connecticut Power Co., 33 A.2d 342, 130 Conn. 256—Ross v. Post Pub. Co., 29 A.2d 768, 129 Conn. 564—Robert C. Buell & Co. v. Donaher, 18 A.2d 697, 127 Conn. 606—Jack & Jill, Inc. v. Tone, 9 A.2d 497, 126 Conn. 114—Northwestern Mut. Life Ins. Co. v. Tone, 4 A.2d 640, 125 Conn. 183, 121 A.L.R. 993—Caraher v. Sears, Roebuck & Co., 200 A. 324, 124 Conn. 409—Hall v. Sera, 152 A. 148, 112 Conn. 291.

Del.—**Corpus Juris cited in** Reardon v. Exchange Furniture Store, 183 A. 330, 332, 7 W.W.Harr. 321.

D.C.—Grace v. Magruder, 148 F.2d 679, 80 U.S.App.D.C. 53, certiorari denied 66 S.Ct. 24.

Fla.—Gulf Refining Co. v. Wilkinson, 114 So. 503, 94 Fla. 664.

Ga.—Blair v. Smith, 41 S.E.2d 133, 201 Ga. 747—Gulf Life Ins. Co. v.

the test is whether the employee represents his em- | ployer as to the result of the work only or as to the

McDaniel, App., 43 S.E.2d 784—Blakely v. U. S. Fidelity & Guaranty Co., 21 S.E.2d 339, 67 Ga.App. 795—Nichols v. G. L. Hight Motor Co., 10 S.E.2d 439, 63 Ga.App. 155—Scott v. Minor, 191 S.E. 263, 55 Ga.App. 714—Bibb Mfg. Co. v. Martin, 185 S.E. 137, 139, 53 Ga. App. 137—Yearwood v. Peabody, 164 S.E. 901, 45 Ga.App. 451—Massee & Felton Lumber Co. v. Macon Cooperage Co., 162 S.E. 396, 44 Ga. App. 590.

Idaho.—**Corpus Juris cited in** Joslin v. Idaho Times Pub. Co., 53 P.2d 323, 328, 56 Idaho 242.

Ill.—Ozark Minerals Co. v. Murphy, 51 N.E.2d 197, 384 Ill. 94—Kehrer v. Industrial Commission, 6 N.E.2d 635, 365 Ill. 378—Trzaska v. Bigane, 60 N.E.2d 264, 325 Ill.App. 528—Ryan v. Associates Inv. Co. of Illinois, 18 N.E.2d 47, 297 Ill.App. 544—Jones v. Standerfer, 15 N.E. 2d 924, 296 Ill.App. 145—Hoke v. Harrisburg Hospital, 281 Ill.App. 247—Scharfenstein v. Forest City Knitting Co., 253 Ill.App. 190.

Iowa.—Sanford v. Goodridge, 13 N.W.2d 40, 234 Iowa 1036—McDonald v. Dodge, 1 N.W.2d 280, 231 Iowa 325—**Corpus Juris cited in** Arne v. Western Silo Co., 242 N.W. 539, 542, 214 Iowa 511.

Ky.—American Slav Life Ins. Co. v. Riplinger, 60 S.W.2d 115, 249 Ky. 8—**Corpus Juris cited in** Bowen v. Gradison Constr. Co., 32 S.W.2d 1014, 1019, 236 Ky. 270.

La.—Olano v. Leathers, App., 2 So. 2d 486—Taylor v. Victoria Nav. Co., App., 176 So. 519—Goff v. Sinclair Refining Co., App., 162 So. 452, 459—Goetschel v. Glassell-Wilson Co., 127 So. 81, 13 La.App. 424.

Md.—Henkelmann v. Metropolitan Life Ins. Co., 26 A.2d 418, 180 Md. 591.

Mass.—Bell v. Sawyer, 47 N.E.2d 1, 313 Mass. 250—Parker v. Taylor, 3 N.E.2d 25, 295 Mass. 51—Marsh v. Beraldi, 157 N.E. 347, 260 Mass. 225.

Mich.—Hamilton v. J. Kelsey McClure, Inc., 270 N.W. 308, 278 Mich. 307.

Minn.—Willner v. Wallinder Sash & Door Co., 28 N.W.2d 682—Carter v. W. J. Dyer & Bro., 243 N.W. 436, 438, 186 Minn. 413—Robertson v. Olson, 232 N.W. 43, 181 Minn. 240.

Miss.—McDonald v. Hall-Neely Lumber Co., 147 So. 315, 165 Miss. 143—**Corpus Juris cited in** Gulf Refining Co. v. Nations, 145 So. 327, 332, 167 Miss. 315—**Corpus Juris cited in** Kisner v. Jackson, 132 So. 90, 91.

Mo.—Foster v. Campbell, 196 S.W.2d 147—Mattan v. Hoover Co., 166 S.W.2d 557, 350 Mo. 506—Corder v. Morgan Roofing Co., 166 S.W.2d 455, 350 Mo. 382—**Corpus Juris cited in** Ross v. St. Louis Dairy Co., 98 S.W.2d 717, 723, 339 Mo. 982—Clayton v. Wells, 26 S.W.2d 969, 324 Mo. 1176—Russell v. Union Elec. Co. of Mo., 191 S.W.2d 278, 238 Mo.App. 1074—Becher v. Bonahue, App., 168 S.W.2d 960—Dorsett v. Pevely Dairy Co., App., 124 S.W.2d 624—**Corpus Juris cited in** Young v. Sinclair Refining Co., App., 92 S.W.2d 995, 999—**Corpus Juris cited in** Manus v. Kansas City Distributing Corporation, 74 S.W.2d 506, 509, 228 Mo.App. 905—**Corpus Juris cited in** Igo v. Alford, 69 S.W.2d 317, 319, 228 Mo. App. 457—Clayton v. Hydraulic Press Brick Co., App., 27 S.W.2d 52—Aubuchon v. Security Const. Co., App., 291 S.W. 187.

Mont.—**Corpus Juris cited in** Coombes v. Letcher, 66 P.2d 769, 772, 104 Mont. 371.

Neb.—Curry v. Bruns, 285 N.W. 88, 136 Neb. 74—Peterson v. Brinn & Jensen Co., 277 N.W. 82, 133 Neb. 796, vacated on other grounds 280 N.W. 171, 134 Neb. 909.

N.Y.—**Corpus Juris cited in** Mace v. Morrison & Fleming, 44 N.Y.S.2d 672, 674, 267 App.Div. 29—**Corpus Juris cited in** In re Electrolux Corporation, 30 N.Y.S.2d 972, 977, 262 App.Div. 642—**Corpus Juris cited in** Claim of Miller, 29 N.Y.S. 2d 15, 17, 262 App.Div. 385—Haykl v. Drees, 286 N.Y.S. 38, 247 App. Div. 90, motion granted 4 N.E.2d 745, 272 N.Y. 576 and Haykl v. Drees, 4 N.E.2d 745, 272 N.Y. 577—**Corpus Juris quoted in** Hogan v. Comac Sales, 281 N.Y.S. 207, 213, 245 App.Div. 216.

N.C.—Lassiter v. Cline, 22 S.E.2d 558, 222 N.C. 271—Inman v. Gulf Refining Co., 140 S.E. 289, 194 N.C. 566—Aderholt v. Condon, 128 S.E. 337, 189 N.C. 748.

N.D.—La Bree v. Dakota Tractor & Equipment Co., 288 N.W. 476, 69 N.D. 561.

Ohio.—Commercial Motor Freight v. Ebright, 54 N.E.2d 297, 143 Ohio St. 127, 151 A.L.R. 1321—**Corpus Juris cited in** Gillum v. Industrial Commission, 48 N.E.2d 234, 235, 141 Ohio St. 373—Gallick v. Ott, App., 51 N.E.2d 404—Post Pub. Co. v. Schickling, 154 N.E. 751, 22 Ohio App. 318, affirmed Schickling v. Post Pub. Co., 155 N.E. 143, 115 Ohio St. 589.

Okl.—**Corpus Juris cited in** State Highway Commission v. Brewer, 165 P.2d 612, 614, 196 Okl. 437—**Corpus Juris cited in** Atlas Life Ins. Co. of Tulsa v. Foraker, 165 P.2d 323, 326, 196 Okl. 389—Modern Motors v. Elkins, 113 P.2d 969, 189 Okl. 134—**Corpus Juris cited in** Matherly v. Hamer, 50 P. 2d 619, 620, 174 Okl. 403.

Pa.—Blake v. Capanna, 36 A.2d 789, 349 Pa. 144—Joseph v. United Workers Ass'n, 23 A.2d 470, 343 Pa. 636—Tyler v. MacFadden Newspapers Corporation, 163 A. 79, 107 Pa.Super. 166—Commonwealth v. McNelly, Com.Pl., 56 Dauph.Co. 95.

Tenn.—Howell v. Shepherd, 196 S.W. 2d 849—**Corpus Juris quoted in** Knight v. Hawkins, 173 S.W.2d 163, 166, 26 Tenn.App. 448—**Corpus Juris cited in** Copeland v. Cherry, 95 S.W.2d 1275, 1278, 20 Tenn.App. 122—Grace v. Louisville & N. R. Co., 89 S.W.2d 354, 19 Tenn.App. 382.

Tex.—**Corpus Juris cited in** Ochoa v. Winerich Motor Sales Co., 94 S.W.2d 416, 419, 127 Tex. 542, reversing, Civ.App., Winerich Motor Sales Co. v. Ochoa, 58 S.W.2d 193, remanding cause, Civ.App., 98 S.W.2d 235—National Cash Register Co. v. Rider, Com.App., 24 S.W.2d 28—Standard Ins. Co. v. McKee, Civ.App., 201 S.W.2d 627, refused no reversible error—Herndon v. Halliburton Oil Well Cementing Co., Civ.App., 154 S.W.2d 163—Shahan v. Biggs & Co., Civ.App., 123 S.W.2d 686—Panama Refining Co. v. Crouch, Civ.App., 98 S.W.2d 271, affirmed 124 S.W.2d 988, 132 Tex. 608—Haden Co. v. Riggs, Civ. App., 84 S.W.2d 789, affirmed Riggs v. Haden Co., 94 S.W.2d 152, 127 Tex. 314—Brasher v. Carnation Co. of Texas, Civ.App., 92 S.W.2d 573, error refused—Allen v. Republic Bldg. Co., Civ.App., 84 S.W.2d 506—Moreman v. Armour & Co., Civ. App., 65 S.W.2d 334, error refused—Dave Lehr, Inc. v. Brown, Civ. App., 58 S.W.2d 886, reversed on other grounds 91 S.W.2d 693, 127 Tex. 236—Maryland Casualty Co. v. Donnelly, Civ.App., 50 S.W.2d 388, error dismissed—McElwrath v. Dixon, Civ.App., 49 S.W.2d 995—**Corpus Juris quoted in** Hoffman v. Houston Clinic, Civ.App., 41 S.W.2d 134, 139—**Corpus Juris quoted in** T. J. Mansfield Const. Co. v. Gorsline, Civ.App., 278 S.W. 485, 486, reversed on other grounds, Com.App., 288 S.W. 1067, rehearing denied 292 S.W. 187—McKinney v. Sherwin-Williams Co. of Texas, Civ.App., 271 S.W. 133.

Vt.—Rich v. Holmes, 160 A. 173, 175, 104 Vt. 433—Rich v. Holmes, 160 A. 175, 104 Vt. 441.

Va.—Knight v. Peoples Nat. Bank of Lynchburg, 29 S.E.2d 364, 182 Va. 380—Ross v. Schneider, 27 S.E. 2d 154, 181 Va. 931—Hann v. Times-Dispatch Pub. Co., 184 S.E. 183, 166 Va. 102.

Wash.—Miles v. Pound Motor Co.,

means as well as the result.[13] It has been variously held that control as to the manner, mode, and detail of the performance of the work is the main,[14] essential,[15] and decisive[16] question; the chief[17] and distinguishing[18] criterion; the prime,[19] decisive,[20] determining[21] and most important[22] factor; the chief[23] and controlling[24] consideration; the most important element;[25] the real test,[26] and, likewise,

117 P.2d 179, 10 Wash.2d 492—Femling v. Star Pub. Co., 81 P. 2d 293, 195 Wash. 395, set aside on other grounds 84 P.2d 1008, 195 Wash. 395—Sills v. Sorenson, 73 P. 2d 798, 192 Wash. 318—Carlson v. P. F. Collier & Son Corporation, 67 P.2d 842, 192 Wash. 301—**Corpus Juris cited in** Mitchell v. Maytag-Pacific-Intermountain Co., 51 P.2d 393, 397, 184 Wash. 342—**Corpus Juris cited in** Leech v. Sultan Ry. & Timber Co., 297 P. 203, 204, 161 Wash. 426.

W.Va.—Oakley v. Thornbury, 171 S. E. 426, 114 W.Va. 188—Rogers v. Boyers, 170 S.E. 905, 114 W.Va. 107—E. C. Klipstein & Sons Co. v. State Compensation Com'r, 169 S. E. 169, 113 W.Va. 567—**Corpus Juris cited in** Greaser v. Appaline Oil Co., 155 S.E. 170, 171, 109 W.Va. 396.

Wis.—Kolman v. Dvorak, 262 N.W. 622, 219 Wis. 139—Sprecher v. Roberts, 248 N.W. 795, 212 Wis. 69—Kruse v. Weigand, 235 N.W. 426, 204 Wis. 195, followed in 235 N.W. 431, 204 Wis. 206, Smith v. Weigand, 235 N.W. 431, 204 Wis. 207, Smith v. Weigand, 235 N.W. 431, 204 Wis. 208, two cases, and Woodard v. Weigand, 235 N.W. 432, 204 Wis. 209.

Wyo.—**Corpus Juris cited in** Stockwell v. Morris, 22 P.2d 189, 190, 46 Wyo. 1.

39 C.J. p 1316 note 7—31 C.J. p 474 note 32.

When master-servant relationship exists with respect to liability of master to third persons see infra § 563.

Test for tort liability

The master's right or power to control manner in which servant shall do work is not always sole test for determining existence of relation of master and servant, but is test of master's liability for servant's negligent acts while performing his duties as servant and for determining whether party performing work is servant or independent contractor.—Knapp v. Standard Oil Co. of California, 68 P.2d 1052, 156 Or. 564.

The distinction between a servant and an independent contractor lies in the right of control over the performance of the work.

U.S.—Karas v. Klein, D.C.Minn., 70 F.Supp. 469—In re Ten Eyck Co., D.C.N.Y., 41 F.Supp. 375.

Cal.—Casselman v. Hartford Accident & Indemnity Co., 98 P.2d 539, 36 Cal.App.2d 700.

Conn.—Robert C. Buell & Co. v. Danaher, 18 A.2d 697, 127 Conn. 606—Beaverdale Memorial Park v. Danaher, 15 A.2d 17, 127 Conn. 175.

Ill.—Dean v. Ketter, 65 N.E.2d 572, 328 Ill.App. 206.

Mo.—Aubuchon v. Security Const. Co., App., 291 S.W. 187.

N.Y.—In re Morton, 30 N.E.2d 369, 284 N.Y. 167, motion denied In re Morton, 31 N.E.2d 205, 284 N.Y. 788.

13. U.S.—Walling v. McKay, D.C. Neb., 70 F.Supp. 160—Dugas v. Nashua Mfg. Co., D.C.N.H., 62 F. Supp. 846, appeal dismissed, C.C. A., 154 F.2d 655—Walling v. Todd, D.C.Pa., 52 F.Supp. 62, motion denied 3 F.R.D. 490.

Cal.—Fuller v. Lindenbaum, 84 P.2d 155, 29 Cal.App.2d 227.

Ill.—John Gabel Mfg. Co. v. Murphy, 62 N.E.2d 401, 390 Ill. 455.

Iowa.—Hough v. Central States Freight Service, 269 N.W. 1, 222 Iowa 548.

Ky.—Eastern Const. Co. v. Back, 85 S.W.2d 859, 237 Ky. 505.

La.—Merritt v. E. L. Bruce, App., 166 So. 195.

Miss.—McDonald v. Hall-Neely Lumber Co., 147 So. 315, 165 Miss. 143.

Ohio.—Snodgrass v. Cleveland Coop. Coal Co., 167 N.E. 493, 31 Ohio App. 470.

Pa.—Huck-Gerhardt Co. v. Davies, 3 A.2d 963, 134 Pa.Super. 430.

Tex.—Clark v. Lynch, Civ.App., 139 S.W.2d 294—J. M. Huber Petroleum Co. v. Yake, Civ.App., 121 S. W.2d 670—Winerich Motor Sales Co. v. Ochoa, Civ.App., 58 S.W.2d 193—Brigman v. Holt & Bowers, Civ.App., 32 S.W.2d 220, error refused.

Va.—Knight v. Peoples Nat. Bank of Lynchburg, 29 S.E.2d 364, 182 Va. 380.

Wash.—White v. J. R. Watkins Co., 96 P.2d 456, 1 Wash.2d 466—Amann v. City of Tacoma, 16 P.2d 601, 170 Wash. 296.

13 C.J. p 212 note 62—39 C.J. p 1317 note 10—31 C.J. p 475 notes 36, 37.

One is not "master" who is interested in ultimate result of work done as whole, but not in details of performance.—McDonald v. Hall-Neely Lumber Co., 147 So. 315, 165 Miss. 143.

14. U.S.—Glenn v. Beard, C.C.A.Ky., 141 F.2d 376, certiorari denied 65 S.Ct. 57, 323 U.S. 724, 89 L.Ed. 582, rehearing denied 65 S.Ct. 910, 324 U.S. 889, 89 L.Ed. 1437.

Ky.—Ruth Bros. v. Stambaugh's Adm'r, 122 S.W.2d 501, 275 Ky. 677.

15. Tex.—National Cash Register Co. v. Rider, Com.App., 24 S.W.2d 28—Shahan v. Biggs & Co., Civ. App., 123 S.W.2d 686.

16. Ark.—Hobbs-Western Co. v. Carmical, 91 S.W.2d 605, 192 Ark. 59—Mississippi River Fuel Corporation v. Morris, 35 S.W.2d 607, 183 Ark. 207.

17. Ky.—Barnes v. Indian Refining Co., 134 S.W.2d 620, 280 Ky. 811.

18. Pa.—Blakey v. Capanna, 36 A.2d 789, 349 Pa. 144—Commonwealth v. Wertz, Com.Pl., 53 Dauph.Co. 353.

19. La.—Taylor v. Victoria Nav. Co., App., 176 So. 519.

20. Conn.—Northwestern Mut. Life Ins. Co. v. Tone, 4 A.2d 640, 125 Conn. 183, 121 A.L.R. 993.

21. Cal.—Los Flores School Dist. v. Industrial Accident Commission, 56 P.2d 581, 13 Cal.App.2d 180.

Mo.—Clayton v. Hydraulic Press Brick Co., App., 27 S.W.2d 52.

Okl.—Kelly v. Cann, 136 P.2d 896, 192 Okl. 446.

22. Cal.—Tomlin v. California Employment Commission, 180 P.2d 342.

D.C.—Grace v. Magruder, 148 F.2d 679, 80 U.S.App.D.C. 53, certiorari denied 66 S.Ct. 24.

Ill.—Kehrer v. Industrial Commission, 6 N.E.2d 635, 365 Ill. 378.

23. Cal.—Curran v. Earle C. Anthony, Inc., 247 P. 236, 77 Cal.App. 462.

Ky.—American Sav. Life Ins. Co. v. Riplinger, 60 S.W.2d 115, 249 Ky. 8.

Wash.—White v. J. R. Watkins Co., 96 P.2d 456, 1 Wash.2d 466.

24. Conn.—Robert C. Buell & Co. v. Danaher, 18 A.2d 697, 127 Conn. 606—Jack & Jill, Inc., v. Tone, 9 A.2d 497, 126 Conn. 114.

25. Tex.—Maryland Casualty Co. v. Donnelly, Civ.App., 50 S.W.2d 388, error dismissed.

One of the most decisive elements

The existence or absence of power on part of employer to control conduct of employment is one of the most decisive elements to be considered in determining whether employee is an "independent contractor."—Standard Oil Co. v. Glenn, D. C.Ky., 52 F.Supp. 755, affirmed, C.C. A., 148 F.2d 51.

26. Cal.—George v. Chaplin, 279 P. 485, 99 Cal.App. 709.

Neb.—Peterson v. Brinn & Jensen Co., 277 N.W. 82, 133 Neb. 796, vacated on other grounds 280 N.W. 171, 134 Neb. 909.

such control has been held to be the essential,[27] important,[28] principal,[29] primary,[30] ultimate,[31] basic,[32] vital,[33] supreme,[34] decisive,[35] and controlling[36] test.

"Control" means the right to control rather than its actual exercise;[37] it is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant;[38] if the employer has the right of control, it is immaterial whether he actually exercises it,[39] although the extent of con-

27. Ala.—Moore-Handley Hardware Co. v. Williams, 189 So. 757, 238 Ala. 189.

28. U.S.—Cimorelli v. New York Cent. R. Co., C.C.A.Ohio, 148 F.2d 575.
Cal.—Graetch v. Dix, 156 P.2d 79, 68 Cal.App.2d 115—California Employment Commission v. Los Angeles Down Town Shopping News Corporation, App., 139 P.2d 342—Baugh v. Rogers, App., 138 P.2d 757.
Iowa.—McDonald v. Dodge, 1 N.W.2d 280, 231 Iowa 325.
La.—Olano v. Leathers, App., 2 So. 2d 486.
N.C.—Lassiter v. Cline, 22 S.E.2d 558, 222 N.C. 271.
Va.—Texas Co. v. Zeigler, 14 S.E.2d 704, 177 Va. 557.

29. Mo.—Gorman v. A. R. Jackson Kansas City Showcase Works Co., App., 19 S.W.2d 559—Aubuchon v. Security Const. Co., App., 291 S.W. 187.
Wis.—Employers Mut. Liability Ins. Co. v. Brower, 272 N.W. 359, 224 Wis. 485—Town of Eagle v. Industrial Commission, 266 N.W. 274, 221 Wis. 166—Kolman v. Dvorak, 262 N.W. 622, 219 Wis. 139.
Wyo.—Stockwell v. Morris, 22 P.2d 189, 190, 46 Wyo. 1.

30. N.D.—La Bree v. Dakota Tractor & Equipment Co., 288 N.W. 476, 69 N.D. 561.

31. Ariz.—Consolidated Motors v. Ketcham, 66 P.2d 246, 49 Ariz. 295.
Mo.—Maltz v. Jackoway-Katz Cap Co., 82 S.W.2d 909, 336 Mo. 1000.
Tenn.—Grace v. Louisville & N. R. Co., 89 S.W.2d 354, 19 Tenn.App. 382.
Tex.—Dave Lehr, Inc., v. Brown, Civ. App., 58 S.W.2d 886, reversed on other grounds 91 S.W.2d 693, 127 Tex. 236.
Wash.—Miles v. Pound Motor Co., 117 P.2d 179, 10 Wash.2d 492.

32. Mich.—Hamilton v. J. Kelsey McClure, Inc., 270 N.W. 308, 278 Mich. 307.
Tex.—Brasher v. Carnation Co. of Texas, Civ.App., 92 S.W.2d 573, error dismissed.

33. Ark.—Ozan Lumber Co. v. Tidwell, 198 S.W.2d 182—Rice v. Sheppard, 168 S.W.2d 198, 205 Ark. 193—C. M. Farmer Stave & Heading Co. v. Whorton, 102 S.W.2d 79, 193 Ark. 708.

34. Tex.—Herndon v. Halliburton Oil Well Cementing Co., Civ.App., 154 S.W.2d 163, error refused.

35. Conn.—Caraher v. Sears, Roebuck & Co., 200 A. 324, 124 Conn. 409.
Mo.—Maltz v. Jackoway-Katz Cap Co., 82 S.W.2d 909, 336 Mo. 1000.
Tex.—Moreman v. Armour & Co., Civ.App., 65 S.W.2d 334, error refused.

36. Ga.—Nichols v. G. L. Hight Motor Co., 10 S.E.2d 439, 63 Ga.App. 155.
Va.—Knight v. Peoples Nat. Bank of Lynchburg, 29 S.E.2d 364, 182 Va. 380.

37. U.S.—Cimorelli v. New York Cent. R. Co., C.C.A.Ohio, 148 F.2d 575—MacMillan v. Montecito Country Club, D.C.Cal., 65 F.Supp. 240—Whalen v. Harrison, D.C.Ill., 51 F.Supp. 515.
Ala.—Moore-Handley Hardware Co. v. Williams, 189 So. 757, 238 Ala. 189—**Corpus Juris cited in** Ex parte Board of School Com'rs of Mobile County, 178 So. 63, 64, 235 Ala. 82.
Ariz.—Southwest Lumber Mills v. Industrial Commission of Arizona, 134 P.2d 162, 60 Ariz. 199.
Ark.—Crossett Lumber Co. v. McCain, 170 S.W.2d 64, 205 Ark. 631—Rice v. Sheppard, 168 S.W.2d 198, 205 Ark. 193—Wilson v. Davison, 122 S.W.2d 539, 197 Ark. 99—Arkansas Power & Light Co. v. Richenback, 119 S.W.2d 515, 196 Ark. 620.
Cal.—Burlingham v. Gray, 137 P.2d 9, 22 Cal.2d 87—Robinson v. George, 105 P.2d 914, 16 Cal.2d 238—Graetch v. Dix, 156 P.2d 79, 68 Cal.App.2d 115—**Corpus Juris cited in** Associated Indemnity Corporation v. Industrial Accident Commission, 133 P.2d 698, 700, 56 Cal. App.2d 804—California Employment Commission v. Los Angeles Down Town Shopping News Corporation, App., 139 P.2d 342—**Corpus Juris cited in** Hollingsworth v. Pemberton, 31 P.2d 1063, 1064, 138 Cal.App. 261—Smith v. Fall River Joint Union High School Dist., 5 P.2d 930, 118 Cal.App. 673.
Ky.—**Corpus Juris quoted in** Bowen v. Gradison Constr. Co., 32 S.W.2d 1014, 1019, 236 Ky. 270.
Mass.—Bell v. Sawyer, 47 N.E.2d 1, 313 Mass. 250.
Mich.—Holloway v. Nassar, 267 N.W. 619, 276 Mich. 212.
Miss.—**Corpus Juris cited in** Kisner v. Jackson, 132 So. 90, 91.
Mo.—Fuqua v. Lumbermen's Supply Co., 76 S.W.2d 715, 229 Mo.App. 210—Greene v. Spinning, App., 48 S. W.2d 51—Chase v. American Press Brick Co., App., 31 S.W.2d 246.
N.C.—Lassiter v. Cline, 22 S.E.2d 558, 222 N.C. 271.
Or.—Knapp v. Standard Oil Co. of California, 68 P.2d 1052, 156 Or. 564.
Pa.—Commonwealth v. Continental Rubber Works, 32 A.2d 878, 347 Pa. 514—Dunmire v. Fitzgerald, Com.Pl., 27 West.Co.L.J. 223.
Tenn.—Welch v. Reiling, 99 S.W.2d 216, 170 Tenn. 698.
Tex.—King v. Galloway, Com.App., 284 S.W. 942—Lloyds Guarantee Assur. v. Sheffield, Civ.App., 170 S.W.2d 327—Texas & N. O. R. Co. v. Rittimann, Civ.App., 87 S.W.2d 745, error dismissed.
Va.—Texas Co. v. Zeigler, 14 S.E.2d 704, 177 Va. 557.
Wash.—Bill v. Gattavara, 167 P.2d 434, 24 Wash.2d 819—**Corpus Juris quoted in** Mitchell v. Maytag-Pacific-Intermountain Co., 51 P.2d 393, 397, 184 Wash. 342—**Corpus Juris quoted in** Leech v. Sultan Ry. & Timber Co., 297 P. 203, 204, 161 Wash. 426.
Wis.—Le Sage v. Le Sage, 271 N.W. 369, 224 Wis. 57.
31 C.J. p 475 note 35.

38. Cal.—Casselman v. Hartford Accident & Indemnity Co., 98 P. 2d 539, 36 Cal.App.2d 700—Hollingsworth v. Pemberton, 31 P.2d 1063, 138 Cal.App. 261.
Conn.—Caraher v. Sears, Roebuck & Co., 200 A. 324, 124 Conn. 409—Welz v. Manzillo, 155 A. 841, 113 Conn. 674.
Ill.—Flood v. Bitzer, 40 N.E.2d 557, 313 Ill.App. 359.
La.—Olano v. Leathers, App., 2 So. 2d 486.
Minn.—Rochester Dairy Co. v. Christgau, 14 N.W.2d 780, 217 Minn. 460.
Mo.—Smith v. Fine, 175 S.W.2d 761, 351 Mo. 1179—Russell v. Union Elec. Co. of Mo., 191 S.W.2d 278, 238 Mo.App. 1074—Pfeifer v. United Bakers Supply Co., App., 160 S. W.2d 795—Fuqua v. Lumbermen's Supply Co., 76 S.W.2d 715, 229 Mo. App. 210—Burgess v. Garvin, 272 S.W. 108, 219 Mo.App. 162.
N.C.—Aderholt v. Condon, 128 S.E. 337, 189 N.C. 748.
Utah.—**Corpus Juris cited in** Chatelain v. Thackeray, 100 P.2d 191, 199, 98 Utah 525.
39 C.J. p 1317 note 8.

39. U.S.—Birmingham v. Bartels, C. C.A.Iowa, 157 F.2d 295—Cimorelli

trol actually exercised may be considered in determining the right of control.[40] Where a master-servant relationship is created, the master's failure to assert or exercise his right of control does not change the relationship.[41] On the other hand, although a contract creates a contractee-independent contractor relationship, it may be transformed into a master-servant relationship by the employer's assumption of control over the details of the work,[42] and it has been held that the relationship of master and servant exists where the employer actually exercises control.[43] The employer must have control over the physical conduct of the employee in the performance of the work,[44] and in applying the test for purposes of tort liability, it should be directed to the particular factor or matter on which liability is sought to be established.[45]

§ 3(4). —— Right of Supervision

A relationship which is otherwise one of contractee-independent contractor is not destroyed by the employer's reservations of powers which do not deprive the contractor of the right to use his own judgment and discretion as to the performance of the work.

A relationship which is otherwise one of contractee-independent contractor is not destroyed by the employer's reservation of powers which do not deprive the contractor of the right to use his own judgment and discretion as to the performance of the work.[46] A contractee does not become a master where his control is limited to the result sought and to insuring compliance with the terms of the contract.[47] To take one out of the class of independent contractors and into that of servants, the employer's direction, supervision, or control must go further than to the ends sought, and must extend

v. New York Cent. R. Co., C.C.A. Ohio, 148 F.2d 575.
Cal.—Fischer v. Havelock, 25 P.2d 864, 134 Cal.App. 584.
Ill.—Ozark Minerals Co. v. Murphy, 51 N.E.2d 197, 384 Ill. 94.
N.C.—Lassiter v. Cline, 22 S.E.2d 558, 222 N.C. 271.
N.D.—La Bree v. Dakota Tractor & Equipment Co., 288 N.W. 476, 69 N.D. 561.
39 C.J. p 1317 note 9.

40. N.C.—Lassiter v. Cline, 22 S.E. 2d 558, 222 N.C. 271.
Tex.—Dave Lehr, Inc., v. Brown, Civ. App., 58 S.W.2d 886, reversed on other grounds 91 S.W.2d 693, 127 Tex. 236.

41. Ga.—Gulf Life Ins. Co. v. McDaniel, App., 43 S.E.2d 784.

42. Ark.—Arkansas Fuel Oil Co. v. Scaletta, 140 S.W.2d 684, 200 Ark. 645.

43. Ga.—Blair v. Smith, 41 S.E.2d 133, 201 Ga. 747—Bibb Mfg. Co. v. Martin, 185 S.E. 137, 53 Ga.App. 137—Yearwood v. Peabody, 164 S.E. 901, 45 Ga.App. 451.
Okl.—Sawin v. Nease, 97 P.2d 27, 186 Okl. 195.
Tex.—American Nat. Ins. Co. v. Denke, Civ.App., 65 S.W.2d 522, reversed on other grounds 95 S.W. 2d 370, 128 Tex. 229, 107 A.L.R. 409.

44. Ark.—Rice v. Sheppard, 168 S. W.2d 198, 205 Ark. 193—Moore v. Phillips, 120 S.W.2d 722, 197 Ark. 131.
Miss.—Texas Co. v. Jackson, 165 So. 546, 174 Miss. 737.
Mo.—Russell v. Union Elec. Co. of Mo., 191 S.W.2d 278, 238 Mo.App. 1074.
Tex.—Layton v. Waltermire, Civ. App., 197 S.W.2d 858—Walter Irvin, Inc., v. Vogel, Civ.App., 158 S. W.2d 93, error refused.

45. Tenn.—Morgan Lumber Co. v. James, 14 Tenn.App. 305.
Wyo.—Stockwell v. Morris, 22 P.2d 189, 46 Wyo. 1.

46. Ark.—Moore v. Phillips, 120 S. W.2d 722, 197 Ark. 131.
Pa.—Joseph v. United Workers Ass'n, 23 A.2d 470, 343 Pa. 636—Weaver v. Foundation Co., 165 A. 381, 310 Pa. 310—Koch v. Matter, 161 A. 309, 307 Pa. 337—Long v. Eastern Paving Co., 145 A. 71, 295 Pa. 163.

Partial reservations of control of means and methods of work in certain respects only by party for whom it is done do not prevent existence of relation of contractee and independent contractor, but general control over work as to manner and method of its execution and oversight and direction of performance of actual manual labor constitute true test for determination of whether relation is that of "employer and contractor" or "master and servant." —Robert C. Buell & Co. v. Danaher, 18 A.2d 697, 127 Conn. 606.

Satisfactory results

In an independent contract, the parties may incorporate provisions tending to secure satisfactory results, and such provisions neither negative the relationship of independent contract nor point to the relationship of employer and employee.—Mountain Meadow Creameries v. Industrial Accident Commission, 76 P.2d 724, 25 Cal.App.2d 123.

Right to make suggestions

Fact that salesman fully recognized store's right to make suggestions and requests which he sought to carry out were circumstances to be considered in determining whether relation between parties was that of independent contractor or of employer and employee.—Moore-Handley Hardware Co. v. Williams, 189 So. 757, 238 Ala. 189.

Repairs

Right of corporation to designate and examine repairs does not withdraw contractor's control over manner of conducting work.—Klar v. Erie R. Co., 162 N.E. 793, 118 Ohio St. 612, appeal dismissed and certiorari denied 49 S.Ct. 342, 279 U.S. 818, 73 L.Ed. 975.

47. U.S.—Waggaman v. General Finance Co. of Philadelphia, C.C.A. Pa., 116 F.2d 254—Standard Oil Co. v. Glenn, D.C.Ky., 52 F.Supp. 755, affirmed, C.C.A., 148 F.2d 51.
Ill.—Orange v. Pitcairn, 280 Ill.App. 566.
La.—Merritt v. E. L. Bruce Co., App., 166 So. 195.
Okl.—Sawin v. Nease, 97 P.2d 27, 186 Okl. 195.
Tex.—R. E. Cox Dry Goods Co. v. Kellog, Civ.App., 145 S.W.2d 675, error refused—Carter Publications v. Davis, Civ.App., 68 S.W.2d 640, error refused.

Complete disassociation from work

Owner or employer, in order to avoid responsibility of master, need not entirely absent himself from work, or entirely disassociate himself from active interest, or aid in performance, or from supervision of results as long as details of work, physical management of instrumentalities used, and physical conduct of those employed remain under sole control of contractor or of those placed in authority by him.—Cook v. Wright, 171 So. 686, 177 Miss. 644.

General control exercised over independent contractor to facilitate service and accomplish proper result is insufficient to make contractor a servant.—Dave Lehr, Inc., v. Brown, 91 S.W.2d 693, 127 Tex. 236.

to the details of the work.[48] The fact that the right of supervision or inspection is reserved to the employer or his representative for the purpose of seeing that the specific work is done in compliance with the contract will not prevent the employee from being an independent contractor;[49] in other words, the retention of the right to supervise as to results, as distinguished from the right to supervise as to the means by which the intermediate results should be obtained, does not affect the relationship.[50]

If the relation of employer and independent contractor is otherwise made out from the terms of the contract, such relation is not affected by a reservation of the right to the employer to change the general plan of the work,[51] or of the right to make any deviation from, or alteration of, the contract.[52] The relation is not affected by a reservation of the right to fix the time for doing the work,[53] the right to direct as to the quantity of work to be done,[54] the right to approve contracts with subcontractors,[55] or the right to require the putting on of an extra force to complete the work if in the judgment of the employer's engineer this is necessary to complete the work within the time fixed by the contract.[56] Nevertheless, the right of supervision means merely the right to approve or disapprove the results of the work and does not give the owner the right to make directions as to the mode of arriving at such results.[57]

§ 3(5). —— Power to Terminate Relationship

The power to terminate the relationship at will is an important, but not decisive, factor in determining whether the relationship is that of master-servant or of contractee-independent contractor.

The presence or absence of the power by either

48. Ark.—Moore v. Phillips, 120 S.W.2d 722, 197 Ark. 131.
Tex.—Herndon v. Halliburton Oil Well Cementing Co., Civ.App., 154 S.W.2d 163, error refused.

Minutiae of conduct
Control must extend much further into the minutiae of alleged servant's conduct than merely telling him where to go.—Patterson v. Barnes, 60 N.E.2d 82, 317 Mass. 721.

Although the control goes to the extent of conditioning the work in many aspects, still, if the contractor is left free to exercise his own will generally respecting methods and means, he is an independent contractor.—Kansas City, M. & O. Ry. Co. v. Loosley, 90 P. 990, 76 Kan. 103.

49. U.S.—**Corpus Juris cited in** Vaughan v. Warner, C.C.A.Pa., 157 F.2d 26, 33—Ryan-Richards, Inc., v. Whitesides, C.C.A.Okl., 96 F.2d 826.
Ala.—**Corpus Juris cited in** Ex parte Board of School Com'rs of Mobile County, 178 So. 63, 65, 235 Ala. 82.
Ark.—Moore v. Phillips, 120 S.W.2d 722, 197 Ark. 131—**Corpus Juris quoted in** Meyer v. Moore, 115 S.W.2d 1087, 1090, 195 Ark. 1114.
Ga.—Louisville & N. R. Co. v. Hughes, 67 S.E. 542, 134 Ga. 75—Lokey & Simpson v. Hightower, 196 S.E. 210, 211, 57 Ga.App. 577.
La.—**Corpus Juris cited in** Beck v. Dubach Lumber Co., 131 So. 196, 197, 171 La. 423—Crysel v. Gifford-Hill & Co., App., 158 So. 264.
Miss.—Cook v. Wright, 171 So. 686, 177 Miss. 644.
Mo.—Ingram v. Great Lakes Pipe Line Co., App., 153 S.W.2d 547.
N.J.—Giroud v. Stryker Transp. Co., 140 A. 305, 104 N.J.Law 424.
N.Y.—Wawrzonek v. Central Hudson Gas & Electric Corporation, 12 N.E.2d 525, 276 N.Y. 412—Kuhn v. P. J. Carlin Const. Co., 278 N.Y.S. 635, 154 Misc. 892.
Pa.—Weaver v. Foundation Co., 165 A. 381, 310 Pa. 310—Bojarski v. M. F. Howlett, Inc., 140 A. 544, 291 Pa. 485—**Corpus Juris cited in** Festi v. Proctor & Schwartz, 163 A. 354, 357, 107 Pa.Super. 349.
Tex.—**Corpus Juris cited in** Lone Star Gas Co. v. Kelly, Com.App., 46 S.W.2d 656, 657—Kelly v. Lone Star Gas Co., Civ.App., 32 S.W.2d 699, reversed on other grounds Lone Star Gas Co. v. Kelly, Com. App., 46 S.W.2d 656.
Va.—Boyd, Higgins & Goforth v. Mahone, 128 S.E. 259, 142 Va. 690.
Wash.—Seattle Ærie No. 1 of Fraternal Order of Eagles v. Commissioner of Unemployment Compensation and Placement, 160 P.2d 614, 23 Wash.2d 167, motion denied 163 P.2d 921, 23 Wash.2d 167—White v. J. R. Watkins Co., 96 P.2d 456, 1 Wash.2d 466.
39 C.J. p 1319 note 52.

Building contracts
(1) The text rule has been applied as to building contracts.
Conn.—Pribulo v. Chiarelli, 157 A. 420, 114 Conn. 32.
Mo.—Stanley v. Louisiana Pure Ice & Supply Co., App., 279 S.W. 157.
N.J.—Messina v. Terhune, 148 A. 758, 106 N.J.Law 119.

(2) Fact that owner has overseer or architect to see that work complies with contract or is done to owner's satisfaction does not make person doing work the owner's employee rather than independent contractor, if he represents owner only as to result of work and himself selects the means.—John Gabel Mfg. Co. v. Murphy, 62 N.E.2d 401, 390 Ill. 455—Ozark Minerals Co. v. Murphy, 51 N.E.2d 197, 384 Ill. 94.

50. Mo.—**Corpus Juris cited in** Ross v. St. Louis Dairy Co., 98 S.W.2d 717, 723, 339 Mo. 982—**Corpus Juris cited in** Stein v. Battenfeld Oil & Grease Co., 39 S.W.2d 345, 350, 327 Mo. 804—**Corpus Juris quoted in** Baker v. Scott County Milling Co., 20 S.W.2d 494, 498, 323 Mo. 1089—**Corpus Juris quoted in** Young v. Sinclair Refining Co., App., 92 S.W.2d 995, 999.
39 C.J. p 1321 note 54.

51. Okl.—White v. McGee, 11 P.2d 924, 926, 157 Okl. 204.
Va.—Boyd, Higgins & Goforth v. Mahone, 128 S.E. 259, 142 Va. 690.
38 C.J. p 1321 note 56.

52. Mo.—**Corpus Juris cited in** Glaser v. St. Louis University, App., 293 S.W. 432, 434.
39 C.J. p 1321 notes 57, 58.

53. Ill.—Chicago Hydraulic Press Brick Co. v. Campbell, 116 Ill.App. 322.
Pa.—Erie v. Caulkins, 85 Pa. 247, 27 Am.R. 642.

54. N.Y.—Charlock v. Freel, 26 N.E. 262, 125 N.Y. 357.
Ohio.—Hughes v. Cincinnati & Springfield R. Co., 39 Ohio St. 461.

55. Mo.—Glaser v. St. Louis University, App., 293 S.W. 432.

56. N.C.—Hopper v. Ordway, 72 S.E. 839, 157 N.C. 125.

57. Ark.—**Corpus Juris quoted in** Meyer v. Moore, 115 S.W.2d 1087, 1091, 195 Ark. 1114.
Mo.—Ingram v. Great Lakes Pipe Line Co., App., 153 S.W.2d 547—**Corpus Juris cited in** Young v. Sinclair Refining Co., App., 92 S.W.2d 995, 999.
39 C.J. p 1321 note 62.

party to terminate the relationship at will is an important factor to be considered in determining whether the relationship is one of master and servant or one of contractee and independent contractor.[58] Where the parties have the right to terminate the relationship at will, it indicates a master-servant relationship,[59] whereas a contractee-independent contractor relationship is indicated where the parties do not have such right.[60] However, it is not of itself a decisive and conclusive factor,[61] and, where a relationship of contractee-independent contractor is otherwise clearly established, the fact that there is the power to terminate the relationship at will does not change it to a master-servant relationship.[62]

§ 3(6). —— Control of Contractor's Servants

Control over the employee's servants is a test of whether the employee is a servant or an independent contractor.

Another test of whether an employee is a servant or an independent contractor is whether he has the power to control and direct servants in the performance of their work,[63] but this test is not conclusive.[64] The power of the employee to employ and discharge workers in the performance of the work is not alone sufficient to create the relation of independent contractor,[65] although it is a circumstance

58. U.S.—Kentucky Cottage Industries v. Glenn, D.C.Ky., 39 F.Supp. 642.
Ala.—Moore-Handley Hardware Co. v. Williams, 189 So. 757, 238 Ala. 189.
Ark.—**Corpus Juris quoted in** Wright v. McDaniel, 159 S.W.2d 737, 739, 203 Ark. 992.
Cal.—Tomlin v. California Employment Commission, 180 P.2d 342—Graetch v.. Dix, 156 P.2d 79, 68 Cal.App.2d 115—People v. Grier, 128 P.2d 207, 53 Cal.App.2d Supp. 841—Phillips v. Larrabee, 90 P.2d 820, 32 Cal.App.2d 720—Brooks v. Johnson, 72 P.2d 194, 22 Cal.App. 2d 618—Curcic v. Nelson Display Co., 64 P.2d 1153, 19 Cal.App.2d 46—George v. Chaplin, 279 P. 485, 99 Cal.App. 709.
Ga.—Gulf Life Ins. Co. v. McDaniel, App., 43 S.E.2d 784.
Ill.—Trzaska v. Bigane, 60 N.E.2d 264, 325 Ill.App. 528—Bristol & Gale Co. v. Industrial Commission, 126 N.E. 599, 292 Ill. 16.
Tenn.—Income Life Ins. Co. v. Mitchell, 79 S.W.2d 572, 168 Tenn. 471.
Tex.—**Corpus Juris cited in** Associated Indem. Corp. v. Insurors Indem. & Ins. Co., Civ.App., 153 S.W.2d 533, 538—**Corpus Juris quoted in** J. W. Tempter Const. Co. v. Rodgers, Civ.App., 45 S.W.2d 763, 765.
Wash.—**Corpus Juris quoted in** Leech v. Sultan Ry. & Timber Co., 297 P. 203, 204, 161 Wash. 426.
39 C.J. p 1322 note 86.

No significance

Fact that alleged employer could terminate employment without being liable for breach of contract had no significance on question whether other party was an employee or an independent contractor, as he would have such right in either case in absence of contract binding parties for specified period or quantity.—Employers Mut. Liability Ins. Co. v. Brower, 272 N.W. 359, 224 Wis. 485.

In a doubtful case the power to terminate the relationship may become an important circumstance.—Luckie v. Diamond Coal Co., 183 P. 178, 41 Cal.App. 468.

Insurance agent

Fact that insurance company reserved right to discharge district agent at will was a most important circumstance as indicating that relationship between company and district agent was relationship of employer and employee rather than employer and independent contractor.—Knight v. Hawkins, 173 S.W.2d 163, 26 Tenn.App. 448.

59. Cal.—People v. Grier, 128 P.2d 207, 53 Cal.App.2d Supp. 841—Phillips v. Larrabee, 90 P.2d 820, 32 Cal.App.2d 720—Hollingsworth v. Pemberton, 31 P.2d 1063, 138 Cal. App. 261—Smith v. Fall River Joint Union High School Dist., 5 P.2d 930, 118 Cal.App. 673—May v. Farrell, 271 P. 789, 94 Cal.App. 703.
N.C.—Lassiter v. Cline, 22 S.E.2d 558, 222 N.C. 271.
Pa.—Commonwealth v. Marie Gas & Oil Co., Com.Pl., 52 Pa.Dist. & Co. 382, 55 Dauph.Co. 105.
Tenn.—Welch v. Reiling, 99 S.W.2d 216, 170 Tenn. 698.
Tex.—Burton-Lingo Co. v. Armstrong, Civ.App., 116 S.W.2d 791, error refused.

60. Cal.—Phillips v. Larrabee, 90 P. 2d 820, 32 Cal.App.2d 720—Brooks v. Johnson, 72 P.2d 194, 22 Cal. App.2d 618.
Ind.—Van Drake v. Thomas, 38 N.E. 2d 878, 110 Ind.App. 586.

61. Cal.—Bohanon v. James McClatchy Pub. Co., 60 P.2d 510, 16 Cal.App.2d 188.
Conn.—Northwestern Mut. Life Ins. Co. v. Tone, 4 A.2d 640, 125 Conn. 183, 121 A.L.R. 993.
Miss.—Shell Petroleum Corporation v. Linham, 163 So. 839.
Tex.—Burton-Lingo Co. v. Armstrong, Civ.App., 116 S.W.2d 791, error refused.
Wash.—Leech v. Sultan Ry. & Timber Co., 297 P. 203, 161 Wash. 426.
39 C.J. p 1323 note 88.

62. Ark.—Moore v. Phillips, 120 S. W.2d 722, 197 Ark. 131.
Kan.—Houdek v. Gloyd, 107 P.2d 751, 152 Kan. 789.

Milk route

Where distributor was placed in possession of milk route by producer, producer furnished distributor with merchandise to sell to customers, and contract provided for termination by either party on notice, right of termination was not equivalent to right of an employer to discharge an employee, or right of an employee to quit his employment, which are incident to employer-employee relationship.—Mountain Meadow Creameries v. Industrial Accident Commission, 76 P.2d 724, 25 Cal.App.2d 123.

Power to stop work

Company employed to build railroad was "independent contractor," even though contractee retained right to stop work if it was not progressing properly, such right being for contractee's protection and not for protection of others.—Slusher v. Asher, 61 S.W.2d 1057, 250 Ky. 88.

63. Va.—Epperson v. De Jarnette, 180 S.E. 412, 164 Va. 482.

Assumption of powers

Where an employer assumes the relation of master to the servants of one whom he has engaged to produce a given result, the duties and responsibilities which the law imposes on such a relation attach.—Kansas City, M. & O. R. Co. v. Loosley, 90 P. 990, 76 Kan. 103—39 C.J. p 1323 note 89.

64. Pa.—Burns v. Elliott-Lewis Electrical Co., 179 A. 47, 118 Pa. Super. 243.

65. Ind.—**Corpus Juris cited in** Lazarus v. Scherer, 174 N.E. 293, 295, 92 Ind.App. 90.
Ky.—Clendenin v. Colonial Supply Co., 102 S.W.2d 992, 267 Ky. 544.

strongly indicative thereof.[66] The reservation to the employer of the right to demand the discharge of the contractor's servants under certain circumstances such as incompetence, negligence, and the like, does not affect the relationship of independent contractor where it otherwise exists,[67] although it has been said that it is a matter of considerable weight in determining the relation between employer and employee,[68] and it has been held that the reservation of the right to have discharged any servant of the contractor who disobeys the order of the owner's representative creates the relation of master and servant as between the employer and employee.[69]

The fact that in practice employees would discharge their servants, on request of the employers, for refusal to observe certain rules, and that the employers objected to the hiring of a certain class of servants, does not show such reservation of control as creates the relation of master and servant.[70] The right to annul the contract for a failure to employ a force in kind and quality to the satisfaction of the employer's representative does not show such a right of selection of the contractor's servant as to make the employer liable for injuries to him.[71]

§ 3(7). —— Materials and Appliances

Who furnishes the materials and appliances is to be taken into consideration, but is not a decisive factor in determining whether the employee is a servant or an independent contractor.

Where the employer furnishes materials and appliances for the work, it indicates a master-servant relationship,[72] whereas the furnishing of materials and appliances by the employee indicates a contractee-independent contractor relationship.[73] However, such fact, while it should be taken into consideration,[74] is not decisive as to the nature of the relationship.[75] An employee is not an independent contractor merely because he furnishes the appliances or materials.[76] On the other hand, the fact that materials are furnished by the employer does not prevent the employee being an independent contractor.[77]

§ 3(8). —— Mode of Payment

The mode of payment, while it is an element to be considered, is not decisive as to whether the employee is a servant or an independent contractor.

The mode of payment is an element to be considered in determining whether the relationship is that of master and servant or that of contractee and

Mo.—**Corpus Juris cited in** Baker v. Scott County Milling Co., 20 S.W. 2d 494, 498, 323 Mo. 1089—Young v. Sinclair Refining Co., App., 92 S.W.2d 995.
W.Va.—Waldron v. Garland Pocahontas Coal Co., 109 S.E. 729, 89 W. Va. 426.
39 C.J. p 1323 note 95.

66. U.S.—Kentucky Cottage Industries v. Glenn, D.C.Ky., 39 F.Supp. 642.
Ind.—**Corpus Juris cited in** Lazarus v. Scherer, 174 N.E. 293, 295, 92 Ind.App. 90.
N.D.—La Bree v. Dakota Tractor & Equipment Co., 288 N.W. 476, 69 N. D. 561.
Pa.—Tyler v. MacFadden Newspapers Corporation, 163 A. 79, 107 Pa.Super. 166.
39 C.J. p 1323 note 96.

67. Miss.—Cook v. Wright, 171 So. 686, 177 Miss. 644.
39 C.J. p 1323 note 90.

68. Mo.—Larson v. Metropolitan St. R. Co., 19 S.W. 416, 110 Mo. 234, 33 Am.S.R. 439, 16 L.R.A. 330—Speed v. Atlantic & Pacific R. Co., 71 Mo. 303.

69. Mo.—Larson v. Metropolitan St. R. Co., 19 S.W. 416, 110 Mo. 234, 33 Am.S.R. 439, 16 L.R.A. 330.

70. Ala.—Harris v. McNamara, 12 So. 103, 97 Ala. 181.

71. N.Y.—Burmeister v. New York El. R. Co., 47 N.Y.Super. 264.
Pa.—Thomas v. Altoona & L. V. Electric R. Co., 43 A. 215, 191 Pa. 361.

72. Tenn.—Ely v. Rice Bros., 167 S. W.2d 355, 26 Tenn.App. 19.

73. La.—West Bros. v. Pierson, App., 2 So.2d 71.
Tex.—**Corpus Juris cited in** Associated Indemnity Corp. v. Insurors Indemnity & Ins. Co., Civ.App., 153 S.W.2d 533, 538.
Window washer furnishing own tools held independent contractor.—Aita v. John Beno Co., 222 N.W. 386, 206 Iowa 1361, 61 A.L.R. 351.

74. La.—Goetschel v. Glassel-Wilson Co., 127 So. 81, 13 La.App. 424.
Miss.—Texas Co. v. Jackson, 165 So. 546, 174 Miss. 737.
Mo.—Porter v. Withers Est. Co., 210 S.W. 109, 201 Mo.App. 27.

75. Miss.—Texas Co. v. Jackson, 165 So. 546, 174 Miss. 737.
Mo.—Porter v. Withers Est. Co., 210 S.W. 109, 201 Mo.App. 27.
Tenn.—Ely v. Rice Bros., 167 S.W. 2d 355, 26 Tenn.App. 19.
Paint
Fact that house owner furnished painter with paint did not change relationship of painter from independent contractor to that of servant.—Parker v. Taylor, 3 N.E.2d 25, 295 Mass. 51.
Use of own automobile
Fact that agent uses his own car in merchant's business is not controlling as to whether he is servant or independent contractor.—Burgess v. Garvin, 272 S.W. 108, 219 Mo.App. 162.

76. Ohio.—Snodgrass v. Cleveland Co-op. Coal Co., 167 N.E. 493, 31 Ohio App. 470.
39 C.J. p 1322 note 82.
School bus
Fact that individual contracting with board of school commissioners for transportation of pupils furnished chassis and motor for school bus and also gasoline and oil was not a determining factor in construing contract to determine whether individual was an independent contractor or an employee, since fact that servant makes use of own property in performing service for master does not prevent relationship being that of master and servant.—Daves v. Rain, 178 So. 59, 28 Ala.App. 54, certiorari granted Ex parte Board of School Com'rs of Mobile County, 178 So. 63, 235 Ala. 82.

77. Ill.—Foster v. Wadsworth-Howland Co., 48 N.E. 163, 168 Ill. 514.
39 C.J. p 1322 note 83.

independent contractor[78] in a doubtful case,[79] but it is uniformly held that the mode of payment is not conclusive nor the decisive test as to the nature of the relationship,[80] and inferences derived from the mode of payment as to the nature of the relationship must yield to evidence that the person was working under general employment having no dominion or control over the premises and subject at all times to the orders of the employer as to when and how he should work and how it was to be accomplished.[81] Payment for a result or by the job is an indicia that the relationship is one of contractee and independent contractor,[82] whereas payment for the performance of work indicates a master-servant relationship.[83]

One may be an independent contractor, although not to be paid a round sum for his work,[84] as, for instance, where he is paid by the day, week, or month,[85] or by the piece,[86] or according to the time consumed,[87] or by the cubic foot as the work progresses,[88] or the cost of the work and a per cent,[89] or by some other unit of measurement,[90] or where the compensation is practically a salary;[91] and the fact that the employer furnishes the money required to pay employees of the contractor and operating expenses does not prevent the latter from being an independent contractor.[92]

On the other hand, a person is not an independent contractor merely because he is paid by the

78. U.S.—Henry W. Cross Co. v. Burns, C.C.A.Ark., 81 F.2d 856.
Cal.—Curcic v. Nelson Display Co., 64 P.2d 1153, 19 Cal.App.2d 46.
Ga.—Nichols v. G. L. Hight Motor Co., 10 S.E.2d 439, 63 Ga.App. 155.
Ind.—**Corpus Juris cited in** Lazarus v. Scherer, 174 N.E. 293, 295, 92 Ind.App. 90.
La.—Goetschel v. Glassel-Wilson Co., 127 So. 81, 13 La.App. 424.
Mo.—Mallory v. Louisiana Pure Ice & Supply Co., 6 S.W.2d 617, 320 Mo. 95—Dorsett v. Pevely Dairy Co., App., 124 S.W.2d 624—Fuqua v. Lumbermen's Supply Co., 76 S.W.2d 715, 229 Mo.App. 210—Burgess v. Garvin, 272 S.W. 108, 219 Mo.App. 162.
N.C.—North Carolina Lumber Co. v. Spear Motor Co., 135 S.E. 115, 192 N.C. 377.
Pa.—Bojarski v. M. F. Howlett, Inc., 140 A. 544, 291 Pa. 485.
Va.—Ross v. Schneider, 27 S.E. 154, 181 Va. 931.
39 C.J. p 1321 note 67.

Payment of subservants
In determining whether a contractor is "independent," to consider by whom the wages of the contractor's servants are paid is important; but such circumstance is not decisive.
Ark.—Standard Oil Co. of Louisiana v. Chandler, 165 S.W.2d 595, 204 Ark. 895.
Mo.—Dorsett v. Pevely Dairy Co., App., 124 S.W.2d 624.

79. N.C.—North Carolina Lumber Co. v. Spear Motor Co., 135 S.E. 115, 192 N.C. 377.

80. U.S.—Henry W. Cross Co. v. Burns, C.C.A.Ark., 81 F.2d 856.
Cal.—Burlingham v. Gray, 137 P.2d 9, 22 Cal.2d 87—Curcic v. Nelson Display Co., 64 P.2d 1153, 19 Cal.App.2d 46—Los Flores School Dist. v. Industrial Accident Commission, 56 P.2d 581, 13 Cal.App.2d 180.
Colo.—Farmers' Reservoir & Irrigation Co. v. Fulton Inv. Co., 255 P. 449, 81 Colo. 69.
Conn.—Caraher v. Sears, Roebuck & Co., 200 A. 324, 124 Conn. 409.
Ga.—Nichols v. G. L. Hight Motor Co., 10 S.E.2d 439, 63 Ga.App. 155.
Ill.—Ozark Minerals Co. v. Murphy, 51 N.E.2d 197, 384 Ill. 94—Kehrer v. Industrial Commission, 6 N.E.2d 635, 365 Ill. 378.
Ind.—**Corpus Juris cited in** Lazarus v. Scherer, 174 N.E. 293, 295, 92 Ind.App. 90.
Mo.—Heisey v. Tide Water Oil Co., App., 92 S.W.2d 922—Fuqua v. Lumbermen's Supply Co., 76 S.W.2d 715, 229 Mo.App. 210—Burgess v. Garvin, 272 S.W. 108, 219 Mo.App. 162.
N.C.—North Carolina Lumber Co. v. Spear Motor Co., 135 S.E. 115, 192 N.C. 377.
Tenn.—Grace v. Louisville & N. R. Co., 89 S.W.2d 354, 19 Tenn.App. 382.
Wash.—Leech v. Sultan Ry. & Timber Co., 297 P. 203, 161 Wash. 426.
39 C.J. p 1321 note 68.

Piece worker may be either independent contractor or servant.—Benjamin v. Davidson-Gulfport Fertilizer Co., 152 So. 839, 169 Miss. 162.

Payment on commission basis is not controlling.—Ward v. Scott County Milling Co., Mo.App., 47 S.W.2d 250.

81. W.Va.—Knicely v. West Virginia Midland R. Co., 61 S.E. 811, 64 W.Va. 278, 17 L.R.A.,N.S., 370.

82. Cal.—Bohanon v. James McClatchy Pub. Co., 60 P.2d 510, 16 Cal.App.2d 188.
Ill.—Ryan v. Associates Inv. Co. of Illinois, 18 N.E.2d 47, 297 Ill.App. 544.
Mass.—Forsyth v. Hooper, 11 Allen 419.

83. Cal.—Bohanon v. James McClatchy Pub. Co., 60 P.2d 510, 16 Cal.App.2d 188.

Salesman employed at fixed monthly salary and traveling and hotel expenses held employee, not independent contractor.—Mitchem v. Shearman Concrete Pipe Co., 165 S.E. 889, 45 Ga.App. 809, followed in Teichmiller v. Steele, 167 S.E. 911, 46 Ga.App. 468.

84. Me.—Pooler v. Sargent Lumber Co., 94 A. 754, 113 Me. 426, 429, L.R.A.1915F 1125.
39 C.J. p 1321 note 69.

85. Ill.—Ryan v. Associates Inv. Co. of Illinois, 18 N.E.2d 47, 297 Ill. App. 544.
Mass.—Parker v. Taylor, 3 N.E.2d 25, 295 Mass. 51.
39 C.J. p 1322 note 70.

86. N.Y.—Berger v. Mandel, 54 N.Y.S. 987, 25 Misc. 766.

87. Mass.—Dane v. Cochrane Chemical Co., 41 N.E. 678, 164 Mass. 453.
39 C.J. p 1322 note 72.

88. Kan.—Chute v. Moeser, 95 P. 398, 77 Kan. 706.

89. La.—Standard Oil Co. of Louisiana v. Fontenot, 4 So.2d 634, 198 La. 644.
39 C.J. p 1322 note 74.

Not inconsistent with relationship
U.S.—J. B. McCrary Engineering Co. v. White Coal Power Co., C.C.A.N.C., 35 F.2d 142.

90. Ill.—Ryan v. Associates Inv. Co. of Illinois, 18 N.E.2d 47, 297 Ill. App. 544.

91. Tex.—Higrade Lignite Co. v. Courson, Civ.App., 219 S.W. 230.

92. La.—Crysel v. Gifford-Hill & Co., App., 158 So. 264.
Miss.—Cook v. Wright, 171 So. 686, 177 Miss. 644.
Tex.—Higrade Lignite Co. v. Courson, Civ.App., 219 S.W. 230.

piece or job,[93] or by way of commissions,[94] or because he is not to be paid until the job is satisfactorily completed,[95] or although he receives a specified compensation for his services, not in the nature of wages.[96]

Fixing of price and specifications. It has been held that the fact that no price was fixed, and no specifications were made, as to the work to be done does not render the contract one of mere hire and service, or create the relation of master and servant between the parties;[97] but there is authority which is apparently not in harmony with this view.[98]

§ 3(9). —— Particular Applications

The tests for determining whether an employee is a servant or an independent contractor have been applied in a great many particular situations.

Under the rules and tests discussed supra §§ 3 (2)–3 (8) for determining whether a master-servant or contractee-independent contractor relationship is established, various persons or entities have been held to be independent contractors,[99] such as an actor,[1] architect,[2] aviator,[3] collection agency,[4] cropper,[5] drover,[6] electrician,[7] engineer,[8] expressman, truckman, drayman, and the like,[9] insurance

93. Ky.—Bringardner Lumber Co. v. Middleton, 124 S.W.2d 52, 276 Ky. 247.
Miss.—Benjamin v. Davidson-Gulfport Fertilizer Co., 152 So. 839, 169 Miss. 162.
Mo.—Young v. Sinclair Refining Co., App., 92 S.W.2d 995.
N.D.—La Bree v. Dakota Tractor & Equipment Co., 288 N.W. 476, 69 N.D. 561.
Ohio.—Snodgrass v. Cleveland Co-op. Coal Co., 167 N.E. 493, 31 Ohio App. 470.
39 C.J. p 1322 note 79.

94. Ala.—Moore-Handley Hardware Co. v. Williams, 189 So. 757, 238 Ala. 189.

95. N.C.—North Carolina Lumber Co. v. Spear Motor Co., 135 S.E. 115, 192 N.C. 377.
N.D.—La Bree v. Dakota Tractor & Equipment Co., 288 N.W. 476, 69 N.D. 561.

96. Cal.—Sacchi v. Bay Side Lumber Co., 108 P. 885, 13 Cal.App. 72.

97. N.Y.—Hexamer v. Webb, 4 N.E. 755, 101 N.Y. 377, 54 Am.R. 703.
39 C.J. p 1319 note 48.

98. Mass.—Dane v. Cochrane Chemical Co., 41 N.E. 678, 164 Mass. 453.
39 C.J. p 1322 note 78.

99. U.S.—Yearwood v. U. S., D.C. La., 55 F.Supp. 295—Gucciardi v. Chisholm, D.C.N.Y., 49 F.Supp. 581, reversed on other grounds, C.C.A., 145 F.2d 514.
Ala.—Bugg v. Sanders, 121 So. 410, 219 Ala. 129.
Ark.—W. H. Moore Lumber Co. v. Starrett, 279 S.W. 4, 170 Ark. 92.
Ill.—Herendeen v. Hamilton, 47 N.E. 2d 335, 317 Ill.App. 644—Sollars v. Review Pub. Co., 264 Ill.App. 207.
Ind.—National Veneer & Lumber Co. v. Crisp, 72 N.E.2d 576.
Miss.—Crescent Baking Co. v. Denton, 112 So. 21, 147 Miss. 639.
Ohio.—Montgomery v. Board of Com'rs of Erie County, 158 N.E. 278, 25 Ohio App. 440.
Or.—Helzer v. Wax, 272 P. 556, 127 Or. 427.
Tex.—Lone Star Gas Co. v. Kelly, Com.App., 46 S.W.2d 656—Seismic Explorations v. Dobray, Civ.App., 169 S.W.2d 739, error refused.
Wis.—Brabazon v. Joannes Bros. Co., 286 N.W. 21, 231 Wis. 426.

1. Me.—Franklin v. Maine Amusement Co., 175 A. 305, 133 Me. 203.

2. N.Y.—Burke v. Ireland, 59 N.E. 914, 166 N.Y. 305.
39 C.J. p 1319 note 21.

3. Cal.—Montijo v. Samuel Goldwyn, Inc., of California, 297 P. 949, 113 Cal.App. 57.

Dusting fields with insecticide

Where owner of airplane, equipped with power dusting attachment for dusting fields of growing vegetables, was engaged to dust tract of honeydew melons with calcium arsenate by owner of melons who furnished compound and directed amount to be used, but left method of application to owner of airplane, airplane owner was an independent contractor, with regard to liability for death of bees killed by drifting dust.—Miles v. A. Arena & Co., 73 P.2d 1260, 23 Cal. App.2d 680.

4. Ala.—Lynch Jewelry Co. v. Bass, 124 So. 222, 220 Ala. 96.
Ga.—Calvert v. Atlanta Hub Co., 139 S.E. 917, 37 Ga.App. 295.

5. Ga.—Duncan v. Anderson, 56 Ga. 398.

6. Eng.—Milligan v. Wedge, 12 A. & E. 737, 40 E.C.L. 366, 113 Reprint 993.

7. Mo.—Stein v. Battenfeld Oil & Grease Co., 39 S.W.2d 345, 327 Mo. 804.

8. Mass.—Taunton v. Hoar, 192 N.E. 831, 288 Mass. 326.

9. Ark.—Fordyce Lumber Co. v. Wardlaw, 176 S.W.2d 241, 206 Ark. 35.
Ky.—Structure Oil Co. v. Chambers, 270 S.W. 458, 208 Ky. 30.
N.Y.—La Rose v. Donnelly, 219 N. Y.S. 148, 219 App.Div. 181.
Okl.—Branham v. International Supply Co., 27 P.2d 354, 166 Okl. 273.
Pa.—**Corpus Juris cited in** Tyler v. MacFadden Newspapers Corporation, 163 A. 79, 81, 107 Pa.Super. 166.
S.C.—Googe v. Speaks, 9 S.E.2d 439, 194 S.C. 206.
39 C.J. p 1319 note 25.

General rule

Ordinarily draymen, truckmen, carters, etc., a part of whose regular business is the hiring of their vehicles, are regarded as independent contractors, with respect to liability of one hiring such vehicles for the negligence of owner thereof.—Joseph v. United Workers Ass'n, 23 A.2d 470, 343 Pa. 636—Tyler v. MacFadden Newspapers Corporation, 163 A. 79, 107 Pa.Super. 166.

Unloading

Trucker who agreed with gas company to unload pipe from railroad car at a specified price per car, and who for that purpose hired his own help and used his own equipment, was an independent contractor for whose negligence in unloading car gas company was not liable.—Arkansas-Louisiana Gas Co. v. Tuggle, 146 S.W.2d 154, 201 Ark. 416.

Direction to haul property to or from specific place

The direction to one engaged in general hauling to haul property to or from a specified place does not change the nature of or convert a special employment into the general relation of master and servant, with respect to liability of person for whom property is being hauled for negligence of the hauler.—Joseph v. United Workers Ass'n, 23 A. 2d 470, 343 Pa. 636.

Truck driver held servant of independent contractor and not of contractee.
Md.—Hilton Quarries v. Hall, 158 A. 19, 161 Md. 518.
N.H.—Wentworth v. Boston & M. R. R., 166 A. 265, 86 N.H. 251.

agent,[10] log driver,[11] logger,[12] mechanic,[13] miner,[14] painter,[15] paper hanger,[16] photographer,[17] physician,[18] plumber,[19] roofer,[20] salesman,[21] stevedore,[22] well digger,[23] and a window cleaner.[24] Also the operator of a cookhouse,[25] farm,[26] gravel pit,[27] mill,[28] mine,[29] or shooting gallery[30] has been held to be an independent contractor. So too persons engaged in construction work in general,[31] persons who undertake the construction of an entire building or specific portions thereof,[32] and road construction,[34] persons engaged to make repairs or improvements on a building,[35] a builder who by the contract is required to furnish plans and specifications, architectural services, superintendents, and all labor and material, although the owner was to pay the cost of labor and material and a stated sum in addition,[36] and one who agrees to superintend the erection of a building for a per cent of the cost and to furnish appliances[37] have been held independent contractors. Also one employed to assist in public entertainments,[38] clear land,[39] cut and deliver timber,[40]

10. Ky.—American Sav. Life Ins. Co. v. Riplinger, 60 S.W.2d 115, 249 Ky. 8.
Mo.—Vert v. Metropolitan Life Ins. Co., 117 S.W.2d 252, 342 Mo. 629, 116 A.L.R. 1381.

11. Wash.—Cartier Van Dissel v. Holland-Horr Mill Co., 157 P. 687, 91 Wash. 239.

12. Ark.—Moore v. Phillips, 120 S.W.2d 722, 197 Ark. 131.
Ky.—Yellow Poplar Lumber Co. v. Adkins, 299 S.W. 963, 221 Ky. 794.
La.—Beck v. Dubach Lumber Co., 131 So. 196, 171 La. 423.
Miss.—Hutchinson-Moore Lumber Co. v. Pittman, 122 So. 191, 154 Miss. 1.
Va.—Epperson v. De Jarnette, 180 S.E. 412, 164 Va. 482.
Wash.—Hollingsworth v. Robe Lumber Co., 45 P.2d 614, 182 Wash. 74.
39 C.J. p 1319 note 41.

13. Kan.—Smith v. Brown, 107 P.2d 718, 152 Kan. 758.
N.Y.—Flower v. Buck, 159 N.Y.S. 1042, 173 App.Div. 506.
39 C.J. p 1319 notes 32, 39.

14. N.M.—Sucetti v. Jones' Estate, 32 P.2d 815, 38 N.M. 327.

Workmen's compensation register
Fact that clay miner employees signed mine owner's workmen's compensation register held not controlling on question whether miner was independent contractor.—General Refractories Co. v. Mozier, 30 S.W.2d 952, 235 Ky. 252.

15. Ill.—Andronick v. Daniszewski, 268 Ill.App. 543.
Mass.—Parker v. Taylor, 3 N.E.2d 25, 295 Mass. 51.
Pa.—Koch v. Matter, 161 A. 309, 307 Pa. 337.

16. Mass.—Lappen v. Chaplick, 188 N.E. 498, 285 Mass. 65.

17. Mich.—Holgate v. Chrysler Corporation, 271 N.W. 539, 279 Mich. 24.

18. U.S.—Metzger v. Western Maryland Ry. Co., C.C.A.Ind., 30 F.2d 50.
Mass.—Pearl v. West End St. R. Co., 57 N.E. 339, 176 Mass. 177, 79 Am.S.R. 330, 49 L.R.A. 826.

19. Cal.—Bennett v. Truebody, 6 P. 329, 66 Cal. 509, 56 Am.R. 117.
39 C.J. p 1319 note 37.

20. Mass.—Goldstein v. Slutsky, 150 N.E. 326, 254 Mass. 501.
Pa.—Martin v. Wentz, 21 A.2d 444, 145 Pa.Super. 424.

21. Ala.—Aldrich v. Tyler Grocery Co., 89 So. 289, 206 Ala. 138.
Mo.—A. J. Meyer & Co. v. Unemployment Compensation Commission, 152 S.W.2d 184, 348 Mo. 147.
Tex.—R. E. Cox Dry Goods Co. v. Kellog, Civ.App., 145 S.W.2d 675, error refused.

22. U.S.—The Teno, C.C.A.N.Y., 47 F.2d 197.
39 C.J. p 1319 note 34.

23. Neb.—Westover v. Hoover, 129 N.W. 285, 88 Neb. 201, 19 A.L.R. 215.

24. Pa.—Nettis v. General Tire Co. of Philadelphia, 177 A. 39, 317 Pa. 204.

25. Or.—Varley v. Consolidated Timber Co., 139 P.2d 584, 172 Or. 157.

26. N.Y.—Marsh v. Hand, 24 N.E. 463, 120 N.Y. 315.

27. Tex.—Ray v. St. Louis Southwestern Ry. Co. of Texas, Civ.App., 289 S.W. 1030.

28. Ark.—Froman v. J. R. Kelley Stave & Heading Co., 123 S.W.2d 1081, 197 Ark. 545—C. M. Farmer Stave & Heading Co. v. Whorton, 102 S.W.2d 79, 193 Ark. 708—W. H. Moore Lumber Co. v. Starrett, 279 S.W. 4, 170 Ark. 92.
39 C.J. p 1319 note 40.

29. Ala.—U. S. Cast Iron Pipe & Foundry Co. v. Caldwell, 94 So. 540, 208 Ala. 260.
39 C.J. p 1319 note 24.

30. Cal.—Basye v. Craft's Golden State Shows, 111 P.2d 746, 43 Cal. App.2d 782.

31. La.—Clements v. Luby Oil Co., 130 So. 851, 15 La.App. 384.
39 C.J. p 1318 note 17.

32. Mass.—Devlin v. Newfell, 175 N.E. 647, 275 Mass. 279.
Tex.—Allen v. Republic Bldg. Co., Civ.App., 84 S.W.2d 506.
39 C.J. p 1318 note 18.

33. U.S.—Steinman v. Pennsylvania R. Co., C.C.A.N.J., 54 F.2d 1052, certiorari denied 52 S.Ct. 408, 285 U.S. 552, 76 L.Ed. 942.
Ky.—Slusher v. Asher, 61 S.W.2d 1057, 250 Ky. 88.
N.C.—Teague v. Louisville & N. R. Co., 192 S.E. 846, 212 N.C. 33.
39 C.J. p 1318 note 19.

34. Ariz.—Alhberg v. Louise Mining & Development Co., 241 P. 510, 29 Ariz. 313.

Contract provisions as to insurance
Where highway subcontractor rendered services with own labor and means, and general contractor was concerned only in result of work, subcontractor held independent contractor, even though subcontract required general contractor to carry compensation insurance for subcontractor's employees and public liability insurance.—Harris v. Stone, 77 S.W.2d 18, 256 Ky. 737.

35. La.—Giacona v. Orleans Ice Mfg. Co., 5 La.App. 259.
Wash.—Scheiber v. Grigsby, 182 P.2d 745.
39 C.J. p 1318 note 20.

36. U.S.—Underwood v. Davies, C.C.A.La., 287 F. 776.

37. Mich.—Bayne v. Everham, 163 N.W. 1002, 197 Mich. 181.

38. Md.—Smith v. Benick, 41 A. 56, 87 Md. 610, 42 L.R.A. 277.
Pa.—Heidenwag v. Philadelphia, 31 A. 1063, 168 Pa. 72.

39. Ky.—Kentucky Utilities Co. v. Carter, 176 S.W.2d 81, 296 Ky. 30.
La.—Levy v. McWilliams, 127 So. 761, 13 La.App. 444, modified on other grounds 129 So. 170, 13 La. App. 444.
39 C.J. p 1319 note 27.

40. Ark.—J. L. Williams & Sons v. Hunter, 133 S.W.2d 892, 199 Ark. 391.
Mich.—McBride v. Jerry Madden Shingle Co., 138 N.W. 1077, 173 Mich. 248.

deliver milk[41] or newspapers,[42] drill an oil well,[43] erect a sign,[44] fumigate cargoes,[45] install an elevator[46] or a sewer,[47] move machinery,[48] remove junk,[49] or to transport[50] or maintain and repair[51] equipment has been held an independent contractor. A lessee of land and machinery,[52] a mine,[53] an oil and gas station,[54] or a gasoline tank[55] has been held an independent contractor.

On the other hand, various persons have been held, under particular circumstances, to be servants and not independent contractors,[56] such as a blaster,[57] distributor for an oil company,[58] driller,[59] insurance agent,[60] lessee of a mill,[61] logger,[62] operator of a coal mine machine,[63] salesman,[64] sawyer,[65] supervisor of street improvements,[66] trimmer of trees,[67] trucker,[68] and a yardman;[69] also persons employed to demolish an oil derrick,[70] drill a mine drift,[71] erect a building,[72] maintain and operate a railroad yard[73] or an oil storage plant,[74] make an excavation for a building,[75] move a disabled vehicle,[76] perform domestic services[77] or odd jobs,[78] pick cotton,[79] remove a scaffold,[80] or to repair or improve property[81] or a road.[82]

41. Kan.—Brownrigg v. Allvine Dairy Co., 19 P.2d 474, 137 Kan. 209.

42. La.—Turner v. Item Co., 6 La. App. 270.
Mich.—Gall v. Detroit Journal Co., 158 N.W. 36, 191 Mich. 405, 19 A.L. R. 1164.
Mo.—Skidmore v. Haggard, 110 S.W. 2d 726, 341 Mo. 837.
Ohio.—Post Pub. Co. v. Schickling, 154 N.E. 751, 22 Ohio App. 318, affirmed Schickling v. Post Pub. Co., 155 N.E. 143, 115 Ohio St. 589.
Tex.—Carter Publications v. Davis, Civ.App., 68 S.W.2d 640, error refused.

A common carrier for hire who picked up newspapers at railway station and delivered them to addressees free from control of publisher was an independent contractor.—Courier Journal & Louisville Times Co. v. Akers, 175 S.W.2d 350, 295 Ky. 745.

43. Ga.—Edmondson v. Town of Morven, 152 S.E. 280, 41 Ga.App. 209.
Okl.—Riverland Oil Co. v. Chisholm, 287 P. 379, 143 Okl. 120.
Tex.—Herndon v. Halliburton Oil Well Cementing Co., Civ.App., 154 S.W.2d 163, error refused.

44. Vt.—Jourdenais v. Hayden, 158 A. 664, 104 Vt. 215.

45. U.S.—Carr v. Stevens, D.C.Md., 295 F. 701.
39 C.J. p 1319 note 44.

46. Ind.—Parkhurst v. Swift, 68 N. E. 620, 31 Ind.App. 521.

47. N.C.—Evans v. Elliott, 17 S.E. 2d 125, 220 N.C. 253.

48. N.D.—Taute v. J. I. Case Threshing Mach. Co., 141 N.W. 134, 25 N.D. 102.
R.I.—Lake v. Bennett, 103 A. 145, 41 R.I. 154.

49. Cal.—Brown v. Leland Stanford Junior Univ., 182 P. 316, 41 Cal. App. 100.

50. Mo.—Rogers v. Poteet, 199 S.W. 2d 378.
Tex.—Burton-Lingo Co. v. Armstrong, Civ.App., 116 S.W.2d 791, error refused.
Wash.—Miles v. Pound Motor Co., 117 P.2d 179, 10 Wash.2d 492.

The parties to a transportation contract may establish a contractee-independent contractor relationship. —Atlas Coal Co. v. Bryant, 93 S.W. 2d 5, 263 Ky. 626.

51. Ark.—Standard Oil Co. of Louisiana v. Chandler, 165 S.W.2d 595, 204 Ark. 895.

52. Tex.—Johnson v. Murray Co., Civ.App., 90 S.W.2d 920, error dismissed.

Railroad's lessee contracting to furnish ice for cars held independent contractor, whose workmen were not employees, within federal Employers' Liability Act.—Reynolds v. Addison Miller Co., 255 P. 110, 143 Wash. 271.

53. Ky.—Eutsler v. Huff, 299 S.W. 1070, 222 Ky. 48.

54. Mich.—Brown v. Standard Oil Co., 14 N.W.2d 797, 309 Mich. 101.
Miss.—Shell Petroleum Corporation v. Linham, 163 So. 839.
N.C.—Hudson v. Gulf Oil Co., 2 S.E. 2d 26, 215 N.C. 422.

55. Mass.—Baker v. Texas Co., 160 N.E. 248, 262 Mass. 425.

56. Miss.—Texas Co. v. Jackson, 165 So. 546, 174 Miss. 737.

57. Pa.—McGowan v. William Steele & Sons Co., 171 A. 903, 112 Pa. Super. 552, followed in Ballard v. William Steele & Sons Co., 171 A. 906, 112 Pa.Super. 558.

58. U.S.—Gulf Refining Co. v. Brown, C.C.A.Va., 93 F.2d 870, 116 A.L.R. 449.
Miss.—Texas Co. v. Mills, 156 So. 866, 171 Miss. 231.

59. Mo.—Cunningham v. Doe Run Lead Co., 285 S.W. 757, 220 Mo. App. 38.

60. Tex.—Fidelity Union Life Ins. Co. v. McGinnis, Civ.App., 62 S.W. 2d 186.

61. Miss.—Kisner v. Jackson, 132 So. 90, 159 Miss. 424.

62. Tex.—Esthay v. Sherman, Civ. App., 135 S.W.2d 174, error dismissed, judgment correct.

63. Ark.—New Union Coal Co. v. Sult, 290 S.W. 580, 172 Ark. 753.

64. Pa.—Turner v. Good, Com.Pl., 48 Lanc.L.Rev. 559.

65. Tex.—West Lumber Co. v. Smith, Civ.App., 283 S.W. 1104, affirmed, Com.App., 292 S.W. 1103.

66. Tenn.—Ridgeway Land Co. v. Vincent, 7 Tenn.App. 262.

67. Kan.—Nordgren v. Southwestern Bell Telephone Co., 262 P. 577, 125 Kan. 33.

68. Ark.—Arkansas Power & Light Co. v. Richenback, 119 S.W.2d 515, 196 Ark. 620.

69. Hawaii.—Chai v. Murata, 34 Hawaii 35.

70. La.—Vinton Petroleum Co. v. L. Seiss Oil Syndicate, 139 So. 543, 19 La.App. 179.

71. Mo.—Cunningham v. Doe Run Lead Co., 4 S.W.2d 802.

72. Ohio.—Burns v. Fritz, 169 N.E. 309, 33 Ohio App. 306.

73. U.S.—Pennsylvania R. Co. v. Roth, C.C.A.Ohio, 163 F.2d 161—Cimorelli v. New York Cent. R. Co., C.C.A.Ohio, 148 F.2d 575.

74. Miss.—Gulf Refining Co. v. Nations, 145 So. 327, 167 Miss. 315.

75. Ill.—Scharfenstein v. Forest City Knitting Co., 253 Ill.App. 190.

76. N.J.—Brown v. Freeman, 86 A. 384, 84 N.J.Law 360.

77. Mass.—Bell v. Sawyer, 47 N.E. 2d 1, 313 Mass. 250.

78. Tex.—Texas & N. O. R. Co. v. Rittimann, Civ.App., 87 S.W.2d 745, error dismissed.

79. Miss.—Harper v. Wilson, 140 So. 693, 163 Miss. 199.

80. Ky.—Nashville Bridge Co. v. Marsh, 279 S.W. 1099, 212 Ky. 728.

81. N.C.—Livingston v. Essex Inv. Co., 14 S.E.2d 489, 219 N.C. 416.
Ohio.—Ballato v. Industrians Savings & Loan Co., 28 N.E.2d 789, 64 Ohio App. 339.
R.I.—O'Connor v. Narragansett Electric Co., 172 A. 889, 54 R.I. 317.

82. Ariz.—Maxey v. Johnson, 242 P. 866, 29 Ariz. 452.

§ 4. Substitutes

A substitute employed by a servant having the right to do so by custom or with the acquiescence of the master is entitled to the same protection and bound by the same obligations as the servant himself.

A substitute employed by a servant, in accordance with a custom permitting such hiring,[83] or with the implied knowledge of the master or his subsequent ratification,[84] is entitled to the same protection as the servant; he is bound by the terms and conditions of his predecessor's contract,[85] and the fact that the employee receives his own regular wages does not affect the relation of the substitute to the master.[86] On the other hand, one who, with the right under his contract to work whenever he desires, has a private arrangement with a third person who acts as his substitute and looks alone to him for compensation, is, while at work, an employee under his contract.[87]

§ 5. Contracts of Employment

A contract of employment cannot arise without the consent of an alleged party thereto, and it has been held that such contract, when made without reference to the law of a particular place, is governed by the law of the place where the contract was made, at least where such place is the same as the place where the contract is to be performed.

The relation of master and servant arises out of contract, as discussed supra § 2, and a contract of employment usually involves the agreement of one party to render services or labor for the benefit of another, who in turn becomes obligated to pay a consideration therefor,[88] and the rights of an employer and an employee under an employment contract are correlative.[89] A contract of employment cannot arise against the will or without the consent of an alleged party thereto.[90]

What law governs. It has been held that a contract of employment is governed as to its construction and effect by the law with reference to which the parties in good faith intended to contract[91] and that a contract made without reference to the law of a particular place[92] is governed by the law of the place where the contract was made.[93] The lat-

83. Okl.—**Corpus Juris quoted in** Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 429, 148 Okl. 107—Kali Inla Coal Co. v. Ghinelli, 155 P. 606, 55 Okl. 289.

84. Okl.—**Corpus Juris quoted in** Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 429, 148 Okl. 107.
39 C.J. p 38 note 58.

85. Ark.—Missouri & N. A. R. Co. v. Bates, 153 S.W. 609, 106 Ark. 454.
Minn.—**Corpus Juris cited in** Wicklund v. North Star Timber Co., 287 N.W. 7, 12, 205 Minn. 620.
Okl.—**Corpus Juris quoted in** Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 429, 148 Okl. 107.

86. Ark.—Garretson-Greeson Lumber Co. v. Goza, 172 S.W. 825, 116 Ark. 277.
Minn.—**Corpus Juris cited in** Wicklund v. North Star Timber Co., 287 N.W. 7, 12, 205 Minn. 620.

87. Ky.—Louisville, H. & St. L. Ry. Co. v. Armes, 166 S.W. 190, 158 Ky. 676.

88. U.S.—Rickenbaker v. Layton, D. C.S.C., 59 F.Supp. 156.

Memorandum of salary paid

A contract, whereby employee of corporation agreed to give note for stock in corporation which agreed to pay employee an additional sum per year salary in excess of salary then being paid, was not an "employment contract" which created obligation on either party to continue employment at salary then being paid, the reference to regular salary being but a memorandum of salary, presently paid.—Gutknecht v. C. A. Lawton Co., 285 N.W. 411, 231 Wis. 413.

Contract or trade agreement

(1) "Contract" in labor law is a term the implications of which must be determined from the connection in which it appears; it does not necessarily connote a contract of employment.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762.

(2) As discussed infra § 28 (37), negotiations between a union and management result in what is often called a trade agreement rather than in a contract of employment.

89. Wash.—Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 188 Wash. 396.

90. U.S.—Vaughan v. Warner, C.C. A.Pa., 157 F.2d 26—N. L. R. B. v. Knoxville Pub. Co., C.C.A.6, 124 F.2d 875—Morgan v. Wheland Co., D.C.Tenn., 66 F.Supp. 439.
Cal.—Sumner v. Edmunds, 21 P.2d 159, 130 Cal.App. 770.
Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473 v. Rialto Theatre Co., 17 A. 2d 836.
Me.—Copp v. Paradis, 157 A. 228, 130 Me. 464
N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188—Aberon Bakery Co. v. Raimist, 254 N.Y.S. 38, 141 Misc. 774.
Okl.—**Corpus Juris quoted in** Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 428, 148 Okl. 107.
Pa.—Saldukas v. McKerns, 16 A.2d 30, 340 Pa. 113—White v. Consumers Finance Service, 15 A.2d 142, 339 Pa. 417—Corbin v. George, 162 A. 459, 308 Pa. 201—Jacamino v. Harrison Motor Freight Co., 5 A.2d 393, 135 Pa.Super. 356—Steffy v. City of Reading, Com.Pl., 37 Berks Co.L.J. 91, 36 Mun.L.R. 133, affirmed 46 A.2d 182, 353 Pa. 539—Henry v. Beck, Com.Pl., 56 York 209, affirmed 36 A.2d 734, 154 Pa.Super. 585.
Tex.—Linden Lumber Co. v. Johnston, Civ.App., 128 S.W.2d 121, error dismissed—Carter Publications v. Davis, Civ.App., 68 S.W.2d 640, error refused—West Texas Produce Co. v. Pate, Civ.App., 64 S.W. 2d 381.
Wash.—Bradley v. S. L. Savidge, Inc., 152 P.2d 149, 21 Wash.2d 556—Bradley v. S. L. Savidge, Inc., 123 P.2d 780, 13 Wash.2d 28.
39 C.J. p 34 note 16—p 39 note 65.
Meeting of minds and offer and acceptance as essential to a valid contract see infra § 6.
Right to discharge as element of relation see supra § 2 d.
Terms of contract see infra § 6 b.

91. Conn.—Pollak v. Danbury Mfg. Co., 131 A. 426, 103 Conn. 553.
What law governs contracts generally see Contracts § 12.

92. Mass.—Weiner v. Pictorial Paper Package Corporation, 20 N.E.2d 458, 303 Mass. 123.
N.Y.—Denihan v. Finn-Iffland & Co., 256 N.Y.S. 801, 143 Misc. 525.

93. U.S.—Moore v. Illinois Cent. R. Co., C.C.A.Miss., 136 F.2d 412, certiorari denied 64 S.Ct. 84, 320 U. S. 771, 88 L.Ed. 61—Helfer v. Cor-

ter is undoubtedly true in so far as the place where the contract is made is the same as where it is to be performed,[94] or where the contract is to be performed in various jurisdictions.[95] Where, however, a contract is made in one place and is to be performed in another place it has been held that the law of the place of performance governs.[96]

Right of seniority. An employee has no inherent right to seniority in service, and can have only such rights as may be based on a contract or on a statute or administrative regulation relative thereto.[97] Inasmuch as seniority rights must be effective against the employer if they are to be effective at all, he must be a party to any contractual arrangement which creates them.[98] Where seniority rights do in fact exist as the result of contract they are not inconsistent with the employer's right to discharge an employee, but ordinarily they exist on the assumption of continuing employment.[99] It has been stated that there is no apparent reason why they may not be enforced in the courts by the application of the remedies usually employed in the enforcement of other legal rights.[1]

§ 6. —— Form and Validity

a. In general
b. Terms and conditions
c. Certainty
d. Contracts for permanent or life employment

a. In General

Like every other contract, a contract of employment arises out of a meeting of the minds of the parties; and, while mutuality of obligation and sufficient consideration are essential, in the absence of statute or arbitrary rule of law no specific formalities are essential. The contract may be void or voidable because of fraud or misrepresentation.

Like every other contract, a contract of employment arises out of a meeting of the minds of the parties,[2] with an offer on the part of one and an

ona Products, C.C.A.Ark., 127 F.2d 612.
Mass.—Weiner v. Pictorial Paper Package Corporation, 20 N.E.2d 458, 303 Mass. 123.
N.J.—Cohen v. Camden Refrigerating & Terminals Co., 30 A.2d 428, 129 N.J.Law 519, 145 A.L.R. 308.

Contract merged in another contract
Where the original contract which had been made in one state was merged into a later contract made in another state, the law of the state where the later contract was made was required to be applied to construe the contractual rights and obligations of the parties.—Sprague Elec. Co. v. Cornell-Dubilier Elec. Corp., D.C.Del., 62 F.Supp. 1.

94. U.S.—Bernhard v. Metcalfe Const. Co., D.C.Neb., 64 F.Supp. 953.
Ill.—Oakes v. Chicago Fire Brick Co., 58 N.E.2d 460, 388 Ill. 474—Joy v. Ditto, Inc., 271 Ill.App. 395, affirmed 190 N.E. 671, 356 Ill. 348.
Iowa.—Elk River Coal & Lumber Co. v. Funk, 271 N.W. 204, 222 Iowa 1222, 110 A.L.R. 1415.
N.J.—Donnellan v. Halsey, 176 A. 176, 114 N.J.Law 175.
N.Y.—Denihan v. Finn-Iffland & Co., 256 N.Y.S. 801, 143 Misc. 525.

95. Ill.—Oakes v. Chicago Fire Brick Co., 58 N.E.2d 460, 388 Ill. 474.

96. Iowa.—Elk River Coal & Lumber Co. v. Funk, 271 N.W. 204, 222 Iowa 1222, 110 A.L.R. 1415.
N.Y.—Denihan v. Finn-Iffland & Co., 256 N.Y.S. 801, 143 Misc. 625.

97. U.S.—Trailmobile Co. v. Whirls, Ohio, 67 S.Ct. 982—Elder v. New York Cent. R. Co., C.C.A.Ky., 152 F.2d 361.
Colo.—Capra v. Local Lodge No. 273 of Brotherhood of Locomotive Firemen and Enginemen, 76 P.2d 738, 102 Colo. 63.
Conn.—Boucher v. Godfrey, 178 A. 655, 119 Conn. 622.
Ill.—Carver v. Brien, 43 N.E.2d 597, 315 Ill.App. 643.
Mass.—Donovan v. Travers, 188 N.E. 705, 285 Mass. 167.
Mich.—Ryan v. New York Cent. R. Co., 255 N.W. 365, 267 Mich. 202.
Ohio.—Hess v. Trailer Co. of America, 17 Ohio Supp. 39.
Pa.—Madera v. Monongahela Ry. Co., 52 A.2d 329, 356 Pa. 460—Polanskey v. Monongahela Ry. Co., 19 A.2d 377, 342 Pa. 188.
Tex.—Fine v. Pratt, Civ.App., 150 S.W.2d 308.
Restoration of employment under Selective Service Act of 1940 see Army and Navy § 60.
Seniority rights under collective bargaining agreements see infra § 28 (41).

Meaning of "seniority rights"
(1) "Seniority rights" mean that a man shall be entitled to preference in matter of choice of and right to work in his occupation in accordance with length of time he has been employed.
Tex.—Fine v. Pratt, supra.
Wyo.—Samuelson v. Brotherhood of Railroad Trainmen, Rocky Mountain Lodge No. 852, 151 P.2d 347, 60 Wyo. 316.

(2) It comprehends the length of period of service in office or entrance on an office anterior to that of another.—Unkovich v. New York Cent. R. Co., 16 A.2d 558, 128 N.J.Eq. 377, affirmed 174 A. 876, 117 N.J.Eq. 20.

Right held not conferred by contract of employment.—Hartley v. Brotherhood of Railway and Steamship Clerks, Freight Handlers and Station Employees, 277 N.W. 885, 283 Mich. 201.

98. Ill.—Carver v. Brien, 43 N.E.2d 597, 315 Ill.App. 643.

99. Tex.—Fine v. Pratt, Civ.App., 150 S.W.2d 308.

1. Tex.—Fine v. Pratt, supra.

2. U.S.—N. L. R. B. v. Knoxville Pub. Co., C.C.A.6, 124 F.2d 875—Rickenbacker v. Layton, D.C.S.C., 59 F.Supp. 156.
Ala.—Peacock v. Virginia-Carolina Chemical Co., 130 So. 411, 221 Ala. 680.
Ariz.—Durkee-Thomas Corporation v. Doherty, 295 P. 302, 37 Ariz. 457.
Mo.—Solace v. T. J. Moss Tie Co., App., 142 S.W.2d 1079—Jesse v. Rolaff, App., 74 S.W.2d 890.
N.Y.—Smith v. Compania Litografica de la Habana, 217 N.Y.S. 39, 127 Misc. 508, affirmed 222 N.Y.S. 902, 220 App.Div. 782.
Okl.—Hamilton v. Randall, 276 P. 705, 136 Okl. 170—Palmer v. Skelly Oil Co., 263 P. 440, 129 Okl. 32.
Tex.—Courreges v. System Freight Service, Civ.App., 152 S.W.2d 841.

Reality of consent
(1) The consent necessary to create a binding contract must be real.—Silbros, Inc. v. Solomon, N.J.Ch., 52 A.2d 534.

(2) However, one signing an employment contract and who knew that the document related to the terms of employment and who had an opportunity to examine the con-

acceptance on the part of the other,[3] and it is essential that both parties understand the terms used in the same sense.[4] In the absence of statute or arbitrary rule of law, no specific formalities are essential.[5] Except as may be otherwise required by the statute of frauds, as discussed in Frauds, Stat-

tract before signing it, is bound thereby notwithstanding he did not read it in the absence of a showing of fraud.—Silbros, Inc., v. Solomon, supra.

(3) A fortiori, in the absence of fraud, a party reading and signing an employment contract is bound thereby.—Clements v. Knighton, La. App., 1 So.2d 139.

Payment for service rendered, under a misapprehension as to the terms of employment does not affect the question as to the nature of the employment arrangement or agreement.—St. Louis Hay & Grain Co. v. U. S., Ct.Cl., 24 S.Ct. 47, 191 U.S. 159, 48 L.Ed. 130—Gorman v. U. S., 102 Ct.Cl. 260.

A contract entered into by an agent of the employer without real or apparent authority to make the contract is not binding on the employer.

Kan.—Hawkins v. Shell Petroleum Corporation, 62 P.2d 833, 144 Kan. 800.

Okl.—Chicago, R. I. & P. Ry. Co. v. Sawyer, 56 P.2d 418, 176 Okl. 446.

Knowledge insufficient to establish privity

Where defendant allegedly entered into written contract with another for exclusive right for sale of property and defendant engaged plaintiff to act as salesman, the other's knowledge of plaintiff's contract was insufficient to establish privity of contract between the other and plaintiff.—Von Keller v. Koehler, 34 N.Y.S.2d 673, 264 App.Div. 778.

3. U.S.—N. L. R. B. v. Knoxville Pub. Co., C.C.A.6, 124 F.2d 875—Metropolitan Life Ins. Co. v. Henderson, C.C.A.Wash., 92 F.2d 891.

Ala.—Remington Typewriter Co. v. Hall, 115 So. 73, 22 Ala.App. 267, certiorari denied 115 So. 74, 217 Ala. 128.

Cal.—Sumner v. Edmunds, 21 P.2d 159, 130 Cal.App. 770.

Fla.—Edgewater Beach Corporation v. Sugarman, 15 So.2d 260, 153 Fla. 555.

Ky.—Clay v. Louisville & N. R. Co., 71 S.W.2d 617, 254 Ky. 271.

Mass.—Fenton v. Federal St. Bldg. Trust, 39 N.E.2d 414, 310 Mass. 609.

Mich.—Valentine v. King Mfg. Co., 245 N.W. 529, 260 Mich. 601—Shapiro v. Fyrac Mfg. Co., 242 N.W. 902, 259 Mich. 242.

N.Y.—Dorrance, Sullivan & Co. v. Bright Star Battery Co., 164 N.E. 596, 249 N.Y. 593—Fahey v. Kennedy, 243 N.Y.S. 396, 230 App.Div. 156, appeal denied 244 N.Y.S. 603, 230 App.Div. 799—Levoff v. Washington Piece Dyeing & Finishing Co., 210 N.Y.S. 463, 125 Misc. 184—Noble v. McKinley, 72 N.Y.S.2d 510.

Pa.—Taylor v. Stanley Co. of America, 158 A. 157, 305 Pa. 546.

Construction of offer

A corporation's written offer of employment, prepared by its president, must be construed most favorably to offeree, and words of offer must be given meaning which corporation should reasonably have understood that offeree would put on them.—Noble v. McKinley, 72 N.Y.S. 2d 510.

In determining whether offer was accepted, so as to consummate contract, all surrounding circumstances should be considered.—Noble v. McKinley, supra.

Time, place, and mode of acceptance

A party making an offer of employment has a right to stipulate the time, place, and the mode of its acceptance, and, when the offer does so stipulate, it cannot be accepted in any other place or in any other manner.

Neb.—Kline v. Metcalfe Const. Co., 27 N.W.2d 383, 148 Neb. 357.

Tex.—Texas Employers' Ins. Ass'n v. Moore, Civ.App., 56 S.W.2d 652, error refused.

Acceptance conditionally or on terms varying from offer

(1) An offer cannot be accepted in part and rejected in part.—Pettit v. New Jersey Paint Works, Harry Louderbough, Inc., 136 A. 427, 5 N. J.Misc. 328.

(2) An acceptance in order to be effectual must be identical with the offer and unconditional.

Cal.—Purdy v. Buffums, Inc., 272 P. 770, 95 Cal.App. 299.

N.Y.—Levoff v. Washington Piece Dyeing & Finishing Co., 210 N.Y.S. 463, 125 Misc. 184.

(3) However, if the offerer accepts an acceptance which is not responsive to the original offer, he is bound by the contract thus made.—Kline v. Metcalfe Const. Co., 27 N.W.2d 383, 148 Neb. 357.

(4) If an offer is accepted as made, the acceptance is not conditional and does not vary from the offer because of inquiries whether the offerer will change his terms, or as to future acts, or by the expression of hopes or suggestions.

Cal.—Purdy v. Buffums, Inc., supra.

Mass.—Nelson v. Hamlin, 155 N.E. 18, 258 Mass. 331.

Acceptance of conditional offer

Acceptance of an offer of employment made by an agent expressly subject to his principal's approval does not operate to create a binding contract without fulfillment of the condition.—Durkee-Thomas Corporation v. Doherty, 295 P. 302, 37 Ariz. 457.

4. Ala.—Peacock v. Virginia-Carolina Chemical Co., 130 So. 411, 221 Ala. 680.

5. U.S.—Lassiter v. Guy F. Atkinson Co., C.C.A.Wash., 162 F.2d 774—Standard Oil Co. v. Lyons, C.C. A.Iowa, 130 F.2d 965—Metropolitan Life Ins. Co. v. Henderson, C. C.A.Wash., 92 F.2d 891.

Ala.—Remington Typewriter Co. v. Hall, 115 So. 73, 22 Ala.App. 267, certiorari denied 115 So. 74, 217 Ala. 128.

Me.—Lunt v. Fidelity & Casualty Co. of New York, 28 A.2d 736, 139 Me. 218.

Mich.—Valentine v. King Mfg. Co., 245 N.W. 529, 260 Mich. 601.

N.Y.—Dorrance, Sullivan & Co. v. Bright Star Battery Co., 164 N. E. 596, 249 N.Y. 593—Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 152 Misc. 716.

Ohio.—Crosby v. Rath, 25 N.E.2d 934, 136 Ohio St. 352, certiorari denied Roth v. Crosby, 61 S.Ct. 618, 312 U.S. 690, 85 L.Ed. 1126.

W.Va.—Stewart v. Blackwood Electric Steel Corporation, 130 S.E. 447, 100 W.Va. 331.

Formal notice of acceptance of offer is not necessary.—Fahey v. Kennedy, 243 N.Y.S. 396, 230 App.Div. 156, appeal denied 244 N.Y.S. 603, 230 App.Div. 799.

Formal delivery of written contract of employment, under which parties operated, has been held not necessary.—Houk v. Gilmore, 259 P. 891, 122 Or. 498.

Execution by master not essential

(1) A written employment contract executed in duplicate by the employee, of which one copy was delivered to, and accepted by, employer, has been held to be a binding contract, even though signed by employee only.—Knight v. Gulf Refining Co., 166 A. 880, 311 Pa. 357.

(2) So it has been held, where the parties have operated under a written contract, that the master will not be permitted to repudiate the contract on the ground that it was not executed by or for him.—Hollingsworth v. Robe Lumber Co., 45 P. 2d 614, 182 Wash. 74.

ute of § 62, or the parties themselves contemplate the execution of a written agreement,[6] such contract may be oral or written,[7] express or implied.[8] Thus one who is allowed to work in connection with the carrying on of a business, and is given reason to believe and bona fide believes that he is employed in that business, has a right to treat himself as an employee.[9]

Consideration; mutuality. It is equally essential that a contract of employment be supported by sufficient consideration;[10] mutuality of obligation is an essential element of every enforceable contract of employment.[11] While it has been held that a contract terminable by either party at will is not in-

Notarial act enjoining on employee knowledge and understanding of contract signed is unnecessary.—Red Star Yeast & Products Co. v. Hague, 157 N.E. 398, 25 Ohio App. 100.

6. **Signing letter enclosing contract insufficient**

Where employer and employee were negotiating for contract and employee signed proposed contract, employer's letter, stating that employer was sending two revised copies of proposed contract, and if contract as revised was satisfactory employee should execute both copies and return them so that they might be executed on behalf of employer, did not constitute the execution of enclosed contract on theory that letter and contract were so united as to constitute the signature to letter as subscribed, to both.—Price v. Reynolds Metals Co., D.C.N.Y., 69 F. Supp. 82.

7. U.S.—Walling v. Halliburton Oil Well Cementing Co., D.C.Cal., 57 F.Supp. 408, affirmed, C.C.A., 152 F.2d 622, affirmed 67 S.Ct. 1056, 331 U.S. 17, 91 L.Ed. —.

Ind.—**Corpus Juris cited in** Kirmse v. City of Gary, 51 N.E.2d 883, 884, 114 Ind.App. 558.

Neb.—Arman v. Structiform Engineering Co., 24 N.W.2d 723, 147 Neb. 658.

N.Y.—Foster v. White, 3 N.Y.S.2d 456, 253 App.Div. 448, reversed on other grounds 17 N.E.2d 761, 279 N.Y. 38, reargument denied 18 N.E.2d 868, 279 N.Y. 786.

Okl.—**Corpus Juris quoted in** Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 429, 148 Okl. 107.

Pa.—Taylor v. Stanley Co. of America, 158 A. 157, 305 Pa. 546.

S.C.—**Corpus Juris cited in** Cooksey v. Beaumont Mfg. Co., 9 S.E.2d 790, 791, 194 S.C. 395.

Tex.—Wheat v. Texas Co., Civ.App., 159 S.W.2d 238, reversed on other grounds Texas Co. v. Wheat, 168 S.W.2d 632, 140 Tex. 468.

39 C.J. p 39 note 64.

8. U.S.—Lassiter v. Guy F. Atkinson Co., C.C.A.Wash., 162 F.2d 774—Standard Oil Co. v. Lyons, C.C.A.Iowa, 130 F.2d 965—Fersing v. Fast, Cust. & Pat.App., 121 F.2d 531—Jones v. Goodson, C.C.A.Okl., 121 F.2d 176.

Colo.—Linder v. Midland Oil Refining Co., 40 P.2d 253, 96 Colo. 160.

Ind.—**Corpus Juris cited in** Kirmse v. City of Gary, 51 N.E.2d 883, 884, 114 Ind.App. 558.

La.—Ranson-Rooney v. Overseas Ry., 134 So. 765, 17 La.App. 205, judgment set aside on other grounds Rooney v. Overseas Ry., 136 So. 486, 173 La. 183.

Minn.—Gonyea v. Duluth, M. & I. R. Ry. Co., 19 N.W.2d 384, 220 Minn. 225.

N.Y.—Foster v. White, 3 N.Y.S.2d 456, 253 App.Div. 448, reversed on other grounds 17 N.E.2d 761, 279 N.Y. 38, reargument denied 18 N.E.2d 868, 279 N.Y. 786—Paulsen v. Kahn, 288 N.Y.S. 622, 248 App.Div. 744.

Okl.—**Corpus Juris quoted in** Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 429, 148 Okl. 107.

39 C.J. p 39 note 64.

Assent of employer may be implied.—Shapiro v. Fyrac Mfg. Co., 242 N.W. 902, 259 Mich. 242—39 C.J. p 39 note 66.

Performance of services as implied acceptance

Mass.—McCrillis v. L. Q. White Shoe Co., 161 N.E. 902, 264 Mass. 32.

N.Y.—Wanhope v. Press Co., 10 N.Y.S.2d 797, 256 App.Div. 433, affirmed 22 N.E.2d 171, 281 N.Y. 607.

Facts insufficient to create implied contract

(1) A prospective employer does not assume contractual obligations merely by asking price of service.—Yurgelin v. Emery, 185 N.E. 33, 282 Mass. 571.

(2) Other circumstances held insufficient.—H. F. Fites Co. v. Harris Mfg. Co., 264 P. 799, 89 Cal.App. 427.

9. Okl.—**Corpus Juris quoted in** Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 429, 148 Okl. 107.

39 C.J. p 39 note 68.

10. U.S.—National Wooden Box Ass'n v. U. S., 59 F.Supp. 118, 103 Ct.Cl. 595.

La.—Lowy v. Bulliard, App., 17 So. 2d 855.

N.Y.—Strobe v. Netherland Co., 283 N.Y.S. 246, 245 App.Div. 573.

Consideration beyond services

(1) A contract of employment does not require any consideration beyond employee's services.—Adolph v. Cookware Co. of America, 278 N.W. 687, 283 Mich. 561.

(2) Payment of a consideration to the employer at the time of the making of the contract is not necessary.—Joffe v. Cohen, 141 A. 14, 104 N.J. Law 209.

Consideration held sufficient

(1) Mutual promises to hire and to serve constitute sufficient consideration.—Fullington v. Ozark Poultry Supply Co., 39 S.W.2d 780, 327 Mo. 1167.

(2) The obligation to perform duties not already required to be performed under an existing contract affords sufficient consideration for a new contract.—Arman v. Structiform Engineering Co., 24 N.W.2d 723, 147 Neb. 658.

(3) Where defendant promised employment if plaintiff would leave his employer and plaintiff did so, there was sufficient consideration for promise of employment.—Kirkley v. F. H. Roberts Co., 167 N.E. 289, 268 Mass. 246.

(4) Other considerations.

La.—Hanks v. Shreveport Yellow Cabs, App., 187 So. 817.

Pa.—Sheesley v. Bisbee Linseed Co., 10 A.2d 401, 337 Pa. 197.

Consideration held lacking or insufficient

Obligee's promise to give guarantor employment if guarantor would retake merchandise sold to person whose debt was guaranteed, and thereby reduce guarantor's loss, held without consideration.—Waller v. Martin-Senour Co., 166 S.E. 53, 45 Ga. App. 808.

Insufficiency of part of consideration

If one or more of the several considerations which are recited as the ground of a promise are frivolous or insufficient, but not illegal, and others are good and sufficient, the latter will sustain the promise.—Fullington v. Ozark Poultry Supply Co., 39 S.W.2d 780, 327 Mo. 1167.

11. Ind.—Davis v. Davis, 151 N.E. 134, 197 Ind. 386.

Ky.—Stanley v. Kentucky Utilities Co., 4 S.W.2d 732, 223 Ky. 688.

N.Y.—Petigor v. Morgan Lithograph Co., 238 N.Y.S. 688, 135 Misc. 889, affirmed 243 N.Y.S. 812, 229 App. Div. 864.

Mutuality as essential element of contracts for services generally see Contracts § 101.

Contract held not lacking in mutuality

Pa.—Sheesley v. Bisbee Linseed Co., 10 A.2d 401, 337 Pa. 197.

valid as unilateral,[12] it has also been held that mutuality is lacking when only one of the parties is bound to perform.[13] Thus it has been held that an agreement which depends for performance on the wish, will, or pleasure of one of the parties,[14] whether the employer[15] or the employee,[16] is unilateral and void for want of mutuality, at least in so far as it remains executory.[17] It has also been held, however, that the fact that an employer may at any time terminate the employment or change any of its terms does not preclude the existence of a valid contract[18] and that a contract is not void as unilateral because, although the employer is bound for a definite period, the employee may terminate it at pleasure.[19] Generally, where an independent consideration passes from the employee, in addition to the performance of service, the fact that the contract is terminable at the will of the employee does not impair its mutuality.[20] A contract is not necessarily lacking in mutuality because there is no express agreement on the part of the employee to serve, as such a promise is implied from his entering on the service[21] or even from his readiness and willingness to serve.[22]

Fraud and misrepresentation. Although a contract of employment induced by the false statements of the servant ordinarily is not void, but voidable at the option of the master,[23] for reasons of public policy this rule has been ignored and the contract treated as void, at least for some purposes;[24] and where an employee falsely assumes the name of a third person for the purpose of obtaining employment, in violation of a statute, it has been held that the contract is void.[25] So it has been held that one who obtains service by misrepresenting his age against a rule of the employer which forbids the employment of a minor does not become the servant of the employer, but a trespasser.[26] Fraud and misrepresentation by the employee will not ordinarily avail the employer, however, where he does not rely on the employee's statements but conducts his own investigation.[27] Fraud and misrepresentation inducing the execution of an employment contract are never presumed, but must be established by evi-

12. La.—Hanks v. Shreveport Yellow Cabs, App., 187 So. 817.
N.Y.—Schmidl v. Central Laundry & Supply Co., 13 N.Y.S.2d 817.

13. N.Y.—Strobe v. Netherland Co., 283 N.Y.S. 246, 245 App.Div. 573.
Wis.—Strauss v. Eulberg Brewing Co., 27 N.W.2d 723, 250 Wis. 579.

14. Mo.—Solace v. T. J. Moss Tie Co., App., 142 S.W.2d 1079.

15. Ky.—Louisville Tobacco Warehouse Co. v. Zeigler, 244 S.W. 899, 196 Ky. 414.
39 C.J. p 40 note 69.

Practically unlimited power inequitable

A contract, giving the employer practically unlimited power to discharge and purporting to bind the employee for a definite period is inequitable to say the least, whatever its status at law.—Interborough Rapid Transit Co. v. Green, 227 N.Y.S. 258, 131 Misc. 682.

16. Mo.—Solace v. T. J. Moss Tie Co., App., 142 S.W.2d 1079.
39 C.J. p 40 note 73.

17. Mo.—Clarkson v. Standard Brass Mfg. Co., 170 S.W.2d 407, 237 Mo.App. 1018—Solace v. T. J. Moss Tie Co., App., 142 S.W.2d 1079.
N.Y.—Strobe v. Netherland Co., 283 N.Y.S. 246, 245 App.Div. 573.

Indefinite agreement lacking mutuality

An executory agreement by an employer to pay an employee at a rate not specified for time when he did no work, without any corresponding agreement binding him to work for the employer even for a single day at an agreed rate of compensation, has been held to be too indefinite for enforcement, and so lacking in mutuality as not to support an action for breach of contract.—Davis v. Davis, 151 N.E. 134, 197 Ind. 386.

18. Cal.—California Casualty Indemnity Exchange v. Industrial Accident Commission, 132 P.2d 815, 21 Cal.2d 461.
Pa.—Crosby v. McGlauflin, Com.Pl., 94 Pittsb.Leg.J. 213.

19. Minn.—Newhall v. Journal Printing Co., 117 N.W. 228, 105 Minn. 44, 20 L.R.A.,N.S., 899.
Tex.—Gulf, C. & S. F. R. Co. v. Jackson, 69 S.W. 89, 29 Tex.Civ.App. 342.

An employer's promise not to discharge an employee unjustly has been held not invalid for lack of mutuality because the employee does not agree to remain in service for any definite length of time but may terminate his employment at any time.—Moore County Carbon Co. v. Whitten, Tex.Civ.App., 140 S.W.2d 880, error dismissed, judgment correct—St. Louis, B. & M. Ry. Co. v. Booker, Tex.Civ.App., 5 S.W.2d 856.

20. S.C.—Shealy v. Fowler, 188 S.E. 499, 182 S.C. 81.

Surrender of position held not consideration supporting contract lacking mutuality.—Stanley v. Kentucky Utilities Co., 4 S.W.2d 732, 223 Ky. 688.

21. N.Y.—Stadler v. Samuels, 178 N.Y.S. 324.
39 C.J. p 40 note 70.

22. Ill.—Mahon v. Daly, 70 Ill. 653.

23. Tex.—Dawson v. Texas & P. Ry. Co., 70 S.W.2d 392, 123 Tex. 191, certiorari denied Texas & P. Ry. Co. v. Dawson, 55 S.Ct. 110, 293 U.S. 580, 79 L.Ed. 677.
39 C.J. p 40 note 75, p 276 note 45.
Fraud or misrepresentation as not terminating relation of master and servant existing at time of injury to servant see infra § 180.

24. **Recovery by injured railroad employee**

Where an employee of a railroad had obtained employment on misrepresentations, relied on by the railroad, the employment contract was held void, precluding recovery for injuries under statute.—Fort Worth & D. C. Ry. Co. v. Griffith, Tex.Civ.App., 27 S.W.2d 351, error refused.

25. N.Y.—Morgan Munitions Supply Co. v. Studebaker Corp., 123 N.E. 146, 226 N.Y. 94.
39 C.J. p 40 note 76.

26. Va.—Norfolk & W. R. Co. v. Bondurant, 59 S.E. 1091, 107 Va. 515, 122 Am.S.R. 867, 15 L.R.A.,N.S., 443.
Misrepresentation of age as affecting employer's liability for injuries to minors employed in violation of statute see infra § 194.

27. **Rule inapplicable**

The rule stated in the text has been held inapplicable, however, where the employee induces a third person to make a false statement.—Fort Worth & D. C. Ry. Co. v. Griffith, Tex.Civ.App., 27 S.W.2d 351, error refused.

dence,[28] and a party relying on such fraud and misrepresentation as part of his cause of action or defense has the burden of proving them.[29] Fraud inducing a contract of employment may be shown by circumstantial evidence.[30]

b. Terms and Conditions

A contract of employment may contain such terms and conditions as the parties see fit to make provided they are not illegal or unreasonable.

The contract must conform to, and not be in violation of, valid statutory provisions governing the terms and conditions of employment,[31] but it may contain such terms and conditions as the parties see fit to make provided they are not illegal or unreasonable.[32] In other words, subject to valid statutes designed to prohibit substandard conditions and unfair labor practices, wages, hours, and working conditions are the proper subjects of contract between the employer and the employee, and their agreements must be, and are, given full effect in the courts.[33] Particular provisions which have been held not illegal or unreasonable include provisions permitting the employer to terminate the employment at any time with or without cause,[34] permitting the employer to continue to use the employee's ideas and materials after the termination of the employment on payment of a stipulated compensation,[35] requiring employees to participate in a group insurance plan under which a part of the premiums therefor are paid by deduction from the employee's wages,[36] and making an employee's right to a bonus conditional on his continuous service for a stated period.[37]

c. Certainty

It is essential to the validity of a contract of employment that the nature and extent of its obligations be certain.

It is essential to the validity of a contract of employment that the nature and the extent of its obligations be certain.[38] A contract is not necessarily uncertain, however, because some of its terms must be fixed at a future time or by subsequent events,[39] and a contract is sufficiently certain if it may be rendered certain[40] or has been rendered certain by

28. Mo.—Paulette v. Sernes, App., 103 S.W.2d 573.

29. La.—Clements v. Knighton, App., 1 So.2d 139.
Mo.—Paulette v. Sernes, App., 103 S.W.2d 573.
39 C.J. p 40 note 78.

30. Mo.—Paulette v. Sernes, supra.
Evidence held to warrant inference that contract was induced by fraud.—Paulette v. Sernes, supra.

31. U.S.—Travis v. Ray, D.C.Ky., 41 F.Supp. 6—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009.
Mass.—In re West, 46 N.E.2d 760, 313 Mass. 146.
N.Y.—People v. Grass, 11 N.Y.S.2d 803, 257 App.Div. 1.
Okl.—Foster v. Atlas Life Ins. Co., 6 P.2d 805, 154 Okl. 30.
Pa.—Chapter No. 763 Master Barbers v. Gambino, Com.Pl., 87 Pittsb.Leg. J. 288, 27 North.Co. 6.
Utah.—Golding v. Schubach Optical Co., 70 P.2d 871, 93 Utah 32.
39 C.J. p 40 notes 89, 90.
Statutory regulations affecting:
Relation of master and servant generally see infra §§ 14–28.
Wages and other remuneration see infra §§ 151–160.

32. U.S.—Cater Const. Co. v. Nischwitz, C.C.A.Ill., 111 F.2d 971—Harrison v. Kansas City Terminal Ry. Co., D.C.Mo., 36 F.Supp. 434, affirmed, C.C.A., 126 F.2d 422—Reeves v. Howard County Refining Co., D.C. Tex., 33 F.Supp. 90.
Kan.—Reynolds v. Armour & Co., 87 P.2d 530, 149 Kan. 460.
Mo.—Douglas v. Metropolitan Life Ins. Co., App., 297 S.W. 87.
N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N. Y. 65, 63 A.L.R. 188.
Utah.—Golding v. Schubach Optical Co., 70 P.2d 871, 93 Utah 32.
39 C.J. p 41 note 91—63 C.J. p 659 note 54.

33. U.S.—Fleming v. A. H. Belo Corporation, C.C.A.Tex., 121 F.2d 207, affirmed Walling v. A. H. Belo Corporation, 62 S.Ct. 1223, 316 U. S. 624, 86 L.Ed. 1716, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Fleming v. Stone, D.C. Ill., 41 F.Supp. 1000, reversed on other grounds, C.C.A., Walling v. Stone, 131 F.2d 461—Allen v. Moe, D.C.Idaho, 39 F.Supp. 5—Reeves v. Howard County Refining Co., D.C. Tex., 33 F.Supp. 90.

34. Ind.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind. App. 661.
Provision for termination on week's notice
N.Y.—Schmidl v. Central Laundry & Supply Co., 13 N.Y.S.2d 817.

35. Ill.—Hobbs v. H. M. Gousha Co., 24 N.E.2d 240, 302 Ill.App. 508.

36. Kan.—Harold v. Armour & Co., 99 P.2d 856, 151 Kan. 487, certiorari denied Cook v. Armour & Co., 60 S.Ct. 1082, 310 U.S. 630, 84 L. Ed. 1401—Reynolds v. Armour & Co., 87 P.2d 530, 149 Kan. 460.

37. Ind.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind.App. 661.

38. Mass.—Kirkley v. F. H. Roberts Co., 167 N.E. 289, 268 Mass. 246.
N.Y.—Nikulnikoff v. Archbishop, etc., of Russian Orthodox Greek Catholic Church, 255 N.Y.S. 653, 142 Misc. 894—Rice v. Elmhurst Cont. Co., 66 N.Y.S.2d 765.
39 C.J. p 40 note 79.
Contracts held sufficiently definite
(1) Generally.
Mass.—Fenton v. Federal St. Bldg. Trust, 39 N.E.2d 414, 310 Mass. 609.
Pa.—Sheesley v. Bisbee Linseed Co., 10 A.2d 401, 337 Pa. 197.
(2) A contract of employment is not rendered indefinite by the employer's promise to plaintiff of a future interest in the business, where plaintiff was not to acquire such an interest unless an interest should be given other employee.—Newell v. Anchor Webbing Co., R.I., 129 A. 264.

39. Mass.—Kirkley v. F. H. Roberts Co., 167 N.E. 289, 268 Mass. 246.

40. U.S.—F. S. Royster Guano Co. v. Hall, C.C.A.N.C., 68 F.2d 533.
Miss.—Thorne v. True-Hixon Lumber Co., 148 So. 388, 167 Miss. 266.
Pa.—Mayo v. Art Metal Works, Inc., Com.Pl., 6 Monroe L.R. 102.
R.I.—Newell v. Anchor Webbing Co., 129 A. 264.
A promise of top wages for common labor has been held sufficiently definite.—F. S. Royster Guano Co. v. Hall, C.C.A.N.C., 68 F.2d 533.
Option as to compensation
Where plaintiff gave defendant alternative proposals under which plaintiff would manage defendant's hotel during a season and defendant expressed satisfaction with either or

dence,[28] and a party relying on such fraud and misrepresentation as part of his cause of action or defense has the burden of proving them.[29] Fraud inducing a contract of employment may be shown by circumstantial evidence.[30]

b. Terms and Conditions

A contract of employment may contain such terms and conditions as the parties see fit to make provided they are not illegal or unreasonable.

The contract must conform to, and not be in violation of, valid statutory provisions governing the terms and conditions of employment,[31] but it may contain such terms and conditions as the parties see fit to make provided they are not illegal or unreasonable.[32] In other words, subject to valid statutes designed to prohibit substandard conditions and unfair labor practices, wages, hours, and working conditions are the proper subjects of contract between the employer and the employee, and their agreements must be, and are, given full effect in the courts.[33] Particular provisions which have been held not illegal or unreasonable include provisions permitting the employer to terminate the employment at any time with or without cause,[34] permitting the employer to continue to use the employee's ideas and materials after the termination of the employment on payment of a stipulated compensation,[35] requiring employees to participate in a group insurance plan under which a part of the premiums therefor are paid by deduction from the employee's wages,[36] and making an employee's right to a bonus conditional on his continuous service for a stated period.[37]

c. Certainty

It is essential to the validity of a contract of employment that the nature and extent of its obligations be certain.

It is essential to the validity of a contract of employment that the nature and the extent of its obligations be certain.[38] A contract is not necessarily uncertain, however, because some of its terms must be fixed at a future time or by subsequent events,[39] and a contract is sufficiently certain if it may be rendered certain[40] or has been rendered certain by

28. Mo.—Paulette v. Sernes, App., 103 S.W.2d 573.

29. La.—Clements v. Knighton, App., 1 So.2d 139.
Mo.—Paulette v. Sernes, App., 103 S.W.2d 573.
39 C.J. p 40 note 78.

30. Mo.—Paulette v. Sernes, supra.
Evidence held to warrant inference that contract was induced by fraud.—Paulette v. Sernes, supra.

31. U.S.—Travis v. Ray, D.C.Ky., 41 F.Supp. 6—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009.
Mass.—In re West, 46 N.E.2d 760, 313 Mass. 146.
N.Y.—People v. Grass, 11 N.Y.S.2d 803, 257 App.Div. 1.
Okl.—Foster v. Atlas Life Ins. Co., 6 P.2d 805, 154 Okl. 30.
Pa.—Chapter No. 768 Master Barbers v. Gambino, Com.Pl., 87 Pittsb.Leg. J. 283, 27 North.Co. 6.
Utah.—Golding v. Schubach Optical Co., 70 P.2d 871, 93 Utah 32.
39 C.J. p 40 notes 89, 90.
Statutory regulations affecting:
Relation of master and servant generally see infra §§ 14–28.
Wages and other remuneration see infra §§ 151–160.

32. U.S.—Cater Const. Co. v. Nischwitz, C.C.A.Ill., 111 F.2d 971—Harrison v. Kansas City Terminal Ry. Co., D.C.Mo., 36 F.Supp. 434, affirmed, C.C.A., 126 F.2d 422—Reeves v. Howard County Refining Co., D.C. Tex., 33 F.Supp. 90.
Kan.—Reynolds v. Armour & Co., 87 P.2d 530, 149 Kan. 460.
Mo.—Douglas v. Metropolitan Life Ins. Co., App., 297 S.W. 87.
N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188.
Utah.—Golding v. Schubach Optical Co., 70 P.2d 871, 93 Utah 32.
39 C.J. p 41 note 91—63 C.J. p 659 note 54.

33. U.S.—Fleming v. A. H. Belo Corporation, C.C.A.Tex., 121 F.2d 207, affirmed Walling v. A. H. Belo Corporation, 62 S.Ct. 1223, 316 U.S. 624, 86 L.Ed. 1716, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Fleming v. Stone, D.C. Ill., 41 F.Supp. 1000, reversed on other grounds, C.C.A., Walling v. Stone, 131 F.2d 461—Allen v. Moe, D.C.Idaho, 39 F.Supp. 5—Reeves v. Howard County Refining Co., D.C. Tex., 33 F.Supp. 90.

34. Ind.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind. App. 661.
Provision for termination on week's notice
N.Y.—Schmidl v. Central Laundry & Supply Co., 13 N.Y.S.2d 817.

35. Ill.—Hobbs v. H. M. Gousha Co., 24 N.E.2d 240, 302 Ill.App. 508.

36. Kan.—Harold v. Armour & Co., 99 P.2d 856, 151 Kan. 487, certiorari denied Cook v. Armour & Co., 60 S.Ct. 1082, 310 U.S. 630, 84 L. Ed. 1401—Reynolds v. Armour & Co., 87 P.2d 530, 149 Kan. 460.

37. Ind.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind.App. 661.

38. Mass.—Kirkley v. F. H. Roberts Co., 167 N.E. 289, 268 Mass. 246.
N.Y.—Nikulnikoff v. Archbishop, etc., of Russian Orthodox Greek Catholic Church, 255 N.Y.S. 653, 142 Misc. 894—Rice v. Elmhurst Cont. Co., 66 N.Y.S.2d 765.
39 C.J. p 40 note 79.
Contracts held sufficiently definite
(1) Generally.
Mass.—Fenton v. Federal St. Bldg. Trust, 39 N.E.2d 414, 310 Mass. 609.
Pa.—Sheesley v. Bisbee Linseed Co., 10 A.2d 401, 337 Pa. 197.
(2) A contract of employment is not rendered indefinite by the employer's promise to plaintiff of a future interest in the business, where plaintiff was not to acquire such an interest unless an interest should be given other employee.—Newell v. Anchor Webbing Co., R.I., 129 A. 264.

39. Mass.—Kirkley v. F. H. Roberts Co., 167 N.E. 289, 268 Mass. 246.

40. U.S.—F. S. Royster Guano Co. v. Hall, C.C.A.N.C., 68 F.2d 533.
Miss.—Thorne v. True-Hixon Lumber Co., 148 So. 388, 167 Miss. 266.
Pa.—Mayo v. Art Metal Works, Inc., Com.Pl., 6 Monroe L.R. 102.
R.I.—Newell v. Anchor Webbing Co., 129 A. 264.
A promise of top wages for common labor has been held sufficiently definite.—F. S. Royster Guano Co. v. Hall, C.C.A.N.C., 68 F.2d 533.
Option as to compensation
Where plaintiff gave defendant alternative proposals under which plaintiff would manage defendant's hotel during a season and defendant expressed satisfaction with either or

the performance of the parties under it.[41] As a general rule, it is essential that the contract specify the nature and extent of the services to be performed, the place where, and the person to whom, rendered, and the compensation paid,[42] and a contract which does not specify any of the essential terms is unenforceable and void.[43]

It has been held that a contract is not unenforceable as indefinite for the reason that the particular duties of the employee are not specified,[44] the minimum salary alone is specified,[45] the exact amount of allowances to be paid in addition to salary is not stated,[46] or the amount of a bonus,[47] or a per cent of the profits,[48] as additional compensation, is not capable of exact determination at the time of making the contract.

Duration. While it has been held that a contract is void for uncertainty which does not specify the period for its continuance,[49] it has been held that a contract of employment is not unenforceable on the ground of uncertainty because the precise period of its duration is not specified,[50] but is only approximated,[51] and a contract is not fatally indefinite merely because its duration is not fixed by the calendar, but by reference to the existence or happening of certain events, contingencies, or conditions.[52] Thus it has been held that a contract for as long a time as the employer should use patent rights assigned to it by the employee,[53] or for as long as the employee faithfully and diligently performs the duties of his employment,[54] or until such time as the employee should be physically incapacitated to work[55] is enforceable. Under a statute providing that a contract for the hire of services can only be made for a definite limited time, a contract under which a servant performs services in consideration of a promise to provide for her by will is invalid for lack of a definite term.[56]

d. Contracts for Permanent or Life Employment

In the absence of a statute to the contrary, a contract for permanent or life employment, when based on good consideration additional to the services to be rendered, is valid and enforceable according to its terms.

A contract for permanent employment[57] or em-

both of the proposals and plaintiff entered on his duties, defendant could not defeat recovery by plaintiff for breach of contract on ground that no contract in fact existed because of indefiniteness, especially where plaintiff, in fact, undertook management of defendant's hotel under a third arrangement more favorable to defendant.—Edgewater Beach Corporation v. Sugarman, 15 So.2d 260, 153 Fla. 555.

41. Cal.—Weintraub v. Soronow, 1 P.2d 28, 115 Cal.App. 145.

42. Ala.—Harris-Cortner & Co. v. Morgan, 108 So. 449, 214 Ala. 599.
Ind.—Davis v. Davis, 151 N.E. 134, 197 Ind. 386.
39 C.J. p 40 note 79.

43. N.Y.—Nikulnikoff v. Archbishop, etc., of Russian Orthodox Greek Catholic Church, 255 N.Y.S. 653, 142 Misc. 894.

44. N.Y.—Cudney v. R. B. Phillips Mfg. Co., 168 N.Y.S. 268, 181 App. Div. 257.

45. N.Y.—Rosbach v. Sackett, 118 N.Y.S. 846, 134 App.Div. 130.
39 C.J. p 40 note 82.

Tentative minimum rate
Contract which was complete as to all terms except additional compensation over a tentative minimum rate but which contained provision for fixing such additional compensation at a later date was a valid contract.—Hardy v. Erickson, 36 N.Y.S.2d 823.

Free quarters and salary of "not less than 180 rubles per month" held too indefinite as to consideration to produce binding contract.—Nikulnikoff v. Archbishop, etc., of Russian Orthodox Greek Catholic Church, 255 N.Y.S. 653, 142 Misc. 894.

46. N.Y.—Rosenthal v. U. S. Paper Co., Inc., 164 N.Y.S. 121.
39 C.J. p 40 note 83.

47. Wash.—Sibley v. Stetson & Post Lumber Co., 188 P. 389, 110 Wash. 204.
39 C.J. p 40 note 84.

48. Tex.—Fruth v. Gaston, Civ.App., 187 S.W.2d 581, refused for want of merit.
39 C.J. p 40 note 85.

49. Ala.—Birmingham Electric Co. v. Praytor, 111 So. 895, 22 Ala.App. 45.

Contract not terminable without consent of both parties has been held to be too indefinite as to its duration to form a basis for the assessment of damages for its breach and therefore void.—Mallory v. Jack, 274 N.W. 746, 281 Mich. 156.

50. Ky.—Putnam v. Producers' Live Stock Marketing Ass'n, 75 S.W.2d 1075, 256 Ky. 196.

51. Minn.—Costello v. Siems-Carey Co., 167 N.W. 551, 140 Minn. 208.
39 C.J. p 40 note 81.

Contract "to have winter's work until spring" was sufficiently specific to constitute contract of employment for definite period.—Harrington v. Deloraine Refining Co., 43 P.2d 660, 99 Mont. 78—39 C.J. p 40 note 81 [a].

52. Cal.—Wittmann v. Whittingham, 259 P. 63, 85 Cal.App. 140.
Miss.—Thorne v. True-Hixon Lumber Co., 148 So. 388, 167 Miss. 266.
Pa.—Mayo v. Art Metal Works, Inc., Com.Pl., 6 Monroe L.R. 102.
Contract for life employment as not void for indefiniteness see infra subdivision d of this section.

53. Ky.—Shaw v. Hudson Engineering Co., 159 S.W. 653, 155 Ky. 4.

54. Mass.—Kirkley v. F. H. Roberts Co., 167 N.E. 289, 268 Mass. 246.

55. Tex.—Duff v. Ford Motor Co., Civ.App., 91 S.W.2d 871.

56. La.—Caldwell v. Turner, 55 So. 695, 129 La. 19.

57. U.S.—**Corpus Juris quoted in** Fletcher v. Agar, D.C.W.D.Mo., 45 F.Supp. 650, 653.
N.C.—**Corpus Juris quoted in** Jones v. Carolina Power & Light Co., 175 S.E. 167, 206 N.C. 862.
Va.—**Corpus Juris quoted in** Kiser v. Amalgamated Clothing Workers of America, 194 S.E. 727, 731, 169 Va. 574.
39 C.J. p 41 note 93.

Lack of a stipulation as to the compensation, or character of the services to be rendered does not render such contract void for uncertainty.
Kan.—Pierson v. Kingman Milling Co., 139 P. 394, 91 Kan. 775, rehearing denied 140 P. 1033, 92 Kan. 468.
Tex.—Texas Cent. R. Co. v. Eldredge, Civ.App., 155 S.W. 1010.

ployment for life[58] is not so vague and indefinite as to time as to be void and unenforceable because of uncertainty or indefiniteness. While it has been held that a contract for permanent employment[59] or employment for life[60] is not unenforceable because the only consideration for it, as far as the employer is concerned, is the employee's promise to render the service called for by the contract, some courts have apparently taken the view that such contracts, unless supported by good consideration in addition to the services to be performed, are not binding and enforceable as such,[61] but only as general indefinite hirings or hirings at will, as discussed infra § 8.

In any case, in the absence of a statute to the contrary, a contract for permanent employment or employment for life, when based on good consideration additional to the services to be rendered, is valid and enforceable according to its terms,[62] and not void for lack of mutuality because the employee is not bound to continue in the employer's service[63] or as against public policy.[64] Ordinarily sufficient consideration to support the contract is afforded by the adjustment of a bona fide claim, whether or not the claim is well founded;[65] by a release by an injured employee of his claim against the employer for personal injuries previously sustained, or by an agreement, express or implied, by the employee to forego his right to make a claim therefor,[66] provided the workmen's compensation

58. U.S.—F. S. Royster Guano Co. v. Hall, C.C.A.N.C., 68 F.2d 533.
Tex.—Duff v. Ford Motor Co., Civ. App., 91 S.W.2d 871.
39 C.J. p 41 note 93.

59. D.C.—Littell v. Evening Star Newspaper Co., 120 F.2d 36, 73 App.D.C. 409.
"When one who enters into a contract of employment, promises not only that he will give his service but also additional consideration—as, for example, by making an investment in the business . . . or by relinquishing an acknowledged right to recover for injury which he has suffered—such facts may be sufficient, in each case, to show the intent of the parties to enter into a contract for permanent employment. Some of the courts have reasoned from these cases that, to prove a contract of permanent employment, *two* considerations *must* be shown; that is, a consideration in addition to the services to be performed; and that in the absence of two considerations there can be no such contract. This misconception results from mistaking the form for the substance. . . . The meaning of the cases previously referred to is that where no such intent is clearly expressed and, absent evidence which shows other consideration than a promise to render services, the assumption will be that—even though they speak in terms of 'permanent' employment —the parties have in mind the ordinary business contract for a continuing employment, terminable at the will of either party."—Littell v. Evening Star Newspaper Co., 120 F.2d 36, 37, 73 App.D.C. 409.

60. U.S.—Eggers v. Armour & Co. of Delaware, C.C.A.Iowa, 129 F.2d 729.

61. Ala.—Alabama Mills v. Smith, 186 So. 699, 237 Ala. 296.
La.—Pitcher v. United Oil & Gas Syndicate, Inc., 139 So. 760, 174 La. 66.
Mich.—Adolph v. Cookware Co. of America, 278 N.W. 687, 283 Mich. 561.
Minn.—Skagerberg v. Blandin Paper Co., 266 N.W. 872, 197 Minn. 291.
Miss.—Rape v. Mobile & O. R. Co., 100 So. 585, 136 Miss. 38, 35 A.L.R. 1422.
Mo.—Minter v. Tootle Campbell Dry Goods Co., 173 S.W. 4, 187 Mo.App. 16.
Wash.—Heidman v. Tall's Travel Shops, 73 P.2d 1323, 192 Wash. 513.

62. U.S.—F. S. Royster Guano Co. v. Hall, C.C.A.N.C., 68 F.2d 533.
Ala.—Alabama Mills v. Smith, 186 So. 699, 237 Ala. 296.
Cal.—Millsap v. National Funding Corporation of California, 135 P. 2d 407, 57 Cal.App.2d 772.
Ill.—Jones v. Stoneware Pipe Co., 277 Ill.App. 18.
Ind.—Toni v. Kingan & Co., 15 N.E. 2d 80, 214 Ind. 611—Mt. Pleasant Coal Co. v. Watts, 151 N.E. 7, 91 Ind.App. 501.
La.—Pitcher v. United Oil & Gas Syndicate, Inc., 139 So. 760, 761, 174 La. 66.
Pa.—Lucacher v. Kerson, 45 A.2d 245, 158 Pa.Super. 437, affirmed 48 A.2d 857, 355 Pa. 79.
39 C.J. p 41 note 92.
Effect of statutes see infra § 14.

63. U.S.—F. S. Royster Guano Co. v. Hall, C.C.A.N.C., 68 F.2d 533—**Corpus Juris quoted in** Fletcher v. Agar, D.C.Mo., 45 F.Supp. 650, 653.
D.C.—Riefkin v. E. I. Du Pont de Nemours & Co., 290 F. 286, 53 App. D.C. 311.
Ind.—Toni v. Kingan & Co., 15 N.E. 2d 80, 214 Ind. 611.
S.C.—Shealy v. Fowler, 188 S.E. 499, 182 S.C. 81.
Tex.—Texas Cent. R. Co. v. Eldredge, Civ.App., 155 S.W. 1010.
Va.—**Corpus Juris quoted in** Kiser v. Amalgamated Clothing Workers of America, 194 S.E. 727, 731, 169 Va. 574.

The absence of an express promise by the employee to perform the services does not render the contract void for lack of mutuality.—East Line & R. R. R. Co. v. Scott, 10 S.W. 99, 72 Tex. 70, 13 Am.S.R. 758.

64. Ind.—Pennsylvania Co. v. Dolan, 32 N.E. 802, 6 Ind.App. 109, 51 Am. S.R. 289.
39 C.J. p 41 note 92.

65. N.C.—Stevens v. Southern R. Co., 122 S.E. 295, 187 N.C. 528.
39 C.J. p 41 note 95.

66. U.S.—F. S. Royster Guano Co. v. Hall, C.C.A.N.C., 68 F.2d 533.
Ark.—Gerard B. Lambert Co. v. Fleming, 275 S.W. 912, 169 Ark. 532.
Ill.—Jones v. Stoneware Pipe Co., 277 Ill.App. 18.
Ind.—Toni v. Kingan & Co., 15 N.E. 2d 80, 214 Ind. 611.
Mo.—Slabon v. St. Louis Car Co., App., 138 S.W.2d 673, record and judgment quashed on other grounds State ex rel. St. Louis Car Co. v. Hughes, 152 S.W.2d 193, 348 Mo. 125, mandate conformed to Slabon v. St. Louis Car Co., 153 S.W.2d 827.
Okl.—**Corpus Juris cited in** Oklahoma Portland Cement Co. v. Pollock, 73 P.2d 427, 429, 181 Okl. 266.
Tex.—Duff v. Ford Motor Co., Civ. App., 91 S.W.2d 871.
39 C.J. p 41 note 92.

Where the release is void for fraud, the contract falls with it.—Cline v. Southern R. Co., 102 S.E. 641, 113 S.C. 440.

Forbearance alone without an agreement to forbear or a request to forbear or circumstances from which an agreement to forbear may be implied has been held insufficient consideration.—Horvath v. Sheridan-Wyoming Coal Co., 131 P.2d 315, 58 Wyo. 211.

act is not violated thereby;[67] by a conveyance or transfer of property from the employee to the employer;[68] or by any prejudice suffered or agreed to be suffered by the employee as an inducement to the employer,[69] such as the giving up of a private or governmental position or a business or profession.[70] However, it has been held that the consideration necessary to support the contract must be consideration moving toward the employer,[71] and a detriment suffered by the employee,[72] such as the giving up of a position, business, or profession,[73] or seniority rights,[74] or the dismissal of a suit against a third person where the employer is not even remotely liable in the suit dismissed,[75] has been held insufficient.

§ 7. —— Construction in General

a. In general
b. Implied terms
c. Parties

a. In general

In accordance with general rules of construction of contracts, regard is to be had to the intention of the parties as shown by the terms of the contract.

Contracts of employment are subject to the same rules of construction as other contracts,[76] and in construing them regard is to be had to the intention of the parties, as shown by the terms of the contract, taking into consideration the circumstances surrounding its making and the object had in view.[77] While, if the terms are clear and unam-

67. Tex.—Woolsey v. Panhandle Refining Co., 116 S.W.2d 675, 131 Tex. 449.
Wyo.—Horvath v. Sheridan-Wyoming Coal Co., 131 P.2d 315, 58 Wyo. 211.

Act not violated
Ind.—Toni v. Kingan & Co., 15 N.E. 2d 80, 214 Ind. 611.

68. Ind.—Mt. Pleasant Coal Co. v. Watts, 151 N.E. 7, 91 Ind.App. 601.

69. Cal.—Millsap v. National Funding Corporation of California, 135 P.2d 407, 57 Cal.App.2d 772.

70. U.S.—**Corpus Juris quoted in** Fletcher v. Agar, D.C.Mo., 45 F. Supp. 650, 653.
D.C.—Riefkin v. E. I. Du Pont de Nemours & Co., 290 F. 286, 53 App. D.C. 311.
N.C.—**Corpus Juris quoted in** Jones v. Carolina Power & Light Co., 175 S.E. 167, 206 N.C. 862.
Va.—**Corpus Juris quoted in** Kiser v. Amalgamated Clothing Workers of America, 194 S.E. 727, 731, 194 Va. 574.

Where employer knows that person being employed then has employment, and that he is giving it up to engage in his new work under new contract, a valuable consideration sufficient to support contract for permanent employment is shown.
Ala.—Alabama Mills v. Smith, 186 So. 699, 237 Ala. 296.
Cal.—Millsap v. National Funding Corporation of California, 135 P.2d 407, 57 Cal.App.2d 772.

71. Ky.—Edwards v. Kentucky Utilities Co., 150 S.W.2d 916, 286 Ky. 341.

72. Ky.—Edwards v. Kentucky Utilities Co., supra.

73. Mich.—Adolph v. Cookware Co. of America, 278 N.W. 687, 283 Mich. 561.
Mo.—Minter v. Tootle Campbell Dry Goods Co., 173 S.W. 4, 187 Mo.App. 16.
Wash.—Heideman v. Tall's Travel Shops, 73 P.2d 1323, 192 Wash. 513.

74. Ky.—Edwards v. Kentucky Utilities Co., 150 S.W.2d 916, 286 Ky. 341.

75. Ky.—Rasnick v. W. M. Ritter Lumber Co., 219 S.W. 801, 187 Ky. 523.

76. Cal.—Canavan v. College of Osteopathic Physicians and Surgeons, 166 P.2d 878, 882, 73 Cal.App.2d 511.

The rule of ejusdem generis applies and under this rule, where the contract has enumerated a good and sufficient and an adequate consideration, the added general words "and other valuable considerations" should be treated as surplusage.—Hebbard v. American Zinc, Lead & Smelting Co., D.C.Mo., 66 F.Supp. 113.

77. U.S.—Patch v. Stahly, C.C.A. Ind., 135 F.2d 269, certiorari denied 64 S.Ct. 54, 320 U.S. 750, 88 L.Ed. 446—F. S. Royster Guano Co. v. Hall, C.C.A.N.C., 68 F.2d 533—Ohio Marble Co. v. Byrd, C.C.A.Ohio, 65 F.2d 98—Bertino v. Marion Steam Shovel Co., C.C.A.Mo., 64 F.2d 409.
Ala.—Peacock v. Virginia-Carolina Chemical Co., 130 So. 411, 221 Ala. 680.
Cal.—Monroe v. Grolier Soc. of London, 281 P. 604, 208 Cal. 447, 65 A.L.R. 989—Gregg v. McDonald, 239 P. 373, 73 Cal.App. 748.
Conn.—Boucher v. Godfrey, 178 A. 655, 119 Conn. 622.
Ind.—Phelps v. Stutz Motor Car Co. of America, 161 N.E. 577, 87 Ind. App. 609.
Ky.—Aronson v. Gibbs-Inman Co., 140 S.W.2d 806, 283 Ky. 107.
La.—Broderick v. Taylor, App., 161 So. 630.
Mass.—Fenton v. Federal St. Bldg. Trust, 39 N.E.2d 414, 310 Mass. 609—McNally v. Schell, 199 N.E. 748, 293 Mass. 356.
Mo.—Clarkson v. Standard Brass Mfg. Co., 170 S.W.2d 407, 237 Mo. App. 1018—McClintock v. Skelly Oil Co., 114 S.W.2d 181, 232 Mo. App. 1204.
N.J.—Dixon v. Smyth Sales Corporation, 166 A. 103, 110 N.J.Law 459—Unkovich v. New York Cent. R. Co., 16 A.2d 558, 128 N.J.Eq. 377, affirmed 174 A. 876, 177 N.J.Eq. 20.
N.Y.—Schmidl v. Central Laundry & Supply Co., 13 N.Y.S.2d 817.
N.C.—Kesler Const. Co. v. Dixson Holding Corporation, 175 S.E. 843, 207 N.C. 1.
Pa.—Scotzin v. Brown, Com.Pl., 63 Dauph.Co. 129.
Tex.—Hotel Co. v. Lackey, Civ.App., 203 S.W.2d 557—Brown v. Neyland, Civ.App., 161 S.W.2d 833, affirmed in part and reversed in part on other grounds Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253—Guardian Trust Co. v. Bauereisen, Civ.App., 99 S.W.2d 357, reversed on other grounds 121 S.W.2d 579, 132 Tex. 396.
39 C.J. p 42 note 9.

Rights of third persons
In cases involving rights of third persons, written instruments purporting to define the rights of contracting parties are not conclusive of the actual legal relationship existing between such parties.—Wheat v. Texas Co., Civ.App., 159 S.W.2d 238, reversed on other grounds Texas Co. v. Wheat, 168 S.W.2d 632, 140 Tex. 468.

The term "right to reserve" as used in a baseball player's contract must be construed in the light of the surrounding and antecedent circumstances and, so construed, it has been held to signify an option.—Metropolitan Exhibition Co. v. Ewing, C.C.N.Y., 42 F. 198, 7 L.R.A. 381.

biguous, the court is bound to give effect to them,[78] the language used should be reasonably construed.[79] The contract is to be construed as a whole, if possible, and an effect given to the various parts consistent with all the language of the contract,[80] and it has been held that, where two contracts were made on the same day for the services of the employee, the two agreements should be construed as constituting one contract.[81] Where a contract is made in view of well established customs of the trade to which it relates, it is to be construed in the light of those customs.[82] If an employment contract is capable of two constructions, one of which renders it valid and the other void, the interpretation rendering it valid should be adopted.[83]

Practical constructions of parties. Where the contract is clear and unequivocal, it cannot be varied by conduct of one of the parties tending to place a different construction on it.[84] However, an ambiguous contract may be construed with relation to the conduct of parties subsequent to the execution of the contract,[85] and where, during the execution of a contract of employment, the parties thereto have accepted and acted on a certain interpretation of one of its provisions, a court will not, in litigation subsequently arising, adopt another in-

78. U.S.—Arkansas Amusement Corporation v. Kempner, C.C.A.Ark., 57 F.2d 466.
Conn.—Boucher v. Godfrey, 178 A. 655, 119 Conn. 622.
Idaho.—Weed v. Idaho Copper Co., 10 P.2d 613, 51 Idaho 737.
Mo.—McClintock v. Skelly Oil Co., 114 S.W.2d 181, 232 Mo.App. 1204.
N.J.—J. I. Kislak, Inc., v. Coffin, 14 A.2d 42, 127 N.J.Eq. 535.
N.Y.—Drivas v. Lekas, 39 N.Y.S.2d 15, 265 App.Div. 1003, modified on other grounds 54 N.E.2d 365, 292 N.Y. 204, mandate conformed to 48 N.Y.S.2d 781, and 48 N.Y.S.2d 785, 182 Misc. 567, motion denied 56 N.E.2d 123, 292 N.Y. 718.
Va.—Rudlin v. Parker, 43 S.E.2d 918, 186 Va. 647.
39 C.J. p 42 note 11.

Hardship

The fact that application of the terms of employment contract might appear to inflict hardship on one of the parties does not warrant remaking of the contract by the court.—Gingsberg v. Reliable Linen Service Co., 290 N.W. 331, 292 Mich. 70.

The presumption that parties contemplated compliance with law does not, of itself, justify the court in redrafting the contract.—Yellow Truck & Coach Mfg. Co. v. Edmondson, C.C.A.Mich., 155 F.2d 367.

79. La.—Bondio v. Joseph Binder, Inc., App., 24 So.2d 398.
N.M.—Kiker v. Bank Sav. Life Ins. Co., 23 P.2d 366, 37 N.M. 346.
Tex.—Brown v. Neyland, Civ.App., 161 S.W.2d 833, affirmed in part and reversed in part on other grounds Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253.
39 C.J. p 42 note 11.

Employee's agreement to devote whole time, attention, and ability to employment cannot be taken literally but must be reasonably interpreted.—Kiker v. Bank Sav. Life Ins. Co., 23 P.2d 366, 37 N.M. 346.

Term "ability to pay," as used in agreement between sister and decedent which provided that decedent was to pay sister an agreed wage for services performed if and when decedent was able to do so and at some time in future after he had completed payment on certain investment, meant the ability to pay in the ordinary course of decedent's accustomed way of life, and not by liquidating his business, his life insurance, and the last of his clothing and personal effects.—Binzel v. Viehmann, 106 P.2d 187, 111 Mont. 6.

80. U.S.—Arkansas Amusement Corporation v. Kempner, C.C.A.Ark., 57 F.2d 466.
Cal.—Monroe v. Grolier Soc. of London, 281 P. 604, 208 Cal. 447, 65 A.L.R. 989.
Ind.—Phelps v. Stutz Motor Car Co. of America, 161 N.E. 577, 87 Ind. App. 609.
N.Y.—Parsil v. Emery, 272 N.Y.S. 439, 242 App.Div. 653—Hines v. Ziegfeld, 226 N.Y.S. 562, 222 App. Div. 643.
Tex.—Dallas Hotel Co. v. Lackey, Civ.App., 203 S.W.2d 557.
39 C.J. p 42 note 12.
Contracts of employer with, and bylaws of, labor unions as part of contract see infra § 28 (41).

Two instruments

Where employer retained first instrument which bore signature of employee but not employer's signature, and employee kept a second instrument which was signed only by employer, but parties thought both writings were substantially identical, both instruments should be construed together, at least to extent that the provisions of each did not exclude those of the other, in determining the terms of the employment contract.—Clements v. Knighton, La. App., 1 So.2d 139.

81. U.S.—Keith v. Kelermann, C.C. N.Y., 169 F. 196.
39 C.J. p 42 note 13.

82. Ala.—Peacock v. Virginia-Carolina Chemical Co., 130 So. 411, 221 Ala. 680.
39 C.J. p 42 note 10.

83. N.Y.—Parsil v. Onyx Hosiery, 221 N.Y.S. 174, 220 App.Div. 148, affirmed 159 N.E. 651, 246 N.Y. 559.

84. Conn.—Boucher v. Godfrey, 178 A. 655, 119 Conn. 622.
Miss.—**Corpus Juris cited in** Texas Co. v. Jackson, 165 So. 546, 550, 174 Miss. 737.
Va.—Rudlin v. Parker, 43 S.E.2d 918, 186 Va. 647.
39 C.J. p 42 note 14.

Master's failure to exercise powers

If contract creates relation of master and servant, master cannot avoid its consequences by refraining from exercising powers thereby conferred, although he does so under belief that contract did not create such relation.—Texas Co. v. Jackson, 165 So. 546, 174 Miss. 737.

85. U.S.—Atkinson v. New Britain Mach. Co., C.C.A.Ill., 154 F.2d 895—Ohio Marble Co. v. Byrd, C.C.A. Ohio, 65 F.2d 98—Detroit Graphite Co. v. Hoover, C.C.A.Mass., 41 F.2d 490.
Ky.—Louisville & N. R. Co. v. Bryant, 92 S.W.2d 749, 263 Ky. 578.
Mich.—O'Connor v. March Automatic Irr. Co., 218 N.W. 784, 242 Mich. 204, affirmed 223 N.W. 228, 245 Mich. 593.
Miss.—**Corpus Juris cited in** Texas Co. v. Jackson, 165 So. 546, 550, 174 Miss. 737.
Mo.—Zeppenfeld v. Morgan, App., 168 S.W.2d 971.
N.Y.—Wagner v. G. Gaudig & Blum Corporation, 228 N.Y.S. 139, 223 App.Div. 254.
39 C.J. p 42 note 15.

Controlling effect given practical construction adopted by parties.—Louisville & N. R. Co. v. Bryant, 92 S.W.2d 749, 263 Ky. 578.

An involuntary act of one of the parties cannot be relied on as showing his construction and interpretation of the contract.—Carson v. Manor Baking Co., Mo.App., 138 S.W.2d 43.

terpretation more favorable to one of the litigants.[86]

Construction against party preparing contract. Where an employment contract is ambiguous,[87] it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises,[88] and this, of course, applies to contracts prepared by the employer,[89] and ambiguous language used by the employer will be given the meaning which the employer ought reasonably to have understood that the employee would put on it.[90] Moreover, it has been held that, where a contract contains coercive and harsh provisions bearing on the employee, it will be construed by the courts liberally in his favor.[91]

Writing and printing. An express written addition to the printed provisions of a contract is deemed to be significant of the intentions of the parties, and of governing force,[92] and printed provisions may be disregarded in construing a contract when it appears that a printed form was intended for use under other circumstances and is not reasonably applicable to the situation.[93]

Rules and regulations of employer. A regulation of the employer as to applications for employment cannot prevent the making of a contract without regard to such rule, or affect it when made,[94] and a rule adopted by the employer several years after the beginning of an employment does not form part of the contract of employment.[95]

b. Implied Terms

An employment contract includes not only what is expressly stated, but also what is necessarily implied from the nature of the relationship created, the language used, and the conduct of the parties. Usages or customs and rules of law may become a part of the contract.

An employment contract includes not only what is expressly stated, but also what is necessarily implied from the nature of the relationship created,[96] the language used,[97] and the conduct of the parties.[98] Also usages or customs prevailing in the particular employment and principles and rules of law applicable thereto become as much a part of the contract as though they were expressly incorporated or referred to therein.[99] Ordinarily the employee will be taken to have impliedly agreed to perform satisfactorily the work assigned to him,[1] and to be loyal, diligent, faithful, and obedient.[2] More specifically, the law implies that the employee

86. La.—Dunbar v. Orleans Metal Bed Co., 82 So. 889, 145 La. 779.

87. N.J.—Perfect Laundry Co. v. Marsh, 191 A. 774, 121 N.J.Eq. 588.

88. Ky.—Simon v. Neptune Mfg. Co., 147 S.W.2d 1024, 285 Ky. 340.
N.Y.—National Cash Register Co. v. Remington Arms Co., 209 N.Y.S. 40, 212 App.Div. 343, affirmed 151 N.E. 144, 242 N.Y. 99, reargument denied 152 N.E. 431, 242 N.Y. 569.

89. D.C.—National Symphony Orchestra Ass'n of Washington, D. C., v. Konevsky, Mun.App., 44 A. 2d 694.
Mo.—McClintock v. Skelly Oil Co., 114 S.W.2d 181, 232 Mo.App. 1204.
N.Y.—Prescott v. Buffalo Fire Appliance Corporation, 260 N.Y.S. 840, 237 App.Div. 198, affirmed 188 N.E. 27, 262 N.Y. 475—La Juett v. Coty Mach. Co., 275 N.Y.S. 822, 153 Misc. 410.
39 C.J. p 43 note 17.

The purpose of the rule is not to punish the employer or to deprive him of contractual rights, or to impair the operation of contract fairly and plainly expressed, but to promote justice.—McClintock v. Skelly Oil Co., 114 S.W.2d 181, 232 Mo.App. 1204.

90. Colo.—Tritch Hardware Co. v. Donovan, 221 P. 881, 74 Colo. 350.
39 C.J. p 43 note 18.

91. U.S.—Standard Plunger Elevator Co. v. Stokes, N.Y., 212 F. 893, 129 C.C.A. 413.
N.Y.—Baseball Players Fraternity v. Boston American League Base Ball Club, 151 N.Y.S. 557, 166 App.Div. 484, affirmed 117 N.E. 1061, 221 N. Y. 704.

92. Tex.—Dallas Hotel Co. v. Lackey, Civ.App., 203 S.W.2d 557.
39 C.J. p 43 note 20.

93. Ill.—Ripon v. Alcazar Amusement Co., 197 Ill.App. 416—Hoey v. Alcazar Amusement Co., 197 Ill. App. 411.

94. Tex.—International Harvester Co. v. Campbell, 96 S.W. 93, 43 Tex. Civ.App. 421.

95. Ill.—Cleveland, C. C. & St. L. R. Co. v. Jenkins, 51 N.E. 811, 174 Ill. 398, 66 Am.S.R. 296, 62 L.R.A. 922.

96. N.Y.—Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 152 Misc. 716.
39 C.J. p 42 note 9 [a].

One employed as the general manager of a business is entitled to exercise all of the authority over the transaction of the business that the employer had, subject to the terms of the contract.—Zeppenfeld v. Morgan, Mo.App., 185 S.W.2d 898.

Implied trust
Where employee, when entering employment, deposited money as security, the employer became by implication trustee thereof.—Carl v. Grand Union Co., 161 A. 429, 105 Pa.Super. 371.

97. Cal.—Gregg v. McDonald, 239 P. 373, 73 Cal.App. 748.
Mass.—McNally v. Schell, 199 N.E. 748, 293 Mass. 356.

Payment of salary
An agreement by one person to employ another at a given salary imports an undertaking by the employer to pay the employee the stipulated salary.—Comery v. Globe Automatic Sprinkler Co., 12 N.Y.S.2d 206, 257 App.Div. 911.

Exclusive right to services
Tex.—Elliott-Greer Office Supply Co. v. Martin, 86 S.W.2d 635, 126 Tex. 112.

98. Conn.—Boucher v. Godfrey, 178 A. 655, 119 Conn. 622.

Rules of employer
By continuing employment with knowledge of rules of company, employees impliedly accepted them as terms of the employment.—Boucher v. Godfrey, supra.

99. U.S.—N. L. R. B. v. Knoxville Pub. Co., C.C.A.6, 124 F.2d 875.
Cal.—Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, 171 P.2d 21, 28 Cal.2d 481.
Ill.—Orminski v. Hyland Elec. Supply Co., 62 N.E.2d 14, 326 Ill.App. 392.
La.—Legal Rate Loan Co. v. Bouanchaud, App., 148 So. 101.
Tenn.—Hammett v. Vogue, Inc., 165 S.W.2d 577, 179 Tenn. 284.

1. U.S.—F. S. Royster Guano Co. v. Hall, C.C.A.N.C., 68 F.2d 533.

2. Pa.—Bernstein v. Lipper Mfg. Co.,

will faithfully perform the duties reasonably required of him in the manner directed by the employer.[3] The court cannot read something into the contract, however, that is neither expressed therein nor implied from anything in the contract or from the surrounding circumstances,[4] and the implied obligation of the employee to be loyal and faithful to his employer does not prevent him from engaging in whatever activities he chooses outside of his employment as long as they are not inconsistent with his duties to his employer.[5]

Authority to employ assistants. Ordinarily a servant has no implied authority to employ assistants.[6] A servant's authority to employ assistants may be implied, however, from the nature of the work to be performed, from the general course of conducting the business of the master by the servant, or from the circumstances of the particular case,[7] and in case of an emergency where a servant is unable to perform the work himself it has been held that he may employ an assistant.[8]

c. Parties

A person expressly employed by an individual on behalf of another person, corporation, or other entity becomes the servant of the latter; whether or not a contract entered into by more than two parties is joint, several, or joint and several is dependent on the intention of the parties.

A person expressly employed by an individual on behalf of another person, corporation, or other entity becomes the servant of the latter,[9] and a contract of employment made through an employment agency, naming applicant, the employer, and the person authorizing the hiring, does not make the latter, but the one so named, the employer.[10] The addition of the word "trustee" to a writing signed by the employer does not, however, make the latter any the less an employer when the employee does not know whom the employer represents.[11] Although there may be a more or less complete identity in the stock ownership of two or more corporations, as long as they remain distinct legal entities, an employee of one is not to be regarded as an employee of the others,[12] but where the servant, although employed by one company, is with the knowledge and consent of the others acting for them also, the relation may be regarded as existing as to them.[13] Where two parties are jointly interested in a business, the presumption is that those employed in such business are the servants of both, although the actual employment and control are by one.[14]

Joint or several. Whether or not a contract of employment entered into by more than two parties is joint, several, or joint and several is dependent on the intention of the parties.[15]

§ 8. —— Commencement and Duration of Employment

a. In general
b. General or indefinite hiring
c. Contracts for permanent or life employment

a. In General

The commencement and duration of services under a contract of employment are controlled by the intention of the parties, as gathered from the terms of the contract and the surrounding circumstances.

The commencement and duration of services under a contract of employment are controlled by the

160 A. 770, 307 Pa. 36—Scotzin v. Brown, Com.Pl., 53 Dauph.Co. 129.

3. Fla.—Haiman v. Gundersheimer, 177 So. 199, 130 Fla. 109.

4. Mo.—McClintock v. Skelly Oil Co., 114 S.W.2d 181, 232 Mo.App. 1204.

5. Ohio.—Miller Agency Co. v. Greene, 177 N.E. 534, 39 Ohio App. 503.

6. Pa.—Jacamino v. Harrison Motor Freight Co., 5 A.2d 393, 135 Pa. Super. 356.

Authority of servant to employ assistant as affecting employer's liability to:
Injured assistant see infra § 177.
Third persons injured by assistant see infra § 564.

7. Pa.—Jacamino v. Harrison Motor Freight Co., supra.

8. Pa.—Jacamino v. Harrison Motor Freight Co., supra.

"Emergency," as used in rule permitting a servant to engage an assistant in case of an emergency, implies necessity for assistance.—Jacamino v. Harrison Motor Freight Co., supra.

9. **One employed before organization of syndicate** by syndicate's sales manager becomes employee of syndicate, not of sales manager personally.—Byrnes v. Chase Nat. Bank, 232 N.Y.S. 224, 225 App.Div. 102, affirmed 168 N.E. 423, 251 N.Y. 551.

10. N.Y.—Schon v. Messer, 194 N.Y.S. 245.

11. N.Y.—Whalen v. Ruegamer, 108 N.Y.S. 38, 123 App.Div. 585.
39 C.J. p 43 note 29.

Recognition of employer

Where first contract contemplated that defendant's personal liability as employer should cease on execution of trust which was to assume liability until formation of corporation which was to assume the liability, and after trust was executed a second contract referred to defendant as "Trustee under a certain Trust Agreement," and after formation of corporation plaintiff recognized corporation as his employer, defendant was not liable individually under second contract notwithstanding such contract provided that it superseded all previous contracts.—Patch v. Stahly, C.C.A.Ind., 135 F.2d 269, certiorari denied 64 S.Ct. 54, 320 U.S. 750, 88 L.Ed. 446.

12. Wis.—Bosanich v. Chicago, N. S. & M. R. Co., 181 N.W. 297, 173 Wis. 280.

13. Idaho.—Barrow v. B. R. Lewis Lumber Co., 95 P. 682, 14 Idaho 698.
Ill.—Asplund v. Conklin Constr. Co., 165 Ill.App. 44.

14. Minn.—McMahon v. Davidson, 12 Minn. 357, appeal dismissed 14 S. Ct. 1200, 154 U.S. 566, 19 L.Ed. 52.

15. Or.—Pitts v. Crane, 236 P. 475, 114 Or. 593.
Pa.—Fick v. Gup, Com.Pl., 32 Berks Co.L.J. 133.

intention of the parties.[16] Ordinarily the terms of the contract are controlling,[17] but if ambiguity exists therein the intent of the parties may be sought in the circumstances surrounding the transaction, including the situation and object of the parties,[18] and the practical construction placed on the agreement by the parties.[19] Where no time is fixed in a contract of employment at which the person employed is to commence work, the presumption is that he is to commence either at once or within a reasonable time.[20]

The duration of a contract for a definite period is not affected by a change in the duties required of an employee[21] or by the fact that the period specified is stated to be a probationary period,[22] nor is such a contract made indefinite by the fact that it may be terminated by reason of a condition subsequent,[23] and, when it appears to have been the intention of the parties to create an employment for a definite period, it will not be changed into an employment for a shorter period by reason of the fact that the salary is payable at specified intervals during the time fixed.[24] It has been held, where a servant employed on a monthly basis starts to work in the middle of a month, that payment on the first of the succeeding month makes the new month run from that date.[25]

A hiring for a specified sum for a named period may be construed as a hiring for the period named when there are other circumstances in the case supporting such construction,[26] and it will be so construed when the other circumstances in the case are such that it would be unreasonable to suppose that the intention of the parties was otherwise.[27]

b. General or Indefinite Hiring

Ordinarily a general or indefinite hiring is presumed to be a hiring at will, and according to some authorities the fact that the contract specifies a salary pro-

16. Idaho.—**Corpus Juris cited in** Weed v. Idaho Copper Co., 10 P.2d 613, 619, 51 Idaho 737.
Ky.—Hamilton Carhartt Overall Co. v. Short, 197 S.W.2d 792, 303 Ky. 423—**Corpus Juris cited in** Putnam v. Producers' Live Stock Marketing Ass'n, 75 S.W.2d 1075, 1076, 256 Ky. 196.
N.J.—Dennis v. Thermoid Co., 25 A. 2d 886, 128 N.J.Law 303.
N.Y.—Hollwedel v. Duffy-Mott Co., 188 N.E. 266, 263 N.Y. 95, 90 A.L.R. 1312.
Tenn.—Combs v. Standard Oil Co. of Louisiana, 59 S.W.2d 525, 166 Tenn. 88.
Tex.—Dallas Hotel Co. v. Lackey, Civ.App., 203 S.W.2d 557.
39 C.J. p 43 note 35.
Termination of relation in general see infra §§ 29–40.

17. Mich.—Muir v. Leonard Refrigerator Co., 257 N.W. 723, 269 Mich. 406.
Minn.—Steward v. Nutrena Feed Mills, 244 N.W. 813, 186 Minn. 606.
N.Y.—Meo v. Bloomgarden, 261 N.Y.S. 279, 237 App.Div. 325, appeal dismissed 186 N.E. 207, 262 N.Y. 72.
39 C.J. p 43 note 35.

Consecutive weeks

Contract for a specified number of weeks is clearly intended as an undertaking to employ for consecutive weeks.—Mackenzie v. King, 30 Hawaii 230.

Period implied

A contract for employment of plaintiff as manager of defendant's business, giving him all of five years, if he chose to take it, within which to make his payment for a one-third interest in the business, was held to imply that plaintiff should have the right to continue in defendant's employ during full term of five years, unless he should elect sooner to pay purchase price for interest which he had agreed to buy.—Gregg v. McDonald, 239 P. 373, 73 Cal.App. 748.

Provision for stock purchase

Provision, in contract employing plaintiff for a definite term at a definite compensation, which authorized plaintiff under certain conditions to purchase forty nine per cent of capital stock of corporate defendant at end of his term, was a separate element, and did not change the employment to one at will.—Royce v. Delta Intern. Industries, 63 N.Y.S.2d 369.

18. Ill.—Davis v. Englestein, 263 Ill. App. 57.
Ky.—Hamilton Carhartt Overall Co. v. Short, 197 S.W.2d 792, 303 Ky. 423—**Corpus Juris cited in** Putnam v. Producers' Live Stock Marketing Ass'n, 75 S.W.2d 1075, 1076, 256 Ky. 196.
N.Y.—Hollwedel v. Duffy-Mott Co., 188 N.E. 266, 263 N.Y. 95, 90 A.L.R. 1312.
Pa.—Trainer v. Laird, 183 A. 40, 320 Pa. 414.
39 C.J. p 43 note 35.

19. U.S.—Atkinson v. New Britain Mach. Co., C.C.A.Ill., 154 F.2d 895.

20. Ill.—Barnard v. Babbitt, 54 Ill. App. 62.
39 C.J. p 44 note 36.

The acceptance of an offer of employment has been held to mark the commencement of the contract.—Nelson v. Hamlin, 155 N.E. 18, 258 Mass. 331.

21. Ill.—Kinney v. Calumet Pub. Co., 167 Ill.App. 369.

22. N.Y.—Royce v. Delta Intern. Industries, 63 N.Y.S.2d 369.

23. N.Y.—Hebberd v. Lath Co., 152 N.Y.S. 1083, 90 Misc. 350.

24. Ala.—Adams v. Stewart, 153 So. 401, 228 Ala. 194.
La.—Eberle & Co. v. C. C. Tank & Boiler Works, 5 La.App. 268.
Mich.—Pryor v. Briggs Mfg. Co., 20 N.W.2d 279, 312 Mich. 476, 161 A.L.R. 699.
Tex.—Dallas Hotel Co. v. Lackey, Civ.App., 203 S.W.2d 557.
39 C.J. p 46 note 45.

25. Tex.—Crater Oil Co. v. Voorhies, Civ.App., 280 S.W. 849.

26. R.I.—Minor v. Narragansett Mach. Co., 42 A.2d 711.

Circumstances considered

Agreement for period of time mentioned as that for payment, or as basis for payment, is indicated if one party to employment contract pays consideration aside from his promise to employ or to serve, or if employment is important one and of such kind that temporary appointment would not be likely to be made, or if employee has made important change in his general relations in order to accept position and employer has notice thereof, or has given up position of some value in order to enter employment.—Holcomb & Hoke Mfg. Co. v. Younge, 8 N.E.2d 426, 103 Ind.App. 439.

27. R.I.—Hatch v. Sallinger, 133 A. 621, 47 R.I. 395.
39 C.J. p 45 note 41.

Employment of instructor

A manufacturing company's employment of instructor in its technical training school at specified sum per month for no definite period of time was not a hiring at will, but by the month, in view of the nature of the services performed by an instructor.—Pryor v. Briggs Mfg. Co., 20 N.W.2d 279, 312 Mich. 476, 161 A.L.R. 699.

portionate to units of time which are commonly used for the purpose of accounting or payment does not of itself raise a presumption that the parties have agreed that the employment is to continue for the stated unit of time.

Where the contract of employment is general and indefinite and contains no provision respecting the duration of the employment, there is some diversity of opinion with respect to the duration of the employment.[28] The "English view," so called, tends to a construction establishing a contract for a definite term if this can be spelled out of the language used,[29] and this view finds some support in American decisions.[30] On the other hand, it has been stated that the "American view" tends toward a holding that the hiring is at will, unless the contrary be fairly plain,[31] and in the United States a general or indefinite hiring, or a hiring under a contract which does not specify a definite time or prescribe conditions which determine the duration of the relation, ordinarily is regarded as, or is presumed to be, a hiring at will.[32] This result does not, however, invariably follow,[33] and the presumption of a hiring at will is rebuttable.[34]

The duration of the employment under such contracts depends on the intention of the parties,[35] and each case must be determined on its own facts.[36] In ascertaining the intention of the par-

28. N.J.—Willis v. Wyllys Corporation, 119 A. 24, 98 N.J.Law 180.

29. N.J.—Willis v. Wyllys Corporation, supra.

39 C.J. p 46 note 48–p 48 note 60.

Mere employment raises no presumption of contract for definite time.—Toone v. Skorupski, 154 A. 621, 9 N.J.Misc. 381.

30. N.J.—Dennis v. Thermoid Co., 25 A.2d 886, 128 N.J.Law 303—Essbee Amusement Corp. v. Greenhaus, 177 A. 562, 114 N.J.Law 492—Donnellan v. Halsey, 176 A. 176, 114 N.J.Law 175—Willis v. Wyllys Corporation, 119 A. 24, 98 N.J.Law 180.

31. N.J.—Willis v. Wyllys Corporation, supra.

32. U.S.—Fahrenwald v. Ohio Steel Foundry Co., C.C.A.Ohio, 16 F.2d 659—American Merchant Marine Ins. Co. v. Letton, C.C.A.N.Y., 9 F. 2d 799, certiorari denied Letton v. American Merchant Marine Ins. Co., 46 S.Ct. 483, 271 U.S. 668, 70 L.Ed. 1142.
Cal.—Thacker v. American Foundry, App., 177 P.2d 322—Lynch v. Gagnon, 274 P. 584, 96 Cal.App. 512.
Conn.—**Corpus Juris cited in** Boucher v. Godfrey, 178 A. 655, 657, 119 Conn. 622.
Ill.—White v. American Elec. Fusion Corp., 65 N.E.2d 234, 328 Ill.App. 128—Fuchs v. Weibert, 233 Ill.App. 536.
Ind.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind. App. 661.
Ky.—**Corpus Juris cited in** Putnam v. Producers' Live Stock Marketing Ass'n, 75 S.W.2d 1075, 1076, 256 Ky. 196.
Minn.—Steward v. Nutrena Feed Mills, 244 N.W. 813, 186 Minn. 606.
N.J.—**Corpus Juris cited in** Blonder v. United Retail Employees of Newark, Local No. 108, 15 A.2d 826, 128 N.J.Eq. 41.
N.Y.—Gulickson v. Seglin Const. Co., 273 N.Y.S. 908, 152 Misc. 624—Rice v. Elmhurst Cont. Co., 66 N.Y.S.2d 765.
N.D.—**Corpus Juris cited in** Wood v. Buchanan, 5 N.W.2d 680, 682, 72 N.D. 216.
Pa.—Slonaker v. P. G. Publishing Co., 13 A.2d 48, 338 Pa. 292—Trainer v. Laird, 183 A. 40, 320 Pa. 414—Swayne v. Pressed Steel Car Co., 147 A. 837, 298 Pa. 31—Jones v. Pittsburgh Mercantile Co., 145 A. 80, 295 Pa. 219—Moyer v. Heilveil, 49 A.2d 514, 159 Pa.Super. 610—Lucacher v. Kerson, 45 A.2d 245, 158 Pa.Super. 437, affirmed 48 A.2d 857, 355 Pa. 79—Hay v. Pittsburgh Lodge No. 46, Loyal Order of Moose, 8 A.2d 434, 137 Pa.Super. 205—Kostenbader v. Schoeneck Farms, 4 A.2d 199, 134 Pa.Super. 334—Johnson v. Spear & Co., 186 A. 313, 122 Pa.Super. 526—Howard v. Siegel, 184 A. 272, 121 Pa.Super. 519—Subers v. Dewart Milk Products Co., Com.Pl., 14 Northumb.L. J. 344.
Tenn.—Combs v. Standard Oil Co. of Louisiana, 59 S.W.2d 525, 166 Tenn. 88—**Corpus Juris quoted in** American Nat. Ins. Co. v. Jackson, 12 Tenn.App. 305, 308—Hughes v. Taubel-Scott-Kitzmiller Co., 6 Tenn.App. 432.
Tex.—Dallas Hotel Co. v. McCue, Civ.App., 25 S.W.2d 902—McKinney v. Smith, Civ.App., 271 S.W. 247.
Va.—Hoffman Specialty Co. v. Pelouze, 164 S.E. 397, 158 Va. 586.
Wyo.—Long v. Forbes, 136 P.2d 242, 58 Wyo. 533—Casper Nat. Bank v. Curry, 65 P.2d 1116, 51 Wyo. 284, 110 A.L.R. 360.
39 C.J. p 44 note 39.
Contracts for permanent or life employment as general or indefinite hirings see infra subdivision c of this section.
Termination of contracts for indefinite term see infra § 31.

Under void contract for definite term

Where the parties enter into a contract for a definite term, but the contract is void, it has been held that an indefinite hiring results.—Brown v. Oneida Knitting Mills, 277 N.W. 653, 226 Wis. 662.

A contract prescribing the conditions which determine its duration, although not setting a date by reference to the calendar, is not an indefinite hiring terminable at will.—Deucht v. Storper, 44 N.Y.S.2d 356.

A hiring from month to month is time employment, as distinguished from employment at will.
N.Y.—National Cash Register Co. v. Remington Arms Co., 209 N.Y.S. 40, 212 App.Div. 343, affirmed 151 N.E. 144, 242 N.Y. 99, reargument denied 152 N.E. 431, 242 N.Y. 569.
Tex.—Crater Oil Co. v. Voorhies, Civ. App., 280 S.W. 849.

33. Ky.—Putnam v. Producers' Live Stock Marketing Ass'n, 75 S.W.2d 1075, 256 Ky. 196.
Pa.—Slonaker v. P. G. Publishing Company, 13 A.2d 48, 338 Pa. 292—Lucacher v. Kerson, 45 A.2d 245, 158 Pa.Super. 437, affirmed 48 A. 2d 857, 355 Pa. 79.

34. Va.—Hoffman Specialty Co. v. Pelouze, 164 S.E. 397, 158 Va. 586.

35. Ala.—Peacock v. Virginia-Carolina Chemical Co., 130 So. 411, 221 Ala. 680.
Ky.—Putnam v. Producers' Live Stock Marketing Ass'n, 75 S.W.2d 1075, 256 Ky. 196.
La.—Binnion v. M. & D. Drugs, App., 8 So.2d 307.
Mass.—Lane v. Epinard, 63 N.E.2d 463, 318 Mass. 664.
N.J.—Dennis v. Thermoid Co., 25 A. 2d 886, 128 N.J.Law 303.
Pa.—Slonaker v. P. G. Publishing Company, 13 A.2d 48, 338 Pa. 292—Moyer v. Heilveil, 49 A.2d 514, 159 Pa.Super. 610—Lucacher v. Kerson, 45 A.2d 245, 158 Pa.Super. 437, affirmed 48 A.2d 857, 355 Pa. 79—Kostenbader v. Schoeneck Farms, 4 A.2d 199, 134 Pa.Super. 334.

36. Ill.—Davis v. Englestein, 263 Ill. App. 57.
Ky.—Putnam v. Producers' Live Stock Marketing Ass'n, 75 S.W.2d 1075, 256 Ky. 196.
Tex.—Western Union Telegraph Co. v. Eckhardt, Com.App., 20 S.W.2d

ties, the court may consider customs affecting the employment,[37] the nature of the employment,[38] the construction placed on the contract by the parties,[39] and any other facts and circumstances showing their intention.[40]

The fact that the contract specifies a salary or wage proportionate to units of time which are frequently used for the purpose of accounting or payment, such as a month or a year, is evidence, in connection with other relevant facts, indicating that the agreement is for such unit,[41] and may, sometimes by virtue of statutory provisions, show or raise a presumption that the employment is to continue for the stated unit of time,[42] and such fact is often determinative,[43] but according to a number of authorities such fact does not of itself show or raise a presumption that the parties have agreed that the employment is to continue for the stated unit of time.[44]

759—Dallas Hotel Co. v. McCue, Civ.App., 25 S.W.2d 902.

Yearly contract not shown

Tenn.—Hughes v. Taubel-Scott-Kitzmiller Co., 6 Tenn.App. 432.

37. Ala.—**Corpus Juris quoted in** Peacock v. Virginia-Carolina Chemical Co., 130 So. 411, 412, 221 Ala. 680.

La.—**Corpus Juris quoted in** Russell v. White Oil Corporation, 110 So. 70, 71, 162 La. 9—Binnion v. M. & D. Drugs, App., 8 So.2d 307.

Pa.—Trainer v. Laird, 183 A. 40, 320 Pa. 414.

Tex.—Western Union Telegraph Co. v. Eckhardt, Com.App., 20 S.W.2d 759—Dallas Hotel Co. v. McCue, Civ.App., 25 S.W.2d 902.

39 C.J. p 45 note 40.

38. Ala.—Peacock v. Virginia Carolina Chemical Co., 130 So. 411, 221 Ala. 680.

La.—Binnion v. M. & D. Drugs, App., 8 So.2d 307.

Mich.—Pryor v. Briggs Mfg. Co., 20 N.W.2d 279, 312 Mich. 476, 161 A.L.R. 699.

Tex.—Dallas Hotel Co. v. McCue, Civ. App., 25 S.W.2d 902.

39. Tex.—Dallas Hotel Co. v. McCue, Civ.App., 25 S.W.2d 902.

40. Ala.—**Corpus Juris quoted in** Peacock v. Virginia-Carolina Chemical Co., 130 So. 411, 412, 221 Ala. 680.

Ill.—Davis v. Englestein, 263 Ill.App. 57.

Ky.—Putnam v. Producers' Live Stock Marketing Ass'n, 75 S.W.2d 1075, 256 Ky. 196.

La.—**Corpus Juris quoted in** Russell v. White Oil Corporation, 110 So. 70, 71, 162 La. 9—Binnion v. M. & D. Drugs, App., 8 So.2d 307.

N.D.—**Corpus Juris cited in** Wood v. Buchanan, 5 N.W.2d 680, 682, 72 N. D. 216.

Pa.—Trainer v. Laird, 183 A. 40, 320 Pa. 414—Hay v. Pittsburgh Lodge No. 46, Loyal Order of Moose, 8 A.2d 434, 137 Pa.Super. 205—Johnson v. Spear & Co., 186 A. 313, 122 Pa.Super. 526—Howard v. Siegel, 184 A. 272, 121 Pa.Super. 519.

Tex.—Dallas Hotel Co. v. McCue, Civ. App., 25 S.W.2d 902.

39 C.J. p 45 note 41.

41. Ind.—Holcomb & Hoke Mfg. Co. v. Younge, 8 N.E.2d 426, 103 Ind. App. 439.

Mass.—Maynard v. Royal Worcester Corset Co., 85 N.E. 877, 200 Mass. 1.

42. Ark.—Chas. S. Stifft Co. v. Florsheim, 159 S.W.2d 748, 203 Ark. 1043.

Ga.—National Manufacture & Stores Corporation v. Dekle, 173 S.E. 408, 48 Ga.App. 515.

Ky.—Putnam v. Producers' Live Stock Marketing Ass'n, 75 S.W.2d 1075, 256 Ky. 196.

N.J.—Dennis v. Thermoid Co., 22 A. 2d 535, 19 N.J.Misc. 614, affirmed 25 A.2d 886, 128 N.J.Law 303.

Tex.—Young v. Lewis, 9 Tex. 73—Dallas Hotel Co. v. Lackey, Civ. App., 203 S.W.2d 557—Dallas Hotel Co. v. McCue, Civ.App., 25 S.W.2d 902.

39 C.J. p 46 notes 43, 44.

A contract for a named sum per month for sixty days, an increase in the monthly salary for the next one hundred eighty days, and a further increase in the monthly salary thereafter has been held to create a month to month employment.—Red Star Yeast & Products Co. v. Hague, 157 N.E. 393, 25 Ohio App. 100.

In Michigan

(1) In an early case it was held that a telegram to the alleged employee stating, "You may come at once at salary of two thousand, conditional only upon satisfactory discharge of business," could not be relied on to make out a contract of employment for a single year, since the language used was just as consistent with a contract of employment for a term of years.—Palmer v. Marquette & Pacific Rolling Mill Co., 32 Mich. 274.

(2) In later cases, however, it was held that the fixing of a yearly salary was sufficient to establish a hiring for a year.—Southwell v. Parker Plow Co., 207 N.W. 872, 234 Mich. 292—Fuller v. Peninsular White Lead & Color Works, 69 N.W. 492, 111 Mich. 221.

(3) This has been regarded as leaving open the question of whether a hiring for a monthly salary constitutes a hiring by the month.—Pryor v. Briggs Mfg. Co., 20 N.W.2d 279, 312 Mich. 476, 161 A.L.R. 699.

In Tennessee

(1) Supreme court has held that contract for hiring at specified sum per annum could not be construed as contract for longer than year.—Godson v. MacFadden, 39 S.W.2d 287, 288, 162 Tenn. 528.

(2) However, in an earlier case, court of appeals quoted rule stated in Corpus Juris "that the fact that a hiring is at so much per day, week, month, quarter, or year, raises no presumption that the hiring was for such a period."—American Nat. Ins. Co. v. Jackson, 12 Tenn.App. 305, 308.

43. Ala.—**Corpus Juris quoted in** Holland v. State, 194 So. 412, 413, 29 Ala.App. 181—**Corpus Juris cited in** Great Atlantic & Pacific Tea Co. v. Summers, 148 So. 332, 333, 25 Ala.App. 404, certiorari denied 148 So. 333, 226 Ala. 635.

39 C.J. p 46 notes 46, 47.

Finding not disturbed on appeal

If from the facts referred to in the text, even standing alone, without any other evidence to impair its weight, the trial court finds a monthly or yearly hiring, corresponding to the rate of wages, it has been held that the inference so drawn cannot be disturbed on appeal.—Kellogg v. Citizens' Ins. Co., 69 N.W. 362, 94 Wis. 554.

44. U.S.—American Merchant Marine Ins. Co. v. Letton, C.C.A.N.Y., 9 F.2d 799, certiorari denied Letton v. American Merchant Marine Ins. Co., 46 S.Ct. 483, 271 U.S. 668, 70 L.Ed. 1142.

Ala.—**Corpus Juris quoted in** Peacock v. Virginia-Carolina Chemical Co., 130 So. 411, 412, 221 Ala. 680.

Ill.—White v. American Elec. Fusion Corp., 65 N.E.2d 234, 328 Ill.App. 128.

La.—**Corpus Juris quoted in** Russell v. White Oil Corporation, 110 So. 70, 71, 162 La. 9—**Corpus Juris quoted in** Binnion v. M. & D. Drugs, App., 8 So.2d 307, 308.

N.Y.—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 260, reargument denied 157 N. E. 895, 245 N.Y. 651—Amelotte v. Jacob Dold Packing Co., 17 N.Y.S.2d

Additional and independent consideration, other than services to be rendered, may prevent an employment contract from being considered a hiring at will.[45]

c. Contracts for Permanent or Life Employment

As a general rule, in the absence of additional stipulations as to duration, or of a good consideration additional to the rendering of the services contracted for, a contract for permanent or life employment is no more than an indefinite general hiring or hiring at will.

As a general rule, "permanent employment," as used in contracts of employment, means steady employment, a steady job, a position of some permanence, as contrasted with a temporary job or a temporary employment.[46] Standing alone and by themselves, the words do not mean life employment[47] or employment for any definite period.[48] On the contrary, as a general rule, in the absence of additional stipulations as to duration[49] or of a good consideration additional to the rendering of the services contracted for,[50] a contract for permanent employment is no more than an indefinite general hiring or hiring at will, and this has been held to be true of a contract for life employment.[51] In other words, where the intent to enter into a contract for permanent employment, not terminable except pursuant to its express terms, is not clearly expressed, and there is no evidence showing consideration other than a promise to render service, the assumption will be that, even though the parties speak in terms of permanent employment, the parties have in mind merely the ordinary business contract for a continuing employment, terminable at the will of either party.[52]

The duration of the employment under such contracts, however, depends ultimately on the intention of the parties,[53] as shown by the circumstances sur-

929, 173 Misc. 477, affirmed 24 N.Y. S.2d 134, 260 App.Div. 984.
Pa.—Trainer v. Laird, 183 A. 40, 320 Pa. 414—Swayne v. Pressed Steel Car Co., 147 A. 837, 298 Pa. 31—Jones v. Pittsburgh Mercantile Co., 145 A. 80, 295 Pa. 219—Miller v. Rodd, 131 A. 482, 285 Pa. 16—Hay v. Pittsburgh Lodge No. 46, Loyal Order of Moose, 8 A.2d 434, 137 Pa. Super. 205—Kostenbader v. Schoeneck Farms, 4 A.2d 199, 134 Pa. Super. 334—Johnson v. Spear & Co., 186 A. 313, 122 Pa.Super. 526—Howard v. Siegel, 184 A. 272, 121 Pa.Super. 519.
Va.—Hoffman Specialty Co. v. Pelouze, 164 S.E. 397, 158 Va. 586.
Wis.—Brown v. Oneida Knitting Mills, 277 N.W. 653, 226 Wis. 662—Saylor v. Marshall & Ilsley Bank, 272 N.W. 369, 224 Wis. 511—Koskey v. Harnischfeger Corporation, 265 N.W. 583, 221 Wis. 267—Brooks v. National Equipment Corporation, 244 N.W. 598, 209 Wis. 198—Milwaukee Corrugating Co. v. Flagge, 198 N.W. 394, 184 Wis. 139.
39 C.J. p 45 note 42.

Hiring at will presumed
Ill.—Fuchs v. Weibert, 233 Ill.App. 536.

45. Mo.—Schonwald v. F. Burkart Mfg. Co., 202 S.W.2d 7—Fullington v. Ozark Poultry Supply Co., 39 S.W.2d 780, 327 Mo. 1167.
Effect of additional consideration on contracts for permanent or life employment see infra subdivision c of this section.

Surrender of position held not consideration preventing contract from being considered an indefinite hiring.—Stanley v. Kentucky Utilities Co., 4 S.W.2d 732, 223 Ky. 688.

46. Mass.—Weiner v. Pictorial Paper Package Corporation, 20 N.E. 2d 458, 303 Mass. 123, applying law of New York.
N.Y.—Arentz v. Morse Dry Dock & Repair Co., 164 N.E. 342, 249 N.Y. 439, 62 A.L.R. 231.
N.C.—Malever v. Kay Jewelry Co., 25 S.E.2d 436, 223 N.C. 148.
"Permanent employment" defined generally see Employment 30 C.J.S. p 234 note 83-p 235 note 88.
Validity of contracts for permanent or life employment see supra § 6 d.

47. N.Y.—Arentz v. Morse Dry Dock & Repair Co., 164 N.E. 342, 249 N.Y. 439, 62 A.L.R. 231.
39 C.J. p 43 note 35 [d]—48 C.J. p 921 note 69.

48. Mo.—Minter v. Tootle-Campbell Dry Goods Co., 173 S.W. 4, 187 Mo. App. 16.
39 C.J. p 43 note 35 [d]—48 C.J. p 921 note 70.

49. Mass.—Campion v. Boston & M. R. R., 169 N.E. 499, 269 Mass. 579.
Mich.—Lynas v. Maxwell Farms, 273 N.W. 315, 279 Mich. 684.
Minn.—Skagerberg v. Blandin Paper Co., 266 N.W. 872, 197 Minn. 291.
N.Y.—Arentz v. Morse Dry Dock & Repair Co., 164 N.E. 342, 249 N.Y. 439, 62 A.L.R. 231—Brown v. Babcock, 40 N.Y.S.2d 428, 265 App.Div. 596—Heaman v. E. N. Rowell Co., 258 N.Y.S. 138, 236 App.Div. 34, motion granted and certified question answered 258 N.Y.S. 1075, 236 App.Div. 775.
N.C.—Malever v. Kay Jewelry Co., 25 S.E.2d 436, 223 N.C. 148.
48 C.J. p 922 note 74.

50. U.S.—Kunz v. Colnon, D.C.Kan., 54 F.Supp. 673.
Cal.—Speegle v. Board of Fire Underwriters of the Pacific, 172 P.2d 867, 29 Cal.2d 34.
Mich.—Adolph v. Cookware Co. of America, 278 N.W. 687, 283 Mich. 561—Lynas v. Maxwell Farms, 273 N.W. 315, 279 Mich. 684.
N.Y.—Arentz v. Morse Dry Dock & Repair Co., 164 N.E. 342, 249 N.Y. 439, 62 A.L.R. 231—Brown v. Babcock, 40 N.Y.S.2d 428, 265 App.Div. 596—Heaman v. E. N. Rowell Co., 258 N.Y.S. 138, 236 App.Div. 34, motion granted and certified question answered 258 N.Y.S. 1075, 236 App. Div. 775.
Wash.—Gensman v. West Coast Power Co., 101 P.2d 316, 3 Wash.2d 404.
39 C.J. p 43 note 35 [d]—48 C.J. p 922 note 75.

51. Mich.—Lynas v. Maxwell Farms, 273 N.W. 315, 279 Mich. 684.

52. D.C.—Littell v. Evening Star Newspaper Co., 120 F.2d 36, 73 App.D.C. 409.

Where it is not clear from contract or surrounding circumstances or consideration furnished that parties intended that employment was to continue for life or while employee could render required service or employer furnish employment, contract will be construed to be for indefinite period.—Eggers v. Armour & Co. of Delaware, C.C.A.Iowa, 129 F.2d 729.

53. U.S.—Eggers v. Armour & Co. of Delaware, supra—Fletcher v. Agar Mfg. Corporation, D.C.Mo., 45 F.Supp. 650.
Cal.—Bene v. La Grande Laundry Co., 71 P.2d 351, 22 Cal.App.2d 512.
D.C.—Littell v. Evening Star Newspaper Co., 120 F.2d 36, 73 App.D.C. 409.
Mass.—Carnig v. Carr, 46 N.E. 117, 167 Mass. 544, 35 L.R.A. 512, 57 Am.S.R. 488.
Okl.—Roxana Petroleum Co. of Oklahoma v. Rice, 235 P. 502, 109 Okl. 161.

rounding the making of the contract, its subject, the situation and relation of the parties, and the sense in which, taking these things into account, the words used would be ordinarily understood,[54] and under some circumstances a contract for permanent employment will be held to contemplate an engagement to endure as long as the employer is engaged in the same nature of business and needs the services of the employee, and the employee is able and willing to do the work satisfactorily and gives no cause for his discharge.[55] Thus, where a consideration is given by the employee other than the services contracted for,[56] such as the release of a claim for damages,[57] or where the employee gives up a position or business in order to enter his new employment,[58] such facts may be sufficient to show the intent of the parties to enter into a contract to endure for the life of the employee or at least as long as he is able to do the work and there is work to be done. It has been held, however, that detriment sustained by the employee in preparing himself to accept the offered employment not mutually understood as being part of the consideration,[59] such as giving up a business or position,[60] is insufficient to show that the parties intended more than a general indefinite hiring or hiring at will.

§ 9. —— Modification or Rescission

a. Modification
b. Rescission

a. Modification

The parties to a contract of employment may change or modify it, provided a sufficient consideration moves between them. An employment terminable at any time is subject to modification at any time by either party as a condition of its continuance.

It is competent for the parties to a contract of employment to change or modify it, and thus by new conditions add to or qualify its terms,[61] provided a sufficient consideration moves between them.[62] A contract of employment cannot be modi-

54. U.S.—Fletcher v. Agar Mfg. Corporation, D.C.Mo., 45 F.Supp. 650.
D.C.—Littell v. Evening Star Newspaper Co., 120 F.2d 36, 73 App.D.C. 409.
Mass.—Campion v. Boston & M. R. R., 169 N.E. 499, 269 Mass. 579—Carnig v. Carr, 46 N.E. 117, 167 Mass. 544, 35 L.R.A. 512, 57 Am. S.R. 488.
Okl.—Roxana Petroleum Co. of Oklahoma v. Rice, 235 P. 502, 109 Okl. 161.
Pa.—Lucacher v. Kerson, 45 A.2d 245, 158 Pa.Super. 437, affirmed 48 A.2d 857, 355 Pa. 79.
48 C.J. p 921 note 68.

55. Ala.—Alabama Mills v. Smith, 186 So. 699, 237 Ala. 296.
Ill.—Jones v. Stoneware Pipe Co., 277 Ill.App. 18.
Mass.—Carnig v. Carr, 46 N.E. 117, 167 Mass. 544, 35 L.R.A. 512, 57 Am.S.R. 488.
Minn.—Skagerberg v. Blandin Paper Co., 266 N.W. 872, 197 Minn. 291.
N.H.—Perry v. New England Casualty Co., 100 A. 605, 78 N.H. 346.
Okl.—Roxana Petroleum Co. of Oklahoma v. Rice, 235 P. 502, 109 Okl. 161.
Pa.—Lucacher v. Kerson, 45 A.2d 245, 158 Pa.Super. 437, affirmed 48 A. 2d 857, 355 Pa. 79.
48 C.J. p 922 note 76.

56. D.C.—Littell v. Evening Star Newspaper Co., 120 F.2d 36, 73 App. D.C. 409.
Minn.—Skagerberg v. Blandin Paper Co., 266 N.W. 872, 197 Minn. 291.
N.Y.—Heaman v. E. N. Rowell Co., 258 N.Y.S. 138, 236 App.Div. 34, motion granted and certified question answered 258 N.Y.S. 1075, 236 App.Div. 775.
48 C.J. p 922 note 76.

57. D.C.—Littell v. Evening Star Newspaper Co., 120 F.2d 36, 73 App.D.C. 409.
Ill.—Jones v. Stoneware Pipe Co., 277 Ill.App. 18.
N.Y.—Heaman v. E. N. Rowell Co., 258 N.Y.S. 138, 236 App.Div. 34, motion granted and certified question answered 258 N.Y.S. 1075, 236 App.Div. 775.

58. D.C.—Riefkin v. E. I. Du Pont De Nemours & Co., 290 F. 286, 53 App.D.C. 311.
Mass.—Carnig v. Carr, 46 N.E. 117, 167 Mass. 544, 35 L.R.A. 512, 57 Am.S.R. 488.
Pa.—Lucacher v. Kerson, 45 A.2d 245, 158 Pa.Super 437, affirmed 48 A.2d 857, 355 Pa. 79.

59. Mich.—Lynas v. Maxwell Farms, 273 N.W. 315, 279 Mich. 684.

60. La.—Page v. New Orleans Public Service, 167 So. 99, 184 La. 617.
Mich.—Adolph v. Cookware Co. of America, 278 N.W. 687, 283 Mich. 561—Lynas v. Maxwell Farms, 273 N.W. 315, 279 Mich. 684.

Inducement

Where there was no evidence showing any declaration by the employee that he would not give up his present employment unless the employer would permanently employ him or any acquiescence by the employer to such terms, but evidenced indicated that his former employment was terminating, employment contract was not supported by any consideration requiring continuance of employment for any particular period of time.—Thacker v. American Foundry, Cal.App., 177 P.2d 322.

61. Ariz.—Mineral Basin Copper Co. v. Standish, 250 P. 364, 31 Ariz. 65.
Ga.—Evans v. Henson, 37 S.E.2d 164, 73 Ga.App. 494.
Okl.—Phillips Petroleum Co. v. Widick, 52 P.2d 773, 175 Okl. 376.
Tex.—**Corpus Juris quoted in** L. G. Balfour Co. v. Brown, Civ.App., 110 S.W.2d 104, 107.
Vt.—Wakefield v. Champlain Marine Co., 13 A.2d 183, 111 Vt. 243.
Wash.—Dunlap v. West Const. Co., 162 P.2d 448, 23 Wash.2d 827.
39 C.J. p 48 note 62.
Modification as to compensation see infra § 110.

Failure to execute a new contract as contemplated by the parties is immaterial as respects the binding effect of an otherwise valid modification.—Lockwood v. Embalmers' Supply Co., 251 N.Y.S. 321, 233 App. Div. 189.

The burden of proving a modification of the contract rests on the party relying on a modification to sustain his cause of action or defense.
La.—Lucas v. Morefield, 137 So. 633, 18 La.App. 497.
Mo.—Atchison & Eastern Bridge Co. v. Commerce Trust Co., 179 S.W.2d 722, 352 Mo. 884.
Pa.—Knight v. Gulf Refining Co., 166 A. 880, 311 Pa. 357.

Evidence held insufficient to show modification.—Atchison & Eastern Bridge Co. v. Commerce Trust Co., 179 S.W.2d 722, 352 Mo. 884—Waller v. Tootle-Campbell Dry Goods Co., Mo.App., 59 S.W.2d 751.

62. Cal.—Thacker v. American Foundry, App., 177 P.2d 322.
La.—De Villafranca v. International Trade Exhibition, 122 So. 889, 168 La. 635.
N.Y.—Albrecht v. Altoona Textile Co., 242 N.Y.S. 159, 229 App.Div. 784,

fied except by mutual consent,[63] although a condition of employment imposed by a party in his interest may be waived by him,[64] and an employment terminable at any time is subject to modification at any time by either party as a condition of its continuance,[65] and may even be split up so as to allow a recovery for one part of a continuous service and disallow it for another part.[66] An agreement for a modification may be implied,[67] as by the employee's continuing in the employment after the employer has made or announced a change,[68] but circumstances may be shown to controvert the implication of consent,[69] and it has been held that an employee cannot be deemed to have accepted a modification merely by reason of having continued in

motion granted 177 N.E. 172, 256 N.Y. 637.
Tex.—Farley v. Universal Mills, Civ. App., 116 S.W.2d 488.
39 C.J. p 48 note 63.

Future employment

(1) Continuance of employment may constitute consideration for a retroactive modification.
Ariz.—Mineral Basin Copper Co. v. Standish, 250 P. 364, 31 Ariz. 65.
Wyo.—Long v. Forbes, 136 P.2d 242, 58 Wyo. 533.

(2) Where parties, after agreeing on employee's weekly compensation, realized, at time they agreed to reduce compensation, that work had lasted for a longer period than had been contemplated, and employee in part reduced compensation as a good will gesture toward employer with view to subsequent business dealings, employee's assignee in suit against employer was not entitled to amount of compensation under original agreement, on ground that employee's voluntary agreement to reduce compensation was without consideration.—Quinn v. McCurdy, Tex.Civ.App., 187 S.W.2d 595, refused for want of merit.

Mutual consent

(1) An executory contract may be modified without other consideration than mutual assent.
Ala.—Birmingham Electric Co. v. Praytor, 111 So. 895, 22 Ala.App. 45.
Ga.—Southern Sav. Bank v. Dickey, 199 S.E. 546, 58 Ga.App. 718.

(2) Where neither party is bound to continue the relationship, the parties' mutual consent constitutes sufficient consideration for the modification of the contract or substitution of a new agreement.—Wakefield v. Champlain Marine Co., 13 A.2d 183, 111 Vt. 248.

63. U.S.—Morgan v. Wheland Co., D.C.Tenn., 66 F.Supp. 439.
Mich.—Piggins v. Fellinger, 28 N.W. 2d 273, 318 Mich. 398.
Minn.—Dormady v. Hose, 246 N.W. 521, 188 Minn. 121.
39 C.J. p 48 note 64.

Seniority rights cannot be altered except by a contractual arrangement to which the employer is a party.—Carver v. Brien, 43 N.E.2d 597, 315 Ill.App. 643.

Modification held not induced by duress, because employee's refusal to agree would mean discharge, since exercise of legal right does not constitute duress.—De Villafranca v. International Trade Exhibition, 122 So. 889, 168 La. 635.

Misrepresentations cannot affect a modification when they were not relied on by the person to whom they were made.—Wilson v. Galena-Signal Oil Co., 119 A. 471, 275 Pa. 355—39 C.J. p 48 note 68.

Employer held to have right to change salesman's territory in the absence of a showing that the contract deprived him of that right, and an oral conversation between the manager of the employer and the salesman, wherein the manager assured the salesman that the salesman would be given at least six months' notice before the manager would let him go, did not constitute a contract not to change the salesman's territory without notice or effect change of the existing contract of employment.—Farley v. Universal Mills, Tex.Civ.App., 116 S.W.2d 488.

Substitution of new employer

(1) A contract of employment cannot be changed by the substitution of a new employer without the knowledge and consent of the employee.
Minn.—Yoselowitz v. Peoples Bakery, 277 N.W. 221, 201 Minn. 600.
R.I.—Anderson v. Polleys, 165 A. 436, 53 R.I. 182.

(2) Where contract provided that it could be assigned to a subsidiary or allied corporation, on subsequent organization of another corporation and assignment of contract thereto, a new contract of employment was not made.—Panich v. Curtis, Owen, Fuller Corporation, Mo.App., 124 S. W.2d 619.

64. N.Y.—Cudney v. R. B. Phillips Mfg. Co., 168 N.Y.S. 268, 181 App. Div. 257.

65. U.S.—Swalley v. Addressograph-Multigraph Corp., C.C.A.Ill., 158 F.2d 51.
Colo.—Linder v. Midland Oil Refining Co., 40 P.2d 253, 96 Colo. 160.
Ga.—Southern Sav. Bank v. Dickey, 199 S.E. 546, 58 Ga.App. 718.
N.J.—Donnellan v. Halsey, 176 A. 176, 114 N.J.Law 175.
Okl.—**Corpus Juris quoted in** Robinson v. Phillips Petroleum Co., 54 P.2d 322, 323, 175 Okl. 640.
Pa.—Trainer v. Laird, 183 A. 40, 320 Pa. 414.
Tenn.—Moore Coal Co. v. Brown, 64 S.W.2d 3, 166 Tenn. 516.
Tex.—**Corpus Juris quoted in** L. G. Balfour Co. v. Brown, Civ.App., 110 S.W.2d 104, 107.
Wyo.—Long v. Forbes, 136 P.2d 242, 58 Wyo. 533.
39 C.J. p 48 note 66.

66. Mass.—Norton v. Brookline, 63 N.E. 930, 181 Mass. 360.

67. Pa.—Max v. U. S. Shipping Bd. Emergency Fleet Corp., 80 Pa. Super. 86.

Submission to physical examination

Where an employee on reporting for work was told that it would be necessary for him to pass a physical examination, he had the option of standing on the contract as originally made or assenting to the new stipulation, and, where he voluntarily submitted to an examination, he assented to the new stipulation.—Birmingham Electric Co. v. Praytor, 111 So. 895, 22 Ala.App. 45.

68. Colo.—Linder v. Midland Oil Refining Co., 40 P.2d 253, 96 Colo. 160.
Ga.—Southern Sav. Bank v. Dickey, 199 S.E. 546, 58 Ga.App. 718.
Neb.—Smith Baking Co. v. Behrens, 251 N.W. 826, 125 Neb. 718.
Okl.—Robinson v. Phillips Petroleum Co., 54 P.2d 322, 175 Okl. 640.
Or.—Page v. Thomas Kay Woolen Mill Co., 123 P.2d 982, 168 Or. 434.
Tenn.—Moore Coal Co. v. Brown, 64 S.W.2d 3, 166 Tenn. 516.

Protest ineffective

Where contract of employment provided for termination on notice, and employer sent employee a letter stating that in future compensation would be lowered in certain respects, agent was put to election whether to accept modification of contract embodied in letter, and he ratified such modification by continuing in employment, although under protest, and accepting lowered compensation.—L. G. Balfour Co. v. Brown, Tex. Civ.App., 110 S.W.2d 104.

69. Minn.—Dormady v. Hose, 246 N. W. 521, 188 Minn. 121.
Neb.—Smith Baking Co. v. Behrens, 251 N.W. 826, 125 Neb. 718.

the employment for a short time after announcement of a change.[70]

Necessity of writing. As a general rule, a written contract of employment,[71] whether sealed or unsealed,[72] may be modified by parol, where neither the old[73] nor the new[74] contract is within the scope of the statute of frauds, and this is true, notwithstanding a provision in the old contract requiring changes to be made in writing.[75] Under a statute in effect so providing, however, a written contract may be altered only by a contract in writing or an executed oral agreement,[76] and it has been held that an oral agreement is not executed within the meaning of such statute while reciprocal obligations of the parties remain to be performed in the future.[77]

Merger of oral contract in written contract. In the absence of fraud, a written contract of employment merges a prior oral contract,[78] and it has been held that, where, after an oral agreement has been partly performed, a written agreement is executed specifying the terms of employment, such written agreement should be deemed to embody the contract relating to past, as well as to future, services.[79]

Change in nature of relationship. The relationship of employer and employee may be changed to another relationship, such as an independent-contractor status, by an abrogation of the provision for control by the employer, through either an express agreement, or an agreement implied from circumstances demonstrative of a mutual abandonment of it,[80] but clear and convincing proof is necessary.[81]

Operation and effect. An agreement modifying a prior employment contract is a substitute for the original one in so far as it alters, modifies, or changes it.[82] A new contract with respect to the employment does not, however, supersede the old contract and destroy its obligations, except in so far as the two are inconsistent, when it is evident that the parties did not intend the new to supersede the old, but intended it as supplementary thereto.[83]

b. Rescission

A contract of employment cannot be rescinded except for cause, unless by mutual consent.

70. Or.—Krause v. Bell Potato Chip Co., 39 P.2d 363, 149 Or. 388.
Pa.—Max v. U. S. Shipping Bd. Emergency Fleet Corp., 80 Pa.Super. 86.

71. Ga.—Evans v. Henson, 37 S.E.2d 164, 73 Ga.App. 494.
Neb.—Smith Baking Co. v. Behrens, 251 N.W. 826, 125 Neb. 718.
Pa.—Ruck v. Vassalotti, 31 A.2d 596, 152 Pa.Super. 188.
Wis.—Gutknecht v. C. A. Lawton Co., 285 N.W. 411, 231 Wis. 413.

Burden of proof
Where the employer alleges an oral modification of a written contract made in his interest, the burden is on him to establish such modification.—Dunbar v. Orleans Metal Bed Co., 82 So. 889, 145 La. 779.

Degree of proof
The existence of an oral contract changing the terms of a prior written one must be clearly and positively shown, and, where written employment contract was contract at will, authorizing employer to change salary at any time, letters to employee in subsequent years, increasing salary, and superior's subsequent statement that contract was "renewed" for year, did not, as matter of law, change contract to contract for year.—Knight v. Gulf Refining Co., 166 A. 880, 311 Pa. 357.

72. Wis.—Gutknecht v. C. A. Lawton Co., 285 N.W. 411, 231 Wis. 413.

73. Wis.—Gutknecht v. C. A. Lawton Co., supra.
39 C.J. p 48 note 70.

74. Ala.—Tilley v. Bartow, 62 So. 330, 8 Ala.App. 639.
39 C.J. p 48 note 70.

75. Ala.—Tilley v. Bartow, supra.

76. Cal.—Klein Norton Co. v. Cohen, 290 P. 613, 107 Cal.App. 325.
39 C.J. p 48 note 71 [a].

The statute has no application to the abrogation, as distinguished from modification, of a written contract of employment by a subsequent oral agreement.—Klein Norton Co. v. Cohen, supra.

77. Cal.—Klein Norton Co. v. Cohen, supra.

78. N.Y.—Davidson v. Library Bureau, 254 N.Y.S. 95, 234 App.Div. 47, modified on other grounds 182 N.E. 221, 259 N.Y. 654.

Oral contract not terminated
Where contract was reduced to writing after employment commenced, the written contract did not terminate the oral contract so as to entitle the employee to a separate accounting for profits for periods before and after writing was executed.—Anagnosti v. Almy, 147 N.E. 854, 252 Mass. 492.

79. Minn.—Blondel v. Le Vesconte, 42 N.W. 544, 41 Minn. 35.

80. U.S.—Birmingham v. Bartels, C.C.A.Iowa, 157 F.2d 295.

81. U.S.—Birmingham v. Bartels, supra.

82. N.Y.—Strobe v. Netherland Co., 283 N.Y.S. 246, 245 App.Div. 573.
Pa.—Ruck v. Vassalotti, 31 A.2d 596, 152 Pa.Super. 188.
Vt.—Wakefield v. Champlain Marine Co., 13 A.2d 183, 111 Vt. 243.

Provision abrogating prior contract
(1) An employment contract which contained provision to effect that all prior communications between the parties should be abrogated, and that the contract when approved constituted the agreement between the parties, has been held to abrogate a prior contract entered into between the parties.—Burns v. Reliance Life Ins. Co. of Pittsburgh, 12 S.E.2d 509, 122 W.Va. 708.

(2) So, it has been held that a provision that "This letter on your accepting and signing and returning a copy to our office will become our final agreement and void all other agreements now in existence" voided and terminated a prior contract of employment rather than merely modified it.—Lidenberg v. Anchor Stove & Range Co., 291 N.W. 512, 207 Minn. 341.

83. Ky.—Henry Vogt Mach. Co. v. Thurstensen, 66 S.W.2d 77, 252 Ky. 161.
N.J.—Tribune Assoc. v. Simonds, Ch., 104 A. 386.
Ohio.—Harry Livingston, Inc., v. Stern, 43 N.E.2d 302, 69 Ohio App. 105.
Pa.—Swayne v. Pressed Steel Car Co., 147 A. 837, 298 Pa. 31.
39 C.J. p 48 note 74.

Merely keeping still and going on earning a living after a new agreement does not require a finding that the employee consented to the surrender of rights already accrued under the old contract.—McDonald v. Fitch, 183 N.E. 848, 281 Mass. 528.

A contract of employment cannot be rescinded except for cause, unless by mutual consent.[84] One who has been induced by fraud to enter a contract may rescind it,[85] and, when the contract is breached or repudiated by one of the parties before or pending the performance of service, the other may elect to treat the contract as rescinded.[86] In order to justify rescission on such ground, the breach must affect the substance of the contract, or the repudiation must be positive, unequivocal, and absolute.[87] The contract may be rescinded for a cause which would justify a discharge from, or abandonment of, service,[88] but the refusal to account for profits earned under a contract has been held not to warrant rescission where the contract has otherwise been fully executed.[89] A written contract may be rescinded by an oral agreement.[90]

A modification of a contract may be abrogated in turn, and, when both parties have mutually disregarded it, it has been held that their rights are to be determined under the terms of the original contract,[91] but it has also been held that, where a contract superseding a prior contract of hiring is abandoned by mutual consent, the prior contract is not reëstablished.[92]

After rescission, the contract and each of its terms and provisions cease to be a subsisting or enforceable obligation.[93] A party cannot avert the consequences of his rescission on the ground that the rescission was ineffectual because of his own laches,[94] especially where the other party has relied on his rescission,[95] but an agreement canceling a prior contract of employment may be rescinded on the ground of fraud or duress in a proper action brought therefor.[96]

§ 10. —— Renewal or Continuance

a. In general

b. Option and privilege of renewal

a. In General

As a general rule, where one enters into the service of another for a definite period, and continues in the employment after the expiration of that period, without any new contract, the presumption is that the employment is continued on the terms of the original contract.

As a general rule, sometimes by virtue of statutory provisions, where one enters into the service of another for a definite period, and continues in the employment after the expiration of that period, without any new contract, the presumption is that the employment is continued on the terms of the original contract,[97] and provisions and restrictions

84. Md.—Vincent v. Palmer, 19 A.2d 183, 179 Md. 365.
39 C.J. p 48 note 77.
Termination of relation by mutual agreement see infra § 33.

Contract abrogated by mutual rescission

U.S.—Parks v. Interstate Accounts Service, D.C.Mo., 54 F.Supp. 581.

85. Mich.—Eckenrode v. Motor Oil Corporation of America, 266 N.W. 409, 275 Mich. 437.

Offer of restoration of benefits

Where an employer, in an action against him for commissions, proceeds as for a rescission of the contract for fraud, an offer of restoration of benefits received is unnecessary when the employee's services are alleged to have been valueless.—Morgan Munitions Supply Co. v. Studebaker Corp., 168 N.Y.S. 37, 180 App. Div. 530.

86. Fla.—Croker v. Powell, 156 So. 146, 115 Fla. 733.
Ill.—Therm-O-Proof Insulation Mfg. Co. v. Hoffman, 69 N.E.2d 725, 329 Ill.App. 645.

A breach or repudiation does not of itself abrogate the contract, but merely gives the nondefaulting party a right to treat contract as discharged.—Panich v. Curtis, Owen, Fuller Corporation, Mo.App., 124 S. W.2d 619.

87. Fla.—Croker v. Powell, 156 So. 146, 115 Fla. 733.

Substantial breach not shown

Where employer, having prior right to services of employee, who had privilege of working elsewhere when not needed by employer, waived such right on some occasions but employee recognized obligation to report for duty when called, complied substantially with such obligation, and worked for him at least half of employee's working time during entire contract period, there was no such substantial nonperformance or breach of contract as would justify rescission thereof by employer.—Vincent v. Palmer, 19 A.2d 183, 179 Md. 365.

88. N.Y.—Nolan v. Thompson, 11 Daly 314.
39 C.J. p 49 note 78.

89. N.Y.—Smith v. Johannsen, 192 N.Y.S. 478, 199 App.Div. 823.

90. Cal.—Klein Norton Co. v. Cohen, 290 P. 613, 107 Cal.App. 325.

Clear, positive, and convincing evidence is necessary to establish such oral contract.—Atkinson v. New Britain Mach. Co., C.C.A.Ill., 154 F.2d 895.

Sealed contract

As against the contention that the original contract was under seal and could not be abrogated by parol, it has been held that the employee was excused from performance of the original contract to the extent that the parol contract had been acted on by both parties.—National Cash Register Co. v. Remington Arms Co., 151 N.E. 144, 242 N.Y. 99, reargument denied 152 N.E. 431, 242 N.Y. 569.

91. Me.—Stachowitz v. Barron Anderson Co., 122 A. 869, 123 Me. 386.

92. N.Y.—Kapp v. Baruch, 168 N.Y. S. 24.

93. Cal.—Altman v. Bautzer, 129 P. 2d 458, 54 Cal.App.2d 543.

94. Cal.—Altman v. Bautzer, supra.

95. Cal.—Altman v. Bautzer, supra.

96. **Allegation of offer of restitution** of consideration received under the cancellation agreement is necessary to state a cause of action for rescission on the ground of fraud.—Fonberg v. Middlesex Gauge & Tool Corp., 57 N.Y.S.2d 161.

General rules as to proper parties have been applied in such actions.—Fonberg v. Middlesex Gauge & Tool Corp., supra.

97. U.S.—**Corpus Juris cited in** Hines v. Ward Baking Co., C.C.A. Ill., 155 F.2d 257, 260—Toledo Machine & Tool Co. v. Byerlein, C.C.A. Mich., 9 F.2d 279—Patent & Licensing Corp. v. Olsen, D.C.N.Y., 71 F.Supp. 181.

forming essential parts of the contract, although collateral to the employment itself, continue in force.[98] A change in one of the terms does not destroy the presumption as to the other terms.[99] Thus, a mere change in the contract with respect to the amount of salary will not affect the applicability of the rule.[1]

While it has been held that, where the original term is for more than a year, a continuance in employment will not support a presumption of a renewal for the full period of the original term,[2] but only of employment from year to year thereafter,[3] where the hiring is for a definite term less than a year, it has been held that a renewal for that term will be implied,[4] but there is authority to the contrary.[5] Unless the original contract was for an entire year and the service rendered under it continued for at least a year, no presumption of renewal for another year on the same terms arises by reason of continuance in the same service.[6]

It has been held, however, that the presumption will not arise where the original contract is absolutely void,[7] or where the services rendered after the expiration of the term are of a different char-

Cal.—Henkel v. J. J. Henkel Co., 298 P. 28, 212 Cal. 288—Otten v. San Francisco Hotel Owners Ass'n, 168 P.2d 739, 740, 74 Cal.App.2d 341—Williams v. Schalk Chemical Co., 53 P.2d 1015, 11 Cal.App.2d 396.
Ga.—National Manufacture & Stores Corporation v. Dekle, 173 S.E. 408, 48 Ga.App. 515.
Mich.—**Corpus Juris cited in** Carter v. Marvel Carburetor Co., 248 N.W. 545, 547, 263 Mich. 48.
Neb.—Fairchild v. Fairchild Clay Products Co., 3 N.W.2d 581, 141 Neb. 356.
N.J.—Dennis v. Thermoid Co., 22 A.2d 535, 19 N.J.Misc. 614, affirmed 25 A.2d 886, 128 N.J.Law 303.
N.Y.—Lonsdale v. J. A. Migel, Inc., 225 N.Y.S. 593, 222 App.Div. 197—Pohlers v. Exeter Mfg. Co., 52 N.Y.S.2d 316.
Tenn.—**Corpus Juris quoted in** Srygley v. City of Nashville, 135 S.W.2d 451, 175 Tenn. 417.
Tex.—**Corpus Juris quoted in** Magnolia Compress & Warehouse Co. v. Davidson, Civ.App., 38 S.W.2d 634, 636—Accidental Oil Mills v. Tomlinson, Civ.App., 8 S.W.2d 558, error refused.
Va.—D. Buchanan & Son v. Ewell, 139 S.E. 483, 148 Va. 762.
Wash.—Holton v. Hart Mill Co., 166 P.2d 186.
Wis.—Brown v. Oneida Knitting Mills, 277 N.W. 653, 226 Wis. 662.
39 C.J. p 49 note 81.

Statutory codification

It has been stated that the statute was intended to codify the common-law rule as it had been developed and interpreted at the time of the enactment of the statute.—Otten v. San Francisco Hotel Owners Ass'n, 168 P.2d 739, 74 Cal.App.2d 341.

Same wages

Both prior to and since the adoption of the statute, it was held that, where one continues employment after the expiration of the contract, the fair presumption is that both parties understood that the same salary is to be paid.—Nicholson v. Patchin, 5 Cal. 474—Schneider v. Oakman Cons. Min. Co., 176 P. 177, 38 Cal.App. 338—Perry v. J. Noonan Furniture Co., 95 P. 1128, 8 Cal.App. 35.

In Louisiana

(1) It has been held that, after the expiration of a contract of employment for a fixed period, the employment continues for an indefinite period, unless expressly renewed for another fixed period, or unless the custom in such employment is for a fixed time.—Fletcher v. Crichton, 164 So. 411, 183 La. 551—Russell v. White Oil Corporation, 110 So. 70, 162 La. 9—National Automatic Fire Alarm Co. v. New Orleans & N. E. R. Co., 39 So. 738, 115 La. 633.

(2) Thus, the employment may be considered as renewed for a fixed period where the nature of the employment and the general custom relative thereto, as well as the facts and circumstances of the particular case, show that the intention of the parties was that the employment should continue for a definite period.—Fletcher v. Crichton, supra.

(3) Earlier decisions apparently held otherwise.—Sullivan v. New Orleans Stave & Heading Co., 11 So. 89, 44 La.Ann. 787—Lalande v. Aldrich, 6 So. 28, 41 La.Ann. 307—Alba v. Moriarty, 36 La.Ann. 680.

98. Tex.—**Corpus Juris quoted in** Magnolia Compress & Warehouse Co. v. Davidson, Civ.App., 38 S.W.2d 634, 636.
39 C.J. p 49 note 82.

99. Cal.—Henkel v. J. J. Henkel Co., 298 P. 28, 212 Cal. 288—Williams v. Schalk Chemical Co., 53 P.2d 1015, 11 Cal.App.2d 396.

1. Cal.—Henkel v. J. J. Henkel Co., 298 P. 28, 212 Cal. 288.
Tex.—**Corpus Juris quoted in** Magnolia Compress & Warehouse Co. v. Davidson, Civ.App., 38 S.W.2d 634, 636.
39 C.J. p 49 note 85.

2. U.S.—**Corpus Juris cited in** Hines v. Ward Baking Co., C.C.A.Ill., 155 F.2d 257, 260.
Ind.—Jenkins v. King, 65 N.E.2d 121.
Tenn.—Srygley v. City of Nashville, 135 S.W.2d 451, 175 Tenn. 417.
39 C.J. p 50 note 89.

3. U.S.—**Corpus Juris cited in** Hines v. Ward Baking Co., C.C.A.Ill., 155 F.2d 257, 260.
N.Y.—Carter v. Bradlee, 280 N.Y.S. 368, 245 App.Div. 49, affirmed 200 N.E. 48, 269 N.Y. 664.
39 C.J. p 50 note 89.

4. Mass.—Frati v. Jannini, 115 N.E. 746, 226 Mass. 430.
39 C.J. p 50 note 91.

Principle governing yearly contract applied

It has been held that, where one was employed in the spring for the balance of the calendar year, the principle applicable to employment by the year, that is, implied renewal for another year, could fairly be invoked.—Virginia Canners' Exch. v. Scheidt, 119 S.E. 56, 137 Va. 452—39 C.J. p 50 note 92.

5. **In New York**

(1) It has been held that, where a contract of hiring is for a term less than a year, there is no presumption that the parties agreed to its renewal for the same period by reason of the continuance of the employment or holding over for a short time after the expiration of the term.—Moskowitz v. Mawhinney, 137 N.Y.S. 903—Barnes v. Summit Silk Mfg. Co., 113 N.Y.S. 977—Caldwell v. Caldwell Co., 88 N.Y.S. 970.

(2) It has been stated, however, "in passing, although not necessary to the determination . . . that, if the first hiring was for a definite term of six months, a renewal for that term would be implied."—Wood v. Miller, 138 N.Y.S. 562, 565, 78 Misc. 377.

6. Mich.—White v. U. S. Gypsum Co., 133 N.W. 501, 168 Mich. 238.
39 C.J. p 50 note 90.

7. Wis.—Brown v. Oneida Knitting Mills, 277 N.W. 653, 226 Wis. 662.
Effect of invalidity of original agreement under statute of frauds as affecting presumption see Frauds, Statute of § 255.
Hiring by year or shorter period as

acter from that called for by the contract,[8] and it may be rebutted by showing a new agreement or that a different hiring was in fact intended by the parties.[9] A new contract may arise, although it is shown under an agreement which is in terms an express renewal of the original contract.[10] Also, when, at the close of a definite term, negotiations are pending for a new contract, it has been held that the law will not conclude them by a presumption of an implied contract,[11] and when such negotiations have been in fact concluded by the parties, and a new arrangement agreed on, it is immaterial that, although contemplated, the new agreement has not been reduced to writing.[12]

Rights and obligations under former contract. Where separate and independent contracts of employment for successive periods of time contain no statement of a settlement of prior dealing with the parties, there is no presumption that their mutual claims up to the date of making a contract had been adjusted.[13]

b. Option and Privilege of Renewal

Employment contracts may validly give either party the option or privilege to extend the term.

Employment contracts may validly give the employer[14] or the employee[15] the option or privilege to extend the term annually or for a term of greater or lesser length. Where a contract provides that it may be terminated at the end of a fixed period at the option of either party on notice, and that otherwise it is to remain in force for a definite period, the failure of the parties to exercise the option is a renewal of the contract with all its provisions.[16] The fact that the contract expressly provides for a renewal for a definite period on the failure of the parties to give notice of discontinuance does not preclude subsequent renewals based on the continuance of the employment, after the expiration of the renewal term provided for by the contract.[17] Where a contract of hiring for a year provides that it may be renewed for three years at the election of the employer, by notice in writing, it has been held that it is immaterial whether he exercised his election in the manner prescribed in the agreement, where he continues the employee in his employment, and the continuance of the employment after the expiration of the original period will be for a like period.[18]

§ 11. —— Actions for Breach of Contract

a. In general
b. Pleading
c. Evidence
d. Damages

a. In General

An employee may maintain an action against his employer for appropriate damages when the contract is breached or repudiated by the employer.

Just as the employer may recover damages from his employee, as discussed infra § 77, for any failure on the part of the employee to perform the duties devolving on him under the employment contract, so the employee may maintain an action against his employer for damages when the contract is breached or repudiated by the employer.[19]

not invalid under statute of frauds by reason of implied renewals of contract at expiration of each period see Frauds, Statute of § 62 d.

8. Mich.—White v. U. S. Gypsum Co., 133 N.W. 501, 168 Mich. 238.

9. U.S.—Toledo Machine & Tool Co. v. Byerlein, C.C.A.Mich., 9 F.2d 279—Patent & Licensing Corp. v. Olsen, D.C.N.Y., 71 F.Supp. 181.
Cal.—Henkel v. J. J. Henkel Co., 298 P. 28, 212 Cal. 288.
Ill.—Davis v. Tampico Farmers Mut. Tel. Co., 74 N.E.2d 721, 332 Ill. App. 280.
Mich.—Corpus Juris cited in Carter v. Marvel Carburetor Co., 248 N.W. 545, 547, 263 Mich. 48.
N.Y.—Foster v. White, 17 N.E.2d 761, 279 N.Y. 38, reargument denied 18 N.E.2d 868, 279 N.Y. 786—Lonsdale v. J. A. Migel, Inc., 225 N.Y.S. 593, 222 App.Div. 197—National Cash Register Co. v. Remington Arms Co., 209 N.Y.S. 40, 212 App.Div. 343, affirmed 151 N.E. 144, 242 N.Y. 99, reargument denied 152 N.E. 431, 242 N.Y. 569—Pohlers v. Exeter Mfg. Co., 52 N.Y.S.2d 316.
39 C.J. p 50 note 94.

Void agreement

The presumption is inapplicable where the parties made an express agreement for continuance, which was void.—White v. Simplex Radio Co., 5 S.E.2d 922, 61 Ga.App. 157.

10. N.Y.—Daniel v. Manhattan L. Ins. Co., 102 N.Y.S. 27, 116 App. Div. 780, affirmed 84 N.E. 1112, 191 N.Y. 541.
39 C.J. p 50 note 95.

11. Ill.—Davis v. Tampico Farmers Mut. Tel. Co., 74 N.E.2d 721, 332 Ill.App. 280.
39 C.J. p 50 note 96.

12. Mo.—Gale v. J. Kennard & Sons Carpet Co., 165 S.W. 842, 182 Mo. App. 498.

13. Iowa.—Watkins Medical Co. v. Moss, 141 N.W. 497, 160 Iowa 244.

14. Cal.—Warner Bros. Pictures v. Brodel, App., 179 P.2d 57.

15. Wash.—Warner v. Channell Chemical Co., 208 P. 1104, 121 Wash. 237.

Consideration

The full performance by an employee of his obligation, as a condition of the continuing in force of the contract from year to year, is ample consideration for the employer's covenant to continue the employment at the employee's option, notwithstanding the latter is not bound to remain in such employment.—Warner v. Channell Chemical Co., 208 P. 1104, 121 Wash. 237.

16. N.Y.—Charlop v. Waldman, 117 N.Y.S. 910.

17. N.J.—J. I. Kislak, Inc. v. Muller, 135 A. 673, 100 N.J.Eq. 110.

18. N.Y.—Mendelson v. Bronner, 108 N.Y.S. 807, 124 App.Div. 396.

19. Cal.—De La Falaise v. Gaumont-British Picture Corporation, 103 P.2d 447, 39 Cal.App.2d 461.
Fla.—Croker v. Powell, 156 So. 146, 115 Fla. 783.
Ind.—Pittsburgh Plate Glass Co. v.

Such action may be maintained whether the breach or repudiation occurs before[20] or pending[21] the performance of the service. While it has been held that it is necessary that the employee tender his services as a condition precedent to a right of action against the employer for breach of contract,[22] it has also been held that where an employee is ready and willing to perform services contracted for, and the employer has repudiated the contract, the employee need not thereafter tender his services or keep himself in readiness to perform.[23] His only further duty is to use reasonable care and diligence in entering into other employment of the same kind, and thus reduce the damages.[24]

It is no defense to an action for breach of contract that the period of employment was uncertain,[25] that the employee breached the contract after the employer's default,[26] or has failed to perform an act or condition, the performance of which was prevented by the employer,[27] nor is it any answer to such an action that at a time subsequent to the alleged contract the master had employees enough, without plaintiff, to do all his business.[28] On the other hand, the action cannot be maintained where the contract relied on is void,[29] or has been rescinded by mutual agreement,[30] or where performance is prevented by acts or events for which neither party is responsible;[31] nor can it be maintained where the employer has not actually breached or repudiated the contract.[32] Further, as a general rule, whatever

Young, 151 N.E. 227, 84 Ind.App. 313.

Iowa.—Breen v. Central Iowa Power & Light Co., 224 N.W. 562, 207 Iowa 1161.

Actions for wages see infra §§ 122–137.

Actions for wrongful discharge see infra §§ 47–59.

Statute prohibiting political control

On violation of statute preventing employers from controlling political activities of employees, employees have a right of action for damages for breach of employment contract.—Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, 171 P.2d 21, 28 Cal.2d 481.

An appeal to his union for help does not affect an employee's right to recover damages for breach of contract in absence of evidence of authority in the union to change or modify contracts so as to affect individual rights of member theretofore secured by such contract.—McCoy v. St. Joseph Belt Ry. Co., 77 S.W.2d 175, 229 Mo.App. 506.

Plaintiff's wife must be joined as a party plaintiff in an action for breach of an employment contract entered into jointly by plaintiff and his wife.—Fick v. Gup, Pa.Com.Pl., 32 Berks Co.L.J. 133.

20. Fla.—Croker v. Powell, 156 So. 146, 115 Fla. 733.

Ind.—Pittsburgh Plate Glass Co. v. Young, 151 N.E. 227, 84 Ind.App. 313.

La.—Adler v. Castle-Hirsch-Lohmar, Inc., App., 165 So. 478.

39 C.J. p 51 note 7.

The remedy of the employee is not an action for wages, but an action for damages for breach of contract where the employer breaches or repudiates the contract prior to the commencement of the services.—Adler v. Castle-Hirsch-Lohmar, Inc., supra—Smith v. Pollock Co., 3 La.App. 125—39 C.J. p 51 note 7.

21. Fla.—Croker v. Powell, 156 So. 146, 115 Fla. 733.

22. Wash.—Amann v. Pantages, 155 P. 1070, 90 Wash. 271.

39 C.J. p 51 note 9.

Monthly offer and readiness

It has been held that an employee in order to recover damages for breach of contract must have stood by the contract, offering from month to month to serve, and keeping himself in position to do so.—Shaughnessy v. D'Antoni, C.C.A.La., 100 F.2d 422.

Place of tender

When a contract made in one state contemplates performance of the services in another state, tender of performance should be made in the latter state.—Amann v. Pantages, 155 P. 1070, 90 Wash. 271.

Application to person in charge of work

The action cannot be defeated because plaintiff did not apply to a superior officer of the corporation for employment, where it appeared that he had applied to the manager of the department who had charge of the work he was to be given.—Mengel Box Co. v. Hall, 157 S.W. 723, 154 Ky. 384.

A tender coupled with an improper demand is insufficient.—Amann v. Pantages, 155 P. 1070, 90 Wash. 271.

23. Cal.—De La Falaise v. Gaumont-British Picture Corporation, 103 P.2d 447, 39 Cal.App.2d 461.

Tex.—**Corpus Juris quoted in** Magnolia Compress & Warehouse Co. v. Davidson, Civ.App., 38 S.W.2d 634, 636.

39 C.J. p 51 note 12.

24. Mass.—Hussey v. Holloway, 104 N.E. 471, 217 Mass. 100.

N.Y.—Howard v. Daly, 61 N.Y. 362, 19 Am.R. 285.

25. Tex.—Moore County Carbon Co. v. Whitten, Civ.App., 140 S.W.2d 880, error dismissed, judgment correct.

26. Tex.—Moore County Carbon Co. v. Whitten, supra.

27. Tex.—Moore County Carbon Co. v. Whitten, supra.

28. Ala.—Sayre v. Durwood, 35 Ala. 247.

29. Wis.—Strauss v. Eulberg Brewing Co., 27 N.W.2d 723, 250 Wis. 579.

Agreement void as illegal

N.Y.—Munden v. McDaniel, 274 N.Y.S. 278, 152 Misc. 472.

30. U.S.—Parks v. Interstate Accounts Service, D.C.Mo., 54 F.Supp. 581.

31. N.Y.—People v. Globe Mutual Life Ins. Co., 91 N.Y. 174—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented 33 N.Y.S.2d 764.

Possession taken for purpose of liquidation

An action for damages for breach of contract of employment resulting from superintendent of banks taking possession of corporate employer for purposes of liquidation cannot be maintained.—Montefalcone v. Banco Di Napoli Trust Co. of N. Y., 52 N.Y.S.2d 655, 268 App.Div. 636, reargument denied 53 N.Y.S.2d 955, 269 App.Div. 685.

Refusal to grant permit for operating distillery after corporation had hired distillery manager excused corporation from performance under employment contract.—Wischhusen v. American Medicinal Spirits Co., 163 A. 685, 163 Md. 565.

32. Mo.—Zeppenfeld v. Morgan, App., 163 S.W.2d 971.

Pa.—Scotzin v. Brown, Com.Pl., 58 Dauph.Co. 129.

Conduct not constituting breach

The employer's silence when employee asked him what he intended to do about carrying out his contract to pay plaintiff for personal services does not constitute an "anticipatory breach" of the contract which would

would be a good reason for discharging a servant, as discussed infra § 42, would be an equally good reason for refusing to take him into one's service after having engaged to do so,[33] but the fact that the contract gives the employer an option to discharge an employee should his services or conduct prove unsatisfactory has been held not to entitle the employer to repudiate the contract prior to the commencement of service.[34]

Waiver and estoppel. Where, with full knowledge of his rights, the conduct of an employee is wholly inconsistent with reliance on his contract of employment, he will be deemed to have waived his right to sue for a breach of the contract.[35] It has been held, however, that an employee does not waive his right to rely on a breach of contract by the employer as the basis of an action for damages merely because he continues to work after the breach;[36] nor does such action on his part work an estoppel.[37]

Questions of fact in an action for breach of an employment contract ordinarily are for the jury.[38]

b. Pleading

Generally, a declaration or complaint in an action for breach of an employment contract must clearly allege the substantial facts which are essential to the right of recovery. A slight variance is immaterial.

General rules of pleading in actions for breach of contract, as discussed in Contracts §§ 533–564, have been applied in actions for breach of employment contracts.[39] It is not enough to show a right of action against defendant that the promises or covenants of the respective parties be fully set out, with averment of performance on the part of plaintiff.[40] Plaintiff must in due form assign such breaches of defendant's promises or covenants as are relied on as grounds for a recovery of damages,[41] and the breaches assigned must be coextensive with the import and effect of the contract.[42]

The declaration, complaint, or petition should show the making and existence of a valid and enforceable contract between plaintiff and defendant, the right of plaintiff and the obligation of defendant thereunder,[43] a breach or repudiation thereof,[44] or a tender of services[45] and refusal to accept them,[46] and the damages flowing therefrom.[47] While it has been held that the employee must aver willingness and ability to perform at the time of the alleged breach,[48] it is not necessary for him to allege readiness and willingness to perform the services throughout the term during which he bound himself to serve,[49] and it has been held that, where plaintiff alleges that defendant refused to employ him, it is unnecessary to allege that he was ready to accept the employment.[50]

While the declaration, complaint, or petition need not set forth what evidence is to be introduced or relied on as to matters of detail,[51] or anticipate

entitle plaintiff to damages for breach of the contract for the future.—Shaughnessy v. D'Antoni, C.C.A. La., 100 F.2d 422.

33. Mich.—Robinson v. Western Union Tel. Co., 135 N.W. 292, 169 Mich. 503, 517.

34. Pa.—Silberman v. Escoll, 58 Montg.Co. 369, 46 Pa.Dist. & Co. 38.

35. W.Va.—Beall v. Morgantown & Kingwood R. Co., 190 S.E. 333, 118 W.Va. 289.

36. N.Y.—Hicks v. Haight, N.Y.Sup., 11 N.Y.S.2d 912, 171 Misc. 151.

37. **Failure to respect seniority**
An employee is not estopped from prosecuting an action for damages for failure to respect seniority rights in recalling him to work after layoff because he continued to work after seniority was reduced, since he could not be charged with acquiescence in change made in violation of contract until it reasonably appeared that he would not be restored to violated rights.—McCoy v. St. Joseph Belt Ry. Co., 77 S.W.2d 175, 229 Mo.App. 506.

38. Ky.—Black Mountain Corporation v. Thomas, 291 S.W. 737, 218 Ky. 497.

39. **The pleadings should be construed** in accordance with the natural intendment of the words used.—State ex rel. St. Louis Car Co. v. Hughes, 152 S.W.2d 193, 348 Mo. 125, mandate conformed to 153 S.W.2d 827.

A speaking demurrer or the equivalent thereof is improper.—Silberman v. Escoll, 46 Pa.Dist. & Co. 38, 58 Montg.Co. 369.

40. Ala.—Buford v. Graden, 59 So. 368, 5 Ala.App. 421.

41. Ala.—Buford v. Graden, supra.

Date of breach
Complaint failing to allege date of the breach was insufficient to support a recovery.—Pita v. Whitney, 10 S.E.2d 851, 190 Ga. 810.

42. Fla.—Hazen v. Cobb, 117 So. 853, 96 Fla. 151.

43. Ky.—Stanley v. Kentucky Utilities Co., 4 S.W.2d 732, 223 Ky. 688.

In an action against the successor of the employer, in order to state a cause of action relation of employer and employee must be shown.—Groshoff v. St. Gertrude's Convent, 258 P. 528, 44 Idaho 554.

44. N.Y.—Sharp v. Andrus, 218 N.Y.S. 40, 218 App.Div. 746.

Pa.—Scotzin v. Brown, Com.Pl., 53 Dauph.Co. 129.
S.C.—White v. Metcalf, 177 S.E. 371, 174 S.C. 350.

45. N.Y.—Sharp v. Andrus, 218 N.Y.S. 40, 218 App.Div. 746.

Allegation that plaintiff reported to defendant to go to work was held sufficiently to allege tender of services to defendant.—Smith v. Pollack Co., 121 So. 240, 9 La.App. 432.

46. N.Y.—Sharp v. Andrus, 218 N.Y.S. 40, 218 App.Div. 746.

47. Cal.—Offeman v. Robertson-Cole Studios, 251 P. 830, 80 Cal.App. 1.
La.—Adler v. Castle-Hirsch-Lohmar, Inc., App., 165 So. 478.
S.C.—White v. Metcalf, 177 S.E. 371, 174 S.C. 350.

48. Ala.—Marx v. Miller, 32 So. 765, 134 Ala. 347—Standard Oil Co. v. Lloyd, 159 So. 371, 26 Ala.App. 306.

49. Ala.—Marx v. Miller, 32 So. 765, 134 Ala. 347—Standard Oil Co. v. Lloyd, 159 So. 371, 26 Ala.App. 306.

50. S.C.—Cline v. Southern R. Co., 96 S.E. 532, 110 S.C. 534.

51. Mo.—Zeppenfeld v. Morgan, App., 185 S.W.2d 898.

matters of defense,[52] and should not state mere legal conclusions,[53] it must clearly allege the substantial facts which are essential to the right of recovery,[54] and for failure, the trial or appellate court may take notice of such fatal defect, although the sufficiency of a declaration is not tested by demurrer.[55]

Issues, proof, and variance. In an action for breach of a contract of employment, only such matters may be considered, or relied on by the parties for recovery or defense, as are put in issue by the pleadings and supported by the evidence at the trial.[56] Where plaintiff avers that he was "ready at the day" to perform all the covenants on his part to be performed, he cannot recover on proof that defendant had consented that the time should be enlarged and that he was ready at the day substituted,[57] and plaintiff is not entitled to recover under an allegation that, but for the contract entered into with defendant, she could have obtained employment at other places, where there was no evidence that, at the time she contracted with defendant, there was any contract or request for employment with other parties.[58] A slight variance between the pleading and proof, however, is not necessarily fatal.[59] The variance between an allegation that an oral contract was entered into on a certain day and proof that the actual contract was made prior thereto, and that on that day plaintiff was notified in writing by defendant that the latter was ready for plaintiff to go to work, may be disregarded where no prejudice is shown.[60]

Judgment on pleadings. Where there is no substantial issue of fact involved, the court may, under some statutes, render judgment on the pleadings.[61]

c. Evidence

(1) Presumptions and burden of proof
(2) Admissibility
(3) Weight and sufficiency

(1) Presumptions and Burden of Proof

In an action by an employee against his employer for breach of the employment contract, the employee has the burden of proving every fact essential to his cause of action, while the employer has the burden of proving affirmative defenses.

In an action by an employee against his employer for breach of the employment contract, the employee has the burden of proving every fact essential to his cause of action.[62] The burden is on

52. N.Y.—Clark v. Hinzmann, N.Y. Sup., 59 N.Y.S.2d 255, 185 Misc. 881.

Mitigation of damages

(1) It has generally been held that the employee need not allege inability to mitigate damages, the burden being on the employer to plead such matter defensively.

U.S.—Stinson v. Edgemoor Iron Works, D.C.Del., 53 F.Supp. 864.

S.C.—White v. Metcalf, 177 S.E. 371, 174 S.C. 350.

Tex.—Grimes v. Bowman, Civ.App., 122 S.W.2d 361—Elliot-Greer Office Supply Co. v. Martin, Civ.App., 54 S.W.2d 1068, set aside on other grounds 86 S.W.2d 635, 126 Tex. 112—Gomez v. Vanlandingham, Civ.App., 300 S.W. 145.

(2) There is, however, authority to the contrary.—Louisville & N. R. Co. v. Wells, 160 S.W.2d 16, 289 Ky. 700.

53. Idaho.—Groshoff v. St. Gertrude's Convent, 258 P. 528, 44 Idaho 554.

54. Cal.—De La Falaise v. Gaumont-British Picture Corporation, 103 P.2d 447, 39 Cal.App.2d 461.

Fla.—Sylvester v. Lichtenstein, 55 So. 282, 61 Fla. 441.

Ga.—Smith v. Chicopee Mfg. Corporation, 192 S.E. 481, 56 Ga.App. 294.

Idaho.—Groshoff v. St. Gertrude's Convent, 258 P. 528, 44 Idaho 554.

Ky.—Stanley v. Kentucky Utilities Co., 4 S.W.2d 732, 223 Ky. 688.

Mo.—Zeppenfeld v. Morgan, App., 185 S.W.2d 898.

Tex.—Matlock v. Gulf, C. & S. F. Ry. Co., Civ.App., 70 S.W.2d 279, error dismissed.

39 C.J. p 51 note 20.

Punitive damages

Where there was no allegation that breach of contract was accompanied by any fraudulent act of employer, allegations that breach was willful, malicious, fraudulent, or with intent to defraud or embarrass the employee were not sufficient to state a cause of action for punitive damages.—Sadler v. Pennsylvania Refining Co., D.C.S.C., 31 F.Supp. 1.

Complaints held sufficient

Ind.—Carter v. Richart, 114 N.E. 110, 65 Ind.App. 255.

Mo.—Zeppenfeld v. Morgan, App., 185 S.W.2d 898.

N.Y.—Becker v. Burkes, 28 N.Y.S.2d 850, 262 App.Div. 893.

N.C.—Hearn v. Erlanger Mills, 14 S.E.2d 675, 219 N.C. 623—Williams v. Bruton, 5 S.E.2d 848, 216 N.C. 582.

55. Fla.—Sylvester v. Lichtenstein, 55 So. 282, 61 Fla. 441.

56. Cal.—Offeman v. Robertson-Cole Studios, 251 P. 830, 80 Cal.App. 1.

Mass.—Nelson v. Hamlin, 155 N.E. 18, 258 Mass. 331.

Mo.—Slabon v. St. Louis Car Co., App., 102 S.W.2d 939.

N.Y.—Harris v. A. & J. Freed Corporation, 8 N.Y.S.2d 229.

Evidence inadmissible under pleadings

Employee's representations prior to time of employment contract were held properly excluded where employer did not assert that alleged contract was obtained by fraud.—Schwade v. Van Bree, 252 N.W. 702, 214 Wis. 250.

57. S.C.—Marks v. Robinson, 17 S.C. Law 89.

58. Tex.—Stovall v. Gardner, Civ. App., 103 S.W. 405.

59. Ga.—Powell Paving Co. of North Carolina v. Scott, 170 S.E. 529, 47 Ga.App. 401.

60. Wash.—Cholokovitch v. Porcupine Gold Min. Co., 131 P. 459, 73 Wash. 48.

61. N.Y.—Larme Estates v. Omnichrome Corporation, 10 N.E.2d 793, 275 N.Y. 426, reargument denied 12 N.E.2d 582, 276 N.Y. 573.

Pleadings held to present issues of fact

N.Y.—Caselotti v. Walt Disney Productions, 30 N.Y.S.2d 842, 262 App. Div. 1002, appeal denied 31 N.Y.S. 2d 666, 263 App.Div. 707.

62. Ariz.—Durkee-Thomas Corporation v. Doherty, 295 P. 302, 37 Ariz. 457.

him to prove the making of a binding contract,[63] and the essential terms thereof.[64] The burden of overcoming the presumption that a hiring for an indefinite period is a hiring at will, as discussed supra § 8 b, is on plaintiff.[65] On the other hand, the employer has the burden of proving affirmative defenses.[66] Although there is authority to the contrary,[67] it has been held that the burden is on the employer to prove mitigation of damages or that plaintiff did earn, or by reasonable diligence could have earned, wages in other similar employment.[68] There is no presumption that one suffers a loss by changing his place of residence.[69]

(2) Admissibility

Any competent evidence relevant to a material issue is admissible in an action for breach of an employment contract.

Any competent evidence relevant to a material issue is admissible in an action for breach of an employment contract.[70] Conversely, evidence not relevant to a material issue is inadmissible.[71] If a written contract is ambiguous or obscure in its terms, so that the contractual intention cannot be understood from a mere inspection of the instrument, extrinsic evidence of the facts and circumstances surrounding the execution of the contract is admissible to show the intention of the parties.[72] In an action on a written contract of service for one year, with a right of renewal by plaintiff for another year, unless there should be given written notice of any cause of dissatisfaction, evidence of causes of dissatisfaction other than those alleged in the required notice is not admissible.[73] In an action alleging a breach of a contract made in consideration of the release by plaintiff of a claim for damages, evidence of knowledge of defendant's representative that defendant's attorney had given an opinion that defendant was not liable under such claim is inadmissible in the absence of evidence that plaintiff was present and had knowledge of the opinion.[74] Evidence tending to prove plaintiff's discharge is properly admitted under a complaint alleging a refusal to furnish him with employment.[75]

(3) Weight and Sufficiency

In an action for breach of an employment contract, the plaintiff must establish his right of recovery by a preponderance of the evidence, while the defendant has a like duty of establishing affirmative defenses.

In an action for breach of a contract of employ-

Mo.—Zeppenfeld v. Morgan, App., 168 S.W.2d 971.

63. Ala.—Mobile, J. & K. C. R. Co. v. Hawkins, 51 So. 37, 163 Ala. 565.
Tex.—Texas Vegetable Union v. Obets, Civ.App., 4 S.W.2d 1058.
W.Va.—Martin v. Board of Education of Lincoln County, 199 S.E. 887, 120 W.Va. 621.

Authority of corporate officer
In the case of a defendant corporation, the burden is on the employee to show the authority of the officer to make the contract.—Mobile, J. & K. C. R. Co. v. Hawkins, 51 So. 37, 163 Ala. 565.

Permanent employment
In action by employee for breach of contract of "permanent employment," burden is on employee to prove a valuable consideration other than services to be rendered for which employee is to be paid.—Alabama Mills v. Smith, 186 So. 699, 237 Ala. 296.

64. Pa.—Howard v. Siegel, 184 A. 272, 121 Pa.Super. 519.

65. Pa.—Jones v. Pittsburgh Mercantile Co., 145 A. 80, 295 Pa. 219 —Hay v. Pittsburgh Lodge No. 46, Loyal Order of Moose, 8 A.2d 434, 137 Pa.Super. 205—Kostenbader v. Schoeneck Farms, 4 A.2d 199, 134 Pa.Super. 334.

66. Ill.—Oakes v. Chicago Fire Brick Co., 58 N.E.2d 460, 388 Ill. 474.
W.Va.—Martin v. Board of Education of Lincoln County, 199 S.E. 887, 120 W.Va. 621.

In action to recover amount deposited by an employee as security, the employer had burden of proving the existence and amount of shortage.
Mass.—Duclos v. A. H. Phillips, Inc., 11 N.E.2d 580, 298 Mass. 549.
Pa.—Carl v. Grand Union Co., 161 A. 429, 105 Pa.Super. 371.

67. "The burden is on the plaintiff to allege and prove that he exercised reasonable diligence . . . [in respect to finding other employment] and his inability to earn anything, if such was the case, or what he earned during the period."—Louisville & N. R. Co. v. Wells, 160 S.W.2d 16, 19, 289 Ky. 700.

68. U.S.—Stinson v. Edgemoor Iron Works, D.C.Del., 53 F.Supp. 864.
Conn.—Krawitz v. Ganzke, 159 A. 897, 114 Conn. 662.
Ill.—Hostettler v. Mushrush, 194 Ill. App. 58.
S.C.—White v. Metcalf, 177 S.E. 371, 174 S.C. 350.
Tex.—Grimes v. Bowman, Civ.App., 122 S.W.2d 361—Gomez v. Vanlandingham, Civ.App., 300 S.W. 145.
W.Va.—Martin v. Board of Education of Lincoln County, 199 S.E. 887, 120 W.Va. 621.
17 C.J. p 1025 note 63.

The employer has the burden of going forward with evidence of lesser actual damage or that employee by the exercise of diligence could have obtained similar employment, since employee is prima facie entitled to compensation provided for in contract as damages for breach of contract.—Karas v. H. R. Laboratories, 67 N.Y.S.2d 15, 271 App.Div. 30.

69. Cal.—Offeman v. Robertson-Cole Studios, 251 P. 830, 80 Cal.App. 1.

70. Ind.—Mt. Pleasant Coal Co. v. Watts, 151 N.E. 7, 91 Ind.App. 501.
Mass.—Nelson v. Hamlin, 155 N.E. 18, 258 Mass. 331.
Mont.—Harrington v. Deloraine Refining Co., 43 P.2d 660, 99 Mont. 78.

71. Mass.—Nelson v. Hamlin, 155 N.E. 18, 258 Mass. 331.

72. Tex.—Guardian Trust Co. v. Bauereisen, Civ.App., 99 S.W.2d 357, reversed on other grounds 121 S.W.2d 579, 132 Tex. 396.

Historical background of work
Testimony disclosing historical background of plaintiff's relations and work was held competent to explain nature of employment.—Oehme v. Whittemore-Wright Co., 181 N.E. 733, 279 Mass. 558.

73. Mass.—Hughes v. Gross, 43 N.E. 1031, 166 Mass. 61, 55 Am.S.R. 375, 32 L.R.A. 620.

74. Tex.—Texas Cent. R. Co. v. Eldredge, Civ.App., 155 S.W. 1010.

75. Iowa.—Moore v. Chicago, B. & Q. R. Co., 22 N.W. 650, 65 Iowa 505, 54 Am.R. 26.

ment, plaintiff must establish his right of recovery by a preponderance of the evidence,[76] and defendant has a like duty of establishing affirmative defenses.[77]

d. Damages

In an action by an employee against his employer for breach of contract, the employee is entitled to recover his actual damages. Ordinarily the measure of such damages is prima facie the compensation payable under the terms of the contract, less the income the employee has earned, will earn, or could, with reasonable diligence, earn during the life of the contract.

In an action brought by an employee against his employer for breach of the contract of employment, the employee is entitled to recover his actual damages.[78] Ordinarily, the measure of such damages is prima facie the compensation payable under the terms of the contract,[79] but this is only the prima facie measure, and the actual damage is measured by such sum reduced by the income which the employee has earned, will earn, or could, with reasonable diligence, earn during the life of the contract.[80] The employee may also recover any special damage pleaded and proved which is shown to have been in the reasonable contemplation of the

76. Wash.—Holton v. Hart Mill Co., 166 P.2d 186, 24 Wash.2d 493.

Evidence held sufficient

(1) To make a prima facie case.—Martin v. Board of Education of Lincoln County, 199 S.E. 887, 120 W.Va. 621.

(2) To prove contract of employment.—McCurtain Cotton Oil Co. v. Guthrie, 294 P. 133, 146 Okl. 144—39 C.J. p 52 note 34 [b] (1).

(3) To show damages.—Irving v. Goodimate Co., 70 N.E.2d 414, 320 Mass. 454.

(4) To show renewal of contract.—Holton v. Hart Mill Co., 166 P.2d 186, 24 Wash.2d 493.

(5) To show breach of contract.
N.J.—Berman v. Sindel, Schiff & Co., 135 A. 668, 5 N.J.Misc. 106.
N.Y.—Hedeman v. Fairbanks, Morse & Co., 36 N.E.2d 129, 286 N.Y. 240, reargument denied 23 N.Y.S.2d 551, 260 App.Div. 859.
W.Va.—Ingram v. Johnstone, 140 S.E. 143, 104 W.Va. 409.

(6) To show other matters.
Mich.—Ginsberg v. Reliable Linen Service Co., 290 N.W. 331, 292 Mich. 70.
Minn.—George v. Chicago, R. I. & P. Ry. Co., 235 N.W. 673, 183 Minn. 610, affirmed 237 N.W. 876, 183 Minn. 610.
Pa.—Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36.
Tex.—Geyser Ice Co. v. Sharp, Civ. App., 87 S.W.2d 883—San Antonio Machine & Supply Co. v. Kinard, Civ.App., 47 S.W.2d 877.
Wis.—De Karske v. Woelffer, 259 N.W. 259, 217 Wis. 462.
39 C.J. p 52 note 34 [b] (3).

Evidence held insufficient

(1) To show contract of employment.—Colter v. Travelers' Ins. Co., 170 N.E. 407, 270 Mass. 424—39 C.J. p 52 note 34 [a].

(2) To show contract for life employment.—Machen v. Budd Wheel Co., 143 A. 482, 294 Pa. 69.

(3) To establish valuable consideration to support contract of "permanent employment."—Alabama Mills v. Smith, 186 So. 699, 237 Ala. 296.

(4) To show breach of contract.—Wittmann v. Whittingham, 259 P. 63, 85 Cal.App. 140.

(5) To show other matters.
U.S.—Starr v. Superheater Co., C.C.A. Ind., 102 F.2d 170.
Cal.—Offeman v. Robertson-Cole Studios, 251 P. 830, 80 Cal.App. 1.
Iowa.—Breen v. Central Iowa Power & Light Co., 224 N.W. 562, 207 Iowa 1161.
Mo.—McCoy v. St. Joseph Belt Ry. Co., 77 S.W.2d 175, 229 Mo.App. 506.
N.Y.—Elco Shoe Mfrs. v. Sisk, 183 N.E. 191, 260 N.Y. 100.
S.D.—Tretheway v. Tri-State Milling Co., 222 N.W. 950, 54 S.D. 201.
Tex.—Texas Vegetable Union v. Obets, Civ.App., 4 S.W.2d 1058.

77. **Mitigation of damages**
Employer's burden of showing mitigation of damages is not sustained by showing that employee was offered employment, although similar to that involved in employment contract, unless at a place reasonably convenient to employee.—Martin v. Board of Education of Lincoln County, 199 S.E. 887, 120 W.Va. 621.

78. La.—Smith v. Pollack Co., 121 So. 240, 9 La.App. 432.
N.Y.—Hollwedel v. Duffy-Mott Co., 188 N.E. 266, 263 N.Y. 95, 90 A.L.R. 1312.
39 C.J. p 52 note 35.
Damages in general in actions for wrongful discharge see infra § 58.

Ignoring seniority rights
An employee suing for damages for failure to respect seniority rights in recalling him to work after layoff could recover damages for loss of wages only to extent that he could reasonably have hoped to be recalled to work.—McCoy v. St. Joseph Belt Ry. Co., 77 S.W.2d 175, 229 Mo.App. 506.

Salesman allowed commission on all sales in territory could not recover alleged damages by reason of another salesman being put in territory.—Dennis v. J. Frank Darling Co., 120 So. 686, 10 La.App. 268.

79. U.S.—Taylor v. Tulsa Tribune Co., C.C.A.Okl., 136 F.2d 981.
Cal.—Robinson v. Arthur R. Lindburg, Inc., 35 P.2d 1057, 140 Cal. App. 669—Wood v. Girot, 282 P. 981, 102 Cal.App. 160.
Ind.—Township of Haddon School of Sullivan County v. Willis, 199 N.E. 251, 209 Ind. 356.
N.Y.—Hollwedel v. Duffy-Mott Co., 188 N.E. 266, 263 N.Y. 95, 90 A.L.R. 1312—Karas v. H. R. Laboratories, 67 N.Y.S.2d 15, 271 App. Div. 30—Burke, Kuipers & Mahoney v. Dallas Dispatch Co., 1 N.Y.S.2d 674, 253 App.Div. 206.
Okl.—Ray v. Board of Education of Pond Creek, Grant County, 153 P. 2d 233, 194 Okl. 472.
W.Va.—Martin v. Board of Education of Lincoln County, 199 S.E. 887, 120 W.Va. 621.

80. U.S.—Taylor v. Tulsa Tribune Co., C.C.A.Okl., 136 F.2d 981.
Cal.—Robinson v. Arthur R. Lindburg, Inc., 35 P.2d 1057, 140 Cal. App. 669—Wood v. Girot, 282 P. 981, 102 Cal.App. 160.
Ind.—Township of Haddon School of Sullivan County v. Willis, 199 N.E. 251, 209 Ind. 356.
N.Y.—Hollwedel v. Duffy-Mott Co., 188 N.E. 266, 263 N.Y. 95, 90 A.L.R. 1312—Karas v. H. R. Laboratories, 67 N.Y.S.2d 15, 271 App. Div. 30.
Okl.—Ray v. Board of Education of Pond Creek, Grant County, 153 P.2d 233, 194 Okl. 472.
Tex.—Kennon v. Schesinger, Civ. App., 182 S.W.2d 373, error refused—Gulf, C. & S. F. R. Co. v. Jackson, 69 S.W. 89, 29 Tex.Civ.App. 342.
39 C.J. p 52 note 35.
Other employment as ground for reduction of damages in actions for wrongful discharge see infra § 59.

Disability compensation
In action for breach of contract of employment, employee could not recover damages for salary for period during which employee received disability compensation.—Spalding v. Bush, 1 N.Y.S.2d 448, 253 App.Div. 790.

parties at the time the contract was entered into as a probable result of its breach,[81] and his actual damages may properly include expenses incurred or expenditures made in anticipation of, or preparation for, performance,[82] but remote consequences of the employer's breach of contract do not afford an adequate basis for an award of damages,[83] and damages accruing after the contract has expired or been terminated cannot be recovered.[84] It has been held that, where a contract provided that it might be terminated by the employer on notice and the payment of liquidated damages, the refusal of the employer to allow the employee to enter on the service was, in contemplation of law, the termination of the contract under its provision, and the employee's damages were liquidated at the amount provided for by the terms of the contract.[85] Where a contract specifies no time of service, and the hiring is at a daily rate, the measure of damages has been held to be the price of one day's service.[86]

Punitive damages. It has been held that punitive damages cannot be recovered for breach of a contract of employment unless the breach is accompanied by a fraudulent act.[87]

§ 12. Evidence of Employment

a. Burden of proof and presumptions
b. Admissibility
c. Weight and sufficiency

a. Burden of Proof and Presumptions

Ordinarily the burden of proving the existence of the relationship of master and servant rests on the party relying on such relationship as part of his cause of action, but there is a presumption that one performing work for another is an employee of such other.

Ordinarily the burden of proving the existence of the relationship of master and servant rests on the party relying on such relationship as part of his cause of action,[88] but, when he has adduced sufficient evidence to establish the relationship prima facie, the adverse party then has the burden of producing evidence in rebuttal.[89] Where a change of masters is claimed by the employer, the burden is on him to show that the alleged change was made with the servant's assent.[90] There is a presumption that the relationship of master and servant exists where the alleged servant is working on the premises of the master,[91] or is driving a vehicle belonging to the master,[92] and the presumption may exist where one performs work and labor for another without being on his premises or using his vehicle.[93] A party denying the existence of the relationship has the burden of overcoming the presumption by proof,[94] although, if the evidence produced by the party relying on the presumption disputes or negatives the presumption, the presumption cannot avail in his favor.[95]

b. Admissibility

Generally speaking, any competent evidence tending to prove or disprove the relationship of master and servant is admissible.

81. Tex.—Gulf, C. & S. F. R. Co. v. Jackson, 69 S.W. 89, 29 Tex.Civ. App. 342.
39 C.J. p 214 note 68.

82. **Loss of payments on automobile** purchased for use in employment and sacrifice of other property have been held recoverable.—Smith v. Pollack Co., 121 So. 240, 9 La.App. 432.

83. **Loss of a homestead for failure to pay mortgage** is too remote to be considered.—Stanley v. Kentucky Utilities Co., 4 S.W.2d 732, 223 Ky. 688.

84. La.—Dennis v. J. Frank Darling Co., 120 So. 686, 10 La.App. 268.

Contract terminable on notice

(1) The employer's breach of a contract, terminable on notice, by refusing employee's performance, has been held to amount to notice and bar recovery for more compensation than would have accrued if formal notice had been given.—Stolz v. Wells, Tex.Civ.App., 43 S.W.2d 163.

(2) So, where contract entitled either party to rescind on stipulated notice, it has been held that the filing of the petition was the equivalent of notice and plaintiff could not recover damages accruing after filing of petition.—Indian Refining Co. v. McCombs, 191 N.E. 919, 47 Ohio App. 425.

85. N.Y.—Watson v. Russell, 44 N. E. 161, 149 N.Y. 388.

86. N.Y.—Davis v. Barr, 12 N.Y.St. 111.

87. U.S.—Sadler v. Pennsylvania Refining Co., D.C.S.C., 31 F.Supp. 1.

88. Ark.—Federal Compress & Warehouse Co. v. Hall, 189 S.W. 2d 922, 209 Ark. 180.
Ill.—Orange v. Pitcairn, 280 Ill.App. 566.
Tex.—Texas Vegetable Union v. Obets, Civ.App., 4 S.W.2d 1058.
Presumptions and burden of proof in:
Actions by:
Master against servant for breach of contract see infra § 77.
Servant against master for breach of contract see supra § 11.
Servant against master for injuries see infra § 501.
Third persons against master for injuries caused by servant see infra § 615.
Actions for:
Wages see infra § 129.
Wrongful discharge see infra § 53.
Burden of proving fraud and misrepresentations inducing contract see supra § 6.

89. Iowa.—Buescher v. Schmidt, 228 N.W. 26, 209 Iowa 300.

90. Minn.—Gonyea v. Duluth, M. & I. R. Ry. Co., 19 N.W.2d 384, 220 Minn. 225.

91. Idaho.—Joslin v. Idaho Times Pub. Co., 53 P.2d 323, 56 Idaho 242.

92. Idaho.—Joslin v. Idaho Times Pub. Co., supra.

93. Idaho.—**Corpus Juris cited in** Joslin v. Idaho Times Pub. Co., 53 P.2d 323, 330, 56 Idaho 242.
Tex.—**Corpus Juris quoted in** Liberty Mut. Ins. Co. v. Boggs, Civ.App., 66 S.W.2d 787, 791.
39 C.J. p 52 note 40.

94. Tex.—**Corpus Juris quoted in** Liberty Mut. Ins. Co. v. Boggs, Civ.App., 66 S.W.2d 787, 791.
39 C.J. p 52 note 41.

95. Idaho.—Joslin v. Idaho Times Pub. Co., 53 P.2d 323, 56 Idaho 242.

The existence of the relation of master and servant is to be proved, as any other like question,[96] and, generally speaking, any competent evidence tending to prove or disprove the relationship is admissible.[97] The contract may be established by the correspondence of the parties.[98] Evidence of the surrounding facts and circumstances is admissible to show the character of an ambiguous agreement, and the intention of the parties.[99] Evidence that the employee had been paid by a person other than the alleged employer,[1] or had not been on the alleged employer's pay roll for a number of years,[2] is admissible to disprove the relationship. Although an employer's liability policy is inadmissible as evidence on the question of negligence, it is competent on the question of the existence of the relation of master and servant.[3]

Practice or custom. Where there is no express contract for a definite term, evidence of the custom of the parties themselves in prior years of employment,[4] or even of similar employment of others,[5] may be admissible to show the term of employment. Evidence of custom is inadmissible, however, to contradict the terms of an express contract,[6] and evidence of the practice of one to make contracts only in writing is inadmissible on the issue of whether the alleged contract was in writing or in parol.[7]

Contract implied from holding over. Where an employee continues in the employment after the expiration of a definite term, both the original contract[8] and the circumstances surrounding its making[9] are admissible in evidence to show the character and terms of the contract of continuing employment.

c. Weight and Sufficiency

The party relying on the existence of the relationship of master and servant as part of his cause of action must establish such fact by a preponderance of the evidence.

The party relying on the existence of the relationship of master and servant as part of his cause of action must establish such fact by a preponderance of the evidence.[10] The fact that one obtained

96. Ky.—Memphis Min. Co. v. Shacklett, 155 S.W. 1154, 153 Ky. 476.

97. Cal.—Rapolla v. Goulart, 287 P. 562, 105 Cal.App. 417.
Ill.—Orange v. Pitcairn, 280 Ill.App. 566.
39 C.J. p 52 note 44.

Evidence showing services not required

Evidence of a lease by one sought to be charged as an employer, and of an entry of the lessee on the premises of employment, is admissible as showing that plaintiff's services were not required at the time of the alleged employment.—Rebecca Gold Min. Co. v. Baker, 87 P. 1072, 38 Colo. 289.

98. W.Va.—Stewart v. Blackwood Electric Steel Corporation, 130 S. E. 447, 100 W.Va. 331.
39 C.J. p 52 note 45.

Letter containing independent offer is not made inadmissible by such offer.—Safford v. Morris Metal Products Co., 118 A. 37, 97 Conn. 650.

99. Tex.—Guardian Trust Co. v. Bauereisen, Civ.App., 99 S.W.2d 357, reversed on other grounds 121 S. W.2d 579, 132 Tex. 396.
39 C.J. p 53 note 47.

Although relating to a different contract, evidence tending to show what was in the minds of the parties is admissible.—Weston v. Ball, 116 A. 99, 80 N.H. 275—39 C.J. p 53 note 48.

1. Ill.—Orange v. Pitcairn, 280 Ill. App. 566.

Payment by alleged agents

Where the only issue raised by defendants is that they did not employ plaintiff, by themselves or their agents, it is proper to admit proof of payments made by the alleged agents to plaintiff to show that they, and not defendants, were considered by him as his employers.—Gilmore v. Atlantic & Pacific R. Co., 35 Barb. N.Y., 279.

2. N.Y.—Corning v. Walker, 3 N.E. 290, 100 N.Y. 547.

3. Ill.—Vacker v. Yeager, 151 Ill. App. 144.

4. Ala.—Johnston v. Brentley, 56 So. 742, 2 Ala.App. 281.
Customs and usages as affecting master and servant relationship generally see Customs and Usages, § 19 i.

5. Ark.—Arkadelphia Lumber Co. v. Asman, 107 S.W. 1171, 95 Ark. 568.
39 C.J. p 53 note 57.

6. Ala.—Hartsell v. Masterson, 31 So. 616, 132 Ala. 275.
Tex.—International Harvester Co. v. Campbell, 96 S.W. 93, 43 Tex.Civ. App. 421.

Other testimony unaffected

In a suit on an express contract a reference to a custom is as to an immaterial matter, but testimony relating thereto will not necessarily affect the admissibility of other testimony.—San Antonio Light Pub. Co. v. Moore, 101 S.W. 867, 46 Tex.Civ. App. 259.

7. Ga.—Stewart v. Exum, 64 S.E. 471, 132 Ga. 422.

8. Mich.—Wright v. Elk Rapids Iron Co., 89 N.W. 335, 129 Mich. 543.
39 C.J. p 53 note 68.

9. Va.—Conrad v. Ellison-Harvey Co., 91 S.E. 763, 120 Va. 458, Ann. Cas.1918B 1171.

10. Ill.—Ostroff v. A. J. Canfield Co., 47 N.E.2d 382, 317 Ill.App. 653.
Evidence as to fraud inducing contract see supra § 6.

Evidence held sufficient

(1) To prove or sustain finding of contract of employment or existence of master and servant relationship generally.
U.S.—U. S., to Use of Roig, v. Castro, D.C.Puerto Rico, 71 F.Supp. 36.
Alaska.—Walbridge v. New York Alaska Gold Dredging Co., 8 Alaska, 64.
Ariz.—Concrete Machinery & Supply Co. v. Waara, 27 P.2d 682, 42 Ariz. 512.
Idaho.—People ex rel. Heartburg v. Interstate Engineering & Construction Co., 75 P.2d 997, 58 Idaho 457.
Ill.—Friese v. Mid-City Trust & Sav. Bank of Chicago, 65 N.E.2d 241, 328 Ill.App. 126—Smith v. Curran, 35 N.E.2d 87, 310 Ill.App. 607—Hobbs v. H. M. Gousha Co., 24 N. E.2d 240, 302 Ill.App. 508—Morehouse v. Gulf Warehouse & Sales Co., 17 N.E.2d 608, 297 Ill.App. 367.
Iowa.—Buescher v. Schmidt, 228 N. W. 26, 209 Iowa 300.
Ky.—Cumnock-Reed Co. v. Lewis, 128 S.W.2d 926, 278 Ky. 496.
La.—White v. Grant Timber & Mfg. Co., 109 So. 921, 161 La. 1117—Lowy v. Bulliard, App., 17 So.2d 855.
Mass.—Nelson v. Hamlin, 155 N.E. 18, 258 Mass. 331.
Minn.—Norton v. Wyman, Partridge & Co., 206 N.W. 442, 165 Minn. 366.

a social security number as an employer of others, while it has persuasive value, is not conclusive evidence that he is the employer of such persons.[11]

§ 13. Questions of Law and Fact

As in civil actions generally, where the evidence on a material issue in actions involving the relation of master and servant is conflicting or admits of more than one inference, the question thereby raised is one of fact for the determination of the jury; otherwise the question is one of law for the court.

As in civil actions generally, where the evidence on a material issue in actions involving the relation of master and servant is conflicting or admits of more than one inference, the question thereby raised is one of fact for the determination of the jury.[12] On the other hand, where the facts are undisputed or admit of only one inference, the ques-

Mo.—Menard v. Goltra, 40 S.W.2d 1053, 328 Mo. 368.
N.H.—Merchants Mut. Casualty Co. v. Smith, 17 A.2d 88, 91 N.H. 204—Bowdler v. St. Johnsbury Trucking Co., 4 A.2d 871, 90 N.H. 68.
N.J.—De Geeter v. Bennett, 32 A.2d 335, 133 N.J.Eq. 349, certiorari denied 64 S.Ct. 67, 320 U.S. 759, 88 L.Ed. 453, rehearing denied 64 S. Ct. 156, 320 U.S. 813, 88 L.Ed. 491.
N.Y.—Wolin v. Perlco Venetian Blind Corporation, 43 N.Y.S.2d 262, 180 Misc. 544—Saito v. Waiters and Waitresses Union Local No. 2 of Brooklyn and Queens, 12 N.Y.S.2d 283.
Ohio.—Indian Refining Co. v. McCombs, 191 N.E. 919, 47 Ohio App. 425.
Okl.—Redd v. Warehime, 26 P.2d 142, 166 Okl. 128.
S.D.—Hayes v. Battle Creek Power Co., 249 N.W. 629, 61 S.D. 385.
Tex.—Oberholz v. Odom, Civ.App., 43 S.W.2d 122.
39 C.J. p 53 note 70 [a].

(2) To support finding that contract or relationship did not exist.
La.—Malone v. Vieille, App., 174 So. 713.
Va.—Mullins v. Mingo Lime & Lumber Co., 10 S.E.2d 492, 176 Va. 44.
Wash.—Gensman v. West Coast Power Co., 101 P.2d 316, 3 Wash.2d 404.

(3) To sustain finding that individual was "independent contractor."—Tanner v. Drake, Civ.App., 47 S.W.2d 452, affirmed 78 S.W.2d 162, 124 Tex. 395.

(4) To establish verbal contract of employment.
Ill.—Ostroff v. A. J. Canfield Co., 47 N.E.2d 382, 317 Ill.App. 653.
La.—Maritime & Merchants' Protective Co. v. Crescent Paper Box Factory, 121 So. 674, 9 La.App. 600.
N.Y.—Tudanger v. Festinger, 50 N.Y. S.2d 216.
Okl.—General Hotel Operating Co. v. Hunter, 139 P.2d 808, 192 Okl. 677.

(5) To prove or sustain finding of hiring for a definite time.—Copeland v. Hill, Tex.Civ.App., 126 S.W.2d 567—39 C.J. p 53 note 70 [a] (3).

(6) To prove or sustain finding of hiring for a year.
Ill.—Oakes v. Chicago Fire Brick Co., 53 N.E.2d 42, 321 Ill.App. 298, affirmed 58 N.E.2d 460, 388 Ill. 474.
Ind.—Holcomb & Hoke Mfg. Co. v. Younge, 8 N.E.2d 426, 103 Ind.App. 439.
La.—Nickerson v. Burnstein, Inc., 115 So. 271, 164 La. 1066—Boudreaux v. Simon, App., 24 So.2d 476.
Mich.—Arnold v. Masonic Country Club of Western Michigan, 256 N. W. 472, 268 Mich. 430.
N.J.—Dennis v. Thermoid Co., 25 A. 2d 886, 128 N.J.Law 303.
Pa.—Howard v. Siegel, 184 A. 272, 121 Pa.Super. 519.
Va.—Hoffman Specialty Co. v. Pelouze, 164 S.E. 397, 158 Va. 586—D. Buchanan & Son v. Ewell, 139 S.E. 483, 148 Va. 762.
Wash.—Hansen v. Columbia Breweries, 122 P.2d 489, 12 Wash.2d 554.

(7) To sustain finding of employment for a reasonable time.—Millsap v. National Funding Corporation of California, 135 P.2d 407, 57 Cal.App. 2d 772.

(8) To sustain finding that parties entered into permanent employment contract.—Weiner v. Pictorial Paper Package Corporation, 20 N.E.2d 458, 303 Mass. 123.

(9) To prove or sustain findings as to other matters.—Madera v. Monongahela Ry. Co., 52 A.2d 329, 356 Pa. 460—39 C.J. p 53 note 70 [a] (4)–(15).

Evidence held insufficient

(1) To show contract of employment or existence of relationship of master and servant.
U.S.—Lientz v. Wheeler, C.C.A.Mo., 113 F.2d 767.
Idaho.—People ex rel. Heartburg v. Interstate Engineering & Construction Co., 75 P.2d 997, 58 Idaho 457.
Ill.—Slingerland v. Slingerland, 73 N.E.2d 164, 331 Ill.App. 409.
Ky.—Williams v. United Mine Workers of America, 182 S.W.2d 237, 298 Ky. 117.
La.—Calavartenos v. Southeastern Raw Fur Merchants of Louisiana, 179 So. 46, 189 La. 94—Rains v. Jones, App., 152 So. 356.
Md.—Houston v. Monumental Radio, 148 A. 536, 158 Md. 292.
Mich.—Donald v. Faulds, 4 N.W.2d 676, 302 Mich. 331.
N.Y.—Cummings v. Poirier & McLane Corporation, 31 N.Y.S.2d 98, 263 App.Div. 739.
Pa.—Carr v. Smith, 157 A. 3, 102 Pa. Super. 406, followed in Richter v. Smith, 157 A. 4, 102 Pa.Super. 410.
S.C.—Pennington v. Wolf Const. Co., 171 S.E. 45, 170 S.C. 501.
Wash.—Caldwell v. Williams, 60 P.2d 28, 187 Wash. 501.
39 C.J. p 53 note 70 [b] (1).

(2) To show terms of contract generally.—Carson v. Manor Baking Co., Mo.App., 138 S.W.2d 43.

(3) To show contract for permanent employment.—Littell v. Evening Star Newspaper Co., 120 F.2d 36, 73 App.D.C. 409.

(4) To show employment coupled with an interest.—Thacker v. American Foundry, Cal.App., 177 P.2d 322.

(5) To show that contract was the result of error.—Lowy v. Bulliard, La.App., 17 So.2d 855.

(6) To show assumption of employment contract.—Larson v. Jeffrey-Nichols Motor Co., 181 N.E. 213, 279 Mass. 362.

(7) To show or support finding that contract was entered into under duress.—Powis v. Moore Machinery Co., 164 P.2d 822, 72 Cal.App.2d 844—39 C.J. p 53 note 70 [b] (4).

(8) To show other matters.—Walters v. Commonwealth, Pa.Com.Pl., 56 Dauph.Co. 245—39 C.J. p 53 note 70 [b] (2), (3).

11. U.S.—Brown v. Minngas Co., D. C.Minn., 51 F.Supp. 363.
Ky.—Williams v. United Mine Workers of America, 182 S.W.2d 237, 298 Ky. 117.
Pa.—Turner v. Good, Com.Pl., 48 Lanc.L.Rev. 559.

12. Mass.—Duclos v. A. H. Phillips, Inc., 11 N.E.2d 580, 298 Mass. 549.
39 C.J. p 54 note 73.
Questions of law and fact in actions for:
Injuries to third persons see infra § 617.
Personal injuries to servant see infra §§ 529–537.
Wages see infra § 131.
Wrongful discharge see infra § 54.

Particular questions held for jury

(1) Terms and conditions of employment generally.
U.S.—Eggers v. Armour & Co. of Delaware, C.C.A.Iowa, 129 F.2d 729.
Ky.—Torson Const. Co. v. Grant, 66 S.W.2d 79, 251 Ky. 800.
Mich.—McIntyre v. Smith-Bridgman & Co., 4 N.W.2d 36, 301 Mich. 629.

tion thereby presented is one of law for the court to determine.[13] Ordinarily, the determination of the relationship of master and servant is a question of fact,[14] but the question of the relation created by a written contract between the parties is ordinarily one of law for the court,[15] as is the construction of an express oral contract.[16] The construction of an unambiguous written contract is for the court.[17]

B. STATUTORY REGULATIONS IN GENERAL

§ 14. In General

a. State and territorial statutes
b. Federal statutes

a. State and Territorial Statutes

(1) In general
(2) Particular classes of employees
(3) Offenses and prosecutions

(1) In General

In the exercise of its police power a state may impose wholesome and reasonable regulations on the relation of master and servant.

The purpose of a constitutional provision authorizing the passage of laws providing for the comfort, health, safety, and general welfare of all employees is not to define the word "employees"[18] or to create a rule that has been nonexistent,[19] but rather is to allay all doubt as to the right of the legislature to enact subsequent legislation respecting those who are employed by others[20] and to empower the legislature

Mo.—Truitt v. Rothschild-Greenfield Co., App., 32 S.W.2d 770—Dickes v. Bookman, App., 6 S.W.2d 981—Dickes v. Bookman, App., 285 S.W. 546.
N.Y.—West v. Scaroon Hotel Corp., N.Y.Sup., 67 N.Y.S.2d 163, 187 Misc. 539.
39 C.J. p 54 note 73.

(2) Whether hiring was for an indefinite or definite period.
Fla.—Newton v. Wall, 8 So.2d 9, 150 Fla. 510.
Ga.—National Manufacture & Stores Corporation v. Dekle, 173 S.E. 408, 48 Ga.App. 515.
Ill.—Davis v. Englestein, 263 Ill.App. 57.
N.Y.—Preager v. Unity Shoemakers Corporation, 15 N.Y.S.2d 45, 257 App.Div. 632.
Pa.—Jones v. Pittsburgh Mercantile Co., 145 A. 80, 295 Pa. 219.
Va.—D. Buchanan & Son v. Ewell, 139 S.E. 483, 148 Va. 762.

(3) Duration of employment generally.
U.S.—Eggers v. Armour & Co. of Delaware, C.C.A.Iowa, 129 F.2d 729.
Ky.—Hamilton Carhardt Overall Co. v. Short, 197 S.W.2d 792, 303 Ky. 423—Torson Const. Co. v. Grant, 66 S.W.2d 79, 251 Ky. 800.
Mich.—McIntyre v. Smith-Bridgman & Co., 4 N.W.2d 36, 301 Mich. 629.
R.I.—Minor v. Narragansett Mach. Co., 42 A.2d 711.
39 C.J. p 54 note 73 [e].

(4) What parties intended by "permanent" employment.—Lucacher v. Kerson, Pa., 48 A.2d 857.

(5) Whether writing embodied entire agreement and was to be in substitution of a prior oral agreement or to supplement the oral agreement.—MacLaren v. Windram Mfg. Co., 191 N.E. 347, 287 Mass. 221.

(6) Whether an employee was acting in the line of his employment or merely as a volunteer.—Cannon v. Fargo, 118 N.E. 796, 222 N.Y. 321.

(7) Other matters.
Ky.—Memphis Min. Co. v. Shacklett, 155 S.W. 1154, 153 Ky. 476.
Mo.—Zeppenfeld v. Morgan, App., 185 S.W.2d 898—Zeppenfeld v. Morgan, App., 168 S.W.2d 971—Carson v. Manor Baking Co., App., 138 S.W. 2d 43.
N.Y.—Karas v. H. R. Laboratories, 67 N.Y.S.2d 15, 271 App.Div. 530.
R.I.—Minor v. Narragansett Mach. Co., 42 A.2d 711.

13. Ill.—Hobbs v. H. M. Gousha Co., 24 N.E.2d 240, 302 Ill.App. 508.
Mo.—Wolfe v. Stark Bros. Nurseries & Orchards Co., App., 288 S.W. 1004.
N.J.—Ryan v. Brown Motors, 39 A.2d 70, 132 N.J.Law 154.
Pa.—Hay v. Pittsburgh Lodge No. 46, Loyal Order of Moose, 8 A.2d 434, 137 Pa.Super. 205.
Tenn.—American Nat. Ins. Co. v. Jackson, 12 Tenn.App. 305.

14. U.S.—Baltimore & O. R. Co. v. Foar, C.C.A.Ind., 84 F.2d 67.
Conn.—Beaverdale Memorial Park v. Danaher, 15 A.2d 17, 127 Conn. 175.
Ky.—Torson Const. Co. v. Grant, 66 S.W.2d 79, 251 Ky. 800.
Mass.—Rhodes v. Green, 162 N.E. 305, 264 Mass. 295.
Mich.—McIntyre v. Smith-Bridgman & Co., 4 N.W.2d 36, 301 Mich. 629.
Neb.—Kline v. Metcalfe Const. Co., 19 N.W.2d 693, 146 Neb. 389.
S.C.—Griswold v. Texas Co., 161 S. E. 409, 163 S.C. 156.
39 C.J. p 54 note 73 [a].

If unsupported by subordinate facts found, the conclusion of fact is erroneous as a matter of law.—Beaverdale Memorial Park v. Danaher, 15 A.2d 17, 127 Conn. 175.

15. Ind.—Howe Fire Apparatus Co. v. Humphrey, 46 N.E.2d 259, 113 Ind.App. 167.
39 C.J. p 54 note 71.

16. N.Y.—Braxton v. Mendelson, 135 N.E. 198, 233 N.Y. 122.
Okl.—Chicago, R. I. & P. R. Co. v. Bennett, 128 P. 705, 36 Okl. 358, 20 A.L.R. 678.

17. Pa.—Armstrong v. Standard Ice Co., 195 A. 171, 129 Pa.Super. 207—Custis & Co. v. Silent Automatic Corporation, 97 Pa.Super. 313.
Tex.—Guardian Trust Co. v. Bauereisen, 121 S.W.2d 579, 132 Tex. 396—Fort Worth & D. C. Ry. Co. v. Larson, Civ.App., 169 S.W.2d 260.

18. Ohio.—State v. Iden, 47 N.E.2d 907, 71 Ohio App. 65.

19. Ohio.—State v. Iden, supra.

20. N.Y.—W. H. H. Chamberlin, Inc., v. Andrews, 286 N.Y.S. 242, 159 Misc. 124, modified on other grounds 2 N.E.2d 22, 271 N.Y. 1, 106 A.L.R. 1519, affirmed 57 S.Ct. 122, 299 U.S. 515, 81 L.Ed. 380, rehearing denied 57 S.Ct. 926, 301 U. S. 714, 81 L.Ed. 1365.
Ohio.—State v. Iden, 47 N.E.2d 907, 71 Ohio App. 65.
Particular objections to labor law:
Delegation of legislative power see Constitutional Law § 138 b (25).
Denial:
Of equal protection of laws see Constitutional Law §§ 503, 511 e (4), 513–515.
Of liberty and property, including liberty to contract, without due process see Constitutional Law §§ 211, 684–689.
Or abridgment of privileges or immunities of citizens see Constitutional Law § 475.
Grant of special privileges see Constitutional Law § 464 d.
Impairment of obligations of contracts see Constitutional Law § 349.
Improper classification see Constitutional Law § 497.

to pass laws that will promote the general welfare of employees by improving their working conditions.[21] So too a constitutional provision authorizing the passage of laws to protect the health and safety of employees in factories, mines, and railroads does not, by implication, limit the legislative power or prevent the passage of laws of the same character relating to other industries.[22]

In the exercise of its police power[23] a state may impose such wholesome and reasonable regulations and restrictions on the relation of master and servant as are conducive to the public welfare,[24] health,[25] or safety.[26] The object of labor legislation is to protect persons employed in industry;[27] but such legislation, although enacted for the benefit of employees, is also enacted in the interest of the public at large.[28] In dealing with the relation of employer and employee, a state legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to secure wholesome conditions of work and freedom from oppression.[29] The state, however, cannot interfere in a private employment and stipulate the terms of the service to be rendered,[30] nor can it in terms destroy the property right of an employer.[31]

Regulations governing employees' organizations and discrimination are discussed infra §§ 28 (65)-28 (68).

Commerce clause of federal Constitution as affecting validity of state regulations of relation of employer and employee see Commerce §§ 20, 46, 71 b (2), 78 e, 79.

21. Ohio.—State v. Iden, supra.

22. Okl.—Associated Industries of Oklahoma v. Industrial Welfare Commission, 90 P.2d 899, 185 Okl. 177.

23. Ala.—Alabama State Federation of Labor v. McAdory, 18 So.2d 810, 246 Ala. 1, certiorari dismissed 65 S.Ct. 1384, 325 U.S. 450, 89 L.Ed. 1725.
N.C.—Morris v. Holshouser, 17 S.E. 2d 115, 220 N.C. 293, 137 A.L.R. 733.
Utah.—Buckingham Transp. Co. v. Industrial Commission, 72 P.2d 1077, 93 Utah 342.
39 C.J. p 55 notes 77, 78, p 56 note 79.

24. N.Y.—W. H. H. Chamberlin, Inc., v. Andrews, 286 N.Y.S. 242, 159 Misc. 124, modified on other grounds 2 N.E.2d 22, 271 N.Y. 1, 106 A.L.R. 1519, affirmed 57 S.Ct. 122, 299 U.S. 515, 81 L.Ed. 380, rehearing denied 57 S.Ct. 926, 301 U.S. 714, 81 L.Ed. 1365.
39 C.J. p 55 note 77.

Interests of society

The rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist.
U.S.—Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe, Tex., 62 S.Ct. 807, 315 U.S. 722, 86 L.Ed. 1143, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775—Thornhill v. State of Alabama, Ala., 60 S.Ct. 736, 310 U.S. 88, 84 L.Ed. 1093.
Cal.—Ex parte Blaney, 184 P.2d 892.

Exclusion from statute

A statute relating to employer-employee relations may be deemed to exclude the operation of hotels, including dining apartments, although the same duties are performed by the employees of independent restaurants engaged in the business of feeding the public in the same manner as hotels.—Burrow v. Kapfhammer, 145 S.W.2d 1067, 284 Ky. 753.

Delivery of copy of contract to employee

It is constitutionally permissible to legislate so as to provide that a written contract of employment shall be void unless, at the time of making it, a copy thereof, signed by the employer or his authorized representative, is delivered to the employee.—In re Opinion of Justices, 166 N.E. 401, 267 Mass. 607, 63 A. L.R. 838.

Statute not violated

Lessee under mining lease held not to have violated mining act by employing second-class manager when having more than a specified number of men engaged as miners.—Ripley v. Kaemmerer, 279 Ill.App. 336.

25. N.Y.—People v. Charles Schweinler Press, 108 N.E. 639, 214 N.Y. 395, L.R.A.1918A 1124, Ann. Cas.1916D 1059.
39 C.J. p 55 note 78.

26. Ky.—Jones v. Russell, 6 S.W.2d 460, 224 Ky. 390.
39 C.J. p 56 note 79.

Safety of workmen engaged in hazardous employment is legitimate subject of legislation under police power.—Jones v. Russell, 6 S.W.2d 460, 224 Ky. 390.

27. N.Y.—Griebsch v. B. T. Babbitt, Inc., 298 N.Y.S. 848, 164 Misc. 7, affirmed 2 N.Y.S.2d 848, 254 App. Div. 601—Mortimer v. Natapow, 14 N.Y.S.2d 971.

28. Cal.—De Haviland v. Warner Bros. Pictures, 153 P.2d 983, 67 Cal.App.2d 225.

29. U.S.—West Coast Hotel Co. v. Parrish, Wash., 57 S.Ct. 578, 300 U.S. 379, 81 L.Ed. 703, 108 A.L.R. 1330.
Cal.—California Drive-In Restaurant Ass'n v. Clark, 140 P.2d 657, 22 Cal.2d 287, 147 A.L.R. 1028.

General conditions of labor

A state legislature has power to enact legislation regulating general conditions of labor, at least as to women and children, in any industry in the state.—McGrew v. Industrial Commission, 85 P.2d 608, 96 Utah 203.

Policy furthering desirable industrial relations is within ambit of proper exercise of legislative power.—Isolantite, Inc., v. United Electrical, Radio and Machine Workers of America, C.I.O., 29 A.2d 183, 132 N.J. Eq. 613.

Prevention of disputes

(1) It is a matter of general public concern and well within the police power of the state to attempt to prevent disputes between employees and employers not only in manufacturing concerns and factories but also in public utilities, whether privately or publicly owned and operated.—Local Union No. 876, International Brotherhood of Electrical Workers v. State of Michigan Labor Mediation Board, 293 N.W. 809, 294 Mich. 629.

(2) Determination of disputes see infra §§ 28 (1)-28 (144).

30. Ill.—People v. Chicago, M. & St. P. R. Co., 138 N.E. 155, 306 Ill. 486, 28 A.L.R. 610.
39 C.J. p 56 note 80.

31. Mass.—Bogni v. Perrotti, 112 N. E. 853, 224 Mass. 152, L.R.A.1916F 831.
39 C.J. p 56 note 81.

"Employer" and "employee." Definitions of "employer" and "employee" contained in one article in a labor code, and in terms limited to that article, can have no effect on a section contained in another article of the code.[32] A statute regulating employment and defining "employer," but not expressly including the state, does not apply to the state.[33] The word "employee," as used in some statutes regulating the relation of master and servant, cannot be defined in the strict contractual sense,[34] and such statutes apply to employees whose contracts of employment are terminable at will.[35] Under some statutes an employee means a mechanic, working man, or laborer working for another for hire,[36] but the provisions refer to manual laborers only.[37]

Public boards, commissions, or officers. Under some labor laws an industrial board may make rules limited to carrying out the purposes of the law,[38] or the only function of a commissioner in respect of the employment of minors and women may be to examine into such employment and the observance of statutory regulations, to investigate complaints, and to report violations to the prosecuting officer.[39] Before an industrial commission may determine and prescribe general standards and conditions of labor by employees, a full and public hearing at which sufficient evidence is taken to support the necessary findings of fact may be required,[40] and the findings must embrace the facts which are needed to sustain the order.[41]

Terms and consequences of contract of employment. It is one of the functions of a state to decree the legal consequences that shall attach to a contract of employment made within the state, regardless of a stipulation of the parties.[42] Statutes which preclude a contract for personal service from being binding or enforceable for a longer term than a prescribed number of years are accorded effect.[43] While such statutes are for the benefit of the employee,[44] they are closely identified with the public interest[45] and are in the nature of police regulations or expressions of public policy to prevent those compelled to seek employment from tying themselves up by indefinite or unlimited agreements that may seriously affect or restrict their ability to develop by a desirable change of employment.[46] They may not be waived by the employee;[47] but they do not render void ab initio a contract for a longer term than that prescribed[48] or prevent the employee, with the consent of the employer, from voluntarily performing the excessive part of the contract.[49]

(2) Particular Classes of Employees

Statutes which are valid and binding and are to be given effect when applicable include "full crew" statutes affecting freight trains and statutes prohibiting the employment of aliens on public work. Child labor laws are highly remedial in character and are to be liberally interpreted.

In a particular case involving a "full crew" statute affecting freight trains, the evidence may be insufficient to show that operating conditions and the cost of complying with the statute have so changed since the enactment of the statute as to make application thereof to the railroad in question arbitrary

32. Cal.—People v. McEntyre, 84 P.2d 560, 32 Cal.App.2d Supp. 752.

33. Wis.—State ex rel. Martin v. Reis, 284 N.W. 580, 230 Wis. 683.

34. U.S.—Santiago v. People of Puerto Rico, C.C.A.Puerto Rico, 154 F.2d 811.

35. U.S.—Santiago v. People of Puerto Rico, supra.

36. N.Y.—People v. Eureka Shipbuilding Corp., 59 N.Y.S.2d 332.

37. N.Y.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 6 N.Y.S.2d 775, 168 Misc. 948, affirmed 7 N.Y.S.2d 1007, 255 App.Div. 840, and 7 N.Y.S.2d 1008, 255 App.Div. 840, affirmed 20 N.E.2d 390, 280 N.Y. 194.

38. N.Y.—Mortimer v. Natapow, 14 N.Y.S.2d 971.

39. Conn.—Swiss Cleaners v. Danaher, 27 A.2d 806, 129 Conn. 338.

40. Utah.—McGrew v. Industrial Commission, 85 P.2d 608, 96 Utah 203.

Hearings of boards generally see infra §§ 28 (102)–28 (108).

Matter which is not evidence may not be treated by the commission as evidence.—McGrew v. Industrial Commission, supra.

41. Utah.—McGrew v. Industrial Commission, supra.

42. N.J.—Miller v. National Chair Co., 22 A.2d 804, 127 N.J.Law 414, affirmed 28 A.2d 125, 129 N.J.Law 98.

Contracts of employment at will do not restrict legislature from enacting laws in the interest of the general public which so deal with master and servant relationship as to effect changes in the terms of employment.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.

43. U.S.—Shaugnessy v. D'Antoni, C.C.A.La., 100 F.2d 422—Hill v. Missouri Pac. Ry. Co., D.C.La., 8 F.Supp. 80.

Cal.—De Haviland v. Warner Bros. Pictures, 153 P.2d 983, 67 Cal.App.2d 225.

Okl.—Foster v. Atlas Life Ins. Co., 6 P.2d 805, 154 Okl. 30.

44. U.S.—Shaughnessy v. D'Antoni, C.C.A.La., 100 F.2d 422.

45. Cal.—De Haviland v. Warner Bros. Pictures, 153 P.2d 983, 67 Cal.App.2d 225.

46. U.S.—Hill v. Missouri Pac. Ry. Co., D.C.La., 8 F.Supp. 80.

Contract for permanent employment

(1) Under a statute providing that services to be rendered in certain employments shall not extend beyond a stated period, a contract for permanent employment is illegal, when the services might, in the nature of things, extend beyond such period.—Perry v. New England Casualty Co., 100 A. 605, 78 N.H. 346.

(2) Contracts for permanent employment generally see supra §§ 6, 8.

47. Cal.—De Haviland v. Warner Bros. Pictures, 153 P.2d 983, 67 Cal.App.2d 225.

48. U.S.—Shaughnessy v. D'Antoni, C.C.A.La., 100 F.2d 422.

49. U.S.—Shaughnessy v. D'Antoni, supra.

and unreasonable.[50] Statutes forbidding employment of aliens on public work are valid.[51]

Children. Child labor laws, being highly remedial in character are to be liberally interpreted in order to effect their beneficent objects.[52] The determination of the question whether a particular child activity is "work" within the meaning of child labor laws depends altogether on the circumstances of each case,[53] and there is no fixed and universal rule which will solve the diversified questions which can arise under different sets of facts.[54]

Miners. Statutory and official regulation of the employment and conduct of miners is discussed in the C.J.S. title Mines and Minerals § 236, also 40 C.J. p 1138 note 81–p 1139 note 2.

(3) Offenses and Prosecutions

In a prosecution for violation of a statute regulating the relation between employer and employee, the burden is on the state to prove facts bringing the case within the statute.

Under some statutes regulating the relation between employer and employee, and making a violation thereof a misdemeanor, only the owner of an establishment is criminally liable,[55] while under other statutes an agent may be subject to criminal prosecution.[56] The burden is on the state to show facts bringing the case within the statute;[57] and defendant is entitled to any reasonable doubt as to the construction of the statute where it does not plainly cover the case.[58] Criminal liability and prosecution for violation of state statute regulating hours of service are discussed infra § 15 a.

Second offense. Where punishment is based on the number of violations of any of the provisions of the act, it is not necessary, in order to warrant an increased punishment as for a second offense, that a previous violation should have been of the same character;[59] but a person may not be punished as a second offender where he is not charged as such either in the original information or in any information filed in proceedings following conviction.[60]

b. Federal Statutes

Statutes enacted for the purpose of eliminating labor conditions detrimental to workers have been held valid.

The Fair Labor Standards Act of 1938, 29 U.S.C.A. §§ 201–219, which sets up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions which fail to conform to standards set up by the act, has been held constitutional.[61] It is

50. U.S.—Missouri Pac. R. Co. v. Norwood, D.C.Ark., 13 F.Supp. 24, affirmed 54 S.Ct. 227, 290 U.S. 600, 78 L.Ed. 527.

51. U.S.—Heim v. McCall, N.Y., 36 S.Ct. 78, 239 U.S. 175, 60 L.Ed. 206. 12 C.J. p 927 note 83.

52. U.S.—Lenroot v. Western Union Tel. Co., D.C.N.Y., 52 F.Supp. 142, affirmed, C.C.A., 141 F.2d 400, reversed on other grounds 65 S.Ct. 335, 323 U.S. 490, 89 L.Ed. 414.
Pa.—Commonwealth v. McKaig, 29 Pa.Dist. & Co. 629.

Purpose of laws
Child labor laws are intended to protect children, in their healthful development to adult age, from exploitation by business and industry, and to insure to them, in the interests of the public welfare, that condition of freedom from debilitating labor in which alone they can develop into fully efficient economic and social units of the state.—Commonwealth v. McKaig, supra.

53. Pa.—Commonwealth v. McKaig, supra.

Skating exhibition
It is not violation of child labor laws for nine-year-old child to give exhibition of skating at meeting of amateur skating society where she receives no compensation therefor, where exhibition is not for profit, although admission fee is charged, and is not held at place of public resort, but one privately leased for purely private purpose; nor is it material that professional skater appeared on same program for compensation if child's skating was in no way linked with his.—Commonwealth v. McKaig, supra.

54. Pa.—Commonwealth v. McKaig, supra.

55. Pa.—Commonwealth v. Rohrman, 20 Pa.Dist. 1108.

56. U.S.—Santiago v. People of Puerto Rico, C.C.A.Puerto Rico, 154 F.2d 811.
39 C.J. p 56 note 83.

57. N.Y.—People v. R. F. Stevens Co., 165 N.Y.S. 39, 178 App.Div. 308, appeal dismissed 117 N.E. 1079, 221 N.Y. 622—People v. Interborough Rapid Transit Co., 168 N.Y.S. 357, 35 N.Y.Cr. 317.

Giving required information to labor commissioner
In prosecution under statute prohibiting securing of labor in state for one's use in another without notifying commissioner of labor, it is not sufficient for state to show that defendant secured labor within state for his use in another, but it should also be shown that he did so without giving commissioner information required under statute.—Gleaton v. State, 191 S.E. 926, 55 Ga.App. 875.

Evidence held sufficient
To support conviction of using moneys, put up with defendant by his employees, for another purpose than liquidation of his accounts with them or return to them.—People v. McEntyre, 84 P.2d 560, 32 Cal.App.2d Supp. 752.

58. Mich.—People v. Wells, 227 N.W. 696, 248 Mich. 579.

59. N.Y.—People v. James Butler, Inc., 138 N.Y.S. 1068, 154 App.Div. 311, 28 N.Y.Cr. 465.

60. N.Y.—People v. Baldwin, 69 N.Y.S.2d 195, 188 Misc. 11.

61. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L.Ed. 624—U. S. v. Darby, Ga., 61 S.Ct. 451, 312 U.S. 100, 657, 85 L.Ed. 609, 132 A.L.R. 1430—Sunshine Mining Co. v. Carver, D.C.Idaho, 41 F.Supp. 60—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., Atlantic Co. v. Walling, 131 F.2d 518—Magann v. Long's Baggage Transfer Co., D.C.Va., 39 F.Supp. 742—Fleming v. A. B. Kirschbaum Co., 38 F.Supp. 204, affirmed, C.C.A., 124 F.2d 564, certiorari granted A. B. Kirschbaum Co. v. Fleming, 62 S.Ct. 800,

remedial in nature,[62] having been enacted for the humanitarian purpose of eliminating labor conditions detrimental to workers engaged in interstate commerce or in the production of goods for such commerce,[63] and therefore should be liberally construed.[64]

The provisions of the act relating to wages and overtime compensation are discussed infra §§ 151–160.

The child labor provisions of the act, which do not prohibit the employment of child labor, but instead prohibit the shipment, or delivery for shipment, in interstate commerce of goods produced in an establishment where oppressive child labor is employed, manifest an intent to keep the arteries of interstate commerce free from the products of child labor,[65] and they establish a national policy and a national standard, rather than a mere additional sanction for the enforcement of state child labor laws.[66] The purposes of such provisions are to protect adult employees against competition of minors, as well as to protect children against harmful labor, and hence are both economic and sociological.[67]

National Industrial Recovery Act. Provisions of the National Industrial Recovery Act relating to employers and employees were accorded effect according to the express language thereof where they were not regarded as unconstitutional.[68] Also provisions of a code approved for a particular industry under the act became by implication a part of a contract of employment by an employer in that industry;[69] and it was not permissible for the employer, employees, or a labor union to violate such provisions by waiver or consent.[70] An employee could not

315 U.S. 792, 86 L.Ed. 1195, affirmed Kirschbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Fleming v. Arsenal Bldg. Corporation, D.C.N.Y., 38 F.Supp. 207, reversed on other grounds, C.C.A., 125 F.2d 278, certiorari granted Arsenal Bldg. Corporation v. Fleming, 62 S.Ct. 801, 315 U.S. 792, 86 L.Ed. 1195, affirmed Arsenal Bldg. Corporation v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Fleming v. Wood-Fruitticher Grocery Co., D.C.Ala., 37 F.Supp. 947—Berger v. Clouser, D.C.Pa., 36 F.Supp. 168—U. S. v. Barr & Bloomfield Shoe Mfg. Co., D.C.N.H., 35 F.Supp. 75—U. S. v. Feature Frocks, D.C.Ill., 33 F.Supp. 206.

N.Y.—Atkocus v. Terker, 30 N.Y.S.2d 628.

62. U.S.—Bowie v. Gonzalez, C.C.A. Puerto Rico, 117 F.2d 11—Fleming v. Hawkeye Pearl Button Co., C.C.A.Iowa, 113 F.2d 52—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, D.C.Ala., 40 F.Supp. 4, modified on other grounds, C.C.A., 135 F.2d 320, rehearing denied 137 F.2d 176, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—Collins v. Kidd, D.C.Tex., 38 F.Supp. 634, reversed on other grounds, C.C.A., Collins v. Kidd Dairy & Ice Co., 132 F.2d 79—Lowrimoore v. Union Bag & Paper Corporation, D.C.Ga., 30 F.Supp. 647, affirmed, C.C.A., Gate v. Union Bag & Paper Corporation, 116 F.2d 27, certiorari denied 61 S.Ct. 837, 313 U.S. 559, 85 L.Ed. 1519.

63. U.S.—Fleming v. Hawkeye Pearl Button Co., C.C.A.Iowa, 113 F.2d 52—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, D.C.Ala., 40 F.Supp. 4, modified on other grounds, C.C.A., 135 F.2d 320, rehearing denied 137 F.2d 176, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—Collins v. Kidd, D.C.Tex., 38 F.Supp. 634, reversed on other grounds, C.C.A., Collins v. Kidd Dairy & Ice Co., 132 F.2d 79.

Protection of laboring public

The act was designed to protect the laboring public generally against the practices which it outlaws.—Fleming v. Tidewater Optical Co., D.C.Va., 35 F.Supp. 1015.

Declaration of public policy

The act constitutes a declaration of public policy against substandard labor conditions.—Hutchinson v. William C. Barry, Inc., D.C.Mass., 44 F.Supp. 829.

Reduction of unemployment

It is said that the main objective of the act is to reduce unemployment without financially hurting industry or its employees.—Williams v. General Mills, D.C.Ohio, 39 F.Supp. 849, reversed on other grounds, C.C.A., 132 F.2d 367, 144 A.L.R. 1371.

64. U.S.—Bowie v. Gonzalez, C.C.A. Puerto Rico, 117 F.2d 11—Fleming v. Hawkeye Pearl Button Co., C.C.A.Iowa, 113 F.2d 52—Collins v. Kidd, D.C.Tex., 38 F.Supp. 634, reversed on other grounds, C.C.A., Collins v. Kidd Dairy & Ice Co., 132 F.2d 79—Lefevers v. General Export Iron & Metal Co., D.C.Tex., 36 F.Supp. 838.

Consideration of congressional motive

In construing the act, arguments founded on common experience furnishing motive of congress for the legislation may be material.—U. S. v. Barr & Bloomfield Shoe Mfg. Co., D.C.N.H., 35 F.Supp. 75.

Plain meaning

The meaning of the act must in the first instance at least be sought in its language, and if that is plain and the act is constitutional the sole function of the court is to enforce it.—Fleming v. Hawkeye Pearl Button Co., C.C.A.Iowa, 113 F.2d 52.

65. U.S.—Lenroot v. Western Union Tel. Co., D.C.N.Y., 52 F.Supp. 142, affirmed, C.C.A., 141 F.2d 400, reversed on other grounds 65 S.Ct. 335, 323 U.S. 490, 89 L.Ed. 414.

66. U.S.—Lenroot v. Western Union Tel. Co., supra.

67. U.S.—Lenroot v. Interstate Bakeries Corporation, D.C.Mo., 55 F.Supp. 234, affirmed in part and reversed on other grounds in part, C.C.A., 146 F.2d 325.

68. Ohio.—Drake Bakeries Inc., v. Bowles, 31 Ohio N.P.,N.S., 425.

Invalidity, as unauthorized delegation of legislative power, of provisions authorizing president to approve, prescribe, or modify codes of fair competition see Constitutional Law § 138 b (10).

Unconstitutionality of provisions respecting hours of labor see infra § 15 b.

Purpose of related state statutes was solely to secure coöperation and uniformity with acts of federal government and its agencies.—Edwards v. New York Edison Co., 268 N.Y.S. 24, 149 Misc. 722.

69. N.Y.—Farulla v. Ralph A. Freundlich, Inc., 279 N.Y.S. 228, 155 Misc. 262.

70. N.Y.—Farulla v. Ralph A. Freundlich, Inc., 279 N.Y.S. 228, 155 Misc. 262.

maintain an action for violation of a code promulgated under the National Industrial Recovery Act, as that act, although providing for criminal prosecutions and injunction proceedings instituted by the attorney general, did not contain any provision, or authorize a code provision, giving the right to any private person to commence an action to compel obedience to the act or any code promulgated thereunder.[71]

§ 15. Hours of Service in General

a. State statutes
b. Federal statutes

a. State Statutes

In the absence of broader constitutional authorization, a state law regulating the hours of labor of employees, other than public employees and employees on public works, is valid when, and only when, it is a proper exercise of the police power in that it has for its object, and bears a direct and reasonable relation to, the protection of the health, safety, morals, or general welfare of the public or the employees affected, and does not violate constitutional limitations or guaranties.

A state law regulating the hours of labor of employees may be enacted and enforced under the police power,[72] without offense to constitutional limitations,[73] where the object of the enactment is to protect the public health, safety, morals, or general welfare, and the statute is adapted to that end,[74] or where there is a reasonable relation between the hours of labor and the health, safety, morals, or welfare of the employees within the purview of the statute,[75] especially where the employees are, by the nature of their employment, subject to extraordinary perils.[76] However, in the absence of a constitutional provision expressing a contrary policy, a state's police power to regulate the hours of labor for work performed within its borders is not general or unlimited;[77] a regulation of such hours, in order to be valid, must tend reasonably to advance the public interest;[78] and it is invalid where it has no direct relation to the health, safety, or morals of the public[79] or the employees whose working hours are curtailed,[80] or where it violates one or more constitutional limitations or guaranties.[81] Such a regulation will not be sustained as an exercise of the extraordinary power of government, in times of emergency, to combat unemployment where there is nothing in the statute to indicate a purpose to relieve unemployment or which would induce judicial belief that it would have any substantial effect on unemployment.[82]

Construction and application generally. A state statute limiting the hours of employment should be liberally construed to effect its object to protect the health of employees and promote the general welfare;[83] and an exception or exemption should be strictly construed.[84] Under some statutes of this nature an employee has no right to waive the restriction,[85] which is imposed for the benefit of the community and not for the exclusive benefit of employees;[86] but a differently worded statute has been construed to permit an adult workman to agree to

71. Neb.—Carmody v. L. L. Coryell Oil Co., 276 N.W. 383, 133 Neb. 661.

72. Okl.—Associated Industries of Oklahoma v. Industrial Welfare Commission, 90 P.2d 899, 185 Okl. 177.
39 C.J. p 57 note 90.

73. U.S.—Brashear Freight Lines v. Hughes, D.C.Ill., 26 F.Supp. 908.
Okl.—Associated Industries of Oklahoma v. Industrial Welfare Commission, 90 P.2d 899, 185 Okl. 177.

74. S.C.—Gasque, Inc. v. Nates, 2 S.E.2d 36, 191 S.C. 271.
12 C.J. p 926 note 73—39 C.J. p 57 note 90.

75. Mont.—State v. Safeway Stores, 76 P.2d 81, 106 Mont. 182.
N.Y.—Long Island R. Co. v. Department of Labor of State of New York, 247 N.Y.S. 278, 138 Misc. 612, affirmed 177 N.E. 17, 256 N.Y. 498.
Okl.—Associated Industries of Oklahoma v. Industrial Welfare Commission, 90 P.2d 899, 185 Okl. 177.
39 C.J. p 57 note 91.

76. U.S.—Holden v. Hardy, Utah, 18 S.Ct. 383, 169 U.S. 366, 42 L.Ed. 780.
39 C.J. p 58 note 92.
Smelters
Cal.—In re Martin, 106 P. 235, 157 Cal. 51, 26 L.R.A.,N.S., 242.

77. N.Y.—Long Island R. Co. v. Department of Labor of State of New York, 177 N.E. 17, 256 N.Y. 498.

78. N.Y.—Long Island R. Co. v. Department of Labor of State of New York, supra.

79. Ark.—Noble v. Davis, 161 S.W. 2d 189, 204 Ark. 156.
N.M.—State v. Henry, 25 P.2d 204, 37 N.M. 536, 90 A.L.R. 805.
S.C.—Gasque, Inc., v. Nates, 2 S.E. 2d 36, 191 S.C. 271.
39 C.J. p 66 note 87.

80. U.S.—Lochner v. State of New York, N.Y., 25 S.Ct. 539, 198 U.S. 45, 49 L.Ed. 937, 3 Ann.Cas. 1133.
N.M.—State v. Henry, 25 P.2d 204, 37 N.M. 536, 90 A.L.R. 805.
S.C.—Gasque, Inc., v. Nates, 2 S.E. 2d 36, 191 S.C. 271.

81. Ark.—Noble v. Davis, 161 S.W. 2d 189, 204 Ark. 156.
Pa.—Miller v. Bashore, Com.Pl., 45 Dauph.Co. 310, affirmed Holgate Bros. Co. v. Bashore, 200 A. 672, 331 Pa. 255, 117 A.L.R. 639—Holgate Bros. Co. v. Bashore, Com.Pl., 45 Dauph. Co. 274.
S.C.—Gasque, Inc., v. Nates, 2 S.E.2d 36, 191 S.C. 271.

82. S.C.—Gasque, Inc., v. Nates, supra.

83. Mont.—Butte Miners' Union No. 1 v. Anaconda Copper Mining Co., 118 P.2d 148, 112 Mont. 418.
Time included in "hours worked"
Mont.—Butte Miners' Union No. 1 v. Anaconda Copper Mining Co., supra.

84. N.Y.—People ex rel. S. J. Groves & Sons Co. v. Hamilton, 238 N.Y.S. 81, 227 App.Div. 356, affirmed 173 N.E. 856, 254 N.Y. 540.

85. Cal.—Lewis v. Ferrari, 90 P.2d 384, 34 Cal.App.2d Supp. 767.
Mont.—State v. Livingston Concrete Bldg. & Mfg. Co., 87 P. 980, 34 Mont. 570, 9 Ann.Cas. 204.
Utah.—Short v. Bullion-Beck & Champion Min. Co., 57 P. 720, 20 Utah 20, 45 L.R.A. 603.

86. Cal.—Lewis v. Ferrari, 90 P.2d 384, 34 Cal.App.2d Supp. 767.

work in any employment for a longer or shorter period each day than the maximum number of hours prescribed.[87] Provided the statute is otherwise applicable and the employee is within its terms,[88] the regulation applies where the relation of employer and employee, rather than some other relation, such as that of lessor and lessee, exists.[89]

Offenses and prosecutions. The penal provisions of some statutes limiting the hours of employment are so broadly worded as to be applicable to an employee as well as to the employer;[90] but the employees or servants expressly mentioned in a penal provision in connection with an agent are deemed to be limited to those belonging to the same class of persons as an agent, that is, that class of persons who stand in place of the owner, lessee, or operator, and have something to do with employing, superintending, or directing other persons.[91] An information for violation of the law must negative statutory exceptions.[92] Where a corporation is charged with a violation of a penal statute, the state must establish its guilt beyond a reasonable doubt, and show that in working excessive hours the employee did so under the direction of the corporation, and not voluntarily.[93] Under an act regulating the hours of work in a manufacturing establishment, and making a violation thereof punishable, there can be but one violation in any one day, whether all or only part of the employees are worked more than the prescribed hours.[94]

One day of rest each week. A statute requiring employers operating designated business enterprises to allow every employee at least twenty-four consecutive hours of rest in each calendar week is a legitimate exercise of the police power of the state.[95] Such a statute relates to the health of the worker,[96] and, under it, an employer must not compel an employee to work more than six days per week,[97] although an employee may have no right of action for violation of any of its provisions.[98] It is applicable when the establishment operated by an employer is within its terms,[99] but not otherwise,[1] even though the establishment is not expressly exempted.[2] In construing it, the court should endeavor to ascertain its fair and reasonable meaning and avoid a construction which either extends or limits its provisions beyond that which was obviously intended.[3]

Rule or order of commission. Some statutes are construed not to authorize a public service commission to fix the hours of service of drivers for private motor carriers[4] or a railroad commission to fix the hours of duty of railroad employees at depots and stations.[5] However, other statutory provisions, which have been held valid,[6] are construed to authorize the promulgation of administrative or-

Utah.—Short v. Bullion-Beck & Champion Min. Co., 57 P. 720, 20 Utah 20, 45 L.R.A. 603.

87. Minn.—Thibault v. National Tea Co., 269 N.W. 466, 198 Minn. 246, 107 A.L.R. 702.

88. Ind.—Finerty v. Bryan, 16 N.E. 2d 882, 214 Ind. 570.
39 C.J. p 57 note 90 [b] (3)–(6), [e].

Election officials
The inspector, judge, and clerk at primary election were not "mechanics, workmen, or laborers," within meaning of a statute.—Finerty v. Bryan, supra.

Employees constructing tunnel for water
A statute limiting to eight hours per day period of employment of working men in all "underground mines" or "workings" applies only to employees engaged in mining and smelting operations, and not to employees constructing a tunnel for conveyance of water.—Thompson v. Industrial Commission, 104 P.2d 629, 99 Utah 234.

89. Mass.—Commonwealth v. Weinfield's Inc., 25 N.E.2d 198, 305 Mass. 108.

90. Mont.—State v. Livingston Concrete Bldg. & Mfg. Co., 87 P. 980, 34 Mont. 570, 9 Ann.Cas. 204.

Utah.—Short v. Bullion-Beck & Champion Min. Co., 57 P. 720, 20 Utah 20, 45 L.R.A. 603.

91. Wyo.—State v. Thompson, 87 P. 433, 15 Wyo. 136.

92. N.Y.—People v. Thursam, 23 N. Y.S.2d 706.

93. Mont.—State v. Northern Pac. R. Co., 111 P. 141, 41 Mont. 557.

94. Miss.—Buckeye Cotton Oil Co. v. State, 60 So. 775, 103 Miss. 767.

95. Pa.—Commonwealth v. Junker, 7 Pa.Dist. 125, 20 Pa.Co. 503.

96. N.Y.—Tanner v. Imperial Recreation Parlors, 39 N.Y.S.2d 99, 265 App.Div. 371, affirmed 50 N.E.2d 110, 290 N.Y. 801.

97. N.Y.—Tanner v. Imperial Recreation Parlors, supra.

98. N.Y.—Tanner v. Imperial Recreation Parlors, supra.

99. N.Y.—People v. Transit Dev. Co., 165 N.Y.S. 114, 178 App.Div. 288.
39 C.J. p 57 note 90 [a] (2).

1. N.Y.—People ex inf. Hertzberger v. John R. Thompson Co., 243 N.Y. S. 618, 230 App.Div. 75, affirmed 175 N.E. 300, 255 N.Y. 530—People v. Middletown & U. R. Co., 8 N. Y.S.2d 193, 169 Misc. 773.
39 C.J. p 57 note 90 [a] (3), (5), (6).

Pharmacy or drug store is not within the statute, there being another statute expressly regulating the working hours of apprentices and employees in pharmacies and drug stores.—People ex inf. Reed v. Rosenberg, 218 N.Y.S. 21, 218 App. Div. 297.

Evidence held insufficient
To sustain conviction of violating statute.—People v. Geffen Industries, 28 N.Y.S.2d 583, 262 App.Div. 882.

2. N.Y.—People ex inf. Hertzberger v. John R. Thompson Co., 243 N. Y.S. 618, 230 App.Div. 75, affirmed 175 N.E. 300, 255 N.Y. 530.

3. N.Y.—People v. Middletown & U. R. Co., 8 N.Y.S.2d 193, 169 Misc. 773.

4. Wis.—Gardner Baking Co. v. Public Service Commission of Wisconsin, 271 N.W. 833, 224 Wis. 588.

5. Tenn.—Nashville, C. & St. L. Ry. v. Railroad & Public Utilities Commission, 15 S.W.2d 751, 159 Tenn. 43.

6. Okl.—Associated Industries of Oklahoma v. Industrial Welfare Commission, 90 P.2d 899, 185 Okl. 177.

ders prescribing maximum hours of employment.[7] Under some statutes a commission's order determining and prescribing maximum hours must be preceded by a full and public hearing at which sufficient evidence is taken to support the necessary findings of fact,[8] and the findings must embrace the facts needed to sustain the order.[9] The order is subject to judicial inquiry as to its reasonableness.[10]

b. Federal Statutes

Various federal statutes have been enacted with respect to the hours and work of employees, some of which statutes have been held unconstitutional.

The Fair Labor Standards Act of 1938, 29 U.S.C.A. §§ 201-219, is not merely a wage statute.[11] The detrimental labor conditions to which the act is directed include long hours,[12] and the act was intended and expected to maintain health.[13] The act is intended to fix a standard of hours of work per week for laborers engaged in handling goods in, or producing goods for, interstate commerce[14] and to prevent the shipment in interstate commerce of certain commodities produced in the United States under labor conditions, as respects hours, which fail to conform to the standard set up by the act.[15] However, the act does not limit the number of hours which an employer engaged in interstate commerce may require his employees to work during each week,[16] and the hour provisions of the act do not become a part of an employment contract made without reference thereto;[17] but a provision of the act has been held to prohibit an employer from breaching a contract for the purpose of increasing hours of employment.[18]

The construction and application of the Fair Labor Standards Act, 29 U.S.C.A. §§ 201 et seq, with respect to wages and overtime pay are discussed infra §§ 151 (1)-151 (35). The Federal Hours of Service Act is discussed infra §§ 18-23, and statutes relating to public employees or employees on public works are discussed infra § 17.

The Adamson Law, 45 U.S.C.A. § 65, declaring that, in contracts for labor and service, eight hours shall be deemed a day's work, and the measure or standard of a day's work for the purpose of reckoning the compensation of railroad employees actually engaged in the operation of trains, does not deprive employer and employee of the right to agree between themselves on the hours to be served.[19] A provision therein expressly excepting railroads independently owned and operated and not exceeding one hundred miles in length is accorded effect according to the congressional intent, manifested thereby, to except short-line independent railroads[20]

7. Okl.—Associated Industries of Oklahoma v. Industrial Welfare Commission, supra.

8. Utah.—McGrew v. Industrial Commission, 85 P.2d 608, 96 Utah 203.

That which is not evidence cannot be treated by the commission as evidence.—McGrew v. Industrial Commission, supra.

9. Utah.—McGrew v. Industrial Commission, supra.

10. Okl.—Associated Industries of Oklahoma v. Industrial Welfare Commission, 90 P.2d 899, 185 Okl. 177.

11. U.S.—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed Overnight Motor Transp. Co. v. Missel, 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Bumpus v. Continental Baking Co., C.C.A. Tenn., 124 F.2d 549, 140 A.L.R. 1258, certiorari denied Continental Bakery Co. v. Bumpus, 62 S.Ct. 1305, 316 U.S. 704, 86 L.Ed. 1772.

Purpose of act is not limited to a scheme to raise substandard wages by a minimum wage and increased pay for overtime work.—Overnight Motor Transp. Co. v. Missel, Md., 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

12. U.S.—Bumpus v. Continental Baking Co., C.C.A.Tenn., 124 F.2d 549, 140 A.L.R. 1258, certiorari denied Continental Bakery Co. v. Bumpus, 62 S.Ct. 1305, 316 U.S. 704, 86 L.Ed. 1772.

Declaration of public policy

Under the Fair Labor Standards Act congress has declared a public policy respecting hours of employment of employees engaged in interstate commerce.—McNorrill v. Gibbs, D.C.S.C., 45 F.Supp. 363.

Eradication of evils

The purpose of the Fair Labor Standards Act is to eradicate from interstate commerce the evils attendant on long hours of service in industry.—Fleming v. Goldblatt Bros., D.C.Ill., 39 F.Supp. 701, modified on other grounds Walling v. Goldblat Bros., 128 F.2d 778, certiorari denied 63 S.Ct. 528, 314 U.S. 757, 87 L.Ed. 1130.

13. U.S.—Southland Gasoline Co. v. Bayley, Ark., 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244—Richardson v. James Gibbons Co., Md., 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244.

14. U.S.—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed Overnight Motor Transp. Co. v. Missel, 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Tolliver v. Cudahy Packing Co., D.C.Tenn., 39 F.Supp. 337.

Minn.—McMillan v. Wilson & Co., 2 N.W.2d 838, 212 Minn. 142, petition dismissed Wilson & Co. v. McMillan, 63 S.Ct. 81, 317 U.S. 702, 87 L.Ed. 561.

15. U.S.—Abadie v. Cudahy Packing Co. of Louisiana, D.C.La., 37 F. Supp. 164.

16. U.S.—Overnight Motor Transp. Co. v. Missel, Md., 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

Ky.—Black Mountain Corporation v. Adkins, 133 S.W.2d 900, 280 Ky. 617.

17. U.S.—St. John v. Brown, D.C. Tex., 38 F.Supp. 385.

18. U.S.—Remer v. Czaja, D.C.Md., 36 F.Supp. 629.

19. U.S.—Plummer v. Pennsylvania R. Co., C.C.A.Ill., 37 F.2d 874.

20. U.S.—Miller v. Mississippi & S. V. R. Co., C.C.A.Miss., 146 F.2d 550, certiorari denied 65 S.Ct. 1185, 325 U.S. 857, 89 L.Ed. 1977, and 65 S.Ct. 1185, 325 U.S. 857, 89 L.Ed. 1977.

where the railroad in question is not within a further provision that the exception shall not apply to a railroad engaged in the transfer of freight between railroads or between railroads and industrial plants.[21]

Bituminous Coal Conservation Act. Provisions of the federal Bituminous Coal Conservation Act relative to the fixing of maximum hours of labor have been held unconstitutional.[22]

The National Industrial Recovery Act obligated only the employers to comply with the maximum hours of labor approved or prescribed by the president, and did not impose on the employees the obligation to accept the maximum hours of labor thus ordained.[23] The provisions of the act, and of a code, attempting to regulate hours of labor were held to be without constitutional sanction and void[24] as well as ineffective to impose any liability on an employer independent of a voluntary contract.[25]

§ 16. —— Women and Children

A statute reasonably regulating or limiting the hours of employment of women or children is a valid exercise of the police power and will be given effect when applicable.

Generally a state legislature may constitutionally regulate or limit the hours of labor of employed women.[26] Provided it is reasonable,[27] a statute limiting the number of hours per day or per week, or both, a woman may be employed or permitted to work in certain industries or establishments, or prohibiting her employment on Sunday or during certain hours at night in such industries or establishments, is a valid[28] exercise[29] of the police power. Such a statute is intended to protect the health of the women employees affected[30] and of the public generally,[31] and sometimes the legislature also has in mind the prevention of immorality.[32] The regulation or limitation is not for the benefit of employees only, but is also for the benefit of the public generally;[33] it may not be waived by a single employee;[34] and a contract to violate it is illegal and unenforceable.[35]

Such a statute will be accorded effect when it is applicable,[36] but not otherwise.[37] Likewise an applicable exception or exemption will be given effect;[38] but an exemption which is not in fact ap-

21. U.S.—Miller v. Mississippi & S. V. R. Co., supra.

Special meaning of "transfer"

The word "transfer," as used in the act, has a special meaning common in railroad speech to signify moving of freight for some railroad purpose other than its line transportation.—Miller v. Mississippi & S. V. R. Co., supra.

22. U.S.—Carter v. Carter Coal Co., App.D.C., 56 S.Ct. 855, 298 U.S. 238, 80 L.Ed. 1160.

23. N.J.—Bayonne Textile Corporation v. American Federation of Silk Workers, 172 A. 551, 116 N.J.Eq. 146, 92 A.L.R. 1450.

Apprentices and learners

Maximum hour provisions of particular code were held to apply to apprentices and learners.—Farulla v. Ralph A. Freundlich, Inc., 279 N.Y.S. 228, 155 Misc. 262.

24. U.S.—Acme, Inc., v. Besson, D. C.N.J., 10 F.Supp. 1.

25. Tex.—Monroe v. Morten Inv. Co., Civ.App., 101 S.W.2d 593.

26. Conn.—Doncourt v. Danaher, 13 A.2d 868, 126 Conn. 678.

Utah.—McGrew v. Industrial Commission, 85 P.2d 608, 96 Utah 203.

12 C.J. p 926 note 76—39 C.J. p 58 note 99.

Statute restricting hours of labor of women as:

Class or discriminatory legislation see Constitutional Law § 497 b.

Denying equal protection of laws see Constitutional Law § 514.

Even if similar statute applied to males would be invalid, a law as applied to females may be valid.—State v. Dominion Hotel, 151 P. 958, 17 Ariz. 267—39 C.J. p 59 note 1.

27. N.D.—State v. Ehr, 221 N.W. 883, 57 N.D. 310.

12 C.J. p 927 note 78.

Legislative intention regarded as reasonable

S.C.—State v. Seithel, 21 S.E.2d 195, 201 S.C. 1.

28. Conn.—Doncourt v. Danaher, 13 A.2d 868, 126 Conn. 678.

N.D.—State v. Ehr, 221 N.W. 883, 57 N.D. 310.

Utah.—McGrew v. Industrial Commission, 85 P.2d 608, 96 Utah 203.

12 C.J. p 926 note 76—39 C.J. p 58 note 99.

29. Nev.—Martinez v. Johnson, 119 P.2d 880, 61 Nev. 125.

Tex.—Montgomery Ward & Co. v. Lusk, Civ.App., 52 S.W.2d 1110, error refused.

30. Conn.—Swiss Cleaners v. Danaher, 27 A.2d 806, 129 Conn. 338.

Nev.—Martinez v. Johnson, 119 P.2d 880, 61 Nev. 125.

Or.—Fred Meyer, Inc. v. Keasey, 27 P.2d 311, 145 Or. 266.

39 C.J. p 58 note 99.

31. Tex.—Montgomery Ward & Co. v. Lusk, Civ.App., 52 S.W.2d 1110, error refused.

32. Conn.—Doncourt v. Danaher, 13 A.2d 868, 126 Conn. 678.

Or.—Fred Meyer, Inc. v. Keasey, 27 P.2d 311, 145 Or. 266.

33. Tex.—Montgomery Ward & Co. v. Lusk, Civ.App., 52 S.W.2d 1110, error refused.

34. Tex.—Montgomery Ward & Co. v. Lusk, supra.

35. Tex.—Montgomery Ward & Co. v. Lusk, supra.

36. Tex.—Campbell Cleaning & Dye Works v. Porter, Civ.App., 183 S.W. 2d 253, error refused.

39 C.J. p 58 note 99 [g], [h], [k] (2), (3).

Employment

The method of payment is not controlling, but may be important, in determining whether the relation between the persons in question is that of employer and employee or of lessor and lessee.—Commonwealth v. Weinfield's, Inc., 25 N.E.2d 198, 305 Mass. 108.

37. Okl.—Ex parte Carson, 243 P. 260, 33 Okl.Cr. 198.

Employment of woman in bank is not within the statute where the bank is not specifically mentioned, and is not similar to the establishments mentioned, in the statute.—Ex parte Carson, supra.

38. S.C.—State v. Seithel, 21 S.E.2d 195, 201 S.C. 1.

Restaurant

Under statute prohibiting the employment of women to work in mercantile or manufacturing establishments on Sunday except cafeterias and "restaurants," the employment of a woman to work in the restaurant department of a drug store

plicable is unavailing,[39] and the court will not transcend judicial construction by holding that there is an implied exception.[40]

Particular statutes may be violated by employment longer than the maximum prescribed in respect of hours per day,[41] hours per week,[42] or days per week;[43] but a prohibition of employment during certain hours is, of course, not violated by employment during other hours.[44] Provided a penalty therefor is provided by statute,[45] a violation warrants prosecution and conviction on a sufficient indictment or information[46] and adequate evidence.[47] Failure of an inspector of employment records to make daily reports to the governing body of the municipality, as required by statute, does not preclude prosecution;[48] and, since an excuse for violation is not a defense,[49] evidence to show such excuse is not admissible.[50]

Order of public commission. When not authorized by statute, an order of a state welfare commission prohibiting the employment of women in mercantile establishments after a fixed time of the day is null and void.[51]

Children. A statute reasonably regulating or restricting the hours of employment of children is within the police power of the state and free from constitutional objections.[52]

§ 17. —— Public Employees; Employees on Public Works

A statute limiting the hours of labor of persons employed by or on behalf of the government or any of its political subdivisions, or employed by contractors or subcontractors on public works, is within the power of the legislature to enact.

A state legislature has power to enact a statute limiting the hours of labor of persons employed by, or on behalf of, the state or any of its political subdivisions, or employed by contractors or subcontractors on public works of the state or any of its political subdivisions.[53] Although enacted for the

which department also contained a soda fountain did not constitute a violation of the statute; and fact that drug store employed men to work on Sunday in other departments could not be considered either by way of aggravation or extenuation of charge on which prosecution was based.—State v. Seithel, 21 S.E.2d 195, 201 S.C. 1.

Permissible overtime

The statute is not violated where the case is within a provision permitting limited overtime.—People v. Elite Steam Laundry, 234 N.Y.S. 157, 226 App.Div. 35—People v. Marlin-Rockwell Corporation, 234 N.Y.S. 220, 133 Misc. 741.

39. N.Y.—People v. Gobeo, 6 N.Y.S. 2d 937.
39 C.J. p 58 note 99 [b].

Existence of state of war is not "emergency" within statutory exception.—Lampley v. State, Okl.Cr., 166 P.2d 445, followed in Lampley v. State, 166 P.2d 447, Lampley v. State, 166 P.2d 448, and Lampley v. State, 166 P.2d 450.

40. Conn.—Doncourt v. Danaher, 13 A.2d 868, 126 Conn. 678.

41. N.J.—Toohey v. Abromowitz Department Store, 11 A.2d 297, 124 N.J.Law 209.
Okl.—Ex parte Carson, 243 P. 260, 33 Okl.Cr. 198.

42. N.J.—Toohey v. Abromowitz Department Store, 11 A.2d 297, 124 N.J.Law 209.
Okl.—Ex parte Carson, 243 P. 260, 33 Okl.Cr. 198.

43. N.J.—Toohey v. Abromowitz Department Store, 11 A.2d 297, 124 N.J.Law 209.

44. Ohio.—State v. Conley, 71 N.E. 2d 275, 147 Ohio St. 351.

45. Tex.—Ex parte Butcher, 53 S. W.2d 781, 122 Tex.Cr. 39, followed in 53 S.W.2d 784, 122 Tex.Cr. 45.

Employer alone is made criminally liable for violation of some statutes. —Martinez v. Johnson, 119 P.2d 880, 61 Nev. 125.

Imprisonment on default in payment of fine is proper when authorized by a general statute, although the statute creating the offense provides for fines only.—Anderson v. District of Columbia, D.C.Mun.App., 48 A.2d 710.

46. Tex.—Stevens v. State, 58 S.W. 2d 829, 123 Tex.Cr. 334.

It is sufficient to follow statute in charging the offense in the indictment or information.—Commonwealth v. Beatty, 15 Pa.Super. 5.

47. **Evidence held sufficient**

To authorize conviction.
N.Y.—People v. Kent Stores, 6 N.E. 2d 60, 272 N.Y. 371.
Okl.—Lampley v. State, Cr., 166 P.2d 445, followed in Lampley v. State, Cr., 166 P.2d 447, Lampley v. State, Cr., 166 P.2d 448, and Lampley v. State, Cr., 166 P.2d 450.

Evidence held insufficient

To warrant conviction.—People v. Moskowitz, 38 N.Y.S.2d 189.

48. D.C.—Anderson v. District of Columbia, Mun.App., 48 A.2d 710.

49. N.Y.—People v. Snider Packing Corporation, 259 N.Y.S. 305, 144 Misc. 654.

50. N.Y.—People v. Snider Packing Corporation, supra.

51. Or.—Fred Meyer, Inc., v. Keasey, 27 P.2d 311, 145 Or. 266.

52. Ohio.—State v. Rodefer, 5 Ohio N.P.,N.S., 337.
Utah.—McGrew v. Industrial Commission, 85 P.2d 608, 96 Utah 203.
12 C.J. p 927 note 77—39 C.J. p 59 note 5.

53. Ariz.—State v. Anklam, 31 P.2d 888, 43 Ariz. 362—State v. Jay J. Garfield Bldg. Co., 3 P.2d 983, 39 Ariz. 45, followed in State v. Perry, 3 P.2d 987, 39 Ariz. 55.
Md.—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.
N.Y.—Long Island R. Co. v. Department of Labor of State of New York, 247 N.Y.S. 278, 138 Misc. 612, affirmed 177 N.E. 17, 256 N.Y. 498.
Wyo.—State v. A. H. Read Co., 240 P. 208, 33 Wyo. 387.
12 C.J. p 927 note 81—39 C.J. p 60 note 7.

Validity of statute as against objection that it:
Denies equal protection of laws see Constitutional Law § 508.
Violates constitutional guaranty of due process of law see Constitutional Law § 685.

Elimination of railroad grade crossing

Statutory provision regulating hours of work of laborers employed by railroads in eliminating railroad grade crossings, for cost of which state or its divisions is proportionately liable, is valid.—Long Island R. Co. v. Department of Labor of State of New York, 177 N.E. 17, 256 N.Y. 498.

Prior to adoption of constitutional provisions on the subject, statutes limiting the hours of labor on public works were held unconstitutional in

benefit and protection of labor,[54] a statute of this nature is directed as much to the employee as to the state or a political subdivision,[55] it becomes a part of every contract of employment between a laborer and the state or political subdivision employing him,[56] and an agreement contrary to the statute is void in the absence of an emergency.[57] As properly construed,[58] constitutional or statutory provisions restricting the hours of labor of public employees or employees on public works are given effect when applicable,[59] but not otherwise.[60]

Although either an agent of the state[61] or an agent of a contractor[62] may be punished for a violation of a law making it a misdemeanor to employ laborers on public works for longer than the prescribed hours, such a statute only imposes good faith and diligence on the part of the contractor, and it does not make him guarantee against every possible accidental and unintentional violation of the provision.[63] In order to authorize a conviction, it is essential that defendant shall have had some control over the laborer,[64] and where the contractor has sublet a part of the work to an independent contractor he will not be responsible for the acts of such independent contractor in requiring workmen to work more than the permitted hours.[65]

A federal statute limiting the hours of work of laborers and mechanics on public works of the United States or the District of Columbia, except in cases of extraordinary emergency, is within the power of congress to enact and is constitutional[66] and mandatory.[67] It will be accorded effect when it is applicable,[68] but not otherwise.[69] An extraordinary emergency may not be a continuing one so as to suspend the operation of the law during the entire life of the contract.[70] A contractor for public works of the United States, who intention-

some states.—Cleveland v. Clements Bros. Constr. Co., 65 N.E. 885, 67 Ohio St. 197, 93 Am.S.R. 670, 59 L.R.A. 775—12 C.J. p 927 note 80.

54. Ariz.—City of Glendale v. Dixon, 75 P.2d 683, 51 Ariz. 206.
N.Y.—Carder Realty Corporation v. State, 15 N.Y.S.2d 604, 172 Misc. 498, reversed on other grounds 23 N.Y.S.2d 395, 260 App.Div. 459, affirmed 35 N.E.2d 194, 285 N.Y. 803, motion denied 35 N.E.2d 941, 286 N.Y. 604.

Reasons for enactment
A statute fixing eight-hour working day for manual or mechanical laborer employed on behalf of the state or its subdivisions was enacted for two reasons, the health of the laborer and the distribution of labor. —City of Glendale v. Dixon, 75 P.2d 683, 51 Ariz. 206.

55. Ariz.—City of Glendale v. Dixon, 75 P.2d 683, 51 Ariz. 206.

Punishment
An act fixing eight hours as a day's work on municipal work, and providing for the punishment of every person violating its provisions, applies to both employers and employees, although it does not contemplate the punishment of laborers who fail to work for the full period of eight hours in every working day. —State v. Livingston Concrete Bldg. & Mfg. Co., 87 P. 980, 34 Mont. 570, 9 Ann.Cas. 204.

56. Ariz.—City of Glendale v. Dixon, 75 P.2d 683, 51 Ariz. 206.

57. Ariz.—City of Glendale v. Dixon, supra.

Agreement with municipal corporation
(1) A municipal corporation cannot, by agreement with contractors, abrogate the provisions of a law determining the hours of a day's work on city work.—Medina v. Dingledine, 136 N.Y.S. 786, 152 App.Div. 307, affirmed 104 N.E. 1018, 211 N.Y. 24.

(2) However, it has been held that a statute establishing the number of hours which shall constitute a day's work for cities and other governmental subdivisions does not prohibit a special agreement between the city and its employees for a longer day's work.—Woods v. Woburn, 107 N.E. 985, 220 Mass. 416, Ann.Cas. 1917A 492.

58. Mass.—Hurley v. City of Lynn, 34 N.E.2d 520, 309 Mass. 138.

Purpose of statute
Ariz.—City of Glendale v. Dixon, 75 P.2d 683, 51 Ariz. 206.

Rest period for firemen
Tex.—Long v. City of Wichita Falls, 176 S.W.2d 936, 142 Tex. 202—City of Amarillo v. York, 176 S.W.2d 935, 142 Tex. 210.

Alternating tours of duty
Mass.—Hurley v. City of Lynn, 34 N.E.2d 520, 309 Mass. 138.

59. Ariz.—City of Glendale v. Dixon, 75 P.2d 42, 51 Ariz. 86, affirmed 75 P.2d 683, 51 Ariz. 206—State v. Jaastad, 32 P.2d 799, 43 Ariz. 458.
N.Y.—Erie R. Co. v. Department of Labor of State of New York, 251 N.Y.S. 581, 233 App.Div. 35—Kaufman v. City of New York, 61 N.Y.S. 2d 779.
Wyo.—State v. A. H. Read Co., 240 P. 208, 33 Wyo. 387.
39 C.J. p 60 note 7 [a].

Mandatory statute
Cal.—Styring v. City of Santa Ana, 147 P.2d 689, 64 Cal.App.2d 12.

Statute held not repealed
Ariz.—State v. Jaastad, 32 P.2d 799, 43 Ariz. 458.

Exemption held not applicable
N.Y.—People ex rel. S. J. Groves & Sons Co. v. Hamilton, 238 N.Y.S. 81, 227 App.Div. 356, affirmed 173 N.E. 856, 254 N.Y. 540.

60. Ind.—Finerty v. Bryan, 16 N.E. 2d 882, 214 Ind. 570.
39 C.J. p 60 note 7 [b]-[f].

Employees engaged in operation or maintenance of state institutions or publicly owned utilities are not within the application of provisions dealing with public work.—State v. Peters, 147 N.E. 81, 112 Ohio St. 249—Clements v. Sherwood, 45 N.E.2d 805, 70 Ohio App. 266, appeal dismissed 43 N.E.2d 238, 140 Ohio St. 338.

61. Or.—Ex parte Steiner, 137 P. 204, 68 Or. 218.
39 C.J. p 60 note 11.

62. Tex.—Bradford v. State, 180 S.W. 702, 78 Tex.Cr. 285.

63. N.Y.—People v. Zimmerman, 109 N.Y.S. 396, 58 Misc. 264.

64. Tex.—Perkins v. State, 190 S.W. 168, 80 Tex.Cr. 416.

65. Mont.—State v. Hughes, 100 P. 610, 38 Mont. 468.

66. U.S.—Ellis v. U. S., Mass., 27 S.Ct. 600, 206 U.S. 246, 51 L.Ed. 1047, 11 Ann.Cas. 589.
39 C.J. p 61 note 18

67. U.S.—Consolidated Engineering Co. v. U. S., D.C.Wash., 35 F.Supp. 980, appeal dismissed, C.C.A., 123 F.2d 1015.

68. U.S.—Chattanooga & Tennessee River Power Co. v. U. S., Tenn., 209 F. 28, 126 C.C.A. 170.
39 C.J. p 61 note 18 [b].

69. U.S.—Ellis v. U. S., Mass., 27 S.Ct. 600, 206 U.S. 246, 51 L.Ed. 1047, 11 Ann.Cas. 589.
39 C.J. p 61 note 18 [b] (2)-[e].

70. U.S.—U. S. v. Sheridan-Kirk

ally permits laborers employed thereon to work more than the prescribed hours, intentionally violates the provisions of an act prohibiting such action, although he acted under the mistaken assumption that an excepting clause was applicable.[71] Where there is a separate offense in the case of each laborer required to work excessive hours, a criminal information against a contractor for violation of the statute must set out the names of, or otherwise identify, the persons alleged to have been unlawfully employed so that accused may meet the charge intelligently.[72]

§ 18. Federal Hours of Service Act

The Hours of Service Act, limiting the hours of service of certain employees of common carriers engaged in transportation by railroad from one state to another is a highly remedial statute and should be liberally construed to effectuate its purpose of promoting safety in railroad operation and protecting the lives of employees and passengers.

Despite the fact that it provides a penalty for violation thereof,[73] the Hours of Service Act, 45 U.S.C.A. §§ 61–64, limiting the hours of service of employees actually engaged in, or connected with, the movement of trains of common carriers engaged in the transportation of passengers or property by railroad from one state to another or in, to, or from the District of Columbia or a territory, is a highly remedial statute and should be liberally construed in order to effectuate its purpose,[74] which is to promote safety in railroad operation and protect the lives of employees and passengers by preventing the danger arising from undue fatigue and excessive mental and physical strain usually resulting from remaining too long at an exacting task.[75] The courts are required to give effect to all provisions of the act unless they are hopelessly irreconcilable.[76] While the carriers must use diligence to observe the hours of service of their employees,[77] the exercise of reasonable diligence or due care on their part is not an excuse for nonperformance, since the statute imposes an absolute duty.[78] Also the fact that excess service was in violation of the general rules of the carrier[79] or of the instructions of a superior officer[80] is not a defense. It is not essential to a violation that excessive service shall have been required or permitted by an officer or agent having the duty of supervising and regulating hours of service,[81] as the statute expressly enlarges the general rule under which a corporation is usually chargeable only with the knowledge of certain classes of officers and agents.[82]

Contract Co., D.C.Ohio, 149 F. 809, error dismissed 29 S.Ct. 687, 212 U.S. 587, 53 L.Ed. 662.
39 C.J. p 61 note 18 [a].

71. U.S.—Ellis v. U. S., Mass., 27 S.Ct. 600, 206 U.S. 246, 51 L.Ed. 1047, 11 Ann.Cas. 589—Industrial Engineering Co. v. U. S., 92 Ct.Cl. 54.

72. U.S.—U. S. v. Breakwater Co., D.C.N.J., 174 F. 78.

73. U.S.—U. S. v. Thompson, C.C.A. Mo., 146 F.2d 475—U. S. v. Baltimore & O. R. Co., C.C.A.Md., 133 F.2d 831.
Tenn.—Mitchell v. Southern Ry. Co., 12 Tenn.App. 523.
39 C.J. p 61 note 24.
Penalty and recovery thereof in civil action see infra § 23.

74. U.S.—U. S. v. Atlantic Coast Line R. Co., C.C.A.S.C., 153 F.2d 243—U. S. v. Thompson, C.C.A.Mo., 146 F.2d 475—U. S. v. Baltimore & O. R. Co., C.C.A.Md., 133 F.2d 831—U. S. v. Pitcairn, D.C.Mo., 23 F. Supp. 242—U. S. v. Northern Pac. Ry. Co., D.C.Mont., 6 F.Supp. 278, affirmed, C.C.A., 77 F.2d 587.
Tenn.—Mitchell v. Southern Ry. Co., 12 Tenn.App. 523.
39 C.J. p 61 note 24.
Power of congress under commerce clause of federal Constitution to regulate hours of service of employees of railroads engaged in interstate commerce see Commerce § 49.
Validity of statute or regulation of commerce see Commerce § 78 e (2).

Construction in war times

It has been held that in war times the courts of the country in their administration of law should recognize the new and unusual conditions which confront carriers, and that such construction of the laws should be adopted as would promote a practical operation of railroads to their full limit of ability.—Pennsylvania R. Co. v. U. S., Pa., 246 F. 881, 159 C.C.A. 153—39 C.J. p 63 note 50.

75. U.S.—Atchison, T. & S. F. Co. v. U. S., Ill., 46 S.Ct. 109, 269 U.S. 266, 70 L.Ed. 268—Chicago & A. R. Co. v. U. S., Ill., 38 S.Ct. 442, 247 U.S. 197, 62 L.Ed. 1066—U. S. v. Thompson, C.C.A.Mo., 146 F.2d 475—U. S. v. Baltimore & O. R. Co., C.C.A.Md., 133 F.2d 831—U. S. v. Atlantic Coast Line R. Co., D.C. Fla., 68 F.Supp. 941—U. S. v. New York Cent. R. Co., D.C.Mass., 64 F. Supp. 499—U. S. v. Pitcairn, D.C. Mo., 23 F.Supp. 242—U. S. v. Northern Pac. Ry. Co., D.C.Mont., 6 F. Supp. 278, affirmed, C.C.A., 77 F.2d 587—U. S. v. Chicago, M. & P. S. Ry. Co., D.C.Wash., 197 F. 624.
Mich.—Brown v. Père Marquette Ry. Co., 213 N.W. 179, 237 Mich. 530, 71 A.L.R. 854, certiorari denied 48 S.Ct. 35, 275 U.S. 538, 72 L.Ed. 413.
Tenn.—Mitchell v. Southern Ry. Co., 12 Tenn.App. 523.

Disastrous accidents

It is well known that congress was moved to enact this legislation because of the large number of disastrous wrecks and other accidents due to tired and overworked employees.—U. S. v. Pitcairn, D.C.Mo., 23 F.Supp. 242.

76. U.S.—U. S. v. Atlantic Coast Line R. Co., C.C.A.S.C., 153 F.2d 243.

77. U.S.—U. S. v. Atlantic Coast Line R. Co., supra.

78. U.S.—U. S. v. Oregon-Washington R. & Nav. Co., D.C.Wash., 213 F. 688, affirmed 223 F. 596, 139 C.C.A. 142.
39 C.J. p 61 note 25.

79. U.S.—U. S. v. Oregon Short Line R. Co., D.C.Idaho, 228 F. 561, affirmed 234 F. 584, 148 C.C.A. 350.

80. U.S.—U. S. v. Oregon-Washington R. & Nav. Co., D.C.Wash., 213 F. 688, affirmed 223 F. 596, 139 C.C.A. 142.

81. U.S.—Oregon Short Line R. Co. v. U. S., Idaho, 234 F. 584, 148 C.C.A. 350.

82. U.S.—U. S. v. Oregon-Washington R. & Nav. Co., D.C.Wash., 213 F. 688, affirmed 223 F. 596. 139 C.C.A. 142.
39 C.J. p 61 note 27.

§ 19. —— To Whom Statute Applies

a. In general

b. Employees using telephone or telegraph for train order purposes

a. In General

In order to be within the application of the Hours of Service Act a carrier must be a common carrier by railroad and an employee must be actually engaged in, or connected with, the movement of a train.

The Hours of Service Act is applicable to any common carrier by railroad engaged in interstate commerce.[83] On the other hand, a carrier must be a common carrier to be within the application of the act,[84] and, while the agent of a common carrier and itself a common carrier may be liable for the penalty under the act,[85] the employees of an agent which is not itself a common carrier are not within the provisions of the act.[86] Whether a carrier is a common carrier within the meaning of the act does not depend on whether its charter declares it to be such or on whether the state of incorporation so considers it, but on what it does.[87]

The term "employees," within the meaning and application of the act, means persons actually engaged in, or connected with, the movement of a train[88] other than the crew of a wrecking or relief train.[89] The statute may be applicable to employees on a work train[90] or to employees assisting in the moving of cars in yards.[91] Where a servant is employed by two railroads, either or both may be liable for requiring or permitting excess service.[92]

b. Employees Using Telephone or Telegraph for Train Order Purposes

Effect is accorded, in cases within their application, to provisions of the Hours of Service Act prescribing limitations of hours of service for employees transmitting or receiving train orders by telephone or telegraph, and differentiating between towers, offices, places, or stations operated only during the daytime and those operated continuously day and night.

The purpose of a provision in the Hours of Service Act that no operator, train dispatcher, or other employee who, by the use of the telegraph or telephone, dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in towers, offices, places, and stations operated only during the daytime, is to deal with all telegraph offices through which interstate train orders are transmitted;[93] and the provision also includes every sort of place where train orders are handled.[94] Employees within this provision are not restricted to those whose duties primarily involve the use of telegraph or telephone in connection with train orders,[95] but all who regularly, by the use of telephone or telegraph, receive or deliver orders per-

83. U.S.—Union Stock Yard & Transit Co. of Chicago v. U. S., 60 S.Ct. 193, 308 U.S. 213, 84 L.Ed. 98.

84. U.S.—Brooklyn Eastern Dist. Terminal v. U. S., N.Y., 239 F. 287, 152 C.C.A. 275, reversed on other grounds 39 S.Ct. 283, 249 U. S. 296, 63 L.Ed. 613.

85. U.S.—U. S. v. Brooklyn Eastern Dist. Terminal, N.Y., 39 S.Ct. 283, 249 U.S. 296, 63 L.Ed. 613.

86. U.S.—Brooklyn Eastern Dist. Terminal v. U. S., N.Y., 239 F. 287, 152 C.C.A. 275, reversed on other grounds 39 S.Ct. 283, 249 U.S. 296, 63 L.Ed. 613.

87. U.S.—U. S. v. Brooklyn Eastern Dist. Terminal, N.Y., 39 S.Ct. 283, 249 U.S. 296, 63 L.Ed. 613.

39 C.J p 61 note 33

Terminal company may be a common carrier within the act.—U. S. v. Terminal R. Ass'n of St. Louis, C.C.A.Ill., 296 F. 466—39 C.J. p 61 note 33 [a], [b].

88. U.S.—U. S. v. Missouri Pac. Ry. Co., D.C.Kan., 206 F. 847.

39 C.J. p 61 note 34.

Person clearing switches and main line of snow is not actually engaged in, or connected with, the movement of any train, within the act.—Terry v. Illinois Cent. R. Co., 3 N.E.2d 154, 285 Ill.App. 581.

89. U.S.—U. S. v. Thompson, C.C.A. Mo., 146 F.2d 475—Pennsylvania R. Co. v. U. S., C.C.A.Pa., 265 F. 609.

Exception must be strictly construed, and it does not save railroad from penalties in case of members of wrecking trains unless the emergency implied in the use of the words "crews of wrecking trains" actually exists and their work is related to it.—U. S. v. Thompson, C.C. A.Mo., 146 F.2d 475.

Telegraph operators, engaged in wrecking or relief work, although not in a sense members of the crew, come within the exemption applicable to crews of a wrecking or relief train.—U. S. v. Baltimore & O. R. Co., D.C.W.Va., 226 F. 220.

90. U.S.—St. Joseph & G. I. R. Co. v. U. S., Kan., 232 F. 349, 146 C.C. A. 397.

39 C.J. p 62 note 36.

91. U.S.—Pennsylvania R. Co. v. U. S., C.C.A.Pa., 265 F. 609.

39 C.J. p 62 note 35.

Power of congress to regulate hours of service of railroad employees engaged in interstate commerce see Commerce § 49.

92. U.S.—U. S. v. Denver & R. G. R. Co., Colo., 249 F. 464, 161 C.C.A. 422.

93. U.S.—U. S. v. Grand Rapids & I. R. Co., Mich., 224 F. 667, 140 C.C.A. 177, error dismissed 37 S.Ct. 651, 244 U.S. 645, 61 L.Ed. 1369.

94. U.S.—U. S. v. Baltimore & O. R. Co., C.C.A.Md., 133 F.2d 831.

Matters involved

The meaning of "office, place, or station" within act does not depend on foot measure, but involves also the character of work performed, its scope, to what applied, how work is done, and whether, consistently with remedial object of act, it is naturally separable or unitary and continuous.—U. S. v. Baltimore & O. R. Co., supra.

95. U.S.—Chicago, R. I. & P. R. Co. v. U. S., Ill., 226 F. 27, 141 C.C.A. 135.

Actual handling of train orders by relief operator on duty is not essential to violation of the provision.

taining to the movements of trains are included.[96] A yardmaster is within the provision where he gives orders or directions, pertaining to, and affecting the movement of, trains, and uses the telephone for that purpose,[97] but not where his telephone messages are not orders and are not conclusive on the tower man.[98]

A company does not avoid a violation by an arrangement under which the services of on operator are shared with another carrier.[99]

Continuous operation night and day. It is not indispensable to the continuous operation of an office night and day, within the meaning of the act, that the office be operated or kept open continuously every hour or minute of the day or night[1] or that the person transmitting or receiving train orders by telephone or telegraph be in the office at all times,[2] nor is the question whether an office, place, or station is continuously operated during the day and night to be determined by the number or frequency of train orders that may be handled during a given period.[3] The night and day provision may not be frustrated by a severance of work and calling two places of performance distinct stations where there is in fact an identity of service.[4]

§ 20. —— Interruption of Continuity of Service

In order to interrupt continuity of service, a release of an employee from duty must afford a substantial opportunity for rest during a definite period of time.

Under the provisions of the statute relating to employees generally and making it unlawful for the carrier or its officers or agents to require or permit an employee to remain on duty longer than sixteen consecutive hours, or, where he has been on duty continuously for sixteen hours, again to go on duty until he has had at least ten consecutive hours off duty, or, where he has been on duty sixteen hours in the aggregate in any twenty-four hour period, to continue or again go on duty without having had at least eight consecutive hours off duty, there may, as a matter of law, be periods of duty with intermissions between, provided the aggregate of such periods does not exceed sixteen hours and there are at least eight consecutive hours off duty in any twenty-four hour period.[5] Whether particular intermissions are such as the law will recognize depends on their character as periods of substantial rest;[6] and a release of an employee from duty will not interrupt the continuity of service within the statute unless it is definite and certain as to period of time and substantial and opportune as to period of rest.[7] Also it has been held that a release from duty so as to justify a deduction of time must have been given by some officer or agent having authority to give it.[8] A release from duty may interrupt continuity of service where it is absolute and there is no contingency that, during the period thereof, the employee may be called on to perform any kind of service;[9] but, in order for a release to have this effect, the employee must be free to come and go at

—U. S. v. Atlanta Terminal Co., D.C. Ga., 30 F.2d 109.

96. U.S.—Chicago & A. R. Co. v. U. S., Ill., 38 S.Ct. 442, 247 U.S. 197, 62 L.Ed. 1066.
39 C.J. p 62 note 41.

97. U.S.—U. S. v. Baltimore & O. R. Co., C.C.A.Md., 133 F.2d 831—U. S. v. Pennsylvania R. Co., D.C. Pa., 239 F. 576.

Yardmasters taking over former duties of dispatchers
U.S.—U. S. v. Baltimore & O. R. Co., C.C.A.Md., 133 F.2d 831.

98. U.S.—Atchison, T. & S. F. Co. v. U. S., Ill., 46 S.Ct. 109, 269 U.S. 266, 70 L.Ed. 268.

99. U.S.—U. S. v. Denver & R. G. R. Co., Colo., 249 F. 464, 161 C.C.A. 422.
39 C.J. p 62 note 46.

1. U.S.—U. S. v. Baltimore & O. R. Co., C.C.A.Md., 133 F.2d 831.
39 C.J. p 62 note 42.

2. U.S.—U. S. v. Baltimore & O. R. Co., supra.

3. U.S.—U. S. v. Baltimore & O. R. Co., supra—U. S. v. Illinois Cent. R. Co., D.C.Iowa, 234 F. 433, affirmed 241 F. 667, 154 C.C.A. 425, certiorari denied 37 S.Ct. 745, 244 U. S. 658, 61 L.Ed. 1375.

4. U.S.—Grand Rapids & I. R. Co. v. U. S., Mich., 249 F. 646, 161 C.C.A. 556.
39 C.J. p 62 note 45.

5. U.S.—Southern Pac. Co. v. U. S., C.C.A.Ariz., 222 F. 46, 137 C.C.A. 584.

Work period begins when employees, acting under orders, report for duty.—Brown v. Père Marquette Ry. Co., 213 N.W. 179, 237 Mich. 530, 71 A.L.R. 854, certiorari denied 48 S.Ct. 35, 275 U.S. 538, 72 L.Ed. 413.

6. U.S.—Southern Pac. Co. v. U. S., C.C.A.Ariz., 222 F. 46, 137 C.C.A. 584.

Interval giving no opportunity for rest
Switch engine firemen who, on completing eight-hour shift at 4 p. m., were called to report one and one half hours later for second eight-hour shift at another yard three or four miles away, and who spent one and one-half-hour period in going to the other yard and in eating, were "on duty" during the one and one-half-hour interval, as such interval gave no opportunity whatever for rest.—U. S. v. Pitcairn, D.C.Mo., 23 F.Supp. 242.

7. U.S.—Southern Pac. Co. v. U. S., Ariz., 222 F. 46, 137 C.C.A. 584.
39 C.J. p 62 note 47.

8. U.S.—Denver & R. G. R. Co. v. U. S., Utah, 233 F. 62, 147 C.C.A. 132.

9. U.S.—U. S. v. Great Northern R. Co., C.C.A.Wash., 285 F. 152.
39 C.J. p 63 note 49.

Employee who quit work because his sixteen hours of continuous service had expired, left the engine where his duty, if at work, required him to remain, and went to sleep in the caboose, was not on duty while in the caboose, even though he was not relieved by any order from the superintendent or train dispatcher, he having treated the statute and a general notice from the superintendent not to exceed the prescribed hours of service as a command.—Brown v. Père Marquette Ry. Co., 213 N.W. 179, 237 Mich. 530, 71 A.L.R. 854, certiorari denied 48 S.Ct. 35, 275 U.S. 538, 72 L.Ed. 413.

will and the release must not be so restricted that complete enjoyment thereof may be hampered by fear that the employee may, during the time thereof, be wanted by the employer at some particular place in connection with regular work.[10]

The limitation, as to hours, is not to a specific duty or class of duties, but to the employee, and it is a violation of the act to require or permit the remaining on duty of the employee for a longer time than the prescribed hours, although such duty for a part of the time has no connection with the employee's usual duty embraced within the terms of the statute,[11] and this is so whether such other work preceded[12] or followed[13] his usual work, and regardless of the fact that it was not the custom of the carrier to enforce such additional work[14] or of the fact that the employee worked contrary to instructions.[15]

Train order operatives. While the provision limiting the number of hours of service of train order operatives in any twenty-four hour period contemplates either aggregated or consecutive hours of service,[16] and is not violated where two separate periods of service do not, in the aggregate, exceed the prescribed maximum,[17] a company does not avoid a violation of the act by dividing the hours of service of an operator into two periods, where the aggregate hours exceed the prescribed maximum.[18] The words "any twenty-four hour period" should be given their literal meaning of any twenty-four consecutive hours or the twenty-four consecutive hours following any point of time;[19] they do not refer to a period beginning when an employee usually commences work.[20] In determining whether particular service is permissible, the twenty-four hour period is the twenty-four consecutive hours immediately preceding and including the service in question.[21]

§ 21. —— Reports

The filing of a report of excessive hours of service has been held to be mandatory.

The filing of a report of excessive hours of service has been held to be mandatory,[22] and the liability of a carrier to a penalty for failure to comply is discussed infra § 23 a.

§ 22. —— Emergencies and Other Happenings Excusing Violations

A carrier is not subject to penalties for excessive hours of service in the case of casualty, unavoidable accident, act of God, or delay arising from a cause not known and not forseeable when the employee left a terminal; but, notwithstanding casualty or the like, the carrier must use diligence to avoid a violation of the statute and must avail itself of a reasonable opportunity to relieve an employee from further excessive hours of service.

The proviso of the act declaring that its provisions shall not apply in the case of casualty, unavoidable accident, act of God, or a delay where the cause thereof was not known to the carrier, or its officer or agent in charge of the employee, at the time the employee left the terminal, and could not have been foreseen, extends to all employees, including telegraph operators or train dispatchers.[23] Penalties under the act will not accrue for such excess service as is the proximate result of casualty, unavoidable accident, or an act of God.[24] A cause, however, which will excuse a carrier must be one which was not only not known, but which could not have been foreseen, and it will be liable to the penalty for excessive hours resulting from accidents which might occur in the ordinary operation of railroad trains, and which might have been anticipated.[25] Although the mere fact that the company has knowledge of a casualty that may result in the de-

10. U.S.—U. S. v. Pitcairn, D.C.Mo., 23 F.Supp. 242—U. S. v. Southern Pac. Co., Cal., 245 F. 722, 158 C.C.A. 124.

11. U.S.—U. S. v. Atlantic Coast Line R. Co., D.C.Fla., 68 F.Supp. 941.
39 C.J. p 63 notes 51, 53.

12. U.S.—U. S. v. Great Northern R. Co., D.C.Idaho, 206 F. 838, affirmed 211 F. 309, 127 C.C.A. 595—U. S. v. Denver & R. G. R. Co., D.C.N.M., 197 F. 629.

13. U.S.—Northern Pac. R. Co. v. U. S., Mont., 213 F. 577, 130 C.C.A. 157.
39 C.J. p 63 note 54.

14. U.S.—U. S. v. Illinois Cent. R. Co., D.C.Iowa, 180 F. 630.

15. U.S.—Oregon-Washington R. & Nav. Co. v. U. S., Wash., 223 F. 596, 139 C.C.A. 142—Delano v. U. S., Ill., 220 F. 635, 136 C.C.A. 243.

16. U.S.—U. S. v. Atlanta Terminal Co., D.C.Ga., 30 F.2d 109.

17. U.S.—U. S. v. Atchison, T. & S. F. R. Co., Ill., 31 S.Ct. 362, 220 U.S. 37, 55 L.Ed. 361.

18. U.S.—U. S. v. St. Louis Southwestern R. Co., D.C.Tex., 189 F. 954, affirmed 199 F. 990, 117 C.C.A. 666.

19. U.S.—U. S. v. Atlanta Terminal Co., D.C.Ga., 30 F.2d 109—U. S. v. Northern Pac. Ry. Co., D.C.Mont., 6 F.Supp. 278, affirmed, C.C.A., 77 F.2d 587.

20. U.S.—U. S. v. Atlanta Terminal Co., D.C.Ga., 30 F.2d 109.
Contra U. S. v. Missouri Pac. R. Co., Colo., 244 F. 38, 156 C.C.A. 466.

21. U.S.—U. S. v. Atlanta Terminal Co., D.C.Ga., 30 F.2d 109.

22. U.S.—U. S. v. Baltimore & O. R. Co., D.C.W.Va., 226 F. 220—U. S. v. Yazoo & M. V. R. Co., D.C.Tenn., 203 F. 159.

23. U.S.—Baltimore & O. R. Co. v. U. S., C.C.A.Ohio, 243 F. 153, 156 C.C.A. 19.
39 C.J. p 63 note 61.

24. U.S.—U. S. v. Atlantic Coast Line R. Co., C.C.A.S.C., 153 F.2d 243.
39 C.J. p 63 note 63.

25. U.S.—U. S. v. Kansas City Southern R. Co., Okl., 202 F. 828, 121 C.C.A. 136.
39 C.J. p 64 note 64.

lay of subsequent trains, and necessitate excessive hours of service for the employees of such latter trains, does not in itself deprive it of the excuse of such casualty,[26] nevertheless the company is bound to use all reasonable diligence to avoid a violation of the statute, and will not be excused from liability where it has had, and failed to avail itself of, a reasonable opportunity to relieve the employee from further hours in excess of the statutory maximum.[27] Thus, although an unavoidable accident or casualty has occurred after a train has left its terminal, the crew cannot be permitted to continue to the end of their particular run, if excess hours will be thereby necessitated when the carrier has an opportunity to relieve them at a division point.[28]

Emergency. The word "emergency," as used in the statutory provision that, in case of emergency, operators and like employees transmitting or receiving train orders by telephone or telegraph may be permitted to remain on duty four additional hours in a twenty-four hour period on not exceeding three days in any week, is not synonymous with "casualty," "unavoidable accident," or "act of God" as used in another provision of the act.[29] It refers to an unusual or abnormal condition which is beyond the carrier's control and beyond its reasonable power to remove or overcome,[30] and which creates a pressing necessity or exigency, calling for immediate action or remedy;[31] but, although it does not require the emergency to be an extraordinary one,[32] it does not include exigencies arising from ordinary mistakes and negligences which happen in the practical operation of railroads.[33] Whether or not the sudden illness of a coemployee is an emergency depends on whether or not it is coupled with inability in the exercise of proper care, to obtain a substitute employee.[34] The duration of an emergency is dependent on the facts of each case and is not limited to one week.[35]

§ 23. —— Penalties

a. In general

b. Actions to recover

a. In General

A carrier incurs a statutory penalty by violating the Hours of Service Act, or by failing to make a report of excessive hours of service as required by an authorized order of the Interstate Commerce Commission; but matters in mitigation may be considered in determining the amount of the penalty to be imposed in a particular case

The carrier incurs a separate penalty for each employee kept on duty beyond the prescribed hours by reason of the same delay of a train.[36] However it has been held that the good faith of defendant in arranging periods of rest which were insufficient to break the continuity of service, and avoid the act, may be considered as a reason why a heavy fine should not be imposed.[37] Also the fact that the Interstate Commerce Commission approved defendant's operation of its railroad in requiring an employee handling train orders to work excessive hours does not estop or preclude the government from recovering the penalties incurred by a viola-

26. U.S.—U. S. v. Pennsylvania Co., D.C.Pa., 239 F. 761.
39 C.J. p 64 note 65.

27. U.S.—Atchison, T. & S. F. R. Co. v. U. S., Cal., 37 S.Ct. 635, 244 U. S. 336, 61 L.Ed. 1175.
39 C.J. p 64 note 66.

28. U.S.—Atchison, T. & S. F. R. Co. v. U. S., supra.
39 C.J. p 64 note 67.

"End of the run"

In construing the term as applied to a train crew the court said: "It does not appear that the word 'terminal' has been judicially defined. According to the usage of railroad men in the United States . . . each train crew is assigned by the officers of the company to a definite, fixed run, beginning and ending at fixed points or places on its line of railroad; and, in my judgment, these fixed beginning and ending points of a given run for a given crew are the 'terminals' of that run within the meaning of the word 'terminal.' . . . In the usage of railroad men there are different 'runs' for different train crews, and also different runs for different employés on the same train, and the run of an engineer on a passenger train might be different from the run of a conductor or brakeman. There may be one run for a freight crew and another run for a passenger crew, and these runs may not be, and usually are not, coterminous, and one run or several runs for freight crews may lie between the terminals of the run of a single passenger crew, and each of these runs has its own terminals."—U. S. v. Atchison, T. & S. F. R. Co., D.C.Ariz., 212 F. 1,000, 1,007.

29. U.S.—U. S. v. Atlantic Coast Line R. Co., C.C.A.S.C., 153 F.2d 243—Baltimore & O. R. Co. v. U. S., Ohio, 243 F. 153, 156 C.C.A. 19—U. S. v. Atlantic Coast Line Co., D. C.N.C., 224 F. 160.

30. U.S.—U. S. v. Atlantic Coast Line R. Co., C.C.A.S.C., 153 F.2d 243.

Abnormal and unforseeable labor situation created by war may be an emergency.—U. S. v. Atlantic Coast Line R. Co., supra.

31. U.S.—U. S. v. Southern Pac. Co., Utah, 209 F. 562, 126 C.C.A. 384.
39 C.J. p 64 note 70.

32. U.S.—U. S. v. New York Cent. R. Co., D.C.Mass., 64 F.Supp. 499.
39 C.J. p 65 note 71.

33. U.S.—U. S. v. Missouri Pac. R. Co., Colo., 244 F. 38, 156 C.C.A. 466.
39 C.J. p 65 note 71.

Employer may not create emergency and claim protection under it.—U. S. v. Atlantic Coast Line R. Co., C.C.A.S.C., 153 F.2d 243.

34. U.S.—U. S. v. New York Cent. R. Co., D.C.Mass., 64 F.Supp. 499.
39 C.J. p 64 note 70 [d].

35. U.S.—U. S. v. Atlantic Coast Line R. Co., C.C.A.S.C., 153 F.2d 243.

36. U.S.—Missouri, K. & T. R. Co. v. U. S., Tex., 34 S.Ct. 26, 231 U. S. 112, 58 L.Ed. 144.

37. U.S.—U. S. v. Minneapolis & St. L. R. Co., D.C.Iowa, 236 F. 414, affirmed 245 F. 60, 157 C.C.A. 356, certiorari denied 38 S.Ct. 64, 245 U. S. 666, 62 L.Ed. 538.

tion of the act, but may be considered in mitigation of such penalties.[38]

In respect of reports. Where the pertinent statute is mandatory as to the carrier's liability in case of a failure to make reports of excessive hours of service, as required by an authorized order of the Interstate Commerce Commission, the court is without jurisdiction to consider matters in mitigation, in order to justify a reduction of the penalty in such a case.[39] However, it has also been held that a railroad company permitting operators to work a greater number of hours than prescribed by statute and failing to make a report is liable to but one penalty for each employee, and not a further sum per day for each of the days the reports have been in default where the omission was made in good faith.[40] An unintentional omission, in a report duly filed, of excessive hours of employment, has been held not to render the company subject to a penalty.[41]

b. Actions to Recover

An action to recover a penalty for violation of the Hours of Service Act is a civil action in which it is incumbent on the government to plead and establish facts showing prima facie a violation of the statute, and in which it rests on defendant to plead and prove facts excusing a violation. Questions of fact are for the jury to determine; but it is for the judge to determine the penalty to be imposed.

Actions to recover penalties for violations of the Hours of Service Act are civil actions.[42] The complaint need not negative all possible legal excuses.[43] The excuses for nonapplication of the law contained in the proviso of the act constitute separate and affirmative defenses which must be specially pleaded[44] and are not available under a general denial.[45]

Issues, proof, and variance. Where affirmative defenses are pleaded under the Hours of Service Act, the proof should bring the case clearly within the letter and spirit of the statutory proviso.[46] Evidence will be considered in defense of an action, although not pleaded, where it appears that by consent of court and counsel the case was tried as though the matters to which the evidence related were within the issues.[47] The negligence of defendant in not providing relief for the crew of a train delayed by an unavoidable accident is in issue, although not charged or pleaded.[48]

Evidence. The burden is on the government to establish the facts essential to recovery;[49] but, where the complaint alleges and the answer admits that defendant required or permitted its employees to remain on duty longer than the consecutive hours permitted by the statute, a prima facie case is established;[50] and, where it appears from the evidence that a train was away from its terminal on a regular trip, the delay constitutes a prima facie violation of the act.[51] The burden of proof is on defendant to show facts defeating liability within the proviso of the act relating to casualty and like matters.[52] To this end defendant has the burden of showing that the excess service was the necessary result of the cause claimed to justify it[53] and that the carrier exercised the requisite diligence to relieve the employees and prevent service on their part in excess of the statutory maximum.[54]

Evidence is admissible on the part of the government to show daily occurrence of accidents similar to those claimed by defendant to be unavoidable;[55] but evidence is inadmissible on the part of defendant to show what changes in methods, practices, and

38. U.S.—U. S. v. Illinois Cent. R. Co., D.C.Iowa, 234 F. 433, affirmed 241 F. 667, 154 C.C.A. 425, certiorari denied 37 S.Ct. 745, 244 U.S. 658, 61 L.Ed. 1375.

39. U.S.—U. S. v. Yazoo & M. V. R. Co., D.C.Tenn., 203 F. 159.

40. U.S.—U. S. v. Baltimore & O. R. Co., D.C.W.Va., 226 F. 220.

41. U.S.—Oregon-Washington R. & Nav. Co. v. U. S., Or., 222 F. 887, 138 C.C.A. 367.
39 C.J. p 63 note 59.

Penalty for perjury seems to be the direct and sufficient sanction relied on by the lawmakers to secure the correctness of the reports.—U. S. v. Northern R. Co., N.D., 37 S.Ct. 22, 242 U.S. 190, 61 L.Ed. 240.

42. U.S.—U. S. v. Great Northern R. Co., Wis., 220 F. 630, 136 C.C.A. 238.

43. U.S.—U. S. v. Great Northern R. Co., supra.
39 C.J. p 65 note 78.

44. U.S.—U. S. v. Geer, D.C.Pa., 268 F. 385, certificate dismissed 43 S. Ct. 165, 260 U.S. 756, 67 L.Ed. 498 —U. S. v. Kansas City Southern R. Co., Okl., 202 F. 828, 121 C.C.A. 136.

Sufficient answer

An answer alleging that delay was due to an unavoidable accident that could not have been foreseen states a good defense as against a demurrer.—U. S. v. Southern Pac. Co., Ariz., 220 F. 745, 136 C.C.A. 351.

45. U.S.—Great Northern R. Co. v. U. S., Minn., 218 F. 302, 134 C.C.A. 98, L.R.A.1915D 408.
39 C.J. p 65 note 80.

46. U.S.—U. S. v. Great Northern R. Co., Wis., 220 F. 630, 136 C.C.A. 238.

47. U.S.—U. S. v. Kansas City Southern R. Co., Okl., 202 F. 828, 121 C.C.A. 136.

48. U.S.—U. S. v. Colorado, W. & E. R. Co., C.C.A.Wyo., 292 F. 916.

49. U.S.—U. S. v. Kansas City Southern R. Co., Okl., 202 F. 828, 121 C.C.A. 136.

50. U.S.—U. S. v. Atchison, T. & S. F. R. Co., D.C. Ariz., 212 F. 1000.

51. U.S.—U. S. v. Marion & E. R. Co., D.C.Ill., 2 F.2d 782.

52. U.S.—U. S. v. Atchison, T. & S F. R. Co., D.C.Cal., 236 F. 154.
39 C.J. p 65 note 88.

53. U.S.—Atchison, T. & S. F. R. Co. v. U. S., Cal., 251 F. 261, 163 C.C.A. 417.

54. U.S.—Denver & R. G. R. Co. v. U. S., C.C.A.Colo., 270 F. 63.
39 C.J. p 65 note 89.

55. U.S.—U. S. v. Great Northern R. Co., Wis., 220 F. 630, 136 C.C.A. 238.

properties it had made to enable it, in the exercise of reasonable care, prudence, and foresight, to meet the new conditions created by the statute and to secure compliance therewith.[56]

Questions for jury. The jury are to determine what constitutes night operation,[57] and whether a delay was in fact unavoidable or could have been prevented by due care is a question for the jury,[58] as is the question whether, after an unavoidable accident, defendant used the degree of care required to avoid a violation of the act.[59] It is for the jury to determine whether releases of a train crew from duty were for such substantial and opportune periods of rest as to constitute interruption of their hours of service[60] or whether they were mere subterfuges resorted to in order to evade the act.[61] It is for the judge, and not the jury, to determine the penalty to be imposed for a violation of the act.[62]

Review. A carrier cannot urge on certiorari that a delay necessitating excessive hours was caused by an unavoidable casualty where the question was raised only by a request to direct a verdict for defendant.[63]

§ 24. Place for Work

Statutes requiring stairways, washrooms, ventilation, protection from inclement weather, or other things conducive to safe and healthful places of work for employees are generally upheld. Orders of public boards or commissions in this connection are also upheld when they are reasonable and within the authority conferred by law on such boards or commissions.

It is a proper and reasonable exercise of the police power to regulate the use and enjoyment of property for the protection of the health and safety of employees.[64] Thus a statute requiring the owners and operators of mines, mills, foundries, and other like places of employment to provide washrooms for their employees is constitutional,[65] and it is not an objection to the validity of such an act that it applies only to places where a certain number are employed[66] or that the act provides that the requirement shall become operative only on the request of a certain number of the employees.[67] So also a statute is constitutional which requires the ventilation of factories, workrooms, or other places of work,[68] vestibules for street railway employees,[69] or the furnishing of maps or plans for the working of mines;[70] but a statute requiring the manufacture, repair, or alteration of metals or merchandise by methods productive of poisonous or noxious fumes or dusts to be conducted in rooms lying wholly above the surface of the ground has been held unconstitutional.[71] In pursuance of its object to provide for the health and safety of employees, the legislature has the right to provide for the inspection of places of employment.[72]

An order of a state board, commission, or commissioner relative to a place for industrial work, such as an order relating to stairways, washrooms, or industrial homework, is valid when it is reasonable,[73] is within the authority conferred by a valid statute,[74] and is supported by the requisite finding

56. U.S.—Atchison, T. & S. F. R. Co. v. U. S., Cal., 251 F. 261, 163 C.C.A. 417

57. U.S.—U. S. v. Boston & M. R. Co., D.C.Mass., 265 F. 800, reversed on other grounds, C.C.A., 269 F. 89, certiorari denied 41 S.Ct. 448, 255 U.S. 577, 65 L.Ed. 794.

58. U.S.—U. S. v. Lehigh Valley R. Co., N.Y., 219 F. 532, 135 C.C.A. 282—U. S. v. Delaware, L. & W. R. Co., N.Y., 218 F. 608, 134 C.C.A. 366.

59. U.S.—Baltimore & O. R. Co. v. U. S., Ohio, 242 F. 1, 154 C.C.A. 593.

60. U.S.—Southern Pac. Co. v. U. S., Ariz., 222 F. 46, 137 C.C.A. 584.

61. U.S.—U. S. v. Missouri Pac. R. Co., D.C.Colo., 235 F. 944, affirmed 244 F. 38, 156 C.C.A. 466.

62. U.S.—Missouri, K. & T. R. Co. v. U. S., Tex., 34 S.Ct. 26, 231 U.S. 112, 58 L.Ed. 144.

63. U.S.—Missouri, K. & T. R. Co. v. U. S., supra.

64. U.S.—Chicago & N. W. R. Co. v. Railroad & Warehouse Commission of Minnesota, D.C.Minn., 280 F. 387.

12 C.J. p 926 note 74—39 C.J. p 66 note 1.

Proper scaffolding

Ky.—Jones v. Russell, 6 S.W.2d 460, 224 Ky. 390.

65. Ill.—People v. Cleveland, C., C. & St. L. R. Co., 123 N.E. 579, 288 Ill. 523.

39 C.J. p 66 notes 2, 3.

66. Okl.—Patterson v. State, 124 P. 942, 7 Okl.Cr. 497.

67. U.S.—Booth v. State of Indiana, Ind., 35 S.Ct. 617, 237 U.S. 391, 59 L.Ed. 1011.

39 C.J. p 67 note 5.

68. U.S.—Michalek v. U. S. Gypsum Co., D.C.N.Y., 16 F.Supp. 708.

Colo.—Dalrymple v. Sevcik, 251 P. 134, 80 Colo. 297.

Ill.—Parks v. Libbey-Owens-Ford Glass Co., 195 N.E. 616, 360 Ill. 130.

Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259, 216 Ind. 180—Dean v. Dalton Foundries, 34 N.E.2d 145, 109 Ind.App. 377.

Tenn.—Holliston Mills of Tennessee v. McGuffin, 145 S.W.2d 1, 177 Tenn. 1, rehearing denied 146 S.W. 2d 357, 177 Tenn. 1.

39 C.J. p 67 note 6.

69. Minn.—State v. Smith, 59 N.W. 545, 58 Minn. 35, 25 L.R.A. 759.

39 C.J. p 67 note 7.

70. Ill.—Daniels v. Hilgard, 77 Ill. 640.

71. Ill.—Agnew v. Woodruff & Edwards, 6 N.E.2d 623, 365 Ill. 384.

Statutes void for uncertainty and indefiniteness in defining offense see Criminal Law § 24 a.

72. Tenn.—Athens Hosiery Mills v. Thomason, 231 S.W. 904, 144 Tenn. 159.

39 C.J. p 67 note 9.

73. Ill.—Chicago, B. & Q. R. Co. v. Illinois Commerce Commission ex rel. Brotherhood of Railroad Trainmen, 4 N.E.2d 96, 364 Ill. 213.

N.Y.—First American Natural Ferns Co. v. Picard, 23 N.Y.S.2d 39, 175 Misc. 280—Dote v. Department of Labor of State of New York, 18 N.Y.S.2d 557, 173 Misc. 652.

74. Ill.—Brotherhood of Railroad Trainmen v. Elgin, J. & E. Ry. Co., 46 N.E.2d 932, 382 Ill. 55—Chicago, B. & Q. R. Co. v. Illinois Commerce

of facts,[75] even though there is an inadvertent misnomer in the order[76] or the commission did not require a city to be made a party to the proceedings.[77] The order must be definite[78] and sustained by the findings.[79]

Construction, application, and enforcement. The purpose and intent of such statutes are given due consideration by the courts;[80] and a person may be convicted on sufficient evidence of his violation of a statute;[81] but the statute, or a regulation adopted thereunder, will not be accorded effect where it is not applicable;[82] and a person may not be convicted of violating the statute where such statute, although imposing a requirement, does not impose the duty of complying therewith on such person[83] or where the evidence is insufficient to sustain a conviction.[84]

Effect on civil liability. A statute requiring the employer to furnish lockers and washrooms for the convenience of the employees does not relieve the employer from civil liability for the value of wearing apparel, deposited in such lockers and destroyed by fire through the negligence of the employer, where the employees are free from contributory negligence proximately causing the damage.[85] Liability of the master for personal injuries to servant is discussed infra § 171.

§ 25. Machinery, Appliances, and Safeguards

A master's duty to exercise reasonable care to provide his servant with reasonably safe instrumentalities and safeguards against personal injuries is a proper subject of statutory regulation; and, within the scope of the authority conferred on it by statute, a state department may make a reasonable order, rule, or regulation requiring certain safeguards for workers.

The legislature may regulate a master's duty to exercise reasonable care to provide his servant with reasonably safe instrumentalities and safeguards or

Commission ex rel. Brotherhood of Railroad Trainmen, 4 N.E.2d 96, 364 Ill. 213.

Presidential order, modifying codes of fair competition prohibiting homework so as to permit persons physically incapacitated for factory work or unable to leave home for stated reasons to engage in home work after obtaining certificate from state authority, was held to permit issuance of home-work licenses in embroidery industry under state Labor Law.—Sabatini v. Andrews, 276 N.Y.S. 502, 243 App.Div. 109.

Industrial homework

The statute relating to powers of industrial commissioner with regard to permitting industrial homework is valid exercise of police power of legislature and does not violate property rights guaranteed by the state and federal constitutions.—First American Natural Ferns Co. v. Picard, 23 N.Y.S.2d 39, 175 Misc. 280—Dote v. Department of Labor of State of New York, 18 N.Y.S.2d 557, 173 Misc. 652.

75. Ill.—Chicago, B. & Q. R. Co. v. Illinois Commerce Commission ex rel. Brotherhood of Railroad Trainmen, 4 N.E.2d 96, 364 Ill. 213.

76. Ill.—Chicago, B. & Q. R. Co. v. Illinois Commerce Commission ex rel. Brotherhood of Railroad Trainmen, supra.

77. Ill.—Chicago, B. & Q. R. Co. v. Illinois Commerce Commission ex rel. Brotherhood of Railroad Trainmen, supra.

78. Ill.—Brotherhood of Locomotive Firemen and Enginemen v. New York Cent. R. Co., 171 N.E. 148, 339 Ill. 201.

79. Ill.—Brotherhood of Locomotive Firemen and Enginemen v. New York Cent. R. Co., supra.

Procedure where issues determined in prior proceeding

The board may, under a statute, confirm a previous determination without a hearing if issues raised have been determined in the prior proceeding; but the court will send the matter back to the board for a hearing on request of workmen who are attacking the order, where prior proceeding was one brought by employers instead of workmen, and a federal statute created new conditions in the industry, which did not exist at time of promulgation of order or at time of determination of prior proceeding.—Dote v. Department of Labor of State of New York, 18 N.Y.S.2d 557, 173 Misc. 652.

80. N.Y.—Mortimer v. Natapow, 14 N.Y.S.2d 971.

Elevators

The entire chapter of labor code with respect to elevators was designed to prevent unnecessary occupational hazards.—Bateman v. Doughnut Corporation of America, 147 P.2d 404, 63 Cal.App.2d 711.

Industrial homework

The purpose of statute delegating powers to industrial commissioner with respect to permitting industrial homework is to effect the gradual elimination of industrial homework; and it is intended to cover adult males as well as women and minors.—First American Natural Ferns Co. v. Picard, 23 N.Y.S.2d 39, 175 Misc. 280.

81. Ky.—Bailey v. Commonwealth, 30 S.W.2d 879, 235 Ky. 173.

Puerto Rico.—People v. Garcia, 28 Puerto Rico 660.

Jury may consider, in prosecution for failure to provide suitable toilet facilities for female employees, fact that other toilets were available in other buildings.—Bailey v. Commonwealth, 30 S.W.2d 879, 235 Ky. 173.

82. Ill.—People v. Cleveland, C., C. & St. L. R. Co., 123 N.E. 579, 288 Ill. 523.

N.Y.—Metildi v. State, 52 N.Y.S.2d 333.

39 C.J. p 66 note 3 [a]–[b].

Elevators

(1) Rules made by industrial board governing installation and maintenance of elevators and similar equipment had no application to installation and maintenance of elevator in hotel building in which two stores and a restaurant were located, since building was neither a factory nor a mercantile establishment within meaning of the statute.—Mortimer v. Natapow, 14 N.Y.S.2d 971.

(2) Statute requiring employers of females as clerks, helpers, etc., to provide suitable seats, does not apply to employment of elevator operators.—People v. Wells, 227 N.W. 696, 248 Mich. 579.

Exception of light repairs

"Light repairs," as used in a statutory exception of light repairs to railroad cars, have been defined in the statute itself as being such repairs as can be made to cars in the switching yard in thirty minutes or less, or which may be made in less time than would be required to switch such car or cars to the repair building.—Wabash R. Co. v. O'Bryan, D.C.Mo., 285 F. 583—37 C.J. p 659 note 21.

83. Ind.—Colvin v. State, 180 N.E. 479, 203 Ind. 417.

84. N.Y.—People v. Borden, 39 N.Y.S.2d 679, 265 App.Div. 1066.

85. Okl.—Prince v. King Coal Co., 198 P. 293, 8[illegible]

protective devices against personal injuries or occupational diseases.[86] So also an order, rule, or regulation of a state department treating certain places of employment as factories,[87] and requiring certain safeguards for workers therein,[88] may be within the power of the department to make; but the court is authorized to determine the reasonableness and validity of the rule or order[89] and will hold it invalid when it is unreasonable.[90]

A statute of this character is designed to protect persons laboring in manufacturing establishments while in the performance of any duty, whether ordinary or exceptional and occasional.[91] Under a federal statute, and rules and regulations promulgated thereunder, each use of a locomotive after the time for inspection has passed without any inspection having been made is a separate offense for which a penalty attaches.[92]

§ 26. Employment Agencies

When not transcending constitutional limitations, a state statute regulating private employment agencies is valid as an exercise of the police power, and must be complied with in cases within its application; but a commissioner administering the law must not exceed his statutory powers.

When kept within constitutional limitations,[93] a state statute regulating private employment agencies may be upheld as an exercise of the police power.[94] However, since the conduct of an employment agency is a lawful business[95] not inherently dangerous to the public health, safety, morals, or welfare,[96] the legislation may not be prohibitory, rather than regulatory, as by denying the right to charge a fee for services in securing employment.[97] While some statutes regulating the fees chargeable by employment agencies have been held invalid,[98] especially where the maximum fees prescribed are so unreasonably low as to make the statute prohibitory or confiscatory,[99] other statutes have been held not invalid.[1]

A valid statute regulating employment agencies must be complied with[2] unless it is not applica-

86. Mo.—Boll v. Condie-Bray Glass & Paint Co., 11 S.W.2d 48, 321 Mo. 92.
39 C.J. p 67 note 11.

87. N.Y.—Red Hook Cold Storage Co. v. Department of Labor, 64 N.E.2d 265, 295 N.Y. 1.
Cold storage warehouses, in which apples are graded by sizing machines, boxed, and shipped or stored in cold rooms, are properly treated as factories by the department.—Red Hook Cold Storage Co. v. Department of Labor, supra.

88. N.Y.—Red Hook Cold Storage Co. v. Department of Labor, supra.
Ohio.—McKee v. New Idea, App., 44 N.E.2d 697.

89. N.Y.—Russell v. Department of Labor of New York, 237 N.Y.S. 263, 135 Misc. 199.

90. N.Y.—Russell v. Department of Labor of New York, supra.

91. Kan.—Caspar v. Lewin, 109 P. 657, 82 Kan. 604, 83 Kan. 799, 49 L.R.A.,N.S., 526, 544.
39 C.J. p 65 note 76 [b].

92. U.S.—U. S. v. Southern R. Co., D.C.Tenn., 1 F.2d 487.
39 C.J. p 65 note 76 [a].

93. U.S.—Hanley v. Moody, D.C. Tex., 39 F.2d 198.
Ariz.—McManus v. Industrial Commission, 85 P.2d 54, 53 Ariz. 22.
Cal.—Collier & Wallis v. Astor, 70 P.2d 171, 9 Cal.2d 202.
Ill.—People v. Redfield, 10 N.E.2d 341, 366 Ill. 562.
Minn.—Engberg v. Debel, 260 N.W. 626, 194 Minn. 394.
N.Y.—Austin v. National Employment Exchange, 266 N.Y.S. 306, 148 Misc. 715.
39 C.J. p 68 note 14.
Employees to replace workmen on strike
Legislation tending to fetter the right of an agency to furnish lists of possible employees to an employer whose workmen have gone out on strike has been held invalid.—Mathews v. People, 67 N.E. 28, 202 Ill. 389, 95 Am.S.R. 241, 63 L.R.A. 73.

94. U.S.—Hanley v. Moody, D.C. Tex., 39 F.2d 198.
Cal.—Collier & Wallis v. Astor, 70 P.2d 171, 9 Cal.2d 202.
N.Y.—Goodman v. Moss, 43 N.Y.S.2d 381, affirmed in part and reversed in part on other grounds 56 N.Y.S. 2d 534, 269 App.Div. 839.
12 C.J. p 924 note 88—39 C.J. p 68 note 14.
Employment agencies as subject to license see Licenses § 30.
Reasonable legislation
(1) Business of employment agency is subject to reasonable regulation.—Austin v. National Employment Exchange, 266 N.Y.S. 306, 148 Misc. 715.
(2) Fact that some few employment agencies having little need of regulation might suffer loss through statutory regulation does not invalidate provisions generally reasonable. —National Employment Exchange v. Geraghty, C.C.A.N.Y., 60 F.2d 918.
(3) Reasonable standards for the operation of a private employment agency may be prescribed by the legislature.—Boomer v. Olsen, 10 N.W.2d 507, 143 Neb. 579.

95. Ill.—People v. Redfield, 10 N.E. 2d 341, 366 Ill. 562.
Neb.—Boomer v. Olsen, 10 N.W.2d 507, 143 Neb. 579.

96. Ill.—People v. Redfield, 10 N.E. 2d 341, 366 Ill. 562.

97. U.S.—Hanley v. Moody, D.C. Tex., 39 F.2d 198.
39 C.J. p 68 note 15.

98. Ark.—Alsup v. State, 10 S.W.2d 9, 178 Ark. 170.
Neb.—Boomer v. Olsen, 10 N.W.2d 507, 143 Neb. 579.
Tex.—Karr v. State, 54 S.W.2d 92, 122 Tex.Cr. 88.

99. Neb.—Boomer v. Olsen, 10 N.W. 2d 507, 143 Neb. 579.

1. U.S.—Olsen v. State of Nebraska ex rel. Western Reference & Bond Ass'n, Neb., 61 S.Ct. 862, 313 U.S. 236, 85 L.Ed. 1305, 133 A.L.R. 1500, overruling Ribnik v. McBride, N. J., 48 S.Ct. 545, 277 U.S. 350, 72 L. Ed. 913, 56 A.L.R. 1327.
N.Y.—Faingnaert v. Moss, 64 N.E.2d 337, 295 N.Y. 18—Abbye Employment Agency v. Robinson, 2 N.Y.S. 2d 947, 166 Misc. 820.
Validity under due process clause of regulations of employment agencies' fees see Constitutional Law § 690.

2. D.C.—Janof v. Newsom, 53 F.2d 149, 60 App.D.C. 291.
N.Y.—Corporate Employment Service v. Moss, 31 N.Y.S.2d 134, 263 App. Div. 14, affirmed 40 N.E.2d 653, 287 N.Y. 794, motion denied 42 N.E.2d 28, 288 N.Y. 584—Austin v. National Employment Exchange, 266 N.Y.S. 306, 148 Misc. 715.
Action for commissions under contract may not be maintained by an

ble[3] or a particular employment bureau is within an express exemption.[4] A penal provision of the statute will be strictly construed in favor of employment agencies until such time as the legislature clearly makes a contrary direction;[5] but in equity a theatrical employment agent will not be permitted to assert his noncompliance with the statute in order to avoid payment of a commission to a talent scout and thereby unjustly enrich himself.[6] A statutory definition of "employment agency" or "employment agent" will be accorded effect;[7] but the true import of such definition must be sought in the light of the statute taken as a whole.[8] An "employment agency" has been judicially defined as one for the brokerage of labor for a fee paid by the applicant for employment or by the prospective employer.[9] In the absence of restrictive words, any definition of the term includes the employment of laborers to work for another either in or beyond the state.[10]

The acts of a commissioner in administering the law will be upheld where they are within his statutory powers,[11] but not where they are in excess of such powers,[12] as where he in effect assumes the power to declare legislative policy and create standards.[13]

§ 27. Coercion

Some statutes prohibit employers from coercing employees with respect to matters specified therein.

In several jurisdictions statutes have been enacted prohibiting employers from coercing employees with respect to matters specified therein,[14] as in the case of statutes making it an offense to compel or coerce any employee to purchase goods or supplies from any particular person, firm, company, or corporation,[15] or prohibiting employers from attempting to prevent any employee from voluntarily furnishing information concerning an accident to an employee of a common carrier.[16]

Under some statutes, except as otherwise provided by law, no person, as a condition of securing employment or of continuing employment, may be required to be fingerprinted.[17] It has been held that the exception in the provision includes not only state statutes, but also local laws, municipal ordinances and regulations, and rules promulgated within the authority granted to officials.[18]

Under statutory provisions requiring the cash payment of wages, an employee is not entitled to recover money paid on account of stock subscriptions induced by the employer's threat to discharge the employee if he did not subscribe and by implication that if the employee subscribed he would be permitted to continue employment indefinitely, where the contract, although made at the instance of the employer, was not with the employer and the sellers of the stock were not joined in the action as par-

employment agency without referring controversy to commissioner of labor and securing determination of controversy by commissioner, as required by statute.—Collier & Wallis v. Astor, 70 P.2d 171, 9 Cal.2d 702—Abraham Lehr, Inc., v. Cortez, 135 P.2d 684, 57 Cal.App.2d 973.

Liability for injury from noncompliance

Employment agent is liable for injury resulting from failure to do, or make reasonable good faith effort to do, things required by statute.—Janof v. Newsom, 53 F.2d 149, 60 App.D.C. 291.

Employee may recover back illegal fee exacted by an employment agency.—Executive Service Corporation v. Moss, 100 N.Y.S.2d 103, 256 App. Div. 345.

Evidence held insufficient to show noncompliance

Cal.—Haldor, Inc., v. Beebe, 164 P. 2d 568, 72 Cal.App.2d 357.

3. Cal.—Abraham Lehr, Inc., v. Cortez, 135 P.2d 684, 57 Cal.App.2d 973—Warner v. Marchetti, 125 P. 2d 838, 52 Cal.App.2d 172.

4. Iowa.—Employment Bureau of Des Moines v. State Employment Agency Commission, 229 N.W. 677, 209 Iowa 1046.

5. N.Y.—Faingnaert v. Moss, 64 N. E.2d 337, 295 N.Y. 18.

6. Cal.—Warner v. Marchetti, 125 P. 2d 838, 52 Cal.App.2d 172.

7. N.Y.—Austin v. National Employment Exchange, 266 N.Y.S. 306, 148 Misc. 715.

20 C.J. p 1246 note 81.

8. Pa.—In re Employment Agencies, 29 Pa.Dist. 9.

9. Tenn.—McMillan v. City of Knoxville, 202 S.W. 65, 139 Tenn. 319.

10. Tenn.—McMillan v. City of Knoxville, supra.

11. N.Y.—Wilman v. Miller, 35 N.Y. S.2d 352, 178 Misc. 549, affirmed In re Wilman Agency, 36 N.Y.S.2d 187, 264 App.Div. 850.

12. N.Y.—Executive Service Corporation v. Moss, 10 N.Y.S.2d 103, 256 App.Div. 345.

13. N.Y.—Goodman v. Moss, 43 N.Y. S.2d 381, affirmed in part and reversed in part on other grounds 56 N.Y.S.2d 534, 269 App.Div. 839.

14. Ariz.—Vaughn v. State, 282 P. 277, 36 Ariz. 32.

Cal.—Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, 171 P.2d 21, 28 Cal.2d 481.

15. Ariz.—Vaughn v. State, 282 P. 277, 36 Ariz. 32.

Evidence held not to sustain conviction

Ariz.—Vaughn v. State, supra.

Company store

Statute prohibiting employers from requiring employees to trade at company store was not intended to protect merchants in competition with employer for trade of employees.—Hackney v. Fordson Coal Co., 19 S.W.2d 989, 230 Ky. 362.

16. U.S.—Dugger v. Baltimore & O. R. Co., D.C.N.Y., 5 F.R.D. 334.

Purpose of statute is to enable injured employee readily to obtain all available information from witnesses, particularly employees of carrier. —Dugger v. Baltimore & O. R. Co., supra.

17. N.Y.—Friedman v. Valentine, 30 N.Y.S.2d 891, 177 Misc. 437, affirmed 42 N.Y.S.2d 593, 266 App. Div. 561.

Purpose of provision was to prevent private employers from using fingerprinting as a means for blacklisting union leaders and members.—Friedman v. Valentine, supra.

18. N.Y.—Friedman v. Valentine, supra

ties defendant.[19] Moreover, recovery may not be had against the employer on the theory of duress and fraud in the absence of a showing of damage.[20]

Political affiliations and activities. Under some statutes an employer may not forbid or prevent employees from engaging or participating in politics or from becoming candidates for public office, or control or direct the political activities or affiliations of employees.[21] The test of "political activities or affiliations" within such a statute is not membership in, or activities connected with, any particular group or organization, but whether such activities are related to, or connected with, the orderly conduct of government and the peaceful organization, regulation, and administration of government,[22] and the statute does not protect any individual or group advocating the overthrow of government by force or violence.[23]

C. EMPLOYEE ORGANIZATIONS; DISCRIMINATORY PRACTICES; DETERMINATION OF DISPUTES

1. In General

§ 28(1). In General

The public policy is to secure the peaceful settlement of controversies between employer and employees.

The peaceful settlement of controversies between employer and employees is generally a matter of public concern,[24] and the public policy is to foster industrial peace by encouraging collective bargaining between employer and employees and by securing the settlement of labor disputes by conciliation, mediation, and arbitration.[25]

§ 28(2). Constitutional and Statutory Provisions

a. In general
b. National Labor Relations Act
c. Railway Labor Act
d. State constitutional and statutory provisions

a. In General

Numerous legislative enactments have dealt with the relations of employer and employee and have sought to forestall and adjust differences between them.

Numerous legislative enactments have dealt with the relations of employer and employees and have sought to forestall and adjust differences between them by the encouragement of collective bargaining, and the settlement of labor disputes through conciliation, mediation, and arbitration.[26] Such statutes govern the rights and duties of employers and employees subject to their provisions.[27]

b. National Labor Relations Act

The National Labor Relations Act generally provides

19. N.Y.—Caesar v. H. S. Chardavoyne, Inc., 280 N.Y.S. 273, 245 App.Div. 724.

20. N.Y.—Caesar v. H. S. Chardavoyne, Inc., supra.

21. Cal.—Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, 171 P.2d 21, 28 Cal.2d 481.

Statutes held valid

U.S.—Santiago v. People of Puerto Rico, C.C.A.Puerto Rico, 154 F.2d 811.

Cal.—Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, 171 P.2d 21, 28 Cal.2d 481.

Damages

Where laborer was allegedly discharged because of refusal to vote for certain candidate, but had never been employed for definite time, corporate employer and manager were held not liable in damages, notwithstanding statute subjecting an officer or agent of corporation to imprisonment on conviction of coercing or intimidating employee to vote for any candidate.—Bell v. Faulkner, Mo. App., 75 S.W.2d 612.

Discharge

(1) The act of an employer in discharging day laborer on plantation or in refusing to give him further employment because of his political affiliation is an act of "prejudicial discrimination" within statute prohibiting such discrimination against employees.—Santiago v. People of Puerto Rico, C.C.A.Puerto Rico, 154 F.2d 811.

(2) In prosecution for violation of statute, evidence justified finding that workman was discharged because of affiliation with a certain political party and that defendant, who was overseer of plantation, was an "employer" within the act.—Santiago v. People of Puerto Rico, supra.

22. Cal.—Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, 171 P.2d 21, 28 Cal.2d 481.

Words "politics" and "political" in statute imply orderly conduct of government and not revolution.—Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, supra.

23. Cal.—Lockheed Aircraft Corp. v. Superior Court of Los Angeles County, supra.

24. U.S.—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S. Ct. 592, 300 U.S. 515, 81 L.Ed. 789.

Threats, force, or intimidation

Neither employer nor employee may use threats, force, or intimidation in bringing their side of wage controversy before public, or urge or advertise it by false statements, insulting language, or other means calculated to become nuisance, obstruct traffic, or impede orderly course of business or other relations. —Paramount Enterprises v. Mitchell, 140 So. 328, 104 Fla. 407.

25. U.S.—Adams v. Union Dime Sav. Bank, D.C.N.Y., 48 F.Supp. 1022.

26. U.S.—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789—Adams v. Union Dime Sav. Bank, D.C.N.Y., 48 F.Supp. 1022.

27. U.S.—Gatliff Coal Co. v. Cox, C. C.A.Ky., 152 F.2d 52.

for the regulation of practices occurring in relations between employer and employees which provoke or tend to provoke labor disturbances affecting interstate commerce.

The National Labor Relations Act, 29 U.S.C.A. § 151 et seq, generally provides for the regulation of practices occurring in relations between employer and employees which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce,[28] and establishes a single tribunal, the National Labor Relations Board, to administer the provisions of the statute, with adequate and exclusive opportunity for judicial review in a designated court.[29] The basic purpose of the statute is to protect interstate commerce from the adverse effects of labor disputes and to prevent obstructions to the free flow of such commerce arising from industrial unrest.[30] The intent is to forestall possible labor strife with its harmful repercussions on the employer, employee, and the general public,[31] and to promote the peaceful settlement of disputes between employers and employees,[32] by securing to employees the right to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes,[33] free of domination or influ-

28. U.S.—N. L. R. B. v. Fainblatt, 59 S.Ct. 668, 306 U.S. 601, 307 U. S. 609, 83 L.Ed. 1014—Consolidated Edison Co. of New York v. N. L. R. B., C.C.A.2, 95 F.2d 390, modified on other grounds Consolidated Edison Co. of New York v. N. L. R. B., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

Intra-state commerce not regulated

Purpose of statute was to prevent unfair labor practices in interstate commerce on part of those engaged in such commerce, and not to interfere in field of intra-state commerce. —Foster Bros. Mfg. Co. v. N. L. R. B., C.C.A.Md., 85 F.2d 98, rehearing denied 90 F.2d 948.

29. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corp., 57 S.Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352.

N.J.—Keller v. American Cyanamid Co., 28 A.2d 41, 132 N.J.Eq. 210.

Decision as to bargaining agent

One of the purposes of the act is to afford a public tribunal in which a prompt decision will be given to determine with whom the employer shall bargain.—International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers v. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, C.C.A.Cal., 106 F.2d 871.

30. U.S.—Polish Nat. Alliance of U. S. v. N. L. R. B., 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509—N. L. R. B. v. Bradford Dyeing Ass'n, 60 S.Ct. 918, 310 U.S. 318, 84 L.Ed. 1226—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S 240, 83 L.Ed. 627, 123 A.L.R. 599—Consolidated Edison Co. of N. Y. v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. Edinburg Citrus Ass'n, C.C.A.5, 147 F.2d 353—N. L. R. B. v. Jones & Laughlin Steel Corp., C.C.A.6, 146 F.2d 718, vacated on other grounds 65 S.Ct. 1413, 325 U.S. 838, 89 L.Ed. 1965, rehearing denied 66 S.Ct. 13, 326 U.S. 804, 90 L.Ed. 490—Federal Motor Truck Co., C.C.A.6, 146 F.2d 718, vacated on other grounds 65 S.Ct. 1412, 325 U.S. 838, 89 L.Ed. 1965—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F.2d 44, certiorari denied 65 S.Ct. 1025, 324 U.S. 877, 89 L.Ed. 1429—Stewart Die Casting Corporation v. N. L. R. B., C.C.A., 132 F.2d 801—N. L. R. B. v. Knoxville Pub. Co., C.C.A. 6, 124 F.2d 875—N. L. R. B. v. Henry Levaur, Inc., C.C.A.1, 115 F.2d 105, certiorari denied Henry Levaur, Inc. v. N. L. R. B., 61 S. Ct. 550, 312 U.S. 682, 85 L.Ed. 1120—N. L. R. B. v. Waumbec Mills, C.C.A.1, 114 F.2d 226—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—N. L. R. B. v. Carlisle Lumber Co., C.C. A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045—Black Diamond S. S. Corporation v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S. Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542—St. Clair v. Russell & Pugh Lumber Co., D.C.Idaho, 51 F.Supp. 47—Bemis Bro. Bag Co. v. Feidelson, D.C.Tenn., 13 F.Supp. 153.

Wis.—Wisconsin Employment Relations Board v. Allis-Chalmers Workers' Union, Local 248, 25 N. W.2d 425, 249 Wis. 590.

31. U.S.—N. L. R. B. v. Armour & Co., C.C.A.10, 154 F.2d 570, certiorari denied 67 S.Ct. 92, 329 U.S. 732, 91 L.Ed. —— —N. L. R. B. v. Barrett Co., C.C.A.Ill., 120 F.2d 583—N. L. R. B. v. Prettyman, C.C.A. 6, 117 F.2d 786—N. L. R. B. v. Alloy Cast Steel Co., C.C.A., 117 F. 2d 302—St. Clair v. Russell & Pugh Lumber Co., D.C.Idaho, 51 F. Supp. 47.

32. U.S.—N. L. R. B. v. Fainblatt, 59 S.Ct. 668, 306 U.S. 601, 307 U.S. 609, 83 L.Ed. 1014—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. Armour & Co., C.C.A.10, 154 F.2d 570, certiorari denied 67 S. Ct. 92, 329 U.S. 732, 91 L.Ed. —— —N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39—N. L. R. B. v. Indiana & Michigan Electric Co., C.C.A.6, 124 F.2d 50, affirmed 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579—N. L. R. B. v. Electric Vacuum Cleaner Co., C.C.A.6, 120 F.2d 611, reversed on other grounds 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L. Ed. 1775—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786—N. L. R. B. v. Whittier Mills Co., C.C.A. 5, 111 F.2d 474—Swift & Co. v. N. L. R. B., C.C.A.10, 106 F.2d 87—N. L. R. B. v. Colten, C.C.A.6, 105 F.2d 179—Agwilines, Inc., v. N. L. R. B., C.C.A.5, 87 F.2d 146.

Brute force

The primary purpose of the act is to obviate appeals to brute force which often accompany labor disputes.—N. L. R. B. v. Delaware-New Jersey Ferry Co., C.C.A.3, 90 F.2d 520, certiorari denied 58 S.Ct. 141, 302 U.S. 738, 82 L.Ed. 571.

33. U.S.—Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, N.Y., 65 S.Ct. 1533, 325 U.S. 797, 89 L.Ed. 1939, rehearing denied 66 S.Ct. 11, 326 U.S. 803, 90 L.Ed. 489—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S. Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—N. L. R. B. v. Scullin Steel Co., C.C.A.8, 161 F.2d 143—N. L. R. B. v. Norfolk Southern Bus Corp., C.C.A.4, 159 F.2d 516—N. L. R. B. v. Inter-City Advertising Co., C.C.A.4, 154 F.2d 244—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F.2d 44, certiorari denied 65 S.Ct. 1025, 324 U.S. 877, 89 L.Ed. 1429—N. L. R. B. v. Draper Corporation, C.C.A.4, 145 F.

ence by the employer or others.[34] The statute is not calculated to force adjustments of disputes, and each party to a labor controversy is left to use its own economic strength in all lawful ways to promote its advantage.[35] However, a necessary hostility between employers and employees is not contemplated.[36]

It has been held that the purpose of the statute is to protect the rights of employees generally,[37] but under the Labor Management Relations Act of 1947, which amended the National Labor Relations Act, the declared purpose is also to protect the legitimate rights of employers with relation to employees. The intention of the National Labor Relations Act is to accord employees full freedom to belong or not to belong to a labor union,[38] but it does not compel an employer to hire members of one union rather than another union, or union men rather than nonunion men.[39] The statute does not guarantee to employees the right to do as they please[40] or grant a blanket immunity to employees from the consequences of illegal acts and breaches of contract just because they were committed in the course of a labor dispute, no matter how helpful they might be to their cause.[41]

2d 199, 156 A.L.R. 989—N. L. R. B. v. Century Oxford Mfg. Corporation, C.C.A.2, 140 F.2d 541, certiorari denied 65 S.Ct. 40, 323 U.S. 714, 89 L.Ed. 574—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15—N. L. R. B. v. Montgomery Ward & Co., C.C.A. 9, 133 F.2d 676, 146 A.L.R. 1045—N. L. R. B. v. Thompson Products, C.C.A.6, 130 F.2d 363—N. L. R. B. v. Baldwin Locomotive Works, C. C.A.3, 128 F.2d 39—N. L. R. B. v. Hollywood-Maxwell Co., C.C.A.9, 126 F.2d 815—N. L. R. B. v. Knoxville Pub. Co., C.C.A.6, 124 F.2d 875 —North Electric Mfg. Co. v. N. L. R. B., C.C.A.6, 123 F.2d 887, certiorari denied 62 S.Ct. 906, 315 U.S. 818, 86 L.Ed. 1215—N. L. R. B. v. W. A. Jones Foundry & Machine Co., C.C.A.7, 123 F.2d 552—N. L. R. B. v. Newark Morning Ledger Co., C.C.A.3, 120 F.2d 262, 137 A.L.R. 849, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 314 U.S. 693, 86 L.Ed. 554—N. L. R. B. v. Ferguson, C.C. A.9, 118 F.2d 892, followed in N. L. R. B. v. Miller, 118 F.2d 893—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—N. L. R. B. v. Ed. Friedrich, Inc., C.C.A.5, 116 F.2d 888 —Valley Mould & Iron Corporation v. N. L. R. B., C.C.A.7, 116 F.2d 760, certiorari denied 61 S.Ct. 1114, 313 U.S. 590, 85 L.Ed. 1545—N. L. R. B. v. Automotive Maintenance Machinery Co., C.C.A.7, 116 F.2d 350, reversed on other grounds 62 S.Ct. 608, 315 U.S. 282, 86 L.Ed. 848—Wilson & Co. v. N. L. R. B., C.C.A. 8, 115 F.2d 759—Art Metals Const. Co. v. N. L. R. B., C.C.A.2, 110 F. 2d 148—N. L. R. B. v. Piqua Munising Wood Products Co., C.C.A.6, 109 F.2d 552—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F. 2d 992—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713—Hamilton-Brown Shoe Co. v. N. L. R. B., C.C.A.8, 104 F.2d 49—Peninsular & Occidental S. S. Co. v. N. L. R. B., C.C.A.5, 98 F.2d 411, certiorari denied N. L. R. B. v. Peninsular & Occidental S. S. Co., 59 S.Ct. 248, 305 U.S. 653, 83 L.Ed. 423—St. Clair v. Russell & Pugh Lumber Co., D.C.Idaho, 51 F.Supp. 47—Oberman & Co. v. United Garment Workers of America, D.C.Mo., 21 F.Supp. 20.

Mass.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.

Compulsion on employers

The purpose of the act was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made.—N. L. R. B. v. Sands Mfg. Co., 59 S. Ct. 508, 306 U.S. 332, 83 L.Ed. 682.

34. U.S.—Republic Aviation Corp. v. N. L. R. B., 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081 —N. L. R. B. v. Le Tourneau Co. of Ga., 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081, rehearing denied 65 S.Ct. 1401, 325 U.S. 894, 89 L.Ed. 2005—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—N. L. R. B. v. American Car & Foundry Co., C.C.A.7, 161 F. 2d 501—N. L. R. B. v. American Creosoting Co., C.C.A.6, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U.S. 797, 88 L.Ed. 1086—N. L. R. B. v. Security Warehouse & Cold Storage Co., C.C.A.9, 136 F.2d 829 —De Bardeleben v. N. L. R. B., C. C.A.5, 135 F.2d 13—N. L. R. B. v. P. Lorillard Co., C.C.A.6, 117 F.2d 921, reversed on other grounds 62 S.Ct. 397, 314 U.S. 512, 86 L.Ed. 380 —Virginia Ferry Corporation v. N. L. R. B., C.C.A.4, 101 F.2d 103—International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America v. California State Brewers' Institute, D. C.Cal., 25 F.Supp. 870, reversed on other grounds, C.C.A., International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers v. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, 106 F. 2d 871.

Freedom from pressure

The purpose of the act is to protect the workmen from employer pressure and leave them free to choose associates.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S. Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

35. U.S.—Black Diamond S. S. Corporation v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S.Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542.

N.Y.—Barfield v. Standard Oil Co. of New Jersey, 14 N.Y.S.2d 627, 172 Misc. 95.

36. U.S.—International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers v. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, C.C.A.Cal., 106 F.2d 871.

Understanding and trust

The act does not require that there be no mutual understanding and trust between employer and employee.—N. L. R. B. v. Duncan Foundry & Machine Works, C.C.A.7, 142 F.2d 594.

37. U.S.—N. L. R. B. v. Federal Engineering Co., C.C.A.6, 155 F.2d 17.

New rights

The act was designed to give new rights to employees, not to abolish old ones open to every litigant.—Coldiron v. Good Coal Co., 125 S.W. 2d 757, 276 Ky. 833.

Primary benefit

The act was adopted for primary benefit of employees as distinguished from primary benefit to labor unions. —N. L. R. B. v. Schwartz, C.C.A.5, 146 F.2d 773.

38. U.S.—American Federation of Labor v. Watson, D.C.Fla., 60 F. Supp. 1010, reversed on other grounds 66 S.Ct. 761, 327 U.S. 582, 90 L.Ed. 873.

39. U.S.—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992.

40. U.S.—N. L. R. B. v. Draper Corporation, C.C.A.4, 145 F.2d 199, 156 A.L.R. 989.

Right to direct

Employer has the right to direct employee as to tasks to be performed and manner of performance.—N. L. R. B. v. Scullin Steel Co., C.C.A.8, 161 F.2d 143.

41. N.Y.—Barfield v. Standard Oil

The statute is essentially remedial[42] and contemplates no more than the protection of the public rights which it creates and defines.[43]

No enforceable private right is created until a matter has been brought before the National Labor Relations Board, it has entered and sought to enforce its order, and judgment enforcing the order has been entered.[44] The act confers no right of action triable by a jury or otherwise,[45] and employees can invoke the act only to bring about collective bargaining and the settlement of disputes by electing bargaining representatives under the supervision of the board if those who represent them are in doubt, and by proceeding before the board to procure the restraint of interference with their rights to bargain, the restraint of other unfair and discriminatory labor practices, and the reinstatement of employees who have been subjected to any unfair labor practice.[46]

The National Labor Relations Act does not carry a penal program declaring described unfair labor practices to be crimes, and does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees.[47] The sanctions of the act are imposed not in punishment of the employer but for the protection of the employee.[48]

c. Railway Labor Act

The Railway Labor Act was enacted to promote the orderly and peaceful settlement of labor disputes affecting interstate railroads.

By Transportation Act 1920 title III chapter 91, 41 U.S.St. at L. pages 456, 469, 45 U.S.C.A. §§ 131–146, congress established the Railroad Labor Board as a means for the peaceful settlement by agreement, or by arbitration of labor controversies between interstate railroad carriers and their employees.[49] Such statute sought to encourage settlements without strikes, first by conference between the parties, failing that, by reference to adjustment boards of the parties' own choosing and, if this was ineffective, by a full hearing before a national board; but the disputants were not in any way forced into compliance with the statute or with the judgments of the board.[50] In 1926 congress, aware of the impotence of the board, and of the fact that its authority was generally not recognized or respected by the railroads or their employees, repealed the 1920 Act and adopted the Railway Labor Act, 45 U.S.C.A. § 151 et seq.[51] By the new measure congress continued its policy of encouraging the amicable adjustment of labor disputes by their voluntary submission to arbitration before an impartial board, and it supported that policy by the imposition of legal obligations and provision of means for enforcing the award obtained by arbitration between the parties.[52] By the Railway Labor Act of 1934 various other obligations were imposed on carriers with respect to noninterference with employees' organizations,[53] and the Railroad Adjustment Board was created for the adjudication of grievances, and to get them out of the way of settling major disputes through the Mediation Board.[54]

The primary purpose of the Railway Labor Act as amended, 45 U.S.C.A. § 151 et seq., is to avoid the interruption of interstate commerce by promoting the orderly and peaceful settlement of labor disputes affecting railroads.[55] In order to effectuate

Co. of New Jersey, 14 N.Y.S.2d 627, 172 Misc. 95.

42. U.S.—Republic Steel Corporation v. N. L. R. B., 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A.6, 133 F. 2d 295—N. L. R. B. v. Marshall Field & Co., C.C.A.7, 129 F.2d 169, 144 A.L.R. 394, affirmed 63 S.Ct. 585, 318 U.S. 253, 87 L.Ed. 744, rehearing denied 63 S.Ct. 849, 318 U. S. 802, 87 L.Ed. 1165—N. L. R. B. v. Alloy Cast Steel Co., C.C.A.6, 117 F.2d 302—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F.2d 38—Clover Fork Coal Co. v. N. L. R. B., C.C.A.6, 97 F.2d 331.

43. U.S.—National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F.2d 38.

44. U.S.—Blankenship v. Kurfman, C.C.A.Ill, 96 F.2d 450.

Wis.—Public Service Employees' Union v. Wisconsin Employment Relations Board, 16 N.W.2d 823, 246 Wis. 190.

45. U.S.—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260.

46. U.S.—Black Diamond S. S. Corporation v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S.Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542.

47. U.S.—Republic Steel Corporation v. N. L. R. B., 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6.

48. U.S.—N. L. R. B. v. Virginia Electric & Power Co., 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—N. L. R. B. v. Winona Textile Mills, C. C.A.8, 160 F.2d 201.

49. U.S.—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789.

50. U.S.—Virginian Ry. Co. v. System Federation No. 40, supra.

51. U.S.—Virginian Ry. Co. v. System Federation No. 40, supra.

52. U.S.—Virginian Ry. Co. v. System Federation No. 40, supra.

53. U.S.—Virginian Ry. Co. v. System Federation No. 40, supra.

54. U.S.—Elgin, J. & E. Ry. Co. v. Burley, Ill., 65 S.Ct. 1282, 325 U.S. 711, 89 L.Ed. 1886, opinion adhered to 66 S.Ct. 721, 327 U.S. 661, 90 L.Ed. 928.

55. U.S.—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pac. Co. v. Southern Pac. Co., C.C.A.Cal., 132 F.2d 194, reversed on other grounds 64 S.Ct. 142, 320 U.S. 338, 88 L.Ed. 85—Atlantic Coast Line R. Co. v. Pope, C.C.A. N.C., 119 F.2d 39—Estes v. Union Terminal Co., C.C.A.Tex., 89 F.2d

this purpose, the statute safeguards the rights of employees to self-organization and to bargain collectively with the carrier through representatives of their own choosing without interference by the carrier[56] and encourages the use of the nonjudicial processes of negotiation, mediation, and arbitration.[57] The statute does not undertake governmental regulation of wages, hours, or working conditions, but seeks merely to provide a means by which agreement may be reached with respect thereto.[58] The statute is not self-executing but merely provides the machinery by which described labor practices may, after due hearing, be held to be unfair and the person against whom complaint is made ordered to cease and desist from such practices.[59] The statute does not manifest an intention to exclude a state from exercising the right to approve or disapprove the terms on which one carrier may use another carrier's property or facilities.[60]

d. State Constitutional and Statutory Provisions

Various state statutes provide methods for the peaceful settlement of labor disputes.

The legislatures of various states have recognized a public interest in the relation between employer and employees,[61] and various statutes have been enacted providing new methods of peacefully settling labor disputes in order to safeguard the interests of the public, employers, and employees.[62] Some statutes, similar in purpose to the National Labor Relations Act,[63] provide for protection of the right of employees to self-organization and to bargain collectively with employers,[64] and other statutes provide for mediation or arbitration of labor dis-

768—Brotherhood of Railroad Shop Crafts of America, Rock Island System, Grand Lodge No. 3 v. Lowden, C.C.A.Kan., 86 F.2d 458, 108 A.L.R. 1128, certiorari denied Brotherhood of Railroad Shop Crafts of America v. Lowden, 57 S.Ct. 435, 300 U.S. 659, 81 L.Ed. 868—Order of R. R. Telegraphers v. New Orleans, T. & M. Ry. Co., D.C.Mo., 61 F.Supp. 869, vacated on other grounds 156 F.2d 1, certiorari denied 67 S.Ct. 112, 329 U.S. 758, 91 L.Ed. —, rehearing denied 67 S.Ct. 201, 329 U.S. 829, 91 L.Ed. — —Brand v. Pennsylvania R. Co., D.C.Pa., 22 F.Supp. 569.

D.C.—Brotherhood of Locomotive Firemen and Enginemen v. I. C. C., 147 F.2d 312, 79 U.S.App.D.C. 318, certiorari denied 65 S.Ct. 1196, 325 U.S. 860, 89 L.Ed. 1981—Brotherhood of Railroad Trainmen v. National Mediation Bd., 88 F.2d 757, 66 App.D.C. 375.

Kan.—Betts v. Easley, 169 P.2d 831, 161 Kan. 459.

Dual intent

The act was intended not merely to protect employees' independence and right to organize, but also to settle disputes and avoid interruptions in operation of railroads.—Order of Ry. Conductors of America v. National Mediation Board, 113 F. 2d 531, 72 App.D.C. 299.

The substitution of "may" for "shall" in the Railway Labor Act, as amended, does not indicate a change in policy but is a clarification of the original purpose to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature.—Moore v. Illinois Cent. R. Co., Miss., 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.

Duty

The 1934 amendment to the Railway Labor Act which superseded the act of 1926 continued and placed the duty on carriers and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions and to settle disputes.—Brisbin v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277, 134 Neb. 517.

56. U.S.—Pickett v. Union Terminal Co., Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Williams v. Jacksonville Terminal Co., Fla. & Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Order of Railroad Telegraphers v. Railway Express Agency, D.C.Ga., 55 F. Supp. 319, reversed on other grounds, C.C.A., 137 F.2d 46, reversed on other grounds 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788.

D.C.—Switchmen's Union of North America v. National Mediation Board, 135 F.2d 785, 77 U.S.App. D.C. 264, reversed on other grounds 64 S.Ct. 95, 320 U.S. 297, 88 L.Ed. 61—Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F.2d 757, 66 App.D.C. 375.

57. U.S.—Brotherhood of Railroad Trainmen, Enterprise Lodge, No. 27, v. Toledo, P. & W. R. R., Ill., 64 S.Ct. 413, 321 U.S. 50, 88 L.Ed. 534, 150 A.L.R. 810—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789—In re Chicago North Shore & M. R. Co., C.C.A.Ill., 147 F.2d 723, certiorari denied Brotherhood of Locomotive Firemen and Enginemen v. Chicago N. S. & M. R. Co., 65 S.Ct. 1089, 325 U.S. 852, 89 L.Ed. 1973—Shipley v. Pittsburgh & L. E. R. Co., D.C.Pa., 68 F.Supp. 395.

58. U.S.—Terminal R. Ass'n of St. Louis v. Brotherhood of Railroad Trainmen, Ill., 63 S.Ct. 420, 318 U.S. 1, 87 L.Ed. 571.

Authority to fix conditions

The Railway Labor Act does not fix or authorize any one to fix generally applicable standards for working conditions, and term "working conditions" does not include any and all circumstances concerning work required of employees.—In re Chicago North Shore & M. R. Co., C.C.A. Ill., 147 F.2d 723, certiorari denied Brotherhood of Locomotive Firemen and Enginemen v. Chicago, N. S. & M. R. Co., 65 S.Ct. 1089, 325 U.S. 852, 89 L.Ed. 1973.

59. Wis.—Hotel and Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 294 N. W. 632, 236 Wis. 329, rehearing denied 295 N.W. 634, 236 Wis. 329, affirmed 62 S.Ct. 706, 315 U.S. 437, 86 L.Ed. 946.

60. U.S.—In re Chicago North Shore & M. R. Co., C.C.A.Ill., 147 F.2d 723, certiorari denied Brotherhood of Locomotive Firemen and Enginemen v. Chicago, N. S. & M. R. Co., 65 S.Ct. 1089, 325 U.S. 852, 89 L.Ed. 1973.

61. Wis.—Appleton Chair Corporation v. United Brotherhood of Carpenters & Joiners, Millmen's Local No. 1748, 1 N.W.2d 188, 239 Wis. 337.

62. Wis.—Wisconsin Employment Relations Board v. Evangelical Deaconess Soc., 7 N.W.2d 590, 242 Wis. 78.

63. Mass.—R. H. White Co. v. Murphy, 38 N.E.2d 685, 310 Mass. 510.

64. Cal.—Levy v. Superior Court in and for Los Angeles County, 104 P.2d 770, 15 Cal.2d 692, 129 A.L.R. 956.

Mass.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.

putes under the guidance and supervision of a governmental agency.[65] The purpose of these statutes is generally to promote industrial peace and to prevent strikes in order that there may be no obstructions to the free flow of industry and trade.[66]

Statutes promoting industrial peace by the encouragement of collective bargaining do not destroy, nor are they calculated to invade, contract rights, but they do seek to protect the public against unfair labor practices and to foster the continuance of that relation in which the public is interested.[67] They make no effort to destroy free competition;[68] they merely attempt to insure equality of bargaining power on which the benefits of free competition and enterprise rest, and thus secure to the individual workman a larger measure of freedom in his dealings with employers.[69] The purpose is to safeguard the right of workmen to self-organization[70] and to encourage and protect the practice of collective bargaining through representatives of the workers' own choosing;[71] and accordingly such statutes are intended to keep employer and employee organizations separate and distinct, free from domination by the other.[72]

The fundamental policy is to preserve the public interest rather than to punish a guilty employer,[73] or merely to confer benefits on those covered by the statute.[74] The statutes are essentially remedial[75] and are not criminal in their nature.[76] Usually they do not prescribe penalties or fines in vindication of

N.Y.—Campbell v. Picard, 300 N.Y.S. 515, 165 Misc. 148.
Pa.—Petition of Salvation Army, 36 A.2d 479, 349 Pa. 105.

65. N.Y.—International Ass'n of Machinists v. E. C. Stearns & Co., 36 N.Y.S.2d 156, 178 Misc. 661.
39 C.J. p 69 note 20.

Compliance with statute not shown
Pa.—Edward H. Ellis, Inc., v. Hines, 12 A.2d 440, 338 Pa. 183.

Mediation by federal agencies
The declaration of policy embodied in labor law recognizing the process of mediation by government agency in case of labor disputes is broad enough to include mediation by federal as well as state agencies.—International Ass'n of Machinists v. E. C. Stearns & Co., 36 N.Y.S.2d 156, 178 Misc. 661.

Rights of parties
It has been held that a labor relations statute affects the rights of the parties only in the manner and to the extent prescribed by the board's order.—Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America v. Wisconsin Employment Relations Board, Wis., 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. 1154.

66. Mass.—St. Luke's Hospital v. Labor Relations Commission, 70 N.E.2d 10, 320 Mass. 467—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.
N.Y.—Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union of Brooklyn and Queens, Local 287, 42 N.E.2d 480, 288 N.Y. 188—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, 14 N.Y.S.2d 74, 257 App.Div. 501.

Approach to problems
The purpose of state labor relations act is to afford means whereby employer and employee may approach their problems under conditions likely to promote industrial peace and bring about adjustments.—New York State Labor Relations Board v. Charles C. Loehmann Corp., 56 N.Y.S.2d 485, 269 App.Div. 566.

67. Wis.—Appleton Chair Corporation v. United Brotherhood of Carpenters & Joiners, Millmen's Local No. 1748, 1 N.W.2d 188, 239 Wis. 337.

68. Cal.—C. S. Smith Metropolitan Market Co. v. Lyons, 106 P.2d 414, 16 Cal.2d 389.

69. Cal.—C. S. Smith Metropolitan Market Co. v. Lyons, supra.
N.Y.—Association of Plumbing & Heating Contractors of Greater New York v. Merten, 17 N.Y.S.2d 828, 173 Misc. 448, affirmed 26 N.Y.S.2d 72, 261 App.Div. 543, affirmed 42 N.E.2d 16, 288 N.Y. 555.

70. Mass.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.
N.Y.—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347.

71. Cal.—In re Porterfield, 168 P.2d 706, 28 Cal.2d 91.
Mass.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160—Jordan Marsh Co. v. Labor Relations Commission, 45 N.E.2d 925, 312 Mass. 597.
N.Y.—Campbell v. Picard, 300 N.Y.S. 515, 165 Misc. 148—Triboro Coach Corporation v. New York State Labor Relations Board, 22 N.Y.S.2d 1013, affirmed 27 N.Y.S.2d 83, 261 App.Div. 636, affirmed 36 N.E.2d 315, 286 N.Y. 314, 144 A.L.R. 410, motion denied 39 N.E.2d 276, 287 N.Y. 647, 144 A.L.R. 410.
Pa.—Petition of Salvation Army, 36 A.2d 479, 349 Pa. 105—Petition of Shafer, 31 A.2d 537, 347 Pa. 130—Petition of Koehler, Com.Pl., 92 Pittsb.Leg.J. 587.
Wis.—American Furniture Co. v. I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, 268 N.W. 250, 222 Wis. 338, 106 A.L.R. 335.

The statutory declaration that negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees evidences existence of a policy to uphold freedom of employees to organize and to enter into collective bargaining contracts for their own protection.—Levy v. Superior Court in and for Los Angeles County, 104 P.2d 770, 15 Cal.2d 692, 129 A.L.R. 956.

Voluntary agreements
The purpose of labor relations statute is to safeguard employees from entering into, or being bound by, agreements that are not voluntary.—Nutter v. City of Santa Monica, 168 P.2d 741, 74 Cal.App.2d 292.

Collective rather than individual bargaining
The aim and purpose of the statute are the promotion, advancement, and protection of collective bargaining and not of individual bargaining, to which it has no reference.—In re G. C. Murphy Co., 51 Pa.Dist. & Co. 535.

72. Mass.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.
N.Y.—Campbell v. Picard, 300 N.Y.S. 515, 165 Misc. 148.

Benevolent or malevolent
The state labor relations act strives to avert employer influence, benevolent or malevolent, over employees' union aspirations and activities.—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347.

73. Pa.—John Hancock Mut. Life Ins. Co. of Boston v. Pennsylvania Labor Relations Board, 45 Pa.Dist. & Co. 169.

74. Wis.—Wisconsin Employment Relations Board v. Evangelical Deaconess Soc., 7 N.W.2d 590, 242 Wis. 78.

75. Pa.—In re W. T. Grant Co., 17 A.2d 614, 341 Pa. 70.

76. Wis.—Hotel and Restaurant Employees' International Alliance, Lo-

public rights, or provide indemnity against community losses, as distinguished from protection and compensation of employees.[77] The rights created by constitutional and statutory provisions relating to labor practices exist independently of the machinery set up by statute for their enforcement.[78]

It has been held that a statute protecting the right of self-organization and collective bargaining is simply declaratory of the preëxisting law and does not render lawful any act which was unlawful when the statute was enacted.[79] Statutes regulating picketing are aimed at conduct involving assaults by pickets acting in concert, the payment by labor unions of fines imposed on pickets, and the forcible prevention of ingress to, and egress from, the employer's premises.[80]

§ 28(3). —— Validity

a. Federal statutes

b. State constitutional and statutory provisions

a. Federal Statutes

Congress may regulate labor relations in employments affecting interstate commerce.

As a general rule, congress may regulate labor relations in employments affecting interstate commerce.[81] Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation for collective bargaining purposes are proper subjects of condemnation by competent legislative authority,[82] and in the enactment of legislation covering such subjects congress is entitled to determine what remedy it will provide, the way that remedy shall be sought, the extent to which it shall be afforded, and the means by which it shall be made effective.[83]

Numerous decisions have sustained the validity of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and particular provisions thereof,[84] at least to the extent that it limits its regulation of la-

cal No. 122 v. Wisconsin Employment Relations Board, 294 N.W. 632, 236 Wis. 329, rehearing denied 295 N.W. 634, 236 Wis. 329, affirmed 62 S.Ct. 65, 314 U.S. 590, 86 L.Ed. 476, affirmed 62 S.Ct. 706, 315 U.S. 437, 86 L.Ed. 946.

77. Pa.—W. T. Grant Co. v. United Retail Employees of America, Local No. 134, 31 A.2d 900, 347 Pa. 224—In re W. T. Grant Co., 17 A.2d 614, 341 Pa. 70.

78. N.Y.—Domanick v. Triboro Coach Corporation, 18 N.Y.S.2d 960, 173 Misc. 911, reversed on other grounds 20 N.Y.S.2d 306, 259 App. Div. 657.

79. N.Y.—Remington Rand v. Crofoot, 289 N.Y.S. 1025, 248 App.Div. 356, affirmed 18 N.E.2d 37, 279 N. Y. 635.

80. Wis.—Hotel and Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 294 N. W. 632, 236 Wis. 329, rehearing denied 295 N.W. 634, 236 Wis. 329, affirmed 62 S.Ct. 65, 314 U.S. 590, 86 L.Ed. 476, affirmed 62 S.Ct. 706, 315 U.S. 437, 86 L.Ed. 946.

81. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S. Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352.

82. U.S.—Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738.

83. U.S.—Amalgamated Utility Workers v. Consolidated Edison Co. of New York, supra—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 125 F.2d 757.

84. U.S.—N. L. R. B. v. Fruehauf Trailer Co., Mich., 57 S.Ct. 642, 301 U.S. 49, 81 L.Ed. 918, 108 A.L.R. 1352—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S. Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126—Continental Box Co. v. N. L. R. B., C.C.A.5, 113 F.2d 93—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 113 F. 2d 85—Peninsular & Occidental S. S. Co. v. N. L. R. B., C.C.A.5, 98 F.2d 411, certiorari denied N. L. R. B. v. Peninsular & Occidental S. S. Co., 59 S.Ct. 248, 305 U.S. 653, 83 L.Ed. 423—Beman v. Bendix Products Corporation, C.C.A.Ill., 89 F. 2d 661—Elliott v. El Paso Electric Co., C.C.A.Tex., 88 F.2d 505, certiorari denied 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363, and Perrin v. v. Elliott, 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363—N. L. R. B. v. Washington, Virginia & Maryland Coach Co., C.C.A.4, 85 F.2d 990, affirmed Washington, Virginia & Maryland Coach Corporation v. N. L. R. B., 57 S.Ct. 648, 301 U.S. 142, 81 L.Ed. 965—Surpass Leather Co. v. Winters, D.C.N.Y., 23 F.Supp. 776 —Precision Castings Co. v. Boland, D.C.N.Y., 13 F.Supp. 877, affirmed, C.C.A., 85 F.2d 15.

D.C.—Press Co. v. N. L. R. B., 118 F.2d 937, 73 App.D.C. 103, certiorari denied 61 S.Ct. 1118, 313 U.S. 595, 85 L.Ed. 1548.

Particular provisions held valid

(1) Procedural provisions generally.—Myers v. Bethlehem Shipbuilding Corporation, Mass., 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S.Ct. 615, 301 U.S. 1, 81 L. Ed. 893, 108 A.L.R. 1352.

(2) Establishing employees' right to self-organization and to bargain collectively.—N. L. R. B. v. Tidewater Express Lines, C.C.A.4, 90 F.2d 301—S. Buchsbaum & Co. v. Beman, D.C.Ill., 14 F.Supp. 444.

(3) Prohibiting an employer from discouraging employees from becoming members of labor unions by discrimination with regard to hire, tenure, or condition of employment.

U.S.—N. L. R. B. v. Associated Press, C.C.A.2, 85 F.2d 56, affirmed Associated Press v. N. L. R. B., 57 S. Ct. 650, 301 U.S. 103, 81 L.Ed. 953.

D.C.—Press Co. v. N. L. R. B., 118 F.2d 937, 73 App.D.C. 103, certiorari denied 61 S.Ct. 1118, 313 U.S. 595, 85 L.Ed. 1548.

(4) Providing that strike does not terminate employer-employee relationship.—N. L. R. B. v. Mackay Radio & Telegraph Co., 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381.

(5) Authorizing the board to require reinstatement of employees discharged in violation of provisions of the statute.—N. L. R. B. v. Jones & Laughlin Steel Corp., 57 S.Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352 —N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539—Agwilines, Inc., v. N. L. R. B., C.C.A.5, 87 F.2d 146.

(6) Authorizing the board to compel an employer to hire an applicant.

bor relations to subjects falling within the commerce power,[85] and the fact that the statute is claimed to be one-sided in its application and to subject the employer to supervision and restraint, and leave untouched abuses for which employees may be responsible, does not render it invalid as the legislative authority exerted within its proper field need not embrace all evils within its reach.[86] However, an earlier provision of National Industrial Recovery Act § 7 (a), 15 U.S.C.A. § 707 (a), assuring to employees the right to organize and bargain collectively through representatives of their own choosing free from interference, restraint, or coercion from their employers was held invalid as applied to a company not directly engaged in interstate commerce.[87]

It has been held that a statute governing labor relations is the law of the land from the date of its enactment notwithstanding its validity is not sustained by the supreme court until a later date,[88] and that an employer attacking the validity of the statute must take proper steps to preserve the constitutional question and to have it heard before the court or body having jurisdiction to pass on it.[89]

Statutes governing interstate carriers. The power of congress over interstate commerce extends to such regulations of the relations of interstate carriers to their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders.[90] Accordingly numerous decisions have sustained the validity of the Railway Labor Act, 45 U.S.C.A. § 151 et seq, providing for the orderly settlement of disputes between carriers and their employees,[91] and of the

where the applicant would have been employed had the employer not applied a forbidden criterion.—N. L. R. B. v. Waumbec Mills, C.C.A.1, 114 F. 2d 226.

(7) Authorizing service of process in proceedings by the board anywhere in the United States.—N. L. R. B. v. Hearst, C.C.A.9, 102 F.2d 658.

(8) Giving the board power to petition the circuit court of appeals for enforcement of its orders, and vesting in the court power to review the board's orders.—N. L. R. B. v. Mackay Radio & Telegraph Co., C.C.A.9, 87 F.2d 611, affirmed 92 F.2d 761, reversed on other grounds 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381.

(9) Authorizing the board to determine the appropriate bargaining unit. —Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied 61 S. Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551 —N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U.S. 751, 87 L.Ed. 1705.

(10) Withholding from the federal appellate courts jurisdiction to review a certification as to the appropriate bargaining representative.—American Federation of Labor v. N. L. R. B., App.D.C., 60 S.Ct. 300, 308 U.S. 401, 84 L.Ed. 347.

85. U.S.—Washington, Virginia & Maryland Coach Co. v. N. L. R. B., 57 S.Ct. 648, 301 U.S. 142, 81 L.Ed. 965.
Wis.—Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 279 N.W. 673, 228 Wis. 473, 117 A. L.R. 398.

Constitutional application

National Labor Relations Act, intended to eliminate obstructions to commerce, must be treated as having a field for constitutional application.—Bradley Lumber Co. of Arkansas v. N. L. R. B., C.C.A.La., 84 F.2d 97, certiorari denied 57 S.Ct. 21, 299 U.S. 559, 81 L.Ed. 411.

Particular subjects

(1) Instrumentality engaged in interstate commerce of gathering and distributing news to newspapers in United States and foreign countries. —Associated Press v. N. L. R. B., N.Y., 57 S.Ct. 650, 301 U.S. 103, 81 L.Ed. 953.

(2) Shipbuilding and dry dock company doing work for federal government and private persons.—Newport News Shipbuilding & Dry Dock Co. v. N. L. R. B., C.C.A.4, 101 F.2d 841, reversed on other grounds N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U. S. 241, 84 L.Ed. 219.

86. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corp., 57 S.Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352.

87. U.S.—U. S. v. Weirton Steel Co., D.C.Del., 10 F.Supp. 55.

88. U.S.—Roebling Employees Ass'n v. N. L. R. B., C.C.A.3, 120 F.2d 289.

89. U.S.—N. L. R. B. v. Anwelt Shoe Mfg. Co., C.C.A.1, 93 F.2d 367.

90. U.S.—Shipley v. Pittsburgh & L. E. R. Co., D.C.Pa., 68 F.Supp. 395.

91. U.S.—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S. Ct. 592, 300 U.S. 515, 81 L.Ed. 789 —Lewellyn v. Fleming, C.C.A.Okl., 154 F.2d 211, certiorari denied 67 S.Ct. 45, 329 U.S. 715, 91 L.Ed. —— —Estes v. Union Terminal Co., C.C. A.Tex., 89 F.2d 768—Brotherhood of Ry. & S. S. Clerks, Freight Handlers, Express & Station Employees, Southern Pac. Lines in Texas & Louisiana v. Texas & N. O. R. Co., D.C.Tex., 25 F.2d 873, affirmed, C.C.A., Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 33 F.2d 13, affirmed 50 S.Ct. 427, 281 U.S. 548, 74 L.Ed. 1034—Shipley v. Pittsburgh & L. E. R. Co., D.C.Pa., 68 F.Supp. 395—Primakow v. Railway Exp. Agency, D.C.Wis., 56 F.Supp. 413.
D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S.App. D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

Financial distress

The statute is valid even as applied to a carrier in financial distress.—Burke v. Morphy, C.C.A.Vt., 109 F.2d 572, certiorari denied Morphy v. Burke, 60 S.Ct. 1078, 310 U.S. 635, 84 L.Ed. 1404.

Particular provisions held valid

(1) Prohibiting company unions and imposing on railway the duty of treating with the authorized representative of its employees for the purpose of negotiating a labor dispute.—Texas Electric Ry. Co. v. Eastus, D.C.Tex., 25 F.Supp. 825, affirmed 60 S.Ct. 134, 308 U.S. 512, 84 L.Ed. 437, rehearing denied 60 S.Ct. 258, 308 U.S. 637, 84 L.Ed. 529.

(2) Establishing majority rule in the selection of an employee bargaining agency.—National Federation of Railway Workers v. National Mediation Board, 110 F.2d 529, 71 App.D.C. 266, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

(3) Provision that award of adjustment board shall be final and binding on both labor organization and carrier.—Cook v. Des Moines Union Ry. Co., D.C.Iowa, 16 F.Supp. 810.

(4) Authorizing suit within a limited time for enforcement of an award of the board.—Washington Terminal Co. v. Boswell, 124 F.2d 235,

Federal Transportation Act of February 28, 1920, chapter 91, 41 U.S.St. at L. pages 456, 469, 45 U.S.C.A. §§ 131, 146, which formerly governed the labor relations of railroad companies engaged in interstate commerce.[92] However, an earlier statute making it an offense for an interstate carrier to discharge an employee because of his membership in a labor organization was held invalid.[93]

b. State Constitutional and Statutory Provisions

Generally a state may regulate the labor relations of its citizens, and state statutes are not ipso facto superseded by federal legislation applicable to the same situations.

As a general rule a state may regulate the labor relations of its citizens in the interests of peace, health, and order.[94] State statutes governing the relations of employer and employees, and providing a procedure for collective bargaining or for the arbitration and determination of differences have generally been held valid,[95] and a state constitutional provision prohibiting the denial or abridgment of the right to work because of membership or nonmembership in any labor union, but expressly preserving to employees the right to collective bargaining, has been held not in violation of the federal Constitution.[96] However, some statutes regulating labor relations have been held invalid,[97] as in the

76 U.S.App.D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

(5) Authorizing taxing of attorney's fees in case of successful suit in district court to enforce an award of National Railroad Adjustment Board.—Cook v. Des Moines Union Ry. Co., D.C.Iowa, 16 F.Supp. 810.

Award not otherwise enforceable

Facts that under Railway Labor Act award of National Railway Adjustment Board is not self-enforcing or enforceable by board but employee is authorized to institute suit within two years from accrual of causes of action under award for enforcement thereof, and carrier is not given right to institute suit for review of award, do not render the act invalid.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S.App. D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

92. U.S.—U. S. Railroad Labor Board v. Pennsylvania R. Co., C.C.A.Ill., 282 F. 701, affirmed 43 S.Ct. 278, 261 U.S. 72, 67 L.Ed. 536.
Miss.—Rhodes v. New Orleans Great Northern R. Co., 91 So. 281, 129 Miss. 78.

93. U.S.—Adair v. U. S., Ky., 28 S.Ct. 277, 208 U.S. 161, 52 L.Ed. 436, 13 Ann.Cas. 764.

94. Wis.—Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 279 N.W. 673, 228 Wis. 473, 117 A.L.R. 398.

95. N.Y.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 20 N.E.2d 390, 280 N.Y. 194—State Labor Relations Board v. McChesney, 27 N.Y.S.2d 866, 175 Misc. 95, affirmed 27 N.Y.S.2d 870, 261 App.Div. 1089.
Pa.—In re W. T. Grant Co., 17 A.2d 614, 341 Pa. 70—Appeal of Spungin, 32 Pa.Dist. & Co. 611, 45 Dauph.Co. 145.
Wis.—Hotel & Restaurant Employees' International Alliance, Local No. 122, v. Wisconsin Employment Relations Board, 295 N.W. 634, 236 Wis. 329, affirmed 62 S.Ct. 706, 315 U.S. 437, 86 L.Ed. 946.

Particular provisions held valid

(1) Authorizing the state labor relations board to fix a unit for collective bargaining.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 6 N.Y.S.2d 775, 168 Misc. 948, affirmed 7 N.Y.S.2d 1007, 255 App.Div. 840 and 7 N.Y.S.2d 1008, 255 App.Div. 840, affirmed 20 N.E.2d 390, 280 N.Y. 194.

(2) Providing that fact findings of board shall be conclusive.—The Nevins v. Boland, 3 N.Y.S.2d 323, 167 Misc. 428.

(3) Declaring it to be an unfair labor practice for an employee, individually or in concert with others, to coöperate in engaging in picketing or any other overt concomitant of a strike unless a majority in a collective bargaining unit of employees of employer against whom such acts are directed have voted to call a strike.—Hotel and Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 294 N.W. 632, 236 Wis. 329, rehearing denied 295 N.W. 634, 236 Wis. 329, affirmed 62 S.Ct. 706, 315 U.S. 437, 86 L.Ed. 946.

(4) Authorizing the board of conciliation and arbitration to investigate the cause of any strike or lockout where more than a certain number of persons are employed, and to make and publish a report assigning responsibility.—Moore Drop Forging Co. v. Fisher, 132 N.E. 169, 239 Mass. 434.

(5) Permitting labor unions to endeavor to induce an employer, when unionizing his shop, to agree to refrain from working in his business with his own hands.—Senn v. Tile Layers Protective Union, Local No. 5, Wis., 57 S.Ct. 857, 301 U.S. 468, 81 L.Ed. 1229.

Exclusion of certain organizations

Statute concerning labor and labor organizations is not invalid for capricious discrimination in expressly excluding organizations within influence of Federal Railway Labor Act, by which congress intended, in large part, if not entirely, to preempt field covered by salient features of such act.—Alabama State Federation of Labor v. McAdory, 18 So.2d 810, 246 Ala. 1, certiorari granted 65 S.Ct. 191, 323 U.S. 703, 89 L.Ed. 567, certiorari dismissed 65 S.Ct. 1384, 325 U.S. 450, 89 L.Ed. 1725.

96. U.S.—American Federation of Labor v. Watson, D.C.Fla., 60 F.Supp. 1010, reversed on other grounds 66 S.Ct. 761, 327 U.S. 582, 90 L.Ed. 873.

Benefit without burden

Fact that such constitutional provision makes it possible for nonunion members to benefit from union activities without bearing any of the burdens of such activities does not render it invalid.—American Federation of Labor v. Watson, supra.

97. U.S.—Stapleton v. Mitchell, D.C.Kan., 60 F.Supp. 51, appeal dismissed Mitchell v. McElroy, 66 S.Ct. 172, 326 U.S. 690, 90 L.Ed. 406, and McElroy v. Mitchell, 66 S.Ct. 172, 326 U.S. 690, 90 L.Ed. 406.

Particular provisions held invalid

(1) Making it an offense for an employer to require or influence any person to agree not to join or remain in a labor union as a condition of obtaining or retaining employment.—Hitchman Coal & Coke Co. v. Mitchell, W.Va., 38 S.Ct. 65, 245 U.S. 229, 62 L.Ed. 260, L.R.A.1918C, 497, Ann.Cas.1918B, 461, mandate stayed 38 S.Ct. 190—Coppage v. State of Kansas, Kan., 35 S.Ct. 240, 236 U.S. 1, 59 L.Ed. 441, L.R.A.1915C, 960—Montgomery v. Pacific Electric Ry. Co., C.C.A.Cal., 293 F. 680, certiorari denied, 1924, 44 S.Ct. 334, 264 U.S. 586, 68 L.Ed. 862—Goldfield Consol. Mines Co. v. Goldfield Miner's Union No. 20, C.C.Nev., 159 F. 500—39 C.J. p 68 note 16—63 C.J. p 659 note 56.

(2) Prohibiting participation in any strike, walkout or cessation of work not authorized by majority vote of employees, and prohibiting caus-

case of statutes, declaring it unlawful for an employee to refuse to use or work on any particular materials, equipment, or supplies because they are not produced, processed, or delivered by members of labor organizations,[98] or statutes providing for a system of compulsory arbitration of industrial disputes in certain businesses declared to be affected with a public interest, as applied to businesses not in fact clothed with a public interest.[99]

Effect of federal legislation. It has been held that federal enactments governing labor relations, such as the National Labor Relations Act, 29 U.S. C.A. § 151 et seq, are intended only to regulate and protect interstate commerce, and that the field of proper state action with respect to labor relations generally is intended to be left unrestricted as far as possible.[1] Accordingly such federal legislation does not ipso facto preclude state legislation applicable to the same situations,[2] and the states are not deprived of their police power to protect property rights or punish illegal acts committed in the course of labor disputes.[3] The National Labor Relations Act does not supersede state statutes as to labor relations which do not so affect interstate commerce as to bring them within the commerce clause of the federal Constitution,[4] nor does it supersede state statutes effective as an exercise of police power even in labor relations involving interstate commerce;[5] but in case of conflict in administration of the state and national labor relations acts, in matters properly within the scope of the national act, the state must yield.[6] Accordingly, since jurisdiction to determine appropriate bargaining units and to certify collective bargaining representatives is vested exclusively in the National Labor Relations Board where an industry is engaged in interstate commerce within the meaning of the national act, state action in this field is foreclosed,[7] and a state labor relations board may not constitutionally entertain a petition for the determination of such matters where the employer is engaged in interstate commerce notwithstanding the National Labor Relations Board has not acted in the same case.[8]

§ 28(4). —— Construction, Amendment, and Repeal

Legislative enactments encouraging the peaceful settlement of labor disputes should be liberally construed in order to effectuate their purpose.

ing cessation of work or interfering with progress of work by reason of jurisdictional dispute.—Stapleton v. Mitchell, D.C.Kan., 60 F.Supp. 512, appeal dismissed Mitchell v. McElroy, 66 S.Ct. 172, 326 U.S. 690, 90 L.Ed. 406, and McElroy v. Mitchell, 66 S.Ct. 172, 326 U.S. 690, 90 L.Ed. 406.

98. U.S.—Stapleton v. Mitchell, D.C. Kan., 60 F.Supp. 51, appeal dismissed Mitchell v. McElroy, 66 S. Ct. 172, 326 U.S. 690, 90 L.Ed. 406, and McElroy v. Mitchell, 66 S.Ct. 172, 326 U.S. 690, 90 L.Ed. 406.
Ala.—Alabama State Federation of Labor v. McAdory, 18 So.2d 810, 246 Ala. 1, certiorari granted 65 S. Ct. 191, 323 U.S. 703, 89 L.Ed. 567, certiorari dismissed 65 S.Ct. 1384, 325 U.S. 450, 89 L.Ed. 1725.

99. U.S.—Dorchy v. State of Kansas, Kan., 44 S.Ct. 323, 264 U.S. 286, 68 L.Ed. 686.
39 C.J. p 69 note 22.

1. Pa.—Pittsburgh Rys. Co. Substation Operators and Maintenance Employees Case, 54 A.2d 891, 357 Pa. 379.
Wis.—Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 295 N.W. 791, 237 Wis. 164, affirmed 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. 1154.

2. Pa.—Petition of Equitable Gas Co., 51 Pa.Dist. & Co. 653, 92 Pittsb. Leg.J. 423.
The criterion to determine validity of the exercise of state power over an employer-employee relationship is whether congress has asserted its power to regulate that relationship and is not whether the agency administering federal law has acted upon the relationship in a given case.—Pittsburgh Rys. Co. Substation Operators and Maintenance Employees Case, Pa., 54 A.2d 891.

3. Ill.—Fansteel Metallurgical Corporation v. Lodge 66 of Amalgamated Ass'n of Iron, Steel and Tin Workers of North America, 14 N. E.2d 991, 295 Ill.App. 323.

4. Wis.—Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 279 N.W. 673, 228 Wis. 473, 117 A.L.R. 398.
Finding of board
When the National Labor Relations Board finds from substantial evidence that employer-employee dispute does not substantially affect interstate or foreign commerce, state power may properly be exercised and is unaffected by the National Labor Relations Act.—Pittsburgh Rys. Co. Substation Operators and Maintenance Employees Case, Pa., 54 A.2d 891.

5. Wis.—Wisconsin Labor Relations Board v. Fred Rueping Leather Co., supra.
Mass picketing
An interference with mass picketing by reason of state statutory provision does not contravene the policy of the National Labor Relations Act.—United Elec., Radio & Mach. Workers of America, C.I.O. v. Baldwin, D. C.Conn., 67 F.Supp. 235.

6. Wis.—Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 279 N.W. 673, 228 Wis. 473, 117 A. L.R. 398.

7. U.S.—Bethlehem Steel Co. v. New York State Labor Relations Board, 67 S.Ct. 1026, 330 U.S. 767, 91 L. Ed. ——.
Pa.—Pittsburgh Rys. Co. Substation Operators and Maintenance Employees Case, 54 A.2d 891.

8. U.S.—Bethlehem Steel Co. v. New York State Labor Relations Board, 67 S.Ct. 1026, 330 U.S. 767, 91 L. Ed. ——.
Pa.—Pittsburgh Rys. Co. Substation Operators and Maintenance Employees Case, 54 A.2d 891.
No conflict
It was held, however, prior to the decision of the matter by the supreme court of the United States, that where the National Labor Relations Board had not taken jurisdiction of a labor controversy no conflict existed between a state labor relations statute applied to the controversy and rights guaranteed employees by the National Labor Relations Act.—Public Service Emp. Union v. Wisconsin Employment Relations Bd., 16 N.W.2d 823, 246 Wis. 190.

Legislative enactments dealing with relations between employer and employees and encouraging the peaceful settlement of labor disputes by collective bargaining are remedial in nature and should be liberally construed; and this rule has been applied in the construction of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq,[9] the Railway Labor Act, 45 U.S.C.A. § 151 et seq,[10] and state statutes of a similar nature.[11] Such statutes are to be construed to effectuate their purpose of preventing industrial strife[12] and to harmonize the procedure with the characteristics of our system of government wherein the law is supreme.[13] They are not to be administered for the purpose of vengeance but for the ends of justice to give tranquillity to industrial life.[14]

A statute providing for notification of state officers of a labor controversy and for mediation of such dispute has been held mandatory and not directory.[15]

Prospective or retroactive operation. As a rule the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes are prospective in operation and do not apply to transactions occurring prior to their enactment[16] or to employment relations previously terminated.[17] However, a labor dispute which is current at the time of enactment of the statute is subject to its operation notwithstanding the dispute originated prior to passage of the statute.[18]

Amendment and repeal. General rules as to amendment and repeal of statutes apply in the case of amendment or repeal of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes dealing with labor relations.[19] The Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 141–197, generally amends the National Labor Relations Act of 1935. It has been held that employers who operate in interstate transportation by motor carrier are compelled to obey the mandates of the Motor Carrier Act equally with the mandates of the National Labor Relations Act, and that the safety provisions of the Motor Carrier Act are of paramount importance.[20] It has also been held that the maritime safety laws are paramount to the National Labor Relations Act to the extent that any proposed order of the Labor Relations Board may increase danger.[21]

9. U.S.—N. L. R. B. v. Knoxville Pub. Co., C.C.A.6, 124 F.2d 875—Jeffery-De Witt Insulator Co. v. N. L. R. B., C.C.A.4, 91 F.2d 134, certiorari denied 58 S.Ct. 55, 302 U. S. 731, 82 L.Ed. 565.

10. U.S.—Nashville, C. & St. L. Ry. v. Railway Employees' Department of American Federation of Labor, C.C.A.Tenn., 93 F.2d 340, certiorari denied 58 S.Ct. 746, 303 U.S. 649, 82 L.Ed. 1110—Brotherhood of Ry. & S. S. Clerks, Freight Handlers, Express & Station Employees, Southern Pac. Lines in Texas and Louisiana v. Texas & N. O. R. Co., D.C.Tex., 24 F.2d 426, affirmed, C. C.A., Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 33 F.2d 13, affirmed 50 S.Ct. 427, 281 U.S. 548, 74 L.Ed. 1034.

11. N.Y.—State Labor Relations Board v. McChesney, 27 N.Y.S.2d 866, 175 Misc. 95, affirmed 27 N.Y. S.2d 870, 261 App.Div. 1089—In re New York State Labor Relations Board, 21 N.Y.S.2d 771, 175 Misc. 95.

Pa.—Petition of Salvation Army, 36 A.2d 479, 349 Pa. 105.

In light of constitutional provision

The statute should be construed in the light of constitutional provision as to the right of employees to collective bargaining through representatives of their own choosing.—Trustees of Columbia University in City of New York v. Herzog, 46 N.Y.S. 2d 130, 181 Misc. 903, reversed on other grounds 53 N.Y.S.2d 617, 269 App.Div. 24, affirmed 64 N.E.2d 351, 295 N.Y. 605.

12. U.S.—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786—N. L. R. B. v. Carlisle Lumber Co., C.C.A., 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045.

Social purposes

The court must construe the labor law and its collective bargaining provisions not narrowly, but so as to give life to the social purposes of the act to avoid labor strife and promote labor peace.—New York State Labor Relations Board v. Metropolitan Life Ins. Co., 52 N.Y.S.2d 590, 183 Misc. 1064, affirmed 58 N.Y.S.2d 343, 269 App.Div. 934, affirmed 66 N.E.2d 853, 295 N.Y. 839.

13. U.S.—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786.

14. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., C.C.A.6, 124 F.2d 50, affirmed 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

15. Pa.—Edward H. Ellis, Inc., v. Hines, 12 A.2d 440, 338 Pa. 183.

16. U.S.—Appalachian Electric Power Co. v. N. L. R. B., C.C.A., 93 F. 2d 985.

17. U.S.—N. L. R. B. v. National Casket Co., C.C.A., 107 F.2d 992.

18. U.S.—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, C. C.A.4, 91 F.2d 134, 112 A.L.R. 948, certiorari denied 58 S.Ct. 55, 302 U.S. 731, 82 L.Ed. 565.

19. U.S.—Droste v. Nash-Kelvinator Corp., D.C.Mich., 64 F.Supp. 716.

Nature of amendment

The rider to National Labor Relations Board Appropriation Act prohibiting use of funds in a "complaint case" arising over agreement between management and labor which has been in existence for at least three months without complaint being filed was not intended as a substantive amendment to the National Labor Relations Act.—N. L. R. B. v. Thompson Products, C.C.A.9, 141 F. 2d 794.

The Selective Service Act would not be regarded as amending or repealing any part of the National Labor Relations Act in absence of specific repeal or positive repugnancy, and effect would be given both by reasonable construction.—Droste v. Nash-Kelvinator Corp., D.C.Mich., 64 F.Supp. 716.

20. U.S.—N. L. R. B. v. U. S. Truck Co., C.C.A.6, 124 F.2d 887.

21. U.S.—Texas Co. v. N. L. R. B., C.C.A.9, 120 F.2d 186.

§ 28(5). Employments Included within Regulatory Provisions

In the absence of a provision to the contrary, statutes regulating relations between employers and employees apply to all employments regardless of the nature or character of the particular business or activity.

In the absence of a provision to the contrary, statutes regulating relations between employers and employees apply to all employments regardless of the nature or character of the particular business or activity,[22] and they are not limited in their application to employment relations in industry.[23] Some statutes, however, are limited in their application to industrial pursuits,[24] or to businesses or employments "affected with a public interest,"[25] such as "public utilities."[26]

The word "industry" within statutory provisions controlling labor relations in industry covers labor conditions in any field of employment where the objective is the earning of a livelihood on one side and the gaining of a profit on the other.[27] In the absence of express exemption, statutes have been held to apply to banks,[28] insurance companies,[29] and retail businesses.[30]

Railway Labor Act. The Railway Labor Act, 45 U.S.C.A. § 151 et seq, applies only to carriers of the kind specified in the statute,[31] and has been held not to govern the labor relations of corporations engaged in motor freight trucking service and motor transit bus service in interstate commerce.[32] The statute exempts from its operation interurban electric railways[33] except where they operate as part of a general steam railroad system of transportation.[34]

22. U.S.—N. L. R. B. v. Hearst, C. C.A.9, 102 F.2d 658.
Minn.—Northwestern Hospital, Minneapolis v. Public Building Service Employes' Union Local No. 113, 294 N.W. 215, 208 Minn. 389.
Persons specifically exempted from operation of statute see infra § 28 (12).

"Seasonal industries," exempted from operation of statute prohibiting strikes without thirty days' written notice by provision that statute shall not apply to seasonal industries, includes every class of industry made seasonal by natural causes, but not industries which are seasonal by reason of fluctuations in consumer demand.—Local Union, Division No. 1362, Amalgamated Ass'n of Street Elec. Ry. and Motor Coach Emp. of America v. Howard Bus Lines, La., 43 S.E.2d 523.

23. Wis.—Wisconsin Employment Relations Board v. Evangelical Deaconess Soc., 7 N.W.2d 590, 242 Wis. 78.

The occasional use of words such as "craft" and "plant" in Employment Peace Act does not alone show clear intent to limit application of such act to industry.—Wisconsin Employment Relations Board v. Evangelical Deaconess Soc., supra.

Labor difficulties in general

Some statutes are intended to alleviate labor difficulties in general and not only disputes in privately owned factories and utilities.—Local Union No. 876, International Brotherhood of Electrical Workers v. State of Michigan Labor Mediation Board, 293 N.W. 809, 294 Mich. 629.

24. Pa.—Petition of Salvation Army, 36 A.2d 479, 349 Pa. 105—City of Philadelphia v. Lichliter, Com.Pl., 55 Dauph.Co. 184—Washington and Jefferson College v. Gifford, Com.Pl., 55 Dauph.Co. 182.

25. Colo.—People ex rel. Industrial Commission of Colorado v. Aladdin Theatre Corporation, 44 P.2d 1022, 96 Colo. 527.

Ordinary interpretation

Under statute prohibiting strikes and lockouts in "business affected with a public interest" prior to or during hearing by industrial commission, the term "business affected with a public interest" is used in its ordinary interpretation and application, and does not mean a business affected with any degree of public interest, however slight, such as theater business.—People ex rel. Industrial Commission of Colorado v. Aladdin Theatre Corporation, supra.

26. Mich.—Local Union No. 876, International Brotherhood of Electrical Workers v. State of Michigan Labor Mediation Board, 293 N.W. 809, 294 Mich. 629.

27. N.Y.—State Labor Relations Board v. McChesney, 27 N.Y.S.2d 866, 175 Misc. 95, affirmed 27 N.Y. S.2d 870, 261 App.Div. 1089.

28. N.Y.—Bank of Yorktown v. Boland, 31 N.E.2d 510, 284 N.Y. 749.

A national bank does not fall within the provisions excluding from the operation of the statute the United States or any state or political subdivision thereof.—N. L. R. B. v. Bank of America Nat. Trust & Savings Ass'n, C.C.A.9, 130 F.2d 624, certiorari denied Bank of America Nat. Trust & Savings Ass'n v. N. L. R. B., 63 S.Ct. 992, first case, 318 U.S. 791, 87 L.Ed. 1157, and 63 S.Ct. 992, second case, 318 U.S. 792, 87 L.Ed. 1158, rehearing denied 63 S.Ct. 1171, 319 U.S. 782, 87 L.Ed. 1726.

Visitatorial powers

State banks are not exempt from visitatorial powers of National Labor Relations Board either under National Banking Act or under similar provision in state statute.—N. L. R. B. v. Northern Trust Co., C.C.A.Ill., 148 F.2d 24, certiorari denied 66 S. Ct. 38, 326 U.S. 731, 90 L.Ed. 435 and American Nat. Bank & Trust Co. of Chicago v. N. L. R. B., 66 S. Ct. 39, 326 U.S. 731, 90 L.Ed. 435.

29. N.Y.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 6 N.Y.S. 775, 168 Misc. 948, affirmed 7 N.Y.S.2d 1007, 255 App. Div. 840, and 7 N.Y.S.2d 1008, 255 App.Div. 840, affirmed 20 N.E.2d 390, 280 N.Y. 194.
Pa.—Pennsylvania Labor Relations Board v. Metropolitan Life Ins. Co., 48 Pa.Dist. & Co. 340—John Hancock Mut. Life Ins. Co. of Boston v. Pennsylvania Labor Relations Board, 45 Pa.Dist. & Co. 169.

30. U.S.—J. L. Brandeis & Sons v. N. L. R. B., C.C.A.8, 142 F.2d 977, certiorari denied 65 S.Ct. 85, 323 U.S. 751, 89 L.Ed. 601, rehearing denied 65 S.Ct. 129, 323 U.S. 815, 89 L.Ed. 648.

Retail department store is covered by National Labor Relations Act even if it applies only to industries, since "industry" is any department or branch of business which employs much labor and capital, and is a distinct branch of trade.—J. L. Brandeis & Sons v. N. L. R. B., supra.

31. U.S.—In re Virginia & Truckee Ry., C.C.A.Nev., 130 F.2d 460, certiorari denied 63 S.Ct. 265, 317 U. S. 690, 87 L.Ed. 552.

32. U.S.—In re Virginia & Truckee Ry., supra.

33. U.S.—Hudson & M. R. Co. v. Hardy, D.C.N.Y., 22 F.Supp. 105, reversed on other grounds, C.C.A., 103 F.2d 327, certiorari denied Hudson & M. R. Co. v. Cahill, 59 S.Ct. 1038, 307 U.S. 640, 83 L.Ed. 1521.

34. U.S.—Shields v. Utah Idaho Cent. R. Co., Utah, 59 S.Ct. 160,

Under a provision of the act defining a carrier as including, among others, any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad, the words "any company" do not mean any railroad company; the purpose of the words is to designate other types of companies which are owned or controlled by a carrier and to place such companies under the authority of the National Mediation Board.[35]

§ 28(6). —— Charitable, Educational, and Nonprofit Enterprises

Some statutes dealing with labor relations have been held to apply to nonprofit organizations as well as to profit-making enterprises, but other statutes have been construed as not applying to charitable corporations.

Some statutes dealing with labor relations have been held to apply to nonprofit organizations as well as to profit-making enterprises,[36] and hence to govern the labor relations of charitable corporations operated as public hospitals, at least with respect to nonprofessional and maintenance employees.[37] This was the rule under the National Labor Relations Act prior to the amendment specifically excepting hospitals from operation of the statute.[38] It has also been held, in the absence of express provisions to the contrary, that other statutes are limited to industrial pursuits and do not include as an employer a charitable or eleemosynary association.[39] In this respect it has been held that the fact that hospitals organized and conducted as charitable institutions are not expressly excepted from the definition of "employer" in the statute is not conclusive that they are within such term,[40] and such institutions will not be considered employers where they do not come within the scope of the statute in the light of its declared underlying and predominant aim and object,[41] and may be regarded as impressed with a public interest taking them out of the purview of the statute.[42]

Some statutes expressly exempt from their operation charitable, educational, and religious associations or corporations.[43] Under such provisions the test of the applicability of the statute is not the nature of the undertaking on which the employee is engaged but the character of the employer,[44] and the exemption may be applicable although the particular activity does not involve charitable or educational work.[45] It has also been held that the exemption is not limited to educational corporations which are nonprofit corporations, but includes educational corporations operated as commercial enterprises for profit.[46] However, private hospitals operated for profit have been held to be employers within the statute,[47] not impliedly exempted by pro-

305 U.S. 177, 83 L.Ed. 111—Hudson & M. R. Co. v. Hardy, C.C.A.N.Y., 103 F.2d 327, certiorari denied Hudson & M. R. Co. v. Cahill, 59 S.Ct. 1038, 307 U.S. 640, 83 L.Ed. 1521.

35. D.C.—Switchmen's Union of North America v. National Mediation Board, 135 F.2d 785, 77 U.S. App.D.C. 264, reversed on other grounds 64 S.Ct. 95, 320 U.S. 297, 88 L.Ed. 61.

36. Wis.—Wisconsin Employment Relations Board v. Evangelical Deaconess Soc., 7 N.W.2d 590, 242 Wis. 78.

37. Minn.—Northwestern Hospital, Minneapolis v. Public Building Service Employes' Union Local No. 113, 294 N.W. 215, 208 Minn. 389.

Wis.—Wisconsin Employment Relations Board v. Evangelical Deaconess Soc., 7 N.W.2d 590, 242 Wis. 78.

38. D.C.—N. L. R. B. v. Central Dispensary & Emergency Hospital, 145 F.2d 852, 79 U.S.App.D.C. 274, certiorari denied 65 S.Ct. 684, 324 U.S. 847, 89 L.Ed. 1408.

39. Pa.—Petition of Salvation Army, 36 A.2d 479, 349 Pa. 105—Washington and Jefferson College v. Gifford, Com.Pl., 55 Dauph.Co. 182.

Salvation Army

Where the Salvation Army operated a residence for girls, charging rates estimated to cover costs, it was not conducting the activity as an industrial pursuit, but as a purely charitable enterprise, and it was not an employer subject to provisions of the Labor Relations Act.—Petition of Salvation Army, 36 A.2d 479, 349 Pa. 105.

40. Mass.—St. Luke's Hospital v. Labor Relations Commission, 70 N.E.2d 10, 320 Mass. 467.

41. Mass.—St. Luke's Hospital v. Labor Relations Commission, supra.

Pa.—Western Pennsylvania Hospital v. Lichliter, 17 A.2d 206, 340 Pa. 382, 132 A.L.R. 1146.

42. Pa.—Western Pennsylvania Hospital v. Lichliter, supra.

43. N.Y.—Trustees of Columbia University in City of New York v. Herzog, 53 N.Y.S.2d 617, 269 App.Div. 24, affirmed 64 N.E.2d 351, 295 N.Y. 605.

In ascertaining legislative intent in exempting from collective bargaining requirements employees of charitable, educational, or religious corporations, court may draw inferences from manner in which conflicting interests of the public and employees were reconciled.—Trustees of Columbia University in City of New York v. Herzog, supra.

44. N.Y.—Trustees of Columbia University in City of New York v. Herzog, supra.

45. N.Y.—Trustees of Columbia University in City of New York v. Herzog, supra.

Commercial building

Employees engaged in servicing and maintaining university's commercial building, no part of which was used by university for educational purposes, but total income of which was applied to educational and charitable purposes of university, were employees of charitable and educational corporation within exemption from labor law regarding collective bargaining.—Trustees of Columbia University in City of New York v. Herzog, supra.

46. N.Y.—Rhodes Preparatory School v. Kelley, 64 N.Y.S.2d 112, affirmed 66 N.Y.S.2d 617, 271 App. Div. 823, affirmed 73 N.E.2d 264, 296 N.Y. 951.

47. N.Y.—State Labor Relations Board v. McChesney, 27 N.Y.S.2d 866, 175 Misc. 95, affirmed 27 N.Y.S.2d 870, 261 App.Div. 1089.

visions relating to charitable associations, corporations, or enterprises.[48]

§ 28(7). —— Public Employment

Statutes dealing with labor relations generally do not apply to the United States, or to any state or political subdivision thereof, in their capacity as employers.

The National Labor Relations Act, 29 U.S.C.A. § 151 et seq, does not recognize the existence of the right of collective bargaining in public employment and expressly excepts from the definition of the term "employer" the United States and any state or political subdivision thereof.[49] Some state statutes dealing with labor relations similarly except from their operation the state and its agencies,[50] and it has been held that the same rule applies even in the absence of express provision[51] on the ground that the statute would not be construed so as largely to nullify the elaborate system of laws constituting the policy of the state in the domain of public employment.[52] Accordingly the state and its municipalities need not contract for terms and conditions of public employment even in respect of matters not covered by state law or county and city charters or ordinances,[53] or in respect of activities conducted in a proprietary capacity as distinguished from a governmental capacity.[54] However, a statute providing for mediation of labor disputes involving a public utility or industry affected with a public interest has been held to apply to a municipality operating a power plant.[55]

A statutory provision exempting employees of the state or its agencies does not give immunity to employees in their capacity as employers of helpers.[56] One engaged in the interstate transportation of mail by truck pursuant to a contract with the United States is an independent contractor, and an employer within the statute, and his employees are not employees of the United States.[57]

§ 28(8). —— Labor and Employer Organizations

Labor and employer organizations acting as employers or in their interest are subject to the operation of statutes dealing with labor relations.

A union which is not engaging in a legitimate function as a labor union to secure the interests of workmen by agreement with respect to wages, hours, or conditions of employment is not entitled to immunity from classification as an employer under statutes dealing with labor relations,[58] and this is particularly the case where the membership of the union consists not of employees and workers but of business men and entrepreneurs.[59]

Employer organizations. An association of employers which acts in concert with its members in the perpetration of alleged unfair labor practices may be considered an employer within the terms of the statute.[60] The term "employer organization" as used in a statute declaring contrary to public pol-

48. N.Y.—In re New York State Labor Relations Board, 21 N.Y.S.2d 771, 175 Misc. 95.

49. Cal.—Nutter v. City of Santa Monica, 168 P.2d 741, 74 Cal.App. 2d 292.
Fla.—Miami Water Works Local No. 654 v. City of Miami, 26 So.2d 194, 157 Fla. 445.

50. N.Y.—In re New York State Labor Relations Board, 37 N.Y.S.2d 304, affirmed 45 N.Y.S.2d 942, 267 App.Div. 763, affirmed 56 N.E.2d 262, 293 N.Y. 671.

51. Cal.—Nutter v. City of Santa Monica, 168 P.2d 741, 74 Cal.App.2d 292.

Terms defined by law

Persons entering public employment do not thereby acquire a right to arrange, by negotiation and contract, terms and conditions of employment which are defined by law or, under established systems, are subject to regulation by governmental bodies.—Nutter v. City of Santa Monica, supra.

52. Cal.—Nutter v. City of Santa Monica, supra.

53. Cal.—Nutter v. City of Santa Monica, supra.

54. Cal.—Nutter v. City of Santa Monica, supra.

Motor coach line

The labor relations statutes do not require city operating a motor coach line to recognize union of bus operators and to bargain collectively with such union.—Nutter v. City of Santa Monica, supra.

55. Mich.—Local Union No. 876, International Brotherhood of Electrical Workers v. State of Michigan Labor Mediation Board, 293 N.W. 809, 294 Mich. 629.

56. N.Y.—In re New York State Labor Relations Board, 37 N.Y.S.2d 304, affirmed 45 N.Y.S.2d 942, 267 App.Div. 763, affirmed 56 N.E.2d 262, 293 N.Y. 671.

Meaning of exemption

Provisions of the act exempting employees of the state or political subdivisions mean that while as employees of the state they may not invoke the act against it, as employers the act may be invoked against them.—In re New York State Labor Relations Board, supra.

57. U.S.—N. L. R. B. v. Carroll, C. C.A.1, 120 F.2d 457.

58. N.Y.—In re New York State Labor Relations Board, 37 N.Y.S.2d 304, affirmed 45 N.Y.S.2d 942, 267 App.Div. 763, affirmed 56 N.E.2d 262, 293 N.Y. 671.

59. N.Y.—In re New York State Labor Relations Board, supra.

Organization of custodians

A labor union to which custodians of school buildings belong and which aided them in resisting a proceeding before a labor relations board brought by employees of the custodians is an employer within the act notwithstanding its incidental form as a labor union.—In re New York State Labor Relations Board, supra.

60. U.S.—N. L. R. B. v. Sun Tent-Luebbert Co., C.C.A.9, 151 F.2d 483, opinion supplemented 154 F.2d 108, certiorari denied Merchants & Manufacturers Ass'n of Los Angeles v. N. L. R. B., 67 S.Ct. 44, 329 U.S. 818, 91 L.Ed. ——.

Farmer's organization

A nonprofit association composed of farmers and others and its officers who determined what persons were to be hired as employees by

icy an employee's or employer's promise to join or remain a member of a labor organization or employer organization, not to join or not to remain a member of such an organization, or to withdraw from the employment relation if he joins or remains a member thereof, refers to an association of employers, not to a company union.[61]

§ 28(9). —— Businesses Affecting Interstate Commerce

The National Labor Relations Act extends and is confined in application to businesses whose interruption by labor disputes would interfere with interstate or foreign commerce.

As a general rule, the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, extends and is confined in application to businesses whose interruption by labor disputes would interfere with interstate or foreign commerce.[62] The statute applies where the employer is engaged in interstate commerce,[63] or where the disturbance of his business would substantially affect interstate commerce,[64]

member-employer engaged in interstate commerce, were employers and subject to the National Labor Relations Act.—N. L. R. B. v. Holtville Ice & Cold Storage Co., C.C.A.9, 148 F.2d 168—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F.2d 368.

61. Cal.—Shafer v. Registered Pharmacists Union Local 1172, 106 P.2d 403, 16 Cal.2d 379.

62. U.S.—Polish Nat. Alliance of U. S. v. N. L. R. B., 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509—N. L. R. B. v. Fainblatt, 59 S.Ct. 668, 306 U.S. 601, 307 U.S. 609, 83 L.Ed. 1014—Santa Cruz Fruit Packing Co. v. N. L. R. B., 58 S.Ct. 656, 303 U.S. 453, 82 L.Ed. 954—Washington, Virginia & Maryland Coach Co. v. N. L. R. B., 57 S.Ct. 648, 301 U.S. 142, 81 L.Ed. 965—N. L. R. B. v. W. H. Kistler Stationery Co., C.C.A., 122 F.2d 989—N. L. R. B. v. Suburban Lumber Co., C.C.A.3, 121 F.2d 829, certiorari denied Suburban Lumber Co. v. N. L. R. B., 62 S.Ct. 364, 314 U.S. 693, 86 L.Ed. 554—N. L. R. B. v. Barrett Co., C.C.A.Ill., 120 F.2d 583—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780—N. L. R. B. v. Alloy Cast Steel Co., C.C.A., 117 F.2d 302—Southern Colorado Power Co. v. N. L. R. B., C.C.A., 111 F.2d 539—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, opinion supplemented, C.C.A., 128 F.2d 188—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 91 F.2d 509, rehearing denied 93 F.2d 1010—Myers v. Bethlehem Shipbuilding Corporation, C.C.A.Mass., 88 F.2d 154, rehearing denied 89 F.2d 1000, reversed on other grounds 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638—Foster Bros Mfg. Co. v. N. L. R. B., C.C.A.Md., 85 F.2d 984, rehearing denied 90 F.2d 948—Oberman & Co. v. Pratt, D.C.Mo., 16 F.Supp. 887, reversed on other grounds, C.C.A., Pratt v. Oberman & Co., 89 F.2d 786—Remington Rand v. Lind, D.C.N.Y., 16 F.Supp. 666.

Wis.—Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 295 N.W. 791, 237 Wis. 164, affirmed 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. 1154.

What constitutes interstate commerce generally see Commerce 15 C.J.S. p 252 et seq.

Federal practice

The National Labor Relations Act has to do only with commerce as understood under federal practice.—N. L. R. B. v. Barrett Co., D.C.Ill., 35 F.Supp. 588.

63. U.S.—Tyne Co. v. N. L. R. B., C.C.A., 125 F.2d 832—N. L. R. B. v. Niles Fire Brick Co., C.C.A., 124 F.2d 366, certiorari denied 62 S.Ct. 944, 316 U.S. 664, 86 L.Ed. 1740—N. L. R. B. v. W. H. Kistler Stationery Co., C.C.A., 122 F.2d 989—N. L. R. B. v. West Texas Utilities Co., C.C.A., 119 F.2d 683—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549—Cudahy Packing Co. v. N. L. R. B., C.C.A., 118 F.2d 295—N. L. R. B. v. National Licorice Co., C.C.A.2, 104 F.2d 655, modified on other grounds National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799—N. L. R. B. v. Bell Oil & Gas Co., C.C.A., 91 F.2d 509, rehearing denied 93 F.2d 1010.

Building maintenance employees

Elevator operators, watchmen, and janitors employed in a building owned by corporation and housing tenants engaged in interstate commerce are so closely associated with the flow of interstate commerce as to be entitled to protection under the statute regardless of whether they were employed by owner or by a building maintenance company doing work for the owner.—Butler Bros. v. N. L. R. B., C.C.A., 134 F.2d 981, certiorari denied 64 S.Ct. 203, 204, 2 cases, 320 U.S. 789, 88 L.Ed. 475.

Where the general activities of a corporation extend over state lines and constitute interstate commerce, the corporation is subject to the statute.—N. L. R. B. v. Kinner Motors, C.C.A.9, 152 F.2d 816, modified on other grounds 154 F.2d 1007.

64. U.S.—N. L. R. B. v. Fainblatt, 59 S.Ct. 668, 306 U.S. 601, 307 U.S. 609, 83 L.Ed. 1014—Santa Cruz Fruit Packing Co. v. N. L. R. B., 58 S.Ct. 656, 303 U.S. 453, 82 L.Ed. 954—Associated Press v. N. L. R. B., N.Y., 57 S.Ct. 650, 301 U.S. 103, 81 L.Ed. 953—N. L. R. B. v. Holtville Ice & Cold Storage Co., C.C.A.9, 148 F.2d 168—Loveman, Joseph & Loeb v. N. L. R. B., C.C.A.5, 146 F.2d 769—N. L. R. B. v. M. E. Blatt Co., C.C.A., 143 F.2d 268, certiorari denied 65 S.Ct. 135, 323 U.S. 774, 89 L.Ed. 619—J. L. Brandeis & Sons v. N. L. R. B., C.C.A.8, 142 F.2d 977, certiorari denied 65 S.Ct. 85, 323 U.S. 751, 89 L.Ed. 601, rehearing denied 65 S.Ct. 129, 323 U.S. 815, 89 L.Ed. 648—N. L. R. B. v. T. W. Phillips Gas & Oil Co., C.C.A.3, 141 F.2d 304—N. L. R. B. v. Richter's Bakery, C.C.A.5, 140 F.2d 870, certiorari denied 64 S.Ct. 1267, 322 U.S. 754, 88 L.Ed. 1584—N. L. R. B. v. J. L. Hudson Co., C.C.A., 135 F.2d 380, certiorari denied 64 S.Ct. 40, 320 U.S. 740, 88 L.Ed. 439—Canyon Corporation v. N. L. R. B., C.C.A., 128 F.2d 953—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A., 122 F.2d 419—N. L. R. B. v. Suburban Lumber Co., C.C.A., 121 F.2d 829, certiorari denied 62 S.Ct. 364, 314 U.S. 693, 86 L.Ed. 554—N. L. R. B. v. Aluminum Products Co., C.C.A., 120 F.2d 567—N. L. R. B. v. West Texas Utilities Co., C.C.A., 119 F.2d 683—N. L. R. B. v. New Era Die Co., C.C.A., 118 F.2d 500—Pueblo Gas & Fuel Co. v. N. L. R. B., C.C.A., 118 F.2d 304—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786—N. L. R. B. v. Alloy Cast Steel Co., C.C.A., 117 F.2d 302—N. L. R. B. v. Henry Levaur, Inc., C.C.A., 115 F.2d 105, certiorari denied 61 S.Ct. 550, 312 U.S. 682, 85 L.Ed. 1120—Bethlehem Shipbuilding Corporation, Limited v. N. L. R. B., C.C.A., 114 F.2d 930, certiorari dismissed 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141—Continental Oil Co.

and only in such case.[65]

In determining whether the operations of an employer are subject to the statute, it is the effect on interstate commerce and not the source of the injury which is the criterion.[66] The test is not whether operations of the employer constitute interstate commerce, but whether a stoppage of operations by threatened industrial strife would result in a substantial interruption to, or interference with, the free flow of such commerce.[67] The per cent of the interstate transactions to the entire business of a company is not of itself determinative of whether the company's business affects interstate commerce,[68] and an employer may be within the statute even though only a small per cent of the entire business is interstate in character.[69] So the fact that an employer engages in activities other than interstate business does not withdraw it from amenability to the labor relations statute where such activities do not subordinate the interstate business to insignificance.[70] The statute may apply even though the employer is not himself engaged in commerce,[71] or is engaged mainly in intra-state commerce,[72] if its

v. N. L. R. B., C.C.A., 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—Southern Colorado Power Co. v. N. L. R. B., C.C.A., 111 F.2d 539—N. L. R. B. v. Planters Mfg. Co., C.C.A., 105 F.2d 750, rehearing denied 106 F.2d 524—N. L. R. B. v. Hearst, C.C.A., 102 F.2d 658—Newport News Shipbuilding & Dry Dock Co. v. N. L. R. B., C.C.A., 101 F.2d 841, reversed on other grounds 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219—Clover Fork Coal Co. v. N. L. R. B., C.C.A., 97 F.2d 331—N. L. R. B. v. Bell Oil & Gas Co., C.C.A., 91 F.2d 509, rehearing denied 93 F.2d 1010.

Definition of "affect"

The word "affect" within statute giving jurisdiction in cases affecting interstate commerce has the widest conceivable scope and means to act on, produce an effect on, touch, acting on, working a change in, or concerning.—N. L. R. B. v. Suburban Lumber Co., C.C.A.3, 121 F.2d 829, certiorari denied Suburban Lumber Co. v. N. L. R. B., 62 S.Ct. 364, 314 U.S. 693, 86 L.Ed. 554.

65. U.S.—Alabama State Federation of Labor, Local Union No. 103, United Broth. of Carpenters and Joiners of America v. McAdory, Ala., 65 S.Ct. 1384, 325 U.S. 450, 89 L.Ed. 1725—Hill v. State of Florida ex rel. Watson, Fla., 65 S.Ct. 1373, 325 U.S. 538, 89 L.Ed. 1782, rehearing denied 66 S.Ct. 11, 326 U.S. 804, 90 L.Ed. 489—Pueblo Gas & Fuel Co. v. N. L. R. B., C.C.A.10, 118 F.2d 304—Southern Colorado Power Co. v. N. L. R. B., C.C.A.10, 111 F.2d 539—N. L. R. B. v. Washington, Virginia & Maryland Coach Co., C.C.A., 85 F.2d 990, affirmed 57 S.Ct. 648, 301 U.S. 142, 81 L.Ed. 965.

66. U.S.—Consolidated Edison Co. of N. Y. v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. Henry Levaur, Inc., C.C.A., 115 F.2d 105, certiorari denied 61 S.Ct. 550, 312 U.S. 682, 85 L.Ed. 1120—Clover Fork Coal Co. v. N. L. R. B., C.C.A., 97 F.2d 331.

67. U.S.—J. L. Brandeis & Sons v. N. L. R. B., C.C.A., 142 F.2d 977, certiorari denied 65 S.Ct. 85, 323 U.S. 751, 89 L.Ed. 601, rehearing denied 65 S.Ct. 129, 323 U.S. 815, 89 L.Ed. 648—N. L. R. B. v. Baltimore Transit Co., C.C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084—Polish Nat. Alliance of U. S. v. N. L. R. B., C.C.A.7, 136 F.2d 175, affirmed 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509—N. L. R. B. v. J. L. Hudson Co., C.C.A., 135 F.2d 380, certiorari denied 64 S.Ct. 40, 320 U.S. 740, 88 L.Ed. 439—N. L. R. B. v. Cowell Portland Cement Co., C.C.A., 108 F.2d 198—N. L. R. B. v. Planters Mfg. Co., C.C.A., 105 F.2d 750, rehearing denied 106 F.2d 524—N. L. R. B. v. Hearst, C.C.A., 102 F.2d 658.

A flow of interstate commerce is not necessary to subject an enterprise to the statute, since burdens on such commerce can result from intra-state acts irrespective of the origin of the materials or the place where the sale is made.—N. L. R. B. v. Henry Levaur, Inc., C.C.A.1, 115 F.2d 105, certiorari denied Henry Levaur, Inc., v. N. L. R. B., 61 S.Ct. 550, 312 U.S. 682, 85 L.Ed. 1120.

68. U.S.—N. L. R. B. v. Planters Mfg. Co., C.C.A., 105 F.2d 750, rehearing denied 106 F.2d 524—N. L. R. B. v. Santa Cruz Fruit Packing Co., C.C.A., 91 F.2d 790, affirmed 58 S.Ct. 656, 303 U.S. 453, 82 L.Ed. 954.

69. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—Santa Cruz Fruit Packing Co. v. N. L. R. B., 58 S.Ct. 656, 303 U.S. 453, 82 L.Ed. 954—J. L. Brandeis & Sons v. N. L. R. B., C.C.A.8, 142 F.2d 977, certiorari denied 65 S.Ct. 85, 323 U.S. 751, 89 L.Ed. 601, rehearing denied 65 S.Ct. 129, 323 U.S. 815, 89 L.Ed. 648—N. L. R. B. v. Henry Levaur, Inc., C.C.A.1, 115 F.2d 105, certiorari denied Henry Levaur, Inc., v. N. L. R. B., 61 S.Ct. 550, 312 U.S. 682, 85 L.Ed. 1120—Southern Colorado Power Co. v. N. L. R. B., C.C.A.10, 111 F.2d 539—N. L. R. B. v. Cowell Portland Cement Co., C.C.A., 108 F.2d 198—N. L. R. B. v. Planters Mfg. Co., C.C.A., 105 F.2d 750, rehearing denied 106 F.2d 524.

70. U.S.—Polish Nat. Alliance of U. S. v. N. L. R. B., 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509.

Plants engaged in intra-state commerce only

(1) A company purchasing most of its materials and supplies in other states than that wherein two of its three plants were located, making large interplant shipments of materials and supplies, and selling and delivering a substantial part of its products to customers outside the state in which produced is within the statute although the industrial dispute which gave rise to the charges against it occurred at the plant producing goods sold only in the state wherein it was located.—N. L. R. B. v. Schmidt Baking Co., C.C.A., 122 F.2d 162.

(2) It has been held, however, that where a company maintained two plants and made no interstate shipments from one plant, orders of the National Labor Relations Board to cease and desist certain violations of the statute would not be enforced as respects such plant.—N. L. R. B. v. Santa Cruz Fruit Packing Co., C.C.A., 91 F.2d 790, affirmed 58 S.Ct. 656, 303 U.S. 453, 82 L.Ed. 954.

71. U.S.—N. L. R. B. v. Fainblatt, 59 S.Ct. 668, 306 U.S. 601, 307 U.S. 609, 83 L.Ed. 1014—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438—N. L. R. B. v. Niles Fire Brick Co., C.C.A.6, 124 F.2d 366, certiorari denied Niles Fire Brick Co. v. N. L. R. B., 62 S.Ct. 944, 316 U.S. 664, 86 L.Ed. 1740.

72. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed.

activities are such that interruption of operations would burden or affect interstate commerce.

In determining whether an employer is within the statute, the magnitude of its business[73] or the volume of interstate commerce affected[74] ordinarily is not material, except in so far as the maxim, De minimis non curat lex, applies.[75] Thus an employer may be within the statute although the quantity of products he ships in interstate commerce is small in proportion to the total interstate commerce in that product from all the states or from the manufacturer's state,[76] or although its business constitutes a relatively small per cent of the trade or industry in which it is engaged,[77] and it is not a bar to application of the statute that customers might be able to secure the same services or goods from other companies in the same state if a labor dispute should stop the operation of the business.[78] Also the fact that the labor dispute actually did not interfere with interstate commerce, and that even if continued the interstate business could otherwise be handled, may not be relied on to prevent application of the statute.[79] The statute applies to forestall labor troubles which may affect commerce, not merely to stop or remedy those which have occurred.[80]

The nature and extent of an employer's activities determine whether they affect interstate commerce so as to bring the business within the operation of the National Labor Relations Act.[81] Whether the

126—N. L. R. B. v. Fainblatt, 59 S.Ct. 668, 306 U.S. 601, 307 U.S. 609, 83 L.Ed. 1014—Santa Cruz Fruit Packing Co. v. N. L. R. B., 58 S.Ct. 656, 303 U.S. 453, 82 L.Ed. 954—N. L. R. B. v. M. E. Blatt Co., C.C.A., 143 F.2d 268, certiorari denied 65 S.Ct. 135, 323 U.S. 774, 89 L.Ed. 619—N. L. R. B. v. Niles Fire Brick Co., C.C.A., 124 F.2d 366, certiorari denied Niles Fire Brick Co. v. N. L. R. B., 62 S.Ct. 944, 316 U.S. 664, 86 L.Ed. 1740—N L. R. B. v. Western Massachusetts Electric Co., C.C.A.1, 120 F. 2d 455—N. L. R. B. v. Henry Levaur, Inc., C.C.A., 115 F.2d 105, certiorari denied 61 S.Ct. 550, 312 U.S. 682, 85 L.Ed. 1120—Stout v. Pratt, D.C.Mo., 12 F.Supp. 864, affirmed, C.C.A., 85 F.2d 172.

The activities of transportation company on whose operation industrial life of city extensively engaged in interstate commerce was largely dependent, "affected commerce" so as to render National Labor Relations Act applicable to company's business, notwithstanding none of its vehicles crossed state lines.—N. L. R. B. v. Baltimore Transit Co., C.C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084.

73. U.S.—N. L. R. B. v. Fainblatt, 59 S.Ct. 668, 306 U.S. 601, 307 U.S. 609, 83 L.Ed. 1014—N. L. R. B. v. Gulf Public Service Co., C.C.A.5, 116 F.2d 852—N. L. R. B. v. Bell Oil & Gas Co., C.C.A., 91 F.2d 509, rehearing denied 93 F.2d 1010.

Although relatively few individuals are employed, the statute may apply if interruption of the business would affect interstate commerce.—Stout v. Pratt, D.C.Mo., 12 F.Supp. 864, affirmed, C.C.A., 85 F.2d 172.

74. U.S.—N. L. R. B. v. Fainblatt, 59 S.Ct. 668, 306 U.S. 601, 307 U. S. 609, 83 L.Ed. 1014—J. L. Brandeis & Sons v. N. L. R. B., C.C.A. 8, 142 F.2d 977, certiorari denied 65 S.Ct. 85, 323 U.S. 751, 89 L.Ed. 601, rehearing denied 65 S.Ct. 129, 323 U.S. 815, 89 L.Ed. 648—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A., 133 F.2d 295—N. L. R. B. v. Suburban Lumber Co., C.C.A.3, 121 F.2d 829, certiorari denied Suburban Lumber Co. v. N. L. R. B., 62 S.Ct. 364, 314 U.S. 693, 86 L.Ed. 554—N. L. R. B. v. Gulf Public Service Co., C.C.A., 116 F.2d 852—N. L. R. B. v. Cowell Portland Cement Co., C.C.A., 108 F.2d 198—N. L. R. B. v. Planters Mfg. Co., C.C. A., 105 F.2d 750, rehearing denied 106 F.2d 524—N. L. R. B. v. Crowe Coal Co., C.C.A.8, 104 F.2d 633, certiorari denied Crowe Coal Co. v. N. L. R. B., 60 S.Ct. 107, 308 U.S. 584, 84 L.Ed. 489.

75. U.S.—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A., 133 F.2d 295—N. L. R. B. v. W. H. Kistler Stationery Co., C.C.A.10, 122 F.2d 989.

Maxim held not applicable

U.S.—J. L. Brandeis & Sons v. N. L. R. B., C.C.A.8, 142 F.2d 977, certiorari denied 65 S.Ct. 85, 323 U. S. 751, 89 L.Ed. 601, rehearing denied 65 S.Ct. 129, 323 U.S. 815, 89 L.Ed. 648—N. L. R. B. v. Cowell Portland Cement Co., C.C.A., 108 F.2d 198.

76. U.S.—N. L. R. B. v. Cowell Portland Cement Co., supra.

77. U.S.—N. L. R. B. v. Bradford Dyeing Ass'n, 60 S.Ct. 918, 310 U.S. 318, 84 L.Ed. 1226.

78. U.S.—N. L. R. B. v. Bradford Dyeing Ass'n, 60 S.Ct. 918, 310 U. S. 318, 84 L.Ed. 1226—J. L. Brandeis & Sons v. N. L. R. B., C.C.A.8, 142 F.2d 977, certiorari denied 65 S.Ct. 85, 323 U.S. 751, 89 L.Ed. 601, rehearing denied 65 S.Ct. 129, 323 U.S. 815, 89 L.Ed. 648.

Plants not running at capacity

The facts that a certain plant of a packing company in which there was a labor dispute was located in a city in which there were several similar plants which were not running at full capacity and that if the company's plant closed down all the interstate commerce done by it would readily be done by the other plants in the city did not establish that interstate commerce was not affected by the labor dispute so as to defeat the jurisdiction of the National Labor Relations Board.—Cudahy Packing Co. v. N. L. R. B., C.C.A., 118 F.2d 295.

79. U.S.—N. L. R. B. v. Henry Levaur, Inc., C.C.A.1, 115 F.2d 105, certiorari denied Henry Levaur, Inc., v. N. L. R. B., 61 S.Ct. 550, 312 U.S. 682, 85 L.Ed. 1120.

80. U.S.—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A., 122 F.2d 433—N. L. R. B. v. Henry Levaur, Inc., C.C.A., 115 F.2d 105, certiorari denied 61 S.Ct. 550, 312 U.S. 682, 85 L.Ed. 1120—N. L. R. B. v. American Potash & Chemical Corporation, C.C.A., 98 F.2d 488, certiorari denied 59 S.Ct. 582, 306 U.S. 643, 83 L.Ed. 1043.

81. U.S.—N. L. R. B. v. Crowe Coal Co., 104 F.2d 633, certiorari denied Crowe Coal Co. v. N. L. R. B., 60 S.Ct. 107, 308 U.S. 584, 84 L.Ed. 489.

The labor disputes of a local merchant usually will not fall within the statute, even though some part of his stock in trade originates outside the state or some of his local customers are engaged in interstate commerce.—Consolidated Edison Co. of New York v. N. L. R. B., C.C.A.2, 95 F.2d 390, modified on other grounds 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

Total incidence of activities

Whether employer's labor practices might be deemed by congress to affect interstate commerce was not to be determined by confining judgment to the quantitative effect of activities immediately before the National Labor Relations Board, but

conduct of an intra-state business affects interstate or foreign commerce so closely as to be subject to federal control under the National Labor Relations Act is left to be determined as individual cases arise.[82] Regard must be had to all the existing facts and circumstances,[83] including the bearing and effect of any protective action already taken under state authority;[84] and the justification for the exercise of federal power should clearly appear.[85] It may be sufficient to bring an employer within the statute, either by itself, or together with other facts and circumstances warranting the conclusion that the employer's activities affect interstate commerce, that the employer ships products or goods in interstate commerce,[86] purchases all or a substantial part of its raw materials or stocks of

fact that the immediate situation was representative of many others throughout the country, the total incidence of which if left unchecked might well become far-reaching in its harm to commerce, could be considered.—Polish Nat. Alliance of U. S. v. N. L. R. B., 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509.

82. U.S.—Consolidated Edison Co of N. Y. v. N. L. R. B., N.Y., 59 S. Ct. 206, 305 U.S. 197, 83 L.Ed. 126 —Continental Oil Co. v. N. L. R. B., C.C.A., 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—Southern Colorado Power Co. v. N. L. R. B., C.C.A., 111 F.2d 539—N. L. R. B. v. Bradford Dyeing Ass'n, C.C.A., 106 F.2d 119, reversed on other grounds 60 S.Ct. 918, 310 U.S. 318, 84 L.Ed. 1226—N. L. R. B. v. Santa Cruz Fruit Packing Co., C.C.A., 91 F.2d 790, affirmed 58 S.Ct. 656, 303 U.S. 453, 82 L.Ed. 954.

83. U.S.—Consolidated Edison Co. of N. Y. v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. W. H. Kistler Stationery Co., C.C.A., 122 F.2d 989—Southern Colorado Power Co. v. N. L. R. B., C.C.A.10, 111 F.2d 539.

Pa.—Pittsburgh Rys. Co. Substation Operators and Maintenance Employees Case, 54 A. 891, 357 Pa. 379.

84. U.S.—Consolidated Edison Co. of N. Y. v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

Pa.—Pittsburgh Rys. Co. Substation Operators and Maintenance Employees Case, 54 A.2d 891, 357 Pa. 378.

Absence of state proceedings

The National Labor Relations Board had jurisdiction of labor disputes of parent utility and its subsidiaries operating an integrated system engaged in intra-state business, but affecting interstate and foreign commerce, as against contention that state legislature had enacted comprehensive and adequate measures to protect against interruption of service through labor disputes, where proceeding was instituted before the state statute became effective, and so far as appeared no proceedings had been taken under that statute in relation to unfair labor practices alleged.—Consolidated Edison Co. of N. Y. v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126, modifying 95 F.2d 390.

85. U.S.—Consolidated Edison Co. of N. Y. v. N. L. R. B., supra.

86. U.S.—N. L. R. B. v. Fruehauf Trailer Co., Mich., 57 S.Ct. 642, 301 U.S. 49, 81 L.Ed. 918, 108 A.L.R. 1352—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S. Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352—N. L. R. B. v. Ellis-Klatscher & Co., C.C.A.9, 142 F. 2d 356—N. L. R. B. v. T. W. Phillips Gas & Oil Co., C.C.A.3, 141 F. 2d 304—N. L. R. B. v. H. G. Hill Stores, C.C.A.5, 140 F.2d 924—N. L. R. B. v. J. G. Boswell Co., C.C. A.9, 136 F.2d 585—N. L. R. B. v. J. L. Hudson Co., C.C.A., 135 F.2d 380, certiorari denied 64 S.Ct. 40, 320 U.S. 740, 88 L.Ed. 439—N. L. R. B. v. Weyerhaeuser Timber Co., Clemons Branch, C.C.A., 132 F.2d 234—Tyne Co. v. N. L. R. B., C.C. A., 125 F.2d 832—N. L. R. B. v. Niles Fire Brick Co., C.C.A., 124 F.2d 366, certiorari denied 62 S.Ct. 944, 316 U.S. 664, 86 L.Ed. 1740—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A., 122 F.2d 419—N. L. R. B. v. Bachelder, C.C.A.7, 120 F.2d 574, certiorari denied 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519, and modified on other grounds, C.C.A., 125 F.2d 387—N. L. R. B. v. West Texas Utilities Co., C.C.A., 119 F.2d 683—N. L. R. B. v. New Era Die Co., C.C.A., 118 F.2d 500—Cudahy Packing Co. v. N. L. R. B., C.C.A., 118 F.2d 295 —N. L. R. B. v. Superior Tanning Co., C.C.A., 117 F.2d 881, certiorari denied 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—New Idea v. N. L. R. B., C.C.A., 117 F.2d 517—Continental Oil Co. v. N. L. R. B., C.C. A., 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U. S. 212, 85 L.Ed. 1292—N. L. R. B. v. Empire Furniture Corporation, C.C.A.6, 107 F.2d 92—N. L. R. B. v. Planters Mfg. Co., C.C.A., 105 F. 2d 750, rehearing denied 106 F.2d 524—N. L. R. B. v. Colten, C.C.A., 105 F.2d 179—Burlington Dyeing & Finishing Co. v. N. L. R. B., C.C.A. Fla., 104 F.2d 736—Wilson & Co. v. N. L. R. B., C.C.A., 103 F.2d 243 —N. L. R. B. v. Eagle Mfg. Co., C.C.A., 99 F.2d 930—N. L. R. B. v. Carlisle Lumber Co., C.C.A., 94 F.2d 138, certiorari denied 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539—Lyons v. Eagle-Picher Lead Co C.C.A.Okl., 90 F.2d 321.

Pa.—In re Abbotts Dairies, 19 A.2d 128, 341 Pa. 145.

Arrangements between seller and purchaser

(1) The arrangements that are made between seller and purchaser with respect to place of taking title to the commodity, or as to the payment of freight, where the actual movement is interstate, does not affect the applicability of the statute to employment relations of the seller.—Santa Cruz Fruit Packing Co. v. N. L. R. B., 58 S.Ct. 656, 303 U.S. 453, 82 L.Ed. 954.

(2) Sales are not withdrawn from federal control because goods are delivered f. o. b. within state of origin.

U.S.—N. L. R. B. v. Alloy Cast Steel Co., C.C.A.6, 117 F.2d 302—Mooresville Cotton Mills v. N. L. R. B, C.C.A., 94 F.2d 61, modified on other grounds 97 F.2d 959.

Wyo.—Morrison-Knudson Co. v. State Board of Equalization, 135 P.2d 927, 58 Wyo. 500.

(3) Subsidiary which consigned product direct to consumer was not the less engaged in interstate commerce within statute because it sold its products through parent corporation as agent, thus allegedly creating a break in any shipment out of the state.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A., 108 F. 2d 198.

Ownership of merchandise

Under rule making manufacturer who ships product in interstate commerce subject to National Labor Relations Board with respect to unfair labor practices tending to lead to labor disputes, such tendency does not differ in kind, quantity, or effect merely because the merchandise shipped belongs to consignee or customers in other states, instead of to manufacturer himself.—N. L. R. B. v. Fainblatt, 59 S.Ct. 668, 306 U.S. 601, 307 U.S. 609, 83 L.Ed. 1014.

goods outside the state,[87] supplies essential services to carriers and others engaged in interstate or foreign commerce,[88] or builds, repairs, or overhauls instrumentalities of interstate and foreign commerce.[89]

Corporations which are intimately associated in a joint enterprise, as affiliated corporations, under the same management, engaged in an industrial operation involving a direct and continuous flow of commerce across state lines to the market are subject to the statute.[90] Where one company is jointly held with another company for unfair labor practices in which the latter was the prime movant, the former is subject to the statute regardless of whether it is engaged in interstate commerce within the meaning of the statute.[91]

Particular businesses. In accordance with the foregoing rules, numerous particular businesses have been held subject to the National Labor Relations Act on the ground that their activities affect interstate commerce,[92] such as manufactur-

87. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S.Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L. R. 1352—N. L. R. B. v. Van De Kamp's Holland-Dutch Bakers, C. C.A.9, 152 F.2d 818, modified on other grounds 154 F.2d 828—Loveman, Joseph & Loeb v. N. L. R. B., C.C.A.5, 146 F.2d 769—N. L. R. B. v. M. E. Blatt Co., C.C.A.3, 143 F. 2d 268, certiorari denied 65 S.Ct. 135, 323 U.S. 774, 89 L.Ed. 619—J. L. Brandeis & Sons v. N. L. R. B., C.C.A.8, 142 F.2d 977, certiorari denied 65 S.Ct. 85, 323 U.S. 751, 89 L.Ed. 601, rehearing denied 65 S.Ct. 129, 323 U.S. 815, 89 L.Ed. 648—N. L. R. B. v. Ellis-Klatscher & Co., C.C.A.9, 142 F.2d 356—N. L. R. B. v. H. G. Hill Stores, C.C.A. 5, 140 F.2d 924—N. L. R. B. v. Richter's Bakery, C.C.A.5, 140 F.2d 870, certiorari denied 64 S.Ct. 1267, 322 U.S. 754, 88 L.Ed. 1584—N. L. R. B. v. Poultrymen's Service Corporation, C.C.A.3, 138 F.2d 204—Tyne Co. v. N. L. R. B., C.C.A., 125 F.2d 832—N. L. R. B. v. Robert S. Green, Inc., C.C.A., 125 F.2d 485—N. L. R. B. v. W. H. Kistler Stationery Co., C.C.A., 122 F.2d 989—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A., 122 F.2d 419—N. L. R. B. v. Suburban Lumber Co., C.C.A., 121 F.2d 829, certiorari denied 62 S.Ct. 364, 314 U.S. 693, 86 L.Ed. 554—Cudahy Packing Co. v. N. L. R. B., C.C.A., 118 F.2d 295—N. L. R. B. v. Superior Tanning Co., C.C.A., 117 F.2d 881, certiorari denied 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—N. L. R. B. v Alloy Cast Steel Co., C.C.A.6, 117 F.2d 302—Link-Belt Co. v. N. L. R. B., C.C.A., 110 F.2d 506, reversed on other grounds 61 S.Ct. 358, 311 U. S. 584, 85 L.Ed. 368—N. L. R. B. v. Norfolk Shipbuilding & Drydock Corporation, C.C.A., 109 F.2d 128—N. L. R. B. v. Empire Furniture Corporation, C.C.A., 107 F.2d 92—Burlington Dyeing & Finishing Co. v. N. L. R. B., C.C.A.Fla., 104 F.2d 736—Newport News Shipbuilding & Dry Dock Co. v. N. L. R. B., C.C.A.4, 101 F.2d 841, reversed on other grounds N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219—N. L. R. B. v. Eagle Mfg. Co., C.C.A., 99 F.2d 930.

Ability to purchase within state

The fact that employer could have secured its raw materials from within state did not militate against the interstate nature of its commerce where it also shipped part of its finished products outside the state.—N. L. R. B. v. Niles Fire Brick Co., C.C.A., 124 F.2d 366, certiorari denied 62 S.Ct. 944, 316 U.S. 664, 86 L.Ed. 1740.

Purchase through intermediary

Fact that a company, instead of buying all its supplies outside the state and shipping them in as formerly, arranged to have someone else ship in the supplies, which were then bought by the company, did not destroy the effect of the transactions on interstate commerce as respects application of the statute to the company.—N. L. R. B. v. Sunshine Mining Co., C.C.A., 110 F.2d 780, certiorari denied 61 S.Ct. 447, 312 U. S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144.

88. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. Stremel, C.C. A.10, 141 F.2d 317—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—Indianapolis Power & Light Co. v. N. L. R. B., C.C.A.7, 122 F.2d 757, certiorari denied 62 S.Ct. 633, 315 U.S. 804, 86 L.Ed. 1204—N. L. R. B. v. Western Massachusetts Electric Co., C.C.A., 120 F.2d 455—N. L. R. B. v. West Texas Utilities Co., C.C.A., 119 F.2d 683—Pueblo Gas & Fuel Co. v. N. L. R. B., C.C.A., 118 F.2d 304—N. L. R. B. v. Gulf Public Service Co., C.C.A., 116 F.2d 852—N. L. R. B. v. West Kentucky Coal Co., C.C.A., 116 F.2d 816—Consumers Power Co. v. N. L. R. B., C.C.A., 113 F.2d 38—Southern Colorado Power Co. v. N. L. R. B., C.C.A., 111 F.2d 539.

A radio station, is an "instrumentality" of "interstate commerce," and board had jurisdiction of unfair practices by power company serving radio stations.—N. L. R. B. v. Pacific Gas & Elec. Co., C.C.A.9, 118 F.2d 780.

89. U.S.—Newport News Shipbuilding & Dry Dock Co. v. N. L. R. B., C.C.A.4, 101 F.2d 841, reversed on other grounds N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219.

Naval vessels for United States

U.S.—Newport News Shipbuilding & Dry Dock Co. v. N. L. R. B., C.C. A.4, 101 F.2d 841, reversed on other grounds N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219.

90. U.S.—N. L. R. B. v. Aluminum Products Co., C.C.A.7, 120 F.2d 567.

91. U.S.—N. L. R. B. v. Gluek Brewing Co., C.C.A.8, 144 F.2d 847.

92. U.S.—N. L. R. B. v. Holtville Ice & Cold Storage Co., C.C.A.9, 148 F.2d 168—N. L. R. B. v. Gluek Brewing Co., C.C.A.8, 144 F.2d 847—Williams Motor Co. v. N. L. R. B., C.C.A., 128 F.2d 960—N. L. R. B. v. Aluminum Products Co., C.C. A., 120 F.2d 567—N. L. R. B. v. White Swan Co., C.C.A., 118 F.2d 1002, certiorari denied 62 S.Ct. 93, 314 U.S. 648, 86 L.Ed. 520—New Idea v. N. L. R. B., C.C.A., 117 F. 2d 517—N. L. R. B. v. Planters Mfg. Co., C.C.A., 105 F.2d 750, rehearing denied 106 F.2d 524—Bowen v. James Vernor Co., C.C.A. Mich., 89 F.2d 968—N. L. R. B. v. Hopwood Retinning Co., C.C.A., 98 F.2d 97—N. L. R. B. v. National New York Packing & Shipping Co., C.C.A., 86 F.2d 98.

Pa.—In re Abbotts Dairies, 19 A.2d 128, 341 Pa. 145.

ers,[93] retailers,[94] and wholesalers[95] generally; producers, processors, and distributors of lumber,[96] oil and gas,[97] and mine products;[98] processors and packers of foodstuffs and agricultural products;[99]

93. U.S.—N. L. R. B. v. Henry Levaur, Inc., C.C.A., 115 F.2d 105, certiorari denied 61 S.Ct. 550, 312 U.S. 682, 85 L.Ed. 1120—N. L. R. B. v. Eagle Mfg. Co., C.C.A., 99 F. 2d 930—Jeffery-De Witt Insulator Co. v. N. L. R. B., C.C.A., 91 F.2d 134, 112 A.L.R. 948, certiorari denied 58 S.Ct. 55, 302 U.S. 731, 82 L.Ed. 565.

Materials purchased within state

Fact that greater part of materials used by manufacturer were purchased within state did not prevent its business from being interstate so as to subject manufacturer to statute where most of its products were shipped to other states so that industrial strife would result in interruption to the flow of interstate commerce.—Mooresville Cotton Mills v. N. L. R. B., C.C.A., 94 F.2d 61, modified on other grounds 97 F.2d 959.

Particular kinds of manufacturing

(1) Building materials.—N. L. R. B. v. Kentucky Fire Brick Co., C.C. A., 99 F.2d 89—Standard Lime & Stone Co. v. N. L. R. B., C.C.A., 97 F.2d 531.

(2) Clothing and textiles.—N. L. R. B. v. Bradford Dyeing Ass'n, 60 S.Ct. 918, 310 U.S. 318, 84 L.Ed. 1226—N. L. R. C. v. Fainblatt, 59 S.Ct. 668, 306 U.S. 601, 307 U.S. 609, 83 L. Ed. 1014—N. L. R. B. v. Friedman-Harry Marks Clothing Co., 57 S.Ct. 645, 301 U.S. 58, 81 L.Ed. 921—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—N. L. R. B. v. Crystal Spring Finishing Co., C.C.A., 116 F. 2d 669—Burlington Dyeing & Finishing Co. v. N. L. R. B., C.C.A.Fla., 104 F.2d 736—N. L. R. B. v. Fashion Piece Dye Works, C.C.A., 100 F.2d 304—N. L. R. B. v. Lion Shoe Co., C. C.A., 97 F.2d 448, affirmed 59 S.Ct. 191, 305 U.S. 315, 83 L.Ed. 195, rehearing denied 59 S.Ct. 356, 305 U. S. 675, 83 L.Ed. 437—N. L. R. B. v. J. Freezer & Son, C.C.A., 95 F.2d 840—N. L. R. B. v. Wallace Mfg. Co., C.C.A., 95 F.2d 818—Mooresville Cotton Mills v. N. L. R. B., C.C.A., 94 F.2d 61, modified on other grounds 97 F.2d 959—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C.Mo., 21 F.Supp. 807, vacated on other grounds International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, mandate conformed to, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 23 F.Supp. 998, reversed on other grounds, C.C.A., 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

(3) Furniture.—N. L. R. B. v. Empire Furniture Corporation, C.C.A., 107 F.2d 92.

(4) Radio parts.—N. L. R. B. v. Stackpole Carbon Co., C.C.A., 105 F. 2d 167, certiorari denied 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506.

(5) Steel, iron, and machinery.—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S.Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352—Link-Belt Co. v. N. L. R. B., C.C. A., 110 F.2d 506, reversed on other grounds 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Union Drawn Steel Co. v. N. L. R. B., C.C.A., 109 F.2d 587.

94. U.S.—Loveman, Joseph & Loeb v. N. L. R. B., C.C.A.5, 146 F.2d 769—N. L. R. B. v. M. E. Blatt Co., C.C.A., 143 F.2d 268, certiorari denied 65 S.Ct. 135, 323 U.S. 774, 89 L.Ed. 619—J. L. Brandeis & Sons v. N. L. R. B., C.C.A.8, 142 F.2d 977, certiorari denied 65 S.Ct. 85, 323 U.S. 751, 89 L.Ed. 601, rehearing denied 65 S.Ct. 129, 323 U.S. 815, 89 L.Ed. 648—N. L. R. B. v. J. L. Hudson Co., C.C.A., 135 F. 2d 380, certiorari denied 64 S.Ct. 40, 320 U.S. 740, 88 L.Ed. 439—N. L. R. B. v. Suburban Lumber Co., C.C.A., 121 F.2d 829, certiorari denied 62 S.Ct. 364, 314 U.S. 693, 86 L.Ed. 554.

95. U.S.—N. L. R. B. v. Ellis-Klatscher & Co., C.C.A.9, 142 F.2d 356—N. L. R. B. v. H. G. Hill Stores, C.C.A.5, 140 F.2d 924.

96. U.S.—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A., 133 F.2d 295—N. L. R. B. v. Weyerhaeuser Timber Co., Clemons Branch, C.C. A., 132 F.2d 234—N. L. R. B. v. Bachelder, C.C.A., 120 F.2d 574, certiorari denied 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519, and modified on other grounds, C.C.A., 125 F.2d 387—N. L. R. B. v. Carlisle Lumber Co., C.C.A., 94 F.2d 138, certiorari denied 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539.

Or.—Markham & Callow v. International Woodworkers of America, Lumber & Sawmill Workers Union, 135 P.2d 727, 170 Or. 517.

97. U.S.—N. L. R. B. v. T. W. Phillips Gas & Oil Co., C.C.A.3, 141 F. 2d 304—N. L. R. B. v. Louisville Refining Co., C.C.A., 102 F.2d 678, certiorari denied 60 S.Ct. 81, 308 U.S. 568, 84 L.Ed. 477—N. L. R. B. v. Bell Oil & Gas Co., C.C.A., 91 F.2d 509, rehearing denied 93 F.2d 1010.

98. U.S.—Lyons v. Eagle-Picher Lead Co., C.C.A.Okl., 90 F.2d 321.

Sale to smelting company

Where mining company sold all its products within the state to a smelting company also within the state, and the finished products of smelting company were shipped to other states, the arrangement between the companies did not change the essential fact that the transactions together constituted a direct and continuous flow of commerce across state lines so as to subject the mining company to the statute.—N. L. R. B. v. Sunshine Mining Co., C.C.A., 110 F.2d 780, certiorari denied 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U. S. 713, 85 L.Ed. 1144.

Sale to mint

(1) The production and shipment of gold bullion by a mine and refinery in one state for the purpose of selling it to a United States mint in another state is commerce within labor relations statute even though the United States may be the only customer to which bullion can legally be sold.—Canyon Corporation v. N. L. R. B., C.C.A., 128 F.2d 953.

(2) However a company engaged in mining gold and silver in certain state and selling its product to a government mint in the same state was held not subject to regulation under the statute on the ground that it was not engaged in interstate commerce.—N. L. R. B. v. Idaho-Maryland Mines Corporation, C.C.A., 98 F.2d 129.

Coal mine operators

U.S.—N. L. R. B. v. Stremel, C.C.A. 10, 141 F.2d 317—N. L. R. B. v. West Kentucky Coal Co., C.C.A., 116 F.2d 816—N. L. R. B. v. Good Coal Co., C.C.A., 110 F.2d 501, certiorari denied 60 S.Ct. 978, 310 U. S. 630, 84 L.Ed. 1400—N. L. R. B. v. Crowe Coal Co., C.C.A., 104 F. 2d 633, certiorari denied 60 S.Ct. 107, 308 U.S. 584, 84 L.Ed. 489—Cover Fork Coal Co. v. N. L. R. B., C.C.A., 97 F.2d 331.

99. U.S.—Santa Cruz Fruit Packing Co. v. N. L. R. B., 58 S.Ct. 656, 303 U.S. 453, 82 L.Ed. 954—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433—Cudahy Packing Co. v. N. L. R. B., C.C.A., 118 F.2d 295—North Whittier Heights Citrus Ass'n v. N. L. R. B., C.C.A., 109 F.2d 76, certiorari denied 60 S.Ct. 1075, 310 U.S. 632, 84 L.Ed. 1402, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472—Wilson & Co. v. N. L. R. B., C.C. A., 103 F.2d 243—Stout v. Pratt, D.C.Mo., 12 F.Supp. 864, affirmed, C.C.A., Pratt v. Stout, 85 F.2d 172.

Bakeries

U.S.—N. L. R. B. v. Richter's Bak-

financial institutions;[1] insurance companies;[2] newspapers, news agencies, and printing;[3] shipbuilding and repairing;[4] and utilities.[5] The activities of other particular companies have been held not to affect interstate commerce so as to render the statute applicable.[6]

§ 28(10). Who Are Employers within Regulatory Provisions

The term "employer," as used in statutes dealing with labor relations, carries with it more than the technical and traditional common-law definition, and, generally, any person acting directly or indirectly in the interest of an employer is an employer within the statutes.

The term "employer," as used in statutes dealing with labor relations, carries with it more than the technical and traditional common-law definition; it also draws substance from the policy and purpose of the statute, the circumstances and background of the particular employment relationship, and all the hard facts of industrial life.[7] Accordingly, although the labor relations board in performing its function of defining and applying the term should not disregard the technical and traditional concept of "employer," it is not confined to such concept and may take into account the more relevant economic and statutory considerations.[8]

Statutes dealing with labor relations generally define the term "employer" as including any person acting directly or indirectly in the interest of an employer,[9] and by an amendment to the National

ery, C.C.A.5, 140 F.2d 870, certiorari denied 64 S.Ct. 1267, 322 U.S. 754, 88 L.Ed. 1584—N. L. R. B. v. Van De Kamp's Holland-Dutch Bakers, C.C.A.9, 152 F.2d 818, modified on other grounds 154 F.2d 828—N. L. R. B. v. Schmidt Baking Co., C.C.A., 122 F.2d 162.

Mass.—Hathaway Bakeries v. Labor Relations Commission, 55 N.E.2d 254, 316 Mass. 136.

Shipments of fruit

Proof that stoppage of operations by labor troubles of a co-operative corporation composed of Texas citrus fruit growers which processed and packed only their own fruit and sold it in Texas to another company, which in turn shipped most of it in interstate commerce, would affect at once to a considerable extent the flow of interstate commerce was sufficient to give National Labor Relations Board jurisdiction over labor dispute, notwithstanding neither the co-operative corporation nor its employees were engaged in interstate commerce.—N. L. R. B. v. Edinburg Citrus Ass'n, C.C.A.5, 147 F.2d 353.

1. U.S.—N. L. R. B. v. Northern Trust Co., D.C.Ill., 56 F.Supp. 335, affirmed, C.C.A., 148 F.2d 24, certiorari denied 66 S.Ct. 38, 326 U.S. 731, 90 L.Ed. 435, and American Nat. Bank & Trust Co., of Chicago v. N. L. R. B., 66 S.Ct. 39, 326 U.S. 731, 90 L.Ed. 435.

State bank

U.S.—N. L. R. B. v. Northern Trust Co., D.C.Ill., 56 F.Supp. 335, affirmed, C.C.A., 148 F. 24, certiorari denied 66 S.Ct. 38, 326 U.S. 731, 90 L.Ed. 435 and American Nat. Bank & Trust Co. of Chicago v. N. L. R. B., 66 S.Ct. 39, 326 U.S. 731, 90 L.Ed. 435.

2. U.S.—Polish Nat. Alliance of U. S. v. N. L. R. B., 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509.

3. U.S.—Associated Press v. N. L. R. B., N.Y., 57 S.Ct. 650, 301 U.S. 103, 81 L.Ed. 953—N. L. R. B. v. Times-Picayune Pub. Co., C.C.A.5, 130 F.2d 257—N. L. R. B. v. W. H. Kistler Stationery Co., C.C.A., 122 F.2d 989—N. L. R. B. v. Hearst, C.C.A., 102 F.2d 658—N. L. R. B. v. A. S. Abell Co., C.C.A., 97 F.2d 951.

D.C.—Press Co. v. N. L. R. B., 118 F.2d 937, 73 App.D.C. 103, certiorari denied 61 S.Ct. 1118, 313 U.S. 595, 85 L.Ed. 1548.

4. U.S.—Bethlehem Shipbuilding Corporation, Limited v. N. L. R. B., C.C.A., 114 F.2d 930, certiorari dismissed 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141—N. L. R. B. v. Norfolk Shipbuilding & Drydock Corporation, C.C.A., 109 F.2d 128—Newport News Shipbuilding & Dry Dock Co. v. N. L. R. B., C.C.A. 4, 101 F.2d 841, reversed on other grounds N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219.

5. U.S.—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—N. L. R. B. v. Western Massachusetts Electric Co., C.C.A., 120 F.2d 455—Pueblo Gas & Fuel Co. v. N. L. R. B., C.C.A., 118 F.2d 304—N. L. R. B. v. Gulf Public Service Co., C.C.A., 116 F.2d 852—N. L. R. B. v. Central Missouri Telephone Co., C.C.A., 115 F.2d 563—Virginia Electric & Power Co. v. N. L. R. B., C.C.A., 115 F.2d 414, reversed on other grounds 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—Consumers Power Co. v. N. L. R. B., C.C.A., 113 F.2d 38—Southern Colorado Power Co. v. N. L. R. B., C.C.A., 111 F.2d 539—Appalachian Electric Power Co. v. N. L. R. B., C.C.A.4, 93 F.2d 985.

Electricity, gas, and steam

The National Labor Relations Board had jurisdiction of labor disputes of parent utility and its subsidiaries operating as an integrated system engaged in intra-state business furnishing electricity, gas, and steam where system imported large quantities of raw materials from without the state, and interruption of its public service would, because of interstate activities of its customers, halt operation of terminals and trains of three great interstate railroads, interstate communication by telegraph, telephone, and radio and lighting maintained to aid navigation, and would greatly impede business of interstate ferries and foreign steamships, notwithstanding only a small per cent of system's total business was used in interstate or foreign commerce.—Consolidated Edison Co. of N. Y. v. N. L. R. B., N. Y., 59 S.Ct. 206, 305 U.S. 197, 83 L. Ed. 126.

6. U.S.—N. L. R. B. v. Idaho-Maryland Mines Corporation, C.C.A., 98 F.2d 129—Oberman & Co. v. Pratt, D.C.Mo., 16 F.Supp. 887, reversed on other grounds, C.C.A., 89 F.2d 786.

Local store

The National Labor Relations Act was not applicable to a controversy arising out of the attempted unionization of a local shoe store.—Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 9 A.2d 295, 126 N.J.Eq. 374, reversed on other grounds 8 A.2d 767, 126 N.J.Eq. 318.

7. U.S.—N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265.

8. U.S.—N. L. R. B. v. E. C. Atkins & Co., supra.

9. U.S.—N. L. R. B. v. Hearst, C.C.A., 102 F.2d 658.

An incorporated advisory board on labor relations could be considered an "employer," because acting on behalf of the employers.—In re New York State Labor Relations Bd. v. Metropolitan Life Ins. Co., 52 N.Y.S.2d 590, 183 Misc. 1064, affirmed 58 N.Y.S.2d 343, 269 App.Div. 934, appeal granted 59 N.Y.S.2d 292, 269 App.Div. 980, affirmed 66 N.E.2d 853, 295 N.Y. 839.

Labor Relations Act, § 2 (2), 29 U.S.C.A. § 152 (2), the term is defined as including any person acting as an agent of an employer. One who aids the immediate employer in contravening the statute is also an employer under the common-law principle that an agent is accountable for his illegal acts, even though performed under conditions imposing liability on his principal.[10] Supervisory employees will be considered employers only where they act in the interest of the employer in matters envisaged by the statute, and not where they serve their own interest as employees with respect to wages, hours, seniority rights, or working conditions.[11]

Whoever as or in the capacity of the employer controls the employer-employee relations in an integrated industry is an employer,[12] and, where in fact there is but one enterprise, that enterprise, as a whole, is responsible for compliance with the statute regardless of the corporate arrangements of the parties among themselves.[13] So a parent corporation may be responsible for its activities with respect to the employees of a wholly owned subsidiary,[14] to the extent that it controls the labor relations of such subsidiary.[15] On the other hand, a parent corporation is not responsible for unfair labor practices committed by a subsidiary where it did not exercise control over the labor practices of its subsidiary and did not participate in the acts of which complaint is made.[16]

Generally, no formal change in the corporate structure of an employer, as by merger, will be permitted to vitiate its relations with its employees, or lessen its obligations under the statute,[17] but it has been held that, where a substantial new corporation is organized, although with the same stockholders as the old corporation, each corporation is responsible for the acts of a supervisory employee only while employed by it, and the old corporation may not be charged as an employer with responsibility for the acts of the employee while employed by the new corporation.[18] A business employing persons is an employer within the terms of the statute, although it is in receivership,[19] or although it is being managed under an order in a reorganization proceeding.[20]

Independent contractor. In determining whether one contracting with another for the performance of certain services is an employer or whether the employees are those of an independent contractor, the contract should be appraised in connection with the circumstances.[21] The fact that one company used another in delivering its product, even if the latter were an independent contractor, would not protect the former from committing unfair labor practices if the purpose of such use was a forbid-

10. U.S.—N. L. R. B. v. Taylor-Colquitt Co., C.C.A.4, 140 F.2d 92.

11. U.S.—American Steel Foundries v. N. L. R. B., C.C.A.7, 158 F.2d 896—N. L. R. B. v. Packard Motor Car Co., C.C.A.6, 157 F.2d 80, affirmed 67 S.Ct. 789.

Terms not mutually exclusive

"Employer" and "employee," as defined in National Labor Relations Act, are not mutually exclusive since a foreman in his relation to his employer is an "employee" within the act and, in his relation to the laborers under him, he is the representative of the employer and is, therefore, an "employer" within the act.—N. L. R. B. v. Armour & Co., C.C.A.10, 154 F.2d 570, certiorari denied 67 S.Ct. 92.

Department heads and assistant department heads who, as practical matter, had power to bring about discharge of rank and file of employees, although actual discharge was handled by personnel director, were "supervisory officials" for purposes of National Labor Relations Act.—N. L. R. B. v. Brown Co., C.C.A.1, 160 F.2d 449.

12. U.S.—N. L. R. B. v. Lund, C.C.A.8, 103 F.2d 815.

13. U.S.—N. L. R. B. v. Condenser Corp. of America, C.C.A.3, 128 F.2d 67.

Publishing activities

An order of National Labor Relations Board, commanding newspaper publisher and numerous corporations, by means of which he conducted his publishing activities, to cease and desist from unfair labor practices, by coercing union employees, should be enforced, although only one of such corporations was nominal employer, since all of them acted directly or indirectly for such employer and, hence, were within definition of "employer," which is included in term "person" as used in statute.—N. L. R. B. v. Hearst, C.C.A.9, 102 F.2d 658.

14. U.S.—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—N. L. R. B. v. Swift & Co., C.C.A.6, 127 F.2d 30.
D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

15. U.S.—N. L. R. B. v. Condenser Corp. of America, C.C.A.3, 128 F.2d 67.

16. D.C.—Press Co. v. N. L. R. B., 118 F.2d 937, 73 App.D.C. 103, certiorari denied 61 S.Ct. 1118, 313 U.S. 595, 85 L.Ed. 1548.

17. U.S.—Commercial Telegraphers' Union, A. F. L. v. Western Union Telegraph Co., D.C.D.C., 53 F.Supp. 90.

18. U.S.—N. L. R. B. v. Bonita Fruit Co., C.C.A.5, 158 F.2d 758.

19. U.S.—N. L. R. B. v. Bachelder, C.C.A.7, 120 F.2d 574, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519, and modified on other grounds, C.C.A., 125 F.2d 387.

20. U.S.—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39.

21. U.S.—Butler Bros. v. N. L. R. B., C.C.A.7, 134 F.2d 981, certiorari denied 64 S.Ct. 203, 320 U.S. 789, 88 L.Ed. 475, and Wasleff v. N. L. R. B., 64 S.Ct. 204, 320 U.S. 789, 88 L.Ed. 475.

Mining property owners

Under provisions of Missouri mining laws for mining by consent of landowners, mining property owners were "employers" notwithstanding some coöwners did not personally take part in the operation.—N. L. R. B. v. Blount, C.C.A.8, 131 F.2d 585, certiorari denied Blount v. N. L. R. B., 63 S.Ct. 995, 318 U.S. 791, 87 L.Ed. 1157.

den interference in labor matters.[22] Where an independent contractor knowingly participates in the effectuation of an unfair labor practice, it places itself within the orbit of the corrective jurisdiction of the statute.[23]

§ 28(11). Who Are Employees within Regulatory Provisions

Generally, the application of statutes dealing with labor relations depends on the existence of an employer and employee relationship, and the question whether persons are or are not employees is to be determined in accordance with the intent of the statute and the facts of the particular case.

As a general rule, the application of statutes dealing with labor relations depends on the existence of an employer and employee relationship.[24] The question whether persons are or are not employees is to be determined in accordance with the intent of the statute[25] and the facts of the particular case,[26] and, although the meaning of the term is the same wherever used in the statute,[27] it is not necessarily controlled by special definitions contained in other unrelated statutes.[28]

The term "employee," as used in the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes is not treated as a word of art having a definite meaning.[29] It is to be given a broad and comprehensive interpretation, taking color from its surroundings,[30] and is to be understood with respect to the purpose of the statute and the facts involved in the economic relationship,[31] rather than technically and exclusively by previously established

22. U.S.—N. L. R. B. v. Gluek Brewing Co., C.C.A.8, 144 F.2d 847.

Common-law or statutory concepts

of legal relationship must yield in so far as is necessary to effectuate purposes of National Labor Relations Act.—N. L. R. B. v. Gluek Brewing Co., supra.

23. U.S.—N. L. R. B. v. Gluek Brewing Co., supra.

24. N.Y.—New York Post Corp. v. Kelley, 61 N.Y.S.2d 264, affirmed Hearst Consolidated Publications v. Kelley, 61 N.Y.S.2d 762, 270 App. Div. 916, appeal granted 62 N.Y.S. 2d 614, 270 App.Div. 923, New York Sun v. Kelley, and New York World Telegram Corp. v. Kelley, 62 N.Y.S.2d 614, two cases, 270 App.Div. 924, and New York Post Corp. v. Kelley, 62 N.Y.S.2d 615, 270 App.Div. 923.

25. U.S.—Hearst Publications v. N. L. R. B., C.C.A.9, 64 S.Ct. 851, 322 U.S. 111, 88 L.Ed. 1170, rehearing denied 64 S.Ct. 1148, 322 U.S. 769, 88 L.Ed. 1595, two cases, N. L. R. B. v. Stockholders Pub. Co., 64 S. Ct. 1148, 32 U.S. 770, 88 L.Ed. 1595 and N. L. R. B. v. Times-Mirror Co., 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595.

26. U.S.—N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265—N. L. R. B. v. Blount, C.C.A.8, 131 F.2d 585, certiorari denied Blount v. N. L. R. B., 63 S.Ct. 995, 318 U.S. 791, 87 L.Ed. 1157.

Determined from actual situation

Question whether employer-employee relationship exists must be determined from actual situation as disclosed by proof and on facts contained in record and not on decisions of National Labor Relations Board in other cases on different facts.—N. L. R. B. v. E. C. Atkins & Co., C.C.A.7, 147 F.2d 730, vacated on other grounds 65 S.Ct. 1418, 325 U. S. 838, 89 L.Ed. 1965, rehearing denied 66 S.Ct. 13, 326 U.S. 804, 90 L. Ed. 490, reinstated 155 F.2d 567, reversed on other grounds 67 S.Ct. 1265.

Particular persons held employees

(1) Tiff miners working on landowners' mining properties producing ore which became property of landowners.—N. L. R. B. v. Blount, C.C. A.8, 131 F.2d 585, certiorari denied Blount v. N. L. R. B., 63 S.Ct. 995, 318 U.S. 791, 87 L.Ed. 1157.

(2) Haulers, where coöwner of mining property selected and directed haulers of ore and arranged for disposition thereof at selling price fixed by such coöwner a portion of which price haulers received as pay for their work.—N. L. R. B. v. Blount, supra.

Checkweighman

A miner who was elected checkweighman by members of local union, became a union employee, and ceased to be employee of mine operator.—Mackey v. U. S. Coal & Coke Co., 200 S.W.2d 755, 304 Ky. 334.

27. U.S.—Mooresville Cotton Mills v. N. L. R. B., C.C.A.4, 97 F.2d 959.

28. N.Y.—In re New York State Labor Relations Board, 37 N.Y.S.2d 304, affirmed 45 N.Y.S.2d 942, 267 App.Div. 763, affirmed 56 N.E.2d 262, 293 N.Y. 671.

Separate definitions

Although the state labor relations act was inserted in consolidated laws, as an article of the chapter on labor law, the term "employees," as used in the act, was not confined to employees as defined by the earlier chapters of the labor law, in view of the fact that the act contained definition of the word "employees."—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 20 N.E.2d 390, 280 N.Y. 194.

29. U.S.—N. L. R. B. v. Hearst Publications, 64 S.Ct. 851, 322 U.S. 111, 88 L.Ed. 1170, rehearing denied N. L. R. B. v. Hearst Publications, 64 S.Ct. 1148, 2 cases, 322 U.S. 769, 88 L.Ed. 1595, N. L. R. B. v. Stockholders Pub. Co., 64 S.Ct. 1148, 322 U.S. 770, 88 L.Ed. 1595, and N. L. R. B. v. Times-Mirror Co., 64 S. Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595—N. L. R. B. v. Armour & Co., C.C.A.10, 154 F.2d 570, certiorari denied 67 S.Ct. 92.

30. U.S.—N. L. R. B. v. Armour & Co., supra.

31. U.S.—N. L. R. B. v. Hearst Publications, 64 S.Ct. 851, 322 U.S. 111, 88 L.Ed. 1170, rehearing denied N. L. R. B. v. Hearst Pub., 64 S.Ct. 1148, 2 cases, 322 U.S. 769, 88 L.Ed. 1595, N. L. R. B. v. Stockholders Pub. Co., 64 S.Ct. 1148, 322 U.S. 770, 88 L.Ed. 1595, and N. L. R. B. v. Times-Mirror Co., 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595—N. L. R. B. v. Armour & Co., C.C. A.10, 154 F.2d 570, certiorari denied 67 S.Ct. 92—N. L. R. B. v. Gluek Brewing Co., C.C.A.8, 144 F. 2d 847.

Effectiveness of collective bargaining

Employer-employee relationship within National Labor Relations Act may be found present where collective bargaining may appropriately be utilized as contemplated by the act.—N. L. R. B. v. E. C. Atkins Co., 67 S.Ct. 1265.

Remedial purpose

The statutory definition of the word "employee" should not be narrowed to make abortive the remedial purposes of the act.—Phelps Dodge Corp. v. N. L. R. B., C.C.A.2, 113 F. 2d 202, modified on other grounds Phelps Dodge Corp. v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217.

legal classifications.[32] The term, as used in the statute, carries with it more than the traditional common-law definition,[33] and, while the common-law tests of the relationship of employer-employee are to be considered, they are not controlling.[34] Persons who are independent contractors are not employees within the statute.[35]

The term "employee," as used in the statutes, has been held not restricted to persons employed in industry,[36] or to manual laborers,[37] but extends to any employee,[38] including so-called white collar workers.[39] The term has been held to include bank employees,[40] insurance agents,[41] newsboys,[42] plant guards,[43] and service and maintenance employees of a private hospital,[44] or of a nonprofit charitable corporation operating a public hospital.[45]

Railway Labor Act. Every person in the service of a carrier is not an "employee" within the Railway Labor Act, 45 U.S.C.A. § 151 et seq, although subject to the carrier's continuing control and authority.[46] Under the statute, only those who perform work defined as that of an employee by existing or amended orders of the Interstate Commerce Commission are within its terms,[47] and the authority thus to define employees is not vested in the

32. U.S.—N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265—N. L. R. B. v. Hearst Publications, 64 S.Ct. 851, 322 U.S. 111, 88 L.Ed. 1170, rehearing denied N. L. R. B. v. Hearst Pub., 64 S.Ct. 1148, 2 cases, 322 U.S. 769, 88 L.Ed. 1595, N. L. R. B. v. Stockholders Pub. Co., 64 S.Ct. 1148, 322 U.S. 770, 88 L.Ed. 1595, and N. L. R. B. v. Times-Mirror Co., 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595—N. L. R. B. v. Gluek Brewing Co., C.C.A.8, 144 F. 2d 847.

33. U.S.—N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265.

34. U.S.—N. L. R. B. v. E. C. Atkins & Co., supra.

Power to hire and fire and absolute power to control physical activities in performance of service are relevant but not exclusive indicia of employer-employee relationship.—N. L. R. B. v. E. C. Atkins & Co., supra.

35. Pa.—Eddyside Co. v. Seibel, 15 A.2d 691, 142 Pa.Super. 174.

36. N.Y.—State Labor Relations Board v. McChesney, 27 N.Y.S.2d 870, 261 App.Div. 1089.

37. N.Y.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 6 N.Y.S.2d 775, 168 Misc. 948, affirmed 7 N.Y.S.2d 1007, 255 App.Div. 840, and 7 N.Y.S.2d 1008, 255 App.Div. 840, affirmed 20 N.E.2d 390, 280 N.Y. 194.

38. U.S.—N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265.

Foremen and supervisory personnel as within statutes in absence of contrary provision see infra § 28 (12).

39. U.S.—N. L. R. B. v. Armour & Co., C.C.A.10, 154 F.2d 570, certiorari denied 67 S.Ct. 92.

Plant clerks

Plant clerks employed by packing house have been held "employees" within National Labor Relations Act as against objections that the objective of the duties performed by such clerks is to increase plant efficiency and benefit the employer, and that the knowledge which such clerks obtain is of a highly confidential nature and that its disclosure to competitors might result in injury —N. L. R. B. v. Armour & Co., supra.

40. N.Y.—Bank of Yorktown v. Boland, 16 N.Y.S.2d 756, 172 Misc. 885, affirmed 20 N.Y.S.2d 1017, 259 App.Div. 987, appeal granted 21 N.Y.S.2d 612, 259 App.Div. 1073, affirmed 31 N.E.2d 510, 284 N.Y. 749.

41. N.Y.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 20 N.E.2d 390, 280 N. Y. 194.

Pa.—John Hancock Mut. Life Ins. Co. of Boston v. Pennsylvania Labor Relations Board, 45 Pa.Dist. & Co. 169.

42. U.S.—Hearst Pub. v. N. L. R. B., C.C.A.9, 64 S.Ct. 851, 322 U.S. 111, 88 L.Ed. 1170, rehearing denied 64 S.Ct. 1148, 322 U.S. 769, 88 L.Ed. 1595, two cases, N. L. R. B. v. Stockholders Pub. Co., 64 S.Ct. 1148, 32 U.S. 770, 88 L.Ed. 1595 and N. L. R. B. v. Times-Mirror Co., 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595.

43. U.S.—N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265.

Loyalty and efficiency

In determining status of plant guards as "employees," court could not assume that labor organizations would make demands on plant guards as members or extract concessions from employers so as to decrease guards' loyalty and efficiency. —N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265—Wilson & Co. v. N. L. R. B., C.C.A.8, 162 F.2d 310.

Militarization

(1) If militarization of plant guards is qualified, so that employer retains power to fix wages, hours, and conditions of work, need and desirability for collective action of guards may exist, and recognition of statutory rights may be consistent with guards' military obligations, they remain "employees" under the statute; but, if militarization transfers to army matters which would form basis for collective bargaining, guards may lose such status.—N. L. R. B. v. Jones & Laughlin Steel Corp., 67 S.Ct. 1274—N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265.

(2) The facts relative to changed status of defendant's plant guards by reason of their demilitarization were irrelevant to issue whether they were employees of manufacturer of war material before such demilitarization within National Labor Relations Act.—N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265.

Deputization

Guards may remain "employees" within National Labor Relations Act, although deputized as police officers.—N. L. R. B. v. Jones & Laughlin Steel Corp., 67 S.Ct. 1274—Wilson & Co. v. N. L. R. B., C.C.A. 8, 162 F.2d 310.

44. N.Y.—State Labor Relations Board v. McChesney, 27 N.Y.S.2d 866, 175 Misc. 95, affirmed 27 N.Y. S.2d 870, 261 App.Div. 1089—In re New York State Labor Relations Board, 21 N.Y.S.2d 771, 175 Misc. 95.

45. Minn.—Northwestern Hospital, Minneapolis v. Public Building Service Employes' Union Local No. 113, 294 N.W. 215, 208 Minn. 389.

46. U.S.—National Council of Ry. Patrolmen's Unions, A. F. of L. v. Sealy, C.C.A.Tex., 152 F.2d 500.

47. U.S.—National Council of Ry. Patrolmen's Unions, A. F. of L. v. Sealy, supra.

Patrolmen or watchmen engaged by city to guard railway and wharf terminals are not covered by Railway Labor Act, where not defined as railway employees by Interstate Commerce Commission.—National Council of Ry. Patrolmen's Unions, A. F. of L., v. Sealy, supra—National Council of Railway Patrolmen's Union, A. F. of L., v. Sealy, D.C. Tex., 56 F.Supp. 720.

courts.[48] Persons who are employees of independent contractors within the coverage and protection of the Social Security Act and the Fair Labor Standards Act are not employees of a railroad governed by special legislation enacted for railroad employees, such as the Railway Labor Act.[49]

§ 28(12). —— Persons Specifically Excepted from Operation of Statute

Statutes governing labor relations frequently exclude from the term "employee" certain persons not intended to be covered by the statute such as agricultural laborers, domestic servants, and persons employed by a parent or spouse.

The National Labor Relations Act § 2 (3), 29 U.S.C.A. § 152 (3), and similar statutes specifically exclude from the term "employee" certain persons not intended to be covered by the statute,[50] such as any individual employed as an agricultural laborer,[51] or in the domestic service of any family or person at his home,[52] or any individual employed by his parent or spouse.[53]

It has been held that the exemption of agricultural laborers is not measured by the magnitude of the farmer's planting or by the prolificacy of the harvest.[54] In determining whether a worker is an agricultural laborer within the exception, the nature of the work he does, modified by the custom of doing it, ordinarily is controlling,[55] but it has been held that the fact that the work is similar to that traditionally performed by agriculturists is not decisive where it is not performed as an incident to agricultural activity but as an incident to an industrial enterprise.[56] The work need not be strictly related to the crop in order to constitute agricultural labor within the statute, and, on the other hand, every work related strictly to the crop is not of necessity agricultural labor.[57] It has been held that the packing and preparing of agricultural products for the market are a necessary incident to any agricultural operation so that the labor necessary thereto is agricultural labor,[58] but it has also been held that employees who are not working at farming, but who are specializing in the preparation of farm products for trade or shipment after they have been reaped or gathered, are not agricultural laborers.[59] Employees of a packing plant which processes, packs, and sells the products of numerous individual producers are not agricultural laborers, although handling agricultural products.[60]

Supervisory personnel. Although the National

48. U.S.—National Council of Ry. Patrolmen's Unions, A. F. of L. v. Sealy, C.C.A.Tex., 152 F.2d 500.

49. U.S.—Northern Pac. Ry. Co. v. Reynolds, D.C.Minn., 68 F.Supp. 492, followed in Great Northern Ry. Co. v. Reynolds, 68 F.Supp. 499, and Chicago, St. P., M. & O. Ry. Co. v. Reynolds, 68 F.Supp. 499.

50. U.S.—North Whittier Heights Citrus Ass'n v. N. L. R. B., C.C.A. 9, 109 F.2d 76, certiorari denied 60 S.Ct. 1075, 310 U.S. 632, 84 L.Ed. 1402, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472.

51. U.S.—N. L. R. B. v. John W. Campbell, Inc., C.C.A.5, 159 F.2d 184—North Whittier Heights Citrus Ass'n v. N. L. R. B., C.C.A.9, 109 F.2d 76, certiorari denied 60 S.Ct. 1075, 310 U.S. 632, 84 L.Ed. 1402, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472.

Scope of term

The term "agricultural labor" in the act is no broader than same term in Social Security Act.—N. L. R. B. v. John W. Campbell, Inc., C.C.A.5, 159 F.2d 184.

52. U.S.—North Whittier Heights Citrus Ass'n v. N. L. R. B., C.C.A.9, 109 F.2d 76, certiorari denied 60 S.Ct. 1075, 310 U.S. 632, 84 L.Ed. 1402, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472.

53. U.S.—N. L. R. B. v. Hofmann, C.C.A.3, 147 F.2d 679, 157 A.L.R. 1149—North Whittier Heights Citrus Ass'n v. N. L. R. B., C.C.A.9, 109 F.2d 76, certiorari denied 60 S.Ct. 1075, 310 U.S. 632, 84 L.Ed. 1402, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472.

54. U.S.—N. L. R. B. v. John W. Campbell, Inc., C.C.A.5, 159 F.2d 184.

55. U.S.—North Whittier Heights Citrus Ass'n v. N. L. R. B., C.C.A. 9, 109 F.2d 76, certiorari denied 60 S.Ct. 1075, 310 U.S. 632, 84 L.Ed. 1402, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472.

56. U.S.—N. L. R. B. v. Tovrea Packing Co., C.C.A.9, 111 F.2d 626, certiorari denied Tovrea Packing Co. v. N. L. R. B., 61 S.Ct. 28, 311 U.S. 668, 85 L.Ed. 429.

A meat packing company's employees, working in feed mill and feeding pens adjacent to its packing plant, were not agricultural laborers.—N. L. R. B. v. Tovrea Packing Co., C.C.A.9, 111 F.2d 626, certiorari denied Tovrea Packing Co. v. N. L. R. B., 61 S.Ct. 28, 311 U.S. 668, 85 L.Ed. 429.

57. U.S.—North Whittier Heights Citrus Ass'n v. N. L. R. B., C.C.A. 9, 109 F.2d 76, certiorari denied 60 S.Ct. 1075, 310 U.S. 632, 84 L.Ed. 1402, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472.

58. U.S.—N. L. R. B. v. John W. Campbell, Inc., C.C.A.5, 159 F.2d 184.

Products not grown by employer

In determining whether discharged employees claiming reinstatement were exempt from act as agricultural laborers, fact that approximately twenty per cent of employer's tomato pack during war was done for others was without significance, where discharged employees were never engaged in working on products not grown by employer.—N. L. R. B. v. John W. Campbell, Inc., supra.

59. U.S.—Idaho Potato Growers v. National Labor Relations Board, C.C.A.9, 144 F.2d 295, certiorari denied 65 S.Ct. 122, 323 U.S. 769, 89 L.Ed. 615.

Cellar-warehouse crews, which go to different farms and to dealers' warehouses and prepare potatoes for movement into market, are not "agricultural laborers" excepted from definition of "employee" in act.—Idaho Potato Growers v. N. L. R. B., supra.

60. U.S.—N. L. R. B. v. Edinburg Citrus Ass'n, C.C.A.5, 147 F.2d 353—North Whittier Heights Citrus Ass'n v. N. L. R. B., C.C.A.9, 109 F.2d 76, certiorari denied 60 S.Ct. 1075, 310 U.S. 632, 84 L.Ed. 1402, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472.

Labor Relations Act was subsequently amended to provide that the term "employee" shall not include any individual employed as a supervisor, it has been held that, in the absence of such express provision, the privileges and benefits of the statute conferred on employees extend to foremen[61] and other supervisory personnel.[62]

Employees of state or agency thereof. Some statutory provisions exclude from the term "employee" persons employed by the state or any subdivision or agency thereof,[63] but such exemption does not extend to employees of a business in liquidation being managed by the state superintendent of banks.[64] Helpers employed by custodians of school buildings are his employees subject to the statute and not employees of the board of education exempted from operation of the act.[65]

Employees of charitable organizations. Provisions specifically exempting from the act employees of a charitable association, corporation, or enterprise will not be construed as impliedly exempting employees of a private hospital.[66]

§ 28(13). —— Termination or Cessation of Employment

Generally, in the absence of a statute to the contrary, employees who quit their work to wage a lawful strike in a lawful manner continue as "employees" at least with respect to matters connected with the strike.

It has been held that the question whether the action of a workman in withdrawing from his job and participating in a strike which results in a stoppage of work terminates for such workman the relationship of employer and employee depends on the particular circumstances of each case,[67] and generally, in the absence of a statute to the contrary, employees who quit their work to wage a lawful strike in a lawful manner continue as "employees" at least with respect to matters connected with the strike.[68] Under the express provisions of the National Labor Relations Act § 2 (3), 29 U.S.C.A. § 152 (3), and similar statutes, an employee retains his status as such notwithstanding his employment has ceased as a consequence of, or in connection with, any current labor dispute, or because of an unfair labor

61. U.S.—Packard Motor Car Co. v. N. L. R. B., 67 S.Ct. 789—Wells, Inc., v. N. L. R. B., C.C.A.9, 162 F. 2d 457—American Steel Foundries v. N. L. R. B., C.C.A.7, 158 F.2d 896—N. L. R. B. v. Armour & Co., C.C.A.10, 154 F.2d 570, certiorari denied 67 S.Ct. 92—N. L. R. B. v. Skinner & Kennedy Stationery Co., C.C.A.8, 113 F.2d 667.

Not an employer

Provisions in the act including in the term "employer" any person acting in the interest of an employer, directly or indirectly, could not be construed to deny the organizational privilege to foremen because they acted in the interest of their employer.—Packard Motor Car Co. v. N. L. R. B., 67 S.Ct. 789.

62. U.S.—American Steel Foundries v. N. L. R. B., C.C.A.7, 158 F.2d 896.

Director of research

A graduate chemist acting as director of research for mining company was an "employee" rather than an "executive."—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C. C.A.8, 119 F.2d 903.

A building superintendent, even if an employer as to subordinates, is an "employee" within the labor law as regards collective bargaining with his own employer.—In re New York State Labor Relations Bd. v. Metropolitan Life Ins. Co., 52 N.Y.S.2d 590, 183 Misc. 1064, affirmed 58 N.Y.S.2d 343, 269 App.Div. 934, appeal granted 59 N.Y.S.2d 292, 269 App.Div. 980, affirmed 66 N.E.2d 853, 295 N.Y. 839.

Inspectors, charged with duty of inspecting materials and workmanship for purpose of insuring that employer's product met its specifications and those of its customers, were "employees" within National Labor Relations Act.—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A. 7, 162 F.2d 435.

Mates

The first, second, and third mates employed on each of four vessels regularly sailing the Great Lakes, were "employees" within the National Labor Relations Act and as such were entitled to organize for bargaining purposes, although their work at times involved independent responsibility for property of employer and for its personnel relations.—N. L. R. B. v. Wyandotte Transp. Co., C.C.A.6, 162 F.2d 101.

63. N.Y.—White v. Boland, 5 N.Y. S.2d 119, 254 App.Div. 356.

Public employment as not within statutes generally see supra § 28 (7).

Reason for exemption

The statute excludes state employees because they are responsible to the people of the state and are given adequate safeguards in other provisions of the law.—White v. Boland, 5 N.Y.S.2d 119, 254 App.Div. 356.

64. N.Y.—White v. Boland, 5 N.Y.S. 2d 119, 254 App.Div. 356.

65. N.Y.—In re New York State Labor Relations Board, 37 N.Y.S.2d 304, affirmed 45 N.Y.S.2d 942, 267 App.Div. 763, affirmed 56 N.E.2d 262, 293 N.Y. 671.

66. N.Y.—State Labor Relations Board v. McChesney, 27 N.Y.S.2d 866, 175 Misc. 95, affirmed 27 N.Y. S.2d 870, 261 App.Div. 1089.

Employment by charitable or nonprofit organizations as not within statutes see supra § 28 (6).

Workers in private hospitals as "employees" within statutes see supra § 28 (11).

67. W.Va.—Homer Laughlin China Co. v. Hix, 37 S.E.2d 649.

Employer's rights

Fact that the employer failed to exercise right to discharge striking employee, because of violation of employment agreement, and that the relationship of employer and employee was not terminated during the stoppage of work did not impair employer's general rights which existed by general law or under the wage agreement or otherwise.—Homer Laughlin China Co. v. Hix, supra.

No vested right in job

Striking employees had no vested right in their jobs and did not obtain additional rights by the act of striking, and were not entitled to any greater consideration than nonstriking employees.—Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 9 A.2d 295, 126 N.J.Eq. 374, reversed on other grounds 8 A.2d 767, 126 N.J.Eq. 318.

68. U.S.—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. National Labor Relations

practice,[69] provided he has not obtained any other regular and substantially equivalent employment.[70] Accordingly, under the statute, employees may strike in connection with a current labor dispute or because of an unfair labor practice without putting an end to the relationship,[71] and, during a strike, the

Board, 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539.

Mass.—Mengel v. Justices of Superior Court, 47 N.E.2d 3, 313 Mass. 238.

N.Y.—Degnan v. Metropolitan Life Ins. Co., 34 N.Y.S.2d 238, 178 Misc. 312.

Duty to negotiate with representative of employees, even though employees are on strike see infra § 28 (24).

69. U.S.—Social Sec. Bd. v. Nierotko, Mich., 66 S.Ct. 637, 327 U.S. 358, 90 L.Ed. 718, 162 A.L.R. 1445—N. L. R. B. v. Mackay Radio & Tel. Co., 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381, reversing 87 F.2d 611, affirmed 92 F.2d 761, certiorari granted 58 S.Ct. 644, 303 U. S. 630, 82 L.Ed. 1090—Home Beneficial Life Ins. Co. v. N. L. R. B., C.C.A.4, 159 F.2d 280—Carter Carburetor Corporation v. N. L. R. B., C.C.A., 140 F.2d 714—N. L. R. B. v. Cape County Milling Co., C.C.A., 140 F.2d 543, 152 A.L.R. 144—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 139 F.2d 855—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721—N. L. R. B. v. Remington Rand, C.C.A., 130 F.2d 919—Rapid Roller Co. v. N. L. R. B., C.C.A., 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F.2d 368—M. H. Ritzwollen Co. v. N. L. R. B., C.C.A., 114 F.2d 432—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—N. L. R. B. v. Good Coal Co., C.C.A.6, 110 F.2d 501, certiorari denied Good Coal Co. v. N. L. R. B., 60 S.Ct. 978, 310 U.S. 630, 84 L.Ed. 1400—N. L. R. B. v. Stackpole Carbon Co., C.C.A., 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, opinion supplemented 128 F.2d 188—N. L. R. B. v. Sands Mfg. Co., C.C.A., 96 F.2d 721, certiorari granted 59 S.Ct. 91, 305 U. S. 586, 83 L.Ed. 370, affirmed 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682—N. L. R. B. v. Carlisle Lumber Co., C.C.A., 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539.

N.Y.—New York State Labor Relations Bd. v. Union Club of City of N. Y., 52 N.Y.S.2d 74, 268 App. Div. 516, reversed on other grounds 68 N.E.2d 29, 295 N.Y. 915.

Pa.—Wilson Laundry Company v. Laundry and Linen Supply Drivers and Chauffeurs Local Union, No. 187, Com.Pl., 56 Montg.Co. 164.

Renunciation

If employees strike in connection with a current labor dispute, their action is not a renunciation of the employment relation and they remain "employees" for the remedial purposes specified in the National Labor Relations Act.—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599.

Currency at time of hearing

Employees who went on strike and did not return to work were nevertheless "employees," although labor dispute which caused the strike was not current at time of hearing.—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A.8, 119 F.2d 903.

One employed to begin work on the day strike began and who failed to report for work and joined picket line was an "employee."—Phelps Dodge Corp. v. N. L. R. B., C.C.A. 2, 113 F.2d 202, modified on other grounds Phelps Dodge Corp. v. N. R. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217.

Remedies

Where employees struck in consequence of labor disputes while the National Labor Relations Board was conducting an election, their remedies were unaffected by continuing on strike, and, when the employer refused to bargain with their certified bargaining agent, it violated the statute and became subject to such orders of the board as would effectuate the policies of the statute.—Black Diamond S. S. Corporation v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S.Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542.

70. U.S.—Phelps Dodge Corp. v. N. L. R. B., C.C.A.2, 113 F.2d 202, modified on other grounds Phelps Dodge Corp. v. N. L. R. B., 61 S. Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. Carlisle Lumber Co., C.C.A., 99 F. 2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S. Ct. 586, 306 U.S. 646, 83 L.Ed. 1045—Mooresville Cotton Mills v. N. L. R. B., C.C.A.4, 97 F.2d 959.

The word "regular," as used in provision of National Labor Relations Act, defining an employee as one whose work has ceased as a consequence of a labor dispute and who has not obtained any other regular and substantially equivalent employment, means substantially the same amount of work from point of time as employee had received from employer, and words "substantially equivalent" cover many things, including rate of pay, hours, working conditions, location of work, kind of work, and seniority rights, if any.—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. National Labor Relations Board, 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045.

71. U.S.—N. L. R. B. v. Remington Rand, C.C.A., 130 F.2d 919—Wilson & Co. v. N. L. R. B., C.C.A.7, 120 F.2d 913—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F. 2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L. Ed. 1549—Stewart Die Casting Corporation v. N. L. R. B., C.C.A. 7, 114 F.2d 849, certiorari denied 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119—Phelps Dodge Corp. v. N. L. R. B., C.C.A.2, 113 F.2d 202, modified on other grounds Phelps Dodge Corp. v. N. L. R. B., 61 S. Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, opinion supplemented 128 F. 2d 188—Black Diamond S. S. Corp. v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S.Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542—Jeffery-De Witt Insulator Co. v. N. L. R. B., C.C.A.4, 91 F.2d 134, certiorari denied 58 S.Ct. 55, 302 U.S. 731, 82 L.Ed. 565.

W.Va.—Homer Laughlin China Co. v. Hix, 37 S.E.2d 649.

Guiltless employer

Strikers remain employees, and are protected against unfair labor practices, even though employer has not been guilty of any unfair labor practice, provided strike is in connection with a current labor dispute.—N. L. R. B. v. Lightner Pub. Corp. of Illinois, C.C.A.7, 113 F.2d 621.

Strike prior to passage of statute

Where striking employees were continuing their efforts to induce compliance with their demands, and employer, although work had been resumed, had not yet secured a full complement of workers at time alleged unfair labor practice took place, striking employees were then "employees" within meaning of National Labor Relations Act, notwithstanding strike had begun and work had been resumed prior to passage of act with warning to strikers to return to work if they desired to remain employees.—Standard Lime &

mere quitting of work by an employee, in circumstances which do not definitely preclude further negotiations, does not necessarily terminate the relationship of employer and employee.[72]

The statutes, however, do not hold the employment relationship in statu quo in the absence of wrongful conduct on the part of the employer and of rightful conduct on the part of employees.[73] The employer-employee relationship may be terminated for proper cause,[74] such as unlawful conduct of the employee,[75] and it has been held that participants in a strike who engage in unlawful conduct toward the employer and nonstriking employees retain their status as employees only at the discretion of the employer.[76] The implied termination of an employer-employee relationship, by reason of unlawful conduct in labor controversies, applies only to those actually participating in the violence and their aiders and abettors.[77] Under some statutes, an employee who is guilty of an unfair labor practice may lose his status as an employee,[78] and the labor relations board has the authority to determine in a labor dispute whether the act of an employee is a complete and irrevocable termination of the employee status,[79] but the employer-employee relation is not to be dissolved because of differing ideas as to the right of collective bargaining or union membership.[80]

Where a sit-down strike developed into a general strike but the employer solicited all former employees to return to their jobs, the employer has been held to be precluded from claiming that the sit-down strikers have lost their status as employees.[81] Former employees who were discharged or who left their employment prior to the effective date of the statute are not "employees" within the statute.[82]

§ 28(14). Responsibility for Acts of Agents

Generally, an employer is responsible under the National Labor Relations Act and similar statutes for the actions and statements of supervisory employees and others who have actual or implied authority to represent him.

As a general rule, an employer is responsible under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes for the actions and

Stone Co. v. N. L. R. B., C.C.A.4, 97 F.2d 531.

72. W.Va.—Homer Laughlin China Co. v. Hix, 37 S.E.2d 649.

73. U.S.—N. L. R. B. v. Sands Mfg. Co., C.C.A.6, 96 F.2d 721, certiorari granted 59 S.Ct. 91, 305 U.S. 586, 83 L.Ed. 370, affirmed 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682.

74. U.S.—Home Beneficial Life Ins. Co. v. N. L. R. B., C.C.A., 159 F. 2d 280.

Pa.—In re Lehrman, Com.Pl., 52 Dauph.Co. 1.

Violation of company rules

Employees who did not strike but continued to work without reporting in the morning as required by company rule and were discharged for violation of the rule ceased to be employees on date of discharge, and fact that such employees subsequently associated themselves with the strikers did not improve their position or gain the right to reinstatement as strikers.—Home Beneficial Life Ins. Co. v. N. L. R. B., C.C.A.4, 159 F.2d 280.

Suspension of work

As respects whether employer-employee relation continued to exist during lay-off period, ten-day shutdown resulted in "suspension of work," and not "termination of work."—North Whittier Heights Citrus Ass'n v. N. L. R. B., C.C.A.9, 109 F.2d 76, certiorari denied 60 S.Ct. 1075, 310 U.S. 632, 84 L.Ed. 1402, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472.

75. U.S.—Wilson & Co. v. N. L. R. B., C.C.A.7, 120 F.2d 913—Standard Lime & Stone Co. v. N. L. R. B., C.C.A.4, 97 F.2d 531.

N.Y.—New York State Labor Relations Bd. v. Union Club of City of N. Y., 52 N.Y.S.2d 74, 268 App. Div. 516, reversed on other grounds 68 N.E.2d 29, 295 N.Y. 915.

Trespass or violence

Provision of the National Labor Relations Act defining term "employee" as including any individual whose work shall cease as a consequence of any current labor dispute or because of any unfair labor practice does not invest those who go on strike with an immunity from discharge for acts of trespass or violence against employer's property which they would not have enjoyed had they remained at work, as against contention that status of employees continued, despite discharge for unlawful conduct, by virtue of such provision.—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599.

76. U.S.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

77. U.S.—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. Ohio Calcium Co., C.C.A., 133 F.2d 721.

78. Wis.—Hotel and Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 294 N.W. 632, 236 Wis. 329, rehearing denied 295 N.W. 634, 236 Wis. 329, certiorari granted 62 S.Ct. 65, 314 U.S. 590, 86 L.Ed. 476, affirmed 62 S.Ct. 706, 315 U.S. 437, 86 L.Ed. 946.

Subsequent restraints

When employee withdraws from employment, he is free to speak, but his right to coerce his former employer is limited by the act, and, except as his acts affect employer, employee is under no restraint.—Hotel and Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, supra.

79. Wis.—Appleton Chair Corporation v. United Brotherhood of Carpenters & Joiners, Millmen's Local No. 1748, 1 N.W.2d 188, 239 Wis. 337.

80. Wis.—Appleton Chair Corporation v. United Brotherhood of Carpenters & Joiners, Millmen's Local No. 1748, supra.

81. U.S.—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 849, certiorari denied 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119.

82. U.S.—Phelps Dodge Corporation v. N. L. R. B., C.C.A.2, 113 F.2d 202, modified on other grounds Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992.

statements of supervisory employees who have actual or implied authority to represent him,[83] such as foremen who exercise some authority over employees and are in a position to translate to subordinates the policies and desires of the management;[84] and the employer may likewise be responsible for the actions and statements of other persons who have actual or implied authority to represent him.[85] Such responsibility has been held to follow from provisions of the statutes defining the term "employer" as including persons acting in the interest of an employer or as his agent,[86] and from application of the doctrine of respondeat superior.[87]

Although there is some authority holding that the employer's liability depends on whether the conduct complained of was within the scope of the authority of the supervisory employees as agents,[88] it is generally held that an employer is not responsible for the conduct of his supervisory employees with respect to unfair labor practices on the strict

83. U.S.—Link-Belt Co. v. N. L. R. B., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Independent Union of Craftsmen v. N. L. R. B., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Elyria Tel. Co., C.C.A.6, 158 F.2d 868—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 140 F. 2d 777—N. L. R. B. v. Taylor-Colquitt Co., C.C.A.4, 140 F.2d 92—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—N. L. R. B. v. Schaefer-Hitchcock Co., C.C.A. 9, 131 F.2d 1004—American Smelting & Refining Co. v. N. L. R. B., C.C.A.5, 128 F.2d 345—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C. C.A.5, 122 F.2d 433—Cudahy Packing Co. v. N. L. R. B., C.C.A.10, 118 F.2d 295—Atlas Underwear Co. v. N. L. R. B., C.C.A.6, 116 F.2d 1020—Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 115 F.2d 414, reversed on other grounds 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F. 2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144.

Management representatives

Where supervisory employees were in complete charge of their departments, and general manager considered their recommendations, the supervisory employees were "management representatives."—N. L. R. B. v. Aintree Corporation, C.C.A.7, 132 F.2d 469, certiorari denied Aintree Corporation v. N. L. R. B., 63 S.Ct. 831, 318 U.S. 774, 87 L.Ed. 1144—New Idea v. N. L. R. B., C.C.A.7, 117 F.2d 517.

General superintendent

Acts of general superintendent, who was in authority over company's employees bound the employer.—N. L. R. B. v. Planters Mfg. Co., C.C.A.4, 105 F.2d 750, rehearing denied 106 F.2d 524—Virginia Ferry Corp. v. N. L. R. B., C.C.A.4, 101 F.2d 103.

Bookkeeper

Conduct of employer's bookkeeper in obtaining employees to sign withdrawals from union in consideration of wage increase was properly chargeable to the employer, justifying enforcement of cease and desist order, where employer granted wage increase in accordance with promise made.—N. L. R. B. v. Fitzpatrick & Weller, C.C.A.2, 138 F.2d 697.

Personnel committee

An employer was responsible for discrimination practiced by its personnel committee in hiring workers after reorganization of employer.—N. L. R. B. v. Chattanooga Bakery, C.C.A.6, 127 F.2d 201, certiorari denied Chattanooga Bakery v. N. L. R. B., 63 S.Ct. 157, 317 U.S. 676, 87 L.Ed. 543.

Shipping master

Although shipping master was not an employment manager, where on some occasions he rejected applicants as not qualified and some men were employed without being interviewed by anyone other than the shipping master, the shipping master's conduct was ascribable to the employer.—N. L. R. B. v. Cities Service Oil Co., C.C.A.2, 129 F.2d 933.

Effect of contract

Where contract between building owner and maintenance company did not terminate the employer status of building owner, statements and acts of officials of maintenance company were chargeable to building owner.—Butler Bros. v. N. L. R. B., C.C.A.7, 134 F.2d 981, certiorari denied 64 S.Ct. 203, 320 U.S. 789, 88 L. Ed. 475, and Wasleff v. N. L. R. B., 64 S.Ct. 204, 320 U.S. 789, 88 L.Ed. 475.

84. U.S.—N. L. R. B. v. Jas. H. Matthews & Co., C.C.A.3, 156 F.2d 706—R. R. Donnelley & Sons Co. v. N. L. R. B., C.C.A.7, 156 F.2d 416, certiorari denied 67 S.Ct. 624—N. L. R. B. v. Blair Quarries, C.C.A.4, 152 F.2d 25—N. L. R. B. v. Glenn L. Martin-Nebraska Co., C.C.A.8, 142 F.2d 371—N. L. R. B. v. Fitzpatrick & Weller, C.C.A.2, 138 F.2d 697—N. L. R. B. v. Faultless Caster Corporation, C.C.A.7, 135 F.2d 559—N. L. R. B. v. Aintree Corporation, C.C.A.7, 132 F.2d 469, certiorari denied Aintree Corporation v. N. L. R. B., 63 S.Ct. 831, 318 U. S. 774, 87 L.Ed. 1144—N. L. R. B. v. Algoma Net Co., C.C.A.7, 124 F.2d 730, certiorari denied Algoma Net Co. v. N. L. R. B., 62 S.Ct. 1311, 316 U.S. 706, 86 L.Ed. 1773—N. L. R. B. v. Niles Fire Brick Co., C. C.A.6, 124 F.2d 366, certiorari denied Niles Fire Brick Co. v. N. L. R. B., 62 S.Ct. 944, 316 U.S. 664, 86 L.Ed. 1740—N. L. R. B. v. Jahn & Ollier Engraving Co., C.C.A.7, 123 F.2d 589—N. L. R. B. v. Brashear Freight Lines, C.C.A.8, 119 F. 2d 379—Solvay Process Co. v. N. L. R. B., C.C.A.5, 117 F.2d 83, certiorari denied 61 S.Ct. 1121, 313 U. S. 596, 85 L.Ed. 1549—N. L. R. B. v. Skinner & Kennedy Stationery Co., C.C.A.8, 113 F.2d 667.

85. U.S.—N. L. R. B. v. Taylor-Colquitt Co., C.C.A.4, 140 F.2d 92.

Foreman's wife

U.S.—N. L. R. B. v. Taylor-Colquitt Co., supra.

Statements by attorney for employer that implied threats to close the plant or to move it elsewhere were properly considered by the board in determining whether there had been coercion of employees by employer.—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201.

Industrial relations counsellor

U.S.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311—Atlas Underwear Co. v. N. L. R. B., C. C.A.6, 116 F.2d 1020.

86. U.S.—N. L. R. B. v. Taylor-Colquitt Co., C.C.A.4, 140 F.2d 92.
Pa.—In re Ewart, 42 Pa.Dist. & Co. 307.

87. U.S.—Swift & Co. v. N. L. R. B., C.C.A.10, 106 F.2d 87—Virginia Ferry Corporation v. N. L. R. B., C.C.A.4, 101 F.2d 103.

88. U.S.—Western Union Telegraph Co. v. N. L. R. B., C.C.A.2, 113 F.2d 992.

theory of agency or respondeat superior, but on the broader premise that the employer may be given an unlawful advantage by reason of unlawful conduct of subordinates in furtherance of the employer's known attitude or policy.[89] The controlling consideration is not the culpability of the employer, or the conventional representation of the master by an employee, but whether employees have been subjected to prohibited compulsions flowing from the employer's economic power, the use of which the employer could and should have prevented.[90] In other words, the prevailing test of the employer's reponsibility is not whether the supervisory employee's acts were authorized by the employer, but whether the employees subjected to the unlawful practices had reasonable cause to believe that the supervisors were acting for, and on behalf of, the management,[91] and it is generally held that acts of supervisory employees may bind the employer, even though they would not have this effect under the doctrine of respondeat superior.[92] So the employer has the duty, on learning of unlawful acts or statements of supervisory employees, to take steps to remove any effects of such action in order to avoid liability therefor.[93]

In determining whether it could reasonably be inferred that the conduct of supervisory employees represented the attitude of the employer so as to bind the latter, a number of factors may be considered, including the actual authority of the supervisory employees, their strategic position to translate to subordinates the management's policies and desires, the employee's previous union attitude, favoritism of the employer, and the employer's failure to renounce acts of supervisory officials and announce its impartiality.[94] However, all such factors need not be present in order to impose liability on the employer, and one or more may be sufficient to authorize the inference that the supervisory employee spoke for the employer.[95] When other evidence of the employee's agency for the employer is lacking, supervisory or disciplinary authority suffices,[96] but lack of such authority only makes it necessary to show the agency in other ways.[97]

89. U.S.—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C.C.A.10, 140 F.2d 423.

90. U.S.—International Ass'n of Machinists, Tool & Die Makers Lodge No. 35 v. N. L. R. B., App.D.C., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F.2d 9—Birmingham Post Co. v. N. L. R. B., C.C.A.5, 140 F.2d 638.

Subjective test

Views expressed by employer's supervisors become important in determining whether employees have reasonable ground to believe that supervisors, in discouraging unionization or interfering in any way with their free choice of a bargaining agency, represent the views of the management; the test is not objective, but subjective, from standpoint of employees.—N. L. R. B. v. Mt. Clemens Pottery Co., C.C.A.6, 147 F.2d 262.

91. U.S.—Link-Belt Co. v. N. L. R. B., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Independent Union of Craftsmen v. N. L. R. B., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., App.D.C., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474—Birmingham Post Co. v. N. L. R. B., C.C.A.5, 140 F.2d 638—N. L. R. B. v. Security Warehouse & Cold Storage Co., C.C.A.9, 136 F.2d 829—North Carolina Finishing Co. v. N. L. R. B., C.C.A.4, 133 F.2d 714, certiorari denied 64 S.Ct. 39, 320 U.S. 738, 88 L.Ed. 437—N. L. R. B. v. Cities Service Oil Co., C.C.A.2, 129 F.2d 933—N. L. R. B. v. Continental Oil Co., C.C.A., 121 F.2d 120—National Labor Relations Board v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780.

Acts considered in setting

Under National Labor Relations Act, acts of supervisory officials are not viewed in vacuo but are to be taken in their setting.—N. L. R. B. v. Brown Co., C.C.A.1, 160 F.2d 449.

Acts of coercion and intimidation by supervisory employees may be restrained and their resumption interdicted, even in absence of clear demonstration of prior authorization or subsequent ratification by the employer, at least where the circumstances are such as to induce in subordinate employees a reasonable apprehension that the acts condemned reflect the policy of the employer.—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F.2d 38.

An employer may gain no advantage from the acts of those who reasonably may be regarded by employees as representing the policy of the management.—Atlas Underwear Co. v. N. L. R. B., C.C.A.6, 116 F.2d 1020.

92. U.S.—Link-Belt Co. v. N. L. R. B., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Independent Union of Craftsmen v. N. L. R. B., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., App.D.C., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474—Birmingham Post Co. v. N. L. R. B., C.C.A.5, 140 F.2d 638—N. L. R. B. v. Lettie Lee, Inc., C.C.A.9, 140 F.2d 243—N. L. R. B. v. American Creosoting Co., C.C.A.6, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U.S. 797, 88 L.Ed. 1086—N. L. R. B. v. Moench Tanning Co., C.C.A.2, 121 F.2d 951—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780.

The question is not one of legal liability of the employer in damages or for penalties on the principles of agency or respondeat superior, but only whether the statute condemns such activities as unfair labor practices as far as the employer may gain from them any advantage in the bargaining process of a kind which the statute proscribes.—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309.

93. U.S.—N. L. R. B. v. Aluminum Goods Mfg. Co., C.C.A.7, 125 F.2d 353.

94. U.S.—N. L. R. B. v. Pacific Gas & Elec. Co., C.C.A.9, 118 F.2d 780.

95. U.S.—N. L. R. B. v. Pacific Gas & Elec. Co., supra.

96. D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

97. D.C.—International Ass'n of

If supervisory employees occupy positions of authority and may be reasonably regarded as representing the employer's policy, their acts and statements bind the employer, even though they are only minor supervisory officials,[98] not having the power to hire and discharge directly,[99] and notwithstanding they are eligible to union membership,[1] and are included in an appropriate unit for collective bargaining.[2] However, the mere fact that employees are characterized as "supervisory" does not of itself establish that they are vested with such apparent authority as to bind the employer by their acts,[3] at least where there is no proof of knowledge of their activities by the management or authorization thereof,[4] and there is no evidence of open or covert opposition or hostility on the part of the employer to employee self-organization or to a particular union or favoritism of another.[5]

When the unlawful activities of supervisory employees are sporadic and do not reflect the attitude of the employer otherwise indicated, the latter ordinarily will not be responsible for such activities.[6] Accordingly, isolated or casual expressions of minor supervisory employees, constituting nothing more than the utterance of individual views not authorized by the employer and not of such character or made under circumstances reasonably calculated to give rise to the conclusion that they are an expression of his policy, do not bind the employer.[7] However, the number of statements made by supervisory employees, their nature and substance, the time at which they were made, the con-

Machinists, Tool and Die Makers Lodge No. 35 v. N. L. R. B., supra.

98. D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., supra.

99. U.S.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Independent Union of Craftsmen, 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Clinton Woolen Mfg. Co., C.C.A.6, 141 F.2d 753—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—N. L. R. B. v. Aintree Corp., C.C.A.7, 132 F.2d 469, certiorari denied Aintree Corp. v. N. L. R. B., 63 S.Ct. 831, 318 U.S. 774, 87 L. Ed. 1144—N. L. R. B. v. Continental Oil Co., C.C.A., 121 F.2d 120—New Idea v. N. L. R. B., C.C.A.7, 117 F.2d 517—N. L. R. B. v. Chicago Apparatus Co., C.C.A.7, 116 F.2d 753.

1. U.S.—N. L. R. B. v. Aintree Corp., C.C.A.7, 132 F.2d 469, certiorari denied Aintree Corp. v. N. L. R. B., 63 S.Ct. 831, 318 U.S. 774, 87 L.Ed. 1144—New Idea v. N. L. R. B., C.C.A.7, 117 F.2d 517.

2. U.S.—N. L. R. B. v. Christian Board of Publication, C.C.A.8, 113 F.2d 678.

3. U.S.—N. L. R. B. v. Scullin Steel Co., C.C.A.8, 161 F.2d 143—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15—N. L. R. B. v. Arma Corporation, C.C.A.2, 122 F.2d 153—N. L. R. B. v. Mathieson Alkali Works, C.C.A.4, 114 F.2d 796—Ballston - Stillwater Knitting Co. v. N. L. R. B., C.C.A. 2, 98 F.2d 758.

4. U.S.—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F.2d 340.

5. U.S.—N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F.2d 556—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15.

6. U.S.—N. L. R. B. v. Clinton Woolen Mfg. Co., C.C.A.6, 141 F. 2d 753—Nevada Consol. Copper Corporation v. N. L. R. B., C.C.A. 10, 122 F.2d 587, reversed on other grounds 62 S.Ct. 960, 316 U.S. 105, 86 L.Ed. 1305—Wilson & Co. v. N. L. R. B., C.C.A.7, 120 F.2d 913—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F. 2d 388, certiorari denied N. L. R. B. v. E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A. 4, 116 F.2d 388, certiorari denied N. L. R. B. v. Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U. S. 571, 85 L.Ed. 1529—N. L. R. B. v. Mathieson Alkali Works, C.C.A. 4, 114 F.2d 796.

Isolated and unrelated incidents

Inference of employer's liability for violation of act will not be drawn from a small number of isolated and unrelated incidents by minor officials, especially when they are susceptible of different constructions, and especially when considered in light of employer's fair attitude toward union.—N. L. R. B. v. Shenandoah-Dives Mining Co., C. C.A.10, 145 F.2d 542.

7. U.S.—N. L. R. B. v. Reynolds Intern. Pen Co., C.C.A.7, 162 F.2d 680—Keystone Steel & Wire Co. v. N. L. R. B., C.C.A.7, 155 F.2d 553, vacated on other grounds 68 S. Ct. 214—N. L. R. B. v. Fairmont Creamery Co., C.C.A.10, 144 F.2d 128—Utah Copper Co. v. N. L. R. B., C.C.A.10, 139 F.2d 788, certiorari denied Independent Ass'n of Mill Workers v. National Labor Relations Board, 64 S.Ct. 946, 322 U.S. 731, 88 L.Ed. 1566—Quaker State Oil Refining Corporation v. N. L. R. B., C.C.A.3, 119 F.2d 631—Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Martel Mills Corporation v. N. L. R. B., C.C.A.4, 114 F.2d 624—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 111 F.2d 474.

Voters at election

Where assistant foremen who spent at least eighty per cent of their time in working and only the remainder in supervision and direction were permitted to vote without objection in election supervised by board, after the election employer could not be held responsible for what some of such voters said to each other on theory that their statements constituted unfair labor practice.—N. L. R. B. v. Jas. H. Matthews & Co., C.C.A.3, 156 F.2d 706.

An anti-union petition circulated in employer's store during working hours shortly before election to determine whether a particular union should be collective bargaining representative of employees and signed only by persons who had been declared eligible to vote at election was not binding on employer so as to constitute an unfair labor practice in view of employer's established policy of allowing free expression by employees on labor matters.—N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F.2d 556.

ditions under which they were made, and other circumstances in their totality may warrant the conclusion that they were more than mere casual or desultory expressions of individual views, unrelated to the policy of the employer.[8] Punitive action taken against employees by a supervisory official in pursuance of a purely personal grievance rather than as a labor practice of management does not bind the employer.[9]

Effect of employer's instructions to supervisory employees. An employer may not disclaim responsibility for acts of supervisory employees by express orders to them not to engage in unfair labor practices where they had definite indicia of authority to act for the employer,[10] or it appeared that the unlawful conduct had the employer's acquiescence, approval, or support,[11] especially where the employer did not communicate to other employees its instructions as to its policy, and the other employees were justified in believing that the supervisory employees were acting as the employer's representatives.[12] So, also, instructions not to engage in certain unlawful activities will not save the employer from responsibility for other unlawful activities by supervisory employees.[13] However, an isolated act in violation of express instructions is not to be imputed to the employer.[14]

§ 28(15). Employees' Organizations

Under the National Labor Relations Act and similar statutes, employees are secured in their right to self-organization, to form, join, or assist labor organizations, and to deal with their employer collectively through representatives of their own choosing.

Under the National Labor Relations Act, 29 U.S.C.A. § 157, and similar statutes, employees are secured in their right to self-organization, to form, join, or assist labor organizations, and to deal with their employer collectively through representatives of their own choosing,[15] and such right comprehends whatever may be appropriate and lawful to

8. U.S.—N. L. R. B. v. Fairmont Creamery Co., C.C.A.10, 144 F.2d 128—N. L. R. B. v. Mathieson Alkali Works, C.C.A.4, 114 F.2d 796.

The continued course of conduct consisting in part of statements or comments of foreman and other employees having supervisory authority, in connection with other circumstances, may in its totality constitute interference, restraint, coercion, and domination in respect of the right of self-organization within meaning of the act.—N. L. R. B. v. Fairmont Creamery Co., C.C.A.10, 144 F.2d 128—Utah Copper Co. v. N. L. R. B., C.C.A.10, 139 F.2d 788, certiorari denied Independent Ass'n of Mill Workers v. N. L. R. B., 64 S.Ct. 946, 322 U.S. 731, 88 L.Ed. 1566.

9. U.S.—N. L. R. B. v. Citizen-News Co., C.C.A.9, 134 F.2d 962.

10. U.S.—N. L. R. B. v. East Texas Motor Freight Lines, C.C.A.5, 140 F.2d 404—N. L. R. B. v. Franks Bros. Co., C.C.A.1, 137 F.2d 989, affirmed 64 S.Ct. 817, 321 U.S. 702, 88 L.Ed. 1020—North Carolina Finishing Co. v. N. L. R. B., C.C.A.4, 133 F.2d 714, certiorari denied 64 S.Ct. 39, 320 U.S. 738, 88 L.Ed. 437—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198—Solvay Process Co. v. N. L. R. B., C.C.A.5, 117 F.2d 83, certiorari denied 61 S.Ct. 1121, 313 U.S. 596, 85 L.Ed. 1549—N. L. R. B. v. Mathieson Alkali Works, C.C.A.4, 114 F.2d 796.

Exceeding instructions

Even if instructions by employer during strike to its operating superintendents to inform employees by telephone that their jobs were open did not establish coercion, proof that superintendent exceeded instructions and said things forbidden would be attributed to employer.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045.

11. U.S.—N. L. R. B. v. Shenandoah-Dives Mining Co., C.C.A.10, 145 F.2d 542.

12. U.S.—N. L. R. B. v. Bird Mach. Co., C.C.A.1, 161 F.2d 589—North Carolina Finishing Co. v. N. L. R. B., C.C.A., 133 F.2d 714, certiorari denied 64 S.Ct. 39, 320 U.S. 738, 88 L.Ed. 437—H. J. Heinz Co. v. N. L. R. B., C.C.A.6, 110 F.2d 843, affirmed 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309.

13. U.S.—F. W. Woolworth Co. v. N. L. R. B., C.C.A.2, 121 F.2d 658.

14. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486—N. L. R. B. v. Standard Oil Co., C.C.A.10, 124 F.2d 895—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—C. G. Conn, Limited, v. N. L. R. B., C.C.A.7, 108 F.2d 390.

15. U.S.—Nierotko v. Social Sec. Bd., C.C.A.Mich., 149 F.2d 273, affirmed 66 S.Ct. 637, 327 U.S. 358, 90 L.Ed. 718, 162 A.L.R. 1445—N. L. R. B. v. Standard Oil Co., C.C.A.10, 124 F.2d 895—N. L. R. B. v. American Potash & Chemical Corporation, C.C.A.9, 113 F.2d 232, 129 A.L.R. 874, petition denied 118 F.2d 630—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951.

Wash.—United Union Brewing Co. v. Beck, 93 P.2d 772, 200 Wash. 474.

Representative for collective bargaining in general see infra § 28 (24).

Labor unions are recognized as entities in the National Labor Relations Act and similar state statutes.—Kirkman v. Westchester Newspapers, 24 N.Y.S.2d 860, 261 App.Div. 181.

Wages and working conditions

The "self-organization" which congress seeks to protect is the "self-organization of employees" in dealing with their employer with respect to wages and working conditions.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

When right protected

The protection of the right of employees to full freedom in self-organizational activities should be subordinated to the vindication of the interests of society as a whole in flagrant cases in which the misconduct of the employee is so violent or of such serious character as to render the employee unfit for further service, but not in cases in which

accomplish and maintain such organization.[16] Also, some state constitutional provisions guarantee to employees the right to organize.[17] However, the right of workingmen to organize into unions to deal with employers is a fundamental one existing apart from such statutes,[18] and the National Labor Relations Act and similar statutes did not create a new right to self-organization[19] or repeal any of the disabilities of the old right of employees to self-organization,[20] but merely broadened the old right by protecting it against certain practices which had become odious to an enlightened public, and which in labor terminology were unfair.[21] The right under statute to maintain labor organizations for collective bargaining is a·continuous one, and exists after the signing of a collective bargaining agreement as well as before.[22]

Generally, employees may join unions, even though they know of their employer's wish to the contrary.[23] Labor unions may be organized for the purpose of selling the labor of their members on stipulated terms,[24] securing better working conditions[25] and improved relations with employers,[26] fixing the hours of labor,[27] and arbitrating labor disputes.[28] They may be formed for the purpose of obtaining employment for their members,[29] or of securing control of the work connected with their trade[30] or favorable terms to their employers in the purchase of material, and contracts for such persons as employ members of their society.[31] They may be organized for the purpose of protecting and conserving their rights and interests[32] against possible aggression by the employer,[33] or of gaining collective bargaining power,[34] or of accumulating a fund reasonably necessary for the lawful conduct of a strike.[35]

Independent organizations of employees, if free of employer domination, are recognized by the statutes as proper agencies to represent employees and are entitled to recognition as such if they represent the free choice of a majority of the employees.[36] Employees are not compelled to affiliate themselves

the employee exceeds the bounds of lawful conduct in a moment of exuberance.—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 153 F.2d 811.

The effect of the pendency of a proceeding under the National Labor Relations Act to restrain employers from exerting pressure on employees to join certain union and from discouraging membership in another union would appropriately extend to the practices of the employers to which the complaint was addressed, but did not reach so far as to suspend the right of the employees to self-organization.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

16. U.S.—Thomas v. Collins, Tex., 65 S.Ct. 315, 323 U.S. 516, 89 L.Ed. 430, rehearing denied 65 S.Ct. 557, 323 U.S. 819, 89 L.Ed. 630.

17. N.Y.—Domanick v. Triboro Coach Corporation, 18 N.Y.S.2d 650.

18. U.S.—El Paso Electric Co. v. Elliott, D.C.Tex., 15 F.Supp. 81.
Fla.—Paramount Enterprises v. Mitchell, 140 So. 328, 104 Fla. 407.
Right to organize unions generally see the C.J.S. title Trade Unions § 4, also 63 C.J. p 656 note 15–p 658 note 38.

19. U.S.—Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738.
N.Y.—Barfield v. Standard Oil Co. of New Jersey, 14 N.Y.S.2d 627, 172 Misc. 95.
Wis.—Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 295 N.W. 791, 237 Wis. 164, affirmed 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. 1154.

20. N.Y.—Barfield v. Standard Oil Co. of New Jersey, 14 N.Y.S.2d 627, 172 Misc. 95.

21. N.Y.—Barfield v. Standard Oil Co. of New Jersey, supra.

22. U.S.—N. L. R. B. v. Newark Morning Ledger Co., C.C.A.3, 120 F.2d 262, 137 A.L.R. 849, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 314 U.S. 693, 86 L.Ed. 554.

23. N.Y.—Michaels v. Hillman, 183 N.Y.S. 195, 112 Misc. 395.

24. N.Y.—Maisel v. Sigman, 205 N.Y.S. 807, 123 Misc. 714.

25. U.S.—Coeur D'Alene Consolidated & Mining Co. v. Miners' Union of Wardner, C.C.Idaho, 51 F. 260, 19 L.R.A. 382.
63 C.J. p 660 note 81.

26. N.Y.—National Protective Ass'n of Steam Fitters & Helpers v. Cumming, 63 N.E. 369, 170 N.Y. 315, 88 Am.S.R. 648, 58 L.R.A. 135.
63 C.J. p 660 note 82.

27. Ark.—Meier v. Speer, 132 S.W. 988, 96 Ark. 618.
63 C.J. p 660 note 85.

28. N.Y.—Auburn Draying Co. v. Wardell, 124 N.E. 97, 227 N.Y. 1, 6 A.L.R. 901.

29. N.Y.—Curren v. Galen, 46 N.E. 297, 152 N.Y. 33, 57 Am.S.R. 496, 37 L.R.A. 802.

30. N.J.—Mayer v. Journeymen Stone-Cutters' Ass'n, 20 A. 492, 47 N.J.Eq. 519.

31. Ohio.—Parker v. Bricklayers' Union No. 1, 10 Ohio Dec. (Reprint) 458, 21 Cinc.L.Bull. 223, affirmed 51 Ohio St. 603.

32. U.S.—Alaska S. S. Co. v. International Longshoremen's Ass'n of Puget Sound, D.C.Wash., 236 F. 964.
63 C.J. p 661 note 91.

33. Mass.—Snow v. Wheeler, 113 Mass. 179.
63 C.J. p 661 note 92.

34. Md.—International Pocketbook Workers' Union v. Orlove, 148 A. 826, 158 Md. 496.
63 C.J. p 661 note 93.

35. Ala.—Brotherhood of Railroad Trainmen v. Barnhill, 108 So. 456, 214 Ala. 565, 47 A.L.R. 270.

36. U.S.—N. L. R. B. v. Standard Oil Co., C.C.A.10, 124 F.2d 895—Colorado Fuel & Iron Corporation v. N. L. R. B., C.C.A.10, 121 F.2d 165—N. L. R. B. v. P. Lorillard Co., C.C.A.6, 117 F.2d 921, reversed on other grounds 62 S.Ct. 397, 314 U.S. 512, 86 L.Ed. 380—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.10, 115 F.2d 1007—N. L. R. B. v. Mathieson Alkali Works, C.C.A.4, 114 F.2d 796—Foote Bros. Gear & Machine Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Foote Bros. Gear & Machine Corporation 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394, mandate conformed to Foote Bros. Gear & Machine Corporation v. N. L. R. B., 121 F.2d 802—Independent Union of Gear Workers v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Independent Union of Gear Workers, 61 S.Ct. 318, 311

with existing national or other unions or associations.[37] The act protects self-organized unions as well as unions already existing and seeking to increase their membership,[38] and it protects the rights of independent unions as well as the rights of those nationally organized.[39] The right of employees to form an independent union and to be advised of that right is not dependent on the degree of coercion or persuasion which the employer may previously have exerted in the formation of such a union,[40] and, accordingly, the members of an employees' organization which is disestablished because the employer dominated or supported may form another organization, if free from domination, interference, or support of the employer.[41] However, the court will carefully scrutinize acts leading to the formation of an association which springs from, and has its inception in, a plan admittedly not in conformity with the statute, and will scrutinize any contribution made by the employer to the new association.[42]

As a general rule, the right of employees to self-organization is not to be controlled or influenced by any expression or form of order coming from the courts,[43] or from the labor relations board.[44] It is the duty of the board to protect the self-organization of employees where it is properly exercised;[45] and the board has no power to interfere with the action of a union membership in making a choice of their officers,[46] and directing their activities,[47] unless there is evidence of interference on the part of the employer in such matters.[48] However, a labor union, or other organization, in performing its functions as a bargaining agent of employees under the Railway Labor Act is not to be regarded as a wholly

U.S. 620, 85 L.Ed. 394—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 108 F.2d 867, certiorari denied Brown Paper Mill Co. v. N. L. R. B., 60 S.Ct. 1104, 310 U.S. 651, 84 L.Ed. 1416.
N.Y.—Breen v. Picard, 4 N.Y.S.2d 301, 167 Misc. 561.
Pa.—Labor Relations Board v. Union Trust Co., Com.Pl., 89 Pittsb. Leg.J. 343.

Extent of benefit
The question whether greater benefit might have been secured to members of independent union had they selected national union as their bargaining agent was matter with which court could not be concerned, but was to be determined solely by the membership, and, if the agent selected was legally qualified and willing to serve, the court was bound to approve the selection.—Keystone Steel & Wire Co. v. N. L. R. B., C.C.A.7, 155 F.2d 553, certiorari granted 67 S.Ct. 190, 329 U.S. 705, 91 L.Ed. —, vacated on other grounds 68 S.Ct. 214.

Pressure of affiliated organizations
When employees have formed an organization of their own, they are entitled to bargain through it and may not be deprived of that right by pressure of affiliated organizations exerted either with or without the support of the board.—N. L. R. B. v. Ed. Friedrich, Inc., C.C.A.5, 116 F.2d 888.

Organization held "company union"
N.Y.—Sherman v. Abeles, 269 N.Y.S. 849, 150 Misc. 497, affirmed 269 N.Y.S. 864, 241 App.Div. 676, reversed on other grounds 193 N.E. 241, 265 N.Y. 383, 95 A.L.R. 1384.

37. U.S.—De Bardeleben v. N. L. R. B., C.C.A.5, 135 F.2d 13—N. L. R. B. v. Standard Oil Co., C.C.A.10, 124 F.2d 895—N. L. R. B. v. Riverside Mfg. Co., C.C.A.5, 119 F.2d 302—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.10, 115 F.2d 1007—Foote Bros. Gear & Machine Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Foote Bros. Gear & Machine Corporation, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394, mandate conformed to Foote Bros. Gear & Machine Corporation v. N. L. R. B., 121 F.2d 802—Independent Union of Gear Workers v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Independent Union of Gear Workers, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 108 F.2d 867, certiorari denied Brown Paper Mill Co. v. N. L. R. B., 60 S.Ct. 1104, 310 U.S. 651, 84 L.Ed. 1416.
Pa.—In re Ewart, 42 Pa.Dist. & Co. 307.

38. U.S.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

39. U.S.—Keystone Steel & Wire Co. v. N. L. R. B., C.C.A.7, 155 F.2d 553, certiorari granted 67 S.Ct. 190, 329 U.S. 705, 91 L.Ed. —, vacated on other grounds 68 S.Ct. 214.

40. U.S.—Hamilton-Brown Shoe Co. v. National Labor Relations Board, C.C.A.8, 104 F.2d 49.

41. U.S.—N. L. R. B. v. Standard Oil Co., C.C.A.10, 124 F.2d 895—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 113 F.2d 85—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.5, 112 F.2d 545.

42. U.S.—N. L. R. B. v. Continental Oil Co., C.C.A.10, 121 F.2d 120.

43. U.S.—Hamilton-Brown Shoe Co. v. National Labor Relations Board, C.C.A.8, 104 F.2d 49.

44. U.S.—Hamilton-Brown Shoe Co. v. N. L. R. B., C.C.A.8, 104 F.2d 49.

45. U.S.—N. L. R. B. v. Sterling Elec. Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

The civil liberties of employees in making and maintaining of labor organizations are not subject to deprivation at the discretion of the board.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

46. Utah.—Utah Poultry Producers Co-op. Ass'n v. Utah Labor Relations Board, 149 P.2d 643, 106 Utah 394.

47. Utah.—Utah Poultry Producers Co-op. Ass'n v. Utah Labor Relations Board, supra.

48. Utah.—Utah Poultry Producers Co-op. Ass'n v. Utah Labor Relations Board, supra.

private association of individuals free from all constitutional or statutory restraints to which public agencies are subjected,[49] and negro employees are not precluded from complaining about limitations placed on membership under the constitution and by-laws of a union.[50] It has been held that the tendency of the legislatures and the courts is to deal liberally with labor unions.[51]

Right to refuse to join labor organization. Under the statute employees have the right to refuse to join or create or assist any labor organization,[52] except to the extent that such right may be affected by an agreement with the employer requiring membership in a labor organization as a condition of employment, as discussed infra § 28 (41) c.

"Labor organization" defined. Under some statutes, the term "labor organization" is defined as any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.[53] An organization may be considered a "labor organization" within the statute notwithstanding it has no charter, by-laws, or dues.[54]

§ 28(16). What Constitutes Labor Disputes

Under the National Labor Relations Act and similar statutes, the term "labor disputes" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating or fixing terms or conditions of employment.

Under the provisions of the National Labor Relations Act, 29 U.S.C.A. § 152 (9), and similar statutes, the term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.[55] Ordinarily, a current la-

49. Kan.—Betts v. Easley, 169 P. 2d 831, 161 Kan. 459.

50. Kan.—Betts v. Easley, supra.

Voluntary membership

The fact that membership in Grand Lodge Brotherhood Railway Carmen of America, selected as collective bargaining agent, was voluntary, did not relieve the brotherhood from according equal privileges of participation and representation to all employees, including negro workmen, whom it represented in matters within purview of the Railway Labor Act.—Betts v. Easley, supra.

51. N.Y.—John F. Trommer, Inc. v. Brotherhood of Brewery Workers of Greater New York, 8 N.Y.S.2d 782, 167 Misc. 197.

52. U.S.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S. Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

53. U.S.—N. L. R. B. v. Jas. H. Matthews & Co., C.C.A.3, 156 F.2d 706.

Labor organizations within statute

(1) Generally.—In re Incorporation of Scranton Sportswear Welfare Ass'n, 57 Pa.Dist. & Co. 91, 47 Lack. Jur. 233.

(2) Committees appointed by employer's superintendent for purpose of presenting petition for increase of wages for limited group of employees and for consideration with management of plan to improve working conditions were "labor organizations."—N. L. R. B. v. American Furnace Co., C.C.A.7, 158 F.2d 376.

(3) Where employer under "multiple management" plan had a "manufacturing" or "junior board" composed of factory employees, board had several committees including "the suggestions and grievance committee," "safety committee," and "personnel committee," board discussed rates of pay, hours of employment, etc., employer bore all expenses of board, conducted elections, and employer's board of directors approved all nominees and had power of removal, meetings and elections were held on employer's property, and employer's officers participated in meetings, the board was a "labor organization."—N. L. R. B. v. Jas. H. Matthews & Co., C.C.A.3, 156 F. 2d 706.

Continuance of status

The facts were not sufficient to destroy union's status as a "labor organization" within the National Labor Relations Act where it had never been formally dissolved, and twenty persons were asserting union's authority to act for them in their grievances against employer. —N. L. R. B. v. Blanton Co., C.C. A.8, 121 F.2d 564.

54. U.S.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

55. U.S.—Carter Carburetor Corporation v. N. L. R. B., C.C.A., 140 F. 2d 714—N. L. R. B. v. Remington Rand, C.C.A.2, 130 F.2d 919—Phelps Dodge Corporation v. N. L. R. B., C.C.A.2, 113 F.2d 202, modified on other grounds Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. Carlisle Lumber Co., C.C.A., 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539.

Pa.—Eddyside Co. v. Seibel, 15 A.2d 691, 142 Pa.Super. 174.

Activity undermining union

A dispute between an employee and employer and a union concerning employee's obligation to refrain from any "activity in the plant calculated to undermine the status of the union as the bargaining agency," as provided in contract between union and employer, was a controversy concerning terms of employment and was a "labor dispute."—Keller v. American Cyanamid Co., 28 A.2d 41, 132 N.J.Eq. 210.

Normal production in mine at effective date of statute was not decisive of question whether there was a current labor dispute, so as to entitle employees to strike without being deemed to have renounced their employment.—Phelps Dodge Corp. v. N. L. R. B., C.C.A.2, 113 F. 2d 202, modified on other grounds Phelps Dodge Corp. v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217.

bor dispute may be said to exist in the case of a controversy over wages,[56] seniority rights,[57] working on holidays,[58] interference with the employees' right to self-organization,[59] recognition of a particular union as the sole collective bargaining agent for the employer's employees,[60] or refusal to bargain collectively with the union designated by a majority of the employees as their representative.[61] Also, a labor dispute exists where a strike is called by reason of dissatisfaction with the state of negotiations for execution of a contract touching wages and conditions of employment, notwithstanding the employer was not guilty of any unfair labor practice prior to the strike.[62]

The term "labor dispute," however, is not intended to include a dispute, the settlement of which would violate a statutory provision,[63] and, where the employer and employees are precluded by a positive provision of law from settling or adjusting wage demands without the approval of a governmental agency, a strike to obtain such wage demands without regard to the approval required by law is not a labor dispute within the statute.[64] It has been held that employees who were willing to work during regular hours, but who were discharged for refusal to work overtime without additional compensation, were not on strike or engaged in a labor dispute, within the statute.[65]

Under some statutory provisions it is not essential to the existence of a labor dispute that the disputants stand in the approximate relation of employer and employee,[66] but under other statutes, a controversy between persons who are not employer and employee has been held not to constitute such a dispute.[67] A controversy involving persons who are independent contractors rather than employees has been held not to involve a labor dispute.[68]

Railway Labor Act. A suit by an employer seeking a determination of its status, rights, and obligations with respect to a controversy between antagonistic groups of employees has been held not to involve a labor dispute within the Railway Labor Act, 45 U.S.C.A. § 151 et seq.[69] The issue as to the unlawful taking of money by dining car employees from dining cars on trains moving in interstate commerce does not involve a labor dispute under the Railway Labor Act so as to preclude criminal prosecution, notwithstanding the employees are members of railroad labor unions and the claim that their conviction practically destroyed such unions.[70]

§ 28(17). Concerted Activities of Employees for Mutual Aid or Protection

The National Labor Relations Act and similar statutes generally accord to employees the right to engage in concerted activities for their mutual aid or protection.

Trade war maneuver
Picketing of restaurant by group of rival factions dealing in cigarette vending machines as a trade war maneuver, in attempt to force restaurant to desist using machine of competitors with result that restaurant suffered a loss of business, did not involve a labor dispute.—Miller v. Tobin, 70 N.Y.S.2d 36.

56. U.S.—N. L. R. B. v. Indiana Desk Co., C.C.A.7, 149 F.2d 987.

57. U.S.—N. L. R. B. v. Sands Mfg. Co., C.C.A.6, 96 F.2d 721, affirmed 59 S.Ct. 508, 306 U.S. 332, 83 L. Ed. 682.

58. U.S.—N. L. R. B. v. Good Coal Co., C.C.A.6, 110 F.2d 501, certiorari denied Good Coal Co. v. N. L. R. B., 60 S.Ct. 978, 310 U.S. 630, 84 L.Ed. 1400.

59. U.S.—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, opinion supplemented, C.C.A., 128 F.2d 188.

60. U.S.—Cupples Co. v. American Federation of Labor, D.C.Mo., 20 F. Supp. 894.

Observance of contract
Refusal of the employer to observe a contract recognizing a certain labor organization as the representative of the employees on the ground that another organization had been certified as the representative by the Labor Relations Board involves a "labor dispute."—Wilson & Employees' Representation Plan v. Wilson & Co., D.C.Cal., 53 F.Supp. 23.

61. U.S.—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539.

62. U.S.—N. L. R. B. v. Mackay Radio & Telegraph Co., 58 S.Ct. 904, 304 U. S. 333, 82 L.Ed. 1381.

Justification
The wisdom of employees, their justification or lack of it, in attributing to employer an unreasonable or arbitrary attitude in connection with negotiations for execution of a contract cannot determine whether, when employees struck, they did so as a consequence of, or in connection with, a current "labor dispute" within National Labor Relations Act.—N. L. R. B. v. Mackay Radio & Tel. Co., supra.

63. U.S.—N. L. R. B. v. Indiana Desk Co., C.C.A.7, 149 F.2d 987.

64. U.S.—N. L. R. B. v. Indiana Desk Co., supra.

65. U.S.—C. G. Conn, Limited, v. N. L. R. B., C.C.A.7, 108 F.2d 390.

66. Pa.—Dominic Maurer, Inc. v. Berks Products Corp., 55 Pa.Dist. & Co. 1, 37 Berks 209.

67. Mich.—Lafayette Dramatic Productions v. Ferentz, 9 N.W.2d 57, 305 Mich. 193, 145 A.L.R. 1158.

Coercing employment of union members
The conduct of musicians' union in inducing stagehands' union to join in a combination to force theater operator, which did not need or desire musicians, and which had no dispute under its contract with stagehands' union, either to employ musicians or to discontinue the theater did not involve a "labor dispute" within act creating a board for mediation of labor disputes.—Lafayette Dramatic Productions v. Ferentz, supra.

68. Pa.—Eddyside Co. v. Seibel, 15 A.2d 691, 142 Pa.Super. 174.

69. U.S.—Texas & P. Ry. Co. v. Brotherhood of R. Trainmen, D.C. La., 60 F.Supp. 263.

70. U.S.—Stone v. U. S., C.C.A.Cal., 153 F.2d 331.

Under the National Labor Relations Act § 7, 29 U.S.C.A. § 157, and similar statutes, employees are generally accorded the right to engage in concerted activities for their mutual aid or protection,[71] whether within or without a union.[72] The statutory right is not limited to union activities in the interrelation between employees and employer of one company,[73] and an employee has a right to join and participate in union activities outside his own employment.[74]

§ 28(18). Strikes, Jurisdictional Disputes, and Boycotts by Employees

In the absence of a statute to the contrary, the right of employees to engage in concerted activities for mutual aid or protection includes the right to strike, and the statutes protect such right provided the strike is lawfully conducted.

It has been held, prior to the amendment of the National Labor Relations Act limiting employee activities, that the right of employees to engage in concerted activities for mutual aid or protection includes the right to strike[75] or to engage in secondary boycotts,[76] and that the strike may be one in protest over the treatment of a coemployee or in support of a coemployee in any other grievance connected with his work or his employer's conduct.[77] It has also been held, prior to the Labor Management Relations Act of 1947, that the right of employees to strike for any cause was expressly preserved by the National Labor Relations Act, 29 U.S.C.A. § 163, and similar statutes, providing that nothing in the statute should be construed so as to interfere with, or impede or diminish in any way, the right to strike.[78] It has been held that the Railway Labor Act, 45 U.S.C.A. § 151 et seq, does not outlaw the right to strike, but merely aims to prevent the necessity for its exercise.[79]

Under statutory provisions dealing with the right of employees to strike and restrictions on such right, the word "strike" must be given its plain and ordinary signification in the absence of a legislative definition at variance.[80] In the application of such statutes, the word "strike" means an act of quitting work, specifically such an act done by mutual understanding by a body of workmen as a means of enforcing compliance with demands made on the employer to obtain or resist a change in conditions of employment;[81] the term ordinarily connotes a movement growing out of problems arising between the employee and employer class, relating to hours, wages, or employment conditions, in the course of which there is a concerted suspension of employment by the employees for the purpose of enforcing certain demands against the employer.[82] A "ju-

71. U.S.—N. L. R. B. v. Peter Cailler Kohler Swiss Chocolates Co., C.C.A.2, 130 F.2d 503—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corporation v. N. L. R. B., 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141.

Legislative representatives

In the absence of contrary provision, the right of employees to self-organization and to engage in concerted activities is not only for the purpose of bargaining but extends to activities for mutual aid or protection, including the appearance of employee representatives before legislative committees.—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corporations v. N. L. R. B., 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141.

72. U.S.—N. L. R. B. v. Schwartz, C.C.A.5, 146 F.2d 773—Western Cartridge Co. v. N. L. R. B., C.C.A., 139 F.2d 855.

73. U.S.—Fort Wayne Corrugated Paper Co. v. N. L. R. B., C.C.A.7, 111 F.2d 869.

74. U.S.—Fort Wayne Corrugated Paper Co. v. N. L. R. B., supra.

75. U.S.—N. L. R. B. v. Peter Cailler Kohler Swiss Chocolates Co., C.C.A.2, 130 F.2d 503.

Wash.—Kimbel v. Lumber & Saw Mill Workers Union No. 2575, 65 P.2d 1066, 189 Wash. 416.

The common-law, however, does not confer an absolute right to strike.—Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 9 A.2d 295, 126 N.J.Eq. 374, reversed on other grounds 8 A.2d 767, 126 N.J.Eq. 318.

76. U.S.—N. L. R. B. v. Peter Cailler Kohler Swiss Chocolates Co., C.C.A.2, 130 F.2d 503.

77. U.S.—Carter Carburetor Corporation v. National Labor Relations Board, C.C.A.8, 140 F.2d 714—N. L. R. B. v. Peter Cailler Kohler Swiss Chocolates Co., C.C.A.2, 130 F.2d 503.

Abandonment of department

Where an employer determines to abandon a department of his establishment, the employees of other departments may strike to induce the employer to refrain from so doing, provided they do not injure the business of the employer.—Welinsky v. Hillman, 185 N.Y.S. 257.

78. U.S.—Berkshire Knitting Mills v. N. L. R. B., C.C.A., 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579—N. L. R. B. v. Stackpole Carbon Co., C.C.A., 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, opinion supplemented 128 F.2d 188—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546—Yoerg Brewing Co. v. Brennan, D.C.Minn., 59 F.Supp. 625.

Loss of jobs

The statute permits a strike because of fear that jobs would be taken over by nonunion men.—Firth Carpet Co. v. N. L. R. B., C.C.A.2, 129 F.2d 633.

79. D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 75 U.S.App.D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

80. Fla.—State ex rel. Frazier v. Coleman, 23 So.2d 477, 156 Fla. 413.

81. Fla.—State ex rel. Frazier v. Coleman, supra.

82. Fla.—State ex rel. Frazier v. Coleman, supra.

risdictional dispute" has been defined as one in which classes of employees engage in a controversy with their employer and with one another concerning the right to control a particular matter.[83]

Statutory provisions affirming the right of employees to engage in strikes and lawful concerted activities do not protect all strikes and concerted activities but only those lawfully conducted,[84] and employees are not authorized to commit acts of violence, to take possession of the employer's property, or forcibly to prevent ingress and egress.[85] However, the question whether a strike constitutes lawful concerted activity is not dependent solely on whether the employees have or have not committed violence.[86] The statute does not countenance activities which would flout the fundamental rights and obligations lying at the foundation of the relation of employer and employee,[87] or authorize repeated work stoppages at times when the services of employees were needed most.[88] So, also, a "wildcat strike" by a minority of the employees in violation of the purposes of the statute and of the agreement existing between employer and employees for orderly collective bargaining is not protected by the statute.[89] The provision of the statute preserving to individuals or groups of employees the right to present grievances to the employer negatives by necessary implication the right on their part to call strikes for the purpose of influencing the bargaining being carried on by chosen representatives of all the employees.[90] A minority union, although having no standing as the collective bargaining agent of employees covered by an election held by the board, may strike or otherwise manifest dissatisfaction or opposition to the results of the election, notwithstanding the designation of another union as the sole bargaining agent, as long as the minority union pursues lawful means to publicize its grievances.[91]

Where the minds of the parties to an agreement between striking employees and employer did not meet with respect to certain matters, a strike, in effect after the so-called agreement, is not a new strike but a continuation of the one called prior thereto.[92] An employee cannot be on a strike and at work simultaneously, but must be on the job subject to the authority and control of the employer or off the job as a striker in support of such grievance.[93]

§ 28(19). Acts of Labor Organizations in General

Labor unions have the right to interfere by lawful means between an employer and his employees, even though the latter are not members of the union where the purpose of such interference is to advance the interest of the members of the union, notwithstanding consequent hardship imposed on individual employers or employees; but harm done thereby can be countenanced only if the purpose is, in the eye of the law, sufficient to justify such harm.

Labor unions have the right to interfere by law-

83. U.S.—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-K.-T. R. R. v. Missouri-K.-T. R. Co., C.C.A.Tex., 132 F.2d 91, reversed on other grounds 64 S.Ct. 146, 320 U.S. 323, 88 L.Ed. 76.

84. U.S.—N. L. R. B. v. Perfect Circle Co., C.C.A.7, 162 F.2d 566—Hamilton v. N. L. R. B., C.C.A.6, 160 F.2d 465.
N.Y.—New York State Labor Relations Bd. v. Union Club of City of N. Y., 52 N.Y.S.2d 74, 268 App.Div. 516, reversed on other grounds 68 N.E.2d 29, 295 N.Y. 915.

85. Wis.—Hotel & Restaurant Employees' International Alliance, Local No. 122, v. Wisconsin Employment Relations Board, 295 N.W. 634, 236 Wis. 329, affirmed 62 S.Ct. 706, 315 U.S. 437, 86 L.Ed. 946.

Obstruction of plant manager's entrance to plant, rather than intention of striking employees, was determinative of misconduct.—N. L. R. B. v. Perfect Circle Co., C.C.A.7, 162 F.2d 566.

86. U.S.—Dorchy v. State of Kansas, Kan., 47 S.Ct. 86, 272 U.S. 306, 71 L.Ed. 248.
N.Y.—New York State Labor Relations Bd. v. Union Club of City of N. Y., 52 N.Y.S.2d 74, 268 App. Div. 516, reversed on other grounds 68 N.E.2d 29, 295 N.Y. 915.

Barring entrance

The action of striking employees in preventing plant manager from entering employer's property by barring the way had the same legal effect as if employees had used physical violence to prevent entry, although employees intended to use only oral argument against manager's entry.—N. L. R. B. v. Perfect Circle Co., C.C.A.7, 162 F.2d 566.

87. N.Y.—New York State Labor Relations Bd. v. Union Club of City of N. Y., 52 N.Y.S.2d 74, 268 App.Div. 516, reversed on other grounds 68 N.E.2d 29, 295 N.Y. 915.

88. N.Y.—New York State Labor Relations Bd. v. Union Club of City of N. Y., supra.

89. U.S.—N. L. R. B. v. Draper Corporation, C.C.A.4, 145 F.2d 199, 156 A.L.R. 989.

Unjustified strike distinguished

Such a strike is distinguishable from a strike which, although not justified, accords with the rights of the parties under the statute.—N. L. R. B. v. Draper Corporation, supra.

90. U.S.—N. L. R. B. v. Draper Corporation, supra.

91. U.S.—Yoerg Brewing Co. v. Brennan, D.C.Minn., 59 F.Supp. 625.

92. U.S.—N. L. R. B. v. Elkland Leather Co., C.C.A.3, 114 F.2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S.Ct. 170, 311 U.S. 705, 85 L.Ed. 457.

93. U.S.—Home Beneficial Life Ins. Co. v. N. L. R. B., C.C.A.4, 159 F.2d 280.

Refusal to perform some of tasks

While employees could strike to assist other striking employees of employer's plant in another city, employees could not remain at their positions, accept wages paid to them, and at same time select what part of their allotted tasks they cared to perform, or refuse, openly or secretly, to employer's damage, to do other work on ground that performance of such work would work to detriment of such other striking employees.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486.

ful means between an employer and his employees who are not members of the union where the purpose of such interference is solely to advance the interest of the members of the union, notwithstanding consequent hardship imposed on individual employers or employees,[94] but harm done to another or to the public by such unions can be countenanced only if the purpose, in the eye of the law, is sufficient to justify such harm.[95] Acts of a union which have any reasonable connection with wages, hours of employment, health, safety, and the right of collective bargaining or any other condition of employment or for the protection from labor abuses have been held to be justified,[96] but the leaders of a labor union cannot make an illegal objective legal merely by the use of a legal method such as a strike to obtain that objective,[97] and a labor union is not free from legal responsibility for injury inflicted by the union in obtaining an objective which is not a lawful labor objective.[98] It is not a lawful labor objective for a union to insist that machinery be discarded in order that manual labor may take its place, and thus secure additional opportunity of employment,[99] or to eliminate from economic life businessmen-workers operating without aid of employees.[1] Where labor objectives of a union are illegal, the courts must control,[2] and, when doubt arises as to whether a contemplated objective is within the legal sphere, it is for the courts to determine.[3] The question whether a union rule against the doing of journeymen's work by employers is just, reasonable, or wise is one of policy which concerns only the union and its members, and may not be raised by an employer not a member of the union.[4] It has been held that a union may lawfully engage in a controversy with an employer with respect to his conduct in performing part of his own works.[5]

In the absence of a statute to the contrary, a union may lawfully resort to concerted activities to win over the employees with the object of gaining a closed shop agreement,[6] and members of a union

94. U.S.—Senn v. Tile Layers Protective Union, Local No. 5, Wis., 57 S.Ct. 857, 301 U.S. 468, 81 L.Ed. 1229.
Cal.—Fortenbury v. Superior Court in and for Los Angeles County, 106 P.2d 411, 16 Cal.2d 405—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311.
N.Y.—O'Keefe v. Local 463 of United Ass'n of Plumbers and Gasfitters of U. S. and Canada, 14 N.E.2d 77, 277 N.Y. 300.
Pa.—Brown v. Lehman, 15 A.2d 513, 141 Pa.Super. 467—Dominic Maurer, Inc. v. Berks Products Corp., Com.Pl., 37 Berks Co.L.J. 209.

Physically peaceable compulsion, coercion, intimidation, and threats may go to make up lawful moral and social pressure as against both employers and nonmember employees.—In re Porterfield, 168 P.2d 706, 28 Cal.2d 91.

95. N.Y.—Opera on Tour v. Weber, 34 N.E.2d 349, 285 N.Y. 348, motion denied 19 N.Y.S.2d 1020, 259 App.Div. 806, reargument denied 35 N.E.2d 920, 286 N.Y. 565.

Secondary boycott

(1) A labor union which aims its power of secondary boycott against businesses not connected with industrial dispute goes beyond the limits of constitutional protection and is subject to regulation by the state, but the state cannot confine the concerted action of labor to steps against the unfair employer alone, and somewhere between the two extremes the line for legislative regulation may be drawn.—**Ex parte** Blaney, Cal., 184 P.2d 892.

(2) "Secondary boycott" defined see Conspiracy § 12 a.

96. N.Y.—Opera on Tour v. Weber, 34 N.E.2d 349, 285 N.Y. 348, motion denied 19 N.Y.S.2d 1020, 259 App. Div. 806, reargument denied 35 N.E.2d 920, 286 N.Y. 565.

97. N.Y.—Opera on Tour v. Weber, supra.

Compelling discharge of foreman

A labor union did not have the right to demand that employer discharge a foreman, without a hearing, because he was too strict a disciplinarian.—N. L. R. B. v. Aladdin Industries, C.C.A.7, 125 F.2d 377, certiorari denied Aladdin Industries v. N. L. R. B., 62 S.Ct. 1310, 316 U. S. 706, 86 L.Ed. 1773.

98. N.Y.—Opera on Tour v. Weber, 34 N.E.2d 349, 285 N.Y. 348, motion denied 19 N.Y.S.2d 1020, 259 App.Div. 806, reargument denied 35 N.E.2d 920, 286 N.Y. 565.

99. N.Y.—Opera on Tour v. Weber, supra.

Making continuance of business impossible and thus preventing employment of a full complement of actors, singers, and stagehands merely because a machine is not discarded and in place thereof live musicians employed is not a lawful labor objective of a trade union.—Opera on Tour v. Weber, supra.

1. Cal.—Bautista v. Jones, 155 P.2d 343, 25 Cal.2d 746.

2. N.Y.—Opera on Tour v. Weber, 34 N.E.2d 349, 285 N.Y. 348, motion denied 19 N.Y.S.2d 1020, 259 App.Div. 806, reargument denied 35 N.E.2d 920, 286 N.Y. 565.

3. N.Y.—Opera on Tour v. Weber, supra.

4. Wash.—Zaat v. Building Trades Council, 20 P.2d 589, 172 Wash. 445.

5. Wash.—Zaat v. Building Trades Council, supra.

Right to resort to picketing and publicity

Where a contractor refused to execute a union shop agreement with a union except on condition that a provision requiring the contractor to refrain from working with his own hands was eliminated, the union had the right to resort to picketing and publicly to acquaint the public with such facts.—Senn v. Tile Layers Protective Union, Local No. 5, Wis., 57 S.Ct. 857, 301 U.S. 468, 81 L.Ed. 1229.

6. Cal.—In re Porterfield, 168 P.2d 706, 28 Cal.2d 91—C. S. Smith Metropolitan Market Co. v. Lyons, 106 P.2d 414, 16 Cal.2d 389—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311.
Validity of closed-shop contracts see infra § 28 (40).

Under National Labor Relations Act, it has been held that a union may engage in concerted activities to win over a majority of employees to a closed shop, notwithstanding union does not then represent a majority or even if union does not include any members who are in employ of particular employer.—Park & Tilford Import Corp. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L.,

or group of affiliated unions are privileged to refuse to work on the same job with other workmen whether or not the latter have united or organized themselves into a separate trade union,[7] but the National Labor Relations Act does not give labor unions a right to maintain a closed or partially closed membership together with a closed-shop agreement.[8]

Strike or refusal to work generally. The right of the members of a union to strike[9] or to refuse to work for any particular employer,[10] or to withdraw from the service of one whose terms or actions are objectionable to them[11] is generally recognized, so long as they do not violate an express contract[12] or a statute,[13] and as long as their primary object is accomplishment of the purpose of their organization,[14] and not the mere gratification of personal malice,[15] or the injuring of others.[16] A strike must be for a lawful purpose,[17] and a strike for both a legal and an illegal purpose is wholly illegal.[18] Those who attack the validity of a strike must prove that it comes within an express exception to the right to strike.[19]

The members of a labor union may thus singly or in a body leave the services of their employers in order to compel a reduction in the hours of labor,[20] to secure any other lawful benefit to their several members,[21] to secure for themselves all the work of their trade,[22] or, as discussed infra § 81, to compel an advance of wages. Where not under contract to render service for a specified time, the members of a labor union may unite in refusing to work for an employer who, after notice, continues in his employment one who is not a member of their society,[23] or who is a member of a rival organization;[24] and they may withdraw in a body from service under such conditions.[25] They may thus withdraw to prevent the use of materials made up by nonunion labor.[26] Although a strike for the purpose of organizing nonunion employees has been held lawful,[27] it has also been held that such a strike which has for its purpose the complete unionizing of labor and the doing away with nonunion labor is unlawful.[28] The right to strike, how-

165 P.2d 891, 27 Cal.2d 599, 162 A.L.R. 1426.

7. Cal.—In re Porterfield, 168 P.2d 706, 28 Cal.2d 91—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal. 2d 311.

8. Cal.—James v. Marinship Corp., 155 P.2d 329, 25 Cal.2d 721, 160 A.L.R. 900.

9. N.J.—International Ticket Co. v. Wendrich, 193 A. 808, 122 N.J.Eq. 222, affirmed 196 A. 474, 123 N.J. Eq. 172.
Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 146 Ohio St. 600.
63 C.J. p 666 note 76.
Injunction against strikes see Injunctions § 147.
Lawfulness of strikes generally see Conspiracy § 11.
Right to unemployment compensation benefits see the C.J.S. title Social Security and Public Welfare.
"Strike" defined see Conspiracy § 11 a.

10. Conn.—Cohn & Roth Electric Co. v. Bricklayers', Masons' and Plasterers' Local Union, No. 1, 101 A. 659, 92 Conn. 161, 6 A.L.R. 887.
63 C.J. p 666 note 77.

11. Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836.
N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N. Y. 65, 63 A.L.R. 188.
63 C.J. p 666 note 78.

12. Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836.
N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N. Y. 65, 63 A.L.R. 188.
63 C.J. p 666 note 79.

13. N.Y.—Maisel v. Sigman, 205 N. Y.S. 807, 123 Misc. 714.

14. Conn.—Cohn & Roth Electric Co. v. Bricklayers', Masons' and Plasterers' Local Union, No. 1, 101 A. 659, 92 Conn. 161, 6 A.L.R. 887.
N.Y.—Maisel v. Sigman, 205 N.Y.S. 807, 123 Misc. 714.

15. N.Y.—Maisel v. Sigman, supra.

16. Mass.—M. Steinert & Sons Co. v. Tagen, 93 N.E. 584, 207 Mass. 394, 32 L.R.A.,N.S., 1013.
63 C.J. p 666 note 83.

17. U.S.—N. L. R. B. v. Aladdin Industries, C.C.A.7, 125 F.2d 377, certiorari denied Aladdin Industries v. N. L. R. B., 62 S.Ct. 1310, 316 U. S. 706, 86 L.Ed. 1773.
N.J.—Blonder v. United Retail Employees of Newark, Local No. 108, 15 A.2d 826, 128 N.J.Eq. 41, reversed on other grounds 19 A.2d 786, 129 N.J.Eq. 424—International Ticket Co. v. Wendrich, 193 A. 808, 122 N.J.Eq. 222, affirmed 196 A. 474, 123 N.J.Eq. 172.
63 C.J. p 666 note 84.

18. Mass.—Folsom Engraving Co. v. McNeil, 126 N.E. 479, 235 Mass. 269—Baush Mach. Tool Co. v. Hill, 120 N.E. 188, 231 Mass. 30.

19. N.Y.—Maisel v. Sigman, 205 N. Y.S. 807, 123 Misc. 714.
63 C.J. p 666 note 86.

20. Mass.—L. D. Willcutt & Sons Co. v. Bricklayers' Benevolent & Protective Union No. 3, 85 N.E. 897, 200 Mass. 110, 23 L.R.A.,N.S., 1236.
63 C.J. p 667 note 88.

21. N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188.
63 C.J. p 667 note 89.

22. Mass.—Pickett v. Walsh, 78 N. E. 753, 192 Mass. 572, 6 L.R.A.,N. S., 1067, 116 Am.S.R. 272, 7 Ann. Cas. 638.
63 C.J. p 667 note 90.

23. Conn.—Cohn & Roth Electric Co. v. Bricklayers', Masons' and Plasterers' Local Union, No. 1, 101 A. 659, 92 Conn. 161, 6 A.L.R. 887.
63 C.J. p 667 note 91.

24. N.Y.—National Steam Fitters, etc. Protective Assoc. v. Cumming, 63 N.E. 369, 170 N.Y. 315, 88 Am. S.R. 648, 58 L.R.A. 135.

25. Conn.—State v. Stockford, 58 A. 769, 77 Conn. 227, 107 Am.S.R. 28.
63 C.J. p 667 note 93.

26. U.S.—Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n of North America, C.C.A.Ind., 9 F. 2d 40, reversed on other grounds 47 S.Ct. 522, 274 U.S. 37, 71 L.Ed. 916, 54 A.L.R. 791.
N.Y.—Maisel v. Sigman, 205 N.Y.S. 807, 123 Misc. 714.

27. N.Y.—Michaels v. Hillman, 183 N.Y.S. 195, 112 Misc. 395—Rosenwasser Bros. v. Pepper, 172 N.Y.S. 310, 104 Misc. 457.
63 C.J. p 666 notes 76–78.

28. Mass.—Folsom Engraving Co. v. McNeil, 126 N.E. 479, 235 Mass. 269.
66 C.J. p 667 note 96.

ever, exists only as against employers with whom the union has a trade dispute.[29] A strike to prevent one from carrying on a lawful trade is illegal.[30]

The right to strike includes the right to win over others to its support,[31] provided such other persons may do so without violating any contract with the employer,[32] and pay the expenses of those thus persuaded to leave,[33] and post in the place of the strikers' assembly the names of all persons contributing, or refusing to contribute, to such expenses.[34] Strikers may also persuade others not to take their places.[35] These rights are not affected by the fact that the employer is a receiver;[36] nor is the legality of such acts affected by the fact that loss results to the employer.[37]

It is legal for a labor union by means of a strike to secure the discharge of objectionable persons[38] and procure employment for its members.[39] Such act is legal, however, only when its purpose is to secure employment or benefit for members of the union.[40] It has been held to become unlawful when its design is to coerce the nonunion man to become a member of the society and come under its rules and conditions,[41] or to deprive him of the opportunity to labor.[42] However laudable the object of a strike, the means used in its conduct must not be unlawful or contrary to public policy.[43] The union may not resort to force, intimidation, threats, or coercion[44] to prevent others from entering the employment of their abandoned employers,[45] or to coerce dealers and users into starving the business of their employers.[46]

Sit-down strike. Attempted coercion of an employer to enforce demands by taking possession of the employer's property has no recognition under the law,[47] and the withholding of such property by individuals who had formerly been employed thereon but who claimed the right by sit-down strike to remain for the purpose of coercing the employer into granting their claims is unauthorized.[48]

Picketing. Picketing as an aid to strike is not unlawful,[49] provided it does not consist of coercive or otherwise unlawful acts,[50] or amount to an invasion of the rights of others.[51] The right of

Strike to compel closed shop has been held not justifiable.
Mass.—Cornellier v. Haverhill Shoe Mfrs.' Ass'n, 109 N.E. 643, 221 Mass. 554, L.R.A.1916C 218.
N.J.—International Ticket Co. v. Wendrich, 193 A. 808, 122 N.J.Eq. 222, affirmed 196 A. 474, 123 N.J. Eq. 172.

29. Md.—Bricklayers', Masons' & Plasterers' International Union of America v. Seymour Ruff & Sons, 154 A. 52, 160 Md. 483.
63 C.J. p 668 note 98.

30. N.Y.—Grand Shoe Co. v. Children's Shoe Workers' Union, 187 N.Y.S. 886.

31. N.Y.—Michaels v. Hillman, 183 N.Y.S. 195, 112 Misc. 395.
63 C.J. p 668 note 1.

32. N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188.
63 C.J. p 668 note 2.

33. N.Y.—Rogers v. Evarts, 17 N. Y.S. 264.

34. N.Y.—Rogers v. Evarts, supra.

35. U.S.—Alaska S. S. Co. v. International Longshoremen's Ass'n of Puget Sound, D.C.Wash., 236 F. 964.
63 C.J. p 668 note 5.

36. U.S.—U. S. v. Kane, C.C.Colo., 23 F. 748.

37. Conn.—State v. Stockford, 58 A. 769, 77 Conn. 227, 107 Am.S.R. 28.
63 C.J. p 668 note 8.

38. N.Y.—National Steam Fitters, etc. Protective Assoc. v. Cumming, 63 N.E. 369, 170 N.Y. 315, 88 Am. S.R. 648, 58 L.R.A. 135.
63 C.J. p 668 note 9.

39. Mass.—Pickett v. Walsh, 78 N. E. 753, 192 Mass. 572, 6 L.R.A.,N. S., 1067, 116 Am.S.R. 272, 7 Ann. Cas. 638.
63 C.J. p 668 note 10.

40. Conn.—Cohn & Roth Electric Co. v. Bricklayers', Masons' and Plasterers' Local Union, No. 1, 101 A. 659, 92 Conn. 161, 6 A.L.R. 887.
63 C.J. p 669 note 11.

41. U.S.—Old Dominion Steamship Co. v. McKenna, 30 F. 48, 18 Abb. N.Cas. 262.
63 C.J. p 669 note 12.

42. Md.—Lucke v. Clothing Cutters' & Trimmers' Assembly No. 7507, K. of L., 26 A. 505, 77 Md. 396, 39 Am.S.R. 421, 19 L.R.A. 408.
63 C.J. p 669 note 13.

43. Conn.—Cohn & Roth Electric Co. v. Bricklayers', Masons' & Plasterers' Local Union No. 1, 101 A. 659, 92 Conn. 161, 6 A.L.R. 887.
63 C.J. p 669 note 14.

44. N.J.—International Ticket Co. v. Wendrich, 193 A. 808, 122 N.J. Eq. 222, affirmed 196 A. 474, 123 N.J.Eq. 172.
63 C.J. p 669 note 15.

45. Ill.—Franklin Union, No. 4 v. People, 77 N.E. 176, 220 Ill. 355, 4 L.R.A.,N.S., 1001, 110 Am.S.R. 248.
63 C.J. p 669 note 16.

46. N.Y.—Bossert v. Dhuy, 117 N.E. 582, 221 N.Y. 342, Ann.Cas.1918D 661—Michaels v. Hillman, 183 N. Y.S. 195, 112 Misc. 395.
63 C.J. p 669 note 17.

47. U.S.—The Oakmar, D.C.Md., 20 F.Supp. 650.

48. U.S.—The Oakmar, supra.
Refusal to reinstate employees engaged in unlawful sit-down strike see infra § 28 (51) b.
Right to discharge employees engaged in unlawful sit-down strike see infra § 28 (49) b.

49. N.C.—Citizens' Co. v. Asheville Typographical Union, No. 263, 121 S.E. 31, 187 N.C. 42.
63 C.J. p 669 note 22.
Injunction against picketing see Injunctions §§ 143–145.
Picketing as conspiracy:
Civil liability see Conspiracy § 12.
Criminal liability see Conspiracy § 71.

50. Ark.—Local Union No. 313, Hotel & Restaurant Employees International Alliance v. Stathakis, 205 S.W. 450, 135 Ark. 86.
63 C.J. p 669 note 23.

51. Ark.—Local Union No. 313, Hotel & Restaurant Employees International Alliance v. Stathakis, supra.
63 C.J. p 670 note 24.

Justification under statute
When picketing is sought to be justified under statute authorizing "peaceably and without threat or intimidation being on any public street or highway or thoroughfare for the purpose of obtaining or communicating information," the purpose for which persons are to be un-

peaceful picketing does not arise under the National Labor Relations Act;[52] or was the Act intended to prevent one labor union from peacefully picketing the plant of an employer who recognizes another union as bargaining agent where the purpose of the picketing was to urge employees who are members of the bargaining agent to pursue a course similar to that followed by the picketing union in a campaign waged by both unions to increase wages in the industry,[53] although the right of a minority union peacefully to picket the plant of an employer who has entered into a closed-shop agreement with a union certified as the sole collective bargaining agent of the employees, for the purpose of interfering with or abrogating that agreement, has been denied where there was no labor dispute between the employer and the picketing union.[54]

2. Collective Bargaining

§ 28(20). Collective Bargaining in General

Collective bargaining is a procedure looking toward the making of a collective agreement between the employer and the accredited representative of his employees concerning wages, hours, and other conditions of employment.

Collective bargaining is a procedure looking toward the making of a collective agreement between the employer and the accredited representative of his employees concerning wages, hours, and other conditions of employment.[55] It involves the right of members of a labor organization, either through a committee or through a representative, to confer with the employer, and to present their claims or grievances as to hours, wages, and general conditions incident to their employment, with the end in view of arriving at a reasonable and amicable adjustment of such matters.[56] The right of collective bargaining is necessarily a continuing right, and it is not a detached or isolated procedure which, once reflected in a written agreement, becomes a final and permanent result.[57] The right to organize is essential to the right to bargain collectively.[58]

The right of employees to bargain collectively and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection has long been recognized by the courts and public opinion as lawful and in the public interest,[59] and it has been expressly provided for

restrained in "being on" public streets must be borne in mind and statute interpreted in light of right of employee to be free and of the employer to have employee free from importunity, following, and dogging. —International Ticket Co. v. Wendrich, 193 A. 808, 122 N.J.Eq. 222, affirmed 196 A. 474, 123 N.J.Eq. 172.

52. U.S.—Home Building Corporation v. Carpenters Dist. Council, D. C.Mo., 53 F.Supp. 804.

Freedom of speech as constitutional right see Constitutional Law § 213.

53. Wash.—State ex rel. Lumber and Sawmill Workers v. Superior Court for Pierce County, 164 P.2d 662, 24 Wash.2d 314.

54. Wash.—Bloedel Donovan Lumber Mills v. International Woodworkers of America, Local No. 46, 102 P.2d 270, 4 Wash.2d 62.

55. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F. 2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523—N. L. R. B. v. Boss Mfg. Co., C.C.A. 7, 118 F.2d 187.

Other definitions

(1) A broad definition of "collective bargaining" is an agreement between an employer and a labor union which regulates terms and conditions of employment with reference to hours of labor and wages, and deals also with strikes, lockouts, walkouts, arbitration, shop conditions, safety devices, the enforceability and interpretation of such agreement and of numerous other relations existing between employer and employee.—Railway Mail Ass'n v. Murphy, 44 N.Y.S.2d 601, 180 Misc. 868, reversed on other grounds Railway Mail Ass'n v. Corsi, 47 N.Y. S.2d 404, 267 App.Div. 470, affirmed 56 N.E.2d 721, 293 N.Y. 315, affirmed 65 S.Ct. 1483, 326 U.S. 88, 89 L.Ed. 2072.

(2) Collective bargaining is a policy whereby employers and employees, by the union for employees, may agree in writing concerning wages and hours.—St. Clair v. Russell & Pugh Lumber Co., D.C.Idaho, 51 F.Supp. 47.

(3) To bargain collectively or negotiate means to confer regarding terms and conditions of employment and incorporation of such terms and conditions in a contract.—Nutter v. City of Santa Monica, 168 P.2d 741, 74 Cal.App.2d 292.

56. U.S.—Yellow Cab Operating Co. v. Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, D.C. Okl., 35 F.Supp. 403, reversed on other grounds, C.C.A., Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, Okl., v. Yellow Cab Operating Co., 123 F.2d 262.

The distinguishing characteristic of collective bargaining is a contract negotiated by a designated representative of a group of employees.—Earle Restaurant v. O'Meara, App.D. C., 160 F.2d 275.

57. U.S.—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F. 2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—N. L. R. B. v. Newark Morning Ledger Co., C.C.A.3, 120 F.2d 262, 137 A.L.R. 849, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 314 U.S. 693, 86 L.Ed. 554.

Wis.—International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, Local 180, C. I. O., v. J. I. Case Co., 26 N.W.2d 305, 250 Wis. 63.

58. D.C.—Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees of America, 137 F.2d 817, 78 U.S.App.D.C. 125, reversed on other grounds and certiorari granted 64 S.Ct. 260, 320 U.S. 715, 88 L.Ed. 420, rehearing denied 64 S.Ct. 435, 320 U.S. 816, 88 L.Ed. 493.

59. U.S.—El Paso Electric Co. v. Elliott, D.C.Tex., 15 F.Supp. 81.

Ky.—Aulich v. Craigmyle, 59 S.W.2d 560, 248 Ky. 676.

N.J.—Blonder v. United Retail Employees of Newark, Local No. 108, 15 A.2d 826, 128 N.J.Eq. 41—Eve-

or safeguarded in federal statutes,[60] such as the Railway Labor Act, 45 U.S.C.A. § 151 et seq,[61] and the National Labor Relations Act, 29 U.S.C.A. § 151 et seq,[62] and in the statutes or constitutional provisions of a number of states.[63] The right of

ning Times Printing & Publishing Co. v. American Newspaper Guild, 195 A. 378, 122 N.J.Eq. 545—Bayonne Textile Corporation v. American Federation of Silk Workers, 172 A. 551, 116 N.J.Eq. 146, 92 A.L.R. 1450.

N.Y.—Busch Jewelry Co. v. United Retail Employees Union, Local 830, 22 N.E.2d 320, 281 N.Y. 150, 124 A.L.R. 744, motion denied Busch Jewelry Co. v. United Retail Employees' Union, 21 N.E.2d 207, 280 N.Y. 706—Barfield v. Standard Oil Co. of New Jersey, 14 N.Y.S.2d 627, 172 Misc. 95—Maisel v. Sigman, 205 N.Y.S. 807, 123 Misc. 714.

Or.—Geo. B. Wallace Co. v. International Ass'n of Mechanics, Mt. Hood Lodge, Local No. 1005, Auto Mechanics, 63 P.2d 1090, 155 Or. 652.

A union may enter into a contract with an employer for the benefit of its members.—H. Blum & Co. v. Landan, 155 N.E. 154, 23 Ohio App. 426.

Bargaining power beyond single shop

As modern industry is not organized on a single-shop basis, independent labor organizations should be permitted to grow and extend their bargaining power beyond the single shop.—C. S. Smith Metropolitan Market Co. v. Lyons, 106 P.2d 414, 16 Cal.2d 389.

Persuasion causing exercise of right

Workers have a right to secure collective bargaining if they can, and as long as the action is of their own free will it is a matter of indifference whether they conclude to do so on their own initiative or on outside suggestion or persuasion.—International Pocketbook Workers' Union v. Orlove, 148 A. 826, 158 Md. 496.

60. N.Y.—Farulla v. Ralph A. Freundlich, Inc., 277 N.Y.S. 47, 153 Misc. 738.

Norris-La Guardia Act

U.S.—Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, N.Y., 65 S.Ct. 1533, 325 U.S. 797, 89 L.Ed. 1939, rehearing denied 66 S.Ct. 11, 326 U.S. 803, 90 L.Ed. 489—U. S. v. Bay Area Painters and Decorators Joint Committee, D.C.Cal., 49 F.Supp. 733.

War Labor Disputes Act

U.S.—N. L. R. B. v. West Ky. Coal Co., C.C.A.6, 152 F.2d 198, certiorari denied 66 S.Ct. 1372, 328 U.S. 866, 90 L.Ed. 1636.

61. U.S.—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-K.-T. R. R. v. Missouri-K.-T. R. Co., Tex., 64 S.Ct. 146, 320 U.S. 323, 88 L.Ed. 76—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789—Railway Employees' Department of American Federation of Labor v. Virginian Ry. Co., D.C. Va., 39 F.Supp. 354.

D.C.—Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. United Transport Service Employees of America, 137 F.2d 817, 78 U.S.App.D.C. 125, reversed on other grounds and certiorari granted 64 S.Ct. 260, 320 U.S. 715, 88 L.Ed. 420, rehearing denied 64 S.Ct. 435, 320 U.S. 816, 88 L.Ed. 493.

Kan.—Betts v. Easley, 169 P.2d 831, 161 Kan. 459.

Although not defined in Railway Labor Act, "collective bargaining" generally has been considered to absorb and give statutory approval to philosophy of bargaining as worked out in the labor movement in United States.—Order of Railroad Telegraphers v. Railway Exp. Agency, Ga., 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788.

The purpose of the Railway Labor Act in providing for a representative of a craft or class of employees is to secure benefits of agreements which represent the strength and bargaining power and serve the welfare of the group and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the class who selected it.—Steele v. Louisville & N. R. Co., Ala., 65 S.Ct. 226, 323 U.S. 192, 89 L.Ed. 173.

The basic principle of legislation recognizing the policy of collective bargaining between railroads and their employees is that there must be some agency vested with authority to represent and bind all of the employees of each craft or class, whether or not members of a labor organization, for the preservation of the rights of the employees and for the protection of the public.—Brisbin v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277, 134 Neb. 517.

62. U.S.—Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, N.Y., 65 S.Ct. 1533, 325 U.S. 797, 89 L.Ed. 1939, rehearing denied 66 S.Ct. 11, 90 L.Ed. 489—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 114 F.2d 738, certiorari dismissed 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391—St. Clair v. Russell & Pugh Lumber Co., D.C.Idaho, 51 F.Supp. 47.

Ill.—Fansteel Metallurgical Corporation v. Lodge 66 of Amalgamated Ass'n of Iron, Steel and Tin Workers of North America, 14 N.E.2d 991, 295 Ill.App. 323.

Employee's right to protect interests

Under the National Labor Relations Act, although the employer has the right to whole-hearted loyalty in the performance of a contract of employment, the employee has the right to protect his independent and adverse interest in the terms of the contract itself and the conditions of work.—Packard Motor Car Co. v. N. L. R. B., 67 S.Ct. 789.

Right to violate state law

Provision in National Labor Relations Act authorizing employees to engage in concerted activities for purpose of collective bargaining or other mutual aid and protection does not give to employees the right to use concerted activities which are in violation of state law.—International Union, U. A. W. A. A. F. of L., Local 232, v. Wisconsin Employment Relations Bd., 27 N.W.2d 875, 250 Wis. 550.

63. Cal.—Nutter v. City of Santa Monica, 168 P.2d 741, 74 Cal.App.2d 292.

Kan.—Swart v. Huston, 117 P.2d 576, 154 Kan. 182.

N.Y.—In re New York State Labor Relations Bd. v. Metropolitan Life Ins. Co., 52 N.Y.S.2d 590, 183 Misc. 1064, affirmed 58 N.Y.S.2d 343, 269 App.Div. 934, affirmed 66 N.E.2d 853, 295 N.Y. 839—International Ry. Co. v. Boland, 8 N.Y.S.2d 643, 169 Misc. 926.

As giving right to particular employees

(1) A constitutional provision which merely protects the right of collective bargaining does not give the right of collective bargaining to any group of employees.—Miami Water Works Local No. 654 v. City of Miami, Fla., 26 So.2d 194.

(2) Accordingly such a provision does not give right of collective bargaining to union whose membership is composed of employees of munici-

collective bargaining is a fundamental[64] or natural[65] right which the federal statutes[66] and state statutes and constitutional provisions[67] have merely affirmed and not created, although it has been held that the National Labor Relations Act basically reconstructed the right.[68] The court must construe the collective bargaining provisions of labor relations statutes so as to give effect to their social purposes, to avoid labor strife, and to promote labor peace.[69]

Employers have the right to bargain as a group with employee organizations in a given trade in the matter of wages or of trade rules and working conditions.[70]

§ 28(21). —— Duty to Bargain in General

Under a number of statutes the employer has the duty to engage in collective bargaining with his employees.

In accordance with the provisions of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq,[71] of the Railway Labor Act, 45 U.S.C.A. § 151 et seq,[72] and of various state statutes,[73] the employer has the duty to engage in collective bargaining with his employees. Under the National Labor Relations Act and similar statutes the duty exists only after the statutory bargaining representative re-

pality.—Miami Water Works Local No. 654 v. City of Miami, supra.

Collective action by employer or employees

Although it is the policy of the law to protect employees' right of collective bargaining, nothing in the law denies to either employers or employees the right of lawful collective action.—Bentley v. Mountain, 124 P.2d 91, 51 Cal.App.2d 95.

64. U.S.—Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738.
N.Y.—Domanick v. Triboro Coach Corporation, 18 N.Y.S.2d 650.

65. Cal.—Nutter v. City of Santa Monica, 168 P.2d 741, 74 Cal.App. 2d 292.

66. U.S.—Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738.
Wis.—Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 295 N.W. 791, 237 Wis. 164, affirmed 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. 1154.

67. Cal.—Nutter v. City of Santa Monica, 168 P.2d 741, 74 Cal.App.2d 292.
N.Y.—Domanick v. Triboro Coach Corporation, 18 N.Y.S.2d 650.

68. U.S.—United Electrical Radio & Machine Workers of America v. International Brotherhood of Electrical Workers, C.C.A.N.Y., 115 F.2d 488.

69. N.Y.—In re New York State Labor Relations Bd. v. Metropolitan Life Ins. Co., 52 N.Y.S.2d 590, 183 Misc. 1064, affirmed 58 N.Y.S. 2d 343, 269 App.Div. 934, affirmed 66 N.E.2d 853, 295 N.Y. 839.

70. Ill.—Carpenters' Union v. Citizens' Committee to Enforce Landis Award, 244 Ill.App. 540, reversed on other grounds 164 N.E. 393, 333 Ill. 225, 63 A.L.R. 157.

71. U.S.—Medo Photo Supply Corporation v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007—N. L. R. B. v. Scullin Steel Co., C.C.A.8, 161 F.2d 143—N. L. R. B. v. A. Sartorius & Co., C.C.A.2, 140 F.2d 203—N. L. R. B. v. Swift & Co., C.C.A.6, 127 F.2d 30—N. L. R. B. v. Calument Steel Division of Borg-Warner Corporation, C.C.A. 7, 121 F.2d 366—Solvay Process Co. v. N. L. R. B., C.C.A.5, 117 F.2d 83, certiorari denied 61 S.Ct. 1121, 313 U.S. 596, 85 L.Ed. 1549.
Mass.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.
Refusal to bargain collectively as unfair labor practice see infra § 28 (45) e.

Employer's announcement of new wage scale without prior agreement and while negotiations were still in progress constituted an attempt to settle unilaterally matters with respect to which employer was under a statutory duty to deal with the union.—N. L. R. B. v. Barrett Co., C. C.A.7, 135 F.2d 959—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 127 F.2d 180, certiorari denied 63 S. Ct. 48, 317 U.S. 652, 87 L.Ed. 524.

Majority support

An employer is under duty to bargain collectively as soon as union representative presents convincing evidence of majority support for the union.—N. L. R. B. v. Dahlstrom Metallic Door Co., C.C.A.2, 112 F.2d 756.

Employee's consent to violation

The statute may not be ignored by employer even though the employees consent, or the employees suggest conduct found to be an unfair labor practice, at least where employer is in a position to secure an advantage from the practice.—Medo Photo Supply Corp. v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007.

Reason for requiring negotiations is based on idea that negotiations honestly entered into will generally result in settlement of differences.—Jeffery-De Witt Insulator Co. v. N. L. R. B., C.C.A.4, 91 F.2d 134, certiorari denied 58 S.Ct. 55, 302 U.S. 731, 82 L.Ed. 565.

72. U.S.—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S. Ct. 592, 300 U.S. 515, 81 L.Ed. 789.

"Treat with"

Provision of Railway Labor Act commanding employer to "treat with" authorized representative of employees for collective bargaining requires employer to meet and confer with such representative, to listen to complaints, and to make reasonable effort to compose differences, as against contention that command requires employer to meet representative only if and when he should elect to negotiate with representative.—Virginian Ry. Co. v. System Federation No. 40, supra.

Federal Transportation Act of 1920 did not require the railway company to recognize or to deal with or confer with labor unions, and it did not require employees to deal with their employers through their fellow employees.—Pennsylvania R. Co. v. U. S. Railroad Labor Board, Ill., 43 S.Ct. 278, 261 U.S. 72, 67 L.Ed. 536.

73. Mass.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.
N.Y.—New York State Labor Relations Board v. Montgomery Ward & Co., 38 N.Y.S.2d 858, 179 Misc. 298, affirmed 42 N.Y.S.2d 840, 266 App.Div. 878.
Pa.—In re Oestreicher Co., Com.Pl., 96 Luz.Leg.Reg. 25—Wilson Laundry Co. v. Laundry and Linen Supply Drivers and Chauffeurs Local Union, No. 187, Com.Pl., 56 Montg. Co. 164.

Consideration of standards of living

In wage controversy, employer should be willing to consider in good faith the present standard of living and salaries or wages paid to employees in similar lines of endeavor. —New York State Labor Relations Bd. v. Charles C. Loehmann Corp., 56 N.Y.S.2d 485, 269 App.Div. 566.

quests the employer to bargain collectively,[74] and the employer need not take the initiative in seeking a contract or request his employees to participate in negotiations for purposes of collective bargaining.[75] After a request to bargain has been made by the employees through their representative it is not incumbent on the employees to renew continually the proposal to bargain,[76] but after the employer has entered into negotiations for collective bargaining, and the negotiations are suspended with no arrangement for further meeting, the employees must request further negotiations to impose the duty on the employer.[77] The employer is not excused from compliance with the statute because of economic hardships,[78] because his plant is shut down,[79] by reason of the fact that union organizers have stated to employees that persons not joining the union would lose their jobs when the union was recognized,[80] or by reason of the fact that the union has proposed a preferential shop.[81] If the union offers in good faith to negotiate, the employer may not refuse because of the union's past misconduct.[82] The employer violates the statute when he refuses to bargain except on conditions which are unreasonable or which interfere with the employees' rights given by the statute.[83]

§ 28(22). —— Subjects of Collective Bargaining

Generally, where collective bargaining is required by statute, the employer must negotiate with respect to all matters which affect his employees as a class or which involve legitimate collective bargaining.

Generally, where collective bargaining is required by statute, the employer must negotiate with respect to all matters which affect his employees as a class[84] or which involve legitimate collective bargaining,[85] and a refusal to bargain as to matters which are proper subjects for collective bargaining indicates a lack of good faith.[86] Accordingly the employer is under the duty to bargain collectively before making changes in existing contracts,[87] but the employee's breach of contract does not leave the employer under an obligation to initiate negotiations for a new contract.[88] Exceptional as well as routine matters are properly the subjects for collective bargaining.[89]

74. U.S.—N. L. R. B. v. Columbian Enameling & Stamping Co., 59 S. Ct. 501, 306 U.S. 292, 83 L.Ed. 660 —N. L. R. B. v. West Ky. Coal Co., C.C.A.6, 152 F.2d 198, certiorari denied 66 S.Ct. 1372, 328 U.S. 866, 90 L.Ed. 1636—N. L. R. B. v. Burke Mach. Tool Co., C.C.A.6, 133 F.2d 618—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311.

75. U.S.—N. L. R. B. v. Sands Mfg. Co., 59 S Ct. 508, 306 U.S. 332, 83 L.Ed. 682—N. L. R. B. v. Columbian Enameling & Stamping Co., 59 S.Ct. 501, 306 U.S. 292, 83 L. Ed. 660—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 127 F.2d 180, certiorari denied 63 S.Ct. 48, 317 U.S. 652, 87 L.Ed. 524—Wilson & Co. v. N. L. R. B., C.C.A.8, 115 F.2d 759.

76. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—M. H. Ritzwoller Co. v. N. L. R. B., C.C.A.7, 114 F. 2d 432.

77. U.S.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682.

78. U.S.—N. L. R. B. v. John Engelhorn & Sons, C.C.A.3, 134 F.2d 553.

79. U.S.—N. L. R. B. v. Somerset Shoe Co, C.C.A.1, 111 F.2d 681.

80. U.S.—N. L. R. B. v. Dahlstrom Metallic Door Co., C.C.A.2, 112 F. 2d 756.

81. U.S.—N. L. R. B. v. George P. Pilling & Son Co., C.C.A.3, 119 F. 2d 32.

82. U.S.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

83. U.S.—N. L. R. B. v. George P. Pilling & Sons Co., C.C.A.3, 119 F. 2d 32.

84. U.S.—Wilson & Co. v. N. L. R. B., C.C.A.8, 115 F.2d 759.

85. U.S.—Singer Mfg. Co. v. N. L. R. B., C.C.A.7, 119 F.2d 131, certiorari denied 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549, rehearing denied 62 S.Ct. 55, 314 U.S. 708, 86 L.Ed. 565.

86. U.S.—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 118 F.2d 187.

Necessity for negotiation in good faith see infra § 28 (23).

87. U.S.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682—In re Chicago North Shore & M. R. Co., C.C.A.Ill., 147 F.2d 723, certiorari denied Brotherhood of Locomotive Firemen and Enginemen v. Chicago, N. S. & M. R. Co., 65 S.Ct. 1089, 325 U.S. 852, 89 L.Ed. 1973—Consolidated Aircraft Corporation v. N. L. R. B., C.C.A.9, 141 F.2d 785—N. L. R. B. v. Montgomery Ward & Co., C.C.A. 9, 133 F.2d 676, 146 A.L.R. 1045—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523—Singer Mfg. Co. v. N. L. R. B., C.C.A.7, 119 F.2d 131, certiorari denied 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549, rehearing denied 62 S.Ct. 55, 314 U.S. 708, 86 L.Ed. 565.

Change in working conditions prior to agreement

Where no collective bargaining agreement is in force, the carrier, by making individual agreements which change working conditions, does not violate the provision of the Railway Labor Act, 45 U.S.C.A. § 152, which prohibits changes in collective bargaining agreements without resort to the procedure prescribed by the act, although negotiations for a collective agreement are pending. —Williams v. Jacksonville Terminal Co., Fla. & Tex., 62 S.Ct. 659, 315 U. S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Pickett v. Union Terminal Co., Fla. & Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

88. U.S.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682.

89. U.S.—Order of Railroad Telegraphers v. Railway Express Agency, Ga., 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788.

Wages or rates of pay,[90] hours of employment,[91] conditions of employment,[92] and the method for presenting and adjusting grievances[93] are proper subjects for collective bargaining. The interpretation of ambiguous provisions of the contract is a matter for collective bargaining,[94] but where the provisions of the contract are not ambiguous the employer need not negotiate as to their interpretation.[95] Where the closed shop is not prohibited by statute it constitutes a proper subject for collective bargaining.[96] Collection of union dues is not in its nature a matter for collective bargaining required by the National Labor Relations Act, 29 U.S.C.A. § 151 et seq,[97] but it may properly be included in a collective bargaining contract, as considered infra § 103.

§ 28(23). —— Conduct of Collective Bargaining Negotiations

Under labor relations statutes which require collective bargaining, mere pretended bargaining by the employer is not sufficient; the employer must bargain in good faith.

Under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes, mere pretended bargaining by the employer is not sufficient to constitute collective bargaining;[98] the employer must bargain in good faith.[99] Collective bargain-

90. U.S.—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198 and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198.

Fixing of wages by contract generally see infra § 110.

Employer has right to insist that question of wages be settled by the contract with employees' bargaining agent, and employees have right to include in contract a proper clause recognizing the right to bargain collectively as to wages.—Singer Mfg. Co. v. N. L. R. B., 119 F.2d 131, certiorari denied 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549, rehearing denied 62 S.Ct. 55, 314 U.S. 708, 86 L.Ed. 565.

91. U.S.—N. L. R. B. v. Swift & Co., C.C.A.6, 127 F.2d 30—N. L. R. B. v. George P. Pilling & Son Co., C.C.A.3, 119 F.2d 32—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198 and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198.

92. U.S.—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523.

Division of labor is within the province of collective bargaining.—Gaskill v. Roth, C.C.A.Neb., 151 F.2d 366, certiorari denied 66 S.Ct. 896, 327 U.S. 798, 90 L.Ed. 1024, rehearing denied 66 S.Ct. 975, 328 U.S. 876, 90 L.Ed. 1645.

"Working conditions"

(1) The phrase "working conditions" within provision of Railway Labor Act, 45 U.S.C.A. § 152, that no carrier shall change working conditions except as prescribed in agreement with employees or in the act means such conditions affecting work of employees as might be subject of agreement between carrier and employees.—In re Chicago North Shore & M. R. Co., C.C.A.Ill., 147 F.2d 723, certiorari denied Brotherhood of Locomotive Firemen and Enginemen v. Chicago, N. S. & M. R. Co., 65 S.Ct. 1089, 325 U.S. 852, 89 L.Ed. 1973.

(2) A mere change in intercorporate operating arrangements between companies was held not to constitute a change in "working conditions."—In re Chicago North Shore & M. R. Co., supra.

93. U.S.—Hughes Tool Co. v. N. L. R. B., C.C.A.5, 147 F.2d 69, 158 A.L.R. 1165.

94. U.S.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523.

Types of dispute recognized by statute

The Railway Labor Act, 45 U.S.C.A. § 151 et seq., recognizes two types of disputes arising between railway management and employees which may be adjusted thereunder, the first relating to disputes over formation of collective agreements or efforts to secure them looking to acquisition of rights for the future, and the second contemplating existence of a collective agreement or a situation in which no effort is made to change terms of employment and dispute, relates either to meaning or proper application of a particular provision with reference to a specific situation or to an omitted case.—Murphre v. Brotherhood of R. R. Trainmen, 173 P.2d 926, 197 Okl. 627.

95. U.S.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682.

96. U.S.—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201.

Validity of closed-shop provision in collective bargaining contract see infra § 28 (40).

97. U.S.—Hughes Tool Co. v. N. L. R. B., C.C.A.5, 147 F.2d 69.

98. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—N. L. R. B. v. Swift & Co., C.C.A.6, 127 F.2d 30—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523—Singer Mfg. Co. v. N. L. R. B., C.C.A.7, 119 F.2d 131, certiorari denied 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549, rehearing denied 62 S.Ct. 55, 314 U.S. 708, 86 L.Ed. 565—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 118 F.2d 187.

Determintaion not to agree

(1) Mere discussion with fixed resolve not to enter into an agreement even regarding matters as to which there is no dispute does not satisfy the statute.—N. L. R. B. v. Highland Park Mfg. Co., C.C.A.4, 110 F.2d 632.

(2) An employer who enters into negotiations with his mind closed against even the thought of entering into an agreement is guilty of refusing to bargain collectively.—N. L. R. B. v. Westinghouse Air Brake Co., C.C.A.3, 120 F.2d 1004—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713.

99. U.S.—N. L. R. B. v. Poultrymen's Service Corp., C.C.A.3, 138 F.2d 204—N. L. R. B. v. Barrett Co., C.C.A.7, 135 F.2d 959—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 127 F.2d 180, certiorari denied 63 S.Ct. 48, 317 U.S. 652, 87 L.Ed. 524—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 123 F.2d 725—Singer Mfg. Co. v. N. L. R. B., C.C.A.7, 119 F.2d 131, certiorari denied 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549, rehearing denied 62 S.Ct. 55, 314 U.S. 708, 86 L.Ed. 565—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549—Wilson & Co. v. N. L. R. B., C.C.A.8, 115 F.2d 759—Continental

ing contemplates an exchange of information, ideas, and theories in open discussion, and an honest attempt to arrive at an agreement,[1] and both sides have the duty to enter the discussion with an open and fair mind, and with a sincere purpose to find a basis for agreement.[2] The employer need not continue the discussion indefinitely,[3] particularly where the employees refuse to perform their contract.[4] The National Labor Relations Board has authority under the National Labor Relations Act to determine whether the employer was acting in good faith.[5]

Collective bargaining has no reference to the terms of the agreement offered as long as the parties negotiate in good faith,[6] but the insistence by the employer on an agreement which would be illegal indicates that the employer is not bargaining in good faith.[7] It is not illegal for either the employer or the employees' representative to offer a unilateral draft of a contemplated agreement[8] unless he has a fixed determination not to recede from the terms therein expressed.[9] The employer may properly refuse terms proposed by the employees,[10] but he is not free to refuse without consideration

Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S. Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F.2d 18.

N.Y.—New York State Labor Relations Board v. Montgomery Ward & Co., 38 N.Y.S.2d 858, 179 Misc. 298, affirmed 42 N.Y.S.2d 840, 266 App.Div. 878.

Expression of willingness to negotiate must be made in good faith.—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67.

Statements prior to statute

Written and verbal statements by employer prior to passage of statute could not of themselves constitute a "refusal to bargain" but could be considered as throwing light on attitude of employer and in determining whether employer negotiated in good faith.—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292.

Test

(1) The sincerity of employer's effort in negotiating must be tested by length of time involved in negotiations and persistence with which employer offers opportunity for agreement.—N. L. R. B. v. P. Lorillard Co., C.C.A.6, 117 F.2d 921, reversed on other grounds 62 S.Ct. 397, 314 U.S. 512, 86 L.Ed. 380—N. L. R. B. v. Sands Mfg. Co., C.C.A.6, 96 F. 2d 721, affirmed 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682.

(2) Whether there has been collective bargaining is to be determined by intent of employer to deal collectively with the employees as shown by employer's acts and the terms of the contract offered or accepted.—N. L. R. B. v. Hopwood Retaining Co., C.C.A.2, 98 F.2d 97.

1. U.S.—Aluminum Ore Co. v. N. L. R. B., C.C.A.7, 131 F.2d 485, 147 A.L.R. 1.

Active participation

The employer has the duty to participate actively in deliberation so as to indicate present intention to find a basis for agreement.—N. L. R. B. v. Montgomery Ward & Co., C.C.A. 9, 133 F.2d 676, 146 A.L.R. 1045.

Refusal to furnish wage history

Refusal to furnish union as representative of the employees with the wage history of its members on the ground that it was "confidential" was not justified and justified board in concluding that employer had failed to cooperate wholeheartedly in collective bargaining.—Aluminum Ore Co. v. N. L. R. B., C.C.A.7, 131 F.2d 485, 147 A.L.R. 1.

2. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523—N. L. R. B. v. Bachelder, C.C.A.7, 120 F. 2d 574, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519, and modified on other grounds, C.C.A., 125 F.2d 387—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 118 F.2d 187—Globe Cotton Mills v. N. L. R. B., C.C.A.5, 103 F.2d 91.

N.Y.—New York State Labor Relations Bd. v. Charles C. Loehmann Corp., 56 N.Y.S.2d 485, 269 App. Div. 566—New York State Labor Relations Board v. Montgomery Ward & Co., 38 N.Y.S.2d 858, 179 Misc. 298, affirmed 42 N.Y.S.2d 840, 266 App.Div. 878.

3. U.S.—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C.A.7, 121 F.2d 602.

4. U.S.—N. L. R. B. v. Sands Mfg. Co., C.C.A.6, 96 F.2d 721, affirmed 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682.

5. U.S.—Singer Mfg. Co. v. N. L. R. B., C.C.A.7, 119 F.2d 131, certiorari denied 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549, rehearing denied 62 S.Ct. 55, 314 U.S. 708, 86 L.Ed. 565.

6. U.S.—N. L. R. B. v. P. Lorillard Co., C.C.A.6, 117 F.2d 921, reversed on other grounds 62 S.Ct. 397, 314 U.S. 512, 86 L.Ed. 380.

Demands

The Wisconsin Employment Peace Act St. 1939, § 111.01 et seq., does not prevent employees from making such demands on their employer as they think that circumstances warrant, irrespective of whether employees act singly or in concert.—Hotel and Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 294 N.W. 632, 236 Wis. 329, rehearing denied 295 N.W. 634, 236 Wis. 329, affirmed 62 S.Ct. 706, 315 U.S. 437, 86 L.Ed. 946.

7. U.S.—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549.

8. U.S.—N. L. R. B. v. P. Lorillard Co., C.C.A.6, 117 F.2d 921, reversed on other grounds 62 S.Ct. 397, 314 U.S. 512, 86 L.Ed. 380.

9. U.S.—Aluminum Ore Co. v. N. L. R. B., C.C.A.7, 131 F.2d 485, 147 A. L.R. 1.

N.Y.—New York State Labor Relations Board v. Montgomery Ward & Co., Inc., 42 N.Y.S.2d 840, 266 App.Div. 878.

10. U.S.—N. L. R. B. v. Register Pub. Co., C.C.A.9, 141 F.2d 156.

Cal.—U. S. Elec. Motors v. United Elec., Radio and Mach. Workers of America, Local No. 1421, Super., 166 P.2d 921.

N.Y.—New York State Labor Relations Bd. v. Charles C. Loehmann Corp., 56 N.Y.S.2d 485, 269 App. Div. 566—New York State Labor Relations Board v. Montgomery Ward & Co., 38 N.Y.S.2d 858, 179 Misc. 298, affirmed 42 N.Y.S.2d 840, 266 App.Div. 878.

Sound business judgment

Refusal to meet the demands of the bargaining agent based on sound business judgment is not refusal to bargain.—Yellow Cab Operating Co. v. Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, D.C.Okl., 35 F.Supp. 403, reversed on other

all proposals looking to an agreement,[11] and if the employees request a counter-proposal he should make it.[12] Rights possessed by the employees may not be withheld by the employer for the purpose of making a better bargain as to some other provision of the contract in the process of negotiation.[13]

Bargaining in a labor dispute must be at arm's length,[14] but the employees are not required to adopt a militant attitude in the exercise of their guaranteed rights.[15] The National Labor Relations Act does not require that bargaining must be pursued in a particular manner,[16] and it does not limit the right of the employer and employees to agree on the mode in which bargaining is done.[17] The board is not authorized to shape or control the course of negotiations as long as the employer bargains with the employees collectively, in accordance with the statute.[18] The adjustment of grievances by conferences between the employer and the employees' representative, and, in event of failure, by arbitration, is a bargaining process.[19]

§ 28(24). Representative for Collective Bargaining in General

In accordance with provisions of labor relations statutes, the employer must recognize the chosen representative of the employees as the exclusive bargaining agent of all employees in the bargaining unit.

Under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes, the employer must recognize the chosen representative of the employees as the bargaining agent of all employees in the bargaining unit,[20] if recognition is requested,[21] even though such representative also represents employees in a rival industry[22] or even though a rival union threatens economic reprisals.[23] The

grounds, C.C.A., Taxi-Cab Drivers Local Union No. 889 of Oklahoma City, Okl., v. Yellow Cab Operating Co., 123 F.2d 262.

11. U.S.—N. L. R. B. v. Westinghouse Air Brake Co., C.C.A.3, 120 F.2d 1004.
N.Y.—New York State Labor Relations Board v. Montgomery Ward & Co., 38 N.Y.S.2d 858, 179 Misc. 298, affirmed 42 N.Y.S.2d 840, 266 App.Div. 878.

12. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523—N. L. R. B. v. George P. Pilling & Son Co., C.C.A.3, 119 F.2d 32.

13. U.S.—Richfield Oil Corporation v. N. L. R. B., C.C.A.9, 143 F.2d 860.

14. U.S.—N. L. R. B. v. Poultrymen's Service Corp., C.C.A.3, 138 F.2d 204.

15. U.S.—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A. 4, 116 F.2d 388, certiorari denied N. L. R. B. v. Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529.

16. U.S.—Timken Roller Bearing Co. v. N. L. R. B., C.C.A.6, 161 F.2d 949.

17. U.S.—Timken Roller Bearing Co. v. N. L. R. B., supra.

18. U.S.—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 123 F.2d 725—N. L. R. B. v. P. Lorillard Co., C.C.A.6, 117 F.2d 921, reversed on other grounds 62 S.Ct. 397, 314 U.S. 512, 86 L.Ed. 380.

19. U.S.—Timken Roller Bearing Co. v. N. L. R. B., C.C.A.6, 161 F.2d 949.

20. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—N. L. R. B. v. Blair Quarries, C.C.A.4, 152 F.2d 25—N. L. R. B. v. Poultrymen's Service Corporation, C.C.A.3, 138 F.2d 204—N. L. R. B. v. National Mineral Co., C.C.A.7, 134 F.2d 424, certiorari denied National Mineral Co. v. N. L. R. B., 64 S.Ct. 58, 320 U.S. 753, 88 L.Ed. 448—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721—N. L. R. B. v. Clinton E. Hobbs Co., C.C.A. 1, 132 F.2d 249—N. L. R. B. v. Acme Air Appliance Co., C.C.A.2, 117 F.2d 417—Valley Mould & Iron Corporation v. N. L. R. B., C.C.A. 7, 116 F.2d 760, certiorari denied 61 S.Ct. 1114, 313 U.S. 590, 85 L.Ed. 155—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corporation v. N. L. R. B., 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141—Fort Wayne Corrugated Paper Co. v. N. L. R. B., C.C.A.7, 111 F.2d 869—N. L. R. B. v. Piqua Munising Wood Products Co., C.C.A.6, 109 F.2d 552—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713.
Mass.—R. H. White Co. v. Murphy, 38 N.E.2d 685, 310 Mass. 510.
Refusal to:
Bargain collectively as unfair labor practice generally see infra § 28 (45) e.
Grant complete recognition of union as sole bargaining agent as unfair labor practice see infra § 28 (59).

Contract with dominated association
Existence of a contract between employer and a dominated association was no excuse for refusal to negotiate or bargain with representative of majority of employees.—N. L. R. B. v. Wm. Tehel Bottling Co., C.C.A.8, 129 F.2d 250.

Nonmembers of union
When union represents majority of employees, employer has obligation to recognize union as bargaining agent, not only for members of union, but for all employees.—McQuay-Norris Mfg. Co. v. N. L. R. B., C.C.A.7, 116 F.2d 748, certiorari denied 61 S.Ct. 843, 313 U.S. 565, 85 L.Ed. 1524, and modified on other grounds 119 F.2d 1009—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574.

Railway Labor Act
U.S.—Railway Employees' Department of American Federation of Labor v. Virginian Ry. Co., D.C. Va., 39 F.Supp. 354.

State statutes
N.Y.—New York State Labor Relations Board v. Montgomery Ward & Co., 38 N.Y.S.2d 858, 179 Misc. 298, affirmed 42 N.Y.S.2d 840, 266 App.Div. 878—In re New York State Labor Relations Board, 21 N.Y.S.2d 771, 175 Misc. 95.

21. **Uncommunicated request**
A request to be recognized as bargaining agent was not binding on employer when not communicated to employer.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311.

22. U.S.—Pueblo Gas & Fuel Co. v N. L. R. B., C.C.A.10, 118 F.2d 304.

23. U.S.—N. L. R. B. v. National

obligation is exclusive and the employer has the negative duty to bargain with no one else,[24] including rival unions[25] or individual employees,[26] even though the employees ask that the obligation be disregarded.[27] On the other hand, an employer has the legal right to deal exclusively with the agency which represents the employees[28] and he is not required by the statute to negotiate with other persons.[29] If the majority of employees has not selected a representative, the employer may bargain with different groups of his employees.[30] An employer may refuse to bargain with a union which declines to accept its responsibility and insists on bargaining only for its own members.[31]

An employer must furnish a representative for personal conferences with the representative of the employees,[32] and, unless the employees assent to another arrangement, he must make his representative available for conferences at the industrial site at reasonable times and places.[33] The employer must not preclude the employees from their right to confer with their representatives.[34]

In the absence of statutory prohibition, employers may lawfully unite in designating a common agent for negotiation,[35] and such a prohibition will not be imported into labor law on inference alone.[36] Bargaining by employers through a common agent is authorized by a statute which provides that the

Broadcasting Co, C.C.A.2, 150 F. 2d 895—McQuay-Norris Mfg. Co. v. N. L. R. B., C.C.A.7, 116 F.2d 748, certiorari denied 61 S.Ct. 843, 313 U.S. 565, 85 L.Ed. 1524, and modified on other grounds 119 F. 2d 1009.

24. U.S.—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495—Medo Photo Supply Corporation v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007—N. L. R. B. v. Elyria Tel. Co., C.C.A.6, 158 F.2d 868—North Electric Mfg. Co. v. N. L. R. B., C.C.A.6, 123 F. 2d 887, certiorari denied 62 S.Ct. 906, 315 U.S. 818, 86 L.Ed. 1215—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F.2d 480—Donnelly Garment Co. v. International Ladies Garment Workers' Union, C. C.A.Mo., 99 F.2d 309, conforming to mandate International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U. S. 662, 83 L.Ed. 430—J. J. Newberry Co. v. Retail Clerks' Union Local 655, D.C.Mo., 67 F.Supp. 86, appeal dismissed, C.C.A., 158 F.2d 802.

Mass.—R. H. White Co. v. Murphy, 38 N.E.2d 685, 310 Mass. 510.

N.J.—Eastwood-Nealley Corporation v. International Ass'n of Machinists, Dist. No. 47, 1 A.2d 477, 124 N.J.Eq. 274.

Railway Labor Act

U.S.—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789.

D.C.—National Federation of Railway Workers v. National Mediation Board, 110 F.2d 529, 71 App. D.C. 266, certiorari denied 60 S. Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

25. N.J.—Isolantite, Inc., v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J.Eq. 506, modified on other grounds Isolantite, Inc. v. United Electrical Radio and Machine Workers of America, C. I. O., 29 A.2d 183, 132 N.J.Eq. 613.

Wash.—Swenson v. Seattle Central Labor Council, 177 P.2d 873.

26. U.S.—Medo Photo Supply Corp. v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007.

Appeal to membership of union

It was employer's duty to negotiate with union's committee rather than appeal to membership as a whole.—N. L. R. B. v. Martin Bros. Box Co., C.C.A.7, 130 F.2d 202, certiorari denied Martin Bros. Box Co. v. N. L. R. B., 63 S.Ct. 59, 317 U.S. 660, 87 L.Ed. 531.

Railway Labor Act

U.S.—Steele v. Louisville & N. R. Co., Ala., 65 S.Ct. 226, 323 U.S. 192, 89 L.Ed. 173—Lewellyn v. Fleming, C.C.A.Okl., 154 F.2d 211, certiorari denied 67 S.Ct. 45.

27. U.S.—Medo Photo Supply Corporation v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007.

28. U.S.—N. L. R. B. v. Hollywood-Maxwell Co., C.C.A.9, 126 F.2d 815—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 111 F.2d 474—Cupples Co. v. American Federation of Labor, D.C.Mo., 20 F.Supp. 894.

Wash.—Bloedel Donovan Lumber Mills v. International Woodworkers of America, Local No. 46, 102 P.2d 270, 4 Wash.2d 62.

29. U.S.—N. L. R. B. v. Columbian Enameling & Stamping Co., 59 S. Ct. 501, 306 U.S. 292, 83 L.Ed. 660—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—Wilson & Co. v. N. L. R. B., C.C.A.8, 115 F.2d 759.

Labor organizer

Refusal of employer to make an appointment in response to telephone calls of a labor organizer who did not act as chosen representative of majority of employees was not a violation of statute.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, affirmed 112 F.2d 63, set aside 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U. S. 722, 85 L.Ed. 471.

30. N.J.—Eastwood-Nealley Corporation v. International Ass'n of Machinists, Dist. No. 47, 1 A.2d 477, 124 N.J.Eq. 274.

31. U.S.—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F. 2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549.

Duty of representative to bargain for all employees see infra § 28 (35).

32. U.S.—N. L. R. B. v. P. Lorillard Co., C.C.A.6, 117 F.2d 921, reversed on other grounds 62 S.Ct. 397, 314 U.S. 512, 86 L.Ed. 380.

33. U.S.—N. L. R. B. v. P. Lorillard Co., supra.

34. **Refusal to permit delegates aboard ship**

Refusal of owner of oil tankers to permit shore delegates of unions to come aboard while vessels are in port for purpose of conferring with seamen whom unions represent and negotiating with ships' officers concerning grievances is an improper interference with employees' collective bargaining rights.—Richfield Oil Corporation v. N. L. R. B., C.C.A.9, 143 F.2d 860.

35. N.Y.—Association of Plumbing and Heating Contractors of Greater New York v. Merten, 26 N.Y.S. 2d 72, 261 App.Div. 543, appeal granted 27 N.Y.S.2d 992, 262 App. Div. 711, affirmed 42 N.E.2d 16, 288 N.Y. 555.

36. N.Y.—Association of Plumbing and Heating Contractors of Greater New York v. Merten, supra.

term "employer" includes any person acting on behalf of or in the interest of an employer, directly or indirectly.[37]

Employees on strike. Under the National Labor Relations Act and similar statutes, the employer continues to be legally obligated to negotiate with the union representing the employees although the employees are on strike where the strike is lawful,[38] and even though the strike is not lawful he must negotiate with the union where he continues to treat the strikers as his employees.[39] Where a strike is unlawful and in violation of contract the employer who has replaced the strikers with new employees is not required to bargain further with the representative of the strikers.[40]

Grievances. In the matter of representation, collective bargaining as to rates of pay, wages, hours, and other conditions of employment is to be distinguished from grievances,[41] and the employer is not obligated by the National Labor Relations Act or similar statutes to negotiate concerning grievances of individual employees only with the representative chosen by the majority of the employees.[42]

§ 28(25). Freedom in Choice of Representative

As a general rule under labor relations statutes which provide for collective bargaining, employees are entitled to a free exercise of their choice of a bargaining representative, and the employer must refrain from all acts which interfere with this right.

The essence of collective bargaining is the employees' freedom of choice in the selection of their bargaining representative,[43] and, as a general rule under labor relations statutes which provide for collective bargaining, employees are entitled to a free exercise of their choice of a bargaining representative.[44] Accordingly the employer must refrain from all acts which interfere with the employees in their choice of a collective bargaining agent.[45] The employer must take no part in the

37. N.Y.—Association of Plumbing and Heating Contractors of Greater New York v. Merten, supra.

38. U.S.—N. L. R. B. v. Remington Rand, C.C.A.2, 130 F.2d 919—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549—M. H. Ritzwollen Co. v. N. L. R. B., C.C.A.7, 114 F.2d 432—N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A.7, 113 F.2d 621.

Strike as terminating relationship as employee see supra § 28 (13).

Rule held applicable under state statute

N.Y.—Collier Service Corporation v. Boland, 4 N.Y.S.2d 480, 167 Misc. 709.

39. U.S.—N. L. R. B. v. Highland Shoe, C.C.A.1, 119 F.2d 218—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549.

40. U.S.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682—United Biscuit Co. of America v. N. L. R. B., C.C.A.7, 128 F.2d 771.

Termination or revocation of authority of representative see infra § 28 (36).

41. U.S.—Hughes Tool Co. v. N. L. R. B., C.C.A.5, 147 F.2d 69, 158 A.L.R. 1165.

42. U.S.—Hughes Tool Co. v. N. L. R. B., supra.

Right of representative and of individual employees to present grievances see infra § 28 (35) b.

43. U.S.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., App. D.C., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S. Ct. 314, 311 U.S. 729, 85 L.Ed. 474 —N. L. R. B. v. American Rolling Mill Co., C.C.A.6, 126 F.2d 38.

Public policy of United States does not limit choice of employees to any particular representation and does not exclude from their choice the representative of any employees.—Wilson & Co. v. N. L. R. B., C.C.A.8, 162 F.2d 310.

44. U.S.—Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, Tex., 50 S.Ct. 427, 281 U.S. 548, 74 L.Ed. 1034—Nierotko v. Social Sec. Bd., C.C.A.Mich., 149 F.2d 273, affirmed 66 S.Ct. 637, 327 U.S. 358, 90 L.Ed. 718, 162 A.L.R. 1445 —Glen Alden Coal Co. v. N. L. R. B., C.C.A.3, 141 F.2d 47—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951.

D.C.—Brotherhood of Railways and Steamship Clerks, Freight Handlers, Express and Station Employees v. United Transp. Service Employees of America, 137 F.2d 817, 78 U.S.App.D.C. 125, reversed on other grounds, rehearing denied 64 S.Ct. 435, 320 U.S. 816, 88 L.Ed. 493.

N.Y.—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347.

Contract between employer and union

A contract entered into by an employer with a union does not necessarily settle question as to the proper exclusive bargaining representative of the employees, in view of the fact that it is the employees who are to decide the question.—R. H. White Co. v. Murphy, 38 N.E. 2d 685, 310 Mass. 510.

Employees revoking designation of representative

Employees who have revoked their designation of a bargaining representative have the right to choose another bargaining representative.—N. L. R. B. v. Hollywood-Maxwell Co., C.C.A.9, 126 F.2d 815.

Members of employer dominated union

Former members of a union which has been disestablished because of employer domination are entitled to choose a new representative.—N. L. R. B. v. Thompson Products, C.C.A. 6, 162 F.2d 287.

Merger of telegraph companies

The Communications Act, 47 U.S.C.A. § 222, which authorized the merger of telegraph companies, has been held to indicate that all the employees after the merger shall have the right to choose the bargaining representative.—Commercial Telegraphers' Union, A.F.L., v. Western Union Telegraph Co., D.C., 53 F. Supp. 90.

45. U.S.—N. L. R. B. v. Virginia Electric & Power Co., 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—Wells, Inc., v. N. L. R. B., C.C.A.9, 162 F.2d 457—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—Western Elec. Co. v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1014, 324 U.S. 870, 89 L.Ed. 1424—Point Breeze Emp. Ass'n v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1015, 324 U.S. 870, 89 L.Ed. 1425

original formation or in the maintenance of a labor organization for collective bargaining,[46] even though he may be actuated by good motives,[47] and in a contest between rival unions for the right to represent the employees he must remain neutral.[48] Interference without domination of a labor organization is sufficient to constitute a violation of labor relations statutes.[49] Where the employer has been guilty of interference he should plainly and openly disavow any intention to continue the interference,[50] and if the labor organization of his employees is under his domination he should disestablish it.[51]

The employees' choice of a bargaining representa-

—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—Jacksonville Paper Co. v. N. L. R. B., C. C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462—N. L. R. B. v. J. I. Case Co., C.C.A.7, 134 F.2d 70, modified on other grounds 64 S. Ct. 576, 321 U.S. 332, 88 L.Ed. 762 —N. L. R. B. v. Thompson Products, C.C.A.6, 130 F.2d 363—N. L. R. B. v. American Rolling Mill Co., C.C.A.6, 126 F.2d 38—Tyne Co. v. N. L. R. B., C.C.A.7, 125 F.2d 832 —N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F.2d 368—N. L. R. B. v. Mathieson Alkali Works, C.C.A.4, 114 F.2d 796—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 113 F.2d 85—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B, 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713—Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, C.C.A.Va., 84 F.2d 641, affirmed Virginian Ry. Co. v. System Federation No. 40, 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789.

N.J.—Fryns v. Fair Lawn Fur Dressing Co., 168 A. 862, 114 N.J. Eq. 462.

N.Y.—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347.

Domination or interference with formation of organization as unfair labor practice see infra § 28 (45) b.

Provision to protect labor organization

Provision of National Labor Relations Act prohibiting employer's domination or interference with labor organization was designed to protect labor organization from interference or domination by employer and not for protection of employer against organization of a union.—E. Anthony & Sons v. N. L. R. B., App.D.C., 163 F.2d 22.

46. U.S.—N. L. R. B. v. Norfolk Southern Bus Corp., C.C.A.4, 159 F.2d 516—N. L. R. B. v. American Furnace Co., C.C.A.7, 158 F.2d 376 —N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F. 2d 67—American Enka Corporation v. N. L. R. B., C.C.A.4, 119 F.2d 60 —N. L. R. B. v. Rath Packing Co., C.C.A.8, 115 F.2d 217—Western Union Telegraph Co. v. N. L. R. B., C.C.A.2, 113 F.2d 992—Continental Oil Co. v. N. L. R. B., C.C.A. 10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U. S. 212, 85 L.Ed. 1292—Humble Oil & Refining Co. v. N. L. R. B., C.C. A.5, 113 F.2d 85—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144.

Cal.—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311, certiorari denied 61 S.Ct. 939, 313 U. S. 566, 85 L.Ed. 1525.

Pa.—In re Incorporation of Scranton Sportswear Welfare Ass'n, 57 Pa. Dist. & Co. 91, 47 Lack.Jur. 233.

Assistance to union as unfair labor practice see infra § 28 (52).

Broad interpretation of statute

The National Labor Relations Act must be broadly interpreted to cover any conduct of employer intended to bring into being an organization which he has reason to believe will be friendly.—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713.

Participation by employees

Participation by a large majority of employees in annual elections under a company plan of employee representation did not as matter of law make plan the employees' freely chosen method of representation.—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corporation v. N. L. R. B., 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141.

Approval by employees

A company plan of employee representation does not necessarily escape condemnation under the National Labor Relations Act by the fact that the employees in a secret referendum vote for continuance of the plan.—N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S. Ct. 203, 308 U.S. 241, 84 L.Ed. 219—Bethlehem Shipbuilding Corp. Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corp. v. N. L. R. B., 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141.

47. U.S.—N. L. R. B. v. Southwestern Greyhound Lines, C.C.A.8, 126 F.2d 883—American Smelting & Refining Co. v. N. L. R. B., C.C.A. 8, 126 F.2d 680.

48. U.S.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 143 F.2d 761—N. L. R. B. v. Faultless Caster Corporation, C.C.A.7, 135 F.2d 559—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 134 F.2d 240, certiorari denied 64 S.Ct. 48, 320 U.S. 746, 88 L.Ed. 443—N. L. R. B. v. Sunbeam Electric Mfg. Co., C.C.A.7, 133 F.2d 856—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 128 F. 2d 528—N. L. R. B. v. Burry Biscuit Corporation, C.C.A.7, 123 F.2d 540—N. L. R. B. v. Aluminum Products Co., C.C.A.7, 120 F.2d 567—Valley Mould & Iron Corporation v. N. L. R. B., C.C.A.7, 116 F.2d 760, certiorari denied 61 S. Ct. 1114, 313 U.S. 590, 85 L.Ed. 1545.

49. U.S.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311.

50. U.S.—N. L. R. B. v. McLain Fire Brick Co., C.C.A.3, 128 F.2d 393—N. L. R. B. v. Rath Packing Co., C.C.A.8, 123 F.2d 684—N. L. R. B. v. Rath Packing Co., C.C.A. 8, 115 F.2d 217.

Notice

Where a company union or plan was required to be disorganized as illegal and notice to show termination of domination thereof given, no particular form of notice is required under the National Labor Relations Act, although any notice, in order to be valid, must constitute actual notice of the true situation and not a statement of facts from which many inferences might be drawn.—Western Elec. Co. v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1014, 324 U.S. 870, 89 L.Ed. 1424 —Point Breeze Emp. Ass'n v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1015, 324 U.S. 870, 89 L.Ed. 1425.

51. U.S.—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—N. L. R. B. v. Swift & Co., C.C.A.8, 116 F.2d 143.

tive may not be controlled by the labor relations board,[52] but the board may determine which labor union is the choice of the majority of employees, as considered infra § 28 (33) f, and, if the employees' selection of a bargaining representative is made under circumstances which show that such selection does not reflect the free choice of the employees, the selection is not binding on the board.[53] The board alone may decide when employees, who have been acting through a dominated representative, have so far shaken off the effect of so doing as to be able to exercise a free choice.[54]

What constitutes domination or interference. Domination of a labor organization by the employer means to master, to rule, or to control,[55] whereas interference may include any substantial intermeddling.[56] In order to constitute domination or interference by the employer it must appear that the employees acted for the employer rather than for themselves, or that the employer gave aid to one group which he withheld from the other, or discriminated in favor of a labor organization or against nonmembers.[57] Whether the union is dominated does not depend on abject servility of the union; the test is whether there is collective bargaining free from all taints of an employer's domination or influence.[58] An employer's interference or domination may be shown by specific acts or by a course of conduct,[59] and the acts or conduct may be committed by employees acting for the employer.[60] Where employees have just cause to believe that solicitors professedly for a labor organization are acting for management, the employees do not have complete and unhampered freedom of choice.[61] Statutory provisions prohibiting domination or interference

52. U.S.—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A.7, 162 F.2d 435—De Bardeleben v. N. L. R. B., C.C.A.5, 135 F.2d 13—N. L. R. B. v. Automotive Maintenance Machinery Co., C.C.A.7, 116 F.2d 350, rereversed on other grounds 62 S.Ct. 608, 315 U.S. 282, 86 L.Ed. 848—Hamilton-Brown Shoe Co. v. N. L. R. B., C.C.A.8, 104 F.2d 49.
Pa.—Pennsylvania Labor Relations Board v. Levin, 50 Pa.Dist. & Co. 79.

Effectiveness of organization
The board does not have the power to test the practical effectiveness of a labor organization where the organization is free from employer domination or interference.—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. E. I. Dupont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F. 2d 388, certiorari denied N. L. R. B. v. Association of Chemical Employees at Belle Works of E. I. Du Pont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529.

Protection of rights
The rights of employees to join a great international union, to organize a so-called inside union, or to refuse to join or create or assist any labor organization, are of equal value, and in administering the National Labor Relations Act each right is entitled to the protection of the National Labor Relations Board. —N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287.

53. U.S.—N. L. R. B. v. Wm. Tehel Bottling Co., C.C.A.8, 129 F.2d 250.

54. U.S.—N. L. R. B. v. Century Oxford Mfg. Corporation, C.C.A.2, 140 F.2d 541, certiorari denied 65 S. Ct. 40, 323 U.S. 714, 89 L.Ed. 574.

55. U.S.—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 113 F. 2d 85.
What constitutes domination or interference as unfair labor practice see infra § 28 (45) b.

56. U.S.—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 113 F.2d 85.

57. U.S.—Ballston-Stillwater Knitting Co. v. N. L. R. B., C.C.A.2, 98 F.2d 758.

58. U.S.—Independent Employees Ass'n of Neptune Meter Co. v. N. L. R. B., C.C.A.2, 158 F.2d 448—Sperry Gyroscope Co. v. N. L. R. B., C.C.A.2, 129 F.2d 922.

Employer's representatives on governing council
Where representatives of employer were on governing council of an unaffiliated labor organization and its basic law recognized restraints on action by employer representatives, the organization was a labor organization dominated by the employer.—N. L. R. B. v. Thompson Products, C.C.A.6, 130 F.2d 363.

Functional weakness of organization
The functional weakness of collective bargaining organization of employees in single department of employer's business is not itself proof of employer domination of such organization, but is factor which should lead court to scrutinize carefully all circumstances surrounding its formation in determining question of its legality.—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal. 2d 311, certiorari denied 61 S.Ct. 939, 313 U.S. 566, 85 L.Ed. 1525.

59. U.S.—N. L. R. B. v. Clinton Woolen Mfg. Co., C.C.A.6, 141 F. 2d 753.

Allurements
Interference may be accomplished through allurements.—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 134 F.2d 240, certiorari denied 64 S.Ct. 48, 320 U.S. 746, 88 L.Ed. 443.

Announcement of willingness to contract
Permitting premature announcement that employer would sign a contract with a certain labor organization gave unlawful assistance to such labor organization.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L. Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

Display of marked specimen ballot by the company on its bulletin board may amount to interference.—N. L. R. B. v. Bird Mach. Co., C.C.A. 1, 161 F.2d 589.

60. U.S.—Big Lake Oil Co. v. N. L. R. B., C.C.A.5, 146 F.2d 967—Utah Copper Co. v. N. L. R. B., C.C.A.10, 139 F.2d 788, certiorari denied Independent Ass'n of Mill Workers v. National Labor Relations Board, 64 S.Ct. 946, 322 U.S. 731, 88 L.Ed. 1566—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A.6, 133 F.2d 295—Railway Employees' Co-op. Ass'n v. Atlanta B. & C. R. Co., D. C.Ga., 22 F.Supp. 510.

61. U.S.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., App. D.C., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474—Independent Employees Ass'n of Neptune Meter Co. v. N. L. R. B., C.C.A.2, 158 F.2d 448—N. L. R. B. v. Clinton Woolen Mfg. Co., C.C.A. 6, 141 F.2d 753—Sperry Gyroscope

must not be construed so strictly as to destroy the purpose of the statute or the legislative intent.[62]

Various acts or statements by the employer have been held not to constitute interference with the employees' freedom in the choice of a bargaining agency.[63] If no element of intimidation is present an employer's expression of opinion as to the disadvantages of belonging to a union[64] or his expression of preference for one union instead of another[65] is not necessarily interference. An employer may encourage membership in a union with which he has a valid closed-shop agreement,[66] but he may not do so where the contract is not a closed-shop agreement.[67] An employer may permit his employees to solicit membership in a union during working hours if he does not withhold a like privilege from employees soliciting membership in an opposing union.[68] A statute which protects the employees' right to choose representatives does not interfere with the employer's right to make and enforce rules and orders which are necessary for the proper conduct of his business.[69]

Payment of representative. Employees' representatives should not be paid by the employer when engaged in the performance of their duties as representatives, in order that they will be free from any possible influence of favor from the employer.[70]

§ 28(26). Who May Act as Representative

a. In general
b. Organization favored by employer
c. Successor to favored union
d. Person authorized to conduct negotiations

a. In General

Any organization which represents the free choice of the majority of employees in the bargaining unit is the proper representative of such employees for the purpose of collective bargaining.

Any organization which represents the free choice of the majority of employees in the bargaining unit is the proper representative of such employees for the purpose of collective bargaining[71] even though many of the employees are members of a minority union.[72] In the absence of unfair labor practices by the employer, a union which does not represent a majority of employees may not require the employer to bargain with it,[73] but such a union may

Co. v. N. L. R. B., C.C.A.2, 129 F. 2d 922.

Authority to act

With respect to company union, authority of employee to act for management may be deduced from acts of the employer coupled with the type of employee's authority.—N. L. R. B. v. Swank Products, C.C.A. 3, 108 F.2d 872.

62. U.S.—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713.

63. U.S.—N. L. R. B. v. Sparks-Withington Co., C.C.A.6, 119 F.2d 78, certiorari dismissed 62 S.Ct. 477, 314 U.S. 703, 86 L.Ed. 562—N. L. R. B. v. Asheville Hosiery Co., C.C.A.4, 108 F.2d 288.

Inquiry as to unionization

An employer is not precluded from inquiring or being informed as to the progress of the efforts at unionization.—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U. S. 772, 88 L.Ed. 462.

Permitting employees to hear discussion

Having older employees attend meeting with union representatives and wiring the conference room with loud speaker in another room so that any employee could hear the discussion on the question of the union's authority to represent the employees, was not unlawful.—North Electric Mfg. Co. v. N. L. R. B., C.C.A.6, 123 F.2d 887, certiorari denied 62 S.Ct. 906, 315 U.S. 818, 86 L.Ed. 1215.

64. U.S.—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144.

65. U.S.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 143 F.2d 761—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949.

66. U.S.—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A.4, 127 F.2d 109.

67. U.S.—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 128 F.2d 528.

68. U.S.—Ballston-Stillwater Knitting Co. v. N. L. R. B., C.C.A.2, 98 F.2d 758.

69. U.S.—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 128 F.2d 528.

70. U.S.—Colorado Fuel & Iron Corporation v. N. L. R. B., C.C.A.10, 121 F.2d 165—American Enka Corporation v. N. L. R. B., C.C.A.4, 119 F.2d 60.

71. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—Pueblo Gas & Fuel Co. v. N. L. R. B., C.C.A.10, 118 F.2d 304—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 98 F.2d 97—Pauly Jail Bldg. Co. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, D.C.Mo., 29 F.Supp. 15, reversed on other grounds International Ass'n of Bridge Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co., 118 F.2d 615, certiorari denied Pauly Jail Bldg. Co. v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 62 S.Ct. 75, 314 U.S. 639, 86 L.Ed. 513—McNally v. Reynolds, D.C.Wash., 7 F.Supp. 112.

A labor union may act as a bargaining agency.—Kirkman v. Westchester Newspapers, 24 N.Y.S.2d 860, 261 App.Div. 181.

Selection binding on employees

The action of a majority of employees in the selection of representatives is binding on the whole class of employees.—Atlantic Coast Line R. Co. v. Pope, C.C.A.N.C., 119 F.2d 39.

72. U.S.—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 137 F.2d 77.

73. U.S.—N. L. R. B. v. Indiana Desk Co., C.C.A.7, 149 F.2d 987—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F.2d 480—N. L. R. B. v. Sands Mfg. Co., C.C.A.6, 96 F.2d 721, affirmed 59 S. Ct. 508, 306 U. S. 332, 83 L.Ed. 682.

N.Y.—New York State Labor Relations Bd. v. Holland Laundry, 63 N.E.2d 68, 294 N.Y. 480, reargument denied 64 N.E.2d 278, 295 N.Y. 568.

represent its own members until it is superseded by a union representing the majority of employees.[74] A union affiliated with a national organization may be a proper representative,[75] but an inside or independent union may be a proper representative as well as a union affiliated with a national organization.[76] After a labor organization has been duly certified as the bargaining agent, a new labor organization may not represent the employers until a reasonable period of time has elapsed after the certification,[77] but a new labor organization which is formed after the contract with the old organization has expired may properly represent the employees for the negotiation of a new contract.[78]

A union which agrees to arbitrate differences is not thereby disqualified from acting as bargaining agent.[79]

The fact that the employer has not given unlawful aid to a union does not of itself render the union the appropriate bargaining agency.[80]

b. Organization Favored by Employer

As a general rule under the labor relations statutes an organization which is controlled, influenced, or unlawfully aided by the employer is incapacitated to act as bargaining representative for the employees even though such organization has been designated by a majority of the employees as bargaining agent.

Under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes, an organization which is controlled, influenced, or unlawfully aided by the employer is incapacitated to act as bargaining representative for the employees[81] until measures are taken to disabuse the employees of any belief that they will win the employer's approval if they remain in it or incur his displeasure if they leave,[82] even though it has been designated by a majority of the employees as bargaining agent.[83] After all vestige of the employer's domination or influence has been removed, the employees have a right to choose the union which was formerly favored by the employer.[84] The purpose of the prohibition against the employer-dominated union is to prevent the rights of the employees from being nullified by an organization which is responsive to the will of the employer.[85]

The test whether a challenged organization is employer-controlled is not an objective one but rather

Pa.—Pennsylvania Labor Relations Board v. Levin, 50 Pa.Dist. & Co. 79.

Loss of majority through unfair labor practices see infra § 28 (36).

74. U.S.—Consolidated Edison Co. of N. Y. v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

75. N.J.—Bayonne Textile Corporation v. American Federation of Silk Workers, 172 A. 551, 116 N.J. Eq. 146, 92 A.L.R. 1450.

76. U.S.—N. L. R. B. v. Independent Union of Craftsmen, 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Arrowhead Rubber Co. of Tex., C.C.A.5, 146 F.2d 749—N. L. R. B. v. Rock Hill Printing & Finishing Co., C.C.A.4, 131 F.2d 171—Western Union Telegraph Co. v. N. L. R. B., C.C.A.2, 113 F.2d 992—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, affirmed 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S. Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471—N. L. R. B. v. Swank Products, C.C.A. 3, 108 F.2d 872—N. L. R. B. v. Lion Shoe Co., C.C.A.1, 97 F.2d 448.

Preference of employer

Fact that employer would prefer to deal with a local unaffiliated association does not show that the local association is not freely formed and acting.—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 108 F.2d 867, certiorari denied Brown Paper Mill Co. v. N. L. R. B., 60 S.Ct. 1104, 310 U. S. 651, 84 L.Ed. 1416.

Unaffiliated status as showing domination

Fact that an association was an unaffiliated rather than an affiliated union did not establish domination by employer.—De Bardeleben v. N. L. R. B., C.C.A.5, 135 F.2d 13.

77. U.S.—N. L. R. B. v. Blair Quarries, C.C.A.4, 152 F.2d 25—N. L. R. B. v. Appalachian Elec. Power Co., C.C.A.4, 140 F.2d 217.

Duration and termination of authority of representative see infra § 28 (36).

78. U.S.—N. L. R. B. v. Lion Shoe Co., C.C.A.1, 97 F.2d 448.

79. U.S.—Western Union Telegraph Co. v. N. L. R. B., C.C.A.2, 113 F. 2d 992.

80. D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

81. U.S.—N. L. R. B. v. Lane Cotton Mills Co., C.C.A.5, 111 F.2d 814, appeal dismissed Lane Cotton Mills Co. v. N. L. R. B., 61 S.Ct. 316, 311 U.S. 723, 85 L.Ed. 471—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 108 F.2d 867, certiorari denied Brown Paper Mill Co. v. N. L. R. B., 60 S.Ct. 1104, 310 U.S. 651, 84 L.Ed. 1416.

Cal.—McKay v. Retail Automobile Salesmen's Local Union No. 1067, 106 P.2d 373, 16 Cal.2d 311, certiorari denied 61 S.Ct. 939, 313 U. S. 566, 85 L.Ed. 1525.

D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

Committee chosen by employer from employees' superior officers is not an appropriate agency for collective bargaining.—Virginia Ferry Corporation v. N. L. R. B., C.C.A.4, 101 F.2d 103.

82. U.S.—Western Union Tel. Co. v. N. L. R. B., C.C.A.2, 113 F.2d 992.

83. U.S.—Western Elec. Co. v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1014, 324 U. S. 870, 89 L.Ed. 1424—Point Breeze Emp. Ass'n v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1015, 324 U.S. 870, 89 L.Ed. 1425—N. L. R. B. v. Condenser Corp. of America, C.C.A.3, 128 F. 2d 67.

84. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., 59 S. Ct. 206, 305 U.S. 197, 83 L.Ed. 126—De Bardeleben v. N. L. R. B., C. C.A.5, 135 F.2d 13.

85. U.S.—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713.

subjective from the standpoint of employees.[86] A union may in fact be employer-dominated even though the employer has stopped all active interference.[87] Harmonious relations between the employer and the union,[88] the employer's observance of a closed-shop agreement with a union,[89] or the fact that the employer did not grant many requests of the union and the preliminary contract has no provision fixing wages, hours, or seniority[90] does not necessarily indicate that the union is dominated by the employer.

c. Successor to Favored Union

A successor to a disestablished company union may properly be the bargaining representative, but there must be a definite, clear line of cleavage between the two organizations.

Where the employer has disestablished a company union, a successor to the company union may properly be the bargaining representative[91] even though it is closely parallel in form to the original employer-dominated organization,[92] but there must be a definite, clear line of cleavage between the two organizations.[93] Historical continuity may indicate that the successor organization is employer-dominated.[94]

d. Person Authorized to Conduct Negotiations

Under the National Labor Relations Act and similar statutes, neither the employer nor the union has any right to determine the individual or individuals who shall personally conduct the negotiations for the other party.

Under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes, neither the employer[95] nor the union[96] has any right to determine the individual or individuals who shall personally conduct the negotiations for the other party. An employer is under no legal obligation to bargain through any particular officer,[97] and an employer need not be represented by a person competent to enter into an agreement,[98] but the character and powers of the negotiating officer may be indicative of the employer's good faith.[99]

The labor relations board is without power to say which particular person may conduct the negotiations for an agreement,[1] and therefore it is without authority to direct an employer corporation to cease and desist from using the services of a certain individual in preparing an agreement to pre-

86. U.S.—N. L. R. B. v. Clinton Woolen Mfg. Co., C.C.A.6, 141 F.2d 753.

87. U.S.—Independent Emp. Ass'n of Neptune Meter Co. v. N. L. R. B., C.C.A.2, 158 F.2d 448—Sperry Gyroscope Co. v. N. L. R. B., C.C.A.2, 129 F.2d 922.

88. U.S.—N. L. R. B. v. Duncan Foundry & Machine Works, C.C.A.7, 142 F.2d 594.

89. U.S.—N. L. R. B. v. McGough Bakeries Corp., C.C.A.5, 153 F.2d 420.

90. U.S.—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C.A.7, 121 F.2d 602.

91. U.S.—N. L. R. B. v. Standard Oil Co., C.C.A.10, 124 F.2d 895—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A.10, 122 F.2d 419.

92. U.S.—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. E. I. Dupont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. Association of Chemical Employees at Belle Works of E. I. Du Pont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529.

Same officers

The fact that former officers of dissolved union took a leading part in formation of new independent union which was recognized by employer, and eventually became officers of new union, was not indicative of domination of new union by employer.—Keystone Steel & Wire Co. v. N. L. R. B., C.C.A.7, 155 F.2d 553, vacated in view of stipulation 68 S.Ct. 214.

93. U.S.—Western Elec. Co. v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1014, 324 U.S. 870, 89 L.Ed. 1424—Point Breeze Emp. Ass'n v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1015, 324 U.S. 870, 89 L.Ed. 1425—N. L. R. B. v. Condenser Corp. of America, C.C.A.3, 128 F.2d 67—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A.10, 122 F.2d 419—Roebling Employees Ass'n v. N. L. R. B., C.C.A.3, 120 F.2d 289—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.10, 115 F.2d 1007.

Covert advancement of plan by employer

An employer cannot openly withdraw proscribed plan and at same time covertly advance a plan meeting its approval.—N. L. R. B. v. Continental Oil Co., C.C.A.10, 121 F.2d 120.

94. U.S.—N. L. R. B. v. Southern Ass'n of Bell Telephone Employees, Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250.

95. U.S.—N. L. R. B. v. Ross Gear & Tool Co., C.C.A.7, 158 F.2d 607—M. H. Ritzwoller Co. v. N. L. R. B., C.C.A.7, 114 F.2d 432.

Railway Labor Act

U.S.—Myers v. Louisiana & A. Ry. Co., D.C.La., 7 F.Supp. 97.

96. U.S.—N. L. R. B. v. Ross Gear & Tool Co., C.C.A.7, 158 F.2d 607.

97. U.S.—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 127 F.2d 180, certiorari denied 63 S.Ct. 48, 317 U.S. 652, 87 L.Ed. 524.

98. U.S.—Great Southern Trucking Co. v. N. L. R. B., supra.

Ratification of agreement

The conduct of chairman of board of directors and vice president of employer in continuing discussions with representative of union concerning raise in employees' wages and improved working conditions without any suggestion that union did not represent majority of employees constitutes ratification of agreement made with superintendent, in determining whether the agreement is enforceable under National Labor Relations Act.—N. L. R. B. v. Ellis-Klatscher & Co., C.C.A.9, 142 F.2d 356.

99. U.S.—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 127 F.2d 180, certiorari denied 63 S.Ct. 48, 317 U.S. 652, 87 L.Ed. 524.

1. U.S.—N. L. R. B. v. Hopwood Retinning Co., C.C.A., 98 F.2d 97.

sent to its employees.[2]

§ 28(27). Proof of Authority of Representative

No specific form of authority to represent employees as their collective bargaining agent is necessary, and such authority may be given by action as well as by words.

Under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes, no specific form of authority to represent employees as their collective bargaining agent is necessary,[3] and such authority may be given by action as well as by words.[4] Rules or principles of construction of the authorization should be simple, liberal, and of the common-sense variety.[5] Voting in an election is not the only way in which an employee may express his choice of a bargaining representative;[6] he may designate an organization as his representative by signing a statement of express authorization,[7] or by signing a membership[8] or checkoff[9] card, or by signing an application for membership in the organization,[10] even though he has paid no dues.[11] The fact that an employee has signed a union affiliation card on Sunday does not impair the majority representation thus obtained by the union,[12] nor does the fact that the union member is a minor render voidable his authorization of the union to bargain for him.[13] It is immaterial whether the employees are members of, or even entitled to membership in, the union designated by them as their bargaining agency.[14]

When the employer in good faith questions the majority status of the bargaining representative, it is the representative's duty to offer proof of the majority status or to suggest some reasonable method for proving his claim of a majority,[15] and it is

2. U.S.—N. L. R. B. v. Hopwood Retinning Co., supra.

3. U.S.—N. L. R. B. v. Consolidated Mach. Tool Corp., C.C.A.2, 163 F.2d 376—N. L. R. B. v. Fargo Foundry Co., C.C.A.8, 141 F.2d 462.
D.C.—Lebanon Steel Foundry v. N. L. R. B., 130 F.2d 404, 76 U.S. App. D.C. 100, certiorari denied 63 S.Ct. 58, 317 U.S. 659, 87 L.Ed. 530.

4. U.S.—N. L. R. B. v. Fargo Foundry Co., C.C.A.8, 141 F.2d 462.
D.C.—Lebanon Steel Foundry v. N. L. R. B., 130 F.2d 404, 76 App.D.C. 100, certiorari denied 63 S.Ct. 58, 317 U.S. 659, 87 L.Ed. 530.

5. U.S.—N. L. R. B. v. Fargo Foundry Co., C.C.A.8, 141 F.2d 462.
D.C.—Lebanon Steel Foundry v. N. L. R. B., 130 F.2d 404, 76 App.D.C. 100, certiorari denied 63 S.Ct. 58, 317 U.S. 659, 87 L.Ed. 530.

6. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287.
Election of representative see infra § 28 (33).

7. U.S.—Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees v. Virginian Ry. Co., C.C.A.Va., 125 F.2d 853—N. L. R. B. v. Blackstone Mfg. Co., C.C.A.2, 123 F.2d 633—N. L. R. B. v. Electric Vacuum Cleaner Co., 120 F.2d 611, reversed on other grounds 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775.

Variations in statements of authorization

Employees' cards, designating local union as bargaining representative, and other employees' cards, designating joint board, composed of members from such union and other local unions in vicinity, were properly counted together in determining whether such union represented majority of employees.—N. L. R. B. v. Franks Bros. Co., C.C.A.,137 F.2d 989, affirmed 64 S.Ct. 817, 321 U.S. 702, 88 L.Ed. 1020.

8. U.S.—N. L. R. B. v. Gutmann & Co., C.C.A.7, 121 F.2d 756.

Authority to negotiate closed-shop agreement

Where a closed-shop agreement is not prohibited by statute, or where a statute does not require express authority, an employee by joining the labor organization ipso facto designates or selects it to be his agent to negotiate a closed-shop agreement with his employer.—N. L. R. B. v. Mason Mfg. Co., C.C.A.9, 126 F.2d 810.

9. D.C.—Lebanon Steel Foundry v. N. L. R. B., 130 F.2d 404, 76 U.S. App.D.C. 100, certiorari denied 63 S.Ct. 58, 317 U.S. 659, 87 L.Ed. 530.

10. U.S.—N. L. R. B. v. Consolidated Mach. Tool Corp., C.C.A.2, 163 F. 2d 376—N. L. R. B. v. Delaware-New Jersey Ferry Co., C.C.A.3, 128 F.2d 130—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681.

11. U.S.—N. L. R. B. v. Chicago Apparatus Co., C.C.A.7, 116 F.2d 753.

12. U.S.—N. L. R. B. v. New Era Die Co., C.C.A.8, 118 F.2d 500.

13. U.S.—N. L. R. B. v. New Era Die Co., supra.

14. U.S.—Pueblo Gas & Fuel Co. v. N. L. R. B., C.C.A.10, 118 F.2d 304—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S. Ct. 861, 313 U.S. 212, 85 L.Ed. 1292.
Utah.—International Union of Operating Engineers, Local No. 354, v. Industrial Commission of Utah, 119 P.2d 243, 101 Utah 139.

Railway Labor Act

Under the Railway Labor Act, 45 U.S.C.A. § 151 et seq., a group of employees may select a union to represent them in collective bargaining regardless of whether they are members of the union.—Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees v. Virginian Ry. Co., C.C.A.Va., 125 F.2d 853.

Selection of rival union

Membership in one union does not prevent employees from selecting another union to serve as bargaining representative.—N. L. R. B. v. McGough Bakeries Corp., C.C.A.5, 153 F.2d 420.

15. U.S.—N. L. R. B. v. Crown Can Co., C.C.A.8, 138 F.2d 263, certiorari denied Crown Can Co. v. N. L. R. B., 64 S.Ct. 527, 321 U.S. 769, 88 L.Ed. 1065—N. L. R. B. v. Clinton E. Hobbs Co., C.C.A.1, 132 F. 2d 249—North Electric Mfg. Co. v. N. L. R. B., C.C.A.6, 123 F.2d 887, certiorari denied 62 S.Ct. 906, 315 U.S. 818, 86 L.Ed. 1215—N. L. R. B. v. Moltrup Steel Products Co., C. C.A.3, 121 F.2d 612—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C.A.7, 121 F.2d 602—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F.2d 480—N. L. R. B. v. Chicago Apparatus Co., C.C.A.7, 116 F.2d 753—N. L. R. B. v. Empire Furniture Corporation, C.C.A.6, 107 F.2d 92.
Or.—Stone Logging & Contracting Co. v. International Woodworkers of America, Columbia District Council No. 5, 135 P.2d 759, 171 Or. 13.

Challenge of majority status

A statement by superintendent during conference that employer might even question right of union to represent majority did not amount

the employer's duty to accept such offer.[16] The employer may not dictate an arbitrary method of proof.[17] The bargaining process need not be delayed until an election is ordered by the labor relations board[18] or until the union has been certified as bargaining agent by the board.[19] Where the employer has refused to bargain collectively on general grounds, he cannot excuse his refusal on the ground that sufficient proof that the labor organization represented the majority of employees was not furnished him,[20] and where he has made no effort to learn the facts as to the labor organization's authority to represent the employees he may not base his refusal to bargain on the claim that he did not know whether the organization was properly accredited.[21]

Employees who do not question the authority of the representative purporting to act for them in the negotiation of a contract with their employer may not attack the representative's authority after the contract has been made.[22]

Agreement between unions. An agreement by two unions affiliated with the same parent organization to abide by the decision of the parent organization as to which union has the right to organize the employees is not binding where one of the unions withdraws from the organization before the decision, and the employer is not justified, on the basis of the agreement, in recognizing as the bargaining representative the union in whose favor the parent organization has decided.[23]

Persons counted in determining majority. Employees ousted by virtue of an unfair labor practice of the employer remain employees for the purpose of determining majority representation by the union,[24] but striking employees who are properly discharged for unlawful acts are not to be counted[25] unless they are reëmployed.[26] Persons who are employed to replace employees engaged in a lawful strike are not to be counted in determin-

to a challenge of the union's majority, imposing burden on union to make such proof.—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C. A.7, 121 F.2d 602.

16. U.S.—N. L. R. B. v. Clinton E. Hobbs Co., C.C.A.1, 132 F.2d 249—N. L. R. B. v. Dahlstrom Metallic Door Co., C.C.A.2, 112 F.2d 756.

17. U.S.—N. L. R. B. v. Moltrup Steel Products Co., C.C.A.3, 121 F. 2d 612.

Membership list

An employer's demand that production of union's membership list was sole method of proof that union represented majority of employees was arbitrary, and refusal to comply with demand did not justify refusal to bargain.—N. L. R. B. v. Moltrup Steel Products Co., supra—N. L. R. B. v. New Era Die Co., C.C.A.3, 118 F.2d 500.

18. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287.

19. D.C.—Jones v. Laughlin Steel Corp. v. United Mines Workers of America, 159 F.2d 18.

Government in possession of mines

Mine owner could not validly complain of conduct of the government, while in possession of coal mines, in recognizing a union as exclusive bargaining representative of certain employees without any proceedings being taken before the National Labor Relations Board, where owner, had it been in possession of the mines, could have recognized the union as such representative independent of any labor board certification.—Jones & Laughlin Steel Corp. v. United Mine Workers of America, supra.

20. U.S.—N. L. R. B. v. Wm. Tehel Bottling Co., C.C.A.8, 129 F.2d 250—N. L. R. B. v. Clarksburg Pub. Co., C.C.A.4, 120 F.2d 976—Continental Oil Co. v. N. L. R. B., C.C.A. 10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U. S. 212, 85 L.Ed. 1292—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F. 2d 652—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F.2d 18.

21. U.S.—N. L. R. B. v. Crown Can Co., C.C.A.8, 138 F.2d 263, certiorari denied Crown Can Co. v. N. L. R. B., 64 S.Ct. 527, 321 U.S. 769, 88 L.Ed. 1065—N. L. R. B. v. Dahlstrom Metallic Door Co., C.C.A.2, 112 F.2d 756—Art Metals Const. Co. v. N. L. R. B., C.C.A.2, 110 F. 2d 148—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'n v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

Pendency of proceeding for certification

An employer was not obliged to bargain with union during pendency of union's proceeding for certificate that it represented majority of employees if employer had real and reasonable doubts, but, if doubts were spurious, pendency of proceeding would be no excuse.—N. L. R. B. v. National Seal Corporation, C.C.A. 2, 127 F.2d 776.

22. N.J.—Isolantite, Inc., v. United Electrical Radio and Machine Workers of America, 22 A.2d 796, 130 N.J.Eq. 506, modified on other grounds Isolantite, Inc., v. United Electrical Radio and Machine Workers of America, C.I.O., 29 A. 2d 183, 132 N.J.Eq. 613.

23. D.C.—Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Affiliated with American Federation of Labor v. N. L. R. B., 121 F. 2d 84, 74 App.D.C. 28, certiorari denied Warehousemen's Union Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539—N. L. R. B. v. McKesson & Robbins, 121 F.2d 84, 74 App.D.C. 28, certiorari denied McKesson & Robbins v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539.

24. U.S.—N. L. R. B. v. Cape County Milling Co., C.C.A.8, 140 F.2d 543, 152 A.L.R. 144.

25. U.S.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721—Standard Lime & Stone Co. v. N. L. R. B., C.C.A.4, 97 F.2d 531.

26. U.S.—Fansteel Metallurgical Corp. v. N. L. R. B., C.C.A.7, 98 F.2d 375, modified on other grounds N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599.

ing the number of employees needed to constitute a majority,[27] but persons who are employed to replace employees engaged in an unlawful strike are to be counted.[28] Employees who sign up with two unions are not to be counted for either in determining which one has a majority.[29] Membership cards in a union are not to be disregarded because of threats of the union organizer that employees who do not join the union might lose their positions.[30]

§ 28(28). Collective Bargaining Units

The unit of employees appropriate for the purpose of choosing a representative to negotiate with the employer and the extent of the discretion of the labor relations board to determine appropriate collective bargaining units are dependent on the provisions of the labor relations statutes.

Some labor relations statutes expressly state what constitutes a collective bargaining unit for the purpose of choosing a representative to negotiate with the employer. Thus under some statutes a collective bargaining unit consists of all the employees of one employer except where a majority of employees engaged in a single craft have voted to constitute such group a separate bargaining unit,[31] and the labor relations board or commission may determine whether a certain group of employees constitutes a craft for this purpose.[32] The Railway Labor Act, 45 U.S.C.A. § 151 et seq, contemplates the preservation of existing crafts and classes of employees as units for collective bargaining,[33] and the power to determine the occupational boundaries that comprehend a craft or class for collective bargaining purposes is vested in the National Mediation Board,[34] which has a large discretion in making this determination,[35] although it must base its decision on reasonable grounds.[36]

In accordance with the provisions of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar provisions of other labor relations statutes, the labor relations board is empowered to determine appropriate collective bargaining units,[37] and

27. U.S.—N. L. R. B. v. A. Sartorius & Co., C.C.A.2, 140 F.2d 203.

28. U. S.—N. L. R. B. v. A. Sartorius & Co., supra.

29. U.S.—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C.A.7, 121 F.2d 602.

30. U.S.—N. L. R. B. v. Karp Metal Products Co., Inc., C.C.A.2, 134 F. 2d 954. Certiorari denied 64 S.Ct. 941, 322 U.S. 728, 88 L.Ed. 1564.

31. **"Craft"**
The term "craft," as used in such a statute means a trade or occupation requiring skill and training, particularly manual skill combined with knowledge of principles of art and also a body of persons pursuing such calling.—In re International Ass'n of Machinists, Lodge No. 1406, A. F. L., 23 N.W.2d 489, 249 Wis. 112.

32. Wis.—In re International Ass'n of Machinists, Lodge No. 1406, A. F. L., supra.

33. U.S.—Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Nashville, C. & St. L. Ry. Co., C.C.A.Tenn., 94 F.2d 97.
D.C.—Order of Ry. Conductors of America v. National Mediation Board, 113 F.2d 531, 72 App.D.C. 299.

34. U.S.—Switchmen's Union of North America v. National Mediation Board, App.D.C., 64 S.Ct. 95, 320 U.S. 297, 88 L.Ed. 61.

35. D.C.—Brotherhood of Railways and Steamship Clerks, Freight Handlers, Express and Station Employees v. United Transp. Service Employees of America, 137 F. 2d 817, 78 U.S.App.D.C. 125, reversed on other grounds 64 S.Ct. 260, 320 U.S. 715, 88 L.Ed. 420, rehearing denied 64 S.Ct. 435, 320 U.S. 816, 88 L.Ed. 493.

Single carrier
The National Mediation Board was vested with discretion in determining whether a company, which operated several railroad lines, was to be treated as a single carrier for purpose of collective bargaining.—Switchmen's Union of North America v. National Mediation Board, 135 F.2d 785, 77 U.S.App.D.C. 264, reversed on other grounds 64 S.Ct. 95, 320 U.S. 297, 88 L.Ed. 61.

36. U.S.—Brotherhood of Ry. and Steamship Clerks, Freight Handlers, Express and Station Employees v. Nashville, C. & St. L. Ry. Co., C.C.A.Tenn., 94 F.2d 97.

Agreement determining class or craft
The fact that Railway Labor Act, 45 U.S.C.A. § 151 et seq, leaves uncertain precise or exact meaning of words "class or craft" has been held to manifest congressional intent to adopt designation of class or craft as determined by current working agreement between railroad and particular groups or classes of its employees.—Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F.2d 757, 66 App.D.C. 375.

Classification held unreasonable
U.S.—Brotherhood of Ry. and Steamship Clerks, Freight Handlers, Express and Station Employees v. Nashville, C. & St. L. Ry. Co., C.C.A.Tenn., 94 F.2d 97.

37. U.S.—N. L. R. B. v. Prudential Ins. Co. of America, C.C.A.6, 154 F. 2d 385—Jones & Laughlin Steel Corp. v. N. L. R. B., C.C.A.5, 146 F.2d 833, certiorari denied 65 S.Ct. 1575, 325 U.S. 886, 89 L.Ed. 2000, rehearing denied 66 S.Ct. 15, 326 U.S. 806, 90 L.Ed. 491—N. L. R. B. v. Appalachian Electric Power Co., C.C.A.4, 140 F.2d 217—Lund v. Woodenware Workers Union, D.C. Minn., 19 F.Supp. 607.
D.C.—Fur Workers Union, Local No. 72 v. Fur Workers Union, No. 21238, 105 F.2d 1, 70 App.D.C. 122, affirmed Fur Workers Union No. 21238 v. Fur Workers Union, Local, No. 72, 60 S.Ct. 292, 308 U.S. 522, 84 L.Ed. 443—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35 v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S. Ct. 314, 311 U.S. 729, 85 L.Ed. 474.
Mass.—Jordan Marsh Co. v. Labor Relations Commission, 45 N.E.2d 925, 312 Mass. 597.
Pa.—Chapin v. Pennsylvania Labor Relations Board, 52 A.2d 568, 356 Pa. 577.

Determination before election
Board should decide on units appropriate for collective bargaining for employees before it calls an election to determine the employees' choice of representatives.—Marshall Field & Co. v. N. L. R. B., C.C.A.7, 135 F.2d 391.

Right to petition for determination
Unless otherwise provided by statute, the employees alone, and not the employer, have the right to petition the board to determine the

it may not delegate the selection of the appropriate unit to the employees.[38] The board may exercise a broad discretion in making its determination,[39] but its authority is not absolute[40] and it must comply with the statutory requirement that the unit selected must be one to effectuate the policy of the act of efficient collective bargaining.[41] In determining the proper unit for collective bargaining the board must give due consideration to all relevant factors,[42] such as the availability of a workers' or-

proper bargaining unit for the employees.—Houston & North Texas Motor Freight Lines v. Local Union No. 886 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, D. C.Okl., 24 F.Supp. 619.

38. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corp., C.C.A.6, 146 F.2d 718, vacated on other grounds 65 S.Ct. 1413, 325 U.S. 838, 89 L. Ed. 1965, rehearing denied 66 S. Ct. 13, 326 U.S. 804, 90 L.Ed. 490—N. L. R. B. v. Federal Motor Truck Co., C.C.A.6, 146 F.2d 718, vacated on other grounds 65 S.Ct. 1412, 325 U.S. 838, 89 L.Ed. 1965—Marshall Field & Co. v. N. L. R. B., C.C.A.7, 135 F.2d 391.

39. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corp., 67 S.Ct. 1274, 331 U.S. 416, 91 L.Ed. —— —Packard Motor Car Co. v. N. L. R. B., 67 S.Ct. 789, 330 U.S. 485, 91 L.Ed. —— —N. L. R. B. v. Norfolk Southern Bus Corp., C.C.A.4, 159 F.2d 516—N. L. R. B. v. Prudential Ins. Co. of America, C.C.A.6, 154 F.2d 385—N. L. R. B. v. May Department Stores Co., C.C.A.8, 146 F.2d 66, modified on other grounds 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495—N. L. R. B. v. Clinton E. Hobbs Co., C. C.A.1, 132 F.2d 249—N. L. R. B. v. Lund, C.C.A.8, 103 F.2d 815.

D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

Mass.—Sanford v. Boston Edison Co., 64 N.E.2d 631, 319 Mass. 55.

N.Y.—In re New York State Labor Relations Board, 37 N.Y.S.2d 304, affirmed 45 N.Y.S.2d 942, 267 App. Div. 763, affirmed 56 N.E.2d 262, 293 N.Y. 671.

Consistency in the rulings of the board is essential, but there is an allowable area for the play of administrative discretion.—N. L. R. B. v. Calumet Steel Division of Borg-Warner Corporation, C.C.A.7, 121 F. 2d 366.

Order

In the selection of collective bargaining units the board cannot be held to mathematical precision, and, if it chooses to couch its order in terms which for good reasons it regards as effective to accomplish its stated ends, peripheral or hypothetical deviations will not defeat an otherwise appropriate order.—N. L. R. B. v. Hearst Publications, 64 S.Ct. 851, 322 U.S. 111, 88 L.Ed. 1170, rehearing denied 64 S.Ct. 1148, 2 cases, 322 U.S. 769, 88 L.Ed. 1595, N. L. R. B. v. Stockholders Pub. Co., 64 S.Ct. 1148, 322 U.S. 770, 88 L.Ed. 1595, and N. L. R. B. v. Times-Mirror Co., 64 S.Ct. 1149, 322 U.S. 770, 88 L. Ed. 1595.

40. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corp., C.C.A.6, 146 F.2d 718, vacated on other grounds 65 S.Ct. 1413, 325 U.S. 838, 89 L. Ed. 1965, rehearing denied 66 S.Ct. 13, 326 U.S. 804, 90 L.Ed. 490—N. L. R. B. v. Federal Motor Truck Co., C.C.A.6, 146 F.2d 718, vacated on other grounds 65 S.Ct. 1412, 325 U.S. 838, 89 L.Ed. 1965.

Approval of union

N.Y.—Bain v. Kelley, 73 N.Y.S.2d 93.

Character of unit

Provision of state labor relations act that state labor relations board should decide in each case whether in order to effectuate policies of the act, the units appropriate for purposes of collective bargaining should be the employer unit, craft unit, plant unit, "or any other unit," did not delegate lawmaking power, since the quoted words mean any other character of unit resembling the types described by the preceding words.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 20 N.E.2d 390, 280 N.Y. 194.

Reasonable grounds

The decision must be based on reasonable grounds.—Marshall Field & Co. v. N. L. R. B., C.C.A.7, 135 F. 2d 391.

Discretion held properly exercised

U.S.—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495—N. L. R. B. v. Hearst Publications, 64 S.Ct. 851, 322 U.S. 111, 88 L.Ed. 1170, rehearing denied N. L. R. B. v. Hearst Publications, 64 S.Ct. 1148, 2 cases, 322 U.S. 769, 88 L.Ed. 1595, N. L. R. B. v. Stockholders Pub. Co., 64 S.Ct. 1148, 322 U.S. 770, 88 L.Ed. 1595 and N. L. R. B. v. Times-Mirror Co., 64 S. Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595—N. L. R. B. v. Prudential Ins. Co. of America, C.C.A.6, 154 F. 2d 385—N. L. R. B. v. West Ky. Coal Co., C.C.A.6, 152 F.2d 198, certiorari denied 66 S.Ct. 1372, 328 U. S. 866, 90 L.Ed. 1636—N. L. R. B. v. National Broadcasting Co., C. C.A.2, 150 F.2d 895—Glen Alden Coal Co. v. N. L. R. B., C.C.A.3, 141 F.2d 47—N. L. R. B. v. Lettie Lee, Inc., C.C.A.9, 140 F.2d 243—N. L. R. B. v. Calumet Steel Division of Borg-Warner Corporation, C.C.A.7, 121 F.2d 366—N. L. R. B. v. Clarksburg Pub. Co., C.C. A.4, 120 F.2d 976—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F.2d 18.

N.Y.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 6 N.Y.S.2d 775, 168 Misc. 948, affirmed 7 N.Y.S.2d 1007, 255 App.Div. 840, and 7 N.Y.S.2d 1008, 255 App.Div. 840, affirmed 20 N.E. 2d 390, 280 N.Y. 194.

41. U.S.—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A.7, 162 F.2d 435—N. L. R. B. v. E. C. Atkins & Co., C.C.A.7, 147 F.2d 730, vacated on other grounds 65 S.Ct. 1413, 325 U.S. 838, 89 L.Ed. 1965, rehearing denied 66 S.Ct. 13, 326 U.S. 804, 90 L.Ed. 490, reinstated, C.C.A., 155 F.2d 567, reversed on other grounds 67 S.Ct. 1265, 331 U.S. 398, 91 L.Ed. ——, rehearing denied 67 S.Ct. 1725, 329 U.S. 710, 91 L.Ed. ——.

Mass.—Sanford v. Boston Edison Co., 64 N.E.2d 631, 319 Mass. 55.

"Appropriate"

(1) Under provision of state labor relations act authorizing state board to decide in each case whether the unit appropriate for the purposes of collective bargaining should be employer unit, craft unit, plant unit, or any other unit, the requirement that the unit be "appropriate for the purposes of collective bargaining" enjoined on the board ascertainable rules of decision for performance of its function of deciding the appropriate unit.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 20 N.E.2d 390, 280 N.Y. 194.

(2) The statutory requirement that employees' collective bargaining units be "appropriate" means that they must be practically adapted to purpose of collective bargaining in existing situation.—Jordan Marsh Co. v. Labor Relations Commission, 56 N.E.2d 915, 316 Mass. 748.

42. U.S.—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A.7, 162 F.2d 435.

ganization,[43] domination of a labor union by the employer,[44] the general conditions under which the business is conducted,[45] and the wishes of the employees;[46] and it should select the unit which would best serve the public policy declared in the law.[47] The public interest is the determining factor in determining the appropriate bargaining unit for employees,[48] and the duty to serve the public interest cannot be affected by the desires or acquiescence of the employees.[49] A bargaining unit which in view of all relevant circumstances is not an appropriate unit does not become appropriate merely because the collective bargaining process can begin more quickly through such unit.[50]

In the absence of statutory direction otherwise, the board may properly decide that all employees of a single employer form the most suitable unit for collective bargaining[51] or it may decide that the workers in any craft or plant or subdivision thereof are more appropriate.[52] Where the circumstances are such that the board reasonably could conclude that either the craft or the plant unit would be appropriate for collective bargaining purposes, and where either contention, if unopposed, would be adopted by the board, it has been held that the board ordinarily will give paramount weight to the wishes of the employees within the craft unit.[53] The right of one group to collective bargaining may not be

Mass.—Jordan Marsh Co. v. Labor Relations Commission, 56 N.E.2d 915, 316 Mass. 748.

Pa.—In re Employees of Colfax Station of Duquesne Light Co., 29 A.2d 18, 345 Pa. 458.

43. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551.

Mass.—Jordan Marsh Co. v. Labor Relations Commission, 56 N.E.2d 915, 316 Mass. 748.

Possibility of organization in one division

Where employer's bus operations were organized into two divisions and board was of opinion that either a company-wide or division bargaining unit would be appropriate, it was proper for the board to consider the fact that organization for collective bargaining was possible in a division but not for the wider unit, in making its determination in favor of the divisional unit.—N. L. R. B. v. Norfolk Southern Bus Corp., C.C.A. 4, 159 F.2d 516.

44. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied Crystal City Glass Workers' Union v. N. L. R. B., 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551.

Unlawful aid

In determining whether a unit is appropriate the board does not act arbitrarily in considering unlawful aid.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

45. Mass.—Jordan Marsh Co. v. Labor Relations Commission, 56 N.E. 2d 915, 316 Mass. 748.

46. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied Crystal City Glass Workers' Union v. N. L. R. B., 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551—Marshall Field & Co. v. N. L. R. B., C.C.A.7, 135 F.2d 391—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U.S. 751, 87 L.Ed. 1705.

Mass.—Jordan Marsh Co. v. Labor Relations Commission, 56 N.E.2d 915, 316 Mass. 748.

47. U.S.—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A.7, 162 F.2d 435—Pittsburgh Plate Glass Co. v. N. L. R. B., C.C.A.8, 113 F.2d 698, affirmed Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied Crystal City Glass Workers' Union v. N. L. R. B., 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551.

48. U.S.—N. L. R. B. v. Delaware-New Jersey Ferry Co., C.C.A.3, 128 F.2d 130.

49. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corp., C.C.A.6, 146 F.2d 718, vacated on other grounds 65 S.Ct. 1413, 325 U.S. 838, 89 L. Ed. 1965, rehearing denied 66 S. Ct. 13, 326 U.S. 804, 90 L.Ed. 490—N. L. R. B. v. Federal Motor Truck Co., C.C.A.6, 146 F.2d 718, vacated on other grounds 65 S.Ct. 1412, 325 U.S. 838, 89 L.Ed. 1965—N. L. R. B. v. Delaware-New Jersey Ferry Co., C.C.A.3, 128 F. 2d 130.

50. Mass.—Jordan Marsh Co. v. Labor Relations Commission, 56 N.E. 2d 915, 316 Mass. 748.

51. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied Crystal City Glass Workers' Union v. N. L. R. B., 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551.

52. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied Crystal City Glass Workers' Union v. N. L. R. B., 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551—N. L. R. B. v. Graham, C. C.A.9, 159 F.2d 787—N. L. R. B. v. Norfolk Southern Bus Corp., C.C.A.4, 159 F.2d 516—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U. S. 751, 87 L.Ed. 1705—Bussmann Mfg. Co. v. N. L. R. B., C.C.A.8, 111 F.2d 783.

Before expiration of agreement with employer

Where the majority of the employes of one craft group within a plant petition to have their craft union designated as their collective bargaining agent at a time when there is a valid closed-shop agreement between the employer and an independent union of which they are members, the board may properly designate the craft union to be the collective bargaining agent of the craft employes at the expiration of the agreement in effect at the time of the petition.—Petition of Grant Bldg., 45 Pa.Dist. & Co. 442.

Superintendents of apartment houses

The labor relations board's order to apartment house owners and managers to bargain collectively with a union representing building superintendents, although each building had but a single superintendent, should be enforced, as against the contention that bargaining with a representative of a single employee could not be collective bargaining.—In re New York State Labor Relations Bd. v. Metropolitan Life Ins. Co., 52 N.Y. S.2d 590, 183 Misc. 1064, affirmed 58 N.Y.S.2d 343, 269 App.Div. 934, affirmed 66 N.E.2d 853, 295 N.Y. 839.

53. D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

denied because other employees do not desire to organize and assert collective rights,[54] but it has been held that a group of employees whose interests are shared in common by all the employees may not be designated as a bargaining unit where the majority of the employees do not desire to bargain collectively.[55]

After the entry of an order designating the appropriate unit for collective bargaining, the employer may not be compelled by any other agency of the government to perform acts inconsistent with that order.[56]

Employees with confidential information. Office employees who possess confidential employer information are not for that reason improperly included in a bargaining unit if the nature of their duties does not give them access to confidential information with respect to labor relations.[57]

Guards. In the absence of a statutory prohibition, plant guards may constitute an appropriate bargaining unit,[58] and the bargaining unit may be affiliated with the same union which represents the production and maintenance employees.[59]

Supervisory employees. In the absence of a statutory prohibition, supervisory employees may constitute an appropriate bargaining unit,[60] but ordinarily they should not be included in a bargaining unit with the subordinate employees,[61] although they may be so included,[62] or they may select a union which represents subordinate employees,[63] if no incompatibility with their full and proper allegiance to their employer thereby arises.

"Globe doctrine"
The rule as stated in the text is called the "Globe doctrine."—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., supra.

54. U.S.—N. L. R. B. v. Prudential Ins. Co. of America, C.C.A.6, 154 F.2d 385—N. L. R. B. v. Lettie Lee, Inc., C.C.A.9, 140 F.2d 243.

55. Mass.—Jordan Marsh Co. v. Labor Relations Commission, 56 N.E. 2d 915, 316 Mass. 748.

56. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551.

57. U.S.—N. L. R. B. v. Poultrymen's Service Corp., C.C.A.3, 138 F.2d 204.

Plant clerks
U.S.—N. L. R. B. v. Armour & Co., C.C.A.10, 154 F.2d 570, certiorari denied 67 S.Ct. 92, 329 U.S. 732, 91 L.Ed. —, 169 A.L.R. 421.

58. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corp., 67 S.Ct. 1274, 331 U.S. 416, 91 L.Ed. — —Wilson & Co. v. N. L. R. B., C.C.A.8, 162 F.2d 310.

59. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corp., 67 S.Ct. 1274, 331 U.S. 416, 91 L.Ed. — —Wilson & Co. v. N. L. R. B., C.C.A.8, 162 F.2d 310.

Matters for consideration by board
In determining proper collective bargaining unit for militarized guards and deciding whether they should be permitted to choose union also representing production and maintenance employees, national labor relations board must not be guided alone by wishes of guards or union, or by what is appropriate in case of nonmilitarized guards, but must also consider guards' military duties and obligations, their possible relationships to union representing other employees, and limitations on normal freedom to choose representative necessitated by war effort. —N. L. R. B. v. Jones & Laughlin Steel Corp., 67 S.Ct. 1274, 331 U.S. 416, 91 L.Ed. —.

60. U.S.—Packard Motor Car Co. v. N. L. R. B., 67 S.Ct. 789, 330 U.S. 485, 91 L.Ed. —.

Building superintendents
The labor relations board's order to apartment house owners to bargain collectively with a union representing building superintendents was not, in view of a prior history of collective bargaining, arbitrary, or contrary to public policy or to the purposes of the labor law on the theory that the loyalty of superintendents to owners would be undermined.—In re New York State Labor Relations Bd. v. Metropolitan Life Ins. Co., 52 N.Y.S.2d 590, 183 Misc. 1064, affirmed 58 N.Y.S.2d 343, 269 App.Div. 934, affirmed 66 N.E.2d 853, 295 N.Y. 839.

Inspectors, charged with duty of inspecting materials and workmanship for purpose of insuring that employer's product met its specifications and those of its customers constituted a unit appropriate for purposes of collective bargaining.—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A.7, 162 F.2d 435.

Officers of ships
U.S.—N. L. R. B. v. Wyandotte Transp. Co., C.C.A.6, 162 F.2d 101 —Jones & Laughlin Steel Corp. v. N. L. R. B., 146 F.2d 833, certiorari denied 65 S.Ct. 1575, 325 U.S. 886, 89 L.Ed. 2000, rehearing denied 66 S.Ct. 15, 326 U.S. 806, 90 L.Ed. 491.

61. U.S.—N. L. R. B. v. Lettie Lee, Inc., C.C.A.9, 140 F.2d 243.

Licensed and unlicensed personnel of ship
The appropriate bargaining unit for the employees of a ferry company was not a local union including both licensed deck officers and engineers and unlicensed personnel.—N. L. R. B. v. Delaware-New Jersey Ferry Co., C.C.A.3, 128 F.2d 130.

Small amount of authority
Employees who have only a small amount of supervisory authority, and who are allied in interest and character of work with the other employees, are properly included in bargaining unit excluding supervisory employees.—N. L. R. B. v. Calumet Steel Division of Borg-Warner Corp., C.C.A.7, 121 F.2d 366.

62. U.S.—Eastern Gas & Fuel Associates v. N. L. R. B., C.C.A.6, 162 F.2d 864.

63. N.Y.—Bain v. Kelley, 73 N.Y.S. 2d 93.

Hazardous industry
A single union may lawfully act as exclusive representative of both rank and file employees and their supervisors in a hazardous industry such as coal mining.—Jones & Laughlin Steel Corp. v. United Mine Workers of America, 159 F.2d 18, 81 U.S.App.D.C. 361, certiorari denied 67 S.Ct. 1350, 331 U.S. 828, 91 L.Ed. —.

Inspectors may be permitted to select as their bargaining representative a labor organization which represents production and maintenance employees. The National Labor Relations Board, in determining unit appropriate for collective bargaining of inspectors and in deciding whether inspectors should be permitted to choose the same union that represents production and maintenance employees, must be guided not alone by wishes of inspectors but it must give due consideration to duties and obligations of inspectors and their possible relationships to union representing other employees.—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A.7, 162 F.2d 435.

§ 28(29). Administrative Determination of Unit Representation

In accordance with statutory provisions, the labor relations board or other administrative agency designated by statute has exclusive jurisdiction to determine disputes concerning who is authorized to represent the employees in bargaining with the employer.

In accordance with the provisions of labor relations statutes, the labor relations board or other administrative agency designated by the particular statute has exclusive jurisdiction to determine disputes concerning who is authorized to represent the employees in bargaining with the employer,[64] and this grant of authority by the statute to the administrative agency excludes determination of the matter by the courts.[65] The labor relations board can determine the representative only when a question of representation arises.[66] The question should be determined as of the date of the hearing rather than as of the date the proceeding was instituted.[67] The board has a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.[68] The fact that two unions claiming the right to represent the employees are members of the same national labor organization which requires disputes to be settled by the national organization does not deprive the labor relations board of jurisdiction to act under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes,[69] but under some state statutes the state labor relations board has no power to investigate and determine which of two labor organizations affiliated with the same parent labor organization has the right to represent employees in collective bargaining.[70]

In the absence of statutory restrictions the labor board may make a determination, when prop-

64. U.S.—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R. R. v. Missouri-Kansas-Texas R. Co., Tex., 64 S. Ct. 146, 320 U.S. 323, 88 L.Ed. 76—Switchmen's Union of North America v. National Mediation Board, App.D.C., 64 S.Ct. 95, 320 U.S. 297, 88 L.Ed. 61—N. L. R. B. v. Harris-Woodson Co., C.C.A.4, 162 F.2d 97—N. L. R. B. v. Prudential Ins. Co. of America, C.C.A.6, 154 F.2d 385—Great Southern Trucking Co. v. N. L. R. B., C.C.A., 139 F.2d 984—New York Handkerchief Mfg. Co. v. N. L. R. B., C.C.A.7, 114 F.2d 144, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457—International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers v. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, C.C.A.Cal., 106 F.2d 871—Howard v. Thompson, D.C.Mo., 72 F. Supp. 695—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C.Mo., 23 F. Supp. 998, reversed on other grounds, C.C.A., 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430—Railway Employees' Co-op. Ass'n v. Atlanta B. & C. R. Co., D.C.Ga., 22 F.Supp. 510.

D.C.—Fur Workers Union, Local No. 72, v. Fur Workers Union, No. 21238, 105 F.2d 1, 70 App.D.C. 122, affirmed Fur Workers Union No. 21238 v. Fur Workers Union, Local No. 72, 60 S.Ct. 292, 308 U.S. 522, 84 L.Ed. 443.

Mass.—Jordan Marsh Co. v. Labor Relations Commission, 45 N.E.2d 925, 312 Mass. 597.

Or.—Stone Logging & Contracting Co. v. International Woodworkers of America, Columbia District Council No. 5, 135 P.2d 759, 171 Or. 13.

Pa.—PRT Employees Union v. State Labor Relations Board, 51 Pa.Dist. & Co. 47, 55 Dauph.Co. 5.

Wash.—Bloedel Donovan Lumber Mills v. International Woodworkers of America, Local No. 46, 102 P.2d 270, 4 Wash.2d 62.

Wis.—Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 295 N.W. 791, 237 Wis. 164, affirmed 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. 1154.

Amicable relations between employer and employees

Fact that employees have amicable relations with their employers does not preclude the existence of a dispute concerning the representative for collective bargaining purposes within the Railway Labor Act, 45 U. S.C.A. § 151 et seq.—National Federation of Railway Workers v. National Mediation Board, 110 F.2d 529, 71 App.D.C. 266, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

Duty to make determination

Pa.—PRT Employees Union v. State Labor Relations Board, 51 Pa.Dist. & Co. 47, 55 Dauph.Co. 5.

65. U.S.—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C.Mo., 23 F. Supp. 998, reversed on other grounds, C.C.A., 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430—Lund v. Woodenware Workers Union, D. C.Minn., 19 F.Supp. 607.

66. Mass.—Anderson v. Labor Relations Commission, 38 N.E.2d 929, 310 Mass. 590.

Conditions of work

Where valid agreement between railway and unions transferred yard work to conductors, and yards were operated in accordance with that scheme for more than twenty years, contention that former conditions should be restored did not involve a representation dispute authorizing board to certify bargaining representative.—Brotherhood of Railroad Trainmen v. National Mediation Board, 135 F.2d 780, 77 U.S.App.D.C. 259.

67. U.S.—N. L. R. B. v. Karp Metal Products Co., C.C.A.2, 134 F.2d 954, certiorari denied 64 S.Ct. 941, 322 U.S. 728, 88 L.Ed. 1564—Hamilton-Brown Shoe Co. v. N. L. R. B., C.C. A.8, 104 F.2d 49.

68. U.S.—N. L. R. B. v. A. J. Tower Co., 67 S.Ct. 324, 329 U.S. 324, 91 L.Ed. —— —Southern S. S. Co. v. N. L. R. B., 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246—Marlin-Rockwell Corporation v. N. L. R. B., C.C.A.2, 116 F.2d 586, certiorari denied 61 S.Ct. 1116, 313 U.S. 594, 85 L.Ed. 1548—Railway Employees' Co-op. Ass'n v. Atlanta B. & C. R. Co., D.C.Ga., 22 F.Supp. 510.

69. U.S.—International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers v. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, C.C.A.Cal., 106 F.2d 871.

70. N.Y.—Rubel Corporation v. Boland, 31 N.Y.S.2d 572, 177 Misc. 638.

erly requested, at any time,[71] and the fact that a contract between an employer and the representative of the employees is in existence does not preclude the board from conducting an investigation to determine who shall represent the employees in the future.[72]

The authority to determine the representative does not include authority to define the type of work that each class or craft must do.[73]

§ 28(30). —— Nature of Proceedings

A proceeding for the determination of the bargaining representative by the labor relations board is not litigation; it is of a nonadversary, fact-finding character.

A proceeding for the determination of the bargaining representative by the labor relations board is not litigation;[74] it is of a nonadversary,[75] fact-finding[76] character. It is a mere investigation[77] in which the board plays the part of a disinterested investigator,[78] and the employer is only a nominal party.[79]

§ 28(31). —— Pleadings

A petition filed by a labor union requesting that it be certified as the representative of certain employees raises the question as to the proper exclusive bargaining representative of the employees.

A petition filed with the labor relations board by a labor union requesting that it be certified as the representative of certain employees raises the question as to the proper exclusive bargaining representative of the employees.[80] A labor union need not make a showing that it represents a majority of the employees in order to be entitled to petition for certification as bargaining representative.[81] Under some statutes the board has no jurisdiction to entertain a petition for a certification that a certain union does not represent the employees.[82]

§ 28(32). —— Conduct of Proceedings; Notice

The inquiry as to the proper bargaining representative is to be conducted in accordance with such procedure as is prescribed by the labor relations statute but under some statutes there may be great latitude in procedural details. Where there is a dispute between different groups of employees as to which group represents the majority, notice of the investigation must be given to the employees concerned.

71. Pa.—PRT Employees Union v. State Labor Relations Board, 61 Pa.Dist. & Co. 47, 55 Dauph.Co. 5.

72. Pa.—PRT Employees Union v. State Labor Relations Board, supra.

73. D.C.—Brotherhood of Railroad Trainmen v. National Mediation Board, 135 F.2d 780, 77 U.S.App. D.C. 259.

74. U.S.—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S. Ct. 1164, two cases, 319 U.S. 751, 87 L.Ed. 1705.

75. U.S.—Inland Empire Dist. Council Lumber and Sawmill Workers Union, Lewiston, Idaho v. Millis, App.D.C., 65 S.Ct. 1316, 325 U.S. 697, 89 L.Ed. 1877, rehearing denied 66 S.Ct. 11, 326 U.S. 803, 90 L.Ed. 489—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 152 F. 2d 198, certiorari denied 66 S.Ct. 1372, 328 U.S. 866, 90 L.Ed. 1636—N. L. R. B. v. National Mineral Co., C.C.A.7, 134 F.2d 424, certiorari denied National Mineral Co. v. N. L. R. B., 64 S.Ct. 58, 320 U.S. 753, 88 L.Ed. 448—Southern S. S. Co. v. N. L. R. B., C.C.A.3, 120 F.2d 505, reversed on other grounds 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246.

76. U.S.—Southern S. S. Co. v. N. L. R. B., C.C.A.3, 120 F.2d 505, reversed on other grounds 62 S. Ct. 886, 316 U.S. 31, 86 L.Ed. 1246.
Mass.—Jordan Marsh Co. v. Labor Relations Commission, 45 N.E.2d 925, 926, 312 Mass. 597.

77. U.S.—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U.S. 751, 87 L.Ed. 1705.

78. U.S.—Southern S. S. Co. v. N. L. R. B., C.C.A.3, 120 F.2d 505, reversed on other grounds 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246.

Public agency to effectuate statutory policy

In proceedings for certification of a bargaining agent, the National Labor Relations Board was not a tribunal for settlement and enforcement of private rights under a private contract between employer company and a union, but was acting as public agency for purpose of effectuating public policy of the National Labor Relations Act.—Sanford v. Boston Edison Co., 64 N.E.2d 631, 319 Mass. 55.

79. U.S.—N. L. R. B. v. National Mineral Co., C.C.A.7, 134 F.2d 424, certiorari denied National Mineral Co. v. N. L. R. B., 64 S.Ct. 58, 320 U.S. 753, 88 L.Ed. 448.

Proceedings after government seizure of mines

Fact that government had seized employer's coal mines did not deprive National Labor Relations Board of authority to continue representation proceedings to determine bargaining representative for miners, since the United States was not an indispensable party.—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 152 F.2d 198, certiorari denied 66 S.Ct. 1372, 328 U.S. 866, 90 L.Ed. 1636.

80. U.S.—N. L. R. B. v. Northern Trust Co., C.C.A.Ill., 148 F.2d 24, certiorari denied 66 S.Ct. 38, 326 U.S. 731, 90 L.Ed. 435 and American Nat. Bank & Trust Co. of Chicago v. N. L. R. B., 66 S.Ct. 39, 326 U.S. 731, 90 L.Ed. 435.
Mass.—R. H. White Co. v. Murphy, 38 N.E.2d 685, 310 Mass. 510.

81. U.S.—New York Handkerchief Mfg. Co. v. N. L. R. B., C.C.A.7, 114 F.2d 144, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457.
D.C.—National Federation of Railway Workers v. National Mediation Board, 110 F.2d 529, 71 App. D.C. 266, certiorari denied 60 S. Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

Number of employees represented

Where union's petition for determination of employees' representative by state labor relations board stated case belonging to general class within board's jurisdiction, and board had jurisdiction of parties, insufficiency, if any, of petition in that it did not show how many employees union claimed to represent did not render board's order for election void.—Hanley v. Boland, 33 N. Y.S.2d 673, 177 Misc. 973.

82. Pa.—In re G. C. Murphy Co., 51 Pa.Dist. & Co. 535—Petition of Koehler, Com.Pl., 92 Pittsb.Leg.J. 587.

The inquiry as to the proper bargaining representative is to be conducted in accordance with such procedure as is prescribed by the labor relations statute,[83] and a hearing is a prerequisite to the validity of any certification where the statute so provides.[84] The board may properly require documentary evidence of representation before it will conduct a hearing.[85] Where the statutory provisions for an election are permissive rather than mandatory, the hearing need not be held before the election,[86] and the fact that the hearing before the election has been inadequate is immaterial where an adequate hearing is given after the election.[87] The National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes contemplate great latitude in procedural details[88] and an investigation which is essentially informal.[89]

In determining whether a named union has been selected by the employees as their representative, the labor relations board is entitled to make its decision in the light of all the facts.[90] The board may determine in the proceedings whether a union is dominated by the employer[91] or it may refuse to rule on a request for certification until after a determination has been had as to whether the union is dominated by the employer.[92] Likewise the board may withhold its decision pending the outcome of unfair practice proceedings which might show that the selection by the employees may have been affected by unfair practices of the employer.[93] After the original hearing the board may properly hear additional evidence as to the continued affiliation of the majority of employees with the union[94] or, in its discretion, it may refuse to do so.[95]

By submitting evidence at a representation hearing the employer does not waive his right to have jurisdictional objections subsequently determined.[96]

Notice. Where there is a dispute between different groups of employees as to which group represents the majority, notice of the investigation must be given to the employees concerned.[97]

§ 28(33). —— Election of Representative

a. In general
b. Campaigning and other conduct before election
c. Eligibility to vote
d. Ballots
e. Conduct of election

83. U.S.—Oberman & Co. v. United Garment Workers of America, D.C. Mo., 21 F.Supp. 20.

84. U.S.—Inland Empire Dist. Council, Lumber and Sawmill Workers Union, Lewiston, Idaho v. Millis, App.D.C., 65 S.Ct. 1316, 325 U.S. 697, 89 L.Ed. 1877, rehearing denied 66 S.Ct. 11, 326 U.S. 803, 90 L.Ed. 489—Inland Empire Dist. Council, Lumber and Sawmill Workers Union, Lewiston, Idaho, v. Graham, D.C.Wash., 53 F.Supp. 369, appeal dismissed, C.C.A., 142 F.2d 455.

85. U.S.—N. L. R. B. v. Premo Pharmaceutical Laboratories, C.C. A.2, 136 F.2d 85.

86. U.S.—Inland Empire Dist. Council, Lumber and Sawmill Workers Union, Lewiston, Idaho v. Millis, App.D.C., 65 S.Ct. 1316, 325 U.S. 697, 89 L.Ed. 1877, rehearing denied 66 S.Ct. 11, 326 U.S. 803, 90 L.Ed. 489.

87. U.S.—Inland Empire Dist. Council, Lumber and Sawmill Workers Union, Lewiston, Idaho v. Millis, supra.

88. U.S.—Inland Empire Dist. Council, Lumber and Sawmill Workers Union, Lewiston, Idaho v. Millis, supra.

89. U.S.—Inland Empire Dist. Council Lumber and Sawmill Workers Union, Lewiston, Idaho v. Millis, supra.

90. U.S.—N. L. R. B. v. Fargo Foundry Co., C.C.A.8, 141 F.2d 462.

91. U.S.—Madden v. Brotherhood and Union of Transit Employees of Baltimore, C.C.A.Md., 147 F.2d 439, 158 A.L.R. 1330.

Freedom in choice of representative see supra § 28 (25).

Effect of nonreviewable nature of determination

The fact that determination of question of employer's domination of union would not be reviewable if made in a representation proceeding, whereas it would be reviewable if decided in an unfair practice proceeding, did not furnish basis for ruling that the question could not be determined in representation proceeding, since order made in unfair practice proceeding is a final order, whereas order in representation proceeding is a mere interlocutory order in an administrative process.—Madden v. Brotherhood and Union of Transit Employees of Baltimore, supra.

92. U.S.—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F.2d 340.

Trial of issue in separate proceedings

National Labor Relations Board's adoption of the practice in representation proceedings of requiring issue of employer domination to be tried in separate proceedings was discretionary.—N. L. R. B. v. National Broadcasting Co., C.C.A.2, 150 F.2d 895.

93. D.C.—Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Affiliated with American Federation of Labor v. N. L. R. B., 121 F.2d 84, 74 App.D.C. 28, certiorari denied Warehousemen's Union Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539—N. L. R. B. v. McKesson & Robbins, 121 F.2d 84, 74 App.D.C. 28, certiorari denied McKesson & Robbins v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539.

94. D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

95. D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., supra.

96. U.S.—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 152 F.2d 198, certiorari denied 66 S.Ct. 1372, 328 U.S. 866, 90 L.Ed. 1636.

97. U.S.—Cole v. Atlanta Terminal Co., D.C.Ga., 15 F.Supp. 131.

f. Determination of result
g. Operation and effect

a. In General

Under the various labor relations statutes, the labor relations board or other administrative agency may have the right or the duty to order an election in which the employees may express their choice of a bargaining representative.

As a general rule under the provisions of labor relations statutes, the labor relations board or other administrative agency may order an election in which the employees may express their choice of a bargaining representative.[98] Under some statutes the board must order an election where a question of representation exists,[99] but if no statutory requirement exists the board need not order an election.[1] In accordance with statutory provisions a petition for an election by a majority of employees[2] or a hearing in the investigation concerning representation[3] is not a condition precedent to the exercise of the power by the board, but it has been held, where the charge is made that the employer has favored one candidate with the purpose of influencing the employees to cast their votes for that candidate, that the board should investigate the charge before holding an election.[4] The fact that a mistake of fact causes the board to order an election does not render the order void.[5] It has been held that the board has no power to order an election where a collective bargaining agreement conforming to the labor relations statute has recently been signed[6] or where no representation controversy exists,[7] and, if the state labor relations board has no power under the state statute to determine which of two labor organizations affiliated with the same parent labor organization has the right to represent the employees, the board has no power to direct an election for the purpose of deciding such question.[8]

Reasonable notice of the election and the candidates to be voted on must be given.[9]

The board is not bound by its previous construction of the statutory provision for elections where

98. U.S.—Madden v. Brotherhood and Union of Transit Employees of Baltimore, C.C.A.Md., 147 F.2d 439, 158 A.L.R. 1330—Cupples Co. Manufacturers v. N. L. R. B., C. C.A.8, 106 F.2d 100—Union Premier Food Stores v. Retail Food Clerks and Managers Union, Local No. 1357, C.C.A.Pa., 98 F.2d 821—Beebe Corp. v. Millis, D.C.N.Y., 58 F. Supp. 993.

Pa.—Appeal of York Tel. & Tel. Co., Com.Pl., 59 York Leg.Rec. 113.

99. **Compliance with request**

(1) Where so provided by statute, the labor relations board must order an election when such is requested by either party to the representation controversy which has been submitted to the board for investigation.—Petition of Shafer, 31 A.2d 537, 347 Pa. 130.

(2) Even though the employer has been guilty of unfair labor practices the board must comply with his request for an election.—Petition of Shafer, 31 A.2d 537, 347 Pa. 130.

1. U.S.—Inland Empire Dist. Council, Lumber and Sawmill Workers Union, Lewiston, Idaho v. Millis, App.D.C., 65 S.Ct. 1316, 325 U.S. 697, 89 L.Ed. 1877, rehearing denied 66 S.Ct. 11, 326 U.S. 803, 90 L.Ed. 489—Inland Empire Dist. Council, Lumber and Sawmill Workers Union, Lewiston, Idaho, v. Graham, D.C.Wash., 53 F.Supp. 369, appeal dismissed, C.C.A., 142 F.2d 455.

Pa.—Petition of Shafer, 31 A.2d 537, 347 Pa. 130.

Decision based on authorization cards

Action of mediation board in certifying bargaining representatives on basis of authorization cards signed by employees without an election was not void.—Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees v. Virginian Ry. Co., C.C.A. Va., 125 F.2d 853.

2. U.S.—Beebe Corp. v. Millis, D.C. N.Y., 58 F.Supp. 993.

Railway Labor Act

Under the Railway Labor Act, 45 U.S.C.A. § 151 et seq, a petition for an election need show only that a dispute exists among the employees as to the identity of the representative, and it is not necessary for it to show that the labor organization petitioning for the election includes a majority of the employees.—National Federation of Railway Workers v. National Mediation Bd., 110 F. 2d 529, 71 App.D.C. 266, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

3. U.S.—Inland Empire Dist. Council, Lumber and Sawmill Workers Union, Lewiston, Idaho v. Millis, App.D.C., 65 S.Ct. 1316, 325 U.S. 697, 89 L.Ed. 1877, rehearing denied 66 S.Ct. 11, 326 U.S. 803, 90 L.Ed. 489.

4. D.C.—Order of Railway Conductors of America v. National Mediation Board, 141 F.2d 366, 79 U.S. App.D.C. 1, dismissed 65 S.Ct. 222, 323 U.S. 166, 89 L.Ed. 154.

5. U.S.—Madden v. Brotherhood & Union of Transit Employees of Baltimore, C.C.A.Md., 147 F.2d 439, 158 A.L.R. 1330.

6. N.Y.—Triboro Coach Corporation v. New York State Labor Relations Board, 27 N.Y.S.2d 83, 261 App.Div. 636, affirmed 36 N.E.2d 315, 286 N.Y. 314, 144 A.L.R. 410, motion denied 39 N.E.2d 276, 287 N.Y. 647, 144 A.L.R. 410.

7. Pa.—In re G. C. Murphy Co., 51 Pa.Dist. & Co. 535.

Number signing authorization cards

Where record showed that the National Mediation Board, when it ordered a representation election, had before it the number and not the names of persons who had signed authorization cards, the board could decide that a dispute existed, and it could treat the names of the signers as immaterial.—National Federation of Railway Workers v. National Mediation Board, 110 F.2d 529, 71 App.D.C. 266, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

8. N.Y.—Rubel Corporation v. Boland, 31 N.Y.S.2d 572, 177 Misc. 638.

9. U.S.—R. J. Reynolds Employees Ass'n v. N. L. R. B., D.C.N.C., 61 F.Supp. 280.

Notice to official of labor organization

Under the Railway Labor Act, 45 U.S.C.A. § 151 et seq, notice of a representation election to a proper official of contending labor organization is sufficient.—National Federation of Railway Workers v. National Mediation Board, 110 F.2d 529, 71 App.D.C. 266, certiorari denied 60 S. Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

a different construction has been adopted by the court.[10]

New election. Where the charge is made that the union which was formerly elected bargaining agent for the employees no longer represents the majority of the employees, the labor relations board has discretionary power to order or to refuse to order a new election.[11] The board is not required to order a new election merely because several years have elapsed since the last election[12] or because the employer's unfair labor practices may have adversely affected the majority status of the duly elected representative.[13]

The fact that the existing collective agreement requires all employees to be members of the union which is the bargaining agent of the employees does not preclude the holding of another election.[14]

b. Campaigning and Other Conduct before Election

Labor unions or individual employees may campaign before the election.

Labor unions[15] or individual employees[16] may campaign before the election, and the labor relations board has no authority to order them not to take part in the election campaign.[17] A union may employ peaceful picketing[18] or it may waive membership dues for a period of time[19] in order to gain votes in the forthcoming election.

An employer's action in distributing a mere statement of policy before the election is not of itself an interference with the right of employees freely to choose their bargaining representative.[20]

c. Eligibility to Vote

All persons who are employees in the bargaining unit at the time of the election are entitled to vote in the election.

All persons who are employees in the bargaining unit at the time of the election are entitled to vote in the election,[21] and persons who are not employees in the bargaining unit at the time of the election are not entitled to vote.[22] Under the Railway Labor Act, 45 U.S.C.A. § 151 et seq, the National Mediation Board has great discretion in determining eligibility for participation in the election,[23] but it should give a full hearing to those claiming eligibility to vote[24] and it should base its decision on evidence introduced at the hearing.[25]

Employees who are laid off for lack of work but

10. U.S.—Association of Clerical Employees of Atchison, T. & S. F. Ry. System v. Brotherhood of Ry. and S. S. Clerks, C.C.A.Ill., 85 F. 2d 152.

11. U.S.—N. L. R. B. v. Garfunkel, C.C.A.2, 162 F.2d 256.

Agreement between employer and employee

Alleged agreement of bargaining agent's representative with the employer to have another election held by the labor board for purpose of selecting the bargaining representative was not binding on the National Labor Relations Board.—N. L. R. B. v. Harris-Woodson Co., C.C.A.4, 162 F.2d 97.

12. U.S.—N. L. R. B. v. Federbush Co., C.C.A.2, 121 F.2d 954.

13. U.S.—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 139 F. 2d 984, certiorari denied 64 S.Ct. 944, 322 U.S. 729, 88 L.Ed. 1564—N. L. R. B. v. Swift & Co., C.C.A. 6, 127 F.2d 30.

Replacement of personnel

Where, as result of strike caused by employer's unfair labor practices, nearly all employees left employer's plant and were replaced by new personnel, a new election as to bargaining agency was not mandatory on ground of changed conditions, but that was a matter to be determined by National Labor Relations Board.—N. L. R. B. v. A. Sartorius & Co., C.C.A.2, 140 F.2d 203.

14. U.S.—Klein v. Herrick, D.C.N.Y., 41 F.Supp. 417.

15. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287.

16. U.S.—N. L. R. B. v. Thompson Products, supra.

17. U.S.—N. L. R. B. v. Thompson Products, supra.

Members of disestablished organization

The National Labor Relations Board had no power to forbid attempts by members of disestablished bargaining representatives and their organization to induce other employees to vote as they desired.—N. L. R. B. v. Thompson Products, supra.

18. U.S.—Montgomery Ward Employees' Ass'n v. Retail Clerks International Protective Ass'n, Local No. 47, D.C.Cal., 38 F.Supp. 321.

19. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287.

20. U.S.—Continental Box Co. v. N. L. R. B., C.C.A.5, 113 F.2d 93.

21. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—N. L. R. B. v. Norris, Inc., C.C.A. 5, 162 F.2d 50.
D.C.—Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F.2d 757, 66 App.D.C. 375.

22. U.S.—N. L. R. B. v. Norris, Inc., C.C.A.5, 162 F.2d 50.

Son of partner

An employee of a partnership who is the son of one of the partners is properly excluded from voting in the election where the labor relations statute provides that the term "employee" shall not include an individual employed by his parent.—N. L. R. B. v. Hofmann, C.C.A.3, 147 F.2d 679, 157 A.L.R. 1149.

23. U.S.—Nashville, C. & St. L. Ry. v. Railway Employees' Department of American Federation of Labor, C.C.A.Tenn., 93 F.2d 340, certiorari denied 58 S.Ct. 746, 303 U.S. 649, 82 L.Ed. 1110.

Altering rules of eligibility

The National Mediation Board in the exercise of its discretion may alter its ruling concerning eligibility after notice of election.—Nashville, C. & St. L. Ry. v. Railway Employees' Department of American Federation of Labor, supra.

24. D.C.—Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F.2d 757, 66 App.D.C. 375.

25. **Information obtained through examiner**

Refusal of National Mediation Board to inform emergency conductors who were excluded from election of class or craft representatives for collective bargaining of facts on which board based designation or rule as to eligibility for participation in election on ground that infor-

who are subject to recall are properly permitted to vote[26] unless they have obtained work with another employer.[27] Persons who have voluntarily terminated their employment during a strike are not eligible voters.[28] Apprentices who are minors and employed under contracts which required the consent of their guardians may be excluded from the election in the discretion of the board.[29]

The fact that votes are cast by ineligible voters does not invalidate the election where that fact has not affected the outcome of the election.[30]

d. Ballots

In accordance with statutory provisions, the labor relations board may properly direct which names shall go on the ballot.

Under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes, the labor relations board may properly direct which names shall go on the ballot,[31] and it may exclude from the ballot the name of an organization which is not free from employer control.[32]

e. Conduct of Election

In accordance with statutory provisions, the manner in which the election is to be conducted and the rules and regulations for the conduct of the election are within the discretion of the labor relations board, subject to the principles of majority rule and secrecy of the ballot.

As a general rule under labor relations statutes, the manner in which the election of the bargaining representative is to be conducted and the rules and regulations for the conduct of the election are within the discretion of the labor relations board,[33] subject to the principles of majority rule[34] and secrecy of the ballot.[35] A rule requiring the challenge of a person's right to vote to be made before the elec-

mation was obtained through its examiner and should not be divulged was held improper, since nothing can be treated as evidence which is not introduced as such.—Brotherhood of Railroad Trainmen v. National Mediation Board, supra.

26. U.S.—Marlin-Rockwell Corporation v. N. L. R. B., C.C.A.2, 116 F.2d 586, certiorari denied 61 S.Ct. 1116, 313 U.S. 594, 85 L.Ed. 1548.

Furloughed employees

Under Railway Labor Act, 45 U.S.C.A. § 151 et seq., defining term "employee" as every person in service of carrier, furloughed employees who were entitled to priority in any subsequent reemployment by carrier were entitled to participate in election to choose representatives to negotiate with railroad.—Nashville, C. & St. L. Ry. v. Railway Employees' Department of American Federation of Labor, C.C.A.Tenn., 93 F.2d 340, certiorari denied 58 S.Ct. 746, 303 U.S. 649, 82 L.Ed. 1110.

27. U.S.—Marlin-Rockwell Corp. v. N. L. R. B., C.C.A.2, 116 F.2d 586, certiorari denied 61 S.Ct. 1116, 313 U.S. 594, 85 L.Ed. 1548.

Furloughed employees working for other railroad

U.S.—Brotherhood of Locomotive Firemen and Enginemen v. Kenan, C.C.A.Fla., 87 F.2d 651, certiorari denied Grand International Brotherhood of Locomotive Engineers v. Kenan, 57 S.Ct. 790, 301 U.S. 687, 81 L.Ed. 1344.

28. U.S.—N. L. R. B. v. Norris, Inc., C.C.A.5, 162 F.2d 50.

29. U.S.—Marlin-Rockwell Corp. v. N. L. R. B., C.C.A.2, 116 F.2d 586, certiorari denied 61 S.Ct. 1116, 313 U.S. 594, 85 L.Ed. 1548.

30. U.S.—N. L. R. B. v. Armour & Co., C.C.A.10, 154 F.2d 570, certiorari denied 67 S.Ct. 92, 329 U.S. 732, 91 L.Ed. 633, 169 A.L.R. 421.

31. U.S.—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed, 495.

32. U.S.—N. L. R. B. v. Southern Bell Telephone & Telegraph Co., Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—Madden v. Brotherhood and Union of Transit Employees of Baltimore, C.C.A.Md., 147 F.2d 439, 158 A.L.R. 1330.

After order to disestablish association

Where the labor relations board, after ordering the company to disestablish completely a workers' association, ordered an election without provision for workers' association to be placed on ballot, a stay would not be granted on theory that board's action constituted an enforcement of its disestablishment order.—Utah Copper Co. v. N. L. R. B., C.C.A.10, 136 F.2d 485.

33. U.S.—N. L. R. B. v. A. J. Tower Co., 67 S.Ct. 324, 329 U.S. 324, 91 L.Ed. 322—Southern S. S. Co. v. N. L. R. B., 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246—N. L. R. B. v. Falk Corporation, 60 S.Ct. 307, 308 U.S. 453, 84 L.Ed. 396—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., C.C.A.8, 160 F.2d 388—N. L. R. B. v. Porcelain Steels, Inc., C.C.A.6, 138 F.2d 840—Nashville, C. & St. L. Ry. v. Railway Employees' Department of American Federation of Labor, C.C.A.Tenn., 93 F.2d 340, certiorari denied 58 S.Ct. 746, 303 U.S. 649, 82 L.Ed. 1110—Association of Clerical Employees of Atchison, T. & S. F. Ry. System v. Brotherhood of Ry. and S. S. Clerks, C.C.A.Ill., 85 F.2d 152.

D.C.—National Federation of Railway Workers v. National Mediation Board, 110 F.2d 529, 71 App.D.C. 266, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399—Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F.2d 757, 66 App.D.C. 375.

Calling off election

The action of field examiner of National Labor Relations Board in calling off a bargaining agency election immediately before time set on ground that election would be influenced by wage increases recently granted was not to be commended, although control of elections is vested in labor board and not in the courts.—S. H. Camp & Co. v. N. L. R. B., C.C.A.6, 160 F.2d 519.

Interpretation and amendment of rules

National Mediation Board, in holding election to determine which of two brotherhoods should represent locomotive engineers employed by railroad, in negotiating with railroad's receivers, had authority to interpret its own rules and to amend or set them aside in its own discretion.—Brotherhood of Locomotive Firemen and Enginemen v. Kenan, C.C.A.Fla., 87 F.2d 651, certiorari denied Grand International Brotherhood of Locomotive Engineers v. Kenan, 57 S.Ct. 790, 301 U.S. 687, 81 L. Ed. 1344.

34. U.S.—N. L. R. B. v. A. J. Tower Co., 67 S.Ct. 324, 329 U.S. 324, 91 L.Ed. 322—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., C.C.A. 8, 160 F.2d 388.

35. U.S.—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., supra.

tion and not after is valid and reasonable.[36] The board has discretionary power to refuse to permit the employer, the union, or employees to be represented at the polls by observers[37] or to exclude the employer or his representatives from the place of the election.[38]

Run-off election. A run-off election limiting the choice between the two unions who have received the largest number of votes is proper as within the discretion of the board.[39] Where in the interim between an election and a run-off election there has been a large turn-over of employees and a considerable time has elapsed so that the run-off election is in legal contemplation a new election, it has been held improper for the board to limit the election to the two unions which previously received the largest number of votes.[40]

f. Determination of Result

As a general rule a majority of those voting in the election determines the choice of bargaining representative.

As a general rule a majority of those voting in the election determines the choice of bargaining representative[41] even though a majority of the employees has not participated in the election.[42] The real test in determining the validity of an election carried by a majority of a minority is whether the election is actually representative.[43] The principle of majority rule does not foreclose practical adjustments designed to protect the election machinery from abuse and fraud,[44] and the determination of whether in fact a majority voted for the union must be made in accordance with such formal rules of procedure as the labor relations board may find necessary to adopt in the sound exercise of its discretion.[45] The board must adopt rules which will provide for the recording of votes accurately, efficiently, and speedily.[46]

The board may properly refuse to count signed ballots,[47] ballots containing a cross in more than one square,[48] ballots cast by ineligible voters,[49] or ballots containing a write-in vote for an ineligible organization.[50] Blank ballots are not to be considered in determining the majority of votes cast.[51] Although a voter's intention is not apparent from the face of the ballot, he should not be permitted to testify as to his intention.[52]

Contest. Where a recount of the ballots by the court supports the original return, an attempt to impeach the election return will fail.[53] Affidavits and depositions to show how certain employees vot-

36. U.S.—N. L. R. B. v. A. J. Tower Co., 67 S.Ct. 324, 329 U.S. 324, 91 L.Ed. 322.

37. U.S.—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., C.C.A.8, 160 F.2d 388.

Effect of possible error

Even if the National Mediation Board committed an error in permitting a certain person to act as election observer for a labor organization this would not justify nullifying election fairly and honestly conducted.—National Federation of Railway Workers v. National Mediation Board, 110 F.2d 529, 71 App.D.C. 266, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

38. U.S.—Marlin-Rockwell Corporation v. N. L. R. B., C.C.A.2, 116 F.2d 586, certiorari denied 61 S.Ct. 1116, 313 U.S. 594, 85 L.Ed. 1548.

Exclusion from vessel

Refusal to permit a representative of the employer aboard one of seven vessels during voting did not vitiate the election.—Southern S. S. Co. v. N. L. R. B., 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246.

39. U.S.—N. L. R. B. v. Standard Lime & Stone Co., C.C.A.4, 149 F.2d 435, certiorari denied 66 S.Ct. 28, 326 U.S. 723, 90 L.Ed. 429.

40. U.S.—International Brotherhood of Electrical Workers v. N. L. R. B., D.C.Mich., 41 F.Supp. 57.

41. U.S.—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789—Marlin-Rockwell Corporation v. N. L. R. B., C.C.A.2, 116 F.2d 586, certiorari denied 61 S.Ct. 1116, 313 U.S. 594, 85 L.Ed. 1548—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 111 F.2d 474—Nashville, C. & St. L. Ry. v. Railway Employees' Department of American Federation of Labor, C.C.A.Tenn., 93 F.2d 340, certiorari denied 58 S.Ct. 746, 303 U.S. 649, 82 L.Ed. 1110—Association of Clerical Employees of Atchison, T. & S. F. Ry. System v. Brotherhood of Ry. and S. S. Clerks, C.C.A.Ill., 85 F.2d 152.

Pa.—In re Media Drug Stores, 56 Pa. Dist. & Co. 113.

42. U.S.—N. L. R. B. v. Standard Lime & Stone Co., C.C.A.4, 149 F.2d 435, certiorari denied 66 S.Ct. 28, 326 U.S. 723, 90 L.Ed. 429—N. L. R. B. v. National Mineral Co., C.C.A.7, 134 F.2d 424, certiorari denied National Mineral Co. v. N. L. R. B., 64 S.Ct. 58, 320 U.S. 753, 88 L.Ed. 448—New York Handkerchief Mfg. Co. v. N. L. R. B., C.C.A.7, 114 F.2d 144, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457.

D.C.—N. L. R. B. v. Central Dispensary & Emergency Hospital, 145 F.2d 852, 79 U.S.App.D.C. 274, certiorari denied 65 S.Ct. 684, 324 U.S. 847, 89 L.Ed. 1408.

43. D.C.—N. L. R. B. v. Central Dispensary & Emergency Hospital, supra.

44. U.S.—N. L. R. B. v. A. J. Tower Co., 67 S.Ct. 324, 329 U.S. 324, 91 L.Ed. 322—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., C.C.A.8, 160 F.2d 388.

45. U.S.—N. L. R. B. v. A. J. Tower Co., 67 S.Ct. 324, 329 U.S. 324, 91 L.Ed. 322—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., C.C.A.8, 160 F.2d 388.

46. U.S.—N. L. R. B. v. A. J. Tower Co., 67 S.Ct. 324, 329 U.S. 324, 91 L.Ed. —.

47. U.S.—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., C.C.A.8, 160 F.2d 388.

48. U.S.—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., supra.

49. U.S.—N. L. R. B. v. Norris, Inc., C.C.A.5, 162 F.2d 50.

50. N.Y.—Cody v. Kelley, 53 N.Y.S.2d 224, 184 Misc. 150.

51. U.S.—Association of Clerical Employees of Atchison, T. & S. F. Ry. System v. Brotherhood of Ry. and S. S. Clerks, C.C.A.Ill., 85 F.2d 152.

52. U.S.—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., C.C.A.8, 160 F.2d 388.

53. D.C.—National Federation of Railway Workers v. National Mediation Board, 110 F.2d 529, 71 App.D.C. 266, certiorari denied 60

ed are not competent as evidence to impeach the ballots.[54]

Where an improper exclusion of votes cast does not affect the result of the election, the union for which the votes were cast may not complain.[55] After votes have been rejected on the objection of a union, the union is in no position to assert impropriety in their rejection.[56]

g. Operation and Effect

As a general rule an election determines the right of representation, but, when circumstances warrant, the labor relations board may disregard the results of the election.

Generally an election expresses the desires of the employees concerning their choice of a bargaining representative[57] and it determines the right of representation.[58] The election is binding on the participating parties[59] and a subsequent repudiation of the results of the election by the employees does not destroy its effect.[60] However, when circumstances warrant, the labor relations board may disregard the results of the election,[61] such as where it finds that interference by the employer has affected the results of the election[62] or that the organization which won the election is dominated by the employer.[63] The fact that the board has ordered or supervised an election does not operate as an estoppel against it to inquire into the validity of a labor organization[64] or to investigate unfair labor practices which have benefited the organization which won the election.[65] Where the statute does not require the bargaining representative to be determined by an election, the administrative agency, after it has set aside the election, may adopt any other suitable method to ascertain the proper representative.[66]

§ 28(34). —— Certification

a. In general
b. Operation and effect

a. In General

As a general rule certification of a union as the proper bargaining representative of employees is the final and effective action by the labor relations board in the investigation of a controversy concerning representation.

As a general rule, under labor relations statutes, certification of a union as the proper bargaining representative of employees is the final and effective action by the labor relations board in the investigation of a controversy concerning representation.[67] Under the National Labor Relations Act,

S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

54. D.C.—National Federation of Railway Workers v. National Mediation Board, supra.

55. N.Y.—Cody v. Kelley, 53 N.Y.S. 2d 224, 184 Misc. 150.

56. U.S.—Association of Clerical Employees of Atchison, T. & S. F. Ry. System v. Brotherhood of Ry. and S. S. Clerks, C.C.A.Ill., 85 F. 2d 152.

57. U.S.—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U.S. 751, 87 L.Ed. 1705.

58. U.S.—N. L. R. B. v. May Department Stores Co., C.C.A.8, 146 F.2d 66, modified on other grounds 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495.

59. U.S.—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., C.C.A.8, 160 F.2d 388—In re Quick Charge, D.C.Okl., 69 F.Supp. 961.

60. U.S.—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U.S. 751, 87 L.Ed. 1705.

61. U.S.—Inland Empire Dist. Council, Lumber and Sawmill Workers Union, Lewiston, Idaho v. Millis, App.D.C., 65 S.Ct. 1316, 325 U.S. 697, 89 L.Ed. 1877, rehearing denied 66 S.Ct. 11, 326 U.S. 803, 90 L.Ed. 489.

62. D.C.—Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Affiliated with American Federation of Labor v. N. L. R. B., 121 F.2d 84, 74 App.D.C. 28, certiorari denied Warehousemen's Union Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539—N. L. R. B. v. McKesson & Robbins, 121 F.2d 84, 74 App.D.C. 28, certiorari denied McKesson & Robbins v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539.

Minn.—Warehouse Employees Union, Local No. 359, A. F. L. v. Forman Ford & Co., 18 N.W.2d 767, 220 Minn. 34.

63. U.S.—Locomotive Finished Material Co. v. N. L. R. B., C.C.A.10, 142 F.2d 802.

64. U.S.—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.10, 115 F.2d 1007.

65. U.S.—Wallace Corporation v. N. L. R. B., C.C.A.4, 141 F.2d 87, affirmed 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Richwood Clothespin & Dish Worker's Union v. N. L. R. B., C.C.A.4, 141 F.2d 87, affirmed 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216—Utah Copper Co. v. N. L. R. B., C.C.A.10, 139 F.2d 788, certiorari denied Independent Ass'n of Mill Workers v. N. L. R. B., 64 S.Ct. 946, 322 U.S. 731, 88 L.Ed. 1566.

66. Minn.—Warehouse Employees Union, Local No. 359, A. F. L. v. Forman Ford & Co., 18 N.W.2d 767, 220 Minn. 34.

Representation cards

The state labor conciliator's use of representation cards, signed by majority of corporation's employees eligible to vote at election of collective bargaining representative, as basis for ascertaining such representative after election resulted in tie vote, constituted adoption of suitable method to ascertain representative, as authorized by statute.—Warehouse Employees Union, Local No. 359, A. F. L. v. Forman Ford & Co., supra.

67. U.S.—Inland Empire Dist. Council, Lumber and Sawmill Workers Union, Lewiston, Idaho v. Millis, App.D.C., 65 S.Ct. 1316, 325 U.S. 697, 89 L.Ed. 1877, rehearing denied 66 S.Ct. 11, 326 U.S. 803, 90 L.Ed. 489—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct.

29 U.S.C.A. § 151 et seq, and similar statutes, a certification is not an order but is merely the certification of a fact,[68] and likewise under the Railway Labor Act, 45 U.S.C.A. § 151 et seq, the National Mediation Board makes no order and its only ultimate finding of fact is the certificate to which congress has added a command enforceable by judicial decree.[69] A certificate which complies with the statute is sufficient.[70]

The fact that a representative is not certified until a considerable period of time has elapsed from the date of the election is not a ground for invalidating the certification if no showing of a loss of majority by the certified representative is made.[71] Where the statute specifying the period of time within which certification is to be made is merely directory, failure of the board to make certification within that time does not render the certification invalid.[72]

If certification has been induced by fraud the board has sole jurisdiction to amend, modify, or vacate the order.[73]

b. Operation and Effect

In accordance with statutory provisions, certification of a union as bargaining agent by the labor relations board is final and conclusive where no proceedings are taken to review or set aside the certification, and until it is set aside or altered in a proper proceeding it is binding on the employer, on the unions concerned, and on the courts.

In accordance with the provisions of labor relations statutes, certification of a union as bargaining agent by the labor relations board is final and conclusive where no proceedings are taken to review or set aside the certification,[74] and until it is set aside or altered in a proper proceeding it is binding on the employer,[75] on the unions concerned,[76] and on the courts.[77] Certification of a bargaining agent is not res judicata and it does not bar further action by the board,[78] and it does not limit the board's

1164, two cases, 319 U.S. 751, 87 L. Ed. 1705.

Pa.—In re Employes of American Store Co., Com.Pl., 9 Sch.Reg. 206.

Informal statement of field representative of National Labor Relations Board to effect that employer, engaged in interstate commerce, had a bona fide contract with labor organization, did not constitute a decision or certification regarding exclusive bargaining agent within National Labor Relations Act.—Stone Logging & Contracting Co. v. International Woodworkers of America, Columbia District Council No. 5, 135 P.2d 759, 171 Or. 13.

68. U.S.—United Employees Ass'n v. N. L. R. B., C.C.A.3, 96 F.2d 875.

69. U.S.—Switchmen's Union of North America v. National Mediation Board, App.D.C., 64 S.Ct. 95, 320 U.S. 297, 88 L.Ed. 61—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789.

70. U.S.—Virginian Ry. Co. v. System Federation No. 40, supra.

71. U.S.—N. L. R. B. v. Calumet Steel Division of Borg-Warner Corporation, C.C.A.7, 121 F.2d 366.

72. U.S.—System Federation No. 40, Railway Employees Department of American Federation of Labor v. Virginian Ry. Co., D.C.Va., 11 F. Supp. 621, affirmed, C.C.A., Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 84 F.2d 641, affirmed Virginian Ry. Co. v. System Federation No. 40, 57 S.Ct. 592, 300 U. S. 515, 81 L.Ed. 789.

73. N.Y.—Florsheim Shoe Co. v. Retail Shoe Salesmen's Union of Brooklyn and Queens Local 287, 24 N.Y.S.2d 923, reversed on other grounds 27 N.Y.S.2d 883, 262 App. Div. 769, reversed on other grounds 42 N.E.2d 480, 288 N.Y. 188.

74. Mass.—Sanford v. Boston Edison Co., 64 N.E.2d 631, 319 Mass. 55.

75. U.S.—N. L. R. B. v. Swift & Co., C.C.A.3, 162 F.2d 575—N. L. R. B. v. Prudential Ins. Co. of America, C.C.A.6, 154 F.2d 385—N. L. R. B. v. May Department Stores Co., C. C.A.8, 146 F.2d 66, modified on other grounds 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L. Ed. 495—N. L. R. B. v. Grieder Machine Tool & Die Co., C.C.A.6, 142 F.2d 163, certiorari denied 65 S.Ct. 56, 323 U.S. 724, 89 L.Ed. 582—Valley Mould & Iron Corporation v. N. L. R. B., C.C.A.7, 116 F.2d 760, certiorari denied 61 S.Ct. 1114, 313 U.S. 590, 85 L.Ed. 1545.

Mass.—Sanford v. Boston Edison Co., 64 N.E.2d 631, 319 Mass. 55—R. H. White Co. v. Murphy, 38 N.E. 2d 685, 310 Mass. 510.

N.Y.—Gulf Oil Corp. v. International Broth. of Teamsters, Local 806, 57 N.Y.S.2d 24, 185 Misc. 409.

Federal Transportation Act of 1920 vested in the labor board the power to decide how representatives ought to be chosen with the view to securing a satisfactory coöperation, and left it with the carrier and the employees to accept or reject the decision.—Pennsylvania R. Co. v. U. S. Railroad Labor Board, Ill., 43 S.Ct. 278, 261 U.S. 72, 67 L.Ed. 536.

76. U.S.—Bloedel Donovan Lumber Mills v. International Woodworkers of America, Local No. 46, 102 P.2d 270, 4 Wash.2d 62.

Limitation on representation

Where certification by National Labor Relations Board of a union as bargaining agent provided that union's representation did not include certain supervisory employees, and board declined to designate as the exclusive bargaining agency a union whose membership included supervisory employees, certificate was a denial by board of union's request for authority to represent all employees, and thereafter union had no authority to represent supervisory employees in dealing with employer with respect to conditions of employment.—Sanford v. Boston Edison Co., 64 N.E.2d 631, 319 Mass. 55.

77. U.S.—Wilson Employees' Representation Plan v. Wilson & Co., D. C.Cal., 53 F.Supp. 23.

D.C.—Commercial Telegraphers' Union, A.F.L., v. Western Union Telegraph Co., D.C., 53 F.Supp. 90.

N.Y.—Florsheim Shoe Co. v. Retail Shoe Salesmen's Union of Brooklyn and Queens Local 287, 24 N. Y.S.2d 923, reversed on other grounds 27 N.Y.S.2d 883, 262 App. Div. 769, reversed on other grounds 42 N.E.2d 480, 288 N.Y. 188.

78. U.S.—Wallace Corporation v. N. L. R. B., C.C.A.4, 141 F.2d 87, affirmed 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Richwood Clothespin & Dish Worker's Union v. N. L. R. B., C. C.A.4, 141 F.2d 87, affirmed 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216—Utah Copper Co. v. N. L. R. B., C. C.A.10, 139 F.2d 788, certiorari de-

power later to declare the union to be company dominated and to order its disestablishment.[79] The dismissal of a prior application of a union to represent all of the employees does not bar subsequent proceedings resulting in the determination that a smaller number in a certain department constitutes an appropriate unit.[80] Where a union whose request to be recognized as bargaining agent is refused because of an order of the board requiring the employer to bargain with another union, the union is in the same position after the order has been held improper by a reviewing court as though the order had not been issued.[81]

The successful union is not required to negotiate with the employer immediately after it has been certified as bargaining agent, and a delay does not justify the employer's refusal to bargain with it thereafter.[82]

Certification as affecting the duration of the authority of the bargaining representative is considered infra § 28 (36).

§ 28(35). Extent of Authority and Duties of Representative

a. In general

b. Grievances and individual claims

a. In General

Under labor relations statutes the collective bargaining representative has the exclusive authority to represent all the employees in the unit for purposes of collective bargaining, and it must act fairly and impartially on behalf of all members of the unit.

Under labor relations statutes the representative chosen by the majority of the employees in the bargaining unit has the exclusive authority to represent all the employees in the unit for purposes of collective bargaining,[83] whether or not all the employees are members of the union which is the representative;[84] and a minority union has no authority to represent its members in negotiations with the employer.[85] The representative has whatever pow-

nied Independent Ass'n of Mill Workers v. N. L. R. B., 64 S.Ct. 946, 322 U.S. 731, 88 L.Ed. 1566—N. L. R. B. v. Delaware-New Jersey Ferry Co., C.C.A.3, 128 F.2d 130—N. L. R. B. v. Stone, C.C.A.7, 125 F.2d 752, certiorari denied Stone v. N. L. R. B., 63 S.Ct. 44, 317 U.S. 649, 87 L.Ed. 522.

79. U.S.—Wallace Corporation v. N. L. R. B., C.C.A.4, 141 F.2d 87, affirmed 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Richwood Clothespin & Dish Worker's Union v. N. L. R. B., C.C.A.4, 141 F.2d 87, affirmed 65 S. Ct. 238, 323 U.S. 248, 89 L.Ed. 216.

Discharges under closed-shop agreement

Use of closed-shop agreement by union with acquiescence of employer to obtain discharge of employees because of previous activities in behalf of opposing union justified inquiry by labor relations board into early history of union's organization with assistance of supervisory employees to determine whether it was fit bargaining agency, even though meantime elected as such by election of employees and certified by board.—Wallace Corporation v. N. L. R. B., C.C.A.4, 141 F.2d 87, affirmed 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Richwood Clothespin & Dish Worker's Union v. N. L. R. B., C.C.A.4, 141 F.2d 87, affirmed 65 S.Ct. 238, 323 U. S. 248, 89 L.Ed. 216.

80. U.S.—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495.

81. U.S.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311.

82. U.S.—Motor Valve & Mfg. Co. v. N. L. R. B., C.C.A.6, 149 F.2d 247.

83. U.S.—Elgin, J. & E. Ry. Co. v. Burley, Ill., 65 S.Ct. 1282, 325 U. S. 711, 89 L.Ed. 1886, opinion adhered to 66 S.Ct. 721, 327 U.S. 661, 90 L.Ed. 928—N. L. R. B. v. Draper Corporation, C.C.A.4, 145 F.2d 199, 156 A.L.R. 989—N. L. R. B. v. Clinton E. Hobbs Co., C.C.A.1, 132 F.2d 249—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-K.-T. R. R. v. Missouri-K.-T. R. Co., C.C.A.Tex., 132 F.2d 91, reversed on other grounds 64 S.Ct. 146, 320 U.S. 323, 88 L.Ed. 76—North Electric Mfg. Co. v. N. L. R. B., C.C.A.6, 123 F.2d 887, certiorari denied 62 S.Ct. 906, 315 U.S. 818, 86 L.Ed. 1215—Atlantic Coast Line R. Co. v. Pope, C.C.A.4, 119 F.2d 39—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 113 F.2d 85—Howard v. Thompson, D.C.Mo., 72 F.Supp. 695.

Kan.—Betts v. Easley, 169 P.2d 831, 161 Kan. 459.

N.Y.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 6 N.Y.S.2d 775, 168 Misc. 948, affirmed 7 N.Y.S.2d 1007, 255 App.Div. 840, and 7 N.Y.S.2d 1008, 255 App.Div. 840, affirmed 20 N.E. 2d 390, 280 N.Y. 194.

Wis.—International Union, United Auto, Aircraft & Agr. Implement Workers of America, Local 180, C.I.O., v. J. I. Case Co., 26 N.W.2d 305, 250 Wis. 63.

Settlement of dispute

Under the Railway Labor Act, 45 U.S.C.A. § 151 et seq. where employees of a craft have organized and selected a representative, negotiations for settlement of a dispute between employees and a carrier are to be carried on by representative selected by the organization.

U.S.—Patterson v. Chicago & E. I. R. Co., D.C.Ill., 50 F.Supp. 334.

Okl.—Murphree v. Brotherhood of R. R. Trainmen, 173 P.2d 926, 197 Okl. 627.

84. U.S.—Lewellyn v. Fleming, C. C.A.Okl., 154 F.2d 211, certiorari denied 67 S.Ct. 45, 329 U.S. 715, 91 L.Ed. ——.

Mass.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.

Wis.—Wisconsin Employment Relations Board v. International Ass'n of Bridge, Structural and Ornamental Iron Workers and Shopmen's Local No. 471, 6 N.W.2d 339, 241 Wis. 286, 144 A.L.R. 430.

Seniority rights

The power to contract with reference to seniority rights of nonunion employee exists only in exclusive bargaining agent as long as the agent acts within the law, and court is not empowered to contract for nonunion employee or to make a new contract.—Hess v. Trailer Co. of America, 17 Ohio Supp. 39.

85. Kan.—Betts v. Easley, 169 P.2d 831, 161 Kan. 459.

Wash.—Bloedel Donovan Lumber Mills v. International Woodworkers of America, Local No. 46, 102 P.2d 270, 4 Wash.2d 62.

er is necessary fully to perform its functions,[86] and it is authorized to make contracts and agreements which are binding on all employees of the bargaining unit[87] and to modify such agreements,[88] but ordinarily it is the agent of the employees only for the limited purpose of securing for them fair and just wages and good working conditions[89] and it has no power to surrender personal rights of the employees.[90]

Where the employer deals with the representative of the employees he may assume that the representative is acting with full authority and that agreements with him are valid,[91] and after a contract has been entered into between the union and employer the court may not determine whether the procedure agreed on among members with respect to specific authority of the bargaining agent has been followed.[92] A union is not an agent of a nonmember employee for purposes other than collective bargaining.[93] The same organization may represent different groups of employees as long as their interests do not conflict.[94]

The representative must act fairly and impartially[95] on behalf of all members of the bargaining unit,[96] the majority as well as the minority,[97] regardless of union affiliations or want of them,[98] and the representative is without power to discriminate against employees in the unit on the ground of race or color[99] even though the discrimination purports

86. Mass.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.

87. Neb.—Brisbin v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277, 134 Neb. 517.

Closed shop

Where a closed shop is not prohibited by statute, or where express consent of the employees is not required by statute, a labor union that has been duly designated as exclusive collective bargaining agency of all employees has power to agree on behalf of all such employees on a closed shop.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.

Open shop

A union may agree to an open shop.—N. L. R. B. v. National Licorice Co., 104 F.2d 655, modified on other grounds National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799.

88. U.S.—Gaskill v. Roth, C.C.A. Neb., 151 F.2d 366, certiorari denied 66 S.Ct. 896, 327 U.S. 798, 90 L.Ed. 1024, rehearing denied 66 S. Ct. 975, 328 U.S. 876, 90 L.Ed. 1645.

89. Ky.—Piercy v. Louisville & N. R. Co., 248 S.W. 1042, 198 Ky. 477, 33 A.L.R. 322.

63 C.J. p 671 notes 57, 58.

90. Ky.—Braddom v. Three Point Coal Corporation, 157 S.W.2d 349, 288 Ky. 734—Piercy v. Louisville & N. R. Co., 248 S.W. 1042, 198 Ky. 477.

91. U.S.—Division 525, Order of Railway Conductors of America, v. Gorman, C.C.A.Ark., 133 F.2d 273.

Ky.—Day v. Louisville & N. R. Co., 175 S.W.2d 347, 295 Ky. 679.

92. Ky.—Day v. Louisville & N. R. Co., supra.

Regularity of procedure

It is not within province of court to determine regularity of procedure which prompted representative of trainmen to enter into agreement with railroad.—Gaskill v. Roth, C.C. A.Neb., 151 F.2d 366, certiorari denied 66 S.Ct. 896, 327 U.S. 798, 90 L. Ed. 1024, rehearing denied 66 S.Ct. 975, 328 U.S. 876, 90 L.Ed. 1647—Division 525, Order of Railway Conductors of America v. Gorman, C.C. A.Ark., 133 F.2d 273.

93. Wash.—Wicklund v. Commissioner of Unemployment Compensation and Placement, 138 P.2d 876, 18 Wash.2d 206, 148 A.L.R. 1298.

94. U.S.—Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees v. Virginian Ry. Co., C.C. A.Va., 125 F.2d 853.

95. U.S.—Wallace Corporation v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Richwood Clothespin & Dish Workers' Union v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216—Steele v. Louisville & N. R. Co., Ala., 65 S.Ct. 226, 323 U.S. 192, 89 L.Ed. 173—Lewellyn v. Fleming, C.C.A.Okl., 154 F.2d 211, certiorari denied 67 S.Ct. 45, 329 U.S. 715, 91 L.Ed. —— —Hughes Tool Co. v. N. L. R. B., C.C.A.5, 147 F.2d 69, 158 A.L.R. 1165.

96. U.S.—Wallace Corporation v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Richwood Clothespin & Dish Workers' Union v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216—Steele v. Louisville & N. R. Co., Ala., 65 S.Ct. 226, 323 U.S. 192, 89 L.Ed. 173—Gauweiler v. Elastic Stop Nut Corp. of America, C.C.A.N.J., 162 F.2d 448.

Kan.—Betts v. Easley, 169 P.2d 831, 161 Kan. 459.

N.Y.—Greenwald v. Chiarella, 57 N. Y.S.2d 765, 185 Misc. 762, reversed on other grounds 63 N.Y.S.2d 49, 271 App.Div. 213.

97. U.S.—Steele v. Louisville & N. R. Co., Ala., 65 S.Ct. 226, 323 U.S. 192, 89 L.Ed. 173.

Fulfillment of purpose of statute

The declared purposes of the Railway Labor Act to avoid any interruption to commerce or to the operation of any carrier engaged therein by means of the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions could hardly be attained if a substantial minority of a craft were denied the right to have their interests considered at the conference table and if the final result of the bargaining process were to be the sacrifice of the rights of the minority by the action of a representative chosen by the majority.—Steele v. Louisville & N. R. Co., supra.

98. U.S.—Steele v. Louisville & N. R. Co., supra—Hughes Tool Co. v. N. L. R. B., C.C.A.5, 147 F.2d 69, 158 A.L.R. 1165.

Consideration of requests and opportunity for hearing

The union must consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining with the employer and give them notice of, and opportunity for, hearing on its proposed action.—Steele v. Louisville & N. R. Co., Ala., 65 S.Ct. 226, 323 U.S. 192, 89 L.Ed. 173.

Seniority

The union which is the bargaining agent for the employees owes the same duty to protect the seniority rights of nonmembers of the union as it does the members of the union.—Griffin v. Gulf & S. I. R. Co., 21 So.2d 814, 198 Miss. 458.

99. U.S.—Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Va., 65 S.Ct. 235, 323 U.S. 210, 89 L.Ed. 187, conformed to, C.C.A., 148 F.2d 403—Steele v. Louisville & N. R. Co., Ala., 65 S.Ct. 226, 323 U.S. 192, 89 L.Ed. 173—Brotherhood of Lo-

to be based on another ground.[1] However, the representative is not barred from making contracts which may have unfavorable effects on some employees in the unit,[2] and variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, and competence and skill in the performance of work, are within the scope of the representative's authority.[3]

b. Grievances and Individual Claims

In accordance with statutory provisions, the collective bargaining agent does not have the exclusive right to handle grievances unless they involve collective bargaining or an interpretation of the collective agreement.

Under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes, the collective bargaining agent does not have the exclusive right to handle grievances unless they involve collective bargaining or an interpretation of the collective agreement,[4] although he has the right to attend the hearing to safeguard the collective bargain[5] if he has not waived this right.[6] Individual employees or groups of employees may negotiate with the employer concerning grievances,[7] and an inexperienced employee may be assisted in presenting his grievance by a more experienced friend,[8] but an employee may not present a grievance through a union other than the one which is the collective bargaining agent.[9]

Under the Railway Labor Act, 45 U.S.C.A. § 151 et seq, the bargaining agent does not have exclusive authority, in the absence of authorization over and above that given by the statute, to settle grievances of individual employees[10] or to settle claims of individual employees for damages caused by the employer's breach of contract.[11] The employee may conduct negotiations for the settlement of his individual claim or grievance either personally[12] or through a chosen representative[13] which may or may not be a labor organization,[14] and he may choose a labor organization which is not the collective bargaining agent.[15] The mere making of a complaint by a railroad employee through the union does not as a matter of law amount to final authorization to settle the claim,[16] but custom and practice in the railroad world may be adequate as a basis of authority for the union to settle the claim or

comotive Firemen and Enginemen v. Tunstall, C.C.A.Va., 163 F.2d 289.

Cal.—Williams v. International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America, 165 P.2d 903, 27 Cal.2d 586.

Kan.—Betts v. Easley, 169 P.2d 831, 161 Kan. 459.

1. **Nonpromotability**

Brotherhood, which was collective bargaining agent for both firemen who were members and negro firemen who were not members, was not authorized to enter into a contract with railroad which sacrificed seniority and other rights of negro firemen, merely because the contract purported to base the discrimination on nonpromotability of firemen to eningeers, where the nonpromotability was itself based on race.—Brotherhood of Locomotive Firemen and Enginemen v. Tunstall, C.C.A.Va., 163 F.2d 289.

2. U.S.—Steele v. Louisville & N. R. Co., Ala., 65 S.Ct. 226, 323 U.S. 192, 89 L.Ed. 173—Lewellyn v. Fleming, C.C.A.Okl., 154 F.2d 211, certiorari denied 67 S.Ct. 45, 329 U.S. 715, 91 L.Ed. ——.

3. U.S.—Steele v. Louisville & N. R. Co., Ala., 65 S.Ct. 226, 323 U.S. 192, 89 L.Ed. 173—Lewellyn v. Fleming, C.C.A.Okl., 154 F.2d 211, certiorari denied 67 S.Ct. 45, 329 U. S. 715, 91 L.Ed. ——.

Date of commencement of seniority rights

Collective bargaining agent certified by National Labor Relations Board had right to contract with employer fixing seniority rights of former employees of dissolved corporation as of date when merger between the dissolved corporation and the employer was finally consummated rather than as of date of hiring by the dissolved corporation.—Hess v. Trailer Co. of America, 17 Ohio Supp. 39.

4. U.S.—Hughes Tool Co. v. N. L. R. B., C.C.A.5, 147 F.2d 69, 158 A.L.R. 1165.

5. U.S.—Hughes Tool Co. v. N. L. R. B., supra.

6. **Waiver by contract**

U.S.—Hughes Tool Co. v. N. L. R. B., supra.

7. U.S.—Hughes Tool Co. v. N. L. R. B., supra—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 113 F.2d 85.

8. U.S.—Hughes Tool Co. v. N. L. R. B., C.C.A.5, 147 F.2d 69, 158 A.L.R. 1165.

9. U.S.—Hughes Tool Co. v. N. L. R. B., supra.

Wash.—Bloedel Donovan Lumber Mills v. International Woodworkers of America, Local No. 46, 102 P.2d 270, 4 Wash.2d 62.

10. U.S.—Elgin J. & E. Ry. Co. v. Burley, Ill., 65 S.Ct. 1282, 325 U.S. 711, 89 L.Ed. 1886, opinion adhered to 66 S.Ct. 721, 327 U.S. 661, 90 L. Ed. 928—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pac. Co. v. Southern Pac. Co., C.C.A.Cal., 132 F.2d 194, reversed on other grounds 64 S.Ct. 142, 320 U.S. 338, 88 L.Ed. 85.

Okl.—Murphree v. Brotherhood of R. R. Trainmen, 173 P.2d 926, 197 Okl. 627.

11. U.S.—Elgin, J. & E. Ry. Co. v. Burley, Ill., 65 S.Ct. 1282, 325 U. S. 711, 89 L.Ed. 1886, opinion adhered to 66 S.Ct. 721, 327 U.S. 661, 90 L.Ed. 928—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pac. Co. v. Southern Pac. Co., C.C.A.Cal., 132 F.2d 194, reversed on other grounds 64 S.Ct. 142, 320 U.S. 338, 88 L.Ed. 85.

12. U.S.—Estes v. Union Terminal Co., C.C.A.Tex., 89 F.2d 768.

13. U.S.—Estes v. Union Terminal Co., supra.

14. U.S.—Estes v. Union Terminal Co., supra.

15. U.S.—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pac. Co. v. Southern Pac. Co., C.C.A.Cal., 132 F.2d 194, reversed on other grounds 64 S. Ct. 142, 320 U.S. 338, 88 L.Ed. 85.

16. Okl.—Murphree v. Brotherhood of R. R. Trainmen, 173 P.2d 926, 197 Okl. 627.

grievance where the individual employee does not protest the representation.[17]

Where special authority is not given to the collective bargaining agent to represent an employee for the settlement of a claim or grievance, the bargaining agent has no legal duty to act for the employee in the matter.[18]

§ 28(36). Duration and Termination of Authority of Representative

a. In general
b. Loss of majority

a. In General

The employees' designation of their bargaining representative, or an order or decree requiring the employer to bargain with the designated representative, does not grant a permanent status; the status of the designated representative continues until it is terminated in some legally effective manner.

The employees' designation of their bargaining representative or an order or decree requiring the employer to bargain with the designated representative, does not grant a permanent status,[19] and the employees have the right to revoke the designation;[20] the status of the designated representative continues until it is terminated in some legally effective manner.[21] There must be some measure of permanence in the choice of a bargaining representative,[22] and, unless extraordinary circumstances intervene, the certification of a union as the bargaining representative is effective for a reasonable period of time after its issuance,[23] regardless of the fact that conditions may have materially changed after the certification.[24] The labor relations board may determine whether the period of time is sufficient[25] or whether changed conditions invalidate an

17. U.S.—Elgin, J. & E. Ry. Co. v. Burley, Ill., 66 S.Ct. 721, 327 U.S. 661, 90 L.Ed. 928.

18. Okl.—Murphree v. Brotherhood of R. R. Trainmen, 173 P.2d 926. 197 Okl. 627.

19. U.S.—Franks Bros. v. N. L. R. B., 64 S.Ct. 817, 321 U.S. 702, 88 L.Ed. 1020—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 139 F.2d 984, certiorari denied 64 S.Ct. 944, 322 U.S. 729, 88 L.Ed. 1564—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 111 F.2d 474.

Certification for specified time

Where, by statute, certification of a labor union as bargaining representative is for a specified period of time, the authority of the labor union to represent the employees terminates at the expiration of that time if, when its majority status is challenged, it does not prove its claim to represent the majority.—In re G. C. Murphy Co., 51 Pa.Dist. & Co. 535—Petition of Koehler, Com.Pl., 92 Pittsb.Leg.J. 587.

20. U.S.—N. L. R. B. v. Hollywood-Maxwell Co., C.C.A.9, 126 F.2d 815—International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co., C.C.A.Mo., 118 F.2d 615, certiorari denied 62 S.Ct. 75, 314 U.S. 639, 86 L.Ed. 513.
Pa.—Petition of Koehler, Com.Pl., 92 Pittsb.Leg.J. 587.

21. U.S.—N. L. R. B. v. Scullin Steel Co., C.C.A.8, 161 F.2d 143—N. L. R. B. v. Appalachian Electric Power Co., C.C.A.4, 140 F.2d 217.
N.J.—Dooley v. Lehigh Valley R. Co. of Pennsylvania, 21 A.2d 334, 130 N.J.Eq. 75, affirmed 25 A.2d 893, 131 N.J.Eq. 468, certiorari denied Lehigh Valley R. Co. of Pennsylvania v. Dooley, 63 S.Ct. 45, 317 U.S. 649, 87 L.Ed. 523.
Wis.—Wisconsin Employment Relations Board v. International Ass'n of Bridge, Structural and Ornamental Iron Workers and Shopmen's Local No. 471, 6 N.W.2d 339, 241 Wis. 286, 144 A.L.R. 430.

Automatic extension of agreement

Where collective bargaining agreement between company and labor union provided that agreement should be automatically renewed for another period of three years unless either party should notify other party at least ninety days before expiration of the then current term that it elected to terminate the agreement, and rival labor union did not petition for an election to determine appropriate representative of employees until after expiration of period during which notice to terminate agreement might have been given, employees in effect made choice that union which signed agreement was to be their representative for next three years or until another representative was chosen, and such union continued as exclusive bargaining agent.—Triboro Coach Corporation v. New York State Labor Relations Board, 36 N.E.2d 315, 286 N.Y. 314, 144 A.L.R. 410, motion denied 39 N.E.2d 276, 287 N.Y. 647, 144 A.L.R. 410.

Presumption arises that organization chosen by election continues to represent unit, but such presumption may be rebutted.
U.S.—N. L. R. B. v. P. Lorillard Co., C.C.A.6, 117 F.2d 921, reversed on other grounds 62 S.Ct. 397, 314 U.S. 512, 86 L.Ed. 1740.
N.J.—Dooley v. Lehigh Valley R. Co. of Pennsylvania, 21 A.2d 334, 130 N.J.Eq. 75, affirmed 25 A.2d 893, 131 N.J.Eq. 468, certiorari denied Lehigh Valley R. Co. of Pennsylvania v. Dooley, 63 S.Ct. 45, 317 U.S. 647, 87 L.Ed. 523.

22. U.S.—N. L. R. B. v. Century Oxford Mfg. Corporation, C.C.A.2, 140 F.2d 541, certiorari denied 65 S.Ct. 40, 323 U.S. 714, 89 L.Ed. 574—N. L. R. B. v. Appalachian Electric Power Co., C.C.A.4, 140 F.2d 217.

23. U.S.—Franks Bros. v. N. L. R. B., 64 S.Ct. 817, 321 U.S. 702, 88 L.Ed. 1020—N. L. R. B. v. Prudential Ins. Co. of America, C.C.A.6, 154 F.2d 385—N. L. R. B. v. Blair Quarries, C.C.A.4, 152 F.2d 25—N. L. R. B. v. Appalachian Electric Power Co., C.C.A.4, 140 F.2d 217.

24. U.S.—N. L. R. B. v. Prudential Ins. Co. of America, C.C.A.6, 154 F.2d 385.

The facts in each case must determine the date when the effect of the certification of a bargaining representative for employees expires, and the rule is followed in case of a reduction in the number of employees to the point where union no longer represents a majority.—N. L. R. B. v. Gatke Corp., C.C.A.7, 162 F.2d 252.

25. U.S.—N. L. R. B. v. Century Oxford Mfg. Corp., C.C.A.2, 140 F.2d 541, certiorari denied 65 S.Ct. 40, 323 U.S. 714, 89 L.Ed. 574.
Discretion to order new election see supra § 28 (33) a.

Extent of discretion

Provision of state labor relations act authorizing state board to determine the life of service of representatives selected for purposes of collective bargaining does not commit to the board an undefined discretion to permit employees to change bargaining representatives for any rea-

existing certification.[26]

After a considerable period of time has elapsed since the certification, the employees may seek in a proper proceeding certification of another bargaining agent,[27] and the labor relations board may in a proper proceeding take steps in recognition of changed situations which make appropriate changed bargaining relationships.[28] The labor relations board should on request make a new determination as to whether the bargaining representative continues to be the choice of the majority of employees,[29] and where the employees' revocation is freely and voluntarily made it must be respected by the board[30] even though the revocation is joined in by employees formerly connected with a dominated organization.[31] An employee must give direct expression of his desire to revoke the right of the union to represent him,[32] and an employee's failure to pay union dues[33] or his return to work even though a strike has been called by the union[34] does not of itself indicate a genuine desire to be unrepresented by the union. Where employees join another union after the expiration of the collective bargaining agreement, the authority of the union which negotiated the agreement is ended.[35]

Where a revocation is not freely and voluntarily made, the authority of the bargaining representative continues.[36]

A change in business by the employer does not operate to terminate the authority of the bargaining agent to represent the employees.[37]

b. Loss of Majority

Generally, after a union is shown to be no longer the choice of the majority of employees, it no longer possesses the authority to represent the employees for collective bargaining purposes; but where the union's loss of majority has been caused by unfair labor practices of the employer the status of the union as bargaining representative is not thereby terminated.

Generally, after a union is shown to be no longer the choice of the majority of the employees, it no longer possesses the authority to represent the employees for collective bargaining purposes.[38] An employer acting in good faith may properly change the personnel even though the union's majority is thereby reduced,[39] and where, by reason of valid discharges by the employer, the union's majority has been dissipated the union is no longer in a position to demand collective bargaining on behalf of the employees.[40]

son at any moment, in view of further provision that authority so conferred on the board should be exercised through such rules as may be necessary to carry out provisions of the act.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 20 N.E.2d 390, 280 N.Y. 194.

26. U.S.—N. L. R. B. v. Swift & Co., C.C.A.3, 162 F.2d 575—N. L. R. B. v. Prudential Ins. Co. of America, C.C.A.6, 154 F.2d 385.

27. U.S.—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 139 F.2d 984, certiorari denied 64 S.Ct. 944, 322 U.S. 729, 88 L.Ed. 1564—N. L. R. B. v. Aluminum Products Co., C.C.A.7, 120 F.2d 567—N. L. R. B. v. Highland Park Mfg. Co., C.C.A. 4, 110 F.2d 632—Hamilton-Brown Shoe Co. v. N. L. R. B., C.C.A.8, 104 F.2d 49.

28. U.S.—Franks Bros. v. N. L. R. B., 64 S.Ct. 817, 321 U.S. 702, 88 L.Ed. 1020—N. L. R. B. v. Prudential Ins. Co. of America, C.C.A. 6, 154 F.2d 385.

29. U.S.—N. L. R. B. v. Karp Metal Products Co., C.C.A.2, 134 F.2d 954, certiorari denied 64 S.Ct. 941, 322 U.S. 728, 88 L.Ed. 1564.

30. U.S.—N. L. R. B. v. Hollywood-Maxwell Co., C.C.A.9, 126 F.2d 815 —Hamilton-Brown Shoe Co. v. N. L. R. B., C.C.A.8, 104 F.2d 49.

31. U.S.—N. L. R. B. v. Hollywood-Maxwell Co., C.C.A.9, 126 F.2d 815.

32. U.S.—International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co., C.C.A.Mo., 118 F.2d 615, certiorari denied 62 S.Ct. 75, 314 U.S. 639, 86 L.Ed. 513.

33. U.S.—N. L. R. B. v. National Seal Corporation, C.C.A.2, 127 F. 2d 776.

Wis.—Wisconsin Employment Relations Board v. International Ass'n of Bridge, Structural and Ornamental Iron Workers and Shopmen's Local No. 471, 6 N.W.2d 339, 241 Wis. 286, 144 A.L.R. 430.

34. U.S.—International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co., C.C.A.Mo., 118 F.2d 615, certiorari denied 62 S.Ct. 75, 314 U. S. 639, 86 L.Ed. 513.

N.Y.—New York State Labor Relations Board v. Astoria Casket Co., 17 N.Y.S.2d 13.

35. R.I.—McGee v. Local No. 682 of Brotherhood of Painters, Decorators and Paperhangers of America, A. F. of L., 38 A.2d 303, 70 R.I. 200.

36. U.S.—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292.

37. U.S.—N. L. R. B. v. National Mineral Co., C.C.A.7, 134 F.2d 424, certiorari denied National Mineral Co. v. N. L. R. B., 64 S.Ct. 58, 320 U.S. 753, 88 L.Ed. 448.

38. U.S.—N. L. R. B. v. Inter-City Advertising Co., C.C.A.4, 154 F.2d 244—Oughton v. N. L. R. B., C.C.A. 3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198.

39. U.S.—N. L. R. B. v. Inter-City Advertising Co., C.C.A.4, 154 F.2d 244.

40. U.S.—N. L. R. B. v. Inter-City Advertising Co., supra—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

Breach of contract

Where employees breached their contract with employer who had lawfully secured others to fill the places of former employees and had recognized a new union which represented a majority of its employees, the old union which represented the former employees was no longer in a position thereafter to demand collective bargaining on behalf of the employees.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682.

Sit-down strikers

Where union was choice of majority of employees for purpose of collective bargaining at beginning of strike, but when employer resumed operations situation had changed by reason of valid discharge of sit-down strikers and filling of their positions with new men, order of Na-

An employer may not discredit a bargaining agent by a refusal to bargain and then take advantage of the resulting loss of membership as an excuse for refusal to recognize it as bargaining agent.[41] Where the union's loss of a majority has been caused by unfair labor practices of the employer, the status of the union as bargaining agent for the employees is not thereby terminated,[42] and the labor relations board may properly direct the employer to bargain collectively with the union.[43]

§ 28(37). Collective Bargaining Contracts

A collective bargaining agreement represents an accord between the employer and the bargaining representative of the employees as to terms which will govern hiring and work and pay. Ordinarily, it refers to general terms of employment rather than contracts of actual engagement or hiring.

A collective bargaining agreement represents an accord between the employer and the bargaining representative of the employees as to terms which will govern hiring and work and pay,[44] and it is not ipso facto invalid[45] as against ordinary claims of lack of consideration or want of mutuality.[46] Ordinarily, the term refers to general terms of employment rather than contracts of actual engagement or hiring,[47] and the accord is in the nature of a trade agreement

tional Labor Relations Board requiring employer after resumption of work to treat the union as representative of employees was improper.—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599.

41. U.S.—Medo Photo Supply Corp. v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007—Franks Bros. v. N. L. R. B., 64 S.Ct. 817, 321 U.S. 702, 88 L.Ed. 1020—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 139 F.2d 984, certiorari denied 64 S.Ct. 944, 322 U.S. 729, 88 L.Ed. 1564—Colorado Fuel & Iron Corporation v. N. L. R. B., C.C.A.10, 121 F.2d 165—N. L. R. B. v. George P. Pilling & Son Co., C.C.A.3, 119 F.2d 32—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—Bussmann Mfg. Co. v. N. L. R. B., C.C.A.8, 111 F.2d 783—N. L. R. B. v. Highland Park Mfg. Co., C.C.A.4, 110 F.2d 632.

Effect on collective bargaining

It cannot be assumed that an unremedied refusal to bargain collectively with an appropriate labor organization has no effect on collective bargaining.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., App. D.C., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

42. U.S.—N. L. R. B. v. Morris P. Kirk & Son, C.C.A.9, 151 F.2d 490, opinion supplemented 154 F.2d 110—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438—N. L. R. B. v. Cape County Milling Co., C.C.A.8, 140 F.2d 543, 152 A.L.R. 144—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 139 F.2d 984, certiorari denied 64 S.Ct. 944, 322 U.S. 729, 88 L.Ed. 1564—N. L. R. B. v. Crown Can Co., C.C.A.8, 138 F.2d 263, certiorari denied Crown Can Co. v. N. L. R. B., 64 S.Ct. 527, 321 U.S. 769, 88 L.Ed. 1065—N. L. R. B. v. Wm. Tehel Bottling Co., C.C.A.8, 129 F.2d 250—N. L. R. B. v. Dixie Motor Coach Corporation, C.C.A.5, 128 F.2d 201—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549—N. L. R. B. v. Chicago Apparatus Co., C.C.A.7, 116 F.2d 753—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681—N. L. R. B. v. Colten, C.C.A.6, 105 F.2d 179.

Mass.—R. H. White Co. v. Murphy, 38 N.E.2d 685, 310 Mass. 510.

Hired strikebreakers

Where employer forced its employees out on strike and hired strikebreakers to fill their places, employer, after striking employees were required to be reinstated, could not assert that union which a majority of its former employees had selected as their representative for collective bargaining was not their legal representative on ground that employer's present employees were not members of such union.—N. L. R. B. v. Poultrymen's Service Corporation, C.C.A.3, 138 F.2d 204.

43. U.S.—Franks Bros. v. N. L. R. B., 64 S.Ct. 817, 321 U.S. 702, 88 L.Ed. 1020—N. L. R. B. v. Swift & Co., C.C.A.3, 162 F.2d 575—N. L. R. B. v. Gatke Corp., C.C.A.7, 162 F.2d 252—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., C.C.A.8, 160 F.2d 388—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 139 F.2d 984, certiorari denied 64 S.Ct. 944, 322 U.S. 729, 88 L.Ed. 1564—N. L. R. B. v. Burke Mach. Tool Co., C.C.A.6, 133 F.2d 618—N. L. R. B. v. Moltrup Steel Products Co., C.C.A.3, 121 F.2d 612—N. L. R. B. v. Blanton Co., C.C.A.8, 121 F.2d 564—N. L. R. B. v. George P. Pilling & Son Co., C.C.A.3, 119 F.2d 32—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198.

44. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762.

D.C.—McNeil v. Peoples Life Ins. Co., Mun.App., 43 A.2d 293.

Similar statement

The terms "collective labor agreement" and "trade agreement" describe a bargaining agreement as to wages and conditions of employment entered into by a group of employees, usually organized into a brotherhood or union on one side, and a group of employers or a corporation on other side.

Neb.—Rentschler v. Missouri Pac. R. Co., 253 N.W. 694, 126 Neb. 493, 95 A.L.R. 1.

Or.—Shelley v. Portland Tug & Barge Co., 76 P.2d 477, 158 Or. 377.

Wash.—Clark v. Claremont Apartment Hotel Co., 141 P.2d 403, 19 Wash.2d 115.

45. Ohio.—H. Blum & Co. v. Landau, 155 N.E. 154, 23 Ohio App. 426.

Contract made pursuant to valid statute

U.S.—Wilson & Co. v. N. L. R. B., C.C.A.8, 162 F.2d 310.

46. Ariz.—Gates v. Arizona Brewing Co., 95 P.2d 49, 54 Ariz. 266.

Cal.—Montaldo v. Hires Bottling Co., 139 P.2d 666, 59 Cal.App.2d 642—Weber v. Nasser, App., 286 P. 1074.

Neb.—Rentschler v. Missouri Pac. R. Co., 253 N.W. 694, 126 Neb. 493, 95 A.L.R. 1.

47. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762—Gatliff Coal Co. v. Cox, C.C.A.Ky., 142 F.2d 876—Illinois Cent. R. Co. v. Moore, C.C.A.Miss., 112 F.2d 959, reversed on other grounds 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.

Cal.—Levy v. Superior Court in and for Los Angeles County, 104 P.2d 770, 15 Cal.2d 692, 129 A.L.R. 956.

rather than a contract of employment,[48] but there may be collective bargaining of actual individual employments.[49] A collective bargaining agreement is the joint and several contract of the members of the union made by the officers of the union as their agents,[50] but a union representing the employees may also be considered as a principal of the contract.[51] An employee is not entitled to notice of the negotiation of a collective bargaining contract by his representative.[52]

As a general rule, the labor relations board, or other administrative agency created by labor relations statutes, cannot make collective bargaining contracts or prescribe what shall be written in them,[53] and it has no equitable powers to reform a contract made under its supervision.[54] Likewise, the court has no power to make a contract for the parties.[55]

A legally called and properly conducted strike does not constitute duress enabling the employer to repudiate or avoid an agreement entered into in settlement of the strike,[56] even though the strike is called at the height of the employer's busy season.[57] The fact that a contract is made with a labor organization during the pendency of proceedings to restrain the employer from exerting pressure on the employees to join the organization does not render the contract invalid.[58]

An agreement may be modified by shortening the time for the termination of the agreement.[59] The practice of antedating contracts between the employer and the labor organization is inappropriate to a fair and proper administration of the National Labor Relations Act.[60]

The principle, that a party contemplating rescission must elect between that remedy and the course of pursuing his contract rights, applies to collective bargaining agreements,[61] and, where an employer operates under a collective bargaining contract for a considerable period of time before attempting to repudiate it for duress, he thereby ratifies the contract and loses the right to avoid it.[62]

An employer is entitled to demand a contract from the union which will permit the employer to do business at a profit.[63]

"Voluntary agreement." A contract negotiated with unorganized workers is not a "voluntary agreement" within some labor relations statutes,[64] but the term "voluntary agreement" means an agreement which is negotiated by representatives of the employees chosen without interference, restraint, or coercion on the part of the employer.[65]

Contract with improper representative. A contract entered into by an employer with an uncertified union which professes to represent the majority of the employees, but in fact does not represent them, has been held not to be a valid collective contract under the labor relations statute,[66] and, like-

D.C.—Earle Restaurant v. O'Meara, 160 F.2d 275.
Ga.—Jones v. Hearst Consolidated Publications, 10 S.E.2d 761, 190 Ga. 762.
Kan.—Swart v. Huston, 117 P.2d 576, 154 Kan. 182.
N.J.—Blonder v. United Retail Employees of Newark, Local No. 108, 15 A.2d 826, 128 N.J.Eq. 41.
Wash.—Clark v. Claremont Apartment Hotel Co., 141 P.2d 403, 19 Wash.2d 115.

48. U.S.—J. I. Case Co. v. National Labor Relations Board, 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762.

49. D.C.—Earle Restaurant v. O'Meara, 160 F.2d 275.

50. N.J.—Local 60 of Industrial Union of Maring and Shipbuilding Workers of America v. Welin Davit & Boat Corporation, 33 A.2d 708, 133 N.J.Eq. 551—Dooley v. Lehigh Valley R. Co. of Pennsylvania, 21 A.2d 334, 130 N.J.Eq. 75, affirmed 25 A.2d 893, 131 N.J.Eq. 468, certiorari denied Lehigh Valley R. Co. of Pennsylvania v. Dooley, 63 S.Ct. 45, 317 U.S. 649, 87 L.Ed. 523—Christiansen v. Local 680 of Milk Drivers and Dairy Employees of New Jersey, 10 A.2d 168, 126 N.J.Eq. 508.

51. U.S.—N. L. R. B. v. Knoxville Pub. Co., C.C.A.6, 124 F.2d 875.
Pa.—Madera v. Monongahela Ry. Co., Com.Pl., 9 Fay.L.J. 27.

52. Cal.—Austin v. Southern Pac. Co., 123 P.2d 39, 50 Cal.App.2d 292.

53. U.S.—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 123 F.2d 725.

54. N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, 14 N.Y.S.2d 74, 257 App.Div. 501.

55. U.S.—Gaskill v. Roth, C.C.A. Neb., 151 F.2d 366, certiorari denied 66 S.Ct. 896, 327 U.S. 798, 90 L.Ed. 1024, rehearing denied 66 S. Ct. 975, 328 U.S. 876, 90 L.Ed. 1645.

56. N.Y.—Wasserstein v. Beim, 294 N.Y.S. 439, 163 Misc. 160.

Threat of strike
U.S.—Howard v. Thompson, D.C.Mo., 72 F.Supp. 695.

57. N.Y.—Wasserstein v. Beim, 294 N.Y.S. 439, 163 Misc. 160.

58. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

59. U.S.—N. L. R. B. v. Pacific Greyhound Lines, C.C.A.9, 106 F.2d 867.

60. D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

61. N.Y.—Dubinsky v. Blue Dale Dress Co., 292 N.Y.S. 898, 162 Misc. 177.

62. Cal.—Pearson Candy Co. v. Waits, 165 P.2d 674, 27 Cal.2d 615.
N.Y.—Granata v. Ira S. Bushey & Sons, 63 N.Y.S.2d 47, 270 App.Div. 1026—Wasserstein v. Beim, 294 N.Y.S. 439, 163 Misc. 160.

63. U.S.—N. L. R. B. v. Lion Shoe Co., C.C.A.1, 97 F.2d 448.

64. Cal.—Nutter v. City of Santa Monica, 168 P.2d 741, 74 Cal.App.2d 292.

65. Cal.—Nutter v. City of Santa Monica, supra.

66. U.S.—N. L. R. B. v. McGough Bakeries Corp., C.C.A.5, 153 F.2d 420.
N.Y.—Busch Jewelry Co. v. United

wise, a contract with an employer dominated union is invalid under such statutes.[67]

§ 28(38). —— Duty to Enter into Contract

As a general rule, the labor relations statutes do not compel the employer or the employees to enter into a contract or agreement under the collective bargaining process, but they contemplate that contracts or agreements will be reached as a result of collective bargaining.

As a general rule, the labor relations statutes do not compel the employer or the employees to enter into a contract or agreement under the collective bargaining process,[68] or to agree in all particulars,[69] but the objective of such statutes is the making of contracts between employers and labor organizations,[70] and they contemplate that contracts or agreements will be reached as a result of collective bargaining.[71]

§ 28(39). —— Form of Contract; Signature

Generally, once an agreement has been reached between the employer and the representative of the employees, a good faith compliance with the collective bargaining provisions of labor relations statutes requires that the agreement be reduced to writing. The agreement need not be signed by each individual employee.

Generally, once an agreement has been reached between the employer and the representative of the employees, a good faith compliance with the collective bargaining provisions of labor relations statutes requires that the agreement be reduced to writing,[72] and the employer is not free to refuse to embody the agreement in a signed contract.[73] A statement by the employer that he will not sign a written contract with the employees' representative constitutes a refusal to bargain collectively,[74] even though at the time of the statement no understanding as to the terms of the agreement has been

Retail Employees' Union, Local 830, 10 N.Y.S.2d 519, 170 Misc. 482.

67. U.S.—N. L. R. B. v. Pacific Greyhound Lines, C.C.A.9, 106 F.2d 867—Hamilton-Brown Shoe Co. v. N. L. R. B., C.C.A.8, 104 F.2d 49.

Who may act as representative see supra § 28 (26).

68. U.S.—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S.Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352—Timken Roller Bearing Co. v. N. L. R. B., C.C.A. 6, 161 F.2d 949—Farmers Grain Co. v. Toledo, P. & W. R. R., C.C. A.Ill., 158 F.2d 109—N. L. R. B. v. Montgomery Ward & Co., C.C.A. 9, 133 F.2d 676, 146 A.L.R. 1045—N. L. R. B. v. P. Lorillard Co., C.C.A.6, 117 F.2d 921, reversed on other grounds 62 S.Ct. 397, 314 U.S. 512, 86 L.Ed. 380—N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A.7, 113 F.2d 621—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—Globe Cotton Mills v. N. L. R. B., C.C.A.5, 103 F.2d 91—N. L. R. B. v. Bell Oil & Gas Co., C.C. A.5, 91 F.2d 509, rehearing denied 93 F.2d 1010—Malone v. Gardner, C.C.A.W.Va., 62 F.2d 15.

Mass.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.

N.Y.—New York State Labor Relations Bd. v. Charles C. Loehmann Corp., 56 N.Y.S.2d 485, 269 App. Div. 566.

69. U.S.—N. L. R. B. v. Knoxville Pub. Co., C.C.A.6, 124 F.2d 875.

N.Y.—New York State Labor Relations Bd. v. Charles C. Loehmann Corp., 56 N.Y.S.2d 485, 269 App. Div. 566.

Closed Shop

Employer is not required to reach an agreement with the union on the issue of the closed shop.—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201.

70. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—Timken Roller Bearing Co. v. N. L. R. B., C.C.A.6, 161 F.2d 949.

71. U.S.—Timken Roller Bearing Co. v. N. L. R. B., supra—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—N. L. R. B. v. Highland Park Mfg. Co., C.C.A.4, 110 F.2d 632.

72. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—Wilson & Co. v. N. L. R. B., C.C.A.8, 115 F.2d 759—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—H. J. Heinz Co. v. N. L. R. B., C.C.A.6, 110 F.2d 843, affirmed 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309.

Both sides have the duty to embody the basis of the agreement in a contract as specific and definite as possible.—Globe Cotton Mills v. N. L. R. B., C.C.A.5, 103 F.2d 91.

73. U.S.—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309—Timken Roller Bearing Co. v. N. L. R. B., C.C.A.6, 161 F.2d 949—Gatliff Coal Co. v. Cox, C.C.A.Ky., 152 F.2d 52—N. L. R. B. v. American Creosoting Co., C.C. A.6, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U.S. 797, 88 L.Ed. 1086—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—N. L. R. B. v. National Seal Corporation, C.C.A.2, 127 F.2d 776—N. L. R. B. v. Knoxville Pub. Co., C.C.A.6, 124 F.2d 875—N. L. R. B. v. Blanton Co., C.C.A.8, 121 F.2d 564—Inland Lime & Stone Co. v. N. L. R. B., C.C.A.7, 119 F.2d 20—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Building Corporation v. N. L. R. B., 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—N. L. R. B. v. Highland Park Mfg. Co., C.C. A.4, 110 F.2d 632—Art Metals Const. Co. v. N. L. R. B., C.C.A.2, 110 F.2d 148—Cox v. Gatliff Coal Co., D.C.Ky., 59 F.Supp. 882.

Mass.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.

N.Y.—New York State Labor Relations Board v. Roosevelt Chevrolet Co., 30 N.Y.S.2d 381, 177 Misc. 468.

Before the rule was settled it was held in some cases that the employer could properly refuse to sign a written agreement.—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 849, certiorari denied 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119—M. H. Ritzwoller Co. v. N. L. R. B., C.C.A.7, 114 F.2d 432—Fort Wayne Corrugated Paper Co. v. N. L. R. B., C.C.A.7, 111 F.2d 869—Inland Steel Co. v. N. L. R. B., C.C.A. 7, 109 F.2d 9.

74. U.S.—N. L. R. B. v. Scullin Steel Co., C.C.A.8, 161 F.2d 143—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—N. L. R. B. v. Nation-

reached.[75] The purpose of a written agreement is to provide a statement of principles and rules for the orderly government of the employer-employee relationship in the future.[76]

The contract need not be signed by each individual employee.[77] An agreement between an association of employers and a labor organization need not be signed by the individual members of the association,[78] and a contract provision stating that it must be so signed may be waived where the parties recognize the validity of the contract and fully perform their obligations under it for a considerable period of time.[79]

§ 28(40). —— Validity or Propriety of Terms

In the absence of a statute otherwise providing, no particular terms need be included in the collective bargaining contract. A closed-shop or a union-shop provision may be included in the contract unless such a provision is prohibited by statute.

In the absence of a statute otherwise providing, no particular terms or provisions need be included in the collective bargaining contract between the employer and the employees,[80] but, where the employer is a public utility, it has been held that both the union and the employer must take into account the reasonable needs of the public.[81] Various provisions in collective bargaining contracts have been held to be valid,[82] including provisions for seniority rights,[83] provisions respecting the number of men to be employed,[84] provisions which prohibit the employer from using materials made up by nonunion labor,[85] provisions which prohibit the employer from giving work to a firm which employs nonunion labor,[86] provisions which give the union the right to call a strike in order to prevent the employer from doing work for another against whom a strike is pending,[87] and provisions in which the employees surrender the right to strike.[88] Provisions for arbitration of disputes have been held to be valid,[89] but they have also been held to be in-

al Seal Corp., C.C.A.2, 127 F.2d 776—N. L. R. B. v. Highland Park Mfg. Co., C.C.A.4, 110 F.2d 632.

75. U.S.—N. L. R. B. v. Register Pub. Co., C.C.A.9, 141 F.2d 156—N. L. R. B. v. Highland Park Mfg. Co., C.C.A.4, 110 F.2d 632.

Entering into negotiations with reservation not to reduce an agreement to writing or sign it is not bargaining in good faith.—N. L. R. B. v. Barrett Co., C.C.A.7, 135 F.2d 959.

76. U.S.—N. L. R. B. v. Highland Park Mfg. Co., C.C.A.4, 110 F.2d 632.

77. D.C.—Earle Restaurant v. O'Meara, 160 F.2d 275.

78. Mass.—National Overall Dry Cleaning Co. v. Yavner, 73 N.E.2d 744.

Acquiescence in revision of contract

Where an employer acquiesces in the revision of a contract made by the employers' association with the union, and ratifies the agreement by his conduct, it is unnecessary that he give express assent thereto.—H. Blum & Co. v. Landau, 155 N.E. 154, 23 Ohio App. 426.

79. Mass.—National Overall Dry Cleaning Co. v. Yavner, 73 N.E.2d 744.

80. U.S.—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 123 F.2d 725.

81. Kan.—Chicago, B. & Q. R. Co. v. Reed, 217 P. 322, 114 Kan. 190.

82. N.Y.—Bernstein v. Madison Baking Co., 38 N.Y.S.2d 811, 186 Misc. 474.

63 C.J. p 671 note 43.

Anticipation of unauthorized work stoppages

It is consistent with the principle of mutuality to anticipate unauthorized stoppages by groups of employees and, by providing for the adjustment of such complaints, to deprive the employer of the right to treat these incidents as an excuse for abrogating the contract.—Dubinsky v. Blue Dale Dress Co., 292 N.Y. S. 898, 162 Misc. 177.

Union officers on employer's premises

A contract providing that union officers may talk to union employees on premises of employer is not unlawful.—Hotel & Restaurant Employees Intern. Alliance v. Greenwood, Ala., 30 So.2d 696, certiorari denied 68 S.Ct. 349.

83. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287.

Colo.—Capra v. Local Lodge No. 273 of Brotherhood of Locomotive Firemen and Enginemen, 76 P.2d 738, 102 Colo. 63.

Conn.—Boucher v. Godfrey, 178 A. 655, 119 Conn. 622.

Mich.—Hartley v. Brotherhood of Railway and Steamship Clerks, Freight Handlers and Station Employees, 277 N.W. 885, 283 Mich. 201.

N.C.—Coley v. Atlantic Coast Line R. R., 19 S.E.2d 124, 221 N.C. 66.

Ohio.—Hess v. Trailer Co. of America, 17 Ohio Supp. 39.

Pa.—Madera v. Monongahela Ry. Co., Com.Pl., 9 Fay.L.J. 27.

Preferred seniority for union officers

Labor contract provision for top or preferred seniority for union officers and other officials is not arbitrary.—Gauweiler v. Elastic Stop Nut Corp. of America, C.C.A.N.J., 162 F.2d 448.

84. **Number of street car operatives**

Where a municipality has not exercised its regulatory powers concerning the number of operatives to be used in the operation of street cars within its confines, a trade union and a street railway company may contract in respect thereto.—Des Moines City Ry. Co. v. Amalgamated Ass'n of Street & Electric Ry. Employees of America, Division 441, of Des Moines, 213 N.W. 264, 204 Iowa 1195.

85. N.Y.—Maisel v. Sigman, 205 N. Y.S. 807, 123 Misc. 714.

86. N.Y.—Maisel v. Sigman, supra.

87. N.Y.—Maisel v. Sigman, supra.

88. U.S.—Western Union Telegraph Co. v. N. L. R. B., C.C.A.2, 113 F.2d 992.

89. Ala.—Bell v. Western Ry. of Alabama, 153 So. 434, 228 Ala. 328, followed in Keller v. Western Ry. of Alabama, 153 So. 441, 228 Ala. 336.

N.Y.—Application of Devery, 41 N.Y. S.2d 293, 266 App.Div. 213, affirmed 55 N.E.2d 370, 292 N.Y. 596.

Pa.—Campbell v. Industrial Union of Marine & Shipbuilding Workers of America, Com.Pl., 33 Del.Co. 204.

Tex.—Cousins v. Pullman Co., Civ. App., 72 S.W.2d 356.

Agreement fixing time for award

Under Railway Labor Act, 45 U.S. C.A. § 151 et seq, providing for the prompt and orderly settlement of all disputes concerning rates of pay or working conditions and that arbitration agreement should fix a period within which arbitrators should

valid under the common law[90] and under statutes.[91] The parties have a right to provide for the modification of the agreement if modification is necessary to comply with the terms of a subsequent certification of the bargaining agency by the labor relations board.[92] A contract which operates retroactively so as to require the discharge of union members who did not maintain their membership before the execution of the contract has been held not to be valid.[93] An agreement between the employer and the bargaining representative that employees who are not members of the union may bargain individually with the employer is void under the National Labor Relations Act.[94]

Checkoff of union dues as a valid provision of a collective bargaining agreement is considered infra § 103.

Closed shop or union shop. In the absence of a statute otherwise providing, a closed-shop[95] or union-shop[96] contract negotiated by the exclusive bargaining representative of the employees has been

make and file an award, the provision requiring a time limit to be set forth in the agreement is mandatory.—Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Norfolk Southern Ry. Co., C.C.A.N.C., 143 F.2d 1015, 154 A.L.R. 1385—Atchison, T. & S. F. Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen, C.C.A.7, 26 F.2d 413.

"Contract pertaining to labor"

A collective bargaining agreement whose function is to lay down relative duties or obligations to be observed between employer and union, and which contemplates that contract of hiring shall be a distinct and separate transaction, is not a "contract pertaining to labor" within statute providing that statutes with respect to arbitration shall not apply to contracts pertaining to labor; it does not become a contract pertaining to labor by the fact that the agreement and arbitration award based thereon provide that employer should reëmploy certain specified union members.—Levy v. Superior Court in and for Los Angeles County, 104 P.2d 770, 15 Cal.2d 692, 129 A.L.R. 956.

90. Ariz.—Gates v. Arizona Brewing Co., 95 P.2d 49, 54 Ariz. 266.

91. Ariz.—Gates v. Arizona Brewing Co., supra.

92. Mass.—Sanford v. Boston Edison Co., 64 N.E.2d 631, 319 Mass. 55.

93. U.S.—Colonie Fibre Co. v. N. L. R. B., C.C.A.2, 163 F.2d 65.

94. Wis.—International Union, United Auto. Aircraft & Agr. Implement Workers of America, Local 180, CIO, v. J. I. Case Co., 26 N.W.2d 305, 250 Wis. 63.

95. U.S.—Richwood Clothespin & Dish Worker's Union v. National Labor Relations Board, 141 F.2d 87, affirmed 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216—Wallace Corporation v. N. L. R. B., 141 F.2d 87, affirmed 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—M and M Wood Working Co. v. N. L. R. B., C.C.A.9, 101 F.2d 938.

Ala.—Hotel & Restaurant Employees Intern. Alliance v. Greenwood, 30 So.2d 696, certiorari denied 68 S. Ct. 349.

Colo.—Denver Local Union No. 13 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America v. Perry Truck Lines, 101 P.2d 436, 106 Colo. 25.

Fla.—International Ass'n of Machinists v. State ex rel. Watson, 15 So. 2d 485, 153 Fla. 672.

N.Y.—Williams v. Quill, 12 N.E.2d 547, 277 N.Y. 1, appeal dismissed 58 S.Ct. 650, 303 U.S. 621, 82 L.Ed. 1085—Farulla v. Ralph A. Freundlich, Inc., 277 N.Y.S. 47, 153 Misc. 738—Triboro Coach Corporation v. New York State Labor Relations Board, 22 N.Y.S.2d 1013, affirmed 27 N.Y.S.2d 83, 261 App.Div. 636, affirmed 36 N.E.2d 315, 286 N.Y. 314, 144 A.L.R. 410, motion denied 39 N.E.2d 276, 287 N.Y. 647, 144 A.L.R. 410—Domanick v. Triboro Coach Corporation, 18 N.Y.S. 2d 650.

Pa.—Brown v. Lehman, 15 A.2d 513, 141 Pa.Super. 467.

63 C.J. p 671 note 45.

Contract, written by arbitrator pursuant to agreement between single labor union and about three-fourths of manufacturers in certain industry to submit certain disputes to arbitration in form determined by regional labor board, was held not to violate National Industrial Recovery Act because of provision for closed shop.—Farulla v. Ralph A. Freundlich, Inc., 274 N.Y.S. 70, 152 Misc. 761.

Excluding nonunion men from entire industry

Labor organizations may contract with employer even to the extent of excluding others from the entire industry who are not union men.—Bucko v. Murray, 11 N.Y.S.2d 402, 170 Misc. 902, affirmed 16 N.Y.S.2d 537, 258 App.Div. 867, appeal denied 17 N.Y.S.2d 866, 258 App.Div. 943, affirmed 28 N.E.2d 35, 283 N.Y. 634.

Statute invalidating promise to join labor organization

The statutory provision, declaring employee's promise "to join or to remain a member of a labor organization" contrary to public policy, does not prohibit promise to join independent labor union, although term "labor organization," taken by itself, is broad enough to refer to either company union or independent union, as purpose of statute containing such provision was to prohibit company unions and interference by employers with collective bargaining by employees.—Shafer v. Registered Pharmacists Union Local 1172, 106 P.2d 403, 16 Cal.2d 379.

Statute prohibiting intimidation

Where labor union, acting within the scope of its authority, executed a closed-shop agreement with manufacturing association, the certified union's solicitation to nonmembers to become members of union in order to continue their employment was within the permissible area of economic conflict and did not violate statute prohibiting use of intimidation or force to prevent a person from entering into or continuing in the employment of any person.—Hamer v. Nashawena Mills, 52 N.E. 2d 22, 315 Mass. 160.

96. Or.—Markham & Callow v. International Woodworkers of America, Lumber & Sawmill Workers Union, 135 P.2d 727, 170 Or. 517.

Pa.—Roberts v. Penn Tobacco Co., Com.Pl., 34 Luz.Leg.Reg. 237.

Men subsequently employed

(1) Contract between employer and labor organization, requiring as a condition of employment membership in the organization with respect to all men subsequently employed was valid.—N. L. R. B. v. Electric Vacuum Cleaner Co., C.C.A. 6, 120 F.2d 611, reversed on other grounds 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775.

(2) Provision of contract between employer and labor organization exempting from requirement of union membership older employees whose

held to be valid, but such a contract has also been held to be illegal.[97] Closed-shop contracts, as affected by public policy, are considered in Contracts § 267.

Where the validity of such an agreement is upheld, an employer may properly agree to a closed shop[98] or union shop,[99] and, where the employees are not members of, or represented by, any collective bargaining agency, the employer may agree with an outside union to operate a union shop.[1] The provision of the National Labor Relations Act, 29 U.S.C.A. § 158 (3), that nothing in the act or any other statute of the United States shall preclude an employer from making an agreement with a labor organization requiring membership therein as a condition of employment, at least prior to the amendment of such statute, was held not to confer authority to enter into a closed-shop agreement but merely to remove what otherwise might be considered restrictions on such an agreement.[2] In considering the question whether a closed-shop agreement in a war industry in time of war hinders the war effort and should not be upheld, the operation of the agreement must be viewed as a whole.[3]

In order that a closed-shop or union-shop agreement may be valid under some labor relations statutes, the labor organization must be one which is not established, maintained, or assisted by any unfair labor practice, and one which is the representative of a majority of employees in the unit when the agreement is made.[4] Thus, a closed-shop or union-shop agreement with a union assisted or dominated by the employer,[5] or with an uncertified union which does not represent the majority of employees in the appropriate bargaining unit,[6] is invalid, but, if the union properly represents the employees, the agreement is not invalidated by the fact that the union has not been certified by the labor relations board.[7] The employer has the legal duty to reject the demands for a closed-shop by

unwillingness to join the labor organization was preventing the settlement of a strike did not affect the validity of the contract.—N. L. R. B. v. Electric Vacuum Cleaner Co., supra.

Preference of employment

A steamship company's contract to give preference of employment to members of seamen's union, of which majority of company's employees were members, was valid.—Waterman Steamship Corporation v. N. L. R. B., C.C.A.5, 103 F.2d 157, certiorari granted N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 95, 308 U.S. 534, 84 L.Ed. 450, reversed on other grounds 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L. Ed. 1036.

97. N.J.—International Ticket Co. v. Wendrich, 193 A. 808, 122 N. J.Eq. 222, affirmed 196 A. 474, 123 N.J.Eq. 172.

98. U.S.—N. L. R. B. v. Clinton Woolen Mfg. Co., C.C.A.6, 141 F. 2d 753—N. L. R. B. v. Lion Shoe Co., C.C.A.1, 97 F.2d 448.

Mass.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.

A partial closed-shop provision in agreement with employees' association did not show discrimination against union, particularly where employer offered union a closed-shop provision which union was unable or unwilling to accept.—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C. A.7, 121 F.2d 602.

99. Or.—Stone Logging & Contracting Co. v. International Woodworkers, of America, Columbia District Council No. 5, 135 P.2d 759, 171 Or. 13.

1. Ill.—Schuster v. International Ass'n of Machinists, Auto Mechanics Lodge No. 701, 12 N.E.2d 50, 293 Ill.App. 177.

Wis.—United Shoe Workers of America, Local 132, v. Wisconsin Labor Relations Board, 279 N.W. 37, 227 Wis. 569—American Furniture Co. v. I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, 268 N.W. 250, 222 Wis. 338, 106 A.L.R. 335.

2. Wis.—International Broth. of Paper Makers, Local No. 66, A. F. of L. v. Wisconsin Employment Relations Bd., 24 N.W.2d 672, 249 Wis. 362—International Brotherhood of Electrical Workers, Local No. 953, A. F. of L., v. Wisconsin Employment Relations Board, 15 N.W.2d 823, 245 Wis. 532.

3. Fla.—International Ass'n of Machinists v. State ex rel. Watson, 15 So.2d 485, 153 Fla. 672.

4. U.S.—N. L. R. B. v. John Engelhorn & Sons, C.C.A.3, 134 F.2d 553.

D.C.—N. L. R. B. v. McKesson & Robbins, 121 F.2d 84, 74 App.D.C. 28, certiorari denied McKesson & Robbins v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539—Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America affiliated with American Federation of Labor v. N. L. R. B., 121 F.2d 84, 74 App.D.C. 28, certiorari denied Warehousemen's Union Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35 v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

Or.—Stone Logging & Contracting Co. v. International Woodworkers of America, Columbia District Council No. 5, 135 P.2d 759, 171 Or. 13.

5. U.S.—Richwood Clothespin & Dish Worker's Union v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216—Wallace Corp. v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—N. L. R. B. v. Electric Vacuum Cleaner Co., 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775—N. L. R. B. v. J. Greenebaum Tanning Co., C.C.A.7, 110 F.2d 984, certiorari denied J. Greenebaum Tanning Co. v. N. L. R. B., 61 S.Ct. 18, 311 U.S. 662, 85 L.Ed. 424.

6. U.S.—N. L. R. B. v. McGough Bakeries Corp., C.C.A.5, 153 F.2d 420.

Cal.—Park & Tilford Import Corp. v. International Broth. of Teamsters Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., 165 P.2d 891, 27 Cal.2d 599, 162 A.L.R. 1426.

Mass.—R. H. White Co. v. Murphy, 38 N.E.2d 685, 310 Mass. 510.

N.J.—Eastwood-Nealley Corporation v. International Ass'n of Machinists, Dist. No. 47, 1 A.2d 477, 124 N.J.Eq. 274.

N.Y.—Johnson v. Bee Line, 28 N.Y.S. 2d 18.

7. U.S.—M and M Wood Working

a union which does not represent the majority of the employees in the bargaining unit.[8] The fact that a majority of employees are members of a labor organization does not authorize the organization to make a closed-shop agreement unless it is authorized to engage in collective bargaining.[9] The labor relations board has the power to determine the right of the union to bind all of the employees to a closed-shop or union-shop contract.[10] An employer is not required to enter into a closed-shop agreement under which the employer knows that discriminatory discharges of employees who were members of another union are bound to occur.[11]

A provision that the union will not, in future negotiations, demand a closed-shop, where a closed-shop is authorized by statute, has been held to be invalid.[12]

§ 28(41). —— Construction and Operation

a. In general
b. Arbitration
c. Closed shop or union shop
d. Discharge and layoff
e. Seniority rights

a. In General

Generally, a collective bargaining contract is subject to the same rules of interpretation as other contracts. The contract creates enforceable rights and is binding on both parties.

Generally, a collective bargaining contract between employers and employees is subject to the same rules of interpretation as other contracts.[13] The contract should be realistically construed,[14] and it should be broadly construed so as to accomplish its evident aims.[15] The court, in construing the agreement, must endeavor to ascertain the substantial intent of the parties as expressed by the language employed by them,[16] and the construction of the contract by the parties themselves should be

Co. v. Plywood & Veneer Workers Local Union No. 102, D.C.Or., 23 F. Supp. 11.

8. Cal.—Park & Tilford Import Corp. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., 165 P.2d 891, 27 Cal.2d 599, 162 A.L.R. 1426.

9. U.S.—N. L. R. B. v. Mason Mfg. Co., C.C.A.9, 126 F.2d 810.

10. Or.—Stone Logging & Contracting Co. v. International Woodworkers of America, Columbia District Council No. 5, 135 P.2d 759, 171 Or. 13.

11. U.S.—Wallace Corp. v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435.

12. U.S.—N. L. R. B. v. National Licorice Co., C.C.A.2, 104 F.2d 655, certiorari granted National Licorice Co. v. N. L. R. B., 60 S.Ct. 108, 308 U.S. 535, 84 L.Ed. 451, modified on other grounds 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799.

13. U.S.—St. Clair v. Russell & Pugh Lumber Co., D.C.Idaho, 51 F.Supp. 47.
Minn.—Mueller v. Chicago & N. W. Ry. Co., 259 N.W. 798, 194 Minn. 83.
N.Y.—Triboro Coach Corporation v. New York State Labor Relations Board, 22 N.Y.S.2d 1013, affirmed 27 N.Y.S.2d 83, 261 App.Div. 636, affirmed 36 N.E.2d 315, 286 N.Y. 314, 144 A.L.R. 410, motion denied 39 N.E.2d 276, 287 N.Y. 647, 144 A.L.R. 410—Reichert v. Quindazzi, 6 N.Y.S.2d 284.
Tenn.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.
63 C.J. p 672 note 67.

The word "grievances," in collective bargaining agreement providing procedures for adjustment of grievances, is not a term of art having a connotation differing from its meaning in ordinary use.—Timken Roller Bearing Co. v. N. L. R. B., C.C.A.6, 161 F.2d 949.

14. U.S.—Virginian Ry. Co. v. System Federation No. 40 of Railway Employees' Department of American Federation of Labor, C.C.A.Va., 131 F.2d 840.

Long established labor relations
Where, as a result of process of collective bargaining, labor relations have been established and maintained over a long period of time, powers of court should not be lightly used to disturb them.—Gaskill v. Roth, C.C.A.Neb., 151 F.2d 366, certiorari denied 66 S.Ct. 896, 327 U.S. 798, 90 L.Ed. 1024, rehearing denied 66 S.Ct. 975, 328 U.S. 876, 90 L.Ed. 1645.

Unqualified employee
A contract will not be construed so as to require the employer to intrust his property and the safety and lives of others to an employee who is not qualified for his position. —Monaco v. National Organization Masters, Mates and Pilots of America, 49 N.Y.S.2d 81.

15. U.S.—Yazoo & M. V. R. Co. v. Webb, C.C.A.5, 64 F.2d 902.
D.C.—McNeil v. Peoples Life Ins. Co., Mun.App., 43 A.2d 293.
Md.—Western Maryland Dairy v. Chenowith, 23 A.2d 660, 180 Md. 256.
Neb.—Brisbin v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277, 134 Neb. 517 —Rentschler v. Missouri Pac. R. Co., 253 N.W. 694, 126 Neb. 493, 95 A.L.R. 1.

Maintenance of validity
The contract must be given a reasonable construction, and, if possible, such a construction as will maintain its validity.—Nederlandsch Amerikaansche Stoomvaart Maatschappij v. Stevedores' & Longshoremen's Benev. Soc., D.C.La., 265 F. 397.

The primary purpose of contract entered into between employer and labor union regarding wages, hours, and general working conditions is to carry out the purposes of the labor relations statute by affording employees the advantages derived from collective bargaining.—Amelotte v. Jacob Dold Packing Co., 17 N.Y.S.2d 929, 173 Misc. 477, affirmed 24 N.Y. S. 134, 260 App.Div. 984.

16. D.C.—McNeil v. Peoples Life Ins. Co., Mun.App., 43 A.2d 293.
Tenn.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

Terms or provisions construed
(1) Employees working on "control of production" within provision of labor agreement which excluded employees on control of production. —Nash-Kelvinator Corp. v. Wisconsin Employment Relations Bd., 19 N.W.2d 255, 247 Wis. 202.

(2) "Labor dispute."—Singer v. Kirsch Beverages, 65 N.Y.S.2d 34, 186 Misc. 474, affirmed in part and reversed on other grounds in part 65 N.Y.S.2d 400, 271 App.Div. 801.

given great weight.[17] A supplemental agreement is to be read in connection with the principal agreement,[18] particularly where the contract expressly so provides.[19] In the absence of authority given by statute, the labor relations board has no power to resolve differences between the parties as to the meaning of the contract.[20]

A collective bargaining contract creates enforceable rights,[21] and both parties,[22] the employer[23] and the employees,[24] are bound by its terms, but it

(3) "Local working rules," as used in railroad labor contract.—Griffin v. Gulf & S. I. R. Co., 21 So. 2d 814, 198 Miss. 458.

(4) The word "necessity" in agreement which preserved positions only as long as "necessity" therefor existed.—Hanks v. Delaware & H. R. Corp., D.C.N.Y., 63 F.Supp. 161.

(5) Provisions as to filling vacancies with union members.—South Atlantic S. S. Co. of Delaware v. N. L. R. B., C.C.A.5, 116 F.2d 480.

(6) Provisions as to nature of duties of employees.

U.S.—Crowley v. Delaware & H. R. Corp., D.C.N.Y., 63 F.Supp. 164.

Okl.—Sinclair Prairie Oil Co. v. Dose, 118 P.2d 210, 189 Okl. 569.

(7) Provisions as to pay roll classification.—Crowley v. Delaware & H. R. Corp., supra.

(8) Provisions for promotion of employees.—Sinclair Prairie Oil Co. v. Dose, supra.

(9) "Successor" of the contracting union.—Klinger v. J. S. Krum, Inc., 19 N.Y.S.2d 193, 259 App.Div. 309.

(10) Other terms or provisions.

U.S.—Colonie Fibre Co. v. N. L. R. B., C.C.A.2, 163 F.2d 65—Gaskill v. Roth, C.C.A.Neb., 151 F.2d 366, certiorari denied 66 S.Ct. 896, 327 U.S. 798, 90 L.Ed. 1024, rehearing denied 66 S.Ct. 975, 328 U.S. 876, 90 L.Ed. 1645—Texoma Natural Gas Co. v. Oil Workers Intern. Union, Local No. 463, D.C.Tex., 58 F.Supp. 132, affirmed, C.C.A., Oil Workers Intern. Union, Local No. 463 v. Texoma Natural Gas Co., 146 F.2d 62, certiorari denied 65 S.Ct. 1017, 324 U.S. 872, 89 L.Ed. 1426, rehearing denied 65 S.Ct. 1183, 325 U.S. 893, 89 L.Ed. 2004—Brotherhood of Locomotive Engineers v. Chicago, M., St. P. & P. R. R., D.C.Wis., 41 F.Supp. 751.

Ariz.—Gates v. Arizona Brewing Co., 95 P.2d 49, 54 Ariz. 266.

17. Tenn.—McClure v. Louisville & N. R. Co., 64 S.W.2d 538, 16 Tenn. App. 369.

Employees included in contract

The fact that a contract as to services of a certain class of employees was negotiated between a railroad company and an organization representing a part of such class does not exclude others of that class, not members of the organization, from its benefits, when the nonmembers and the company recognized and treated it as the contract under which their services were rendered and accepted.—Gregg v. Starks, 224 S.W. 459, 188 Ky. 834.

Statements during negotiation of contract

If there were any doubt as to proper interpretation of collective bargaining contract with regard to employer's right to determine the length of the work week, employer's refusal to accept the inclusion of a contractual provision limiting the length of the work week, and fact that employer informed the union that shortage in manpower was already being felt and that it would be necessary to adopt a longer work week, would be of great value in determining intent of the parties.—Texoma Natural Gas Co. v. Oil Workers Intern. Union, Local No. 463, D.C.Tex., 58 F.Supp. 132, affirmed, C.C.A., Oil Workers Intern. Union, Local No. 463 v. Texoma Natural Gas Co., 146 F.2d 62, certiorari denied 65 S.Ct. 1017, 324 U.S. 872, 89 L.Ed. 1426, rehearing denied 65 S. Ct. 1183, 325 U.S. 893, 89 L.Ed. 2004.

18. N.Y.—Amsterdam & Co. v. Devery, 5 N.Y.S.2d 427, 168 Misc. 478.

Tenn.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

19. U.S.—Aluminum Co. of America, v. N. L. R. B., C.C.A.7, 159 F.2d 523.

20. U.S.—Consolidated Aircraft Corporation v. N. L. R. B., C.C.A.9, 141 F.2d 785.

N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, 14 N.Y.S.2d 74, 257 App.Div. 501.

21. Neb.—Brisbin v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277, 134 Neb. 519—Rentschler v. Missouri Pac. R. Co., 253 N.W. 694, 126 Neb. 493, 95 A.L.R. 1.

N.J.—Dooley v. Lehigh Valley R. Co. of Pennsylvania, 21 A.2d 334, 130 N.J.Eq. 75, affirmed 25 A.2d 893, 131 N.J.Eq. 488, certiorari denied Lehigh Valley R. Co. of Pennsylvania v. Dooley, 63 S.Ct. 45, 317 U.S. 649, 87 L.Ed. 523—Christiansen v. Local 680 of Milk Drivers and Dairy Employees of New Jersey, 10 A.2d 168, 126 N.J. Eq. 508.

Ohio.—Sullivan v. Doehler Die Casting Co., 15 Ohio Supp. 122.

Contract between employers' association and union

Ohio.—H. Blum & Co. v. Landau, 155 N.E. 154, 23 Ohio App. 426.

22. U.S.—Timken Roller Bearing Co. v. N. L. R. B., C.C.A.6, 161 F. 2d 949—United Biscuit Co. of America v. N. L. R. B., C.C.A.7, 128 F.2d 771—N. L. R. B. v. Electric Vacuum Cleaner Co., C.C.A.6, 120 F.2d 611, reversed on other grounds 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775.

Ky.—Day v. Louisville & N. R. Co., 175 S.W.2d 347, 295 Ky. 679.

N.J.—Christiansen v. Local 680 of Milk Drivers and Dairy Employees of New Jersey, 10 A.2d 168, 126 N.J.Eq. 508.

N.Y.—Triboro Coach Corporation v. New York State Labor Relations Board, 36 N.E.2d 315, 286 N.Y. 314, 144 A.L.R. 410, motion denied 39 N.E.2d 276, 287 N.Y. 647, 144 A. L.R. 410.

23. U.S.—N. L. R. B. v. Pacific Greyhound Lines, C.C.A.9, 106 F.2d 867.

Pa.—Yost v. Finch, Com.Pl., 32 Berks Co.L.J. 68.

Tenn.—Cross Mountain Coal Co. v. Ault, 9 S.W.2d 692, 157 Tenn. 461.

Agreement not to move shop

N.Y.—Dubinsky v. Blue Dale Dress Co., 292 N.Y.S. 898, 162 Misc. 177.

24. U.S.—Gatliff Coal Co. v. Cox, C.C.A.Ky., 142 F.2d 876—N. L. R. B. v. Pacific Greyhound Lines, C. C.A.9, 106 F.2d 867.

Ga.—Savage v. W. U. Tel. Co., 32 S. E.2d 785, 198 Ga. 728.

N.Y.—Triboro Coach Corporation v. New York State Labor Relations Board, 22 N.Y.S.2d 1013, affirmed 27 N.Y.S.2d 83, 261 App.Div. 636, affirmed 36 N.E.2d 315, 286 N.Y. 314, 144 A.L.R. 410, motion denied 39 N.E.2d 276, 287 N.Y. 647, 144 A.L.R. 410.

63 C.J. p 673 notes 78, 79.

Contract not seen by employee

The collective bargaining contract is binding on an employee, although he has not seen the contract.—Earle Restaurant v. O'Meara, D.C., 160 F. 2d 275.

Jobbers

The mere fact that in some instances jobbers delivering products of bakeries might be corporations or partnerships did not prevent the individuals performing the labor for the jobbers from being bound by a

has been held that, where collective bargaining is not provided for by statute, individual members of a labor union are not bound by a contract between the union and the employer unless they ratify the contract as individuals.[25]

An individual employee is entitled to the benefits of the agreement,[26] even if on his own he would agree to less favorable terms,[27] unless he is not within the class of employees covered by the agreement,[28] but it has also been held that, where the agreement is not a part of the contract of employment, no rights accrue under it to the employee which he may enforce against the employer.[29] Ordinarily, a collective bargaining agreement does not operate to fix the term of employment,[30] or bind the individual employees to serve for any definite time;[31] nor does it require the employer to continue in business for the period of the contract.[32] The effect of a collective bargaining agreement on individual employee contracts is considered infra § 28 (42).

A maintenance of membership provision which requires that members of the union must remain members of the union in good standing or be subject to discharge from the employment does not create a closed shop, a union shop, or a preferential union shop.[33]

Antedated contract. The fact that a contract is antedated does not permit it to operate retroactively as far as the rights of third persons are affected,[34] and, accordingly, it does not legalize discharges of employees outside the organization and other aid given to the organization when no contract actually existed.[35]

Invalid contract. A contract with an unfairly favored union does not bar the necessity for bargaining with the exclusive bargaining representative.[36] Where the bargaining agent negotiating the agreement is not the proper representative of a group of employees, all the terms of the agreement, in so far as they pertain to that group of employees, are unenforceable.[37] The employer is not bound by, or entitled to the benefit of, a contract prohibited by statute.[38]

Duration and termination. The rights and duties under the collective bargaining agreement continue

collective agreement between the union and the bakeries.—Bernstein v. Madison Baking Co., 38 N.Y.S.2d 811, 186 Misc. 474.

Repudiation by subsequent representative

After a collective bargaining agreement has been negotiated, the employees may not choose another representative to repudiate the obligations of the contract.—Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union of Brooklyn and Queens, Local 287, 42 N.E.2d 480, 288 N.Y. 188—Triboro Coach Corporation v. New York State Labor Relations Board, 36 N.E.2d 315, 286 N.Y. 314, 144 A.L.R. 410, motion denied 39 N.E.2d 276, 287 N.Y. 647, 144 A.L.R. 410.

Restrictions on competition with employer after leaving employ

Md.—Western Maryland Dairy v. Chenowith, 23 A.2d 660, 180 Md. 236.

Mass.—National Overall Dry Cleaning Co. v. Yavner, 73 N.E.2d 744—Whiting Milk Cos. v. Grondin, 184 N.E. 379, 282 Mass. 41.

25. Tex.—Panhandle & S. F. Ry. Co. v. Wilson, Civ.App., 55 S.W.2d 216.
63 C.J. p 671 note 59–p 672 note 62.

26. U.S.—Gatliff Coal Co. v. Cox, C.C.A.Ky., 142 F.2d 876—System Federation No. 59 of Railway Employees Department of American Federation of Labor v. Louisiana & A. Ry. Co., C.C.A.La., 119 F.2d 509, certiorari denied 68 S.Ct. 108, 314 U.S. 656, 86 L.Ed. 526.
Miss.—Stephenson v. New Orleans & N. E. R. Co., 177 So. 509, 180 Miss. 147.
Mo.—Baron v. Kurn, 164 S.W.2d 310, 349 Mo. 1202, 142 A.L.R. 787, reversing 153 S.W.2d 405.
N.J.—Christiansen v. Local 680 of Milk Drivers and Dairy Employees of New Jersey, 10 A.2d 168, 126 N.J.Eq. 508.
N.Y.—Gulickson v. Seglin Const. Co., 273 N.Y.S. 908, 152 Misc. 624.
Ohio.—H. Blum & Co. v. Landau, 155 N.E. 154, 23 Ohio App. 426.
Wash.—Huston v. Washington Wood & Coal Co., 103 P.2d 1095, 4 Wash. 2d 449.
Wyo.—Beatty v. Chicago, B. & Q. R. Co., 52 P.2d 404, 49 Wyo. 22.

27. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762.

28. U.S.—Yazoo & M. V. R. Co. v. Webb, C.C.A.Miss., 64 F.2d 902.
Ga.—Savage v. W. U. Tel. Co., 32 S.E.2d 785, 198 Ga. 728.

29. Tex.—Panhandle & S. F. Ry. Co. v. Wilson, Civ.App., 55 S.W.2d 216.
63 C.J. p 671 note 59–p 672 note 62.
Right of action for breach of agreement see infra § 28 (71).

30. Ky.—Hudson v. Cincinnati, N. O. & T. P. Ry. Co., 154 S.W. 47, 152 Ky. 711, 45 L.R.A.,N.S., 184, Ann.Cas.1915B 98.
N.J.—**Corpus Juris cited in** Blonder v. United Retail Employees of Newark, Local No. 108, 15 A.2d 826, 828, 128 N.J.Eq. 41.

31. U.S.—Yazoo & M. V. R. Co. v. Webb, C.C.A.5, 64 F.2d 902.
N.Y.—Amelotte v. Jacob Dold Packing Co., 17 N.Y.S.2d 929, 173 Misc. 477, affirmed 24 N.Y.S.2d 134, 260 App.Div. 984.
Tenn.—Cross Mountain Coal Co. v. Ault, 9 S.W.2d 692, 157 Tenn. 461.

32. U.S.—Yazoo v. M. V. R. Co. v. Webb, C.C.A.Miss., 64 F.2d. 902.
N.Y.—Amelotte v. Jacob Dold Packing Co., 17 N.Y.S.2d 929, 173 Misc. 477, affirmed 24 N.Y.S.2d 134, 260 App.Div. 984.
Tenn.—Cross Mountain Coal Co. v. Ault, 9 S.W.2d 692, 157 Tenn. 461.

33. Mass.—Colonial Press v. Ellis, 74 N.E.2d 1.

34. D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

35. D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35 v. N. L. R. B., supra.

36. U.S.—N. L. R. B. v. John Engelhorn & Sons, C.C.A.3, 134 F.2d 553.

37. Mass.—Sanford v. Boston Edison Co., 64 N.E.2d 631, 319 Mass. 55.

38. U.S.—Steele v. Louisville & N. R. Co., Ala., 65 S.Ct. 226, 323 U.S. 192, 89 L.Ed. 173.

as long as the agreement remains in force.[39] The agreement does not create a permanent status, give an indefinite tenure, or extend rights created and arising under the agreement beyond its life where it has been terminated in accordance with its provisions.[40] Where an employer observes the condition of employment provided in an agreement between it and a labor union after expiration of the agreement, as a matter of practice and not of agreement, there is no implied contract to continue observing such conditions.[41]

Where the agreement provides for automatic renewal or extension in the absence of notice before the expiration of the agreement,[42] or where it permits abrogation of the agreement a certain period of time after notice,[43] the notice must be given substantially in conformity with the terms of the agreement in order to be valid and effective. Notice of termination by the secretary of the union is not binding unless the secretary is fully authorized to give such notice.[44]

The suspension of the charter of a local union by the national union may constitute a failure of consideration terminating the employer's obligation under the collective bargaining agreement where the parties have contemplated continued affiliation with the national union,[45] but such suspension does not constitute a failure of consideration where the parties have not contemplated affiliation with the national union and the local union is engaged in business independently of the national union.[46]

Performance or breach; waiver. Where the employer without justification states that he will be bound no longer by the contract, the union may disregard the anticipatory breach and may wait until an affirmative act in breach of the contract occurs.[47] A trivial breach of the agreement by one party does not justify nonperformance of the agreement by the other,[48] and the failure of the employer to adhere strictly to the terms of the contract may be excused, where such action is caused by a national emergency.[49] A strike by union members, even though it is without the approval of union officials, may be a breach of an agreement not to strike,[50] but an unauthorized strike by union members is not a breach of an agreement which provides that no strike shall be ordered or enforced by the union.[51] An implied agreement not to lock out the employees is operative only if the employees fulfill their obligation not to strike.[52] A union contracting with an employer to furnish him union labor is entitled, at the termination of the contract when the union members cease work, to take the union stamp previously supplied the employer's shop.[53]

The terms of the contract may be waived by the parties.[54]

39. U.S.—Yazoo & M. V. R. Co. v. Webb, C.C.A.Miss., 64 F.2d 902.
Mo.—McGee v. St. Joseph Belt Ry. Co., 110 S.W.2d 389, 232 Mo.App. 639.

40. U.S.—Elder v. New York Cent. R. Co., C.C.A.Ky., 152 F.2d 361.
N.J.—Blonder v. United Retail Employees of Newark, Local No. 108, 15 A.2d 826, 128 N.J.Eq. 41, reversed on other grounds 19 A.2d 786, 129 N.J.Eq. 424.

Termination of business

(1) Provision of contract between union and its members and corporate employer that employees who had been continuously employed for a year or more should receive a week's vacation between May and September did not entitle employees to vacation after employer's place of business was in effect destroyed by fire and the business had come to an end where the contract was made on the assumption that the business would continue.—Reid & Yeomans v. Drug Store Employees Union, 29 N.Y.S.2d 835.

(2) After a shipping company has disposed of all its vessels and retired from the shipping business, it owes no duty to give employment to union members under a contract which obligates it to give preference to the members of the union whenever the company finds it necessary to employ men for work on its ships.—Locals No. 1470, No. 1469, and No. 1512 of International Longshoremen's Ass'n v. Southern Pac. Co., C.C.A.Tex., 131 F.2d 605.

41. Mass.—Goyette v. C. V. Watson Co., 140 N.E. 285, 245 Mass. 577.

42. U.S.—Aluminum Co. of America v. N. L. R. B., C.C.A.7, 159 F.2d 523—Oil Workers Intern. Union, Local No. 463, v. Texoma Natural Gas Co., C.C.A.Tex., 146 F.2d 62, certiorari denied 65 S.Ct. 1017, 324 U.S. 872, 89 L.Ed. 1426, rehearing denied 65 S.Ct. 1183, 325 U.S. 893, 89 L.Ed. 2004.
Cal.—Harvey Mach. Co., Inc. v. Western Mechanics Local Union No. 700, 173 P.2d 330, 76 Cal.App.2d 421—Montaldo v. Hires Bottling Co., 139 P.2d 666, 59 Cal.App.2d 642.
63 C.J. p 672 notes 70, 71.

43. U.S.—Yazoo & M. V. R. Co. v. Webb, C.C.A.Miss., 64 F.2d 902.

44. U.S.—Texoma Natural Gas Co. v. Oil Workers Intern. Union, Local No. 463, D.C.Tex., 58 F.Supp. 132, affirmed Oil Workers Intern. Union, Local No. 463 v. Texoma Natural Gas Co., 146 F.2d 62, certiorari denied 65 S.Ct. 1017, 324 U.S. 872, 89 L.Ed. 1426, rehearing denied 65 S.Ct. 1183, 325 U.S. 893, 89 L.Ed. 2004.

45. Cal.—Montaldo v. Hires Bottling Co., 139 P.2d 666, 59 Cal.App.2d 642.

46. Cal.—Montaldo v. Hires Bottling Co., supra.

47. U.S.—In re Public Ledger, D.C.Pa., 63 F.Supp. 1008.

48. Mass.—Keegan v. O'Donnell, 37 N.E.2d 995, 310 Mass. 346.

49. U.S.—Consolidated Aircraft Corp. v. N. L. R. B., C.C.A.9, 141 F.2d 785.

50. N.Y.—McGrath v. Norman, 223 N.Y.S. 288, 221 App.Div. 804.

51. N.Y.—Motor Haulage Co. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Truck Drivers and Chauffeurs, Local No. 807, 69 N.Y.S.2d 656, 189 Misc. 152.

52. N.Y.—McGrath v. Norman, 223 N.Y.S. 288, 221 App.Div. 804.

53. Ky.—Saulsberry v. Coopers' International Union, 143 S.W. 1018, 147 Ky. 170, 39 L.R.A.,N.S., 1203.
63 C.J. p 672 note 72.

54. U.S.—Northland Greyhound Lines v. Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp.

b. Arbitration

Provisions for arbitration in a collective bargaining contract are to be treated the same as such provisions in any other contract, and, if valid, they are binding on the parties.

Provisions for arbitration in a collective bargaining contract are to be treated the same as such provisions in any other contract,[55] and such provisions, if valid, are binding on the parties.[56] A contract written by an arbitrator appointed by the parties is as enforceable as though all parties actually signed it.[57]

c. Closed Shop or Union Shop

In the absence of a statute otherwise providing, a closed-shop contract or union-shop contract entered into by an employer with the appropriate bargaining representative of the employees is binding and enforceable, and discharges made in accordance with its provisions are proper.

In the absence of a statute otherwise providing, a closed-shop contract[58] or a union-shop contract[59] entered into by an employer with the appropriate bargaining representative of the employees has been held to be binding and enforceable. Discharges of nonunion employees in accordance with a closed-shop or union-shop agreement with the valid bargaining agency are proper[60] and are necessitated by the agreement,[61] but discharges under such an agreement with a company-dominated union are a violation of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes.[62] If the

of America, Division 1150, D.C. Minn., 66 F.Supp. 431.

R.I.—McGee v. Local No. 682 of Brotherhood of Painters, Decorators and Paperhangers of America, A. F. of L., 38 A.2d 303, 69 R. I. 1.

63 C.J. p 672 note 73.

55. N.Y.—Amsterdam & Co. v. Devery, 5 N.Y.S.2d 427, 168 Misc. 478.

Intention of parties

If collective bargaining agreement between employer and union provides for prompt settlement of all disputes, disagreements, complaints, and grievances by arbitration, a court should not construe the contract so as to defeat the intention of the parties.—United Elec. Radio, and Mach. Workers of America, Local 411, C.I.O., v. National Pneumatic Co., 48 A.2d 295, 134 N.J.Law 349.

56. Ala.—Bell v. Western Ry. of Alabama, 153 So. 434, 228 Ala. 328, followed in Keller v. Western Ry. of Alabama, 153 So. 441, 228 Ala. 336.

N.J.—McLean Piece Dye Works v. Verga, 178 A. 625, 13 N.J.Misc. 416.

N.Y.—Neves v. P. S. Thorsen & Co., 35 N.Y.S.2d 678—Uneeda Credit Clothing Stores v. Briskin, 14 N.Y. S.2d 964.

Validity of arbitration provision in collective bargaining agreement see supra § 28 (40).

Enforcement under common law

The enforcement of arbitration clauses in collective bargaining agreements is not dependent on statute, but enforcement is possible under the common law.—Goldstein v. International Ladies' Garment Workers' Union, 196 A. 43, 328 Pa. 385.

57. N.Y.—Farulla v. Ralph A. Freundlich, Inc., 274 N.Y.S. 70, 152 Misc. 761.

Agreement negotiated by arbitrator

Agreement between regional labor board, manufacturers' association, employer, and arbitrator delegated to act for both employer and labor union was held enforceable as contract, and not merely an agreement to contract, where agreement was entered into pursuant to arbitration and provided in detail for conditions of employment.—Farulla v. Ralph A. Freundlich, Inc., 279 N.Y.S. 228, 155 Misc. 262.

58. Cal.—James v. Marinship Corp., 155 P.2d 329, 25 Cal.2d 721, 160 A. L.R. 900.

Mass.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.

Pa.—Yost v. Finch, Com.Pl., 32 Berks Co.L.J. 68.

Validity of closed-shop contract see supra § 28 (40).

Members of union

An agreement between an employer and a labor union made with the unanimous concurrence of the employees providing for a closed shop is obligatory not only on the union but on each individual member thereof, and each member has a property right therein which does not depend on action of the majority or anyone except himself.—M and M Wood Working Co. v. Plywood & Veneer Workers Local Union No. 102, D.C.Or., 23 F.Supp. 11.

59. Or.—Markham & Callow v. International Woodworkers of America, Lumber & Sawmill Workers Union, 135 P.2d 727, 170 Or. 517.

60. U.S.—Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 115 F. 2d 414, reversed on other grounds 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348.

N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union Local 221, 9 N.Y.S.2d 964, 170 Misc. 199, affirmed 14 N.Y.S.2d 74, 257 App.Div. 501.

Utah.—White v. Oregon Short Line R. Co., 88 P.2d 546, 96 Utah 540.

A preferential employment contract which provided that agreement was not to be construed to require the discharge of any employee who might not desire to join the union was not a "closed-shop agreement" authorized by law.—South Atlantic S. S. Co. of Delaware v. N. L. R. B., C.C.A.5, 116 F.2d 480, certiorari denied 61 S.Ct. 1101, 313 U.S. 582, 85 L.Ed. 1538, rehearing denied 62 S. Ct. 54, 314 U.S. 708, 86 L.Ed. 565.

Maintenance of membership or union shop

Contract between employer and labor organization whereby all employees were to maintain membership in labor organization, present employees were to be accepted into membership, and all new employees were to become members of organization, and employer agreed, on demand, to discharge any employee who refused to maintain membership, was not a mere "maintenance of membership contract," but was a "union-shop contract" which authorized the employer to discharge employees in compliance with the contract.—Markham & Callow v. International Woodworkers of America, Lumber & Sawmill Workers Union, 135 P.2d 727, 170 Or. 517.

Notice from union

Ordinarily, in absence of judicial proceeding, employer in enforcing closed-shop agreement need not look behind notice from labor union that a particular employee is not a member in good standing.—James v. Marinship Corp., 155 P.2d 329, 25 Cal.2d 721, 160 A.L.R. 900.

61. U.S.—M and M Wood Working Co. v. Plywood & Veneer Workers Local Union No. 102, D.C.Or., 23 F.Supp. 11.

N.Y.—Greenwald v. Chiarella, 63 N. Y.S.2d 49, 271 App.Div. 213—De Agostina v. Parkshire Ridge Amusements, 278 N.Y.S. 622, 155 Misc. 518.

62. U.S.—N. L. R. B. v. Electric Vacuum Cleaner Co., 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehear-

contract properly construed is not a valid closed-shop or union-shop contract, the employer has no right to discharge an employee for membership in another union.[63]

A closed-shop contract carries with it certain responsibilities in which the public has an interest to prevent abuse,[64] and it is the duty of the courts to be vigilant to safeguard such rights as the individual employee retains and to protect them from infringement.[65] The provisions of the National Labor Relations Act and similar statutes do not give a union the authority to maintain a closed-shop agreement with an arbitrarily closed-union membership,[66] and they constitute no authority for the successful union to deny membership to employees who supported the opposing union, and to have them discharged, where the employees are willing to join the successful union,[67] since such a construction would deny to workers the full freedom of association and self-organization which is the prime purpose of such statutes.[68]

A contract provision which requires new employees to join the union has been held not to oblige the union to admit all new employees to membership.[69]

d. Discharge and Layoff

The existence of a collective bargaining agreement between the employer and the employees does not of itself deprive the employer of the right to discharge or lay off an employee, but express terms of the agreement may regulate or restrict the right.

The fact that a collective bargaining agreement between the employer and the employees is in existence does not of itself deprive the employer of the right to discharge or lay off an employee,[70] particularly where the agreement expressly reserves the right to the employer,[71] but express terms of the agreement may regulate or restrict the right,[72] such as by depriving the employer of the right to discharge employees for certain reasons,[73] or by imposing the duty on the employer to discharge employees for specified causes.[74] A collective agreement frequently includes provisions that an employee shall not be discharged without just cause or without a hearing, or similar provisions, and it is generally held that such provisions are binding on the employer,[75] but there is other authority

ing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775—Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 132 F.2d 390, affirmed 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U.S. 809, 88 L.Ed. 489—Sperry Gyroscope Co. v. N. L. R. B., C.C.A. 2, 129 F.2d 922.

63. U.S.—South Atlantic S. S. Co. of Delaware v. N. L. R. B., C.C.A. 5, 116 F.2d 480, certiorari denied 61 S.Ct. 1101, 313 U.S. 582, 85 L. Ed. 1538, rehearing denied 62 S. Ct. 54, 314 U.S. 708, 86 L.Ed. 565.

Old employees not required to join
An agreement which requires that new employees join the union does not permit the discharge of old employees on the ground that they are not union members.—N. L. R. B. v. Mason Mfg. Co., C.C.A.9, 126 F.2d 810.

Yielding to union's threat to strike
if company did not discharge seamen who had joined a rival union was not the making of an oral closed-shop agreement.—South Atlantic S. S. Co. of Delaware v. N. L. R. B., C.C.A.5, 116 F.2d 480, certiorari denied 61 S.Ct. 1101, 313 U.S. 582, 85 L.Ed. 1538, rehearing denied 62 S.Ct. 54, 314 U.S. 708, 86 L.Ed. 565.

64. Cal.—Williams v. International Broth. of Boilermakers, Iron Shipbuilders and Helpers of America, 165 P.2d 903, 27 Cal.2d 586.

65. Pa.—Cheetham v. Local No. 222, United Garment Workers of America, 55 Pa.Dist. & Co. 28.

66. Cal.—Williams v. International Broth. of Boilermakers, Iron Shipbuilders and Helpers of America, 165 P.2d 903, 27 Cal.2d 586—James v. Marinship Corp., Cal., 155 P.2d 329, 25 Cal.2d 721, 160 A.L.R. 900.
Pa.—Dorrington v. Manning, Com. Pl., 32 Luz.L.Reg. 417.

67. U.S.—Wallace Corp. v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S. Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Richwood Clothespin & Dish Worker's Union v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216.

68. U.S.—Wallace Corporation v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Richwood Clothespin & Dish Worker's Union v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216.

69. Pa.—Dorrington v. Manning, 4 A.2d 886, 135 Pa.Super. 194.

70. N.Y.—Amelotte v. Jacob Dold Packing Co., 17 N.Y.S.2d 929, 173 Misc. 477, affirmed 24 N.Y.S.2d 134, 260 App.Div. 984.
Tenn.—Cross Mountain Coal Co. v. Ault, 9 S.W.2d 692, 157 Tenn. 461.

71. Ga.—Lambert v. Georgia Power Co., 183 S.E. 814, 181 Ga. 624.

72. Ga.—Gary v. Central of Georgia Ry. Co., 141 S.E. 819, 37 Ga.App. 744.
Miss.—Moore v. Illinois Cent. R. Co., 176 So. 593, 180 Miss. 276.
Tenn.—Cross Mountain Coal Co. v. Ault, 9 S.W.2d 692, 157 Tenn. 461.
Seniority rights see infra subdivision e of this section.

73. **Union membership**
The discharge of an employee because the employee is a union officer violates a contract prohibiting discrimination because of membership in a union.—Cross Mountain Coal Co. v. Ault, supra.

74. **Discharge of married female employees**
Neb.—Brisbin v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277, 134 Neb. 517.

Failure to maintain union membership
U.S.—Aluminum Co. of America v. N. L. R. B., C.C.A.7, 159 F.2d 523.
Pa.—Ralston v. Cunningham, 18 A. 2d 108, 143 Pa.Super. 412.
Discharge in conformity with closed-shop or union-shop contract see supra subdivision c of this section.

75. U.S.—Illinois Cent. R. Co. v. Moore, C.C.A.Miss., 112 F.2d 959, reversed on other grounds 61 S. Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.
Ga.—Gary v. Central of Georgia Ry. Co., 141 S.E. 819, 37 Ga.App. 744.
Miss.—Gulf & S. I. R. Co. v. McGlohn, 184 So. 71, 183 Miss. 465—Moore v. Illinois Cent. R. Co., 176 So. 593, 180 Miss. 276—McGlohn

which holds that they are not binding since an employee has no reciprocal obligation to continue in the employ.[76] The hearing, where the agreement is binding, must be conducted within the period of time[77] and in the manner[78] prescribed or contemplated by the agreement. The employee must request a hearing or investigation where the contract so provides,[79] but in the absence of such provision it is not necessary for the employee to do so.[80]

Contractual regulations of the right of the employer to discharge or lay off employees apply only to the extent and under the circumstances provided for, or contemplated by, the contract,[81] and only in

v. Gulf & S. I. R. R., 174 So. 250, 179 Miss. 396.

Mo.—McGee v. St. Joseph Belt Ry. Co., 133 S.W.2d 675, 235 Mo.App. 707, certiorari quashed State ex rel. St. Joseph Belt R. Co. v. Shain, 145 S.W.2d 131, 346 Mo. 1098—Ward v. Kurn, 132 S.W.2d 245, 234 Mo.App. 241—Lyons v. St. Joseph Belt Ry. Co., App., 84 S.W. 2d 933, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.

Pa.—In re Lehrman, Com.Pl., 52 Dauph.Co. 1.

S.C.—Johnson v. American Ry. Express Co., 161 S.E. 473, 163 S.C. 191.

Tex.—Moore County Carbon Co. v. Whitten, Civ.App., 140 S.W.2d 880, error dismissed, judgment correct.

Filing suit as just cause

The discharge of an employee because the employee filed suit to assert his rights under a collective agreement is not a discharge for just cause under the agreement.—Illinois Cent. R. Co. v. Moore, C.C.A. Miss., 112 F.2d 959, reversed on other grounds 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.

76. Ky.—Louisville & N. R. Co. v. Wells, 160 S.W.2d 16, 289 Ky. 700—Louisville & N. R. Co. v. Bryant, 92 S.W.2d 749, 263 Ky. 578.

77. S.C.—Youmans v. Charleston & W. C. Ry. Co., 178 S.E. 671, 175 S.C. 99.

78. Miss.—Gulf & S. I. R. Co. v. McGlohn, 184 So. 71, 183 Miss. 465.

Mo.—Hall v. St. Louis-San Francisco Ry. Co., 28 S.W.2d 687, 224 Mo.App. 431.

Right to confront complainant

(1) Where collective bargaining agreement provided that bus operators should not be discharged without fair investigation, and required complainant to be present at hearing, discharge of bus operator on sole ground that spotter employed by an independent investigating company had reported operator's failure to report fares, without producing spotter so that operator could confront or examine him, was improper.—Brotherhood of R. Trainmen v. Hill Bus Co., 44 A.2d 904, 137 N.J.Eq. 408.

(2) Failure to produce spotter at hearing was not excusable on ground that the spotter who reported operator was an employee of another company and that, if he were produced, his usefulness would be ended.—Brotherhood of R. R. Trainmen v. Hill Bus Co., 51 A.2d 116, 139 N. J.Eq. 304.

(3) Where unions expressly demanded the right of confronting spotter on basis of whose report bus operator was discharged, failure to insist on production of spotter in previous instances did not excuse dismissal of operator without producing spotter.—Brotherhood of R. Trainmen v. Hill Bus Co., supra.

Failure to object

In action against railroad by former engine foreman for wrongful discharge, on ground that he did not have a fair hearing, foreman was not precluded from recovering because foreman made no objection at hearing at which he was discharged, that the hearing was conducted by one who was not fair and impartial, where there was nothing to show that any objection in that respect would have been effective, and there was nothing in railroad's rules indicating that the foreman had the right to object to the one holding the hearing.—Butner v. Union Pac. R. Co., 163 S.W.2d 100, 236 Mo.App. 1134.

79. **Substantial compliance**

Discharged railroad section foreman's letter asking immediate superior to investigate why company was acting as it had and to write foreman letter was held substantial compliance with union contract making request for an investigation a prerequisite to a hearing.—Youmans v. Charleston & W. C. Ry. Co., 178 S.E. 671, 175 S.C. 99.

80. Mo.—Lyons v. St. Joseph Belt Ry. Co., App., 84 S.W.2d 933, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.

81. U.S.—Illinois Cent. R. Co. v. Moore, C.C.A.Miss., 112 F.2d 959, reversed on other grounds 61 S. Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.

Utah.—White v. Oregon Short Line R. Co., 88 P.2d 546, 96 Utah 540.

Business conditions causing discharges or layoffs

(1) Where original agreement between railroads and labor union did not expressly require railroads to return to their service yardmen let out in a reduction of forces, but provided for an investigation and hearing for any yardman taken out of service or censured for cause, the provision for investigation and trial did not limit right of railroads to reduce their forces as and when required by the state of their business.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

(2) Provision in union contract for one week's notice of intended layoffs applied to temporary layoffs due to slack work and to the closing of a store in the chain operated by employer, but did not apply to closing of entire business of chain and liquidation in legal proceedings pursuant to court order.—In re Willow Cafeterias, D.C.N.Y., 71 F.Supp. 685.

(3) Suspension of operations because of an unfavorable market is not within a provision prohibiting the closing of the plant because of a dispute between the employer and the employees.—Cross Mountain Coal Co. v. Ault, 9 S.W.2d 692, 157 Tenn. 461.

Discharge for use of intoxicants

Under contract between railway and order of railway conductors authorizing railway to discharge conductors without investigation only in cases of intoxication, and railway rule prohibiting use of intoxicants, railway did not breach contract when it discharged conductor without investigation for being under influence of an intoxicant when he reported for work, although he was not intoxicated, where parties construed contract as authorizing railway to discharge conductors without investigation for any use of liquor, and conductor discharged had sought reinstatement on a leniency basis.—Robertson v. Panhandle & S. F. Ry. Co., Tex.Civ.App., 77 S.W. 2d 1078, error dismissed.

Discharge for physical disability

A provision in contract between railroad and union that conductors should not be disciplined or discharged without just cause and that accused should be given ten days' notice related only to disciplinary action and did not prevent railroad from discharging a conductor for physical disability, except on ten days' notice, since the word "discharge" could not be taken from its

respect of employees covered by the agreement.[82] In order to constitute a discharge of a person protected by a union contract there must be an intent on the part of the employer to terminate the employment,[83] and there must be some affirmative action taken by the employer which will communicate the intent to the employee.[84] Failure to call a laid-off employee back to work in the order required by seniority provisions of the contract is not necessarily a discharge,[85] but a refusal by an employer, when requested, to take back an employee after work is available for him may constitute a discharge within a provision restricting the employer's right to discharge.[86]

e. Seniority Rights

In the absence of a statute governing the matter of seniority rights of employees, where seniority rights are provided for in a collective bargaining agreement, the seniority rights of an individual employee arise only from the agreement, and their extent and limitation depend on the terms of the agreement.

"Seniority," as the term is used in collective bargaining agreements, is the right of employees to certain preferential treatment based on their length of service.[87] It is in a sense a reward for length of service combined with capacity of performance;[88] it is in effect unemployment insurance which the worker has purchased by his years of faithful service,[89] and essentially it is as much a part of an employee's wages as though he received an increase therein and used the increase to buy such insurance.[90] Seniority begins when an employee's pay begins and continues as long as he is in the service of the employer regardless of whether he is laid off, on vacation, or, under the terms of the Selective Service Act, in military service.[91]

In accordance with the rule that an employee has no inherent right to seniority, as discussed supra § 5, in the absence of a statute governing the matter, where seniority rights are provided for in a collective bargaining agreement, the seniority rights of an individual employee arise only from the agreement,[92] and their extent and limitation depend on the terms of the agreement,[93] including union

context and was subject to the rule of "ejusdem generis."—Louisville & N. R. Co. v. Wells, 160 S.W.2d 16, 289 Ky. 700.

Prohibition of discharge for striking

Provision in agreement between striking employees and employer, providing, that no striking employee would be discharged during an eight months' period for his participation in the strike, did not bind employer to retain any particular employees for any length of time, since such provision contemplated only that no employee would be discharged because of his participation in the strike.—Smith v. Chicopee Mfg. Corporation, 192 S.E. 481, 56 Ga.App. 294.

82. Miss.—Otis v. Gulf & Ship Island R. Co., 19 So.2d 241, 197 Miss. 56.

Employees held covered by agreement

Pa.—Ralston v. Cunningham, 18 A.2d 108, 143 Pa.Super. 412.

83. U.S.—In re Public Ledger, D.C.Pa., 63 F.Supp. 1008.

84. U.S.—In re Public Ledger, supra.

85. Mo.—McGee v. St. Joseph Belt Ry. Co., 133 S.W.2d 675, 235 Mo.App. 707, certiorari quashed State ex rel. St. Joseph Belt R. Co. v. Shain, 145 S.W.2d 131, 346 Mo. 1098.

86. Mo.—Ward v. Kurn, 132 S.W.2d 245, 234 Mo.App. 241.

Tenn.—Cross Mountain Coal Co. v. Ault, 9 S.W.2d 692, 157 Tenn. 461.

87. U.S.—Huffman v. Norfolk & W. Ry. Co., D.C.Va., 71 F.Supp. 564.

Continuous employment

The right of seniority is the right of employees who have served longest to a preference as respects continuous employment, in absence of specific limitation or enlargement.—Droste v. Nash-Kelvinator Corp., D.C.Mich., 64 F.Supp. 716—Brand v. Pennsylvania R. Co., D.C.N.Y., 22 F.Supp. 569.

Right to work

Seniority represents in the highest degree the right to work, and by seniority the oldest man, in point of service, ability, and fitness for the job being sufficient, is given choice of jobs, is first promoted within range of jobs subject to seniority, and is the last laid off, proceeding so on down the line to the youngest in point of service.—Dooley v. Lehigh Valley R. Co. of Pennsylvania, 21 A.2d 334, 130 N.J.Eq. 75, affirmed 25 A.2d 893, 131 N.J.Eq. 468, certiorari denied Lehigh Valley R. Co. of Pennsylvania v. Dooley, 63 S.Ct. 45, 317 U.S. 649, 87 L.Ed. 523.

Seniority in train service means the privilege of an employee of a railroad to choose runs or assignments of service as they are arranged by proper authority.—Order of Railway Conductors of America v. Shaw, 119 P.2d 549, 189 Okl. 665.

88. N.J.—Dooley v. Lehigh Valley R. Co. of Pennsylvania, 21 A.2d 334, 130 N.J.Eq. 75, affirmed 25 A.2d 893, 131 N.J.Eq. 468, certiorari denied Lehigh Valley R. Co. of Pennsylvania v. Dooley, 63 S.Ct. 45, 317 U.S. 649.

89. Ariz.—Grand International Brotherhood of Locomotive Engineers v. Mills, 31 P.2d 971, 43 Ariz. 379.

90. Ariz.—Grand International Brotherhood of Locomotive Engineers v. Mills, supra.

91. U.S.—Huffman v. Norfolk & W. Ry. Co., D.C.Va., 71 F.Supp. 564.

92. U.S.—Trailmobile Co. v. Whirls, Ohio, 67 S.Ct. 982—Elder v. New York Cent. R. Co., C.C.A.Ky., 152 F.2d 361.

Cal.—Austin v. Southern Pac. Co., 123 P.2d 39, 50 Cal.App.2d 292.

Ky.—Norfolk & W. Ry. Co. v. Harris, 84 S.W.2d 69, 260 Ky. 132.

Mass.—Donovan v. Travers, 188 N.E. 705, 285 Mass. 167.

Mich.—Hartley v. Brotherhood of Railway and Steamship Clerks, Freight Handlers and Station Employees, 277 N.W. 885, 283 Mich. 201.

Okl.—Order of Railway Conductors of America v. Shaw, 119 P.2d 549, 189 Okl. 665.

Pa.—Madera v. Monongahela Ry. Co., 52 A.2d 329, 356 Pa. 460—Madera v. Monogahela Ry. Co., Com.Pl., 9 Fay.L.J. 27.

Tenn.—McClure v. Louisville & N. R. Co., 64 S.W.2d 538, 16 Tenn.App. 369.

Validity of provisions for seniority rights in collective bargaining agreements see supra § 28 (40).

93. Ill.—Evans v. Johnston, 20 N.E.2d 841, 300 Ill.App. 78.

Ky.—McGregor v. Louisville & N. R. Co., 51 S.W.2d 953, 244 Ky. 696.

Mass.—Donovan v. Travers, 188 N.E. 705, 285 Mass. 167.

Miss.—Griffin v. Gulf & S. I. R. Co., 21 So.2d 814, 198 Miss. 458.

regulations which are referred to, or made a part of, the agreement,[94] even though the employee is not a member of the union.[95]

Provisions for seniority rights should be interpreted in accordance with established canons of construction of contracts generally,[96] and the understanding of the parties as to the meaning of the agreement should be considered.[97] The provisions should be construed in an objective manner,[98] in the light of the surrounding circumstances, the nature of the operations contemplated and regulated thereby, and the objects sought to be accomplished.[99] The motives of the parties in insisting on their rights under the contract are not to be considered.[1] A supplemental agreement should be construed with the original agreement.[2]

Mo.—McCoy v. St. Joseph Belt Ry. Co., 77 S.W.2d 175, 229 Mo.App. 506.

Pa.—Madera v. Monongahela Ry. Co., Com.Pl., 9 Fay.L.J. 27.

Tenn.—McClure v. Louisville & N. R. Co., 64 S.W.2d 538, 16 Tenn.App. 369.

Consolidation of companies

Where two companies are consolidated, the rosters of seniority of the employees of the two companies which are made up in accordance with the directions of the employees' representatives are binding on all the employees.

N.J.—Franklin v. Pennsylvania-Reading Seashore Lines, 193 A. 712, 122 N.J.Eq. 205.

Ohio.—Hess v. Trailer Co. of America, 17 Ohio Supp. 39.

Discretion of employer

(1) Where under the collective agreement the employer has final discretion respecting recognition of seniority rights, an employee has no enforceable seniority rights under the contract.—Aulich v. Craigmyle, 59 S.W.2d 560, 248 Ky. 676.

(2) Where telegraph operator under contract between his labor union and railroad had seniority rights entitling him to a position, if he was qualified and there was nothing to show that railroad's superintendent who customarily passed on employees' qualifications in the first instance acted arbitrarily or in bad faith in deciding that operator was not qualified, operator was not entitled to the position, and he could not predicate breach of contract on the permitted exercise of the superintendent's discretion.—Steadman v. Atlantic Coast Line R. Co., C.C.A. S.C., 138 F.2d 691, certiorari denied 64 S.Ct. 636, 321 U.S. 780, 88 L.Ed. 1073.

Terms or provisions construed

(1) "Official positions" in contract saving seniority rights of railroad telegraphers appointed to "official positions."—McGregor v. Louisville & N. R. Co., 51 S.W.2d 953, 244 Ky. 696.

(2) "Out of the service" under agreement obligating railroads to return to the service yardmen, let out in reduction of forces, in order of their seniority standing in case yardmen were not out of the service to exceed six months.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

(3) Provision that fireman who fails in third examination for promotion to position of train engineer "shall be assigned and rank as the oldest extra fireman on the seniority district at the time he fails."—Casey v. Brotherhood of Locomotive Firemen and Enginemen, 266 N.W. 737, 197 Minn. 189.

(4) Provision that seniority rights of any employee "who is advanced" to supervisory position shall continue as to plant and department.—Texoma Natural Gas Co. v. Oil Workers Intern. Union, Local No. 463, D.C.Tex., 58 F.Supp. 132, affirmed, C.C.A., Oil Workers Intern. Union, Local No. 463 v. Texoma Natural Gas Co., 146 F.2d 62, certiorari denied 65 S.Ct. 1017, 324 U.S. 872, 89 L.Ed. 1426, rehearing denied 65 S.Ct. 1183, 325 U.S. 893, 89 L.Ed. 2004.

(5) Provision that seniority rights should "extend over division where employed."—Burton v. Oregon-Washington R. & Nav. Co., 38 P.2d 72, 148 Or. 648.

(6) Other terms or provisions.

U.S.—Gaskill v. Roth, C.C.A.Neb., 151 F.2d 366, certiorari denied 66 S.Ct. 896, 327 U.S. 798, 90 L.Ed. 1024, rehearing denied 66 S.Ct. 975, 328 U.S. 876, 90 L.Ed. 1645—Dahlberg v. Pittsburgh & L. E. R. Co., C.C.A.Pa., 138 F.2d 121—Primakow v. Railway Exp. Agency, D.C.Wis., 60 F.Supp. 691.

Colo.—Capra v. Local Lodge No. 273 of Brotherhood of Locomotive Firemen and Enginemen, 76 P.2d 738, 102 Colo. 63.

Ga.—Evans v. Louisville & N. R. Co., 12 S.E.2d 611, 191 Ga. 395.

Minn.—Jorgensen v. Great Northern Ry. Co., 22 N.W.2d 544, 221 Minn. 438.

Miss.—Stephenson v. New Orleans & N. E. R. Co., 177 So. 509, 180 Miss. 147.

Ohio.—Storms v. United Grain & Millworkers Union, 27 N.E.2d 781, 64 Ohio App. 19, appeal dismissed 28 N.E.2d 561, 137 Ohio St. 267.

94. U.S.—Steadman v. Atlantic Coast Line R. Co., C.C.A.S.C., 138 F.2d 691, certiorari denied 64 S. Ct. 636, 321 U.S. 780, 88 L.Ed. 1073.

Ind.—Louisville & N. R. Co. v. Miller, 38 N.E.2d 239, 219 Ind. 389, 142 A.L.R. 1050, certiorari denied Miller v. Louisville & N. R. Co., 63 S. Ct. 36, 317 U.S. 644, 87 L.Ed. 519.

Ky.—Norfolk & W. Ry. Co. v. Harris, 84 S.W.2d 69, 260 Ky. 132—Aulich v. Craigmyle, 59 S.W.2d 560, 248 Ky. 676.

Mass.—Donovan v. Travers, 188 N. E. 705, 285 Mass. 167.

Mich.—Mosshamer v. Wabash R. Co., 191 N.W. 210, 221 Mich. 407.

Okl.—Order of Railway Conductors of America v. Shaw, 119 P.2d 549, 189 Okl. 665—Lockwood v. Chitwood, 89 P.2d 951, 185 Okl. 44.

95. U.S.—Elder v. New York Cent. R. Co., C.C.A.Ky., 152 F.2d 361.

N.J.—Franklin v. Pennsylvania-Reading Seashore Lines, 193 A. 712, 122 N.J.Eq. 205.

96. Tenn.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

97. Tenn.—Earle v. Illinois Cent. R. Co., supra.

Constructive knowledge of interpretation

Where agreement between labor union and railroads obligated railroads to return to the service yardmen, let out in reduction of forces, in order of their seniority standing if yardmen were not out of the service to exceed six months and understanding of railroads' construction of agreement was widespread and notorious among the employees whose interests were directly affected by the agreement, and local officials of the railroads, and the practice thereunder was uniform, yardman suing for breach of such obligation was chargeable with constructive knowledge of the meaning attributed to the agreement.—Earle v. Illinois Cent. R. Co., supra.

98. Tenn.—Earle v. Illinois Cent. R. Co., supra.

99. Tenn.—Earle v. Illinois Cent. R. Co., supra.

1. Tenn.—Earle v. Illinois Cent. R. Co., supra.

2. Tenn.—Earle v. Illinois Cent. R. Co., supra.

The seniority provisions of a collective agreement are enforceable,[3] and an employee's seniority rights, duly fixed by the contract between the employer and the collective bargaining agent, are valuable[4] property rights[5] which belong exclusively to the employee,[6] and of which he may not be unlawfully deprived.[7] A breach of the seniority provisions of the agreement may be waived by the employee.[8]

Modification and termination of rights. Seniority rights may be taken away or modified by subsequent agreements properly entered into by the bargaining agent and the employer.[9] Where an employee separates from the service of the employer,[10] or, after being laid off temporarily, fails to comply with the regulations prescribed by the agreement to preserve his seniority rights,[11] or transfers to another department or division which, under the terms of the agreement, has a separate seniority roster,[12] his seniority rights under the original employment are terminated.

§ 28(42). Effect on Individual Contracts of Right and Duty to Bargain Collectively

Individual contracts between employer and employees in the sense of contracts of hiring are necessitated by the collective bargaining procedure, but a collective bargaining agreement circumscribes the rights of employer and employees with respect to making individual contracts and it surmounts or supersedes the provisions of the individual contract as to terms and conditions of employment.

Individual contracts between employer and employees in the sense of contracts of hiring are necessitated by the collective bargaining procedure,[13] since after the collective trade agreement is made the individuals who benefit by it are identified by in-

3. Mo.—Sparks v. Thompson, App., 161 S.W.2d 977—McGee v. St. Joseph Belt Ry. Co., 110 S.W.2d 389, 232 Mo.App. 639—McCoy v. St. Joseph Belt Ry. Co., 77 S.W.2d 175, 229 Mo.App. 506.

Contract held breached
Miss.—Moore v. Yazoo & M. V. R. Co., 166 So. 395, 176 Miss. 65.

Contract held not breached
Ohio.—Storms v. United Grain & Millworkers Union, 27 N.E.2d 781, 64 Ohio App. 19, appeal dismissed 28 N.E.2d 561, 137 Ohio St. 267.
Tenn.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

4. U.S.—Elder v. New York Cent. R. Co., C.C.A.Ky., 152 F.2d 361—Illinois Cent. R. Co. v. Moore, C.C.A. Miss., 112 F.2d 959, reversed on other grounds 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.
Tenn.—McClure v. Louisville & N. R. Co., 64 S.W.2d 538, 16 Tenn. App. 369.

5. U.S.—Primakow v. Railway Exp. Agency, D.C.Wis., 56 F.Supp. 413.
Ariz.—Grand International Brotherhood of Locomotive Engineers v. Mills, 31 P.2d 971, 43 Ariz. 379.
Ga.—Evans v. Louisville & N. R. Co., 12 S.E.2d 611, 191 Ga. 395.
Mass.—Donovan v. Travers, 188 N. E. 705, 285 Mass. 167.
N.J.—Dooley v. Lehigh Valley R. Co. of Pennsylvania, 21 A.2d 334, 130 N.J.Eq. 75, affirmed 25 A.2d 893, 131 N.J.Eq. 468, certiorari denied Lehigh Valley R. Co. of Pennsylvania v. Dooley, 63 S.Ct. 45, 317 U.S. 649, 87 L.Ed. 523.
Ohio.—Hess v. Trailer, 17 Ohio Supp. 39.
Tenn.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

6. U.S.—Primakow v. Railway Exp. Agency, D.C.Wis., 56 F.Supp. 413.
Miss.—Stephenson v. New Orleans & N. E. R. Co., 177 So. 509, 180 Miss. 147.

7. U.S.—Elder v. New York Cent. R. Co., C.C.A.Ky., 152 F.2d 361.

8. Miss.—Moore v. Yazoo & M. V. R. Co., 166 So. 395, 176 Miss. 65.

9. U.S.—Elder v. New York Cent. R. Co., C.C.A.Ky., 152 F.2d 361—Division 525, Order of Railway Conductors of America v. Gorman, C.C.A.Ark., 133 F.2d 273—System Federation No. 59 of Railway Employees Department of American Federation of Labor v. Louisiana & A. Ry. Co., D.C.La., 32 F.Supp. 89, affirmed, C.C.A., 119 F.2d 509, certiorari denied 62 S.Ct. 108, 314 U.S. 656, 86 L.Ed. 526.
Ill.—Evans v. Johnston, 20 N.E.2d 841, 300 Ill.App. 78.
Mich.—Hartley v. Brotherhood of Railway and Steamship Clerks, Freight Handlers and Station Employees, 277 N.W. 885, 283 Mich. 201.
Miss.—Yazoo & M. V. R. Co. v. Mitchell, 161 So. 860.
N.C.—Coley v. Atlantic Coast Line R. R., 19 S.E.2d 124, 221 N.C. 66.
Okl.—Order of Railway Conductors of America v. Shaw, 119 P.2d 549, 189 Okl. 665.
Pa.—Hanlen v. Brotherhood of Locomotive Firemen and Enginemen, 19 Pa.Dist. & Co. 564, 37 Dauph. Co. 198—Madera v. Monongahela Ry. Co., Com.Pl., 9 Fay.L.J. 27.

Acquiescence by company in union ruling
U.S.—Harris v. Missouri Pac. R. Co., D.C.Ill., 1 F.Supp. 946.

Change in assignment of train runs
Okl.—Lockwood v. Chitwood, 89 P. 2d 951, 185 Okl. 44.

10. Minn.—Jorgensen v. Great Northern Ry. Co., 22 N.W.2d 544, 221 Minn. 438.
Mo.—McGee v. St. Joseph Belt Ry. Co., 133 S.W.2d 675, 235 Mo.App. 707, certiorari quashed State ex rel. St. Joseph Belt R. Co. v. Shain, 145 S.W.2d 131, 346 Mo. 1098.
Pa.—Madera v. Monongahela Ry. Co., Com.Pl., 9 Fay.L.J. 27.

11. U.S.—Sanders v. Louisville & N. R. Co., C.C.A.Tenn., 144 F.2d 485.
Minn.—Jorgensen v. Great Northern Ry. Co., 22 N.W.2d 544, 221 Minn. 438.

Return to service within six months
Tenn.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

12. Minn.—Florestano v. Northern Pac. Ry. Co., 269 N.W. 407, 198 Minn. 203.

Agreement after transfer from department
Where original working agreement between railroad and telegraphers' union established seniority rights in operating department only, and telegrapher had voluntarily transferred to traffic department before working agreement was made, he had no seniority rights under such agreement.—McClure v. Louisville & N. R. Co., 64 S.W.2d 538, 16 Tenn.App. 369.

13. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762—Yazoo & M. V. R. Co. v. Webb, C.C.A.Miss., 64 F.2d 902.
Nature of collective bargaining agreements generally **see supra §** 28 (37).

dividual hirings.[14] The labor relations statutes do not prohibit an employer from making individual contracts with his employees,[15] or prohibit an employee from making an individual contract with the employer,[16] and such statutes do not preclude an employer from conducting his business on an open-shop basis;[17] but he may not insert in the contract of employment any discriminatory term which encourages or discourages membership in a labor organization other than requiring membership in the labor organization which has been legally chosen to represent the employees.[18] Conditions of employment which are not covered or provided for by the collective agreement may be fixed by the employer,[19] and the employer may make rules governing employees not covered by the collective agreement.[20] Where there is a great variation in circumstances of employment or capacity of employees, the collective bargaining agreement may prescribe only minimum rates of pay or maximum hours or expressly leave certain areas open to individual bargaining.[21]

Individual contracts cannot defeat or delay the procedure prescribed by labor relations statutes,[22] or effectively waive any of the benefits of collective bargaining,[23] and such contracts in existence at the effective date of the labor relations statute providing for collective bargaining are terminated in so far as they interfere with the employee's freedom of choice in selecting a bargaining agent or with the free bargaining process.[24] A collective bargaining agreement circumscribes the rights of employer and employees with respect to making individual

14. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762.

15. U.S.—J. I. Case Co. v. N. L. R. B., supra—N. L. R. B. v. Jones & Laughlin Steel Corp., 57 S.Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A. L.R. 1352—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—Peninsular & Occidental S. S. Co. v. N. L. R. B., C.C.A.5, 98 F.2d 411, certiorari denied N. L. R. B. v. Peninsular & Occidental S. S. Co., 59 S.Ct. 248, 305 U.S. 653, 83 L.Ed. 423—N. L. R. B. v. Sands Mfg. Co., C.C.A. 6, 96 F.2d 721, affirmed 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682.

Individual contracts pending negotiations

Under the Railway Labor Act changes by carriers in agreements reached through collective bargaining, pending negotiations, are prohibited, but independent individual contracts are not affected.—Williams v. Jacksonville Terminal Co., Fla. & Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Pickett v. Union Terminal Co., Fla. & Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

16. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520.

17. U.S.—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153.

18. U.S.—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992.

19. U.S.—Texoma Natural Gas Co. v. Oil Workers Intern. Union Local No. 463, D.C.Tex., 58 F.Supp. 132, affirmed, C.C.A., Oil Workers Intern. Union, Local No. 463 v. Texoma Natural Gas Co. 146 F.2d 62, certiorari denied 65 S.Ct. 1017, 324 U.S. 872, 89 L.Ed. 1426, rehearing denied 65 S.Ct. 1183, 325 U.S. 893, 89 L.Ed. 2004.

A profit-sharing contract entered into in good faith and without interference with, or restraint on, the rights as guaranteed by labor relations statutes is proper.—N. L. R. B. v. Jahn & Ollier Engraving Co., C.C.A.7, 123 F.2d 589.

Seniority rights

An employer may adopt any rule of seniority, so long as normal operation does not discriminate against freedom to select bargaining agency. —Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F.2d 340.

20. U.S.—Williams v. Jacksonville Terminal Co., Fla. & Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Pickett v. Union Terminal Co., Fla. & Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

21. U.S.—J. I. Case Co. v. National Labor Relations Board, 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762.

Railway Labor Act

"Collective bargains" between a railroad and its employees under Railway Labor Act, 45 U.S.C.A. § 151 et seq., need not always settle or embrace every exceptional circumstance in rates, rules, and working conditions, but may reserve particular situations for individual contracting, either completely or within prescribed limits.—Order of Railroad Telegraphers v. Railway Exp. Agency, Ga., 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788.

22. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762—Lewellyn v. Fleming, C.C.A.Okl., 154 F.2d 211, certiorari denied 67 S.Ct. 45—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 134 F.2d 240, certiorari denied 64 S.Ct. 48, 320 U.S. 746, 88 L.Ed. 443 —N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F.2d 368.

Employer's refusal to bargain with union

Where acceptance of employer's proposed contract by employees individually was brought about by employer's interference and refusal to bargain with union, the contracts were properly voided.—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 119, 313 U.S. 595, 85 L.Ed. 1549.

Coercion to compel individual contracts

Welfare and safety of employees of entire plant did not justify a coercive effort to compel acceptance of individual contracts by employees. —N. L. R. B. v. Bear Brand Hosiery Co., C.C.A.7, 131 F.2d 731.

23. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762—N. L. R. B. v. Poultrymen's Service Corporation, C.C. A.3, 138 F.2d 204—N. L. R. B. v. Jahn & Ollier Engraving Co., C.C. A.7, 123 F.2d 589.

Provisions for settlement of differences

Individual employment contracts whereby employees bound themselves to negotiate differences and to submit differences to arbitration constituted an unlawful restraint on the right of employees to bargain collectively.—N. L. R. B. v. Stone, C.C.A.7, 125 F.2d 752, certiorari denied Stone v. N. L. R. B., 63 S.Ct. 44, 317 U.S. 649, 87 L.Ed. 522.

24. U. S.—N. L. R. B. v. American Rolling Mill Co., C.C.A.6, 126 F.2d 38.

contracts of employment.[25] The collective agreement becomes a part of the contract of employment,[26] and it surmounts or supersedes the provisions of the individual contract as to terms and conditions of employment,[27] even though the individual contracts may be more advantageous to individual employees than the collective agreement.[28] Contracts of employment must be construed so as to include such terms of labor relations statutes as are applicable.[29]

The mere fact that an employee is a member of a labor union does not abrogate the employer's right to discharge him.[30] An employer has the right to refuse to maintain union standards.[31]

In the absence of a statute otherwise providing, nonmembership in a union may be made a condition of employment,[32] or a condition of continuance of employment,[33] and a labor union, by incorporating provisions into its constitution or by contract with its members, cannot abridge the employer's right to

25. U.S.—Dooley v. Lehigh Valley R. Co. of Pennsylvania, 21 A.2d 334, 130 N.J.Eq. 75, affirmed 25 A. 2d 893, 131 N.J.Eq. 468, certiorari denied Lehigh Valley R. Co. of Pennsylvania v. Dooley, 63 S.Ct. 45, 317 U.S. 649, 87 L.Ed. 523—Christiansen v. Local 680 of Milk Drivers and Dairy Employees of New Jersey, 10 A.2d 168, 126 N.J. Eq. 508.

Change in agreement

A railway express company's failure to proceed under statute and bargaining agreement requirement by giving notice to employees' bargaining agent of intended change in agreement and instead giving individual notices to employees as to change was ineffective and left collective bargaining agreement in force.—Order of Railroad Telegraphers v. Railway Exp. Agency, Ga., 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788.

Subordination of individual rights to rights of group

Pa.—Madera v. Monongahela Ry. Co., Com.Pl., 9 Fay.L.J. 27.

26. Neb.—Brisbin v. E. L. Oliver Lodge No. 335 of Brotherhood of Railway Clerks, 279 N.W. 277, 134 Neb. 517.

N.J.—Dooley v. Lehigh Valley R. Co. of Pennsylvania, 21 A.2d 334, 130 N.J.Eq. 75, affirmed 25 A.2d 893, 131 N.J.Eq. 468, certiorari denied Lehigh Valley R. Co. of Pennsylvania v. Dooley, 63 S.Ct. 45, 317 U.S. 649, 87 L.Ed. 523—Christiansen v. Local 680 of Milk Drivers and Dairy Employees of New Jersey, 10 A.2d 168, 126 N.J.Eq. 508.

Tenn.—Cross Mountain Coal Co. v. Ault, 9 S.W.2d 692, 157 Tenn. 461.

63 C.J. p 672 note 69.

Seniority rights

(1) Provisions for seniority rights in a collective bargaining agreement become a part of the employment contract of each individual employee.

Mo.—McCoy v. St. Joseph Belt Ry. Co., 77 S.W.2d 175, 229 Mo.App. 506.

Tenn.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

(2) One who accepts employment is bound by the prior construction of seniority rights provisions in the collective bargaining agreement in force at the time of his employment.—Burton v. Oregon-Washington R. & Nav. Co., 38 P.2d 72, 148 Or. 648.

27. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762—Gatliff Coal Co. v. Cox, C.C.A.Ky., 152 F.2d 52—St. Clair v. Russell & Pugh Lumber Co., D.C.Idaho, 51 F.Supp. 47.

Mass.—Hamer v. Nashawena Mills, 52 N.E.2d 22, 315 Mass. 160.

Railway Labor Act

(1) Under Railway Labor Act, 45 U.S.C.A. § 151 et seq., special voluntary individual contracts between a company and its employees as to rates of pay, rules, and conditions of employment, are subordinate to a collective bargaining agreement.—Order of Railroad Telegraphers v. Railway Express Agency, Ga., 64 S. Ct. 582, 321 U.S. 342, 88 L.Ed. 788—Lewellyn v. Fleming, C.C.A.Okl., 154 F.2d 211, certiorari denied 67 S.Ct. 45.

(2) Before the rule was settled it had been held that an employee need not accept the terms of the collective agreement but could make a special contract with the company.—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pac. Co. v. Southern Pac. Co., C.C.A. Cal., 132 F.2d 194, reversed on other grounds 64 S.Ct. 142, 320 U.S. 338, 88 L.Ed. 85—Illinois Cent. R. Co. v. Moore, C.C.A.Miss., 112 F.2d 959, reversed on other grounds 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.

28. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762.

Seniority rights

A collective agreement may abrogate an employee's seniority rights under his private contract.—Lewellyn v. Fleming, C.C.A.Okl., 154 F.2d 211, certiorari denied 67 S.Ct. 45.

29. U.S.—Manseau v. U. S., D.C. Mich., 52 F.Supp. 395.

Tex.—Mansell v. Texas & P. Ry. Co., 137 S.W.2d 997, 135 Tex. 31.

30. Or.—Moreland Theatres Corporation v. Portland Moving Picture Mach. Operators' Protective Union, Local No. 159, 12 P.2d 333, 140 Or. 35.

31. Colo.—People v. Harris, 91 P.2d 989, 104 Colo. 386, 122 A.L.R. 1034.

32. N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188—Vail-Ballou Press v. Casey, 212 N.Y.S. 113, 125 Misc. 689.

Pa.—Kraemer Hosiery Co. v. American Federation of Full Fashioned Hosiery Workers, Reading Branch, Local No. 10, 157 A. 588, 305 Pa. 206.

39 C.J. p 41 note 91 [a]—63 C.J. p 659 note 55.

Continuance of open-shop policy

Agreement required of employees not to aid in changing open-shop policy of employer does not affect an agreement between the union and the employees that the employees will not sign a contract of employment which precludes them from union membership.—Nolan v. Farmington Shoe Mfg. Co., D.C.Mass., 25 F.2d 906.

Employment of nonunion labor

An employer may employ only nonunion labor.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., Del., 17 A.2d 836.

33. U.S.—Hitchman Coal & Coke Co. v. Mitchell, W.Va., 38 S.Ct. 65, 245 U.S. 229, 62 L.Ed. 260, L.R.A.1918C 497, Ann.Cas.1918B 461.

N.J.—Currier v. International Molders' Union of North America Local No. 40, 115 A. 66, 93 N.J.Eq. 61.

63 C.J. p 659 note 55.

Binding effect during continuance of employment

Fact that parties to employee's contract not to join union were bound only while employment relation voluntarily continued was held not to vitiate contract.—Kraemer Hosiery Co. v. American Federation of Full Fashioned Hosiery Workers, Reading Branch, Local No. 10, 157 A. 588, 305 Pa. 206.

conduct an open shop.[34] Likewise, in the absence of statute, an employer's contract with a union cannot prevent an independent contract disregarding it,[35] but it may be read into the agreement of employment,[36] and there is a presumption that the contract of employment is to be read in the light of the union's by-laws in so far as these by-laws attempt to regulate the terms of employment of their members.[37]

Where the extent of a union delegate's authority is set forth in the agreement between the employer and the union, acts of the delegate in excess of his stated authority cannot modify individual agreements,[38] unless express authority is given outside the agreement,[39] or unless the union members ratify the modification of their individual agreements.[40]

3. UNFAIR LABOR PRACTICES

§ 28(43). In General

a. Under federal statutes
b. Under state statutes

a. Under Federal Statutes

Although it does not undertake to specify in precise and unmistakable language each incident which might constitute an unfair labor practice, the National Labor Relations Act describes and defines unfair labor practices, and labor practices condemned as unfair are strictly limited to those enumerated in the statute.

The National Labor Relations Act § 8, 29 U.S.C.A. § 158, describes and defines unfair labor practices; and labor practices condemned as unfair are strictly limited to those enumerated in the statute.[41] The act does not undertake to specify in precise and unmistakable language each incident which might constitute an unfair labor practice, but leaves to the National Labor Relations Board the work of applying the act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms.[42] The statute does not seek to prohibit evil intent but unfair labor practices.[43] On the other hand, it does not excuse concerted activities themselves independently unlawful.[44] Individual contracts between employer and employees obtained as the result of an unfair labor practice may not be the bases of advantage to the violator of the act or of disadvantage to employees.[45]

b. Under State Statutes

State statutes relating to unfair labor practices embrace only those unfair labor practices listed in the statute; the public cannot be deprived of its right to protection against such practices by any agreement of employees and employer or litigation between them for vindication of their private rights.

Statutes relating to unfair labor practices have been enacted in some states.[46] The term "unfair labor practices" within a state statute providing for the state board to hold hearing on charges of such practices means only those unfair labor practices listed in the statute.[47] The public cannot be deprived of its right to protection against unfair la-

34. U.S.—Nolan v. Farmington Shoe Mfg. Co., D.C.Mass., 25 F.2d 906.

35. N.Y.—Langmade v. Olean Brewing Co., 121 N.Y.S. 388, 137 App. Div. 355.
Tex.—Panhandle & S. F. Ry. Co. v. Wilson, Civ.App., 55 S.W.2d 216.

Employee subsequently joining union
A contract made by a labor union with an employer for benefit of employees does not ipso facto abrogate a prior agreement of an employer with an employee, notwithstanding employee subsequently joins union. —Huston v. Washington Wood & Coal Co., 103 P.2d 1095, 4 Wash.2d 449.

36. N.Y.—Langmade v. Olean Brewing Co., 121 N.Y.S. 388, 137 App. Div. 355.

37. N.Y.—Scarano v. Lemlein, 121 N.Y.S. 351, 66 Misc. 174.
39 C.J. p 43 note 25.

38. U.S.—Ahlquist v. Alaska-Portland Packers' Ass'n, C.C.A.Or., 39 F.2d 348.

39. **Conduct of meeting**
If authority to modify individual agreements is actually given at a union meeting, the fact that the meeting was not conducted in accordance with union rules is immaterial.—Ahlquist v. Alaska-Portland Packers' Ass'n, supra.

40. **Knowledge of modification**
In the absence of knowledge of the modification, the union members may not be held to have ratified the modification.—Ahlquist v. Alaska-Portland Packers' Ass'n, supra.

41. U.S.—Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217.

Acts of strangers
Where an employer and a city chamber of commerce had no connection with, financial interest in, or control over, each other, an advertisement published by the latter disseminating information secured by its committee concerning comparative wages paid by the employer and his competitors, and urging employees to vote at a union election did not warrant a cease and desist order by the National Labor Relations Board against the chamber of commerce.—N. L. R. B. v. American Pearl Button Co., C.C.A.8, 149 F.2d 311.

42. U.S.—Republic Aviation Corp. v. N. L. R. B., 65 S.Ct. 982, 324 U. S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081—National Labor Relations Board v. Le Tourneau Co. of Ga., 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081, rehearing denied 65 S.Ct. 1401, 325 U.S. 894, 89 L.Ed. 2005.

43. U.S.—F. W. Poe Mfg. Co. v. N. L. R. B., C.C.A.4, 119 F.2d 45.

44. U.S.—N. L. R. B. v. Peter Cailler Kohler Swiss Chocolates Co., C.C.A.2, 130 F.2d 503.

45. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L. Ed. 762—National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799.

46. **Strict rules of respondeat superior held inapplicable**
Pa.—Hodson Motor Co. v. United Automobile Workers, Com.Pl., 90 Pittsb.Leg.J. 295.

47. N.Y.—In re Almroth, 14 N.Y.S. 2d 63, 171 Misc. 314, affirmed Ap-

bor practices under such statutes by any agreement of employees and employer or litigation between them for vindication of their private rights.[48]

§ 28(44). Unfair Labor Practices of Employer in General

The circumstances with which an employer is confronted do not excuse an unfair labor practice; and with respect to compliance with the statute his conduct will be judged by what he does as well as what he says.

The circumstances with which the employer is confronted do not justify disregard of statutes relating to unfair labor practices,[49] and such a practice cannot be excused because of economic pressure exerted against the employer by one of the unions engaged in a jurisdictional labor dispute.[50] With respect to compliance by the employer with the National Labor Relations Act, an employer's conduct will be judged not only by what he says, but what he does.[51] An employer's labor policy as evidenced by his conduct prior to the enactment of the statute is material to the question of the intent of his action after and under the act.[52] Hostility to outside unions and support of, or predilection for, a company union prior to the enactment of the act, unless later unequivocally repudiated so as to induce confidence in employees in their freedom of choice, is relevant in determination of unfair labor practices;[53] and it is proper for the labor relations board to consider the employer's recent and uniform hostility to organizational activities in appraising his conduct in his dealings with his employees.[54] The statutory prohibition of unfair labor practices designed by the employer to prevent free exercise of the employees' wishes with reference to membership in a union was intended as a grant of right to employees rather than as a grant of power to the union.[55]

Acts of supervisory employees. In order to constitute an unfair labor practice of an employer, it is not necessary that actions of supervisory employees actually reflect the employer's policy,[56] and it is sufficient that the employees have cause to believe that foremen who commit unfair labor practices are acting as representatives of the management.[57]

Effect of strikes generally. Employees on strike are protected against unfair labor practices denounced by the National Labor Relations Act.[58] Where causes contributing to a strike are unfair la-

plication of Almroth, 17 N.Y.S.2d 225, 258 App.Div. 378.

48. N.Y.—New York State Labor Relations Bd. v. Holland Laundry, 63 N.E.2d 68, 294 N.Y. 480, reargument denied 64 N.E.2d 278, 295 N.Y. 568.

49. U.S.—Wilson & Co. v. N. L. R. B., C.C.A.8, 123 F.2d 411.

50. U.S.—N. L. R. B. v. National Broadcasting Co., C.C.A.2, 150 F. 2d 895—N. L. R. B. v. Gluek Brewing Co., C.C.A.8, 144 F.2d 847—N. L. R. B. v. John Engelhorn & Sons, C.C.A.3, 134 F.2d 553—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C.C.A.5, 129 F.2d 661—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 128 F.2d 528—N. L. R. B. v. Isthmian S. S. Co., C.C.A.2, 126 F.2d 598—Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Affiliated with the American Federation of Labor v. N. L. R. B., 121 F.2d 84, 74 App. D.C. 28, certiorari denied 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539—McQuay-Norris Mfg. Co. v. N. L. R. B., C.C.A.7, 116 F.2d 748, certiorari denied 61 S.Ct. 843, 313 U. S. 565, 85 L.Ed. 1524—South Atlantic S. S. Co. of Delaware v. N. L. R. B., C.C.A.5, 116 F.2d 480, certiorari denied 61 S.Ct. 1101, 313 U. S. 582, 85 L.Ed. 1538—N. L. R. B. v. Star Pub. Co., C.C.A.9, 97 F.2d 465.

Belief that other employees would refuse to work with employees not rehired did not excuse employer's disregard of requirements of statute.—Wilson & Co. v. N. L. R. B., C.C.A.8, 123 F.2d 411.

51. U.S.—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C.C.A.10, 140 F.2d 423.

Violation of settlement agreement

The National Labor Relations Board is authorized to treat violations of a settlement agreement between the employer and the board by subsequent unfair labor practices, which indicate that the purpose of the settlement agreement has been thwarted, as entitling the board to make the previous, as well as the subsequent, unfair labor practices committed, the subject of an effectual order.—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72.

52. U.S.—N. L. R. B. v. McLain Fire Brick Co., C.C.A.3, 128 F.2d 393.

Attitude prior to judicial determination of constitutionality

Where employer had adopted a policy of opposition to statute but had professedly changed such policy after the act was upheld, it was proper for examiner and board to interpret employer's action in light of his earlier attitude.—N. L. R. B. v. Aladdin Industries, C.C.A.7, 125 F.2d 377, certiorari denied Aladdin Industries v. N. L. R. B., 62 S.Ct. 1310, 316 U.S. 706, 86 L.Ed. 1773.

53. U.S.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Atlas Underwear Co. v. N. L. R. B., C.C.A.6, 116 F.2d 1020.

54. U.S.—N. L. R. B. v. American Laundry Machinery Co., C.C.A.2, 152 F.2d 400—N. L. R. B. v. Eclipse Moulded Products Co., C. C.A.7, 126 F.2d 576.

55. U.S.—N. L. R. B. v. Schwartz, C.C.A.5, 146 F.2d 773.

56. U.S.—N. L. R. B. v. Brezner Tanning Co., C.C.A.1, 141 F.2d 62.

Responsibility for acts and conduct of supervisory employees generally see supra § 28 (14).

57. U.S.—N. L. R. B. v. Brezner Tanning Co., C.C.A.1, 141 F.2d 62.

58. U.S.—N. L. R. B. v. Mackay Radio & Tel. Co., 58 S.Ct. 904, 304 U. S. 333, 82 L.Ed. 1381.

Effect of termination or cessation of employment on status as employee see supra § 28 (13).

Construction of letter sent to employees

A letter sent by an employer to all employees, including those on strike, and found to have restrained or coerced employees in their rights, was required to be taken as a whole, and employer's conduct both before and after sending of letter was material in construing what was intended.—Wilson & Co. v. N. L. R. B., C.C.A.7, 120 F.2d 913.

bor practices and the employees' desire for wage betterments, the latter should not excuse the employer from the legal consequences that flow from the unfair labor practices.[59] An employer whose conduct brings on a strike must be held responsible for what follows.[60]

§ 28(45). Statutory Definition of Employer's Unfair Practices

a. Interference, restraint, or coercion
b. Domination of, or interference with, formation of labor organization or support thereof
c. Discrimination with respect to hire or tenure of employment
d. Discrimination for filing charges or testifying under statute
e. Refusal to bargain collectively

a. Interference, Restraint, or Coercion

Interference with, or restraint or coercion of, employees by an employer in the exercise of their statutory rights of self-organization and collective bargaining may constitute an unfair labor practice regardless of the motive of the employer or of his success or failure in preventing organization.

Under the National Labor Relations Act § 8, 29 U.S.C.A. § 158 (a) (1), interference with, or restraint or coercion of, employees by an employer in the exercise of their statutory rights of self-organization and collective bargaining constitutes an unfair labor practice,[61] regardless of the motive of the employer in so doing.[62] Interference, restraint, and coercion within the statute are not acts themselves but are descriptive and are the result of acts.[63] Whatever acts may have the effect of interference, restraint, and coercion are included in those terms, and are therefore prohibited.[64] Thus they include a great number of acts which ordinarily could be val-

Union activities

Employer could not discriminate against strikers who were willing to return to work because of their union activities or their participation in strike.—Wilson & Co. v. N. L. R. B., C.C.A.7, 124 F.2d 845.

59. U.S.—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579.

60. U.S.—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144.

61. U.S.—Medo Photo Supply Corporation v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007—N. L. R. B. v. Monumental Life Ins. Co., C.C.A.6, 162 F.2d 340—N. L. R. B. v. Harris-Woodson Co., C.C.A.4, 162 F.2d 97—N. L. R. B. v. Bird Mach. Co., C.C.A.1, 161 F.2d 589—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201—N. L. R. B. v. American White Cross Laboratories, C.C.A.2, 160 F.2d 75—N. L. R. B. v. Indiana Desk Co., C.C.A.7, 149 F.2d 987—LeTourneau Co. of Georgia v. N. L. R. B., C.C.A.5, 143 F.2d 67, reversed on other grounds 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081, rehearing denied 65 S.Ct. 1401, 325 U.S. 894, 89 L.Ed. 2005, rehearing denied 150 F.2d 1012—Western Cartridge Co. v. N. L. R. B., C.C.A. 7, 139 F.2d 855—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—N. L. R. B. v. American Rolling Mill Co., C.C.A. 6, 126 F.2d 38—Tyne Co. v. N. L. R. B., C.C.A.7, 125 F.2d 832—N. L. R. B. v. Acme Air Appliance Co., C. C.A.2, 117 F.2d 417—Foote Bros. Gear & Machine Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Foote Bros. Gear & Machine Corporation, 61 S.Ct. 318, 311 U. S. 620, 85 L.Ed. 394, mandate conformed to Foote Bros. Gear & Machine Corporation v. N. L. R. B., 121 F.2d 802—Independent Union of Gear Workers v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Independent Union of Gear Workers, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394—N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A.7, 113 F.2d 621—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F.2d 340—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144.

Coercion of employees generally see supra § 27.

Particular acts of employer as unfair labor practices within statute see infra §§ 28(46)–28(62).

Course of conduct

Interference, coercion, and domination are active processes and may be inferred from a course of conduct even though no overt acts are proved, and the board must guard against subtle evasions by which attitudes, fair on their face, realistically viewed, amount to interference and coercion on part of employer.—N. L. R. B. v. Mt. Clemens Pottery Co., C.C.A.6, 147 F.2d 262.

Extent of improper conduct

(1) The slightest interference, intimidation or coercion by employer of the employees in exercise of right to self-organization constitutes an unfair labor practice.—N. L. R. B. v. William Davies Co., C.C.A.7, 135 F.2d 179, certiorari denied William Davies Co. v. N. L. R. B., 64 S.Ct. 82, 320 U.S. 770, 88 L.Ed. 460.

(2) In order to constitute interference with employees' right to bargain collectively, it is not necessary that the interference be so substantial as to preclude the reasonable exercise of employees' right.—N. L. R. B. v. Cities Service Oil Co., C.C.A.2, 122 F.2d 149.

Totality of employer's activities

Where board found that anti-union remarks of two supervisors constituted unfair labor practices, but that the conduct of two other foremen did not constitute unfair labor practice the conduct of all supervisors might be considered as part of the totality of employer's activities.—North Carolina Finishing Co. v. N. L. R. B., C.C.A.4, 133 F.2d 714, certiorari denied 64 S.Ct. 39, 320 U.S. 738, 88 L.Ed. 437.

Prohibition not enforceable at common law

Prohibitions against interference by employers with self-organization of employees were not enforceable at common law.—Agwilines, Inc., v. N. L. R. B., C.C.A.5, 87 F.2d 146.

62. U.S.—N. L. R. B. v. Perfect Circle Co., C.C.A.7, 162 F.2d 566.

63. U.S.—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F.2d 368.

64. U.S.—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, supra.

idly done, but when they interfere with, restrain, or coerce employees in the exercise of their rights they are prohibited by the statute.[65] It is only necessary that the employer have interfered, intimidated, or coerced.[66] Duress is not necessary, but only interference,[67] and it is not necessary that the interference shall be successful in preventing organization.[68] The remedy furnished by the act is just as available when coercion succeeds as when it fails.[69] Interference is no less interference because it is accomplished through allurements rather than coercion.[70] On the question whether the employer is guilty of unfair labor practices each case must rest on its particular facts,[71] and the existence of employer interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible.[72]

The statute does not protect a union against loss of its members as a result of a conspiracy between competing unions and employers except as incident to the determination by the National Labor Relations Board of its right to act as bargaining representative.[73]

Under a state labor relations act an employer's claim of harassment has been held to be no defense to a general claim of interference and coercion to prevent and discourage the employees from joining a union of their own choosing.[74] The maxim, "De minimis non curat lex," has no application, for employers may clearly manifest their active preference for one labor union and their intense displeasure with another by resorting to the most trifling forms of discrimination.[75]

b. Domination of, or Interference with, Formation of Labor Organization or Support Thereof

Under statutory provisions making it an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it, support to be prohibited need not take financial forms, and a charge of domination cannot be insulated from unfair practices held to have interfered with organizational activities of employees.

Under the express provisions of the National Labor Relations Act § 8, 29 U.S.C.A. § 158 (a) (2), it is an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.[76] Support to be prohibited need not take financial forms.[77] A charge of domination cannot be insulated from un-

65. U.S.—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, supra.

66. U.S.—N. L. R. B. v. Brezner Tanning Co., C.C.A.1, 141 F.2d 62—N. L. R. B. v. John Engelhorn & Sons, C.C.A.3, 134 F.2d 553—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 134 F.2d 240, certiorari denied 64 S.Ct. 48, 320 U.S. 746, 88 L.Ed. 443—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523.

The test of employer's interference, restraint, and coercion of employees engaging in concerted union activities, is not the employer's motive or the success or failure of coercion, but is whether employer engaged in conduct which may reasonably be said to have tended to interfere with free exercise of employees' rights to engage in concerted union activities.—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 153 F.2d 811.

67. U.S.—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523.

68. U.S.—N. L. R. B. v. Brezner Tanning Co., C.C.A.1, 141 F.2d 62—N. L. R. B. v. John Engelhorn & Sons, C.C.A.3, 134 F.2d 553—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 134 F.2d 240, certiorari denied 64 S.Ct. 48, 320 U.S. 746, 88 L.Ed. 443—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523.

Effect of anti-union statements

Whether particular employees to whom anti-union statements were made were influenced or restrained was not necessarily the test of unfair labor practices, but it was pertinent to consider whether anti-union statements were made in a setting which could fairly be said to be symptomatic of an existent condition and whether the statements had a general, rather than a special, effect.—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C.C.A.10, 140 F.2d 423.

69. U.S.—N. L. R. B. v. Crown Can Co., C.C.A.8, 138 F.2d 263, certiorari denied Crown Can Co. v. N. L. R. B., 64 S.Ct. 527, 321 U.S. 769, 88 L.Ed. 1065.

70. U.S.—N. L. R. B. v. Crown Can Co., C.C.A.8, 138 F.2d 263, certiorari denied Crown Can Co. v. N. L. R. B., 64 S.Ct. 527, 321 U.S. 769, 88 L.Ed. 1065—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 134 F.2d 240, certiorari denied 64 S.Ct. 48, 320 U.S. 746, 88 L.Ed. 443.

71. U.S.—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C.C.A.10, 140 F.2d 423.

72. U.S.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., App.D.C., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

73. U.S.—United Electrical Radio & Machine Workers of America v. International Brotherhood of Electrical Workers, C.C.A.N.Y., 115 F.2d 488.

74. N.Y.—New York State Labor Relations Board v. Toffenetti Restaurant Co., 46 N.Y.S.2d 70, 181 Misc. 779, affirmed 47 N.Y.S.2d 113, 267 App.Div. 860, appeal denied 47 N.Y.S.2d 310, 267 App.Div. 869, motion dismissed 55 N.E.2d 379, 292 N.Y. 618, reversed on other grounds 48 N.Y.S.2d 554, 267 App.Div. 978.

75. Pa.—In re Ewart, Com.Pl., 42 Pa.Dist. & Co. 307.

76. U.S.—Hamilton-Brown Shoe Co. v. N. L. R. B., C.C.A.8, 104 F.2d 49.

Pa.—In re Incorporation of Scranton Sportswear Welfare Ass'n, 57 Pa. Dist. & Co. 91, 47 Lack.Jur. 233.

Domination as interference with freedom in choice of bargaining representative see supra § 28 (25).

Particular acts of employer as unfair labor practices within statute see infra §§ 28 (46)–28 (62).

77. D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

fair labor practices held to have interfered with the organizational activities of employees, either concurrent with, prior to, or subsequent to, organizational effort.[78] It is immaterial that an employee representation plan dominated and controlled by the employer had in fact not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental rather than fundamental, and with good motives.[79] The formation of a labor organization has been held not to have been dominated by the employer merely because a foreman ordered some men under him to vote at an election to determine whether a proposed federation of employees was desired.[80] Payment of wages by the employer to employees for a few hours' time spent at meetings leading up to the organization of the union does not constitute attempted domination of the employees' choice of unions such as would make it an unfair labor practice.[81]

An employer cannot, by wrongfully dominating or interfering with a union, confer on himself the right to destroy the union,[82] and, even though a union is formed in violation of the statutory prohibition against employer domination, it is a labor organization under the protection of the National Labor Relations Act.[83]

Under some state statutes it is an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization.[84] The mere fact that an organization limited to employees of a particular employer is approved by the management does not constitute an unfair labor practice;[85] and a state statute providing that it shall be an unfair labor practice for an employer to contribute financial or other support to any employee organization is not intended to prevent those who actually do the same work as the other members of a union from being members of that union or bearing their fair share of the expense of its maintenance by paying dues to that union.[86] Unfair labor practices of a labor organization in the conduct of a strike cannot be considered as in connection with, or as part of the actions forming the basis of, a complaint against the employer for interference in his employees' right to organize by aiding formation of a union in opposition to the complaining union within the meaning of a provision of the state labor relations act forfeiting the rights of a complainant found to be engaged in unfair labor practices in connection with, or as part of the action forming the basis of, the complaint,[87] and such provision, moreover, does not apply in considering a complaint filed before its enactment.[88]

c. Discrimination with Respect to Hire or Tenure of Employment

An employer who discriminates against certain employees because of their affiliation with a labor union or because of activity in a labor organization is guilty of an unfair labor practice unless such discrimination is in conformity with a valid closed-shop agreement.

In order to make out a charge of unfair labor practice under the provision of the National Labor Relations Act relating to discrimination to encourage or discourage union membership, it must appear that the employer by discrimination with respect to hire or tenure of employment or any term or condition of employment encouraged or discouraged

Discharge of nonmembers

An employer may give support to a particular group of its employees within statutory definition of "unfair labor practice," by pursuing a policy of discharging those who refuse to join that group or who join a rival, obnoxious to the employer.—Hamilton-Brown Shoe Co. v. N. L. R. B., C.C.A.8, 104 F.2d 49.

Held not to constitute support

(1) Action of employer in posting announcement that as result of discussions with organization certain concessions had been made by employer.—N. L. R. B. v. Sparks-Withington Co., C.C.A.6, 119 F.2d 78, certiorari dismissed 62 S.Ct. 477, 314 U.S. 703, 86 L.Ed. 562.

(2) Refreshments furnished and paid for by employer on condition that every employee be invited to social gathering of employees' association.—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C.A.7, 121 F.2d 602.

78. U.S.—N. L. R. B. v. Mt. Clemens Pottery Co., C.C.A.6, 147 F.2d 262.

79. U.S.—N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219.

Support of company union as unfair labor practice see infra § 28 (52).

80. U.S.—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 113 F.2d 85.

81. U.S.—N. L. R. B. v. Falk Corporation, C.C.A.7, 102 F.2d 383.

82. D.C.—E. Anthony & Sons v. N. L. R. B., App., 163 F.2d 22.

83. D.C.—E. Anthony & Sons v. N. L. R. B., App., 163 F.2d 22.

84. Pa.—In re Incorporation of Scranton Sportswear Welfare Ass'n, 57 Pa.Dist. & Co. 91, 47 Lack.Jur. 233.

85. N.Y.—Breen v. Picard, 4 N.Y.S. 2d 301, 305, 167 Misc. 561.

Reason for rule

"If the reasoning of the defendants be carried to its logical conclusion, it would mean that only such labor organizations as are disapproved by employers would be valid in this state. No such antagonism between employer and employee could have reasonably been within the contemplation of the Legislature and certainly such a provocative public policy has not been expressed by it in the words of the statute or by any reasonable implication."—Breen v. Picard, supra.

86. N.Y.—Master Plumbers Ass'n of Albany v. Weir, 15 N.Y.S.2d 889, 258 App.Div. 76.

87. Pa.—In re Ewart, 42 Pa.Dist. & Co. 307.

Unfair labor practices of employees, labor organizations, or their agents, see infra § 28 (63).

88. Pa.—In re Ewart, supra.

membership in any labor organization.[89] There is no discrimination where union and nonunion members are similarly treated.[90] An employer who discriminates against certain employees because of their affiliation with a labor union or because of their activity in union organization, however, is guilty of an unfair labor practice under the statute[91] even though he believes that he has good business reasons to justify his discrimination;[92] but discrimination with respect to hire or tenure of employment in conformity with a valid closed-shop agreement has been held not to constitute an unfair labor practice within the statute.[93] The statute confers rights on employees, not on applicants for employment.[94] Acts and statements by an employer hostile to a union may properly be determined as discriminatory even though such acts or statements would not be so considered coming from an employer with a friendly attitude.[95]

Under state statutes. A provision in a state labor law making it an unfair labor practice for an employer to discourage membership in a labor organization by discrimination with respect to hire or tenure must be read into a contract between the employer and a labor union.[96]

d. Discrimination for Filing Charges or Testifying under Statute

The statutory provision making it an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the act relates to testimony given in any proceeding under the act.

Under National Labor Relations Act, § 8, 29 U.S.C.A. § 158 (a) (4), it is an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the act.[97] Such provision relates to testimony given in any proceeding under the act.[98]

e. Refusal to Bargain Collectively

It is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees respecting rates of pay, wages, hours of employment, or other conditions of employment, where a specific request to bargain has been made.

Under National Labor Relations Act § 8, 29 U.S.C.A. § 158 (a) (5), it is an unfair practice for an employer to refuse to bargain collectively with the representatives of his employees,[99] and it has been held that an unfair labor practice consisting of a

89. U.S.—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536.
Particular acts of employer as unfair labor practices within statute see infra § 28 (46)–28 (62).
The word "hire" in statute will be taken as equivalent to "hiring."—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992, 997.

90. U.S.—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201.

91. U.S.—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A.7, 162 F.2d 435—N. L. R. B. v. Robbins Tire & Rubber Co., C.C.A.5, 161 F.2d 798—N. L. R. B. v. American White Cross Laboratories, C.C.A.2, 160 F.2d 75—N. L. R. B. v. Fairmont Creamery Co., C.C.A.10, 143 F.2d 668, certiorari denied 65 S.Ct. 87, 323 U.S. 752, 89 L.Ed. 602—Sewell Hats, Inc. v. N. L. R. B., C.C.A.5, 143 F.2d 450, certiorari denied 65 S.Ct. 130, 323 U.S. 772, 89 L.Ed. 617—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462—N. L. R. B. v. Security Warehouse & Cold Storage Co., C.C.A.9, 136 F.2d 829—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 133 F.2d 988—N. L. R. B. v. Dixie Motor Coach Corporation, C.C.A.5, 128 F.2d 201—North Whittier Heights Citrus Ass'n v. N. L. R. B., C.C.A.9, 109 F.2d 76, certiorari denied 60 S.Ct. 1075, 310 U.S. 632, 84 L.Ed. 1402, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472.
Employer's subsequent recession
In determining whether employer was guilty of discrimination, the board could consider obviously discriminatory treatment of employees by reason of their union activities, even though the employer receded from its action and put the employees back to work.—N. L. R. B. v. Eclipse Moulded Products Co., C.C.A.7, 126 F.2d 576.
Fact that employer considered strike illegal did not justify discrimination by employer against union or its employees either during strike or subsequent thereto.—N. L. R. B. v. Indiana Desk Co., C.C.A.7, 149 F.2d 987.
The word "discrimination," in provision refers to anti-union discrimination, that is to a different treatment accorded union employees solely because of their union memberships or activities.—Montgomery Ward & Co. v. N. L. R. B., C.C.A.7, 107 F.2d 555, 564.

92. U.S.—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A.7, 162 F.2d 435.

93. U.S.—M and M Wood Working Co. v. N. L. R. B., C.C.A.9, 101 F.2d 938.

94. U.S.—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992.

95. U.S.—N. L. R. B. v. Vincennes Steel Corporation, C.C.A.7, 117 F.2d 169.

96. N.Y.—Diamond Candle Co. v. Fratello, 16 N.Y.S.2d 346.

97. U.S.—N. L. R. B. v. White Cross Laboratories, C.C.A.2, 160 F.2d 75.

98. U.S.—N. L. R. B. v. White Cross Laboratories, supra.

99. N.Y.—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A.7, 162 F.2d 435—N. L. R. B. v. Harris-Woodson Co., C.C.A.4, 162 F.2d 97—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., C.C.A.8, 160 F.2d 388—N. L. R. B. v. National Broadcasting Co., C.C.A.2, 150 F.2d 895—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438—Glen Alden Coal Co. v. N. L. R. B., C.C.A.3, 141 F.2d 47—N. L. R. B. v. H. G. Hill Stores, C.C.A.5, 140 F.2d 924—N. L. R. B. v. Cape County Milling Co., C.C.A.8, 140 F.2d 543, 152 A.L.R. 144—N. L. R. B. v. John Engelhorn & Sons, C.C.A.3, 134 F.2d 553—N. L. R. B. v. National Seal Corp., C.C.A.2, 127 F.2d 776—N. L. R. B. v. Acme Air Appliance Co., C.C.A.2, 117 F.2d 417—N. L. R. B. v. Lightner Pub. Corp. of Ill., C.C.A.7, 113 F.2d 621—Black Diamond S. S. Corporation v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S.Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542.

refusal to bargain collectively is also an unfair labor practice within other provisions of the statute.[1] The subject matter of collective bargaining embraced by the statute includes rates of pay, wages, hours of employment, or other conditions of employment,[2] and an employer's refusal to bargain about legislative policies and other generalities is not an unfair labor practice under the statute.[3] A specific request to bargain is a prerequisite to finding the employer guilty of an unfair labor practice for refusal to bargain,[4] and the employer's quick-tempered reaction to a protest by a union organizer whom he had never seen before does not dispense with the necessity for such request.[5]

Under some state statutes the refusal of an employer to bargain collectively with duly designated representatives of the employees is an unfair labor practice,[6] but an employer is not guilty of an unfair labor practice in refusing to deal with a union which at no time has represented a majority of his employees;[7] and, where a union has lost its right under its contract with the employer to an automatic renewal thereof by calling a strike on refusal of the employer to increase compensation of employees prior to the expiration of the contract, an order of the state board holding the employer guilty of an unfair labor practice in refusing to bargain with the union has been held to be erroneous.[8] The statutes do not preclude an employer from insisting on a final and full determination by the court of an issue properly pending therein, such as an employer's action to enjoin a labor union from violating the terms of a collective bargaining agreement.[9]

§ 28(46). Particular Acts of Employer

Various acts of an employer have been held to constitute or not to constitute unfair labor practices.

In addition to the particular acts considered in detail in the sections immediately following, various other acts of an employer have been held to constitute unfair labor practices,[10] such as active assistance to a citizen's committee in an anti-union cam-

Particular acts of employer as unfair labor practices within statute see infra § 28 (46)–28 (62).

1. U.S.—N. L. R. B. v. Barrett Co., C.C.A.7, 135 F.2d 959—Pueblo Gas & Fuel Co. v. N. L. R. B., C.C.A. 10, 118 F.2d 304—N. L. R. B. v. Highland Park Mfg. Co., C.C.A.4, 110 F.2d 632—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F.2d 18.

Interference, restraint, or coercion

Disregard of employer's duty to bargain collectively only with duly recognized or accredited representative of employees, violates statute making it an unfair labor practice to interfere with, restrain, or coerce employees in exercise of rights to organize, bargain collectively, etc.—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495—N. L. R. B. v. National Broadcasting Co., C.C.A.2, 150 F.2d 895—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

Contrary authority

(1) Some cases have held contrary to the text rule.—Globe Cotton Mills v. N. L. R. B., C.C.A.5, 103 F.2d 91—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'n v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

(2) The case of N. L. R. B. v. Remington Rand, supra, however, has been expressly overruled.—Art Metals Const. Co. v. N. L. R. B., C.C.A., 110 F.2d 148.

2. U.S.—Globe Cotton Mills v. N. L. R. B., C.C.A.5, 103 F.2d 91.

3. U.S.—Globe Cotton Mills v. N. L. R. B., C.C.A.5, supra.

Subcontracting

Under employer's contract with union providing that dispute as to interpretation of management clause should be settled within grievance procedures provided by contract and, if they failed, by arbitration, employer's declination to confer with union on question of subcontracting was not an unfair labor practice or a refusal to bargain, where employer and union had always theretofore deemed subcontracting a function of management, and the question involved interpretation of the management clause, and employer did not act in bad faith.—Timken Roller Bearing Co. v. N. L. R. B., C.C.A.6, 161 F.2d 949.

4. U.S.—N. L. R. B. v. Burke Mach. Tool Co, C.C.A.6, 133 F.2d 618.

5. U.S.—N. L. R. B. v. Burke Mach. Tool Co., supra.

6. Wis.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

Mere existence of strike does not in itself preclude state labor relations board from finding that employers' refusal to negotiate further with representative of employees is unreasonable and therefore an unfair labor practice.—Collier Service Corporation v. Boland, 4 N.Y.S.2d 480, 167 Misc. 709.

7. Pa.—Pennsylvania Labor Relations Board v. Levin, 50 Pa.Dist. & Co. 79.

8. R.I.—McGee v. Local No. 682 of Brotherhood of Painters, Decorators and Paperhangers of America, A. F. of L., 38 A.2d 303, 70 R.I. 200.

9. N.Y.—In re State Labor Relations Board, 22 N.Y.S.2d 40, 175 Misc. 88.

10. **"Booth renting"**

Where beauty parlor operators, in order to avoid expenses incidental to cost of labor, adopted practice of "booth renting," whereby each employee was made a tenant with per cent of his commissions paying the rent, and employees adopted the method with understanding that probable alternative was operators' going out of business, method adopted was an unfair labor practice within state labor relations act.—New York State Labor Relations Board v. National Beauty Parlors, 45 N.Y.S. 2d 36, 180 Misc. 997.

Plan for purchase of stock by employees is not inherently bad or in contravention of statute, but is invalid where it binds employees to refrain from requesting a raise in wages, since such agreement deprives employees of right to designate agent to bargain with reference thereto.—N. L. R. B. v. Vincennes Steel Corporation, C.C.A.7, 117 F.2d 169.

Taking strike vote

Discrediting a labor organization,

paign,[11] circulation of petitions relating to union matters,[12] discontinuance of operations in order to discourage union membership,[13] refusal to arbitrate in accordance with terms of a collective bargaining contract,[14] or willingness to meet only with individuals and not with a union committee to discuss grievances.[15]

Other acts have been held not to constitute unfair labor practices,[16] such as consulting individuals as to matters not covered by a union contract,[17] continued indiscriminate enforcement of a preëxisting rule prohibiting display of union insignia on uniforms while on duty,[18] refusal to arbitrate while a strike in violation of agreement continued,[19] refusal to ac-

which is an exclusive bargaining unit and which has taken a strike vote, by employer's taking a strike vote of his own is an unfair labor practice.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862. Certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U. S. 585, 82 L.Ed. 1546.

Inviting test of necessity of treating with union

Where an employer obviously did not mean to confer with a labor organization representing a majority of its employees and its president invited a test of the necessity of treating with the union and consistently followed that course, the National Labor Relations Board was justified in finding it guilty of unfair labor practices.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

Unusually severe punishment or a sudden discovery of employees' inefficiency when they join union may be ground for finding that employer had interfered with right of self-organization and to bargain collectively and had discriminated because of union activity.—N. L. R. B. v. Cities Service Oil Co., C.C.A.2, 129 F. 2d 933.

Employer's procurement of contract with employees, providing that they should have no right to demand closed shop or signed agreement by employer with any union, that employer had absolute, unqualified right to hire or discharge, and that employees would not strike, constituted unfair labor practice as interference with right to bargain collectively.—N. L. R. B. v. American Mfg. Co., C.C.A.2, 106 F.2d 61, modified on other grounds American Mfg. Co. v. N. L. R. B., 60 S.Ct. 612, 309 U.S. 629, 84 L.Ed. 988.

11. U.S.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311.

Acquiescence in mayor's speech on premises

Employer's acquiescence in, and apparent approval of, mayor's speech on employer's premises during working hours, in which mayor stated that employer could and probably would move out if union came in, and that he, the mayor, did not see why employees should bring in some one to organize any union and that the employer would recognize a shop union, violated the National Labor Relations Act as an unfair labor practice.—N. L. R. B. v. American Furnace Co., C.C.A.7, 158 F.2d 376.

12. U.S.—F. W. Woolworth Co. v. N. L. R. B., C.C.A.2, 121 F.2d 658 —N. L. R. B. v. New Era Die Co., C.C.A.3, 118 F.2d 500.

13. U.S.—N. L. R. B. v. Cape County Milling Co., C.C.A.8, 140 F.2d 543, 152 A.L.R. 144.

14. U.S.—Consolidated Aircraft Corp. v. N. L. R. B., C.C.A.9, 141 F.2d 785.

15. U.S.—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 153 F.2d 811.

Refusal to permit union delegates on premises

Refusal of owner of oil tankers to permit shore delegates of unions to come aboard while vessels are in port for purpose of conferring with seamen whom unions represent and negotiating with ships' officers concerning grievances, is an improper interference with employees' collective bargaining rights as against claim of owner that such refusal was necessary in order to protect vessels from spies and saboteurs where owner did not exclude laundry agents, extra work parties, and casual labor not members of the crew.—Richfield Oil Corp. v. N. L. R. B., C.C.A.9, 143 F.2d 860.

Refusal to treat with union representatives

(1) Dealing with employees directly, refusing to recognize authority of union's attorney, and refusing after strike to treat with any representative of union constitute unfair labor practice under statutory provision relating to interference, restraint, or coercion.—N. L. R. B. v. Highland Shoe, Inc., C.C.A.1, 119 F.2d 218.

(2) Employer, ignoring union as employees' exclusive bargaining representative, and negotiating with employees concerning wages at time when wage negotiations with union were pending, was also guilty of unfair practices.—Medo Photo Supply Corporation v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007.

16. **Assigning place of work**

Since the statute contemplates only those unfair labor practices listed in the statute, a barber shop proprietor is not guilty of unfair labor practice within state labor relations act in telling his barbers at what chairs in shop he wants them to work, although some chairs are more desirable than others.—New York State Labor Relations Bd. v. Grasso, 69 N.Y.S.2d 711, 272 App. Div. 149.

Circulation of petition

An employer was not guilty of unfair labor practice because a nonsupervisory employee was permitted to act on employer's property and time in soliciting signatures to a petition that employees did not desire to be affiliated with any union, without having his wages docked, and because a general foreman discussed petition with the nonsupervisory employee where there was no showing that such action influenced the signers.—N. L. R. B. v. Appalachian Electric Power Co., C.C.A.4, 140 F.2d 217.

Reprimand

Notwithstanding the National Labor Relations Act, an employer may reprimand an employee for cause.—Fort Wayne Corrugated Paper Co. v. N. L. R. B., C.C.A.7, 111 F.2d 869.

Treating grievances individually presented

Fact that employer notified employees of method of treating grievances individually presented when another scheme for treating grievances was already in effect under agreement with union did not constitute an unfair labor practice.—N. L. R. B. v. North American Aviation, C.C.A.9, 136 F.2d 898.

17. U.S.—N. L. R. B. v. Brown-Brockmeyer Co., C.C.A.6, 143 F.2d 537.

18. U.S.—N. L. R. B. v. El Paso Electric Co., C.C.A.5, 133 F.2d 168.

19. N.Y.—In re State Labor Relations Board, 22 N.Y.S.2d 40, 175 Misc. 88.

Conditional proposal to negotiate

An employer's proposal to negotiate with respect to causes of strike, if employees would go back to work

cept a proposed arbitrator,[20] or refusal to discuss grievances with employee representatives who do not represent a majority of the employees.[21]

The making of a contract for collective bargaining does not absolvė the employer of his prior unfair labor practices when those practices were continued in substantially the same pattern after the contract had been entered into.[22]

Discrimination as to seniority rights. The deliberate violation of a seniority rule may constitute an unfair labor practice,[23] but various acts with respect to seniority rules have been held not to constitute unfair labor practices.[24] A railway employee's grievance with respect to loss of seniority when he was demoted is within the purview of the Railway Labor Act provision for settlement of disputes between individual employees and the employer.[25]

Gifts and favors to employees. The action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination,[26] but an employer is not guilty of an unfair labor practice merely because he treats his employees well in order to forestall a union movement,[27] even though benefits are conferred during an election period.[28]

Inquiry as to union matters. The employer may inquire or be informed as to the progress of the efforts at unionization[29] or as to whether the union was organized[30] or has "washed up;"[31] but inquiry by an employer as to his employees' union affiliation has been held to be an unfair labor practice,[32] and a similar rule has been applied with respect to an employer's attempt to ascertain and identify union leaders,[33] and interrogation of employees concerning union membership[34] and activities.[35]

§ 28(47). —— Creation or Termination of Relationship in General

Except as provided otherwise by statute an employer may hire and discharge employees when and as he chooses, but the right is limited by the provisions

and if grievances were filed in accordance with grievance procedures in contract with union, was not an unfair labor practice or a refusal to bargain, where strike was in breach of contract with union and employer's proposal was merely to carry on within normal processes of collective bargaining as provided for in contract, and was not in bad faith. —Timken Roller Bearing Co. v. N. L. R. B., C.C.A.6, 161 F.2d 949.

20. U.S.—N. L. R. B. v. Athens Mfg. Co., C.C.A.5, 161 F.2d 8.

21. U.S.—Mooresville Cotton Mills v. N. L. R. B., C.C.A.4, 94 F.2d 61, modified on other grounds 97 F.2d 959.

22. U.S.—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U. S. 650, 87 L.Ed. 523.

23. U.S.—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F.2d 340.

Injured laborer

The fact that a laborer has sustained a slight injury not seriously interfering with his work has been held not to be a sufficient reason for preferring him in reëmployment in violation of a seniority rule.—Kansas City Power & Light Co. v. N. L. R. B., supra.

24. **Hiring of new employees**

The fact that an employer abandoned a long-standing seniority policy may not be argued in support of the conclusion that he discriminated against striking employees where he has hired new employees in numbers sufficient to operate his plant.—Wilson & Co. v. N. L. R. B., C.C.A.7, 120 F.2d 913.

Members of same union

An employer's action in giving preference to one employee over another contrary to the contract rule of seniority does not constitute an unfair labor practice under the National Labor Relations Act where both employees were members of the same union and it does not appear that the respective union activities of the two men had any influence whatever.—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F.2d 340.

Motive

Where an employer desires to operate his shop in accordance with his honest understanding of his contract with a labor organization providing for departmental seniority of employees, his motive, whether efficiency or economy, is proper as regards his rights after the labor organization refuses to permit operation of the shop on the principle of departmental seniority.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682.

25. Cal.—Austin v. Southern Pac. Co., 123 P.2d 39, 50 Cal.App.2d 292.

26. U.S.—Medo Photo Supply Corp. v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007.

27. D.C.—Peter J. Schweitzer, Inc., v. N. L. R. B., 144 F.2d 520, 79 U. S.App.D.C. 178.

28. D.C.—Peter J. Schweitzer, Inc. v. N. L. R. B., supra.

29. U.S.—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462.

Effect dissipated by subsequent action

Questioning of employees by superintendent, effect of which was dissipated by subsequent action, does not furnish basis for finding that employer was guilty of unfair labor practices.—Virginia Elec. & Power Co. v. N. L. R. B., C.C.A.4, 115 F.2d 414, reversed on other grounds 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348.

30. U.S.—N. L. R. B. v. East Texas Motor Freight Lines, C.C.A.5, 140 F.2d 404—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462.

31. U.S.—Jacksonville Paper Co. v. N. L. R. B., supra.

32. U.S.—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 153 F.2d 811 —N. L. R. B. v. Alco Feed Mills, C.C.A.5, 133 F.2d 419—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F.2d 480.

33. U.S.—Sewell Hats, Inc. v. N. L. R. B., C.C.A.5, 143 F.2d 450, certiorari denied 65 S.Ct. 130, 323 U. S. 772, 89 L.Ed. 617.

34. U.S.—N. L. R. B. v. Harris-Woodson Co., C.C.A.4, 162 F.2d 97—Sewell Hats, Inc. v. N. L. R. B., C.C.A.5, 143 F.2d 450, certiorari denied 65 S.Ct. 130, 323 U.S. 772, 89 L.Ed. 617.

35. U.S.—N. L. R. B v. Harris-Woodson Co., C.C.A.4, 162 F.2d 97 —Sewell Hats, Inc. v. N. L. R. B., C.C.A.5, 143 F.2d 450, certiorari denied 65 S.Ct. 130, 323 U.S. 772, 89 L.Ed. 617.

of some labor relations acts. The labor relations board may not substitute its judgment for that of the employer in hiring or discharging employees.

An employee has no right to work on terms prescribed solely by himself,[36] and except as provided otherwise by statute the employer may hire and discharge workmen when and as he chooses.[37] So an employer has the right, in the conduct of his business, to employ workmen who are independent of any labor union[38] and to adopt a system of apprenticeship which excludes his apprentices from membership in such a union.[39] He has the same right, unless controlled by a contract, to refuse to continue in his employ those who become union members, as his employees have to refuse to continue in his employ unless he discharges all but union members.[40] Some labor relations acts leave an employer free to employ or discharge his employees as he sees fit, for good reason or for poor reason, or for no reason at all, subject only to the limitation that he may not require an employee, or one seeking employment, as a condition of employment, to join any company union, or to refrain from forming or joining, or assisting, a labor organization of his own choosing.[41] Under a statutory provision making it an unfair labor practice for an employer to encourage or discourage membership in any labor organization, an employer may not require an applicant to join or resign from a union or insert in the contract of employment any other discriminatory term which encourages or discourages membership in a labor organization, except with respect to a labor organization which has been legally chosen to represent the employees.[42]

Power of labor relations board. The statutes do not authorize the labor relations board to substitute its judgment for that of an employer with respect to hiring or what is sufficient cause for discharging employees[43] or to interfere with his right to discharge for legitimate reasons.[44] While the board has power to determine whether an employee had been improperly discharged for union activity,[45] it cannot inquire into whether the employer is just or unjust, wise or unwise, in the exercise of its managerial judgment in selecting or discharging em-

36. U.S.—Home Beneficial Life Ins. Co. v. N. L. R. B., C.C.A.4, 159 F. 2d 280—C. G. Conn, Limited v. N. L. R. B., C.C.A.7, 108 F.2d 390.

37. Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836.
N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N. Y. 65, 63 A.L.R. 188.

38. N.Y.—Interborough Rapid Transit Co. v. Lavin, supra.
Pa.—Kraemer Hosiery Co. v. American Federation of Full Fashioned Hosiery Workers, Reading Branch, Local No. 10, 157 A. 588, 305 Pa. 206—Flaccus v. Smith, 48 A. 894, 199 Pa. 128, 54 L.R.A. 640, 85 Am.S.R. 779.

39. Pa.—Kraemer Hosiery Co. v. American Federation of Full Fashioned Hosiery Workers, Reading Branch, Local No. 10, 157 A. 588, 305 Pa. 206—Flaccus v. Smith, 48 A. 894, 199 Pa. 128, 54 L.R.A. 640, 85 Am.S.R. 779.

40. Pa.—Kraemer Hosiery Co. v. American Federation of Full Fashioned Hosiery Workers, Reading Branch, Local No. 10, 157 A. 588, 305 Pa. 206.

41. N.Y.—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App. Div. 315—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256.
Pa.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398.

Reduction of expenses
Employer's right to choose between laying off or discharging employees in order to reduce expenses because of a business recession was not limited either by state labor relations act or by agreement with labor union recognizing employer's right to discharge any employee for inefficiency and providing for departmental seniority preference in case of layoff.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398.

42. U.S.—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992.
Contracts for employment of union labor as valid or invalid as against public policy see Contracts § 267.

Requiring repudiation of affiliated union
Fact that employer made a condition precedent to employee's reemployment that he sign a statement in effect repudiating an affiliated union, warranted order requiring such employee's reinstatement.—N. L. R. B. v. Duncan Foundry & Machine Works, C.C.A.7, 142 F.2d 594.

43. U.S.—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153.
Power of board to prevent and redress unfair labor practices generally see infra § 28 (64).

Rating efficiency of employees
Board has no jurisdiction to determine that a department store, in selecting for discharge because of business recession salesmen who were least efficient, should have rated employees according to their records over the entire period of their service rather than over a three-month period, where under the labor relations act it is for the employer to fix its own standard of efficiency in the absence of a limitation thereon in agreement with the labor union.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398.

Determination of necessity for dismissal
A labor relations board had no jurisdiction to determine whether it was necessary for department store to dismiss any of its employees because of a business recession, where employer has a right to determine how many salesmen it wishes to have in its employ and how many permanently to dismiss if it decides to reduce its sales force.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, supra.

44. U.S.—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—N. L. R. B. v. Keystone Freight Lines, C.C. A.10, 126 F.2d 414.

45. Ky.—Coldiron v. Good Coal Co., 125 S.W.2d 757, 276 Ky. 833.

Duty of board
Whether discharge was because of union activities was for the board to determine.—Williams Motor Co. v. N. L. R. B., C.C.A.8, 128 F.2d 960.

ployees,[46] but its inquiry must be confined to whether the employees have been discriminated against because of their union activities or affiliations.[47] The board may not command an employer to retain in his employ a discharged employee who is a member of the union unless it appears that the discharge was influenced by the employee's membership in the union and was calculated to interfere with the freedom of choice guaranteed by the act to all employees.[48] It may order reinstatement only when an employee is discharged for union membership or activities, in order to encourage or discourage membership in a labor organization.[49] Interference with the right of an employer to determine when an employee is inefficient should not be lightly indulged in when applying the act.[50] The board has the right to decide not only whether there was a proper cause for the discharge of the employee but also, conceding such cause, whether the employers acted on it or for reasons prohibited by the act.[51]

§ 28(48). —— Employment

a. In general
b. During strike

a. In General

Generally an employer has the right to hire his employees on the basis of individual merit without regard to union affiliation, and the National Labor Relations Act does not interfere with the normal exercise of his right; but refusal to hire an employee solely because of his affiliation with a labor union is an unfair labor practice.

Apart from statute, an employer has the right to hire his employees on the basis of individual merit, without regard to their affiliation or nonaffiliation with any labor organization.[52] The National Labor Relations Act does not interfere with the normal exercise of the right of the employer to select his employees[53] and does not impose an obligation on

46. U.S.—N. L. R. B. v. Montgomery Ward & Co.. C.C.A.8, 157 F.2d 486—N. L. R. B. v. American Pearl Button Co., C.C.A.8, 149 F.2d 258—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F. 2d 680.

47. U.S.—N. L. R. B. v. American Pearl Button Co., C.C.A.8, 149 F. 2d 258—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—Kansas City Power & Light Co. v. N. L. R. B., C.C.A. 8, 111 F.2d 340—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F. 2d 153.

48. N.Y.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256.
Pa.—In re Lehrman, Com.Pl., 52 Dauph.Co. 1.

Lawful exercise of authority

(1) Where master exercises right of discharge for reasons other than intimidation or coercion with respect to union activities or as part of an unfair labor practice, state labor relations board is not entitled to disregard master's lawful exercise of authority or make it a pretext for interference with the right of discharge.—New York State Labor Relations Bd. v. Union Club of City of N. Y., 52 N.Y.S.2d 74, 268 App.Div. 516, reversed on other grounds 68 N.E.2d 29, 295 N.Y. 915.

(2) Provision of contract with labor union that in case of layoff seniority rights should cease after six months impliedly fixed such time as the normal limit for a layoff as distinguished from a discharge, so that failure to replace discharged employees within six months would indicate that employer acted in good faith in discharging rather than laying them off.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398.

49. U.S.—N. L. R. B. v. Clarksburg Pub. Co., C.C.A.4, 120 F.2d 976.
Reinstatement of employees in general see infra § 28 (51).

Discharge for inefficiency

Where fewer employees were needed to operate oil and gas repressure plant after strike due to depletion of stripper wells resulting from injury to employer's property during strike, employer had the right to exercise a choice between efficiency and inefficiency, as respects right of board to order reinstatement of discharged employees.—N. L. R. B. v. Bell Oil & Gas Co., C.C.A. 5, 98 F.2d 406, rehearing denied 98 F.2d 870.

Minor misconduct on the part of the employee would not deprive board of power to apply the remedial provisions of statute unless it was the cause for the refusal to reinstate.—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680.

Time of discharge

The fact that employees whose reinstatement was ordered by the board were discharged during interim between expiration of first and execution of second agreement between employer and the union did not affect question of right of employees to reinstatement, where adjournment of conference when second agreement was being formulated occurred at the request of union representatives and the officials representing the employer agreed to consider the matter of the discharges on their merits without reference as to whether or not an agreement was in existence.—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153.

50. U.S.—N. L. R. B. v. Goshen Rubber & Manufacturing Co., C. C.A.7, 110 F.2d 432.

51. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486—Onan v. N. L. R. B., C.C.A.8, 139 F.2d 728.

52. N.J.—Bayonne Textile Corporation v. American Federation of Silk Workers, 168 A. 799, 114 N. J.Eq. 307, modified on other grounds 172 A. 551, 116 N.J.Eq. 146, 92 A.L.R. 1450.

53. U.S.—Phelps Dodge Corp. v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S.Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L. R. 1352—N. L. R. B. v. American Pearl Button Co., C.C.A.8, 149 F.2d 258—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—N. L. R. B. v. Keystone Freight Lines, C.C.A.10, 126 F.2d 414—Nevada Consol. Copper Corporation v. N. L. R. B., C.C.A.10, 122 F.2d 587, reversed on other grounds 62 S. Ct. 960, 316 U.S. 105, 86 L.Ed. 1305—N. L. R. B. v. Blue Bell-Globe Mfg. Co., C.C.A.4, 120 F.2d 974—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F.2d 480—N. L. R. B. v. Waumbec Mills, C.C.A.1, 114 F. 2d 226—N. L. R. B. v. Lane Cotton Mills Co., C.C.A.5, 111 F.2d 814, appeal dismissed Lane Cotton Mills

an employer to favor union members in hiring employees[54] or prevent him, for good sufficient reasons, from refusing to employ a union applicant[55] or anyone;[56] but an employer may not refuse to hire employees solely because of their affiliation with a labor union,[57] and refusal to hire an employee solely because of his affiliation with a labor union is an unfair labor practice.[58] Refusal to violate a valid contract with a union by reëmploying discharged nonunion men is not an unfair labor practice.[59]

Under state statutes. Under the provisions of some state labor relations acts, an employer may not require an employee, or one seeking employment, as a condition of employment, to join any company union[60] or to refrain from forming or joining, or assisting, a labor organization of his own choosing,[61] and refusal to employ a person solely because of membership in a labor union constitutes an unfair labor practice.[62]

b. During Strike

It does not constitute an unfair labor practice for an employer, who is confronted with a concerted refusal on the part of a labor union to permit its members to perform their contracts with him, to procure others to fill their places or to assure those who accept employment during a strike that their employment is permanent.

Where an employer is confronted with a concerted refusal on the part of a labor union to permit its members to perform their contracts with him, there is nothing unlawful in his attempt to procure

Co. v. N. L. R. B., 61 S.Ct. 316, 311 U.S. 723, 85 L.Ed. 471—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949—N. L. R. B. v. Union Pacific Stages, C.C.A. 9, 99 F.2d 153—Peninsular & Occidental S. S. Co. v. N. L. R. B., C.C.A.5, 98 F.2d 411, certiorari denied N. L. R. B. v. Peninsular & Occidental S. S. Co., 59 S.Ct. 248, 305 U.S. 653, 83 L.Ed. 423—N. L. R. B. v. Sands Mfg. Co., C.C.A.6, 96 F.2d 721, affirmed 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682—Appalachian Electric Power Co. v. N. L. R. B., C.C.A.4, 93 F.2d 985—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 91 F.2d 509, rehearing denied 93 F.2d 1010.

Reëmployment of former employees

(1) An employer may refuse to reëmploy for any reason, just or unjust, except discrimination because of union activities and relationships.—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 139 F.2d 855—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260—N. L. R. B. v. Kohen-Ligon-Folz, Inc., C.C.A.5, 128 F.2d 502—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433—N. L. R. B. v. National Motor Bearings Co., C.C.A.9, 105 F.2d 652.

(2) Where evidence showed policy of company to require presence of laid off workers on spare floor, there was no obligation to send for weaver before hiring outside weavers.—F. W. Poe Mfg. Co. v. N. L. R. B., 119 F.2d 45.

54. U.S.—Phelps Dodge Corp. v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217.

55. U.S.—N. L. R. B. v. Waumbec Mills, C.C.A.1, 114 F.2d 226.

56. U.S.—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462.

57. U.S.—Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 139 F.2d 855—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260—N. L. R. B. v. Kohen-Ligon-Folz, Inc., C.C.A.5, 128 F.2d 502—N. L. R. B. v. Dixie Motor Coach Corporation, C.C.A.5, 128 F.2d 201—N. L. R. B. v. Chattanooga Bakery, C.C.A.6, 127 F.2d 201, certiorari denied Chattanooga Bakery v. N. L. R. B., 63 S.Ct. 157, 317 U.S. 676, 87 L.Ed. 543—N. L. R. B. v. Keystone Freight Lines, C.C.A.10, 126 F.2d 414—Nevada Consol. Copper Corp. v. N. L. R. B., C.C.A.10, 122 F.2d 587, reversed on other grounds 62 S.Ct. 960, 316 U.S. 105, 86 L.Ed. 1305—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433—N. L. R. B. v. Bachelder, C.C.A.7, 120 F.2d 574, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519, modified on other grounds 125 F.2d 387—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F.2d 652—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153—Appalachian Electric Power Co. v. N. L. R. B., C.C.A.4, 93 F.2d 985—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 91 F.2d 509, rehearing denied 93 F.2d 1010.

"Hire"

(1) The word "hire" in provision concerning discrimination with regard to hire would be taken as equivalent to "hiring."—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992.

(2) The prohibition against discrimination with regard to hire must be applied as a means toward the accomplishment of the main object of the act, and the word "hire" cannot be read as meaning the wages paid.—Phelps Dodge Corp. v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217.

The statutory test is whether the applicant was rejected because of union membership or activity, or because of some permissible criterion.—N. L. R. B. v. Waumbec Mills, C.C.A.1, 114 F.2d 226.

Contrary authority

Prior to the determination of the question by the supreme court, there was authority contrary to the rule of the text.—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992.

58. U.S.—Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. Chattanooga Bakery, C.C.A.6, 127 F.2d 201, certiorari denied Chattanooga Bakery v. N. L. R. B., 63 S.Ct. 157, 317 U.S. 676, 87 L.Ed. 543—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A.10, 122 F.2d 419—N. L. R. B. v. Crystal Springs Finishing Co., C.C.A.1, 116 F.2d 669—N. L. R. B. v. Waumbec Mills, C.C.A.1, 114 F.2d 226—Black Diamond S. S. Corporation v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S.Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542.

59. Or.—Markham & Callow v. International Woodworkers of America, Lumber & Sawmill Workers Union, 135 P.2d 727, 170 Or. 517.

60. N.Y.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App.Div. 315.

61. N.Y.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App.Div. 315.

62. Pa.—Petition of St. Marys Sewer Pipe Co., 55 Pa.Dist. & Co. 297.

others to fill their places,[63] and such others have a right to accept the employment,[64] and such hiring does not constitute an unfair labor practice.[65] The employer is at liberty to make a contract with a new labor union for services of workmen to fill the places of his former employees.[66] In such case the offering of reëmployment to some of the old employees on a new and different basis does not constitute discrimination against the labor organization representing them,[67] for, if the whole body of employees has been lawfully discharged, the law does not prohibit the making of individual contracts with men whose prior relations have thereby been severed.[68] Since, as discussed infra § 28 (51) b, an employer who has been guilty of no unfair labor practice is not bound to discharge those hired to fill the places of strikers, on the election of the latter to resume their employment, in order to create places for them, the assurance by the employer to those who accept employment during the strike that if they so desire their places may be permanent is not an unfair labor practice.[69]

§ 28(49). —— Discharge

a. In general
b. Effect of National Labor Relations Act
c. Effect of state statutes

a. In General

In the absence of a statute to the contrary, an employer has the right to discharge his employees for cause or without cause and without regard to their affiliation or nonaffiliation with any labor union.

In the absence of statutory provisions to the contrary, it is the right of an employer to discharge his employees without regard to their affiliation or nonaffiliation with any labor organization.[70] The right to discharge for cause has not been taken away from the employer by reason of the passage of labor relations legislation[71] and an employer may also, without any reason therefor, discharge an employee;[72] but the absence of a reason in connection with other circumstances may point strongly to a discrimination in violation of labor relations legislation.[73]

b. Effect of National Labor Relations Act

(a) In general
(b) Employees on strike

(a) In General

The National Labor Relations Act does not interfere with the normal exercise of the right of the employer to discharge his employees, and the exercise of that right does not constitute an unfair labor practice or coercion unless it is for a reason prohibited by the act, such as for union activity or agitation for collective bargaining.

The National Labor Relations Act does not interfere with the normal exercise of the right of the

63. U.S.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682—N. L. R. B. v. Mackay Radio & Telegraph Co., 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 761—N. L. R. B. v. Shenandoah-Dives Mining Co., C.C.A.10, 145 F.2d 542—United Biscuit Co. of America v. N. L. R. B., C.C.A.7, 128 F.2d 771—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 127 F.2d 180, certiorari denied 63 S.Ct. 48, 317 U. S. 652, 87 L.Ed. 524—Wilson & Co. v. N. L. R. B., C.C.A.7, 124 F.2d 845—Wilson & Co. v. N. L. R. B., C.C.A.7, 120 F.2d 913—N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A.7, 113 F.2d 621.
N.Y.—In re State Labor Relations Board, 22 N.Y.S.2d 40, 175 Misc. 88.
Pa.—Pennsylvania Labor Relations Board v. Camino, 47 Pa.Dist. & Co. 1, 25 West.Co.L.J. 54.
63 C.J. p 659 note 57.

64. Ill.—Mathews v. People, 67 N. E. 28, 202 Ill. 389, 63 L.R.A. 73, 95 Am.S.R. 241.
Mass.—Vegelahn v. Guntner, 44 N. E. 1077, 167 Mass. 92, 35 L.R.A. 722, 57 Am.S.R. 443.

65. U.S.—N. L. R. B. v. Mackay Radio & Telegraph Co., 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 127 F.2d 180, certiorari denied 63 S.Ct. 48, 317 U.S. 652, 87 L.Ed. 524—C. G. Conn, Limited, v. N. L. R. B., C.C.A.7, 108 F.2d 390.

66. U.S.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682.

67. U.S.—N. L. R. B. v. Sands Mfg. Co., supra.

68. U.S.—N. L. R. B. v. Sands Mfg. Co., supra.

69. U.S.—N. L. R. B. v. Mackay Radio & Telegraph Co, 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381.

70. N.J.—Bayonne Textile Corporation v. American Federation of Silk Workers, 168 A. 799, 114 N.J. Eq. 307, modified on other grounds 172 A. 551, 116 N.J.Eq. 146, 92 A.L.R. 1450.
Pa.—Metropolitan Life Ins. Co. v. Insurance Guild, Local No. 22, 49 Pa.Dist. & Co. 75.
Negotiations with union
Employer's right to discharge striking employee, because of the violation of terms of employment agreement, was not waived by employer's subsequent negotiations with a local union prior to termination of arbitration.—Homer Laughlin China Co. v. Hix, W.Va., 37 S. E.2d 649.
Under National Industrial Recovery Act
U.S.—Harper v. Southern Coal & Coke Co., C.C.A.Ala., 73 F.2d 792.
N.Y.—H. B. Rosenthal-Ettlinger Co. v. Schlossberg, 266 N.Y.S. 762, 149 Misc. 210.

71. U.S.—N. L. R. B. v. Robbins Tire & Rubber Co., C.C.A.5, 161 F. 2d 798—N. L. R. B. v. Continental Pipe Line Co., C.C.A.5, 161 F.2d 302.

72. U.S.—N. L. R. B. v. Robbins Tire & Rubber Co., C.C.A.5, 161 F. 2d 798.
Wis.—Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 279 N.W. 673, 228 Wis. 473, 117 A.L.R. 398.

73. Wis.—Wisconsin Labor Relations Board v. Fred Rueping Leather Co., supra.

employer to discharge his employees,[74] and the exercise of that right does not, standing alone, constitute an unfair labor practice[75] or coercion[76] unless it is for a reason prohibited by the act,[77] such

74. U.S.—Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U. S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. Waterman S. S. Corp., 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S.Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352—N. L. R. B. v. Continental Pipe Line Co., C.C.A.5, 161 F.2d 302—Hamilton v. N. L. R. B., C.C.A.6, 160 F.2d 465—American Steel Foundries v. N. L. R. B., C.C.A.7, 158 F.2d 896—N. L. R. B. v. American Pearl Button Co., C. C.A.8, 149 F.2d 258—Harp v. N. L. R. B., C.C.A.10, 138 F.2d 546—Edward G. Budd Mfg. Co. v. N. L. R. B., C.C.A.Pa., 138 F.2d 86, certiorari denied 64 S.Ct. 619, 321 U.S. 778, 88 L.Ed. 1071—Jacksonville Paper Co. v. N. L. R. B., C. C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462—Dannen Grain & Milling Co. v. N. L. R. B., C.C.A.8, 130 F.2d 321—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—United Biscuit Co. of America v. N. L. R. B., C.C.A.7, 128 F.2d 771—N. L. R. B. v. Kohen-Ligon-Folz, Inc., C. C.A.5, 128 F.2d 502—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—N. L. R. B. v. Keystone Freight Lines, C.C.A.10, 126 F.2d 414—N. L. R. B. v. Union Mfg. Co., C.C.A.5, 124 F.2d 332—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433—N. L. R. B. v. Blue Bell-Globe Mfg. Co., C.C.A.4, 120 F.2d 974—N. L. R. B. v. Electric Vacuum Cleaner Co., C.C.A.6, 120 F.2d 611, reversed on other grounds 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775—N. L. R. B. v. Auburn Foundry, C.C.A.7, 119 F.2d 331—N. L. R. B. v. Riverside Mfg. Co., C.C.A.5, 119 F.2d 302—N. L. R. B. v. Automotive Maintenance Machinery Co., C.C.A. 7, 116 F.2d 350, reversed on other grounds 62 S.Ct. 608, 315 U.S. 282, 86 L.Ed. 848—Martel Mills Corp. v. N. L. R. B., C.C.A.4, 114 F.2d 624—N. L. R. B. v. Waumbec Mills, C.C.A.1, 114 F.2d 226—Continental Oil Co. v. N. L. R. B., C. C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—Fort Wayne Corrugated Paper Co. v. N. L. R. B., C.C.A.7, 111 F.2d 869—N. L. R. B. v. Lane Cotton Mills Co., C.C.A.5, 111 F.2d 814, appeal dismissed Lane Cotton Mills Co. v. N. L. R. B., 61 S.Ct. 316, 311 U.S. 723, 85 L.Ed. 471—Link-Belt Co. v. N. L. R. B., C.C.A.7, 110 F.2d 506, reversed on other grounds 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Independent Union of Craftsmen v. N. L. R. B., C.C.A.7, 110 F. 2d 506, reversed on other grounds 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Goshen Rubber & Manufacturing Co., C.C.A.7, 110 F.2d 432—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574—Jefferson Electric Co. v. N. L. R. B., C. C.A.7, 102 F.2d 949—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153—Peninsular & Occidental S. S. Co. v. N. L. R. B., C.C.A.5, 98 F.2d 411, certiorari denied N. L. R. B. v. Peninsular & Occidental S. S. Co., 59 S.Ct. 248, 305 U.S. 653, 83 L.Ed. 423—N. L. R. B. v. Sands Mfg. Co., C.C.A.6, 96 F.2d 721, affirmed 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682—Appalachian Electric Power Co. v. N. L. R. B., C.C. A.4, 93 F.2d 985—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 91 F. 2d 509, rehearing denied 93 F.2d 1010.

D.C.—E. Anthony & Sons v. N. L. R. B., App.D.C., 163 F.2d 22.

S.C.—Parker v. Southeastern Haulers, 41 S.E.2d 387, 210 S.C. 18.

Employee held lawfully discharged

(1) For conviction of crime of petit larceny, although the property stolen was not that of employer.—N. L. R. B. v. Federal Bearings Co., C.C.A.2, 109 F.2d 945.

(2) For disobedience of employer's directions in breach of contract.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486.

(3) For refusal to obey directions as to what part of plant employee shall occupy.—N. L. R. B. v. Columbia Products Corporation, C.C.A.2, 141 F.2d 687.

(4) For refusal to work overtime without additional compensation.—C. G. Conn, Limited, v. N. L. R. B., C.C.A.7, 108 F.2d 390.

(5) For slight interference with war production.—Wyman-Gordon Co. (Ingalls Shepard Division) v. N. L. R. B., C.C.A.7, 153 F.2d 480.

Discretion of management

In determining whether discharge of employee constituted unfair labor practice, question as to proper discipline was within discretion of the management.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486.

75. U.S.—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 139 F.2d 855—N. L. R. B. v. Empire Furniture Corporation, C.C.A.6, 107 F.2d 92—N. L. R. B. v. Sands Mfg. Co., C. C.A.6, 96 F.2d 721, affirmed 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682.

Discontinuance of jobs

Evidence that particular jobs were discontinued and that no replacement employees were hired may constitute a defense to charge against employer of discriminating.—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574—Montgomery Ward & Co. v. N. L. R. B., C.C.A.7, 107 F.2d 555.

Discharge without warning

An employer was not required to warn employee who was deliberately interfering with war production in order to discharge him without violating the act.—Wyman-Gordon Co. (Ingalls Shepard Division) v. N. L. R. B., C.C.A.7, 153 F.2d 480.

76. U.S.—Peninsular & Occidental S. S. Co. v. N. L. R. B., C.C.A.5, 98 F.2d 411, certiorari denied National Labor Relations Board v. Peninsular & Occidental S. S. Co., 59 S.Ct. 248, 305 U.S. 653, 83 L.Ed. 423.

77. U.S.—N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036—N. L. R. B. v. Fansteel Metallurgical Corp., 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. American Car & Foundry Co., C.C.A.7, 161 F.2d 501—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—N. L. R. B. v. Blue Bell-Globe Mfg. Co., C.C.A.4, 120 F.2d 974—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L. Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

D.C.—E. Anthony & Sons v. N. L. R. B., App.D.C., 163 F.2d 22.

Pressure to join specific union as unfair labor practice see infra § 28 (56).

Concerted activity for mutual aid

Provision of act guaranteeing to employees the right to engage in

as for union activity[78] or, according to the decisions on the question, for agitation for collective

concerted activities for their mutual aid entitled employees to petition for overtime work; and to restrain or coerce employees in exercise of such right by discharging employee because of belief, although erroneous, that he was engaged in such activity constituted an unfair labor practice. —N. L. R. B. v. Schwartz, C.C.A.5, 146 F.2d 773.

78. U.S.—Republic Aviation Corp. v. N. L. R. B., 65 S.Ct. 982, 324 U. S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081—National Labor Relations Board v. Le Tourneau Co. of Ga., 65 S.Ct. 982, 324 U.S. 793, 89 L. Ed. 1372, 157 A.L.R. 1081, rehearing denied 65 S.Ct. 1401, 325 U.S. 894, 89 L.Ed. 2005—Phelps Dodge Corporation v. N. L. R. B., 61 S. Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. Froedman-Harry Marks Clothing Co., 57 S.Ct. 645, 301 U.S. 58, 81 L.Ed. 921, 108 A.L.R. 1352—N. L. R. B. v. Fruehauf Trailer Co., 57 S.Ct. 642, 301 U.S. 49, 81 L.Ed. 918, 108 A.L.R. 1352—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S.Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352—N. L. R. B. v. Robbins Tire & Rubber Co., C.C.A.5, 161 F.2d 798—N. L. R. B. v. Gonzalez Padin Co., C.C.A.1, 161 F.2d 353—N. L. R. B. v. American White Cross Laboratories, C.C.A.2, 160 F.2d 75—American Steel Foundries v. N. L. R. B., C.C.A.7, 158 F.2d 896—N. L. R. B. v. Vail Mfg. Co., C.C.A.7, 158 F.2d 664—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S. Ct. 44, 326 U.S. 735, 90 L.Ed. 438—N. L. R. B. v. Fairmont Creamery Co., C.C.A.10, 143 F.2d 668, certiorari denied 65 S.Ct. 87, 323 U.S. 752, 89 L.Ed. 602—Humble Oil & Refining Co. v. N. L. R. B., C.C.A. 5, 140 F.2d 777—N. L. R. B. v. Cape County Milling Co., C.C.A.8, 140 F.2d 543, 152 A.L.R. 144—N. L. R. B. v. East Texas Motor Freight Lines, C.C.A.5, 140 F.2d 404—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 139 F.2d 855—Harp v. N. L. R. B., C.C.A.10, 138 F.2d 546—N. L. R. B. v. Denver Tent & Awning Co., C.C.A.10, 138 F.2d 410—Edward G. Budd Mfg. Co. v. N. L. R. B., C.C.A.Pa., 138 F.2d 86, certiorari denied 64 S. Ct. 619, 321 U.S. 778, 88 L.Ed. 1071—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A. 5, 130 F.2d 260—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C.C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—N. L. R. B. v. Kohen-Ligon-Folz, Inc., C.C.A.5, 128 F.2d 502—N. L. R. B. v. Quality Art Novelty Co., C.C.A.2, 127 F.2d 903—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F. 2d 680—N. L. R. B. v. Keystone Freight Lines, C.C.A.10, 126 F.2d 414—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433—N. L. R. B. v. Blue Bell-Globe Mfg. Co., C.C.A. 4, 120 F.2d 974—N. L. R. B. v. Newark Morning Ledger Co., C.C. A.3, 120 F.2d 262, 137 A.L.R. 849, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 314 U.S. 693, 86 L.Ed. 554—N. L. R. B. v. Mall Tool Co., C.C. A.7, 119 F.2d 700—N. L. R. B. v. Auburn Foundry, C.C.A.7, 119 F.2d 331—Triplex Screw Co. v. N. L. R. B. C.C.A.6, 117 F.2d 858—N. L. R. B. v. Crystal Springs Finishing Co., C.C.A.1, 116 F.2d 669—Martel Mills Corp. v. N. L. R. B., C.C.A. 4, 114 F.2d 624—N. L. R. B. v. Lane Cotton Mills Co., C.C.A.5, 111 F.2d 814, appeal dismissed Lane Cotton Mills Co. v. N. L. R. B., 61 S.Ct. 316, 311 U.S. 723, 85 L. Ed. 471—N. L. R. B. v. Louisville Refining Co., C.C.A.6, 102 F.2d 678, Certiorari denied Louisville Refining Co. v. N. L. R. B., 60 S.Ct. 81, 308 U.S. 568, 84 L.Ed. 477—N. L. R. B. v. Union Pacific Stages, C.C.A., 99 F.2d 153—Peninsular & Occidental S. S. Co. v. N. L. R. B., C. C.A.5, 98 F.2d 411, certiorari denied N. L. R. B. v. Peninsular & Occidental S. S. Co., 59 S.Ct. 248, 305 U.S. 653, 83 L.Ed. 423—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F. 2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 91 F.2d 509, rehearing denied 93 F.2d 1010—Appalachian Electric Power Co. v. N. L. R. B., C.C.A.4, 93 F.2d 985.

S.C.—Parker v. Southeastern Haulers, 41 S.E.2d 387, 210 S.C. 18.

Acquiescing in union's ejection of crew members who had transferred their affiliations and hiring men belonging to union to take their place was discharge because of union membership.—N. L. R. B. v. Isthmian S. S. Co., C.C.A.2, 126 F.2d 598.

Discharge and layoff of members of affiliated union while retaining employees who had worked for a shorter time but were members of company union was unfair labor practice.—N. L. R. B. v. Quality Art Novelty Co., C.C.A.2, 127 F.2d 903.

Discharges for particular reasons held to constitute unfair labor practices.

(1) Because of employee's sympathy with union members.—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585.

(2) For belonging to labor organization which was illegal because dominated by employer.—E. Anthony & Sons v. N. L. R. B., App.D.C., 163 F.2d 22.

(3) For instigating union resolution protesting employer's action with respect to a strike, since such resolution was not a libel.—N. L. R. B. v. Peter Cailler Kohler Swiss Chocolates Co., C.C.A.2, 130 F.2d 503.

(4) For seeking to prevent employer from taking strike vote after the union has taken a strike vote.—N. L. R. B. v. Remington Rand, C. C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U. S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U. S. 585, 82 L.Ed. 1546.

(5) For wearing union insignia.—Republic Aviation Corp. v. N. L. R. B., 65 S.Ct. 982, 324 U.S. 793, 89 L. Ed. 1372, 157 A.L.R. 1081—N. L. R. B. v. Le Tourneau Co. of Ga., 65 S. Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081, rehearing denied 65 S.Ct. 1401, 325 U.S. 894, 89 L.Ed. 2005.

(6) To stop employee from electioneering for union.—N. L. R. B. v. Columbia Products Corporation, C. C.A.2, 141 F.2d 687.

Employment at will

(1) The statute does not outlaw discrimination only where there is in existence a formal contract or relation of employment, but embraces as well all elements of the employment relationship which in fact customarily attend employments. —N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S. Ct. 611, 309 U.S. 696, 84 L.Ed. 1036.

(2) Employer may not terminate employment or term or condition of employment because of union activity or affiliation, even though employment is at will.—N. L. R. B. v. Waterman S. S. Corp., supra.

bargaining.[79] An employee who is not a member of a union is none the less entitled to the protection of the act if termination of his employment is occasioned by an unfair labor practice designed to interfere with the employees in the exercise of rights guaranteed them by the terms of the statute.[80]

Membership or office in a union is not a guarantee against discharge,[81] nor does the act require the employer to discriminate in favor of union men as against nonunion men where economic considerations necessitate a contraction in the employer's labor force;[82] and the mere fact that the employer dislikes a union or a union man does not prevent his exercising his undoubted right to discharge when real grounds for discharge exist.[83] The true reason back of the discharge must be ascertained,[84] and such reason may be sought in the circumstances surrounding the discharge.[85] Where discharge is because of union membership the act may not be evaded by assigning some other ground.[86] On the other hand, where there was cause for the employee's discharge, fragmentary and unrelated suspicions are insufficient in substance to transform a proper exercise of the power to discharge into an improper one.[87] The fact that an employee who resigned under pressure exerted because of his union activities did not seek or want reëmployment or back pay does not purge the employer of his unfair practices.[88]

Discharge for violation of rules. The National Labor Relations Act does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time[89] or from discharging employees for breach of such rules.[90] The discharge of an employee for violation of a rule prohibiting union solicitation during

Prior affiliation with particular union
Under the act no employee can be deprived of his employment because of his prior affiliation with any particular union.—Wallace Corporation v. National Labor Relations Board, 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S. Ct. 682, 324 U.S. 885, 89 L.Ed. 1435 —Richwood Clothespin & Dish Worker's Union v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216.

The statutory test is whether the employee was discharged because of union membership or activity or because of some permissible criterion. —N. L. R. B. v. Waumbec Mills, C.C. A.1, 114 F.2d 226.

Preferential hiring agreement requiring preference to union members in filling vacancies did not justify discharge of members of rival union and bound the employer only when vacancies lawfully occurred.—N. L. R. B. v. Isthmian S. S. Co., C.C.A.2, 126 F.2d 598.

79. U.S.—N. L. R. B. v. Fansteel Metallurgical Corp., 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. Vail Mfg. Co., C.C.A.7, 158 F.2d 664.
S.C.—Parker v. Southeastern Haulers, 41 S.E.2d 387, 210 S.C. 18.

80. U.S.—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A.4, 127 F.2d 109.

81. U.S.—N. L. R. B. v. Robbins Tire & Rubber Co., C.C.A.5, 161 F. 2d 798—N. L. R. B. v. Continental Pipe Line Co., C.C.A.5, 161 F.2d 302 —North Carolina Finishing Co. v. N. L. R. B., C.C.A.4, 133 F.2d 714, certiorari denied 64 S.Ct. 39, 320 U.S. 738, 88 L.Ed. 437—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C.C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—N. L. R. B. v. Riverside Mfg. Co., C.C.A.5, 119 F.2d 302—N. L. R. B. v. Empire Furniture Corporation, C.C.A.6, 107 F.2d 92.

Mistaken belief as to inefficiency
An employer may properly discharge member of union, mistakenly thought to be inefficient.—N. L. R. B. v. Clarksburg Pub. Co., C.C.A.4, 120 F.2d 976.

82. U.S.—Martel Mills Corporation v. N. L. R. B., C.C.A.4, 114 F.2d 624.

83. U.S.—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C. C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723.

84. U.S.—Williams Motor Co. v. N. L. R. B., C.C.A.8, 128 F.2d 960—N. L. R. B. v. Kohen-Ligon-Folz, Inc., C.C.A.5, 128 F.2d 502—N. L. R. B. v. Algoma Net Co., C.C.A.7, 124 F.2d 730, certiorari denied Algoma Net Co. v. N. L. R. B., 62 S.Ct. 1311, 316 U.S. 706, 86 L.Ed. 1773.

85. U.S.—N. L. R. B. v. Kohen-Ligon-Folz, Inc., C.C.A.5, 128 F.2d 502.

Events subsequent to discharge
In determining whether employees were discriminatorily discharged for union activities in violation of act, court must view entire scope of labor dispute, including events subsequent to discharge, and not view discharges separate from the background.—N. L. R. B. v. Vail Mfg. Co., C.C.A.7, 158 F.2d 664.

86. U.S.—N. L. R. B. v. Continental Pipe Line Co., C.C.A.5, 161 F.2d 302—Williams Motor Co. v. N. L. R. B., C.C.A.8, 128 F.2d 960—N. L. R. B. v. Kohen-Ligon-Folz, Inc., C.C.A.5, 128 F.2d 502—N. L. R. B. v. Clarksburg Pub. Co., C.C.A.4, 120 F.2d 976—N. L. R. B. v. Blue Bell-Globe Mfg. Co., C.C.A.4, 120 F.2d 974.

Existence of some justifiable ground for discharge is no defense if it was not the moving cause.—Wells, Inc., v. N. L. R. B., C.C.A.9, 162 F.2d 457.

Where discrimination appears it is no explanation to say that there must have been some reason for discharge.—N. L. R. B. v. Gallup American Coal Co., C.C.A.10, 131 F.2d 665.

87. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486.

88. U.S.—N. L. R. B. v. East Texas Motor Freight Lines, C.C.A.5, 140 F.2d 404.

89. U.S.—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260.

Reason for rule
Working time is for work.—N. L. R. B. v. May Dept. Stores, C.C.A.8, 154 F.2d 533, certiorari denied 67 S. Ct. 72, 329 U.S. 725, 91 L.Ed. —.

90. U.S.—N. L. R. B. v. Continental Pipe Line Co., C.C.A.5, 161 F.2d 302—Home Beneficial Life Ins. Co. v. N. L. R. B., C.C.A.4, 159 F.2d 280—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486 —N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260—United Biscuit Co. of America v. N. L. R. B., C.C.A.7, 128 F.2d 771.

Prohibition of outside work
Dismissal for second violation of rule against outside work, was not discrimination.—Quaker State Oil Refining Corporation v. N. L. R. B., C.C.A.3, 119 F.2d 631.

working hours is not an unfair labor practice provided the rule is promulgated in good faith and bears some reasonable relation to the efficient operation of the plant or business and is not merely a device to obstruct or impede self-organization.[91] Even though the employer's rule is against solicitation generally and is enforced against all solicitations and not discriminatorily applied against union solicitation, discharge of employees because of union solicitation on the employer's premises during the employee's own time constitutes an unfair labor practice because it discourages membership in labor organizations.[92]

Discharge for refusal to join union. In the absence of an agreement with a lawful union with which the employer has a bargaining agreement requiring membership in the union, the employer's discharge of an employee because of his refusal to join the union is an unfair labor practice,[93] since such conduct constitutes interference with, or restraint or coercion of, employees in the exercise of their statutory rights,[94] and discrimination with respect to hire or tenure of employment to encourage or discourage membership in labor organization.[95] Also, under the provision making it an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it, the discharge by an employer of employees who refuse to join a local independent union which is dominated, controlled, and supported by the employer is illegal.[96]

Contract for closed shop. While the rule is otherwise as to a discharge pursuant to an invalid contract,[97] a discharge pursuant to a valid maintenance of membership provision in a collective bargaining agreement has been held not to be an unfair labor practice;[98] but the closed-shop provision of the contract between the employer and the union cannot be invoked to justify the discharge by the employer of an employee expelled by the union because he supported another union in an election for bargaining agent of the employer's employees[99] or because the discharged employee testified in favor of a rival union at a hearing by the labor relations board.[1]

Discharge prior to effective date of statute. The discharge of employees prior to the effective date of the statute, because of union activities, has been held not to be an unfair labor practice.[2]

(b) Employees on Strike

Discharge of strikers ordinarily is unjustified where an employer's illegal practices are responsible for a strike; but strikers engaging in an illegal or unlawfully

Leaving place of work

An employee may be discharged for violating employer's rule forbidding an employee to leave his place of work before the whistle blows.—N. L. R. B. v. American Car & Foundry Co., C.C.A.7, 161 F.2d 501.

91. U.S.—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C. C.A.10, 140 F.2d 423—N. L. R. B. v. Denver Tent & Awning Co., C. C.A.10, 138 F.2d 410—Midland Steel Products Co. v. N. L. R. B., C.C.A. 6, 113 F.2d 800—N. L. R. B. v. Empire Furniture Corp., C.C.A.6, 107 F.2d 92.

Conn.—Bigelow Co. v. Waselik, 50 A.2d 769, 133 Conn. 304.

Whether employer's rule prohibiting union solicitation constitutes unfair labor practice see infra § 28 (57).

Application of valid portion of company rule

An employer's rule as far as it forbade solicitation for union membership on the employer's premises during working hours was valid, and the fact that the order posted did not limit its operation to working hours did not prevent application of the rule.—N. L. R. B. v. William Davies Co., C.C.A.7, 135 F.2d 179, certiorari denied William Davies Co. v. N. L. R. B., 64 S.Ct. 82, 320 U.S. 770, 88 L.Ed. 460.

92. U.S.—Republic Aviation Corp. v. N. L. R. B., 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081—N. L. R. B. v. LeTourneau Co. of Georgia, 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L. R. 1081, rehearing denied 65 S.Ct. 1401, 325 U.S. 894, 89 L.Ed. 2005.

93. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S. Ct. 44.

Pressure to join specific union as unfair labor practice generally see infra § 28 (56).

94. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

Interference, restraint, or coercion as unfair labor practice generally see supra § 28 (45) a.

95. U.S.—N. L. R. B. v. American Car & Foundry Co., C.C.A.7, 161 F.2d 501—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

Discrimination with respect to hire or tenure of employment as unfair labor practice generally see supra § 28 (45) c.

96. U.S.—Hamilton-Brown Shoe Co. v. N. L. R. B., C.C.A.8, 104 F.2d 49.

Domination or interference with formation of organization or support thereof as unfair labor practice generally see supra § 28 (45) b.

Reason for rule

An employer may give support to a particular group of its employees within statute by pursuing a policy of discharging those who refuse to join that group or who join a rival, obnoxious to the employer.—Hamilton-Brown Shoe Co. v. N. L. R. B., supra.

97. U.S.—N. L. R. B. v. John Engelhorn & Sons, C.C.A.3, 134 F.2d 553.

98. U.S.—Aluminum Co. of America, v. N. L. R. B., C.C.A.7, 159 F.2d 523.

99. U.S.—Local No. 2880, Lumber and Sawmill Workers Union, United Broth. of Carpenters and Joiners of America, A. F. of L., v. N. L. R. B., C.C.A.9, 158 F.2d 365.

1. U.S.—N. L. R. B. v. American White Cross Laboratories, C.C.A.2, 160 F.2d 75.

Discrimination for filing charges or testifying under act as unfair labor practice generally see supra § 28 (45) d.

2. U.S.—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992 —Appalachian Electric Power Co. v. N. L. R. B., C.C.A.4, 93 F.2d 985.

conducted strike may be discharged by an employer even though he has been guilty of unfair labor practices.

Where an employer's illegal or unfair labor practices are responsible for a strike, discharge of the strikers has been held to constitute a direct violation of the statute[3] and to be unjustified;[4] but where an employee engages in such conduct as would justify an employer in discharging him if a strike were not in effect the National Labor Relations Act does not prevent such discharge.[5] Where the discharge of employees for disobedience of a rule of the employer, and a strike to compel a modification of the rule, happened at about the same time, the existence of the strike as a factor of paramount importance should be recognized and given the effect provided by the National Labor Relations Act, although the decision to discharge in case of continued disobedience to the rule was first taken and first announced.[6]

Illegal or unlawfully conducted strike. An illegal strike constitutes sufficient justification for the discharge of the strikers[7] or for the discharge of one who refuses to work because the strike is on.[8] The National Labor Relations Act does not undertake to abrogate the right of an employer to refuse to retain in his employ those who illegally take and hold possession of his property.[9] or who forcibly or unlawfully bar him from his plant,[10] and when employees engage in an unlawful sit-down strike they may be discharged by an employer even though he has been guilty of unfair labor practices.[11] The provision expressly recognizing the right of employees to engage in concerted activities does not confer on them the right to engage en masse in unlawful activities, or to defy the authority of the employer to manage his business while remaining in his service.[12]

c. Effect of State Statutes

Under some state statutes discharge of employees because of union activities is unlawful, but even the

3. U.S.—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 127 F. 2d 180, certiorari denied 63 S.Ct. 48, 317 U.S. 652, 87 L.Ed. 524.

4. U.S.—N. L. R. B. v. Draper Corporation, C.C.A.4, 145 F.2d 199, 156 A.L.R. 989—N. L. R. B. v. American Mfg. Co., C.C.A.2, 106 F.2d 61, modified on other grounds American Mfg. Co. v. N. L. R. B., 60 S. Ct. 612, 309 U.S. 629, 84 L.Ed. 988.

5. U.S.—Hamilton v. N. L. R. B., C.C.A.6, 160 F.2d 465.

6. U.S.—Home Beneficial Life Ins. Co. v. N. L. R. B., C.C.A.4, 159 F. 2d 280.

7. U.S.—Southern S. S. Co. v. N. L. R. B., C.C.A.3, 62 S.Ct. 886, 316 U. S. 31, 86 L.Ed. 1246—N. L. R. B. v. Indiana Desk Co., C.C.A.7, 149 F.2d 987—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A.4, 127 F.2d 109.

"Wildcat" strike
U.S.—N. L. R. B. v. Draper Corporation, C.C.A.4, 145 F.2d 199, 156 A. L.R. 989.

8. U.S.—N. L. R. B. v. Draper Corporation, C.C.A.4, 145 F.2d 199, 156 A.L.R. 989—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A.4, 127 F.2d 109.

9. U.S.—Southern S. S. Co. v. N. L. R. B., 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246—N. L. R. B. v. Clinchfield Coal Corp., C.C.A.4, 145 F.2d 66, 155 A.L.R. 874—Peninsular & Occidental S. S. Co. v. N. L. R. B., C.C.A.5, 98 F.2d 411, certiorari denied N. L. R. B. v. Peninsular & Occidental S. S. Co., 59 S.Ct. 248, 305 U.S. 653, 83 L.Ed. 423.

Sabotage
With respect to employer's right to discharge sit-down strikers, who broke windows of buildings occupied by them to obtain air in combating gas used to compel surrender, who permitted furnaces to burn out, and who destroyed supplies by throwing them from the windows in resisting eviction, such strikers were guilty of malicious sabotage of equipment, notwithstanding there was no serious injury to machinery.—Fansteel Metallurgical Corporation v. N. L. R. B., C.C.A.7, 98 F.2d 375, modified on other grounds 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599.

10. U.S.—N. L. R. B. v. Perfect Circle Co., C.C.A.7, 162 F.2d 566.

Discharge of obstructing employees held justified although plant manager did not attempt to force his way into plant over objection of striking employees.—N. L. R. B. v. Perfect Circle Co., supra.

Pickets
Employees may not avoid consequences of their action in barring employer from his plant even though they are engaged in picketing the plant.—N. L. R. B. v. Perfect Circle Co., supra.

11. U.S.—Southern S. S. Co. v. N. L. R. B., 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246—Home Beneficial Life Ins. Co. v. N. L. R. B., C.C.A. 4, 159 F.2d 280—N. L. R. B. v. Clinchfield Coal Corporation, C.C. A.4, 145 F.2d 66, 155 A.L.R. 874—Peninsular & Occidental S. S. Co. v. N. L. R. B., C.C.A.5, 98 F.2d 411, certiorari denied N. L. R. B. v. Peninsular & Occidental S. S. Co., 59 S.Ct. 248, 305 U.S. 653, 83 L. Ed. 423.

Sit-down strike as unlawful generally see supra § 28 (19).

Statement of cause for discharge
Where employer's representatives demanded that sit-down strikers leave plant and on their refusal announced that they were discharged for the seizure and retention of buildings, the fact that it was a general announcement applicable to all men in the plant who refused to leave did not detract from the effect of the discharge.—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R., 599.

Held not sit-down strike within rule
Employees' action in standing around employer's premises for not over two hours while attempt was being made to persuade employer to fix date for collective bargaining was not in nature of sit-down strike permitting termination of employee relationship.—N. L. R. B. v. American Mfg. Co., C.C.A.2, 106 F.2d 61, modified on other grounds American Mfg. Co. v. N. L. R. B., 60 S.Ct. 612, 309 U.S. 629, 84 L.Ed. 988.

Unfair labor practice held not to justify unlawful conduct
Ill.—Fansteel Metallurgical Corporation v. Lodge 66 of Amalgamated Ass'n of Iron, Steel and Tin Workers of North America, 14 N.E.2d 991, 295 Ill.App. 323.

12. U.S.—Home Beneficial Life Ins. Co. v. N. L. R. B., C.C.A.4, 159 F.2d 280—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486.

fact that an employer has been guilty of an unfair labor practice does not deprive him of the right to discharge employees for insubordination.

Under the provisions of some state labor relations acts, discharge of employees because of union activities is unlawful;[13] and an employer may not, under cover of his right to discharge employees, and in violation of the provisions of the labor relations acts, interfere with, restrain, or coerce his employees in the exercise of their rights of self-organization and collective bargaining[14] or discriminate against them because of union activity.[15] When an employer dismisses an employee for union activities or discriminates with respect to his tenure for this reason, it is of no consequence that the discharged employee is not actually a member of the union.[16] An employer's claim of harassment is not a defense to a charge of wrongful discharge of an employee;[17] but, on the other hand, an employer's lack of good faith in bargaining, even though it amounts to an unfair labor practice, does not deprive him of the right to discharge employees because of their insubordination.[18]

§ 28(50). —— Layoff

A layoff is not necessarily an unfair labor practice, but it becomes such when motivated by a purpose forbidden by the labor relations statute.

A layoff is a termination of employment at the will of the employer, without prejudice to the worker.[19] A layoff is not necessarily an unfair labor practice,[20] but it becomes such when motivated by a purpose forbidden by the labor relations statute.[21] Thus the National Labor Relations Board should not interfere because of discrimination in bona fide layoffs unless the discrimination is due to union activities.[22] Where the employer had a policy of laying off and taking on during depression periods according to seniority and of retaining key men by transfers and staggering work, the board is entitled to hold the employer strictly to the policy as it affects a discharged employee who the employer claims would have been laid off in the normal course of events.[23] It is no defense to proceedings by the board against an employer for discriminatory discharge of employees that the layoffs were pur-

13. Pa.—Manko v. Kahn, Com.Pl., 93 Pittsb.Leg.J. 477.
Wis.—Century Building Co. v. Wisconsin Employment Relations Board, 291 N.W. 305, 235 Wis. 376.

14. Pa.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398.
Interference, restraint, or coercion as unfair labor practice generally see supra § 28 (45) a.

Discharge as burdening or obstructing commerce

Discharge by employer of employees because of activities relating to organization and affiliation of employees with labor union was a denial by employer of the right of employees to organize for their own welfare, and the necessary effect of such denial was a burdening or obstructing of commerce within state statutes.—Teamsters Local Union No. 222 v. Strevell-Paterson Hardware Co., Utah, 174 P.2d 164.

15. Pa.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398.

16. Wis.—Century Building Co. v. Wisconsin Employment Relations Board, 291 N.W. 305, 235 Wis. 376.

17. N.Y.—New York State Labor Relations Board v. Toffenetti Restaurant Co., 46 N.Y.S.2d 70, 181 Misc. 779, affirmed 47 N.Y.S.2d 113, 267 App.Div. 860, appeal denied 47 N.Y.S.2d 310, 267 App.Div. 869, motion dismissed 55 N.E.2d 379, 292 N.Y. 618. Reversed on other grounds 48 N.Y.S.2d 554, 267 App. Div. 978.

18. N.Y.—New York State Labor Relations Bd. v. Union Club of City of N. Y., 52 N.Y.S.2d 74, 268 App.Div. 516, reversed on other grounds 68 N.E.2d 29, 295 N.Y. 915.

19. Fla.—International Ass'n of Machinists v. State ex rel. Watson, 15 So.2d 485, 490, 153 Fla. 672.

20. U.S.—Independent Union of Craftsmen v. N. L. R. B., C.C.A.7, 110 F.2d 506, reversed on other grounds 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681—Link-Belt Co. v. N. L. R. B., C.C.A.7, 110 F.2d 506, reversed on other grounds 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368.

Suspension for distributing union literature

Where employees distributed leaflets regarding radio program concerning board's decision, and referring to local union as company dominated, action of employer in suspending employees did not authorize finding of unfair labor practice.—N. L. R. B. v. Aintree Corporation, C.C. A.7, 135 F.2d 395.

Layoff of men who denied violating company rule, as distinguished from one who immediately acknowledged his fault, was a reasonable disciplinary action and not unlawful.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287.

21. U.S.—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681.

Layoff for union activities

(1) Layoff of members of affiliated union while retaining employees who had worked for a shorter time but who were members of company union was unfair labor practice.—N. L. R. B. v. Quality Art Novelty Co., C. C.A.2, 127 F.2d 903.

(2) An employer's laying off of employee who was member of editorial committee of union bulletin which published inaccurate figures of wage rates procured by union in other companies, and who promised to publish correction which did not appear in the next regular bulletin, was an improper interference with employee's right to engage in union activities.—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 153 F.2d 811.

(3) Such lay off was not a settlement of tort committed by employee, since the indispensable element of mutual assent to compromise was lacking.—N. L. R. B. v. Illinois Tool Works, supra.

(4) Where there was no sufficient evidence of why one employee was laid off and another employee, over whom he had seniority, was retained, board was justified in considering employer's hostile attitude toward outside unions.—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F.2d 340.

22. U.S.—Interlake Iron Corporation v. N. L. R. B., C.C.A.7, 131 F.2d 129.

23. U.S.—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 130 F.2d 765.

suant to a contract with a union dominated by the employer.[24] Although union activity or holding office in a union is a fact to be considered on the issue of discrimination, membership or office in a union is not a guarantee against layoff.[25]

§ 28(51). —— Reinstatement or Refusal to Reinstate

a. In general
b. Employees on strike

a. In General

There is no obligation to reinstate an employee who was discharged for legitimate cause or who quit his job without legitimate cause, and refusal of an employer to reinstate such an employee is not an unfair labor practice; but an employer is under a duty to reinstate an employee who was discharged in violation of the labor relations act.

There is no obligation to reinstate an employee who was discharged for legitimate cause[26] or one who quit his job without legitimate cause,[27] and refusal of an employer to reinstate such an employee is not an unfair labor practice.[28] An employer is not required to reinstate an employee who walked out in anger when assigned to certain work, whether he was discharged or whether he quit his job,[29] even though the same offense had been committed in the past with less serious consequences.[30] The conviction of an employee of the crime of larceny is justification for refusal to reinstate an employee wrongfully discharged under the National Labor Relations Act[31] even though the property stolen was not that of the employer,[32] but where an employee was discriminatorily discharged because of union activity the employer cannot in good faith urge, as the basis for refusal to reinstate him, his criminal record which was known to the employer long before his discharge.[33] The duty of an employer to reinstate employees discharged in violation of the act arises from the statute's specific provisions for such a mandate to effectuate its purpose.[34] Willingness to reinstate employees only on conditions which the employer has no right to attach is equivalent to absolute refusal to reinstate,[35] and the imposition of a condition which requires the union to abandon rights to which it is entitled under the National Labor Relations Act is an unfair labor practice.[36] The fact that employees of a war contractor ceased work in violation of the War Labor Disputes Act did not deprive them of their rights under the National Labor Relations Act.[37] Reopening the employer's plant following a pretended closing and hiring many of the former employees, but omitting union members, is an unfair labor practice.[38]

b. Employees on Strike

As a general rule striking employees are entitled to reinstatement; but the rule is otherwise where they have been guilty of unlawful conduct or where an employer who has been guilty of no unfair labor practice has hired others to fill the places of the strikers.

Whether strikers are entitled to reinstatement and back pay depends on whether they were guilty of such unlawful conduct as to terminate their status as employees.[39] As a general rule employees on strike because of the employer's unfair labor practices are entitled to an offer of reinstatement,[40] and the offer must be one made in good faith and calculated to place strikers on the same basis of rights and privileges as all other workers;[41] and it has

24. U.S.—N. L. R. B. v. Empire Worsted Mills, C.C.A.2, 129 F.2d 668.

25. U.S.—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536.

26. U.S.—N. L. R. B. v. Scullin Steel Co., C.C.A.8, 161 F.2d 143—Home Beneficial Life Ins. Co. v. N. L. R. B., C.C.A.4, 159 F.2d 280 —N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486.

27. U.S.—N. L. R. B. v. Scullin Steel Co., C.C.A.8, 161 F.2d 143.

28. U.S.—C. G. Conn, Limited v. N. L. R. B., C.C.A.7, 108 F.2d 390.

Refusal to reinstate, with back pay, employees discharged for refusal to work overtime without additional compensation, was not an unfair labor practice.—C. G. Conn, Limited, v. N. L. R. B., supra.

29. U.S.—N. L. R. B. v. Scullin Steel Co., C.C.A.8, 161 F.2d 143.

30. U.S.—N. L. R. B. v. Scullin Steel Co, supra.

31. U.S.—N. L. R. B. v. Federal Bearings Co., C.C.A.2, 109 F.2d 945.

32. U.S.—N. L. R. B. v. Federal Bearings Co., supra.

33. U.S.—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585.

34. U.S.—N. L. R. B. v. American Potash & Chemical Corporation, C.C.A.9, 113 F.2d 232, 129 A.L.R. 874, petition denied 118 F.2d 630.

35. U.S.—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A. 8, 119 F.2d 903.

36. U.S.—N. L. R. B. v. St. Marys Sewer Pipe Co., C.C.A.3, 146 F.2d 995.

37. U.S.—Hamilton v. N. L. R. B., C.C.A.6, 160 F.2d 465.

38. U.S.—N. L. R. B. v. Crystal Spring Finishing Co., C.C.A.1, 116 F.2d 669.

39. U.S.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

Who are employees generally see supra §§ 28 (11)–28 (13).

40. U.S.—N. L. R. B. v. A. Sartorius & Co., C.C.A.2, 140 F.2d 203.

41. U.S.—N. L. R. B. v. A. Sartorius & Co., supra.

Discrimination

(1) Discrimination in reinstating striking employees because of their activity in connection with the strike is prohibited by the National Labor Relations Act.—Hamilton v. N. L. R. B., C.C.A.6, 160 F.2d 465.

(2) Employees who failed to accept employer's alleged offer of reinstatement after going on strike induced by employer's unfair labor practices did not cease to be employees, where some of them who did return were discriminated against after resuming their work.—N. L. R. B. v. A. Sartorius & Co., C.C.A.2, 140 F.2d 203.

been held that an employer who denies further employment to employees merely because they have taken part in a strike performs an unlawful act.[42] Where the employer has been guilty of an unfair labor practice, he is under a duty, on application, to reinstate striking employees,[43] even though this may occasion the discharge of those employees hired to take the place of strikers during the strike,[44] and refusal to do so constitutes an unfair labor practice,[45] since it is a discrimination in the hiring and tenure of the striking employees.[46] Even where a strike, which initially involved no unfair labor practice, is prolonged or aggravated by an employer's unfair labor practice, the employer has been held to be bound to reinstate all strikers and discharge all those hired to replace them during the strike.[47]

An employer who has been guilty of no unfair labor practice, however, is not bound to discharge those hired to fill the places of strikers, in order to create places for them, on the election of the latter to resume their employment.[48] The employer is not excused from reinstating striking employees where nonstriking employees have been transferred in a makeshift arrangement but no replacements have been made.[49] Failure to reëmploy striking employees because they engaged in a strike may be an interference with their right to engage in "concerted activities"[50] and may therefore constitute an unfair labor practice under the provision of the act prohibiting interference with the right to engage in concerted activity;[51] but such a violation in and of itself will not warrant a finding of violation of the provision against discrimination in such manner as to encourage or discourage membership in any labor organization.[52]

42. U.S.—Hamilton v. N. L. R. B., C.C.A.6, 160 F.2d 465—Home Beneficial Life Ins. Co. v. N. L. R. B., C.C.A.4, 159 F.2d 280.

43. U.S.—N. L. R. B. v. Remington Rand, C.C.A.2, 130 F.2d 919—United Biscuit Co. of America v. N. L. R. B., C.C.A.7, 128 F.2d 771.

Conduct held not refusal to reinstate

U.S.—N. L. R. B. v. Register Pub. Co., C.C.A.9, 141 F.2d 156.

Refusal of offer of reinstatement not fairly made

An employer was not relieved of its obligation to reinstate striking employees because its offer of reinstatement to any strikers who desired to return to work was refused by strikers, where employer did not make a full and fair offer of reinstatement to the strikers.—N. L. R. B. v. Poultrymen's Service Corporation, C.C.A.3, 138 F.2d 204.

Strike caused in part by wrongful refusal to negotiate

Although the wrongful refusal of an employer to negotiate was only one of the causes of a strike, where the employer cannot show that the negotiations, if undertaken, would have broken down, reinstatement of employees cannot be denied on the ground that the loss of their jobs was due to a controversy which the statute does not regulate.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

Sufficiency of request for reinstatement

Letter from union requesting meeting with employer for purpose of renewing negotiations and reaching agreement for reinstatement of striking employees was not a request for reinstatement of strikers on which employer's failure to reinstate could be found to be an unfair labor practice.—N. L. R. B. v. Register Pub. Co., C.C.A.9, 141 F.2d 156.

Where employer hired new employees after strike was terminated and application had been made by old employees for reinstatement, such action constituted unfair labor practice within National Labor Relations Act.—N. L. R. B. v. Shenandoah-Dives Mining Co., C.C.A.10, 145 F.2d 542.

44. U.S.—N. L. R. B. v. Remington Rand, C.C.A.2, 130 F.2d 919—United Biscuit Co. of America v. N. L. R. B., C.C.A.7, 128 F.2d 771—N. L. R. B. v. Remington Rand, C. C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

45. U.S.—N. L. R. B. v. Niles Fire Brick Co., C.C.A.6, 124 F.2d 366, certiorari denied Niles Fire Brick Co. v. N. L. R. B., 62 S.Ct. 944, 316 U.S. 664, 86 L.Ed. 1740.

46. U.S.—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523.

Discrimination with respect to hire or tenure of employment as unfair labor practice generally see supra § 28 (45) c.

47. U.S.—N. L. R. B. v. Remington Rand, C.C.A.2, 130 F.2d 919.

48. U.S.—N. L. R. B. v. Mackay Radio & Tel. Co., 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381—N. L. R. B. v. Shenandoah-Dives Mining Co., C.C.A.10, 145 F.2d 542—United Biscuit Co. of America v. N. L. R. B., C.C.A.7, 128 F.2d 771—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 127 F.2d 180, certiorari denied 63 S.Ct. 48, 317 U.S. 652, 87 L.Ed. 524—Wilson & Co. v. N. L. R. B., C.C.A.7, 124 F.2d 845—Wilson & Co. v. N. L. R. B., C.C.A.7, 120 F.2d 913—N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A.7, 113 F.2d 621—C. G. Conn, Limited, v. N. L. R. B., C.C.A.7, 108 F.2d 390.

Pa.—Pennsylvania Labor Relations Board v. Camino, 47 Pa.Dist. & Co. 1, 25 West. 54.

Strike of lawfully discharged employees

Where employees have been lawfully discharged for refusal to obey the rules laid down by a law-abiding employer for the conduct of the business, even though they subsequently engage in a strike, the employer may fill the places left vacant and is not obligated to discharge the new employees when the strikers change their minds and apply for reinstatement.—Home Beneficial Life Ins. Co. v. N. L. R. B., C. C.A.4, 159 F.2d 280.

49. U.S.—Firth Carpet Co. v. N. L. R. B., C.C.A.2, 129 F.2d 633.

50. U.S.—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 139 F.2d 855.

51. U.S.—Western Cartridge Co. v. N. L. R. B., supra.

52. U.S.—Western Cartridge Co. v. N. L. R. B., supra.

The employer may not lawfully do anything in connection with the reinstatement of the strikers to discourage the right of collective bargaining.[53] An employer's refusal to reinstate striking employees unless they give up their seniority rights constitutes an unfair labor practice.[54] Refusal by the employer to put men guilty of certain acts back to work does not constitute the unfair labor practice of arbitrarily refusing to negotiate respecting the return to work of men on strike.[55]

Illegal or unlawfully conducted strike. An employer is justified in refusing to reinstate any employees who participate in an unauthorized or "wildcat" strike,[56] and refusal to reëmploy such employees[57] or to accede to the request of a conciliation commissioner to reëmploy them[58] does not constitute an unfair labor practice. Striking employees who commit unwarranted acts of trespass or violence against the property of the employer are not entitled to reinstatement,[59] although the mere fact that striking employees are members of a union which conducted the strike in an unlawful manner does not warrant refusal to reinstate them in the absence of clear proof of actual participation in, or authorization of, the unlawful acts.[60]

The employer has the right to determine which striking employees have engaged in unlawful conduct,[61] but not to discriminate against a striker under the guise that he has engaged in unlawful conduct.[62] He is not required to take back all striking employees regardless of their unlawful conduct[63] or to reinstate all striking employees and then later discharge those who participated in unlawful activities where he has hired new employees to take the place of the strikers and has obligated himself to furnish them permanent employment.[64] He has the privilege of selecting from those guilty of violence the ones whom he will reinstate,[65] and it is not an unfair labor practice to reinstate only as many of the strikers as there are vacant places to be filled.[66]

The employer is not required, before an application for reinstatement is made, to identify union members whom he might deem objectionable.[67] The fact that striking employees who have participated in violence and unlawful activities are union officials does not minimize the employer's right to

53. U.S.—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A.4, 127 F.2d 109.

54. U.S.—N. L. R. B. v. American Mfg. Co., C.C.A.2, 106 F.2d 61, modified on other grounds American Mfg. Co. v. N. L. R. B., 60 S. Ct. 612, 309 U.S. 629, 84 L.Ed. 988.

55. U.S.—N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A. 7, 113 F.2d 621.

56. U.S.—N. L. R. B. v. Reynolds Intern. Pen Co., C.C.A.7, 162 F.2d 680.

57. U.S.—N. L. R. B. v. Draper Corporation, C.C.A.4, 145 F.2d 199, 156 A.L.R. 989.

58. U.S.—N. L. R. B. v. Draper Corporation, supra.

59. U.S.—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A.10, 122 F. 2d 419.

N.Y.—New York State Labor Relations Board v. Holland Laundry, 49 N.Y.S.2d 411, 268 App.Div. 827, reargument denied 46 N.Y.S.2d 524, 180 Misc. 1031, reversed on other grounds 63 N.E.2d 68, 294 N.Y. 480, 161 A.L.R. 802, reargument denied 64 N.E.2d 278, 295 N. Y. 568.

Sit-down strike as unlawful generally see supra § 28 (19).

Forcible denial of employer's right to enter

(1) The forcible denial by employee of employer's right to go upon its property is the equivalent of a seizure of employer's property, as respects discharged employee's right to reinstatement under the National Labor Relations Act.—N. L. R. B. v. Perfect Circle Co., C.C.A.7, 162 F.2d 566.

(2) Employer which was denied possession of its property by four striking employees, and which was justified in its belief from words and acts of the employees that it could not get possession save through a fight, was not required to take chance of bloodshed in order to justify discharge of those who unlawfully obstructed its entry, and employer could not be required to reinstate the employees after having discharged them.—N. L. R. B. v. Perfect Circle Co., supra.

60. U.S.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

Reason for rule

Implied termination of employer-employee relationship by reason of unlawful conduct in labor controversies applies only to those actually participating in violence and their aiders and abettors.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

61. U.S.—Wilson & Co. v. N. L. R. B., C.C.A.7, 120 F.2d 913.

62. U.S.—Wilson & Co. v. N. L. R. B., supra.

63. U.S.—Wilson & Co. v. N. L. R. B., supra.

Unlawful purpose and conduct of strike

Minority employees, who called a strike for an illegal purpose of forcing employer to violate the wartime wage freeze, who conducted strike unlawfully, and who were discharged by employer, were not entitled to reinstatement or back pay.—N. L. R. B. v. Indiana Desk Co., C.C.A.7, 149 F.2d 987.

Unlawful picketing

(1) Picketing, which was not conducted for purpose of publicizing strike or any grievance against employer or for purpose of persuading nonstrikers to join strikers or to refrain from going to work during strike, but which was designed and maintained for avowed purpose of forcibly excluding all employees from entering plant, conducted by pickets who were prepared to use any force necessary to accomplish the purpose, was unlawful.—N. L. R. B. v. Indiana Desk Co., supra.

(2) Misconduct of pickets is not to be measured by the amount of violence which occurs, and fact that violence did not take place due solely to the forbearance of employer and nonstrikers could not be considered as establishing that picketing was peaceful.—N. L. R. B. v. Indiana Desk Co., supra.

64. U.S.—Wilson & Co. v. N. L. R. B., C.C.A.7., 120 F.2d 913.

65. U.S.—Wilson & Co. v. N. L. R. B., supra.

66. U.S.—N. L. R. B. v. Mackay Radio & Telegraph Co., 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381.

67. U.S.—Wilson & Co. v. N. L. R. B., C.C.A.7, 120 F.2d 913.

refuse reinstatement,[68] but discrimination in reinstating striking employees by keeping out certain of them for the sole reason that they have been active in the union constitutes an unfair labor practice.[69] Failure of the employer to specify the particular types of conduct he might consider sufficient to bar reinstatement is immaterial where the conduct specified consisted of unlawful, violent, and criminal acts.[70] The fact that strikers who participated in an illegal strike were subsequently allowed to return to work does not require the reinstatement of a nonunion foreman who was discharged because he refused to work while the illegal strike was in progress.[71] Where there has been an agreement on the employer's part, when inviting employees to return to their old places after a sit-down strike, to accept all employees subject only to matters specified, the employer may not refuse reëmployment for any reason other than those specified or the absence of an opening.[72]

§ 28(52). —— Assistance to Union

The statute does not prevent mutual assistance and coöperation between an employer and a labor organization unless such assistance amounts to an unfair labor practice, but it may be an unfair labor practice for an employer to support a company union or coöperate with unions for the purpose of securing new members.

Labor relations legislation does not prevent mutual assistance and coöperation between an employer and a labor organization representing a majority of the employees unless such assistance amounts to an unfair labor practice.[73] It was not intended to prohibit friendly intercourse between employers and labor organizations or to outlaw the extension of common courtesies.[74] It is more in keeping with the purpose of the statutes to foster such friendship rather than to condemn it.[75] It is, however, an unfair labor practice for an employer, prior to the execution of a closed-shop agreement, to coöperate with unions representing an uncoerced majority of its employees for the purpose of securing new members.[76] So the act of the employer in favoring one union over another in a jurisdictional dispute may be an unfair labor practice,[77] even though he is motivated by his own economic interest and has no desire to injure one union or help the other;[78] but where an employer has an unimpeachable closed shop contract with one union he is justified in supporting such union and opposing another union in a jurisdictional dispute between the unions.[79] While the prior existence and subsequent dissolu-

68. U.S.—Wilson & Co. v. N. L. R B., supra.

69. U.S.—N. L. R. B. v. Mackay Radio & Telegraph Co., 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381—C. G. Conn, Limited, v. N. L. R. B., C.C.A.7, 108 F.2d 390.

70. U.S.—Wilson & Co. v. N. L. R. B., C.C.A.7, 120 F.2d 913.

71. U.S.—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A.4, 127 F.2d 109.

72. U.S.—N. L. R. B. v. Aladdin Industries, C.C.A.7, 125 F.2d 377, certiorari denied Aladdin Industries v. N. L. R. B., 62 S.Ct. 1310, 316 U.S. 706, 86 L.Ed. 1773.

73. U.S.—N. L. R. B. v. Electric Vacuum Cleaner Co., C.C.A.6, 120 F.2d 611, reversed on other grounds 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775.

Assistance by shutdown see infra § 28(61).

Failure to discipline employees for leaving plant for the purpose of holding an organizational meeting does not constitute an unfair labor practice, since a walkout is, in practical aspect, a strike, and strikers may not be discharged for exercising their inherent right to strike.—N. L. R. B. v. Clinton Woolen Mfg. Co., C.C.A.6, 141 F.2d 753.

Permitting meeting of independent union during working hours, although not on company premises or company time, does not constitute an unfair labor practice where such union was then the recognized representative of the employees and a contract was to be submitted for ratification.—N. L. R. B. v. Clinton Woolen Mfg. Co., supra.

Paying monthly check-off to union

(1) Paying a monthly checkoff to a local labor organization which represented a majority of the employees was proper and did not constitute a preference for that organization over another.—N. L. R. B. v. Gutmann & Co., C.C.A.7, 121 F.2d 756.

(2) Whether payroll deductions for union dues constitutes unfair labor practice see infra § 28 (62).

Permitting union solicitation during working hours

Pa.—Pennsylvania Labor Relations Board v. American Stores Co., Com. Pl., 10 Sch.Reg. 20.

Consent to closed shop and checkoff

An employer was not guilty of unfair labor practice because without delay it consented to closed shop and checkoff, especially in view of showing that at time of signing of contract other large corporations had granted closed-shop contracts to their employees.—N. L. R. B. v. Clinton Woolen Mfg. Co., C.C.A.6, 141 F.2d 753.

74. U.S.—Southern Ass'n of Bell Telephone Employees v. N. L. R. B., C.C.A.5, 129 F.2d 410, reversed on other grounds 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—Southern Bell Telephone & Telegraph Co. v. N. L. R. B., C.C.A.5, 129 F.2d 410, reversed on other grounds 63 S. Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949.

75. U.S.—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949.

76. U.S.—N. L. R. B. v. Electric Vacuum Cleaner Co., 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 128 F.2d 528.

Pressure to join specific union as unfair labor practice see infra § 28 (56).

Unauthorized union shop contract

An employer, engaged in interstate commerce, is guilty of unfair labor practice in standing on the performance of a union shop contract which purports to bind all employees unless that contract was authorized by the National Labor Relations Act.—Stone Logging & Contracting Co. v. International Woodworkers of America, Columbia District Council No. 5, 135 P.2d 759, 171 Or. 13.

77. U.S.—N. L. R. B. v. Gluek Brewing Co., C.C.A.8, 144 F.2d 847.

78. U.S.—N. L. R. B. v. Gluek Brewing Co., supra.

79. U.S.—N. L. R. B. v. Gluek Brewing Co., supra.

tion of a company representation plan do not per se constitute an unfair labor practice or coercion of the employees,[80] and the fact that an independent union was quickly formed and promptly recognized by the employer following dissolution of a prior union is not an unfair labor practice[81] notwithstanding former officers of the prior union took an active part in the formation of the new union,[82] an employer's support of a company union,[83] and attempts to prevent the organization of his plant by outside unions,[84] as by discriminating in favor of members of the company union and against members of the outside union,[85] may constitute an unfair labor practice. An employer may be held to have assisted the formation of a union even though the acts of so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of respondeat superior.[86] The unanimous ratification of a closed-shop agreement at a meeting attended by all employees does not overcome the effect of the employer's unfair labor practice in favoring a particular union where plant supervisors who have been instrumental in negotiations leading to the agreement are present.[87]

Procuring formation of new union. The act of an employer in procuring the formation of a new union constitutes an interference with, restraint, or coercion of employees in the exercise of their statutory rights, and is therefore an unfair labor practice.[88]

§ 28(53). —— Employment of Undercover Operatives, Detectives, Etc.

The employment of undercover operatives to spy on employees in their efforts to organize and on union affairs, or the surveillance by an employer of union meetings and activities, may constitute an unfair labor practice where it results in actual interference or domination.

The employment of undercover operatives or missionaries to spy on employees in their effort to organize and on union affairs is a violation of the statute defining unfair labor practices,[89] at least where it results in actual interference with union

80. U.S.—Foote Bros. Gear & Machine Corporation v. N. L. R. B., C. C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Foote Bros. Gear & Machine Corporation, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394, mandate conformed to, C.C.A., Foote Bros. Gear & Machine Corporation v. N. L. R. B., 121 F.2d 802—Independent Union of Gear Workers v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Independent Union of Gear Workers, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394.

81. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—Keystone Steel & Wire Co. v. N. L. R. B., C.C.A.7, 155 F.2d 553, certiorari granted 67 S.Ct. 190, 329 U.S. 705, 91 L.Ed. ——, and vacated in view of stipulation 68 S.Ct. 259, motion granted 68 S.Ct. 214—Foote Bros. Gear & Machine Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Foote Bros. Gear & Machine Corporation, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394, mandate conformed to, C.C.A., Foote Bros. Gear & Machine Corporation v. N. L. R. B., 121 F.2d 802—Independent Union of Gear Workers v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Independent Union of Gear Workers, 61 S.Ct. 318, 311 U. S. 620, 85 L.Ed. 394.

82. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—Keystone Steel & Wire Co. v. N. L. R. B., C.C.A.7, 155 F.2d 553, certiorari granted 67 S.Ct. 190, 329 U.S. 705, 91 L.Ed. ——, and vacated in view of stipulation 68 S.Ct. 214, motion granted 68 S.Ct. 259—Foote Bros. Gear & Mach. Corp. v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Foote Bros. Gear & Mach. Corp., 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394, mandate conformed to, C.C.A., Foote Bros. Gear & Mach. Corp. v. N. L. R. B., 121 F. 2d 802—Independent Union of Gear Workers v. N. L. R. B., C.C.A. 7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Independent Union of Gear Workers, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394.

83. U.S.—N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219—N. L. R. B. v. Quality Art Novelty Co., C.C.A.2, 127 F.2d 903—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311—N. L. R. B. v. Automotive Maintenance Machinery Co., C.C.A.7, 116 F.2d 350, reversed on other grounds 62 S. Ct. 608, 315 U.S. 282, 86 L.Ed. 848—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, opinion supplemented, C.C.A., 128 F.2d 188—N. L. R. B. v. Lund, C.C.A.8, 103 F.2d 815—N. L. R. B v. Eagle Mfg. Co., C.C.A.4, 99 F.2d 930—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539.

Support of labor organization as unfair labor practice generally see supra § 28 (45) b.

Suggesting formation of company union was held to be an unfair labor practice.—N. L. R. B. v. Crystal Spring Finishing Co., C.C.A.1, 116 F.2d 669.

84. U.S.—N. L. R. B. v. Quality Art Novelty Co., C.C.A.2, 127 F.2d 903—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311—N. L. R. B. v. Eagle Mfg. Co., C.C.A.4, 99 F. 2d 930.

85. U.S.—N. L. R. B. v. Quality Art Novelty Co., C.C.A.2, 127 F.2d 903—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311.

86. U.S.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., App. D.C., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

87. U.S.—N. L. R. B. v. John Engelhorn & Sons, C.C.A.3, 134 F.2d 553.

88. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S. Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

89. U.S.—Atlas Underwear Co. v. N. L. R. B., C.C.A.6, 116 F.2d 1020—Ohio Power Co. v. N. L. R. B., C.C. A.6, 115 F.2d 839—Fort Wayne

activity,[90] even though the employees do not know they are being watched;[91] but there is authority holding that the surveillance by an employer of the meetings and activities of a union is not an unfair labor practice unless it interferes with, restrains, or coerces his employees in the exercise of the rights guaranteed by the statute, or dominates or interferes with a labor organization.[92]

§ 28(54). —— Execution of Contract with Employer-Dominated Organization

Execution of a contract by the employer with a union which he dominates and supports constitutes an unfair labor practice.

Execution of a contract by the employer with a union which the employer dominates and supports constitutes an unfair labor practice on the part of the employer[93] under the statutory provisions relating to interference with, or restraint or coercion of, employees in the exercise of their statutory rights,[94] domination or interference with the formation or administration of labor organizations,[95] and discrimination with respect to hire or tenure of employment or any term or condition of employment to discourage membership in a labor organization.[96]

§ 28(55). —— Expression of Views

Labor relations statutes do not take away an employer's right to freedom of speech or make it an unfair labor practice for him to state his views on labor policies and problems, provided he does not act threateningly or coercively.

It has been said that under the National Labor Relations Act it devolves on an employer to assume a position of honest impartiality and neutrality and to refrain from communicating his managerial prejudices in an effort to sway the employees from making a free choice with respect to joining a union or pursuing such choice once it has been made.[97] The act, however, does not take away the employer's right to freedom of speech,[98] and, before oral statements of an employer may be held to con-

Corrugated Paper Co. v. N. L. R. B., C.C.A.7, 111 F.2d 869.

Labor spies

The employment of labor spies to report on the growth of a new union in furtherance of support of a company union and interference with independent organization is an unfair labor practice.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

90. U.S.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—Consolidated Edison Co. v. N. L. R. B., 59 S. Ct. 206, 305 U.S. 197, 83 L.Ed. 126 —N. L. R. B. v. Friedman-Harry Marks Clothing Co., 57 S.Ct. 645, 301 U.S. 58, 81 L.Ed. 921, 108 A. L.R. 1352—N. L. R. B. v. Fruehauf Trailer Co., 57 S.Ct. 642, 301 U.S. 49, 81 L.Ed. 918, 108 A.L.R. 1352—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F.2d 368—N. L. R. B. v. Calumet Steel Division of Borg-Warner Corporation, C.C. A. 7, 121 F.2d 366.
D.C.—Press Co. v. N. L. R. B., 118 F. 2d 937, 73 App.D.C. 103, certiorari denied 61 S.Ct. 1118, 313 U.S. 595, 85 L.Ed. 1548.

91. U.S.—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F.2d 368.
D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

92. U.S.—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F. 2d 652.

Surveillance of union representatives

Where employer might legally have forbidden solicitation of membership in labor organization on its premises during working hours, the fact that employer allowed such solicitation but placed union representatives under surveillance of detectives to see that they did not abuse their privilege was not an unfair labor practice.—N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F.2d 556.

Real surveillance prohibited as restraint or coercion

U.S.—N. L. R. B. v. Collins & Aikman Corp., C.C.A.4, 146 F.2d 454.

93. U.S.—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, opinion supplemented, C.C.A., 128 F.2d 188.

94. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S. Ct. 44, 326 U.S. 735, 90 L.Ed. 438 —N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, opinion supplemented, C.C.A., 128 F.2d 188.

95. U.S.—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, opinion supplemented, C.C.A., 128 F.2d 188.

96. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

97. U.S.—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F.2d 9—N. L. R. B. v. Duncan Foundry & Machine Works, C.C.A.7, 142 F.2d 594—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580.

98. U.S.—N. L. R. B. v. Virginia Electric & Power Co., 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—N. L. R. B. v. Thompson Products, C.C. A.6, 162 F.2d 287—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201—N. L. R. B. v. Kopman-Woracek Shoe Mfg. Co., C.C.A.8, 158 F.2d 103—N. L. R. B. v. Peterson, C.C.A.6, 157 F.2d 514—R. R. Donnelley & Sons Co. v. N. L. R. B., C.C.A.7, 156 F.2d 416, certiorari denied 67 S.Ct. 624, 329 U.S. 810, 91 L.Ed. —— —Big Lake Oil Co. v. N. L. R. B., C.C.A.5, 146 F.2d 967 —N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F.2d 536—Edward G. Budd Mfg. Co. v. N. L. R. B., C.C.A.3, 142 F.2d 922—Jacksonville Paper Co. v. N. L. R. B., C. C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462—N. L. R. B. v. American Tube Bending Co., C.C.A., 134 F. 2d 993, 146 A.L.R. 1017, certiorari denied 64 S.Ct. 84, 320 U.S. 768, 88 L.Ed. 459—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126—Jefferson Electric Co. v. N. L. R. B., C.C.A.7,

stitute an unfair labor practice, it must appear that they interfered with, restrained, or coerced employees in the rights guaranteed by the act, that is to say, the right to join labor organizations, to bargain collectively, and to engage in concerted activities.[99] Accordingly, in the absence of any interference with attempts of his employees to organize or of any threat of discrimination, it does not constitute an unfair labor practice for the employer to state his views on labor policies and problems[1] such as his opposition to the closed shop.[2]

The employer is as free as ever to take any side he may choose in determining the issue of representation of his employees by a labor union.[3] As long as the expression is not coercive, it does not constitute an unfair labor practice for the employer to express a preference for one union over another,[4] nor does it constitute an unfair labor prac-

102 F.2d 949—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153.

Freedom of speech as guaranteed by federal and state constitutions see Constitutional Law § 213.

Distribution of circular setting out employee's rights under statute did not in itself constitute a violation of the statute.—N. L. R. B. v. Gutmann & Co., C.C.A.7, 121 F.2d 756—N. L. R. B. v. Blossom Products Corporation, C.C.A.3, 121 F.2d 260—N. L. R. B. v. Auburn Foundry, C.C.A.7, 119 F.2d 331—Midland Steel Products Co. v. N. L. R. B., C.C.A.6, 113 F.2d 800.

99. U.S.—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201.

D.C.—Press Co. v. N. L. R. B., 118 F.2d 937, 73 App.D.C. 103, certiorari denied 61 S.Ct. 1118, 313 U.S. 595, 85 L.Ed. 1548.

Interference, restraint, or coercion as unfair labor practice generally see supra § 28 (45) a.

1. U.S.—N. L. R. B. v. Virginia Electric & Power Co., 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—N. L. R. B. v. Winona Textile Mills, C. C.A.8, 160 F.2d 201—N. L. R. B. v. Elyria Tel. Co., C.C.A.6, 158 F. 2d 868—N. L. R. B. v. Kopman-Woracek Shoe Mfg. Co., C.C.A.8, 158 F.2d 103—N. L. R. B. v. Peterson, C.C.A.6, 157 F.2d 514—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486—R. R. Donnelley & Sons Co. v. N. L. R. B., C.C.A.7, 156 F.2d 416, certiorari denied 67 S.Ct. 624, 329 U.S. 810, 91 L.Ed. —— —Big Lake Oil Co. v. N. L. R. B., C.C.A.5, 146 F. 2d 967—N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F.2d 536 —N. L. R. B. v. Fairmont Creamery Co., C.C.A.10, 144 F.2d 128—Edward G. Budd Mfg. Co. v. N. L. R. B., C.C.A.3, 142 F.2d 922—N. L. R. B. v. East Texas Motor Freight Lines, C.C.A.5, 140 F.2d 404—Utah Copper Co. v. N. L. R. B., C.C.A.10, 139 F.2d 788, certiorari denied Independent Ass'n of Mill Workers v. N. L. R. B., 64 S.Ct. 946, 322 U.S. 731, 88 L.Ed. 1566—N. L. R. B. v. Citizen-News Co., C.C.A.9, 134 F.2d 970—N. L. R. B. v. Clarksburg Pub. Co., C.C. A.4, 120 F.2d 976—Diamond T Motor Car Co. v. N. L. R. B., C.C.A. 7, 119 F.2d 978—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S. Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126—Midland Steel Products Co. v. N. L. R. B., C.C.A.6, 113 F.2d 800—N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A.7, 113 F.2d 621—Continental Box Co. v. N. L. R. B., C.C.A.5, 113 F.2d 93—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F. 2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S. Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—Jefferson Electric Co. v. N. L. R. B., C.C. A.7, 102 F.2d 949—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153.

D.C.—Peter J. Schweitzer, Inc., v. N. L. R. B., 144 F.2d 520, 79 U.S. App.D.C. 178.

"The labor law does not prohibit the right of opinion on the part of the employer, nor the expression of it."—Press Co. v. N. L. R. B., 118 F.2d 937, 942, 73 App.D.C. 103, certiorari denied 61 S.Ct. 1118, 313 U. S. 595, 85 L.Ed. 1548.

Particular statements held not to constitute unfair labor practice

U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486—N. L. R. B. v. Brown-Brockmeyer Co., C.C.A. 6, 143 F.2d 537—N. L. R. B. v. Citizen-News Co., C.C.A.9, 134 F. 2d 962—Wilson & Co. v. N. L. R. B., C.C.A.7, 120 F.2d 913—Midland Steel Products Co. v. N. L. R. B., C.C.A.6, 113 F.2d 800.

Compulsory attendance at meetings

Where employees, prior to election at which union membership was to be decided, were called in groups to hear message from employer's labor relation manager, and employees were paid for time spent at the meetings and were not inconvenienced, if employees were influenced against their will by arguments presented, compulsory attendance did not constitute a species of coercion in violation of National Labor Relations Act, since it was a legitimate consequence of free speech and presumably one of its purposes, since free speech cannot be limited to ineffective speech.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486.

Occasion on which employer elects to utter his thoughts to employees is not to be considered as an element of coercion; employer is as free to speak at one time as another.—N. L. R. B. v. Montgomery Ward & Co., supra.

2. U.S.—N. L. R. B. v. Montgomery Ward & Co., supra.

3. U.S.—N. L. R. B. v. Virginia Electric & Power Co., 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—N. L. R. B. v. Winona Textile Mills, C. C.A.8, 160 F.2d 201—N. L. R. B. v. Kopman-Woracek Shoe Mfg. Co., C.C.A.8, 158 F.2d 103—N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F.2d 556—N. L. R. B. v. East Texas Motor Freight Lines, C.C.A. 5, 140 F.2d 404—N. L. R. B. v. American Tube Bending Co., C.C. A.2, 134 F.2d 993, 146 A.L.R. 1017, certiorari denied 64 S.Ct. 84, 320 U. S. 768, 88 L.Ed. 459—N. L. R. B. v. Citizen-News Co., C.C.A.9, 134 F.2d 970—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U. S. 713, 85 L.Ed. 1144—Montgomery Ward & Co. v. N. L. R. B., C.C.A. 7, 107 F.2d 555.

4. U.S.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 143 F.2d 761—Diamond T Motor Car Co. v. N. L. R. B., C.C.A.7, 119 F.2d 978—N. L. R. B. v. Auburn Foundry, C.C.A.7, 119 F.2d 331—Continental Box Co. v. N. L. R. B., C.C.A.5, 113 F.2d 93—Montgomery Ward & Co. v. N. L. R. B., C.C.A.7, 107 F.2d 555—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949—N. L. R. B. v. Falk Corporation, C.C.A.7, 102 F.2d 383.

Slight suggestions to employees as to employer's choice between unions to act as bargaining agency, standing alone, are not sufficient to sustain a finding of unfair labor prac-

tice to disparage the union[5] or to express his hostility to a union if he has any,[6] and his opinion of the leaders of the union, be that opinion good or bad.[7] He may appeal to the employees' gratitude to convince them that a union is unnecessary.[8] Furthermore, the employer may, by proper persuasion, induce union members to resign from their organizations,[9] using lawful means for that purpose.[10]

The employer may not use the right of freedom of speech threateningly or coercively,[11] especially

tices.—Edward G. Budd Mfg. Co. v. N. L. R. B., C.C.A.3, 142 F.2d 922.

Interpretation in light of previous labor relations

Employer's letters to employees which, standing alone, were concededly susceptible of merely stating that employees were not required to join any particular union and that they could form their own union and that, arguing from past experiences, employees would do well to form their own union, were not required to be interpreted in light of employer's labor relations over ten-year period preceding decree enforcing board's order directing employer to cease certain unfair labor practices. —Edward G. Budd Mfg. Co. v. N. L. R. B., supra.

Celebration of defeat of union

Fact that some representatives of the management attended a celebration of the defeat of a particular union in election was immaterial, since it was not illegal for them to express their preference either before or after the election.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F. 2d 287.

Prior to enactment of National Labor Relations Act, a representative plan of organization of employees was lawful and there was no valid law inhibiting an employer from expressing to his employees his opposition to one form of union organization and preference for another.—Nevada Consol. Copper Corporation v. N. L. R. B., C.C.A.10, 122 F.2d 587, reversed on other grounds 62 S.Ct. 960, 316 U.S. 105, 86 L.Ed. 1305.

5. U.S.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 143 F.2d 761—N. L. R. B. v. East Texas Motor Freight Lines, C.C.A.5, 140 F.2d 404—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L. Ed. 462—N. L. R. B. v. Citizen-News Co., C.C.A.9, 134 F.2d 970 —N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L. Ed. 1126—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153.

D.C.—Press Co. v. N. L. R. B., 118 F. 2d 937, 73 App.D.C. 103, certiorari denied 61 S.Ct. 1118, 313 U.S. 595, 85 L.Ed. 1548.

Mere statements that employees would gain nothing from joining the union and that it was organized by racketeers and similar statements without threatened, coercive, or punitive action was within right of free speech.—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462.

Comment as to experience of others

Comment by general superintendent to financial secretary of union that men in another plant of employer were disgusted with unionism did not violate prohibition against interference, coercion or restraint.—Midland Steel Products Co. v. N. L. R. B., C.C.A.6, 113 F.2d 800.

Hampering free choice of employees

Disparaging remarks by supervisory employees, made in such way as to hamper the exercise of free choice on the part of the employees, constitute an unfair labor practice.—N. L. R. B. v. Harris-Woodson Co., C.C.A.4, 162 F.2d 97.

6. U.S.—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201—N. L. R. B. v. Kopman-Woracek Shoe Mfg. Co., C.C.A.8, 158 F.2d 103—N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F.2d 536—Edward G. Budd Mfg. Co. v. N. L. R. B., C.C.A.3, 142 F.2d 922—N. L. R. B. v. East Texas Motor Freight Lines, C.C.A.5, 140 F.2d 404—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U. S. 772, 88 L.Ed. 462—N. L. R. B. v. Citizen-News Co., C.C.A.9, 134 F. 2d 970—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126.

Personal views of officer

An employer cannot be held liable for infringing statutory rights of employees by reason of mere expression of personal views of an officer concerning unionism.—N. L. R. B. v. Reynolds International Pen Co., C.C.A.7, 162 F.2d 680.

7. U.S.—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462.

8. D.C.—Peter J. Schweitzer, Inc., v. N. L. R. B., 144 F.2d 520, 79 U. S.App.D.C. 178.

9. Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836.

N.Y.—H. B. Rosenthal-Ettlinger Co. v. Schlossberg, 266 N.Y.S. 762, 149 Misc. 210.

10. N.Y.—H. B. Rosenthal-Ettlinger Co. v. Schlossberg, supra.

11. U.S.—N. L. R. B. v. Virginia Electric & Power Co., 62 S.Ct. 364, 314 U.S. 469, 86 L.Ed. 348—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309—N. L. R. B. v. Monumental Life Ins. Co., C.C.A.6, 162 F.2d 340—N. L. R. B. v. Bird Mach Co., C.C. A.1, 161 F.2d 589—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201—N. L. R. B. v. Kopman-Woracek Shoe Mfg. Co., C.C.A.8, 158 F.2d 103—N. L. R. B. v. Peterson, C.C.A.6, 157 F.2d 514—R. R. Donnelley & Sons Co. v. N. L. R. B., C.C.A.7, 156 F.2d 416, certiorari denied 67 S.Ct. 624, 329 U.S. 810, 91 L.Ed. —— —N. L. R. B. v. American Pearl Button Co., C.C. A.8, 149 F.2d 311—N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F.2d 536—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 143 F.2d 761—N. L. R. B. v. Fairmont Creamery Co., C.C.A.10, 143 F.2d 668, certiorari denied 65 S.Ct. 87, 323 U.S. 752, 89 L.Ed. 602—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580 —N. L. R. B. v. East Texas Motor Freight Lines, C.C.A.5, 140 F.2d 404—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U. S. 772, 88 L.Ed. 462—N. L. R. B. v. American Tube Bending Co., C. C.A.2, 134 F.2d 993, 146 A.L.R. 1017, certiorari denied 64 S.Ct. 84, 320 U.S. 768, 88 L.Ed. 459—N. L. R. B. v. Martin Bros. Box Co., C. C.A.7, 130 F.2d 202, certiorari denied Martin Bros. Box Co. v. N. L. R. B., 63 S.Ct. 59, 317 U.S. 660, 87 L.Ed. 531—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F. 2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—Montgomery Ward & Co. v. N. L. R. B., C.C.A.7, 107 F. 2d 555—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153.

D.C.—Peter J. Schweitzer, Inc. v. N. L. R. B., 144 F.2d 520, 79 U.S.App. D.C. 178—Press Co. v. N. L. R. B.,

where he has within himself the power to enforce his threats.[12] Thus he does not have the right to threaten to discharge or discriminate against an employee for union membership or activities[13] and it is an unfair labor practice for the employer to suggest that his plant might be closed if it were unionized,[14] to suggest that the benefits of a liberal labor policy would be lost if a union is organized,[15] or to express an opinion which is intended to discourage and in fact does discourage union activity.[16]

In determining whether there was an unfair labor practice, the employer's statement must be interpreted as a whole and not from certain phrases isolated from the context.[17] The effectiveness or accuracy of the employer's expression of his views is not determinative of whether the statement of them constitutes an unfair labor practice.[18] Misrepresentation by the employer of the legal effect of contracts with individual employees is improper and may be properly prohibited.[19]

State statutes have been held not to prevent an employer innocent of coercion or interference from discussing labor policies and problems with his employees.[20]

§ 28(56). —— Pressure to Join Specific Union

An employer who coerces or forces an employee to join a specific union, at least in the absence of a valid closed-shop agreement with such union, is guilty of an unfair labor practice.

To coerce or force an employee to join a union, at least in the absence of a valid closed-shop or union-shop agreement with a lawful union, is to encourage membership therein and constitutes an unfair labor practice.[21] Accordingly, refusal to reinstate discharged employees until they joined a new union is an unfair labor practice,[22] since it is an interference with, or restraint or coercion of, employees in the exercise of their statutory rights,[23] and it is discrimination with respect to hire or tenure of employment to encourage or discourage membership in a labor organization;[24] and offers of reinstatement conditioned on the discharged employees becoming members of a particular union or its successor are equivalent to an absolute refusal to reinstate.[25] An employer encouraging its employees' membership in a labor union by signing a collective bargaining contract therewith and discharging certain employees for not being members of, or having work permits from, such union, as required by the contract, has been held to be guilty of unfair labor practices prohibited by a state employment relations act.[26]

118 F.2d 937, 73 App.D.C. 103, certiorari denied 61 S.Ct. 1118, 313 U.S. 595, 85 L.Ed. 1548.

12. U.S.—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201—N. L. R. B. v. Peterson, C.C.A.6, 157 F.2d 514—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462.

13. U.S.—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309—N. L. R. B. v. Peterson, C.C.A.6, 157 F.2d 514—R. R. Donnelley & Sons Co. v. N. L. R. B., C.C.A.7, 156 F.2d 416, certiorari denied 67 S.Ct. 624, 329 U.S. 810, 91 L.Ed. —— —N. L. R. B. v. Fairmont Creamery Co., C.C.A.10, 143 F.2d 668, certiorari denied 65 S.Ct. 87, 323 U.S. 752, 89 L.Ed. 602—Sewell Hats, Inc. v. N. L. R. B., C.C.A.5, 143 F.2d 450, certiorari denied 65 S.Ct. 130, 323 U.S. 772, 89 L.Ed. 617—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 140 F.2d 777—N. L. R. B. v. East Texas Motor Freight Lines, C.C.A.5, 140 F.2d 404—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 133 F.2d 988—Fort Wayne Corrugated Paper Co. v. N. L. R. B., C.C.A.7, 111 F.2d 869.

Discharge for union activity as unfair labor practice see supra § 28 (49).

14. U.S.—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201—Atlas Underwear Co. v. N. L. R. B., C.C.A.6, 116 F.2d 1020—N. L. R. B. v. Asheville Hosiery Co., C.C.A.4, 108 F.2d 288.

15. U.S.—N. L. R. B. v. Bird Mach. Co., C.C.A.1, 161 F.2d 589.
D.C.—Peter J. Schweitzer, Inc. v. N. L. R. B., 144 F.2d 520, 79 U.S. App.D.C. 178.

16. U.S.—N. L. R. B. v. Clarksburg Pub. Co., C.C.A.4, 120 F.2d 976.

17. U.S.—N. L. R. B. v. Gutmann & Co., C.C.A.7, 121 F.2d 756—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C.A.7, 121 F.2d 602.

18. U.S.—N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F.2d 556—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C.C.A.10, 140 F.2d 423.

19. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762.

20. Pa.—Lazarus Store v. Pennsylvania Labor Relations Board, Com. Pl., 37 Luz.Leg.Reg. 413—Pennsylvania Labor Relations Board v. Schlossman, Com.Pl., 91 Pittsb. Leg.J. 489.

21. U.S.—N. L. R. B. v. American Car & Foundry Co., C.C.A.7, 161 F.2d 501—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

Discharge for refusal to join union as unfair labor practice under the National Labor Relations Act see supra § 28 (49) b (a).

22. U.S.—N. L. R. B. v. Cowell Portland Cement Co., supra.

23. U.S.—N. L. R. B. v. Cowell Portland Cement Co., supra.

Interference, restraint, or coercion as unfair labor practice generally see supra § 28 (45) a.

24. U.S.—N. L. R. B. v. Cowell Portland Cement Co., supra.

Discrimination with respect to hire or tenure of employment as unfair labor practice generally see supra § 28 (45) c.

25. U.S.—N. L. R. B. v. Cowell Portland Cement Co., supra.

26. Wis.—International Union, United Automobile, Aircraft & Agricultural Implement Workers of

§ 28(57). —— Prohibiting Union Solicitation or Activity

An employer's rule prohibiting union solicitation during working hours is not objectionable as an unfair labor practice unless adopted for a discriminatory purpose; but rules prohibiting union solicitation by an employee outside of working hours on company property or prohibiting participation in organization activities of any kind on company time and property may constitute an unfair labor practice.

It is within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours,[27] and such a rule is not objectionable on its face as an unfair labor practice[28] but must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose.[29] A rule prohibiting union solicitation on company property or time, when construed by the employer as prohibiting all talk about unions and union activities, may, however, constitute an unfair labor practice.[30]

Ordinarily it is not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours although on company property,[31] and the facts that the rule represented the considered judgment of management and was applied by employers generally, and that labor itself had recognized such a rule as valid, are not determinative of its validity.[32] Such a rule may constitute an unfair labor practice[33] and must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.[34] Denying an employee the right to distribute union literature at relatively the same spot and time as anti-union literature was distributed by business men of the community has been held to be an unfair labor practice.[35]

In determining whether an employer's rule is an unfair labor practice, the National Labor Relations Board is authorized to consider the manner in which and the purpose for which the rule was promulgated and employed.[36]

America v. Wisconsin Employment Relations Board, 14 N.W.2d 872, 245 Wis. 417, followed in 14 N.W. 2d 882, 245 Wis. 439, rehearing denied 15 N.W.2d 873, 245 Wis. 417, certiorari dismissed 65 S.Ct. 685, 324 U.S. 884, 89 L.Ed. 1434.

27. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486 —N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72, 329 U.S. 725, 91 L.Ed. —— —N. L. R. B. v. Illinois Tool Works, C.C.A.7, 153 F.2d 811—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C.C.A.10, 140 F.2d 423—N. L. R. B. v. Denver Tent & Awning Co., C.C.A.10, 138 F.2d 410—N. L. R. B. v. William Davies Co., C.C.A.7, 135 F.2d 179, certiorari denied William Davies Co. v. N. L. R. B., 64 S.Ct. 82, 320 U.S. 770, 88 L.Ed. 460 —Waterman Steamship Corporation v. N. L. R. B., C.C.A.5, 103 F. 2d 157, reversed on other grounds N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036.

Conn.—Bigelow Co. v. Waselik, 50 A. 2d 769, 133 Conn. 304.

Objection to union discussions

An employer may object to union discussions during work hours without being guilty of interfering with employees in exercising their right of self-organization.—N. L. R. B. v. Edinburg Citrus Ass'n, C.C.A.5, 147 F.2d 353.

28. U.S.—Carter Carburetor Corporation v. N. L. R. B., C.C.A.8, 140 F.2d 714.

Pa.—Lazarus Store v. Pennsylvania Labor Relations Board, Com.Pl., 37 Luz.Leg.Reg. 413.

29. U.S.—N. L. R. B. v. May Dept. Stores, C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72, 329 U.S. 725, 91 L.Ed. ——.

30. U.S.—Carter Carburetor Corp. v. N. L. R. B., C.C.A.8, 140 F.2d 714.

31. U.S.—N. L. R. B. v. American Furnace Co., C.C.A.7, 158 F.2d 376 —N. L. R. B. v. Illinois Tool Works, C.C.A.7, 153 F.2d 811.

Reason for rule

Time outside working hours, whether before or after work or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property.—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72, 329 U.S. 725, 91 L.Ed. ——.

Prohibition of unauthorized solicitation

Shop rule providing that no collecting, soliciting, selling, or visiting was permited unless proper authorization was received was invalid in so far as it prohibited union solicitation on employer's premises during nonworking hours.—N. L. R B. v. Clark Bros. Co., C.C.A.2, 163 F 2d 373.

32. U.S.—N. L. R. B. v. May Dept. Stores Co., 154 F.2d 533, certiorari denied 67 S.Ct. 72, 329 U.S. 725, 91 L.Ed. ——.

33. U.S.—N. L. R. B. v. Le Tourneau Co. of Georgia, 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A. L.R. 1081, rehearing denied 65 S. Ct. 1401, 325 U.S. 894, 89 L.Ed. 2005—N. L. R. B. v. Glenn L. Martin-Nebraska Co., C.C.A.8, 141 F.2d 371.

34. U.S.—Republic Aviation Corp. v. N. L. R. B., 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081 —National Labor Relations Board v. Le Tourneau Co. of Ga., 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081, rehearing denied 65 S.Ct. 1401, 325 U.S. 894, 89 L.Ed. 2005—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72, 329 U.S. 725, 91 L.Ed. ——.

Rules prohibiting participation in organization activities of any kind on company time and property may constitute an unfair labor practice in the absence of special circumstances rendering enforcement thereof necessary for the effective operation of the business or for discipline.—N. L. R. B. v. American Pearl Button Co., C.C.A.8, 149 F.2d 258.

35. U.S.—N. L. R. B. v. American Furnace Co., C.C.A.7, 158 F.2d 376.

36. U.S.—Carter Carburetor Corporation v. N. L. R. B., C.C.A.8, 140 F.2d 714.

§ 28(58). —— Promotion, Demotion, or Transfer of Employees

An employer may promote, demote, transfer, or change the status of an employee unless he does so for a reason prohibited by statute.

Apart from statute it is the right of an employer to advance his employees on the basis of individual merit, without regard to their affiliation or nonaffiliation with any labor organization;[37] and the National Labor Relations Act does not attempt to regulate the employer's control of his business in the promotion of employees as long as the employer does not attempt thereby to interfere with the right of self-organization of the employees or to intimidate or coerce them.[38] So an employer may, notwithstanding the act, demote an employee for cause[39] unless it is for a reason prohibited by the act,[40] such as for union activity;[41] but membership or office in a union is not a guarantee against demotion.[42]

While the act does not interfere with the exercise of the normal right of an employer to transfer employees in the course of business,[43] the transfer of an employee,[44] or the change in status of an employee from permanent to temporary,[45] traceable to membership in a labor union or to activities on behalf of a bargaining agency, constitutes discrimination within the interdiction of the statute. The fact that the employer felt that the transfer was necessary to prevent his business from being disrupted does not justify the unfair practice.[46]

§ 28(59). —— Refusal to Grant Complete Recognition to Union as Sole Bargaining Agent

An employer who refuses to grant complete recognition of a union representing a majority of the employees as exclusive bargaining agent of all the employees or who places a limitation on the recognition granted may be guilty of an unfair labor practice.

An employer may be guilty of an unfair labor practice where he refuses to grant complete recognition of a union representing a majority of the employees as exclusive bargaining agent of all the employees[47] or places a limitation on the recognition granted,[48] as by recognizing the union as sole bargaining agency for those employees who are affiliated with the union,[49] notwithstanding the employer did in fact bargain with the union and the agreement reached as a result of such bargaining was in fact approved by its members;[50] nor is it material that the limited recognition granted was approved by members of the union[51] or that exclusive recognition was refused for fear that it would bring about reprisals by rival unions.[52] Where the union and employees have violated their contract with the employer, the employer's refusal to meet with the union's representatives does not constitute an unfair labor practice, since the National Labor Relations Act does not abrogate the correlative rights of the employer.[53] Where strikers, although acting as a group, are not the representatives of the

37. N.J.—Bayonne Textile Corporation v. American Federation of Silk Workers, 168 A. 799, 114 N.J.Eq. 307, modified on other grounds 172 A. 551, 116 N.J.Eq. 146, 92 A.L.R. 1450.

38. U.S.—Appalachian Electric Power Co. v. N. L. R. B., C.C.A.4, 93 F.2d 985.

39. U.S.—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—N. L. R. B. v. Auburn Foundry, C.C.A.7, 119 F.2d 331—Fort Wayne Corrugated Paper Co. v. N. L. R. B., C.C.A.7, 111 F.2d 869.

40. U.S.—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536.

41. U.S.—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A.7, 162 F.2d 435—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—N. L. R. B. v. Auburn Foundry, C.C.A.7, 119 F.2d 331.

42. U.S.—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536.

43. U.S.—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292.

Transfer affecting many employees
The transfer of an employee from one department to another by employer could not be basis for a conclusion unfavorable to employer, with respect to whether employer had violated statute, where the transfer affected many employees in the same department.—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67.

44. U.S.—N. L. R. B. v. Fairmont Creamery Co., C.C.A.10, 143 F.2d 668, certiorari denied 65 S.Ct. 87, 323 U.S. 752, 89 L.Ed. 602—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—N. L. R. B. v. Star Pub. Co., C.C.A.9, 97 F.2d 465.

45. U.S.—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292.

46. U.S.—N. L. R. B. v. Star Pub. Co., C.C.A.9, 97 F.2d 465.

47. U.S.—McQuay-Norris Mfg. Co. v. N. L. R. B., C.C.A.7, 116 F.2d 748, certiorari denied 61 S.Ct. 843, 313 U.S. 565, 85 L.Ed. 1524, and modified on other grounds, C.C.A., 119 F.2d 1009.

48. U.S.—McQuay-Norris Mfg. Co. v. N. L. R. B., supra.

49. U.S.—United Biscuit Co. of America v. N. L. R. B., C.C.A.7, 128 F.2d 771—McQuay-Norris Mfg. Co. v. N. L. R. B., C.C.A.7, 116 F.2d 748, certiorari denied 61 S.Ct. 843, 313 U.S. 565, 85 L.Ed. 1524, and modified on other grounds, C.C.A., 119 F.2d 1009.

50. U.S.—McQuay-Norris Mfg. Co. v. N. L. R. B., supra.

51. U.S.—McQuay-Norris Mfg. Co. v. N. L. R. B., supra.

52. U.S.—McQuay-Norris Mfg. Co. v. N. L. R. B., supra.

53. U.S.—N. L. R. B. v. Sands Mfg. Co., C.C.A.6, 96 F.2d 721, affirmed

employees for the purpose of bargaining, refusal of the employer to bargain under such circumstances is not an unfair labor practice.[54]

§ 28(60). —— Refusal to Sign Written Contract

Refusal of the employer to sign a written contract embodying the terms of an agreement reached with the union may constitute an unfair labor practice.

Refusal of the employer to sign a written contract embodying the terms of an agreement reached with the union may constitute an unfair labor practice[55] and so is an employer's intention, announced or determined on before negotiations are commenced, to refuse to sign such a written contract.[56]

Under some state statutes, where negotiations are pending and the employer and employees reach an oral agreement, the employer is not guilty of an unfair labor practice when he refuses to sign a written contract without consulting his counsel.[57]

§ 28(61). —— Shutdown and Lockout

While a bona fide shutdown of a plant does not of itself constitute a violation of the labor relations statutes, a shutdown or lockout of employees for the purpose of assisting, or discouraging membership in, a labor union constitutes an unfair labor practice.

The public policy of the state and nation is opposed to the closing or removal of factories in order to discourage, intimidate, and punish employees by removing hopes of reëmployment of such employees by the employer.[58] While a bona fide shutdown of a plant does not of itself constitute a violation of the labor relations statutes,[59] assistance given by an employer to a union by a shutdown, like other employer assistance, is forbidden by the National Labor Relations Act.[60] A shutdown or lockout of employees by an employer for the purpose of discouraging membership in a labor union constitutes a discrimination with respect to tenure or hire within the provision of the act making such discrimination an unfair labor practice,[61] as well as interference with, or restraint or coercion of, employees in the exercise of the rights guaranteed by the statute;[62] and a like rule applies where the shutdown has the additional purpose of compelling the employees to join a new union.[63]

§ 28(62). —— Wage Increases or Cuts; Deductions from Wages

An employer may be guilty of an unfair labor practice where he takes action with respect to wages, as by increasing them, without consulting a properly certified bargaining representative, or where he reduces wages because of union activity or to discourage bargaining regarding wages; but payroll deductions for union dues are not forbidden, at least where the union involved is not dominated by the employer.

Although the grant of a wage increase to employees does not necessarily constitute an unfair labor practice,[64] after a collective bargaining agent has been designated by the employees in an appropriate unit it may constitute an unfair labor practice for an employer to take unilateral action with respect to wages,[65] as, according to the decisions

59 S.Ct. 508, 306 U.S. 332, 83 L. Ed. 682.

54. U.S.—N. L. R. B. v. Indiana Desk Co., C.C.A.7, 149 F.2d 987.

55. U.S.—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309—N. L. R. B. v. National Seal Corporation, C.C.A.2, 127 F.2d 776—N. L. R. B. v. Blanton Co., C.C.A.8, 121 F.2d 564—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A. 1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corporation v. N. L. R. B., 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141—N. L. R. B. v. Highland Park Mfg. Co., C.C.A.4, 110 F.2d 632—Art Metals Const. Co. v. N. L. R. B., C.C.A.2, 110 F.2d 148.

Refusal before agreement reached

A refusal of employer to sign any agreement with union was an unfair labor practice, notwithstanding at time of refusal no agreement had been reached.—N. L. R. B. v. Register Pub. Co., C.C.A.9, 141 F.2d 156.

56. U.S.—N. L. R. B. v. Blanton Co., C.C.A.8, 121 F.2d 564.

57. Pa.—Pennsylvania Relations Board v. Camino, 47 Pa.Dist. & Co. 1, 25 West.L.J. 54.

58. N.Y.—Abrams v. Allen, 74 N.E. 2d 305, 297 N.Y. 52.

59. U.S.—Atlas Underwear Co. v. N. L. R. B., C.C.A.6, 116 F.2d 1020.

60. U.S.—N. L. R. B. v. Electric Vacuum Cleaner Co., 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F. 2d 652—N. L. R. B. v. Lund, C.C.A. 8, 103 F.2d 815.

Assistance to union as unfair labor practice generally see supra § 28 (52).

61. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438—N. L. R. B. v. Stremel, C.C.A.10, 141 F.2d 317.

Discrimination with respect to hire or tenure of employment as unfair labor practice generally see supra § 28 (45) c.

62. U.S.—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F.2d 652.

Interference, restraint, or coercion as unfair labor practice generally see supra § 28 (45) a.

63. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S. Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

64. U.S.—N. L. R. B. v. Bradford Machine Tool Co., C.C.A.6, 138 F. 2d 246.

65. U.S.—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A.7, 162 F.2d 435—Consolidated Aircraft Corp. v. N. L. R. B., C.C.A.9, 141 F.2d 785.

Application to War Labor Board

(1) Employer's application to War Labor Board for wage increase for most of his employees, including small group having a properly certified bargaining representative which was not consulted by employer who disagreed with National Labor Relations Board's decision that such group was an appropriate bargaining unit, justified conclusion that under circumstances employer had engaged in an unfair labor prac-

on the question, by increasing them.[66] So it is an unfair labor practice for an employer, in response to an offer of his employees, to induce them by the grant of wage increases to leave their union,[67] and such practice is sufficient in itself to support an order of the labor relations board to cease and desist.[68] An employer who during a strike increases the salary of employees not striking but fails to increase the salaries of those on strike has been held to be guilty of improper interference with the exercise of the employees' right of self-organization in violation of a state statute.[69]

It constitutes an unfair labor practice for an employer to reduce the wages of his employees because of union activity,[70] to discourage any bargaining regarding wages,[71] or to reduce wages or job classifications of men without consulting a union with which he has entered into a collective bargaining contract relating to such matters.[72] An employer's refusal in good faith to agree to a union's interpretation of a collective bargaining contract entitling the employees under certain circumstances to double time does not constitute an unfair labor practice.[73] The termination of an arrangement voluntarily put into effect by the employer with respect to additional time off by employees does not necessarily constitute an unfair labor practice.[74] Under the Railway Labor Act no wage cut may be imposed unless provisions of the statute are first obeyed.[75]

Payroll deductions for union dues are not forbidden if made impartially.[76] The act of the employer in continuing his former practice of making payroll deductions for union dues of all employees on request, whether members of the bargaining representative or of rival unions, is not an unfair labor practice,[77] nor is it a refusal to bargain collectively with the bargaining representative.[78] Where deductions from wages were at the request of employees, made by the employer and paid over to a union dominated by the employer, the liability of the employer to the employees, if any, can, according to one view, be based only on the theory that the employer is liable in damages for the tort of compelling the members to contribute through the coercion of an unfair labor practice,[79] and the employer cannot be required by the National Labor Relations Board to reimburse the employees for such deductions[80] even in a case involving a closed shop;[81] but there is authority holding that the checkoff provision of a closed shop contract in such case is an unfair labor practice requiring reimbursement by the employer for the wages deducted.[82] Checkoff orders signed by union members directing

tice.—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S. Ct. 468, 326 U.S. 811, 90 L.Ed. 495.

(2) But omission of such group from employees who received increases would not have been considered an unfair labor practice.—May Dept. Stores Co. v. N. L. R. B., supra.

66. U.S.—N. L. R. B. v. May Department Stores Co., C.C.A.8, 146 F.2d 66, modified on other grounds 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495.

67. U.S.—Medo Photo Supply Corporation v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007.

68. U.S.—Medo Photo Supply Corporation v. N. L. R. B., supra.

Prevention and redress of unfair labor practices by labor relations board generally see infra § 28 (64).

69. Pa.—In re Ewart, 42 Pa.Dist. & Co. 307.

70. U.S.—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A.7, 162 F.2d 435.

Reason for rule

The employer thereby necessarily discourages membership in the labor organization involved.—Allis-Chalmers Mfg. Co. v. N. L. R. B., supra.

71. U.S.—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 111 F.2d 474.

Reason for rule

Such conduct constitutes a refusal to bargain regarding wages within the meaning of the National Labor Relations Act making it an unfair labor practice for an employer to refuse to bargain with the representative of the employees.—N. L. R. B. v. Whittier Mills Co., supra.

72. U.S.—Consolidated Aircraft Corp. v. N. L. R. B., C.C.A.9, 141 F.2d 785.

73. U.S.—Consolidated Aircraft Corporation v. N. L. R. B., supra.

74. U.S.—N. L. R. B. v. Palm Beach Broadcasting Corp., C.C.A.5, 155 F. 2d 805.

75. U.S.—In re Chicago North Shore & M. R. Co., C.C.A.Ill., 147 F.2d 723, certiorari denied Brotherhood of Locomotive Firemen and Enginemen v. Chicago, N. S. & M. R. Co., 65 S.Ct. 1089, 325 U.S. 852, 89 L.Ed. 1973.

76. U.S.—Hughes Tool Co. v. N. L. R. B., C.C.A.5, 147 F.2d 69, 158 A. L.R. 1165.

77. U.S.—Hughes Tool Co. v. N. L. R. B., supra.

78. U.S.—Hughes Tool Co. v. N. L. R. B., supra.

79. U.S.—N. L. R. B. v. Continental Oil Co., C.C.A.10, 121 F.2d 120—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F.2d 816—Western Union Telegraph Co. v. N. L. R. B., C.C.A.2, 113 F.2d 992.

80. U.S.—N. L. R. B. v. Southwestern Greyhound Lines, C.C.A.8, 126 F.2d 883—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311—N. L. R. B. v. U. S. Truck Co., C.C. A.6, 124 F.2d 887—N. L. R. B. v. Continental Oil Co., C.C.A.10, 121 F.2d 120—Corning Glass Works v. N. L. R. B., C.C.A.2, 118 F.2d 625—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868.

81. U.S.—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F.2d 816—N. L. R. B. v. J. Greenebaum Tanning Co., C.C.A.7, 110 F.2d 984.

Check-off on association's demand

Where check-off from wages as method of collecting dues for employees' association was conceded only on association's demand, and employees prefering to pay dues direct were relieved from checkoff, order requiring employer to reimburse employees was improper, notwithstanding company interference in formation of the association.—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F.2d 340.

82. U.S.—Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 132 F.

the employer to deduct from wages union dues and assessments do not violate constitutional or statutory requirements that wages be paid in money.[83]

§ 28(63). Unfair Labor Practices of Employees, Labor Organizations, or Their Agents

Under some statutes it is an unfair labor practice for employees or labor organizations or their agents to perform specified acts.

Under some statutes it is an unfair labor practice for employees or labor organizations or their agents to perform specified forbidden acts.[84] Thus under some statutes picketing, boycotting, or the like, under conditions described in the statute, is made an unfair labor practice.[85] Such statutes do not forbid picketing but merely attempt to regulate it

2d 390, affirmed 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U.S. 809, 88 L.Ed. 489.

83. Ky.—Braddom v. Three Point Coal Corporation, 157 S.W.2d 349, 288 Ky. 734.

84. **Held unfair labor practice**

(1) Actions of labor union which has called a strike of the employees of an eating establishment in causing slovenly and unkempt persons to invade the establishment at the busiest time of day and occupy all seats to the exclusion of regular patrons, and in causing the proprietors falsely to be arrested on criminal charges.—In re Ewart, 42 Pa.Dist. & Co. 307.

(2) Falsely asserting that an employer is unfair to organized labor.—Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 299 N.W. 31, 238 Wis. 379, certiorari denied Milk & Ice Cream Drivers and Dairy Employees Union, Local No. 225 v. Wisconsin Employment Relations Board, 62 S.Ct. 1035, 316 U.S. 668, 86 L.Ed. 1744.

(3) Inducing an employer to sign a collective bargaining contract requiring employees to be members of, or to obtain and pay for, work permits from the union as a condition of further employment.—International Union, United Automobile Aircraft & Agricultural Implement Workers of America v. Wisconsin Employment Relations Board, 15 N.W.2d 873, 245 Wis. 417, certiorari dismissed 65 S.Ct. 685, 324 U.S. 884, 89 L.Ed. 1438.

(4) Inducing an employer to discharge an employee pursuant to a collective bargaining contract.—International Union, United Automobile, Aircraft & Agricultural Implement Workers of America v. Wisconsin Employment Relations Board, 14 N.W.2d 872, 245 Wis. 417, followed in 14 N.W.2d 882, 245 Wis. 439, rehearing denied 15 N.W.2d 873, 245 Wis. 417, certiorari dismissed 65 S. Ct. 685, 324 U.S. 844, 89 L.Ed. 1434.

(5) Temporary quitting of work by employees to attend union meetings with intent to resume work at the commencement of the next shift while the employer and union officials were attempting to negotiate a new union contract, under statute making it an unfair labor practice for employees individually or in concert with others to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.—Amalgamated Local No. 806 of United Auto. Workers of America v. Wisconsin Employment Relations Board, 27 N.W.2d 885, 250 Wis. 570—International Union U. A. W. A. A. F. of L., Local 232 v. Wisconsin Employment Relations Board, 27 N.W.2d 875, 250 Wis. 550.

(6) Walking out and refraining from work by employees, and not appearing for work for purpose of exerting economic pressure were within provision making engaging in overt act concomitant of a strike an unfair labor practice unless the majority in collective bargaining unit of the employees of an employer against whom such acts are primarily directed, has voted by a secret ballot to call a strike, at least where there has been no such vote.—International Union, U. A. W. A. A. F. of L., Local 232, v. Wisconsin Employment Relations Board, supra.

85. **Held unfair labor practice**

(1) Picketing done at places of business of dairy company's customers to advertise that company and its employees were unfair to organized labor.—Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 299 N.W. 31, 238 Wis. 379, certiorari denied Milk & Ice Cream Drivers and Dairy Employees Union Local No. 225 v. Wisconsin Employment Relations Board, 62 S. Ct. 1035, 316 U.S. 668, 86 L.Ed. 1744.

(2) Picketing carried on to enforce union's demand that dairy company enter into an all-union contract although free from violence, where under statute company could not enter into such a contract unless three-fourths of its employees constituting a collective bargaining union voted therefor.—Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 299 N.W. 31, 238 Wis. 379, certiorari denied Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, v. Wisconsin Employment Relations Board, 62 S.Ct. 1035, 316 U.S. 668, 86 L.Ed. 1744.

Held not unfair labor practice

Where union had been duly recognized as exclusive bargaining representative of workers, and no appropriate action had been taken to terminate such relation, banner used by union in picketing employer which stated that employer had no contract with union and which requested public to refrain from patronizing employer did not constitute fraudulent advertising, and hence cease and desist order was improper, in absence of any evidence of interference with ingress to, or egress from, employer's premises or other oppressive misconduct in connection with the picketing.—Wisconsin Employment Relations Board v. International Ass'n of Bridge, Structural and Ornamental Iron Workers and Shopmen's Local No. 471, 6 N.W.2d 339, 241 Wis. 286, 144 A.L.R. 430.

Application of particular provisions

(1) The provisions of statute declaring it to be an unfair labor practice for an employee, individually or in concert with others, to coöperate in engaging in picketing or any other overt act concomitant of a strike unless a majority in a collective bargaining unit of employees of employer against whom such acts are directed have voted to call a strike do not apply to an individual and do not forbid an employee to quit his employment individually or in concert with others or forbid an employee, singly or in concert with others, from bringing about a vote by a collective bargaining unit as to whether there shall be a strike, and the provisions have no application except in case of an unauthorized strike.—Hotel and Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 294 N.W. 632, 236 Wis. 329, rehearing denied 295 N.W. 634, 236 Wis. 329, affirmed 62 S.Ct. 706, 315 U.S. 437, 86 L.Ed. 946.

(2) If employees constituting a minority of a collective bargaining unit withdraw from employment, either singly or in concert, such employees are not guilty of an unfair labor practice within the statute;

and to provide under what conditions picketing may be carried on by striking employees,[86] and one who violates the provisions of the statute has been held not to be guilty of a misdemeanor but his act is merely an unfair labor practice.[87] The picketing referred to in the statute is that kind of picketing with which the state has power to deal as a part of the power to preserve the peace and protect the privacy, lives, and property of its residents.[88] The failure of congress to define unfair labor practices of employees does not license employees, in the enforcement of their demands in a labor dispute, to commit acts of violence or coercion, or to do other things declared by the state statute to be unfair labor practices.[89]

§ 28(64). Prevention and Redress

a. By National Labor Relations Board
b. By state boards or agencies

a. By National Labor Relations Board

The National Labor Relations Board has power under the National Labor Relations Act to decide whether any unfair labor practices have been committed and to determine how they shall be corrected as well as to prevent any person from engaging in any unfair labor practice affecting interstate or foreign commerce.

Under the provisions of the National Labor Relations Act, the National Labor Relations Board has initial power, which, prior to the amendment of the Act in 1947, was exclusive, to decide whether any unfair labor practices have been committed and to determine how they shall be corrected,[90] as well as to prevent any person from engaging in any unfair labor practice affecting interstate or foreign commerce,[91] rather than merely to restrain the method by which such a practice is carried on in a particular case;[92] and this power may not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.[93] This does not empower the board to deal with or to issue orders concerning unfair labor practices in general,[94] but extends only to unfair labor practices affecting commerce.[95] The

but if they attempt to coerce employer by concerted picketing, a boycott, or by any other similar overt act concomitant of a strike, they will be guilty of an unfair labor practice.—Hotel and Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, supra.

86. Wis.—Hotel and Restaurant Employees' International Alliance, Local No. 122, v. Wisconsin Employment Relations Board, supra.

87. Wis.—Hotel and Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, supra.

88. Wis.—Hotel and Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, supra.

89. Wis.—Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 295 N.W. 791, 237 Wis. 164, affirmed 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. 1154.

90. U.S.—United Brock & Clay Workers of America v. Robinson Clay Product Co., D.C.Ohio, 64 F. Supp. 872.

91. U.S.—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762—Amalgamated Utility Workers v. Consolidated Edison Co., 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738—N. L. R. B. v. Federal Engineering Co., C.C.A.6, 153 F.2d 233, rehearing denied 155 F.2d 17—N. L. R. B. v. Alloy Cast Steel Co., C. C.A.6, 117 F.2d 302—N. L. R. B. v. National Motor Bearing Co., C. C.A.9, 105 F.2d 652—N. L. R. B. v. Washington, Virginia & Maryland Coach Co., C.C.A.4, 85 F.2d 990, affirmed Washington, Virginia & Maryland Coach Corporation v. N. L. R. B., 57 S.Ct. 648, 301 U.S. 142, 81 L.Ed. 965—The Saccarrappa, D.C.S.C., 21 F.Supp. 417.

Cal.—James v. Marinship Corp., 155 P.2d 329, 25 Cal.2d 721, 160 A.L.R. 900.

N.Y.—Devon Knitwear Co. v. Levinson, 19 N.Y.S.2d 102, 173 Misc. 779.

Wis.—Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 295 N.W. 791, 237 Wis. 164, affirmed 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. 1154.

"Unfair labor practices fall within the scope of the Act and the jurisdiction of the Board not because they have led or have tended to lead to labor strife in a particular instance, but by reason of the fact that long and painful experience teaches that in the generality of cases they do lead to such strife."—N. L. R. B. v. Alloy Cast Steel Co., C.C.A.6, 117 F.2d 302, 303.

Practices affecting commerce

The board has authority to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of congress.—Polish Nat. Alliance of U. S. v. N. L. R. B., 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509.

92. U.S.—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F. 2d 652.

93. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762—Amalgamated Utility Workers v. Consolidated Edison Co., 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F.2d 44, certiorari denied 65 S. Ct. 1025, 324 U.S. 877, 89 L.Ed. 1429—The Saccarrappa, D.C.S.C., 21 F.Supp. 417.

Wis.—Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 295 N.W. 791, 237 Wis. 164, affirmed 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. 1154.

Effect of agreement or other litigation on administrative proceedings generally see infra § 28 (70).

Arbitration agreement

The fact that employer's collective bargaining agreement with union contained a grievance and arbitration procedure for settlement of disputes did not preclude the board from taking jurisdiction in proceedings to determine whether employee's discharge was because of union activities.—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F. 2d 44, certiorari denied 65 S.Ct. 1025, 324 U.S. 877, 89 L.Ed. 1429.

94. U.S.—N. L. R. B. v. Idaho-Maryland Mines Corporation, C.C.A.9, 98 F.2d 129.

95. U.S.—N. L. R. B. v. Idaho-Maryland Mines Corporation, supra.

power of the board includes the power to determine and prevent the employer from dominating, or interfering with the employees' right of self-organization.[96] The power or duty of the board extends to the prevention of the enjoyment of any advantage which the employer has gained by a violation of the statute,[97] and the board may determine whether any prior unfair labor practice has been committed and how the effect of the prior practice may be corrected,[98] and bar the resumption of such practice.[99]

The jurisdiction of the board to prevent such practices is very broad,[1] and the exercise of this jurisdiction in any particular case is discretionary with the board;[2] but the jurisdiction is not to be exercised unless the unfair practice complained of interferes so substantially with public rights created by the act as to require its restraint in the public interest.[3]

Prior to the Labor Management Relations Act of 1947, otherwise known as the Taft-Hartley Act, § 8 (b), which amended the original act, and made it applicable to unfair labor practices on the part of a labor organization or its agents, it was held that the board's power of prevention applied only to unfair labor practices by employers which interfered with, restrained, or coerced employees in the exercise of their rights guaranteed by the act,[4] and did not give the board jurisdiction to prevent acts of employees[5] or of members of a labor union,[6] and that if there was wrongdoing on both sides the board could prevent the employer wrongdoing prohibited by the act, even though it could not reach the other wrongdoing.[7]

b. By State Boards or Agencies

State boards have jurisdiction to enforce an unfair labor practice provision of a state statute unless the national board has taken jurisdiction or until it does so.

A state board has jurisdiction to enforce an unfair labor practice provision of a state statute identical with the provision of the national statute unless the National Labor Relations Board has taken

Unfair practice affecting commerce

(1) With respect to jurisdiction of board, newspaper publisher's unfair labor practices in discharging union employees because of strike, which directly resulted in cessation of interstate shipments of newspapers and materials and machinery used in publication thereof, directly affected interstate commerce within National Labor Relations Act, although publication of newspaper was intra-state activity.—N. L. R. B. v. Hearst, C.C.A.9, 102 F.2d 658.

(2) Where parties stipulated that employer between specified dates engaged in commerce, board could properly infer that commerce would not cease in following month and could assume jurisdiction over unfair labor practices beginning in such month.—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585.

96. U.S.—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309.

Interference by supervising employees

Notwithstanding supervising employees apparently have no direct authority from their employer to participate in the organization activities of the employees so as to prejudice their rights of self-organization, the employer is subject to the board's power to prevent any repetition of such activities of the supervising employees and to remove the consequences of them on the other employees' rights of self-organization, to the same extent as though the employer had directed the supervising employees' acts.—H. J. Heinz Co. v. N. L. R. B., supra.

Determination

Whether employer domination or interference with employees' organization was present was question for the National Labor Relations Board to determine from the facts and reasonable inferences.—Western Elec. Co. v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1014, 324 U.S. 870, 89 L.Ed. 1424—Point Breeze Employees Ass'n v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1015, 324 U.S. 870, 89 L.Ed. 1425.

97. U.S.—National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799.

98. U.S.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., App. D.C., 61 S.Ct. 83, 311 U.S. 72, 85 L. Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474—United Brick & Clay Workers of America v. Robinson Clay Product Co., D.C.Ohio, 64 F.Supp. 872.

99. U.S.—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A. 8, 119 F.2d 903.

1. U.S.—N. L. R. B. v. Newark Morning Ledger Co., C.C.A.3, 120 F.2d 262, 137 A.L.R. 849, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 314 U. S. 693, 86 L.Ed. 554.

2. U.S.—N. L. R. B. v. Newark Morning Ledger Co., C.C.A.3, 120 F.2d 262, 137 A.L.R. 849, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 314 U.S. 693, 86 L.Ed. 554.

3. U.S.—N. L. R. B. v. Newark Morning Ledger Co., C.C.A.3, 120 F.2d 262, 137 A.L.R. 849, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 314 U. S. 693, 86 L.Ed. 554.

4. U.S.—N. L. R. B. v. Indiana & Michigan Elec. Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579—N. L. R. B. v. Newark Morning Ledger Co., C.C.A.3, 120 F.2d 262, 137 A.L.R. 849, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 314 U.S. 693, 86 L.Ed. 554.

Cal.—James v. Marinship Corp., 155 P.2d 329, 25 Cal.2d 721, 160 A.L.R. 900.

The board is not made either guardian or ruler over employees, but is only empowered to deliver them from restraint at hands of the employer.—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. E. I. Dupont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. Association of Chemical Employees at Belle Works of E. I. Du Pont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529.

5. Cal.—James v. Marinship Corp., 155 P.2d 329, 25 Cal.2d 721, 160 A. L.R. 900.

6. Cal.—James v. Marinship Corp., supra.

7. U.S.—N. L. R. B. v. Indiana & Michigan Elec. Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

jurisdiction or until it does so,[8] and the fact that the national board assumed jurisdiction to supervise an election at which the employees chose the union as their bargaining agent does not deprive the state board of its jurisdiction.[9] So it has been held that the state board has jurisdiction under state statutes to prevent and redress unfair labor practices,[10] but, under some statutes, not to determine whether such practices exist in a particular case.[11] Where, however, the national board takes jurisdiction, the jurisdiction of the state board is ousted notwithstanding the identity in language of the two acts,[12] and the determination made by the national board is controlling.[13] Furthermore, where the state statute expressly prohibits the state board from dealing with any unfair labor practice subject to the national act, the state board has been held to have no authority with respect to any such unfair labor practice whether or not the national board has taken any action.[14]

4. LABOR RELATIONS BOARDS

§ 28(65). In General

A labor relations board, created by the various labor relations acts, is generally an administrative, fact-finding board or tribunal, with inquisitorial powers of a quasi-judicial character. It acts as a public agency in the interest of the public.

The adjustment of labor disputes, or settlement of other matters, arising under the various labor relations statutes, is usually vested in a labor relations board of an administrative nature.[15] Such a board is generally regarded as a fact-finding board

8. Wis.—International Union, United Automobile, Aircraft & Agricultural Implement Workers of America v. Wisconsin Employment Relations Board, 14 N.W.2d 872, 245 Wis. 417, followed in 14 N.W.2d 882, 245 Wis. 439, and rehearing denied 15 N.W.2d 873, 245 Wis. 417, certiorari dismissed 65 S.Ct. 685, 324 U.S. 884, 89 L.Ed. 1434—Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 295 N.W. 791, 237 Wis. 164, affirmed 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. 1154—Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 279 N.W. 673, 228 Wis. 473, 117 A.L.R. 398.

9. Wis.—Christoffel v. Wisconsin Employment Relations Board, 10 N.W.2d 197, 243 Wis. 132.

Reason for rule

In supervising the election the national board did not take jurisdiction of any unfair labor practice controversy; the proceeding was not adverse.—International Union, United Automobile, Aircraft & Agricultural Implement Workers of America v. Wisconsin Employment Relations Board, 14 N.W.2d 872, 245 Wis. 417, followed in 14 N.W.2d 882, 245 Wis. 439, and rehearing denied 15 N.W.2d 873, 245 Wis. 417, certiorari dismissed 65 S.Ct. 685, 324 U.S. 884, 89 L.Ed. 1434.

10. N.Y.—New York State Labor Relations Board v. Holland Laundry, 42 N.Y.S.2d 183, 180 Misc. 1031, reargument denied In re New York State Labor Relations Board, 46 N.Y.S.2d 524, 180 Misc. 1031, appeal dismissed 49 N.Y.S.2d 411, 268 App.Div. 827, reversed on other grounds 63 N.E.2d 68, 294 N.Y. 480, 161 A.L.R. 802, reargument denied 64 N.E.2d 278, 295 N.Y. 568—Domanick v. Triboro Coach Corporation, 18 N.Y.S.2d 960, 173 Misc. 911, reversed on other grounds 20 N.Y.S.2d 306, 259 App.Div. 657.

Pa.—In re Lehrman, Com.Pl., 52 Dauph.Co. 1—Manko v. Kahn, Com. Pl., 93 Pittsb.Leg.J. 477.

Wis.—Public Service Employees' Union v. Wisconsin Employment Relations Board, 16 N.W.2d 823, 246 Wis. 190.

Loss of statutory benefits

Where a person pursues a course of conduct which under the state statute amounts to an unfair labor practice, such person is subject to statute under which he may, on complaint, be brought before the state board, and, when found guilty of an unfair labor practice, he loses benefit of statute prescribing what acts shall be legal in conduct of a labor dispute and is remitted to his rights under constitution, other statutes, and common law.—Hotel and Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 294 N.W. 632, 236 Wis. 329, rehearing denied 295 N.W. 634, 236 Wis. 329, affirmed 62 S.Ct. 706, 315 U.S. 437, 86 L.Ed. 946.

Employer engaged in intra-state commerce

In proceeding before state board against employer because of unfair practices where employer admitted that it was engaged in intra-state commerce, the board had jurisdiction to hear the matter and to make cease and desist order if there was sufficient evidence of acts of defendant which would affect intra-state commerce.—Teamsters Local Union No. 222 v. Strevell-Paterson Hardware Co., Utah, 174 P.2d 164.

11. N.Y.—New York State Labor Relations Board v. Holland Laundry, 42 N.Y.S.2d 183, 180 Misc. 1031, reargument denied In re New York State Labor Relations Board, 46 N.Y.S.2d 524, 180 Misc. 1031, appeal dismissed 49 N.Y.S.2d 411, 268 App.Div. 827, reversed o other grounds 63 N.E.2d 68, 294 N.Y. 480, 161 A.L.R. 802, reargument denied 64 N.E.2d 278, 295 N.Y. 568.

12. Wis.—Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 295 N.W. 791, 237 Wis. 164, affirmed 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. 1154.

13. Wis.—Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, supra.

14. Mass.—Hathaway Bakeries v. Labor Relations Commission, 55 N.E.2d 254, 316 Mass. 136.

15. U.S.—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pac. Co. v. Southern Pac. Co., C.C.A.Cal., 132 F.2d 194, reversed on other grounds 64 S.Ct. 142, 320 U.S. 338, 88 L.Ed. 85.

N.Y.—Domanick v. Triboro Coach Corporation, 18 N.Y.S.2d 650.

Board is creature of statute

Utah.—Furbreeders Agricultural Cooperative v. Wiesley, 132 P.2d 384, 102 Utah 601.

State labor relations board or commissioner, empowered to hear and determine labor disputes, is purely an administrative officer with statewide authority.—Collier & Wallis v. Astor, 70 P.2d 171, 9 Cal.2d 202.

or tribunal, with inquisitorial powers in labor controversies.[16] It is generally regarded as quasi-judicial in character,[17] but without judicial power as a court, in a strict sense.[18] It is a public agency acting in the public interest, to protect the public from unfair labor practices described in the act.[19]

The National Labor Relations Board, as created by the National Labor Relations Act of July 5th, 1935, c 372 § 3, 29 U.S.C.A. § 153 et seq, is a "public agency,"[20] with judicial, as well as administrative, functions,[21] and as such is responsible, within the limits of the powers granted to it, for the performance of its public functions in the public interest.[22] Since the purpose of the act is to eliminate obstructions to commerce, the board must also be treated as having a constitutional function.[23] It is an entity distinct from its members,[24] and has a seal;[25] and, although not expressly made a corporation,[26] it is a body corporate with capacity to be party plaintiff or defendant in federal courts, in so far as the act gives the right of suit.[27]

The function of the National Labor Relations Board is to administer the National Labor Relations Act,[28] and to effectuate the declared policy of such act;[29] but this does not mean that the board may wholly ignore other and equally important congressional objectives.[30] Its powers may be asserted or invoked only where there is a public right to be protected,[31] such as to secure to employees their rights under the act and to remove the effects of any un-

16. U.S.—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 870.
Mass.—Jordan Marsh Co. v. Labor Relations Commission, 45 N.E.2d 925, 312 Mass. 597.
Pa.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398.
Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

17. U.S.—Thompson Products v. N. L. R. B., C.C.A., 133 F.2d 637—N. L. R. B. v. Bell Oil & Gas Co., C.C.A., 98 F.2d 870, denying rehearing 98 F.2d 406—Bradley Lumber Co. of Arkansas v. National Labor Relations Board, C. C.A.La., 84 F.2d 97, certiorari denied 57 S.Ct. 21, 299 U.S. 559, 81 L.Ed. 411—Cook v. Des Moines Union Ry. Co., D.C.Iowa, 16 F.Supp. 810.
N.Y.—New York State Labor Relations Bd. v. Greif Realty Corp., 70 N.Y.S.2d 288, 188 Misc. 549, reversed on other grounds 71 N.Y. S.2d 91, 272 App.Div. 928—New York State Labor Relations Board v. Holland Laundry, 42 N.Y.S.2d 183, 180 Misc. 1031, reargument denied In re New York State Labor Relations Board, 46 N.Y.S.2d 524, 180 Misc. 1031, appeal dismissed 49 N.Y.S.2d 411, 268 App. Div. 827, reversed on other grounds 63 N.E.2d 68, 294 N.Y. 480, 161 A.L.R. 802, reargument denied 64 N.E.2d 278, 295 N.Y. 568.
Pa.—Pennsylvania Labor Relations Board v. Heinel Bros., 25 A.2d 306, 344 Pa. 238—In re Employes of American Store Co., 9 Sch.Reg. 206.

Under the Railway Labor Act § 3 (o, p), as amended, 45 U.S.C.A. § 153 (o, p), however, the National Railroad Adjustment Board and its subdivisions have been held not to be a "tribunal" of a judicial or quasi-judicial nature.—Watson v. Missouri-Kansas-Texas, R. Co. of Texas, Tex.Civ.App., 173 S.W.2d 357.

18. U.S.—N. L. R. B. v. Bell Oil & Gas Co., C.C.A., 98 F.2d 870.
Cal.—Collier & Wallis v. Astor, 70 P.2d 171, 9 Cal.2d 202.
N.Y.—New York State Labor Relations Bd. v. Holland Laundry, 63 N.E.2d 68, 75, 294 N.Y. 480, reargument denied 64 N.E.2d 278, 295 N. Y. 568—New York State Labor Relations Bd. v. Grief Realty Corp., 70 N.Y.S.2d 238, 188 Misc. 549, reversed on other grounds 71 N.Y.S.2d 91, 272 App.Div. 928.
Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

19. N.Y.—New York State Labor Relations Bd. v. Holland Laundry, 63 N.E.2d 68, 294 N.Y. 480, reargument denied 64 N.E.2d 278, 295 N.Y. 568.

20. U.S.—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67.

21. U.S.—N. L. R. B. v. T. W. Phillips Gas & Oil Co., C.C.A.3, 141 F.2d 304.

22. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762—N. L. R. B. v. Federal Engineering Co., C.C.A., 153 F.2d 233, rehearing denied 155 F.2d 17—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F.2d 44, certiorari denied 65 S.Ct. 1025, 324 U. S. 877, 89 L.Ed. 1429—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67.

The purpose of administrative orders made in exercise of powers conferred by the act is to implement a public, social, or economic policy not primarily concerned with private rights and through remedies not only unknown to the common law, but often in derogation of it.—N. L. R. B. v. Colten, C.C.A.6, 105 F.2d 179.

23. U.S.—Bradley Lumber Co. v. N. L. R. B., C.C.A.La., 84 F.2d 97, certiorari denied 57 S.Ct. 21, 299 U.S. 559, 81 L.Ed. 411.
Purpose of National Labor Relations Act generally see supra § 28 (2) b.

24. U.S.—Bradley Lumber Co. of Arkansas v. N. L. R. B., supra.

25. U.S.—Bradley Lumber Co. of Arkansas v. N. L. R. B., supra.

26. U.S.—Bradley Lumber Co. of Arkansas v. N. L. R. B., supra.

27. U.S.—Jamestown Veneer & Plywood Corporation v. N. L. R. B., D.C.N.Y., 13 F.Supp. 405.

28. U.S.—Bradley Lumber Co. of Arkansas v. N. L. R. B., C.C.A.La., 84 F.2d 97, certiorari denied 57 S.Ct. 21, 299 U.S. 559, 81 L.Ed. 411.

One of the chief responsibilities of the board is to direct such action as will dissipate the unwholesome effects of violation of the act.—Franks Bros. v. N. L. R. B., 64 S.Ct. 817, 321 U.S. 702, 88 L.Ed. 1020.

29. U.S.—Southern S. S. Co. v. N. L. R. B., 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246—National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 136 F.2d 385—N. L. R. B. v. Killoren, C.C.A.Mo., 122 F.2d 609, 137 A.L.R. 510, certiorari denied Killoren v. N. L. R. B., 62 S.Ct. 412, 314 U.S. 696, 86 L.Ed. 556.

30. U.S.—Southern S. S. Co. v. N. L. R. B., 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260.

31. U.S.—N. L. R. B. v. Newark Morning Ledger Co., C.C.A., 120 F. 2d 262, 137 A.L.R. 849, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 314 U.S. 693, 86 L.Ed. 554.

lawful conduct by the employer.[32] Its powers may not be asserted or invoked for the adjudication or protection of private rights, or the redress of private wrongs.[33]

§ 28(66). Powers and Duties

a. In general
b. Managerial or supervisory powers

a. In General

A labor relations board has only the powers and duties which are conferred on it by the statute which created it, and such incidental powers as are necessary to carry them into effect.

A labor relations board may exercise only such powers, and is subject to only such duties, as are conferred on or prescribed to it, by the labor relations act, which created it,[34] together with such incidental powers as are reasonably necessary to enable it to carry into effect the powers and duties expressly conferred or prescribed.[35] The board is generally given the power to hear and initially determine and adjudge labor disputes,[36] and, usually, it has no equitable powers.[37] Under some statutes, the board has no power to enforce or abrogate a contract between an employer and a trade union,[38] particularly where the board is not a party to the contract;[39] and it may be prohibited from investigating controversies between members of the same parent labor organization or union.[40]

National labor relations board. Every power is conferred on the National Labor Relations Board which is essential to the exercise of the powers granted, or to the performance of the duties imposed, by the National Labor Relations Act,[41] and the power of the board to settle a controversy by administrative action carries with it the responsibility to act.[42] The board has no power to adjudicate the validity or effect of existing contracts between employer and individual employees,[43] except as to their effect on matters within the board's jurisdiction.[44]

Under the National Labor Relations Act § 4, 29 U.S.C.A. § 154, the National Labor Relations Board may appoint various agents or assistants, including attorneys who at its direction may appear for and represent the board in a case in court.[45] It has supervisory powers over such agents,[46] and may prevent obstructive tactics on their part.[47]

32. U.S.—N. L. R. B. v. Continental Oil Co, C.C.A., 121 F.2d 120.

33. U.S.—National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799—N. L. R. B. v. Federal Engineering Co., C.C.A., 153 F.2d 233, rehearing denied 155 F. 2d 17—N. L. R. B. v. Baltimore Transit Co., C.C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084—N. L. R. B. v. Hudson Motor Car Co., C. C.A., 136 F.2d 385—N. L. R. B. v. Thompson Products, C.C.A., 130 F. 2d 363—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260—N. L. R. B. v. Condenser Corporation of America, C.C.A., 128 F. 2d 67—N. L. R. B. v. Newark Morning Ledger Co., C.C.A.3, 120 F.2d 262, 137 A.L.R. 849, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 303, 314 U.S. 693, 86 L.Ed. 554—N. L. R. B. v. Mall Tool Co., C.C.A.7, 119 F.2d 700—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F.2d 816—Agwilines, Inc., v. N. L. R. B., C.C.A.5, 87 F.2d 146.

Making an employee whole for his improper discharge is an immediate, although secondary object of proceedings under the act.—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 132 F.2d 801.

34. Mass.—Hathaway Bakeries v. Labor Relations Commission, 55 N. E.2d 254, 316 Mass. 136—Jordan Marsh Co. v. Labor Relations Board, 45 N.E.2d 925, 312 Mass. 597.

Pa.—In re G. C. Murphy Co., 51 Pa. Dist. & Co. 535—Petition of Koehler, Com.Pl., 92 Pittsb.Leg.J. 587.

35. Mass.—Hathaway Bakeries v. Labor Relations Commission, 55 N.E.2d 254, 316 Mass. 136.

Pa.—In re Lehrman, 52 Dauph.Co. 1 —Pennsylvania Labor Relations Bd. v. Yellow Cab & Bus Co., Com. Pl., 30 North.Co. 9.

36. Pa.—Pennsylvania Labor Relations Board v. Heinel Motors, 25 A.2d 306, 344 Pa. 238.

Hearing and determination generally see infra §§ 28 (102)–28 (119).

37. N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union Local 221, 9 N.Y.S.2d 964, 170 Misc. 199, affirmed 14 N. Y.S.2d 74, 257 App.Div. 501.

Fraud

The state labor relations board has no authority to determine question of whether contract adjusting controversies between employer and trade union was procured by fraud. —United Baking Co. v. Bakery and Confectionery Workers' Union Local 221, supra.

38. N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, 14 N.Y.S.2d 74, 257 App.Div. 501.

39. N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, supra.

40. N.Y.—Great Atlantic & Pacific Tea Co. v. Boland, 25 N.Y.S.2d 517, 524, 176 Misc. 258, affirmed 26 N. Y.S.2d 492, 261 App. Div. 900.

The purpose of such statutory prohibition was to prevent a governmental agency from interfering with internal union matters for which settlement machinery existed within the union or federation itself.—Great Atlantic & Pacific Tea Co. v. Boland, supra.

41. U.S.—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A., 130 F. 2d 260—N. L. R. B. v. Knoxville Pub. Co., C.C.A.6, 124 F.2d 875.

42. U.S.—M and M Wood Working Co. v. Plywood & Veneer Workers Local Union No. 102, D.C.Or., 23 F.Supp. 11.

43. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762.

44. U.S.—J. I. Case Co. v. N. L. R. B., supra—National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799.

45. U.S.—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 103 F. 2d 953—Bradley Lumber Co. of Arkansas v. National Labor Relations Board, C.C.A.La., 84 F.2d 97, certiorari denied 57 S.Ct. 21, 299 U.S. 559, 81 L.Ed. 411.

46. D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

47. D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

Railroad Adjustment Board. The powers conferred on the National Railroad Adjustment Board by the Railway Labor Act are advisory only,[48] with no coercive effect other than the sanction and force of publicity and public opinion.[49]

b. Managerial or Supervisory Powers

A labor relations board has no managerial or supervisory powers over the conduct of an employer's business.

A labor relations board, such as the National Labor Relations Board, has no managerial or supervisory powers over the conduct of an employer's business.[50] It may not substitute its own judgment, or ideas of discipline and management, for those of the employer,[51] or supervise and control employee and employer relations;[52] nor has it power to police collective bargaining contracts between employers and labor organizations.[53] It has been held that a labor board has no power to compel employees to work, where they undertake to strike in breach of a covenant not to do so;[54] nor has it authority to prevent the stockholders of a corporation employer, against which a judgment for affirmative action has been entered under the act, from dissolving and reorganizing the corporation.[55]

§ 28(67). Exercise of Powers in General

A labor relations board generally is granted a wide discretion; but it must act impartially and conform to the standards established by the statute under which it acts. Action by a majority of the members of the board is generally sufficient.

A labor relations board is generally granted a wide discretion in the exercise of its powers in administering the statute,[56] but it must deal fairly with all the parties to the controversy,[57] and must conform to the standards established by the labor relations statute under which it acts,[58] and the board must see that the statute is fairly applied,[59] and not brought into disrepute by unlawful or palpably unjust applications of it.[60]

Number required to act. The power vested in the board may be executed by a majority of the members authorized to act in the particular matter,[61] if all of such members have had notice and an op-

48. U.S.—Shipley v. Pittsburgh & L. E. R. Co., D.C.Pa., 70 F.Supp. 870.

49. U.S.—Shipley v. Pittsburgh & L. E. R. Co., D.C.Pa., 70 F.Supp. 870.

50. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corp., 57 S.Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352—N. L. R. B. v. Cape County Milling Co., C.C.A., 140 F.2d 543, 152 A.L.R. 144—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S. Ct. 72, 317 U.S. 667, 87 L.Ed. 536—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—N. L. R. B. v. Clarksburg Pub. Co., C.C.A.4, 120 F.2d 976—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F.2d 340—Independent Union of Craftsmen v. N. L. R. B., C.C.A.7, 110 F.2d 506, reversed on other grounds 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Link-Belt Co. v. N. L. R. B., C.C. A.7, 110 F.2d 506, reversed on other grounds 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368.

51. U.S.—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A., 130 F.2d 260—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153.

52. U.S.—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260.

Pa.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398.

It may not supervise employing policies with respect to persons who were not discharged in violation of law.—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C.C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723.

53. U.S.—Timken Roller Bearing Co. v. N. L. R. B., C.C.A.6, 161 F.2d 949.

54. U.S.—Timken Roller Bearing Co. v. N. L. R. B., supra.

55. U.S.—N. L. R. B. v. Tupelo Garment Co., C.C.A.5, 122 F.2d 603.

56. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corp., 67 S.Ct. 1274—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260—Waterman Steamship Corporation v. N. L. R. B., C.C.A., 103 F.2d 157, certiorari granted N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 95, 308 U.S. 534, 84 L.Ed. 450, reversed on other grounds 60 S. Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036—Peninsular & Occidental S. S. Co. v. N. L. R. B., C.C.A., 98 F.2d 411, certiorari denied N. L. R. B. v. Peninsular & Occidental S. S. Co., 59 S.Ct. 248, 305 U.S. 653, 83 L.Ed. 423.

N.Y.—In re New York State Labor Relations Board, 37 N.Y.S.2d 304, affirmed 45 N.Y.S.2d 942, 267 App. Div. 763, affirmed 56 N.E.2d 262, 293 N.Y. 671.

Statute vesting discretion

The statute, providing that employment relations board by a final order "may" do various enumerated things in disposing of complaint, vests in the board a power which it may exercise according to its discretion, since statute does not provide that board shall do certain things.—Appleton Chair Corporation v. United Brotherhood of Carpenters & Joiners, Millmen's Local No. 1748, 1 N.W.2d 188, 239 Wis. 337.

57. U.S.—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574—Waterman Steamship Corporation v. N. L. R. B., C.C.A., 103 F.2d 157, certiorari granted N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 95, 308 U.S. 534, 84 L.Ed. 450, reversed on other grounds 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036—Peninsular & Occidental S. S. Co. v. N. L. R. B., C.C.A., 98 F.2d 411, certiorari denied N. L. R. B. v. Peninsular & Occidental S. S. Co., 59 S.Ct. 248, 305 U.S. 653, 83 L.Ed. 423.

Pa.—Pennsylvania Labor Relations Bd. v. Beck, 27 West.Co. 143.

Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

58. U.S.—Myers v. Bethlehem Shipbuilding Corporation, Mass., 58 S. Ct. 459, 303 U.S. 41, 82 L.Ed. 638—N. L. R. B. v. Piqua Munising Wood Products Co., C.C.A.6, 109 F.2d 552.

59. U.S.—N. L. R. B. v. McGough Bakeries Corp., C.C.A., 153 F.2d 420.

60. U.S.—N. L. R. B. v. McGough Bakeries Corp., C.C.A.5, 153 F.2d 420.

61. U.S.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

portunity to act;[62] and, where a majority of such members concur in the decision and order, it is as binding as the act of the full board, and must be viewed as if all of such members had approved it.[63]

Principal office of board. Under the express provisions of the National Labor Relations Act § 5, 29 U.S.C.A. § 155, the principal office of the National Labor Relations Board is located in the District of Columbia,[64] although it may meet and exercise its powers at any other place.[65]

§ 28(68). Rules and Regulations

A labor relations board generally is vested with power to establish such rules and regulations as may be reasonably necessary to enable it properly to perform its functions, and to make changes in such rules from time to time.

A labor relations board is usually vested with the power of establishing such rules and regulations as are reasonably necessary to enable it properly to perform its functions,[66] and is also vested with the power of changing such rules from time to time.[67]

Under the express provisions of the National Labor Relations Act § 6 (a), 29 U.S.C.A. § 156, the National Labor Relations Board has power to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of the act. The board, in dealing with various situations under the act, may, in the sound exercise of its discretion, establish and apply general rules and principles,[68] subject only to their appropriateness to effectuate the purposes of the act,[69] and to their reasonableness with relation to all the rights involved.[70] Likewise, the board has power to suspend its rules.[71] The board also has the right to construe its own rules,[72] unless such construction is so arbitrary as to result in the denial of substantial justice.[73] The board, however, cannot, by its own rules and regulations, confer on itself jurisdiction which it does not have under the statute creating it.[74]

Under the Railway Labor Act § 2, 45 U.S.C.A. § 152, the National Mediation Board has authority to interpret its own rules[75] and to amend or set them aside in its own discretion.[76]

62. U.S.—N. L. R. B. v. Ohio Calcium Co., supra.

63. U.S.—N. L. R. B. v. Ohio Calcium Co, supra—N. L. R. B. v. Leviton Mfg. Co., C.C.A., 111 F.2d 619.

Where second member of three concurred in decision and order finding employer guilty of unfair labor practices and dissented in part because of opinion employer had committed other such practices, order was the act of the full board.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

64. U.S.—Bradley Lumber Co. of Arkansas v. N. L. R. B., C.C.A.La., 84 F.2d 97, certiorari denied 57 S.Ct. 21, 299 U.S. 559, 81 L.Ed. 411.

65. U.S.—Bradley Lumber Co. of Arkansas v. N. L. R. B., supra.

66. N.Y.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 20 N.E.2d 390, 280 N.Y. 194.

67. U.S.—Atchison, T. & S. F. Ry. Co. v. Ferryboatmen's Union of California, C.C.A.Cal., 28 F.2d 26.

68. U.S.—N. L. R. B. v. A. J. Tower Co., 67 S.Ct. 324—N. L. R. B. v. May Dept. Stores Co., C.C.A., 154 F.2d 533, certiorari denied 67 S.Ct. 72.

69. U.S.—N. L. R. B. v. A. J. Tower Co., 67 S.Ct. 324—Republic Aviation Corporation v. N. L. R. B., 65 S.Ct. 982, 324 U.S. 793, 157 A.L.R. 1081—N. L. R. B. v. May Dept. Stores Co., C.C.A., 154 F.2d 533, certiorari denied 67 S.Ct. 72.

Settlement agreements

The rule adopted by the board, that it will ordinarily respect the terms of a settlement agreement approved by it, but that it will go behind such agreements where subsequent events demonstrate that efforts for adjustment had failed to accomplish their purpose or where there has been a subsequent unfair labor practice, is appropriate to accomplish the purpose of the act with fairness to all concerned.—Wallace Corporation v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Richwood Clothespin and Dish Worker's Union v. National Labor Relations Board, 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216.

70. U.S.—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72—Inland Steel Co. v. N. L. R. B., C.C.A., 109 F.2d 9.

Unfair and discriminatory rule

A rule, requiring applications for issuance of subpoena to be timely and to specify names of witnesses and the nature of facts to be proved, was unfair and discriminatory, where the rule applied to employer but not to counsel for the board.—Inland Steel Co. v. N. L. R. B., C.C.A.7, 109 F.2d 9.

71. U.S.—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A., 118 F.2d 780.

72. U.S.—N. L. R. B. v. J. S. Popper, Inc., C.C.A., 113 F.2d 602.

73. U.S.—N. L. R. B. v. J. S. Popper, Inc., C.C.A.3, 113 F.2d 602.

74. U.S.—N. L. R. B. v. A. J. Tower Co., C.C.A.1, 152 F.2d 275, reversed on other grounds 67 S.Ct. 324.

75. U.S.—Brotherhood of Locomotive Firemen and Enginemen v. Kenan, C.C.A.Fla., 87 F.2d 651, certiorari denied Grand International Brotherhood of Locomotive Engineers v. Kenan, 57 S.Ct. 790, 301 U.S. 687, 81 L.Ed. 1344.

76. U.S.—Brotherhood of Locomotive Firemen and Enginemen v. Kenan, supra.

5. Procedure for Settlement of Disputes

a. IN GENERAL

§ 28(69). Administrative Proceedings

a. In general
b. Under National Labor Relations Act; Communications Act
c. Under Railway Labor Act

a. In General

The appropriate initial remedy for the adjustment of a labor dispute, or the enforcement of a right, arising under the various labor relations acts, usually is by an administrative proceeding before the labor relations board created by the statute.

The appropriate initial remedy for the adjustment of a labor dispute, or the enforcement of a right, arising under the various labor relations acts, usually is by an administrative proceeding before the labor relations board created by the statute,[77] and, as discussed infra § 28 (71), as a general rule resort may not be had to the courts until the administrative remedies have been exhausted. Such an administrative proceeding has been held to be the proper remedy for the settlement of jurisdictional disputes between rival labor groups;[78] and, under some statutes, an administrative proceeding before the board is the exclusive remedy for the redress of wrongs arising from the relation of employer and employee.[79]

Administrative procedure before a labor relations board is generally simple, informal, and direct,[80] and, while the processes of adjudication and litigation should be within the limits and requirements of the provisions of the labor statute,[81] the strictness of technical procedure with which judicial proceedings are surrounded is relaxed.[82] The board is generally allowed a wide discretion or latitude in procedural details,[83] although it must conform to standards of fairness and reasonableness.[84]

b. Under National Labor Relations Act; Communications Act

Under the National Labor Relations Act, and Communications Act, an administrative proceeding before the National Labor Relations Board is the proper and exclusive initial remedy for a violation of the act.

Under the National Labor Relations Act, the proper and exclusive initial remedy for a violation of the act is by an administrative proceeding before the National Labor Relations Board;[85] and the proce-

77. U.S.—United Brick & Clay Workers of America v. Junction City Clay Co., C.C.A.Ohio, 158 F.2d 552.

Special action
Under some statutes, any action brought by the board against an employer is a special action, brought to enforce a statutory cause of action.—Furbreeders Agricultural Cooperative v. Wiesley, 132 P.2d 384, 102 Utah 601.

78. N.Y.—Dinny & Robbins v. Davis, 48 N.E.2d 280, 282, 290 N.Y. 101—Gulf Oil Corp. v. International Broth. of Teamsters, Local 806, 57 N.Y.S.2d 24, 185 Misc. 409.

79. Kan.—Kelly v. Grimshaw, 167 P. 2d 627, 161 Kan. 253.
N.Y.—Gomeringer v. Natrel Realty Corp., 64 N.Y.S.2d 361.

Under National Industrial Recovery Act
U.S.—Harper v. Southern Coal & Coke Co., C.C.A.Ala., 73 F.2d 792.
N.Y.—Abramovitz v. Trolman, 273 N.Y.S. 243, 152 Misc. 768.

80. U.S.—Inland Empire Dist. Council, Lumber and Sawmill Workers Union, Lewiston, Idaho v. Mills, App.D.C., 65 S.Ct. 1316, 325 U.S. 697, 89 L.Ed. 1877, rehearing denied 66 S.Ct. 11, 326 U.S. 803, 90 L.Ed. 489—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221—Estes v. Union Terminal Co., C.C.A.Tex., 89 F.2d 768.

81. U.S.—Switchmen's Union of North America v. National Mediation Board, App.D.C., 64 S.Ct. 95, 320 U.S. 297, 88 L.Ed. 61—Brotherhood and Union of Transit Emps. of Baltimore v. Madden, D.C.Md., 58 F.Supp. 366, reversed on other grounds C.C.A., 147 F.2d 439, 158 A.L.R. 1330.
Pa.—Edward H. Ellis, Inc. v. Hines, Com.Pl., 48 Dauph.Co. 160, affirmed 12 A.2d 440, 338 Pa. 183.
Utah.—Southeast Furniture Co. v. Industrial Commission, 111 P.2d 153, 100 Utah 154.

The board must follow the procedure laid down in the statute in ordering employer to enter negotiations with collective bargaining agent.—Southeast Furniture Co. v. Industrial Commission, supra.

82. U.S.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 112 F.2d 63, set aside 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471—N. L. R. B. v. Lund, C.C.A.8, 103 F.2d 815—N. L. R. B. v. Union Pacific Stages, C.C.A., 99 F.2d 153.

The purpose of the relaxation of the strictness of procedure with which judicial proceedings are surrounded in conduct of such proceedings was not to encourage loose practices or set aside or abandon the rules of evidence which are best suited to ascertain the truth of the controversy, but to meet certain exigencies which might arise by reason of exceptional circumstances.—N. L. R. B. v. Union Pacific Stages, C.C.A. 9, 99 F.2d 153.

83. U.S.—Inland Empire Dist. Council, Lumber and Sawmill Workers Union, Lewiston, Idaho v. Millis, App.D.C., 65 S.Ct. 1316, 325 U.S. 697, 89 L.Ed. 1877, rehearing denied 66 S.Ct. 11, 326 U.S. 803, 90 L.Ed. 489—N. L. R. B. v. Calumet Steel Division of Borg-Warner Corporation, C.C.A., 121 F.2d 366—N. L. R. B. v. Union Pac. Stages, C.C.A.9, 99 F.2d 153.

84. U.S.—N. L. R. B. v. Indiana & Mich. Elec. Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579—Consolidated Edison Co. of New York v. N. L. R. B., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—Jefferson Electric Co. v. N. L. R. B., C.C.A., 102 F. 2d 949.

85. U.S.—United Brick & Clay Workers of America v. Junction City Clay Co., C.C.A.Ohio, 158 F. 2d 552.

Improper practice or procedure
A practice or procedure of the Na-

dure set forth in such act is the full measure of the remedies available to a union for a violation of the right of collective bargaining.[86]

The National Labor Relations Board may fashion its procedure so as to achieve the purposes of the act to afford protection from unfair labor practices,[87] and a court cannot, by incorporating the judicial concept of estoppel into the procedure of the board, render it powerless to prevent an obvious frustration of the purposes of the act.[88] A proceeding before a board is not an action at law;[89] nor is it a litigation between private parties.[90] It is neither punitive nor compensatory,[91] but is preventative and remedial to implement a public economic policy, and promote public welfare.[92]

Under the Communications Act, of 1934 § 222, subs. (f) (10), 47 U.S.C.A. § 222 (f) (10), relating to the enforcement of rights granted by such act to employees of merged telegraph carriers, such employees have the same remedies as has an employee complaining of unfair labor practices under the National Labor Relations Act,[93] and an application to the National Labor Relations Board is the primary and exclusive remedy of an employee complaining of a reduction in compensation[94] or of an assignment to work inconsistent with his training and experience.[95]

c. Under Railway Labor Act

Under the Railway Labor Act, a complaining carrier or employee may have his rights either determined in a court or settled by the administrative remedies provided by the statute.

Although the National Railroad Adjustment Board has the power to function, under The Railway Labor Act, without being interfered with by the courts,[96] the provisions of such act for the submission of labor disputes relating to contract rights to the adjustment board do not provide an exclusive remedy or tribunal for the adjustment of such rights.[97] The complaining carrier or employee may elect whether to have his grievances or rights determined by a court or settled by the administrative remedies prescribed by the statute,[98] but, if the lat-

tional Labor Relations Board, no matter how uniformly and long continued, cannot be made a lawful practice or procedure, unless it is within the scope and intent of the National Labor Relations Act from which, and only from which, the board derives its power.—Brotherhood and Union of Transit Emps. of Baltimore v. Madden, D.C.Md., 58 F.Supp. 366, reversed on other grounds 147 F.2d 439, 158 A.L.R. 1330.

86. U.S.—United Electrical Radio & Machine Workers of America v. International Brotherhood of Electrical Workers, C.C.A.N.Y., 115 F. 2d 488.

87. U.S.—Richwood Clothespin & Dish Worker's Union v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216—Wallace Corporation v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435.

88. U.S.—Richwood Clothespin & Dish Worker's Union v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216—Wallace Corporation v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435.

89. U.S.—N. L. R. B. v. West Kentucky Coal Co., C.C.A., 116 F.2d 816.

Little analogy to common-law remedies

Remedies which the board is authorized to prescribe have little analogy to common-law remedies for collection of debts.—N. L. R. B. v. Adel Clay Products Co., C.C.A.8, 134 F.2d 342.

90. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 130 F.2d 363.

91. U.S.—N. L. R. B. v. Thompson Products, supra.

92. U.S.—N. L. R. B. v. Thompson Products, supra—N. L. R. B. v. Mall Tool Co., C.C.A., 119 F.2d 700.

93. U.S.—Pehlert v. W. U. Tel. Co., D.C.Pa., 64 F.Supp. 228.

The word "same," as used in such provision, means no less, and no more.—Pehlert v. W. U. Tel. Co., supra.

94. U.S.—Pehlert v. W. U. Tel. Co., supra.

95. U.S.—Pehlert v. W. U. Tel. Co., supra.

96. U.S.—Southern Ry. Co. v. Order of Ry. Conductors of America, D.C.S.C., 68 F.Supp. 306—Brand v. Pennsylvania R. Co., D.C.Pa., 22 F. Supp. 569.

Before obligation enforceable in courts should be implied, the command of the Railway Labor Act should be explicit and the purpose to afford a judicial remedy be plain. —General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R. R. v. Missouri-Kansas-Texas R. Co., Tex., 64 S.Ct. 146, 320 U.S. 323, 88 L.Ed. 76.

97. U.S.—Moore v. Illinois Cent. R. Co., Miss., 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089—Berryman v. Pullman Co., D.C.Mo., 48 F.Supp. 542.

Cal.—Austin v. Southern Pac. Co., 123 P.2d 39, 50 Cal.App.2d 292.

S.C.—Southern Ry. Co. v. Order of Ry. Conductors of America, 41 S. E.2d 774, 210 S.C. 121.

98. U.S.—Adams v. New York, C. & St. L. R. Co., C.C.A.Ind., 121 F.2d 808.

Cal.—Austin v. Southern Pac. Co., 123 P.2d 39, 50 Cal.App.2d 292.

D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S.App. D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

Tex.—Watson v. Missouri-Kansas-Texas R. Co. of Texas, Civ.App., 173 S.W.2d 357.

Election made

Where a dispute arises between a carrier and employees regarding a collective agreement, a choice regarding the remedy is made not only when the carrier submits or joins in submitting dispute to the National Railway Adjustment Board but when, under submission by an employee, the carrier appears before the board and participates in full hearing on the merits.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S.App.D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

Dispute regarding construction of employment contract may be adjusted either under the authority of the Railway Labor Act by carrying it to the adjustment board or by exercising common-law rights to bring an action to construe contract and protect rights.—Southern Ry. Co. v. Order of Ry. Conductors of America, D.C.S.C., 63 F.Supp. 306.

ter remedy is selected, it must be followed through to the conclusion prescribed.[99]

Under the Federal Transportation Act of Febr. 28, 1920, 41 U.S.St. at L. tit III § 301, et seq, now repealed, a dispute between a railroad company, engaged in interstate commerce, and its employees could be settled by an administrative proceeding before the labor board, created by the act.[1] It was within the province and lawful power of the board to determine the existence of the jurisdictional facts on which its right to function exists.[2] A dispute between carriers and employees, although existing before the enactment of the statute, was none the less one cognizable by the board, if continuing to exist after the board began to function.[3] Where a dispute came before the board as to wages and working conditions cognizable by it, and had been so treated by the parties thereto, it was immaterial, as regards the board's jurisdiction, whether the dispute came before the board by ex parte or joint submission or on the board's initiative.[4] The labor board did not lose jurisdiction of such a dispute pending before it by requesting the parties to confer and if possible to agree thereon.[5] The board could not be ousted over a dispute as to rules and working conditions between carriers and employees, pending before it, either by a carrier promulgating on its own motion new rules and working conditions, or by notice of the association of railway executives to labor organizations that it had made recommendation to the member roads that negotiations be handled by the management and employees of each road.[6]

§ 28(70). —— Effect of Agreement or Other Litigation

An administrative proceeding, under a labor relations statute, generally may not be affected by any private agreement between the employer and the employees, or by any litigation between them with respect to private rights.

An administrative proceeding under a labor relations statute, such as with respect to unfair labor practices, may not be affected by any private agreement between the employer and the employees,[7] or between the employer and the union,[8] or by any litigation between them for the vindication of private rights.[9] Where a union, controlling the defense of the employer's action against employees, and the employees named as defendants therein, are not parties to a subsequent proceeding before the labor board, although their interest will be directly affected by its outcome, the rule of res judicata does not govern in a strict sense,[10] although the public policy on which the rule is based may place some limit on the scope of the board's investigation and the effect of its decision.[11] A labor relations board is not precluded by any principle of res judicata or estoppel, or by public policy, from investigating in public interest the facts involved in a labor dispute.[12] A pending proceeding before a state board, charging the illegality of a strike, does not preclude the National Labor Relations Board from proceeding

99. D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S. App.D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

1. U.S.—U. S. Railroad Labor Board v. Pennsylvania R. Co., C.C.A.7, 282 F. 701, affirmed 43 S.Ct. 278, 261 U.S. 72, 67 L.Ed. 536.

2. U.S.—Pennsylvania System Bd. of Adjustment of Brotherhood of Ry. & S. S. Clerks, Freight Handlers, Express & Station Employees v. Pennsylvania R. Co., D. C.Pa., 294 F. 556.

3. U.S.—U. S. Railroad Labor Bd. v. Pennsylvania R. Co., C.C.A.Ill., 282 F. 701, affirmed 43 S.Ct. 278, 261 U.S. 72, 67 L.Ed. 536.

4. U.S.—U. S. Railroad Labor Bd. v. Pennsylvania R. Co., supra.

5. U.S.—U. S. Railroad Labor Bd. v. Pennsylvania R. Co., supra.

6. U.S.—U. S. Railroad Labor Bd. v. Pennsylvania R. Co., supra.

7. N.Y.—New York State Labor Relations Bd. v. Holland Laundry, 63 N.E.2d 68, 294 N.Y. 480, reargument denied 64 N.E.2d 278, 295 N. Y. 568.

Power of labor relations board to prevent and redress unfair labor practices generally see supra § 28 (64).

8. U.S.—Lewellyn v. Fleming, C.C. A.Okl., 154 F.2d 211, certiorari denied 67 S.Ct. 45—Myers v. Louisiana & A. Ry. Co., D.C.La., 7 F. Supp. 97.

Agreement as to interpretation of rules and contracts

An agreement between an order of railway conductors and a railway company that the order's general committee should represent the members in making and interpreting contracts, rates, rules, and working agreements does not nullify the statutory provisions as to steps in handling disputes after the failure of conferences between such committee and the company's management, or prevent the use of other contractual and statutory agencies for the settlement of such controversies.—Myers v. Louisiana & A. Ry. Co., supra.

9. N.Y.—New York State Labor Relations Board v. Holland Laundry, 63 N.E.2d 68, 294 N.Y. 480, reargument denied 64 N.E.2d 278, 295 N. Y. 568.

Determination of issues in action between private parties cannot bar a contest to vindicate public interest, as provided in a labor relations act. —New York State Labor Relations Board v. Holland Laundry, supra.

10. N.Y.—New York State Labor Relations Board v. Holland Laundry, supra.

Res judicata generally see Judgments § 592 et seq.

Not conclusive as against public interest

The court's determination in employer's action to enjoin employees from striking and picketing, that employer was not guilty of unfair labor practices, is not conclusive in labor relations board's subsequent investigation for protection of public against such practices.—New York State Labor Relations Board v. Holland Laundry, supra.

11. N.Y.—New York State Labor Relations Board v. Holland Laundry, supra.

12. N.Y.—New York State Labor Relations Board v. Holland Laundry, supra.

against the employer for a violation of the National Labor Relations Act.[13] It has been held, however, that an application to such board for relief, as for unfair labor practices, cannot be made while negotiations between the parties, as for collective bargaining, is still pending.[14]

§ 28(71). Judicial Remedies

a. In general
b. Under National Labor Relations Act
c. Under Railway Labor Act

a. In General

(a) Resort to court in general
(b) Action for breach of contract

(a) Resort to Court in General

Under some labor relations statutes resort may not be had to the courts until all of the administrative remedies have been exhausted, except to the extent that jurisdiction has been conferred on the courts by statute, and except as to disputes and matters which are not within the exclusive jurisdiction of the labor relations board.

Under some labor relations statutes, until all of the administrative remedies with respect to the adjustment or settlement of labor disputes have been exhausted, resort may not be had to the courts,[15] except to the extent that jurisdiction has been conferred on the courts by the statute,[16] except as to disputes or matters which are not within the exclusive jurisdiction of the board,[17] or except where the person aggrieved is without adequate administrative remedy before the board.[18]

A court of equity, ordinarily, has no power to interfere to maintain an employee in his position pending the disposition by the state labor relations board of an unfair labor practice charge, filed in the employee's behalf by his labor union,[19] and may not interfere to maintain such employee in an apartment occupied by him in the employer's multiple dwelling as an incident of his compensation or salary,[20] unless there is a showing of irreparable damage.[21] A court of equity also will not interfere with, or invalidate, a decision of a labor federation, with its internal organization, or with the method of its making or enforcing its awards, if all the parties have had an opportunity to be heard, the decision has not been arbitrary, and the fundamental law of the association has not been violated.[22] A bill in equity, however, has been held to be a proper remedy for the reinstatement of an employee and damages, on the basis of an individual contract with the employer granting seniority rights, at least where an action at law would be inadequate.[23]

Where a contract between a railroad company and a union provides for the submission of the whole subject matter of a labor dispute to arbitration by

13. U.S.—N. L. R. B. v. Eclipse Moulded Products Co., C.C.A.7, 126 F.2d 576.

14. U.S.—Inland Lime & Stone Co. v. N. L. R. B., C.C.A.7, 119 F.2d 20.

Negotiations held not pending

A statement by the employer's superintendent to a representative of the National Labor Relations Board that he had already rejected a proposed contract and would waste no time in reviewing it, and that he was under no duty to offer proposals, precludes a contention that the board could not consider the union's application for relief because the negotiations were still pending.—Inland Lime & Stone Co. v. N. L. R. B., supra.

15. U.S.—Order of Ry. Conductors of America v. Pitney, N.J., 66 S.Ct. 322, 326 U.S. 561, 90 L.Ed. 1318, rehearing denied 66 S.Ct. 525, 327 U.S. 814, 90 L.Ed. 1038—Steele v. Louisville & N. R. Co., Ala., 65 S.Ct. 226, 323 U.S. 192, 89 L.Ed. 173—Myers v. Bethlehem Shipbuilding Corporation, Mass., 58 S.Ct. 459, 303 U.S. 41, 83 L.Ed. 638—State of Florida ex rel. Watson v. Bellman, C.C.A.Fla., 149 F.2d 890—Inland Empire Dist. Council v. N. L. R. B., D.C.D.C., 62 F.Supp. 207—Sanco Piece Dye Works v. Herrick, D.C.N.Y., 33 F.Supp. 80.

N.Y.—Domanick v. Triboro Coach Corporation, 18 N.Y.S.2d 650.

Under National Industrial Recovery Act

U.S.—Harper v. Southern Coal & Coke Co., C.C.A.Ala., 73 F.2d 792.

16. U.S.—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R. R. v. Missouri-Kansas-Texas R. Co., Tex., 64 S.Ct. 146, 320 U.S. 323, 88 L.Ed. 76.

N.Y.—Beazer v. Bluttal, 60 N.Y.S.2d 668, 186 Misc. 234—Gominger v. Natrel Realty Corp., 64 N.Y.S.2d 361.

Under National Industrial Recovery Act

N.Y.—Farulla v. Ralph A. Freundlich, Inc., 279 N.Y.S. 228, 155 Misc. 262.

17. U.S.—Illinois Central R. Co. v. Moore, C.C.A., 112 F.2d 965.

18. U.S.—Joel v. Rosseter, D.C.Cal., 15 F.Supp. 914.

19. N.Y.—Gomeringer v. Natrel Realty Corporation, 64 N.Y.S.2d 361.

Injunctive relief see Injunctions § 138 b.

20. N.Y.—Beazer v. Bluttal, 60 N.Y.S.2d 668, 186 Misc. 234—Gomeringer v. Natrel Realty Corp., 64 N.Y.S.2d 361.

21. N.Y.—Gomeringer v. Natrel Realty Corp., supra.

22. U.S.—California State Brewers' Institute v. International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers, D.C.Cal., 19 F.Supp. 824.

23. Pa.—Madera v. Monongahela Ry. Co., 52 Pa.Dist. & Co. 216, 93 Pittsb.Leg.J. 38, 7 Fay.L.J. 250, 12 Som.Leg.J. 166.

New union

In such a case, an employee seeking reinstatement of seniority rights, established by an individual contract of employment and confirmed by a collective bargaining agreement between the employer and a former union, is not required, before suing for equitable relief, to resort to the tribunals of a new union which thereafter executes a new collective agreement, establishing different seniority rights, particularly where it does not appear that he has ever been a member of that union.—Madera v. Monongahela Ry. Co., supra.

the railroad adjustment board, such course should be pursued before resort to the courts.[24]

(b) Action for Breach of Contract

An employee coming under the provisions of a contract between the employer and a labor union has a right of action at law for the redress of his wrongs arising out of a breach of such contract. An action for breach of contract may also be maintained by or against a labor union.

An employee coming under the provisions of a contract between the employer and a labor union has a right of action at law for the redress of his wrongs or grievances, arising out of a breach of such contract,[25] although he is not a party to the contract, except to the extent that he is made a party thereto by its being made for his benefit.[26] He may sue for damages for a failure to respect his seniority rights, by demoting him,[27] even though he continues to work after his seniority has been reduced.[28]

An employee has a right of action for damages for a wrongful discharge under a contract, which covers him, between the employer and union,[29] although he has not agreed to work for the employer for any definite length of time.[30] He may sue for a wrongful discharge, where, in violation of the terms of the contract, he is discharged without a fair hearing or investigation,[31] even though he has not requested such a hearing, where, under the terms of the working agreement, it was not incumbent on him to make such a request;[32] but he is not entitled to recover

24. Ala.—Bell v. Western Ry. of Alabama, 153 So. 434, 228 Ala. 328.

25. U.S.—System Federation No. 59 of Railway Employes Department of American Federation of Labor v. Louisiana & A. Ry. Co., C.C.A. La., 119 F.2d 509, rehearing denied 32 F.Supp. 89, certiorari denied 62 S.Ct. 108, 314 U.S. 626, 86 L.Ed. 526.
Neb.—Rentschler v. Missouri Pac. R. Co., 253 N.W. 694, 126 Neb. 493, 95 A.L.R. 1.
N.Y.—Gulla v. Barton, 149 N.Y.S. 952, 164 App.Div. 293.
Pa.—In re Lehrman, Com.Pl., 52 Dauph.Co. 1.

A provision for arbitration, in a collective bargaining contract, of disputes arising under the agreement does not prevent resort to the courts for the enforcement of rights or the redress of wrongs.—Rentschler v. Missouri Pac. R. Co., 253 N.W. 694, 126 Neb. 493, 95 A.L.R. 1.

Labor board's award
An employee's action for a breach of contract of employment, in which the labor board's award, authorizing the employee's recovery of wages for time lost, if accepted as final, is not an action to enforce the board's decision as such, but is one for breach of the contract.—San Antonio & A. P. Ry. Co. v. Collins, Tex., 61 S.W.2d 84.

Rights are governed by terms of contract
U.S.—System Federation No. 59 of Railway Employees Department of American Federation of Labor v. Louisiana & A. Ry. Co., C.C.A.La., 119 F.2d 509, rehearing denied 32 F.Supp. 89, certiorari denied 62 S. Ct. 108, 314 U.S. 626, 86 L.Ed. 526.

What law governs
The law of the state in which a railroad employee was employed for work therein, in which the collective bargaining agreement on which he relies was executed, and in which the breach, if any, occurred, governs such employee's action for a wrongful discharge.—Elder v. New York Cent. R. Co., C.C.A.Ky., 152 F.2d 361.

26. U.S.—Moore v. Illinois Cent. R. Co., D.C.Miss., 24 F.Supp. 731, reversed on other grounds, C.C.A., Illinois Cent. R. Co. v. Moore, 112 F.2d 959, reversed on other grounds 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.
Ohio.—H. Blum & Co. v. Landau, 155 N.E. 154, 23 Ohio App. 426.
Wash.—Huston v. Washington Wood & Coal Co., 103 P.2d 1095, 4 Wash. 2d 449.
Wyo.—Beatty v. Chicago, B. & Q. R. Co., 52 P.2d 404, 49 Wyo. 22.

27. Minn.—Florestano v. Northern Pac. Ry. Co., 269 N.W. 407, 198 Minn. 203.
Mo.—McGee v. St. Joseph Belt Ry. Co., 93 S.W.2d 1111, 233 Mo.App. 111.

A contract respecting seniority of switchmen, signed by president representing railway company and committee representing switchmen, has been held to entitle switchman to action thereon to recover damages for failure to respect seniority rights established therein.—McGee v. St. Joseph Belt Ry. Co., supra.

An employee who has automatically lost his seniority rights, under the terms of his contract of employment, by his voluntary transfer to another department, is not entitled to maintain an action for breach of contract after having been laid off without regard to seniority.—Florestano v. Northern Pac. Ry. Co., 269 N.W. 407, 198 Minn. 203.

28. Mo.—McGee v. St. Joseph Belt Ry. Co., 93 S.W.2d 1111, 233 Mo. App. 111.

29. Wyo.—Beatty v. Chicago, B. & Q. R. Co., 52 P.2d 404, 44 Wyo. 22.

Compliance with contract
An employee who receives notice of his discharge, in compliance with the provisions of the contract between his employer and the union of which he is a member, is not entitled to maintain an action for a wrongful discharge, regardless of whether the motive for giving the notice was to abrogate the contract with the union.—Volquardsen v. Southern Amusement Co., La.App., 156 So. 678.

If wrongfully discharged before end of term, he may sue immediately for breach of contract.—Gary v. Central of Georgia Ry. Co., 141 S.E. 819, 37 Ga.App. 744.

Prevention of performance of conditions
An employer, who refuses to do the acts required of it by the contract of employment relating to the settlement of disputes arising out of the discharge of an employee, and prevents the discharged employee from complying with such provisions, may not urge as a defense to the discharged employee's action for breach of the contract the fact that the employee had failed to comply with such provisions.—Moore County Carbon Co. v. Whitten, Tex.Civ.App., 140 S.W.2d 880, error dismissed, judgment correct.

30. Miss.—Moore v. Illinois Cent. R. Co., 176 So. 593, 180 Miss. 276.
Mo.—Hall v. St. Louis-San Francisco Ry. Co., 28 S.W.2d 687, 224 Mo.App. 431.

31. Mo.—Butner v. Union Pac. R. Co., 163 S.W.2d 100, 236 Mo.App. 1134.

32. Mo.—Lyons v. St. Joseph Belt Ry. Co., App., 84 S.W.2d 933, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.

An engineman is not estopped to complain of his discharge by railroad because of his failure to request hearing, where it was not incumbent on engineman under working agreement with railroad to request hearing, but it was incumbent on rail-

damages for a delay in rendering a decision of discharge after the investigation, if he suffers no damage as result of such delay.[33] The fact that an employee's discharge was found justified after an investigation by a delegate of the union may be urged as a defense to the discharged employee's action for breach of his contract of employment, where the contract provides that the employee shall have no recourse if his discharge is found justified by such investigation.[34]

An employee, who has been lawfully laid off, may have a cause of action for damages for a breach of the employer's obligation to reëmploy him, in accordance with the terms of the contract,[35] such as for a refusal to reëmploy him according to his seniority standing,[36] unless such rights are not preserved;[37] and each day that he is not reëmployed, in accordance with the contract, constitutes a separate violation, and gives rise to a distinct cause of action, for which a new action may be brought.[38]

By or against union. A labor union, although unincorporated, may maintain an action to enforce the provisions of a contract entered into by it with an employer, when the employer has breached or is threatening a breach of some provision which is deemed by the courts of consequence to the union as an organization, and where an action by an individual member of the union would not lie.[39] It has been held that an action will lie by the union to prevent the breach of an agreement for a closed shop,[40] or for a breach of agreement with respect to keeping the employer's shop or store open after the hours agreed on.[41] An action for damages may also be maintained against a union for a violation of its collective bargaining contract,[42] for damages sustained by an employer as a result of an unlawful strike,[43] or as a result of the unlawful conduct thereof;[44] for damages resulting from a strike against an employer with whom no trade dispute exists;[45] for damages sustained by one as a result of an unlawful boycott conducted by a union;[46] or for damages sustained by one as a result of unlawful picketing.[47]

road to give him one before discharging him, and engineman was discharged without notice and without knowledge that there was charge against him that might be investigated.—Lyons v. St. Joseph Belt Ry. Co., supra.

33. Mo.—Reed v. St. Louis Southwestern R. Co., App., 95 S.W.2d 887.

Within five days

Discharged employee is not entitled to recover damages for employer's failure to render decision of discharge within five days after investigation as provided in employment contract, where employee continued in employment until notified of discharge and had right to appeal from decision and hence suffered no damage as result of delay in rendering decision.—Reed v. St. Louis Southwestern R. Co., supra.

34. N.Y.—Rolandez v. Star Liquor Dealers, 12 N.Y.S.2d 17, 257 App. Div. 97.

35. Tenn.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

36. Tenn.—Earle v. Illinois Cent. R. Co., supra.

Action for wrongful discharge

Where agreement between railroads and labor union obligating railroads to reëmploy yardmen, let out in reduction of forces, in order of their seniority standing if yardmen were not out of the service to exceed six months, became part of yardman's individual contract of employment and yardman, let out of service in reduction of forces, instituted suit for breach of contract, the yardman's cause of action was not for breach of contract occasioned by wrongful discharge, but for breach of railroads' obligation to reëmploy yardman when services of additional yardmen were needed.—Earle v. Illinois Cent. R. Co., supra.

37. Tenn.—Earle v. Illinois Cent. R. Co., supra.

38. Mo.—McGee v. St. Joseph Belt Ry. Co., 110 S.W.2d 389, 232 Mo. App. 639.

39. U.S.—Milk Wagon Drivers Union of Chicago, Local 753 v. Associated Milk Dealers, D.C.Ill., 42 F. Supp. 584.

40. N.Y.—Jacobs v. Cohen, 76 N.E. 5, 183 N.Y. 207, 2 L.R.A.,N.S., 292, 111 Am.S.R. 730, 5 N.Y.Ann.Cas. 280—Ribner v. Racso Butter & Egg Co., 238 N.Y.S. 132, 135 Misc. 616.
Tex.—Harper v. Local Union, Civ. App., 48 S.W.2d 1033.

41. Ariz.—Henderson v. Ugalde, 147 P.2d 490, 61 Ariz. 221.

Barber shop

Where all the parties to a contract between a barbers' union and two barbers waive compliance with a statute providing for arbitration of barbers' controversies by a barbers' board, the union has the right to bring an action to restrain, and recover damages for, such barbers' breach of contract by keeping their shop open after the hours agreed to. —Henderson v. Ugalde, supra.

42. U.S.—American-Hawaiian S. S. Co. v. Sailors Union of the Pacific, D.C.Cal., 37 F.Supp. 828.

Contract to furnish employees

A sailor's union, which tried in good faith to persuade the crew to return to work by calling members of the crew by phone and posting notices in the union hall, discharged its duty under an agreement to furnish employees for the vessel and could not be held liable in damages for a delay in sailing, although it would be liable for the cost of the action because the work stoppage occurred in fact in violation of the agreement. —American-Hawaiian S. S. Co. v. Sailors Union of the Pacific, supra.

43. Mass.—W. A. Snow Iron Works v. Chadwick, 116 N.E. 801, 227 Mass. 382, L.R.A.1917F 755.
63 C.J. p 674 note 88.

44. Mo.—Berry Foundry Co. v. International Moulders Union, 164 S.W. 245, 177 Mo.App. 84.
63 C.J. p 674 note 89.

45. Md.—Bricklayers', Masons', & Plasterers' International Union of America v. Seymour Ruff & Sons, 154 A. 52, 160 Md. 483.

46. Mass.—Shinsky v. Tracey, 114 N.E. 957, 226 Mass. 21, L.R.A.1917C 1053.
63 C.J. p 674 note 93.

47. Mass.—Harvey v. Chapman, 115 N.E. 304, 226 Mass. 191, L.R.A. 1917E 389.
Wash.—St. Germain v. Bakery & Confectionery Workers' Union, No. 9 of Seattle, 166 P. 665, 97 Wash. 282, L.R.A.1917F 824.

b. Under National Labor Relations Act

Under the National Labor Relations Act, as a general rule, resort may not be had to the courts, until the administrative remedies before the National Labor Relations Board have been exhausted.

Under the National Labor Relations Act, resort may be had to the courts, for violations of the act, only where the administrative remedies before the National Labor Relations Board have been exhausted,[48] and this rule cannot be circumvented by asserting that the charge on which the complaint rests is groundless, and that the mere holding of an administrative hearing would result in irreparable damage.[49] Until the administrative remedy has been exhausted, a person aggrieved cannot apply for relief in equity,[50] such as for injunctive relief, as discussed in Injunctions § 138 b (2) (a) dd. A state court, however, may enforce against a labor union such rights as are consistent with the provisions of the act;[51] and such act does not deprive a state court of the power to prevent unlawful conduct by labor unions, where such conduct is not authorized or protected by the act.[52]

c. Under Railway Labor Act

Under the Railway Labor Act, resort may be had to the courts for the redress of wrongs, or for the establishment and enforcement of rights, without exhausting administrative remedies.

The Railway Labor Act does not deprive employees of the right to resort to law tribunals for the redress of wrongs,[53] and does not require that the administrative remedies before the board shall be resorted to, or exhausted, by the complaining carrier or employees, before bringing an action in court to redress grievances, or to establish and enforce rights, under the statute,[54] such as to establish and enforce an employee's seniority rights under a collective bargaining contract.[55] If the dispute or grievance is first taken before a court, it will retain jurisdiction and carry the case through to an adjudication.[56]

48. U.S.—Myers v. Bethlehem Shipbuilding Corporation, Mass., 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638—Montgomery Ward Employees' Ass'n v. Retail Clerks International Protective Ass'n Local No. 47, D.C.Cal., 33 F.Supp. 321—Sanco Piece Dye Works v. Herrick, D.C. N.Y., 33 F.Supp. 80.

Exclusiveness of board's jurisdiction see infra § 28 (74) b.

49. U.S.—Myers v. Bethlehem Shipbuilding Corporation, Mass., 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638—Clark v. Lindemann & Hoverson Co., C.C.A.Wis., 88 F.2d 59—Bradley Lumber Co. of Arkansas v. N. L. R. B., C.C.A.La., 84 F.2d 97.

50. U.S.—Joel v. Rosseter, D.C.Cal., 15 F.Supp. 914.

A state court may not entertain jurisdiction of war industry employee's suit challenging validity of clause in contract between labor union and employer which obligated employees to refrain from engaging in "activity in the plant calculated to undermine the status of the union as the bargaining agency . . .," where the employee had not availed himself of provisions of the National Labor Relations Act for determination of a labor dispute.—Keller v. American Cyanamid Co., 28 A.2d 41, 132 N.J.Eq. 210.

51. Cal.—Williams v. International Broth. of Boilermakers, Iron Shipbuilders and Helpers of America, 165 P.2d 903, 27 Cal.2d 586.

52. Cal.—James v. Marinship Corp., 155 P.2d 329, 25 Cal.2d 721, 160 A.L.R. 900.

Demand for closed-shop agreement

Where, in employer's proceeding for certification of a bargaining representative, National Labor Relations Board held that employer could not lawfully recognize either union as exclusive bargaining representative of employees because not representing a majority, supreme court was not encroaching on exclusive jurisdiction of board in determining that unions' demands for closed-shop agreement were unlawful and that employer was under legal duty to reject such demands.—Park & Tilford Import Corp., v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., 165 P.2d 891, 27 Cal.2d 599, 162 A.L.R. 1426.

53. Ala.—Keller v. Western Ry. of Alabama, 153 So. 441, 228 Ala. 336—Bell v. Western Ry. of Alabama, 153 So. 434, 228 Ala. 328.

54. U.S.—Moore v. Illinois Cent. R. Co., Miss., 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089—Randolph v. Missouri-Kansas-Texas R. Co., D. C.Mo., 68 F.Supp. 1007—Delaware, L. & W. R. Co. v. Slocum, D.C.N.Y., 56 F.Supp. 634.

D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S.App. D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

Ga.—Evans v. Louisville & N. R. Co., 12 S.E.2d 611, 191 Ga. 395.

N.Y.—Delaware, L. & W. R. Co. v. Slocum, 50 N.Y.S.2d 313, 183 Misc. 454.

S.C.—Southern Ry. Co. v. Order of Ry. Conductors of America, 41 S.E. 2d 774, 210 S.C. 121.

An administrative finding by the board is not a prerequisite to filing a suit in court.—Moore v. Illinois Cent. R. Co., Miss., 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.

Procedure before board not compulsory

Neither the original Railway Labor Act of 1926 nor the act as amended in 1934 indicates that the machinery provided for settling disputes between employees and carriers growing out of grievances or out of interpretation of agreements concerning rates of pay, etc., was based on the philosophy of legal compulsion.

U.S.—Moore v. Illinois Cent. R. Co., supra.

Tex.—Watson v. Missouri-Kansas-Texas R. Co. of Texas, Civ.App., 173 S.W.2d 357.

State courts

The provision of the Railway Labor Act, which permits controversies arising under employment contracts to be determined before the National Railroad Adjustment Board, does not deprive state courts of jurisdiction.—Delaware, L. & W. R. Co. v. Slocum, 57 N.Y.S.2d 65, 269 App.Div. 467.

55. U.S.—Adams v. New York, C. & St. L. R. Co., C.C.A.Ind., 121 F. 2d 808.

Cal.—Austin v. Southern Pac. Co., 123 P.2d 39, 50 Cal.App.2d 292.

Ga.—Evans v. Louisville & N. R. Co., 12 S.E.2d 611, 191 Ga. 395.

Tenn.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

56. U.S.—Southern Ry. Co. v. Order of Ry. Conductors of America, D. C.S.C., 63 F.Supp. 306.

Employees having individual grievances are without adequate administrative remedy, and may seek relief in equity without first attempting to obtain relief by administrative means,[57] such as for a breach of duty by a bargaining representative toward a member of the craft represented and a discriminatory contract between such representative and the carriers.[58] If the contract of employment provides that the federal board of mediation is the final tribunal to which a discharged employee may appeal for a determination of his grievances, and a reinstatement if the decision of such tribunal favors him, the failure of such board to reach an adjustment does not give the employee a cause of action, where a number of prior tribunals had found against him.[59]

Jurisdictional disputes. The courts, under the Railway Labor Act, have no jurisdiction of a jurisdictional dispute or controversy between two rival unions,[60] but a union in such a case must have its contract construed by the adjustment board, and then seek relief in a court of equity to protect its rights under the contract as so interpreted.[61]

The Federal Transportation Act of Febr. 28, 1920, 41 U.S.St. at L. tit III § 301 et seq, now repealed, providing for the settlement, by administrative proceedings, of disputes between a railroad, engaged in interstate commerce, and its employees, did not disturb the jurisdiction of state courts of a controversy over contract rights between two employees and a carrier, where all parties were residents of the state and no question of interstate commerce was involved.[62] In the absence of a request to refer a dispute to the labor board as provided by the act, the statute did not take away the right of an individual employee first to resort to the courts to adjudicate his rights,[63] and in order to abate such a suit, a request of the railroad to refer the matter to the labor board must have been alleged and proved and the claims shown to be within its jurisdiction.[64]

§ 28(72). Arbitration

The right to arbitration and the particular matters or disputes which may be arbitrated depend on the provisions of the statute, or of the arbitration clause of the employment contract, under which arbitration is sought.

The arbitration of disputes between employers and employees is strongly supported by a sound and well recognized public policy.[65] The right to arbitration[66] and the particular disputes which may be arbitrated depend on the terms of the statute,[67] or the terms of the arbitration clause of the employment

57. U.S.—Steele v. Louisville & N. R. Co., Ala., 65 S.Ct. 226, 323 U.S. 192, 89 L.Ed. 173.

58. U.S.—Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Va., 65 S.Ct. 235, 323 U.S. 210, 89 L.Ed. 187, conformed to C.C.A., 148 F.2d 403—Steele v. Louisville & N. R. Co., Ala., 65 S.Ct. 226, 323 U.S. 192, 89 L.Ed. 173.

Discrimination against negro

Where a negro fireman was ineligible for membership in union chosen by majority of his craft as bargaining representative under the Railway Labor Act and was discriminated against in contracts between bargaining representative and carrier in favor of white fireman, he was without adequate administrative remedy and could seek relief in equity without first attempting to secure relief by administrative means.—Steele v. Louisville & N. R. Co., supra.

59. Tex.—Cousins v. Pullman Co., Civ.App., 72 S.W.2d 356.

60. U.S.—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R. R. v. Missouri-Kansas-Texas R. Co., Tex., 64 S.Ct. 146, 320 U.S. 323, 88 L.Ed. 76—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pac. Co. v. Southern Pac. Co., Cal., 64 S.Ct. 142, 320 U.S. 338, 88 L.Ed. 85—Order of R. R. Telegraphers v. New Orleans, T. & M. Ry. Co., C.C.A.Mo., 156 F.2d 1, certiorari denied 67 S.Ct. 112, rehearing denied 67 S.Ct. 201.

Disputes held jurisdictional

U.S.—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R. R. v. Missouri-Kansas-Texas R. Co., Tex., 64 S.Ct. 146, 320 U.S. 323, 88 L.Ed. 76—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pac. Co. v. Southern Pac. Co., Cal., 64 S.Ct. 142, 320 U.S. 338, 88 L.Ed. 85.

61. U.S.—Order of R. R. Telegraphers v. New Orleans, T. & M. Ry. Co., C.C.A.Mo., 156 F.2d 1, certiorari denied 67 S.Ct. 112, rehearing denied 67 S.Ct. 201.

62. Ky.—Gregg v. Starks, 224 S.W. 459, 188 Ky. 834.

63. Tex.—Panhandle & S. F. R. Co. v. Curtis, Civ.App., 245 S.W. 781.

39 C.J. p 70 note 35.

64. Tex.—Panhandle & S. F. R. Co. v. Curtis, supra.

65. Wash.—Hegeberg v. New England Fish Co., 110 P.2d 182, 7 Wash.2d 509.

66. N.Y.—Amsterdam & Co. v. Devery, 5 N.Y.S.2d 427, 168 Misc. 478—Uneeda Credit Clothing Stores v. Briskin, 14 N.Y.S.2d 964.

Truck owners

Where truck owners had entered into identical written employment contracts with truck drivers' union providing that any differences arising between owner and employee should be submitted to arbitration by both parties, truck owners, acting through transport association to which they belonged, were entitled to compel union to arbitrate disputes meeting description of "any difference" contained in contract.—Amsterdam & Co. v. Devery, 5 N.Y.S. 2d 427, 168 Misc. 478.

67. Mich.—Motorcoach Operators' Ass'n v. Board of Street Ry. Com'rs, 255 N.W. 391, 267 Mich. 568.

Directory provision

A provision in a city charter authorizing board of street railway commissioners to arbitrate any dispute over wages or conditions of employment, provided each party would agree in advance to pay half of expenses of arbitration, has been held directory, so that motorcoach employees could not compel board of commissioners to submit to arbitration a proposed change in method of determining seniority in transportation system.—Motorcoach Operators' Ass'n v. Board of Street Ry. Com'rs, supra.

contract,[68] under which arbitration is sought. Under an arbitration clause in a collective bargaining contract, such disputes only may be arbitrated as come within the provisions of the clause;[69] and the willingness of the employer to recognize a matter not in the agreement, in a particular instance, does not constitute an agreement on his part that anything not in the agreement might be made the subject of arbitration.[70] The particular matters arbitrable, under such clause, may be determined by the practical construction of the clause by the parties to the contract,[71] and, if the interpretation so given is a reasonable one, the employer may not subsequently assert that the controversy submitted was not within the arbitration clause.[72] A blanket arbitration clause, covering all disputes, applies to a dispute, although it is not mentioned in the contract,[73] and the fact that a claim sought to be arbitrated appears to be contrary to the language of the contract is not sufficient to authorize the substitution of a court's determination as to the merits of the claim for that of the arbitrators.[74] Under a contract providing that, if it is impossible to reach a satisfactory understanding as to an employee's complaint or grievance by procedure before the successive tribunals provided for in the agreement, the question in dispute shall be submitted to a board of arbitrators, the only matters that may be so arbitrated are those relating to individual complaints and grievances,[75] and not matters relating to amendments to, or modifications of, the contract;[76] and, where the contract provides that there should be no modification thereof, during the term of the agreement, an employee is not entitled to arbitration of

68. N.Y.—Application of Scully, 47 N.Y.S.2d 256.

69. U.S.—Transcontinental & Western Air v. Parker, C.C.A.Mo., 144 F. 2d 735—Northland Greyhound Lines v. Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp. of America, Division 1150, D.C. Minn., 66 F.Supp. 431—Texoma Natural Gas Co. v. Oil Workers Intern. Union, Local No. 463, D.C. Tex., 58 F.Supp. 132, affirmed C. C.A., Oil Workers Intern. Union, Local No. 463 v. Texoma Natural Gas Co., 146 F.2d 62, certiorari denied 65 S.Ct. 1017, 324 U.S. 872, 89 L.Ed. 1426, rehearing denied 65 S.Ct. 1183, 325 U.S. 893, 89 L.Ed. 2004.

N.Y.—Application of Towns & James, 48 N.Y.S.2d 81, 183 Misc. 181—P. S. Thorsen & Co. v. Neves, 37 N.Y.S.2d 113, 179 Misc. 11—Amsterdam & Co. v. Devery, 5 N.Y.S. 2d 427, 168 Misc. 478—Application of Selly, 47 N.Y.S.2d 256—Uneeda Credit Clothing Stores v. Briskin, 14 N.Y.S.2d 964.

Pa.—In re Lehrman, Com.Pl., 52 Dauph.Co. 1.

Matters left exclusively to employer

Under arbitration agreement between telegraph company and employee's union providing that successful applicants for positions should be chosen by company on basis of ability, merit, and seniority, and where ability and merit were adequate, seniority should prevail, but company should not have its authority to fill vacancies "diluted," matter of selection of employees to fill vacancies was left exclusively to company and, hence, could not present an arbitrable dispute.—Application of Selly, 47 N.Y.S.2d 256.

70. N.Y.—Application of Towns & James, 48 N.Y.S.2d 81, 183 Misc. 181.

Sick leave

Where undisputed fact was that sick leave was not matter covered by final agreement entered into between employer and labor union, providing for arbitration of any dispute arising by virtue of contract, dispute concerning such question was not subject to arbitration, notwithstanding employer had recognized previously other matters not in contract.—Application of Towns & James, supra.

71. Minn.—Mueller v. Chicago & N. W. Ry. Co., 259 N.W. 798, 194 Minn. 83.

Difference in disputes of several parties

A truck drivers' union, which had entered into identical employment contracts with truck owners providing that any difference arising between owner and employee should be submitted to arbitration, could not avoid arbitration on ground that disputes concerning which arbitration was sought by truck owners' association varied as between different truck owners and their employees, in view of dealings indicating that union recognized association as real party in interest with respect to any disputes.—Amsterdam & Co. v. Devery, 5 N.Y.S.2d 427, 168 Misc. 478.

72. Minn.—Mueller v. Chicago & N. W. Ry. Co., 259 N.W. 798, 194 Minn. 83.

73. N.Y.—Pierce v. Brown Buick Co., 11 N.Y.S.2d 160, 256 App.Div. 1076, reargument denied 12 N.Y.S. 2d 356, 256 App.Div. 1101, appeal denied—Freydberg Bros. v. Corey, 31 N.Y.S.2d 10, 177 Misc. 560, affirmed 32 N.Y.S.2d 129, 263 App. Div. 805, reargument denied 32 N. Y.S.2d 783, 263 App.Div. 858.

74. N.Y.—Freydberg Bros. v. Corey, supra.

Under a provision "any dispute of any nature that might arise between us is to be adjusted by the American Arbitration Association," the arbitrator was authorized to pass on any disputes arising out of employment relationship between parties.—Freydberg Bros. v. Corey, supra.

75. U.S.—Texoma Natural Gas Co. v. Oil Workers Intern. Union, Local No. 463, D.C.Tex., 58 F.Supp. 132, affirmed, C.C.A., Oil Workers Intern. Union, Local No. 463 v. Texoma Natural Gas Co., 146 F.2d 62, certiorari denied 65 S.Ct. 1017, 324 U.S. 872, 89 L.Ed. 1426, rehearing denied 65 S.Ct. 1183, 325 U.S. 893, 89 L.Ed. 2004.

76. U.S.—Texoma Natural Gas Co. v. Oil Workers Intern. Union, Local No. 463, D.C.Tex., 58 F.Supp. 132, affirmed C.C.A., Oil Workers Intern. Union, Local No. 463 v. Texoma Natural Gas Co., 146 F. 2d 62, certiorari denied 65 S.Ct. 1017, 324 U.S. 872, 89 L.Ed. 1426, rehearing denied 65 S.Ct. 1183, 325 U.S. 893, 89 L.Ed. 2004.

Seniority standing

When an employee's seniority standing was required by collective bargaining contract, and seniority list posted by employer in accordance with terms of the contract became a part thereof, such employee's seniority was not arbitrable under the contract which provided for arbitration of an employee's complaint or grievance, but not for matters relating to amendments to or modifications of the contract.—Texoma Natural Gas Co. v. Oil Workers Intern. Union, Local No. 463, D.C.Tex., 58 F. Supp. 132, affirmed, C.C.A., Oil Workers Intern. Union, Local No. 463 v. Texoma Natural Gas Co., 146 F.2d 62, certiorari denied 65 S.Ct. 1017, 324 U.S. 872, 89 L.Ed. 1426, rehearing denied 65 S.Ct. 1183, 325 U.S. 893, 89 L.Ed. 2004.

disputes, which, if submitted to arbitration, would in effect create a new contract.[77] Although the contract makes the state compensation act applicable to the employee's injury or death, if the arbitration clause refers only to disputes between the employer and employee, it is inapplicable in an action by the employee's widow on the contract.[78]

An employer may be required to proceed to arbitration, in accordance with a collective bargaining contract, containing an arbitration clause,[79] unless he signed the contract under duress;[80] and, where an arbitration has been had, the employer may not question the validity of the contract to arbitrate.[81]

An arbitration clause in a collective bargaining contract does not establish an agreement for statutory arbitration, if there is no attempt to limit the arbitration to controversies which might be the subject of a personal action at law or a suit in equity, and no court is designated to which any award is to be returned;[82] but a proviso excluding statutory arbitrations as to contracts for personal services has been held not to preclude such an arbitration with reference to a dispute growing out of a collective bargaining agreement.[83]

§ 28(73). —— Procedure

The arbitration of a dispute between an employer and a labor union should comply with the requirements of the arbitration clause of the contract, or of the provisions of the statute, under which it is conducted.

The arbitration of a controversy or dispute between an employer and a labor union, in pursuance of an arbitration clause in the contract between them, providing for the settlement of future controversies, or in pursuance of the provisions of an arbitration statute, should be conducted in accordance with the requirements of the contract,[84] or statute,[85] as the case may be, such as with respect to the time within which a demand or notice for arbitration must be made, unless such requirement is waived.[86] If such a contract contains no formal requirements as to the certification of disputes, the submission to arbitration thereunder is not required to be in writing subscribed by the parties;[87] but the contrary obtains where the submission is under a statute which requires such formality.[88] A provision of such a contract, which gives the arbitrator power to render decisions as to the meaning, application, or interpretation of the agreement, does not vest in the arbitrator authority to issue a directive to the employer,[89] but he may make such a directive if he is expressly vested with such authority by the contract.[90] In a proceeding for a stay of arbitration proceedings instituted by a local union before an arbitration association, the court may enter an order appointing an arbitrator and directing arbitration under the contract entered into between the parties, notwithstanding such relief is not specifically requested.[91] If one of the parties agrees that the award should be made by certain designated persons, he thereby waives objection to any apparent bias.[92]

Under the Railway Labor Act § 157, if a controversy between a carrier and its employees is not settled either by a conference between the representatives of the parties, or by the appropriate adjustment board or through mediation, it may be submitted to a proper board for arbitration.[93] This arbi-

77. N.Y.—In re Amsterdam Dispatch, 4 N.Y.S.2d 908, 254 App.Div. 233, affirmed Amerstam Dispatch v. Devery, 16 N.E.2d 403, 278 N.Y. 688.

78. U.S.—Transcontinental & Western Air v. Parker, C.C.A.Mo., 144 F.2d 735.

79. N.Y.—Granata v. Ira S. Bushey & Sons, 63 N.Y.S.2d 47, 270 App. Div. 1026.

80. N.Y.—Granata v. Ira S. Bushey & Sons, supra.

Signing not under duress

Employer's signing of collective bargaining contract under alleged threat of seizure of its plant by the government pursuant to law did not constitute duress so as to justify employer's refusal to proceed to arbitration pursuant to contract.—Granata v. Ira S. Bushey & Sons, supra.

81. N.Y.—Granata v. Ira S. Bushey & Sons, supra.

82. Mass.—Sanford v. Boston Edison Co., 56 N.E.2d 1, 316 Mass. 631, 156 A.L.R. 644.

83. Pa.—Kaplan v. Bagrier, 12 Pa. Dist. & Co. 693.

84. N.Y.—Application of Davis, 57 N.Y.S.2d 387.

85. U.S.—Toledo, P. & W. R. R. v. Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, C. C.A.Ill., 132 F.2d 265, reversed on other grounds 64 S.Ct. 413, 321 U. S. 50, 88 L.Ed. 534, 150 A.L.R. 810.

86. N.Y.—Application of Ketchum & Co., 70 N.Y.S.2d 476.

Notice of appeal in nature of arbitration

A provision in a collective bargaining contract that an employee, on giving notice to an employer within three days of discharge, might appeal from discharge, which appeal was to be handled through grievance machinery in the nature of arbitration, is, in effect, a statute of limitations by which right to demand arbitration is barred by failure to give required notice within time prescribed, unless waived.—Application of Ketchum & Co., supra.

87. N.Y.—Application of Davis, 57 N.Y.S.2d 387.

88. N.Y.—Application of Davis, supra.

89. N.Y.—Goldberg v. Rialto Retailers, 43 N.Y.S.2d 432.

90. N.Y.—Application of Devery, 41 N.Y.S.2d 293, 266 App.Div. 213—Goldberg v. Rialto Retailers, 43 N.Y.S.2d 432.

91. N.Y.—In re Feuer Transp., 65 N.E.2d 178, 295 N.Y. 87, reversing reargument denied Feuer Transp. v. Local Union No. 445 of Intern. Broth. of Teamsters, 66 N.E.2d 590, 295 N.Y. 821, motion denied 66 N. E.2d 593, 295 N.Y. 825.

92. Or.—Rueda v. Union Pac. R. Co., 175 P.2d 778.

93. U.S.—Toledo, P. & W. R. R. v. Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, C.

tration is voluntary, and not mandatory,[94] and a failure to arbitrate does not bar a legal action.[95]

Under a general arbitration statute, it has been held that, where in proceedings involving an agreement between a workers' union and an employers' association, defendant employer raises the issue as to whether he is a party to the agreement, under which the arbitration is to be conducted, the arbitrator may not determine his own jurisdiction and status by finding that the employer is bound by the contract,[96] but, where a jury trial has been waived, the court is required to determine the preliminary question,[97] and, if it refuses to make the initial determination whether the employer is a party to the arbitration agreement before the submission of the controversy to the arbitrator, the arbitration proceedings are fatally defective.[98] Where the submission is made in accordance with the agreement of the parties, it has been held not to be invalid because of a failure to conform to the arbitration statute.[99]

Appointment and removal of arbitrator. An arbitrator appointed by the court to adjust and settle a controversy, arising out of a labor dispute, such as a strike, must have the proper qualifications and ability for the performance of such duties,[1] and the removal of an arbitrator, so appointed, is within the discretion of the court.[2] It is not sufficient to justify his appointment that he possess honesty and integrity, if he has evinced a course of conduct showing an ardor of advocacy for the cause of labor;[3] and, where such fact is established, the court, which appointed the arbitrator, may declare the office of arbitration vacant and appoint a successor arbitrator, on the motion of the employer.[4]

Common-law arbitration. Under an agreement between a union and an employers' association which on behalf of its members agrees to submit disputes thereunder to an impartial chairman, the union may compel an employer member which has breached the agreement to submit to a common-law arbitration.[5] Where an agreement between a union and an employer expressly grants to each employee the right to have arbitrated the question whether, by being discharged, he was unjustly discriminated against, a discharged employee, as a third party beneficiary, may maintain a proceeding to require the employer to arbitrate the question of discrimination,[6] and, unless required by statute, he is not required to deposit security for costs as a condition of obtaining an order against the employer directing arbitration.[7]

§ 28(74). Jurisdiction

a. In general
b. Under National Labor Relations Act
c. Under Railway Labor Act

a. In General

Jurisdiction to adjust controversies arising under the various labor relations acts is generally vested, in the first instance, in a labor relations board or commission, created by the statute.

Jurisdiction to adjust a labor dispute, or enforce a right, arising under the various labor relations acts is generally vested, in the first instance, in a labor relations board or commission.[8] A state labor board has been held to have jurisdiction of a case dealing with a resident employer and resident employees, for a violation of the state statute,[9] notwithstanding the employer also has employees residing outside the state.[10] A labor board, which has no jurisdiction to proceed further with a complaint than to decide that it has no jurisdiction of the subject matter has jurisdiction to make that decision.[11]

C.A.Ill., 132 F.2d 265, reversed on other grounds 64 S.Ct. 413, 321 U.S. 50, 88 L.Ed. 534, 150 A.L.R. 810.

94. U.S.—Toledo, P. & W. R. R. v. Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, supra.

95. U.S.—Toledo, P. & W. R. R. v. Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, supra.

96. Pa.—Goldstein v. International Ladies' Garment Workers' Union 196 A. 43, 328 Pa. 385.

97. Pa.—Goldstein v. International Ladies' Garment Workers' Union, supra.

98. Pa.—Goldstein v. International Ladies' Garment Workers' Union, supra.

99. Wash.—Gord v. F. S. Harmon & Co., 61 P.2d 1294, 188 Wash. 134.

1. N.Y.—W. U. Tel. Co. v. Selly, 60 N.Y.S.2d 411, affirmed 61 N.Y. S.2d 911, 270 App.Div. 839, affirmed 68 N.E.2d 183, 295 N.Y. 395.

2. N.Y.—W. U. Tel. Co. v. Selly, 68 N.E.2d 183, 295 N.Y. 395.

3. N.Y.—W. U. Tel. Co. v. Selly, 60 N.Y.S.2d 411, affirmed 61 N.Y.S.2d 911, 270 App.Div. 839, affirmed 68 N.E.2d 183, 295 N.Y. 395.

4. N.Y.—W. U. Tel. Co. v. Selly, supra.

5. Pa.—Goldstein v. International Ladies' Garment Workers' Union, 196 A. 43, 328 Pa. 385.

6. N.J.—Fagliarone v. Consolidated Film Industries, 26 A.2d 425, 20 N. J.Misc. 193, affirmed 36 A.2d 297, 131 N.J.Law 315.

7. N.J.—Fagliarone v. Consolidated Film Industries, supra.

8. Utah.—Teamsters Local Union No. 222 v. Strevell-Paterson Hardware Co., 174 P.2d 164.
Wis.—International Brotherhood of Electrical Workers, Local No. 953, A. F. L. v. Wisconsin Employment Relations Board, 15 N.W.2d 823, 245 Wis. 532.

9. Wis.—International Brotherhood of Electrical Workers, Local No. 953, A. F. L. v. Wisconsin Employment Relations Board, supra.

10. Wis.—International Brotherhood of Electrical Workers, Local No. 953, A. F. of L., v. Wisconsin Employment Relations Board, supra.

11. Utah.—Furbreeders Agricultural Cooperative v. Wiesley, 132 P.2d 384, 102 Utah 601.

Exclusiveness. Unless otherwise provided by the statute, the jurisdiction of such board, within the limits of the powers conferred on it, is generally exclusive,[12] and the exercise of its powers, under such jurisdiction, is not subject to the action of the courts,[13] except, as discussed infra § 28 (122), for and in enforcing its orders or for a review of such orders. It has been held that a state labor board does not have exclusive jurisdiction over a contract between a trade union and an employer, adjusting a controversy over charges of unfair labor practices by the employer,[14] as against the jurisdiction of the proper court to afford full protection to the parties to the contract,[15] and that to give exclusive jurisdiction of the board in such a case would be against public policy.[16]

b. Under National Labor Relations Act

Under the provisions of the National Labor Relations Act, the National Labor Relations Board has jurisdiction, unaffected by state statutes or decisions, or by private agreements, over all labor disputes affecting interstate commerce. Within the limits of the act, this jurisdiction is generally exclusive, as against the courts and state labor relations boards.

The National Labor Relations Act establishes a general and uniform jurisdiction over labor relations in the National Labor Relations Board,[17] and this jurisdiction may not be varied or denied by state statutes[18] or decisions[19] or by an agreement between private parties.[20] The jurisdiction of the board over a labor dispute depends on the facts existing at the time of the dispute,[21] and continues as long as the relation of employer and employee continues.[22] It may take jurisdiction of a dispute, notwithstanding the dispute originated prior to the passage of the statute, if the board's action is based on acts which occurred after the effective date of the statute.[23] Any objection to the jurisdiction of the board should, in the first instance, be addressed to the board.[24]

Elements of jurisdiction; interstate commerce. The jurisdiction of the National Labor Relations Board attaches, and is restricted, to labor disputes affecting interstate commerce,[25] since the National Labor Relations Act applies only to such commerce,

12. N.Y.—Domanick v. Triboro Coach Corporation, 18 N.Y.S.2d 650.
Pa.—Western Pennsylvania Hospital v. Lichliter, 17 A.2d 206, 340 Pa. 382, 132 A.L.R. 1146—In re Lehrman, Com.Pl., 52 Dauph.Co. 1—Pennsylvania Labor Relations Bd. v. Yellow Cab & Bus Co., 30 North.Co. 9.

13. Pa.—Western Pennsylvania Hospital v. Lichliter, 17 A.2d 206, 340 Pa. 382, 132 A.L.R. 1146—Pennsylvania Labor Relations Bd. v. Yellow Cab & Bus Co., 30 North.Co. 9.
Right to resort to courts in general see supra § 28 (71) a.

14. N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, 14 N.Y.S.2d 74, 257 App.Div. 501.

15. N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, supra.

16. N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union, Local 221, supra.

17. U.S.—N. L. R. B. v. Blount, C. C.A.8, 131 F.2d 585, certiorari denied Blount v. N. L. R. B., 63 S. Ct. 995, 318 U.S. 791, 87 L.Ed. 1157.

Landlord and tenant
National Labor Relations Board possesses no jurisdiction over the relationship of landlord and tenant since its jurisdiction is limited to labor conditions and practices.—Mackey v. U. S. Coal & Coke Co., 200 S.W.2d 755, 304 Ky. 334.

18. U.S.—N. L. R. B. v. Blount, C. C.A.8, 131 F.2d 585, certiorari denied Blount v. N. L. R. B., 63 S.Ct. 995, 318 U.S. 791, 87 L.Ed. 1157.

19. U.S.—N. L. R. B. v. Blount, C. C.A.8, 131 F.2d 585, certiorari denied Blount v. N. L. R. B., 63 S.Ct. 995, 318 U.S. 791, 87 L.Ed. 1157.

20. U.S.—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F.2d 44, certiorari denied 65 S.Ct. 1025, 324 U.S. 877, 89 L.Ed. 1429—N. L. R. B. v. General Motors Corporation, C.C.A.7, 116 F.2d 306.
Mass.—Sanford v. Boston Edison Co., 64 N.E.2d 631, 319 Mass. 55.

21. U.S.—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539.

22. U.S.—Jeffery-De Witt Insulator Co. v. N. L. R. B., C.C.A.4, 91 F.2d 134, certiorari denied 58 S.Ct. 55, 302 U.S. 731, 82 L.Ed. 565.

Effect of strike
(1) The National Labor Relations Board has been held authorized to take jurisdiction of labor dispute between employer and union, notwithstanding union members continued to strike after resumption of operations and after date when employees desiring to work were required to go to work.—Jeffery-De Witt Insulator Co. v. N. L. R. B., supra.

(2) Who are employees within meaning of labor relations statutes generally see supra §§ 28 (11)–28 (13).

23. U.S.—Jeffery-De Witt Insulator Co. v. National Labor Relations Board, supra.

24. U.S.—Thompson Products v. N. L. R. B., C.C.A.6, 133 F.2d 637.

25. U.S.—N. L. R. B. v. Bradford Dyeing Ass'n, 60 S.Ct. 918, 310 U. S. 318, 84 L.Ed. 1226—N. L. R. B. v. Edinburg Citrus Ass'n, C.C.A., 147 F.2d 353—Loveman, Joseph & Loeb v. N. L. R. B., C.C.A.5, 146 F.2d 769—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A., 122 F. 2d 433—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780—N. L. R. B. v. Idaho-Maryland Mines Corporation, C.C.A.9, 98 F.2d 129—N. L. R. B. v. Washington, Virginia & Maryland Coach Co., C.C.A., 85 F.2d 990, affirmed Washington, Virginia & Maryland Coach Corporation v. N. L. R. B., 57 S.Ct. 112, 299 U.S. 533, 81 L.Ed. 392, affirmed 57 S.Ct. 648, 301 U.S. 142, 81 L.Ed. 965.
Wash.—Bloedel Donovan Lumber Mills, v. International Woodworkers of America, Local No. 46, 102 P.2d 270, 4 Wash.2d 62.

"Commerce," as defined in National Labor Relations Act § 2, 29 U.S.C.A. § 152, extending jurisdiction of National Labor Relations Board only to unfair labor practices affecting commerce, aside from that in a territory or District of Columbia, is interstate and foreign commerce in the constitutional sense.—N. L. R. B. v. Idaho-Maryland Mines Corp., C.C. A.9, 98 F.2d 129.

Utility's interstate business
Where unitary character of utility's business had resulted in organization of a single association of its employees, and strife affecting interstate commerce would be avoided

as discussed supra § 28 (2) b. It is the duty of the board, at the beginning of a proceeding before it, to decide whether the dispute is one which affects commerce,[26] and it is error for the board to fail to make such decision on the ground that the facts were not sufficiently developed and then deny a petition for leave to adduce additional evidence.[27] The board's jurisdiction, however, is not limited to cases in which the labor disputes, strikes, or lockouts in question have the necessary effect of impairing, burdening, or obstructing commerce, but may attach where there is a reasonable probability of interference with interstate commerce;[28] but if the case is one in which the employer is not itself engaged in interstate commerce, justification for the exercise of the jurisdiction of the board, because of intra-state activities, should clearly appear.[29] No restrictions on the board's jurisdiction are to be determined or fixed exclusively by reference to the volume of interstate commerce involved, except in so far as the maxim de minimis applies.[30]

Jurisdictional disputes. It has been held that a jurisdictional dispute between members of the same labor organization must be decided by such organization, and not by the National Labor Relations Board.[31]

Exclusiveness of jurisdiction. Except as otherwise provided by statute, the jurisdiction of the National Labor Relations Board with respect to hearing and determining labor disputes, to the extent that such jurisdiction is conferred on it by the National Labor Relations Act, is generally exclusive,[32] and an order of the board deprives a state court of jurisdiction as to the same subject matter.[33] Where, however, the dispute is essentially one between the members of a labor union and certain individual workers, and the employer is made a party solely

only if rights of all employees were properly safeguarded, the gas and transportation businesses of the utility as well as its interstate electrical business were subject to jurisdiction of the board.—Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 115 F.2d 414, reversed on other grounds 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348.

26. U.S.—Jacobsen v. N. L. R. B., C.C.A.3, 120 F.2d 96—Remington Rand v. Lind, D.C.N.Y., 16 F.Supp. 666.

Jurisdiction sustained by findings

The board has jurisdiction of proceeding if any of its findings concerning effect of labor dispute on interstate commerce is sustained by substantial evidence.—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780.

27. U.S.—Jacobsen v. N. L. R. B., C.C.A.3, 120 F.2d 96.

28. U.S.—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U.S. 751, 87 L.Ed. 1705—N. L. R. B. v. Rath Packing Co., C.C.A.8, 115 F.2d 217.

Pa.—Pittsburgh Rys. Co. Substation Operators and Maintenance Employees Case, 54 A.2d 891, 357 Pa. 379.

Actual stoppage or impairment of commerce is not required, but once the practices which congress has declared as having necessary effect of impairing, burdening, or obstructing commerce are shown to take place in an industry whose products enter interstate commerce in substantial degree, the board is empowered to correct them.—N. L. R. B. v. American Potash & Chemical Corporation, C.C.A.9, 98 F.2d 488, certiorari denied American Potash & Chemical Corporation v. N. L. R. B., 59 S.Ct. 582, 306 U.S. 643, 83 L.Ed. 1043.

Before strike

Jurisdiction of the board may attach before actual industrial strike materializes to obstruct commerce.—N. L. R. B. v. J. L. Hudson Co., C.C.A.6, 135 F.2d 380, certiorari denied J. L. Hudson Co. v. N. L. R. B., 64 S.Ct. 40, 320 U.S. 740, 88 L.Ed. 439.

Industries within rule

Jurisdiction of the National Labor Relations Board extends not merely to those industries directly engaged in interstate commerce or in production or manufacture of goods destined to use interstate channels for distribution, but also to those which, admittedly local and intra-state, have a close and substantial relation to interstate commerce and whose regulation is necessary to maintain conditions under which interstate commerce may be conducted without hinderance.—Pittsburgh Rys. Co. Substation Operators and Maintenance Employees Case, 54 A.2d 891, 357 Pa. 379.

29. Pa.—Pittsburgh Rys. Co. Substation Operators and Maintenance Employees Case, supra.

Propriety of exercise of jurisdiction

Where employers are not themselves engaged in interstate or foreign commerce, and the authority of the National Labor Relations Board is invoked to protect that commerce from interference arising from employers' intra-state activities, the question whether alleged unfair labor practices actually threaten interstate or foreign commerce in any substantial manner is presented and question would relate not to the existence of the federal power but to the propriety of its exercise on a given state of facts.—Pittsburgh Rys. Co. Substation Operators and Maintenance Employees Case, supra.

30. U.S.—N. L. R. B. v. Fainblatt, 59 S.Ct. 668, 306 U.S. 601, 307 U.S. 609, 83 L.Ed. 1014.

31. U.S.—California State Brewers' Institute v. International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers, D.C.Cal., 19 F.Supp. 824.

32. U.S.—Sanco Piece Dye Works v. Herrick, D.C.N.Y., 33 F.Supp. 80.

N.Y.—Lane Lifeboat & Davit Emp. Ass'n v. Lane Lifeboat & Davit Corp., 54 N.Y.S.2d 55, 184 Misc. 1041.

Or.—Stone Logging & Contracting Co. v. International Woodworkers of America, Columbia District Council No. 5, 135 P.2d 759, 171 Or. 13.

Pa.—In re Abbotts Dairies, 19 A.2d 128, 341 Pa. 145.

Judicial remedies under act generally see supra § 28 (7) b.

33. N.Y.—Lane Lifeboat & Davit Emp. Ass'n v. Lane Lifeboat & Davit Corp., 54 N.Y.S.2d 55, 184 Misc. 1041.

Disestablishment of union

Where National Labor Relations Board had directed employer to disestablish a company union, such order deprived the state supreme court of jurisdiction of issues raised in action by company union against employer to recover union dues allegedly collected by employer under check-off system.—Lane Lifeboat & Davit Emp. Ass'n v. Lane Lifeboat & Davit Corp., supra.

to render effective any order issued with respect to the union defendants, the board does not have exclusive jurisdiction,[34] and a state court may have jurisdiction of the dispute.[35] Where suit is brought in a state court, in the belief that the employer is engaged exclusively in intra-state commerce, and representatives of the board voluntarily participate in the proceedings, the board cannot avoid the jurisdiction of the state court by instituting new proceedings beyond the reach of such court.[36]

Conflicting jurisdiction of boards. Where the dispute affects interstate commerce, the National Labor Relations Board has jurisdiction as against a state labor relations board,[37] and this is true under the express provisions of some of the state statutes.[38] Under a state labor relations act, containing practically the same provisions as the National Labor Relations Act, the state labor relations board has jurisdiction to administer the provisions of the state act,[39] until the National Labor Relations Board takes jurisdiction of the particular controversy, under the identical provisions of the federal statute;[40] but the fact that the federal board takes jurisdiction for one matter, such as with respect to the election or appointment of a bargaining agent, does not deprive the state board of jurisdiction of a different controversy.[41]

Loss of jurisdiction. Under a statute providing that a corporation whose charter has expired shall continue for a designated period of time for the purpose of prosecuting and defending suits, and settling up its affairs, if the board has acquired jurisdiction over a corporate employer, it does not lose that jurisdiction by reason of the fact that, before a decision and order, the corporate employer's charter has expired.[42] The board also does not lose jurisdiction by the fact that the person who filed the charge had ceased working for the employer and had ceased to be an officer in the union which was the authorized bargaining agent, before the filing of the charge.[43]

c. Under Railway Labor Act

The National Railway Adjustment Board has jurisdiction to adjust disputes with respect to the enforcement of contracts between a railroad company and its employees. The National Mediation Board has no power of enforcement of such contracts, but is limited to matters in dispute which are purely questions of mediation.

Under the Railway Labor Act of May 20, 1926 c 347 § 1 et seq, as amended by later acts, 45 U.S.C.A. § 151 et seq, the National Railroad Adjustment Board has jurisdiction only of disputes, submitted to it for settlement, between a railroad on the one side and a union or its employees on the other side,[44] with respect to the enforcement of contracts

34. Cal.—James v. Marinship Corp., 155 P.2d 329, 25 Cal.2d 721, 160 A.L.R. 900.

35. Cal.—James v. Marinship Corp., supra.

36. U.S.—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786.

37. U.S.—N. L. R. B. v. Algoma Net Co., C.C.A.7, 124 F.2d 730, certiorari denied Algoma Net Co. v. N. L. R. B., 62 S.Ct. 1311, 316 U. S. 706, 86 L.Ed. 1773.

Interstate commerce admitted

Where employer admittedly was engaged in interstate commerce and record did not disclose the nature of charges filed before a state labor relations board, and no charges or disposition of the matter by the state board appeared, the National Labor Relations Board had jurisdiction.—N. L. R. B. v. Algoma Net Co., C.C.A. 7, 124 F.2d 730, certiorari denied Algoma Net Co. v. N. L. R. B., 62 S.Ct. 1311, 316 U.S. 706, 86 L.Ed. 1773.

38. Mass.—Hathaway Bakeries v. Labor Relations Commission, 55 N.E.2d 254, 316 Mass. 136.

Pa.—In re Abbotts Dairies, 19 A.2d 128, 341 Pa. 145.

The state board has no jurisdiction, under such a statute, to entertain a petition for certification of bargaining agency where parties in question are subject to the federal act.—Hathaway Bakeries v. Labor Relations Commission, 55 N.E.2d 254, 316 Mass. 136.

39. Wis.—International Union, United Automobile, Aircraft & Agricultural Implement Workers of America v. Wisconsin Employment Relations Board, 14 N.W.2d 872, 245 Wis. 417, followed in 14 N.W.2d 882, 245 Wis. 439, rehearing denied 15 N.W.2d 873, 245 Wis. 417, certiorari dismissed 65 S.Ct. 685, 324 U.S. 884, 89 L.Ed. 1434—Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 279 N.W. 673, 228 Wis. 473, 117 A.L.R. 398.

40. Wis.—International Union, United Automobile, Aircraft & Agricultural Implement Workers of America v. Wisconsin Employment Relations Board, 14 N.W.2d 872, 245 Wis. 417, followed in 14 N.W.2d 882, 245 Wis. 439, rehearing denied 15 N.W.2d 873, 245 Wis. 417, certiorari dismissed 65 S.Ct. 685, 324 U.S. 884, 89 L.Ed. 1434.

41. Wis.—International Union, United Automobile, Aircraft & Agricultural Implement Workers of America v. Wisconsin Employment Relations Board, supra—Christoffel v. Wisconsin Employment Relations Board, 10 N.W.2d 197, 243 Wis. 332.

42. U.S.—N. L. R. B. v. Timken Silent Automatic Co., C.C.A.2, 114 F. 2d 449.

Construction of statute

A statute relating to the winding up of dissolved corporations is remedial and should be construed to prevent loss of jurisdiction by the National Labor Relations Board through the dissolution of a corporate respondent.—N. L. R. B. v. Timken Silent Automatic Co., supra.

43. U.S.—Marlin-Rockwell Corporation v. N. L. R. B., C.C.A.2, 133 F.2d 258.

44. U.S.—Order of Ry. Conductors of America v. Pitney, N.J., 66 S. Ct. 322, 326 U.S. 561, 90 L.Ed. 318, rehearing denied 66 S.Ct. 525, 327 U.S. 814, 90 L.Ed. 1038—Malone v. Gardner, C.C.A.W.Va., 62 F.2d 15—Texas & P. Ry. Co. v. Brotherhood of R. Trainmen, D.C.La., 60 F.Supp. 263.

Ind.—Long v. Van Osdale, App., 26 N.E.2d 69, superseded on other grounds 29 N.E.2d 953, 218 Ind. 483.

Miss.—Stephenson v. New Orleans & N. E. R. Co., 177 So. 509, 180 Miss. 147.

between the railroad company and its employees,[45] which disputes, at least in part, have arisen after the effective date of the act.[46] This jurisdiction extends to disputes between a carrier and employees who are not members of a union.[47] If the dispute in question is not a "labor dispute," within the meaning of the statute, a court, rather than the administrative agencies, has jurisdiction.[48] The adjustment board has jurisdiction of jurisdictional disputes between a railroad and unions,[49] but not of such disputes between two groups of employees of the same employer,[50] or between rival unions of railroad employees.[51] The adjustment board's jurisdiction over disputes between employees and the carrier as to contract rights is not exclusive.[52]

Divisional jurisdiction. Under the Railway Labor Act § 3 subd 1 (h), 45 U.S.C.A. § 153 1 (h), the adjustment board is composed of four divisions, whose proceedings are independent of one another, and each division has jurisdiction over disputes involving particular classes of employees. The first division has jurisdiction over disputes involving train- and yard-service employees of carriers.[53] The fourth division has jurisdiction over disputes involving all other employees of carriers over which jurisdiction is not given to either of the other three divisions.[54]

System, group, or regional boards. Where, as provided by the Railway Labor Act § 153, Second, 45 U.S.C.A. § 153, Second, a system, group, or regional board of adjustment is established, by agreement between a carrier, system, or group of carriers and any class or classes of its or their employees, for the purpose of local settlement of disputes, such board, as long as it exists, has exclusive jurisdiction over all disputes, within the act, referred to it,[55] and, in such a case, the National Railroad Adjustment Board has

Seniority rights

A controversy between labor union and railroad having inception because of divergent views relative to interpretation of employment contract as to machinist's seniority status was a "dispute between a carrier and a group of its employees" within Railway Labor Act giving jurisdiction of such disputes to National Railroad Adjustment Board and the fact that railroad, without an enforcement suit, was willing to comply with board's award sustaining union's position and complied with award after temporary injunction in favor of machinist was dissolved did not deprive board of jurisdiction.—Watson v. Missouri-Kansas-Texas R. Co. of Texas, Tex.Civ.App., 173 S.W.2d 357.

45. U.S.—Order of Railroad Telegraphers v. Railway Express Agency, D.C.Ga., 55 F.Supp. 319, reversed on other grounds, C.C.A., 137 F.2d 46, reversed on other grounds 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788—Cook v. Des Moines Union Ry. Co., D.C.Iowa, 16 F.Supp. 810.

One complaint in respect of one railroad agent for one year was sufficient to constitute a "pending and unadjusted complaint" as to rights under contract with railroad so as to give jurisdiction.—Railway Labor Exp. Agency v. Order of Railroad Telegraphers, C.C.A.Ga., 137 F.2d 46, reversed on other grounds 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788.

Computation of wages

A dispute between a brotherhood and railroad as to the question whether the cost of board furnished extra gang laborers in the maintenance of way department should be included in computation of wages paid for purpose of determining compliance with wage order pursuant to Fair Labor Standards Act promulgated after collective bargaining contract fixed a lower rate was properly submitted to National Railroad Adjustment Board.—Brotherhood of Maintenance of Way Employees v. Nashville, C. & St. L. Ry., D.C.Tenn., 56 F.Supp. 559.

The adjustment board is not deprived of jurisdiction by the dismissal of a proceeding involving a contract dispute before mediation board, and refiling of proceedings before the adjustment board.—Cook v. Des Moines Union Ry. Co., D.C.Iowa, 16 F.Supp. 810.

46. U.S.—Railway Labor Express Agency v. Order of Railroad Telegraphers, C.C.A.Ga., 137 F.2d 46, reversed on other grounds 64 S. Ct. 582, 321 U.S. 342, 88 L.Ed. 788.
Miss.—Stephenson v. New Orleans & N. E. R. Co., 177 So. 509, 180 Miss. 147.

47. U.S.—Patterson v. Chicago & Eastern Illinois R. Co., D.C.Ill., 50 F.Supp. 334.

48. U.S.—Texas & P. Ry. Co. v. Brotherhood of R. Trainmen, D.C. La., 60 F.Supp. 263.

49. U.S.—Conductors of America v. Pitney, N.J., 66 S.Ct. 322, 326 U.S. 561, 90 L.Ed. 318, rehearing denied 66 S.Ct. 525, 327 U.S. 814, 90 L.Ed. 1038.

50. U.S.—Malone v. Gardner, C.C.A. W.Va., 62 F.2d 15—Texas & P. Ry. Co. v. Brotherhood of R. Trainmen, D.C.La., 60 F.Supp. 263.
Ind.—Long v. Van Osdale, 26 N.E.2d 69, superseded on other grounds 29 N.E.2d 953, 218 Ind. 483.
Miss.—Stephenson v. New Orleans & N. E. R. Co., 177 So. 509, 180 Miss. 147.

51. U.S.—General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R. R. v. Missouri-Kansas-Texas R. Co., Tex., 64 S. Ct. 146, 320 U.S. 323, 88 L.Ed. 76—Order of R. R. Telegraphers v. New Orleans, T. & M. Ry. Co., C.C.A.Mo., 156 F.2d 1, certiorari denied 67 S.Ct. 112, rehearing denied 67 S. Ct. 201.

52. U.S.—Illinois Central R. Co. v. Moore, C.C.A.Miss., 112 F.2d 959, reversed on other grounds 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.
Ga.—Evans v. Louisville & N. R. Co., 12 S.E.2d 611, 191 Ga. 395.

53. U.S.—Order of Ry. Conductors of America v. Swan, Ill., 67 S.Ct. 405.

Yardmasters are not "yard-service employees" within the jurisdiction of this division.—Order of Ry. Conductors of America v. Swan, supra.

54. U.S.—Order of Ry. Conductors of America v. Swan, supra.

Yardmaster disputes fall exclusively within the "catch-all" jurisdiction of the fourth division of the board.—Order of Ry. Conductors of America v. Swan, supra.

55. U.S.—Atlantic Coast Line R. Co. v. Pope, C.C.A.N.C., 119 F.2d 39—Primakow v. Railway Exp. Agency, D.C.Wis., 56 F.Supp. 413.
Tex.—Galveston, H. & S. A. Ry. Co. v. Eubanks, Civ.App., 42 S.W.2d 475, affirmed Eubanks v. Galveston, H. & S. A. Ry. Co., Com.App., 59 S.W.2d 825.

Railroad and shopmen's association

Where railroad and shopmen's association, which represented a majority of employees, agreed to establish system board of adjustment, the system board of adjustment had ex-

no jurisdiction;[56] nor has an aggrieved employee the right to elect to take his case either to the system board or the national board at his pleasure.[57] If, however, either party to such arrangement is dissatisfied therewith, it may, on ninety days' notice to the other party, elect to come under the jurisdiction of the National Adjustment Board.[58]

National Mediation Board. The National Mediation Board, as provided for by the Railway Labor Act, 45 U.S.C.A. §§ 154, 155, has no power of enforcement of contracts,[59] but is limited to questions which cannot be enforced by judicial proceedings,[60] and its jurisdiction may be invoked only where the matters in dispute are purely questions of mediation,[61] such as questions arising as to the formation of contracts.[62] It does not have jurisdiction to consider a controversy involving the rivalry between two groups of employees who are all members of the same union and a faction which is asserting that its constitutional rights have been violated within the union.[63]

§ 28(75). Conditions Precedent

a. In general
b. Charges

a. In General

As a general rule there must be a compliance with the requirements of the contract or statute involved before an administrative proceeding or an action at law may be instituted thereunder.

Any requirement of the contract between the union and the employer, or of the statute, under which the administrative proceeding or action at law is instituted, which is in the nature of a condition precedent, must be complied with before such a proceeding may be instituted before the labor relations board,[64] or before an action at law may be brought,[65] as the case may be, unless performance of the condition has been waived by defendant, or unless he is estopped to complain of its nonperformance.[66] A contract provision that a discharged employee may appeal to successive designated tribunals for a determination of his grievances, and have a reinstatement if the final decision of such tribunal sustains his contention, does not give him a right of action unless the tribunal finds that he was unjustly discharged,[67] and, although there is authority to the contrary,[68] the employee cannot properly complain to the courts for redress until he exhausts his remedy, before such tribunal, and shows an effective appeal entitling him to reinstatement and compensation for wages lost,[69] and, moreover, his failure to make such an appeal, at any stage of the proceedings, will constitute a waiver of his right to do so.[70] Under a contract requiring an employee first to seek adjustment of his grievance, not involving the construction of the terms of the agreement, with the foreman under whom he was employed, the employee may apply to the courts for the construction of certain words of the contract, without first applying to his foreman for such construction.[71] Where, however, the right asserted by an employee is in the nature of a property right, he is not required to exhaust the remedies provided for in the contract between the employer and the union, before seeking relief by way of damages in a court;[72] nor does an adverse decision against the employee in partially

clusive jurisdiction regardless of whether the employees were members of shopmen's association.—Atlantic Coast Line R. Co. v. Pope, C.C.A.N.C., 119 F.2d 39.

56. U.S.—Atlantic Coast Line R. Co. v. Pope, supra.

57. U.S.—Atlantic Coast Line R. Co. v. Pope, supra.

58. U.S.—Atlantic Coast Line R. Co. v. Pope, supra.

59. U.S.—Cook v. Des Moines Union Ry. Co., D.C.Iowa, 16 F.Supp. 810.

60. U.S.—Cook v. Des Moines Union Ry. Co., supra.

Definition of employees is not within authority of National Mediation Board.—National Council of Ry. Patrolmen's Unions, A. F. of L., v. Sealy, C.C.A.Tex., 152 F.2d 500.

61. U.S.—Cook v. Des Moines Union Ry. Co., D.C.Iowa, 16 F.Supp. 810.

62. U.S.—Cook v. Des Moines Union Ry. Co., supra.

63. U.S.—Texas & P. Ry. Co. v. Brotherhood of R. Trainmen, D.C. La., 60 F.Supp. 263.

64. Tex.—Cousins v. Pullman Co., Civ.App., 72 S.W.2d 356.

65. U.S.—Sanders v. Louisville & N. R. Co., C.C.A.Tenn., 144 F.2d 485—Smith v. Texas & N. O. R. Co., D.C.La., 32 F.Supp. 1013.

Exhaustion of administrative remedies see supra § 28 (71) b.

Pullman porter who failed to pursue remedies under plan of employee representation, as provided in agreement between company and porters, could not maintain action for wrongful discharge.—Harrison v. Pullman Co., C.C.A.Mo., 68 F.2d 826.

66. Minn.—George v. Chicago, R. I. & P. Ry. Co., 237 N.W. 876, 183 Minn. 610.

Tenn.—Cross Mountain Coal Co. v. Ault, 9 S.W.2d 692, 157 Tenn. 461.

Failure to present grievances in writing, as required by the rules of an employer railroad company, may not be complained of by the railroad, where it had not raised any objection thereto on the hearing of the grievances.—George v. Chicago, R. I. & P. Ry. Co., 237 N.W. 876, 183 Minn. 610.

67. Tex.—Cousins v. Pullman Co., Civ.App., 72 S.W.2d 356.

68. Miss.—Tri-State Transit Co. of Louisiana v. Rawls, 1 So.2d 497, 191 Miss. 573—Moore v. Illinois Cent. R. Co., 176 So. 593, 180 Miss. 276.

69. Mo.—Reed v. St. Louis Southwestern R. Co., App., 95 S.W.2d 887.

Tex.—Swilley v. Galveston, H. & S. A. Ry. Co., Civ.App., 96 S.W.2d 105, error dismissed—Cousins v. Pullman Co., Civ.App., 72 S.W.2d 356.

70. Tex.—Cousins v. Pullman Co., supra.

71. Okl.—Sinclair Prairie Oil Co. v. Dose, 118 P.2d 210, 189 Okl. 569.

72. Tenn.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App.

availing himself of those remedies preclude a resort to the courts for damages.[73] Where the constitution and by-laws of a union are not made a part of an employee's contract with his employer, the failure of the employee to pursue remedies afforded by the constitution and by-laws does not preclude him from resorting to the courts for a breach of the employment contract.[74] Where an employee must be a member of the union in order to retain his job, and where an employee is discharged on the ground that he is not a member of the union in good standing, the employee need not seek further relief in the union before resorting to the court where the seeking of further relief within the union would be futile.[75]

Under the Railway Labor Act, 45 U.S.C.A. §§ 153 (i), 155 (*l*), relief must be sought through the highest operating officers of the railroad, as a condition precedent to proceeding before the adjustment board,[76] but not as a condition precedent to a suit in court.[77] Where, however, a dispute is carried through the various stages of the carrier's executive organization before it is filed with the mediation board, it is not necessary, after the dismissal of the case before such board, again to carry the proceedings through such stages, before filing it with the adjustment board.[78] An employee who contracts through an employees' association with a railroad company for the creation of a board to determine disputes pursuant to the Railway Labor Act must first present his grievances to such board before he may appeal to a law tribunal for redress of his wrongs,[79] unless such presentation, in accordance with the contract, is prevented by an act of the railroad company.[80] The failure of an employee to appeal, from an investigation by railroad officers, to higher officers of the railroad does not affect his right of action for a wrongful discharge, where there has not been a compliance with a rule requiring a verification of the record of such investigation by both parties.[81]

Appeal to higher officers of union. A union member is not required to exhaust his remedies within the union, as by appealing to higher officers, as a condition precedent to bringing an action against the union and his employer, for a breach of the contract between the union and the employer, where, under the circumstances, it would be unreasonable and a practical denial of justice to require him to do so.[82]

b. Charges

The filing of charges with the National Labor Relations Board is a condition precedent to the issuance of a complaint by such board.

Under the National Labor Relations Act § 10 b, 29 U.S.C.A. § 160 (b), and the rules and regulations of the board with respect thereto, 29 U.S.C.A.Appendix, §§ 203.7–203.10, the filing of a charge of unfair labor practices, with the National Labor Relations Board, by an informer, authorized to do so,[83] is a condition precedent to the issuance of a complaint,[84] and is jurisdictional.[85]

Under the rules and regulations of the National Labor Relations Board, 29 U.S.C.A.Appendix, §§ 203.8–203.10 the charge must be in writing,[86] must be sworn to before a notary public, an agent of the board, or any other person duly authorized to ad-

660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

73. Tenn.—Earle v. Illinois Cent. R. Co., supra.

74. Tenn.—Earle v. Illinois Cent. R. Co., supra.

75. N.Y.—O'Brien v. Papas, 49 N.Y. S.2d 521.

76. U.S.—Illinois Cent. R. Co. v. Moore, C.C.A.Miss., 112 F.2d 959, reversed on other grounds 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.

Conference with officials

Where employee conferred with railroad's officials with respect to his alleged wrongful discharge and they denied reinstatement, employee had done all that he was required to do before bringing dispute before National Railroad Adjustment Board.—Patterson v. Chicago & Eastern Ill. R. Co., D.C.Ill., 50 F.Supp. 334.

77. U.S.—Illinois Cent. R. Co. v. Moore, C.C.A.Miss., 112 F.2d 959, reversed on other grounds 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.

78. U.S.—Cook v. Des Moines Union Ry. Co., D.C.Iowa, 16 F.Supp. 810.

79. Ala.—Bell v. Western Ry. of Alabama, 153 So. 434, 228 Ala. 328, followed in Keller v. Western Ry. of Alabama, 153 So. 441, 228 Ala. 336.

80. S.C.—Youmans v. Charleston & W. C. Ry. Co., 178 S.E. 671, 175 S. C. 99.

Tex.—Mallehan v. Texas & P. Ry. Co., Civ.App., 87 S.W.2d 771, error dismissed.

Before judiciary committee

A discharged railway employee subject to employment contract giving employee right to appeal to general judiciary committee if not satisfied with disposition of grievance by minor officials has been held entitled to maintain action against railway company to enforce contractual rights where his appeal to committee was prevented by company which failed to submit case to committee or to appoint members as required by contract.—Mallehan v. Texas & P. Ry. Co., supra.

81. Miss.—Gulf & S. I. R. Co. v. McGlohn, 184 So. 71, 183 Miss. 465.

82. N.Y.—Dobkowski v. Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America, 1 N.Y.S.2d 774, 166 Misc. 277.

83. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., C.C.A.6, 124 F.2d 50, affirmed 63 S.Ct. 394, 317 U.S. 9, 87 L.Ed. 579—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F.2d 38.

84. U.S.—N. L. R. B. v. National Licorice Co., C.C.A.2, 104 F.2d 655, modified on other grounds 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799.

Complaint generally see infra § 28 (89).

85. U.S.—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F.2d 38—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 98 F.2d 97.

86. U.S.—N. L. R. B. v. Hopwood Retinning Co., supra.

minister oaths,[87] and must be filed with the regional director of the region in which the unfair labor practices have occurred or are occurring,[88] whereupon the regional director must serve on respondent a formal complaint stating the charges and containing a notice of hearing.[89] The charge filed with the board is not proof, and does not serve the purpose of a pleading, but merely sets in motion the machinery of an inquiry.[90] If the charge is withdrawn, the regional director must withdraw any complaint based thereon.[91]

§ 28(76). Time to Sue, Limitations, and Laches

In the absence of statute, the timeliness of an administrative proceeding before a labor relations board generally rests within the discretion of the board. Such a proceeding, however, as well as an action at law for the protection or enforcement of rights, may be barred by laches, if it is not prosecuted with due diligence.

Where the labor statute fixes no time limitation within which charges must be filed, it may not be contended that the labor relations board has not exercised due diligence in prosecuting the complaint.[92] The timeliness of a charge, under such a statute, is within the board's discretion,[93] and its failure to dismiss a complaint based on charges filed long after the occurrences complained of, without pointing out the unfair effect of the delay, does not constitute an abuse of discretion.[94] The rider attached to the National Labor Relations Board's appropriation act of 1944, prohibiting the use of the funds in connection with a "complaint case," arising over an agreement between management and labor, which has been in existence for at least three months without a complaint, has been held to put a limitation on proceedings, involving such matter, before the board.[95] A state statute of limitations does not restrict the power of a federal labor board to consider and adjust claims.[96]

Under the Railway Labor Act § 3, Second, 45 U.S.C.A. § 153, Second, a railroad and its employees, in agreeing to the establishment of a system board of adjustment, may fix a reasonable limitation on the time within which the board's jurisdiction may be invoked by appeal from a decision of the chief operating officer of a railroad.[97] Such limitation begins to run from the time the chief operating officer, designated to handle disputes, has rendered an adverse decision,[98] and, if the appeal is not taken within the time limited thereafter, the case is finally closed.[99]

Laches. If the complaint before the board involves the granting of affirmative relief, the case should be prosecuted to a conclusion with as much expedition as is reasonably practical,[1] and under some statutory provisions the controversy involved may become moot, if it is not adjusted within a designated period of time.[2] An employee's suit, such as for the restoration of seniority rights, may be barred by laches, if it is not prosecuted with due diligence.[3] An action by employees for an accounting and a determination of their status or relationship may also be barred by laches.[4]

87. U.S.—N. L. R. B. v. J. S. Popper, Inc., C.C.A.3, 113 F.2d 602, 603.

The purpose of such rule was that "the affiant might be prosecuted for perjury in case he made a willful misstatement in regard to a material matter."—N. L. R. B. v. J. S. Popper, Inc., supra.

Objection to amended charge because verified before commissioner in chancery, the attorney for the complaining labor union, has been overruled.—N. L. R. B. v. J. S. Popper, Inc., supra.

88. U.S.—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 98 F.2d 97.

89. U.S.—N. L. R. B. v. Hopwood Retinning Co., supra.

Notice and appearance generally see infra § 28 (87).

90. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

91. U.S.—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 98 F.2d 97.

92. U.S.—N. L. R. B. v. Wilson Line, C.C.A., 122 F.2d 809—Triplex Screw Co. v. N. L. R. B., C.C.A.6, 117 F.2d 858—N. L. R. B. v. Crowe Coal Co., C.C.A., 104 F.2d 633, certiorari denied Crowe Coal Co. v. N. L. R. B., 60 S.Ct. 107, 308 U.S. 584, 84 L.Ed. 489.

93. U.S.—N. L. R. B. v. Thompson Products, C.C.A.9, 141 F.2d 794.

94. U.S.—N. L. R. B. v. Thompson Products, supra.

95. U.S.—N. L. R. B. v. Thompson Products, supra.

Jurisdiction

The rider did not deprive the board of jurisdiction of proceeding against employer allegedly interfering with its employees' exercise of right to self-organization.—S. H. Camp & Co. v. N. L. R. B., C.C.A.6, 160 F.2d 519.

The purpose of such rider was the stabilization of labor conditions, particularly the elimination of jurisdictional disputes between unions.—N. L. R. B. v. Thompson Products, C.C.A.9, 141 F.2d 794.

96. U.S.—Order of Railroad Telegraphers v. Railway Express Agency, Ga., 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788.

97. U.S.—Atlantic Coast Line R. Co. v. Pope, C.C.A.N.C., 119 F.2d 39.

Sixty days held reasonable period

U.S.—Atlantic Coast Line R. Co. v. Pope, supra.

98. U.S.—Atlantic Coast Line R. Co. v. Pope, supra.

99. U.S.—Atlantic Coast Line R. Co. v. Pope, supra.

1. U.S.—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992.

2. Pa.—In re G. C. Murphy Co., 51 Pa.Dist. & Co. 535.

Controversy as to representation

Under a statutory provision that "any certification of representatives by the board shall be binding for a period of one year, or for a longer period if the contract so provides," a controversy as to the representation of employees by a labor organization becomes moot after the expiration of one year unless there is a contract of longer duration.—In re G. C. Murphy Co., supra.

3. Pa.—Madera v. Monongahela Ry. Co., 52 A.2d 329, 356 Pa. 460.

4. U.S.—Barnhart v. Western Mary-

Time to sue. Where a contract between a union and an employer is extended from time to time during negotiations for a new contract, but finally is erroneously rejected, without any justification, by the employer's representative, the union may sue immediately, as for an anticipatory breach,[5] or it may wait until an affirmative act, such as a refusal to perform a term of the contract, has occurred, and then sue for the breach.[6]

§ 28(77). Continuance

The continuance of a proceeding before a labor relations board generally rests within the discretion of the board or trial examiner.

In a proceeding before a labor relations board, such as the National Labor Relations Board, the matter of continuances rests within the discretion of the board or trial examiner,[7] and the exercise of that discretion should not be interfered with[8] unless it is clearly abused[9] or is prejudicial to the rights of the adverse party.[10]

§ 28(78). Stay

An action or proceeding may be stayed pending the determination of a jurisdictional dispute between rival unions; but ordinarily a stay will not be granted where the determination of an issue of fact is involved.

An action in court against or by an employer which involves a jurisdictional dispute between rival unions may be stayed pending a determination of such dispute by the proper board.[11] Where, however, the determination of an issue of fact is involved, a stay will not be granted,[12] such as a stay pending arbitration in accordance with the terms of an agreement between the parties, where such an issue is to be determined;[13] and under some statutes a stay pending arbitration will be refused where the application is not made until after the suit or proceeding is at issue.[14]

The respondent to an arbitration proceeding may be entitled to a stay thereof, where a question of law for determination by a court is presented;[15] and, where the arbitration is of disputes within the arbitration clause of an employment contract, a motion to stay the arbitration as to certain allegedly "non-arbitrable issues and matters" will be denied.[16] A stay of arbitration, however, under an arbitration clause of a collective bargaining agreement, may be denied to an employee who had knowledge of the agreement and that it was made for his benefit.[17] A stay may be denied subject to conditions imposed on respondent.[18] It has been held that the motion of an employer for a stay of arbitration proceedings be-

land Ry. Co., C.C.A.Md., 128 F.2d 709, certiorari denied 63 S.Ct. 75, 317 U.S. 671, 87 L.Ed. 538.

5. U.S.—In re Public Ledger, D.C. Pa., 63 F.Supp. 1008.

6. U.S.—In re Public Ledger, supra.

7. U.S.—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C.A.7, 121 F.2d 602—N. L. R. B. v. American Potash & Chemical Corporation, C.C.A.9, 98 F.2d 488, certiorari denied American Potash & Chemical Corporation v. National Labor Relations Board, 59 S.Ct. 582, 306 U.S. 643, 83 L.Ed. 1043.

Refusal held not error

U.S.—Jefferson Elec. Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949.

8. U.S.—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C.A.7, 121 F.2d 602.

9. U.S.—N. L. R. B. v. Algoma Plywood & Veneer Co., supra.

Discretion held not abused

U.S.—N. L. R. B. v. Algoma Plywood & Veneer Co., supra.

10. U.S.—Mississippi Valley Structural Steel Co. v. N. L. R. B., C.C.A.8, 145 F.2d 664.

Short postponement

Where employer, which had been charged with unfair labor practices, sought a short continuance because attorney, who was familiar with matter pending before board, was absent because of health, and there was nothing to indicate that short postponement would have prejudiced either the union or the board, denial of continuance was improper.—Mississippi Valley Structural Steel Co. v. N. L. R. B., supra.

11. U.S.—Order of Railway Conductors of America v. Pitney, N.J., 66 S.Ct. 322, 326 U.S. 561, 90 L.Ed. 318, rehearing denied 66 S.Ct. 525, 327 U.S. 814, 90 L.Ed. 1038—Order of R. R. Telegraphers v. New Orleans, T. & M. Ry. Co., C.C.A.Mo., 156 F.2d 1, certiorari denied 67 S. Ct. 112, 329 U.S. 758, 91 L.Ed. —, rehearing denied 67 S.Ct. 201, 329 U.S. 829, 91 L.Ed. —.

12. N.Y.—Winter v. Lefkowitz, 6 N.Y.S.2d 184.

13. N.Y.—Winter v. Lefkowitz, supra.

In employer's action against labor union for breach of contract not to strike, wherein union moved for order staying the action and compelling employer to arbitrate pursuant to contract, on ground that strike was warranted by employer's refusal to arbitrate dispute regarding reinstatement of employee, and affidavits were in conflict on whether such employee was dismissed or left employment voluntarily, such motion would not be granted, since there was a fact issue determinative of whether employer was relieved by unjustified strike from duty to arbitrate, or union was justified in calling strike by employer's failure to arbitrate.—Winter v. Lefkowitz, supra.

14. Pa.—Amberlavage v. Lehigh Valley Coal Co., Com.Pl., 8 Sch. Reg. 143.

15. N.Y.—Application of Graphite Metallizing Corp., 66 N.Y.S.2d 53, 271 App.Div. 839.

16. N.Y.—Freydberg Bros. v. Corey, 31 N.Y.S.2d 10, 177 Misc. 560, affirmed 32 N.Y.S.2d 129, 263 App. Div. 805, reargument denied 32 N. Y.S.2d 783, 263 App.Div. 858.

17. N.Y.—Sperling v. Newtown Laundry Service, 35 N.Y.S.2d 588, 264 App.Div. 878, appeal denied 37 N.Y.S.2d 438, 264 App.Div. 957.

Member of union

One who was a member of union of laundry workers and in the employ of laundry operator at the time contract containing arbitration clause was made, and who knew of the contract and that it was made by the union in his behalf as one of the members thereof and that his wages, hours, and other interests were served by provisions of contract, became bound thereby and was not entitled to an order staying arbitration proceedings under the contract.—Sperling v. Newtown Laundry Service, supra.

18. N.Y.—J. K. Welding Co. v. International Union of Marine and

tween him and an alleged successor to a local union, with which the employer had entered into a contract containing arbitration provisions, should be granted where there is an issue of fact concerning the existence and identification of such successor.[19] Where there is no question as to the making of, or compliance with, an arbitration clause in a contract of employment, questions raised on a motion for a stay of the arbitration are determinable solely by the arbitrators, and an order of court staying arbitration is erroneous.[20]

§ 28(79). Abandonment, Dismissal, or Termination; Reinstatement

It is within the discretion of a labor relations board to determine whether a proceeding instituted before it may be abandoned, or whether a complaint dismissed without prejudice to the right to reinstate it may be reinstated.

It is within the discretion of a labor relations board, such as the National Labor Relations Board, to determine whether a proceeding instituted before it may be abandoned,[21] and it does not abuse its discretion in refusing to dismiss charges because an amicable settlement has been made, in the absence of any evidence as to the terms of the settlement,[22] or in refusing to dismiss a proceeding to determine whether the discharge of an employee was an unfair labor practice,[23] notwithstanding a letter written to the regional director by the complaining labor union withdrawing its charge and requesting a dismissal of the complaint.[24] An action in court against an employer should not be dismissed pending the determination of a jurisdictional dispute between rival unions by the proper board.[25]

Termination. After a complaint has been filed, and the object of the complaint has been accomplished, the proceedings should be brought to an end,[26] but as the board itself, representing the government, is a party in interest any agreement between the parties settling their differences must have its approval.[27]

Reinstatement. If a complaint before a labor relations board is dismissed without prejudice to the right to reinstate it, the board may subsequently reinstate the cause and determine the issues on the testimony theretofore heard,[28] notwithstanding a considerable time has elapsed.[29]

§ 28(80). Witnesses

In hearings before labor relations boards, the board or the examiner has discretion with respect to the examination of witnesses.

In proceedings before labor relations boards, the board or the examiner is vested with discretion in the examination of witnesses.[30] In hearings before the National Labor Relations Board the strict rules which govern the examination of witnesses in trials at law have been held not to be applicable.[31] The board has the right of examination and cross-examination of witnesses.[32] The examiner has discretion with respect to permitting leading questions to be asked of a witness.[33] The return and further

Shipbuilding Workers of America, 62 N.Y.S.2d 742.

Stipulation by union

In proceeding for arbitration of controversies between company and union, where only issues to be arbitrated appeared to be those affecting discharge in violation of seniority clause of agreement and union expressed willingness to stipulate that union would not file unfair labor practice charges, motion for stay would be denied on condition that union so stipulated.—J. K. Welding Co. v. International Union of Marine and Shipbuilding Workers of America, supra.

19. N.Y.—Klinger v. J. S. Krum, Inc., 19 N.Y.S.2d 193, 259 App. Div. 309.

20. N.Y.—In re Arbitration between Pierce and Brown Buick Co., 17 N.Y.S.2d 889, 258 App.Div. 679, affirmed 28 N.E.2d 400, 283 N.Y. 669.

21. U.S.—N. L. R. B. v. Federal Engineering Co., C.C.A.6, 153 F.2d 233, rehearing denied 155 F.2d 17.

22. U.S.—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786.

23. U.S.—N. L. R. B. v. Federal Engineering Co., C.C.A.6, 153 F.2d 233, rehearing denied 155 F.2d 17.

24. U.S.—N. L. R. B. v. Federal Engineering Co., supra.

25. U.S.—Order of Railway Conductors of America v. Pitney, N.J., 66 S.Ct. 322, 326 U.S. 561, 90 L.Ed. 318, rehearing denied 66 S.Ct. 525, 327 U.S. 814, 90 L.Ed. 1038—Order of R. R. Telegraphers v. New Orleans, T. & M. Ry. Co., C.C.A.Mo., 156 F.2d 1, certiorari denied 67 S. Ct. 112, 329 U.S. 758, 91 L.Ed. —, rehearing denied 67 S.Ct. 201, 329 U.S. 829, 91 L.Ed. —.

26. U.S.—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786.

27. U.S.—N. L. R. B. v. Prettyman, supra.

28. U.S.—C. G. Conn, Limited, v. N. L. R. B., C.C.A.7, 108 F.2d 390.

29. U.S.—C. G. Conn, Limited v. N. L. R. B., supra.

30. U.S.—N. L. R. B. v Condenser Corporation of America, C.C.A.3, 128 F.2d 67.

**Refusal to permit questions concerning earnings of employees during period they were laid off until after determination of issue of discrimination was not an abuse of discretion; but, where order requiring reinstatement with back pay was required to be remanded for further investigation as to earnings, employer's right to cross-examine employees as to their earnings during period which they were laid off should be granted.—Marlin-Rockwell Corporation v. N. L. R. B., C.C.A.2, 133 F.2d 258.

31. U.S.—N. L. R. B. v. Quality Art Novelty Co., C.C.A.2, 127 F.2d 903.

32. U.S.—N. L. R. B. v. Ridge Tool Co., C.C.A.6, 151 F.2d 947.

Cross-examination of witnesses called by board

Attorney for board may cross-examine employers or supervisory employees who were charged with unfair labor practices even though board had called them.—N. L. R. B. v. Garfunkel, C.C.A.2, 162 F.2d 256.

33. U.S.—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67.

Reluctance to testify

A leading question addressed to a

examination of excused witnesses are within the legitimate control of the examiner.[34]

Where the board's witnesses used records and pleadings in connection with prior withdrawn charges to refresh their recollection before the hearing, the examiner's refusal to require the production of such records and pleadings for the employer's use in cross-examination has been held not to be erroneous.[35]

§ 28(81). —— Issuance of Subpœnas

Where authorized by statute, labor relations boards may issue subpœnas requiring the attendance and testimony of witnesses and the production of evidence which relates to matter under investigation.

Where authority is conferred by statute, a subpœna may be issued by a labor relations board.[36] Under the National Labor Relations Act, 29 U.S.C.A. § 161, for the purpose of all hearings and investigations the National Labor Relations Board, or any member thereof, has the power to issue subpœnas requiring the attendance and testimony of witnesses and the production of evidence which relates to matter under investigation.[37] The subpœna must be obeyed if the evidence sought relates to matter under investigation by the board.[38] The board may not compel production of documentary or oral evidence which does not relate to or touch the matter under investigation or pry into the affairs of a business concern generally.[39] The board in conducting a preliminary investigation to determine whether the employer's business operations affect interstate commerce may issue a subpœna directing the employer to produce its records bearing on the question whether the employer is engaged in interstate commerce.[40] Requests for subpœnas should be viewed sympathetically in order to insure a fair hearing.[41]

An employer has the same right as the board to have the examiner issue subpœnas on its behalf.[42] The board may refuse the subpœna to an employer where his purpose is frivolous and dilatory[43] or where the witnesses sought to be summoned are to be used in an effort to build up a record of irrelevancy and immateriality.[44]

The subpœna may issue before any complaint is filed.[45] A rule of the board that applications for the issuance of subpœnas shall be timely and shall specify the name of the witness and the nature of the facts is designed to keep the inquiry within reasonable limits.[46] The rule is applicable to ordinary subpœnas as well as to subpœnas duces tecum.[47] The employer must comply with this rule,[48] but the employer is deprived of a fair hearing where the rule is applied to him but is not applied to counsel for the board.[49]

Enforcement. Under the National Labor Relations Act § 11, 29 U.S.C.A. § 161, in case of contumacy or refusal to obey a subpœna, any United States district court, or the United States courts of any territory or possession, or the district court, formerly the supreme court, of the District of Columbia has jurisdiction to issue an order to compel the person to appear before the board to produce the evidence, and any failure of such person to obey the order of the court may be punished by such court as a contempt thereof.[50] The proceeding in the district court to compel compliance with the subpœna of the

witness who shows reluctance to give testimony is not objectionable.—N. L. R. B. v. Auburn Foundry, C.C.A.7, 119 F.2d 331.

34. U.S.—N. L. R. B. v. Acme-Evans Co., C.C.A.7, 130 F.2d 477, certiorari denied Acme-Evans Co. v. N. L. R. B., 63 S.Ct. 769, 318 U.S. 772, 87 L.Ed. 1142, rehearing denied 63 S.Ct. 851, 318 U.S. 802, 87 L.Ed. 1166.

35. U.S.—N. L. R. B. v. Phillips Gas & Oil Co., C.C.A.3, 141 F.2d 304.

36. U.S.—N. L. R. B. v. Barrett Co., C.C.A.Ill., 120 F.2d 583.

37. U.S.—N. L. R. B. v. Northern Trust Co., C.C.A.Ill., 148 F.2d 24, certiorari denied 66 S.Ct. 38, 326 U.S. 731, 90 L.Ed. 435 and American Nat. Bank & Trust Co. of Chicago v. N. L. R. B., 66 S.Ct. 39, 326 U.S. 731, 90 L.Ed. 435.

38. U.S.—Goodyear Tire & Rubber Co. v. N. L. R. B., C.C.A.Ohio, 122 F.2d 450, 136 A.L.R. 883.

39. U.S.—Cudahy Packing Co. v. N. L. R. B., C.C.A.Kan., 117 F.2d 692.

Application and subpœna held not too broad

U.S.—N. L. R. B. v. Northern Trust Co., C.C.A.Ill., 148 F.2d 24, certiorari denied 66 S.Ct. 38, 326 U.S. 731, 90 L.Ed. 435, and American Nat. Bank & Trust Co. of Chicago v. N. L. R. B., 66 S.Ct. 39, 326 U.S. 731, 90 L.Ed. 435—N. L. R. B. v. New England Transp. Co., D.C. Conn., 14 F.Supp. 497.

40. U.S.—N. L. R. B. v. Northern Trust Co., C.C.A.Ill., 148 F.2d 24, certiorari denied 66 S.Ct. 38, 326 U.S. 731, 90 L.Ed. 435, and American Nat. Bank & Trust Co. of Chicago v. N. L. R. B., 66 S.Ct. 39, 326 U.S. 731, 90 L.Ed. 435—N. L. R. B. v. Barrett Co., C.C.A.Ill., 120 F.2d 583.

41. U.S.—N. L. R. B. v. Dahlstrom Metallic Door Co., C.C.A.2, 112 F.2d 756.

42. U.S.—N. L. R. B. v. Ed. Friedrich, Inc., C.C.A.5, 116 F.2d 888.

43. U.S.—N. L. R. B. v. Blackstone Mfg. Co., C.C.A.2, 123 F.2d 633.

44. U.S.—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39.

45. U.S.—N. L. R. B. v. Barrett Co., C.C.A.Ill., 120 F.2d 583.

46. U.S.—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67.

47. U.S.—Inland Steel Co. v. N. L. R. B., C.C.A.7, 109 F.2d 9.

48. U.S.—N. L. R. B. v. Delaware-New Jersey Ferry Co., C.C.A.3, 128 F.2d 130.

49. U.S.—Inland Steel Co. v. N. L. R. B., C.C.A.7, 109 F.2d 9.

50. U.S.—Goodyear Tire & Rubber Co. v. N. L. R. B., C.C.A.Ohio, 122 F.2d 450, 136 A.L.R. 883—N. L. R. B. v. New England Transp. Co., D.C.Conn., 14 F.Supp. 497.

board is not a suit of a civil nature governed by the Federal Rules of Civil Procedure,[51] but is of a summary nature not requiring the issuance of process, hearing, findings of fact, and the elaborate process of a civil suit.[52] It does not constitute a review of the board's action or an independent action.[53]

As the statute directs, the procedure to enforce a subpœna issued by the National Labor Relations Board is by application to the United States district court for an order.[54] The board is entitled to have its order compelling obedience to a subpœna enforced without first alleging and showing that the employer is engaged in interstate commerce or that its activities affect commerce.[55] The enforcement by the district courts of a subpœna issued by the board is confided to the discretion of the court, which is to be judicially exercised.[56]

It has been held that the only questions presented are whether the subpœna was regularly issued and duly served and whether there has been a refusal to obey,[57] and that the district court has no jurisdiction to determine the relevancy and materiality of the evidential data sought to be produced,[58] although it has also been held that the district court may inquire only to ascertain that a proceeding is pending of which the board has jurisdiction and that the evidence sought relates to or touches the matter under investigation,[59] and that the application of the board should be dismissed on the merits if it is found that the evidence sought does not relate to matter under investigation.[60] The question whether or not the findings of the board with respect to unfair labor practices are sustained by the evidence may not be litigated.[61]

Where the production of books and records before the examiner would interfere with the employer's business, the order requiring compliance with the subpœna may provide a convenient method of compliance which will not interfere with the employer's business.[62]

Effect of prior application

Application by board for order enforcing subpœna for employer's pay roll was not subject to objection based on similar prior application to court of another district, wherein employer filed bill to restrain board, it appearing that prior application was withdrawn before making of subsequent application, and that after hearing on subsequent application foreign court quashed subpœnas issued on bill filed therein because of absence of proper service.—N. L. R. B. v. New England Transp. Co., supra.

Railway Labor Act

Under Transportation Act § 310 pars a and b (Comp.St.Suppl.Annot. 1923 § 10071¼hhh), authorizing Railway Labor Board to require attendance of any witness from any place in United States at designated place for taking of depositions, and providing that in case of failure to comply with subpœna board may invoke "aid of any United States District Court," a citizen and inhabitant of Cleveland, Ohio, who had refused to comply with subpœna issued by board, could not be required to answer suit brought pursuant to act in northern district of Illinois; "any District Court of the United States" meaning any such court of competent jurisdiction.—Robertson v. Railroad Labor Board, Ill., 45 S.Ct. 621, 268 U.S. 619, 69 L.Ed. 1119, appeal dismissed McGuire v. Railroad Labor Board, 47 S.Ct. 20, 273 U.S. 770, 71 L.Ed. 883.

51. U.S.—N. L. R. B. v. Goodyear Tire & Rubber Co., D.C.Ohio, 36 F. Supp. 413.

52. U.S.—Goodyear Tire & Rubber Co. v. N. L. R. B., C.C.A.Ohio, 122 F.2d 450, 136 A.L.R. 883—Cudahy Packing Co. v. N. L. R. B, C.C.A. Kan., 117 F.2d 692.

53. U.S.—N. L. R. B. v. Goodyear Tire & Rubber Co., D.C.Ohio, 36 F. Supp. 413.

54. U.S.—Goodyear Tire & Rubber Co. v. N. L. R. B., C.C.A.Ohio, 122 F.2d 450, 136 A.L.R. 883—N. L. R. B. v. Cudahy Packing Co., D.C. Kan., 34 F.Supp. 53, affirmed, C.C. A., Cudahy Packing Co. v. N. L. R. B., 117 F.2d 692.

55. U.S.—N. L. R. B. v. Northern Trust Co., C.C.A.Ill., 148 F.2d 24, certiorari denied 66 S.Ct. 38, 326 U.S. 731, 90 L.Ed. 435 and American Nat. Bank & Trust Co. of Chicago v. N. L. R. B., 66 S.Ct. 39, 326 U.S. 731, 90 L.Ed. 435.

56. U.S.—N. L. R. B. v. Northern Trust Co., C.C.A.Ill., 148 F.2d 24, certiorari denied 66 S.Ct. 38, 326 U.S. 731, 90 L.Ed. 435 and American Nat. Bank & Trust Co. of Chicago v. N. L. R. B., 66 S.Ct. 39, 326 U.S. 731, 90 L.Ed. 435—Goodyear Tire & Rubber Co. v. N. L. R. B., C.C.A.Ohio, 122 F.2d 450, 136 A.L.R. 883—N. L. R. B. v. Cudahy Packing Co., D.C.Kan., 34 F.Supp. 53, affirmed, C.C.A., Cudahy Packing Co. v. N. L. R. B., 117 F.2d 692.

57. U.S.—N. L. R. B. v. Goodyear Tire & Rubber Co., D.C.Ohio, 36 F. Supp. 413.

58. U.S.—N. L. R. B. v. Goodyear Tire & Rubber Co., supra.

59. U.S.—Cudahy Packing Co. v. N. L. R. B., C.C.A.Kan., 117 F.2d 692.

60. U.S.—Goodyear Tire & Rubber Co. v. N. L. R. B., C.C.A.Ohio, 122 F.2d 450, 136 A.L.R. 883.

Employer's conclusion of irrelevancy

Where an application was filed for an order requiring an employer to obey a subpœna to produce a card index, if employer's conclusion that card index was not relevant was not final, at least some evidence was required to show that it was wrong, and, in absence thereof, district court erred in ordering compliance with subpœna.—Goodyear Tire & Rubber Co. v. N. L. R. B., supra.

61. U.S.—Cudahy Packing Co. v. N. L. R. B., C.C.A.Kan., 117 F.2d 692.

62. U.S.—N. L. R. B. v. Northern Trust Co., C.C.A.Ill., 148 F.2d 24, certiorari denied 66 S.Ct. 38, 326 U. S. 731, 90 L.Ed. 435, and American Nat. Bank & Trust Co. of Chicago v. N. L. R. B., 66 S.Ct. 39, 326 U. S. 731, 90 L.Ed. 435.

Order held proper

District court's order compelling obedience to subpoenas issued by board, in connection with petition filed with board for investigation and certification of representatives for bank's employees pursuant to National Labor Relations Act, properly placed limitations on subpoenas by providing that bank should be required to produce at a single time only such documents as would not unduly interfere with its banking business, and could, on adjournment of any session of such hearing, return such documents to its place of business.—N. L. R. B. v. Northern Trust Co., C.C.A.Ill., 148 F.2d 24, certiorari denied 66 S.Ct. 38, 326 U. S. 731, 90 L.Ed. 435 and American Nat. Bank & Trust Co. of Chicago

Board of mediation. A statute authorizing a state board of mediation to subpœna and compel the attendance of witnesses gives the board power to compel attendance, not of parties to labor disputes, but only of necessary witnesses at hearings conducted after a voluntary submission of such disputes for mediation.[63]

b. Parties, Process, Pleading, and Evidence

§ 28(82). Parties

Particular matters with respect to parties are discussed in detail in the sections immediately following.

Examine Pocket Parts for later cases.

§ 28(83). —— Who May Institute Proceedings or Action

a. In general
b. Who may sue at law

a. In General

Provision usually is made in the statutes as to the persons or entities who may institute administrative proceedings for the settlement of labor disputes.

The National Labor Relations Act § 10 b, 49 U.S.C.A. § 160 b, does not limit the class of persons who may lodge complaints with the National Labor Relations Board.[64] At least prior to the Labor Management Relations Act of 1947, 49 U.S.C.A. § 151 et seq, it was held that the only persons authorized to file charges under the National Labor Relations Act were the employees whose work had ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice of the employer,[65] or their agency or employee representative, who dealt with the employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.[66]

A labor organization filing a charge must have some direct connection with, or relationship to, the employees and be capable of acting as a bargaining representative,[67] and must be an existing organization eligible to bring the charges.[68] The dubious character, evil or unlawful motives, misconduct, or bad faith of the informer does not disqualify him or it from filing charges or deprive the board of its jurisdiction to conduct an inquiry,[69] although such misconduct of a labor union, which has filed charges, may be considered by the board as material to its own decision to entertain and proceed on the charge.[70] The fact that a union has been inactive, due largely to the employer's undermining efforts, is not such a change of status as will prevent it from filing charges against the employer.[71]

Under some state statutes it is the mandatory duty of the labor relations board to institute an investigation at the request of a labor union, a fair employer, or a designated per cent of the employees.[72] A labor relations board, however, cannot be said to be a "party" to the litigation in the sense that that term is customarily used,[73] as it should be impartial and should not be able to convert itself into a litigant and become the partisan advocate of one or the other of the parties whose cause it has heard.[74] Under some statutes it has been held that an employer may not be required to defend the complaints of rival unions,[75] particularly with respect to controversies

v. N. L. R. B., 66 S.Ct. 39, 326 U.S. 731, 90 L.Ed. 435.

Inspection at place of business
U.S.—N. L. R. B. v. Cudahy Packing Co., D.C.Kan., 34 F.Supp. 53, affirmed, C.C.A., Cudahy Packing Co. v. N. L. R. B., 117 F.2d 692.

63. N.Y.—In re State Board of Mediation, 298 N.Y.S. 934, 165 Misc. 15.

64. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

65. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., C.C.A.6, 124 F.2d 50, affirmed 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

66. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., supra.

67. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., supra—Wilson & Co. v. N. L. R. B., C.C.A.8, 103 F.2d 243.

68. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 130 F.2d 363.

69. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

A labor union which is the bargaining agent of employees does not disqualify itself by its own misconduct from appealing to the National Labor Relations Board because of employer's refusal to negotiate, where there is no warrant for supposing that further negotiations would have been useless.—N. L. R. B., v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

70. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

71. U.S.—N. L. R. B. v. Blanton Co., C.C.A.8, 121 F.2d 564.

72. Pa.—Petition of Shafer, 31 A.2d 537, 347 Pa. 130.

73. Pa.—Pennsylvania Labor Relations Board v. Heinel Motors, 25 A.2d 306, 344 Pa. 238.

74. Pa.—Pennsylvania Labor Relations Board v. Heinel Motors, supra—PRT Employees Union v. State Labor Relations Board, Com. Pl., 54 Dauph.Co. 341.

75. N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union Local 221, 9 N.Y.S.2d 964, 170 Misc. 199, affirmed 14 N.Y.S.2d 74, 257 App.Div. 501.

which have been adjusted between the parties,[76] unless the bargaining union has sacrificed its right to be such[77] or the employer has exercised some influence or control over such union.[78]

Under the Railway Labor Act an aggrieved employee not only has the right to be heard by the union and the carrier, but he also has the right to participate in the procedure before the board,[79] and may conduct proceedings before the adjustment board, if necessary, either personally[80] or through a chosen representative,[81] which may or may not be a labor organization.[82] The exclusive authority vested by the act in a duly selected collective agent to negotiate and conclude agreements concerning major disputes includes the representation of employees in mediation, arbitration, and conciliation proceedings;[83] but this power does not extend to the settlement of grievances to the exclusion of the right of aggrieved employees of any effective voice in the settlement and of an individual hearing before the board.[84] The extent of the authority of the collective agent to represent an employee before the adjustment board is not controlled by any technical agency rules, but may be affected by the custom and practice in the railroad world.[85]

b. Who May Sue at Law

An employee who is affected by a breach of the contract between the employer and the labor union may generally bring an action therefor as a third-party beneficiary.

According to some decisions an individual member of a labor union may not, in the absence of ratification or assent, maintain an action for the breach of an agreement between the employer and the union, of which such employee is a member, with respect to wages and conditions of service.[86] According to other decisions, however, such agreement is regarded as being primarily for the benefit of the individual members of the union, and the rights secured as being the rights of such members, and therefore an action for its breach may be brought directly by an individual member,[87] even though not mentioned by name in such contract.[88] If the contract purports to be made for the benefit of all employees, both members and nonmembers of the union, an action for its breach may be maintained by one who is not a member of the union;[89] but it has been held that the fact that a contract violates the constitution and by-laws of a union cannot be raised by one outside the union.[90] If the contract expressly names employees as third-party beneficiaries, and

76. N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union Local 221, supra.

77. N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union Local 221, supra.

78. N.Y.—United Baking Co. v. Bakery and Confectionery Workers' Union Local 221, supra.

79. U.S.—Elgin, J. & E. Ry. Co. v. Burley, Ill., 65 S.Ct. 1282, 325 U.S. 711, 89 L.Ed. 1886, opinion adhered to 66 S.Ct. 721, 327 U.S. 661, 90 L.Ed. 928.

80. U.S.—Estes v. Union Terminal Co., C.C.A.Tex., 89 F.2d 768.

81. U.S.—Estes v. Union Terminal Co., supra—Myers v. Louisiana & A. Ry. Co., D.C.La., 7 F.Supp. 97.

82. U.S.—Estes v. Union Terminal Co., C.C.A.Tex., 89 F.2d 768.

Where there is no organized group of which employee can become a member, employee may present dispute to national railroad adjustment board.—Patterson v. Chicago & E. I. R. Co., D.C.Ill., 50 F.Supp. 334.

83. U.S.—Elgin, J. & E. Ry. Co. v. Burley, Ill., 65 S.Ct. 1282, 325 U.S. 711, 89 L.Ed. 1886, opinion adhered to 66 S.Ct. 721, 327 U.S. 661, 90 L.Ed. 928.

84. U.S.—Elgin, J. & E. Ry. Co. v. Burley, supra.

Fact that railway brotherhood is the collective bargaining agent of employees does not entitle the railroad to assume that brotherhood had authority to settle claims of employees for damages for alleged breach of collective agreement, but scope of authority to act exclusively for employees in such matter before the railroad adjustment board is essential.—Elgin, J. & E. Ry. Co. v. Burley, supra.

85. U.S.—Elgin, J. & E. Ry. Co. v. Burley, Ill., 66 S.Ct. 721, 327 U.S. 661, 90 L.Ed. 928.

86. Kan.—Swart v. Huston, 117 P. 2d 576, 154 Kan. 182.
Mo.—Burnetta v. Marceline Coal Co., 79 S.W. 136, 180 Mo. 281.
Tex.—Panhandle & S. F. Ry. Co. v. Wilson, Civ.App., 55 S.W.2d 216.
W.Va.—West v. Baltimore & O. R. Co., 137 S.E. 654, 103 W.Va. 417.

Discharge

Agreement between brotherhood and railroad respecting rules for discharge of employee has been held not to give right of action to discharged member of brotherhood.—Kessell v. Great Northern Ry. Co., D.C.Wash., 51 F.2d 304.

87. Ky.—Piercy v. Louisville & N. Ry. Co., 248 S.W. 1042, 198 Ky. 477, 33 A.L.R. 322—Hudson v. Cincinnati, N. O. & T. P. Ry. Co., 154 S.W. 47, 152 Ky. 711, 45 L.R.A.,N.S., 184, Ann.Cas.1915B 98.
Miss.—Yazoo & M. V. R. Co. v. Sideboard, 133 So. 669, 161 Miss. 4.
N.Y.—Gulla v. Barton, 149 N.Y.S. 952, 164 App.Div. 293.
Pa.—Roberts v. Penn Tobacco Co., Com.Pl., 34 Luz.Leg.Reg. 237.
Tenn.—Cross Mountain Coal Co. v. Ault, 9 S.W.2d 692, 157 Tenn. 461.
63 C.J. p 671 note 54.

Under National Industrial Recovery Act, 15 U.S.C.A. § 703, an action against a dress manufacturer for a violation of code wage provisions could not be brought by employees as individuals, where the act authorizing such codes made no provision for individuals to prosecute actions in their own names for their own benefit for violations of the code.—Abramovitz v. Trolman, 273 N.Y.S. 243, 152 Misc. 768.

88. Ohio.—H. Blum & Co. v. Landau, 155 N.E. 154, 23 Ohio App. 426.
Pa.—Roberts v. Penn Tobacco Co., Com.Pl., 34 Luz.Leg.Reg. 237.

89. U.S.—Yazoo & M. V. R. Co. v. Webb, C.C.A.5, 64 F.2d 902.
Miss.—Yazoo & M. V. R. Co. v. Sideboard, 133 So. 669, 161 Miss. 4.

90. Iowa.—Des Moines City Ry. Co. v. Amalgamated Ass'n of Street & Electric Ry. Employees of America Division 441 of Des Moines, 213 N.W. 264, 204 Iowa 1194.
63 C.J. p 671 note 39.

provides that only union members in good standing will be employed, employees and union members will be regarded as one and the same, so that members of the union may bring a representative suit on the contract, as direct and third-party beneficiaries,[91] notwithstanding a provision in the agreement authorizing the employer to employ nonunion men when qualified union members are not available.[92]

It has been held that a suit by a single employee to enforce his individual rights, or to recover damages for being discharged, is not directly on the collective agreement as a complete contract made for his benefit, since it is merely the basis for his contract of employment,[93] but is a suit on his contract of hiring which, by reference or otherwise, has adopted the terms of the collective agreement which are applicable to him.[94] This rule has been applied to a railroad employee's suit for damages for a breach of contract and for a decree directing his reinstatement with full seniority rights.[95]

Coercion. If a statute which makes it a criminal offense for an employer to require an employee or person seeking employment to agree not to become or remain a member of any labor organization, or to threaten him with loss of employment or unjustly discriminate against him because of his membership in such an organization, may be assumed to give a right to a civil remedy, such remedy is confined to employees or to persons seeking employment.[96]

§ 28(84). —— Against Whom Proceedings or Action May Be Prosecuted

It has been held that an employer cannot maintain an action at law for damages against a labor union which is a voluntary unincorporated association not possessing the power to sue or be sued.

It has been held that an employer cannot maintain an action at law for damages against a labor union which is a voluntary unincorporated association, at least where such an association does not have the power to sue or be sued,[97] unless such an action is authorized by statute.[98] Where a complaint for unfair labor practice has issued against a predecessor, the proceedings may be continued against the successor who is in privity with the predecessor.[99] A proceeding, however, against a wholly owned subsidiary of a parent corporation does not give the board jurisdiction to enter an order against the parent corporation[1] unless it is shown that the control of the subsidiary by the parent corporation wrongs or defrauds someone with whom the proceedings are concerned.[2]

§ 28(85). —— Necessary and Proper Parties

The usual rules with respect to necessary and proper parties generally apply in an administrative proceeding before a labor relations or arbitration board.

The usual rules as to necessary and proper parties apply in a proceeding before a labor relations board with respect to a labor dispute between employer and employees[3] or in a special proceeding to confirm

91. N.M.—Key v. George E. Breece Lumber Co., 115 P.2d 622, 45 N.M. 397.

92. N.M.—Key v. George E. Breece Lumber Co., supra.

93. U.S.—Illinois Cent. R. Co. v. Moore, C.C.A.Miss., 112 F.2d 959, reversed on other grounds 61 S. Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.

94. U.S.—Illinois Cent. R. Co. v. Moore, supra.

Member of bridge gang

Where collective labor agreement between union of railroad employees and railroad was made part of individual contract of member of bridge gang, such employee, on discharge in violation of seniority provisions, had a cause of action against railroad for damages for breach of contract. —Rentschler v. Missouri Pac. R. Co., 253 N.W. 694, 126 Neb. 493, 95 A.L.R. 1.

95. Tenn.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

96. U.S.—Order of R. R. Telegraphers v. Louisville & N. R. Co., C.C. A.Ky., 148 F. 437, appeal dismissed 29 S.Ct. 695, 214 U.S. 529, 53 L.Ed. 1069.

97. Mass.—Pickett v. Walsh, 78 N. E. 753, 192 Mass. 572, 116 Am.S.R. 272, 6 L.R.A.,N.S., 1067, 7 Ann. Cas. 829.

N.C.—Hallman v. Wood, Wire & Metal Lathers' International Union, 15 S.E.2d 361, 219 N.C. 798.

Trade union as party defendant. generally see the C.J.S. title Trade Unions § 52, also 63 C.J. p 703 note 68–p 705 note 90.

98. N.C.—Hallman v. Wood, Wire & Metal Lathers' International Union, supra.

Statute not authorizing action

A statute empowering an unincorporated association issuing certificates of association to sue and be sued, and limiting the power given to actions on certificates of insurance, does not authorize a contractor to maintain an action at law for damages against a trade union which was a voluntary unincorporated association of individuals.—Hallman v. Wood, Fire & Metal Lathers' International Union, supra.

99. U.S.—N. L. R. B. v. Adel Clay Products Co., C.C.A.8, 134 F.2d 342—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39.

Trustees

(1) An action for damages for a wrongful discharge may be maintained against the permanent trustees of a railroad, appointed after an assignment by the railroad and the appointment of temporary receivers and trustees.—McCrory v. Kurn, Mo.App., 101 S.W.2d 114.

(2) Successor trustee, against whom supplemental complaint was filed, could not challenge board's order on ground that statute was inapplicable to successor because of failure to file a complaint charging that successor had violated the act. —N. L. R. B. v. Bachelder, C.C.A.7, 120 F.2d 574, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519, and modified on other grounds, C.C.A., 125 F.2d 387.

1. U.S.—N. L. R. B. v. Timken Silent Automatic Co., C.C.A.2, 114 F. 2d 449.

2. U.S.—N. L. R. B. v. Timken Silent Automatic Co., supra.

3. U.S.—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari de-

the award of a board of arbitrators functioning under a contract between a union and an employers' association.[4] An association made up of individual truck owners is a proper party to a proceeding to compel arbitration under a written employment contract entered into by the truck drivers' union with individual truck owners.[5]

In proceeding before National Labor Relations Board. In a proceeding against an employer for unfair labor practices in violation of the National Labor Relations Act, neither the labor union[6] nor the employees[7] involved are indispensable or necessary parties in order to enable the board to determine whether the employer has violated the statute, and a failure to make them parties is not an abuse of the board's discretion.[8] The fact that one is a witness before the board does not make him, or an employer or union of which he is an officer, a party to the proceeding.[9]

A company-formed or company-dominated union is not a necessary party to a proceeding against the employer for unfair labor practices,[10] such as a proceeding to determine that the employer is guilty of dominating and supporting the union,[11] or to a proceeding to displace such union as the representative of the employees, and order the employer to cease recognizing it, since such an order would not run against the union,[12] although as to the latter proposition there is also authority to the contrary.[13]

A labor union, however, or the employees, are necessary or proper parties to a proceeding which puts in issue the validity of a contract between the union and the employer,[14] and the fact that the contract, a closed-shop contract, is illegal does not authorize the board to declare it illegal without the employees or their union being made parties;[15] and, moreover, in such a proceeding the employer may not be regarded as being sued in a representative capacity for the employees.[16] The union has a right to be made a

nied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198.

4. N.Y.—Publishers' Ass'n of New York City v. New York Typographical Union No. 6, 5 N.Y.S.2d 847, 168 Misc. 267.

In statutory proceeding by typographical union for confirmation of award of arbitrators functioning under contract between union and publishers' association, which award determined disputes arising from acquisition of certain newspaper by second newspaper, including disputes as to whether separate chapels, or groups of union journeymen, should be maintained and as to attempted interchange of printed matter without reproduction, second newspaper was a proper and necessary party.—Publishers' Ass'n of New York City v. New York Typographical Union No. 6, supra.

5. N.Y.—Amsterdam & Co. v. Devery, 5 N.Y.S.2d 427, 168 Misc. 478.

6. U.S.—Oughton v. N.L.R.B., C.C.A. 3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N.L.R.B., 62 S. Ct. 485, 315 U.S. 797, 86 L.Ed. 1198.

7. U.S.—National Licorice Co. v. N. L.R.B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799—Semi-Steel Casting Co. of St. Louis v. N.L.R.B., C.C.A. 8, 160 F.2d 388—Oughton v. N.L. R.B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L.R.B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198.

Reason for rule

"The National Labor Relations Act contemplates no more than the protection of the public rights which it creates and defines, and as the board's order is directed solely to the employer and is ineffective to determine any private rights of the employees and leaves them free to assert such legal rights as they may have acquired under their contracts, in any appropriate tribunal, we think they are not indispensable parties."—National Licorice Co. v. N.L.R.B., 60 S.Ct. 569, 578, 309 U.S. 350, 84 L. Ed. 799.

8. U.S.—National Licorice Co. v. N. L.R.B., supra.

9. U.S.—N.L.R.B. v. Cowell Portland Cement Co., C.C.A.9, 108 F.2d 198.

10. U.S.—N.L.R.B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 576, 303 U.S. 261, 82 L.Ed. 831, 115 A. L.R. 307—N.L.R.B. v. Indiana & Michigan Electric Co., C.C.A.6, 124 F.2d 50, affirmed 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

11. U.S.—N.L.R.B. v. Ed. Friedrich, Inc., C.C.A.5, 116 F.2d 888.

12. U.S.—Pittsburgh Plate Glass Co. v. N.L.R.B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551—N.L.R.B. v. Pennsylvania Greyhound Lines, 58 S. Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307—N.L.R.B. v. National Licorice Co., 104 F.2d 655, modified on other grounds National Licorice Co. v. N.L.R.B., 60 S. Ct. 569, 309 U.S. 350, 84 L.Ed. 799.

13. U.S.—N.L.R.B. v. Ferguson, C.C. A.9, 118 F.2d 892, followed in N. L.R.B. v. Miller, 118 F.2d 893—N.L.R.B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N.L.R.B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N.L.R.B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

Joinder

Where majority of employees had organized a so-called "inside union" and had designated it as their bargaining agent, the board abused its discretion in failing to join the union or its member-employees in proceedings against the employer.—N.L. R.B. v. Sterling Electric Motors, C. C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F. 2d 738, motion denied Ex parte N.L. R.B., 61 S.Ct. 67, 311 U.S. 617, 85 L. Ed. 391, certiorari dismissed N.L.R. B. v. Sterling Electric Motors, 61 S. Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

14. U.S.—Consolidated Edison Co. of New York v. N.L.R.B., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N.L.R.B. v. Cowell Portland Cement Co., C.C.A.9, 108 F.2d 198.

15. U.S.—N.L.R.B. v. Cowell Portland Cement Co., supra.

Union should be given the opportunity to show validity of closed-shop contract and to meet properly framed challenges to its validity, and a cease and desist order entered without either union or members having been made parties to the proceedings is invalid for want of jurisdiction.—N.L.R.B. v. Cowell Portland Cement Co., supra.

16. U.S.—N.L.R.B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N.L.R.B., 61

party to such a proceeding, irrespective of the board's orders or rules,[17] and the fact that the board has failed to plead a closed-shop contract does not excuse its failure to make the contracting union a party to the proceeding.[18]

If the right asserted by the board arises solely out of a bargaining contract, the performance of which does not inherently result in a violation of the act, the beneficiaries of the contract or their representatives are necessary parties,[19] but if the contract is inherently unfair, or its performance will result in the continuance of unfair labor practices, the beneficiaries or their representatives are not necessary parties,[20] but may be made parties in the discretion of the board.[21]

An "employees council or committee" which is allegedly dominated by the employer is not a necessary party to a proceeding against the employer to withdraw recognition of such council or committee as the representative of the employees[22] or to disestablish such committee and to declare void a contract between it and the employer.[23]

In a proceeding before the National Railroad Adjustment Board an employee whose seniority rights would be vitally affected thereby is a necessary party.[24]

In a proceeding before the National Mediation Board an employer-dominated labor organization has no legal standing in a controversy with respect to the bargaining representative of the clerical employees of a railroad.[25]

§ 28(86). —— Intervention

The usual rules as to intervention generally apply in a proceeding before a labor relations board or in a judicial proceeding with respect to a labor dispute.

The usual rules as to intervention generally apply in a proceeding before a labor relations board[26] or in a judicial proceeding with respect to a labor dispute,[27] except in so far as controlled by the labor relations acts and rules and regulations adopted thereunder.[28]

Intervention in a proceeding before the National Labor Relations Board by persons who are not necessary parties to the proceeding is within the discretion of the board[29] or of the member or agency conducting the hearing.[30] If an issue is properly joined between the board and the employer, intervention by a committee of employees or by individual employees may properly be refused.[31] In proceedings against the employer, permission to intervene may be denied to an employer-dominated em-

S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N.L.R.B. v. Sterling Electric Motors, 61 S.Ct 69, 311 U.S. 722, 85 L.Ed. 471.

In proceeding to destroy employees' contract of self-organization by an order to the employer to cease and desist from dealing with the association and to disestablish it, the employer cannot be regarded as sued in a representative capacity for the employees.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F. 2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

17. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 108 F.2d 198.

18. U.S.—N. L. R. B. v. Cowell Portland Cement Co., supra.

19. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., C.C.A.6, 124 F.2d 50, affirmed 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

20. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., supra.

21. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., supra.

22. U.S.—Solvay Process Co. v. N. L. R. B., C.C.A.5, 117 F.2d 83, certiorari denied 61 S.Ct. 1121, 313 U.S. 596, 85 L.Ed. 1549, petition granted, C.C.A., 122 F.2d 993.

23. U.S.—National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U. S. 350, 84 L.Ed. 799—N. L. R. B. v. Christian Board of Publication, C.C.A.8, 113 F.2d 678.

24. U.S.—Railroad Yardmasters of North America v. Indiana Harbor Belt R. Co., D.C.Ind., 70 F.Supp. 914.

25. U.S.—Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees v. Virginian Ry. Co., C.C. A.Va., 125 F.2d 853.

26. N.Y.—Cody v. Kelley, 53 N.Y. S.2d 224, 184 Misc. 150.

27. Pa.—PRT Employees Union v. State Labor Relations Board, Com. Pl., 54 Dauph.Co. 341.

Unincorporated association

Although, generally speaking, judicial discretion should not permit an unincorporated association in its representative capacity to be joined as a party with individual parties, plaintiffs or defendants, who have an immediate and direct interest in the controversy, merely because such association may represent a larger group, where the plaintiff itself is the representative group, an unincorporated association, it may be permitted to intervene.—PRT Employees Union v. State Labor Relations Board, supra.

28. N.Y.—Cody v. Kelley, 53 N.Y.S. 2d 224, 184 Misc. 150.

Time of application for leave

Union's telegram to state labor relations board asking leave to intervene in collective bargaining proceeding sent after completion of first formal hearing by board was neither proper nor timely within a regulation providing for a verified application for leave to intervene made at least two days before first hearing and board properly refused to permit intervention.—Cody v. Kelley, supra.

29. U.S.—N. L. R. B. v. Star Pub. Co., C.C.A.9, 97 F.2d 465.

30. U.S.—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., C.C.A.8, 160 F.2d 388—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198.

Any person may intervene and present testimony in discretion of the agency conducting the hearing. —N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 870.

31. U.S.—Oughton v. N. L. R. B., C. C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198 and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198.

ployees group or union,[32] particularly where the records and operations of such group are examined during the hearing and the leading representatives of the association testify at length.[33] It may also be denied to employees opposed to the union in an unfair labor practice proceeding[34] or to persons to whom the matter in controversy is of no concern;[35] and, moreover, a union or its locals, having notice of the proceeding, are under no duty to intervene if they are not put on notice that their interests are involved.[36] The board may refuse to permit one union to intervene in a case before it filed by a rival union.[37] Private parties have no rightful place, as by intervention, in proceedings before the board except as the board may desire to avail itself of helpful suggestions.[38]

Under Railway Labor Act § 3 (j), 45 U.S.C.A. § 153 (j), an employee involved in a controversy with his employer may intervene in a proceeding before the National Railroad Adjustment Board which might adversely affect him.[39]

§ 28(87). Notice and Appearance

The usual rules as to notice to necessary and proper parties apply in a proceeding before a labor relations board, in an arbitration proceeding, or in an action at law.

In a proceeding before a labor relations board all necessary and proper parties should be given notice and an opportunity to be heard on all points properly in issue.[40] Such notice, however, is not necessary to one whose presence is not necessary to the determination of the particular issue before the board.[41] It has been held that notice to a company-formed union is not necessary, in a proceeding against the employer for unfair labor practices, with respect to the organization and recognition of such union, since the presence of the union is not necessary to enable the board to determine whether the employer has violated the statute or to make an appropriate order against the employer, such as to withdraw its recognition of the union.[42] On the other hand, it has been held that notice to such union is necessary where the proceeding involves the setting aside of a contract between the union and the employer[43] or where the proceeding involves the destruction of the existence of the union,[44] and this rule has been held to apply even though the employees who organized the union have a right to intervene.[45]

32. U.S.—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corporation v. N. L. R. B., 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141—Inland Steel Co. v. N. L. R. B., C.C. A.7, 109 F.2d 9.

33. U.S.—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corporation v. N. L. R. B., 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141.

34. U.S.—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., C.C.A.8, 160 F.2d 388.

35. U.S.—N. L. R. B. v. Star Pub. Co., C.C.A.9, 97 F.2d 465.

36. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

In proceeding to restrain employers from exerting pressure on employees to join a certain union and from discouraging membership in another union, where neither original complaint, which antedated labor contracts between employers and favored union, nor subsequent amendments contained any mention of contracts, and favored union and its locals were not put on notice that validity of contracts was under attack, favored union and locals were not under a duty to intervene before the board to safeguard their interests.—Consolidated Edison Co. of New York v. N. L. R. B., supra.

37. U.S.—Order of R. R. Telegraphers v. New Orleans, T. & M. Ry. Co., D.C.Mo., 61 F.Supp. 869, vacated on other grounds, C.C.A., 156 F.2d 1, certiorari denied 67 S.Ct. 112, 329 U.S. 758, 91 L.Ed. —, rehearing denied 67 S.Ct. 201, 329 U.S. 829, 91 L.Ed. —.

38. U.S.—Aluminum Ore Co. v. N. L. R. B., C.C.A.7, 131 F.2d 485, 147 A.L.R. 1.

39. U.S.—Estes v. Union Terminal Co., C.C.A.Tex., 89 F.2d 768.

40. U.S.—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949.
Pa.—In re Employes of American Store Co., Com.Pl., 9 Sch.Reg. 206.

41. U.S.—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A. L.R. 307.

42. U.S.—N. L. R. B. v. Pennsylvania Greyhound Lines, supra—Republic Steel Corporation v. N. L. R. B., C.C.A.3, 107 F.2d 472.

43. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S. Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

44. U.S.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

The statute does not permit destruction of a freely organized self-organized inside or company union, by means of order prohibiting employer from dealing with such union, without giving such union notice and opportunity to be heard.—N. L. R. B. v. Sterling Electric Motors, C.C.A. 9, 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U. S. 722, 85 L.Ed. 471.

45. U.S.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L. Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

Right of intervention no substitute
The right of employees who had organized a so-called "inside union" to intervene was not a substitute for service of complaint, notice

A labor union does not have sufficient notice to require an appearance from the mere fact that its president is produced as a witness for the employer,[46] and the publicity of the proceedings does not charge the union or its members with notice thereof.[47] If an employee's association is served with a copy of the complaint and notice of the hearing it is subject to the board's jurisdiction although it does not appear;[48] and, on the other hand, if a party voluntarily appears and participates in the proceedings he is also subject to the court's jurisdiction even though he has not been served with notice.[49]

Under Railway Labor Act. In a proceeding before the National Railroad Adjustment Board for the adjustment of a dispute relating to the enforcement of a contract, every person involved in the controversy who may be adversely affected by an order entered in the proceeding should be given reasonable notice of the hearing[50] even though he is not named as a party,[51] and a failure to give such notice is not excused by the difficulty or inconvenience of giving it.[52] The board, however, is not deprived of jurisdiction to proceed with respect to a person not served with process, if such person has actual knowledge of the proceeding and hearing,[53] or of such facts as would put him on notice,[54] in view of the power of the board to correct an error and of the right of such person to intervene in, or otherwise be made a party to, a suit in court to enforce the order of the board.[55] Notice may be waived by intervening in the proceeding.[56]

The notice may be informal,[57] and may be delivered by mail,[58] or it may be given by posting it in appropriate places.[59] Notice to every individual member of an organized group of employees is unnecessary; it is generally sufficient to bind the members that notice is given to duly constituted officers of the organization.[60]

In a proceeding before a system, group, or regional board of adjustment, established by agreement, which provides that due and timely notice shall be given to an employee involved in a dispute before such board, a member of a union involved in such dispute is entitled to such notice[61] although he is not

and hearing.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

46. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 108 F.2d 198.

47. U.S.—N. L. R. B. v. Cowell Portland Cement Co., supra.

Contents of complaint

Neither union nor members were chargeable with notice of the contents of complaint because of publicity given the proceeding, and were not required to inform themselves that something might be done affecting them because the complaint alleged that the officers of employer had sought to persuade employees to join a labor organization not of their own choosing.—N. L. R. B. v. Cowell Portland Cement Co., supra.

48. U.S.—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585.

49. U.S.—Estes v. Union Terminal Co., C.C.A.Tex., 89 F.2d 768.
Mass.—Hathaway Bakeries v. Labor Relations Commission, 55 N.E.2d 254, 316 Mass. 136.

Challenge of jurisdiction

An employer did not submit to jurisdiction of labor relations commission by filing motion to dismiss for sole purpose of challenging commission's jurisdiction.—Hathaway Bakeries v. Labor Relations Commission, supra.

50. U.S.—Estes v. Union Terminal Co., C.C.A.Tex., 89 F.2d 768—Railroad Yardmasters of North America v. Indiana Harbor Belt R. Co., D.C.Ind., 70 F.Supp. 914.

"No man should be deprived of his means of livelihood without a fair opportunity to defend himself."—Estes v. Union Terminal Co., C.C.A. Tex., 89 F.2d 768, 770.

Assistant station master who was not covered by provisions of contract between railroad and certain classes of employees at time of execution of contract, but who was given position of gateman which was subject to contract, has been held "involved" in controversy over seniority between displaced gateman and company resulting in his displacement as gateman, and hence entitled to notice of proceedings before adjustment board.—Estes v. Union Terminal Co., supra.

Suit to enjoin enforcement

Application to adjustment board concerning matters complained of was not a prerequisite to maintenance of class action to enjoin enforcement of awards of the board which plaintiff contended board had no jurisdiction to make for lack of personal jurisdiction and which were destructive of rights personal to plaintiff and member of class he represented in violation of constitutional privileges.—Templeton v. Atchison, T. & S. F. Ry. Co., D.C.Mo., 7 F.R.D. 116.

51. U.S.—Estes v. Union Terminal Co., C.C.A.Tex., 89 F.2d 768.

52. U.S.—Estes v. Union Terminal Co., supra.

53. U.S.—Estes v. Union Terminal Co., supra.

54. U.S.—Elgin, J. & E. Ry. Co. v. Burley, Ill., 66 S.Ct. 721, 327 U.S. 661, 90 L.Ed. 928.

"Due notice," within provision of act that due notice of all hearings of board shall be given to employee and carrier involved in dispute, requires at least knowledge on aggrieved employee's part of pendency of proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency.—Elgin, J. & E. Ry. Co. v. Burley, supra.

55. U.S.—Estes v. Union Terminal Co., C.C.A.Tex., 89 F.2d 768.

56. U.S.—Estes v. Union Terminal Co., supra.

57. U.S.—Estes v. Union Terminal Co., supra.

58. U.S.—Estes v. Union Terminal Co., supra.

59. U.S.—Estes v. Union Terminal Co., supra.

60. U.S.—Estes v. Union Terminal Co., supra.

61. U.S.—Primakow v. Railway Express Agency, D.C.Wis., 56 F.Supp. 413.

Seniority rights

A member of union of railway express company's employees was entitled to due and timely notice of hearings before adjustment board.

named as a party to the dispute.[62] Notice to the union is not notice to an employee whose claim is contested by the union.[63] In case of a dispute involving seniority rights between one employee and another employee, the employee who does not receive or waive notice of the hearing is not bound by the board's decision in favor of the other employee.[64]

Arbitration. Notice to the representatives of employers of what a board set up for the arbitration of a labor dispute proposes to do constitutes notice to the employers.[65]

In action. In a contractor's action at law for damages against a labor union which is a voluntary unincorporated association, it has been held that process cannot be served on the association since there is no legal entity capable of being served with process.[66]

§ 28(88). Pleading

Particular matters with respect to the complaint or petition, the answer, and issues, proof, and variance will be discussed in detail in the sections immediately following.

Examine Pocket Parts for later cases.

§ 28(89). —— Complaint or Petition

a. In administrative proceedings
b. In judicial proceedings

a. In Administrative Proceedings

(a) Issuance of complaint
(b) Requisites and sufficiency

(a) Issuance of Complaint

As a general rule under the statutes the issuance of a complaint rests within the discretion of the labor relations board, after an investigation of the charges which have been filed.

As a general rule under the labor relations acts the case between the labor relations board and respondent begins with the complaint prepared and issued by the board;[67] and since, as stated supra § 28 (75), the filing of charges is a condition precedent to the issuance of a complaint the board may not initiate a complaint on its own motion[68] but must await the filing of charges.[69] The board should investigate the charges before issuing the complaint,[70] and, after such investigation, it has a wide discretion as to whether it will issue a complaint[71] and as to the time of its issuance,[72] and accordingly it may issue a complaint for violations occurring after a decree of enforcement.[73] A charge of interference, restraint, and coercion of employees in the exercise of their right of self-organization and discriminatory discharge of named employees because of their union activities has been held sufficient to authorize the issuance of a complaint[74] even though the union which makes the charge does not represent a majority of the employees.[75]

This discretion of the board involves expert administrative policy, and is not a legal discretion, at

established by agreement between union and company, to settle dispute involving seniority rights as between such member and another employee, whose cause was espoused by union. —Primakow v. Railway Express Agency, supra.

62. U.S.—Primakow v. Railway Express Agency, supra.

63. U.S.—Primakow v. Railway Express Agency, supra.

64. U.S.—Primakow v. Railway Express Agency, supra.

65. Wash.—Gord v. F. S. Harmon & Co., 61 P.2d 1294, 188 Wash. 134.

66. N.C.—Hallman v. Wood, Wire & Metal Lathers' International Union, 15 S.E.2d 361, 219 N.C. 798.

67. U.S.—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433.

Where no complaint is issued challenging good faith of union, selection of its bargaining representatives, and terms and condition of contract of employment negotiated with employers by union's representatives, no necessity exists for enlisting functions of labor board or provisions of National Labor Relations Act.—Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C.Mo., 21 F.Supp. 807, vacated on other grounds International Ladies' Garment Workers' Union v. Donnelly Garment Co., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, mandate conformed to, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 23 F.Supp. 998, reversed on other grounds, C.C.A., 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

68. U.S.—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F.2d 38 —N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 98 F.2d 97.

Who may institute proceedings generally see supra § 28 (83).

69. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., C.C.A.6, 124 F.2d 50, affirmed 63 S.Ct. 394, 317 U.S. 9, 87 L.Ed. 579—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F.2d 38.

70. U.S.—N. L. R. B. v. Barrett Co., C.C.A.Ill., 120 F.2d 583.

71. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579—N. L. R. B. v. National Broadcasting Co., C.C.A.2, 150 F.2d 895—N. L. R. B. v. General Motors Corporation, C.C.A.7, 116 F.2d 306.

Issuance is not mandatory

U.S.—N. L. R. B. v. Barrett Co., C.C.A.Ill., 120 F.2d 583.

72. U.S.—Berkshire Employees Ass'n of Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 121 F.2d 235.

73. U.S.—Thompson Products v. N. L. R. B., C.C.A.6, 133 F.2d 637.

Judicial enforcement or review of orders or awards see infra § 28 (122).

74. U.S.—N. L. R. B. v. Brashear Freight Lines, C.C.A.8, 119 F.2d 379.

75. U.S.—N. L. R. B. v. Brashear Freight Lines, supra.

least not to the extent of authorizing the courts to compel it to issue a complaint.[76] The board is not required to move on every charge which may be filed, but is merely enabled to do so.[77] It may decline to be imposed on, or to submit its process to abuse,[78] and may properly withhold or dismiss its own complaint if such abuse becomes apparent.[79] The board's power to issue a complaint cannot be affected by an agreement between the employer and the labor union.[80]

Effect of receivership. The fact that a receiver has been appointed for the respondent employer does not require that prior leave be obtained for the state court which appointed the receiver before the board may file a complaint.[81]

(b) Requisites and Sufficiency

A complaint should be sufficient to advise the respondent of the nature of the charges against him, should contain a plain statements of the facts, and should be issued in the manner required by the statute or by the rules and regulations of the board. A complaint may be amended.

The sole function of a complaint under a labor relations act, such as the National Labor Relations Act, is to apprise respondent of the charges against him so that he may have due notice and a full opportunity for a hearing.[82] The complaint, therefore, as issued, must accord with the charges[83] and must be adequate to advise respondent of the unfair labor practices therein charged,[84] although the particularity of a pleading at law or in equity is not required.[85] The complaint need not contain the names of individuals or the time and place of occurrences;[86] but there should be a plain statement of the facts which are claimed to constitute unfair labor practices,[87] although it is not necessary to set out the particular facts which constitute such practice, as finally found, if the parties to the proceeding know the basis of the complaint,[88] and since, as stated supra § 28 (68), the board may suspend its rules the fact that the complaint violates the rules of the board has been held immaterial.[89] The sufficiency of the complaint is to be considered in the light of the fact that the proceeding is not punitive but preventive and in the interest of the general public.[90] Under some state labor relations acts the complaint should allege facts which show the board's jurisdiction of the subject matter.[91]

76. U.S.—Jacobsen v. N. L. R. B., C.C.A.3, 120 F.2d 96.

77. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579—Jacobsen v. N. L. R. B., C.C.A.3, 120 F.2d 96.

78. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

79. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., supra.

Abuse of the board's process appears where the charge is related to a course of violence and destruction, carried on for purpose of coercing an employer.—N. L. R. B. v. Indiana & Michigan Electric Co., supra.

80. U.S.—N. L. R. B. v. General Motors Corporation, C.C.A.7, 116 F.2d 306.

As not precluding issuance of complaint

An agreement between the employer and a labor union that all cases pending before the board should be withdrawn and that no further claims of discrimination would be presented to the board or to the employer for alleged discriminations against the union or its members occurring prior to the date of the agreement does not preclude the board from issuing a complaint against the employer for unfair labor practices based on charges filed with respect to the employer's conduct prior to the agreement.—N. L. R. B. v. General Motors Corporation, supra.

81. U.S.—N. L. R. B. v. Bachelder, C.C.A.7, 120 F.2d 574, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519, and modified on other grounds, C.C.A., 125 F.2d 387.

82. U.S.—N. L. R. B. v. Piqua Munising Wood Products Co., C.C.A.6, 109 F.2d 552.

83. U.S.—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 98 F.2d 97.

84. U.S.—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F.2d 38.

Determination of sufficiency

The board may decide whether the pleadings of the one or the other contestant are sufficient to maintain his contention.—International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers v. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, C.C.A.Cal., 106 F.2d 871.

85. U.S.—N. L. R. B. v. Sunbeam Electric Mfg. Co., C.C.A.7, 133 F.2d 856—N. L. R. B. v. Precision Castings Co., C.C.A.6, 130 F.2d 639—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F.2d 38.

86. U.S.—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780.

87. U.S.—N. L. R. B. v. Piqua Munising Wood Products Co., C.C.A.6, 109 F.2d 552.

Pa.—John Hancock Mutual Life Ins. Co. of Boston, v. Pennsylvania Labor Relations Board, 45 Pa.Dist. & Co. 169.

The only matters which need be stated are the manner in which the employer has engaged in unfair labor practices and which of such practices is in question.—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A. 9, 118 F.2d 780.

88. U.S.—N. L. R. B. v. Piqua Munising Wood Products Co., C.C.A.6, 109 F.2d 552.

A complaint was sufficient where employer participated in extensive hearings and admitted that board intended to charge the things of which employer was found guilty.—N. L. R. B. v. Sunbeam Electric Mfg. Co., C.C.A.7, 133 F.2d 856.

Matters of evidence need not be cited in a complaint.—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F.2d 38.

89. U.S.—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780.

90. U.S.—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F.2d 38.

91. Utah.—Furbreeders Agricultural Coöperative v. Wiesley, 132 P.2d 384, 102 Utah 601.

Complaint held defective

Complaint filed with labor relations board, which alleged that furbreeding coöperative association was engaged in unfair labor practices affecting intra-state commerce and the orderly operation of industry, but

Under the rules and regulations of the National Labor Relations Board, 29 U.S.C.A.Appendix § 203.11, a complaint may be issued and filed in a regional office, by the regional director, in the name of the board,[92] and may be signed by the director.[93]

Joinder. The board, in its discretion, may combine several matters relating to the same employer, or respondent, in one complaint.[94] It may combine a complaint proceeding against the employer with an employee-representation proceeding,[95] and the fact that the board, without hearing from respondent, consolidates charges made by separate unions against the same employer does not invalidate the proceedings[96] if the findings and conclusions are separately made and disconnected occurrences do not appear to have been illogically confused.[97]

Amendment. Subject to the limitation that respondent may not be taken by surprise, or that no disadvantage or injury accrue to him, the complaint may be amended with respect to the charges against respondent.[98] The board or trial examiner may, in his discretion, permit the complaint to be amended by adding names, referable to the same basic charge,[99] or by supplying omitted allegations,[1] such as to conform the pleadings to the proof;[2] and the fact that the examiner so exercises his discretion affords no ground for challenging the validity of the proceedings.[3] If respondent is afforded ample opportunity to meet the issue, and none of his substantial rights is invaded, a formal amendment is not required,[4] and in such a case respondent may not complain of an allegation by amendment made a few months before the hearing.[5]

b. In Judicial Proceedings

The rules relating to pleadings in civil actions usually apply in an action at law or in equity by a union or employees for damages for a breach of contract.

The rules relating to pleadings in civil actions usually apply in an action at law or in equity by a union or employees for damages for a breach of contract,[6] such as for the breach of a collective bargaining contract,[7] as for a wrongful discharge,[8] or for

which failed to allege facts showing board's jurisdiction of the subject matter of the controversy, in that fur breeding by specific statute is declared to be an agricultural pursuit exempt from the act was fatally defective.—Furbreeders Agricultural Cooperative v. Wiesley, supra.

92. U.S.—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 98 F.2d 97.

93. U.S.—N. L. R. B. v. Sunbeam Electric Mfg. Co., C.C.A.7, 133 F. 2d 856.

Provision in prior rules that executive secretary or director of field division should sign and issue all complaints, meant complaints issued from Washington under provision applicable under exceptional circumstances.—N. L. R. B. v. Sunbeam Electric Mfg. Co., supra.

94. U.S.—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A., 122 F.2d 433.

95. U.S.—Madden v. Brotherhood and Union of Transit Employees of Baltimore, C.C.A.Md., 147 F.2d 439, 158 A.L.R. 1330.

96. U.S.—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433.

97. U.S.—N. L. R. B. v. Tex-O-Kan Flour Mills Co., supra.

98. U.S.—Valley Mould & Iron Corporation v. N. L. R. B., C.C.A.7, 116 F.2d 760, certiorari denied 61 S. Ct. 1114, 313 U.S. 590, 85 L.Ed. 1545.

Under a state statute, it has been held that, if the original complaint fails clearly to set forth the nature of the improper acts charged, an amended complaint may be filed, before the hearing, which adequately advises the employer, or respondent, of the exact nature of the charges against him.—John Hancock Mutual Life Ins. Co. of Boston v. Pennsylvania Labor Relations Board, 45 Pa. Dist. & Co. 169.

99. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 108 F.2d 198.

Pa.—Pennsylvania Labor Relations Bd. v. Yellow Cab & Bus Co., Com. Pl., 30 North.Co. 9.

1. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

2. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., supra—M. H. Ritzwoller Co. v. N. L. R. B., C.C.A.7, 114 F.2d 432.

3. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

New name

An amendment that a union was operating under a new name did not affect validity of the proceedings.—N. L. R. B. v. Cudahy Packing Co., D.C.Kan., 34 F.Supp. 53.

4. U.S.—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A. 8, 119 F.2d 903.

5. U.S.—N. L. R. B. v. American Creosoting Co., C.C.A.6, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U.S. 797, 88 L.Ed. 1086.

Refusal to sign agreement

Where employer had ample opportunity to meet supplemental complaint charging refusal to sign an agreement as an unfair labor practice, and did not claim surprise or claim that it did sign the agreement, or was prepared to sign any supplemental agreement, employer could not complain of addition of allegation respecting such unfair practice by amendment to original complaint a few months before case was heard by the board, and could not complain that allegation was not included in charge as filed by employees.—N. L. R. B. v. American Creosoting Co., supra.

6. Ga.—O'Jay Spread Co. v. Hicks, 195 S.E. 564, 185 Ga. 507.

7. Ga.—O'Jay Spread Co. v. Hicks, supra.

Switchman's petition for damages for violation of seniority rights has been held not demurrable on theory that individual member of labor union cannot enforce union's contract with employer, where contract made by employees' committee and ratified by employees became part of employment contract.—McCoy v. St. Joseph Belt Ry. Co., 77 S.W.2d 175, 229 Mo.App. 506.

Petition by union and employees held sufficient

U.S.—O'Jay Spread Co. v. Hicks, 195 S.E. 564, 185 Ga. 507.

8. U.S.—Coxon v. Southern Pac. Co., C.C.A.Ariz., 155 F.2d 455.

Mo.—Hall v. St. Louis-San Francisco Ry. Co., 28 S.W.2d 687, 224 Mo.App. 431.

restoration to, and damages for loss of, seniority rights.[9] In pleading a cause of action which arose before the effective date of an amendment to the labor relations statute, plaintiff need not allege that he has complied with certain requirements of the amendment before suing.[10]

§ 28(90). —— Answer

Allegations as to irrelevant and immaterial matters in an employer's answer may properly be stricken.

Allegations as to irrelevant and immaterial matters in an employer's answer in an administrative proceeding before a labor relations board may properly be stricken.[11] Where an employer, charged with unfair labor practices, alleges in his answer that the labor organization was engaged in a conspiracy to seize plants under the guise of collective bargaining activity, it has been held that such allegations may be properly stricken for the purpose of preventing the introduction of testimony to sustain them,[12] but they cannot be stricken from the record as admissions of the employer's fixed purpose not to recognize a particular union.[13]

§ 28(91). —— Issues, Proof, and Variance

As a general rule in a proceeding before a labor board the issues are confined to those raised by the pleadings, although it has been held that, if the respondent is given full opportunity to meet the testimony, or to produce further proof, he may not complain of a variance between the pleadings and proof.

Although no particular form of procedure is essential in presenting the issues to respondent charged with unfair labor practices,[14] as a general rule the issues are confined to those raised by the pleadings,[15] and the issues as thus raised must be proved.[16] On the other hand, the trial and determination of an issue not clearly raised by the pleadings has been held not to be error where the parties are afforded ample time to meet the issue,[17] and it has also been held that, if respondent is given full opportunity to meet the testimony, he may not complain of a variance between the pleadings and the proof,[18] such as to the

Allegations held sufficient
Miss.—McGlohn v. Gulf & S. I. R. R., 174 So. 250, 179 Miss. 396.

Pleadings held insufficient
U.S.—Coxon v. Southern Pac. Co., C. C.A.Ariz., 155 F.2d 455.
Ga.—Hornsby v. Southern Ry. Co., 28 S.E.2d 542, 70 Ga.App. 467.

9. Ky.—Cannon v. Brotherhood of Railroad Trainmen, 89 S.W.2d 620, 262 Ky. 113.
Pa.—Madera v. Monongahela Ry. Co., 52 Pa.Dist. & Co. 216, 7 Fay.L. J. 250, 93 Pittsb.Leg.J. 38, 12 Som. Leg.J. 166.

In action for loss of seniority rights of trainman, where contract between union and railroad was involved, contract and union's constitution and by-laws should be disclosed in petition, as court could not adjudicate trainman's rights without complete disclosure of entire agreement.—Cannon v. Brotherhood of Railroad Trainmen, 89 S.W.2d 620, 262 Ky. 113.

Petition held insufficient
Ky.—Cannon v. Brotherhood of Railroad Trainmen, supra.

Restoration of seniority rights
In action by railroad employee to be restored to his proper status on seniority lists, complaint alleging that plaintiff was employed by railroad as a chef in 1911 and had worked continuously for same employer for twenty eight years, and that in 1933 he was reduced in rank to second cook and never restored to his former rating, was insufficient for failing to allege nature of seniority status or why employee was entitled thereto by alleging when and how seniority rights had become fixed.—Austin v. Southern Pac. Co., 123 P.2d 39, 50 Cal.App.2d 292.

10. Tex.—Mansell v. Texas & P. Ry. Co., 137 S.W.2d 997, 135 Tex. 31.

11. U.S.—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F. 2d 39.

As to conduct of board
Trial examiner properly struck from employer's answer as immaterial the allegations charging that attitude and conduct of board, its members, officers, agents, and employees had been such as to deprive employer of life, liberty and property without due process of law.—N. L. R. B. v. Baldwin Locomotive Works, supra.

12. D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35 v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

13. D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., supra.

14. U.S.—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 103 F. 2d 953.

15. U.S.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682—Consolidated Edison Co. of N. Y. v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579.

Particular matters held put in issue
U.S.—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U. S. 747, 88 L.Ed. 1579—Jefferson Electric Co. v. N. L. R. B., C.C.A. 7, 102 F.2d 949.

"Express aider"
In action against railroad by former engine foreman for wrongful discharge, wherein railroad's answer alleged that general yardmaster who discharged the foreman conducted a full, complete, fair and impartial hearing, issue as to whether foreman had a fair and impartial trial was in the case, under the doctrine of "express aider," even though foreman's petition may not have pleaded that he did not have a fair and impartial trial.—Butner v. Union Pac. R. Co., 163 S.W.2d 100, 236 Mo.App. 1134.

16. U.S.—N. L. R. B. v. Greater New York Broadcasting Corp., C. C.A.2, 147 F.2d 337, certiorari denied 65 S.Ct. 1190, 325 U.S. 860, 89 L.Ed. 1981—Western Union Telegraph Co. v. N. L. R. B., C.C.A. 2, 113 F.2d 992.
Utah.—International Union of Operating Engineers, Local No. 354 v. Industrial Commission of Utah, 119 P.2d 243, 101 Utah 139.

17. U.S.—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A. 8, 119 F.2d 903.

18. U.S.—N. L. R. B. v. Mackay Radio & Telegraph Co., 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381—N. L. R. B. v. Grieder Machine Tool & Die Co., C.C.A.6, 142 F.2d 163, certiorari denied 65 S.Ct. 56, 323 U.S. 724, 89 L.Ed. 582.

Fair hearing
Employer could not complain that he was not afforded a fair and un-

dates on which employees were discharged;[19] and, moreover, if he is not misled and does not raise the question until the conclusion of the hearing, he may not raise a jurisdictional issue that words were omitted from the complaining union's name as signed to the charge.[20]

Where the complaint alleges that the employer had wrongfully discharged employees on or about specified dates, the date of discharge is open to proof within the usual, reasonable limits.[21] Allegations in the complaint that the employer discharged employees for union activity on or about certain dates does not bind the board to limit its proof to discharges on those particular dates merely because the employer in his answer admitted that at the time mentioned he had discharged employees for cause.[22]

§ 28(92). Evidence in General

Where the statutes so provide, the rules of evidence prevailing in courts of law or equity are not controlling in proceedings by labor relations boards to prevent unfair labor practices.

Although the contrary is true under some statutes,[23] under a number of labor relations statutes in proceedings by the boards to prevent unfair labor practices the rules of evidence prevailing in courts of law or equity are not controlling.[24] The board is not required before making its findings to sift out the various items of evidence before it and reserve for special treatment those items which would have been inadmissible in a court of law under the technical rules of evidence.[25] However, the statutes do not abolish the rules of evidence prevailing in courts of law and equity.[26]

Where a board of conciliation and arbitration in the performance of its duties acts as a quasi-judicial tribunal, nothing can be treated by the board as evidence which is not introduced as such.[27]

§ 28(93). Presumptions and Burden of Proof

In proceedings to prevent unfair labor practices by an employer, the presumption obtains that the employer has not violated the law, and the burden is on the one alleging the commission of unfair labor practices to prove them.

In proceedings to prevent unfair labor practices under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar state statutes, various presumptions have been indulged.[28] The presumption obtains that the employer has not violated the stat-

prejudiced hearing because of a variance between evidence taken before trial examiner and allegations of complaint charging unfair labor practices, even if any variance existed, where examiner allowed employer full opportunity to meet testimony and at conclusion of hearing asked employer whether he desired any more time to develop case as to any phase of complaint as amended.—N. L. R. B. v. Grieder Machine Tool & Die Co., supra.

19. U.S.—N. L. R. B. v. Greater New York Broadcasting Corp., C. C.A.2, 147 F.2d 337, certiorari denied 65 S.Ct. 1190, 325 U.S. 860, 89 L.Ed. 1981.

20. U.S.—N. L. R. B. v. Vincennes Steel Corporation, C.C.A.7, 117 F. 2d 169.

21. U.S.—N. L. R. B. v. Greater New York Broadcasting Corp., C. C.A.2, 147 F.2d 337, certiorari denied 65 S.Ct. 1190, 325 U.S. 860, 89 L.Ed. 1981.

The board should not be held to the precise dates alleged in the complaint or found by the examiner; proof of an act or offense in violation of the statute within the limitation period is sufficient.—M. H. Ritzwoller Co. v. N. L. R. B., C.C.A. 7, 114 F.2d 432.

22. U.S.—N. L. R. B. v. Greater New York Broadcasting Corp., C. C.A.2, 147 F.2d 337, certiorari denied 65 S.Ct. 1199, 325 U.S. 860, 89 L.Ed. 1981.

23. **In Wisconsin**

(1) Under St.1939 § 111.07(3) the proceedings before the board shall be governed by the rules of evidence prevailing in courts of equity and the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.—Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 299 N.W. 31, 238 Wis. 379, certiorari denied Milk & Ice Cream Drivers & Dairy Employees Union Local 225 v. Wisconsin Employment Relations Board, 62 S.Ct. 1035, 316 U.S. 668, 86 L.Ed. 1944—Century Building Co. v. Wisconsin Employment Relations Board, 291 N. W. 305, 235 Wis. 376.

(2) Under earlier provisions in proceedings before the board the rules of evidence prevailing in courts of law or equity were not controlling.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 825, 232 Wis. 170.

24. U.S.—N. L. R. B. v. Quality Art Novelty Co., C.C.A., 127 F.2d 903—N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A.7, 113 F.2d 621—N. L. R. B. v. Empire Furniture Corporation, C.C.A.6, 107 F.2d 92.

N.Y.—New York State Labor Relations Board v. Select Operating Corporation, 49 N.Y.S.2d 294, 183 Misc. 480, reversed on other grounds 55 N.Y.S.2d 117, 269 App. Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684.

Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

Purpose of provision was to free board from compulsion of technical rules.—Consolidated Edison Co. of New York v. N. L. R. B., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. Sun Tent-Luebbert Co., C.C.A.9, 151 F.2d 483, opinion supplemented 154 F.2d 108, certiorari denied Merchants Ass'n of Los Angeles v. N. L. R. B., 67 S.Ct.44, 329 U.S. 714, 91 L.Ed. —.

25. U.S.—N. L. R. B. v. Service Wood Heel Co., C.C.A.1, 124 F.2d 470.

26. U.S.—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 870.

27. Mass.—Boott Mills v. Board of Conciliation and Arbitration, 40 N. E.2d 870, 311 Mass. 223.

28. U.S.—N. L. R. B. v. Piqua Munising Wood Products Co., C.C.A.6, 109 F.2d 552.

Where employer during strike abandoned one plant and opened new plant in another city, fact that reasons for not taking some of its workmen to that city lies exclusively within its own knowledge raises

ute;[29] and the act does not establish a presumption that employees are always to be deemed to be aiding a violation of the act if they prefer no organization and decline to create one.[30] Preference by employees for, and their selection of, an unaffiliated as against a nationally affiliated organization raises no presumption that this preference was coerced or purchased by the employer.[31]

Where there is a legitimate cause for an employee's discharge there can be no presumption that the discharge was illegal.[32] The unexplained hiring of inexperienced nonunion employees in preference to union employees active in union affairs is sufficient to create a reasonable inference of discrimination.[33]

Where a majority of employees has selected a bargaining agent, until such employees take action to express a new choice it will be presumed that the authority of the bargaining agent continues[34] for a reasonable time;[35] but, where employees have put an express time limit on the authority of their bargaining agent, the agent's authority cannot be presumed to continue beyond the time limited.[36] Where an employer has improperly refused to bargain with the authorized labor organization, it may reasonably be assumed that any diminution in the membership of the labor organization was due to the employer.[37] A mere witness is not presumed to know the contents of the pleadings or prayers of the litigants.[38]

Under the Railway Labor Act, 45 U.S.C.A. § 151 et seq, in the absence of any special agreement otherwise, every railway employment may be presumed to be on the basis of the collective agreement and to adopt its terms.[39]

Burden of proof. In proceedings to prevent unfair labor practices under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq; and similar state statutes, the burden of proof is on the one alleging violation of the statute to prove that unfair labor practices have been committed.[40] Thus it is

presumption against employer on question whether it would have offered jobs in new plant if there had been no strike, although the burden remains on board in proceeding to compel reinstatement.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

29. U.S.—N. L. R. B. v. Union Mfg. Co., C.C.A.5, 124 F.2d 332.

Mere filing of charges creates no presumption of commission of unfair labor practices.—Boeing Airplane Co. v. N. L. R. B., C.C.A.10, 140 F.2d 423.

Board must observe traditional rule against presumption of liability or bad faith.—Boeing Airplane Co., Wichita Division, v. N. L. R. B., supra.

Statute does not abolish for employers presumption that private transactions have been fair and regular, or the principle in favor of integrity of conduct.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, affirmed 112 F.2d 63, set aside 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Elec. Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

30. U.S.—N. L. R. B. v. Sterling Electric Motors, supra.

31. U.S.—Southern Ass'n of Bell Telephone Employees v. N. L. R. B., C.C.A.5, 129 F.2d 410, reversed on other grounds 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.5, 112 F.2d 545.

32. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486.

33. U.S.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311.

34. U.S.—N. L. R. B. v. Harris-Woodson Co., C.C.A.4, 162 F.2d 97—Colorado Fuel & Iron Corporation v. N. L. R. B., C.C.A.10, 121 F.2d 165—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 111 F.2d 474—N. L. R. B. v. Highland Park Mfg. Co., C.C.A.4, 110 F.2d 632—N. L. R. B. v. Biles-Coleman Lumber Co., C.C.A.9, 96 F.2d 197.

Selection prior to enactment of statute

U.S.—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539.

35. U.S.—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 849, certiorari denied 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119.

Between hearing and decision

Where it was stipulated that majority of employees was affiliated with certain union, presumption existed that majority continued until board had opportunity to make its decision.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

During strike

Where union represented a large majority of employees when strike was called, presumptively at least, its status as collective bargaining agent continued during period of strike.—International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co., C.C.A.Mo., 118 F.2d 615.

Three years

Presumption that union continued to represent a majority of employees would not continue for as long as three years particularly in face of an assertion and offer of proof to the contrary.—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 849, certiorari denied 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119.

36. U.S.—N. L. R. B. v. Acme Air Appliance Co., C.C.A.2, 117 F.2d 417.

37. U.S.—Colorado Fuel & Iron Corporation v. N. L. R. B., C.C.A.10, 121 F.2d 165.

38. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 108 F.2d 198.

39. U.S.—Railway Express Agency v. Order of Railroad Telegraphers, C.C.A.Ga., 137 F.2d 46, reversed on other grounds 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788—Illinois Cent. R. Co. v. Moore, C.C.A.5, 112 F.2d 959.

40. U.S.—Boeing Airplane Co., Wichita Division, C.C.A.10, v. N. L. R. B., 140 F.2d 423—Texarkana Bus

incumbent on the one so alleging to prove interference, restraint, or coercion by an employer of employees in the exercise of rights guaranteed by the statutes[41] or domination or interference by an employer with the formation or administration of any labor organization.[42] Where the employer formerly dominated a union he has the burden of establishing that the consequences of his domination have been fully dissipated.[43]

The burden of proof is not on the employer, but rather on the person who asserts the fact, to prove that an employee was discharged in violation of the statutes because of participation in union activities.[44] Where the employer shows that he was justified in discharging an employee, the burden is on the employee to show that the dismissal was for union activity;[45] where the employer's explanation of the motivating cause of the discharge of an employee is reasonable, the burden is on the board to establish the falsity of the explanation and that the motivating reason was union affiliation.[46] Where there is substantial evidence to indicate that an employee was discharged because of his union activities, a very definite burden is imposed on the employer to prove the existence of a reason, not within the prohibitions of the act, sufficient in itself to justify the discharge.[47] An inference of discriminatory discharge, unless destroyed and refuted, leaves it up to the employer to give an adequate explanation.[48] Where the employer claims that the discharge was justified because of a closed-shop agreement, the employer has the burden of proving the closed-shop agreement.[49]

Where a refusal to bargain is one of the causes

Co. v. N. L. R. B., C.C.A., 119 F. 2d 480—N. L. R. B. v. Illinois Tool Works, C.C.A., 119 F.2d 356—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.5, 112 F.2d 545.

N.Y.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256—New York State Labor Relations Board v. Select Operating Corporation, 49 N.Y.S.2d 294, 183 Misc. 480, reversed on other grounds 55 N.Y.S. 2d 117, 269 App.Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684—Triboro Coach Corporation v. New York State Labor Relations Board, 22 N.Y.S.2d 1013, affirmed 27 N.Y. S.2d 83, 261 App.Div. 636, affirmed 36 N.E.2d 315, 286 N.Y. 314, 144 A.L.R. 410, 39 N.E.2d 276, 287 N. Y. 647, 144 A.L.R. 410.

Pa.—Petition of Union Trust Co. of Pittsburgh, 20 A.2d 779, 342 Pa. 456.

In its capacity as accuser national board has burdens and obligations of proof as any other litigant who takes the affirmative, and must prove its charge.—Southern Ass'n of Bell Telephone Employees v. N. L. R. B., C.C.A.5, 129 F.2d 410, reversed on other grounds 63 S.Ct. 905, 319 U. S. 50, 87 L.Ed. 1250—N. L. R. B. v. Riverside Mfg. Co., C.C.A.5, 119 F. 2d 302.

41. U.S.—N. L. R. B. v. Express Pub. Co., C.C.A.5, 111 F.2d 588, reversed on other grounds 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930.

42. U.S.—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 106 F. 2d 100—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951.

Where employer states his preference for representative of employees, it has been held that burden remains on him to show that by his activity he has in no way exercised any form of coercion or domination or insinuated possibility of reprisal against employees in case of decision contrary to his thoughts.—In re McGarvey, Pa.Com.Pl., 26 Erie Co. 119.

43. U.S.—Sperry Gyroscope Co. v. N. L. R. B., C.C.A.2, 129 F.2d 922.

44. U.S.—N. L. R. B. v. Reynolds Intern. Pen Co., C.C.A.7, 162 F.2d 680—N. L. R. B. v. Alco Feed Mills, C.C.A.5, 133 F.2d 419—Interlake Iron Corporation v. N. L. R. B., C.C.A.7, 131 F.2d 129—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A.4, 127 F.2d 109—American Smelting & Refining Co. v. N. L. R. B., C.C.A., 126 F.2d 680—N. L. R. B. v. Union Mfg. Co., C.C.A.5, 124 F.2d 332—N. L. R. B. v. Vincennes Steel Corporation, 117 F.2d 169—Independent Union of Gear Workers v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Independent Union of Gear Workers, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394—Foote Bros. Gear & Machine Corporation v. N. L. R. B., 114 F.2d 611, reversed on other grounds N. L. R. B. v. Foote Bros. Gear & Machine Corporation, 61 S. Ct. 318, 311 U.S. 620, 85 L.Ed. 394, mandate conformed to Foote Bros. Gear & Machine Corporation v. N. L. R. B., 121 F.2d 802—N. L. R. B. v. Goshen Rubber & Manufacturing Co., C.C.A.7, 110 F.2d 432.

Pa.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398.

Attitude of employer after passage of statute

Decision of board as ground for ordering reinstatement of discharged employees, that no affirmative reason was found for believing that employer's attitude toward unionization had changed after effective date of labor relations act, improperly placed on employer burden of producing affirmative proof that its attitude had changed.—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App.Div. 315.

45. Pa.—Pennsylvania Labor Relations Board v. Metropolitan Life Ins. Co., 48 Pa.Dist. & Co. 340.

Wis.—Blum Bros. Box Co. v. Wisconsin Labor Relations Board, 282 N.W. 98, 229 Wis. 615.

46. U.S.—Nevada Consol. Copper Corporation v. N. L. R. B., C.C.A. 10, 122 F.2d 587, reversed on other grounds 62 S.Ct. 960, 316 U.S. 105, 86 L.Ed. 1305—N. L. R. B. v. Entwistle Mfg. Co., C.C.A.4, 120 F.2d 532—Martel Mills Corporation v. N. L. R. B., C.C.A.4, 114 F.2d 624.

Employer need not justify his failure to reinstate employee on some ground other than union activity until it is shown that such employee was refused reinstatement for that reason.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

47. U.S.—N. L. R. B. v. Entwistle Mfg. Co., C.C.A.4, 120 F.2d 532.

48. U.S.—N. L. R. B. v. Chicago Steel Foundry Co., C.C.A.7, 142 F. 2d 306, 153 A.L.R. 838—Montgomery Ward & Co. v. N. L. R. B., C.C. A.7, 107 F.2d 555.

49. Or.—Stone Logging & Contracting Co. v. International Woodworkers of America, Columbia District Council No. 5, 135 P.2d 759, 171 Or. 13.

Under National Labor Relations Act

Prior to amendment of 1947 to National Labor Relations Act, 29 U.S.C.A. § 158(3), the rule of the text applied, and the employer was required to show either that a designation or selection of the labor organization claimed to have execut-

of a strike, the burden rests on the employer, so refusing to bargain, to show that the strike would have taken place even though he had not refused to bargain.[50]

In an action by several employees against the employer on a written agreement between such employees and employer, the burden is on the employer to prove a contention that a delegate authorized to represent the employees had authority to alter the written contract by an oral agreement.[51]

§ 28(94). Admissibility of Evidence

Where the statutes so provide, labor relations boards in proceedings to prevent unfair labor practices are not bound by technical rules concerning the admissibility of evidence.

Where the statutes so provide, in proceedings to prevent unfair labor practices the rules of evidence prevailing in courts of law or equity are not controlling, and the boards are not bound by technical rules concerning the admissibility of evidence.[52] All facts tending to prove or disprove a violation of the statute are competent evidence.[53] The mere admission of matter which would be deemed incompetent in judicial proceedings does not invalidate the orders of the board;[54] and under such statutes the boards may hear incompetent evidence,[55] including hearsay evidence.[56]

In proceedings by labor boards to prevent unfair labor practices the evidence has been held admissible or inadmissible in various cases[57] with respect to

ed the agreement as an agent to bargain generally for working conditions or specifically for a closed shop had been made by a majority of employees in an appropriate unit of employees of the bargaining employer, or that the employees were members of the labor organization claimed to have executed the agreement and that the organization was so constituted as to be empowered to act as such an agent, and that it had in its membership a majority of the employees in an appropriate unit of employees of the bargaining employer.—N. L. R. B. v. Mason Mfg. Co., C.C.A.9, 126 F.2d 810.

50. U.S.—N. L. R. B. v. Barrett Co., C.C.A.7, 135 F.2d 959—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167.

51. U.S.—Ahlquist v. Alaska-Portland Packers Ass'n, C.C.A.Or., 39 F.2d 348.

52. U.S.—Oughton v. N. L. R. B., C. C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198—Arts Metals Const. Co. v. N. L. R. B., C.C.A.2, 110 F. 2d 148.

N.Y.—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App.Div. 315.

53. U.S.—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949.

Controversy was not ripe for decision until all competent and material evidence proffered had been received and considered by board.—Donnelly Garment Co. v. N. L. R. B., C.C.A.8, 123 F.2d 215.

54. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. Sun Tent-Luebbert Co., C.C.A.9, 151 F.2d 483, opinion supplemented 154 F.2d 108, certiorari denied Merchants & Manufacturers Ass'n of Los Angeles v. N. L. R. B., 67 S.Ct. 44—Indianapolis Power & Light Co. v. N. L. R. B., C.C.A.7, 122 F.2d 757, certiorari denied 62 S.Ct. 633, 315 U.S. 804, 86 L.Ed. 1204—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713.

Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

55. U.S.—N. L. R. B. v. Washington Dehydrated Food Co., C.C.A.9, 118 F.2d 980—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 870.

Materiality of evidence

It has been held, however, that such a statute is not intended to limit the well-known rules relating to the materiality of evidence.—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 119 F.2d 356.

Nonlegal evidence must have substantial probative force and may not be mere opinion, except in fields where opinion of experts is proper for consideration and person giving it is shown to have some special knowledge reasonably entitling his opinion to some weight.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

56. U.S.—N. L. R. B. v. Remington Rand, C.C.A.2, 130 F.2d 919—N. L. R. B. v. Cities Service Oil Co., C. C.A.2, 129 F.2d 933—N. L. R. B. v. Service Wood Heel Co., C.C.A.1, 124 F.2d 470—Consolidated Edison Co. of New York v. N. L. R. B., C. C.A.2, 95 F.2d 390, modified on other grounds 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

N.Y.—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App.Div. 315—New York State Labor Relations Board v. Select Operating Corporation, 49 N.Y.S.2d 294, 183 Misc. 480, reversed on other grounds 55 N.Y.S.2d 117, 269 App. Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684.

If hearsay evidence is corroborative of other evidence or is otherwise of such nature as to have some reasonable bearing on fact for determination, it may be admitted.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

Rejection of hearsay rests in board's discretion

D.C.—E. Anthony & Sons v. N. L. R. B., App., 163 F.2d 22.

57. **Belief of examiner that witnesses would commit perjury** would not have affected admissibility of their evidence.—Donnelly Garment Co. v. N. L. R. B., C.C.A.8, 123 F.2d 215.

Evidence held admissible

(1) In general.—N. L. R. B. v. Reynolds Corp., C.C.A.5, 155 F.2d 679—N. L. R. B. v. Pick Mfg. Co., C.C. A.7, 135 F.2d 329—N. L. R. B. v. National Seal Corporation, C.C.A.2, 127 F.2d 776—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—Art Metals Const. Co. v. N. L. R. B., C.C.A.2, 110 F.2d 148.

(2) Evidence of bribery.—Application of Almroth, 17 N.Y.S.2d 225, 258 App.Div. 378.

Evidence held inadmissible

(1) In general.—Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 299 N. W. 31, 238 Wis. 379, certiorari denied Milk & Ice Cream Drivers and Dairy Employees Union Local 225 v. Wisconsin Employment Relations Board, 62 S.Ct. 1035, 316 U.S. 668, 86 L.Ed. 1744.

(2) Testimony concerning past action of union.—N. L. R. B. v. Acme-

such issues as whether a union was a labor organization within the statute,[58] interference with or restraint or coercion by employers of employees in the exercise of rights guaranteed by the act,[59] domination or interference by the employer with the formation or administration of any labor organization,[60] discrimination by the employer with regard to hire and tenure of employment because of union activities,[61] including the discharge of employees,[62] and the refusal of employers to bargain collectively

Evans Co., C.C.A.7, 130 F.2d 477, certiorari denied Acme-Evans Co. v. N. L. R. B., 63 S.Ct. 769, 318 U.S. 772, 87 L.Ed. 1142, rehearing denied 63 S. Ct. 851, 318 U.S. 802, 87 L.Ed. 1166.

(3) Inquiry into employer's affairs which was immaterial and which might be used to employer's detriment.—N. L. R. B. v. Washington Dehydrated Food Co., C.C.A.9, 118 F. 2d 980.

(4) Testimony of employees that they voluntarily revoked authorizations of union, where unfair labor practices occurred before, and still existed when, the revocations were executed.—N. L. R. B. v. New Era Die Co., C.C.A.3, 118 F.2d 500.

Receipt of documents without authentication

Statutory provision that rules of evidence prevailing in courts of law or equity shall not be controlling permits receipt of letters and documents without authentication.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

Testimony with respect to what employer did and what he said was admissible, but admission of testimony with respect to employer's intent in so doing or saying was improper.—Folding Furniture Works v. Wisconsin Labor Relations Board, supra.

Copies of documents subpœnaed

Where witness producing copies of documents pursuant to subpœna for production of certain documents of labor union in hearing before board stated he did not know where originals were, the absence of originals was sufficiently accounted for to warrant admission of copies.—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579.

58. **Alleged criminal activity of labor union** which filed charges against employer was material on question whether union was a labor organization.—N. L. R. B. v. Indiana & Michigan Electric Co., C.C.A.6, 124 F.2d 50, affirmed 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

59. U.S.—N. L. R. B. v. Bird Mach. Co., C.C.A.1, 161 F.2d 589.

Evidence held admissible

U.S.—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S. Ct. 468, 326 U.S. 811, 90 L.Ed. 495.

Evidence held inadmissible

D.C.—E. Anthony & Sons v. N. L. R. B., App.D.C., 163 F.2d 22—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

Statement of company's policy on bulletin board

In proceeding on charges of unfair labor practices, statement of policy which appeared on employer's bulletin board on date when union which filed charges had majority in appropriate unit was relevant and material and admissible as bearing on employer's attitude, even though it may have been an exercise of employer's constitutional right of free speech.—N. L. R. B. v. Chicago Apparatus Co., C.C.A.7, 116 F.2d 753.

60. U.S.—Wallace Corporation v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Richwood Clothespin & Dish Worker's Union v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216—Donnelly Garment Co. v. N. L. R. B., C.C.A.8, 123 F.2d 215—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 113 F.2d 85.

Expressions of opinion by employer concerning unions are competent evidence if they destroy employer's neutrality with respect to unions.—Valley Mould & Iron Corporation v. N. L. R. B., C.C.A.7, 116 F.2d 760, certiorari denied 61 S.Ct. 1114, 313 U.S. 590, 85 L.Ed. 1545.

Circular distributed by employer to employees, and which set out rights of employees to organize independent union, affiliate with national organization, or be free from joining any union, was admissible on question of domination by employer of inside labor organization.—N. L. R. B. v. Blossom Products Corporation, C.C.A.3, 121 F.2d 260.

Alleged statement by organizers expressing hostility to certain national labor union was immaterial.—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868.

Limitation as to time of occurrence of acts

Board was not guilty of discriminatory treatment because evidence of company coercion in 1935 was admitted as bearing on independence of new company union in 1937, whereas, on issue of influence of outside union's violence in formation of 1937 company union, board drew line at events six months prior thereto.—N. L. R. B. v. Donnelly Garment Co., 67 S.Ct. 756, 330 U.S. 219, 91 L.Ed. —.

61. **Employer's personnel records** were relevant evidence.—Montgomery Ward & Co. v. N. L. R. B., C.C.A. 7, 107 F.2d 555.

62. **Evidence held admissible**

U.S.—N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036—N. L. R. B. v. Reynolds Corp., C.C.A.5, 155 F.2d 679—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F.2d 9—Peninsular & Occidental S. S. Co. v. N. L. R. B., C.C.A.5, 98 F.2d 411, certiorari denied N. L. R. B. v. Peninsular & Occidental S. S. Co., 59 S.Ct. 248, 305 U.S. 653, 83 L.Ed. 423—Clover Fork Coal Co. v. N. L. R. B., C.C.A.6, 97 F.2d 331.

Evidence held inadmissible

U.S.—Tyne Co. v. N. L. R. B., C.C. A.7, 125 F.2d 832—N. L. R. B. v. Vincennes Steel Corporation, C.C.A. 7, 117 F.2d 169.

Statements and actions of foremen, inspectors, etc.

(1) Evidence of supervisory employee's statement that if discharged employee "had stayed out of the union he would have been working today" was admissible.—N. L. R. B. v. Entwistle Mfg. Co., C.C.A.4, 120 F.2d 532.

(2) Testimony as to opinion of employer's foreman regarding reason for discharge of certain employees was not relevant where foreman had nothing to do with discharge.—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433.

(3) Board properly considered testimony concerning statements and actions of inspectors, foremen, and subforemen, including attempts to induce employees to join company union and threats that they would be discharged if they did not cease their activity in the other union.—N. L. R. B. v. Walworth Co., C.C.A.7, 124 F.2d 816.

(4) Testimony with respect to what employer's sons had said as to employer's ability to increase wages was improperly admitted in absence of showing that sons knew anything about the matter.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

with their employees' representatives.[63] The attitude of the employer toward unions and the history of labor relations at the employer's plant are relevant circumstances to be considered by the board in ascertaining the existence of unfair labor practices.[64] Testimony relating to the arrest of a witness is inadmissible for impeachment purposes in the absence of a showing of a conviction on the charges.[65]

Actions for breach of union contract. In actions by an employee against the employer for breach of a union contract the general rules governing the admissibility of evidence in civil actions ordinarily are applicable.[66]

§ 28(95). Weight and Sufficiency of Evidence

The statutory relaxation of the strict rules of evidence in proceedings before labor relations boards does not justify orders by the boards without a basis in evidence having rational probative force.

Statutes providing that the rules of evidence prevailing in courts of law or equity shall not be controlling do not justify orders by labor relations boards without a basis in evidence having rational probative force,[67] and, as considered infra § 28 (136), the findings of the boards as to the facts are not binding on the courts on review unless they are supported by substantial or credible evidence. The relaxation of the strict rules pertaining to the admission of evidence does not limit the well-known rules relating to the weight of evidence;[68] it does not permit the boards arbitrarily to substitute surmise, suspicion, rumor, gossip, or guess for proof.[69] The statutory power given to the board to decide the facts does not authorize it to ignore conceded, undisputed, or established material facts.[70]

Circumstantial, as well as direct, evidence may be relied on.[71] The board may draw inferences from

63. U.S.—N. L. R. B. v. Burke Mach. Tool Co., C.C.A.6, 133 F.2d 618.

Evidence of employees' election to determine collective bargaining agency and agreement between employer and union for such election under National Labor Relations Act is competent at hearing on charge in complaint pending before national labor relations board that employer refused to bargain with union as such agency.—Surpass Leather Co. v. Winters, D.C.N.Y., 23 F.Supp. 776.

Testimony of chief economist for board, as an expert on subject of process of collective bargaining, was not objectionable.—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713.

64. U.S.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Independent Union of Craftsmen, 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Collins & Aikman Corp., C.C.A.4, 146 F.2d 454—N. L. R. B. v. Trojan Powder Co., C.C.A. 3, 135 F.2d 337, certiorari denied Trojan Powder Co. v. N. L. R. B., 64 S.Ct. 76, 320 U.S. 768, 88 L.Ed. 458, rehearing denied 64 S.Ct. 194, 320 U.S. 813, 88 L.Ed. 491—Marlin-Rockwell Corporation v. N. L. R. B., C.C.A.2, 133 F.2d 258.

Prior to enactment of act

(1) History of labor relations at employer's plant prior to enactment of act was material evidence.—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579—N. L. R. B. v. McLain Fire Brick Co., C.C.A.3, 128 F.2d 393.

(2) Hostility to outside unions prior to enactment of statute and preference for a company union unless later unequivocally repudiated was considered in determining whether employer has been guilty of unfair labor practices.—Atlas Underwear Co. v. N. L. R. B., C.C.A.6, 116 F.2d 1020.

Evidence of unfair practices occurring prior to posting of notices by employer in compliance with order of board was admissible in subsequent proceeding.—N. L. R. B. v. Kohen-Ligon-Folz, Inc., C.C.A.5, 128 F.2d 502.

65. U.S.—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F.2d 9.

66. **Discharge of employee**

(1) In discharged engineman's action against railroad, working agreement between Brotherhood of Locomotive Firemen and Enginemen and the Union Terminal was admissible where such agreement was adopted as working agreement between defendant and its enginemen.—Lyons v. St. Joseph Belt Ry. Co., Mo.App., 84 S.W.2d 933, certiorari quashed, Sup., State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351.

(2) In action by railroad switchman against permanent trustees for railroad, appointed by federal court pursuant to bankruptcy proceedings, for wrongful discharge contrary to labor union contract, evidence of earnings of other switchmen, junior in seniority to plaintiff, was admissible.—Ward v. Kurn, 132 S.W.2d 245, 234 Mo.App. 241.

67. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L. Ed. 126—Indianapolis Power & Light Co. v. N. L. R. B., C.C.A.7, 122 F.2d 757, certiorari denied 62 S.Ct. 633, 315 U.S. 804, 86 L.Ed. 1204—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574.

N.Y.—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App.Div. 315.

Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

68. U.S.—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 119 F.2d 356.

69. U.S.—N. L. R. B. v. Draper Corporation, C.C.A.4, 145 F.2d 199, 156 A.L.R. 989—Cudahy Packing Co. v. N. L. R. B., C.C.A., 116 F.2d 367.

N.Y.—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App.Div. 315.

Pa.—Petition of Union Trust Co. of Pittsburgh, 20 A.2d 779, 342 Pa. 456—Lazarus Store v. Pennsylvania Labor Relations Board, Com. Pl., 37 Luz.Leg.Reg. 413—Hodson Motor Co. v. United Automobile Workers, Com.Pl., 89 Pittsb.Leg.J. 241—Pennsylvania Labor Relations Board v. American Stores Co., Com.Pl., 10 Sch.Reg. 20.

70. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287.

71. U.S.—Piedmont Shirt Co. v. N. L. R. B., C.C.A., 138 F.2d 738—Sperry Gyroscope Co. v. N. L. R. B., C.C.A., 129 F.2d 922—F. W. Woolworth Co. v. N. L. R. B., C.C. A.2, 121 F.2d 658—Hartsell Mills Co. v. N. L. R. B., C.C.A., 111 F.2d 291.

N.Y.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256—New York State Labor Relations Board v. Select Operating Corporation, 49 N.Y.S.2d 294, 183 Misc. 480, reversed on other grounds 55 N.Y.S.

the facts proved,[72] and the possibility of drawing either of two inferences from the evidence does not prevent the board from drawing one of them.[73] The board may credit its own witnesses to the exclusion of others.[74] Statements of employers or of employees generally can have no rational probative force as evidence in a proceeding before the board except when such statements relate directly to a factual issue before the board.[75] There is no legal justification for the rejection of the testimony of a witness where it is not inherently improbable and is substantially supported by other evidence.[76]

Where the statute provides that the rules of evidence prevailing in the courts shall be followed, the party on whom the burden of proof rests is required to sustain such burden by a clear and satisfactory preponderance of the evidence.[77]

The evidence in proceedings before labor relations boards, including the National Labor Relations Board, to prevent unfair labor practices has been held in various cases to be sufficient to sustain the order of the board;[78] or sufficient or insufficient with respect to particular matters,[79] such as closed shop agreements,[80] whether a certain person is an employer[81] or employee,[82] whether an employer is engaged in interstate commerce or his activities af-

2d 117, 269 App.Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684.

72. U.S.—Canyon Corporation v. N. L. R. B., C.C.A., 128 F.2d 953.
Pa.—Lazarus Store v. Pennsylvania Labor Relations Board, Com.Pl., 37 Luz.Leg.Reg.Rep. 413.

73. U.S.—N. L. R. B. v. Nevada Consol. Copper Corporation, 62 S.Ct. 960, 316 U.S. 105, 86 L.Ed. 1305—Elastic Stop Nut Production v. N. L. R. B., C.C.A., 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—Onan v. N. L. R. B., C.C.A., 139 F.2d 728—Harp v. N. L. R. B., C.C.A., 138 F.2d 546—N. L. R. B. v. Denver Tent & Awning Co., C.C.A., 138 F.2d 410—N. L. R. B. v. Harbison-Walker Refractories Co., C.C.A., 135 F.2d 837—Canyon Corporation v. N. L. R. B., C.C.A., 128 F.2d 953—Montgomery Ward & Co. v. N. L. R. B., C.C.A.7, 107 F.2d 555.

74. U.S.—N. L. R. B. v. Bird Mach. Co., C.C.A.1, 161 F.2d 589.

75. U.S.—N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A. 7, 113 F.2d 621.

76. U.S.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

77. Rules of evidence prevailing in courts of equity
Wis.—Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 299 N.W. 31, 238 Wis. 379, certiorari denied Milk & Ice Cream Drivers and Dairy Employees Union Local 225 v. Wisconsin Employment Relations Board, 62 S.Ct. 1035, 316 U.S. 668, 86 L.Ed. 1944—Century Building Co. v. Wisconsin Employment Relations Board, 291 N.W. 305, 235 Wis. 376.

78. U.S.—N. L. R. B. v. Automative Maintenance Machinery Co., C.C.A. 7, 62 S.Ct. 608, 315 U.S. 282, 86 L.Ed. 848—N. L. R. B. v. Rosebraugh, C.C.A.9, 154 F.2d 58—N. L. R. B. v. New Idea, C.C.A.6, 133 F.2d 194—N. L. R. B. v. Good Coal Co., 110 F.2d 501, certiorari denied Good Coal Co. v. N. L. R. B., 60 S.Ct. 978, 310 U.S. 630, 84 L.Ed. 1400.

79. U.S.—N. L. R. B. v. Premo Pharmaceutical Laboratories, Inc., C.C.A., 136 F.2d 85—N. L. R. B. v. Weirton Steel Co., C.C.A.3, 135 F.2d 494—N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A.6, 123 F.2d 831—N. L. R. B. v. Blanton Co., C.C.A.8, 121 F.2d 564—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A.8, 119 F.2d 903—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F.2d 340—N. L. R. B. v. Asheville Hosiery Co., C.C.A.4, 108 F.2d 288—Wilson & Co. v. N. L. R. B., C.C.A.8, 103 F.2d 243—Appalachian Electric Power Co. v. N. L. R. B., C.C.A.4, 93 F.2d 985.
Wis.—Christoffel v. Wisconsin Employment Relations Board, 10 N.W.2d 197, 243 Wis. 332, certiorari denied 64 S.Ct. 90, 320 U.S. 776, 88 L.Ed. 466—Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 299 N.W. 31, 238 Wis. 379, certiorari denied Milk & Ice Cream Drivers & Dairy Employees Union Local 225, v. Wisconsin Employment Relations Board, 62 S.Ct. 1035, 316 U.S. 668, 86 L.Ed. 1744.

80. Evidence held sufficient
(1) Generally.—N. L. R. B. v. Electric Vacuum Cleaner Co., 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, reversing 120 F.2d 611, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775.

(2) To sustain finding that closed-shop agreement was invalid.—Sperry Gyroscope Co. v. N. L. R. B., C.C.A.2, 129 F.2d 922—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—N. L. R. B. v. Mason Mfg. Co., C.C.A.9, 126 F.2d 810.

Evidence held insufficient
(1) To authorize finding that closed-shop contracts with union were culmination of unfair labor practices.—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949.

(2) To establish that labor organization had authority to make valid closed shop agreement.—N. L. R. B. v. Mason Mfg. Co., C.C.A.9, 126 F.2d 810.

Maintenance-of-membership clause
In proceeding by employer to set aside an order of board reinstating employees discharged on basis of maintenance-of-membership clause in labor union, evidence sustained board's determination that no agreement existed between union and employer from March 14, 1945, to May 23, 1945.—Colonie Fibre Co. v. N. L. R. B., C.C.A.2, 163 F.2d 65.

81. U.S.—Butler Bros. v. N. L. R. B., C.C.A.7, 134 F.2d 981, certiorari denied 64 S.Ct. 203, 320 U.S. 789, 88 L.Ed. 475 and Wasleff v. N. L. R. B., 64 S.Ct. 204, 320 U.S. 789, 88 L.Ed. 475.

Joint employers
Evidence that holder of a contract for the logging of standing timber owned by a lumber company was not a free agent in handling the enterprise or in dealing with men employed, but in a measure was dominated by the lumber company, justified finding of board that contractor and lumber company were joint employers as to men employed by contractor.—N. L. R. B. v. Long Lake Lumber Co., C.C.A.9, 138 F.2d 363.

Successor corporation
U.S.—N. L. R. B. v. Tupelo Garment Co., C.C.A.5, 122 F.2d 603.

82. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438—N. L. R. B. v. Poultrymen's Service Corporation, C.C.A.3, 138 F.2d 204.

Newsboys
U.S.—N. L. R. B. v. Hearst Publications, 64 S.Ct. 851, 322 U.S. 111, 88 L.Ed. 1170, rehearing denied N. L. R. B. v. Hearst Publications, 64

fect interstate commerce so as to come within the federal statute,[83] whether a labor dispute had been settled,[84] whether an organization is a labor organization,[85] whether a certain organization was the authorized representative of the employees[86] and whether the employer has recognized or refused to

S.Ct. 1148, 2 cases, 322 U.S. 769, 88 L.Ed. 1595, N. L. R. B. v. Stockholders Pub. Co., 64 S.Ct. 1148, 322 U.S. 770, 88 L.Ed. 1595 and N. L. R. B. v. Times-Mirror Co., 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595.

Plant clerks having supervisory duties

U.S.—N. L. R. B. v. Swift & Co., C.C.A.3, 162 F.2d 575.

Plant guards during war

U.S.—N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265, 331 U.S. 398, 91 L.Ed. ——.

Seamen

U.S.—Southern S. S. Co. v. N. L. R. B., 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246.

Tiff miners working mining properties on royalty basis and haulers were employees under evidence.—N. L. R. B. v. Blount, C.C.A.9, 131 F.2d 585, certiorari denied Blount v. N. L. R. B., 63 S.Ct. 995, 318 U.S. 791, 87 L. Ed. 1157.

83. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S. Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

Particular employers

(1) Bank and trust company.—Reilly v. Millis, D.C.D.C., 52 F.Supp. 172, affirmed 144 F.2d 259, 79 U.S. App.D.C. 171, certiorari denied 65 S.Ct. 1566, 325 U.S. 879, 89 L.Ed. 1995.

(2) Clothing or garment manufacturer.—N. L. R. B. v. Fainblatt, 59 S.Ct. 668, 306 U.S. 601, 307 U.S. 609, 83 L.Ed. 1014—N. L. R. B. v. Friedman-Harry Marks Clothing, 57 S.Ct. 645, 301 U.S. 58, 81 L.Ed. 921, 108 A. L.R. 1352.

(3) Fraternal benefit association. —Polish Nat. Alliance of U. S. v. N. L. R. B., C.C.A.7, 136 F.2d 175, affirmed 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509.

(4) Newspaper publisher.—N. L. R. B. v. Register Pub. Co., C.C.A.9, 141 F.2d 156.

(5) Power company.—Southern Colorado Power Co. v. N. L. R. B., C.C.A.10, 111 F.2d 539.

(6) Telephone company.—N. L. R. B. v. Central Missouri Telephone Co., C.C.A.8, 115 F.2d 563.

84. U.S.—N. L. R. B. v. Fitzpatrick & Weller, C.C.A.2, 138 F.2d 697.

85. U.S.—N. L. R. B. v. Landis Tool Co., C.C.A.3, 145 F.2d 152—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39—N. L. R. B. v. Blanton Co., C.C.A.8, 121 F.2d 564.

86. **Evidence held sufficient**

(1) Generally.—Wilson & Co. v. N. L. R. B., C.C.A.8, 162 F.2d 310—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—N. L. R. B. v. American Mfg. Co., C.C.A.2, 106 F.2d 61, modified on other grounds American Mfg. Co. v. N. L. R. B., 60 S.Ct. 612, 309 U.S. 629, 84 L.Ed. 988.

(2) To support conclusion that organization was choice as bargaining representative of employees.

U.S.—N. L. R. B. v. Bradford Dyeing Ass'n, 60 S.Ct. 918, 310 U.S. 318, 84 L.Ed. 1226—National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799—N. L. R. B. v. Consolidated Mach. Corp., C.C.A.2, 163 F.2d 376—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438—N. L. R. B. v. Fargo Foundry Co., C.C.A., 141 F.2d 462—N. L. R. B. v. Crown Can Co., C.C.A.8, 138 F.2d 263, certiorari denied Crown Can Co. v. N. L. R. B., 64 S.Ct. 527, 321 U.S. 769, 88 L.Ed. 1065—N. L. R. B. v. Wm. Tehel Bottling Co., C.C.A.8, 129 F.2d 250—N. L. R. B. v. Service Wood Heel Co., C.C.A.1, 124 F.2d 470—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C.A.7, 121 F.2d 602—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F.2d 480—Oughton v. N. L. R. B., C. C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198—N. L. R. B. v. Chicago Apparatus Co., C.C.A.7, 116 F. 2d 753—Stewart Die Casting Corporation v. N. L. R. B., 114 F.2d 849, certiorari denied 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—N. L. R. B. v. Dahlstrom Metallic Door Co., C.C.A.2, 112 F.2d 756—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681—Hartsell Mills Co. v. N. L. R. B., C.C.A.4, 111 F.2d 291—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—N. L. R. B. v. Piqua Munising Wood Products Co., C.C. A.6, 109 F.2d 552—N. L. R. B. v. National Motor Bearing Co., C.C.A. 9, 105 F.2d 652—N. L. R. B. v. Louisville Refining Co., C.C.A.6, 102 F.2d 678, certiorari denied Louisville Refining Co. v. N. L. R. B., 60 S.Ct. 81, 308 U.S. 568, 84 L.Ed. 477.

N.Y.—New York State Labor Relations Board v. Astoria Casket Co., 17 N.Y.S.2d 13.

(3) To sustained finding that union with which employer entered into closed shop agreement did not represent majority of employees.

U.S.—N. L. R. B. v. Premo Pharmaceutical Laboratories, C.C.A.2, 136 F.2d 85.

D.C.—Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Affiliated with American Federation of Labor v. N. L. R. B., 121 F.2d 84, 74 App.D.C. 28, certiorari denied Warehousemen's Union Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539—N. L. R. B. v. McKesson & Robbins, 121 F.2d 84, 74 App.D.C. 28, certiorari denied McKesson & Robbins v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539.

Evidence held insufficient

(1) Generally.—Motor Valve & Mfg. Co. v. N. L. R. B., C.C.A.6, 149 F.2d 247—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949.

(2) To overcome presumption that authority of union continued.—N. L. R. B. v. Highland Park Mfg. Co., C. C.A.4, 110 F.2d 632.

(3) To sustain finding that certain organization was sole representative of employees.

U.S.—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C.A.7, 121 F.2d 602.

Pa.—Petition of St. Marys Sewer Pipe Co., 55 Pa.Dist. & Co. 297.

Inference from testimony of union official

Board in support of finding that union other than one with which employer entered into closed shop contract was representative of appropriate bargaining unit could properly infer from a union official's testimony that certain employees had designated union as their bargaining agent.—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F.2d 652.

Application cards for membership

Where employer challenged three of application cards for membership in union on ground that they were undated as shown by printed sum-

recognize the employee's authorized representative,[87] and whether the unit selected by the board to insure to the employees the full benefit of self-organization and collective bargaining was an appropriate unit.[88]

Railway Labor Act. In various cases under the Railway Labor Act, 45 U.S.C.A. § 151 et seq, the evidence has been held sufficient or insufficient to sustain the findings of the National Mediation Board and the district court[89] and the National Railroad Adjustment Board and the district court.[90]

Actions for breach of union contract. In actions for breach of a labor union contract the general rules governing the weight and sufficiency of evidence in civil actions ordinarily are applicable[91] with respect to actions by the employee against the employer for wrongful discharge[92] or to compel reinstatement[93] or in actions by the employer for breach of contract.[94]

§ 28(96). —— Unfair Labor Practices in General

In proceedings before labor relations boards to prevent unfair labor practices the evidence must be sufficient to sustain the charges made, but such charges may be established by circumstantial, as well as by direct, evidence.

It has been variously held that charges of unfair labor practices filed before labor relations boards

mary, original exhibit which showed dates was controlling.—N. L. R. B. v. Piqua Munising Wood Products Co., C.C.A.6, 109 F.2d 552.

87. **Evidence held sufficient**

(1) To sustain board's finding that employer has recognized union as collective bargaining agency.—N. L. R. B. v. Ellis-Klatscher & Co., C. C.A.9, 142 F.2d 356.

(2) To sustain determination that employer had failed to recognize union, as exclusive representative of the employees.—N. L. R. B. v. Century Projector Corporation, C.C.A.2, 141 F.2d 488—N. L. R. B. v. Medo Photo Supply Corporation, C.C.A.2, 135 F.2d 279, affirmed 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007—Wilson & Co. v. N L. R. B., C.C.A.8, 115 F. 2d 759.

Evidence held insufficient

To authorize recognition of new collective bargaining agent on ground that notice of termination of contract with rival union had been given.—Triboro Coach Corporation v. New York State Labor Relations Board. 22 N.Y.S.2d 1013, affirmed 27 N.Y.S.2d 83, 261 App.Div. 636, affirmed 36 N.E.2d 315, 286 N.Y. 314, 144 A.L.R. 410, motion denied 39 N. E.2d 276, 287 N.Y. 647, 144 A.L.R. 410.

88. **Evidence held sufficient**

(1) To show that bargaining unit designated by board was not appropriate.—Jordan Marsh Co. v. Labor Relations Commission, 56 N.E.2d 915, 316 Mass. 748.

(2) To sustain decision of board as to appropriate unit for selection of collective bargaining representative.

U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551—Polish Nat. Alliance of U. S. v. N. L. R. B., C.C.A.7, 136 F.2d 175, affirmed 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509—N. L. R. B. v. Clinton E. Hobbs Co., C.C.A. 1, 132 F.2d 249—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corporation v. N. L. R. B., 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141—N. L. R. B. v. Piqua Munising Wood Products Co., C.C.A.6, 109 F.2d 552—N. L. R. B. v. Lund, C.C.A.8, 103 F.2d 815.

D.C.—Reilly v. Millis, 52 F.Supp. 172, affirmed 144 F.2d 259, 79 U.S.App. D.C. 171, certiorari denied 65 S.Ct. 1566, 325 U.S. 879, 89 L.Ed. 1995.

Single craft

Evidence authorized findings of employment relations board that employees in employer's tool room, experimental tool room, and maintenance department, except supervisory employees, firemen, and oilers, constituted a single craft entitled to determine at an election whether they desired to have a separate bargaining unit.—In re International Ass'n of Machinists, Lodge No. 1406, A. F. L., 23 N.W.2d 489, 249 Wis. 112.

89. **Evidence held sufficient**

D.C.—Switchmen's Union of North America v. National Mediation Board, 135 F.2d 785, 77 U.S.App. D.C. 264, reversed on other grounds 64 S.Ct. 95, 320 U.S. 297, 88 L.Ed. 61—Order of Ry. Conductors of America v. National Mediation Board, 113 F.2d 531, 72 App.D.C. 299—National Federation of Railway Workers v. National Mediation Board, 110 F.2d 529, 71 App. D.C. 266, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

Evidence held insufficient

D.C.—National Federation of Railway Workers v. National Mediation Board, 110 F.2d 529, 71 App.D. C. 266, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

Certificate of board held prima facie evidence

U.S.—Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Nashville, C. & St. L. Ry. Co., C.C.A.Tenn., 94 F.2d 97.

90. **Evidence held sufficient**

U.S.—Order of Ry. Conductors of America v. Swan, C.C.A.Ill., 152 F.2d 325, affirmed 67 S.Ct. 405, 329 U.S. 520, 91 L.Ed. —— —Williams v. Swan, 152 F.2d 325, affirmed 67 S.Ct. 405, 329 U.S. 520, 91 L.Ed. —— —Railway Express Agency v. Order of Railroad Telegraphers, C. C.A.Ga., 137 F.2d 46, reversed on other grounds 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788.

91. Tex.—Panhandle & S. F. Ry. Co. v. Wilson, Civ.App., 55 S.W.2d 216.

92. **Evidence held sufficient**

(1) To justify discharge because of violation of company rules.

Ga.—Cowart v. Atlanta, Birmingham & Coast R. Co., 14 S.E.2d 215, 64 Ga.App. 779.

Tex.—Swilley v. Galveston, H. & S. A. Ry. Co., Civ.App., 96 S.W.2d 105, error dismissed—Robertson v. Panhandle & S. F. Ry. Co., Civ. App., 77 S.W.2d 1078, error dismissed.

(2) To show that plaintiff had not surrendered seniority rights.—Clay v. Louisville & N. R. Co., 71 S.W.2d 617, 254 Ky. 271.

Evidence held insufficient

Minn.—Neid v. Tassie's Bakery, 17 N.W.2d 357, 219 Minn. 272.

N.Y.—Kadish v. New York Evening Journal, 67 N.Y.S.2d 435.

Tex.—Panhandle & S. F. Ry. Co. v. Wilson, Civ.App., 55 S.W.2d 216.

93. Ky.—Louisville & N. R. Co. v. Wells, 160 S.W.2d 16, 289 Ky. 700.

N.J.—Brotherhood of R. Trainmen v. Hill Bus Co., 44 A.2d 904, 137 N.J.Eq. 408.

N.Y.—O'Brien v. Papas, 49 N.Y.S.2d 521.

94. U.S.—American-Hawaiian S. S. Co. v. Sailors Union of the Pacific, D.C.Cal., 37 F.Supp. 828.

must be proved by a fair preponderance of the evidence,[95] by substantial evidence,[96] or by substantial and credible evidence.[97] The evidence must be sufficient to justify, if the trial were to a jury, a refusal to direct a verdict for defendant.[98]

The evidence in various cases has been held sufficient to sustain a finding of the board that the employer has been guilty of unfair labor practices,[99] and likewise the evidence in particular cases has been held to be insufficient to show such fact;[1] or sufficient to sustain a finding[2] or insufficient to sustain

95. U.S.—Boeing Airplane Co. Wichita Division, v. N. L. R. B., C.C.A. 10, 140 F.2d 423—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F. 2d 480—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 106 F.2d 100.

96. N.Y.—New York State Labor Relations Board v. Select Operating Corporation, 49 N.Y.S.2d 294, 183 Misc. 480, reversed on other grounds 55 N.Y.S.2d 117, 269 App. Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684.

97. Pa.—Petition of Union Trust Co. of Pittsburgh, 20 A.2d 779, 342 Pa. 456.

98. U.S.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, affirmed 112 F.2d 63, set aside 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471—N. L. R. B. v. Asheville Hosiery Co., C.C.A.4, 108 F.2d 288.

99. U.S.—Wallace Corporation v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Richwood Clothespin & Dish Worker's Union v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216—N. L. R. B. v. Bird Mach. Co., C.C.A.1, 161 F.2d 589—Hamilton v. N. L. R. B., C.C.A.6, 160 F.2d 465—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72—N. L. R. B. v. Parkers Prairie Co-op. Creamery Ass'n, C.C.A.8, 154 F.2d 455—N. L. R. B. v. Marquette Metal Products Co., C.C.A.6, 152 F.2d 964—N. L. R. B. v. American Pearl Button Co., C.C.A.8, 149 F.2d 311—N. L. R. B. v. May Department Stores Co., C.C.A.8, 146 F.2d 66, modified on other grounds 66 S. Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495—N. L. R. B. v. Gluek Brewing Co., C.C.A. 8, 144 F.2d 847—Idaho Potato Growers v. N. L. R. B., C.C.A.9, 144 F.2d 295, certiorari denied 65 S. Ct. 122, 323 U.S. 769, 89 L.Ed. 615—N. L. R. B. v. Laister-Kauffmann Aircraft Corp., C.C.A.8, 144 F.2d 9—N. L. R. B. v. M. E. Blatt Co., C.C.A.3, 143 F.2d 268, certiorari denied 65 S.Ct. 135, 323 U.S. 774, 89 L.Ed. 619—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—N. L. R. B. v. A. Sartorius & Co., C.C.A.2, 140 F.2d 203—N. L. R. B. v. Taylor-Colquitt Co., C.C.A.4, 140 F.2d 92—Utah Copper Co. v. N. L. R. B., C.C.A.10, 139 F.2d 788, certiorari denied 64 S.Ct. 946, 322 U.S. 731, 88 L.Ed. 1566—Piedmont Shirt Co. v. N. L. R. B., C.C.A.4, 138 F.2d 738—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F. 2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462—N. L. R. B. v. Harbison-Walker Refractories Co., C.C.A.8, 135 F.2d 837—N. L. R. B. v. Weirton Steel Co., C.C.A.3, 135 F.2d 494—N. L. R. B. v. Pick Mfg. Co., C.C.A.7, 135 F.2d 329—N. L. R. B. v. Tennessee Products Corporation, C.C.A.6, 134 F.2d 486—N. L. R. B. v. Gallup American Coal Co., C.C.A.10, 131 F. 2d 665—N. L. R. B. v. Kudile, C.C. A.3, 130 F.2d 615, certiorari denied Kudile v. N. L. R. B., 63 S.Ct. 436, 317 U.S. 694, 87 L.Ed. 555—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—N. L. R. B. v. Swift & Co., C.C.A.6, 127 F.2d 30—N. L. R. B. v. Milan Shirt Mfg. Co., C.C.A.6, 125 F.2d 376—N. L. R. B. v. Blanton Co., C.C.A.8, 121 F.2d 564—N. L. R. B. v. West Texas Utilities Co., C.C.A. 5, 119 F.2d 683—Burk Bros. v. N. L. R. B., C.C.A.3, 117 F.2d 686, certiorari denied 61 S.Ct. 1110, 313 U. S. 588, 85 L.Ed. 1543—N. L. R. B. v. General Motors Corporation, C. C.A.7, 116 F.2d 306—N. L. R. B. v. Swift & Co., C.C.A.8, 116 F.2d 143—N. L. R. B. v. Elkland Leather Co., C.C.A.3, 114 F.2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S.Ct. 170, 311 U. S. 705, 85 L.Ed. 457—Fort Wayne Corrugated Paper Co. v. N. L. R. B., C.C.A.7, 111 F.2d 869—N. L. R. B. v. Tovrea Packing Co., C.C.A.9, 111 F.2d 626, certiorari denied Tovrea Packing Co. v. N. L. R. B., 61 S.Ct. 28, 311 U.S. 668, 85 L.Ed. 429—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574—Titan Metal Mfg. Co. v. N. L. R. B., C.C.A.3, 106 F.2d 254, certiorari denied 60 S.Ct. 260, 308 U.S. 615, 84 L.Ed. 514—N. L. R. B. v. Falk Corporation, C.C.A.7, 102 F.2d 383.

Pa.—In re Lehrman, Com.Pl., 52 Dauph.Co. 1—Pennsylvania Labor Relations Bd. v. Beck, Com.Pl., 27 West.Co.L.J. 143.

Wis.—Appleton Chair Corporation v. United Brotherhood of Carpenters & Joiners, Millmen's Local No. 1748, 1 N.W.2d 188, 239 Wis. 337.

1. U.S.—Keystone Steel & Wire Co. v. N. L. R. B., C.C.A.7, 155 F.2d 553, certiorari granted 67 S.Ct. 190, 329 U.S. 705, 91 L.Ed. —, vacated in view of stipulation 68 S.Ct. 214, motion granted 68 S.Ct. 259—N. L. R. B. v. Indiana Desk Co., C.C.A.7, 149 F.2d 987—N. L. R. B. v. Brown-Brockmeyer Co., C.C.A.6, 143 F.2d 537—N. L. R. B. v. Lettie Lee, Inc., C.C.A.9, 140 F.2d 243—N. L. R. B. v. Appalachian Electric Power Co., 140 F.2d 217—N. L. R. B. v. Pick Mfg. Co., C.C.A., 135 F.2d 329—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15—N. L. R. B. v. Citizen-News Co., C.C.A.9, 134 F.2d 962—N. L. R. B. v. Aluminum Goods Mfg. Co., C. C.A.7, 125 F.2d 353—N. L. R. B. v. Bowen Motor Coaches, C.C.A.5, 124 F.2d 151—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F.2d 480—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

N.Y.—Triboro Coach Corporation v. New York State Labor Relations Board, 22 N.Y.S.2d 1013, affirmed 27 N.Y.S.2d 83, 261 App.Div. 636, affirmed 36 N.E.2d 315, 286 N.Y. 314, 144 A.L.R. 410, motion denied 39 N.E.2d 276, 287 N.Y. 647, 144 A. L.R. 410.

2. U.S.—N. L. R. B. v. Barrett Co., C.C.A.7, 135 F.2d 959—N. L. R. B. v. National Seal Corporation, C.C. A.2, 127 F.2d 776—Great Southern Trucking Co. v. N. L. R. B., C.C.A. 4, 127 F.2d 180, certiorari denied 63 S.Ct. 48, 317 U.S. 652, 87 L.Ed. 524—N. L. R. B. v. Eclipse Moulded Products Co., C.C.A.7, 126 F.2d 576—N. L. R. B. v. Blanton Co., C.C.A.8, 121 F.2d 564—Southern S. S. Co. v. N. L. R. B., C.C.A.3, 120 F.2d 505, reversed on other grounds 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246—El Paso Electric Co. v. N. L. R. B., C.C.A.5, 119 F.2d 581—N. L. R. B. v. Acme Air Appliance

a finding[3] under various circumstances that the employer's unfair labor practices caused or prolonged a strike; or sufficient to sustain a finding of the board that the union and its officers have committed unfair labor practices;[4] or sufficient to warrant the board's finding that the union or its members were not guilty of unfair labor practices.[5]

The proof of unfair labor practices may be by circumstantial, as well as by direct, evidence;[6] but the circumstantial evidence must be sufficient to permit a reasonable inference of a violation of the law.[7] The board may not disregard the uncontradicted testimony of unimpeached and credible witnesses.[8] The mere rejection by the board of the employer's denials as perjury does not take the place of affirmative evidence of his wrongdoing.[9] A finding of unfair labor practices may be supported when the evidence is taken as a whole and a number of related incidents considered, notwithstanding instances in the conduct of the employer, if taken separately and considered in isolation, might be insufficient.[10]

Anti-union bias on the part of the employer is not of itself sufficient proof of an unfair labor practice, but where there is clear proof of such bias it may be considered by the board for the color and point it gives to speech and action, otherwise equivocal and of doubtful meaning.[11]

Where the evidence indicates a desire by the employer to thwart or nullify unionizing efforts, either generally or as to a particular employee organization, a broad scope of inference is open to the board on questions of motive and discrimination.[12] Where an employer posts printed statements of its wages and labor terms but refuses to sign an agreement with the union representing the employees embodying those terms, the inference that the employer did not wish to deal with and would not recognize the union may be considered on the issue of unfair labor practices.[13] Where an employer has continued unfair labor practices after a settlement has been made and in disregard of the specific terms of the settlement, the board may consider the unfair labor practices occurring before the date of the agreement on the question of the board's right to enter an order against further violations.[14]

In recognition of the difficulty of proving that the conduct of employees in proposing to the employer that they would abandon the union if granted a rise in wages was voluntary, the board, in determining whether acceptance by the employer of such an offer is, in a particular case, an unfair labor practice, may consider the possibility for the employer to create an appearance of having received such an

Co., C.C.A.2, 117 F.2d 417—M. H. Ritzwoller Co. v. N. L. R. B., C.C.A. 7, 114 F.2d 432.

Unfair labor practices by different employer
U.S.—United Biscuit Co. of America v. N. L. R. B., C.C.A.7, 128 F.2d 771.

3. U.S.—N. L. R. B. v. Reynolds Intern. Pen Co., C.C.A.7, 162 F.2d 680—Ballston-Stillwater Knitting Co., v. N. L. R. B., C.C.A.2, 98 F. 2d 758.

Strike as result of labor dispute
U.S.—N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A.7, 113 F.2d 621.

4. **Picketing**
Wis.—Retail Clerks' Union, Local No. 1403, A. F. of L. v. Wisconsin Employment Relations Board, 6 N.W.2d 698, 242 Wis. 21, 149 A.L.R. 452—Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 299 N.W. 31, 238 Wis. 379, certiorari denied Milk & Ice Cream Drivers and Dairy Employees Union, Local 225 v. Wisconsin Employment Relations Board, 62 S.Ct. 1035, 316 U. S. 668, 86 L.Ed. 1744.

Strike without majority vote
Wis.—International Union, U. A. W. A. A. F. of L., Local 232, v. Wisconsin Employment Relations Bd., 27 N.W.2d 875, 250 Wis. 550.

5. Wis.—Appleton Chair Corporation v. United Brotherhood of Carpenters & Joiners, Millmen's Local No. 1748, 1 N.W.2d 188, 239 Wis. 337.

6. U.S.—N. L. R. B. v. Bird Mach. Co., C.C.A.1, 161 F.2d 589.
N.Y.—New York State Labor Relations Board v. Select Operating Corporation, 49 N.Y.S.2d 294, 183 Misc. 480, reversed on other grounds 55 N.Y.S.2d 117, 269 App. Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684.

7. N.Y.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256—New York State Labor Relations Board v. Select Operating Corporation, 49 N.Y.S.2d 294, 183 Misc. 480, reversed on other grounds 55 N.Y.S.2d 117, 269 App.Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684.

8. U.S.—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 106 F.2d 100.

9. U.S.—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A.4, 127 F.2d 109.

10. U.S.—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S. Ct. 55, 323 U.S. 722, 89 L.Ed. 580—Onan v. N. L. R. B., C.C.A.8, 139 F.2d 728.

11. U.S.—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536.

Speeches of employer's president must be considered along with the evidence as to questioning of employees and other anti-union conduct and activity on his part and the part of supervisory employees.—Piedmont Shirt Co. v. N. L. R. B., C.C.A.4, 138 F.2d 738.

Animosity prior to enactment of statute
Where proof supported presumption that employer would obey labor relations act, giving affirmative evidence of its intention to do so, no probative value remained in proof of employer's conduct prior to enactment of act showing animosity toward unions.—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App. Div. 315.

12. U.S.—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533.

13. U.S.—Fort Wayne Corrugated Paper Co. v. N. L. R. B., C.C.A.7, 111 F.2d 869.

14. U.S.—Canyon Corporation v. N. L. R. B., C.C.A.8, 128 F.2d 953.

offer, seemingly made spontaneously by a majority of employees, when the employer secretly played a part in inducing the offer.[15]

Acts of supervisory employees or others. Mere isolated expressions of minor supervisory employees, which appear to be nothing more than the utterance of individual views, not authorized by the employer and not of such a character or made under such circumstances as to justify the conclusion that they are an expression of the employer's policy, ordinarily do not justify a finding against the employer.[16] The fact that the evidence on which one or more of the findings complained of are based consists, in whole or in part, of statements or acts of supervisory employees not shown to be within the scope of their authority does not preclude the board from basing inferences on such evidence.[17] Where the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employee and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere.[18] Evidence that certain employees left work without interference from the foremen or supervisors in order to threaten a union representative justifies a conclusion that such conduct was at least encouraged and approved by the employer.[19] In evaluating the acts and conduct of supervisory employees the board is entitled to take into account the attitude of unfriendliness to unions manifested by more authoritative officials of the employer.[20]

The evidence in various cases has been held sufficient[21] or insufficient[22] to sustain a finding that the acts or declarations of supervisory employees or others were the acts or declarations of an employer so as to charge him with an unfair labor practice, or sufficient to justify the conclusion that the employees had just cause to believe that supervisory employees were acting on behalf of the employer.[23]

15. U.S.—N. L. R. B. v. Medo Photo Supply Corporation, C.C.A.2, 135 F.2d 279, affirmed 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007.

16. U.S.—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868—Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 115 F.2d 414, reversed on other grounds 62 S. Ct. 344, 314 U.S. 469, 86 L.Ed. 348.

Making of single unwarranted remark to employee, in face of employer's definite public announcement of its policy recognizing union chosen by employees, the certification of independent union as employees' representative, and a record otherwise clear of labor union hostility was insufficient to sustain board's finding of domination or interference by employer's supervisory employees.—N. L. R. B. v. Scullin Steel Co., C.C.A.8, 161 F.2d 143.

17. U.S.—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A. 8, 119 F.2d 903.

18. U.S.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045.

Authority

To warrant finding of unfair labor practices, board was not required to show that actions of supervisory employees actually reflected employer's policy, since it is enough that employees had cause to believe that foremen who committed unfair labor practices were acting as representatives of the management.—N. L. R. B. v. Brezner Tanning Co., C. C.A.1, 141 F.2d 62.

19. U.S.—N. L. R. B. v. New Era Die Co., C.C.A.3, 118 F.2d 500.

20. U.S.—N. L. R. B. v. Bank of America Nat. Trust & Savings Ass'n, C.C.A.9, 130 F.2d 624, certiorari denied Bank of America Nat. Trust & Savings Ass'n v. N. L. R. B., 63 S.Ct. 992, first case, 318 U.S. 791, 87 L.Ed. 1157 and 63 S.Ct. 992, second case, 318 U.S. 791, 87 L.Ed. 1158, rehearing denied 63 S.Ct. 1171, 319 U.S. 782, 87 L.Ed. 1726.

21. U.S.—N. L. R. B. v. Kopman-Woracek Shoe Mfg. Co., C.C.A.8, 158 F.2d 103—N. L. R. B. v. Taylor-Colquitt Co., C.C.A.4, 140 F.2d 92—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—Marlin-Rockwell Corporation v. N. L. R. B., C.C.A.2, 133 F.2d 258—N. L. R. B. v. Schaefer-Hitchcock Co., C.C. A.9, 131 F.2d 1004—N. L. R. B. v. Swift & Co., C.C.A.8, 129 F.2d 222—N. L. R. B. v. Aluminum Goods Mfg. Co., C.C.A.7, 125 F.2d 353—N. L. R. B. v. Moench Tanning Co., C.C.A.2, 121 F.2d 951—American Enka Corporation v. N. L. R. B., C.C.A.4, 119 F.2d 60—New Idea v. N. L. R. B., C.C.A.7, 117 F.2d 517—Western Union Telegraph Co. v. N. L. R. B., C.C.A.2, 113 F.2d 992—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951.

22. U.S.—N. L. R. B. v. Arma Corporation, C.C.A.2, 122 F.2d 153—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 119 F.2d 356—Cupples Co. Manufacturers v. N. L. R. B., C.C. A.8, 106 F.2d 100.

Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

Isolated and unrelated utterances hostile to outside unions, made by different supervisory officials of employer, were not of nature sufficiently substantial to support finding of unfair labor practices.—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. E. I. Du Pont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529.

Shipping clerk who was superior of another employee and a superintendent of employer did not hold such positions that their statements were evidence of employer's policy regarding labor organization.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682, affirming 96 F.2d 721, certiorari granted 59 S. Ct. 91, 305 U.S. 586, 83 L.Ed. 370.

Hearsay evidence

Testimony of witness that some one had told him that an official of employer had stated that if the employees threw out labor organization they would never get another organization carried no weight, where alleged statement was contrary to employer's instructions and was hearsay.—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868.

Chamber of commerce

U.S.—N. L. R. B. v. American Pearl Button Co., C.C.A.8, 149 F.2d 311.

City attorney, etc.

U.S.—N. L. R. B. v. Moench Tanning Co., C.C.A.2, 121 F.2d 951.

23. U.S.—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F.2d 9—N. L. R. B. v. Faultless Caster Corporation, C.C. A.7, 135 F.2d 559—N. L. R. B. v. Germain Seed & Plant Co., C.C.A.9, 134 F.2d 94—North Carolina Finishing Co. v. N. L. R. B., C.C.A.4, 133 F.2d 714, certiorari denied 64 S.Ct. 39, 320 U.S. 738, 88 L.Ed. 437

Espionage. The employment of a former detective with knowledge of his past business connections and experience may arouse a suspicion of the nature of his employment, but to sustain a finding that the employer hired a labor spy the evidence must amount to more than mere suspicion and conjecture.[24] Acts of espionage of certain employees at some time and place wholly unrelated to the employer charged can form no rational basis for a finding that such employees were performing acts of the same character for the employer;[25] and the admission by the employer of labor espionage during the employment of certain employees is not sufficient to constitute a rational basis for inferring that labor espionage was continued after the discharge of such employees.[26]

Evidence of the employer's hostility to unionization, the employment of a private detective agency and the installation of an operative in the guise of a worker, the billing of union dues by the agency as expense, reports to management immediately destroyed, and the presence of the investigator at union meetings, all taken together not only sustain but compel the inference that the primary purpose of the employment of the private agency was espionage over, and surveillance of, union activities.[27] Evidence that responsible officers of the employer did not actually use the information secured through espionage and that the system was discarded without likelihood of resumption did not compel the board to find noninterference with the employees' rights.[28]

Where a witness called by the board is evasive, no imputation of concealment can be made against the employer because of the witness' failure to remember things which he could hardly have forgotten.[29]

In various cases the evidence has been held sufficient[30] or insufficient[31] to sustain a finding that the employer was guilty of espionage of union activities.

§ 28(97). —— Interference, Restraint, or Coercion of Employees

A charge of unfair labor practice consisting of interference, restraint, or coercion of employees in the exercise of rights guaranteed by law must be established by sufficient evidence.

Where the unfair labor practice charged before a labor relations board consists of interference, restraint, or coercion of employees in the exercise of rights guaranteed by the statutes, the evidence must be sufficient to prove such interference, restraint, or coercion.[32] In various cases the evidence has been held sufficient to sustain a finding of the board that the employer has interfered with, restrained, or coerced his employees in the exercise of rights guaranteed them by the statutes,[33] and in other cases the

—Gamble-Robinson Co. v. N. L. R. B., C.C.A.8, 129 F.2d 588.

24. U.S.—Ohio Power Co. v. N. L. R. B., C.C.A.6, 115 F.2d 839.

25. U.S.—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 119 F.2d 356.

26. U.S.—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 119 F.2d 356.

27. U.S.—Atlas Underwear Co. v. N. L. R. B., C.C.A.6, 116 F.2d 1020.

28. U.S.—Montgomery Ward & Co. v. N. L. R. B., C.C.A.8, 115 F.2d 700.

29. U.S.—Ohio Power Co. v. N. L. R. B., C.C.A.6, 115 F.2d 839.

30. U.S.—N. L. R. B. v. Collins & Aikman Corp., C.C.A.4, 146 F.2d 454—N. L. R. B. v. Standard Gage Co., C.C.A.2, 146 F.2d 33—N. L. R. B. v. Standard Oil Co., C.C.A.10, 124 F.2d 895—N. L. R. B. v. Brashear Freight Lines, C.C.A.8, 119 F. 2d 379—Montgomery Ward & Co. v. N. L. R. B., C.C.A.8, 115 F.2d 700—Link-Belt Co. v. N. L. R. B., C.C.A.7, 110 F.2d 506, reversed on other grounds 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368.
D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

Eavesdropping
U.S.—N. L. R. B. v. Clark Bros. Co., C.C.A.2, 163 F.2d 373.

Lack of knowledge by employees of espionage does not invalidate finding.—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A., 122 F.2d 368.

31. U.S.—N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F.2d 556—N. L. R. B. v. Weirton Steel Co., C.C.A.3, 135 F.2d 494—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15—Ohio Power Co. v. N. L. R. B., C.C.A.6, 115 F.2d 839—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 106 F.2d 263.

Membership in trade association
Finding that purpose of employer's membership in National Metal Trade Association was unlawful surveillance of attempts by employees to organize was not sustained by evidence.—N. L. R. B. v. Arma Corporation, C.C.A.2, 122 F.2d 153.

32. U.S.—Wyman-Gordon Co. (Ingalls Shephard Division) v. N. L. R. B., C.C.A., 153 F.2d 480.
Pa.—Lazarus Store v. Pennsylvania Labor Relations Board, Com.Pl., 37 Luz.Leg.Reg.Rep. 413.

33. U.S.—N. L. R. B. v. Electric Vacuum Cleaner Co., 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed 1775—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309—N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036—N. L. R. B. v. Falk Corporation, 60 S.Ct. 307, 308 U.S. 453, 84 L.Ed. 396—N. L. R. B. v. Clark Bros. Co., C.C.A.2, 163 F.2d 373—N. L. R. B. v. Harris-Woodson Co., C.C.A. 4, 162 F.2d 97—N. L. R. B. v. Continental Pipe Line Co., C.C.A.5, 161 F.2d 302—Hamilton v. N. L. R. B., C.C.A.6, 160 F.2d 465—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201—N. L. R. B. v. Continental Oil Co., C.C.A. 10, 159 F.2d 326—N. L. R. B. v. Toledo Desk & Fixture Co., C.C.A. 6, 158 F.2d 426—R. R. Donnelley & Sons Co. v. N. L. R. B., C.C.A. 7, 156 F.2d 416, certiorari denied 67 S.Ct. 624, 329 U.S. 810, 91 L.Ed. —— —N. L. R. B. v. Litchfield Mfg. Co., C.C.A.8, 154 F.2d 739—N. L. R. B. v. Winter, C.C.A.10, 154 F.2d 719—N. L. R. B. v. Armour & Co., C.C.A.10, 154 F.2d 570, certiorari denied 67 S.Ct. 92, 329 U.S. 732, 91 L.Ed. —— —N. L. R. B. v. American Laundry Machinery Co., C.C.A.2, 152 F.2d 400—N. L. R. B. v. Mt. Clemens Pottery Co., C.C. A.6, 147 F.2d 262—Loveman, Joseph & Loeb v. N. L. R. B., C.C.A. 5, 146 F.2d 769—N. L. R. B. v. Standard Gage Co., C.C.A.2, 146 F. 2d 33—Idaho Potato Growers v. N. L. R. B., C.C.A.9, 144 F.2d 295, cer-

tiorari denied 65 S.Ct. 122, 323 U.S. 769, 89 L.Ed. 615—American Nat. Bank of St. Paul v. N. L. R. B., C.C.A.8, 144 F.2d 268—N. L. R. B. v. Fairmont Creamery Co., C.C.A. 10, 144 F.2d 128—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F.2d 9—N. L. R. B. v. Idaho Refining Co., C.C.A. 9, 143 F.2d 246—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580 —Consolidated Aircraft Corporation v. N. L. R. B., C.C.A.9, 141 F. 2d 785—P. H. Glatfelter Co. v. N. L. R. B., C.C.A.3, 141 F.2d 631—N. L. R. B. v. Glenn L. Martin-Nebraska Co., C.C.A.8, 141 F.2d 371 —N. L. R. B. v. Brezner Tanning Co., C.C.A.1, 141 F.2d 62—N. L. R. B. v. H. G. Hill Stores, C.C.A.5, 140 F.2d 924—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 140 F.2d 777—N. L. R. B. v. Montag Bros., C.C.A., 140 F.2d 730—Birmingham Post Co. v. N. L. R. B., C.C.A.5, 140 F.2d 638—N. L. R. B. v. Waples-Platter Co., C.C.A.5, 140 F.2d 228—N. L. R. B. v. A. Sartorius & Co., C.C.A.2, 140 F. 2d 203—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 139 F.2d 855 —N. L. R. B. v. American Creosoting Co., C.C.A.6, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U.S. 797, 88 L.Ed. 1086—N. L. R. B. v. American Laundry Mach, Co., C.C.A.2, 138 F.2d 889—N. L. R. B. v. Franks Bros. Co., C.C.A.1, 137 F.2d 989, affirmed 64 S.Ct. 817, 321 U.S. 702, 88 L.Ed. 1020—N. L. R. B. v. J. G. Boswell Co., C.C. A.9, 136 F.2d 585—N. L. R. B. v. Polson Logging Co., C.C.A.9, 136 F. 2d 314—Oklahoma Transp. Co. v. N. L. R. B., C.C.A.5, 136 F.2d 42 —N. L. R. B. v. Barrett Co., C.C.A. 7, 135 F.2d 959—N. L. R. B. v. Pick Mfg. Co., C.C.A.7, 135 F.2d 329—N. L. R. B. v. William Davies Co., C.C.A.7, 135 F.2d 179, certiorari denied William Davies Co. v. N. L. R. B., 64 S.Ct. 82, 320 U.S. 770, 88 L.Ed. 460—N. L. R. B. v. Tennessee Products Corporation, C.C.A.6, 134 F.2d 486—N. L. R. B. v. National Mineral Co., C.C.A.7, 134 F.2d 424, certiorari denied National Mineral Co. v. N. L. R. B., 64 S.Ct. 58, 320 U.S. 753, 88 L.Ed. 448—N. L. R. B. v. Germain Seed & Plant Co., C.C.A.9, 134 F.2d 94 —N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 133 F.2d 988—N. L. R. B. v. Sunbeam Electric Mfg. Co., C.C.A.7, 133 F.2d 856—North Carolina Finishing Co. v. N. L. R. B., C.C.A.4, 133 F.2d 714, certiorari denied 64 S.Ct. 39, 320 U. S. 738, 88 L.Ed. 437—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A. 6, 133 F.2d 295—N. L. R. B. v. Locomotive Finished Material Co., C.C.A.8, 133 F.2d 233—N. L. R. B. v. Aintree Corporation, C.C.A.7, 132 F.2d 469, certiorari denied Aintree Corporation v. N. L. R. B., 63 S.Ct. 831, 318 U.S. 774, 87 L. Ed. 1144—N. L. R. B. v. Clinton E. Hobbs Co., C.C.A.1, 132 F.2d 249 —N. L. R. B. v. Schaefer-Hitchcock Co., C.C.A.9, 131 F.2d 1004—Hickory Chair Mfg. Co. v. N. L. R. B., C.C.A.4, 131 F.2d 849—Interlake Iron Corporation v. N. L. R. B., C.C.A.7, 131 F.2d 129—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260—N. L. R. B. v. Times-Picayune Pub. Co., C.C.A.5, 130 F.2d 257—N. L. R. B. v. Martin Bros. Box Co., C.C.A.7, 130 F.2d 202, certiorari denied Martin Bros. Box Co. v. N. L. R. B., 63 S.Ct. 59, 317 U.S. 660, 87 L.Ed. 531—N. L. R. B. v. Cities Service Oil Co., C.C.A.2, 129 F.2d 933—Firth Carpet Co. v. N. L. R. B., C.C.A.2, 129 F.2d 633—N. L. R. B. v. Armour & Co., C.C.A., 129 F.2d 316—Canyon Corporation v. N. L. R. B., C.C.A.8, 128 F.2d 953—American Smelting & Refining Co. v. N. L. R. B., C.C.A.5, 128 F.2d 345—Shell Oil Co. v. N. L. R. B., C.C.A.5, 128 F.2d 206—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 127 F.2d 180, certiorari denied 63 S.Ct. 48, 317 U. S. 652, 87 L.Ed. 524—N. L. R. B. v. Hollywood-Maxwell Co., C.C.A. 9, 126 F.2d 815—N. L. R. B. v. Eclipse Moulded Products Co., C. C.A.7, 126 F.2d 576—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F. 2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523—Tyne Co. v. N. L. R. B., C.C.A.7, 125 F.2d 832—N. L. R. B. v. Stone, C.C.A.7, 125 F.2d 752, certiorari denied Stone v. N. L. R. B., 63 S. Ct. 44, 317 U.S. 649, 87 L.Ed. 522 —N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A.6, 123 F. 2d 831—Owens-Illinois Glass Co. v. N. L. R. B., C.C.A.6, 123 F.2d 670, certiorari denied 62 S.Ct. 943, 316 U.S. 662, 86 L.Ed. 1739—N. L. R. B. v. Jahn & Ollier Engraving Co., C.C.A.7, 123 F.2d 589—N. L. R. B. v. W. A. Jones Foundry & Machine Co., C.C.A.7, 123 F.2d 552 —N. L. R. B. v. Luxuray, Inc., C.C.A.2, 123 F.2d 106—Indianapolis Power & Light Co. v. N. L. R. B., C.C.A.7, 122 F.2d 757, certiorari denied 62 S.Ct. 633, 315 U.S. 804, 86 L.Ed. 1204—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433—N. L. R. B. v. Moore-Lowery Flour Mills Co., C.C.A.10, 122 F.2d 419—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F.2d 368—N. L. R. B. v. Arma Corp., C.C.A.2, 122 F.2d 153—N. L. R. B. v. Cities Service Oil Co., C.C.A.2, 122 F.2d 149—F. W. Woolworth Co. v. N. L. R. B., C.C.A.2, 121 F. 2d 658—N. L. R. B. v. Clarksburg Pub. Co., C.C.A.4, 120 F.2d 976—N. L. R. B. v. Blue Bell-Globe Mfg. Co., C.C.A.4, 120 F.2d 974—N. L. R. B. v. Bachelder, C.C.A.7, 120 F.2d 574, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519, modified on other grounds 125 F.2d 387—N. L. R. B. v. Aluminum Products Co., C.C.A. 7, 120 F.2d 567—N. L. R. B. v. C. Nelson Mfg. Co., C.C.A.8, 120 F.2d 444—Roebling Employees Ass'n v. N. L. R. B., C.C.A.3, 120 F.2d 289 —Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A.8, 119 F. 2d 903—N. L. R. B. v. Mall Tool Co., C.C.A.7, 119 F.2d 700—Texarkana Bus Co. v. N. L. R. B., C.C.A. 8, 119 F.2d 480—N. L. R. B. v. Auburn Foundry, C.C.A.7, 119 F.2d 331—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780 —Oughton v. N. L. R. B., C.C.A. 3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198—Pueblo Gas & Fuel Co. v. N. L. R. B., C.C.A.10, 118 F.2d 304 —Triplex Screw Co. v. N. L. R. B., C.C.A.6, 117 F.2d 858—N. L. R. B. v. Acme Air Appliance Co., C.C.A.2, 117 F.2d 417—N. L. R. B. v. Vincennes Steel Corporation, C. C.A.7, 117 F.2d 169—Atlas Underwear Co. v. N. L. R. B., C.C.A.6, 116 F.2d 1020—Valley Mould & Iron Corporation v. N. L. R. B., C.C.A.7, 116 F.2d 760, certiorari denied 61 S.Ct. 1114, 313 U.S. 590, 85 L.Ed. 1545—N. L. R. B. v. Chicago Apparatus Co., C.C.A.7, 116 F.2d 753—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corporation v. N. L. R. B., 61 S. Ct. 448, 312 U.S. 710, 85 L.Ed. 1141 —N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126—N. L. R. B. v. Stover, C.C.A.10, 114 F.2d 513—N. L. R. B. v. Elkland Leather Co., C.C.A. 3, 114 F.2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S.Ct. 170, 311 U.S. 705, 85 L.Ed. 457—N. L. R. B. v. Viking Pump Co., C.C.A.8, 113 F.2d 759, certiorari denied Viking Pump Co. v. N. L. R. B., 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F. 2d 38—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—N. L. R. B. v. Goshen Rubber & Manufacturing Co., C.C.A.7, 110 F.2d 432—N. L. R. B.

evidence has been held to be insufficient to sustain such a finding.[34] Likewise, in particular cases the evidence has been held sufficient to sustain a finding that the employer has not interfered with, restrained or coerced his employees,[35] or sufficient to sustain a finding that a union or individual employees have coerced and intimidated other employees.[36] In addition, the evidence has been held

v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574—N. L. R. B. v. Planters Mfg. Co., C.C.A.4, 105 F.2d 750, rehearing denied 106 F.2d 524—N. L. R. B. v. Colten, C.C.A.6, 105 F.2d 179—N. L. R. B. v. Lund, C.C.A.8, 103 F.2d 815—Virginia Ferry Corporation v. N. L. R. B., C.C.A.4, 101 F. 2d 103—N. L. R. B. v. American Potash & Chemical Corporation, C. C.A.9, 98 F.2d 488, certiorari denied American Potash & Chemical Corporation v. N. L. R. B., 59 S. Ct. 582, 306 U.S. 643, 83 L.Ed. 1043—N. L. R. B. v. Wallace Mfg. Co., C.C.A.4, 95 F.2d 818.

D.C.—Peter J. Schweitzer, Inc., v. N. L. R. B., 144 F.2d 520, 79 U.S. App.D.C. 178.

N.Y.—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App.Div. 315.

Utah.—American Foundry & Machine Co. v. Utah Labor Relations Board, 141 P.2d 390, 105 Utah 83.

Wis.—Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 279 N.W. 673, 228 Wis. 473, 117 A.L.R. 398.

Announcing retroactive wage increase

Evidence authorized conclusion that employer was guilty of unfair labor practices by announcing retroactive wage raise, which had been negotiated by union, without giving union credit and by attempting to undercut authority of union.—N. L. R. B. v. Elyria Tel. Co., C.C.A.6, 158 F.2d 868.

Circulation by employer of vote of confidence

Evidence sustained finding that automobile manufacturer circulated a "vote of confidence" in manufacturer's labor policies, and that such circulation and publication of the vote interfered with, restrained, and coerced employees in the exercise of rights to self-organization to join, form and assist labor organizations, and to bargain collectively.—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126.

Contracts with individual employees

Evidence sustained finding that contracts with individual employees were obtained as a means of defeating unionization and discouraging collective bargaining.—N. L. R. B. v. Adel Clay Products Co., C.C.A.8, 134 F.2d 342.

Evidence that company caused strike by its refusal to bargain with union representing company's plant and sawmill employees, and that company refused to end strike except on terms which would deny collective bargaining by recognizing union as representative of its members only, warranted finding of board that company had interfered with, restrained, and coerced its employees in exercise of their statutory rights.—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F.2d 18.

Evidence as to employer's use of police and change of lunch hour of female employees to prevent discussion and organizational activities and as to charges made by service manager to employees that union was communistic sustained finding that employer interfered with, restrained, and coerced its employees in the exercise of right to organize.—N. L. R. B. v. Revlon Products Corporation, C.C.A.2, 144 F.2d 88.

Prohibition of solicitation on employer's property

U.S.—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533—Carter Carburetor Corporation v. N. L. R. B., C.C.A.8, 140 F.2d 714.

Urging return to work during strike

Evidence that employer following commencement of strike instructed its operating superintendents to inform employees by telephone that plant was operating the next day as usual and that their jobs were open for them, if they cared to come in, established that employer was guilty of coercion.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045.

34. U.S.—N. L. R. B. v. Reynolds Intern. Pen Co., C.C.A.7, 162 F.2d 680—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—N. L. R. B. v. Ross Gear & Tool Co., C.C.A.7, 158 F.2d 607—Keystone Steel & Wire Co. v. N. L. R. B., C.C.A.7, 155 F.2d 553, certiorari granted 67 S.Ct. 190, 329 U.S. 705, 91 L.Ed. —, vacated in view of stipulation 68 S.Ct. 214, motion granted 68 S.Ct. 259—Wyman-Gordon Co. (Ingalls Shepard Division) v. N. L. R. B., C.C.A.7, 153 F.2d 480—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F.2d 44, certiorari denied 65 S.Ct. 1025, 324 U.S. 877, 89 L.Ed. 1429—N. L. R. B. v. Shenandoah-Dives Mining Co., C.C.A.10, 145 F.2d 542—N. L. R. B. v. Draper Corporation, C.C.A.4, 145 F.2d 199, 156 A. L.R. 989—N. L. R. B. v. Brown-Brockmeyer Co., C.C.A.6, 143 F.2d 537—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C.C.A.10, 140 F.2d 423—N. L. R. B. v. American Rolling Mill Co., C.C.A.6, 126 F.2d 38—N. L. R. B. v. Aladdin Industries, C.C.A.7, 125 F.2d 377, certiorari denied Aladdin Industries v. N. L. R. B., 62 S.Ct. 1310, 316 U.S. 706, 86 L.Ed. 1773—N. L. R. B. v. Arma Corp., C.C.A.2, 122 F.2d 153—Wilson & Co. v. N. L. R. B., C.C.A.7, 120 F.2d 913—Martel Mills Corporation v. N. L. R. B., C. C.A.4, 114 F.2d 624—Foote Bros. Gear & Machine Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Foote Bros. Gear & Machine Corporation, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394, mandate conformed to Foote Bros. Gear & Machine Corporation v. N. L. R. B., 121 F.2d 802—N. L. R. B. v. Express Pub. Co., C.C.A.5, 111 F.2d 588, reversed on other grounds 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930—C. G. Conn, Limited, v. N. L. R. B., C.C.A.7, 108 F.2d 390—Ballston-Stillwater Knitting Co. v. N. L. R. B., C.C.A.2, 98 F.2d 758.

Pa.—Lazarus Store v. Pennsylvania Labor Relations Board, Com.Pl., 37 Luz.Leg.Reg.Rep. 413.

Wis.—E. G. Shinner & Co. v. Wrabetz, 292 N.W. 902, 235 Wis. 195.

Employer's conduct of strike vote

Evidence would not sustain finding that employer was guilty of an unfair labor practice in conducting a "strike vote" after union had passed a strike resolution, notwithstanding statements in speech by superintendent that strike would require shutdown.—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C.A.7, 121 F.2d 602.

35. Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

Wis.—Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 299 N.W. 31, 238 Wis. 379, certiorari denied Milk & Ice Cream Drivers and Dairy Employees Union, Local 225, v. Wisconsin Employment Relations Board, 62 S.Ct. 1035, 316 U. S. 668, 86 L.Ed. 1744.

36. Wis.—International Union, U. A. W. A. A. F. of L., Local 232 v. Wisconsin Employment Relations Bd., 27 N.W.2d 875, 250 Wis. 550.

sufficient or insufficient with respect to gifts and favors to employees,[37] employment on condition of joining a particular union[38] or pressure by employers to join a certain union,[39] lockouts,[40] and the closing down or transfer of the employer's business.[41]

In determining whether an employer has interfered with, restrained, or coerced his employees, the board is entitled to consider the facts and incidents shown by the testimony, not simply in isolation, but cumulatively and compositely as well, in arriving at its inferences and conclusions.[42] Normally, the conclusion that the employees' choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible, and as a result of which it may reasonably be inferred that the employees did not have complete and unfettered freedom of choice.[43] Even where assurances are made to the employees, the actions of executives may be looked to for the purpose of determining the policy of the company, for lip service to the policy and purposes of the statute is not sufficient.[44]

The failure of an employer to take affirmative steps to disabuse the minds of the employees generally of the belief that the employer favored an organization which he helped to establish and which he dominated justifies a finding that the employees were not as free as the statute demands.[45] A finding of interference, restraint, or coercion may be sustained by evidence that after efforts were made to organize a union the employer shifted certain employees to less desirable hours of employment and attempted to have employees sign letters stating that they did not wish anyone to bargain for them.[46] A general increase of wages, especially during organizational activities by the employees, is a relevant circumstance to be considered by the board and may, at least in connection with other evidence, be sufficient to sustain a finding of interference, restraint, or coercion.[47] The employer's attempt to dissuade its employees from joining or remaining in a union by shutting down the plant, or by threatening to do so, is pertinent in determining whether the employer interfered with, restrained, or coerced its employees in the exercise of their rights under the statute[48] and may be sufficient, particularly in connection with other evidence, to sustain a finding of interference, restraint, or coercion.[49]

A finding that the conduct of the employer con-

37. **Evidence held sufficient**
U.S.—N. L. R. B. v. Bradley Lumber Co. of Arkansas, C.C.A.8, 128 F.2d 768.

Evidence held insufficient
U.S.—N. L. R. B. v. Reynolds Intern. Pen Co., C.C.A.7, 162 F.2d 680.
D.C.—Peter J. Schweitzer, Inc., v. N. L. R. B., 144 F.2d 520, 79 U.S. App.D.C. 178.

38. **Evidence held sufficient**
(1) To sustain finding that employment of certain employee was conditioned on acceptance by his father of membership in alleged company union, and that such condition violated statute.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368.
(2) To support finding that employer required membership in particular union as condition of employment.—N. L. R. B. v. Swift & Co., C.C.A., 129 F.2d 222—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A.8, 119 F.2d 903.

39. **Evidence held sufficient**
U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438—N. L. R. B. v. Lund, C.C.A.8, 103 F.2d 815—Consolidated Edison Co. of New York v. N. L. R. B., C.C.A.2, 95 F. 2d 390, modified on other grounds Consolidated Edison Co. of New York v. National Labor Relations Board, 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

40. **Evidence held sufficient**
To support findings of board that lockout was result of union activities and was attempt to discourage unionization.—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F. 2d 652—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 98 F.2d 97.

Evidence held insufficient
To support board's finding that employer locked out employees for purpose of discouraging first efforts toward collective bargaining.—Ballston-Stillwater Knitting Co. v. N. L. R. B., C.C.A.2, 98 F.2d 758.

Evidence held insufficient
U.S.—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 98 F.2d 97.

42. U.S.—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201—Canyon Corporation v. N. L. R. B., C.C.A.8, 128 F.2d 953.
D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

43. U.S.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 134 F.2d 240, certiorari denied 64 S.Ct. 48, 320 U.S. 746, 88 L.Ed. 443.

44. U.S.—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F.2d 9.

45. U.S.—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680.

46. U.S.—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F.2d 480.

47. U.S.—Medo Photo Supply Corporation v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007—N. L. R. B. v. Crown Can Co., C.C.A.8, 138 F.2d 263, certiorari denied Crown Can Co. v. N. L. R. B., 64 S. Ct. 527, 321 U.S. 769, 88 L.Ed. 1065—N. L. R. B. v. Christian Board of Publication, C.C.A., 113 F.2d 678.

48. U.S.—N. L. R. B. v. Franks Bros. Co., C.C.A.1, 137 F.2d 989.

49. U.S.—N. L. R. B. v. Lipshutz, C.C.A.5, 149 F.2d 141—N. L. R. B. v. Cape County Milling Co., C.C. A.8, 140 F.2d 543, 152 A.L.R. 144—N. L. R. B. v. Crown Can Co., C.C. A.8, 138 F.2d 263, certiorari denied Crown Can Co. v. National Labor Relations Board, 64 S.Ct. 527, 321 U.S. 769, 88 L.Ed. 1065—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—N. L. R. B. v. New Era Die Co., C.C.A.3, 118 F. 2d 500—N. L. R. B. v. Asheville Hosiery Co., C.C.A.4, 108 F.2d 288.

stituted interference, restraint, and coercion of the employees is not invalidated by proof that some individual employees were not in fact coerced.[50] A finding of coercion may be sustained on sufficient evidence, although it is shown that the coercive conduct of the employer did not have its intended effect;[51] and a showing of noncoercion in one instance does not disprove an affirmative showing of coercion in another instance.[52]

Evidence that the union was unable to obtain a meeting place in the city, without evidence that the employer was responsible, does not establish interference, restraint, or coercion by the employer.[53]

§ 28(98). —— Domination of, or Interference with, Labor Organizations; Disestablishment

Domination of, or interference with, a labor organization as an unfair labor practice must be established by sufficient evidence, but the charge may be proved by circumstantial as well as by direct evidence.

Where the domination of, or interference with, a labor organization by the employer is the unfair labor practice charged before a labor relations board, the evidence must be sufficient to establish the charge.[54] The evidence in various cases has been held sufficient to sustain a finding of the board that the employer dominated or interfered with the formation or administration of a labor organization[55]

Testimony of employee that foreman warned him that plant might shut down unless employees joined certain union and that employee was given membership applications and told to sign up other employees, was substantial evidence that employer interfered with, and coerced its employees.—N. L. R. B. v. John Engelhorn & Sons, C.C.A.3, 134 F.2d 553.

50. U.S.—N. L. R. B. v. Trojan Powder Co., C.C.A.3, 135 F.2d 337, certiorari denied Trojan Powder Co. v. N. L. R. B., 64 S.Ct. 76, 320 U.S. 768, 88 L.Ed. 458, rehearing denied 64 S.Ct. 194, 320 U.S. 813, 88 L.Ed. 491.

51. U.S.—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A., 142 F. 2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 134 F.2d 240, certiorari denied 64 S.Ct. 48, 320 U.S. 746, 88 L.Ed. 443.

52. U.S.—Western Cartridge Co. v. N. L. R. B., supra.

53. U.S.—N. L. R. B. v. Auburn Foundry, C.C.A.7, 119 F.2d 331.

54. U.S.—N. L. R. B. v. Duncan Foundry & Machine Works, C.C.A. 7, 142 F.2d 594.

55. U.S.—Wallace Corporation v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U. S. 809, 88 L.Ed. 489—N. L. R. B. v. Southern Bell Telephone & Telegraph Co., Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—N. L. R. B. v. Southern Ass'n of Bell Telephone Employees, Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Independent Union of Craftsmen, 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., App.D.C., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474—N. L. R. B. v. Bradford Dyeing Ass'n, 60 S.Ct. 918, 310 U.S. 318, 84 L.Ed. 1226—N. L. R. B. v. Falk Corporation, 60 S.Ct. 307, 308 U.S. 453, 84 L.Ed. 396—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307—N. L. R. B. v. Consolidated Mach. Tool Corp., C.C.A.2, 163 F. 2d 376—N. L. R. B. v. Clark Bros. Co., C.C.A.2, 163 F.2d 373—N. L. R. B. v. Winona Knitting Mills, C. C.A.8, 163 F.2d 156—N. L. R. B. v. Norfolk Southern Bus Corp., C.C. A.4, 159 F.2d 516—Independent Employees Ass'n of Neptune Meter Co. v. N. L. R. B., C.C.A.2, 158 F. 2d 448—Wilson & Co. v. N. L. R. B., C.C.A.10, 156 F.2d 577, certiorari denied 67 S.Ct. 357, 329 U.S. 789, 91 L.Ed. —— —N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S. Ct. 72, 329 U.S. 725, 91 L.Ed. —— —N. L. R. B. v. Gilfillan Bros., C. C.A.9, 148 F.2d 990—N. L. R. B. v. Cowell Portland Cement Co., C. C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438—Western Elec. Co. v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1014, 324 U. S. 870, 89 L.Ed. 1424—Point Breeze Emp. Ass'n v. N. L. R. B., C.C.A. 4, 147 F.2d 519, certiorari denied 65 S.Ct. 1015, 324 U.S. 870, 89 L. Ed. 1425—N. L. R. B. v. Arrowhead Rubber Co. of Tex., C.C.A.5, 146 F.2d 749—N. L. R. B. v. Thompson Products, C.C.A.9, 141 F.2d 794—N. L. R. B. v. M. E. Blatt Co., C.C.A.3, 143 F.2d 268, certiorari denied 65 S.Ct. 135, 323 U.S. 774, 89 L.Ed. 619—N. L. R. B. v. Northwestern Mut. Fire Ass'n, C.C.A.9, 142 F.2d 866, certiorari denied 65 S.Ct. 59, 323 U. S. 726, 89 L.Ed. 583—Locomotive Finished Material Co. v. N. L. R. B., C.C.A.10, 142 F.2d 802—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—N. L. R. B. v. Ellis-Klatscher & Co., C.C.A.9, 142 F. 2d 356—N. L. R. B. v. Thompson Products, C.C.A.9, 141 F.2d 794—N. L. R. B. v. Baltimore Transit Co., C.C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084—Berkshire Knitting Mills v. N. L. R. B., C.C. A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L. Ed. 1579—N. L. R. B. v. Elvine Knitting Mills, C.C.A.2, 138 F.2d 633—Edward G. Budd Mfg. Co. v. N. L. R. B., C.C.A.Pa., 138 F.2d 86, certiorari denied 64 S.Ct. 619, 321 U.S. 778, 88 L.Ed. 1071—N. L. R. B. v. Security Warehouse & Cold Storage Co., C.C.A.9, 136 F.2d 829 —N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—Commonwealth Edison Co. v. N. L. R. B., C.C.A.7, 135 F.2d 891—N. L. R. B. v. Southern Wood Preserving Co., C.C.A.5, 135 F.2d 606—N. L. R. B. v. Faultless Caster Corporation, C. C.A.7, 135 F.2d 559—N. L. R. B. v. Pick Mfg. Co., C.C.A.7, 135 F. 2d 329—West Virginia Glass Specialty Co. v. N. L. R. B., C.C.A. 4, 134 F.2d 551, certiorari denied 64 S.Ct. 38, 320 U.S. 738, 88 L.Ed. 437—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 134 F.2d 240, certiorari denied 64 S.Ct. 48, 320 U. S. 746, 88 L.Ed. 443—N. L. R. B. v. Germain Seed & Plant Co., C.C. A.9, 134 F.2d 94—Greenport Basin & Construction Co. v. N. L. R. B., C.C.A.2, 132 F.2d 857—N. L. R. B. v. Aintree Corporation, C.C.A.7, 132 F.2d 469, certiorari denied Aintree Corporation v. N. L. R. B., 63 S.Ct. 831, 318 U.S. 774, 87 L.Ed. 1144—

N. L. R. B. v. Rock Hill Printing & Finishing Co., C.C.A.4, 131 F.2d 171—N. L. R. B. v. Precision Castings Co., C.C.A.6, 130 F.2d 639—N. L. R. B. v. Thompson Products, C. C.A.6, 130 F.2d 363—N. L. R. B. v. Cities Service Oil Co., C.C.A.2, 129 F.2d 933—Sperry Gyroscope Co. v. N. L. R. B., C.C.A.2, 129 F. 2d 922—N. L. R. B. v. Wm. Tehel Bottling Co., C.C.A.8, 129 F.2d 250—N. L. R. B. v. McLain Fire Brick Co., C.C.A.3, 128 F.2d 393—N. L. R. B. v. Condenser Corp. of America, C.C.A.3, 128 F.2d 67—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39—N. L. R. B. v. Quality Art Novelty Co., C.C.A. 2, 127 F.2d 903—N. L. R. B. v. Southwestern Greyhound Lines, C. C.A.8, 126 F.2d 883—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—N. L. R. B. v. Eclipse Moulded Products Co., C.C.A.7, 126 F.2d 576—N. L. R. B. v. Keystone Freight Lines, C.C.A.10, 126 F.2d 414—Wilson & Co. v. N. L. R. B., C.C.A.7, 126 F. 2d 114, certiorari denied 62 S.Ct. 1292, 316 U.S. 699, 86 L.Ed. 1768—N. L. R. B. v. American Rolling Mill Co., C.C.A.6, 126 F.2d 38—N. L. R. B. v. M. A. Hanna Co., C. C.A.6, 125 F.2d 786—N. L. R. B. v. Aluminum Goods Mfg. Co., C.C. A.7, 125 F.2d 353—N. L. R. B. v. Standard Oil Co., C.C.A.10, 124 F. 2d 895—Wilson & Co. v. N. L. R. B., C.C.A.8, 123 F.2d 411—N. L. R. B. v. Youngstown Mines Corporation, C.C.A.8, 123 F.2d 178—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A.10, 122 F. 2d 419—N. L. R. B. v. Reynolds Wire Co., C.C.A.7, 121 F.2d 627—N. L. R. B. v. Moltrup Steel Products Co., C.C.A.3, 121 F.2d 612—N. L. R. B. v. Blossom Products Corporation, C.C.A.3, 121 F.2d 260—Colorado Fuel & Iron Corporation v. N. L. R. B., C.C.A.10, 121 F. 2d 165—Roebling Employees Ass'n v. N. L. R. B., C.C.A.3, 120 F.2d 289—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C. A.8, 119 F.2d 903—N. L. R. B. v. West Texas Utilities Co., C.C.A.5, 119 F.2d 683—American Enka Corporation v. N. L. R. B., C.C.A.4, 119 F.2d 60—Texas Co. v. N. L. R. B., C.C.A.7, 119 F.2d 23—Corning Glass Works v. N. L. R. B., C. C.A.2, 118 F.2d 625—New Idea v. N. L. R. B., C.C.A.7, 117 F.2d 517—N. L. R. B. v. Dow Chemical Co., C.C.A.6, 117 F.2d 455—N. L. R. B. v. Ed. Friedrich, Inc., C.C.A. 5, 116 F.2d 888—N. L. R. B. v. Gulf Public Service Co., C.C.A.5, 116 F.2d 852—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F. 2d 816—Valley Mould & Iron Corporation v. N. L. R. B., C.C.A.7, 116 F.2d 760, certiorari denied 61 S.Ct. 1114, 313 U.S. 590, 85 L.Ed. 1545—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 116 F.2d 367—N. L. R. B. v. General Motors Corporation, C.C.A.7, 116 F.2d 306—N. L. R. B. v. Swift & Co., C.C.A.8, 116 F.2d 143—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.10, 115 F.2d 1007—N. L. R. B. v. American Oil Co. (Curtis Bay Plant), C.C.A.4, 114 F.2d 1009—N. L. R. B. v. Elkland Leather Co., C.C.A.3, 114 F. 2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S. Ct. 170, 311 U.S. 705, 85 L.Ed. 457—Western Union Telegraph Co. v. N. L. R. B., C.C.A.2, 113 F.2d 992—Continental Box Co. v. N. L. R. B., C.C.A.5, 113 F.2d 93—Texas Co. v. N. L. R. B., C.C.A.5, 112 F.2d 744, certiorari denied 61 S.Ct. 392, 311 U.S. 712, 85 L.Ed. 463—Subin v. N. L. R. B., C.C.A.3, 112 F.2d 326, certiorari denied 61 S.Ct. 38, 311 U.S. 673, 85 L.Ed. 433—N. L. R. B. v. Tovrea Packing Co., C.C.A. 9, 111 F.2d 626, certiorari denied Tovrea Packing Co. v. N. L. R. B., 61 S.Ct. 28, 311 U.S. 668, 85 L.Ed. 429—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F. 2d 340—N. L. R. B. v. J. Greenebaum Tanning Co., C.C.A.7, 110 F. 2d 984, certiorari denied J. Greenebaum Tanning Co. v. N. L. R. B., 61 S.Ct. 18, 311 U.S. 662, 85 L.Ed. 424—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U. S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—Union Drawn Steel Co. v. N. L. R. B., C.C.A.3, 109 F. 2d 587—N. L. R. B. v. Norfolk Shipbuilding & Drydock Corporation, C.C.A.4, 109 F.2d 128—N. L. R. B. v. Brown Paper Mill Co., C. C.A.5, 108 F.2d 867, certiorari denied Brown Paper Mill Co. v. N. L. R. B., 60 S.Ct. 1104, 310 U.S. 651, 84 L.Ed. 1416—N. L. R. B. v. H. E. Fletcher Co., C.C.A.1, 108 F. 2d 459, certiorari denied H. E. Fletcher Co. v. N. L. R. B., 60 S. Ct. 716, 309 U.S. 678, 84 L.Ed. 1022—Swift & Co. v. N. L. R. B., C. C.A.10, 106 F.2d 87—N. L. R. B. v. American Mfg. Co., C.C.A.2, 106 F.2d 61, modified on other grounds American Mfg. Co. v. N. L. R. B., 60 S.Ct. 612, 309 U.S. 629, 84 L. Ed. 988—N. L. R. B. v. Colten, C. C.A.6, 105 F.2d 179—Hamilton-Brown Shoe Co. v. N. L. R. B., C.C.A.8, 104 F.2d 49—Wilson & Co. v. N. L. R. B., C.C.A.8, 103 F.2d 243—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 102 F.2d 745, certiorari denied 60 S.Ct. 78, 308 U.S. 565, 84 L.Ed. 475—Virginia Ferry Corporation v. N. L. R. B., C.C.A. 4, 101 F.2d 103—N. L. R. B. v. American Potash & Chemical Corporation, C.C.A.9, 98 F.2d 488, certiorari denied American Potash & Chemical Corporation v. N. L. R. B., 59 S.Ct. 582, 306 U.S. 643, 83 L.Ed. 1043—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U. S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L. Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52—N. L. R. B. v. Arcade-Sunshine Co., 118 F.2d 49, 73 App.D.C. 128, certiorari denied Arcade-Sunshine Co. v. N. L. R. B., 61 S.Ct. 942, 313 U.S. 567, 85 L.Ed. 1526.

N.Y.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256—New York State Labor Relations Board v. Interborough News Co., 10 N. Y.S.2d 396, 170 Misc. 347.

Pa.—In re Ewart, 42 Pa.Dist. & Co. 307.

Evidence of anti-union statements of supervisory employees necessarily resulting in assistance in organization of independent union and of participation of employees having supervisory powers in such organization sustained board's findings that employer was guilty of unfair labor practices.—Wallace Corporation v. N. L. R. B., C.C.A.4, 141 F. 2d 87, affirmed 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Richwood Clothespin & Dish Worker's Union v. National Labor Relations Board, C.C.A.4, 141 F.2d 87, affirmed 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216.

New union as continuation of dominated union

U.S.—Western Elec. Co. v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1014, 324 U.S. 870, 89 L.Ed. 1424—Point Breeze Emp. Ass'n v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1015, 324 U.S. 870, 89 L.Ed. 1425—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A.10, 122 F.2d 419—N. L. R. B. v. Continental Oil Co., C.C.A.10, 121 F.2d 120.

Solicitation of votes at election

U.S.—N. L. R. B. v. Clinchfield Coal Corporation, C.C.A.4, 145 F.2d 66, 155 A.L.R. 874.

Discrimination in issuing passes to one union

U.S.—South Atlantic S. S. Co. of Delaware v. N. L. R. B., C.C.A.5, 116 F.2d 480, certiorari denied 61 S.Ct. 1101, 313 U.S. 582, 85 L.Ed. 1538, rehearing denied 62 S.Ct. 54, 314 U.S. 708, 86 L.Ed. 565.

and in other cases the evidence has been held to be insufficient to sustain such a finding.[56] Likewise in various cases the evidence has been held to be sufficient to support a finding that the employer contributed financial or other support to a labor organization[57] or the evidence has been held insufficient

56. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—N. L. R. B. v. Brown Co., C.C.A.1, 160 F.2d 449—Keystone Steel & Wire Co. v. N. L. R. B., C.C.A.7, 155 F.2d 553, certiorari granted 67 S.Ct. 190, 329 U.S. 705, 91 L.Ed. —— and vacated in view of stipulation 68 S.Ct. 214, motion granted 68 S. Ct. 259—N. L. R. B. v. Clinchfield Coal Corporation, C.C.A.4, 145 F.2d 66, 155 A.L.R. 874—N. L. R. B. v. Brown-Brockmeyer Co., C.C.A.6, 143 F.2d 537—N. L. R. B. v. Duncan Foundry & Machine Works, C.C.A.7, 142 F.2d 594—N. L. R. B. v. Clinton Woolen Mfg. Co., C.C.A. 6, 141 F.2d 753—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C. A.3, 135 F.2d 15—N. L. R. B. v. Standard Oil Co., C.C.A.10, 124 F. 2d 895—N. L. R. B. v. Arma Corporation, C.C.A.2, 122 F.2d 153—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C.A.7, 121 F.2d 602—Diamond T Motor Car Co. v. N. L. R. B., C.C.A.7, 119 F.2d 978—N. L. R. B. v. Sparks-Withington Co., C.C.A.6, 119 F.2d 78, certiorari dismissed 62 S.Ct. 477, 314 U. S. 703, 86 L.Ed. 562—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868—E. I. Du Pont De Nemours & Co v. N. L. R. B., C.C.A. 4, 116 F.2d 388, certiorari denied N. L. R. B. v. E. I. Du Pont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—N. L. R. B. v. International Shoe Co., C.C. A.8, 116 F.2d 31—Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 115 F.2d 414, reversed on other grounds 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—Independent Organization of Employees of Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 115 F.2d 414, reversed on other grounds 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—N. L. R. B. v. Mathieson Alkali Works, C.C.A. 4, 114 F.2d 796—Foote Bros. Gear & Machine Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Foote Bros. Gear & Machine Corporation, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394, mandate conformed to, C.C.A., Foote Bros. Gear & Machine Corporation v. N. L. R. B., 121 F.2d 802—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 113 F.2d 85—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.5, 112 F. 2d 545—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471—N. L. R. B. v. Swank Products, C.C.A.3, 108 F.2d 872—L. Greif & Bro. v. N. L. R. B., C.C.A.4, 108 F. 2d 551—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 106 F.2d 100—Ballston-Stillwater Knitting Co. v. N. L. R. B., C.C.A.2, 98 F.2d 758—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951—N. L. R. B. v. Lion Shoe Co., C.C.A.1, 97 F. 2d 448—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

N.Y.—International Ry. Co. v. Boland, 8 N.Y.S.2d 643, 169 Misc. 926.

Pa.—Hodson Motor Co. v. United Automobile Workers, Com.Pl., 89 Pittsb.Leg.J. 241.

Utah.—Utah Poultry Producers Co-op. Ass'n v. Utah Labor Relations Board, 149 P.2d 643, 106 Utah 394—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

Wis.—E. G. Shinner & Co. v. Wrabetz, 292 N.W. 902, 235 Wis. 195.

New union as continuation of dominated union

U.S.—Keystone Steel & Wire Co. v. N. L. R. B., C.C.A.7, 155 F.2d 553, certiorari granted 67 S.Ct. 190, 329 U.S. 705, 91 L.Ed. ——, and vacated in view of stipulation 68 S.Ct. 214, motion granted 68 S.Ct. 259.

Evidence that eight or ten supervisory employees joined organization of employees and solicited members, spoke favorably of it, and kept membership cards on their desks, etc., did not establish that employer interfered with organization.—N. L. R. B. v. Sparks-Withington Co., C.C.A.6, 119 F.2d 78, certiorari dismissed 62 S.Ct. 477, 314 U.S. 703, 86 L.Ed. 562.

Display of buttons

Fact that management did not disapprove of display of buttons by employees was immaterial since management had no right to prohibit the use of the buttons.—N. L. R. B. v. Thompson Products, C.C.A. 6, 162 F.2d 287.

57. U.S.—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U.S. 514, 85 L. Ed. 309—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—Wyman-Gordon Co. (Ingalls Shepard Division) v. N. L. R. B., C.C.A.7, 153 F.2d 480—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579—N. L. R. B. v. Elvine Knitting Mills, C.C.A.2, 138 F.2d 633—N. L. R. B. v. Security Warehouse & Cold Storage Co., C. C.A.9, 136 F.2d 829—N. L. R. B. v. Germain Seed & Plant Co., C.C.A.9, 134 F.2d 94—N. L. R. B. v. Rock Hill Printing & Finishing Co., C. C.A.4, 131 F.2d 171—N. L. R. B. v. Condenser Corp. of America, C. C.A.3, 128 F.2d 67—Wilson & Co. v. N. L. R. B., C.C.A.7, 126 F.2d 114, certiorari denied 62 S.Ct. 1292, 316 U.S. 699, 86 L.Ed. 1768—N. L. R. B. v. Standard Oil Co., C.C. A.10, 124 F.2d 895—N. L. R. B. v. Moore-Lowery Flour Mills Co., C. C.A.10, 122 F.2d 419—N. L. R. B. v. Continental Oil Co., C.C.A.10, 121 F.2d 120—Roebling Employees Ass'n v. N. L. R. B., C.C.A.3, 120 F.2d 289—N. L. R. B. v. Colten, C.C.A.6, 105 F.2d 179—Hamilton-Brown Shoe Co. v. N. L. R. B., C. C.A.8, 104 F.2d 49—Wilson & Co. v. N. L. R. B., C.C.A.8, 103 F.2d 243—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employees' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App. D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

Favoritism shown company union

U.S.—Cudahy Packing Co. v. N. L. R. B., C.C.A.10, 118 F.2d 295.

Permitting circulation of petition

Board's inference that employer knew of and permitted activities of circulating petition for joining independent union during working hours and collection of dues and posting of notices was supported by substantial evidence, and fact that handbill hostile to affiliated union was posted on bulletin board subsequent to organization of independent union

to support such a finding,[58] or sufficient to support a finding that the employer did not dominate or interfere with a labor organization.[59]

Domination of, and interference with, a labor organization by the employer may be established by circumstantial, as well as direct, evidence,[60] but they may not be established by mere suspicion or inference generated by a preference for one organization over another one.[61] The circumstances allegedly supporting a finding that the employer had dominated and interfered with the formation of a union is to be viewed in the light of surrounding circumstances.[62] In order to establish employer domination or support of a labor organization it is not necessary to prove overt or express words or acts of domination or support by stockholders or executive officers of the employer; it is sufficient to show covert support or domination or acts of supervisory employees and a general setup of such a nature and so carried out as reasonably to warrant the inference that the union was an employer project.[63] The statute does not require that lack of harmonious relations between employer and employees shall constitute the only possible proof of absence of employer domination.[64] In determining whether an employer's dominance of a labor organization had been terminated, evidence that a supervisor, at a supervisor's suggestion, undertook to influence certain subordinates is entitled to consideration by the board.[65] The effect on the minds of the employees of the employer's public disavowal of a dominated union ordinarily is a question of fact for the board to determine.[66]

Where there is testimony indicating the disapproval of an outside union and encouragement of an inside union, the board may infer interference with collective bargaining privileges and domination of the inside union.[67] The comparison of speed in negotiating and contracting with contending unions is evidentiary in showing interference or assistance, at least when considered with other acts.[68] The quick execution of a closed-shop agreement when the employer knew that a rival labor organization claimed to represent a majority of employees is itself evidential of the employer's assistance to the contracting union.[69] Where a lawyer who subsequently represented the employer assisted in the formation of a union, the failure of the employer to show what its connection with the lawyer was is significant.[70]

Sworn testimony given by witnesses before the

and execution of contract did not militate against finding of board.—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580.

58. U.S.—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15.

59. Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

60. U.S.—Sperry Gyroscope Co. v. N. L. R. B., C.C.A.2, 129 F.2d 922.

Circumstances to be considered

Facts that employees' association hired its own attorney, collected dues, held regular meetings off employer's property, elected officers and received no financial assistance from employer, and that association negotiated collective bargaining contract and disposed of certain grievances and obtained various plant improvements were only part of evidence which board was entitled to appraise in determining whether association was employer dominated.—New Idea v. N. L. R. B., C.C.A.7, 117 F.2d 517.

Common types of domination

While the indicia of company participation or domination may be numerous, the following are the more or less common types: "(1) Organization of a union to 'succeed' or 'continue' a Company union which suspended immediately after Supreme Court decision upholding the National Labor Relations Act . . .; (2) organization on Company time and property; (3) lack of dues, and support by mere contributions; (4) similarity in union structure between old and new unions; (5) similarity of official personnel of the former and new unions; (6) failure of the Company to 'broadcast' to all employees its impartiality in selection of union; (7) acts of the Company indicative of its preference for or against a particular union; (8) its maintenance of a Company union long after the enactment of the Wagner Act as indicative of the Company's attitude towards unions generally; (9) statements of all these factors are the 'imponderables which the Board was entitled to appraise' in determining whether the Company dominated and fostered the new union."—Texas Co. v. N. L. R. B., C.C.A.7, 119 F.2d 23, 24.

61. U.S.—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.10, 115 F.2d 1007.

62. U.S.—Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 115 F.2d 414, reversed on other grounds 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—Independent Organization of Employees of Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 115 F.2d 414, reversed on other grounds 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348.

63. U.S.—N. L. R. B. v. Ed. Friedrich, Inc., C.C.A.5, 116 F.2d 888.

64. U.S.—N. L. R. B. v. Duncan Foundry & Machine Works, C.C.A. 7, 142 F.2d 594.

65. U.S.—N. L. R. B. v. Southern Bell Telephone & Telegraph Co., Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—N. L. R. B. v. Southern Ass'n of Bell Telephone Employees, Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250.

66. U.S.—Sperry Gyroscope Co. v. N. L. R. B., C.C.A.2, 129 F.2d 922.

67. U.S.—N. L. R. B. v. Empire Worsted Mills, C.C.A.2, 129 F.2d 668.

68. D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

69. U.S.—N. L. R. B. v. John Engelhorn & Sons, C.C.A.3, 134 F.2d 553.

70. U.S.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58

board as to the formation of an independent union, which testimony is consistent and uncontradicted and which shows no unlawful domination of or assistance to, the independent union by the employer, may not be overridden by suspicion or by slight circumstances that may be given another color.[71] The fact that a former labor organization had been dominated by the employer does not justify an inference that a subsequent organization is employer-dominated where the undisputed testimony is to the contrary.[72] The fact that certain representatives of an earlier employer-dominated union participated in the organization of a subsequent labor organization does not establish that the subsequent organization is employer-dominated.[73] The fact that employees choose unaffiliated associations is in itself no evidence that such associations are not genuine unions or that the choice is dominated, interfered with, or coerced;[74] the fact that employees express a dislike for organized labor does not indicate that they must be acting for management.[75] Domination or interference by the employer may not be inferred from the fact that the employer refused to post a notice to the effect that it did not care whether its employees joined a national labor organization[76] or from the fact that the employer paid for the services of accountants to examine membership cards of the union to ascertain whether it represented a majority of employees.[77]

Evidence that an employer welcomed the organization of an independent union and preferred such a union to any other and made haste to recognize such union is not sufficient to sustain a finding of interference, domination, and support.[78] The fact that a temporary committee of an inside union informed the employer that a permanent organization would be created if the employer would recognize the union is insufficient to establish that the employer had aided the employees in the organization.[79]

Evidence that an independent union, without suggestion or assistance from the employer, expelled from its membership a member of a national union does not establish discrimination by the employer in the absence of evidence that the member's employment was affected.[80]

Disestablishment of union. Whether the continued recognition by the employer of a dominated union constitutes a continuing obstacle to the exercise of the employees' right of self organization and to bargain collectively is an inference of fact which the board may draw if there is evidence to support it.[81] In various cases it has been held that the evidence justified[82] or failed to justify[83] the order of the

S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

71. U.S.—N. L. R. B. v. McGough Bakeries Corp., C.C.A.5, 153 F.2d 420.

72. U.S.—N. L. R. B. v. Standard Oil Co., C.C.A.10, 124 F.2d 895.

73. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868.

74. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—De Bardeleben v. N. L. R. B., C. C.A.5, 135 F.2d 13.

75. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—N. L. R. B. v. Swank Products, C.C.A.3, 108 F.2d 872.

76. U.S.—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868.

77. U.S.—A. E. Staley Mfg. Co. v. N. L. R. B., supra.

78. U.S.—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 106 F. 2d 100.

79. U.S.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

80. U.S.—Keystone Steel & Wire Co. v. N. L. R. B., C.C.A.7, 155 F.2d 553, certiorari granted 67 S.Ct. 190, 329 U.S. 705, 91 L.Ed. —, and vacated in view of stipulation 68 S. Ct. 214, motion granted 68 S.Ct. 299.

81. U.S.—N. L. R. B. v. Pacific Greyhound Lines, 58 S.Ct. 577, 303 U.S. 272, 82 L.Ed. 838.

82. U.S.—N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219—N. L. R. B. v. Pacific Greyhound Lines, 58 S.Ct. 577, 303 U.S. 272, 82 L.Ed. 838—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307—N. L. R. B. v. Morris P. Kirk & Son, C.C.A.9, 151 F.2d 490, opinion supplemented 154 F.2d 110—N. L. R. B. v. Gilfillan Bros., C.C.A.9, 148 F.2d 990—N. L. R. B. v. Mt. Clemens Pottery Co., C.C.A.6, 147 F.2d 262—N. L. R. B. v. Engineering & Research Corporation, C.C.A.4, 145 F. 2d 271, certiorari denied 65 S.Ct. 560, 323 U.S. 801, 89 L.Ed. 639—Locomotive Finished Material Co. v. N. L. R. B., C.C.A.10, 142 F.2d 802—N. L. R. B. v. Ellis-Klatscher & Co., C.C.A.9, 142 F.2d 356—N. L. R. B. v. American Rolling Mill Co., C.C.A.6, 126 F.2d 38—N. L. R. B., v. C. Nelson Mfg. Co., C.C.A.8, 120 F.2d 444—New Idea v. N. L. R. B., C.C.A.7, 117 F.2d 517—N. L. R. B. v. J. Greenebaum Tanning Co., C.C.A.7, 110 F.2d 984, certiorari denied J. Greenebaum Tanning Co. v. N. L. R. B., 61 S.Ct. 18, 311 U. S. 662, 85 L.Ed. 424—H. J. Heinz Co. v. N. L. R. B., C.C.A.6, 110 F.2d 843, affirmed 61 S.Ct. 320, 311 U. S. 514, 85 L.Ed. 309—N. L. R. B. v. National Licorice Co., C.C.A.2, 104 F.2d 655, modified on other grounds National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799—N. L. R. B. v. Wallace Mfg. Co., C.C.A.4, 95 F.2d 818—N. L. R. B. v. J. Freezer & Son, C.C.A.4, 95 F.2d 840.

83. U.S.—N. L. R. B. v. Germain Seed & Plant Co., C.C.A.9, 134 F. 2d 94—N. L. R. B. v. Arma Corporation, C.C.A.2, 122 F.2d 153—N. L. R. B. v. Mathieson Alkali Works, C.C.A.4, 114 F.2d 796—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S. Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

board requiring the employer to withdraw all recognition of the dominated union and to give appropriate notice of the withdrawal to the employees, or sufficient to sustain a finding of the board that the employer had not disestablished a dominated union,[84] or sufficient to show that on disestablishment of a dominated union the employer properly notified its employees of the disestablishment.[85]

A union formed by a majority of employees may not be disestablished because the employer dealt with such union without a careful determination that it had such a majority[86] or because some of the majority had formerly been members of an allegedly employer-dominated organization.[87] An employer ordered to cease and desist from dominating a labor organization is under no obligation to comply with an order of a representative of the board that he disestablish the labor organization.[88]

§ 28(99). —— Discrimination Because of Union Activities

A finding of discrimination because of union affiliation or activities must have a satisfactory foundation in the evidence.

Where the unfair labor practice charged before a labor relations board consists of discrimination because of union affiliation or activities, there must be a satisfactory foundation in the evidence to support the charge.[89] The disproportionate treatment of union and nonunion workers may, under certain circumstances, be very persuasive evidence of discrimination.[90] The evidence in various cases has been held sufficient[91] or insufficient[92] to sustain a finding by the board of discrimination by the employer against the employees because of union affiliation and activities, or sufficient or insufficient to sustain a finding of discrimination against an employee because he had given testimony before the board.[93]

The evidence in various cases has been held sufficient or insufficient with respect to hire and tenure of employment[94] or any term or condition of em-

84. U.S.—N. L. R. B. v. Landis Tool Co., C.C.A.3, 145 F.2d 152—N. L. R. B. v. Elizabeth Arden, Inc., C.C.A. 2, 139 F.2d 488.

85. U.S.—Keystone Steel & Wire Co. v. N. L. R. B., C.C.A.7, 155 F. 2d 553, certiorari granted 67 S.Ct. 190, 329 U.S. 705, 91 L.Ed. ——, and vacated in view of stipulation 68 S.Ct. 214, motion granted 68 S.Ct. 259.

86. U.S.—N. L. R. B v. Hollywood-Maxwell Co., C.C.A.9, 126 F.2d 815.

87. U.S.—N. L. R. B. v. Hollywood-Maxwell Co., supra.

88. U.S.—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868.

89. U.S.—Nevada Consol. Copper Corporation v. N. L. R. B., C.C.A. 10, 122 F.2d 587, reversed on other grounds 62 S.Ct. 960, 316 U.S. 105, 86 L.Ed. 1305.

90. U.S.—N. L. R. B. v. Wilson Line, C.C.A.3, 122 F.2d 809—N. L. R. B. v. Bachelder, C.C.A.7, 120 F. 2d 574, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519 and modified on other grounds, C.C.A., 125 F.2d 387.

91. U.S.—Washington, Virginia & Maryland Coach Co. v. N. L. R. B., 57 S.Ct. 648, 301 U.S. 142, 81 L.Ed. 965—Hamilton v. N. L. R. B., C.C. A.6, 160 F.2d 465—N. L. R. B. v. A. Sartorius & Co., C.C.A.2, 140 F. 2d 203—Butler Bros. v. N. L. R. B., C.C.A.7, 134 F.2d 981, certiorari denied 64 S.Ct. 203, 320 U.S. 789, 88 L.Ed. 475 and Wasleff v. N. L. R. B., 64 S.Ct. 204, 320 U.S. 789, 88 L.Ed. 475—New York Handkerchief Mfg. Co. v. N. L. R. B., C.C. A.7, 114 F.2d 144, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457—Southern Colorado Power Co. v. N. L. R. B., C.C.A.10, 111 F.2d 539—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F. 2d 340—N. L. R. B. v. J. Freezer & Son, C.C.A.4, 95 F.2d 840.

Pa.—International Brotherhood of Teamsters, Etc., v. Foster, Com.Pl., 24 Wash.Co. 161.

92. U.S.—N. L. R. B. v. Reynolds Intern. Pen Co., C.C.A.7, 162 F.2d 680—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—N. L. R. B. v. Citizen-News Co., C.C.A.9, 134 F.2d 970—N. L. R. B. v. Citizen-News Co., C.C.A.9, 134 F. 2d 962—Interlake Iron Corporation v. N. L. R. B., C.C.A.7, 131 F.2d 129—N. L. R. B. v. Aluminum Goods Mfg. Co., C.C.A.7, 125 F.2d 353—N. L. R. B. v. Gutmann & Co., C.C.A.7, 121 F.2d 756—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F. 2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

Pa.—International Brotherhood of Teamsters, Etc., v. Foster, Com. Pl., 24 Wash.Co. 161.

93. **Evidence held insufficient**

U.S.—N. L. R. B. v. Riverside Mfg. Co., C.C.A.5, 119 F.2d 302.

Threat of reprisal

Substantial evidence supported board's conclusion that statements made by foreman to employee constituted threat of reprisal for testifying before board's examiner who was conducting hearing.—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L. Ed. 580.

94. **Evidence held sufficient**

U.S.—N. L. R. B. v. Winter, C.C.A. 10, 154 F.2d 719—N. L. R. B. v. Holtville Ice & Cold Storage Co., C.C.A.9, 148 F.2d 168—N. L. R. B. v. Idaho Refining Co., C.C.A.9, 143 F.2d 246—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462—N. L. R. B. v. National Mineral Co., C. C.A.7, 134 F.2d 424, certiorari denied National Mineral Co. v. N. L. R. B., 64 S.Ct. 58, 320 U.S. 753, 88 L.Ed. 448—N. L. R. B. v. Chattanooga Bakery, C.C.A.6, 127 F.2d 201, certiorari denied Chattanooga Bakery v. N. L. R. B., 63 S.Ct. 157, 317 U.S. 676, 87 L.Ed. 543—N. L. R. B. v. Bachelder, C.C.A.7, 120 F. 2d 574, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519, and modified on other grounds, C.C.A., 125 F.2d 387—N. L. R. B. v. Acme Air Appliance Co., C.C..2, 117 F.2d 417—N. L. R. B. v. J. Greenebaum Tanning Co., C.C.A.7, 110 F.2d 984, certiorari denied J. Greenebaum Tanning Co. v. N. L. R. B., 61 S.Ct. 18, 311 U.S. 662, 85 L.Ed. 424—Union Drawn Steel Co. v. N. L. R. B., C.

ployment[95] to encourage or discourage membership in any labor organization; imposing demerits on an employee;[96] reduction in wages;[97] demotion of employees[98] or the promotion of other employees;[99] layoffs;[1] the transfer or shift of employees;[2] or forced resignations.[3]

Rehiring or reinstatement. A finding that an employee was refused reinstatement because of union affiliation or activities cannot be based on mere surmise.[4] In determining whether an employer has discriminated in refusing to reinstate striking employees, testimony of an unfriendly attitude on the part of the employer prior to the enactment of the statute prohibiting unfair labor practices may be considered, but where such testimony is uncertain and remote it carries little weight.[5] The possibility of drawing either of two inconsistent inferences with respect to the employer's motive in refusing to reemploy certain employees does not prevent the board from drawing one of them.[6]

The evidence in various cases has been held sufficient to sustain a finding that an employer refused to rehire or reinstate an employee because of union affiliation or activities,[7] or insufficient to sustain such

C.A.3, 109 F.2d 587—Montgomery Ward & Co. v. N. L. R. B., C.C.A.7, 107 F.2d 555.

Evidence held insufficient
U.S.—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 139 F.2d 855—Martel Mills Corporation v. N. L. R. B., C.C.A.4, 114 F.2d 624—Montgomery Ward & Co. v. L. R. B., C.C.A. 7, 107 F.2d 555—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F. 2d 406, rehearing denied 98 F.2d 870.

Giving preference to students
Evidence sustained finding that employer had adopted policy of hiring college students to discourage union membership and that such students were given preference over seasonal employees.—N. L. R. B. v. Security Warehouse & Cold Storage Co., C.C.A.9, 136 F.2d 829.

Fact that employer had background of hostility to union did not in and of itself show discrimination in hiring and firing.—Interlake Iron Corporation v. N. L. R. B., C.C.A.7, 131 F.2d 129.

95. **Evidence held sufficient**
U.S.—N. L. R. B. v. Clinchfield Coal Corporation, C.C.A.4, 145 F.2d 66, 155 A.L.R. 874.

96. **Evidence held insufficient**
U.S.—Oklahoma Transp. Co. v. N. L. R. B., C.C.A.5, 136 F.2d 42.

97. **Evidence held sufficient**
U.S.—N. L. R. B. v. New Era Die Co., C.C.A.3, 118 F.2d 500.

98. **Evidence held sufficient**
U.S.—R. R. Donnelley & Sons Co. v. N. L. R. B., C.C.A.7, 156 F.2d 416, certiorari denied 67 S.Ct. 624, 329 U.S. 810, 91 L.Ed. —— —P. H. Glatfelter Co. v. N. L. R. B., C.C.A.3, 141 F.2d 631—N. L. R. B. v. Faultless Caster Corporation, C.C.A.7, 135 F.2d 559.

Evidence held insufficient
U.S.—Boeing Airplane Co., Wichita Division v. N. L. R. B., C.C.A.10, 140 F.2d 423.

99. **Evidence held insufficient**
U.S.—Appalachian Electric Power Co. v. N. L. R. B., C.C.A.4, 93 F. 2d 985.

1. **Evidence held sufficient**
U.S.—N. L. R. B. v. Winona Knitting Mills, C.C.A.8, 163 F.2d 156—Hamilton v. N. L. R. B., C.C.A.6, 160 F.2d 465—P. H. Glatfelter Co. v. N. L. R. B., C.C.A.3, 141 F.2d 631—Greenport Basin & Construction Co. v. N. L. R. B., C.C.A.2, 132 F.2d 857—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A.4, 127 F.2d 109—N. L. R. B. v. Arma Corporation, C.C.A.2, 122 F.2d 153—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F.2d 480—N. L. R. B. v. Auburn Foundry, C.C.A.7, 119 F.2d 331—Burk Bros. v. N. L. R. B., C.C.A.3, 117 F.2d 686, certiorari denied 61 S.Ct. 1110, 313 U.S. 588, 85 L.Ed. 1543—N. L. R. B. v. Vincennes Steel Corporation, C.C.A.7, 117 F. 2d 169—Marlin-Rockwell Corporation v. N. L. R. B., C.C.A.2, 116 F. 2d 586, certiorari denied 61 S.Ct. 1116, 313 U.S. 594, 85 L.Ed. 1548—Subin v. N. L. R. B., C.C.A.3, 112 F.2d 326, certiorari denied 61 S.Ct. 38, 311 U.S. 673, 85 L.Ed. 433—Burlington Dyeing & Finishing Co. v. N. L. R. B., C.C.A.4, 104 F. 2d 736.

Evidence held insufficient
U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—N. L. R. B. v. Aluminum Goods Mfg. Co., C.C.A.7, 125 F.2d 353—N. L. R. B. v. Vincennes Steel Corporation, C.C.A.7, 117 F.2d 169.

2. **Evidence held sufficient**
(1) Shift from day to less desirable night shift.—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F.2d 480.

(2) Transfer from one shift to another resulting in loss of day's work.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

(3) Transfer of skilled and experienced employee to another plant.—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F.2d 340.

(4) Other cases.
U.S.—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292.
N.Y.—New York State Labor Relations Board v. Select Operating Corporation, 55 N.Y.S.2d 117, 269 App.Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684.

Fact of transfer alone does not justify finding of discrimination, but transfer must be shown to have been associated with active interference with employee's union activities.—New York State Labor Relations Board v. Select Operating Corporation, 49 N.Y.S.2d 294, 183 Misc. 480, reversed on other grounds 55 N.Y.S.2d 117, 269 App.Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684.

3. **Evidence held sufficient**
U.S.—N. L. R. B. v. East Texas Motor Freight Lines, C.C.A.5, 140 F. 2d 404—N. L. R. B. v. Baltimore Transit Co., C.C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084.

Evidence held insufficient
D.C.—Press Co. v. N. L. R. B., 118 F.2d 937, 73 App.D.C. 103, certiorari denied 61 S.Ct. 1118, 313 U.S. 595, 85 L.Ed. 1548.

4. U.S.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

5. U.S.—C. G. Conn, Limited, v. N. L. R. B., C.C.A.7, 108 F.2d 390.

6. U.S.—N. L. R. B. v. Nevada Consol. Copper Corporation, 62 S. Ct. 960, 316 U.S. 105, 86 L.Ed. 1305.

7. U.S.—N. L. R. B. v. Nevada Consol. Copper Corporation, supra—N. L. R. B. v. Mackay Radio & Telegraph Co., 58 S.Ct. 904, 304 U. S. 333, 82 L.Ed. 1381—N. L. R. B. v. American Pearl Button Co., C. C.A.8, 149 F.2d 258—N. L. R. B. v. Montag Bros., C.C.A.5, 140 F.2d 730—Piedmont Shirt Co. v. N. L. R. B., C.C.A.4, 138 F.2d 738—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—Marlin-Rockwell Corporation v. N. L. R. B., C.C.A.2, 133 F.2d 258—N. L. R. B. v. Gallup American Coal Co., C.C.A.10, 131 F.2d 665—N. L. R. B. v. Chattanooga Bakery, C.C.A.6, 127 F.2d 201, certiorari denied Chattanooga Bakery v. N. L. R. B., 63 S.Ct. 157, 317 U.S. 676, 87 L.Ed. 543—Wilson & Co. v. N. L. R. B., C.C.A.8, 123

a finding;[8] or sufficient to sustain a finding that the employer had refused to reinstate an employee because of his participation in a strike;[9] or sufficient to support a finding that a striking employee whose reinstatement was refused had obtained employment equivalent to that formerly held;[10] or sufficient[11] or insufficient[12] to establish that striking employees were guilty of lawlessness during the strike which would bar reinstatement.

§ 28(100). —— Discriminatory Discharge and Reinstatement

Where the unfair labor practice charged consists of the dismissal of an employee because of his union affiliation or activities, the evidence must be sufficient to establish that union affiliation or activities were the real and actual cause for the discharge.

Where in a proceeding before a labor relations board it is charged as an unfair labor practice that an employee was dismissed because of union affiliation or activities, the evidence must be sufficient to show that his union activities constituted the real and actual cause for his discharge.[13] In various cases the evidence has been held sufficient to sustain the finding of the board that an employee was discharged because of union affiliation or activities,[14]

F.2d 411—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A.10, 122 F.2d 419—N. L. R. B. v. Arma Corporation, C.C.A.2, 122 F.2d 153—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A.8, 119 F.2d 903 —N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549—Cudahy Packing Co. v. N. L. R. B., C.C.A., 8, 116 F.2d 367—Subin v. N. L. R. B., C.C.A.3, 112 F.2d 326, certiorari denied 61 S.Ct. 38, 311 U.S. 673, 85 L.Ed. 433—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F. 2d 992—N. L. R. B. v. Kentucky Fire Brick Co., C.C.A.6, 99 F.2d 89.

Members of negotiating committee

Evidence that men not reinstated after a shutdown were members of a negotiating committee may be sufficient to support a finding of discrimination against such employees.—N. L. R. B. v. Bachelder, C.C.A.7, 120 F.2d 574, certiorari denied Bachelder v. N. L. R. B., 62 S. Ct. 90, 314 U.S. 647, 86 L.Ed. 519, and modified on other grounds, C.C.A., 125 F.2d 387.

Reinstatement conditional on withdrawal of charges

Evidence sustained finding that employer engaged in unfair labor practice by making reinstatement of striking employees conditional on withdrawal of charges against employer of discrimination.—N. L. R. B. v. St. Marys Sewer Pipe Co., C. C.A.3, 146 F.2d 995.

8. U.S.—Loveman, Joseph & Loeb v. N. L. R. B., C.C.A.5, 146 F.2d 769—N. L. R. B. v. Register Pub. Co., C.C.A.9, 141 F.2d 156—N. L. R. B. v. William Davies Co., C.C.A. 7, 135 F.2d 179—United Biscuit Co. of America v. N. L. R. B., C.C. A.7, 128 F.2d 771—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—Wilson & Co. v. N. L. R. B., C.C.A.8, 123 F.2d 411—N. L. R. B. v. Aluminum Products Co., C.C.A.7, 120 F. 2d 567—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F.2d 480—N. L. R. B. v. Riverside Mfg. Co., C.C.A.5, 119 F.2d 302—F. W. Poe Mfg. Co. v. N. L. R. B., C.C.A.4, 119 F.2d 45—Union Drawn Steel Co. v. N. L. R. B., C.C.A.3, 109 F.2d 587—C. G. Conn, Limited, v. N. L. R. B., C.C.A.7, 108 F.2d 390 —N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 406, rehearing denied 98 F.2d 870.

Where employer was justified in discharging employee for insubordination, it was justified in not reëmploying for same reason, and finding that refusal to reëmploy was because of union adherence was not supported by substantial evidence.—Loveman, Joseph & Loeb v. N. L. R. B., C.C.A.5, 146 F.2d 769.

9. U.S.—N. L. R. B. v. Lettie Lee, Inc., C.C.A.9, 140 F.2d 243—N. L. R. B. v. Poultrymen's Service Corporation, C.C.A.3, 138 F.2d 204—Firth Carpet Co. v. N. L. R. B., C. CA.2, 129 F.2d 633—Wilson & Co. v. N. L. R. B., C.C.A.7, 124 F.2d 845—N. L. R. B. v. Blanton Co., C.C.A.8, 121 F.2d 564—N. L. R. B. v. Kentucky Fire Brick Co., C.C.A. 6, 99 F.2d 89.

10. U.S.—Mooresville Cotton Mills v. N. L. R. B., C.C.A.4, 110 F.2d 179.

11. U.S.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

12. U.S.—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A.10, 122 F.2d 419.

13. U.S.—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680.

Wis.—Blum Bros. Box Co. v. Wisconsin Labor Relations Board, 282 N.W. 98, 229 Wis. 615.

When cause of discharge may have been union activities or refusal to work overtime, board cannot find that union activities were the real cause, in absence of any satisfactory foundation in testimony for such conclusion.—Bussmann Mfg. Co. v. N. L. R. B., C.C.A.8, 111 F.2d 783.

14. U.S.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Independent Union of Craftsmen, 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036—N. L. R. B. v. Friedman-Harry Marks Clothing Co., 57 S.Ct. 645, 301 U.S. 58, 81 L.Ed. 921, 108 A.L.R. 1352—Colonie Fibre Co. v. N. L. R. B., C.C.A.2, 163 F.2d 65 —Eastern Gas & Fuel Associates v. N. L. R. B., C.C.A.6, 162 F.2d 864—N. L. R. B. v. Monumental Life Ins. Co., C.C.A.6, 162 F.2d 340 —N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—N. L. R. B. v. Robbins Tire & Rubber Co., C.C.A.5, 161 F.2d 798—N. L. R. B. v. Bird Mach. Co., C.C.A.1, 161 F.2d 589—N. L. R. B. v. American Car & Foundry Co., C.C.A.7, 161 F.2d 501—N. L. R. B. v. Continental Pipe Line Co., C.C.A.7, 161 F.2d 302—N. L. R. B. v. Women's Wear Co., C.C.A.2, 159 F.2d 866—American Steel Foundries v. N. L. R. B., C.C.A.7, 158 F.2d 896—N. L. R. B. v. Vail Mfg. Co., C.C.A.7, 158 F.2d 664—N. L. R. B. v. Kopman-Woracek Shoe Mfg. Co., C.C. A.8, 158 F.2d 103—N. L. R. B. v. Armour & Co., C.C.A.10, 154 F.2d 570, certiorari denied 67 S.Ct. 92, 329 U.S. 732, 91 L.Ed. —— —N. L. R. B. v. Parkers Prairie Co-op. Creamery Ass'n, C.C.A.8, 154 F.2d 455—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 153 F.2d 811—N. L. R. B. v. McGough Bakeries Corp., C.C.A.5, 153 F.2d 420—N. L. R. B. v. Federal Engineering Co., C.C.A.6, 153 F.2d 233, rehearing denied 155 F.2d 17—N. L. R. B. v. Morris P. Kirk & Son, C.C.A.9, 151 F.2d 490, opinion supplemented 154 F.2d 110—N. L. R. B. v. Servel, Inc., C.C.A.7, 149 F.2d 542—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S.

735, 90 L.Ed. 438—N. L. R. B. v. Greater N. Y. Broadcasting Corp., C.C.A.2, 147 F.2d 337, certiorari denied 65 S.Ct. 1199, 325 U.S. 860, 89 L.Ed. 1981—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F.2d 44, certiorari denied 65 S.Ct. 1025, 324 U.S. 877, 89 L.Ed. 1429—N. L. R. B. v. Standard Gage Co., C.C.A.2, 146 F.2d 33—N. L. R. B. v. Clinchfield Coal Corporation, C.C.A.4, 145 F.2d 66, 155 A.L.R. 874—Idaho Potato Growers v. N. L. R. B., C.C.A.9, 144 F.2d 295, certiorari denied 65 S.Ct. 122, 323 U.S. 769, 89 L.Ed. 615—American Nat. Bank of St. Paul v. N. L. R. B., C.C.A.8, 144 F.2d 268—N. L. R. B. v. Revlon Products Corporation, C.C.A.2, 144 F.2d 88—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F.2d 9—Sewell Hats, Inc., v. N. L. R. B., C.C.A.5, 143 F.2d 450, certiorari denied 65 S.Ct. 130, 323 U.S. 772, 89 L.Ed. 617—N. L. R. B. v. M. E. Blatt Co., C.C.A.3, 143 F.2d 268, certiorari denied 65 S.Ct. 135, 323 U.S. 774, 89 L.Ed. 619—N. L. R. B. v. Idaho Refining Co., C.C.A.9, 143 F.2d 246—N. L. R. B. v. Peyton Packing Co., C.C.A.5, 142 F.2d 1009, certiorari denied 65 S.Ct. 66, 323 U.S. 730, 89 L.Ed. 585—N. L. R. B. v. Northwestern Mut. Fire Ass'n, C.C.A.9, 142 F.2d 866, certiorari denied 65 S.Ct. 59, 323 U.S. 726, 89 L.Ed. 583—N. L. R. B. v. Grieder Machine Tool & Die Co., C.C.A.6, 142 F.2d 163, certiorari denied 65 S.Ct. 56, 323 U.S. 724, 89 L.Ed. 582—N. L. R. B. v. Glenn L. Martin-Nebraska Co., C.C.A.8, 141 F.2d 371—N. L. R. B. v. Brezner Tanning Co., C.C.A.1, 141 F.2d 62—N. L. R. B. v. Richter's Bakery, C.C.A.5, 140 F.2d 870, certiorari denied 64 S.Ct. 1267, 322 U.S. 754, 88 L.Ed. 1584—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 140 F.2d 777—Carter Carburetor Corp. v. N. L. R. B., C.C.A.8, 140 F.2d 714—N. L. R. B. v. Baltimore Transit Co., C.C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084—Oman v. N. L. R. B., C.C.A.8, 139 F.2d 728—N. L. R. B. v. Jasper Chair Co., C.C.A.7, 138 F.2d 756, certiorari denied Jasper Chair Co. v. N. L. R. B., 64 S.Ct. 618, 321 U.S. 777, 88 L.Ed. 1070—Piedmont Shirt Co. v. N. L. R. B., C.C.A.4, 138 F.2d 738—N. L. R. B. v. Western Cartridge Co., Winchester Repeating Arms Co. Division, C.C.A.2, 138 F.2d 551, certiorari denied Western Cartridge Co. v. N. L. R. B., 64 S.Ct. 780, 321 U.S. 786, 88 L.Ed. 1077, rehearing denied 64 S.Ct. 942, 322 U.S. 767, 88 L.Ed. 1593—N. L. R. B. v. Crown Can Co., C.C.A.8, 138 F.2d 263, certiorari denied Crown Can Co. v. N. L. R. B., 64 S.Ct. 527, 321 U.S. 769, 88 L.Ed. 1065—Edward G. Budd Mfg. Co. v. N. L. R. B., C.C.A.Pa., 138 F.2d 86, certiorari denied 64 S.Ct. 619, 321 U.S. 778, 88 L.Ed. 1071—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—N. L. R. B. v. Polson Logging Co., C.C.A.9, 136 F.2d 314—Polish Nat. Alliance of U. S. v. N. L. R. B., C.C.A.7, 136 F.2d 175, affirmed 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509—Oklahoma Transp. Co. v. N. L. R. B., C.C.A.5, 136 F.2d 42—N. L. R. B. v. Harbison-Walker Refractories Co., C.C.A.8, 135 F.2d 837—N. L. R. B. v. Southern Wood Preserving Co., C.C.A.5, 135 F.2d 606—Texas Co. v. N. L. R. B., C.C.A.9, 135 F.2d 562—N. L. R. B. v. Pick Mfg. Co., C.C.A.7, 135 F.2d 329—N. L. R. B. v. William Davies Co., C.C.A.7, 135 F.2d 179, certiorari denied William Davies Co. v. N. L. R. B., 64 S.Ct. 82, 320 U.S. 770, 88 L.Ed. 460—N. L. R. B. v. National Traffic Guard Co., C.C.A.5, 135 F.2d 42—N. L. R. B. v. Johnson Steel & Wire Co., C.C.A.1, 134 F.2d 785—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 134 F.2d 240, certiorari denied 64 S.Ct. 48, 320 U.S. 746, 88 L.Ed. 443—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 133 F.2d 988—North Carolina Finishing Co. v. N. L. R. B., C.C.A.4, 133 F.2d 714, certiorari denied 64 S.Ct. 39, 320 U.S. 738, 88 L.Ed. 437—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A.6, 133 F.2d 295—Greenport Basin & Construction Co. v. N. L. R. B., C.C.A.2, 132 F.2d 857—N. L. R. B. v. Aintree Corporation, C.C.A.7, 132 F.2d 469, certiorari denied Aintree Corporation v. N. L. R. B., 63 S.Ct. 831, 318 U.S. 774, 87 L.Ed. 1144—Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 132 F.2d 390, affirmed 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U.S. 809, 88 L.Ed. 489—N. L. R. B. v. Clinton E. Hobbs Co., C.C.A.1, 132 F.2d 249—N. L. R. B. v. Weyerhaeuser Timber Co. v. Clemons Branch, C.C.A.9, 132 F.2d 234—N. L. R. B. v. Schaefer-Hitchcock Co., C.C.A.9, 131 F.2d 1004—Hickory Chair Mfg. Co. v. N. L. R. B., C.C.A.4, 131 F.2d 849—N. L. R. B. v. Bear Brand Hosiery Co., C.C.A.7, 131 F.2d 731—N. L. R. B. v. Gallup American Coal Co., C.C.A.10, 131 F.2d 665—N. L. R. B. v. Rock Hill Printing & Finishing Co., C.C.A.4, 131 F.2d 171—N. L. R. B. v. Bank of America Nat. Trust & Savings Ass'n, C.C.A.9, 130 F.2d 624, certiorari denied Bank of America Nat. Trust & Savings Ass'n v. N. L. R. B., 63 S.Ct. 992, first case, 318 U.S. 791, 87 L.Ed. 1157 and 63 S.Ct. 992, second case, 318 U.S. 792, 87 L.Ed. 1158, rehearing denied 63 S.Ct. 1171, 319 U.S. 782, 87 L.Ed. 1726—N. L. R. B. v. Martin Bros. Box Co., C.C.A.7, 130 F.2d 202, certiorari denied Martin Bros. Box v. N. L. R. B., 63 S.Ct. 59, 317 U.S. 660, 87 L.Ed. 531—N. L. R. B. v. Cities Service Oil Co., C.C.A.2, 129 F.2d 933—N. L. R. B. v. Empire Worsted Mills, C.C.A.2, 129 F.2d 668—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C.C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—Gamble-Robinson Co. v. N. L. R. B., C.C.A.8, 129 F.2d 588—United Biscuit Co. of America v. N. L. R. B., C.C.A.7, 128 F.2d 771—N. L. R. B. v. Bradley Lumber Co. of Arkansas, C.C.A.8, 128 F.2d 768—N. L. R. B. v. Kohen-Ligon-Folz, Inc., C.C.A.5, 128 F.2d 502—American Smelting & Refining Co. v. N. L. R. B., C.C.A.5, 128 F.2d 345—Shell Oil Co. v. N. L. R. B., C.C.A.5, 128 F.2d 206—N. L. R. B. v. Dixie Motor Coach Corporation, C.C.A.5, 128 F.2d 201—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—N. L. R. B. v. Quality Art Novelty Co., C.C.A.2, 127 F.2d 903—N. L. R. B. v. Abbott Worsted Mills, C.C.A.1, 127 F.2d 438—N. L. R. B. v. Eclipse Moulded Products Co., C.C.A.7, 126 F.2d 576—N. L. R. B. v. Keystone Freight Lines, C.C.A.10, 126 F.2d 414—Tyne Co. v. N. L. R. B., C.C.A.7, 125 F.2d 832—Wilson & Co. v. N. L. R. B., C.C.A.7, 124 F.2d 845—N. L. R. B. v. Algoma Net Co., C.C.A.7, 124 F.2d 730, certiorari denied Algoma Net Co. v. N. L. R. B., 62 S.Ct. 1311, 316 U.S. 706, 86 L.Ed. 1773—N. L. R. B. v. Bersted Mfg. Co., C.C.A.6, 124 F.2d 409, amended 128 F.2d 738—N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A.6, 123 F.2d 831—N. L. R. B. v. W. A. Jones Foundry & Machine Co., C.C.A.7, 123 F.2d 552—N. L. R. B. v. Luxuray, Inc., C.C.A.2, 123 F.2d 106—N. L. R. B. v. Wilson Line, C.C.A.3, 122 F.2d 809—Indianapolis Power & Light Co. v. N. L. R. B., C.C.A.7, 122 F.2d 757, certiorari denied 62 S.Ct. 633, 315 U.S. 804, 86 L.Ed. 1204—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433—N. L. R. B. v. Schmidt Baking Co., C.C.A.4, 122 F.2d 162—N. L. R. B. v. Arma Corporation, C.C.A.2, 122 F.2d 153—F. W. Woolworth Co. v. N. L. R. B., C.C.A.2, 121 F.2d 658—N. L. R. B. v. Reynolds Wire Co., C.C.A.7, 121 F.2d 627—N. L. R. B. v. Moltrup Steel Products Co., C.C.A.3, 121 F.2d 612—N. L. R. B. v. Air Associates, C.C.A.2, 121 F.2d 586—N. L. R. B. v. Clarksburg Pub. Co., C.C.A.4, 120 F.2d 976—N. L. R. B. v. Hawk & Buck Co., C.C.A.5, 120 F.2d 903—N. L. R. B. v. Aluminum Products Co., C.C.A.7, 120 F.2d 567—N. L.

R. B. v. Entwistle Mfg. Co., C.C.A. 4, 120 F.2d 532—Southern S. S. Co. v. N. L. R. B., C.C.A.3, 120 F. 2d 505, reversed on other grounds 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246—N. L. R. B. v. C. Nelson Mfg. Co., C.C.A.8, 120 F.2d 444—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A.8, 119 F.2d 903 —El Paso Electric Co. v. N. L. R. B., C.C.A.5, 119 F.2d 581—Texarkana Bus Co. v. N. L. R. B., C. C.A.8, 119 F.2d 480—N. L. R. B. v. New Era Die Co., C.C.A.3, 118 F. 2d 500—Triplex Screw Co. v. N. L. R. B., C.C.A.6, 117 F.2d 858—N. L. R. B. v. Dow Chemical Co., C.C.A.6, 117 F.2d 455—N. L. R. B. v. Southport Petroleum Co., C.C.A. 5, 117 F.2d 90, affirmed 62 S.Ct. 452, 315 U.S. 100, 86 L.Ed. 718, rehearing denied 62 S.Ct. 637, 315 U.S. 827, 86 L.Ed. 1223—N. L. R. B. v. Texas Mining & Smelting Co., C.C.A.5, 117 F.2d 86—N. L. R. B. v. Gulf Public Service Co., C.C.A.5, 116 F.2d 852—N. L. R. B. v. Chicago Apparatus Co., C.C.A.7, 116 F. 2d 753—South Atlantic S. S. Co. of Delaware v. N. L. R. B., C.C.A.5, 116 F.2d 480, certiorari denied 61 S.Ct. 1101, 313 U.S. 582, 85 L.Ed. 1538, rehearing denied 62 S.Ct. 54, 314 U.S. 708, 86 L.Ed. 565—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126—N. L. R. B. v. Yale & Towne Mfg. Co., C.C.A.2, 114 F.2d 376—New York Handkerchief Mfg. Co. v. N. L. R. B., C.C.A.7, 114 F.2d 144, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457—N. L. R. B. v. Viking Pump Co., C.C.A.8, 113 F.2d 759, certiorari denied Viking Pump Co. v. N. L. R. B., 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119—N. L. R. B. v. Skinner & Kennedy Stationery Co., C.C.A.8, 113 F.2d 667—N. L. R. B. v. J. S. Popper, Inc., C.C.A.3, 113 F.2d 602—Continental Box Co. v. N. L. R. B., C. C.A.5, 113 F.2d 93—Subin v. N. L. R. B., C.C.A.3, 112 F.2d 326, certiorari denied 61 S.Ct. 38, 311 U.S. 673, 85 L.Ed. 433—Bussmann Mfg. Co. v. N. L. R. B., C.C.A.8, 111 F.2d 783—N. L. R. B. v. Tovrea Packing Co., C.C.A.9, 111 F.2d 626, certiorari denied Tovrea Packing Co. v. N. L. R. B., 61 S.Ct. 28, 311 U. S. 668, 85 L.Ed. 429—N. L. R. B. v. Leviton Mfg. Co., C.C.A.2, 111 F. 2d 619—N. L. R. B. v. Good Coal Co., C.C.A.6, 110 F.2d 501, certiorari denied Good Coal Co. v. N. L. R. B., 60 S.Ct. 978, 310 U.S. 630, 84 L.Ed. 1400—N. L. R. B. v. Asheville Hosiery Co., C.C.A.4, 108 F.2d 288—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992—Montgomery Ward & Co. v. N. L. R. B., C.C.A.7, 107 F.2d 555—N. L. R. B. v. Botany Worsted Mills, C. C.A.3, 106 F.2d 263—Cupples Co. Manufacturers v. N. L. R. B., C. C.A.8, 106 F.2d 100—N. L. R. B. v. Planters Mfg. Co., C.C.A.4, 105 F. 2d 750, rehearing denied 106 F.2d 524—N. L. R. B. v. Lund, C.C.A. 8, 103 F.2d 815—N. L. R. B. v. Louisville Refining Co., C.C.A.6, 102 F.2d 678, certiorari denied Louisville Refining Co. v. N. L. R. B., 60 S.Ct. 81, 308 U.S. 568, 84 L.Ed. 477—N. L. R. B. v. American Potash & Chemical Corporation, C.C.A.9, 98 F.2d 488, certiorari denied American Potash & Chemical Corporation v. N. L. R. B., 59 S.Ct. 582, 306 U.S. 643, 83 L.Ed. 1043—N. L. R. B. v. Wallace Mfg. Co., C.C.A.4, 95 F.2d 818—Consolidated Edison Co. of New York v. N. L. R. B., C.C.A.2, 95 F.2d 390, modified on other grounds 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L. Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546—N. L. R. B. v. Pacific Greyhound Lines, C.C.A.9, 91 F.2d 458, reversed on other grounds 58 S.Ct. 577, 303 U.S. 272, 82 L.Ed. 838—Agwilines, Inc. v. N. L. R. B., C.C.A.5, 87 F.2d 146—N. L. R. B. v. Washington, Virginia & Maryland Coach Co., C.C.A.4, 85 F.2d 990, affirmed Washington, Virginia & Maryland Coach Co. v. N. L. R. B., 57 S.Ct. 648, 301 U.S. 142, 81 L.Ed. 965.

D.C.—E. Anthony & Sons v. N. L. R. B., 163 F.2d 22—Press Co. v. N. L. R. B., 118 F.2d 937, 73 App.D.C. 103, certiorari denied 61 S.Ct. 1118, 313 U.S. 595, 85 L.Ed. 1548—N. L. R. B. v. Willard, Inc., 98 F.2d 244, 68 App.D.C. 372.

N.Y.—New York State Labor Relations Board v. Union Club of City of N. Y., 68 N.E.2d 29, 295 N.Y. 915—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256—New York State Labor Relations Board v. Interborough News Co., 10 N.Y. S.2d 396, 170 Misc. 347.

Pa.—Chapin v. Pennsylvania Labor Relations Board, 52 A.2d 568, 356 Pa. 577—Max Pisarev Co. v. Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 195, 27 A.2d 52, 345 Pa. 123—Chapin Lumber Co. v. Pennsylvania Labor Relations Board, 39 Luz.Leg.Reg. 121.

Wis.—Century Building Co. v. Wisconsin Employment Relations Board, 291 N.W. 305, 235 Wis. 376.

Particular contentions

The evidence has been held sufficient in particular cases as against a contention that discharge was for:

(1) Inefficiency, rule breaking, incompetency, or insubordination.—N. L. R. B. v. Bradford Dyeing Ass'n, 60 S.Ct. 918, 310 U.S. 318, 84 L.Ed. 1226—N. L. R. B. v. Harris-Woodson Co., C.C.A.4, 162 F.2d 97—N. L. R. B. v. Cowell Portland Cement Co., C. C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L. Ed. 438—N. L. R. B. v. Collins & Aikman Corp., C.C.A.4, 146 F.2d 454 —N. L. R. B. v. Columbia Products Corporation, C.C.A.2, 141 F.2d 687 —Carter Carburetor Corporation v. N. L. R. B., C.C.A.8, 140 F.2d 714—N. L. R. B. v. Oklahoma Transp. Co., C.C.A.5, 140 F.2d 509—N. L. R. B. v. Kaplan, C.C.A.2, 138 F.2d 884, certiorari denied Kaplan v. N. L. R. B., 64 S.Ct. 787, 321 U.S. 788, 88 L.Ed. 1079—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F. 2d 67—N. L. R. B. v. Colten, C.C. A.6, 105 F.2d 179—N. L. R. B. v. Oregon Worsted Co., C.C.A.9, 96 F. 2d 193.

(2) Intoxication solely.—N. L. R. B. v. Arcade-Sunshine Co., 118 F.2d 49, 73 App.D.C. 128, certiorari denied Arcade-Sunshine Co. v. N. L. R. B., 61 S.Ct. 942, 313 U.S. 567, 85 L.Ed. 1526.

(3) Kicking another employee.—N. L. R. B. v. Revlon Products Corporation, C.C.A.2, 144 F.2d 88.

(4) Lack of work.—N. L. R. B. v. Vail Mfg. Co., C.C.A.7, 158 F.2d 664 —N. L. R. B. v. Van Deusen, C.C.A. 2, 138 F.2d 893.

(5) Reason that employee went on vacation and did not return or indicate willingness to return.—N. L. R. B. v. Bradford Dyeing Ass'n, 60 S. Ct. 918, 310 U.S. 318, 84 L.Ed. 1226.

(6) Slackness of work and frivolous behavior.—N. L. R. B. v. Condenser Corporation of America, C.C. A.3, 128 F.2d 67.

Refusal to act as strikebreakers

U.S.—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523.

Fact that employee was discharged soon after election as president of local chapter of labor union sustained finding that discharge was discriminatory.—Hartsell Mills Co. v. N. L. R. B., C.C.A.4, 111 F.2d 291.

Where discharged employee had been a picket and had acted as secretary of union, and there was testimony that plant superintendent had said that his union activities would cause his discharge, board was authorized to find that he was discharged for union activities.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540,

or insufficient to sustain such a finding;[15] and in various cases the evidence has been held suffi-

rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L. Ed. 1546.

Where employer discharged satisfactory workman who had been active in trying to stop a strike vote being taken by the employer, board was authorized to find that he was discharged for such activity.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S. Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

Where discharged employee was officer of union, and had been over ten years in employer's employ, and one to whom he applied for loan told him, after interviewing his immediate boss, that he would never be taken back, board was justified in finding that he was discharged for union activity.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U. S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 509, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

Discharge because of want of union work permit

Evidence supported state board's finding that employer was guilty of unfair labor practices in discharging employees for not being members of, or having work permits from, labor union, as required by collective bargaining contract therewith, so as to encourage membership in union.—International Union, United Automobile, Aircraft & Agricultural Implement Workers of America v. Wisconsin Employment Relations Board, 14 N.W.2d 872, 245 Wis. 417, followed in 14 N.W.2d 882, 245 Wis. 439, and rehearing denied 15 N.W.2d 873, 245 Wis. 417, certiorari dismissed 65 S.Ct. 685, 324 U.S. 884, 89 L.Ed. 1434.

15. U.S.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682—N. L. R. B. v. Winona Knitting Mills, C.C.A.8, 163 F.2d 156—N. L. R. B. v. Reynolds International Pen Co., C.C.A.7, 162 F.2d 680—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—Home Beneficial Life Ins. Co. v. N. L. R. B., C.C.A.4, 159 F.2d 280—N. L. R. B. v. Ross Gear & Tool Co., C.C.A.7, 158 F.2d 607—N. L. R. B. v. Kopman-Woracek Shoe Mfg. Co., C.C.A.8, 158 F.2d 103—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486—N. L. R. B. v. Litchfield Mfg. Co., C.C.A.8, 154 F.2d 739—Wyman-Gordon Co. (Ingalls Shepard Division) v. N. L. R. B., C.C.A.7, 153 F.2d 480—N. L. R. B. v. Edinburg Citrus Ass'n, C. C.A.5, 147 F.2d 353—N. L. R. B. v. Schwartz, C.C.A.5, 146 F.2d 773—N. L. R. B. v. Duncan Foundry & Machine Works, C.C.A.7, 142 F. 2d 594—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C.C.A.10, 140 F.2d 423—Western Cartridge Co. v. N. L. R. B., C.C. A.7, 139 F.2d 855—Piedmont Shirt Co. v. N. L. R. B., C.C.A.4, 138 F. 2d 738—N. L. R. B. v. Pick Mfg. Co., C.C.A.7, 135 F.2d 329—N. L. R. B. v. William Davies Co., C.C.A. 7, 135 F.2d 179, certiorari denied William Davies Co. v. N. L. R. B., 64 S.Ct. 82, 320 U.S. 770, 88 L. Ed. 460—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15—N. L. R. B. v. Citizen-News Co., C.C.A.9, 134 F.2d 970—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A.6, 133 F.2d 295—Interlake Iron Corporation v. N. L. R. B., C.C.A.7, 131 F.2d 129—Dannen Grain & Milling Co. v. N. L. R. B., C.C.A.8, 130 F.2d 321—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260—N. L. R. B. v. Times-Picayune Pub. Co., C.C.A.5, 130 F.2d 257—N. L. R. B. v. Dixie Motor Coach Corporation, C.C.A.5, 128 F.2d 291—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A.4, 127 F.2d 109—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—N. L. R. B. v. Sheboygan Chair Co., C.C.A.7, 125 F.2d 436—N. L. R. B. v. Walworth Co., C.C.A.7, 124 F.2d 816—N. L. R. B. v. Union Mfg. Co., C.C.A.5, 124 F.2d 332—Wilson & Co. v. N. L. R. B., C.C. A.8, 123 F.2d 411—Indianapolis Power & Light Co. v. N. L. R. B., C.C.A.7, 122 F.2d 757, certiorari denied 62 S.Ct. 633, 315 U.S. 804, 86 L.Ed. 1204—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433—N. L. R. B. v. Arma Corporation, C.C.A.2, 122 F.2d 153—N. L. R. B. v. Blue Bell-Globe Mfg. Co., C.C.A.4, 120 F.2d 974—N. L. R. B. v. West Texas Utilities Co., C. C.A.5, 119 F.2d 683—Quaker State Oil Refining Corporation v. N. L. R. B., C.C.A.3, 119 F.2d 631—N. L. R. B. v. Illinois Tool Works, C.C. A.7, 119 F.2d 356—N. L. R. B. v. Auburn Foundry, C.C.A.7, 119 F. 2d 331—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 116 F.2d 367—Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 115 F.2d 414, reversed on other grounds 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—Independent Organization of Employees of Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 115 F.2d 414, reversed on other grounds 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126—Foote Bros. Gear & Machine Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Foote Bros. Gear & Machine Corporation, 61 S.Ct. 318, 311 U. S. 620, 85 L.Ed. 394, mandate conformed to, C.C.A., Foote Bros. Gear & Machine Corporation v. N. L. R. B., 121 F.2d 802—Independent Union of Gear Workers v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Independent Union of Gear Workers, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394—N. L. R. B. v. Stover, C.C.A. 10, 114 F.2d 513—Midland Steel Products Co. v. N. L. R. B., C.C. A.6, 113 F.2d 800—Subin v. N. L. R. B., C.C.A.3, 112 F.2d 326, certiorari denied 61 S.Ct. 38, 311 U. S. 673, 85 L.Ed. 433—Bussmann Mfg. Co. v. N. L. R. B., C.C.A.8, 111 F.2d 783—Kansas City Power & Light Co. v. N. L. R. B., C.C.A. 8, 111 F.2d 340—N. L. R. B. v. Goshen Rubber & Manufacturing Co., C.C.A.7, 110 F.2d 432—N. L. R. B. v. Norfolk Shipbuilding & Drydock Corporation, C.C.A.4, 109 F.2d 128—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 108 F.2d 867, certiorari denied Brown Paper Mill Co. v. N. L. R. B., 60 S.Ct. 1104, 310 U.S. 651, 84 L.Ed. 1416—N. L. R. B. v. Empire Furniture Corporation, C.C.A.6, 107 F.2d 92—Burlington Dyeing & Finishing Co. v. N. L. R. B., C.C.A.4, 104 F.2d 736—Wilson & Co. v. N. L. R. B., C.C.A.8, 103 F.2d 243—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949—Ballston-Stillwater Knitting Co. v. N. L. R. B., C.C.A. 2, 98 F.2d 758—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 406, rehearing denied 98 F.2d 870—N. L. R. B. v. Thompson Products, C.C.A.6, 97 F.2d 13—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F. 2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061,

cient[16] or insufficient[17] to sustain a finding of discriminatory discharge because an employee had given testimony in a proceeding before the board.

In ascertaining whether an employee was discharged because of union activities the board may consider circumstantial, as well as direct, evidence,[18] but when circumstantial evidence is relied on there must be evidence of circumstances from which the board may conclude with reasonable certainty that the employee was discharged because of union activity.[19] The board may draw inferences from the facts proved.[20] The fact that some of the evidence relating to a discriminatory discharge was hearsay affords no basis for objecting to the finding of the board.[21] However, mere suspicion or conjecture alone is not sufficient on which to base a finding of discriminatory discharge.[22]

The mere discharge of an employee with or without reason is not evidence of an intent to affect labor unions or the right of employees.[23] The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is not sufficient evidence of a discharge as a result of such activities.[24]

Where the employee admits dereliction in complying with the employer's rule, the board should not lightly infer that such dereliction was not the cause of the discharge.[25] Even though an employer disavows under oath that employees were discharged because of union activities, if he can assign no other credible motive or cause he need not be believed, but if the employer assigns a legitimate reason for the discharge, his oath cannot be disregarded because of suspicion that he may be lying; there must be impeachment of him, or substantial contradiction, or, if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point.[26] The fact that the employer's explanation does not stand up under scrutiny strengthens the inference drawn by the board from other

304 U.S. 585, 82 L.Ed. 1546—Agwilines, Inc. v. N. L. R. B., C.C.A.5, 87 F.2d 146.

Pa.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398—Petition of Union Trust Co. of Pittsburgh, 20 A.2d 779, 342 Pa. 456—Metropolitan Life Ins. Co. v. Insurance Guild, Local No. 22, 49 Pa.Dist. & Co. 75—In re Lehrman, Com.Pl., 52 Dauph.Co. 1.

Utah.—American Foundry & Machine Co. v. Utah Labor Relations Board, 141 P.2d 390, 105 Utah 83.

Wis.—Blum Bros. Box Co. v. Wisconsin Labor Relations Board, 282 N.W. 98, 229 Wis. 615.

Abolition of department

Where employee was discharged when employer abolished department in which employee was working, evidence failed to support finding of board that employer was guilty of unfair labor practice in discharging employee, notwithstanding employee did some work in other departments.—New York State Labor Relations Board v. Fordham Electric Co., 42 N.Y.S.2d 875, 266 App.Div. 563.

Carelessness of employee

Evidence that longshoremen holding most responsible positions in gang were guilty of carelessness which was inexcusable in men of their experience and that they were put back to work after their discharge on agreement voluntarily made on their part was insufficient to support board's finding that their discharge was for union activities.—Agwilines, Inc. v. N. L. R. B., C.C.A. 5, 87 F.2d 146.

Resignation of employee

U.S.—Loveman, Joseph & Loeb v. N. L. R. B., C.C.A.5, 146 F.2d 769—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 139 F.2d 855.

N.Y.—New York State Labor Relations Board v. Grasso, 69 N.Y.S. 2d 711, 272 App.Div. 149.

16. U.S.—N. L. R. B. v. McGough Bakeries Corp., C.C.A.5, 153 F.2d 420—N. L. R. B. v. Viking Pump Co., C.C.A.8, 113 F.2d 759, certiorari denied Viking Pump Co. v. N. L. R. B., 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119.

D.C.—N. L. R. B. v. Willard, Inc., 98 F.2d 244, 68 App.D.C. 372.

17. U.S.—N. L. R. B. v. Union Mfg. Co., C.C.A.5, 124 F.2d 332.

18. U.S.—Piedmont Shirt Co. v. N. L. R. B., C.C.A.4, 138 F.2d 738—N. L. R. B. v. Entwistle Mfg. Co., C.C.A.4, 120 F.2d 532—Hartsell Mills Co. v. N. L. R. B., C.C.A.4, 111 F.2d 291.

19. U.S.—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 116 F.2d 367.

20. **Possibility of drawing either of two inferences** from evidence does not prevent board from drawing one of them.—Harp v. N. L. R. B., C.C. A.10, 138 F.2d 546—N. L. R. B. v. Denver Tent & Awning Co., C.C.A.10, 138 F.2d 410—N. L. R. B. v. Harbison-Walker Refractories Co., C.C.A. 8, 135 F.2d 837—Canyon Corporation v. N. L. R. B., C.C.A., 128 F.2d 953.

21. U.S.—N. L. R. B. v. American Potash & Chemical Corp., C.C.A.9, 98 F.2d 488, certiorari denied American Potash & Chemical Corp. v. N. L. R. B., 59 S.Ct. 582, 306 U.S. 643, 83 L.Ed. 1043.

22. U.S.—N. L. R. B. v. Citizen-News Co., C.C.A.9, 134 F.2d 970—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 116 F.2d 367—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 106 F.2d 100.

23. U.S.—N. L. R. B. v. Citizen-News Co., C.C.A.9, 134 F.2d 970.

24. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486—N. L. R. B. v. Citizen-News Co., C.C.A.9, 134 F.2d 970.

Wis.—Blum Bros. Box Co. v. Wisconsin Labor Relations Board, 282 N.W. 98, 229 Wis. 615.

25. U.S.—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992.

26. U.S.—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433.

Corroboration by employee

When employer, wholly unimpeached, testifies under oath to his reasons for discharging employee, board cannot find that employee was discharged for union activities, especially when employee testifies that he was discharged for failure to perform work.—N. L. R. B. v. Sheboygan Chair Co., C.C.A.7, 125 F.2d 436.

Fact that employee who was discharged was hired in other plants during war man-power shortage did not afford sound basis for ignoring undisputed testimony of supervisors that they were dissatisfied with such employee's work.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F. 2d 287.

facts that the employee was discharged for union activities.[27]

The failure of the employer to give a reason for the discharge, or the giving of evasive or contradictory reasons, may be considered by the board in determining the employer's motive.[28] The failure of the employer to give an explanation for the discharge of an employee of many years' service is a circumstance indicating that the discharge was for union activities.[29] The discharge of an employee without notice contrary to the well-established practice of the employer is cogent evidence of discrimination.[30] The fact that the employer offers a discharged employee a temporary job subsequent to the filing of charges before the board does not establish the employer's good faith in discharging him.[31]

The employer's hostility toward any union and his determined effort to defeat the organization of his employees into a union must be considered in determining whether an active union member was discharged for his union activities when no other satisfactory reason for the discharge appears.[32] The employer's opposition to a union and discharges of employees who are members are not sufficient to justify a finding of discriminatory discharges unless such discharges are motivated by such opposition,[33] but such a situation warrants a critical attitude and may justify unfavorable inferences where the evidence is not clear as to whether or not there was discrimination because of such opposition.[34] The fact that a large per cent of the employees discharged belonged to the union is not alone sufficient to establish discriminatory discharges, but, coupled with other evidence, it becomes very persuasive.[35] The inference that union membership was discouraged by an employee's discharge is not unfounded merely because a closed-shop agreement was in existence and because the discharged employee continued to be a member of the union.[36] It has been held that a refusal to bargain collectively with a union is sufficient, in the absence of any other satisfactory reason, to support a finding of discrimination in the discharge of an employee.[37]

Reinstatement by order of board. The evidence to justify an order of reinstatement with back pay of employees discriminatorily discharged should be substantial, and surmise or suspicion, even though reasonable, is not sufficient.[38] In various cases it has been held that the evidence justified[39] or failed

27. U.S.—N. L. R. B. v. Brezner Tanning Co., C.C.A.1, 141 F.2d 62—N. L. R. B. v. Abbott Worsted Mills, C.C.A.1, 127 F.2d 438.

28. U.S.—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67.

29. U.S.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 509, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

30. U.S.—N. L. R. B. v. Rock Hill Printing & Finishing Co., C.C.A. 4, 131 F.2d 171.

31. U.S.—N. L. R. B. v. Entwistle Mfg. Co., C.C.A.4, 120 F.2d 532.

32. U.S.—N. L. R. B. v. Chicago Apparatus Co., C.C.A.7, 116 F.2d 753.

33. U.S.—Interlake Iron Corporation v. N. L. R. B., C.C.A.7, 131 F. 2d 129—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F.2d 340—Burlington Dyeing & Finishing Co. v. N. L. R. B., C. C.A.4, 104 F.2d 736.

Pa.—Pennsylvania Labor Relations Board v. Metropolitan Life Ins. Co., 48 Pa.Dist. & Co. 340.

Where employee's conduct would have justified his discharge had there been no labor controversy his activities in promoting union to which employer is hostile will not support finding that he was discharged because of such activities.—Bussmann Mfg. Co. v. N. L. R. B., C.C.A.8, 111 F.2d 783.

34. U.S.—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F.2d 340.

Where there is substantial evidence that employer is opposed to organization of his employees, and there is some evidence of a manifested desire to be rid of employees who become union members, discharge of an employee is improper unless the evidence is very convincing that a finding of improper discharge is arbitrary.—Dannen Grain & Milling Co. v. N. L. R. B., C.C.A.8, 130 F.2d 321.

35. U.S.—Montgomery Ward & Co. v. N. L. R. B., C.C.A.7, 107 F.2d 555.

36. U.S.—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F.2d 44, certiorari denied 65 S.Ct. 1025, 324 U.S. 877, 89 L.Ed. 1429.

37. U.S.—Bussmann Mfg. Co. v. N. L. R. B., C.C.A.8, 111 F.2d 783.

38. U.S.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433.

39. U.S.—N. L. R. B. v. American Car & Foundry Co., C.C.A.7, 161 F. 2d 501—N. L. R. B. v. Kinner Motors, C.C.A.9, 152 F.2d 816, modified on other grounds 154 F.2d 1007—N. L. R. B. v. Montag Bros., C. C.A.5, 140 F.2d 730—N. L. R. B. v. American Laundry Mach. Co., C.C.A.2, 138 F.2d 889—N. L. R. B. v. Quality & Service Laundry, C. C.A.4, 131 F.2d 182, certiorari denied Quality & Service Laundry v. N. L. R. B., 63 S.Ct. 831, 318 U. S. 775, 87 L.Ed. 1144—N. L. R. B. v. Armour & Co., C.C.A.10, 129 F. 2d 316—Owens-Illinois Glass Co. v. N. L. R. B., C.C.A.6, 123 F.2d 670, certiorari denied 62 S.Ct. 943, 316 U.S. 662, 86 L.Ed. 1739—N. L. R. B. v. C. Nelson Mfg. Co., C.C.A. 8, 120 F.2d 444.

N.Y.—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App.Div. 315.

Pa.—In re Lehrman, Com.Pl., 52 Dauph.Co. 1.

With back pay

U.S.—N. L. R. B. v. Clinchfield Coal Corporation, C.C.A.4, 145 F.2d 66, 155 A.L.R. 874—N. L. R. B. v. Fairmont Creamery Co., C.C.A.10, 143 F.2d 668, certiorari denied 65 S.Ct. 87, 323 U.S. 752, 89 L.Ed. 602—N. L. R. B. v. Niles Fire Brick Co., C.C.A.6, 124 F.2d 366, certiorari denied Niles Fire Brick Co.

to justify[40] an order of reinstatement.

§ 28(101). —— Refusal to Bargain Collectively

Where the unfair labor practice charged consists of a refusal to engage in collective bargaining, the evidence must be sufficient to show a refusal to bargain collectively in good faith.

Where the unfair labor practice charged in a proceeding before a labor relations board consists of a refusal to bargain collectively, the evidence must be sufficient to show a refusal to engage in good faith in collective bargaining.[41] In various cases the evidence has been held sufficient to sustain a finding that the employer has refused to bargain collectively in good faith with the authorized representatives of his employees[42] or insufficient to sustain such a

v. N. L. R. B., 62 S.Ct. 944, 316 U.S. 664, 86 L.Ed. 1740—N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A.6, 123 F.2d 831—N. L. R. B. v. Moltrup Steel Products Co., C.C.A.3, 121 F.2d 612—N. L. R. B. v. Acme Air Appliance Co., C.C.A.2, 117 F.2d 417—N. L. R. B. v. Lane Cotton Mills Co., C.C.A.5, 111 F.2d 814, appeal dismissed Lane Cotton Mills Co. v. N. L. R. B., 61 S.Ct. 316, 311 U.S. 723, 85 L.Ed. 471—N. L. R. B. v. Washington, Virginia & Maryland Coach Co., C.C.A.4, 85 F.2d 990, affirmed Washington, Virginia & Maryland Coach Corporation v. N. L. R. B., 57 S.Ct. 648, 301 U.S. 142, 81 L. Ed. 965.

N.Y.—New York State Labor Relations Board v. Timen, 35 N.Y.S.2d 449, 264 App.Div. 120, appeal granted 44 N.E.2d 618, 289 N.Y. 644.

Amount of back pay

U.S.—Waterman S. S. Corporation v. N. L. R. B., C.C.A.5, 119 F.2d 760—New York Handkerchief Mfg. Co. v. N. L. R. B., C.C.A.7, 114 F. 2d 144, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457.

Pa.—W. T. Grant Co. v. United Retail Employees of America, Local No. 134, 31 A.2d 900, 347 Pa. 224.

40. U.S.—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—N. L. R. B. v. Air Associates, C.C.A.2, 121 F. 2d 586—N. L. R. B. v. Brashear Freight Lines, C.C.A.8, 119 F.2d 379—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153.

N.Y.—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App.Div. 315.

Where evidence disclosed no pattern of discharge of union members and undisputed testimony indicated that employer had no knowledge of any union activity, evidence did not support order for reinstatement with back pay.—N. L. R. B. v. Alco Feed Mills, C.C.A.5, 133 F.2d 419.

41. U.S.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682.

Inference of bad faith

(1) Employer's hostility to union, threats by supervisory employees, and president's refusal to participate in conferences showed determined course of deliberate noncompliance with statute from which an inference of bad faith could be drawn.—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 127 F.2d 180, certiorari denied 63 S.Ct. 48, 317 U.S. 652, 87 L.Ed. 524.

(2) Newspaper publishing company's insistence that certain position should be eliminated from classification provided for in proposed collective bargaining agreement did not warrant inference of bad faith.—N. L. R. B. v. Knoxville Pub. Co., C.C.A. 6, 124 F.2d 875.

(3) Employer's wish to lower minimum wage schedule, provided for in proposed collective bargaining agreement, did not warrant inference that employer failed to bargain in good faith.—N. L. R. B. v. Knoxville Pub. Co., supra.

(4) Newspaper publishing company's rejection of portion of proposed collective bargaining contract, concerning employment which should be included, did not warrant inference that company refused to bargain in good faith.—N. L. R. B. v. Knoxville Pub. Co., supra.

(5) Publishing company's insistence that certain positions be excluded from terms of proposed collective bargaining agreement did not warrant an inference of bad faith.—N. L. R. B. v. Knoxville Pub. Co., supra.

(6) Employer's rejection of proposed contract provision that if payment was made in office vouchers or checks they should be cashed same day did not warrant inference of bad faith.—N. L. R. B. v. Knoxville Pub. Co., supra.

42. U.S.—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. Consolidated Mach. Corp., C.C.A.2, 163 F. 2d 376—N. L. R. B. v. Garfunkel, C.C.A.2, 162 F.2d 256—N. L. R. B. v. Harris-Woodson Co., C.C.A.4, 162 F.2d 97—N. L. R. B. v. Athens Mfg. Co., C.C.A.5, 161 F.2d 8—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201—N. L. R. B. v. Van De Kamp's Holland-Dutch Bakers, C.C.A.9, 152 F.2d 818, modified on other grounds 154 F.2d 828—N. L. R. B. v. Morris P. Kirk & Son, C.C.A.9, 151 F.2d 490, opinion supplemented 154 F. 2d 110—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438—N. L. R. B. v. Greater N. Y. Broadcasting Corp., C.C.A.2, 147 F.2d 337, certiorari denied 65 S.Ct. 1199, 325 U. S. 860, 89 L.Ed. 1981—Idaho Potato Growers v. N. L. R. B., C.C.A. 9, 144 F.2d 295, certiorari denied 65 S.Ct. 122, 323 U.S. 769, 89 L.Ed. 615—N. L. R. B. v. Grieder Machine Tool & Die Co., C.C.A.6, 142 F.2d 163, certiorari denied 65 S. Ct. 56, 323 U.S. 724, 89 L.Ed. 582—N. L. R. B. v. Register Pub. Co., C.C.A.9, 141 F.2d 156—N. L. R. B. v. H. G. Hill Stores, C.C.A.5, 140 F.2d 924—N. L. R. B. v. Lettie Lee, Inc., C.C.A.9, 140 F.2d 243—N. L. R. B. v. American Creosoting Co., C.C.A.6, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U.S. 797, 88 L.Ed. 1086—N. L. R. B. v. Crown Can Co., C.C.A.8, 138 F.2d 263, certiorari denied Crown Can Co. v. N. L. R. B., 64 S.Ct. 527, 321 U.S. 769, 88 L.Ed. 1065—N. L. R. B. v. Poultrymen's Service Corporation, C.C. A.3, 138 F.2d 204—N. L. R. B. v. Franks Bros. Co., C.C.A.1, 137 F. 2d 989, affirmed 64 S.Ct. 817, 321 U. S. 702, 88 L.Ed. 1020—Polish Nat. Alliance of U. S. v. N. L. R. B., C.C.A.7, 136 F.2d 175, affirmed 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509—N. L. R. B. v. Barrett Co., C.C.A.7, 135 F.2d 959—N. L. R. B. v. Montgomery Ward & Co., C.C.A. 9, 133 F.2d 676, 146 A.L.R. 1045—N. L. R. B. v. Burke Mach. Tool Co., C.C.A.6, 133 F.2d 618—N. L. R. B. v. Clinton E. Hobbs Co., C. C.A.1, 132 F.2d 249—N. L. R. B. v. Blount, C.C.A.8, 131 F.2d 585, certiorari denied Blount v. N. L. R. B., 63 S.Ct. 995, 318 U.S. 791, 87 L.Ed. 1157—Aluminum Ore Co. v. N. L. R. B., C.C.A.7, 131 F.2d 485, 147 A.L.R. 1—N. L. R. B. v. Martin Bros. Box Co., C.C.A.7, 130 F.2d 202, certiorari denied Martin Bros. Box Co. v. N. L. R. B., 63 S.Ct. 59, 317 U.S. 660, 87 L.Ed. 531—N. L. R. B. v. Wm. Tehel Bottling Co., C.C.A.8, 129 F.2d 250—N. L. R. B. v. Dixie Motor Coach Corporation, C.C.A.5, 128 F.2d 201—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 127 F.2d 180,

finding;[43] or sufficient to sustain a finding that the authorized representatives of the employees had not refused to bargain with the employer;[44] or sufficient to support a finding that the employer violated the statute by bargaining directly with his employees;[45] or sufficient to show that the employer in good faith attempted to bargain with the employees' representatives.[46]

In determining whether the board's conclusion that the employer had refused to bargain might be sustained, a conference at which the employer had allegedly refused to bargain is not to be considered alone, but must be considered in connection with prior events.[47]

certiorari denied 63 S.Ct. 48, 317 U.S. 652, 87 L.Ed. 524—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S. Ct. 45, 317 U.S. 650, 87 L.Ed. 523—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311—N. L. R. B. v. Schmidt Baking Co., C.C. A.4, 122 F.2d 162—N. L. R. B. v. Federbush Co., C.C.A.2, 121 F.2d 954—N. L. R. B. v. Moench Tanning Co., C.C.A.2, 121 F.2d 951—N. L. R. B. v. Moltrup Steel Products Co., C.C.A.3, 121 F.2d 612—Colorado Fuel & Iron Corporation v. N. L. R. B., C.C.A.10, 121 F.2d 165—N. L. R. B. v. Westinghouse Air Brake Co., C.C.A.3, 120 F.2d 1004—N. L. R. B. v. Bachelder, C. C.A.7, 120 F.2d 574, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519, and modified on other grounds, C. C.A., 125 F.2d 387—N. L. R. B. v. Riverside Mfg. Co., C.C.A.5, 119 F. 2d 302—Singer Mfg. Co. v. N. L. R. B., C.C.A.7, 119 F.2d 131, certiorari denied 61 S.Ct. 1119, 313 U. S. 595, 85 L.Ed. 1549, rehearing denied 62 S.Ct. 55, 314 U.S. 708, 86 L.Ed. 565—N. L. R. B. v. George P. Pilling & Son Co., C.C.A.3, 119 F.2d 32—Inland Lime & Stone Co. v. N. L. R. B., C.C.A.7, 119 F.2d 20—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 119, 313 U.S. 595, 85 L.Ed. 1549—N. L. R. B. v. New Era Die Co., C.C.A.3, 118 F.2d 500—N. L. R. B. v. Acme Air Appliance Co., C.C.A. 2, 117 F.2d 417—N. L. R. B. v. Texas Mining & Smelting Co., C. C.A.5, 117 F.2d 86—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 849, certiorari denied 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119—New York Handkerchief Mfg. Co. v. N. L. R. B., C. C.A.7, 114 F.2d 144, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—N. L. R. B. v. Dahlstrom Metallic Door Co., C.C.A.2, 112 F.2d 756—N. L. R. B. v. Lane Cotton Mills Co., C.C.A.5, 111 F.2d 814, appeal dismissed Lane Cotton Mills Co. v. N. L. R. B., 61 S.Ct. 316, 311 U.S. 723, 85 L.Ed. 471—N. L. R. B. v. Express Pub. Co., C.C.A.5, 111 F.2d 588, reversed on other grounds 61 S.Ct. 693, 312 U. S. 426, 85 L.Ed. 930—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 111 F. 2d 474—Hartsell Mills Co. v. N. L. R. B., C.C.A.4, 111 F.2d 291—H. J. Heinz Co. v. N. L. R. B., C.C. A.6, 110 F.2d 843, affirmed 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—N. L. R. B. v. Good Coal Co., C.C.A.6, 110 F.2d 501, certiorari denied Good Coal Co. v. N. L. R. B., 60 S.Ct. 978, 310 U.S. 630, 84 L.Ed. 1400—N. L. R. B. v. Piqua Munising Wood Products Co., C.C.A.6, 109 F.2d 552—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713—N. L. R. B. v. American Mfg. Co., C.C.A.2, 106 F.2d 61, modified on other grounds American Mfg. Co. v. N. L. R. B., 60 S. Ct. 612, 309 U.S. 629, 84 L.Ed. 988—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 98 F.2d 97—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F.2d 18—Black Diamond S. S. Corporation v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S.Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542—Jeffery-De Witt Insulator Co. v. N. L. R. B., C.C.A.4, 91 F.2d 134, certiorari denied 58 S.Ct. 55, 302 U.S. 731, 82 L.Ed. 565—Agwilines, Inc., v. N. L. R. B., C.C.A.5, 87 F.2d 146.

D.C.—Lebanon Steel Foundry v. N. L. R. B., 130 F.2d 404, 76 U.S.App. D.C. 100, certiorari denied 63 S.Ct. 58, 317 U.S. 659, 87 L.Ed. 530.

N.Y.—Collier Service Corporation v. Boland, 4 N.Y.S.2d 480, 167 Misc. 709.

Wis.—Appleton Chair Corporation v. United Brotherhood of Carpenters & Joiners, Millmen's Local No. 1748, 1 N.W.2d 188, 239 Wis. 337.

Tendency to lead to disputes

Where board found on sufficient evidence that employer's refusal to bargain collectively tended to lead to labor dispute burdening or obstructing interstate commerce, fact that there was no evidence that employer's refusal did in fact lead to such dispute was immaterial.—N. L. R. B. v. Register Pub. Co., C.C.A.9, 141 F. 2d 156.

43. U.S.—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682—N. L. R. B. v. Columbian Enameling & Stamping Co., 59 S.Ct. 501, 306 U.S. 292, 83 L.Ed. 660—N. L. R. B. v. Ross Gear & Tool Co., C.C.A.7, 158 F.2d 607—N. L. R. B. v. Dadourian Export Corporation, C.C.A.2, 138 F.2d 891—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A. 9, 122 F.2d 368—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C. A.7, 121 F.2d 602—N. L. R. B. v. Empire Furniture Corporation, C. C.A.6, 107 F.2d 92—Globe Cotton Mills v. N. L. R. B., C.C.A.5, 103 F.2d 91.

Articles written by publishing company's president in company's publications, directed to readers of publications and not to employees, did not show company's lack of good faith in negotiating with striking employees' bargaining agents.—N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A.7, 113 F.2d 621.

44. U.S.—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549.

45. U.S.—N. L. R. B. v. Highland Shoe, C.C.A.1, 119 F.2d 218.

46. U.S.—N. L. R. B. v. P. Lorillard Co., C.C.A.6, 117 F.2d 921, reversed on other grounds 62 S.Ct. 397, 314 U.S. 512, 86 L.Ed. 380—N. L. R. B. v. Sands Mfg. Co., C.C.A.6, 96 F.2d 721, affirmed 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682.

47. U.S.—N. L. R. B. v. Algoma Plywood & Veneer Co., C.C.A.7, 121 F.2d 602.

c. *Hearings, Findings, Determinations, and Orders*

§ 28(102). Administrative Hearings

Persons whose rights may be adversely affected by administrative proceedings with respect to unfair labor practices are entitled to a hearing thereon.

Persons whose rights may be adversely affected by administrative proceedings taken under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes, with respect to unfair labor practices, are entitled to a hearing thereon.[48] Such a hearing must be fair,[49] and is quasi-judicial, rather than executive, in character.[50] The test of a fair hearing has been held to be whether the issues are clearly defined, so that respondent may address himself to the charges made against him,[51] although, as discussed supra § 28 (91), the trial and determination of an issue not clearly raised by the pleadings have been held not to be error where the parties are afforded ample time to meet the issue. A hearing is not rendered unfair to respondent by his refusal to summon any witnesses or present any evidence,[52] by the fact that the employees' witnesses were credited and the employer's were not,[53] or by the board's failure to submit its proposed findings and order to respondent before adopting them,[54] and one is not necessarily deprived of a fair hearing because the board's procedure deviated from its prescribed rules of practice.[55] A requirement that a party submit evidence on his own behalf at his own expense is fair.[56] The right to a hearing is not infringed by the board's employment of subordinates to sift and analyze the evidence and the law.[57] Mere recitals in the decision and order of the board are

48. U.S.—N. L. R. B. v. New York Merchandise Co., C.C.A.2, 134 F.2d 949—N. L. R. B. v. Prettyman, C. C.A.6, 117 F.2d 786.

Parties to proceeding see supra §§ 28 (82)–28 (86).

Requirements of due process of law in administrative proceedings see Constitutional Law § 628.

Employees' organizations

(1) In a proceeding in which it is asserted that an employees' organization is employer-dominated and relief is sought against the employer recognizing, bargaining with, or dominating and supporting such organization, the organization is not entitled to a hearing.—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307—Solvay Process Co. v. N. L. R. B., C.C.A.5, 117 F.2d 83, certiorari denied 61 S.Ct. 1121, 313 U.S. 596, 85 L.Ed. 1549.

(2) Where, however, it is sought to have the employer cease recognizing and enforcing a contract with an independent labor organization, which is not employer dominated, the employees' organization is entitled to notice and a hearing.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 108 F.2d 198.

Specific measures of relief

Where an employer has had a full and fair hearing on the unfair labor practices charged, he is not entitled to a further hearing on the specific measures of relief which the board determines should be taken.—N. L. R. B. v. Weirton Steel Co., C.C.A.3, 135 F.2d 494.

49. U.S.—N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A.6, 123 F.2d 831.

Hearing held fair

U.S.—N. L. R. B. v. Newberry Lumber & Chemical Co., supra.

Hearing on all issues

The procedural action of the board must conform to standards of fairness and reasonableness, with due notice of and opportunity to be heard on all points properly in issue.—Jefferson Electric Co. v. N. L. R. B., C. C.A.7, 102 F.2d 949.

50. U.S.—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786—Bradley Lumber Co. of Arkansas v. National Labor Relations Board, C.C.A. La., 84 F.2d 97, certiorari denied 57 S.Ct. 21, 299 U.S. 559, 81 L.Ed. 411.

51. U.S.—N. L. R. B. v. Air Associates, C.C.A.2, 121 F.2d 586.

Independent investigation by board

Where proceeding before state labor relations board was tried solely on issue whether union had a majority, it was improper for the board to make its investigation on any other theory without giving parties an opportunity to meet such theory notwithstanding stipulation that board might make its own investigation, since parties to stipulation were entitled to rely on assumption that board would conduct investigation pursuant to announced issue in the case.—International Union of Operating Engineers, Local No. 354 v. Industrial Commission of Utah, 119 P.2d 243, 101 Utah 139.

Hearing must be in accord with charge, in an attempt to prove or rebut such charge.—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 98 F.2d 97.

Opportunity to meet claim

The right to a hearing embraces a reasonable opportunity to learn of and meet opposing claims.—Valley Mould & Iron Corporation v. N. L. R. B., C.C.A.7, 116 F.2d 760, certiorari denied 61 S.Ct. 1114, 313 U.S. 590, 85 L.Ed. 1545.

Report and complaint

On argument before the board, the report of the trial examiner, coupled with the complaint stating the charges, was sufficient indication to the respondent of what it was required to meet.—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 103 F.2d 953.

52. U.S.—N. L. R. B. v. Newberry Lumber Chemical Co., C.C.A.6, 123 F.2d 831.

53. U.S.—N. L. R. B. v. Robbins Tire & Rubber Co., C.C.A.5, 161 F.2d 798.

54. U.S.—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F. 2d 16.

55. U.S.—N. L. R. B. v. Air Associates, C.C.A.2, 121 F.2d 586.

Pa.—Labor Relations Board v. Union Trust Co., Com.Pl., 89 Pittsb.Leg.J. 343.

56. U.S.—N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A.6, 123 F.2d 831.

57. U.S.—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 103 F. 2d 953—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F.2d 16.

Under state statute

Personal examination by each member of state labor relations board of all testimony as a prerequisite to a determination of a labor dispute is not an essential, and members of board are entitled to avail themselves of services of competent assistants in sifting and analyzing the proof.—New York State Labor Relations Bd. v. Greif Realty Corp., 71 N.Y.S.2d 91, 272 App.Div. 928.

not in themselves evidence of a substantial compliance with the law requiring a fair hearing.[58]

Place of hearing. Under the National Labor Relations Act the board may meet and exercise its power in any part of the United States, and within reasonable limits the board has discretion as to the place where the hearing is to be held;[59] but this does not give the board an uncontrolled discretion as to the place of holding hearings,[60] and the hearing must be held at a place convenient to all of the parties.[61]

Reopening case. After the report of the hearing officer or trial examiner, it is within the board's discretion to reopen or to refuse to reopen the case for further proceedings[62] or for the receipt of new evidence,[63] particularly after its findings and decisions have been made.[64]

§ 28(103). —— Scope of Inquiry

The extent to which a labor relations board may refuse to go into a matter raised by the complaint because the matter is stale or because it has been satisfactorily concluded rests in the board's discretion.

Although, as discussed supra § 28 (91) as a general rule the issues in a proceeding before a labor board are confined to those raised by the pleadings, the board is not prevented from considering unfair labor practices which are related to those alleged in the charge and which grew out of them while the proceeding was pending before the board.[65] The board is not required, however, to sidetrack proceedings involving an unfair labor practice in order to explore irrelevant matters,[66] and the board in determining whether unfair labor practices were committed need not consider and determine the cause of such practices.[67]

The extent to which the board may refuse to go into a matter raised by the complaint because the matter is stale or because it has been satisfactorily concluded rests in the board's discretion.[68] The discontinuance of an unfair labor practice does not preclude the board from taking action with respect to it;[69] and an unobserved agreement by an employer to refrain from certain unfair labor practices does not prevent the board from considering the employer's conduct before the agreement in connection with subsequent unfair practices.[70]

The board has discretion to refuse to reconsider an issue which was determined in a prior proceeding involving the same parties,[71] or even where all of the present parties were not parties to the prior proceeding where the issue is only collateral,[72] and to proceed on the basis of the knowledge acquired in such proceeding,[73] particularly where there is no showing that the proposed evidence was not introduced or available at the prior proceeding.[74]

§ 28(104). —— Who May Conduct Hearing

Under the National Labor Relations Act and similar statutes, the hearing may be conducted by the board, a member of the board, or an agent of the board.

Under the National Labor Relations Act § 10 (b),

58. U.S.—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 103 F.2d 953.

59. U.S.—N. L. R. B. v. Southwestern Greyhound Lines, C.C.A.8, 126 F.2d 883.

60. U.S.—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786.

61. U.S.—N. L. R. B. v. Southwestern Greyhound Lines, C.C.A.8, 126 F.2d 883—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786.

62. U.S.—N. L. R. B. v. Kentucky Fire Brick Co., C.C.A.6, 99 F.2d 89.

63. U.S.—N. L. R. B. v. Standard Oil Co., C.C.A.2, 138 F.2d 885—N. L. R. B. v. J. S. Popper, Inc., C.C.A.3, 113 F.2d 602.

Events subsequent to hearing
Board was within its discretionary power in refusing to adduce additional testimony concerning events subsequent to hearing.—N. L. R. B. v. Westinghouse Air Brake Co., C.C.A.3, 120 F.2d 1004—New Idea v. N. L. R. B., C.C.A.7, 117 F.2d 517.

64. U.S.—N. L. R. B. v. Greater N. Y. Broadcasting Corp., C.C.A.2, 147 F.2d 337, certiorari denied 65 S.Ct. 1199, 325 U.S. 860, 89 L.Ed. 1981—N. L. R. B. v. H. G. Hill Stores, C.C.A.5, 140 F.2d 924—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433.

65. U.S.—National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799.

66. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579—Donnelly Garment Co. v. N. L. R. B., C.C.A.8, 123 F.2d 215.

67. U.S.—N. L. R. B. v. Star Pub. Co., C.C.A.9, 97 F.2d 465.

Motive and intent
Where an employer has concededly committed an unfair labor practice, his intent or motives are immaterial.—New York Labor Relations Board v. Mill Road Live Poultry Market, 50 N.Y.S.2d 631, 182 Misc. 556.

68 U.S.—N. L. R. B. v. T. W. Phillips Gas & Oil Co., C.C.A.3, 141 F.2d 304.

Change in name of union
Where, at time of filing of union's charges, membership of union was composed of employees of employer and two other companies but thereafter a separate local was formed for each, the change in the name did not alter the issues or render the case "moot."—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 116 F.2d 367.

69. U.S.—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A.6, 133 F.2d 295.

70. U.S.—Canyon Corporation v. N. L. R. B., C.C.A.8, 128 F.2d 953.

71. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551.

72. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., supra.

73. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., supra.

74. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., supra—N. L. R. B. v. West Ky. Coal Co., C.C.A.6, 152 F.2d 198, certiorari denied 66 S.Ct. 1372, 328 U.S. 866, 90 L.Ed. 1636.

29 U.S.C.A. § 160 (b), and similar statutes, the hearing may be conducted by the board, any member of the board, or any agent designated by the board.[75] It is not essential that the board or any member thereof be personally present and hear the testimony of the witnesses;[76] nor need the board have heard or read all of the evidence presented.[77] The hearings under the National Labor Relations Act are generally conducted by a trial examiner, who is an agent of the board[78] to gather the facts and make recommendation to the board in an intermediate report.[79]

Bias and prejudice. The person conducting the hearing should not be biased or prejudiced,[80] and, where the trial examiner's conduct clearly evidences bias and prejudice, the parties have not had a fair hearing;[81] but it has been held that the improper conduct of a trial examiner is not a denial of a fair hearing where the decision is correct and the case is not a close one,[82] and that the bias of the examiner does not warrant upsetting the decision of the board where it is not shown that the party complaining has been prejudiced by the bias.[83] A trial examiner is not disqualified because he was reversed on his earlier hearing of the cause, and such fact does not render the board's denial of a party's request for a different examiner improper.[84]

§ 28(105). —— Conduct of Hearing

The person conducting the hearing is vested with a broad discretion as to the general conduct thereof.

As a general rule under the labor relations statutes, the official conducting the hearing or the trial examiner is vested with a broad discretion as to the general conduct of the hearing, but his exercise of that power should reflect a reasonable effort to enable all the parties to present their theory of what happened.[85] The person conducting the hearing has some discretion as to the reception of evidence[86]

75. U.S.—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 98 F.2d 97.

76. U.S.—Inland Steel Co. v. N. L. R. B., C.C.A.7, 105 F.2d 246.

77. U.S.—Inland Steel Co. v. N. L. R. B., supra—N. L. R. B. v. Cherry Cotton Mills, C.C.A.5, 98 F.2d 444, rehearing denied 98 F.2d 1021—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F.2d 16.

78. U.S.—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U.S. 751, 87 L.Ed. 1705.

Authority to hear testimony

The trial examiner had authority to hear testimony, notwithstanding order of board designating trial examiner was not introduced in evidence.—N. L. R. B. v. J. S. Popper, Inc., C.C.A.3, 113 F.2d 602.

Substitution

The trial examiner is the agent of the board and examiners may be substituted at the will of board during course of proceeding.—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U.S. 751, 87 L. Ed. 1705.

79. U.S.—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U.S. 751, 87 L.Ed. 1705.

80. U.S.—N. L. R. B. v. Gallup American Coal Co., C.C.A.10, 131 F.2d 665—Inland Steel Co. v. N. L. R. B., C.C.A.7, 109 F.2d 9.

"Audi alteram partem"

A hearing before board is invalid, where the maxim, Audi alteram partem, is ignored.—Continental Box Co. v. N. L. R. B., C.C.A.5, 113 F.2d 93.

Bias not established

The trial examiner was not guilty of bias or prejudice in permitting receipt of evidence showing employer guilty of espionage.—N. L. R. B. v. Acme-Evans Co., C.C.A.7, 130 F.2d 477, certiorari denied Acme-Evans Co. v. N. L. R. B., 63 S.Ct. 769, 318 U.S. 772, 87 L.Ed. 1142, rehearing denied 63 S.Ct. 851, 318 U.S. 802, 87 L.Ed. 1166.

Distant relation to person interested

The fact that examiner was distantly related to one of firm representing employer did not affect order of board.—N. L. R. B. v. Garfunkel, C.C.A.2, 162 F.2d 256.

81. U.S.—N. L. R. B. v. Washington Dehydrated Food Co., C.C.A.9, 118 F.2d 980.

Partial agreement with employer

Good faith of trial examiner and the board was attested by fact that in five out of eleven charges they agreed with employer.—N. L. R. B. v. Gallup American Coal Co., C.C.A. 10, 131 F.2d 665.

82. U.S.—N. L. R. B. v. Western Cartridge Co., Winchester Repeating Arms Co. Division, C.C.A.2, 138 F.2d 551, certiorari denied Western Cartridge Co. v. N. L. R. B., 64 S. Ct. 780, 321 U.S. 786, 88 L.Ed. 1077, rehearing denied 64 S.Ct. 942, 322 U.S. 767, 88 L.Ed. 1593.

83. U.S.—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433—N. L. R. B. v. Air Associates, C.C.A.2, 121 F.2d 586.

84. U.S.—N. L. R. B. v. Donnelly Garment Co., 67 S.Ct. 756.

85. U.S.—N. L. R. B. v. Burke Mach. Tool Co., C.C.A.6, 133 F.2d 618.

Counsel guilty of contempt

The board may exclude from its hearings counsel guilty of contemptuous conduct.—N. L. R. B. v. Weirton Steel Co., C.C.A.3, 135 F.2d 494.

Extension of hearing

Where attorney for employer, relying on practice of board to receive hearsay testimony, had not brought a witness to hearing but as time for adjournment had arrived attorney offered to produce witness on following day to give testimony which would go to very heart of case, refusal to extend hearing for such purpose was unreasonable.—N. L. R. B. v. Fairchild Engine & Airplane Corporation, C.C.A.4, 145 F.2d 214.

Refusal to summon witness

A hearing is not rendered unfair by a refusal to summon a witness in order that he may be asked irrelevant questions.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App. D.C. 52.

86. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551.

Refusal to receive evidence

(1) Where a continuance was obtained solely for the presentation of certain testimony, it was an abuse of discretion to refuse to receive other testimony which was important and which would not involve an undue delay in concluding the hearings.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

(2) Rejection of cumulative testimony was not an abuse of discretion or deprivation of a fair hearing.

and may exercise a reasonable discretion in controlling the order of proof,[87] but he should, within reasonable limits, permit each of the parties to prove his own case in his own way by his own counsel.[88] The separation of witnesses is a matter within the discretion of the one conducting the hearing,[89] but, where it appears that the testimony of witnesses will be in sharp conflict, it has been held to be improvident to deny a timely request for the separation of the witnesses.[90]

It is the function of the person conducting the hearing or of the trial examiner to see that the facts are fully and clearly developed[91] and, to that end, it is proper for him to ask questions and elicit testimony,[92] to call witnesses and introduce evidence,[93] and he has broad authority to accept evidence and make findings unfettered by the strict rules of judicial inquiry.[94]

The trial examiner should accept and have recorded all of the evidence offered by any of the parties, including evidence he rules inadmissible, unless it is palpably incompetent,[95] and he may not deny a party's request to have its own reporter present to take and transcribe the proceeding.[96] The matter of making a record of the argument of counsel is within the discretion of the one conducting the hearing.[97] Failure to have "off-the-record" statements recorded does not establish bias by the trial examiner; nor is it prejudicial error.[98]

§ 28(106). —— Trial Examiner's Report and Recommendations

Ordinarily, under the labor relations statutes, the trial examiner's report and recommendations to the labor relations board are merely advisory.

Under the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, and similar statutes, the better practice is for the trial examiner to render a report before the transfer of the case to the board,[99] but employers charged with unfair labor practices may not complain of the transfer of the proceeding from the trial examiner to the board and its determination without a report by the trial examiner or a hearing before the board where the employer failed to request either.[1] The trial examiner's report and recommendations to the board are merely advisory;[2] the board may accept, reject, or modify his recommendations,[3] and an employer by complying with the

U.S.—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 134 F.2d 240, certiorari denied 64 S.Ct. 48, 320 U.S. 746, 88 L.Ed. 443.

D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

(3) Exclusion of evidence held not to constitute a denial of a full and fair hearing.—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A.7, 162 F.2d 435.

87. U.S.—N. L. R. B. v. Premo Pharmaceutical Laboratories, C.C.A.2, 136 F.2d 85.

88. U.S.—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 106 F.2d 100.

89. U.S.—N. L. R. B. v. Quality & Service Laundry, C.C.A.4, 131 F.2d 182, certiorari denied Quality & Service Laundry v. N. L. R. B., 63 S.Ct. 831, 318 U.S. 775, 87 L.Ed. 1144.

90. U.S.—N. L. R. B. v. Burke Mach. Tool Co., C.C.A.6, 133 F.2d 618.

91. U.S.—N. L. R. B. v. Franks Bros. Co., C.C.A.1, 137 F.2d 989.
D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

92. U.S.—N. L. R. B. v. Franks Bros. Co., C.C.A.1, 137 F.2d 989, affirmed 64 S.Ct. 817, 321 U.S. 702, 88 L.Ed. 1020—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, and opinion supplemented, C.C.A., 128 F.2d 188—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

93. U.S.—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39.

94. U.S.—N. L. R. B. v. Grieder Machine Tool & Die Co., C.C.A.6, 142 F.2d 163, certiorari denied 65 S.Ct. 56, 323 U.S. 724, 89 L.Ed. 582.

95. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., C.C.A.8, 113 F.2d 698, affirmed Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied Crystal City Glass Workers' Union v. N. L. R. B., 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551.

96. U.S.—Inland Steel Co. v. N. L. R. B., C.C.A.7, 109 F.2d 9.

97. U.S.—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67.

98. U.S.—N. L. R. B. v. Acme-Evans Co., C.C.A.7, 130 F.2d 477, certiorari denied Acme-Evans Co. v. N. L. R. B., 63 S.Ct. 769, 318 U.S. 772, 87 L.Ed. 1142, rehearing denied 63 S.Ct. 851, 318 U.S. 802, 87 L.Ed. 1166.

99. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

1. U.S.—Consolidated Edison Co. of N. Y. v. N. L. R. B., supra.

2. U.S.—N. L. R. B. v. M. E. Blatt Co., C.C.A.3, 143 F.2d 268, certiorari denied 65 S.Ct. 135, 323 U.S. 774, 89 L.Ed. 619—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U.S. 751, 87 L.Ed. 1705—N. L. R. B. v. Oregon Worsted Co., C.C.A.9, 94 F.2d 671.

Determination on record

The board may disregard the trial examiner's report and make its determination solely on the evidence contained in the record, and such procedure does not deny respondent a fair hearing.—N. L. R. B. v. Air Associates, C.C.A.2, 121 F.2d 586.

What constitute record

All the pleadings, notices, rulings, orders, stenographic records, exhibits, documents, and depositions constitute the record before the board.—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U.S. 751, 87 L.Ed. 1705.

3. U.S.—N. L. R. B. v. L. H. Hamel Leather Co., C.C.A.1, 135 F.2d 71

examiner's recommendations does not destroy the board's jurisdiction to proceed further in the matter.[4] As discussed infra § 28 (108), the statute imposes on the board the duty of making findings of fact, and the board may not delegate the duty to a trial examiner, but must treat his report as merely a recommendation,[5] and may make independent findings contrary to those recommended in the report,[6] even though the recommended findings have not been objected to by the parties,[7] and this applies even on a question of the credibility of witnesses.[8] However, it has been held that, where the board makes findings contrary to those made by the examiner, the examiner's report has a bearing on the question whether the findings are substantially supported by the evidence,[9] particularly where a minority of the board agrees with the examiner.[10]

§ 28(107). Administrative Determination of Issues

Under the National Labor Relations Act and similar statutes, the board has the power to determine questions of fact.

Under the National Labor Relations Act and similar statutes, the board has the power to determine questions of fact,[11] to draw inferences from the facts,[12] appraise conflicting and circumstantial evidence,[13] and to determine the weight and credibility of testimony,[14] and as discussed infra § 28 (136), such determinations are not subject to judicial review, since it is for the board and not the courts to make such determinations. The board may properly weigh and appraise the totality of the situation presented by the evidence,[15] may detect and appraise imponderables permeating the record,[16] and may find support for its findings in the whole congeries of facts before it.[17] However, the board

—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 443—N. L. R. B. v. Oregon Worsted Co., C.C.A.9, 94 F.2d 671.

4. U.S.—N. L. R. B. v. Oregon Worsted Co., supra.

5. U.S.—Burk Bros. v. N. L. R. B., C.C.A.3, 117 F.2d 686, certiorari denied 61 S.Ct. 1110, 313 U.S. 588, 85 L.Ed. 1543—N. L. R. B. v. Elkland Leather Co., C.C.A.3, 114 F. 2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S. Ct. 170, 311 U.S. 705, 85 L.Ed. 457.

6. U.S.—N. L. R. B. v. Lasiter-Kauffman Aircraft Corporation, C. C.A.8, 144 F.2d 9—N. L. R. B. v. M. E. Blatt Co., C.C.A.3, 143 F.2d 268, certiorari denied 65 S.Ct. 135, 323 U.S. 774, 89 L.Ed. 619—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 443—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—Burk Bros. v. N. L. R. B., C.C.A.3, 117 F.2d 686, certiorari denied 61 S.Ct. 1110, 313 U.S. 588, 85 L.Ed. 1543—N. L. R. B. v. Elkland Leather Co., C.C.A.3, 114 F.2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S. Ct. 170, 311 U.S. 705, 85 L.Ed. 457.

7. U.S.—N. L. R. B. v. Elkland Leather Co., C.C.A.3, 114 F.2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S.Ct. 170, 311 U.S. 705, 85 L.Ed. 457.

8. U.S.—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433.

9. U.S.—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868.

10. U.S.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

11. U.S.—N. L. R. B. v. Burry Biscuit Corporation, C.C.A.7, 123 F.2d 540.

Conflict between employer's and employees' interests

The National Labor Relations Board must weigh the conflicts which arise from time to time between employer and employee out of the exercise of the employee's right to full freedom in self-organizational activities, and must determine in each case whether the interest of the employees or the interest of the employers should be held paramount.—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 153 F.2d 811.

Unfair practices

The board has power to determine whether unfair labor practices were committed.—National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 98 F.2d 97.

Under state statute

The function of a Labor Relations Board has been held to be to appraise conflicting evidence, determine the credibility of witnesses, resolve primary issues of fact, and draw inferences from the established facts and circumstances.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398.

12. U.S.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580.

Fact that board might have drawn a contrary inference did not require the board to draw such inference.—N. L. R. B. v. Precision Castings Co., C.C.A.6, 130 F.2d 639.

13. U.S.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371. certiorari denied 65 S. Ct. 55, 323 U.S. 722, 89 L.Ed. 580.

14. U.S.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580.

15. U.S.—American Nat. Bank of St. Paul v. N. L. R. B., C.C.A.8, 144 F.2d 268.

Discriminatory discharge

Board, in arriving at its conclusion on question whether employer discriminatorily discharged two employees because of their union activities, properly viewed the picture as a whole and properly considered a number of related incidents.—Oman v. N. L. R. B., C.C.A.8, 139 F. 2d 728.

16. U.S.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., App. D.C., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S. Ct. 314, 311 U.S. 729, 85 L.Ed. 474—N. L. R. B. v. Precision Castings Co., C.C.A.6, 130 F.2d 639.

17. U.S.—N. L. R. B. v. Precision Castings Co., supra.

must consider all of the evidence[18] and may not disregard undisputed evidence which does not support its findings.[19] Since the board has such great power with respect to the determination of the facts, it should be scrupulously careful to see that the power is exercised with a commensurate sense of what is just and fair;[20] its functions as investigator and prosecutor of charges should not be confused with its quasi-judicial duty to find and state the actual facts on the basis of substantial, credible evidence impartially weighed,[21] and the board should evaluate the evidence presented on behalf of the employer and the employees with scrupulous impartiality.[22]

In determining whether an employees' association is company-dominated, sponsored, or interfered with, the board may appraise imponderables[23] and give careful scrutiny to all factors which restrain the employees' choice and for which the employer may fairly be held responsible.[24]

Disclosure of deliberations in reaching decision. The members of the board will not be required to disclose their deliberations and actions in arriving at a decision.[25]

§ 28(108). —— Findings of Fact

Under the National Labor Relations Act and similar statutes, the board is required to make findings of fact.

The National Labor Relations Act § 10 (c), 29 U.S.C.A. § 160 (c), imposes on the National Labor Relations Board the duty of making findings of fact.[26]

18. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579—Western Cartridge Co. v. N. L. R. B., C.C.A. 7, 134 F.2d 240, certiorari denied 64 S.Ct. 48, 320 U.S. 746, 88 L.Ed. 443—N. L. R. B. v. Texas Mining & Smelting Co., C.C.A.5, 117 F.2d 86—Peninsular & Occidental S. S. Co. v. N. L. R. B., C.C.A.5, 98 F.2d 411, certiorari denied N. L. R. B. v. Peninsular & Occidental S. S. Co., 59 S.Ct. 248, 305 U.S. 653, 83 L.Ed. 423.

Evidence introduced for limited purpose

Publishing company's publications introduced only as evidence that company was engaged in interstate commerce could not be used to show bad faith while meeting with representatives of striking employees.—N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A.7, 113 F.2d 621.

19. U.S.—Waterman Steamship Corporation v. N. L. R. B., C.C.A.5, 103 F.2d 157, reversed on other grounds 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036—Peninsular & Occidental S. S. Co. v. N. L. R. B., C.C.A.5, 98 F.2d 411, certiorari denied N. L. R. B. v. Peninsular & Occidental S. S. Co., 59 S.Ct. 248, 305 U.S. 653, 83 L.Ed. 423.

Finding held not to show that board disregarded evidence

U.S.—Montgomery Ward & Co. v. N. L. R. B., C.C.A.7, 107 F.2d 555.

20. U.S.—N. L. R. B. v. Western Cartridge Co., Winchester Repeating Arms Co. Division, C.C.A.2, 138 F.2d 551, certiorari denied Western Cartridge Co. v. N. L. R. B., 64 S.Ct. 780, 321 U.S. 786, 88 L.Ed. 1077, rehearing denied 64 S.Ct. 942, 322 U.S. 767, 88 L.Ed. 1593.

The board is required to exercise the greatest of wisdom and detachment in the hearing and decision on its own charges.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L. Ed. 471.

21. U.S.—N. L. R. B. v. Western Cartridge Co., Winchester Repeating Arms Co. Division, C.C.A.2, 138 F.2d 551, certiorari denied Western Cartridge Co. v. N. L. R. B., 64 S.Ct. 780, 321 U.S. 786, 88 L.Ed. 1077, rehearing denied 64 S.Ct. 942, 322 U.S. 767, 88 L.Ed. 1593.

22. U.S.—N. L. R. B. v. Sands Mfg. Co., C.C.A.6, 96 F.2d 721, affirmed 59 S.Ct. 508, 306 U.S. 332, 82 L. Ed. 682.

23. U.S.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Independent Union of Craftsmen, 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368.

An employer's attitude toward unions is relevant in determining whether employer dominated or interfered with an organization of its employees.—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L. Ed. 368—N. L. R. B. v. Independent Union of Craftsmen, 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368.

Campaign by an employer to keep one union out of its plant will be considered in determining whether there has been such employer interference as to vitiate the employer's contracts with assisted union.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

Wage increase granted on request of employees' committee was a relevant circumstance to consider in determining whether committee was dominated and supported by employer.—N. L. R. B. v. Christian Board of Publication, C.C.A.8, 113 F.2d 678.

24. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045.

25. U.S.—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 106 F.2d 263.

Public policy

The policy against requiring public disclosure by judges or jurors of their reasoning and actions in arriving at a decision or verdict applies as well to the judicial function of the National Labor Relations Board.—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 106 F.2d 263.

26. U.S.—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S. Ct. 1164, two cases, 319 U.S. 751, 87 L.Ed. 1705—N. L. R. B. v. Elkland Leather Co., C.C.A.3, 114 F.2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S.Ct. 170, 311 U.S. 705, 85 L.Ed. 457.

Adoption of trial examiner's findings

Where trial examiner made findings to which employer filed exceptions, and board, after considering entire record, adopted findings of examiner, board's order was not erroneous on ground that board never found the facts on which order was based.—N. L. R. B. v. Jasper Chair Co., C.C.A.7, 138 F.2d 756, certiorari denied Jasper Chair Co. v. N. L. R. B., 64 S.Ct. 618, 321 U.S. 777, 88 L. Ed. 1070.

Preparation by employees

The preparation of findings of fact and conclusions of law by employees or subordinates of the board did not constitute denial of due process.—

The making of findings of facts may be waived[27] as where the parties stipulate the sole issue to be that of the board's jurisdiction.[28] The board need only find the ultimate facts;[29] it need not recite all of the evidence,[30] or even all of the undisputed evidence,[31] and it need not set forth conflicts in the evidence[32] or relate facts contrary or irrelevant to the finding made.[33]

Findings as to the ultimate facts required by the statute may be based on other findings.[34] A finding that a labor organization does not represent an uncoerced majority of the employees is adequate to support the conclusion that the maintenance as well as the acquisition of the majority was contaminated by the employer's aid and justifies the board in refusing to give effect to a closed-shop contract.[35]

Conformity to pleadings. In a general way the findings must conform to the pleadings,[36] but technical differences between the findings and the pleadings do not invalidate the proceeding where the parties at all times understand the real nature of the issues.[37] A finding as to unfair practices is sufficiently supported by an allegation of unfair practices "by other acts" where there has been no surprise and the employer presents evidence with respect to such acts.[38]

Support by evidence. The findings must be based on evidence testified to by witnesses who are subject to cross-examination,[39] but this rule does not require evidence as to the results which may flow from such evidentiary facts;[40] nor does it bar the board from drawing reasonable inferences and conclusions from the evidence produced.[41]

Form of findings. It is not necessary that the

N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F.2d 16.

Jurisdictional facts

A finding that a labor union which filed a charge of unfair labor practices was a labor organization within meaning of statute was jurisdictional.—N. L. R. B. v. Indiana & Michigan Electric Co., C.C.A.6, 124 F.2d 50, affirmed 63 S.Ct. 394, 317 U.S. 9, 87 L.Ed. 579.

Findings on stipulated evidence

Where no evidence was offered at hearing on unfair labor practice charge against employer but it was stipulated that evidence which had previously been offered in representation proceeding should be considered, the board, with record of both proceedings before it, had right to make further findings as it deemed appropriate, in unfair labor practice proceeding.—N. L. R. B. v. E. C. Atkins & Co., C.C.A.7, 147 F.2d 730, vacated on other grounds 65 S.Ct. 1413, 325 U.S. 838, 89 L.Ed. 1965, rehearing denied 66 S.Ct. 13, 326 U.S. 804, 90 L.Ed. 490, reinstated, C.C.A., 155 F.2d 567, reversed on other grounds 67 S.Ct. 1265.

Construction of finding

A finding that certain employees had obtained regular and substantially equivalent employment elsewhere was tantamount to finding that others had not obtained such employment.—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F.2d 652.

27. U.S.—N. L. R. B. v. J. L. Hudson Co., C.C.A.6, 135 F.2d 380, certiorari denied J. L. Hudson Co. v. N. L. R. B., 64 S.Ct. 40, 320 U.S. 740, 88 L.Ed. 439.

28. U.S.—N. L. R. B. v. J. L. Hudson Co., C.C.A.6, 135 F.2d 380, certiorari denied J. L. Hudson Co. v. N. L. R. B., 64 S.Ct. 40, 320 U.S. 740, 88 L.Ed. 439.

29. U.S.—N. L. R. B. v. Texas Mining & Smelting Co., C.C.A.5, 117 F.2d 86.

Findings as to specific employee

Where board found unfair labor practices in interfering with employees' rights to self-organization, a finding as to the particular employees restrained or coerced was unnecessary.—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126.

30. U.S.—N. L. R. B. v. Swift & Co., C.C.A.8, 116 F.2d 143.

31. U.S.—N. L. R. B. v. Swift & Co., supra.

32. U.S.—N. L. R. B. v. Texas Mining & Smelting Co., C.C.A.5, 117 F.2d 86.

Finding as to every disputed fact is not required.—Carter Carburetor Corporation v. N. L. R. B., C.C.A.8, 131 F.2d 927.

33. U.S.—N. L. R. B. v. Texas Mining & Smelting Co., C.C.A.5, 117 F.2d 86—N. L. R. B. v. Swift & Co., C.C.A.8, 116 F.2d 143.

34. U.S.—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713.

Finding as to ultimate fact held supported by other findings

U.S.—N. L. R. B. v. Register Pub. Co., C.C.A.9, 141 F.2d 156—N. L. R. B. v. Boss Mfg., C.C.A.7, 107 F.2d 574—Republic Steel Corporation v. N. L. R. B., C.C.A.3, 107 F.2d 472, certiorari denied 60 S.Ct. 806, 309 U.S. 684, 84 L.Ed. 1027, vacated on other grounds 60 S.Ct. 1072, 310 U.S. 655, 84 L.Ed. 1419, certiorari denied Central Council of Steel Plants, Northern District, Republic Steel Corporation v. N. L. R. B., 60 S.Ct. 808, 309 U.S. 684, 84 L.Ed. 1028, supplemented C.C.A., Republic Steel Corporation v. N. L. R. B., 114 F.2d 820, modified on other grounds 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6.

Subsidiary finding held insufficient to support ultimate finding

U.S.—N. L. R. B. v. Reynolds Intern. Pen Co., C.C.A.7, 162 F.2d 680—N. L. R. B. v. Brown Co., C.C.A.1, 160 F.2d 449.

Finding held not to show that union represented majority

U.S.—Standard Lime & Stone Co. v. N. L. R. B., C.C.A.4, 97 F.2d 531.

35. U.S.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35 v. N. L. R. B., App. D.C., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

36. U.S.—N. L. R. B. v. Mackay Radio & Telegraph Co., 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381.

37. U.S.—N. L. R. B. v. Mackay Radio & Telegraph Co., supra.

38. U.S.—N. L. R. B. v. Yale & Towne Mfg. Co., C.C.A.2, 114 F.2d 376.

39. U.S.—Republic Aviation Corp. v. N. L. R. B., 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081—N. L. R. B. v. Le Tourneau Co. of Ga., 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081, rehearing denied 65 S.Ct. 1401, 325 U.S. 894, 89 L.Ed. 2005.

40. U.S.—Republic Aviation Corp. v. N. L. R. B., 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081—N. L. R. B. v. Le Tourneau Co. of Ga., 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, rehearing denied 65 S.Ct. 1401, 325 U.S. 894, 89 L.Ed. 2005.

41. U.S.—Republic Aviation Corporation v. N. L. R. B., 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081.

board make its findings in any formal style;[42] it is sufficient if it makes findings which clearly and definitely state the basic facts on which its ultimate conclusion and decision rest.[43] A finding as to an ultimate fact need not be express where it is necessarily implied in other findings.[44]

Under state statutes similar to the National Labor Relations Act the boards established by such statutes are required to make findings,[45] and it has been held that the findings should state the ultimate facts rather than the evidentiary facts.[46] The findings of the board must be supported by competent, material, and relevant evidence,[47] and the board may not rely on only part of the evidence and disregard other undisputed evidence.[48]

§ 28(109). Orders by State Administrative Bodies

Under some state labor relations acts, the state board may issue appropriate orders to nullify the effects of unfair labor practices.

Under some state labor relations acts, the state board is authorized to issue appropriate orders to nullify the effects of unfair labor practices,[49] and to order such affirmative action as is considered by the board reasonably necessary to effectuate the policies of the statute.[50] Although the board has discretion as to the relief to be awarded,[51] its order must be supported by, and in conformity with, the findings of fact,[52] and findings which would be sufficient to support a court order are sufficient to support a board order.[53]

Notices. The employer may be required to post

42. U.S.—Swift & Co. v. N. L. R. B., C.C.A.10, 106 F.2d 87.

43. U.S.—Swift & Co. v. N. L. R. B., supra.

44. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

45. Mass.—Jordan Marsh Co. v. Labor Relations Commission, 45 N.E.2d 925, 312 Mass. 597.
Pa.—Petition of St. Marys Sewer Pipe Co., 55 Pa.Dist. & Co. 297—Labor Relations Board v. Union Trust Co., Com.Pl., 89 Pittsb.Leg.J. 343.
Utah.—Teamsters Local Union No. 222 v. Strevell-Paterson Hardware Co., 174 P.2d 164.
Wis.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

46. Pa.—In re Lane's Apparel Shops, Com.Pl., 32 Del.Co. 115.
Wis.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

47. Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

Findings held supported by evidence
N.Y.—New York State Labor Relations Board v. Peerless Wood Products, 9 N.Y.S.2d 855, 170 Misc. 594.

48. Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

49. Mass.—Jordan Marsh Co. v. Labor Relations Commission, 45 N.E.2d 925, 312 Mass. 597.
N.Y.—New York State Labor Relations Board v. Toffenetti Restaurant Co., 44 N.Y.S.2d 798, 180 Misc. 326, affirmed 42 N.Y.S.2d 938, 266 App.Div. 837, appeal denied 44 N.Y.S.2d 262, first case, 266 App.Div. 950, stay granted 44 N.Y.S.2d 262, second case, 266 App.Div. 950, appeal dismissed 52 N.E.2d 961, 291 N.Y. 750.
Pa.—In re Ewart, 42 Pa.Dist. & Co. 307.
Wis.—International Union, United Automobile, Aircraft & Agricultural Implement Workers of America v. Wisconsin Employment Relations Board, 14 N.W.2d 872, 245 Wis. 417, followed in 14 N.W.2d 882, 245 Wis. 439, and rehearing denied 15 N.W.2d 873, 245 Wis. 417, certiorari dismissed 65 S.Ct. 685, 324 U.S. 884, 89 L.Ed. 1434.

Acceptance as correct
The board's determination that a union was not company-dominated and that it was the exclusive bargaining representative for the employees must be accepted as correct in a proceeding by the employer to enjoin a rival union from picketing.—Sachs Quality Furniture v. Hensley, 55 N.Y.S.2d 450, 269 App.Div. 264.

Res judicata; estoppel
The state labor relations board is not precluded by any principle of res judicata or estoppel, or by public policy, from making valid order commanding employer to cease and desist from acts shown by such investigation to be unlawful and constituting continuing means of thwarting policy of the statute.—New York State Labor Relations Board v. Holland Laundry, 63 N.E.2d 68, 294 N.Y. 480, reargument denied 64 N.E.2d 278, 295 N.Y. 568.

Precedence over arbitration award
A decision of a state labor relations board takes precedence over an arbitration award made without prejudice to the rights of the parties under the state labor relations act.—Application of Building Service Employees International Union, Local No. 32K, 60 N.Y.S.2d 811.

50. Mass.—Jordan Marsh Co. v. Labor Relations Commission, 45 N.E.2d 925, 312 Mass. 597.
Pa.—In re Lehrman, Com.Pl., 52 Dauph.Co. 1.
Wis.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

51. Wis.—Appleton Chair Corporation v. United Brotherhood of Carpenters & Joiners, Millmen's Local No. 1748, 1 N.W.2d 188, 239 Wis. 337.

Not mere fact finding agency
It is the order of the employment relations board which determines the status and relative rights of parties and the existence of a certain fact does not of itself require the board to reach a certain result, since board's findings merely furnish the factual situation to which the board in the exercise of its discretion applies the law.—Appleton Chair Corporation v. United Brotherhood of Carpenters & Joiners, Millmen's Local No. 1748, supra.

52. N.Y.—New York State Labor Relations Board v. Toffenetti Restaurant Co., 46 N.Y.S.2d 70, 181 Misc. 779, affirmed 47 N.Y.S.2d 113, 267 App.Div. 860, appeal denied 47 N.Y.S.2d 310, 267 App.Div. 869, motion dismissed 55 N.E.2d 379, 292 N.Y. 618, and reversed on other grounds 48 N.Y.S.2d 554, 267 App.Div. 978.
Utah.—Teamsters Local Union No. 222 v. Strevell-Paterson Hardware Co., 174 P.2d 164.

53. Utah.—Teamsters Local Union No. 222 v. Strevell-Paterson Hardware Co., supra.

the notice of the board's order in all of its shops and not only in those where the violation occurred.[54] It has been held that the form of the notice should be such as to avoid unnecessary embarrassment to the employer.[55]

Reinstatement and back-pay orders. Under some of the statutes the state board has the power to order an employer guilty of unfair labor practices in violation of the statute to reinstate discharged employees[56] and to pay them for the period since their discharge.[57] Reinstatement may be ordered only if the discharge involved discrimination against the employee because of the exercise of the rights guaranteed him by the statute or was the result of an unfair labor practice.[58] Relief as to an employee discharged in violation of the statute has been held not to be dependent on his application for reinstatement[59] but in the case of an employee on strike, relief has been held to be dependent on an application for reinstatement.[60] The board has considerable discretion as to the award of back pay, but the discretion is a legal discretion.[61]

It has been held that the back pay award should be limited to an amount necessary to effectuate the policies of the statute.[62] In computing the back-pay award, the amount earned in other employment

54. N.Y.—New York State Labor Relations Board v. National Beauty Parlors, 45 N.Y.S.2d 36, 180 Misc. 997.

55. N.Y.—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347.

56. N.Y.—Collier Service Corporation v. Boland, 4 N.Y.S.2d 480, 167 Misc. 709.
Pa.—In re Lehrman, Com.Pl., 52 Dauph.Co. 1—In re Lane's Apparel Shops, Com.Pl., 32 Del.Co. 115.
Wis.—Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 295 N.W. 791, 237 Wis. 164, affirmed 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. 1154—Century Building Co. v. Wisconsin Employment Relations Board, 291 N.W. 305, 235 Wis. 376—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

Conciliations and conciliatory efforts are in order at any stage of proceedings before labor relations board, even after commencement of court action, and employer, who was found guilty of unfair labor practices, might properly have offered to reinstate discharged employees at any time.—Folding Furniture Works v. Wisconsin Labor Relations Board, supra.

Employees engaged in interstate commerce

The exclusive method for reinstatement available to two employees engaged in interstate commerce, allegedly discharged for labor activities, would be by a proceeding had before National Labor Relations Board.—Benedict v. Limited Editions Club, 39 N.Y.S.2d 852, 265 App.Div. 518.

57. N.Y.—New York State Labor Relations Board v. Toffenetti Restaurant Co., 44 N.Y.S.2d 798, 180 Misc. 326, affirmed 42 N.Y.S.2d 938, 266 App.Div. 837, appeal denied 44 N.Y.S.2d 262, first case, 266 App.Div. 950, stay granted 44 N.Y.S.2d 262, second case, 266 App.Div. 950, appeal dismissed 52 N.E.2d 961, 291 N.Y. 750.
Pa.—Metropolitan Life Ins. Co. v. Insurance Guild, Local No. 22, 49 Pa.Dist. & Co. 75—In re Lehrman, Com.Pl., 52 Dauph.Co. 1—Manko v. Kahn, Com.Pl., 93 Pittsb.Leg.J. 477.

Assignee

A back-pay award has been held to be binding on the employer's assignee for the benefit of creditors.—New York State Labor Relations Board v. Peerless Wood Products, 9 N.Y.S.2d 855, 170 Misc. 594.

Offer to reinstate

An order requiring an employer to offer to reinstate discharged employees with back pay up to time offer should be made, without taking into consideration the fact that employer had offered to take the men back during the proceedings before the hearing chairman, was improper.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

Payment by union

The employment relations board, which ordered employer to reinstate nonunion employee who had been discharged pursuant to closed-shop agreement which violated statute, could not require union to pay to employer one half of wages required to be paid by employer to employee from time of his discharge to date of his reinstatement, since under Employment Peace Act the board may require reinstatement of employee with or without pay, but cannot divide the obligation placed on employer.—International Brotherhood of Paper Makers, Local No. 66, A. F. of L. v. Wisconsin Employment Relations Board, 24 N.W.2d 672, 249 Wis. 362.

58. N.Y.—New York State Labor Relations Board v. Union Club of City of N. Y., 52 N.Y.S.2d 74, 268 App.Div. 516, reversed on other grounds 68 N.E.2d 29, 295 N.Y. 915.
Pa.—In re Lehrman, Com.Pl., 52 Dauph.Co. 1—Hodson Motor Co. v. United Automobile Workers, Com. Pl., 89 Pittsb.Leg.J. 241.

Discharge pursuant to closed-shop contract

The statute authorizing making of contract for closed shop between employer and employee only in manner specified does not conflict with provision of National Labor Relations Act removing any restriction in federal law on right of employer and employees to bargain for closed shop, and hence an employee who had not joined the union and had been discharged pursuant to closed-shop agreement which violated the statute was properly ordered reinstated.—International Broth. of Paper Makers, Local No. 66, A. F. of L. v. Wisconsin Employment Relations Board, 24 N.W.2d 672, 249 Wis. 362.

Reinstatement order held not supported by findings

Wis.—Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 279 N.W. 673, 228 Wis. 473, 117 A.L.R. 398.

59. N.Y.—New York State Labor Relations Board v. Union Club of City of N. Y., 52 N.Y.S.2d 74, 268 App.Div. 516, reversed on other grounds 68 N.E.2d 29, 295 N.Y. 915.

60. N.Y.—New York State Labor Relations Board v. Union Club of City of N. Y., supra.

61. Pa.—W. T. Grant Co. v. United Retail Employees of America, Local No. 134, 31 A.2d 900, 347 Pa. 224.

62. Wis.—Folding Furniture Works v. Wisconsin Labor Relations Board, 286 N.W. 875, 232 Wis. 170.

Refusal of employment

If it appeared that employee who was found by the labor relations board to have been discharged solely because she was an active union member and the chairman of the

should be deducted,[63] and back pay should not be awarded for periods during which the employee made no effort to secure employment.[64]

Unfair practices by employees or their organization. Under a state statute proscribing certain unfair labor practices committed by employees, an order may run against a labor union which "caused to be done" the unfair labor practice.[65] Where a union is found to have engaged in unfair labor practices, the board may order it to cease and desist from unfair labor practices and unlawful acts,[66] and may order it to cease publicly asserting that an employer is unfair to organized labor or to the union involved where the sole basis for such claim is the fact that the employer has refused to perform an act which the law forbids.[67] The board may act against attempted unfair practices; the fact that the union did not succeed in accomplishing its unfair objectives does not deprive the board of the power to order the union to cease such activities.[68] However, in the absence of statutory provision therefor, the board may not order the union to pay damages.[69]

An order has been held not to be prejudicial in that it is too broad and forbids unfair labor practices which the union is not shown to have committed,[70] and it has been held that an order forbidding peaceful picketing generally will not be disturbed since the order is to be construed in its context as limited to picketing to promote an unlawful purpose.[71] Where a labor union has committed an unfair labor practice by calling a strike without following the procedure prescribed by the statute, the board may order the union to cease all picketing and boycotting.[72] The union may be ordered to desist from interfering with the rights of others than the complainants, where such others are made party to

grievance committee and was ordered to be reinstated was offered appropriate employment and declined it or otherwise became disqualified from performing the duties of employment, those facts should be taken into consideration in determining the sum necessary to reimburse her.—In re W. T. Grant Co., 17 A.2d 614, 341 Pa. 70.

Financial consequences to employer

An order requiring employer to offer to reinstate discharged employees and to pay those who accepted offer back pay up to time offer should be made, was unreasonable with respect to amount of back pay ordered and would be set aside as to amount, in view of employer's limited capital and amount of time consumed by board in deciding action.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

63. Pa.—W. T. Grant Co. v. United Retail Employees of America, Local No. 134, 31 A.2d 900, 347 Pa. 224—Manko v. Kahn, Com.Pl., 93 Pittsb.Leg.J. 477.

64. Pa.—W. T. Grant Co. v. United Retail Employees of America, Local No. 134, 31 A.2d 900, 347 Pa. 224—Manko v. Kahn, Com.Pl., 93 Pittsb.Leg.J. 477.

65. Wis.—Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 299 N.W. 31, 238 Wis. 379, certiorari denied Milk & Ice Cream Drivers and Dairy Employees Union, Local 225 v. Wisconsin Employment Relations Board, 62 S.Ct. 1035, 316 U.S. 668, 86 L.Ed. 1744.

Unfair practices by both employer and employees

Where there are unfair labor practices on the part of both employer and employee, in furtherance of public policy, the Employment Relations Board by reason of its disinterested position is authorized to order the remedy most consistent with the public interest.—Appleton Chair Corporation v. United Brotherhood of Carpenters & Joiners, Millmen's Local No. 1748, 1 N.W.2d 188, 239 Wis. 337.

66. Wis.—Christoffel v. Wisconsin Employment Relations Board, 10 N.W.2d 197, 243 Wis. 332, certiorari denied 64 S.Ct. 90, 320 U.S. 776, 88 L.Ed. 466.

Coercion of employer

Wis.—Christoffel v. Wisconsin Employment Relations Board, supra.

Operation against union members

The prohibition of cease and desist order issued by employment relations board against union operates on individual members of the union as well as on union officers, although individual members are not named as defendants, since union is only an association of its members and whatever is forbidden the union is forbidden to its members.—International Union, U. A. W. A. A. F. of L., Local 232 v. Wisconsin Employment Relations Board, 27 N.W.2d 875, 250 Wis. 550.

Slow-down strike

Wis.—International Union, U. A. W. A. A. F. of L., Local 232 v. Wisconsin Employment Relations Board, supra.

67. Wis.—Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 299 N.W. 31, 238 Wis. 379, certiorari denied Milk & Ice Cream Drivers and Dairy Employees Union, Local 225, v. Wisconsin Employment Relations Board, 62 S.Ct. 1035, 316 U.S. 668, 86 L.Ed. 1744.

68. Wis.—Christoffel v. Wisconsin Employment Relations Board, 10 N.W.2d 197, 243 Wis. 332, certiorari denied 64 S.Ct. 90, 320 U.S. 776, 88 L.Ed. 466.

69. Wis.—International Union, United Automobile, Aircraft & Agricultural Implement Workers of America v. Wisconsin Employment Relations Board, 14 N.W.2d 872, 245 Wis. 417, followed in 14 N.W.2d 882, 245 Wis. 439, and rehearing denied 15 N.W.2d 873, 245 Wis. 417, certiorari dismissed 65 S.Ct. 685, 324 U.S. 884, 89 L.Ed. 1434.

70. Wis.—Christoffel v. Wisconsin Employment Relations Board, 10 N.W.2d 197, 243 Wis. 332, certiorari denied 64 S.Ct. 90, 320 U.S. 776, 88 L.Ed. 466.

Order held not too indefinite

Order banning coercion or intimidation by certain methods or by any other manner or in any other way was not too broad or too indefinite. —Christoffel v. Wisconsin Employment Relations Board, supra.

71. Wis.—Retail Clerks' Union, Local No. 1403, A. F. of L., v. Wisconsin Employment Relations Board, 6 N.W.2d 698, 242 Wis. 21, 149 A.L.R. 452.

72. Wis.—Hotel and Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 294 N.W. 632, 236 Wis. 329, rehearing denied 295 N.W. 634, 236 Wis. 329, affirmed 62 S.Ct. 706, 315 U.S. 437, 86 L.Ed. 946.

the proceeding.[73] A union offending against the act may be required to post notices of the board's action and its compliance therewith.[74]

§ 28(110). Orders by Federal Administrative Bodies

The National Labor Relations Board has the power to order persons found to have violated the statute to cease and desist from unfair labor practices and to take such affirmative action as will effectuate the policies of the statute.

Under the National Labor Relations Act § 10, 29 U.S.C.A. § 160, the National Labor Relations Board has the power to order persons found to have committed unfair labor practices in violation of the statute to cease and desist from unfair labor practices[75] and to take such affirmative action as will effectuate the policies of the statute.[76] The provision of the statute conferring such power on the board is valid[77] and is to be construed in harmony with the spirit and remedial purposes of the act.[78] The board may order such affirmative action as will ensure the employees their rights,[79] as of self-organization and collective bargaining,[80] and its power to order affirmative action is not limited to ordering the reinstatement of employees.[81]

The National Labor Relations Board has wide discretion as to the orders it may issue and the relief it may direct.[82] It is for the board to determine how the effect of unfair labor practices shall be ex-

73. Wis.—Christoffel v. Wisconsin Employment Relations Board, 10 N.W.2d 197, 243 Wis. 332, certiorari denied 64 S.Ct. 90, 320 U.S. 776, 88 L.Ed. 466.

74. Wis.—Christoffel v. Wisconsin Employment Relations Board, supra.

75. U.S.—N. L. R. B. v. Mackay Radio & Tel. Co., 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F.2d 816.

Nature of orders

A cease and desist order of the National Labor Relations Board is of the nature of an injunction, and its affirmative provisions are analogous to those of a mandatory injunction.—National Labor Relations Board v. Wm. Tehel Bottling Co., C.C.A.8, 129 F.2d 250—National Labor Relations Board v. Colten, C.C.A.6, 105 F.2d 179.

76. U.S.—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U.S. 809, 88 L.Ed. 489—International Ass'n of Machinists, Tool & Die Makers Lodge No. 35 v. N. L. R. B., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831—N. L. R. B. v. National Casket Co., C.C.A., 107 F.2d 992.

The time when it is to be determined whether affirmative action, which the board may direct employer to take, will effectuate policies of act, is the time when board makes its order.—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045.

Passes to union representatives

An order requiring operators of oil tankers to cease and desist from refusing to grant passes to representatives of a maritime union should have provided that passes should be forfeited, if the holders used their access to the vessels either to solicit membership in the union or to collect dues.—N. L. R. B. v. Cities Service Oil Co., C.C.A.2, 122 F.2d 149.

77. U.S.—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F.2d 816.

78. U.S.—Republic Steel Corporation v. N. L. R. B., 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307.

79. U.S.—Republic Steel Corporation v. N. L. R. B., 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. Continental Oil Co., C.C.A.10, 121 F.2d 120.

80. U.S.—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992.

81. U.S.—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U.S. 809, 88 L.Ed. 489.

Reinstatement orders see **infra § 28 (119).**

The phrase "including reinstatement of employees" was inserted in statute to illustrate a type of relief appropriate to commonly recurring unfair labor practice, rather than for purpose of limiting remedial powers of the board.—N. L. R. B. v. Waumbec Mills, C.C.A.1, 114 F.2d 226.

82. U.S.—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U.S. 809, 88 L.Ed. 489—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831—N. L. R. B. v. Quality & Service Laundry, C.C.A.4, 131 F.2d 182, certiorari denied Quality & Service Laundry v. N. L. R. B., 63 S.Ct. 831, 318 U.S. 775, 87 L.Ed. 1144—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—Solvay Process Co. v. N. L. R. B., C.C.A.5, 117 F.2d 83, certiorari denied 61 S.Ct. 1121, 313 U.S. 596, 85 L.Ed. 1549, and petition granted, C.C.A., 122 F.2d 993.

Affirmative or negative relief

The board may exercise discretion in determining whether affirmative or negative relief, or both, should be granted.—Solvay Process Co. v. N. L. R. B., supra.

Necessity for, and character of, relief

The board has the right to exercise judgment and discretion regarding the necessity for affirmative relief and the character of affirmative relief to be ordered.—Swift & Co. v. N. L. R. B., C.C.A.10, 106 F.2d 87.

Orders held valid

U.S.—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—Sperry Gyroscope Co. v. N. L. R. B., C.C.A.2, 129 F.2d 922—Solvay Process Co. v. N. L. R. B., C.C.A.5, 117 F.2d 83, certiorari denied 61 S.Ct. 1121, 313 U.S. 596, 85 L.Ed. 1549, and petition granted, C.C.A., 122 F.2d 993—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681—N. L. R. B. v. H. E. Fletcher Co., C.C.A.1, 108 F.2d 459, certiorari denied H. E. Fletcher Co. v. N. L. R. B., 60 S.Ct. 716, 309 U.S. 678, 84 L.Ed. 1022.

punged and the relief to be awarded,[83] and the test of its power to grant particular relief and to issue particular orders is whether such award will effectuate the policies of the statute.[84] However, the board's power is not unlimited,[85] and the board is not authorized to break some other law as a means of enforcing the statute.[86] The board does not have the power of punishment or retribution for past wrongs or errors;[87] the power to command affirmative action is remedial, not punitive,[88] and is to be exercised in aid of the board's authority to restrain violations and as a means of removing or avoiding the consequences of violations where those consequences are the kind to thwart the purposes of the act,[89] and is designed to enable the board to restore the status that would have existed had the unfair labor practice not been committed.[90]

The relief which the board may grant is to be adapted to the situation which calls for redress.[91] The board has the power to take appropriate steps to nullify the effect of the employer's illegal conduct and to prevent its enjoyment of any advantage gained thereby,[92] and in determining whether a particular remedy is justified, the restoration of the situation to that which would have obtained but for the commission of the unfair labor practices should be considered.[93]

The board may order an employer to engage in collective bargaining,[94] and to refrain from inter-

83. U.S.—International Ass'n of Machinists v. N. L. R. B., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50—National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799—N. L. R. B. v. Porcelain Steels, C.C.A.6, 138 F.2d 840—Williams Motor Co. v. N. L. R. B., C.C.A.8, 128 F.2d 960.

84. U.S.—Williams Motor Co. v. N. L. R. B., supra.

85. U.S.—N. L. R. B. v. Fansteel Metallurgical Corp., 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. Scullin Steel Co., C.C.A.8, 161 F.2d 143.

Power denied by statute

The board has broad powers to require such affirmative action as will effectuate policies of National Labor Relations Act, but it cannot order any action clearly denied to it by statute.—Mooresville Cotton Mills v. N. L. R. B., C.C.A.4, 94 F.2d 61, modified on other grounds 97 F.2d 959.

86. U.S.—N. L. R. B. v. Scullin Steel Co., C.C.A.8, 161 F.2d 143.

Violation of contract

Where employees designated an independent union as their bargaining agent and the board issued its certificate and employer by contract recognized the union as employees' representative, board could not require violation of the contract because of alleged unfair labor practices engaged in by employer subsequent to execution of the contract.—N. L. R. B. v. Scullin Steel Co., supra.

87. U.S.—Republic Steel Corp. v. N. L. R. B., 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6—N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219—National Labor Relations Board v. Cape County Milling Co., C.C.A.8, 140 F.2d 543, 152 A.L.R. 144—N. L. R. B. v. Thompson Products, C.C.A.6, 130 F.2d 363—N. L. R. B. v. Marshall Field & Co., C.C.A.7, 129 F.2d 169, 144 A.L.R. 394, affirmed 63 S.Ct. 585, 318 U.S. 253, 87 L.Ed. 744, rehearing denied 63 S.Ct. 849, 318 U.S. 802, 87 L.Ed. 1165.

Order held not punitive

Provisions directing employer to afford its employees adequate protection from violence directed at discouraging membership in union and to give certain instructions to employees were not punitive.—N. L. R. B. v. Ford Motor Co., C.C.A.5, 119 F.2d 326.

88. U.S.—Republic Steel Corp. v. N. L. R. B., 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—Black Diamond S. S. Corp. v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S.Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employees' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

89. U.S.—N. L. R. B. v. Fansteel Metallurgical Corp., 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—Consolidated Edison Co. of N. Y. v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

90. U.S.—Black Diamond S. S. Corporation v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S.Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542—N. L. R. B. v. Remington Rand, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

91. U.S.—N. L. R. B. v. Mackay Radio & Telegraph Co., 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381—Clover Fork Coal Co. v. N. L. R. B., C.C.A.6, 97 F.2d 331.

Relief awarded held appropriate

U.S.—Bethlehem Shipbuilding Corp. Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141.

92. U.S.—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580.

93. U.S.—Williams Motor Co. v. N. L. R. B., C.C.A.8, 128 F.2d 960.

94. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762—N. L. R. B. v. Consolidated Mach. Tool Corp., C.C.A.2, 163 F.2d 376—N. L. R. B. v. Gatke Corp., C.C.A.7, 162 F.2d 252—N. L. R. B. v. Porcelain Steels, C.C.A.6, 138 F.2d 840—Pueblo Gas & Fuel Co. v. N. L. R. B., C.C.A.10, 118 F.2d 304—Wilson & Co. v. N. L. R. B., C.C.A.8, 115 F.2d 759—Bethlehem Shipbuilding Corp. Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141.

Board may not dictate terms of contract, but may only direct employer to bargain in good faith.—Singer Mfg. Co. v. N. L. R. B., C.C.A.7, 119 F.2d 131, certiorari denied 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549, rehearing denied 62 S.Ct. 55, 314 U.S. 708, 86 L.Ed. 565.

Place of bargaining

The board has authority to order corporation to bargain collectively

fering with the efforts of the accredited bargaining representative to bargain collectively.[95] The board may order affirmative remedial action not only as to contracts between employer and employees, whose terms per se violate the act,[96] but may also take such action as to contracts whose terms are fair on their face, but which in their history, execution, and existence are tainted by conduct which is condemned by the act.[97] It may order an employer not to give effect to individual contracts with his employees,[98] and to refrain from requiring his employees to contract with him not to join a labor organization.[99] The board may order the employer to cease recognizing and enforcing a contract with an employees' organization where such contract is unfair or is the consequence of unfair labor practices,[1] to embody in a written agreement the contract it has made with the employees' representative,[2] and to afford its employees reasonable protection from physical violence.[3] The board may order the suppression or discontinuance of oppressive acts against employees, even though the employer's management is entirely ignorant of such acts.[4]

Nature of orders. The board's orders are not private awards but are public reparation orders,[5] and are for the enforcement of public, not of private, rights.[6]

Form of order. The orders of the National Labor Relations Board should be explicit[7] and must state with reasonable specificity the acts which respondent is to do or refrain from doing.[8]

Time for order. The statute sets no time limit

through union in city wherein plant is located, instead of distant city wherein corporation's main executives' offices are.—N. L. R. B. v. P. Lorillard Co., C.C.A.6, 117 F.2d 921, reversed on other grounds 62 S.Ct. 397, 314 U.S. 512, 86 L.Ed. 380.

Specified organization

In an unfair labor practices proceeding the board may not only order the employer to cease and desist from the complained of practices, but it may go further and direct the employer to bargain with a specified labor organization, even though another organization, which the employer improperly favored, claims that it has been designated by a majority of the employees.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., App.D.C., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

95. U.S.—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U.S. 751, 87 L.Ed. 1705.

96. U.S.—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520.

Fruits of unfair practices

Where contracts between employer and employees were the fruits of unfair labor practices, and were a continuing means of thwarting the policy of the statute, the contracts were appropriate subjects for affirmative remedial action by board.—National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799.

97. U.S.—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520.

98. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762—N. L. R. B. v. Adel Clay Products Co., C.C.A.8, 134 F. 2d 342—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 134 F.2d 240, certiorari denied 64 S.Ct. 48, 320 U.S. 746, 88 L.Ed. 443—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L. Ed. 1520.

99. U.S.—N. L. R. B. v. Tidewater Express Lines, C.C.A.4, 90 F.2d 301.

1. U.S.—Consolidated Edison Co. of N. Y. v. N. L. R. B., N.Y., 59 S. Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

Right to strike

An order to cease giving effect to closed shop contract with one union and to bargain with exclusive bargaining representative was not objectionable as interfering with first union's right to strike.—N. L. R. B. v. John Engelhorn & Sons, C.C.A.3, 134 F.2d 553.

Contracts not unfair or fruit of unfair practices

Where there was no basis for a finding that labor contracts between employers and favored but not company-dominated union were a consequence of unfair labor practices or that contracts in themselves thwarted any policy of the National Labor Relations Act or that their cancellation would in any way make the order to cease specified unfair practices any more effective, the board had no authority to require employers to desist from giving effect to contracts.—Consolidated Edison Co. of N. Y. v. N. L. R. B., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

2. U.S.—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309.

Contra Inland Steel Co. v. N. L. R. B., C.C.A.7, 109 F.2d 9.

3. U.S.—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585.

4. U.S.—N. L. R. B. v. Citizen-News Co., C.C.A.9, 134 F.2d 962.

5. U.S.—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260.

6. U.S.—N. L. R. B. v. Newark Morning Ledger Co., C.C.A.3, 120 F.2d 262, 137 A.L.R. 849, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 86 L.Ed. 554.

7. U.S.—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 104 F.2d 302.

8. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762—N. L. R. B. v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72—N. L. R. B. v. Lipshutz, C.C. A.5, 149 F.2d 141—Hughes Tool Co. v. N. L. R. B., C.C.A.5, 147 F.2d 69.

Protection of employees from violence

An order directing employer to afford all its employees reasonable protection at all times from physical assaults or threats of physical violence directed at discouraging membership in unions was not fatally defective because of indefiniteness.—N. L. R. B. v. General Motors Corporation, C.C.A.7, 116 F.2d 306.

Refusal to bargain

An order determining that employer has refused to bargain in good faith and directing it to cease and desist from such refusal is not objectionable as vague and indefinite. —Singer Mfg. Co. v. N. L. R. B., C.

within which the board must make its order[9] and complaint may not be made of a delay which is not unreasonable,[10] but, where the delay is unreasonable, circumstances excusing the delay should be shown,[11] since, as discussed infra § 28 (125), laches in reaching a decision may bar enforcement of the order.

Service of order. The statute requires that the board serve the order on the persons affected thereby, but a liberal, practical view will be taken as to the sufficiency of the compliance with this provision.[12]

§ 28(111). —— Scope of Order

a. In general
b. Restriction to issues and pleadings
c. Restriction to evidence and findings

a. In General

The national labor relations board may restrain any unlawful practice which it has found the employer to have committed, but it may not issue a blanket order forbidding any acts in violation of the statute unless the board may reasonably conclude from the evidence that such an order is necessary.

The scope of the orders of the National Labor Relations Board is of importance,[13] since, unlike violations of the statute, violations of the board's orders, when enforced by judicial decree, may be punished as contempt, as discussed infra § 28 (142).

The board has authority to restrain the unlawful practice which it has found the employer to have committed[14] and other like or related unlawful acts,[15] but not other unlawful acts which the em-

C.A.7, 119 F.2d 131, certiorari denied 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549, rehearing denied 62 S.Ct. 55, 314 U.S. 708, 86 L.Ed. 565.

Union solicitation

An order directing department store to rescind rule in so far as it prohibited union solicitation off the selling floor during nonworking hours was not so vague and unworkable as to be invalid; nor was it invalid because of circumstance that store had chosen to allow its employees to use washrooms and restrooms open to the public, instead of private facilities.—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F. 2d 533, certiorari denied 67 S.Ct. 72.

Order held sufficiently certain

U.S.—N. L. R. B. v. Stone, C.C.A.7, 125 F.2d 752, certiorari denied Stone v. N. L. R. B., 63 S.Ct. 44, 317 U.S. 649, 87 L.Ed. 522.

9. U.S.—N. L. R. B. v. Isthmian S. S. Co., C.C.A.2, 126 F.2d 598.

10. U.S.—Firth Carpet Co. v. N. L. R. B., C.C.A.2, 129 F.2d 633.

11. U.S.—N. L. R. B. v. Isthmian S. S. Co., C.C.A.2, 126 F.2d 598.

12. U.S.—N. L. R. B. v. Suburban Lumber Co., C.C.A.3, 121 F.2d 829, certiorari denied Suburban Lumber Co. v. N. L. R. B., 62 S.Ct. 364, 314 U.S. 693, 86 L.Ed. 554.

13. U.S.—May Dept. Stores v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495.

14. U.S.—N. L. R. B. v. May Department Stores, 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495—Medo Photo Supply Corporation v. N. L. R. B., 64 S. Ct. 830, 321 U.S. 678, 88 L.Ed. 1007, affirming National Labor Relations Board v. Medo Photo Supply Corporation, 135 F.2d 279—N. L. R. B. v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930—N. L. R. B. v. Lipshutz, C.C.A.5, 149 F. 2d 141—Canyon Corporation v. N. L. R. B., C.C.A.8, 128 F.2d 953—N. L. R. B. v. Chattanooga Bakery, C. C.A.6, 127 F.2d 201, certiorari denied Chattanooga Bakery v. N. L. R. B., 63 S.Ct. 157, 317 U.S. 676, 87 L.Ed. 543—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523—Burk Bros. v. N. L. R. B., C.C.A.3, 117 F.2d 686, certiorari denied 61 S.Ct. 1110, 313 U.S. 588, 85 L.Ed. 1543—N. L. R. B. v. Swift & Co., C.C.A.7, 108 F.2d 988.

15. U.S.—N. L. R. B. v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930—N. L. R. B. v. Lipshutz, C.C.A.5, 149 F.2d 141—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F.2d 44, certiorari denied 65 S.Ct. 1025, 324 U.S. 877, 89 L.Ed. 1429—National Labor Relations Board v. Brezner Tanning Co., C.C.A.1, 141 F.2d 62—Canyon Corporation v. N. L. R. B., C.C.A.8, 128 F.2d 953—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433—N. L. R. B. v. Continental Oil Co., C.C.A.10, 121 F.2d 120—N. L. R. B. v. Newark Morning Ledger Co., C.C.A.3, 120 F.2d 262, 137 A.L.R. 849, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 314 U.S. 693, 86 L.Ed. 554—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F. 2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—N. L. R. B. v. Swift & Co., C.C.A. 7, 108 F.2d 988—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F.2d 652.

Discretion

Question whether board on finding unfair labor practices by employer should restrain employer from committing other related unlawful acts is a matter for the informed discretion of the board.—N. L. R. B. v. Sun Tent-Luebbert Co., C.C.A.9, 151 F.2d 483, opinion supplemented 154 F.2d 108.

Interference with self-organization

(1) Board properly prohibited, generally, any interference with the right of self-organization and not merely the particular kind of interference covered by finding against employer.—N. L. R. B. v. American Oil Co. (Curtis Bay Plant), C.C.A.4, 114 F.2d 1009.

(2) A cease and desist order restraining employers organization from interfering with labor organization of employees is not too broad because it restrains similar acts of the corporation with employers other than ones with whom corporation was found to have committed unfair labor practices, where danger of commission of such violations in future could be anticipated from course of corporation's conduct in the past.—N. L. R. B. v. Sun Tent-Luebbert Co., C.C.A.9, 151 F.2d 483, opinion supplemented 154 F.2d 108.

Fact that restraints are broader than the offenses is not a valid ground for objection.—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126.

Protection from violence

An order directing employer to afford employees reasonable protection from physical assaults or threats of physical violence directed at discouraging membership in unions was not objectionable as being too broad.—N. L. R. B. v. General Motors Corporation, C.C.A.7, 116 F.2d 306.

ployer is not shown to have committed or which are not related to the proved unlawful conduct.[16]

The test of the proper scope of a cease and desist order is whether the board might reasonably conclude from the evidence that such order is necessary to prevent the employer from engaging in an unfair labor practice.[17] Accordingly, the board may not issue a blanket order forbidding any acts in violation of the statute or any unfair labor practices[18] where the record does not disclose persistent attempts by varying methods to interfere with the right of self-organization under circumstances in which could be found the threat of continuing and varying efforts to attain the same end in the future.[19] To justify an order restraining violations other than that found, it must appear that they bear some resemblance to that which the employer has committed, or that the danger of their commission in the future is to be anticipated from the course of his conduct in the past.[20]

16. U.S.—N. L. R. B. v. May Department Stores, 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495—N. L. R. B. v. Express Pub. Co., 61 S.Ct. 693, 312 U. S. 426, 85 L.Ed. 930—N. L. R. B. v. Federal Engineering Co., C.C.A.6, 153 F.2d 233, rehearing denied 155 F.2d 17—N. L. R. B. v. Kinner Motors, C.C.A.9, 152 F.2d 816, modified on other grounds 154 F.2d 1007—N. L. R. B. v. Lipshutz, C.C.A.5, 149 F.2d 141—N. L. R. B. v. Gluek Brewing Co., C.C.A.8, 144 F.2d 847—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A.6, 133 F.2d 295—Aluminum Ore Co. v. N. L. R. B., C.C.A.7, 131 F.2d 485, 147 A.L.R. 1—Canyon Corporation v. N. L. R. B., C.C.A.8, 128 F.2d 953—N. L. R. B. v. Stone, C.C.A.7, 125 F.2d 752, certiorari denied Stone v. N. L. R. B., 63 S.Ct. 44, 317 U.S. 649, 87 L. Ed. 522—N. L. R. B. v. Burry Biscuit Corporation, C.C.A.7, 123 F.2d 540—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.8, 118 F.2d 780—Globe Cotton Mills v. N. L. R. B., C.C.A.5, 103 F.2d 91.

17. U.S.—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495.

Analogy to court of equity

The board's power as to the scope of its cease and desist orders is analogous to the power of an equity court as to the scope of an injunction order.—May Dept. Stores Co. v. N. L. R. B., supra—N. L. R. B. v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930—N. L. R. B. v. Federal Engineering Co., C.C.A.6, 153 F.2d 233, rehearing denied 155 F.2d 17.

Circumstances of case

The breadth and propriety of an order depend on the circumstances of the particular case.—N. L. R. B. v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—N. L. R. B. v. Swift & Co., C.C.A.7, 108 F.2d 988.

Past conduct

The scope of the order is to be measured by the character and extent of the employer's past conduct.—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39.

18. U.S.—N. L. R. B. v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930—N. L. R. B. v. Swift & Co., C.C.A.3, 162 F.2d 575—N. L. R. B. v. Federal Engineering Co., C.C.A.6, 155 F.2d 17—N. L. R. B. v. Armour & Co., C.C.A.10, 154 F.2d 570, certiorari denied 67 S. Ct. 92—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72—N. L. R. B. v. American Rolling Mill Co., C.C.A.6, 154 F.2d 57—N. L. R. B. v. Van De Kamp's Holland-Dutch Bakers, C.C.A.9, 152 F.2d 818, modified on other grounds 154 F.2d 828—General Motors Corp. v. N. L. R. B., C.C.A.3, 150 F.2d 201—N. L. R. B. v. Cheney Cal. Lumber Co., C. C.A.9, 149 F.2d 333, reversed on other grounds 66 S.Ct. 553, 327 U.S. 385, 90 L.Ed. 739—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438—N. L. R. B. v. Gluek Brewing Co., C.C.A.8, 144 F.2d 847—Consolidated Aircraft Corporation v. N. L. R. B., C.C.A.9, 141 F.2d 785—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A.6, 133 F.2d 295—N. L. R. B. v. Swift & Co., C.C.A.8, 129 F.2d 222—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C. A.5, 122 F.2d 433—N. L. R. B. v. Cities Service Oil Co., C.C.A.2, 122 F.2d 149—N. L. R. B. v. Continental Oil Co., C.C.A.10, 121 F.2d 120—N. L. R. B. v. West Texas Utilities Co., C.C.A.5, 119 F.2d 683—Singer Mfg. Co. v. N. L. R. B., C. C.A.7, 119 F.2d 131, certiorari denied 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549, rehearing denied 62 S. Ct. 55, 314 U.S. 708, 86 L.Ed. 565.

19. U.S.—N. L. R. B. v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930—N. L. R. B. v. Federal Engineering Co., C.C.A.6, 155 F.2d 17—N. L. R. B. v. Kinner Motors, C.C.A.9, 152 F.2d 816, modified on other grounds 154 F.2d 1007—General Motors Corp. v. N. L. R. B., C.C.A.3, 150 F.2d 201—N. L. R. B. v. Newark Morning Ledger Co., C.C.A.3, 120 F.2d 262, 137 A.L.R. 149, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 314 U.S. 693, 86 L.Ed. 554.

20. U.S.—May Dept. Stores v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495—N. L. R. B. v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L. Ed. 930—N. L. R. B. v. Swift & Co., C.C.A.3, 162 F.2d 575—N. L. R. B. v. Armour & Co., C.C.A.10, 154 F. 2d 570, certiorari denied 67 S.Ct. 92—Commonwealth Edison Co. v. N. L. R. B., C.C.A.7, 135 F.2d 891—N. L. R. B. v. Swift & Co., C.C.A. 8, 129 F.2d 222—N. L. R. B. v. Bradley Lumber Co. of Arkansas, C.C.A.8, 128 F.2d 768—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—Wilson & Co. v. N. L. R. B., C.C.A.8, 123 F.2d 411—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F.2d 368—N. L. R. B. v. Entwistle Mfg. Co., C.C.A.4, 120 F.2d 532—Singer Mfg. Co. v. N. L. R. B., C.C.A.7, 119 F.2d 131, certiorari denied 61 S. Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549, rehearing denied 62 S.Ct. 55, 314 U.S. 708, 86 L.Ed. 565.

Different plants

(1) Where the employer is found to have violated the act at only one of his plants, the board's order must be limited to such plant and may not be directed to all his plants.—N. L. R. B. v. Ford Motor Co., C.C. A.5, 119 F.2d 326.

(2) Where supervisory employees of parent corporation made coercive statements, the board was authorized to issue a cease and desist order, but it was not authorized to disestablish a labor organization at the plant of a wholly owned subsidiary where such organization was freely formed and operated by the employees themselves.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F. 2d 287.

In particular cases, a general order has been held to be improper where a violation of only one of the provisions has been found.[21] Thus, a general order has been held to be improper where the only unfair practice committed is discrimination against union employees[22] or domination of a labor organization.[23] Where the employer has refused to bargain, the board's order should go no further than ordering him to bargain and enjoining acts interfering with the representative's effort to negotiate;[24] and an employer's refusal to bargain, while technically it may be a violation of the employees' right of self-organization, does not warrant a general order to desist from interference.[25] However, it has been held that a general order, in the language of the statute restraining interference with the employees' rights, may issue even where the only unfair labor practice is one specifically condemned by other provisions of the statute,[26] as where the unfair practices committed constitute discrimination against union employees,[27] or domination or interference with a labor organization.[28] Where the employer has been found guilty of interfering, intimidating, and coercing, by acts which are not specifically condemned by the other provisions of the statute, it has been held that he may be required not only to cease and desist from doing the number of things found, but also from all manner of like things.[29]

An omnibus order in the statutory language restraining the employer from interfering with the rights guaranteed employees by the statute is proper where the employer has sought, by various methods, to interfere with the right of self-organization and it appears that it will continue to do so.[30] A

One type of worker

Where the employer's interference was limited to one type of worker, the board's order should be similarly restricted.—N. L. R. B. v. Consolidated Mach. Tool Corp., C.C.A.2, 163 F.2d 376.

21. U.S.—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680.

A finding of a single isolated act did not authorize the board to enter blanket order restraining employer from committing any act in violation of the statute.—N. L. R. B. v. Newark Morning Ledger Co., 120 F. 2d 262, 137 A.L.R. 849, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 314 U.S. 693, 86 L.Ed. 554.

Closed-shop agreement

Where jurisdictional dispute existed and the only unfair practice of employer resulted from closed-shop agreement with union which did not represent majority, provision requiring the employer to cease and desist from interfering with, restraining, or coercing its employees in any manner was eliminated.—Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Affiliated with American Federation of Labor v. N. L. R. B., 121 F. 2d 84, 74 App.D.C. 28, certiorari denied Warehousemen's Union Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L. Ed. 539.

22. U.S.—N. L. R. B. v. Newark Morning Ledger Co., C.C.A.3, 120 F.2d 262, 137 A.L.R. 149, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 314 U.S. 693, 86 L.Ed. 554.

23. U.S.—Commonwealth Edison Co. v. N. L. R. B., C.C.A.7, 135 F.2d 891—N. L. R. B. v. Burry Biscuit Corporation, C.C.A.7, 123 F.2d 540—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868—N. L. R. B. v. Swift & Co., C.C.A.7, 108 F.2d 988.

24. U.S.—N. L. R. B. v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F. 2d 368—N. L. R. B. v. Western Massachusetts Electric Co., C.C.A. 1, 120 F.2d 455.

Where interference with right of self-organization is intertwined with the refusal to bargain, a general order may be improper without a clear determination by the board of an attitude of opposition to the purposes of the act.—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L. Ed. 495.

25. U.S.—N. L. R. B. v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930—N. L. R. B. v. Swift & Co., C.C.A.3, 162 F.2d 575—N. L. R. B. v. Van De Kamp's Holland-Dutch Bakers, C.C.A.9, 152 F. 2d 818, modified on other grounds 154 F.2d 828—N. L. R. B. v. J. I. Case Co., C.C.A.7, 134 F.2d 70, modified on other grounds 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762—N. L. R. B. v. Westinghouse Air Brake Co., C.C.A.3, 120 F.2d 1004—McQuay-Norris Mfg. Co. v. N. L. R. B., C.C.A.7, 119 F.2d 1009, certiorari denied 61 S.Ct. 843, 313 U.S. 565, 85 L.Ed. 1524—Globe Cotton Mills v. N. L. R. B., C.C.A.5, 103 F.2d 91.

Contra N. L. R. B. v. Highland Park Mfg. Co., C.C.A.4, 110 F.2d 632.

26. U.S.—N. L. R. B. v. American Laundry Mach. Co., C.C.A.2, 138 F. 2d 889—N. L. R. B. v. Kaplan, C. C.A.2, 138 F.2d 884, certiorari denied Kaplan v. N. L. R. B., 64 S. Ct. 787, 321 U.S. 788, 88 L.Ed. 1079—N. L. R. B. v. Moench Tanning Co., C.C.A.2, 121 F.2d 951—F. W. Woolworth Co. v. N. L. R. B., C. C.A.2, 121 F.2d 658—N. L. R. B. v. Air Associates, Inc., C.C.A.2, 121 F.2d 586.

Rule questioned

The correctness of the text rule has been questioned, although, in view of its prior decisions thereon, the court followed the text rule.—N. L. R. B. v. Standard Oil Co., C.C. A.2, 138 F.2d 885.

27. U.S.—N. L. R. B. v. American Laundry Mach. Co., C.C.A.2, 138 F. 2d 889—N. L. R. B. v. Bersted Mfg. Co., C.C.A.6, 128 F.2d 738—Wilson & Co. v. N. L. R. B., C.C. A. 7, 124 F.2d 845.

28. U.S.—N. L. R. B. v. Standard Oil Co., C.C.A.2, 138 F.2d 885—N. L. R. B. v. Kaplan, C.C.A.2, 138 F. 2d 884, certiorari denied Kaplan v. N. L. R. B., 64 S.Ct. 787, 321 U.S. 788, 88 L.Ed. 1079.

29. U.S.—N. L. R. B. v. Sunbeam Electric Mfg. Co., C.C.A.7, 133 F. 2d 856.

30. U.S.—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S. Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72—N. L. R. B. v. Morris P. Kirk & Son, C.C.A.9, 154 F.2d 110—N. L. R. B. v. Reeves Rubber Co., C.C.A. 9, 153 F.2d 340—N. L. R. B. v. Bradley Lumber Co. of Arkansas, C.C.A.8, 128 F.2d 768—F. W. Woolworth Co. v. N. L. R. B., C.C.A.2, 121 F.2d 658—N. L. R. B. v. Reynolds Wire Co., C.C.A.7, 121 F.2d 627.

general order has been held proper where the employer refused to bargain, discriminated against union employees, and committed other acts of interference with the employees' right of self-organization;[31] where the employer interfered with or dominated an employee organization, discriminated against union members, and committed other acts of interference,[32] although as to this there is also authority to the contrary;[33] where the employer discriminated against union employees and committed other acts of interference,[34] although, as to this likewise, there is authority to the contrary;[35] and where the employer interfered with and dominated an employee organization and committed other acts of interference with the employees' rights.[36]

b. Restriction to Issues and Pleadings

The order of the National Labor Relations Board should be limited to the issues presented and should be in conformity with the pleadings.

The order of the National Labor Relations Board should be limited to the disposition of the issues actually presented.[37] The board's order should also be in conformity with the pleadings,[38] but this rule is not to be applied technically, and the board may issue an order as to a matter clearly in issue between the parties, although it is technically outside the pleadings.[39] The board may deal adequately with unfair labor practices which are related to those alleged and which grow out of them while the proceeding is pending;[40] and the board may act with respect to an unfair labor practice occurring after the filing of the complaint where it is similar to charges made.[41] The order may be directed at a refusal to bargain which occurs subsequent to the verification of the charge.[42]

c. Restriction to Evidence and Findings

The order must be based on the evidence and be in conformity with, and supported by, the findings.

The orders of the National Labor Relations Board must be based on the evidence[43] and must be in conformity with, and sustained by, the findings of fact,[44] and, where a finding is not supported by the

31. U.S.—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549.

32. U.S.—N. L. R. B. v. Faultless Caster Corporation, C.C.A.7, 135 F. 2d 559—Republic Steel Corporation v. N. L. R. B., C.C.A.3, 107 F.2d 472, certiorari denied 60 S.Ct. 806, 309 U.S. 684, 84 L.Ed. 1027, vacated on other grounds 60 S.Ct. 1072, 310 U.S. 655, 84 L.Ed. 1419, certiorari denied Central Council of Steel Plants, Northern District, Republic Steel Corporation v. N. L. R. B., 60 S.Ct. 808, 309 U.S. 684, 84 L.Ed. 1028, and supplemented, C.C.A., Republic Steel Corporation v. N. L. R. B., 114 F.2d 820, modified on other grounds 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F.2d 652.

33. U.S.—Wilson & Co. v. N. L. R. B., C.C.A.8, 123 F.2d 411.

34. U.S.—N. L. R. B. v. Revlon Products Corporation, C.C.A.2, 144 F.2d 88—N. L. R. B. v. Van Deusen, C.C.A.2, 138 F.2d 893—N. L. R. B. v. Algoma Net Co., C.C.A.7, 124 F.2d 730, certiorari denied Algoma Net Co. v. N. L. R. B., 62 S.Ct. 1311, 316 U.S. 706, 86 L.Ed. 1773—N. L. R. B. v. Air Associates, C.C.A.2, 121 F.2d 586—N. L. R. B. v. Entwistle Mfg. Co., C.C.A. 4, 120 F.2d 532.

Text rule questioned but followed
U.S.—N. L. R. B. v. Federbush Co., C.C.A.2, 121 F.2d 954.

35. U.S.—Wilson & Co. v. N. L. R. B., C.C.A.8, 123 F.2d 411.
D.C.—Press Co. v. N. L. R. B., 118 F.2d 937, 73 App.D.C. 103, certiorari denied 61 S.Ct. 1118, 313 U.S. 595, 85 L.Ed. 1548.

36. U.S.—N. L. R. B. v. Swift & Co., C.C.A.8, 116 F.2d 143.
D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

37. U.S.—Singer Mfg. Co. v. N. L. R. B., C.C.A.7, 119 F.2d 131, certiorari denied 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549, rehearing denied 62 S.Ct. 55, 314 U.S. 708, 86 L.Ed. 565.

Dismissed charge
The board may not issue an affirmative order with respect to a charge which has been dismissed.—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F.2d 816.

38. U.S.—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 113 F.2d 85.

39. U.S.—N. L. R. B. v. Piqua Munising Wood Products Co., C.C.A.6, 109 F.2d 552.

Implicit issue
The order may cover an issue that is implicit in the proceeding, even though the issue is not explicitly set up in the pleading.—N. L. R. B. v. T. W. Phillips Gas & Oil Co., C.C.A.3, 141 F.2d 304.

40. U.S.—National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799.

41. U.S.—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 849, certiorari denied 61 S. Ct. 449, 312 U.S. 680, 85 L.Ed. 1119.

42. U.S.—N. L. R. B. v. Piqua Munising Wood Products Co., C.C.A. 6, 109 F.2d 552.

43. U.S.—N. L. R. B. v. Aluminum Products Co., C.C.A.7, 120 F.2d 567—N. L. R. B. v. Goshen Rubber & Manufacturing Co., C.C.A.7, 110 F.2d 432.
Weight and sufficiency of evidence see supra §§ 28 (95)–28 (101).

44. U.S.—N. L. R. B. v. McGough Bakeries Corp., C.C.A.5, 153 F.2d 420—N. L. R. B. v. Ford Motor Co., C.C.A.6, 119 F.2d 326—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 113 F.2d 85.
Findings of fact see supra § 28 (108).

Order held supported by findings
U.S.—Wallace Corporation v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Richwood Clothespin & Dish Workers' Union, v. N. L. R. B., 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216—Hamilton v. N. L. R. B., C.C.A. 6, 160 F.2d 465—N. L. R. B. v. Sun Tent-Luebbert Co., C.C.A.9, 154 F. 2d 108—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438—Idaho Potato Growers v. N. L. R. B., C. C.A.9, 144 F.2d 295, certiorari denied 65 S.Ct. 122, 323 U.S. 769, 89 L.Ed. 615—N. L. R. B. v. Stehli & Co., C.C.A.3, 125 F.2d 705—N. L. R. B. v. Jahn & Ollier Engraving Co., C.C.A.7, 123 F.2d 589—N. L. R. B. v. Brashear Freight Lines, C.C.A.8, 119 F.2d 379—American Enka Corporation v. N. L. R. B., C.

evidence, an order based on such finding is invalid.[45] The board's order must be directed at an unlawful act as to which a finding has been made;[46] an order to cease and desist from unfair labor practices must be based on findings that the employer has performed improper acts[47] and that such acts constitute unfair labor practices.[48] Thus, an order to bargain may not be made in the absence of a finding that the employer has refused to bargain.[49] The board's order is valid where the findings on which it is based, rather than all of the findings, are valid;[50] where findings sufficient to support the order are valid, the other findings need not be considered.[51] Although some of the findings on which the order is based are invalid, the order may be valid where it is sufficiently supported by other findings.[52]

§ 28(112). —— Effect of Prior Determination

It has been held that the doctrine of res judicata or estoppel may not be invoked to bar the National Labor Relations Board from ordering the cessation of unfair labor practices.

It has been held that the doctrine of res judicata or estoppel may not be invoked to bar the National Labor Relations Board from taking action to stop the commission of unfair labor practices in violation of the statute.[53] Thus, while good practice requires the consolidation of all current charges against an employer, the board is not precluded from acting with respect to certain charges because they could or should have been adjudicated in prior proceedings.[54] The power of the board in relieving against unfair labor practices is not limited by agreements between employer and employees made with the board's approval;[55] nor is it limited by administrative orders which the board has entered.[56] A refusal to file a complaint against an employer because of the board's view that it did not have jurisdiction over him does not preclude the board from thereafter taking action on a new charge and a different state of facts.[57]

§ 28(113). —— Order Moot or Unnecessary

The fact that an employer has ceased his unfair labor practices does not necessarily bar the National Labor Relations Board from ordering him to cease and desist from such practices.

An order of the National Labor Relations Board, if lawful when made, does not become moot by being obeyed or because changing conditions have reduced the need for it.[58] The fact that the employer

C.A.4, 119 F.2d 60—N. L. R. B. v. Yale & Towne Mfg. Co., C.C.A.4, 114 F.2d 376—Bussmann Mfg. Co. v. N. L. R. B., C.C.A.8, 111 F.2d 783 —N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F.2d 652 —N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F.2d 18.

Order held not supported by findings
U.S.—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A.4, 127 F.2d 109—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 113 F.2d 85—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951.

45. U.S.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311.

46. U.S.—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F.2d 816.

47. U.S.—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F. 2d 652.

48. U.S.—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F. 2d 652.

49. U.S.—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F.2d 816.

A change in name and affiliation of union with which employer refused to bargain did not affect validity of order requiring employer to bargain collectively with union designated by its new name.—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292.

50. U.S.—N. L. R. B. v. M. A. Hanna Co., C.C.A.6, 125 F.2d 786—N. L. R. B. v. Yale & Towne Mfg. Co., C.C.A.2, 114 F.2d 376.

51. U.S.—N. L. R. B. v. Yale & Towne Mfg. Co., supra.

52. U.S.—N. L. R. B. v. M. A. Hanna Co., C.C.A.6, 125 F.2d 786.

53. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 130 F.2d 363.

Order for holding of election
The board, by ordering an election in the course of an unfair practices proceeding, does not preclude itself from proceeding further with respect to the charges.—Warehousemen's Union, Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Affiliated with American Federation of Labor v. N. L. R. B., 121 F. 2d 84, 74 App.D.C. 28, certiorari denied Warehousemen's Union Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539—N. L. R. B. v. McKesson & Robbins, 121 F.2d 84, 74 App.D.C. 28, certiorari denied McKesson & Robbins v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539.

54. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 130 F.2d 363.

55. U.S.—Wallace Corporation v. N. L. R. B., C.C.A.4, 141 F.2d 87, affirmed 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435.

Guides
Such settlements and administrative orders are guides for the exercise of the board's discretion, and are not limitations on its power.—Wallace Corporation v. N. L. R. B., supra.

Prior conduct
Where a pending unfair labor practices proceeding is settled by agreement between the employer, the union, and the board, the board may consider the employer's conduct before that agreement in determining a subsequent charge of unfair labor practices.—N. L. R. B. v. Hawk & Buck Co., C.C.A.5, 120 F.2d 903.

56. U.S.—Wallace Corporation v. N. L. R. B., C.C.A.4, 141 F.2d 87, affirmed 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435.

57. U.S.—N. L. R. B. v. Baltimore Transit Co., C.C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084.

58. U.S.—Indianapolis Power & Light Co. v. N. L. R. B., C.C.A.7, 122 F.2d 757, certiorari denied 62 S.Ct. 633, 315 U.S. 804, 86 L.Ed. 1204.

has ceased his unfair labor practices does not necessarily preclude the board from ordering him to cease and desist from such practices,[59] particularly when the practices are not stopped until charges are filed;[60] but, where such is the case, the order should recognize the fact that the employer has previously voluntarily terminated such practices,[61] and it has been held that the board's order should not be directed at an unfair labor practice which has long ceased and as to which there is no prospect of a recurrence.[62] The board has been held not to be precluded from entering an order against an employer who has discontinued business, where he retains ownership of the property and is in a position to reëngage in business.[63] Where an order covering the matter has already been issued in another proceeding, it should not be repeated in the order in the current proceeding.[64]

§ 28(114). —— Against Whom Order May Run

The orders of the National Labor Relations Board may run against the employer's successors and assigns as well as against the employer who violated the statute.

The orders of the National Labor Relations Board may properly run against the employer's successors and assigns as well as against the employer who violated the statute.[65] The inclusion of the term "successors and assigns" in the order does not, however, enlarge the effect of the order as to such persons beyond the limits fixed by the Federal Rules of Civil Procedure as to the persons bound by a restraining order or an order granting an injunction,[66] and it has been held that the inclusion of the phrase "successors and assigns" in the order does not impose any liability which would not exist if the phrase was not included.[67] It has been held that the order should not include the phrase "successors and assigns," since such phrase is unnecessary.[68]

An order against the receiver of a company may provide that it shall run against the company in the event the receivership is discharged.[69] The board's cease and desist order may run not only against the employer, but against another where such other is so interrelated with the employer that the order must run against both, if the rights of the employees are to be effectively protected.[70] The order may properly run against persons who participated with

Change of attitude by employer
An order which was valid when made continued to be the board's authentic exercise of its discretion regardless of change of attitude on part of employer in its labor policy.—N. L. R. B. v. McLain Fire Brick Co., C.C.A.3, 128 F.2d 393.

One specific instance of an unfair labor practice has been held to be sufficient to warrant a cease and desist order.—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126.

59. U.S.—N. L. R. B. v. Burke Mach. Tool Co., C.C.A.6, 133 F.2d 618—N. L. R. B. v. Ford Motor Co., C.C.A.5, 119 F.2d 326—Pueblo Gas & Fuel Co. v. N. L. R. B., C.C.A.10, 118 F.2d 304—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868—N. L. R. B. v. Gerling Furniture Mfg. Co., C.C.A.7, 103 F.2d 663.

60. U.S.—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 119 F.2d 356.

61. U.S.—N. L. R. B. v. Burke Mach. Tool Co., C.C.A.6, 133 F.2d 618.

62. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 130 F.2d 363—N. L. R. B. v. Youngstown Mines Corporation, C.C.A.8, 123 F.2d 178—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 119 F.2d 356.

63. U.S.—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A.6, 133 F.2d 295.

64. U.S.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311.

65. U.S.—Regal Knitwear Co. v. N. L. R. B., 65 S.Ct. 478, 324 U.S. 9, 89 L.Ed. 661—N. L. R. B. v. Landis Tool Co., C.C.A.3, 145 F.2d 152—N. L. R. B. v. Gluek Brewing Co., C.C.A.3, 144 F.2d 847—N. L. R. B. v. Brezner Tanning Co., C.C.A.1, 141 F.2d 62—N. L. R. B. v. Weirton Steel Co., C.C.A.3, 135 F.2d 494—N. L. R. B. v. Jac. Feinberg Hosiery Mill, Inc., C.C.A.4, 134 F.2d 620—N. L. R. B. v. Blackstone Mfg. Co., C.C.A.2, 123 F.2d 633.
D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

Successor made party
The board's order may run against a successor corporation which was made party to the proceeding and participated in the hearings.—Union Drawn Steel Co. v. N. L. R. B., C.C.A.3, 109 F.2d 587.

Successors and assigns may be instrumentalities through which the employer seeks to evade the order or may come within the description of persons in active concert or participation with the employer in the violation of the order.—Regal Knitwear Co. v. N. L. R. B., 65 S.Ct. 478, 324 U.S. 9, 89 L.Ed. 661.

66. U.S.—Regal Knitwear Co. v. N. L. R. B., 65 S.Ct. 478, 324 U.S. 9, 89 L.Ed. 661.

67. U.S.—N. L. R. B. v. Blackstone Mfg. Co., C.C.A., 123 F.2d 633.

68. U.S.—Polish Nat. Alliance of U. S. v. N. L. R. B., C.C.A.7, 136 F.2d 175, affirmed 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509—Commonwealth Edison Co. v. N. L. R. B., C.C.A.7, 135 F.2d 891—N. L. R. B. v. Faultless Caster Corporation, C.C.A.7, 135 F.2d 559—Butler Bros. v. N. L. R. B., C.C.A.7, 134 F.2d 981, certiorari denied 64 S.Ct. 203, 320 U.S. 789, 88 L.Ed. 475 and Wasleff v. N. L. R. B., 64 S.Ct. 204, 320 U.S. 789, 88 L.Ed. 475—N. L. R. B. v. National Mineral Co., C.C.A.7, 134 F.2d 424, certiorari denied National Mineral Co. v. N. L. R. B., 64 S.Ct. 58, 320 U.S. 753, 88 L.Ed. 448—N. L. R. B. v. Sunbeam Electric Mfg. Co., C.C.A.7, 133 F.2d 856.—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A.6, 133 F.2d 295—N. L. R. B. v. Stone, C.C.A.7, 125 F.2d 752, certiorari denied Stone v. N. L. R. B., 63 S.Ct. 44, 317 U.S. 649, 87 L.Ed. 522—N. L. R. B. v. Bachelder, C.C.A.7, 125 F.2d 387, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519.

69. U.S.—N. L. R. B. v. Bachelder, C.C.A.7, 125 F.2d 387, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519.

70. U.S.—N. L. R. B. v. Federal Engineering Co., C.C.A.6, 153 F.2d 233, rehearing denied 155 F.2d 17.

the employer in his violations of the statute, although such persons are not employers of the employees affected.[71]

§ 28(115). —— Construction of Orders

In construing orders of the National Labor Relations Board, the determinative factor is the intention of the board as gathered from all parts of the order.

Orders of the National Labor Relations Board are to be construed like any other written instrument;[72] the determinative factor is the intention of the board as gathered from all the parts of the order.[73] The order is to be construed as of the time it was made.[74]

§ 28(116). —— Operation and Effect

An order of the National Labor Relations Board is operative until reversed or suspended.

An order of the National Labor Relations Board is operative until reversed or suspended,[75] and it is presumed to have continuing effect until altered by the board.[76] Such an order, however, is not self-executing,[77] and is not final or conclusive in the same sense as a judgment or decree of a court,[78] or in the sense that it may not be changed in the future,[79] and it is not conclusive as to matters not expressly decided.[80] It has been held that a finding by the National Labor Relations Board that an employer failed to bargain in good faith is not binding in proceedings under a state unemployment compensation statute.[81]

The board has the power to set aside its order and findings and to conduct such further procedure as it deems appropriate,[82] and it may amend its order and findings on appropriate notice and hearing to the parties affected.[83] An order directing an employer to withdraw recognition from a labor organization will not prevent the employer from recognizing the organization, if it should be freely chosen by the employees as their bargaining representative.[84]

An order of the board is not to be evaded by indirections or formal observances which in fact defy it,[85] and an employer may not avoid compliance with the board's orders by means of subterfuge.[86]

The entry of an order on consent and stipulation does not detract from its force.[87]

§ 28(117). —— Posting of Notice of Order

The National Labor Relations Board may require the employer to post notices advising its employees of the board's order and that the employer will comply therewith.

The National Labor Relations Board may direct an employer against which it has entered an order to post notices advising its employees of the order[88]

71. U.S.—N. L. R. B. v. Morris P. Kirk & Son, C.C.A.9, 151 F.2d 490, opinion supplemented 154 F.2d 110.

72. U.S.—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 136 F.2d 385.
D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

73. U.S.—N. L. R. B. v. Fitzpatrick & Weller, C.C.A.2, 138 F.2d 697—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 136 F.2d 385.

74. D.C.—Commercial Telegraphers' Union, A. F. L., v. Western Union Telegraph Co., D.C., 53 F.Supp. 90.

75. Tenn.—Manning v. Feidelson, 136 S.W.2d 510, 175 Tenn. 576.

76. D.C.—Commercial Telegraphers' Union, A.F.L. v. Western Union Telegraph Co., D.C., 53 F.Supp. 90.

77. U.S.—Utah Copper Co. v. N. L. R. B., C.C.A.10, 136 F.2d 485.
Tenn.—Manning v. Feidelson, 136 S.W.2d 510, 175 Tenn. 576.

78. Tenn.—Manning v. Feidelson, supra.

79. Tenn.—Manning v. Feidelson, supra.

80. Tenn.—Manning v. Feidelson, supra.

81. Utah.—Members of Iron Workers' Union of Provo v. Industrial Commission, 139 P.2d 208, 104 Utah 242.

82. U.S.—Inland Steel Co. v. N. L. R. B., C.C.A.7, 105 F.2d 246.

83. U.S.—N. L. R. B. v. Swift & Co., C.C.A.8, 116 F.2d 143.

84. U.S.—Swift & Co. v. N. L. R. B., C.C.A.10, 106 F.2d 87.

85. U.S.—N. L. R. B. v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930.

86. U.S.—N. L. R. B. v. Skinner & Kennedy Stationery Co., C.C.A.8, 113 F.2d 667.

87. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551.

88. U.S.—N. L. R. B. v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930—N. L. R. B. v. Sunbeam Electric Mfg. Co., C.C.A. 7, 133 F.2d 856—N. L. R. B. v. Bersted Mfg. Co., C.C.A.6, 128 F.2d 738—Wilson & Co. v. N. L. R. B., C.C.A.7, 126 F.2d 114, certiorari denied 62 S.Ct. 1292, 316 U.S. 699, 86 L.Ed. 1768—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549—H. J. Heinz Co. v. N. L. R. B., C.C.A.6, 110 F.2d 843, affirmed 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713—N. L. R. B. v. Eagle Mfg. Co., C.C.A.4, 99 F.2d 930—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951.
D.C.—N. L. R. B. v. Arcade-Sunshine Co., 118 F.2d 49, 73 App.D.C. 128, certiorari denied Arcade-Sunshine Co. v. N. L. R. B., 61 S.Ct. 942, 313 U.S. 567, 85 L.Ed. 1526.

Should be required in all cases

The board should require posting of notices of board's decision by employer in all cases so that employees may have full and accurate information of decisions of the board.—Mooresville Cotton Mills v. N. L. R. B., C.C.A.4, 97 F.2d 959.

Mailed notice

An order requiring respondent to mail to employees a notice that employer would not engage in the conduct from which it was ordered to cease and desist would not be disturbed.—N. L. R. B. v. American Laundry Machinery Co., C.C.A.2, 152 F.2d 400.

Order partly obeyed

Order requiring posting and maintaining of notices of cease and desist order was justified, even though it

and that it will comply with the order.[89] Thus an employer may be required to post notices of the withdrawal of recognition from a company-dominated union,[90] that it will cease dominating such union,[91] of the disestablishment of such union,[92] or that specified contracts violate the statute and will not be enforced.[93]

The addition to the required notice of other matter which has the effect of altering the total impression to be conveyed by the notice may render it insufficient.[94] It has been held that the employer may be required to post the notices at all of its places of business, including those in which no violation of the act has been committed,[95] but it has also been held that, where the proceeding involves only a particular plant, the required posting of notices should be limited to that plant.[96]

While an order that the notice shall state that the employer will cease and desist from specified practices is valid,[97] it has been pointed out that a notice in such form may imply a confession of guilt, and that the required notice should state, instead, that the employer will not engage in the activity from which it is ordered to cease and desist,[98] or that the order has been approved by the court and is binding on the employer.[99]

Where there is any danger of misinterpretation, the required notice should make it clear that the employees have complete freedom of organization.[1] The notice that an employer-dominated union has

appeared that the order had already been partly obeyed.—Newport News Shipbuilding & Dry Dock Co. v. N. L. R. B., C.C.A.4, 101 F.2d 841, reversed on other grounds N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219.

89. U.S.—N. L. R. B. v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930—Union Drawn Steel Co. v. N. L. R. B., C.C.A.3, 109 F.2d 587.

D.C.—N. L. R. B. v. Arcade-Sunshine Co., 118 F.2d 49, 73 App.D.C. 128, certiorari denied Arcade-Sunshine Co. v. N. L. R. B., 61 S.Ct. 942, 313 U.S. 567, 85 L.Ed. 1526.

90. U.S.—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307—A. E. Haley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868.

91. U.S.—N. L. R. B. v. Falk Corporation, 60 S.Ct. 307, 308 U.S. 453, 84 L.Ed. 396.

92. U.S.—N. L. R. B. v. Falk Corporation, supra—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 108 F.2d 867, certiorari denied Brown Paper Mill Co. v. N. L. R. B., 60 S.Ct. 1104, 310 U.S. 651, 84 L.Ed. 1416.

93. U.S.—N. L. R. B. v. Jahn & Ollier Engraving Co., C.C.A.7, 123 F.2d 589—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520.

94. U.S.—N. L. R. B. v. Trojan Powder Co., C.C.A.3, 135 F.2d 337, certiorari denied Trojan Powder Co. v. N. L. R. B., 64 S.Ct. 76, 320 U.S. 768, 88 L.Ed. 458, rehearing denied 64 S.Ct. 194, 320 U.S. 813, 88 L.Ed. 491.

95. U.S.—N. L. R. B. v. T. W. Phillips Gas & Oil Co., C.C.A.3, 141 F.2d 304.

Discretion

When board finds unfair labor practices existing on two of employer's vessels, board does not abuse its discretion in ordering usual notices posted in several places accessible to employees.—Texas Co. v. N. L. R. B., C.C.A.9, 135 F.2d 562.

96. U.S.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311—N. L. R. B. v. West Texas Utilities Co., C.C.A.5, 119 F.2d 683—N. L. R. B. v. Ford Motor Co., C.C.A.6, 119 F.2d 326.

97. U.S.—N. L. R. B. v. Vincennes Steel Corporation, C.C.A.7, 117 F.2d 169—N. L. R. B. v. Elkland Leather Co., C.C.A.3, 114 F.2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S.Ct. 170, 311 U.S. 705, 85 L.Ed. 457—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681—N. L. R. B. v. Falk Corporation, C.C.A.7, 102 F.2d 383—Clover Fork Coal Co. v. N. L. R. B., C.C.A.6, 97 F.2d 331.

98. U.S.—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39—N. L. R. B. v. Southwestern Greyhound Lines, C.C.A.8, 126 F.2d 883—N. L. R. B. v. Isthmian S. S. Co., C.C.A.2, 126 F.2d 598—N. L. R. B. v. Blossom Products Corporation, C.C.A.3, 121 F.2d 260—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F.2d 480—N. L. R. B. v. Brashear Freight Lines, C.C.A.8, 119 F.2d 379—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198—Phelps Dodge Corporation v. N. L. R. B., C.C.A.2, 113 F.2d 202, modified on other grounds Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—Kansas City Power & Light Co. v. N. L. R. B., C.C.A.8, 111 F.2d 340—Hartsell Mills Co. v. N. L. R. B., C.C.A.4, 111 F.2d 291—Art Metals Const. Co. v. N. L. R. B., C.C.A.2, 110 F.2d 148—Swift & Co. v. N. L. R. B., C.C.A.10, 106 F.2d 87—Burlington Dyeing & Finishing Co. v. N. L. R. B., C.C.A.4, 104 F.2d 736—Virginia Ferry Corporation v. N. L. R. B., C.C.A.4, 101 F.2d 103—N. L. R. B. v. Eagle Mfg. Co., C.C.A.4, 99 F.2d 930—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951.

99. U.S.—N. L. R. B. v. Planters Mfg. Co., C.C.A.4, 105 F.2d 750, rehearing denied 106 F.2d 524—N. L. R. B. v. Nebel Knitting Co., C.C.A.4, 103 F.2d 594—N. L. R. B. v. Louisville Refining Co., C.C.A.6, 102 F.2d 678, certiorari denied Louisville Refining Co. v. N. L. R. B., 60 S.Ct. 81, 308 U.S. 568, 84 L.Ed. 477—Virginia Ferry Corporation v. N. L. R. B., C.C.A.4, 101 F.2d 103—N. L. R. B. v. Eagle Mfg. Co., C.C.A.4, 99 F.2d 930—Mooresville Cotton Mills v. N. L. R. B., C.C.A.4, 97 F.2d 959—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951.

1. U.S.—N. L. R. B. v. Blossom Products Corporation, C.C.A.3, 121 F.2d 260—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 102 F.2d 745, certiorari denied 60 S.Ct. 78, 308 U.S. 565, 84 L.Ed. 475.

Discrimination

In notices reciting that employer would not discriminate against any employee because of membership or activity in any of named organizations, the words "or any other union of their choice" should be inserted.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311.

been disestablished should include a statement that the employees are free to join or organize any union they choose.[2] Similarly, a notice that employees are free to join or remain members of certain unions should also state that they have the same freedom as to other unions.[3]

§ 28(118). —— Orders with Respect to Employees' Organizations Dominated by Employer

The National Labor Relations Board may order an employer to cease supporting, dominating, or interfering with an organization of its employees, to refrain from recognizing such organization as bargaining representative, and to disestablish the organization.

Where an employer sponsors, dominates, or interferes with an organization of its employees, the National Labor Relations Board may order it to cease such sponsorship, support, domination, and interference,[4] to cease recognizing such organization as the bargaining representative for its employees[5] and order the employer to refrain from recognizing any labor organization as the representative of its employees until it has been certified as such by the board,[6] to cease giving effect to a contract made with such organization,[7] and to disestablish such organization.[8] Where the employees may reasonably believe that their employer's favor may be won by

2. U.S.—N. L. R. B. v. Standard Oil Co., C.C.A.2, 138 F.2d 885—N. L. R. B. v. American Rolling Mill C., C.C.A.6, 126 F.2d 38—Roebling Employees Ass'n v. N. L. R. B., C.C.A.3, 120 F.2d 289—Westinghouse Electric & Manufacturing Co. v. N. L. R. B., C.C.A.2, 112 F. 2d 657, affirmed 61 S.Ct. 736, 312 U.S. 660, 85 L.Ed. 1108.

3. U.S.—N. L. R. B. v. Johnson Bronze Co., C.C.A.3, 148 F.2d 818—N. L. R. B. v. Standard Oil Co., C. C.A.6, 142 F.2d 676, certiorari denied 65 S.Ct. 427, 323 U.S. 791, 89 L.Ed. 630—N. L. R. B. v. Harbison-Walker Refractories Co., C.C.A.8, 135 F.2d 837—N. L. R. B. v. Weirton Steel Co., C.C.A.3, 135 F.2d 494—Butler Bros. v. N. L. R. B., C. C.A.7, 134 F.2d 981, certiorari denied 64 S.Ct. 203, 320 U.S. 789, 88 L.Ed. 475 and Wasleff v. N. L. R. B., 64 S.Ct. 204, 320 U.S. 789, 88 L.Ed. 475—N. L. R. B. v. Sunbeam Electric Mfg. Co., C.C.A.7, 133 F. 2d 856—Polish Nat. Alliance of U. S. v. N. L. R. B., C.C.A.7, 136 F. 2d 175, affirmed 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509—N. L. R. B. v. New Idea, C.C.A.6, 133 F.2d 194—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39.

4. U.S.—De Bardeleben v. N. L. R. B., C.C.A.5, 135 F.2d 13—N. L. R. B. v. Precision Castings Co., C.C.A. 6, 130 F.2d 639—New Idea v. N. L. R. B., C.C.A.7, 117 F.2d 517.

5. U.S.—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S. Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307—N. L. R. B. v. Mt. Clemens Pottery Co., C.C.A.6, 147 F.2d 262—De Bardeleben v. N. L. R. B., C.C.A.5, 135 F.2d 13—Wilson & Co. v. N. L. R. B., C.C.A.7, 126 F.2d 114, certiorari denied 62 S.Ct. 1292, 316 U.S. 699, 86 L.Ed. 1768—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868—N. L. R. B. v. H. E. Fletcher Co., C.C.A.1, 108 F.2d 459, certiorari denied H. E. Fletcher Co. v. N. L. R. B., 60 S.Ct. 716, 309 U.S. 678, 84 L.Ed. 1022—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

Certified agent

The board may order an employer to cease recognizing as the representative of its employees a labor organization which has been duly certified as bargaining agent, where the employer has dominated, favored, or interfered with the organization either before or after the certification.—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15.

6. U.S.—N. L. R. B. v. Winona Knitting Mills, C.C.A.8, 163 F.2d 156—Independent Employees Ass'n of Neptune Meter Co. v. N. L. R. B., C.C.A.2, 158 F.2d 448.

7. U.S.—N. L. R. B. v. Thompson Products, C.C.A.9, 141 F.2d 794—N. L. R. B. v. Porcelain Steels, C.C.A. 6, 138 F.2d 840—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311—De Bardeleben v. N. L. R. B., C. C.A.5, 135 F.2d 13—N. L. R. B. v. Elkland Leather Co., C.C.A.3, 114 F.2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S.Ct. 170, 311 U.S. 705, 85 L.Ed. 457—N. L. R. B. v. H. E. Fletcher Co., C.C.A.1, 108 F.2d 459, certiorari denied H. E. Fletcher Co. v. N. L. R. B., 60 S.Ct. 716, 309 U.S. 678, 84 L.Ed. 1022—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, and opinion supplemented, C.C.A., 128 F.2d 188.

Necessity that company-dominated union be party to proceeding see supra § 28 (85).

8. U.S.—Southern Ass'n of Bell Telephone Employees v. N. L. R. B., Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—Southern Bell Telephone & Telegraph Co. v. N. L. R. B., Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—N. L. R. B. v. Jas. H. Matthews & Co., C.C.A.3, 156 F.2d 706—N. L. R. B. v. Duncan Foundry & Machine Works, C.C.A.7, 142 F.2d 594—Utah Copper Co. v. N. L. R. B., C.C.A.10, 139 F.2d 788, certiorari denied Independent Ass'n of Mill Workers v. N. L. R. B., 64 S.Ct. 946, 322 U.S. 731, 88 L.Ed. 1566—N. L. R. B. v. Swift & Co., C.C.A.6, 127 F.2d 30—Wilson & Co. v. N. L. R. B., C.C.A.7, 126 F.2d 114, certiorari denied 62 S.Ct. 1292, 316 U.S. 699, 86 L.Ed. 1768—N. L. R. B. v. Dow Chemical Co., C.C.A.6, 117 F.2d 455—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C. A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. E. I. Dupont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. Association of Chemical Employees at Belle Works of E. I. Du Pont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 116 F.2d 367—N. L. R. B. v. Rath Packing Co., C.C.A.8, 115 F.2d 217—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corporation v. N. L. R. B.,

abandoning a union for an association favored by the employer, the board may employ whatever means it regards as reasonable to bring home to the employees that, as far as their employer is concerned, they are entirely free.[9]

A disestablishment order is a valid remedy where an order that the employer cease and desist from dominating or interfering with the organization would not be sufficient to protect the employees' right to self-organization[10] and whether the continued existence of a labor organization which the employer sponsored, dominated, or interfered with would be an obstacle to its employees' freedom of choice as to self-organization is an inference of fact to be drawn by the board from all the circumstances of the case.[11] It is for the board to determine whether the disestablishment of the organization is necessary to preserve the employees' freedom of choice,[12] and the necessity for such remedy is a matter resting within the discretion of the board.[13] The board may find that the continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence or violation of the act whose continuance thwarts the act and renders ineffective any order restraining the unfair practices.[14] Disestablishment may be ordered where the organization has evolved out of an employer-dominated organization under circumstances which give the employees to understand that the employer favors such organization.[15]

The employer may be ordered to disestablish an employer-dominated union even though it has recognized and entered into collective bargaining with an independent labor organization,[16] or although its interference with, and domination of, such organization has ceased,[17] or although there have been no

61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141—N. L. R. B. v. Elkland Leather Co., C.C.A.3, 114 F.2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S.Ct. 170, 311 U. S. 705, 85 L.Ed. 457—Westinghouse Electric & Manufacturing Co. v. N. L. R. B., C.C.A.2, 112 F.2d 657, affirmed 61 S.Ct. 736, 312 U.S. 660, 85 L.Ed. 1108—N. L. R. B. v. H. E. Fletcher Co., C.C.A.1, 108 F.2d 459, certiorari denied H. E. Fletcher Co. v. N. L. R. B., 60 S.Ct. 716, 309 U.S. 678, 84 L.Ed. 1022—Republic Steel Corporation v. N. L. R. B., C.C.A.3, 107 F.2d 472, certiorari denied 60 S.Ct. 806, 309 U.S. 684, 84 L.Ed. 1027, vacated on other grounds 60 S.Ct. 1072, 310 U.S. 655, 84 L.Ed. 1419, certiorari denied Central Council of Steel Plants, Northern District, Republic Steel Corporation v. N. L. R. B., 60 S. Ct. 808, 309 U.S. 684, 84 L.Ed. 1028, and supplemented, C.C.A., Republic Steel Corporation v. N. L. R. B., 114 F.2d 820, modified on other grounds 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6—N. L. R. B. v. American Mfg. Co., C.C.A.2, 106 F.2d 61, modified on other grounds American Mfg. Co. v. N. L. R. B., 60 S. Ct. 612, 309 U.S. 629, 84 L.Ed. 988—N. L. R. B. v. American Potash & Chemical Corporation, C.C.A.9, 98 F.2d 488, certiorari denied American Potash & Chemical Corporation v. N. L. R. B., 59 S.Ct. 582, 306 U.S. 643, 83 L.Ed. 1043—N. L. R. B. v. Cudahy Packing Co., D.C.Kan., 34 F.Supp. 53, affirmed, C.C.A., Cudahy Packing Co. v. N. L. R. B., 117 F.2d 692.

The purpose of order requiring the complete disestablishment of an employer-dominated union was to compel a good faith disavowal of the disqualified union, so as to convince employees it was a matter of complete indifference to employer what labor organization employees might choose to join.—N. L. R. B. v. Rath Packing Co., C.C.A.8, 130 F.2d 540.

9. U.S.—H. J. Heinz Co. v. N. L. R. B., C.C.A.6, 110 F.2d 843, affirmed 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309.

10. U.S.—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. J. Greenebaum Tanning Co., C.C.A.7, 110 F.2d 984, certiorari denied J. Greenebaum Tanning Co. v. N. L. R. B., 61 S.Ct. 18, 311 U.S. 662, 85 L.Ed. 424.

11. U.S.—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U.S. 809, 88 L.Ed. 489—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U. S. 514, 85 L.Ed. 309—N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U. S. 241, 84 L.Ed. 219—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307.

12. U.S.—N. L. R. B. v. Falk Corporation, 60 S.Ct. 307, 308 U.S. 453, 84 L.Ed. 396.

13. U.S.—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309.

14. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126.

15. U.S.—Southern Ass'n of Bell Telephone Employees v. N. L. R. B., Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—Southern Bell Telephone & Telegraph Co. v. N. L. R. B., Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—Western Elec. Co. v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1014, 324 U.S. 870, 89 L.Ed. 1424—Point Breeze Employees Ass'n v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1015, 324 U.S. 870, 89 L.Ed. 1425—Locomotive Finished Material Co. v. N. L. R. B., C.C.A.10, 142 F.2d 802—Westinghouse Electric & Manufacturing Co. v. N. L. R. B., C.C.A.2, 112 F.2d 657, affirmed 61 S.Ct. 736, 312 U.S. 660, 85 L.Ed. 1108.

The test of successorship to an illegal labor organization which was to be disestablished is whether there existed, in so far as employees are concerned, an appearance of continuity and relation between the illegal organization and later organization so that employees were not apprised of fact that new organization did not carry with it the preference, domination, and interference which accompanied prior organization.—N. L. R. B. v. Landis Tool Co., C.C.A.3, 145 F.2d 152.

Clear line of cleavage

Under National Labor Relations Act, when existing labor organization, unlawful because of employer domination, is succeeded by a new organization, there must be a clear line of cleavage between the old and the new.—Wilson & Co. v. N. L. R. B., C.C.A.10, 156 F.2d 577, certiorari denied 67 S.Ct. 357, 329 U.S. 789, 91 L.Ed. —.

16. U.S.—H. J. Heinz Co. v. N. L. R. B., 61 S.Ct. 320, 311 U.S. 514, 85 L.Ed. 309.

17. U.S.—N. L. R. B. v. Southern Bell Telephone & Telegraph Co., Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—N. L. R. B. v. Southern Ass'n of Bell Telephone Employees, Ga., 63 S.Ct. 905, 319 U.

labor difficulties,[18] or although such order will foster the growth of a national union among the employees;[19] but it has been held that the disestablishment of a company-dominated union should not be ordered where the organization has ceased to exist and there is no likelihood of its revival.[20] An order disestablishing a labor organization as dominated by the employer should make clear the right of the employees to join any labor organization they choose.[21]

It is not clear what action must be taken by an employer to disestablish an employer-dominated organization so as to free both itself and any newly formed organization from later condemnation by the board.[22] It has been held that an order to "disestablish" requires the employer not to recognize, support, or encourage the further existence of the organization for any purpose or in any manner.[23]

Reimbursement of dues deducted by employer. The board may order an employer to reimburse employees for dues deducted from wages for the benefit of an employer-dominated labor organization.[24] Such order is not a redress for a private wrong,[25]

S. 50, 87 L.Ed. 1250—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Independent Union of Craftsmen, 61 S.Ct. 358, 311 U.S. 629, 85 L.Ed. 368—Western Elec. Co. v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1014, 324 U.S. 870, 89 L.Ed. 1424—Point Breeze Emp. Ass'n v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1015, 324 U.S. 870, 89 L.Ed. 1425—American Enka Corporation v. N. L. R. B., C.C.A.4, 119 F.2d 60.

18. U.S.—N. L. R. B. v. Southern Bell Telephone & Telegraph Co., Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—N. L. R. B. v. Southern Ass'n of Bell Telephone Employees, Ga., 63 S.Ct. 905, 319 U. S. 50, 87 L.Ed. 1250—N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219.

19. U.S.—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 108 F.2d 867, certiorari denied Brown Paper Mill Co. v. N. L. R. B., 60 S.Ct. 1104, 310 U.S. 651, 84 L.Ed. 1416.

20. U.S.—Independent Employees Ass'n of Neptune Meter Co. v. N. L. R. B., C.C.A.2, 158 F.2d 448—N. L. R. B. v. Youngstown Mines Corporation, C.C.A.8, 123 F.2d 178—N. L. R. B. v. Mall Tool Co., C.C.A.7, 119 F.2d 700—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868.

21. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—N. L. R. B. v. Precision Castings Co., C.C.A.6, 130 F.2d 639—N. L. R. B. v. Reynolds Wire Co., C.C.A. 7, 121 F.2d 627—Colorado Fuel & Iron Corporation v. N. L. R. B., C. C.A.10, 121 F.2d 165.

Rights of disestablished organization and its members

The board is not authorized to prohibit an organization which is disestablished from acting lawfully, and, although the board had decided that labor organization could no longer function as bargaining representative, the organization had a constitutional right to express its preference at an election; the members of a disestablished bargaining representative are not deprived of a right to vote in labor elections or to campaign in such elections, and for such legitimate purposes they have a right to be represented by the organization.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287.

22. U.S.—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 102 F.2d 745, certiorari denied 60 S.Ct. 78, 308 U.S. 565, 84 L.Ed. 475.

"We do not regard 'disestablishment' in reference to labor organizations as having any precise, technical meaning. We are not here dealing with the 'dissolution' or 'reorganization' of complex corporate structures. We are concerned with individual rights and human relationships as defined by a sweeping statute."—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F. 2d 388, 399, certiorari denied N. L. R. B. v. E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, 399, certiorari denied N. L. R. B. v. Association of Chemical Employees at Belle Works of E. I. Du Pont de Nemours & Co., 61 S.Ct. 959, 313 U. S. 571, 85 L.Ed. 1529.

What must appear

In order to avoid having a new labor organization regarded as the alter ego or the successor of an old labor organization that was subject to employer domination, it must appear that, prior to the formation of the new organization, the employees were advised by their employer, in substance, that all recognition of the old organization by him had ended, that they were entirely free to join or not to join any other labor organization, and that the employer was completely indifferent as to what organization they joined.—N. L. R. B. v. Rath Packing Co., C.C.A.8, 130 F.2d 540.

Posted notices constituted a sufficient public expression of a disestablishment of the labor organization, and the notices constituted an adequate means of assuring the employees of an absolute freedom of choice in their selection of a collective bargaining agency.—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. E. I. Du Pont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F. 2d 388, certiorari denied N. L. R. B. v. Association of Chemical Employees at Belle Works of E. I. Du Pont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529.

23. U.S.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 116 F.2d 367—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 102 F.2d 745, certiorari denied 60 S.Ct. 78, 308 U.S. 565, 84 L.Ed. 475.

24. U.S.—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568—N. L. R. B. v. Baltimore Transit Co., C. C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084—N. L. R. B. v. Cassoff, C.C.A.2, 139 F.2d 397.

Contra Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311—N. L. R. B. v. U. S. Truck Co., C.C.A.6, 124 F.2d 887—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F.2d 816—Western Union Telegraph Co. v. N. L. R. B., C.C.A.2, 113 F.2d 992—N. L. R. B. v. J. Greenebaum Tanning Co., C.C.A.7, 110 F.2d 984, certiorari denied J. Greenebaum Tanning Co. v. N. L. R. B., 61 S.Ct. 18, 311 U.S. 662, 85 L. Ed. 424.

25. U.S.—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568—N. L. R. B v Baltimore Transit Co., C.

nor is it penal[26] or the adjudication of a mass tort.[27] Although it restores to the employees in some measure what was taken from them by the employer's unfair labor practices and somewhat resembles compensation for private injury, such remedy is designed to achieve the elimination of industrial conflict and to vindicate public, not private, rights.[28] The power of the board to order an employer to reimburse employees for dues of a company-dominated union withheld from their pay under the checkoff provisions of a contract between the union and the employer is not dependent on the involuntary nature of the payment, but on the power of the board to take action to remove the effect of an unfair labor practice.[29] The board may order reimbursement of the dues collected by the employer for the employer-dominated labor organization without regard to the actual damage suffered by the employees.[30]

§ 28(119). —— Reinstatement and Back-Pay Orders

a. In general
b. When and as to whom reinstatement may be ordered
c. Amount of back-pay award

a. In General

The National Labor Relations Board may order the reinstatement of employees with or without back pay where such action will effectuate the policies of the statute.

The National Labor Relations Act § 10 c, 29 U.S. C.A. § 160 c, expressly authorizes the National Labor Relations Board to order the reinstatement of employees, with or without back pay, where such action will effectuate the policies of the statute,[31] and whether such relief should be awarded lies within

C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084.

26. U.S.—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568—N. L. R. B. v. Baltimore Transit Co., C. C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084.

27. U.S.—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568—N. L. R. B. v. Baltimore Transit Co., C. C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084.

28. U.S.—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568—N. L. R. B v Baltimore Transit Co., C. C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084.

29. U.S.—N. L. R. B. v. Baltimore Transit Co., C.C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084.

30. U.S.—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568—N. L. R. B. v. Baltimore Transit Co., C. C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084.

"It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such order, or to force it to inquire into the amount of damages actually sustained. Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and knowledge."—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 1220, 319 U.S. 533, 87 L.Ed. 1568—N. L. R. B. v. Baltimore Transit Co., C.C.A.4, 140 F.2d 51, 57, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084.

31. U.S.—N. L. R. B. v. Electric Vacuum Cleaner Co., 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120—N. L. R. B. v. Mackay Radio & Telegraph Co., 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381—N. L. R. B. v. Cape County Milling Co., C.C.A.8, 140 F.2d 543, 152 A.L.R. 144—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260—N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A.6, 123 F.2d 831—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central Cal., C.C.A.9, 122 F.2d 368—N. L. R. B. v. Mall Tool Co., C.C.A.7, 119 F.2d 700—N. L. R. B. v. American Potash & Chemical Corp., C.C.A.9, 113 F.2d 232, 129 A.L.R. 874, petition denied 118 F.2d 630—N. L. R. B. v. American Potash & Chemical Corporation, C. C.A.9, 98 F.2d 488, certiorari denied American Potash & Chemical Corporation v. N. L. R. B., 59 S. Ct. 582, 306 U.S. 643, 83 L.Ed. 1043—Clover Fork Coal Co. v. N. L. R. B., C.C.A.6, 97 F.2d 331—Black Diamond S. S. Corp. v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S.Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542.

Application for reinstatement

Where employer was ordered to reëmploy and reinstate employees on application, the application might be made personally or through an agent in any manner which reasonably brought notice thereof to the employer.—N. L. R. B. v. Lightner Pub. Corp. of Ill., C.C.A.7, 128 F.2d 237.

Confidential employment

Where clerks were wrongfully discharged because of union activities, they were entitled to be restored to their former positions even though they would thereby acquire confidential information; but employer could condition continued employment on employees' not disclosing such information to others, and employer could offer reinstatement in other positions which were substantially equivalent to former positions, as respects wages, character of work, hours and other terms and conditions of employment.—N. L. R. B. v. Armour & Co., C.C.A.10, 154 F.2d 570, certiorari denied 67 S.Ct. 92, 329 U.S. 732, 91 L.Ed. ——.

Employee in army

Where employee who had been improperly discharged for union activities had entered the army, he was entitled to offer of reinstatement to become effective on retirement from army, and back pay from date of discharge to date of his induction into army.—N. L. R. B. v. Revlon Products Corp., C.C.A.2, 144 F.2d 88.

Remedy unknown to common law

Reinstatement of wrongfully discharged employee and payment for time lost by him are remedies unknown to common law.—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F.2d 816.

Subsequent events

An order for reinstatement with back pay speaks as of the time it is made and its validity is not affected by subsequent events.—N. L.

the discretion of the board.[32] The board has wide discretion in adapting its reinstatement orders to the circumstances of the particular case.[33] It has been held that an order directing the employer in general terms to offer reëmployment and pay back pay to all his employees who went on strike without naming them is valid where the employer will have an opportunity to present any defense it may have against reinstatement and back pay to any given employee.[34] An order requiring reinstatement is to be reasonably construed[35] and does not prevent the employer from discharging the reinstated employee for any reason which does not involve a violation of the statute.[36]

The power to order reinstatement and back pay is exercised in the public interest[37] to vindicate public, not private, rights.[38] The power to order rein-

R. B. v. Acme Air Appliance Co., C.C.A.2, 117 F.2d 417.

32. U.S.—N. L. R. B. v. Cape County Milling Co., C.C.A.8, 140 F.2d 543, 152 A.L.R. 144—N. L. R. B. v. Quality & Service Laundry, C.C.A. 4, 131 F.2d 182, certiorari denied Quality & Service Laundry v. N. L. R. B., 63 S.Ct. 831, 318 U.S. 775, 87 L.Ed. 1144—N. L. R. B. v. Marshall Field & Co., C.C.A.7, 129 F.2d 169, 144 A.L.R. 394, affirmed 63 S.Ct. 585, 318 U.S. 253, 87 L. Ed. 744, rehearing denied 63 S.Ct. 849, 318 U.S. 802, 87 L.Ed. 1165—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 128 F.2d 528—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A.8, 119 F.2d 903—N. L. R. B. v. Brashear Freight Lines, C.C.A.8, 119 F.2d 379.

Order directing reinstatement held proper

U.S.—N. L. R. B. v. Scullin Steel Co., C.C.A.8, 161 F.2d 143—Hamilton v. N. L. R. B., C.C.A.6, 160 F. 2d 465—N. L. R. B. v. Whiting-Mead Co., C.C.A.9, 148 F.2d 817—N. L. R. B. v. Moltrup Steel Products Co., C.C.A.3, 121 F.2d 612—Republic Steel Corporation v. N. L. R. B., C.C.A.3, 107 F.2d 472, certiorari denied 60 S.Ct. 806, 309 U.S. 684, 84 L.Ed. 1027, vacated on other grounds 60 S.Ct. 1072, 310 U.S. 655, 84 L.Ed. 1419, certiorari denied Central Council of Steel Plants, Northern District Republic Steel Corporation v. N. L. R. B., 60 S.Ct. 808, 309 U.S. 684, 84 L. Ed. 1028, and supplemented, C.C.A., Republic Steel Corporation v. N. L. R. B., 114 F.2d 820, modified on other grounds 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6.

Order directing reinstatement with back pay held proper

(1) In general.—N. L. R. B. v. Chicago Steel Foundry Co., C.C.A.7, 142 F.2d 306, 153 A.L.R. 838—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721—N. L. R. B. v. Isthmian S. S. Co., C.C.A.2, 126 F.2d 598—Tyne Co. v. N. L. R. B., C.C.A.7, 125 F.2d 832—Wilson & Co. v. N. L. R. B., C.C.A.7, 124 F.2d 845—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F. 2d 368—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A.8, 119 F.2d 903—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—N. L. R. B. v. Elkland Leather Co., C.C.A.3, 114 F.2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S.Ct. 170, 311 U.S. 705, 85 L.Ed. 457—N. L. R. B. v. Viking Pump Co., C.C.A.8, 113 F.2d 759, certiorari denied Viking Pump Co. v. N. L. R. B., 61 S. Ct. 449, 312 U.S. 680, 85 L.Ed. 1119—North Whittier Heights Citrus Ass'n v. N. L. R. B., C.C.A.9, 109 F.2d 76, certiorari denied 60 S.Ct. 1075, 310 U.S. 632, 84 L.Ed. 1402, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472—Clover Fork Coal Co. v. N. L. R. B., C.C.A.6, 97 F.2d 331.

(2) Supervisory employees.—N. L. R. B. v. Vail Mfg. Co., C.C.A.7, 158 F.2d 664.

Request of union

Where an employee was discharged in violation of the statute at the request of a union with which the employer had a closed-shop contract, the fact that the employee has a civil remedy against the union does not prevent the board from ordering the employer to reinstate him.—N. L. R. B. v. American White Cross Laboratories, C.C.A.2, 160 F.2d 75.

33. U.S.—F. W. Woolworth Co. v. N. L. R. B., C.C.A.2, 121 F.2d 658.

Discrimination in favor of union employees

Order that all union employees who were not reinstated should be placed on a preference list to be offered employment as it should become available was erroneous, and the employer should have been required to select union men from preference list only in the old proportion of union men.—F. W. Woolworth Co. v. N. L. R. B., supra.

Physical examination

Employee who had been examined by three physicians, one of whom was employer's physician, and whose record disclosed no physical defect, did not forfeit right to reinstatement because of his refusal to submit to further physical examination.—N. L. R. B. v. Eclipse Moulded Products Co., C.C.A.7, 126 F.2d 576.

Where a strike is in progress at the time of the reinstatement order, the order may provide for reinstatement on the employee's application within a reasonable time.—N. L. R. B. v. Biles Coleman Lumber Co., C. C.A.9, 98 F.2d 18.

34. U.S.—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579.

35. U.S.—N. L. R. B. v. Lightner Pub. Corp. of Ill., C.C.A.7, 128 F. 2d 237.

Substantially equivalent position

An order requiring an employer to reinstate a discharged employee to his former or a substantially equivalent position does not give the employer an option, but requires him to reinstate the employee to his former position if possible, and to a substantially equivalent position if that is not possible.—N. L. R. B. v. Draper Corp., C.C.A.1, 159 F.2d 294.

36. U.S.—Salmon & Cowin v. N. L. R. B., C.C.A.5, 148 F.2d 941, certiorari denied 66 S.Ct. 100, 326 U. S. 758, 90 L.Ed. 456.

37. U.S.—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F. 2d 39.

To keep channels of commerce open

The statute and all proceedings taken under it are for the primary object of keeping the channels of commerce open, and the making an employee whole is secondary object.—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 132 F.2d 801.

38. U.S.—N. L. R. B. v. Reynolds Corp., C.C.A.5, 155 F.2d 679—Waterman S. S. Corporation v. N. L. R. B., C.C.A.5, 119 F.2d 760—N. L. R. B. v. Mall Tool Co., C.C.A. 7, 119 F.2d 700—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F.2d 816—Nanseau v. U. S., D. C.Mich., 52 F.Supp. 395.

A settlement between employer and employee is not binding on the board.—Waterman S. S. Corporation v. N. L. R. B., C.C.A.5, 119 F.2d 760.

Discharged employee's status

An employee discharged contrary to statute takes a peculiar status, and the board has a broad discretion in vindicating the act through him.—Waterman S. S. Corporation v. N. L. R. B., supra.

Discharge in bankruptcy does not affect back-pay order.—N. L. R. B. v.

statement and back pay is remedial and not punitive.[39] The purpose of reinstatement and back-pay orders is to effectuate the policies of the statute,[40] to restore the status that would have existed but for the unfair labor practice,[41] and to discourage the discharge of employees in violation of the statute.[42]

Incidental rights. The board in ordering the reinstatement of an employee may require that he be reinstated with all the rights and benefits which would have accrued to him but for the illegal discharge,[43] including seniority[44] and insurance rights.[45] A reinstatement order does not require that the employee be offered a position identical in its duties with his former work; it is sufficient if the offer is of substantially the same work.[46]

Pleading. The complaint need not specifically raise the issues of reinstatement and back pay in order to warrant an order granting such relief; it is sufficient if the complaint charges unfair labor practices since the statute authorizes the board to order reinstatement and back pay where it finds unfair labor practices,[47] and an order as to reinstatement need not be limited to the persons named in the charge or complaint.[48]

Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39.

Public reparation order

Order directing reinstatement is not private award operating by way of penalty or of damages, but is public reparation order.—Agwilines, Inc., v. N. L. R. B., C.C.A.5, 87 F.2d 146.

The statute creates a legal right in employee and authorizes the board as a remedial measure to order reinstatement with back pay.—Continental Oil Co. v. N. L. R. B., C.C.A. 10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292.

39. U.S.—Nierotko v. Social Sec. Board, C.C.A.Mich., 149 F.2d 273, affirmed 66 S.Ct. 637, 326 U.S. 358, 90 L.Ed. 718, 162 A.L.R. 1445—N. L. R. B. v. American Creosoting Co., C.C.A.6, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U. S. 797, 88 L.Ed. 1086—N. L. R. B. v. Keystone Freight Lines, C.C.A. 10, 126 F.2d 414—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F. 2d 311—Mooresville Cotton Mills v. N. L. R. B., C.C.A.4, 110 F.2d 179.

Fine or penalty

(1) It has been stated that a back-pay award is not a fine or a penalty. —Social Sec. Board v. Nierotko, Mich., 66 S.Ct. 637, 327 U.S. 358, 90 L.Ed. 718, 162 A.L.R. 1445.

(2) It has also been stated, however, that back-pay orders are in the nature of penalties.—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A. 5, 130 F.2d 260—American Smelting & Refining Co. v. N. L. R. B., C.C.A. 8, 126 F.2d 680—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433.

Punishment for violation of statute

Provision of statute authorizing affirmative actions, including reinstatement with or without back pay, is intended not to reward employees, but to serve in a measure as a punishment of employer's violation of the act.—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 128 F.2d 528—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L. Ed. 1045.

Remedial pay is allowable to employees who have been denied employment because of discrimination practiced by employer.—N. L. R. B. v. Chattanooga Bakery, C.C.A.6, 127 F.2d 201, certiorari denied Chattanooga Bakery v. N. L. R. B., 63 S.Ct. 157, 317 U.S. 676, 87 L.Ed. 543.

Tender in good faith

The board should, on request, cooperate with employer in framing a proper tender to comply with an order directing employer to reinstate illegally discharged employees and make them whole and court will be slow to punish unassisted tenders made in good faith.—Waterman S. S. Corporation v. N. L. R. B., C.C.A.5, 119 F.2d 760.

40. U.S.—Social Sec. Board v. Nierotko, Mich., 66 S.Ct. 637, 327 U.S. 358, 90 L.Ed. 718, 162 A.L.R. 1445.

41. U.S.—N. L. R. B. v. Killoren, C.C.A.Mo., 122 F.2d 609, 137 A.L.R. 510, certiorari denied Killoren v. N. L. R. B., 62 S.Ct. 412, 314 U.S. 696, 86 L.Ed. 556.

Protection of employee

The purpose of back pay orders is that the employee shall not suffer loss because of the employer's unfair labor practice.—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 130 F.2d 765.

42. U.S.—Waterman S. S. Corporation v. N. L. R. B., C.C.A.5, 119 F. 2d 760.

43. U.S.—Nierotko v. Social Sec. Board, C.C.A.Mich., 149 F.2d 273, affirmed 66 S.Ct. 637, 326 U.S. 358, 90 L.Ed. 718, 162 A.L.R. 1445—N. L. R. B. v. Eclipse Moulded Products Co., C.C.A.7, 126 F.2d 576.

Vacation rights

U.S.—Republic Steel Corporation v. N. L. R. B., C.C.A.3, 114 F.2d 820, modified on other grounds Republic Steel Corporation v. N. L. R. B., 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6.

Employee is entitled to no greater rights

U.S.—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 140 F.2d 777—N. L. R. B. v. Quality Art Novelty Co., C.C.A.2, 127 F.2d 903.

44. U.S.—N. L. R. B. v. Eclipse Moulded Products Co., C.C.A.7, 126 F.2d 576.

45. U.S.—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292.

Payment of insurance benefits

Board may order the payment of insurance benefits which would have been paid to the employee or his representative but for the wrongful discharge.—N. L. R. B. v. Revlon Products Corporation, C.C.A.2, 144 F. 2d 88.

46. U.S.—N. L. R. B. v. Skinner & Kennedy Stationery Co., C.C.A.8, 113 F.2d 667.

Right to hire and fire

The words "rights and privileges" in order that foreman should be offered reinstatement without prejudice to his rights and privileges, did not include the right to hire and discharge employees.—N. L. R. B. v. Skinner & Kennedy Stationery Co., supra.

47. U.S.—Stewart Die Casting Corp. v. N. L. R. B., C.C.A.7, 114 F.2d 849, certiorari denied 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119—Republic Steel Corporation v. N. L. R. B., C.C.A.3, 107 F.2d 472, certiorari denied 60 S.Ct. 806, 309 U.S. 684, 84 L.Ed. 1027, vacated on other grounds 60 S.Ct. 1072, 310 U. S. 655, 84 L.Ed. 1419, certiorari denied Central Council of Steel Plants, Northern District Republic Steel Corporation v. N. L. R. B., 60 S.Ct. 808, 309 U.S. 684, 84 L.Ed. 1028, and supplemented, C.C.A., Republic Steel Corporation v. N. L. R. B., 114 F.2d 820, modified on grounds 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6.

48. U.S.—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 849, certiorari denied 61 S. Ct. 449, 312 U.S. 680, 85 L.Ed. 1119.

Existence of work. The board's power to order reinstatement does not give it the power to require the employer to hire more men than it needs or to employ a person for whom there is no work;[49] an order directing reinstatement does not mean that such persons must be furnished employment when no employment is available, but that they be restored to their former position and given work when other like employees are given work.[50] The board may require the employer to discharge employees hired since the unfair labor practice to make room for the persons ordered to be reinstated,[51] but it may not require for such purpose the discharge of employees hired before that time.[52] The employer may be required to place on a preferential hiring list those persons entitled to reinstatement for whom there is no work.[53] Where an employer refuses to bargain after its employees have gone out on strike, the board may order the employer to reinstate strikers whose positions have been filled since the refusal to bargain, and to place the balance of the strikers on a preferential list for employment.[54]

Sale or abandonment of business. An implicit condition of an order of reinstatement is the continued operation of the business by the offending employer,[55] but an order directing an employer to reinstate certain employees is operative although the business is continued under a disguise to evade the order,[56] and the order is enforceable despite a change in the name or the apparent ownership of the business.[57] The death of one of the partners who constituted the employers will not prevent the issuance of a reinstatement and back-pay order.[58] A reinstatement order may issue although that branch of the employer's business in which the employee was engaged has been abandoned,[59] or his former

49. U.S.—N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A. 7, 128 F.2d 237—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F. 2d 681—Union Drawn Steel Co. v. N. L. R. B., C.C.A.3, 109 F.2d 587 —N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 405, rehearing denied 99 F.2d 56.

Other plants

The board had power to direct possible reinstatement at a plant other than that at which employees formerly worked.—Republic Steel Corp. v. N. L. R. B., C.C.A.3, 107 F.2d 472, certiorari denied 60 S.Ct. 806, 309 U.S. 684, 84 L.Ed. 1027, vacated on other grounds 60 S.Ct. 1072, 310 U.S. 655, 84 L.Ed. 1419, certiorari denied Central Council of Steel Plants, Northern Dist. Republic Steel Corp. v. N. L. R. B., 60 S.Ct. 808, 309 U.S. 684, 84 L.Ed. 1028, and supplemented, C. C.A., Republic Steel Corp. v. N. L. R. B., 114 F.2d 820, modified on other grounds 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6.

50. U.S.—N. L. R. B. v. C. Nelson Mfg. Co., C.C.A.8, 120 F.2d 444—N. L. R. B. v. Planters Mfg. Co., C.C.A.4, 106 F.2d 524.

51. U.S.—N. L. R. B. v. Shenandoah-Dives Mining Co., C.C.A.10, 145 F.2d 542—N. L. R. B. v. Eclipse Moulded Products Co., C.C.A.7, 126 F.2d 576—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F.2d 368—N. L. R. B. v. Giannasca, C. C.A.2, 119 F.2d 756, 135 A.L.R. 560 —N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A.7, 113 F. 2d 621—Black Diamond S. S. Corporation v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S.Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542.

Rights of new employees

An order of reinstatement was not invalid on ground that individuals employed to fill positions would be deprived of their jobs without due process of law, since order did not discharge such individuals, but merely compelled employer to exercise its right of discharge.—N. L. R. B. v. Star Pub. Co., C.C.A.9, 97 F.2d 465.

52. U.S.—N. L. R. B. v. Burke Mach. Tool Co., C.C.A.6, 133 F.2d 618—N. L. R. B. v. Wilson Line, C.C.A. 3, 122 F.2d 809—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F. 2d 480—N. L. R. B. v. Lightner Pub. Corporation of Illinois, C.C.A. 7, 113 F.2d 621—Black Diamond S. S. Corp. v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S.Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 91 F.2d 509, rehearing denied 93 F.2d 1010.

53. U.S.—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—Williams Motor Co. v. N. L R. B., C.C.A.8, 128 F.2d 960—N. L. R. B. v. Eclipse Moulded Products Co., C.C.A.7, 126 F.2d 576—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681—Union Drawn Steel Co. v. N. L. R. B., C.C.A.3, 109 F.2d 587—Black Diamond S. S. Corp. v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S.Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542—Jeffery-De Witt Insulator Co. v. N. L. R. B., C.C.A.4, 91 F.2d 134, 112 A.L.R. 948.

54. U.S.—N. L. R. B. v. Lettie Lee, Inc., C.C.A.9, 140 F.2d 243.

55. U.S.—Southport Petroleum Co. v. N. L. R. B., 62 S.Ct. 452, 315 U.S. 100, 86 L.Ed. 718, rehearing denied 62 S.Ct. 637, 315 U.S. 827, 86 L.Ed. 1223.

A true change of ownership terminates the duty of complying with the order.—Southport Petroleum Co. v. N. L. R. B., supra.

56. U.S.—Southport Petroleum Co. v. N. L. R. B., supra.

Independent contractor

Where an employer discharged his employees and arranged for the work to be done by an independent contractor as part of an unfair labor practice, the board's reinstatement order may run against the employer and the independent contractor jointly and severally.—N. L. R. B. v. Gluek Brewing Co., C.C.A.8, 144 F.2d 847.

57. U.S.—Southport Petroleum Co. v. N. L. R. B., 62 S.Ct. 452, 315 U.S. 100, 86 L.Ed. 718, rehearing denied 62 S.Ct. 637, 315 U.S. 827, 86 L.Ed. 1223.

Transfer after unfair labor practices

U.S.—N. L. R. B. v. Adel Clay Products Co., C.C.A.8, 134 F.2d 342.

58. U.S.—N. L. R. B. v. Colten, C. C.A.6, 105 F.2d 179.

59. U.S.—Williams Motor Co. v. N. L. R. B., C.C.A.8, 128 F.2d 960.

Employment in new plant

Where an employer abandons its plant and opens a new plant in another city in the course of a strike, the board may order the employer to offer its old employees work in the new plant, but it may not require the employer to furnish the men and their families transportation.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R.

position has been abolished,[60] where the employer can offer him substantially equivalent employment. A voluntary sale of the vessel on which the wrongfully discharged employee was employed does not bar an order for reinstatement and back pay where the employer is operating a number of other vessels.[61]

Rights of employee's creditors in back-pay award. A back-pay award is not a private judgment or chose in action of the employee and he has no property right in the award pending his actual receipt of the money in so far as the rights of third persons and creditors are concerned.[62] Third persons may litigate the title to the back pay when paid over to the employee and may when permitted by state law subject the money to attachment, but they may not by judicial process command payment of the award to others than those designated in the board's order.[63] It is for the board to determine in what circumstances it will aid third persons seeking satisfaction of their claims against the employee out of the back-pay award.[64]

b. When and as to Whom Reinstatement May Be Ordered

The National Labor Relations Board may order the reinstatement of employees only where the employer has been guilty of unfair labor practices. The power of the board to order reinstatement is not limited to persons discharged by the employer, but extends to persons the employer refuses to hire where such refusal is an unfair labor practice.

Although it has been stated in general terms that the power of the National Labor Relations Board to order reinstatement is limited to persons who are employees of the employer found to have committed unfair labor practices[65] at the time of the order,[66] the power of the board to order reinstatement with or without back pay is not limited to persons discharged by the employer, but extends to persons the employer refuses to hire where such refusal is an unfair labor practice.[67] Where the employer's unfair practices resulted in a loss of wages, although the employee was not discharged, the board may nevertheless order the employer to make good the loss of wages.[68] The board may order payment of back wages to a discharged employee although it does not order his reëmployment,[69] but

B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

60. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

61. U.S.—Waterman S. S. Corporation v. N. L. R. B., C.C.A.5, 119 F.2d 760.

62. U.S.—N. L. R B. v. Stackpole Carbon Co., C.C.A.3, 128 F.2d 188—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 125 F.2d 757.

Assignments of back wages made by employees were invalid and could not be given effect against the board and its agents.—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 128 F.2d 188, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506.

63. U.S.—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 125 F.2d 757.

64. U.S.—N. L. R. B. v. Sunshine Mining Co., supra.

65. U.S.—N. L. R. B. v. Hearst, C.C.A.9, 102 F.2d 658—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045.

66. U.S.—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F.2d 652—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045.

67. U.S.—Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. Waumbec Mills, C.C.A.1, 114 F.2d 226.

Contra N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992.

Discrimination in denying or terminating employment

Congress did not differentiate between discrimination in denying employment and in terminating employment.—Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217.

Closed-shop contract

The board may not order an employer to offer employment to one not a member of a union with which the employer has a valid contract under the terms of which the employer is required to select its employees from the members of such union.—Waterman Steamship Corporation v. N. L. R. B., C.C.A.5, 103 F.2d 157, reversed on other grounds N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036.

Constructive discharge

Where employees were temporarily transferred to positions where working conditions were as good as where they originally worked, and hours and pay were the same, and employees elected to quit employer's service, and employer had sought to influence employees against organizing labor unions, employees should be tendered their former or substantially equivalent positions with full seniority rights, but are not entitled to compensation from the time they left employer's service on ground that they had been constructively discharged.—N. L. R. B. v. Waples-Platter Co., C.C.A.5, 140 F.2d 228.

68. U.S.—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 601.

Curtailment of overtime

National Labor Relations Board properly considered the discontinuance of overtime in determining whether employer had interfered with or coerced employees in the exercise of their statutory right, but where both union and nonunion employees were treated alike there was no discrimination against individual union workers and board was without power to require reimbursement of union workers by employer.—N. L. R. B. v. Winona Textile Mills, supra.

69. U.S.—Indianapolis Power & Light Co. v. N. L. R. B., C.C.A.7, 122 F.2d 757, certiorari denied 62 S.Ct. 633, 315 U.S. 804, 86 L.Ed. 1204—New York Handkerchief Mfg. Co. v. N. L. R. B., C.C.A.7, 114 F.2d 144, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457—Phelps Dodge Corporation v. N. L. R. B., C.C.A.2, 113 F.2d 202, modified on other grounds 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217.

Death of discharged employee

The fact that employee who had been improperly discharged for union activity had died and could not

as to this there is also authority to the contrary.[70]

The power of the board to order reinstatement extends to persons who have obtained other equivalent employment[71] where an order to such effect will effectuate the policies of the statute.[72] A reinstatement order in the case of one who has obtained substantially equivalent employment is a matter within the discretion of the board,[73] whose order must show that it has exercised its discretion and the reasons therefor;[74] and the fact that employees may hesitate to exercise their rights unless such orders are issued is a sufficient reason for their issuance.[75]

The board may order reinstatement of an employee with or without back pay where the employer is guilty of unfair labor practices in violation of the statute[76] and such action is necessary to effectuate the policies of the statute.[77] Reinstatement with or without back pay may be ordered as to employees discharged because of union activities and for the purpose of discouraging membership in the union.[78] Where a strike is caused by the employer-

be reinstated did not preclude award of back pay.—N. L. R. B. v. Revlon Products Corporation, C.C.A.2, 144 F.2d 88.

Reinstated employee

Persons already reinstated should be excepted from reinstatement provision without impairing their rights to back pay.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311.

70. U.S.—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045.

Death after reinstatement ordered

While National Labor Relations Act does not permit award of back pay to wrongfully discharged employee unless reinstated, back pay could properly be awarded to personal representative of discharged employee dying after board entered order for his reinstatement.—N. L. R. B. v. Hearst, C.C.A.9, 102 F.2d 658.

Reinstatement impossible

If reinstatement in compliance with order, which also contains a back-pay allowance, becomes impossible, the back pay obligation is nevertheless enforceable.—N. L. R. B. v. Killoren, C.C.A.Mo., 122 F.2d 609, 137 A.L.R. 510, certiorari denied Killoren v. N. L. R. B., 62 S.Ct. 412, 314 U. S. 696, 86 L.Ed. 556.

71. U.S.—Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. Brezner Tanning Co., C.C.A.1, 141 F.2d 62—N. L. R. B. v. Regal Knitwear Co., C.C.A.2, 140 F.2d 746, affirmed 65 S.Ct. 478, 324 U.S. 9, 89 L.Ed. 661—N. L. R. B. v. Van Deusen, C.C.A.2, 138 F.2d 893—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—N. L. R. B. v. Weirton Steel Co., C.C.A.3, 135 F.2d 494—N. L. R. B. v. Moltrup Steel Products Co., C.C.A.3, 121 F.2d 612—N. L. R. B. v. Blanton Co., C.C.A.8, 121 F.2d 564—N. L. R. B. v. Mall Tool Co., C.C.A.7, 119 F.2d 700.

Before the rule was settled by the supreme court there were several decisions to the contrary.—N. L. R. B. v. Moltrup Steel Products Co., C.C.A.3, 121 F.2d 612—N. L. R. B. v. Mall Tool Co., C.C.A.7, 119 F.2d 700—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F.2d 480—N. L. R. B. v. Skinner & Kennedy Stationery Co., C.C.A.8, 113 F.2d 667—Subin v. N. L. R. B., C.C.A.3, 112 F.2d 326, certiorari denied 61 S.Ct. 38, 311 U. S. 673, 85 L.Ed. 433—Mooresville Cotton Mills v. N. L. R. B., C.C.A.4, 110 F.2d 179—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045—Mooresville Cotton Mills v. N. L. R. B., C.C.A.4, 97 F.2d 959, modifying 94 F.2d 61.

72. U.S.—N. L. R. B. v. Brezner Tanning Co., C.C.A.1, 141 F.2d 62.

73. U.S.—N. L. R. B. v. Regal Knitwear Co., C.C.A.2, 140 F.2d 746, affirmed 65 S.Ct. 748, 324 U.S. 9, 89 L.Ed. 661.

74. U.S.—Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. Regal Knitwear Co., C.C.A.2, 140 F.2d 746, affirmed 65 S.Ct. 478, 324 U.S. 9, 89 L.Ed. 661.

75. U.S.—N. L. R. B. v. Regal Knitwear Co., supra.

76. U.S.—American Nat. Bank of St. Paul v. N. L. R. B., C.C.A.8, 144 F.2d 268—N. L. R. B. v. Louisville Refining Co., C.C.A.6, 102 F.2d 678, certiorari denied Louisville Refining Co. v. N. L. R. B., 60 S.Ct. 81, 308 U.S. 568, 84 L.Ed. 477.

Employee discharged for testifying in labor board proceeding was properly ordered reinstated.—N. L. R. B. v. Viking Pump Co., C.C.A.8, 113 F.2d 759, certiorari denied Viking Pump Co. v. N. L. R. B., 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119.

Employees on strike when statute enacted

Where employer's factory was closed because of strike before enactment of National Labor Relations Act, restoration of strikers to their employment by order of board could be effected only if employer had failed in its statutory duty to bargain collectively at some time after approval of the act, and before the employer had resumed normal operations of its factory with a full complement of production employees.—N. L. R. B. v. Columbian Enameling & Stamping Co., 59 S.Ct. 501, 306 U.S. 292, 83 L.Ed. 660.

Union jurisdictional conflict

Where drivers' union had informed newspaper company that it would not haul newspapers unless company's circulation employees were members of union, and company thereafter transferred to temporary positions in other departments employees in circulation department who would not give up their membership in newspaper guild, fact that company might be compelled to close its plant because drivers would refuse to haul papers if company complied with order of board requiring reinstatement of transferred employees, did not preclude board from ordering reinstatement.—N. L. R. B. v. Star Pub. Co., C.C.A.9, 97 F.2d 465.

77. U.S.—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045.

Shutdown of plant

A reinstatement order has been held proper where a plant was shut down for the purpose of interfering with the self organization of the employees.—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681.

78. U.S.—Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U. S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S. Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352—Sewell Hats, Inc., v. N. L. R. B., C.C.A.5, 143 F.2d 450, certiorari denied 65 S.Ct. 130, 323 U.S. 772, 89 L.Ed. 617—N. L. R. B. v. Brashear Freight Lines, C.C.A.8, 119 F.2d 379—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992—N. L. R. B. v. Fashion

er's unfair labor practices, the board may order the reinstatement of the strikers,[79] and the board may order the reinstatement of an employee discharged solely because he participated in a strike against the employer.[80] It is not a valid objection to a reinstatement order as to employees discriminatorily discharged that they participated in a strike against the employer after their discharge,[81] that they failed to apply for reinstatement,[82] or that some of them have been reinstated.[83] Where the refusal to reinstate employees was discriminatory, the board may order their reëmployment although they had struck in sympathy with others whose discharge was found to be not illegal.[84]

The board may not order the reinstatement of employees where the employer has not committed an unfair labor practice in violation of the statute[85] or where the employee was lawfully discharged.[86] The reinstatement of employees discharged because of their illegal seizure and retention of their employer's property may not be ordered even though the employer is guilty of unfair labor practices[87]

Piece Dye Works, C.C.A.3, 100 F.2d 304—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

Employee in a supervisory position

The reinstatement of shop foreman whose discharge was motivated by employer's hostility toward union which foreman represented would not be required in view of foreman's active connection with union and his known history of influencing employees in favor of the union in which he had a supervisory position.—Wells, Inc., v. N. L. R. B., C.C.A.9, 162 F.2d 457.

Contract with craft union

Where employer improperly interfered with attempts of employees to have a plant-wide union in place of craft unions, employees who were discharged in conformity with an agreement between employer and craft union were properly ordered reinstated with back pay.—Corning Glass Works v. N. L. R. B., C.C.A. 2, 118 F.2d 625.

79. U.S.—N. L. R. B. v. American Creosoting Co., C.C.A.6, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U.S. 797, 88 L.Ed. 1086—N. L. R. B. v. Poultrymen's Service Corporation, C.C.A.3, 138 F.2d 204—N. L. R. B. v. Chattanooga Bakery, C.C.A.6, 127 F.2d 201, certiorari denied Chattanooga Bakery v. N. L. R. B., 63 S.Ct. 157, 317 U.S. 676, 87 L.Ed. 543—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S. Ct. 142, 308 U.S. 605, 84 L.Ed. 506, and opinion supplemented, C.C.A., 128 F.2d 188—N. L. R. B. v. Star Pub. Co., C.C.A.9, 97 F.2d 465.

Nonunion strikers

The board, in ordering company to reinstate all employees who went on strike because of unfair labor practice, properly included in reinstatement order nonunion workers, those joining strike after it was originally called, and employees who were not eligible for membership in union calling strike.—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F. 2d 18.

Confidential employee

Fact that employer's striking secretary was excluded from the collective bargaining unit because she might have access to confidential information pertaining directly to employer's labor relations did not preclude her from receiving reinstatement and back pay, since the exclusion did not deprive her of the benefits of the National Labor Relations Act.—N. L. R. B. v. Poultrymen's Service Corp., C.C.A.3, 138 F.2d 204.

Notice of absence

Provision of employment contract requiring employees to give notice of intended absence from work was not intended to apply to absence from work due to strikes or to affect rights of striking employees to reinstatement in accordance with order.—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579.

With back pay

Where the employer has committed an unfair labor practice, the board may order the reinstatement with back pay of employees even though they have gone out on strike.—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A.10, 122 F.2d 419.

80. U.S.—Home Beneficial Life Ins. Co. v. N. L. R. B., C.C.A.4, 159 F.2d 280.

81. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S. Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

82. U.S.—N. L. R. B. v. Cowell Portland Cement Co., supra—Idaho Potato Growers v. N. L. R. B., C. C.A.9, 144 F.2d 295, certiorari denied 65 S.Ct. 122, 323 U.S. 769, 89 L.Ed. 615—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144.

Unlawful conditions

An employer's refusal to reinstate his striking employees unless they joined a company union warrants a reinstatement order as to such employees even though they failed to apply for reinstatement where such failure was caused by the employer's unlawful conditions.—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A.8, 119 F.2d 903.

83. U.S.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S. Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

84. U.S.—Firth Carpet Co. v. N. L. R. B., C.C.A.2, 129 F.2d 633.

85. U.S.—N. L. R. B. v. Brashear Freight Lines, C.C.A.8, 119 F.2d 379—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—N. L. R. B. v. Carlisle Lumber Co., C.C. A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045—Black Diamond S. S. Corp. v. N. L. R. B., C.C.A.2, 94 F.2d 875, certiorari denied 58 S. Ct. 1044, 304 U.S. 579, 82 L.Ed. 1542.

86. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486—N. L. R. B. v. Williamson-Dickie Mfg. Co., C.C.A.5, 130 F.2d 260.

Refusal to handle work shifted from strike-bound plant

U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486.

87. U.S.—N. L. R. B. v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599.

Aiders and abettors

U.S.—N. L. R. B. v. Fansteel Metallurgical Corp., supra.

Sit-down strike

U.S.—McNeely & Price Co. v. N. L. R. B., C.C.A.3, 106 F.2d 878.

and has reëmployed some of those who participated in the illegal seizure of the plant.[88] Similarly the board may not order the reinstatement of employees discharged because of their participation in a strike on board a ship in violation of a mutiny statute even though the strike was precipitated by the employer's unfair labor practice.[89] It has been held that reinstatement may not be ordered as to employees discharged because they went on strike in violation of a contract with the employer not to strike and to submit differences to arbitration.[90] Similarly, where a minority of the employees strike because of a refusal by the employer to bargain with their representative and are discharged, it has been held that they are limited to their economic weapon and that the board may not order their reinstatement.[91] The power of the board to order reinstatement as to employees who have committed crimes or other unlawful acts is somewhat restricted.[92] One habitually intoxicated while at work where his intoxication represented a danger to the public should not be ordered reinstated even though he was discharged for other reasons and as part of an unfair labor practice.[93]

88. U.S.—N. L. R. B. v. Fansteel Metallurgical Corp., 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A. L.R. 599.

89. U.S.—Southern S. S. Co. v. N. L. R. B., 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246.

Statutes regarding shipping articles and duties of master must be considered in determining validity of order requiring reinstatement of seamen who conducted a strike on board a vessel away from home port.—Southern S. S. Co. v. N. L. R. B., supra.

90. U.S.—N. L. R. B. v. Columbian Enameling & Stamping Co., C.C.A. 7, 96 F.2d 948, affirmed 59 S.Ct. 501, 306 U.S. 292, 83 L.Ed. 660.

91. U.S.—N. L. R. B. v. Brashear Freight Lines, C.C.A.8, 119 F.2d 379.

92. U.S.—N. L. R. B. v. Quality & Service Laundry, C.C.A.4, 131 F.2d 182, certiorari denied Quality & Service Laundry v. N. L. R. B., 63 S.Ct. 831, 318 U.S. 775, 87 L.Ed. 1144.

Clean hands

(1) Striking employees were not precluded from reinstatement under order of board on ground that they did not come into court with clean hands, since that principle is not applicable to governmental agency seeking enforcement of its order.—Republic Steel Corp. v. N. L. R. B., C.C.A.3, 107 F.2d 472, certiorari denied 60 S.Ct. 806, 309 U.S. 684, 84 L.Ed. 1027, vacated on other grounds 60 S.Ct. 1072, 310 U.S. 655, 84 L.Ed. 1419, certiorari denied Central Council of Steel Plants, Northern Dist. Republic Steel Corp. v. N. L. R. B., 60 S.Ct. 808, 309 U.S. 684, 84 L.Ed. 1028, and supplemented, C.C.A., Republic Steel Corp. v. N. L. R. B., 114 F.2d 820, modified on other grounds 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6.

(2) Discharged employees were not barred from being reinstated and from obtaining back pay from employer guilty of unfair labor practices on ground that they did not have clean hands because they had committed acts of violence.—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045.

Employees charged with contempt

Order directing reinstatement of employees against whom employer had initiated contempt proceedings for violation of temporary injunction was not invalid where no finding of guilt was made as to striking employees in contempt proceedings.—N. L. R. B. v. Colten, C.C.A.6, 105 F. 2d 179.

Violence

(1) Ordinarily the employer should not be required to reinstate an employee who had been guilty of violence during a labor dispute.—Republic Steel Corp. v. N. L. R. B., C.C.A.3, 107 F.2d 472, certiorari denied 60 S.Ct. 806, 309 U.S. 684, 84 L.Ed. 1027, vacated on other grounds 60 S.Ct. 1072, 310 U.S. 655, 84 L.Ed. 1419, certiorari denied Central Council of Steel Plants, Northern Dist. Republic Steel Corp. v. N. L. R. B., 60 S.Ct. 808, 309 U.S. 684, 84 L.Ed. 1028, and supplemented, C.C.A., Republic Steel Corp. v. N. L. R. B., 114 F.2d 820, modified on other grounds 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6—Standard Lime & Stone Co. v. N. L. R. B., C.C.A.4, 97 F.2d 531—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

(2) Violence and lawless conduct occurring during strike did not require dismissal of entire proceeding before National Labor Relations Board involving reinstatement of striking employees.—Berkshire Knitting Mills & N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579.

(3) Norris-LaGuardia Act applies to reinstatement order of the board, and in absence of proof of actual participation, authorization, or ratification, an order requiring employer to reinstate strikers was not improper on theory that strikers were all responsible for acts of violence committed by some of their fellows.—Republic Steel Corp. v. N. L. R. B., C.C.A.3, 107 F.2d 472, certiorari denied 60 S.Ct. 806, 309 U.S. 684, 84 L. Ed. 1027, vacated on other grounds 60 S.Ct. 1072, 310 U.S. 655, 84 L.Ed. 1419, certiorari denied Central Council of Steel Plants, Northern Dist. Republic Steel Corp. v. N. L. R. B., 60 S.Ct. 808, 309 U.S. 684, 84 L.Ed. 1028, and supplemented, C.C.A., Republic Steel Corp. v. N. L. R. B., 114 F.2d 820, modified on other grounds 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6.

Conviction of crime

(1) Order of board requiring reinstatement of striking employees using punishment inflicted in local court as criterion of seriousness of offense was proper.—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579.

(2) The board could order reinstatement and back pay for striking employees who were convicted in military courts of rioting or were indicted for crime in other courts, where employers did not raise the question and had no rule or policy against employment of such persons.—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A.8, 119 F.2d 903.

(3) Finding that rioting was not of sufficient gravity to warrant exclusion from order of reinstatement was not an abuse of discretion.—N. L. R. B. v. Elkland Leather Co., C.C. A.3, 114 F.2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S.Ct. 170, 311 U.S. 705, 85 L.Ed. 457.

(4) Where employee was discharged because of union activities, board could order reinstatement despite a conviction of employee for malicious destruction of property, which employee testified was a consequence of his having become intoxicated and which was not a reason for the employee's discharge.—N. L. R. B. v. Oregon Worsted Co., C.C.A.9, 96 F. 2d 193.

93. U.S.—N. L. R. B. v. U. S. Truck Co., C.C.A.6, 124 F.2d 887.

Reinstatement will not be ordered where the employer has made a proper offer of reëmployment which was refused,[94] but an illegally conditioned offer of reëmployment will not bar a reinstatement order.[95] Reinstatement should not be ordered as to an employee who testifies that he does not desire reinstatement.[96]

c. Amount of Back-Pay Award

The back-pay award may not exceed the amount that the employee would have earned but for the unlawful discharge, and deductions should be made for compensation from other employment and for losses from the failure to seek or accept other employment.

The National Labor Relations Board has the power to determine the amount of back pay that the employer shall pay the employee,[97] but should give the employer a fair hearing on the question.[98] The order directing back pay need not determine the amount of the back-pay award; it may prescribe the rule to be applied and leave the actual computation to the parties.[99]

The board has reasonable discretion in determining the amount of the back-pay awards,[1] and, where the circumstances make it impractical to make an exact determination of each employee's back pay, the board may use as close approximations as the circumstances permit in determining back-pay awards.[2] Where the discrimination consisted in the fact that an undue proportion of union men were laid off during a slack period, an order directing back pay for such excess number and dividing it among all the union men laid off has been upheld.[3]

The provision for payment of back wages must be confined to restitution for the wrong done[4] and may not exceed the amount that the employee would have earned while at work but for the unlawful discharge.[5] Thus back pay may not be awarded for slack periods during which the employee would have been laid off[6] under the governing seniority system,[7] but men who ordinarily would have been transferred to other work during slack periods are entitled to back pay for such periods.[8] The period during which the employer's plant was closed down by a strike caused by his unfair labor practices need not be deducted in computing the back-pay award to one illegally discharged.[9] Back pay may not be awarded for the period during which the employee was serving in the armed forces.[10]

94. U.S.—N. L. R. B. v. Wilson Line, C.C.A.3, 122 F.2d 809.

General offer of employment

U.S.—N. L. R. B. v. Van Deusen, C.C.A.2, 138 F.2d 893.

Delay

An employee who did not appear for work until six days after it was offered him by employer, because of consideration for temporary employer did not forfeit his rights to reemployment and reinstatement.—N. L. R. B. v. Lightner Pub. Corp. of Ill., C.C.A.7, 128 F.2d 237.

95. U.S.—N. L. R. B. v. St. Marys Sewer Pipe Co., C.C.A.3, 146 F.2d 995—Waterman S. S. Corp. v. N. L. R. B., C.C.A.5, 119 F.2d 760—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F.2d 652.

96. U.S.—Colonie Fibre Co. v. N. L. R. B., C.C.A.2, 163 F.2d 65.

97. U.S.—N. L. R. B. v. Carlisle Lumber Co., 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539.

98. U.S.—N. L. R. B. v. New York Merchandise Co., C.C.A.2, 134 F.2d 949.

99. U.S.—N. L. R. B. v. Wilson Line, C.C.A.3, 122 F.2d 809—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045.

Reinstatement before negotiations as to back pay

An employer may not delay compliance with the reinstatement provisions of the order until the back-pay negotiations are concluded; reinstatement should precede the negotiations.—N. L. R. B. v. American Potash & Chemical Corporation, C.C.A.9, 113 F.2d 232, 129 A.L.R. 874, petition denied 118 F.2d 630.

1. U.S.—Home Beneficial Life Ins. Co. v. N. L. R. B., C.C.A.4, 159 F.2d 280—Williams Motor Co. v. N. L. R. B., C.C.A.8, 128 F.2d 960.

2. U.S.—Marlin-Rockwell Corporation v. N. L. R. B., C.C.A.2, 133 F.2d 258.

Particular approximation held valid

U.S.—N. L. R. B. v. American Creosoting Co., C.C.A.6, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U.S. 797, 88 L.Ed. 1086.

3. U.S.—F. W. Woolworth Co. v. N. L. R. B., C.C.A.2, 121 F.2d 658.

4. U.S.—N. L. R. B. v. Leviton Mfg. Co., C.C.A.2, 111 F.2d 619.

Employment by coworkers

Where employee worked only half of her time for employer, the other half being devoted to preparing lunches for employees who paid her for such work, such employee would not be allowed loss of compensation for serving lunches to employees.—N. L. R. B. v. Acme Air Appliance Co., C.C.A.2, 117 F.2d 417.

5. U.S.—N. L. R. B. v. C. Nelson Mfg. Co., C.C.A.8, 120 F.2d 444—N. L. R. B. v. Planters Mfg. Co., C.C.A.4, 106 F.2d 524.

6. U.S.—Salmon & Cowin v. N. L. R. B., C.C.A.5, 148 F.2d 941, certiorari denied 66 S.Ct. 100, 326 U.S. 758, 90 L.Ed. 456—N. L. R. B. v. American Creosoting Co., C.C.A.6, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U.S. 797, 88 L.Ed. 1086—Marlin-Rockwell Corp. v. N. L. R. B., C.C.A.2, 133 F.2d 258—N. L. R. B. v. Wilson Line, C.C.A.3, 122 F.2d 809.

7. U.S.—Corning Glass Works v. N. L. R. B., C.C.A.2, 118 F.2d 625.

Seniority rules

Where discriminatorily discharged employee had seniority over some employees retained, seniority based on length of service within the particular class of employment was the proper test only if work denied discharged employee was within the scope of his particular class, but, if it was of a kind not restricted to his class, seniority should be determined on basis of time of entry into company's employ.—N. L. R. B. v. Wilson Line, C.C.A.3, 122 F.2d 809.

8. U.S.—N. L. R. B. v. Remington Rand, C.C.A.2, 130 F.2d 919—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 130 F.2d 765.

9. U.S.—N. L. R. B. v. Hearst, C.C.A.9, 102 F.2d 658.

10. U.S.—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F.2d 44, certiorari denied 65 S.Ct. 1025, 324

The period for which back pay may be awarded terminates on reinstatement,[11] but an employer's discriminatory offer of reëmployment does not terminate the period for which back pay may be awarded.[12] In the case of employees on strike, back pay should be limited to the period after application for reëmployment was made.[13]

In computing back-pay allowances, deductions should be made for compensation received from other employment.[14] Where the board limits its back-pay order to certain periods, earnings of the employee made outside the periods may not be deducted.[15] In the case of an employee who has obtained other employment at higher wages, the board may order the payment of back wages from the time of discharge to the time the new employment was obtained without deducting the subsequent excess from such sum.[16]

In computing the back-pay allowance, deductions should be made for losses which the employee willfully incurred, as where he failed to seek or refused to accept other employment,[17] but the strict rule of mitigation of damages applicable in civil

U.S. 877, 89 L.Ed. 1429—N. L. R. B. v. Harbison-Walker Refractories Co., C.C.A.8, 137 F.2d 596.

11. U.S.—N. L. R. B. v. Yale & Towne Mfg. Co., C.C.A.2, 114 F.2d 376.

Change in pay

Where seamen had been reinstated to former positions without discrimination, and changes in their pay were not due to discriminations, such seamen were entitled to be made whole only for time between their respective discharges and offers of reinstatement.—Waterman S. S. Corporation v. N. L. R. B., C.C.A.5, 119 F.2d 760.

Date of reinstatement

The back-pay award may include the period up to reinstatement and not simply to the date of the reinstatement order.—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045.

12. U.S.—N. L. R. B. v. Poultrymen's Service Corporation, C.C.A. 3, 138 F.2d 204.

13. U.S.—Polish Nat. Alliance of U. S. v. N. L. R. B., C.C.A.7, 133 F.2d 175, affirmed 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509—United Biscuit Co. of America v. N. L. R. B., C. C.A.7, 128 F.2d 771—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, and opinion supplemented, C.C.A., 128 F.2d 188.

One who made application prior to other striking employees was entitled to be made whole from date of his application.—Polish Nat. Alliance of U. S. v. N. L. R. B., C.C.A.7, 133 F.2d 175, affirmed 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509.

14. U.S.—Social Sec. Board v. Nierotko, Mich., 66 S.Ct. 637, 327 U. S. 358, 90 L.Ed. 718, 162 A.L.R. 1445—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579—N. L. R. B. v. Hudson Motor Car Co., C. C.A.6, 136 F.2d 385—N. L. R. B. v. Baldwin Locomotive Works, C.C. A.3, 128 F.2d 39—New York Handkerchief Mfg. Co. v. N. L. R. B., C.C.A.7, 114 F.2d 144, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457—Phelps Dodge Corporation v. N. L. R. B., C.C.A.2, 113 F. 2d 202, modified on other grounds 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. American Potash & Chemical Corporation, C.C.A.9, 98 F.2d 488, certiorari denied American Potash & Chemical Corporation v. N. L. R. B., 59 S.Ct. 582, 306 U.S. 643, 83 L.Ed. 1043.

Amount earned in own business should be deducted.—N. L. R. B. v. Poultrymen's Service Corporation, C. C.A.3, 138 F.2d 204.

Severance pay paid by the employer to the discharged employees should be deducted.—N. L. R. B. v. Hearst, C.C.A.9, 102 F.2d 658.

Deduction of time during which employed

A back-pay order is not complied with by paying an amount computed by paying full wages for the period the employee was unemployed, instead of full wages for the total period less the amount of wages earned during that period.—Waterman S. S. Corporation v. N. L. R. B., C.C.A. 5, 119 F.2d 760.

Failure to raise issue

Where during hearing employer had not raised issue concerning potential earnings from other employers, that issue was foreclosed to date of close of hearing.—Corning Glass Works v. N. L. R. B., C.C.A.2, 129 F.2d 967.

"Earnings" within order requiring employer to pay to wrongfully discharged employee a sum which employee would have earned, less his net earnings during period of unemployment, means sums received as "wages" for services performed.—N. L. R. B. v. Brashear Freight Lines, C.C.A.8, 127 F.2d 198.

15. U.S.—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 136 F.2d 385.

Employment during slack periods

Employer was not authorized to deduct from the amount that the employees would normally have earned, but for their discharge, amounts they had earned elsewhere during the period employees would normally have been unemployed.—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 139 F.2d 765.

16. U.S.—N. L. R. B. v. Kaplan, C. C.A.2, 138 F.2d 884, certiorari denied Kaplan v. N. L. R. B., 64 S. Ct. 787, 321 U.S. 788, 88 L.Ed. 1079.

17. U.S.—Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. Cheney California Lumber Co., C.C.A.9, 149 F. 2d 333, reversed on other grounds 66 S.Ct. 553, 327 U.S. 385, 90 L.Ed. 739—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438—N. L. R. B. v. American Laundry Mach. Co., C.C.A.2, 138 F.2d 889—N. L. R. B. v. Hudson Motor Car Co., C. C.A.6, 136 F.2d 385—Corning Glass Works v. N. L. R. B., C.C.A.2, 129 F.2d 967—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—N. L. R. B. v. Suburban Lumber Co., C.C.A.3, 121 F.2d 829, certiorari denied Suburban Lumber Co. v. N. L. R. B., 62 S. Ct. 364, 314 U.S. 693, 86 L.Ed. 554—Subin v. N. L. R. B., C.C.A.3, 112 F.2d 326, certiorari denied 61 S.Ct. 38, 311 U.S. 673, 85 L.Ed. 433.

Affirmative defense

Showing as basis for deductions from back pay because of clearly unjustifiable refusal of discharged employee to take desirable new employment is an affirmative defense, and is not a part of board's case so as to require voiding of reinstatement order for failure to introduce evidence and make finding on the question.—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585.

suits by discharged employees is not applicable[18] and the board has a wide discretion in determining such deduction.[19]

Collateral benefits. The amount of the back-pay award should not be affected by collateral benefits and gifts received by the employee as a result of the discharge.[20] Unemployment insurance payments received by the employee need not be deducted in computing his back pay,[21] and are not "earnings" within the meaning of an order of the board directing the payment of back wages less the employee's net earnings.[22]

Delay in proceeding. Delay by the board in entering the order[23] or in filing the complaint[24] does not require the shortening of the period for which the employee is entitled to back pay, but the back-pay award should not cover the period prior to the filing of charges, where the filing of charges was unreasonably delayed.[25]

Payment to government work relief agencies. A back-pay order providing that, in computing the amount, receipts by the employee from work relief agencies be deducted and that the employer pay such sums to the government agencies involved is invalid in so far as it directs payment to the government agencies.[26]

Discriminatory jobs
Where employees were wrongfully discharged because of union activities, employer was not entitled to credit for amounts which employees would have earned in discriminatory jobs offered by employer.—N. L. R. B. v. Armour & Co., C.C.A.10, 154 F. 2d 570, certiorari denied 67 S.Ct. 92, 329 U.S. 732, 91 L.Ed. ——.

18. U.S.—Phelps Dodge Corp. v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—Corning Glass Works v. N. L. R. B., C.C.A.2, 129 F.2d 967—N. L. R. B. v. Carlisle Lumber Co., C.C.A. 9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045.

19. U.S.—Corning Glass Works v. N. L. R. B., C.C.A.2, 129 F.2d 967.

20. U.S.—N. L. R. B. v. Marshall Field & Co., C.C.A.7, 129 F.2d 169, 144 A.L.R. 394, affirmed 63 S.Ct. 585, 318 U.S. 253, 87 L.Ed. 744, rehearing denied 63 S.Ct. 849, 318 U.S. 802, 87 L.Ed. 1165—N. L. R. B. v. Brashear Freight Lines, C.C. A.8, 127 F.2d 198.

Groceries distributed by union
U.S.—N. L. R. B. v. Brashear Freight Lines, supra.

21. U.S.—N. L. R. B. v. Marshall Field & Co., C.C.A.7, 129 F.2d 169, 144 A.L.R. 394, affirmed 63 S.Ct. 585, 318 U.S. 253, 87 L.Ed. 744, rehearing denied 63 S.Ct. 849, 318 U. S. 802, 87 L.Ed. 1165.

Right to retain unemployment payments
Whether discharged employees were entitled to retain state unemployment benefits when paid by employer for the same period was a question between employees and the proper state officials.—N. L. R. B. v. Marshall Field & Co., supra.

22. U.S.—Marshall Field & Co. v. N. L. R. B., Ill., 63 S.Ct. 585, 318 U. S. 253, 87 L.Ed. 744, rehearing denied 63 S.Ct. 849, 318 U.S. 802, 87 L.Ed. 1165.

23. U.S.—N. L. R. B. v. Electric Vacuum Cleaner Co., 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775—N. L. R. B. v. American Creosoting Co., C. C.A.6, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U.S. 797, 88 L.Ed. 1086—N. L. R. B. v. Wilson Line, C.C.A.3, 122 F.2d 809—Triplex Screw Co. v. N. L. R. B., C.C.A. 6, 117 F.2d 858.

24. U.S.—N. L. R. B. v. William Davies Co., C.C.A.7, 135 F.2d 179, certiorari denied William Davies Co. v. N. L. R. B., 64 S.Ct. 82, 320 U.S. 770, 88 L.Ed. 460.

Reason for delay in filing complaint could be considered in framing a back-pay order.—Berkshire Employees Ass'n of Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 121 F.2d 235.

25. U.S.—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F.2d 44, certiorari denied 65 S.Ct. 1025, 324 U.S. 877, 89 L.Ed. 1429—N. L. R. B. v. Mall Tool Co., C.C.A.7, 119 F.2d 700—N. L. R. B. v. Crowe Coal Co., 104 F.2d 633, certiorari denied Crowe Coal Co. v. N. L. R. B., 60 S.Ct. 107, 308 U.S. 584, 84 L.Ed. 489.

26. U.S.—N. L. R. B. v. Electric Vacuum Cleaner Co., 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775—Republic Steel Corporation v. N. L. R. B., 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39—N. L. R. B. v. Quality Art Novelty Co., C.C.A.2, 127 F.2d 903—N. L. R. B. v. Chattanooga Bakery, C.C.A.6, 127 F.2d 201, certiorari denied Chattanooga Bakery v. N. L. R. B., 63 S. Ct. 157, 317 U.S. 676, 87 L.Ed. 543—N. L. R. B. v. Isthmian S. S. Co., C.C.A.2, 126 F.2d 598—N. L. R. B. v. Milan Shirt Mfg. Co., C.C.A.6, 125 F.2d 376—N. L. R. B. v. Newberry Lumber & Chemical Co., C. C.A.6, 123 F.2d 831—Wilson & Co. v. N. L. R. B., C.C.A.8, 123 F.2d 411—N. L. R. B. v. Luxuray, Inc., C.C.A.2, 123 F.2d 106—N. L. R. B. v. Standard Knitting Mills, C.C.A.6, 123 F.2d 58—N. L. R. B. v. Wilson Line, C.C.A.3, 122 F.2d 809—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A.10, 122 F.2d 419—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A. 9, 122 F.2d 368—N. L. R. B. v. Reynolds Wire Co., C.C.A.7, 121 F. 2d 627—N. L. R. B. v. Moltrup Steel Products Co., C.C.A.3, 121 F. 2d 612—N. L. R. B. v. Blanton Co., C.C.A.8, 121 F.2d 564—N. L. R. B. v. Clarksburg Pub. Co., C.C.A.4, 120 F.2d 976—N. L. R. B. v. Bachelder, C.C.A.7, 120 F.2d 574, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519, and, modified on other grounds, C. C.A., 125 F.2d 387—N. L. R. B. v. Entwistle Mfg. Co., C.C.A.4, 120 F.2d 532—Southern S. S. Co. v. N. L. R. B., C.C.A.3, 120 F.2d 505, reversed on other grounds 62 S. Ct. 886, 316 U.S. 31, 86 L.Ed. 1246—N. L. R. B. v. C. Nelson Mfg. Co., C.C.A.8, 120 F.2d 444—N. L. R. B. v. Newark Morning Ledger Co., C. C.A.3, 120 F.2d 262, 137 A.L.R. 849, certiorari denied Newark Morning Ledger Co. v. N. L. R. B., 62 S.Ct. 363, 314 U.S. 693, 86 L.Ed. 554—N. L. R. B. v. Mall Tool Co., C.C.A. 7, 119 F.2d 700—N. L. R. B. v. West Texas Utilities Co., C.C.A.5, 119 F.2d 683—El Paso Electric Co. v. N. L. R. B., C.C.A.5, 119 F.2d 581—Texarkana Bus Co. v. N. L. R. B., C.C.A.8, 119 F.2d 480—N. L. R. B. v. Illinois Tool Works, C.C.A. 7, 119 F.2d 356—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549—Corning Glass Works v. N. L. R. B., C.C.A.2, 118 F.2d 625—N. L. R. B. v. New Era Die Co., C.C.A.3, 118 F.2d 500—N. L. R. B. v. Superior Tanning Co., C.C.A.7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B.,

§ 28(120). Actions For Breach of Contract

In an action by an employee against his employer for damages arising from the employer's breach of a contract between the employer and the employee's bargaining representative, the general rules as to trial in civil actions apply.

General rules as to trial and judgment apply to actions by an employee against his employer for breach of his rights under a contract between the employer and the employee's organization.[27] The union's interpretation of its contract with the employer should be recognized in determining an employee's rights under such contract.[28] Where the contract provides a method for determining whether a discharge is wrongful and the parties resort to such procedure and a determination is made, the wrongfulness of the discharge may not be determined de novo in an action for damages because of the discharge.[29] The court may not adjudicate rights against one not party to the proceeding.[30]

Disputed questions of fact, such as whether a discharge was wrongful, should be submitted to the jury[31] under proper instructions.[32] A verdict for defendant should not be directed where plaintiff has established a prima facie case,[33] but the court in awarding judgment may disregard the finding of the jury as to an immaterial fact.[34]

Damages. An employee has been held to be entitled to recover the damage caused to him by the breach of contract.[35] The measure of damages for breach of an employment contract is the amount the

61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—Triplex Screw Co. v. N. L. R. B., C.C.A.6, 117 F.2d 858—N. L. R. B. v. Dow Chemical Co., C.C. A.6, 117 F.2d 455—N. L. R. B. v. Vincennes Steel Corporation, C.C. A.7, 117 F.2d 169—N. L. R. B. v. Texas Mining & Smelting Co., C.C. A.5, 117 F.2d 86—N. L. R. B. v. Crystal Spring Finishing Co., C.C. A.1, 116 F.2d 669—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 116 F.2d 367—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 849, certiorari denied 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119—M. H. Ritzwoller Co. v. N. L. R. B., C.C.A.7, 114 F.2d 432—N. L. R. B. v. Waumbec Mills, C.C.A.1, 114 F.2d 226—New York Handkerchief Mfg. Co. v. N. L. R. B., C.C.A.7, 114 F.2d 144, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457—Phelps Dodge Corporation v. N. L. R. B., C.C.A.2, 113 F.2d 202, modified on other grounds 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. Tovrea Packing Co., C.C.A.9, 111 F.2d 626, certiorari denied Tovrea Packing Co. v. N. L. R. B., 61 S. Ct. 28, 311 U.S. 668, 85 L.Ed. 429—N. L. R. B. v. Leviton Mfg. Co., C.C.A.2, 111 F.2d 619.

D.C.—Warehousemen's Union Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Affiliated with American Federation of Labor v. N. L. R. B., 121 F.2d 84, 74 App.D.C. 28, certiorari denied Warehousemen's Union Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L. Ed. 539—N. L. R. B. v. McKesson & Robbins, 121 F.2d 84, 74 App.D. C. 28, certiorari denied McKesson & Robbins v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539—Press Co. v. N. L. R. B., 118 F.2d 937, 73 App.D.C. 103, certiorari denied 61 S.Ct. 1118, 313 U.S. 595, 85 L.Ed. 1548—N. L. R. B. v. Arcade-Sunshine Co., 118 F.2d 49, 73 App.D.C. 128, certiorari denied Arcade-Sunshine Co. v. N. L. R. B., 61 S.Ct. 942, 313 U.S. 567, 85 L.Ed. 1526.

Contra Union Drawn Steel Co. v. N. L. R. B., C.C.A.3, 109 F.2d 587.

27. Ind.—Columbia Conserve Co. v. Watson, 39 N.E.2d 740, 219 Ind. 494.

Judgment held not void as interfering with internal affairs of union. —Fine v. Pratt, Tex.Civ.App., 150 S. W.2d 308.

28. Minn.—George T. Ross Lodge No. 831, Brotherhood of Railroad Trainmen, v. Brotherhood of Railroad Trainmen, 254 N.W. 590, 191 Minn. 373.

29. Tex.—St. Louis, B. & M. Ry. Co. v. Booker, Civ.App., 5 S.W.2d 856, certiorari denied 49 S.Ct. 348, 279 U.S. 852, 73 L.Ed. 995.

30. Ky.—Cannon v. Brotherhood of Railroad Trainmen, 89 S.W.2d 620, 262 Ky. 113.

31. Mo.—Butner v. Union Pac. R. Co., 163 S.W.2d 100, 236 Mo.App. 1134—McGee v. St. Joseph Belt Ry. Co., 133 S.W.2d 675, 235 Mo.App. 707, certiorari quashed State ex rel. St. Joseph Belt R. Co. v. Shain, 145 S.W.2d 131, 346 Mo. 1098—McCrory v. Kurn, App., 101 S.W. 2d 114—Lyons v. St. Joseph Belt Ry. Co., App., 84 S.W.2d 933, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733—Hall v. St. Louis-San Francisco Ry. Co., 28 S.W.2d 687, 224 Mo.App. 431.

Damages as a result of a wrongful discharge are a question of fact for the jury.—Eubanks v. Galveston, H. & S. A. Ry. Co., Tex.Com.App., 59 S.W.2d 825.

Held questions of fact

Colo.—Capra v. Local Lodge No. 273 of Brotherhood of Locomotive Firemen and Enginemen, 76 P.2d 738, 102 Colo. 63.

Minn.—George v. Chicago, R. I. & P. Ry. Co., 235 N.W. 673, 183 Minn. 610, adhered to 237 N.W. 876, 183 Minn. 610.

Mo.—McGee v. St. Joseph Belt Ry. Co., 93 S.W.2d 1111, 233 Mo.App. 111.

32. Mo.—Butner v. Union Pac. R. Co., 163 S.W.2d 100, 236 Mo.App. 1134—McGee v. St. Joseph Belt Ry. Co., 93 S.W.2d 1111, 233 Mo.App. 111.

Instructions held proper

Mo.—McGee v. St. Joseph Belt Ry. Co., supra.

33. S.C.—Youmans v. Charleston & W. C. Ry. Co., 178 S.E. 671, 175 S.C. 99.

Tex.—St. Louis, B. & M. Ry. Co. v. Booker, Civ.App., 287 S.W. 130.

34. Tex.—Moore County Carbon Co. v. Whitten, Civ.App., 140 S.W.2d 880, error dismissed, judgment correct.

35. Ga.—Gary v. Central of Georgia Ry. Co., 141 S.E. 819, 37 Ga.App. 744.

N.Y.—Kadish v. New York Evening Journal, 67 N.Y.S.2d 435, affirmed 72 N.Y.S.2d 402, 272 App.Div. 872.

To time of trial

The damages recoverable by an unjustly discharged employee are limited to the amount accrued at the time of the trial.—Galveston, H. & S. A. Ry. Co. v. Eubanks, Tex.Civ. App., 42 S.W.2d 475, affirmed Eubanks v. Galveston, H. & S. A. Ry. Co., Com.App., 59 S.W.2d 825.

Vacation pay

It has been held that, under a contract providing for severance pay on discharge, the employee is not entitled to accrued vacation pay in

employee would have received as wages had the contract been performed, less the amount he has earned during the period,[36] and it has been held that damages for loss of seniority and for being blacklisted and boycotted by other employers are too remote to be recoverable.[37] The employee may not recover for the loss of rights not contemplated when the contract was made, such as the right to group insurance, where such insurance was issued after the contract was made.[38] The duty of a wrongfully discharged employee to mitigate damages by exercising reasonable diligence to obtain other employment has been held to be confined to a search for other work of substantially the same position, status, capacity, or grade, or, failing to secure such, other employment for which he is fitted.[39]

§ 28(121). Arbitration Proceedings

The general rules as to arbitration proceedings apply as to the hearing, determination, and award in the arbitration of a labor dispute or a controversy between employers and employees.

The general rules, discussed in Arbitration and Award § 1 et seq, apply as to the hearing, determination, and award in the arbitration of a labor dispute or a controversy between employers and em ployees.[40] Accordingly a valid arbitration award is binding and conclusive on the parties.[41] The award must be final and definite and an arbitrators' award of back pay, without specifying the amount, is ineffective.[42] The award must be within the scope of the submission,[43] but one who acquiesced in enlarging the scope of the proceedings may not raise the point.[44] The fact that the award ex-

addition to the severance pay.—Wanhope v. Press Co., 10 N.Y.S.2d 797, 256 App.Div. 433, affirmed 22 N.E.2d 171, 281 N.Y. 607.

Verdict held not excessive

Mo.—McGee v. St. Joseph Belt Ry. Co., 93 S.W.2d 1111, 233 Mo.App. 111.

36. Mo.—McGee v. St. Joseph Belt Ry. Co., supra.

Earnings of one having next seniority

In switchman's action against railroad for damages for wrongful discharge contrary to contract between railroad and trainmen's union, the earnings of man next below switchman on seniority roster did not measure his damages where switchman was not a regular worker before his discharge, and hence it was proper to consider that in estimating his losses due to discharge.—Illinois Cent. R. Co. v. Moore, C.C.A. Miss., 112 F.2d 959, reversed on other grounds 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.

Damages awarded held not excessive

U.S.—Union Pac. R. Co. v. Olive, C.C.A.Nev., 156 F.2d 737.

37. Ga.—Gary v. Central of Georgia Ry. Co., 141 S.E. 819, 37 Ga.App. 744.

38. Ga.—Gary v. Central of Georgia Ry. Co., supra.

39. Tex.—San Antonio & A. P. Ry. Co. v. Collins, Com.App., 61 S.W.2d 84.

Employment in distant place

Wrongfully discharged railroad employee was not required to accept employment at distant places, involving change of residence and loss of position and seniority in local yards, in mitigation of damages.—San Antonio & A. P. Ry. Co. v. Collins, supra.

40. Cal.—Consolidated Vultee Aircraft Corp. v. United Auto. Aircraft and Agr. Implement Workers of America, Local 904, 167 P.2d 725, 27 Cal.2d 859.

N.Y.—Goldberg v. Rialto Retailers, 43 N.Y.S.2d 432.

Sufficiency of reasons assigned by the arbitrators in support of the award need not be considered in determining the validity of the award.—Application of Davis, 57 N.Y.S.2d 387.

41. Or.—Rueda v. Union Pac. R. Co., 175 P.2d 778.

Pa.—Campbell v. Industrial Union of Marine & Shipbuilding Workers of America, 52 Pa.Dist. & Co. 597.

Tenn.—Cross Mountain Coal Co. v. Ault, 9 S.W.2d 692, 157 Tenn. 461.

A union not participating in an arbitration proceeding between employers and employees in an industry of which it is a part is not obliged to conform to the award.—Carpenters' Union v. Citizens' Committee to Enforce Landis Award, 244 Ill. App. 540.

Conditions precedent

Provision in contract that disputes should be decided by board subject to right of final review by state director whose decision should be binding on all parties, would not make decision of state director final and binding on any of the parties unless a dispute had been first decided by the board and decision of the director was then made on review of board's decision.—Allen v. Davis, 23 S.E.2d 665, 195 Ga. 167.

42. N.Y.—Publishers' Ass'n of New York City v. New York Typographical Union No. 6, 5 N.Y.S.2d 847, 168 Misc. 267—In re E. A. Laboratories, 50 N.Y.S.2d 222.

Matter resubmitted to arbitrator

N.Y.—In re E. A. Laboratories, supra.

43. N.Y.—Publishers' Ass'n of New York City v. New York Typographical Union No. 6, 5 N.Y.S.2d 847, 168 Misc. 267—In re Green Bus Lines, 61 N.Y.S.2d 672.

Awards held valid

N.Y.—Application of Devery, 41 N.Y.S.2d 293, 266 App.Div. 213, affirmed 55 N.E.2d 370, 292 N.Y. 596—Pierce v. Brown Buick Co., 11 N.Y.S.2d 160, 256 App.Div. 1076, reargument denied and motion denied 12 N.Y.S.2d 356, 256 App.Div. 1101.

Reinstatement award

Under arbitration provision that, whenever any grievance had not been settled satisfactorily such grievance could be submitted to impartial umpire for determination, the umpire was not limited to a determination as to whether discharge of certain employees was wrongful, but he had power to direct reinstatement of such employees with or without back pay, and his determination was final.—Atlantic Basin Iron Works v. Industrial Union of Marine & Shipbuilding Workers of America CIO Local 39, 59 N.Y.S.2d 662.

Specific performance

Where employment contract contained provision for the arbitration of any dispute of any nature that might arise, in arbitrating a dispute arbitrator was not limited to an award of money judgment as against contention that arbitrators could not properly award relief in the nature of a decree of specific performance.—Freydberg Bros. v. Corey, 31 N.Y.S. 2d 10, 177 Misc. 560, affirmed 32 N.Y.S.2d 129, 263 App.Div. 805, reargument denied 32 N.Y.S.2d 783, 263 App.Div. 858.

44. N.Y.—In re Green Bus Lines, 61 N.Y.S.2d 672.

ceeds the scope of the submission does not render the entire award invalid; only that part of the award which is improper is invalid.[45] An award is ineffective where it is incomplete and fails to determine essential issues.[46]

Under statutes establishing administrative agencies to conciliate, arbitrate, and determine differences, and discriminations affecting employers, employees, and their organizations, it is generally required that the agency afford all parties a full and fair hearing before making its determination.[47] Where such agency acts as a quasi-judicial tribunal it may not consider as evidence facts which were not introduced as such.[48] An award which fails to decide all the material questions submitted is invalid;[49] thus, where interdependent questions as to wage rate and work load are submitted, an award as to wage rate without a determination of work load is invalid.[50] Where the parties have joined in the submission of the controversy, the award is binding on them,[51] but the award is not binding on one who refused to submit the controversy to the board,[52] and one who participated in the proceedings, but reserved the right to attack the award if it went beyond certain matters, is not estopped to do so.[53]

Railway Labor Act. Under the Railway Labor Act, 45 U.S.C.A. § 151 et seq, an award by the National Railroad Adjustment Board is not effective against an aggrieved employee unless he is represented individually in the proceedings, and the mere fact that the collective representative of the employees appeared and purported to act for him is insufficient.[54] However, an award by the board is entitled to presumptive weight in determining whether the employee was represented in the proceedings[55] and the burden of proof is on the one claiming to the contrary;[56] it will not be presumed that the union or the board disregarded the employee's right to participate in the proceedings.[57] Moreover, an employee who has knowledge of the proceeding and that the union is purporting to act for him may not stand by and assert his rights for the first time after a decision has been reached.[58]

It has been held that a dispute once submitted to, and heard by, the National Railroad Adjustment Board may not be withdrawn.[59] If any member of

45. N.Y.—Amalgamated Watch, Clock & Time Instrument Workers Union, Local 121 of International Jewelry Workers Union v. Jaeger Watch Co., Inc., 59 N.Y.S.2d 731, 270 App.Div. 802—Publishers' Ass'n of New York City v. New York Typographical Union No. 6, 5 N.Y.S.2d 847, 168 Misc. 267.

46. Minn.—Mueller v. Chicago & N. W. Ry. Co., 259 N.W. 798, 194 Minn. 83.

Finding not necessarily implied

Where agreement between union and employer provided that if a discharge was determined by impartial chairman as arbitrator to have been wrongful, the discharged employee should be immediately reinstated, but award of impartial chairman in controversy with respect to discharged employee directed that employee be reinstated on probation with loss of pay for four weeks without finding that employee's discharge was wrongfully effected, judgment confirming award would be reversed.—Simon v. Stag Laundry, 18 N.Y.S.2d 197, 259 App.Div. 106.

47. Pa.—Appeal of Spungin, 32 Pa. Dist. & Co. 611, 45 Dauph.Co. 145.
Wis.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

Board created by code

It has been held that a board, created by a code adopted under the National Industrial Recovery Act, had authority to issue an order binding on an employer adopting the code to reinstate an employee wrongfully discharged.—Fuller Cleaning & Dyeing Co. v. Brickner, 32 Ohio N.P., N.S., 177.

48. Mass.—Burns v. Thomas Cook & Sons, 58 N.E.2d 150, 317 Mass. 398—Boott Mills v. Board of Conciliation and Arbitration, 40 N.E.2d 870, 311 Mass. 223.

Waiver

Mass.—Burns v. Thomas Cook & Sons, 58 N.E.2d 150, 317 Mass. 398.

Report by accountants

Mass.—Burns v. Thomas Cook & Sons, supra.

49. Mass.—Boott Mills v. Board of Conciliation and Arbitration, 40 N.E.2d 870, 311 Mass. 223.

50. Mass.—Boott Mills v. Board of Conciliation and Arbitration, supra.

51. Mass.—Burns v. Thomas Cook & Sons, 58 N.E.2d 150, 317 Mass. 398.
Tex.—St. Louis, B. & M. Ry. Co. v. Booker, Civ.App., 5 S.W.2d 856, certiorari denied 49 S.Ct. 348, 279 U. S. 852, 73 L.Ed. 995.

52. U.S.—Parker v. First Trust & Savings Bank, C.C.A.Wash., 266 F. 961.

Acquiescence in an award is not shown by the advice of a superintendent to the employees to wait until the award is made or by the action of a receiver in appearing before the board and expressly refusing to be bound by its award.—Parker v. First Trust & Savings Bank, supra.

53. U.S.—Texoma Natural Gas Co. v. Oil Workers Intern. Union, Local No. 463, D.C.Tex., 58 F.Supp. 132, affirmed, C.C.A., Oil Workers International Union, Local No. 463 v. Texoma Natural Gas Co., 146 F. 2d 62, certiorari denied 65 S.Ct. 1017, 324 U.S. 872, 89 L.Ed. 1426, rehearing denied 65 S.Ct. 1183, 325 U.S. 893, 89 L.Ed. 2004.

54. U.S.—Elgin, J. & E. Ry. Co. v. Burley, Ill., 65 S.Ct. 1282, 325 U.S. 711, 89 L.Ed. 1886, opinion adhered to 66 S.Ct. 721, 327 U.S. 661, 90 L.Ed. 928.

Employer's representative

Employee involved in controversy with employer could have named representatives of employer as his representatives in hearing before national railroad adjustment board.—Estes v. Union Terminal Co., C.C.A. Tex., 89 F.2d 768.

55. U.S.—Elgin, J. & E. Ry. Co. v. Burley, Ill., 66 S.Ct. 721, 327 U.S. 661, 90 L.Ed. 928.

56. U.S.—Elgin, J. & E. Ry. Co. v. Burley, Ill., 66 S.Ct. 721, 327 U.S. 661, 90 L.Ed. 928.

57. U.S.—Elgin, J. & E. Ry. Co. v. Burley, Ill., 66 S.Ct. 721, 327 U.S. 661, 90 L.Ed. 928.

58. U.S.—Elgin, J. & E. Ry. Co. v. Burley, Ill., 66 S.Ct. 721, 327 U.S. 661, 90 L.Ed. 928.

59. U.S.—Delaware & Hudson R. Corporation v. Williams, C.C.A.Ill.,

the board is directly interested in the result, his decision should not be considered on the final award,[60] but if no such interest appears, and the award is unanimous, the fact that one of the members is disqualified will not affect the validity of the award.[61] An award by the board must be final and definite and capable of enforcement[62] and should fix a time for compliance.[63] The awards of the board are not self-executing.[64]

An award of arbitrators acting under the Railway Labor Act must dispose of every substantial matter presented in the specific questions submitted to them;[65] an award which is incomplete is invalid unless it is accepted by the parties.[66] It has been held that an award signed by a majority of the arbitrators is valid, notwithstanding the refusal of the minority to participate further after the filing of a report stating the inability of the arbitrators to agree.[67] An award made and filed after the date specified in the submission is a nullity[68] unless the parties have agreed to an extension of time.[69] It has been held that the arbitration of the question whether the notice of starting time should be changed from forty-eight to twelve hours gave the arbitrators power to fix a time anywhere within those figures.[70]

An arbitration award under the Railway Labor Act is binding on the parties.[71] An award by the Railroad Adjustment Board is not a mere advisory opinion, but is legally binding on the parties,[72] and

129 F.2d 11, vacated on other grounds Williams v. Delaware & H. R. Corporation, 63 S.Ct. 256, two cases, 317 U.S. 600, 87 L.Ed. 490.

60. U.S.—Cook v. Des Moines Union Ry. Co., D.C.Iowa, 16 F.Supp. 810.

61. U.S.—Cook v. Des Moines Union Ry. Co., supra.

62. U.S.—System Federation, No. 59 of Railway Employees Department of American Federation of Labor v. Louisiana & A. Ry. Co., C.C.A. La., 119 F.2d 509, certiorari denied 62 S.Ct. 108, 314 U.S. 656, 86 L.Ed. 526—Railroad Yardmasters of North America v. Indiana Harbor Belt R. Co., D.C.Ind., 70 F.Supp. 914.

Interpretation of award

The provision requiring board to interpret award where dispute arises refers to ascertainment of board's intent and does not require parties to ask the board to supply omitted findings.—Railroad Yardmasters of North America v. Indiana Harbor Belt R. Co., supra.

Award held sufficiently definite

U.S.—Virginian Ry. Co. v. System Federation No. 40 of Railway Employees' Department of American Federation of Labor, C.C.A.Va., 131 F.2d 840—Order of Railroad Telegraphers v. Railway Express Agency, D.C.Ga., 55 F.Supp. 319, reversed on other grounds, C.C.A., 137 F.2d 46, reversed on other grounds 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788—Munsey v. Virginian Ry. Co., D.C.Va., 39 F.Supp. 881.

Award held too vague and indefinite

U.S.—System Federation No. 59 of Railway Employees Department of American Federation of Labor v. Louisiana & A. Ry. Co., C.C.A.La., 119 F.2d 509, certiorari denied 62 S.Ct. 108, 314 U.S. 656, 86 L.Ed. 526—Railroad Yardmasters of North America v. Indiana Harbor Belt R. Co., D.C.Ind., 70 F.Supp. 914.

Hours of labor

A ruling of an arbitration board, to which a controversy between carriers and a union had been submitted, that changed exceptions to a modified rule regulating the hours of labor would not apply to positions then on an eight-hour basis, although reserved until the evidence was all in, was merely a ruling on the evidence, separate from the decision and award of the board, and did not prevent a change of rule as to working time and of exceptions thereto, except then existing exceptions relating to eight-hour watches, and the board had jurisdiction to consider evidence introduced by the carriers with respect to exceptions.—Atchison, T. & S. F. Ry. Co. v. Ferryboatmen's Union of California, C.C.A. Cal., 28 F.2d 26.

63. U.S.—Railroad Yardmasters of North America v. Indiana Harbor Belt R. Co., D.C.Ind., 70 F.Supp. 914.

64. U.S.—Estes v. Union Terminal Co., C.C.A.Tex., 89 F.2d 768.

Tex.—Watson v. Missouri-Kansas-Texas R. Co. of Texas, Civ.App., 173 S.W.2d 357.

Enforcement of awards by Railroad Adjustment Board see infra §§ 28 (122)–28 (144).

65. U.S.—Iowa Transfer Ry. Co. v. Switchmen's Union of North America, C.C.A.Iowa, 66 F.2d 909.

Award held incomplete

U.S.—Iowa Transfer Ry. Co. v. Switchmen's Union of North America, supra.

66. U.S.—Iowa Transfer Ry. Co. v. Switchmen's Union of North America, supra.

67. U.S.—Atchison, T. & S. F. Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen, C.C.A.Ill., 26 F.2d 413.

68. U.S.—Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Norfolk Southern Ry. Co., C.C.A.N.C., 143 F.2d 1015, 154 A.L.R. 1385.

69. U.S.—Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Norfolk Southern Ry. Co., supra.

Time is of the essence in arbitration at common law, and, in the absence of express words by congress, it could not be assumed that there was an intention to overrule such well-established principle in passing the Railway Labor Act.—Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Norfolk Southern Ry. Co., supra.

70. U.S.—Iowa Transfer Ry. Co. v. Switchmen's Union of North America, C.C.A.Iowa, 66 F.2d 909.

71. U.S.—Farmers Grain Co. v. Toledo, P. & W. R. R., C.C.A.Ill., 158 F.2d 109.

Ruling by Railway Mediation Board

If employer felt aggrieved by decisions of Railway Mediation Board that employer was under statute, employer should have appealed or promptly taken proceedings to correct erroneous holdings.—Denver Union Stock Yard Co. v. Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, D.C.Colo., 48 F.Supp. 308.

72. U.S.—Elgin, J. & E. Ry. Co. v. Burley, Ill., 65 S.Ct. 1282, 325 U.S. 711, 89 L.Ed. 1886, opinion adhered to 66 S.Ct. 721, 327 U.S. 661, 90 L.Ed. 928.

Cal.—Austin v. Southern Pac. Co., 123 P.2d 39, 50 Cal.App.2d 292.

D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 75 U.S.App. D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

Discrimination against negro members

Where Brotherhood of Railroad

this is also true as to an award by arbitrators acting under the Railway Labor Act.[73]

Under the Railway Labor Act, 45 U.S.C.A. § 155 first (b), if arbitration at the request of the mediation board shall be refused by one or both of the parties, the board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board be created, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.[74]

Transportation Act. An award of the Railroad Labor Board under the Transportation Act of 1920, 45 U.S.C.A. § 131 et seq, was advisory only, with no coercive effect whatsoever other than the sanction and force of publicity and public opinion,[75] but such award was binding where the parties made a prior agreement to submit the controversy to the board and abide by its decision[76] or where they accepted or ratified the award.[77] Although an agreement between a railroad company and its employees as to wages, as modified by the board, having been accepted and followed by the company, creates an implied contract to pay its employees accordingly, where there is no agreement to continue such payments for any specified time, and a reduction in wages has been accepted by the employee, there is no contract or legal obligation on the part of the company to pay the higher wages.[78]

6. Judicial Enforcement or Review of Orders or Awards

§ 28(122). In General

a. General principles
b. Under National Labor Relations Act
c. Under Railway Labor Act

a. General Principles

Judicial proceedings are necessary, under some state labor relations acts, in order to compel compliance with orders of the state labor relations board.

Under provisions of a state labor relations act similar to those of the National Labor Relations Act it has been held that the board cannot enforce its orders by its own direct action, but must petition the court to secure enforcement.[79] Until confirmed by the court the order of the board does not have final legal sanction[80] or give any vested right,[81] and where an order rendered by the board has not been

Engineers, under its agreement with colored firemen and under Railway Labor Act owed colored firemen same duty to protect their seniority rights as Brotherhood owed its own members, and Brotherhood presented to Nation Railroad Adjustment Board dispute with railroad as to seniority rights as firemen of demoted white engineers as a dispute solely between demoted engineers and railroad, wholly ignoring seniority rights of colored firemen, and railroad knew of contract establishing seniority rights for colored firemen and withheld such information from board, award of board giving demoted engineers seniority was not res judicata as to rights of colored firemen.—Griffin v. Gulf & S. I. R. Co., 21 So.2d 814, 198 Miss. 458.

An award is not a "conclusive legal determination" but its decisions are not without legal effect.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S.App.D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

"Final and binding"

The provision of the act that awards of the board shall be "final and binding" by quoted words may make decisions of the board more efficacious than mere private advice, but do not invest them with the force of unappealable judicial decisions.—Dahlberg v. Pittsburgh & L. E. R. Co., C.C.A.Pa., 138 F.2d 121.

Money award

Award is final and conclusive on the parties except in so far as it contains a money award.—Berryman v. Pullman Co., D.C.Mo., 48 F.Supp. 542.

73. U.S.—Atchison, T. & S. F. Ry. Co. v. Ferryboatmen's Union of California, C.C.A.Cal., 28 F.2d 26.

74. U.S.—Toledo, P. & W. R. R. v. Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27, C.C.A.Ill., 132 F.2d 265, reversed on other grounds 64 S.Ct. 413, 321 U.S. 50, 88 L.Ed. 534, 150 A.L.R. 810.

75. U.S.—Virginian Ry. Co. v. Chambers, C.C.A.W.Va., 46 F.2d 20, affirmed 52 S.Ct. 27, 284 U.S. 577, 76 L.Ed. 501—Barnhart v. Western Maryland R. Co., D.C.Md., 41 F. Supp. 898, affirmed, C.C.A., 128 F.2d 709, certiorari denied 63 S.Ct. 75, 317 U.S. 671, 87 L.Ed. 538.
La.—Hoey v. New Orleans Great Northern R. Co., 105 So. 310, 159 La. 258, 47 A.L.R. 832.
39 C.J. p 70 note 29.

76. U.S.—Barnhart v. Western Maryland R. Co., C.C.A.Md., 128 F. 2d 709, certiorari denied 63 S.Ct. 75, 317 U.S. 671, 87 L.Ed. 538—Virginian Ry. Co. v. Chambers, C.C.A.W.Va., 46 F.2d 20, 52 S.Ct. 27, 284 U.S. 577, 76 L.Ed. 501.
Tex.—San Antonio & A. P. Ry. Co. v. Collins, Com.App., 61 S.W.2d 84.

77. U.S.—Virginian Ry. Co. v. Chambers, C.C.A.W.Va., 46 F.2d 20, affirmed 52 S.Ct. 27, 284 U.S. 577, 76 L.Ed. 501.
La.—Hoey v. New Orleans Great Northern R. Co., 105 So. 310, 159 La. 258, 47 A.L.R. 832.
Tex.—San Antonio & A. P. Ry. Co. v. Collins, Com.App., 61 S.W.2d 84.

78. U.S.—Pennsylvania R. System and Allied Lines Federation No. 90 v. Pennsylvania R. Co., D.C.Pa., 296 F. 220, affirmed, C.C.A., 1 F.2d 171.

79. Wis.—Metropolitan Life Ins. Co. v. Wisconsin Labor Relations Board, 297 N.W. 430, 237 Wis. 464.

80. Wis.—Metropolitan Life Ins. Co. v. Wisconsin Labor Relations Board, supra.

81. Wis.—Metropolitan Life Ins. Co. v. Wisconsin Labor Relations Board, supra.

Procedural right

Until an order made by the board is reviewed and confirmed by a court under the statute, the only right ensuing by virtue of the order is in the nature of a procedural right in which no one has a vested interest.—International Union of Life Ins.

reviewed and confirmed by a court at the time that the labor relations statute is repealed, the order loses its vitality and the reviewing court loses any jurisdiction conferred on it by the statute over proceedings with relation to such an order.[82]

On the proper filing in court of the petition for enforcement and the record, and the giving of notice to the person charged with failure to obey the board's order, the court acquires jurisdiction of the proceeding.[83] Where the matter is already in court on an appeal or petition for review, there is no need for the board to file a new action or petition for enforcement of its order,[84] since the court, on such appeal, can do precisely what it could on a petition of the board seeking enforcement of its order.[85]

Arbitration. The enforcement of an arbitration award under a clause in a collective bargaining agreement ordinarily is not dependent on statute, but may be had under the common law.[86] However, where the review of a labor arbitration is sought under statutory provisions, the scope of the court's jurisdiction depends on the terms of the statute.[87]

b. Under National Labor Relations Act

Under the National Labor Relations Act judicial proceedings may be instituted to enforce or review an order of the National Labor Relations Board, and the court thereupon acquires exclusive jurisdiction of the cause.

Under National Labor Relations Act § 10 (e), 29 U.S.C.A. § 160 (e), an order of the National Labor Relations Board may be enforced by a court decree;[88] and under a further provision of the Act, § 10 (f), 29 U.S.C.A. § 160 (f), an order of the board may be reviewed by the court, at the instance of a person aggrieved thereby, with a view to having the order modified or set aside.[89] Application to the court is necessary in order to secure enforcement of an order of the board,[90] since the board itself has no power directly to enforce it;[91] and until the board's order has been affirmed by the appro-

Agents, Local Nos. 1, 2 and 3, v. Wisconsin Labor Relations Board, 297 N.W. 434, 237 Wis. 473—Metropolitan Life Ins. Co. v. Wisconsin Labor Relations Board, 297 N.W. 430, 237 Wis. 464.

82. Wis.—International Union of Life Ins. Agents, Locals Nos. 1, 2 and 3, v. Wisconsin Labor Relations Board, 297 N.W. 434, 237 Wis. 473—Metropolitan Life Ins. Co. v. Wisconsin Labor Relations Board, 297 N.W. 430, 237 Wis. 464.

83. Wis.—Metropolitan Life Ins. Co. v. Wisconsin Labor Relations Board, supra.

Notice directed by court

It has been held, where the board has made no provision for advising a complainant in a case before it of an appeal by a respondent in the case, that the court to which the appeal has been taken may nevertheless direct that notice be given.—Foster v. International Brotherhood of Teamsters, Chauffeurs, etc., 45 Pa.Dist. & Co. 591.

84. Pa.—Foster v. International Brotherhood of Teamsters, Chauffeurs, etc., supra.

Wis.—Nash-Kelvinator Corp. v. Wisconsin Employment Relations Bd., 19 N.W.2d 255, 247 Wis. 202.

Right to file enforcement petition during pendency of review

(1) It has been held under the provisions of some labor relations statutes that the board can file a petition for enforcement before final adjudication of the petition for review and while the review is pending.—Metropolitan Life Ins. Co. v. Insurance Guild, Local No. 22, 48 Pa.Dist. & Co. 355—In re Metropolitan Life Ins. Co., 48 Pa.Dist. & Co. 321.

(2) However, it has also been held that the petition of the board for the enforcement of its order, if required, should not be presented until a final decision has been made on the petition for review.—Foster v. Local Union No. 585, Pa.Com.Pl., 24 Wash.Co. 48.

85. Pa.—Foster v. International Brotherhood of Teamsters, Chauffeurs, etc., 45 Pa.Dist. & Co. 591.

86. Pa.—Goldstein v. International Ladies' Garment Workers' Union, 196 A. 43, 328 Pa. 385.

87. Ill.—Appeal of Frank Foundries Corporation, 56 N.E.2d 649, 323 Ill. App. 594.

Special act

A general statute relating to arbitration and awards, which did not mention labor disputes, was held not to confer jurisdiction on the court to review an arbitration proceeding between employer and union, particularly in view of a subsequent special act covering such subject.—Appeal of Frank Foundries Corporation, supra.

88. U.S.—N. L. R. B. v. Cheney California Lumber Co., 66 S.Ct. 553, 327 U.S. 385, 90 L.Ed. 739—Link-Belt Co. v. N. L. R. B., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738—N. L. R. B. v. Mackay Radio & Telegraph Co., 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381—Salmon & Cowin v. N. L. R. B., C.C.A.5, 148 F.2d 941, certiorari denied 66 S.Ct. 100, 326 U.S. 758, 90 L.Ed. 456—N. L. R. B. v. La Salle Hat Co., C.C.A.3, 105 F.2d 709—Newport News Shipbuilding & Dry Dock Co. v. N. L. R. B., C.C.A.4, 101 F.2d 841, reversed on other grounds N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 406, rehearing denied 98 F.2d 870.

89. U.S.—N. L. R. B. v. Swift & Co., C.C.A.3, 162 F.2d 575—Stewart Die Casting Corporation v. N. L. R. B., C.C.A., 132 F.2d 801—Jacobsen v. N. L. R. B., C.C.A.3, 120 F.2d 96—Olin Industries v. N. L. R. B., D.C.Mass., 72 F.Supp. 225.

Provision of Administrative Procedure Act, 5 U.S.C.A. § 1009 (a, c), that any person suffering legal wrong because of any agency action shall be entitled to judicial review thereof and that every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review grants to aggrieved parties no rights they did not have under the National Labor Relations Act.—Olin Industries v. N. L. R. B., supra.

90. U.S.—Myers v. Bethlehem Shipbuilding Corp., 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638—Utah Copper Co. v. N. L. R. B., C.C.A.10, 136 F.2d 485.

91. U.S.—Myers v. Bethlehem Shipbuilding Corp., 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638—Bradley Lumber Co. of Arkansas v. National Labor Relations Board, C.C.A. La., 84 F.2d 97, certiorari denied

priate court no penalty accrues for disobeying it.[92]

The aim of the stautory provisions is to attain simplicity and directness on judicial review[93] and to secure a just result with a minimum of technical requirements.[94] After jurisdiction of the court has attached in proceedings for the enforcement of an order of the National Labor Relations Board no separate proceeding is needed on the part of the person brought into court, who deems himself aggrieved by the order of the board, to obtain a review of the order of the board;[95] the breadth of the jurisdiction conferred on the court by the statutory provisions providing for the enforcement of the board's orders gives the party proceeded against the right to raise all pertinent questions and to obtain any affirmative relief that is appropriate.[96] Similarly, where the court entertains a petition of a person for a review of the board's order, the board can seek not merely to have the petition denied but to have its order enforced, regardless of any separate proceeding to that end.[97]

Acquisition and retention of jurisdiction. On the proper commencement of proceedings for enforcement or review of an order of the board by the filing of the necessary papers and the giving of notice, the court becomes vested with exclusive[98] jurisdiction[99] of the cause. In this connection three things are necessary to give the court jurisdiction, a petition, a transcript of the entire record, and notice to the respondent;[1] and the court has no jurisdiction and can take no step of any sort until all this has been done.[2] Until the court has thus acquired jurisdiction, the board has the right to vacate its order and proceed further in the matter,[3] and if it does so the court has no jurisdiction of the cause;[4] but, after jurisdiction has been acquired by the court, the board is without power to modify or set aside its findings and order[5] or to withdraw its petition at its pleasure.[6]

Nature of proceedings. Proceedings for the enforcement of an order of the National Labor Rela-

57 S.Ct. 21, 299 U.S. 559, 81 L.Ed. 411—Olin Industries v. N. L. R. B., D.C.Mass., 72 F.Supp. 225.

"The only method of enforcement of the decision of the Board is by direction of the Circuit Court of Appeals."—Oregon Shipbuilding Corporation v. N. L. R. B., D.C.Or., 49 F.Supp. 386, 388.

92. U.S.—Myers v. Bethlehem Shipbuilding Corp., 58 S.Ct. 459, 303 U.S. 41, 82 L.Ed. 638—Olin Industries v. N. L. R. B., D.C.Mass., 72 F. Supp. 225.

93. U.S.—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221.

94. U.S.—Ford Motor Co. v. N. L. R. B., supra—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574.

The statutory mandate dispensing with judicial technicalities in procedure binds the reviewing court.
U.S.—N. L. R. B. v. Service Wood Heel Co., C.C.A.1, 124 F.2d 470.
D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35 v. N. L. R. B., 110 F. 2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

95. U.S.—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221.

96. U.S.—Ford Motor Co. v. N. L. R. B., supra.

Retention of transcript

Where the National Labor Relations Board has petitioned for enforcement of its order against an employer, and the employer institutes a separate proceeding to review and set aside the board's order, and the court grants a motion of the board to withdraw its own petition, the court thereafter has power to amend the order permitting withdrawal so as to provide for retention of the transcript and the filing thereof in the proceedings instituted by the employer.—Ford Motor Co. v. N. L. R. B., supra.

97. U.S.—Ford Motor Co. v. N. L. R. B., supra.

98. U.S.—International Union of Mine, Mill and Smelter Workers, Locals No. 15 v. Eagle-Picher Mining & Smelting Co., 65 S.Ct. 1166, 325 U.S. 335, 89 L.Ed. 1649, motion granted 66 S.Ct. 8, 326 U.S. 684, 90 L.Ed. 400—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 125 F.2d 757—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 406, rehearing denied 98 F.2d 870.

Jurisdiction of federal courts of actions arising under National Labor Relations Act see Federal Courts §§ 30, 35.

Venue of actions under National Labor Relations Act see Federal Courts § 21.

99. U.S.—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221—N. L. R. B. v. Ferguson, C.C.A.9, 118 F.2d 892, followed in N. L. R. B. v. Miller, 118 F.2d 893.

Fund deposited for employees

Where court approved stipulation pursuant to which money was deposited in bank for distribution to certain employees, the fund was subject to the jurisdiction of the court; and the court had jurisdiction to determine validity of employees' assignment thereof.—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 128 F. 2d 188, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506.

1. U.S.—In re N. L. R. B., 58 S. Ct. 1001, 304 U.S. 486, 82 L.Ed. 1482—N. L. R. B. v. Friedman-Harry Marks Clothing Co., C.C.A. 2, 83 F.2d 731.

2. U.S.—Thompson Products v. N. L. R. B., C.C.A.6, 133 F.2d 637—N. L. R. B. v. Friedman-Harry Marks Clothing Co., C.C.A.2, 83 F. 2d 731.

Nunc pro tunc filing of transcript

An order that a transcript should be deemed to have been filed nunc pro tunc as of the date when the petition was filed is a nullity as far as acquisition of jurisdiction by the court is concerned, since jurisdiction cannot be antedated by fictions contrary to the express provisions of the statute.—N. L. R. B. v. Friedman-Harry Marks Clothing Co., supra.

3. U.S.—In re N. L. R. B., 58 S.Ct. 1001, 304 U.S. 486, 82 L.Ed. 1482.

4. U.S.—Harris v. N. L. R. B., C.C. A.3, 100 F.2d 197, certiorari denied 59 S.Ct. 584, 306 U.S. 645, 83 L.Ed. 1044, rehearing denied 59 S. Ct. 642, 306 U.S. 669, 83 L.Ed. 1063.

5. U.S.—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221.

6. U.S.—Ford Motor Co. v. N. L. R. B., supra.

Discretion of court

The grant or refusal of permission to withdraw a petition, after the court has acquired jurisdiction of

tions Board are statutory;[7] but they are judicial proceedings rather than administrative or quasi-judicial as were the proceedings before the board.[8] The jurisdiction of the court on a petition to enforce or review an order of the board is of an appellate court review character,[9] and the proceedings have been described as a combination of an appeal from the order and a motion to enforce it.[10] It has been said that proceedings for a review of an order of the board are substantially proceedings in equity in that equitable rules are applicable.[11]

Discovery, interrogatories, depositions, and subpœnas. The court has power to permit an employer to file interrogatories to be propounded to the board,[12] and also to permit the taking of depositions of named witnesses who are alleged to know how the case was handled by the board and how its decision was reached.[13] However, the court in the exercise of its discretion will not order a bill of discovery, permit the taking of depositions, or require the answering of interrogatories where sufficient grounds therefor are not shown.[14] It will not, for example, permit interrogatories as to matters which are irrelevant and immaterial.[15] In determining whether allegations made by the employer are such as to require an answer to the interrogatories submitted by it in support of its application, the court may look at the proceeding from the time of its inception.[16]

It has been held proper, in proceedings for the enforcement of an order of the National Labor Relations Board, for a special master first to examine documents subpœnaed by him and to determine their materiality with respect to issues presented by the case before any of the documents are exhibited or submitted to counsel for the respective parties.[17]

c. Under Railway Labor Act

An award of the National Railroad Adjustment Board made pursuant to the federal Railway Labor Act may be enforced in a suit brought by the employee for that purpose, provided the conditions precedent to such an action have been met.

Under the federal Railway Labor Act an award of the National Railroad Adjustment Board may be enforced by means of a suit,[18] and the aid of the courts by means of an enforcement suit is necessary

the cause, rests in the sound discretion of the court to be exercised in the light of the circumstances of the particular case.—Ford Motor Co. v. N. L. R. B., supra.

7. U.S.—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 125 F.2d 757.

Unknown to common law

A proceeding to enforce an order of the National Labor Relations Board is a special statutory proceeding not known to the common law, and is governed and controlled by the statute.—N. L. R. B. v. Ford Motor Co., C.C.A.5, 119 F.2d 326.

Public interest

An enforcement proceeding is in the public interest, prosecuted by an authorized agency of the government, in furtherance of an express policy and intent on the part of congress to establish, in behalf of the national public, a standard of conduct presumably productive of progress in protection of the public welfare.—Aluminum Ore Co. v. N. L. R. B., C.C.A., 131 F.2d 485, 147 A.L.R. 1.

8. U.S.—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 406, rehearing denied 98 F.2d 870.

9. U.S.—Stewart Die Casting Corporation v. N. L. R. B., C.C.A., 132 F.2d 801.

10. U.S.—N. L. R. B. v. Kellburn Mfg. Co., C.C.A.2, 149 F.2d 686.

11. U.S.—Hamilton-Brown Shoe Co. v. N. L. R. B., C.C.A.8, 104 F.2d 49.

12. U.S.—N. L. R. B. v. Cherry Cotton Mills, C.C.A.5, 98 F.2d 444, rehearing denied 98 F.2d 1021.

Scope of interrogatories

(1) The court has power to issue a commission to take depositions of members of the board and to order members to answer interrogatories in order that it might ascertain whether board had proceeded lawfully in reaching final decision.—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 103 F.2d 953.

(2) Court has jurisdiction to permit employer to propound interrogatories to board in support of allegations that employer had been denied statutory and constitutional right to a hearing before the board.—Inland Steel Co. v. N. L. R. B., C.C.A. 7, 105 F.2d 246.

13. U.S.—N. L. R. B. v. Cherry Cotton Mills, C.C.A.5, 98 F.2d 444, rehearing denied 98 F.2d 1021.

14. U.S.—N. L. R. B. v. Ford Motor Co., C.C.A.9, 118 F.2d 766—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 103 F.2d 953.

15. U.S.—Inland Steel Co. v. N. L. R. B., C.C.A.7, 105 F.2d 246.

Allegations held insufficient to warrant commission

An allegation that members of the board did not personally consider evidence in proceeding against employer charged with unfair labor practices, but relied on summary and recommendations of assistants, was insufficient to entitle employer to issuance of commission to take deposition of members of board and to order requiring board to answer interrogatories relating to method by which it reached its decision.—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 103 F.2d 953.

16. U.S.—Inland Steel Co. v. N. L. R. B., C.C.A.7, 105 F.2d 246.

17. U.S.—N. L. R. B. v. Weirton Steel Co., C.C.A.3, 160 F.2d 774.

Scope of special master's subpœna

U.S.—N. L. R. B. v. Weirton Steel Co., supra.

18. U.S.—General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co., Tex., 64 S.Ct. 146, 320 U.S. 323, 88 L.Ed. 76—Joint Council Dining Car Employees Local 370, Hotel and Restaurant Employees International Alliance v. Delaware, L. & W. R. Co., C.C.A. N.Y., 157 F.2d 417.

D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S.App. D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

Jurisdiction of federal courts over suits based on Railway Labor Act see Federal Courts § 35.

Holdings under earlier statutes

(1) The decisions of the labor board created under the Transportation Act of 1920 were not enforceable by process.—Pennsylvania R. Co. v. U. S. Railroad Labor Bd., 43 S. Ct. 278, 261 U.S. 72, 79, 67 L.Ed. 536 —39 C.J. p 69 note 27.

(2) It was not for any court to pass on the correctness of the board's conclusions if it kept within the jurisdiction assigned to it by the

to compel the carrier to obey the award.[19] Such a suit brought by the person for whose benefit the order of the board was made is the only judicial review of orders of the board which is provided by the Railway Labor Act,[20] and it has been held that the statute impliedly makes the enforcement suit exclusive of others to determine rights arising under collective agreements as to a carrier and employees who have utilized the adjustment procedure and procured an award.[21]

Proceedings to compel a carrier to comply with an order of the National Railroad Adjustment Board, since they are purely statutory, must comply with the statutory provisions.[22] In such a suit the Railway Labor Act gives the employee definite and substantial advantages,[23] such as choice of venue, exemption from payment of costs, and recovery of attorney's fees if successful,[24] and the purpose and effect of such advantages are to equalize the burden, financial and otherwise, of extended litigation as between employees and the carriers.[25]

Nature of action as contractual. It has been held that an action to enforce an award of the National Railroad Adjustment Board is comparable to an action brought for a breach of contract,[26] and that the legal rights of plaintiff in such an action must be determined in accordance with the law of contracts;[27] but it has also been held that such an action is of statutory origin on a basis quite different from that of an ordinary law action for breach of contract.[28]

Conditions precedent to action. Enforcement proceedings against a carrier under the Railway Labor Act are not authorized unless the National Railroad Adjustment Board has made an award and order against the carrier,[29] and the carrier has failed or refused to comply therewith,[30] within the time limit set therein.[31] The court cannot require the carrier to comply with an order of the board where the order fails to fix a time limit within which the order should be complied with,[32] and the court is without authority to choose some optional date at which a compliance shall be had.[33]

statute.—Pennsylvania R. Co. v. U. S. Railroad Labor Bd., supra—39 C. J. p 70 note 28.

(3) A receiver of an insolvent railroad company which operated at a continuous loss, both before and after the receivership, however, could be authorized by the court to reduce wages of employees below the scale fixed by the labor board without being subject to the penalty provided by the act.—St. Louis Union Trust Co. v. Missouri & N. A. R. Co., D.C. Ark., 270 F. 796—39 C.J. p 70 note 32.

(4) Other holdings see 39 C.J. p 69 note 27 [a].

19. U.S.—Dahlberg v. Pittsburgh & L. E. R. Co., C.C.A., 138 F.2d 121—Barnhart v. Western Maryland Ry. Co., C.C.A.Md., 128 F.2d 709, certiorari denied 63 S.Ct. 75, 317 U. S. 671, 87 L.Ed. 538—Shipley v. Pittsburgh & L. E. R. Co., D.C. Pa., 70 F.Supp. 870.

Direct enforcement by board

The National Railroad Adjustment Board and its subdivisions are not tribunals of judicial or quasi-judicial nature and cannot directly enforce their awards.—Watson v. Missouri-Kansas-Texas R. Co. of Texas, Tex. Civ.App., 173 S.W.2d 357.

20. U.S.—Railroad Yardmasters of North America v. Pittsburgh & L. E. R. Co., D.C.Ohio, 39 F.Supp. 876.

21. D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S. App.D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

Collateral attack

The Railway Labor Act makes no provision for a collateral attack, without the presence of the Railroad Adjustment Board, on the propriety of the board's order.—Railroad Yardmasters of North America v. Pittsburgh & L. E. R. Co., D.C.Ohio, 39 F.Supp. 876.

22. U.S.—System Federation No. 8 of Railway Employers' Department of American Federation of Labor v. Missouri-Kansas-Texas R. Co. of Texas, D.C.Tex., 40 F. Supp. 803.

23. D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S. App.D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

24. D.C.—Washington Terminal Co. v. Boswell, supra.

25. D.C.—Washington Terminal Co. v. Boswell, supra.

26. U.S.—Hanks v. Delaware & H. R. Corp., D.C.N.Y., 63 F.Supp. 161.

27. U.S.—Crowley v. Delaware & H. R. Corp., 63 F.Supp. 164.

28. U.S.—Joint Council Dining Car Employees Local 370, Hotel and Restaurant Employees International Alliance v. Delaware, L. & W. R. Co., C.C.A.N.Y., 157 F.2d 417.

29. U.S.—Burke v. Union Pac. R. Co., C.C.A.Utah, 129 F.2d 844—Alabama State Federation of Labor v. Kurn, D.C.Ala., 46 F.Supp. 385—Smith v. Texas & N. O. R. Co., D. C.La., 32 F.Supp. 1013.

Trustees of carrier

Proceedings against the trustees of a carrier are not authorized in the district court where there has been no effective order against them by the National Railroad Adjustment Board.—Alabama State Federation of Labor v. Kurn, D.C.Ala., 46 F.Supp. 385.

Dismissal by board

Where adjustment board upheld dismissal and no money award was made, the award was final, precluding a subsequent inquiry by the court.—Berryman v. Pullman Co., D.C.Mo., 48 F.Supp. 542.

30. U.S.—Burke v. Union Pac. R. Co., C.C.A., 129 F.2d 844.

Award without order

Where an award of the board procured by a labor union was not followed by an order of the board, directed to employer, commanding payment, suit by a member of the union seeking to enforce the award as an individual right was properly dismissed, since the issuance of an order and a refusal of compliance therewith must take place before court has jurisdiction to entertain a suit for the enforcement of the award made.—Thomas v. Texas & N. O. R. Co., C.C.A.Tex., 118 F.2d 75.

31. U.S.—Joint Council Dining Car Employees Local 370, Hotel and Restaurant Employees International Alliance v. Delaware, L. & W. R. Co., C.C.A.N.Y., 157 F.2d 417.

32. U.S.—System Federation No. 8 of Railway Employers' Department of American Federation of Labor v. Missouri-Kansas-Texas R. Co. of Texas, D.C.Tex., 40 F. Supp. 803.

33. U.S.—System Federation No. 8 of Railway Employers' Department of American Federation of Labor v. Missouri-Kansas-Texas R. Co. of Texas, supra.

Inspection of authorization cards. Where the identity of signers of authorization cards was irrelevant and immaterial, the court denied access to the names on such cards to a railroad employees' labor union seeking to review a certification by the National Mediation Board of another union as bargaining representative.[34]

§ 28(123). Decisions Reviewable

As a rule only final orders of a labor relations board are subject to direct judicial review under federal and state labor relations acts.

In general, under the provisions of the federal[35] and state[36] labor relations acts, the courts have power to review proceedings of a labor relations board only where the board has rendered a final order. Ordinarily no judicial review of interlocutory determinations of the board is available;[37] the sole remedy for a review of such determination is in the course of an appeal from a final order of the board.[38]

§ 28(124). —— Orders Entered in Representation Proceedings

a. Under federal statutes
b. Under state statutes

a. Under Federal Statutes

Orders of the National Labor Relations Board fixing a bargaining unit, directing that an election be held, or certifying a bargaining agent, are not subject to direct judicial review, and can be reviewed only where the board has made a final determination of unfair labor practice based thereon. The certification of a bargaining representative by the National Mediation Board is not subject to judicial review.

Under the National Labor Relations Act the court cannot review representation proceedings unless the National Labor Relations Board, following such proceedings, has made a final order under the statutory provisions dealing with unfair labor practices, and such final order is based in whole or in part on facts certified in the representation proceedings.[39] Thus a ruling of the board determining an appropriate bargaining unit, but not making any final order based thereon, is not subject to direct review under the statute,[40] although such ruling can be challenged when a determination of unfair practices is based on that ruling.[41] Similarly a direction of the board that an election be held is but a

34. D.C.—National Federation of Railway Workers v. National Mediation Board, 110 F.2d 529, 71 App.D.C. 266, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

35. U.S.—Thompson Products v. N. L. R. B., C.C.A.6, 133 F.2d 637—United Employees Ass'n v. N. L. R. B., C.C.A.3, 96 F.2d 875.

Complaint and notice

Mere issuance of a complaint and giving notice of a hearing thereon is not a final order reviewable by the courts.—Thompson Products v. N. L. R. B., C.C.A.6, 133 F.2d 637.

36. N.Y.—Wallach's, Inc. v. Boland, 2 N.Y.S.2d 179, 253 App.Div. 371, affirmed 14 N.E.2d 381, 277 N.Y. 345—Cody v. Kelley, 53 N.Y.S.2d 224, 184 Misc. 150—Application of Lowell Cab Corporation, 11 N.Y. S.2d 497, 170 Misc. 866.

Pa.—Appeal of Bakery Drivers, 48 Pa.Dist. & Co. 372, 91 Pittsb.Leg.J. 414.

Referendum as to all-union agreement

Under some statutes it has been held that there could be no judicial review of an order of the board directing a referendum to determine whether the required number of employees desired an all-union agreement.—United Retail and Wholesale Department Store Employees of America, Local 174, C. I. O., v. Wisconsin Employment Relations Board, 15 N.W.2d 844, 245 Wis. 636.

Order held final

Order of labor relations board requiring employer to cease unfair labor practices was held to be a final order subject to review by the court.—Chapin v. Pennsylvania Labor Relations Bd., 52 A.2d 568, 356 Pa. 577.

37. N.Y.—Wallach's, Inc., v. Boland, 2 N.Y.S.2d 179, 253 App.Div. 371, affirmed 14 N.E.2d 381, 277 N.Y. 345—Domanick v. Triboro Coach Corporation, 18 N.Y.S.2d 960, 173 Misc. 911, reversed on other grounds 20 N.Y.S.2d 306, 259 App. Div. 657—In re Almroth, 14 N.Y. S.2d 63, 171 Misc. 314, affirmed Application of Almroth, 17 N.Y.S.2d 225, 25 App.Div. 378.

Pa.—Pennsylvania Labor Relations Bd. v. Yellow Cab & Bus Co., Com. Pl., 30 North.Co. 9.

38. N.Y.—In re Almroth, 14 N.Y.S. 2d 63, 171 Misc. 314, affirmed Application of Almroth, 17 N.Y.S.2d 225, 25 App.Div. 378.

39. U.S.—Employees Protective Ass'n of Norfolk v. N. L. R. B., C. C.A.4, 147 F.2d 684—Madden v. Brotherhood & Union of Transit Emp. of Baltimore, C.C.A.Md., 147 F.2d 439, 158 A.L.R. 1330—Inland Container Corporation v. N. L. R. B., C.C.A.6, 137 F.2d 642—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 103 F.2d 953—Beebe Corp. v. Millis, D.C.N.Y., 58 F.Supp. 993—Northrop Corporation v. Madden, D.C.Cal., 30 F.Supp. 993.

Dismissal of petition for certification

A decision dismissing a petition for an order of certification in a representation proceeding is not reviewable by the circuit court of appeals.—A. G. M. Workers' Ass'n v. N. L. R. B., C.C.A.7, 117 F.2d 209.

Under National Industrial Recovery Act

U.S.—Guide Lamp Corporation v. N. L. R. B., C.C.A., 76 F.2d 370—Ames Baldwin Wyoming Co. v. N. L. R. B., C.C.A.4, 73 F.2d 489.

40. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551—American Federation of Labor v. N. L. R. B., 60 S.Ct. 300, 308 U.S. 401, 84 L.Ed. 347—N. L. R. B. v. Prudential Ins. Co. of America, C.C.A.6, 154 F.2d 385—N. L. R. B. v. Standard Oil Co., C.C.A.10, 124 F.2d 895.

41. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551—N. L. R. B. v. Prudential Ins. Co. of America, C.C.A.6, 154 F.2d 385.

part of the representation proceeding and is not subject to direct review,[42] and a court review of an election or order therefor is available when, but only when, the board, subsequent to the election, has made a final order requiring the employer to do something predicated on the result of the election.[43] Likewise the certification of a bargaining representative is not itself a final order based on facts certified in the representation proceedings so as to be subject to direct judicial review;[44] here too judicial review of the board's certification may be had when, but only when, the board finds unfair labor practices and makes its certification the basis of an order with respect to such practices.[45]

Under the Railway Labor Act the federal courts have no power to review the action of the National Mediation Board in certifying a particular labor organization as the bargaining representative of employees of a carrier.[46]

b. Under State Statutes

Under state labor relations acts containing provisions similar to those of the federal act, determinations of a state labor relations board in representation proceedings are not directly reviewable and may be considered by the court only in connection with its review of a final order dealing with unfair labor practices.

Under state labor relations acts containing provisions similar to those of the National Labor Relations Act, it has been held that an order directing that an election be held[47] or certifying a bargaining representative[48] is not a final order subject to direct

42. U.S.—N. L. R. B. v. International Brotherhood of Electrical Workers, 60 S.Ct. 306, 308 U.S. 413, 84 L.Ed. 354—Employees Protective Ass'n of Norfolk v. N. L. R. B., C. C.A., 147 F.2d 684—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corporation v. N. L. R. B., 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141—Klein v. Herrick, D.C.N.Y., 41 F.Supp. 417—N. L. R. B. v. Cudahy Packing Co., D.C.Kan., 34 F.Supp. 53.

Setting aside election

An order of the board setting aside an election is not reviewable where no unfair labor practice order based thereon has been rendered.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F.2d 287—Big Lake Oil Co. v. N. L. R. B., C.C.A.5, 146 F.2d 967—N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F.2d 556.

43. U.S.—N. L. R. B. v. Falk Corporation, 60 S.Ct. 307, 308 U.S. 453, 84 L.Ed. 396—Utah Copper Co. v. N. L. R. B., C.C.A.10, 136 F.2d 485—Wilson & Co. v. N. L. R. B., C.C.A. 7, 120 F.2d 913—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C. A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 111 F.2d 474.

44. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551—American Federation of Labor v. N. L. R. B., 60 S. Ct. 300, 308 U.S. 401, 84 L.Ed. 347—United Employees Ass'n v. N. L. R. B., C.C.A.3, 96 F.2d 875—Zimmer-Thomson Corp. v. N. L. R. B., D.C.N.Y., 60 F.Supp. 84—N. L. R. B. v. Cudahy Packing Co., D.C. Kan., 34 F.Supp. 53.

D.C.—Millis v. Inland Empire District Council, Lumber and Sawmill Workers Union, 144 F.2d 539, 79 U.S.App.D.C. 214, affirmed 65 S.Ct. 1316, 325 U.S. 697, 89 L.Ed. 1877, rehearing denied 66 S.Ct. 11, 326 U.S. 803, 90 L.Ed. 489—Reilly v. Millis, 144 F.2d 259, 79 U.S.App.D. C. 171, certiorari denied 65 S.Ct. 1566, 325 U.S. 879, 89 L.Ed. 1995.

45. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251—American Federation of Labor v. N. L. R. B., 60 S.Ct. 300, 308 U.S. 401, 84 L.Ed. 347—Employees Protective Ass'n of Norfolk v. N. L. R. B., C.C.A., 147 F.2d 684—Zimmer-Thomson Corp. v. N. L. R. B., D.C.N.Y., 60 F.Supp. 84.

D.C.—Millis v. Inland Empire District Council, Lumber and Sawmill Workers Union, 144 F.2d 539, 79 U.S.App.D.C. 214, affirmed 65 S.Ct. 1316, 325 U.S. 697, 89 L.Ed. 1877, rehearing denied 66 S.Ct. 11, 326 U.S. 803, 90 L.Ed. 489.

Refusal to bargain with designated agency

Order of board affirming its previous finding that certain unit was the duly designated bargaining agency of employees, and finding that employer's refusal to bargain with the union was a violation of the National Labor Relations Act, was a final order within provision of the act dealing with review.—N. L. R. B. v. Swift & Co., C.C.A.3, 162 F.2d 575.

46. U.S.—Order of Railway Conductors of America v. Pennsylvania R. Co., App.D.C., 65 S.Ct. 222, 323 U.S. 166, 89 L.Ed. 154—Switchmen's Union of North America v. National Mediation Board, App.D. C., 64 S.Ct. 95, 320 U.S. 297, 88 L. Ed. 61, followed in Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. United Transport Service Employees of America, 64 S.Ct. 260, 320 U.S. 715, 88 L.Ed. 420, rehearing denied 64 S.Ct. 435, 320 U.S. 816, 88 L.Ed. 493—Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees v. Virginian Ry. Co., C.C. A.Va., 125 F.2d 853.

D.C.—National Federation of Railway Workers v. National Mediation Board, 141 F.2d 725, 79 U.S. App.D.C. 16—United Transport Service Employees of America v. National Mediation Board, 141 F. 2d 724, 79 U.S.App.D.C. 15.

"The fact that the certificate of the Mediation Board is conclusive is of course no ground for judicial review."—Switchmen's Union of North America v. National Mediation Board, App.D.C., 64 S.Ct. 95, 98, 320 U.S. 297, 88 L.Ed. 61.

Congressional intent

Where Congress provided for judicial review of certain orders or awards under the Railway Labor Act, but provided for none in respect of certificate of National Mediation Board, a plain line of distinction was drawn and such certificate was intended to be final and not subject to judicial review.—Switchmen's Union of North America v. National Mediation Board, supra.

47. N.Y.—Application of Lowell Cab Corporation, 11 N.Y.S.2d 497, 170 Misc. 866.

Pa.—Chapin v. Pennsylvania Labor Relations Bd., 52 A.2d 568, 356 Pa. 577—In re York Tel. & Tel. Co. Employes Case, 55 Pa.Dist. & Co. 113—Appeal of Bakery Drivers, 48 Pa.Dist. & Co. 372, 91 Pittsb.Leg.J. 414—Appeal of York Tel. & Tel. Co., Com.Pl., 59 York Leg.Rec. 113.

48. N.Y.—Wallach's Inc., v. Boland, 2 N.Y.S.2d 179, 253 App.Div. 371, affirmed 14 N.E.2d 381, 277 N.Y. 345—Cody v. Kelley, 53 N.Y.S.2d 224, 184 Misc. 150—Great Atlantic & Pacific Tea Co. v. Boland, 25 N. Y.S.2d 517, 176 Misc. 258, affirmed 26 N.Y.S.2d 492, 261 App.Div. 900.

R.I.—McGee v. Local No. 682 of

review by the courts. Such a determination is interlocutory and may be reviewed only in connection with the review of a final order which is made under the provisions relating to the prevention of unfair labor practices[49] and which is necessarily affected by the interlocutory determination.[50] However, where the board does make an order on the question of unfair practices directing the employer to take or to refrain from taking some action, and such order of the board is properly taken before a court for review, that court may then review the propriety of the board's action in the representation proceedings.[51]

§ 28(125). Limitations and Laches

Enforcement proceedings should be instituted promptly; but in the absence of statutory limitation mere delay in seeking enforcement of an order of a labor relations board is not fatal.

While enforcement proceedings should be instituted promptly,[52] there is no period of limitation set forth in the National Labor Relations Act within which such proceedings must be brought.[53] Hence, enforcement of an order of the National Labor Relations Board ordinarily will not be denied because of delay in bringing the enforcement proceedings[54] notwithstanding the delay may be unusual,[55] since if the employer is aggrieved by the delay he has a remedy by bringing a petition for review;[56] and under state statutes similar to the National Labor Relations Act it has also been held that mere delay in applying to the court for enforcement of an order of the state labor relations board is not a ground for refusing an enforcement decree.[57]

Enforcement will not be denied on the ground of long delay of the board in concluding the case where laches is not in fact shown.[58] The fact that

Brotherhood of Painters, Decorators and Paperhangers of America, A. F. of L., 38 A.2d 303, 70 R.I. 200.

Refusal to certify bargaining agent is not a final order which can be appealed from and reviewed in court.—Appeal of McNary, 33 Pa. Dist. & Co. 429, 86 Pittsb.Leg.J. 509.

49. Mass.—St. Luke's Hospital v. Labor Relations Commission, 70 N.E.2d 10, 320 Mass. 467.
N.Y.—Wallach's Inc., v. Boland, 14 N.E.2d 381, 277 N.Y. 345—Hanley v. Boland, 33 N.Y.S.2d 673, 177 Misc. 973—Great Atlantic & Pacific Tea Co. v. Boland, 25 N.Y.S.2d 517, 176 Misc. 258, affirmed 26 N.Y.S.2d 492, 261 App.Div. 900.

Exclusive method of review

The provisions for judicial review contained in the labor law were held apparently intended to furnish the exclusive method for reviewing the action taken by the board in certifying a bargaining representative.—Wallach's, Inc. v. Boland, 2 N.Y.S.2d 541, 166 Misc. 420, affirmed 2 N.Y.S.2d 179, 253 App.Div. 371, affirmed 14 N.E.2d 381, 277 N.Y. 345.

Certiorari held unavailable

Mass.—Jordan Marsh Co. v. Labor Relations Commission, 45 N.E.2d 925, 312 Mass. 597.

50. N.Y.—Wallach's, Inc. v. Boland, 14 N.E.2d 381, 277 N.Y. 345.

51. Mass.—Jordan Marsh Co. v. Labor Relations Commission, 56 N.E.2d 915, 316 Mass. 748—Jordan Marsh Co. v. Labor Relations Commission, 45 N.E.2d 925, 312 Mass. 597.
Pa.—Chapin v. Pennsylvania Labor Relations Bd., 52 A.2d 568, 356 Pa. 577.
R.I.—McGee v. Local No. 682 of Brotherhood of Painters, Decorators and Paperhangers of America, A. F. of L., 38 A.2d 303, 70 R.I. 200.
Utah.—Southeast Furniture Co. v. Industrial Commission, 111 P.2d 153, 100 Utah 154.

Preservation of right

An appeal by an association from an order of the labor relations board denying its right to investigate a controversy concerning representation of employees and its right to represent all employees was dismissed without prejudice to the right, if any, of the petitioner to raise the questions presented on a review of any final order of the board.—Appeal of McNary, 33 Pa. Dist. & Co. 429, 86 Pittsb.Leg.J. 509.

52. U.S.—N. L. R. B. v. La Salle Hat Co., C.C.A.3, 105 F.2d 709.

Stipulation providing for entry of order "forthwith"

Where the parties had stipulated for a consent decree, and the stipulation provided that the order should be entered "forthwith," and a long delay had the effect of making unenforceable such provision in the stipulation, the court dismissed a petition for enforcement.—N. L. R. B. v. La Salle Hat Co., supra.

53. U.S.—N. L. R. B. v. Nebel Knitting Co., C.C.A.4, 103 F.2d 594.

54. U.S.—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C.C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723.

Continuance of validity of order

Orders of the board do not lose their validity or cease dynamic existence merely because the board delays in seeking an enforcement decree.—N. L. R. B. v. Bachelder, C.C.A.7, 120 F.2d 574, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519—N. L. R. B. v. Aluminum Products Co., C.C.A.7, 120 F.2d 567.

55. U.S.—N. L. R. B. v. Nebel Knitting Co., C.C.A.4, 103 F.2d 594.

Three years

U.S.—N. L. R. B. v. Suburban Lumber Co., C.C.A.3, 121 F.2d 829, certiorari denied Suburban Lumber Co. v. N. L. R. B., 62 S.Ct. 364, 314 U.S. 693, 86 L.Ed. 554.

56. U.S.—N. L. R. B. v. Sun Tent-Luebbert Co., C.C.A.9, 151 F.2d 483, opinion supplemented 154 F.2d 108, certiorari denied Merchants & Manufacturers Ass'n of Los Angeles v. N. L. R. B., 67 S.Ct. 44—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—N. L. R. B. v. Suburban Lumber Co., C.C.A., 121 F.2d 829, certiorari denied Suburban Lumber Co. v. N. L. R. B., 62 S.Ct. 364, 314 U.S. 693, 86 L.Ed. 554—N. L. R. B. v. Bachelder, C.C.A.7, 120 F.2d 574, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519—N. L. R. B. v. Aluminum Products Co., C.C.A.7, 120 F.2d 567—N. L. R. B. v. Nebel Knitting Co., 103 F.2d 594.
D.C.—N. L. R. B. v. Central Dispensary & Emergency Hospital, 145 F.2d 852, 79 U.S.App.D.C. 274, certiorari denied 65 S.Ct. 684, 324 U.S. 847, 89 L.Ed. 1408.

57. N.Y.—New York State Labor Relations Board v. Timen, 35 N.Y.S.2d 449, 264 App.Div. 120, appeal granted 44 N.E.2d 618, 289 N.Y. 644.

58. U.S.—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F.2d 368.

Fifteen months

Board's delay of some fifteen months in making a decision after

delay has ensued between the date of an election at which a bargaining agent for the employees was chosen and the date of certification of such agent by the board has been held not a basis for refusing to enforce the order of the board.[59]

Under the Railway Labor Act § 3 (q), 45 U.S.C.A. § 153 (q), statutory suits for the enforcement of an award of the National Railway Adjustment Board must be commenced within two years from the time the cause of action accrues.[60] The intent of the statute is to cut off the statutory right at once on the termination of the stated period,[61] and the statutory limitation must be construed in an endeavor to effectuate its purpose and intent.[62] In determining whether the period of limitations has run, the underlying facts set forth in the complaint,[63] rather than some erroneous theory of law or legal conclusion asserted by plaintiff,[64] must control.

§ 28(126). Parties

a. In general
b. Under National Labor Relations Act

a. In General

In general an order of a labor relations board may be enforced at the instance of the board or reviewed at the instance of a person aggrieved. An action under the federal Railway Labor Act may be maintained only by the person for whose benefit the order was made.

The general rules governing the joinder of necessary parties in other civil proceedings have been applied in proceedings brought under labor relations statutes to review orders of a board.[65] Under state labor relations acts similar to the National Labor Relations Act it has been held that the state labor relations board is not only a proper party to proceedings to enforce its order,[66] but is the only party authorized to institute such proceedings.[67] On the other hand, under state statutes similar to the federal act, a "person aggrieved" by a decision of the board,[68] such as the employer,[69] may in a proper case seek a review of the board's decision with a view to having it modified or set aside. However, it has been held that the board itself is not a "person aggrieved" by its own orders and has no right to be heard or represented in court on an appeal from its decision.[70]

Railway Labor Act. Only the person for whose

hearing oral argument in labor dispute did not constitute such laches that decision would not be enforced.—N. L. R. B. v. Isthmian S. S. Co., C.C.A.2, 126 F.2d 598.

59. U.S.—N. L. R. B. v. Calumet Steel Division of Borg-Warner Corporation, C.C.A.7, 121 F.2d 366.

60. U.S.—Joint Council Dining Car Employees Local 370, Hotel and Restaurant Employees International Alliance v. Delaware, L. & W. R. Co., C.C.A.N.Y., 157 F.2d 417.
D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S.App.D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

61. U.S.—Joint Council Dining Car Emp. Local 370, Hotel and Restaurant Emp. Intern. Alliance v. Delaware, L. & W. R. Co., C.C.A.N.Y., 157 F.2d 417.

Loss of special advantages of statutory suit
By failing to act within the statutory period, the employee loses at least the special advantages of the statutory suit.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S.App.D.C. 1, reargument granted 63 S.Ct. 198, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

62. U.S.—Joint Council Dining Car Employees Local 370, Hotel and Restaurant Employees International Alliance v. Delaware, L. & W. R. Co., C.C.A.N.Y., 157 F.2d 417.

63. U.S.—Joint Council Dining Car Employees Local 370, Hotel and Restaurant Employees International Alliance v. Delaware, L. & W. R. Co., supra.

Computation of limitation period
Where the order of the National Railroad Adjustment Board directs reimbursement of an employee "on or before" a specified date, the time for commencing action does not expire until two years from the day after the date specified for complying with the board's order.—Joint Council Dining Car Employees Local 370, Hotel and Restaurant Employees International Alliance v. Delaware, L. & W. R. Co., supra.

64. U.S.—Joint Council Dining Car Employees Local 370, Hotel and Restaurant Employees International Alliance v. Delaware, L. & W. R. Co., supra.

65. **Transportation Act of 1920**
In a suit by a state to vacate the decisions of the labor board established under the Transportation Act of 1920 on the ground that the act giving the board such power was unconstitutional, the carriers and their employees who recognized the validity of such decisions and operated thereunder were held necessary parties.—Texas v. Interstate Commerce Commission, 42 S.Ct. 261, 258 U.S. 158, 66 L.Ed. 531.

66. Pa.—In re McGarvey, Com.Pl., 26 Erie Co. 119.
Wis.—Wisconsin Employment Relations Bd. v. Allis-Chalmers Workers' Union, Local 248, 25 N.W.2d 425, 249 Wis. 590.

67. Wis.—Wisconsin Employment Relations Bd. v. Allis-Chalmers Workers' Union, Local 248, supra.
"It rests entirely within the discretion of the Board whether to seek enforcement or not."—New York State Labor Relations Board v. Paragon Oil Co., 45 N.Y.S.2d 152, 158.

68. Pa.—Petition of Equitable Gas Co., 51 Pa.Dist. & Co. 653, 92 Pittsb.Leg.J. 423.

Union was not a "person aggrieved" by order of state employment relations board directing referendum to determine desires of employees with respect to all-union agreement within statute specifying persons entitled to judicial review of administrative decisions in contested cases.—United Retail and Wholesale Department Store Employees of America, Local 174, C. I. O., v. Wisconsin Employment Relations Board, 15 N.W.2d 844, 245 Wis. 636.

69. Pa.—Petition of Equitable Gas Co., 51 Pa.Dist. & Co. 653, 92 Pittsb.Leg.J. 423.

70. Pa.—Foster v. International Brotherhood of Teamsters, Chauffeurs, etc., Com.Pl., 45 Pa.Dist. & Co. 591—Foster v. Local Union No. 585, Com.Pl., 24 Wash.Co. 48.

Board held entitled to quash improper appeal
Pa.—Pennsylvania Labor Relations Bd. v. Yellow Cab & Bus Co., Com. Pl., 30 North.Co. 9.

benefit an order of the Railroad Adjustment Board has been made may maintain the statutory action provided for in the Railway Labor Act.[71] Such an action may be maintained, in a proper case, by individual employees[72] or by labor organizations.[73]

b. Under National Labor Relations Act

The National Labor Relations Board alone has the right to institute enforcement proceedings under the National Labor Relations Act; but the right to institute proceedings to modify or set aside an order of the board extends to any "person aggrieved" by the order.

Enforcement proceedings are in the public interest, and private parties have no rightful place therein except as the court may desire to avail itself of helpful suggestions.[74] The National Labor Relations Act gives no authority for any proceeding by a private person or group, or by any employee or group of employees, to secure enforcement of the Board's order under § 10 (e) of the Act, 29 U.S.C.A. § 160 (e);[75] the board,[76] and the board alone,[77] may institute the enforcement proceedings. A private person aggrieved by a final order of the board, however, has the right under National Labor Relations Act § 10 (f), 29 U.S.C.A. § 160 (f), to review or contest the order with a view to having it modified or set aside;[78] and an employee[79] or a labor union acting as representative of employees[80] may be a person so aggrieved.

The presence of an employees' association is not a prerequisite to enforcement of an order directing the employer to cease and desist from dominating such association or interfering with the employees' right to self organization.[81]

§ 28(127). Pleadings and Briefs

a. In general
b. Answer or cross petition

a. In General

The pleadings in proceedings to enforce orders of labor relations or railroad adjustment boards should state facts sufficient to justify the relief sought; but compliance with common-law formalities of pleading is not always essential. Briefs may properly be filed.

The National Labor Relations Act does not require common-law formality in pleading,[82] and under some circumstances the court may treat a brief

71. U.S.—Burke v. Union Pac. R. Co., C.C.A.Utah, 129 F.2d 844—Railroad Yardmasters of North America v. Pittsburgh & L. E. R. Co., D.C.Ohio, 39 F.Supp. 876.

The word "petitioner" in Railway Labor Act § 3 (p), 45 U.S.C.A. § 153 (p), providing that "the petitioner, or any person for whose benefit such order was made" may enforce an order of the National Railroad Adjustment Board refers to the petitioner before the board.—Virginian Ry. Co. v. System Federation No. 40 of Railway Employees' Department of American Federation of Labor, C.C.A. Va., 131 F.2d 840.

72. D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S. App.D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

73. U.S.—Virginian Ry. Co. v. System Federation No. 40 of Railway Employees' Department of American Federation of Labor, C.C.A.Va., 131 F.2d 840—Munsey v. Virginian Ry. Co., D.C.Va., 39 F.Supp. 881.
D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S.App. D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

74. U.S.—Aluminum Ore Co. v. N. L. R. B., C.C.A.7, 131 F.2d 485, 147 A.L.R. 1.

Application of union to intervene denied
U.S.—Aluminum Ore Co. v. N. L. R. B., supra.

75. U.S.—Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738—Stewart Die Casting Corp. v. N. L. R. B., C.C.A. 7, 132 F.2d 801.

76. U.S.—Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738.

Board as plenary trustee
The status of board with respect to back-pay allowance in an order directed to be enforced was, as to employees entitled to benefits of the order, in nature of a plenary trusteeship; and the fact that under terms of back-pay allowance the employer might have discharged his legal obligation by payment to employees did not affect board's right to seek enforcement in its own name.—N. L. R. B. v. Killoren, C.C.A.Mo., 122 F.2d 609, 137 A.L.R. 510, certiorari denied Killoren v. N. L. R. B., 62 S.Ct. 412, 314 U.S. 696, 86 L.Ed. 556.

77. U.S.—Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 132 F.2d 801—N. L. R. B. v. Sunshine Mining Co., C.C.A. 9, 125 F.2d 757—N. L. R. B. v. Killoren, C.C.A.Mo., 122 F.2d 609, 137 A.L.R. 510, certiorari denied Killoren v. N. L. R. B., 62 S.Ct. 412, 314 U.S. 696, 86 L.Ed. 556—Waterman S. S. Corporation v. N. L. R. B., C.C.A.5, 119 F.2d 760.

78. U.S.—Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 132 F.2d 801.

The exclusion of certain employees from an election to establish representation was an injury of which they alone might complain, and employer could not complain nor could a union where no union members had been deprived of their right to participate.—Northrop Corporation v. Madden, D.C.Cal., 30 F.Supp. 993.

79. U.S.—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 132 F.2d 801—International Brotherhood of Electrical Workers v. N. L. R. B., C.C.A.6, 105 F.2d 598, reversed on other grounds 60 S.Ct. 306, 308 U.S. 413, 84 L.Ed. 354, mandate conformed to, C.C.A., 110 F.2d 661.

However, there is some authority to the effect that a workman is not a "person aggrieved" so as to be entitled to review of order allegedly depriving him of re-employment and back pay.—Anthony v. N. L. R. B., C.C.A.9, 132 F.2d 620.

80. D.C.—American Federation of Labor v. N. L. R. B., 103 F.2d 933, 70 App.D.C. 62, affirmed 60 S.Ct. 300, 308 U.S. 401, 84 L.Ed. 347.

81. U.S.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 114 F.2d 738, certiorari dismissed 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391.

82. U.S.—N. L. R. B. v. Lund, C.C.

as the equivalent of a pleading.[83] Nevertheless, judicial proceedings under the National Labor Relations Act ordinarily must be heard by the court on the pleadings, rather than on the briefs,[84] and, although briefs may be filed by the parties,[85] the court may disregard all[86] or a part[87] thereof. A petition for enforcement must contain allegations sufficient to justify the relief sought.[88]

Railway Labor Act. The complaint in an action to enforce an order of the National Railroad Adjustment Board must state the causes for which relief is claimed[89] and will be construed in accordance with the usual rules governing the construction of pleadings.[90]

b. Answer or Cross Petition

It is better practice for a respondent to file an answer to a petition for the enforcement of an order of the National Labor Relations Board. Under some state statutes, the state labor relations board cannot file an answer to a petition for review, although it can file a cross petition for enforcement.

Although the provisions of the National Labor Relations Act and the rules of court make no mention of a respondent's answer to a petition for enforcement of an order of the National Labor Relations Board,[91] and although the court will not order an answer where no point is made touching the absence of one,[92] nevertheless the filing of an answer has been considered to be desirable in order that the grounds of opposition may be shown, the issues defined, and undisputed matters more readily eliminated from consideration.[93] The allegations of the answer should be allegations of fact, not conclusions of law,[94] although the absence of sufficient denials in the answer does not always preclude the court from considering the merits of the case.[95]

Under the provisions of some state labor relations acts, the labor relations board has no standing to file an answer to a petition for a review of its order.[96] It can, however, file a counter petition or cross petition for enforcement which the

A.8, 103 F.2d 815—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F.2d 18.

83. U.S.—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 111 F.2d 474.

84. U.S.—N. L. R. B. v. Lund, C.C.A. 8, 103 F.2d 815—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A. 9, 98 F.2d 18.

85. **Findings held properly considered**
Where evidence and findings were quite similar as to several plants operated by the employer, the action of the board in considering the findings for each of the plants together in brief was not improper.—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311.

86. **Outcome immaterial to party filing brief**
Where the brief of a union asked that the order of the board be set aside, but on oral argument before the court the union stated that it was immaterial to such union whether the court enforced or set aside the order, it was held that the court could disregard the brief of the union.—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780.

87. **Surplusage**
That part of a brief which presented evidence contrary to that supporting the findings, and in which the court was asked to pass on the credibility of witnesses and the weight of their testimony, was held unnecessary and surplusage.—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585.

88. U.S.—N. L. R. B. v. Whittier Mills Co., C.C.A., 111 F.2d 474—N. L. R. B. v. Friedman-Harry Marks Clothing Co., C.C.A.2, 83 F. 2d 731.

89. U.S.—Alabama State Federation of Labor v. Kurn, D.C.Ala., 46 F. Supp. 385.

Discharge as result of union affiliation
A complaint which fails to allege a causal connection between an employee's union affiliation and his discharge is deficient in such respect, although such a defect is not necessarily fatal where an amendment can easily be framed to assert such connection.—Alabama State Federation of Labor v. Kurn, supra.

Complaint held sufficient to show a prima facie right in plaintiff to recover.—Pegg v. Conemaugh & B. L. R. Co., D.C.Pa., 70 F.Supp. 148.

90. **Applicability of agreement to plaintiff**
A petition was construed as alleging that railroad agreed with plaintiff that provisions of bargaining agreement should be applicable to plaintiff, notwithstanding provisions in agreement to contrary.—Cleapor v. Atlanta, B. & C. R. Co., C.C.A.Ga., 123 F.2d 374.

91. U.S.—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 111 F.2d 474.

92. U.S.—N. L. R. B. v. Whittier Mills Co., supra.

93. U.S.—N. L. R. B. v. Whittier Mills Co., supra—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F. 2d 713—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F.2d 18.

Issues argued orally and in briefs
In the absence of an answer to the petition of the board, it will be assumed that the respondent raises only those issues argued in its briefs and orally before the court.—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713.

94. U.S.—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F.2d 16.

95. U.S.—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A., 98 F.2d 18.

Answer deemed amended
Although the answer set forth no legal ground why the order of the board should not be enforced, nevertheless where the case was fully argued on the merits, both in the briefs and at the hearing, and the board did not urge the absence of denials in the answer, the court considered the merits, on the theory that the answer might be deemed amended to raise the argued issues.—N. L. R. B. v. Biles Coleman Lumber Co., supra.

96. Pa.—Metropolitan Life Ins. Co. v. Insurance Guild, Local No. 22, 48 Pa.Dist. & Co. 355—In re Metropolitan Life Ins. Co., 48 Pa.Dist. & Co. 321—In re McGarvey, Com. Pl., 26 Erie Co. 119.

Answer by board will be stricken even though the board has filed a petition to enforce and the same issues are involved in the answer to the petition to review as are involved in the petition to enforce.—In re Metropolitan Life Ins. Co., 48 Pa.Dist. & Co. 321.

court may treat as an original petition for enforcement.[97]

§ 28(128). Record

The record in the proceedings before the labor relations board should be filed in court as a basis for judicial proceedings with respect to the board's order, and permission to supplement or correct the record must be based on a showing of sufficient grounds.

The National Labor Relations Act requires the certification, and the filing in the court, of a transcript of the entire record in the proceeding, including the pleadings and testimony on which such order was entered and the findings and order of the board.[98] It has been held that the evidence must be presented in the record in question and answer form[99] and that it is not sufficient to set out the evidence in narrative form.[1]

Correcting or supplementing record. The court will deny an application to supplement[2] or correct[3] the record where sufficient grounds therefor are not shown, as where the facts sought to be incorporated in a supplemental record pertain to an issue which the court may not properly consider.[4] A motion to compel a labor relations board to certify up a certain document for consideration may properly be denied where it is not made until after the court has entered judgment.[5]

Cost; proceedings in forma pauperis. The circuit court of appeals cannot require the National Labor Relations Board to deliver a certified copy of the transcript of the record without prepayment of costs;[6] and the court, even if willing to permit proceedings for review in forma pauperis, may do so only in so far as the costs of the circuit court of appeals are concerned.[7]

§ 28(129). Questions Presented; Grounds of Attack

a. In general
b. Under National Labor Relations Act
c. Under Railway Labor Act
d. Under state statutes

a. In General

The courts should not interfere with the award of an arbitrator in a labor dispute except for substantial reasons, such as fraud, corruption, or misconduct.

The court is not justified in interfering with the award rendered by an arbitrator in a labor dispute unless substantial reason exists for so doing,[8] and, in general, the award should not be disturbed in the

97. Pa.—Metropolitan Life Ins. Co. v. Insurance Guild, Local No. 22, No. 1, 48 Pa.Dist. & Co. 355—In re Metropolitan Life Ins. Co., 48 Pa. Dist. & Co. 321.

98. U.S.—In re N. L. R. B., 58 S.Ct. 1001, 304 U.S. 486, 82 L.Ed. 1482.

Record of previous proceedings only
Provision requiring the board, when petitioning for enforcement of its order, to certify and file a transcript of the record in the proceedings, refers to the record of previous proceedings and not proceedings subsequent to the hearing before, and decision of, the board, even though they arise between the same parties.—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 152 F.2d 198, certiorari denied 66 S.Ct. 1372, 328 U.S. 866, 90 L.Ed. 1636.

99. U.S.—Foote Bros. Gear & Machine Corporation v. N. L. R. B., C.C.A.7, 121 F.2d 802.

Defect not cured by record supporting counter-petition
Failure to present the evidence in question and answer form on an application for a review of the board's order has been held fatal to the jurisdiction of the court to grant such application, even where a counter-petition is presented by the board for enforcement supported by a record certified by the board and setting out the evidence in question and answer form.—Foote Bros. Gear & Machine Corporation v. N. L. R. B., supra.

1. U.S.—Foote Bros. Gear & Machine Corporation v. N. L. R. B., supra—N. L. R. B. v. Swift & Co., C.C.A.8, 116 F.2d 143.

2. U.S.—N. L. R. B. v. Ford Motor Co., C.C.A.9, 118 F.2d 766.

Transcript of hearing before congressional committee
Motion of employer for leave to file transcript of hearing before special committee of house of representatives was denied on ground that the act did not authorize a record to be presented in such manner.—Inland Steel Co. v. N. L. R. B., C.C.A.7, 109 F.2d 9.

Evidence concerning election
Petitioners seeking to review and set aside cease and desist order of National Labor Relations Board were not entitled to have court consider their motion to include additional evidence in the record concerning an election, since petitioners' remedy was to apply to court for an order requiring board to receive and consider such additional evidence and to file its recommendations for modification or setting aside of its original order.—Wilson & Co. v. N. L. R. B., C.C.A.10, 156 F.2d 577, certiorari denied 67 S.Ct. 357, 329 U.S. 789, 91 L.Ed. 676.

3. U.S.—Big Lake Oil Co. v. N. L. R. B., C.C.A.5, 146 F.2d 967.

Stipulation as to use of record
In proceeding for enforcement of order, record would not be corrected where there was a stipulation that it might be used as the basis of the board's decision.—N. L. R. B. v. Isthmian S. S. Co., C.C.A.2, 126 F.2d 598.

4. U.S.—Big Lake Oil Co. v. N. L. R. B., C.C.A.5, 146 F.2d 967.

5. Wis.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

6. U.S.—Jacobsen v. N. L. R. B., C.C.A.3, 113 F.2d 728.

7. U.S.—Jacobsen v. N. L. R. B., supra.

8. N.Y.—Goldberg v. Rialto Retailers, 43 N.Y.S.2d 432.

Grounds held not established
(1) Arbitrator's willful disregard of well-established legal principles and deliberate misstatements with respect to the evidence.—In re E. A. Laboratories, 50 N.Y.S.2d 222.

(2) Arbitrator's refusal to hear evidence pertinent and material to the controversy.—Goldberg v. Rialto Retailers, 43 N.Y.S.2d 432.

(3) Evident miscalculation of figures.—In re Green Bus Lines, 61 N.Y.S.2d 672—Goldberg v. Rialto Retailers, 43 N.Y.S.2d 432.

absence of fraud, corruption, or misconduct.[9] Such award should not be set aside for mere errors of judgment either as to the law or the facts[10] or for a mere departure from formal technicalities not resulting in injury.[11]

Propriety of submission. Where a labor dispute has been submitted to arbitration by the employer and a union claiming to represent a majority of the employees, and thereafter a group of employees also claiming to constitute a majority attacks the arbitrator's award and asserts that the union was not authorized to act for them, it has been held that the court has power to determine whether the arbitration submission and award were proper;[12] and the court has also been held to have power to determine all questions of fact preliminary to that determination,[13] such as whether or not the union in fact represented a majority of the employees.[14]

b. Under National Labor Relations Act

(a) In general
(b) Due process and fair trial
(c) Harmless error

(a) In General

As a general rule a court reviewing an order of the National Labor Relations Board may examine questions of jurisdiction, regularity of procedure, and constitutional right or statutory authority; but the court should confine its review to questions of law and may not probe the mental processes of the board.

In proceedings under the National Labor Relations Act for the enforcement or review of an order of the National Labor Relations Board, all questions of the jurisdiction of the board[15] and the regularity of its proceedings,[16] and all questions of constitutional right or statutory authority,[17] are open to examination by the court. The court may

9. N.Y.—In re E. A. Laboratories, 50 N.Y.S.2d 222.

Favoritism and partiality on the part of an arbitrator is not established by the circumstance that he has erred or because he made known his views in advance of the formal decision.—Publishers' Ass'n of New York City v. New York Typographical Union No. 6, 5 N.Y.S.2d 847, 168 Misc. 267.

10. N.Y.—Publishers' Ass'n of New York City v. New York Typographical Union No. 6, 5 N.Y.S.2d 847, 168 Misc. 267—In re E. A. Laboratories, 50 N.Y.S.2d 222.

Pa.—Campbell v. Industrial Union of Marine & Shipbuilding Workers of America, Com.Pl., 33 Del.Co. 204.

Moving of factory in violation of agreement

Arbitrator's finding that factory had been moved in alleged violation of agreement between workers' union and employers' association was binding on the court.—Goldstein v. International Ladies' Garment Workers' Union, 196 A. 43, 328 Pa. 385.

11. N.Y.—In re E. A. Laboratories, 50 N.Y.S.2d 222.

Time of filing award

The fact that an award of appraisers was not filed before the date specified for such filing in the agreement of the parties was held not a ground for refusing to enforce the award where there was no provision in the agreement making time of the essence, or showing that the time element was of practical consequence, and rigorous enforcement of the time condition of the contract would in effect impose a heavy and unreasonable forfeiture.—Hegeberg v. New England Fish Co., 110 P.2d 182, 7 Wash.2d 509.

12. N.Y.—Busch Jewelry Co. v. United Retail Employees' Union, Local 830, 10 N.Y.S.2d 519, 170 Misc. 482.

13. N.Y.—Busch Jewelry Co. v. United Retail Employees' Union, Local 830, supra.

14. N.Y.—Busch Jewelry Co. v. United Retail Employees' Union, Local 830, supra.

Prevention of illegal act

If employees attacking the arbitration award do in fact represent a majority of the employees, a contract forcing their membership in a particular union is illegal; and on that ground alone, and completely apart from any question of jurisdiction under the arbitration law, the court in the exercise of its general equitable power to prevent the commission of an illegal act has full power to set aside a closed-shop provision of the arbitration award.—Busch Jewelry Co. v. United Retail Employees' Union, Local 830, supra.

15. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S. Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352—N. L. R. B. v. Cowell Portland Cement Co., C.C. A.9, 108 F.2d 198—Cupples Co. Manufacturers v. N. L. R. B., C.C. A.8, 103 F.2d 953—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A. 9, 98 F.2d 16—United Employees Ass'n v. N. L. R. B., C.C.A.3, 96 F.2d 875—Northrop Corporation v. Madden, D.C.Cal., 30 F.Supp. 993—Surpass Leather Co. v. Winters, D.C.N.Y., 23 F.Supp. 776.

16. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S. Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352—Donnelly Garment Co. v. N. L. R. B., C.C.A.8, 123 F.2d 215—Cupples Co. Manufacturers v. N. L. R. B., C.C.A., 103 F.2d 953—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A., 98 F.2d 16—United Employees Ass'n v. N. L. R. B., C.C.A., 96 F.2d 875—Surpass Leather Co. v. Winters, D.C. N.Y., 23 F.Supp. 776.

Service of order

Petitions for enforcement of board's orders are premature unless filed after orders were served on respondent, and, if jurisdiction depends on filing of petitions alone, lack of certainty whether petitions were filed after orders were served would be fatal.—N. L. R. B. v. Friedman-Harry Marks Clothing Co., C.C. A.2, 83 F.2d 731.

17. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S. Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352—Cupples Co. Manufacturers v. N. L. R. B., C.C.A., 103 F.2d 953—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A., 98 F. 2d 16—United Employees Ass'n v. N. L. R. B., C.C.A., 96 F.2d 875—Surpass Leather Co. v. Winters, D. C.N.Y., 23 F.Supp. 776.

Scope of order

Courts which are called on to enforce board orders by their own decrees may examine the scope of the orders to see whether they go so beyond the authority of the board so as to require modification as a matter of law before enforcement.—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495.

Source of order

The court may inquire as to the source of an order purporting to come from the National Labor Relations Board where the record discloses no evidence that it did, and the circumstances indicate that it did not.—N. L. R. B. v. Lane Cotton Mills Co., C.C.A.5, 108 F.2d 568.

consider the question whether or not the board proceeded lawfully in making up the findings of fact,[18] and may examine the findings of the board to determine whether they afford any legal basis for the board's order.[19] The court is not, however, a general court of errors for the National Labor Relations Board[20] and its supervisory power or control over orders of the board is limited;[21] its review must rest within the statutory power granted to it under the provisions of the National Labor Relations Act.[22]

In general the only function of the court in proceedings to enforce or review such an order is to determine whether the board, acting within the compass of its power, has held a proper hearing, has made findings based on substantial evidence, and has ordered an appropriate remedy;[23] and, if the findings are supported or unchallenged, the only

18. U.S.—N. L. R. B. v. Cherry Cotton Mills, C.C.A.5, 98 F.2d 444, rehearing denied 98 F.2d 1021.

19. U.S.—N. L. R. B. v. Ohio Calcium Co., C.C.A.6, 133 F.2d 721.

Ambiguity or inconsistency in findings

It is within the power of the court to determine whether or not there is any ambiguity or inconsistency in the findings of the board.—Jacksonville Paper Co. v. N. L. R. B., C.C.A., 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462.

Adoption of findings without consideration of evidence

Where petition for enforcement stated that board considered the case and on all testimony and evidence made its findings of fact and issued its order, and answer alleged that board did not consider evidence but referred it to others for suggested findings of facts and that, with no opportunity to know of or criticize suggestions, they were adopted by board without further inquiry, court had jurisdiction to decide the issue. —N. L. R. B. v. Cherry Cotton Mills, C.C.A.5, 98 F.2d 444, rehearing denied 98 F.2d 1021.

20. U.S.—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433.

21. U.S.—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 132 F.2d 801—N. L. R. B. v. Acme-Evans Co., C.C.A., 130 F.2d 477, certiorari denied Acme-Evans Co. v. N. L. R. B., 63 S.Ct. 769, 318 U.S. 772, 87 L.Ed. 1142, rehearing denied 63 S.Ct. 851, 318 U.S. 802, 87 L.Ed. 1166—N. L. R. B. v. Aladdin Industries, C.C.A.7, 125 F.2d 377, certiorari denied Aladdin Industries v. N. L. R. B., 62 S.Ct. 1310, 316 U.S. 706, 86 L.Ed. 1773—N. L. R. B. v. Milan Shirt Mfg. Co., C.C.A.6, 125 F.2d 376.

Ruling of examiner on continuances

In proceeding on charges of unfair labor practices, the matter of continuances rests in trial examiner's sound discretion, and his ruling ordinarily is not reviewable.—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949.

Production of election records

Trial examiner's refusal to have election records produced need not be considered by reviewing court when the election was not involved. —N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780.

Refusal to bargain

In proceedings for the review and enforcement of an order requiring the employer to bargain with a union, where it appears that the employees undertook a strike in breach of covenant not to do so, the court cannot compel employees to work, or restrain them in exercise of lawful activities normally incident to prosecution of strike, but has the sole problem to determine whether there was a refusal to bargain in view of the terms of the contract and in the light of undisputed facts. —Timken Roller Bearing Co. v. N. L. R. B., C.C.A.6, 161 F.2d 949.

Conflict with state law

An order requiring insurance company to reinstate discharged agent could not be refused enforcement on ground that enforcement would conflict with state statute relating to notice to state superintendent of insurance of appointment of agent, where order did not curtail company's obligation to state the truth when it applied to state superintendent for renewal of any agent's license, and, if company should be unable to comply with order because of agent's failure to obtain a renewal of his license, company might then petition the court for amendment of enforcement decree.—N. L. R. B. v. Monumental Life Ins. Co., C.C.A.6, 162 F.2d 340.

Proviso attached to board's current appropriation was held not to preclude the board from asking enforcement of its order by the court, since a limitation on spending by the board may not be construed as a limitation on the jurisdiction of the court to enforce a board order.—N. L. R. B. v. Thompson Products, C.C.A.9, 141 F.2d 794—N. L. R. B. v. Baltimore Transit Co., C.C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084 —N. L. R. B. v. Elvine Knitting Mills, C.C.A.2, 138 F.2d 633.

22. U.S.—Jacobsen v. N. L. R. B., C.C.A.3, 120 F.2d 96.

Grounds of attack on board's order held insufficient

(1) Denial of employer's motion for a separation of witnesses in the proceedings before the board.—N. L. R. B. v. Burke Mach. Tool Co., C.C.A.6, 133 F.2d 618.

(2) Failure of the board to comply with the terms of a stipulation calling for an election by employees. —N. L. R. B. v. Auburn Foundry, C.C.A.7, 119 F.2d 331.

(3) Hardship involved if the order were enforced.—Wallace Corp. v. N. L. R. B., Local No. 129, C.C.A.4, 159 F.2d 952.

(4) Permission given to union to participate in the proceedings against the employer before the board.—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F.2d 38.

(5) Possibility of a further dispute arising from the order of the board.—N. L. R. B. v. Draper Corp., C.C.A.1, 159 F.2d 294.

(6) Posting of notice by employer expressing intention to abide by National Labor Relations Act.—N. L. R. B. v. L. H. Hamel Leather Co., C.C.A.1, 135 F.2d 71.

(7) Unclean hands on part of union.—N. L. R. B. v. Hearst, C.C.A.9, 102 F.2d 658—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539.

(8) Claim that coercive remarks did not actually intimidate employees.—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201.

(9) Other grounds.—N. L. R. B. v. Gilfillan Bros., C.C.A.9, 148 F.2d 990 —N. L. R. B. v. Crown Can Co., C.C.A.8, 138 F.2d 263, certiorari denied Crown Can Co. v. N. L. R. B., 64 S.Ct. 527, 321 U.S. 769, 88 L.Ed. 1065—N. L. R. B. v. Bradley Lumber Co. of Arkansas, C.C.A.8, 128 F.2d 768—N. L. R. B. v. Star Pub. Co., C.C.A.9, 97 F.2d 465—N. L. R. B. v. Remington Rand, C.C.A.2, 97 F.2d 195.

23. U.S.—N. L. R. B. v. Parkers Prairie Co-op. Creamery Ass'n, C.C.A.8, 154 F.2d 455—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A.8, 119 F.2d 903.

"We can reverse the order of the

question for consideration is the kind of order, based on such findings, which the board had power to make.[24] Ordinarily only questions of law are open for the consideration of the court;[25] but, conversely, a decision of the board on a question of law is not conclusive on the court.[26]

Rulings which individually would not invalidate an order of the board do not in combination acquire the necessary strength to do so, at least where such rulings in their combination do not amount to unfairness.[27] Circumstances which might be sufficient courtroom disturbance to be grounds for a mistrial in a jury case do not necessarily constitute a basis for setting aside an order of the board based on the record.[28]

Mental processes; motive or intent. The court will not probe the mental process of the board in reaching its conclusions,[29] nor, when it appears that the employer has violated the express provisions of the act, will the court inquire into his intent or motives.[30]

Order as based on past conduct; omnibus provisions. The court may decline to enforce an order of the National Labor Relations Board which is unrelated to any unfair labor practice engaged in by the employer and has no basis in past conduct

Board only if we determine there is error of law or no substantial evidence to support the findings."—N. L. R. B. v. Security Warehouse & Cold Storage Co., C.C.A.9, 136 F.2d 829, 834.

24. U.S.—Sperry Gyroscope Co. v. N. L. R. B., C.C.A., 129 F.2d 922—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F.2d 368.

25. U.S.—Medo Photo Supply Corporation v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007—Aluminum Co. of America v. N. L. R. B., C.C.A.7, 159 F.2d 523—N. L. R. B. v. Lion Shoe Co., C.C.A.1, 97 F.2d 448.

26. U.S.—N. L. R. B. v. Dadourian Export Corp., C.C.A.2, 138 F.2d 891—N. L. R. B. v. Acme-Evans Co., C.C.A.7, 130 F.2d 477, certiorari denied Acme-Evans Co. v. N. L. R. B., 63 S.Ct. 769, 318 U.S. 772, 87 L.Ed 1142, rehearing denied 63 S. Ct. 851, 318 U.S. 802, 87 L.Ed. 1166—Midland Steel Products Co. v. N. L. R. B., C.C.A.6, 113 F.2d 800—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 870—Olin Industries v. N. L. R. B., D.C.Mass., 72 F.Supp. 225.
D.C.—E. Anthony & Sons v. N. L. R. B., App.D.C., 163 F.2d 22.

Repayment of amounts paid to union
Portion of order which required that amounts deducted from salaries of employees and paid into union's treasury be paid by employer to employees, involved a question of law upon which the court was authorized to rule.—N. L. R. B. v. U. S. Truck Co., C.C.A.6, 124 F.2d 887.

Construction and effect of words or acts
(1) While, it is within the province of the board to determine whether words were spoken or acts were done, the legal effect of the words spoken or acts done, and the determination of whether or not they amount as a matter of law to a violation of the act, may be a legal question and within the power of the court to determine.—Jacksonville Paper Co. v. N. L. R. B., C.C.A., 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462.

(2) The determination of whether language used by employer with reference to labor matters amounts to interference, restraint, or coercion so as to authorize a cease and desist order by board is a question of law determinable from a consideration of language itself.—N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F. 2d 556.

Mixed question of law and fact
(1) Where the employer has a rule forbidding solicitation of any kind in its plant, the question whether the employer may apply such a rule so as to prevent electioneering for a union during the employees' own time, without being guilty of unfair labor practices, is a mixed question of law and fact; it is a question of fact for the board as to the respective benefits and prejudice to the employer and employees in allowing or disallowing electioneering at such times, but it is a question of law, which the court may review, as to the appraisal of, and the priority to be awarded between, the conflicting interests of the employer and employees.—Republic Aviation Corporation v. N. L. R. B., C.C.A.2, 142 F.2d 193, affirmed 65 S. Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081.

(2) Even as to the question of law, the court may intervene only in cases where it believes that there is no reasonable warrant for the priority as between conflicting interests actually awarded by the board, and the court should give presumptive validity to the board's decision even though by specific findings the legal question is brought out clearly and definitely; and on a record where the question of law was enmeshed in the mixed question the court declined to consider the question of law.—Republic Aviation Corporation v. N. L. R. B., supra.

27. U.S.—N. L. R. B. v. Donnelly Garment Co., 67 S.Ct. 756, 330 U. S. 219, 91 L.Ed. 854.

28. U.S.—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579.

29. U.S.—N. L. R. B. v. Jasper Chair Co., C.C.A.7, 138 F.2d 756, certiorari denied Jasper Chair Co. v. N. L. R. B., 64 S.Ct. 618, 321 U.S. 777, 88 L.Ed. 1070—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39.
D.C.—Bethlehem Steel Co. v. N. L R. B., 120 F.2d 641, 74 App.D.C. 52.

Disbelief of employers' witnesses
A suggestion that board had created an operating presumption of noncredibility of employers' witnesses is one which reviewing court has no right to entertain.—N. L. R. B. v. Air Associates, C.C.A.2, 121 F.2d 586.

Actual consideration of record by board
The court, on a showing that procedural requisites have been complied with, and a full hearing granted, will not inquire whether or not the board actually considered the record, or relevant facts thereof, or merely conducted its hearing to supply colorable compliance with the law.—N. L. R. B. v. Lane Cotton Mills Co., C.C.A.5, 108 F.2d 568.

30. U.S.—National Labor Relations Board v. Gluck Brewing Co., C.C. A.8, 144 F.2d 847—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 128 F.2d 528.

Praiseworthy intentions
In proceeding to enforce order directing employer to cease and desist from unfair labor practices, the question was not whether intentions of employer toward employee were praiseworthy, but rather whether the standard of free and independent action existed.—N. L. R. B. v. Jahn & Ollier Engraving Co., C.C.A.7, 123 F.2d 589.

of the kind forbidden.[31] Ordinarily it will not uphold an omnibus order of the board which enjoins violation of the National Labor Relations Act generally merely because the violation of one or more provisions has been proved.[32] However, where the situation presents such an attitude of opposition to the purposes of the act as to warrant the board in concluding that unfair labor practices generally, and not merely of the type involved in the immediate proceeding, are likely to occur and should be prevented, the court should not undertake to delimit the board's order.[33]

Res judicata. The dismissal of a petition for the enforcement of an order of the National Labor Relations Board is not res judicata of the issues presented by a later petition for the enforcement of another order, where the court did not pass on any of the issues presented but declared the questions moot.[34]

Several grounds of decision. The court may base its decision on more than one ground where the record shows more than one ground in favor of the litigant who prevails.[35] Where a sufficient ground appears for setting aside the board's order, however, the court need not examine other grounds of attack.[36] Thus, where the party attacking an or-

31. U.S.—N. L. R. B. v. Lipshutz, C.C.A.5, 149 F.2d 141—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F.2d 44, certiorari denied 65 S.Ct. 1025, 324 U.S. 877, 89 L.Ed. 1429—Globe Cotton Mills v. N. L. R. B., C.C.A.5, 103 F.2d 91—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

Conduct at particular plant

Where principal issue turned on validity of election at particular plant of employer, order was modified so as to require only that employer cease and desist from interfering with efforts to bargain collectively at that plant.—N. L. R. B. v. Calumet Steel Division of Borg-Wagner Corporation, C.C.A.7, 121 F.2d 366.

Place of distribution of literature

Where it was found that employer's rule against distribution of literature on its parking lots was enforced impartially and not specially to deter union organization, a decree enjoining employer from engaging in activities otherwise regarded as an unfair labor practice could not be broadened so as to cover parking lots which might later be established, where there was no reason to anticipate any attempt to evade injunction.—Le Tourneau Co. of Ga. v. N. L. R. B., C.C.A.Ga., 150 F.2d 1012.

Employer's disavowal of superintendents' activities

A petition to enforce order requiring company to post notice that it would cease and desist from discouraging employees from joining or assisting the union and taking membership therein was granted where order was supported by evidence that some of company's superintendents had on occasions sought to discourage employees from joining or assisting the union and taking membership therein, notwithstanding such activities were disavowed by the company.—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153.

32. U.S.—N. L. R. B. v. May Dept. Stores Co., C.C.A., 154 F.2d 533, certiorari denied 67 S.Ct. 72—N. L. R. B. v. Lipshutz, C.C.A.5, 149 F.2d 141—N. L. R. B. v. Gilfillan Bros., C.C.A.9, 148 F.2d 990—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F.2d 44, certiorari denied 65 S.Ct. 1025, 324 U.S. 877, 89 L.Ed. 1429—Richfield Oil Corporation v. N. L. R. B., C.C.A.9, 143 F.2d 860.

"The court believes it should exercise great care in entering general cease and desist decrees in such cases as these whereby a single mistaken act on the part of the employer would, on the face of the decree, transfer from the experience, skill and knowledge of the Board future claims of violations of the Act affecting some entirely different labor organization, in an entirely different way, and place their determination in contempt proceedings in the more restricted area of evidence of court procedure."—N. L. R. B. v. Mason Mfg. Co., C.C.A.9, 126 F.2d 810, 814.

Complaint of single employee

An order of the board requiring reinstatement of employee was too broad in requiring that employer cease in any other manner from interfering with employees in exercise of right of self-organization, to join or assist a union or other organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for such purposes, where board was concerned only with complaint of one employee.—N. L. R. B. v. Servel, Inc., C.C.A.7, 149 F.2d 542.

Order held not too broad

Board's order which required employer to cease and desist from "in any other manner" interfering with employees in exercise of right of self-organization, etc., was not narrowed where the violations of National Labor Relations Act found by the board were the surveillance by employer over employees' union activities and discriminatory discharge of an employee because of his union activities.—N. L. R. B. v. Collins & Aikman Corp., C.C.A.4, 146 F.2d 454.

33. U.S.—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72.

34. U.S.—N. L. R. B. v. Delaware-New Jersey Ferry Co., C.C.A.3, 128 F.2d 130.

35. U.S.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, affirmed 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

36. U.S.—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221.

Opportunity for reconsideration and new record

Where board instituted proceeding for enforcement of its order against an employer, and the employer instituted proceeding to vacate the order, and thereafter the court allowed the board itself to set aside the findings and order, it was not necessary for court to consider the employer's objections to the board's conduct of the proceeding, since the setting aside of the findings and order carried with it the opportunity for reconsideration and making a new record.—Ford Motor Co. v. N. L. R. B., supra.

der of the board establishes his case on the ground of unfairness of trial[37] or lack of due process,[38] the question of the sufficiency of the evidence need not be considered.

Waiver or estoppel to assert particular grounds. An employer by his conduct or omissions may be precluded from urging a particular ground of attack on an order of the National Labor Relations Board.[39] Thus an employer has been held not entitled to complain of the refusal of the board or trial examiner to receive particular testimony, or to grant a continuance to permit the employer to adduce additional evidence, where the employer failed to apply to the court for leave to adduce additional testimony.[40]

(b) Due Process and Fair Trial

On a review of an order of the National Labor Relations Board the court may inquire as to whether there was a fair hearing in the proceedings before the board and a compliance with the requirements of due process.

Where the issue is properly presented, the court has the power and the duty to inquire as to the method by which the board reached its decision,[41] whether the requirements of due process were met,[42] and whether there was a fair and impartial trial or hearing;[43] and the court may set aside or refuse to enforce an order issued without due process of law[44] or based on a trial or hearing which was not fair and impartial.[45]

Bias or prejudice. The fact that some of the

37. U.S.—Montgomery Ward & Co. v. N. L. R. B., C.C.A.8, 103 F.2d 147.

38. U.S.—Donnelly Garment Co. v. N. L. R. B., C.C.A.8, 123 F.2d 215.

39. U.S.—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72, 329 U.S. 725, 91 L.Ed. —— —McQuay-Norris Mfg. Co. v. N. L. R. B., C.C.A.7, 116 F.2d 748, certiorari denied 61 S.Ct. 843, 313 U.S. 565, 85 L.Ed. 1524, modified on other grounds 119 F.2d 1009.

Presentation of objection in proceedings before board see infra § 28 (131).

Waiver of, or failure to challenge, findings

(1) The employer is not entitled to complain of the absence of a finding by the board in a particular respect where, following the report of the trial examiner, the employer expressly waives its right to findings of fact by the board and consents that the board issue its order based on the entire record.—N. L. R. B. v. Central Missouri Telephone Co., C.C.A.8, 115 F.2d 563.

(2) The employer will be deemed to have admitted the validity of so much of the findings and order relating thereto as remain undisputed and unchallenged by the employer.—N. L. R. B. v. National Mineral Co., C.C.A.7, 134 F.2d 424, certiorari denied National Mineral Co. v. N. L. R. B., 64 S.Ct. 58, 320 U.S. 753, 88 L.Ed. 448.

Estoppel by suggestion as to further proceedings

Where order of board had been made in pursuance of formal stipulation of parties, employer which thereafter objected to proposed vacation of order, and which suggested that any further proceeding should be in form of enforcement proceedings or pursuant to a proper and valid charge, was thereby estopped to object to enforcement of order by court on board's petition.—N. L. R. B. v. Pure Oil Co., C.C.A.5, 103 F.2d 497.

40. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L. Ed. 126—N. L. R. B. v. Fairchild Engine & Airplane Corporation, C. C.A.4, 145 F.2d 214.

41. U.S.—Cupples Co. Manufacturers v. National Labor Relations Board, C.C.A.8, 103 F.2d 953.

"The Court is bound to consider the Constitution and the statutes as they affect the order and touch the manner of its making, as distinguished from the correctness of its conclusions."—N. L. R. B. v. Cherry Cotton Mills, C.C.A.5, 98 F.2d 444, 446, rehearing denied 98 F.2d 1021.

42. U.S.—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F. 2d 39—N. L. R. B. v. Biles Coleman Lumber Co., C.C.A.9, 98 F.2d 16.

43. U.S.—N. L. R. B. v. Indiana & Mich. Elec. Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579—Mississippi Valley Structural Steel Co. v. N. L. R. B., C.C.A.8, 145 F.2d 664—Donnelly Garment Co. v. N. L. R. B., C.C.A.8, 123 F.2d 215—Inland Steel Co. v. N. L. R. B., C.C.A.7, 109 F.2d 9.

Right to produce evidence and cross-examine

Court whose aid is sought for enforcement of order of board has some discretion to see that hearings did not shut off party's right to produce evidence or conduct cross-examination material to issue.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

44. U.S.—N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A., 123 F.2d 831—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786—Oregon Shipbuilding Corp. v. N. L. R. B., D.C.Or., 49 F.Supp. 386.

45. U.S.—N. L. R. B. v. Acme-Evans Co., C.C.A.7, 130 F.2d 477, certiorari denied Acme-Evans Co. v. N. L. R. B., 63 S.Ct. 769, 318 U.S. 772, 87 L.Ed. 1142, rehearing denied 63 S.Ct. 851, 318 U.S. 802, 87 L.Ed. 1166—N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A. 6, 123 F.2d 831—Inland Steel Co. v. N. L. R. B., C.C.A.7, 109 F.2d 9—National Labor Relations Board v. Lion Shoe Co., C.C.A.1, 97 F.2d 448—Oregon Shipbuilding Corp. v. N. L. R. B., D.C.Or., 49 F.Supp. 386.

Bias or unfairness held not shown

(1) Generally.

U.S.—N. L. R. B. v. Grieder Machine Tool & Die Co., C.C.A.6, 142 F.2d 163, certiorari denied 65 S.Ct. 66, 323 U.S. 724, 89 L.Ed. 582—N. L. R. B. v. Thompson Products, C.C. A.9, 141 F.2d 794—N. L. R. B. v. Luxuray, Inc., C.C.A.2, 123 F.2d 106—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 116 F.2d 367—Continental Box Co. v. N. L. R. B., C.C.A.5, 113 F.2d 93.

D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

(2) Record did not show that examiner had abused his discretion with respect to cross-examination and the use of leading questions by employers.—N. L. R. B. v. Condenser Corp. of America, C.C.A.3, 128 F.2d 67.

(3) Statement of board's examiner, after all the testimony had been taken, that employer's plant superintendent, who had denied certain statements attributed to him by employees, was a good witness and told the truth, and examiner's refusal when he filed his report to credit superintendent's denials, did not show such bias of examiner as would prevent enforcement of board's order against employer.—N. L. R. B. v. Volney Felt Mills, C.C.A.2, 162 F. 2d 204.

conclusions of the National Labor Relations Board were not supported by evidence does not establish bias and prejudice on the part of the board such as will invalidate its order.[46] Bias of an examiner is not sufficient of itself to upset an order of the board where it does not appear that the examiner committed any error in the admission or exclusion of evidence, or that he conducted himself in a manner which was likely to intimidate any of the witnesses or to prevent any of them from giving any relevant testimony.[47] Further, alleged bias of the trial examiner does not require denial of a petition for enforcement where his report was reviewed by the board and it does not appear that his bias in any way affected the final decision of the board;[48] and similarly assertions that the attorneys for the board who investigated and prosecuted the case were guilty of improprieties have been held irrelevant where the board based its decision on the evidence in the record.[49]

(c) Harmless Error

Enforcement of an order of the National Labor Relations Board will not be refused for alleged error in the proceedings which, in view of all the circumstances, appears to have been harmless.

Error or unjust and arbitrary rulings in the proceedings before the National Labor Relations Board which were harmless and without prejudice to the rights of the parties do not justify the court in setting aside or refusing to enforce an order of the board;[50] and whether an impropriety has resulted in substantial prejudice depends on the peculiar facts of the case, the kind and degree of the impropriety, the appraisal thereof made at the time by the parties themselves, and whether the determination made was affected by the impropriety.[51] An attack on the board's order cannot be predicated on nonprejudicial conduct or actions of the trial examiner,[52] as, for example, in matters involving the admission or exclusion of evidence,[53] examination

46. U.S.—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, and opinion supplemented, C.C.A., 128 F.2d 188.

47. U.S.—N. L. R. B. v. Air Associates, C.C.A.2, 121 F.2d 586.

48. U.S.—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A.6, 133 F.2d 295—N. L. R. B. v. Air Associates, C.C.A.2, 121 F.2d 586.

49. U.S.—N. L. R. B. v. Weirton Steel Co., C.C.A.3, 135 F.2d 494.

50. U.S.—N. L. R. B. v. Air Associates, C.C.A.2, 121 F.2d 586—N. L. R. B. v. Ed. Friedrich, Inc., C.C.A. 5, 116 F.2d 888—N. L. R. B. v. American Potash & Chemical Corporation, C.C.A.9, 98 F.2d 488, certiorari denied American Potash & Chemical Corporation v. N. L. R. B., 59 S.Ct. 582, 306 U.S. 643, 83 L.Ed. 1043.

51. U.S.—N. L. R. B. v. Ford Motor Co., 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126.

Prejudicial error held not shown in matters involving:

(1) Apportionment of wages.—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., C.C.A.8, 119 F.2d 903.

(2) Consolidation of representation hearing with proceeding charging unfair labor practices.—N. L. R. B. v. Niles Fire Brick Co., C.C.A.6, 124 F.2d 366, certiorari denied Niles Fire Brick Co. v. N. L. R. B., 62 S. Ct. 944, 316 U.S. 664, 86 L.Ed. 1740 —N. L. R. B. v. American Laundry Machinery Co., C.C.A.2, 152 F.2d 400.

(3) Exclusion of votes of particular employees in election proceeding. —Marlin-Rockwell Corporation v. N. L. R. B., C.C.A.2, 116 F.2d 586, certiorari denied 61 S.Ct. 1116, 313 U.S. 594, 85 L.Ed. 1548.

(4) Failure of reporter to take down all off-the-record statements made on hearing.—N. L. R. B. v. Acme-Evans Co., C.C.A.7, 130 F.2d 477, certiorari denied Acme-Evans Co. v. N. L. R. B., 63 S.Ct. 769, 318 U.S. 772, 87 L.Ed. 1142, rehearing denied 63 S.Ct. 851, 318 U.S. 802, 87 L.Ed. 1166.

(5) Failure to serve intervening labor union with process.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., C.C.A.2, 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U. S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

(6) Indefiniteness of, or lack of particularity in, complaint or charge. —Locomotive Finished Material Co. v. N. L. R. B., C.C.A.2, 142 F.2d 802 —Fort Wayne Corrugated Paper Co. v. N. L. R. B., C.C.A.7, 111 F.2d 869— Swift & Co. v. N. L. R. B., C.C.A.10, 106 F.2d 87.

(7) Introduction of copies of documents instead of originals.—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579.

(8) Other circumstances.—Cudahy Packing Co. v. N. L. R. B., C.C.A.10, 118 F.2d 295—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 849, certiorari denied 61 S. Ct. 449, 312 U.S. 680, 85 L.Ed. 1119 —Pittsburgh Plate Glass Co. v. N. L. R. B., C.C.A.8, 113 F.2d 698, affirmed Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed 1251, rehearing denied Crystal City Glass Workers' Union v. N. L. R. B., 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551—North Whittier Heights Citrus Ass'n v. N. L. R. B., C.C.A.9, 109 F.2d 76, certiorari denied 60 S.Ct. 1075, 310 U.S. 632, 84 L.Ed. 1402, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472.

52. U.S.—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72—N. L. R. B. v. Condenser Corp. of America, C.C.A.3, 128 F.2d 67—N. L. R. B. v. Reed & Prince Mfg. Co., C.C. A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126—Subin v. N. L. R. B., C.C.A.3, 112 F. 2d 326, certiorari denied 61 S.Ct. 38, 311 U.S. 673, 85 L.Ed. 433.

D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

53. U.S.—N. L. R. B. v. Cities Service Oil Co., C.C.A.2, 129 F.2d 933— Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 849, certiorari denied 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119—Wilson & Co. v. N. L. R. B., C.C.A.8, 103 F. 2d 243—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949.

of witnesses,[54] refusal to permit cross-examination,[55] or denial of a request for a subpœna[56] or for a bill of particulars.[57]

c. Under Railway Labor Act

An order of the National Railroad Adjustment Board may be refused enforcement if the board acted without jurisdiction; but mere technicalities ordinarily will not suffice as a ground of attack.

Although orders of the National Railroad Adjustment Board should not be set aside for technicalities if all substantial rights can be finally protected,[58] an award will not be enforced by the court if the board acted without jurisdiction and beyond its statutory authority.[59] An award of the National Railroad Adjustment Board will not be enforced where there has been a valid compromise of all matters involved in the dispute.[60] In a suit predicated only on the award of the National Railroad Adjustment Board, a question not within the claim or award is not within the scope of the suit and will not be adjudicated.[61]

d. Under State Statutes

Ordinarily the court will review an order of a state labor relations board only to determine the validity of the order, and will not upset the board's order for mere technicalities or harmless error; but the court may inquire into the jurisdiction of the board and also into the arbitrary character of an order.

Under state labor relations statutes containing provisions similar to those of the National Labor Relations Act, it has been held that on an application by a labor relations board for an enforcement order, or by an employer for a review of the order, the only questions before the court are whether the board's findings are supported by sufficient evidence and whether the board's order was proper when made.[62] Immaterial issues will not be considered by the court.[63] The court may not review the processes by which the state labor relations board arrived at its ultimate conclusions,[64] and the fact that the board may have given a wrong reason or have entertained a mistaken view of the law is immaterial if in the end it makes an order which the act authorizes it to make on the facts found.[65] In the absence of arbitrary action, decisions of the board should not be upset by a failure to observe technical niceties or specific forms of procedure[66]

54. U.S.—Jefferson Electric Co. v. N. L. R. B., supra.

55. U.S.—N. L. R. B. v. Ed. Friedrich, Inc., C.C.A.5, 116 F.2d 888.

56. U.S.—N. L. R. B. v. Delaware-New Jersey Ferry Co., C.C.A.3, 128 F.2d 130—N. L. R. B. v. Ed. Friedrich, Inc., C.C.A.5, 116 F.2d 888.

Acceptance of truth of facts

Ruling of trial examiner, who denied request for subpœna was not prejudicial where the board arguendo accepted as true all that the employer offered to prove if subpœnas should be issued.—N. L. R. B. v. Dahlstrom Metallic Door Co., C.C.A. 2, 112 F.2d 756.

57. U.S.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

58. U.S.—Estes v. Union Terminal Co., C.C.A.Tex., 89 F.2d 768.

59. U.S.—Dahlberg v. Pittsburgh & L. E. R. Co., C.C.A.Pa., 138 F.2d 121—System Federation No. 59 of Railway Employees Department of American Federation of Labor v. Louisiana & A. Ry. Co., C.C.A.La., 119 F.2d 509, certiorari denied 62 S.Ct. 108, 314 U.S. 656, 86 L.Ed. 526—Order of Railroad Telegraphers v. Railway Express Agency, D.C. Ga., 55 F.Supp. 319, reversed on other grounds, C.C.A., 137 F.2d 46, reversed on other grounds 64 S. Ct. 582, 321 U.S. 342, 88 L.Ed. 788.

60. U.S.—Smith v. Texas & N. O. R. Co., D.C.La., 32 F.Supp. 1013.

61. U.S.—Order of Railroad Telegraphers v. Railway Express Agency, D.C.Ga., 55 F.Supp. 319, reversed on other grounds, C.C.A., 137 F.2d 46, reversed on other grounds 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788.

62. N.Y.—New York State Labor Relations Board v. Timen, 35 N.Y.S.2d 449, 264 App.Div. 120, appeal granted 44 N.E.2d 618, 289 N.Y. 644—In re Rochester-Penfield Bus Co., 63 N.Y.S.2d 305, 187 Misc. 239, reversed on other grounds 69 N.Y.S.2d 356, 271 App.Div. 1049—New York State Labor Relations Board v. Toffenetti Restaurant Co., 46 N.Y.S.2d 70, 181 Misc. 779, affirmed 47 N.Y.S.2d 113, 267 App. Div. 860, appeal denied 47 N.Y.S. 2d 310, 267 App.Div. 869, motion dismissed 55 N.E.2d 379, 292 N.Y. 618, reversed on other grounds 48 N.Y.S.2d 554, 267 App.Div. 978.

Immunity of order from attack

When the board enters an order authorized by the act on a set of facts which are supported by the evidence, that order is immune from judicial attack.—United Shoe Workers of America, Local 132, v. Wisconsin Labor Relations Board, 279 N. W. 37, 227 Wis. 569.

63. Wis.—Century Building Co. v. Wisconsin Employment Relations Board, 291 N.W. 305, 235 Wis. 376.

Construction of repealed statute

Wis.—Folding Furniture Works v. Wisconsin Labor Relations Board, 286 N.W. 875, 232 Wis. 170.

Possible danger resulting from enforcement of order has been held not to render order unenforceable.—Wisconsin Employment Relations Board v. Evangelical Deaconess Soc., 7 N. W.2d 590, 242 Wis. 78.

64. Wis.—United Shoe Workers of America, Local 132, v. Wisconsin Labor Relations Board, 279 N.W. 37, 227 Wis. 569.

65. Wis.—United Shoe Workers of America, Local 132, v. Wisconsin Labor Relations Board, supra.

66. Pa.—John Hancock Mut. Life Ins. Co. of Boston v. Pennsylvania Labor Relations Board, 45 Pa.Dist. & Co. 169.

Examiner's failure to file intermediate report

An order of the labor relations board will not be set aside because of the failure of the trial examiner to file an intermediate report, where respondent was given adequate opportunity to file exceptions to the board's preliminary ruling.—John Hancock Mut. Life Ins. Co. of Boston v. Pennsylvania Labor Relations Board, supra.

Lack of clarity in complaint

An order of the board will not be set aside on the ground that the original complaint failed clearly to set forth the nature of the allegedly

or by reason of alleged error which does not appear to have been prejudicial.[67] The fact that a hearing before the state labor relations board in connection with a representation proceeding was conducted in conjunction with the hearing relative to unfair labor practices has been held not a ground for refusing to enforce an order of the board.[68]

The powers of the court, however, are more than perfunctory.[69] The court may inquire whether the board's conclusions of law are supported by the facts found[70] and whether the orders or conclusions of the board are reasonable, rather than arbitrary or capricious;[71] also it may inquire whether an impartial hearing was afforded[72] and whether the board acted within the scope of its statutory powers and jurisdiction in making the order.[73]

§ 28(130). —— Limitation by Scope of Record

In proceedings for the judicial enforcement or review of an order of a labor relations board, the court must decide the case on the record as made before the board, rather than on assertions in the briefs or on factual developments occurring after the entry of the board's order.

In proceedings for the judicial enforcement or review of an order of a labor relations board, the case must be decided by the court on the record[74]

improper acts of the employer where an amended complaint, filed long before the decision and order of the board and before hearings in the matter, adequately advised the employer of the exact nature of the charges against him.—John Hancock Mut. Life Ins. Co. of Boston v. Pennsylvania Labor Relations Board, supra.

67. Pa.—John Hancock Mut. Life Ins. Co. of Boston v. Pennsylvania Labor Relations Board, supra.
Wis.—Christoffel v. Wisconsin Employment Relations Board, 10 N.W.2d 197, 243 Wis. 332, certiorari denied 64 S.Ct. 90, 320 U.S. 776, 88 L.Ed. 466.

Typographical error

The court need not refuse to enforce an order of the board because of a typographical error in one of the board's findings.—Teamsters Local Union No. 222 v. Strevell-Paterson Hardware Co., Utah, 174 P.2d 164.

Trial examiner's refusal to issue subpœnas was held not prejudicial error under the circumstances so as to require denial of a motion to enforce an order of the labor relations board.—New York State Labor Relations Board v. American Surety Co. of N. Y., 51 N.Y.S.2d 803, affirmed 58 N.Y.S.2d 355, 269 App.Div. 970, appeal denied 59 N.Y.S.2d 308, 269 App.Div. 982.

Effect on union's status

With respect to enforcement of a collective bargaining order, substitution of one employee for another in the bargaining unit is of no effect unless the union's status as representative is thereby affected.—In re New York State Labor Relations Board v. Metropolitan Life Ins. Co., 52 N.Y.S.2d 590, 183 Misc. 1064, affirmed 58 N.Y.S.2d 343, 269 App. Div. 934, affirmed 66 N.E.2d 853, 295 N.Y. 839.

68. N.Y.—New York State Labor Relations Board v. Roosevelt Chevrolet Co., 30 N.Y.S.2d 381, 177 Misc. 468.

69. N.Y.—Collier Service Corporation v. Boland, 4 N.Y.S.2d 480, 167 Misc. 709.

70. Pa.—Pennsylvania Relations Board v. Camino, 47 Pa.Dist. & Co. 1, 25 West.L.J. 54.
Wis.—United Shoe Workers of America, Local 132, v. Wisconsin Labor Relations Board, 279 N.W. 37, 227 Wis. 569.
Sufficiency of evidence to support findings see infra § 28 (136) c.

71. Pa.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398—Metropolitan Life Ins. Co. v. Insurance Guild, Local No. 22, 49 Pa.Dist. & Co. 75—In re Employes of American Store Co., Com.Pl., 9 Sch.Reg. 206—Pennsylvania Labor Relations Board v. Beck, Com.Pl., 27 West.L.J. 143.

72. Pa.—Appeal of Spungin, 32 Pa. Dist. & Co. 611, 45 Dauph.Co. 145.

73. Wis.—United Shoe Workers of America, Local 132 v. Wisconsin Labor Relations Board, 279 N.W. 37, 227 Wis. 569.

Argument of question involving statutory construction

Question whether board acted in excess of its powers which involves question of statutory construction should not be considered or decided without being argued.—Public Service Employees' Union v. Wisconsin Employment Relations Board, 16 N.W.2d 823, 246 Wis. 190.

Inability to waive statutory requirements

An employer, seeking review of state labor relations board's order naming union as collective bargaining agent and ordering employer to negotiate with agent, could not thereby waive right to object to failure of board to follow statutory procedure in issuing cease and desist orders.—Southeast Furniture Co. v. Industrial Commission, 111 P.2d 153, 100 Utah 154.

74. U.S.—N. L. R. B. v. Crown Can Co., C.C.A.8, 138 F.2d 263, certiorari denied Crown Can Co. v. N. L. R. B., 64 S.Ct. 527, 321 U.S. 769, 88 L.Ed. 1065—N. L. R. B. v. National Mineral Co., C.C.A.7, 134 F. 2d 424, certiorari denied National Mineral Co. v. N. L. R. B., 64 S.Ct. 58, 320 U.S. 753, 88 L.Ed. 448—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 111 F.2d 474.

Compliance with procedural requisites

If procedural requisites have been complied with, and a full hearing has been granted, the board's order must stand or fall on the record.—N. L. R. B. v. Lane Cotton Mills Co., C.C.A.5, 108 F.2d 568.

Facts embodied in supplementary certificate

The court may consider facts embodied in a supplementary certificate as part of the record.—N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219.

Release of claim for back pay

Modification of an order directing reinstatement with back pay, on the ground of a release executed by the employees involved, was refused where the release was not made a part of the record; but the court stated that there could be no implication from its ruling that the release might not be a complete defense if the board sought enforcement of the paragraphs requiring back pay.—N. L. R. B. v. Eastern Footwear Corporation, C.C.A.2, 112 F.2d 716.

Acquiescence in incorporation of prior proceedings

By failing to object to incorporation of records in prior proceedings, on appeal to the court from board's decision, union was held to have acquiesced in such action.—McGee v. Local No. 682 of Brotherhood of

as made before,[75] and certified by,[76] the board, in the absence of a showing of extraordinary circumstances which prevented the presentation of the matter to the board.[77] The court may not consider statements or alleged facts set forth in a brief but not supported by the record,[78] nor may it determine the case on factual developments which occurred after the board's order was entered.[79] Such transcript as the court may consider must be prepared entirely on the official record.[80]

§ 28(131). —— Presentation of Objection in Proceedings before Board

As a rule, objections not presented to the labor relations board cannot be raised for the first time in proceedings for the judicial enforcement or review of the board's order.

Under the National Labor Relations Act, an objection which has not been urged before the board, its member, agent, or agency ordinarily may not be considered by the court in proceedings for the enforcement or review of the board's order[81] unless

Painters, Decorators and Paperhangers of America, A. F. of L., 38 A. 2d 303, 70 R.I. 200.

Matters held not presented by record

(1) Discriminatory discharge of employee.—N. L. R. B. v. Ridge Tool Co., C.C.A.6, 151 F.2d 947.

(2) Exclusion of evidence.—N. L. R. B. v. Kohen-Ligon-Folz, Inc., C.C. A.5, 128 F.2d 502.

(3) Refusal to reduce agreement to writing.—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144.

(4) Whether cease and desist order of National Labor Relations Board was supplanted by action of War Labor Board.—N. L. R. B. v. National Laundry Co., 138 F.2d 589, 78 U.S.App.D.C. 184.

(5) Other matters.—Engineers Union v. Pittsburgh Rys. Co., Pa. Com.Pl., 94 Pittsb.Leg.J. 207.

75. U.S.—N. L. R. B. v. Toledo Desk & Fixture Co., C.C.A.6, 158 F.2d 426—N. L. R. B. v. National Mineral Co., C.C.A.7, 134 F.2d 424, certiorari denied National Mineral Co. v. N. L. R. B., 64 S.Ct. 58, 320 U.S. 753, 88 L.Ed. 448—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292.

N.Y.—New York State Labor Relations Board v. Holland Laundry, 42 N.Y.S.2d 183, 180 Misc. 1031, reargument denied In re New York State Labor Relations Board, 46 N.Y.S.2d 524, 180 Misc. 1031, appeal dismissed 49 N.Y.S.2d 411, 268 App.Div. 827, reversed on other grounds 63 N.E.2d 68, 294 N.Y. 480, 161 A.L.R. 802, reargument denied 64 N.E.2d 278, 295 N.Y. 568.

76. U.S.—N. L. R. B. v. Newport News Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219—Commonwealth Edison Co. v. N. L. R. B., C.C.A.7, 135 F.2d 891—Bussmann Mfg. Co. v. N. L. R. B., C.C.A.8, 111 F.2d 783—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144.

D.C.—N. L. R. B. v. National Laundry Co., 138 F.2d 589, 78 U.S.App. D.C. 184.

Absence of application for additional testimony

In absence of application by either party for leave to introduce additional testimony, the court's consideration of the case is limited to record as certified.—N. L. R. B. v. Cape County Milling Co., C.C.A.8, 140 F.2d 543, 152 A.L.R. 144.

77. U.S.—N. L. R. B. v. National Mineral Co., C.C.A.7, 134 F.2d 424, certiorari denied National Mineral Co. v. N. L. R. B., 64 S.Ct. 58, 320 U.S. 753, 88 L.Ed. 448.

78. U.S.—N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219—N. L. R. B. v. Kohen-Ligon-Folz, Inc., C.C.A.5, 128 F.2d 502—Bussmann Mfg. Co. v. N. L. R. B., C.C.A.8, 111 F.2d 783—North Whittier Heights Citrus Ass'n v. N. L. R. B., C.C.A.9, 109 F.2d 76, certiorari denied 60 S.Ct. 1075, 310 U.S. 632, 84 L.Ed. 1402, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472.

79. U.S.—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292.

Change of circumstances as defense to enforcement proceedings see infra § 28 (132).

Voluntary disestablishment of labor union by vote of its members after entry of board's order directing employer to cease and desist from dominating and interfering with such union, is immaterial in proceeding to set aside such order. —Commonwealth Edison Co. v. N. L. R. B., C.C.A.7, 135 F.2d 891.

Agreement between union and employer

Order of state employment relations board would not be upset on ground that, since hearing conducted by board, union and employer had entered into agreement for sole adjudication of matters included in order, where record contained no evidence of occurrences since hearings of board.—Christoffel v. Wisconsin Employment Relations Board, 10 N.W.2d 197, 243 Wis. 332, certiorari denied 64 S.Ct. 90, 320 U.S. 776, 88 L.Ed. 466.

80. U.S.—N. L. R. B. v. Aluminum Goods Mfg. Co., C.C.A.7, 125 F.2d 353.

Preparation by independent reporter

The court will not consider a transcript which was not prepared from the official record but from that of an independent court reporter employed by the employer.—N. L. R. B. v. Aluminum Goods Mfg. Co., C. C.A.7, 125 F.2d 353.

81. U.S.—N. L. R. B. v. Cheney California Lumber Co., 66 S.Ct. 553, 327 U.S. 385, 90 L.Ed. 739—Marshall Field & Co. v. N. L. R. B., 63 S.Ct. 585, 318 U.S. 253, 87 L.Ed. 744, rehearing denied 63 S.Ct. 849, 318 U.S. 802, 87 L.Ed. 1165—N. L. R. B. v. Vail Mfg. Co., C.C.A.7, 158 F.2d 664—N. L. R. B. v. Cutler, C.C.A.1, 158 F.2d 677—N. L. R. B. v. Kinner Motors, C.C.A.9, 154 F. 2d 1007—N. L. R. B. v. Van De Kamp's Holland-Dutch Bakeries, Inc., C.C.A.9, 154 F.2d 828—N. L. R. B. v. Winter, C.C.A.10, 154 F.2d 719—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F.2d 368—N. L. R. B. v. American Potash & Chemical Corporation, C.C.A.9, 98 F.2d 488, certiorari denied American Potash & Chemical Corporation v. N. L. R. B., 59 S.Ct. 582, 306 U.S. 643, 83 L.Ed. 1043.

"Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested."—N. L. R. B. v. Cheney California Lumber Co., 66 S.Ct. 553, 554, 327 U.S. 385, 90 L.Ed. 739.

Failure to reserve point in stipulation

A point not reserved by employer

the failure or neglect to urge such objection is excused because of extraordinary circumstances.[82] In this connection the objection must have been sufficiently specific to apprise the board of the question later presented to the court[83] and a general exception to all the recommendations of the trial examiner is not sufficient.[84]

Under state statutes similar to the National Labor Relations Act, objections not raised before the board will not be considered by the court on an appeal.[85]

Railway Labor Act. Only in clear cases should courts called on to enforce an award of the National Railroad Adjustment Board vitiate the award on grounds not urged or presented to the board.[86] The power of the board to render an award on a claim should first be presented to the board rather than to the court,[87] and failure to object before the board on all available grounds renders a subsequent attack subject to the closest scrutiny and requires, in order to sustain the attack, a clear and unmistakable showing of absence of jurisdiction.[88]

§ 28(132). —— Moot Questions; Change of Circumstances

While the court in proceedings to enforce or review an order of a labor relations board will not determine moot questions, enforcement will not be refused merely because of compliance with the order or because changing circumstances indicate that there is no longer great need for the order.

The court will decline to review or enforce an order of a labor relations board, and will dismiss a petition for its review or enforcement, where the questions involved have become moot,[89] and to the

in stipulation agreeing to entry of order could not be raised for the first time in the court.—N. L. R. B. v. Draper Corp., C.C.A.1, 159 F.2d 294.

Objections held not presented

(1) Bias or prejudice of trial examiner.

U.S.—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F. 2d 39.

D.C.—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

(2) Employees' threat of, or incitement to, unlawful conduct.—N. L. R. B. v. Bradford Dyeing Ass'n, 60 S.Ct. 918, 310 U.S. 318, 84 L.Ed. 1226.

(3) Failure of board to give evidentiary weight to affidavits.—Cudahy Packing Co. v. N. L. R. B., C.C.A. 8, 116 F.2d 367.

(4) Grounds affecting majority status of union.—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144.

(5) Inclusion in back-pay orders of losses willfully incurred.—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39.

(6) Inclusion in order of a paragraph directing employer to cease and desist from in any manner interfering with, restraining, or coercing employees in exercise of their rights.—N. L. R. B. v. Cheney California Lumber Co., 66 S.Ct. 553, 327 U.S. 385, 90 L.Ed. 739—N. L. R. B. v. Parkers Prairie Co-op. Creamery Ass'n, C.C.A.8, 154 F.2d 455.

(7) Possible danger resulting from reinstatement of employees.—N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A.6, 123 F.2d 831.

(8) Violation of stipulation.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

Questions held raised before board

U.S.—N. L. R. B. v. Jas. H. Matthews & Co., C.C.A.3, 156 F.2d 706—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F. 2d 67—Standard Lime & Stone Co. v. N. L. R. B., C.C.A.4, 97 F.2d 531.

82. U.S.—N. L. R. B. v. Cheney California Lumber Co., 66 S.Ct. 553, 327 U.S. 385, 90 L.Ed. 739—Marshall Field & Co. v. N. L. R. B., 63 S.Ct. 585, 318 U.S. 253, 87 L.Ed. 744, rehearing denied 63 S.Ct. 849, 318 U.S. 802, 87 L.Ed. 1165—N. L. R. B. v. National Mineral Co., C.C. A.7, 134 F.2d 424, certiorari denied National Mineral Co. v. N. L. R. B., 64 S.Ct. 58, 320 U.S. 753, 88 L.Ed. 448—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786.

Extraordinary circumstances held not shown

U.S.—Marshall Field & Co. v. N. L. R. B., 63 S.Ct. 585, 318 U.S. 253, 87 L.Ed. 744, rehearing denied 63 S.Ct. 839, 318 U.S. 802, 87 L.Ed. 1165—N. L. R. B. v. Illinois Tool Works, C.C.A.7, 153 F.2d 811.

83. U.S.—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L. Ed. 495.

Objection held sufficiently specific

Objection that paragraph of board's order was not supported or justified by record was held sufficiently specific to apprise board of question of propriety of order in going beyond specific types of unfair practices actually engaged in, and hence permitted judicial review of such paragraph.—May Dept. Stores Co. v. N. L. R. B., supra.

84. U.S.—N. L. R. B. v. Kinner Motors, C.C.A.9, 154 F.2d 1007.

85. N.Y.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256.

Pa.—Pennsylvania Labor Relations Board v. Markle Banking & Trust Co., Com.Pl., 39 Luz.Leg.Reg. 345.

Waiver of objection to trial examiner

Where employer's attorney in proceeding before the Board's trial examiner objected to the trial examiner, but never urged his objection before the Board although opportunity to do so was afforded, and the attorney of his own volition withdrew his request for another trial examiner, the attorney in effect waived any objection to the trial examiner.—New York State Labor Relations Board v. Roosevelt Chevrolet Co., 30 N.Y.S.2d 381, 177 Misc. 468.

86. U.S.—Order of Railroad Telegraphers v. Railway Express Agency, D.C.Ga., 55 F.Supp. 319, reversed on other grounds, C.C.A., 137 F.2d 46, reversed on other grounds, C.C.A., 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788.

87. U.S.—Order of Railroad Telegraphers v. Railway Express Agency, supra.

88. U.S.—Order of Railroad Telegraphers v. Railway Express Agency, supra.

89. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corp., 67 S.Ct. 1274, 331 U.S. 416, 91 L.Ed. —— —Continental Oil Co. v. N. L. R. B., C.C. A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—N. L. R.

extent that an employer has complied with any portion of an order of the board he will not again be required to perform on the granting of a petition to enforce the order.[90] However, the issue for determination by the court is the validity of the order of the board when made,[91] and an order of the board, lawful when made, does not become moot, and will not be refused enforcement, merely because it is obeyed,[92] or because of a change in circumstances[93] indicating that the need for the

B. v. Delaware-New Jersey Ferry Co., C.C.A.3, 90 F.2d 520, certiorari denied 58 S.Ct. 141, 302 U.S. 738, 82 L.Ed. 571—Acme Mach. Products Co. v. N. L. R. B., C.C.A.7, 79 F.2d 519.

Death of discharged employee rendered question of reinstatement moot.—Loveman, Joseph & Loeb v. N. L. R. B., C.C.A.5, 146 F.2d 769.

Futility of directing collective bargaining

The court will not lend itself to the empty and futile gesture of commanding enforcement of an order of the board directing collective bargaining with a unit which is nonexistent, with respect to questions which are nonexistent, arising out of operations which are nonexistent.—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292.

New elections

Where new elections had been held, it would be futile to issue a decree enforcing order nullifying earlier elections and ordering new ones, and that part of board's order would be stricken.—N. L. R. B. v. Thompson Products, C.C.A.6, 162 F. 2d 287.

90. U.S.—N. L. R. B. v. Aluminum Products Co., C.C.A.7, 120 F.2d 567.

Protection to complying employer

Where employer pleaded that he had made every effort to comply with board's order, court entered an order directing enforcement of board's order without prejudice to employer's right to show, in any proceeding arising under court's order, the extent to which employer had already complied with board's order, and without obligation on employer again to comply in respects in which it had already complied therewith.—N. L. R. B. v. Hills Bros. Co., C.C.A.5, 161 F.2d 179.

91. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corp., 67 S.Ct. 1274, 331 U.S. 416, 91 L.Ed. 1575—N. L. R. B. v. Fickett-Brown Mfg. Co., C.C.A.5, 140 F.2d 883—N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A.6, 123 F.2d 831.

92. U.S.—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307—N. L. R. B. v. Toledo Desk & Fixture Co., C.C.A.6, 158 F.2d 426—Wyman-Gordon Co. (Ingalls Shepard Division) v. N. L. R. B., C.C.A.7, 153 F.2d 480—N. L. R. B. v. Fickett-Brown Mfg. Co., C.C.A.5, 140 F.2d 883—N. L. R. B. v. Swift & Co., C.C.A.8, 129 F.2d 222—United Biscuit Co. of America v. N. L. R. B., C.C.A.7, 128 F. 2d 771—N. L. R. B. v. Westinghouse Air Brake Co., C.C.A.3, 120 F.2d 1004—N. L. R. B. v. Bachelder, C.C.A.7, 125 F.2d 387, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519 —N. L. R. B. v. Acme Air Appliance Co., C.C.A.2, 117 F.2d 417—N. L. R. B. v. Boss Mfg. Co., C.C.A. 7, 107 F.2d 574—N. L. R. B. v. Gerling Furniture Mfg. Co., C.C.A. 7, 103 F.2d 663—N. L. R. B. v. Pure Oil Co., C.C.A.5, 103 F.2d 497—N. L. R. B. v. Oregon Worsted Co., C. C.A.9, 96 F.2d 193.

D.C.—N. L. R. B. v. National Laundry Co., 138 F.2d 589, 78 U.S.App.D. C. 184.

Abandonment of an illegal practice by employer does not cause controversy to become moot.—N. L. R. B. v. Toledo Desk & Fixture Co., C.C. A.6, 158 F.2d 426.

Threat of repetition

Hostile statements of employer's president constituted sufficient threat of repetition of unfair labor practices to warrant enforcement of cease and desist order.—N. L. R. B. v. Burke Mach. Tool Co., C.C.A.6, 133 F.2d 618.

Partial compliance; reservation of rights

The filing by employer of certificate of partial compliance with order of National Labor Relations Board, following receipt of order, furnished no basis for rehearing in proceeding to enforce the order, where certificate stated that notification of compliance was not to be construed as a waiver of any objections to the proceedings.—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S. Ct. 142, 308 U.S. 605, 84 L.Ed. 506, and opinion supplemented, C.C.A., 128 F.2d 188.

Disestablishment of employees' organization

(1) It has been held that orders of the board directing disestablishment of an employees' organization could be enforced, and did not become moot, on the ground that the employer had complied therewith, or that the organization had been disbanded or dissolved.—Independent Employees Ass'n of Neptune Meter Co. v. N. L. R. B., C.C.A.2, 158 F.2d 448—Wyman-Gordon Co. (Ingalls Shepard Division) v. N. L. R. B., C.C. A.7, 153 F.2d 480—N. L. R. B. v. Baltimore Transit Co., 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084.

(2) There is also authority, however, holding that the court may refuse to enforce, as unnecessary, an order of the National Labor Relations Board directing the disestablishment of an employees' organization where it appears that such organization has ceased to function and thus has in fact become completely disestablished.—N. L. R. B. v. Hollywood-Maxwell Co., C.C.A.9, 126 F.2d 815—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F. 2d 388, certiorari denied N. L. R. B. v. E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529.

Board's right to press enforcement proceedings

(1) Although performance of trial examiner's recommendations by an employer may lead National Labor Relations Board in its administrative discretion to dismiss petition to enforce its orders, performance does not entitle employer to insist on dismissal.—N. L. R. B. v. Oregon Worsted Co., C.C.A.9, 94 F.2d 671.

(2) Fact that employer had entered into collective agreement with union as bargaining agent and that union sought to have proceedings discontinued did not require board to abandon proceedings brought against employer who had been guilty of unfair labor practices in seeking to prevent unionization of his plant.—N. L. R. B. v. Revlon Products Corporation, C.C.A.2, 144 F. 2d 88.

93. U.S.—N. L. R. B. v. Bachelder, C.C.A.7, 125 F.2d 387, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519 —N. L. R. B. v. Blanton Co., C.C.A. 8, 121 F.2d 564—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—Bussmann Mfg.

order at the time enforcement is sought is less than when the order was first made.[94] In other words, if the order of the board is proper on the record before it, the board is not required, as a condition of obtaining enforcement, to litigate in the court issues of fact as to whether the employer has complied with the order.[95]

In accordance with the foregoing rules, enforcement of an order of the board need not be denied because of a subsequently arising controversy as to the proper bargaining agent, or because of a decline in the membership of the union certified.[96] Except in so far as the statutes may provide for the dismissal of a charge of unfair labor practice on voluntary adjustment of the dispute, the court ordinarily has no authority, over objection of the board, to remand a cause with directions to dismiss because of amicable settlement of the controversy between employer and employee[97] or because of a request made by employees that the proceedings be discontinued.[98] Of course, subsequent steps taken for the purpose of evading obedience to an order of the board will not be accorded any consideration.[99] In the final analysis, the determination of whether a question or controversy has become moot so as to preclude enforcement of an order of the board depends on the facts and circumstances of the particular case.[1]

Discontinuance of business by employer. Ordinarily enforcement of the board's orders may be decreed although the employer has gone out of business, where there may be a successor who

Co. v. N. L. R. B., C.C.A.8, 111 F. 2d 783.

N.Y.—New York State Labor Relations Board v. Timen, 35 N.Y.S. 2d 449, 264 App.Div. 120, appeal granted 44 N.E.2d 618, 289 N.Y. 644—New York State Labor Relations Board v. Toffenetti Restaurant Co., 44 N.Y.S.2d 798, 180 Misc. 326, affirmed 42 N.Y.S.2d 938, 266 App.Div. 837, appeal denied 44 N. Y.S.2d 262, first case, 266 App.Div. 950, stay granted 44 N.Y.S.2d 262, second case, 266 App.Div. 950, appeal dismissed 52 N.E.2d 961, 291 N.Y. 750—New York State Labor Relations Board v. Jacobson, 35 N.Y.S.2d 157—New York State Labor Relations Board v. Astoria Casket Co., 17 N.Y.S.2d 13.

Pa.—Case of York Corp. Employees, Com.Pl., 59 York Leg.Rec. 157.

Availability of similar work

Enforcement of a reinstatement order was not refused on the ground that changed circumstances made it unjust to enforce the board's order where it did not appear that there was no available work of the kind formerly done by the men whose reinstatement was ordered.—N. L. R. B. v. Air Associates, C.C.A.2, 121 F.2d 586.

94. U.S.—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307—Wyman-Gordon Co. (Ingalls Shepard Division) v. N. L. R. B., C.C.A.7, 153 F.2d 480—N. L. R. B. v. Westinghouse Air Brake Co., C.C.A.3, 120 F.2d 1004—N. L. R. B. v. Louisville Refining Co., C.C.A.6, 102 F.2d 678, certiorari denied Louisville Refining Co. v. N. L. R. B., 60 S.Ct. 81, 308 U.S. 568, 84 L.Ed. 477—N. L. R. B. v. Oregon Worsted Co., C.C.A.9, 96 F.2d 193.

D.C.—N. L. R. B. v. National Laundry Co., 138 F.2d 589, 78 U.S.App. D.C. 184.

95. U.S.—N. L. R. B. v. Draper Corp., C.C.A.1, 159 F.2d 294—N. L. R. B. v. Lettie Lee, Inc., C.C.A.9, 140 F.2d 243—N. L. R. B. v. L. H. Hamel Leather Co., C.C.A.1, 135 F. 2d 71—N. L. R. B. v. Clinton E. Hobbs Co., C.C.A.1, 132 F.2d 249.

96. U.S.—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307—N. L. R. B. v. Gatke Corp., C.C.A.7, 162 F.2d 252—N. L. R. B. v. H. G. Hill Sotes, C.C. A.5, 140 F.2d 924—N. L. R. B. v. American Creosoting Co., C.C.A.6, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U.S. 797, 88 L.Ed. 1086—N. L. R. B. v. Clinton E. Hobbs Co., C.C.A.1, 132 F.2d 249—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—N. L. R. B. v. Blanton Co., C. C.A.8, 121 F.2d 564—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—N. L. R. B. v. Highland Park Mfg. Co., C.C.A.4, 110 F.2d 632.

N.Y.—New York State Labor Relations Board v. Paragon Oil Co., 45 N.Y.S.2d 152.

Mere possibility of change

An order of the board will not be modified to provide for a present determination of the bargaining representative merely because there has been a lapse of time and changes may have taken place, there being no showing that any change in bargaining representative has in fact taken place; the nebulous supposition is insufficient.—Williams Motor Co. v. N. L. R. B., C.C.A.8, 128 F.2d 960.

97. U.S.—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786.

98. U.S.—N. L. R. B. v. Louisville Refining Co., C.C.A.6, 102 F.2d 678, certiorari denied Louisville Refining Co. v. N. L. R. B., 60 S.Ct. 81, 308 U.S. 568, 84 L.Ed. 477.

99. U.S.—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292.

1. **Controversies held not moot**

(1) Generally.—N. L. R. B. v. Clark Bros. Co., C.C.A.2, 163 F.2d 373—N. L. R. B. v. Blackstone Mfg. Co., C.C.A.2, 123 F.2d 633.

(2) Demilitarization of private plant guards who had been civilian auxiliaries to the military police was held not to render moot an enforcement proceeding or to affect the prime issue of whether such guards were subject to provisions of the National Labor Relations Act.—N. L. R. B. v. Jones & Laughlin Steel Corp., 67 S.Ct. 1274, 331 U.S. 416, 91 L.Ed. 1575—N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265, 331 U. S. 398, 91 L.Ed. 1563.

(3) Proceeding to enforce order did not become moot because union opposed by employer won election and entered into contract with employer.—N. L. R. B. v. Southern Wood Preserving Co., C.C.A.5, 135 F.2d 606.

(4) Where union still claimed to represent employees notwithstanding employer's change in business, and no employee or labor organization disputed such fact, motion to dismiss on ground that question was moot was denied.—N. L. R. B. v. National Mineral Co., C.C.A.7, 134 F.2d 424, certiorari denied National Mineral Co. v. N. L. R. B., 64 S.Ct. 58, 320 U.S. 753, 88 L.Ed. 448.

(5) A motion to dismiss a petition to enforce an order of the National Labor Relations Board on the ground that the controversy had become moot because it had been settled was denied, where the employer had not performed all that had been required

would be a privy bound by the order.[2] An order of the board may be enforced against a corporate employer notwithstanding its voluntary dissolution, particularly where, by virtue of state statutes, the corporate entity may be deemed preserved for the purposes of the proceeding.[3] The death of a partner does not make unenforceable an order of the board directed against a partnership.[4] However, enforcement will not be decreed where the business of the employer has permanently ceased, and there is no probability that it will again be operated, so that any decree of the court would be inoperative.[5]

§ 28(133). Hearing and Determination

a. In general
b. Under National Labor Relations Act
c. Under Railway Labor Act

a. In General

The court may not interfere with a valid determination of a labor relations board, as, for example, in selecting an appropriate bargaining unit or representative, merely because in the judgment of the court a different determination might result in better effectuation of the policies of the labor statutes.

Under provisions of a state labor relations act similar to those of the National Labor Relations Act, it has been held that the court cannot substitute its judgment for that of the board as to whether or not any proposed action would effectuate the policies of the act.[6] A determination of a state labor relations board as to an appropriate bargaining unit or collective bargaining representative cannot be disturbed where reasonable minds might differ on the question, and the action of the board, in exercising its discretion in the matter, does not clearly appear to have been arbitrary or capricious.[7] On the other hand, the court will not enforce an order of the board which is improper or void,[8] and, under appropriate circumstances, the court may set

by the board, and controversies had apparently arisen as to the meaning of the settlement.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employe's Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

2. U.S.—N. L. R. B. v. Reynolds Corp., C.C.A.5, 155 F.2d 679.

Reorganization or transfer of business

An employer cannot be permitted by reorganization or transfer to nullify an order of the board and make it necessary to start new proceedings against the new owner of the business.—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39.

3. U.S.—N. L. R. B. v. Weirton Steel Co., C.C.A.3, 135 F.2d 494—De Bardeleben v. N. L. R. B., C.C.A.5, 135 F.2d 13.

4. U.S.—N. L. R. B. v. Wm. Tehel Bottling Co., C.C.A.8, 129 F.2d 250.

5. U.S.—N. L. R. B. v. Reynolds Corp., C.C.A.5, 155 F.2d 679.

Question of fact as to good faith

Question whether there is good faith discontinuance of business by the employer and true change of ownership is question of fact to be tried either before board or before court on application to show cause why enforcement decree was not complied with.—Southport Petroleum Co. v. N. L. R. B., 62 S.Ct. 452, 315 U.S. 100, 86 L.Ed. 718, rehearing denied 62 S.Ct. 637, 315 U.S. 827, 86 L.Ed. 1223—N. L. R. B. v. Bachelder, C.C.A.7, 125 F.2d 387, certiorari denied Bachelder v. N. L. R. B., 62 S. Ct. 90, 314 U.S. 647, 86 L.Ed. 519.

6. Wis.—United Shoe Workers of America, Local 132, v. Wisconsin Labor Relations Board, 279 N.W. 37, 227 Wis. 569.

Board's refusal to act

A determination of the state labor relations board, that it would not act in a controversy between a union and an employer charged with unfair labor practices, because no order which board could enter would effectuate policies of labor relations act, was not reviewable by court as an order dismissing a petition, since board acted in the exercise of its discretion.—United Shoe Workers of America, Local 132, v. Wisconsin Labor Relations Board, supra.

Reinstatement with back pay

Pa.—In re McGarvey, Com.Pl., 26 Erie Co. 119.

7. N.Y.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 20 N.E.2d 390, 280 N.Y. 194—In re New York State Labor Relations Board, 37 N.Y.S.2d 304, affirmed 45 N.Y.S.2d 942, 267 App.Div. 763, affirmed 56 N.E.2d 262, 293 N.Y. 671—Johnson v. Bee Line, 28 N.Y.S.2d 18.

Pa.—In re Employees of Colfax Station of Duquesne Light Co., 29 A. 2d 18, 345 Pa. 458—In re Media Drug Stores, 56 Pa.Dist. & Co. 113—Supervisory Employees' Union v. Pittsburgh Rys. Co., Com.Pl., 93 Pittsb.Leg.J. 47.

Multiple employer unit

In proceedings under state labor relations act to compel school custodians to bargain collectively with their helpers, where labor relations board, after custodians' stipulation, found a multiple employer unit, in the absence of proof indicating that the action of the board was capricious, finding of board was affirmed.—In re New York State Labor Relations Board, 37 N.Y.S.2d 304, affirmed 45 N.Y.S.2d 942, 267 App.Div. 763, affirmed 56 N.E.2d 262, 293 N. Y. 671.

Maintenance of several plants by employer

Where it was shown that company maintained three plants, that although the largest plant was an integral part of the company's operations it was geographically separated from the other two plants, and that a decided majority of the employees at the largest plant desired certain union to represent them, the board did not abuse its discretion in determining that such union was the representative of the employees of the largest plant, rather than union which was allegedly the choice of the employees of the three plants taken as a unit.—In re Employees of Colfax Station of Duquesne Light Co., 29 A.2d 18, 345 Pa. 458.

Board's lack of jurisdiction to certify bargaining unit

Pa.—In re Oestreicher Co., Com.Pl., 39 Luz.Leg.Reg. 25.

8. N.Y.—New York State Labor Relations Board v. Greif Realty Corp., 70 N.Y.S.2d 288, 188 Misc. 549, reversed on other grounds 71 N.Y.S.2d 91, 272 App.Div. 928.

Pa.—Pennsylvania Labor Relations Board v. Schlossman, Com.Pl., 91 Pittsb.Leg.J. 489.

Utah.—Southeast Furniture Co. v. Industrial Commission, 111 P.2d 153, 100 Utah 154.

aside part of the board's order.[9]

It has been held that, where the findings of the board support its order, the court's judgment should merely affirm the board's order and should not incorporate independent conclusions or findings of the court.[10] It has also been held however, that a court order enforcing an order of a labor relations board should on its face contain sufficient to apprise a party of what is ordered without the necessity of referring to the board's order,[11] and judicial disapproval has been registered of a form of court order which merely commands a party to perform or refrain from performing the acts described in the labor board's order.[12]

An arbitrators' award will not be confirmed in so far as the provisions thereof are ambiguous[13] or in so far as the arbitrator has exceeded his powers in issuing a directive, instead of merely making a finding;[14] and under some circumstances it has been held proper to modify or correct the award to make it accord with the intent of the arbitrators.[15]

A decision of an impartial chairman of an industry made pursuant to the authority given him by agreement between employers and employees in the industry ordinarily may not be disturbed by the courts.[16] In proceedings to vacate or set aside an award of an impartial chairman the court must construe the agreement which the parties made, and may not attempt to reconstruct a new agreement for them.[17] A decision made by a chairman in his legislative capacity, rather than in his capacity as an arbitrator of a dispute, cannot be vacated for his failure to hold or give notice of hearings where power is vested in him by the agreement of the parties to proceed without any such requirements.[18]

b. Under National Labor Relations Act

Although it is for the court in the final instance to see that the National Labor Relations Act is fairly applied, it is primarily for the National Labor Relations Board to determine how the policies of the act should be effectuated and the effect of unfair labor practices expunged. The court may not interfere with a reasonable exercise of discretion by the board in determining an appropriate bargaining unit or representative.

In the hearing and determination of proceedings for the enforcement or review of orders of the National Labor Relations Board, it is the duty of the court to comply with the National Labor Relations Act[19] and to see that the rights guaranteed by the act are amply secured to the employees,[20]

9. Pa.—John Hancock Mut. Life Ins. Co. of Boston v. Pennsylvania Labor Relations Board, 45 Pa.Dist. & Co. 169.

10. Wis.—Nash-Kelvinator Corp. v. Wisconsin Employment Relations Board, 19 N.W.2d 255, 247 Wis. 202.

11. N.Y.—In re Boland, 19 N.Y.S. 2d 166, 259 App.Div. 847.

12. N.Y.—In re Boland, supra.

13. N.Y.—Publishers' Ass'n of New York City v. New York Typographical Union No. 6, 5 N.Y.S.2d 847, 168 Misc. 267.

14. N.Y.—Goldberg v. Rialto Retailers, 43 N.Y.S.2d 432.

Treatment of award as referee's report

While award in the form of a directive could not be enforced as such, the court by regarding the case as on a referee's report in an action awarded judgment directing replacement of employees in accordance with arbitrator's finding.—Goldberg v. Rialto Retailers, supra.

15. N.Y.—Publishers' Ass'n of New York City v. New York Typographical Union No. 6, 5 N.Y.S. 2d 847, 168 Misc. 267.

16. U.S.—Bowles v. Biberman Bros., C.C.A.Pa., 152 F.2d 700.

N.Y.—Association of Master Painters & Decorators of City of New York v. Posner, 30 N.Y.S.2d 134, affirmed Application of Association of Master Painters and Decorators of City of New York, 30 N.Y.S.2d 850, 262 App.Div. 1019.

Appointment of shop stewards

Impartial chairman was held empowered to make decision authorizing union to appoint shop stewards and not limiting appointees to journeymen employed by parties to trade agreement.—Association of Master Painters & Decorators of City of New York v. Posner, 30 N.Y.S.2d 134, affirmed Application of Association of Master Painters & Decorators of City of New York, 30 N.Y.S. 2d 850, 262 App.Div. 1019.

17. N.Y.—Association of Master Painters & Decorators of City of New York v. Posner, 30 N.Y.S.2d 134, affirmed Application of Association of Master Painters & Decorators of City of New York, 30 N.Y.S.2d 850, 262 App.Div. 1019.

18. N.Y.—Association of Master Painters & Decorators of City of New York v. Posner, 30 N.Y.S.2d 134, affirmed Application of Association of Master Painters & Decorators of City of New York, 30 N.Y.S.2d 850, 262 App.Div. 1019.

19. U.S.—N. L. R. B. v. Bradford Dyeing Ass'n, 60 S.Ct. 918, 310 U.S. 318, 84 L.Ed. 1226—Sperry Gyroscope Co. v. N. L. R. B., C.C.A.2, 129 F.2d 922—Jacobsen v. N. L. R. B., C.C.A.3, 120 F.2d 96.

"A court on review of the Board's order lacks the power to apply a construction of the Act on the basis of what it believes might be just between employer and employees but must carry out the intent of the Congress regardless of where the burden may fall."—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 128 F.2d 528, 533.

Weaknesses of employees

The court cannot vary the specific terminology of the act to meet alleged weaknesses on the part of employees as against the employer. —E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F. 2d 388, certiorari denied N. L. R. B. v. E. I. Dupont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Association of Chemical Employees at Belle Works of E. I. Du Pont de Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. Association of Chemical Employees at Belle Works of E. I. Du Pont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529.

Dismissal for want of jurisdiction

A petition to review and set aside an order of the board will be dismissed where the court is without jurisdiction.—Wilson Line v. N. L. R. B., C.C.A.3, 113 F.2d 929.

20. U.S.—N. L. R. B. v. Riverside Mfg. Co., C.C.A.5, 119 F.2d 302—

although in its effort to prevent unfair labor practices the court must be mindful of the welfare of the honest employer.[21] The court must act within the bounds of the statute, without intruding on the administrative province,[22] and without interfering with the exercise by the board of discretion vested in it,[23] in the absence of an abuse thereof.[24] A determination by the board based in whole or in part on relevant economic and statutory considerations is entitled to great respect by the reviewing court.[25]

It is not for the court, but rather for the National Labor Relations Board, to determine primarily how the policy of the National Labor Relations Act can best be effectuated,[26] how the effect of prior un-

Martel Mills Corporation v. N. L. R. B., C.C.A.4, 114 F.2d 624.

Absence of employees from proceedings

Where employees who had formed union were not parties before board, court from which the board sought a decree enforcing order disestablishing the union was required to examine with care the treatment of the absent persons.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 109 F.2d 194, reheard 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

21. U.S.—Martel Mills Corporation v. N. L. R. B., C.C.A.4, 114 F.2d 624.

Free speech

The problem of balancing the right of free speech by an employer against the employee's similar right in matters of self-organization is essentially a judicial equation for the court to resolve, and the necessity of reconciling competing interests within the framework of an organized society requires the court to draw the line in the public interest.—N. L. R. B. v. Continental Oil Co., C.C.A.10, 159 F.2d 326.

Responsibility for independent acts of employees

The court is bound to countenance and make no order which will, under the guise of disciplining the employer, charge him with responsibility for independent acts of the employees.—N. L. R. B. v. Riverside Mfg. Co., C.C.A.5, 119 F.2d 302.

22. U.S.—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F.2d 652.

Public interest

Responsibility of representing public interest and giving due weight to all relevant factors lies primarily with National Labor Relations Board, and, in absence of compelling evidence that board has failed to measure up to its responsibility, courts should be reluctant to overturn board's considered judgment and substitute their own ideas of the public interest.—N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265, 331 L.Ed. 398, 91 L.Ed. 1563.

Exclusion of evidence

On review of its order, the board cannot be compelled to admit evidence which it excluded unless such exclusion was clearly insupportable.—N. L. R. B. v. Donnelly Garment Co., 67 S.Ct. 756, 330 U.S. 219, 91 L. Ed. 854.

Status as employee

Board has duty of determining in first instance who is an employee for purposes of the act, and its determination must be accepted if it has a reasonable basis in evidence and is not inconsistent with the law.—N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265, 331 U.S. 398, 91 L.Ed. 1563.

23. U.S.—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F. 2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15—Norristown Box Co. v. N. L. R. B., C.C.A.3, 124 F.2d 429, certiorari denied 62 S.Ct. 1033, 316 U.S. 667, 86 L.Ed. 1743—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U. S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198.

24. U.S.—Southern S. S. Co. v. N. L. R. B., 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F. 2d 816—Valley Mould & Iron Corporation v. N. L. R. B., C.C.A.7, 116 F.2d 760, certiorari denied 61 S.Ct. 1114, 313 U.S. 590, 85 L.Ed. 1545—Fort Wayne Corrugated Paper Co. v. N. L. R. B., C.C.A.7, 111 F.2d 869.

Arbitrary action

The judicial review afforded is not for the purpose of overruling the board's exercise of its discretion but to guarantee against arbitrary action by the board.—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495.

25. U.S.—N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265, 331 U.S. 398, 91 L.Ed. 1563.

26. U.S.—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U.S. 809, 88 L.Ed. 489—N. L. R. B. v. Palm Beach Broadcasting Corp., C.C.A.5, 155 F.2d 805—N. L. R. B. v. Landis Tool Co., C.C.A.3, 145 F. 2d 152—N. L. R. B. v. Northwestern Mut. Fire Ass'n, C.C.A.9, 142 F.2d 866, certiorari denied 65 S.Ct. 59, 323 U.S. 726, 89 L.Ed. 583—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 125 F.2d 757—N. L. R. B. v. Superior Tanning Co., C.C.A. 7, 117 F.2d 881, certiorari denied Superior Tanning Co. v. N. L. R. B., 61 S.Ct. 834, 313 U.S. 559, 85 L.Ed. 1520—N. L. R. B. v. Waumbec Mills, C.C.A.1, 114 F.2d 226—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045.

Specialized knowledge of board

The board is for practical purposes supreme on those issues as to which it must be assumed to have a competence, born of its specialized acquaintance with labor relations, such as the extent and persistence of an employer's influence on a succeeding company union.—N. L. R. B. v. Dadourian Export Corporation, C.C.A.2, 138 F.2d 891.

Dissipation of effects of employer's dominance

Where employees' association was employer-dominated and supported, the weight to be given to passage of time or subsequent efforts to dissipate the effect of the early dominance was for the board.—N. L. R. B. v. Southern Bell Telephone & Telegraph Co., Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—N. L. R. B. v. Southern Ass'n of Bell Telephone Employees, Ga., 63 S.Ct. 905, 319 U. S. 50, 87 L.Ed. 1250.

Employer's failure to bargain

The board is authorized to determine if and when the remedial provisions of the Act should be invoked on a failure of the employer to bargain, and if this exercise of power is not abused the court is without authority to interfere.—N. L. R. B. v. Chicago Apparatus Co., C.C.A.7, 116 F.2d 753.

fair labor practices may be expunged,[27] and, within the limits of the board's power, what order shall issue.[28]

A determination of the board rendered in accord-

27. U.S.—Franks Bros. v. N. L. R. B. 64 S.Ct. 817, 321 U.S. 702, 88 L.Ed. 1020—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U.S. 809, 88 L.Ed. 489—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Independent Union of Craftsmen, 61 S.Ct. 358, 311 U.S. 629, 85 L.Ed. 368—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474—N. L. R. B. v. Consolidated Mach. Tool Corp., C.C.A.2, 163 F.2d 376—Wells, Inc. v. N. L. R. B., C.C.A.9, 162 F.2d 457—N. L. R. B. v. Gonzalez Padin Co., C.C.A.1, 161 F.2d 353—Wallace Corp. v. N. L. R. B., C.C.A.4, 159 F.2d 952—Wilson & Co. v. N. L. R. B., C.C.A.10, 156 F.2d 577, certiorari denied 67 S.Ct. 357, 320 U.S. 789, 91 L.Ed. —— —N. L. R. B. v. Gluek Brewing Co., C.C.A.8, 144 F.2d 847—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—Utah Copper Co. v. N. L. R. B., C.C.A.10, 139 F.2d 788, certiorari denied 64 S.Ct. 946, 322 U.S. 731, 88 L.Ed. 1566—Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 132 F.2d 390, affirmed 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U.S. 809, 88 L.Ed. 489—Williams Motor Co. v. N. L. R. B., C.C.A.8, 128 F.2d 960—N. L. R. B. v. Southwestern Greyhound Lines, C.C.A.8, 126 F.2d 883—N. L. R. B. v. Calumet Steel Division of Borg-Warner Corporation, C.C.A.7, 121 F.2d 366—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corporation v. N. L. R. B., 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141—N. L. R. B. v. Waumbec Mills, C.C.A.1, 114 F.2d 226—Western Union Telegraph Co. v. N. L. R. B., C.C.A.2, 113 F.2d 992.

Reinstatement for wrongful discharge

(1) Court would not disturb order of board directing reinstatement of discharged employee, where there was substantial evidence that his layoff, allegedly for union activities and affiliations, was improper.—National Labor Relations Act, 29 U.S.C.A. § 151 et seq.—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 102 F.2d 745, certiorari denied 60 S.Ct. 78, 308 U.S. 565, 84 L.Ed. 475.

(2) Statement of board that reason for requiring offer of reinstatement to employee discharged for unionizing activities and obtaining equivalent employment elsewhere is that without assurance that offer of reinstatement will always be forthcoming employees may hesitate fearlessly to exercise their rights under the statute is binding on reviewing court.—N. L. R. B. v. Regal Knitwear Co., C.C.A.2, 140 F.2d 746, affirmed 65 S.Ct. 478, 324 U.S. 9, 89 L.Ed. 661.

Disestablishment of employees' organization

Whether an order requiring the disestablishment of an employees' organization on the ground of domination, control, or interference by the employer is an appropriate remedy is a matter for the board rather than for the courts.—N. L. R. B. v. Falk Corporation, 60 S.Ct. 307, 308 U.S. 453, 84 L.Ed. 396—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—N. L. R. B. v. Moench Tanning Co., C.C.A.2, 121 F.2d 951—Roebling Employees Ass'n v. N. L. R. B., C.C.A.3, 120 F.2d 289—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corporation v. N. L. R. B., 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141.

Placing employees on preferential list

Whether requirement that workmen who had participated in an unsuccessful strike be continued on employer's preferential list would effectuate the policies of the statute was a matter peculiarly within the province of the board.—N. L. R. B. v. C. Nelson Mfg. Co., C.C.A.8, 120 F.2d 444.

Reimbursement of employees

(1) The board has a broad discretion to require the reimbursement of workers for loss of wages discriminatorily imposed, and the court will not interfere with the exercise of such discretion except for the most cogent reasons.—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201.

(2) Determination of the board that reimbursement in full of employees for dues checked off to company union is necessary to effectuate the policies of the act must stand unless it is shown to be a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of such act.—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U.S. 809, 88 L.Ed. 489.

28. U.S.—Williams Motor Co. v. N. L. R. B., C.C.A.8, 128 F.2d 960—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F.2d 816—N. L. R. B. v. Bradley Lumber Co. of Arkansas, C.C.A.8, 128 F.2d 768.

Board's choice of remedies may not be lightly disturbed by the court and should be accepted unless not supported by the evidence.—Southern S. S. Co. v. N. L. R. B., 62 S.Ct. 886, 316 U.S. 31, 86 L.Ed. 1246—Sperry Gyroscope Co. v. N. L. R. B., C.C.A.2, 129 F.2d 922—Williams Motor Co. v. N. L. R. B., C.C.A.8, 128 F.2d 960.

Scope of cease and desist orders

It is the board's province to determine the needed scope of cease and desist orders under the National Labor Relations Act and the function of the courts merely to test as a matter of law whether the scope of a particular order has a reasonable basis in the situation presented.—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72, 329 U.S. 725, 91 L.Ed. ——.

Back pay

The nature and extent of remedy for back pay of reinstated employees are primarily within the administrative discretion of the board which cannot be interfered with as long as the board acts within its authority.—International Union of Mine, Mill and Smelter Workers, Locals No. 15 v. Eagle-Picher Mining & Smelting Co., 65 S.Ct. 1166, 325 U.S. 335, 89 L.Ed. 1649, motion granted 66 S.Ct. 8, 326 U.S. 684, 90 L.Ed. 400.

Posting of notice

(1) Board was held entitled to enforcement of order that employer post a notice that it would cease and desist from interfering with employees' right of self-organization.—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574.

(2) Content of notice which should be posted by employer is for the board to determine, and unless there is an abuse of discretion, court will not disturb it.—Fort Wayne Corrugated Paper Co. v. N. L. R. B., C.C.A.7, 111 F.2d 869.

Reinstatement notwithstanding dereliction of duty

Where board found that employer had discharged employee because of his activities on behalf of union, a further finding that employee had been taking certain property of the employer for his own use without permission did not establish dereliction of duty so great as to prevent enforcement of board's order to reinstate employee, in view of ar-

ance with the requirements of due process, based on findings supported by adequate evidence, and constituting an appropriate remedy, must be upheld by the court,[29] although the court may not approve of the relief awarded.[30] Even on questions of law the experienced judgment of the board is entitled to great weight.[31]

On the other hand, the manner in which the board has exercised its powers is subject to some control by the courts,[32] and the function of the courts in this respect is by no means perfunctory.[33] On the courts rests the final judicial responsibility, and from them emanates the sole authority, for making the board's orders coercively effective.[34] It is the duty of the court to see that the National Labor Relations Act is properly and fairly applied, and not brought into disrepute by unlawful or palpably unjust applications of it,[35] and the court, on challenge, must determine whether a provision of the board's order is in fact calculated to effectuate the purpose of the act[36] and is in accordance with

rangement between employer and employee with respect to such property.—N. L. R. B. v. Gonzalez Padin Co., C.C.A.1, 161 F.2d 353.

29. U.S.—N. L. R. B. v. A. J. Tower Co., 67 S.Ct. 324, 329 U.S. 324, 91 L.Ed. 322—N. L. R. B. v. Bradford Dyeing Ass'n, 60 S.Ct. 918, 310 U.S. 318, 84 L.Ed. 1226—N. L. R. B. v. Mackay Radio & Telegraph Co., 58 S.Ct. 904, 304 U.S. 333, 82 L.Ed. 1381—Wilson & Co. v. N. L. R. B., C.C.A.8, 162 F.2d 310—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 162 F.2d 247—Independent Employees Ass'n of Neptune Meter Co. v. N. L. R. B., C.C.A.2, 158 F.2d 448—N. L. R. B. v. Industrial Metal Fabricators, C.C.A.7, 158 F. 2d 14—N. L. R. B. v. Douglas Silk Products Co., C.C.A.5, 156 F.2d 115—N. L. R. B. v. Kellburn Mfg. Co., C.C.A.2, 149 F.2d 686—N. L. R. B. v. Hofmann, C.C.A.3, 147 F. 2d 679, 157 A.L.R. 1149—N. L. R. B. v. Cincinnati Chemical Works, C.C.A.6, 144 F.2d 597—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F.2d 9—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—Wallace Corporation v. N. L. R. B., C.C.A.4, 141 F.2d 87, affirmed 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216, rehearing denied 65 S.Ct. 682, 324 U.S. 885, 89 L.Ed. 1435—Richwood Clothespin & Dish Worker's Union v. N. L. R. B., C.C.A.4, 141 F.2d 87, affirmed 65 S.Ct. 238, 323 U.S. 248, 89 L.Ed. 216—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U.S. 751, 87 L. Ed. 1705—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 132 F.2d 801—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—Norristown Box Co. v. N. L. R. B., C.C.A.3, 124 F.2d 429, certiorari denied 62 S.Ct. 1033, 316 U.S. 667, 86 L.Ed. 1748—N. L. R. B. v. Heilig Bros. Co., C.C.A.3, 123 F.2d 734, certiorari denied Heilig Bros. Co. v. N. L. R. B., 62 S.Ct. 1294, two cases, 316 U.S. 701, 86 L.Ed. 1770—N. L. R. B. v. Hawk & Buck Co., C.C.A.5, 120 F.2d 903—N. L. R. B. v. Pearlstone Co., C.C.A.8, 115 F. 2d 132—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 110 F.2d 780, certiorari denied Sunshine Mining Co. v. N. L. R. B., 61 S.Ct. 447, 312 U.S. 678, 85 L.Ed. 1118, rehearing denied 61 S.Ct. 619, 312 U.S. 713, 85 L.Ed. 1144—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 91 F.2d 509, rehearing denied 93 F.2d 1010—Inland Empire Dist. Council, Lumber and Sawmill Workers Union, Lewistown, Idaho v. Graham, D.C.Wash., 53 F.Supp. 369, appeal dismissed, C.C.A., 142 F.2d 455.

Stipulations

(1) An enforcement decree may be rendered where the order of the board was entered on stipulation and the employer did not contest the binding force of its agreement.—N. L. R. B. v. Fickett-Brown Mfg. Co., C.C.A.5, 140 F.2d 883.

(2) Where employer waived a hearing by the board on charges of unfair labor practices pursuant to stipulation in which the form of notice to be posted was prescribed, court in decreeing form of notice to be posted declined to insert a recitation of fact that board's order had been enforced by decree of the court.—N. L. R. B. v. Draper Corp., C.C.A. 1, 159 F.2d 294.

(3) Where a stipulation was entered into between the board and the employer, and the court approved the stipulation and ordered it filed, its provisions were held to have the effect of a decree entered in the proceedings.—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 128 F.2d 188, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506.

30. U.S.—Wallace Corp. v. N. L. R. B., C.C.A.4, 159 F.2d 952.

31. U.S.—Medo Photo Supply Corporation v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201—Local No. 2880, Lumber & Sawmill Workers Union, United Broth. of Carpenters & Joiners of America, A. F. of L., v. N. L. R. B., C.C.A.9, 158 F.2d 365—N. L. R. B. v. May Department Stores Co., C.C.A.8, 146 F.2d 66, modified on other grounds 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 92 L.Ed. 495.

32. U.S.—N. L. R. B. v. Gonzalez Padin Co., C.C.A.1, 161 F.2d 353.

33. U.S.—Southern Ass'n of Bell Telephone Employees v. N. L. R. B., C.C.A.5, 129 F.2d 410, reversed on other grounds 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—Southern Bell Telephone & Telegraph Co. v. N. L. R. B., C.C.A.5, 129 F.2d 410, reversed on other grounds 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 91 F.2d 509, rehearing denied 93 F.2d 1010.

34. U.S.—Southern Ass'n of Bell Telephone Employees v. N. L. R. B., C.C.A.5, 129 F.2d 410, reversed on other grounds 63 S.Ct. 905, 319 U.S. 50 87 L.Ed. 1250—Southern Bell Telephone & Telegraph Co. v. N. L. R. B., C.C.A.5, 129 F.2d 410, reversed on other grounds 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—N. L. R. B. v. Riverside Mfg. Co., C.C.A.5, 119 F.2d 302—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 91 F.2d 509, rehearing denied 93 F.2d 1010.

35. U.S.—N. L. R. B. v. McGough Bakeries Corp., C.C.A.5, 153 F.2d 420.

Striker convicted of offense

Order of the board, reinstating with back pay a striker convicted of assault and battery in connection with a strike, was set aside.—N. L. R. B. v. Mt. Clemens Pottery Co., C. C.A.6, 147 F.2d 262.

Retention of drunkard

Order would not be enforced in so far as it purported to hold that habitual drunkard should have been retained and directed employer to make good to him any back pay.—Texas Co. v. N. L. R. B., C.C.A.9, 120 F.2d 186.

36. U.S.—Southern Ass'n of Bell Telephone Employees v. N. L. R.

the law.[37] It is the duty of the court to decline to enforce an order of the board which in the opinion of the court is not supported by the law and the facts,[38] as where the board has patently traveled outside the orbit of its authority[39] or has made an order which is not based on proper findings.[40] However, the court may enforce an order of the board, notwithstanding alleged error in respect of particular findings where, even without such findings, there would still be a basis in the record for the board's conclusions;[41] and an enforcement decree may be rendered notwithstanding the board's order may have been technically outside the issues raised by the pleadings before it, where the order was germane to the subject matter before the board, especially where the complaint filed was sufficiently definite to support evidence of unfair labor practices and there is substantial evidence to sustain the findings and order of the board.[42]

While ordinarily the court should make its enforcement decree accord with the order of the board,[43] and should not disturb the order of the board further than necessary to make it conform

B., C.C.A.5, 129 F.2d 410, reversed on other grounds 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—Southern Bell Telephone & Telegraph Co. v. N. L. R. B., C.C.A.5, 129 F.2d 410, reversed on other grounds 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—Reliance Mfg. Co. v. N. L. R. B., C.C.A.7, 125 F.2d 311.

37. U.S.—N. L. R. B. v. Robbins Tire & Rubber Co., C.C.A.5, 161 F.2d 798.

Impossibility of performing an order of the board may be determined in an enforcement proceeding.—N. L. R. B. v. Gluek Brewing Co., C. C.A.8, 144 F.2d 847.

38. U.S.—N. L. R. B. v. Caroline Mills, C.C.A.5, 158 F.2d 793—N. L. R. B. v. McGough Bakeries Corp., C.C.A.5, 153 F.2d 420—N. L. R. B. v. Cincinnati Chemical Works, C.C. A.6, 144 F.2d 597—N. L. R. B. v. American Tube Bending Co., C.C.A. 2, 134 F.2d 993, 146 A.L.R. 1017, certiorari denied 64 S.Ct. 84, 320 U.S. 768, 88 L.Ed. 459—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C.C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723—N. L. R. B. v. Union Mfg. Co., C.C.A.5, 124 F.2d 332—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 91 F.2d 509, rehearing denied 93 F.2d 1010.

Reinstatement of legally discharged employees

Where board had determined that certain employees were legally discharged and had not been discriminated against, board's order, reinstating such employees on ground their work had ceased in consequence of a labor dispute and that they remained employees within meaning of the act, was set aside.—N. L. R. B. v. Mt. Clemens Pottery Co., C.C.A.6, 147 F.2d 262.

Provisions dependent on matters involved in reversal

Where the order of the board is predicated on certain matters, as to which it is reversed, cease and desist provisions, which clearly would not have been made in the absence of such matters, ought not be enforced because of an incidental finding as to an unfair labor practice of minor character which has long since ceased to be operative or to have any effect.—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F. 2d 388, certiorari denied N. L. R. B. v. E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 115 F.2d 414, reversed on other grounds 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—Independent Organization of Employees of Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 115 F.2d 414, reversed on other grounds 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348.

39. U.S.—N. L. R. B. v. Cheney California Lumber Co., 66 S.Ct. 553, 327 U.S. 385, 90 L.Ed. 739—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495—N. L. R. B. v. Federal Engineering Co., C.C.A.6, 153 F.2d 233, rehearing denied 155 F.2d 17.

Illegal penalty

U.S.—N. L. R. B. v. Southwestern Greyhound Lines, C.C.A.8, 126 F.2d 883.

40. U.S.—N. L. R. B. v. McGough Bakeries Corp., C.C.A.5, 153 F.2d 420—M and M Wood Working Co. v. N. L. R. B., C.C.A., 101 F.2d 938—N. L. R. B. v. Union Pac. Stages, C.C.A.9, 99 F.2d 153.

Absence of specific findings

U.S.—National Labor Relations Board v. Fansteel Metallurgical Corporation, 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599.

Disestablishment of labor organization

Where evidence did not sustain finding that new labor organization was employer-dominated, order directing employer to disestablish new labor organization was set aside.—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529—Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A. 4, 116 F.2d 388, certiorari denied N. L. R. B. v. Association of Chemical Employees at Belle Works of E. I. Du Pont De Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529.

Necessity of sustaining all findings

In order to sustain the order of the board it is not necessary to sustain all the findings of the board, but only those on which the order was based.—N. L. R. B. v. M. A. Hanna Co., C.C.A.6, 125 F.2d 786.

41. U.S.—N. L. R. B. v. Newport News Shipbuilding & Dry Dock Co., 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219—Bethlehem Shipbuilding Corporation Limited v. N. L. R. B., C.C.A.1, 114 F.2d 930, certiorari dismissed Bethlehem Shipbuilding Corporation v. N. L. R. B., 61 S.Ct. 448, 312 U.S. 710, 85 L.Ed. 1141.

Wrongful discharge

An order of reinstatement was enforced notwithstanding the board's finding of discharge for union activity was not supported by the evidence, where the evidence disclosed a discharge on other grounds constituting an unfair labor practice.—N. L. R. B. v. Schwartz, C.C.A.5, 146 F.2d 773.

42. U.S.—N. L. R. B. v. Piqua Munising Wood Products Co., C.C.A.6, 109 F.2d 552.

43. U.S.—Republic Steel Corporation v. N. L. R. B., C.C.A.3, 114 F.2d 820, modified on other grounds 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6—N. L. R. B. v. Biles-Coleman Lumber Co., C.C.A.9, 96 F.2d 197.

Back pay

(1) Where order directing employer to reinstate striking employees

to the court's determination of the questions argued,[44] nevertheless the court has the jurisdiction and duty judicially to determine for itself the remedial decree that shall be entered,[45] and may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action.[46] It may modify the order of the board,[47] particularly where the parties consent to the modification[48] or where the literal language of the order goes beyond that which the board admits was intended.[49] The court may decree enforcement of part of the board's order and refuse enforcement as to the balance[50] except to the extent that the provisions involved may be inseparable,[51] or it may set aside the board's order in its entirety.[52]

An enforcement decree should be so worded as not to invite litigation as to its meaning,[53] and an employer is entitled to have defined, as exactly as the circumstances may permit, the acts which he may perform without being subject to contempt for violation of the court's enforcement decree.[54]

did not direct employer to give back pay, court could not make an order awarding employees vacation pay.—Republic Steel Corp. v. N. L. R. B., C.C.A.3, 114 F.2d 820, modified on other grounds 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6.

(2) Delays in proceeding under National Labor Relations Act did not require modification of provision for back pay to discharged employees so as to include only period subsequent to filing date of union's second amended charge.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

44. U.S.—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 106 F.2d 100.

45. U.S.—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 91 F.2d 509, rehearing denied 93 F.2d 1010.

46. U.S.—Ford Motor Co. v. National Labor Relations Board, 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221—N. L. R. B. v. Prettyman, C.C.A.6, 117 F.2d 786—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F.2d 652.

Decree conditioned on holding of election

The court may condition its decree of enforcement on the holding of an election.—National Licorice Co. v. N. L. R. B., 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799—N. L. R. B. v. American Mfg. Co., C.C.A.2, 106 F.2d 61, modified on other grounds American Mfg. Co. v. N. L. R. B., 60 S.Ct. 612, 309 U.S. 629, 84 L.Ed. 988.

Possibility of liquidation

Where possibility existed that employer might be in process of liquidation before amounts of back pay could be liquidated, order enforcing cease and desist order of the board should include provision that assets should not be distributed until a liquidation has been had or until leave of court is procured that liquidation proceed.—N. L. R. B. v. Kellburn Mfg. Co., C.C.A.2, 149 F.2d 686.

47. U.S.—N. L. R. B. v. Cheney California Lumber Co., 66 S.Ct. 553, 327 U.S. 385, 90 L.Ed. 739—N. L. R. B. v. Lipshutz, C.C.A.5, 149 F.2d 141—N. L. R. B. v. Walt Disney Productions, C.C.A.9, 146 F.2d 44, certiorari denied 65 S.Ct. 1025, 324 U.S. 877, 89 L.Ed. 1429—N. L. R. B. v. Jasper Chair Co., C.C.A.7, 138 F.2d 756, certiorari denied Jasper Chair Co. v. N. L. R. B., 64 S.Ct. 318, 321 U.S. 777, 88 L.Ed. 1070—N. L. R. B. v. Gerity Whitaker Co., C.C.A.6, 137 F.2d 198, certiorari denied Gerity Whitaker Co. v. N. L. R. B., 63 S.Ct. 663, 318 U.S. 763, 87 L.Ed. 1134, rehearing denied 63 S.Ct. 827, 318 U.S. 801, 87 L.Ed. 1165—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A.4, 127 F.2d 109—N. L. R. B. v. Mason Mfg. Co., C.C.A.9, 126 F.2d 810—N. L. R. B. v. Riverside Mfg. Co., C.C.A.5, 119 F.2d 302—Zimmer-Thomson Corp. v. N. L. R. B., D.C.N.Y., 60 F.Supp. 84.

Particular modifications pertaining to:

(1) Back pay.—United Biscuit Co. of America v. N. L. R. B., C.C.A.7, 128 F.2d 771—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 125 F.2d 757.

(2) Employees' freedom to organize.—N. L. R. B. v. Elizabeth Arden, Inc., C.C.A.2, 139 F.2d 488.

(3) Posting of order or notices.—N. L. R. B. v. Hollywood-Maxwell Co., C.C.A.9, 126 F.2d 815—N. L. R. B. v. Dow Chemical Co., C.C.A.6, 117 F.2d 455.

(4) Payment to public work relief agencies of sums earned by the discharged employees on work relief projects.—N. L. R. B. v. Standard Knitting Mills, C.C.A.6, 123 F.2d 58.

48. U.S.—N. L. R. B. v. General Shoe Corporation, C.C.A.5, 99 F.2d 223.

D.C.—N. L. R. B. v. Arcade-Sunshine Co., 118 F.2d 49, 73 App.D.C. 128, certiorari denied Arcade-Sunshine Co. v. N. L. R. B., 61 S.Ct. 942, 313 U.S. 567, 85 L.Ed. 1526.

49. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762.

50. U.S.—Corning Glass Works v. N. L. R. B., C.C.A.2, 118 F.2d 625.

Embodying understanding in written agreement

Where the employer refused to make any proposal for an agreement touching wages, hours, and conditions of employment, the court upheld and enforced that part of the board's order which required the employer to bargain collectively, and, if an understanding were reached on any matters with respect to pay, hours, or conditions of employment, to embody such understanding in a written agreement.—Globe Cotton Mills v. N. L. R. B., C.C.A.5, 103 F.2d 91.

51. U.S.—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F.2d 652.

Disposition of proceedings as entirety

Where the court deems it impracticable to attempt to separate certain transactions and to modify the board's order to apply to them it may dispose of the proceedings as an entirety.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 108 F.2d 198.

52. U.S.—N. L. R. B. v. Cheney California Lumber Co., 66 S.Ct. 553, 327 U.S. 385, 90 L.Ed. 739—Zimmer-Thomson Corp. v. N. L. R. B., D.C.N.Y., 60 F.Supp. 84.

Request of board

Where board on a further hearing asked to have set aside its own order, court accepted board's recommendation and set its order aside.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 118 F.2d 893.

Allowing board to set aside order

An employer cannot complain because the court instead of setting aside the board's findings and order has allowed the board itself to set them aside, since in either event the findings and order are vacated and the employer is freed from any determination they contain or any obligation they impose.—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221.

53. U.S.—J. I. Case Co. v. N. L. R. B., 64 S.Ct. 576, 321 U.S. 332, 88 L.Ed. 762.

54. U.S.—J. I. Case Co. v. N. L. R. B., supra.

Determination of bargaining unit. A decision of the board in the matter of selecting a bargaining unit is entitled to great weight,[55] and if reasonable, rather than arbitrary or capricious, should not be interfered with by the court.[56] In this connection the court should not substitute its judgment for that of the board on a question of wisdom or convenience.[57] The court may interfere, however, if the unit designated is unlawful,[58] and, if the facts before the board are such that all reasonable minds must honestly draw the same conclusion from them with respect to what would constitute an appropriate bargaining unit, a wrong determination of the question by the board will be subject to reversal as being purely arbitrary.[59]

Selection of bargaining agent. The action of the board, in the exercise of its discretion, in placing appropriate limitations on the choice of bargaining representatives, on a finding that public or statutory policies so dictate, is binding on the courts if grounded in reasonableness.[60] The act vests power in the board, not in the court, to select the method of determining what representative, if any, employees desire as a bargaining agent,[61] and it is only where the law has been ignored or violated that the court may nullify the certificate of a bargaining representative.[62] If the board deems it appropriate that the bargaining agent be selected by means of an

55. U.S.—Glen Alden Coal Co. v. N. L. R. B., C.C.A.3, 141 F.2d 47—N. L. R. B. v. Delaware-New Jersey Ferry Co., C.C.A.3, 128 F.2d 130.

Rarely to be disturbed
U.S.—Packard Motor Car Co. v. N. L. R. B., 67 S.Ct. 789, 330 U.S. 485, 91 L.Ed. 1040.

56. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corp., 67 S.Ct. 1274, 331 U.S. 416, 91 L.Ed. 1575—N. L. R. B. v. Swift & Co., C.C.A.3, 162 F.2d 575—Allis-Chalmers Mfg. Co. v. N. L. R. B., C.C.A.7, 162 F.2d 435—N. L. R. B. v. Packard Motor Car Co., C.C.A.6, 157 F.2d 80, affirmed 67 S.Ct. 789, 330 U.S. 485, 91 L.Ed. 1040—N. L. R. B. v. Prudential Ins. Co. of America, C.C.A.6, 154 F.2d 385—N. L. R. B. v. National Broadcasting Co., C.C.A.2, 150 F.2d 895—J. L. Brandeis & Sons v. N. L. R. B., C.C.A.8, 142 F.2d 977, certiorari denied 65 S.Ct. 85, 323 U.S. 751, 89 L.Ed. 601, rehearing denied 65 S.Ct. 129, 323 U.S. 815, 89 L.Ed. 648—N. L. R. B. v. Lettie Lee, Inc., C.C.A.9, 140 F.2d 243—Polish Nat. Alliance of U. S. v. N. L. R. B., C.C.A.7, 136 F.2d 175, affirmed 64 S.Ct. 1196, 322 U.S. 643, 88 L.Ed. 1509—Marshall Field & Co. v. N. L. R. B., C.C.A.7, 135 F.2d 391—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 133 F.2d 876, certiorari denied Botany Worsted Mills v. N. L. R. B., 63 S.Ct. 1164, two cases, 319 U.S. 751, 87 L.Ed. 1705—N. L. R. B. v. Wm. Tehel Bottling Co., C.C.A.8, 129 F.2d 250—N. L. R. B. v. Clarksburg Pub. Co., C.C.A.4, 120 F.2d 976—N. L. R. B. v. Chicago Apparatus Co., C.C.A.7, 116 F.2d 753—Marlin-Rockwell Corporation v. N. L. R. B., C.C.A.2, 116 F.2d 586, certiorari denied 61 S.Ct. 1116, 313 U.S. 594, 85 L.Ed. 1548—Pittsburgh Plate Glass Co. v. N. L. R. B., C.C.A.8, 113 F.2d 698, affirmed Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied Crystal City Glass Workers' Union v. N. L. R. B., 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551—Bussmann Mfg. Co. v. N. L. R. B., C.C.A.8, 111 F.2d 783—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 94 F.2d 138 certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539.
D.C.—Reilly v. Millis, D.C., 52 F. Supp. 172, affirmed 144 F.2d 259, 79 U.S.App.D.C. 171, certiorari denied 65 S.Ct. 1566, 325 U.S. 879, 89 L.Ed. 1995.

Decision held not arbitrary
U.S.—J. L. Brandeis & Sons v. N. L. R. B., C.C.A.8, 142 F.2d 977, certiorari denied 65 S.Ct. 85, 323 U.S. 751, 89 L.Ed. 601, rehearing denied 65 S.Ct. 129, 323 U.S. 815, 89 L.Ed. 648.

57. U.S.—Jones & Laughlin Steel Corp. v. N. L. R. B., C.C.A.5, 146 F.2d 833, certiorari denied 65 S.Ct. 1575, 325 U.S. 886, 89 L.Ed. 2000, rehearing denied 66 S.Ct. 15, 326 U.S. 806, 90 L.Ed. 491.

58. U.S.—Jones & Laughlin Steel Corp. v. N. L. R. B., supra.

Due consideration to relevant factors
Proper determination of appropriate collective bargaining unit necessarily implies that the board gave due consideration to all relevant factors, and correlated policies of the act with conflicting public or private interests.—N. L. R. B. v. Jones & Laughlin Steel Corp., 67 S.Ct. 1274, 331 U.S. 416, 91 L.Ed. 1575.

59. U.S.—Pittsburgh Plate Glass Co. v. N. L. R. B., C.C.A.8, 113 F.2d 698, affirmed Pittsburgh Plate Glass Co. v. N. L. R. B., 61 S.Ct. 908, 313 U.S. 146, 85 L.Ed. 1251, rehearing denied Crystal City Glass Workers' Union v. N. L. R. B., 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1551.

60. U.S.—N. L. R. B. v. Jones & Laughlin Steel Corp., 67 S.Ct. 1274, 331 U.S. 416, 91 L.Ed. 1575.

61. U.S.—N. L. R. B. v. Falk Corporation, 60 S.Ct. 307, 308 U.S. 453, 84 L.Ed. 396—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198—United Electrical Radio & Machine Workers of America v. International Brotherhood of Electrical Workers, C.C.A.N.Y., 115 F.2d 488.

62. U.S.—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 111 F.2d 474.

Redetermination of bargaining agent
(1) Where evidence supported findings of board with respect to effect of employer's unfair labor practices on the attitude of its employees toward their union, the question of what action, if any, should be taken with respect to a redetermination of the bargaining representative of employees was one for the board and not for the court.—N. L. R. B. v. Highland Shoe, C.C.A.1, 119 F.2d 218.

(2) The fact that a union may have lost its majority status after the employer has refused to bargain collectively with it does not authorize the court to direct a new election, this being a matter within the province of the board.—N. L. R. B. v. P. Lorillard Co., 62 S.Ct. 397, 314 U.S. 512, 86 L.Ed. 380—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 139 F.2d 984, certiorari denied 64 S.Ct. 944, 322 U.S. 729, 88 L.Ed. 1564—N. L. R. B. v. Medo Photo Supply Corporation, C.C.A.2, 135 F.2d 279, affirmed 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007.

(3) Where, as result of strike caused by employer's unfair labor practices, nearly all employees left employer's plant and were replaced by new personnel, a new election as to bargaining agency was not mandatory on ground of changed conditions, but that was a matter to be determined by the board, and its failure to require such election on that ground was not error.—N. L. R. B. v. A. Sartorius & Co., C.C.A.2, 140 F.2d 203.

election, the control of the election and the determination of the steps necessary fairly to conduct that election are matters for the board, and interference in those matters by the court is error.[63] There is no authority granted by the National Labor Relations Act for anticipatory judicial control of election methods so as to permit the court, in effect, to review a proposed election and to supervise the manner in which the election should be conducted.[64]

c. Under Railway Labor Act

A suit to enforce an award of the National Railroad Adjustment Board proceeds as do other civil suits. The trial is de novo and the carrier may be heard on objections to the award. Selection of a bargaining representative by the National Mediation Board is binding on the courts in the absence of abuse of discretion.

In an action under the federal Railway Labor Act § 3, 45 U.S.C.A. § 153, to enforce an award made by the National Railroad Adjustment Board the trial is de novo[65] and the suit, in general, proceeds as do other civil suits.[66] The mere fact that plaintiff obtained a favorable order from the National Railroad Adjustment Board does not, per se, give him a cause of action,[67] and the carrier may be heard on objections, if any, to the award.[68] The court exercises broader powers than merely directing coercive process to issue if satisfied that the proceeding was authorized by law.[69]

Under the statute the district court is empowered to enter such judgment as may be appropriate to enforce or set aside the order.[70] An award of arbitrators under the Railway Labor Act must be set aside by the court if any part of it is not sustained[71] unless the parties agree to a different disposition.[72]

Selection of bargaining representative. The exercise of discretion by the National Mediation Board with respect to questions arising in the holding of an election,[73] and a determination by it as to whether a secret election is the most desirable method of determining the bargaining representative of employees in any particular case,[74] will not be interfered with by the court where no abuse ap-

63. U.S.—N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036.

Presence of observers

Whether employer, union, or employees opposed to union should be represented at polls by observers in election of bargaining representative is exclusively within discretion of the Board.—Semi-Steel Casting Co. of St. Louis v. N. L. R. B., C.C.A.8, 160 F.2d 388.

64. U.S.—N. L. R. B. v. Falk Corporation, 60 S.Ct. 307, 308 U.S. 453, 84 L.Ed. 396.

65. U.S.—Dahlberg v. Pittsburgh & L. E. R. Co., C.C.A.Pa., 138 F.2d 121—Hanks v. Delaware & H. R. Corp., D.C.N.Y., 63 F.Supp. 161—Order of Sleeping Car Conductors v. Pullman Co., D.C.Wis., 47 F. Supp. 599.

Testimony of passenger

On the trial of an action seeking to enforce an award of the National Railroad Adjustment Board ordering reinstatement of an employee who was discharged for alleged improper conduct toward a passenger of the carrier, where the board did not pass on the employee's guilt or innocence of the charges which caused his removal it has been asserted that "it would seem to be essential" for the carrier to present the testimony of the passenger who complained of the employee's conduct.—Order of Sleeping Car Conductors v. Pullman Co., supra.

66. D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S. App.D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

Prima facie case

Where the action is one to enforce an award in favor of an employee whose position had been abolished, plaintiff makes a prima facie case by showing the collective bargaining agreement, the existence of the position, the duties thereof, its abolishment, and the continuance of such duties at the particular office.—Hanks v. Delaware & H. R. Corp., D. C.N.Y., 63 F.Supp. 161.

67. U.S.—System Federation No. 59 of Railway Employees Department of American Federation of Labor v. Louisiana & A. Ry. Co., D.C.La., 30 F.Supp. 909, rehearing denied 32 F.Supp. 89, affirmed, C.C.A., 119 F.2d 509, certiorari denied 62 S.Ct. 108, 314 U.S. 656, 86 L.Ed. 526.

Analysis of order and consideration of facts

In determining whether plaintiff has a cause of action for enforcement of an order of the National Railroad Adjustment Board the court may analyze the order and may also consider all the other allegations of fact of the petition.—System Federation No. 59 of Railway Employees Department of American Federation of Labor v. Louisiana & A. Ry. Co., supra.

68. U.S.—Order of R. R. Telegraphers v. New Orleans, T. & M. Ry. Co., D.C.Mo., 61 F.Supp. 869, vacated on other grounds, C.C.A., 156 F.2d 1, certiorari denied 67 S.Ct. 112, 329 U.S. 758, 91 L.Ed. 654, rehearing denied 67 S.Ct. 201, 329 U.S. 829, 91 L.Ed. 703.

69. U.S.—Dahlberg v. Pittsburgh & L. E. R. Co., C.C.A.Pa., 138 F.2d 121.

70. U.S.—Joint Council Dining Car Employees Local 370, Hotel and Restaurant Employees International Alliance v. Delaware, L. & W. R. Co., C.C.A.N.Y., 157 F.2d 417—System Federation No. 8 of Railway Employers' Department of American Federation of Labor v. Missouri-Kansas-Texas R. Co. of Texas, D.C.Tex., 40 F.Supp. 803.

71. U.S.—Iowa Transfer Ry. Co. v. Switchmen's Union of North America, C.C.A.Iowa, 66 F.2d 909.

72. U.S.—Iowa Transfer Ry. Co. v. Switchmen's Union of North America, supra.

73. U.S.—Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees v. Virginian Ry. Co., C.C.A. Va., 125 F.2d 853—Brotherhood of Locomotive Firemen and Enginemen v. Kenan, C.C.A.Fla., 87 F.2d 651, certiorari denied Grand International Brotherhood of Locomotive Engineers v. Kenan, 57 S.Ct. 790, 301 U.S. 687, 81 L.Ed. 1344.

74. U.S.—Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees v. Virginian Ry. Co., C.C. A.Va., 125 F.2d 853.

Employees' authorization cards

Record did not disclose that National Mediation Board acted arbitrarily or in bad faith in determining bargaining representative of employees of carrier on authorization cards signed by employees.—Brotherhood of Railway & Steamship

pears. Further, a determination of the National Mediation Board as to the choice of a bargaining representative for employees is binding on the court in the absence of some abuse of discretion.[75] However, the court is not required to enforce a certification which ignores the basic facts of historical development, similarity of employment, community of interest, and well-defined group choice.[76]

Construction of bargaining agreements. In construing collective bargaining agreements between railroads and their employees, great weight is to be given to a determination of the National Railroad Adjustment Board.[77]

§ 28(134). —— Presumptions

On the review of an order of a labor relations board, the court may indulge in proper presumptions, as, for example, that the board has performed its duty, and that its proceedings were regular; but presumptions without a proper basis will not be indulged.

The court in proceedings for the enforcement or review of an order of a labor relations board may indulge in proper presumptions.[78] The decision or action of the board is entitled to a presumption of regularity;[79] there is a presumption that the board performed its duty[80] and made its findings in accordance with the law.[81] It may be presumed that the board properly considered the evidence[82] and briefs[83] presented to it. Presumptions without a proper basis will not be indulged.[84]

§ 28(135). —— Burden of Proof

A labor relations board seeking judicial enforcement of its order has the burden of establishing its right to relief; but in an action brought to enforce an award of the National Railroad Adjustment Board, the defendant has been held to have the burden of showing the invalidity of the award.

A labor relations board in coming before the court to enforce its order must establish its right to the relief for which it prays,[85] and in this con-

Clerks, Freight Handlers, Express and Station Employees v. Virginian Ry. Co., supra.

75. U.S.—Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees v. Virginian Ry. Co., supra.

76. U.S.—Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Nashville, C. & St. L. Ry. Co., C.C.A.Tenn., 94 F.2d 97.

77. U.S.—Virginian Ry. Co. v. System Federation No. 40 of Railway Employees' Department of American Federation of Labor, C.C.A.Va., 131 F.2d 840.

78. **Particular presumptions**

(1) Continuance of interstate shipments.—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438.

(2) Continuance of union as bargaining agent of a majority of the employees.—N. L. R. B. v. Biles-Coleman Lumber Co., C.C.A. 9, 96 F. 2d 197.

(3) Decline in union membership as due to employer's wrongful failure to bargain.—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292 —N. L. R. B. v. Highland Park Mfg. Co., C.C.A., 110 F.2d 632.

(4) Disobedience of board's order. —N. L. R. B. v. Whittier Mills Co., C.C.A.5, 111 F.2d 474.

(5) Employees' satisfaction with elected bargaining agents.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

(6) Immateriality of delay.—N. L. R. B. v. National Casket Co., C.C.A. 2, 107 F.2d 992.

(7) Prejudice resulting from impropriety in the proceedings before the trial examiner.—N. L. R. B. v. Ford Motor Co., C.C.A., 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126.

(8) Time of commencement of unfair labor practice.—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F.2d 681.

(9) Validity of, and preference indicated by, challenged ballot.—N. L. R. B. v. A. J. Tower Co., C.C.A.1, 152 F.2d 275, reversed on other grounds 67 S.Ct. 324.

(10) Value of services rendered.—Republic Steel Corporation v. N. L. R. B., 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6.

(11) Other presumptions.—Reliance Mfg. Co. v. N. L. R. B., C.C.A. 7, 125 F.2d 311.

79. U.S.—N. L. R. B. v. Jasper Chair Co., C.C.A.7, 138 F.2d 756, certiorari denied Jasper Chair Co. v. N. L. R. B., 64 S.Ct. 618, 321 U.S. 777, 88 L.Ed. 1070—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 103 F.2d 953.

N.Y.—New York State Labor Relations Bd. v. Greif Realty Corp., 71 N.Y.S.2d 91, 272 App.Div. 928.

80. U.S.—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585.

Disregard of subordinates' unfairness

The board must be presumed to be capable of resisting any unfair attitudes expressed to it by its subordinates, including its attorneys or the trial examiner.—N. L. R. B. v. Air Associates, C.C.A.2, 121 F.2d 586.

81. U.S.—N. L. R. B. v. Texas Mining & Smelting Co., C.C.A.5, 117 F. 2d 86.

Findings as made by board

Where the board issues an order purporting to be based on findings of fact, there is a presumption that the board made them, and a contrary allegation ought not to be lightly made or sustained.—N. L. R. B. v. Cherry Cotton Mills, C.C.A.5, 98 F.2d 444, rehearing denied 98 F.2d 1021.

Failure to relate all facts

The presumption that the findings were made in accordance with the law is not dissipated by the failure of the board to relate all of the facts pertaining to the ultimate finding.—N. L. R. B. v. Texas Mining & Smelting Co., C.C.A.5, 117 F.2d 86.

82. U.S.—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433.

83. U.S.—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 103 F.2d 953.

84. U.S.—N. L. R. B. v. Ford Motor Co., C.C.A.9, 118 F.2d 766.

Weakness of employees

The court cannot indulge in any assumption of weakness on the part of employees as against the employer.—E. I. Du Pont De Nemours & Co. v. N. L. R. B., C.C.A.4, 116 F.2d 388, certiorari denied N. L. R. B. v. E. I. Dupont de Nemours & Co., 61 S.Ct. 959, 313 U.S. 571, 85 L.Ed. 1529.

85. U.S.—N. L. R. B. v. Ford Motor Co., C.C.A.5, 119 F.2d 326.

nection has been held to have the "burden of proof."[86] The burden has been held on the board, in proceedings for review or enforcement of an order made by it, to sustain its findings;[87] but by other authority the burden of showing that the board's findings and order were without support was held to be on the parties so asserting.[88]

Railway Labor Act. In an action brought under the Railway Labor Act to enforce an award of the National Railroad Adjustment Board, defendant has the burden of showing the invalidity of the award,[89] and this burden extends also to the effect of the award where dependent on mixed questions of law and fact.[90]

§ 28(136). —— Conclusiveness of Board's Findings

a. Under National Labor Relations Act
b. Under Railway Labor Act
c. Under state statutes

a. Under National Labor Relations Act

(a) In general
(b) Inferences or conclusions of fact
(c) Character and sufficiency of evidence

(a) In General

In proceedings to enforce or review an order of the National Labor Relations Board the court does not act as an independent trier of the facts, and is bound by findings of the board which are supported by sufficient evidence.

In proceedings to enforce or review an order of the National Labor Relations Board, the findings and conclusions of the board are in general to be accorded the same weight as the verdict of a jury under the common law,[91] and, if supported by sufficient evidence, are conclusive.[92] As far as a review of the evidence is concerned, the power of the

86. U.S.—N. L. R. B. v. West Ky. Coal Co., C.C.A.6, 152 F.2d 198, certiorari denied 66 S.Ct. 1372, 328 U.S. 866, 90 L.Ed. 1636—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 106 F.2d 100.
Pa.—Labor Relations Board v. Union Trust Co., Com.Pl., 89 Pittsb. Leg.J. 343.

Reason for employee's discharge
In a proceeding to enforce an order of the board directing reinstatement of an employee, wherein the board contended that the employee was in fact discharged for union affiliations and activities rather than for the reasons given by the employer, the burden of proof was held to be on the board.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486.

Union as bargaining agent
In a proceeding to enforce an order of the National Labor Relations Board requiring the employer to bargain collectively with a designated union, the board was held to have the burden of proving that the union was so organized that mere membership of employees therein constituted the union their designated bargaining agent.—N. L. R. B. v. Hollywood-Maxwell Co., C.C.A.9, 126 F.2d 815.

Expression of opinion; coercive conduct
(1) The board's burden is not sustained with respect to a charge growing out of an expression of opinion by an employer unless the entire statement is given.—N. L. R. B. v. West Ky. Coal Co., C.C.A.6, 152 F.2d 198, certiorari denied 66 S.Ct. 1372, 328 U.S. 866, 90 L.Ed. 1636.
(2) However, it is not necessary, in order to obtain an enforcement decree, for the board to show that normally coercive conduct had its intended or desired effect.—N. L. R. B. v. Aintree Corporation, C.C.A.7, 132 F.2d 469, certiorari denied Aintree Corporation v. N. L. R. B., 63 S.Ct. 831, 318 U.S. 774, 87 L.Ed. 1144.

87. U.S.—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 116 F.2d 367.

88. U.S.—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 108 F.2d 867, certiorari denied Brown Paper Mill Co. v. N. L. R. B., 60 S.Ct. 1104, 310 U.S. 651, 84 L.Ed. 1416.

Cause of strike
In proceeding to enforce order requiring reinstatement of striking employees, employer which had interfered with employees' right to self-organization had burden of showing that strike would have taken place, even if it had not interfered with employees' rights.—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, opinion supplemented, C.C.A., 128 F.2d 188.

89. U.S.—Order of Railroad Telegraphers v. Railway Express Agency, D.C.Ga., 55 F.Supp. 319, reversed on other grounds 137 F.2d 46, reversed on other grounds 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788.

90. U.S.—Order of Railroad Telegraphers v. Railway Express Agency, supra.

91. U.S.—N. L. R. B. v. Riverside Mfg. Co., C.C.A.5, 119 F.2d 302—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.10, 115 F.2d 1007.

Errors of fact
Whatever mistakes the board may make in appraising the credibility of witnesses and the weight of evidence, and in drawing inferences from conflicting or circumstantial evidence, are errors of fact which, like similar errors committed by a jury, are not subject to correction on review.—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 162 F.2d 247.

92. U.S.—Medo Photo Supply Corporation v. National Labor Relations Board, 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007—N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036—N. L. R. B. v. Sands Mfg. Co., 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 162 F.2d 247—N. L. R. B. v. Continental Pipe Line Co., C.C.A.5, 161 F.2d 302—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201—N. L. R. B. v. Caroline Mills, C.C.A.5, 158 F.2d 794—N. L. R. B. v. Parkers Prairie Co-op. Creamery Ass'n, C.C.A.8, 154 F.2d 455—Western Elec. Co. v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1014, 324 U.S. 870, 89 L.Ed. 1424—Point Breeze Emp. Ass'n v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1015, 324 U.S. 870, 89 L.Ed. 1425—N. L. R. B. v. May Department Stores Co., C.C.A.8, 146 F.2d 66, modified on other grounds 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495—N. L. R. B. v. Sandy Hill Iron & Brass Works, C.C.A.2, 145 F.2d 631—N. L. R. B. v. Idaho Refining Co., C.C.A.9, 143 F.2d 246—N. L. R. B. v. Duncan Foundry & Machine Works, C.C.A.7, 142 F.2d 594—N.

L. R. B. v. Central Steel Tube Co., C.C.A.8, 139 F.2d 489—N. L. R. B. v. Harbison-Walker Refractories Co., C.C.A.8, 135 F.2d 837—N. L. R. B. v. Trojan Powder Co., C.C.A.3, 135 F.2d 337, certiorari denied 64 S.Ct. 76, 320 U.S. 768, 88 L.Ed. 458, rehearing denied 64 S.Ct. 194, 320 U.S. 813, 88 L.Ed. 491—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15—N. L. R. B. v. Sport-Wear Hosiery Mills, C.C.A.6, 134 F.2d 824—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—Carter Carburetor Corporation v. N. L. R. B., C.C.A.8, 131 F.2d 927—N. L. R. B. v. Gallup American Coal Co., C.C.A.10, 131 F.2d 665—N. L. R. B. v. Cities Service Oil Co., C.C.A.2, 129 F.2d 933—N. L. R. B. v. Armour & Co., C.C.A.10, 129 F.2d 316—N. L. R. B. v. Swift & Co., C.C.A.8, 129 F.2d 222—N. L. R. B. v. Bradley Lumber Co. of Arkansas, C.C.A.8, 128 F.2d 768—N. L. R. B. v. Quality Art Novelty Co., C.C.A.2, 127 F.2d 903—N. L. R. B. v. Isthmian S. S. Co., C.C.A.2, 126 F.2d 598—N. L. R. B. v. Aladdin Industries, C.C.A.7, 125 F.2d 377, certiorari denied Aladdin Industries v. N. L. R. B., 62 S.Ct. 1310, 316 U.S. 706, 86 L.Ed. 1773—N. L. R. B. v. Walworth Co., C.C.A.7, 124 F.2d 816—N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A.6, 123 F.2d 831—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A.10, 122 F.2d 419—Foote Bros. Gear & Machine Corporation v. N. L. R. B., C.C.A. 7, 121 F.2d 802, conforming to mandate N. L. R. B. v. Foote Bros. Gear & Machine Corporation, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394—N. L. R. B. v. Sparks-Withington Co., C.C.A.6, 119 F.2d 78, certiorari dismissed 62 S.Ct. 477, 314 U.S. 703, 86 L.Ed. 562—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 198—Triplex Screw Co. v. N. L. R. B., C.C.A.6, 117 F.2d 858—Montgomery Ward & Co. v. N. L. R. B., C.C.A.8, 115 F.2d 700—N. L. R. B. v. Ford Motor Co., C.C.A.6, 114 F.2d 905, certiorari denied Ford Motor Co. v. N. L. R. B., 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126—Martel Mills Corporation v. N. L. R. B., C.C.A.4, 114 F.2d 624—N. L. R. B. v. Skinner & Kennedy Stationery Co., C.C.A.8, 113 F.2d 667—N. L. R. B. v. J. S. Popper, Inc., C.C.A.3, 113 F.2d 602—N. L. R. B. v. Goshen Rubber & Manufacturing Co., C.C.A.7, 110 F.2d 432—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 108 F.2d 867, certiorari denied Brown Paper Mill Co. v. N. L. R. B., 60 S.Ct. 1104, 310 U.S. 651, 84 L.Ed. 1416—N. L. R. B. v. H. E. Fletcher Co., C.C.A.1, 108 F.2d 459, certiorari denied H. E. Fletcher Co. v. N. L. R. B., 60 S.Ct. 716, 309 U.S. 678, 84 L.Ed. 1022—N. L. R. B. v. Empire Furniture Corporation, C.C.A.6, 107 F.2d 92—N. L. R. B. v. Griswold Mfg. Co., C.C.A.3, 106 F.2d 713—Burlington Dyeing & Finishing Co. v. N. L. R. B., C.C.A.4, 104 F.2d 736—Peninsular & Occidental S. S. Co. v. N. L. R. B., C.C.A.5, 98 F.2d 411, certiorari denied N. L. R. B. v. Peninsular & Occidental S. S. Co., 59 S. Ct. 248, 305 U.S. 653, 83 L.Ed. 423—N. L. R. B. v. Sands Mfg. Co., C.C.A.6, 96 F.2d 712, affirmed 59 S. Ct. 508, 306 U.S. 332, 83 L.Ed. 682—N. L. R. B. v. Oregon Worsted Co., C.C.A.9, 96 F.2d 193—N. L. R. B. v. National New York Packing & Shipping Co., C.C.A.2, 86 F.2d 98—N. L. R. B. v. Cudahy Packing Co., D.C.Kan., 34 F.Supp. 53.

D.C.—N. L. R. B. v. McKesson & Robbins, 121 F.2d 84, 74 App.D.C. 28, certiorari denied McKesson & Robbins v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539—Warehousemen's Union Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, Affiliated with American Federation of Labor v. N. L. R. B., 121 F.2d 84, 74 App.D.C. 28, certiorari denied Warehousemen's Union Local 117, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America v. N. L. R. B., 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539—N. L. R. B. v. Arcade-Sunshine Co., 118 F.2d 49, 73 App. D.C. 128, certiorari denied Arcade-Sunshine Co. v. N. L. R. B., 61 S. Ct. 942, 313 U.S. 567, 85 L.Ed. 1526.

Particular findings or determinations

(1) Existence of unfair practices, generally.—Republic Aviation Corp. v. N. L. R. B., 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081—N. L. R. B. v. Le Tourneau Co. of Ga., 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081, rehearing denied 65 S.Ct. 1401, 325 U.S. 894, 89 L.Ed. 2005—Hamilton v. N. L. R. B., C.C.A.6, 160 F.2d 465—N. L. R. B. v. Reeves Rubber Co., C.C.A.9, 153 F.2d 340—N. L. R. B. v. Baldwin Locomotive Works, C.C.A.3, 128 F.2d 39—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198.

(2) Interference, coercion, discrimination, or domination by employer.—N. L. R. B. v. Southern Bell Telephone & Telegraph Co., Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—N. L. R. B. v. Southern Ass'n of Bell Telephone Employees, Ga., 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—N. L. R. B. v. Nevada Consol. Copper Corporation, 62 S.Ct. 960, 316 U.S. 105, 86 L.Ed. 1305—N. L. R. B. v. Virginia Electric & Power Co., 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307—N. L. R. B. v. Jones & Laughlin Steel Corporation, 57 S.Ct. 615, 301 U.S. 1, 81 L.Ed. 893, 108 A.L.R. 1352—Eastern Gas & Fuel Associates v. N. L. R. B., C.C.A.6, 162 F.2d 864—N. L. R. B. v. Edward G. Budd Mfg. Co., C.C.A.6, 162 F.2d 461—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 162 F. 2d 247—N. L. R. B. v. Miller, C.C.A. 6, 162 F.2d 197—N. L. R. B. v. Robbins Tire & Rubber Co., C.C.A.5, 161 F.2d 798—N. L. R. B. v. Bird Mach. Co., C.C.A.1, 161 F.2d 589—S. H. Camp & Co. v. N. L. R. B., C.C.A.6, 160 F.2d 519—Independent Emp. Ass'n of Neptune Meter Co. v. N. L. R. B., C.C.A.2, 158 F.2d 448—N. L. R. B. v. Marquette Metal Products Co., C.C.A.6, 152 F.2d 964—Salmon & Cowin v. N. L. R. B., C.C.A.5, 148 F. 2d 941, certiorari denied 66 S.Ct. 100, 326 U.S. 758, 90 L.Ed. 456—Salmon & Cowin v. N. L. R. B., C.C.A.5, 148 F.2d 941, certiorari denied 66 S.Ct. 100, 326 U.S. 758, 90 L.Ed. 456—N. L. R. B. v. Walt Disney Productions, C. C.A.9, 146 F.2d 44, certiorari denied 65 S.Ct. 1025, 324 U.S. 877, 89 L.Ed. 1429—N. L. R. B. v. Clinchfield Coal Corporation, C.C.A.4, 145 F.2d 66, 155 A.L.R. 874—N. L. R. B. v. Concordia Ice Co., C.C.A.10, 143 F.2d 656—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—N. L. R. B. v. Chicago Steel Foundry Co., C.C.A.7, 142 F.2d 306, 153 A.L.R. 838—N. L. R. B. v. Clinton Woolen Mfg. Co., C.C.A.6, 141 F.2d 753—N. L. R. B. v. Century Projector Corp., C.C.A.2, 141 F.2d 488—N. L. R. B. v. Standard Oil Co., C.C. A.2, 138 F.2d 885—N. L. R. B. v. Western Cartridge Co., Winchester Repeating Arms Co. Division, C.C.A. 2, 138 F.2d 551, certiorari denied Western Cartridge Co. v. N. L. R. B., 64 S.Ct. 780, 321 U.S. 786, 88 L.Ed. 1077, rehearing denied 64 S.Ct. 942, 322 U.S. 767, 88 L.Ed. 1593—N. L. R. B. v. Locomotive Finished Material Co., C.C.A.8, 133 F.2d 233—Sperry Gyroscope Co. v. N. L. R. B., C.C.A.2, 129 F.2d 922—Gamble-Robinson Co. v. N. L. R. B., C.C.A.8, 129 F.2d 588—N. L. R. B. v. Burry Biscuit Corporation, C.C.A.7, 123 F.2d 540—N. L. R. B. v. Air Associates, C.C.A.2, 121 F.2d 586—N. L. R. B. v. Vincennes Steel Corporation, C.C.A.7, 117 F.2d 169—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 116 F.2d 816—Western Union Telegraph Co. v. N. L.

court is limited,[93] and its function in this respect is to determine whether the necessary quantum of supporting evidence can be found to support the board's findings.[94] It is not for the courts, but is rather for the board, to pass on the weight of conflicting or circumstantial evidence and to deter-

R. B., C.C.A.2, 113 F.2d 992—N. L. R. B. v. Whittier Mills Co., C.C.A.5, 111 F.2d 474—Hartsell Mills Co. v. N. L. R. B., C.C.A.4, 111 F.2d 291—Mexia Textile Mills v. N. L. R. B., C.C.A.5, 110 F.2d 565—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 106 F.2d 100—N. L. R. B. v. Nebel Knitting Co., C.C.A.4, 103 F.2d 594—Mooresville Cotton Mills v. N. L. R. B., C.C.A.4, 97 F.2d 959—Clover Fork Coal Co. v. N. L. R. B., C.C.A.6, 97 F.2d 331.

(3) Cause of strike.—N. L. R. B. v. Mt. Clemens Pottery Co., C.C.A., 147 F.2d 262—N. L. R. B. v. American Creosoting Co., C.C.A.6, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U.S. 797, 88 L.Ed. 1086.

(4) Duration and effect of closed-shop agreement or arrangements.—N. L. R. B. v. Electric Vacuum Cleaner Co., 62 S.Ct. 846, 315 U.S. 685, 86 L.Ed. 1120, rehearing denied 62 S.Ct. 1038, 316 U.S. 708, 86 L.Ed. 1775.

(5) Effect of employee's wearing of button.—Republic Aviation Corporation v. N. L. R. B., C.C.A., 142 F.2d 193, affirmed 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081.

(6) Effect of employer's refusal to bargain.—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198.

(7) Effect on employees of actions of foremen.—N. L. R. B. v. American Pearl Button Co., C.C.A.8, 149 F.2d 311.

(8) Good faith of employer.—Consolidated Aircraft Corporation v. N. L. R. B., C.C.A.9, 141 F.2d 785—N. L. R. B. v. Martin Bros. Box Co., C.C.A.7, 130 F.2d 202, certiorari denied Martin Bros. Box Co. v. N. L. R. B., 63 S.Ct. 59, 317 U.S. 660, 87 L.Ed. 531—Singer Mfg. Co. v. N. L. R. B., C.C.A.7, 119 F.2d 131, certiorari denied 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549, rehearing denied 62 S.Ct. 55, 314 U.S. 708, 86 L.Ed. 565.

(9) Motive of company official in presenting employer's views.—N. L. R. B. v. Federbush Co., C.C.A.2, 121 F.2d 954.

(10) Status of specified persons as employees.—N. L. R. B. v. Hearst Publications, 64 S.Ct. 851, 322 U.S. 111, 88 L.Ed. 1170, rehearing denied N. L. R. B. v. Hearst Publications, 64 S.Ct. 1148, 2 cases, 322 U.S. 769, 88 L.Ed. 1595, N. L. R. B. v. Stockholders Pub. Co., 64 S.Ct. 1148, 322 U.S. 770, 88 L.Ed. 1595, and N. L. R. B. v. Times-Mirror Co., 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595—N. L. R. B. v. Swift & Co., C.C.A.3, 162 F.2d 575—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045.

(11) Substantial and representative character of vote for bargaining representative.—N. L. R. B. v. Standard Lime & Stone Co., C.C.A.4, 149 F.2d 435, certiorari denied 66 S.Ct. 28, 326 U.S. 723, 90 L.Ed. 429.

(12) Determination that particular union had been selected by employees as bargaining agent.—N. L. R. B. v. Fargo Foundry Co., C.C.A.8, 141 F.2d 462—N. L. R. B. v. Capital Greyhound Lines, C.C.A.6, 140 F.2d 754, certiorari denied 64 S.Ct. 1285, 322 U.S. 763, 88 L.Ed. 1590.

(13) Other findings or determinations.—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A., 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—N. L. R. B. v. Columbia Products Corporation, C.C.A.2, 141 F.2d 687—N. L. R. B. v. Indiana & Michigan Electric Co., C.C.A.6, 124 F.2d 50, affirmed 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

93. U.S.—Foote Bros. Gear & Machine Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Foote Bros. Gear & Machine Corporation, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394, mandate conformed to C.C.A., Foote Bros. Gear & Machine Corporation v. N. L. R. B., 121 F.2d 802—Independent Union of Gear Workers v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Independent Union of Gear Workers, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394.

94. U.S.—N. L. R. B. v. Bird Mach. Co., C.C.A.1, 161 F.2d 589—N. L. R. B. v. McGough Bakeries Corp., C.C.A.5, 153 F.2d 420—N. L. R. B. v. Servel, Inc., C.C.A.7, 149 F.2d 542—N. L. R. B. v. Western Cartridge Co., Winchester Repeating Arms Co. Division, C.C.A.2, 138 F.2d 551, certiorari denied Western Cartridge Co. v. N. L. R. B., 64 S.Ct. 780, 321 U.S. 786, 88 L.Ed. 1077, rehearing denied 64 S.Ct. 942, 322 U.S. 767, 88 L.Ed. 1593—Wilson & Co. v. N. L. R. B., C.C.A.7, 126 F.2d 114, certiorari denied 62 S.Ct. 1292, 316 U.S. 699, 86 L.Ed. 1768—N. L. R. B. v. Gutmann & Co., C.C.A.7, 121 F.2d 756—F. W. Woolworth Co. v. N. L. R. B., C.C.A.2, 121 F.2d 658—Inland Lime & Stone Co. v. N. L. R. B., C.C.A.7, 119 F.2d 20—Cudahy Packing Co. v. N. L. R. B., C.C.A.10, 118 F.2d 295—Valley Mould & Iron Corporation v. N. L. R. B., C.C.A.7, 116 F.2d 760, certiorari denied 61 S.Ct. 1114, 313 U.S. 590, 85 L.Ed. 1545—N. L. R. B. v. Chicago Apparatus Co., C.C.A.7, 116 F.2d 753—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 116 F.2d 367—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.10, 115 F.2d 1007—Foote Bros. Gear & Machine Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Foote Bros. Gear & Machine Corporation, 61 S.Ct. 318, 311 U.S. 621, 85 L.Ed. 394, mandate conformed to Foote Bros. Gear & Machine Corporation v. N. L. R. B., 121 F.2d 802—Independent Union of Gear Workers v. N. L. R. B., C.C.A.7, 114 F.2d 611, reversed on other grounds N. L. R. B. v. Independent Union of Gear Workers, 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 108 F.2d 867, certiorari denied Brown Paper Mill Co. v. N. L. R. B., 60 S.Ct. 1104, 310 U.S. 651, 84 L.Ed. 1416—Republic Steel Corporation v. N. L. R. B., C.C.A.3, 107 F.2d 472, certiorari denied 60 S.Ct. 806, 309 U.S. 684, 84 L.Ed. 1027, order denying certiorari vacated 60 S.Ct. 1072, 310 U.S. 655, 84 L.Ed. 1419, certiorari denied Central Council of Steel Plants, Northern District, Republic Steel Corporation v. N. L. R. B., 60 S.Ct. 808, 309 U.S. 684, 84 L.Ed. 1028, supplemented C.C.A., Republic Steel Corporation v. N. L. R. B., 114 F.2d 820, modified on other grounds 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6—N. L. R. B. v. Washington, Virginia & Maryland Coach Co., C.C.A.4, 85 F.2d 990, affirmed Washington, Virginia & Maryland Coach Corporation v. N. L. R. B., 57 S.Ct. 112, 299 U.S. 533, 81 L.Ed. 392, affirmed 57 S.Ct. 648, 201 U.S. 142, 81 L.Ed. 965.

Reasonable basis for findings

Court can interfere with board's findings only where evidence offered no reasonable basis for such findings.—Agwilines, Inc., v. N. L. R. B., C.C.A.5, 87 F.2d 146.

Different view of evidence

Circuit court of appeals is vested with no power to upset findings of board if supported by evidence, even if its views are not consonant with those of the board.—N. L. R. B. v. Federal Engineering Co., C.C.A.6, 153 F.2d 233, rehearing denied 155 F.2d 17.

ine the credibility of witnesses,[95] and, likewise, it | is for the board to pass on and to determine con-

95. U.S.—May Dept. Stores Co. v. N. L. R. B., 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495—Medo Photo Supply Corporation v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007—N. L. R. B. v. Nevada Consol. Copper Corporation, 62 S.Ct. 960, 316 U.S. 105, 86 L.Ed. 1305—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Independent Union of Craftsmen, 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Washington, Va. & Md. Coach Co. v. N. L. R. B., 57 S.Ct. 648, 301 U.S. 142, 81 L.Ed. 965—N. L. R. B. v. Winona Knitting Mills, C.C.A.8, 163 F.2d 156—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 162 F.2d 247—N. L. R. B. v. Bird Mach. Co., C.C.A.1, 161 F.2d 589—N. L. R. B. v. Continental Pipe Line Co., C.C.A.5, 161 F.2d 302—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201—N. L. R. B. v. Women's Wear Co., C.C.A.2, 159 F.2d 866—N. L. R. B. v. Continental Oil Co., C.C.A.10, 159 F.2d 326—N. L. R. B. v. Jas. H. Matthews & Co., C.C.A.3, 156 F.2d 706—Wilson & Co. v. N. L. R. B., C.C.A.10, 156 F.2d 577, certiorari denied 67 S.Ct. 357—N. L. R. B. v. Palm Beach Broadcasting Corp., C.C.A.5, 155 F.2d 805—N. L. R. B. v. Winter, C.C.A.10, 154 F.2d 719—N. L. R. B. v. Reeves Rubber Co., C.C.A.9, 153 F.2d 340—N. L. R. B. v. Kinner Motors, C.C.A.9, 152 F.2d 816, modified on other grounds 154 F.2d 1007—N. L. R. B. v. Ridge Tool Co., C.C.A., 151 F.2d 947—Salmon & Cowin v. N. L. R. B., C.C.A.5, 148 F.2d 941, certiorari denied 66 S.Ct. 100, 326 U.S. 758, 90 L.Ed. 456—N. L. R. B. v. E. C. Atkins & Co., C.C.A., 147 F.2d 730, vacated on other grounds 65 S.Ct. 1413, 325 U.S. 838, 89 L.Ed. 1965, rehearing denied 66 S.Ct. 13, 326 U.S. 804, 90 L.Ed. 490, reinstated 155 F.2d 567, reversed on other grounds 67 S.Ct. 1265—N. L. R. B. v. Greater N. Y. Broadcasting Corp., C.C.A.2, 147 F.2d 337, certiorari denied 65 S.Ct. 1199, 325 U.S. 860, 89 L.Ed. 1981—N. L. R. B. v. Standard Gage Co., C.C.A.2, 146 F.2d 33—N. L. R. B. v. Sandy Hill Iron & Brass Works, C.C.A.2, 145 F.2d 631—N. L. R. B. v. Landis Tool Co., C.C.A.3, 145 F.2d 152—N. L. R. B. v. Gluek Brewing Co., C.C.A.8, 144 F.2d 847—N. L. R. B. v. Fairmont Creamery Co., C.C.A.10, 144 F.2d 128—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F.2d 9—N. L. R. B. v. Fairmont Creamery Co., C.C.A.10, 143 F.2d 668, certiorari denied 65 S.Ct. 87, 323 U.S. 752, 89 L.Ed. 602—N. L. R. B. v. Concordia Ice Co., C.C.A.10, 143 F.2d 656—N. L. R. B. v. M. E. Blatt Co., C.C.A.3, 143 F.2d 268, certiorari denied 65 S.Ct. 135, 323 U.S. 774, 89 L.Ed. 619—Locomotive Finished Material Co. v. N. L. R. B., C.C.A.10, 142 F.2d 802—N. L. R. B. v. Thompson Products, C.C.A.9, 141 F.2d 794—N. L. R. B. v. Century Projector Corporation, C.C.A.2, 141 F.2d 488—N. L. R. B. v. Glenn L. Martin-Nebraska Co., C.C.A.8, 141 F.2d 371—Humble Oil & Refining Co. v. N. L. R. B., C.C.A.5, 140 F.2d 777—Carter Carburetor Corporation v. N. L. R. B., C.C.A.8, 140 F.2d 714—N. L. R. B. v. Cape County Milling Co., C.C.A.8, 140 F.2d 543, 152 A.L.R. 144—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C.C.A.10, 140 F.2d 423—N. L. R. B. v. Lettie Lee, Inc., C.C.A.9, 140 F.2d 243—N. L. R. B. v. Baltimore Transit Co., C.C.A.4, 140 F.2d 51, certiorari denied Baltimore Transit Co. v. N. L. R. B., 64 S.Ct. 848, 321 U.S. 795, 88 L.Ed. 1084—Utah Copper Co. v. N. L. R. B., C.C.A.10, 139 F.2d 788, certiorari denied 64 S.Ct. 946, 322 U.S. 781, 88 L.Ed. 1566—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579—N. L. R. B. v. Western Cartridge Co., Winchester Repeating Arms Co. Division, C.C.A.2, 138 F.2d 551, certiorari denied Western Cartridge Co. v. N. L. R. B., 64 S.Ct 780, 321 U.S. 786, 88 L.Ed. 1077, rehearing denied 64 S.Ct. 942, 322 U.S. 767, 88 L.Ed. 1593—N. L. R. B. v. Crown Can Co., C.C.A.8, 138 F.2d 263, certiorari denied Crown Can Co. v. N. L. R. B., 64 S.Ct. 527, 321 U.S. 769, 88 L.Ed. 1065—N. L. R. B. v. Franks Bros. Co., C.C.A.1, 137 F.2d 989, affirmed 64 S.Ct. 817, 321 U.S. 702, 88 L.Ed. 1020—Jacksonville Paper Co. v. N. L. R. B., C.C.A.5, 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462—N. L. R. B. v. Security Warehouse & Cold Storage Co., C.C.A.9, 136 F.2d 829—N. L. R. B. v. Barrett Co., C.C.A.7, 135 F.2d 959—Texas Co. v. N. L. R. B., C.C.A.9, 135 F.2d 562—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15—N. L. R. B. v. Johnson Steel & Wire Co., C.C.A.1, 134 F.2d 785—N. L. R. B. v. John Engelhorn & Sons, C.C.A.3, 134 F.2d 553—West Virginia Glass Specialty Co. v. N. L. R. B., C.C.A.4, 134 F.2d 551, certiorari denied 64 S.Ct. 38, 320 U.S. 738, 88 L.Ed. 437—N. L. R. B. v. Adel Clay Products Co., C.C.A.8, 134 F.2d 342—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—Greenport Basin & Construction Co. v. N. L. R. B., C.C.A.2, 132 F.2d 857—N. L. R. B. v. Schaefer-Hitchcock Co., C.C.A.9, 131 F.2d 1004—N. L. R. B. v. Cities Service Oil Co., C.C.A.2, 129 F.2d 933—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C.C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723—Stonewall Cotton Mills v. N. L. R. B., C.C.A., 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—N. L. R. B. v. Armour & Co., C.C.A.10, 129 F.2d 316—American Smelting & Refining Co. v. N. L. R. B., C.C.A.5, 128 F.2d 345—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—N. L. R. B. v. Quality Art Novelty Co., C.C.A.2, 127 F.2d 903—N. L. R. B. v. Chattanooga Bakery, C.C.A.6, 127 F.2d 201, certiorari denied Chattanooga Bakery v. N. L. R. B., 63 S.Ct. 157, 317 U.S. 676, 87 L.Ed. 543—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—N. L. R. B. v. Keystone Freight Lines, C.C.A.10, 126 F.2d 414—N. L. R. B. v. Aluminum Goods Mfg. Co., C.C.A.7, 125 F.2d 353—N. L. R. B. v. Walworth Co., C.C.A.7, 124 F.2d 816—N. L. R. B. v. Niles Fire Brick Co., C.C.A.6, 124 F.2d 366, certiorari denied Niles Fire Brick Co. v. N. L. R. B., 62 S.Ct. 944, 316 U.S. 664, 86 L.Ed. 1740—N. L. R. B. v. Burry Biscuit Corporation, C.C.A.7, 123 F.2d 540—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A.10, 122 F.2d 419—N. L. R. B. v. Moltrup Steel Products Co., C.C.A.3, 121 F.2d 612—N. L. R. B. v. Blue Bell-Globe Mfg. Co., C.C.A.4, 120 F.2d 974—N. L. R. B. v. Aluminum Products Co., C.C.A.7, 120 F.2d 567—Roebling Employees Ass'n v. N. L. R. B., C.C.A.3, 120 F.2d 289—N. L. R. B. v. Auburn Foundry, C.C.A.7, 119 F.2d 331—American Enka Corporation v. N. L. R. B., C.C.A.4, 119 F.2d 60—Texas Co. v. N. L. R. B., C.C.A.7, 119 F.2d 23—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549—N. L. R. B. v. New Era Die Co., C.C.A.3, 118 F.2d 500—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198—Cudahy Packing Co. v. N. L. R. B., C.C.A.10, 118 F.2d 295—New Idea v. N. L. R. B., C.C.A.7, 117 F.2d 517—N. L. R. B. v. Texas Mining & Smelting Co., C.C.A.5, 117 F.2d 86—N. L. R. B. v. Chicago Apparatus Co., C.C.A.7, 116 F.2d 753—N. L. R. B. v. Swift & Co., C.C.A.8, 116 F.2d 143—N. L. R. B. v.

roverted questions of fact.[96] The court may not undertake an independent consideration of the case as a trier of the facts,[97] or encroach on the power of the board to make findings of fact.[98]

The court does have the right and duty, however, to determine whether or not there is any proper evidence on which the board's findings can be predicated.[99] The matter of whether the board pro-

Stover, C.C.A.10, 114 F.2d 513—M. H. Ritzwoller Co. v. N. L. R. B., C.C.A.7, 114 F.2d 432—N. L. R. B. v. Elkland Leather Co., C.C.A.3, 114 F.2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S.Ct. 170, 311 U.S. 705, 85 L.Ed. 457—New York Handkerchief Mfg. Co. v. N. L. R. B., C.C.A.7, 114 F. 2d 144, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457—N. L. R. B. v. Viking Pump Co., C. C.A.8, 113 F.2d 759, certiorari denied Viking Pump Co. v. N. L. R. B., 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119—N. L. R. B. v. Skinner & Kennedy Stationery Co., C.C.A.8, 113 F.2d 667—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—N. L. R. B. v. Piqua Munising Wood Products Co., C. C.A.6, 109 F.2d 552—Cupples Co. Manufacturers v. N. L. R. B., C.C. A.8, 106 F.2d 100—Swift & Co. v. N. L. R. B., C.C.A.10, 106 F.2d 87 —N. L. R. B. v. Colten, C.C.A.6, 105 F.2d 179—Fansteel Metallurgical Corporation v. N. L. R. B., C.C. A.7, 98 F.2d 375, modified on other grounds 59 S.Ct. 490, 306 U.S. 240, 83 L.Ed. 627, 123 A.L.R. 599—N. L. R. B. v. Wallace Mfg. Co., C. C.A.4, 95 F.2d 818—N. L. R. B. v. Washington, Virginia & Maryland Coach Co., C.C.A.4, 85 F.2d 990, affirmed Washington, Virginia & Maryland Coach Corporation v. N. L. R. B., 57 S.Ct. 112, 299 U.S. 533, 81 L.Ed. 392, affirmed 57 S.Ct. 648, 201 U.S. 142, 81 L.Ed. 965.

D.C.—E. Anthony & Sons v. N. L. R. B., 163 F.2d 22—N. L. R. B. v. Arcade-Sunshine Co., 118 F.2d 49, 73 App.D.C. 128, certiorari denied Arcade-Sunshine Co. v. N. L. R. B., 61 S.Ct. 942, 313 U.S. 567, 85 L.Ed. 1526.

Probative value of testimony by employees before the board that they voluntarily organized and joined company union and that, to their knowledge, its affairs were uninfluenced by employer, was for the board.—N. L. R. B. v. Donnelly Garment Co., 67 S.Ct. 756.

96. U.S.—N. L. R. B. v. Cheney Cal. Lumber Co., 66 S.Ct. 553, 327 U.S. 385, 90 L.Ed. 739—N. L. R. B. v. Schaefer-Hitchcock Co., C.C.A.9, 131 F.2d 1004—N. L. R. B. v. Gallup American Coal Co., C.C.A.10, 131 F.2d 665—N. L. R. B. v. Cities Service Oil Co., C.C.A.2, 129 F.2d 933—N. L. R. B. v. Armour & Co., C.C.A.10, 129 F.2d 316—N. L. R. B. v. Burry Biscuit Corporation, C.C. A.7, 123 F.2d 540—N. L. R. B. v. Moore-Lowry Flour Mills Co., C. C.A.10, 122 F.2d 419—N. L. R. B. v. Blossom Products Corporation, C.C. A.3, 121 F.2d 260—N. L. R. B. v. Stackpole Carbon Co., C.C.A.3, 105 F.2d 167, certiorari denied Stackpole Carbon Co. v. N. L. R. B., 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506, opinion supplemented, C.C.A., 128 F.2d 188—Mooresville Cotton Mills v. N. L. R. B., C.C.A.4, 97 F. 2d 959—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'n v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

Equivalence of employment

As respects right to reinstatement on order of National Labor Relations Board, equivalence of employment of men who had been refused reinstatement because of connection with, or interest in, union, and who had obtained other employment after refusal of reinstatement, was fact question for board.—Mooresville Cotton Mills v. N. L. R. B., C.C.A.4, 97 F.2d 959.

Continuance of membership in union

Question as to presumption of continuation of membership in union was one of fact and rested in sound discretion of board to be decided in light of facts before it.—N. L. R. B. v. Piqua Munising Wood Products Co., C.C.A.6, 109 F.2d 552.

97. U.S.—N. L. R. B. v. Virginia Electric & Power Co., 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., App.D.C., 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474—National Labor Relations Board v. Grieder Machine Tool & Die Co., C.C.A.6, 142 F.2d 163, certiorari denied 65 S.Ct. 56, 323 U.S. 724, 89 L.Ed. 582—N. L. R. B. v. Trojan Powder Co., C.C.A. 3, 135 F.2d 337, certiorari denied Trojan Powder Co. v. N. L. R. B., 64 S.Ct. 76, 320 U.S. 768, 88 L.Ed. 458, rehearing denied 64 S.Ct. 194, 320 U.S. 813, 88 L.Ed. 491—N. L. R. B. v. Johnson Steel & Wire Co., C.C.A.1, 134 F.2d 785—N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A.6, 123 F.2d 831—N. L. R. B. v. Moench Tanning Co., 121 F.2d 951—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 108 F.2d 867, certiorari denied Brown Paper Mill Co. v. N. L. R. B., 60 S.Ct. 1104, 310 U.S. 651, 84 L.Ed. 1416—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153—N. L. R. B. v. Washington, Virginia & Maryland Coach Co., C.C.A.4, 85 F. 2d 990, affirmed Washington, Virginia & Maryland Coach Corporation v. N. L. R. B., 57 S.Ct. 112, 299 U.S. 533, 81 L.Ed. 392, affirmed 57 S.Ct. 648, 301 U.S. 142, 81 L.Ed. 965.

Determination of preponderance of evidence

It is not the province of the court to decide the facts on preponderance of the evidence.—Continental Box Co. v. N. L. R. B., C.C.A.5, 113 F.2d 93.

98. U.S.—N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036—N. L. R. B. v. Perfect Circle Co., C.C.A.7, 162 F.2d 566—N. L. R. B. v. Harris-Woodson Co., C.C.A.4, 162 F.2d 97—N. L. R. B. v. Cape County Milling Co., C.C.A.8, 140 F.2d 543, 152 A.L.R. 144—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 133 F.2d 988—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—Sperry Gyroscope Co. v. N. L. R. B., C.C.A.2, 129 F. 2d 922—N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A.6, 123 F.2d 831—Texas Co. v. N. L. R. B., C.C.A.7, 119 F.2d 23—N. L. R. B. v. New Era Die Co., C.C.A.3, 118 F.2d 500—N. L. R. B. v. Elkland Leather Co., C.C.A.3, 114 F.2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S.Ct. 170, 311 U.S. 705, 85 L.Ed. 457—New York Handkerchief Mfg. Co. v. N. L. R. B., C.C.A.7, 114 F.2d 144, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457—N. L. R. B. v. Falk Corporation, C.C.A.7, 102 F.2d 383—N. L. R. B. v. Washington, Virginia & Maryland Coach Co., C.C.A.4, 85 F.2d 990, affirmed Washington, Virginia & Maryland Coach Corporation v. N. L. R. B., 57 S.Ct. 112, 299 U.S. 533, 81 L.Ed. 392, affirmed 57 S.Ct. 648, 301 U.S. 142, 81 L.Ed. 965.

Missing findings

It is not the function of the court to supply missing findings of fact.—N. L. R. B. v. Somerset Shoe Co., C. C.A.1, 111 F.2d 681.

99. U.S.—N. L. R. B. v. Robbins Tire & Rubber Co., C.C.A.5, 161 F.

ceeded lawfully in making up the findings of fact and its order is not a question on which its findings are conclusive.[1] On the question of unfairness or bias of the trial examiner, the board's findings, although not to be lightly disturbed,[2] are not conclusive.[3]

Disagreement within board, or with trial examiner. A determination of the board on the evidence may be conclusive on the court notwithstanding a member of the board dissented,[4] or the trial examiner reached a different conclusion;[5] and the fact that the members of the board disagreed on certain conclusions does not authorize the court to weigh the evidence or hold that the board's order was not supported by substantial evidence, where, in so far as the members of the board did agree, their findings of fact were so supported.[6] The court may, however, properly take into consideration such contrariety of views as bears on the question of the substantial character of the evidence.[7]

(b) Inferences or Conclusions of Fact

Findings of the National Labor Relations Board which are based on reasonable inferences are conclusive on the court notwithstanding the court, if considering the matter as an original trier of the facts, might have drawn a different inference.

It is for the National Labor Relations Board to draw inferences from the evidence or established facts, and the court may not substitute its own inferences or conclusions from disputed facts for those of the board.[8] A reasonable inference or con-

2d 798—Jacksonville Paper Co. v. N. L. R. B., C.C.A., 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462—N. L. R. B. v. Adel Clay Products Co., C.C.A. 8, 134 F.2d 342—N. L. R. B. v. Ohio Calcium Co., C.C.A., 133 F.2d 721—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C.C.A., 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L. Ed. 1723—Southern Ass'n of Bell Telephone Employees v. N. L. R. B., C.C.A.5, 129 F.2d 410, reversed on other grounds 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250—N. L. R. B. v. Ford Motor Co., C.C.A.5, 119 F. 2d 326—N. L. R. B. v. Riverside Mfg. Co., C.C.A.5, 119 F.2d 302—N. L. R. B. v. Automotive Maintenance Machinery Co., C.C.A.7, 116 F.2d 350, reversed on other grounds 62 S.Ct. 608, 315 U.S. 282, 86 L.Ed. 848—C. G. Conn, Limited, v. N. L. R. B., C.C.A.7, 108 F.2d 390—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 870—N. L. R. B. v. Cherry Cotton Mills, C.C.A.5, 98 F.2d 444, rehearing denied 98 F.2d 1021—N. L. R. B. v. Lion Shoe Co., C.C. A.1, 97 F.2d 448.

Question of law

The question whether there is sufficient evidence to support findings of fact is one of law.—N. L. R. B. v. Boss Mfg. Co., C.C.A.7, 107 F.2d 574.

Interpretation of testimony

The court is not without power to interpret or construe the testimony of the witnesses whom the board and the examiner have chosen to believe.—Jacksonville Paper Co. v. N. L. R. B., C.C.A., 137 F.2d 148, certiorari denied 64 S.Ct. 84, 320 U.S. 772, 88 L.Ed. 462.

1. U.S.—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 103 F.2d 953—N. L. R. B. v. Cherry Cotton Mills, C.C.A.5, 98 F.2d 444, rehearing denied 98 F.2d 1021.

2. U.S.—N. L. R. B. v. Acme-Evans Co., C.C.A.7, 130 F.2d 477, certiorari denied Acme-Evans Co. v. N. L. R. B., 63 S.Ct. 769, 318 U.S. 772, 87 L.Ed. 1142, rehearing denied 63 S.Ct. 851, 318 U.S. 802, 87 L.Ed. 1166.

3. U.S.—N. L. R. B. v. Acme-Evans Co., C.C.A.7, 130 F.2d 477, certiorari denied Acme-Evans Co. v. N. L.R.B., 63 S.Ct. 769, 318 U.S. 772, 87 L.Ed. 1142, rehearing denied 63 S.Ct. 851, 318 U.S. 802, 87 L.Ed. 1166.

4. U.S.—Wyman-Gordon Co. (Ingalls Shepard Division) v. N. L. R. B., C.C.A.7, 153 F.2d 480—N. L. R. B. v. Leviton Mfg. Co., C.C.A.2, 111 F.2d 619.

5. U.S.—Wyman-Gordon Co. (Ingalls Shepard Division) v. N. L. R. B., C.C.A.7, 153 F.2d 480—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F.2d 9—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433—Eagle-Picher Mining & Smelting Co. v. N. L. R. B., 119 F. 2d 903.

Fair and impartial hearing

Fact that board reached a conclusion opposite to that of trial examiner did not show that employer was denied a fair and impartial hearing.—Wilson & Co. v. N. L. R. B., C.C. A.7, 124 F.2d 845.

Disagreement as to weight and credibility of evidence

Where there is substantial evidence to support board's findings, the court may not set them aside merely because board's view of weight and credibility of evidence differed from that of trial examiner.—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F. 2d 9.

6. U.S.—N. L. R. B. v. A. Sartorius & Co., C.C.A.2, 140 F.2d 203.

7. U.S.—Wyman-Gordon Co. (Ingalls Shepard Division) v. N. L. R. B., C.C.A.7, 153 F.2d 480—Wilson & Co. v. N. L. R. B., C.C.A.8, 123 F.2d 411.

8. U.S.—N. L. R. B. v. Cheney Cal. Lumber Co., 66 S.Ct. 553, 327 U.S. 385, 90 L.Ed. 739—N. L. R. B. v. Hearst Publications, 64 S.Ct. 851, 322 U.S. 111, 88 L.Ed. 1170, rehearing denied N. L. R. B. v. Hearst Publications, 64 S.Ct. 1148, 2 cases, 322 U.S. 769, 88 L.Ed. 1595, N. L. R. B. v. Stockholders Pub. Co., 64 S.Ct. 1148, 322 U.S. 770, 88 L.Ed. 1595, and N. L. R. B. v. Times-Mirror Co., 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595—Medo Photo Supply Corporation v. N. L. R. B., 64 S.Ct. 830, 321 U.S. 678, 88 L.Ed. 1007—N. L. R. B. v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Independent Union of Craftsmen, 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—N. L. R. B. v. Pennsylvania Greyhound Lines, 58 S.Ct. 571, 303 U.S. 261, 82 L.Ed. 831, 115 A.L.R. 307—N. L. R. B. v. Winona Knitting Mills, C.C.A.8, 163 F.2d 156—N. L. R. B. v. Harris-Woodson Co., C.C.A.4, 162 F.2d 97—N. L. R. B. v. Bird Mach. Co., C.C.A.1, 161 F.2d 589—N. L. R. B. v. Continental Pipe Line Co., C.C.A.5, 161 F.2d 302—S. H. Camp & Co. v. N. L. R. B., C.C.A.6, 160 F.2d 519—N. L. R. B. v. Continental Oil Co., C.C.A.10, 159 F.2d 326—Wilson & Co. v. N. L. R. B., C. C.A.10, 156 F.2d 577, certiorari denied 67 S.Ct. 357—N. L. R. B. v. Winter, C.C.A., 154 F.2d 719—N. L. R. B. v. E. C. Atkins & Co., C.C.A. 7, 147 F.2d 730, vacated on other grounds 65 S.Ct. 1413, 325 U.S. 838, 89 L.Ed. 1965, rehearing denied 66 S.Ct. 13, 326 U.S. 804, 90 L.Ed. 490, reinstated, C.C.A., 155 F.2d

lusion of fact drawn by the board binds the court,[9] notwithstanding other contrary or reasonable inferences could also have been drawn,[10] and notwithstanding the court, if considering the matter de

567, reversed on other grounds 67 S.Ct. 1265—Western Elec. Co. v. N. L. R. B., C.C.A., 147 F.2d 519, certiorari denied 65 S.Ct. 1014, 324 U.S. 870, 89 L.Ed. 1424—Point Breeze Emp. Ass'n v. N. L. R. B., C.C.A.7, 147 F.2d 519, certiorari denied 65 S.Ct. 1015, 324 U.S. 870, 89 L.Ed. 1425—N. L. R. B. v. Mt. Clemens Pottery Co., C.C.A.6, 147 F.2d 262—N. L. R. B. v. May Department Stores Co., C.C.A.8, 146 F. 2d 66, modified on other grounds 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 92 L.Ed. 495—N. L. R. B. v. Landis Tool Co., C.C.A.3, 145 F.2d 152—N. L. R. B. v. Fairmont Creamery Co., C.C.A.10, 144 F.2d 128—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F.2d 9—N. L. R. B. v. Fairmont Creamery Co., C.C.A., 143 F.2d 668, certiorari denied 65 S. Ct. 87, 323 U.S. 752, 89 L.Ed. 602—N. L. R. B. v. M. E. Blatt Co., C.C.A.3, 143 F.2d 268, certiorari denied 65 S.Ct. 135, 323 U.S. 774, 89 L.Ed. 619—N. L. R. B. v. Chicago Steel Foundry Co., C.C.A.7, 142 F. 2d 306, 153 A.L.R. 838—N. L. R. B. v. Grieder Machine Tool & Die Co., C.C.A.6, 142 F.2d 163, certiorari denied 65 S.Ct. 56—N. L. R. B. v. Glenn L. Martin-Nebraska Co., C. C.A.8, 141 F.2d 371—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C.C.A.10, 140 F.2d 423—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 139 F.2d 855—Utah Copper Co. v. N. L. R. B., C.C.A.10, 139 F.2d 788, certiorari denied Independent Ass'n of Mill Workers v. N. L. R. B., 64 S.Ct. 946, 322 U.S. 731, 88 L.Ed. 1566—N. L. R. B. v. American Creosoting Co., C. C.A.9, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U.S. 797, 88 L.Ed. 1086—N. L. R. B. v. Security Warehouse & Cold Storage Co., C.C.A.9, 136 F.2d 829—N. L. R. B. v. Barrett Co., C.C.A.7, 135 F. 2d 959—N. L. R. B. v. Faultless Caster Corporation, C.C.A.7, 135 F. 2d 559—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15—N. L. R. B. v. Adel Clay Products Co., C.C.A.8, 134 F. 2d 342—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 134 F.2d 240—N. L. R. B. v. Cleveland-Cliffs Iron Co., C.C.A.6, 133 F.2d 295—N. L. R. B. v. Locomotive Finished Material Co., C.C.A.8, 133 F.2d 233—N. L. R. B. v. Schaefer-Hitchcock Co., C.C.A.9, 131 F.2d 1004—Interlake Iron Corporation v. N. L. R. B., C.C.A., 131 F.2d 129—N. L. R. B. v. Thompson Products, C.C.A.6, 130 F.2d 363—N. L. R. B. v. Martin Bros. Box Co., C.C.A.7, 130 F.2d 202, certiorari denied Martin Bros. Box Co. v. N. L. R. B., 63 S.Ct. 59, 317 U.S. 660, 87 L. Ed. 531—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C. C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723—N. L. R. B. v. Armour & Co., C.C.A.10, 129 F.2d 316—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F. 2d 67—N. L. R. B. v. Chattanooga Bakery, C.C.A.6, 127 F.2d 201, certiorari denied Chattanooga Bakery v. N. L. R. B., 63 S.Ct. 157, 317 U.S. 676, 87 L.Ed. 543—N. L. R. B. v. Aladdin Industries, C.C.A.7, 125 F.2d 377, certiorari denied Aladdin Industries v. N. L. R. B., 62 S.Ct. 1310, 316 U.S. 706, 86 L.Ed. 1773—N. L. R. B. v. U. S. Truck Co., C. C.A.6, 124 F.2d 887—Wilson & Co. v. N. L. R. B., C.C.A.7, 124 F.2d 845—N. L. R. B. v. Moore-Lowry Flour Mills Co., C.C.A.10, 122 F.2d 419—N. L. R. B. v. Moltrup Steel Products Co., C.C.A.3, 121 F.2d 612—N. L. R. B. v. Clarksburg Pub. Co., C.C.A.4, 120 F.2d 976—N. L. R. B. v. Highland Shoe, C.C.A.1, 119 F.2d 218—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780—N. L. R. B. v. New Era Die Co., C.C.A.3, 118 F.2d 500—N. L. R. B. v. Dow Chemical Co., C.C.A. 6, 117 F.2d 455—Martel Mills Corporation v. N. L. R. B., C.C.A.4, 114 F.2d 624—N. L. R. B. v. Christian Board of Publication, C.C.A.8, 113 F.2d 678—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—N. L. R. B. v. Lane Cotton Mills Co., C.C.A.5, 111 F.2d 814, appeal dismissed Lane Cotton Mills Co. v. N. L. R. B., 61 S.Ct. 316, 311 U.S. 723, 85 L.Ed. 471—Montgomery Ward & Co. v. N. L. R. B., C.C.A.7, 107 F.2d 555—Swift & Co. v. N. L. R. B., C.C.A.10, 106 F.2d 87—N. L. R. B. v. Louisville Refining Co., C.C.A.6, 102 F.2d 678, certiorari denied Louisville Refining Co. v. N. L. R. B., 60 S.Ct. 81, 308 U.S. 568, 84 L.Ed. 477—N. L. R. B. v. Sands Mfg. Co., C.C.A.6, 96 F.2d 721, affirmed 59 S.Ct. 508, 306 U.S. 332, 83 L.Ed. 682—N. L. R. B. v. Oregon Worsted Co., C.C.A.9, 96 F.2d 193—N. L. R. B. v. Wallace Mfg. Co., C.C.A.4, 95 F.2d 818—N. L. R. B. v. Washington, Virginia & Maryland Coach Co., C.C.A.4, 85 F. 2d 990, affirmed Washington, Virginia & Maryland Coach Corporation v. N. L. R. B., 57 S.Ct. 112, 299 U.S. 533, 81 L.Ed. 392, affirmed 57 S.Ct. 648, 201 U.S. 142, 81 L.Ed. 965.

Different reasoning

The court is not privileged to substitute its own reasoning on evidentiary fact issues for that of the National Labor Relations Board.—N. L. R. B. v. Cincinnati Chemical Works, C.C.A.6, 144 F.2d 597.

9. U.S.—Western Elec. Co. v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1014, 324 U.S. 870, 89 L.Ed. 1424—Point Breeze Emp. Ass'n v. N. L. R. B., C.C.A.4, 147 F.2d 519, certiorari denied 65 S.Ct. 1015, 324 U.S. 870, 89 L.Ed. 1425—N. L. R. B. v. Glenn L. Martin-Nebraska Co., C.C.A.8, 141 F.2d 371—Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 132 F.2d 390, affirmed 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U.S. 809, 88 L.Ed. 489—Interlake Iron Corporation v. N. L. R. B., C.C.A.7, 131 F.2d 129—Agwilines, Inc., v. N. L. R. B., C.C.A.5, 87 F.2d 146.

Inferences from nonconflicting evidence

(1) Even though the evidence is without conflict, if more than one inference can reasonably be drawn from it, the board's determination as to the inference to be drawn binds the court.—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536.

(2) When the material evidence is entirely without dispute, so that the ultimate or concluding findings are based on nonconflicting evidence, the determination of the court as to the question whether the board's findings must stand or fall must rest on whether the undisputed facts are in law capable of fairly giving rise to the fact inferences the board has drawn, that is, whether reasonable minds, having no interest as accuser or otherwise in the result, but wholly impartial, could, on the evidence, have legally and fairly drawn the fact inferences and made the fact findings which the board did make.—Southern Ass'n of Bell Telephone Employees v. N. L. R. B., C.C.A.5, 129 F.2d 410, reversed on other grounds 63 S.Ct. 905, 319 U.S. 50, 87 L.Ed. 1250.

10. U.S.—Virginia Electric & Power Co. v. N. L. R. B., 63 S.Ct. 1214, 319 U.S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U.S. 809, 88 L.Ed. 489—N. L. R. B. v. Nevada Consol. Copper Corporation, 62 S.Ct. 960, 316 U.S. 105, 86 L.Ed. 1305—N. L. R. B. v. Robbins Tire & Rubber Co., C.C.A.5, 161 F. 2d 798—N. L. R. B. v. Landis Tool Co., C.C.A.3, 145 F.2d 152—Elastic Stop Nut Corporation v. N. L. R. B., C.C.A.8, 142 F.2d 371, certiorari denied 65 S.Ct. 55, 323 U.S. 722, 89 L.Ed. 580—N. L. R. B. v. Brezner Tanning Co., C.C.A.1, 141 F.2d 62

novo as an original trier of the facts, might draw a different inference or conclusion;[11] as far as the drawing of inferences is concerned, the sole duty of the court is to determine whether the inferences drawn by the board could reasonably have been drawn.[12] It is only where there is no substantial conflict in the evidence and only one permissible inference may be drawn from it, when, in short, what the evidence amounts to is a question of law rather than of fact, that the court is permitted to set aside the findings of the board as without support in the evidence.[13] On the other hand, the inferences drawn by the board, in order to be binding on the court, must be reasonable inferences,[14] and they must be generated by facts,[15] not surmise, suspicion, or speculation.[16]

(c) Character and Sufficiency of Evidence

Findings of the National Labor Relations Board, in order to be conclusive on the court, must be supported by substantial evidence which has been defined as relevant evidence which a reasonable mind might accept as adequate to support a conclusion. While circumstantial evidence may suffice, mere rumor or suspicion is insufficient.

The evidence required to make the findings of the National Labor Relations Board conclusive must be substantial,[17] and, hence, it is the duty of

—N. L. R. B. v. Oklahoma Transp. Co., C.C.A.5, 140 F.2d 509—Onan v. N. L. R. B., C.C.A.8, 139 F.2d 728—N. L. R. B. v. Central Steel Tube Co., C.C.A.8, 139 F.2d 489—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U. S. 747, 88 L.Ed. 1579—N. L. R. B. v. Security Warehouse & Cold Storage Co., C.C.A.9, 136 F.2d 829—N. L. R. B. v. Martin Bros. Box Co., C.C.A.7, 130 F.2d 202, certiorari denied Martin Bros. Box Co. v. N. L. R. B., 63 S.Ct. 59, 317 U.S. 660, 87 L.Ed. 531—Canyon Corporation v. N. L. R. B., C.C.A.8, 128 F.2d 953—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 128 F.2d 528—N. L. R. B. v. George P. Pilling & Son Co., C.C.A.3, 119 F.2d 32—Swift & Co. v. N. L. R. B., C.C.A. 10, 106 F.2d 87—Agwilines, Inc., v. N. L. R. B., C.C.A.5, 87 F.2d 146.

Reasonable minds

The court must sustain the board's findings, if reasonable minds, unhampered by preconceptions derived from the technical law of evidence, might differ as to conclusions to be drawn from the evidence presented.

U.S.—N. L. R. B. v. Service Wood Heel Co., C.C.A.1, 124 F.2d 470.

D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

11. U.S.—N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036—N. L. R. B. v. Women's Wear Co., C.C.A.2, 159 F.2d 866—N. L. R. B. v. Federal Engineering Co., C.C.A.6, 153 F.2d 233, rehearing denied 155 F.2d 17—N. L. R. B. v. May Department Stores Co., C.C.A.8, 146 F.2d 66, modified on other grounds 66 S.Ct. 203, 326 U.S. 376, 90 L.Ed. 145, rehearing denied 66 S.Ct. 468, 326 U.S. 811, 90 L.Ed. 495—Utah Copper Co. v. N. L. R. B., C.C.A.10, 139 F.2d 788, certiorari denied 64 S.Ct. 946, 322 U.S. 731, 88 L.Ed. 1566—Indianapolis Power & Light Co. v. N. L. R. B., C.C.A.7, 122 F.2d 757, certiorari denied 62 S.Ct. 633, 315 U.S. 804, 86 L.Ed. 1204—N. L. R. B. v. Skinner & Kennedy Stationery Co., C.C.A.8, 113 F.2d 667—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F. 2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F. 2d 38—N. L. R. B. v. Lane Cotton Mills Co., C.C.A.5, 111 F.2d 814, appeal dismissed Lane Cotton Mills Co. v. N. L. R. B., 61 S.Ct. 316, 311 U.S. 723, 85 L.Ed. 471.

12. U.S.—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15—N. L. R. B. v. Moltrup Steel Products Co., C.C.A.3, 121 F. 2d 612.

Reasonable and impartial minds

The question to be decided by the court is whether reasonable and impartial minds could, on the evidence, have reached the conclusion the board did.—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.5, 112 F.2d 545.

13. U.S.—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C. C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536.

14. U.S.—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C. C.A.10, 140 F.2d 423—N. L. R. B. v. Sparks-Withington Co., C.C.A.6, 119 F.2d 78, certiorari dismissed 62 S.Ct. 477, 314 U.S. 703, 86 L.Ed. 562—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949—N. L. R. B. v. Lion Shoe Co., C.C.A.1, 97 F.2d 448.

Direct contrary evidence

A conclusion of the board resting on inferences cannot prevail in the face of direct evidence to the contrary.—A. E. Staley Mfg. Co. v. N. L. R. B., C.C.A.7, 117 F.2d 868.

15. U.S.—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C.C.A.10, 140 F.2d 423—Western Cartridge Co. v. N. L. R. B., C.C.A. 7, 139 F.2d 855.

16. U.S.—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C. C.A.10, 140 F.2d 423—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949.

"The Board should not discard the positive credible testimony of witnesses in favor of an inference drawn from tenuous circumstances that at best could have supported only an anemic suspicion."—N. L. R. B. v. Sheboygan Chair Co., C.C.A.7, 125 F.2d 436, 439.

17. U.S.—N. L. R. B. v. Columbian Enameling & Stamping Co., 59 S. Ct. 501, 306 U.S. 292, 83 L.Ed. 660—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—Washington, Virginia & Maryland Coach Co. v. N. L. R. B., 57 S.Ct. 648, 301 U.S. 142, 81 L.Ed. 965—N. L. R. B. v. Continental Pipe Line Co., C.C.A.5, 161 F.2d 302—Wilson & Co. v. N. L. R. B., C.C.A., 156 F.2d 577, certiorari denied 67 S.Ct. 357—N. L. R. B. v. American Pearl Button Co., C.C.A.8, 149 F.2d 311—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C.C.A., 140 F.2d 423—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676—N. L. R. B. v. Sparks-Withington Co., C.C.A.6, 119 F.2d 78, certiorari dismissed 62 S.Ct. 477, 314 U.S. 703, 86 L.Ed. 562—N. L. R. B. v. International Shoe Co., C. C.A.8, 116 F.2d 31—Martel Mills Corporation v. N. L. R. B., C.C.A.4, 114 F.2d 624—Midland Steel Products Co. v. N. L. R. B., C.C.A.6, 113 F.2d 800—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.5, 112 F.2d 545—N. L. R. B. v. Norfolk Shipbuilding & Drydock Corporation, C.C.A., 109 F.2d 128—C. G. Conn, Limited, v. N. L. R. B., C.C.A., 108 F.2d 390—Burlington Dyeing & Finishing Co. v. N. L. R. B., C.C. A., 104 F.2d 736—Jefferson Electric

the court to determine the question whether the findings are in fact supported by substantial evidence.[18] Conversely, it is held that the findings and determinations of the board[19] as to matters

Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949—N. L. R. B. v. Hearst, C.C.A. 9, 102 F.2d 658—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 870—Ballston-Stillwater Knitting Co., v. N. L. R. B., C.C.A.2, 98 F.2d 758—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951—N. L. R. B. v. Lion Shoe Co., C.C.A.1, 97 F.2d 448—N. L. R. B. v. Wallace Mfg. Co., C.C.A.4, 95 F.2d 818—Appalachian Electric Power Co. v. N. L. R. B., C.C.A., 93 F.2d 985—Marzacco v. Lowe, D.C.N.J., 58 F.Supp. 900.

18. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15—N. L. R. B. v. Acme-Evans Co., C.C.A.7, 130 F.2d 477, certiorari denied Acme-Evans Co. v. N. L. R. B., 63 S.Ct. 769, 318 U.S. 772, 87 L.Ed. 1142, rehearing denied 63 S.Ct. 851, 318 U.S. 802, 87 L.Ed. 1166—Foote Bros. Gear & Machine Corporation v. N. L. R. B., C.C.A.7, 121 F.2d 802—N. L. R. B. v. Auburn Foundry, C.C.A.7, 119 F. 2d 331—N. L. R. B. v. Ed Friedrich, Inc., C.C.A.5, 116 F.2d 888—N. L. R. B. v. Viking Pump Co., C.C.A.8, 113 F.2d 759, certiorari denied Viking Pump Co. v. N. L. R. B., 61 S.Ct. 449, 312 U.S. 680, 85 L. Ed. 1119—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.5, 112 F.2d 545—Hamilton-Brown Shoe Co. v. N. L. R. B., C.C.A.8, 104 F.2d 49—N. L. R. B. v. Falk Corporation, C. C.A.7, 102 F.2d 383—Olin Industries v. N. L. R. B., D.C.Mass., 72 F.Supp. 225.

Court may search record for substantial evidence and set board's order aside if such evidence is lacking.—N. L. R. B. v. Hudson Motor Car Co., C.C.A.6, 128 F.2d 528.

19. U.S.—N. L. R. B. v. E. C. Atkins & Co., 67 S.Ct. 1265—N. L. R. B. v. Automotive Maintenance Machinery Co., 62 S.Ct. 608, 315 U.S. 282, 86 L.Ed. 848—N. L. R. B. v. Consolidated Mach. Tool Corp., C. C.A.2, 163 F.2d 376—Eastern Gas & Fuel Associates v. N. L. R. B., C.C.A.6, 162 F.2d 864—N. L. R. B. v. Perfect Circle Co., C.C.A.7, 162 F.2d 566—N. L. R. B. v. Edward G. Budd Mfg. Co., C.C.A.6, 162 F. 2d 461—N. L. R. B. v. Miller, C.C. A.6, 162 F.2d 197—N. L. R. B. v. Bird Mach. Co., C.C.A.1, 161 F.2d 589—N. L. R. B. v. Gonzalez Padin Co., C.C.A.1, 161 F.2d 353—S. H. Camp & Co. v. N. L. R. B., C.C.A. 6, 160 F.2d 519—Hamilton v. N. L. R. B., C.C.A.6, 160 F.2d 465—Aluminum Co. of America v. N. L. R. B., C.C.A.7, 159 F.2d 523—Independent Emp. Ass'n of Neptune Meter Co. v. N. L. R. B., C.C.A.2, 158 F.2d 448—N. L. R. B. v. Marquette Metal Products Co., C.C.A. 6, 152 F.2d 964—N. L. R. B. v. Van De Kamp's Holland-Dutch Bakers, C.C.A.9, 152 F.2d 818, modified on other grounds 154 F.2d 828—N. L. R. B. v. Keilburn Mfg. Co., C.C.A. 2, 149 F.2d 686—N. L. R. B. v. Cowell Portland Cement Co., C.C. A.9, 148 F.2d 237, certiorari denied 66 S.Ct. 44, 326 U.S. 735, 90 L.Ed. 438—N. L. R. B. v. Mt. Clemens Pottery Co., C.C.A., 147 F.2d 262—N. L. R. B. v. Clinchfield Coal Corporation, C.C.A.4, 145 F.2d 66, 155 A.L.R. 874—N. L. R. B. v. Fairmont Creamery Co., C.C.A.10, 144 F.2d 128—N. L. R. B. v. Fairmont Creamery Co., C.C.A., 143 F.2d 668, certiorari denied 65 S.Ct. 87, 323 U.S. 752, 89 L.Ed. 602—N. L. R. B. v. Concordia Ice Co., C.C.A.10, 143 F.2d 656—N. L. R. B. v. Standard Oil Co., C.C.A.6, 142 F.2d 676, certiorari denied 65 S.Ct. 427, 323 U.S. 791, 89 L.Ed. 630—N. L. R. B. v. Fargo Foundry Co., C.C.A.8, 141 F.2d 462—N. L. R. B. v. Stremel, C.C.A.10, 141 F.2d 317—N. L. R. B. v. Register Pub. Co., C.C.A.9, 141 F.2d 156—N. L. R. B. v. Capital Greyhound Lines, C.C.A., 140 F.2d 754, certiorari denied 64 S.Ct. 1285, 322 U.S. 763, 88 L.Ed. 1590—Carter Carburetor Corporation v. N. L. R. B., C.C.A.8, 140 F.2d 714—N. L. R. B. v. Cape County Milling Co., C.C.A.8, 140 F.2d 543, 152 A.L.R. 144—N. L. R. B. v. Lettie Lee, Inc., C.C.A.9, 140 F.2d 243—Utah Copper Co. v. N. L. R. B., C.C.A.10, 139 F.2d 788, certiorari denied 64 S.Ct. 946, 322 U.S. 731, 88 L.Ed. 1566—N. L. R. B. v. National Tool Co., C.C.A.6, 139 F.2d 490—Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579—Harp v. N. L. R. B., C.C.A.10, 138 F.2d 546—N. L. R. B. v. Perfection Steel Body Co., C.C.A.6, 138 F.2d 515—N. L. R. B. v. Denver Tent & Awning Co., C.C. A.10, 138 F.2d 410—N. L. R. B. v. Gerity Whitaker Co., C.C.A.6, 137 F.2d 198, certiorari denied Gerity Whitaker Co. v. N. L. R. B., 63 S. Ct. 663, 318 U.S. 763, 87. L.Ed. 1134, rehearing denied 63 S.Ct. 827, 318 U.S. 801, 87 L.Ed. 1165—N. L. R. B. v. Fiss Corporation, C.C.A.3, 136 F.2d 990—N. L. R. B. v. J. G. Boswell Co., C.C.A.9, 136 F.2d 585—Western Cartridge Co. v. N. L. R. B., C.C.A.7, 134 F.2d 240, certiorari denied 64 S.Ct. 48, 320 U.S. 746, 88 L.Ed. 443—N. L. R. B. v. Brown Paper Mill Co., C.C.A.5, 133 F.2d 988—Marlin-Rockwell Corporation v. N. L. R. B., C.C.A.2, 133 F.2d 258—N. L. R. B. v. Schaefer-Hitchcock Co., C.C.A.9, 131 F.2d 1004—Hickory Chair Mfg. Co. v. N. L. R. B., C.C.A.4, 131 F.2d 849—Gamble-Robinson Co. v. N. L. R. B., C.C.A.8, 129 F.2d 588—N. L. R. B. v. Hudson Motor Car Co., C.C.A. 6, 128 F.2d 528—N. L. R. B. v. Niles Fire Brick Co., C.C.A.6, 128 F.2d 258—Great Southern Trucking Co. v. N. L. R. B., C.C.A.4, 127 F.2d 180, certiorari denied 63 S.Ct. 48, 317 U.S. 652, 87 L.Ed. 524—N. L. R. B. v. Service Wood Heel Co., C.C.A.1, 124 F.2d 470—North Electric Mfg. Co. v. N. L. R. B., C. C.A.6, 123 F.2d 887, certiorari denied 62 S.Ct. 906, 315 U.S. 818, 86 L.Ed. 1215—Wilson & Co. v. N. L. R. B., C.C.A.8, 123 F.2d 411—Roebling Employees Ass'n v. N. L. R. B., C.C.A.3, 120 F.2d 289—Jacobsen v. N. L. R. B., C.C.A.3, 120 F.2d 96—Texas Co. v. N. L. R. B., C.C.A.7, 119 F.2d 23—Triplex Screw Co. v. N. L. R. B., C.C.A.6, 117 F.2d 858—N. L. R. B. v. West Kentucky Coal, C.C.A.6, 116 F.2d 816—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.10, 115 F.2d 1007—Ohio Power Co. v. N. L. R. B., C.C.A.6, 115 F.2d 839—N. L. R. B. v. Rath Packing Co., C.C.A.8, 115 F.2d 217—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 849, certiorari denied 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119—Consumers Power Co. v. N. L. R. B., C.C.A.6, 113 F.2d 38—Southern Colorado Power Co. v. N. L. R. B., C.C.A.10, 111 F.2d 539—Mexia Textile Mills v. N. L. R. B., C.C.A.5, 110 F.2d 565—Independent Union of Craftsmen v. N. L. R. B., C.C.A.7, 110 F. 2d 506, reversed on other grounds 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Link-Belt Co. v. N. L. R. B., C.C.A.7, 110 F.2d 506, reversed on other grounds 61 S.Ct. 358, 311 U. S. 584, 85 L.Ed. 368—Mooresville Cotton Mills v. N. L. R. B., C.C.A. 4, 110 F.2d 179—Union Drawn Steel Co. v. N. L. R. B., C.C.A.3, 109 F.2d 587—N. L. R. B. v. Crowe Coal Co., C.C.A.8, 104 F.2d 633, certiorari denied Crowe Coal Co. v. National Labor Relations Board, 60 S.Ct. 107, 308 U.S. 584, 84 L.Ed. 489—N. L. R. B. v. Lund, C.C.A. 8, 103 F.2d 815—N. L. R. B. v. Nebel Knitting Co., C.C.A.4, 103 F.2d 594—Waterman Steamship Corporation v. N. L. R. B., C.C.A., 103 F. 2d 157, reversed on other grounds 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036—N. L. R. B. v. Lion Shoe Co., C.C.A.1, 97 F.2d 448—N. L. R. B. v. J. Freezer & Son, C.C.A.4, 95 F.2d 840—Appalachian Electric Power Co. v. N. L. R. B., C.C.A.4, 93 F.2d 985—Jeffery-De Witt Insulator Co. v. N. L.

within its jurisdiction[20] are conclusive if supported by substantial evidence, and, consequently, that the function of the court is limited to a determination of whether there is substantial evidence to support the board's findings.[21] Substantial evidence within this rule must amount to more than a scintilla,[22] and must do more than create a suspicion of the existence of the fact to be established.[23] Evidence

R. B., C.C.A.4, 91 F.2d 134, certiorari denied 58 S.Ct. 55, 302 U.S. 731, 82 L.Ed. 565—Brotherhood and Union of Transit Emps. of Baltimore v. Madden, D.C.Md., 58 F. Supp. 366, reversed on other grounds, C.C.A., 147 F.2d 439, 158 A.L.R. 1330.

D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F. 2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

Opinion of court

The court is bound by all the fact findings of the board which are supported by substantial evidence, regardless of the opinion of the court as to the real truth.—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433.

Possibility of prejudice

Where there is substantial evidence to sustain finding court has no power to review the board's decision because it may seem to be prejudiced.—N. L. R. B. v. William Davies Co., C.C.A.7, 135 F.2d 179, certiorari denied William Davies Co. v. N. L. R. B., 64 S.Ct. 82, 320 U.S. 770, 88 L.Ed. 460.

Ground of employees' discharge

A finding of the board as to the real ground for the discharge of particular employees by the employer must be sustained if supported by substantial evidence.—N. L. R. B. v. Central Steel Tube Co., C.C.A.8, 139 F.2d 489—N. L. R. B. v. Gallup American Coal Co., C.C.A.10, 131 F. 2d 665—N. L. R. B. v. Blue Bell-Globe Mfg. Co., C.C.A.4, 120 F.2d 974—N. L. R. B. v. Fashion Piece Dye Works, C.C.A.3, 100 F.2d 304.

Board's concept of substantial evidence is to be accorded liberality.—N. L. R. B. v. American Creosoting Co., C.C.A.6, 139 F.2d 193, certiorari denied 64 S.Ct. 937, 321 U.S. 797, 88 L.Ed. 1086.

Determination of sufficiency after supreme court ruling

Supreme court's reversal of decision of circuit court of appeals setting aside order on ground that order was not supported by substantial evidence precluded another holding that the identical evidence was insufficient.—Virginia Electric & Power Co. v. N. L. R. B., C.C.A.4, 132 F. 2d 390, affirmed 63 S.Ct. 1214, 319 U. S. 533, 87 L.Ed. 1568, rehearing denied 64 S.Ct. 27, 320 U.S. 809, 88 L. Ed. 489.

20. U.S.—N. L. R. B. v. Planters Mfg. Co., C.C.A.4, 105 F.2d 750, rehearing denied 106 F.2d 524—N. L. R. B. v. Eagle Mfg. Co., C.C.A.4, 99 F.2d 930—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539.

21. U.S.—Washington, Va. & Md. Coach Co. v. N. L. R. B., 57 S.Ct. 648, 301 U.S. 142, 81 L.Ed. 965—N. L. R. B. v. Reeves Rubber Co., C.C.A.9, 153 F.2d 340—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F.2d 9—N. L. R. B. v. Concordia Ice Co., C.C.A. 10, 143 F.2d 656—N. L. R. B. v. Grieder Machine Tool & Die Co., C.C.A.6, 142 F.2d 163, certiorari denied 65 S.Ct. 56, 323 U.S. 724, 89 L. Ed. 582—Carter Carburetor Corporation v. N. L. R. B., C.C.A., 140 F. 2d 714—N. L. R. B. v. A. Sartorius & Co., C.C.A.2, 140 F.2d 203—Onan v. N. L. R. B., C.C.A.8, 139 F.2d 728—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15—N. L. R. B. v. Johnson Steel & Wire Co., C.C.A.1, 134 F.2d 785—N. L. R. B. v. Aintree Corporation, C.C.A.7, 132 F.2d 469—Sperry Gyroscope Co. v. N. L. R. B., C.C.A.2, 129 F.2d 922—Williams Motor Co. v. N. L. R. B., C.C.A.8, 128 F.2d 960—N. L. R. B. v. Condenser Corporation of America, C. C.A.3, 128 F.2d 67—N. L. R. B. v. Eclipse Moulded Products Co., C. C.A.7, 126 F.2d 576—Wilson & Co. v. N. L. R. B., C.C.A.7, 126 F.2d 114, certiorari denied 62 S.Ct. 1292, 316 U.S. 699, 86 L.Ed. 1768—N. L. R. B. v. M. A. Hanna Co., C.C.A.6, 125 F.2d 786—Quaker State Oil Refining Corporation v. N. L. R. B., C.C.A.3, 119 F.2d 631—N. L. R. B. v. New Era Die Co., C.C.A.3, 118 F.2d 500—N. L. R. B. v. Gulf Public Service Co., C.C.A.5, 116 F.2d 852—M. H. Ritzwoller Co. v. N. L. R. B., C.C.A.7, 114 F.2d 432—N. L. R. B. v. Viking Pump Co., C.C.A.8, 113 F.2d 759, certiorari denied Viking Pump Co. v. N. L. R. B., 61 S. Ct. 449, 312 U.S. 680, 85 L.Ed. 1119—Phelps Dodge Corporation v. N. L. R. B., C.C.A.2, 113 F.2d 202, modified on other grounds Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217—N. L. R. B. v. National Casket Co., C.C.A.2, 107 F.2d 992—N. L. R. B. v. Louisville Refining Co., C.C.A.6, 102 F.2d 678, certiorari denied Louisville Refining Co. v. National Labor Relations Board, 60 S.Ct. 81, 308 U.S. 568, 84 L.Ed. 477.

D.C.—E. Anthony & Sons v. N. L. R. B., 163 F.2d 22.

Scope of court's function

It is not for the court to decide what findings the board ought to have made on the evidence, but whether the findings it did make are supported by substantial evidence, that is, whether reasonable and unbiased minds could have reached the conclusions and made the findings that were made.—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C.C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536.

Interpretation of facts

Court is not concerned with board's interpretation of the facts, except to inquire whether there is substantial evidence to support such interpretation.—N. L. R. B. v. Jahn & Ollier Engraving Co., C.C.A.7, 123 F.2d 589.

22. U.S.—N. L. R. B. v. Columbian Enameling & Stamping Co., 59 S. Ct. 501, 306 U.S. 292, 83 L.Ed. 660—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S. Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F.2d 556—Boeing Airplane Co., Wichita Division, v. N. L. R. B., C.C.A., 140 F.2d 423—Utah Copper Co. v. N. L. R. B., C.C.A.10, 139 F.2d 788, certiorari denied 64 S.Ct. 946, 322 U.S. 731, 88 L.Ed. 1566—Harp v. N. L. R. B., C.C.A.10, 138 F.2d 546—N. L. R. B. v. Montgomery Ward & Co., C.C.A., 133 F.2d 676—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A., 127 F.2d 109—Continental Oil Co. v. N. L. R. B., C.C.A.10, 113 F.2d 473, case remanded on other grounds 61 S. Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.5, 112 F.2d 545—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 103 F.2d 953—Jefferson Electric Co. v. N. L. R. B., C.C.A., 102 F.2d 949—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153—N. L. R. B. v. Bell Oil & Gas Co., C.C.A., 98 F.2d 406, rehearing denied 98 F.2d 870—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951—Appalachian Electric Power Co. v. N. L. R. B., C.C.A., 93 F.2d 985.

23. U.S.—N. L. R. B. v. Columbian Enameling & Stamping Co., 59 S. Ct. 501, 306 U.S. 292, 83 L.Ed. 660—N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F.2d 556—N. L. R. B. v. Sun Shipbuilding & Dry

is not substantial which gives equal support to inconsistent inferences,[24] or which consists merely of uncorroborated hearsay or rumor;[25] nor are findings supported by substantial evidence so as to be conclusive on the court where they rest on mere surmise or conjecture,[26] or are the result of basing one inference on another.[27] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;[28] evidence affording a substantial basis of fact from which the fact in issue can be reasonably inferred.[29]

The principles which apply in determining the sufficiency of evidence to support a jury verdict or to require a directed verdict are sometimes held applicable in determining the sufficiency of the evi-

Dock Co., C.C.A.3, 135 F.2d 15—N. L. R. B. v. Montgomery Ward & Co., C.C.A., 133 F.2d 676—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C.C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723—Hazel-Atlas Glass Co. v. N. L. R. B., C. C.A., 127 F.2d 109—N. L. R. B. v. Sparks-Withington Co., C.C.A.6, 119 F.2d 78, certiorari dismissed 62 S.Ct. 477, 314 U.S. 703, 86 L.Ed. 562—Martel Mills Corporation v. N. L. R. B., C.C.A.4, 114 F.2d 624—Continental Oil Co. v. N. L. R. B., C.C.A., 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—N. L. R. B. v. Empire Furniture Corporation, C.C.A.6, 107 F.2d 92—Waterman Steamship Corporation v. N. L. R. B., C.C.A.5, 103 F.2d 157, reversed on other grounds 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U. S. 696, 84 L.Ed. 1036—Jefferson Electric Co. v. N. L. R. B., C.C.A. 7, 102 F.2d 949—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F. 2d 153—N. L. R. B. v. Bell Oil & Gas Co., C.C.A., 98 F.2d 406, rehearing denied 98 F.2d 870—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951—Appalachian Electric Power Co. v. N. L. R. B., C.C.A., 93 F.2d 985.

24. U.S.—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951—Appalachian Electric Power Co. v. N. L. R. B., C.C.A., 93 F.2d 985.

25. U.S.—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—N. L. R. B. v. Service Wood Heel Co., C.C.A.1, 124 F.2d 470—Indianapolis Power & Light Co. v. N. L. R. B., C.C.A.7, 122 F.2d 757, certiorari denied 62 S.Ct. 633, 315 U.S. 804, 86 L.Ed. 1204—Union Drawn Steel Co. v. N. L. R. B., C. C.A.3, 109 F.2d 587—N. L. R. B. v. Remington Rand, C.C.A., 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U. S. 585, 82 L.Ed. 1546.

26. U.S.—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C. C.A., 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723—N. L. R. B. v. Empire Furniture Corporation, C.C.A., 107 F.2d 92.

Probabilities or possibilities

The boards' findings must rest on probabilities, not on bare possibilities.—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.5, 112 F.2d 545.

27. U.S.—N. L. R. B. v. Pick Mfg. Co., C.C.A.7, 135 F.2d 329—Interlake Iron Corporation v. N. L. R. B., C.C.A.7, 131 F.2d 129.

28. U.S.—N. L. R. B. v. Columbian Enameling & Stamping Co., 59 S. Ct. 501, 306 U.S. 292, 83 L.Ed. 660—Consolidated Edison Co. of New York v. N. L. R. B., N.Y., 59 S.Ct. 206, 305 U.S. 197, 83 L.Ed. 126—Utah Copper Co. v. N. L. R. B., C. C.A.10, 139 F.2d 788, certiorari denied Independent Ass'n of Mill Workers v. N. L. R. B., 64 S.Ct. 946, 322 U.S. 731, 88 L.Ed. 1566—Harp v. N. L. R. B., C.C.A.10, 138 F.2d 546—N. L. R. B. v. Sun Shipbuilding & Dry Dock Co., C.C.A.3, 135 F.2d 15—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676—N. L. R. B. v. Remington Rand, C.C.A., 130 F.2d 919—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A.4, 127 F.2d 109—N. L. R. B. v. Service Wood Heel Co., C.C. A.1, 124 F.2d 470—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F. 2d 368—N. L. R. B. v. Blue Bell-Globe Mfg. Co., C.C.A.4, 120 F.2d 974—Quaker State Oil Refining Corporation v. N. L. R. B., C.C.A.3, 119 F.2d 631—N. L. R. B. v. Sparks-Withington Co., C.C.A.6, 119 F.2d 78, certiorari dismissed 62 S.Ct. 477, 314 U.S. 703, 86 L.Ed. 562—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780—Continental Oil Co. v. N. L. R. B., C.C.A., 113 F.2d 473, case remanded on other grounds 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—Magnolia Petroleum Co. v. N. L. R. B., C.C.A.5, 112 F.2d 545—N. L. R. B. v. Goshen Rubber & Manufacturing Co., C.C.A.7, 110 F.2d 432—N. L. R. B. v. Empire Furniture Corporation, C.C.A.6, 107 F.2d 92—Cupples Co. Manufacturers v. N. L. R. B., C.C.A., 103 F.2d 953—Jefferson Electric Co. v. N. L. R. B., C.C.A., 102 F.2d 949.

D.C.—N. L. R. B. v. Arcade-Sunshine Co., 118 F.2d 49, 73 App.D.C. 128, certiorari denied Arcade-Sunshine Co. v. N. L. R. B., 61 S.Ct. 942, 313 U.S. 567, 85 L.Ed. 1526—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

Arbitrary finding

The court is not concluded from setting aside a finding or directive that appears to be arbitrary or capricious.—N. L. R. B. v. Mt. Clemens Pottery Co., C.C.A.6, 147 F.2d 262.

Reasonable conclusion of ordinary man

In determining the question whether statements by supervisory employees constituted interference, restraint, or coercion, reviewing court must decide whether an ordinary man could reasonably so conclude.—N. L. R. B. v. Pacific Gas & Electric Co., C.C.A.9, 118 F.2d 780.

29. U.S.—N. L. R. B. v. Columbian Enameling & Stamping Co., 59 S. Ct. 501, 306 U.S. 292, 83 L.Ed. 660—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676, 146 A.L.R. 1045—N. L. R. B. v. Standard Oil Co, C.C.A.10, 124 F.2d 895—Magnolia Petroleum Co. v. N. L. R. B., C.C.A., 112 F.2d 545—N. L. R. B. v. Norfolk Shipbuilding & Drydock Corporation, C.C.A.4, 109 F.2d 128—N. L. R. B. v. Falk Corporation, C.C.A.7, 102 F.2d 383—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153—N. L. R. B. v. Bell Oil & Gas Co., C.C.A. 5, 98 F.2d 406, rehearing denied 98 F.2d 870—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951—Appalachian Electric Power Co. v. N. L. R. B., C.C.A.4, 93 F.2d 985.

Where reasonable minds could fairly differ, finding of board is required to be accepted as substantially supported by the evidence.—Continental Box Co. v. N. L. R. B., C.C.A.5, 113 F.2d 93.

dence to sustain the findings of the board.[30] Thus it is held that evidence which would be sufficient to take the case to a jury and to support a verdict will support a finding of the board,[31] and, conversely, that the evidence must be enough to justify, if the trial were to a jury, a refusal to direct a verdict.[32]

In determining the sufficiency of the evidence to support the findings of the board, the court must consider the evidence and all inferences therefrom in the light which is most favorable to the findings.[33] Further, the evidence in the record must be considered as a whole,[34] and in the light of the general background of labor conditions prevailing in the employer's plant.[35] The statutory provision that the findings of the board as to the facts, if supported by evidence, shall be conclusive does not compel the court to accept findings reached by accepting evidence presented by one side to the controversy with total disregard for other worthy evidence before the board;[36] and the fact that witnesses before the board are or were employees of

30. U.S.—N. L. R. B. v. Alco Feed Mills, C.C.A.5, 133 F.2d 419—N. L. R. B. v. Wallace Mfg. Co., C.C.A.4, 95 F.2d 818.

"The rule as to substantiality is not different, we think, from that to be applied in reviewing the refusal to direct a verdict at law, where the lack of substantial evidence is the test of the right to a directed verdict."—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951, 958—Appalachian Electric Power Co. v. N. L. R. B., C.C.A., 93 F.2d 985, 989.

31. U.S.—N. L. R. B. v. Regal Knitwear Co., C.C.A.2, 140 F.2d 746, affirmed 65 S.Ct. 478, 324 U.S. 9, 89 L.Ed. 661—West Virginia Glass Specialty Co. v. N. L. R. B., C.C.A. 4, 134 F.2d 551, certiorari denied 64 S.Ct. 38, 320 U.S. 738, 88 L.Ed. 437—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433.

32. U.S.—N. L. R. B. v. Columbian Enameling & Stamping Co., 59 S. Ct. 501, 306 U.S. 292, 83 L.Ed. 660 —N. L. R. B. v. J. L. Brandeis & Sons, C.C.A.8, 145 F.2d 556—N. L. R. B. v. Montgomery Ward & Co., C.C.A.9, 133 F.2d 676—Hazel-Atlas Glass Co. v. N. L. R. B., C.C.A., 127 F.2d 109—N. L. R. B. v. Grower-Shipper Vegetable Ass'n of Central California, C.C.A.9, 122 F.2d 368—Magnolia Petroleum Co. v. N. L. R. B., C.C.A., 112 F.2d 545—C. G. Conn, Limited, v. N. L. R. B., C.C.A.7, 108 F.2d 390.

33. U.S.—N. L. R. B. v. American Car & Foundry Co., C.C.A.7, 161 F.2d 501—N. L. R. B. v. Sunbeam Electric Mfg. Co., C.C.A.7, 133 F.2d 856—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—N. L. R. B. v. Eclipse Moulded Products Co., C.C.A.7, 126 F.2d 576—N. L. R. B. v. Reed & Prince Mfg. Co., C.C.A.1, 118 F.2d 874, certiorari denied Reed & Prince Mfg. Co. v. N. L. R. B., 61 S.Ct. 1119, 313 U.S. 595, 85 L.Ed. 1549—N. L. R. B. v. Vincennes Steel Corporation, C.C.A.7, 117 F.2d 169—Wilson & Co. v. N. L. R. B., C.C.A.8, 115 F.2d 759—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 849, certiorari denied 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 1119—N. L. R. B. v. Elkland Leather Co., C.C.A.3, 114 F. 2d 221, certiorari denied Elkland Leather Co. v. N. L. R. B., 61 S.Ct. 170, 311 U.S. 705, 85 L.Ed. 457—Independent Union of Craftsmen v. N. L. R. B., C.C.A.7, 110 F.2d 506, reversed on other grounds 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Link-Belt Co. v. N. L. R. B., C.C.A. 7, 110 F.2d 506, reversed on other grounds 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368—Cupples Co. Manufacturers v. N. L. R. B., C.C.A.8, 106 F.2d 100.

Favorable evidence taken as true

(1) The evidence favorable to the order and findings of the board, not repudiated by the board, and not wholly unbelievable, must be taken as true.—Idaho Potato Growers v. N. L. R. B., C.C.A.9, 144 F.2d 295, certiorari denied 65 S.Ct. 122, 323 U.S. 769, 89 L.Ed. 615—N. L. R. B. v. Idaho Refining Co., C.C.A.9, 143 F.2d 246.

(2) Court must assume as established all facts that evidence supporting board's determination reasonably tends to prove, and must give to board benefit of all inferences fairly deducible.—N. L. R. B. v. Adel Clay Products Co., C.C.A.8, 134 F.2d 342.

Conflicts resolved against employer

The court, in considering the sufficiency of the evidence to sustain board's findings, must assume that board resolved all conflicts in the evidence against the employer.—N. L. R. B. v. Wm. Tehel Bottling Co., C.C.A.8, 129 F.2d 250.

34. U.S.—Stonewall Cotton Mills v. N. L. R. B., C.C.A.5, 129 F.2d 629, certiorari denied 63 S.Ct. 72, 317 U.S. 667, 87 L.Ed. 536—N. L. R. B. v. Chicago Apparatus Co., C.C.A.7, 116 F.2d 753.

Background, setting, and circumstances

The facts should be determined not alone as the direct testimony declares them to be but as the background, setting, and circumstances, including interests and motives of witnesses, give color and meaning to the testimony.—Jefferson Elec. Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949.

Evidence not mentioned in board's decision

The court may consider evidence which supports a finding although not mentioned in the board's decision.—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 114 F.2d 849, certiorari denied 61 S.Ct. 449, 312 U.S. 680, 85 L.Ed. 111.

Evidence improperly ignored by board

In determining the question whether order requiring disestablishment of an employees' representative committee was justified by the evidence, court was entitled to consider undisputed and stipulated facts, although such facts were ignored by the board on the mistaken assumption that they were immaterial.—Newport News Shipbuilding & Dry Dock Co. v. N. L. R. B., C.C.A.4, 101 F.2d 841, reversed on other grounds 60 S.Ct. 203, 308 U.S. 241, 84 L.Ed. 219.

35. U.S.—Quaker State Oil Refining Corporation v. N. L. R. B., C.C.A. 3, 119 F.2d 631.

Fair attitude of employer

In determining the question whether evidence sustained finding of employer's violation of National Labor Relations Act, court could take into account unquestioned fair attitude of employer toward union and collective bargaining.—N. L. R. B. v. Shenandoah-Dives Mining Co., C.C.A.10, 145 F.2d 542.

Pressure exerted by employer

In determining the question whether conduct amounted to restraint or coercion, pressure exerted vocally by employer on employee may not be disregarded.—N. L. R. B. v. Lettie Lee, Inc., C.C.A.9, 140 F.2d 243.

36. U.S.—N. L. R. B. v. Laister-Kauffmann Aircraft Corporation, C.C.A.8, 144 F.2d 9—N. L. R. B. v. A. Sartorius & Co., C.C.A.2, 140 F.

a party in whose favor they testified is not alone sufficient to discredit or discard their testimony.[37]

Circumstantial evidence. While circumstantial evidence must be weighed with caution,[38] a finding of the board supported by circumstantial evidence from which the conclusion of the board may legitimately be drawn is binding on the courts.[39]

Competency of evidence. It has been held, under the National Labor Relations Act, at least prior to the 1947 amendment to § 10 (b), 29 U.S.C.A. § 160 (b), which provides that proceedings before the board shall, as far as practicable, be conducted in accordance with the rules of evidence applicable in the federal district courts, that the admission of incompetent evidence does not preclude enforcement of an order of the board, provided there remains competent, relevant, and material evidence sufficient to support the board's findings,[40] and that hearsay may support a finding, at least if more was not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.[41] The court, it has been held, cannot exclude from consideration on review evidence which the board was entitled to take into account.[42] However, a finding of fact cannot rest solely on evidence which is incompetent, irrelevant, or immaterial,[43] such as hearsay evidence.[44]

b. Under Railway Labor Act

Although decisions of the National Railroad Adjustment Board are not final, nevertheless in an action to enforce an award the findings and order of the board are prima facie evidence of the facts therein stated.

Although decisions of the National Railroad Adjustment Board are not final as to either facts or law, with respect to enforcement thereof,[45] they nevertheless have substantive effect[46] and must be

2d 203—N. L. R. B. v. Union Pacific Stages, C.C.A.9, 99 F.2d 153.

Disregard of uncontradicted or established facts

The court is required to reject a conclusion of the board that disregards or fails to give proper cognizance to uncontradicted or well established facts.—N. L. R. B. v. Winona Textile Mills, C.C.A.8, 160 F.2d 201.

37. U.S.—N. L. R. B. v. Alco Feed Mills, C.C.A.5, 133 F.2d 419—American Smelting & Refining Co. v. N. L. R. B., C.C.A.8, 126 F.2d 680—N. L. R. B. v. Tex-O-Kan Flour Mills Co., C.C.A.5, 122 F.2d 433.

38. U.S.—N. L. R. B. v. Entwistle Mfg. Co., C.C.A.4, 120 F.2d 532.

39. U.S.—S. H. Camp & Co. v. N. L. R. B., C.C.A.6, 160 F.2d 519—N. L. R. B. v. Blue Bell-Globe Mfg. Co., C.C.A.4, 120 F.2d 974—N. L. R. B. v. Entwistle Mfg. Co., C.C.A.4, 120 F.2d 532—Hartsell Mills Co. v. N. L. R. B., C.C.A.4, 111 F.2d 291.

Discrimination

A finding of the board supported by circumstances from which the conclusion of discriminatory discharge and refusal to reëmploy may legitimately be drawn is binding on the court.—N. L. R. B. v. Harris-Woodson Co., C.C.A.4, 162 F.2d 97—Piedmont Shirt Co. v. N. L. R. B., C.C.A.4, 138 F.2d 738.

40. U.S.—N. L. R. B. v. Sun Tent-Luebbert Co., C.C.A.9, 151 F.2d 483, opinion supplemented 154 F.2d 108, certiorari denied Merchants & Manufacturers Ass'n of Los Angeles v. N. L. R. B., 67 S.Ct. 44—Cudahy Packing Co. v. N. L. R. B., C.C.A.10, 118 F.2d 295—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 870.

Convincing evidence

It is only convincing evidence, not lawyers' evidence, which is required. U.S.—N. L. R. B. v. Remington Rand, C.C.A., 130 F.2d 919—N. L. R. B. v. Service Wood Heel Co., C.C.A., 124 F.2d 470.

D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

41. U.S.—N. L. R. B. v. Remington Rand, C.C.A.2, 130 F.2d 919—N. L. R. B. v. Service Wood Heel Co., C. C.A.1, 124 F.2d 470—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

Hearsay in form of written affidavits may be given as much evidentiary weight as parol testimony of witness regarding hearsay statements.—Cudahy Packing Co. v. N. L. R. B., C.C.A.8, 116 F.2d 367.

42. U.S.—N. L. R. B. v. Service Wood Heel Co., C.C.A.1, 124 F.2d 470.

D.C.—International Ass'n of Machinists, Tool and Die Makers Lodge No. 35, v. N. L. R. B., 110 F.2d 29, 71 App.D.C. 175, affirmed 61 S.Ct. 83, 311 U.S. 72, 85 L.Ed. 50, rehearing denied 61 S.Ct. 314, 311 U.S. 729, 85 L.Ed. 474.

43. U.S.—N. L. R. B. v. Washington Dehydrated Food Co., C.C.A.9, 118 F.2d 980—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 406, rehearing denied 98 F.2d 870.

44. U.S.—N. L. R. B. v. Washington Dehydrated Food Co., C.C.A.9, 118 F.2d 980—Oughton v. N. L. R. B., C.C.A.3, 118 F.2d 486, certiorari denied 62 S.Ct. 485, 315 U.S. 797, 86 L.Ed. 1198, and Gibbs v. N. L. R. B., 62 S.Ct. 485, 315 U.S. 797, 86 L. Ed. 1198—N. L. R. B. v. Bell Oil & Gas Co., C.C.A.5, 98 F.2d 406, rehearing denied 98 F.2d 870.

Availability of direct evidence

Hearsay evidence is not sufficient where it is both specifically denied and is substituted for direct evidence which is conveniently available.—Martel Mills Corporation v. N. L. R. B., C.C.A.4, 114 F.2d 624.

45. U.S.—Dahlberg v. Pittsburgh & L. E. R. Co., C.C.A.Pa., 138 F.2d 121.

D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S.App. D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

The expression "final and binding" in Railway Labor Act § 3 (m), 45 U. S.C.A. § 153 (m), which provides that the awards of the National Railroad Adjustment Board "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award," is used in the sense that the award is the definitive act of a mediative agency, binding until and unless it is set aside in the manner prescribed.—Dahlberg v. Pittsburgh & L. E. R. Co., C.C.A.Pa., 138 F.2d 121.

46. D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S. App.D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

given due weight.[47] In an action to enforce an award of the board the findings and order of the board are prima facie evidence of the facts therein stated,[48] and in this connection the findings are probative, not merely presumptive in value,[49] and have effect fairly comparable to that of expert testimony.[50] Where a finding of the National Mediation Board is supported by substantial evidence, it should not be disturbed by the courts, especially where the court concurs in the finding.[51]

c. Under State Statutes

(a) In general

(b) Character and sufficiency of evidence

(a) In General

Under state statutes similar to the federal act, findings of a state labor relations board which are supported by sufficient evidence are conclusive, and the credibility of the evidence and the drawing of inferences therefrom are matters for the board rather than the court.

Under state statutes similar to the National Labor Relations Act it has been held that findings or determinations of a state labor relations board which are supported by sufficient evidence are conclusive on the court.[52] The court's review of the findings of the board is circumscribed,[53] and, as far as concerns a review of the evidence, the question before the court is whether there is sufficient evidence to sustain the findings,[54] and not whether the evidence preponderates in favor of the findings.[55]

47. U.S.—Hanks v. Delaware & H. R. Corp., D.C.N.Y., 63 F.Supp. 161.

48. U.S.—Hanks v. Delaware & H. R. Corp., supra.
D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S.App. D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

Mixed question of fact and law
The ultimate conclusion of the board on a question involving mixed questions of fact and law is entitled, in a suit to enforce the award, to the presumption of prima facie correctness afforded by the statute.—Order of Railroad Telegraphers v. Railway Express Agency, D.C.Ga., 55 F.Supp. 319, reversed on other grounds, C.C.A., 137 F.2d 46, reversed on other grounds 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788.

Conclusion not based on detailed findings
As respects the statutory provision that the findings and order of the National Railroad Adjustment Board shall be prima facie evidence of the facts therein stated, the sustaining of plaintiff's claim was held to be more a conclusion than a finding where detailed findings of fact were not made and the board in its findings found only that it had jurisdiction and that the claim should be sustained in part.—Crowley v. Delaware & H. R. Corp., D.C.N.Y., 63 F. Supp. 164.

49. D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S. App.D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

50. U.S.—Hanks v. Delaware & H. R. Corp., D.C.N.Y., 63 F.Supp. 161.
D.C.—Washington Terminal Co. v. Boswell, 124 F.2d 235, 76 U.S.App. D.C. 1, affirmed 63 S.Ct. 1430, 319 U.S. 732, 87 L.Ed. 1694.

51. D.C.—National Federation of Railway Workers v. National Mediation Board, 110 F.2d 529, 71 App. D.C. 266, certiorari denied 60 S.Ct. 975, 310 U.S. 628, 84 L.Ed. 1399.

Existence of craft
Conclusion of National Mediation Board that a craft does or does not exist is the finding of an ultimate fact which must be supported by the evidentiary facts; and the question whether substantial supporting evidence exists is one of law.—Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Nashville, C. & St. L. Ry. Co., C.C.A.Tenn., 94 F.2d 97.

52. N.Y.—New York State Labor Relations Board v. Union Club of City of N. Y., 68 N.E.2d 29, 295 N. Y. 915—Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union of Brooklyn and Queens, Local 287, 42 N.E.2d 480, 288 N.Y. 188—New York State Labor Relations Board v. Greif Realty Corp., 71 N.Y.S.2d 91, 272 App.Div. 928—New York State Labor Relations Board v. Select Operating Corporation, 55 N.Y.S.2d 117, 269 App.Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684—New York State Labor Relations Board v. Montgomery Ward & Co., 38 N.Y.S.2d 858, 179 Misc. 298, affirmed 42 N.Y.S.2d 840, 266 App. Div. 878—In re State Labor Relations Board, 22 N.Y.S.2d 40, 175 Misc. 88—New York State Labor Relations Board v. Peerless Wood Products, 9 N.Y.S.2d 855, 170 Misc. 594.
Pa.—In re Lane's Apparel Shops, Com.Pl., 32 Del.Co. 115—Wilson Laundry Co. v. Laundry and Linen Supply Drivers and Chauffeurs Local Union, No. 187, Com.Pl., 56 Montg.Co. 164—Manko v. Kahn, Com.Pl., 93 Pittsb.Leg.J. 477—Pennsylvania Labor Relations Board v. Beck, Com.Pl., 25 West. L.J. 170.
R.I.—McGee v. Local No. 682 of Brotherhood of Painters, Decorators and Paperhangers of America, A. F. of L., 38 A.2d 303, 70 R.I. 200.

Reasonable inferences
(1) The findings of the board are supported by the evidence and are conclusive where others might reasonably make the same choice of inferences.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256.
(2) Reasonable inferences, however, are not fine-spun arguments but are inferences based on a reason or that a reasonable man would accept.—International Ry. Co. v. Boland, 8 N.Y.S.2d 643, 169 Misc. 926.

53. N.Y.—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347.
Pa.—In re McGarvey, Com.Pl., 26 Erie Co. 119—Chapin Lumber Co. v. Pennsylvania Labor Relations Board, Com.Pl., 39 Luz.Leg.Reg. 121—Supervisory Employees' Union v. Pittsburgh Rys. Co., Com. Pl., 93 Pittsb.Leg.J. 47—International Brotherhood of Teamsters, Etc., v. Foster, Com.Pl., 24 Wash. Co. 161.

54. N.Y.—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347.
Pa.—Chapin v. Pennsylvania Labor Relations Board, 52 A.2d 568, 356 Pa. 577—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398—Petition of St. Marys Sewer Pipe Co., 55 Pa.Dist. & Co. 297—Metropolitan Life Ins. Co. v. Insurance Guild, Local No. 22, 49 Pa.Dist. & Co. 75.
Wis.—Century Building Co. v. Wisconsin Employment Relations Board, 291 N.W. 305, 235 Wis. 376.

55. Wis.—Retail Clerks' Union, Local No. 1403, A. F. of L., v. Wisconsin Employment Relations Board, 6 N.W.2d 698, 242 Wis. 21, 149 A. L.R. 452—Century Building Co. v.

It is for the board, rather than for the court, to pass on the weight and credibility of the evidence before the state labor relations board,[56] and to draw reasonable inferences therefrom;[57] and the court cannot substitute its own judgment on questions of fact for the judgment of the board.[58] On the other hand, the court is not bound by findings based on insufficient evidence,[59] and hence it is the duty of

Wisconsin Employment Relations Board, 291 N.W. 305, 235 Wis. 376—Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 279 N.W. 673, 228 Wis. 473, 117 A.L.R. 398.

No determination de novo

On a review of the board's findings, the court has no jurisdiction to determine the factual issues anew if there is some evidence before the board reasonably tending to support a finding; the court may not weigh the evidence to ascertain whether it preponderates in favor of the finding or substitute its judgment for that of the board even though the court might have decided the question differently had it been before the court de novo.—In re International Ass'n of Machinists, Lodge No. 1406, A. F. L., 23 N.W.2d 489, 249 Wis. 112.

Different standards for board and court

Under some statutes the standard by which the findings of the board are to be tested by a court on a motion for review are not the same as those prescribed for the board; the party seeking to arouse the action of the board must establish his facts by a clear and satisfactory preponderance of the evidence, whereas on review the findings of fact made by the board are conclusive if supported by credible and competent evidence.—Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 299 N.W. 31, 238 Wis. 379, certiorari denied Milk & Ice Cream Drivers and Dairy Employees Union Local 225 v. Wisconsin Employment Relations Board, 62 S.Ct. 1035, 316 U.S. 668, 86 L.Ed. 1744—Century Building Co. v. Wisconsin Employment Relations Board, 291 N.W. 305, 235 Wis. 376.

56. N.Y.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App.Div. 315—In re Rochester-Penfield Bus Co., 63 N.Y.S.2d 305, 187 Misc. 239, reversed on other grounds 69 N.Y.S.2d 356, 271 App.Div. 1049—New York State Labor Relations Board v. Mill Road Live Poultry Market, 50 N.Y.S.2d 631, 182 Misc. 556—New York State Labor Relations Board v. Toffenetti Restaurant Co., 44 N.Y.S.2d 798, 180 Misc. 326, affirmed 42 N.Y.S.2d 938, 266 App.Div. 837, appeal denied 44 N.Y.S.2d 262, first case, 266 App.Div. 950, stay granted 44 N.Y.S.2d 262, second case, 266 App.Div. 950, appeal dismissed 52 N.E.2d 961, 291 N.Y. 750—New York State Labor Relations Board v. Roosevelt Chevrolet Co., 30 N.Y.S.2d 381, 177 Misc. 468—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347—New York State Labor Relations Board v. Paragon Oil Co., 45 N.Y.S.2d 152—New York State Labor Relations Board v. Jacobson, 35 N.Y.S.2d 157—New York State Labor Relations Board v. Astoria Casket Co., 17 N.Y.S.2d 13.

Pa.—Chapin v. Pennsylvania Labor Relations Board, 52 A.2d 568, 356 Pa. 577—Hodson Motor Co. v. United Automobile Workers, Com. Pl., 90 Pittsb.Leg.J. 295.

Wis.—Christoffel v. Wisconsin Employment Relations Board, 10 N.W.2d 197, 243 Wis. 332, certiorari denied 64 S.Ct. 90, 320 U.S. 776, 88 L.Ed. 466—Retail Clerks' Union, Local No. 1403, A. F. of L., v. Wisconsin Employment Relations Board, 6 N.W.2d 698, 242 Wis. 21, 149 A.L.R. 452—Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 299 N.W. 31, 238 Wis. 379, certiorari denied Milk & Ice Cream Drivers and Dairy Employees Union, Local 225 v. Wisconsin Employment Relations Board, 62 S.Ct. 1035, 316 U.S. 668, 86 L.Ed. 1744—Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 279 N.W. 673, 228 Wis. 473, 117 A.L.R. 398.

57. N.Y.—New York State Labor Relations Board v. American Surety Co. of N. Y., 51 N.Y.S.2d 803, affirmed 58 N.Y.S.2d 355, 269 App. Div. 970, appeal denied 59 N.Y.S.2d 303, 269 App.Div. 982—New York State Labor Relations Board v. Montgomery Ward & Co., 38 N.Y.S.2d 858, 179 Misc. 298, affirmed 42 N.Y.S.2d 840, 266 App.Div. 878—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347—Collier Service Corporation v. Boland, 4 N.Y.S.2d 480, 167 Misc. 709.

Pa.—Chapin v. Pennsylvania Labor Relations Board, 52 A.2d 568, 356 Pa. 577.

Wis.—Christoffel v. Wisconsin Employment Relations Board, 10 N.W.2d 197, 243 Wis. 332, certiorari denied 64 S.Ct. 90, 320 U.S. 776, 88 L.Ed. 466—Retail Clerks' Union, Local No. 1403, A. F. of L., v. Wisconsin Employment Relations Board, 6 N.W.2d 698, 242 Wis. 21, 149 A.L.R. 452.

Good faith of employer

N.Y.—New York State Labor Relations Board v. Montgomery Ward & Co., 38 N.Y.S.2d 858, 179 Misc. 298, affirmed 42 N.Y.S.2d 840, 266 App.Div. 878.

Purpose of picketing

Wis.—Retail Clerks' Union, Local No. 1403, A. F. of L., v. Wisconsin Employment Relations Board, 6 N.W.2d 698, 242 Wis. 21, 149 A.L.R. 452.

58. N.Y.—New York State Labor Relations Board v. Mill Road Live Poultry Market, 50 N.Y.S.2d 631, 182 Misc. 556—New York State Labor Relations Board v. Roosevelt Chevrolet Co., 30 N.Y.S.2d 381, 177 Misc. 468—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347—Collier Service Corporation v. Boland, 4 N.Y.S.2d 480, 167 Misc. 709—New York State Labor Relations Board v. Astoria Casket Co., 17 N.Y.S.2d 13.

Pa.—Wilson Laundry Co. v. Laundry and Linen Supply Drivers and Chauffeurs Local Union, No. 187, Com.Pl., 56 Montg.Co. 164—Hodson Motor Co. v. United Automobile Workers, Com.Pl., 90 Pittsb.Leg.J. 295—Labor Relations Board v. Union Trust Co., Com.Pl., 89 Pittsb.Leg.J. 343.

Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

Wis.—In re International Ass'n of Machinists, Lodge No. 1406, A. F. L., 23 N.W.2d 489, 249 Wis. 112—Appleton Chair Corporation v. United Brotherhood of Carpenters & Joiners, Millmen's Local No. 1748, 1 N.W.2d 188, 239 Wis. 337.

59. Pa.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398—Foster v. International Brotherhood of Teamsters, Chauffeurs, Etc., 45 Pa.Dist. & Co. 591—Pennsylvania Labor Relations Board v. Schlossman, Com.Pl., 91 Pittsb.Leg.J. 489—Labor Relations Board v. Union Trust Co., Com.Pl., 89 Pittsb.Leg.J. 343—Hodson Motor Co. v. United Automobile Workers, Com.Pl., 89 Pittsb.Leg.J. 241—Pennsylvania Labor Relations Board v. American Stores Co., Com. Pl., 10 Sch.Reg. 20.

Utah.—Utah Poultry Producers Co-op. Ass'n v. Utah Labor Relations Board, 149 P.2d 643, 106 Utah 394—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

the court to determine whether the findings are in fact supported by the required amount of evidence.[60] Further, the fact that the board has incorporated a determination as a "finding" of fact does not preclude a review thereof where it actually constitutes a determination of a question of law.[61]

(b) Character and Sufficiency of Evidence

Under some state statutes, findings of a state labor relations board, in order to be conclusive on the courts, must be supported by substantial evidence.

It has been held, under some state statutes, that findings or determinations of the state labor relations board are conclusive on the court if, but only if, they are supported by substantial evidence,[62] or, under some statutes, by credible and competent evidence.[63] The court is not compelled to accept findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence.[64] Under some state statutes it has been held that the court is not authorized to reverse the board for errors in the admission of evidence,[65] and that, where the findings of the board are supported by credible and competent evidence, the fact that hearsay evidence has also been admitted before the

Wis.—E. G. Shinner & Co. v. Wrabetz, 292 N.W. 902, 235 Wis. 195.

60. N.Y.—International Ry. Co. v. Boland, 8 N.Y.S.2d 643, 169 Misc. 926—New York State Labor Relations Board v. Astoria Casket Co., 17 N.Y.S.2d 13.
Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.
Wis.—United Shoe Workers of America, Local 132 v. Wisconsin Labor Relations Board, 279 N.W. 37, 227 Wis. 569.

61. Pa.—Petition of Equitable Gas Co., 51 Pa.Dist. & Co. 653, 92 Pittsb.Leg.J. 423.

62. Mass.—Jordan Marsh Co. v. Labor Relations Commission, 56 N.E.2d 915, 316 Mass. 748.
N.Y.—In re Rochester-Penfield Bus Co., 63 N.Y.S.2d 305, 187 Misc. 239, reversed on other grounds 69 N.Y.S.2d 356, 271 App.Div. 1049—New York State Labor Relations Board v. Select Operating Corporation, 49 N.Y.S.2d 294, 183 Misc. 480, reversed on other grounds 55 N.Y.S.2d 117, 269 App.Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684—New York State Labor Relations Board v. Toffenetti Restaurant Co., 46 N.Y.S.2d 70, 181 Misc. 779, affirmed 47 N.Y.S.2d 113, 267 App.Div. 860, appeal denied 47 N.Y.S.2d 310, 267 App.Div. 869, motion dismissed 55 N.E.2d 379, 292 N.Y. 618. Reversed on other grounds 48 N.Y.S.2d 554, 267 App.Div. 978—New York State Labor Relations Board v. Toffenetti Restaurant Co., 44 N.Y.S.2d 798, 180 Misc. 326, affirmed 42 N.Y.S.2d 938, 266 App.Div. 837, appeal denied 44 N.Y.S.2d 262, first case, 266 App.Div. 950, stay granted 44 N.Y.S.2d 262, second case, 266 App.Div. 950, appeal dismissed 52 N.E.2d 961, 291 N.Y. 750—New York State Labor Relations Board v. Montgomery Ward & Co., 38 N.Y.S.2d 858, 179 Misc. 298, affirmed 42 N.Y.S.2d 840, 266 App.Div. 878—New York State Labor Relations Board v. Roosevelt Chevrolet Co., 30 N.Y.S.2d 381, 177 Misc. 468—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347—Collier Service Corporation v. Boland, 4 N.Y.S.2d 480, 167 Misc. 709—New York State Labor Relations Board v. Jacobson, 35 N.Y.S.2d 157.
Utah.—Utah Poultry Producers Co-op. Ass'n v. Utah Labor Relations Board, 149 P.2d 643, 106 Utah 394—American Foundry & Machine Co. v. Utah Labor Relations Board, 141 P.2d 390, 105 Utah 83—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

Freedom from technical rules

The statutory freedom of labor relations board from restrictions of technical rules of evidence does not justify orders without a basis in substantial evidence of rational probative force.—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App.Div. 315.

Consideration of evils sought to be rectified

An examination by the court of the question whether the findings of the state labor relations board are sustained by substantial evidence was held to require that the evils which the state labor relations act seeks to rectify be considered.—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347.

Status as employees

In a proceeding to enforce a collective bargaining order, the labor relations board's finding that particular persons were employees cannot be disturbed by the court where the finding is at least reasonably permissible and has substantial support from the evidence.—In re New York State Labor Relations Board v. Metropolitan Life Ins. Co., 52 N.Y.S.2d 590, 183 Misc. 1064, affirmed 58 N.Y.S.2d 343, 269 App.Div. 934, affirmed 66 N.E.2d 853, 295 N.Y. 839.

"Substantial and legally credible evidence"

(1) Under some state statutes the conclusiveness of the board's findings depends on whether they are supported by "substantial and legally credible evidence."—W. T. Grant Co. v. United Retail Employees of America, Local No. 134, 31 A.2d 900, 347 Pa. 224—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398—Petition of Union Trust Co. of Pittsburgh, 20 A.2d 779, 342 Pa. 456—Petition of St. Marys Sewer Pipe Co., 55 Pa.Dist. & Co. 297—In re Ewart, 42 Pa.Dist. & Co. 307—In re Lane's Apparel Shops, Com.Pl., 32 Del.Co. 115—Labor Relations Board v. Union Trust Co., Com.Pl., 89 Pittsb.Leg.J. 343—Pennsylvania Labor Relations Board v. American Stores Co., Com.Pl., 10 Sch.Reg. 20.

(2) Findings of the board that union was dominated or controlled by employer, not supported by any substantial or legally credible evidence, should be vacated, and order directing employer to withdraw recognition from the union should be set aside.—Petition of Union Trust Co. of Pittsburgh, 20 A.2d 779, 342 Pa. 456.

63. Wis.—Retail Clerks' Union, Local No. 1403, A. F. of L., v. Wisconsin Employment Relations Board, 6 N.W.2d 698, 242 Wis. 21, 149 A.L.R. 452.

Finding unsupported or based on error of law

If finding of facts by state labor relations board is not supported by competent evidence or is based on an error of law, court has jurisdiction to determine true merits of the case and to modify or set aside, in whole or in part, board's decision and order.—McGee v. Local No. 682 of Brotherhood of Painters, Decorators and Paperhangers of America, A. F. of L., 38 A.2d 303, 70 R.I. 200.

64. Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

65. Wis.—Century Building Co. v. Wisconsin Employment Relations Board, 291 N.W. 305, 235 Wis. 376.

board is not a ground for setting aside or refusing to enforce the board's order.[66]

What constitutes substantial evidence. Substantial evidence means more than a mere scintilla of evidence,[67] and must amount to more than mere suspicion,[68] surmise,[69] uncorroborated hearsay,[70] or rumor;[71] and it may not consist solely of evidence which gives equal support to inconsistent inferences.[72] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;[73] evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred;[74] evidence such that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions, and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conviction.[75] The evidence, in order to meet the test of being substantial, must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it would be one of fact for the jury.[76]

§ 28(137). Remand to Board

The court may remand the case to the labor relations board for the correction of irregularities or findings or the supplying of deficiencies in the record; and in such case it becomes the duty of the board to act on the issues recommitted to it in accordance with the law.

66. Wis.—Century Building Co. v. Wisconsin Employment Relations Board, supra.

67. N.Y.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App.Div. 315—New York State Labor Relations Board v. Select Operating Corporation, 49 N.Y.S.2d 294, 183 Misc. 480, reversed on other grounds 55 N.Y.S.2d 117, 269 App. Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347—International Ry. Co. v. Boland, 8 N.Y.S.2d 643, 169 Misc. 926.
Pa.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398—Petition of Union Trust Co. of Pittsburgh, 20 A.2d 779, 342 Pa. 456.
Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.
Wis.—E. G. Shinner & Co. v. Wrabetz, 292 N.W. 902, 235 Wis. 195—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

68. N.Y.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256—New York State Labor Relations Board v. Select Operating Corporation, 49 N.Y.S.2d 294, 183 Misc. 480, reversed on other grounds 55 N.Y.S.2d 117, 269 App.Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347—International Ry. Co. v. Boland, 8 N.Y.S.2d 643, 169 Misc. 926.
Pa.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398—Petition of Union Trust Co. of Pittsburgh, 20 A.2d 779, 342 Pa. 456.
Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

69. N.Y.—International Ry. Co. v. Boland, 8 N.Y.S.2d 643, 169 Misc. 926.

70. N.Y.—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App. Div. 315—New York State Labor Relations Board v. Select Operating Corporation, 49 N.Y.S.2d 294, 183 Misc. 480, reversed on other grounds 55 N.Y.S.2d 117, 269 App. Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684.
Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.
Hearsay and nonexpert opinion evidence may not be used as basis to support state labor relations board's finding, on which board's order sought to be enforced rests.—Building Service Employees Local No. 59 v. Newhouse Realty Co., supra.

71. N.Y.—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y.S.2d 949, 260 App. Div. 315—New York State Labor Relations Board v. Select Operating Corporation, 49 N.Y.S.2d 294, 183 Misc. 480, reversed on other grounds 55 N.Y.S.2d 117, 269 App. Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684.
Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

72. N.Y.—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347.
Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

73. Mass.—Jordan Marsh Co. v. Labor Relations Commission, 56 N.E. 2d 915, 316 Mass. 748.
N.Y.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256—New York State Labor Relations Board v. Frank G. Shattuck Co., 20 N.Y. S.2d 949, 260 App.Div. 315—International Ry. Co. v. Boland, 8 N.Y. S.2d 643, 169 Misc. 926.
Pa.—Pennsylvania Labor Relations Board v. Kaufmann Department Stores, 29 A.2d 90, 345 Pa. 398—Petition of Union Trust Co. of Pittsburgh, 20 A.2d 779, 342 Pa. 456—In re Lane's Apparel Shops, Com.Pl., 32 Del.Co. 115.
Wis.—E. G. Shinner & Co. v. Wrabetz, 292 N.W. 902, 235 Wis. 195—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

74. N.Y.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256—New York State Labor Relations Board v. Select Operating Corporation, 49 N.Y.S.2d 294, 183 Misc. 480, reversed on other grounds 55 N.Y.S.2d 117, 269 App.Div. 766, affirmed 65 N.E.2d 329, 295 N.Y. 684—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347.
Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.
Similar statements
(1) Evidence of substance which establishes facts and from which reasonable inferences may be drawn.—International Ry. Co. v. Boland, 8 N.Y.S.2d 643, 169 Misc. 926.
(2) A quality of proof which induces conviction and makes an impression on reason.—Building Service Employees Local No. 59 v. Newhouse Realty Co., 95 P.2d 507, 97 Utah 562.

75. Utah.—Building Service Employees Local No. 59 v. Newhouse Realty Co., supra.

76. Pa.—Petition of Union Trust Co. of Pittsburgh, 20 A.2d 779, 342 Pa. 456.

The court may remand the case to the labor relations board,[77] as, for example, for the purpose of having the board correct irregularities in procedure,[78] supply deficiencies in its record,[79] make additional essential findings,[80] or supply findings in place of those attacked as invalid.[81] Such a remand does not dismiss or terminate the administrative proceeding[82] or encroach on administrative functions;[83] it results simply in having the case returned to the administrative body in order that it may take further action in accordance with the law,[84] and whatever findings or order may subsequently be made will be subject to challenge if not adequately supported or if the board has failed to act in accordance with the statutory requirements.[85]

The court will not remand the case to the board where adequate grounds for remand do not appear[86] or where it appears that in the interest of justice the controversy should be decided without further delay;[87] and where, after the board has once decided against an employer, he applies to the

77. U.S.—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221—N. L. R. B. v. Cowell Portland Cement Co., C.C.A.9, 108 F.2d 198.

Pa.—Engineers Union v. Pittsburgh Rys. Co., Com.Pl., 94 Pittsb.Leg.J. 207.

Circumstances subsequent to Board's order

When circumstances arising after issuance of National Labor Relations Board's order may affect propriety of enforcing the order, reviewing court has discretion to decide the matter itself or to remand it to board for further consideration; and, where such circumstances involve complicated or disputed facts or questions of statutory policy, remand to the board is ordinarily in order.—N. L. R. B. v. Jones & Laughlin Steel Corp., 67 S.Ct. 1274, 331 U.S. 416, 91 L.Ed. —.

Remand as to part of order

The court may decree enforcement of the board's order in part, and may remand the case to the board for further proceedings as to the other parts of the order.—N. L. R. B. v. Harbison-Walker Refractories Co., C.C.A.8, 137 F.2d 596—N. L. R. B. v. Somerset Shoe Co., C.C.A.1, 111 F. 2d 681.

Bias of examiner

Where there was bias on the part of the examiner and a fair hearing was not had, the court may set aside the order of the board in its entirety and remand the cause to the board for a new hearing before another examiner to be selected by the board. —Montgomery Ward & Co. v. N. L. R. B., C.C.A.8, 103 F.2d 147.

Disregard of relevant legislation

Where entire proceeding against operator of a fleet of vessels was conducted without regard to legislation for protection of life at sea and with a misconception of the powers of a ship's officers and managers, the proceedings could be remanded.—Texas Co. v. N. L. R. B., C.C.A.9, 120 F.2d 186.

78. U.S.—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221.

Admission of evidence subject to connection

Where trial examiner in overruling objection to documentary evidence made statement from which counsel would naturally assume that the evidence was admitted subject to being connected up by other evidence, and no such other evidence followed, the case was remanded to the board.—N. L. R. B. v. Service Wood Heel Co., C.C.A.1, 124 F.2d 470.

79. U.S.—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221—N. L. R. B. v. Harbison-Walker Refractories Co., C.C.A.8, 137 F.2d 596.

80. U.S.—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221—Wallace Corp. v. N. L. R. B., C.C.A.4, 159 F.2d 952—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C.C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L. Ed. 1723—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F. 2d 652.

Operations as affecting commerce

Court has discretion to order that additional evidence be taken on question whether employer's operations affected commerce.—Jacobsen v. N. L. R. B., C.C.A.3, 120 F.2d 96.

81. U.S.—N. L. R. B. v. Virginia Electric & Power Co., 62 S.Ct. 344, 314 U.S. 469, 86 L.Ed. 348—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221—N. L. R. B. v. Botany Worsted Mills, C.C.A.3, 106 F.2d 263.

82. U.S.—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221.

83. U.S.—Ford Motor Co. v. N. L. R. B., supra.

84. U.S.—Ford Motor Co. v. N. L. R. B., supra.

85. U.S.—Ford Motor Co. v. N. L. R. B., supra.

Further order as part of record

In remanding the cause to the board for the determination of certain questions, the court may direct that any further order of the board as a result of such proceedings should be made a supplemental part of the pending record.—N. L. R. B. v. Acme Air Appliance Co., C.C.A.2, 117 F.2d 417.

Disregard of supplemental order

Under appropriate circumstances the court may disregard a supplemental order rendered by the board after hearing additional evidence, and may enforce the board's original order.—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 99 F.2d 533, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 59 S.Ct. 586, 306 U.S. 646, 83 L.Ed. 1045.

86. U.S.—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C. C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723.

General problem

The fact that a finding did not enable the court to distinguish the part of the determination which was within the court's power of review from the part which was within the province of the board was held not to require the court to send the case back for specific findings as to the facts where the problem was a general one applying to industry at large.—Republic Aviation Corporation v. N. L. R. B., C.C.A.2, 142 F.2d 193, affirmed 65 S.Ct. 982, 324 U.S. 793, 89 L.Ed. 1372, 157 A.L.R. 1081.

Change in result not indicated

The court would not send the case back to the board to ascertain facts respecting election where it did not appear that result would be changed. —Colorado Fuel & Iron Corporation v. N. L. R. B., C.C.A.10, 121 F.2d 165.

Abolition of board

A remand to a labor board which has been abolished will be refused as futile.—Folding Furniture Works v. Wisconsin Labor Relations Board, 286 N.W. 875, 232 Wis. 170.

87. U.S.—N. L. R. B. v. National Motor Bearing Co., C.C.A.9, 105 F. 2d 652.

Union's lack of majority

The board may not find an employer guilty of an unfair labor practice in refusing to deal with a union which, according to undisput-

court for a rehearing before the board because of some alleged change in the situation, such an application should be scrutinized with jealousy lest it open the door to abuse.[88]

On remand of the case to the board it becomes the duty of the board to act on the issues recommitted to it by the court.[89] Where the court remands the cause to the board for the purpose of setting aside its previous findings and order, issuing new proposed findings, and making its decision and order on a reconsideration of the entire case, the specified purpose qualifies the court's order remanding the cause and creates a condition which the board is bound to observe;[90] and, if the board within a reasonable time fails to set aside its findings and order, the court can vacate its order of remand and proceed with its consideration of a petition to review filed by the employer.[91] However, if additional essential findings may properly be made on the evidence already received, the court need not require the evidence to be reheard,[92] and, where a remand of the case to the board does not call for a proceeding de novo, the board is not required to reopen any issue as to which its ruling was left unassailed by the court,[93] although in this connection it has been observed that a change in circumstances may make relevant at the second hearing that which was irrelevant at the first hearing.[94]

Resubmission of arbitration. The propriety of a resubmission of a controversy to the same arbitrator or to a new arbitrator rests in the sound discretion of the court.[95]

§ 28(138). —— Issues Involving Reinstatement or Back Pay

The court may remand the case to the labor relations board for the determination of details respecting a back-pay and reinstatement order, in which case the board acts as an original tribunal rather than as a master appointed by the court.

The court may remand the case to the labor relations board for the determination of issues involving back pay and reinstatement.[96] On an issue as to the propriety of an order directing reinstatement, the court may remand the cause to the board to require the board to disclose the basis of its order;[97] and where the board has ordered reinstatement merely on the ground that it has the power to make such order, but has not considered the appropriateness of its exercise of such power, the court may remand the case to the board for a determination of the issue whether reinstatement would effectuate the policies of the statute.[98]

After rendition of a decree enforcing an order of the board which in general terms directs back pay and reinstatement, but which does not specifically provide for such matters as the amounts to be paid or the positions to be tendered, the case should be remanded to the board to work out the details of back pay and reinstatement.[99] If there is a con-

ed evidence in the record, at no time represented a majority of his employes; under such circumstances a court may so determine without remitting the case for further findings.—Pennsylvania Labor Relations Board v. Levin, 50 Pa.Dist. & Co. 79.

88. U.S.—N. L. R. B. v. Karp Metal Products Co., C.C.A.2, 134 F.2d 954, certiorari denied 64 S.Ct. 941, 322 U.S. 728, 88 L.Ed. 1564—N. L. R. B. v. New York Merchandise Co., C.C.A.2, 134 F.2d 949.

89. U.S.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 114 F.2d 738, certiorari dismissed 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391.

Failure to consider bias
Where the case had been remanded to the board for that body to consider bias on the part of one of its members, but the case was considered in its entirety by a new board, the failure of such new board to consider the alleged bias of the former member was held not error.—Berkshire Knitting Mills v. National Labor Relations Board, C.C.A.3, 139 F.2d 134, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579.

Mandate is one method of compelling a proper respect for obligation of the National Labor Relations Board to the court and the respondent on recommitment of an issue to the board, and of making effective that purpose of the National Labor Relations Act which requires prompt action on part of the board.—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 114 F.2d 738, certiorari dismissed 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391.

90. U.S.—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221.

91. U.S.—Ford Motor Co. v. N. L. R. B., supra.

92. U.S.—Ford Motor Co. v. N. L. R. B., supra.

93. U.S.—N. L. R. B. v. Donnelly Garment Co., 67 S.Ct. 756, 330 U.S. 219, 91 L.Ed. ——.

94. U.S.—N. L. R. B. v. Donnelly Garment Co., supra.

Change held not to affect admissibility of evidence
U.S.—N. L. R. B. v. Donnelly Garment Co., supra.

95. N.Y.—In re E. A. Laboratories, 50 N.Y.S.2d 222.

96. U.S.—Wallace Corp. v. N. L. R. B., C.C.A.4, 159 F.2d 952.

Equivalence of employment
Court may remand case to board for determination of equivalence of employment obtained by discharged employees where such question had not been passed on by the board.—Mooresville Cotton Mills v. N. L. R. B., C.C.A.4, 97 F.2d 959.

97. U.S.—Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271.

98. U.S.—Continental Oil Co. v. N. L. R. B., 61 S.Ct. 861, 313 U.S. 212, 85 L.Ed. 1292—Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271, 133 A.L.R. 1217.

99. U.S.—Wallace Corp. v. N. L. R. B., Local No. 129, C.C.A.4, 159 F.2d 952—N. L. R. B. v. New York Merchandise Co., C.C.A.2, 134 F.2d 949—N. L. R. B. v. Carlisle Lum-

troversy as to essential facts not determined by the previous findings of the board, the employer should be given a hearing at which he may adduce his evidence and be allowed to present his arguments,[1] and the board should then determine the controversy and make new findings of fact.[2] The court should not assume the duty of determining the controversy and making new findings, either directly or through a commissioner or master;[3] and the board in making its determination on the details of back pay and reinstatement acts as an original tribunal and not as a master or surrogate of the court.[4]

Even where the original order of the board with respect to reinstatement might be regarded as final rather than interlocutory, the court can direct the board to make further findings with respect to reinstatement in view of changed conditions which have developed since the entry of the order.[5] However, a motion of the employer to refer the case to the board for a further hearing on the ground that conditions have so changed that reinstatement is no longer proper will not be granted as of course;[6] the application should be scrutinized with jealousy lest it open the door to abuse.[7] Here too, if the application is granted, the case goes to the board as such, and not to the board as a master of the court.[8]

Remission to arbitrator. Where an arbitrator has failed to determine the precise amount of back pay due to an employee, and under the terms of the submission he should have done so, the court may remit the matter to him in order that he may make his award definite.[9]

§ 28(139) —— Taking of Additional Evidence

Under the National Labor Relations Act and similar state statutes the court on application by either party may remand the case to the labor relations board for the taking of additional material evidence if there were reasonable grounds for failure to adduce the evidence at the previous hearings.

Under the National Labor Relations Act § 10 (e), 29 U.S.C.A. § 160 (e), the court in proceedings for the enforcement or review of an order of the National Labor Relations Board may remand the case to the board for the taking of additional evidence[10] on application by either party to the pro-

ber Co., C.C.A.9, 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539.

Interlocutory nature of decree

A decree enforcing a general order of the board directing reinstatement and back pay is analogous to an affirmance of an interlocutory judgment on appeal; pro tanto it is interlocutory, although it is final as to any of its other provisions which require no further definition.—Wallace Corp. v. N. L. R. B., C.C.A.4, 159 F.2d 952—N. L. R. B. v. New York Merchandise Co., C.C.A.2, 134 F.2d 949.

Deductions from back pay award

(1) The matter of deducting from a back-pay order actual or potential earnings by the worker or losses which he willfully incurred should be determined by the board, not the court.—Phelps Dodge Corporation v. N. L. R. B., 61 S.Ct. 845, 313 U.S. 177, 85 L.Ed. 1271—Corning Glass Works v. N. L. R. B., C.C.A.2, 129 F.2d 967—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F.2d 67—Rapid Roller Co. v. N. L. R. B., C.C.A.7, 126 F.2d 452, certiorari denied 63 S.Ct. 45, 317 U.S. 650, 87 L.Ed. 523.

(2) Court should not determine the amount that reinstated employees could have earned elsewhere, but should direct that back pay be reduced by that which board, in its discretion, found appropriate.—N. L. R. B. v. Condenser Corporation of America, supra.

Review

Such findings and determination are subject to review by the court, and the prior general decree may be modified or supplemented.—Wallace Corp. v. N. L. R. B., Local No. 129, C.C.A.4, 159 F.2d 952.

1. U.S.—Wallace Corp. v. N. L. R. B., supra—N. L. R. B. v. New York Merchandise Co., C.C.A.2, 134 F.2d 949.

2. U.S.—Wallace Corp. v. N. L. R. B., C.C.A.4, 159 F.2d 952—Corning Glass Works v. N. L. R. B., C.C.A. 2, 129 F.2d 967.

Where mere administrative determination is involved, questions affecting reinstatement, as well as those relating to back pay, should be referred to the board rather than be heard in a contempt proceeding.—Wallace Corp. v. N. L. R. B., Local No. 129, C.C.A.4, 159 F.2d 952.

3. U.S.—Wallace Corp. v. N. L. R. B., supra—N. L. R. B. v. New York Merchandise Co., C.C.A. 2, 134 F.2d 949—Corning Glass Works v. N. L. R. B., C.C.A.2, 129 F.2d 967—N. L. R. B. v. Condenser Corporation of America, C.C.A.3, 128 F. 2d 67—N. L. R. B. v. Lund, C.C.A. 8, 103 F.2d 815.

4. U.S.—Wallace Corp. v. N. L. R. B., C.C.A.4, 159 F.2d 952—N. L. R. B. v. New York Merchandise Co., C.C.A.2, 134 F.2d 949.

5. U.S.—Wallace Corp. v. N. L. R. B., Local No. 129, C.C.A.4, 159 F.2d 952.

6. U.S.—N. L. R. B. v. New York Merchandise Co., C.C.A.2, 134 F. 2d 949.

7. U.S.—N. L. R. B. v. New York Merchandise Co., supra.

8. U.S.—N. L. R. B. v. New York Merchandise Co., supra.

9. N.Y.—In re E. A. Laboratories, 50 N.Y.S.2d 222.

10. U.S.—Ford Motor Co. v. N. L. R. B., 59 S.Ct. 301, 305 U.S. 364, 83 L.Ed. 221—N. L. R. B. v. Ridge Tool Co., C.C.A.6, 151 F.2d 947—Mississippi Valley Structural Steel Co. v. N. L. R. B., C.C.A.8, 145 F. 2d 664—N. L. R. B. v. Newberry Lumber & Chemical Co., C.C.A.6, 123 F.2d 831—Berkshire Employees Ass'n of Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 121 F.2d 235—Swift & Co. v. N. L. R. B., C.C.A.10, 106 F.2d 87—N. L. R. B. v. Lund, C.C.A.8, 103 F.2d 815.

Compliance with mandate of court

(1) Where enforcement proceeding was remanded to the board for reconsideration with suggestion that presentation of evidence and additional findings might be required, mandate of court was sufficiently complied with by notice to parties of right to present additional evidence, notwithstanding no additional proof was offered by any of parties. —S. H. Camp & Co. v. N. L. R. B., C.C.A.6, 160 F.2d 519.

ceeding,[11] if it is shown to the satisfaction of the court that such additional evidence is material[12] and that there were reasonable grounds for the failure to adduce the evidence at the hearing.[13] The application for leave to adduce additional evidence is addressed to the sound judicial discretion of the court;[14] it will be granted only for proper

(2) Record was held to establish that the board obeyed mandate of the court that previously rejected testimony of employees regarding their voluntary membership in company union was to be adduced and considered.—N. L. R. B. v. Donnelly Garment Co., 67 S.Ct. 756, 330 U.S. 219, 91 L.Ed. 854.

11. U.S.—Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738—Jacobsen v. N. L. R. B., C.C.A.3, 120 F.2d 96.
D.C.—N. L. R. B. v. National Laundry Co., 138 F.2d 589, 78 U.S.App. D.C. 184.

Application of company unions

Where order to cease and desist ran only against employer, application of so-called company unions for leave to adduce additional evidence was denied.—Republic Steel Corporation v. N. L. R. B., C.C.A.3, 107 F.2d 472, certiorari denied 60 S.Ct. 806. 309 U.S. 684, 84 L.Ed. 1027, vacated on other grounds 60 S.Ct. 1072, 310 U.S. 655, 84 L.Ed. 1419, certiorari denied Central Council of Steel Plants, Northern District, Republic Steel Corporation v. N. L. R. B., 60 S.Ct. 808, 309 U.S. 684, 84 L.Ed. 1028, supplemented, C.C.A., Republic Steel Corporation v. N. L. R. B., 114 F.2d 820, modified on other grounds 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6.

12. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579—N. L. R. B. v. May Dept. Stores Co., C.C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72, 329 U.S. 725, 91 L.Ed. 627—N. L. R. B. v. National Broadcasting Co., C.C.A.2, 150 F. 2d 895—Jones & Laughlin Steel Corp. v. N. L. R. B., C.C.A.5, 146 F.2d 833, certiorari denied 65 S. Ct. 1575, 325 U.S. 886, 89 L.Ed. 2000, rehearing denied 66 S.Ct. 15, 326 U.S. 806, 90 L.Ed. 491—N. L. R. B. v. New York Merchandise Co., C.C.A.2, 134 F.2d 949—N. L. R. B. v. Aluminum Goods Mfg. Co., C.C.A.7, 125 F.2d 353—Donnelly Garment Co. v. N. L. R. B., C.C.A. 8, 123 F.2d 215—Berkshire Employees Ass'n of Berkshire Knitting Mills v. N. L. R. B., C.C.A.3, 121 F.2d 235—N. L. R. B. v. Biles-Coleman Lumber Co., C.C.A.9, 96 F.2d 197—N. L. R. B. v. Carlisle Lumber Co., C.C.A.9, 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L.Ed. 1539—N. L. R. B. v. Anwelt Shoe Mfg. Co., C. C.A.1, 93 F.2d 367.
D.C.—E. Anthony & Sons v. N. L. R. B., 163 F.2d 22—National Labor Relations Board v. National Laundry Co., 138 F.2d 589, 78 U.S.App. D.C. 184.

Partial compliance with board's order is not so material as to justify granting an application for leave to adduce such fact as additional evidence.
U.S.—N. L. R. B. v. Swift & Co., C. C.A.8, 129 F.2d 222.
D.C.—N. L. R. B. v. National Laundry Co., 138 F.2d 589, 78 U.S.App. D.C. 184.

Harmless bias of trial examiner

Employer's motion for leave to adduce additional evidence of trial examiner's bias was denied where it appeared that bias, if any, was harmless.—N. L. R. B. v. Air Associates, C.C.A.2, 121 F.2d 586.

Misconduct of board member

An employer was not entitled to take additional testimony to show misconduct of members of board who left office before case was decided.—N. L. R. B. v. Weirton Steel Co., C.C.A.3, 135 F.2d 494.

Transfer of employer's assets

Where order ran not only to corporate employer but also to its officers, agents, successors, and assigns, additional evidence which employer sought to adduce that employer's assets had been transferred and that employer had been dissolved was immaterial.—Southport Petroleum Co. v. N. L. R. B., 62 S.Ct. 452, 315 U.S. 100, 86 L.Ed. 718, rehearing denied 62 S.Ct. 637, 315 U.S. 827, 86 L.Ed. 1223.

Releases signed by employees

Employer was not entitled to adduce additional evidence showing that discharged employees had signed releases acknowledging receipt of payments of money in full settlement of their claims for back pay, since evidence was not concerned with propriety of order, and hence was not material.—N. L. R. B. v. American Potash & Chemical Corporation, C.C.A.9, 98 F.2d 488, certiorari denied American Potash & Chemical Corporation v. N. L. R. B., 59 S. Ct. 582, 306 U.S. 643, 83 L.Ed. 1043.

13. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579—Southport Petroleum Co. v. N. L. R. B., 62 S.Ct. 452, 315 U.S. 100, 86 L.Ed. 718, rehearing denied 62 S.Ct. 637, 315 U.S. 827, 86 L.Ed. 1223—N. L. R. B. v. May Dept. Stores Co., C. C.A.8, 154 F.2d 533, certiorari denied 67 S.Ct. 72, 329 U.S. 725, 91 L.Ed. 627—N. L. R. B. v. West Kentucky Coal Co., C.C.A.6, 152 F.2d 198, certiorari denied 66 S.Ct. 1372, 328 U.S. 866, 90 L.Ed. 1636—N. L. R. B. v. Weirton Steel Co., C.C.A.3, 135 F.2d 494—N. L. R. B. v. Aluminum Products Co., C.C.A.7, 120 F.2d 567—Jacobsen v. N. L. R. B., C.C.A.3, 120 F.2d 96—N. L. R. B. v. Carlisle Lumber Co., C.C.A. 9, 94 F.2d 138, certiorari denied Carlisle Lumber Co. v. N. L. R. B., 58 S.Ct. 1045, 304 U.S. 575, 82 L. Ed. 1539—N. L. R. B. v. Anwelt Shoe Mfg. Co., C.C.A.1, 93 F.2d 367.
D.C.—N. L. R. B. v. National Laundry Co., 138 F.2d 589, 78 U.S.App. D.C. 184.

Exclusion of evidence

(1) Where board refused to hear evidence, failure of employer to adduce such evidence was held reasonable within statute.—N. L. R. B. v. New York Merchandise Co., C.C.A. 2, 134 F.2d 949.

(2) However, an application for leave to adduce additional evidence on the ground that the evidence was unlawfully excluded was denied where the record did not show that the evidence was in fact offered and rejected.—N. L. R. B. v. National Broadcasting Co., C.C.A.2, 150 F.2d 895.

Belief of unconstitutionality of statute

Fact that employers charged with unfair labor practices under National Labor Relations Act believed that act was unconstitutional did not justify their refusal to go to trial on merits or entitle them, subsequent to board's decision, to introduce additional testimony.—N. L. R. B. v. Anwelt Shoe Mfg. Co., C.C.A.1, 93 F. 2d 367.

14. U.S.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579—Southport Petroleum Co. v. N. L. R. B., 62 S. Ct. 452, 315 U.S. 100, 86 L.Ed. 718, rehearing denied 62 S.Ct. 637, 315 U.S. 827, 86 L.Ed. 1223.

Respect for discretion of board

An element of fair judicial discretion vested in the circuit court of appeals as to whether or not to order the taking of additional evidence consists of respect for a wide range of discretion in the board itself as to when the board should or should not inquire into allegations of violence or threats of violence by witnesses or parties before it.—N. L. R. B. v. Indiana & Michigan Electric Co., 63 S.Ct. 394, 318 U.S. 9, 87 L.Ed. 579.

purposes[15] and not for the mere purpose of delay.[16] It will not be granted where the allegations in support thereof do not contain allegations sufficient to justify the relief sought[17] or where it appears that the result would not be changed by the introduction of the new evidence.[18]

Under state labor relations acts containing provisions similar to those of the National Labor Relations Act, the court may order additional evidence to be taken before the board[19] when it is shown to the satisfaction of the court that such additional evidence is material[20] and that there were reasonable grounds for failure to adduce such evidence on the hearing before the board or hearing chairman.[21] The granting of leave to adduce additional evidence rests in the discretion of the court.[22]

Provisions of this nature do not contemplate that any evidence be produced before the court, the court's powers being limited to granting leave to present new facts to the board;[23] and the board, after the new evidence has been adduced before it, may then modify its findings on the basis of such additional evidence and file new findings with the same effect as the original findings.[24]

15. U.S.—Southport Petroleum Co. v. N. L. R. B., 62 S.Ct. 452, 315 U.S. 100, 86 L.Ed. 718, rehearing denied 62 S.Ct. 637, 315 U.S. 827, 86 L.Ed. 1223.

Enlargement of statutory scope of review

The power to adduce additional evidence granted to the circuit court of appeals cannot be employed to enlarge the statutory scope of judicial review.—N. L. R. B. v. Donnelly Garment Co., 67 S.Ct. 756, 330 U.S. 219, 91 L.Ed. ——.

Regularity or fairness of hearing

It has been held that the statutory provisions providing for the adducing of additional evidence before the board manifestly refers to evidence going to the merits of the charge and not to the question of the regularity or fairness of the hearing as conducted by the board.—Cupples Co. Manufacturers v. N. L. R. B., C.C.A. 8, 103 F.2d 953.

Action of board limited to directing election

Circuit courts of appeals have jurisdiction under National Labor Relations Act to order additional evidence to be taken only where proceeding involves an unfair labor practice, and not where the only action taken by the board was the direction of an election.—Inland Container Corporation v. N. L. R. B., C.C.A.6, 137 F.2d 642.

16. U.S.—Southport Petroleum Co. v. N. L. R. B., 62 S.Ct. 452, 315 U.S. 100, 86 L.Ed. 718, rehearing denied 62 S.Ct. 637, 315 U.S. 827, 86 L.Ed. 1223.

17. U.S.—Southport Petroleum Co. v. N. L. R. B., supra—N. L. R. B. v. Goodyear Tire & Rubber Co. of Alabama, C.C.A.5, 129 F.2d 661, certiorari dismissed 63 S.Ct. 1026, 319 U.S. 776, 87 L.Ed. 1723.

18. U.S.—Wyman-Gordon Co. (Ingalls Shepard Division) v. N. L. R. B., C.C.A.7, 153 F.2d 480—N. L. R. B. v. Van De Kamp's Holland-Dutch Bakers, C.C.A.9, 152 F.2d 818, modified on other grounds 154 F.2d 828—N. L. R. B. v. Aluminum Products Co., C.C.A.7, 120 F.2d 567—Republic Steel Corporation v. N. L. R. B., C.C.A.3, 107 F.2d 472, certiorari denied 60 S.Ct. 806, 309 U.S. 684, 84 L.Ed. 1027, vacated on other grounds 60 S.Ct. 1072, 310 U.S. 655, 84 L.Ed. 1419, certiorari denied Central Council of Steel Plants, Northern District, Republic Steel Corporation v. N. L. R. B., 60 S.Ct. 808, 309 U.S. 684, 84 L.Ed. 1028, supplemented, C.C.A., Republic Steel Corporation v. N. L. R. B., 114 F.2d 820, modified on other grounds 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6.

D.C.—E. Anthony & Sons v. N. L. R. B., 163 F.2d 22—Bethlehem Steel Co. v. N. L. R. B., 120 F.2d 641, 74 App.D.C. 52.

Change in union membership

Where employer sought to adduce additional testimony to show a change in membership in union after vote was taken and lack of present majority in favor of union representation, and board took position that, even with added testimony, it would be required to reaffirm order and again direct respondent to bargain with union, court denied motion to remand for purpose of adducing additional testimony as a useless gesture.—N. L. R. B. v. Swift & Co., C.C.A.3, 158 F.2d 670.

19. Wash.—Century Building Co. v. Wisconsin Employment Relations Board, 291 N.W. 305, 235 Wash. 376.

Wis.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

Nature of evidence

A provision authorizing the court to direct additional evidence to be taken by the board has been held to refer to evidence available at the time of the hearing before the board and relating to conditions existing prior to the entry of the order.—New York State Labor Relations Board v. Timen, 35 N.Y.S.2d 449, 264 App.Div. 120, appeal granted 44 N.E.2d 618, 289 N.Y. 644.

20. Pa.—Case of York Corp. Employees, Com.Pl., 59 York Leg.Rec. 157.

Wis.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

Issue held immaterial

Wis.—Century Building Co. v. Wisconsin Employment Relations Board, 291 N.W. 305, 235 Wis. 376.

21. Pa.—Case of York Corp. Employees, Com.Pl., 59 York Leg.Rec. 157.

Wis.—Folding Furniture Works v. Wisconsin Labor Relations Board, 285 N.W. 851, 232 Wis. 170, rehearing denied 286 N.W. 875, 232 Wis. 170.

22. Wash.—Century Building Co. v. Wisconsin Employment Relations Board, 291 N.W. 305, 235 Wash. 376.

Failure to show meritorious defense

An application to remand the case to the board to enable the employer to interpose additional evidence will be denied where nowhere in the affidavits presented in support of the application is the evidence on the merits referred to which would challenge that in the record and, at least presumptively, show that there is a meritorious defense.—New York State Labor Relations Board v. Paragon Oil Co., 45 N.Y.S.2d 152.

Inconsistent contention

Request for reopening of case to permit introduction of evidence not presented because of trial examiner's denial of adjournment was held without merit as inconsistent with principal contention in brief that board was guilty of laches in prosecution of charges, for reopening would result in more delay.—New York State Labor Relations Board v. Paragon Oil Co., supra.

23. Wash.—Century Building Co. v. Wisconsin Employment Relations Board, 291 N.W. 305, 235 Wash. 376.

24. Wis.—Century Building Co. v.

§ 28(140). Decree in General

The usual rules governing the construction and operation of judicial decrees apply to decrees rendered in proceedings to enforce an order of a labor relations board. Successors or assigns of the employer may be bound under some circumstances.

The construction and operation of a court decree rendered in proceedings to enforce an order of a labor relations board are governed by the usual rules.[25] A cease and desist order of the board, when sustained by the court, is in effect an injunction.[26] It has been held that the conduct of the employer prior to the date of the board's order determines the character of the acts from which the employer was ordered to cease and desist;[27] but it has also been held that the scope of a consent decree may not be limited on the ground that the acts complained of as violating the decree had no connection with, or similarity to, the acts and practices which brought about the enforcement decree and which that decree sought to remedy.[28]

If the enforcement decree needs any clarification, the proper procedure, it has been held, is an application to the court which rendered it.[29] The court has been held not authorized, however, particularly after an enforcement order has been entered and the proceedings closed, to receive and hear a petition of the board which seeks instruction on the payment of funds to the employees.[30] It has also been held that the court has no authority on a petition for the construction of an enforcement decree, or under the guise of modification or interpretation thereof, to advise an employer as to whether or not its activities constitute a violation of the decree;[31] and it has been asserted that even if the court had such authority it would not make such a determination since its decision on such matter would not be binding on the parties.[32]

Persons bound; successors and assigns. An enforcement decree binds the parties and their privies.[33] Enforcement may be granted of a cease

Wisconsin Employment Relations Board, supra.

Court's suggestion of additional findings

Pa.—Pennsylvania Labor Relations Board v. Beck, Com.Pl., 25 West. L.J. 170.

25. **Enforceable obligation**

A decree affirming a back-pay award creates a definite and enforceable obligation against the employer.—N. L. R. B. v. Killoren, C.C.A.Mo., 122 F.2d 609, 137 A.L.R. 510, certiorari denied Killoren v. N. L. R. B., 62 S.Ct. 412, 314 U.S. 696, 86 L.Ed. 556.

"Final," within statute providing that court's judgment enforcing an order of the employment relations board shall be "final" except that it shall be subject to review by the supreme court, does not relate to the finality of the interest of the board in the proceedings, but means merely that a judgment following such proceedings is a final adjudication of the matter litigated unless it be reversed on appeal.—Wisconsin Employment Relations Board v. Allis-Chalmers Workers' Union, Local 248, 25 N.W.2d 425, 249 Wis. 590.

Reinstatement of employees

An enforcement decree which provided for the reinstatement of striking employees was held intended to effect a restoration of the status quo and to contemplate a return of the employees to their former jobs, as against the contention that the decree was satisfied merely by reinstatement to former classifications.—N. L. R. B. v. Remington Rand, C.C.A.2, 130 F.2d 919.

Necessity of awaiting election

Decree enforcing order requiring employer to bargain collectively with designated union was construed as requiring employer to negotiate without waiting for an election, despite proviso permitting the company, or labor organizations at its plant, to petition board for a certification of representatives.—Solvay Process Co. v. N. L. R. B., C.C.A.5, 122 F.2d 993, certiorari denied 61 S.Ct. 1121, 313 U.S. 596, 85 L.Ed. 1549.

26. U.S.—N. L. R. B. v. Lipshutz, C.C.A.5, 149 F.2d 141.

27. U.S.—N. L. R. B. v. Pacific Greyhound Lines, C.C.A.9, 106 F.2d 867.

28. U.S.—N. L. R. B. v. American Mfg. Co., C.C.A.5, 132 F.2d 740, certiorari denied American Mfg. Co. of Texas v. N. L. R. B., 63 S.Ct. 1030, 319 U.S. 743, 87 L.Ed. 1700.

29. N.Y.—Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 20 N.E.2d 390, 280 N.Y. 194.

Procedure not favored

In a case in which the court entertained a petition to clarify and interpret an enforcement decree rendered by it, in view of considerations of national defense and the peculiar facts of the case, it stated that its action in so doing was not to be considered as a precedent for other cases in the future.—Solvay Process Co. v. N. L. R. B., C.C.A.5, 122 F.2d 993, certiorari denied 61 S.Ct. 1121, 313 U.S. 596, 85 L.Ed. 1549.

30. U.S.—Stewart Die Casting Corp. v. N. L. R. B., C.C.A.7, 132 F.2d 801.

31. U.S.—J. Greenebaum Tanning Co. v. N. L. R. B., C.C.A.7, 129 F.2d 487.

32. U.S.—J. Greenebaum Tanning Co. v. N. L. R. B., supra.

33. U.S.—Le Tourneau Co. of Ga. v. N. L. R. B., C.C.A.Ga., 150 F.2d 1012.

New corporation

Where corporation transferred its machinery and business to new corporation formed by persons in control of old corporation, the National Labor Relations Board's order against both corporations to cease and desist from unfair labor practices was ordered vacated as against new corporation, since it was not a subsidiary but a distinct and separate entity.—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 98 F.2d 97.

Unsuccessful union

Where employer had refused to bargain with a union certified as bargaining representative, such refusal being grounded on alleged fear of economic reprisals by another union, and court could not assume that the unsuccessful union would not respect court's decision affirming the selection of bargaining representative, the enforcement order against the employer would not also be made to run against the unsuccessful union.—N. L. R. B. v. National Broadcasting Co., C.C.A.2, 150 F.2d 895.

Partnership acquiring corporation's business

Finding of facts constituting commission of unfair labor practices by corporation, and that proceeding before labor relations board was not instituted until after partnership had acquired business, did not preclude enforcement of order against partnership.—N. L. R. B. v. Adel Clay Products Co., C.C.A.8, 134 F.2d 342.

and desist order of the board which is directed not only against a particular respondent, but also its "successors and assigns;"[34] the inclusion of "successors and assigns" is permissible on the ground that such parties may under some circumstances be among those reached by the enforcement order,[35] as where they are instrumentalities through which a party seeks to evade the decree, or where they are in active concert or participation with a party in the violation of the decree.[36] It has been considered, however, that provisions of this nature are unnecessary,[37] that they add nothing to the effectiveness of the decree,[38] and that whether one is bound by the decree as a successor or assign of the employer depends on an appraisal of his relations and behavior and not on mere construction of the terms of the enforcement order.[39]

It has been asserted that an employer's officers and agents are bound as privies;[40] but it has also been held improper to direct enforcement against the individuals who were the directors or officers of a corporate employer.[41]

§ 28(141). Compliance with Decree

There must be compliance in good faith with the terms of an enforcement decree.

There must be compliance with a decree enforcing an order of a labor relations board in accordance with its terms,[42] and, where the terms of a consent decree are clear and comprehensive, they may not be defied or disobeyed on the ground that they read more broadly than the employer intended they should.[43] An enforcement decree directing collective bargaining requires the employer to deal with the representatives selected by the employees of an appropriate unit as their sole agent.[44] Such a decree requires bargaining in good faith with the purpose of reaching an agreement,[45] and the obligation to bargain in good faith rests on the labor organization as well as on the employer.[46] Under such a decree the employer may be com-

34. U.S.—Regal Knitwear Co. v. N. L. R. B., 65 S.Ct. 478, 324 U.S. 9, 89 L.Ed. 661—N. L. R. B. v. Landis Tool Co., C.C.A.3, 145 F.2d 152—N. L. R. B. v. Gluek Brewing Co., C.C.A.8, 144 F.2d 847—N. L. R. B. v. Brezner Tanning Co., C. C.A.1, 141 F.2d 62—N. L. R. B. v. Weirton Steel Co., C.C.A.3, 135 F. 2d 494—N. L. R. B. v. Jac. Feinberg Hosiery Mill, Inc., C.C.A.4, 134 F.2d 620—N. L. R. B. v. Blackstone Mfg. Co., C.C.A.2, 123 F.2d 633.

D.C.—Bethlehem Steel Co. v. N. L. R. B., 74 App.D.C. 52, 120 F.2d 641.

N.Y.—In re New York State Labor Relations Board, 46 N.Y.S.2d 524, 180 Misc. 1031, appeal dismissed 49 N.Y.S.2d 411, 268 App.Div. 827. Reversed on other grounds 63 N.E. 2d 68, 294 N.Y. 480, 161 A.L.R. 802, reargument denied 64 N.E.2d 278, 295 N.Y. 568.

35. U.S.—Regal Knitwear Co. v. N. L. R. B., 65 S.Ct. 478, 324 U.S. 9, 89 L.Ed. 661.

Successors or assigns as privies

Successors of an employer, although not parties to the case personally, are privies; assignees may or may not be bound depending on the circumstances.—Le Tourneau Co. of Ga. v. N. L. R. B., C.C.A.Ga., 150 F.2d 1012.

Continuance of business

The decree may properly run against the successors and assigns of the employer where it is not suggested that the property has been liquidated or that the business does not continue as an operating unit.—N. L. R. B. v. Weirton Steel Co., C. C.A.3, 135 F.2d 494.

36. U.S.—Regal Knitwear Co. v. N. L. R. B., 65 S.Ct. 478, 324 U.S. 9, 89 L.Ed. 661.

37. U.S.—Le Tourneau Co. of Ga. v. N. L. R. B., C.C.A.Ga., 150 F.2d 1012—N. L. R. B. v. Stone, C.C.A.7, 125 F.2d 752—N. L. R. B. v. Bachelder, C.C.A.7, 125 F.2d 387, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519.

38. U.S.—Le Tourneau Co. of Ga. v. N. L. R. B., C.C.A.Ga., 150 F. 2d 1012.

Enlargement of obligations

The inclusion of "successors and assigns" does not enlarge the employer's own obligation; and, if the employer complies with the order, little by way of obligation may be passed to a successor or assign by the order that is not in any event imposed by statute.—Regal Knitwear Co. v. N. L. R. B., 65 S.Ct. 478, 324 U.S. 9, 89 L.Ed. 661.

39. U.S.—Regal Knitwear Co. v. N. L. R. B., supra.

Scope of decree limited by Federal Rules of Civil Procedure

The addition of the words "successors and assigns" cannot enlarge the scope of the decree of a federal court beyond that defined by the Federal Rules of Civil Procedure providing that injunctions and restraining orders are binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and those persons in active concert with them who receive actual notice of the order.—Regal Knitwear Co. v. N. L. R. B., supra.

40. U.S.—Le Tourneau Co. of Ga. v. N. L. R. B., C.C.A.Ga., 150 F.2d 1012.

41. N.Y.—In re New York State Labor Relations Board, 46 N.Y.S.2d 524, 180 Misc. 1031, appeal dismissed 49 N.Y.S.2d 411, 268 App. Div. 827. Reversed on other grounds 63 N.E.2d 68, 294 N.Y. 480, 161 A.L.R. 802, reargument denied 64 N.E.2d 278, 295 N.Y. 568.

42. U.S.—N. L. R. B. v. American Mfg. Co., C.C.A.5, 132 F.2d 740, certiorari denied American Mfg. Co. of Texas v. N. L. R. B., 63 S. Ct. 1030, 319 U.S. 743, 87 L.Ed. 1700.

Misapplication of order by board

Where the court has rendered an enforcement decree, and in so doing has construed the board's order, any action of the board in attempting to apply the order otherwise than according to the intent and meaning of the order as construed by the court is subject to review on petition properly filed with the court. —N. L. R. B. v. Planters Mfg. Co., C.C.A.4, 106 F.2d 524.

43. U.S.—N. L. R. B. v. American Mfg. Co., C.C.A.5, 132 F.2d 740, certiorari denied American Mfg. Co. of Texas v. N. L. R. B., 63 S. Ct. 1030, 319 U.S. 743, 87 L.Ed. 1700.

44. U.S.—N. L. R. B. v. Knoxville Pub. Co., C.C.A.6, 124 F.2d 875.

45. U.S.—N. L. R. B. v. Express Pub. Co., C.C.A.5, 128 F.2d 690, certiorari denied 63 S.Ct. 157, 317 U.S. 676, 87 L.Ed. 542.

46. U.S.—N. L. R. B. v. Express Pub. Co., supra.

pelled to enter into a written agreement covering wages, hours, and working conditions which in fact prevail in its business at the time of the proceedings;[47] but the decree does not require the employer to make a collective contract hiring individuals on any other terms than those which, as a matter of voluntary action, it does in fact lay down.[48]

Refusal to confess illegal act. It has been held that the refusal of a person to confess the commission of an illegal act, as ordered by the board, should not be punished under the power of the court to enforce obedience to its decrees.[49]

§ 28(142). —— Contempt

Disobedience of an enforcement decree is punishable in contempt proceedings instituted by the labor relations board; and if there are disputed issues of fact in such proceedings a master may be appointed to take testimony and make findings.

Disobedience of a decree enforcing an order of a labor relations board is punishable by contempt proceedings,[50] and the fact that a case has been remanded to the board for further proceedings in connection with some provisions of its order does not preclude a motion to punish the employer for disobedience of other provisions with respect to which enforcement has been decreed.[51] The board has exclusive authority to institute proceedings for the violation of a court decree directing enforcement of an order of the board.[52] Impossibility of performing the order of the board may be determined in contempt proceedings brought after rendition of the enforcement decree.[53] It has been held that, in determining whether an employer is guilty of contempt for violation of the court's decree, the time elapsing between the date of the board's order and the date of the alleged violation, although not controlling, is not immaterial.[54]

With respect to the significance of a change in conditions since the entry of the board's order, the considerations applicable in an enforcement proceeding are different from those on a proceeding to punish for contempt for failure to comply with an enforcement order already made;[55] thus, although a change in circumstances does not constitute a defense in enforcement proceedings, as discussed supra § 28 (132), in the contempt proceeding the court may in its discretion consider intervening circumstances in determining whether punishment should be administered.[56] The court will not pun-

47. U.S.—N. L. R. B. v. Knoxville Pub. Co., C.C.A.6, 124 F.2d 875.

Refusal to sign agreement as bad faith

Where the bargaining agent for the employees demands no more as to wages, hours, and other conditions than what the employer has already granted and proposes to grant, the parties to the bargaining conference are in agreement, and, being in agreement, an employer who, by his refusal to honor the agreement with his signature, impairs the bargaining process does not bargain in good faith.—N. L. R. B. v. Knoxville Pub. Co., supra.

48. U.S.—N. L. R. B. v. Knoxville Pub. Co., supra.

49. U.S—N. L. R. B. v. Eagle Mfg. Co., C.C.A.4, 99 F.2d 930—N. L. R. B. v. A. S. Abell Co., C.C.A.4, 97 F.2d 951.

50. U.S.—Amalgamated Utility Workers v. Consolidated Edison Co. of N. Y., 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738—J. Greenebaum Tanning Co. v. N. L. R. B., C.C.A.7, 129 F.2d 487—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

Matter taken from board's consideration

A cease and desist order takes from the consideration of the board, and makes a matter of court contempt, the employer's relation with disestablished union.—N. L. R. B. v. Sterling Elec. Motors, C.C.A.9, 109 F. 2d 194, affirmed, C.C.A., 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed N. L. R. B. v. Sterling Elec. Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

Sufficiency of decree to support contempt

An enforcement decree is not void for indefiniteness, and will support contempt proceedings, where it incorporates by reference the provisions of a sufficiently explicit order of the board.—N. L. R. B. v. Hopwood Retinning Co., C.C.A.2, 104 F. 2d 302.

51. U.S.—N. L. R. B. v. New York Merchandise Co., C.C.A.2, 134 F.2d 949.

52. U.S.—Amalgamated Utility Workers v. Consolidated Edison Co. of N. Y., 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738—J. Greenebaum Tanning Co. v. N. L. R. B., C.C.A. 7, 129 F.2d 487—N. L. R. B. v. Sunshine Mining Co., C.C.A.9, 125 F.2d 757.

Labor organization cannot maintain petition requesting that employer be adjudged in contempt for failure to comply with requirements of decree directing enforcement of an order of the National Labor Relations Board.—Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 60 S.Ct. 561, 309 U.S. 261, 84 L.Ed. 738.

53. U.S.—N. L. R. B. v. Gluek Brewing Co., C.C.A.8, 144 F.2d 847.

54. U.S.—N. L. R. B. v. Pacific Greyhound Lines, C.C.A.9, 106 F.2d 867.

55. N.Y.—New York State Labor Relations Board v. Timen, 35 N.Y. S.2d 449, 264 App.Div. 120, appeal granted 44 N.E.2d 618, 289 N.Y. 644.

56. U.S.—N. L. R. B. v. Acme Air Appliance Co., C.C.A.2, 117 F.2d 417.

N.Y.—New York State Labor Relations Board v. Timen, 35 N.Y.S.2d 449, 264 App.Div. 120, appeal granted 44 N.E.2d 618, 289 N.Y. 644—New York State Labor Relations Board v. Jacobson, 35 N.Y.S. 2d 157.

Good-faith challenge of bargaining agent

It has been held that where an employer in good faith challenges the right of a labor organization to act as bargaining agent, although the organization was previously recognized in an enforcement decree as

ish for contempt a mere failure to comply with its order in the face of a showing that the order was ambiguous and that the employer construed it in good faith, and in good faith endeavored to comply with it.[57]

An employer cannot be subjected to contempt proceedings for alleged violation of a decree which, in directing enforcement of a general back-pay and reinstatement order, leaves open matters of administrative determination for the board, such as the amount of back pay or the position to be offered; in such case the employer is not liable for contempt until new findings have been made and the original decree modified so as to prescribe definitely what the employer is to do.[58] Thus, in the case of a controversy as to the amount of back pay, the employer cannot be subjected to contempt until a hearing has been held by the board, a decision has been rendered fixing the amount, and the court has incorporated the amount so fixed into its own order.[59] Similarly, whether or not positions involving substantially equivalent employment are open, so that the order of reinstatement can apply to them, and what sort of reëmployment will wipe out the effects of unfair labor practices, are essentially administrative questions, and only after they have been answered is the court in a position to direct the employer to take specific action of such a character that disobedience of its order will justify punishment for contempt.[60]

The court, acting through a commissioner or special master, may take testimony and make findings on an issue of contempt.[61] On the hearing of contempt proceedings, the board should be required to prove by competent and material evidence that its charges are true,[62] and in this connection a rather heavy burden rests on the board.[63] A showing of contempt requires something more than a mere preponderance of evidence,[64] and clear and convincing proof is necessary.[65] The employer and any of its officers who are accused should be accorded the right to confront the board's witnesses, to cross-examine them, and to adduce evidence to disprove the charges.[66] Subpœnas may be issued to aid in the production of evidence on the hearing.[67]

Conclusiveness of commissioner's or master's findings. The findings of a commissioner in contempt proceedings for violation of a decree enforcing an order of the National Labor Relations Board are subject to review by the court under the Federal Rules of Civil Procedure, 28 U.S.C.A. following § 723c, and not under the rule set forth in the

representing a majority of the employees, the court will not treat the employer's refusal to deal with such organization at a subsequent time as a contempt until after the board has certified the result.—N. L. R. B. v. Remington Rand, C.C.A.2, 94 F.2d 862, certiorari denied Remington Rand v. N. L. R. B., 58 S.Ct. 1046, 304 U.S. 576, 82 L.Ed. 1540, rehearing denied Remington Rand v. U. S., 58 S.Ct. 1054, 304 U.S. 590, 82 L.Ed. 1549, certiorari denied Central Executive Council of Remington Rand Employes' Ass'ns v. N. L. R. B., 58 S.Ct. 1061, 304 U.S. 585, 82 L.Ed. 1546.

57. U.S.—N. L. R. B. v. Athens Mfg. Co., C.C.A.5, 163 F.2d 255.

58. U.S.—Wallace Corp. v. N. L. R. B., C.C.A.4, 159 F.2d 952—N. L. R. B. v. New York Merchandise Co., C.C.A.2, 134 F.2d 949.

59. U.S.—Wallace Corp. v. N. L. R. B., C.C.A.4, 159 F.2d 952—N. L. R. B. v. New York Merchandise Co., C.C.A.2, 134 F.2d 949.

60. U.S.—Wallace Corp. v. N. L. R. B., Local No. 129, C.C.A.4, 159 F. 2d 952.

61. U.S.—Wallace Corp. v. N. L. R. B., supra—N. L. R. B. v. Little Rock Furniture Mfg. Co., C.C.A.8, 123 F.2d 868.

Finding as to back pay and reinstatement

Where there has been a remand to the board and new findings by it on issues of back pay and reinstatement, which have been embodied in an enforcement decree, if the court desires a finding to be made as a basis for the exercise of the power to punish an employer for contempt for failure to comply with the enforcement decree, the court may either make the finding itself or have it made by a commissioner appointed by the court.—Wallace Corp. v. N. L. R. B., Local No. 129, C.C.A.4, 159 F.2d 952.

62. U.S.—N. L. R. B. v. Little Rock Furniture Mfg. Co., C.C.A.8, 123 F. 2d 868.

Violation held not shown

(1) Generally.—N. L. R. B. v. Remington Rand, C.C.A.2, 130 F.2d 919.

(2) An employer who took back striking employees within a few days after entry of decree enforcing order of board which required employer to reinstate striking employees immediately was held to have sufficiently complied with the decree.—N. L. R. B. v. Giannasca, C.C.A.2, 119 F.2d 756, 135 A.L.R. 560.

(3) Refusal by supervisory officials to meet with grievance committees of union because employer's president informed union's representative that he would handle such matters directly did not constitute a violation of court decree enjoining employer from interfering with employees etc., so as to warrant adjudication of contempt against employer.—N. L. R. B. v. Standard Trouser Co., C.C.A.4, 162 F.2d 1012.

63. U.S.—N. L. R. B. v. Standard Trouser Co., supra.

64. U.S.—N. L. R. B. v. Standard Trouser Co., supra.

65. U.S.—N. L. R. B. v. Standard Trouser Co., supra.

66. U.S.—N. L. R. B. v. Little Rock Furniture Mfg. Co., C.C.A.8, 123 F.2d 868.

67. **Subpœnas in lieu of depositions and discovery**

In contempt proceeding, where date of hearing was near and the issues did not appear to be particularly complicated, the court as a matter of discretion denied board's motion for pretrial depositions and discovery, and for production thereon of certain books, records, and documents, and in lieu thereof directed clerk to issue subpœnas duces tecum for production on the contempt hearing of books, records, and documents and subpoenas ad testificandum directed to individuals named requiring their attendance at the hearing. —Bethlehem Shipbuilding Corporation v. N. L. R. B., C.C.A.1, 120 F.2d 126.

National Labor Relations Act making the findings of the board, if supported by sufficient evidence, conclusive whether or not the court agrees with them.[68] The findings of a special master should be set aside by the court only where such findings are clearly erroneous,[69] and not simply because the court might have reached a different conclusion;[70] and in this respect it has been observed that a special master who has seen and heard the witnesses, and who could observe their demeanor while testifying, is in a better position than the court to pass on the credibility of witnesses.[71]

Denial of contempt without prejudice. The court may in its discretion deny a motion to punish the employer for contempt without prejudice to a renewal in the event that there is no compliance with the court's order of enforcement within a reasonable time.[72]

§ 28(143). Modification or Vacation of Decree

A decree rendered in an enforcement proceeding may be modified or set aside by the court on an application which is timely presented and based on sufficient grounds.

The court in a proper case may modify or set aside a decree rendered by it in an enforcement proceeding;[73] and even after the expiration of the term it has power to modify an enforcement decree in so far as the decree is executory or continuing.[74] An application for modification of an enforcement decree will be denied, however, where there is a want of equity therein.[75] The National Labor Relations Board is not entitled, as of right, to have a decree procured by it set aside in part and the cause remanded for trial de novo in part;[76] and, where the term at which the decree was entered has expired, the only remedy of the board to obtain vacation thereof has been held to be a bill of review.[77]

§ 28(144). Review of Decree

General rules apply to the review by a higher court of a judicial decree rendered in proceedings to confirm or vacate an award in a labor dispute.

The review of a decree of a lower court in proceedings to confirm or vacate an award in a labor dispute is governed by the usual rules.[78] Objections not raised or considered below will not be considered on appeal.[79]

Right of board to appeal. Under some statutes it has been held that the labor relations board is not entitled to appeal from a decision of a lower court setting aside an order of the board, since the right to such appeal is limited to the actual parties in interest who are concerned and affected, such as the employees and the employer.[80]

68. U.S.—Wallace Corp. v. N. L. R. B., C.C.A.4, 159 F.2d 952.
Conclusiveness of board's findings in proceedings for enforcement or review of board's order see supra § 28 (136).

69. U.S.—N. L. R. B. v. Standard Trouser Co., C.C.A.4, 162 F.2d 1012—Polish National Alliance of U. S. of North America v. N. L. R. B., C.C.A.7, 159 F.2d 38.

Findings upheld
U.S.—N. L. R. B. v. Standard Trouser Co., C.C.A.4, 162 F.2d 1012.

70. U.S.—Polish National Alliance of U. S. of North America v. N. L. R. B., C.C.A.7, 159 F.2d 38.

71. U.S.—N. L. R. B. v. Standard Trouser Co., C.C.A.4, 162 F.2d 1012.

72. U.S.—N. L. R. B. v. Remington Rand, C.C.A.2, 97 F.2d 195.

73. U.S.—McQuay-Norris Mfg. Co. v. N. L. R. B., C.C.A.7, 119 F.2d 1009, certiorari denied 61 S.Ct. 843, 313 U.S. 565, 85 L.Ed. 1524—N. L. R. B. v. Sterling Electric Motors, C.C.A.9, 114 F.2d 738, certiorari dismissed 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471, motion denied Ex parte N. L. R. B., 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391.

Time during which decree should operate
In view of the Labor Management Relations Act of 1947, which amended the National Labor Relations Act so as to exclude supervisors from the term "employee," a decree which enforced an order directing an employer to cease and desist from discouraging membership of its supervisory employees in a union was modified so as to be limited to the period ending with the effective date of the Labor Management Relations Act.—Eastern Gas & Fuel Associates v. N. L. R. B., C.C.A.6, 162 F.2d 864.

Request to amend as constituting petition for rehearing
A request to amend an enforcement decree may constitute, in effect, a petition for a rehearing, and may be disposed of as such.—N. L. R. B. v. Bachelder, C.C.A.7, 125 F.2d 387, certiorari denied Bachelder v. N. L. R. B., 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519.

74. U.S.—Stewart Die Casting Corporation v. N. L. R. B., C.C.A.7, 129 F.2d 481.

75. U.S.—Stewart Die Casting Corp. v. N. L. R. B., supra.

Elimination of proviso requiring election
Modification of an enforcement decree so as to eliminate a proviso requiring an election before a designated union should act as the bargaining agent was denied where the board and the employer had agreed to the proviso, and neither claimed that such proviso should be eliminated, the application for modification being made by the designated union.—Stewart Die Casting Corp. v. N. L. R. B., supra.

76. U.S.—International Union of Mine, Mill and Smelter Workers, Locals No. 15 v. Eagle-Picher Mining & Smelting Co., 65 S.Ct. 1166, 325 U.S. 335, 89 L.Ed. 1649, motions granted 66 S.Ct. 8, 326 U.S. 684, 90 L.Ed. 400.

77. U.S.—International Union of Mine, Mill and Smelter Workers, Locals No. 15 v. Eagle-Picher Mining & Smelting Co., supra.

78. **Moot questions**
An appeal will be dismissed where the questions involved have become moot.—Consolidated Vultee Aircraft Corp. v. United Auto. Aircraft and Agr. Implement Workers of America, Local 904, 167 P.2d 725, 27 Cal.2d 859.

79. N.Y.—Stork Restaurant v. Boland, 26 N.E.2d 247, 282 N.Y. 256.

80. Pa.—Pennsylvania Labor Relations Board v. Heinel Motors, 25 A.2d 306, 344 Pa. 238.

D. TERMINATION OF RELATION

§ 29. In General

A contract of employment for a definite term may not be terminated before the end of the term, except for cause or by mutual agreement, unless the right to do so is reserved in the contract.

Where a contract of employment is for a definite term, it may not be terminated at an earlier period,[81] except for cause[82] or by mutual agreement, as considered infra § 33, unless the right to do so is reserved in the contract, infra § 32. However, there may be a tenure or term of office determinable at will.[83] It has also been stated generally that employment is held only by mutual consent,[84] and that at common law the right of the employer to terminate the employment is unconditional and absolute.[85] On the termination of an employment the law implies, in the absence of an agreement to the contrary, that the employee will discontinue the use of all the property of his former employer, returning it where possible.[86]

Failure to furnish work. Where the employee continues in the employment after the employer's failure to furnish work for a part of the service period contracted for, he waives his right to terminate the contract on that ground.[87]

"Labor separations" are classified as "quits," defined infra § 40, "discharges" defined infra § 41, and "layoffs," which have been defined as terminations of employment at the will of the employer, without prejudice to the worker, and may be due to lack of orders, technical changes, or the failure of flow of parts or materials to the job, as needed.[88]

§ 30. Expiration of Term

An employment for a definite period terminates at the end of the period. A periodic employment may be terminated by either party at the end of any particular period.

A contract of employment for a definite period terminates by its own terms at the end of such period.[89] Where the continuation of employment after the expiration of the original employment period is for an indefinite period, or without any fixed limitation as to time, it may be terminated at will by either party.[90]

Periodic employment. Where the hiring is by the

81. Ark.—Moline Lumber Co. v. Harrison, 194 S.W. 25, 128 Ark. 260, 11 A.L.R. 466.
La.—Harrosh v. Fife Bros. Health Ass'n, App., 1 So.2d 323.
Mo.—Fullington v. Ozark Poultry Supply Co., 39 S.W.2d 780, 327 Mo. 1167.
N.J.—Dennis v. Thermoid Co., 25 A. 2d 886, 128 N.J.Law 303.
N.C.—Elmore v. Atlantic Coast Line R. Co., 131 S.E. 633, 191 N.C. 182, 43 A.L.R. 1072.
Tex.—Fairbanks, Morse & Co. v. Carsey, Civ.App., 109 S.W.2d 985, error dismissed.
39 C.J. p 71 note 46.
Discharge of seamen see the C.J.S. title Seamen §§ 30–41, also 56 C. J. p 940 note 24–p 951 note 79.
Obligation of master to furnish work in general see infra § 61.
Power of employer to make wrongful discharge see infra § 41.
Term and duration of employment in general see supra § 8.
Termination of employment of:
Agents and employees of schools and school districts see the C.J. S. title Schools and School Districts § 152, also 56 C.J. p 366 notes 86, 87.
Municipal employees see the C.J.S. title Municipal Corporations §§ 732–744, also 43 C.J. p 910 note 52–p 920 note 37.
Officers and agents of corporation see Corporations §§ 732–738, 1251 b.
School teachers see the C.J.S. title Schools and School Districts §§ 200–216, also 56 C.J. p 398 note 33–p 415 note 29.
Termination of relation:
As affecting master's liability for injuries to:
Servant see infra § 180.
Third persons see infra § 568.
Of agency see Agency §§ 70–90.
A professional boxer is not entitled to terminate a contract of employment with his manager on the ground that his share of the net proceeds of the contests and exhibitions in which he engages is in violation of the law where no regulation of the boxing commission forbidding such a division of the proceeds is shown, and the contract expressly provides for the waiver of any unlawful portions.—Baer v. Lorimer, 28 P.2d 909, 219 Cal. 677.

82. La.—Harrosh v. Fife Bros. Health Ass'n, App., 1 So.2d 323.
Mo.—Fullington v. Ozark Poultry Supply Co., 39 S.W.2d 780, 327 Mo. 1167.
N.J.—Dennis v. Thermoid Co., 25 A. 2d 886, 128 N.J.Law 303.

83. U.S.—N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036.

84. U.S.—Pope Motor Car Co. v. Keegan, C.C.Ohio, 150 F. 148.
Mo.—Douglas v. Metropolitan Life Ins. Co., App., 297 S.W. 87.

85. U.S.—Jefferson Electric Co. v. N. L. R. B., C.C.A.7, 102 F.2d 949.
Incident of the relationship
The right of immediate discharge is an incident of the relationship of employer and employee, and points strongly to the existence of such a relationship.—Mountain Meadow Creameries v. Industrial Accident Commission, 76 P.2d 724, 25 Cal.App. 2d 123.
Whether employment terminated
In determining whether term of employment under original contract was actually terminated or merely suspended, duration of period intervening before reëmployment under new contract is material fact, but not conclusive.—Hambleton & Co. v. Union Nat. Bank of Pittsburgh, 157 A. 404, 161 Md. 318.

86. N.Y.—Kadison v. Reibman, 62 N. Y.S.2d 728.

87. N.Y.—Livingston v. Klaw, 122 N.Y.S. 264, 137 App.Div. 639.

88. Fla.—International Ass'n of Machinists v. State ex rel. Watson, 15 So.2d 485, 153 Fla. 672.

89. Ark.—Ewing v. Janson, 21 S.W. 430, 57 Ark. 237.
Construction of contract as to duration see supra § 8.

90. La.—Russell v. White Oil Corporation, 110 So. 70, 162 La. 9—Fletcher v. Crichton, App., 159 So. 442, affirmed 162 So. 435, annulled on other grounds 164 So. 411, 183 La. 551.

day,[91] or from week to week,[92] or from month to month,[93] either party has the right to terminate it at the end of any particular employment period, without notice.[94] Conversely, an employment from year to year,[95] including a year-to-year employment after a definite term,[96] or from month to month,[97] may be terminated only at the end of the unit period, except by consent of the parties.[98] Likewise, in jurisdictions where the fixing of a salary or wage at so much per unit of service, as at so much per week or month, without specifying the duration of the employment, makes the employment definite for the unit or period so fixed; as considered supra § 8, the employment is terminable by either party at the end of any unit period[99] on the giving of notice;[1] but it may be terminated only at the end of such unit period.[2] A general custom does not arise from the fact that wages are paid periodically that an employee may be discharged on a notice equal to such periods.[3]

§ 31. Indefinite Term

In the absence of a statutory or contractual provision to the contrary, an employment for an indefinite term may be terminated at the will of either party.

In the absence of a statute to the contrary, an employment for an indefinite term may be terminated at the will of either party,[4] regardless of the length

Continuance of employment after expiration of term see supra § 10.

91. Mich.—Wyngert v. Norton, 4 Mich. 286.
39 C.J. p 71 note 52.

92. Mo.—Hutton v. Lambardi, App., 180 S.W. 566.
N.Y.—Dunbar v. Cuban Land & Steamship Co., 75 N.Y.S. 498, 37 Misc. 360.

93. Ala.—Holland v. State, 194 So. 412, 29 Ala.App. 181.
Ohio.—Red Star Yeast & Products Co. v. Hague, 157 N.E. 393, 25 Ohio App. 100.
39 C.J. p 71 note 54.

Intent to terminate
Salesman's acceptance of salary was held to show intent of parties to terminate employment at end of any month for any reason.—Red Star Yeast & Products Co. v. Hague, supra.

94. Ohio.—Red Star Yeast & Products Co. v. Hague, supra.

95. Tex.—Accidental Oil Mills v. Tomlinson, Civ.App., 8 S.W.2d 558, error refused.

96. N.Y.—Carter v. Bradlee, 280 N.Y.S. 368, 245 App.Div. 49, affirmed 200 N.E. 48, 269 N.Y. 664.

97. Miss.—Ross v. Fair, 110 So. 841, 145 Miss. 18.
Tex.—Crater Oil Co. v. Voorhies, Civ. App., 280 S.W. 849—Dodson-Braun Mfg. Co. v. Dix, Civ.App., 76 S.W. 451.

98. Tex.—Crater Oil Co. v. Voorhies, Civ.App., 280 S.W. 849.

99. Ala.—Peacock v. Virginia-Carolina Chemical Co., 130 So. 411, 221 Ala. 680—Clark v. Ryan, 11 So. 22, 95 Ala. 406—Holland v. State, 194 So. 412, 29 Ala.App. 181—Great Atlantic & Pacific Tea Co. v. Summers, 148 So. 332, 25 Ala.App. 404, certiorari denied 148 So. 333, 226 Ala. 635—Cleveland v. Towle, 106 So. 58, 21 Ala.App. 161.
Fla.—Knudsen v. Green, 156 So. 240, 116 Fla. 47.
La.—Harrosh v. Fife Bros. Health Ass'n, App., 1 So.2d 323.

1. Fla.—Knudsen v. Green, 156 So. 240, 116 Fla. 47.

2. Ala.—Peacock v. Virginia-Carolina Chemical Co., 130 So. 411, 221 Ala. 680.

3. N.J.—Larkin v. Hecksher, 16 A. 703, 51 N.J.Law 133, 3 L.R.A. 137.
39 C.J. p 71 note 49.
Evidence of customs and usages as admissible to show duration of contract generally see Customs and Usages § 26.

4. U.S.—Livermore v. Mandeville & Thompson, C.C.A.Tex., 93 F.2d 563, certiorari denied 58 S.Ct. 752, 303 U.S. 653, 82 L.Ed. 1113—Harper v. Southern Coal & Coke Co., C.C.A. Ala., 73 F.2d 792—**Corpus Juris cited in** Boatright v. Steinite Radio Corporation, C.C.A.Kan., 46 F.2d 385, 390—Fahrenwald v. Ohio Steel Foundry Co., C.C.A.Ohio, 16 F.2d 658.
Ala.—Alabama Mills v. Smith, 186 So. 699, 237 Ala. 296—Peacock v. Virginia-Carolina Chemical Co., 130 So. 411, 221 Ala. 680.
Cal.—Union Labor Hospital Ass'n v. Vance Redwood Lumber Co., 112 P. 886, 158 Cal. 551, 33 L.R.A.,N.S., 1034—Thacker v. American Foundry, App., 177 P.2d 322—Mile v. California Growers Wineries, 114 P.2d 651, 45 Cal.App.2d 674.
Conn.—Boucher v. Godfrey, 178 A. 655, 119 Conn. 622.
Del.—Motion Picture Machine Projectionists Protective Union, Local No. 473, v. Rialto Theatre Co., 17 A.2d 836.
Fla.—Paramount Enterprises v. Mitchell, 140 So. 328, 104 Fla. 407.
Ga.—Crow v. Southern Ry. Co., 18 S.E.2d 690, 66 Ga.App. 608—Bailey v. Nashville, C. & St. L. Ry., 3 S.E. 2d 112, 60 Ga.App. 142—National Manufacture & Stores Corporation v. Dekle, 173 S.E. 408, 48 Ga.App. 515.
Ill.—White v. American Elec. Fusion Corp., 65 N.E.2d 234, 328 Ill.App. 128.
Ind.—Davis v. Davis, 151 N.E. 134, 197 Ind. 386—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind.App. 661.
Ky.—Western Union Telegraph Co. v. Ramsey, 88 S.W.2d 675, 261 Ky. 657, 103 A.L.R. 541—Putnam v. Producers' Live Stock Marketing Ass'n, 75 S.W.2d 1075, 256 Ky. 196—Clay v. Louisville & N. R. Co., 71 S.W.2d 617, 254 Ky. 271.
La.—Russell v. White Oil Corporation, 110 So. 70, 162 La. 9.
Md.—Vincent v. Palmer, 19 A.2d 183, 179 Md. 365.
Mass.—Fenton v. Federal St. Bldg. Trust, 39 N.E.2d 414, 310 Mass. 609—Campion v. Boston & M. R. R., 169 N.E. 499, 269 Mass. 579—Patton v. Babson Statistical Organization, 156 N.E. 534, 259 Mass. 424.
Mich.—McClain v. Township of Royal Oak, 267 N.W. 613, 276 Mich. 185—O'Connor v. Hayes Body Corporation, 242 N.W. 233, 258 Mich. 280.
Minn.—Steward v. Nutrena Feed Mills, 244 N.W. 813, 186 Minn. 606.
Miss.—Montgomery Ward & Co. v. Skinner, 25 So.2d 572.
Mo.—Culver v. Kurn, 193 S.W.2d 602, 354 Mo. 1158—Clarkson v. Standard Brass Mfg. Co., 170 S.W.2d 407, 237 Mo.App. 1018—O'Dell v. Hurt, App., 106 S.W.2d 526—Bell v. Faulkner, App., 75 S.W.2d 612—Waller v. Tootle-Campbell Dry Goods Co., App., 59 S.W.2d 751—Douglas v. Metropolitan Life Ins. Co., App., 297 S.W. 87.
Neb.—State v. Employers of Labor, 169 N.W. 717, 102 Neb. 768, dissenting opinion 170 N.W. 185, 102 Neb. 768.
N.J.—Donnellan v. Halsey, 176 A. 176, 114 N.J.Law 175—**Corpus Juris cited in** Blonder v. United Retail Employees of Newark, Local No. 108, 15 A.2d 826, 828, 128 N.J. Eq. 41, reversed on other grounds 19 A.2d 786, 129 N.J.Eq. 424—Miller's, Inc., v. Journeymen Tailors Union Local No. 195, 15 A.2d 822, affirmed Miller's, Inc., v. Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America, 15 A.2d 824, 128 N.J. Eq. 162, reversed on other grounds,

of service,[5] for or without cause,[6] and without giving any reason or explanation therefor, as considered infra § 44, unless such termination is limited by contract.[7] This rule is followed notwithstanding the contract of employment provides for payment at a daily, weekly, monthly, or yearly rate,[8] or for

Journeymen Tailors Union Local No. 195 of Amalgamated Clothing Workers of America v. Miller's, Inc., 61 S.Ct. 732, 312 U.S. 658, 85 L.Ed. 1106—**Corpus Juris cited in** Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 9 A.2d 295, 299, 126 N.J.Eq. 374, reversed on other grounds 8 A.2d 767, 126 N. J.Eq. 318.

N.Y.—**Corpus Juris cited in** Gelson v. City of New York, 261 N.Y.S. 552, 553, 237 App.Div. 889, affirmed 188 N.E. 36, 262 N.Y. 497—National Cash Register Co. v. Remington Arms Co., 209 N.Y.S. 40, 212 App. Div. 343, and affirmed 151 N.E. 144, 242 N.Y. 99, reargument denied 152 N.E. 431, 242 N.Y. 569—Amelotte v. Jacob Dold Packing Co., 17 N. Y.S.2d 929, 173 Misc. 477, affirmed 24 N.Y.S.2d 134, 260 App.Div. 984—Willson & Adams Co. v. Pearce, 237 N.Y.S. 601, 135 Misc. 426, reversed on other grounds 265 N.Y.S. 624, 240 App.Div. 718, affirmed 191 N.E. 545, 264 N.Y. 521.

N.C.—May v. Tide Water Power Co., 5 S.E.2d 308, 216 N.C. 439—Elmore v. Atlantic Coast Line R. Co., 131 S.E. 633, 191 N.C. 182, 43 A.L.R. 1072.

N.D.—**Corpus Juris cited in** Wood v. Buchanan, 5 N.W.2d 680, 682, 72 N.D. 216.

Ohio.—Ullman v. May, App., 70 N.E. 2d 507, affirmed 72 N.E.2d 63, 147 Ohio St. 468.

Okl.—Foster v. Atlas Life Ins. Co., 6 P.2d 805, 154 Okl. 30.

Pa.—Trainer v. Laird, 183 A. 40, 320 Pa. 414—Hay v. Pittsburgh Lodge No. 46, Loyal Order of Moose, 8 A. 2d 434, 137 Pa.Super. 205.

R.I.—Anderson v. Polleys, 165 A. 436, 53 R.I. 182.

S.C.—**Corpus Juris cited in** Parker v. Southeastern Haulers, 41 S.E.2d 387, 393, 210 S.C. 18—**Corpus Juris cited in** Shealy v. Fowler, 188 S.E. 499, 503, 182 S.C. 81—Johnson v. American Ry. Express Co., 161 S.E. 473, 163 S.C. 191.

Tenn.—**Corpus Juris quoted in** Combs v. Standard Oil Co. of Louisiana, 59 S.W.2d 525, 526, 166 Tenn. 88—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

Tex.—Dallas Hotel Co. v. Lackey, Civ.App., 203 S.W.2d 557—Farley v. Universal Mills, Civ.App., 116 S. W.2d 488—Robertson v. Panhandle & S. F. Ry. Co., Civ.App., 77 S.W.2d 1078, error dismissed—Consolidated Indemnity Ins. Co. v. Smith, Civ.App., 74 S.W.2d 139—McKinney v. Smith, Civ.App., 271 S.W. 247.

Va.—Edwards Co. v. Deihl, 169 S.E. 907, 160 Va. 587—**Corpus Juris quoted in** Title Ins. Co. of Richmond v. Howell, 164 S.E. 387, 389, 158 Va. 713.

Wash.—Hansen v. Columbia Breweries, 122 P.2d 489, 12 Wash.2d 554.

W.Va.—Adkins v. Aetna Life Ins. Co., 43 S.E.2d 372.

Wis.—Bitzke v. Folger, 286 N.W. 36, 231 Wis. 513.

39 C.J. p 71 note 57.

Apportionment of wages see infra § 89.

Construction of employment contracts with reference to duration generally see supra § 8.

Duration of employment rights under labor union contracts see supra § 28 (41).

Termination of contracts fixing no period of duration generally see Contracts § 398.

Effect on contract

When either party elects to terminate contract for labor which is indefinite as to time, it becomes a completed contract and cannot be repudiated by the party who has reaped the benefit of it.

N.Y.—Foley v. Western N. Y. & P. R. Co., 19 N.Y.S. 826.

Wyo.—Casper Nat. Bank v. Curry, 65 P.2d 1116, 51 Wyo. 284, 110 A. L.R. 360.

Mutual consent

A job cannot be held except by mutual consent.—Hawthorne v. Metropolitan Life Ins. Co., 280 N.W. 777, 285 Mich. 329.

Employments within rule

(1) The rule applies to employment between a railway company and trainmen.

Ky.—Louisville & N. R. Co. v. Wells, 160 S.W.2d 16, 289 Ky. 700—Louisville & N. R. Co. v. Bryant, 92 S.W. 2d 749, 263 Ky. 578.

Mo.—McGee v. St. Joseph Belt Ry. Co., 133 S.W.2d 675, 235 Mo.App. 707, certiorari quashed State ex rel. St. Joseph Belt R. Co. v. Shain, 145 S.W.2d 131, 346 Mo. 1098.

(2) A newspaper has been held entitled to terminate the relation between itself and one of its carriers at pleasure where no proof was presented of any custom as to the extent of the employment or as to the notice to which the carrier was entitled.—Hathaway v. Bennett, 10 N. Y. 108, 61 Am.D. 739.

Void contract

An employment which is for an indefinite period because a provision in the employment contract for a definite term is void under the statute of frauds may be terminated at any time by either party.—Brown v. Oneida Knitting Mills, 277 N.W. 653, 226 Wis. 662.

5. Tenn.—Earle v. Illinois Cent. R. Co., 167 S.W.2d 15, 25 Tenn.App. 660, certiorari denied 63 S.Ct. 161, 317 U.S. 680, 87 L.Ed. 546.

6. U.S.—Harper v. Southern Coal & Coke Co., C.C.A.Ala., 73 F.2d 792.

Cal.—Union Labor Hospital Ass'n v. Vance Redwood Lumber Co., 112 P. 886, 158 Cal. 551, 33 L.R.A.,N.S., 1034.

Conn.—Boucher v. Godfrey, 178 A. 655, 119 Conn. 622.

Ky.—Louisville & N. R. Co. v. Bryant, 92 S.W.2d 749, 263 Ky. 578—Hudson v. Cincinnati, N. O. & T. P. Ry. Co., 154 S.W. 47, 152 Ky. 711, 45 L.R.A.,N.S., 184, Ann.Cas. 1915B 98.

Minn.—Steward v. Nutrena Feed Mills, 244 N.W. 813, 186 Minn. 606.

Miss.—Montgomery Ward & Co. v. Skinner, 25 So.2d 572.

Mo.—Culver v. Kurn, 193 S.W.2d 602, 354 Mo. 1158.

N.J.—Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 9 A. 2d 295, 126 N.J.Eq. 374, reversed on other grounds 8 A.2d 767, 126 N.J.Eq. 318.

S.C.—Johnson v. American Ry. Express Co., 161 S.E. 473, 163 S.C. 191.

Tex.—Dallas Hotel Co. v. Lackey, Civ.App., 203 S.W.2d 557.

Assumed risk

An employee who accepts employment "until further notice" assumes risk of being discharged for reasons for which he could not be discharged if he had obtained a contract of employment for a definite period of time, and fact that apparent hardship may result from discharge does not authorize courts to change contract.—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented 33 N.Y.S.2d 764.

7. Tex.—Mansell v. Texas & P. Ry. Co., 137 S.W.2d 997, 135 Tex. 31—Robertson v. Panhandle & S. F. Ry. Co., Civ.App., 77 S.W.2d 1078, error dismissed.

Continuance of state of facts

An employment contract which does not cover any specific period, but provides that the employment is to last during the continuance of a certain state of facts, may not be terminated by the employer as long as that state of facts exists except for good cause.—Seifert v. Arnold Bros., 31 P.2d 1059, 138 Cal.App. 324.

8. U.S.—Boatright v. Steinite Radio

payment based on a per cent of the profits of the business in which the services are being rendered,[9] or for transfer to the employee of specified property or an interest therein if profits in a certain amount are realized.[10] The employment has also been held terminable at the will of either party where the term of service is discretionary with one of the parties.[11] The fact, however, that the employment is terminable at will does not deprive the employee of protection of such rights as he may have under the employment.[12]

Permanent employment contracts. As a general rule employment contracts which in some form purport to provide for permanent employment,[13] as where the agreement is for the employee to have a permanent position or permanent employment[14] or employment for life,[15] or the employee is hired to fill a "permanent vacancy,"[16] or where the employment is to be for as long as the master is operating,[17] as long as the employee desires the position,[18] or as long as the employee satisfactorily performs his duties,[19] are terminable at will by either party where they are not supported by any consideration other than the obligation of service to be performed on the one hand and wages or salary to be paid on the other. Where, however, the employee gives consideration in addition to his services, as where he relinquishes a claim for personal injuries or gives some other thing of value, a contract for permanent employment,[20] or as long as the services are satisfactory,[21] is not such an indefinite contract as to come within the rule. Also it

Corporation, C.C.A.Kan., 46 F.2d 385.
Ill.—White v. American Elec. Fusion Corp., 65 N.E.2d 234, 328 Ill.App. 128.
La.—Russell v. White Oil Corporation, 110 So. 70, 162 La. 9—Binnion v. M. & D. Drugs, App., 8 So.2d 307.
Mich.—O'Connor v. Hayes Body Corporation, 242 N.W. 233, 258 Mich. 280.
Mo.—Douglas v. Metropolitan Life Ins. Co., App., 297 S.W. 87—Hubbard v. Turner Department Store Co., 278 S.W. 1060, 220 Mo.App. 95.
N.Y.—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 260, reargument denied 157 N.E. 895, 245 N.Y. 651—Lipka v. Walker, 69 N.Y.S.2d 686, 188 Misc. 44—Amelotte v. Jacob Dold Packing Co., 17 N.Y.S.2d 929, 173 Misc. 477, affirmed 24 N.Y.S.2d 134, 260 App.Div. 984.
Wash.—Davidson v. Mackall-Paine Veneer Co., 271 P. 878, 149 Wash. 685.
Wis.—Brown v. Oneida Knitting Mills, 277 N.W. 653, 226 Wis. 662—Saylor v. Marshall & Ilsley Bank, 272 N.W. 369, 224 Wis. 511—Koskey v. Harnischfeger Corporation, 265 N.W. 583, 221 Wis. 267—Brooks v. National Equipment Corporation, 244 N.W. 598, 209 Wis. 198.

9. Ga.—Allgood v. Feckoury, 135 S.E. 314, 36 Ga.App. 42.

10. U.S.—Livermore v. Mandeville & Thompson, C.C.A.Tex., 93 F.2d 563, certiorari denied 58 S.Ct. 752, 303 U.S. 653, 82 L.Ed. 1113.

11. Ky.—Dysart v. Dawkins Log & Mill Co., 300 S.W. 906, 222 Ky. 415—Louisville & N. R. Co. v. Offutt, 36 S.W. 181, 99 Ky. 427.

12. Cal.—Austin v. Southern Pac. Co., 123 P.2d 39, 50 Cal.App.2d 292.

13. Cal.—Speegle v. Board of Fire Underwriters of the Pacific, 172 P. 2d 867, 29 Cal.2d 34.
Ky.—**Corpus Juris cited in** Edwards v. Kentucky Utilities Co., 150 S.W. 2d 916, 918, 286 Ky. 341, 135 A.L.R. 642.
Mich.—Adolph v. Cookware Co. of America, 278 N.W. 687, 283 Mich. 561—Lynas v. Maxwell Farms, 273 N.W. 315, 279 Mich. 684.
Minn.—Skagerberg v. Blandin Paper Co., 266 N.W. 872, 197 Minn. 291.
S.C.—Weber v. Perry, 21 S.E.2d 193, 201 S.C. 8—**Corpus Juris cited in** Shealy v. Fowler, 188 S.E. 499, 502, 182 S.C. 81.
Tenn.—**Corpus Juris quoted in** Combs v. Standard Oil Co. of Louisiana, 59 S.W.2d 525, 526, 166 Tenn. 88.

14. N.Y.—Arentz v. Morse Dry Dock & Repair Co., 164 N.E. 342, 249 N.Y. 439, 62 A.L.R. 231—Brown v. Babcock, 40 N.Y.S.2d 428, 265 App. Div. 596.
S.C.—Weber v. Perry, 21 S.E.2d 193, 201 S.C. 8.

15. Wash.—Heideman v. Tall's Travel Shops, 73 P.2d 1323, 192 Wash. 513.

16. Mass.—Campion v. Boston & M. R. R., 169 N.E. 499, 269 Mass. 579.

17. La.—Pitcher v. United Oil & Gas Syndicate, 139 So. 760, 174 La. 66.

18. Ky.—Clay v. Louisville & N. R. Co., 71 S.W.2d 617, 254 Ky. 271.
Tex.—Duff v. Ford Motor Co., Civ. App., 91 S.W.2d 871.

19. Ky.—Louisville & N. R. Co. v. Offutt, 36 S.W. 181, 99 Ky. 427.
Miss.—Rape v. Mobile & O. R. Co., 100 So. 585, 136 Miss. 38, 35 A.L.R. 1422.
S.C.—Weber v. Perry, 21 S.E.2d 193, 201 S.C. 8—**Corpus Juris cited in** Shealy v. Fowler, 188 S.E. 499, 502, 182 S.C. 81.
Tenn.—**Corpus Juris quoted in** Combs v. Standard Oil Co. of Louisiana, 59 S.W.2d 525, 526, 166 Tenn. 88.

20. Ala.—Alabama Mills v. Smith, 186 So. 699, 237 Ala. 296.
Cal.—Millsap v. National Funding Corporation of California, 135 P. 2d 407, 57 Cal.App.2d 772.
Ky.—Yellow Poplar Lumber Co. v. Rule, 50 S.W. 685, 106 Ky. 455, 20 Ky.L. 2006.
La.—Pitcher v. United Oil & Gas Syndicate, 139 So. 760, 174 La. 66.
S.C.—**Corpus Juris cited in** Shealy v. Fowler, 188 S.E. 499, 502, 182 S.C. 81.
Tenn.—**Corpus Juris quoted in** Combs v. Standard Oil Co. of Louisiana, 59 S.W.2d 525, 526, 166 Tenn. 88.
39 C.J. p 72 note 58.

Abandonment of business in order to accept employment has been held to constitute independent consideration sufficient to support permanent employment provision of contract.—Weber v. Perry, 21 S.E.2d 193, 201 S. C. 8.

Additional consideration not shown

(1) Contract employing filling station operator was held not supported by consideration in addition to promise to render services, so as to prevent employer from terminating contract at will.—Combs v. Standard Oil Co. of Louisiana, 59 S.W.2d 525, 166 Tenn. 88.

(2) Surrender of seniority services based on two days' services was held insufficient consideration to support permanent employment provision of contract.—Edwards v. Kentucky Utilities Co., 150 S.W.2d 916, 286 Ky. 341, 135 A.L.R. 642.

(3) Agreement of employee to reject other offer and to purchase home of his predecessor in the employment was held insufficient consideration to support permanent employment provision of contract.—Skagerberg v. Blandin Paper Co., 266 N.W. 872, 197 Minn. 291.

21. Cal.—Seifert v. Arnold Bros., 31 P.2d 1059, 138 Cal.App. 324.

has been held in some jurisdictions that a contract of employment for as long as the employee faithfully and diligently, or satisfactorily, performs the duties of his employment may not be terminated as long as the employee performs the prescribed duties in the required manner and is able and willing to do so,[22] even though there is no promise on the part of the employee to remain with the employer for any definite time.[23]

Employment coupled with interest or based on a consideration. It has been held that an employment without any fixed time or term for its duration, which is coupled with an interest or is entered into on a consideration other than the services to be rendered, is intended to continue for a reasonable time[24] and cannot rightfully be terminated at will;[25] and, although in such case the employment is not irrevocable and the employer has the power to terminate the employment at any time,[26] his right to do so is dependent on circumstances and it can be rightfully terminated only under circumstances which render it reasonably just and proper to do so.[27]

Notice. It has been held that an employment for an indefinite term may be terminated without notice.[28] Other authority, however, has held that such an employment may be terminated on notice,[29] on giving the other party reasonable notice,[30] or only on notice to the other party.[31]

§ 32. Termination under Provisions of Contract

a. In general
b. Termination by reason of dissatisfaction
c. Provisions as to notice

a. In General

An employment may be validly terminated on the happening of any event stipulated in the employment contract or in conformity with other provisions thereof.

A contract of employment may be validly terminated on the happening of any event stipulated in the employment contract.[32] It has been held that

Depreciation in business does not authorize employer to terminate the contract.—Seifert v. Arnold Bros., supra.

22. Mass.—Kirkley v. F. H. Roberts Co., 167 N.E. 289, 268 Mass. 246.

Ambiguous contract

Even in jurisdictions where the text rule is followed, a contract for such employment which is so ambiguous as to be construed to be one for an indefinite period is terminable at will by either party.—Eggers v. Armour & Co. of Delaware, C.C.A. Iowa, 129 F.2d 729.

23. Mass.—Kirkley v. F. H. Roberts Co., 167 N.E. 289, 268 Mass. 246.

24. Cal.—Thacker v. American Foundry, App., 177 P.2d 322.

25. Mo.—Schonwald v. F. Burkart Mfg. Co., 202 S.W.2d 7.

26. Cal.—Lynch v. Gagnon, 274 P. 584, 96 Cal.App. 512.

27. Cal.—Seifert v. Arnold Bros., 31 P.2d 1059, 138 Cal.App. 324—Lynch v. Gagnon, 274 P. 584, 96 Cal.App. 512.

Wyo.—Dutch Maid Bakeries v. Schleicher, 131 P.2d 630, 58 Wyo. 374.

28. Ga.—Allgood v. Feckoury, 135 S. E. 314, 36 Ga.App. 42.

Mich.—O'Connor v. Hayes Body Corporation, 242 N.W. 233, 258 Mich. 280.

N.Y.—Cronk v. Vogt's Ice Cream, 15 N.Y.S.2d 649.

29. Tex.—McKinney v. Smith, Civ. App., 271 S.W. 247.

Effect of notification

Notification of discharge to employee at will terminated contract and further obligation to pay stipulated salary.—McKinney v. Smith, supra.

30. Cal.—Mile v. California Growers Wineries, 114 P.2d 651, 45 Cal. App.2d 674.

31. Cal.—Anderson v. Van Camp Sea Food Co., 277 P. 1099, 98 Cal. App. 787.

32. Cal.—**Corpus Juris cited in** Miller v. San Francisco Church Extension Society of Methodist Episcopal Church, 13 P.2d 824, 827, 125 Cal.App. 85.

Ky.—Aronson v. Gibbs-Inman Co., 140 S.W.2d 806, 283 Ky. 107.

Mich.—Muir v. Leonard Refrigerator Co., 257 N.W. 723, 269 Mich. 406.

N.Y.—Beck v. Fybern Holding Corporation, 263 N.Y.S. 9, 238 App. Div. 25.

39 C.J. p 72 note 61.

Mutuality of termination provision

Where terms of a contract of employment give a privilege to one party to terminate contract, law will extend privilege to the other.—State ex rel. Anderson v. Brand, 7 N.E.2d 777, 214 Ind. 347, 110 A.L.R. 778, reversed on other grounds State of Indiana ex rel. Anderson v. Brand, 58 S.Ct. 443, 303 U.S. 95, 82 L.Ed. 685, 113 A.L.R. 1482, rehearing denied 58 S.Ct. 641, 303 U.S. 669, 82 L.Ed. 1123, mandate conformed to State ex rel. Anderson v. Brand, 13 N.E.2d 955, 214 Ind. 347.

Increase of business

Contract authorizing cancellation by employer if employee failed to increase business specified amount was construed to intend that increase should be measured on yearly and not monthly basis.—Baer v. Toys & Novelties Pub. Co., 216 N.Y. S. 298, 217 App.Div. 92.

Payment of specified amount

(1) Where the contract so provides, the employer may terminate the employment at any time, without notice, on payment of a stipulated amount.—Armstrong v. Standard Ice Co., 195 A. 171, 129 Pa.Super. 207.

(2) Interpretation of contract to permit employer to terminate the employment on payment of five days' wages was not rendered unreasonable by fact that employee agreed not to engage in the business for period of two years after the employment should cease, where employee had sold his interest in the business to the employer and contract clearly gave such right to employer.—Armstrong v. Standard Ice Co., supra.

(3) Under some contracts, in the case of an employment for a definite term to be continued at the will of the parties, the employment may be terminated by the employer, after expiration of the term, by giving notice and making a specified payment.—Ryan v. Kroger Grocery & Baking Co., Ohio App., 31 N.E.2d 698.

(4) Other provisions providing for payments see 39 C.J. p 72 note 61 [g].

Provisions held not to jusify termination

(1) Contract employing salesman

the mere happening of the event provided for will not automatically terminate the contract, but that there must be an affirmative action taken by the one relying on the reservation.[33] The right reserved must be clearly exercised, and language which in part recognizes the contract as in existence will not be sufficient to terminate it.[34]

If the contract expressly so provides, the employment may be terminated at any time by either party.[35] Under the provisions of some contracts the employer cannot properly terminate the employment if he is in default in the performance of his obligations under the contract[36] or until outstanding claims arising under the employment activity have been settled.[37] Also under some employment contracts the employee cannot be discharged without a trial or hearing.[38]

Termination at employer's discretion. A provision in the employment contract authorizing the employer to terminate the employment at his discretion requires him to act on a sound judgment and excludes an arbitrary, unreasonable, or oppressive act;[39] and in such case it is a breach of the contract to terminate the employment before the employee has had an opportunity to perform any services.[40]

Good faith. A reservation of the right to discharge for reasons of the sufficiency of which the employer reserves the right to be the sole judge does not give the employer the right to terminate the contract without a reason or for a false reason.[41] He must act in good faith[42] and not arbitrarily,[43] and the reason or reasons for his termination of the employment must have some relation to particular grounds or conditions specified in the contract sufficient to authorize termination.[44] However, if exercised in good faith, his judgment is not reviewable.[45]

When such right is given an employer, the employee is entitled to the personal judgment of the former, which cannot be delegated to another.[46] Where a contract provides that it may be terminated if a party thereto in good faith so wishes, good faith is presumed,[47] and, where it is stipulated in the contract that the relation is to continue if the parties can agree, either party may terminate the contract at pleasure and without showing any rea-

for two years, "predicated" on salesman selling at least ten pieces of apparatus per year, gave employer no right to terminate contract and discharge salesman during term.—Prescott v. Buffalo Fire Appliance Corporation, 260 N.Y.S. 840, 237 App. Div. 198, affirmed 188 N.E. 27, 262 N.Y. 475.

(2) Other provisions see 39 C.J. p 72 note 61 [f].

33. Wis.—Jewel Tea Co. v. Himmelstein, 159 N.W. 910, 164 Wis. 325.
39 C.J. p 73 note 63.

34. N.Y.—Wood v. Miller, 138 N.Y.S. 562, 78 Misc. 377.
39 C.J. p 72 note 62.

35. U.S.—National Manufacture & Stores Corporation v. Whitman, C.C.A.S.C., 93 F.2d 829.
Ala.—Oates v. Lee, 133 So. 44, 222 Ala. 506.
Ind.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind. App. 661—Sinclair Refining Co. v. McCullom, 24 N.E.2d 784, 107 Ind. App. 356.
Pa.—General Office Equipment Corporation v. Sampson, Com.Pl., 90 Pittsb.Leg.J. 179.
Tex.—Barton v. Farm & Home Savings & Loan Ass'n of Missouri, Civ.App., 109 S.W.2d 233—May v. Lee, Civ.App., 28 S.W.2d 202.

For any cause or reason

(1) A clause in an employment contract authorizing termination of the employment before expiration of the term "for any cause" refers to a cause which would justify the employer in terminating the contract for the employee's breach thereof, and not arbitrarily or at will.—Parsil v. Emery, 272 N.Y.S. 439, 242 App. Div. 653—Vogel v. Pathe Exchange, 254 N.Y.S. 881, 234 App.Div. 313.

(2) Provision in employment contract for specified term which authorizes employer to discharge employee at any time for any reason requires some reasonable ground for discharge, and does not permit discharge at will.—Carter v. Bradlee, 280 N.Y.S. 368, 245 App.Div. 49, affirmed 200 N.E. 48, 269 N.Y. 664.

Periodic payment

Employee is dischargeable at will, notwithstanding he receives a monthly salary.—Binnion v. M. & D. Drugs, La.App., 8 So.2d 307—Williamson v. National Ben. Life Ins. Co., 133 So. 515, 16 La.App. 451.

36. N.Y.—Engel v. Ansco Photoproducts, 240 N.Y.S. 737, 229 App. Div. 241, affirmed Engel v. Ansco Photo-products Co., 177 N.E. 163, 256 N.Y. 615.

37. Tex.—Heatley v. W. P. Ponder & Sons, Civ.App., 40 S.W.2d 951.

38. Ga.—Gary v. Central of Georgia Ry. Co., 141 S.E. 819, 37 Ga.App. 744.
Tex.—Mansell v. Texas & P. Ry. Co., 137 S.W.2d 997, 135 Tex. 31—Mallehan v. Texas & P. Ry. Co., Civ. App., 87 S.W.2d 771.

Pending appeal

Under contract providing for appeal from result of trial, but not providing for supersedeas, employer's right to discharge is not in abeyance pending employee's appeal after trial.—Gary v. Central of Georgia Ry. Co., 141 S.E. 819, 37 Ga.App. 744.

39. Wis.—Beers v. Atlas Assur. Co., 253 N.W. 584, 215 Wis. 165.

40. Wis.—Beers v. Atlas Assur. Co., supra.

41. Fla.—Corpus Juris cited in Hazen v. Cobb, 117 So. 853, 855, 96 Fla. 151.
39 C.J. p 73 note 65.
Reservation of right to discharge for dissatisfaction see infra subdivision b of this section.

42. Fla.—Hazen v. Cobb, 117 So. 853, 96 Fla. 151.
N.Y.—Carter v. Bradlee, 280 N.Y.S. 368, 245 App.Div. 49, affirmed 200 N.E. 48, 269 N.Y. 664.
39 C.J. p 73 note 68.

43. Fla.—Hazen v. Cobb, 117 So. 853, 96 Fla. 151.

44. Fla.—Hazen v. Cobb, supra.

45. Ky.—Independent L. Ins. Co. v. Williamson, 154 S.W. 409, 152 Ky. 818.

46. N.Y.—Lipshutz v. Proctor, 95 N.Y.S. 566.

47. Ill.—Wilmington Coal Min. & Mfg. Co. v. Lamb, 90 Ill. 465.

sonable cause for disagreement,[48] although it has been held that the disagreement must be bona fide.[49]

Reference to arbitration. Where a contract of employment provides that any dispute arising in connection with the agreement shall be referred to arbitration in accordance with the provisions of the by-laws of an association, an award adverse to the employee on a reference of a question of misconduct involves the question of the right to dismiss, as a dispute arising in connection with the agreement for service, and is binding on the employee.[50]

Waiver of provision. Where a contract has been terminated by the happening of an event stipulated in the contract, the fact that the employee is retained on the premises under a temporary arrangement is not to be regarded as a waiver of the contract.[51]

b. Termination by Reason of Dissatisfaction

(1) In general
(2) Necessity of good faith

(1) In General

Where the employment contract so provides, the employer may terminate the employment for dissatisfaction with the employee's services.

Where the employment contract so provides, the employer may terminate the employment if the employee fails to perform his duties to the employer's satisfaction,[52] in which case the employer is the sole judge of the sufficiency of his reasons and of the fact that such dissatisfaction exists, and the reasonableness of his dissatisfaction is not open to inquiry.[53] Where the contract may be terminated "for any good reason," the sufficiency of a reason for discharge is open to judicial inquiry.[54] The fact that a servant is retained after his work becomes unsatisfactory is not a condonation of the acts which caused the dissatisfaction and will not prevent his discharge at any time thereafter without a new cause of dissatisfaction.[55] Where the employment is continued after the expiration of a contract, a provision of the original contract that the servant should be retained during satisfaction is not attached to the reëmployment and gives the master the right of removal at will.[56]

It has been held that the incompetency giving rise to dissatisfaction must appear after the contract is made.[57] The employer may not discharge the employee for dissatisfaction with his services prior to the commencement of the employment,[58] or, if satisfaction is to be determined by stipulated tests, until such tests have had an opportunity to function,[59] although events which occurred prior to the execution of the employment contract may have a bearing on whether the employer is actually dissatisfied with the employee's services.[60] Also where a servant is taken on trial for a specified

48. Me.—Durgin v. Bayer, 32 Me. 273.

49. N.Y.—Gates v. Davenport, 29 Barb. 160.

50. La.—**Corpus Juris quoted in** Caulfield v. Yazoo & M. V. R. Co., 127 So. 585, 587, 170 La. 155.
39 C.J. p 73 note 73.

51. Ga.—Edwards v. Block, 73 Ga. 450.
39 C.J. p 73 note 72.

52. Ark.—Rife v. Mote, 197 S.W.2d 277.
Ill.—Trevellick v. Western Vaudeville Managers' Ass'n, 237 Ill.App. 493.
N.Y.—Zitlin v. Max Heit Dress Corporation, 271 N.Y.S. 275, 151 Misc. 241.
Pa.—Silberman v. Escoll, 46 Pa.Dist. & Co. 38, 58 Montg.Co. 369.

Contract construed
Contract as construed was held to give right to discharge for dissatisfaction under first employment only and not under second employment.—National Symphony Orchestra Ass'n of Washington, D. C., v. Konevsky, D.C.Mun.App., 44 A.2d 694.

Grounds for dissatisfaction
Provision in employment contract that employer might terminate it if employee, from "bad habits or improper conduct," did not perform his duties to employer's satisfaction, included "bad business habits" and "improper business conduct," and was not limited to immoral or dishonest conduct.—Rorick v. Gilbert, 186 N.E. 756, 45 Ohio App. 96, affirmed Gilbert v. Rorick, 186 N.E. 90, 125 Ohio St. 636.

53. Ark.—Rife v. Mote, 197 S.W.2d 277.
Cal.—Coats v. General Motors Corporation, 39 P.2d 838, 3 Cal.App.2d 340.
Fla.—**Corpus Juris cited in** Hazen v. Cobb, 117 So. 853, 855, 96 Fla. 151.
Mich.—Lynas v. Maxwell Farms, 273 N.W. 315, 279 Mich. 684.
N.J.—Cooper v. Singer, 191 A. 849, 118 N.J.Law 200.
N.Y.—Appelgate v. MacFadden Newspaper Pub. Corporation, 212 N.Y.S. 67, 214 App.Div. 221.
Okl.—Roxana Petroleum Co. of Oklahoma v. Rice, 235 P. 502, 109 Okl. 161.
Tex.—**Corpus Juris cited in** Barton v. Farm & Home Savings & Loan Ass'n of Missouri, Civ.App., 109 S.W.2d 233, 235.
39 C.J. p 74 note 84.

54. Fla.—**Corpus Juris cited in** Hazen v. Cobb, 117 So. 853, 855, 96 Fla. 151.
Wash.—Caldwell v. Klyce, 141 P. 1042, 80 Wash. 469.

55. Ill.—Alexis Stoneware Mfg. Co. v. Young, 59 Ill.App. 226.
39 C.J. p 75 note 87.

56. Mich.—Laughlin v. Jackson School Dist. No. 17, 57 N.W. 571, 98 Mich. 523.

57. N.Y.—Walton v. Godwin, 11 N.Y.S. 391, 58 Hun 87.

58. Ark.—Rife v. Mote, 197 S.W.2d 277.
Pa.—Silberman v. Escoll, 46 Pa.Dist. & Co. 38, 58 Montg.Co. 369.

59. Pa.—Jacobs v. Kraft Cheese Co., 164 A. 774, 310 Pa. 75.

Waiver
Employer's failure to put on market article manufactured under discharged employee's process is waiver of contract condition requiring employee to produce article satisfactory to market as demonstrated by increased sales.—Jacobs v. Kraft Cheese Co., supra.

60. Ark.—Rife v. Mote, 197 S.W.2d 277.

time, the master is entitled to a reasonable time after the expiration of the trial period to give notice of dissatisfaction.[61]

Mere agreement or desire to give satisfaction. Where the employee merely contracts to give satisfaction in his work, and no absolute right of discharge for dissatisfaction is reserved, the arbitrary right to discharge without cause is not thereby given to the employer.[62] Also a contract of employment for a definite time cannot be converted into one dependent on the satisfaction of the employer with the work of the employee by a recital that the employee is desirous of obtaining and filling the position to the satisfaction of the employer.[63]

(2) Necessity of Good Faith

In order to justify a termination of the employment under a contract authorizing its termination because of dissatisfaction with the employee's services, the employer's dissatisfaction with such services must be real and in good faith.

The employer's dissatisfaction with the employee's services must be real and in good faith, and not feigned or assumed, in order to justify his termination of the employment under a provision of the employment contract authorizing its termination because of dissatisfaction,[64] particularly where the contract expressly provides that the right must be exercised in good faith;[65] and it must have been the cause of the discharge,[66] although it has been held that, when an employee is summarily discharged, it is assumed that the discharge is for a cause specified in the contract.[67] So also where, as in the case of a corporation employer, it is provided that the employee may be dismissed if his services are unsatisfactory but only after a hearing of the board of directors, the contract may not be terminated except after such hearing had and conducted in good faith.[68] However, when the contract provides that it may be terminated for unsatisfactory work or other causes, a discharge may be authorized, although not founded on dissatisfaction.[69] A distinction has been made in some decisions, and it has been held that good faith is immaterial in the exercise of the right to discharge for dissatisfaction when the services are to be rendered in a position of trust or confidence[70] or where the employment is of a class involving taste, fancy, interest, and personal satisfaction or judgment.[71]

c. Provisions as to Notice

An employment may be terminated, where authorized by the contract of employment, by the giving of a stipulated notice. The right to notice, or to a particular form of notice, may be waived.

A contract of employment may be terminated by the giving of such notice as the contract provides.[72] A provision in an employment contract for a stated term that it may be terminated before the expiration of the term by the giving of a specified notice merely limits the provision for continuance of the contract for a stated term and is not in irreconcilable conflict therewith.[73] The giving of notice of termination by an employer after the abandonment

61. Ga.—Baldwin Fertilizer Co. v. Cope, 35 S.E. 316, 110 Ga. 325.

62. Tex.—Golden Rod Mills v. Green, Civ.App., 230 S.W. 1089.
39 C.J. p 76 note 97.

63. N.Y.—Heller v. Bodensiek, 142 N.Y.S. 496, 81 Misc. 222.

64. Ark.—Rife v. Mote, 197 S.W.2d 277.
Cal.—Coats v. General Motors Corporation, 39 P.2d 838, 3 Cal.App. 2d 340.
Fla.—**Corpus Juris cited in** Hazen v. Cobb, 117 So. 853, 855, 96 Fla. 151.
Ga.—Fried v. Portis Bros. Hat Co., 152 S.E. 151, 41 Ga.App. 30.
Ill.—Trevellick v. Western Vaudeville Managers' Ass'n, 237 Ill.App. 493.
N.J.—Cooper v. Singer, 191 A. 849, 118 N.J.Law 200.
N.Y.—Appelgate v. MacFadden Newspaper Pub. Corporation, 212 N.Y.S. 67, 214 App.Div. 221—Zitlin v. Max Heit Dress Corporation, 271 N.Y.S. 275, 151 Misc. 241—Gutner v. Success Magazine Corporation, 242 N.Y.S. 679, 136 Misc. 257.
Okl.—Roxana Petroleum Co. of Oklahoma v. Rice, 235 P. 502, 109 Okl. 161.
Pa.—Silberman v. Escoll, 46 Pa.Dist. & Co. 38, 58 Montg.Co. 369.
Tex.—Dallas Hotel Co. v. Lackey, Civ.App., 203 S.W.2d 557.
39 C.J. p 75 note 89.
Dissatisfaction held shown
Mich.—Lynas v. Maxwell Farms, 273 N.W. 315, 279 Mich. 684.

65. N.Y.—Grinnell v. Kiralfy, 8 N.Y.S. 623, 55 Hun 422.
39 C.J. p 75 note 90.

66. Cal.—Seifert v. Arnold Bros., 31 P.2d 1059, 138 Cal.App. 324.
Ill.—Trevellick v. Western Vaudeville Managers' Ass'n, 237 Ill.App. 493.
N.J.—Cooper v. Singer, 191 A. 849, 118 N.J.Law 200.
N.Y.—Zitlin v. Max Heit Dress Corporation, 271 N.Y.S. 275, 151 Misc. 241—Gutner v. Success Magazine Corporation, 242 N.Y.S. 679, 136 Misc. 257.
Okl.—Roxana Petroleum Co. of Oklahoma v. Rice, 235 P. 502, 109 Okl. 161.
39 C.J. p 75 note 92.

67. U.S.—Cressey v. International Harvester Co., Or., 206 F. 29, 124 C.C.A. 163.

68. U.S.—Gilman v. Lamson Co., Mass., 234 F. 507, 510, 148 C.C.A. 273.
39 C.J. p 75 note 91.

69. Mich.—Teichner v. Pope Mfg. Co., 83 N.W. 1031, 125 Mich. 91, 103.
39 C.J. p 75 note 94.

70. N.Y.—Saxe v. Shubert Theatrical Co., 108 N.Y.S. 683, 57 Misc. 620.
39 C.J. p 75 note 95.

71. Mich.—Schmand v. Jandorf, 140 N.W. 996, 175 Mich. 88, 44 L.R.A., N.S., 680, Ann.Cas.1915A, 746.
39 C.J. p 75 note 96.

72. U.S.—System Federation No. 59 of Railway Employees Department of American Federation of Labor v. Louisiana & A. Ry. Co., D.C.La., 30 F.Supp. 909, rehearing denied 32 F.Supp. 89, affirmed, C.C.A., 119 F.2d 509, certiorari denied 62 S. Ct. 108, 314 U.S. 656, 86 L.Ed. 526.
Ohio.—Ullman v. May, App., 70 N.E. 2d 507, affirmed 72 N.E.2d 63, 147 Ohio St. 468.

73. U.S.—F. W. Woolworth Co. v. Petersen, C.C.A.Colo., 78 F.2d 47—

of the service by the employee does not waive such previous breach of the contract, with an assent to the restoration of their previous relations.[74] A provision of the contract authorizing termination of the employment on the giving of a specified notice is subject to a further provision guaranteeing a minimum period of employment, so as to preclude its arbitrary termination prior thereto.[75]

There must be compliance with a provision in the contract of employment,[76] or with a statutory requirement,[77] for a stipulated notice of the termination of the employment, and a discharge or abandonment without the required notice is unlawful except where valid grounds authorizing the termination of the employment exist.[78] It has been held that if a vis major incapacitates the servant from performing the contract it dispenses with the necessity for notice.[79] A party claiming the benefit of a notice under the contract of employment must show compliance on his part with the terms of the contract.[80]

A notice of termination of employment may be retracted by a subsequent oral agreement of the parties;[81] and the fact that the employment contract is under seal and cannot be changed or modified except in writing and in the same manner of execution does not require a retraction of the notice of termination to be under seal.[82] Where, by the terms of a contract, a party is bound to give notice of an intention to terminate it, and, having given the notice, afterward waives it, he may in fact renew the notice, although the form of his communication purports to insist on the notice which he has waived.[83]

Waiver of notice. The right to notice may be waived by a party, and the question whether his acts constitute a waiver is ordinarily one of fact for the jury.[84] Also an oral notice of termination acted on by the employee has been held to waive or dispense with the necessity for a written notice.[85] Notice is not dispensed with by reason of the fact that the employee has performed no services for a long time prior to the date on which the contract could have been terminated by a proper notice,[86] and the giving of the required notice is not conclusively shown by an admission that the employee, shortly before the contract would have expired by its terms, sought other employment.[87]

§ 33. Termination by Mutual Agreement

Contracts of employment may be terminated by mutual agreement of the parties.

Like any other contract, a contract of employment may be terminated by agreement of the parties, or by their consent, either express or implied.[88]

Gordon v. Northwestern Nat. Life Ins. Co., C.C.A.5, 193 F. 405.
Tex.—Texas Cotton Co-op. Ass'n v. Anderson, Civ.App., 67 S.W.2d 406.

Provision construed with reference to termination of year-to-year contract.—F. W. Woolworth Co. v. Petersen, C.C.A.Colo., 78 F.2d 47.

74. U.S.—Mallory v. Mackaye, N.Y., 92 F. 749, 34 C.C.A. 653.
39 C.J. p 74 note 78.

75. Ark.—McGehee v. Cunningham, 25 S.W.2d 449, 181 Ark. 148.
N.Y.—Koupal v. Baker, 172 N.Y.S. 114.

76. N.D.—**Corpus Juris cited in** Bartley v. Ashbridge, 237 N.W. 758, 760, 61 N.D. 330.
Pa.—In re Mershon's Estate, 11 Pa. Dist. & Co. 271.
Tenn.—**Corpus Juris quoted in** Combs v. Standard Oil Co. of Louisiana, 59 S.W.2d 525, 527, 166 Tenn. 88.
Va.—Forsberg v. Zehm, 143 S.E. 284, 150 Va. 756, 61 A.L.R. 232.
39 C.J. p 73 note 74.
Discharge as constituting notice of termination see infra § 46.

Contract held validly terminated
N.Y.—Stanley v. Chris-Craft Corporation, 21 N.Y.S.2d 898, affirmed 21 N.Y.S.2d 502, 259 App.Div. 1038, appeal denied 22 N.Y.S.2d 926, 260 App.Div. 810.
39 C.J. p 73 note 74 [f].

Letter construed as election to terminate
Iowa.—Clinton v. Des Moines Music Co., 228 N.W. 664, 209 Iowa 636.

Payment of wages
(1) It has been held that an employer who terminates immediately an employment under a contract which requires notice of termination for a stipulated period of time is obligated to pay the employee wages for the stipulated period.—Beck v. Fybern Holding Corporation, 263 N.Y.S. 9, 238 App.Div. 25.
(2) It has also been held that notice for the full time stipulated must be given in order to terminate the employment of an employee entitled to a partnership when the profits of the business reach a specified amount, and that notification that the employment is terminated accompanied by payment of wages for the stipulated period is insufficient.—Johnson v. Kahrs, 34 S.E.2d 503, 199 Ga. 365.

Time required
A thirty-day notice has been held not to take effect until the end of the month in which the thirty-day period expired.—Labatt v. Louisiana Adjustment Bureau, La.App., 185 So. 702.

77. U.S.—Howard v. Thompson, D.C.Mo., 72 F.Supp. 695.

78. Pa.—Ceroni v. Montgomery Ward & Co., 22 West.Co.L.J. 58.

79. Mass.—Hughes v. Wamsutta, 11 Allen 201—Fuller v. Brown, 11 Metc. 440.

80. Tex.—Basse v. Allen, 43 Tex. 481.
39 C.J. p 74 note 79.

81. U.S.—Vassardakis v. Parish, D.C.N.Y., 36 F.Supp. 1002.
N.Y.—Pohlers v. Exeter Mfg. Co., 57 N.Y.S.2d 325.

82. N.Y.—Pohlers v. Exeter Mfg. Co., supra.

83. U.S.—Lyon v. Pollard, D.C., 20 Wall. 403, 22 L.Ed. 361.

84. Mass.—Nashua & Lowell R. Corp. v. Paige, 135 Mass. 145.

Waiver held shown
Colo.—Nolan v. Lantz Sanitary Laundry Co., 274 P. 931, 85 Colo. 247.
Ky.—Pierce v. Bringardner Lumber Co., 132 S.W.2d 932, 280 Ky. 205.

85. N.H.—Couture v. Hebert, 42 A.2d 691, 93 N.H. 378.

86. Mass.—Horton v. Wickwire Spencer Steel Corp., 132 N.E. 361, 239 Mass. 584.

87. N.Y.—Ince v. Weber, 41 N.Y.S. 396, 18 Misc. 254.

88. Ky.—Aronson v. Gibbs-Inman Co., 140 S.W.2d 806, 283 Ky. 107—Consolidated Textile Corporation v.

A contract of employment is terminated by a new agreement,[89] although the new arrangement must be a complete one.[90] Such a result is not established by a mere provision for an additional salary[91] or by a purely supplementary agreement,[92] although a termination of the original employment is shown where an employee remains and works in a different position and at a different wage rate, after being informed that he is ineligible for the position for which he was originally hired.[93] An employee who has notice or knowledge of the substitution of a new employer and thereafter continues in his employment is deemed to have accepted the new employer and to have terminated the relation previously existing with the old one.[94]

Indefinite communications will not suffice to effect a termination by mutual agreement;[95] and if the resignation of an employee is not accepted, as offered, it is not binding on the employee and does not terminate the employment.[96] Also unsuccessful negotiations as to the damages sustained by the employee because of his discharge do not establish a mutual termination of the employment.[97] A demand by an employee for written evidence of his discharge so that he may minimize the damage does not amount to an agreement for the cancellation of the contract.[98] The employment of another to fill a position abandoned by an employee is not a consent to such abandonment,[99] and, where one party declares that he will not perform the contract, the other need not delay until the time for performance before acting on such declaration.[1] Ordinarily the termination of an employment does not affect rights already accrued under it;[2] but an employee's unconditional surrender of his employment contract for a valuable consideration has been held to carry with it every right he has under the contract.[3]

§ 34. Change in Business of Master

An employer who changes or closes out his business or transfers it to another terminates his contracts with his employees, and if the contract obligates him not to disable himself from continuing the employment and is not terminable at will he is liable for its breach; but in such circumstances the employees may quit his employment without incurring any liability and are under no obligation to continue with their employer's successor.

Where a master closes out or changes his business, and thereby becomes unable to perform his contract, the contract is terminated,[4] and, if not

Magarahan, 280 S.W. 91, 212 Ky. 696.
Minn.—Yoselowitz v. Peoples Bakery, 277 N.W. 221, 201 Minn. 600.
R.I.—Anderson v. Polleys, 165 A. 436, 53 R.I. 182.
39 C.J. p 76 note 2.
Apportionment of wages see infra § 88.
Formation of copartnership between employer and employee as terminating employment see infra § 34 b.
Rescission see supra § 9.

Consent

Employee's acceptance, at time of alleged discharge, of check in full payment for salary and other claims, followed by organization and carrying on shortly thereafter of his own competitive business, constituted acceptance of termination of employment agreement.—Kaufman v. Goldman Stores Corporation, 293 N.Y.S. 284, 161 Misc. 773, affirmed 300 N.Y. S. 773, 252 App.Div. 666.

Obligations of agreement

Agreement, whereby employee was released from further performance of services under employment contract in consideration of his promise to pay employer whatever earnings employee might make elsewhere, placed on employee duty of exercising reasonable diligence to secure profitable employment in same or similar business, but did not obligate employee to accept detrimental or unfamiliar employment.—Speer v. Johnson, 184 S.E. 388, 52 Ga.App. 636.

89. N.Y.—Bellclair v. Wirth & Hamid, 236 N.Y.S. 306, 134 Misc. 801.
Wis.—Porte v. Chicago & N. W. R. Co., 156 N.W. 469, 162 Wis. 446.

90. N.Y.—Watters v. Plumbers' Trade Journal Pub. Co., 148 N.Y.S. 52, 86 Misc. 38.

91. N.Y.—Molostowsky v. Grauer, 113 N.Y.S. 679.

92. N.Y.—Schlesinger v. Quinto, 194 N.Y.S. 401, 201 App.Div. 487.

93. Ind.—Davis v. Clapp, 149 N.E. 908, 83 Ind.App. 697.

94. Minn.—Yoselowitz v. Peoples Bakery, 277 N.W. 221, 201 Minn. 600.

95. N.Y.—Bolles v. International Specialties Co., 110 N.Y.S. 882.

96. Neb.—Nesbit v. Giblin, 148 N.W. 138, 96 Neb. 369, L.R.A.1915D 477, Ann.Cas.1916A 1008.
39 C.J. p 76 note 8.

97. N.J.—Diffley v. Jacobson Mfg. Co., 143 A. 696, 6 N.J.Misc. 1044, affirmed 147 A. 908, 105 N.J.Law 631.

98. Mo.—George v. Kansas City American Assoc. Baseball Co., App., 219 S.W. 134.
39 C.J. p 76 note 9.

99. Md.—Schneider v. Hagerstown Brewing Co., Inc., 110 A. 218, 136 Md. 151.

1. Ill.—Collins Ice-Cream Co. v. Stephens, 59 N.E. 524, 189 Ill. 200.
39 C.J. p 76 note 11.

2. Cal.—Schwartz v. Teunisz, 175 P. 2d 246, 77 Cal.App. 258.

Reference to employment agreement

Sales manager's statement in receipt, after acknowledging receipt from employer of money, that he would be entitled to further sums of money in the nature of commissions earned by virtue of certain paragraphs of employment contract, did not incorporate those paragraphs of employment contract into and make them part of new agreement, but left the old contract as the basis of the right to such commissions.—Schwartz v. Teunisz, supra.

Presumption

Under allegation that employment contract was terminated by mutual consent, presumption is parties intended to discharge each other only from obligations yet to be performed. —Coletti v. Knox Hat Co., 169 N.E. 648, 252 N.Y. 468.

3. W.Va.—Wright v. Board of Education of Huntington Independent Dist., 164 S.E. 147, 112 W.Va. 240.

4. Cal.—Gaspar v. United Milk Producers of California, 144 P.2d 867, 62 Cal.App.2d 546.
Idaho.—Corpus Juris cited in Groshoff v. St. Gertrude's Convent, 258 P. 528, 44 Idaho 554.
Minn.—Matthews v. Minnesota Tribune Co., 10 N.W.2d 230, 215 Minn. 369, 147 A.L.R. 147.
39 C.J. p 76 note 12.

terminable at will, the employee can recover for the breach,[5] provided the contract expressly or impliedly obligates the employer not to disable himself from continuing the employment for the stipulated time.[6] On the other hand, under such circumstances, the employee may quit his employment without liability for damages.[7] Where the master disposes of his business to another without notifying the servant of the change, and the latter continues his services thereafter, the master is liable for the servant's wages as long as he remains without notice,[8] and knowledge by the employee of the negotiations which resulted in the disposal of the business will not release the employer from such liability.[9] Also an individual who operates a business after the dissolution of the corporation which formerly owned it is liable for the wages of those who continue to work in the business.[10]

In case of contracts terminable at will, actual knowledge by the servant of the change of employers, however acquired, will release the employer.[11] Where the employer has reserved the right to terminate the contract in the event of his wishing to merge his business with others, he will be relieved of liability if his option is exercised in good faith.[12] Where an employee recognizes a successor of his master and continues in his employ, the contract of employment is as binding on him in favor of the successor as though the original master had continued in such capacity,[13] and he has been denied any right of action against the original employer personally as for a breach of contract arising from such a transfer of the business,[14] although the fact that an employee continued to work for the buyer of the business has been held not to deprive him of a contractual right to severance pay from the original employer.[15]

An immaterial change in business gives no cause of action for damages.[16] The mere forming of a corporation by an employer and the use of the corporate name in the business for which he has hired the servant do not terminate the employment, where there is otherwise no change in the manner of conducting the business and the employer continues to be the real owner.[17] Performance of an employee's contract is not made impossible, so as to justify its termination, by governmental regulations consequent on the country's being engaged in a war, which regulations partially curtail the business activities the employee was hired to perform.[18]

In determining whether the contract obligates the employer to carry on the business during the employment term each and every part of the agreement, including the consideration agreed on, its nature and value, should be considered,[19] and the mere fact that the employer received a consideration for his promise will not show such an obligation.[20] Unless some provision in the contract negatives it,[21] a contract of employment for a definite term for a compensation, the amount whereof can be earned and determined only by an actual performance of the services over the whole of the stipulated period, implies that the employment will continue uninterruptedly during the term.[22]

Formation or dissolution of partnership. A contract of employment is terminated where, pending the term of service, the master enters into a partnership with another and the servant, without any new

5. Cal.—Langenberg v. Guy, 247 P. 621, 77 Cal.App. 664.
39 C.J. p 76 note 12.
Apportionment of wages see infra § 82.

6. Cal.—Langenberg v. Guy, supra.

7. Wash.—Columbia College v. Tunberg, 116 P. 280, 64 Wash. 19.

New corporation

One who contracts to give his personal services for a certain period to a corporation which thereafter merges with others cannot be required to give his services to the new corporation.—Globe & Rutgers Fire Ins. Co. v. Jones, 89 N.W. 580, 129 Mich. 664—39 C.J. p 77 note 18.

8. N.Y.—**Corpus Juris quoted in** Carouso v. Empire Case Goods Co., 63 N.Y.S.2d 35, 39, 271 App.Div. 149, affirmed 74 N.E.2d 462, 297 N.Y. 514.
39 C.J. p 77 note 19.

9. N.Y.—Carouso v. Empire Case Goods Co., supra.

10. La.—Succession of Mereaux, App., 28 So.2d 300.

11. N.Y.—**Corpus Juris quoted in** Carouso v. Empire Case Goods Co., 63 N.Y.S.2d 35, 39, 271 App.Div. 149, affirmed 74 N.E.2d 462, 297 N.Y. 514.
39 C.J. p 77 note 20.

12. N.Y.—Fuller v. Downing, 104 N.Y.S. 991, 120 App.Div. 36.
Termination under provisions of contract see supra § 32.

13. N.Y.—Kessler v. Chappelle, 77 N.Y.S. 285, 73 App.Div. 447.

14. Cal.—Armstrong v. Cherry, 264 P. 798, 89 Cal.App. 442.
N.J.—Bird v. J. L. Prescott Co., 99 A. 380, 89 N.J.Law 591.

15. Minn.—Matthews v. Minnesota Tribune Co., 10 N.W.2d 230, 215 Minn. 369, 147 A.L.R. 147.

16. Cal.—**Corpus Juris cited in** Armstrong v. Cherry, 264 P. 798, 799, 89 Cal.App. 442.
La.—Levy v. Friedlander, 24 La.Ann. 439.

17. Ill.—Sands v. Potter, 46 N.E. 282, 165 Ill. 397, 56 Am.S.R. 253.

18. N.J.—Ryan v. Brown Motors, 39 A.2d 70, 132 N.J.Law 154.

19. Cal.—Langenberg v. Guy, 247 P. 621, 77 Cal.App. 664.

20. Cal.—Langenberg v. Guy, supra.

21. Cal.—Langenberg v. Guy, supra.

Contract provisions construed

A provision for employment "as our business warrants" negatives any obligation on the part of the employer not to sell the business.—Langenberg v. Guy, supra.

22. Cal.—Langenberg v. Guy, supra.

contract, enters into the service of the firm,[23] or where the employer and employee become copartners.[24] According to some authority the death of a partner dissolves a contract of employment made by the firm,[25] particularly an employment for an indefinite period which could have been terminated by either of the parties at any time;[26] but there is also authority to the contrary,[27] and it has been held that the contract will not be so dissolved, at least when the business has gone on without a break and the parties have assumed to treat the contract as not terminated.[28] Where the dissolution is voluntary, and the business is not closed, but is continued in the same manner and at the same place, it has been held that the dissolution does not terminate the contract of employment.[29]

§ 35. Insolvency of Master or Appointment of Receiver

A contract of employment is not per se terminated by the insolvency of the master.

A contract of employment is not per se terminated by the insolvency of the master;[30] but sequestration proceedings which work the practical dissolution of a corporation have been held to terminate its contract of employment with an employee.[31] An employer's act in placing his affairs in the hands of a liquidating committee of his creditors will not constitute a breach of the contract of employment when the employee continues to work for the committee.[32] Unless the employee has assented to the termination of his employment[33] he may maintain an action for damages for breach of his contract arising from his nonemployment because of bankruptcy, insolvency, or receivership proceedings against the master,[34] whether such proceedings are voluntary or involuntary;[35] or his claim arising from such breach may constitute a valid claim provable against the insolvent master in insolvency proceedings,[36] or in bankruptcy proceedings, as considered in Bankruptcy § 394 b.

§ 36. Destruction of Employer's Property

An employment contract has been held not to be terminated by the destruction of the employer's property, even though he ceases to do business as a result.

Although there is authority to the contrary,[37] it has been held that a contract between an employer and employee is not terminated by the destruction of the property of the employer by fire, and, although the employer ceases to do business as a result, he is still bound by the terms of his contract.[38] Moreover, the temporary impairment of the business by the destruction of credit records, the commodity in which the business deals, will not authorize a termination of the employment.[39]

§ 37. Death or Disability of Master

The death of the master, or other disability preventing his performance, will terminate an employment contract, at least where the contract requires his personal coöperation for its proper fulfillment.

In the absence of a stipulation to the contrary in the contract of employment,[40] the death of the master during the term will terminate a contract of employment,[41] at least where it involves the obedi-

23. Ga.—Anderson v. Freeman, 9 S. E. 1075, 75 Ga. 93, 80 Ga. 364.
39 C.J. p 77 note 22.

24. U.S.—Ream v. Callahan, D.C. N.Y., 42 F.Supp 951, affirmed, C. C.A., 136 F.2d 194.

25. D.C.—Shumate v. Sohon, 12 F. 2d 825, 56 App.D.C. 290, 59 A.L.R. 291.
39 C.J. p 77 note 23.
Sale of business
A contract of employment is not breached by the surviving partner's sale of the entire business without making any provision for the employee's continued employment.—Shumate v. Sohon, supra.

26. N.Y.—U. S. v. U. S. Fidelity & Guaranty Co., 123 N.Y.S. 938, 139 App.Div. 262.

27. Pa.—Fereira v. Sayres, 5 Watts & S. 210, 40 Am.D. 496—Johnson v. Judge, 16 Pa.Super. 137.

28. Mass.—Hughes v. Gross, 43 N. E. 1031, 166 Mass. 61, 55 Am.S.R. 375, 32 L.R.A. 620.

29. Mass.—Nickerson v. Russell, 53 N.E. 141, 172 Mass. 584.
39 C.J. p 77 note 26.

30. U.S.—Conway v. White, C.C.A. Conn., 9 F.2d 863.
Pa.—Hassenfus v. Philadelphia Packing & Provision Co., 15 Pa.Co. 650.
39 C.J. p 77 note 28.
Involuntary bankruptcy as giving other party to executory contract option to terminate see Contracts § 430.

31. N.Y.—Eddy v. Co-Operative Dress Assoc., 3 N.Y.Civ.Proc. 442.

32. U.S.—In re Levy & Sons Co., D.C.Md., 208 F. 479.

33. Pa.—Vanuxem v. Bostwick, 7 A. 598, 4 Pa.Cas. 532.

34. Ga.—Milton v. Newborn Bank, 116 S.E. 861, 30 Ga.App. 55.
39 C.J. p 77 note 32.
Appointment of receiver for party to executory contract as giving other party to contract right to treat such appointment as terminating contract and to prove a claim, or sue, for damages see the C.J.S. title Receivers § 267, also 53 C.J. p 233 notes 81–82.

35. Ga.—Milton v. Newborn Bank, 116 S.E. 861, 30 Ga.App. 55.
39 C.J. p 77 note 33.

36. Pa.—Hassenfus v. Philadelphia Packing & Provision Co., 15 Pa. Co. 650.
Claim under unexpired employment contract as claim against corporation provable in insolvency or receivership proceedings see Corporations §§ 1537–1538.

37. N.Y.—Maidment v. Charles A. Krause Milling Co., 233 N.Y.S. 621, 225 App.Div. 492.

38. Ga.—Macon Canning Co. v. Roberts, 105 S.E. 734, 26 Ga.App. 147.

39. Mass.—Moreland v. Credit Guide Pub. Co., 152 N.E. 62, 255 Mass. 469, 47 A.L.R. 256.

40. Neb.—Homan v. Redick, 149 N.W. 782, 97 Neb. 299, L.R.A.1915C 601.

41. N.Y.—Kadison v. Reibman, 62 N.Y.S.2d 728.
Tenn.—Ridges v. Williams, 15 Tenn. App. 197.
39 C.J. p 78 note 40.
Death of partner see supra § 34.

ence or following of directions by the employee and the giving of such directions or orders by the employer, or its proper fulfillment requires the personal coöperation of the employer,[42] unless the contract is capable of performance by his personal representatives in whose service the servant continues.[43] It has been held that a contract of employment cannot be enforced against personal representatives of a deceased master, although the contract expressly provides that they are to be bound by the covenants thereof, when it is of such a nature that it could not have been enforced against the personal representatives of the employee if he had deceased.[44] A contract of employment for a definite term has been held not to be terminated by the master's becoming insane during the term[45] although the contract gives the master the option to terminate it at any time on payment of a certain amount.[46]

§ 38. Death or Disability of Servant

The death, insanity, sickness, or other disability of an employee which prevents the performance of his contract terminates his employment unless the parties have contracted to the contrary.

A contract of employment for personal services is terminated by the death of the servant,[47] or where by reason of insanity,[48] sickness, or other disability,[49] or conviction of a felony[50] he is unable to perform his contract, unless the parties have contracted to the contrary.[51] The fact that the servant is incapacitated by causes beyond his control, or, as it is termed, by the act of God, does not deprive the master of his right to terminate the contract.[52] Illness of the employee, however, does not ipso facto breach the employment contract to such an extent as to terminate it.[53] Whether it is terminated thereby depends on the facts of the particular case, the period of illness, its nature, the kind of service rendered, and other facts.[54] Ordinarily the employment will not be regarded as terminated by the employee's illness if he is able to return to his employment within a reasonable time[55] or if the

42. Ill.—In re Wilmes' Estate, 239 Ill.App. 229.

43. N.C.—Hall v. Durham Loan & Trust Co., 158 S.E. 388, 200 N.C. 734.
39 C.J. p 78 note 41.

44. Neb.—Homan v. Redick, 149 N. W. 782, 97 Neb. 299, L.R.A.1915C 601.

45. Ill.—Sands v. Potter, 46 N.E. 282, 165 Ill. 397, 56 Am.S.R. 253.
39 C.J. p 78 note 44.

46. Ill.—Sands v. Potter, supra.
39 C.J. p 78 note 45.

47. Cal.—Carver v. Fitzsimmons, 42 P.2d 1066, 5 Cal.App.2d 320.
Ill.—In re Wilmes' Estate, 239 Ill. App. 229.
Tenn.—Ridges v. Williams, 15 Tenn. App. 197—**Corpus Juris cited in** American Nat. Ins. Co. v. Jackson, 12 Tenn.App. 305, 308–309.
39 C.J. p 78 note 47.
Deduction or forfeiture and apportionment of wages see infra § 85.

Obligations of contract undertaken in contemplation of the rendition of personal services by one of the parties thereto are terminated by the death of such party.—Carver v. Fitzsimmons, 42 P.2d 1066, 5 Cal.App.2d 320.

Right to services abrogated
In legal contemplation the servant's death instantly abrogates the master's right to his services.—Stevenson v. W. M. Ritter Lumber Co., 62 S.E. 351, 108 Va. 575, 18 L. R.A.,N.S., 316.

48. Tenn.—American Nat. Ins. Co. v. Jackson, 12 Tenn.App. 305.

49. Mass.—Shawsheen Dairy v. Keefe, 29 N.E.2d 157, 307 Mass. 30—Kowalski v. Ætna Life Ins. Co., 165 N.E. 476, 266 Mass. 255, 63 A.L.R. 1030.
S.D.—**Corpus Juris cited in** Rollinger v. Dairyland Creamery Co., 287 N. W. 333, 336, 66 S.D. 592.
Tenn.—**Corpus Juris cited in** Greenwood v. National Biscuit Co., 134 S.W.2d 149, 151, 175 Tenn. 302—**Corpus Juris cited in** American Nat. Ins. Co. v. Jackson, 12 Tenn. App. 305, 308, 309.
39 C.J. p 78 note 48.

Implied condition
(1) It is an implied condition of a contract of employment that inability from sickness or disease to perform the services on which the contract depends will be a sufficient excuse for nonperformance on the part of either party and will justify the master in terminating the relation.—Green v. Gilbert, 21 Wis. 395—39 C.J. p 88 note 51.

(2) In contract for special work and labor, it is implied that party contracting shall be mentally and physically capable of performing duties.—Lambert v. Laing & Thompson Iron Works, 264 P. 362, 124 Or. 197.

(3) A contract for personal services presupposes the continuing ability of the employee to make substantial performance.—Hetkowski v. School District of Borough of Dickson City, 15 A.2d 470, 141 Pa.Super. 526.

50. Miss.—Gulf & S. I. R. Co. v. McGlohn, 184 So. 71, 183 Miss. 465.

51. S.D.—**Corpus Juris cited in** Rollinger v. Dairyland Creamery Co., 287 N.W. 333, 336, 66 S.D. 592.
Tenn.—**Corpus Juris cited in** Greenwood v. National Biscuit Co., 134 S.W.2d 149, 151, 175 Tenn. 302—**Corpus Juris cited in** American Nat. Ins. Co. v. Jackson, 12 Tenn. App. 305, 308, 309.
39 C.J. p 78 note 49.

Contract held not to prevent termination of employment for employee's disability.—Rollinger v. Dairyland Creamery Co., 287 N.W. 333, 66 S.D. 592.

Effect of agreement
A contract of employment which expressly provides that the death of either party will not terminate it prior to the end of the term may be terminated because of the disabling, but not fatal, illness of the employee which prevents his performance for a substantial period of time of the services he contracted to perform.—Wells v. Haff, 151 N.Y.S. 497, 165 App.Div. 705.

52. Mass.—Johnson v. Walker, 29 N.E. 522, 155 Mass. 253, 31 Am. S.R. 550.

53. N.Y.—Fahey v. Kennedy, 243 N. Y.S. 396, 230 App.Div. 156, appeal denied 244 N.Y.S. 603, 230 App. Div. 799—Bassett v. French, 31 N. Y.S. 667, 10 Misc. 672, appeal dismissed 49 N.E. 325, 155 N.Y. 46.

54. N.Y.—Fahey v. Kennedy, 243 N. Y.S. 396, 230 App.Div. 156, appeal denied 244 N.Y.S. 603, 230 App.Div. 799.

Waiver
Employers' prior conduct may operate as waiver of their rights to terminate employment contract because of employee's illness.—Fahey v. Kennedy, supra.

55. N.Y.—Fahey v. Kennedy, supra.

disability is temporary and does not in any substantial manner prevent performance on the part of the employee;[56] but the protracted illness of an employee whose services are of immediate necessity, or are of such a special character that no ordinary person can perform them, so that it is necessary to obtain the services of a skilled person in order to continue the business, furnishes grounds for the employer to declare the employment terminated.[57] Where a master has wrongfully discharged his servant, he cannot treat the subsequent sickness of the servant while in the employment of another, for which he is not discharged by the subsequent employer, as a cancellation of his own contract.[58]

Notice of termination. Where an employee has been sick for an appreciable length of time whereby he is unable to perform his duties it has been held not to be necessary to give notice of the termination of the contract,[59] as in such case the right to terminate the employment does not depend on giving notice to the employee but on the fact that he has become unable to render the services on whose continuance the employment depends.[60]

§ 39. Military Service of Servant

An employee who voluntarily leaves his employment and enlists in the armed services terminates his contract of employment.

An employee who voluntarily leaves his employment and enlists in the armed services terminates his contract of employment and surrenders his contractual rights thereunder; and, regardless of any statutory right he may have to reinstatement of his employment status on his release or discharge from the service, as considered in the title Army and Navy § 60, he has no rights to employment or cause of action for refusal to employ based on the contract itself.[61]

§ 40. Abandonment of Employment by Servant

a. In general

b. Justification

a. In General

An employee who refuses to serve or voluntarily abandons his employer's service, terminates the employment, or, at least, the employer is authorized to rescind the contract and refuse longer to be bound by it.

Where an employee, including one under a contract for permanent employment,[62] refuses to serve or voluntarily abandons the service, whether with or without justifiable cause, the contract of employment is terminated,[63] or, at least, the employer is authorized to rescind the contract and refuse longer to be bound by it.[64] In such case he may not insist on reëmployment.[65] The only way he can

56. N.Y.—Fisher v. Monroe, 12 N.Y.S. 273, 16 Daly 461—Rubin v. International Film Co., 204 N.Y.S. 81, 122 Misc. 413.
39 C.J. p 88 note 55.

57. N.Y.—Fahey v. Kennedy, 243 N.Y.S. 396, 230 App.Div. 156, appeal denied 244 N.Y.S. 603, 230 App.Div. 799.

58. N.Y.—Bassett v. French, 31 N.Y.S. 667, 10 Misc. 672, 1 N.Y.Ann.Cas. 270, appeal dismissed 49 N.E. 325, 155 N.Y. 46.

59. Mass.—Kowalski v. Aetna Life Ins. Co., 165 N.E. 476, 266 Mass. 255, 63 A.L.R. 1030.
Tenn.—American Nat. Ins. Co. v. Jackson, 12 Tenn.App. 305.

60. Mass.—Johnson v. Walker, 29 N.E. 522, 155 Mass. 253, 31 Am. S.R. 550.
Tenn.—American Nat. Ins. Co. v. Jackson, 12 Tenn.App. 305.

61. U.S.—Dacey v. Trust Funds, D.C.Mass., 66 F.Supp. 321.

62. Cal.—Bene v. La Grande Laundry Co., 71 P.2d 351, 22 Cal.App. 2d 512.

63. Cal.—**Corpus Juris cited in** Bene v. La Grande Laundry Co., 71 P. 2d 351, 353, 22 Cal.App.2d 512.
Mo.—**Corpus Juris quoted in** Douglas v. Metropolitan Life Ins. Co., App., 297 S.W. 87, 90.
Tex.—Farley v. Universal Mills, Civ. App., 116 S.W.2d 488.
W.Va.—**Corpus Juris cited in** Adkins v. Aetna Life Ins. Co., 43 S.E.2d 372, 377.
39 C.J. p 79 note 54.
Action by master for breach of contract see infra § 78.
Deduction or forfeiture and apportionment of wages see infra §§ 104, 113.
Indictment of servant for breach of contract see infra § 80.
Right to:
Terminate contract of employment for indefinite term see supra § 31.
Unemployment Compensation benefits see the C.J.S. title Social Security and Public Welfare.
Servant's abandonment of employment as ground for discharge see infra § 42.
Set-off or counterclaim of damages in action for wages see infra § 126.
Strike as terminating employment within regulating provisions see supra § 28 (13).
Time to sue for wages see infra § 124.

Declaration of intention

(1) If an employee leaves his work and definitely declares that he intends to terminate his employment his departure terminates the contract.
La.—Labatt v. Louisiana Adjustment Bureau, App., 185 So. 702—Ford v. Danks, 16 La.Ann. 119.
Mo.—Douglas v. Metropolitan Life Ins. Co., App., 297 S.W. 87.

(2) Under such circumstances it is not necessary that he remain away for any fixed period.—Labatt v. Louisiana Adjustment Bureau, La. App., 185 So. 702.

Evidence held to show abandonment
Mo.—Douglas v. Metropolitan Life Ins. Co., App., 297 S.W. 87.
39 C.J. p 79 note 54 [a].

Leave of absence

An employee who leaves his employment on a leave of absence terminates his employment if he does not return and resume his employment within a reasonable time.—Bene v. La Grande Laundry Co., 71 P.2d 351, 22 Cal.App.2d 512.

64. Me.—Dube v. Simard, 129 A. 488, 124 Me. 369.

65. Cal.—Bene v. La Grande Laundry Co., 71 P.2d 351, 22 Cal.App. 2d 512.
Mo.—Douglas v. Metropolitan Life Ins. Co., App., 297 S.W. 87.

return to the abandoned employment is by making a new contract with his employer, who may or may not receive him back, as he sees fit.[66] In the absence of assent by both parties to its cancellation, a contract of employment, however, is not abandoned or merged by the employee's entry into a contract with a third person,[67] even though the subsequent contract calls for the employee's exclusive service.[68] The employer may waive the employee's abandonment of his employment,[69] even though the contract of employment is under seal.[70]

A "quit" has been defined as a termination of employment by the worker because of his desire to leave, and may result from dissatisfaction with wages, hours, or conditions of labor. Sickness, disability, old age, death, or expected call to military service may likewise be influencing factors.[71]

b. Justification

In order to justify an employee in abandoning his employment before the expiration of its term, good and just cause must exist therefor, which generally includes any breach of the employment contract, or act or neglect by the master which is prejudicial to the safety, health, comfort, morals, or reputation of the employee.

An employee is not justified in abandoning his contract before the expiration of the term unless good and just causes exist therefor.[72] For adequate cause, however, he is entitled to refuse to continue his employment;[73] and since, as discussed supra § 31, an employment for an indefinite term may be terminated at the will of either party, an employee who is not bound by contract has the right to quit his employment when he pleases,[74] for any cause, in good or bad faith, with or without malice.[75] Generally speaking, any breach of the express or implied provisions of the contract of employment by the master, or any act or neglect on his part which is prejudicial to the safety, health, comfort, morals, or reputation of the servant, will be deemed a sufficient ground for abandonment.[76] Grounds which have been held sufficient to justify the employee in terminating his contract are the employer's restriction of the employee's rights under his employment contract[77] or the employer's requirement that an employee do something immoral or dishonorable in connection with the performance of his duties,[78] although a mere request for such improper conduct, not insisted on, has been held not to justify the employee's quitting the employment.[79]

The requiring of services not contemplated by the contract constitutes a sufficient ground for abandonment by the servant,[80] unless the servant has consented[81] or made no objection thereto;[82] but a mere request, not insisted on, that the servant perform services outside his duty will not justify an abandonment.[83] Where a contract is made on the condition that the employee is to work under, and be supervised by, a certain manager, the employee is justified in abandoning the service after the manager has lawfully severed his connection with the employer.[84]

An employee is not justified in abandoning his employment by the temporary financial embarrassment of the employer;[85] and a neglect to pay wages elsewhere than at the employer's established place of business does not, in the absence of any demand and refusal, amount to such a violation of the contract as to justify an abandonment.[86] However, the neglect or refusal by the employer to pay the agreed compensation will justify an abandonment by the

66. Cal.—Bene v. La Grande Laundry Co., 71 P.2d 351, 22 Cal.App.2d 512.
Mo.—Douglas v. Metropolitan Life Ins. Co., App., 297 S.W. 87.

67. U.S.—Vassardakis v. Parish, D. C.N.Y., 36 F.Supp. 1002.

68. U.S.—Vassardakis v. Parish, supra.

69. Me.—Dube v. Simard, 129 A. 488, 124 Me. 369.

70. Me.—Dube v. Simard, supra.

71. Fla.—International Ass'n of Machinists v. State ex rel. Watson, 15 So.2d 485, 153 Fla. 672.

72. Ky.—Posey v. R. G. Hill & Co., 291 S.W. 773, 218 Ky. 543.
39 C.J. p 79 note 56.

73. Me.—Dube v. Simard, 129 A. 488, 124 Me. 369.

74. N.J.—Kitty Kelly Shoe Corporation v. United Retail Employees of Newark, N. J., Local No. 108, 9 A.2d 295, 126 N.J.Eq. 374, reversed on other grounds 8 A.2d 767, 126 N.J.Eq. 318.
N.Y.—Interborough Rapid Transit Co. v. Lavin, 159 N.E. 863, 247 N.Y. 65, 63 A.L.R. 188.
Ohio.—Baker v. Powhatan Min. Co., 67 N.E.2d 714, 146 Ohio St. 600.
Tex.—Farley v. Universal Mills, Civ. App., 116 S.W.2d 488.
Wash.—Kimbel v. Lumber & Saw Mill Workers Union No. 2575, 65 P. 2d 1066, 189 Wash. 416—Blanchard v. Golden Age Brewing Co., 63 P. 2d 397, 188 Wash. 396.

75. N.Y.—Exchange Bakery & Restaurant v. Rifkin, 157 N.E. 130, 245 N.Y. 260, reargument denied 157 N.E. 895, 245 N.Y. 651.

76. Iowa.—Murphy v. Williamson, 163 N.W. 211, 180 Iowa 291.
39 C.J. p 79 note 57.

77. Ky.—Posey v. R. G. Hill & Co., 291 S.W. 773, 218 Ky. 543.
Refusal to permit exercise of inventive ability
Conn.—Rockwell v. New Departure Mfg. Co., 128 A. 302, 102 Conn. 255.

78. Ky.—Posey v. R. G. Hill & Co., 291 S.W. 773, 218 Ky. 543.
39 C.J. p 79 note 57 [k], [l].

79. Ky.—Posey v. R. G. Hill & Co., supra.

80. La.—Baron v. Placide, 7 La. Ann. 229.

81. Vt.—Mullen v. Gilkinson, 19 Vt. 503.

82. Vt.—Hair v. Bell, 6 Vt. 35.

83. Wis.—Koplitz v. Powell, 14 N. W. 831, 56 Wis. 671.

84. U.S.—Triangle Film Corp. v. Artcraft Pictures Corp., N.Y., 250 F. 981, 163 C.C.A. 231, 7 A.L.R. 303.

85. Ky.—Posey v. R. G. Hill & Co., 291 S.W. 773, 218 Ky. 543.

86. Mass.—Dockham v. Smith, 113 Mass. 320, 18 Am.R. 495.

servant,[87] although, as considered infra § 41, it does not necessarily constitute a discharge.

Whether, in a given case, the ground assigned for abandoning the employment is sufficient is usually a question of fact,[88] the burden of proving which is on the servant.[89]

Waiver. A servant who continues in the employ of the master after a breach which would have justified an abandonment may be deemed to have waived his right;[90] and a restriction of the duties of an employee on the ground that he is unable to give proper attention to all of them has been held not to constitute sufficient grounds for his resignation where he fails to object at the time and continues in the employment for a time thereafter.[91]

§ 41. Discharge

a. General considerations
b. What constitutes discharge

a. General Considerations

As a general rule an employer has the power to discharge an employee notwithstanding the discharge constitutes a breach of the contract of employment.

Although the right to discharge an employee depends on the nature of the employment and the terms of the contract,[92] as a general rule an employer has the power to discharge an employee, even though the discharge constitutes a breach of the contract of employment.[93] Notwithstanding a rule of the employer which requires an open and fair investigation before the discharge of an employee, such an investigation is not essential where an employee admits to the employer the commission of acts which are grounds for discharge.[94]

b. What Constitutes Discharge

Any words or acts which show the master's intention to dispense with the servant's services and which are equivalent to a declaration to the servant that his services will not be accepted are sufficient to constitute a discharge.

A discharge of a servant presumptively means that the employer no longer needs or desires his services, that he is done with him, and all contract relations are at an end.[95] Generally, in order to constitute a discharge there must be some conduct on the part of the employer indicating that he will no longer be bound by the contract of employment,[96] and there must be an intention on his part to abrogate the contract and communication of such intention to the employee by word or act.[97] There is authority for the view, however, that, in order to be effective, it is not essential under all circumstances that the fact of discharge shall be communicated to the employee at the time of discharge.[98]

No set form of words is necessary to constitute a discharge, but any words or acts which show a clear intention on the part of a master to dispense with the servant's services, and which are equivalent to a declaration to the servant that his services will be no longer accepted, are sufficient.[99] Mere

87. Wis.—Dore v. Glenn Rock Mineral Spring Co., 132 N.W. 906, 147 Wis. 158.
39 C.J. p 79 note 63.

88. Me.—Dube v. Simard, 129 A. 488, 124 Me. 369.
Minn.—Erickson v. Sorby, 96 N.W. 791, 90 Minn. 327.

89. Ill.—Griffin v. Kaericher, 29 Ill. App. 162.
N.J.—Erving v. Ingram, 24 N.J.Law 520.

90. N.J.—Tribune Ass'n v. Simonds, Ch., 104 A. 386.
39 C.J. p 79 note 58.

91. Ky.—Posey v. R. G. Hill & Co., 291 S.W. 773, 218 Ky. 543.

92. Va.—Spotswood Arms Corporation v. Este, 133 S.E. 570, 147 Va. 1047.

93. U.S.—Taylor v. Tulsa Tribune Co., C.C.A.Okl., 136 F.2d 981.

Unexecuted authority

It has been laid down that a master may suspend or revoke authority which has not been executed.—Reid v. Milwaukee Air Power Pump Co., 247 N.W. 868, 211 Wis. 242.

94. Cal.—Adams v. Southern Pac. Co., 266 P. 541, 204 Cal. 63, 57 A.L.R. 1066.

95. U.S.—Droste v. Nash-Kelvinator Corp., D.C.Mich., 64 F.Supp. 716.
Mich.—Stitt v. Locomotive Engineers' Mut. Protective Ass'n, 142 N.W. 1110, 177 Mich. 207, 215.
Minn.—Neid v. Tassie's Bakery, 17 N.W.2d 357, 219 Minn. 272.

Other definitions

(1) "The term 'discharge' means to cease to employ."—Barrows v. Riss & Co., 179 S.W.2d 473, 475, 238 Mo.App. 334.

(2) "To suspend or discharge means to remove, either temporarily or permanently, from employment."—Markey v. Pickley, 132 N.W. 883, 885, 152 Iowa 508.

(3) "To discharge an employee is to remove him temporarily or permanently from employment."—In re Public Ledger, D.C.Pa., 63 F. Supp. 1008, 1015.

(4) "A 'discharge' is a termination of employment at the will of the employer, with prejudice, because of some fault on the part of the worker."—International Ass'n of Machinists v. State ex rel. Watson, 15 So.2d 485, 490, 153 Fla. 672.

96. U.S.—In re Public Ledger, D.C. Pa., 63 F.Supp. 1008.

Change of territory of salesman was held not to constitute a discharge.—Farley v. Universal Mills, Tex.Civ.App., 116 S.W.2d 488.

97. U.S.—In re Public Ledger, D. C.Pa., 63 F.Supp. 1008.

98. Utah.—Bodmer v. Police Mut. Aid Ass'n, 78 P.2d 640, 94 Utah 450.

99. U.S.—Taylor v. Tulsa Tribune Co., C.C.A.Okl., 136 F.2d 981.
Cal.—Percival v. National Drama Corp., 185 P. 972, 181 Cal. 631.
La.—Kottemann v. Gross, App., 184 So. 380.
Minn.—Neid v. Tassie's Bakery, 17 N.W.2d 357, 219 Minn. 272.
N.Y.—Rosenthal v. Becher, 289 N. Y.S. 136, 159 Misc. 856.
39 C.J. p 80 note 69–78.

Matters constituting discharge

(1) Employer's statement, to employee that he was unable to pay overdue or accruing salary and suggestion that employee look for an-

expressions of dissatisfaction or even threats to terminate the contract of employment do not, however, amount to a termination of the contract with resultant discharge.[1] Words, although apt for the purpose, will not constitute a discharge when not so treated by the servant,[2] and even declaring the contract terminated will not terminate it unless both parties act accordingly and the relationship is actually discontinued.[3]

A failure to pay the employee as required by the contract,[4] or a mere closing up of the employer's place of business,[5] does not of itself necessarily constitute a discharge, but under some circumstances failure to pay may be tantamount to a discharge,[6] and a refusal to pay compensation as provided in the contract and an offer to pay on a different basis may constitute a rescission of the contract constituting a discharge.[7] According to some decisions a discharge may be effected by acts making it impractical for the employee to perform the duties of his employment,[8] or by a complete transferance to another of duties for the performance of which the employee was hired.[9] The view has been taken, however, that a refusal by the employer to allow the employee to perform duties in his behalf is not a breach of the contract when the employer continues to pay him his salary.[10]

A resolution of a corporation directing officers to discharge an employee will not constitute a discharge where the officers fail to act thereon.[11] A purported discharge by an agent will not operate as such, as against the employer, when the agent was without authority in fact.[12]

§ 42. —— Grounds

a. General considerations
b. Inducing contract by false representation
c. Breach of contract in general
d. Misconduct in general
e. Adverse or disloyal interests or acts
f. Incompetency
g. Neglect of duty
h. Disobedience and insubordination
i. Intoxication or intemperance

a. General Considerations

Unless the contract of employment is terminable at will or the right to discharge without cause is reserved, a discharge of a servant made arbitrarily and without good cause is not justifiable; any act of a servant which injures or tends to injure the master's business, interests, or reputation justifies dismissal of the servant.

As a general rule, unless the contract of employ-

other job constituted wrongful discharge of employee.—Rosenthal v. Becher, supra.

(2) Where acts and statements of employer could not reasonably be understood otherwise than plainly indicating its purpose not longer to accept and pay for employee's services in accordance with agreement, there was a repudiation of the contract.—Taylor v. Tulsa Tribune Co., C.C.A.Okl., 136 F.2d 981.

(3) Other matters held to constitute discharge.
N.Y.—Mavian v. Majestic Photo Engraving Co., 19 N.Y.S.2d 677.
Tex.—McKinney v. Smith, Civ.App., 271 S.W. 247.

Want of formal discharge
In salesman's action to recover commissions where employer sent salesman a telegram stating that it was releasing salesman from any contract and thereafter employer failed to cooperate with salesman and refused to allow salesman his commission on all orders received by employer as provided in contract, employer breached contract, so as to entitle salesman to maintain an action for lost profits, notwithstanding employer had not formally discharged salesman.—Helfer v. Corona Products, C.C.A.Ark., 127 F.2d 612.

1. Okl.—Roxana Petroleum Co. of Oklahoma v. Rice, 235 P. 502, 109 Okl. 161.

Warning to employee that, unless he does better his services will be dispensed with, does not constitute a discharge.—Richard v. Producers Distributing Corporation, 1 La.App. 406.

2. Wis.—Reiber v. Rathbone, Sard & Co., 193 N.W. 67, 180 Wis. 287.
39 C.J. p 80 note 79.

3. Okl.—Roxana Petroleum Co. of Oklahoma v. Rice, 235 P. 502, 109 Okl. 161.

4. Cal.—Percival v. National Drama Corp., 185 P. 972, 181 Cal. 631.
39 C.J. p 80 note 80.

Failure to pay commission
Employer's failure to pay disputed commission demanded by employee did not terminate contract.—Clinton v. Des Moines Music Co., 228 N.W. 664, 209 Iowa 636.

5. Cal.—Percival v. National Drama Corp., 185 P. 972, 181 Cal. 631.

6. N.Y.—Rosenthal v. Becher, 289 N.Y.S. 136, 159 Misc. 856.

Failure to pay increase provided for by contract
La.—Kottemann v. Gross, App., 184 So. 380.

7. **Attempted substitution of commission for salary**
N.J.—Diffley v. Jacobson Mfg. Co., 143 A. 696, 6 N.J.Misc. 1044, affirmed 147 A. 908, 105 N.J.Law 631.

8. Okl.—Roxana Petroleum Co. of Oklahoma v. Rice, 235 P. 502, 109 Okl. 161.
39 C.J. p 80 note 83.

9. N.Y.—Hicks v. Haight, 11 N.Y. S.2d 912, 171 Misc. 151.
39 C.J. p 80 note 83.

Employee not in default
Construction contractors, employing mechanical engineer to check materials and supervise construction, were not authorized to employ another to do such work at his expense or fix his hours, where such engineer had done all that was required or that the contractors had permitted him to do, and the contractors terminated contract by writing him that they had employed another to do work, after notifying him to do so and be on job at certain time every morning.—Catalano v. Bopst, 170 A. 562, 166 Md. 91.

10. N.Y.—Wallace v. Kranz, 234 N.Y.S. 439, 226 App.Div. 125.
39 C.J. p 80 note 82.

11. Wash.—Barnett v. Mayer, 205 P. 396, 119 Wash. 323.

12. Wash.—Amann v. Pantages, 155 P. 1070, 90 Wash. 271.
Authority of agent to discharge employee generally see Agency § 105 c.

ment is terminable at will under rules discussed supra § 31, or the right to discharge without cause is reserved,[13] an employer is not justified in arbitrarily discharging his employee,[14] but only in discharging the employee for good cause.[15] Generally, however, an employer has the right to discharge an employee at any time for good cause.[16]

As a general proposition, any act of the servant which injures or has a tendency to injure his master's business, interests, or reputation will justify the dismissal of the servant.[17] Actual loss is not essential;[18] it is sufficient if, from the circumstances, it appears that the master has been, or is likely to be, damaged by the acts of which complaint is made.[19] The fact that the contract of employment authorizes the employer to terminate it for certain specified causes does not necessarily prevent the employer from discharging the employee for a legal cause not so specified.[20]

Termination of contract because of illness of servant is discussed supra § 38.

b. Inducing Contract by False Representation

False representations by the servant which induced the making of the contract of employment may justify the master in discharging the servant.

Where the contract of employment has been entered into by reason of the false representations of the servant, the master is justified in discharging him.[21]

c. Breach of Contract in General

As a general rule, a master is justified in discharging his servant because of breach by the servant of an express or implied condition in the contract of employment.

As a general rule, a master is justified in discharging his servant for any breach of the express or implied conditions in the contract of employment,[22] even though the employer has not sustained

13. N.Y.—Dineen v. May, 134 N.Y.S. 7, 149 App.Div. 469.

14. N.J.—Meyers v. Potoker, 128 A. 601, 3 N.J.Misc. 450.
Pa.—See Ceroni v. Montgomery Ward & Co., Com.Pl., 22 West.Co. L.J. 58.
39 C.J. p 80 note 88.

Breach of contract
Employer's repudiation of employment contract by notifying employee of termination without legal justification was breach of contract.—Westerfield v. Liberty Oil Co., 223 N.W. 894, 208 Iowa 912.

15. Pa.—See Ceroni v. Montgomery Ward & Co., Com.Pl., 22 West.Co. L.J. 58.
Tex.—Fairbanks, Morse & Co. v. Carsey, Civ.App., 109 S.W.2d 985, error dismissed.
39 C.J. p 80 note 89.

Causes held insufficient
(1) Filing of suit to impress lien on stock transferred by employer to employer's wife.—McCutcheon v. National Acceptance Corporation, 197 So. 475, 143 Fla. 663, 130 A.L.R. 915.
(2) Refusal to sign written contract containing extraneous statements.—Fairbanks, Morse & Co. v. Carsey, Tex.Civ.App., 109 S.W.2d 985, error dismissed.

Employment based on consideration
Employment based on a consideration can be rightfully terminated by employer only under conditions which render it reasonably just and proper to do so.—Seifert v. Arnold Bros., 31 P.2d 1059, 138 Cal.App. 324—Lynch v. Gagnon, 274 P. 584, 96 Cal.App. 512.

Excessive pay
Discharge of employee without notice and excuse, other than that employee was receiving too much pay, was inequitable.—Chicago Towel Co. v. Reynolds, 152 S.E. 200, 108 W.Va. 615.

Operation at loss
(1) Under statutory provision that if, without serious ground of complaint, a man sends away a laborer whose services he has hired for a certain time, before that time has expired, he shall be bound to pay such laborer the whole of the salaries to which such laborer would have been entitled for the full term, the facts that another was coming into an agency and that the department was showing a loss did not constitute a serious or sufficient ground of complaint which would justify the discharge of a department manager.—Van Denburgh v. H. T. Higginbotham, Inc., 122 So. 581, 168 La. 461.

Right under provision of contract
Where right to discharge is dependent on provision of contract that it will be effective until terminated by the employer for cause, there must be a reasonable and justifiable cause in order to warrant discharge.—Fairmont Creamery Co. v. Ewing, 182 N.E. 883, 43 Ohio App. 191.

16. Tenn.—Jackson v. Texas Co., 10 Tenn.App. 235—Glasgow v. Hood, Ch.App., 57 S.W. 162.

17. Md.—Bright v. Ganas, 189 A. 427, 171 Md. 493, 109 A.L.R. 467.
Mich.—Robinson v. Western Union Telegraph Co., 135 N.W. 292, 169 Mich. 503.
Or.—**Corpus Juris quoted in** Osburn v. De Force, 257 P. 685, 690, 122 Or. 360, motion denied 262 P. 222, 123 Or. 352.
Pa.—Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36.
Tex.—**Corpus Juris cited in** Royal Oak Stave Co. v. Groce, Civ.App., 113 S.W.2d 315, 316, **error dismissed.**
39 C.J. p 81 note 90.

18. Pa.—Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36.
39 C.J. p 81 note 91.

Pecuniary loss
Where there otherwise is ground for discharge, master is not compelled to keep employee for given term in service until master's business has suffered pecuniary loss.—Bernstein v. Lipper Mfg. Co., supra.

19. Iowa.—Miller v. Jones, 159 N.W. 671, 178 Iowa 168.
39 C.J. p 81 note 91.

20. Ohio.—Rorick v. Gilbert, 186 N.E. 756, 45 Ohio App. 96, affirmed Gilbert v. Rorick, 186 N.E. 90, 125 Ohio St. 636.

Contract authorizing termination for disability
Provision in employment contract that employer might terminate contract in event of disability of employee, except for temporary illness, to perform duties does not preclude employer from discharging employee where legal, other than disability, cause is shown.—Corman Aircraft Corporation v. Weihmiller, C.C.A.Ill., 78 F.2d 241, 100 A.L.R. 504.

21. U.S.—Jones v. Trinity Parish, C.C.N.C., 19 F. 59.
39 C.J. p 83 note 7.

False representations in an application for employment may be ground for cancellation of the contract.—Huffman v. Southern Underwriters, 128 S.W.2d 4, 133 Tex. 354.

22. Ind.—H. C. Bay Co. v. Kroner, 149 N.E. 184, 83 Ind.App. 541.
Ky.—Watkins, Inc., v. Cochran, 168 S.W.2d 351, 292 Ky. 846.
Minn.—Bang v. International Sisal

any injury as a result of the breach.[23] A substantial compliance with the terms of the contract is all that is required[24] and the refusal of a servant to perform services not provided for in the contract will not justify his discharge, as shown infra subdivision h of this section. An employee's refusal to accede to a custom of his employer does not necessarily justify the discharge of the employee.[25] In order to justify a termination of a contract for services of various kinds, dependent on circumstances, a demand and refusal to do some kind of work not inconsistent with the performance of other duties under the contract must be shown.[26] Where, however, there has been a substantial breach of the contract, the master is justified in discharging the servant, even though the omission of the latter to do the thing required of him was produced by causes which he could neither foresee nor control.[27]

d. Misconduct in General

Misconduct of a servant or employee which is inconsistent with the relation of master and servant justifies discharge.

As a general rule, any misconduct inconsistent with the relation of master and servant will justify the master in terminating the contract at any time,[28] and, where an employee's conduct with respect to his fellow employees or others with whom he is brought in contact has a tendency to interfere with the employer's business or with plant or business discipline, the employer may properly discharge such employee.[29]

Among grounds which have been regarded as in-

Co., 4 N.W.2d 113, 212 Minn. 135, 141 A.L.R. 657.

N.Y.—Kandell v. American Beverage Corporation, 32 N.Y.S.2d 381, 263 App.Div. 888, reargument denied 33 N.Y.S.2d 826, 263 App.Div. 968.

39 C.J. p 81 note 94.

Absence from, or abandonment of, service

N.Y.—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented 33 N.Y.S.2d 764.

Wis.—Blum Bros. Box Co. v. Wisconsin Labor Relations Board, 282 N.W. 98, 229 Wis. 615.

39 C.J. p 81 note 94 [f].

Consideration of term of contract

Where sales manager for company violated contract, term of employment under contract was immaterial with respect to legality of discharge. —Union Deposit Co. v. Schulte, 7 P. 2d 820, 90 Colo. 152.

Failure to furnish bond

Colo.—Union Deposit Co. v. Schulte, 7 P.2d 820, 90 Colo. 152.

39 C.J. p 81 note 94 [g].

Refusal to perform services contemplated by contract

N.Y.—West v. Scaroon Hotel Corp., 67 N.Y.S.2d 163, 187 Misc. 539.

Particular facts held not to show breach of contract

Ala.—E. D. Lanford Co. v. Buck, 124 So. 418, 220 Ala. 190.

Cal.—Goudal v. Cecil B. De Mille Pictures Corporation, 5 P.2d 432, 118 Cal.App. 407, hearing in supreme court denied 7 P.2d 174, 118 Cal.App. 407.

La.—Labatt v. Louisiana Adjustment Bureau, App., 185 So. 702—Travis v. Swearingen, App., 143 So. 509.

39 C.J. p 81 note 94 [i].

23. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Republic Productions, 112 P.2d 972, 44 Cal. App.2d 651.

24. Tex.—Dallas Hotel Co. v. Lackey, Civ.App., 203 S.W.2d 557.

39 C.J. p 82 note 95.

25. Tex.—Freeman v. Morrow, Civ. App., 156 S.W. 284.

39 C.J. p 82 note 97.

26. Wis.—Wright v. C. S. Graves Land Co., 75 N.W. 1000, 100 Wis. 269.

27. Ill.—Leopold v. Salkey, 89 Ill. 412, 31 Am.S.R. 93.

39 C.J. p 82 note 99.

Absence from place of employment

An employee's absence from the place of employment which prevents employee from performing his contract of employment, even though induced by forces beyond employee's control, is a justification for a discharge.—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented 33 N.Y.S.2d 764.

28. U.S.—Brown v. Dupuy, C.C.A. Ill., 4 F.2d 367.

Ark.—**Corpus Juris cited in** Texarkana Baptist Orphanage v. Wilson, 74 S.W.2d 224, 225, 189 Ark. 466.

Md.—Bright v. Ganas, 189 A. 427, 171 Md. 493, 109 A.L.R. 467.

Mo.—**Corpus Juris quoted in** M. F. A. Milling Co. v. Unemployment Compensation Commission, Mo., 169 S. W.2d 929, 931, 350 Mo. 1102.

N.Y.—La Duke v. International Paper Co., 17 N.Y.S.2d 608, 258 App. Div. 375.

39 C.J. p 84 note 24.

Abusive, insolent, or threatening conduct

(1) Generally.

U.S.—**Corpus Juris cited in** Myers v. American Wells Co., C.C.A.Va., 114 F.2d 252, 253.

Ohio.—Dayton Rubber Mfg. Co. v. Brown, 156 N.E. 136, 116 Ohio St. 373.

Pa.—Clark v. Pinkerton, 169 A. 413, 111 Pa.Super. 150.

Wash.—Haag v. Revell, 184 P.2d 442.

39 C.J. p 84 note 24 [b].

(2) Disrespectful language toward employer unless reasonably induced by the conduct of employer.—Griffin Grocery Co. v. Thaxton, 11 S.W.2d 473, 178 Ark. 736.

(3) Abusive language to superiors. —White v. Mandel Bros., 248 Ill.App. 313.

(4) Abusive and rude conduct and language as to superior and customers.—Speiden v. Innis, Speiden & Co., 215 N.Y.S. 515, 216 App.Div. 408.

(5) Threatening language and conduct of employee toward employer.—Blue v. Chandler, La.App., 5 So.2d 210.

Dishonesty warranting discharge

(1) Generally.

Ark.—Hale Hardware Co. v. Ragland, 263 S.W. 962, 165 Ark. 258.

Del.—Tilden v. E. A. Stevenson & Co., 132 A. 739, 3 W.W.Harr. 151.

Ky.—Watkins, Inc., v. Cochran, 168 S.W.2d 351, 292 Ky. 846.

39 C.J. p 84 note 24 [a].

(2) Embezzlement from subsidiary company.—Tilden v. E. A. Stevenson & Co., supra.

(3) Stealing from employer.

N.Y.—Sundland v. Korfund Co., 20 N.Y.S.2d 819, 260 App.Div. 80.

Pa.—In re Lehrman, Com.Pl., 52 Dauph.Co. 1—Ceroni v. Montgomery Ward & Co., Com.Pl., 22 West. Co.L.J. 58.

Immoral acts or associations

Cal.—Adams v. Southern Pac. Co., 266 P. 541, 204 Cal. 63, 57 A.L.R. 1066.

39 C.J. p 84 note 24 [c].

29. Pa.—Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36.

Tex.—Royal Oak Stave Co. v. Groce, Civ.App., 113 S.W.2d 315, error dismissed—Hicks v. Dunlap, Civ.App., 59 S.W.2d 884, error dismissed.

sufficient to justify a discharge are petty annoyances[30] and slight discourtesies.[31] While, according to some decisions, insolence, which otherwise would afford a sufficient ground, will not necessarily justify a dismissal when provoked by the master,[32] the fact that the employee was goaded and unjustly provoked to the use of abusive language does not necessarily render a discharge unjustifiable.[33]

Where moral turpitude is alleged as the ground of dismissal, the test is, not morality in the abstract, but whether, taking the nature of the servant's employment into account, the acts complained of render him unfit to perform the duties which he had undertaken,[34] or did, or were likely to, affect the master's business injuriously.[35] Actual loss is unnecessary.[36]

Notwithstanding the master has agreed to employ a servant permanently, the discharge of such servant for misconduct may be justifiable.[37]

Misconduct antedating the employment. Misconduct antedating the employment of which the master had knowledge is not a ground for dismissal.[38]

e. Adverse or Disloyal Interests or Acts

An employee's assertion of an interest or performance of acts adverse or disloyal to his employer may justify the discharge of such employee.

One who asserts an interest, or performs acts, adverse[39] or disloyal[40] to his employer commits a breach of an implied condition of the contract of employment which may warrant discharge, as, for example, where one secretly engages in a business which renders him a competitor and rival of his employer,[41] and acts of the employee in violation of an express provision of the contract that the employee shall devote his whole time to his employer's business and shall not engage in any other business may justify discharge.[42] So, also, the taking of secret commissions by the employee on transactions between his employer and third persons warrants a discharge.[43]

The mere engaging in other business, when not inconsistent with a contract of employment, is not a sufficient ground for discharge when the business of the employer is not injured thereby.[44] A mere planning to engage in a competing business at the

30. Mo.—Stevens v. Crane, 37 Mo. App. 487.

31. Mass.—Oehme v. Whittimore-Wright Co., 181 N.E. 733, 279 Mass. 558.
39 C.J. p 85 note 26.

32. U.S.—Lubriko Co. v. Wymann, C.C.A.Pa., 290 F. 12.
39 C.J. p 85 note 27.

33. Ill.—White v. Mandel Bros., 248 Ill.App. 313.

34. Ill.—Ostroff v. A. J. Canfield Co., 47 N.E.2d 382, 317 Ill.App. 653.
Mass.—Child v. Boyd & Corey Boot & Shoe Mfg. Co., 56 N.E. 608, 175 Mass. 493.
39 C.J. p 85 note 29.

35. N.Y.—Brownell v. Ehrich, 60 N.Y.S. 112, 43 App.Div. 369.
39 C.J. p 86 note 30.

36. Tenn.—Wyatt v. Brown, Ch. App., 42 S.W. 478.
39 C.J. p 86 note 31.

37. Tex.—Matlock v. Gulf, C. & S. F. Ry. Co., Civ.App., 99 S.W.2d 1056, error dismissed.

38. Tex.—G. A. Kelly Plow Co. v. London, 125 S.W. 974, 59 Tex.Civ. App. 208.
39 C.J. p 86 note 32.

39. U.S.—In re Nagel, C.C.A.N.Y., 278 F. 105.
Okl.—Weber v. Barnsdall, 134 P. 842, 39 Okl. 212.
39 C.J. p 82 note 1.

40. Ohio.—Dayton Rubber Mfg. Co. v. Brown, 156 N.E. 136, 116 Ohio St. 373.
Or.—Osburn v. De Force, 257 P. 685, 122 Or. 360, motion denied 262 P. 222, 123 Or. 352.
Pa.—Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36.
82 C.J. p 92 note 2.

Unfaithfulness to employer's interest may justify discharge prior to expiration of term of employment.
Ky.—Watkins, Inc., v. Cochran, 168 S.W.2d 351, 292 Ky. 846.
N.J.—Kellems Products v. Coley, 160 A. 639, 10 N.J.Misc. 695.

Enticing other employees to leave employment during the term of their contract apparently has been regarded as a matter which would justify discharge.—Perfection Mattress & Spring Co. v. Dupree, 113 So. 74, 216 Ala. 303.

Sending improper letter to wife of employer was such an act of unfaithfulness and disloyalty as would justify discharge.—Bright v. Ganas, 189 A. 427, 171 Md. 493, 109 A.L.R. 467.

Charges against employers in suit against them
Manager's charges of incompetency and neglect, in suit to enjoin employers from interfering with his management, justified his discharge, since such charges constituted a display of disloyalty and lack of fidelity.—Osburn v. De Force, 257 P. 685, 122 Or. 360, motion denied 262 P. 222, 123 Or. 352.

41. Ala.—Perfection Mattress & Spring Co. v. Dupree, 113 So. 74, 216 Ala. 303.
39 C.J. p 83 note 3.

Particular matters held to warrant discharge
U.S.—Brown v. Dupuy, C.C.A.Ill., 4 F.2d 367.
N.Y.—Eleo Shoe Mfrs. v. Sisk, 183 N.E. 191, 260 N.Y. 100.

42. U.S.—Hill v. S. E. Massengill, D.C.Fla., 69 F.Supp. 1.
Colo.—Union Deposit Co. v. Schulte, 7 P.2d 820, 90 Colo. 152.
Mass.—Walsh v. Atlantic Research Associates, 71 N.E.2d 580.
N.Y.—Eleo Shoe Mfrs. v. Sisk, 183 N.E. 191, 260 N.Y. 100.

Exploitation of other business
As bearing on justification of discharge, it has been stated that, where employee engages for period of time to give exclusive service to master, employee cannot use employment as subterfuge to exploit other business. —Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36.

43. U.S.—New Jersey Asbestos Co. v. Federal Trade Commn., C.C.A.N. Y., 264 F. 509.
39 C.J. p 83 note 4.

44. Mo.—Stockton v. John Ainsfield Co., 167 S.W. 1143, 180 Mo.App. 126.
N.Y.—Brownell v. Ehrich, 60 N.Y.S. 112, 43 App.Div. 369.

Duties requiring part time
Employee employed for four days a week was entitled for remainder of time to do such other work as he chose, if not inconsistent with duties to employer, as against contention that discharge was justified.—Miller Agency Co. v. Greene, 177 N. E. 534, 39 Ohio App. 503.

expiration of the term will not justify a discharge.[45] Negotiations among employees looking to their future betterment by engaging in other pursuits, after the expiration of their existing contract of employment, does not of itself justify a discharge.[46]

f. Incompetency

A breach of a servant's implied agreement that he is competent to discharge the duties for which he is employed may justify his discharge.

A breach of the implied contract on the part of the servant that he is competent to discharge the duties for which he is employed may warrant his discharge.[47] A breach warranting discharge may arise from a series of omissions which, viewed as a whole, warrant the inference that the servant cannot properly exert himself in the interests of the master, even though no one of them would constitute a substantial breach of the contract.[48] As a general rule, however, failure of a servant to perform his work in an absolutely skillful and satisfactory manner does not, in the absence of a special contract, authorize his discharge, but only failure to perform it in a reasonably skillful manner.[49] Where an employee is required to do work not contemplated by the contract of the parties, his manner of doing it is not ground for discharge in the absence of proof of gross negligence.[50]

Permanent employment. Where a master, in settlement of a claim for personal injuries, agrees to employ a man permanently, he is not bound to retain him in employment regardless of his manner of performing his duties, but may discharge him for incompetency,[51] but when, on such a consideration, he agrees to employ the injured employee in a new capacity, he is bound to give him a reasonable opportunity to learn the business before discharging him for such cause.[52]

g. Neglect of Duty

Negligence on the part of a servant in the performance of his duties may justify his discharge.

As a general rule, the discharge of a servant or employee is warranted where he is guilty of habitual negligence in the discharge of his duties[53] or of any neglect which may or does affect his master injuriously.[54] Even though a servant possesses the required skill, frequent and important breaches of duty on his part are a sufficient ground for his discharge.[55] A temporary absenting, however, will not

45. Ala.—Perfection Mattress & Spring Co. v. Dupree, 113 So. 74, 216 Ala. 303.
39 C.J. p 83 note 6.

46. Ala.—Perfection Mattress & Spring Co. v. Dupree, supra.

47. Ark.—Hale Hardware Co. v. Ragland, 263 S.W. 962, 165 Ark. 258.
Ky.—Watkins, Inc., v. Cochran, 168 S.W.2d 351, 392 Ky. 846—Robertson v. Wolfe, 283 S.W. 428, 214 Ky. 244, 49 A.L.R. 469.
Ohio.—Rorick v. Gilbert, 186 N.E. 756, 45 Ohio App. 96, affirmed Gilbert v. Rorick, 186 N.E. 90, 125 Ohio St. 636.
Pa.—Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36.
Tex.—**Corpus Juris cited in** Hicks v. Dunlap, Civ.App., 59 S.W.2d 884, error dismissed.
39 C.J. p 83 note 8.

Distillery manager

Employer could rescind, on ground of employee's default, contract for employment of distillery manager, where commissioner of internal revenue refused permit to operate distillery for reason that manager was believed not trustworthy or competent. —Wischhusen v. American Medicinal Spirits Co., 163 A. 685, 163 Md. 565.

48. Mass.—Casavant v. Sherman, 99 N.E. 475, 213 Mass. 23.

49. Ga.—Hattaway v. Sanderlin, 88 S.E. 941, 145 Ga. 219.
39 C.J. p 83 note 10.

Particular employees

(1) As bearing on the propriety of the discharge of a general manager of a manufacturing plant, it was stated that such manager need only use best skill and judgment in discharging his duties.—Schafer v. Thurston Mfg. Co., R.I., 143 A. 613.

(2) As to the discharge of the manager of a drug store in a hotel, the view has been upheld that the term "reasonably well performed" as defining the obligation of such manager with respect to the performance of his duties means that a person will use such skill and diligence as is ordinarily required of the manager of a drug store of the character conducted by the employer hotel company.—Dallas Hotel Co. v. Lackey, Tex.Civ.App., 203 S.W.2d 557.

50. La.—Pringle v. Producers' Turpentine Co., 53 So. 359, 126 La. 1095.

51. Ark.—St. Louis, I. M. & S. R. Co. v. Morgan, 154 S.W. 518, 107 Ark. 202.
Tex.—**Corpus Juris cited in** Matlock v. Gulf, C. & S. F. Ry. Co., Civ. App., 99 S.W.2d 1056, 1057, error dismissed.

52. Iowa.—Moore v. Chicago, B. & Q. R. Co., 22 N.W. 650, 65 Iowa 505, 54 Am.R. 26.

53. Ark.—Hale Hardware Co. v. Ragland, 263 S.W. 962, 165 Ark. 258.
Ky.—Watkins, Inc., v. Cochran, 168 S.W.2d 351, 292 Ky. 846.
Ohio.—Dayton Rubber Mfg. Co. v. Brown, 156 N.E. 136, 116 Ohio St. 373.
Pa.—Elliott v. Wanamaker, 25 A. 826, 155 Pa. 67.
39 C.J. p 84 note 16.

Failure to make required reports

A requirement that store manager render a daily report to employer showing business transactions of the day for which the report was made, as well as all items of expense which had been paid from the petit cash account, together with receipts therefor, was reasonable, as respects employer's right to discharge manager for noncompliance.—Haiman v. Gundersheimer, 177 So. 199, 130 Fla. 109.

Business results disappointing

As affecting right to discharge, want of diligence on part of employee may not properly be inferred merely because the business disappoints the employer's expectations.—Coon v. Floyd Knox, Inc., 296 N.W. 267, 296 Mich. 305.

54. Neb.—Armour-Cudahy Packing Co. v. Hart, 54 N.W. 262, 36 Neb. 166.
39 C.J. p 84 notes 17, 20.

55. Pa.—Peltz v. Printz, 40 A. 486, 186 Pa. 347.

necessarily justify a discharge when the nature of the employment and the circumstances warrant the inference that it will not work an injury to the employer.[56]

h. Disobedience and Insubordination

Conduct or acts of an employee which amount to insubordination or disobedience may warrant his discharge.

Conduct or acts of an employee which amount to disobedience or insubordination may justify his discharge,[57] unless, according to some cases, such conduct or acts are provoked or brought about by the conduct of the employer.[58] Thus, generally a refusal or neglect on the servant's part to obey a lawful and reasonable command, order, or rule of the master which, in view of all the circumstances of the case, amounts to insubordination, and is inconsistent with his duties to his master, is a sufficient ground for discharge.[59] The rule has been announced that in this regard "reasonable" refers not only to the kind and character of directions and commands given but also to the manner in which they are given.[60] According to some decisions the willful disobedience of a lawful order of the master is a good cause of discharge,[61] even though the servant fears that he may be prejudiced by obeying,[62] and even though there has been no resulting loss to the employer,[63] but the view has been taken that, in order to constitute just cause for the discharge of a servant, the disobedience must be with respect to matters of such importance in the conduct of the business as reasonably require obedience and fulfillment,[64] and that in such employments as involve a higher order of services, and some degree of discretion and judgment, it would be unauthorized and unreasonable to regard skilled mechanics or other employees as subject to the whim and caprice of their employers or as deprived of all right of action to such a degree as to be liable to lose their places on every omission to obey orders involving no serious consequences.[65] So, with respect to insubordination and disobedience as a ground for discharge, it has been stated that an employee holding a position of responsibility requiring the exercise of power is not bound to as strict adherence to directions of superiors as is one in an employment involving the exercise of less responsibility and discretion.[66] Even a servant who occupies a position

56. Ga.—Vidalia Compress & Power Co. v. Mathews, 57 S.E. 902, 1 Ga. App. 56.
39 C.J. p 84 note 21.

57. Ark.—Griffin Grocery Co. v. Thaxton, 11 S.W.2d 473, 178 Ark. 736.
Minn.—Bang v. International Sisal Co., 4 N.W.2d 113, 212 Minn. 135, 141 A.L.R. 657.
Ohio.—Dayton Rubber Mfg. Co. v. Brown, 156 N.E. 136, 116 Ohio St. 373.
Pa.—Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36.
39 C.J. p 86 note 35.

What constitutes insubordination as ground for discharge

(1) "An insubordinate employe is one who refuses to obey orders, not submitting to authority, mutinous." —The White Seal, 4 Alaska 212, 214.

(2) "Insubordination imports a willful disregard of express or implied directions and refusal to obey reasonable orders."—Oehme v. Whittemore-Wright Co., 181 N.E. 733, 735, 279 Mass. 558—Campion v. Boston & M. R. R., 169 N.E. 499, 500, 269 Mass. 579.

Willful disobedience is recognized as such a breach of the contract of employment as will justify discharge.—McIntosh v. Abbott, 120 N.E. 383, 384, 231 Mass. 180.

58. Ark.—Griffin Grocery Co. v. Thaxton, 11 S.W.2d 473, 178 Ark. 736.

59. U.S.—Compania Constructora Bechtel-McCone, S. A. v. McDonald, C.C.A.Cal., 157 F.2d 749.
Ark.—S. Unterberger & Co. v. Wiley, 281 S.W. 899, 170 Ark. 976.
Cal.—Adams v. Southern Pac. Co., 266 P. 541, 204 Cal. 63, 57 A.L.R. 1066—Ehlers v. Langley & Michaels Co., 237 P. 55, 72 Cal.App. 214.
Ind.—H. C. Bay Co. v. Kroner, 149 N.E 184, 83 Ind.App. 541.
La.—Caulfield v. Yazoo & M. V. R. Co., 127 So. 585, 170 La. 155.
Mass.—Oehme v. Whittemore-Wright Co., 181 N.E. 733, 279 Mass. 558—Campion v. Boston & M. R. R., 169 N.E. 499, 269 Mass. 579—McIntosh v. Abbott, 120 N.E. 383, 231 Mass. 180.
Neb.—Stoffel v. Metcalfe Const. Co., 17 N.W.2d 3, 145 Neb. 450.
N.Y.—La Duke v. International Paper Co., 17 N.Y.S.2d 608, 258 App. Div. 375—Speiden v. Innis, 215 N.Y.S. 515, 216 App.Div. 408.
Tex.—**Corpus Juris cited in** Robertson v. Panhandle & S. F. Ry. Co., Civ.App., 77 S.W.2d 1078, 1080, error dismissed.
Va.—**Corpus Juris quoted in** Spotswood Arms Corporation v. Este, 133 S.E. 570, 575, 147 Va. 1047.
39 C.J. p 86 notes 35, 36.

Facts held insufficient to show insubordination or disobedience

Cal.—Goudal v. Cecil B. De Mille Pictures Corporation, 5 P.2d 432, 118 Cal.App. 407, hearing in supreme court denied 7 P.2d 174, 118 Cal.App. 407.
Ill.—Corby v. Seventy-One Hundred Jeffery Ave. Bldg. Corp., 60 N.E.2d 236, 325 Ill.App. 442.
39 C.J. p 86 note 35 [f].

60. Ark.—S. Unterberger & Co. v. Wiley, 281 S.W. 899, 170 Ark. 976.

Discussion of rule

An employer must make his requests in a courteous manner and he must not couch his orders in abusive and insulting language, and then expect obedience.—S. Unterberger & Co. v. Wiley, supra.

61. Ill.—Sterling Emery Wheel Co. v. Magee, 40 Ill.App. 340.
39 C.J. p 87 note 39.

Direction to evict tenants

An employee hired to manage realty was justifiably discharged where employee refused to carry out employer's orders to evict certain tenants.—Lightcap v. Keaggy, 194 A. 347, 128 Pa.Super. 348.

62. La.—Vicknair v. Southside Plantation Co., 10 La.App. (Orleans) 43.
39 C.J. p 87 note 37.

63. Pa.—Matthews v. Park, 23 A. 208, 146 Pa. 384.
39 C.J. p 87 note 38.

64. Mo.—Jordan v. J. R. Weber Moulding Co., 77 Mo.App. 572.
39 C.J. p 86 note 36.

65. Mich.—Shaver v. Ingham, 26 N.W. 162, 58 Mich. 649, 55 Am.R. 712.
39 C.J. p 87 note 40.

66. Mass.—Mansfield v. Lang, 200 N.E. 110, 293 Mass. 386.

of authority and responsibility, however, is subject to the obligation of obedience to the reasonable orders of the master so that such employee may properly be discharged for disobedience to such an order.[67]

In order to justify an employer in disregarding a provision of the employment contract for a notice of a specified period before termination and in discharging the employee forthwith on the ground that the employee has disobeyed a rule, order, or instruction, it must appear that there has been a violation of such rule, order, or instruction,[68] and it has been held that the act or omission constituting the alleged violation must have been intentional,[69] and that the alleged violation must have been willful and deliberate on the part of the employee.[70] While it has been stated that willful disobedience which will constitute a ground for discharge means something more than a conscious failure to obey and that it involves a wrongful or perverse disposition, such as to render the conduct unreasonable and inconsistent with proper subordination,[71] according to some decisions in order to constitute willful disobedience which will justify discharge, it is not essential that the conduct of the employee should be perverse or malicious or that it should be the result of an evil intent toward the employer.[72]

A master may not discharge an employee for violation of a rule of which the employee had no notice,[73] and a refusal of a servant to perform services not provided for by the contract will not justify a discharge,[74] although it has been held that an employee who in an emergency refused to obey an order to perform work outside of his regular duties was rightfully discharged for such refusal.[75]

An employee has the right, without breaching his implied obligation to his employer and thus creating ground for discharge, to protest regarding working conditions and rules of the employer and to request that they be altered,[76] and to that end the employee may discuss the subject with fellow employees and join with them in a peaceful and orderly presentation of the grievance.[77]

i. Intoxication or Intemperance

Intoxication which renders a servant unfit for the full and proper discharge of his duties may justify his discharge.

Independently of any agreement to that effect, the master may discharge the servant when, by intoxication, he unfits himself for the full and proper discharge of his duties,[78] and it is immaterial that at the time of the discharge the employee had quit drinking,[79] and discharge is justifiable even when the employee is not incapacitated thereby, if his intoxication is or may be prejudicial to the master's interests;[80] and this is especially true when the employment, in its very nature, requires sobriety.[81] The fact that liquor was drunk as medicine is no excuse for gross intoxication.[82] Drinking, although excessive, when indulged in, in the entertainment of the employer's customers, with his acquiescence, and for the purpose of promoting their good will, is not a just cause for discharge when such conduct is not harmful, but beneficial to the employer.[83]

§ 43. —— Condonation of Breach of Contract and Effect of Reparation

The master may waive, and thereby lose, his right to discharge a servant for breach of contract or duty. Condonation does not, however, affect the right to discharge because of occurrences subsequent to condonation.

Notwithstanding an employee has been guilty of a breach of contract or misconduct which would justify a discharge, the employer may waive, and thereby lose, his right in this regard.[84] Thus, a

67. Conn.—Pollak v. Danbury Mfg. Co., 131 A. 426, 103 Conn. 553.

Trivial derelictions

The rule is subject to the qualification that there may be derelictions of duty by the servant so trivial or inconsequential that the law will not take note of them.—Pollak v. Danbury Mfg. Co., supra.

68. Cal.—Ehlers v. Langley & Michaels Co., 237 P. 55, 72 Cal.App. 214.

69. Cal.—Ehlers v. Langley & Michaels Co., supra.

70. Cal.—Ehlers v. Langley & Michaels Co., supra.

71. Mich.—Shaver v. Ingham, 26 N.W. 162, 58 Mich. 649, 55 Am.R. 712.

72. Cal.—Ehlers v. Langley & Michaels Co., 237 P. 55, 72 Cal.App. 214.
Minn.—Bang v. International Sisal Co., 4 N.W.2d 113, 212 Minn. 135, 141 A.L.R. 657.

73. Ind.—Hamilton v. Love, 53 N.E. 181, 152 Ind. 641, rehearing denied 54 N.E. 437, 152 Ind. 641, 71 Am. S.R. 384.
39 C.J. p 87 note 41.

74. Ga.—Savannah River Lumber Co. v. Myers, 108 S.E. 836, 27 Ga. App. 399.
39 C.J. p 82 note 96, p 87 note 42.

75. Ala.—St. Louis & S. F. R. Co. v. Hunt, 60 So. 530, 6 Ala.App. 434.

76. Cal.—Greene v. Hawaiian Dredging Co., 157 P.2d 367, 26 Cal.2d 245.

77. Cal.—Greene v. Hawaiian Dredging Co., supra.

78. Minn.—Smith v. St. Paul & D. R. Co., 62 N.W. 392, 60 Minn. 330.
39 C.J. p 87 note 45.

79. Miss.—Willis v. Lowery, 57 So. 418, 101 Miss. 118, 38 L.R.A.N.S., 339, Ann.Cas.1916A 1018.

80. Ky.—Louisville & N. R. Co. v. Cox, 141 S.W. 389, 145 Ky. 667.
39 C.J. p 87 note 47.

81. N.Y.—Herbert v. Wood, Dolson Co., 185 N.Y.S. 325, 113 Misc. 671.
39 C.J. p 87 note 48.

82. N.Y.—Dunkell v. Simons, 7 N.Y.S. 655, 15 Daly 352.
39 C.J. p 87 note 49.

83. U.S.—Carpenter Steel Co. v. Norcross, Ohio, 204 F. 537, 123 C.C.A. 63, Ann.Cas.1916A 1035.

84. Ill.—Corby v. Seventy-One Hun-

master who, after knowledge[85] of a breach of contract or duty on the part of his servant, continues to accept his services without reasonable cause for delay in discharging him[86] is presumed to have waived the breach, and, as a general rule, will not be allowed to set it up afterward,[87] at least as the sole ground for discharge.[88] Although the conduct of the master in continuing to accept the services of the servant after the knowledge of a material breach of contract on the latter's part is prima facie condonation of the offense in the absence of any explanation,[89] it does not, as a matter of law, establish a waiver of his right to discharge him,[90] and the master does not waive his rights by postponing action until after there has been an investigation.[91]

Condonation of the employee's prior breaches of contract is subject to the implied condition of future good conduct in compliance with the terms of the contract.[92] So, condonation can in no respect extend to subsequent offenses or to a continued deficiency,[93] and this is especially so in the latter case, when the objection of the master to the servant's conduct is repeated.[94] It has been held or recognized that subsequent misconduct may be considered in the light of the delinquencies waived;[95] and that the retention of a servant after knowledge of certain breaches of duty does not prevent their use as grounds of discharge when the offense is repeated;[96] in this connection it has been stated that, by continuing employment after knowledge of the employee's breach of duty, the employer waives his right to discharge but does not waive the breach of duty.[97]

Although a servant has fulfilled a stipulation to make reparation for his mistakes, these may justify his employer in rescinding the contract.[98] A request by an employer to an employee to reconsider his refusal to obey an order is not, as a matter of law, a waiver of the right to discharge and a condonation of the latter's breach of contract, although the employee does reconsider and offers to comply.[99] The fact that the employer made payments which he was not required to make after a breach of contract by the employee does not prevent the former from asserting such breach,[1] and a like rule applies with respect to the payment of wages or

dred Jeffery Ave. Bldg. Corp., 60 N.E.2d 236, 325 Ill.App. 442.
Me.—Dube v. Simard, 129 A. 488, 124 Me. 369.
Tex.—Elliott-Greer Office Supply Co. v. Martin, Civ.App., 54 S.W.2d 1068, set aside on other grounds 86 S.W.2d 635, 126 Tex. 112.

Direction to return after absence
Employee's breach of contract by absenting himself without due permission was waived by employer's unconditional direction to return.—Remington Typewriter Co. v. Hall, 115 So. 73, 22 Ala.App. 267, certiorari denied 115 So. 74, 217 Ala. 128.

Exercise of option to renew contract was declaration by act that past conduct was not a justification for termination of contract.—Goudal v. Cecil B. De Mille Pictures Corporation, 5 P.2d 432, 118 Cal.App. 407, hearing denied 7 P.2d 174, 118 Cal. App. 407.

Contract under seal
The fact that the contract of employment was under seal did not prevent a waiver.—Dube v. Simard, 129 A. 488, 124 Me. 369.

Waiver held not shown
U.S.—Brown v. Dupuy, C.C.A.Ill., 4 F.2d 367.

85. Ark.—Perkins v. Gillett Warehouse Co., 232 S.W. 17, 149 Ark. 253.
39 C.J. p 88 note 56.

86. U.S.—In re Nagel, C.C.A.N.Y., 278 F. 105.
39 C.J. p 88 note 57.

87. Ark.—Perkins v. Gillett Warehouse Co., 232 S.W. 17, 149 Ark. 253.
39 C.J. p 88 note 58.

88. W.Va.—Gordon v. Dickinson, 130 S.E. 650, 100 W.Va. 490, 44 A.L.R. 526.

89. U.S.—In re Nagel, C.C.A.N.Y., 278 F. 105.

90. U.S.—In re Nagel, supra.
N.Y.—Rafalo v. Edelstein, 140 N.Y.S. 1076, 80 Misc. 153.

91. U.S.—Compania Constructora Bechtel-McCone, S. A. v. McDonald, C.C.A.Cal., 157 F.2d 749.
39 C.J. p 88 note 61.

92. Mont.—Hill Cattle Corporation v. Killorn, 256 P. 497, 79 Mont. 327.
W.Va.—Gordon v. Dickinson, 130 S.E. 650, 100 W.Va. 490, 44 A.L.R. 526.

93. Tex.—United Oil Co. v. Grey, 102 S.W. 934, 47 Tex.Civ.App. 10.
39 C.J. p 88 note 62.

94. Ky.—Thomas v. Houston, Stanwood & Gamble Co., 142 S.W. 214, 146 Ky. 156, 37 L.R.A.,N.S., 950, Ann.Cas.1913C 185.
39 C.J. p 89 note 63.

95. Mass.—Daniell v. Boston & M. R. Co., 68 N.E. 337, 184 Mass. 337.
Utah.—Hauerbach v. Calder, 49 P. 649, 15 Utah 371.

96. Mont—Hill Cattle Corporation v. Killorn, 256 P. 497, 79 Mont. 327.
N.Y.—Kilian v. Ferrous Magnetic Corporation, 280 N.Y.S. 909, 245 App.Div. 298.
Tenn.—Jackson v. Texas Co., 10 Tenn.App. 235.
Va.—**Corpus Juris cited in** Spotswood Arms Corporation v. Este, 133 S.E. 570, 575, 147 Va. 1047.
39 C.J. p 89 note 65.

Otherwise stated
(1) If acts of misconduct and negligence of employee are repeated after condonation, entire course of conduct of employee may be taken into consideration as justification for discharge.
Iowa.—Durr v. Clear Lake Park Co., 218 N.W. 54, 205 Iowa 279.
W.Va.—Gordon v. Dickinson, 130 S.E. 650, 100 W.Va. 490, 44 A.L.R. 526.
(2) Where violations of duties are repeated from time to time until the servant's discharge, the entire course of his conduct may be considered in determining whether the discharge was justified, even though the master retained the servant knowing of his misconduct.—Siselman v. Cohen, 54 N.Y.S. 991, 25 Misc. 529.

97. Iowa.—Durr v. Clear Lake Park Co., 218 N.W. 54, 205 Iowa 279.

98. Ala.—Burkham v. Daniel, 56 Ala. 604.

99. N.Y.—Rafalo v. Edelstein, 140 N.Y.S. 1076, 80 Misc. 153.

1. Ill.—Newman v. Newman Clock Co., 109 N.E. 324, 268 Ill. 418.

salary to the time of discharge.[2] The right of a master to discharge a servant for incompetency is not waived by a stipulation of the contract for services that it should be void only by some providential cause or matters beyond the control of either party.[3]

§ 44. Cause for Termination and Statement Thereof

a. In general
b. Statutory provisions in general
c. Actions

a. In General

The motive of the master in discharging a servant is immaterial if legal ground for discharge exists; in the absence of statutory or contractual requirement, the master need not assign a reason for discharge and, as a general rule, may justify a discharge on a ground other than that assigned at the time of discharge.

The motives which actuate the master in discharging the servant are wholly immaterial, if any legal ground exists for such discharge,[4] and it is immaterial whether or not all, or any, of the grounds were known to the master when he discharged the servant.[5] In the absence of statutory or contractual requirement, it is not necessary for the master to assign a reason for the discharge;[6] nor, according to the rule usually recognized, is he estopped to rely on a reason other than, or different from, that assigned at the time of discharge, whether or not known to him at the time of discharge.[7] According to some decisions, however, if an employer, in discharging an employee, assigns a particular cause of complaint, he will be held to it.[8] It has been held that an employer who has disposed of his business and thereupon has discharged an employee cannot fall back on a reserved right to discharge for unsatisfactory service, as a justification of the discharge.[9] Where, under the contract, the employee is entitled to a written notice of termination specifying the cause, a discharge in connection with which a cause is not specified or an insufficient cause is specified is wrongful,[10] and, it has been held that the employer may not justify the discharge by reliance on a cause not specified in the notice.[11]

b. Statutory Provisions in General

Some statutes requiring the issuance to an employee, discharged or leaving the service, of a service letter stating the cause of termination have been regarded as valid, but the validity of some statutes of this general type has been denied; the construction and effect of a valid statute of this description depend largely on its terms.

A statute requiring an employer to issue to an employee, discharged or leaving its service, a service letter stating the character of the service rendered, the duration thereof, and the true cause of the termination, has been regarded as valid,[12] under

2. N.C.—Johnson v. Van Winkle Gin & Machine Co., 41 S.E. 882, 130 N. C. 441.
W.Va.—Gordon v. Dickinson, 130 S. E. 650, 100 W.Va. 490, 44 A.L.R. 526.

3. W.Va.—Franklin v. T. H. Lilly Lumber Co., 66 S.E. 225, 66 W.Va. 164.

4. Ala.—Comerford v. International Harvester Co., 178 So. 894, 235 Ala. 376.
N.Y.—Kilian v. Ferrous Magnetic Corporation, 280 N.Y.S. 909, 245 App.Div. 298.
39 C.J. p 89 note 69, p 96 note 59.

Discharge by superior servant
(1) A superior's causing the discharge of employee as revenge for superior's failure to alienate affections of employee's wife would impose no liability on employer if discharge was in accordance with superior's right under employer's contract with employee.—Comerford v. International Harvester Co., 178 So. 894, 235 Ala. 376.
(2) Where in such case the contract provided for employment of plaintiff as long as his services were satisfactory, the employer was not liable to plaintiff, notwithstanding employer's refusal to reinstate plaintiff after plaintiff informed employer that his superior maliciously and falsely reported that plaintiff's services were unsatisfactory as revenge for superior's failure to alienate affections of plaintiff's wife, where discharge was in accordance with employer's right under contract.—Comerford v. International Harvester Co., supra.

5. N.M.—**Corpus Juris cited in** Kiker v. Bank Sav. Life Ins. Co., 23 P.2d 366, 368, 37 N.M. 346.
39 C.J. p 89 note 70, p 96 note 59.

6. Miss.—Montgomery Ward & Co. v. Skinner, 25 So.2d 572.
Mo.—Bell v. Faulkner, App., 75 S.W. 2d 612.
Ohio.—Ullman v. May, App., 70 N.E. 2d 507, affirmed 72 N.E.2d 63, 147 Ohio St. 468.
Okl.—Foster v. Atlas Life Ins. Co., 6 P.2d 805, 154 Okl. 30.
S.C.—Parker v. Southeastern Haulers, 41 S.E.2d 387, 210 S.C. 18.
39 C.J. p 89 note 72.

7. N.M.—**Corpus Juris cited in** Kiker v. Bank Sav. Life Ins. Co., 23 P.2d 366, 368, 37 N.M. 346.
N.Y.—Beck v. Fybern Holding Corporation, 263 N.Y.S. 9, 238 App. Div. 25.
39 C.J. p 89 note 73.

8. La.—Vicknair v. Southside Plantation Co., 10 La.App., Orleans, 43—Warner v. Fabacher, 6 La.App., Orleans, 37.

9. Iowa.—Seelman v. Farmers' Co-Op. Co., 165 N.W. 311, 181 Iowa 1228.

10. N.M.—Kiker v. Bank Sav. Life Ins. Co., 23 P.2d 366, 27 N.M. 346.

Contract entitling employee to statement of cause
Employment contract enumerating four causes sufficient for discharge on written notice entitled employee to written statement of cause for dismissal.—Kiker v. Bank Sav. Life Ins. Co., supra.

11. N.M.—Kiker v. Bank Sav. Life Ins. Co., supra.
N.Y.—Mortimer v. Bristol, 180 N.Y.S. 55, 190 App.Div. 452.

12. Mo.—State ex rel. Terminal R. R. Ass'n of St. Louis v. Hughes, 169 S.W.2d 328, 350 Mo. 869—Cheek v. Prudential Ins. Co. of America, 192 S.W. 387, L.R.A.,N.S., 1918A 166.
39 C.J. p 90 note 85.

the police power of the state.[13] It has been held that such a statute does not interfere with the right of the employer to employ or discharge whomever the employer chooses.[14] It has also been held or recognized, however, that a statute of this general type cannot be sustained as an exercise of the police power.[15] The question whether such a statute is violative of constitutional guaranty of freedom of contract or of freedom of speech is discussed in Constitutional Law §§ 211, 213 c (1).

Some statutes requiring the issuance of a service letter showing the cause of discharge and other matters are both remedial and penal.[16] Under such a statute an employee who has been discharged and is otherwise within the terms of the statute is entitled to have a service letter issued to him.[17]

Some statutes which in terms make it the duty of a specified officer of a corporation to issue service letters in effect impose such duty on the corporation acting through such an officer[18] and do not impose the duty on such an officer in his individual capacity.[19] A corporation is required to have an officer who may comply with the statute,[20] and the corporation is not relieved of the duty to issue a service letter by the mere fact that it does not have an officer whose designation is the same as that specified in the statute.[21]

Under some statutes it is essential that the employee shall have been employed for at least a specified period in order to have the right to obtain a service letter,[22] and such employment must have been continuous.[23] A request in accordance with the provisions of the statute for the issuance of a service letter is essential in order to render the employer guilty of a breach of duty for failure to issue such a letter.[24] It has been held that an employer may rightfully refuse to issue a statutory service letter to a discharged employee, except on

13. Mo.—State ex rel. Terminal R. R. Ass'n of St. Louis v. Hughes, 169 S.W.2d 328, 350 Mo. 869—Cheek v. Prudential Ins. Co., 192 S.W. 387, L.R.A.,N.S., 1918A 166.
39 C.J. p 90 note 78.

14. U.S.—Prudential Ins. Co. v. Cheek, Mo., 42 S.Ct. 516, 259 U.S. 530, 66 L.Ed. 1044, 27 A.L.R. 27.
Okl.—Dickinson v. Perry, 181 P. 504, 75 Okl. 25.

15. Kan.—Atchison, Topeka & Santa Fé Ry. Co. v. Brown, 102 P. 459, 80 Kan. 312, 23 L.R.A.,N.S., 247, 133 Am.S.R. 213, 18 Ann.Cas. 346.
Tex.—St. Louis Southwestern R. Co. v. Griffin, 171 S.W. 703, 106 Tex. 477, L.R.A.1916B 1108, followed in Galveston, H. & S. A. Ry. Co. v. State, Civ.App., 175 S.W. 1096.
39 C.J. p 90 note 79 [a].

16. **In Missouri**
(1) The rule stated in the text has been announced with respect to the statute, now Rev.St. § 5064, which in the first part imposes the duty on superintendents and managers of corporations to issue service letters and in that respect is remedial, and in the second part renders a superintendent or manager guilty of a misdemeanor for failure to comply with the statute and in that respect is penal.—State ex rel. Terminal R. R. Ass'n of St. Louis v. Hughes, 169 S.W.2d 328, 350 Mo. 869.

(2) The view has apparently been taken that the statute should be given a strict construction by reason of its penal character, but also should be given reasonable application in view of its objects and purposes and evils to be remedied thereby.—Walker v. St. Joseph Belt Ry. Co., App., 102 S.W.2d 718.

(3) It has been laid down generally, however, that the statute is penal and is to be strictly construed.—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.

(4) It has also been laid down that the statute must be strictly construed as to those portions which are against employers but liberally construed as to those which are in their favor.—Barrows v. Riss & Co., 179 S.W.2d 473, 238 Mo.App. 334.

17. Mo.—Walker v. St. Joseph Belt Ry. Co., App., 102 S.W.2d 718.

Irregular work
(1) A railroad employee who worked continuously for railroad for more than ten years until his discharge was within service letter statute so as to require railroad to furnish service letter, notwithstanding he was not called for work daily during the two last years, where he held himself available for work when needed and did extra work when called.—Ackerman v. Thompson, Mo., 202 S.W.2d 795.

(2) Under statute requiring corporate employers to furnish discharged employees service letter if such employees shall have been in service for a period of at least ninety days, specified period of service had reference to continuous employment of at least ninety days.—Ackerman v. Thompson, supra.

18. Mo.—State ex rel. Terminal R. R. Ass'n of St. Louis v. Hughes, 169 S.W.2d 328, 350 Mo. 869—Cheek v. Prudential Ins. Co., 192 S.W. 387, L.R.A.,N.S., 1918A 166—Burens v. Wolfe Wear-U-Well Corporation, 158 S.W.2d 175, 236 Mo.App. 892—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.

Statute merely specifies officer, or officers, of corporation whose duty it is to issue service letter.—Soule v. St. Joseph Ry., Light, Heat & Power Co., 274 S.W. 517, 220 Mo.App. 497.

19. Mo.—State ex rel. Terminal R. R. Ass'n of St. Louis v. Hughes, 169 S.W.2d 328, 350 Mo. 869—Cheek v. Prudential Ins. Co., 192 S.W. 387, L.R.A.,N.S., 1918A 166—Burens v. Wolfe Wear-U-Well Corporation, 158 S.W.2d 175, 236 Mo.App. 892.

20. Mo.—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo. App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.

21. Mo.—Chrisman v. Terminal R. Ass'n of St. Louis, 157 S.W.2d 230, 237 Mo.App. 181, certiorari quashed State ex rel. Terminal R. R. Ass'n of St. Louis v. Hughes, 169 S.W.2d 328, 350 Mo. 869—Walker v. St. Joseph Belt Ry. Co., App., 102 S. W.2d 718—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.

22. Mo.—Barrows v. Riss & Co., 179 S.W.2d 473, 238 Mo.App. 334.

23. Mo.—Barrows v. Riss & Co., supra.

24. Mo.—Seiller v. Kiel, 149 S.W.2d 463, 235 Mo.App. 952.
Okl.—Chicago, R. I. & P. R. Co. v. Hall, 159 P. 851, 60 Okl. 220.
39 C.J. p 90 note 88.

the condition that he first surrender a service letter which he had previously received from his employer in accordance with the terms of the contract of employment.[25]

In order to be sufficient, the service letter must satisfy the requirements of the statute.[26]

c. Actions

Under some, but not all, statutes providing for furnishing to an employee a statement of the cause or reason of termination of his employment, the employee has a right of action against the employer for failure to comply with the statute.

Some statutes requiring the issuance of service letters stating the cause of termination of employment and other matter impliedly give a right of action to the employee against the employer for damages for breach by the employer of the duty to issue such a letter.[27] It has been held, however, that a statute which merely provides that an employee may demand the reason of his discharge and that the corporation employing him shall furnish such reason to him, and which does not declare that the failure to furnish such reason shall be unlawful, does not give the discharged employee a right of action against his employer for failure to comply with such statute.[28]

Furnishing a proper service letter after action for failure to furnish such a letter has been commenced has been held not to destroy the cause of action.[29] Defendant in such an action is estopped to deny that a proper request was made for the issuance of the letter, where defendant actually issued an insufficient letter on request of plaintiff.[30]

Actions for wrongful discharge are discussed infra §§ 47–59.

In an action for failure to give a service letter as required by statute, the usual rules as to pleading,[31] evidence,[32] and trial[33] are applicable. Accordingly, plaintiff's counsel, in his argument, has the right to refer to the financial condition of defendant as bearing on the amount of punitive damages, if any.[34]

In an action for failure to furnish a service let-

25. Okl.—St. Louis & S. F. R. Co. v. Fitzmartin, 136 P. 764, 39 Okl. 666.

26. **Effect on employee**

"It is commendable for an employer to desire to protect its former employee but under our statute if a discharged employee demands a service letter, then 'truth must out,' and the employee can accept the consequences."—Van Sickle v. Katz Drug Co., 151 S.W.2d 489, 494, 235 Mo.App. 952.

Letter held insufficient

Mo.—Gerharter v. Mitchellhill Seed Co., App., 157 S.W.2d 577—Walker v. St. Joseph Belt Ry. Co., App., 102 S.W.2d 718—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.

27. Mo.—State ex rel. Terminal R. R. Ass'n of St. Louis v. Hughes, 169 S.W.2d 328, 350 Mo. 869—Cheek v. Prudential Ins. Co., 192 S.W.2d 327, L.R.A.1918A, 166—Walker v. St. Joseph Belt Ry. Co., App., 102 S.W.2d 718—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.

28. Ohio.—Crall v. Toledo & Ohio Central R. Co., 7 Ohio Cir.Ct. 132, 3 Ohio Cir.Dec. 696.

29. Mo.—Van Sickle v. Katz Drug Co., 151 S.W.2d 489, 235 Mo.App. 952.

30. Mo.—Soule v. St. Joseph Ry., Light, Heat & Power Co., App., 274 S.W. 517.

31. **Pleading held sufficient** to allege a demand.—Ackerman v. Thompson, Mo., 202 S.W.2d 795.

Proof offered should conform to the pleadings.—Soule v. St. Joseph Ry., Light, Heat & Power Co., Mo. App., 274 S.W. 517.

32. **Burden of proof**

It is incumbent on plaintiff to bring himself within the terms of the statute.—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo. App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.

Evidence held inadmissible

Evidence on behalf of defendant which merely tends to show that a service letter would not have been of any actual value to plaintiff has been held not to be admissible.—Soule v. St. Joseph Ry., Light, Heat & Power Co., Mo.App., 274 S.W. 517.

Weight and sufficiency

(1) Evidence held sufficient.—Gerharter v. Mitchellhill Seed Co., Mo. App., 157 S.W.2d 577—Walker v. St. Joseph Belt Ry. Co., Mo.App., 102 S. W.2d 718—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.

(2) Plaintiff is entitled to have all the evidence on question of refusal of service letter through spite and ill will and all reasonable inferences that may be drawn therefrom considered in the light most favorable to him but the evidence must be substantial and a scintilla or modicum of evidence is not sufficient and the inferences must be reasonable and not forced.—Hatton v. Carder Wholesale Grocery Co., 150 S.W.2d 1096, 235 Mo.App. 1198.

33. **Evidence held sufficient to go to jury**

Mo.—Gerharter v. Mitchellhill Seed Co., App., 157 S.W.2d 577—Walker v. St. Joseph Belt Ry. Co., App., 102 S.W.2d 718—McCrory v. Kurn, App., 101 S.W.2d 114—Lyons v. St. Joseph Belt Ry. Co., 84 S.W. 2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733—Hall v. St. Louis-San Francisco Ry. Co., 28 S.W.2d 687, 224 Mo.App. 431.

Evidence held insufficient to go to jury

Tex.—Richardson v. Texas & N. O. Ry. Co., Civ.App., 75 S.W.2d 962, error dismissed.

Instructions

Mo.—Van Sickle v. Katz Drug Co., 151 S.W.2d 489, 235 Mo.App. 952—Hatton v. Carder Wholesale Grocery Co., 150 S.W.2d 1096, 235 Mo. App. 1198.

Verdict which shows that the jury have reasoned falsely is void.—Hatton v. Carder Wholesale Grocery Co., supra.

34. Mo.—Chrisman v. Terminal R Ass'n of St. Louis, 157 S.W.2d 230, 237 Mo.App. 181, certiorari quashed State ex rel. Terminal R. R. Ass'n of St. Louis v. Hughes, 169 S.W. 2d 328, 350 Mo. 869.

ter as required by statute, the law presumes actual damages to plaintiff from failure of defendant to issue a proper letter,[35] and plaintiff employee is in any event entitled to recover nominal damages where the employer has failed to furnish the required service letter.[36] In order to authorize the recovery of actual damages that are more than nominal, however, some evidence that plaintiff was refused employment by reason of his not having a service letter is essential;[37] but direct evidence of such refusal of employment is not essential, and the fact of such refusal may be established by circumstantial evidence.[38] In determining damages for failure to issue a service letter, the jury may consider the evidence in the light most favorable to plaintiff employee, and, within reasonable bounds, may fix the loss sustained in view of all elements of damage which can reasonably be inferred.[39]

Punitive damages are recoverable in a proper case in an action for failure to issue a service letter as required by statute,[40] and in such case punitive

35. Mo.—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.

Evidence held sufficient

(1) Evidence has been held sufficient to authorize submission to jury of question as to actual damages.—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.

(2) It has been held, under the facts, that there was sufficient evidence of actual damages to sustain a verdict for plaintiff.—Stephens v. Lever Bros. Co., Mo.App., 155 S.W.2d 540.

36. Mo.—Cook v. Mid-Continent Petroleum Corp., App., 193 S.W.2d 66.

37. Mo.—Cook v. Mid-Continent Petroleum Corp., supra.

Instruction as to damages

Where there was no evidence tending to connect employee's failure to obtain employment with failure to give statutory letter, instruction that in no event could employee recover more than nominal damages should have been given.—Soule v. St. Joseph Ry., Light, Heat & Power Co., Mo.App., 274 S.W. 517.

38. Mo.—Cook v. Mid-Continent Petroleum Corp., App., 193 S.W.2d 66.

Evidence sufficient

(1) Where evidence warranted finding by jury that plaintiff was hindered and delayed in obtaining other employment by refusal to issue letter, lack of direct and positive evidence that any person or company refused to employ plaintiff because he had no such letter from defendant did not bar his recovery of substantial damages, and court did not err in refusing defendant's requested instruction that plaintiff could not recover more than nominal damages, or in giving plaintiff's instruction authorizing recovery of actual damages.—Burens v. Wolfe Wear-U-Well Corporation, 158 S.W.2d 175, 236 Mo.App. 892.

(2) Particular evidence has been considered and held sufficient to support an award by the jury of actual damages in an amount more than nominal.—Burens v. Wolfe Wear-U-Well Corporation, supra.

39. Mo.—Burens v. Wolfe Wear-U-Well Corporation, supra.

40. Mo.—Walker v. St. Joseph Belt Ry. Co., App., 102 S.W.2d 718—Cheek v. Prudential Ins. Co., App., 223 S.W. 754, affirmed 42 S.Ct. 516, 259 U.S. 530, 66 L.Ed. 1044.

39 C.J. p 91 note 92.

When recoverable

(1) Defendant corporation may be liable for punitive damages if its actions and those of its representatives are shown to have been willful, malicious, and wrongful and without legal justification or excuse or if such actions were the results of actual malice, spite, and ill will toward plaintiff.—Walker v. St. Joseph Belt Ry. Co., Mo.App., 102 S.W.2d 718.

(2) In order to permit recovery of punitive damages, it is not necessary to show actual malice.—Stephens v. Lever Bros. Co., Mo.App., 155 S.W.2d 540—Hall v. St. Louis-San Francisco Ry. Co., 28 S.W.2d 687, 224 Mo.App. 431.

(3) Malice in law, which is the intentional doing of a wrongful act, without just cause or excuse, is sufficient.—Ackerman v. Thompson, Mo., 202 S.W.2d 795—Hall v. St. Louis-San Francisco Ry. Co., supra.

(4) Negligence amounting to positive misconduct may be sufficient.—Stephens v. Lever Bros. Co., supra.

(5) In case of such negligence, ignorance of the law does not prevent the award of punitive damages.—Stephens v. Lever Bros., supra.

(6) Where defendant corporation's officer had conscious knowledge that he was not complying with the statute requiring the issuance of a service letter, there was ground for awarding punitive damages.—Van Sickle v. Katz Drug Co., 151 S.W.2d 489, 235 Mo.App. 952.

(7) It has been laid down that a "malicious act" which would warrant imposition of punitive damages is a wrongful act intentionally done without cause or excuse.—Chrisman v. Terminal R. Ass'n of St. Louis, 157 S.W.2d 230, 237 Mo.App. 181, certiorari quashed State ex rel. Terminal R. R. Ass'n of St. Louis v. Hughes, 169 S.W.2d 328, 350 Mo. 869.

(8) In this connection it has been stated that, "if the proof be sufficient the jury may affirmatively find that there was a wrongful act, intentionally done without cause or excuse, and that there was actual malice, or the facts may be such that the jury may fairly and reasonably draw the inference of malice from a wrongful act, and this would be legal malice."—Chrisman v. Terminal R. Ass'n of St. Louis, 157 S.W.2d 230, 235, 235 Mo.App. 181, certiorari quashed State ex rel. Terminal R. R. Ass'n of St. Louis v. Hughes, 169 S.W.2d 328, 350 Mo. 869.

Sufficiency of evidence

(1) In order to authorize submission to the jury of question of punitive damages based on spite and ill will, the evidence must be substantial; a scintilla or modicum of evidence is not sufficient and the inferences must be reasonable and not forced.—Hatton v. Carder Wholesale Grocery Co., 150 S.W.2d 1096, 235 Mo.App. 1198.

(2) Evidence held sufficient to justify submission of issue of malice to jury, or to sustain a finding of malice.—Stephens v. Lever Bros. Co., Mo.App., 155 S.W.2d 540—Gerharter v. Mitchellhill Seed Co., Mo.App., 157 S.W.2d 577—Chrisman v. Terminal R. Ass'n of St. Louis, 157 S.W.2d 230, 237 Mo.App. 181, certiorari quashed State ex rel. Terminal R. R. Ass'n of St. Louis v. Hughes, 169 S.W.2d 328, 350 Mo. 869—Hatton v. Carder Wholesale Grocery Co., 150 S.W.2d 1096, 235 Mo.App. 1198—Walker v. St. Joseph Belt Ry. Co., Mo.App., 102 S.W.2d 718—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733—Hall v. St. Louis-San Francisco Ry. Co., 28 S.W.2d 687, 224 Mo.App. 431.

(3) Evidence held insufficient to

damages may be awarded, even though the recovery of actual damages is only nominal.[41] In such case it is within the discretion of the jury whether or not punitive damages should be allowed,[42] as is also the question as to the amount which should be awarded.[43] The amount of actual damages awarded does not furnish a guide for determining the amount of punitive damages where only nominal damages are awarded pursuant to the court's instructions because of plaintiff's inability to introduce competent evidence of greater actual damages.[44]

Defendant is not entitled to show in mitigation of damages for failure to issue a service letter as required by statute unemployment compensation received by plaintiff[45] or payments to plaintiff made from collateral sources, whether in compensation or as gratuities.[46] The fact that a proper service letter was furnished after the commencement of an action for failure to furnish such a letter may be proved in mitigation of damages.[47] In order to claim the benefit of facts tending to mitigate damages in such an action, defendant must plead and prove such facts.[48]

Under the particular facts an award of damages for failure to issue a service letter as required by statute has been regarded as excessive[49] or as not excessive.[50]

§ 45. Testimonials as to Character

An employer is not under a duty to give his employee a testimonial of character, a letter of recommendation, or a clearance card or letter, in the absence of statute, contract provision, or custom or usage imposing such duty.

At common law no duty is imposed on an employer to give his employee a testimonial of character, or a letter of recommendation or clearance card or letter on the severance of the relation in the absence of a contractual provision or a custom or usage requiring it.[51] A custom of certain types of employers to issue a letter of clearance to a discharged employee has been held to be an implied part of the contract of employment.[52]

A statute making it unlawful for an employer to blacklist or to seek to prevent or hinder a dis-

authorize the submission to the jury of the question as to actual malice.—Van Sickle v. Katz Drug Co., 151 S.W.2d 489, 235 Mo.App. 952—Hatton v. Carder Wholesale Grocery Co., supra.

41. Mo.—State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733—Chrisman v. Terminal R. Ass'n of St. Louis, 157 S.W.2d 230, 237 Mo.App. 181, certiorari quashed State ex rel. Terminal R. R. Ass'n of St. Louis v. Hughes, 169 S.W.2d 328, 350 Mo. 869—Collins v. Economy Oil Co., App., 129 S.W.2d 1066.

42. Mo.—Walker v. St. Joseph Belt Ry. Co., App., 102 S.W.2d 718.

43. Mo.—Walker v. St. Joseph Belt Ry. Co., supra.

44. Mo.—Walker v. St. Joseph Belt Ry. Co., App., 102 S.W.2d 718—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.

45. Mo.—Burens v. Wolfe Wear-U-Well Corporation, 158 S.W.2d 175, 236 Mo.App. 892.

46. Mo.—Burens v. Wolfe Wear-U-Well Corporation, 158 S.W.2d 175, 236 Mo.App. 892.

47. Mo.—Van Sickle v. Katz Drug Co., 151 S.W.2d 489, 235 Mo.App. 952.

48. Mo.—Burens v. Wolfe Wear-U-Well Corporation, 158 S.W.2d 175, 236 Mo.App. 892.

49. Mo.—Hopkins v. Terminal R. Ass'n of St. Louis, App., 157 S.W. 2d 236, certiorari quashed State ex rel. Terminal R. R. Ass'n of St. Louis v. Hughes, 169 S.W.2d 328, 350 Mo. 869—Stephens v. Lever Bros. Co., App., 155 S.W.2d 540.

50. Mo.—Ackerman v. Thompson, 202 S.W.2d 795—Burens v. Wolfe Wear-U-Well Corporation, 158 S.W.2d 175, 236 Mo.App. 892—Chrisman v. Terminal R. Ass'n of St. Louis, 157 S.W.2d 230, 237 Mo.App. 181, certiorari quashed State ex rel. Terminal R. R. Ass'n of St. Louis v. Hughes, 169 S.W.2d 328, 350 Mo. 869—State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733—Walker v. St. Joseph Belt Ry. Co., App., 102 S.W.2d 718.

51. Ill.—Creitz v. Bennett, 273 Ill. App. 88.

S.C.—**Corpus Juris cited in** Parker v. Southeastern Haulers, 41 S.E.2d 387, 393, 210 S.C. 18.

39 C.J. p 90 note 81.

Definitions, distinctions, and sufficiency

(1) "Clearance card" has been defined as a letter, good, bad, or indifferent, given to an employee at the time of his discharge or end of service showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment.—Cleveland, C. C. & St. L. R. Co. v. Jenkins, 51 N.E. 811, 812, 174 Ill. 398, 402, 66 Am.S.R. 296, 62 L.R.A. 922—11 C.J. p 836 note 81.

(2) Other definitions.—New York, C. & St. L. R. Co. v. Schaffer, 62 N.E. 1036, 65 Ohio St. 414, 419, 87 Am.S.R. 628, 62 L.R.A. 931—11 C.J. p 836 notes 82, 83.

(3) "Clearance card" has been distinguished from a "letter of recommendation."—Cleveland, C. C. & St. L. R. Co. v. Jenkins, supra—11 C.J. p 836 note 81 [b].

(4) "Letter of recommendation" has been defined as "a letter commending the former services of the holder, and speaking of him in such terms as would tend to bring such services to the favorable notice of those to whom he might apply for employment."—Cleveland, C. C. & St. L. R. Co. v. Jenkins, supra—36 C.J. p 993 note 93 [a].

(5) "The clearance card merely shows the date of entering the service of the employer, the capacities in which service was rendered, the date of leaving the employment, and the reason for the severance of relations between the employer and employee."—Adams v. Southern Pac. Co., 266 P. 541, 542, 204 Cal. 63, 57 A.L.R. 1066.

Discharge without recommendation

Store and assistant manager had right to discharge sales clerk without a recommendation.—Montgomery Ward & Co. v. Skinner, Miss., 25 So. 2d 572.

52. Ill.—Creitz v. Bennett, 273 Ill. App. 88.

charged employee or an employee leaving voluntarily from obtaining employment elsewhere has been regarded as valid.[53] The mere placing by the employer, on his own records, of the cause of a discharge does not come within the definition of "blacklisting" contemplated by such a statute.[54]

Under a statute authorizing an employer to give a truthful statement of the reason of discharge to one to whom the discharged employee has applied for employment, the employer may include the record of the employee,[55] but a statement outside of information requested, and not bearing on the character and competency of the employee, is not rendered proper by the fact that it is true.[56]

Actions. Where the master may suspend or discharge an employee at pleasure, with or without cause, the fact that the employee's reputation is affected by unfavorable inferences drawn from the suspension or discharge will not render the employer liable in damages,[57] and a discharged employee may not maintain an action for failure of the employer to furnish a clearance, in the absence of statutory provision, custom, or express agreement in that regard.[58] A discharged employee is not entitled to recover from his former employer for the latter's maintenance of a record showing the ground of discharge, where such record is in accordance with the facts and the ground stated justified discharge.[59] The view has been taken, however, that, where there is a custom among certain employers to keep a record of the causes of discharge of employees and for one employer not to employ persons discharged by another for certain causes, an employer may be liable to a discharged employee for making a false entry as to the cause of discharge if such entry results in the employee being denied employment by another.[60]

In the absence of statute or specific provision of the contract of employment requiring the issuance of a clearance card or letter of clearance to a discharged employee, in order to recover for failure to issue such a card or letter plaintiff employee must allege a duty on the part of the employer to issue such card or letter by reason of an alleged custom,[61] and, where the allegations of plaintiff's pleading shows that the duty to issue a letter of clearance arises only when the employee's record justifies issuance, such pleadings should contain allegations showing that such duty had arisen.[62] According to some cases, in order to entitle a discharged employee to recover from the employer for making a false entry as to the cause of discharge, it is essential for the employee to allege that he has sought employment and that employment has been refused because of such entry.[63] In an action for failure of the employer to give a clearance card in accordance with an alleged usage or custom, the burden is on plaintiff to prove the existence of such usage or custom.[64]

§ 46. Operation and Effect of Discharge

A servant who has been discharged must depart peaceably and must vacate premises occupied by him as an incident of the employment. A discharge which constitutes a breach of the employment contract renders the employer subject to the consequences of such a breach.

On his discharge, a servant must leave peaceably whether or not the discharge was rightful,[65] and vacate the house or premises occupied by him as servant.[66] If the servant fails to leave peaceably, or after doing so returns, he becomes a trespasser,

53. Minn.—State v. Justus, 88 N.W. 759, 85 Minn. 279, 89 Am.S.R. 550, 56 L.R.A. 757.
39 C.J. p 90 note 86.
Issuance of statutory service letters see supra § 44.

Criminal prosecutions

(1) An intent to injure by preventing future employment is the essence of the offense of "blacklisting" as defined by statutes providing that no firm shall blacklist any former employee with intent to prevent such employee from securing employment. —State v. Dabney, 141 P.2d 303, 77 Okl.Cr. 331.

(2) Under such a statute, while words used may not subject former employee to public hatred, ridicule, or obloquy, if they show that they were published with the intent of injuring such former employee in seeking work, they are sufficient to support conviction.—State v. Dabney, supra.

(3) Information held sufficient.—State v. Dabney, supra.

(4) Questions of fact should be submitted to the jury.—State v. Dabney, supra.

54. Minn.—Cleary v. Great Northern R. Co., 180 N.W. 545, 147 Minn. 403.

55. N.C.—Seward v. Seaboard Air Line R. Co., 75 S.E. 34, 159 N.C. 241.

56. N.C.—Seward v. Seaboard Air Line R. Co., supra.

57. Pa.—Henry v. Pittsburgh & L. E. R. Co., 21 A. 157, 139 Pa. 289.

58. Ohio.—New York, C. & St. L. R. Co. v. Schaffer, 62 N.E. 1036, 65 Ohio St. 414, 87 Am.S.R. 628, 62 L.R.A. 931.
11 C.J. p 836 note 81 [a] (1).

59. Cal.—Adams v. Southern Pac. Co., 266 P. 541, 204 Cal. 63, 57 A.L.R. 1066.

60. Ky.—Hundley v. Louisville & N. R. Co., 48 S.W. 429, 105 Ky. 162, 20 Ky.L. 1085, 88 Am.S.R. 298, 63 L.R.A.. 289.
39 C.J. p 90 note 84 [a].

61. Ill.—Creitz v. Bennett, 273 Ill. App. 88.

62. Ill.—Creitz v. Bennett, supra.

63. Ky.—Hundley v. Louisville & N. R. Co., 48 S.W.2d 429, 105 Ky. 162, 20 Ky.L. 1085, 88 Am.S.R. 298, 63 L.R.A. 289.

64. Ill.—Cleveland, C. C. & St. L. R. Co. v. Jenkins, 51 N.E. 811, 174 Ill. 398, 66 Am.S.R. 296, 62 L.R.A. 922.

65. Wash.—Case v. Knight, 225 P. 645, 129 Wash. 570.
39 C.J. p 91 note 93.

66. Ill.—Crain v. Burnett, 190 Ill. App. 407.
Wash.—Case v. Knight, 225 P. 645, 129 Wash. 570.
39 C.J. p 91 note 94.

and may be ejected by the master,[67] even though his wages may not all have been paid.[68] So, also, where a person is occupying premises as an incident of an employment, and not as a tenant, and the employment has terminated, his goods may be removed with such force as is necessary.[69]

As a general rule, a discharge becomes effective on the date of formal notice of immediate discharge.[70]

A discharge which constitutes a breach of the contract of employment renders the employer subject to the consequences of such breach.[71] In the absence of statutory or contractual requirement, private contracts of employment usually do not carry with them the right to compel the employer to reinstate the employee if the discharge is wrongful.[72]

The performance of subsidiary contract is not excused by notice of the termination of the contract of employment, when the notice given is not to take effect immediately.[73] It has been held, however, that, where the employee has wrongfully been discharged and the contract of employment is entire and inseparable, the employee is not bound by an agreement in the contract not to solicit customers of the employer within a specified time after termination of the contract.[74]

Under a contract allowing cancellation by giving a stipulated notice in writing, a discharge is equivalent to such notice as fixing the amount that can thereafter be recovered.[75]

§ 47. Actions for Wrongful Discharge

The right of action by an employee against his employer for a wrongful discharge and the nature and form of the remedy are considered infra §§ 48–59. Actions for breach of employment contracts generally are discussed supra § 11. Actions for wages are considered infra §§ 122–137, and the remedies of an employee for the malicious procurement of his discharge infra §§ 631, 632.

Examine Pocket Parts for later cases.

§ 48. —— Right of Action

a. In general

b. Conditions precedent

a. In General

As a general rule no right of action arises in favor of an employee on his discharge unless he has been hired for a definite term. The wrongfulness of the discharge determines the right of action where the hiring is for a definite term.

Since a right of action for a wrongful discharge is based or founded on contract, a contract mutually binding on the parties is necessary before such a right of action can arise.[76] As a general rule, unless the contract of employment is for some definite time, the servant has no right of action, on be-

Right to possession

On termination of the employment, generally the right to possession of premises which have been occupied by the servant as living or residential quarters as an incident to the employment is in the master.

N.Y.—Cosvira Realty Corp. v. Hertelendy, 61 N.Y.S.2d 283.

Tex.—Consolidated Indemnity Ins. Co. v. Smith, Civ.App., 74 S.W.2d 139.

67. Ill.—Crain v. Barnett, 190 Ill. App. 407.

Wash.—Case v. Knight, 225 P. 645, 129 Wash. 570.

39 C.J. p 91 note 95.

Where gin company elected to terminate contract of employment to operate gin on its premises, discharged employees could not complain of their eviction, in absence of tortious acts resulting in injury to them.—Consolidated Indemnity Ins. Co. v. Smith, Tex.Civ.App., 74 S.W.2d 139.

68. Ill.—Crain v. Barnett, 190 Ill. App. 407.

Wash.—Case v. Knight, 225 P. 645, 129 Wash. 570.

39 C.J. p 91 note 96.

69. Pa.—Vicary v. Beckwith, Com. Pl., 21 Erie Co. 189, 53 York Leg. Rec. 175.

Tenn.—Crooms v. Reichman, 8 Tenn. Civ.A. 86.

70. Or.—Osburn v. De Force, 257 P. 685, 122 Or. 360, motion denied 262 P. 222, 123 Or. 352.

71. U.S.—Taylor v. Tulsa Tribune Co., C.C.A.Okl., 136 F.2d 981.

Arbitrary termination by employer of employment for one year does not release employer from liability on contract of employment.—McKinney v. Smith, Tex.Civ.App., 271 S.W. 247.

72. U.S.—The Losmar, D.C.Md., 20 F.Supp. 887.

73. U.S.—Kee v. American Food Mfg. Co., 4 Mill.Rev. 413.

74. Va.—Standard Laundry Service v. Pastelnick, 184 S.E. 193, 166 Va. 125.

75. N.Y.—Bitterman v. Gluck, 9 N.Y.S.2d 1007, 256 App.Div. 336—De Vere v. Gilmore, 54 N.Y.S. 587, 25 Misc. 306—Stanley v. Chris-Craft Corporation, 21 N.Y.S.2d 898, affirmed 21 N.Y.S.2d 502, 259 App. Div. 1038, appeal denied 22 N.Y.S. 2d 926, 260 App.Div. 810.

76. Ky.—Clark v. Cincinnati, N. O. & T. P. Ry. Co., 79 S.W.2d 704, 706, 258 Ky. 197.

"In order to sustain a claim for damages for the wrongful discharge of an employee, it should be made to appear that a valid contract for such employment . . . existed at the time of his discharge. It should be shown that such contract was entered into for a definite period of time; and likewise should show obligation on the part of the employee to render service for a fixed period and a reciprocal obligation on the employer's part to retain such services."—Clark v. Cincinnati, N. O. & T. P. Ry. Co., supra.

Obligation of employee

An obligation on the employee to render services for the period of employment is implied under a contract otherwise showing mutuality as to consideration.—Perfection Mattress & Spring Co. v. Dupree, 113 So. 74, 216 Ala. 303.

ing discharged,[77] for breach of contract[78] if he has been paid his salary for the time actually employed.[79] If employed for a definite time, the servant's right of action is dependent on the wrongfulness of the discharge[80] and the monetary loss resulting therefrom.[81] Where a servant, at the time of his discharge, has received more than the contract compensation for the term, he cannot maintain an action for breach of contract because he is not permitted to serve the full term.[82]

No right of action arises where the employee is discharged under the terms of the contract.[83] On the other hand, where a contract for an otherwise indefinite term provides for a certain method of procedure as a condition precedent to discharge, a discharge without such procedure is a breach of the contract entitling the servant to a right of action.[84]

Wrongful discharge as giving rise to action in contract or tort is discussed in Actions § 49 e (8).

"Sanctioning right" is the right of a servant who is wrongfully discharged to recover damages from the master for a breach of contract.[85]

b. Conditions Precedent

An actual offer to perform, or a demand for, work is not a condition precedent to an action for wrongful discharge, at least where the discharge has been clearly indicated.

A formal discharge need not be shown in order to maintain an action for wrongful discharge, since it is sufficient that the employer has by word or conduct plainly evinced an intention not to perform.[86] Tender of performance by the employee of a condition of the contract as to which he is not in default at the time of the institution of the action is not a condition precedent to the maintenance of the action.[87] While it has been held that in an action for wrongful discharge the servant must show his readiness and willingness to carry out the contract,[88] generally an actual offer to perform or a demand for work is unnecessary, at least where the discharge has been clearly indicated.[89] Where,

77. Kan.—Swart v. Huston, 117 P. 2d 576, 154 Kan. 182.
Mo.—Bell v. Faulkner, App., 75 S. W.2d 612.
39 C.J. p 91 note 3.
Commencement and duration of employment see supra § 8.

Employment until further notice
N.Y.—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented on other grounds 33 N.Y.S.2d 764.

Motive of discharge
If the contract is terminable at the will of the employer, with or without cause, no right of action for a wrongful discharge lies regardless of the motive for the discharge.
Ind.—Sinclair Refining Co. v. McCullom, 24 N.E.2d 784, 107 Ind.App. 356.
Tex.—Magnolia Petroleum Co. v. Dubois, Civ.App., 81 S.W.2d 157, error refused.

78. Ind.—Davis v. Davis, 151 N.E. 134, 197 Ind. 386.
Ky.—Clark v. Cincinnati, N. O. & T. P. Ry. Co., 79 S.W.2d 704, 258 Ky. 197—Dysart v. Dawkins Log & Mill Co., 300 S.W. 906, 222 Ky. 415.

79. Tex.—Thomas v. Texas & N. O. R. Co., Civ.App., 162 S.W.2d 1039, error refused.

80. N.Y.—Rosenthal v. Becher, 18 N.Y.S.2d 647.
Tex.—Farley v. Universal Mills, Civ. App., 116 S.W.2d 488—Matlock v. Gulf, C. & S. F. Ry. Co., Civ.App., 99 S.W.2d 1056, error dismissed—**Corpus Juris cited in** Mallehan v. Texas & P. Ry. Co., Civ.App., 87 S.W.2d 771, 774.
39 C.J. p 91 note 6.

Grounds for discharge see supra § 42.

Employment on monthly basis
Servant hired on monthly basis, wrongfully discharged before end of month, may recover damages for rest of month.
Miss.—Ross v. Fair, 110 So. 841, 145 Miss. 18.
Tex.—Crater Oil Co. v. Voorhies, Civ. App., 280 S.W. 849.

Mutual consent
Where the contract is terminated by mutual consent, the servant has no right of action for wrongful discharge.
Ill.—Grannemann v. Kloepper, 24 Ill.App. 277.
N.Y.—Kaufman v. Goldman Stores Corporation, 300 N.Y.S. 773, 252 App.Div. 666.

Parties
Pa.—Goldberg v. Davis Mfg. Co., Com.Pl., 56 Dauph.Co. 358.

81. **Where no monetary loss** results from the discharge the employee cannot maintain an action for breach of a contract for permanent employment.—Ashland Oil & Refining Co. v. Dorton, 189 S.W.2d 394, 300 Ky. 385.

82. N.Y.—Frohman v. Mason, 151 N.Y.S. 938, 89 Misc. 380.

83. Ga.—Roberts v. Crowley, 7 S.E. 740, 81 Ga. 429.
Ind.—Harder v. Marion County, 97 Ind. 455.

Ratification by employee
Employee accepting bonus or extra compensation granted by corporation's resolution ratified contract as tendered, and could not recover damages for subsequent discharge under a provision of the resolution for termination of his employment at end of any year which he failed to read.—Pettit v. New Jersey Paint Works, Harry Louderbough, Inc., 136 A. 427, 5 N.J.Misc. 328.

84. Ga.—Gary v. Central of Georgia Ry. Co., 141 S.E. 819, 37 Ga.App. 744.
N.Y.—Crotty v. Erie R. Co., 133 N.Y. S. 696, 149 App.Div. 262.
Duration of general or indefinite hiring see supra § 8.

85. Ohio.—Tiffin Glass Co. v. Stoehr, 43 N.E. 279, 54 Ohio St. 157.

86. U.S.—Helfer v. Corona Products, C.C.A.Ark., 127 F.2d 612.

87. Cal.—Gregg v. McDonald, 239 P. 373, 73 Cal.App. 748.

88. Neb.—Hale v. Sheehan, 54 N.W. 682, 36 Neb. 439.
39 C.J. p 91 note 12.

89. Cal.—Gregg v. McDonald, 239 P. 373, 73 Cal.App. 748.
N.J.—Diffley v. Jacobson Mfg. Co., 143 A. 696, 6 N.J.Misc. 1044, affirmed 147 A. 908, 105 N.J.Law 631.
Pa.—Baldwin v. Transitone Automobile Radio Corporation, 169 A. 755, 314 Pa. 10.
39 C.J. p 91 note 13.

In Louisiana
(1) Where, under the statute, the whole amount of salary for the term becomes due and demandable on a wrongful discharge, it is unnecessary for the employee to tender his services or put the employer in default.—Van Denburgh v. H. T. Higginbotham, Inc., 122 So. 581, 168 La. 461—Dunbar v. Orleans Metal Bed Co., 82 So. 889, 145 La. 779.

however, a clear unequivocal act of dismissal has not been established, there must be some affirmative act on the part of the servant to show a tender of service.[90] Thus a discharge by a superior whose authority is not shown will not justify the neglect of the servant, whose contract was directly with the employer, to tender his services directly to him,[91] but where the servant is discharged by a duly authorized agent he is not required to seek the employer and demand a continuance in his employ.[92]

In an action for breach of contract to give permanent employment, the servant need not tender a return of the amount paid him before the breach when there is no dispute as to his right thereto and a tender would be an idle ceremony.[93] In an action for breach of such a contract, the consideration for which is the release of a claim for injuries, the employee must have actually performed his part of the agreement by actually releasing his claim,[94] but it is unnecessary for him to have returned or tendered a cash amount received in part consideration of such waiver.[95]

A contract requiring a servant to return all records to the employer as a prerequisite to a final settlement at the termination of the contract does not make such return a condition precedent to the bringing of an action for breach of contract.[96]

A statute requiring notice of an injury is not applicable to actions for a breach of contract by wrongful discharge.[97]

§ 49. —— Accrual of Right

a. In general

b. Under constructive service doctrine

a. In General

A right of action for wrongful discharge usually arises on the discharge.

The right of action for a wrongful discharge of an employee before expiration of the contract term generally arises on the discharge, and ordinarily the action may be brought immediately thereafter where recovery of the value of services performed is sought.[98] If damages for breach of contract are sought, the action may be brought immediately after the discharge, or at any time during, or at the expiration of, the term,[99] unless the damages cannot be ascertained until after expiration of the term, in which case the action cannot be brought until such expiration.[1] An action brought before an actual breach of the contract is premature.[2]

Limitations. The action must be instituted within the time limited by the statute of limitations.[3]

Under statute. Under the statutes of some states, the whole amount of the salary under a contract of

(2) A discharged employee is at liberty to seek other employment, with respect to his right to recover for an unjustified discharge.—Van Denburgh v. H. T. Higginbotham, Inc., supra.

90. Cal.—Winsor v. Silica Brick Co., 159 P. 877, 31 Cal.App. 85.

91. Mich.—Collins v. Hazelton, 31 N. W. 843, 65 Mich. 220.

92. Mich.—Gerardo v. Brush, 79 N. W. 646, 120 Mich. 405.

93. D.C.—Riefkin v. E. I. Du Pont de Nemours & Co., 290 F. 286, 53 App.D.C. 311.

94. U.S.—Starr v. Superheater Co., C.C.A.Ind., 102 F.2d 170.

Reason for rule

In a contract where there is an executory consideration, the execution of the consideration is usually a condition precedent to liability on the promise, and the failure to execute the consideration discharges the promisor.—Starr v. Superheater Co., supra.

Appeal from adverse decision

An employee who agreed to dismiss compensation claim against employer as consideration for oral contract of life employment, but permitted claim to remain pending and appeal to be taken from order deciding the claim adversely, could not enforce the employment contract.—Starr v. Superheater Co., supra.

95. Ky.—Louisville & N. R. Co. v. Cox, 141 S.W. 389, 145 Ky. 667.

96. U.S.—United Autographic Register Co. v. Wright, C.C.A.Mo., 272 F. 545.

97. Puerto Rico.—Sosa v. American R. Co., 12 Puerto Rico 230.

98. Vt.—Holloway v. Levine, 180 A. 889, 107 Vt. 396.
39 C.J. p 92 note 21.
Action on quantum meruit see infra § 50 c.

99. U.S.—Taylor v. Tulsa Tribune Co., C.C.A.Okl., 136 F.2d 981.
Fla.—**Corpus Juris cited in** Hazen v. Cobb, 117 So. 853, 859, 96 Fla. 151.
Ga.—Gary v. Central of Georgia Ry. Co., 141 S.E. 819, 37 Ga.App. 744.
Okl.—Sharpless Separator Co. v. Gray, 161 P. 1074, 62 Okl. 73—Ditzler Dry Goods Co. v. Sanders, 146 P. 17, 44 Okl. 678.
39 C.J. p 92 note 22, p 95 note 49.

After breach

Suit for damages for breach of employment contract may be brought any time after breach within period of limitation.—Wood v. Girot, 282 P. 981, 102 Cal.App. 160.

Delay until end of term or notice period is unnecessary.
Cal.—Wood v. Girot, supra.
Fla.—Hazen v. Cobb, 117 So. 853, 96 Fla. 151.
N.Y.—Mavian v. Majestic Photo Engraving Co., 19 N.Y.S.2d 677.

1. Miss.—Upton v. Adcock, 110 So. 774, 145 Miss. 372.

2. U.S.—Pellet v. Manufacturers' & Merchants' Ins. Co., Ill., 104 F. 502, 43 C.C.A. 669.
39 C.J. p 92 note 25.

Bonus payable at specific time

Action for breach of contract of employment, in which claim was made by employee for bonus under the contract, brought prior to time the bonus was payable under the contract is premature in so far as it was based on claim for bonus.—Chanin v. J. B. Liebman & Co., 20 A.2d 208, 341 Pa. 552.

3. Cal.—Wood v. Girot, 282 P. 981, 102 Cal.App. 160.

Limitations begin to run against an action for breach of a contract of employment by wrongful discharge from the time of the wrongful discharge, and not from the time when the employee elects to treat the contract as terminated.—Pennsylvania Co. v. Good, 103 N.E. 672, 56 Ind.App. 562.

employment for a certain time becomes due and demandable on a wrongful discharge, and may be sued for immediately.[4] Such a statute has been held not to give an employee a cause of action for salary where he never was allowed to enter into the service of the employer.[5] Where the amount of salary is indefinite and to be governed by events, action must be postponed until it can be ascertained with legal certainty.[6]

b. Under Constructive Service Doctrine

As a general rule an action for wages for the period following the discharge, under the constructive service doctrine, cannot be instituted until expiration of the term.

In those jurisdictions in which the doctrine of constructive service obtains, as discussed infra § 50, an action for wages accruing after the discharge cannot be brought until the expiration of the term[7] unless the contract is divisible, in which case an action may be brought for each installment as it falls due.[8]

§ 50. —— Nature and Form of Remedy

a. In general
b. Action for wages
c. Action on quantum meruit
d. Action for breach of contract

a. In General

A choice of several remedies is available to an employee wrongfully discharged before expiration of the contract term.

On wrongful discharge of an employee before the end of the contract term a choice of several remedies is available to the employee.[9] These remedies are considered in detail in the other subdivisions of this section.

As discussed in Actions § 49 e (8), the action available to an employee wrongfully discharged is in contract, not in tort, unless the discharge be accompanied by other wrongful conduct amounting to a tort.

b. Action for Wages

An employee wrongfully discharged before expiration of the contract term may bring an action for wages due for the services rendered prior to the time of the discharge. Except where the constructive service doctrine is followed, an action for wages for the unexpired term does not lie.

One employed to serve for a certain time, and subsequently discharged for no fault of his own before the expiration of the term, may recover by action the wages due prior to the time of the discharge,[10] as well as damages for the breach of the contract with respect to the unexpired term, as discussed infra subdivision d of this section. It has been held that a servant discharged during the period between salary payments cannot recover compensation for that part of the period for which he worked, his only claim being for damages for breach of contract.[11] Where wages cannot be recovered in an action for breach of contract unless a count therefor is contained in the complaint, as discussed infra § 52, a judgment in an action simply for breach of contract does not operate as a bar to a subsequent action for such wages.[12]

Wages for unexpired term. Under the constructive service doctrine,[13] which has been followed in some decisions,[14] an action may be brought to recover the stipulated wages for the unexpired term.[15]

4. La.—Fletcher v. Crichton, 164 So. 411, 183 La. 551—Van Denburgh v. H. T. Higginbotham, Inc., 122 So. 581, 168 La. 461—Chenet v. Libby & Blouin, 100 So. 697, 156 La. 503 —Kotteman v. Gross, App., 184 So. 380—Clesi v. D'Angelo, 5 La.App. 432—Henderson v. Haik, 4 La.App. 636.
39 C.J. p 92 note 26.

5. La.—Smith v. Pollock Co., 3 La. App. 125.

6. La.—Woodward v. Gross, 24 La. Ann. 109.

7. Ga.—Harris v. Moss, 37 S.E. 123, 112 Ga. 95.
39 C.J. p 92 note 27.

8. Miss.—Williams v. Luckett, 26 So. 967, 77 Miss. 394.
39 C.J. p 92 note 28.
Where the wages are payable in installments, the servant may sue for and recover each installment as it becomes due.—Lubriko Co. v. Wyman, C.C.A.3, 290 F. 12—39 C.J. p 93 note 37.

9. Ala.—Standard Oil Co. v. Lloyd, 159 So. 371, 26 Ala.App. 306.
Ga.—Jackson v. Atlantic Coast Line R. Co., 69 S.E. 919, 8 Ga.App. 495.
Ill.—Bowden v. Board of Education of School Dist. No. 41, Du Page County, 264 Ill.App. 1.
Ind.—Watts v. Geisel, 194 N.E. 502, 100 Ind.App. 92.
Pa.—Allen v. Colliery Engineer's Co., 46 A. 899, 196 Pa. 512.
Tex.—Southern Properties v. Carpenter, Civ.App., 21 S.W.2d 372, error dismissed.
Vt.—Holloway v. Levine, 180 A. 889, 107 Vt. 396.

10. Ind.—Watts v. Geisel, 194 N.E. 502, 100 Ind.App. 92.
39 C.J. p 93 note 30.
Actions for wages generally see infra §§ 122–137.

11. N.Y.—Reilly v. Henri Gutmann Silks Corp., 185 N.Y.S. 60, 113 Misc. 502, reversed on other grounds 187 N.Y.S. 717, 195 App.Div. 681—Keane v. Liebler, 107 N.Y.S. 102.

12. N.Y.—Perry v. Dickerson, 85 N. Y. 345, 39 Am.R. 663.
39 C.J. p 93 note 32.

13. **Doctrine explained**
The constructive service doctrine is the doctrine of the law of master and servant that a discharged employee holding himself ready to do the work has therefore done the work, and that readiness is, for all purposes, equivalent to performance. —James v. Allen County, 6 N.E. 246, 44 Ohio St. 226, 58 Am.R. 821.

14. Ala.—Ex parte Towle, 106 So. 60, 213 Ala. 129—Standard Oil Co. v. Lloyd, 159 So. 371, 26 Ala.App. 306.
39 C.J. p 93 note 36.

15. Ala.—Standard Oil Co. v. Lloyd, 159 So. 371, 26 Ala.App. 306.
39 C.J. p 93 note 34.

Where, however, this doctrine is followed, it has been held that a discharged employee has the alternative right of bringing suit at once for damages for the entire unexpired term.[16]

This doctrine has been expressly repudiated in some jurisdictions.[17] These authorities hold that, if a servant is wrongfully discharged, he has no action for wages except for services past rendered,[18] and his remedy with respect to the unexpired term is an action for damages sustained by reason of his discharge, in not being allowed to serve and earn the wages agreed on, as discussed infra subdivision d of this section.

c. Action on Quantum Meruit

Where a servant is discharged after partial performance without just cause, he may sue for the value of the services performed on a quantum meruit.

Where a servant is discharged after partial performance without just cause, he may treat the contract as rescinded and sue for the value of the services performed on a quantum meruit.[19] Such an action precludes a subsequent action for breach of contract, as it is not permissible to split up a single cause of action into two or more suits.[20]

d. Action for Breach of Contract

An employee who has been wrongfully discharged in breach of contract may maintain an action for damages caused by such breach.

Instead of treating the contract as rescinded and suing on a quantum merit, a servant who has been wrongfully discharged may treat the contract as continuing, notwithstanding its breach by the master, and sue for damages for the wrongful discharge,[21] and this is generally the only remedy available to the employee with respect to the unexpired part of the contract term during which he was not permitted to render service to the employer.[22] Although earnings of the employee after

Necessity for seeking other employment see infra § 59.

Time of accrual of action see supra § 49.

Common counts

If employee had contract for services to be performed and was discharged without fault on his part, fact that he held himself in readiness to perform is tantamount to full performance, leaving nothing to be done on either part, save payment of stipulated wage, and entitles employee to recover on common count.—Ex parte Towle, 106 So. 60, 213 Ala. 129.

Special assumpsit for the next installment of salary due under the contract lies where, on the wrongful termination of an employment contract by the employer after the expiration of but part of the term fixed, the employee remained ready, able, and willing to perform.—Bowden v. Board of Education of School Dist. No. 41, Du Page County, 264 Ill.App. 1.

Statutory right

An action to recover wages for the unexpired term is provided for by statute in some jurisdictions.—Kotteman v. Gross, La.App., 184 So. 380.

16. Ala.—Standard Oil Co. v. Lloyd, 159 So. 371, 26 Ala.App. 306.

Ill.—Bowden v. Board of Education of School Dist. No. 41, Du Page County, 264 Ill.App. 1.

39 C.J. p 94 note 40.

17. Mo.—McGee v. St. Joseph Belt Ry. Co., 110 S.W.2d 389, 232 Mo. App. 639.

39 C.J. p 93 notes 38, 39.

18. U.S.—Taylor v. Tulsa Tribune Co., C.C.A.Okl., 136 F.2d 981.

Ind.—U. S. Reduction Co. v. Nussbaum, 42 N.E.2d 403, 112 Ind.App. 330.

Mo.—Hume v. Miller Hatcheries, App., 51 S.W.2d 179.

N.J.—Meyers v. Potoker, 128 A. 601, 3 N.J.Misc. 450.

Tex.—Galveston, H. & S. A. Ry. Co. v. Eubanks, Civ.App., 42 S.W.2d 475, affirmed Eubanks v. Galveston, H. & S. A. Ry. Co., Com.App., 59 S.W.2d 825.

39 C.J. p 93 note 39.

Action of debt

An action of debt does not lie for breach of an employment contract, where the action is not for a sum certain even though mitigation is specially pleaded by an allegation that plaintiff employee was entitled to the balance of the contract price because after due diligence he was unable to secure other employment.—Stinson v. Edgemoor Iron Works, D.C.Del., 53 F.Supp. 864.

19. Cal.—Hart v. Buckley, 128 P. 29, 164 Cal. 100—Neblett v. Getty, 66 P.2d 473, 20 Cal.App.2d 65—Lessing v. Gibbons, 45 P.2d 258, 6 Cal.App.2d 598.

Ga.—Manley v. Exposition Cotton Mills, 170 S.E. 711, 4 Ga.App. 496.

Ill.—Bowden v. Board of Education of School Dist. No. 41, Du Page County, 264 Ill.App. 1.

Ind.—Watts v. Geisel, 194 N.E. 502, 100 Ind.App. 92.

Mo.—McGee v. St. Joseph Belt Ry. Co., 110 S.W.2d 389, 232 Mo.App. 639.

Vt.—Holloway v. Levine, 180 A. 889, 107 Vt. 396.

39 C.J. p 95 note 46.

20. Mass.—Dalton v. American Ammonia Co., 127 N.E. 504, 236 Mass. 105.

39 C.J. p 95 note 48.

21. Fla.—Hazen v. Cobb, 117 So. 853, 96 Fla. 151.

Ga.—Manley v. Exposition Cotton Mills, 170 S.E. 711, 4 Ga.App. 496.

Ill.—Ibold v. 3920 Lake Shore Drive Bldg. Corp., 61 N.E.2d 305, 326 Ill. App. 257—Corby v Seventy-One Hundred Jeffery Ave. Bldg. Corp., 60 N.E.2d 236, 325 Ill.App. 442—Bowden v. Board of Education of School Dist. No. 41, Du Page County, 264 Ill.App. 1.

Ind.—Watts v. Geisel, 194 N.E. 502, 100 Ind.App. 92.

Mass.—Irving v. Goodimate Co., 70 N.E.2d 414, 320 Mass. 454.

Mo.—McGee v. St. Joseph Belt Ry. Co., 110 S.W.2d 389, 232 Mo.App. 639.

Tex.—Southern Properties v. Carpenter, Civ.App., 300 S.W. 963.

Vt.—Holloway v. Levine, 180 A. 889, 107 Vt. 396.

Wyo.—Beatty v. Chicago, B. & Q. R. Co., 52 P.2d 404, 44 Wyo. 22.

39 C.J. p 95 note 49.

Necessity for declaring specially see infra § 52.

Contract provision for damages held unnecessary

Tex.—Moore County Carbon Co. v. Whitten, Civ.App., 140 S.W.2d 880, error dismissed, judgment correct.

22. U.S.—Taylor v. Tulsa Tribune Co., C.C.A.Okl., 136 F.2d 981.

Ind.—U. S. Reduction Co. v. Nussbaum, 42 N.E.2d 403, 112 Ind.App. 330.

N.J.—Meyers v. Potoker, 128 A. 601, 3 N.J.Misc. 450.

Tex.—Galveston, H. & S. A. Ry. Co. v. Eubanks, Civ.App., 42 S.W.2d 475, affirmed Eubanks v. Galveston, H. & S. A. Ry. Co., Com.App., 59 S.W.2d 825.

39 C.J. p 93 note 39.

his wrongful discharge go to mitigate the damages recoverable by him, as discussed infra § 59, the acceptance of new employment by the employee for the unexpired term of service is not, as a general rule, a waiver of his claim or right of action for damages.[23]

Where the employer's breach of the employment contract is the equivalent of a termination thereof so that the breach goes to the entire contract, but a single cause of action for damages arises therefrom.[24] Hence, where an action has been brought for damages, no further action may be brought on a quantum meruit,[25] nor may another action be brought for breach of the contract.[26] Where plaintiff has recovered in an action, although by confession, a sum partly earned and partly not earned, the recovery will be treated as having been obtained in a suit for breach of contract, and a further suit will be barred.[27]

Although an action on a quantum meruit is inconsistent with, and a bar to, a subsequent action for breach of contract, as discussed supra subdivision c of this section, where an employee, not having elected to treat the contract as rescinded, sues on the contract for wages and expenses due him up to the time of dismissal, such an action is not inconsistent with, or a bar to, a subsequent action for breach of contract.[28]

§ 51. —— Defenses

A sufficient cause for the discharge of a servant constitutes a defense to an action for wrongful discharge.

As a general rule a sufficient cause for the discharge of a servant, although not the inducing motive to the discharge, or even known to the master, constitutes a defense to an action for wrongful discharge.[29] Where the contract provides for its termination by written notice specifying the cause, a cause not specified in the notice has been held not to be available as a defense,[30] and it has also been held that a cause arising subsequently to the discharge may not be urged in defense.[31]

While a master does not have the right of recall of a discharge at any time and under all circumstances under pain of a forfeiture by the servant of his right of recovery,[32] a servant is not required to accept a suggestion of return when further association between the parties would be unprofitable to both and degrading to him.[33] It has been held, however, that a master may defend an action for wrongful discharge by showing that the discharge was by mistake, and that as soon as the mistake was discovered, and before the servant had sustained any damages, he offered to revoke, and insisted on revoking, the discharge.[34]

An employer is relieved of liability by showing a threatened resignation unless an improper demand is granted,[35] a voluntary resignation before,[36] or subsequent to,[37] the discharge, or even a resignation tendered only for the sake of appearances, and at the employer's request;[38] but a resignation on a condition not accepted by the employer will not be a defense to a subsequent discharge.[39] Likewise a master may show, in defense, a reconciliation and

23. Tenn.—Allen v. Maronne, 23 S. W. 113, 93 Tenn. 161.
39 C.J. p 94 note 43, p 118 note 36 [a].

24. Mo.—McGee v. St. Joseph Belt Ry. Co., 110 S.W.2d 389, 232 Mo. App. 639.

25. N.D.—McLean v. News Pub. Co., 129 N.W. 93, 21 N.D. 89.
39 C.J. p 96 note 51.

26. N.Y.—McCargo v. Jergens, 99 N. E. 838, 206 N.Y. 363.
39 C.J. p 96 note 52.
Damages recoverable where action brought before expiration of term see infra § 58.

27. Del.—Brand v. Ogden-Howard Co., 111 A. 370, 1 W.W.Harr. 88.
39 C.J. p 96 note 53.

28. Mass.—Dalton v. American Ammonia Co., 127 N.E. 504, 236 Mass. 105.
39 C.J. p 96 note 55.

29. Va.—Crescent Horse-Shoe & Iron Co. v. Eynon, 27 S.E. 935, 95 Va. 151, 158.
39 C.J. p 96 note 59.
Effect of prior assignment of cause for discharge see supra § 44.
Grounds for discharge see supra § 42.
Employee's admission of fault in letter written to employer was held to work no estoppel to employee to deny that he was properly discharged for disobeying orders.—Bang v. International Sisal Co., 4 N.W.2d 113, 212 Minn. 135, 141 A.L.R. 657.

30. N.M.—Kiker v. Bank Sav. Life Ins. Co., 23 P.2d 366, 37 N.M. 346.
N.Y.—Mortimer v. Bristol, 180 N.Y. S. 55, 190 App.Div. 452.

31. Mich.—Gerardo v. Brush, 79 N. W. 646, 120 Mich. 405.

32. Iowa.—Rottlesberger v. Hanley, 136 N.W. 776, 155 Iowa 638.
39 C.J. p 96 note 61.

33. Mo.—Price v. Davis, 173 S.W 64, 187 Mo.App. 1.
Refusal as affecting amount of damages see infra § 59.

34. Tex.—Texas Benev. Ass'n v. Bell, 3 Tex.A.Civ.Cas. § 277.

35. Md.—Williams v. Maryland Glass Corp., 106 A. 755, 134 Md. 320.

36. Tex.—Farley v. Universal Mills, Civ.App., 116 S.W.2d 488.

37. N.J.—Wharton v. Christie, 23 A. 258, 53 N.J.Law 607.
Tex.—New York Life Ins. Co. v. Thomas, 103 S.W. 423, 47 Tex.Civ. App. 150.
After acts not constituting discharge
A salesman, who wrote a letter of resignation after he received a letter from manager of the company changing his territory, was not entitled to maintain an action for wrongful discharge on theory that his letter of resignation was nugatory because of previous letter from manager changing his territory where letter changing salesman's territory did not constitute a discharge.—Farley v. Universal Mills, Tex.Civ.App., 116 S.W.2d 488.

38. Or.—Martin v. Gauld Co., 190 P. 717, 96 Or. 635.

39. N.Y.—La Vin v. Copley-Plaza Operating Co., 171 N.Y.S. 608, 184 App.Div. 417.

return to service,[40] and he may show by way of recoupment any loss of custom or other injury caused by the servant's conduct.[41]

It is not a complete defense to such an action, however, that the servant has had, or, by the exercise of reasonable diligence, might have had, other employment,[42] whatever might be its effect as reducing damages, as discussed infra § 59; that the servant has rejected the master's offer to continue him in his service at a reduced rate;[43] that the servant has accepted employment by the master in another capacity;[44] that the servant has engaged in business for himself in competition with his master;[45] that after his discharge the servant has taken away customers, originally brought by him to his master under the terms of his contract, and carried them to his new employers;[46] that the servant, after his discharge, applied for and obtained a letter of recommendation, where he notifies the master that he claims under, and intends to enforce, his contract;[47] that the servant failed to assert the contract of employment at the time of discharge;[48] or that the master is insolvent and unable to continue his business.[49] It is no defense to an action for wrongful discharge that the operation of the business in which plaintiff was employed was unprofitable[50] unless it is shown that the loss was due to the fault of the servant.[51]

A discharge must be treated as such,[52] and, if ignored, a continuing in employment defeats any right of action;[53] but the fact that the contract is not entirely rescinded by the servant who continues in the employ does not prohibit his recovery for the loss sustained by a partial breach.[54]

Under a statute rendering an employer liable for wages for the unexpired term of a contract of employment on wrongful discharge, the fact that the employee so discharged remained in the employment during the period of notice of the discharge is not an acquiescence therein so as to relieve the employer of liability.[55]

§ 52. —— Pleading

a. Declaration, petition, or complaint
b. Plea or answer
c. Issues, proof, and variance

a. Declaration, Petition, or Complaint

(1) In general
(2) Particular averments

(1) In General

The complaint in an action for breach of contract by wrongful discharge is sufficient if it contains the essential elements of a cause of action ex contractu.

It has been said to be well settled that the general rules of pleading in actions for breach of contracts obtain in actions for the breach of contracts of employment.[56] Thus, as a general rule, a complaint in an action for breach of an employment contract by wrongful discharge is sufficient if it contains the essential elements of a good cause of

Philippine.—Logan v. Philippine Acetylene Co., 33 Philippine 177.

40. La.—Chevalier v. Borie, 3 La. 299.

41. Ga.—Newman v. Reagan, 63 Ga. 755.
39 C.J. p 96 note 70.

42. Ark.—Sweet v. McEwen, 215 S. W. 651, 140 Ark. 162.
39 C.J. p 97 note 71.

43. Iowa.—Redfield v. Boston Piano & Music Co., 165 N.W. 365, 183 Iowa 194.
39 C.J. p 97 note 73.

44. Md.—Hamill v. Foute, 51 Md. 419.
39 C.J. p 97 note 74.

Rights not waived
The acceptance of other and different work from the employer is not sufficient in itself to constitute a waiver of rights by the employee under the original contract.—Warten Cotton Co. v. McGuire, 91 So. 308, 206 Ala. 469.

45. Mo.—Stone v. Vimont, 7 Mo.App. 277.

46. N.Y.—Lichtenhein v. Fisher, 34 N.Y.S. 304, 87 Hun 397, 2 N.Y.Ann. Cas. 156.

47. Mich.—Wright v. Elk Rapids Iron Co., 89 N.W. 335, 129 Mich. 543.
39 C.J. p 97 note 77.

48. Ill.—Lillis v. King Richardson Co., 175 Ill.App. 414.

49. U.S.—In re Silverman, D.C.Mo., 101 F. 219.
39 C.J. p 97 note 80.

50. Iowa.—Huntington v. Jacob Haish Co., 181 N.W. 480, 190 Iowa 1197.

51. Iowa.—Seelman v. Farmers' Co-Op. Co., 165 N.W. 811, 181 Iowa 1228.

52. La.—Tanner v. Cambon, 26 La. Ann. 353.
39 C.J. p 91 note 7.

53. N.J.—Bird v. J. L. Prescott Co., 99 A. 380, 89 N.J.Law 591.
39 C.J. p 91 note 8.

54. Pa.—Bodman v. Fisher, 112 A. 99, 268 Pa. 535.

55. La.—Van Denburgh v. H. T. Higginbotham, Inc., 122 So. 581, 168 La. 461.

Waiver
Where plaintiff was notified that he would be discharged as of a specified date, but he consulted an attorney on day of notification and he performed all work required under his contract between that day and the date specified, alleged fact that when notified of discharge plaintiff stated "Suits me" or words to that effect, could not be construed as a waiver of his rights under contract.—Holton v. Hart Mill Co., 166 P.2d 186, 24 Wash.2d 493.

56. Cal.—Palmer v. Harlow, 199 P. 844, 52 Cal.App. 758.

Construction
Where a written contract is set forth in the pleadings, its terms must prevail over a construction set forth by innuendo in other pleadings.—Oppenheimer v. Seligman, 150 N.Y.S. 156, 164 App.Div. 744.

Special damages
A complaint in an action for wrongful discharge seeking only damages of a special nature which are not recoverable in such an action is demurrable.—W. B. Davis &

action ex contractu,[57] and, where a complaint alleges facts sufficient to constitute such a cause of action, the fact that the prayer is for a judgment for wages instead of for damages does not render it fatally defective.[58] In some decisions it has been held that a servant suing for damages for a wrongful discharge must declare specially, and the common counts are not sufficient,[59] and that, where plaintiff sues on the common count in assumpsit, without inserting a count upon a special contract, he can recover only for the time he has actually served.[60] It has also been held that wages due cannot be recovered in an action for breach of contract, unless a count therefor is contained in the declaration.[61]

In an action in tort for a wrongful discharge the complaint should state facts sufficient to show a legal duty other than that growing out of the contract of employment and a violation thereof resulting in injury to the employee.[62]

Time of issuing writ or filing declaration. The fact that a declaration alleges that the term of service has expired, without making any reference to the time when it was filed, or to the issuance of the writ, cannot prejudice the finding of the jury, where the proof is ample to show a good cause of action as stated by plaintiff.[63]

Joinder of counts. When each of two counts, substantially the same, states a good cause of action, the objection of redundancy cannot be reached by demurrer, since it would be unjust to dismiss the petition because the same good cause of action is stated in two distinct counts.[64] Where a servant, on his discharge, before the expiration of the term, in an action on the contract, files the common counts only, he may amend by filing a special count founded on the breach of the contract.[65]

(2) Particular Averments

In an action by a servant for wrongful discharge, all the essential elements of a valid contract must be set forth in the complaint.

In an action for a wrongful discharge in breach of a contract of employment, the complaint must set forth all the essential elements of a valid contract.[66] A complaint in such an action sounding

Son v. Ruple, 130 So. 772, 222 Ala. 52.

57. Cal.—Palmer v. Harlow, 199 P. 844, 52 Cal.App. 758.

Matters provable under plea of general issue

Generally the declaration, petition, or complaint in an action for wrongful discharge is sufficient if it contains all that it is necessary for plaintiff to prove under a plea of the general issue.—Palmer v. Harlow, supra—39 C.J. p 97 note 86.

Complaint under Federal Rules of Civil Procedure

In employee's action against employer for breach of employment contract, complaint stating existence of an employment contract and discharge without cause, and alleging that plaintiff was entitled to damages in an amount representing balance of plaintiff's unpaid salary under contract amount of which was a specified sum, was sufficient under the Federal Rules of Civil Procedure.—Stinson v. Edgemoor Iron Works, D.C.Del., 53 F.Supp. 864.

Action based on rules or statute

Petition for wrongful discharge was held demurrable as stating no cause of action, where action was based on employer's rules or federal statutes not disclosed by the pleadings.—Clark v. Cincinnati, N. O. & T. P. Ry. Co., 79 S.W.2d 704, 258 Ky. 197.

58. Mich.—Webb v. Depew, 116 N.W. 560, 152 Mich. 698, 125 Am.S.R. 431, 16 L.R.A.,N.S., 813.
39 C.J. p 97 note 87.

59. Fla.—**Corpus Juris cited in** Hazen v. Cobb, 117 So. 853, 858, 96 Fla. 151.
Ill.—Bowden v. Board of Education of School Dist. No. 41, Du Page County, 264 Ill.App. 1.
39 C.J. p 96 note 50.

60. N.C.—Madden v. Porterfield, 53 N.C. 166.
39 C.J. p 97 note 88.

61. N.Y.—Perry v. Dickerson, 85 N.Y. 345, 39 Am.R. 663—Tullis v. Hassell, 54 N.Y.Super. 391.

62. N.C.—May v. Tide Water Power Co., 5 S.E.2d 308, 216 N.C. 439.
When action in tort lies between master and servant see Actions § 49 e (8).

Reason for rule

Liability of employer in employee's action of tort for wrongful discharge must grow out of violation of legal duty by the employer not arising out of contract.—May v. Tide Water Power Co., 5 S.E.2d 308, 216 N.C. 439.

Action ex contractu

Complaint alleging employer's duty to allow employee to work, breached when employee was wrongfully discharged and dragged or shoved from mill was held to state action ex contractu, not ex delicto.—W. B. Davis & Son v. Ruple, 130 So. 772, 222 Ala. 52.

Complaints held insufficient

Complaint which alleged wrongful discharge of the employee in public by employer, but which alleged no assault or trespass committed to the person or property of the employee or any act which, disjointed from the mere termination of the employment, constituted independent cause of action, failed to state cause of action in tort for wrongful discharge.—May v. Tide Water Power Co., 5 S.E.2d 308, 216 N.C. 439.

63. Ala.—Davis v. Ayres, 9 Ala. 292.

64. R.I.—Sowter v. Seekonk Lace Co., 83 A. 437, 34 R.I. 304.
39 C.J. p 99 note 11.

65. Ill.—Mt. Hope Cemetery Ass'n v. Weidenmann, 28 N.E. 834, 139 Ill. 67.
39 C.J. p 99 note 13.

66. Ga.—Manley v. Exposition Cotton Mills, 170 S.E. 711, 47 Ga.App. 496.
Ind.—Davis v. Davis, 151 N.E. 134, 197 Ind. 386.
Ky.—Clark v. Cincinnati, N. O. & T. P. Ry. Co., 79 S.W.2d 704, 258 Ky. 197.

Written contract

Petition alleging a written contract for one year's employment as evidenced by correspondence between parties which was filed as exhibits with the petition, some of which exhibits referred to the employment as having a year's duration, stated a cause of action for breach of contract by discharge without cause before expiration of the year, although some of the exhibits referred to employment as being by the month.—Hamilton Car-

in tort and lacking the requisite contract allegations is insufficient and demurrable.[67]

Period of hiring. In an action for damages for breach of an employment contract by wrongful discharge, it has been held that the complaint must allege a hiring for a specific term.[68] If the employee claims an employment for a term, the duration of which was to extend as long as his services were satisfactory, he should frame his pleading to conform to such theory.[69]

Wrongful discharge. In an action for damages for breach of contract by wrongful discharge, the wrongful discharge must be averred as the breach of the contract and as the fact constituting the cause of action.[70] However, the ground on which the discharge was actually made need not be specifically alleged,[71] and it has been held that a specific averment that the discharge was without cause is unnecessary since a discharge before termination of the contract period is prima facie a violation of the agreement.[72] A formal dismissal need not be alleged or proved; an allegation of the denial and repudiation of the contract is sufficient.[73] An allegation that defendant refused to permit plaintiff to perform services,[74] although coupled with an allegation that defendant refused to pay plaintiff under the contract,[75] is insufficient to charge a discharge in an action for breach of contract, although sufficient in an action for money due for services rendered.[76] However, a complaint alleging a hiring for a term, a notice by the employer of cancellation of the contract, and a refusal by him to permit the employee to continue his performance of the contract, plus an allegation of damage, has been held to state a cause of action for breach of contract.[77]

Where the contract gives the employer a right to discharge the employee under certain circumstances, an allegation that the employer breached the contract by discharging the employee without provocation on his part is not sufficient.[78] Where, however, the contract of employment permits the

hartt Overall Co. v. Short, 197 S.W. 2d 792, 303 Ky. 423.

Corporate employer

In action against corporation for damages for wrongful discharge from oral contract of employment for life, complaint was held insufficient in not alleging that the directors ever authorized or ratified the contract.—Heaman v. E. N. Rowell Co., 185 N.E. 83, 261 N.Y. 229.

67. Ga.—Manley v. Exposition Cotton Mills, 170 S.E. 711, 47 Ga.App. 496.

Allegations of wrongful discharge insufficient

Complaint alleging employer's wrongful discharge of employee in public, which did not allege the making of an employment contract and did not show terms of contract fixing the employee's rights and the employer's liability, was construable as purporting to allege cause of action in tort for wrongful discharge and not cause of action for wrongful breach of employment contract, notwithstanding allegation that employee had been in constant employment of the defendant for nearly seven years.—May v. Tide Water Power Co., 5 S.E.2d 308, 216 N.C. 439.

68. Tex.—Nelson v. Binford, Civ. App., 16 S.W.2d 347.

39 C.J. p 98 note 92.

Insufficient allegations

A complaint alleging that plaintiff received a letter from defendant stating that it had work for a number of men and alleging that the men went to work, were discharged, and had assigned their claim to plaintiff, does not set forth a cause of action for breach of contract.—Clarke v. Atlantic Stevedoring Co., C.C.A.N.Y., 163 F. 423—39 C.J. p 98 note 93.

69. N.Y.—Sinclair v. Positype Corporation of America, 261 N.Y.S. 900, 237 App.Div. 525.

Complaint showing hiring at will is insufficient.—Sinclair v. Positype Corporation of America, supra.

70. Colo.—Saxonia Mining & Reduction Co. v. Cook, 4 P. 1111, 7 Colo. 569.

39 C.J. p 98 note 94.

Race as ground for discharge

In action for breach of employment contract, complaint alleging that plaintiff was discharged on sole ground that he was a Jew was held sufficient to state cause of action.—Holzer v. Deutsche Reichsbahn Gesellschaft, 290 N.Y.S. 181, 159 Misc. 830.

Sufficiency of allegation

(1) Allegation in action for breach of employment contract that plaintiff was discharged without any cause whatsoever is a sufficient allegation of wrongful discharge, in absence of demurrer.—Wood v. Girot, 282 P. 981, 102 Cal.App. 160.

(2) Complaint is sufficient on demurrer where it alleges that plaintiff was discharged "without any reasonable cause whatever."—Foley v. Mail & Express Pub. Co., 28 N.Y. S. 778, 8 Misc. 91.

Discharge in violation of statute

A complaint, seeking to recover damages from corporate employer for alleged wrongful discharge on ground that employer's action in refusing plaintiff's request for a leave of absence, in order to conduct a campaign in his own behalf for nomination to a state office, constituted a violation of statute making it unlawful for corporation to restrain political activities of its employees, which failed to allege that employer's action did interfere with plaintiff's political action, or that plaintiff ever did decide to or ever did run for any nomination, was insufficient.—Coxon v. Southern Pac. Co., C.C.A.Ariz., 155 F.2d 455.

Pleading held sufficient

Ga.—Webb v. Pullman Co., 196 S.E. 477, 57 Ga.App. 772.

71. Ga.—Fried v. Portis Bros. Hat Co., 152 S.E. 151, 41 Ga.App. 30.

72. N.Y.—Linton v. Unexcelled Fire-Works Co., 27 N.E. 406, 124 N.Y. 533.

39 C.J. p 98 note 94.

73. Ga.—Bedell v. Berwick, 82 S.E. 564, 142 Ga. 146.

Tenn.—East Tennessee, V. & G. R. Co. v. Staub, 7 Lea 397.

74. Cal.—Winsor v. Silica Brick Co., 159 P. 877, 31 Cal.App. 85.

39 C.J. p 98 note 98.

75. Cal.—Palmer v. Harlow, 199 P. 844, 52 Cal.App. 758.

76. Cal.—Palmer v. Harlow, supra.

77. N.Y.—Gutner v. Success Magazine Corporation, 242 N.Y.S. 679, 136 Misc. 257.

78. Fla.—Hazen v. Cobb, 117 So. 853, 96 Fla. 151.

Reason for rule

The discharge complained of may

discharge of the employee when his services are unsatisfactory, it is only necessary to allege that the employee's services were not unsatisfactory in fact, and that the employer's assignment of such ground for the discharge was false and made in bad faith.[79]

In an action for damages for wrongful discharge, the precise date of the discharge need not be alleged, as in such a case time is not of the essence of the claim.[80]

Performance or readiness and willingness to perform. Where, under the statutory form, an allegation that an employee "duly" performed the contract is sufficient in an action for wages earned, an allegation that plaintiff "fully" performed is insufficient.[81] An allegation of performance by the employee is unnecessary, however, in an action for damages for breach of contract, as the cause of action is not predicated on performance, but on defendant's prevention of performance.[82] So when a servant, in an action for breach of contract of hiring, counts on breach alone, not attempting to recover on the contract as such, an averment of readiness and willingness to perform is unnecessary.[83]

Nonpayment. Where the declaration in an action for wrongful discharge claims damages in a specified amount, it need not contain an averment that the employee was not paid for the services rendered, since the claim for damages is a sufficient allegation of that fact.[84] In an action for damages for breach of contract, however, it has been held that compensation for services rendered under the contract is not recoverable in the absence of allegations showing the amount due and unpaid.[85]

Negativing defenses. The declaration, petition, or complaint in an action for wrongful discharge need not negative matters of defense,[86] as, for example, matters which might be available to the employer in mitigation of damages.[87] Thus the employee need not allege his inability to obtain employment or to earn anything.[88] In some jurisdictions, however, in order to recover more than nominal damages, the employee must allege that he exercised reasonable diligence in seeking other employment and that he failed to find other employment, or, if he found other employment, that it did not pay as much as he would have received for like services under the contract.[89]

Damages. In an action for damages for breach of contract by wrongful discharge, appropriate allegations with respect to the damages sustained by the employee by reason of his wrongful discharge should be sufficiently set forth in the complaint.[90] Elements of special damage which are not pleaded cannot be allowed or submitted to the jury.[91]

have been on the grounds permitted by the contract.—Hazen v. Cobb, supra.

79. Ga.—Fried v. Portis Bros. Hat Co., 152 S.E. 151, 41 Ga.App. 30.

80. Md.—Spencer v. Trafford, 42 Md. 1.

81. N.Y.—Sisskin v. Workmen's Circle, 163 N.Y.S. 535, reversed on other grounds 167 N.Y.S. 62, 179 App.Div. 645.

82. N.Y.—Sisskin v. Workmen's Circle, 167 N.Y.S. 62, 179 App.Div. 645—Murray v. O'Donohue, 96 N.Y.S. 335, 109 App.Div. 696—Kasen v. Hercules Knitting Co., 60 N.Y.S. 2d 381.

83. Ky.—Morris Shoe Co. v. Coleman, 221 S.W. 242, 187 Ky. 837.
39 C.J. p 98 note 3.

84. Iowa.—Harrod v. Wineman, 125 N.W. 812, 146 Iowa 718.
Md.—Spencer v. Trafford, 42 Md. 1.

85. Cal.—Seidenberg v. George, 172 P.2d 891, 76 Cal.App.2d 306.

Reason for rule

A complaint in a suit for damages for breach of contract will not sustain a judgment for an amount claimed to be due under the contract but not pleaded.—Seidenberg v. George, supra.

86. Cal.—Palmer v. Harlow, 199 P. 844, 52 Cal.App. 758.
39 C.J. p 98 note 7.

87. Cal.—Palmer v. Harlow, supra.

88. Tex.—Gomez v. Vanlandingham, Civ.App., 300 S.W. 145.
39 C.J. p 98 note 8.

89. Ky.—Louisville & N. R. Co. v. Wells, 160 S.W.2d 16, 289 Ky. 700—Newport Dairy v. Shackelford, 88 S.W.2d 940, 261 Ky. 754.
39 C.J. p 102 note 69 [a].

Insufficient allegations

Employee's petition in suit for wrongful discharge was technically demurrable where it showed merely that, at some time "since" discharge, employee unsuccessfully sought sustaining employment.—Clark v. Cincinnati, N. O. & T. P. Ry. Co., 79 S.W.2d 704, 258 Ky. 197.

Under Federal Rules of Civil Procedure

It was held that if an allegation of the employee's inability to mitigate damages was necessary in employee's action for breach of employment contract, complaint alleging that employee was entitled to damages in an amount representing the balance of employee's unpaid salary under the contract, the amount of which was a specified sum, sufficiently alleged such inability under the Federal Rules of Civil Procedure.—Stinson v. Edgemoor Iron Works, D.C.Del., 53 F.Supp. 864.

90. Ga.—Atlanta Plow Co. v. Burnes, 167 S.E. 749, 46 Ga.App. 448—Gary v. Central of Georgia Ry. Co., 160 S.E. 716, 44 Ga.App. 120.
N.Y.—Lezinsky v. Roubaix Mills, 205 N.Y.S. 573, 210 App.Div. 102.
Pa.—Weidner v. Augustine Const. Co., 57 Pa.Dist. & Co. 3.

Loss of earnings

Ga.—Gary v. Central of Georgia Ry. Co., 141 S.E. 819, 37 Ga.App. 744.

Severance pay

In employee's action against employer for breach of an employment contract, where question was not raised in lower court whether employee, in event his discharge was authorized, was entitled to two weeks' salary and bonus under the contract, the lower court's failure to consider the question was not error.—Saari v. George C. Dates & Associates, 19 N.W.2d 121, 311 Mich. 624.

91. Or.—Smith v. Pallay, 279 P. 279, 130 Or. 282.

Expenses in obtaining other employment must be alleged.—Consum-

Where punitive damages are recoverable in an action for breach of a contract of employment by wrongful discharge, as discussed infra § 58, in order to entitle the employee to such damages the complaint must contain such allegations as show his right thereto.[92]

b. Plea or Answer

The general rules of pleading in civil actions apply with respect to the plea or answer in an action for wrongful discharge.

The general rules of pleading in civil actions apply with respect to the plea or answer of the employer in an action instituted by an employee for wrongful discharge.[93] Accordingly, under the provisions of the codes and practice acts, inconsistent defenses may be relied on.[94] It has been held that a written release from liability for damages executed by the employee must be specially pleaded by the employer in order to be available as a defense.[95]

An affidavit of defense alleging that the employee voluntarily left defendant's employ is sufficient to prevent a judgment on the pleadings.[96]

Where recovery of damages for breach of contract is sought and defendant files an affidavit of merits denying such contract, he cannot defend on a different ground without asking leave and filing an amended affidavit.[97] The employer should be permitted to amend his pleadings so as to set up matters in justification, if such matters are not otherwise pleaded.[98]

Where the defense to an action for wrongful discharge is misconduct generally, plaintiff is entitled to an order for particulars, showing the nature and character of the instances relied on by the master, and setting forth the dates and substantial facts and circumstances of all the instances and occasions wherein and whereon plaintiff misconducted himself on which defendant intends to rely.[99] Such particulars may be demanded with respect to an allegation in defendant's answer, although such allegations were unnecessary.[1] Even where justification is not a special defense which must be specially pleaded, the employer may be compelled to specify the ground or grounds of complaint or cause or causes of the discharge if the employee should require such particulars.[2]

Matters in justification. Although there is some authority to the contrary,[3] as a general rule, if justification for the discharge is relied on by the employer as a defense to an action for wrongful discharge, the defense must be specifically pleaded.[4] In order to be sufficient a plea of justification must set forth such facts as will constitute a defense to the action.[5] The mere denial of a wrongful discharge without an allegation of facts justifying it is not sufficient.[6] The employer, however, is only required to plead as a defense such grounds of jus-

ers' Lignite Co. v. James, Tex.Civ. App., 204 S.W. 719.

Interest

Interest cannot be recovered under prayer for general relief, unless specially pleaded or included in prayer.—San Antonio & A. P. Ry. Co. v. Collins, Tex.Com.App., 61 S.W. 2d 84.

92. S.C.—Holland v. Spartanburg Herald-Journal Co., 165 S.E. 203, 166 S.C. 454, 84 A.L.R. 1336.

93. Ala.—Perfection Mattress & Spring Co. v. Dupree, 113 So. 74, 216 Ala. 303.

94. N.Y.—Conklin v. John H. Woodbury Dermatological Inst., 56 N.Y. S. 258, 37 App.Div. 610, 29 N.Y. Civ.Proc. 42.

95. Mo.—Slabon v. St. Louis Car Co., App., 102 S.W.2d 939.

96. U.S.—Wood v. Concrete Fibre Co., D.C.Pa., 217 F. 585.

97. Ill.—Shaffer v. Natoma Farm, 195 Ill.App. 97.

98. Cal.—Boardman v. Petch, 162 P. 1028, 174 Cal. 259.
39 C.J. p 100 note 39.

99. N.Y.—Farquhar v. American Code Co., 194 N.Y.S. 492, 201 App. Div. 454, affirmed 138 N.E. 483, 234 N.Y. 650.
39 C.J. p 99 note 22.

1. N.Y.—Burns v. Lipson, 198 N. Y.S. 810, 204 App.Div. 643.

2. La.—Lurie v. Titcomb, 71 So. 200, 139 La. 9.

3. Okl.—McKelvy v. Choctaw Cotton Oil Co., 178 P. 882, 72 Okl. 74.
39 C.J. p 99 note 22.

4. Iowa.—Seelman v. Farmers' Cooperative Co. of Northwood, 165 N.W. 311, 181 Iowa 1228.
Ky.—Williams v. Leaf Tobacco Co., 168 S.W.2d 570, 293 Ky. 270.
N.Y.—Linton v. Unexcelled Fire-Works Co., 27 N.E. 406, 124 N.Y. 533.
39 C.J. p 99 note 22.

Demurrer improperly sustained

In servant's action for unjustified discharge, sustaining demurrer to plea specifically setting up justification was erroneous.—Tri-State Transit Co. of Louisiana v. Rawls, 1 So.2d 497, 191 Miss. 573.

5. Ala.—Perfection Mattress & Spring Co. v. Dupree, 113 So. 74, 216 Ala. 303.

Conduct after discharge

A plea alleging conduct of the employee after his discharge as a cause for such discharge was held insufficient.—Perfection Mattress & Spring Co. v. Dupree, supra.

Setting up competitive business

(1) A plea alleging as ground for discharge of an employee the contemplated establishment of a competitive business by employees was held insufficient as a plea in justification where it failed to allege the knowledge or consent of the discharged employee of the activities of other employees, or how or in what manner the conduct of the employee was legally prejudicial to the employer.—Perfection Mattress & Spring Co. v. Dupree, supra.

(2) A plea that the employee set up a competitive business was also held bad where it failed to allege that the discharged employee organized such business during the term of his employment.—Perfection Mattress & Spring Co. v. Dupree, supra.

6. N.Y.—Browne v. Empire Type Setting Mach. Co., 61 N.Y.S. 126, 44 App.Div. 598.
39 C.J. p 99 note 24.

tification as are not raised by a mere denial of the allegations in the complaint.[7] Accordingly, where by the terms of a statute plaintiff is compelled to allege that the discharge was without good reason, justification need not be specially pleaded.[8] Allegations in the answer that plaintiff made certain representations as to skill at the time of hiring are properly stricken out when there is no allegation that such representations are false.[9]

Matters in mitigation of damages. The burden is on the employer to plead the facts which he asserts will minimize the damages claimed by the employee.[10] Accordingly the fact that the servant earned or could, by the exercise of reasonable diligence, have earned a certain amount after his discharge must be pleaded specially in mitigation of damages.[11] When such matters are set up as a plea in bar of the entire action and not in mitigation of damages, the plea is demurrable.[12] It is not enough to plead merely that plaintiff made no effort to obtain work, but it must also be alleged that he might have obtained work by the exercise of reasonable diligence, unless the circumstances are such that the latter fact must be presumed.[13]

c. Issues, Proof, and Variance

In an action by a servant for wrongful discharge the issues are confined to those raised by the pleadings, the proof is restricted to the issues, and there must not be a material variance between the pleading and proof.

In an action for damages for breach of contract by wrongful discharge, only such matters may be considered, or relied on by the parties, as are put in issue by the pleadings and supported by the evidence.[14] Hence, when an employer attempts to justify discharge on a particular ground, he is restricted to the ground specified, and no other reasons for the discharge may be invoked.[15] Where a master discharges a servant for breach of duty, the issuable fact is not whether there was a breach of duty, but whether there was such a breach as constituted reasonable ground for terminating the contract.[16] Where an employer sued for a wrongful discharge withdraws a plea of discharge for cause and pleads abandonment of the employment by the employee, the issue of the rightfulness of the discharge is no longer in the case.[17] In a suit by a servant for a wrongful discharge, on a contract in writing set out in the declaration in hæc verba, an unverified plea of the general issue does not put in issue the making of the contract by the master, where by statute the general issue must be verified in order to have the effect of putting the making of the contract sued on in issue.[18]

In an action of this character, only such elements of damages as are warranted by the pleadings and proof are recoverable.[19]

Evidence admissible under pleadings. In an action for breach of contract by wrongful discharge, evidence conforming to the pleadings and the issues raised thereby, and only such evidence, is admissible.[20] Facts which would constitute an affirmative defense cannot avail defendant when they appear in the record over the objection of plaintiff and the defense was not pleaded.[21]

Matters in justification ordinarily are inadmissible under a general denial,[22] although there is also

7. N.Y.—Kahn v. Guggenheimer, 114 N.Y.S. 767.

8. La.—Lurie v. Titcomb, 71 So. 200, 139 La. 9.

9. Iowa.—Redfield v. Boston Piano & Music Co., 165 N.W. 365, 183 Iowa 194.

10. U.S.—Stinson v. Edgemoor Iron Works, D.C.Del., 53 F.Supp. 864.

11. Mo.—South Side Buick Auto Co. v. Schmitter, App., 5 S.W.2d 687.

Tex.—Copeland v. Hill, Civ.App., 126 S.W.2d 567—Elliott-Greer Office Supply Co. v. Martin, Civ.App., 54 S.W.2d 1068, set aside on other grounds 86 S.W.2d 635, 126 Tex. 112—Hoffer Oil Corporation v. Hughes, Civ.App., 48 S.W.2d 426, error refused—**Corpus Juris cited in** Stolz v. Wells, Civ.App., 43 S.W.2d 163, 165.

39 C.J. p 100 note 40.

General denial and demurrer

A defendant sued for breach of employment contract who merely filed a general demurrer, general denial, and a special plea that he had not employed plaintiff and his associates for any definite period of time, and that he had not signed the written contract, was not entitled to raise the special defense that plaintiff failed to mitigate damages by showing reasonable diligence to secure other employment.—Copeland v. Hill, Tex.Civ.App., 126 S.W.2d 567.

12. Ala.—People's Shoe Co. v. Skally, 71 So. 719, 196 Ala. 349.

13. Wis.—Gauf v. Milwaukee Athletic Club, 139 N.W. 207, 151 Wis. 333.

14. Or.—Smith v. Pallay, 279 P. 279, 130 Or. 282.

15. Ga.—Georgia Coast & P. R. Co. v. McFarland, 64 S.E. 897, 132 Ga. 639.

16. Wis.—Schumaker v. Heinemann, 74 N.W. 785, 99 Wis. 251.

39 C.J. p 100 note 46.

17. Ky.—Stark Distillery Co. v. Friedman, 150 S.W. 981, 150 Ky. 820.

18. Ill.—Catholic Press Co. v. Ball, 69 Ill.App. 591.

19. Or.—Smith v. Pallay, 279 P. 279, 130 Or. 282.

20. Me.—Dube v. Simard, 129 A. 488, 124 Me. 369.

39 C.J. p 103 note 73.

Evidence held improperly excluded

Mo.—Slabon v. St. Louis Car Co., App., 102 S.W.2d 939.

Time of discharge

Complaint alleging that discharge took place during the week of a specified date permits proof that discharge took effect several days after the specified date.—Kuna v. Superior Fur Dyeing Corporation, 1 N.Y.S.2d 985, 253 App.Div. 342, appeal denied 14 N.E.2d 214, 278 N.Y. 737.

21. N.Y.—Marshall v. Sackett & Wilhelms Co., 151 N.Y.S. 1045, 166 App.Div. 141.

22. Mich.—Champlain v. Detroit

authority to the contrary.[23] Under a general denial, however, the employer may show conduct on the part of the employee amounting to a breach, when the latter has alleged performance on his part,[24] and, since under such an answer the employer may offer any evidence tending to disprove the contract as alleged, he may show a different contract which authorized a discharge.[25] Where the contract provided that the services of the servant were to be to the satisfaction of the master, under a general denial defendant may show that the services were unsatisfactory.[26] A general denial is also broad enough to include proof of voluntary resignation.[27] When justification is set up by the pleadings, evidence will be limited to the specific ground of justification alleged.[28]

A denial of the making of the alleged contract, without affirmatively pleading another contract, raises an issue which is met by evidence that the employment was for an indefinite time, instead of a fixed period.[29] Where plaintiff alleges performance, which defendant denies, the former may properly show that acts first disclosed during the trial and relied on by defendant as constituting a breach by plaintiff were authorized by a superior.[30]

All damages necessarily resulting from the breach of the contract may be proved, under a general allegation of damages, as general damages.[31] Where, however, the declaration contains no allegation of malice or of special damage beyond the loss of position and wages, evidence of special damage by loss of character is inadmissible.[32] The fact that the employee found employment elsewhere, or declined an offer of similar employment, or by due diligence might have found similar employment, has been held provable, although not specially pleaded, on the ground that it disproves actual damage and does not constitute a mitigating circumstance which must be pleaded to be available as a defense.[33] Also, where the complaint alleges that plaintiff, since the dismissal, has been unable to obtain steady or profitable employment, evidence as to his earnings in the meantime is admissible under a general denial.[34]

Variance. In an action for wrongful discharge there must not be a material variance between the pleadings and the proof,[35] although a slight variation is not fatal.[36] A variance is not established by proof of a modification of the contract declared on.[37] In order to recover for breach of contract, the employee must prove the contract as pleaded.[38] Hence, where plaintiff sues on an alleged contract

Stamping Co., 36 N.W. 57, 68 Mich. 238.

39 C.J. p 99 note 22.

Failure to object

Where evidence of justification for the discharge of a servant is received without objection, it should be submitted to the jury, although not specially pleaded.—Farquhar v. American Code Co., 194 N.Y.S. 492, 201 App.Div. 454, affirmed 138 N.E. 483, 234 N.Y. 650—Lesser v. Gilbert Mfg. Co., 75 N.Y.S. 486, 72 App.Div. 147.

23. Okl.—McKelvy v. Choctaw Cotton Oil Co., 178 P. 882, 72 Okl. 74.

39 C.J. p 99 note 23.

Denial of wrongful discharge

(1) Where plaintiff alleges a wrongful discharge, which defendant denies, and the parties go to trial without objection to the state of the pleadings, it is error to exclude testimony showing misconduct of plaintiff a month prior to the discharge.—Little v. Dougherty, 17 P. 292, 11 Colo. 103.

(2) So defendant, categorically denying allegation of complaint that plaintiff was discharged without cause, has right to introduce evidence that plaintiff was discharged because of his insolence and disrespectful attitude toward defendant. —Haag v. Revell, Wash., 184 P.2d 442.

24. N.Y.—Kahn v. Guggenheimer, 114 N.Y.S. 767.

25. N.Y.—Haines v. Thompson, 21 N.Y.S. 991, 2 Misc. 385.

26. N.Y.—Burns v. Lipson, 198 N.Y.S. 810, 204 App.Div. 643.

27. Tex.—New York Life Ins. Co. v. Thomas, 103 S.W. 423, 47 Tex. Civ.App. 150.

28. Ark.—McGehee v. Cunningham, 25 S.W.2d 449, 181 Ark. 148.

Ga.—Georgia Coast & P. R. Co. v. McFarland, 64 S.E. 897, 132 Ga. 639.

39 C.J. p 103 note 82.

29. Wash.—Armstrong v. Wm. Musser Lumber & Mfg. Co., 86 P. 944, 43 Wash. 584.

30. S.C.—Herlong v. Southern States Lumber Co., 77 S.E. 219, 93 S.C. 529.

31. Or.—Smith v. Pallay, 279 P. 279, 130 Or. 282.

Damages held not special

Damages by failure to pay salary and furnish suitable dwelling house for period following employee's discharge were held general damages provable under ad damnum or general allegation of damages.—Smith v. Pallay, supra.

32. Va.—Lee v. Hill, 6 S.E. 473, 84 Va. 919.

33. N.Y.—McClelland v. Climax Hosiery Mills, 169 N.E. 605, 252 N.Y. 347, remittitur amended 171 N.E. 770, 253 N.Y. 533, reargument denied 171 N.E. 781, 253 N.Y. 558.

Evidence obtained on examination before trial

On issue whether plaintiff has found, declined, or by diligence might have found, employment elsewhere, would be competent, even without affirmative plea, as tending to show reduction from claim of plaintiff.—Handel v. Co-Ed Dressmakers, 215 N.Y.S. 857, 216 App.Div. 838.

34. S.C.—Latimer v. York Cotton Mills, 44 S.E. 559, 66 S.C. 135.

35. Mo.—Sturgeon v. Pioneer Life Ins. Co., App., 186 S.W. 1192.

39 C.J. p 100 note 53.

36. Ga.—Powell Paving Co. of North Carolina v. Scott, 170 S.E. 529, 47 Ga.App. 401.

Date of oral contract

In suit for breach of oral employment contract by wrongful discharge, slight variance between alleged date on which contract was made and date proved is not fatal. —Powell Paving Co. of North Carolin v. Scott, supra.

37. N.Y.—La Vin v. Copley-Plaza Operating Co., 171 N.Y.S. 608, 184 App.Div. 417.

38. Mo.—Fay v. Missouri Power & Light Co., App., 33 S.W.2d 1056.

to employ him for life, he cannot recover on proving a hiring for any shorter period than for life.[39] Also, where the employee declares on a special contract and undertakes to prove it, he cannot, at the same time, offer proof of the value of his services, and recover on a quantum meruit, where the employer has denied the making of any contract at all.[40] In the absence of allegations authorizing recovery on a quantum meruit the employee cannot recover on the entire contract by proof of part performance.[41] Since it is the duty of a wrongfully discharged servant to earn what he can after his discharge, an averment of readiness and willingness to perform subsequent to the discharge is not materially variant from proof of efforts to find employment,[42] or even from proof that he did find it.[43] Money expended to the use of defendant cannot be recovered in an action alleging a breach of contract of employment, since that is a cause of action distinct from that set forth in the complaint.[44]

§ 53. —— Evidence

a. Presumptions and burden of proof
b. Admissibility
c. Weight and sufficiency

a. Presumptions and Burden of Proof

(1) In general
(2) Matters of justification
(3) Damages

(1) In General

As a general rule the burden of proof in actions for wrongful discharge is on the party holding the affirmative of the issue.

In accordance with the general rules of evidence in civil actions, the burden of proof in actions for wrongful discharge is on the party holding the affirmative of the issue.[45] In the first instance, the burden is on plaintiff to prove his contract and its performance up to the time of discharge[46] as well as the employer's breach thereof,[47] and, where the contract of hiring is indefinite, the burden of showing the hiring to have been for a certain term rests on the employee.[48] The burden of showing ability and willingness to perform the contract is on the employee.[49] The employee establishes a prima facie case, however, by proving the contract, his performance thereof up to the time of his discharge, and the damage resulting from the discharge.[50] Where the employer interposes a defense that plaintiff consented to a cancellation of the contract, the burden is on defendant to prove such consent.[51] The fact that an employee becomes ill after discharge furnishes no presumption that such illness would have arisen if he continued in employment, so as to have justified suspension of payment on the part of the employer.[52]

(2) Matters of Justification

The burden of proving just cause for the discharge generally rests on the employer.

Although there is some authority to the contrary,[53] as a general rule, where a servant enters on his duties and continues until he is dismissed, he

39. Mo.—Minter v. Tootle-Campbell Dry Goods Co., 173 S.W. 4, 187 Mo. App. 16.

40. Colo.—Rockwell Stock & Land Co. v. Castroni, 42 P. 182, 6 Colo. App. 528.

41. Tex.—Hoffer Oil Corporation v. Hughes, Civ.App., 16 S.W.2d 901.

42. Ill.—Williams v. Scott, 70 Ill. App. 51.

43. Ala.—Morris Min. Co. v. Knox, 11 So. 207, 96 Ala. 320.

44. N.Y.—Gerard v. Empire Square Realty Co., 187 N.Y.S. 306, 195 App.Div. 244.

45. Tex.—Canthen v. Breyer, Civ. App., 131 S.W. 853.
39 C.J. p 101 note 59.
Presumptions and burden of proof in actions for breach of contract of employment generally see supra § 11.

46. Ky.—Newport Dairy v. Shackelford, 88 S.W.2d 940, 261 Ky. 754.
Pa.—Jacobs v. Kraft Cheese Co., 164 A. 774, 310 Pa. 75.
R.I.—Schafer v. Thurston Mfg. Co., 137 A. 2, 48 R.I. 244.
Wis.—Saylor v. Marshall & Ilsley Bank, 272 N.W. 369, 224 Wis. 511.
39 C.J. p 101 note 60.
Burden of proof of whole case is on the employee.
N.Y.—Zitlin v. Max Heit Dress Corporation, 271 N.Y.S. 275, 151 Misc. 241.
Va.—Rudlin v. Parker, 43 S.E.2d 918, 186 Va. 647.

47. Mo.—Jones v. Schultz, App., 295 S.W. 477.

48. Mo.—Wolfe v. Stark Bros. Nurseries & Orchards Co., App., 288 S.W. 1004.
Pa.—Jones v. Pittsburgh Mercantile Co., 145 A. 80, 295 Pa. 219—Howard v. Siegel, 184 A. 272, 121 Pa. Super. 519.
S.C.—Griswold v. Texas Co., 161 S.E. 409, 163 S.C. 156.
Tenn.—Combs v. Standard Oil Co. of Louisiana, 59 S.W.2d 525, 166 Tenn. 88.
Va.—Edwards Co. v. Deihl, 169 S.E. 907, 160 Va. 587.
39 C.J. p 101 note 61.

49. Ill.—**Corpus Juris cited in** Jones v. Stoneware Pipe Co., 277 Ill.App. 18, 24.
Tex.—Canthen v. Breyer, Civ.App., 131 S.W. 853.

50. Mich.—Saari v. George C. Dates & Associates, 19 N.W. 121, 311 Mich. 624.

51. Md.—Wandell Chocolate Co., Inc. v. Goldsmith, 120 A. 372, 142 Md. 148.

52. N.Y.—Marx v. New York Ribbon Co., 159 N.Y.S. 853, 95 Misc. 551.

53. R.I.—Schafer v. Thurston Mfg. Co., 137 A. 2, 48 R.I. 244.
Statement of rule
The burden of proof in the sense of establishing by a preponderance of evidence that he has faithfully performed his contract and defendant has broken it rests on plaintiff. This burden does not shift. Plaintiff has prima facie sustained his

need not prove that he performed his services faithfully, as a presumption arises that such is the fact,[54] and the burden of proving a sufficient cause for his discharge is on the master,[55] and this burden does not shift to the employee by reason of an allegation in his complaint that he was dismissed without good cause.[56] The general rule, however, is inapplicable when the liability imposed by contract is conditional, and performance of it must be averred and proved or want of performance excused.[57] Accordingly, where the contract calls for performance of the employee's duties in a manner satisfactory to the employer, the burden is on the employee to prove that his services were in fact satisfactory to the employer and that the latter's expression of dissatisfaction as a ground for the discharge was fraudulent and in bad faith.[58]

(3) Damages

As a general rule the burden of proving the damages sustained by reason of a wrongful discharge is on the employee, but the burden of proving matters in mitigation of damages rests on the employer.

As a general rule the burden of proving the damages sustained by reason of a wrongful discharge is on the employee.[59] Where the contract of employment provides for compensation on a commission basis, the employee has the burden of proving his probable earnings and the expenses to which he would have been put in performing the contract.[60] The fact that he is also on a drawing account creates no presumption that the commissions would have covered his expenses as well as drawings.[61] Where the employment contract permits the em-

burden when he testifies generally to faithful performance and the employer's breach. The duty of going forward with evidence of mismanagement or misconduct or unfaithfulness is then shifted to defendant, if he would not have such prima facie case result in an established case by the required weight of evidence. At the close of the testimony, however, if the evidence is evenly balanced, plaintiff has failed to establish his case, and the verdict must be for defendant.—Schafer v. Thurston Mfg. Co., supra.

54. Ky.—**Corpus Juris quoted in** Williams v. Leaf Tobacco Co., 168 S.W.2d 570, 572, 293 Ky. 270.
39 C.J. p 101 note 65.

It cannot be presumed from the fact of discharge that the employee failed to perform his duties in compliance with the employment contract.—Hansen v. Columbia Breweries, 122 P.2d 489, 12 Wash.2d 554.

Failure to prove faithful performance by employee does not justify direction of verdict for employer, since it is incumbent on employer to plead and prove just cause for the dismissal.—Williams v. Leaf Tobacco Co., 168 S.W.2d 570, 293 Ky. 270.

55. Ky.—**Corpus Juris quoted in** Williams v. Leaf Tobacco Co., 168 S.W.2d 570, 572, 293 Ky. 278—Watkins, Inc., v. Cochran, 168 S.W.2d 351, 292 Ky. 846.
Mich.—Saari v. George C. Dates & Associates, 19 N.W.2d 121, 311 Mich. 624.
Mo.—Vernon v. Rife, App., 294 S.W. 747.
Neb.—Stoffel v. Metcalfe Const. Co., 17 N.W.2d 3, 145 Neb. 450.
N.Y.—Herreshoff v. American & British Mfg. Co., 149 N.Y.S. 703, 164 App.Div. 238.
Or.—Lambert v. Laing & Thompson Iron Works, 264 P. 362, 124 Or. 197.
S.C.—Griswold v. Texas Co., 161 S.E. 409, 163 S.C. 156.
Va.—Rudlin v. Parker, 43 S.E.2d 918, 186 Va. 647.
Wash.—Hansen v. Columbia Breweries, 122 P.2d 489, 12 Wash.2d 554.
Wis.—**Corpus Juris cited in** Boynton Cab Co. v. Giese, 296 N.W. 630, 634, 237 Wis. 237.
39 C.J. p 101 note 66.

Employee's breach of contract

Burden of proving breach of contract by employee justifying discharge is on the employer.
Ill.—Brownholtz v. Providers' Life Assur. Co., 160 N.E. 127, 329 Ill. 42.
Mich.—Saari v. George C. Dates & Associates, 19 N.W.2d 121, 311 Mich. 624.

56. Ky.—**Corpus Juris quoted in** Williams v. Leaf Tobacco Co., 168 S.W.2d 570, 572, 293 Ky. 270.
Mo.—Vernon v. Rife, App., 294 S.W. 747—Haxton v. Gilsonite Constr. Co., 114 S.W. 577, 134 Mo. App. 360.

Allegation is surplusage

N.Y.—Herreshoff v. American & British Mfg. Co., 149 N.Y.S. 703, 164 App.Div. 238.

57. Ky.—**Corpus Juris quoted in** Williams v. Leaf Tobacco Co., 168 S.W.2d 570, 572, 293 Ky. 270.
39 C.J. p 101 note 68.

58. Ga.—Fried v. Portis Bros. Hat Co., 159 S.E. 890, 43 Ga.App. 706.
39 C.J. p 101 note 68 [a].

Burden of going forward

Proof of valid employment contract and discharge of employee imposes burden on employer of coming forward with evidence that employee was discharged because of dissatisfaction, but burden of proof on whole case is on plaintiff employee, and he must show that dissatisfaction was not genuine.—Zitlin v. Max Heit Dress Corporation, 271 N.Y.S. 275, 151 Misc. 241.

59. Mo.—Fay v. Missouri Power & Light Co., App., 33 S.W.2d 1056.
N.Y.—Bitterman v. Gluck, 9 N.Y.S. 2d 1007, 256 App.Div. 336.

Wages payable under contract

The employee has the burden of proving the actual wage to which he was entitled under the employment contract.—Preager v. Unity Shoemakers Corporation, 15 N.Y.S.2d 45, 257 App.Div. 632.

Overtime

Testimony that plaintiff was to receive "considerable overtime" was held too indefinite to permit any recovery for overtime.—Fay v. Missouri Power & Light Co., Mo.App., 33 S.W.2d 1056.

60. Mich.—Shapiro v. Fyrac Mfg. Co., 249 N.W. 851, 264 Mich. 280.

Presumptions

Balance of commission which newspaper company, after advertising representative's discharge, calculated was due him, was presumed correct.—Palmer v. New York Herald Co., 239 N.Y.S. 619, 228 App.Div. 176.

61. Mich.—Shapiro v. Fyrac Mfg. Co., 249 N.W. 851, 264 Mich. 280.

Insufficient showing

In action by salesman for unlawful discharge by employer, salesman's statement that had he been permitted to continue for balance of term of employment he would have earned commissions netting him at least amount of weekly drawing account allowed him by employer, was insufficient to establish that fact.—Preager v. Unity Shoemakers Corporation, 15 N.Y.S.2d 45, 257 App. Div. 632.

ployee to do outside work which does not interfere with the employer's requirements, the employee makes out a prima facie case with respect to damages by proving the agreed wage.[62]

Matters in mitigation of damages. As discussed infra § 58, the measure of damages for a breach of contract by wrongful discharge is prima facie the sum stipulated to be paid for the services, and after proof of the stipulated wage the burden generally rests on the employer to prove that the damages were less.[63] Accordingly the burden of reducing the damages by proof that the servant has or might, with reasonable diligence, have obtained other remunerative employment rests on the employer.[64]

b. Admissibility

(1) In general
(2) Damages

(1) In General

In an action by a servant for wrongful discharge, any competent evidence which is relevant to a material issue is admissible.

In accordance with the general rules of evidence in civil actions, in an action for wrongful discharge any competent evidence which is relevant to a material issue is admissible.[65] Thus any evidence oth-

On failure to prove probable expenses, the employee is not entitled to recover.—Shapiro v. Fyrac Mfg. Co., 249 N.W. 851, 264 Mich. 280—Callender v. Myers Regulator Co., 230 N.W. 154, 250 Mich. 298.

62. U.S.—Sanders v. Schenley Products Co., C.C.A.N.Y., 108 F.2d 23.

63. U.S.—Sanders v. Schenley Products Co., C.C.A.N.Y., 108 F.2d 23—Stinson v. Edgemoor Iron Works, D.C.Del., 63 F.Supp. 864.
Cal.—De La Falaise v. Gaumont-British Picture Corporation, 103 P.2d 447, 39 Cal.App.2d 461—Gregg v. McDonald, 239 P. 373, 73 Cal.App. 748.
N.Y.—Hollwedel v. Duffy-Mott Co., 264 N.Y.S. 745, 238 App.Div. 468, motion denied 188 N.E. 102, 262 N.Y. 643, modified on other grounds 188 N.E. 266, 263 N.Y. 95, 90 A.L.R. 1312.
N.C.—Durham Const. Co. v. Wright, 127 S.E. 580, 189 N.C. 456.
Tex.—Elliott-Greer Office Supply Co. v. Martin, Civ.App., 54 S.W.2d 1068, set aside on other grounds 86 S.W.2d 635, 126 Tex. 112—Houston, E. & W. T. Ry. Co. v. Browder, Civ.App., 265 S.W. 227, reversed on other grounds, Com. App., 283 S.W. 154.

Burden of going forward with the evidence is on the employer.—McClelland v. Climax Hosiery Mills, 169 N.E. 605, 252 N.Y. 347, remittitur amended 171 N.E. 770, 253 N.Y. 533, reargument denied 171 N.E. 781, 253 N.Y. 558.

64. U.S.—Taylor v. Tulsa Tribune Co., C.C.A.Okl., 136 F.2d 981—Detroit Graphite Co. v. Hoover, C.C.A.Mass., 41 F.2d 490—Russell v. Barnes Foundation, D.C.Pa., 52 F.Supp. 827, affirmed, C.C.A., 143 F.2d 871, certiorari denied Barnes Foundation v. Russell, 65 S.Ct. 122, 323 U.S. 771, 89 L.Ed. 616—Realty Acceptance Corporation v. Montgomery, D.C.Del., 6 F.Supp. 593, affirmed, C.C.A., 77 F.2d 762, certiorari denied 56 S.Ct. 103, 296 U.S. 590, 80 L.Ed. 418, rehearing denied 56 S.Ct. 167, 296 U.S. 662, 80 L.Ed. 472.
Ark.—Seaman Stores Co. v. Porter, 23 S.W.2d 249, 180 Ark. 860.
Cal.—Goudal v. Cecil B. De Mille Pictures Corporation, 5 P.2d 432, 118 Cal.App. 407, hearing denied 7 P.2d 174, 118 Cal.App. 407.
Conn.—Krawitz v. Ganzke, 159 A. 897, 114 Conn. 662.
Ga.—Waynesboro Planing Mill v. Hargrove, 127 S.E. 665, 33 Ga.App. 684.
Ill.—Jones v. Stoneware Pipe Co., 277 Ill.App. 18.
Ind.—Township of Haddon School of Sullivan County v. Willis, 199 N.E. 251, 209 Ind. 356.
Mich.—Flickema v. Henry Kraker Co., 233 N.W. 362, 252 Mich. 406, 72 A.L.R. 1046.
Mo.—South Side Buick Auto Co. v. Schmitter, App., 5 S.W.2d 687.
Mont.—**Corpus Juris quoted in** Miller v. Yellowstone Irr. Dist., 9 P.2d 795, 796, 91 Mont. 538.
N.Y.—Preager v. Unity Shoemakers Corporation, 15 N.Y.S.2d 45, 257 App.Div. 632—Van Wyck v. Mannino, 9 N.Y.S.2d 684, 256 App.Div. 256, reargument denied 11 N.Y.S.2d 558, 256 App.Div. 1004—Handel v. Co-Ed Dressmakers, 215 N.Y.S. 857, 216 App.Div. 838—Abramson v. Mrs. J. Davis Gowns, Inc., 219 N.Y.S. 137, 128 Misc. 454.
Okl.—Ray v. Board of Education of Pond Creek, Grant County, 153 P.2d 233, 194 Okl. 472—Levy v. Tharrington, 62 P.2d 641, 178 Okl. 276—Farmers' Co-op. Ass'n v. Shaw, 42 P.2d 887, 171 Okl. 358.
Pa.—Lucacher v. Kerson, 45 A.2d 245, 158 Pa.Super. 437, affirmed 48 A.2d 857, 355 Pa. 79—Gordon v. Tomei, 19 A.2d 588, 144 Pa.Super. 449.
Tex.—Hoffer Oil Corporation v. Hughes, Civ.App., 48 S.W.2d 426, error dismissed—Gomez v. Vanlandingham, Civ.App., 300 S.W. 145.
39 C.J. p 102 note 69.

After proof of other employment

(1) It has been held that failure of employee to show wages received from other employment precludes recovery.—Hume v. Miller Hatcheries, Mo.App., 51 S.W.2d 179.

(2) It has also been held, in action for wrongful discharge from employment, that verdict for the amount due under contract for the unexpired term should be reduced by amounts which employee specifically testified that he received during the unexpired term, but not by virtue of other employment during such term, in absence of testimony concerning compensation received therefor.—Van Wyck v. Mannino, 9 N.Y.S.2d 684, 256 App.Div. 256, reargument denied 11 N.Y.S.2d 558, 256 App.Div. 1004.

Examination before trial

Employer, sued for wrongful discharge, was held entitled to examine employee before trial, as to earnings after discharge, because such earnings are an essential part of the employer's case.—Abramson v. Mrs. J. Davis Gowns, Inc., 219 N.Y.S. 137, 128 Misc. 454.

Reasonable diligence

In at least one jurisdiction, however, the burden is on the employee to prove that he exercised reasonable diligence in attempting to find new employment and his inability to earn anything, if such was the case, or if otherwise, what he earned or could have during the period.—Louisville & N. R. Co. v. Wells, 160 S.W.2d 16, 289 Ky. 700—Newport Dairy v. Shackelford, 88 S.W.2d 940, 261 Ky. 754—Torson Const. Co. v. Grant, 66 S.W.2d 79, 251 Ky. 800—39 C.J. p 102 note 69 [a].

65. Pa.—Jaffe v. Lipsky Bros., 140 A. 339, 291 Pa. 470.
39 C.J. p 102 note 72.

Evidence held admissible or improperly excluded

(1) In general.
S.C.—Griswold v. Texas Co., 161 S.E. 409, 163 S.C. 156.
S.D.—Tretheway v. Tri-State Milling Co., 222 N.W. 950, 54 S.D. 201.

erwise competent tending to establish his cause of action is admissible on behalf of the employee;[66] and, where the employer justifies, the employee may introduce any competent evidence in rebuttal of the defense[67] or bearing on the improbability of a discharge without probable cause.[68] Where the competency of the employee is in issue, a promise of a recommendation from the employer is admissible in evidence in rebuttal,[69] although rebutting proof need not be limited to work done for the employer, and the employee may show that his work for others, in a similar capacity, was satisfactory,[70] or he may show generally by witnesses knowing his qualifications that he was capable of performing the work satisfactorily.[71] Where the real issue in the case is the existence of cause for the discharge, evidence of motive for the discharge is inadmissible as beclouding the issue.[72]

Evidence of breach. In an action for wrongful discharge, the employer has the right to introduce any competent evidence tending to show a breach of any express or implied condition of the contract of employment by the employee,[73] provided, as discussed supra § 52 c, the proof is limited to the reason for the discharge set forth in his plea or answer as a justification. It has been held, however, that evidence of neglect of duty is admissible, although in the letter of dismissal another ground was assigned.[74] Evidence of similar conduct of the employee under a prior contract resulting in a discharge followed by condonation has been held properly rejected as without probative value on the issue of whether the employer had cause for the discharge.[75] Statements of an employee at the time of his discharge that he had already secured another position are competent as an admission against interest and relevant as tending to show that plaintiff left defendant's employ rather than that he was discharged.[76]

(2) Damages

Competent evidence relevant to the issue of damages is admissible in actions for damages for breach of contract by wrongful discharge.

Only competent evidence which is relevant to the issue may be admitted to prove damages in an action for wrongful discharge.[77] In such an action the original contract is admissible in evidence as showing the value of the services rendered,[78] and all relevant facts transpiring during the employment[79] or subsequent to the discharge[80] may be considered in estimating damages. Where the employee is engaged to perform services in another

(2) Evidence relating to circumstances surrounding making of lifetime employment contract and recognition of its existence.—Eggers v. Armour & Co. of Delaware, C.C.A. Iowa, 129 F.2d 729.

(3) Testimony showing wages paid to plaintiff prior to entering defendant's employ.—Harrington v. Deloraine Refining Co., 43 P.2d 660, 99 Mont. 78.

(4) Evidence that employer is indemnified against loss, at least when offered as affecting credibility and interest of a witness.—Morton v. Broadway Claremont Co., Inc., 156 N.Y.S. 814, 92 Misc. 355, 357—39 C.J. p 103 note 74.

(5) Written memorandum of verbal agreement.—D. Buchanan & Son v. Ewell, 139 S.E. 483, 148 Va. 762.

Evidence held inadmissible

Ala.—Adams v. Stewart, 153 So. 401, 228 Ala. 194.

Pa.—Machen v. Budd Wheel Co., 143 A. 482, 294 Pa. 69.

S.C.—Shealy v. Fowler, 188 S.E. 499, 182 S.C. 81.

39 C.J. p 103 note 73.

66. Mo.—Vernon v. Rife, App., 294 S.W. 747.

39 C.J. p 103 note 75.

67. Mo.—Vernon v. Rife, supra.

39 C.J. p 103 note 76.

Evidence of dissatisfaction

(1) In an action for wrongful discharge under a contract to do work to the satisfaction of the employer, evidence is admissible on the question whether he was dissatisfied, and whether he discharged the workman because of such dissatisfaction.

N.J.—Gwynne v. Hitchner, 52 A. 997, 67 N.J.Law 654.

Va.—Forsberg v. Zehm, 143 S.E. 284, 150 Va. 756, 61 A.L.R. 232.

(2) It is not legitimate, however, for the workman to prove that he had done good work.—Gwynne v. Hitchner, supra.

68. N.Y.—Grey v. Triumph Film Corp., 168 N.Y.S. 249, 181 App.Div. 107.

Pa.—Gallagher v. Wayne Steam Co., 41 A. 296, 188 Pa. 95.

69. N.Y.—O'Neill v. Traynor, 53 N.Y.S. 918, 24 Misc 686.

70. N.J.—Continental Match Co. v. Swett, 38 A. 969, 61 N.J.Law 457.

71. N.Y.—Hare v. Mahoney, 14 N.Y.S. 81.

72. N.Y.—Kilian v. Ferrous Magnetic Corporation, 280 N.Y.S. 909, 245 App.Div. 298.

73. Pa.—Lightcap v. Keaggy, 194 A. 347, 128 Pa.Super. 348.

39 C.J. p 103 note 81.

Particular evidence held admissible

Pa.—Lightcap v. Keaggy, supra.

Wash.—Katich v. Evich, 297 P. 762, 161 Wash. 581.

Wis.—Schwade v. Van Bree, 252 N.W. 702, 214 Wis. 250.

Particular evidence held immaterial

Wis.—Schwade v. Van Bree, supra.

74. Ky.—Independent Life Ins. Co. v. Williamson, 154 S.W. 409, 152 Ky. 818.

75. Pa.—Schoenfeld v. Sachs, 167 A. 166, 312 Pa. 201.

76. N.Y.—Martindale v. B. F. Cummins Co., 143 N.Y.S. 1100.

77. Earnings in prior employment

In an action to recover damages for wrongful discharge, evidence of the employee's prior earnings with another employer in the same business is inadmissible to show the commissions he would have earned in the absence of a showing that the terms of the contracts were identical.—King v. Oklahoma Gypsum Co., 216 S.W. 992, 202 Mo.App. 667.

78. Ga.—Britt v. Hays, 21 Ga. 157.

39 C.J. p 115 note 3.

79. Ky.—Trosper Coal Co. v. Rader, 159 S.W. 536, 154 Ky. 670.

N.Y.—Farquhar v. American Code Co., 194 N.Y.S. 492, 201 App.Div. 454, affirmed 138 N.E. 483, 234 N.Y. 650.

80. Ga.—Roberts v. Crowley, 7 S.E. 740, 81 Ga. 429.

39 C.J. p 115 note 5.

state, testimony as to the trouble and expense he is put to is admissible as damages naturally flowing from the breach.[81] Where the servant is to be paid, wholly or in part, otherwise than in money, evidence is admissible to show the money value of the medium of payment,[82] and in the case of a traveling salesman who is entitled to expenses on the road it is permissible to show what such expenses would probably have been had the contract not been broken.[83] Under an agreement to pay an injured employee certain wages as long as his disability to do full work shall continue, the employee may in an action for wrongful discharge, where it is shown that the injury is permanent, introduce evidence as to his expectancy of life[84] and as to his probable earnings.[85]

Evidence as to other employment. In an action for wrongful discharge, evidence is generally admissible on behalf of either party on the question of damages to show whether the employee has, or might have, obtained other remunerative[86] employment with the exercise of reasonable diligence.[87] Thus, except in a jurisdiction where the whole amount of the salary for the unexpired term becomes, by force of a statute, due and demandable on a wrongful discharge,[88] the employer may prove in mitigation of damages that after the discharge, and during the remainder of the time, the employee received, or was offered and might have received, in the exercise of diligence, wages in similar employment.[89] Evidence as to other employment which the employee might have obtained in the exercise of reasonable diligence must be confined to employment of the same or substantially similar character as that from which he was discharged.[90] In some cases it has been held that such evidence must be confined to the ability of the employee to have obtained employment in the same locality,[91] and where evidence has been introduced to show that the employee could have secured employment in a different locality, he may offer evidence to show the reasonableness of his refusal to accept such employment.[92]

Evidence as to the amount of his average earnings and the amount of his sales in a prior employment, of a similar but not identical character, is not admissible on behalf of the employee for the purpose of showing prospective profits which he might have made under his contract with the employer but for the wrongful termination thereof,[93] but evidence as to such sales in the same business, although carried on by different proprietors, is admissible.[94] Evidence of the employee's experience while in the employ of others, as well as of the employer, has been held to establish a sufficient foundation for testimony by him as to what his commissions would have been during the unexpired period.[95] Where a discharged employee instead of

81. S.C.—Bray v. Kress, 96 S.E. 135, 109 S.C. 365.

82. Iowa.—Rottlesberger v. Hanley, 136 N.W. 776, 155 Iowa 638.
39 C.J. p 115 note 7.

83. Mo.—Estes v. Desnoyers Shoe Co., 56 S.W. 316, 155 Mo. 577.
39 C.J. p 115 note 8.

84. U.S.—Pierce v. Tennessee Coal, Iron & Railroad Co., Ala., 19 S.Ct. 335, 173 U.S. 1, 43 L.Ed. 591.

85. N.Y.—Rafter v. Richard K. Fox Pub. Co., 201 N.Y.S. 401, 206 App. Div. 389, affirmed 144 N.E. 894, 238 N.Y. 567.

86. Mass.—Irving v. Goodimate Co., 70 N.E.2d 414, 320 Mass. 454.
39 C.J. p 104 note 87.
Other employment as mitigating damages see infra § 59.

Offer to reinstate employee in former position at same salary was held admissible in mitigation of damages for wrongful discharge.—Flickema v. Henry Kraker Co., 233 N.W. 362, 252 Mich. 406, 72 A.L.R. 1046.

Employee's evidence may be considered in determining the possibility of his securing other employment, and the amount to which employer is entitled in mitigation of damages as a result thereof.—Russell v. Barnes Foundation, D.C.Pa., 52 F.Supp. 827, affirmed, C.C.A., 143 F.2d 871, certiorari denied Barnes Foundation v. Russell, 65 S.Ct. 122, 323 U.S. 771, 89 L.Ed. 616.

Presumption as to wages obtained
When, after his discharge, a servant obtains employment, the presumption is that he gets the best wages he can, unless it is shown by the adverse party, or otherwise, that he accepted less wages than he could have obtained.—Hunt v. Crane, 33 Miss. 669, 69 Am.D. 381.

87. Pa.—Babayan v. Reed, 101 A. 339, 257 Pa. 206.
39 C.J. p 104 note 88.

88. La.—Camp v. Baldwin-Melville Co., 48 So. 927, 123 La. 257.
39 C.J. p 95 note 45.

89. Ark.—Gentry v. Harrison, 110 S. W.2d 497, 194 Ark. 916—Seaman Stores Co. v. Porter, 23 S.W.2d 249, 180 Ark. 860.
Ga.—Waynesboro Planing Mill v. Hargrove, 127 S.E. 665, 33 Ga.App. 684.
39 C.J. p 94 note 42, p 115 note 13.

Offer of reëmployment by master
A master may prove in mitigation of damages that he offered to give the discharged servant employment at the same compensation and in the same general line of business as that provided for by the contract.—Flickema v. Henry Kraker Co., 233 N.W. 362, 252 Mich. 406, 72 A.L.R. 1046—39 C.J. p 118 note 36.

90. **Advertisements** which did not relate to work of the same or sufficiently similar character as to make them relevant are properly excluded.
Neb.—Stoffel v. Metcalfe Const. Co., 17 N.W.2d 3, 145 Neb. 450.
N.Y.—West v. Scaroon Hotel Corp., 67 N.Y.S.2d 163, 187 Misc. 539.

91. Pa.—Babayan v. Reed, 101 A. 339, 257 Pa. 206.

92. Mass.—Hussey v. Holloway, 104 N.E. 471, 217 Mass. 100.
39 C.J. p 104 note 90.

93. N.Y.—Caluwaert v. Schapiro, 156 N.Y.S. 359, 93 Misc. 19.
39 C.J. p 104 note 91.

94. Ill.—Lewy v. Standard Plunger El. Co., 218 Ill.App. 306, affirmed 129 N.E. 775, 296 Ill. 295.
39 C.J. p 104 note 92.

95. Mo.—Wamsganz v. Blank-Wenneker Candy Co., App., 216 S.W. 1025.

accepting employment which he could have secured and for which he was fitted embarks in business for himself, evidence as to the details of such business subsequent to the expiration of a period of employment is inadmissible to show plaintiff's value to the business during such period.[96] Communications by the employer to others after the wrongful discharge stating that the employee was incompetent are admissible in evidence as bearing on the latter's inability to obtain other employment to mitigate the damages.[97]

c. Weight and Sufficiency

As a general rule, in an action for wrongful discharge the party having the affirmative of an issue must establish it by a preponderance of the evidence.

In accordance with the general rules as to the weight and sufficiency of the evidence in civil actions, an issue of fact in an action for a wrongful discharge ordinarily must be established by the party having the burden of proof thereof by a preponderance of the evidence.[98] Broadly speaking, the weight and sufficiency of the evidence in such an action is a question dependent on the facts and circumstances of the particular case, and is one wholly for the determination of the triers of the facts, whose finding will not be disturbed unless manifestly erroneous.[99]

The weight and sufficiency of the evidence have been considered in particular cases with respect to such matters as the existence of the contract of employment,[1] the definiteness of the term thereof,[2] performance of the contract by the employee,[3] or his readiness, ability, and willingness to perform,[4] the employee's breach of the contract,[5] the employer's waiver of such breach,[6] the employer's breach of the contract,[7] the discharge of the employee and the wrongfulness thereof,[8] the sufficiency of the evidence to sustain a verdict or judgment

96. Tex.—Wolf Cigar Stores Co. v. Kramer, 109 S.W. 990, 50 Tex.Civ. App. 411.

97. Md.—Hippodrome Co. v. Lewis, 100 A. 78, 130 Md. 154.

98. Va.—Rudlin v. Parker, 43 S.E. 2d 918, 186 Va. 647.

The terms of the contract must be established by a preponderance of the evidence.—Saylor v. Marshall & Ilsley Bank, 272 N.W. 369, 224 Wis. 511.

Matters in mitigation of damage

In servant's suit for breach of contract of employment, employer had burden to show by preponderance of evidence that servant might, with reasonable diligence, have obtained other remunerative employment after her discharge.—Levy v. Tharrington, 62 P.2d 641, 178 Okl. 276.

99. Cal.—Seidenberg v. George, 172 P.2d 891, 76 Cal.App.2d 306.
La.—Wilson v. Yazoo & M. V. R. Co., App., 181 So. 600.
Me.—Dube v. Simard, 129 A. 488, 124 Me. 369.
N.Y.—Hier v. Butterick Co., 34 N. Y.S.2d 237.
Pa.—Megliss v. Bartoletta, Com.Pl., 94 Pittsb.Leg.J. 431, affirmed 48 A. 2d 18, 159 Pa.Super. 308.
39 C.J. p 104 note 96.

1. **Evidence held sufficient**
Ill.—Hobbs v. H. M. Gousha Co., 24 N.E.2d 240, 302 Ill.App. 508.
Mont.—Harrington v. Deloraine Refining Co., 43 P.2d 660, 99 Mont. 78.
N.Y.—McKee v. Gifford, 256 N.Y.S. 635, 234 App.Div. 522.

2. **Evidence held sufficient**
(1) To show existence of new contract or express renewal of previous contract for fixed term.—Knox Stove Works v. Wall, 23 S.E.2d 161, 180 Va. 267—39 C.J. p 104 note 96 [a] (9).
(2) To show, or warrant finding, that plaintiff was employed for fixed period.
Conn.—McPartland v. Beaumart, Inc., 200 A. 1018, 124 Conn. 539.
Tex.—Dallas Hotel Co. v. McCue, Civ.App., 25 S.W.2d 902.
(3) To sustain finding of intended duration of employment.—Minor v. Narragansett Mach. Co., 42 A.2d 711, 71 R.I. 108.

Evidence held insufficient
(1) To prove, or sustain finding of, hiring for a fixed or definite term.
Ga.—Powell Paving Co. of North Carolina v. Scott, 152 S.E. 309, 41 Ga.App. 194.
Wis.—Saylor v. Marshall & Ilsley Bank, 272 N.W. 369, 224 Wis. 511. 39 C.J. p 104 note 96 [b] (8).
(2) To prove that verbal employment contract was by year instead of by month.—Menard v. Edmond Weil, Inc., 119 So. 273, 9 La.App. 254.
(3) To sustain burden on employee of overcoming presumption that hiring was at will.—Kostenbader v. Schoeneck Farms, 4 A.2d 199, 134 Pa.Super. 334.
(4) To sustain finding of a contract of employment for life.—Trickey v. J. M. Pitkin & Co., 291 N.Y.S. 430, 249 App.Div. 707.

3. **Evidence held sufficient**
Cal.—Birdsell v. Dardi, 42 P.2d 335, 5 Cal.App.2d 227.
Tex.—Farmers' Gin Co. v. Smith, Civ.App., 28 S.W.2d 839.

4. **Evidence held sufficient**
Cal.—Birdsell v. Dardi, 42 P.2d 335, 5 Cal.App.2d 227.

5. **Evidence held sufficient**
N.Y.—Leopold v. Hotel Shelburne, Inc., 147 N.Y.S. 949, 162 App.Div. 771.

6. **Evidence held sufficient**
Pa.—Batchelder v. Standard Plunger El. Co., 75 A. 1090, 227 Pa. 201, 19 Ann.Cas. 875.
Wash.—Haag v. Revell, 184 P.2d 442.

Evidence held insufficient
U.S.—Hill v. S. E. Massengill Co., D.C.Fla., 69 F.Supp. 1.

7. Ind.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind. App. 661.

8. **Evidence held sufficient**
(1) To show that employee resigned or left voluntarily or by consent.—Blum v. Nebraska-Iowa Creamery Co., 117 N.W. 104, 82 Neb. 110—39 C.J. p 104 note 96 [a] (1), (2), (15).
(2) To show, or support finding that, discharge was wrongful.
Cal.—Greene v. Hawaiian Dredging Co., 157 P.2d 367, 26 Cal.2d 245—Millsap v. National Funding Corporation of California, 135 P.2d 407, 57 Cal.App.2d 772—Birdsell v. Dardi, 42 P.2d 335, 5 Cal.App.2d 227—Wood v. Girot, 282 P. 981, 102 Cal.App. 160.
Conn.—McPartland v. Beaumart, Inc., 200 A. 1018, 124 Conn. 539—Krawitz v. Ganzke, 159 A. 897, 114 Conn. 662.
Ill.—Hobbs v. H. M. Gousha Co., 24 N.E.2d 240, 302 Ill.App. 508.
Iowa.—Wade & Wade v. Central Broadcasting Co., 288 N.W. 439, 227 Iowa 422.
La.—Nickerson v. Burnstein, Inc., 115 So. 271, 164 La. 1066—Smith

for the employee[9] or the employer,[10] the damages sustained by the employee[11] and matters in mitigation thereof.[12]

§ 54. —— Questions of Law and Fact

a. In general
b. Discharge and sufficiency of grounds therefor
c. Damages

a. In General

In actions for wrongful discharge, as in other actions, questions of law are for the court and, if the evidence justifies, questions of fact are for the jury.

In an action for wrongful discharge, as in other actions for breach of contract, the questions of law are for the court[13] and, where there is insufficient evidence to sustain the employee's cause of action, the complaint should be dismissed or a verdict directed for the employer.[14] Where the evidence justifies, questions of fact, or mixed questions of law and fact, are for the jury, under proper instructions by the court.[15] When the evidence is contra-

v. Standard Industrial Life Ins. Co. of Louisiana, 121 So. 780, 10 La.App. 729.
Mont.—Harrington v. Deloraine Refining Co., 43 P.2d 660, 99 Mont. 78.
Pa.—Jacobs v. Kraft Cheese Co., 164 A. 774, 310 Pa. 75—Howard v. Siegel, 184 A. 272, 121 Pa.Super. 519.
39 C.J. p 104 note 96 [a] (6), (8), (14).

(3) To show, or sustain finding of, discharge.—Edgewater Beach Corporation v. Sugarman, 15 So.2d 260, 153 Fla. 555—39 C.J. p 104 note 96 [a] (3).

(4) To show, or sustain finding of, sufficient cause for discharge.
Ga.—Barber v. Southern Service Corporation, 185 S.E. 93, 182 Ga. 124.
La.—Weisenbach v. McDermott Surgical Instrument Co., 123 So. 336, 168 La. 818—McCluer v. Dykes, App., 14 So.2d 835—Mitchell v. Addington, 134 So. 338, 16 La.App. 454.
Mich.—Saari v. George C. Dates & Associates, 19 N.W.2d 121, 311 Mich. 624.
Mo.—Paulette v. Sernes, App., 103 S.W.2d 573.
N.J.—Kellems Products v. Coley, 160 A. 639, 10 N.J.Misc. 695.
39 C.J. p 104 note 96 [a] (4), (7).

(5) To show other matters.
Ky.—Williams v. Leaf Tobacco Co., 168 S.W.2d 570, 293 Ky. 270.
R.I.—Schafer v. Thurston Mfg. Co., 143 A. 613.
Wash.—Holton v. Hart Mill Co., 166 P.2d 186, 24 Wash.2d 493.

Evidence held insufficient

(1) To show a discharge.
Cal.—Percival v. National Drama Corp., 185 P. 972, 181 Cal. 631.
Mo.—Mozzi v. Administration Restaurant Co., 97 S.W. 947, 120 Mo. App. 587.

(2) To show just cause for discharge.—Brownholtz v. Providers' Life Assur. Co., 236 Ill.App. 494, affirmed 160 N.E. 127, 329 Ill. 42—39 C.J. p 104 note 96 [b] (2).

(3) To show, or support finding, that discharge was wrongful.
Ark.—Platt v. Owens, 35 S.W.2d 358, 183 Ark. 261.
Ky.—Robertson v. Wolfe, 283 S.W. 428, 214 Ky. 244, 49 A.L.R. 469.
Mich.—Coon v. Floyd Knox, Inc., 296 N.W. 267, 296 Mich. 305.
R.I.—Schafer v. Thurston Mfg. Co., 143 A. 613.

9. **Evidence held sufficient**
Ark.—Gerard B. Lambert Co. v. Newton, 294 S.W. 707, 174 Ark. 209.
Cal.—Ehlers v. Langley & Michaels Co., 237 P. 55, 72 Cal.App. 214.
Ky.—Watkins, Inc., v. Cochran, 168 S.W.2d 351, 292 Ky. 846.
R.I.—Minor v. Narragansett Mach. Co., 42 A.2d 711, 71 R.I. 108.
39 C.J. p 104 note 96 [a] (5).

Evidence held insufficient
Ill.—Jones v. Stoneware Pipe Co., 277 Ill.App. 18.
39 C.J. p 104 note 96 [b] (4), (5).

Verdict held not excessive
Mo.—Dickes v. Bookman, App., 6 S.W.2d 981.

10. **Evidence held sufficient**
To sustain judgment for defendant.—Pierce v. Bringardner Lumber Co., 132 S.W.2d 932, 280 Ky. 205.

11. **Evidence held sufficient**
(1) To show damages.—Hurwitz v. Gavrin, 61 N.Y.S.2d 309, 270 App. Div. 887.

(2) To sustain recovery.—Olson v. Naymark, 225 N.W. 275, 177 Minn. 383.

12. **Evidence held sufficient**
Tex.—Copeland v. Hill, Civ.App., 126 S.W.2d 567.
Wash.—O'Brien v. Puget Sound Plywood, 165 P.2d 86, 23 Wash.2d 917.

Evidence held insufficient
(1) To bring employee's right of recovery within rule requiring him to prove that he had, after reasonable efforts, failed to find employment, or that employment found did not pay as much as he would receive for like services under breached contract.—Newport Dairy v. Shackelford, 88 S.W.2d 940, 261 Ky. 754.

(2) To establish any basis for reduction of damages.—McClelland v. Climax Hosiery Mills, 169 N.E. 605, 252 N.Y. 347, remittitur amended on other grounds 171 N.E. 770, 253 N.Y. 533, reargument denied 171 N.E. 781, 253 N.Y. 558—39 C.J. p 104 note 96 [b] (3).

(3) To prove that employee might by exercise of due diligence have obtained other employment during unexpired term.—Waynesboro Planing Mill v. Hargrove, 127 S.E. 665, 33 Ga.App. 684.

13. Pa.—Hay v. Pittsburgh Lodge No. 46, Loyal Order of Moose, 8 A.2d 434, 137 Pa.Super. 205.
39 C.J. p 105 note 97.

Construction of contract is exclusively for the court.
N.Y.—Kurlan v. Gutman, 152 N.Y.S. 897, 90 Misc. 14.
Pa.—Hay v. Pittsburgh Lodge No. 46, Loyal Order of Moose, 8 A.2d 434, 137 Pa.Super. 205.
39 C.J. p 105 note 98 [a].

14. Ky.—Aronson v. Gibbs-Inman Co., 140 S.W.2d 806, 283 Ky. 107.
N.J.—Ryan v. Brown Motors, 39 A.2d 70, 132 N.J.Law 154.
S.C.—Shealy v. Fowler, 188 S.E. 499, 182 S.C. 81.
39 C.J. p 105 note 98.

15. U.S.—Detroit Graphite Co. v. Hoover, C.C.A.Mass., 41 F.2d 490.
Ky.—Hamilton Carhartt Overall Co. v. Short, 197 S.W.2d 792, 303 Ky. 423.
Mass.—Mansfield v. Lang, 200 N.E. 110, 293 Mass. 386.
Mich.—McIntyre v. Smith-Bridgman & Co., 4 N.W.2d 36, 301 Mich. 629.
Mo.—Dickes v. Bookman, App., 6 S.W.2d 981.
N.C.—Colyer v. Vanderbilt Hotel Co., 4 S.E.2d 436, 216 N.C. 228—Durham Const. Co. v. Wright, 127 S.E. 580, 189 N.C. 456.
Or.—Lambert v. Laing & Thompson Iron Works, 264 P. 362, 124 Or. 197.
Pa.—Lucacher v. Kerson, 48 A.2d 857, 355 Pa. 79.
S.C.—Griswold v. Texas Co., 161 S.E. 409, 163 S.C. 156.
Tex.—Fort Worth & D. C. Ry. Co. v. Larson, Civ.App., 169 S.W.2d 260—Dallas Hotel Co. v. McCue, Civ. App., 25 S.W.2d 902.
39 C.J. p 105 note 99.

dictory, the rule which requires that, on a motion to dismiss the complaint, plaintiff is entitled to have the court adopt a view most favorable to him should lead to a denial of the motion and a submission of the case to the jury.[16]

Waiver or condonation by employer. When condonation, waiver, or estoppel with respect to the employee's breach of contract is in issue, the question is one of fact to be determined by the jury[17] except where the evidence is such as to warrant the court assuming its sufficiency or insufficiency as a matter of law.[18]

b. Discharge and Sufficiency of Grounds Therefor

What constitutes a good and sufficient ground for discharge is, as a general rule, a question of law for the court. On the other hand, whether the employee was in fact discharged, and whether he committed the acts which justified his discharge are questions of fact for the jury, on conflicting evidence.

Whether the employee was in fact discharged[19] or voluntarily quit or resigned[20] ordinarily is a question of fact for the jury.

What constitutes a good and sufficient cause for the discharge of the employee is a question of law,[21] and, where the facts are undisputed, it is for the court to say whether the discharge was justified.[22]

Existence of contract of employment is for jury.
U.S.—Eggers v. Armour & Co. of Delaware, C.C.A.Iowa, 129 F.2d 729—Baltimore & O. R. Co. v. Foar, C.C.A.Ind., 84 F.2d 67.
Mo.—Jones v. Schultz, App., 295 S. W. 477.
S.C.—Griswold v. Texas Co., 161 S.E. 409, 163 S.C. 156.

Renewal of contract
Mich.—McIntyre v. Smith-Bridgman & Co., 4 N.W.2d 36, 301 Mich. 629.
N.Y.—Wolkenberg v. New Jersey Crayon Co., 286 N.Y.S. 587, 247 App.Div. 780.

Terms of contract
(1) The jury determine the terms of the contract as a question of fact, where the evidence permits.
Mich.—McIntyre v. Smith-Bridgman & Co., 4 N.W.2d 36, 301 Mich. 629.
Mo.—Dickes v. Bookman, App., 285 S.W. 546.
N.J.—J. K. Larkin & Co. v. Murphy, 138 A. 704, 5 N.J.Misc. 921.
N.Y.—West v. Scaroon Hotel Corp., 67 N.Y.S.2d 163, 187 Misc. 539.
Tex.—Texas Cotton Co-op. Ass'n v. Pollock, Civ.App., 62 S.W.2d 300, error dismissed.
(2) Intended duration of employment is for the jury under the evidence.—Minor v. Narragansett Mach. Co., R.I., 42 A.2d 711.
(3) Whether employee was hired by year or by month is for the jury.
Ala.—Adams v. Stewart, 153 So. 401, 228 Ala. 194.
Ky.—Hamilton Carhartt Overall Co. v. Short, 197 S.W.2d 792, 303 Ky. 423.
(4) Whether contract was for year or only indefinite hiring terminable at will is question for the jury.
Ga.—National Manufacture & Stores Corporation v. Dekle, 173 S.E. 408, 48 Ga.App. 515.
N.Y.—Preager v. Unity Shoemakers Corporation, 15 N.Y.S.2d 45, 257 App.Div. 632.
Pa.—Jones v. Pittsburgh Mercantile Co., 145 A. 80, 295 Pa. 219.
Va.—D. Buchanan & Son v. Ewell, 139 S.E. 483, 148 Va. 762.

Bonus as wages or gratuity
Ark.—Griffin Grocery Co. v. Thaxton, 11 S.W.2d 473, 178 Ark. 736.
N.Y.—Sherlock v. Ansonia Shoe Corporation, 28 N.Y.S.2d 912, 262 App. Div. 914.

16. N.Y.—Crown v. Litvak, 159 N.Y. S. 34.

17. Mont.—Hill Cattle Corporation v. Killorn, 256 P. 497, 79 Mont. 327.
39 C.J. p 106 note 8.

Question of lapse of time between improper conduct of employee and time of discharge, and the reasonableness of such lapse of time, if any, is for the jury on conflicting evidence.—Harrington v. Chittenango First Nat. Bank, 1 Thomps. & C. (N.Y.) 361.

18. Mont.—Hill Cattle Corporation v. Killorn, 256 P. 497, 79 Mont. 327.

19. Mass.—Oehme v. Whittemore-Wright Co., 181 N.E. 733, 279 Mass. 558.
S.C.—Youmans v. Charleston & W. C. Ry. Co., 178 S.E. 671, 175 S.C. 99—Crosby v. Bradley, 140 S.E. 702, 142 S.C. 386.
39 C.J. p 105 note 99 [b].

20. Ind.—Sinclair Refining Co. v. McCullom, 24 N.E.2d 784, 107 Ind. App. 356.
S.C.—Crosby v. Bradley, 140 S.E. 702, 142 S.C. 386.
Va.—D. Buchanan & Son v. Ewell, 139 S.E. 483, 148 Va. 762.

Resignation under protest
R.I.—Minor v. Narragansett Mach. Co., 42 A.2d 711.

21. Md.—Bright v. Ganas, 189 A. 427, 171 Md. 493, 109 A.L.R. 467.
Or.—**Corpus Juris quoted in** Osburn v. De Force, 257 P. 685, 690, 122 Or. 360, motion denied 262 P. 222, 123 Or. 352.
Pa.—Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36.
Tex.—**Corpus Juris quoted in** Roya Oak Stave Co. v. Groce, Civ.App. 113 S.W.2d 315, 317, error dismissed.
Va.—**Corpus Juris quoted in** Spotswood Arms Corporation v. Este, 133 S.E. 570, 573, 147 Va. 1047.
39 C.J. p 105 note 2.

Breach of duty or contract
Determination of what constituted a breach of duty which would justify discharging employee is for the court as a question of law.—Haiman v. Gundersheimer, 177 So. 199, 130 Fla. 109.

Infraction of rules
An employee is not entitled to have a jury decide whether or not his infraction of the employer's rules justifies his dismissal, where the employer acts in good faith.—Adams v. Southern Pac. Co., 266 P. 541, 204 Cal. 63, 57 A.L.R. 1066.

Reasonableness of regulations violated is for the court.—Walker v. John Hancock L. Ins. Co., 68 A. 113, 75 N.J.Law 281—39 C.J. p 105 note 98 [b].

22. Md.—Bright v. Ganas, 189 A. 427, 171 Md. 493, 109 A.L.R. 467.
Or.—**Corpus Juris quoted in** Osburn v. De Force, 257 P. 685, 690, 122 Or. 360, motion denied 262 P. 222, 123 Or. 352.
Pa.—Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36.
Tex.—**Corpus Juris quoted in** Royal Oak Stave Co. v. Groce, Civ.App., 113 S.W.2d 315, 317, error dismissed.
Va.—**Corpus Juris cited in** D. Buchanan & Son v. Ewell, 139 S.E. 483, 485, 148 Va. 762—**Corpus Juris quoted in** Spotswood Arms Corporation v. Este, 133 S.E. 570, 573, 147 Va. 1047.
39 C.J. p 106 note 3.

Reasonableness of order
(1) Where the reasonableness of the order disobeyed by the employee depends on undisputed facts and the inferences point one way, the question is one of law for the court.—May v. New York Motion Picture

Where, however, the facts are disputed, it is for the jury to say on all the evidence whether there were sufficient grounds to warrant the discharge.[23] So, where the facts are in dispute, whether the employee committed any of the acts which constitute ground for discharge,[24] as, for example, disobedience or insubordination,[25] is a matter for the jury, as is the reasonableness of excuses for nonperformance.[26] Nevertheless, the courts will not permit juries to guess or speculate when from the undisputed evidence it is apparent that the order of the employer was reasonable and that the employee was guilty of insubordination.[27]

Services satisfactory to employer. Where the contract provides that the employer can terminate the employment if not satisfied with the services rendered, the question whether or not the services were satisfactorily performed is a question to be determined by the employer and not by the jury.[28] However, the question whether the asserted dissatisfaction as a ground for discharge is in good faith or feigned is for the jury[29] where there is evidence tending to show that the discharge was due to reasons other than dissatisfaction.[30]

c. Damages

What are proper elements of damages presents a question of law for the court. On conflicting evidence, the existence of such elements and the amount of damage sustained are fact questions for the jury.

In accordance with general rules, the question of what elements of damage are proper to be considered in an action for wrongful discharge is one of law for the court[31] although, where the evidence is conflicting, the existence of such elements[32] and the amount of damage sustained[33] present ques-

Corporation, 187 P. 785, 45 Cal.App. 396.

(2) Where, however, different inferences can be deduced it is a question of fact for the jury.—May v. New York Motion Picture Corporation, supra.

(3) Although contract is in writing and requires servant to perform such services as the master may direct, and although the order itself is in writing, the reasonableness of the order is a question for the jury.—Development Co. v. King, N.Y., 161 F. 91, 88 C.C.A. 255, 24 L.R.A.,N.S., 812.

23. Ala.—Wilkes v. Stacy Williams Co., 179 So. 245, 235 Ala. 343.
Ark.—Brandon Tie & Lumber Co. v. Osborn, 83 S.W.2d 530, 191 Ark. 145.
Ill.—Jones v. Stoneware Pipe Co., 277 Ill.App. 18—Davis v. Englestein, 263 Ill.App. 57.
Ky.—Bass v. Simon, 44 S.W.2d 587, 241 Ky. 666.
Me.—Podolsky v. Philco Shoe Corporation, 22 A.2d 861, 138 Me. 126.
Md.—Bright v. Ganas, 189 A. 427, 171 Md. 493, 109 A.L.R. 467.
Mass.—Mansfield v. Lang, 200 N.E. 110, 293 Mass. 386.
Mich.—McIntyre v. Smith-Bridgman & Co., 4 N.W.2d 36, 301 Mich. 629.
Mont.—Miller v. Yellowstone Irr. Dist., 9 P.2d 795, 91 Mont. 538.
Neb.—Stoffel v. Metcalfe Const. Co., 17 N.W.2d 3, 145 Neb. 450.
N.J.—Cooper v. Singer, 191 A. 849, 118 N.J.Law 200.
N.Y.—Vogel v. Pathe Exchange, 254 N.Y.S. 881, 234 App.Div. 313—Fahey v. Kennedy, 243 N.Y.S. 396, 230 App.Div. 156, appeal denied 244 N.Y.S. 603, 230 App.Div. 799.
Ohio.—Rorick v. Gilbert, 186 N.E. 756, 45 Ohio App. 96.
Or.—Osburn v. De Force, 257 P. 685, 122 Or. 360, motion denied 262 P. 222, 123 Or. 352.
Pa.—Jacobs v. Kraft Cheese Co., 164 A. 774, 310 Pa. 75—Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36.
R.I.—Schafer v. Thurston Mfg. Co., 137 A. 2, 48 R.I. 244.
Tex.—Dreyfuss & Son v. Dine, Civ. App., 90 S.W.2d 598—Farmers' Gin Co. v. Smith, Civ.App., 28 S.W.2d 839.
Va.—**Corpus Juris cited in** D. Buchanan & Son v. Ewell, 139 S.E. 483, 485, 148 Va. 762—**Corpus Juris quoted in** Spotswood Arms Corporation v. Este, 133 S.E. 570, 573, 147 Va. 1047.
39 C.J. p 106 note 4.

Incompetence, on conflicting evidence, is for the jury.—Schafer v. Thurston Mfg. Co., R.I., 143 A. 613.

Whether certain acts constituted misconduct which justified discharge is for the jury.—Mansfield v. Lang, 200 N.E. 110, 293 Mass. 386.

24. Fla.—Haiman v. Gundersheimer, 177 So. 199, 130 Fla. 109.
Va.—Rudlin v. Parker, 43 S.E.2d 918, 186 Va. 647.

Remark of employee

Remark of employee to employer's representative, susceptible of interpretation as a reflection on the representative, does not justify discharge as a matter of law, but is for the jury on all the evidence.—Schafer v. Thurston Mfg. Co., 137 A. 2, 48 R.I. 244.

25. U.S.—Arkansas Amusement Corporation v. Kempner, C.C.A.Ark., 57 F.2d 466.
Ark.—S. Unterberger & Co. v. Wiley, 281 S.W. 899, 170 Ark. 976.
Mass.—Mansfield v. Lang, 200 N.E. 110, 293 Mass. 386—Oehme v. Whittemore-Wright Co., 181 N.E. 733, 279 Mass. 558.
N.Y.—Ruthizer v. William Bass Dress Corporation, 35 N.Y.S.2d 473, 264 App.Div. 372.
R.I.—Schafer v. Thurston Mfg. Co., 143 A. 613.
Va.—D. Buchanan & Son v. Ewell, 139 S.E. 483, 148 Va. 762.
39 C.J. p 106 note 5.

Good faith of requests to perform is for the jury to determine.—Arkansas Amusement Corporation v. Kempner, C.C.A.Ark., 57 F.2d 466.

Whether acts were in violation of express orders is for the jury.
Mass.—Mansfield v. Lang, 200 N.E. 110, 293 Mass. 386.
Pa.—Schoenfeld v. Sachs, 167 A. 166, 312 Pa. 201.

26. U.S.—Arkansas Amusement Corporation v. Kempner, C.C.A.Ark., 57 F.2d 466.
Me.—Dube v. Simard, 129 A. 488, 124 Me. 369.

27. N.Y.—Jerome v. Queen City Cycle Co., 57 N.E. 485, 163 N.Y. 351.
39 C.J. p 106 note 6.

28. Mich.—Lynas v. Maxwell Farms, 273 N.W. 315, 279 Mich. 684.
39 C.J. p 106 note 4 [a].

29. N.Y.—Zitlin v. Max Heit Dress Corporation, 271 N.Y.S. 275, 151 Misc. 241—Gutner v. Success Magazine Corporation, 242 N.Y.S. 679, 136 Misc. 257.
39 C.J. p 106 note 7.

30. Cal.—Coats v. General Motors Corporation, 39 P.2d 838, 3 Cal. App.2d 340.

31. **Damage to reputation**
N.J.—Tousley v. Atlantic City Ambassador Hotel Corp., Sup., 50 A. 2d 472.

32. Okl.—Sinclair Prairie Oil Co. v. Dose, 118 P.2d 210, 189 Okl. 569.

33. Iowa.—Breen v. Central Iowa

tions of fact for the jury. Where no evidence of the damages is introduced the case should not be submitted to the jury.[34]

Mitigation of damages. Whether plaintiff, after discharge, made a bona fide effort for the purpose of reducing damages,[35] such as exercising reasonable diligence to obtain other employment,[36] and the reasonableness of an excuse for not so doing,[37] or what the employee could have earned by diligent efforts to secure other employment[38] are questions of fact for the jury. If there is no evidence in the case on the question, the defense of failure to seek other employment should not be submitted to the jury.[39]

Proof that the employee could have secured similar employment at similar wages does not require the case to be taken from the jury, since the employee may be entitled to actual or nominal damages for the breach.[40]

§ 55. —— Instructions

In an action for wrongful discharge the instructions must be confined to the issues made by the evidence and must correctly state the law applicable to the facts.

Each party in an action for wrongful discharge is entitled to instructions covering his theory of the case,[41] the instructions must conform, and be confined, to the issues made by the evidence,[42] and must correctly state the law applicable to the facts.[43] When the court instructs on what state of facts the verdict must be returned against defendant, the instructions must include all the facts material to the right of such party.[44] Where justification for the discharge has been urged in defense of the action, the court should instruct as to what amounts to legal justification, leaving to the jury to deter-

Power & Light Co., 224 N.W. 562, 207 Iowa 1161.
Me.—Podolsky v. Philco Shoe Corporation, 22 A.2d 861, 138 Me. 126.
Mich.—McIntyre v. Smith-Bridgman & Co., 4 N.W.2d 36, 301 Mich. 629.
N.Y.—Engel v. Ansco Photoproducts, 240 N.Y.S. 737, 229 App.Div. 241, affirmed Engel v. Ansco Photoproducts Co., 177 N.E. 163, 256 N.Y. 615—Palmer v. New York Herald Co., 239 N.Y.S. 619, 228 App.Div. 176.
Or.—Osburn v. De Force, 257 P. 685, 122 Or. 360, motion denied 262 P. 222, 123 Or. 352.
Pa.—Hay v. Pittsburgh Lodge No. 46, Loyal Order of Moose, 8 A.2d 434, 137 Pa.Super. 205.
Tex.—Eubanks v. Galveston, H. & S. A. Ry. Co., Com.App., 59 S.W.2d 825.
Wis.—Schwade v. Van Bree, 252 N.W. 702, 214 Wis. 250.
39 C.J. p 105 note 99 [g].

Contract substitute for damages
Whether provision in contract for sale of store business and employment of seller as manager, whereby buyer was to purchase seller's stock in proposed store corporation at specified price in event of buyer's discharge of seller as manager, was intended in lieu of seller-manager's right to damages for discharge during term is question for jury.—National Manufacture & Stores Corporation v. Dekle, 173 S.E. 408, 48 Ga. App. 515.

34. N.Y.—Bitterman v. Gluck, 9 N.Y.S.2d 1007, 256 App.Div. 336.

35. Mich.—Gallino v. Boland, 191 N.W. 222, 221 Mich. 502.
39 C.J. p 107 note 9.

36. Ky.—Williams v. Leaf Tobacco Co., 168 S.W.2d 570, 293 Ky. 270.
Md.—Atholwood Development Co. v. Houston, 19 A.2d 706, 179 Md. 441.

Offer of reëmployment
Question whether a letter written by employer after the breach was an offer to employee of her old position is properly submitted to the jury.—Hussey v. Holloway, 104 N.E. 471, 217 Mass. 100.

What constitutes reasonable diligence is a question of fact dependent on all the circumstances of each case.—Atholwood Development Co. v. Houston, 19 A.2d 706, 179 Md. 441.

37. Mich.—Chisholm v. Preferred Bankers' Life Assur. Co., 70 N.W. 415, 112 Mich. 50.

38. Ky.—Harcourt & Co. v. Heller, 62 S.W.2d 1056, 250 Ky. 321.
Much latitude is allowed jury in determining what wrongfully discharged employee could have earned by diligent efforts during unexpired term.—Harcourt & Co. v. Heller, supra.

39. N.Y.—Rosen v. Druss, 172 N.Y.S. 332.

40. Md.—Atholwood Development Co. v. Houston, 19 A.2d 706, 179 Md. 441.

41. U.S.—Detroit Graphite Co. v. Hoover, C.C.A.Mass., 41 F.2d 490.
N.Y.—West v. Scaroon Hotel Corp., 67 N.Y.S.2d 163, 187 Misc. 539.
39 C.J. p 107 note 12.

Instructions held not erroneous
Ga.—Hooks v. McCart, 164 S.E. 491, 45 Ga.App. 328.
Mo.—Zeppenfeld v. Morgan, App., 185 S.W.2d 898.
S.D.—Tretheway v. Tri-State Milling Co., 222 N.W. 950, 54 S.D. 201.
39 C.J. p 107 note 12 [b].

42. Pa.—Megliss v. Bartoletta, 48 A.2d 18, 159 Pa.Super. 308.
39 C.J. p 107 note 13.

Instructions contrary to established or admitted facts are properly refused.
Mont.—Harrington v. Deloraine Refining Co., 43 P.2d 660, 99 Mont. 78—Miller v. Yellowstone Irr. Dist., 9 P.2d 795, 91 Mont. 538.
Pa.—Schoenfeld v. Sachs, 167 A. 166, 312 Pa. 201.

Issue created by proof
Where evidence on a matter not pleaded is brought out on cross-examination and by direct testimony not objected to, an instruction thereon is not erroneous, as the pleadings are deemed amended to conform to the evidence.—Harrington v. Deloraine Refining Co., 43 P.2d 660, 99 Mont. 78.

Charging facts as matter of law
Where the undisputed evidence establishes the existence of the contract of employment and the discharge of the employee, it is not error for the court to charge such facts as existing as a matter of law.—Stoffel v. Metcalfe Const. Co., 17 N.W.2d 3, 145 Neb. 450.

43. Conn.—Pollak v. Danbury Mfg. Co., 131 A. 426, 103 Conn. 553.
Mass.—Nelson v. Hamlin, 155 N.E. 18, 258 Mass. 331.
Miss.—Tri-State Transit Co. of Louisiana v. Rawls, 1 So.2d 497, 191 Miss. 573.
N.Y.—Morgenbesser v. Levy, 109 N.Y.S. 825, 58 Misc. 554.

Doctrine of substantial performance
An instruction on substantial performance was held objectionable for not defining substantial performance and failing properly to limit its application.—Pollak v. Danbury Mfg. Co., 131 A. 426, 103 Conn. 553.

44. Colo.—Reynolds v. Hart, 94 P. 14, 42 Colo. 150.
39 C.J. p 107 note 15.

mine from the facts whether such justification existed.[45]

An instruction which covers the case generally is sufficient in the absence of a request for a more particular instruction[46] and it is not improper to refuse a charge argumentative in its tendency, and based on only a part of the testimony.[47] An instruction which is confusing or misleading to the jury should not be given and is properly refused,[48] as in the case of an instruction at variance with other instructions already given[49] or of an instruction that the burden was on the employee to prove performance of his contract and not on the employer to prove the employee's violation of any of the terms of the contract.[50]

The use of the phrase "the law presumes," although inapt, is not improper when it appears from the context of the charge that the court did not mean to instruct the jury that this was such a legal presumption as could not be rebutted by proof.[51] Although ordinarily a requested instruction should be given as asked, an addition of words which do not change or affect the meaning is not harmful and does not constitute error.[52]

Instructions as to damages. Appropriate instructions correctly stating the law on the question of damages may and should be given in an action for damages for breach of contract by wrongful discharge.[53] Instructions on damages which are inapplicable under the facts of the particular case, although correct in the abstract, should not be given and are properly refused.[54] If a requested instruction on the question of damages is erroneous it may be modified by the court to state the law correctly as applicable to the case.[55] Where there is evidence in the case on which the damages can properly be estimated, it is proper to refuse an instruction limiting recovery to nominal damages.[56] A charge authorizing an award of punitive damages is improper where, under the pleadings and evidence in the case, such damages are not an issue in the case.[57]

It is improper to refuse to charge that claims of damage which are speculative in character and incapable of reasonably exact computation cannot be made the basis of recovery.[58] Where the employer does not plead that the employee might have obtained other employment, or did so, an instruction that the latter, if entitled to recover, should recover the full amount agreed to be paid under the contract has been held warranted.[59] It has also been held that a charge that the verdict should be for the employer if it be established that the employee failed to seek other employment is erroneous and properly refused.[60] An instruction that, while there should be set off against the employee's damages such sum as he might have obtained or earned by working for others in a like service, the opportunity to be employed by others will not be presumed, but must be affirmatively shown by the em-

45. Neb.—Stoffel v. Metcalfe Const. Co., 17 N.W.2d 3, 145 Neb. 450.

Violation of employer's instructions

In action against employers for breach of employment contract, in which employers set up defense that discharge was justified because of employee's breach of contract by violating instructions, trial court should have defined duties and obligations of employee to employers, and rights of employers as to discharging employee for violation of employment contract.—Stoffel v. Metcalfe Const. Co., supra.

46. Ga.—Terry Shipbuilding Corp. v. Gregory, 106 S.E. 803, 26 Ga. App. 450.

39 C.J. p 107 note 16.

47. Ala.—Drennen v. Satterfield, 24 So. 723, 119 Ala. 84—Johnston Bros. Co. v. Bentley, 56 So. 742, 2 Ala.App. 281.

48. Ala.—Cleveland v. Towle, 106 So. 58, 21 Ala.App. 161, hearing on remandment from Ex parte Towle, 106 So. 60, 213 Ala. 129.

39 C.J. p 108 note 18.

Instructions held not misleading

Or.—Lambert v. Laing & Thompson Iron Works, 264 P. 362, 124 Or. 197.

49. Conn.—Pollak v. Danbury Mfg. Co., 131 A. 426, 103 Conn. 553.

50. N.Y.—Toube v. Rubin-Blankfort Co., 116 N.Y.S. 673, 63 Misc. 298.

51. Ga.—Bagwell v. Milam, 71 S.E. 684, 9 Ga.App. 316.

52. Ill.—Fank v. Crane, 154 Ill.App. 643.

53. U.S.—Detroit Graphite Co. v. Hoover, C.C.A.Mass., 41 F.2d 490.

Ala.—Cleveland v. Towle, 106 So. 58, 21 Ala.App. 161, reversed on other grounds Ex parte Towle, 106 So. 60, 213 Ala. 129.

Ark.—Seaman Stores Co. v. Porter, 23 S.W.2d 249, 180 Ark. 860.

Ky.—Lexington Herald Co. v. Westerman, 87 S.W.2d 128, 261 Ky. 130.

Md.—Atholwood Development Co. v. Houston, 19 A.2d 706, 179 Md. 441.

Mo.—Dickes v. Bookman, App., 285 S.W. 546.

N.Y.—Preager v. Unity Shoemakers Corporation, 15 N.Y.S.2d 45, 257 App.Div. 632.

54. Ark.—Brandon Tie & Lumber Co. v. Osborn, 83 S.W.2d 530, 191 Ark. 145.

Tex.—Stolz v. Wells, Civ.App., 43 S.W.2d 163.

55. Ark.—Gerard B. Lambert Co. v. Fleming, 275 S.W. 912, 169 Ark. 532.

56. U.S.—F. S. Royster Guano Co. v. Hall, C.C.A.N.C., 68 F.2d 533.

57. Ind.—Sinclair Refining Co. v. McCullom, 24 N.E.2d 784, 107 Ind. App. 356.

58. Ga.—American Agricultural Chemical Co. v. Rhodes, 77 S.E. 582, 139 Ga. 495.

59. Okl.—Sharpless Separator Co. v. Gray, 161 P. 1074, 62 Okl. 73.

60. Md.—Atholwood Development Co. v. Houston, 19 A.2d 706, 179 Md. 441.

Reason for rule

Defense that similar employment could have been obtained by exercise of reasonable diligence is made merely in mitigation of damages and not as complete bar to cause of action.—Atholwood Development Co. v. Houston, supra.

ployer, is proper,[61] and an instruction placing on the employee the burden of showing that he made diligent efforts to obtain other employment is improper.[62] It is not improper to charge that a request by the employer that the employee should return to work after a discharge is to be considered only with reference to mitigation of damages.[63] Where it appears that the venture of the employee in business on his own account after discharge was unprofitable, it has been held not erroneous to refuse to charge that it is for the jury to determine, in mitigation of damages, the reasonable value of his services.[64] So, where under the contract the employee had the right to do outside work which did not interfere with the employer's requirements, and there was no contradiction of the employee's evidence that his outside earnings did not interfere with his duty to the employer, the court should instruct that the employee's damage was the agreed salary for the balance of the term.[65] Where the employee was permitted under the terms of his contract to do work for others, an instruction that the employer was entitled to a reduction of the amount that the employee earned or might have earned for the remainder of the term is erroneous as applying the same measure of damages to breach of contract for part time employment as that applicable to a case of hiring for full time employment.[66]

§ 56. —— Review

The general rules as to review in civil actions are discussed in Appeal and Error.

§ 57. —— Attorney's Fees

A statute providing for an attorney's fee in an action for wages is inapplicable in an action for damages for a wrongful discharge.

A statute providing for attorney's fees when an employee brings a suit for wages owing under the terms of the contract of employment does not apply when the employee sues for damages for a wrongful discharge.[67]

§ 58. —— Damages in General

a. In general
b. Elements of damages
c. Punitive damages
d. Nominal damages
e. As dependent on time of bringing suit

a. In General

As a general rule the measure of damages in an action for breach of contract by wrongful discharge is the actual loss sustained by the employee by reason of his discharge.

In an action for breach of a contract of employment by wrongful discharge before expiration of the term fixed in such contract, the real measure of the employee's damages or recovery is the loss actually sustained by him by reason of the wrongful discharge,[68] together with compensation for the services performed.[69] Broadly speaking, this loss consists of the stipulated wages for the unexpired

61. Iowa.—Wood v. Ravenscroft, 112 N.W. 640, 135 Iowa 346.

62. Tex.—Miller v. Sealy Oil Mill & Mfg. Co., Civ.App., 166 S.W. 1182—Sinsheimer v. Edward Weil Co., 129 S.W. 187, 61 Civ.App. 209.

63. Iowa.—Rottlesberger v. Hanley, 136 N.W. 776, 155 Iowa 638.

Immediate offer of reëmployment

Where employer allegedly offered to take back employee almost immediately after wrongful discharge, refusal to charge that employee's refusal to return precluded recovery was held error.—Flickema v. Henry Kraker Co., 233 N.W. 362, 252 Mich. 406, 72 A.L.R. 1046.

64. Ill.—Wall v. Italian Vineyard Co., 209 Ill.App. 578.

65. U.S.—Sanders v. Schenley Products Co., C.C.A.N.Y., 108 F.2d 23.

66. Md.—Wandell Chocolate Co., Inc. v. Goldsmith, 120 A. 372, 142 Md. 148.

67. Ill.—Great Northern Hotel Co. v. Leopold, 72 Ill.App. 108—World's Columbian Exposition v. Thompson, 57 Ill.App. 606.

68. Ga.—Gary v. Central of Georgia Ry. Co., 141 S.E. 819, 37 Ga.App. 744—Waynesboro Planing Mill v. Hargrove, 127 S.E. 665, 33 Ga.App. 684—Georgia, Florida, & Alabama Ry. Co. v. Parsons, 76 S.E. 1063, 12 Ga.App. 180.

Ind.—Haddon School Tp. of Sullivan County v. Willis, 199 N.E. 251, 209 Ind. 356—Watts v. Geisel, 194 N.E. 502, 100 Ind.App. 92.

Mo.—Hume v. Miller Hatcheries, App., 51 S.W.2d 179.

N.Y.—McClelland v. Climax Hosiery Mills, 169 N.E. 605, 252 N.Y. 347, remittitur amended on other grounds 171 N.E. 770, 253 N.Y. 533, reargument denied 171 N.E. 781, 253 N.Y. 558.

N.C.—Durham Const. Co. v. Wright, 127 S.E. 580, 189 N.C. 456.

Ohio.—Swisher v. Kimbrough, 157 N.E. 823, 25 Ohio App. 233.

Tex.—Leak v. Halaby Galleries, Civ. App., 49 S.W.2d 858, error refused—Bender v. Mettler, Civ.App., 17 S.W.2d 182—Hoffer Oil Corporation v. Hughes, Civ.App., 16 S.W.2d 901—McKinney v. Smith, Civ.App., 271 S.W. 247.

39 C.J. p 109 note 41.

Bonus

The right of the employee to a bonus may be a proper element of damage.

Ind.—Watts v. Geisel, 194 N.E. 502, 100 Ind.App. 92.

Va.—D. Buchanan & Son v. Ewell, 139 S.E. 483, 148 Va. 762.

39 C.J. p 109 note 41 [f].

69. Fla.—**Corpus Juris cited in** Hazen v. Cobb, 117 So. 853, 859, 96 Fla. 151.

Ind.—Watts v. Geisel, 194 N.E. 502, 100 Ind.App. 92.

Pa.—Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36.

Tex.—Fairbanks, Morse & Co. v. Carsey, Civ.App., 109 S.W.2d 985, error dismissed.

Va.—Standard Laundry Service v. Pastelnick, 184 S.E. 193, 166 Va. 125.

39 C.J. p 110 note 42.

term,[70] less expenses, if any, which he would have incurred in performing the contract,[71] less what the employee may have received from the employer on account,[72] less the amount by which the employee could have diminished the damages by reasonable action,[73] and, as discussed infra § 59, less what he

Right to further recovery immaterial
Recovery may be had under contract of employment till date of discharge, without regard to right of further recovery depending on reasonableness of discharge.—Forsberg v. Zehm, 143 S.E. 284, 150 Va. 756, 61 A.L.R. 232.

70. U.S.—Taylor v. Tulsa, C.C.A. Okl., 136 F.2d 981—Sanders v. Schenley Products Co., C.C.A.N.Y., 108 F.2d 23—Russell v. Barnes Foundation, D.C.Pa., 52 F.Supp. 827, affirmed, C.C.A., 143 F.2d 871, certiorari denied Barnes Foundation v. Russell, 65 S.Ct. 122, 323 U. S. 771, 89 L.Ed. 616.
Cal.—Smetherham v. Laundry Workers' Union, Local No. 75, 111 P.2d 948, 44 Cal.App.2d 131—De La Falaise v. Gaumont-British Picture Corporation, 103 P.2d 447, 39 Cal.App.2d 461—Goudal v. Cecil B. De Mille Pictures Corporation, 5 P.2d 432, 118 Cal.App. 407, hearing denied 7 P.2d 174, 118 Cal.App. 407—Wood v. Girot, 282 P. 981, 102 Cal.App. 160—Gregg v. McDonald, 239 P. 373, 73 Cal.App. 748.
Conn.—Pollak v. Danbury Mfg. Co., 131 A. 426, 103 Conn. 553.
Ga.—Fried v. Portis Bros. Hat Co., 152 S.E. 151, 41 Ga.App. 30.
Ind.—H. C. Bay Co. v. Kroner, 149 N.E. 184, 83 Ind.App. 541.
Ky.—Louisville & N. R. Co. v. Wells, 160 S.W.2d 16, 289 Ky. 700—Torson Const. Co. v. Grant, 66 S.W.2d 79, 251 Ky. 800—Abrams v. Jackson County Board of Education, 18 S.W.2d 1000, 230 Ky. 151.
Md.—Atholwood Development Co. v. Houston, 19 A.2d 706, 179 Md. 441.
Mass.—Levovsky v. Horvitz, 30 N.E. 2d 411, 307 Mass. 475.
Minn.—Bang v. International Sisal Co., 4 N.W.2d 113, 212 Minn. 135, 141 A.L.R. 657.
Mo.—McGee v. St. Joseph Belt Ry. Co., 93 S.W.2d 1111, 233 Mo.App. 111—Jones v. Schultz, App., 295 S. W. 477.
Mont.—**Corpus Juris cited in** Miller v. Yellowstone Irr. Dist., 9 P.2d 795, 91 Mont. 538.
Neb.—Stoffel v. Metcalfe Const. Co., 17 N.W.2d 3, 145 Neb. 450.
N.Y.—Hollwedel v. Duffy-Mott Co., 188 N.E. 266, 263 N.Y. 95, 90 A.L. R. 1312—Sinclair v. Positype Corporation of America, 261 N.Y.S. 900, 237 App.Div. 525.
N.C.—Durham Const. Co. v. Wright, 127 S.E. 580, 189 N.C. 456.
Or.—Smith v. Pallay, 279 P. 279, 130 Or. 282.
Pa.—Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36—Moyer v Heilveil, 49 A.2d 514, 159 Pa.Super 610.
Tenn.—Godson v. MacFadden, 39 S. W.2d 287, 162 Tenn. 528.
Tex.—Galveston, H. & S. A. Ry. Co. v. Eubanks, Civ.App., 42 S.W.2d 475, affirmed Eubanks v. Galveston, H. & S. A. Ry. Co., Com.App., 59 S.W.2d 825—Fairbanks, Morse & Co. v. Carsey, Civ.App., 109 S. W.2d 985, error refused—Bender v. Mettler, Civ.App., 17 S.W.2d 182.
Va.—Standard Laundry Service v. Pastelnick, 184 S.E. 193, 166 Va. 125.
39 C.J. p 109 note 40.

Contract price is limit of recovery
Tex.—Southern Properties v. Carpenter, Civ.App., 300 S.W. 963.
39 C.J. p 109 note 40 [a].

Effect of receipt of workmen's compensation payments
The receipt and acceptance of workmen's compensation payments by the employee, without objection by the employer and which the employer credited against the employee's salary while the latter remained on duty, was held not to deprive the employee of his right to salary for such period, in determining the employee's damages from the wrongful discharge.—Farmers' Gin Co. v. Smith, Tex.Civ.App., 28 S.W.2d 839.

Prima facie measure
(1) The prima facie measure of damage is the stipulated wage.
U.S.—Taylor v. Tulsa Tribune Co., C.C.A.Okl., 136 F.2d 981—Russell v. Barnes Foundation, D.C.Pa., 52 F. Supp. 827, affirmed, C.C.A., 143 F.2d 871, certiorari denied Barnes Foundation v. Russell, 65 S.Ct. 122, 323 U.S. 771, 89 L.Ed. 616—Realty Acceptance Corporation v. Montgomery, D.C.Del., 6 F.Supp. 593, affirmed, C.C.A., 77 F.2d 762, certiorari denied 56 S.Ct. 103, 296 U.S. 590, 80 L.Ed. 418, rehearing denied 56 S.Ct. 167, 296 U.S. 662, 80 L.Ed. 472.
Cal.—De La Falaise v. Gaumont-British Picture Corporation, 103 P. 2d 447, 39 Cal.App.2d 461—Goudal v. Cecil B. De Mille Pictures Corporation, 5 P.2d 432, 118 Cal.App. 407, hearing denied 7 P.2d 174, 118 Cal.App. 407—Gregg v. McDonald, 239 P. 373, 73 Cal.App. 748.
Fla.—**Corpus Juris cited in** Hazen v. Cobb, 117 So. 853, 859, 96 Fla. 151.
Ind.—Haddon School Tp. of Sullivan County v. Willis, 199 N.E. 251, 209 Ind. 356.
Md.—Atholwood Development Co. v. Houston, 19 A.2d 706, 179 Md. 441.
Mo.—McGee v. St. Joseph Belt Ry. Co., 110 S.W.2d 389, 232 Mo.App. 639.
N.Y.—Hollwedel v. Duffy-Mott Co., 188 N.E. 266, 263 N.Y. 95, 90 A.L.R. 1312—McClelland v. Climax Hosiery Mills, 169 N.E. 605, 252 N.Y. 347, and remittitur amended 171 N.E. 770, 253 N.Y. 533, reargument denied 171 N.E. 781, 253 N.Y. 558—Preager v. Unity Shoemakers Corporation, 15 N.Y.S.2d 45, 257 App. Div. 632—Van Wyck v. Mannino, 9 N.Y.S.2d 684, 256 App.Div. 256, reargument denied 11 N.Y.S.2d 558, 256 App.Div. 1004—Burke, Kuipers & Mahoney v. Dallas Dispatch Co., 1 N.Y.S.2d 674, 253 App.Div. 206.
Okl.—Ray v. Board of Education of Pond Creek, Grant County, 153 P. 2d 233, 194 Okl. 472—Farmers' Coop. Ass'n v. Shaw, 42 P.2d 887, 171 Okl. 358.
Pa.—McMichael v. Hoffecker, Com. Pl., 48 Lanc.L.Rev. 437.
38 C.J. p 109 note 41.

(2) The rule that the specified remuneration is, prima facie, the amount recoverable is limited to a breach of an ordinary contract of employment of a servant on specified terms.—Burke, Kuipers & Mahoney v. Dallas Dispatch Co., 1 N.Y. S.2d 674, 253 App.Div. 206.

(3) In most other cases the general rule that the measure of damages is the difference between the contract price and the cost of performance applies.—Burke, Kuipers & Mahoney v. Dallas Dispatch Co., supra.

71. N.Y.—Palmer v. New York Herald Co., 239 N.Y.S. 619, 228 App. Div. 176.
N.C.—Durham Const. Co. v. Wright, 127 S.E. 580, 189 N.C. 456.
Wash.—Holton v. Hart Mill Co., 166 P.2d 186, 24 Wash.2d 493.

72. Conn.—Pollak v. Danbury Mfg. Co., 131 A. 426, 103 Conn. 553.
Ga.—Fried v. Portis Bros. Hat Co., 152 S.E. 151, 41 Ga.App. 30.
Or.—Smith v. Pallay, 279 P. 279, 130 Or. 282.
Pa.—Moyer v. Heilveil, 49 A.2d 514, 159 Pa.Super. 610.
Tex.—Kennon v. Schlesinger, Civ. App., 182 S.W.2d 373, error refused.
39 C.J. p 109 note 40.

Amount owing to employer is deductible from damages.—Nelson v. M. Morgenthau, Jr., Co., 169 N.Y.S. 512, 183 App.Div. 881.

73. N.Y.—McClelland v. Climax Hosiery Mills, 169 N.E. 605, 252 N.Y. 347, and remittitur amended 171 N.E. 770, 253 N.Y. 533, reargument denied 171 N.E. 781, 253 N.Y. 558.

Employee is under duty to use ordinary diligence to lessen the damages he has suffered.—Southern Properties v. Carpenter, Tex.Civ. App., 300 S.W. 963.

may have earned, or with reasonable diligence might have earned, from other employment for the balance of the term. Such money received by the employee from the employer after the breach of contract as he would not have received had he continued in the employ of the employer has also been held to be a proper item in reduction of damages.[74] Where the contract is indefinite as to the rate of wages, the measure of damages is obtained by considering the usual wages for the employment contracted for, and what time would be lost before similar employment could be obtained.[75]

Contract for permanent employment. A contract for permanent employment is not rendered so indefinite by the uncertainty of the length of life of the employee as to preclude him from recovering substantial damages for breach of such a contract.[76] The damages recoverable in such a case have been held to be the wages lost up to the time of trial plus the loss of wages based on the employee's lifetime expectancy.[77] In an action for breach of a contract to give plaintiff lifetime employment of the kind he was performing at the time of the execution of the contract, at the regular compensation for such employment, plaintiff has been limited in his recovery to compensation for the period sued for at the regular rate for the employment contracted, although at the time of the discharge plaintiff occupied a higher position with increased compensation.[78]

Indefinite or uncertain term of employment. It has been held that the measure of damages for breach of a contract of employment for an indefinite period at a monthly salary is the worth of the bargain to the employee.[79] The measure of damages for breach of a contract of employment, uncertain in point of time, has been held to be the sum due for the work done under the contract, if any, together with compensation for such future benefits as under all circumstances would probably be realized by the employee in its performance.[80]

Accrued right not abridged by subsequent happening. Where the contract is wrongfully broken by the employer, the employee may recover damages for the full amount due under the contract notwithstanding, if it had not been broken, it would have been abrogated, before its expiration, by the subsequent death of the employer.[81]

Contract terminable on notice. Where the contract of employment provides for termination thereon on the giving of a specified notice, the value of the contract constitutes the measure of damage for breach by wrongful discharge.[82] Under such a contract a discharge without the required notice has the effect, with respect to damages for the breach, of terminating the contract as of the earliest time if notice had been given.[83] Hence, where the contract provides for its continuance from year to year subject to termination as of the end of any year on the giving of a specified notice, an employee discharged during a year without having been given the required notice is entitled to recover damages for the term of a year.[84] However, when by its terms, or custom, the contract of employment may be terminated at any time on the giving of a specified notice, the damages for a wrongful discharge can be no more than the wages which would have accrued under the contract after the notice, had one been given.[85] It has also been held

74. Ala.—Standard Oil Co. v. Lloyd, 159 So. 371, 26 Ala.App. 306.

75. N.Y.—Schmerenbeck v. Funke, 17 N.Y.S. 717.

76. Mass.—Daniell v. Boston & M. R. Co., 68 N.E. 337, 184 Mass. 337.
39 C.J. p 111 note 53.

77. Mo.—Slabon v. St. Louis Car Co., App., 102 S.W.2d 939.

78. N.C.—Dotson v. F. S. Royster Guano Co., 178 S.E. 100, 207 N.C. 635.

79. Fla.—Knudsen v. Green, 156 So. 240, 116 Fla. 47.

Salary for month as damages
One employed for monthly salary whom employer wrongfully discharged during month was entitled to salary for that month, where employment was not obtainable elsewhere.—E. D. Lanford Co. v. Buck, 124 So. 418, 220 Ala. 190.

Value of relinquished employment
Contract of employment for indefinite period at stated monthly salary being terminable at any time after first month at master's pleasure, master exercising such right is not liable for special damages because of servant's relinquishment of previous employment to accept new contract.—Knudsen v. Green, 156 So. 240, 116 Fla. 47.

80. W.Va.—Rua v. Bowyer Smokeless Coal Co., 99 S.E. 213, 84 W.Va. 47.
39 C.J. p 110 note 43.

81. N.Y.—Baldwin v. Kohler, 155 N.Y.S. 196, 92 Misc. 174.

82. N.Y.—Stanley v. Chris-Craft Corporation, 21 N.Y.S 2d 898, affirmed 21 N.Y.S.2d 502, 259 App. Div. 1038, appeal denied 22 N.Y.S. 2d 926, 260 App.Div. 810.

83. Mich.—Derry v. Board of Education of City of East Saginaw, 61 N.W. 61, 102 Mich. 631.
N.J.—Tousley v. Atlantic City Ambassador Hotel Corp., Sup., 50 A.2d 472.

84. D.C.—Knipp v. Harris, 45 App. D.C. 460.
39 C.J. p 111 note 57.

Lifetime contract
Lifetime contract providing that either party may withdraw at end of year on giving specified written notice did not entitle discharged employee to recovery of wages for life expectancy as damages for employer's anticipatory breach of contract.—Eubanks v. Galveston, H. & S. A. Ry. Co., Tex.Com.App., 59 S.W.2d 825.

85. Miss.—**Corpus Juris cited in** Louisiana Oil Corporation v. Bryan, 147 So. 324, 325, 165 Miss. 157.
N.J.—**Corpus Juris cited in** Tousley v. Atlantic City Ambassador Hotel, Sup., 50 A.2d 472, 475.
N.Y.—Barth v. Addie Co., 2 N.E.2d 34, 271 N.Y. 31, reargument and amendment of remittitur denied 3 N.E.2d 211, 271 N.Y. 615—Bogy v. Berlage, 38 N.Y.S.2d 584, 265 App. Div. 249—Wanhope v. Press Co., 10 N.Y.S.2d 797, 256 App.Div. 433, ap-

that a discharge is not equivalent to a notice so as to limit the employee's damages to the period of the stipulated notice, when the discharge occurred prior to the time when notice could have been given under the contract, and particularly when the relief from liability was based on the continuance of the contract and not on its cancellation.[86]

Quantum meruit. Where a discharged employee treats the contract as rescinded, thereby barring his right to an action for breach of contract, as discussed supra § 50, he may, in an action on quantum meruit, recover the full value of the services performed regardless of the contract price.[87]

Under statute. Under some statutes an employee discharged before the expiration of the term, without any serious ground of complaint, is entitled to recover the whole salary which he would have been entitled to receive had the full term of his services arrived,[88] and, as discussed infra § 59, this right is not affected by the subsequent engagement by the employee of his services to another. Remote and conjectural damages will not be allowed under some statutes,[89] but the expense of returning to the place where plaintiff was hired and from which he removed to undertake the employment is recoverable,[90] although it has been held that the statute cannot be extended to anything else than wages.[91] The statute is a penal one[92] and does not apply to contracts of hiring purely executory in their nature.[93]

b. Elements of Damages

(1) In general
(2) Profits or commissions

(1) In General

The damages for breach of a contract of employment may include, among other items, expenses necessarily incurred in connection with the employment.

The damages for breach of a contract of employment may include expenses necessarily incurred in connection with the employment,[94] as well as expenses incurred in obtaining new employment[95]

peal granted 11 N.Y.S.2d 838, 256 App.Div. 1027, affirmed 22 N.E.2d 171, 281 N.Y. 607—Bitterman v. Gluck, 9 N.Y.S.2d 1007, 256 App. Div. 336.

Tex.—**Corpus Juris cited in** Stolz v. Wells, Civ.App., 43 S.W.2d 163, 165.

Wis.—**Corpus Juris cited in** Freiburger v. Texas Co., 257 N.W. 592, 594, 216 Wis. 546.

39 C.J. p 111 note 54.

Discharge as notice

When contract is terminable at any time on notice and servant is discharged without formal notice, discharge is to be regarded as notice, and servant may recover wages up to time of discharge, but only nominal damages for discharge.—Freiburger v. Texas Co., supra.

Consideration for contract

Where employment contract was terminable on thirty days' notice and employee was discharged without notice after being employed about seven months, in action for breach of contract and for a sum allegedly paid by employee as consideration for the contract, employee was not entitled to such sum, since he received the contract and his action affirmed it.—Bitterman v. Gluck, 9 N.Y.S.2d 1007, 256 App.Div. 336.

86. N.Y.—Griffin v. Brooklyn Ball Club, 73 N.Y.S. 864, 68 App.Div. 566, affirmed 66 N.E. 1109, 174 N.Y. 535.

39 C.J. p 111 note 56.

87. Cal.—Neblett v. Getty, 66 P.2d 473, 20 Cal.App.2d 65—Lessing v. Gibbons, 45 P.2d 258, 6 Cal.App. 2d 598.

Mass.—Dalton v. American Ammonia Co., 127 N.E. 504, 236 Mass. 105.

Mich.—Nyman v. B. S. Chapin, Inc., 238 N.W. 195, 255 Mich. 442.

88. La.—Travis v. Swearingen, App., 143 So. 509.

39 C.J. p 110 note 46.

Contract price limits recovery

La.—Nickerson v. Burnstein, Inc., 115 So. 271, 164 La. 1066.

89. La.—Breant v. Cazelles, 4 La. App., Orleans, 333.

90. La.—Breant v. Cazelles, supra.

91. La.—Shea v. Schlatre, 1 Rob. 319.

Board and lodging to be furnished by the employer are not within the statute.—Shea v. Schlatre, supra.

92. La.—Wells v. Sherrill Hardwood Lumber Co., 92 So. 706, 151 La. 1081.

93. La.—Lloyd v. Dickson, 46 So. 919, 121 La. 915—Trefethen v. Locke, 16 La.Ann. 19.

94. Ga.—National Manufacture & Stores Corporation v. Dekle, 173 S.E. 408, 48 Ga.App. 515.

N.Y.—Robertson v. Charles Frohman, Inc., 191 N.Y.S. 55, 198 App. Div. 782.

39 C.J. p 111 note 64.

Clothing

In action by cashier for wrongful discharge by summer resort hotel, permitting jury to consider items of clothing allegedly purchased by plaintiff to enable her to carry out her duties was error, since the cost of such items was not a direct loss caused by alleged breach.—West v. Scaroon Hotel Corp., 67 N.Y.S.2d 163, 187 Misc. 539.

Transportation expenses

(1) Damages for wrongful discharge at a place away from employee's home have been held not to include expenses in coming from or returning to such home.—Rench v. Hayes Equipment Mfg. Co., 8 P.2d 346, 134 Kan. 865, 84 A.L.R. 166.

(2) It has also been held that expenses of transportation may be included, but not hotel bills or other expenses which he would have to bear in any event.—Robertson v. Charles Frohman, Inc., 191 N.Y.S. 55, 198 App.Div. 782.

Tort damages

Where contract made no reference to a distributing organization, plaintiff could not recover for defendants' appropriation of plaintiff's distributing organization, since, while it is actionable for a third person having knowledge that an employee is working under contract to induce such employee to break his contract, such conduct is a tort and not a breach of contract.—Buxbom v. Smith, Cal., 132 P.2d 4, reheard 145 P.2d 305, 23 Cal.2d 535.

95. Kan.—Rench v. Hayes Equipment Mfg. Co., 8 P.2d 346, 134 Kan. 865, 84 A.L.R. 166.

Md.—Atholwood Development Co. v. Houston, 19 A.2d 706, 179 Md. 441.

39 C.J. p 111 note 65.

Reduction of mitigating elements

The reasonable cost of obtaining other employment goes to reduce the amount of earnings received from such other employment and offered in mitigation of the employee's damages.—Ray v. Board of Education of Pond Creek, Grant County, 153 P.2d 233, 194 Okl. 472.

and in removal to the new place of employment.[96] Where a rule of an employer provides for an indemnity in case of a dismissal, the employee is entitled to have it included in damages for breach of contract,[97] but recovery cannot be had of a payment not absolutely due, but contingent on the employer's continuing in business.[98] Where another consideration than the payment of money is to be part of compensation for the services, as in the case of the furnishing of board and lodging[99] or an allowance therefor,[1] or the right to the use of a house,[2] damages are recoverable for the deprivation of such right or use, and where a servant whose compensation in part is to be derived from the use of a house is, by a wrongful discharge, forced to remove, he may also recover the cost of such removal.[3]

As discussed supra subdivision a of this section, the stipulated wages for the unexpired term are prima facie the measure of recovery in actions for breach of contract by wrongful discharge, and it has been held that, in the absence of a wrongful act tantamount to a trespass accompanied by actual or constructive force, no additional elements, over and above the stipulated wages for the unexpired term, can enter into making up the measure of damages.[4] It is also generally held that in the absence of any agreement therefor, damages are not recoverable for an injury to the employee's good name, character, or reputation,[5] or for an injury to his business reputation[6] or good will,[7] or for an injury to his health,[8] or for physical[9] or mental[10] pain and suffering, or for the loss of advantages which would have accrued by a continuation of employment.[11]

A loss suffered by the employee in complying with the terms of the contract of employment has been held not to be a proper element of damages.[12] However, where the employer sold stock to the employee as an inducement for entering into the employment contract, the employee has been held entitled to recover the value of the stock predicated on the amount he was required to pay therefor

96. Okl.—Ray v. Board of Education of Pond Creek, Grant County, supra.
39 C.J. p 111 note 65.

97. N.Y.—Schott v. La Compagnie Generale Trans-Atlantique, 102 N.Y.S. 901, 52 Misc. 236.

98. N.Y.—McCargo v. Jergens, 99 N.E. 838, 206 N.Y. 363.

99. Iowa.—Weeksman v. Powell, 160 N.W. 377, 178 Iowa 991.

1. Mo.—Estes v. Desnoyers Shoe Co., 56 S.W. 316, 155 Mo. 577.
39 C.J. p 112 note 73.

2. Miss.—Ross v. Fair, 110 So. 841, 145 Miss. 18.
Or.—Smith v. Pallay, 279 P. 279, 130 Or. 282.
39 C.J. p 112 note 74.

Part performance
Employee may not recover full value of residence, to be given him in part payment for three years' services, on performance of but part of services.—Offeman v. Robertson-Cole Studios, 251 P. 830, 80 Cal.App. 1.

3. Tex.—Hall v. White, Civ.App., 208 S.W. 669.
39 C.J. p 112 note 75.

4. Tenn.—Godson v. MacFadden, 39 S.W.2d 287, 162 Tenn. 528.

5. N.Y.—Sinclair v. Positype Corporation of America, 261 N.Y.S. 900, 237 App.Div. 525.
39 C.J. p 112 note 67 [a].

6. N.J.—Tousley v. Atlantic City Ambassador Hotel Corp., 50 A.2d 472.
N.Y.—**Corpus Juris cited in** Sinclair v. Positype Corporation of America, 261 N.Y.S. 900, 905, 237 App. Div. 525.
39 C.J. p 112 note 66.

7. Cal.—Buxbom v. Smith, 132 P.2d 4, reheard 145 P.2d 305, 23 Cal. 2d 535.
N.Y.—Horn v. Atlas Corrugated Case Co., 12 N.Y.S.2d 508, 257 App.Div. 194.

Loss of patronage and good will may not be recovered in salesman's action for unlawful discharge.—Horn v. Atlas Corrugated Case Co., supra.

8. Cal.—Westwater v. Grace Church, 73 P. 1055, 140 Cal. 339.

9. Ala.—W. B. Davis & Son v. Ruple, 130 So. 772, 222 Ala. 52.

10. Ala.—W. B. Davis & Son v. Ruple, supra.
Fla.—**Corpus Juris cited in** Hazen v. Cobb, 117 So. 853, 856, 96 Fla. 151.
39 C.J. p 112 note 68.

Humiliation, indignity, and shame
(1) Humiliation by reason of discharge is not element recoverable as damages for breach of contract of employment.
Fla.—Hazen v. Cobb, 117 So. 853, 96 Fla. 151.
N.C.—Elmore v. Atlantic Coast Line R. Co., 131 S.E. 633, 191 N.C. 182, 43 A.L.R. 1072.
(2) Damages to employee, wrongfully discharged and forcibly removed from mill, subjecting employee to humiliation, indignity, and shame, are not recoverable in action ex contractu.—W. B. Davis & Son v. Ruple, 130 So. 772, 222 Ala. 52.
(3) Damage for injury to feelings is not recoverable.—Westwater v. Grace Church, 73 P. 1055, 140 Cal. 339.

11. N.Y.—Inglesli v. Hickson, Inc., 186 N.Y.S. 846, 195 App.Div. 585.
39 C.J. p 112 note 69.

12. Or.—Smith v. Pallay, 279 P. 279, 130 Or. 282.

Reason for rule
He is not entitled to recover for what he has agreed to do in performing the contract on his part and at the same time recover what the employer promised to pay for his performance.—Smith v. Pallay, supra.

Loss of organization
Where plaintiff sued for breach of contract of employment to manage publication of a newspaper, damages awarded for loss of trained organization and good will could not be sustained, since in performing contract alleged plaintiff needed no such organization, and defendants' refusal to perform contract could not have resulted in such damage.—Buxbom v. Smith, Cal., 132 P.2d 4, reheard 145 P.2d 305, 23 Cal.2d 535.

Sale of car
The employee cannot recover damages suffered in the sale of a car which he was required to purchase by the contract of employment.—Smith v. Pallay, 279 P. 279, 130 Or. 282.

Employee agreeing to give up law practice as part consideration for employment could not recover compensation therefor as damages for wrongful discharge.—Smith v. Pallay, supra.

in accordance with the terms of the contract.[13]

Interest. Interest from the date of discharge has been held allowable as an element of damages in an action for breach of contract by wrongful discharge,[14] at least where the contract of employment is in writing.[15] It has also been held that an employee wrongfully discharged before the expiration of his contract of employment may recover interest on the amount of wages due to him according to contract from the date of his discharge to the expiration of the period,[16] if the action is not brought before the expiration of the agreed term.[17]

(2) Profits or Commissions

Profits or commissions, if definitely ascertainable, are recoverable as damages in an action for wrongful discharge.

Profits or commissions, if definitely ascertainable, which the employee might have realized had he been permitted to perform under the employment contract are recoverable as damages,[18] and it has generally been held that the fact that the damages consist of profits lost will not prevent their recovery if the evidence furnishes reasonable data on which to compute them.[19] In the case of an employment on a commission basis with the employee bearing the expenses entailed in obtaining business for the employer, the damages are the probable gross commissions for the balance of the term less expenses which necessarily would have been incurred by the employee in connection therewith.[20] The damages of an employee on a commission or profit-sharing basis who has been allowed a definite drawing account have been held to be at least equal to such drawing account, when the employer has put it out of the power of the employee to prove absolutely what the amount of his commissions or profits would have been;[21] and this is true although the drawing account exceeded the commissions earned up to the time of discharge[22] and even though no commissions had been earned up to such time against which the drawing account could have been applied.[23] In the absence of an express or implied agreement on the part of the employee to repay the advances made, the measure of damages in the case of a salesman tendering his services and earning

13. N.Y.—Parsil v. Emery, 272 N.Y. S. 439, 242 App.Div. 653.

14. Minn.—Bang v. International Sisal Co., 4 N.W.2d 113, 212 Minn. 135, 141 A.L.R. 657.

15. Ill.—Catholic Press Co. v. Ball, 69 Ill.App. 591.

16. Mo.—Laming v. Peters Shoe Co., 71 Mo.App. 646.
N.Y.—Crawford v. Mail & Express Pub. Co., 47 N.Y.S. 747, 22 App. Div. 54, reversed on other grounds 57 N.E. 616, 163 N.Y. 404, reargument denied 58 N.E. 1086, 164 N. Y. 568.

17. N.Y.—Crawford v. Mail & Express Pub. Co., supra.
33 C.J. p 212 note 15.

Installment contract
In an action for breach of contract of employment, brought before the end of the term, plaintiff was not entitled to interest on the whole amount sued for from institution of the suit, but only on monthly installments of salary as they became due, before or after institution of the suit.—Puller v. Royal Casualty Co., 196 S.W. 755, 271 Mo. 369.

Wages due in future
Interest on wages due in the future is not allowable as an element of damages.—Hollwedel v. Duffy-Mott Co., 188 N.E. 266, 263 N.Y. 95, 90 A.L.R. 1312, motion denied 188 N.E. 102, 262 N.Y. 643.

18. Ga.—Atlanta Plow Co. v. Burnes, 167 S.E. 749, 46 Ga.App. 448.
Mich.—Callender v. Myers Regulator Co., 230 N.W. 154, 250 Mich. 298.
Minn.—Olson v. Naymark, 225 N.W. 275, 177 Minn. 383.
N.Y.—Hedeman v. Fairbanks, Morse & Co., 36 N.E.2d 129, 286 N.Y. 240 —Chapin v. Learnard, 158 N.E. 58, 246 N.Y. 158, reargument denied 159 N.E. 679, 246 N.Y. 629—Stanley v. Chris-Craft Corporation, 21 N. Y.S.2d 898, affirmed 21 N.Y.S.2d 502, 259 App.Div. 1038, appeal denied 22 N.Y.S.2d 926, 260 App.Div. 810.
Tex.—Bender v. Mettler, Civ.App., 17 S.W.2d 182.
39 C.J. p 112 note 79.

Reasonable probability
(1) Salesman's damages for wrongful discharge are measured by commissions which he might have earned during remainder of term under reasonable probabilities.—Prescott v. Buffalo Fire Appliance Corporation, 260 N.Y.S. 840, 237 App.Div. 198, affirmed 188 N.E. 27, 262 N.Y. 475.

(2) Commissions which salesman might have received from reorders during his contract period if original orders had been properly filled by employer would be entirely speculative, and could not be recovered in salesman's action for wrongful discharge.—Horn v. Atlas Corrugated Case Co., 12 N.Y.S.2d 508, 257 App. Div. 194.

Profits from sale of stock
(1) Where contract entitled employee to share in net profits realized by employer from the sale of certain stock and the employer exchanged such stock for other securities, the employee is entitled to share in the increase in value of the securities taken in exchange.—Chapin v. Learnard, 158 N.E. 58, 246 N.Y. 158, reargument denied 159 N.E. 679, 246 N.Y. 629.

(2) Profits on the exchange of the stock are determinable by conditions existing when contract was breached.—Chapin v. Learnard, 159 N.E. 679, 246 N.Y. 629.

Damages held conjectural
In action by discharged club manager whose agreed compensation was per cent of sums obtained from members, where evidence did not show how many new members were obtained after discharge, damages after discharge were held too conjectural.—Willis v. S. M. H. Corporation, 181 N.E. 79, 259 N.Y. 144, motion denied 182 N.E. 211, 259 N.Y. 629.

19. Mich.—Callender v. Myers Regulator Co., 230 N.W. 154, 250 Mich. 298.
39 C.J. p 112 note 79.

20. N.Y.—Burke, Kuipers & Mahoney v. Dallas Dispatch Co., 1 N.Y.S.2d 674, 253 App.Div. 206—Palmer v. New York Herald Co., 239 N.Y.S. 619, 228 App.Div. 176.
Ohio.—Swisher v. Kimbrough, 157 N. E. 823, 25 Ohio App. 233.

21. N.Y.—Gifford v. Waters, 67 N. Y. 80.
39 C.J. p 113 note 80.

22. N.Y.—Present v. Kassopoulous, 166 N.Y.S. 754.

23. N.Y.—Levay v. Goldwasser, 133 N.Y.S. 456, 75 Misc. 461.
39 C.J. p 113 note 82.

nothing during the unexpired period is prima facie his stipulated drawing account for such period.[24] However, a drawing account given only for traveling expenses does not establish a minimum of damages,[25] and, when the drawing account includes amounts to be disbursed by the employee for traveling expenses, the probable amount of such expenses, as based on the average of his expenses while in the employ, should be deducted.[26] On breach of a contract for services to be performed on commission, where the injured party has partly performed and has earned and collected profits which were necessarily earned as a result of the expenditures made by him in performing the contract, he cannot recover both the expenses incurred and the profits earned.[27]

When a contract of employment contemplates not only the services, but the use also of property and equipment of the employee, he may recover for the loss of the profits he would have received under the contract,[28] less any net sums he may have received from his services and the use of his equipment, after deducting his expenses, in other employment.[29] It has also been held that, where an employee, by reason of the breach of the contract of the employer, lost his equipment through his inability to pay installments due thereon and which he would have been able to pay if not wrongfully discharged, he could recover the profits which he would have made from the use of his property.[30]

c. Punitive Damages

As a general rule exemplary or punitive damages are not recoverable in an action for wrongful discharge.

Although punitive damages ordinarily are not recoverable,[31] in some jurisdictions, where the discharge is accompanied by malicious and oppressive conduct, the employer is liable not only for actual, but also for exemplary, damages.[32]

d. Nominal Damages

Only nominal damages are recoverable in an action for wrongful discharge if no reasonable basis for estimating the damages is found in the evidence.

Only nominal damages can be recovered when by reason of the mode of compensation[33] or of the uncertainty of the contract[34] the evidence affords no reasonably definite basis on which to estimate the damages. On the other hand, although an employee fails to show substantial damage, he can recover at least nominal damages for a breach of contract by the employer,[35] and this has been held to be true even though the salary earned in substituted employment is the same as that contracted for[36] or even though he is benefited by the discharge.[37]

e. As Dependent on Time of Bringing Suit

(1) Suit brought before expiration of term
(2) Suit brought after expiration of term

(1) Suit Brought before Expiration of Term

(a) Trial before expiration of term
(b) Trial after expiration of term

(a) Trial before Expiration of Term

Where an action for wrongful discharge is tried before expiration of the term the authorities differ on the question whether damages are to be computed up to the time of trial or for the whole of the unexpired term.

There is a decided conflict of authority as to the damages recoverable where the action is tried before the expiration of the term. Some decisions have held that damages are to be computed up to, but not after, the time of trial,[38] while in other

24. N.Y.—Denihan v. Finn-Iffland & Co., 256 N.Y.S. 801, 143 Misc. 525.

25. N.Y.—Aronson v. Wollins Waist Co., Inc., 192 N.Y.S. 652.

26. N.Y.—Kahn v. Antevil, 290 N.Y.S. 367, 248 App.Div. 889—Casper v. Naef, 141 N.Y.S. 568, 80 Misc. 492.

27. Ga.—Pacific Mut. Life Ins. Co. v. Caraker, 121 S.E. 876, 31 Ga. App. 707.

28. Iowa.—Wood v. Ravenscroft, 112 N.W. 640, 135 Iowa 346.
39 C.J. p 112 note 76.

29. Iowa.—Wood v. Ravenscroft, supra.
39 C.J. p 112 note 77.

30. Pa.—Schmitt v. Republic Collieries Co., 112 A. 58, 269 Pa. 75.

31. N.C.—Richardson v. Wilmington & W. R. Co., 35 S.E. 235, 126 N.C. 100.
39 C.J. p 113 note 88.

32. Tex.—Scheps v. Giles, Civ.App., 222 S.W. 348.
39 C.J. p 114 note 89.

33. N.Y.—Wooldridge v. Shea, 175 N.Y.S. 130, 186 App.Div. 705.

34. Ind.—Atkins v. Van Buren School Tp., 77 Ind. 447.
Mich.—Sax v. Detroit, G. H. & M. Ry. Co., 89 N.W. 368, 129 Mich. 502.
Minn.—Bolles v. Sachs, 33 N.W. 862, 37 Minn. 315.
39 C.J. p 114 note 93.

35. Miss.—B. Bluethenthal Co. v. McDougal, 141 So. 291, 163 Miss. 406, suggestion of error overruled 142 So. 13, 163 Miss. 406.
39 C.J. p 114 note 94.

36. Colo.—Ryan v. Delta County School Dist. No. 2, 189 P. 782, 68 Colo. 370.

37. Conn.—Excelsior Needle Co. v. Smith, 23 A. 693, 61 Conn. 56.

38. Ark.—Seaman Stores Co. v. Porter, 23 S.W.2d 249, 180 Ark. 860.
Ill.—Mt. Hope Cemetery Ass'n v. Weidenman, 28 N.E. 834, 139 Ill. 67—Corby v. Seventy-One Hundred Jeffery Ave. Bldg. Corp., 60 N.E. 2d 236, 325 Ill.App. 442.
39 C.J. p 114 note 99.
Right to interest as element of damage as affected by time of bringing suit see supra subdivision b (1) of this section.

Damages to date of institution of action only are recoverable.—Robinson v. McAlhaney, 6 S.E.2d 517, 216 N.C. 674.

jurisdictions it has been held that damages for the whole term are recoverable.[39] Where damages for the whole term are recoverable, the measure of damages is the present value of the contract to the employee.[40] While the discharged employee's damages may be measured prima facie by the unpaid wage, it is the present worth of the obligation to pay the wages at a time in the future that fixes the damages, in fixing which may be considered not only time, but also the uncertainty of human life.[41] Also to be taken into consideration are such elements as the probable future earnings, possible sickness, and discount for payment in advance.[42]

(b) Trial after Expiration of Term

Where an action for wrongful discharge, although instituted prior thereto, is tried after expiration of the contract term, damages are to be computed as though the action were instituted after such expiration.

Where an employee's action is brought before the expiration of the term of service, but the trial is had after the expiration of the term, damages may be awarded as though the suit had been brought after the expiration of the term.[43]

(2) Suit Brought after Expiration of Term

Where an action for wrongful discharge is brought after the expiration of the term of services, the servant is entitled to full damages.

Where an action for wrongful discharge is brought after the expiration of the term of services, the servant is entitled to full damages,[44] which, as discussed supra subdivision a of this section, are prima facie the stipulated wages for the term.

§ 59. —— Other Employment as Ground for Reduction of Damages

a. In general
b. Efforts to obtain; nature of employment
c. Reëmployment by master
d. Where employee works for himself

a. In General

As a general rule compensation which the wrongfully discharged employee may have earned, or by diligence might have earned, from other similar employment during the unexpired term goes to mitigate or reduce the damages which he may recover.

In Texas

(1) The rule of the text is generally followed.—Litchenstein v. Brooks, 12 S.W. 975, 75 Tex. 196—Galveston, H. & S. A. Ry. Co. v. Eubanks, Civ. App., 42 S.W.2d 475, affirmed Eubanks v. Galveston, H. & S. A. Ry. Co., Com.App., 59 S.W.2d 825—Louisiana, Rio Grande Canal Co. v. Quinn, Civ.App., 161 S.W. 375—Pacific Express Co. v. Walters, 93 S. W. 497, 42 Tex.Civ.App. 355.

(2) A discharged employee, suing for damages before expiration of the contract, waives damages for the period following the trial.—Southern Properties v. Carpenter, Civ.App., 21 S.W.2d 372, error dismissed—Southern Properties v. Carpenter, Civ.App., 300 S.W. 963.

(3) An employee who asks only for damages to the time of trial waives any claim for the balance.—Weber Gas & Gasoline Engine Co. v. Bradford, 79 S.W. 46, 34 Tex.Civ. App. 543.

(4) However, in an early case it was held that the present value of payment may be considered by the jury in estimating damages, where the action is brought before all wages are due.—Kelly Plow Co. v. London, 125 S.W. 974, 59 Tex.Civ. App. 208.

39. U.S.—Russell v. Barnes Foundation, D.C.Pa., 52 F.Supp. 827, affirmed, C.C.A., 143 F.2d 871, certiorari denied Barnes Foundation v. Russell, 65 S.Ct. 122, 323 U.S. 771, 89 L.Ed. 616.
Cal.—Wood v. Girot, 282 P. 981, 102 Cal.App. 160.
Or.—Smith v. Pallay, 279 P. 279, 130 Or. 282.
39 C.J. p 114 note 1.

Reason for rule

The contract of employment is entire and not severable.—Wood v. Girot, 282 P. 981, 102 Cal.App. 160.

Reasonable certainty

Damages which will arise with reasonable certainty after the trial are recoverable.—Smith v. Pallay, 279 P. 279, 130 Or. 282.

Damages under optional renewal contract

Damages for the renewal period under a contract giving the employee an option to renew for an additional period are not too speculative and are recoverable.—Detroit Graphite Co. v. Hoover, C.C.A.Mass., 41 F. 2d 490.

40. N.Y.—Coyle v. Howard Trucking Corporation, 1 N.Y.S.2d 573, 253 App.Div. 832—Palmer v. New York Herald Co., 239 N.Y.S. 619, 228 App.Div. 176.

41. Mo.—Puller v. Royal Casualty Co., 196 S.W. 755, 271 Mo. 369.
N.Y.—Hollwedel v. Duffy-Mott Co., 188 N.E. 266, 263 N.Y. 95, 90 A.L.R. 1312.
Ohio.—Rorick v. Gilbert, 186 N.E. 756, 45 Ohio App. 96, affirmed Gilbert v. Rorick, 186 N.E. 90, 125 Ohio St. 636.

Basis for computation of damages to discharged employee for breach of unexpired employment contract is total amount of installments accruing after breach which employee would in jury's opinion have lived to earn, subject to all proved diminutions.—Hollwedel v. Duffy-Mott Co., 264 N.Y.S. 745, 238 App.Div. 468, motion denied 188 N.E. 102, 262 N.Y. 643, modified on other grounds 188 N.E. 266, 263 N.Y. 95, 90 A.L.R. 1312.

Acceleration of wages

Employer's wrongful discharge of employee did not entitle employee to acceleration of due date of future wages under unexpired term.—Hollwedel v. Duffy-Mott Co., 188 N.E. 266, 263 N.Y. 95, 90 A.L.R. 1312.

42. Ohio.—Rorick v. Gilbert, 186 N. E. 756, 45 Ohio App. 96, affirmed Gilbert v. Rorick, 186 N.E. 90, 125 Ohio St. 636.

43. Ark.—Seaman Stores Co. v. Porter, 23 S.W.2d 249, 180 Ark. 860.
Mo.—**Corpus Juris quoted in** Jones v. Schultz, App., 295 S.W. 477, 479.
39 C.J. p 115 note 2.

Form of action immaterial

Whether employee's action against employer for wrongful discharge was for recovery of wages or damages for breach of contract was immaterial, where term of contract had expired at time of trial since measure of recovery was the same.—Standard Laundry Service v. Pastelnick, 184 S.E. 193, 166 Va. 125.

44. Ark.—Seaman Stores Co. v. Porter, 23 S.W.2d 249, 180 Ark. 860.

A discharged servant cannot lie by unemployed for the remainder of the term, and then claim full compensation; he is bound to make the best use of his time, and seek other employment.[45] Such compensation as he may have earned or received,[46] or by the exercise of due diligence might have earned or received,[47] from other similar employment during the unexpired term generally goes to

45. Ala.—Navco Hardwood Co. v. Bass, 108 So. 452, 214 Ala. 553—Standard Oil Co. v. Lloyd, 159 So. 371, 26 Ala.App. 306.
Cal.—Smetherham v. Laundry Workers' Union, Local No. 75, 111 P.2d 948, 44 Cal.App.2d 131.
Ky.—Louisville & N. R. Co. v. Wells, 160 S.W.2d 16, 289 Ky. 700—Abrams v. Jackson County Board of Education, 18 S.W.2d 1000, 230 Ky. 151.
Md.—Atholwood Development Co. v. Houston, 19 A.2d 706, 179 Md. 441.
Mich.—Flickema v. Henry Kraker Co., 233 N.W. 362, 252 Mich. 406, 72 A.L.R. 1046.
Miss.—Upton v. Adock, 110 So. 774, 145 Miss. 372.
Mo.—Vernon v. Rife, App., 294 S.W. 747.
Neb.—Stoffel v. Metcalfe Const. Co., 17 N.W.2d 3, 145 Neb. 450.
Pa.—McMichael v. Hoffecker, Com. Pl., 48 Lanc.L.Rev. 437.
Tex.—Galveston, H. & S. A. Ry. Co. v. Eubanks, Civ.App., 42 S.W.2d 475, affirmed Eubanks v. Galveston, Com.App., H. & S. A. Ry. Co., 59 S.W.2d 825—Hoffer Oil Corporation v. Hughes, Civ.App., 16 S.W.2d 901—Southern Properties v. Carpenter, Civ.App., 300 S.W. 963.
Vt.—Holloway v. Levine, 180 A. 889, 107 Vt. 396.
Va.—Standard Laundry Service v. Pastelnick, 184 S.E. 193, 166 Va. 125.
39 C.J. p 94 note 41, p 115 note 12.
Evidence as to other employment on question of damages see supra § 53.

Duty arises only after discharge
Okl.—Levy v. Tharrington, 62 P.2d 641, 178 Okl. 276.
Wash.—Hansen v. Columbia Breweries, 122 P.2d 489, 12 Wash.2d 554.

Doctrine of constructive service, discussed supra § 50, does not permit an employee who has been wrongfully discharged to remain willfully idle during the period for which he had been engaged.—James v. Allen County, 6 N.E. 246, 44 Ohio St. 226, 234, 58 Am.R. 821—12 C.J. p 1306 note 22.

46. U.S.—Pierce v. Tennessee Coal, Iron & R. Co., Ala., 19 S.Ct. 335, 173 U.S. 1, 43 L.Ed. 591—Taylor v. Tulsa Tribune Co., C.C.A.Okl., 136 F.2d 981—Russell v. Barnes Foundation, D.C.Pa., 52 F.Supp. 827, affirmed, C.C.A., 143 F.2d 871, certiorari denied Barnes Foundation v. Russell, 65 S.Ct. 122, 323 U.S. 771, 89 L.Ed. 616—Russell v. Barnes Foundation, D.C.Pa., 50 F.Supp. 174, appeal dismissed, C.C.A., 136 F.2d 654.
Ala.—Standard Oil Co. v. Lloyd, 159 So. 371, 26 Ala.App. 306.
Ark.—Gentry v. Harrison, 110 S.W.2d 497, 194 Ark. 916—Seaman Stores Co. v. Porter, 23 S.W.2d 249, 180 Ark. 860.
Cal.—De La Falaise v. Gaumont-British Picture Corporation, 103 P.2d 447, 39 Cal.App.2d 461—Goudal v. Cecil B. De Mille Pictures Corporation, 5 P.2d 432, 118 Cal. App. 407, hearing denied 7 P.2d 174, 118 Cal.App. 407.
Ind.—H. C. Bay Co. v. Kroner, 149 N.E. 184, 183 Ind.App. 541.
Ky.—Louisville & N. R. Co. v. Wells, 160 S.W.2d 16, 289 Ky. 700—Torson Const. Co. v. Grant, 66 S.W.2d 79, 251 Ky. 800—Abrams v. Jackson County Board of Education, 18 S.W.2d 1000, 230 Ky. 151.
Md.—Atholwood Development Co. v. Houston, 19 A.2d 706, 179 Md. 441.
Mo.—McGee v. St. Joseph Belt Ry. Co., 93 S.W.2d 1111, 233 Mo.App. 111—Hume v. Miller Hatcheries, App., 51 S.W.2d 179—Jones v. Schultz, App., 295 S.W. 477.
Neb.—Stoffel v. Metcalfe Const. Co., 17 N.W.2d 3, 145 Neb. 450.
N.Y.—Hollwedel v. Duffy-Mott Co., 188 N.E. 266, 263 N.Y. 95, 90 A.L.R. 1312—Van Wyck v. Mannino, 9 N.Y.S.2d 684, 256 App.Div. 256, reargument denied 11 N.Y.S.2d 558, 256 App.Div. 1004—Sinclair v. Positype Corporation of America, 261 N.Y.S. 900, 237 App.Div. 525—Palmer v. New York Herald Co., 239 N.Y.S. 619, 228 App.Div. 176.
N.C.—Durham Const. Co. v. Wright, 127 S.E. 580, 189 N.C. 456.
Pa.—Seltzer v. City of Reading, 30 A.2d 177, 151 Pa.Super. 226.
Tex.—Fairbanks, Morse & Co. v. Carsey, Civ.App., 109 S.W.2d 985, error dismissed.
Va.—Standard Laundry Service v. Pastelnick, 184 S.E. 193, 166 Va. 125.
39 C.J. p 94 note 42, p 115 note 13.

Salary lost to time of other employment is recoverable as damages.—Rench v. Hayes Equipment Mfg. Co., 8 P.2d 346, 134 Kan. 865, 84 A.L.R. 166.

Unemployment insurance receipts
Funds received by discharged employee from unemployment compensation fund are not deductible, as compensation received from other employment, in mitigation of damages recoverable by him from former employer for breach of employment contract.—Bang v. International Sisal Co., 4 N.W.2d 113, 212 Minn. 135, 141 A.L.R. 657.

47. U.S.—Pierce v. Tennessee Coal, Iron & R. Co., Ala., 19 S.Ct. 335, 173 U.S. 1, 43 L.Ed. 591—Taylor v. Tulsa, C.C.A.Okl., 136 F.2d 981—Russell v. Barnes Foundation, D.C.Pa., 52 F.Supp. 827, affirmed, C.C.A., 143 F.2d 871, certiorari denied Barnes Foundation v. Russell, 65 S.Ct. 122, 323 U.S. 771, 89 L.Ed. 616—Russell v. Barnes Foundation, D.C.Pa., 50 F.Supp. 174, appeal dismissed, C.C.A., 136 F.2d 654.
Ark.—Gentry v. Harrison, 110 S.W.2d 497, 194 Ark. 916—Seaman Stores Co. v. Porter, 23 S.W.2d 249, 180 Ark. 860.
Cal.—De La Falaise v. Gaumont-British Picture Corporation, 103 P.2d 447, 39 Cal.App.2d 461—Goudal v. Cecil B. De Mille Pictures Corporation, 5 P.2d 432, 118 Cal.App. 407, hearing denied 7 P.2d 174, 118 Cal.App. 407—Wood v. Girot, 282 P. 981, 102 Cal.App. 160.
Ga.—Waynesboro Planing Mill v. Hargrove, 127 S.E. 665, 33 Ga.App. 684.
Ind.—H. C. Bay Co. v. Kroner, 149 N.E. 184, 83 Ind.App. 541.
Ky.—Louisville & N. R. Co. v. Wells, 160 S.W.2d 16, 289 Ky. 700—Torson Const. Co. v. Grant, 66 S.W.2d 79, 251 Ky. 800—Abrams v. Jackson County Board of Education, 18 S.W.2d 1000, 230 Ky. 151.
Md.—Atholwood Development Co. v. Houston, 19 A.2d 706, 179 Md. 441.
Mo.—McGee v. St. Joseph Belt Ry. Co., 93 S.W.2d 1111, 233 Mo.App. 111—South Side Buick Auto Co. v. Schmitter, App., 5 S.W.2d 687—Jones v. Schultz, App., 295 S.W. 477.
Mont.—Miller v. Yellowstone Irr. Dist., 9 P.2d 795, 91 Mont. 538.
Neb.—Stoffel v. Metcalfe Const. Co., 17 N.W.2d 3, 145 Neb. 450.
N.Y.—Hollwedel v. Duffy-Mott Co., 188 N.E. 266, 263 N.Y. 95, 90 A.L.R. 1312—Van Wyck v. Mannino, 9 N.Y.S.2d 684, 256 App.Div. 256, reargument denied 11 N.Y.S.2d 558, 256 App.Div. 1004—Sinclair v. Positype Corporation of America, 261 N.Y.S. 900, 237 App.Div. 525.
N.C.—Durham Const. Co. v. Wright, 127 S.E. 580, 189 N.C. 456.
Tenn.—Godson v. MacFadden, 39 S.W.2d 287, 162 Tenn. 528.
Tex.—Kennon v. Schlesinger, Civ.App., 182 S.W.2d 373, error refused—Galveston, H. & S. A. Ry. Co. v. Eubanks, Civ.App., 42 S.W.2d 475, affirmed, Com.App., Eubanks v. Galveston, H. & S. A. Ry. Co., 59 S.W.2d 825.
Va.—Standard Laundry Service v.

mitigate or reduce the damages which he may recover. The rule applies although the contract of employment includes not only the personal services of plaintiff, but also those of such others as are necessary for the performance of the contract.[48] Where the amount received in other employment equals or exceeds that contracted for, there can be no recovery.[49]

An exception to the rule requiring the employee to mitigate damages exists under statutes providing that an employee wrongfully discharged may recover for the full term for which he was employed.[50] An exception also exists in cases where the services contemplated by the contract of employment are consistent with the pursuit of other duties by the employee and do not purport to occupy all of his time.[51] Thus excluded from the rule is the case of a salesman or part-time servant when the money earned by him after the discharge could likewise have been earned by him without a violation of his duty under the contract if he had not been discharged,[52] even though he made more money after the breach than before.[53] On the other hand, one who, by the terms of his contract, is permitted to do similar work for others cannot, on his discharge, recover damages based on the loss of his earnings from such others, these being too remote and speculative.[54] The rule also is not applicable where the contract of hiring is not for a specified length of time, but for the performance of certain work within a time set, during which time the employee is obligated to keep himself in readiness at all times.[55]

Incapacitation or illness. If a discharged employee whose duty it is to obtain other employment so as to reduce the amount of the employer's liability willfully incapacitates himself, it is proper to find and deduct the earnings of which he deprived himself by the incapacitation.[56] The period of a temporary illness cannot be deducted from the period for which the wrongfully discharged employee can recover damages,[57] nor is his right of recovery affected by a sickness in the new employment, for which he was not discharged, although, had he been retained in the original employment, it would have been a sufficient ground for discharge under the terms of the contract;[58] but it has been held that, where the contract of employment provided that no compensation was to be paid during disability, and the servant was ill for the greater part of the unexpired term after discharge so that he would not have received under his employment more than he received elsewhere, the jury were justified in finding that he sustained no damages.[59]

b. Efforts to Obtain; Nature of Employment

Generally a wrongfully discharged employee is required to use only reasonable diligence to obtain other employment of similar or substantially the same character and grade as that from which he was discharged.

Pastelnick, 184 S.E. 193, 166 Va. 125.
39 C.J. p 115 note 13.

Contract to pay unjustly discharged employee "for all time lost" required only payment for loss of earnings, and did not set aside common-law rule as to measure of damages for breach of contract and substitute new measure.—Eubanks v. Galveston, H. & S. A. Ry. Co., Tex. Com.App., 59 S.W.2d 825.

Vacation trip
In computing damages recoverable, the time spent by the employee on a vacation trip was properly deducted.—Chas. S. Stifft Co. v. Florsheim, 159 S.W.2d 748, 203 Ark. 1043.

Partial defense only
Ill.—Jones v. Stoneware Pipe Co., 277 Ill.App. 18.
Md.—Atholwood Development Co. v. Houston, 19 A.2d 706, 179 Md. 441.

48. N.Y.—Levine v. Rosenschein, 118 N.Y.S. 890, 134 App.Div. 157.

49. Tex.—Farley v. Universal Mills, Civ.App., 116 S.W.2d 488.
39 C.J. p 116 note 15.

50. La.—Camp v. Baldwin-Melville Co., 48 So. 827, 123 La. 257—Breant v. Cazelles, 4 La.App., Orleans, 333.
39 C.J. p 95 note 45.

51. Md.—**Corpus Juris cited in** Atholwood Development Co. v. Houston, 19 A.2d 706, 709, 179 Md. 441.
39 C.J. p 116 note 17.

Measure of damages
Where employment contract permits employee to do outside work as long as such work does not interfere with employer's requirements, on wrongful discharge the damage to the employee is measured by the agreed wage during the remainder of the term, reduced by such part of his earnings during the same period as he could not have earned if he had continued in the employment.—Sanders v. Schenley Products Co., C.C.A.N.Y., 108 F.2d 23.

Professional men held not within rule
(1) Lawyer.
Mass.—Dixon v. Volunteer Co-op. Bank, 100 N.E. 655, 213 Mass. 345.
Or.—Smith v. Pallay, 279 P. 279, 130 Or. 282.
(2) Physician.—Sturgeon v. Pioneer Life Ins. Co., App., 186 S.W. 1192.

52. Md.—Atholwood Development Co. v. Houston, 19 A.2d 706, 179 Md. 441—Wandell Chocolate Co. v. Goldsmith, 120 A. 372, 142 Md. 148.

53. Ill.—Barnett v. Caldwell Furniture Co., 199 Ill.App. 510, affirmed 115 N.E. 389, 277 Ill. 286.

54. Ky.—Tucker v. Horn, 103 S.W. 717, 31 Ky.L. 805.
39 C.J. p 117 note 19.

55. Tex.—Pecos & N. T. Ry. Co. v. Stoker, Civ.App., 142 S.W. 971.
39 C.J. p 117 note 20.

56. N.Y.—Burnside v. Bloxham, 201 N.Y.S. 672, 121 Misc. 672.
39 C.J. p 117 note 21.

57. N.Y.—Marx v. New York Ribbon Co., 159 N.Y.S. 853, 95 Misc. 551.
Tex.—Miller v. Sealy Oil Mill & Mfg. Co., Civ.App., 166 S.W. 1182.

58. N.Y.—Bassett v. French, 31 N.Y.S. 667, 10 Misc. 672, 1 N.Y.Ann. Cas. 270, appeal dismissed 49 N.E. 325, 155 N.Y. 46.

59. Wash.—Grindeman v. Woodland Shingle Co., 119 P. 615, 66 Wash. 240.
39 C.J. p 117 note 24.

While, as discussed supra subdivision a of this section, it is the duty of a discharged servant to seek other employment, he is required to use only reasonable diligence[60] to obtain employment of similar or substantially the same character and grade as that in which he has been employed.[61] Likewise the employee is not bound to accept employment in a different place,[62] or employment under an unsuitable employer,[63] or under a contract extending for a period in excess of the unexpired term,[64] or of a nature which would injuriously affect his future career or reputation.[65] Where, however, an employee is offered the same or similar employment to that from which he has been discharged for the same period and on the same terms, and before he has sustained any injury by reason of the discharge, he cannot recover any damages.[66]

A discharged servant is not obliged to seek another salaried position; it is sufficient that he makes a bona fide attempt to employ his time profitably in a remunerative occupation,[67] and he is entitled to a reasonable time in which to seek and find or make the business that he wants.[68]

c. Reëmployment by Master

An offer made in good faith by the employer to reemploy the employee on the same terms as under the breached contract as a general rule goes to mitigate damages, if rejected by the employee.

60. Ky.—Williams v. Leaf Tobacco Co., 168 S.W.2d 570, 293 Ky. 270—Torson Const. Co. v. Grant, 66 S.W.2d 79, 251 Ky. 800.
Mo.—Vernon v. Rife, App., 294 S. W. 747.
Tex.—San Antonio & A. P. Ry. Co. v. Collins, Com.App., 61 S.W.2d 84.
39 C.J. p 117 note 26.

What constitutes reasonable diligence

(1) In determining whether employee has exercised reasonable diligence, standard to be applied is manner in which person of ordinary diligence would presumably act under similar circumstances.—Atholwood Development Co. v. Houston, 19 A.2d 706, 179 Md. 441.

(2) An honest effort to obtain other employment is all that is necessary.—McMullan v. Dickinson, 65 N. W. 661, 663, 63 Minn. 405.

Reëmployment by former employer

Plaintiff, on being discharged by defendants in breach of oral contract of hiring, was under no obligation to seek reëmployment with a former employer whose services he left to take up employment with defendants.—Lucacher v. Kerson, 45 A.2d 245, 158 Pa.Super. 437, affirmed 48 A.2d 857, 355 Pa. 79.

61. Ala.—Navco Hardwood Co. v. Bass, 108 So. 452, 214 Ala. 553—Standard Oil Co. v. Lloyd, 159 So. 371, 26 Ala.App. 306.
Cal.—Smetherham v. Laundry Workers' Union, Local No. 75, 111 P.2d 948, 44 Cal.App.2d 131—De La Falaise v. Gaumont-British Picture Corporation, 103 P.2d 447, 39 Cal.App.2d 461—Gregg v. McDonald, 239 P. 373, 73 Cal.App. 748.
Ky.—Williams v. Leaf Tobacco Co., 168 S.E.2d 570, 293 Ky. 270—Louisville & N. R. Co. v. Wells, 160 S.W.2d 16, 289 Ky. 700—Torson Const. Co. v. Grant, 66 S.W.2d 79, 251 Ky. 800—Abrams v. Jackson County Board of Education, 18 S. W.2d 1000, 230 Ky. 151.
Minn.—Bang v. International Sisal Co., 4 N.W.2d 113, 212 Minn. 135, 141 A.L.R. 657.
Neb.—**Corpus Juris cited in** Stoffel v. Metcalfe Const. Co., 17 N.W.2d 3, 8, 145 Neb. 450.
Tex.—San Antonio & A. P. Ry. Co. v. Collins, Com.App., 61 S.W.2d 84—**Corpus Juris cited in** Elliott-Greer Office Supply Co. v. Martin, Civ.App., 54 S.W.2d 1068, 1071.
39 C.J. p 117 note 27.

Dissimilar or incompatible employment

(1) Amounts to be applied in mitigation of damages for breach of employment contract do not include money earned in employment not of equal grade and of more menial or onerous kind.—Standard Oil Co. v. Lloyd, 159 So. 371, 26 Ala.App. 306.

(2) Earnings that employee actually received in dissimilar employment should not be credited on his contractual damages unless the employment is shown to have been incompatible with his contractual service.—Martin v. Board of Education of Lincoln County, 199 S.E. 887, 120 W.Va. 621.

(3) Earnings resulting from subsequent activity of the employee which is incompatible with his employment under the contract are deductible.—Griffin v. Oklahoma Natural Gas Corporation, 297 P. 662, 132 Kan. 843, 81 A.L.R. 274.

Employment suitable to employee

(1) Wrongfully discharged employee has right to seek same character of employment as that from which he was discharged, and, if he cannot secure similar employment, he is required to use reasonable diligence to secure other employment for which he is reasonably fitted, but he is not bound to mitigate damages by accepting any employment or to look for or accept employment of substantially different character.—Torson Const. Co. v. Grant, 66 S.W.2d 79, 251 Ky. 800.

(2) Other employment for which employee is fitted should be sought if employment of substantially same character cannot be obtained.—San Antonio & A. P. Ry. Co. v. Collins, Tex.Com.App., 61 S.W.2d 84.

Radio work by film actress

Cal.—De La Falaise v. Gaumont-British Picture Corporation, 103 P.2d 447, 39 Cal.App.2d 461.

62. Ala.—Navco Hardwood Co. v. Bass, 108 So. 452, 214 Ala. 553.
Ky.—Louisville & N. R. Co. v. Wells, 160 S.W.2d 16, 289 Ky. 700—Torson Const. Co. v. Grant, 66 S.W. 2d 79, 251 Ky. 800—Abrams v. Jackson County Board of Education, 18 S.W.2d 1000, 230 Ky. 151.
Tex.—San Antonio & A. P. Ry. Co. v. Collins, Com.App., 61 S.W.2d 84.
39 C.J. p 117 note 28.

63. Puerto Rico.—Hardouin v. Krajewski-Pesant Co., 22 Puerto Rico 641.

64. N.Y.—Griffin v. Brooklyn Ball Club, 73 N.Y.S. 864, 68 App.Div. 566, affirmed 66 N.E. 1109, 174 N.Y. 535.
39 C.J. p 118 note 30.

65. Ill.—Stevens v. Chicago Feather Co., 178 Ill.App. 455.
39 C.J. p 118 note 31.

66. Tex.—Kramer v. Wolf Cigar Stores Co., 91 S.W. 775, 99 Tex. 597, reversed on other grounds, Civ.App., 89 S.W. 995.

Discharged servant unreasonably rejecting other employment cannot claim loss of wages from then on as consequence of earlier discharge.—McClelland v. Climax Hosiery Mills, 169 N.E. 605, 252 N.Y. 347, remittitur amended 171 N.E. 770, 253 N.Y. 533, reargument denied 171 N.E. 781, 253 N.Y. 558.

67. U.S.—Ransome Concrete Machinery Co. v. Moody, C.C.A.2, 282 F. 29.
39 C.J. p 118 note 33.

68. U.S.—Ransome Concrete Machinery Co. v. Moody, C.C.A.2, 282 F. 29.
Mo.—Hunt v. Lehrack, App., 245 S W. 52.

An offer of the employer to reëmploy the discharged employee at the same compensation and in the same general line of work or business as that provided for by the breached contract generally must be accepted by the employee, if it can be done without prejudice to his claim for damages, or it operates to mitigate or reduce his damages.[69] However, an employer, by his conduct, may have rendered himself so objectionable that a discharged employee is under no obligation to return to his service.[70] In any event the offer must be made in good faith and not merely as a foundation for mitigation of damages.[71] Furthermore, a servant cannot be required to accept reëmployment under circumstances which permit the claim that he consents to a modification of the contract,[72] and ordinarily acceptance of service in silence will at least give color to a claim that the contract is modified by consent, tacit, if not express.[73]

d. Where Employee Works for Himself

The value of the employee's services to himself where he engages in work on his own account after his discharge may sometimes be taken into account in assessing damages for his wrongful discharge.

Where, after his discharge, the servant engages in work on his own account, the value of his work to himself should be taken into account in assessing his damages in an action for wrongful discharge,[74] but where the discharged employee, after having failed to obtain similar work, goes into business for himself, and fails to make any profits, no reduction can be made in the damages for the value of his services for the time so employed.[75] Where, after discharge, profits are earned by the discharged employee through assets invested and a responsibility incurred, and not by reason of the time and ability he had contracted to give to the former employment, such earnings are not to be applied in mitigation of damages.[76]

II. SERVICES AND COMPENSATION

A. PERFORMANCE AND BREACH OF EMPLOYMENT CONTRACT

§ 60. Performance Generally

The performance or breach of employment contracts with respect to services and compensation is discussed infra § 61 et seq.

Examine Pocket Parts for later cases.

§ 61. —— Duty to Furnish Work and Appliances

The employer is obligated to furnish employment in conformity to the terms of the contract.

The employer is bound to furnish employment in accordance with the terms of the contract,[77] and

69. Mich.—Flickema v. Henry Kraker Co., 233 N.W. 362, 252 Mich. 406, 72 A.L.R. 1046.
Minn.—Schisler v. Perfection Milker Co., 258 N.W. 17, 193 Minn. 160.
Vt.—Holloway v. Levine, 180 A. 889, 107 Vt. 396.
39 C.J. p 118 note 36.
Refusal to accept reëmployment as a defense to action see supra § 51.

70. N.Y.—Levin v. Standard Fashion Co., 11 N.Y.S. 706, 16 Daly 404.
39 C.J. p 118 note 37.

71. Cal.—Gray v. Pacific Suction Cleaner Co., 155 P. 469, 171 Cal. 234.
Minn.—Schisler v. Perfection Milker Co., 258 N.W. 17, 193 Minn. 160.
Good faith held shown
Minn.—Schisler v. Perfection Milker Co., supra.

72. Okl.—Levy v. Tharrington, 62 P.2d 641, 178 Okl. 276—Farmers' Co-op. Ass'n v. Shaw, 42 P.2d 887, 171 Okl. 358.
Vt.—Holloway v. Levine, 180 A. 889, 107 Vt. 396.
39 C.J. p 118 note 39.

Reduction in wages
Where employer discharged employees who declined to accept reduction of wages below contract rate, damages recovered by employees for breach of contract could not be mitigated by amount of wages proposed in such offer, since acceptance of offer would have amounted to modification of original contract.
Okl.—Farmers' Co-op. Ass'n v. Shaw, 42 P.2d 887, 171 Okl. 358.
Vt.—Holloway v. Levine, 180 A. 889, 107 Vt. 396.

73. Mich.—Chisholm v. Preferred Bankers' Life Assur. Co., 70 N.W. 415, 112 Mich. 50.

74. Miss.—Lee v. Hampton, 30 So. 721, 79 Miss. 321.
39 C.J. p 118 note 41.
Effect of inability to secure other employment
(1) The rule of the text has been held to apply only where no employment, either of the character of the employment for which he was discharged or of a character for which he was fitted, could have been obtained by the exercise of the requisite diligence.—Wolf Cigar Stores Co. v. Kramer, 109 S.W. 990, 50 Tex. Civ.App. 411.
(2) It has also been held, however, that the value of the employee's labor on his own behalf after having tried and failed to obtain other employment cannot be charged against him in estimating damages.—Harrington v. Gies, 8 N.W. 87, 45 Mich. 374.

75. U.S.—Mohawk Sausage & Provision Co. v. Hygrade Food Products Corporation, C.C.A.Mass., 61 F.2d 425.
39 C.J. p 118 note 42.

76. Iowa.—Redfield v. Boston Piano & Music Co., 165 N.W. 365, 183 Iowa 194.
39 C.J. p 118 note 43.

77. U.S.—Coghlan v. Stetson, C.C. N.Y., 19 F. 727.
Conn.—Rockwell v. New Departure Mfg. Co., 128 A. 302, 102 Conn. 255.
N.Y.—Livingston v. Klaw, 122 N.Y.S. 264, 137 App.Div. 639.
39 C.J. p 119 note 46.
Duty to:
Furnish safe tools, appliances, and places to work see infra § 201.

proper materials and place for the grade of work contracted for,[78] the obligation continuing through the stipulated term where the employment is for a definite period.[79] He may refuse his employee further work at any time, without incurring liability therefor, where the contract is terminable at the will of either party,[80] or where he agreed to pay only for work to be furnished at his option,[81] or only for actual services performed,[82] unless there are other controlling provisions in the contract indicating a contrary intention.[83]

Where there is no duty resting on the employer, from custom or contract, express or implied, to furnish means of transportation to his employee to and from work, the burden is cast on the employee to provide himself with such transportation.[84] A duty to furnish transportation, arising out of the conduct of the parties, is as binding as though there had been an express agreement.[85]

Excuses for nonperformance. The employer cannot relieve himself of the obligation imposed on him under the contract by rendering performance by the employee impossible.[86] In the absence of a stipulation in the contract, the master is not excused from performance by reason of a change of conditions rendering performance unprofitable.[87] The employer's failure to furnish work is not excused by a temporary or permanent discontinuance of the employer's business,[88] or its retrenchment during a period of business depression.[89]

§ 62. —— Duty of Employee to Render Services

The employee must perform, or be ready and willing to perform, the services required by the contract of employment unless there exists a valid excuse for nonperformance.

The employee must perform, or be ready and willing to perform, the services called for by the contract.[90] There is an obligation on the part of the servant, implied from the contract of employment, to obey the lawful[91] and reasonable[92] commands of his master. No man has a legal or moral right, while continuing in the employ of another, to refuse to do the work he is employed to do.[93]

Provide for physical wants of employee see infra § 171.
Food, clothing, and lodging as part of compensation see infra § 99.

78. Ark.—Homewood Rice Land Syndicate v. Suhs, 219 S.W. 333, 142 Ark. 619.
39 C.J. p 119 note 47.

Consideration
Consideration for employee's contract to build machine was sufficient consideration for employer's agreement to furnish materials.—Sermuks v. Automatic Aluminum Heel Co., 153 N.E. 8, 256 Mass. 478.

Furnishing product to salesman
Where salesman agreed to aggressively push sale of company's product and to handle no other competing products, and company gave salesman exclusive right to sell product in assigned territory, there was corresponding duty on company's part to furnish their product to salesman.—Sheesley v. Bisbee Linseed Co., 10 A.2d 401, 337 Pa. 197.

79. N.Y.—Dixey v. Al. H. Woods Productions Co., 151 N.Y.S. 224, 88 Misc. 506, affirmed 154 N.Y.S. 49, 168 App.Div. 337.
39 C.J. p 119 note 49.

80. N.Y.—Granger v. American Brewing Co., 55 N.Y.S. 695, 25 Misc. 701.

81. Mo.—Lemaire v. Strassberger Conservatories of Music Co., App., 179 S.W. 959.
39 C.J. p 119 note 52.

Contract to sell output
(1) In agreements to sell output of factory there is no implied obligation to keep plant in operation up to end of period specified, if manufacturer in good faith finds himself unable to do so.—Sheesley v. Bisbee Linseed Co., 10 A.2d 401, 337 Pa. 197.
(2) Contract whereby defendant gave to salesman exclusive right to sell defendant's production of product in assigned area for period of years was not breached by defendant where defendant in good faith ceased manufacturing product because imposition of impost tax made it impossible to sell product for a profit.—Sheesley v. Bisbee Linseed Co., supra.

82. Mo.—Lemaire v. Strassberger Conservatories of Music Co., App., 179 S.W. 959.

83. N.Y.—Dixey v. Al. H. Woods Productions Co., 151 N.Y.S. 224, 88 Misc. 506, affirmed 154 N.Y.S. 491, 168 App.Div. 337.
39 C.J. p 119 note 54.

84. Okl.—Copeland v. Oklahoma Employment Sec. Commission, 172 P.2d 420, 197 Okl. 429.

Contract or custom
The duty of employer to furnish transportation to and from work to employees is matter of contract or obligation between parties fixed and determined by long continued custom in absence of agreement.—Producers Gravel & Sand Co. v. Jones, 126 S.W.2d 99, 197 Ark. 767.

85. Ark.—Producers Gravel & Sand Co. v. Jones, supra.

86. N.J.—Joffe v. Cohen, 141 A. 14, 104 N.J.Law 209.

87. N.Y.—Schlesinger v. Quinto, 194 N.Y.S. 401, 201 App.Div. 487.
Waiver by employee of employer's breach see infra § 108.

88. Colo.—St. Louis & Denver Land & Mining Co. v. Tierney, 5 Colo. 582.
39 C.J. p 119 note 60.

89. Ga.—Standard Oil Co. v. Gilbert, 11 S.E. 491, 84 Ga. 714, 8 L. R. A. 410.
Tex.—Nations v. Cudd, 22 Tex. 550.

90. N.J.—Joffe v. Cohen, 141 A. 14, 104 N.J.Law 209.
39 C.J. p 120 note 66.
Grounds for discharge see supra § 42.
Liability for breach of contract see infra §§ 77–79.
Performance as precedent to right to compensation see infra § 81.
Services called for by contract see infra § 63.
Tender of performance see infra § 65.

91. Va.—**Corpus Juris quoted in** Spotswood Arms Corporation v. Este, 133 S.E. 570, 575, 147 Va. 1047.
39 C.J. p 86 note 33.

92. Ark.—S. Unterberger & Co. v. Wiley, 281 S.W. 899, 170 Ark. 976.
Va.—**Corpus Juris quoted in** Spotswood Arms Corporation v. Este, 133 S.E. 570, 575, 147 Va. 1047.
39 C.J. p 86 note 34.

93. U.S.—In re Grand Jury, D.C. Cal., 62 F. 834.

Where performance by the employee is conditioned on the fulfillment of a condition precedent, he is under no duty to perform until such condition precedent has been met.[94]

Excuses for nonperformance. The employee is excused from performance by illness incapacitating him for the service,[95] or by acts of the employer making performance impossible,[96] or by acts or events for which neither party is responsible.[97] Where the employer fails to pay the salary specified in the contract of employment, the employee is not bound to continue to serve the employer and has a right to abandon the contract.[98]

§ 63. —— Nature and Extent of Services

The nature and extent of the services to be performed by an employee, including the hours and places of service, are to be ascertained from the contract of employment.

The nature and extent of the services to be performed by an employee are to be ascertained from the contract of employment[99] and, in determining what services must be rendered under the contract of employment, the rules applicable in the construction of contracts generally apply.[1] In construing a contract of employment, where the contract is silent as to the duties to be performed by the employees, it will be presumed that the parties had in mind reasonable duties; that they had contracted with respect to the reasonable and not the unreasonable.[2] Under a contract of general employment the servant may be required to do any and all things that are embraced within the scope of the general employment.[3]

An employer has no right to make a material change in the position to which his employee is entitled under the contract of employment, and the employee is justified in refusing to submit to such change.[4] A person who is engaged as a superintendent, or in some leading capacity requiring more than ordinary skill, is not obliged to take an inferior position or to perform ordinary labor,[5] although, when called on, he must assume charge of work which, although strictly not the work for which he was employed, is still necessarily or reasonably incidental to it.[6] So one engaged for general work of a particular kind must be ready to perform any kind of work reasonably incidental to it,[7] but he is not obliged to accept employment of an entirely different kind.[8] An agreement to perform services when requested implies that the services are not to be steady or continuous, and the requests must be reasonable.[9]

An employee hired for one kind of work may be placed on other work temporarily, where the contract so provides,[10] or is based on a trade custom to

94. **Giving of notice by employer**
Where giving of notice by employer to employee as to starting date of employment was condition precedent to duty to perform, or offer to perform, services, employer could not place employee in default without first giving employee notice required by contract.—De La Falaise v. Gaumont-British Picture Corporation, 103 P.2d 447, 39 Cal.App.2d 461.

95. Me.—Dickey v. Linscott, 20 Me. 453, 37 Am.D. 66.
N.Y.—Shaw v. Ward, 170 N.Y.S. 36.
Deductions for loss of time due to employee's sickness see infra § 104.
Recovery of wages see infra § 85.

96. Iowa.—Curtis v. Dodd, 154 N.W. 872, 172 Iowa 521.
Pa.—Baldwin v. Transitone Automobile Radio Corporation, 169 A. 755, 314 Pa. 10.

97. N.Y.—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented 33 N.Y.S.2d 764.

98. U.S.—Shaughnessy v. D'Antoni, C.C.A.La., 100 F.2d 422.
Tex.—Royal Oak Stave Co. v. Groce, Civ.App., 113 S.W.2d 315, error dismissed.

99. U.S.—Arkansas Amusement Corporation v. Kempner, C.C.A. Ark., 57 F.2d 466.
Md.—Catalano v. Bopst, 170 A. 562, 166 Md. 91.
N.J.—Morris v. Muller, 172 A. 63, 113 N.J.Law 46.
N.Y.—National Surety Corporation v. Lybrand, 9 N.Y.S.2d 554, 256 App.Div. 226.
39 C.J. p 120 note 70.
Word "tower," as applied to oil well drilling, means same as "shift" in mining parlance, and tower is day's work of drilling crew.—In re Jensen, Wyo., 178 P.2d 897.

1. U.S.—Standard Scale & Supply Co. v. Reiter, Ill., 227 F. 414, 142 C.C.A. 110.
39 C.J. p 120 note 70.

2. Tex.—Guardian Trust Co. v. Bauereisen, 121 S.W.2d 579, 132 Tex. 396.

3. Mo.—Modlagl v. Kaysing Iron & Foundry Co., 154 S.W. 752, 248 Mo. 587.

4. Tex.—Guardian Trust Co. v. Bauereisen, 121 S.W.2d 579, 132 Tex. 396.

5. Iowa.—Breen v. Central Iowa Power & Light Co., 224 N.W. 562, 207 Iowa 1161.
N.Y.—Karas v. H. R. Laboratories, 67 N.Y.S.2d 15, 271 App.Div. 530.
Tex.—Guardian Trust Co. v. Bauereisen, 121 S.W.2d 579, 132 Tex. 396.
39 C.J. p 120 note 72.

6. Conn.—Excelsior Needle Co. v. Smith, 23 A. 693, 61 Conn. 56.
39 C.J. p 120 note 73.

7. Ill.—Angle v. Hanna, 22 Ill. 429, 74 Am.D. 161.
39 C.J. p 121 note 74.

8. Wis.—Wright v. C. S. Graves Land Co., 75 N.W. 1000, 100 Wis. 269.

9. U.S.—Arkansas Amusement Corporation v. Kempner, C.C.A.Ark., 57 F.2d 466.

10. Wis.—Loos v. Geo. Walter Brewing Co., 129 N.W. 645, 145 Wis. 1, 140 Am.S.R. 1052.
39 C.J. p 121 note 77.
Contract of third person guaranteeing salary
Where contract of irrigation company's stockholder guaranteeing salary of company's manager gave manager election on stockholders' sale of stock to receive salary for balance of employment term from stockholder on condition that he devote his time and services for stockholder's benefit, whether condition named by stockholder after sale of stock was reasonable was to be

that effect.[11] After the termination of the employment the employer cannot command the services of the employee.[12]

Place of rendering services. The employee is under the obligation to perform the services contracted for in such place or places as are specified in the contract.[13] Where the contract so provides, the employee may be required to render services in any part of the United States.[14] On the other hand, the employee is not bound to perform services in a place different from that provided for in the contract.[15]

Hours or days of services. Subject to statutory regulations, the employer has the right to fix the hours within which the work is to be performed.[16] The hours which the employee must work depend on the terms of the contract.[17] Work during unreasonable hours is not required unless the terms of the contract and the nature of the employment make it reasonably necessary.[18] The question whether Sunday work is required under a contract calling for all the time of the employee depends on the custom followed in the business in which he is employed.[19] An employee, in an indeterminate employment, who is not paid for days he does not work, commits no breach of the contract of employment by failing to work on a particular day.[20]

§ 64. —— Substitution of Parties

An employee may not, without the consent of his employer, substitute another in his place to perform his services.

An employee may not, without the consent of his employer, substitute another in his place to perform his services,[21] and, if he does make the substitution without the employer's knowledge, he cannot recover from the employer for the services of the substitute, even though it is shown that the substitute did the work equally as well as the employee.[22]

"Sale" of baseball players. The performance of conditions precedent by an employer baseball club, necessary under a player's contract before it can substitute another club in its place, will not be presumed from the mere act of attempted abrogation by it of its contract and the substitution of another in its stead.[23]

§ 65. —— Tender of Performance

The extent to which an employee must manifest his willingness to perform depends on the attitude and conduct of the employer.

How far an employee must go in evidencing his willingness to perform, or in making a tender of performance, depends on the attitude and conduct of the employer,[24] no formal or actual tender being necessary where the employer refuses to furnish work or to continue the employment.[25] The prop-

determined in light of the intention of the parties in making the contract, and a proffer of employment as a traveling salesman for one of interrelated corporations through which stockholder was conducting his business at time contract was negotiated was not so unreasonable, notwithstanding manager was a mechanical engineer by profession, as to entitle manager to recover damages for stockholder's alleged breach of contract in failing to proffer reasonable employment.—Guardian Trust Co. v. Bauereisen, 121 S.W.2d 579, 132 Tex. 396.

11. Ark.—Arkadelphia Lumber Co. v. Henderson, 105 S.W. 882, 84 Ark. 382.
39 C.J. p 121 note 78.

12. Mass.—Di Angeles v. Scauzillo, 191 N.E. 426, 287 Mass. 291, 93 A.L.R. 1318.

13. Tex.—Guardian Trust Co. v. Bauereisen, 121 S.W.2d 579, 132 Tex. 396.
Statutes regulating place of service see supra § 24.

14. Tex.—Guardian Trust Co. v. Bauereisen, supra.

15. Mass.—Menage v. Rosenthal, 56 N.E. 579, 175 Mass. 358.
39 C.J. p 121 note 76.

16. Miss.—White's Lumber & Supply Co. v. Collins, 191 So. 105, 186 Miss. 659, suggestion of error overruled 192 So. 312, 186 Miss. 659.
N.Y.—New York State Labor Relations Bd. v. Union Club of City of N. Y., 52 N.Y.S.2d 74, 268 App. Div. 516, reversed on other grounds 68 N.E.2d 29, 295 N.Y. 915.
Statutes regulating hours of service see supra §§ 15–23.

Employer may make employee subject to call at any and all hours, or give employee supervisory powers of constantly continuing nature.—White's Lumber & Supply Co. v. Collins, 191 So. 105, 186 Miss. 659, suggestion of error overruled 192 So. 312, 186 Miss. 659.

17. **Contract to supervise construction**
Contract of employment to supervise construction of power plant steam distribution system required time and attention to work needed to see that it was properly and promptly done, regardless of number of hours spent thereon.—Catalano v. Bopst, 170 A. 562, 166 Md. 91.

18. Wis.—Koplitz v. Powell, 14 N. W. 831, 56 Wis. 671.

19. Ill.—Collins Ice-Cream Co. v. Stephens, 59 N.E. 524, 189 Ill. 200.
39 C.J. p 121 note 79.

20. Wis.—Kaiser v. Better Farms, 24 N.W.2d 621, 249 Wis. 302.

21. Ky.—J. B. Colt Co. v. Grubbs, 263 S.W. 749, 204 Ky. 189.
39 C.J. p 121 note 82.

22. Miss.—Hariston v. Sale, 14 Miss. 634.

23. N.Y.—Base Ball Players' Fraternity v. Boston American League Base Ball Club, 151 N.Y.S. 557, 166 App.Div. 484, affirmed 117 N. E. 1061, 221 N.Y. 704.
39 C.J. p 121 note 87.

24. N.Y.—Griffin v. Brooklyn Ball Club, 73 N.Y.S. 864, 68 App.Div. 566, affirmed 66 N.E. 1109, 174 N. Y. 535.
Tender of performance as condition precedent to action for wrongful discharge see supra § 48.

25. N.Y.—Griffin v. Brooklyn Ball Club, supra.

er time[26] and place[27] for making a tender of services varies with the terms of the contract and circumstances in each case. A tender to be effectual must be free of conditions not provided for by the contract.[28]

§ 66. —— Sufficiency of Performance

A substantial performance on the part of the servant generally is regarded as sufficient.

As a general rule, a substantial performance on the part of the servant is regarded as sufficient,[29] and, unless the employee has agreed to procure particular results, the results of his performance are not material.[30]

§ 67. —— Honesty and Faithfulness

An employee is under an obligation to serve his employer honestly and faithfully.

There is an implied agreement on the part of the employee in every contract of service that he will serve his employer honestly and faithfully.[31] It is his duty to communicate to him all facts which he ought to know.[32]

§ 68. —— Compelling Performance

The rendition of personal services by an employee ordinarily cannot be compelled by order of court.

The rendition of personal services by an employee, or his return to his employer's service, ordinarily cannot be compelled by an injunction, or by an action for specific performance, as discussed in the C.J.S. titles Injunctions § 82 b, and Specific Performance § 82, also 58 C.J. page 1056 note 10 et seq, or in any other way by an order of court.[33]

§ 69. Skill and Care Required of Employee

An employee impliedly agrees that he is competent to do the work and that he will perform it faithfully.

In the absence of an express agreement as to the skill which the employee must possess and the care which he shall exercise,[34] one employed to perform certain work for another impliedly agrees that he is competent to do the work and that he will perform it faithfully.[35] It is not sufficient that the employee

26. Tex.—East Line & R. R. R. Co. v. Scott, 10 S.W. 99, 72 Tex. 70, 13 Am.S.R. 758.
39 C.J. p 121 note 91.

27. Wash.—Amann v. Pantages, 155 P. 1070, 90 Wash. 271.
39 C.J. p 121 note 92.

28. Wash.—Amann v. Pantages, supra.
39 C.J. p 121 note 93.

29. Tex.—**Corpus Juris quoted in** Dallas Hotel Co. v. Lackey, Civ. App., 203 S.W.2d 557, 562.
39 C.J. p 121 note 95.
Nature and extent of services see supra § 63.
Part performance see infra §§ 82–89.
Sufficiency of tender of performance see supra § 65.

Satisfaction of employer
Substantial performance of employment contract, although limited to the satisfaction of employer, must be such performance as to meet requirements of reasonable person under like circumstances.—Weed v. Idaho Copper Co., 10 P.2d 613, 51 Idaho 737.

Plaintiff's continuance in employ of company at defendant's request and his willingness to perform at all times was sufficient performance.—Nelson v. Hamlin, 155 N.E. 18, 258 Mass. 331.

30. Tex.—**Corpus Juris quoted in** Dallas Hotel Co. v. Lackey, Civ. App., 203 S.W.2d 557, 562.
39 C.J. p 122 note 96.
Benefit to employer as affecting right to compensation see infra § 81.

31. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F. 2d 486—Grip Nut Co. v. Sharp, C.C.A.Ill., 150 F.2d 192, certiorari denied Sharp v. Grip Nut Co., 66 S.Ct. 55, 326 U.S. 742, 90 L. Ed. 443—Blackshear Mfg. Co. v. Umatilla Fruit Co., C.C.A.Fla., 48 F.2d 174—Brown v. Dupuy, C.C.A. Ill., 4 F.2d 367—U. S. v. Procter & Gamble Co., D.C.Mass., 47 F. Supp. 676.
Ark.—Witmer v. Arkansas Dailies, 151 S.W.2d 971, 202 Ark. 470.
Cal.—Olschewski v. Hudson, 262 P. 43, 87 Cal.App. 242.
Fla.—Van Woy v. Willis, 14 So.2d 185, 153 Fla. 189.
Ind.—H. C. Bay Co. v. Kroner, 149 N.E. 184, 83 Ind.App. 541.
Minn.—Hlubeck v. Beeler, 9 N.W.2d 252, 214 Minn. 484.
Ohio.—Ohio Cas. Ins. Co. v. Capolino, App., 65 N.E.2d 287.
Or.—Osburn v. De Force, 257 P. 685, 122 Or. 360, motion denied 262 P. 222, 123 Or. 352.
Tex.—Elliott-Greer Office Supply Co. v. Martin, Civ.App., 54 S.W.2d 1068, set aside 86 S.W.2d 635, 126 Tex. 112.
39 C.J. p 122 notes 98, 99.
Adverse interest of employee see infra § 70.
Representation as to skill see infra § 69.
Serving employer exclusively see infra § 70.

32. Mich.—Michigan Crown Fender Co. v. Welch, 178 N.W. 684, 211 Mich. 148, 13 A.L.R. 896.

33. N.M.—Jaremillo v. Romero, 1 N.M. 190.
39 C.J. p 122 note 8.
Action for damages against employee see infra § 77.
Actions involving inventions of employee see infra § 73 f.
Criminal liability of servant for breach see infra § 80.

34. Va.—Hatton v. Mountford, 52 S. E. 847, 105 Va. 96.
39 C.J. p 122 note 12.

35. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486.
Cal.—**Corpus Juris cited in** Canavan v. College of Osteopathic Physicians and Surgeons, 166 P.2d 878, 882, 73 Cal.App.2d 511.
Tex.—Yarborough v. Fulton, Civ. App., 78 S.W.2d 247, error dismissed—Shasta Oil Co. v. Halliburton Oil Well Cementing Co., Civ.App., 10 S.W.2d 597, error refused.
39 C.J. p 122 note 13, p 83 note 8.
Actions by employer for negligence of servant see infra § 79.
Contributory negligence of servant injured see infra § 422.
Deduction or forfeiture of wages see infra § 105.
Honesty and faithfulness of employee see supra § 67.

Public accountants
(1) Certified public accountants were not guarantors or insurers of correctness of their accounts, but undertook to use such skill in performance of their agreement to render services as reasonably prudent, skillful accountants would use under circumstances.—O'Neill v. Atlas Automobile Finance Corporation, 11 A.2d 782, 139 Pa.Super. 346.

shall have done the best that he could.[36] Where there is no express contract between an employer and an employee, imposing on the employee a higher degree of skill, care, diligence, and attention in the discharge of the position he contracted to fill, only the ordinary and reasonable skill, care, diligence, and attention implied by law can be required of him.[37]

In measuring the competency and care to be demanded of an employee, there must be taken into consideration his known standing in his trade,[38] the compensation paid to him,[39] the place of performance,[40] and the nature of the work to be done.[41] He is not required to guard against mere errors of judgment,[42] or conditions and causes beyond his control.[43]

Where the employee contracts for a higher degree of skill, care, and diligence than the law implies, he cannot excuse himself from a failure to live up to his contract by merely showing that he performed the duties of his position with the ordinary and reasonable degree of skill, care, and diligence required of him by law; he must perform his duties with the degree and grade of service for which he contracts.[44]

Particular methods of work. Generally, an employee is not required to secure his employer's consent to a particular method of doing his work.[45] In the absence of instructions, he can do it in his own way, provided only he uses reasonable care.[46] On the other hand, if the employer prescribes the methods of work, the employee's use of skill and care does not relieve him of his obligation to obey the rules laid down, but it does relieve him of all responsibility for the result.[47]

Custody of property. An employee's possession of his employer's property, by permission, is lawful but it is not legal possession in the sense in which that term is used in contrast to mere physical possession without any right of ownership; in the absence of a showing by the employee that he was given an unqualified right to have and retain possession of his employer's property, he may not withhold physical control of it from his employer, to whom belongs the absolute legal ownership and right of control.[48]

§ 70. Duty to Serve Employer Exclusively

In the absence of an agreement to devote his entire services to his employer, an employee may employ such time as is not required in the performance of his duty in such way as he may deem advantageous, provided it is not inconsistent with his contract or detrimental to his employer's interest or to the value of his services to his employer.

In the absence of an express or implied agreement on the part of the employee to devote his entire services to the service of the employer, he may employ such time as is not required in the performance of his duty to his employer in such way as he

(2) Accountant engaged to examine books must not only examine books, but, if that be his contract, he must satisfy himself with reasonable diligence that books show true financial position of company.—National Surety Corporation v. Lybrand, 9 N.Y.S.2d 554, 256 App.Div. 226.

(3) Where examinations of brokers' accounts by accountants were to embrace verification of cash, securities, and customers' accounts, accountants were required to exercise reasonable skill and diligence in making actual determination of brokers' cash position and not a mere arithmetical bookkeeping computation, and they assumed risk of nonperformance of their contracts.—National Surety Corporation v. Lybrand, supra.

(4) Other cases see 39 C.J. p 122 note 13 [a].

36. Del.—Carroll v. Cohen, 98 A. 1001, 28 Del. 233.
39 C.J. p 123 note 14.

37. N.J.—Morris v. Muller, 172 A. 63, 113 N.J.Law 46—Brown v. Philmac Sportswear Co., 44 A.2d 805, 123 N.J.Misc. 378.
Ohio.—Ohio Cas. Ins. Co. v. Capolino, App., 65 N.E.2d 287.
Or.—Lambert v. Laing & Thompson Iron Works, 264 P. 362, 124 Or. 197.
39 C.J. p 123 note 15.

38. Iowa.—Condit v. Feldman, 186 N.W. 680, 192 Iowa 1392.
39 C.J. p 123 note 16.

39. Iowa.—Condit v. Feldman, supra.
39 C.J. p 123 note 17.

40. Ohio.—Carter v. Adams, Wright 471.

41. Md.—Baltimore Baseball Club & Exhibition Co. v. Pickett, 28 A. 279, 78 Md. 375, 44 Am.S.R. 304, 22 L. R.A. 690.
39 C.J. p 123 note 19.
Foreman is obligated to greater degree than ordinary employee by reason of position he occupies.—Brown v. Philmac Sportswear Co., 44 A.2d 805, 123 N.J.Misc. 378.
One undertaking to draw chattel mortgage must not only use ordinary skill in drafting document, but must have reasonable qualifications therefor.—Morris v. Muller, 168 A. 772, 11 N.J.Misc. 866, reversed on other grounds 172 A. 63, 113 N.J.Law 46.

42. N.J.—Morris v. Muller, 172 A. 63, 113 N.J.Law 46.
Ohio.—Crawford v. Kellermier, 175 N.E. 600, 123 Ohio St. 404.
39 C.J. p 123 note 20.

43. Ark.—Homewood Rice Land Syndicate v. Suhs, 219 S.W. 333, 142 Ark. 619.
39 C.J. p 123 note 21.

44. Ohio.—Crawford v. Kellermier, 175 N.E. 600, 123 Ohio St. 404.
39 C.J. p 123 note 22.
Person holding himself out as having professional skill and rendering services even gratuitously on such basis is responsible for want of skill professed.—Morris v. Muller, 172 A. 63, 113 N.J.Law 46.

45. Vt.—Hathaway v. Smith, 2 Tyler 248.

46. Vt.—Hathaway v. Smith, supra.
39 C.J. p 123 note 24.

47. La.—McCan v. The Robert J. Ward, 11 La.Ann. 427.
39 C.J. p 124 note 26.
Obedience to rules, regulations, and usages see infra § 75.

48. N.Y.—Colten v. Jacques Marchais, Inc., 61 N.Y.S.2d 269.

may deem advantageous to himself, provided it is not inconsistent with his contract or detrimental to his employer's interest or to the value of his services to his employer.[49] Where a contract of employment contains no provision permitting the employee to hold another position simultaneously, the implication is that the employee will give his full day's work to the services of his employer.[50] However, even where there is an express stipulation that the employee shall devote his whole time to the service,[51] or the best part of his time,[52] or shall not engage in any other business prejudicial to his employer's interest,[53] the agreement must be reasonably construed.

An employment requiring the constant and continuous attention of the employee,[54] the constant payment of wages,[55] or the constant furnishing of food, fuel, and rent where they are a part of the consideration for the service,[56] is indicative of an intention of the parties to contract for the entire services of the employee to the exclusion of all other work. The employer's acquiescence[57] or objection, where followed by the employee's promise to discontinue the practice,[58] may amount to a practical construction of the employment contract by the parties themselves.

Adverse interest of employee. An employee is under an implied obligation not to act in the same matter both for himself and his employer, where their interests are adverse.[59] Where a salesman agrees to give his entire time and energy to the employer and agrees to carry no side lines of any character, he breaches the contract by engaging in a competitive outside interest.[60] The mere planning by an employee to engage in a competing business with his employer at the expiration of his term of employment ordinarily is not improper.[61]

§ 71. —— Earnings from Third Persons

Except for his compensation, the earnings of an employee in the course of, or in connection with, his services belong to the employer.

By express provision of the statutes in some jurisdictions, everything acquired by an employee by virtue of his employment except his compensation belongs to his employer;[62] even in the absence of a statutory provision, the earnings of an employee in the course of, or in connection with, his services belong to the master,[63] and the employer may en-

49. Fla.—**Corpus Juris cited in** Singletary v. Mann, 24 So.2d 718, 723, 157 Fla. 37, 166 A.L.R. 904.
Ill.—Terrell v. Tool Equipment Sales Co., 67 N.E.2d 298, 329 Ill.App. 183.
N.Y.—Elco Shoe Mfrs. v. Sisk, 183 N.E. 191, 260 N.Y. 100.
Tex.—**Corpus Juris quoted in** Elliott-Greer Office Supply Co. v. Martin, Civ.App., 54 S.W.2d 1068, 1070.
39 C.J. p 124 note 28.
Duty to serve honestly and faithfully see supra § 67.
Engaging in other employment as ground for discharge see supra § 42.

50. Pa.—Carroll v. Reuben H. Donnelly Corp., 53 Pa.Dist. & Co. 142.

51. Cal.—Stone v. Bancroft, 70 P. 1017, 139 Cal. 78, reheard 72 P. 717, 139 Cal. 78.
39 C.J. p 124 note 29.

Entire time to job
Provision of contract that employee shall give his entire time to job does not mean that he may not have some time to use in his personal affairs or other business without breach of contract.—Long v. Forbes, 136 P.2d 242, 58 Wyo. 533.

52. U.S.—Ying Niang Tze v. Andrews, 4 Mill.Rev. 334.

53. Pa.—See Batchelder v. Standard Plunger El. Co., 75 A. 1090, 227 Pa. 201, 19 Ann.Cas. 875.
39 C.J. p 124 note 31.
Agreement by employee not to enter competing business on leaving employer's service see Contracts § 254.

54. Conn.—Stebbins v. Waterhouse, 20 A. 480, 58 Conn. 370.
39 C.J. p 124 note 32.

55. Conn.—Stebbins v. Waterhouse, supra.

56. Conn.—Stebbins v. Waterhouse, supra.
Mich.—See Bailey v. Sibley Quarry Co., 129 N.W. 17, 166 Mich. 321.
39 C.J. p 124 note 34.

57. Kan.—Ogallah El. Co. v. Harrison, 154 P. 1016, 97 Kan. 289, L.R.A.1916D 777.
39 C.J. p 124 note 35.

58. Conn.—Stebbins v. Waterhouse, 20 A. 480, 58 Conn. 370.

59. U.S.—Shell Petroleum Corporation v. Pratt, D.C.Kan., 22 F.Supp. 304, affirmed Pratt v. Shell Petroleum, 100 F.2d 833, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1056.
N.Y.—Elco Shoe Mfrs. v. Sisk, 183 N.E. 191, 260 N.Y. 100.
39 C.J. p 125 note 38.

Competition with employer
General manager employed on full time basis by employer engaged in buying and selling used dictating machines could not, while so employed, compete with his employer.—Inboden v. L. W. Hawker, Inc., Ohio App., 41 N.E.2d 271.

60. U.S.—Hill v. S. E. Massengill Co., D.C.Fla., 69 F.Supp. 1.

61. **Organization of new competing company** by district managers of defendant while employed by defendant was not in violation of their contracts providing that district managers could terminate contract on giving thirty days' written notice, where they gave such notice before actually beginning to work for new company, and such organization was not "engaging in business" within contract provision that employee shall not engage in any business other than that covered by contract during its continuance.—Hamilton Depositors Corporation v. Browne, 136 S.W.2d 1031, 199 Ark. 953.

62. Cal.—Al. G. Barnes Shows Co. v. Toyo Kisen Kaisha Oriental SS. Co., 214 P. 1015, 61 Cal.App. 304.
39 C.J. p 125 note 40.

63. U.S.—Grant v. Kellogg Co., D.C. N.Y., 58 F.Supp. 48, affirmed 154 F.2d 59.
Fla.—Van Woy v. Willis, 14 So.2d 185, 153 Fla. 189—Connelly v. Special Road & Bridge Dist. No. 5, 126 So. 794, 99 Fla. 456, 71 A.L.R. 923.
N.Y.—Sundland v. Korfund Co., 20 N.Y.S.2d 819, 260 App.Div. 80.
39 C.J. p 125 note 41.

Credit for labor performed
Where employee was paid on full time basis for services of buying and selling dictating machines, but after regular hours of work he reconditioned machines which he had purchased personally for resale, employee in accounting to employer for

force his rights to profits or earnings of the employee where the contract of hire provides that he shall have a fixed interest therein.[64] Where, however, the circumstances are such that the employee is not bound to serve the employer exclusively, his earnings in other employment wherein his employer's rights or interests are not affected belong to him,[65] even though under the terms of the employment contract the employee is required to give all of his time to his employer's business.[66]

Acquiescence by employer. The employer's knowledge of, and acquiescence in, his employee's practice of taking on outside work on his own account may establish the employee's right to his earnings from that source.[67]

Tips. In businesses where tipping is customary, the tips, in the absence of an explicit contrary understanding, belong to the employee.[68] However, unless prohibited by statutory regulations,[69] an arrangement may be made by which the employee agrees to turn over the tips to the employer.[70]

§ 72. Trade Secrets

a. In general

b. Nature and proof of trade secrets and confidential relationship

a. In General

An employee is under an obligation during and after the termination of his employment not to divulge any of the trade secrets of his employer.

An employee is under an obligation, sometimes expressed in the employment contract,[71] and always implied where not expressed,[72] not to divulge any of the trade secrets of his employer, imparted to him in confidence. The duty of an employee not to use confidential information acquired in his employment is an absolute and not a relative duty.[73] Where no secret is imparted, there is no betrayal of confidence.[74] An employee, who learns in the course of, or by reason of, his employment that the premises where his employer's business is conducted are of peculiar value to his employer or one carrying on his business, has no right, without his employer's knowledge, to take a lease of those premises and hold them as his own to the injury of his employer's property.[75]

Termination and change of employment. Where an employee leaves his employer and goes elsewhere, he may lawfully use in his new employment knowledge gained in the old, provided only he does not disclose secret processes or confidential information involving, on his part, breach of faith or

profits made in sale of reconditioned machines was not entitled to credit for labor done after regular working hours.—Inboden v. L. W. Hawker, Inc., Ohio App., 41 N.E.2d 271.

64. Pa.—Blakely v. Sousa, 47 A. 289, 197 Pa. 335.
39 C.J. p 126 note 47.

65. Tex.—Kelly v. McMullan, Civ. App., 49 S.W.2d 501.
39 C.J. p 125 note 43.

66. Iowa.—Jackson v. Seevers, 88 N. W. 931, 115 Iowa 370.
39 C.J. p 125 note 44.

67. Iowa.—Mayberry v. Newell, 204 N.W. 413, 200 Iowa 458.
39 C.J. p 126 note 48.

68. U.S.—Williams v. Jacksonville Terminal Co., Fla. & Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U. S. 830, 86 L.Ed. 1224—Harrison v. Kansas City Terminal Ry. Co., D. C.Mo., 36 F.Supp. 434, affirmed, C. C.A., 126 F.2d 422.
39 C.J. p 125 note 41 [a].

69. Miss.—State v. Angelo, 68 So. 918, 109 Miss. 624, Ann.Cas.1918D 237.

70. U.S.—Williams v. Jacksonville Terminal Co., Fla. & Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U. S. 830, 86 L.Ed. 1224.
Ohio.—Setree v. Falkner, App., 50 N.E.2d 412.

71. N.J.—Taylor Iron & Steel Co. v. Nichols, Ch., 65 A. 695.
39 C.J. p 126 note 50.
Agreement by employee not to divulge trade secrets as restraint of trade see Contracts § 254.

72. U.S.—Superior Oil Co. v. Renfroe, D.C.Okl., 67 F.Supp. 277—U. S. v. Procter & Gamble Co., D.C. Mass., 47 F.Supp. 676.
Ark.—El Dorado Laundry Co. v. Ford, 294 S.W. 393, 174 Ark. 104.
Cal.—Riess v. Sanford, 117 P.2d 694, 47 Cal.App.2d 244—Olschewski v. Hudson, 262 P. 43, 87 Cal.App. 242.
D.C.—Larson v. Crowther, 1 F.2d 761, 55 App.D.C. 58, certiorari denied Crowther v. Larson, 45 S.Ct. 229, 267 U.S. 593, 69 L.Ed. 804, and 45 S.Ct. 230, 267 U.S. 593, 69 L.Ed. 804.
Mass.—Junker v. Plummer, 67 N.E. 2d 667, 320 Mass. 76—Woolley's Laundry v. Silva, 23 N.E.2d 899, 304 Mass. 383, 126 A.L.R. 752.
Mich.—Richards v. Kline, 236 N.W. 821, 254 Mich. 426.
N.Y.—Cornibert v. Cohn, 7 N.Y.S.2d 351, 169 Misc. 285—Fairchild Engine & Airplane Corporation v. Cox, 50 N.Y.S.2d 643—Friedman v. Stewarts Credit Corporation, 26 N. Y.S.2d 529, affirmed 26 N.Y.S.2d 533, 261 App.Div. 990, reargument denied 28 N.Y.S.2d 156, 262 App. Div. 746—Rubner v. Gursky, 21 N. Y.S.2d 558.
Pa.—Belmont Laboratories v. Heist, 151 A. 15, 300 Pa. 542, modified on other grounds 154 A. 19, 303 Pa. 7.
Tenn.—Kelly Mfg. Co. v. Brower, 1 Tenn.App. 428.
39 C.J. p 126 note 51.

73. N.Y.—Byrne v. Barrett, 197 N. E. 217, 268 N.Y. 199, 100 A.L.R. 680, reargument denied 198 N.E. 528, 268 N.Y. 630—Fairchild Engine & Airplane Corporation v. Cox, 50 N.Y.S.2d 643—Rubner v. Gursky, 21 N.Y.S.2d 558.

74. N.Y.—Kleinfeld v. Roburn Agencies, 60 N.Y.S.2d 485, 270 App.Div. 509.

Knowledge that employer desired secrecy

Duty of employee to maintain secrecy in regard to manufacturing process cannot be implied, in absence of other facts creating such duty, from employee's knowledge that employer wished process to be kept secret or that employee agreed that secrecy was desirable for welfare of company and even urged maintenance of secrecy.—New Method Die & Cut-Out Co. v. Milton Bradley Co., 194 N.E. 80, 289 Mass. 277.

75. Mass.—Horn Pond Ice Co. v. Pearson, 166 N.E. 640, 267 Mass. 256—Essex Trust Co. v. Enwright, 102 N.E. 441, 214 Mass. 507, 47 L. R.A.,N.S., 567.

the violation of an agreement, express or implied.[76] In the absence of an express agreement, the duty of an employee not to disclose confidential information which he has gained in the course of his employment rests on an implied contract.[77] On the other hand, the employee may achieve superiority in his particular department by every lawful means at hand, and then, on the rightful termination of his contract for service, use that superiority for the benefit of himself or rivals in trade of his former employer.[78] The knowledge, experience, and efficiency which an employee obtains in his employment do not become the property of the employer[79] and they are not trade secrets.[80]

Protection and remedies. An employee, while he may be enjoined from committing threatened or continued disclosure of his employer's trade secrets, as considered in Injunctions § 148, or may be sued at law for damages for breach of the implied agreement not to divulge, as considered infra § 77, cannot be held in equity as a trustee of the wages he received from his employer to be recovered back in an action for an accounting if his employer's confidence in him is misplaced.[81]

b. Nature and Proof of Trade Secrets and Confidential Relationship

Trade secrets and confidential information, in order to be protected, must be the particular secrets of the employer as distinguished from the general secrets of the trade.

Trade secrets and confidential information, in order to be protected against disclosure by employees, must be the particular secrets of the employer as distinguished from the general secrets of the trade in which he is engaged.[82] Their character is not material, as long as they are peculiar and important to the employer's business and are used exclusively by him.[83] The courts have considered certain facts as having an important bearing on the question whether the secrets or information divulged was confidential and the business secrets of a particular employer to the exclusion of oth-

76. U.S.—Official Aviation Guide Co. v. American Aviation Associates, C.C.A.Ill., 150 F.2d 173, certiorari denied 66 S.Ct. 267, 326 U.S. 776, 90 L.Ed. 469, rehearing denied 66 S.Ct. 335, 326 U.S. 811, 90 L.Ed. 495, certiorari denied American Aviation Associates v. Official Aviation Guide Co., 66 S.Ct. 268, 326 U.S. 776, 90 L.Ed. 469—Activated Sludge v. Sanitary Dist. of Chicago, D.C.Ill., 33 F.Supp. 692, affirmed, C.C.A., Guthard v. Sanitary Dist. of Chicago, 118 F.2d 899, certiorari denied Sanitary Dist. of Chicago v. Guthard, 61 S.Ct. 1102, 313 U.S. 583, 85 L.Ed. 1539.
Ark.—Witmer v. Arkansas Dailies, 151 S.W.2d 971, 202 Ark. 470.
Fla.—Connelly v. Special Road & Bridge Dist. No. 5, 126 So. 794, 99 Fla. 456, 71 A.L.R. 923.
Mich.—Dutch Cookie Mach. Co. v. Vande Vrede, 286 N.W. 612, 289 Mich. 272.
N.Y.—Byrne v. Barrett, 197 N.E. 217, 268 N.Y. 199, 100 A.L.R. 680, reargument denied 198 N.E. 528, 268 N.Y. 630—Kleinfeld v. Roburn Agencies, 60 N.Y.S.2d 485, 270 App. Div. 509—Fairchild Engine & Airplane Corporation v. Cox, 50 N.Y.S. 2d 643—Rubner v. Gursky, 21 N.Y.S.2d 558—Tinseltex Importing Co. v. Greenwald, 16 N.Y.S.2d 422.
Ohio.—Inboden v. L. W. Hawker, Inc., App., 41 N.E.2d 271.
Pa.—Pittsburgh Cut Wire Co. v. Sufrin, 38 A.2d 33, 350 Pa. 31.
39 C.J. p 127 note 52.
Engaging in competing business with former employer as unfair competition see the C.J.S. title Trade-Marks, Trade-Names, and Unfair Competition § 121, also 63 C.J. p 465 note 86 et seq.

Real estate salesman

Knowledge of status of negotiations for sale of leasehold acquired by brokers' salesman in course of his agency was confidential and special, imposing on salesman active duty of full disclosure to brokers and rendering salesman liable to brokers for share of commissions received by him on consummation of sale after he left employment, notwithstanding salesman was not guilty of conscious purpose to defraud in failing to inform brokers of status of negotiations on severing employment.—Byrne v. Barrett, 197 N.E. 217, 268 N.Y. 199, 100 A.L.R. 680, reargument denied 198 N.E. 528, 268 N.Y. 630.

Manager of volume retail credit clothing and jewelry store acquired no trade secrets.—Harry Livingston, Inc., v. Macher, Del.Ch., 54 A.2d 169.

77. Mass.—Junker v. Plummer, 67 N.E.2d 667, 320 Mass. 76—Woolley's Laundry v. Silva, 23 N.E.2d 899, 304 Mass. 383, 126 A.L.R. 752.

78. Mass.—Junker v. Plummer, 67 N.E.2d 667, 320 Mass. 76—Padover v. Axelson, 167 N.E. 301, 268 Mass. 148—Club Aluminum Co. v. Young, 160 N.E. 804, 263 Mass. 223.
Okl.—Brenner v. Stavinsky, 88 P.2d 613, 184 Okl. 509.

79. U.S.—Sprague Elec. Co. v. Cornell-Dubilier Elec. Corp., D.C.Del., 62 F.Supp. 1.
Ark.—Witmer v. Arkansas Dailies, 151 S.W.2d 971, 202 Ark. 470.
Mass.—Di Angeles v. Scauzillo, 191 N.E. 426, 287 Mass. 291, 93 A.L.R. 1318.

"A man's aptitudes, his skill, his dexterity, his manual or mental ability . . . ought not to be relinquished by the servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and expand his powers is advantageous to every citizen, and may be highly so for the country at large."—Padover v. Axelson, 167 N.E. 301, 302, 268 Mass. 148.

"A man's aptitude, his skill, his dexterity, his manual and mental ability, and such other subjective knowledge as he obtains while in the course of his employment, are not the property of his employer and the right to use and expand these powers remains his property unless curtailed through some restrictive covenant entered into with the employer."—Pittsburgh Cut Wire Co. v. Sufrin, 38 A.2d 33, 34, 350 Pa. 31.

80. Ohio.—Inboden v. L. W. Hawker, Inc., App., 41 N.E.2d 271.

81. Mass.—American Stay Co. v. Delaney, 97 N.E. 911, 211 Mass. 229, Ann.Cas.1913B 509.
39 C.J. p 128 note 77.

82. N.J.—Cameron Mach. Co. v. Samuel M. Langston Co., Ch., 115 A. 212.
39 C.J. p 127 note 54.
Definition of trade secrets within rule allowing injunctive relief see Injunctions § 148.

83. Pa.—Macbeth-Evans Glass Co. v. Schnelbach, 86 A. 688, 239 Pa. 76.

ers,[84] as, for example, factory regulations excluding the public from the premises,[85] and forbidding employees to visit other rooms or departments in the factory than the one in which they are working,[86] or to inspect other machines than the ones they are working on,[87] and provisions made for the effective guarding of formulæ and ingredients.[88] The circumstances surrounding the condition of the business and the way it is carried on at the commencement of the employment period, and during its subsequent development and growth, are frequently considered by the courts as having an important bearing on the question whether the employer and employee regarded their relation to each other as a confidential one in which there should be no disclosure or improper use of the secrets of the business.[89] Facts considered by the courts of probative value in this connection are the employee's holding of a position of trust and confidence,[90] the habit of communicating to, or withholding from, him details of the business, especially matters of a confidential nature,[91] and his supervision of tests of secret processes.[92]

Particular trade secrets protected. Trade secrets within the rule prohibiting disclosure by an employee include secret processes of manufacture,[93] construction and operation of particular machinery,[94] advertising material,[95] business codes,[96] and business records,[97] even though kept by the employee in a so-called personal file.[98] The contents of a patent claim when filed in the Patent Office are not secret or confidential.[99]

Information as to customers. It is usually held that an employee's knowledge of his employer's customers, acquired by him as an ordinary employee and not by virtue of any peculiar trust or confidence placed in him, is not a trade secret, and that, in the absence of an express prohibitory agreement, the employee on a change of employment may solicit such customers as long as he proceeds from his memory rather than by the unauthorized use of a list of customers.[1] No breach of implied contract arises merely because the names and addresses of the employer's customers were furnished to an employee in the expectation, not expressed to the em-

84. Mich.—O. & W. Thum Co. v. Tloczynski, 72 N.W. 140, 114 Mich. 149, 68 Am.S.R. 469, 38 L.R.A. 200.

85. Mich.—O. & W. Thum Co. v. Tloczynski, supra.

86. Mich.—O. & W. Thum Co. v. Tloczynski, supra.
N.Y.—Eastman Kodak Co. v. Reichenbach, 29 N.Y.S. 1143, 79 Hun 183.

87. Mich.—O. & W. Thum Co. v. Tloczynski, 72 N.W. 140, 114 Mich. 149, 68 Am.S.R. 469, 38 L.R.A. 200.

88. N.Y.—Little v. Gallus, 38 N.Y.S. 487, 4 App.Div. 569.
39 C.J. p 127 note 69.

89. Mich.—O. & W. Thum Co. v. Tloczynski, 72 N.W. 140, 114 Mich. 149, 68 Am.S.R. 469, 38 L.R.A. 200.
39 C.J. p 128 note 70.

90. Pa.—Macbeth-Evans Glass Co. v. Schnelbach, 86 A. 688, 239 Pa. 76.
39 C.J. p 128 note 71.

Milk company's route salesmen's activities were not "confidential" within rule denying employee right to use confidential information, acquired in employment, as to employer's customers, for benefit of succeeding employer, after termination of original employment.—Pestel Milk Co. v. Model Dairy Products Co., Ohio App., 52 N.E.2d 651.

91. Pa.—Macbeth-Evans Co. v. Schnelbach, 86 A. 688, 239 Pa. 76.

92. Pa.—Macbeth-Evans Glass Co. v. Schnelbach, supra.

93. N.Y.—Fairchild Engine & Airplane Corporation v. Cox, 50 N.Y.S.2d 643.
39 C.J. p 127 note 56.

Method of printing fabrics and machines used in manufacturing tinsel flitter and jewel cloth were business secrets.—Rubner v. Gursky, 21 N.Y.S.2d 558.

Printing screen for scarf
N.Y.—Cornibert v. Cohn, 7 N.Y.S.2d 351, 169 Misc. 285.

94. Mass.—Junker v. Plummer, 67 N.E.2d 667, 320 Mass. 76.
39 C.J. p 127 note 57.

Machine easy of duplication
Fact that machine used by plaintiff in a combining process in manufacture of shoe uppers was easy to duplicate by those who had an opportunity to work with it did not militate against machine being a trade secret.—Junker v. Plummer, 67 N.E.2d 667, 320 Mass. 76.

95. U.S.—Todd Protectograph Co. v. Hedman Mfg. Co., D.C.Ill., 254 F. 829, affirmed, C.C.A., 265 F. 273.

96. S.D.—Simmons Hardware Co. v. Waibel, 47 N.W. 814, 1 S.D. 488, 36 Am.S.R. 755, 11 L.R.A. 267.

97. U.S.—Union Switch & Signal Co. v. Sperry, C.C.N.Y., 169 F. 926.
39 C.J. p 127 note 63.

98. U.S.—Union Switch & Signal Co. v. Sperry, supra.

99. U.S.—Speaker v. Shaler Co., C.C.A.Wis., 87 F.2d 985, certiorari denied Shaler Co. v. Speaker, 57 S.Ct. 923, 301 U.S. 695, 81 L.Ed. 1350.

1. U.S.—Edwin L. Wiegand Co. v. Harold E. Trent Co., C.C.A.Pa., 122 F.2d 920, certiorari denied 62 S.Ct. 1033, 316 U.S. 667, 86 L.Ed. 743.
Mass.—Di Angeles v. Scauzillo, 191 N.E. 426, 287 Mass. 291, 93 A.L.R. 1318—Commonwealth Laundry Co. v. Daggett, 186 N.E. 41, 283 Mass. 79—May v. Angoff, 172 N.E. 220, 272 Mass. 317—Padover v. Axelson, 167 N.E. 301, 268 Mass. 148.
N.J.—Haut v. Rossbach, 15 A.2d 227, 128 N.J.Eq. 77, affirmed 17 A.2d 165, 128 N.J.Eq. 478—Newark Cleaning & Dye Works v. Gross, 128 A. 789, 97 N.J.Eq. 406.
N.Y.—New Warsaw Bakery Co. v. Ucinski, 6 N.Y.S.2d 862.
Ohio.—Inboden v. L. W. Hawker, Inc., App., 41 N.E.2d 271.
Injunction to restrain use by employee of information as to customers see Injunctions § 148 b.

Pirating or honest competition
Law distinguishes between employee pirating his employer's trade by fraudulent means and honestly competing with him for it.—Abalene Exterminating Co. of N. J. v. Elges, 43 A.2d 165, 137 N.J.Eq. 1.

Information obtained from other employee
That salesman had originally learned names and addresses of customers, which were not trade secrets, from former employee, did not deprive salesman of right, after leaving employment to seek patronage of persons to whom he had delivered bread while working for former employer.—Di Angeles v. Scauzillo, 191 N.E. 426, 287 Mass. 291, 93 A.L.R. 1318.

ployee, that he would not disclose or use the names except as an employee, where on the termination of the employment the employee does not take the list but from memory thereafter solicits the customers of his former employer.[2]

Where the knowledge which the employee possesses as to the names and addresses of his employer's customers is confidential information obtained by him in, and by reason of, the course of his employment with his employer, he may not solicit such customers.[3] It is generally agreed that an employee may not use a list of customers, or a copy thereof, made surreptitiously by him during his employment without the knowledge or consent of the employer, or a list compiled by, and belonging to, the employer and furnished to the employee in connection with his employment, at least where the list is a confidential one.[4] On the other hand, it has been held that, in the absence of an express contract, the use by a former employee of a customers' list is not improper where the names on the list were not derived from any confidential information and did not constitute a trade secret.[5]

§ 73. Inventions and Discoveries of Employee

a. In general
b. Contracts vesting ownership in employer
c. Inventions or patents before or after term of employment
d. License or shop right of employer
e. Compensation of employee for inventions or use thereof
f. Actions

a. In General

In the absence of an agreement to the contrary, an employee under a general employment is vested with the ownership of his inventions.

In the absence of an express or implied agreement as to the ownership of inventions of the employee,[6] the employer from the mere fact of a general employment has no exclusive rights to the inventions of his employee,[7] even though in order to perfect his invention the employee uses his employ-

2. Mass.—Woolley's Laundry v. Silva, 23 N.E.2d 899, 304 Mass. 383, 126 A.L.R. 752.

3. N.J.—Abalene Exterminating Co. v. Oser, 5 A.2d 738, 125 N.J.Eq. 329. 39 C.J. p 127 note 62.

4. Okl.—Brenner v. Stavinsky, 88 P. 2d 613, 184 Okl. 509.

5. U.S.—Edwin L. Wiegand Co. v. Harold E. Trent Co., C.C.A.Pa., 122 F.2d 920, certiorari denied 62 S. Ct. 1033, 316 U.S. 667, 86 L.Ed. 743.

Use of personal memorandum

Salesman who, for himself, made personal memorandum of names of customers, could, after leaving employment, use information regarding names as part of salesman's ordinary experience gained in business, and former employer was not entitled to book as his property, nor was he entitled to it in order that salesman might be deprived of information therein.—Di Angeles v. Scauzillo, 191 N.E. 426, 287 Mass. 291, 93 A.L.R. 1318.

6. Tex.—Atlas Brick Co. v. North, Civ.App., 2 S.W.2d 980, reversed on other grounds North v. Atlas Brick Co., Com.App., 13 S.W.2d 59, motion granted in part 16 S.W.2d 519.

39 C.J. p 128 note 79.

Contract vesting ownership in employer see infra subdivision b of this section.

"To vest the title in appellant [employer], there must be some agreement between the employer and employee . . . and to the effect that, whatever invention the employee may conceive and perfect, under his contract of employment, his employer should have the title to such invention, or to any patent that he might obtain by reason of his employment. In other words, the right of title to the invention itself represented by or embraced in the issued patent, as distinguished from a license to use such invention, rests in an agreement between the employer and the employee."—Atlas Brick Co. v. North, Tex.Civ.App., 2 S. W.2d 980, 983, reversed on other grounds North v. Atlas Brick Co., Com.App., 13 S.W.2d 59, motion granted in part 16 S.W.2d 519.

"The intention to give to the employer the exclusive benefit of the employee's inventive ability must appear either by stipulation in the contract of employment or by clear implication from the character of the employee's duties."—Barlow & Seelig Mfg. Co. v. Patch, 286 N.W. 577, 580, 232 Wis. 220.

"To deprive an inventor of his invention, proof should be strong and convincing that the employee and the employer agreed that the invention was to be the property of the employer."—Kay-Scheerer Corporation v. American Sterilizer Co., D.C. N.Y., 5 F.Supp. 273, 276.

7. U.S.—Solomons v. U. S., Ct.Cl., 11 S.Ct. 88, 137 U.S. 342, 34 L.Ed. 667—Hapgood v. Hewitt, Ind., 7 S. Ct. 193, 119 U.S. 226, 30 L.Ed. 369—Dovel v. Sloss-Sheffield Steel & Iron Co., C.C.A.Ala., 139 F.2d 36, certiorari denied 64 S.Ct. 1057, 322 U.S. 740, 88 L.Ed. 1573—Heywood-Wakefield Co. v. Small, C.C.A. Mass., 87 F.2d 716, certiorari denied 57 S.Ct. 925, 301 U.S. 698, 81 L.Ed. 1353—Howard v. Howe, C.C. A.Ill., 61 F.2d 577, certiorari denied 53 S.Ct. 527, 289 U.S. 731, 77 L.Ed. 1480—St. Louis & O'Fallon Coal Co. v. Dinwiddie, D.C.Md., 53 F.2d 655, affirmed, C.C.A., Dinwiddie v. St. Louis & O'Fallon Coal Co., 64 F.2d 303—Amdyco Corporation v. Urquhart, D.C.Pa., 39 F.2d 943, affirmed, C.C.A., 51 F.2d 1072, and certiorari denied 52 S.Ct. 265, 284 U.S. 689, 76 L.Ed. 582—Monsanto Chemical Works v. Jaeger, D.C.Pa., 31 F.2d 188, affirmed, C.C.A., 42 F. 2d 1018—Texas Co. v. Gulf Refining Co., C.C.A.Tex., 26 F.2d 394, certiorari denied 49 S.Ct. 27, 278 U. S. 625, 73 L.Ed. 545—Houghton v. U. S., C.C.A.Md., 23 F.2d 386, certiorari denied 48 S.Ct. 528, 277 U.S. 592, 72 L.Ed. 1004—Goodyear Tire & Rubber Co. of Akron, Ohio, v. Miller, D.C.Cal., 14 F.2d 776, reversed on other grounds, C.C.A., 22 F.2d 353—Brown v. L. V. Marks & Sons Co., D.C.Ky., 64 F.Supp. 352—U. S. Colloid Mill Corporation v. Myers, D.C.N.Y., 6 F.Supp. 283—Dowse v. Federal Rubber Co., D.C. Ill., 254 F. 308—Johnson Furnace & Engineering Co. v. Western Furnace Co., Colo., 178 F. 819, 102 C.C. A. 267.

Conn.—Transparent Ruler Co. v. C-Thru Ruler Co., 28 A.2d 232, 129 Conn. 369.

D.C.—Eshleman v. Shantz, 39 App.D. C. 434.

Fla.—State v. Neal, 12 So.2d 590, 152

er's property,[8] or receives the assistance of others in the employer's pay,[9] or takes time which should have been given to his employer's business,[10] and even though it can be said that his inventive power was incited by knowledge necessarily derived from his employment.[11] There is no difference between the government and any other employer in this respect.[12] Under such circumstances a patent obtained by an employee need not be assigned to the employer.[13] The rule giving the employee the ownership of his inventions made during employment has no application where the employee, instead of being himself the inventor, purchases a patent after having learned in the course of his employment that his employer wished to purchase it in order to protect and develop his business.[14]

Fla. 582, certiorari denied 64 S.Ct. 191, 320 U.S. 783, 88 L.Ed. 470, rehearing denied 64 S.Ct. 259, 320 U.S. 814, 88 L.Ed. 492—State Board of Education v. Bourne, 7 So.2d 838, 150 Fla. 323.
Ill.—C. V. Mosby Co. v. Jones, 24 N.E.2d 873, 303 Ill.App. 234.
Mass.—National Development Co. v. Gray, 55 N.E.2d 783, 316 Mass. 240, 153 A.L.R. 973—George C. Miller & Co. v. Beagen, 199 N.E. 344, 293 Mass. 54—Manton-Gaulin Mfg. Co. v. Colony, 151 N.E. 71, 255 Mass. 194, 44 A.L.R. 589—Wireless Specialty Apparatus Co. v. Mica Condenser Co., 131 N.E. 307, 239 Mass. 128, 16 A.L.R. 1170.
N.Y.—Talbot v. Harrison, 270 N.Y.S. 171, 150 Misc. 798, affirmed 268 N.Y.S. 875, 240 App.Div. 957—Henry & Wright Mfg. Co. v. Rogers, 239 N.Y.S. 425, 136 Misc. 178.
Tex.—Atlas Brick Co. v. North, Com. App., 288 S.W. 146.
39 C.J. p 128 note 79.
Right of employer to:
Acquire patents see the C.J.S. title Patents § 92, also 48 C.J. p 121 note 91 et seq.
Copyright see Copyright and Literary Property § 57.

Employee may sell his invention either to his employer or to others, if employer is unwilling to pay for assignment of patent.—Barlow & Seelig Mfg. Co. v. Patch, 286 N.W. 577, 232 Wis. 220.

Improvements on appliances, etc., used in business
Employment by another does not prevent employee from making improvements on appliances and machinery used in business and obtaining patents therefor.—National Development Co. v. Gray, 55 N.E.2d 783, 316 Mass. 240, 153 A.L.R. 973—Hoyt v. Corporon, 16 N.E. 94, 268 Mass. 544.

Wrongful appropriation by employer
Where automobile muffler manufacturer filed application for patent on muffler invented by manufacturer's salesman without knowledge of salesman, prior arrangement between parties under which manufacturer agreed to test the muffler, manufacture it, and compensate salesman for mufflers manufactured, was vitiated, and rights of salesman in device were appropriated by manufacturer.—McNamara v. Powell, 11 N.Y.S.2d 491, 256 App.Div. 554, reargument denied 12 N.Y.S.2d 773, 257 App.Div. 913.

8. U.S.—Houghton v. U. S., C.C.A. Md., 23 F.2d 386, certiorari denied 48 S.Ct. 528, 277 U.S. 592, 72 L.Ed. 1004.
Mich.—Gear Grinding Mach. Co. v. Stuber, 276 N.W. 514, 282 Mich. 455.
Tex.—Atlas Brick Co. v. North, Civ. App., 2 S.W.2d 980, reversed on other grounds North v. Atlas Brick Co., Com.App., 13 S.W.2d 59, motion granted in part 16 S.W.2d 519.
Wis.—Barlow & Seelig Mfg. Co. v. Patch, 286 N.W. 577, 232 Wis. 220.
39 C.J. p 128 note 80.
License or shop right of employer see infra subdivision d of this section.

9. Mass.—New Method Die & Cut-Out Co. v. Milton Bradley Co., 194 N.E. 80, 289 Mass. 277.
Wis.—Barlow & Seelig Mfg. Co. v. Patch, 286 N.W. 577, 232 Wis. 220.
39 C.J. p 128 note 81.

10. Mich.—Gear Grinding Mach. Co. v. Stuber, 276 N.W. 514, 282 Mich. 455.
39 C.J. p 128 note 82.

11. Mass.—National Development Co. v. Gray, 55 N.E.2d 783, 316 Mass. 240, 153 A.L.R. 973—American Stay Co. v. Delaney, 97 N.E. 911, 211 Mass. 229, Ann.Cas.1913B 509.

12. U.S.—Sawyer v. Crowell Pub. Co., D.C.N.Y., 46 F.Supp. 471, affirmed, C.C.A., 142 F.2d 497, certiorari denied 65 S.Ct. 74, 323 U.S. 735, 89 L.Ed. 589.

Government expense
It has been stated that, where government employee's invention is made at government expense, his personal interest in invention belongs to government.—Selden Co. v. National Aniline & Chemical Co., D.C.N.Y., 48 F.2d 270.

United States Bureau of Standards
U.S.—U. S. v. Dubilier Condenser Corporation, Del., 53 S.Ct. 554, 289 U.S. 178, 77 L.Ed. 1114, 85 A.L.R. 1488, amended 53 S.Ct. 687, 289 U.S. 706, 77 L.Ed. 1462.

Dedication to public
Officers of government have no authority, by administrative fiat, to determine whether government employee obtaining patent shall be compelled to dedicate his invention to public.—U. S. v. Dubilier Condenser Corporation, supra.

13. U.S.—U. S. v. Dubilier Condenser Corporation, supra—American Cyanamid Co. v. Hubbell, C.C.A.N.J., 76 F.2d 807—Bowers v. Woodman, D.C.Mass., 59 F.2d 797—Barber v. National Carbon Co., Ohio, 129 F. 370, 64 C.C.A. 40, 5 L.R.A., N.S., 1154—Pressed Steel Car Co. v. Hansen, C.C.Pa., 128 F. 444, affirmed 137 F. 403, 71 C.C.A. 207, 2 L.R.A.,N.S., 1172, certiorari denied 26 S.Ct. 749, 199 U.S. 608, 50 L.Ed. 331—Taylor v. Wood, C.C.N.Y., 23 F.Cas.No.13,808, 12 Blatchf. 110—Whiting v. Graves, C.C.Mass., 29 F. Cas.No.17,577, 3 Ban. & A. 222.
D.C.—Sendelbach v. Gillette, 22 App. D.C. 168.
Mich.—Gear Grinding Mach. Co. v. Stuber, 276 N.W. 514, 282 Mich. 455.
N.Y.—Burr v. De La Vergne, 7 N.E. 366, 102 N.Y. 415—Burden v. Burden Iron Co., 80 N.Y.S. 390, 39 Misc. 559—Salterini v. Schneider, 45 N.Y.S.2d 645.
39 C.J. p 128 note 79.

Expectation of improvement
Where employee was employed, not in hope he would invent new machine or new mechanical movement, but with the expectation that he would improve washing machine which company was then manufacturing, an obligation on part of employee to assign a valuable patent could be imported into employment contract only by some positive act or stipulation.—Barlow & Seelig Mfg. Co. v. Patch, 286 N.W. 577, 232 Wis. 220.

Securing patent at expense of employer by employee will not vest employer with title.—Deane v. Hodge, 27 N.W. 917, 35 Minn. 146, 59 Am.R. 321.

Use of employer's name in writing to patent attorneys with respect to patenting an invention was not inconsistent with employee's refusal to surrender his rights as inventor to employer, in view of doctrine of shop rights.—Barlow & Seelig Mfg. Co. v. Patch, 286 N.W. 577, 232 Wis. 220.

14. Mass.—American Circular Loom Co. v. Wilson, 84 N.E. 133, 198 Mass. 182, 126 Am.S.R. 409.

Fiduciary relationship. The employer may be entitled to the invention of the employee or the patent thereon where the employee occupies a relationship of trust and confidence to the employer.[15] The fact that the employee holds an important office or position in the corporation which employs him has been held under the circumstances in some cases to establish a trust relation making it inequitable for him to retain the title to an invention which really belongs to his employer.[16] The holding of such a position is not conclusive,[17] and, if an employee under the other circumstances of the case is entitled to ownership of his invention as against the corporation which employs him, the mere holding of one of its important positions will not operate to defeat his title.[18]

b. Contracts Vesting Ownership in Employer

(1) In general

(2) Employee hired to make invention

(1) In General

Pursuant to an agreement between the employer and employee, the employer may be entitled to the employee's inventions or discoveries made during the term of employment.

By express agreement between the employer and employee, the employer may be entitled to the employee's inventions or discoveries made during the term of the employment;[19] or the provisions of the contract[20] or the nature and circumstances of the employment[21] may be such as to raise an implication of an agreement to that effect. The contract need not be in writing or contain formal words of agreement;[22] but fraud on the part of the employer vitiates the contract.[23] General rules governing consideration for the execution of contracts apply

15. Conn.—Transparent Ruler Co. v. [illegible]

Where employee not inventor

Where employee, by reason of position of trust, acquired idea on which he obtained a patent, valid on its face, court had power to compel employee to assign patent to real owners, notwithstanding finding that employee did not invent idea patented.—Transparent Ruler Co. v. C-Thru Ruler Co., supra.

16. U.S.—Diversey Corporation v. Mertz, D.C.Ill., 13 F.Supp. 410.

Conn.—Transparent Ruler Co. v. C-Thru Ruler Co., 28 A.2d 232, 129 Conn. 369.

39 C.J. p 130 note 94.

17. Mich.—Detroit Testing Laboratory v. Robison, 191 N.W. 218, 221 Mich. 442.

18. U.S.—American Stoker Co. v. Underfeed Stoker Co. of America, C.C.Pa., 182 F. 642, affirmed 188 F. 314, 110 C.C.A. 292—Johnson Furnace & Engineering Co. v. Western Furnace Co., Colo., 178 F. 819, 102 C.C.A. 267.

N.Y.—Talbot v. Harrison, 270 N.Y.S. 171, 150 Misc. 798, affirmed 268 N.Y.S. 875, 240 App.Div. 957—Henry & Wright Mfg. Co. v. Rogers, 239 N.Y.S. 425, 136 Misc. 178.

Tex.—Atlas Brick Co. v. North, Civ. App., 2 S.W.2d 980, reversed on other grounds North v. Atlas Brick Co., Com.App., 13 S.W.2d 59, motion granted in part 16 S.W.2d 519.

39 C.J. p 130 note 96.

19. U.S.—Guth v. Minnesota Min. & Mfg. Co., C.C.A.Wis., 72 F.2d 385, certiorari denied Minnesota Mining & Mfg. Co. v. Guth, 55 S.Ct. 506, 294 U.S. 711, 79 L.Ed. 1245—Conway v. White, C.C.A.Conn., 9 F.2d 863—Suni-Citrus Products Co. v. Vincent, D.C.Fla., 72 F.Supp. 740— [illegible] Conway v. White, C.C.A.Conn., 292 F. 837—Brown Perfection Tube Co. v. Brown, N.Y., 233 F. 676, 147 C.C.A. 484.

Fla.—State v. Neal, 12 So.2d 590, 152 Fla. 582, certiorari denied 64 S.Ct. 191, 320 U.S. 783, 88 L.Ed. 470, rehearing denied 64 S.Ct. 259, 320 U.S. 814, 88 L.Ed. 492.

Mo.—Meissner v. Standard Ry. Equipment Co., 109 S.W. 730, 211 Mo. 112.

Ohio.—United Aircraft Products v. Cruzan, 62 N.E.2d 763, 76 Ohio App. 540.

39 C.J. p 128 note 84.

Extra compensation of employee for inventions see infra subdivision e of this section.

Inventions made before or after employment see infra subdivision c of this section.

Duration and termination

Where employment contract contained no limitation respecting kind of work in which employee might be employed, provision requiring transfer of employee's invention to employer was not impliedly terminated when employee was moved out of department in which he was first employed.—Crown Cork & Seal Co. v. Fankhanel, D.C.Md., 49 F.Supp. 611.

Contract not to invent for others

Under contract employing inventor and stating duties of employment would be performed at employer's plants, employee covenanted not to invent for others.—Essex Specialty Co. v. Bueschel, 173 A. 595, 116 N.J. Eq. 337.

Prosecution of application for patent

Company which agreed to apply for letters patent on engineer's in- [illegible] 229 App.Div. 241, affirmed Engel v. Ansco Photoproducts Co., 177 N.E. 163, 256 N.Y. 615.

20. U.S.—Standard Parts Co. v. Peck, Ohio, 44 S.Ct. 239, 264 U.S. 52, 68 L.Ed. 560, 32 A.L.R. 1033.

39 C.J. p 129 note 85.

21. U.S.—New Jersey Zinc Co. v. Singmaster, D.C.N.Y., 4 F.Supp. 967, modified on other grounds, C.C.A., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.

N.J.—Pomeroy Ink Co. v. Pomeroy, 78 A. 698, 77 N.J.Eq. 293.

39 C.J. p 129 note 86.

22. U.S.—Magnetic Mfg. Co. v. Dings Magnetic Separator Co., C.C.A.Wis., 16 F.2d 739, certiorari denied 47 S.Ct. 586, 274 U.S. 740, 71 L.Ed. 1320.

General instructions of employer

Where employee assigned numerous patents to employer pursuant to general instructions that patentable ideas and devices belong to employer and should be formally assigned to it, employee understood purport of instructions and assented to obligation to assign patentable inventions to employer.—New Jersey Zinc Co. v. Singmaster, C.C.A.N.Y., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.

23. **What constitutes fraud**

Where employer's bonus plan was part consideration for employee's agreement that inventions should become employer's property, but employee never inquired respecting details of plan, employer was not

to agreements in contracts of employment whereby the employee agrees that inventions made by him during the term of employment shall belong, or be assigned, to the employer.[24]

Where the contract requires that the employee assign to his employer the inventions made by him during his employment, the employer is entitled to a disclosure and an assignment of such inventions, but the employer may not require the employee to apply for a patent on an invention.[25] Where the employee has obtained a patent for the invention, the employer is entitled to an assignment of the patent[26] on payment of the expenses incurred by the employee in procuring the patent,[27] even though application for the patent had been made by the employee after the termination of his employment.[28] Where the employee has been paid his wages in full, he may not plead the insolvency of his employer as a defense to executing a transfer of his inventions to the employer according to the contract.[29]

Validity of agreement. A provision in an employment contract under which the employer shall have a right to the employee's inventions is not contrary to public policy[30] unless the provision is limitless in extent of time and in subject matter of invention.[31] Where the contract stipulations are capable of being construed separately, a provision requiring the assignment to the employer of all inventions discovered by the employee during the term of his employment may be sustained, notwithstanding the invalidity of other provisions which are limitless in extent of time and in subject matter of invention.[32]

Construction of agreement. General rules governing the construction of contracts ordinarily apply in construing agreements of employees vesting ownership of their inventions in the employer or requiring their assignment.[33] Such a provision must be interpreted in the light of its phraseology, as a part of the entire instrument in which it is contained, and in connection with the purposes to be accomplished and the surrounding circumstances.[34] The agreement will be strictly construed as against the employer,[35] particularly where such construction is in accordance with the conduct of the parties.[36]

The employer is entitled to such inventions of the employee, or to an assignment of the patents thereon, as come within the terms of the agreement.[37]

guilty of fraud in allegedly concealing plan, as regards employer's right to assignment of patent.—Du Pont Rayon Co. v. Paley, D.C.Ill., 4 F. Supp. 290, affirmed, C.C.A., Paley v. Du Pont Rayon Co., 71 F.2d 856.

24. U.S.—Conway v. White, C.C.A. Conn., 9 F.2d 863.

25. U.S.—Guth v. Minnesota Min. & Mfg. Co., C.C.A.Wis., 72 F.2d 385, certiorari denied Minnesota Mining & Mfg. Co. v. Guth, 55 S.Ct. 506, 294 U.S. 711, 79 L.Ed. 1245.

26. U.S.—New Jersey Zinc Co. v. Singmaster, C.C.A.N.Y., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685—Wright v. Vocalion Organ Co., Mass., 148 F. 209, 79 C.C.A. 183.
D.C.—Hunt v. McCaslin, 10 App.D.C. 527.

27. U.S.—Du Pont Rayon Co. v. Paley, D.C.Ill., 4 F.Supp. 290, affirmed, C.C.A., Paley v. Du Pont Rayon Co., 71 F.2d 856.

28. U.S.—New Jersey Zinc Co. v. Singmaster, C.C.A.N.Y., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.

29. U.S.—Conway v. White, C.C.A. Conn., 9 F.2d 863.

30. U.S.—Guth v. Minnesota Min. & Mfg. Co., C.C.A.Wis., 72 F.2d 385, certiorari denied Minnesota Mining & Mfg. Co. v. Guth, 55 S.Ct. 506, 294 U.S. 711, 79 L.Ed. 1245—Conway v. White, C.C.A.Conn., 9 F.2d 863—**Corpus Juris cited in** Hebbard v. American Zinc, Lead & Smelting Co., D.C.Mo., 66 F.Supp. 113, 116—New Jersey Zinc Co. v. Singmaster, D.C.N.Y., 4 F.Supp. 967, modified on other grounds, C. C.A., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685—Du Pont Rayon Co. v. Paley, D.C.Ill., 4 F.Supp. 290, affirmed, C. C.A., Paley v. Du Pont Rayon Co., 71 F.2d 856—Conway v. White, C. C.A.Conn., 292 F. 837—Thompson v. Automatic Fire Protection Co., D.C.N.Y., 197 F. 750, affirmed 211 F. 120, 128 C.C.A. 22—Wright v. Vocalion Organ Co., Mass., 148 F. 209, 79 C.C.A. 183—Thibodeau v. Hildreth, C.C.A.Mass., 124 F. 892, 60 C.C.A. 78, 63 L.R.A. 480—Hulse v. Bonsack Mach. Co., Va., 65 F. 864, 13 C.C.A. 180.
Ill.—Myers v. Gerhardt, 176 N.E. 713, 344 Ill. 620.
N.J.—Briggs v. United Shoe Mach. Corp., 114 A. 538, 92 N.J.Eq. 277, certiorari denied 41 S.Ct. 149, 254 U.S. 653, 65 L.Ed. 459.
Ohio.—United Aircraft Products v. Cruzan, 62 N.E.2d 763, 76 Ohio App. 540.
Legality of restrictive agreements by employees generally see Contracts § 254.
Validity of assignments of patents generally see the C.J.S. title Patents §§ 229–233, also 48 C.J. p 247 note 35 et seq.

31. U.S.—Guth v. Minnesota Min. & Mfg. Co., C.C.A.Wis., 72 F.2d 385, certiorari denied Minnesota Mining & Mfg. Co. v. Guth, 55 S.Ct. 506, 294 U.S. 711, 79 L.Ed. 1245.

32. U.S.—Guth v. Minnesota Min. & Mfg. Co., C.C.A.Wis., 72 F.2d 385, certiorari denied Minnesota Mining & Mfg. Co. v. Guth, 55 S.Ct. 506, 294 U.S. 711, 79 L.Ed. 1245.

33. Ohio.—United Aircraft Products v. Warrick, 72 N.E.2d 669, 79 Ohio App. 165.

34. U.S.—New Jersey Zinc Co. v. Singmaster, D.C.N.Y., 4 F.Supp. 967, modified on other grounds, C. C.A., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.

35. Mass.—American Circular Loom Co. v. Wilson, 84 N.E. 133, 198 Mass. 182, 126 Am.S.R. 409.
N.Y.—National Cash Register Co. v. Remington Arms Co., 209 N.Y.S. 40, 212 App.Div. 343, affirmed 151 N.E. 144, 242 N.Y. 99, reargument denied 152 N.E. 431, 242 N.Y. 569.
39 C.J. p 130 note 99.

36. U.S.—Hildreth v. Duff, Pa., 148 Fed. 676, 78 C.C.A. 410.

37. U.S.—Wright v. Vocalion Organ Co., Mass., 148 F. 209, 78 C.C.A. 183.
Inventions made before or after term

Where the product invented by an employee is sought to be appropriated by the employer under an agreement to assign, the language of the agreement must be clear and show an unmistakable intention that the particular matter covered by the invention or patent is within the intention of the parties.[38] Contracts referring in express terms or by implication to inventions or improvements connected with a limited class of machines, while enforceable as far as that class is concerned,[39] are held not to apply to inventions of another kind not named or implied in the contract,[40] or to inventions connected with machines generally which are used in that particular trade,[41] even though the contract contains other provisions of a general nature requiring the employee to work for the employer in every way that he can[42] and even though the invention was in a line of manufacture taken on by the employer as a regular part of his business subsequent to the making of the contract.[43]

If the employment contract is not restricted to inventions along a particular line, but in terms covers all inventions made by the employee during the term of employment, the employer has an equitable title in all his employee's inventions made during the term,[44] even though the employee worked on them out of business hours.[45] Inventions specifically excepted in the contract do not belong to the employer.[46]

of employment see infra subdivision c of this section.

Inventions prior to agreement

"During term of employment" within agreement by employee to transfer to employer any inventions "now known", discovered, or made by employee, either in whole or in part, during term of employment, referred to employment prior to as well as after the date of the agreement.—United Aircraft Products v. Warrick, 72 N.E.2d 669, 70 Ohio App. 165.

What invention consisted of must be ascertained from examination of all claims, as well as specifications of patent subsequently granted him.—New Jersey Zinc Co. v. Singmaster, D.C.N.Y., 4 F.Supp. 967, modified on other grounds, C.C.A., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.

38. Pa.—White Heat Products Co. v. Thomas, 109 A. 685, 266 Pa. 551.

39. U.S.—Standard Plunger El. Co. v. Stokes, N.Y., 212 F. 893, 129 C.C.A. 413.

39 C.J. p 130 note 4.

40. Ill.—Lanteen Laboratories v. Clark, 13 N.E.2d 678, 294 Ill.App. 81—Fowler v. Hi-Lo Fan Corporation, 6 N.E.2d 510, 288 Ill.App. 624.
N.Y.—Salterini v. Schneider, 45 N.Y.S.2d 645.

39 C.J. p 130 notes 3, 5.

Inventions in specified lines

(1) Abrasive wheel to be used for grinding steel and other hard metals is not invention "relating to the manufacture of bricks, stone products, earthenware products, or analogous and collateral products" within meaning of those words as used in contract between plaintiff company and defendant employee whereby defendant assigned and transferred to plaintiff all "right, title, and interest in and to every invention . . . relating to the manufacture of bricks, stone products, earthenware products . . . which he now has or may hereafter make or acquire during the period of his employment."—White Heat Products Co. v. Thomas, 109 A. 685, 266 Pa. 551.

(2) Other lines see 39 C.J. p 130 note 5 [a].

41. U.S.—Hildreth v. Duff, C.C.Pa., 143 F. 139, affirmed 148 F. 676, 78 C.C.A. 410.

42. U.S.—Hildreth v. Duff, supra.
Ill.—Joliet Mfg. Co. v. Dice, 105 Ill. 649.

43. Ill.—Joliet Mfg. Co. v. Dice, supra.

44. U.S.—H. F. Walliser & Co. v. F. W. Maurer & Sons Co., D.C.Pa., 17 F.2d 122—New Jersey Zinc Co. v. Singmaster, D.C.N.Y., 4 F.Supp. 967, modified on other grounds, C.C.A., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.
Mich.—Detroit Lubricator Co. v. Lavigne, 115 N.W. 988, 151 Mich. 650.
Ohio.—United Aircraft Products v. Cruzan, 62 N.E.2d 763, 76 Ohio App. 540.

"Patentable ideas"

(1) Phrase "patentable ideas" in employer's instruction to assign such ideas of employees to employer did not mean complete inventions on which patents would issue; meaning of word "idea" is not confined to arts, machines, manufactures or compositions of matter and reduction to practice is unnecessary to constitute "patentable idea."—New Jersey Zinc Co. v. Singmaster, D.C.N.Y., 4 F.Supp. 967, modified on other grounds, C.C.A., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.

(2) Tests of invention in patent infringement and priority cases are not controlling in construing employee's contract to assign his "patentable ideas" to employer.—New Jersey Zinc Co. v. Singmaster, D.C.N.Y., 4 F.Supp. 967, modified on other grounds, C.C.A., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.

45. U.S.—Toledo Machine & Tool Co. v. Byerlein, C.C.A.Mich., 9 F.2d 279.
Mich.—Detroit Lubricator Co. v. Lavigne, 115 N.W. 988, 151 Mich. 650.

46. Mich.—Kysor v. Alma Motor Co., 287 N.W. 385, 290 Mich. 76.

Inventions started before employment

(1) Where manufacturer and engineer entered into written contract whereby engineer agreed that all new inventions pertaining to truck which he conceived during life of contract should belong to manufacturer except any invention which had already been "started," court in determining meaning of quoted word had right to take into consideration business in which both contracting parties were engaged at time of execution of contract as well as business which it was contemplated should be continued.—Kysor v. Alma Motor Co., supra.

(2) In interpretation of a contract whereby an engineer agreed that all new inventions conceived by him during life of contract should belong to manufacturer of four wheel drive trucks, except any invention "started" before execution of contract, quoted word may be defined as beginning of a course of action which, if followed to a conclusion of original, logical conception, would lead to perfected product, completion of a mechanical unit adapted for practical utilization in application of power from generating plant of motor truck to turn each of four wheels thereof.—Kysor v. Alma Motor Co., supra.

(2) Employee Hired to Make Invention

Where an employee is hired to secure certain defined results, the employer has an equitable title as against the employee to the particular inventions the employee was engaged to perfect.

It has been almost universally held that, where one is employed in experimental work to secure certain defined results, the employer has an equitable title as against his employee to the particular inventions the employee was hired to perfect[47] even though the contract of employment does not specifically so provide;[48] and the employee in such case is bound to assign to his employer any patent obtained.[49] The government as an employer stands in the same position in this respect as any other employer;[50] the fact the United States does not desire a monopoly in the invention is not sufficient to deny its right to the invention of a government employee.[51] It is not necessary that the word "invention" be used in the employment agreement in order to constitute it an employment to make an invention.[52]

It has been held that the right of the employer to the invention or discovery of the employee depends, not on the terms of the original contract of hiring, but on the nature of the service in which the employee is engaged at the time he makes the discovery or invention, and arises, not out of the terms of the contract of hiring, but out of the duty which the employee owes to his employer with respect to the service in which he is engaged.[53]

47. U.S.—Hebbard v. American Zinc, Lead & Smelting Co., C.C.A.Mo., 161 F.2d 339—Lion Mfg. Corporation v. Chicago Flexible Shaft Co., C.C.A.Ill., 106 F.2d 930—Owens v. Sponable, Cust. & Pat.App., 69 F. 2d 650—**Corpus Juris cited in** Dinwiddie v. St. Louis & O'Fallon Coal Co., C.C.A.Md., 64 F.2d 303, 306—Texas Co. v. Gulf Refining Co., C.C. A.Tex., 26 F.2d 394, certiorari denied 49 S.Ct. 27, 278 U.S. 625, 73 L.Ed. 545—U. S. v. Houghton, D.C. Md., 20 F.2d 434, affirmed, C.C.A., Houghton v. U. S., 23 F.2d 386, certiorari denied 48 S.Ct. 528, 277 U. S. 592, 72 L.Ed. 1004—Magnetic Mfg. Co. v. Dings Magnetic Separator Co., C.C.A.Wis., 16 F.2d 739, certiorari denied 47 S.Ct. 586, 274 U.S. 740, 71 L.Ed. 1320—Hebbard v. American Zinc, Lead & Smelting Co., D.C.Mo., 66 F.Supp. 113—Crown Cork & Seal Co. v. Fankhanel, D.C.Md., 49 F.Supp. 611—Tennessee Copper & Chemical Corporation v. Martin, D.C.N.J., 4 F. Supp. 38, affirmed, C.C.A., Martin v. Tennessee Copper & Chemical Corporation, 66 F.2d 187, certiorari denied 54 S.Ct. 120, 290 U.S. 683, 78 L.Ed. 588—Dowse v. Federal Rubber Co., D.C.Ill., 254 F. 308—Ordnance Engineering Corporation v. U. S., 68 Ct.Cl. 301, supplemented 73 Ct.Cl. 379, certiorari denied 58 S.Ct. 28, 302 U.S. 708, 82 L.Ed. 547, and U. S. v. Ordnance Engineering Corporation, 58 S.Ct. 28, 302 U.S. 708, 82 L.Ed. 547.

Conn.—Transparent Ruler Co. v. C-Thru Ruler Co., 28 A.2d 232, 129 Conn. 369.

Fla.—State v. Neal, 12 So.2d 590, 152 Fla. 582, certiorari denied 64 S.Ct. 191, 320 U.S. 783, 88 L.Ed. 470, rehearing denied 64 S.Ct. 259, 320 U. S. 814, 88 L.Ed. 492—State Board of Education v. Bourne, 7 So.2d 838, 150 Fla. 323.

Mass.—Hoyt v. Corporon, 168 N.E. 94, 268 Mass. 544.

Mich.—Parker Rust-Proof Co. v. Allen, 203 N.W. 890, 231 Mich. 69.

Mo.—Meissner v. Standard Ry. Equipment Co., 109 S.W. 730, 211 Mo. 112.

N.Y.—Talbot v. Harrison, 270 N.Y.S. 171, 150 Misc. 798, affirmed 268 N.Y.S. 875, 240 App.Div. 957—Salterini v. Schneider, 45 N.Y.S.2d 645.

Tex.—Atlas Brick Co. v. North, Com. App., 288 S.W. 146.

39 C.J. p 130 note 11.

Reasons for rule

(1) The reason is that he has only produced that which he was employed to invent.—U. S. v. Dubilier Condenser Corporation, Del., 53 S.Ct. 554, 289 U.S. 178, 77 L.Ed. 1114, amended 53 S.Ct. 687, 289 U.S. 706, 77 L.Ed. 1462.

(2) The rule is grounded on implied agreement of employee to assign his invention to his employer.—Air Reduction Co., Inc. v. Walker, 195 N.Y.S. 120, 118 Misc. 827—39 C. J. p 131 note 12.

(3) The rule is grounded on an estoppel based on a relationship of trust and confidence.—Wireless Specialty Apparatus Co. v. Mica Condenser Co., 131 N.E. 307, 239 Mass. 158, 16 A.L.R. 1170—39 C.J. p 131 note 13.

Work done at home

Where employee was hired for specific purpose of developing and perfecting employer's edge setting machine and while doing the work for which he was hired invented new machine and made drawing therefor at his own home, drawing came within scope of employment and belonged to employer.—National Development Co. v. Gray, 55 N.E.2d 783, 316 Mass. 240, 153 A.L.R. 973.

48. U.S.—Goodyear Tire & Rubber Co. of Akron, Ohio, v. Miller, C.C. A.Cal., 22 F.2d 353—Hebbard v. American Zinc, Lead & Smelting Co., D.C.Mo., 66 F.Supp. 113—Tennessee Copper & Chemical Corporation v. Martin, D.C.N.J., 4 F. Supp. 38, affirmed, C.C.A., Martin v. Tennessee Copper & Chemical Corporation, 66 F.2d 187, certiorari denied 54 S.Ct. 120, 290 U.S. 683, 78 L.Ed. 588.

Mass.—National Development Co. v. Gray, 55 N.E.2d 783, 316 Mass. 240, 153 A.L.R. 973.

Pa.—Quaker State Oil Refining Co. v. Talbot, 174 A. 99, 315 Pa. 517.

49. U.S.—U. S. v. Dubilier Condenser Corporation, Del., 53 S.Ct. 554, 289 U.S. 178, 77 L.Ed. 1114, 85 A. L.R. 1488, amended 53 S.Ct. 687, 289 U.S. 706, 77 L.Ed. 1462—Tennessee Copper & Chemical Corporation v. Martin, D.C.N.J., 4 F.Supp. 38, affirmed, C.C.A., Martin v. Tennessee Copper & Chemical Corporation, 66 F.2d 187, certiorari denied 54 S.Ct. 120, 290 U.S. 683, 78 L.Ed. 588.

Mass.—National Development Co. v. Gray, 55 N.E.2d 783, 316 Mass. 240, 153 A.L.R. 973—Hoyt v. Corporon, 168 N.E. 94, 268 Mass. 544.

Mich.—Gear Grinding Mach. Co. v. Stuber, 276 N.W. 514, 282 Mich. 455.

N.Y.—Salterini v. Schneider, 45 N.Y. S.2d 645.

50. U.S.—Houghton v. U. S., C.C.A. Md., 23 F.2d 386, certiorari denied 48 S.Ct. 528, 277 U.S. 592, 72 L.Ed. 1004—Yablick v. Protecto Safety Appliance Corporation, C.C.A.N.J., 21 F.2d 885.

Approval of government employee's application for patent did not deprive United States of ownership of invention.—Houghton v. U. S., C.C.A.Md., 23 F.2d 386, certiorari denied 48 S.Ct. 528, 277 U.S. 592, 72 L.Ed. 1004.

51. U.S.—Houghton v. U. S., supra.

52. N.Y.—Salterini v. Schneider, 45 N.Y.S.2d 645.

53. U.S.—Houghton v. U. S., C.C.A. Md., 23 F.2d 386, certiorari denied 48 S.Ct. 528, 277 U.S. 592, 72 L.Ed.

c. Inventions or Patents before or after Term of Employment

Unless otherwise provided by agreement, an employee's inventions made before the commencement, or after the termination, of his employment belong to him.

In the absence of any contract stipulation to the contrary, an employee's inventions belong to him when they are made before the commencement[54] or after the termination[55] of his employment. However, an express provision of a contract may cover inventions made after the term of the employment.[56] Such provisions have been sustained as against the objection that they offend public policy,[57] although the law does not look with special favor on such provisions.[58] Where the circumstances give rise to an equitable title in the employer to the inventions of the employee, the fact that the patent issues or application therefor is filed after the employee has left his employment is not material.[59]

Where an employee is hired for a year under a written employment contract containing an agreement to assign to the employer any inventions made during the year following the cessation of his employment, and on the expiration of the written contract of employment the employee continues at will in the service of his employer, the agreement refers to the year immediately following the termination of the written contract of employment and not to the cessation of employment several years later as an employee at will.[60] A provision requiring the assignment by the employee of inventions made by the employee after the termination of his employment is inoperative where it depends on the happening of conditions which never occur[61] or the employer releases any claim to such inventions.[62]

d. License or Shop Right of Employer

The employer may be entitled to a license or shop right for the use of his employee's invention either as a result of an agreement or because the employer's time, tools, or material were employed in conceiving and perfecting the invention.

The employee may confer on the employer a license or "shop right" for the use of the invention by express agreement,[63] or by implication from the circumstances of the employment,[64] as by evidence disclosing an employment without formal agreement, a use by the employee of his employer's property and the services of his coemployees, and an assent by the employee to the employer's use of the invention.[65] The government is entitled, in the

1004—Crown Cork & Seal Co. v. Fankhanel, D.C.Md., 49 F.Supp. 611.

"It matters not in what capacity the employee may originally have been hired, if he be set to experimenting with the view of making an invention, and accepts pay for such work, it is his duty to disclose to his employer what he discovers in making the experiments, and what he accomplishes by the experiments belongs to the employer. During the period that he is so engaged, he is 'employed to invent,' and the results of his efforts at invention belong to his employer in the same way as would the product of his efforts in any other direction."—Houghton v. U. S., C.C.A.Md., 23 F.2d 386, 390, certiorari denied 48 S.Ct. 528, 277 U.S. 592, 72 L.Ed. 1004.

54. U.S.—Conway v. White, D.C. Conn., 300 F. 866, reversed on other grounds, C.C.A., 9 F.2d 863.
Pa.—Sharples v. McCornack, 99 A. 153, 254 Pa. 535.

55. U.S.—New Jersey Zinc Co. v. Singmaster, C.C.A.N.Y., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.
Mich.—Dow Chemical Co. v. American Bromine Co., 177 N.W. 996, 210 Mich. 262.
N.Y.—National Cash Register Co. v. Remington Arms Co., 209 N.Y.S. 40, 212 App.Div. 343, affirmed 151 N.E. 144, 242 N.Y. 99, reargument denied 152 N.E. 431, 242 N.Y. 569.
39 C.J. p 131 note 16.

Improvements

Although basic patent was assignable to former employer of inventor under contract requiring assignment of all patentable inventions to employer, because invention was conceived before termination of employment, patents on improvements made or discovered after termination of employment were not assignable to former employer, since basic patent and improvement patents constituted separable and independent inventions.—New Jersey Zinc Co. v. Singmaster, C.C.A.N.Y., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U. S. 591, 79 L.Ed. 685.

56. U.S.—Wege v. Safe-Cabinet Co., Mich., 249 F. 696, 161 C.C.A. 606.

57. U.S.—Wege v. Safe-Cabinet Co., supra.
Legality of restrictive agreements by employees generally see Contracts § 254.

58. **Inventions made within year after employment**
N.Y.—National Cash Register Co. v. Remington Arms Co., 151 N.E. 144, 242 N.Y. 99, reargument denied 152 N.E. 431, 242 N.Y. 569.

59. U.S.—Fullman v. Steel City Electric Co., C.C.A.Pa., 2 F.2d 4.

60. N.Y.—National Cash Register Co. v. Remington Arms Co., 209 N.Y.S. 40, 212 App.Div. 343, affirmed 151 N.E. 144, 242 N.Y. 99, reargument denied 152 N.E. 431, 242 N.Y. 569.

61. N.Y.—National Cash Register Co. v. Remington Arms Co., supra.

62. N.Y.—National Cash Register Co. v. Remington Arms Co., 151 N. E. 144, 242 N.Y. 99, reargument denied 152 N.E. 431, 242 N.Y. 569.

63. U.S.—McAleer v. U. S., Ct.Cl., 14 S.Ct. 160, 150 U.S. 424, 37 L.Ed. 1130.
39 C.J. p 129 note 87.
Compensation of employee for use of inventions see infra subdivision e of this section.

64. U.S.—Mix v. National Envelope Co., D.C.Pa., 244 F. 822—Barber v. National Carbon Co., Ohio, 129 F. 370, 64 C.C.A. 40, 5 L.R.A.,N.S., 1154.
39 C.J. p 129 note 88.

Employee who repeatedly refused to assign his patent to employer or to give patent to employer as a "suggestion" or to enter into any arrangements giving employer rights in patent until employee knew what he was going to get for patent, conferred no shop right in patent on employer.—Heywood-Wakefield Co. v. Small, C.C.A.Mass., 87 F.2d 716, certiorari denied 57 S.Ct. 925, 301 U. S. 698, 81 L.Ed. 1353.

65. U.S.—U. S. v. Dubilier Condenser Corporation, Del., 53 S.Ct. 554,

same way and to the same extent as a private employer, to shop rights.[66] Where there exists no agreement between the master and servant, the right of the master is based on equitable principles; since the servant uses his master's time, facilities, and materials to attain a concrete result, the master is entitled in equity to use that which embodies his own property and to duplicate it as often as he may find occasion to employ similar appliances in his business.[67]

The employment, however, does not, of itself, import a license to use the employee's invention.[68] A shop right in favor of the employer does not arise where in conceiving and perfecting the invention the employee does not use the employer's time, tools, or materials[69] or where the parties have agreed on a royalty basis.[70] A shop right cannot come into existence unless the inventor was an employee of the one claiming the right at the time when the invention was made and reduced to practice;[71] but it has also been held that a shop right is not restricted alone to the case of an employer-employee relationship.[72] The scope of a shop right must be determined from the nature of the em-

289 U.S. 178, 77 L.Ed. 1114, 85 A.L.R. 1488, amended 53 S.Ct. 687, 289 U.S. 706, 77 L.Ed. 1462—Keyes v. Eureka Consol. Min. Co., Cal., 15 S.Ct. 772, 158 U.S. 150, 39 L.Ed. 929—Hapgood v. Hewitt, 7 S.Ct. 193, 119 U.S. 226, 30 L.Ed. 369—Grip Nut Co. v. Sharp, C.C.A.Ill., 150 F.2d 192, certiorari denied Sharp v. Grip Nut Co., 66 S.Ct. 55, 326 U.S. 742, 90 L.Ed. 443—Pure Oil Co. v. Hyman, C.C.A.Ill., 95 F.2d 22—Flannery Bolt Co. v. Flannery, C.C.A.Pa., 86 F.2d 43—Barton v. Nevada Consol. Copper Co., C.C.A.Nev., 71 F.2d 381—Bowers v. Woodman, D.C.Mass., 59 F.2d 797—Neon Signal Devices v. Alpha-Claude Neon Corporation, D.C.Pa., 54 F.2d 793—St. Louis & O'Fallon Coal Co. v. Dinwiddie, D.C.Md., 53 F.2d 655, affirmed, C.C.A., Dinwiddie v. St. Louis & O'Fallon Coal Co., 64 F.2d 303—Bowen v. B. F. Goodrich Co., C.C.A.Ohio, 36 F.2d 306—Monsanto Chemical Works v. Jaeger, D.C.Pa., 31 F.2d 188, affirmed, C.C.A., 42 F.2d 1018—Tin Decorating Co. of Baltimore v. Metal Package Corporation, D.C.N.Y., 29 F.2d 1006, affirmed, C.C.A., 37 F.2d 5, certiorari denied 50 S.Ct. 410, 281 U.S. 759, 74 L.Ed. 1168—Texas Co. v. Gulf Refining Co., C.C.A.Tex., 26 F.2d 394, certiorari denied 49 S.Ct. 27, 278 U.S. 625, 73 L.Ed. 545—Houghton v. U. S., C.C.A.Md., 23 F.2d 386, certiorari denied 48 S.Ct. 528, 277 U.S. 592, 72 L.Ed. 1004—Elzwilaw Co. v. Knoxville Glove Co., C.C.A.Ind., 22 F.2d 962—Scott v. Madison Woolen Co., D.C.Me., 3 F.2d 331—Brown v. L. V. Marks & Sons Co., D.C.Ky., 64 F.Supp. 352—Small v. Heywood-Wakefield Co., D.C.Mass., 13 F.Supp. 825, affirmed, C.C.A., Heywood-Wakefield Co. v. Small, 87 F.2d 716, certiorari denied 57 S.Ct. 925, 301 U.S. 698, 81 L.Ed. 1353—U. S. Colloid Mill Corporation v. Myers, D.C.N.Y., 6 F.Supp. 283—Callahan v. Capron Co., D.C.R.I., 280 F. 254—Beecroft & Blackman v. Rooney, D.C.N.Y., 268 F. 545, reversed on other grounds, C.C.A., 280 F. 543—Schmidt v. Central Foundry Co., D.C.N.J., 218 F. 466, affirmed 229 F. 157, 143 C.C.A. 433—Wilson v. American Circular Loom Co., Mass., 187 F. 840, 109 C.C.A. 600—Whiting v. Graves, C.C. Mass., 29 F.Cas.No.17,577, 3 Ban. & A. 222.

Ill.—Chicago Daily News v. Kohler, 196 N.E. 445, 360 Ill. 351—Lindberg Mach. Works v. Lindberg, 27 N.E.2d 565, 305 Ill.App. 543.

Mass.—National Development Co. v. Gray, 55 N.E.2d 783, 316 Mass. 240, 153 A.L.R. 973.

N.Y.—Henry & Wright Mfg. Co. v. Rogers, 239 N.Y.S. 425, 136 Misc. 178.

Tex.—North v. Atlas Brick Co., Com.App., 13 S.W.2d 59, motion granted in part 16 S.W.2d 519—Atlas Brick Co. v. North, Com.App., 288 S.W. 146.

Wis.—Barlow & Seelig Mfg. Co. v. Patch, 286 N.W. 577, 232 Wis. 220.

39 C.J. p 129 note 89.

"Basis of a 'shop right' is the invention of a device during employment with the aid of his employer's materials and at his employer's expense."—Quaker State Oil Refining Co. v. Talbot, 174 A. 99, 103, 315 Pa. 517.

Estoppel as essential element

U.S.—Brown v. L. V. Marks & Sons Co., D.C.Ky., 64 F.Supp. 352.

There are two items of property in an improvement of employer's product by employee, that of employer who owns product in its improved form and that of employee to whom novel idea belongs, and such property rights remain distinct from each other until employee agrees to assign his idea to employer.—Barlow & Seelig Mfg. Co. v. Patch, 286 N.W. 577, 232 Wis. 220.

As against purchaser of patent implied license from inventor to employer was available.—Tin Decorating Co. of Baltimore v. Metal Package Corporation, D.C.N.Y., 29 F.2d 1006, affirmed, C.C.A., 37 F.2d 5, certiorari denied 50 S.Ct. 410, 281 U.S. 759, 74 L.Ed. 1168.

66. U.S.—U. S. v. Dubilier Condenser Corporation, Del., 53 S.Ct. 554, 289 U.S. 178, 77 L.Ed. 1114, 85 A.L.R. 1488, amended 53 S.Ct. 687, 289 U.S. 706, 77 L.Ed. 1462—Gates v. U. S., 87 Ct.Cl. 358—Shearer v. U. S., 87 Ct.Cl. 40.

D.C.—Moffett v. Fiske, 51 F.2d 868, 60 App.D.C. 281, certiorari denied Fiske v. Moffett, 52 S.Ct. 37, 284 U.S. 662, 76 L.Ed. 561.

Waiver by private act

U.S.—Ericsson v. U. S., 70 Ct.Cl. 401.

67. U.S.—U. S. v. Dubilier Condenser Corporation, Del., 53 S.Ct. 554, 289 U.S. 178, 77 L.Ed. 1114, 85 A.L.R. 1488, amended 53 S.Ct. 687, 289 U.S. 706, 77 L.Ed. 1462—Grip Nut Co. v. Sharp, C.C.A.Ill., 150 F.2d 192, certiorari denied Sharp v. Grip Nut Co., 66 S.Ct. 55, 326 U.S. 742, 90 L.Ed. 443.

Pa.—Quaker State Oil Refining Co. v. Talbot, 174 A. 99, 315 Pa. 517.

68. U.S.—Massie v. Fruit Growers' Express Co., D.C.Del., 31 F.2d 463, reversed on other grounds, C.C.A., Fruit Growers' Express Co. v. Massie, 41 F.2d 43.

39 C.J. p 129 note 90.

69. U.S.—Shearer v. U. S., 87 Ct.Cl. 40.

N.Y.—McNamara v. Powell, 11 N.Y.S.2d 491, 256 App.Div. 554, reargument denied 12 N.Y.S.2d 773, 257 App.Div. 913.

Pa.—Quaker State Oil Refining Co. v. Talbot, 174 A. 99, 315 Pa. 517.

70. U.S.—Brown v. L. V. Marks & Sons Co., D.C.Ky., 64 F.Supp. 352.

71. U.S.—Crom v. Cement Gun Co., D.C.Del., 46 F.Supp. 403.

Incorporation into invention made during employment

Oil company which hired inventor to make invention to prevent refilling of its oil drums was not entitled to shop right in invention made by inventor prior to employment and incorporated in invention made during employment.—Quaker State Oil Refining Co. v. Talbot, 174 A. 99, 315 Pa. 517.

72. U.S.—Neon Signal Devices v. Alpha-Claude Neon Corporation, D.C.Pa., 54 F.2d 793.

ployer's business, the character of the invention involved, the circumstances which created it, and the relation, conduct, and intention of the parties.[73] The shop right has been held nonassignable.[74]

Effect of license for exclusive use. The right of the employer under the license may be extended by its terms to an exclusive use of the employee's invention.[75] Under such provision the employee cannot make a valid assignment of the patent to the employer's competitor in trade.[76]

Statutory regulations. Prior to the application by the employee for a patent the employer may be entitled to a license to use the employee's invention under the federal statute, 35 U.S.C.A. § 48, providing that every person who purchases of the inventor, or discoverer, or with his knowledge and consent constructs any newly invented or discovered machine, or other patentable article, prior to the application by the inventor or discoverer for a patent, or who sells or uses one so constructed, shall have the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor.[77]

e. Compensation of Employee for Inventions or Use Thereof

Pursuant to agreement between an employer and employee, the employee may be entitled to additional compensation for his inventions or for the use thereof.

Where the inventions of the employee equitably belong to the employer or are assigned to him under principles considered supra subdivisions b, c of this section, the employee is not entitled to compensation in addition to the regular wages received[78] unless there exists an agreement between the parties for such extra compensation,[79] such as royalties.[80] The employee is entitled to reasonable com-

Implied license to use invention see the C.J.S. title Patents § 246, also 48 C.J. p 264 note 21 et seq.

73. U.S.—Flannery Bolt Co. v. Flannery, C.C.A.Pa., 86 F.2d 43.

"The scope of an implied license is to be determined by the circumstances out of which it arises, including the relation and conduct of the parties in connection with the business in the development of which the employer's money was expended in making the invention operative, and all the other circumstances upon which agreement may be implied or estoppel enforced."—Tin Decorating Co. of Baltimore v. Metal Package Corporation, D.C.N.Y., 29 F.2d 1006, 1007, affirmed, C.C.A., 37 F.2d 5, certiorari denied 50 S.Ct. 410, 281 U.S. 759, 74 L.Ed. 1168.

Shop right is coextensive with business requirements of employer.—Grip Nut Co. v. Sharp, C.C.A.Ill., 150 F.2d 192, certiorari denied Sharp v. Grip Nut Co., 66 S.Ct. 55, 326 U.S. 742, 90 L.Ed. 443—Pure Oil Co. v. Hyman, C.C.A.Ill., 95 F.2d 22.

License to use improved machines

Inventor's license to employer was not limited to first machine constructed by it, but to extend to as many improved machines as were reasonably necessary for its business.—Tin Decorating Co. of Baltimore v. Metal Package Corporation, D.C.N.Y., 29 F.2d 1006, affirmed, C.C.A., 37 F.2d 5, certiorari denied 50 S.Ct. 410, 281 U.S. 759, 74 L.Ed. 1168.

74. U.S.—General Paint Corporation v. Kramer, C.C.A.Okl., 68 F.2d 40, certiorari denied 54 S.Ct. 628, 292 U.S. 623, 78 L.Ed. 1478—Peck v. Standard Parts Co., C.C.A.Ohio, 282 F. 443, reversed on other grounds Standard Parts Co. v. Peck, 44 S.Ct. 239, 264 U.S. 52, 68 L.Ed. 560, 32 A.L.R. 1033.

75. U.S.—Hulse v. Bonsack Mach. Co., Va., 65 F. 864, 13 C.C.A. 180.

76. U.S.—Hulse v. Bonsack Mach. Co., supra.

77. U.S.—Barton v. Nevada Consol. Copper Co., D.C.Nev., 58 F.2d 646, affirmed, C.C.A., 71 F.2d 381—Tin Decorating Co. of Baltimore v. Metal Package Corporation, D.C.N.Y., 29 F.2d 1006, affirmed, C.C.A., 37 F.2d 5, certiorari denied 50 S.Ct. 410, 281 U.S. 759, 74 L.Ed. 1168.

Authority conferred prior to application for patent generally see the C.J.S. title Patents § 284, also 48 C.J. p 293 note 41 et seq.

78. N.Y.—Salterini v. Schneider, 45 N.Y.S.2d 645.

79. Me.—Corthell v. Summit Thread Co., 167 A. 79, 132 Me. 94, 92 A.L.R. 1391.

N.J.—Oliver v. Autographic Register Co., 177 A. 680, 118 N.J.Eq. 72, affirmed 183 A. 171, 119 N.J.Eq. 481.

Per cent of net profits from sales

(1) Contract between mechanical engineer and company employing him, for assignment of invention, providing that as additional remuneration for patents that might be issued, company agreed to pay engineer, in addition to his salary, specified per cent of net profits from sale of invention or patent or the right to use the same, entitled engineer to accounting for sales by company of annealing furnaces embodying patent on invention by engineer which were manufactured by company and installed for use by others.—Sylvester v. Simplex Engineering Co., 192 A. 125, 326 Pa. 235.

(2) Under agreement whereby employer took option to purchase employee's inventions on method of concentrating ore by flotation, and if employee's "reagents, modified oils or other chemicals" could be profitably manufactured "as a patented flotation oil or reagent," to arrange for manufacture thereof and pay employee specified per cent "of the net profits received by the company therefrom," employer was liable for such per cent only on manufacturing profits from sale of materials, not on royalties collected for licenses of flotation process invented by employee.—Martin v. Minerals Separation North American Corporation, D.C.Md., 29 F.Supp. 146.

80. U.S.—Huff v. Ford, D.C.Fla., 289 F. 858, reversed on other grounds, C.C.A., 296 F. 652, certiorari denied 45 S.Ct. 90, 266 U.S. 602, 69 L.Ed. 462.

N.J.—Oliver v. Autographic Register Co., 177 A. 680, 118 N.J.Eq. 72, affirmed 183 A. 171, 119 N.J.Eq. 481.

Obligation to license another

(1) Under contract providing that if inventor's employer decides not to employ inventions assigned to employer, it would license another to make the inventions and pay to inventor a specified portion of the royalties, decision of the employer not to employ the inventions was a "condition precedent" to requiring employer to license another to make the inventions.—Trask v. Mills Novelty Co., D.C.Ill., 52 F.Supp. 723.

(2) Where contract requiring inventor's employer deciding not to employ inventions assigned to employer to license another manufacturer set forth no condition under which the license was to be granted other than the royalties to be paid to inventor, the law implied the condition that the terms of such license must be reasonable and employer's refusal to consider proposed license agreement containing provisions for

pensation under an agreement requiring the employer to make reasonable recognition to the employee for inventions turned over to the employer.[81]

The employee is entitled to compensation for the employer's use of his inventions where the employer agrees to pay compensation or such is the understanding between the parties;[82] and it has been held that if the employer under a license, express or implied, uses his employee's invention, there is an implied promise on his part to pay his employee for its use, independent of, and in addition to, the amount due under the employment contract as wages.[83] The employee is not entitled to compensation from his employer for the use of his inventions where in express terms he has given his employer the free use of his invention[84] or by his conduct has indicated his acquiescence in its use without payment therefor.[85]

Where the employer is entitled to a shop right in the invention of his employee under the principles considered supra subdivision d of this section, the employee is not, in the absence of agreement, entitled to royalties or other compensation for the use of the invention by the employer.[86] An officer of a corporation is not entitled to royalties under a patent issued in his name where the patent belongs to the corporation and is held by the officer as trustee.[87]

f. Actions

Various actions and proceedings have been instituted in connection with employees' inventions and patents thereon, such as suits or actions by the employee to cancel an assignment or to recover compensation or actions by the employer to compel the assignment of the invention or patent thereon.

Various actions or proceedings may be brought in connection with inventions made by employees and the patents granted thereon,[88] such as a suit for the infringement of a patent[89] or a suit by an employee to rescind or cancel a contract to assign,

cancellation by proposed licensee on sixty days' notice without any right to employer to cancel was warranted.—Trask v. Mills Novelty Co., supra.

(3) Where inventor and his employer had contributed to inventions which were assigned to employer and contract requiring employer to license others to manufacture inventions if it decided not to employ inventions or discontinued use thereof set forth the royalty to be paid to inventor, employer and inventor were entitled to reasonable protection in any proposed licensing agreement.—Trask v. Mills Novelty Co., supra.

81. Me.—Corthell v. Summit Thread Co., 167 A. 79, 132 Me. 94, 92 A.L.R. 1391.

Reasonable compensation

Inventions consisting of bobbin controlling adjunct and bossed disc patents which employee turned over to employer, which inventions brought and held profitable customers for employer, mill and machine shop owner, in shoe trade, had reasonable value of five thousand dollars and employee was entitled to such sum, together with interest thereon from date of writ.—Corthell v. Summit Thread Co., supra.

82. U.S.—Cool v. International Shoe Co., C.C.A.Mo., 142 F.2d 318.

Ind.—P. H. & F. M. Roots Co. v. Morgan, 147 N.E. 281, 84 Ind.App. 32.

83. U.S.—Matarese v. Moore-McCormack Lines, C.C.A.N.Y., 158 F.2d 631.

Ind.—Ft. Wayne, C. & L. R. Co. v. Haberkorn, 44 N.E. 322, 15 Ind. App. 479.

84. U.S.—McAleer v. U. S., Ct.Cl., 14 S.Ct. 160, 150 U.S. 424, 37 L. Ed. 1130.

85. U.S.—Dovel v. Sloss-Sheffield Steel & Iron Co., C.C.A.Ala., 139 F.2d 36, certiorari denied 64 S.Ct. 1057, 322 U.S. 740, 88 L.Ed. 1573—Knapp v. U. S., 46 Ct.Cl. 601.

39 C.J. p 131 note 23.

86. U.S.—Grip Nut Co. v. Sharp, C.C.A.Ill., 150 F.2d 192, certiorari denied Sharp v. Grip Nut Co., 66 S.Ct. 55, 326 U.S. 742, 90 L.Ed. 443—Bowers v. Woodman, D.C.Mass., 59 F.2d 797—Brown v. L. V. Marks & Sons Co., D.C.Ky., 64 F.Supp. 352—Wilson v. American Circular Loom Co., Mass., 187 F. 840, 109 C.C.A. 600.

Ill.—Chicago Daily News v. Kohler, 196 N.E. 445, 360 Ill. 351.

Ky.—Dorton v. Ashland Oil & Refining Co., 197 S.W.2d 274, 303 Ky. 279.

Pa.—Manross v. Warr-Penn Refining Co., 17 Pa.Dist. & Co. 485, affirmed 167 A. 564, 312 Pa. 241.

Wis.—Barlow & Seelig Mfg. Co. v. Patch, 286 N.W. 577, 232 Wis. 220.

Government employee

U.S.—Gates v. U. S., 87 Ct.Cl. 358.

Agreement for compensation not shown

Ky.—Dorton v. Ashland Oil & Refining Co., 197 S.W.2d 274, 303 Ky. 279.

Mich.—Pajalich v. Ford Motor Co., 255 N.W. 219, 267 Mich. 418.

87. Mich.—Nahikian v. Mattingly, 251 N.W. 421, 265 Mich. 128.

Patent obtained through breach of trust

Where corporation's employee and not corporation's executive was the first inventor of cushion spring construction, and executive's patent was obtained through executives' breach of trust, corporation was entitled to all royalties received therefrom by executives, less expenses incurred in obtaining the patent.—L. A. Young Spring & Wire Corporation v. Falls, 11 N.W.2d 329, 307 Mich. 69.

88. U.S.—General Paint Corporation v. Kramer, C.C.A.Okl., 68 F.2d 40, certiorari denied 54 S.Ct. 628, 292 U.S. 623, 78 L.Ed. 1478.

Mich.—Kysor v. Alma Motor Co., 287 N.W. 385, 290 Mich. 76.

89. U.S.—Heywood-Wakefield Co. v. Small, C.C.A.Mass., 87 F.2d 716, certiorari denied 57 S.Ct. 925, 301 U.S. 698, 81 L.Ed. 1353.

Actions for infringement of patents generally see the C.J.S. title Patents §§ 310–361, also 48 C.J. p 323 note 55 et seq.

Evidence

Evidence in patent infringement suit failed to establish defendant corporation's claim of license from patentee in its employ.—Kny-Scheerer Corporation v. American Sterilizer Co., D.C.N.Y., 5 F.Supp. 273.

Corroboration

Where an exhibit furnishes corroboration of plaintiff's testimony as to his claim that invention was made when off duty, in absence of other testimony such corroboration is accepted.—Shearer v. U. S., 87 Ct.Cl. 40.

Question of law or fact

Whether employee, hired to check drawings, who on his own time and from his own materials invented chair base applicable to employer's business and showed employer his

or an assignment of, an invention, or patent thereon, to the employer or to compel a reassignment.[90] Cancellation or reassignment may not be obtained where there is an adequate remedy at law.[91] In suits to cancel or rescind or to compel a reassignment, the general rules in civil actions ordinarily apply with respect to pleadings[92] and evidence.[93]

Actions to recover compensation. In a proper case an employee may maintain an action to recover compensation from his employer for the use or assignment of his inventions or patents thereon.[94] In defense to an action by an employee for compensation various matters have been urged,[95] such as laches.[96] A tender of a reassignment by the employer to the employee which reserves shop rights to the employer does not constitute a defense to an action for the value of the invention or patent rights assigned.[97] The general rules in civil actions ordinarily are applicable with respect to pleading,[98] evidence,[99] including its admissibility[1] and weight and sufficiency,[2] and such general

model, conferred shop right on employer, was question of fact.—Small v. Heywood-Wakefield Co., D.C.Mass., 13 F.Supp. 825, affirmed, C.C.A., Heywood-Wakefield Co. v. Small, 87 F.2d 716, certiorari denied 57 S.Ct. 925, 301 U.S. 698, 81 L.Ed. 1353.

90. Mich.—Kysor v. Alma Motor Co., 287 N.W. 385, 290 Mich. 76.

91. Del.—O'Neil v. E. I. Du Pont de Nemours & Co., 107 A. 770, 12 Del.Ch. 120.

92. **Complaint**

In engineer's action against motor truck manufacturer to secure reassignment of certain patent applications, allegations of complaint charging that plaintiff had been induced to assign patents by false representations and pretenses of defendant were sufficient, if proved, to entitle plaintiff to a rescission of assignments.—Kysor v. Alma Motor Co., 287 N.W. 385, 290 Mich. 76.

93. **Evidence held sufficient**

(1) To support finding or judgment for employer.—Hebbard v. American Zinc, Lead & Smelting Co., C.C.A.Mo., 161 F.2d 339—Bowen v. B. F. Goodrich Co., C.C.A.Ohio, 36 F. 2d 306.

(2) In action to have declared void an agreement entered into by plaintiff with defendant institute conferring royalty rights on defendant with reference to invention conceived by plaintiff while in employ of defendant, either on ground of want of consideration or on ground of fraud in the inducement, evidence supported judgment for plaintiff.—Simmons v. California Institute of Technology, Cal.App., 174 P.2d 653.

94. U.S.—Matarese v. Moore-McCormack Lines, C.C.A.N.Y., 158 F. 2d 631.

Actions relating to compensation generally see infra §§ 122–137.

Liability of employer for compensation see supra subdivision e of this section.

95. U.S.—General Paint Corporation v. Kramer, C.C.A.Okl., 68 F.2d 40, certiorari denied 54 S.Ct. 628, 292 U.S. 623, 78 L.Ed. 1478.

96. **Matters constituting laches**

(1) Employee's action to recover just compensation from employer for use of employee's invented devices for many years was not barred by laches where there was no showing that delay prejudiced employer and complaint alleged that delay was due as much to employer as to employee.—Cool v. International Shoe Co., C.C.A.Mo., 142 F.2d 318.

(2) Employee's action to recover compensation for employer's use of employee's invented devices was not barred by laches where complaint did not disclose that cause of action accrued at any particular time and defendant did not request plaintiff to state the time at which compensation became due or date on which cause of action accrued.—Cool v. International Shoe Co., supra.

97. U.S.—General Paint Corporation v. Kramer, C.C.A.Okl., 68 F.2d 40, certiorari denied 54 S.Ct. 628, 292 U.S. 623, 78 L.Ed. 1478.

98. U.S.—Cool v. International Shoe Co., C.C.A.Mo., 142 F.2d 318.

99. U.S.—General Paint Corporation v. Kramer, C.C.A.Okl., 68 P.2d 40, certiorari denied 54 S.Ct. 628, 292 U.S. 623, 78 L.Ed. 1478.

1. **Evidence held admissible**

(1) In action on implied contract for reasonable value of inventions and patent rights assigned, proof of reasonable royalties was admissible and entitled to be considered by jury as element in arriving at value.—General Paint Corporation v. Kramer, supra.

(2) In salesman's action against his master for compensation for advertising idea invented by salesman, involving use of advertising sound car, testimony of master's officials that use of master's trade-mark on sound car had been discussed many years before salesman was employed, and that they were familiar with such type of advertising years before salesman claimed to have evolved the idea was admissible.—Salon v. W. M. Finck & Co., 4 N.W.2d 469, 302 Mich. 65.

(3) In action to recover reasonable value of use of certain inventive ideas disclosed by employee to an agent of employer in expectation of payment, patents obtained by employee after disclosure of inventive ideas to employer's agent were properly admitted as part of history of events between parties taken pursuant to agent's direction and plan of retaining the benefit to employer alone.—Matarese v. Moore-McCormack Lines, C.C.A.N.Y., 158 F.2d 631.

Evidence held inadmissible

U.S.—Dovel v. Sloss-Sheffield Steel & Iron Co., C.C.A.Ala., 139 F.2d 36, certiorari denied 64 S.Ct. 1057, 322 U.S. 740, 88 L.Ed. 1573.

2. **Evidence held sufficient**

(1) To support findings that employee was under no contractual duty to make inventions for employer and that no custom existed requiring employees to assign their patents to employer.—Howard v. Howe, C.C.A.Ill., 61 F.2d 577, certiorari denied 53 S.Ct. 527, 289 U.S. 731, 77 L.Ed. 1480.

(2) To warrant finding that defendant employer agreed to furnish all materials for construction of machine which plaintiff employee was to endeavor to perfect.—Sermuks v. Automatic Aluminum Heel Co., 153 N.E. 8, 256 Mass. 478.

(3) In suit by mechanical engineer against employer for accounting for profits from sale of annealing furnaces, allegedly due under contract for per cent of profits from sale of right to use of invention or patent, evidence sustained finding that engineer was coinventor of patented annealing furnace sold by employer.—Sylvester v. Simplex Engineering Co., 192 A. 125, 326 Pa. 235.

(4) Other evidence.—Matarese v. Moore-McCormack Lines, C.C.A.N.Y., 158 F.2d 631—Dysart v. Remington Rand, D.C.Conn., 40 F.Supp. 596.

Evidence held insufficient

(1) To establish that employer agreed to pay employee any commission for right to use patent covering invention relating to Jacob's ladder.—Salterini v. Schneider, 45 N. Y.S.2d 645.

(2) To show that employee granting exclusive use of device to employer took undue advantage of employer.—Myers v. Gerhardt, 176 N.E. 713, 344 Ill. 620.

rules ordinarily are applicable to trial,[3] damages,[4] and review.[5]

Actions by employers to recover employee's inventions. Where the employer claims the ownership of inventions made by the employee or of patents thereon, as considered supra subdivisions b, c of this section, by appropriate remedy he may establish his ownership and compel the employee to assign the inventions or patents thereon.[6] Various matters have been urged in defense to such actions,[7] such as estoppel[8] or laches.[9] A contract providing for the assignment of the employee's inventions to his employer will not be enforced in

(3) To sustain defenses of fraud and estoppel, based on employee's failure to make an issue of his patent claim when defendant purchased assignor's assets.—Dysart v. Remington Rand, supra.

(4) To sustain employer's claim to invention by way of shop right, license, or equitable or legal title based on employee's position as an officer of employer when invention was made.—Dysart v. Remington Rand, D.C.Conn., 40 F.Supp. 596.

(5) Letter of patentee to employer's president inviting employer to buy rights in the patents so that patentee would be relieved of embarrassment as to licensing nearby competitors was insufficient to prove contract of employer to pay royalties.—Dovel v. Sloss-Sheffield Steel & Iron Co., C.C.A.Ala., 139 F.2d 36, certiorari denied 64 S.Ct. 1057, 322 U.S. 740, 88 L.Ed. 1573.

3. **Questions of law and fact**
U.S.—Matarese v. Moore-McCormack Lines, C.C.A.N.Y., 158 F.2d 631.

Instructions

In action for compensation for use of certain inventions disclosed by employee to employer's agent in expectation of payment, court properly charged that recovery must be based on reasonable value of use of the devices and reasonable value of services rendered by employee.—Matarese v. Moore-McCormack Lines, supra.

4. U.S.—Matarese v. Moore-McCormack Lines, supra.
N.Y.—McNamara v. Powell, 11 N.Y.S.2d 491, 256 App.Div. 554, reargument denied 12 N.Y.S.2d 773, 257 App.Div. 913.

Profits realized from sales

Where automobile muffler manufacturer and his successor attempted to deprive manufacturer's salesman of invention of improved automobile muffler and as part of such scheme manufacturer filed application for patent which resulted in litigation which terminated in favor of salesman, manufacturer and successor were liable to account to salesman for profits realized from sale of mufflers by manufacturer and successor, from date on which muffler was wrongfully appropriated to date on which patent was issued to salesman.—McNamara v. Powell, supra.

Excessiveness

In action for reasonable value of use of certain inventive ideas regarding cargo loading and unloading apparatus disclosed by employee to employer's agent in expectation of payment, an award of forty thousand dollars was not excessive under evidence.—Matarese v. Moore-McCormack Lines, C.C.A.N.Y., 158 F.2d 631.

Expenses of litigation

N.Y.—McNamara v. Powell, 11 N.Y.S.2d 491, 256 App.Div. 554, reargument denied 12 N.Y.S.2d 773, 257 App.Div. 913.

5. **Affirmance by divided court**

In action by employee on contract for invention of motor accessories, decision that employee was entitled to recover royalties on carburetors sold, but not unearned minimum royalties, was affirmed by divided court.—Carter v. Marvel Carburetor Co., 248 N.W. 545, 263 Mich. 48, certiorari denied Marvel Carburetor Co. v. Carter, 54 S.Ct. 92, 290 U.S. 673, 78 L.Ed. 581.

6. U.S.—Conway v. White, C.C.A. Conn., 292 F. 837.
Specific performance to compel assignment of patents see the C.J.S. title Specific Performance § 67, also 58 C.J. p 1038 note 73 et seq.

Invention not patentable

Where defendant orally contracted to assign to plaintiff all rights to any patentable invention or device he was employed to work on, or application not yet acted on by the patent office, but had not agreed to refrain from divulging any secret process of the plaintiff, defendant, and defendant company organized by him could not be restrained from using his inventions, not patentable for lack of novelty, and which could be easily seen and copied, since an assignment thereof would give no rights.—Shur-Loc Elevator Safety Co. v. Purcell, 188 N.Y.S. 25, 196 App. Div. 546.

Conditions precedent

Tender of balance due employee by employer for assignment of patent applications was not required before suit to compel assignment, where employee revoked plaintiff's attorney's power of attorney to prepare applications and denied rights claimed by plaintiff before issuance of patents.—Tennessee Copper & Chemical Corporation v. Martin, D. C.N.J., 4 F.Supp. 38, affirmed, C.C.A., Martin v. Tennessee Copper & Chemical Corporation, 66 F.2d 187, certiorari denied 54 S.Ct. 120, 290 U.S. 683, 78 L.Ed. 588.

7. U.S.—Pure Oil Co. v. Hyman, C. C.A.Ill., 95 F.2d 22.

8. **Matters constituting estoppel**

(1) Where defendant, while employed by plaintiff, agreed to assign to plaintiff any patents which he might make in rust-proofing of metals, and called plaintiff's attention to a rusticide process invented by him, and was willing to turn it over to plaintiff, and plaintiff gave defendant to understand plaintiff did not want it, and defendant entered into engagement with others, plaintiff was estopped to insist on assignment of such patent.—Parker Rust-Proof Co. v. Allen, 203 N.W. 890, 231 Mich. 69.

(2) Plaintiff is estopped to claim inventions of a former employee by causing an interference to be declared between claims of employee's patents and claims of an application for reissue of a patent in which it was interested.—Pure Oil Co. v. Hyman, C.C.A.Ill., 95 F.2d 22.

(3) Fact that employee, who agreed that inventions should be employer's property, submitted to superior, possessing no final authority, his plan, drawings, and report respecting invention, which superior studied and returned with criticisms, did not show rejection of invention which would estop employer to require assignment of patent obtained by employee after leaving employment.—Du Pont Rayon Co. v. Paley, D.C.Ill., 4 F.Supp. 290, affirmed, C. C.A., Paley v. Du Pont Rayon Co., 71 F.2d 856.

9. U.S.—Pure Oil Co. v. Hyman, C. C.A.Ill., 95 F.2d 22.
Mass.—Hoyt v. Corporon, 168 N.E. 94, 268 Mass. 544.

Delay in prosecuting patent application

Corporation suing its former employee for assignment of patent was not at fault in failing to prosecute application for patent within reasonable time, in absence of full revelation of facts to it.—New Jersey Zinc Co. v. Singmaster, 4 F.Supp. 967, modified on other grounds, C.C.A., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.

equity where the employer is himself in default.[10] Where the employee refuses to execute an assignment on request of the employer at a time when the employer was not in default, the subsequent bankruptcy of the employer constitutes no defense.[11]

The general rules in civil actions ordinarily apply with respect to evidence,[12] including its admissibility[13] and weight and sufficiency,[14] and also with

10. U.S.—Conway v. White, D.C. Conn., 300 F. 866, reversed on other grounds, C.C.A., 9 F.2d 863.
39 C.J. p 130 note 97.

11. U.S.—Conway v. White, C.C.A. Conn., 292 F. 837.

12. **Presumptions**
Sales manager's interest and assistance in procuring patents for employer did not warrant presumption of contract to transfer patents to employer.—Amdyco Corporation v. Urquhart, D.C.Pa., 39 F.2d 943, affirmed, C.C.A., 51 F.2d 1072, certiorari denied 52 S.Ct. 265, 284 U.S. 689, 76 L.Ed. 582.

Burden of proof
(1) In suit to compel employee to assign patent to employer, employer had burden of proving claim that employee was engaged to develop the patented device.—Gear Grinding Mach. Co. v. Stuber, 276 N.W. 514, 282 Mich. 455.

(2) Where employee was employed, not in hope he would invent new machine or new mechanical movement, but to improve washing machine which company was then manufacturing, burden was on company to prove that relationship of parties was changed by their subsequent conduct so as to entitle company to invention of employee.—Barlow & Seelig Mfg. Co. v. Patch, 286 N.W. 577, 232 Wis. 220.

(3) In suit against former laboratory employee to compel assignment of an inventor's interest in an application for a patent on a flexible fluid seal for use in automobile engines, employer had burden of proving a clear and specific contract of assignment covering former employee's interest in his invention.—Crane Packing Co. v. Brummer, 67 N.E.2d 892, 329 Ill.App. 272.

13. **Evidence held admissible**
Evidence of judge's opinion that corporation could claim patent for improvement of process was inadmissible, where rendered after relations were entered into.—North v. Atlas Brick Co., Tex.Civ.App., 281 S.W. 608, modified on other grounds Atlas Brick Co. v. North, Com.App., 288 S.W. 146.

Evidence held inadmissible
Testimony as to when witness heard that manager claimed patent adversely to corporation was immaterial.—North v. Atlas Brick Co., Tex.Civ.App., 281 S.W. 608, modified on other grounds Atlas Brick Co. v. North, Com.App., 288 S.W. 146.

14. **Prior assignments**
The fact that employee had assigned other patents or inventions to employer is some evidence of existence of agreement to assign all inventions, but not conclusive.—Bowers v. Woodman, D.C.Mass., 59 F.2d 797.

Evidence held sufficient
(1) In general.—Grip Nut Co. v. Sharp, C.C.A.Ill., 150 F.2d 192, certiorari denied Sharp v. Grip Nut Co., 66 S.Ct. 55, 326 U.S. 742, 90 L.Ed. 443.

(2) To establish alleged representations by principal's agent in respect of protection of employees on inventions.—St. Louis & O'Fallon Coal Co. v. Dinwiddie, D.C.Md., 53 F.2d 655, affirmed, C.C.A., Dinwiddie v. St. Louis & O'Fallon Coal Co., 64 F.2d 303.

(3) To establish that discoveries were made by employees in course of employment and in connection with employment.—St. Louis & O'Fallon Coal Co. v. Dinwiddie, D.C. Md., 53 F.2d 655, affirmed, C.C.A., Dinwiddie v. St. Louis & O'Fallon Coal Co., 64 F.2d 303.

(4) To show or sustain finding that employee's invention or patent thereon belonged to employer.
U.S.—Martin v. Tennessee Copper & Chemical Corporation, C.C.A.N.J., 66 F.2d 187, 54 S.Ct. 120, 290 U.S. 683, 78 L.Ed. 588—Dinwiddie v. St. Louis & O'Fallon Coal Co., C. C.A.Md., 64 F.2d 303—Magnetic Mfg. Co. v. Dings Magnetic Separator Co., C.C.A.Wis., 16 F.2d 739, certiorari denied 47 S.Ct. 586, 274 U.S. 740, 71 L.Ed. 1320—Crown Cork & Seal Co. v. Fankhanel, D. C.Md., 49 F.Supp. 611—New Jersey Zinc Co. v. Singmaster, D.C.N.Y., 4 F.Supp. 967, modified on other grounds, C.C.A., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.
Fla.—State v. Neal, 12 So.2d 590, 152 Fla. 582, certiorari denied 64 S.Ct. 191, 320 U.S. 783, 88 L.Ed. 470, rehearing denied 64 S.Ct. 259, 320 U.S. 814, 88 L.Ed. 492.
Mass.—National Development Co. v. Gray, 55 N.E.2d 783, 316 Mass. 240, 153 A.L.R. 973.

(5) To show or sustain finding that employee's invention or patent thereon did not belong to employer.
Fla.—State Board of Education v. Bourne, 7 So.2d 838, 150 Fla. 323.
Mich.—Gear Grinding Mach. Co. v. Stuber, 276 N.W. 514, 282 Mich. 455.

(6) To show that defendant, in employing inventor who had previously been employed by plaintiff, acted in good faith and in belief employee had right to leave plaintiff's employment.—National Cash Register Co. v. Remington Arms Co., 209 N.Y.S. 40, 212 App.Div. 343, affirmed 151 N.E. 144, 242 N.Y. 99, reargument denied 152 N.E. 431, 242 N.Y. 569.

(7) To show that invention had been completed before defendant entered plaintiff's employ.—Sharples v. McCornack, 99 A. 153, 254 Pa. 535.

(8) To support findings that inventions were conceived after employment terminated.—Pure Oil Co. v. Hyman, C.C.A.Ill., 95 F.2d 22.

(9) To sustain finding that employee was released from contract reserving to employer inventions.—National Cash Register Co. v. Remington Arms Co., 151 N.E. 144, 242 N.Y. 99, reargument denied 152 N.E. 431, 242 N.Y. 569.

(10) To sustain finding that employee, while in position of trust, unlawfully appropriated to her own use idea for patent belonging to plaintiffs and supported conclusion that employee committed breach of trust by obtaining a patent thereon. —Transparent Ruler Co. v. C-Thru Ruler Co., 28 A.2d 232, 129 Conn. 369.

Evidence held insufficient
(1) In general.—Wolf Mineral Process Corporation v. Minerals Separation North American Corporation, C.C.A.Md., 18 F.2d 483, certiorari denied 48 S.Ct. 118, 275 U.S. 558, 72 L.Ed. 425.

(2) To establish express agreement on part of employee to assign patents for inventions to employer.
U.S.—Bowers v. Woodman, D.C. Mass., 59 F.2d 797.
Wis.—Barlow & Seelig Mfg. Co. v. Patch, 286 N.W. 577, 232 Wis. 220.

(3) To show that employee's invention or patent thereon belonged to employer.—Lambert Tire & Rubber Co. v. Brubaker Tire Co., C.C.A. Ohio, 5 F.2d 414—Crites v. Radtke, D.C.N.Y., 28 F.Supp. 282, new trial denied 29 F.Supp. 970.

(4) To show that inventions made by government employees and claimed by government covered matters assigned for research.—U. S. v. Dubilier Condenser Corporation, C.C. A.Del., 59 F.2d 381, affirmed 53 S.Ct. 554, 289 U.S. 178, 77 L.Ed. 1114, 85 A.L.R. 1488, amended 53 S.Ct. 687, 289 U.S. 706, 77 L.Ed. 1462.

respect to trial and judgment.[15]

§ 74. Property, Mineral Deposits, Etc., Found by Employee

The employee is entitled to property, mineral deposits, etc., which he has found by his own efforts, unless there exists an obligation to the contrary based either on contract or on circumstances disclosing a confidential or trust relationship between him and his employer.

Questions of title as between employer and employee involving ownership rights in mines and mineral claims are governed by the principles of law applicable to the ownership of the inventions and discoveries of the employee; the employee is entitled to the fruit of his own efforts in the absence of an obligation to the contrary based either on a contract, express or implied, or on circumstances disclosing a confidential or other trust relationship between him and his employer.[16]

As considered in Finding Lost Goods § 5 d, an employee who finds a lost chattel while engaged in work for his employer is entitled thereto as against his employer if the latter is not the owner.

§ 75. Rules, Regulations, and Usages

An employee or servant is under the obligation to obey the reasonable rules and regulations imposed by the employer.

Subject to statutory provisions, an employer may make reasonable rules and regulations for the conduct of his business,[17] and an assumption is imported into the contract of employment that the servant will obey all reasonable rules and regulations incidental to the carrying out of the contract,[18] of which he has knowledge,[19] or of which he is chargeable with notice,[20] at the time the employment is entered into.

Rules which first come to the employee's notice after he has made his contract,[21] or which are not promulgated until after he has commenced work,[22] are not binding on him unless he accepts them as a part of his contract. Where the acceptance is given in advance of their promulgation, as where the contract provides in terms that the employee shall obey such rules and regulations as the employer shall afterward make, the employee is still not bound unless he receives notice of them.[23]

Employee's skill and care. The employee's use

15. **Questions of law or fact**

U.S.—Lion Mfg. Corporation v. Chicago Flexible Shaft Co., C.C.A. Ill., 106 F.2d 930.

Findings

In former employer's action to compel assignment of patent trial judge's finding as to nature of former employee's work and the granting of relief to plaintiff were tantamount to finding that former employee was under implied obligation to assign patent to plaintiff.—National Development Co. v. Gray, 55 N.E.2d 783, 316 Mass. 240, 153 A.L.R. 973.

Judgment or decree

(1) Judgment requiring defendant to assign to plaintiff patents based on invention which was result of combined efforts of plaintiff's former employee and of three others, at great expense to defendant, and which did not infringe plaintiff's patent rights, was harsh and inequitable.—National Cash Register Co. v. Remington Arms Co., 209 N.Y.S. 40, 212 App.Div. 343, affirmed 151 N.E. 144, 242 N.Y. 99, reargument denied 152 N.E. 431, 242 N.Y. 569.

(2) Decree entitling corporation to shop rights in bolt, based on finding that president of corporation, and not his brother-in-law, invented bolt, was unauthorized where brother-in-law was not party to suit.—Flannery Bolt Co. v. Flannery, C. C.A.Pa., 86 F.2d 43.

16. Cal.—Burns v. Clark, 66 P. 12, 133 Cal. 634, 85 Am.S.R. 233.
39 C.J. p 132 note 26.
Inventions and discoveries of employee see supra § 73.
Location of mining claims by agents see the C.J.S. title Mines and Minerals § 29, also 40 C.J. p 773 note 64 et seq.

17. U.S.—N. L. R. B. v. Kopman-Woracek Shoe Mfg. Co., C.C.A.8, 158 F.2d 103—Midland Steel Products Co. v. N. L. R. B., C.C.A.6, 113 F.2d 800.
N.Y.—New York State Labor Relations Board v. Union Club of City of N. Y., 52 N.Y.S.2d 74, 268 App. Div. 516, reversed on other grounds 68 N.E.2d 29, 295 N.Y. 915.

Employer may prescribe terms of employment contract by general rules or regulations, if employees consent.—New Jersey Zinc Co. v. Singmaster, D.C.N.Y., 4 F.Supp. 967, modified on other grounds, C.C.A., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.

Employer may regulate his employees by rules and orders, and may define sphere of duty of his employees.—Reis v. Breeze Corporations, 15 A.2d 53, 18 N.J.Misc. 532.

18. U.S.—N. L. R. B. v. Montgomery Ward & Co., C.C.A.8, 157 F.2d 486—Midland Steel Products Co. v. N. L. R. B., C.C.A.6, 113 F.2d 800.
Neb.—Stoffel v. Metcalfe Const. Co., 17 N.W.2d 3, 145 Neb. 450.
N.Y.—New York State Labor Relations Board v. Union Club of City of N. Y., 52 N.Y.S.2d 74, 268 App. Div. 516, reversed on other grounds 68 N.E.2d 29, 295 N.Y. 915.
Okl.—**Corpus Juris cited in** Borden v. Day, 168 P.2d 646, 648, 197 Okl. 110.
Tenn.—Standard Oil Co. of Louisiana v. Entriken, 4 Tenn.App. 57.
Tex.—**Corpus Juris cited in** Bishop v. Texas & P. Ry. Co., Civ.App., 62 S.W.2d 247, 249.
39 C.J. p 132 note 29.
Promulgation of rules for safety of employee see infra §§ 270–277.
Violation as:
Contributory negligence see infra § 457.
Ground for discharge see supra § 42.

19. Tenn.—Standard Oil Co. of Louisiana v. Entriken, 4 Tenn.App. 57.
39 C.J. p 132 note 30.

20. Okl.—Borden v. Day, 168 P.2d 646, 197 Okl. 110.
39 C.J. p 132 note 31.

21. Mass.—Collins v. New England Iron Co., 115 Mass. 23.
39 C.J. p 132 note 32.

22. N.J.—Lehigh Valley R. Co. v. Snyder, 28 A. 376, 56 N.J.Law 326.

23. N.J.—Lehigh Valley R. Co. v. Snyder, supra.

of skill and care does not relieve him of his obligation to comply with his employer's rules.[24]

§ 76. Corporal Punishment

An employer has no right under ordinary circumstances to inflict corporal punishment on an employee.

While a master has a limited right to inflict corporal punishment on one apprenticed to him, as considered in Apprentices § 17, an employer has no such right, under ordinary circumstances, over an employee,[25] even though the chastisement is in moderation[26] and by way of correction.[27] The right of the employer to chastise an employee is not enlarged by the circumstance of the employee being a minor,[28] or living in his household as a member of his family,[29] or having been hired to him by the employee's father, if he received no permission from the father to chastise,[30] or by statutes providing that violence to the person does not amount to assault and battery in the case of moderate correction by a parent of his child, a guardian of his ward, a master of his apprentice, and a teacher of his scholar,[31] or statutes requiring proprietors of manufacturing establishments to cause children in their employ to be taught to read and write and attend public worship.[32]

Delegation of right to chastise. The right to chastise an employee who is a minor may be delegated to the employer by the parents.[33] The right to delegate, however, is itself restricted to a delegation that is reasonable under the circumstances.[34] Even where there has been a proper delegation of the power to the employer, the employer in turn cannot delegate it to another.[35]

§ 77. Breach of Contract by Employee and Actions Therefor

The employee is liable to the employer for breach of the contract of employment unless the employer has waived the breach.

In the absence of a waiver of the breach, the employer may recover damages from his employee for leaving his employment in violation of the contract between them, as considered infra § 78, or for involving his employer in loss through his own negligence or wrongful act, as considered infra § 79, or generally for any failure to perform the duties devolving on him under the employment contract.[36] An employee's embezzlement of his employer's funds constitutes a breach of contract which goes to the very root of the subject matter of the contract of service.[37] In an action by an employer against an employee to recover damages to property arising out of breach of contract, where the element of negligence is not involved, recovery can be had only where the contract is breached.[38]

In actions against employees for failure to perform the duties devolving on them under the contract of employment, the general rules prevailing in

24. N.Y.—Macauley v. Press Pub. Co., 155 N.Y.S. 1044, 170 App.Div. 640, affirmed 119 N.E. 1055, 222 N.Y. 696.
39 C.J. p 132 note 35.
Skill and care required of employee generally see supra § 69.

25. Mo.—Cook v. Cook, App., 124 S.W.2d 675.
39 C.J. p 132 note 38.

26. Conn.—Matthews v. Terry, 10 Conn. 455.
Tenn.—Tinkle v. Dunivant, 16 Lea 503.

27. Conn.—Matthews v. Terry, 10 Conn. 455.

28. Conn.—Matthews v. Terry, supra.
39 C.J. p 132 note 41.

29. Tex.—Davis v. State, 6 Tex. App. 133.

30. Tenn.—Cooper v. State, 8 Baxt. 324, 35 Am.R. 704.

31. Tex.—Davis v. State, 6 Tex.App. 133.

32. Conn.—Matthews v. Terry, 10 Conn. 455.
39 C.J. p 132 note 45.

33. Tenn.—Cooper v. State, 8 Baxt. 324, 35 Am.R. 704.
39 C.J. p 133 note 47.

34. Iowa.—Rowe v. Rugg, 91 N.W. 903, 117 Iowa 606, 94 Am.S.R. 318.
39 C.J. p 133 note 48.

35. Pa.—Commonwealth v. Baird, 1 Ashm. 267.
39 C.J. p 133 note 49.

36. N.Y.—Dixon v. Kantor, 299 N.Y.S. 507, 165 Misc. 315.
Ohio.—Ohio Casualty Ins. Co. v. Capolino, App., 65 N.E.2d 287.
39 C.J. p 133 note 54.
Action:
Against employer for breach of contract see supra § 11.
Involving inventions of employee see supra § 73 f.
Breach of contract as ground for discharge see supra § 42.
Injunction against breach of contract see Injunctions §§ 82, 138.
Set-off of damages in action by employee for wages see infra § 126.
Specific performance of contract of service see the C.J.S. title Specific Performance § 82, also 58 C.J. p 1056 note 10 et seq.
Breach of covenant not to compete, etc.
Pa.—Fischer & Porter Company v. Porter, Com.Pl., 60 Montg.Co. 267.
W.Va.—Household Finance Corp. v. Sutton, 43 S.E.2d 144.
Cross action or reconvention
Newspaper carrier, soliciting his subscribers for subscriptions to competing newspaper and failing to furnish his employer route list or its equivalent and take new carrier over route, as was customary, before surrendering route, was not entitled in action by employer for price of newspapers to recover damages in reconvention from employer for taking of route.—Times-Picayune Pub. Co. v. Molenaar, La.App., 152 So. 90.

37. Minn.—Hlubeck v. Beeler, 9 N.W.2d 252, 214 Minn. 484—Peterson v. Mayer, 49 N.W. 245, 46 Minn. 468, 13 L.R.A. 72.
Honesty and faithfulness of employee generally see supra § 67.

38. Ohio.—Crawford v. Kellermier, 175 N.E. 600, 123 Ohio St. 404.

civil actions apply[39] as to trial.[40] Where former employees formed a corporation for the specific purpose of utilizing confidential information and secret processes filched from their employer, the corporation is liable for profits realized from the beginning of its corporate existence,[41] and, in determining profits, doubts as to deductible items should be resolved against the corporation and former employees.[42]

Waiver by employer. The employer may waive nonperformance by the employee.[43] If the employer consents to, or acquiesces in, the employee's unlawful act, the employee may defend himself on that ground against liability to his employer for loss resulting therefrom.[44] A continuance by the employer of an employee in his service, with knowledge of a breach of the employment contract, has been held to constitute a waiver;[45] but it has also been held that it is no defense that the employer merely accepted his employee's services after the commission of the unlawful act.[46]

§ 78. —— Action for Leaving Employment

An employee is liable to his employer in damages as a result of leaving his employer's business in violation of his agreement.

An employee who leaves his employer's business in violation of his agreement is liable to his employer in damages for the loss sustained.[47] Abandonment of the work is not in itself actionable.[48] In order to recover, the employer must show a contract obligating the employee to remain,[49] its violation by the employee,[50] and a resulting loss to the employer.[51] Also an employer may recover damages from an employee who leaves without notice, where the contract or rules of the employer, brought to the employee's notice, require him to give such notice.[52]

Defenses. The employee may show that the employer has so conducted himself as to make his position in the business unbearable, in violation of his implied undertaking not to do so,[53] unless he was

39. **Sufficiency of evidence**

(1) Evidence in action against former newspaper carrier for price of newspapers sold to him showed that sum claimed in reconvention for each of his subscribers was not unconditionally due him.—Times-Picayune Pub. Co. v. Molenaar, La.App., 152 So. 90.

(2) Evidence, in action for price of newspapers sold to former carrier, filing claim in reconvention for sum customarily paid carriers for each subscriber remaining after they left plaintiff's employ, showed that defendant did not reasonably or fairly comply with condition precedent that he furnish route list to plaintiff.—Times-Picayune Pub. Co. v. Molenaar, supra.

(3) In action for damages on theory of fraud by defendants who entered into contract with plaintiff to manage ranch which was to be operated as summer resort, wherein defendants filed cross complaint for damages to property caused by plaintiff, evidence warranted judgment for defendants.—Brown v. Miller, 141 P.2d 682, 111 Colo. 327.

(4) Other evidence.—Walker-Smith Co. v. Roan, Tex.Civ.App., 78 S.W.2d 743.

40. N.Y.—Stadium Pictures v. Walker, 229 N.Y.S. 313, 224 App.Div. 22.

39 C.J. p 213 note 54 [d].

Questions of law or fact

Whether plaintiff breached contract employing defendant as actor for motion picture by contracting to have another produce picture was question of fact.—Stadium Pictures v. Walker, supra.

41. N.J.—Irving Iron Works v. Kerlow Steel Flooring Co., 143 A. 145, 103 N.J.Eq. 240.

42. N.J.—Irving Iron Works v. Kerlow Steel Flooring Co., supra.

Particular items held deductible

(1) Disbursements representing actual cost of manufacture and sale of product.—Irving Iron Works v. Kerlow Steel Flooring Co., supra.

(2) Expense of advertising.—Irving Iron Works v. Kerlow Steel Flooring Co., supra.

(3) Expense of maintaining and repairing machinery and equipment used by corporation.—Irving Iron Works v. Kerlow Steel Flooring Co., supra.

Particular items held not deductible

(1) Advances to agents from corporation.—Irving Iron Works v. Kerlow Steel Flooring Co., supra.

(2) Claim for amortization on patents of corporation.—Irving Iron Works v. Kerlow Steel Flooring Co., supra.

(3) Claim for obsolescence was not separately deductible.—Irving Iron Works v. Kerlow Steel Flooring Co., supra.

(4) Expenditures for agent's equipment, except as to depreciation; expense for fire insurance and taxes incurred by corporation; expenses of foreign patents; expenses of litigation in accounting suit and former criminal proceedings against corporation; expenses of organization of corporation; and reserve for depreciation of machinery, furniture, and equipment used by corporation.—Irving Iron Works v. Kerlow Steel Flooring Co., supra.

43. Pa.—Kemerer v. Johnstown Bank & Trust Co., 182 A. 74, 120 Pa.Super. 173.

44. N.J.—Englander v. Abrahamson-Kaplan Co., 109 A. 307, 93 N.J.Law 25.

39 C.J. p 133 note 55.

45. Pa.—Kemerer v. Johnstown Bank & Trust Co., 182 A. 74, 120 Pa.Super. 173.

46. Ark.—Ewing v. Janson, 21 S.W. 430, 57 Ark. 237.

39 C.J. p 133 note 56.

47. N.Y.—Silbert v. Katz, 151 N.Y.S. 510.

39 C.J. p 133 note 58.

Termination of indefinite term see supra § 31.

48. N.Y.—Murphy v. Lindstedt, 127 N.Y.S. 609, 142 App.Div. 777.

49. N.Y.—Murphy v. Lindstedt, supra.

Wis.—Kaiser v. Better Farms, 24 N.W.2d 621, 249 Wis. 302.

39 C.J. p 134 note 61.

50. N.Y.—Murphy v. Lindstedt, 127 N.Y.S. 609, 142 App.Div. 777.

51. N.Y.—Murphy v. Lindstedt, supra.

52. Mass.—Stevens v. Reeves, 9 Pick. 198.

39 C.J. p 134 note 65.

Employee's obedience of rules, regulations, and usages generally see supra § 75.

53. Iowa.—Murphy v. Williamson, 163 N.W. 211, 180 Iowa 291.

39 C.J. p 134 note 66.

himself guilty of a breach before his position became unbearable.[54]

Proceedings. General rules ordinarily apply in actions against an employee for wrongfully leaving his employment,[55] as with respect to evidence.[56] The cost of replacing the services of an employee with those of another is sufficiently evidenced by the amount actually paid or agreed to be paid to the deserting employee.[57] Additional evidence as to the market cost of similar services, while admissible, is not necessary.[58]

Damages. Actual damages suffered by an employer from the employee's wrongful abandonment of his service may be recovered,[59] provided the employer has made every effort that can reasonably be required of him to fill the vacancy.[60] The measure of damages recoverable is the difference between the contract wage and the sum which the employer is required to pay to obtain someone else equally capable to fill the vacancy.[61] The authorities are in conflict as to whether the employer can also recover damages for injury to his property resulting from the employee's leaving, a recovery being allowed in some jurisdictions[62] and not in others.[63]

§ 79. Action for Negligence or Wrongful Act

An employee is liable in damages to his employer for his negligence or wrongful act resulting in loss to the employer.

Unless otherwise provided by statute,[64] an action for damages lies for the negligence or wrongful act of an employee resulting in loss to his employer.[65] The rule imposing liability on a servant for negligence or wrongful act in favor of his employer is applicable in the case of domestic servants,[66] including chauffeurs or drivers of vehicles.[67] On the other hand, no liability attaches to the employee if

54. Mo.—Werner v. Finley, 129 S. W. 73, 144 Mo.App. 554.

55. **Affirmative defense**
Employee's defense that his position had become unbearable is affirmative defense which must be specially pleaded.—Werner v. Finley, supra.

56. N.Y.—Triangle Waist Co. v. Todd, 119 N.E. 85, 223 N.Y. 27.

57. N.Y.—Triangle Waist Co. v. Todd, supra.

58. N.Y.—Triangle Waist Co. v. Todd, supra.

59. N.Y.—Triangle Waist Co. v. Todd, 154 N.Y.S. 542, 168 App.Div. 693, reversed on other grounds 119 N.E. 27, 223 N.Y. 27.
39 C.J. p 134 note 75.
Weekly sum, agreed to be paid radio musical director and vocalist, was properly excluded in assessing employer's damages after employee's refusal to render further services for latter's failure to perform agreement to refrain from working for others during term of employment contract.—Rooney v. Weeks, 194 N. E. 666, 290 Mass. 18.
Penalty or liquidated damages
Where an agreement contains several stipulations on both sides of such a character that it would be difficult to estimate the damages attendant on the breach of some, but easy in the case of others, the sum specified in the agreement to be paid for the breach of any stipulation will be construed to be a penalty and not liquidated damages.—Hammer v. Breidenbach, 31 Mo. 49.

60. Ky.—Fuqua v. Massie, 37 S.W. 587, 18 Ky.L. 842.
N.Y.—Triangle Waist Co. v. Todd, 154 N.Y.S. 542, 168 App.Div. 693, reversed on other grounds 119 N. E. 27, 223 N.Y. 27.

61. N.Y.—Marcus v. Liner, 147 N. Y.S. 458, 85 Misc. 368—Silbert v. Katz, 151 N.Y.S. 510.

62. Conn.—Satchwell v. Williams, 40 Conn. 371.
39 C.J. p 134 note 79.

63. N.Y.—Marcus v. Liner, 147 N. Y.S. 458, 85 Misc. 368.
39 C.J. p 134 note 80.

64. **Effect of workmen's compensation act**
Provision of workmen's compensation act that acceptance of its provisions should be a surrender by parties of their rights to any other method, form, or amount of compensation, construed with other portions of act, did not deprive employer of common-law right to recover from employee for injury sustained because of employee's alleged negligent driving of employer's automobile, where both had accepted provisions of compensation act.—Rosenfield v. Matthews, 275 N.W. 698, 201 Minn. 113.

65. U.S.—Greenleaf v. Huntingdon & B. T. M. R. & Coal Co., D.C.Pa., 3 F.R.D. 24.
La.—Day Bros., Gilham & Winton v. Marsan, 131 So. 665, 171 La. 545.
R.I.—Darman v. Zilch, 186 A. 21, 56 R.I. 413, 110 A.L.R. 826.
Tenn.—Standard Oil Co. of Louisiana v. Entriken, 4 Tenn.App. 57.
Tex.—Yarborough v. Fulton, Civ. App., 78 S.W.2d 247, error dismissed.
39 C.J. p 134 note 82.
Actions involving inventions of employee see supra § 73 f.
Indemnity as between master and servant see Indemnity § 21.
Liability:
For breach of employment contract see supra §§ 77, 78.
Of servant for injuries to third persons see infra §§ 576–578.
Set-off in action by employee for wages see infra § 126.
Breach of confidential relation
U.S.—Pratt v. Shell Petroleum Corporation, C.C.A.Kan., 100 F.2d 833, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1056.
Wrongful conversion of funds or property
Minn.—Norris v. Cohen, 27 N.W.2d 277, 223 Minn. 471.
39 C.J. p 134 note 82 [f], [g].
Negligent preparation of chattel mortgage
Liability of real estate broker and notary public for negligence in drawing chattel mortgage was not dependent on whether he was practicing law unlawfully.—Morris v. Muller, 168 A. 772, 11 N.J.Misc. 866, reversed on other grounds 172 A. 63, 113 N.J.Law 46.

66. R.I.—Darman v. Zilch, 186 A. 21, 56 R.I. 413, 110 A.L.R. 826.

67. Minn.—Rosenfield v. Matthews, 275 N.W. 698, 201 Minn. 113.
Pa.—Hopshire v. Yesenosky, 43 A.2d 351, 157 Pa.Super. 545.
R.I.—Darman v. Zilch, 7 A.2d 699, 63 R.I. 127—Darman v. Zilch, 186 A. 21, 56 R.I. 413, 110 A.L.R. 826.
Question of joint enterprise was not involved in negligence action against his chauffeur by owner riding in rear seat of automobile at time of collision.—Darman v. Zilch, supra.

he uses the degree of care required under the circumstances in the performance of his duties[68] or if the loss to the employer is not the natural result of his act.[69]

Defenses. Various matters have been urged as defenses in actions by employers against employees for negligence or wrongful acts.[70] The employer may be barred from recovery because of his contributory negligence[71] or assumption of risk;[72] but the negligence of the servant is not imputed to the master so as to preclude recovery against the servant for negligence in injuring the person or property of the master.[73] An employee may defend in an action charging him with negligence by showing that the employer was himself guilty of negligence in furnishing a faulty plan or equipment or defective tools for the work,[74] unless the circumstances of the case were such as to require an added vigilance on his part after knowledge of the employer's negligence, and he failed to meet that requirement.[75] The employee cannot defend on the ground that his act was not willful[76] or that the negligent act of a fellow servant contributed to the loss,[77] although the fellow servant's negligence would be a good defense if it alone caused the injury, and the employee who is sued was in no way responsible for it.[78]

Pleading. The general rules governing pleadings in civil actions ordinarily are applicable in actions by an employer against an employee for negligence or wrongful act.[79] The employee is not entitled to affirmative relief where no such relief was prayed in the answer or leave asked to amend the answer so as to be entitled to such relief.[80]

68. N.J.—Morris v. Muller, 172 A. 63, 113 N.J.Law 46.
39 C.J. p 135 note 85.
Skill and care required of employee generally see supra § 69.

Losses sustained in store

Employee in charge of branch store was not liable for alleged losses where there was no agreement making employee responsible for losses, employee could not hire or discharge the help, and was not a manager, but merely a hired hand who could do nothing without instructions.—Shipp v. Cheek, La.App., 175 So. 174.

69. Tenn.—Standard Oil Co. of Louisiana v. Entriken, 4 Tenn.App. 57.
39 C.J. p 135 note 86.

70. **Shortage in accounts**

In action by lumber company against former manager and bookkeeper to recover alleged shortage in his accounts, defense that defendant had entered checks, the proceeds of which it was claimed he had converted, in cash book and thus accounted for proceeds, and that his cash book was in balance, was insufficient, where defendant made no effort to explain or deny testimony that defendant had failed to enter other customers' checks in cash book, or to record sales, payment for which the checks were entered.—Bond Foley Lumber Co. v. Rader, 134 S.W.2d 1000, 281 Ky. 104.

Condonation

Subsequent employment of accountants to verify amount of defalcations of brokers' employee and to prepare claim against surety did not condone any prior negligence of accountants in previously auditing and examining brokers' books and accounts.—National Surety Corporation v. Lybrand, 9 N.Y.S.2d 554, 256 App.Div. 226.

71. R.I.—Darman v. Zilch, 186 A. 21, 56 R.I. 413, 110 A.L.R. 826.

Requesting realty broker to draw mortgage

Plaintiff suing for defendant's negligence in drawing chattel mortgage was not negligent in seeking services of licensed real estate broker and notary public, instead of lawyer's services.—Morris v. Muller, 168 A. 772, 11 N.J.Misc. 866, reversed on other grounds 172 A. 63, 113 N.J.Law 46.

Making defalcations possible

An employer's negligence in so conducting his business as to make possible employee's defalcations is a defense to action against accountant for failure to discover defalcations after auditing employer's books only when it has contributed to accountant's failure to perform his contract.—National Surety Corporation v. Lybrand, 9 N.Y.S.2d 554, 256 App.Div. 226.

72. S.C.—Smith v. Edwards, 195 S.E. 236, 186 S.C. 186.

73. Mass.—Alderman v. Noble, 4 N.E.2d 619, 296 Mass. 30.
N.Y.—Webb v. Elmira Water, Light & R. Co., 258 N.Y.S. 726, 234 App. Div. 579.
Imputation of negligence of servant to master generally see the C.J.S. title Negligence § 162, also 45 C.J. p 1025 note 76 et seq.

Action against chauffeur

R.I.—Darman v. Zilch, 186 A. 21, 56 R.I. 413, 110 A.L.R. 826.

74. Vt.—Wilder v. Stanley, 49 Vt. 105.
39 C.J. p 135 note 87.
Duty of employer to furnish proper appliances see supra § 61.

75. Ala.—Mobile & M. R. Co. v. Clanton, 59 Ala. 392, 31 Am.R. 15.
39 C.J. p 135 note 88.

76. Tex.—Texas & P. R. Co. v. Hurless, 1 Tex.A.Civ.Cas. § 582.
39 C.J. p 135 note 89.

77. Wis.—Zulkee v. Wing, 20 Wis. 408, 91 Am.D. 425.

78. Ky.—West Louisville Brewing Co. v. Schaefer, 124 S.W. 395.
39 C.J. p 135 note 91.

79. **Allegation of contract in negligence action**

In action in trespass based on alleged negligence in performance of work under contract, plaintiff need not allege whether contract was oral or in writing since action is not based thereon.—Cotts v. Quigley, 58 Pa.Dist. & Co. 687.

Action against chauffeur

Declaration in negligence action by automobile owner against his chauffeur was not demurrable in view of allegations that owner, although riding in automobile at time of collision, was exercising due care, and that automobile was not under his care and direction.—Darman v. Zilch, 186 A. 21, 56 R.I. 413, 110 A.L.R. 826.

80. **Breach of fiduciary relationship**

In suit by corporation and its president for employee's breach of fiduciary relationship in applying for patent for machine which employee constructed through employment by corporation and through information imparted by president, wherein master found that invention was joint property of employee and president, employee's answer, which did not set up counterclaim, alleging that he owned machine and its design did not entitle him to affirmative relief against president so as to authorize court to enjoin president from selling more than undivided half interest in invention, where defendant at no time asked leave to amend answer.—George C.

Evidence. In an action by an employer against an employee for negligence or wrongful act, the general rules governing evidence in civil actions ordinarily are applicable.[81] In an action by an owner of an automobile against his chauffeur for negligence in the operation of the vehicle, the mere presence of the owner in the automobile at the time of the accident raises no presumption of law that the owner was guilty of contributory negligence.[82] The burden is on the employer to prove the employee's negligence or misconduct.[83] General rules also apply with respect to the admissibility[84] and the weight and sufficiency[85] of the evidence. For example, evidence is admissible to show the amount of additional business which would have been done if the employee had properly attended to his work.[86]

Trial. The general rules relating to trials in civil actions usually apply in an action by an employer against an employee for negligence or wrongful act.[87] It is for the jury to decide, under proper instructions as to the law, whether an employee in a particular case has used that degree of caution which a reasonably prudent person would exercise under the existing circumstances,[88] or whether he has been guilty of the conversion of his employer's funds,[89] or whether in any respect he has failed to perform his duties under the employment contract, where issues of fact are involved.[90] Whether an employee's earnings outside of his wages have been for services rendered in the course of, or in connection with, his employment, frequently involves a determination of issues of fact by a jury.[91] Contributory negligence of the employer ordinarily is a question of fact for the jury.[92] Where the owner of a motor vehicle operated by his chauffeur is in the vehicle at the time of the accident and retains the right and power to control the manner in which it is to be operated, then an issue of fact is raised as to whether the owner was guilty of contributory negligence.[93]

Damages. The items of loss to the employer for which the law allows a recovery against the employee and the amount of damages recoverable therefor, follow the rules of law relating to damages generally.[94] Where a mechanic injures the materials furnished him, or wastes them, he must

Miller & Co. v. Beagen, 199 N.E. 344. 293 Mass. 54.

81. **Deposit by employee of proceeds of fraudulent invoices and sales** in postal savings account was not necessary or presumptive deduction from his recent receipt thereof. —Consolidated Textile Corporation, Ella Division v. Patterson, 166 S.E. 900, 203 N.C. 862.

82. R.I.—Darman v. Zilch, 186 A. 21, 56 R.I. 413, 110 A.L.R. 826.

83. N.C.—Consolidated Textile Corporation, Ella Division v. Patterson, 166 S.E. 900, 203 N.C. 862.
39 C.J. p 135 note 93.

84. N.C.—Consolidated Textile Corporation, Ella Division v. Patterson, supra.
39 C.J. p 135 note 95.

Negligent preparation of chattel mortgage
In mortgagee's action against realty broker for negligently preparing chattel mortgage, barring inquiry into consideration for mortgage was error.—Morris v. Muller, 172 A. 63, 113 N.J.Law 46.

85. U.S.—Edwin L. Wiegand Co. v. Harold E. Trent Co., C.C.A.Pa., 122 F.2d 920, certiorari denied 62 S. Ct. 1033, 316 U.S. 667, 86 L.Ed. 1743.
Cal.—Riess v. Sanford, 117 P.2d 694, 47 Cal.App.2d 244.
Minn.—Norris v. Cohen, 27 N.W.2d 277, 223 Minn. 471.
Ohio.—Inboden v. L. W. Hawker, Inc., App., 41 N.E.2d 271.
39 C.J. p 135 note 95.

Evidence held sufficient
Minn.—Norris v. Cohen, 27 N.W.2d 277, 223 Minn. 471.

86. Cal.—Stoddard v. Treadwell, 26 Cal. 294.

87. N.J.—Morris v. Muller, 172 A. 63, 113 N.J.Law 46.

88. N.J.—Morris v. Muller, supra.
39 C.J. p 136 note 98.

Negligence and bad faith in extending credit
U.S.—Blackshear Mfg. Co. v. Umatilla Fruit Co., C.C.A.Fla., 48 F.2d 174.

Negligence of accountant
N.Y.—National Surety Corporation v. Lybrand, 9 N.Y.S.2d 554, 256 App.Div. 226.

89. Mich.—Moore v. Andrews, 168 N.W. 1037, 203 Mich. 219.
39 C.J. p 136 note 99.

90. N.Y.—Hudson v. Levy, 199 N. Y.S. 753.
39 C.J. p 136 note 1.

Representation of special skill and knowledge
In mortgagee's action against licensed realty broker and notary for negligently preparing chattel mortgage, whether defendant represented possession of requisite special skill and knowledge and performed duties required by his undertaking was for jury where nature of undertaking was disputed, and, in determining whether broker exhibited skill and knowledge required by undertaking, jury should consider mortgagee's knowledge of broker's previous training and experience.—Morris v. Muller, 172 A. 63, 113 N. J.Law 46.

91. N.Y.—Genco v. Remington, 91 N.Y.S. 898, 100 App.Div. 223.
39 C.J. p 136 note 2.

92. **Action against accountants**
In action by brokers' surety to recover from certified public accountants for failure to discover cash shortages after auditing brokers' books, whether brokers were contributorily negligent in conducting their business so as to make possible cashier's defalcations was for jury.—National Surety Corporation v. Lybrand, 9 N.Y.S.2d 554, 256 App. Div. 226.

93. R.I.—Darman v. Zilch, 186 A. 21, 56 R.I. 413, 110 A.L.R. 826.

94. **Negligent preparation of chattel mortgage**
In mortgagee's action against realty broker for negligently preparing chattel mortgage, bulk sale price of bankrupt mortgagor's assets furnished no basis for assessing damages.—Morris v. Muller, 172 A. 63, 113 N.J.Law 46.

Wrongful solicitation of customers
(1) Where employees resigned and entered into competing business, in action by employer for net profits which employer would have made from executing orders obtained by employees for their new company from employer's customers, rule of damages was the same as though employer had brought an action for breach of contract.—F. A. Bartlett Tree Expert Co. v. Hartney, 32 N.E. 2d 237, 308 Mass. 407.

account to his employer for the original value of the materials, less what they may be sold for for any purpose whatsoever, if retained by the employer.[95] An employee who breaches his duty of loyalty by improperly engaging in the buying and selling of the commodities dealt in by his employer is liable for the gross, rather than the net, profits made by him.[96] Where an employee wrongfully withholds his employer's property under a claim of ownership, the employer is entitled to a return of the property together with the reasonable value of its use during the period of its wrongful detention, and the employee is not entitled to compensation for storage during such period.[97]

§ 80. Breach of Contract as Criminal Offense

a. In general
b. Validity of statutes
c. Persons to whom statutes apply
d. Elements of offense
e. Defenses
f. Indictment, information, or complaint
g. Evidence
h. Trial

a. In General

Labor-contract statutes which impose criminal liability on an employee for breach of a labor contract have been strictly construed.

Statutes, commonly known as the "labor-contract acts" and variously worded, have been enacted in several jurisdictions and in substance they have provided that the obtaining of money or other property by an employee from his employer on the strength of the employment contract, fraudulently intending not to do any work under the contract, and then failing or refusing to perform it or to repay the money or return the property without just cause, to the loss and damage of the employer, shall be punishable by fine or imprisonment,[98] or they have provided that, where any person shall entice or procure an employee unlawfully to leave his employer's service, such person and employee may be sued jointly or severally for damages, and may be subject to indictment for violating its provisions.[99] These statutes have been strictly construed.[1]

b. Validity of Statutes

Statutes attempting to penalize a mere breach of an employment contract have generally been held to be invalid.

Statutes attempting to penalize a mere breach of an employment contract have generally been held to be unconstitutional,[2] but where the essence of the offense defined is fraud a statute has been held constitutional[3] even though a contract or breach of contract is involved.[4] The United States supreme court has held that a labor contract statute violates the constitution where it punishes criminally the violation of a contract of labor on the faith of which money or goods have been advanced, and renders the refusal or failure on the part of the laborer to perform the labor contracted for without refunding the money or payment for the property received prima facie evidence of fraudulent intent

(2) Where employees after resigning entered into business in competition with employer, in determining employer's damages resulting from former employees' obtaining for their new company orders from employer's customers where overhead costs of employer were not materially decreased by loss of orders improperly procured and executed by former employees and employer's overhead costs would not have been materially increased if it had executed those orders, overhead costs were not to be considered.—F. A. Bartlett Tree Expert Co. v. Hartney, supra.

(3) Where employees after resigning entered into business in competition with former employer and improperly procured and executed orders from former employer's customers, loss which former employer sustained was difference between what it would actually have cost it to execute the orders and contract prices therefor, so that action of trial judge in awarding sum left after deducting from gross amount of orders the actual cost of performance of the work was not error.—F. A. Bartlett Tree Expert Co. v. Hartney, supra.

95. Tex.—Hillyard v. Crabtree, 11 Tex. 264, 62 Am.D. 475.

96. Minn.—Raymond Farmers Elevator Co. v. American Surety Co. of New York, 290 N.W. 231, 207 Minn. 117, 126 A.L.R. 1351.

97. Tex.—L. G. Balfour Co. v. Brown, Civ.App., 110 S.W.2d 104.

98. Ga.—Banton v. State, 194 S.E. 827, 57 Ga.App. 178.
39 C.J. p 136 note 5.

Purpose of statutes making it misdemeanor to procure money fraudulently on contract for services is not to enforce contract to perform services but to punish fraudulent procurement of money or other thing of value under contract.—Banton v. State, supra.

Gist of offense is the fraudulent procurement of money or other thing of value, and fraudulent conduct of defendant, not merely defendant's failure to perform contract.—Broddus v. State, 14 S.E.2d 607, 65 Ga.App. 27.

99. N.C.—State v. Daniel, 89 N.C. 553.
39 C.J. p 136 note 9.

Liability of servant

Under statute providing for punishment of both enticer and servant, servant cannot be punished for leaving his master's service without enticement.—State v. Daniel, 89 N.C. 553.

1. Ga.—Broddus v. State, 14 S.E. 2d 607, 65 Ga.App. 27.
39 C.J. p 136 note 12.

2. U.S.—Pollock v. Williams, Fla., 64 S.Ct. 792, 322 U.S. 4, 88 L.Ed. 1095.
39 C.J. p 136 note 14.
Imprisonment for debt see Constitutional Law § 204 b.
Involuntary servitude see Constitutional Law § 203.

3. U.S.—Pollock v. Williams, supra.
39 C.J. p 137 note 15.

4. Ala.—Bailey v. State, 48 So. 498, 158 Ala. 18, affirmed 29 S.Ct. 141, 211 U.S. 452, 53 L.Ed. 278.

in entering into the contract of employment;[5] and the statute has been held invalid as applied to a conviction based on a plea of guilty.[6] The decisions of the state courts have not been in entire harmony, some of them being in favor of the constitutionality of such statutes,[7] others holding them unconstitutional.[8]

c. Persons to Whom Statutes Apply

The labor-contract statutes ordinarily apply only to cases where the relationship involved is that of master and servant.

The so-called labor-contract statutes ordinarily are limited in their application to cases wherein the relationship involved is that of master and servant,[9] and do not apply where the relationship is that of landlord and tenant[10] or debtor and creditor.[11] Only employees who contract to do the work themselves are affected,[12] those contracting to furnish the labor of others not being included.[13] Croppers have been held to be included,[14] although the contrary has also been held.[15]

A person other than the employer may act as prosecutor where the accusation and the proof are in accord as to the fact that it was the employer who made the contract and suffered the damage.[16]

Minors. A minor who has arrived at the age of criminal responsibility may be convicted under a labor-contract law[17] although a contract of service made by him may not be civilly enforceable.[18]

d. Elements of Offense

Such elements are essential to the offense of breach of an employment contract as are prescribed by the statute defining the offense.

The essential elements of the offense of breach of an employment contract by an employee are those designated by the statute defining the offense.[19] The elements of the offense as generally defined in the labor-contract statutes, are: (1) A contract by accused for the performance of any act or service.[20] (2) An intent on the part of accused to injure or defraud his employer,[21] existing at the time of the execution of the employment contract[22] and again at the time of the employee's failure or refusal to perform.[23] (3) The obtaining by accused of money or other personal property from such employer by means of such contract.[24] (4) The refusal by accused without just cause,[25] and without refunding such money or paying for such proper-

5. U.S.—Pollock v. Williams, Fla., 64 S.Ct. 792, 322 U.S. 4, 88 L.Ed. 1095—Taylor v. State of Georgia, Ga., 62 S.Ct. 415, 315 U.S. 25, 86 L.Ed. 615—Bailey v. State of Alabama, Ala., 31 S.Ct. 145, 219 U.S. 219, 244, 55 L.Ed. 191.
39 C.J. p 137 note 18.

Words "without good and sufficient cause" within statute making proof of contract to perform services, procuring thereon of money or other thing of value, and failure to perform services or return money advanced, without good and sufficient cause, presumptive evidence of intent to defraud within preceding penal provision refer to failure to perform services or return money advanced, and content which has been assigned to those words by courts is immaterial on question of validity of statute, since subsequent breach of an employment contract, however capricious or reprehensible, does not establish initial fraudulent intent.—Taylor v. State of Georgia, Ga., 62 S.Ct. 415, 315 U.S. 25, 86 L.Ed. 615.

Function of statute making failure without just cause to perform labor or service or to pay for money or other property obtained by promise to perform labor prima facie evidence of intent to defraud was to make it possible to convict where proof of guilt was lacking.—Pollock v. Williams, Fla., 64 S.Ct. 792, 322 U.S. 4, 88 L.Ed. 1095.

6. U.S.—Pollock v. Williams, supra.

7. Ga.—Wilson v. State, 75 S.E. 619, 138 Ga. 489.
39 C.J. p 137 note 19.

8. N.C.—State v. Griffin, 70 S.E. 292, 154 N.C. 611.
39 C.J. p 137 note 20.

9. Ga.—Townsend v. State, 52 S.E. 293, 124 Ga. 69.

10. Ga.—Young v. State, 53 S.E. 101, 124 Ga. 788—Townsend v. State, 52 S.E. 293, 124 Ga. 69.

11. Ga.—Hogan v. State, 76 S.E. 1081, 12 Ga.App. 227.
39 C.J. p 138 note 23.

12. Ga.—Adams v. State, 197 S.E. 62, 57 Ga.App. 802.
39 C.J. p 138 note 24.

13. Ga.—Adams v. State, supra.
39 C.J. p 138 note 25.

14. Ga.—Vinson v. State, 52 S.E. 79, 124 Ga. 19.
39 C.J. p 138 note 26.

15. Ala.—Gill v. State, 27 So. 253, 124 Ala. 73.

16. Ga.—Mitchell v. State, 84 S.E. 205, 15 Ga.App. 803.

17. Ala.—Thomas v. State, 69 So. 908, 13 Ala.App. 431.
39 C.J. p 138 note 29.

18. Ga.—Vinson v. State, 52 S.E. 79, 124 Ga. 19, 21.
39 C.J. p 138 note 30.

19. Ala.—McIntosh v. State, 23 So. 668, 117 Ala. 128.
39 C.J. p 138 note 31 [a].

20. Ala.—McIntosh v. State, supra.
39 C.J. p 138 note 32.

Contract must be clear and definite in its terms.—Bennett v. State, 138 S.E. 671, 37 Ga.App. 20—39 C.J. p 138 note 32 [c].

21. Ga.—Golden v. State, 150 S.E. 452, 40 Ga.App. 538—Golden v. State, 146 S.E. 336, 39 Ga.App. 151.
39 C.J. p 138 note 33.

22. Fla.—Thompson v. State, 47 So. 816, 56 Fla. 107.
39 C.J. p 139 note 34.

At time of obtaining advance
Ga.—Broddus v. State, 14 S.E.2d 607, 65 Ga.App. 27—Bullard v. State, 2 S.E.2d 725, 60 Ga.App. 33—Cofer v. State, 147 S.E. 792, 39 Ga.App. 534—Clements v. State, 147 S.E. 792, 39 Ga.App. 554—Dubose v. State, 143 S.E. 150, 38 Ga. App. 130.

23. Ala.—Ex parte Riley, 10 So. 528, 94 Ala. 82.
39 C.J. p 139 note 35.

24. Ga.—Broddus v. State, 14 S.E. 2d 607, 65 Ga.App. 27.
39 C.J. p 139 note 36.

25. Ga.—Adams v. State, 197 S.E. 62, 57 Ga.App. 802—Banton v. State, 194 S.E. 827, 57 Ga.App. 173—Wood v. State, 147 S.E. 780, 39 Ga.App. 555—Skinner v. State, 139 S.E. 90, 37 Ga.App. 153.
39 C.J. p 139 note 37.

ty,[26] to perform such act or service.[27] (5) Loss or damage to the employer.[28]

As soon as the employee fails to perform the work called for by the employment contract, retaining the advances made on the strength of it, the offense is complete, and the right to prosecute at once arises,[29] but not until then[30] even though the circumstances strongly indicate a fraudulent intent.[31]

e. Defenses

Various matters constitute defenses to a prosecution of an employee for violation of a labor-contract statute, such as the performance of the services, or the timely repayment or offer to repay the money advanced.

In prosecutions of employees for violations of labor-contract statutes various matters have been urged in defense.[32] The performance of the services[33] or the timely repayment of the money advanced,[34] or offer to repay,[35] is a complete defense. An offer to repay all that is due the employer, without stating the exact amount, has been held sufficient.[36]

Commencement of work. Where the statute, in defining the offense, stipulates as an essential element a failure "to commence or complete" the work, the commencement of work under the contract is not in itself an absolute defense.[37]

Contract with third person. It is no defense that the employee when he obtained the advances on the employment contract was already under contract to work for another for the same period,[38] although it might be if the employer knew of the other existing contract, and the later contract was designed to work a civil injury to the employer under the first.[39]

f. Indictment, Information, or Complaint

In prosecutions of employees for violations of labor-contract statutes the general rules governing indictments, informations, and complaints in criminal prosecutions ordinarily apply.

General rules governing indictments, informations, and complaints in criminal prosecutions usually are applicable in prosecutions of employees for violations of labor-contract statutes.[40] The indictment or complaint must set forth the offense as defined in the statute.[41] It is not necessary to allege that the term of service had expired before the indictment was preferred.[42] Where the statute creates two offenses, one the fraudulent entering into a contract, in order to secure money on the faith of it, the other the fraudulent securing of money on a contract already made, the indictment must charge accused specifically with either one or both of these offenses.[43]

Contract. The indictment or complaint must set forth a contract of employment,[44] certain as to its terms and duration,[45] and of the character described in the statute.[46] It has been held not necessary to allege that the contract was in writing, even in states where the statute restricts prosecution under it to employees fraudulently securing advances on written contracts.[47]

Advances. The indictment must specify of what the advances consisted[48] and that they were obtained from the employer.[49] It may embrace in a single count various sums procured at different times,[50] provided the allegation of fraudulent intent is made to apply equally to the procurement of each sum.[51] Sums alleged to be fraudulently procured cannot be embraced in one count with other sums against which the same charge is not made.[52]

26. Ga.—Banton v. State, 194 S.E. 827, 57 Ga.App. 173—Barlow v. State, 156 S.E. 641, 42 Ga.App. 437.
39 C.J. p 139 note 38.

27. Ga.—Jones v. State, 84 S.E. 988, 16 Ga.App. 216—Brown v. State, 68 S.E. 865, 8 Ga.App. 211.

28. Ga.—Banton v. State, 194 S.E. 827, 57 Ga.App. 173.
39 C.J. p 139 note 40.

29. N.C.—State v. Norman, 14 S.E. 968, 110 N.C. 484.
39 C.J. p 139 note 41.

30. Ga.—Kemp v. State, 76 S.E. 752, 12 Ga.App. 80.

31. Ga.—Kemp v. State, supra.

32. Ga.—Paschal v. State, 85 S.E. 358, 16 Ga.App. 370—Johnson v. State, 79 S.E. 524, 13 Ga.App. 586.

33. Ga.—Johnson v. State, supra.

34. Ga.—Johnson v. State, supra.
39 C.J. p 139 note 46.

35. Ga.—Paschal v. State, 85 S.E. 358, 16 Ga.App. 370.

36. Ga.—Paschal v. State, supra.
39 C.J. p 139 note 49.

37. N.C.—Downing v. Stone, 68 S.E. 9, 152 N.C. 525, 136 Am.S.R. 841, 21 Ann.Cas. 753.

38. Ga.—Paschal v. State, 85 S.E. 358, 16 Ga.App. 370.
39 C.J. p 139 note 51.

39. S.C.—State v. Robinson, 50 S.E. 192, 70 S.C. 468.
39 C.J. p 139 note 52.

40. Ga.—Bullard v. State, 2 S.E.2d 725, 60 Ga.App. 33.

41. Ga.—Bullard v. State, supra.
39 C.J. p 140 note 54.

42. Ga.—Millinder v. State, 52 S.E. 760, 124 Ga. 452.

43. Ga.—Patterson v. State, 58 S.E. 284, 1 Ga.App. 782.

44. Ga.—Mason v. Terrell, 60 S.E. 4, 3 Ga.App. 348.

45. Ga.—Broddus v. State, 14 S.E.2d 607, 65 Ga.App. 27—Bullard v. State, 2 S.E.2d 725, 60 Ga.App. 33—Bennett v. State, 138 S.E. 671, 37 Ga.App. 20.
39 C.J. p 140 note 58.

46. S.C.—State v. Williams, 81 S.E. 154, 97 S.C. 449—State v. Williams, 10 S.E. 876, 32 S.C. 123.

47. Ga.—Brooks v. State, 76 S.E. 765, 12 Ga.App. 104.

48. Ga.—Campbell v. State, 48 S.E. 920, 121 Ga. 167.

49. Ala.—Hilliard v. State, 34 So. 848, 137 Ala. 89.

50. Ga.—Young v. State, 62 S.E. 558, 4 Ga.App. 827.

51. Ga.—Patterson v. State, 58 S.E. 284, 1 Ga.App. 782.

52. Ga.—Patterson v. State, supra.

Failure to perform or repay. The indictment must set forth the employee's failure to perform the contract or to repay the advances without just cause.[53] Where the statute in terms covers advances of money or property, a failure to refund is the proper charge in an indictment where an advance of money had been made, a further averment of failure to pay for not being required.[54]

Loss or damage to employer. An allegation of loss or damage to the employer resulting from the employee's wrongful act is required.[55]

Issues, proof, and variance. When the proof does not correspond with the accusation with respect to matters legally essential to the charge, accused must be acquitted,[56] but a variance in an immaterial matter will not have that effect.[57] An accusation that the employee procured money from the employer is supported by evidence of the procurement of a draft which has been cashed.[58]

g. Evidence

(1) Presumptions and burden of proof
(2) Admissibility
(3) Weight and sufficiency

(1) Presumptions and Burden of Proof

In prosecutions for violations of labor-contract statutes the state has the burden of proving the elements of the offense.

In prosecutions of employees for violations of labor-contract statutes the burden is on the state to prove the elements of the offense,[59] as, for example, the employee's fraudulent intent[60] at the time of securing the advances,[61] the employee's failure to perform[62] or to repay the advances[63] at or before the time fixed for the performance of the services,[64] a want of good excuse for such failure to perform or repay,[65] and an actual loss or damage, capable of definite computation,[66] sustained by the employer.[67] When services have been rendered by the employee, the burden is on the state to show their value, as well as the amount of the advances.[68]

Prior to the decisions holding such a provision invalid, discussed supra subdivision b of this section, it was held that even after evidence of the facts enumerated by the statute as furnishing presumptive evidence of the employee's guilt had been introduced the burden of establishing its case was still on the state,[69] although the burden of going forward with the evidence to rebut the presumption was on the employee.[70]

Presumptions. The labor-contract statutes, after defining the offense, have usually provided that the intent to defraud shall be presumed on satisfactory proof of the contract, the procuring thereon of money or other thing of value, the failure to perform the services so contracted for, or failure to return the money so advanced, without good and sufficient cause, and loss and damage to the employer.[71] This presumption, which has been held to invalidate the statute, as considered supra subdivision b of this section, did not arise on proof of a part only of the facts enumerated,[72] but as soon as all the facts were satisfactorily proved the presumption existed,[73] even though the term of service provided for in the contract had not yet expired.[74] The presumption was not conclusive.[75]

53. Ga.—Bullard v. State, 2 S.E.2d 725, 60 Ga.App. 33.
39 C.J. p 140 note 67.

54. Ala.—Gill v. State, 27 So. 253, 124 Ala. 73.

55. Ga.—Braughner v. State, 54 S.E. 653, 125 Ga. 629.
39 C.J. p 140 note 70.

56. Ga.—Williams v. State, 52 S.E. 156, 124 Ga. 136.
39 C.J. p 140 note 72.

57. Ga.—Mitchell v. State, 84 S.E. 205, 15 Ga.App. 803.
39 C.J. p 140 note 73.

58. Ga.—McCoy v. State, 52 S.E. 434, 124 Ga. 218.

59. Ga.—Alford v. State, 106 S.E. 733, 26 Ga.App. 421.
39 C.J. p 140 note 76.

60. Ga.—Stuckey v. State, 91 S.E. 784, 19 Ga.App. 441.
39 C.J. p 140 note 77.

61. Ga.—Stuckey v. State, supra.

62. Ga.—Alford v. State, 106 S.E. 733, 26 Ga.App. 421.
39 C.J. p 140 note 79.

63. Ga.—Alford v. State, supra.
39 C.J. p 141 note 80.

64. Ga.—Johnson v. State, 79 S.E. 524, 13 Ga.App. 586.

65. Ga.—Cofer v. State, 147 S.E. 792, 39 Ga.App. 534.
39 C.J. p 141 note 82.

66. Ga.—Mobley v. State, 79 S.E. 906, 13 Ga.App. 728.

67. Ga.—Lewis v. State, 83 S.E. 439, 15 Ga.App. 405.
39 C.J. p 141 note 84.

68. Ga.—Coleman v. State, 65 S.E. 46, 6 Ga.App. 398.

69. Ga.—Fuller v. State, 72 S.E. 718, 10 Ga.App. 117.

70. Ga.—Barnes v. State, 59 S.E. 937, 3 Ga.App. 333.

71. U.S.—Pollock v. Williams, Fla., 64 S.Ct. 792, 322 U.S. 4, 88 L.Ed. 1095—Taylor v. State of Georgia, Ga., 62 S.Ct. 415, 315 U.S. 25, 86 L.Ed. 615.

72. Ga.—Banton v. State, 194 S.E. 827, 57 Ga.App. 173.
39 C.J. p 141 note 91.
Mere failure to perform does not raise presumption that employee failed to comply with his contract without good and sufficient cause.—Banton v. State, supra—Thorn v. State, 78 S.E. 853, 13 Ga.App. 10.

73. Ga.—Millinder v. State, 52 S.E. 760, 124 Ga. 452—Barnes v. State, 59 S.E. 937, 3 Ga.App. 333.

74. Ga.—Millinder v. State, 52 S.E. 760, 124 Ga. 452.

75. Ga.—Paschal v. State, 85 S.E. 358, 16 Ga.App. 370.
39 C.J. p 141 note 94.
Sufficiency of evidence to rebut presumption see infra subdivision g (3) of this section.

(2) Admissibility

In prosecutions for violations of labor-contract statutes the general rules regulating the admissibility of evidence in criminal prosecutions ordinarily are applicable.

General rules governing the admissibility of evidence in criminal prosecutions usually apply in prosecutions of employees for violations of labor contract statutes.[76] The contract of employment[77] and evidence in aid of its construction[78] are admissible in evidence. The admissibility of the contract is not affected by its recital of moneys paid by the employer on the employee's account other than the advances for which the employee is being prosecuted.[79] Testimony as to who took the initiative in securing the contract is admissible as bearing on the issue of fraudulent intent.[80]

Advances. Evidence of advances made after the execution of the contract is admissible under an accusation charging that advances were made after execution and under a statute making it an offense to secure advances before or after execution with fraudulent intent;[81] but evidence that accused had on a previous occasion fraudulently obtained money on another contract is not admissible.[82]

Failure to pay. Failure of an employee to pay his debt to his employer may or may not be admissible evidence to prove an intent not to pay it at the time it was incurred, depending on its relevancy in point of time and circumstance to that issue.[83] If too remote it is not admissible,[84] notwithstanding the statutory provision that the failure to pay with other circumstances named shall raise a presumption of guilt.[85]

(3) Weight and Sufficiency

In order to warrant a conviction for a violation of a labor-contract statute the guilt of the accused must be proved beyond a reasonable doubt.

In order to convict an employee for a fraudulent breach of his contract of employment under a labor-contract law, the jury must be satisfied beyond a reasonable doubt of his guilt.[86] The contract is sufficiently proved by the testimony of the parties to it, even where the statute requires a verbal employment contract to be witnessed by at least two disinterested witnesses, in order to form the basis of criminal prosecution.[87] Where the statute requires that the money procured shall be an advance of money not yet earned, the employer's characterization of the payment as an "advance" is not sufficient evidence of the fact.[88]

Intent in general. The evidence must be sufficient to prove the required fraudulent intent on the part of the employee.[89] Proof of facts indicating that the employee formed a fraudulent intent after the advances were made is not sufficient to support a conviction.[90]

The presumption of fraudulent intent raised by proof of the facts enumerated in the statute, as considered supra subdivisions b, g (1) of this section, was held not to be rebutted by the proved fact that the employee prevailed upon some third person to give security for repayment of the money advanced, unsupported by other evidence of good faith toward the surety,[91] or by the employee's agreement to repay the money advanced made after his failure to do the work,[92] or even by repayment of the money advanced unless made on or before the day fixed by the contract for the commencement of the service,[93] or by evidence that the employee was a minor and yielded to the command of a stranger to go to work for him in the absence of a satisfactory showing that he did so under fear of duress, rather than voluntarily and with the purpose of defrauding his employer in accordance with a previously formed intent.[94]

On the other hand, the presumption of bad faith was held to be successfully rebutted by evidence that the employee worked under the contract for a

76. Ga.—Mulkey v. State, 57 S.E. 1022, 1 Ga.App. 521.

77. Ala.—Frazier v. State, 49 So. 245, 159 Ala. 1.
39 C.J. p 141 note 96.

78. Ga.—Peacock v. State, 73 S.E. 404, 10 Ga.App. 402.
39 C.J. p 141 note 97.

79. Ala.—Campbell v. State, 46 So. 520, 155 Ala. 128.

80. Ala.—Frazier v. State, 49 So. 245, 159 Ala. 1.

81. Ga.—Sheppard v. State, 70 S.E. 972, 9 Ga.App. 234.

82. Ga.—Denham v. State, 63 S.E. 62, 5 Ga.App. 303.

83. Ga.—Mulkey v. State, 57 S.E. 1022, 1 Ga.App. 521, 526.

84. Ga.—Mulkey v. State, supra.

85. Ga.—Mulkey v. State, supra.
39 C.J. p 141 note 5.

86. Ga.—Redwine v. State, 87 S.E. 829, 17 Ga.App. 560—Fuller v. State, 72 S.E. 718, 10 Ga.App. 117.
Evidence held insufficient
Ga.—Garnto v. State, 149 S.E. 150, 40 Ga.App. 136—Dubose v. State, 143 S.E. 150, 38 Ga.App. 130—Cofer v. State, 129 S.E. 110, 34 Ga.App. 244.

87. S.C.—State v. Easterlin, 39 S.E. 250, 61 S.C. 71.

88. Ga.—Walters v. State, 65 S.E. 357, 6 Ga.App. 565—Fuller v. State, 59 S.E. 1, 2 Ga.App. 696.

89. **Evidence held sufficient**
Ga.—Golden v. State, 150 S.E. 452, 40 Ga.App. 538.
Evidence held insufficient
Ga.—Bullard v. State, 2 S.E.2d 725, 60 Ga.App. 33.

90. Ga.—Smith v. State, 108 S.E. 130, 27 Ga.App. 318.

91. Ga.—Harwell v. State, 58 S.E. 1111, 2 Ga.App. 613.

92. Ga.—Lewis v. State, 83 S.E. 439, 15 Ga.App. 405.

93. Ga.—Harwell v. State, 58 S.E. 1111, 2 Ga.App. 613.

94. Ga.—Anthony v. State, 55 S.E. 479, 126 Ga. 632.

period of time approximating[95] or exceeding[96] in value the amount of money advanced; that he had long continued dealings with his employer of a character to negative a fraudulent intent;[97] that he mortgaged his own property to secure repayment of the money advanced;[98] that he asked another to pay his debt to his employer,[99] or refused to work for another until his debt to his employer was paid,[1] or accepted work with another on the latter's agreement to pay his debt to his former employer, and under the belief that the payment had been made.[2]

In addition, the presumption of bad faith was held to be successfully rebutted by evidence that the employee left his employment because his employer failed to perform his part of the agreement,[3] or because he had a dispute with his employer[4] or a well justified fear that he would suffer bodily harm if he continued the work;[5] that he absented himself from his work because of other demands on his time,[6] or because of the need[7] or sickness[8] of another under circumstances requiring his personal services, or because he was directed to keep away by some one having a right to control his actions;[9] or by evidence of a combination of circumstances, such as working under the contract for a period of time, failure to pay the employer what he could for fear of bodily injury if he did not pay all, and leaving his employer because of sickness.[10]

Want of good cause. An entire absence of evidence that the employee's refusal to work was without good and sufficient cause will bar a conviction under the statute,[11] even where it appears that the parties entered into an express contract and that money was fraudulently procured by the employee from the employer under it.[12] The burden resting on the state to prove the want of good cause is not sustained by the employer's opinion, unsupported by facts, that the employee had no good reason[13] or that he did not give his employee any cause[14] for leaving. Facts evidencing the employee's physical ability to work out his contract are, in the absence of other evidence, sufficient to support a finding of want of good cause.[15] The fact that the employee had good cause for his failure to perform his contract is sufficiently established by evidence that performance was impossible through no fault of his,[16] or that he could not work because of sickness[17] or physical disability.[18]

Loss or damage to employer. Loss to the employer may be shown by proving an advancement of money to the employee in excess of the value of his services at the contract rate.[19] The evidence is not sufficient to establish loss where there is no proof offered of the value of the labor done under the contract,[20] or where the value of the labor is shown to have exceeded the amount of the advances,[21] or that the employer is still in possession of the fruits of his employee's labor, and has not sold them,[22] or holds a mortgage to secure the advances and has not foreclosed it,[23] or fails to show, if he has foreclosed it, that the amount realized on the sale did not equal the amount of the advances.[24]

95. Ga.—Swilley v. State, 80 S.E. 31, 14 Ga.App. 15.
39 C.J. p 142 note 16.

96. Ga.—Young v. State, 60 S.E. 117, 3 Ga.App. 463.

97. Ga.—Solomon v. State, 76 S.E. 74, 11 Ga.App. 764.
39 C.J. p 142 note 18.

98. Ga.—Hogan v. State, 76 S.E. 1081, 12 Ga.App. 227.

99. Ga.—Heywood v. State, 57 S.E. 1025, 1 Ga.App. 530.
39 C.J. p 142 note 20.

1. Ga.—Thompson v. State, 62 S.E. 568, 4 Ga.App. 846.

2. Ga.—Denham v. State, 63 S.E. 62, 5 Ga.App. 303.
Contract with third person as defense see supra subdivision e of this section.

3. Ga.—Williams v. State, 67 S.E. 118, 7 Ga.App. 467.
39 C.J. p 142 note 23.

4. Ga.—Coleman v. State, 65 S.E. 46, 6 Ga.App. 398—Rickerson v. State, 60 S.E. 114, 3 Ga.App. 443.

5. Ga.—Sterling v. State, 54 S.E. 921, 126 Ga. 92.
39 C.J. p 142 note 25.

6. Ala.—Ex parte Riley, 10 So. 528, 94 Ala. 82.
39 C.J. p 142 note 26.

7. N.C.—State v. Isley, 79 S.E. 1105, 164 N.C. 491.
39 C.J. p 142 note 27.

8. Ga.—Solomon v. State, 114 S.E. 813, 29 Ga.App. 201.
39 C.J. p 142 note 28.

9. Ga.—Harwell v. State, 58 S.E. 1111, 2 Ga.App. 613.
39 C.J. p 142 note 29.

10. Ga.—Harris v. State, 118 S.E. 405, 30 Ga.App. 344.

11. Ga.—Cofer v. State, 147 S.E. 792, 39 Ga.App. 534—Skinner v. State, 139 S.E. 90, 37 Ga.App. 153—King v. State, 136 S.E. 466, 36 Ga.App. 272.
39 C.J. p 142 note 31.

12. Ga.—Brown v. State, 68 S.E. 865, 8 Ga.App. 211.

13. Ga.—Adams v. State, 197 S.E. 62, 57 Ga.App. 802—Banton v. State, 194 S.E. 827, 57 Ga.App. 173—Barlow v. State, 156 S.E. 641, 42 Ga.App. 437—King v. State, 136 S. E. 466, 36 Ga.App. 272.
39 C.J. p 143 note 34.

14. Ga.—Wood v. State, 147 S.E. 780, 39 Ga.App. 555.
39 C.J. p 143 note 35.

15. Ga.—Mosely v. State, 58 S.E. 298, 2 Ga.App. 189.
39 C.J. p 143 note 36.

16. Ga.—Reese v. State, 77 S.E. 922, 12 Ga.App. 647.
39 C.J. p 143 note 37.

17. Ga.—Johnson v. State, 68 S.E. 318, 7 Ga.App. 812.

18. Ga.—Hart v. State, 48 S.E. 925, 121 Ga. 140.

19. Ga.—Lewis v. State, 83 S.E. 439, 15 Ga.App. 405.

20. Ga.—Banton v. State, 194 S.E. 827, 57 Ga.App. 173.
39 C.J. p 143 note 41.

21. Ga.—Johnson v. State, 68 S.E. 318, 7 Ga.App. 812—Young v. State, 60 S.E. 117, 3 Ga.App. 463.

22. Ga.—Millinder v. State, 52 S.E. 760, 124 Ga. 452.
39 C.J. p 143 note 43.

23. Ga.—Hogan v. State, 76 S.E. 1081, 12 Ga.App. 227.

24. Ga.—Abrams v. State, 55 S.E. 497, 126 Ga. 591.

h. Trial

The general rules governing the trial of criminal prosecutions ordinarily are applicable in prosecutions for violations of labor-contract statutes.

General rules regulating the trial of criminal prosecutions ordinarily apply in prosecutions against employees for violations of labor-contract statutes.[25] It is for the jury to determine, on conflicting evidence, under proper instructions, whether the essentials of the crime, as defined in a labor-contract act, or the defenses thereto, have been sufficiently proved,[26] as, for example, the fraudulent intent of the employee,[27] the nature and purpose of the payment to him by his employer,[28] or the sufficiency of an offer to repay the advances.[29]

Instructions. It is the duty of the court to instruct the jury on the necessity of proving the employee's intent to defraud,[30] and its existence at the time the advances were made,[31] even in the absence of a written request to do so.[32]

B. WAGES AND OTHER REMUNERATION

1. Right to Compensation

§ 81. In General

The right of an employee to compensation rests, in general, on the performance of services under an agreement, express or implied, that compensation shall be had therefor.

The right of an employee to compensation rests, in general, on the performance of services[33] under an agreement, express or implied, that compensation shall be had therefor,[34] although there need be no definite agreement as to the amount thereof.[35] However, by express agreement of the parties, the employee may be entitled to compensation for a period of time during which no services are rendered;[36] and some contracts have been construed as entitling the employee to compensation for such period, where he was at all times ready, willing, and able to perform the services contracted for,[37] even though during such period the employee performed

25. Ga.—Paschal v. State, 85 S.E. 358, 16 Ga.App. 370.

26. Ga.—Paschal v. State, supra—Mitchell v. State, 84 S.E. 205, 15 Ga.App. 803.

27. Ga.—Coleman v. State, 65 S.E. 46, 6 Ga.App. 398.

28. Ga.—Fuller v. State, 59 S.E. 1, 2 Ga.App. 696.
39 C.J. p 143 note 51.

29. Ga.—Paschal v. State, 85 S.E. 358, 16 Ga.App. 370.

30. Ga.—Simmons v. State, 88 S.E. 800, 18 Ga.App. 65.
39 C.J. p 143 note 53.

31. Ga.—Crayton v. State, 106 S.E. 919, 26 Ga.App. 426.

Instructions held proper
Ga.—Golden v. State, 150 S.E. 452, 40 Ga.App. 538.

32. Ga.—Simmons v. State, 88 S.E. 800, 18 Ga.App. 65.
39 C.J. p 143 note 55.

33. Ga.—Jones v. Hearst Consolidated Publications, 10 S.E.2d 761, 190 Ga. 762.
Mass.—Abbott v. Moss, 171 N.E. 712, 271 Mass. 463.
N.Y.—Wagner v. G. Gaudig & Blum Corporation, 228 N.Y.S. 139, 223 App.Div. 254.
39 C.J. p 143 note 57.
Excuses for nonperformance see infra §§ 82–89.
Part performance see infra § 82.
Performance generally see supra §§ 60–68.

Service beyond statutory contractual period
Where a contract for services for a term of more than five years is entered into notwithstanding statute providing that persons who have attained the age of majority cannot bind themselves for a longer term than five years, and by mutual consent, tacit or expressed, service is rendered for the sixth year, the service must be paid for under the contract.—Shaughnessy v. D'Antoni, C. C.A.La., 100 F.2d 422.

Compensation held earned by salesman.—Geib v. Haynes Corporation of Illinois, 240 N.W. 907, 185 Minn. 295.

Use of time for employee's purpose; patents
Where defendant, while employed by plaintiff, used both time owing to plaintiff by defendant and other employees in perfecting devices which defendant patented in his own name, plaintiff was not required to accept assignment of patents in lieu of money paid defendant for time which plaintiff did not receive from defendant, to recover which money plaintiff is suing.—National Lock Co. v. Aldeen, 271 Ill.App. 37.

34. Cal.—Boucher v. Peasley, 272 P. 1087, 95 Cal.App. 532.
Md.—Vincent v. Palmer, 19 A.2d 183, 179 Md. 365.
39 C.J. p 143 note 58.
Implied contracts for services in general see the C.J.S. title Work and Labor §§ 1–67, also 71 C.J. p 37 note 1–p 174 note 60.

"The laborer is worthy of his hire."—Deville v. Couvillion, 5 La. App. 519.

Principle of construction held inapplicable
Rule that situation of parties, object, and surrounding circumstances should be considered in interpreting contract was held inapplicable, with respect to compensation, to contract for employment of manager of farm under evidence.—Birk v. Jackson, Tex.Civ.App., 75 S.W.2d 918, error dismissed.

Tort principles not applicable
Wages are due according to principles of contract and not of tort.—Bowman v. Pace Co., C.C.A.Fla., 119 F.2d 858.

Effect of failure to keep books
Pa.—Hickel v. Allburn, Com.Pl., 21 Erie Co. 56.

35. Philippine.—Herrer v. Cruz Herrera, 7 Philippine 274.
39 C.J. p 144 note 59.
Amount of compensation see infra §§ 109–118.

36. Ga.—Howard v. Posey, 188 S.E. 843, 54 Ga.App. 674.
N.Y.—Mesinger v. Mesinger Bicycle Saddle Co., 60 N.Y.S. 431, 44 App. Div. 26.
Temporary absences in general see infra § 84.

37. Utah.—Parker v. Weber County Irr. Dist., 236 P. 1105, 65 Utah 354.
Wash.—Rudebeck v. Pacific Copper Co., 294 P. 986, 160 Wash. 127.
39 C.J. p 148 note 15 [a].

services for a third person.[38] It has also been held that employees whose only duty is "to stand and wait" are entitled to compensation[39] and that an employer desiring to keep a person in his employ, regardless of whether or not he is performing labor all of the time, cannot escape liability to pay wages during the time work is not being done.[40]

In the case of an express agreement as to compensation, its terms control[41] in the absence of fraud, illegality, or bad faith,[42] and provided it is supported by a sufficient consideration.[43] Thus the right of an employee to compensation may be made to depend on the fulfillment of a particular condition,[44] or may be limited to particular services,[45] or may be restricted to payment from a particular fund.[46] If the happening of the contingency on which the employee's right to wages is based is placed by his contract within the discretion or control of the employer, the contract is generally construed as requiring a fair and honest exercise of that discretion against the employee's right in order to defeat his claim.[47]

An employee's right to compensation also depends on his observance or performance of the duties of faithfulness,[48] honesty,[49] diligence,[50] loyalty,[51] and obedience;[52] but it has been held to be no defense to an action for wages that the employee's conduct was in violation of his contractual and fiduciary obligations to his employer where it is not shown that the employer was injured thereby.[53]

Use or benefit to employer. It is immaterial, as far as an employee's right to compensation is concerned, whether the employer later used or failed to use the results of his employee's labor[54] or whether

Actress not called on to work
Cal.—Payne v. Pathe Studios, 44 P.2d 598, 6 Cal.App.2d 136.

38. Cal.—Payne v. Pathe Studios, supra.
Wash.—Rudebeck v. Pacific Copper Co., 294 P. 986, 160 Wash. 127.

39. U.S.—Burns v. Northern Pac. Ry. Co., C.C.A.Minn., 134 F.2d 766.

40. Idaho.—Nelson v. Boise Petroleum Corporation, 32 P.2d 782, 54 Idaho 179—Blake v. Crystalline Lime Co., 221 P. 1100, 37 Idaho 637.

41. U.S.—Cravens v. Climax Engineering Co., C.C.A.Iowa, 40 F.2d 359.
Cal.—MacDuff v. Earle C. Anthony, Inc., 47 P.2d 477, 8 Cal.App.2d 209—Boucher v. Peasley, 272 P. 1087, 95 Cal.App. 532.
Hawaii.—Black v. Lord, 29 Hawaii 204, rehearing denied 29 Hawaii 420.
Kan.—Fey v. Loose-Wiles Biscuit Co., 75 P.2d 810, 147 Kan. 31.
Ky.—Simon v. Neptune Mfg. Co., 147 S.W.2d 1024, 285 Ky. 340—Keyser v. Hopkins, 34 S.W.2d 968, 237 Ky. 105—Hudson Engineering Co. v. Shaw, 179 S.W. 1083, 167 Ky. 27.
Mass.—Hanson v. Bradley, 10 N.E.2d 259, 298 Mass. 371.
N.Y.—Lockwood v. Embalmers' Supply Co., 251 N.Y.S. 321, 233 App. Div. 189—Engel v. Ansco Photoproducts, 240 N.Y.S. 737, 229 App. Div. 241, affirmed Engel v. Ansco Photoproducts Co., 177 N.E. 163, 256 N.Y. 615—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented on other grounds 33 N.Y.S.2d 764.
39 C.J. p 144 note 61.

Arbitrator's award in conflict with contract will be vacated.—Screen Cartoonists Guild, Local 852, v. Walt Disney Productions, 168 P.2d 983, 74 Cal.App.2d 414.

Contractual liability held not canceled by subsequent agreement.—Hukill v. Highway Trailer Co., 24 A.2d. 74, 147 Pa.Super. 285.

Declaration of policy
Letter from employer to secretary of employees' association, reciting that "it is certainly our intention to pay all back wage claims," was a mere declaration of policy and not a contract to pay back wages, and did not give employees a cause of action.—Doyle v. Rice Ranch Oil Co., 81 P.2d 980, 28 Cal.App.2d 18.

42. Ohio.—Ullmann v. May, 72 N.E.2d 63, 147 Ohio St. 468.

43. **Consideration held sufficient**
Ark.—Bulman Furniture Co. v. Knox, 21 S.W.2d 161, 180 Ark. 1167.

44. U.S.—Gutensohn v. Kansas City Southern Ry. Co., C.C.A.Mo., 140 F.2d 950.
Cal.—Swanson v. McAuliff, 104 P.2d 858, 40 Cal.App.2d 456.
39 C.J. p 144 note 62.
Conditions precedent to right to commissions see infra § 90.

Right held not conditional on future earnings
Pa.—Shallcross v. Highway Trailer Co., 24 A.2d 71, 147 Pa.Super. 279.

45. Me.—Puffer v. L. P. Soule & Son Co., 116 A. 215, 121 Me. 168.
39 C.J. p 144 note 63.

46. Tex.—Cotton v. Rand, Civ.App., 29 S.W. 682.
39 C.J. p 144 note 64.

47. Or.—O'Neill v. Geo. F. Eberhard Co., 196 P. 391, 99 Or. 636.
Discretionary powers affecting right to commission see infra § 90.
Services to satisfaction of employer see supra § 32.

Conditions "beyond human control"
Under contract between employer and labor union providing that employees should not "suffer loss of time or pay during breakdown or interruption of service except when caused by conditions beyond human control," but contemplating right of employer to lay employees off "because of slack work," expression "beyond human control" meant beyond control of employer rather than beyond control of any human being, and employer was not liable for loss of time caused by a strike of another union which forced employer to lay off employees covered by the contract.—Members of Bakery & Confectionery Workers Union Local No. 458, v. Hall Baking Co., 69 N.E.2d 111, 320 Mass. 286.

48. Minn.—Hlubeck v. Beeler, 9 N.W.2d 252, 214 Minn. 484—Peterson v. Mayer, 49 N.W. 245, 46 Minn. 468, 13 L.R.A. 72.
Pa.—Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36.
Effect of negligence or misconduct see infra § 105.
Honesty and faithfulness in performance generally see supra § 67.

49. Minn.—Hlubeck v. Beeler, 9 N.W.2d 252, 214 Minn. 484—Peterson v. Mayer, 49 N.W. 245, 46 Minn. 468, 13 L.R.A. 72.

50. Pa.—Bernstein v. Lipper Mfg. Co., 160 A. 770, 307 Pa. 36.

51. Pa.—Bernstein v. Lipper Mfg. Co., supra.

52. Pa.—Bernstein v. Lipper Mfg. Co., supra.

53. Md.—Baer v. Robbins, 83 A. 341, 117 Md. 213.
39 C.J. p 122 note 2.

54. Wis.—Murray v. Hamilton Beach Mfg. Co., 190 N.W. 460, 178 Wis. 624.
39 C.J. p 144 note 66.

the services were beneficial or profitable to him unless the payment of compensation is made contingent on the success of the employer's enterprise.[55]

Against whom right enforceable. The employer, that is, the person engaging the services of another and agreeing to pay for them, is the one liable for them,[56] notwithstanding another benefits therefrom.[57] The question as to who is the employer may be in dispute,[58] and when it involves issues of fact the liability for wages is for the jury to determine under proper instructions.[59]

Under the rule that a third person can sue on a contract made for his benefit, discussed in Contracts § 519, one who has performed labor for another may sue for his wages a third person who contracted with the hirer to pay the wages, although plaintiff was not a party to the contract.[60]

Tips or gratuities. In the absence of a prohibitory statute or order enacted pursuant to statutory authority, an employee's compensation may consist of, or include, gratuities or tips.[61]

Labor unions may be organized for the purpose of advancing[62] or maintaining[63] their wages, and may singly or in a body leave the service of their employers in order to compel an advance of wages.[64]

§ 82. Part Performance, Abandonment, or Discharge

A contract to render personal services for a specified time is ordinarily, but not always, regarded as an entire, and not as a severable, contract, on which recovery can be had only on showing full performance or a valid excuse for nonperformance.

A contract to render personal services for a specified time ordinarily is regarded as an entire contract, so that a recovery thereon can be had by the employee only on showing full performance or a valid excuse for nonperformance.[65] This is true even though the contract states the compensation to be at the rate of so much per week or month,[66] provided it does not require the actual payment of so much each month or week.[67] Likewise, performance of the entire service may be a condition precedent to a recovery of any part of the wages thereunder where the contract expressly so stipulates.[68] In other cases, however, including generally those in which the actual payment of wages within the

55. Ga.—Central Georgia Transmission Co. v. Storer, 85 S.E. 498, 17 Ga.App. 55.
39 C.J. p 144 note 67.

56. Conn.—Caliendo v. Catania, 14 A.2d 752, 127 Conn. 66.
Ky.—Keyser v. Hopkins, 34 S.W.2d 968, 237 Ky. 105.
39 C.J. p 145 note 71.
Parties to action to recover wages see infra § 127.

Liability to employees of independent contractor

An employer is not liable to the employees of an independent contractor for their pay.
Fla.—Wright v. Terry, 2 So. 6, 23 Fla. 160.
Wash.—Seattle Ærie No. 1 of Fraternal Order of Eagles v. Commissioner of Unemployment Compensation and Placement, 160 P.2d 614, 23 Wash.2d 167, motion denied 163 P.2d 321, 23 Wash.2d 167.

57. Cal.—Stone v. Bancroft, 44 P. 1069, 112 Cal. 652.
39 C.J. p 145 note 72.

58. Conn.—Caliendo v. Catania, 14 A.2d 752, 127 Conn. 66.
39 C.J. p 145 note 73.

59. Iowa.—Kruse v. Seiffert & Weise Lumber Co., 79 N.W. 118, 108 Iowa 352.
39 C.J. p 145 note 74.

60. Nev.—Miliani v. Tognini, 7 P. 279, 19 Nev. 133.

Preference in giving employment

Under public works administration contract for construction, where contractor agreed to make certain preferences in giving work, carpenter who was employed as an assistant carpenter, and who could not show that he was denied employment as such, or that contractor, with knowledge of his qualifications, employed other men of same class not residents of town for same period, was not entitled, as third party beneficiary, to compensation for days on which he was unemployed and on which contractor employed carpenters not within plaintiff's class.—Primus v. D. V. Frione & Co., 198 A. 165, 124 Conn. 1.

61. Ohio.—Setree v. Falkner, App., 50 N.E.2d 412.

62. Ark.—Meier v. Speer, 132 S.W. 988, 96 Ark. 618.
63 C.J. p 660 note 83.
Employee's organizations in general see supra § 28 (15).

63. N.J.—New Jersey Painting Co. v. Local No. 26, Brotherhood of Painters, Decorators, and Paper Hangers of America, 126 A. 399, 96 N.J.Eq. 632, 47 A.L.R. 384.
63 C.J. p 660 note 84.

64. U.S.—Wabash R. Co. v. Hannahan, C.C.Mo., 121 F. 563.
63 C.J. p 666 note 87.

65. Ala.—Peacock v. Virginia-Carolina Chemical Co., 130 So. 411, 221 Ala. 680.
Md.—**Corpus Juris cited in** Bright v. Ganas, 189 A. 427, 431, 171 Md. 493.
N.Y.—Coletti v. Knox Hat Co., 169 N.E. 648, 252 N.Y. 468—De Long v. Elizabeth Arden, Inc., 16 N.Y.S. 2d 837.
Okl.—**Corpus Juris cited in** Looney v. Bruin Oil Corporation, 122 P.2d 1007, 1009, 190 Okl. 266—Davidson v. Gaskill, 121 P. 649, 32 Okl. 40.
39 C.J. p 145 note 78.
Part performance as affecting amount of compensation see infra § 113.
Sufficiency of performance see supra § 66.

Elements of performance; devotion of entire time

(1) Under contract sued on, employee could not recover salary unless, as required by contract, he performed executive service connected with picture show business which employer called on him to do.—Arkansas Amusement Corporation v. Kempner, 33 S.W.2d 42, 182 Ark. 897.

(2) Employee visiting store and dictating letters in connection with store business in which he had formerly been engaged did not violate contract to devote entire time to employer's business.—Dugan v. Ciesi, 115 So. 660, 165 La. 471.

66. Okl.—**Corpus Juris quoted in** Wrightsman v. Brown, 73 P.2d 121, 123, 181 Okl. 142.
39 C.J. p 145 note 79.

67. Okl.—**Corpus Juris quoted in** Wrightsman v. Brown, 73 P.2d 121, 123, 181 Okl. 142.

68. Ala.—Whitley v. Murray, 34 Ala. 155.
39 C.J. p 145 note 81.

employment term is provided for, as discussed infra § 83, the contract is construed as not contemplating its full performance as a condition precedent to recovery of a part of the compensation thereunder, and in these cases the employee may recover his wages for the time he worked.[69]

Payment periods. Where the contract of employment provides for the payment of wages at stated intervals, the payment periods are themselves regarded as entire and a recovery of wages for a particular period is dependent on services having been rendered for the full term of that period.[70]

§ 83. —— Abandonment of Service

In the absence of a provision for forfeiture, an employee who abandons his employment in violation of his contract may recover for his services rendered if the contract is severable, but not if the contract is entire.

If there is no forfeiture provision in the contract or rules governing the employment,[71] an employee who abandons his employment in violation of his contract may recover for services rendered if the contract is severable,[72] but not if the contract is entire.[73] So, if one employed for a specified time under a contract not providing for periodic payment of wages during the term quits before the expiration thereof without adequate cause or excuse, he cannot recover on the contract any unpaid wages for services rendered,[74] and this rule has been incorporated into some statutory enactments.[75] Likewise the servant may not recover money withheld out of his wages to guarantee his performance of the contract,[76] or the use of a house, rent free, to which he was entitled as long as he continued in the employment.[77]

Recovery on quantum meruit. There can be no recovery on a quantum meruit, according to the majority of decisions[78] although there is considerable authority to the contrary, especially where the employer has received a benefit from the labor in excess of any damages from the breach.[79] Where recovery on a quantum meruit is allowed, it is limited in amount to the contract price for the services minus damages for the loss sustained by the employer from the employee's abandonment, as considered infra § 113, and is conditioned on the absence from the contract of any stipulation providing for payment of the employee in kind.[80]

Periodic payments within term. In the group of cases in which a recovery is not otherwise allowable, if the contract provides, or is construed to provide, for actual payments of wages earned at intervals during the employment term, the right to wages due at the end of one of the periods vests at that time so as not to be affected by a subsequent abandonment of the contract,[81] but a recovery is not allowed where it is shown that, because of the employee's breach or other reason, there are no wages due and payable.[82] The rule is otherwise, as appears supra § 82, if the contract provides, not for the actual payment of so much each week or month, but a compensation "at the rate of" so much per week or month.

69. Okl.—Wrightsman v. Brown, 73 P.2d 121, 181 Okl. 142.
39 C.J. p 145 note 83.

Hiring held not by year

A contract to pay "at the rate of" so much per annum, "payable monthly," cannot be an entire contract for the year in the sense that no pay would be due unless the employee served a full year.—Peacock v. Virginia-Carolina Chemical Co., 130 So. 411, 413, 221 Ala. 680.

70. N.Y.—Solotaroff v. Willner Edelstein Amusement Co., 147 N.Y.S. 938, 85 Misc. 445.
39 C.J. p 146 note 86.

71. Okl.—**Corpus Juris quoted in** Wrightsman v. Brown, 73 P.2d 121, 123, 182 Okl. 142.
Deductions in case of nonperformance see infra § 104.

72. Okl.—Wrightsman v. Brown, 73 P.2d 121, 123, 181 Okl. 142.
39 C.J. p 146 note 89.
Abandonment as terminating relation see supra § 40.
Indefinite term see infra § 89.

73. Mo.—Holding v. Kessinger, App., 191 S.W. 1077.
39 C.J. p 146 note 90.

74. N.Y.—Stevens v. Elizabeth Arden, Inc., 2 N.Y.S.2d 187, 253 App. Div. 358—Wolin v. Perlco Venetian Blind Corporation, 43 N.Y.S.2d 262, 180 Misc. 544.
39 C.J. p 146 note 92.

Transportation and travel-time pay

Stenographer employed on project out of country, who was not discharged, but resigned on his own volition, was not, under contract, entitled to cost of transportation and pay for time of travel to home.—Bradley v. McWilliams Dredging Co., 67 N.Y.S.2d 145.

Royalties

Where, under employment contract, employee was to receive payment of royalties on quarterly basis, and he left employment before expiration of the next quarterly period, he was not entitled to receive last quarterly royalty payments.—De Long v. Elizabeth Arden, Inc., 16 N.Y.S.2d 837.

75. La.—Wood v. Southern Life & Health Ins. Co., 140 So. 115, 19 La. App. 214.
39 C.J. p 146 note 93.

76. N.Y.—Fenster v. Bass, 107 N.Y.S. 872—Walls v. Coleman, 11 N.Y.S. 907.

77. Mich.—Lane v. Au Sable Electric Co., 147 N.W. 546, 181 Mich. 26, Ann.Cas.1916C 1108.

78. Okl.—**Corpus Juris cited in** Looney v. Bruin Oil Corporation, 122 P.2d 1007, 1009, 190 Okl. 266.
39 C.J. p 146 note 97.

79. N.H.—Britton v. Turner, 6 N.H. 481, 26 Am.D. 713.
39 C.J. p 147 note 98.

80. N.H.—Roundy v. Thatcher, 49 N.H. 526.
39 C.J. p 147 note 1.

81. Md.—Schneider v. Hagerstown Brewing Co., Inc., 110 A. 218, 136 Md. 151.
39 C.J. p 147 note 2.

82. N.Y.—Ressig v. Waldorf-Astoria Hotel Co., 172 N.Y.S. 616, 185 App. Div. 4, affirmed 129 N.E. 912, 229 N.Y. 553.
Puerto Rico.—Portela v. Porto Rican-American Tobacco Co., 4 Puerto Rico 29.

Abandonment for good cause. If the employee has good cause for quitting he may recover for the services actually performed,[83] including any part of his wages withheld to secure a faithful performance of his duties,[84] but not an additional amount in the form of salary or wages for the rest of the term.[85]

§ 84. —— Temporary Absences in General

As a general rule an employee is not entitled to recover for lost time where there is no agreement to that effect.

An employee generally is not entitled to recover for lost time where there is no agreement to that effect,[86] or where the contract of employment allows compensation only for the days the employee works.[87] Where the employee is given a vacation with pay,[88] or a leave of absence is granted,[89] or where the employee's absence is involuntary,[90] as where the employer fails to furnish work,[91] the employee is entitled to his wages for the time off. Where, however, the contract allows compensation for the employee's entire time excepting periods of nonperformance due to certain specified causes, the employee may recover for days on which he did not work on proof of his offer to do so if his nonperformance was not due to one of the specified causes.[92]

Obligation to make up lost time. When an employee leaves his employer's service after he has worked for the full term agreed on, he cannot be said to have abandoned the service and forfeited the wages due him simply because he had refused to work after the term had expired in order to make up for lost time[93] unless the original contract provides that time lost shall be made up;[94] even then, if the employer is responsible for the loss of time, the employee may refuse to make it up without subjecting himself to the charge of abandonment.[95]

§ 85. —— Sickness, Death, or Other Disability

The death, sickness, or other disability of the employer or employee prevents recovery for services for the entire contract period; but recovery ordinarily may be had for services performed up to the time of an employee's death or of his absence because of sickness.

In the absence of a stipulation to the contrary, the death of either party, or sickness or other disability, preventing its performance, terminates the employment contract, as discussed supra §§ 37, 38, and recovery cannot be had for services for the entire contract period.[96] Subject to rules promulgated by the employer and binding on the employee,[97] a recovery may be had for services actually performed by an employee up to the time of his death,[98] or to the time of his absence because of

83. La.—Moll v. Wall, 4 La.App. (Orleans) 72.
39 C.J. p 147 note 6.

84. N.Y.—Godt v. Henigson, 135 N.Y.S. 666.
39 C.J. p 147 note 7.

85. N.Y.—Koch v. Siff, 154 N.Y.S. 223.
39 C.J. p 147 note 8.

86. Wis.—**Corpus Juris cited in** General Accident Fire & Life Assur. Corporation v. Industrial Commission, 266 N.W. 226, 227, 221 Wis. 544.
39 C.J. p 147 note 9.
Compensation for periods of no service generally see supra § 81.

87. Ga.—Southern R. Co. v. Everett, 66 S.E. 398, 7 Ga.App. 185.
39 C.J. p 147 note 10.

88. Ark.—**Corpus Juris quoted in** Oil Fields Corporation v. Hess, 53 S.W.2d 444, 447, 186 Ark. 241.
39 C.J. p 148 note 11.
Vacation with pay as additional compensation see infra § 96.
Continuous work held required
La.—Bondio v. Joseph Binder, Inc., App., 24 So.2d 398.

89. Ark.—**Corpus Juris quoted in** Oil Fields Corporation v. Hess, 53 S.W.2d 444, 447, 186 Ark. 241.
39 C.J. p 148 note 12.
Transferred employee obtaining leave
Where railroad company transferred combined job of pumper and engine watcher at certain station from its maintenance of way department, of which holder of such job was member, to mechanical department because of such employee's unsatisfactory work, and he obtained leave of absence, instead of continuing as pumper at either of two other stations as authorized by company, he was not entitled to pay as pumper for period of his absence on such leave under provision of agreement between company and maintenance of way employees' union.—Rogers v. Union Pac. R. Co., C.C.A.Or., 145 F.2d 119.

90. Ark.—**Corpus Juris quoted in** Oil Fields Corporation v. Hess, 53 S.W.2d 444, 447, 186 Ark. 241.
39 C.J. p 148 note 13.

91. Ark.—**Corpus Juris quoted in** Oil Fields Corporation v. Hess, 53 S.W.2d 444, 447, 186 Ark. 241.
39 C.J. p 148 note 14.

92. Pa.—Wentworth v. Whitney, 25 Pa.Super. 100.
39 C.J. p 148 note 15.

93. Vt.—McDonald v. Montague, 30 Vt. 357.
Wis.—Bast v. Byrne, 8 N.W. 494, 51 Wis. 531, 37 Am.R. 841.

94. Pa.—Pennsylvania R. Co. v. Bost, 104 Pa. 26.

95. Pa.—Pennsylvania R. Co. v. Bost, supra.

96. Okl.—Davidson v. Gaskill, 121 P. 649, 32 Okl. 40.
39 C.J. p 148 note 22.
Deductions for loss of time due to employee's sickness see infra § 104.
Preservation of seniority rights
The fact that railroad continued employee on its seniority rolls during period of his disability, in order to preserve his rights if he should ever become able to return to work, and granted him privileges to which only an employee was entitled, did not authorize recovery by employee on quantum meruit for time during which he performed no services, and merely visited employers' officials in his own behalf.—Sickelco v. Union Pac. R. Co., C.C.A.Cal., 111 F.2d 746.

97. Iowa.—Margoris v. U. S. Railroad Administration, 174 N.W. 371, 187 Iowa 605.
39 C.J. p 148 note 23.

98. R.I.—Parker v. Macomber, 24 A. 464, 17 R.I. 674, 16 L.R.A. 858.
39 C.J. p 148 note 24.

sickness,[99] even though after absence from illness the employee does not return and offer to complete the period of service.[1] The rule does not apply where the sickness ought to have been anticipated at the time the contract was made,[2] as in the case of confinement in childbirth,[3] or where the contract is entire and the abandonment is for some other and unjustifiable reason, the sickness being made the pretext for the recovery of wages to which otherwise the employee would not be entitled under the law.[4]

§ 86. —— Destruction of Place of Work

One employed to work in a particular building which is accidentally destroyed is entitled to wages for services already rendered, but not for the remainder of the term; but where the employment has no reference to the continued existence of any particular place of work, an employee may recover for the full term despite such destruction.

One employed to work in a particular building which is destroyed by inevitable accident after part performance is entitled to his wages for the services rendered,[5] but not for the remaining part of the contract term.[6] Where, however, the employment has no reference to the continued existence of any particular place of work, the destruction of the place of work does not affect the employee's right to his compensation for the full contract term.[7]

§ 87. —— Discharge

An employee discharged for cause cannot recover future wages under the contract, but under most authorities he can recover for services actually rendered except that, where periodic payments are provided for, he cannot recover for services rendered during the fractional part of the employment period in which he was discharged.

An employee who has been discharged for cause is not entitled to recover future wages or other future compensation under the contract;[8] nor can he recover under the contract for services for an entire employment period where he was discharged after having performed them only in part,[9] or for a time equivalent to the notice period, where the employer is required by the contract to give notice of its termination.[10] It is only where an employee, hired for a term, is dismissed without just cause before the expiration of the term that he is entitled to receive the whole of his wages for the entire term.[11]

In the absence of a contract stipulation to the contrary, it has generally been held that an employee discharged for cause may recover for services actually rendered[12] although under some au-

99. Me.—Lakeman v. Pollard, 43 Me. 463, 69 Am.D. 77.
N.Y.—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented on other grounds 33 N.Y.S.2d 764.
39 C.J. p 148 note 25.

1. Vt.—Seaver v. Morse, 20 Vt. 620.
39 C.J. p 148 note 26.

2. Wis.—Jennings v. Lyons, 39 Wis. 553, 20 Am.R. 57.

3. Wis.—Jennings v. Lyons, supra.
39 C.J. p 149 note 28.

4. Md.—**Corpus Juris cited in** Bright v. Ganas, 189 A. 427, 431, 171 Md. 493.
39 C.J. p 149 note 29.

5. Mo.—Hall v. School Dist. No. 10, 24 Mo.App. 213.
Destruction of employer's property as not terminating relation see supra § 36.

6. Mo.—Hall v. School Dist. No. 10, 24 Mo.App. 213.
39 C.J. p 119 note 51.

7. La.—Madden v. Jacobs, 28 So. 225, 52 La.Ann. 2107, 50 L.R.A. 827.
39 C.J. p 149 note 35.

8. La.—Blue v. Chandler, App., 5 So.2d 210.
Mo.—Clarkson v. Standard Brass Mfg. Co., 170 S.W.2d 407, 237 Mo. App. 1018.
Pa.—Lightcap v. Keaggy, 194 A. 347, 128 Pa.Super. 348.
39 C.J. p 149 note 37.

Arrest of employee on suspicion of larceny justified discharge without payment of wages for term.—Strong v. American Ry. Express Co., 111 So. 669, 163 La. 180.

Awaiting passage home

Under the terms of a particular contract, an employee working abroad and discharged without ground has been held entitled to salary for the time he had to wait after discharge for passage home, where the delay was not due to his fault, although he was chargeable with the reasonable value of his subsistence while awaiting passage; but an employee discharged by the supervising officer, acting in good faith, on the ground that his services were unsatisfactory, has been held not entitled to salary for the period of transportation home, and an employee properly discharged for refusing to work was held chargeable with the cost of transportation home and with the cost of subsistence while awaiting transportation.—Bradley v. McWilliams Dredging Co., 67 N.Y.S.2d 145.

Payment for delay in hearing

Rule, under wage agreement between railroad and labor union, requiring railroad to accord hearing within five days to trainman taken out of service for cause and to pay him wages for any greater delay, was held not to require employer to make payment for period of delay where occasioned by suspended or discharged trainman himself.—St. Clair v. Chicago, M., St. P. & P. R. Co., C.C.A.Ind., 76 F.2d 70.

9. Ga.—Parker v. Farlinger, 50 S. E. 98, 122 Ga. 315.
39 C.J. p 149 note 38.

10. N.Y.—Dixey v. Punch & Judy Theater Co., Inc., 165 N.Y.S. 357.

11. La.—Strong v. American Ry. Express Co., 111 So. 669, 163 La. 180.

Rule under statute

La.—Blue v. Chandler, App., 5 So. 2d 210.

Failure to protest wrongful discharge

Where evidence demanded finding that employee failed to file grievance or protest concerning his discharge for violation of rule relating to intoxication, within sixty days after discharge, as required by agreement between employer and certain of its employees, employee could not recover wages he would have earned had he not been discharged, on theory that discharge was wrongful.—Crow v. Southern Ry. Co., 18 S.E.2d 690, 66 Ga.App. 608.

12. N.Y.—Hedeman v. Fairbanks, Morse & Co., 36 N.E.2d 129, 286 N. Y. 240.

thorities no recovery is allowed[13] except where the contract provides for periodic payments through the employment term, in which case the employee is entitled to such wages as have already become due at the expiration of one or more of such periods.[14] Where the latter rule is followed, any cause sufficient to justify a discharge of the employee will bar a recovery of wages regardless of whether such cause was given as the reason at the time of the discharge.[15]

Where periodic payments are provided for in the contract, it has been held that the employee cannot recover for services rendered during the fractional part of the employment period in which he was discharged[16] unless the contract expressly so provides.[17]

Vacation with pay. Since, as discussed infra § 96, a vacation with pay is in effect additional wages, an employee who has done the work necessary to earn such vacation cannot be deprived thereof by wrongful discharge;[18] but where the discharge is for just cause the employee is not entitled to vacation pay.[19]

Severance or dismissal pay. Where the contract of employment so provides, the employee may be entitled to severance or dismissal pay on termination of his employment by the employer.[20] A contract providing for severance pay on dismissal except for certain causes has been held clear and unambiguous and not susceptible of a construction modifying its terms.[21]

Deferred salary payments. A contract providing for the making of deferred salary payments cannot be avoided by the discharge of the employee.[22]

§ 88. —— Consent or Option to Terminate

Where an employment contract is terminated in accordance with its provisions, the employee may recover compensation for services rendered up to the time of termination.

Where the contract of employment is terminable at the option of either party, the employee may quit at any time and recover for the services actually performed.[23] Accordingly, on discharge by the employer under such a contract,[24] or under a statute allowing the employer to terminate the contract at will,[25] the employee may recover pro rata, recovery being allowed for a fractional part of an employment or payment period during which services are rendered.[26]

Termination after notice. Where the contract is terminable by one party on giving notice to the other a certain fixed time before the cancellation, the employee may recover wages or other compensation up to the time the cancellation takes effect.[27]

Pa.—Geraghty v. Pitcairn, 157 A. 634, 104 Pa.Super. 72.
39 C.J. p 149 note 41.

Employee under contract at will, discharged for cause, may sue for amount due.—Grosner v. Gropper Knitting Mills, 213 N.Y.S. 433, 126 Misc. 370.

13. Minn.—Von Heyne v. Tompkins, 93 N.W. 901, 89 Minn. 77, 5 L.R.A., N.S., 524.
39 C.J. p 149 note 42.

14. Mo.—Maratta v. Chas. H. Heer Dry Goods Co., 177 S.W. 718, 190 Mo.App. 420.
39 C.J. p 149 notes 43, 44.

15. Minn.—Von Heyne v. Tompkins, 93 N.W. 901, 89 Minn. 77, 5 L.R.A., N.S., 524.
39 C.J. p 150 note 48.

16. Cal.—Bank of America Nat. Trust & Savings Ass'n v. Republic Productions, 112 P.2d 972, 44 Cal. App.2d 651.
39 C.J. p 149 note 45.

17. Mo.—Chote v. Danzero, App., 202 S.W. 588.
39 C.J. p 150 note 46.

18. U.S.—In re Wil-Low Cafeterias, Inc., C.C.A.N.Y., 111 F.2d 429.

19. La.—Bondio v. Joseph Binder, Inc., App., 24 So.2d 398.

20. U.S.—In re Public Ledger, C. C.A.Pa., 161 F.2d 762.
N.Y.—Montefalcone v. Banco Di Napoli Trust Co. of N. Y., 52 N.Y. S.2d 655, 268 App.Div. 636, reargument denied 53 N.Y.S.2d 955, 269 App.Div. 685—Giorno v. Banco Di Napoli Trust Co. of New York, 42 N.Y.S.2d 823, 180 Misc. 985, reversed on other grounds 52 N.Y.S. 2d 659, 268 App.Div. 1035.

Lack of notice of discharge
Where employee and employer could, under union agreement, terminate employment by a week's notice except that employer could summarily discharge employee for certain causes, lack of formal notice of discharge in and of itself would not deprive employee of his wages for subsequent week and if not paid when due, employee could recover those wages in action at law.—National Overall Dry Cleaning Co. v. Yavner, Mass., 73 N.E.2d 744.

Under foreign employment law
N.Y.—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented on other grounds 33 N.Y.S.2d 764.

21. Minn.—Matthews v. Minnesota Tribune Co., 10 N.W.2d 230, 215 Minn. 369, 147 A.L.R. 147.

22. Mass.—Patton v. Babson Statistical Organization, 156 N.E. 534, 259 Mass. 424.

Deferment pending employer's ability to pay
A contract between union employer and its employees that wages should be prorated from available income until return of better times, but that record of difference between amount paid and union scale would be kept and paid as a "bonus" as employer was able to pay, entitled discharged employee to recovery of amount of so-called "bonus" as a deferred payment of wages earned. —Herman v. Golden Arrow Dairy, 71 P.2d 581, 191 Wash. 582.

23. Cal.—Mile v. California Growers Wineries, 114 P.2d 651, 45 Cal.App. 2d 674.
N.Y.—Wolin v. Perlco Venetian Blind Corporation, 43 N.Y.S.2d 262, 180 Misc. 544.
39 C.J. p 150 note 50.
Amount recoverable see infra § 113.

24. Md.—Jenkins v. Long, 8 Md. 132.
Minn.—Youngberg v. Lamberton, 97 N.W. 571, 91 Minn. 100.

25. Mo.—Birch v. Glasgow Sav. Bank, 90 S.W. 746, 114 Mo.App. 711.
39 C.J. p 150 note 52.

26. Miss.—Yazoo & M. V. R. Co. v. Monroe, 70 So. 689, 110 Miss. 550.
39 C.J. p 150 note 53.

27. Iowa.—Clinton v. Des Moines Music Co., 228 N.W. 664, 209 Iowa 636.
39 C.J. p 150 note 54.

Termination by consent. Likewise, when the parties terminate the employment by mutual consent before the expiration of the term, the contract becomes fully executed,[28] and the employee may recover for the services actually performed[29] unless the parties agree otherwise.[30] A recovery is also allowed where the employee leaves his employment voluntarily with the acquiescence of his employer even though the contract calls for service for a fixed period and payment for the entire service at the end of the period.[31]

Special agreements. An agreement of the employer, made at the time of entering the employment, relative to the settlement of the employee's claims on termination of the contract, will be enforced.[32]

§ 89. —— Indefinite Term

An employee whose term of service is not fixed may, on quitting or being discharged, recover at the stipulated rate for the time worked.

Where no term of service is fixed by the contract of employment, and the employee quits[33] or is discharged,[34] he may recover at the stipulated rate for the time he has worked. Before the liability to pay ceases, there must be a termination of the contract.[35]

§ 90. Commissions

a. In general
b. Construction of provisions
c. Conditions precedent

a. In General

An employee's right to commissions as compensation for services depends on the language of the employment contract. Unless the contract provides otherwise, an employee is not entitled to commissions on orders which he himself has not secured.

Where commissions by way of compensation for services are provided for by the contract of employment, or by a separate contract supplemental thereto, the employee, on the performance of his contract obligations, is entitled to recover the amount due him on that account.[36] In the absence of a provision allowing commissions, an employee entitled to a reasonable compensation for his services cannot claim commissions in lieu thereof;[37] nor is he entitled to commissions on transactions not connected in any way with his employer's business,[38] or on orders other than those which he has

28. Pa.—Hukill v. Highway Trailer Co., 24 A.2d 74, 147 Pa.Super. 285—Ainesworth v. D. B. Martin Co., 77 Pa.Super. 490.
39 C.J. p 150 note 55.

29. La.—Southern Molasses Co. v. Boutcher, 135 So. 27, 172 La. 691.
Pa.—Hukill v. Highway Trailer Co., 24 A.2d 74, 147 Pa.Super. 285—Ainesworth v. D. B. Martin Co., 77 Pa.Super. 490.
39 C.J. p 150 notes 56, 57.

30. Pa.—Hukill v. Highway Trailer Co., 24 A.2d 74, 147 Pa.Super. 285—Ainesworth v. D. B. Martin Co., 77 Pa.Super. 490.

31. Ga.—Trawick v. Trussell, 50 S. E. 86, 122 Ga. 320.
39 C.J. p 150 note 58.

32. S.C.—King v. Western Union Tel. Co., 65 S.E. 944, 84 S.C. 73.
39 C.J. p 150 note 59.

33. U.S.—The J. P. Schuh, D.C.Ala., 223 F. 455.
39 C.J. p 150 note 60.
Abandonment generally see supra § 83.

Hiring at will

One employed under a hiring at will can, on quitting, recover for the time actually worked.—Wolin v. Perlco Venetian Blind Corporation, 43 N.Y.S.2d 262, 180 Misc. 544.

34. N.Y.—Hagen v. Isko Corp., 167 N.Y.S. 1025.
39 C.J. p 150 note 61.

35. Mo.—O'Dell v. Hurt, App., 106 S.W.2d 526.

36. Ala.—Standard Oil Co. of Kentucky v. Gramling, 160 So. 725, 26 Ala.App. 382.
La.—Ruiz v. Treadaway, App., 17 So.2d 378—Graber v. Victor, 120 So. 68, 10 La.App. 8.
Md.—Home News v. Goodman, 35 A. 2d 442, 182 Md. 585.
Minn.—Gelb v. Haynes Corporation of Illinois, 240 N.W. 907, 185 Minn. 295.
N.J.—Ball v. Metalwash Machinery Co., 8 A.2d 370, 123 N.J.Law 285, 123 A.L.R. 285.
N.Y.—Hedeman v. Fairbanks, Morse & Co., 36 N.E.2d 129, 286 N.Y. 240.
N.C.—Thomas v. Carolina Wood Products Co., 140 S.E. 722, 194 N. C. 729.
Pa.—McKee v. Elliott-Lewis Electrical Co., 11 A.2d 551, 139 Pa. Super. 325.
39 C.J. p 150 note 64.
Amount of commissions see infra § 111.

Commissions on goods shipped on consignment, and not yet sold or paid for, were held properly refused.—Helfer v. Corona Products, C.C.A. Ark., 127 F.2d 612.

Illness; payment of salary during illness

(1) The payment of deceased employee's regular salary for two weeks while employee was ill did not effect a discharge of employer's separate obligation, under contract of employment, to pay commissions which employee had earned, so as to bar recovery of such commissions by employee's administratrix.—Maloney v. B. J. Goldenberg, Inc., 54 N.Y.S. 2d 65.

(2) Where contract provided that plaintiff was to act as sales manager "during his pleasure," and that if he discontinued selling he was to waive commissions and be entitled only to royalties, plaintiff's abandonment of business because of illness through uncontrollable use of intoxicants did not excuse default, but was a discontinuance under the contract depriving him of right to commissions.—Cammack v. J. B. Slattery & Bro., 148 N.E. 781, 241 N.Y. 39.

Notice of withdrawal of business in territory

Where contract of company with salesman to sell equipment in certain territory on commission reserved to company right to withdraw at any time any specific business in such territory, company, in order to exercise such right, should give salesman notice of exercise of option.—American Oil Pump & Tank Co. v. Sizemore, 276 S.W. 558, 210 Ky. 690.

Unjust enrichment

A railroad was not liable to agent for commissions claimed where to hold it liable would permit him to profit by his own wrong.—Railway Express Agency v. Order of Railroad Telegraphers, C.C.A.Ga., 137 F. 2d 46, reversed on other grounds 64 S.Ct. 582, 321 U.S. 342, 88 L.Ed. 788.

37. La.—Gillett v. Deranco, 5 Rob. 13.
39 C.J. p 151 note 68.

38. N.Y.—Atkinson v. Heine, 119 N. Y.S. 122, 134 App.Div. 406.
39 C.J. p 151 note 69.

himself secured,[39] unless the contract is construed to extend his right.[40]

Certainty. A provision for commissions must be clear and definite,[41] but errors of expression not obscuring the intention of the parties will not defeat the employee's right.[42] A provision for commissions is not void for uncertainty as not disclosing the basis for computation where it is clearly disclosed by evidence of the circumstances under which the contract was made.[43]

Separate contract. Where a contract for commissions follows and is distinct from the employment contract, it must itself be based on a separate and valid consideration.[44] The performance of other duties connected with his work, but outside the scope of the original contract, is a sufficient consideration for the later agreement.[45]

Time of shipment or billing. In the absence of a clear agreement to the contrary,[46] an employee selling on a commission basis is entitled to commission on a sale when the sale is made, irrespective of when shipment[47] or billing[48] takes place.

Deductions. An employee's commissions are properly reduced by the amount which the employer has paid to a third person with the employee's consent.[49]

Cancellation of order. A salesman negotiating a contract giving the buyer the right to cancel the order, or part of it, cannot recover commissions on the unfilled portion of the order;[50] but an employer agreeing to pay a commission on accepted orders has been required to pay commission on such orders even though they are subsequently canceled by him or the purchaser, or even though the purchaser returns the goods.[51]

b. Construction of Provisions

General rules governing the construction of contracts have been applied in construing provisions for commissions in contracts of employment.

A contract containing provisions governing an employee's right to commissions must be construed as a whole.[52] Unambiguous contractual provisions of this nature, entered into by the parties without fraud or misrepresentation, will be enforced even

39. Iowa.—Hogan v. Perkins Bros. Co., 238 N.W. 608, 213 Iowa 1175.
N.Y.—Binner v. George Ethridge Co., 150 N.E. 570, 241 N.Y. 598, motion denied 152 N.E. 403, 242 N.Y. 506.
Tex.—San Antonio Machine & Supply Co. v. Allen, Com.App., 284 S. W. 542.

Assistance in making sale
Salesman not securing purchaser, but only assisting employer in making sale, was not entitled to commission.—Spindle v. Michigan Inv. Co., 240 N.W. 79, 257 Mich. 40.

Facts that salesman negotiated with buyers, procured their good will, and brought them to his employer does not in itself entitle him to commissions.—Binner v. George Ethridge Co., 150 N.E. 570, 241 N.Y. 598.

Single salesman in territory
The fact that a manufacturing corporation sends but one salesman into a certain district does not make his appointment exclusive, or, in the absence of express agreement to that effect, entitle him to a commission on all sales within that territory, whether or not made by him.—Hellam Furniture Co. v. Strassman, 87 Pa.Super. 202.

40. Mo.—Velvet Freeze v. Milk Wagon Drivers' and Inside Dairy Employees' Union, Local No. 603, App., 177 S.W.2d 644.
N.Y.—Renner v. John T. Stanley Co., 240 N.Y.S. 148, 136 Misc. 492.
Pa.—Hellam Furniture Co. v. Strassman, 87 Pa.Super. 202.
Wis.—Gagliano v. Ogden & Co., 16 N. W.2d 565, 246 Wis. 291.

Contract not so construed
N.J.—Malone v. Heresite & Chemical Co., 32 A.2d 178, 130 N.J.Law 207.

41. Conn.—Lindsay v. Phillips, 111 A. 176, 95 Conn. 96.

42. N.Y.—Ettenson v. Mendelson, 133 N.Y.S. 283, 75 Misc. 307.
39 C.J. p 151 note 72.

43. Conn.—Lindsay v. Phillips, 111 A. 176, 95 Conn. 96.
39 C.J. p 151 note 73.

44. N.Y.—Altmayer v. Lahm, 113 N. Y.S. 964.
39 C.J. p 151 note 74.

45. U.S.—Armand Co. v. Huegel, C. C.A.Mo., 49 F.2d 140.
39 C.J. p 151 note 75.

46. N.Y.—Lockwood v. Embalmers' Supply Co., 251 N.Y.S. 321, 233 App.Div. 189.

47. U.S.—Atkinson v. New Britain Mach. Co., C.C.A.Ill., 154 F.2d 895 —Ohio Marble Co. v. Byrd, C.C.A. Ohio, 65 F.2d 98.

New salary basis before filling of orders
A salesman was entitled to commissions on all orders obtained by him during year in which commission arrangement existed, even though employer did not or could not fill all such orders during that year and salesman continued in employer's employ under new salary and bonus arrangement thereafter.—Bayer v. Oxford University Press, 61 N.Y.S.2d 209, 270 App.Div. 586, reargument denied 62 N.Y.S.2d 843, 270 App.Div. 929.

48. U.S.—Atkinson v. New Britain Mach. Co., C.C.A.Ill., 154 F.2d 895.

Effect of modification of contract
Where, under employment contract, salesman's commissions were earned when orders were received by employer, statement in letter modifying employment contract that salesman would be paid at certain rate for all billings in excess of specified amount did not change agreement as to when commissions were earned.—Atkinson v. New Britain Mach. Co., supra.

49. Tex.—Giant Mfg. Co. v. Davis, Civ.App., 91 S.W.2d 1099, reversed on other grounds 121 S.W.2d 590, 132 Tex. 220.
Deductions generally see infra §§ 102–106.

50. Ala.—Standard Lumber Co. v. Hosmer, 142 So. 825, 225 Ala. 321.

51. Ohio.—Winchell Shoe Mfg. Co. v. Baehr, 181 N.E. 823, 42 Ohio App. 88.

52. Cal.—Monroe v. Grolier Soc. of London, 281 P. 604, 208 Cal. 447, 65 A.L.R. 989.

Printed form
Servant was entitled to commission in form of per cent of sales as stipulated in original written offer, even though she subsequently signed employer's printed form carrying notation of a particular rate per week, but not using word "only" or "no commission."—Purdy v. Buffums, Inc., 272 P. 770, 95 Cal.App. 299.

though harsh.[53] The construction placed by the parties to the contract on such provisions has been declared the soundest guide to their meaning,[54] and will be followed unless there is some rule of law forbidding it or precluding its adoption.[55]

Particular provisions. Particular contracts have been held to limit the commissions to sales made personally by the employee,[56] or during the term of his employment,[57] or in a particular territory,[58] or to the employer's customers,[59] or to all sales in a particular store, as distinguished from the sales in the employer's entire business;[60] and sales effected through the efforts of a "special dealer" have been held excluded from an agreement for commission,[61] as has a bad account which was rejected by the employer and became the personal obligation of the employee.[62]

The courts have construed contracts allowing commissions "on orders,"[63] "on accepted orders,"[64] "on net sales,"[65] "on all sales,"[66] on sales "fully consummated" and paid for,[67] "on all goods shipped, retained and paid for,"[68] on goods delivered,[69] "on cash receipts, less all expenses,"[70] "on money expended,"[71] on the amount "realized" on sales,[72] on "all business developed" and "all wholesale business obtained,"[73] "on all the business" of the employer of a particular kind,[74] on orders for goods "to be used" in certain territory,[75] and "on every bushel of seed sold by us."[76]

The term "sales," as used in this connection, has been held to mean accepted orders,[77] although in particular circumstances commissions have been held not due on unfilled orders;[78] and a barter has been held a sale within a contract for commission on sales.[79] Completion of the transaction by the employee himself has been held not essential to the right to commission where the elements of a sale by him are present.[80]

The terms "net profit"[81] and "present dealers"[82] have also been construed.

53. Ala.—Oates v. Lee, 133 So. 44, 222 Ala. 506.

54. U.S.—Swalley v. Addressograph Multigraph Corp., C.C.A.Ill., 158 F. 2d 51.

55. Mo.—Velvet Freeze v. Milk Wagon Drivers' and Inside Dairy Employees' Union, Local No. 603, App., 177 S.W.2d 644.

56. Tex.—Moore v. Studebaker Bros. Mfg. Co., Civ.App., 136 S.W. 570.
39 C.J. p 152 note 83.

57. Tex.—Hunter v. Strong, Civ. App., 265 S.W. 539.

Collection from customers after termination of employment

Under contract providing that commissions would be paid on all money collected from customers procured by salesman, but that commissions were to be paid only during time agreement remained in full force, commissions were not payable absolutely, and salesman was not entitled, either on theory of quantum meruit or of unjust enrichment, to commissions on money collected from customers, procured by him after termination of contract by employer pursuant to terms of the contract.—Ullmann v. May, 72 N.E.2d 63, 147 Ohio St. 468.

58. Cal.—Hollin v. Elam, 148 P.2d 388, 64 Cal.App.2d 236.
N.Y.—Brafman v. Kohn, 117 N.Y.S. 924.

59. Iowa.—Huntington v. Jacob Haish Co., 181 N.W. 480, 190 Iowa 1197.
39 C.J. p 152 note 86.

60. Mich.—Olesky v. Dishneau-Peterson Shoe Co., 217 N.W. 750, 241 Mich. 522.

61. N.Y.—Bailey v. Robinson Mfg. Co., 60 N.Y.S.2d 225, 227, affirmed 62 N.Y.S.2d 667, 270 App.Div. 986.

62. Kan.—Smith v. Derby Oil Co., 76 P.2d 846, 147 Kan. 300.

63. N.Y.—Booth v. New Process Cork Co., 187 N.Y.S. 725, 196 App. Div. 376.
39 C.J. p 152 note 88.

64. Pa.—Bodman v. Fisher, 112 A. 99, 268 Pa. 535.
39 C.J. p 152 note 89.

65. N.Y.—Brafman v. Kohn, 117 N.Y.S. 924.
39 C.J. p 152 note 90.

66. Wis.—Dore v. Glenn Rock Mineral Spring Co., 132 N.W. 906, 147 Wis. 158.
39 C.J. p 152 note 92.

67. Ky.—J. B. Colt Co. v. Grubbs, 263 S.W. 749, 204 Ky. 189.
39 C.J. p 152 note 93.

68. N.Y.—Wolsheimer v. Frankel, 115 N.Y.S. 958, 130 App.Div. 853.
39 C.J. p 152 note 94.

69. Mass.—Daly v. Chapman Mfg. Co., 140 N.E. 677, 246 Mass. 118.
39 C.J. p 153 note 95.

70. N.J.—Freudenberger v. Sternberg, 51 A. 699, 67 N.J.Law 297.
39 C.J. p 153 note 96.

71. Cal.—Hughes v. Pacific Wharf & Storage Co., 205 P. 105, 188 Cal. 210.
39 C.J. p 153 note 97.

72. Actual money required

Where contract of employment provided for commissions on amount "realized" on sales of property over and above a certain amount, and only small per cent of that amount had been received in cash, although total sales were over amount, and remainder was represented by contracts and mortgages as authorized by defendant, plaintiff was not entitled to commissions, "realize" meaning to convert into actual money.—Chelan Orchards v. Olive, 235 P. 805, 134 Wash. 324.

73. Commissions on orders shipped

Under contract whereby manufacturer agreed to pay salesman, on "all business developed" in territory assigned for regular contracts, specified commissions on "all wholesale business obtained" at the standard wholesale selling price, salesman's right to commissions depended solely on securing orders, and not on orders shipped.—Meilink Steel Safe Co. v. Vaughn, C.C.A.Ohio, 141 F.2d 389.

74. Mass.—Blasdell v. Souther, 6 Gray 149.
39 C.J. p 153 note 98.

75. U.S.—Swalley v. Addressograph Multigraph Corp., C.C.A.Ill., 158 F. 2d 51.

76. Commission not limited to sale for planting

Tex.—Birk v. Jackson, Civ.App., 75 S.W.2d 918, error dismissed.

77. Mass.—Cray v. Wells, 154 N.E. 848, 849, 258 Mass. 93.

78. S.D.—Needham v. Jameson, 279 N.W. 536, 66 S.D. 131.

79. Mass.—Rollins v. Bazirgan, 147 N.E. 821, 252 Mass. 279.

80. Mo.—Burkhardt v. Decker, 295 S.W. 838, 221 Mo.App. 1066.

81. Profit as to particular goods

Vt.—Stratton v. Cartmell, 42 A.2d 419, 114 Vt. 191.

82. Trade established prior to employment contract

Where contract of employment granted salesman right to receive

c. Conditions Precedent

Where an employee's right to commissions is made conditional, he cannot recover commissions unless the condition is performed or fulfilled.

An employee's right to commissions may be conditioned on the performance by him or by his employer of some specific act prescribed in the contract, or on the existence of a particular situation, in which case there can be no recovery of the commissions except on performance or fulfillment of the condition;[83] the restriction, however, does not extend to other commissions in the same contract not subject to the same condition.[84] Where the employee's right to recover is conditioned on an act which the employer is obligated by the contract to perform, the employee's rights will not be defeated by the employer's default;[85] and, where the act, is one in the performance of which the contract gives the employer discretionary powers, he is required to exercise his powers fairly and honestly.[86]

Where the parties agree that commissions are to be deemed earned only if and when the orders obtained are filled and fully paid for, and the buyer does not accept or pay for goods ordered, the fact that the employer realizes, from other sources, almost as much as the buyer should have paid does not entitle the salesman to commissions.[87]

§ 91. —— Advances

Under a contractual provision for periodic advances to an employee on his commission account, he is entitled to the advance at the end of each period, irrespective of the amount of commissions earned.

Under a contract providing for periodic advances to an employee on his commission account, the employee is entitled to the advance agreed on at the end of each period, irrespective of the amount of the commissions earned,[88] in the absence of a special agreement to the contrary,[89] notwithstanding the employee has already received notice of his discharge to take effect at the end of the current period,[90] and especially where the contract refers to the advance by the employer as a "privilege"

commissions on all accepted orders, whether received by company from customers by direct address to home office, or through the salesman, but the contract excepted business received from the company's "present dealers" from the business on which commissions were to be paid, all business from trade that had been established by company prior to date of the contract was excluded, and not only business from "dealers" in the sense of persons who bought from company for purpose of resale.—Helfer v. Corona Products, C.C.A. Ark., 127 F.2d 612.

83. Ill.—McCann v. Woodstock Typewriter Co., 27 N.E.2d 661, 305 Ill.App. 498.
Iowa.—Clinton v. Des Moines Music Co., 228 N.W. 664, 209 Iowa 636.
La.—Dugan v. Clesi, 115 So. 660, 165 La. 471.
Mo.—Clarkson v. Standard Brass Mfg. Co., 170 S.W.2d 407, 237 Mo. App. 1018.
Ohio.—Ullmann v. May, 72 N.E.2d 63, 147 Ohio St. 468.
39 C.J. p 151 note 77.
Condition on right to compensation generally see supra § 81.

Receipt of payment from buyer
Mich.—O'Connor v. March Automatic Irr. Co., 218 N.W. 784, 242 Mich. 204, reheard 223 N.W. 228, 245 Mich. 593.

Performance of services throughout year
N.Y.—Coletti v. Knox Hat Co., 169 N.E. 648, 252 N.Y. 468.
39 C.J. p 151 note 77 [e].

Acceptance of orders by third person
Mass.—Cray v. Wells, 154 N.E. 848, 258 Mass. 93.

Condition held not waived
S.D.—Hood v. Sioux Steel Co., 287 N. W. 636, 67 S.D. 1.

84. N.Y.—Stevens v. Van Wagoner-Linn Constr. Co., 150 N.Y.S. 502, 165 App.Div. 44.
39 C.J. p 151 note 78.

85. Ill.—Conrad v. Wright & Co., 33 N.E.2d 235, 309 Ill.App. 442.
39 C.J. p 151 note 79.

86. Pa.—Bodman v. Fisher, 112 A. 99, 268 Pa. 535.
39 C.J. p 152 note 80.
Discretionary powers affecting right to compensation generally see supra § 81.

Unjustifiable rejection of orders
Mich.—O'Connor v. March Automatic Irr. Co., 218 N.W. 784, 242 Mich. 204, reheard 223 N.W. 228, 245 Mich. 593.
N.Y.—Hedeman v. Fairbanks, Morse & Co., 36 N.E.2d 129, 286 N.Y. 240.
Wis.—Walter v. Four Wheel Drive Auto Co., 252 N.W. 346, 213 Wis. 559.

87. U.S.—Schweitzer v. Walton N. Moore Dry Goods Co., C.C.A.Cal., 31 F.2d 809.

88. Ill.—Nelson v. American Business Bureau, 241 Ill.App. 432.
N.Y.—Denihan & Finn-Iffland & Co., 256 N.Y.S. 801, 143 Misc. 525—Spirit v. Black Diamond Furniture Works, 241 N.Y.S. 194, 137 Misc. 398—Markstein v. M. Ufland & Co., 214 N.Y.S. 476, 126 Misc. 683—Harris v. A. & J. Freed Corporation, 8 N.Y.S.2d 229.
S.C.—**Corpus Juris cited in** McConnell v. Baker, 169 S.E. 842, 843, 170 S.C. 111.
39 C.J. p 153 notes 2, 3.
Recovery back of excess payments see infra § 120.

Drawing account
(1) A drawing account is a well-recognized modern business method of furnishing the employee with means of maintenance while engaged in the service from which wages or commissions are to accrue.—Packard Motors Co. of Alabama v. Tally, 103 So. 455, 457, 212 Ala. 487.

(2) A drawing account is not salary.—Hoeland v. Lange, 184 N.Y.S. 885, 113 Misc. 469.

(3) Term "drawing account" has been held without ambiguity to mean that, whatever the amount drawn by employee under contract, such amount was in form of salary for services and not an advance against commissions to be earned.—Bankers Union Life Ins. Co. v. Atschel, 49 P. 2d 385, 97 Colo. 377.

(4) Provision of contract that credit department should pass on orders and commission would be lost on customer's failure to pay was consistent with construction that employee was entitled to drawing account regardless of commissions.—Eagle v. Hoffman, 258 Ill.App. 234.

89. N.Y.—Spirit v. Black Diamond Furniture Works, 241 N.Y.S. 194, 137 Misc. 398.

90. N.Y.—Kane v. Auto Laks Mfg. Co., Inc., 172 N.Y.S. 275.
S.C.—**Corpus Juris cited in** McConnell v. Baker, 169 S.E. 842, 843, 170 S.C. 111.

granted to the employee[91] or as salary.[92] A contract providing as to advances must be read in its entirety[93] and be so construed as to effectuate the intentions of the parties.[94] A provision in a contract, guaranteeing a yearly income from commissions, to the effect that any deficiency of commissions earned in one year shall not be carried forward to a succeeding year, will not apply to commissions on goods sold during the last year of the employment term but not paid for until the following year, the contract providing that commissions shall not be regarded as earned until payment is made.[95]

Salary and commissions. A provision in the employment contract for a salary and commissions, the salary to be deducted from any commission that might be due, has been construed to give the employee a guaranteed minimum compensation[96] and to render the commission provisions inoperative as long as the commissions do not exceed the agreed salary.[97]

Loan repaid out of commissions. The employee is equally entitled to payment where the employer agrees to lend the employee a stated amount at fixed intervals, provided the employer has bound himself to look only to the earned commissions for the repayment of the loans.[98]

Advance as constituting guaranty. A provision in an employment contract allowing the employee advances or a drawing account, the amount of the regular payments being fixed, has been variously interpreted by the courts, the provision in some instances being held to constitute a guaranty,[99] limited to a stated period if the contract so limits it;[1] in others it has been held not to constitute a guaranty.[2]

§ 92. —— Forfeiture of Right

Ordinarily an employee does not forfeit his right to commissions, already earned, by the termination of his employment.

Ordinarily an employee does not forfeit his right to commissions, already earned under his contract, by the termination of his employment,[3] as by his discharge,[4] unless the contract of employment provides otherwise[5] or provides for the performance of services as an entirety,[6] or unless there is a recognized custom in the business that such right will terminate with the employment.[7] So an employee

91. N.Y.—Weinberg v. Blum, 13 Daly 399.

92. Ill.—Nelson v. American Business Bureau, 241 Ill.App. 432.

93. N.Y.—Harris v. A. & J. Freed Corporation, 8 N.Y.S.2d 229.

94. N.Y.—Harris v. A. & J. Freed Corporation, supra.

95. Iowa.—Gordon v. Marks Hat Co., 197 N.W. 446.

96. Va.—Staples v. Hervey, 112 S.E. 607, 133 Va. 305.
Wis.—Lieberman v. Weil, 124 N.W. 262, 141 Wis. 635.

97. Wis.—Lieberman v. Weil, supra.

98. Ill.—Gannon v. Tyree, 148 Ill. App. 90.

99. S.C.—**Corpus Juris cited in** McConnell v. Baker, 169 S.E. 842, 843, 170 S.C. 111.
39 C.J. p 153 note 8.

1. Ill.—Hall v. Bird-Bergstrom Motor Car Co., 227 Ill.App. 587.
39 C.J. p 153 note 9.

2. Mass.—Theriault v. E. L. King & Co., 184 N.E. 386, 282 Mass. 109.
39 C.J. p 153 note 10.

3. U.S.—Ohio Marble Co. v. Byrd, C.C.A.Ohio, 65 F.2d 98.
La.—Ruiz v. Treadaway, App., 17 So. 2d 378—Barilleau v. Paquet, App., 159 So. 418.
Mich.—Harris v. Specialties Distributing Co., 9 N.W.2d 645, 305 Mich. 373.
N.J.—Ball v. Metalwash Machinery Co., 8 A.2d 370, 123 N.J.Law 285, 123 A.L.R. 285.
N.Y.—Maloney v. B. J. Goldenberg, Inc., 54 N.Y.S.2d 65.
Provisions for forfeiture see infra § 103.
Waiver by employee see infra § 108.

Termination by consent

(1) The rule stated in the text applies where termination of the employment is by consent.
N.J.—Freudenberger v. Sternberg, 51 A. 699, 67 N.J.Law 297.
Wis.—Mayer v. Goldberg, 92 N.W. 556, 116 Wis. 96.

(2) However, it has been held that under an allegation that the employment was terminated by the consent and agreement of the parties, the presumption is that they intended to discharge each other from those contract obligations which were yet to be performed, so that the employer was discharged from the obligation of making further payments of commissions not yet payable.—Coletti v. Knox Hat Co., 169 N.E. 648, 252 N.Y. 468.

Completion of sale or delivery after termination

Mass.—Rollins v. Bazirgan, 147 N.E. 821, 252 Mass. 279.
Wis.—Braun v. Consolidated Electric Lamp Co., 13 N.W.2d 549, 245 Wis. 170.

Requirement of services on orders received

However, employee under contract to manage magazine and procure advertising in return for per cent of advertising revenue, and to do certain work following receipt of advertising contracts, could not recover commissions allegedly accruing after his resignation, although resignation "reserved" right to receive commission.—Claflin v. Manufacturers' Club of Philadelphia, 158 A. 575, 104 Pa.Super. 163.

4. Md.—Home News v. Goodman, 35 A.2d 442, 182 Md. 585.
39 C.J. p 154 note 20.

Business accepted after discharge

Where defendants contracted to continue to pay commissions on business received from customers procured by plaintiff as long as defendants accepted business from them, plaintiff was entitled to commissions accruing on such business after his discharge.—Williams v. Edward A. Thompson, Inc., 209 N.Y.S. 309, 124 Misc. 742.

In a hiring at will, employee is not entitled to commissions on deliveries made subsequent to the date of his discharge, in the absence of an agreement therefor.—Pelletier v. Dobbins-Trinity Coal, 59 N.Y.S.2d 676.

5. La.—Ruiz v. Treadaway, App., 17 So.2d 378.

6. N.Y.—Coletti v. Knox Hat Co., 169 N.E. 648, 252 N.Y. 468.

7. La.—Ruiz v. Treadaway, App., 17 So.2d 378.

loses his potential right to commissions on sales begun, or orders taken, by him during his term of service but not completed until after its termination, where, by the contract, the commission is not to be considered as earned until the sale has been completed by the delivery and acceptance of the goods,[8] or by delivery and full payment,[9] or by other settlement;[10] and a commission has been denied on renewal contracts or renewal business secured after the employee's discharge.[11]

Circumstances not amounting to forfeiture. An employee does not lose his right to commissions already earned by accepting an increase in his compensation in some other form,[12] or by consenting to the employment of others engaged in the same work,[13] or by changes in the bookkeeping methods of his employer,[14] or by subsequent negotiations between the employer and the customer after he has earned his commissions,[15] or by mistakes in his estimates as to the cost of work forming the basis of his commissions, where they are not due to his negligence and do not result in injury to his employer,[16] or by organizing a new competing company while employed under a contract allowing the employee to terminate the contract on giving notice, where he gave such notice before actually beginning to work for the new company;[17] and an employee does not forfeit his right to commissions on sales by his failure to keep a true account of sales made and of merchandise on hand, where the employer was fully credited with the amounts found due by his auditor and there was no negligence on the employee's part in handling the accounts.[18]

§ 93. Profits or Products of Business

a. In general

b. Nature and extent of right

a. In General

An employee's right to a share of the profits must be founded on a valid and clear contract obligation of the employer, and is conditioned on the existence of profits and the performance by the employee of his contractual obligations.

An employee's right to a share in the profits, to be enforceable, must be founded on a contract obligation of his employer,[19] based on a legal consideration,[20] and defined in clear and explicit terms.[21] Such agreements, it has been held, should be sustained by the courts whenever possible.[22]

8. Ala.—Oates v. Lee, 133 So. 44, 222 Ala. 506.
39 C.J. p 154 note 21.

9. Cal.—Monroe v. Grolier Soc. of London, 281 P. 604, 208 Cal. 447, 65 A.L.R. 989.
D.C.—Parkway Motor Co. v. Charles, 39 F.2d 292, 59 App.D.C. 247.
La.—Tricou v. Philip H. Sizeler, Inc., App., 195 So. 361—Broderick v. Taylor, App., 161 So. 630.

10. U.S.—Rabe v. Rudolph Wurlitzer Co., D.C.Fla., 43 F.Supp. 416.

11. Md.—Home News v. Goodman, 35 A.2d 442, 182 Md. 585.

12. Mo.—Morris v. Z. T. Briggs Photographic Supply Co., 179 S.W. 783, 192 Mo.App. 145.
39 C.J. p 154 note 23.

13. Mass.—Phillips v. Universal Upholstering Co., 143 N.E. 334, 248 Mass. 475.

14. Ill.—Jackson v. Browning, 202 Ill.App. 197.
39 C.J. p 154 note 25.

15. N.Y.—Binner v. George Ethridge Co., 206 N.Y.S. 657, 211 App.Div. 189, modified on other grounds 150 N.E. 570, 241 N.Y. 598, reargument denied 152 N.E. 403, 242 N.Y. 506 —Pancoast v. Industrial Glass Co., 132 N.Y.S. 821, 148 App.Div. 473, affirmed 104 N.E. 1135, 210 N.Y. 565.

16. Ark.—Pritchett v. Stone County Road Impr. Dist. No. 2, 245 S.W. 313, 155 Ark. 514.

17. Ark.—Hamilton Depositors Corporation v. Browne, 136 S.W.2d 1031, 199 Ark. 953.

18. Kan.—Briney v. Toews, 95 P.2d 355, 150 Kan. 489.

19. Mass.—Patton v. Babson Statistical Organization, 156 N.E. 534, 259 Mass. 424.
N.Y.—Friedle v. First Nat. Bank, 221 N.Y.S. 292, 129 Misc. 309.
39 C.J. p 154 note 29.
Action for accounting see infra § 138.
Amount of profits see infra § 112.

Contract held not established
Mo.—Hubbard v. Turner Department Store Co., 278 S.W. 1060, 220 Mo. App. 95.

Agreement held not terminated
Mich.—Swanson v. Wedin, 14 N.W. 2d 66, 308 Mich. 494.

20. Ga.—Phillip v. Hudson, 72 S.E. 178, 9 Ga.App. 779.
39 C.J. p 154 note 30.

First call on services
An employee's agreement to give employer first call on his services after six months' employment, during which he was under no such obligation, constituted valuable consideration for employer's promise to pay employee a share of profits of business.—Vincent v. Palmer, 19 A. 2d 183, 179 Md. 365.

21. N.Y.—Varney v. Ditmars, 111 N. E. 822, 217 N.Y. 223, Ann.Cas.1916B 758.
39 C.J. p 155 note 31.

"Appropriate percentage"
Employer's promise to pay "appropriate percentage" in excess of per diem stipend was held too indefinite to permit employee to recover more than reasonable value of services.—Von Reitzenstein v. Tomlinson, 162 N.E. 584, 585, 249 N.Y. 60.

Absence of method of determining amount
A contract of employment affording no means of discovering any method to determine the employee's share in the profits, in addition to his salary, is unenforceable in respect of such share.—Hubbard v. Turner Department Store Co., 278 S.W. 1060, 220 Mo.App. 95.

Agreements held not ambiguous
Md.—Vincent v. Palmer, 19 A.2d 183, 179 Md. 365.
Mo.—McFarland v. Gillioz, 37 S.W.2d 911, 327 Mo. 690.
N.Y.—Martin v. City of New York, 35 N.Y.S.2d 182, 264 App.Div. 234, appeal denied 37 N.Y.S.2d 426, 265 App.Div. 806, resettlement granted 37 N.Y.S.2d 838, 265 App.Div. 816. Motion granted Martin v. Di Marco & Reimann, 47 N.E.2d 441, 289 N.Y. 841.

22. Md.—Vincent v. Palmer, 19 A.2d 183, 179 Md. 365.

Reason for rule
Such agreements tend to create a better understanding between employers and employees.—Vincent v. Palmer, supra.

The employee's right is conditioned on the existence of profits[23] applicable, under the terms of the contract, to payment of the employee's claim.[24] An employee claiming a share of profits under a profit-sharing plan must show conformity to its provisions,[25] but substantial performance on the employee's part has been held sufficient to entitle him to his share of profits.[26]

Good faith and fair dealing require that neither party be permitted to take an unfair advantage or enjoy greater rights than called for by the terms of the agreement;[27] one may not obtain a secret profit or undue benefit.[28]

Relationship of parties. An employee, under a contract giving him a share in the profits of his employer's business as compensation for his services, is not a partner of his employer, as discussed in the C.J.S. title Partnership § 20, also 47 C.J. p 682 note 97–p 685 note 18, or a joint adventurer, as considered in Joint Adventures § 2 a. Firm money belongs solely to the employer as the owner of the business until transferred or set apart for the employee's benefit;[29] the employee cannot hold the employer liable as trustee[30] until, by the operation of the contract or otherwise, he secures legal title to specific property in the possession of his employer.[31]

b. Nature and Extent of Right

An employee entitled to a share of the profits has merely a right to his compensation; he is restricted to the profits of the business with reference to which he is employed, and cannot share in the profits of other ventures of his employee or, unless the contract provides otherwise, in the profit from a sale of the business. He must share the losses if the contract so provides, but not otherwise.

An employee who is allowed a share of the net profits of his employer's business has merely a right to his compensation;[32] he has no right to demand that his employer shall exercise reasonable skill and diligence in the conduct of his business,[33] although through his own negligence he may lose a share of the profits to which he would otherwise have been entitled.[34] He does, however, have a right to demand that his employer shall act toward him in good faith,[35] and, where he has a share in the net profits from sales, that the employer shall conduct the sales in the usual way.[36] An employee entitled to a share in the "earned profits" is entitled to a share of the book profits when earned, even though they are not later collected through no fault of his own.[37]

Extent of right. The employee is restricted to the profits of the business as constituted when he enters the employment and with reference to which he is employed,[38] and is not entitled to share in profits from other business ventures of his employer in which he is not concerned,[39] or in money received by the employer for the business but not

23. Ark.—St. Francis Valley Lumber Co. v. Orcutt, 295 S.W. 713, 174 Ark. 282.
N.Y.—Burroughs Adding Mach. Co. v. Hosack, 231 N.Y.S. 457, 224 App. Div. 583, affirmed 168 N.E. 414, 251 N.Y. 527.
Tex.—**Corpus Juris cited in** Central Nat. Bank of San Angelo v. Cox, Civ.App., 96 S.W.2d 746, 750.
39 C.J. p 155 note 32.

24. Cal.—Nelson v. Abraham, 177 P. 2d 931, 29 Cal.2d 745.
Ill.—Kaplan v. Stein, 160 N.E. 552, 329 Ill. 253.
Mass.—McDonald v. Fitch, 183 N.E. 848, 281 Mass. 528.
39 C.J. p 155 note 33.
Agreement construed
Mo.—McFarland v. Gillioz, 37 S.W.2d 911, 327 Mo. 690.
Profits from stock
Consideration of employee's claim to per cent of profits based on earnings from stock was unnecessary in suit for compensation, where stock was not delivered and employee made no payments thereon.—St. Francis Valley Lumber Co. v. Orcutt, 295 S. W. 713, 174 Ark. 282.

25. N.Y.—Friedle v. First Nat. Bank, 221 N.Y.S. 292, 129 Misc. 309.
Operations for one year
Where employee's right to share in profits was conditioned on operations for one year, he could recover for shorter period only on theory of wrongful discharge without notice as stipulated.—Navco Hardwood Co. v. Becks, 134 So. 4, 222 Ala. 631.
Voluntarily leaving employment
Cal.—Peterson v. California Shipbuilding Corp., App., 183 P.2d 56.
N.Y.—Friedle v. First Nat. Bank, 221 N.Y.S. 292, 129 Misc. 309.

26. Md.—Vincent v. Palmer, 19 A.2d 183, 179 Md. 365.

27. Cal.—Nelson v. Abraham, 177 P. 2d 931, 29 Cal.2d 745.

28. Cal.—Nelson v. Abraham, supra.

29. Pa.—Keck v. Vandyke, 141 A. 446, 292 Pa. 532.

30. Mass.—Ross v. Burrage, 124 N. E. 267, 233 Mass. 439.
39 C.J. p 155 note 37.

31. N.J.—Crawford v. Van Gaasbeek, 111 A. 602, 95 N.J.Law 1.
39 C.J. p 155 note 38.

32. N.Y.—Kleinbaum v. Miller, 195 N.Y.S. 821, 202 App.Div. 126.

33. N.Y.—Byrns v. United Telpherage Co., 93 N.Y.S. 906, 105 App. Div. 69.
39 C.J. p 155 note 43.

34. La.—Succession of Sauvage, 73 So. 702, 140 La. 619, L.R.A.1917D 426.
39 C.J. p 155 note 44.

35. Cal.—Nelson v. Abraham, 177 P. 2d 931, 29 Cal.2d 745.
39 C.J. p 155 note 45.
Regard to employee's rights
Corporation conducting school under agreement whereby employees were to draw salaries only out of profits as financial condition of corporation permitted was required to manage its affairs and conserve its finances with just regard to employees' rights.—Booth v. Booth & Bayliss Commercial School, 180 A. 278, 120 Conn. 221, 99 A.L.R. 1517.

36. La.—Sharp v. McBride, 63 So. 892, 134 La. 249.
39 C.J. p 155 note 46.

37. Ind.—Keithly v. Craig, 135 N.E. 156, 79 Ind.App. 403.

38. N.Y.—Amsden v. Dunham, 78 N. Y.S. 989, 78 App.Div. 33.

39. N.Y.—Martin v. City of New York, 35 N.Y.S.2d 182, 264 App. Div. 234, appeal denied 37 N.Y.S.

shown to constitute profits.[40] On the other hand, if a contract gives to an employee a per cent of the profits of a department of the employer's business, his contract rights will not be affected by any act of the employer impairing the earning capacity of the department as then constituted.[41] An employee under a contract for a per cent of the net profits is entitled to a per cent of the profits derived from the business as a whole, and not of the profits of any specific piece of business;[42] thus he is not entitled to an interest in the profits from the profitable pieces of business without reference to losses sustained on other pieces of business.[43] The employee must also share the losses of the business where the contract so provides,[44] but not otherwise.[45]

An employee has no interest in profits gained by the employer after the termination of their contract and without the rendition of any service by the employee;[46] nor is he entitled, on the ground of his right to profits, to a share of a reserve fund withdrawn from profits, with his consent, to protect the employer from losses.[47]

Profits from sale of business. The employee is not entitled to share in the profit made by the employer from a sale of his entire business[48] unless the contract of employment stipulates that he shall be so entitled.[49]

§ 94. —— Dividends

In accordance with the contractual language, an employee may be restricted to a share of dividends actually declared, or may have the right to a per cent of profits available for dividends regardless of whether a dividend is actually declared.

A contract making dividends declared on corporate stock the basis of computation of profits may give the employee the right to have his per cent computed on net profits available for dividends regardless of whether or not a dividend is actually declared,[50] such a construction being supported by other terms in the contract stipulating that certain items of expense shall be deducted from the gross receipts in computing the amount due the employee.[51] On the other hand, a contract may restrict the employee's right to a share in dividends actually declared.[52] The contract determines the right of the employee to an apportionment of dividends declared after the termination of his employment,[53] or to have the computation of the dividend rate based on the amount of capital stock existing at the time he entered the employment, unaffected by any later increases, where his share is determined, not by the amount of the fund distributed as dividends, but by the dividend rate.[54]

Stock dividend. A promise to pay an employee the equivalent of the regular dividend on a stated amount of stock has been held not to entitle him to a share of a stock dividend.[55]

§ 95. —— Drawing Account and Advances

Under a contract providing for an employee's share of the net profits and a drawing account of a fixed sum payable periodically, the drawing account is payable absolutely.

Under a contract of employment providing for a share of the net profits in his employer's business as compensation to an employee, and a drawing account of a certain fixed sum payable periodically,

2d 426, 265 App.Div. 806, resettlement granted 37 N.Y.S.2d 838, 265 App.Div. 816. Motion granted Martin v. De Marco & Reimann, 47 N.E.2d 441, 289 N.Y. 841.
39 C.J. p 155 note 49.

40. N.J.—Sellers v. Morehouse, 133 A. 174, 4 N.J.Misc. 425.

41. N.Y.—Hearn v. Stevens, 97 N.Y.S. 566, 111 App.Div. 101.
39 C.J. p 156 note 50.

42. Hawaii.—Black v. Lord, 29 Hawaii 204, rehearing denied 29 Hawaii 420.

43. Hawaii.—Black v. Lord, supra.

44. Miss.—Meyer-Bridges Co. v. Badeau, 43 So. 609, 90 Miss. 27.
N.Y.—Carter v. Bradlee, 280 N.Y.S. 368, 245 App.Div. 49, affirmed 200 N.E. 48, 269 N.Y. 664.

45. Mo.—McFarland v. Gillioz, 37 S.W.2d 911, 327 Mo. 690.

Losses held not deductible
Cal.—Bernstein v. Sirotta, 1 P.2d 8, 213 Cal. 21.

46. Ark.—Cazort v. Bahner, 9 S.W.2d 305, 177 Ark. 1046.

Profits from oysters planted before termination
Employee receiving share of profits of oyster business as compensation under contract, which provided that upon employer's death his legal representatives could cancel contract by giving written notice and on payment of compensation, was not entitled to share of profits accruing from sale of oysters after cancellation of contract, although oysters were planted during time when contract was in force.—Tarburton v. Johnson, 166 A. 327, 113 N.J.Eq. 138.

47. N.Y.—Meza v. Knauth, 225 N.Y.S. 700, 131 Misc. 353.

Reason for rule
This sum never became or constituted a part of the net profits of the year from the profits of which it was withdrawn.—Meza v. Knauth, 225 N.Y.S. 700, 131 Misc. 353.

48. Conn.—Woodbridge v. Pratt, 37 A. 688, 69 Conn. 304.
39 C.J. p 156 note 52.

49. Cal.—Nelson v. Abraham, 177 P.2d 931, 29 Cal.2d 745.
39 C.J. p 156 note 54.

50. Minn.—Scase v. Gillette-Herzog Mfg. Co., 57 N.W. 58, 55 Minn. 349.

51. Minn.—Scase v. Gillette-Herzog Mfg. Co., supra.
39 C.J. p 156 note 57.

52. N.Y.—Clapp v. Astor, 2 Edw. 379.
39 C.J. p 156 note 58.

53. N.Y.—Clapp v. Astor, supra.
39 C.J. p 156 note 59.

54. N.Y.—Bradburn v. Solvay Process Co., 46 N.Y.S. 161, 18 App.Div. 542.

55. N.M.—Booth v. Gross, Kelley & Co., 238 P. 829, 30 N.M. 465, 41 A.L.R. 868.

the drawing account is payable absolutely.[56] The employer's right to repayment of the excess of advances over the share of net profits earned is discussed infra § 120.

§ 96. Additional Compensation and Charges

An employee may not demand more than the contractual wage unless he can establish a supervening contract. Ordinarily he cannot recover compensation for the time spent in going to, and returning from, work.

Where a contract of employment specifies a wage rate, the employee may not demand more unless he can establish a supervening contract.[57] An agreement for extra compensation which is not ambiguous or subject to different interpretations cannot be varied or overthrown by any practical construction which the parties may have placed on it.[58]

Statutory regulations affecting the right to additional compensation are considered infra §§ 151 (1)–160 (13).

A vacation with pay is, in effect, additional wages.[59]

Traveling to and from work. Ordinarily an employee cannot recover compensation for the time spent in going to, and returning from, his work under normal circumstances,[60] although where there are special circumstances creating a situation beyond his control and for the convenience or interest of the employer the employee may be entitled to compensation for such time.[61]

§ 97. —— Extra Work

a. In general

b. Extra work within scope of employment

c. Extra work outside scope of employment

a. In General

An agreement to pay an employee for extra work, such as overtime, may be express or implied, or the right to such compensation may be established by reference to custom. A promise to pay extra wages for work which is already the employee's duty to perform cannot be enforced.

Where there is an agreement to pay for extra work, the employee may recover therefor,[62] even though there is no rate of compensation provided therefor.[63] The agreement must be based on a le-

56. N.Y.—Zuby v. Height, 188 N.Y.S. 88.
39 C.J. p 156 note 61.

Absence of profits

Employee allowed drawing account and also share of profits from which drawing account was deductible was entitled to drawing account, notwithstanding absence of profits.—Southern Molasses Co. v. Boutcher, 135 So. 27, 172 La. 691.

57. U.S.—Rogers v. Union Pac. R. Co., C.C.A.Or., 145 F.2d 119.
Iowa.—Carlin v. Day, 165 N.W. 172, 181 Iowa 903.
Minn.—Olen v. St. Paul City Ry. Co., 270 N.W. 1, 198 Minn. 363.
N.Y.—Gulickson v. Seglin Const. Co., 273 N.Y.S. 908, 152 Misc. 624.
Severance or dismissal pay see supra § 87.

Employee held entitled to additional compensation under an oral contract which had been performed on his part.—Wind v. Swiss-American Gear Mfg. Corp., 62 N.Y.S.2d 695, 187 Misc. 422.

58. U.S.—Libby, McNeill & Libby v. Olsen, C.C.A.Or., 85 F.2d 658.

All employees held entitled to extra compensation

U.S.—Libby, McNeill & Libby v. Olsen, supra.

59. U.S.—In re Wil-Low Cafeterias, Inc., C.C.A.N.Y., 111 F.2d 429.
Right to pay for vacation as time off see supra § 84.

Period antedating agreement

Employee was not entitled to a vacation allowance from employer because of a vacation not given during a period antedating the agreement.—Giorno v. Banco Di Napoli Trust Co. of New York, 43 N.Y.S.2d 920, 181 Misc. 46, reversed on other grounds 53 N.Y.S.2d 308, 268 App. Div. 1035, appeal denied 53 N.Y.S.2d 953, 269 App.Div. 664.

Employee not returning after vacation

A steamship engineer, not discharged by steamship company, but directed to take vacation, after which he never returned or requested to be placed on active duty, is entitled to pay for number of days allowed employees in his class for vacations by company.—Waterman Steamship Corporation v. N. L. R. B., C.C.A.5, 103 F.2d 157, reversed on other grounds N. L. R. B. v. Waterman S. S. Corporation, 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036.

Discharge from military service

Employees not working for employers in calendar year preceding that in which they were discharged from military service were not entitled to any vacation pay for year after such discharges.—MacLaughlin v. Union Switch & Signal Co., D.C. Pa., 72 F.Supp. 284.

Employer held liable for vacation pay

N.Y.—Carouso v. Empire Case Goods Co., 63 N.Y.S.2d 35.

60. U.S.—Sirmon v. Cron & Gracey Drilling Corporation, D.C.La., 44 F.Supp. 29.
Passage money see infra § 100.
What constitutes compensable time under Fair Labor Standards Act see infra § 151 (28).

Miners' portal-to-portal pay under contract

Pa.—Safcsak v. Frick Coke Co., Com.Pl., 9 Fay.L.J. 139.

61. U.S.—Sirmon v. Cron & Gracey Drilling Corporation, D.C.La., 44 F.Supp. 29.

62. Cal.—Cany v. Halleck, 9 Cal. 198.
39 C.J. p 157 note 65.

Implied agreement

Such an agreement may be implied.—Edrington v. Leach, 34 Tex. 285—39 C.J. p 157 note 67.

Payment conditional on "making good"

Where rug department manager was also made manager of furniture department, with promise of compensation if he made good, "making good" required same profit as was required in rug department.—Steinberg v. M. Nathan & Bro., 150 A. 899, 300 Pa. 496.

63. Pa.—Elliott's Estate, 15 Montg. Co. 53.
Amount of additional compensation see infra § 116.

gal consideration,[64] and a mere promise of the employer to pay extra wages for any work which it is already the duty of the employee to perform cannot be enforced.[65]

Custom. A uniform and notorious custom that extra work shall be paid for, sufficient to warrant the presumption that a contract was made with reference thereto, will justify a recovery for extra work by the employee.[66]

Overtime. Where the agreement so provides, an employee may recover for overtime work[67] notwithstanding he has given to his employer receipts for his salary.[68] Where the agreement in terms disallows extra compensation for overtime, no recovery can be had on that account,[69] even though the employee is a member of a union and the employer's agreement with the union provides for overtime payment.[70]

b. Extra Work within Scope of Employment

In the absence of special agreement or custom, an employee generally cannot recover extra compensation for extra work performed within the scope of his employment.

Generally,[71] and in the absence of a special agreement as to additional compensation,[72] or of evidence showing an intent to pay it,[73] or of a uniform and notorious custom sufficient to warrant the presumption that the contract was made with reference thereto,[74] an employee cannot recover extra compensation for extra work performed within the scope of his employment even if the extra work is done at the request of the employer.[75] The rule applies to overtime,[76] work on Sundays[77] or holidays,[78] and to work during the vacation period.[79]

64. Pa.—Hawkins v. Universal Steel Co., 7 Pa.Dist. & Co. 508.
39 C.J. p 157 note 69.

Additional burden
Where employee's agreement with employers for care of ranch was year to year one at monthly salary, and, at request of employers, employee assumed additional burden of caring for adjoining ranch, promise to pay additional compensation was supported by consideration.—Ernst v. Morgan, 36 P.2d 566, 44 Ariz. 297.

65. Pa.—Hawkins v. Universal Steel Co., 7 Pa.Dist. & Co. 508.
39 C.J. p 157 note 70.

66. S.D.—**Corpus Juris cited in** Jorgenson v. Midland Nat. Life Ins. Co., 21 N.W.2d 54, 56.
39 C.J. p 157 note 71.

67. U.S.—Virginian Ry. Co. v. System Federation No. 40 of Railway Employees' Department of American Federation of Labor, C.C.A.Va., 131 F.2d 840.
N.Y.—Heywood v. Doherty, 129 N.Y.S. 507.
Estoppel to claim compensation for overtime work see infra § 108.
Overtime pay required by Fair Labor Standards Act see infra § 151 (26).
Statutes limiting hours of labor see infra § 155.

Recovery held not authorized
U.S.—Rogers v. Union Pac. R. Co., C.C.A.Or., 145 F.2d 119.
Conn.—Sella v. Marder, 42 A.2d 345, 132 Conn. 17.

68. N.Y.—Heywood v. Doherty, 129 N.Y.S. 507.
39 C.J. p 157 note 73.

69. N.Y.—Langmade v. Olean Brewing Co., 121 N.Y.S. 388, 137 App. Div. 355.

70. N.Y.—Langmade v. Olean Brewing Co., supra.

71. Ill.—Hart v. Duncan, 29 N.E.2d 868, 307 Ill.App. 237.
Wis.—In re Gifford's Estate, 12 N.W.2d 921, 244 Wis. 570.
Extra wages of seamen for extra work see the C.J.S. title Seamen § 116, also 56 C.J. p 1017 note 98–p 1019 note 31.
Services required by the contract see supra §§ 60–68.

72. Cal.—Sowash v. Emerson, 161 P. 1018, 32 Cal.App. 13.
Kan.—Walker v. Dixie Frocks, 73 P.2d 1009, 146 Kan. 812—Sheets v. Eales, 11 P.2d 1020, 135 Kan. 627.
Me.—**Corpus Juris cited in** Perlman v. Skolnick Bldg. Corporation, 39 A.2d 186, 187, 141 Me. 79.
N.Y.—Hett v. Barty Axle Corporation, 241 N.Y.S. 609, 229 App.Div. 388.
S.D.—**Corpus Juris cited in** Jorgenson v. Midland Nat. Life Ins. Co., 21 N.W.2d 54, 56.
39 C.J. p 157 note 77.
Burden of proof to show special agreement and character of extra work see infra § 129.
Person receiving salary from corporation see Corporations § 803.

Special agreement held shown
Cal.—Sieck v. Hall, 34 P.2d 844, 139 Cal.App. 279.

73. N.Y.—Hett v. Barty Axle Corporation, 241 N.Y.S. 609, 229 App. Div. 388.

74. S.D.—Jorgenson v. Midland Nat. Life Ins. Co., 21 N.W.2d 54.

75. Wis.—In re Gifford's Estate, 12 N.W.2d 921, 244 Wis. 570.

76. Kan.—Walker v. Dixie Frocks, 73 P.2d 1009, 146 Kan. 812—Sheets v. Eales, 11 P.2d 1020, 135 Kan. 627.
Me.—Perlman v. Skolnick Bldg. Corporation, 39 A.2d 186, 141 Me. 79.
S.D.—**Corpus Juris cited in** Jorgenson v. Midland Nat. Life Ins. Co., 21 N.W.2d 54, 56.
39 C.J. p 157 note 78.
Effect of statutes limiting hours of labor see infra § 155.
Overtime pay required by Fair Labor Standards Act see infra § 151 (26).

77. S.D.—**Corpus Juris cited in** Jorgenson v. Midland Nat. Life Ins. Co., 21 N.W.2d 54, 56.
39 C.J. p 158 note 79.

Prohibition of Sunday work
Engineer employed at agreed weekly wage on forty eight hour weekly basis with time and one-half for overtime, and expressly forbidden to work on Sundays unless directed to do so, was not entitled to compensation for overtime work on Sundays on which he was not requested to work.—Perlman v. Skolnick Bldg. Corporation, 39 A.2d 186, 141 Me. 79.

78. Mo.—Gutweiler v. Lundquist, 207 S.W. 838, 200 Mo.App. 526.
S.D.—**Corpus Juris cited in** Jorgenson v. Midland Nat. Life Ins. Co., 21 N.W.2d 54, 56.

Overtime rate not applicable
Engineer employed at agreed weekly wage on forty-eight hour weekly basis and time and one-half for overtime, was not entitled to compensation of time and one-half for work on Christmas and New Year for which, although he was not required to work, he received regular pay.—Perlman v. Skolnick Bldg. Corporation, 39 A.2d 186, 141 Me. 79.

79. Mich.—Schurr v. Savigny, 48 N.W. 547, 85 Mich. 144.
S.D.—**Corpus Juris cited in** Jorgenson v. Midland Nat. Life Ins. Co., 21 N.W.2d 54, 56.

The presumption is either that the employee volunteers such services[80] or that the salary or other compensation provided for in the contract is intended by the parties to compensate him also for the extra work.[81]

Incidental work. Where the work, while not strictly within the scope of the employment, may still be considered as reasonably incidental to it, an intention on the part of the employer to pay extra compensation for it is not generally to be inferred from his knowledge that the employee was doing the work,[82] or even from the fact that he had requested its performance.[83]

c. Extra Work outside Scope of Employment

An employee rendering extra services so far outside the scope of his employment that an intention to pay for them may be inferred may generally recover therefor even in the absence of an express agreement.

Where the extra services rendered are so far outside the scope of the employment that an intention to pay for them may be inferred, the general rule is that the employee may recover therefor even in the absence of an express agreement.[84] This rule must be cautiously applied, however, and the services must be so far outside the sphere of the employment as to indicate a probable intention on the part of the employer to allow extra compensation therefor.[85] There can be no recovery for extra work where the implied agreement to pay is negatived by the evidence[86] or where there is a failure to prove the performance of the extra work.[87]

§ 98. —— Bonus

a. In general
b. Conditions

a. In General

In order to be enforceable, a promise of a bonus must be clear and explicit and based on a consideration. Such a promise cannot be arbitrarily withdrawn in fraud of persons relying thereon, and the right to a bonus cannot be defeated by arbitrary discharge of the employee unless the contract provides otherwise.

A promise of additional compensation to an employee in the form of a bonus, in order to be enforceable, must be clear and explicit[88] and based on a sufficient consideration.[89] It has been held not

80. Mich.—Schurr v. Savigny, 48 N. W. 547, 85 Mich. 144.
39 C.J. p 158 note 82.

81. Mont.—Keith v. Kottas, 172 P. 2d 306—Doane v. Marquisee, 206 P. 426, 63 Mont. 166.
Wis.—In re Gifford's Estate, 12 N.W. 2d 921, 244 Wis. 570.
39 C.J. p 158 note 83.

82. S.D.—**Corpus Juris cited in** Jorgenson v. Midland Nat. Life Ins. Co., 21 N.W.2d 54, 56.
39 C.J. p 158 note 84.

83. S.D.—**Corpus Juris cited in** Jorgenson v. Midland Nat. Life Ins. Co., 21 N.W.2d 54, 56.
39 C.J. p 158 note 85.

84. Cal.—Sowash v. Emerson, 161 P. 1018, 32 Cal.App. 13.
Ga.—Atlantic Coast Line R. Co. v. Blalock, 68 S.E. 743, 8 Ga.App. 44.
Mont.—Keith v. Kottas, 172 P.2d 306.
N.Y.—Hett v. Barty Axle Corporation, 241 N.Y.S. 609, 229 App.Div. 388.
Wis.—In re Gifford's Estate, 12 N. W.2d 921, 244 Wis. 570.
39 C.J. p 158 note 87.
Person receiving salary from corporation see Corporations § 803.
Services required by contract see supra §§ 60–68.

85. Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Marable, App., 140 N.E. 443, 447.
39 C.J. p 158 note 88.

86. Colo.—**Corpus Juris cited in** Ryan v. School Dist. No. 26, Arapahoe County, 270 P. 865, 84 Colo. 385.
39 C.J. p 158 note 89.

87. N.Y.—Galwey v. Spindler, 168 N.Y.S. 648.

88. Cal.—**Corpus Juris cited in** Redd v. Williams Radiator Co., 296 P. 676, 678, 112 Cal.App. 353.
39 C.J. p 159 note 91.
Share of profits see supra §§ 93–95.
Bonus as part of salary
Bonus payments made annually over period of years by employer to branch manager constituted, by implied agreement, part of manager's salary.—Powell v. Republic Creosoting Co., 19 P.2d 919, 172 Wash. 155.
Indefiniteness as to amount
(1) Promise to employee that fifty per cent balance of bonus would be paid on completion of vessels then under construction was not indefinite as to amount, although promise to increase bonus if profits were greater was too vague to base recovery thereon.—George A. Fuller Co. v. Brown, C.C.A.N.C., 15 F.2d 672.
(2) Salesman suing for bonus, on basis of employer's agreement, which did not fix any proportion between profit which employer was to make and bonus to be paid by reason thereof, so that promise to pay bonus was so indefinite as to be unenforceable, could not recover, since agreement provided no basis on which court could arrive at measure of recovery.—Crowell v. Houde Engineering Corporation, Mo., 19 S.W.2d 516.
Statement held not mere prophecy but definite promise
U.S.—George A. Fuller Co. v. Brown, C.C.A.N.C., 15 F.2d 672.

89. Cal.—**Corpus Juris cited in** Redd v. Williams Radiator Co., 296 P. 676, 678, 112 Cal.App. 353.
Md.—Johnson v. Schenley Distillers Corporation, 28 A.2d 606, 181 Md. 31.
S.D.—Andrews v. Bellman, 208 N.W. 175, 50 S.D. 21.
39 C.J. p 159 note 92.
Bonus at termination of employment
A promise to pay a bonus at the termination of an employee's employment, in lieu of a promised increase in wages, has been held to be without consideration where the employee was not required to do anything at all to entitle him to the bonus.—Andrews v. Bellman, supra.
Consideration held sufficient
(1) Generally.
U.S.—Knapp v. Imperial Oil & Gas Products Co., C.C.A.W.Va., 130 F. 2d 1.
Cal.—Sieck v. Hall, 34 P.2d 844, 139 Cal.App. 279—Redd v. Williams Radiator Co., 296 P. 676, 112 Cal. App. 353.
(2) Promise inducing acceptance of employment.
U.S.—Willoughby Camera Stores v. Commissioner of Internal Revenue, C.C.A.2, 125 F.2d 607.
Cal.—Hunter v. Ryan, 293 P. 825, 109 Cal.App. 736.

necessary that the employee give notice to the employer that he accepts his offer of a bonus; the doing of the act on which the payment of the bonus is conditioned completes the contract.[90]

An instrument embodying the offer or promise of a bonus must be construed as a whole[91] and in the light of the surrounding circumstances;[92] it must be interpreted as the parties have made it, even though its forfeiture provisions seem harsh.[93] A payment may be in effect a bonus although designated as salary.[94]

The offer of a bonus may not be arbitrarily withdrawn when to do so would perpetrate a fraud on those who, in good faith, attempted to perform the service;[95] nor does a condition that the officers of the employing company shall be the sole judges as to what bonus, if any, shall be paid authorize the arbitrary withholding of a bonus payment;[96] nor can an employee's right to a bonus be defeated by the mere inaction of his employer or of the latter's officers.[97] An employee's right to a promised bonus cannot be defeated by an arbitrary discharge[98] unless the contract provides that the employer may discharge the employee at any time and that no bonus shall be payable in the event of discharge,[99] or that the employment may be terminated at any time and that payment of a bonus, on such termination, shall be entirely at the discretion of the employer;[1] and an employee's forfeiture of an earned bonus by voluntarily leaving his position will not be enforced where the employer's right to enforce forfeiture is not clear and unequivocal.[2]

Bonus at end of year. A promise to pay an employee a bonus at the end of the year is a mere gratuity and not enforceable where the employee is not shown to have done or foregone something which otherwise he was not obliged to do or forego;[3] but if the employee is induced thereby to do something which he is not under legal obligation

Gratuity

(1) A bonus paid to employees who turned out more work than stated minimum, the size of the bonus depending on the amount of excess production, was not a gratuity or a gift.—Walling v. Stone, C.C.A.Ill., 131 F.2d 461.

(2) Employment at fixed salary for each stated period, and, in addition, bonus in case of service for specified time, is valid, bonus not being promise of mere gratuity.—Warren v. Mosher, 250 P. 354, 31 Ariz. 33, 49 A.L.R. 1311.

(3) Statement to employee, at time of paying bonus, that employer, at completion of ships then under construction, would pay additional bonus, was held to be definite promise and not mere expression of intention to give gratuity.—George A. Fuller Co. v. Brown, C.C.A.N.C., 15 F.2d 672.

(4) An employer's promise to an employee to give a bonus or other benefit, conditioned on the doing of an act which the employee does, creates an enforceable contract; but the present and unconditional bestowing of a benefit, without costs to the employee, is a mere gratuity not constituting a contract.—Meyerson v. New Idea Hosiery Co., 115 So. 94, 217 Ala. 153, 55 A.L.R. 1231.

90. Wis.—Zwolanek v. Baker Mfg. Co., 137 N.W. 769, 150 Wis. 517, 44 L.R.A.,N.S., 1214, Ann.Cas.1914A 793.

Employee's failure to bind himself

Where an offer was made to pay a bonus if the employee should, through additional efforts, produce the result contemplated in the bonus offer, the fact that the employee did not bind himself to produce such result is immaterial; if the offer was acted on by him while still in effect, and the result was obtained, the contractual obligation to pay the bonus follows.—Sieck v. Hall, 34 P. 2d 844, 139 Cal.App. 279.

Ratification and receipt of benefits by employer

Contract of realty company to pay salesman prize or bonus if his team sold specified amount of property was binding where company ratified sale and received benefits.—Brown v. Morrisey & Walker, 150 A. 330, 106 N.J.Law 307.

91. U.S.—National Manufacture & Stores Corporation v. Whitman, C.C.A.S.C., 93 F.2d 829—George A. Fuller Co. v. Brown, C.C.A.N.C., 15 F.2d 672.
Ind.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind. App. 661.

92. U.S.—George A. Fuller Co. v. Brown, C.C.A.N.C., 15 F.2d 672.
Ohio.—Sullivan v. Doehler Die Casting Co., 15 Ohio Supp. 122.

93. Colo.—Fontius Shoe Co. v. Lamberton, 241 P. 542, 78 Colo. 250.
Mich.—Muir v. Leonard Refrigerator Co., 257 N.W. 723, 269 Mich. 406.

94. Wis.—Gutknecht v. C. A. Lawton Co., 285 N.W. 411, 231 Wis. 413.

95. Wis.—Kaiser v. Better Farms, 24 N.W.2d 621, 249 Wis. 302.

Bonus provision held not subject to cancellation provision

N.Y.—Knight v. American Greyhound Racing Ass'n, 235 N.Y.S. 179, 134 Misc. 279.

96. U.S.—George A. Fuller Co. v. Brown, C.C.A.N.C., 15 F.2d 672.

Committee's finding held contrary to fact

Cal.—Coats v. General Motors Corporation, 81 P.2d 906, 11 Cal.2d 601.

97. U.S.—George A. Fuller Co. v. Brown, C.C.A.N.C., 15 F.2d 672.

98. U.S.—Willoughby Camera Stores v. Commissioner of Internal Revenue, C.C.A.2, 125 F.2d 607.

Christmas bonus

It has also been held, however, that after superintendent of banks took possession of trust company for purposes of liquidation, an employee who was thereupon separated from his employment could not recover Christmas bonus granted by resolution previously adopted by trust company in absence of proof of any custom to the contrary.—Montefalcone v. Banco Di Napoli Trust Co. of N. Y., 52 N.Y.S.2d 655, 268 App. Div. 636, reargument denied 53 N.Y.S.2d 955, 269 App.Div. 685.

Determination as to good cause for discharge held properly made by trustees of stock-purchasing plan.—Larkin v. Stewart, 248 Ill.App. 152.

99. Colo.—Fontius Shoe Co. v. Lamberton, 241 P. 542, 78 Colo. 250.
Ind.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind. App. 661.

1. Mich.—Muir v. Leonard Refrigerator Co., 257 N.W. 723, 269 Mich. 406.

2. La.—United Shoe Stores Co. v. Dryer, 135 So. 50, 16 La.App. 605.

3. Cal.—Russell v. H. W. Johns-Manville Co., 200 P. 668, 53 Cal. App. 572.
39 C.J. p 159 note 95.

to do, or to forego something which he does not have to forego, the promise is enforceable.[4] An employee who is discharged for justifiable cause,[5] or who voluntarily quits before the end of the year,[6] or whose employment rightfully terminates before that time[7] is not entitled to a bonus payable at the end of the year. Particular language expressing the employer's dissatisfaction with the employee's services has been held not to constitute a cancellation of such a bonus provision.[8]

Proportionate part for partial performance. Where the discharge of an employee is justifiable or for cause, he is not entitled to a portion of the bonus proportionate to the part of the term served;[9] recovery of a proportionate part of the bonus promised is generally permitted in cases growing out of the wrongful discharge of the employee during the specified term[10] or in cases where the bonus is offered by the employer, and accepted by the employee, as an added inducement for continuous service.[11]

b. Conditions

An employee is not entitled to a bonus until the conditions designated in the contract for its payment have been fulfilled unless he shows a modification or waiver of the conditions or unless the nonfulfillment is due to the fault of the employer.

An employee is not entitle to a bonus until after the time stipulated in the contract for its payment,[12] or until other conditions designated in the contract for its payment have been fulfilled,[13] in the absence of evidence establishing a modification or waiver of the conditions,[14] and unless the nonfulfillment is due to the employer's act or omission.[15] Where the obligation for the fulfillment of the conditions does not rest on the employer,[16] or where the nonfulfillment has resulted in spite of his honest effort to prevent it[17] the employee cannot recover. A substantial performance of the conditions may be regarded as sufficient.[18]

Bonus for satisfactory services. Where a bonus is given for satisfactory services, it is within the discretion of the employer to determine whether the employee's service has been satisfactory,[19] but the discretion must be fairly and reasonably exercised.[20] If the employee is discharged for cause, it has been held that he is not entitled to the bonus.[21] It has been held that if he continues to the end of his term he can recover in the absence of evidence of the employer's dissatisfaction,[22] al-

4. Cal.—**Corpus Juris cited in** Redd v. Williams Radiator Co., 296 P. 676, 678, 112 Cal.App. 353.
39 C.J. p 159 note 96.

5. D.C.—Watwood v. Potomac Chemical Co., Mun.App., 42 A.2d 728.

6. Iowa.—Meredith v. Carl Youngstrom Co., 205 N.W. 749.

7. Mass.—Sobel v. Signal Shoe Co., 190 N.E. 535, 286 Mass. 286.

8. Cal.—Redd v. Williams Radiator Co., 296 P. 676, 112 Cal.App. 353.

9. Ind.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind. App. 661.

10. Ind.—Montgomery Ward & Co. v. Guignet, supra.
N.C.—Roberts v. Meys Mills, 114 S. E. 530, 184 N.C. 406, 28 A.L.R. 338.

11. Ind.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind. App. 661.

12. N.Y.—Scheuer v. Monash, 83 N. Y.S. 253, 40 Misc. 668.
39 C.J. p 159 note 97.

13. U.S.—George A. Fuller Co. v. Brown, C.C.A.N.C., 15 F.2d 672.
Ind.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind. App. 661.
Md.—Johnson & Higgins v. Simpson, 163 A. 832, 163 Md. 574.
Mich.—Coon v. Floyd Knox, Inc., 296 N.W. 267, 296 Mich. 305.
Mo.—Voight v. Blanton Co., App., 46 S.W.2d 927.
N.Y.—Bayer v. Oxford University Press, 61 N.Y.S.2d 209, 270 App. Div. 586, reargument denied 62 N. Y.S.2d 843, 270 App.Div. 929—Heath v. Chas. L. Huisking & Co., 72 N.Y.S.2d 14—Diamond v. Davis, 62 N.Y.S.2d 181.
Ohio.—Harding v. Montgomery Ward Co., App., 58 N.E.2d 75.
S.D.—Swanson v. Advance-Rumley Thresher Co., 216 N.W. 867, 52 S. D. 113.
39 C.J. p 159 note 98.

Subsequent conditions

The employer cannot vary the terms of the contract by attaching, to the delivery of the bonus, conditions not contained in the contract.—Harbaugh v. Ford Roofing Products Co., Mo., 281 S.W. 686.

14. Ind.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind. App. 661.

15. U.S.—George A. Fuller Co. v. Brown, C.C.A.N.C., 15 F.2d 672.
39 C.J. p 160 note 99.

16. Va.—Winter v. Southern Loan & Investment Co., Va., 26 S.E. 507.
39 C.J. p 160 note 1.

17. Utah.—Dunyon v. Scranton Min., etc., Co., 168 P. 755, 50 Utah 609.
39 C.J. p 160 note 2.

18. Wis.—Kaiser v. Better Farms, 24 N.W.2d 621, 249 Wis. 302.

A farm employee's refusal to work on July 4 was insufficient to make his performance in subsequent six months something less than substantial, so as to preclude recovery of bonus offered in consideration of employees' putting forth every effort to coöperate with employer in "getting the work done," where that was employee's only default, and employee was never notified that he would not receive the bonus until after bonus period had expired.—Kaiser v. Better Farms, supra.

19. N.Y.—Alford v. Cook, 107 N.Y. S. 710.
R.I.—**Corpus Juris cited in** Stender v. Carroll Cut Rate Perfume Co., 172 A. 886, 887, 54 R.I. 331.

20. R.I.—**Corpus Juris cited in** Stender v. Carroll Cut Rate Perfume Co., 172 A. 886, 887, 54 R. I. 331.
39 C.J. p 160 note 4.

Refusal held not unreasonable

R.I.—Stender v. Carroll Cut Rate Perfume Co., supra.

21. N.Y.—Dwyer v. Rathbone, 5 N. Y.S. 505, 1 Silv.Sup. 418.

Dishonesty

R.I.—Stender v. Carroll Cut Rate Perfume Co., 172 A. 886, 54 R.I. 331.

22. N.Y.—Fischer v. Conhaim, 72 N. Y.S. 1102, 35 Misc. 791.
39 C.J. p 160 note 6.

though under other authority he cannot recover unless he introduces affirmative and legally sufficient evidence of the employer's satisfaction.[23]

Bonus for continuous service. A bonus granted for continuous service is payable generally on the performance of the conditions imposed by the contract.[24] Where an employee serves only a part of the term for which he is employed, he may still recover an amount of bonus money proportionate to the term of his actual service where the employer has offered a bonus for continuous service over a longer term than the payment period of a week or month, and has discharged the employee without cause within the bonus term, but at the end of one of the payment periods,[25] or where the employer has offered to make a proportionate payment on certain contingencies, one of which has happened,[26] or where, in the case of an employment terminable at the will of either party, the employer has discharged the employee without cause,[27] the result being different if the employee voluntarily abandons the service or is discharged for cause.[28]

§ 99. Food, Clothing, Lodging, and Education

Ordinarily there is no implied contract to furnish food, clothing, or lodging as part of an employee's compensation; but, apart from express contracts of this nature, such an agreement may be implied from the conduct of the parties or where necessary for the rendering of the services.

Ordinarily there is no implied contract on the part of an employer to furnish food, clothing, or lodging in addition to wages or salary as a part of the employee's compensation,[29] even where the employee is injured in the performance of his duties.[30] A contract to furnish food, clothing, or lodging may be implied from the conduct of the parties[31] or where necessary for the rendering of the services.[32] There can be no such implication on the ground of necessity with reference to the furnishing of the employee with an education,[33] especially where the employee is under no restraint and can leave the service at any time.[34]

Express provisions. The employer's obligation to furnish food, clothing, or lodging exists where the contract provides for it in express terms,[35] subject to such restrictions as may be contained therein[36] or as may be imposed under statute.[37] In such case the obligation has been held to continue through a period of sickness during which the employee is not able to work.[38] The termination of the employment usually ends the right under the employment contract to food, clothing, lodging, or occupancy of premises.[39]

If the employee repudiates an agreement under which he is to receive a fixed sum and board and recovers, on the employer's default, the full value of his services, the employer may sue to recover back the value of board furnished to the employee under the agreement.[40] On the other hand, if the employer repudiates his agreement to furnish board and clothes, the employee may recover the reasonable value of his services.[41]

23. Kan.—Joseph Campbell Preserve Co. v. Holcomb, 72 P. 552, 67 Kan. 48.

24. Ill.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind. App. 661.
39 C.J. p 160 note 8.

Remaining in position for one year
A condition in an agreement to pay a store manager a bonus for improved business, that the bonus is effective only in event the manager remains as manager for one year, is valid in the absence of bad faith or fraud.—National Manufacture & Stores Corporation v. Whitman, C.C. A.S.C., 93 F.2d 829.

Voluntarily leaving employment
(1) Where continued employment to and including last day of quarter-annual period was a condition precedent to payment of bonus or any part thereof to employees, the voluntary termination, by employees, of employment prior to such day precluded recovery of bonus.—Heath v. Chas. L. Huisking & Co., 72 N.Y.S. 2d 14.
(2) Abandonment of service generally see supra § 83.

25. N.C.—Roberts v. Mays Mills, 114 S.E. 530, 184 N.C. 406, 28 A. L.R. 338.

26. Mo.—Redheffer v. Leathe, 15 Mo.App. 12.
39 C.J. p 160 note 11.

27. Ga.—Haag v. Rogers, 72 S.E. 46, 9 Ga.App. 650.

28. Ga.—Haag v. Rogers, supra.

29. N.Y.—McDonald v. Alexander, 71 N.Y.S. 813, 35 Misc. 279.
39 C.J. p 160 note 15.

30. Ind.—Chicago & E. R. Co. v. Behrens, 37 N.E. 26, 9 Ind.App. 575.

31. La.—Godbold v. Harrison, 1 McG., La., 31.
39 C.J. p 160 note 18.

32. Va.—Starke v. Storm, 79 S.E. 1057, 115 Va. 651.
39 C.J. p 161 note 19.

33. Va.—Starke v. Storm, supra.

34. Va.—Starke v. Storm, supra.

35. Wash.—Evans v. Hartman, 105 P.2d 717, 5 Wash.2d 434.

36. Vt.—Taylor v. St. Clair, 65 A. 655, 79 Vt. 536.
39 C.J. p 161 note 23.

37. **Rent charge limited to one third of minimum salary**
Wash.—Evans v. Hartmann, 105 P. 2d 717, 5 Wash.2d 434.

38. Mass.—Nichols v. Coolahan, 10 Metc. 449.
39 C.J. p 161 note 24.

39. N.Y.—Thornycroft Apartments v. Keagy, 14 N.Y.S.2d 920, 172 Misc. 550—Putnam County v. Wixom, 240 N.Y.S. 680, 135 Misc. 760.
38 C.J. p 161 note 25.

Effect of strike
An apartment superintendent was not entitled to remain in occupation of apartment, use of which was given him as part of his compensation, after terminating his employment, merely because a strike was in progress.—Thornycroft Apartments v. Keagy, 14 N.Y.S.2d 920, 172 Misc. 550.

40. Me.—Cook v. Bates, 34 A. 266, 88 Me. 455.

41. Vt.—Spencer v. Storrs, 38 Vt. 156.
39 C.J. p 161 note 27.

§ 100. Reimbursement of Expenditures

Expenditures made by an employee in connection with his work are to be paid for by the employer or by the employee as the contract between them provides.

Expenditures made by an employee in connection with his work are to be paid for by the employer or by the employee as the contract between them provides.[42] Where the contract makes no provision, if it appears that the parties intended that he should be reimbursed therefor, the employee may claim reimbursement for any expenditures incurred by him,[43] reasonable in amount and reasonably incidental to his work,[44] and subject only to such restrictions as the employer may place on him[45] or as may be implied from their conduct or practice.[46] Where, however, it does not appear to have been the intention of the parties that the employee should be reimbursed for expenses incurred by him, no promise will be implied to pay him therefor.[47]

In the absence of an agreement to the contrary, an employer has the right to discriminate among his employees in the matter of allowing expense accounts.[48]

Living expenses. An employee's living expenses are not generally regarded as expenses incidental to his work for which his employer is liable,[49] even where the employment contract allows the employee a stated amount "for his expenses;"[50] but the employment contract may make the employer liable for living expenses in particular circumstances.[51]

Expenses incidental to negotiations for contract. Whether expenses incidental to the negotiations for employment are to be paid for by the employer depends entirely on how far the employer obligates himself by contract to do so;[52] they cannot be recovered on failure of the negotiations if their payment is conditioned on employment[53] or if the failure is due to the refusal of the employee to perform the contract after it is made.[54]

Passage money. In the absence of a binding contract, an employee may not claim to be reimbursed for his expenses for transportation to or from the

42. S.C.—King v. Western Union Tel. Co., 65 S.E. 944, 84 S.C. 73.
39 C.J. p 161 note 28.

Expenses held chargeable against commissions

La.—Broderick v. Taylor, App., 161 So. 630.

Incidental expenses

Where contract whereby individual was made manager of mining company provided that individual was to be entitled to full reimbursement for all expenses which he should incur in connection with his position as general manager, the expenses to be paid monthly, only incidental expenses of a personal nature were contemplated by the parties.—Vance v. Mutual Gold Corporation, 108 P.2d 799, 6 Wash.2d 466.

43. Idaho.—Weed v. Idaho Copper Co., 10 P.2d 613, 51 Idaho 737.
39 C.J. p 161 note 29.

44. Idaho.—Weed v. Idaho Copper Co., supra.
39 C.J. p 161 note 30.

Traveling expenses

Cal.—Bernstein v. Sirotta, 1 P.2d 8, 213 Cal. 21.

Business trips; attending trade meetings

A general manager of a lumber company may charge to the company the expenses of trips made for the purpose of selling lumber and transacting other business for the company, but, in the absence of provisions to that effect in the employment contract, not his expenses in attending meetings of lumber associations and entertaining prospective customers.—Ozark-Badger Co. v. Roberts, 287 S.W. 401, 171 Ark. 1105.

45. Va.—Staples v. Hervey, 112 S.E. 607, 133 Va. 305.
39 C.J. p 161 note 31.

Advising employer of advances made

Sales manager was not entitled to reimbursement from employer for money advanced to salesmen to be deducted from commissions, where he failed to advise employer of such advances, as required, or to turn in cash vouchers therefor signed by salesmen until after salesmen had terminated their employment and their accounts had been settled.—Harris v. Specialties Distributing Co., 9 N.W.2d 645, 305 Mich. 373.

46. Cal.—O'Brien v. L. E. White Lumber Co., 185 P. 514, 43 Cal. App. 703.
39 C.J. p 162 note 32.

47. N.Y.—Hett v. Barty Axle Corporation, 241 N.Y.S. 609, 229 App. Div. 388.

Telephone calls and telegrams

Cost of telephone conversations and telegrams, sent by salesman to employer relative to another salesman being put in his territory, were not recoverable by salesman without evidence that employer authorized him to incur such expenses.—Dennis v. J. Frank Darling Co., 120 So. 686, 10 La.App. 268.

Compensation limited to commissions

Under contract limiting salesman's compensation to commissions on "all orders he may obtain," salesman could not recover expenses incurred for travel or otherwise.—Deitchman v. Korach, 71 N.E.2d 367, 330 Ill.App. 365.

Enforcement of lien against third person

Laborers' expense in attempting to establish and enforce lien against property of third person is not recoverable from employer or estate of his deceased partner.—Fergusson v. Guy, 276 P. 855, 151 Wash. 550.

48. La.—Renauld v. Marine Specialty & Mill Supply Co., 135 So. 374, 172 La. 835.

49. La.—Broderick v. Taylor, App., 161 So. 630.
39 C.J. p 162 note 34.

Strikebreaker's hotel bill

Railroad, in absence of promise to pay therefor, was not liable for hotel bill of strikebreaker and family while he worked.—Dell v. Lancaster, Tex.Civ.App., 285 S.W. 685.

50. N.Y.—Dowd v. Krall, 65 N.Y.S. 797, 32 Misc. 252.
Food, clothing, and lodging as compensation see supra § 99.

51. U.S.—Burns v. Northern Pac. Ry. Co., C.C.A.Minn., 134 F.2d 766.

52. Tex.—Rothe v. Jones, Civ.App., 237 S.W. 581.

53. Tex.—Rothe v. Jones, supra.
39 C.J. p 162 note 37.

54. Miss.—George F. Dittman Boot & Shoe Co. v. Meyer, 54 So. 441, 98 Miss. 874.

place of work;[55] but such an obligation on the part of the employer may be implied.[56] An employee not abiding by the terms of the employment contract with respect to the payment of transportation expenses cannot recover such expenses under the contract.[57]

Advances made to an employer by an employee, on the understanding that the latter was to be reimbursed, may be recovered by him.[58]

§ 101. Interest

If wages are not payable on a certain date, or if the amount is unliquidated, interest does not begin to run thereon until after a demand; if wages are payable at a specified time interest generally runs from that date.

If wages are not payable on a certain date,[59] or if the amount due as wages is unliquidated,[60] interest does not begin to run thereon until after a demand for payment. On the other hand, if wages are payable at a specified time, the general rule is that interest runs from that date;[61] and interest on unpaid wages has also been allowed from the date of termination of the employment.[62] It has been held, under a statute regulating hours of labor and wages of laborers employed by the state, that such an employee is entitled to interest on a valid claim for overtime wages from the date of the filing of the claim.[63]

Where, by the terms of the employment contract, an employee's share of the profits is to remain in the business until termination of the contract, the employee has been held entitled to interest on such share only from the date of such termination;[64] and, where the contract is to pay an employee a fraction of the profits after a deduction for invested capital, the employee has been held entitled to interest on the portion of the invested capital wrongfully withheld from him in the annual statements.[65] An employer terminating a profit-sharing contract and selling the goods on hand within a reasonable time thereafter has been held not chargeable with interest during such period, but only for the period following the sale during which he fails and refuses to account.[66]

§ 102. Deductions, Forfeitures, and Fines

Except where authorized by the contract or justified by the employee's misconduct or failure fully to perform, an employer may not claim any deduction from, or forfeiture of, his employee's wages.

Forfeiture of, or deductions from, the wages agreed to be paid an employee may result from an express provision therefor in a contract of hire, as discussed infra § 103, or may follow, independently thereof, from a failure fully to perform the services to the end of the term agreed on, infra § 104, or from the negligence or misconduct of the employee in the course of his employment, infra § 105. Except where authorized or justified in one of these ways, an employer may not claim any deduction from, or forfeiture of, his employee's wages,[67] a contract obligation without the forfeiture clause does not have that effect.[68]

§ 103. —— Contractual Provisions for Deductions or Forfeitures

a. In general
b. Validity, construction, and operation

a. In General

A provision for forfeiture of wages may bind an employee even though in a writing other than the hiring contract and even though not coming into existence until after he enters the employment. Rules or regulations providing for forfeiture under stated circumstances bind the employee if he has knowledge or notice thereof and can be taken to have assented thereto.

55. Cal.—McFadden v. Crawford, 39 Cal. 662.
Okl.—Sinclair Prairie Oil Co. v. Dose, 118 P.2d 210, 189 Okl. 569.
Transportation in connection with discharge see supra § 87.

56. Tex.—Gulf, etc., R. Co. v. Jackson, 69 S.W. 89, 29 Tex.Civ.App. 342.

57. U.S.—The Z R-3, D.C.Wash., 18 F.2d 122.

Abandonment of service

(1) An employer of persons to work on vessel in Alaskan waters, who agreed to furnish transportation from Seattle and return, provided the employees stayed and rendered satisfactory service during the season, was not under obligation to pay their return fare where they elected to quit before the end of the season.—The Z R-3, supra.

(2) Abandonment of service generally see supra § 83.

58. Cal.—Bernstein v. Sirotta, 1 P. 2d 8, 213 Cal. 21.

59. Mass.—Soule v. Soule, 32 N.E. 663, 157 Mass. 451.
39 C.J. p 162 note 43.

60. Wis.—Farr v. Semple, 51 N.W. 319, 81 Wis. 230.
39 C.J. p 162 note 44.

61. Ky.—**Corpus Juris cited in** Western Casualty & Surety Co. v. Meyer, 192 S.W.2d 388, 393, 301 Ky. 487.
39 C.J. p 162 note 45.

62. Ark.—Missouri Pacific R. Co. v. Clement, 181 S.W.2d 240, 207 Ark. 389.

63. N.Y.—Wright v. State, 119 N.E. 83, 223 N.Y. 44.

64. Cal.—Bernstein v. Sirotta, 1 P. 2d 8, 213 Cal. 21.

65. Mass.—Stewart v. John R. Lankenau Co., 156 N.E. 73, 259 Mass. 242.

66. Ill.—Kaplan v. Stein, 160 N.E. 552, 329 Ill. 253.

67. Ind.—Phelps v. Stutz Motor Car Co. of America, 161 N.E. 577, 87 Ind.App. 609.
39 C.J. p 162 note 52.
Amount of deduction or forfeiture see infra § 114.
Earnings from third persons see supra § 71.
Forfeiture of right to:
Bonus see supra § 98.
Commissions see supra § 92.
Statutory regulation see infra § 159.

68. Mass.—Hunt v. Otis Co., 4 Metc. 464.

A provision for forfeiture of wages may be binding on the employee even though contained in some writing other than the contract of hiring,[69] and even though it does not come into existence until after the employee enters the employment.[70]

An employer's agreement to return deductions made, on a certain condition, is enforceable only on fulfillment of such condition.[71]

Regulations and assent thereto. An employee cannot be penalized for the violation of a rule providing for forfeiture of wages under stated circumstances, where he had no notice of the rule and had not agreed to observe it;[72] and whether he had actual knowledge thereof, and expressly or by conduct impliedly agreed to comply therewith, are questions to be resolved from the facts and circumstances of the particular case.[73] Generally his assent may be inferred from his knowledge of the rule, and his continuance in the employment without objection thereto;[74] but mere knowledge of such a rule does not conclusively, and as a matter of law, show such assent.[75] If the engagement is for an indefinite term and the provisions of the contract do not interfere, a regulation providing for forfeiture of wages under stated circumstances may be made at any time and will be binding on the employee as soon as he has knowledge of it, and can be taken to have assented thereto.[76]

Deduction of union dues. An employer's practice of deducting union dues and fees from the wages of employees, known as the "checkoff," is a contractual expedient,[77] his obligation to do so arising only by virtue of contract,[78] and the destination of the funds deducted, as well as the rights appertaining to their eventual use, are likewise created and governed by contract.[79] The agreement for the checkoff is deemed the joint and several contract of the members of the union made for them by their agents;[80] the employer, although a contracting principal, also becomes the agent of the union and of the union employees for the purpose of making such deductions and transmittals.[81]

b. Validity, Construction, and Operation

Provisions for deductions from, or forfeiture of, an employee's wages will be enforced only if reasonable; they are to be strictly construed against the employer, and a discretion given an employer to enforce a forfeiture must be exercised reasonably and in good faith.

Provisions for deductions from, or forfeiture of, an employee's wages will not be enforced if unreasonable or oppressive;[82] if reasonable and duly proportioned to the wages received, they will be.[83]

Under some authorities a provision for forfeiture of all wages due to the employee on breach of his agreement, without regard to their amount, will not be enforced[84] unless, under the provisions of the contract, the forfeiture of all wages due can be construed to except from its operation wages earned and unpaid through prior default of the employer;[85] but there is also authority to the contrary.[86]

Construction in general. Provisions for the forfeiture of wages are to be strictly construed against

69. Pa.—Pottsville Iron & Steel Co. v. Good, 9 A. 497, 116 Pa. 385, 2 Am.S.R. 614.
39 C.J. p 162 note 54.

70. Pa.—Pottsville Iron & Steel Co. v. Good, supra.
39 C.J. p 162 note 55.

71. Vt.—Wakefield v. Champlain Marine Co., 13 A.2d 183, 111 Vt. 243.
Remaining in employ during certain period
Vt.—Wakefield v. Champlain Marine Co., supra.

72. Okl.—Borden v. Day, 168 P.2d 646, 197 Okl. 110.
Rules and regulations in general see supra § 75.

73. Okl.—Borden v. Day, 168 P.2d 646, 197 Okl. 110.

74. Mass.—Preston v. American Linen Co., 119 Mass. 400.
39 C.J. p 163 note 58.

75. S.C.—Matthews v. Industrial Lumber Co., 75 S.E. 170, 91 S.C. 568, 45 L.R.A.,N.S., 644, Ann.Cas. 1914A 45.
39 C.J. p 163 note 59.

76. Pa.—Pottsville Iron & Steel Co. v. Good, 9 A. 497, 116 Pa. 385, 2 Am.S.R. 614.

77. N.J.—Local 60 of Industrial Union of Marine and Shipbuilding Workers of America v. Welin Davit & Boat Corporation, 33 A.2d 708, 133 N.J.Eq. 551.
N.Y.—Greenwald v. Chiarella, 57 N.Y.S.2d 765, 185 Misc. 762, reversed on other grounds 63 N.Y.S.2d 49, 271 App.Div. 213.
Statutory regulation as to deduction see infra § 159.

78. N.J.—Local 60 of Industrial Union of Marine and Shipbuilding Workers of America v. Welin Davit & Boat Corporation, 33 A.2d 708, 133 N.J.Eq. 551.
N.Y.—Greenwald v. Chiarella, 57 N.Y.S.2d 765, 185 Misc. 762, reversed on other grounds 63 N.Y.S.2d 49, 271 App.Div. 213.

79. N.J.—Local 60 of Industrial Union of Marine and Shipbuilding Workers of America v. Welin Davit & Boat Corporation, 33 A.2d 708, 133 N.J.Eq. 551.

80. N.Y.—Greenwald v. Chiarella, 57 N.Y.S.2d 765, 185 Misc. 762, reversed on other grounds 63 N.Y.S.2d 49, 271 App.Div. 213.

81. N.Y.—Greenwald v. Chiarella, supra.

82. Ill.—Leemon v. Grand Crossing Tack Co., 187 Ill.App. 247.
39 C.J. p 163 note 62.
Validity of contract where statute forbids deduction or forfeitures see infra § 159.

83. Tenn.—Tennessee Mfg. Co. v. James, 18 S.W. 262, 91 Tenn. 154, 161, 30 Am.S.R. 865, 15 L.R.A. 211.
39 C.J. p 163 note 63.

84. Tenn.—Schrimpf v. Tennessee Mfg. Co., 6 S.W. 131, 86 Tenn. 219, 6 Am.S.R. 832.
39 C.J. p 163 note 64.

85. N.Y.—Ressig v. Waldorf-Astoria Hotel Co., 172 N.Y.S. 616, 185 App.Div. 4, affirmed 129 N.E. 912, 229 N.Y. 553.
39 C.J. p 163 note 65.

86. Mass.—Naylor v. Fall River Iron Works Co., 118 Mass. 317.
39 C.J. p 164 note 66.

the employer.[87] Where the forfeiture clause obviously is intended by the parties to apply to either of two contingencies named, it will be so construed, even though on a literal interpretation it applies to one only.[88] Where a provision making the employee responsible for part of the amount charged by him to customers, in lieu of cash payment, is contained in an instrument signed only by him, and not in another instrument signed only by the employer, the two instruments will be read together and the provision given effect.[89]

Discretion of employer. A forfeiture enforceable in the discretion of the employer implies that the exercise of that discretion shall be reasonable and in good faith.[90] Such a provision is to be strictly construed, and conditions named in the contract as justifying a declaration of forfeiture will not be extended beyond the fair meaning of the words used.[91] Thus, where the discretion is placed with a certain officer in the employ of a corporation, it cannot be exercised by some other officer.[92] A provision that the employer may retain part of the employee's wages until the contract is fulfilled to the employer's "entire satisfaction" must be construed to mean "reasonable" satisfaction.[93]

Operation in general. While a forfeiture clause may result in the loss by the employee of certain rights which the contract would otherwise give him, it does not necessarily operate to deprive him of his right to recover for his services on a quantum meruit.[94] A forfeiture clause applies to the employee's acts or failures to act during the term of his employment and not to acts after his discharge.[95]

A checkoff of union dues has been held to be an appropriate matter to be covered by a collective bargaining agreement,[96] and a provision for a checkoff has been held to be valid and enforceable.[97] Where an employee's agreement authorizing his employer to deduct union dues from his wages is indefinite as to time, it is revocable at will,[98] and a deduction made after revocation is unauthorized.[99]

§ 104. —— Deductions in Case of Nonperformance

a. In general
b. Sickness, death, or other disability
c. Leaving without notice

a. In General

An employer's damage arising from his employee's failure to perform his entire contract may be deducted from the amount due the employee for services rendered.

Where an employee fails to complete the performance of the entire contract, damages sustained by the employer by reason of the nonperformance may be set off against, or deducted from, the amount due the employee for services rendered;[1] but, as discussed supra § 103, a forfeiture of all wages due re-

87. Mo.—Cross v. Detroit Base Ball Club, 84 Mo.App. 526.
39 C.J. p 164 note 67.

88. N.Y.—Fox v. International Hotel Co., 58 N.Y.S. 441, 41 App.Div. 140, affirmed 61 N.E. 1129, 168 N.Y. 658.
39 C.J. p 164 note 68.

89. La.—Clements v. Knighton, App., 1 So.2d 139.

90. Neb.—Adams-Smith Co. v. Hayward, 71 N.W. 949, 52 Neb. 79.
39 C.J. p 164 notes 70, 74.

91. Ill.—Chicago City R. Co. v. Blanchard, 35 Ill.App. 481.

92. Ill.—Chicago City R. Co. v. Blanchard, supra.
39 C.J. p 164 note 72.

93. Mass.—Sloan v. Hayden, 110 Mass. 141.

94. Ky.—Foster v. Watson, 16 B. Mon. 377.
39 C.J. p 164 note 75.

95. Wis.—Collins v. Singer Mfg. Co., 10 N.W. 477, 53 Wis. 305.
39 C.J. p 164 note 69.

96. U.S.—N. L. R. B. v. Clinton Woolen Mfg. Co., C.C.A.6, 141 F. 2d 753.
Mass.—Sanford v. Boston Edison Co., 64 N.E.2d 631, 319 Mass. 55.
Validity or propriety of terms of collective bargaining contract in general see supra § 28 (40).

Fees and dues of new employees
A contract provision for checkoff of initiation fees and initial dues of new employees is not unlawful.—Hotel & Restaurant Emp. Intern. Alliance v. Greenwood, Ala., 30 So.2d 696.

97. N.Y.—Greenwald v. Chiarella, 63 N.Y.S.2d 49, 271 App.Div. 213.

Nonunion members
Where an employer signed a closed-shop contract with a union, nonunion employees had no basic right to employment, and if they did not join union it was employer's contractual obligation to discharge them; hence, where he chose to retain them, he became obligated, by virtue of his contract, to employ them under same conditions as union employees, and he became responsible for payment to union of their initiation fees and dues.—Greenwald v. Chiarella, supra.

98. Pa.—Fisher v. Stevens Coal Co., 17 A.2d 642, 143 Pa.Super. 115.

Written notice of withdrawal from union constitutes revocation of such authorization.—Fisher v. Stevens Coal Co., supra.

Right to withdraw from union
Where by-laws and charter provisions of labor union prescribed neither the duration of membership therein nor the method of withdrawal, and established no tribunal to try the rights of a member to withdraw, a member who had exercised the right to withdraw was not precluded from resorting to court for settlement of question as to continued operation of checkoff order, authorizing employer to deduct union dues and assessments from wages, by his failure to first submit dispute to union tribunals.—Braddom v. Three Point Coal Corporation, 157 S.W.2d 349, 288 Ky. 734.

99. Pa.—Fisher v. Stevens Coal Co., 17 A.2d 642, 143 Pa.Super. 115.

1. Iowa.—Porter v. Whitlock, 120 N.W. 649, 142 Iowa 66.
39 C.J. p 164 note 78.
Recovery:
In case of part performance see supra §§ 82–89.
Of damages for breach by employee see supra § 78.

gardless of the employer's default in payment or his loss from the breach is not enforceable. Where the contract provides for the allowance of deductions for time lost due to reasons specifically stated in the contract, a deduction may not be made for failure actually to perform due to other causes than those stated, provided there is readiness to perform.[2]

b. Sickness, Death, or Other Disability

In the absence of contractual provisions fixing the rights of the parties, damages or deductions ordinarily are allowed for the unperformed part of a contract of service where the employee dies within the term, or for the time lost during sickness or other disability; but some authorities permit no deduction where the disability is of short duration.

Ordinarily damages or deductions are allowed for the unperformed part of a contract of service where the employee dies within the term,[3] or for the time which he loses during his sickness[4] or other disability,[5] unless it is the result of injuries to an employee in the line of his duty due to the negligence or other fault of the employer, and the employee himself is free from blame.[6] However, under some authorities, in the absence of agreement making other provision, no deductions are to be made where the employee's disability is of short duration.[7]

Where the contract itself in express terms fixes the rights of the parties in case of the death[8] or sickness[9] of the employee, the rights of the parties are controlled thereby. These rights may also be determined by the rules of the employer binding on the employee.[10]

c. Leaving without Notice

Deductions from wages may be made for the damages suffered by an employer due to the employee's leaving his service without notice, if the contract requires such notice to be given, but not where the contract provides otherwise.

Deductions from wages may be made for the damages suffered by an employer due to the employee's leaving his service without notice, if the contract requires such notice to be given,[11] but not where the contract provides otherwise.[12] A provision for a forfeiture of wages, on quitting the service without cause and without giving a specified notice, where not unreasonable or oppressive, will be enforced as a provision for liquidating damages[13] even though there is no corresponding undertaking on the part of the employer to give notice before he dismisses[14] and notwithstanding the existence of a statute requiring that employees shall be paid weekly and providing for their payment in case of discharge or abandonment of the employment.[15] Such provisions are expressly authorized by statute in some jurisdictions.[16] The forfeiture is not enforced if the employee leaves the service for justifiable cause,[17] or without knowledge of the rule of the employer requiring notice,[18] or where the leaving is not voluntary,[19] or is due to sickness,[20] especially where the employee notifies his employer that he is sick and then is absent only so long as he

2. Pa.—Wentworth v. Whitney, 25 Pa.Super. 100.

3. N.Y.—Clark v. Gilbert, 26 N.Y. 279, 84 Am.D. 189.
Recovery in case of:
Sickness or death see supra § 85.
Temporary absences generally see supra § 84.

4. Wash.—MacFarlane v. Allan-Pfeiffer Chemical Co., 109 P. 604, 59 Wash. 154, 28 L.R.A.,N.S., 314, Ann.Cas.1912A 1180.
39 C.J. p 165 note 83.

5. Vt.—McDonald v. Montague, 30 Vt. 357.

6. U.S.—Missouri Pac. R. Co. v. Texas & P. Ry. Co., C.C.La., 41 F. 319—Missouri Pac. R. Co. v. Texas & P. Ry. Co., C.C.La., 33 F. 701.

7. Colo.—Mott v. Baxter, 56 P. 192, 13 Colo.App. 63.
39 C.J. p 165 notes 86, 87.

8. Pa.—Dunlap v. Montgomery, 16 A. 41, 123 Pa. 27.
39 C.J. p 165 note 88.

9. Or.—Foster v. Henderson, 45 P. 899, 29 Or. 210.
39 C.J. p 165 note 89.
Brief or extended illness
Provision of employment contract that employee's wages should not abate in case of sickness was not construable as applying only to case of brief or casual sickness or disability, and was applicable to extended as well as brief sickness.—Ginsberg v. Reliable Linen Service Co., 290 N.W. 331, 292 Mich. 70.

10. Mass.—Noon v. Salisbury Mills, 3 Allen 340.
39 C.J. p 165 note 90.
Regulations generally see supra § 75.

11. Mass.—Hunt v. Otis Co., 4 Metc. 464.
Recovery of earned wages in absence of forfeiture provision see supra § 83.

12. Ill.—Wilmington Coal Mining & Manufacturing Co. v. Lamb, 90 Ill. 465.

13. Me.—Harmon v. Salmon Falls Mfg. Co., 35 Me. 447, 452, 58 Am. D. 718.
39 C.J. p 166 note 95.

14. Me.—Harmon v. Salmon Falls Mfg. Co., supra.
Mass.—Preston v. American Linen Co., 119 Mass. 400.

15. Mass.—Ferry v. Kinsley Iron & Machine Co., 81 N.E. 305, 195 Mass. 548.

16. Me.—Veitkunas v. Morrison, 95 A. 947, 114 Me. 256.
39 C.J. p 166 note 93.

17. Conn.—Schietenger v. Bridgeport Knife Co., 5 A. 859, 54 Conn. 64.
39 C.J. p 166 note 99.

18. Mass.—Collins v. New England Iron Co., 115 Mass. 23.
39 C.J. p 166 note 1.

19. Mass.—Hughes v. Wamsutta Mills, 11 Allen 201.
N.Y.—Muesling v. International R. Co., 147 N.Y.S. 177, 85 Misc. 309.
39 C.J. p 166 note 2.

20. Mass.—Fuller v. Brown, 11 Metc. 440.

is unable to work.[21] Likewise forfeiture may not be enforced where there is a mere temporary absence not constituting an abandonment[22] unless the employer might reasonably regard the employee's leaving and continued absence as an abandonment of the work, rendering it necessary to procure another to supply his place,[23] since abandonment is a matter of the acts of the employee and not of his undisclosed intentions.[24]

Offer to return. An employee who has abandoned the service without cause and forfeited his wages thereby cannot claim a right to them by showing that he later offered to return where the employer refused to reinstate him.[25]

§ 105. —— Negligence or Misconduct

a. As precluding recovery
b. As ground for deductions

a. As Precluding Recovery

An employee's recovery of wages under the contract may be prevented by his misconduct, fraud, commission of a criminal act, or disloyalty in a manner substantially affecting the employment contract.

A breach of the contract of employment other than by quitting the service may prevent a recovery of any wages thereunder, or of wages for the remainder of the term,[26] as where the employee is guilty of gross misconduct, or misconduct substantially affecting the contract of employment, in the course of his employment,[27] or has practiced intentional fraud on his employer,[28] or has proved disloyal to him[29] in a manner substantially affecting the contract of employment,[30] or has assaulted his employer,[31] or has falsified his accounts,[32] or has stolen or embezzled the money of his employer,[33] or committed other criminal offenses, although not immediately injurious to the person or property of the employer.[34]

The rule has been modified in some decisions in its application to contracts where the services rendered are severable, to the extent of disallowing a recovery only with respect to services affected by the improper acts, and allowing a recovery for the others;[35] so an employee's willful misconduct during a particular year has been held not to forfeit his right to compensation for a prior year during which he performed services for which compensation can be apportioned.[36] Further, a recovery on a quantum meruit has been allowed in some instances.[37]

It is not disloyalty, resulting in a forfeiture of wages earned, for an employee to have a mere difference of opinion with his employer as to the wisdom of certain details in the management of his employer's business,[38] or to confer with a competitor of his employer if he does nothing detrimental to the interests of his employer,[39] or to leave his employer at any time where, under the employment contract, he has a right to do so and to approach customers of his former employer with a view to

21. Mass.—Harrington v. Fall River Iron Works Co., 119 Mass. 82.

22. R.I.—Heber v. U. S. Flax Mfg. Co., 13 R.I. 303.

23. Mass.—Naylor v. Fall River Iron Works Co., 118 Mass. 317.

24. Mass.—Partington v. Wamsutta Mills, 110 Mass. 467.

25. Mo.—Walden v. American Bankers' Assur. Co., 166 S.W. 1111, 183 Mo.App. 376.
39 C.J. p 166 notes 9, 10.

26. U.S.—Caledonian Ins. Co. v. Levy, Cal., 199 F. 407, 118 C.C.A. 91.
39 C.J. p 166 note 12.

Performance to best of ability
Provisions of employment contracts that employees should perform their duties to "best of their ability" did not permit their use of less than ordinary ability in carrying out such duties, but required them to devote to business ability suggested by their previous long experience in such work, so as to preclude their recovery of compensation for remainder of contract terms after their discharge for failure to perform their contractual obligations to best of their ability.—Walters v. Stivers, Cal.App., 177 P.2d 40.

Breach held not shown
Ill.—Terrell v. Tool Equipment Sales Co., 67 N.E.2d 298, 329 Ill. App. 183.

27. N.Y.—Sundland v. Korfund Co., 20 N.Y.S.2d 819, 260 App.Div. 80.
Ohio.—Dayton Rubber Mfg. Co. v. Brown, 156 N.E. 136, 116 Ohio St. 373.
39 C.J. p 167 note 13.

Dishonesty
N.Y.—Sundland v. Korfund Co., 20 N.Y.S.2d 819, 260 App.Div. 80.
39 C.J. p 167 note 14 [a].

28. N.Y.—Abramson v. Dry Goods Refolding Co., Inc., 166 N.Y.S. 771.
39 C.J. p 167 note 14.

29. N.Y.—Lamdin v. Broadway Surface Advertising Corporation, 5 N.E.2d 66, 272 N.Y. 133—Sundland v. Korfund Co., 20 N.Y.S.2d 819, 260 App.Div. 80.
Ohio.—Dayton Rubber Mfg. Co. v. Brown, 156 N.E. 136, 116 Ohio St. 373.

Seeking own business from employer's customers
N.Y.—Slater v. Detroit Graphite Co., 210 N.Y.S. 478, 125 Misc. 183.

30. N.Y.—Sundland v. Korfund Co., 20 N.Y.S.2d 819, 260 App.Div. 80.

31. Ga.—Henderson v. Stiles, 14 Ga. 135.

32. Mo.—Paul v. Minneapolis Threshing Mach. Co., 87 Mo.App. 647.

33. N.Y.—Sundland v. Korfund Co., 20 N.Y.S.2d 819, 260 App.Div. 80.
39 C.J. p 167 note 17.

34. Pa.—Libhart v. Wood, 1 Watts & S. 265, 37 Am.D. 461—Williams v. Eldridge, 9 Kulp 566.

35. R.I.—Barker v. Barker Artesian Well Co., 121 A. 117, 45 R.I. 297.
39 C.J. p 167 note 19.

36. Wis.—Blum v. Palace Garage Co., 252 N.W. 177, 214 Wis. 319.

37. Tenn.—Massey v. Taylor, 5 Coldw. 447, 98 Am.D. 429.
39 C.J. p 167 note 20.

38. U.S.—Westinghouse v. Carlton, N.Y., 202 F. 129, 120 C.C.A. 443.

39. Iowa.—Hopkins v. Conley, 178 N.W. 329.
39 C.J. p 167 note 22.

diverting their trade to a competitor,[40] or, when his employment is about to expire, to attempt to secure a selling agency privilege enjoyed by his employer on the expiration of the latter's contract rights thereto.[41]

After part performance. A breach, after part performance of the employment contract, where it does not go to the essence of the contract, will not prevent a recovery thereon,[42] except where the breach was willful and intentional.[43] If the employee has failed to perform the contract according to its terms, but the employer has received the benefit of the labor which exceeds the damage resulting from the breach of the contract, a recovery on a quantum meruit ordinarily is permissible;[44] and this is true whether the labor was received by the assent of the employer before the breach or whether it was received after the performance of all the work which was in fact done.[45]

b. As Ground for Deductions

Losses occasioned by an employee's negligence or want of skill may be deducted from his wages, but not losses due to causes not within his control or due in part to the employer's act; nor may a deduction be made for unskilled performance where he was employed with knowledge of his lack of skill.

Deductions from an employee's wages may be made to cover losses occasioned by his negligence or want of skill,[46] but not for losses due to causes over which the employee had no control[47] or due in part to the employer's act;[48] nor can the master withhold an amount fixed arbitrarily and bearing no relation to the damage.[49]

The master is not entitled to withhold wages because of unskillful performance where he employed the servant knowing his lack of skill.[50] Likewise, wages may not be withheld where the employer's rules authorize deductions to be made only from the wages of a certain class of employees, and the particular employee does not belong to that class.[51]

The employee may not claim the full compensation for such services as are performed with care and skill, if it is needed in part to make good the loss resulting from other work unskillfully or negligently done.[52] If the latter equals or is in excess of the total amount of wages earned, the employee can recover nothing for his labor.[53]

§ 106. —— Waiver by Employer of Right to Deductions or Forfeitures

An employer's right to claim a forfeiture of, or deduction from, an employee's wages may be waived by acts inconsistent therewith, as by his express or implied consent to, or acquiescence in, the employee's breach of contract.

The right to claim a forfeiture of or deduction from, an employee's wages for the breach of his contract may be waived by acts of the employer inconsistent therewith.[54] A waiver cannot be inferred from the employer's acts, however, if he had no knowledge[55] or no opportunity to know,[56] of his employee's breach. The employer's right to enforce a forfeiture for breach of the employment contract is waived by his consent thereto, or acquiescence therein,[57] or by conduct or practice from which such consent or acquiescence may reasonably be inferred.[58] An employer who refuses for other rea-

40. R.I.—Dondero v. Standard Emblem Co., 121 A. 401, 45 R.I. 329.

Advertised and unadvertised customers distinguished

Where employer alleges a wrongful solicitation of business by using information obtained by employee in the course of his employment as a defense to claim for wages or profits, the courts distinguish between the case of a former employee soliciting customers of his former employer who are openly engaged in business in advertised locations and his soliciting unadvertised customers who became known to the employee only because of information obtained during his employment.—Kleinfeld v. Roburn Agencies, 60 N.Y.S.2d 485, 270 App.Div. 509.

41. Wis.—Rathenberger v. Jacob, 167 N.W. 271, 167 Wis. 273.

42. Ill.—Ely v. King-Richardson, 106 N.E. 619, 265 Ill. 148, L.R.A. 1915B 1052.
39 C.J. p 167 note 25.

43. Mass.—Sipley v. Stickney, 76 N. E. 226, 190 Mass. 43, 112 Am.S.R. 309, 5 L.R.A.,N.S., 469, 5 Ann.Cas. 611.
39 C.J. p 167 note 26.

44. Mo.—Downey v. Burke, 23 Mo. 228.

45. Mo.—Downey v. Burke, supra.

46. Mo.—Maratta v. Chas. H. Heer Dry Goods Co., 177 S.W. 718, 190 Mo.App. 420.
39 C.J. p 168 note 30.
Amount deducted see infra § 114.

47. Wis.—Isaac v. Gerretson Co., 191 N.W. 55, 179 Wis. 417.
39 C.J. p 168 note 31.

48. Mich.—Williams v. Crane, 116 N.W. 554, 153 Mich. 89.
39 C.J. p 168 note 32.

49. N.Y.—Godt v. Henigson, 135 N. Y.S. 666.
39 C.J. p 168 note 34.

50. Ky.—Peters v. Craig, 6 Dana 307.

51. Ga.—Georgia R. Co. v. Gouedy, 36 S.E. 691, 111 Ga. 310.
39 C.J. p 168 note 36.

52. Wis.—Eaton v. Woolly, 28 Wis. 628.
39 C.J. p 168 note 37.

53. S.C.—Byrd v. Boyd, 15 S.C.L. 246, 17 Am.D. 740.
Vt.—Goslin v. Hodson, 24 Vt. 140.

54. N.Y.—**Corpus Juris cited in** Clark v. Irondequoit Coal & Supply Co., Inc., 11 N.Y.S.2d 869, 871, 257 App.Div. 63.
39 C.J. p 168 note 40.

55. Wis.—Wenger v. Marty, 116 N. W. 7, 135 Wis. 408.

56. Wis.—Wenger v. Marty, supra.
39 C.J. p 168 note 42.

57. Mass.—Phillips v. Universal Upholstering Co., 143 N.E. 334, 248 Mass. 475.
39 C.J. p 168 note 43.

58. N.Y.—Base Ball Players' Fraternity v. Boston American League Base Ball Club, 151 N.Y.S. 557, 166 App.Div. 484, affirmed 117 N.E. 1061, 221 N.Y. 704.
39 C.J. p 168 note 44.

sons to accept services offered loses his right to object that the services offered were unsatisfactory.[59]

Retention in employment. A continuance by the employer of an employee in his service with knowledge of his breach of the employment contract constitutes a waiver of the forfeiture of wages where, under the circumstances, it is inconsistent with an intention to insist on the forfeiture;[60] otherwise it does not constitute a waiver.[61] Where the contract of employment provides for a forfeiture of wages if the employee becomes intoxicated, a failure to discharge the employee for his first offense will not operate as a waiver of the employer's right to discharge for later offenses.[62]

Offer to pay, or payment of, wages. Voluntary payments of wages during the time of, or after, the employee's breach, with knowledge thereof on the part of the employer, precludes the latter's right to deduct therefor on the final settlement,[63] unless, from the nature of the employment and the terms of the contract, such payment is consistent with an intention to exact full performance.[64] So the right to declare a forfeiture may be waived by a tender of payment in full for the services,[65] or by a tender of judgment in a suit for the wages,[66] or the giving of a note for the wages earned,[67] or by an offer to pay pro rata wages earned up to the time of leaving,[68] even though the offer postpones the payment to the end of the employment term,[69] unless the offer is refused[70] or is made conditional and the condition is refused.[71] It has been both affirmed[72] and denied[73] that a promise to pay forfeited wages must be supported by a legal consideration in order to bind the employer.

§ 107. Penalties Imposed on Employer

Where a contract provides for payment of a penalty by the employer on violating certain contract obligations, the parties' rights are determined by the terms of the contract.

Where a contract of employment itself provides for the payment of a penalty by the employer on violation of certain contract obligations, the rights of the parties are determined by the terms of the contract.[74]

§ 108. Waiver by, or Estoppel of, Employee

An employee's acceptance of wage payments does not necessarily bar his right to claim additional compensation, although it will if he accepts them without objection knowing that the employer regards them as payments in full.

An employee does not waive his right to compensation by neglecting to demand it when due[75] or by a failure to take exception to an erroneous statement as to the amount due contained in a letter to him from the employer;[76] and his previous acceptance of wage or salary payments does not necessarily bar his right to claim additional compensation.[77]

59. Mass.—Goddard v. Morrissey, 53 N.E. 207, 172 Mass. 594.

60. Pa.—**Corpus Juris cited in** Kemerer v. Johnstown Bank & Trust Co., 182 A. 74, 77, 120 Pa. Super. 173.
39 C.J. p 169 note 46.

61. Wis.—Wenger v. Marty, 116 N. W. 7, 135 Wis. 408.
39 C.J. p 169 note 47.

62. Ark.—Van Vleet v. Hayes, 19 S. W. 427, 56 Ark. 128.
39 C.J. p 169 note 48.

63. Colo.—Olson v. Harvey, 188 P. 751, 68 Colo. 180.
39 C.J. p 169 note 49.

Waiver of particular requirements

(1) Company employing store manager under contract providing for weekly drawing account waived provisions as to volume of business and collections and losses, where it continued payments with knowledge of manager's noncompliance.—Robin v. Sydeman Bros., 163 S.E. 103, 158 Va. 289.

(2) In suit by salesman to recover salary and commissions, reconventional demand based on theory that after certain date compensation reverted to smaller amount because of salesman's failure to sell a certain amount was properly dismissed notwithstanding compensation was intended to be dependent on salesman's reaching a certain figure every month, where employer continued to pay salesman the larger amount up to the time of termination of employment.—Tricou v. Philip H. Sizeler, Inc., La.App., 195 So. 361.

64. N.Y.—Gerber v. Kalmar, Puck & Abrahams Cons., Inc., 171 N.Y.S. 92, 104 Misc. 85.
39 C.J. p 169 note 50.

65. N.Y.—Paine v. Howells, 90 N.Y. 660.
Vt.—Patnote v. Sanders, 41 Vt. 66, 98 Am.D. 564.

66. Wis.—Bast v. Byrne, 8 N.W. 494, 51 Wis. 531, 37 Am.R. 841.

67. N.Y.—Thorpe v. White, 13 Johns. 53.

68. Mass.—Rice v. Dwight Mfg. Co., 2 Cush. 80.
39 C.J. p 169 note 54.

69. Vt.—Merrill v. Fish, 35 A. 368, 68 Vt. 475.

70. N.C.—Lane v. Phillips, 51 N.C. 455.

71. N.Y.—Monell v. Burns, 4 Den. 121.
39 C.J. p 169 note 57.

72. Mass.—Rice v. Dwight Mfg. Co., 2 Cush. 80.

73. Vt.—Cahill v. Patterson, 30 Vt. 592.

74. Ky.—Martin v. Mahan Jellico Coal Co., 265 S.W. 496, 205 Ky. 156.
39 C.J. p 170 note 60.
Penalty for withholding wages due see infra §§ 137, 156.

75. Mass.—White v. Atkins, 8 Cush. 367.
S.C.—**Corpus Juris quoted in** Baxter v. Camp Mfg. Co., 175 S.E. 513, 515, 173 S.C. 194.
Forfeiture of commissions see supra § 92.

76. Cal.—Hughes v. Pacific Wharf & Storage Co., 205 P. 105, 188 Cal. 210.
S.C.—**Corpus Juris quoted in** Baxter v. Camp Mfg. Co., 175 S.E. 513, 515, 173 S.C. 194.

77. U.S.—Martin v. Campanaro, C.C. A.N.Y., 156 F.2d 127—Gatliff Coal Co. v. Cox, C.C.A.Ky., 152 F.2d 52.
N.Y.—Hicks v. Haight, 11 N.Y.S.2d 912, 171 Misc. 151—Walker v. Edward A. Thompson, Inc., 25 N.Y. S.2d 872.
Pa.—Taylor v. Mathues, 170 A. 309, 112 Pa.Super. 169.

An employee who offers evidence that he refrained from taking his full salary from month to month without any intention of waiving the balance is not estopped to demand or sue for such unpaid balance;[78] likewise an employee is not precluded from showing that there was an understanding that, while the payments were present satisfaction for such wages as he was to receive in money, the employer agreed later on to make up and pay in some manner the difference between such payments and the real value of the employee's services.[79]

On the other hand, an employee cannot claim wages in excess of the amount already received from his employer for which he has given a receipt in full for services performed,[80] or which he has accepted without objection knowing that his employer regards them as payment in full,[81] or where the amount received is based on monthly accounts which he himself has presented[82] or which his employer has rendered and in which he has acquiesced;[83] and an employee waives his claim for commissions by abandoning such claim when it appears that his overdrafts exceeded his commissions.[84] An express waiver or release of rights to additional compensation is not ineffective or without consideration because not all of the fixed compensation due under the contract has been paid.[85]

Whether a receipt for compensation, given by an employee, constitutes a waiver or release depends on the circumstances under which it was given;[86] likewise a release without consideration creates no estoppel.[87] The employee is not bound by a recital in a receipt for wages admittedly due, releasing the employer from all future responsibility under the unterminated contract of employment.[88]

Evidence raising a presumption of acquiescence on the part of the employee may be rebutted by other evidence negativing an estoppel,[89] as where it is shown that a receipt for wages has been fraudulently procured,[90] or that the receipt is for salary and that the employee's claim is for commissions,[91] or that the receipt is for services before discharge and that the employee's claim is for wages accruing after the discharge.[92]

Acceptance of salary pending arbitration
N.Y.—Alper v. Greater New York Broadcasting Corporation, 34 N.Y.S.2d 953, 178 Misc. 411, affirmed 43 N.Y.S.2d 272, 266 App.Div. 839, appeal denied 43 N.Y.S.2d 747, 266 App.Div. 917.

Irregular payments
Acceptance of payments made to employee at irregular times and in irregular amounts, and final payment not being accepted as full settlement, constituted no waiver of increased compensation agreed on.—Mineral Basin Copper Co. v. Standish, 250 P. 364, 31 Ariz. 65.

78. Neb.—Fairchild v. Fairchild Clay Products Co., 3 N.W.2d 581, 141 Neb. 356.

79. Iowa.—Meginnes v. McChesney, 160 N.W. 50, 179 Iowa 563, L.R.A. 1917E 1060.

80. S.C.—**Corpus Juris quoted in** Baxter v. Camp Mfg. Co., 175 S.E. 513, 515, 173 S.C. 194.
39 C.J. p 170 note 64.

81. S.C.—**Corpus Juris quoted in** Baxter v. Camp Mfg. Co., 175 S.E. 513, 515, 173 S.C. 194.
39 C.J. p 170 note 65.

Failure to object to deductions
La.—Burgess v. Simon, 1 La.App. 204.
S.C.—Baxter v. Camp Mfg. Co., 175 S.E. 513, 173 S.C. 194.

Employee working in different capacity
A laborer who is employed as a night watchman on a public improvement by a contractor obligated to pay specified minimum wages, and who for six months accepts without protest his regular weekly wages as a watchman, although allegedly actually working as a pumper, waives any right to recover additional pay based on pumpers' wages.—Hurt v. Edgell, 75 P.2d 834, 147 Kan. 234.

82. S.C.—**Corpus Juris quoted in** Baxter v. Camp Mfg. Co., 175 S.E. 513, 515, 173 S.C. 194.
39 C.J. p 170 note 66.

83. Cal.—Shade v. Sisson Mill & Lumber Co., 47 P. 135, 115 Cal. 357.
S.C.—**Corpus Juris quoted in** Baxter v. Camp Mfg. Co., 175 S.E. 513, 515, 173 S.C. 194.

84. Ill.—Deitchman v. Korach, 71 N.E.2d 367, 330 Ill.App. 365.

85. U.S.—Lorentz v. R. K. O. Radio Pictures, C.C.A.Cal., 155 F.2d 84, certiorari denied 67 S.Ct. 81, 329 U.S. 727, 91 L.Ed. ——.

86. U.S.—Martin v. Campanaro, C.C.A.N.Y., 156 F.2d 127, certiorari denied 67 S.Ct. 112, 329 U.S. 759, 91 L.Ed. ——.

Release or waiver not shown
Where employees of bankrupt continued to work while their representative was making efforts to procure revised terms, the fact that employees signed pay envelopes containing statement showing time period, amount due, rate of pay, and deductions and accepted pay checks at old rate, was not the equivalent of giving releases or waiver of their claims for additional compensation.—Martin v. Campanaro, supra.

87. Tex.—Austin Bridge Co. v. Teague, Civ.App., 149 S.W.2d 674, reversed on other grounds 152 S.W.2d 1091, 137 Tex. 119.

Acceptance of pay for lower grade of labor
Tex.—Austin Bridge Co. v. Teague, supra.

88. La.—Wells v. Sherrill Hardwood Lumber Co., 92 So. 706, 151 La. 1081.

89. Md.—Richardson v. Anderson, 72 A. 485, 109 Md. 641, 130 Am.S.R. 543, 25 L.R.A.,N.S., 393.
39 C.J. p 170 note 69.

Oral insistence on rights under contract
Where written employment contract provided for payment of bonus to employee, and early in one year employer advised employee orally that he would not receive bonus for that year, and the employee received no more monthly bonus slips showing amount of bonus for each month, but not mentioned in contract, employee who orally insisted on his rights under the written contract and continued working did not waive his right to bonus and was not estopped to enforce the written contract.—Albert-Ross Refrigerator & Fixture Co. v. Pastore, 111 P.2d 231, 107 Colo. 286.

90. Wis.—Dreger v. Tarrant, 162 N.W. 481, 165 Wis. 414.

91. Mo.—Morris v. Z. T. Briggs Photographic Supply Co., 179 S.W. 783, 192 Mo.App. 145.

92. La.—Wells v. Sherrill Hardwood Lumber Co., 92 So. 706, 151 La. 1081.

Waiver or estoppel under minimum wage statutes is discussed infra §§ 151–153.

An employee who voluntarily resigns his position thereby waives his right to a continuance of his pay;[93] nor can he recover a deposit in the hands of his employer on the ground that it is a part of the compensation for his services where he has already sued for and recovered their reasonable value.[94]

Continuing in employment; reinstatement. Where an employee continues in the employment after the employer's failure to furnish work for a part of the service period contracted for, he does not waive his right to recover the amount due him under the contract for the period for which he was refused work.[95] An employee's acceptance of reinstatement in his employer's service does not constitute a waiver of his right to recover back pay for the time during which he was wrongfully deprived of employment,[96] particularly where at all times he asserted such claim.[97]

Overtime. An employee has been held estopped to claim compensation for overtime work where he never reported it, or advised his employer that he expected compensation for it, until he instituted suit after his discharge.[98]

2. Amount

§ 109. Where Not Fixed by Contract

Where the compensation of an employee is not fixed by contract, he is entitled to recover the reasonable value of his services.

An employee is entitled to recover the reasonable value of his services if the contract of employment does not fix the amount of compensation,[99] or if the contract does fix the amount but, because of the employer's breach, the employee is entitled to treat the contract as having been rescinded by his employer,[1] or if the contract contains a provision for the later determination of the amount and the provision is not carried out[2] or is carried out by agreeing that a reasonable amount shall be paid.[3] A provision that the employee's compensation shall be a limited amount for a probationary period, if at the end of that time his services do not prove satisfactory, permits a recovery beyond the limited amount and equaling the reasonable value of his services if he is discharged on other grounds than dissatisfaction with his work.[4]

Intention of parties. The intention and expectation of the parties as to compensation, expressed in general terms, in so far as they are made a part of the contract by the evidence in the case, are to be taken into consideration and followed in determining the amount recoverable,[5] but a general intention and expectation, not incorporated in the con-

93. Tex.—Beard v. Gulf, C. & S. F. Ry. Co., Civ.App., 160 S.W. 633.
Abandonment generally see supra § 83.

94. Ill.—Myers v. Rehkopf, 30 Ill. App. 209.

95. U.S.—Coghlan v. Stetson, C.C.N. Y., 19 F. 727.
Duty to furnish work see supra § 61.

96. Minn.—George v. Chicago, R. I. & P. Ry. Co., 235 N.W. 673, 183 Minn. 610, affirmed 237 N.W. 876, 183 Minn. 610.

97. Minn.—George v. Chicago, R. I. & P. Ry. Co., supra.

98. Wash.—Herman v. Golden Arrow Dairy, 71 P.2d 581, 191 Wash. 582.
Right to payment for overtime work generally see supra § 97.

99. Kan.—**Corpus Juris cited in** Sturgis v. Kansas City, 100 P.2d 661, 666, 151 Kan. 658.
Mass.—Weiner v. Pictorial Paper Package Corporation, 20 N.E.2d 458, 303 Mass. 123.
N.Y.—Georgis v. Giocalas, 233 N.Y. S. 16, 225 App.Div. 577.
Okl.—Oklahoma Portland Cement Co. v. Pollock, 73 P.2d 427, 181 Okl. 266.
39 C.J. p 171 note 79.

Implied promise to pay reasonable worth
Where employer accepts services of employee for any period of time, the law implies a promise to pay what such services are reasonably worth, unless it is understood that services are to be rendered gratuitously or unless they are rendered under circumstances which repel the presumption.—Gillespie Land & Irr. Co. v. Jones, 164 P.2d 456, 63 Ariz. 535—Dey v. Quinn, 187 P. 578, 21 Ariz. 265.

1. Okl.—**Corpus Juris cited in** Gelvin v. Perkins, 68 P.2d 75, 76, 180 Okl. 82.
39 C.J. p 171 note 80.

2. Cal.—Carney v. Hayter, 145 P.2d 712, 62 Cal.App.2d 792.
39 C.J. p 171 note 81.

3. N.Y.—Muller v. New York, 63 N. Y. 353.
39 C.J. p 171 note 82.

4. N.Y.—Spain v. Manhattan Shirt Co., 164 N.Y.S. 527, 177 App.Div. 610.

5. Ky.—Chiles v. Craig, 4 Dana 544.

Union wage
Provision of alleged oral contract of lifetime employment, entered into in consideration of employee returning to work during pendency of strike, that such employment should be at same wages received by employee previous to strike, was intended by both parties to mean the union wage based on character of work employee was performing at time of strike.—Baltimore & O. R. Co. v. Foar, C.C.A.Ind., 84 F.2d 67.

Growth of business
Where plaintiff was engaged to manage a secondhand store purchased by defendant under an arrangement that plaintiff was to take out enough to cover his living expenses, and that when business grew sufficiently to justify it, he was to receive more, implicit in the arrangement was an understanding that plaintiff was to receive a reasonable compensation for his services if and when the business warranted it, and, where he built the business up, he was entitled to reasonable compensation for his services.—Jeffs v. Stephenson, 114 P.2d 987, 9 Wash.2d 335.

tract, cannot be made the basis of a recovery.[6]

Benefits received by employer. Where the services rendered by the employee are of such a nature that their value is customarily measured by reference to the benefits received by the employer, the extent and value of those benefits are to be taken into account in determining the reasonable value to be placed on such services.[7] Where, however, the benefits received are merely incidental, and an adequate measure of value is to be found in the character of the service itself, the award must be based on the character of the service independently of the benefits received.[8]

Known characteristics of employee's work. Where one employs a person whom he knows to possess certain outstanding characteristics affecting the quality of his work, without any express agreement as to compensation, and afterward accepts the work, a promise to pay the customary charges of that particular employee is implied, especially where the work corresponds with the work usually done by him.[9]

Standard of reasonable value generally. If the employee's service can be classified as belonging to a well defined group, the presumption is that the wages ordinarily paid for that class of labor correctly measures the amount recoverable by the employee,[10] and the classification depends on the character of the service called for by the contract rather than on the words used or not used by the parties in defining it.[11] In other words, the amount of compensation to which an employee is entitled will depend on his nominal classification, the type of work performed, the terms of the union or other contract, and any other pertinent circumstances that may be involved.[12] Where the employee's service, although belonging to a well defined class, has other elements of value, due to the circumstances under which it is rendered, other considerations in addition to the ruling rate of wages must be taken into account in determining the reasonable worth of the service[13] unless the contract in express terms stipulates that the employee is to receive merely the wages usually given to employees of that class.[14]

§ 110. Where Fixed by Contract

a. In general
b. Contract rate and time
c. Provision for optional fixing of rate
d. Change in amount

a. In General

Employers and employees may contract as to the amount of compensation to be paid.

As a general rule employees have the right to negotiate with the employer concerning wages and to make such demands as to the amount of wages as to them seems right,[15] and the employer has the right to determine the wages he is willing to pay employees.[16] Ordinarily the employer is entitled to accept or reject the terms of wages proposed by the employees or their representatives,[17] and, on rejection, to decline to continue the employment.[18]

6. Ky.—Chiles v. Craig, 4 Dana 544.
39 C.J. p 172 note 86.

7. N.Y.—Metz v. Luckemeyer, 12 N.Y.S. 550, 59 N.Y.Super. 53, affirmed 29 N.E. 149, 128 N.Y. 682.
39 C.J. p 172 note 87.

Tax consultant

The amount saved is one of the considerations in determining the value of services of a tax consultant, but it is not the sole element.—Lalley v. Escoett, 146 F.2d 667, 79 U.S.App.D.C. 306.

8. U.S.—Wendell v. Willetts, C.C.N.Y., 183 F. 1014.
39 C.J. p 172 note 88.

9. Vt.—Felt v. Rockingham School Dist. No. 2, 24 Vt. 297.
39 C.J. p 172 note 89.

10. Ohio.—Lawson v. Perry, Wright p 242.
39 C.J. p 172 note 90.

11. Wis.—Von Kaas v. Hamilton, 23 N.W. 424, 63 Wis. 132.
39 C.J. p 172 note 91.

12. Conn.—Primus v. D. V. Frione & Co., 198 A. 165, 124 Conn. 1.
Ga.—Allen v. Davis, 23 S.E.2d 665, 195 Ga. 167.
Ky.—Rowlett v. Louisville & N. R. Co., 75 S.W.2d 371, 255 Ky. 691—Brooks v. Louisville & N. R. Co., 291 S.W. 371, 218 Ky. 279.
N.Y.—Grosso v. General Bronze Corp., 57 N.Y.S.2d 227.
S.D.—Mussetter v. Campbell-Lowrie-Lautermilch Corporation, 271 N.W. 98, 65 S.D. 82.

A railroad pumper, assigned to work part time as section laborer during certain period, with intention that such arrangement should be permanent, was not entitled to payment at pumper's rate of wages for all his work under exception to applicable rule that employee working on more than one class of work on any day should be allowed rate applicable to character of work preponderating for such day, except that, when temporarily assigned to lower rated position, rate of pay should not be reduced.—Rogers v. Union Pac. R. Co., C.C.A.Or., 145 F.2d 119.

13. Cal.—Crusoe v. Clark, 59 P. 700, 127 Cal. 341.
39 C.J. p 172 note 92.

14. Ill.—Heideman v. Bolger, 65 Ill. App. 658.
39 C.J. p 172 note 93.

15. Ala.—Welch v. State, 183 So. 879, 28 Ala.App. 273, certiorari denied 183 So. 886, 236 Ala. 577.

16. Fla.—Paramount Enterprises v. Mitchell, 140 So. 328, 104 Fla. 407.

17. Ala.—Welch v. State, 183 So. 879, 28 Ala.App. 273, certiorari denied 183 So. 886, 236 Ala. 577.

Union wages

An employer has the right to refuse to pay union wages.—People v. Harris, 91 P.2d 989, 104 Colo. 386, 122 A.L.R. 1034.

Operation of railroad on scale of wages causing loss is not required.—Schuppan v. Peoria Ry. Terminal Co., D.C.Ill., 9 F.2d 448, affirmed Shuppan v. Peoria Ry. Terminal Co., C.C.A., 30 F.2d 569.

18. Ala.—Welch v. State, 183 So.

Employees may organize trade unions for the purpose of fixing the rate of wages acceptable to them,[19] and ordinarily a contract between a union and an employer concerning the rate of wages to be paid employees is valid[20] and imposes the reciprocal obligation on the union and its members to work in accordance therewith.[21] It has been held that a contract as to wages between a union and an employer may not effectively be modified by the employer and individual employees so as to provide for a different and lower scale of wages,[22] at least without the consent of the union itself.[23]

Where the terms of the employment contract fix the compensation of an employee for his services, such provisions determine the amount of his recovery,[24] irrespective of what the services are actually worth.[25] Accordingly, wherever work is done by one for another for a price named by one and acquiesced in by the other, the amount named is the amount recoverable.[26] It has been held that minimum payment clauses in contracts for services are valid between the parties.[27]

Per cent of fund or income. Where the contract fixes the compensation for services at a certain per cent of a stated fund or income, the wages recoverable will change in amount as the fund or income on which they are based changes.[28]

Amount dependent on conditions affecting payment. If an agreement fixing the rate of wages stipulates that the employees shall work for less than the full rate until the development of the business to a certain point, and that the back wages shall then be paid out of the proceeds available for the purpose, the then existing fund must be divided among those having claims against it, the share of a particular employee, in the absence of any agreement as to priorities, depending on the size of the fund and the proportion the amount due him bears to the aggregate amount of claims.[29]

Baseball agreements. A professional baseball player, under contract fixing his salary, is entitled to the amount named, undiminished, for the period named, provided there has been performance or readiness to perform on his part.[30] This right is not affected by a transfer or "sale" of the player by one club to another,[31] even though under the "National Agreement" of organized baseball the right to transfer, restricted by certain conditions precedent, is given to the employer, and such conditions have been performed.[32]

879, 28 Ala.App. 273, certiorari denied 183 So. 886, 236 Ala. 577.

19. Fla.—Paramount Enterprises v. Mitchell, 140 So. 328, 104 Fla. 407.
63 C.J. p 660 note 86.

20. Miss.—Moore v. Illinois Cent. R. Co., 176 So. 593, 180 Miss. 276.

Duress

Agreement to pay highest wages to journeymen painters prevailing in either of two localities, entered into with union refusing to proceed with work without such concession, was held not obtained by duress; duress in obtaining contract from employer to pay certain wages must be proved by compulsion, actual, present, or potential.—Glicman v. Barker Painting Co., 238 N.Y.S. 419, 227 App.Div. 585.

21. U.S.—Lynch v. Vincent, D.C. Mo., 55 F.Supp. 44.
Kan.—Ryan v. Ryan, 133 P.2d 119, 156 Kan. 348.
63 C.J. p 671 note 52.

Oral agreement

Union member having accepted benefits of oral agreement between union and employer providing for a substantial increase in his wages was bound by limitations of such agreement and could not thereafter recover difference between wages received under such agreement and wages allegedly earned under general collective bargaining agreement between union and association of hotel operators of which his employer was a member.—Clark v. Claremont Apartment Hotel Co., 141 P.2d 403, 19 Wash.2d 115, 153 A.L.R. 50.

22. N.Y.—McNeil v. Hacker, 21 N.Y.S.2d 432.

23. N.Y.—Reichert v. Quindazzi, 6 N.Y.S.2d 284.

24. Cal.—Merkley v. Merkley, 86 P.2d 89, 12 Cal.2d 543.
Del.—Powers v. Equity Pictures Corporation, 134 A. 97, 15 Del.Ch. 198.
N.Y.—Byrne v. Blaker Advertising Agency, 267 N.Y.S. 662, 239 App. Div. 395—Glicman v. Barker Painting Co., 238 N.Y.S. 419, 227 App. Div. 585.
39 C.J. p 173 note 94.

Construction as a whole

Whole employment contract must be read together in determining amount of employee's compensation. —Clinton v. Des Moines Music Co., 228 N.W. 664, 209 Iowa 636.

Specific oral agreement

Where labor union and association of hotel operators contracted in writing with reference to wages and conditions of employment generally, and union representative and individual hotel operator subsequently agreed orally as to wages to be paid individual union members employed by such hotel, oral agreement was controlling, even though it fixed wages of assistant engineer employed by hotel at a rate lower than scale provided in written contract.—Clark v. Claremont Apartment Hotel Co., 141 P.2d 403, 19 Wash.2d 115, 153 A.L.R. 50.

25. Ill.—Bradbury v. Helms, 92 Ill. 35.
Kan.—Houghton v. Kittleman, 52 P. 898, 7 Kan.App. 207.

26. Mo.—Norton v. Higbee, 38 Mo. App. 467.
N.Y.—Bradley v. McWilliams Dredging Co., 67 N.Y.S.2d 145.
39 C.J. p 173 note 96.

27. Cal.—Payne v. Pathe Studios, 44 P.2d 598, 6 Cal.App.2d 136—A. B. Field & Co. v. Haven, 173 P. 108, 36 Cal.App. 669.

28. Ill.—Adair v. Maxwell, 17 Ill. 98.
39 C.J. p 173 note 97.

29. Colo.—McCormick v. Cox, 44 P. 768, 8 Colo.App. 17.
39 C.J. p 173 note 98.

30. N.Y.—Base Ball Players' Fraternity v. Boston American League Base Ball Club, 151 N.Y.S. 557, 166 App.Div. 484, affirmed 117 N.E. 1061, 221 N.Y. 704.

31. N.Y.—Base Ball Players' Fraternity v. Boston American League Base Ball Club, supra.
39 C.J. p 173 note 1.

32. N.Y.—Base Ball Players' Fraternity v. Boston American League Base Ball Club, supra.

b. Contract Rate and Time

Where the contract fixes compensation at a specified amount per unit of time, the amount of wages due is to be computed at the contract rate for the period of time specified in the contract.

In the case of a contract fixing compensation at a specified amount per unit of time, the amount which may be recovered is to be computed at the contract rate for the period of time specified in the contract,[33] provided, as discussed supra § 81, there has been a substantial performance or readiness to perform on the part of the employee. The day of employment and the day of discharge are included as entire days in determining the amount due for personal services.[34] Where an employee engages to perform certain work within a specified time for an agreed price, he is entitled to the full price on completion of the work within the period specified.[35]

Sundays. Sundays included within the term of service are to be paid for, where the contract so stipulates,[36] provided the legality of the contract is not affected by any provision therein requiring labor to be performed on Sunday.[37]

Days of actual service. If wages are payable weekly, an employee, starting work in the middle of a week, is entitled to recover wages only for the days actually given to the work.[38] However, he is not restricted in his recovery to payment only for days which he has spent in a particular place,[39] or in the discharge of particular duties,[40] where his employment contemplates other duties to be performed, and in other places.

Coming late and going early. An employee can recover for a full day's work, even though he comes to his work late and leaves early, provided he can show that his employer had knowledge of his practice and acquiesced in it.[41] Where no such acquiescence is shown, however, an employee, contracting to labor a certain number of hours each day must show in substance a full day's work in order to recover a day's pay,[42] and, if he does not show this, it has been held that, in the absence of agreement providing otherwise, he cannot recover for the part of the day when he does work,[43] even though his wages are stated in the contract to be a fixed sum per hour.[44]

Intermittent work. Whether an employee who is not kept at work by his employer for the entire period of his employment may recover for the entire period or only for the time he actually works depends on the terms of the contract, a recovery for the entire time covered by the contract being allowed in some cases,[45] and only for the period of actual service in others.[46]

Work and rate scale. Where the contract provides different wages for different kinds of work, and where it can be construed as providing for an apportionment of the compensation, the amount which the employee can recover depends on the time which he spent in each kind of work.[47]

c. Provision for Optional Fixing of Rate

Where the contract so provides, either the employer or the employee may have the option of fixing the rate of compensation.

Where the contract of employment leaves it to the employer to fix the employee's wages, it has been held that the employee can recover only the amount fixed by his employer, even though it is considerably less than the reasonable value of the service, provided the employer has acted in good faith[48] and provided also he fixes the compensation when the contract requires him to do so[49] or when called on by the employee.[50]

If, under the employment contract, the compensation is to be fixed by the employee, he cannot make an unreasonable and oppressive charge.[51]

33. N.Y.—Jova v. Southern Impr. Co., 22 N.Y.S. 1031, 68 Hun 559.
39 C.J. p 173 note 4.

Discharged employee was held entitled to unpaid compensation at contract price until termination of contract or employer's breach thereof.—McKinney v. Smith, Tex.Civ. App., 271 S.W. 247.

34. Minn.—Olson v. Rushfeldt, 84 N. W. 123, 81 Minn. 381.

35. La.—Eberle & Co. v. C. C. Tank & Boiler Works, 5 La.App. 268.

36. Iowa.—Alfree v. Gates, 47 N.W. 993, 82 Iowa 19.

37. Iowa.—Alfree v. Gates, supra.
39 C.J. p 173 note 8.

38. N.Y.—Berlat v. Lasner, 171 N.Y. S. 143.

39. S.D.—Calkins v. Seabury-Calkins Cons. Min. Co., 58 N.W. 797, 5 S.D. 299.
39 C.J. p 174 note 10.

40. S.D.—Calkins v. Seabury-Calkins Cons. Min. Co., supra.

41. Vt.—Willey v. Warden, 27 Vt. 655.

42. Pa.—Wilson v. Lyle, 16 A. 861.

43. Pa.—Wilson v. Lyle, supra.

44. Pa.—Wilson v. Lyle, supra.

45. N.Y.—Dixey v. Al. H. Woods Productions Co., 151 N.Y.S. 224, 88 Misc. 506.
39 C.J. p 174 note 16.

46. N.Y.—Pollock v. Shubert Theatrical Co., 131 N.Y.S. 386, 146 App. Div. 628.
39 C.J. p 174 note 17.

47. Mass.—Brown v. Vinal, 3 Metc. 533.
39 C.J. p 174 note 18.

48. Minn.—Butler v. Winona Mill Co., 9 N.W. 697, 28 Minn. 205, 41 Am.R. 277.
39 C.J. p 174 note 20.

49. Ohio.—Toledo, A. A. & N. M. R. Co. v. Lott, 10 Ohio Cir.Ct. 249, 6 Ohio Cir.Dec. 447.

50. Ohio.—Toledo, A. A. & N. M. R. Co. v. Lott, supra.

51. Ill.—Van Arman v. Byington, 38 Ill. 443.

d. Change in Amount

The amount of compensation may be changed by mutual agreement.

The employment contract may be supplemented by a later valid agreement between the parties, amounting to a suspension or abrogation of the old contract and nullifying any right of the employee to recover compensation under it;[52] or the modifying contract may merely effect a change in the terms of the original contract relating to compensation, in which case recovery can be had only in the amount stipulated in the later agreement.[53] The modifying agreement must be supported by a consideration.[54]

Increase. In order that an agreement between an employer and his employee for a future increase of wages may be enforceable, it must be certain and explicit[55] and based on a valid consideration,[56] and it has been held that, as a promise made to induce a party to do that which he is already bound to do by contract is without consideration, a mere modification of an existing contract whereby the employee is to receive a larger compensation is unenforceable.[57] However, where the original contract is validly canceled, a new one executed in its place for which the mutual promises are again a consideration is valid and enforceable.[58] It follows that a mere promise of additional compensation made by the employer after the employee has left the service is without consideration and of no effect.[59] If, under its terms, the increase is made dependent on the performance of one or more conditions precedent, the employee, in order to be entitled to the increase, must prove a performance of all the conditions named[60] or the making of a valid new contract entitling him to the increase on the terms named therein.[61]

Decrease. Where an employee is hired for a definite term at a fixed compensation, his employer cannot reduce his compensation during the term without his consent.[62] However, when his consent is once given, the employee is bound and cannot thereafter claim right to the difference between the old and the new wage[63] even though he gave his consent to avoid his discharge.[64]

The rule that wages cannot be reduced within the term without the employee's consent applies equally to employees by the day, week, month, or year,[65] but inasmuch as the employment is for recurring terms the same scale of wages is held to continue from one term to the next[66] until the employee has had actual notice of reduction either di-

52. N.Y.—Granz v. Lichtenhein, 32 N.Y.S. 469, 84 Hun 131.

53. Cal.—O'Brien v. L. E. White Lumber Co., 185 P. 514, 43 Cal. App. 703.
Ohio.—Schneider v. Springfield Metallic Casket Co., App., 37 N.E.2d 648.
39 C.J. p 175 note 29.

Adjustment

Contract of employment, providing salary be adjusted not less than every two years, was held to require adjustment within two years.—Miller v. Rodd, 131 A. 482, 285 Pa. 16.

54. Ky.—Marks v. Grace, 266 S.W. 30, 205 Ky. 456.

55. N.Y.—Mackintosh v. Kimball, 92 N.Y.S. 132, 101 App.Div. 494.
39 C.J. p 175 note 48.

56. N.Y.—Obrentz v. Wesenfeld, 170 N.Y.S. 966, 103 Misc. 664.
39 C.J. p 176 note 49.

57. N.Y.—Obrentz v. Wesenfeld, supra.
39 C.J. p 176 note 50.

58. N.Y.—Schwartzreich v. Bauman-Basch, Inc., 131 N.E. 887, 231 N.Y. 196, reargument denied 132 N.E. 905, 231 N.Y. 602.

59. N.Y.—Altmayer v. Lahm, 113 N.Y.S. 964.

60. Ark.—Van Vleet v. Hayes, 19 S.W. 427, 56 Ark. 128.
39 C.J. p 176 note 53.

61. Ind.—Munchoff v. Ford, 46 N.E. 357, 17 Ind.App. 131.
39 C.J. p 176 note 54.

Retroactive increase

(1) Where collective bargaining representative and employer reached agreement that increased pay when approved by War Labor Board would be retroactive, and only thing uncertain was effective date of contract by reason of necessity of approval of increase by War Labor Board, employee was entitled to the retroactive pay increase benefits when contract became effective.—McNeil v. Peoples Life Ins. Co., D.C.Mun.App., 43 A.2d 293.

(2) Where a contract between a company and a labor union, providing for a wage increase, provides that the agreement shall be retroactive to, and effective as of, a date almost two years earlier as of which the former collective bargaining agreement had expired, a member of the union, who voluntarily left the company's employment during the period when negotiations were in progress was entitled to be paid the increase from the effective date thereof to the date of the severance of his employment.—McKinley v. Johnstown Traction Co., 58 Pa.Dist. & Co. 346.

62. Ill.—Dierschow v. West Suburban Dairies, 276 Ill.App. 355.
N.Y.—Barth v. Addie Co., 2 N.E.2d 34, 271 N.Y. 31, reargument and amendment of remittitur denied 3 N.E.2d 211, 271 N.Y. 615.
Okl.—Choctaw Lumber Co. v. Peavy, 36 P.2d 906, 169 Okl. 307.
39 C.J. p 175 notes 32, 35.

63. N.J.—Donnellan v. Halsey, 176 A. 176, 114 N.J.Law 175.
Pa.—Trainer v. Laird, 183 A. 40, 320 Pa. 414.
39 C.J. p 175 note 33.

Less than prevailing rates

Fact that railroad's announcement of wage cut referred to proposed wage as "proportion of wages" was held not to negative intention wages should be less than prevailing rates.—Shuppan v. Peoria Ry. Terminal Co., C.C.A.Ill., 30 F.2d 569.

64. N.Y.—Romaine v. Beacon Lith. Co., 34 N.Y.S. 124, 13 Misc. 122.

65. S.C.—**Corpus Juris quoted in** Cooksey v. Beaumont Mfg. Co., 9 S.E.2d 790, 792, 194 S.C. 395.
39 C.J. p 175 note 35.

66. S.C.—**Corpus Juris quoted in** Cooksey v. Beaumont Mfg. Co., 9 S.E.2d 790, 792, 194 S.C. 395.
39 C.J. p 175 note 36.

rectly from his employer[67] or indirectly through his fellow employees.[68] The employee's continuance in the service after receiving such notice, however, raises an implication of his consent to such reduction from the beginning of a subsequent period[69] although he does not in terms signify such consent[70] or even though he notifies the employer to request his resignation if the reduction is to be put into effect.[71] However, where the facts are such as to show that acquiescence in the reduction is not to be implied from the employee's continuing in the employment under the contract,[72] as where he expressly refuses to assent to the reduction but remains in his employment pending further negotiations with his employer and is allowed by his employer to perform his duties,[73] the employer is liable for such services at the old rate.

Under a contract giving the employer discretion to modify or change in full the compensation for certain work, the judgment so exercised by the employer must be free from fraud or mistake in order to permit a reduction of compensation.[74] Where a minimum wage has been set by agreement, the employer may not reduce the compensation of an employee below such minimum,[75] but he may reduce the compensation to the minimum set by such contract.[76]

Temporary reduction. Where the modifying agreement contemplates merely a temporary reduction, the old wage scale to be restored on the happening of a contingency named, the employee is entitled to the old wage if the contingency has happened;[77] otherwise he is not.[78]

Protest of charges. An employer who merely protests the size of his employee's charges, but continues accepting his services without giving him notice of a definite reduction, or having an agreement with him as to future charges, is held to have consented to a continuance of the old scale.[79]

§ 111. —— Commissions

Where compensation is in whole or in part in the form of commissions, the amount recoverable and the method of computation are dependent on the terms of the contract.

Where the compensation of the employee is in whole or in part in the form of commissions, the contract determines the amount recoverable and the method of computation to be followed,[80] as, for example, in the case of contracts fixing minimum

67. S.C.—**Corpus Juris quoted in** Cooksey v. Beaumont Mfg. Co., 9 S.E.2d 790, 792, 194 S.C. 395.
Tex.—Pennington v. Thompson Bros. Lumber Co., Civ.App., 122 S.W. 923.

68. S.C.—**Corpus Juris quoted in** Cooksey v. Beaumont Mfg. Co., 9 S.E.2d 790, 792, 194 S.C. 395.
Tex.—Pennington v. Thompson Bros. Lumber Co., Civ.App., 122 S.W. 923.

69. U.S.—Shuppan v. Peoria Ry. Terminal Co., C.C.A.Ill., 30 F.2d 569.
Ind.—Davis v. Clapp, 149 N.E. 908, 83 Ind.App. 697.
39 C.J. p 175 note 39.

70. N.Y.—Hughes v. Eddy Valve Co., 131 N.Y.S. 744, 147 App.Div. 356.

71. Ill.—Barron v. Templeton, 207 Ill.App. 161.

72. Iowa.—Redfield v. Boston Piano & Music Co., 160 N.W. 934, 178 Iowa 1275.

73. N.Y.—Herring-Hall-Marvin Safe Co., 49 N.Y.S. 174, 22 Misc. 329.
39 C.J. p 175 note 43.

74. Cal.—Wortman v. Mack-International Motor Truck Corporation, 51 P.2d 1101, 10 Cal.App.2d 445.

75. Utah.—Latter v. Holsum Bread Co., 160 P.2d 421, 108 Utah 364.

Compensation established by union
Contract to employ plaintiff at specified sum per week, "or at such higher compensation" as union might **establish**, was held not to authorize payment according to union rate when union rate declined below the specified sum per week.—Taylor v. Mathues, 170 A. 309, 112 Pa.Super. 169.

76. Utah.—Latter v. Holsum Bread Co., 160 P.2d 421, 108 Utah 364.

77. Ky.—Frankfort Modes Glass Works v. Arbogast, 145 S.W. 1122, 148 Ky. 4.
39 C.J. p 175 note 44.

78. Cal.—O'Brien v. L. E. White Lumber Co., 185 P. 514, 43 Cal. App. 703.
39 C.J. p 175 note 45.

79. Ill.—Painter v. Durham, 195 Ill. App. 468.
39 C.J. p 175 note 46.

80. Cal.—Wortman v. Mack-International Motor Truck Corporation, 51 P.2d 1101, 10 Cal.App.2d 445—Abrams v. Hillman, 296 P. 644, 112 Cal.App. 216.
Ill.—Schermerhorn v. Rolyan Corp., 65 N.E.2d 482, 328 Ill.App. 322—Moring v. Peelle Co., 26 N.E.2d 187, 304 Ill.App. 252.
La.—Thompson v. Goodman, 126 So. 527, 13 La.App. 186.
Minn.—Mienes v. Lucker Sales Co., 246 N.W. 667, 188 Minn. 162.
N.J.—Story v. Stutz Fire Engine Co., 138 A. 888, 104 N.J.Law 145—Knight v. Electric Household Utilities Corporation, 30 A.2d 585, 133 N.J.Eq. 87, affirmed 36 A.2d 201, 134 N.J.Eq. 542.
N.Y.—Moritz v. J. Eisner & Sons, 162 N.E. 598, 249 N.Y. 100, reargument denied 164 N.E. 566, 249 N.Y. 516—Posner v. Precision Shapes, 65 N.Y.S.2d 733, 271 App.Div. 435—Burroughs Adding Mach. Co. v. Hosack, 231 N.Y.S. 457, 224 App.Div. 583, affirmed 168 N.E. 414, 251 N.Y. 527.
R.I.—Baxter v. Lincoln Mills Co., 86 A.2d 106, 70 R.I. 16.

Duplication of identical provisions
A contract of employment, referring twice to a drawing account of a fixed amount, the same amount appearing in both references, is construed as referring to a single drawing account and as not entitling the employee to the payment of two separate sums of equal amount for the same period.—Sulzbacher v. Duplex Electric Co., 150 N.Y.S. 695.

Partial commissions
Under the circumstances, salesmen were held entitled to partial commissions.
La.—Ruiz v. Treadaway, App., 17 So. 2d 378.
Md.—Globe Slicing Mach. Co. v. Murphy, 158 A. 26, 161 Md. 667.

Renegotiation
Where employment contract entitled salesman to commission on sales price determined by employer either at time of, or prior to, billing, a renegotiation, under the Renegotiation Act, of excess profits at subsequent time would not alter base fixed for determining commission.—Atkin-

and maximum limits,[81] or, as discussed supra § 91, guaranteeing the amount of the employee's income from this source, or limiting the amount of commissions to a fixed scale[82] or yearly amount,[83] or making their recovery dependent on the performance of certain conditions precedent,[84] as on collections by the employer.[85] Likewise the amount recoverable and the computation of commissions due are dependent on the terms of the contract in the case of provisions restricting the amount to commissions on actual receipts for a stated period, even though later receipts are the result of the employee's service,[86] or providing for reduction of commission in event of sales at a discount,[87] or for a division of commissions on sales by others in an agent's territory,[88] or extending the basis of computation beyond receipts during the period of actual service and fixing the amount on the basis of commissions earned during that period, even though their computation and payment are deferred to some later time.[89] Following cancellation of his contract, a salesman has been denied the right to prospective commissions computed on a pro rata basis;[90] but where an employee entitled to annual commissions on net earnings of the company for a year dies during the year his commission for the portion of the year preceding death has been computed on a pro rata basis.[91]

§ 112. —— Profits

a. In general
b. Computation of profits

a. In General

Under an agreement by which profits from the employer's business are to be included as a basis for compensation, the amount recoverable by the employee depends on the intention of the parties as revealed in the contract and by their conduct under it.

The amount recoverable by the employee under an agreement by which profits from the employer's business are to be included as a basis for compensation depends on the intentions of the parties as revealed in their contract and by their conduct under it.[92] Where the agreement provides for payment to the employee of a per cent of the profits, but the parties reach no agreement as to the exact per cent, it has been held that the employee may recover only the reasonable value of his services,[93] but an agreement to pay an employee a per cent of profits within specified limits, such as three to five per cent, has been construed as one to pay a reasonable per cent within such limits.[94] An employee

son v. New Britain Mach. Co., C.C.A. Ill., 154 F.2d 895.

81. Wash.—Fry v. Hestwood, 58 P. 206, 21 Wash. 424.
39 C.J. p 176 note 57.

82. Minn.—Larsson v. Augustana Colonization Ass'n, 192 N.W. 108, 155 Minn. 1.
39 C.J. p 176 note 59.

83. N.Y.—Goldstein v. Frances Emblems, Inc., 55 N.Y.S.2d 740, 269 App.Div. 345.

Exclusion of base salary
Where sales employment contract provided for base salary and established sales volume commission schedule for determining annual compensation in addition to base salary, in provision that maximum "compensation" was limited to a designated sum, the quoted word did not include the base salary.—Wallace v. Joseph Dixon Crucible Co., 25 N.W.2d 465, 223 Minn. 162.

84. Vt.—Stratton v. Cartmell, 42 A. 2d 419, 114 Vt. 191.
Performance of conditions precedent as essential to right to commission see supra § 90.

Existence of net profit
Vt.—Stratton v. Cartmell, supra.

85. Wash.—Mackey v. United Civil Service Training Bureaus, 61 P. 2d 1311, 188 Wash. 186.

Risk assumed by employer
In absence of agreement that commissions should be limited to sales of merchandise paid for, salesman was entitled to commission on his total sales, presumption being that credit risk was assumed by employer.—Rosenbaum v. E. Simon's Sons, La.App., 151 So. 225.

86. N.Y.—Ortega v. Collins New York Medical Inst., 111 N.Y.S. 427, 127 App.Div. 293.
39 C.J. p 177 note 61.

87. Ga.—Hutto v. Snap-On Tools Corporation, 30 S.E.2d 510, 71 Ga. App. 245.

Computation on net amount
Where company employed agent on commission basis to sell gasoline and kerosene equipment, clause that company was to pay him commissions as shown on discount sheet, in absence of showing that such words had technical meaning, meant that, where discount was allowed, commission was to be counted on net amount received by company.—American Oil Pump & Tank Co. v. Sizemore, 276 S.W. 558, 210 Ky. 690.

88. Ky.—American Oil Pump & Tank Co. v. Sizemore, supra.
Minn.—Mienes v. Lucker Sales Co., 246 N.W. 667, 188 Minn. 162.

Equitable basis
Where contract between company and agent for sale of goods reserved right to company to assign special assistance to negotiate any business, and in such event to divide commission and sales credit as it might deem equitable, company was not liable to agent for all commissions on sales made in his territory by other agents, but only for what would come to him on equitable division thereof.—American Oil Pump & Tank Co. v. Sizemore, 276 S.W. 558, 210 Ky. 690.

89. N.Y.—McCaskey v. Cumberland Glass Mfg. Co., 184 N.Y.S. 360, 193 App.Div. 856, affirmed 135 N.E. 914, 233 N.Y. 552.
39 C.J. p 177 note 62.

90. Iowa.—Clinton v. Des Moines Music Co., 223 N.W. 882, affirmed 228 N.W. 664, 209 Iowa 636.

91. Pa.—Fidelity Trust Co. v. Whitehall Cement Mfg. Co., 144 A. 915, 295 Pa. 179.

92. Ark.—Rife v. Mote, 197 S.W.2d 277, 210 Ark. 629.
Ill.—Owen v. Mathias Klein & Sons, 54 N.E.2d 88, 322 Ill.App. 689.
La.—Clements v. Knighton, App., 1 So.2d 139.
39 C.J. p 177 note 65.

Particular contracts construed
La.—Clements v. Knighton, supra.
39 C.J. p 177 note 65 [a]–[d].

93. N.Y.—Georgis v. Giocalas, 233 N.Y.S. 16, 225 App.Div. 577.

94. Tex.—Fruth v. Gaston, Civ.App., 187 S.W.2d 581, refused for want of merit.

who has by way of monthly advancements received more than the per cent of the profits provided for by the contract is entitled to no additional compensation.[95]

Interest on share of profits. Ordinarily the employee is entitled to interest on profits belonging to him and remaining in the hands of his employer after their payment to the employee is due.[96]

b. Computation of Profits

(1) In general
(2) Time for computation
(3) Expenditures and deductions
(4) Employer's statement of profits and losses
(5) Averaging profits and losses
(6) Termination of employment

(1) In General

The term "profits" as used in an agreement by which profits are included as a basis for compensation should be construed in accordance with the language of the contract and the surrounding conditions and circumstances, and generally means that which remains of the gross receipts of the business after all legitimate expenses and business losses have been deducted.

In construing the term "profits," under an agreement by which profits are included as a basis for compensation, the court should consider the language used in the contract in connection with the conditions and circumstances under which the parties were contracting,[97] and, where the contract gives to the term "net" or "net profits" a special and restricted meaning, the expressed intention of the parties controls.[98] Generally, however, the profits[99] or net profits[1] of a "business," as the term is used in employment contracts, means that which remains of the gross receipts of an employer's business after all its legitimate expenses have been paid and its business losses have been deducted.[2]

Distinction between actual and "paper profits." The computation is generally based on actual profits so far earned from wholly or partially completed transactions as distinguished from speculative or "paper profits" on unfinished business or outstanding accounts.[3] In profits or net profits on sales, the computation is based on actual profits on completed sales as distinguished from estimated profits on unsold goods[4] even though extended credits are involved.[5] In net profits arising out of transactions, each one of which covers an extended period of time, as in the case of building operations, the computation is made on the basis of the part completed at the end of the particular computation pe-

95. Ky.—Dunn v. Dunn, 194 S.W.2d 372, 302 Ky. 188.

96. Va.—Goldsmith v. Latz, 32 S.E. 483, 96 Va. 680.

97. Utah.—Read v. Forced Underfiring Corporation, 26 P.2d 325, 82 Utah 529.

Reinvested profits

An employment contract stipulating for an ascertainment of the cash net profits at fixed periods and the payment of the employee's share thereof at those times has been construed to entitle the employee to his share of the profits, computed at the end of each period, whether in cash or in the form of material or stock and machinery on hand or accounts outstanding in which profits earned or received have been reinvested.—Fries v. Parr, 139 N.Y.S. 220—39 C.J. p 179 note 80.

98. Pa.—McMullin v. Bodine, 93 A. 321, 247 Pa. 151.

39 C.J. p 178 note 71.

99. N.C.—Samet v. Klaff, 107 S.E. 2, 181 N.C. 502.

Computation in liquidation proceedings

Where the employer's business is being liquidated, an employee entitled to a share of the profits is entitled to an allowance in the computation for any property in which the funds of the business have been invested.—Mack v. Shortle, 79 N.Y.S. 109, 76 App.Div. 586—39 C.J. p 179 note 81.

Stock received in settlement

Where contractors agreed to pay superintendent one half of profits from construction contract, in superintendent's action for an accounting, in determining profits from construction contract, stock received in settlement thereof was to be treated in the same category as notes, accounts receivable, or other personal property, in absence of agreement to contrary.—Brown v. Neyland, Civ.App., 161 S.W.2d 833, affirmed in part and reversed in part on other grounds Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253.

1. Cal.—Boradori v. Peterson, 261 P. 520, 86 Cal.App. 753.

Ga.—Craig v. Baggs, 14 S.E.2d 156, 64 Ga.App. 850.

Ill.—Neeson v. Sangamon County Mining Co., 147 N.E. 369, 316 Ill. 397.

Tex.—Giles v. Rayburn, Civ.App., 173 S.W.2d 371—Stapper v. Van Valkenburgh & Vogel, Civ.App., 128 S.W.2d 466, error dismissed, judgment correct.

39 C.J. p 177 note 67.

2. Cal.—Boradori v. Peterson, 261 P. 520, 86 Cal.App. 753.

Mass.—Anagnosti v. Almy, 147 N.E. 854, 252 Mass. 492.

Pa.—Schoenberg v. Heiman's, Inc., Com.Pl., 24 Erie Co. 160, affirmed 24 Erie Co. 164.

39 C.J. p 178 note 70.

Expenses and deductions generally see infra subdivision b (c) of this section.

Items not deductible as "losses"

(1) Amount charged off as a bad debt during year and thereafter collected in full.—Altendorf v. Hogenson, 19 N.W.2d 430, 220 Minn. 240.

(2) Sum of money belonging to partnership on deposit with bank which closed its doors and which was impounded and not immediately available to partnership in whole or in part.—Swaney v. Derragon, 274 N.W. 741, 281 Mich. 142.

(3) Other items.—Martin v. City of New York, 35 N.Y.S.2d 182, 264 App.Div. 234, appeal denied 37 N.Y.S.2d 426, 265 App.Div. 806, resettlement granted 37 N.Y.S.2d 838, 265 App.Div. 816, motion granted Martin v. Di Marco & Reimann, 47 N.E.2d 441, 289 N.Y. 842.

3. Iowa.—Tooey v. C. L. Percival Co., 182 N.W. 403, 192 Iowa 267.

39 C.J. p 178 notes 73–77.

4. Iowa.—Tooey v. C. L. Percival Co., supra.

39 C.J. p 178 note 73.

5. N.Y.—Watson v. Gillespie, 200 N.Y.S. 191, 205 App.Div. 613, affirmed 143 N.E. 727, 237 N.Y. 522.

riod[6] even though the bookkeeping methods of the employer make no account of the profits earned until the completion of the contract and the receipt of all payments under it.[7] Here too, however, the terms of the contract clearly revealing the intention of the parties will control.[8]

Estimates of financial condition. The profits indicated by a mere estimate of the employer's financial condition at a particular time do not afford a basis for a computation legally binding where the contract stipulates that it shall be based on the balancing of the employer's books in such a way as to exhibit the precise condition of each account and the actual state of his business.[9]

Canceled sales. It has been held that an employer's unliquidated demand for damages against a third person for breach of a contract of sale may be regarded as an element in net profits even though the item would not have gone into the computation until a later time if there had been no breach of contract.[10]

(2) Time for Computation

The time as of which profits should be computed for the purpose of determining the amount due an employee under agreements to pay him a per cent of profits depends on the provisions of the contract of employment.

The terms of the contract in the light of the circumstances surrounding its execution control in determining at what time or times the computation of profits, for the purpose of determining the amount due an employee, is to be made.[11] Ordinarily the employee is entitled to have the computation made at the stated time notwithstanding the existence of doubtful accounts outstanding,[12] such accounts either being deducted in toto from the receipts of that time[13] or carried into the statement of profits for the year, where it is the employer's custom acquiesced in by the employee to do so and to deduct the losses sustained on liquidation during the year of credit sales made in previous years.[14] In computing the net income of which plaintiff is to receive a certain per cent, he is entitled to have included in the computation the total income earned during the period covered even though part of it may not have been received until after the termination of his employment.[15]

(3) Expenditures and Deductions

Where an employment contract provides for profit sharing, all legitimate expenses reasonably involved in the cost of doing business and within the contemplation of the contract are deductible in computing the net income in which an employee is entitled to share.

Under the rule requiring the deduction of legitimate expenses in computing the net income in which an employee is entitled to share, "legitimate expenses" are expenditures, actually made,[16] which can reasonably be said to enter into the cost of carrying on the business of the employer[17] during the period of the employee's service,[18] or a part thereof constituting one of the employer's fiscal periods.[19] Where the contract specifies the expenses to be deducted, its provisions will control,[20] the court following the construction of the contract in this respect by the parties themselves where their conduct is consistent with the terms used.[21] In the

6. N.J.—Morehouse v. John M. Kelly Contracting Co., 122 A. 374, 95 N.J.Eq. 280.

7. N.J.—Morehouse v. John M. Kelly Contracting Co., supra.
39 C.J. p 178 note 76.

8. N.J.—Stites v. Gaskill, Ch., 119 A. 96.
39 C.J. p 178 note 77.

9. Mass.—Allcott v. Boston Steam Flour Mill, 9 Cush. 376.

10. Mass.—Daly v. Chapman Mfg. Co., 140 N.E. 677, 246 Mass. 118.

11. Pa.—Schoenberg v. Heiman's Inc., Com.Pl., 24 Erie Co. 160, affirmed 24 Erie Co. 164.
Wis.—Isaac v. Gerretson Co., 191 N.W. 55, 179 Wis. 417.
39 C.J. p 179 note 82.

Rule of practical construction
Where manager, who was paid a monthly salary and also all monthly profits over a certain amount, was customarily paid his per cent of profits four to six weeks after end of the month, court, in determining when manager was entitled to receive his per cent of monthly profits, properly invoked practical construction rule.—Sayre v. Western Bowl, 174 P.2d 466, 76 Cal.App.2d 793.

Date of sale
Where plaintiff contracted to manage defendants' foreign department, and was to have share of profits, in suit for accounting, profits on cotton purchased while plaintiff was in defendants' employ and sold after termination of employment, were properly computed as of date of sale and not as of date when plaintiff demanded that all cotton be sold and accounted for.—Anagnosti v. Almy, 147 N.E. 854, 252 Mass. 492.

12. Pa.—Brennan v. Felin, 62 Pa. Super. 430.

13. Pa.—Brennan v. Felin, supra.

14. N.Y.—Watson v. Gillespie, 200 N.Y.S. 191, 205 App.Div. 613, affirmed 143 N.E. 727, 237 N.Y. 522.

15. Ga.—Craig v. Baggs, 14 S.E.2d 156, 64 Ga.App. 850.

16. Ky.—**Corpus Juris quoted in** Dunn v. Dunn, 194 S.W.2d 372, 374, 302 Ky. 188.
39 C.J. p 179 note 87.

17. Ky.—**Corpus Juris quoted in** Dunn v. Dunn, 194 S.W.2d 372, 374, 302 Ky. 188.
39 C.J. p 179 note 88.

18. Ky.—**Corpus Juris quoted in** Dunn v. Dunn, 194 S.W.2d 372, 374, 302 Ky. 188.
39 C.J. p 179 note 89.

19. Kan.—Swaller v. Williamson Milling Co., 226 P. 1001, 116 Kan. 329.
Ky.—**Corpus Juris quoted in** Dunn v. Dunn, 194 S.W.2d 372, 374, 302 Ky. 188.

20. Ohio.—Charles Behlen Sons' Co. v. Ricketts, 164 N.E. 436, 30 Ohio App. 167.
39 C.J. p 179 note 91.

21. Ind.—Arthur Jordan Co. v. Caylor, 76 N.E. 419, 36 Ind.App. 646.
39 C.J. p 179 note 92.

absence of express provision in the contract, the particular items which are or are not deductible in determining net profits, and the method of figuring profits in cases where an employee is entitled to share therein, must be determined in the light of the circumstances.[22]

The fact that expenses exceed those of other years will not preclude their deduction provided they are actual and legitimate in character.[23] Where the employee's per cent is computed on the amount by which profits for the year exceed those for a preceding year, all deductions for the year should be made on the same basis as those for such preceding year.[24]

Materials and stocks of goods. The cost of materials consumed in the operation of the business is a proper item of expense,[25] but the employee is entitled to the benefit of all discounts secured by the employer in paying cash for the material,[26] in the absence of express provision in the contract to the contrary,[27] and credit must be given him for the amount of overcharges by the employer for materials furnished.[28] On the other hand, material and labor furnished to the employee for his private use is chargeable against him and cannot be considered as an expense of the employer's business in the absence of the employer's consent or acquiescence.[29]

Where profits are to be calculated on the sale of goods, in estimating the cost of the goods a deduction is properly made for cash discounts availed of by the employer in purchasing the goods.[30] Depreciation in a stock of goods may be allowed as an expense.[31] This item is not cumulative through successive periods as in the case of plant depreciation but is figured at the end of each period at a certain amount to be deducted from the cost price of the goods then in stock.[32] Likewise it is not necessary in order to show good faith in the employer, where, under the terms of the contract, he is given a right to determine conclusively the amount to be deducted, that a fixed per cent of depreciation should be adopted and applied, but rather that the rule adopted should be as constant as practicable with reference to the amount and nature of the goods in stock.[33]

Overhead generally. If the employee is entitled to a share of the net profits from the entire business of the employer, it may be said in a general way that all expenses entering into its overhead cost may be deducted.[34] If, however, the employee is entitled merely to a share of the net profits from certain transactions connected with the employer's business, it has been held that only the expenses directly connected with those transactions can be deducted, and that the general charges incident to the management of the employer's business are not properly included.[35]

Plant and equipment. It has been held that deductions from income may not be allowed for money expended by an employer for the erection of a plant,[36] for the moving of his plant from one place

22. Ala.—Navco Hardwood Co. v. Becks, 134 So. 4, 222 Ala. 631.

Depletion of capital

Under contract by which superintendent was to take charge of defendants' coal mine at a salary and a per cent of "net profits," defendants were entitled to credit against gross receipts for depreciation and depletion of capital of company in determining their "net profits."—Neeson v. Sangamon County Mining Co., 147 N.E. 369, 316 Ill. 397.

Expense of bidding

In computing net profits derived by corporation from subway construction contract to a per cent of which engineers employed in the construction work were entitled, there should be no deduction for the expense of bidding on other jobs.—Martin v. City of New York, 35 N.Y.S.2d 182, 264 App.Div. 234, appeal denied 37 N.Y.S.2d 426, 265 App.Div. 806, resettlement granted 37 N.Y.S.2d 838, 265 App.Div. 816, motion granted Martin v. Di Marco & Reimann, 47 N.E.2d 441, 289 N.Y. 842.

23. Ky.—Dunn v. Dunn, 194 S.W.2d 372, 302 Ky. 188.

24. Ky.—Whitney Transfer Co. v. Rigsby, 96 S.W.2d 577, 265 Ky. 217.

25. N.Y.—Danolds v. Lord, 31 N.Y.S. 915, 83 Hun 359.

26. N.Y.—Bergen v. Hitchings, 48 N.Y.S. 96, 22 App.Div. 395, appeal dismissed 57 N.E. 1104, 162 N.Y. 619.

27. Minn.—Altendorf v. Hogenson, 19 N.W.2d 430, 220 Minn. 240.

Cash discounts

In employee's action for accounting based on contract for share of net profits of business, with a provision that defendant was to furnish necessary money to carry on the business and, as consideration therefor he was to receive all cash discounts on material furnished, a special trade discount by company having no sales representative in territory was not a "cash discount" within meaning of contract.—Altendorf v. Hogenson, supra.

28. N.Y.—Boisnot v. Wilson, 96 N.Y.S. 581, 109 App.Div. 569, modified on other grounds 79 N.E. 1101, 186 N.Y. 593.

29. Mich.—Morrow v. Murphy, 79 N.W. 193, 120 Mich. 204, reheard 80 N.W. 255, 120 Mich. 204.

30. Ky.—Esterman-Verkamp Co. v. Rouse, 278 S.W. 124, 211 Ky. 791.

31. N.Y.—Bolles v. Scheer, 121 N.E. 771, 225 N.Y. 118.

Philippine.—Salgado v. St. Louis Dry Goods Store, Inc., 38 Philippine 320.

32. Philippine.—Salgado v. St. Louis Dry Goods Store, Inc., supra.

33. Philippine.—Salgado v. St. Louis Dry Goods Store, Inc., supra.

34. Kan.—Swaller v. Williamson Milling Co., 226 P. 1001, 116 Kan. 329.

Tex.—Brown v. Neyland, Civ.App., 161 S.W.2d 833, affirmed in part and reversed in part on other grounds Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253.

35. Utah.—Stilphen v. Elliott, 173 P. 700, 53 Utah 579.

39 C.J. p 180 note 2.

36. Mo.—Hartwell v. Becker, 168 S.W. 837, 181 Mo.App. 408.

to another,[37] or for the installation of permanent improvements,[38] or for the purchase of equipment.[39]

It has been held that deterioration in value of the employer's plant cannot be allowed as an expense in the absence of an agreement to that effect,[40] but it has also been held that, where such an agreement can be implied from the conduct of the parties indicating a knowledge of, or an acquiescence in, the practice of charging off a certain amount each year for depreciation, such charge may be allowed in computing the net profits for the year[41] where the charge is itself reasonable.[42] Under a provision of the contract authorizing a charge for depreciation of the plant as an expense of the business, taking the "reasonable value" of the plant at the beginning and end of the work as the basis for computation, the words "reasonable value" have been construed to mean not the value of the plant as secondhand equipment, but its utility value to the employer.[43]

The expenses of ordinary upkeep and repair of a plant and its equipment should be taken out of the gross income of the business in order to determine the net profits, if any.[44] Deductions may also be made for tools and implements worn out[45] and for the depreciation by wear and tear or other necessary causes of such of the tools, implements, and appliances as were not rendered absolutely worthless.[46]

Cost of power for a manufacturing plant may be deducted as an expense as long as the price charged therefor is reasonable,[47] especially where the parties to the contract have so agreed.[48] A sum which represents the value of the use of permanent improvements may be allowed as a legitimate expense of the business.[49]

Interest, rent, and insurance. Where the employee consents[50] or acquiesces,[51] interest on capital invested may be charged as an expense of the business; otherwise it may not be[52] even though the employers agree as between themselves that it shall be so entered.[53] It has been held that interest on money borrowed for the purposes of the business

37. N.Y.—Boisnot v. Wilson, 96 N.Y.S. 581, 109 App.Div. 569, modified on other grounds 79 N.E. 1101, 186 N.Y. 593.

38. La.—Sharp v. McBride, 63 So. 892, 134 La. 249.

39. N.J.—Morehouse v. John M. Kelly Contracting Co., 122 A. 374, 95 N.J.Eq. 280.
39 C.J. p 180 note 7.

Capital assets

(1) Where contract provided that plaintiff's compensation for services rendered in operation of a truck venture was a fixed sum per month plus a per cent of net profits, in determining net profits in accounting action the cost of capital assets acquired such as motor trucks and railroad commission's permit were improperly charged to expenses, since cost thereof should be allocated to net profits.—Giles v. Rayburn, Tex.Civ.App., 173 S.W.2d 371.

(2) Fact that engineer, who was entitled to a per cent of profits derived by corporation from construction contracts, participated in conferences at which it was suggested that equipment remaining after completion of such contracts be sold at public auction, did not indicate engineer's consent that proceeds of such sale should be accepted as basis for determining net profits under the contract, where primary purpose was to determine most efficient way of liquidating remaining assets of corporation after its officers had determined to dissolve and retire from business.—Martin v. City of New York, 35 N.Y.S.2d 182, 264 App.Div. 234, appeal denied 37 N.Y.S.2d 426, 265 App.Div. 806, resettlement granted 37 N.Y.S.2d 838, 265 App.Div. 816. Motion granted Martin v. Di Marco & Reimann, 47 N.E.2d 441, 289 N.Y. 842.

40. N.Y.—Mack v. Shortle, 79 N.Y.S. 109, 76 App.Div. 586.
Tex.—Morrison v. Sewell, Civ.App., 4 S.W.2d 1029, error dismissed.

41. U.S.—Ransome Concrete Machinery Co. v. Moody, C.C.A.N.Y., 282 F. 29.
39 C.J. p 180 note 9.

Excess valuation of corporation's machinery, etc., was held properly added to depreciation charge in adjusting net profits, to per cent of which employee was entitled.—Homes v. James Buckley & Co., 116 So. 218, 165 La. 874.

42. U.S.—Ransome Concrete Machinery Co. v. Moody, C.C.A.N.Y., 282 F. 29.

43. U.S.—Hengst v. John B. Carter Co., D.C.N.J., 235 F. 982, affirmed 246 F. 674, 158 C.C.A. 630.

44. Iowa.—Tooey v. C. L. Percival Co., 182 N.W. 403, 192 Iowa 267.
39 C.J. p 180 note 14.

Repairs not in fact made may not be deducted.—Sayre v. Western Bowl, 174 P.2d 466, 76 Cal.App.2d 793.

45. N.Y.—Danolds v. Lord, 31 N.Y.S. 915, 83 Hun 359.

Capital assets consumed

In determining net profits derived by corporation from subway construction contracts so as to compute additional compensation to which engineers employed in the work were entitled, the cost of all capital assets actually and totally consumed in the work plus a reasonable allowance for the depreciation of those capital assets still in existence when construction contracts were completed should be deducted as an expense.—Martin v. City of New York, 35 N.Y.S.2d 182, 264 App.Div. 234, appeal denied 37 N.Y.S.2d 426, 265 App. Div. 806, resettlement granted 37 N.Y.S.2d 838, 265 App.Div. 816, motion granted Martin v. Di Marco & Reimann, 47 N.E.2d 441, 289 N.Y. 842.

46. N.Y.—Danolds v. Lord, 31 N.Y.S. 915, 83 Hun 359.

47. Kan.—Swaller v. Williamson Milling Co., 226 P. 1001, 116 Kan. 329.

48. Kan.—Swaller v. Williamson Milling Co., supra.

49. La.—Sharp v. McBride, 63 So. 892, 134 La. 249.

50. La.—Sharp v. McBride, supra.
39 C.J. p 180 note 18.

Capital wrongfully withheld

However, employer is not entitled to deduction on portion of invested capital wrongfully withheld from salesman employed on profit-sharing basis.—Stewart v. John R. Lankenau Co., 156 N.E. 73, 259 Mass. 242.

51. N.Y.—Buning v. Kittel, 7 N.Y.S. 485, 4 Silv.Sup. 474.

52. N.Y.—Paine v. Howells, 90 N.Y. 660.
39 C.J. p 180 note 20.

53. N.Y.—Buning v. Kittel, 7 N.Y.S. 485, 4 Silv.Sup. 474.

is not deductible,[54] but it has also been held that such interest is a necessary item of expense deductible from total income,[55] and that interest on money used to hold a stock of goods for a favorable market may be allowed.[56]

Rent of the premises in which the business is carried on is properly chargeable as an expense,[57] but if the property is owned by the employer no allowances on this account will be made in the absence of evidence showing its fair rental value.[58]

Life insurance premiums paid by an employer for insurance on his own life, essential to secure a balance borrowed for purchase of his business, have been held not a proper deduction in computing the profits of which the employee is to receive a per cent;[59] but premiums paid to secure insurance on the lives of corporate officers have been allowed as proper deductions where the policies were deposited as additional collateral to secure loans required in connection with the work.[60]

Salaries and other compensation. In the absence of a provision of the contract permitting it, the employer cannot charge as an expense of the business his own salary[61] or payments to himself because of profits.[62] Where the contract expressly[63] or by implication[64] permits it, the deduction may be made, but a provision allowing it will be strictly construed.[65]

Where the parties agree to the deduction of the employee's salary[66] or advances to him,[67] their intention will prevail. In the absence of express agreement the determination of the question whether fixed payments to the employee are deductible depends on whether the payments are or are not a part of the profits. If they are, they cannot be deducted as expenses.[68] If they are not payable out of profits, they are to be deducted as expenses.[69] Where the contract provides in express terms for payment of a per cent of profits to the employee less his guaranteed salary such salary is not deductible as a "legitimate expense."[70]

Salaries paid to other employees may be deducted,[71] especially where their employment is known to, and acquiesced in, by the employee entitled to a share of the profits.[72] Where compensation to another employee has been withheld, it is not deductible,[73] nor is it deductible where paid during a pe-

54. Ill.—Selz v. Buel, 105 Ill. 122.
39 C.J. p 180 note 23.

55. Utah.—Read v. Forced Underfiring Corporation, 26 P.2d 325, 82 Utah 529.

Understanding of necessity for loan
In computing profits derived from subway construction contracts to a per cent of which engineers employed in the construction work were entitled, interest paid on borrowed money which it was understood would be required to finance the contracts was allowable as part of costs of the performance of the contracts. —Martin v. City of New York, 35 N.Y.S.2d 182, 264 App.Div. 234, appeal denied 37 N.Y.S.2d 426, 265 App.Div. 806, resettlement granted 37 N.Y.S.2d 838, 265 App.Div. 816, motion granted Martin v. Di Marco & Reimann, 47 N.E.2d 441, 289 N.Y. 842.

56. La.—Sharp v. McBride, 63 So. 892, 134 La. 249.
39 C.J. p 181 note 24.

57. N.Y.—Conville v. Shook, 39 N.E. 405, 144 N.Y. 686.

Effect of reduction in rent
La.—Homes v. James Buckley & Co., 116 So. 218, 165 La. 874.

58. N.Y.—Conville v. Shook, 39 N.E. 405, 144 N.Y. 686.

59. Mass.—Kavanagh v. Ellingson, 71 N.E.2d 880.

60. N.Y.—Martin v. City of New York, 35 N.Y.S.2d 182, 264 App.Div. 234, appeal denied 37 N.Y.S.2d 426, 265 App.Div. 806, resettlement granted 37 N.Y.S.2d 838, 265 App.Div. 816, motion granted Martin v. Di Marco & Reimann, 47 N.E.2d 441, 289 N.Y. 842.

61. N.Y.—Hoeland v. Lange, 184 N.Y.S. 885, 113 Misc. 469.
39 C.J. p 181 note 25.

62. Minn.—Kaufman v. Yellow Cab Co., 187 N.W. 974, 152 Minn. 26.
39 C.J. p 181 note 26.

63. N.J.—Smith v. Bedell, 96 A. 898, 84 N.J.Eq. 268.

64. Neb.—McDonald v. Buckstaff, 76 N.W. 476, 56 Neb. 88.
39 C.J. p 181 note 28.

65. N.J.—Smith v. Bedell, 96 A. 898, 84 N.J.Eq. 268.
39 C.J. p 181 note 29.

66. Mass.—Fuller v. Miller, 105 Mass. 103.
39 C.J. p 181 note 30.

67. N.Y.—Schrader v. Fraenckel, 102 N.Y.S. 335, 117 App.Div. 97, affirmed 85 N.E. 1116, 191 N.Y. 545.

68. N.Y.—Briggs v. Groves, 9 N.Y.S. 765, affirmed 30 N.E. 865, 132 N.Y. 545.
39 C.J. p 181 note 32.

Entry as "distribution of profits"
Employee's per cent of corporation's net profits was held not deductible as expense from such profits, where entered on books, with parties' knowledge, as distribution of profits.—Homes v. James Buckley & Co., 116 So. 218, 165 La. 874.

69. N.Y.—Buning v. Kittel, 7 N.Y.S. 485, 4 Silv.Sup. 474.
39 C.J. p 181 note 33.

70. Ky.—Dunn v. Dunn, 194 S.W.2d 372, 302 Ky. 188.

71. N.Y.—Martin v. City of New York, 35 N.Y.S.2d 182, 264 App.Div. 234, appeal denied 37 N.Y.S.2d 426, 265 App.Div. 806, resettlement granted 37 N.Y.S.2d 838, 265 App.Div. 816, motion granted Martin v. Di Marco & Reimann, 47 N.E.2d 441, 289 N.Y. 842—Boisnot v. Wilson, 96 N.Y.S. 581, 109 App.Div. 569, modified on other grounds 79 N.E. 1101, 186 N.Y. 593.

Salaries of directors
In determining net profits of business as basis for computing commission payable to sales manager, salaries of directors voted to them as managers of various divisions of business after contract of employment was entered into were not deductible as expenses.—Read v. Forced Underfiring Corporation, 26 P.2d 325, 82 Utah 529.

72. N.Y.—Boisnot v. Wilson, 96 N.Y.S. 581, 109 App.Div. 569, modified on other grounds 79 N.E. 1101, 186 N.Y. 593.

73. Minn.—Altendorf v. Hogenson, 19 N.W.2d 430, 220 Minn. 240.

Bonus conditionally withheld
Minn.—Altendorf v. Hogenson, supra.

riod other than that involved.[74]

Rebates and gratuities. Rebates allowed to the employer's customer may be charged as expenses of the business provided in making them the employer acted in good faith and according to his best judgment.[75] However, discounts not taken advantage of by customers to which goods were sold are not chargeable against the employee in calculating profits.[76] Gratuities paid by an employer to a third person cannot be deducted as expenses in the absence of proof that they were beneficial to the employer or that such payments were necessary or justifiable on business principles.[77]

Claims and expenses of litigation. Uncollectable[78] or doubtful[79] accounts are properly chargeable as expenses provided they have been previously carried into the accounts as assets.[80] This is true even where the contract provides that the employee, who is given a share in the net profits, shall not be liable for any losses sustained in carrying on the business.[81] On the other hand, unliquidated claims or damages in pending actions brought against the employer are not chargeable,[82] the computation being made independently of pending suits.[83]

Cost of litigation reasonably required to maintain the operation of the employer's business and to conserve profits is properly chargeable as an operating expense.[84] Where the employer's business is being liquidated, an employee entitled to a share of the profits is not chargeable with loss due to depreciation in property furnished by the employer for the business and still owned by him individually after the liquidation.[85]

Taxes and limitations on war profits. Federal income[86] and excess profit[87] taxes imposed on the business have been regarded as deductible expenses in computing the profits in which an employee is to share; but there is also authority denying the right to deduct the excess profits tax where the contract of employment was made before enactment of the taxing act and where the amount of the employee's commission was itself deductible as an item of expense for tax purposes.[88] The personal income tax of an employer is not regarded as an expense of his doing business as an individual, and in the absence of assent of the employee has been held nondeductible.[89]

Limitation on profits placed by the government on certain industries during the war places a limitation on the fund available for the computation of an employee's share in the net profits; excess profits over the fixed limit must be deducted from gross profits, not as an operating expense, but as earnings which the employer is not entitled to keep, and the computation made on the balance.[90]

(4) Employer's Statement of Profits and Losses

An employer's statement of profits and losses may be made conclusive by contract if rendered in good faith.

Generally the employer's statement of profits and losses of his business is to be regarded as final and conclusive between the parties as to the amount of profits in which the employee is to share where the contract so provides,[91] and, where the contract can

74. Ark.—Rife v. Mote, 197 S.W.2d 277, 210 Ark. 629.

Bonuses paid after employee's discharge
Ark.—Rife v. Mote, supra.

75. N.Y.—Conville v. Shook, 39 N.E. 405, 144 N.Y. 686.

76. Ky.—Esterman-Verkamp Co. v. Rouse, 278 S.W. 124, 211 Ky. 791.

77. N.Y.—Marsh v. Masterton, 5 N.E. 59, 101 N.Y. 401.

78. Mich.—Crawford v. Calkins, 136 N.W. 369, 170 Mich. 587.
39 C.J. p 182 note 44.

79. U.S.—Ransome Concrete Machinery Co. v. Moody, C.C.A.N.Y., 282 F. 29.

80. Wis.—Thomas v. Columbia Phonograph Co., 129 N.W. 522, 144 Wis. 470.

81. Mich.—Crawford v. Calkins, 136 N.W. 369, 170 Mich. 587.

82. Mich.—Morrow v. Murphy, 79 N.W. 193, 120 Mich. 204, reheard 80 N.W. 255, 120 Mich. 204.
N.Y.—Elbert v. Haebler, 43 N.E. 914, 149 N.Y. 343.

83. N.Y.—Elbert v. Haebler, supra.
39 C.J. p 182 note 49.

84. Kan.—Swaller v. Williamson Milling Co., 226 P. 1001, 116 Kan. 329.

Expense incurred in settlement of action brought during salesman's employment on profit-sharing basis was held properly deductible in determining profits.—Stewart v. John R. Lankenau Co., 156 N.E. 73, 259 Mass. 242.

85. N.Y.—Mack v. Shortle, 79 N.Y.S. 109, 76 App.Div. 586.

86. Ill.—Neeson v. Sangamon County Mining Co., 147 N.E. 369, 316 Ill. 397.
Kan.—Swaller v. Williamson Milling Co., 226 P. 1001, 116 Kan. 329.
La.—Homes v. James Buckley & Co., 116 So. 218, 165 La. 874.

87. La.—Homes v. James Buckley & Co., supra.
39 C.J. p 181 note 39.

88. N.Y.—Stanley v. Leary, 199 N.Y.S. 617, 120 Misc. 808.

89. Mass.—Kavanagh v. Ellingson, 71 N.E.2d 880.

90. Kan.—Swaller v. Williamson Milling Co., 226 P. 1001, 116 Kan. 329.
39 C.J. p 182 note 41.

91. N.Y.—Jones v. Roberts, 98 N.Y.S. 873, 113 App.Div. 285, affirmed 81 N.E. 1167, 189 N.Y. 497.
Philippine.—Salgado v. St. Louis Dry Goods Store, Inc., 38 Philippine 320.

Notice of accounting practices
Under contract providing that employee should receive per cent of profits to be ascertained by computation made according to employer's standard form of bookkeeping, employee was charged with notice of manner in which employer kept ac-

be so construed, the finality of the statement extends beyond the term of the employee's service.[92] In order for the statement to have this effect, it must be made up in good faith.[93]

(5) Averaging Profits and Losses

Whether or not profits and losses for different periods may be averaged in determining profits under profit-sharing contracts of employment depends on the terms of the contract.

The terms of the contract determine to what extent profits and losses of the employer's fiscal periods, constituting the term of the employee's service, shall be offset one against the other in the computation of net profits in which an employee is to share.[94] As a general rule, averaging is allowed where the final settlement of the employee's share is postponed to the end of his service[95] even though the contract provides for computations to be made periodically during the term.[96] However, averaging is not allowed where the periodic computations within the term are construed as being, each one of them, of the nature of a final settlement, pro tanto, conclusive between the parties,[97] as where the employee's compensation is declared to be payable periodically out of,[98] or is otherwise made dependent on the existence of,[99] net profits for such period.

Where the contract expressly provides that the losses of one period shall be charged against the profits of other periods, the question whether they can be charged only against future profitable periods or against past profitable periods as well depends on the terms of the contract, the charging of losses of one period against profits of another being restricted to subsequent periods where the contract in terms makes the periodic settlements final.[1]

(6) Termination of Employment

Ordinarily an employee entitled to a per cent of the profits may on termination of his employment within a compensation period recover his share of profits earned up to the date of termination.

An employee whose compensation under the contract is measured by the profits of his employer's business, on terminating his employment within one of the computation periods, may recover a share of the profits for that period proportionate to his term of service where the contract expressly or by implication so provides,[2] or where the termination of the employment is under circumstances entitling him to compensation under the contract and at the contract rate for services rendered,[3] unless the contract in terms provides a different method for compensating him in such a contingency.[4] On termination of the employment by the employer, pursuant to option, the employee is entitled to participate in the proportion of profits earned up to the date of termination and no more;[5] but where the employee is discharged wrongfully and without justifiable

counts, where monthly statements were rendered showing that certain items of expense could not be determined as charges to the business expenses until final settlement.—Burroughs Adding Mach. Co. v. Hosack, 231 N.Y.S. 457, 224 App.Div. 583, affirmed 168 N.E. 414, 251 N.Y. 527.

92. Neb.—McDonald v. Buckstaff, 76 N.W. 476, 56 Neb. 88.
N.Y.—Jones v. Roberts, 98 N.Y.S. 873, 113 App.Div. 285, affirmed 81 N.E. 1167, 189 N.Y. 497.

93. Neb.—McDonald v. Buckstaff, 76 N.W. 476, 56 Neb. 88.
N.Y.—Jones v. Roberts, 98 N.Y.S. 873, 113 App.Div. 285, affirmed 81 N.E. 1167, 189 N.Y. 497.

94. Wis.—Girman v. Hampel, 205 N.W. 393, 188 Wis. 45—Thomas v. Columbia Phonograph Co., 129 N.W. 522, 144 Wis. 470.

95. Pa.—Baldwin v. Magen, 123 A. 815, 279 Pa. 302.
39 C.J. p 182 note 60.

96. Wis.—Thomas v. Columbia Phonograph Co., 129 N.W. 522, 144 Wis. 470.
39 C.J. p 182 note 61.

97. U.S.—City of Wheeling v. Chester, C.C.A.Pa., 134 F.2d 759.
39 C.J. p 183 note 62.

Practice to compute annually
Where oral contract of employment for five years as plantation manager provided for monthly salary and for per cent of operational profits, and first year's losses exceeded subsequent four years' profits, profits, in view of custom and practice and parties' testimony, were computable annually and not on entirety basis, and hence manager was not barred from recovering per cent of profits.—Crow v. Knowles, 18 So. 2d 148, 196 Miss. 554.

98. N.Y.—Jennery v. Olmstead, 90 N.Y. 363.

Monthly operating profits
Under employment contract entitling employee to bonus of a designated per cent of monthly operating profits in addition to salary, net losses of one month were held not deductible from net profits of another month in computing bonus, where receipt by employee of monthly statement from employer of profit or loss, and a statement from employer of balance due without offset for losses of any month, together with an agreement to pay such balance, showed an intention so to construe contract.—Girman v. Hampel, 205 N.W. 393, 188 Wis. 45.

99. Mo.—McFarland v. Gillioz, 37 S.W.2d 911, 327 Mo. 690.
39 C.J. p 183 note 64.

1. Colo.—Cooper v. Woodward, 204 P. 336, 71 Colo. 90.
39 C.J. p 183 note 65.

2. Ark.—West v. Todd, 180 S.W.2d 522, 207 Ark. 341.
39 C.J. p 183 note 66.

Per cent earned before resignation
One employed as store manager under verbal contract for payment of monthly salary and per cent of net profits, with bonus at end of year, could not recover from store owner amount exceeding per cent of profits earned while he was manager during year in which he resigned.—West v. Todd, supra.

3. N.Y.—Clark v. Gilbert, 26 N.Y. 279, 84 Am.D. 189.
39 C.J. p 183 note 67.

4. Mass.—Thompson v. Saco Water-Power Co., 114 Mass. 159.
39 C.J. p 183 note 68.

5. Cal.—Thacker v. American Foundry, App., 177 P.2d 322.

cause he may be entitled to his agreed per cent of profits for the entire term of the contract.[6]

The amount recoverable as the employee's share of profits up to the time of termination of the employment ordinarily is based on an average of the profits for the entire period, where the contract expressly or by implication so provides[7] or in the absence of evidence indicating the profits actually earned during the term of service.[8] Where it becomes impossible to take the profits of the entire period as the basis of computation, the average of profits for a few years immediately preceding the fractional period of service may be taken as the basis in the absence of evidence showing that the profits for that time would have exceeded by any substantial increase those of the preceding years.[9] Under a contract whereby employer and employee share equally in profits and losses and providing for computation at end of each year or at the termination of employment, on termination the employee is entitled to half the proceeds of property purchased with money taken from the office account during the life of the agreement.[10]

§ 113. —— Part Performance

Generally an employee whose service terminates before the scheduled date is entitled to recover the reasonable value of services actually rendered, provided such recovery is not in excess of the contract rate; but under some circumstances recovery may be had at the contract rate.

Where one employed for a definite term abandons the employment for cause, he may recover the reasonable value of his services[11] provided such recovery does not exceed the compensation fixed by the employment contract,[12] or he may recover his pro rata wages.[13] Where the employee has abandoned the service without sufficient excuse, and a recovery in quantum meruit is permitted, as discussed supra § 83, the amount of the recovery is limited to the contract price for the services,[14] minus damages for the loss sustained by the employer from the employee's abandonment.[15]

Discharge with or without cause. In the absence of a contract stipulation to the contrary, it has generally been held that an employee discharged for cause may recover the reasonable value of services actually rendered, not to exceed the contract wage and taking into consideration the damages resulting to the employer from the employee's voluntary or willful failure to perform.[16] However, damages to the employer are not allowed for an imperfect performance justifying the employee's discharge, but which has occurred without any willful intention on the part of the employee to violate the contract,[17] and a recovery of liquidated damages is allowed only to the extent provided for by the contract.[18] The reasonable value of services rendered by the employee up to the time of his discharge is the measure of his recovery where the contract expressly so provides.[19] An employee discharged without cause may be entitled to the agreed per cent of profits for the entire time of service limited by the contract instead of merely for the period of actual work before such discharge, as considered supra § 112 b (6).

Termination by consent or under option. Where the contract has been terminated by mutual consent, the employee may recover for the actual time during which services were rendered at the contract rate[20] although reference must be had to any spe-

Employment at will
Under employment contract fixing no time for duration thereof and terminable at any time at the option of either party, and providing that employee was to receive certain per cent of profits, right of employee to per cent of net profits ceased as of date of termination of employment by employer.—Thacker v. American Foundry, supra.

6. Ark.—Rife v. Mote, 197 S.W.2d 277, 210 Ark. 629.

7. Mass.—Allcott v. Boston Steam Flour Mill Co., 9 Cush. 376.
39 C.J. p 183 note 69.

8. Minn.—Kaufman v. Yellow Cab Co., 187 N.W. 974, 152 Minn. 26.
N.Y.—Clark v. Gilbert, 26 N.Y. 279, 84 Am.D. 189.

9. N.Y.—Smith v. Smith, 101 N.Y. S. 521, 116 App.Div. 165.
39 C.J. p 183 note 71.

10. N.D.—Hoopes v. Stevens, 268 N.W. 651, 66 N.D. 662.

11. Minn.—Wallace v. Joseph Dixon Crucible Co., 25 N.W.2d 465, 223 Minn. 162.
39 C.J. p 184 note 73.

12. Minn.—Wallace v. Joseph Dixon Crucible Co., supra.

13. Minn.—Wallace v. Joseph Dixon Crucible Co., supra.
39 C.J. p 184 note 74.
Where parties so construed contract
Minn.—Wallace v. Joseph Dixon Crucible Co., supra.

14. N.H.—Britton v. Turner, 6 N. H. 481, 26 Am.D. 713.

15. Iowa.—Pixler v. Nichols, 8 Iowa 106, 74 Am.D. 298.
39 C.J. p 184 note 77.

16. Mo.—Parks v. Tolman, 87 S.W. 576, 113 Mo.App. 14.
39 C.J. p 184 note 79.
Proportionate amount of final payment
Employee, hired for fifteen months for consideration payable partly at end of period, could recover proportionate amount of final payment, notwithstanding discharge for cause.—Geraghty v. Pitcairn, 157 A. 634, 104 Pa.Super. 72.

17. Me.—Lawrence v. Gullifer, 38 Me. 532.
39 C.J. p 184 note 80.

18. N.Y.—Markham v. Krumbholz, 124 N.Y.S. 16, 139 App.Div. 417.
39 C.J. p 184 note 81.

19. N.Y.—Spain v. Manhattan Shirt Co., 164 N.Y.S. 527, 177 App.Div. 610.
39 C.J. p 184 note 82.

20. N.C.—Coxe v. Skeen, 25 N.C. 443.
39 C.J. p 184 note 83.

cial provisions relating thereto.[21] Where the contract provides for its termination by the employer on a specified notice, the employee is entitled to his salary only for the period of notice, on refusal of the employer to continue the employment.[22] Also, where the contract provides that either party may terminate it after giving the other a certain number of days' notice, the employee, after notice of termination of the contract has been served on him by the employer, may recover at the contract rate for the time of actual service plus the notice period[23] except that in no event can he recover for a longer time than the entire contract period.[24] So, where the hiring is for an indefinite term and wages at a certain rate are paid periodically, the employee, on the termination of the contract before the end of one of the periods, may recover his wages at the contract rate only for that period.[25]

§ 114. Deductions, Fines, and Forfeitures

The amount of deductions from wages which may or should be made generally depends on the terms of the employment contract or the rules or custom governing the employment.

Where deductions from an employee's wages are authorized, as discussed supra §§ 102–106, the amount to be deducted will be controlled by the contract[26] or rules or custom governing the employment,[27] and ordinarily the amount may not be fixed by an arbitrary standard.[28] Ordinarily, in case of negligence, misconduct, or imperfection in the employee's work, he may recover only what his services are reasonably worth, or the contract price, less the damages resulting therefrom,[29] but it has been held that the employee's default will not deprive him of the right to a credit balance in his favor under a profit-sharing agreement[30] although on an accounting the employee may be charged with whatever loss his breach of contract occasioned.[31] Where the provision for forfeiture is considered as liquidated damages, the employer need not show

21. N.C.—Coxe v. Skeen, supra.
39 C.J. p 184 note 84.

"Work accomplished"

The phrase "work accomplished" as used in employment contract between manager and owner of construction company providing that, if manager was discharged, his compensation would be based on per cent of "work accomplished" to date of cancellation of contract, meant per cent of managerial work and not amount of work accomplished on construction project.—Rife v. Mote, 197 S.W.2d 277, 210 Ark. 629.

Resignation

Securing of employee's resignation to avoid summary discharge was held sufficient consideration to support contract to pay salary after resignation.—Bayne v. Proctor & Gamble Distributing Co., 87 Pa.Super. 195.

22. Mich.—Derry v. East Saginaw Board of Education, 61 N.W. 61, 102 Mich. 631.
39 C.J. p 185 note 85.

23. Wash.—Johnson v. Pacific Bank & Store Fixture Co., 109 P. 205, 59 Wash. 58.

24. Wash.—Johnson v. Pacific Bank & Store Fixture Co., supra.
39 C.J. p 185 note 87.

25. Ga.—Webb v. McCranie, 77 S.E. 175, 12 Ga.App. 269.

Suspension of business

Where contract between union and its members and corporate employer provided that the employer agreed to employ specified employees at a specified weekly wage, but it did not specify that they were to be hired for any particular number of weeks, and the only provision concerning the tenure of any employee was that he should not be discharged, laid off, or furloughed except with the union's consent, employees were not under the contract entitled to be paid after employer's place of business was in effect destroyed by fire and its business came to an end.—Reid & Yeomans v. Drug Store Employees Union, 29 N.Y.S.2d 835.

26. La.—Morgan v. Bryant, App., 152 So. 773.
Mich.—Ensley v. Associated Terminals, 8 N.W.2d 161, 304 Mich. 522.
Or.—Marr v. Dunn, 158 P.2d 651, 176 Or. 442.
Pa.—Shallcross v. Highway Trailer Co., 24 A.2d 71, 147 Pa.Super. 279.
39 C.J. p 185 note 89.

27. N.Y.—Warner v. Consolidated Ice Co., 57 N.Y.S. 6, 39 App.Div. 630.
39 C.J. p 185 note 89.

28. W.Va.—Rhodes v. Miller Pocahontas Coal Co., 140 S.E. 323, 104 W.Va. 458.

Disciplinary measures

Contract between union on behalf of miners and mining company, which provided for disciplinary measures for loading impurities by warnings, layoffs, and even discharge and provided for appointment of inspectors, did not warrant, in computing compensation, arbitrary deduction from total weight of each car a specified number of pounds for impurities.—High Splint Coal Co. v. District No. 19, United Mine Workers of America, 189 S.W.2d 735, 300 Ky. 521.

29. Iowa.—Mayberry v. Newell, 204 N.W. 413, 200 Iowa 458.
Mich.—Harris v. Specialties Distributing Co., 9 N.W.2d 645, 305 Mich. 373.
Pa.—Buratti v. Bethlehem Furniture Corporation, Com.Pl., 27 North.Co. 336.
39 C.J. p 185 note 90.

30. Mass.—Walsh v. Atlantic Research Associates, 71 N.E.2d 580.

Agreement similar to one of partnership

Where employment contract provided that "either party may terminate the employment forthwith upon material default by the other" and that on "any termination" of employment, employee's account should be adjusted by credit, etc., and adjusted amount "shall forthwith be paid" to employee, parties intended that employee should have contract rights approximating rights of a partner as far as concerned accrued profits shown on his account, and hence a breach of promise by employee, whether or not in bad faith, did not preclude his right to claim a credit balance in his favor in the accounting.—Walsh v. Atlantic Research Associates, supra.

31. Mass.—Walsh v. Atlantic Research Associates, supra.

Profits from competitor

Where employee in breach of contract requiring him to devote his entire time for his employer rendered some services for employer's competitor, employee in accounting with employer was chargeable with entire profit made by him out of his wrongful connection with competitor, and also with damages for his breach of contract if damages could be proved.—Walsh v. Atlantic Research Associates, supra.

the amount of his actual damages.[32]

§ 115. Where Fixed for Part of Service Only

Where compensation is fixed as to only part of an employee's services, the employee ordinarily is entitled to the contract rate for the part so fixed and to the reasonable value of the other services.

Where services are rendered under an employment fixing the rate for part of them only, the amount of compensation recoverable is computed on the basis of the contract rate for the services so governed and the reasonable value of other services not subject thereto.[33] Where services have been rendered over an extended period with an understanding that they should be paid for, but no agreement as to the rate of compensation is made until the end of the service, when a rate is agreed on covering a part of the service only, the rate agreed on will govern the compensation for similar services during similar periods,[34] but, if the services during similar periods differ, the rate agreed on for one period cannot be made a basis which will control in determining the rate for the other periods.[35]

§ 116. Additional Compensation

Where an employee is entitled to recover additional compensation for extra work, he may recover the amount agreed on, or, in the absence of such an agreement, the reasonable value thereof.

An employee may recover what his employer agreed to pay him for extra work outside the scope of his employment[36] and, in the absence of any stipulated compensation, its reasonable value.[37]

Where the method of computing the amount of bonus to be paid is indicated by the terms of the contract, those terms will control.[38] Whether money paid to the employer, in settlement of canceled contracts, should be carried into the accounts as a profit in computing the amount available for payment of a contract bonus to the employee depends on whether items of cost which the settlement was made to offset have already been carried into the accounts as a loss; if they have been so treated, the amount paid in settlement should appear as a credit.[39]

§ 117. Expenses and Special Damages for Failure to Reimburse

An employee may recover special damages sustained from his employer's wrongful failure to reimburse him for expenses.

An employee, entitled to be reimbursed for expenses, may recover the amount paid out by him, if reasonable, as discussed supra § 100, and also damages for any suffering sustained where such damages are clearly within the reasonable contemplation of the parties as a probable result of the employer's breach of contract.[40]

§ 118. Renewal or Continuance of Employment

In the absence of contrary agreement, a renewal or continuance of employment is usually presumed to be at the rate of compensation specified in the original contract.

Where an employee, hired for a definite term at a fixed price, continues in his employment after the term, without any new contract, it will be presumed that the parties intended that he should be paid the same wages which were payable to him under the original contract,[41] and not their reasonable value under a quantum meruit,[42] and the same rule applies where a seasonal employee renews his service after a period of unemployment intervening without a new agreement as to wages or terms of service.[43] This presumption continues to control as

32. Conn.—Pierce v. Whittlesey, 19 A. 513, 58 Conn. 104, 7 L.R.A. 286.

33. Cal.—Hughes v. Pacific Wharf & Storage Co., 205 P. 105, 188 Cal. 210.

34. N.J.—Van Horn v. Van Horn, Ch., 20 A. 826.
39 C.J. p 185 note 93.

35. N.Y.—Miller v. Hooper, 7 Hun 200.
39 C.J. p 185 note 94.

36. U.S.—Rogers v. Union Pac. R. Co., C.C.A.Or., 145 F.2d 119.
La.—Rogers v. Estate of Peter Jung, App., 176 So. 886.
Mich.—Lewis v. Roulo, 53 N.W. 622, 93 Mich. 475.
Pa.—Steinberg v. M. Nathan & Bro., 150 A. 899, 300 Pa. 496.

Right to additional compensation see supra §§ 96–98.

37. N.H.—Elwell v. Roper, 58 A. 507, 72 N.H. 585.
39 C.J. p 186 note 97.

38. Mass.—Charlton v. Library Bureau, 156 N.E. 705, 260 Mass. 1.
39 C.J. p 186 note 98.

Accountant's determination
Under agreement for bonus to employees, parties were bound, in determining bonus, by accountants' determination of per cent which current earnings bore to outstanding stock.—Charlton v. Library Bureau, supra.

39. Mich.—Hallock v. Economy Drawing Table Co., 193 N.W. 825, 223 Mich. 249.

40. Tex.—Gulf, C. & S. F. R. Co. v. Jackson, 69 S.W. 89, 29 Tex.Civ. App. 342.
39 C.J. p 186 note 2.

41. Alaska.—Walbridge v. New York Alaska Gold Dredging Co., 8 Alaska 64.
Pa.—Schoenberg v. Heiman's Inc., Com.Pl., 24 Erie Co. 164.
S.C.—Cooksey v. Beaumont Mfg. Co., 9 S.E.2d 790, 194 S.C. 395.
S.D.—**Corpus Juris cited in** Jorgenson v. Midland Nat. Life Ins. Co., 21 N.W.2d 54, 56.
39 C.J. p 186 note 5.

42. Cal.—Perry v. J. Noonan Furniture Co., 95 P. 1128, 8 Cal.App. 35.

43. Ark.—Model Window Glass Co. v. Moody, 233 S.W. 1092, 150 Ark. 142.

long as the employer accepts the services on that basis[44] and fails to notify the employee of any change,[45] and a mere declaration of intention not to renew, made some time after the termination of the original contract, is not the equivalent of notice within the meaning of the rule.[46]

The presumption of a continuance of the old wages does not arise, however, when, at the end of the original employment term, the parties take up for consideration the terms of employment for the future, and their negotiations are still pending,[47] or where the old contract, which is sought to be used as a basis for the recovery, is not a contract for services to be rendered but merely a settlement of a claim for past services,[48] or where the old contract is made, not at the beginning of the employment, but at some later time, fixing the wages for past, as well as future, services.[49] Likewise the presumption does not arise where the contract under which recovery is sought is construable as one for an indefinite period during which the employee has accepted a lower rate of compensation without protest,[50] or where the employer assigns his contract to a third person, and the employee continues in the service of the assignee without any express agreement between them as to the wages to be paid.[51] The return to work of striking employees has been held sufficient consideration to support their employer's promise that a labor board decision as to the wage rate, to be rendered thereafter, should be retroactive to the date when the employees returned.[52]

Nature of services. The presumption of a continuance of the old wages does not apply where, after the termination of the original contract, the employee renders services which are substantially different than those rendered under the old contract;[53] but a slight change in the character of the services rendered does not have this effect,[54] especially when the employee holds himself in readiness to perform the same services as formerly.[55]

Continuance after attempted modification. Where the parties to a contract terminable at the will of either party carry on unsuccessful negotiations for a modification of the original contract and the employment is later continued on the basis of the old agreement, the attempted modification will not have the effect of a termination of the contract limiting the employee's recovery to that time.[56]

Express renewal contract. Where the parties enter into an agreement to that effect at the beginning of the renewal term, services rendered thereafter will be compensated for at rates different from those specified in the original contract[57] and, by agreement of the parties, the contract may be renewed at an increased rate with a promise of additional pay for past services.[58]

44. La.—National Automatic Fire Alarm Co. v. New Orleans & N. E. R. Co., 39 So. 738, 115 La. 633.

45. Ill.—Crane Bros. Mfg. Co. v. Adams, 30 N.E. 1030, 142 Ill. 125.
39 C.J. p 186 note 8.

46. La.—National Automatic Fire Alarm Co. v. New Orleans & N. E. R. Co., 39 So. 738, 115 La. 633.

47. Mich.—White v. U. S. Gypsum Co., 133 N.W. 501, 168 Mich. 238.
39 C.J. p 186 note 10.

Implication of contract to pay reasonable value

Where employees of bankrupt continued to work while employees' representative was making efforts to procure revised terms, there was a contract implied in fact to pay reasonable value of services unless a new contract definitizing wage-rates should be negotiated, and, in the meantime, employees accepted, merely on account, what was paid them.—Martin v. Campanaro, C.C.A. N.Y., 156 F.2d 127, certiorari denied 67 S.Ct. 112, 329 U.S. 759, 91 L.Ed. ——.

Risk as to terms of new contract

If salesman employed to sell whisky on commission basis continued to work during January and February with knowledge that a new contract would be made effective as of January 1, he took his chance on terms of the new contract in continuing work after that date.—Meyers v. Brown-Forman Distillery Co., 158 S.W.2d 407, 289 Ky. 185.

48. Mo.—Bell v. Pefer Tobacco Warehouse Co., 103 S.W. 1014, 205 Mo. 475.

49. N.Y.—Smith v. Velie, 60 N.Y. 106.
39 C.J. p 187 note 12.

50. Pa.—Johnson v. Spear & Co., 186 A. 313, 122 Pa.Super. 526.

Tardy effort to recover

Where an employee for an indefinite period at a rate of compensation specified as so much less than that paid another employee continues to work for the same money wages after the wages of such other employee have been raised, and does so with knowledge of the facts and without protest, the employee may not after eventual termination of his employment recover the additional compensation to which he would have been entitled under the original contract.—Southern Sav. Bank v. Dickey, 199 S.E. 546, 58 Ga.App. 718.

51. Mass.—Connor v. Hackley, 2 Metc. 613.
39 C.J. p 187 note 13.

52. Wash.—Gord v. F. S. Harmon & Co., 61 P.2d 1294, 188 Wash. 134.

Extent of liability

Furniture manufacturer which agreed that award of board of arbitrators in wage dispute should be retroactive to date when employees returned to work was liable for difference between wages paid after employees returned to work and wages awarded by board, from time employees returned to work to time when manufacturer repudiated board's award.—Gord v. F. S. Harmon & Co., supra.

53. Cal.—Reed v. Swift, 45 Cal. 255.
39 C.J. p 187 note 14.

54. Ill.—Painter v. Durham, 195 Ill. App. 468.

55. Ill.—Painter v. Durham, supra.

56. Pa.—Loeliger v. Edson, 112 A. 451, 269 Pa. 339.

57. N.Y.—Hughes v. Eddy Valve Co., 131 N.Y.S. 744, 147 App.Div. 356.
39 C.J. p 187 note 18.

58. Wyo.—Long v. Forbes, 136 P. 2d 242, 58 Wyo. 533.

3. Time When Compensation Due and Payment

§ 119. Time When Due

a. In general
b. Time of payment not stipulated

a. In General

Generally the time when compensation becomes due and payable to an employee depends on the provisions of the contract of employment.

Subject to statutory regulations as to the time of payment, discussed infra § 156, the time when wages are payable is to be determined by the original contract of hire[59] or subsequent agreements,[60] unaffected by the parties' own construction of their contract if it in terms clearly indicates when payments are to be made.[61]

Payment when convenient. An agreement to pay an employee when convenient to the employer will be construed as an obligation to pay at some time.[62] Where the employer in such case is a company engaged in development work, the time when "convenient" for it to pay has been construed as the time when it becomes a going concern,[63] or when it becomes reasonably apparent that the company will never become a going concern, at which time it will be regarded as "convenient" for the company to pay the employee out of its existing capital assets.[64]

Payment on condition or contingency. Where an employer agrees to pay on the happening of a condition, the happening thereof imposes an absolute requirement of payment,[65] but until such condition has been met there is no right to the compensation.[66] On the other hand, where payment is postponed by the contract to the happening of a contingency, the employee is entitled to his wages after the lapse of a reasonable time where there is an implied understanding that the contingency will happen within a reasonable time;[67] and, where the promise is to pay on completion of work which is subsequently abandoned, the law implies a promise to pay within a reasonable time.[68]

Payment in advance. Wages are not payable in advance, where the contract does not so provide.[69]

Acceleration of payments. The time of payment for services actually rendered is not accelerated by the employee's falling sick[70] or by the employer's denying all liability, on the theory of anticipatory breach,[71] but, as discussed supra § 49, a right of

59. U.S.—Floyd v. Ring Const. Corp., D.C.Minn., 66 F.Supp. 436.
39 C.J. p 187 note 21.

Provision for irregular payment

Oral contract, under which employee agreed to be paid irregularly and to receive unpaid balance of her compensation when employer should be in a position of financial strength and success, was construable as constituting an agreement to defer part of what became due to employee in order to retain her position, and as deferring payment only while the services were being rendered, so that, on termination of the employment, the remaining wages due the employee became payable, regardless of employer's financial condition at that time.—McDonald v. Texcraft Products Co., 20 A.2d 638, 91 N.H. 411.

60. Me.—Goodwin v. Cabot Amusement Co., 149 A. 574, 129 Me. 36.
N.C.—Booth v. Ratcliffe, 12 S.E. 112, 107 N.C. 6.

61. Mo.—Lindner v. Cape Brewery & Ice Co., 111 S.W. 600, 131 Mo. App. 680.

62. Colo.—Royal Tiger Mines Co. v. Ahearn, 47 P.2d 692, 97 Colo. 116.

Reasonable time

Contract provision leaving time of payment of part of salary to employer's treasurer did not justify contention that such balance was not to be paid at all, either because the contract was too vague to be enforceable or because the treasurer had not decided to make payment; but, on the contrary, the contract should be construed as providing for payment within a reasonable time.—McCrillis v. L. Q. White Shoe Co., 161 N.E. 902, 264 Mass. 32.

63. Colo.—Royal Tiger Mines Co. v. Ahearn, 47 P.2d 692, 97 Colo. 116.

64. Colo.—Royal Tiger Mines Co. v. Ahearn, supra.

65. Idaho.—Smith v. Boyden, 290 P. 377, 49 Idaho 638.

Finances permitting

Corporation agreeing to pay accrued salary to employee out of profits as financial condition permitted became liable to pay on occurrence of condition, and liability was not removed by subsequent changes.—Booth v. Booth & Bayliss Commercial School, 180 A. 278, 120 Conn. 221, 99 A.L.R. 1517.

66. Ohio.—Fate-Root-Heath Co. v. Ceramic Machinery Co., 11 N.E.2d 91, 56 Ohio App. 448.

Payment for goods sold on commission

The provision of employment contract that salesman should receive a commission on all sales was executory, and salesman was entitled to commission only after goods had been delivered, accepted, and paid for during period of his employment.—Fate-Root-Heath Co. v. Ceramic Machinery Co., supra.

Termination of employer's contracts

Under contract with company for services to be rendered in operating store for sale of surplus army goods with provision for payment thereunder at termination of existing contracts between company and the United States, termination of contracts between company and the United States was condition precedent to recovery for services.—Georgia Wholesale Co. v. Downs, 4 S.E.2d 107, 60 Ga.App. 441.

67. U.S.—Hood v. Hampton Plains Exploration Co., C.C.Nev., 106 F. 408.
39 C.J. p 187 note 24.

68. U.S.—George A. Fuller Co. v. Brown, C.C.A.N.C., 15 F.2d 672.

Construction of ships

Under agreement to pay bonus to employee on completion of ships under construction, law implies promise to pay within reasonable time, where ships were never completed, but construction was abandoned by employer.—George A. Fuller Co. v. Brown, supra.

69. Cal.—Oliphant v. Home Builders, 168 P. 700, 34 Cal.App. 720.

70. Vt.—Tebo v. Ballard, 36 Vt. 612.
39 C.J. p 187 note 26.

71. N.Y.—McCaskey v. Cumberland

action for wages may accrue immediately on wrongful discharge.

b. Time of Payment Not Stipulated

Where no provision for time of payment is made by contract, compensation of an employee ordinarily becomes due when earned and demanded, or, in the case of employment by the week or month, at the close of each such period.

If no provision for time of payment is made, an employee's compensation is payable on demand as soon as it is earned,[72] but where no demand is made, at the close of the employment.[73] On termination of a contract of employment by mutual consent, and the superseding thereof by another contract, compensation under the first contract becomes payable immediately.[74]

Fixed term. If the hiring is for a fixed term at a specified rate, the contract not stating, however, when the wages are to be paid, they are not payable until the end of the term,[75] unless from the nature of the employment[76] or the conduct of the parties[77] payments within the term are shown to be within the contemplation of the parties, or where under the circumstances the payment at the end of the term would be so unusual as to furnish ground for a presumption of an intended payment within the term.[78]

Implied contracts. Services rendered and accepted on an implied contract must be paid for as soon as rendered.[79]

By the day, week, or month. Wages are payable at the close of each day, week, or month if the employment is by the day, week, or month,[80] the custom of the neighborhood prevailing in the case of employees of a particular class where such custom is shown.[81]

§ 120. Payment

a. In general
b. Form and medium
c. Recovery of payments

a. In General

Ordinarily an employer's liability to his employee ends with payment of the agreed compensation.

In the absence of fraud or duress an employer's obligation to his employee ordinarily ends with payment of the agreed compensation.[82] Payment by an employer to his own agent, however, or to a third person without the employee's consent, as discussed infra § 125, does not bar the employee's claim for wages.

Discounts on advance payments. An employee who accepts less than the amount of wages due in consideration of their payment before they are due is bound thereby,[83] and cannot thereafter recover the amount of the discount on the ground that the advance payment was in violation of the wage assignment statute.[84]

b. Form and Medium

Ordinarily an employee may be paid in any form or medium agreeable to both parties, but in the absence of contract provision to the contrary he is entitled to payment in money.

Glass Mfg. Co., 184 N.Y.S. 360, 193 App.Div. 856, affirmed 135 N.E. 914, 233 N.Y. 552.
39 C.J. p 188 note 27.

72. Wis.—Murray v. Hamilton Beach Mfg. Co., 190 N.W. 460, 178 Wis. 624.
39 C.J. p 188 note 29.

73. Cal.—Mixer v. Mixer, 83 P. 273, 2 Cal.App. 227.
39 C.J. p 188 note 30.

74. Neb.—Price v. Platte Valley Public Power & Irrigation Dist., 298 N.W. 746, 139 Neb. 787.

75. Mich.—Reynolds v. Reeder, 62 N.W. 355, 104 Mich. 265.
39 C.J. p 188 note 31.

76. La.—Seal v. Erwin, 2 Mart.,N.S., 245.
39 C.J. p 188 note 32.

77. Ill.—F. B. Tait Mfg. Co. v. Tinsman, 138 Ill.App. 76.

78. Cal.—Stone v. Bancroft, 72 P. 717, 139 Cal. 78.
39 C.J. p 188 note 34.

79. N.Y.—Wood v. Dock & Mill Co., 184 N.Y.S. 225, 193 App.Div. 236.

80. Okl.—Corpus Juris cited in Looney v. Bruin Oil Corporation, 122 P.2d 1007, 1009, 190 Okl. 266—Crescent Oil Co. v. Brumley, 37 P.2d 593, 169 Okl. 462.
39 C.J. p 188 note 35.

Salary and commissions
Where, under employment contract for indefinite time, employee in addition to monthly salary is to receive commission, no time being specified when commission is to be paid, commission becomes due and payable at close of each month, in absence of proof of custom or usage to contrary.—Crescent Oil Co. v. Brumley, supra—39 C.J. p 152 note 87.

81. Pa.—In re Schuman's Estate, 45 Pa.Super. 587.
39 C.J. p 188 note 36.

82. N.Y.—Brown v. Utica Mut. Ins. Co., 53 N.Y.S.2d 760, 184 Misc. 693.
Payment to married woman of wages due her see Husband and Wife § 17.

Gratuitous payments
Fact that employer paid commissions when no longer obliged to because of employee's resignation and cessation from part of contractual duties did not obligate employer to continue payments.—Claflin v. Manufacturers' Club of Philadelphia, 158 A. 575, 104 Pa.Super. 163.

Vacation allowance
Auditor of trust company having received customary three weeks' vacation with pay during preceding summer could not recover vacation allowance after superintendent of banks took possession of trust company for purposes of liquidation in December and auditor was separated from his employment.—Montefalcone v. Banco Di Napoli Trust Co. of N. Y., 52 N.Y.S.2d 655, 268 App.Div. 636, reargument denied 53 N.Y.S.2d 955, 269 App.Div. 685.

83. Ind.—Princeton Coal Co. v. Dorth, 133 N.E. 386, 191 Ind. 615, 24 A.L.R. 1471, dissenting opinion 133 N.E. 500, 191 Ind. 615, 24 A.L.R. 1471, rehearing denied 134 N.E. 275, 191 Ind. 615, 24 A.L.R. 1471.

84. Ind.—Princeton Coal Co. v. Dorth, supra.

Generally an employee's compensation may be paid, in any form agreeable to the parties,[85] subject to statutory provisions governing the medium of payment of wages discussed infra § 157. In the absence of a provision to the contrary in the contract,[86] the employee ordinarily is entitled to payment of his wages in money.[87] The fact that an employee acquiesces in the practice of paying him by check does not show his agreement to accept the check as satisfaction of his claim for compensation irrespective of whether or not he subsequently receives payment on it,[88] and, where a salary check is stolen from the employee and cashed by another on a forged indorsement, it has been held that the employer remains liable for the salary.[89]

Payment in stock. By agreement of the parties, provision may be made for payment of employees in corporate stock.[90] An employee is entitled to payment in stock, computed at its then market value, where the contract provides for the payment of services in stock,[91] and employees agreeing to take stock in a corporation to be organized may refuse it where the corporate property has been mortgaged contrary to the agreement, thus reducing the value of the stock.[92] If the contract provides for payment in cash and stock and limits the employee's entire stockholding to a fixed amount, he is entitled to payment in cash and stock until his entire stockholdings equal the limited amount, and after that to payment entirely in cash.[93]

c. Recovery of Payments

Ordinarily an employer cannot recover back payments of compensation voluntarily made to his employee, as in the case of advances against future commissions.

Generally, where an employer has voluntarily made a payment of wages, he cannot recover it back,[94] even though the employee by his subsequent conduct would have forfeited the right thereto if it had not been made.[95] However, he may recover back any overpayments secured through fraud[96] or mistake.[97] It has also been held that an employer is entitled to recover the unearned portion of an annual bonus where the employee voluntarily quit his position before the end of the contract year.[98]

Advances against commissions. Where the contract of employment provides for advances to the employee, to be charged to, and deducted from, the commissions agreed to be paid to him as the same

85. Mich.—Adolph v. Cookware Co. of America, 278 N.W. 687, 283 Mich. 561.
Pa.—Miller v. Thomas, Com.Pl., 48 Dauph.Co. 103.
Form and medium of payment generally see the C.J.S. title Payment §§ 13-37, also 48 C.J. p 595 note 64 —p 630 note 72.

Other than money

Payment of wages or salaries may be made in something other than money, in absence of contrary statutory provision.—Setree v. Falkner, Ohio App., 50 N.E.2d 412.

86. Tex.—Attoyac River Lumber Co. v. Payne, 122 S.W. 278, 57 Tex. Civ.App. 327.
39 C.J. p 188 note 45.

87. Minn.—Hoy v. Hoy, 188 N.W. 263, 152 Minn. 206.
39 C.J. p 188 note 44.

88. Mo.—Rettinghouse v. Krey Packing Co., App., 200 S.W.2d 584.

89. Mo.—Rettinghouse v. Krey Packing Co., supra.

90. Mont.—Davis v. Sullivan Gold Mining Co., 62 P.2d 1292, 103 Mont. 452.

Employer's option

Fact that mining corporation employees who had agreed to accept wages in stock of another corporation were paid in money disclosed intent that agreement was not abrogation of original contract, but mere modification giving employer option to pay wages in money or stock.—Davis v. Sullivan Gold Mining Co., supra.

91. Md.—Schneider v. Hagerstown Brewing Co., 110 A. 218, 136 Md. 151.
39 C.J. p 189 note 46.

92. Iowa.—Tracey v. Judy, 210 N. W. 793, 202 Iowa 646.

93. Ind.—Princeton Coal Co. v. Dorth, 133 N.E. 386, 191 Ind. 615, 24 A.L.R. 1471, dissenting opinion 133 N.E. 500, 191 Ind. 615, 24 A. L.R. 1471, rehearing denied 134 N.E. 275, 191 Ind. 615, 24 A.L.R. 1471.
N.Y.—Maune v. Unity Press, 124 N. Y.S. 504, 139 App.Div. 740.

94. La.—Jones v. Ernst & Ernst, 134 So. 375, 172 La. 406.
N.Y.—Larsen v. McCann, 68 N.Y.S. 2d 352, 188 Misc. 752.
Tex.—Peacock v. Joy, 153 S.W.2d 440, 137 Tex. 387.
Recovery of payments generally see the C.J.S. title Payment §§ 132-160, also 48 C.J. p 734 note 5—p 774 note 36.

Full knowledge of facts

Where salesman entered into a new written agreement with employer each year, which contained same provision, that salesman would be credited with commissions only on merchandise sold to dealers called on by salesman within thirty days before receipt of order, employer, who on yearly settlement with salesman paid commissions without regard to thirty-day provision, could not set off such alleged overpayment of commissions in previous years against commissions earned under a new contract of employment, since payments were voluntarily made by employer with full knowledge of all the facts and without any fraud, duress or extortion by salesman.—Hood v. Sioux Steel Co., 287 N.W. 636, 67 S.D. 1.

In the absence of a special agreement, an employer may not recover back wages or equivalent drawings paid during a period of completed employment.—Kleinfeld v. Roburn Agencies, 60 N.Y.S.2d 485, 270 App. Div. 509.

95. Vt.—Winn v. Southgate, 17 Vt. 355.

96. Me.—Rundlett Co. v. Morrison, 115 A. 247, 120 Me. 439.
39 C.J. p 189 note 51.

97. U.S.—Timberlake v. Day & Zimmerman, D.C.Iowa, 49 F.Supp. 28.

Reduction in grade

In ordnance plant guard's action to recover wage and hour benefits under Fair Labor Standards Act, employer, on counterclaim, was entitled to recover overpayments made to guard by mistake after guard was reduced in grade.—Timberlake v. Day & Zimmerman, supra.

98. La.—United Shoe Stores Co. v. Dryer, 135 So. 50, 16 La.App. 605.

may accrue, the employer may recover back any excess of advances over the commissions earned, if there is an express[99] or implied[1] agreement to repay such excess, or if by breach of his contract the employee disabled himself from earning the commissions,[2] subject, however, to any provision in the contract guaranteeing to the employee a minimum compensation.[3]

It is generally held that in the absence of either an express or implied agreement or promise to repay advances in excess of commissions earned, the employer has no remedy against the employee,[4] even though the contract in terms provides that there shall be settlements between them monthly;[5] the sole source of reimbursement is the commissions and no personal liability rests on the employee to repay advances.[6] The rule precluding the employer's recovery of excess advances applies where the circumstances are such as to prevent implication of an enforceable promise to repay,[7] and the employee is not liable for repayment notwithstanding the contract in terms provides that the employer agrees "to loan and advance" a fixed amount periodically to the employee, where other provisions in the contract show clearly that the parties regarded the payment as an advance and not as a loan.[8] According to some decisions, however, an employer is entitled to recover advances in excess of the commissions earned even in the absence of an express agreement or promise to repay the excess advances.[9]

Where the employer has agreed to cancel the employee's overdrafts, he cannot recover the amount thereof.[10] Also, where excessive advances are made to an employee under a contract providing for

99. Minn.—**Corpus Juris quoted in** St. Anthony Motor Co. v. Patterson, 221 N.W. 719, 720, 175 Minn. 624.
N.Y.—Harris v. A. & J. Freed Corporation, 8 N.Y.S.2d 229—Rice v. Roberts, 140 N.Y.S. 114.

Contract construed as a whole
N.Y.—S. W. Farber, Inc., v. Eisenhardt, 8 N.Y.S.2d 662, 167 Misc. 725.

1. Ill.—Western Picture Frame Co. v. Tuchin, 55 N.E.2d 113, 323 Ill. App. 275.
Minn.—**Corpus Juris quoted in** St. Anthony Motor Co. v. Patterson, 221 N.W. 719, 720, 175 Minn. 624.
N.Y.—Schwed v. E. N. Kennedy, Inc., 221 N.Y.S. 179, 220 App.Div. 189.
39 C.J. p 153 note 12.

2. N.Y.—Johnson v. Quayle & Son Corporation, 257 N.Y.S. 874, 236 App.Div. 351—Schwed v. E. N. Kennedy, Inc., 221 N.Y.S. 179, 220 App.Div. 189.

3. N.Y.—Rice v. Roberts, 140 N.Y. S. 114.
39 C.J. p 153 note 13.

4. Conn.—Sutton v. Avery, 44 A.2d 701, 132 Conn. 397.
Ga.—**Corpus Juris cited in** Smith v. Franklin Printing Co., 187 S.E. 904, 905, 54 Ga.App. 385—Fried v. Portis Bros. Hat Co., 152 S.E. 151, 41 Ga.App. 30.
Ill.—Nelson v. American Business Bureau, 241 Ill.App. 432—Srere v. Rapp, 233 Ill.App. 190.
Ky.—**Corpus Juris cited in** Hibbs-Kiefer Hat Co. v. Schneiderhan, 33 S.W.2d 304, 305, 236 Ky. 470.
La.—American Furniture Co. v. Snell, App., 164 So. 478.
Minn.—Leighton v. Bancamerica-Blair Corporation, 255 N.W. 848, 192 Minn. 223—**Corpus Juris quoted in** St. Anthony Motor Co. v. Patterson, 221 N.W. 719, 720, 175 Minn. 624.
N.J.—**Corpus Juris cited in** Veteran Realty Co. v. Marks, 157 A. 452, 9 N.J.Misc. 1207, affirmed 166 A. 148, 110 N.J.Law 554.
N.Y.—Posner v. Precision Shapes, 65 N.Y.S.2d 733, 271 App.Div. 435—Buchsbaum v. Nussbacker, Friedman & Goodman, 39 N.Y.S.2d 589, 179 Misc. 547—In re Schem's Estate, 284 N.Y.S. 274, 157 Misc. 612—Weinstein-Goodkind, Inc., v. Donovan, 266 N.Y.S. 670, 148 Misc. 847—Denihan v. Finn-Iffland & Co., 256 N.Y.S. 801, 143 Misc. 525—Spirit v. Black Diamond Furniture Works, 241 N.Y.S. 194, 137 Misc. 398—Markstein v. M. Ufland & Co., 214 N.Y.S. 476, 126 Misc. 683.
W.Va.—**Corpus Juris cited in** Richmond Dry Goods Co. v. Wilson, 141 S.E. 876, 105 W.Va. 221, 57 A. L.R. 31.
Wis.—Shaler Umbrella Co. v. Blow, 227 N.W. 1, 199 Wis. 489.
39 C.J. p 154 note 14.

No personal charge
Provision for salesman's drawing account, providing that excess of drawing account over commissions due at end of year would not be personal charge against salesman, was held to mean that balance of drawing account above expenses was salesman's.—Gross Bergman Mfg. Co. v. Feil, 250 P. 387, 80 Colo. 239.

Drawing account against profits
Where agreement provided that department manager was to have weekly drawing account to be charged against his share of net profits, and there were no profits, he was not chargeable with amounts drawn by him.—Anagnosti v. Almy, 147 N. E. 854, 252 Mass. 492.

Admission of liability
Salesman, signing statement showing excess of drawing account payments over commissions earned, does not thereby admit liability for difference.—Roofing Sales Co. v. Rose, 137 A. 211, 103 N.J.Law 553.

5. Minn.—**Corpus Juris quoted in** St. Anthony Motor Co. v. Patterson, 221 N.W. 719, 720, 175 Minn. 624.
N.Y.—Strauss v. Arthur Wolfsohn Co., 159 N.Y.S. 78, 95 Misc. 171.

6. Ky.—Hibbs-Kiefer Hat Co. v. Schneiderhan, 33 S.W.2d 304, 236 Ky. 470.
N.Y.—Denihan v. Finn-Iffland & Co., 256 N.Y.S. 801, 143 Misc. 525.

7. La.—American Furniture Co. v. Snell, App., 164 So. 478.
N.J.—Roofing Sales Co. v. Rose, 137 A. 211, 103 N.J.Law 553.

Subsequent promise without consideration
Where salesman was employed on commission basis but employer guaranteed weekly return of an amount equal to salesman's minimum requirements for living and traveling expenses, salesman's indefinite promise to reimburse employer for advances exceeding commissions if future circumstances permitted it, made after salesman quit, was not an absolute promise to pay as matter of law, and was without consideration and employer could not recover thereon.—Sutton v. Avery, 44 A.2d 701, 132 Conn. 397.

8. N.Y.—Samuels v. Bloom, 154 N. Y.S. 189, 91 Misc. 7.

9. Ala.—Liberty Nat. Life Ins. Co. v. Longshore, 132 So. 614, 222 Ala. 408—Beck v. West & Co., 6 So. 70, 87 Ala. 213.
39 C.J. p 154 note 17, p 156 note 63.

10. Mo.—Panich v. Curtis, Owen, Fuller Corporation, App., 124 S.W. 2d 619.

a drawing account against commissions, and the parties thereafter enter into a new agreement for compensation, expressly canceling the prior agreement, but making no mention of the amount overdrawn under such prior agreement, the employee is entitled to his salary accruing under the new contract without deducting the overpayment under the original contract.[11]

§ 121. —— Presumptions

Proof of regular and periodic payment of an employee's wages ordinarily raises a presumption of payment in full.

It will be presumed that an employee has been fully paid for his services, where it is shown that he worked under a contract fixing his wages and providing for their payment periodically and that they were regularly paid when due,[12] especially where the payment was accepted without protest or demand for more[13] or was receipted for as wages in full.[14] This presumption of payment follows from a single payment for services for a particular month or other period of time,[15] and extends to all prior periods of service,[16] provided no interval of time has intervened between them,[17] and to all labor or services rendered by an employee similar to his regular duties.[18]

The presumption of full payment may be rebutted by evidence of a subsequent agreement providing for the payment of additional compensation if the employee would continue in the service, and his continuing in the service on those terms.[19] Payment of an employee's wages will not be presumed from the employer's ability to pay and the absence of reasons for his not paying.[20]

Domestic servants and time laborers. The presumption that services have been rendered gratuitously or else that they have been fully paid for is especially applicable to domestic servants[21] and to time laborers[22] who make no demand for further payment until a considerable period after the termination of their services. Such a presumption may be rebutted, however, by evidence tending to show that the services were rendered with an understanding between the parties that they were to be paid for,[23] or that no payment had been made,[24] as, for example, where the employee demands payment and the employer promises to pay at some future time.[25]

The presumption of payment is not rebutted by a failure to allege payment,[26] or by the employee's declarations to third persons that he made frequent demands for money and that the employer refused to pay him the amount he asked for,[27] or by the employer's account book which was not a full record either of his receipts or disbursements, but which contained occasional charges against the employee.[28]

The presumption of payment for domestic services applies not only to domestics living in the house of the employer, but also to employees rendering domestic services but not living in the employer's house,[29] and to those rendering services regarded essentially as domestic services, although called on to render other services not usually associated with the ordinary domestic servant.[30] The rule cannot be invoked where the employer assumes relations of intimacy with his servant, and by what he says and does indicates an intention to marry her.[31]

11. Pa.—Ruddy v. Autographic Register Co., 158 A. 308, 104 Pa. Super. 599.

12. Ark.—Corpus Juris quoted in Mogridge v. Mo-Ark Oxygen Co., 97 S.W.2d 899, 900, 193 Ark. 127.
39 C.J. p 189 note 52.
Burden of proof as to payment see infra § 129.

13. Ind.—Starbuck v. Fletcher Savings & Trust Co., 170 N.E. 863, 91 Ind.App. 221.

14. Ark.—Corpus Juris quoted in Mogridge v. Mo-Ark Oxygen Co., 97 S.W.2d 899, 900, 193 Ark. 127.

15. Ark.—Corpus Juris quoted in Mogridge v. Mo-Ark Oxygen Co., 97 S.W.2d 899, 900, 193 Ark. 127.
Tenn.—Shuman v. Clater, 3 Head 445.

16. Ark.—Corpus Juris quoted in Mogridge v. Mo-Ark Oxygen Co., 97 S.W.2d 899, 900, 193 Ark. 127.
Tenn.—Shuman v. Clater, 3 Head 445.

17. Ark.—Corpus Juris quoted in Mogridge v. Mo-Ark Oxygen Co., 97 S.W.2d 899, 900, 193 Ark. 127.
Mo.—Bougher v. Kimball, 30 Mo. 193.

18. Ark.—Corpus Juris quoted in Mogridge v. Mo-Ark Oxygen Co., 97 S.W.2d 899, 900, 193 Ark. 127.
Mont.—Doane v. Marquisee, 206 P. 426, 63 Mont. 166.

19. Ark.—Corpus Juris quoted in Mogridge v. Mo-Ark Oxygen Co., 97 S.W.2d 899, 900, 193 Ark. 127.
39 C.J. p 189 note 58.

20. Ark.—Corpus Juris quoted in Mogridge v. Mo-Ark Oxygen Co., 97 S.W.2d 899, 900, 193 Ark. 127.
Mo.—Ryans v. Hospes, 67 S.W. 285, 167 Mo. 342.

21. Pa.—Witten v. Stout, 131 A. 360, 284 Pa. 410.
39 C.J. p 189 note 60.

22. Iowa.—Yardley v. Iowa Electric Co., 191 N.W. 791, 195 Iowa 380.
Pa.—Paul v. Miller, 1 Lack.Leg. News 151.

23. Pa.—In re Boileau's Estate, 18 Pa.Dist. 320—In re Cummiskey's Estate, 18 Pa.Dist. 43.

24. Pa.—Schreiber v. Northam, 60 Pa.Super. 483.

25. Pa.—Schreiber v. Northam, supra.

26. Pa.—Taylor v. Beatty, 51 A. 771, 202 Pa. 120.

27. Pa.—In re Hayes' Estate, 17 Pa. Super. 412.

28. Pa.—In re Hayes' Estate, supra.

29. Pa.—In re Hayes' Estate, supra.

30. Pa.—Taylor v. Beatty, 51 A. 771, 202 Pa. 120.
39 C.J. p 189 note 69.

31. Pa.—Schrader v. Beatty, 55 A. 958, 206 Pa. 184.

4. Actions

§ 122. Nature and Form of Remedy

A servant has the right to enforce his claims against his master by an honest resort to the courts. Depending on the circumstances, the action is either on the contract for wages due, or on quantum meruit for the value of the services rendered.

A servant has the right to seek enforcement of his claims against his master by a temperate and honest resort to the courts,[32] even while still in the employ of the master.[33]

The recovery of wages as such should be had in an action for wages based on the contract,[34] at least as long as the contract remains in force.[35] When the employer commits a breach of the employment contract, while the employee may recover the wages due him under the contract,[36] he may also, if he so elects, disregard the contract and sue to recover what his services are reasonably worth,[37] although there is some authority to the contrary on this latter point.[38] Moreover, it has been held that, where the contract is terminated and nothing remains to be done except payment of money, a suit may be maintained on a promise under the common counts.[39] In a proper case an employee may maintain a suit, based on quasi contract, for unjust enrichment.[40]

Actions for breach of employment contracts generally are considered supra § 11 and actions by an employee for wrongful discharge supra §§ 47–59. Actions by employees to recover compensation for use of inventions are considered supra § 73 f. Actions by employees of a corporation against stockholders to enforce the stockholders' statutory liability are considered, together with actions to enforce stockholders' statutory liability to creditors generally, in Corporations §§ 678–705.

Effect of union agreements. Under the Railway Labor Act a single employee suing on his contract of employment to enforce his individual right to recover pay does not sue directly on the collective agreement made between the carrier and a union as a complete contract made for his benefit,[41] but sues on his parol contract of hiring which adopted those terms of the collective agreement which are applicable to him.[42]

Recovery on quantum meruit generally. A recovery on quantum meruit, for the reasonable value of the services rendered, may be had where the employer accepts and benefits by services rendered in anticipation of a formal contract which is never made,[43] or under a contract which is silent as to the amount of wages to be paid,[44] or, as appears in Frauds, Statute of, § 259, under a contract which

32. Mo.—M. F. A. Milling Co. v. Unemployment Compensation Commission, 169 S.W.2d 929, 350 Mo. 1102, 146 A.L.R. 239.
N.Y.—Brink v. Fay, 7 Daly 562.

33. Mo.—M. F. A. Milling Co. v. Unemployment Compensation Commission, 169 S.W.2d 929, 350 Mo. 1102, 146 A.L.R. 239.
N.Y.—Brink v. Fay, 7 Daly 562.

34. S.C.—King v. Western Union Tel. Co., 65 S.E. 944, 84 S.C. 73.
39 C.J. p 190 note 77.

35. Conn.—Viall v. Lionel Mfg. Co., 98 A. 329, 90 Conn. 694.
39 C.J. p 190 note 76.

36. U.S.—Taylor v. Tulsa Tribune Co., C.C.A.Okl., 136 F.2d 981.
Pa.—Miller v. Thomas, Com.Pl., 48 Dauph.Co. 103.
39 C.J. p 190 note 74.

Contract provision as not exclusive
Return of corporation's stock and its corporate and trade-names to seller thereof, as provided by sale contract in event of buyer's default, was not seller's exclusive remedy barring recovery of damages for buyer's breach of contract by failure to pay seller agreed salary for entire stipulated period of his employment by buyer.—In re Hale Desk Co., C.C.A.N.Y., 97 F.2d 372.

37. Mont.—Davis v. Sullivan Gold Mining Co., 62 P.2d 1292, 103 Mont. 452.
39 C.J. p 190 note 75.

Facts held not to constitute breach of contract so as to authorize recovery on a quantum meruit.—Parker v. First Trust & Savings Co., 266 F. 961—39 C.J. p 190 note 73.

38. Mich.—Geistert v. Scheffler, 25 N.W.2d 241, 316 Mich. 325.

39. Ala.—Standard Lumber Co. v. Hosmer, 142 So. 825, 225 Ala. 321—Tillery v. Price, 137 So. 440, 223 Ala. 532.

40. N.Y.—Bunnell v. Keystone Varnish Co., 4 N.Y.S.2d 601, 167 Misc. 707, affirmed 5 N.Y.S.2d 415, 254 App.Div. 885.

Suit held one for unjust enrichment
N.Y.—Bunnell v. Keystone Varnish Co., supra.

41. U.S.—Illinois Cent. R. Co. v. Moore, C.C.A.Miss., 112 F.2d 959, reversed on other grounds 61 S.Ct. 754, 312 U.S. 630, 85 L.Ed. 1089.
Who may institute action on collective bargaining contract generally see supra § 28 (83).

The reason for the rule is that, while collective agreement may contain a contract between union and carrier, it is not itself a contract of employment and binds no one to serve the carrier and binds carrier to hire no particular person but is only a basis agreed on as mutually satisfactory for making contracts of employment.—Illinois Cent. R. Co. v. Moore, supra.

42. U.S.—Illinois Cent. R. Co. v. Moore, supra.

43. Ind.—Macbeth-Evans Glass Co. v. Amama, 95 N.E. 228, 176 Ind. 1.

44. Ga.—Bentley v. Smith, 59 S.E. 720, 3 Ga.App. 242.
La.—McWilliams v. Elder, 27 So. 352, 52 La.Ann. 995.

Agreement to pay reasonable compensation
Where employer did not perform promise to pay employee reasonable compensation for inventions turned over to employer, employee could recover under count in indebitatus assumpsit.—Corthell v. Summit Thread Co., 167 A. 79, 132 Me. 94, 92 A.L.R. 1391.

Rate of commission to be arranged
Under contract of employment

cannot be enforced because of the statute of frauds. It will not be allowed where suit is brought on the contract to recover the contract wages,[45] or where the services have already been fully paid for under the contract as proved, an alleged agreement to pay an additional amount not being established,[46] or where no services whatever have been rendered because of injuries received by the employee incapacitating him for work under the contract.[47] If, in the latter case, the employer agrees to pay him the usual wages in lieu of damages, the employee's remedy is on the special agreement.[48]

Employment by the day, week, or month. Where an employee is hired and paid by the day, week, or month, on breach of the contract by his employer he may sue on the contract to recover all wages due and unpaid[49] or in quantum meruit for the reasonable value of the services rendered.[50]

Prevention of performance. Where full performance of the contract is prevented by the employer, the employee, if he has fully performed his part of the contract, may sue on the contract[51] or in quantum meruit for the services performed.[52] However, if the employer has prevented the performance of the entire service contracted for, the employee's sole remedy is on the contract.[53]

After discharge for cause. Recovery for services rendered by an employee discharged for cause after part performance, where allowed, must be on the contract in some jurisdictions,[54] in others on a quantum meruit.[55] However, after discharge, whether for or without cause, there can be no recovery on the contract for wages or salary accruing after discharge[56] or for advances on account thereof;[57] but the employee may recover on quantum meruit for services rendered after his discharge.[58]

Commissions and profits. Where the contract allows the employee commissions or a share of the profits, at least in the absence of grounds for an accounting in equity, a recovery thereon must be by an action at law.[59] It is not necessary that the employee should sue on a stated account or for an accounting, but he can bring his action for a specified amount due him.[60] It has been held, however, that after a contract has been terminated, so that nothing remains to be done except payment of money, an action on the common counts will lie for commissions or a share of the profits earned;[61] but, where plaintiff seeks commissions which he would have made under the contract had it not been breached, his action must be on the contract.[62]

Actions for accounting. Where a fiduciary relation exists between an employer and employee, an action by the latter for an accounting in equity will lie.[63] An employee whose compensation is based on commissions[64] or profits of the business[65] may, in most jurisdictions, bring an action in equity against his employer for an accounting, especially where he is employed by a partnership and a recovery of his share of the profits involves an accounting between the partners themselves;[66] and his right to an accounting is not suspended or defeated by the fact that he is about to become a competitor of his employer in the same kind of business.[67] In

providing for a drawing account against commissions and stating that rate of commissions should be mutually arranged, employee could not recover on express contract, but could recover on quantum meruit.—Finkel v. Rose, 21 N.Y.S.2d 46.

45. S.C.—King v. Western Union Tel. Co., 65 S.E. 944, 84 S.C. 73.

46. N.Y.—Young v. Farwell, 59 N.E. 143, 165 N.Y. 341.

47. Ind.—Louisville, N. A. & C. R. Co. v. Barnes, 44 N.E. 1113, 16 Ind. App. 312.

48. Ind.—Louisville, N. A. & C. R. Co. v. Barnes, supra.

49. N.Y.—Purdy v. C.C.White Paper Mfg. Co., 61 N.Y.S. 254, 29 Misc. 775.

50. N.Y.—Bozzone v. Stafford, 146 N.Y.S. 1076, 85 Misc. 53.

51. Mich.—Nyman v. B. S. Chapin, Inc., 238 N.W. 195, 255 Mich. 442.
39 C.J. p 190 note 88.

52. N.Y.—Welch v. Livingston, 67 N.Y.S. 149, 33 Misc. 116.

53. Cal.—Payne v. Pathe Studios, 44 P.2d 598, 6 Cal.App.2d 136.
39 C.J. p 190 note 90.

54. Md.—Jenkins v. Long, 8 Md. 132, 142.
39 C.J. p 190 note 91.

55. Ga.—Parker v. Farlinger, 50 S.E. 98, 122 Ga. 315.
39 C.J. p 190 note 92.

56. Me.—Harrington v. Empire Cream Separator Co., 115 A. 89, 120 Me. 388, 17 A.L.R. 628.
39 C.J. p 190 note 93.

57. N.Y.—Woolf v. Turkel, 115 N.Y.S. 250.

58. La.—Menard v. Edmond Weil, Inc., 119 So. 273, 9 La.App. 254.

59. N.Y.—Peck v. Philipson, 37 N.Y.S.2d 788, 265 App.Div. 110—La Dreire v. Martin, 56 N.Y.S.2d 436.
39 C.J. p 190 note 96.

60. Tex.—Lewis v. Kelly, Civ.App., 233 S.W. 993.

61. Ala.—Standard Lumber Co. v. Hosmer, 142 So. 825, 225 Ala. 321—Navco Hardwood Co. v. Becks, 134 So. 4, 222 Ala. 631.

62. Ala.—Standard Lumber Co. v. Hosmer, 142 So. 825, 225 Ala. 321.

63. Or.—Hurlburt v. Morris, 135 P. 531, 68 Or. 259.
39 C.J. p 215 note 87.

64. Ark.—Hamilton Depositors Corporation v. Browne, 136 S.W.2d 1031, 199 Ark. 953.
39 C.J. p 215 note 90.

65. Md.—Vincent v. Palmer, 19 A.2d 183, 179 Md. 365—Zalis v. Orman, 199 A. 877, 175 Md. 100—Legum v. Campbell, 131 A. 147, 149 Md. 148.
Or.—Elliott v. Murphy Timber Co., 244 P. 91, 117 Or. 387, 48 A.L.R. 1043.
Pa.—Goldberg v. Davis Mfg. Co., Com.Pl., 57 Dauph.Co. 169.
39 C.J. p 215 note 91.

66. Ill.—Channon v. Stewart, 103 Ill. 541.

67. Pa.—McGann v. Ruggles-Coles Co., 3 Pa.Dist. & Co. 546.

a few jurisdictions, however, it has been held that, in the absence of unusual circumstances, a bill in equity for an accounting will not lie[68] and that the proper remedy is an action at law.[69]

A suit in equity for an accounting will not lie where there is an adequate remedy at law,[70] but a suit for an injunction and an accounting will not be dismissed where the remedy at law is only partial and not complete.[71]

§ 123. Conditions Precedent

Where the contract clearly provides that the performance of specified acts shall be conditions precedent to a suit on the contract, the court, within certain limits, will enforce such provisions.

Where the contract clearly provides that the performance of specified acts shall be conditions precedent to a suit on the contract, the court, within certain limits, will enforce such provisions.[72] Thus a provision for service on the employer of a notice of the employee's claim will be enforced.[73] However, where the contract provides for the securing of a certificate of a third person, a recovery is permissible notwithstanding a failure to furnish a certificate where it is unreasonably withheld.[74] Where the contract provides for the return of papers by the employee as "a prerequisite to a final settlement" between the parties, the return of the papers is not a condition precedent to suit for damages, although it is to any recovery of wages under the contract.[75]

An employee who seeks to recover a money judgment for wages earned and past due to him, in accordance with a scale fixed by contract, has been held not to be required first to resort to administrative proceedings under the national or state labor relations acts.[76] It has been held that the failure of an employee to pursue the method of presenting grievances set up by the agreement between the employer and the employee's union precludes his recovery of wages due under such agreement.[77] However, it has also been held that a provision in a contract between an employer and a union providing for the arbitration of differences arising from the violation of the agreement does not make arbitration a condition precedent to an action for wages due under the contract,[78] particularly where the agreement does not contain a provision making an arbitration award a condition precedent to a right of action.[79] Certainly the submission of the controversy to arbitration is not a condition precedent to an action where the collective bargaining contract providing for such arbitration is void for want of authority of the union to make it.[80] Provisions in a union contract with an employer setting up machinery whereby employees may obtain the decision of the officials of the employing company on supposed grievances does not make resort to such machinery a condition precedent to an action for overtime under the contract.[81]

A demand for payment is not a condition precedent unless the contract specifically so provides.[82]

Financial ability of employee. Under a statute providing that the labor commissioner shall prosecute actions for wages of persons who are financially unable to employ counsel, it is not a condition precedent to the bringing of an action by the com-

68. N.Y.—Schwartz v. Marjolet, Inc., 212 N.Y.S. 464, 214 App.Div. 530—Block v. Selectar Mfg. Corp., 56 N.Y.S.2d 845.
39 C.J. p 215 note 95.

69. N.Y.—Sloane v. United Feature Syndicate, 238 N.Y.S. 91, 135 Misc. 365—Block v. Selectar Mfg. Corp., 56 N.Y.S.2d 845.
39 C.J. p 215 note 95.

70. Ill.—Vancil v. Schuette, 179 Ill. App. 546.

71. Ill.—Ledford v. Chicago, M., St. P. & P. R. Co., 18 N.E.2d 568, 298 Ill.App. 298.

72. U.S.—United Autographic Register Co. v. Wight, C.C.A.Mo., 272 F. 545.

73. Ind.—Prudential Ins. Co. v. Myers, 44 N.E. 55, 15 Ind.App. 339.
Wash.—Dunlap v. West Const. Co., 162 P.2d 448, 23 Wash.2d 827.

74. Mo.—Kinnerk v. Philadelphia Ball Club, 92 Mo.App. 669.
Requirement of approval of third person as to contracts generally see Contracts §§ 496–500.

75. U.S.—United Autographic Register Co. v. Wight, C.C.A.Mo., 272 F. 545.

76. N.Y.—Reichert v. Quindazzi, 6 N.Y.S.2d 284.

77. Tex.—Wyatt v. Kansas City Southern Ry. Co., Civ.App., 101 S.W.2d 1082.

78. U.S.—Gatliff Coal Co. v. Cox, C.C.A.Ky., 142 F.2d 876.
Utah.—Latter v. Holsum Bread Co., 160 P.2d 421, 108 Utah 364.

79. Mich.—Ensley v. Associated Terminals, 8 N.W.2d 161, 304 Mich. 522.

80. U.S.—Ballard v. Consolidated Steel Corp., D.C.Cal., 61 F.Supp. 996.

81. Tex.—Texas & New Orleans R. Co. v. McCombs, 183 S.W.2d 716, 143 Tex. 257.

82. U.S.—Huff v. Ford, D.C.Fla., 289 F. 858, reversed on other grounds, C.C.A., 296 F. 652, certiorari denied 45 S.Ct. 90, 266 U.S. 602, 69 L.Ed. 462.
Tex.—Rhodes v. Bryson, Civ.App., 272 S.W. 517—Aldridge Lumber Co. v. Graves, Civ.App., 131 S.W. 846.

Accounting

Where an action in equity by an employee against his employer for an accounting is otherwise proper as discussed supra § 122, it may be brought after the making of a proper demand.—Lester v. Hinkle, 141 N.E. 463, 193 Ind. 605—39 C.J. p 215 note 88.

Agreement to pay when able

A demand by employee for payment for overtime work was not a prerequisite to commencement of suit against corporate employer, where definite agreement existed to pay employee for overtime as soon as employer was financially able, and employer was able to pay for overtime.—Cole v. Findley Tool & Die Co., 287 N.W. 433, 290 Mich. 199.

missioner that lack of financial ability to employ counsel be first determined.[83]

Waiver. The performance of a condition precedent may be waived,[84] as where the employer answers on the merits without objecting to the nonperformance of the condition precedent.[85]

§ 124. Time to Sue and Limitations

An action for wages and other remuneration may be brought when such compensation is due and payable, and not before. It must be brought within the period fixed by a statute of limitations or by the contract.

A suit to recover wages and other remuneration may not be brought until such items are due and payable under the contract of employment;[86] and this is true where the employee quits before the end of the term[87] or is discharged for cause.[88]

When remuneration is due and payable, suit may be brought at once,[89] as in the case of wages payable periodically, at the end of any period,[90] although it is not necessary that it should be.[91] Similarly suit may be brought at once on the termination of a contract where it provides for the payment of wages from time to time as needed by the employee,[92] or where it is terminable at the option of either party and provides for payment when the services are completed,[93] or where the employee quits for cause.[94] Suit to recover a share of the profits, ascertainable under the terms of the contract only at the end of the year, may not be brought before that time.[95]

Effect of union agreement. On the theory, considered supra § 28 (41), that an individual member of a union is not bound by the terms of a contract between the union and the employer relating to the performance of work and the payment therefor unless he has assented thereto, it has been held, notwithstanding a union agreement relating to the time of payment of wages, that an individual member has the right to sue for his wages on the completion of his work, in the absence of any express contract with him.[96]

Limitation of actions. An action for wages must be brought within the period fixed by the statute of limitations expressly relating to such action,[97] or within a shorter time if the contract so stipulates.[98] The application of general statutes of limitations to actions on contracts of employment is considered in Limitations of Actions § 47, and the time of accrual of such actions in § 133 of that title.

83. Cal.—MacDonald v. Neuner, 43 P.2d 813, 5 Cal.App.2d 751.

84. Minn.—French v. Lindh-Gustafson-Klopfer Co., 13 N.W.2d 479, 216 Minn. 521.

Facts held not to constitute waiver

Requirement of employment contract with respect to filing of written notice of employee's claim for additional wages as a condition to recovery was not impliedly waived by employer by negotiations and efforts to arrive at a settlement, where employee was not lulled into nonaction by employer's statements, and, when employee's counsel negotiated with employer, there was no promise or suggestion of acquiescence on part of employer in employee's demands.—Dunlap v. West Const. Co., 162 P.2d 448, 23 Wash. 2d 827.

85. Minn.—French v. Lindh-Gustafson-Klopfer Co., 13 N.W.2d 479, 216 Minn. 521.

86. U.S.—The Columbus, D.C.N.Y., 43 F. 686.

Time when wages due see supra § 119.

Action for accounting

An action by an employee for an accounting of profits is not premature where it is brought after completion of the work and, under the contract, the right to a division of profits accrued on such completion.—Cox v. Rippe, 19 N.W.2d 514, 146 Neb. 309.

Time of payment fixed by directors

An employee's cause of action against employer to recover sums representing a bonus and dividends on stock was prematurely brought, where employee had agreed to be bound by action of employer's board of directors and such board had provided for payment of bonus and dividends on date subsequent to that on which employee filed his complaint.—Berkowitz v. Palm Springs La Quinta Development Co., 99 P.2d 372, 37 Cal.App.2d 249.

87. N.H.—Ackerman v. Middleby, 78 A. 615, 75 N.H. 576.
39 C.J. p 191 note 8.

88. U.S.—The Columbus, D.C.N.Y., 43 F. 686.
39 C.J. p 191 note 9.
Accrual of right of action for wrongful discharge see supra § 49.

89. Cal.—Percival v. National Drama Corp., 185 P. 972, 181 Cal. 631.
39 C.J. p 191 note 10.

Actions held not premature

Okl.—Kemp v. Roberts, 109 P.2d 827, 188 Okl. 363.
Vt.—Stratton v. Cartmell, 42 A.2d 419, 114 Vt. 191.

90. Ala.—E. D. Lanford Co. v. Buck, 124 So. 418, 220 Ala. 190.
39 C.J. p 191 note 11.

91. Iowa.—Yardley v. Iowa Electric Co., 191 N.W. 791, 195 Iowa 380.

92. Neb.—Parcell v. McComber, 7 N.W. 529, 11 Neb. 209, 38 Am.R. 366.

93. Vt.—Rossiter v. Cooper, 23 Vt. 522.

94. Wis.—La Coursier v. Russell, 52 N.W. 176, 82 Wis. 265.
39 C.J. p 191 note 16.

95. Conn.—Woodbridge v. Pratt & Whitney Co., 37 A. 688, 69 Conn. 304.

96. Mo.—Burnetta v. Marceline Coal Co., 79 S.W. 136, 180 Mo. 241.

97. U.S.—Cowles v. Arkansas & L. M. Ry., D.C.La., 10 F.2d 242.

Action held not barred

U.S.—Cowles v. Arkansas & L. M. Ry., supra.

Provisions held inapplicable

(1) A statute imposing a limitation on actions by an employer to enforce a contract against his employee is not applicable to an action by the employee for wages.—Stone v. Bancroft, 70 P. 1017, 139 Cal. 78, affirmed on rehearing 72 P. 717, 139 Cal. 78.

(2) Foreign law held inapplicable.—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented on other grounds 33 N.Y.S.2d 764.

98. N.Y.—Better v. Prudential Ins. Co., 11 N.Y.S. 70, 16 Daly 344.

Laches. An action for remuneration may also be barred by laches in a proper case.[99]

§ 125. Defenses

Matters germane to the cause of action for wages and presenting a legal reason why the plaintiff should not recover constitute a good defense to such action.

In general, matters which are germane to the cause of action for wages and which present a legal reason why plaintiff should not recover constitute a good defense to such action.[1] On the other hand, matters which are not germane to the cause of action pleaded[2] or which do not present a valid reason why plaintiff should not recover[3] are not valid defenses.

Accordingly it is not a defense that the employee's work was unskillfully done where he is seeking to recover the reasonable value of his services in quantum meruit[4] or where it is shown that the unskillful work was other than that contracted for and for which the employee seeks to recover wages;[5] that the employee had broken an agreement which formed the inducement for the employment, it appearing that the broken agreement was not the contract of employment and was entered into with some one other than the employer;[6] that the work in which the employee was engaged was being done for some one else other than the employer where it appears that, notwithstanding such fact, the employer had obligated himself by contract to pay for it;[7] that the members of the employer firm had agreed among themselves that one of their number should be responsible for payment of the employee's wages where it was shown that the employee was employed by the firm;[8] or that the services rendered to the employer were of an immoral nature and on an illegal consideration where it appears that, although the employee was not in fact married to the employer, the employer had fraudulently induced her to believe that she

99. U.S.—Huff v. Ford, C.C.A.Fla., 296 F. 652, certiorari denied 45 S. Ct. 90, 266 U.S. 602, 69 L.Ed. 462.
Pa.—Benson v. Rileigh Window Display Service, Com.Pl., 39 Luz.Leg. Reg. 90.

Defense held not sustainable

A defense of laches is not sustainable where the suit for an accounting is brought within two months after expiration of the contractual period of service and, under the contract, a per cent of the profits was not to be paid to the employee until the expiration of such period.—Legum v. Campbell, 131 A. 147, 149 Md. 148.

1. N.Y.—Johnson v. Quayle & Son Corporation, 257 N.Y.S. 874, 236 App.Div. 351.
Waiver by employee of right to compensation see supra § 108.

2. La.—Hoey v. New Orleans Great Northern R. Co., 105 So. 310, 159 La. 258, 47 A.L.R. 832.

Offer of compromise

Where discharged employee's suit was only for wages up to time of reinstatement, defendant's offer of compromise was valueless as a defense, since it referred exclusively to matters occurring subsequent to time of reinstatement.—Hoey v. New Orleans Great Northern R. Co., supra.

Recovery of judgment

An employee is not precluded from maintaining an action against his employer to recover notary fees to which he is entitled, and which he paid over to the employer under threat of discharge, by his recovery of damages for breach of the contract of employment.—Millsap v. National Funding Corporation, 152 P.2d 634, 66 Cal.App.2d 658.

3. La.—Rogers v. Estate of Peter Jung, App., 176 So. 886.

Particular matters held not valid defenses

(1) In employee's action against corporate employer for overtime work, employer could not rely on defense that employee and his superior had a secret agreement which was not binding on corporation, where superior was general manager who would be presumed to have authority to hire men and determine their rate of pay, and employee's timecards showing amount of overtime were not kept in secret places. —Cole v. Findley Tool & Die Co., 287 N.W. 433, 290 Mich. 199.

(2) Persons employing and assisting another to sell, and receiving proceeds of his sale of stock in corporation about to be organized by them cannot avoid their contractual obligation to pay him commission on ground that he was engaged in scheme to defraud customers by selling worthless securities of corporation without assets.—Sheridan v. Weber, 299 N.Y.S. 726, 252 App.Div. 398.

(3) In action for commissions allegedly due under employment contract, alleged fact that contracts on which commissions were based were subject to renegotiation to reduce the amount of excessive profits was not a defense.—Atkinson v. New Britain Mach. Co., C.C.A.Ill., 154 F. 2d 895.

(4) Other matters.—Huff v. Ford, D.C.Fla., 289 F. 858, reversed on other grounds, C.C.A., 296 F. 652, certiorari denied 45 S.Ct. 90, 266 U.S. 602, 69 L.Ed. 462.

4. Mo.—Chote v. Danzero, App., 202 S.W. 588.

Necessity of benefit to employer

Employer is not liable for labor which does not conform to specifications unless employer receives benefit.—Hager v. Standard Island Creek Coal Co., 155 S.E. 540, 109 W.Va. 490.

Where work is worthless and without value because of the employee's lack of skill, he cannot recover.—Shasta Oil Co. v. Halliburton Oil Well Cementing Co., Tex.Civ.App., 10 S.W.2d 597, error refused.

5. Iowa.—Redfield v. Boston Piano & Music Co., 160 N.W. 934, 178 Iowa 1275.

6. N.Y.—Pollack v. Retail Tobacconist Printing & Publishing Co., Inc., 181 N.Y.S. 193.

7. Cal.—McFadden v. Crawford, 39 Cal. 662.

Manufacture of employee's invention by another

The officer of a large automobile manufacturing corporation which used an invention could neither add to nor subtract from liability under his contract with employee to pay royalties, and an equitable plea alleging that defendant did not individually manufacture either the mechanical device or the automobiles to which it was applied stated no equitable defense, defendant not being relieved of liability under his contract if such automobiles were manufactured by another for his benefit.—Huff v. Ford, D.C.Fla., 289 F. 858, reversed on other grounds, C.C.A., 296 F. 652, certiorari denied 45 S.Ct. 90, 266 U.S. 602, 69 L.Ed. 462.

8. Neb.—Brewer v. Wright, 41 N.W. 159, 25 Neb. 305.

was.[9] Where the employer continued to accept the employee's services, he cannot set up the employee's incompetency as a failure of performance which would bar recovery,[10] although, as discussed infra § 126, he may be entitled to a set-off or counterclaim for damages suffered thereby. Alleged illegality of a contract on the ground that it required performance on Sunday is not sustained by a written suggestion in the employer's letter to the employee that he could take a certain Sunday train to his work.[11]

The obtaining of employment under an assumed name is no defense where no injury to the employer resulted therefrom;[12] but the securing of employment by falsely personating in writing another is a defense where a statute has made such false personation a misdemeanor.[13] Where an employer has affirmed a fraudulently procured employment contract, the fraud will not constitute a bar to an employee's action for remuneration,[14] although, as considered infra § 126, he may set off or counterclaim for damages occasioned by such fraud.

Payment. Payment of the full amount due an employee is a valid defense to an action by the employee for remuneration.[15] While an offer to pay the full amount due and the employee's refusal thereof have been held to constitute a defense,[16] where the amount tendered is smaller than the amount due the employee's refusal thereof is not a defense;[17] and it has also been held that the employee's rejection of a tender of commission on the ground that it is smaller than the amount due will not preclude him from recovering the proper commission, even though the proper commission was no more than that tendered.[18] A refusal to deliver up an order on the employer for payment is no defense where it appears that the order had been presented for payment and payment had been refused.[19]

Payment by an employer to his own agent,[20] or to a third person without the employee's knowledge or consent,[21] is not a valid defense. However an agreement between the employer and the employee that wages shall be paid to a third person is a defense, if followed by payment;[22] otherwise it is not.[23]

Availability of set-off of claim in pending action. Under a statute so providing, it is a valid defense to an action by an employee for wages that an action by his master is pending in which he could set off his claim for wages.[24]

§ 126. —— Set-Off and Counterclaim

Rules relating to set-off and counterclaim generally apply to claims by an employer for damages in an action brought by the employee for his wages.

The rules of law relating to set-off and counterclaim generally apply to claims by an employer for damages in an action brought by the employee for his wages.[25] Thus an employer can set off or counterclaim for damages resulting from the employee's breach of the employment contract,[26] or from the negligence, incompetence, or wrongful acts of the employee resulting in loss to the employer,[27] even though such loss exceeds the amount of wages

9. Cal.—Mixer v. Mixer, 83 P. 273, 2 Cal.App. 227.

10. Mo.—Maratta v. Chas. H. Heer Dry Goods Co., 177 S.W. 718, 190 Mo.App. 420.

11. Mass.—Goddard v. Morrissey, 53 N.E. 207, 172 Mass. 594.

12. N.Y.—Foley v. Western New York & P. R. Co., 19 N.Y.S. 826.

13. N.Y.—Morgan Munitions Supply Co. v. Studebaker Corp., 166 N.Y.S. 645, 100 Misc. 408.

14. Okl.—Wrightsman v. Brown, 73 P.2d 121, 181 Okl. 142.

15. Cal.—James v. Paramount-Famous-Lasky Corporation, 33 P.2d 63, 138 Cal.App. 585.
N.Y.—Johnson v. Quayle & Son Corporation, 257 N.Y.S. 874, 236 App. Div. 351.
Ohio.—Bell v. Vardalides, App., 36 N.E.2d 819.
What constitutes payment see supra § 120.

16. N.Y.—Leacock v. Striker, 10 N.Y.S. 540.
39 C.J. p 191 note 23.

17. La.—Rogers v. Estate of Peter Jung, App., 176 So. 886.

18. Md.—Globe Slicing Mach. Co. v. Murphy, 158 A. 26, 161 Md. 667.

19. Ark.—Burgen v. Dwinal, 11 Ark. 314.

20. Iowa.—Kruse v. Seiffert & Weise Lumber Co., 79 N.W. 118, 108 Iowa 352.
39 C.J. p 188 note 41.
Payment to married woman of wages due her see Husband and Wife § 17.

21. Ohio.—Erie R. Co. v. Gugliotta, 17 Ohio Cir.Ct.,N.S., 516.

22. Tex.—Lewis v. Warren, etc., R. Co., Civ.App., 97 S.W. 104.

23. Ill.—C. L. Pritchard Mfg. Co. v. Hartney, 68 Ill.App. 336.

24. Pa.—Felpel v. Hershour, 128 Pa. 587.

25. N.Y.—Merlette v. North & East River Steamboat Co., 13 Daly 114.

Note for advances

Where traveling salesman's note for advances was to be void if sales were satisfactory, the fact that in various settlements during succeeding four years no claim was set up as to note was held to show that parties considered it void, so that the note could not be set off against the salesman's claim for remuneration.—Esterman-Verkamp Co. v. Rouse, 278 S.W. 124, 211 Ky. 791.

26. N.Y.—Wagner v. G. Gaudig & Blum Corporation, 228 N.Y.S. 139, 223 App.Div. 254.
Breach of contract by employee and actions therefor see supra §§ 77–79.

Dismissal

Employer's counterclaim in action for wages against ex-employee, based on fact that ex-employee was competing with employer, was properly dismissed, in view of failure to show any breach of contract by ex-employee or damage from ex-employee's acts.—Rosenstein v. Smith, 257 N.W. 397, 218 Iowa 1381.

27. Mo.—Maratta v. Chas. H. Heer Dry Goods Co., 177 S.W. 718, 190 Mo.App. 420.
39 C.J. p 135 note 83.

earned;[28] and, while an employee's fraud in procuring the employment contract is not a defense to his action for remuneration where the employer has affirmed such contract, as discussed supra § 125, the employer may counterclaim for damages occasioned by such fraud.[29]

On the other hand, an employer may not plead as a set-off an unliquidated claim which is irrelevant to the suit,[30] or a claim for unliquidated damages occasioned by the employee's act,[31] or a claim based on the expectation that the employee would continue to work for the employer, where the employee had not so obligated himself.[32]

Since an employer may not recover back wages paid during a period of completed employment in the absence of a special agreement to that effect, as considered supra § 120, such a claim is not a valid counterclaim in an action by an employee for wages or other remuneration;[33] nor may an employer maintain a cross action for an overpayment to the employee which was voluntarily made.[34] It has been held that the employer cannot set off an account for goods sold by him to plaintiff.[35]

Where one is employed to do a specific job, rather than for specific hours, his employer is not entitled to a credit for the amount received by the employee from a third person for work done for such person by the employee in his spare time.[36]

§ 127. Parties

Rules relating to parties in actions on contracts generally apply to actions for compensation for services.

The rules relating to parties in actions on contracts generally, considered in Contracts §§ 518–522, have been held to apply to actions for compensation for services.[37]

§ 128. Pleading

a. In general
b. Issues, proof, and variance

a. In General

(1) Complaint
(2) Plea or answer
(3) Reply
(4) Amendment of pleadings

(1) Complaint

A complaint in an action by an employee to recover compensation for services must allege all the facts showing the existence of a cause of action.

Under the rules applicable to plaintiff's pleading in the case of civil actions generally, discussed in the C.J.S. title Pleading §§ 63–98, also 49 C.J. p 128 note 29–p 179 note 56, and more particularly in actions on contracts, considered in Contracts §§ 533–547, a complaint in an action to recover compensation for services must set forth clearly and with particularity[38] all the facts, as distinguished from

28. Pa.—Glennon v. Lebanon Mfg. Co., 21 A. 429, 140 Pa. 594, 12 L.R.A. 321.
39 C.J. p 133 note 59.

29. Okl.—Wrightsman v. Brown, 73 P.2d 121, 181 Okl. 142.

30. Tex.—Weinzierl v. Watson, Civ. App., 110 S.W.2d 998.

Employee's use of employer's property
In employee's suit on notes issued by employer for back salary, a set-off for employee's private use of employer's geophysical instruments was an unliquidated claim irrelevant to suit and hence properly stricken.—Weinzierl v. Watson, supra.

31. N.Y.—Merlette v. North & East River Steamboat Co., 13 Daly 114.

Prior to determination of liability
Defendant cannot recoup or counterclaim damages for plaintiff's negligence before defendant has paid, or been adjudged liable to pay, damages therefor.—Merlette v. North & East River Steamboat Co., supra.

32. Tex.—Weinzierl v. Watson, Civ. App., 110 S.W.2d 998.

33. N.Y.—Kleinfeld v. Roburn Agencies, 60 N.Y.S.2d 485, 270 App. Div. 509.

Employee's misconduct
A counterclaim by employer, in action by employee to recover per cent of profits of store department he managed, which set out misconduct breaching obligation of good faith and loyalty purportedly forfeiting employee's right to retain weekly wages received during his employment, was insufficient as not alleging a special agreement.—Kleinfeld v. Roburn Agencies, supra.

34. Tex.—Giant Mfg. Co. v. Davis, Civ.App., 91 S.W.2d 1099, reversed on other grounds 121 S.W.2d 590, 132 Tex. 220.

35. Ill.—Leischke v. Miller, 100 Ill. App. 137.

36. Ariz.—Ernst v. Morgan, 36 P. 2d 566, 44 Ariz. 297.

37. Tenn.—Harris v. Owen, 180 S.W. 2d 227, 180 Tenn. 492.
Against whom right to compensation is enforceable generally see supra § 81.
Stockholders' liability for wages of corporation's employees see Corporations § 655.

Witnesses
In suit by employees of government subcontractor for wages, certain employees of principal contractors could not be made party defendants for sole purpose of obtaining from them evidence as to sums paid subcontractor by principal contractors for subcontractor's employees.—Harris v. Owen, supra.

38. La.—Irwin v. Oakes, App., 6 So. 2d 49.

Facts known or available to defendant
Pa.—Solomon v. Solomon, Com.Pl., 46 Lack.Jur. 287—Besecker v. General Acceptance Corporation, Com. Pl., 27 North.Co. 129, affirmed 17 A. 2d 916, 143 Pa.Super. 367.

Allegations held sufficient
(1) In general.—Mayo v. Art Metal Works, Pa.Com.Pl., 7 Monroe L.R. 50.

(2) Where salesman, suing for commissions, alleged that he was to have a specified commission on all sales, the pleading was sufficiently broad to permit recovery of commission of sales of certain machines although they were not specifically mentioned in the pleading.—Grant G. Forsythe, Inc., v. Baker, 124 P.2d 258, 190 Okl. 343.

conclusions of law,[39] showing the existence of a cause of action.[40] Accordingly, in order to be sufficient, the complaint must show the amount claimed to be due[41] and an allegation that the debt sued for is unpaid.[42] An allegation of the employer's bad faith is not irrelevant where the reasonableness of the employer's conduct is in issue.[43] Where plaintiff's right to the remuneration claimed is dependent on a contingency, the complaint must allege the occurrence of such contingency.[44] The complaint is not required to anticipate or negative defenses.[45]

Contract of employment. The complaint must show an express contract between the parties,[46] or the complaint must show an implied contract be-

39. N.Y.—Booth v. New Process Cork Co., 187 N.Y.S. 725, 196 App. Div. 376.

40. La.—Irwin v. Oakes, App., 6 So. 2d 49.
Tex.—Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253.
39 C.J. p 192 note 48.

Actions for accounting

(1) In suit by employees against employer for commissions and bonuses, allegation that plaintiffs were unable to determine amount of commissions and bonuses because employer alone had such information and that accounting was sought to determine total commissions and bonuses due was sufficient to give chancery court jurisdiction.—Hamilton Depositors Corporation v. Browne, 136 S.W.2d 1031, 199 Ark. 953.

(2) Where a bill for discovery and accounting for per cent of net profits under a written contract of employment implied the accrual of profits, it was sufficiently explicit in that respect.—Legum v. Campbell, 131 A. 147, 149 Md. 148.

(3) An averment that written contract of employment was verbally renewed is equivalent to an allegation that it was continued on the same terms.—Legum v. Campbell, supra.

Claims for value of services

(1) Employee's petition in terms declaring for damages, but specifying measure of damages as value of services, amounted to claim on quantum meruit.—Westerfield v. Liberty Oil Co., 223 N.W. 894, 208 Iowa 912.

(2) Where plaintiff was employed at a stipulated salary to promote defendant's business for one year and defendant undertook to pay as further compensation such a per cent of profits derived from plaintiff's promotion of defendant's business in South America as might thereafter be agreed on by the parties, plaintiff's recovery of the reasonable value of the service performed in excess of the stipulated salary was required to proceed upon allegation of the reasonable value of the services, rather than for a per cent of the profits.—Bogy v. Berlage, 38 N.Y.S. 2d 584, 265 App.Div. 249.

Allegations held sufficient

U.S.—Neumann v. Faultless Clothing Co., D.C.N.Y., 27 F.Supp. 810.
Ark.—Mortensen v. Ballard, 188 S.W.2d 749, 209 Ark. 1.
Cal.—Vassere v. Joerger, 76 P.2d 656, 10 Cal.2d 689.
Ga.—Speer v. Johnson, 184 S.E. 388, 52 Ga.App. 636—Speer v. Johnson, 173 S.E. 449, 48 Ga.App. 759.
Ill.—Eagle v. Hoffman, 258 Ill.App. 234.
Mont.—Cramer v. Deschler Broom Factory, 255 P. 346, 79 Mont. 220.
N.Y.—Zaidenberg v. Roth, 37 N.Y.S. 2d 353, 265 App.Div. 823—Lauterstein v. Crawford Clothes, 33 N.Y.S.2d 409, 263 App.Div. 975, appeal denied 34 N.Y.S.2d 527, 264 App.Div. 712.
N.C.—Hearn v. Erlanger Mills, 14 S.E.2d 675, 219 N.C. 623—Brown v. E. H. Clement Co., 6 S.E.2d 842, 217 N.C. 47—Williams v. Bruton, 5 S.E.2d 848, 216 N.C. 582.
Pa.—Miller v. Thomas, Com.Pl., 48 Dauph.Co. 103—Curtis v. Glanckopf, Com.Pl., 36 Luz.Leg.Reg. 53—McCracken v. Washington Mold & Foundry Co., Com.Pl., 19 Wash. Co. 42.
Tex.—Higdon v. Shelton Motor Co., 157 S.W.2d 627, 138 Tex. 121—Monroe v. Morten Inv. Co., Civ. App., 101 S.W.2d 593—Reynolds v. Wood, Civ.App., 65 S.W.2d 1114, error refused—Continental State Bank v. Turner, Civ.App., 3 S.W. 2d 503, error dismissed.
39 C.J. p 192 note 48 [a].

Allegations held insufficient

Kan.—Harold v. Armour & Co., 99 P.2d 856, 151 Kan. 487, certiorari denied Cook v. Armour & Co., 60 S.Ct. 1082, 310 U.S. 630, 84 L.Ed. 1401—Reynolds v. Armour & Co., 87 P.2d 530, 149 Kan. 460.
Ky.—Central West Coal & Lumber Co. v. Sanders, 7 S.W.2d 851, 225 Ky. 119.
N.Y.—Middleton v. Siegel, 56 N.Y.S. 2d 607, 269 App.Div. 491—Walker v. Gerli, 12 N.Y.S.2d 942, 257 App. Div. 249, vacated on other grounds 14 N.Y.S.2d 278, 257 App.Div. 959.
N.C.—Theiling v. Wilson, 167 S.E. 32, 203 N.C. 809.
Tex.—National Live Stock Commission Co. v. Goff, Civ.App., 280 S. W. 856.
39 C.J. p 192 note 48 [b].

41. **Amount of commissions**

In action for balance due on drawing account, employment contract was held not to require plaintiff to show in statement of claim amount of commission earned.—Eagle v. Hoffman, 258 Ill.App. 234.

42. N.Y.—Babcock v. Anson, 106 N.Y.S. 642, 122 App.Div. 73.
39 C.J. p 193 note 54.

Meaning of word "due"

In action to recover salary, in which defense was that plaintiff agreed to deferment of payment, term "due" as employed in complaint and answer was held properly construed as meaning mere indebtedness without reference to time of payment and as synonymous with "owing" and as including debts payable in futuro.—Booth v. Booth & Bayliss Commercial School, 180 A. 278, 120 Conn. 221, 99 A.L.R. 1517.

43. N.Y.—Wayte v. Bowker Chemical Co., 187 N.Y.S. 276, 196 App. Div. 665.
39 C.J. p 193 note 55.

44. N.Y.—Deutsch v. Textile Waste Merchandising Co., 209 N.Y.S. 388, 212 App.Div. 681.

Profits

Complaint alleging breach of employment contract under which plaintiff was to receive a share of the profits of the business was insufficient, in absence of allegation that defendant made any profits.—Deutsch v. Textile Waste Merchandising Co., supra.

45. N.Y.—Clark v. Hinzmann, 59 N.Y.S.2d 255, 185 Misc. 881.

46. La.—Irwin v. Oakes, App., 6 So.2d 49.
N.C.—Wishon v. Gastonia Weaving Co., 22 S.E.2d 711, 222 N.C. 754.
39 C.J. p 192 note 49.

Allegations held sufficient

(1) In general.
U.S.—Piest v. Tide Water Oil Co., D.C.N.Y., 27 F.Supp. 1020.
Ga.—Perry v. Kimberly Jewelry Co., 23 S.E.2d 471, 68 Ga.App. 568.
La.—Jarrell v. Stephens, App., 168 So. 738.
Mont.—Freeman v. Withers, 65 P.2d 601, 104 Mont. 166.
Tex.—Gooden v. Phillips, Civ.App., 118 S.W.2d 943, error dismissed—Bassmer v. Kotulek, Civ.App., 75 S.W.2d 295.

(2) Statement of claim for compensation for services inferentially sets forth oral contract and sufficient cause of action.—Taylor v. Stanley

tween the parties,[47] although under a rule as to liberal construction of the pleadings it has been held that its terms need not be set forth directly.[48]

Nature of services. Where the action is brought on the contract, the complaint need not state the nature of the services in any greater particularity than stated in the contract.[49] Where, however, the employee is seeking to recover their reasonable value, allegations of the nature of the services rendered are proper.[50]

Performance. The complaint must allege performance of the contract on the part of the employee[51] or his readiness to perform.[52] The employee must either specially allege the facts constituting performance on his part[53] or, if he avails himself of the privilege of alleging performance in general terms in the form provided in the statute, he must follow that form.[54] It must appear from the pleading that the performance was in pursuance of the alleged agreement,[55] but performance need be alleged only to the extent required to justify the recovery sought.[56] If the services called for by the contract are severable, a failure to allege performance of a part will not defeat the employee's recovery for services sufficiently declared on.[57] Performance is sufficiently alleged where the complaint contains averments that plaintiff performed all the conditions of the contract as far as defendant permitted[58] or that he entered defendant's employ under a contract at a specified time and continued therein during a specified period.[59] Where such averments are made, it is not necessary, where the employee is discharged, for him further to allege that he used due diligence in seeking other employment and failed to obtain it.[60]

Demand for payment. While it has been held that a demand for payment need not be averred[61] except in special instances where a statute requires it,[62] it has also been held that the complaint must allege that demand for payment had been made or that defendant had failed or refused to pay the amount claimed by plaintiff.[63]

Prayer for relief. The rules governing the requisites of the prayer for relief in civil actions generally, considered in the C.J.S. title Pleading § 95, also 49 C.J. p 172 note 25–p 177 note 97, have been held to apply in actions to recover compensation for services rendered by an employee.[64] In an action at law

Co. of America, 158 A. 157, 305 Pa. 546—Custis & Co. v. Silent Automatic Corporation, 97 Pa.Super. 313.

Allegations held insufficient

(1) In general.—Hamilton v. Braeburn Alloy Steel Corp., Pa.Com.Pl., 28 West.Co. 29.

(2) In action for wages, where it appeared from alleged agreement between defendant and labor union that such union was designated as bargaining agent for all of defendant's employees paid on hourly or piece-work basis and that plaintiff was employed on weekly basis, demurrer to complaint was properly sustained.—Wishon v. Gastonia Weaving Co., 17 S.E.2d 509, 220 N.C. 420.

(3) Complaint alleging plaintiff's employment by defendant at stated annual salary stated no cause of action for salary for unexpired portion of second year, since such contract is regarded as indefinite hiring, terminable at will.—Brooks v. National Equipment Corporation, 244 N.W. 598, 209 Wis. 198.

47. Ky.—Turner v. Peacock, 9 Ky. Op. 396.
39 C.J. p 193 note 50.

Petition held sufficient

Tex.—Magnolia Compress & Warehouse Co. v. Davidson, Civ.App., 38 S.W.2d 634.

48. Mont.—Doane v. Marquisee, 206 P. 426, 63 Mont. 166.

49. R.I.—Lind v. Apponaug Bleaching, Dyeing & Printing Co., 39 A. 188, 20 R.I. 344.
39 C.J. p 193 note 56.

Allegations held sufficient

Pa.—Solomon v. Solomon, Com.Pl., 46 Lack.Jur. 287.

50. Ohio.—Berry v. Collins, 9 Ohio Cir.Ct. 656, 6 Ohio Cir.Dec. 597.
39 C.J. p 193 note 57.

51. N.Y.—Kasen v. Hercules Knitting Co., 60 N.Y.S.2d 381.
39 C.J. p 193 note 52.

52. Ky.—Nave v. Riley, 142 S.W. 388, 140 Ky. 276.

53. N.Y.—Kasen v. Hercules Knitting Co., 60 N.Y.S.2d 381.

Allegations held sufficient

Pa.—Solomon v. Solomon, Com.Pl., 46 Lack.Jur. 287.

54. N.Y.—Sisskin v. Workmen's Circle, 167 N.Y.S. 62, 179 App.Div. 645.
39 C.J. p 193 note 60.

Strict compliance required

N.Y.—Walker v. Gerli, 12 N.Y.S.2d 942, 257 App.Div. 249, vacated on other grounds 14 N.Y.S.2d 278, 257 App.Div. 959—Kasen v. Hercules Knitting Co., 60 N.Y.S.2d 381.
39 C.J. p 193 note 60 [a].

55. Wis.—Joubert v. Carli, 26 Wis. 594.
39 C.J. p 193 note 61.

Pleading held sufficient

Employee's petition, alleging that salary sought to be recovered was for labor performed at defendant's special request, sufficiently alleged employee's performance.—Phœnix Furniture Co. of Port Arthur v. Kay, Tex.Civ.App., 10 S.W.2d 422, error dismissed.

56. N.Y.—Tichenor v. Bruckheimer, 81 N.Y.S. 653, 40 Misc. 194.
12 C.J. p 402 note 33 [a] (1)—39 C.J. p 193 note 62.

57. N.Y.—Gillespie v. Montgomery, 87 N.Y.S. 701, 93 App.Div. 403.
39 C.J. p 193 note 63.

58. Neb.—Culbertson Irrigating & Water-Power Co. v. Wildman, 63 N.W. 947, 45 Neb. 663.

59. U.S.—Joy v. Glidden Varnish Co., C.C.Mass., 83 F. 90.
N.Y.—Treffinger v. Groh, 78 N.E. 1114, 185 N.Y. 610.

60. Ky.—Nave v. Riley, 142 S.W. 388, 140 Ky. 276.

61. Ind.—Hartford L. Ins. Co. v. Bryan, 58 N.E. 262, 25 Ind.App. 406.

62. Ark.—St. Louis-San Francisco R. Co. v. De Voe, 237 S.W. 433, 152 Ark. 38.

63. Tex.—Glenn v. Runo, Civ.App., 87 S.W.2d 506.

64. **Prayer held to justify award of interest**

In action for compensation due under oral employment contract, prayer for specified sum, for interest as provided by statute, and for further relief to which plaintiff may show himself justly entitled, constituted sufficient basis for award of

involving compensation based on the employer's profits it has been held proper to ask for a judgment that an account be taken and that the employer pay the employee the amount found due him.[65]

(2) Plea or Answer

In order to be sufficient, the defendant's plea or answer must state facts establishing a defense.

Under the rules governing pleas or answers in civil actions generally, considered in the C.J.S. title Pleading §§ 99–183, also 49 C.J. p 179 note 57–p 309 note 13, and more particularly in actions on contracts, considered in Contracts §§ 548–560, in order to be sufficient, defendant's plea or answer must state facts and circumstances establishing a defense.[66] An answer is sufficient where it specifically denies the agreement alleged in the complaint,[67] or alleges a modification of the original contract agreed to by the parties and the employer's performance of the modified agreement,[68] or the discharge of the employee, stating the grounds therefor.[69] It is not sufficient merely to set up a discharge for unsatisfactory work without alleging any specific default[70] or, in the absence of a denial, merely to set up a version of the transaction inconsistent with that set up in the complaint.[71] Matters alleged in the complaint which are not denied by the answer are admitted.[72] Counts of the answer setting forth immaterial matter will be stricken.[73]

Set-off, settlement, and special defenses. If a set-off,[74] or settlement,[75] or a special, affirmative, or statutory defense[76] is relied on it must be specially pleaded.

(3) Reply

Rules governing the necessity and sufficiency of replications and replies in civil actions generally apply in actions to recover compensation for services.

In accordance with the rules governing the pleading of replications and replies in civil actions generally, considered in the C.J.S. title Pleading §§ 184–206, also 49 C.J. p 322 note 87–p 358 note 43, the necessity for a replication in an action to recover compensation for services is governed by the answer, and no reply is necessary where an issue has theretofore been formed.[77] A reply must not

legal interest.—A A A Air Conditioning & Mfg. Corp. of Tex. v. Barr, Tex.Civ.App., 186 S.W.2d 825, error refused.

65. N.Y.—Parker v. Pullman, 53 N.Y.S. 839, 24 Misc. 505, affirmed 56 N.Y.S. 734, 36 App.Div. 208.

66. U.S.—Huff v. Ford, D.C.Fla., 289 F. 858, reversed on other grounds, C.C.A., 296 F. 652, certiorari denied 45 S.Ct. 90, 266 U.S. 602, 69 L. Ed. 462.

Construction

On demurrer to plea equally susceptible of two constructions, that one unfavorable to pleader must be given to pleading.—Macon Auto Co. v. Domingos, 129 S.E. 441, 34 Ga. App. 278.

Inconsistency

In accountant's action for reasonable value of services rendered for defendant in a lawsuit, where answer was a general denial and plea that accountant was employed by defendant's attorney who was paid for all services including accountants, pleading would not support defendant's contention of a binding agreement between accountant and defendant fixing amount of accountant's compensation.—Twichell v. Smith, Tex.Civ.App., 117 S.W.2d 163.

67. N.Y.—Kraus v. Agnew, 80 N.Y.S. 518, 80 App.Div. 1.

Pa.—Reichley v. Leingang, 7 Pa.Co. 556.

68. N.Y.—Julie v. Loomis-Manning Filter Distributing Co., 150 N.Y.S. 394, 173 App.Div. 227.

69. Mo.—Wade v. William Barr Dry Goods Co., 134 S.W. 1084, 155 Mo. App. 405.

39 C.J. p 194 note 73.

70. Tex.—Mudgett v. Texas Tobacco Growing & Mfg. Co., Civ.App., 61 S.W. 149.

71. N.Y.—Place v. Bleyl, 60 N.Y.S. 800, 45 App.Div. 17, 7 N.Y.Ann.Cas. 95.

72. N.Y.—Langer v. Kaufman, 157 N.Y.S. 825, 94 Misc. 216.

Plea of prescription for purposes of its disposition, admits all well-pleaded allegations of fact and is a peremptory defense which claims that the demand is barred by lapse of time; and such a plea necessarily puts in issue defendant's right to judgment and involves a determination of the matter completely, if sustained, as though an answer had admitted allegations of fact and simply denied the conclusions of law.—Love v. Silas Mason Co., D.C.La., 66 F.Supp. 753.

73. Iowa.—Redfield v. Boston Piano & Music Co. 160 N.W. 934, 178 Iowa 1275.

39 C.J. p 194 note 76.

74. Ky.—Esterman-Verkamp Co. v. Rouse, 278 S.W. 124, 211 Ky. 791.

39 C.J. p 194 note 77.

Matter raised in pretrial order

In employee's action for services rendered to defendant railroad company, where issue of overpayments of wages to plaintiff was expressly raised in pretrial order, defendant's right to set off such overpayments against plaintiff's recovery was not foreclosed by defendant's failure to plead such overpayments.—Rogers v. Union Pac. R. Co., C.C.A.Or., 145 F.2d 119.

75. Iowa.—Curtis v. Dodd, 154 N.W. 872, 172 Iowa 521.

76. U.S.—Sirmon v. Cron & Gracey Drilling Corporation, D.C.La., 44 F.Supp. 29.

Cal.—Stone v. Bancroft, 70 P. 1017, 139 Cal. 78, reheard 72 P. 717, 139 Cal. 78.

Payment

(1) In general.

Md.—Lynch v. Rogers, 10 A.2d 619, 177 Md. 478.

Ohio.—Bell v. Vardalides, App., 36 N.E.2d 819.

(2) Plea held sufficient.—Johnson v. Quayle & Son Corporation, 257 N.Y.S. 874, 236 App.Div. 351.

Estoppel

Mich.—Ensley v. Associated Terminals, 8 N.W.2d 161, 304 Mich. 522.

Fraud

Pa.—Alexander v. Hunsberger, 86 Pa.Super. 386.

Overpayments

In action against railroad company for balance of wages due pumper, defendant, in showing amount of overpayments to plaintiff, was held not to assert affirmative defense required to be pleaded or counterclaim in order to be separately considered.—Rogers v. Union Pac. R. Co., C.C.A. Or., 145 F.2d 119.

77. Ky.—Nave v. Riley, 142 S.W. 388, 146 Ky. 276.

contain material allegations inconsistent with the allegations of the complaint.[78]

(4) Amendment of Pleadings

The rules governing amendment of pleadings generally apply in actions to recover compensation for services.

The rules governing the amendment of pleadings in civil actions generally, discussed in the C.J.S. title Pleading §§ 275–322, also 49 C.J. p 465 note 82–p 562 note 3, have been held to apply in actions to recover compensation for services rendered.[79]

b. Issues, Proof, and Variance

In accordance with general rules, the issues are determined by the pleadings and the proof must correspond with the allegations in the pleadings.

In accordance with the rules applicable in civil actions generally, and more particularly in actions on contracts, considered in Contracts §§ 565–577, the issues, in actions to recover compensation for services, are determined by the pleadings[80] and the proof must correspond with the allegations in the pleadings;[81] but an immaterial variance which does not mislead or surprise either party has been held not to be fatal.[82] Every fact necessary to constitute a cause of action or defense must be proved;[83] and evidence not within the issues is properly excluded.[84]

Accordingly, if the complaint is for the recovery of wages, under a special contract, damages for breach of the contract cannot be proved;[85] if an express contract is alleged, evidence is not admissible to show an implied contract;[86] if a particular contract is alleged, plaintiff cannot prove a subsequent arrangement which is not alleged;[87] if a full performance of the contract is averred, evidence of an excuse for nonperformance is inadmissible;[88] and allegations of a contract between the employee and the employer will not permit the substitution therefor in the evidence of a contract between the employer and third persons obligating the employer to pay the employee.[89]

Evidence admissible under general issue. A contract of employment different from the one alleged by the employee in his action to recover compensation for his services,[90] or any terms of the alleged contract, which would operate to bar his recovery,[91] may be shown under the general issue or denial,

78. Ky.—Alexander v. Wales, 6 T. B.Mon. 323.

79. Mont.—Callan v. Hample, 236 P. 550, 73 Mont. 321.

Amendment held proper

Amendment, of complaint in action by expert accountant for compensation for services to show employment of an assistant in carrying out his work was held not a departure from original cause of action.—Callan v. Hample, supra.

80. Iowa.—Jorgensen v. Cocklin, 260 N.W. 6, 219 Iowa 1103.
39 C.J. p 194 note 92.

81. Kan.—Spaulding v. Pepper, 85 P. 754, 73 Kan. 644.
39 C.J. p 194 note 93.

Proof held not a variance

Ala.—Tillery v. Price, 137 So. 440, 223 Ala. 532.
Ga.—Neff v. Daniel, 179 S.E. 656, 51 Ga.App. 106.
Iowa.—Schulte v. Ideal Food Products Co., 213 N.W. 431, 203 Iowa 676.
Mo.—Panich v. Curtis, Owen, Fuller Corporation, App., 124 S.W.2d 619.
Pa.—Custis & Co. v. Silent Automatic Corporation, 97 Pa.Super. 313.
Tex.—Neal v. Ellison, Civ.App., 273 S.W. 931.
39 C.J. p 194 note 93 [a].

Proof held not to correspond with pleadings

Ga.—Chambers v. W. L. Florence Const. Co., 36 S.E.2d 69, 73 Ga.App. 172.
Mass.—Rosegartin v. Cohen, 155 N.E. 417, 258 Mass. 534.
39 C.J. p 194 note 93 [b].

82. Ill.—Miller v. Arliskas, 58 N.E.2d 743, 324 Ill.App. 588.
Tex.—Fairbanks, Morse & Co. v. Carsey, Civ.App., 109 S.W.2d 985, error dismissed—Carter v. Jenkins, Civ.App., 282 S.W. 669.
39 C.J. p 195 note 94.

Date of agreement

Iowa.—Beveridge v. Cook, 263 N.W. 264.
Mo.—Panich v. Curtis, Owen, Fuller Corporation, App., 124 S.W.2d 619.
Tex.—Cooper Petroleum Co. v. Coghill, Civ.App., 198 S.W.2d 616.

83. Ga.—Georgia Wholesale Co. v. Downs, 4 S.E.2d 107, 60 Ga.App. 441.

Existence of profit

Ga.—Georgia Wholesale Co. v. Downs, supra.

Express agreement to pay

Under petition alleging that defendant "obtained and employed" plaintiff to render services as an expert accountant in a lawsuit and that defendant "agreed and became bound and obligated" to pay reasonable value of services, proof of an express agreement to pay for services was not necessary to warrant recovery for value of services.—Twichell v. Smith, Tex.Civ.App., 117 S.W.2d 163.

Reasonable value of services

N.Y.—Bogy v. Berlage, 38 N.Y.S.2d 584, 265 App.Div. 249.

84. Ky.—Cassin v. Ewald, 112 S.W.2d 1000, 271 Ky. 595.
Mont.—Davis v. Sullivan Gold Mining Co., 62 P.2d 1292, 103 Mont. 452.
N.J.—Burket v. Ellis, 143 A. 347, 105 N.J.Law 560.
Tex.—Monroe v. Morten Inv. Co., Civ.App., 101 S.W.2d 593.
Wash.—Miller v. Puget Sound Bridge & Dredging Co., 250 P. 64, 140 Wash. 663.

Evidence held admissible under pleadings

Tex.—Weisz v. Horton, Civ.App., 148 S.W.2d 219, error dismissed, judgment correct.

85. Neb.—Culbertson Irr. & Water Power Co. v. Wildman, 63 N.W. 947, 45 Neb. 663.
39 C.J. p 195 note 95.

86. N.Y.—Altmayer v. Lahm, 113 N.Y.S. 964.
39 C.J. p 195 note 97.

87. U.S.—Cravens v. Climax Engineering Co., C.C.A.Iowa, 40 F.2d 359.

88. N.Y.—Stevens v. Van Wagoner-Linn Constr. Co., 150 N.Y.S. 502, 165 App.Div. 44.
39 C.J. p 195 note 96.

89. Wis.—Bean v. Percival Copper Min. Co., 87 N.W. 465, 111 Wis. 598.

90. Wash.—Kain v. Sylvester, 113 P. 573, 62 Wash. 151.

91. Ill.—Norden v. Remington Typewriter Co., 187 Ill.App. 281.

as may also any evidence that the employee has breached or failed to perform his part of the contract,[92] although, on nonperformance, there is also some authority to the contrary.[93] It has been held that, under the general issue, evidence is admissible to show a good cause for discharge,[94] or employment by a third person during the time for which the employee sues to recover wages,[95] or fraud in the execution of the contract,[96] or payment in full or in part.[97] However, it has also been held that defendant cannot rely on a defense of payment[98] or counterclaim[99] under a general denial. Evidence of modification or cancellation of the contract of employment has been held not to be admissible under the general issue or denial.[1]

In an action by an employee to recover the excess of disbursements over receipts in conducting the employer's business, evidence tending to show that the receipts or expenditures alleged by plaintiff are not correct, and hence tending to show that defendant is not indebted to plaintiff at all or in the amount claimed, is admissible under the general issue.[2]

Evidence of contract price or value of services. In an action on an express contract for a fixed salary, evidence of the reasonable value of the services is inadmissible,[3] even where the wages accrued after the expiration of the contract and under an implied renewal of its terms,[4] except for the purpose of showing the probabilities with reference to the respective versions of the parties as to the amount of compensation agreed on where they are in conflict,[5] or for the purpose of meeting and refuting some other claim of the employer,[6] or of furnishing ground for recovery in quantum meruit in case the terms or validity of the contract, where in issue, is not established.[7] However, where plaintiff alleges both an agreed price for services and their reasonable value, evidence as to both is properly received.[8]

Where the wages are incapable of estimation in the way provided for by the contract[9] or where the work is done without any agreement between the parties as to the compensation[10] evidence of the reasonable value of the services is admissible. So, where it is alleged that the employer agreed to pay what he could afford to pay for managing the business, evidence of the value of the services, considering their nature and the profits of the business, is admissible.[11] Where the action is brought on quantum meruit, the contract is admissible in evidence as tending to show the value of the services.[12]

§ 129. Evidence

a. Presumptions
b. Burden of proof
c. Admissibility
d. Weight and sufficiency

a. Presumptions

Various presumptions have been held to be applicable in actions by an employee to recover remuneration for his services.

Certain presumptions have been held by the courts to be applicable to cases involving the nature and performance of services by employees,[13] as, for

92. N.H.—Blodgett v. Berlin Mills Co., 52 N.H. 215.
39 C.J. p 194 note 82.

93. Mich.—Bolt v. Friederick, 22 N.W. 187, 56 Mich. 20.

94. Mass.—Bennett v. Kupfer Bros. Co., 100 N.E. 332, 213 Mass. 218.
39 C.J. p 194 note 84.

95. Kan.—Phinney v. Bronson, 23 P. 624, 43 Kan. 451.

96. Or.—O'Neill v. Keith, 104 P. 725, 55 Or. 122.
39 C.J. p 194 note 86.

97. Md.—Lynch v. Rogers, 10 A.2d 619, 177 Md. 478.

98. Tex.—Craddock v. McAfee, Civ. App., 151 S.W.2d 936.

99. Tex.—Craddock v. McAfee, supra.

Evidence of indebtedness due defendant from plaintiff on another contract was held inadmissible under general issue in assumpsit by employee for services.—Arava v. Bebe, 139 A. 302, 48 R.I. 478.

1. Minn.—Davis v. Reichert, 266 N. W. 855, 197 Minn. 287.

2. N.J.—Cook v. Soden, 171 A. 558, 12 N.J.Misc. 337.

3. Cal.—Gray v. Wohlman Mfg. Co., 268 P. 675, 92 Cal.App. 613.
Ky.—Cassin v. Ewald, 112 S.W.2d 1000, 271 Ky. 595.
39 C.J. p 196 note 1.

4. Ill.—Hart v. Bradbury, 201 Ill. App. 82.

5. Mich.—Vanderhoef v. Parker Bros. Co., 255 N.W. 449, 267 Mich. 672.
39 C.J. p 196 note 3.

6. Iowa.—Murphy v. Williamson, 163 N.W. 211, 180 Iowa 291.
39 C.J. p 196 note 4.

7. Conn.—Hammond v. Hammond Buckle Co., 44 A. 25, 72 Conn. 130.
Kan.—Butcher v. Auld, 3 Kan. 217.

8. Minn.—Kruta v. Lough, 154 N.W. 514, 131 Minn. 13.

9. Mich.—Kent Furniture Mfg. Co. v. Ransom, 9 N.W. 454, 46 Mich. 416.
39 C.J. p 196 note 7.

10. Cal.—Rosenow v. Wiener, 104 P. 839, 11 Cal.App. 294.

11. Pa.—Philliber v. Edelblute, 41 A. 643, 188 Pa. 468.

12. Or.—Toy v. Gong, 170 P. 936, 87 Or. 454.

13. **Compensation for use of automobile**
In absence of express agreement to contrary, presumption exists that use of servant's automobile during employment demonstrating master's product was given gratuitously, especially in view of servant's conduct.—Hett v. Barty Axle Corporation, 241 N.Y.S. 609, 229 App.Div. 388.

Nature of bonus plan
Where bonus plan was set forth in store operations manual and employing agent discussed matter of bonus with employee at time of hiring, in absence of other evidence

example, that a contract of employment is to be performed in the state where it is executed;[14] that the performance of the services is a condition precedent to payment;[15] that the employment was for certain fixed periods where it is shown that payments of wages were made regularly at the end of such periods[16] that the services were rendered under the contract of employment;[17] and that they continued to the end of the term contracted for[18] or until the death of the employee in the service, where it is shown that the relation of employer and employee existed.[19]

Unusual contracts. Employment contracts, unusual in their terms, are not presumed,[20] such as an agreement to work a year for a certain sum per day with payment at the end of the term,[21] or an agreement by a popular singer, much in demand, binding herself for a considerable period to sing exclusively for one employer at a fixed weekly salary to be paid only for such weeks as she should be booked.[22]

Rate or amount of compensation. All services rendered subsequent to the making of a contract of employment are presumed to be rendered at the contract price where it is shown that the contract defined the employee's compensation and that there is no subsequent agreement for an increase[23] or reduction;[24] and this presumption is not rebutted by a change of the place of employment[25] and the assumption of additional duties.[26] The rule is otherwise where a subsequent agreement for an increase or reduction is proved[27] or is itself to be presumed from periodic payments of a greater or smaller amount and their acceptance by the employee.[28]

Extra compensation for extra services. When extra work performed is of a character different from that contemplated by the original contract of employment, its performance by the employee and acceptance by the employer will raise an implication that extra compensation was intended therefor;[29] but services rendered by the employee during his employment which are similar in character to his regular duties are presumed to be compensated for by the stipulated wage or salary.[30] This is true even though the services are not technically in the line of his duty, where it is shown that they were performed by the employee at the request of his employer.[31]

b. Burden of Proof

(1) In general
(2) Defenses; set-off and counterclaim

(1) In General

In actions by an employee to recover compensation for his services, the plaintiff has the burden of proving every fact essential to his cause of action.

In accordance with the rules governing the burden of proof in civil actions generally, plaintiff, in an action by an employee to recover compensation for his services, has the burden of proving every

court was required to assume that bonus referred to was bonus plan as set forth in such manual.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind.App. 661.

Surrender of right of deduction for lost time

With respect to whether an employer may deduct from employee's wages pro rata amount during period when service is interrupted by act of government or by illness or by circumstances not the fault of either party, a surrender by employer of right to deduct wages for short periods of lost time is to be readily inferred.—Clark v. Irondequoit Coal & Supply Co., 11 N.Y.S.2d 869, 257 App.Div. 63.

14. Ky.—Cook v. Todd, 72 S.W. 779, 24 Ky.L. 1909.

15. N.Y.—Coletti v. Knox Hat Co., 169 N.E. 648, 252 N.Y. 468.

16. Ga.—Phillips Lumber Co. v. Smith, 66 S.E. 623, 7 Ga.App. 222.

17. N.Y.—Cooper v. Brooklyn Trust Co., 96 N.Y.S. 56, 109 App.Div. 211.

18. N.Y.—Berg v. Carroll, 9 N.Y.S. 509, 16 Daly 73.

19. Conn.—Leahy v. Cheney, 98 A. 132, 90 Conn. 611, L.R.A.1917D 809.

20. U.S.—Thomas A. Edison, Inc. v. Kidd, N.Y., 242 F. 923, 155 C.C.A. 511.
Ill.—Chicago Soap & Polish Co. v. Stansbury, 99 Ill.App. 488.

Nature and extent of services

It could be presumed that man of wide business experience would not enter into contract not expressing services he intended to perform; and if he intended his services to be merely nominal, while he received a large salary, he should have made such an unusual situation clear in the contract.—Arkansas Amusement Corporation v. Kempner, C.C.A.Ark., 57 F.2d 466.

21. Ill.—Chicago Soap & Polish Co. v. Stansbury, 99 Ill.App. 488.

22. U.S.—Thomas A. Edison, Inc. v. Kidd, N.Y., 242 F. 923, 155 C.C.A. 511.

23. Ark.—Westbrook Grain & Commission Co. v. Rice, 189 S.W. 39, 125 Ark. 503.
Presumption arising from renewal or continuance of employment without new contract see supra § 118.

24. Ill.—Painter v. Durham, 195 Ill. App. 468.

25. Ark.—Westbrook Grain & Commission Co. v. Rice, 189 S.W. 39, 125 Ark. 503.

26. Ark.—Westbrook Grain & Commission Co. v. Rice, supra.
Conn.—Leahy v. Cheney, 98 A. 132, 90 Conn. 611, L.R.A.1917D 809.

27. Iowa.—Hahnel v. Highland Park College, 152 N.W. 571, 171 Iowa 492.

28. Pa.—Osborn v. Presser, 8 Pa. Dist. 271.
39 C.J. p 196 note 28.

29. Mont.—Keith v. Kottas, 172 P. 2d 306.

30. Mont.—Keith v. Kottas, supra.

Rebuttal of presumption

Presumption that employee performed services within regular employment is rebutted by evidence of express inconsistent agreement.—MacFadden v. Compson, 254 P. 622, 81 Cal.App. 629.

31. Cal.—Bee v. San Francisco & Humboldt Bay R. Co., 46 Cal. 248.

fact essential to his cause of action.[32] Thus the burden is on the employee who sues to recover compensation for his services to establish the contract on which his right to recover depends and the terms thereof,[33] except in so far as the rule may be affected by statute;[34] its fairness and propriety where made under circumstances requiring such proof;[35] the performance of his own obligations[36] or excuse for nonperformance;[37] the happening of any contingency on which his right to recover is based;[38] the liability of defendant under the contract;[39] the employee's diligence in its enforcement, where required by circumstances;[40] the waiver by the employer of causes for rescinding the contract;[41] the employer's mistake where the employee seeks to recover more compensation than the employer had allowed him in an earlier settlement;[42] and, where necessary, accounts between the parties sufficiently accurate and clear to warrant the employee's recovery.[43]

In an action by the employer to recover an amount overdrawn by the employee, plaintiff has the burden of proving the allegations of his petition.[44] It is the duty of defendant employee to overcome a prima facie case made out by plaintiff employer in an action on open account and account stated.[45]

Foreign laws. While the employee has the burden of proving the laws of a foreign state which it was agreed should govern the interpretation of the employment contract,[46] the failure to prove such foreign law is not fatal where there is no reason to suppose that any statute law of the foreign state might govern the questions arising in the case.[47]

Right to recover reasonable value. Where plaintiff seeks to recover for the reasonable value of his services, he has the burden of proving that he was induced to perform such services for defendant[48] and that there was no agreement fixing the amount of compensation.[49]

Holding over. Where an employee holds over after the term, the burden is on him to prove that he performed the services under an express or implied contract that he was to receive the original

32. La.—Baham v. Schadwell, App., 165 So. 333.
Okl.—Empire Pipe Line Co. v. Spears, 45 P.2d 1092, 172 Okl. 544.

33. Ala.—Cole v. Cole, 173 So. 382, 234 Ala. 40.
Ark.—Gray v. Ford, Bacon & Davis, 198 S.W.2d 508.
Cal.—Hager v. Goddard, App., 179 P.2d 841—Boradori v. Peterson, 261 P. 520, 86 Cal.App. 753.
Ill.—Fuchs v. Weibert, 233 Ill.App. 536.
Iowa.—Hogan v. Perkins Bros. Co., 238 N.W. 608, 213 Iowa 1175—Schulte v. Ideal Food Products Co., 213 N.W. 431, 203 Iowa 676.
La.—Pickels v. Burnaman, 2 La.App. 639.
Neb.—Fairchild v. Fairchild Clay Products Co., 3 N.W.2d 581, 141 Neb. 356.
N.Y.—Lockwood v. Embalmers' Supply Co., 251 N.Y.S. 321, 233 App. Div. 189.
Ohio.—Winchell Shoe Mfg. Co. v. Baehr, 181 N.E. 823, 42 Ohio App. 88.
Okl.—Empire Pipe Line Co. v. Spears, 45 P.2d 1092, 172 Okl. 544.
39 C.J. p 197 note 29.

Implied contract
N.Y.—Crane v. Baudouine, 55 N.Y. 256.

Change in contract
If original employment contract was changed by subsequent events, employee suing thereon was required to prove only contract in existence at time of breach.—Hoffman Specialty Co. v. Pelouze, 164 S.E. 397, 158 Va. 586.

34. U.S.—Peffer v. Federal Cartridge Corp., D.C.Minn., 63 F.Supp. 291.

Verbal agreements
Under a statute so providing, the burden of proof is on the employer to establish the terms of a verbal agreement in case of a dispute with the employee as to its terms, but the burden of proof is unaffected where the parties enter into a written contract meeting certain statutory requirements.—Peffer v. Federal Cartridge Corp., supra.

35. N.Y.—Merrill v. United Box Board & Paper Co., 128 N.Y.S. 959, 143 App.Div. 833.
39 C.J. p 197 note 31.

36. Colo.—Little Nell Gold Min. Co. v. Hemby, 101 P. 981, 45 Colo. 582.
39 C.J. p 197 note 32.

Devotion of entire time
Employee, in order to recover under contract to devote entire time to employer's services, was required to show devotion of entire time, or reason for failure to do so.—Georgis v. Giocalas, 233 N.Y.S. 16, 225 App.Div. 577.

37. Me.—Harmon v. Salmon Falls Mfg. Co., 35 Me. 447, 58 Am.D. 718.

Discharge without cause
La.—Blue v. Chandler, App., 5 So.2d 210.

38. Colo.—Little Nell Gold Min. Co. v. Hemby, 101 P. 981, 45 Colo. 582.
39 C.J. p 197 note 36.

Share of profits
(1) Plaintiff has burden of proving existence of profits entitling him to a share thereof under the contract.—Livermore v. Mandeville & Thompson, C.C.A.Tex., 93 F.2d 563, certiorari denied 58 S.Ct. 752, 303 U.S. 653, 82 L.Ed. 1113—39 C.J. p 197 note 36 [a].

(2) Employee, however, may be excused from proving occurrence of condition, if corporation designedly prevented happening thereof by expenditures or obligations incurred for that purpose.—Booth v. Booth & Bayliss Commercial School, 180 A. 278, 120 Conn. 221, 99 A.L.R. 1517.

39. Cal.—James v. Paramount-Famous-Lasky Corporation, 33 P.2d 63, 138 Cal.App. 585.
39 C.J. p 197 note 34.

40. Pa.—Taylor v. Beatty, 51 A. 771, 202 Pa. 120.
39 C.J. p 197 note 35.

41. N.Y.—Atkinson v. Heine, 110 N.Y.S. 122, 134 App.Div. 406.

42. N.Y.—Schepps v. Konski, 196 N.Y.S. 299, 203 App.Div. 60.
39 C.J. p 197 note 38.

43. Mo.—Hunt v. Lehrack, App., 245 S.W. 52.

44. Iowa.—Economy Hog & Cattle Powder Co. v. Honett, 292 N.W. 825, 228 Iowa 559.

45. Ala.—Benson & Co. v. Foreman, 1 So.2d 898, 241 Ala. 193.

46. Md.—Globe Slicing Mach. Co. v. Murphy, 158 A. 26, 161 Md. 667.

47. Md.—Globe Slicing Mach. Co. v. Murphy, supra.

48. Tex.—Babb v. Mil-Po Clothes, Civ.App., 117 S.W.2d 873.

49. Tex.—Babb v. Mil-Po Clothes, supra.

rate of compensation;[50] but, if the employee continues to render the same services, the presumption that the services were continued under the original contract, considered supra § 118, will shift the burden of proving the contrary to the employer.[51]

Lost time. Where the employee seeks to recover for lost time, the burden is on him to prove an express or implied contract obligating the employer to pay for lost time.[52]

Additional compensation for extra services. Where an employee seeks to recover from his employer compensation for extra work performed during a period covered by the contract of employment, the burden is on him to prove that the services for which additional compensation is sought are outside the scope of the employee's general employment as contemplated by the parties to the contract,[53] and that the employer either expressly or impliedly promised to pay additional compensation for such extra services.[54] Where the nature of the services is such as to raise the implication that they are compensated for by the stipulated wage, the employee has the burden of proving an express contract for extra compensation for such services.[55]

Exercise of employer's discretion. Where the employee's right to a recovery is dependent, wholly or in part, on the employer's exercise of his discretion, the authorities are in conflict, some holding that the burden is on the employee to prove that the employer's act or failure to act in the exercise of that power was in bad faith,[56] others holding that the burden is on the employer to establish his own good faith.[57]

Minimum and maximum compensation. Where the contract fixes the compensation to be paid between minimum and maximum limits, the exact amount to be determined by certain considerations stated, the burden is on the employee to establish by proof of the existence of such circumstances his right to any compensation in excess of the minimum amount stated.[58]

Damages. If the employee seeks to recover damages for the breach of the contract of employment, the burden is on him to prove the damages which he actually suffered,[59] even where the employer admits all the facts alleged by the employee in his complaint.[60] Where the action is for reimbursement for moneys advanced by the employee in the employer's business, the burden of proving the advances made is on the employee.[61]

Burden of evidence. The burden of evidence, meaning thereby the burden of going forward with the evidence to establish or to meet a prima facie case, is, in the first instance, on the employee to show the contract of employment, his own performance, or readiness to perform and the employer's breach.[62] The burden is then shifted to the employer to establish his defense.[63]

(2) Defenses; Set-Off and Counterclaim

The burden is on the employer to prove affirmative matters of defense.

The burden is on the employer to prove affirmative matters of defense,[64] as, for example, that the services were rendered gratuitously;[65] that the contract of employment is other than the contract set up by the employee,[66] or was superseded[67] or modi-

50. Ark.—Ewing v. Janson, 21 S.W. 430, 57 Ark. 237.

51. Md.—Travelers' Ins. Co. v. Parker, 47 A. 1042, 92 Md. 22.

52. Ala.—Wilson v. Smith, 20 So. 134, 111 Ala. 170.
Or.—Barlow v. Taylor Placer Mining & Milling Co., 44 P. 492, 29 Or. 132.

53. Idaho.—Quirk v. Sunderlin, 130 P. 374, 23 Idaho 368.

54. Idaho.—Quirk v. Sunderlin, supra.
39 C.J. p 197 note 44.

55. Mont.—Keith v. Kottas, 172 P. 2d 306.

56. Md.—Himmel v. Levinstein, 103 A. 848, 132 Md. 317.
39 C.J. p 198 note 45.

57. Pa.—Bodman v. Fisher, 112 A. 99, 268 Pa. 535.
39 C.J. p 198 note 46.

58. Tenn.—Douglas v. McWhirter, 9 Heisk. 69.

59. Puerto Rico.—Padro v. Valdes, 16 Puerto Rico 309.

60. Puerto Rico.—Padro v. Valdes, supra.

61. Cal.—Shields v. Rancho Buena Ventura, 177 P. 499, 38 Cal.App. 696.

62. Pa.—Malickson v. Louis J. Bergdoll Motor Co., 53 Pa.Super. 185.

63. Pa.—Bryden v. Delaware, L. & W. R. Co., 105 A. 79, 262 Pa. 211.
39 C.J. p 198 note 53.

64. Ala.—Wayne Pump Co. v. Harrison, 23 So.2d 392, 247 Ala. 186.
Ga.—Speer v. Johnson, 184 S.E. 388, 52 Ga.App. 636.
N.Y.—Rubin v. Dairymen's League Co-op. Ass'n, 18 N.Y.S.2d 466, 259 App.Div. 23, affirmed 29 N.E.2d 458, 284 N.Y. 32, reargument denied 31 N.E.2d 927, 284 N.Y. 816.
Tex.—Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253.

65. Pa.—Caskey v. Kineavy, 60 Pa. Super. 87.
39 C.J. p 198 note 55.

66. Colo.—Lyman v. Schwartz, 57 P. 735, 13 Colo.App. 318.
39 C.J. p 198 note 56.

Reduced commissions on certain accounts
Employer was held to have burden of proof on issue of reduction of commission sued for by discharged salesman.—Fink v. Superior Lamp & Shade Co., 213 N.W. 453, 238 Mich. 390.

67. La.—Pickels v. Burnaman, 2 La.App. 639.

Agreement to discontinue salary
La.—Pickels v. Burnaman, supra.

fied[68] by a subsequent agreement; that it is illegal[69] or invalid or voidable;[70] that it has been rescinded;[71] that there was a settlement of employee's claim;[72] or that another employer has been substituted relieving defendant from further liability,[73] in which case the burden is on defendant to prove the performance of all conditions precedent required by the contract before such a substitution could be effectually made.[74]

Conduct and competence of employee. The employer has the burden of proving that the employee has been unfaithful;[75] that he was guilty of a breach of an implied covenant of skill;[76] that he has misappropriated funds belonging to the employer equal to, or in excess of, the amount alleged to be due him;[77] that the employer suffered loss by the employee's carelessness;[78] that the employee has been rightfully discharged, the employer in such case having the burden to establish a sufficient ground for the discharge[79] and that he has forfeited the wages due him.[80]

Expenditures in net profits cases. In cases involving an employee's claim to a share of the net profits of his employer's business, the burden is on the employer to prove all expenditures entering into the computation.[81]

Payment. While it has been held that the employee must prove the employer's nonperformance of the contract by failure to make payment in accordance therewith,[82] it is more frequently held that payment is a matter of defense and that the burden of proving such defense is on the employer.[83] However, where the facts raise a presumption that the employee has been paid, as considered supra § 121, the employee has the burden of overcoming the presumption of payment.[84]

Set-off and counterclaim. The burden is on the employer to prove his loss where he seeks to recoup damages by reason of the employee's quitting before the end of the term[85] or illegally withholding funds belonging to him.[86] The burden is also on the employer to prove the extent of overpayments made by him where he counterclaims therefor.[87] Where the employer sets up a counterclaim for moneys lost by the employee, and the employee admits the loss but alleges that it was not through his negligence, the burden of showing the absence of negligence is on the employee.[88]

An employee who interposes a counterclaim in an action by the employer to recover money overdrawn has the burden of proving the contract relied on by him for the purpose of establishing the counterclaim.[89]

68. Ala.—Hosey v. Meadows, 194 So. 861, 29 Ala.App. 244.
La.—Lucas v. Morefield, 137 So. 633, 18 La.App. 497.

Effect of modification

In employee's suit against corporate employer for back salary wherein employer relied on oral agreement whereby employee's salary was alleged to have been cut in half, employer had burden of proving that effect of modification was to reduce salary of employee.—Gutknecht v. C. A. Lawton Co., 285 N.W. 411, 231 Wis. 413.

69. Ind.—Krauss v. Weaver, 130 N.E. 800, 191 Ind. 133.
39 C.J. p 198 note 57.

70. La.—Clements v. Knighton, App., 1 So.2d 139.

71. S.C.—Moore v. Marion Cotton Oil Co., 85 S.E. 52, 100 S.C. 499.

72. La.—Thompson v. Goodman, 126 So. 527, 13 La.App. 186.

73. N.Y.—Base Ball Players' Fraternity v. Boston American League Base Ball Club, 151 N.Y.S. 557, 166 App.Div. 484, affirmed 117 N.E. 1061, 221 N.Y. 704.

74. N.Y.—Base Ball Players' Fraternity v. Boston American League Base Ball Club, supra.
39 C.J. p 198 note 65.

75. Mich.—Williams v. Crane, 116 N.W. 554, 153 Mich. 89.

76. Ariz.—Arizona Superior Mining Co. v. Anderson, 262 P. 489, 33 Ariz. 64, error dismissed 49 S.Ct. 177, 278 U.S. 578, 73 L.Ed. 516.

77. Minn.—Demeules v. Jewel Tea Co., 114 N.W. 733, 103 Minn. 150, 123 Am.S.R. 315, 14 L.R.A.,N.S., 954.

78. La.—Shemper v. Irving Herskovits Fur Co., 120 So. 270, 10 La. App. 89.

79. Mich.—Williams v. Crane, 116 N.W. 554, 153 Mich. 89—Hinchman v. Matheson Motor Car Co., 115 N.W. 48, 151 Mich. 214.

80. Ind.—Macbeth-Evans Glass Co. v. Jones, 95 N.E. 567, 176 Ind. 221.
39 C.J. p 198 note 61.

81. N.J.—Morehouse v. John M. Kelly Contracting Co., 122 A. 374, 95 N.J.Eq. 280.
39 C.J. p 198 note 66.

82. Ala.—Cole v. Cole, 173 So. 382, 234 Ala. 40.
Neb.—Fairchild v. Fairchild Clay Products Co., 3 N.W.2d 581, 141 Neb. 356.

83. Colo.—McMahon v. Williams, 250 P. 560, 80 Colo. 249.
Ind.—Krauss v. Weaver, App., 126 N.E. 248.
Md.—Lynch v. Rogers, 10 A.2d 619, 177 Md. 478.

84. Pa.—Witten v. Stout, 131 A. 360, 284 Pa. 410.

85. Ky.—Asher v. Tomlinson, 60 S.W. 714, 22 Ky.L. 1494.

86. N.Y.—Turner v. Kouwenhoven, 2 N.E. 637, 100 N.Y. 115.
N.D.—Rittle v. Woodward, 153 N.W. 951, 31 N.D. 113.

87. U.S.—Helfer v. Corona Products, C.C.A.Ark., 127 F.2d 612.

Explanation of discrepancies in accounts

In salesman's action to recover commissions where employer alleged that it had made its commission payments to salesman as shown in monthly statements, and thereafter employer sought to show an overpayment by adding up all of cashed checks which employer had issued to salesman, burden was on employer to supply some explanation of discrepancies between account sent to salesman and pleaded by employer and the substituted account offered in evidence.—Helfer v. Corona Products, supra.

88. Iowa.—Becket v. Iowa Impr. Co., 25 N.W. 271, 67 Iowa 337.

89. Iowa.—Economy Hog & Cattle Powder Co. v. Honett, 270 N.W. 842, 222 Iowa 894.

c. Admissibility

(1) In general
(2) Compensation
(3) Performance
(4) Amount due and payment

(1) In General

The rules governing the admissibility of evidence in civil cases generally have been held to apply in actions by an employee to recover remuneration for his services.

The rules as to competency, relevancy, and materiality applicable in the case of civil actions generally have been held to apply in determining the admissibility of evidence in actions by an employee to recover remuneration for his services,[90] as in determining the admissibility of evidence to show who was the real employer[91] and to show the existence and terms of the contract of employment.[92]

(2) Compensation

The admissibility of evidence to show the amount of compensation due has been adjudicated.

In accordance with the general rules of evidence, the admissibility of evidence has been adjudicated with respect to evidence to show the agreed amount of compensation,[93] and its increase[94] or reduction,[95] or, in the case in which evidence of reasonable value is admissible under the pleadings, considered supra § 128 b, the reasonable value of the services rendered.[96]

In order to show the agreed amount of compensation, earlier contracts between the parties may be admitted,[97] as may be evidence of the services[98]

90. Okl.—Boyer v. Walker, 286 P. 304, 142 Okl. 184.

Evidence held admissible

Ala.—Tillery v. Price, 137 So. 440, 223 Ala. 532.

Idaho.—Weed v. Idaho Copper Co., 10 P.2d 613, 51 Idaho 737.

Ind.—Lester v. Hinkle, 153 N.E. 179, 90 Ind.App. 193.

Minn.—Love v. National Credit Clothing Co., 219 N.W. 913, 174 Minn. 573.

Evidence held inadmissible

U.S.—Sickelco v. Union Pac. R. Co., C.C.A.Cal., 111 F.2d 746.

Ill.—Ostroff v. A. J. Canfield Co., 47 N.E.2d 382, 317 Ill.App. 653.

Ind.—Oaktown Telephone Co. v. Miller, 194 N.E. 741, 101 Ind.App. 108, followed in Bruceville Telephone Co. v. Miller, 194 N.E. 775, 101 Ind. App. 701, and Freelandville Telephone Co. v. Miller, 194 N.E. 775, 101 Ind.App. 701.

Minn.—Hlubeck v. Beeler, 9 N.W.2d 252, 214 Minn. 484.

Okl.—Boyer v. Walker, 286 P. 304, 142 Okl. 184.

Or.—Pitts v. Crane, 236 P. 475, 114 Or. 593.

Pa.—Fisher v. Stevens Coal Co., 17 A.2d 642, 143 Pa.Super. 115.

R.I.—Goldblatt v. Koffler, 42 A.2d 490—Long v. Kleistone Rubber Co., 128 A. 574.

91. Colo.—Greenlaw Lumber & Timber Co. v. Chambers, 105 P. 1091, 46 Colo. 587.

39 C.J. p 199 note 71.

92. Tex.—Gate City Roller Rink Co. v. McGuire, Civ.App., 112 S.W. 436.

39 C.J. p 199 note 72.

Evidence held admissible

(1) In general.

La.—Binnion v. M. & D. Drugs, App., 8 So.2d 307.

Mass.—Cray v. Wells, 154 N.E. 848, 258 Mass. 93.

(2) In action on employment contract arising by operation of law by reason of relationship of parties continuing from year to year, original negotiations, and memorandum which did not meet requirements of statute of frauds, were competent evidence to show terms of contract under which parties continued their relations.—Dennis v. Thermoid Co., 22 A.2d 535, 19 N.J.Misc. 614, affirmed 25 A.2d 886, 128 N.J.L. 303.

(3) In action by theater manager for salary, wherein owner pleaded that, under contract, he was not to be individually liable, but that salary was to come only from proceeds of business, evidence of owner's statements as to losses in operating business prior to manager's engagement and amount of such losses was admissible as circumstance bearing on probability that employee would agree to manage such business on such basis.—Ross v. James, Tex.Civ.App., 275 S.W. 171.

(4) In an action for an accounting of profits, a letter from the employer, although not in and of itself constituting the contract, may be competent to prove the terms of the contract.—Stewart v. John R. Lankenau Co., 156 N.E. 73, 259 Mass. 242.

Evidence held inadmissible

(1) In general.

Mo.—Burkhardt v. Decker, 295 S.W. 838, 221 Mo.App. 1066.

Or.—Pitts v. Crane, 236 P. 475, 114 Or. 593.

Pa.—Besecker v. General Acceptance Corporation, 17 A.2d 916, 143 Pa. Super. 367.

39 C.J. p 199 note 72 [c].

(2) Where contract made it employee's duty to perform any "executive function" requested, employee suing for salary could not introduce evidence that duties were to be nominal.—Arkansas Amusement Corporation v. Kempner, 33 S.W.2d 42, 182 Ark. 897.

(3) Where employment contract provided for severance pay on "dismissal" except for drunkenness, proved dishonesty, or gross neglect of duty, in employees' action for severance pay, evidence offered to show meaning of word dismissal was properly excluded since meaning of the word was clear.—Matthews v. Minnesota Tribune Co., 10 N.W.2d 230, 215 Minn. 369, 147 A.L.R. 147.

93. Mich.—Williams v. Williams, 46 N.W. 734, 82 Mich. 449.

39 C.J. p 199 note 74.

Evidence held admissible

Conn.—Vigliotti v. Campano, 133 A. 579, 104 Conn. 464.

Okl.—Harden v. Kifer, 111 P.2d 490, 188 Okl. 538.

Tex.—Babb v. Mil-Po Clothes, Civ. App., 117 S.W.2d 873.

Evidence held inadmissible

Okl.—Boyer v. Walker, 286 P. 304, 142 Okl. 184.

Tex.—Cady v. Donnelly, Civ.App., 47 S.W.2d 337, error dismissed.

94. N.Y.—Diffin v. Reid, 36 N.Y.S. 407, 15 Misc. 268.

39 C.J. p 199 note 75.

95. Tex.—Pennington v. Thompson Bros. Lumber Co., Civ.App., 122 S.W. 923.

39 C.J. p 200 note 76.

Evidence held admissible

Ala.—George D. Witt Shoe Co. v. Mills, 140 So. 578, 224 Ala. 500.

Evidence held inadmissible

Ga.—Lee v. Jones, 147 S.E. 118, 39 Ga.App. 291.

39 C.J. p 200 note 76 [d].

96. Cal.—Crusoe v. Clark, 59 P. 700, 127 Cal. 341.

39 C.J. p 200 note 78.

97. Ill.—Mears v. O'Donoghue, 58 Ill.App. 345.

39 C.J. p 200 note 79.

98. Cal.—Perry v. J. Noonan Furniture Co., 95 P. 1128, 8 Cal.App. 35.

39 C.J. p 200 note 80.

or payments[99] made thereunder, provided the connection is shown;[1] and the employment agreement of a fellow employee with the same employer has also been held to be admissible.[2] What other employers had paid plaintiff for his services[3] or customarily paid to other employees under similar contracts,[4] is not admissible except where it is shown that plaintiff left another's service to enter defendant's employ.[5] Where the employer alleges the employment contract to be unreasonable, evidence of salaries paid to former employees is admissible as bearing on the reasonableness of the alleged contract.[6]

Overtime. Rules governing the admissibility of evidence generally have been held to apply in actions for overtime compensation.[7] On the question of existence of a contract to pay for overtime, the employer may show the receipt of checks in full payment for services rendered,[8] or that the employee voluntarily continued work, although overtime duties were regularly required without extra pay, and received his monthly salaries regularly without coming to a definite understanding with him with regard to additional remuneration.[9] The employee may show that the employer's agent, although unauthorized to do so, told him that he would receive compensation for overtime;[10] and a letter from the general manager of the employer to the employee is admissible.[11]

Bonus. Where the employee claims that he is entitled to a bonus, evidence is admissible tending to show that a bonus was promised by the employer.[12]

Commissions. The admissibility of evidence offered to show the amount of sales on which commissions are based[13] or to explain items of the account between the employer and the employee[14] has been adjudicated. For this purpose sales in periods other than the one in question may be considered if they are not too remote and if evidence of them is the best evidence procurable under the circumstances;[15] but evidence of the employee's earnings under the same contract in prior years is not admissible.[16]

Profits. Under the general rules of evidence, evidence may be admitted to show the existence and the terms of a contract to compensate the employee with a share of the profits[17] and to show the earnings and profits of the employer.[18]

Expenses. The admissibility of evidence to prove

99. Ill.—Glucose Sugar Refining Co. v. Flinn, 56 N.E. 400, 184 Ill. 123.

Explanation of payment

D.C.—Watwood v. Potomac Chemical Co., Mun.App., 42 A.2d 728.

1. Pa.—Cox v. Philadelphia City Pottery Co., 38 Pa.Super. 545.

2. Ark.—St. Francis Valley Lumber Co. v. Orcutt, 295 S.W. 713, 174 Ark. 282.

3. Mich.—Williams v. Williams, 46 N.W. 734, 82 Mich. 449.
39 C.J. p 200 note 83.

4. Wis.—Kosloski v. Kelly, 100 N. W. 1037, 122 Wis. 665.

5. Tenn.—Rocco v. Parczyk, 9 Lea 328.

6. Iowa.—Schulte v. Ideal Food Products Co., 226 N.W. 174, 208 Iowa 767.

7. **Computations made pursuant to court order**

In portal-to-portal action by employees to recover overtime compensation, wherein court entered order imposing burden on employer to compute time spent by employees on employer's premises before they were clocked in and after they were clocked out, computations would not necessarily be admissible in evidence simply because made in compliance with the order.—O'Malley v. Chrysler Corp., C.C.A.Ill., 160 F.2d 35.

8. Iowa.—Wiefenbach v. Lamp, 150 N.W. 1045, 169 Iowa 30.

9. W.Va.—Robinette v. Hubbard Coal Min. Co., 107 S.E. 285, 88 W. Va. 514, 25 A.L.R. 212.

10. Mich.—O'Boyle v. Detroit, 90 N.W. 669, 131 Mich. 15.

11. Iowa.—McGuire v. Interurban R. Co., 200 N.W. 55.

12. **Evidence held admissible**

(1) An offer of a bonus addressed in general terms to all employees is admissible to show that a contract of employment made subsequently with plaintiff was on those terms after it appears that plaintiff was familiar at the time with the terms of the offer.—Scholl v. Hershey Chocolate Co., 71 Pa.Super. 244.

(2) Letters by employer to employee or members of family were admissible to establish that bonus promised was as inducement to enter employment.—Hunter v. Ryan, 293 P. 825, 109 Cal.App. 736.

Evidence held inadmissible

Since bonus was a matter of contract, evidence of amount of work done by employee which he alleged he would not have performed except in expectation of bonus was not material on question of right to bonus.—Harding v. Montgomery Ward Co., Ohio App., 58 N.E.2d 75.

13. Or.—Howland v. Fenner Mfg. Co., 206 P. 730, 104 Or. 373, 207 P. 1096.
39 C.J. p 200 note 91.

Evidence held admissible

U.S.—Helfer v. Corona Products, C. C.A.Ark., 127 F.2d 612.
N.J.—Brown v. Morrisey & Walker, 150 A. 330, 106 N.J.Law 307.
Vt.—Stratton v. Cartmell, 42 A.2d 419, 114 Vt. 191.

Evidence held inadmissible

U.S.—Atkinson v. New Britain Mach. Co., C.C.A.Ill., 154 F.2d 895.
Mich.—O'Connor v. March Automatic Irr. Co., 218 N.W. 784, 242 Mich. 204, affirmed 223 N.W. 228, 245 Mich. 593.
39 C.J. p 200 note 91 [c].

14. N.C.—Peyton v. Hamilton-Brown Shoe Co., 83 S.E. 487, 167 N.C. 280.

15. Wash.—Parrott v. Jacobson, 67 P. 589, 27 Wash. 265.
39 C.J. p 201 note 93.

16. U.S.—Atkinson v. New Britain Mach. Co., C.C.A.Ill., 154 F.2d 895.

17. Tex.—E. Alkemeyer Co. v. McCardell, Civ.App., 183 S.W. 416.
39 C.J. p 201 note 94.

18. Mo.—Beerend v. Benwood-Linze Co., App., 192 S.W.2d 660.

Profits on business "secured"

Slips showing total business only and net profits and plaintiff's testimony as to amount due based thereon, were held properly excluded in action for agreed per cent of profits on business "secured."—Rosegartin

the employer's breach of a contract to pay the employee's traveling expenses and the amount of such expenses has been adjudicated.[19] Directions to the employee not to spend any money without the employer's orders are admissible where the contract is in writing and does not provide that the employer shall pay the employee's expenses.[20] Evidence that the employee was not diligent and neglected his duty so as not to be entitled to a fixed sum which the employer had agreed to pay him periodically for his traveling expenses on the basis of his continuous service is admissible,[21] even though the employee was hired on a commission basis and would himself be the chief sufferer from his own lack of diligence and neglect.[22]

(3) Performance

Any evidence otherwise competent and relevant is admissible to establish performance, abandonment, or breach of the contract by the servant.

Under the rules applicable to civil actions generally, any evidence which is otherwise competent and relevant may be admitted to establish the fact of performance of the contract[23] or to show the fact of abandonment[24] or breach[25] of the contract by the servant. Facts indicating that plaintiff did not fully perform his contract are admissible regardless of whether the action is brought on a special contract or in quantum meruit, such facts, if proved, barring a recovery on the contract, and having a bearing on the value of such services as he did perform where a recovery in quantum meruit is allowed.[26]

Happening of contingency. Where performance under the contract involves the happening of a contingency named therein as a condition precedent to recovery, evidence bearing on the happening of such contingency is admissible.[27]

(4) Amount Due and Payment

The general rules governing the admissibility of evidence apply to evidence to show the amount due to an employee or the payment thereof.

The general rules governing the admissibility of evidence in civil actions have been applied to evidence offered to show the amount due to an employee under his contract.[28] Accordingly the acts and declarations of an employer recognizing the continued liability to the employee for his services after he has left his employment are admissible to show the employer's waiver of the forfeiture of the employee's wages.[29] Evidence of extra ex-

v. Cohen, 155 N.E. 417, 258 Mass. 534.

19. Ala.—Buford v. Graden, 64 So. 552, 185 Ala. 341.

Evidence held admissible

(1) Evidence of conversations between the employee and his employer's duly authorized agent, and of what it cost him to return home after he had been left without any money in a distant state because of such breach held admissible.—Buford v. Graden, 64 So. 552, 185 Ala. 341.

(2) Evidence of employer's negligence in failing to place funds with his disbursing agent to meet such traveling expenses has been held admissible.—Buford v. Graden, 59 So. 368, 5 Ala.App. 421.

20. Ill.—Tait v. Chicago Structural Tile Co., 185 Ill.App. 522.

21. Mich.—Alberts v. Stearns, 15 N.W. 505, 50 Mich. 349.

22. Mich.—Alberts v. Stearns, supra.

23. N.Y.—Seaburn v. Zachmann, 90 N.Y.S. 1005, 99 App.Div. 218.
39 C.J. p 201 note 3.

Evidence held admissible

(1) Time-book kept by employer's manager was held competent in action for salary to show dates on which employee performed services.—Fuqua v. Thomas, 273 P. 1091, 96 Cal.App. 304.

(2) In discharged manager's action for compensation, questions asked expert in operating dry kilns respecting condition of lumber sent to kiln by plaintiff was held admissible as relating to reasons for employee's discharge.—Navco Hardwood Co. v. Becks, 134 So. 4, 222 Ala. 631.

(3) Other evidence held admissible see 39 C.J. p 201 note 3 [a].

24. N.Y.—Wilkinson v. McLeod, 140 N.Y.S. 1031, 80 Misc. 220.
39 C.J. p 202 note 4.

25. **Evidence held admissible**
Cal.—Powis v. Moore Machinery Co., 164 P.2d 822, 72 Cal.App.2d 344.

Evidence held inadmissible
La.—Kottemann v. Gross, App., 184 So. 380.

26. Mich.—Pungs v. American Brake-Beam Co., 87 N.W. 364, 128 Mich. 318.

27. N.Y.—Diffin v. Reid, 36 N.Y.S. 407, 15 Misc. 268.

Evidence held admissible

(1) That the employer's business resulted in loss where the payment of the employee's salary is contingent on profits.—Diffin v. Reid, 36 N.Y.S. 407, 15 Misc. 268.

(2) That the value of the crops raised by the employee showed the "good results" on which his right to compensation is made to depend.—Williams v. Crane, 116 N.W. 554, 153 Mich. 89.

28. La.—Morgan v. Bryant, App., 152 So. 773.

Evidence held admissible

(1) Statements of an employer, signed by his agent.—Auxford Brown Ore Co. v. Pierce, 77 So. 420, 16 Ala.App. 270.

(2) Statements of an employee contained in an offer of compromise to settle for a sum equivalent to the full amount of his claim at the time, even though he later sued for a larger amount.—Abbott v. Andrews, 130 Mass. 145.

(3) Estimates furnished from sources other than those stipulated in the contract, the contract estimates having been lost and the others being the best procurable in their place.—Western Lumber Co. v. Willis, Mont., 160 F. 27, 87 C.C.A. 183.

(4) The employer's ledger account with the employee.—Trotti v. Louisiana Mortg. Corporation, La.App., 156 So. 663.

Evidence held inadmissible

Evidence that other employees working with the plaintiff settled for a smaller amount than plaintiff claims is inadmissible.—Morgan v. Bryant, La.App., 152 So. 773.

29. Vt.—Cahill v. Patterson, 30 Vt. 592.

penses alleged by the employer to have been incurred by him because of his employee's sickness is not admissible as forming the basis of deductions from the employee's salary in the absence of any evidence substantiating the charge that the expenses were incurred for that reason.[30] Evidence of the amount an employee actually received monthly from outside work is immaterial where, in carrying to the account of his employer the amount received from others, the employee credited his employer with the entire amount due from him for those months.[31] Evidence of work done for others by an employee after his discharge is not admissible in the absence of a special plea by the employer setting up such earnings as a defense to the action.[32]

Payment. Subject to the rules of evidence as to competency, relevancy, and materiality, evidence is admissible to show payment[33] or nonpayment.[34] In order to establish payment of the employee's wages, in whole or in part, an employer may show that the employee had been paying his living expenses during the period in issue and that he had not been withdrawing money from the bank for that purpose;[35] that he had received full time payments for days when he had not given a full day's service to reduce the employee's claims for overtime payments on other days;[36] and that the services rendered were domestic services within the meaning of the rule raising the presumption of payment in such cases.[37] However, he cannot show for this purpose his employee's methods of doing his work,[38] or his representations respecting his ability[39] or the work[40] of other employees. On the other hand, the employee may show that the employer stated to him after he had completed his service that he would pay him a specified sum, as tending to show that the services had not at that time been fully paid for.[41] In proving payment, the employee's bookkeeping methods may be in issue and to show that he kept his personal account separate from the labor-expense account, checks received by the employee, some payable to him personally and some on account of his employer's business, are admissible.[42]

d. Weight and Sufficiency

In an action by an employee to recover compensation, the party having the affirmative of an issue must prove it by a preponderance of the evidence.

In an action with respect to the compensation of an employee, the party having the affirmative of an issue must prove it by a preponderance of the evidence.[43] In particular cases the courts have adjudicated the sufficiency or insufficiency of the evi-

30. Ill.—Reiter v. Standard Scale & Supply Co., 86 N.E. 745, 237 Ill. 374.

31. Minn.—Barnes v. Spencer, 129 N.W. 140, 113 Minn. 101.

32. Ga.—Phillips Lumber Co. v. Smith, 66 S.E. 623, 7 Ga.App. 222.

33. **Necessity of foundation for evidence**
In action for wages, check to employee was held inadmissible to show payment without foundation showing check was paid for wages, where checks had been given employee for other purposes.—Davis v. Sullivan Gold Mining Co., 62 P.2d 1292, 103 Mont. 452.

34. Ala.—E. D. Lanford Co. v. Buck, 124 So. 418, 220 Ala. 190.
Evidence held admissible
Evidence that sum charged as advanced to salesman was for entertaining customers was admissible, entertainment expenses not being within meaning of "weekly drawings" or "traveling expenses."—Markstein v. M. Ufland & Co., 214 N.Y.S. 476, 126 Misc. 683.

35. N.Y.—Mann v. Schneider, 110 N.Y.S. 383.

36. N.Y.—Keysaw v. Dotterweich Brewing Co., 105 N.Y.S. 562, 121 App.Div. 58.

37. Pa.—Taylor v. Beatty, 51 A. 771, 202 Pa. 120, 124.
39 C.J. p 202 note 18.

38. Mich.—Fox v. Bialy, 114 N.W. 871, 151 Mich. 106.

39. Mich.—Fox v. Bialy, supra.

40. Mich.—Fox v. Bialy, supra.

41. Iowa.—Murphy v. De Haan, 89 N.W. 100, 116 Iowa 61.

42. Iowa.—Miller v. Brown, 47 N.W. 895, 82 Iowa 79.

43. U.S.—Livermore v. Mandeville & Thompson, C.C.A.Tex., 93 F.2d 563, certiorari denied 58 S.Ct. 752, 303 U.S. 653, 82 L.Ed. 1113—Nazario v. West Indies Trading Corp., D.C.Puerto Rico, 69 F.Supp. 224.
La.—Ritchie Grocer Co. v. Dean, 162 So. 62, 182 La. 518—Baham v. Schadwell, App., 165 So. 333.
Discrepancy in testimony was held not to justify the court in disregarding all of the testimony of the witness.—Jeffs v. Stephenson, 114 P.2d 987, 9 Wash.2d 335.
Establishment of expense items
Where the evidence shows that the books kept by defendant do not state a true account of all receipts and expenses and cannot be relied on in stating the account, the items of expense claimed by defendant as credits and filed with the master should be scrutinized with care, and only such items allowed as are clearly established by the evidence.—Kaplan v. Stein, 160 N.E. 552, 329 Ill. 253.
Prima facie case
In employer's action against employee on open account and account stated, plaintiff's introduction in evidence of verified account and proof that defendant approved and agreed to such account made out prima facie case.—Benson & Co. v. Foreman, 1 So.2d 898, 241 Ala. 193.
Evidence held sufficient
(1) To support plaintiff's claim for remuneration generally.
Ariz.—Egeland v. Jewell, 69 P.2d 804, 50 Ariz. 140.
Cal.—Millsap v. National Funding Corporation, 152 P.2d 634, 66 Cal.App.2d 658—Millsap v. National Funding Corporation of California, 135 P.2d 407, 57 Cal.App.2d 772—Sadik v. Wallberg Mining Corporation, 53 P.2d 981, 11 Cal.App.2d 379—Paretchan v. M. & S. Farms, App., 179 P.2d 619—Weintraub v. Soronow, 1 P.2d 28, 115 Cal.App. 145—Kibele v. Bomke, 285 P. 907, 104 Cal.App. 328.
Conn.—Krawitz v. Ganzke, 159 A. 897, 114 Conn. 662.
Ga.—Speer v. Johnson, 184 S.E. 388, 52 Ga.App. 636—Jones v. Batts, 164 S.E. 462, 45 Ga.App. 323.

dence to show a contract of employment;[44] the validity of such contract;[45] the terms of the con-

Idaho.—Harp v. Stonebraker, 65 P.2d 766, 57 Idaho 434—Nelson v. Boise Petroleum Corporation, 32 P.2d 782, 54 Idaho 179.

Ill.—Hewitt v. Michuda, 18 N.E.2d 738, 298 Ill.App. 622—Boski v. Durka, 2 N.E.2d 590, 285 Ill.App. 598.

Iowa.—Yaus v. Shawmutt Egg Co., 213 N.W. 230, 204 Iowa 426.

Kan.—Stevens v. Pfeifer, 61 P.2d 907, 144 Kan. 487—Dawson v. McMullen, 268 P. 826, 126 Kan. 468.

Ky.—Batnich v. Pollock, 203 S.W.2d 4, 305 Ky. 125.

La.—Roberts v. Lower Coast Lumber Co., App., 166 So. 498—Sturgis v. Imperial Hotel, App., 144 So. 268 —Morris v. Oliphint, 124 So. 564, 11 La.App. 629.

Mich.—Einkorn v. Schemm Brewing Co., 270 N.W. 233, 278 Mich. 105 —Nyman v. B. S. Chapin, Inc., 238 N.W. 195, 255 Mich. 442.

Minn.—Altendorf v. Hogenson, 19 N.W.2d 430, 220 Minn. 240—Ickler v. Hilger, 10 N.W.2d 277, 215 Minn. 82—Costello v. Barry, 278 N.W. 580, 202 Minn. 418—Harris v. North Star Amusement Co., 259 N.W. 16, 193 Minn. 480.

Mont.—Girson v. Girson, 114 P.2d 274, 112 Mont. 183.

Okl.—Grant G. Forsythe, Inc., v. Barclay, 153 P.2d 485, 194 Okl. 643—North American Car Corporation v. Green, 52 P.2d 798, 175 Okl. 136—Redd v. Warehime, 26 P.2d 142, 166 Okl. 128—Southland Refining Co. v. Jackson, 1 P.2d 410, 149 Okl. 286—Sweat v. Skaggs, 280 P. 591, 138 Okl. 141 —Swindler v. Selby, 267 P. 471, 130 Okl. 294—Taylor v. White, 250 P. 512, 120 Okl. 68.

Or.—Marr v. Dunn, 158 P.2d 651, 176 Or. 442—Wohlender v. J. W. Copeland Yards, 16 P.2d 642, 141 Or. 113.

Pa.—Bowers v. Goodman, 2 A.2d 579, 133 Pa.Super. 305—Bayne v. Proctor & Gamble Distributing Co., 87 Pa.Super. 195.

R.I.—Anderson v. Johnson, 195 A. 240, 59 R.I. 241—Prendergast v. Wilson, 159 A. 740.

Tex.—Birk v. Jackson, Civ.App., 75 S.W.2d 918, error dismissed.

Wash.—Jeffs v. Stephenson, 114 P.2d 987, 9 Wash.2d 335.

Wis.—Viereg v. Southwestern Wisconsin Gas. Co., 248 N.W. 775, 212 Wis. 394.

(2) To support plaintiff's claim for commissions earned.

Cal.—Marsh v. Arch Rib Truss Co., 133 P.2d 412, 56 Cal.App.2d 811—Spindler v. Wittemann Co., 249 P. 1092, 79 Cal.App. 485.

Ind.—Schafer Co. v. Hoffman, 155 N.E. 715, 93 Ind.App. 201.

Ky.—McAllister v. Vaughn, 276 S.W. 561, 210 Ky. 663.

Mass.—Irving v. Goodimate Co., 70 N.E.2d 414, 320 Mass. 454.

Mich.—Cagney v. Checker Cab Mfg. Corporation, 224 N.W. 416, 246 Mich. 113.

Minn.—Sigvertsen v. Maney Bros. Mill & Elevator Co., 234 N.W. 688, 182 Minn. 387.

Mont.—Cramer v. Deschler Broom Factory, 255 P. 346, 79 Mont. 220.

N.J.—Kling v. Aron, 136 A. 424, 5 N.J.Misc. 287.

Tex.—Broun v. Collier, Civ.App., 35 S.W.2d 1050, error dismissed.

(3) To support plaintiff's claim for a share of the profits.—Crowley v. Ohio & Michigan Coal Co., 218 N.W. 707, 242 Mich. 360.

(4) To show that employee's claim was a debt and not a contingent claim.—Lientz v. Wheeler, C.C.A.Mo., 113 F.2d 767.

(5) To show that employee did not quit but was discharged.—Signorelli v. Morice, La.App., 174 So. 124.

(6) To warrant an accounting.—Jacobson v. McWha, 23 N.W.2d 770, 147 Neb. 564.

(7) To sustain particular findings.

Cal.—Millsap v. National Funding Corporation, 152 P.2d 634, 66 Cal.App.2d 658—Hollin v. Elam, 148 P.2d 388, 64 Cal.App.2d 236—Charles T. Powner Co. v. Smith, 266 P. 833, 91 Cal.App. 101.

Ill.—Hirsch v. Automatic Canteen Co. of America, 15 N.E.2d 888, 296 Ill.App. 638.

Ind.—Indian Refining Co. v. Maxam, 2 N.E.2d 808, 102 Ind.App. 338.

Kan.—Rupf v. Mason, 78 P.2d 848, 167 Kan. 703.

Ky.—Meyers v. Brown-Forman Distillery Co., 158 S.W.2d 407, 289 Ky. 185.

Okl.—Biggers v. Ward, 106 P.2d 791, 188 Okl. 44.

Or.—Marr v. Dunn, 158 P.2d 651, 176 Or. 442.

R.I.—Grossman v. Laurence, 169 A. 278.

Evidence held insufficient

(1) To support plaintiff's claim for remuneration generally.

U.S.—Lalley v. Escoett, 146 F.2d 667, 79 U.S.App.D.C. 306.

Ala.—Cole v. Cole, 173 So. 382, 234 Ala. 40.

Cal.—Hyde v. Hagen, 161 P.2d 242, 70 Cal.App.2d 517.

Ga.—Barber v. Southern Service Corporation, 185 S.E. 93, 182 Ga. 124—McFarland v. Burney, 153 S.E. 437, 41 Ga.App. 513.

Ill.—Feldman v. Karn, 247 Ill.App. 48.

Kan.—Copp v. Zimmerman, 256 P. 145, 123 Kan. 461.

La.—Poland v. Holden, App., 152 So. 80.

Md.—Challenge Clothes Corporation v. Polski, 31 A.2d 309, 181 Md. 590, followed in Challenge Clothes v. Popp, 31 A.2d 311, 181 Md. 667 —Jendrusiak v. L. J. Appel Sons, 147 A. 530, 157 Md. 675.

Mo.—Clarkson v. Standard Brass Mfg. Co., 170 S.W.2d 407, 237 Mo. App. 1018.

N.J.—Niven v. Metropolitan Lumber Co., 142 A. 354, 6 N.J.Misc. 575.

N.Y.—Moak v. Snell, 286 N.Y.S. 900, 247 App.Div. 924—Juster v. Chessler, 228 N.Y.S. 113, 223 App.Div. 312—Levine v. Horbar, 227 N.Y.S. 155, 131 Misc. 524.

Ohio.—Bell v. Vardalides, App., 36 N.E.2d 819.

Pa.—Henry v. Fisher, 2 Pa.Dist. 71, 2 Lack.Jur. 337.

Wis.—Blum v. Palace Garage Co., 252 N.W. 177, 214 Wis. 319.

(2) To support plaintiff's claim for commissions earned.

Ill.—Hollister-Whitney Co. v. McCallum, App., 72 N.E.2d 649—Schermerhorn v. Rolyan Corp., 65 N.E.2d 482, 328 Ill.App. 322.

Me.—Peaslee v. Thomas Smiley Co., 137 A. 61, 126 Me. 594.

N.Y.—Dictograph Products Corporation v. Delanoie, 222 N.Y.S. 384, 221 App.Div. 6.

(3) To show other particular matters.—Jolliff v. Chadick-Hayes Co., 127 So. 400, 13 La.App. 639.

44. **Evidence held sufficient**

Ark.—Oil Fields Corporation v. Burney, 1 S.W.2d 54, 175 Ark. 1170.

Cal.—Burns v. Renaker Co., 6 P.2d 967, 119 Cal.App. 578.

Colo.—McMahon v. Williams, 250 P. 560, 80 Colo. 249.

La.—Armstrong v. Baldwin, App., 181 So. 72—Faulkner v. Jordan, App., 152 So. 779—Stulb v. State Board of Health, 123 So. 154, 11 La.App. 113.

Mich.—Chaney v. Lake Drive Garage, 233 N.W. 602, 252 Mich. 412.

39 C.J. p 202 note 25 [a].

Evidence held insufficient

(1) Generally.

Okl.—Empire Pipe Line Co. v. Spears, 45 P.2d 1092, 172 Okl. 544.

Va.—Mullins v. Mingo Lime & Lumber Co., 10 S.E.2d 492, 176 Va. 44.

39 C.J. p 202 note 25 [b].

(2) To show an implied promise.—Keith v. Kottas, Mont., 172 P.2d 306.

45. N.Y.—Jereski v. Nussbaum, 164 N.Y.S. 614.

39 C.J. p 203 note 26.

Evidence held sufficient

Mass.—Patton v. Babson Statistical Organization, 156 N.E. 534, 259 Mass. 424.

tract;[46] and the sufficiency or insufficiency of the evidence to show the person or persons entitled to

Evidence held insufficient
La.—Clements v. Knighton, App., 1 So.2d 139.

46. Wash.—Woodbridge v. Johnson, 59 P.2d 1135, 187 Wash. 191.

Testimony of various witnesses considered
Cal.—Sieck v. Hall, 34 P.2d 844, 139 Cal.App. 279.

Evidence held sufficient to establish
(1) Terms of contract generally.
Ill.—Seitz v. Edward P. Allison Co., 5 N.E.2d 621, 288 Ill.App. 616—Rottier v. Doughnut Equipment Corporation, 3 N.E.2d 324, 286 Ill. App. 605.
La.—Carney v. Agurs, App., 197 So. 288.
Md.—Home News v. Goodman, 35 A. 2d 442, 182 Md. 585.
Mass.—Stewart v. John R. Lankenau Co., 156 N.E. 73, 259 Mass. 242.
Okl.—General Hotel Operating Co. v. Hunter, 139 P.2d 808, 192 Okl. 677.
Wash.—Dennis v. Trick, 5 P.2d 493, 165 Wash. 403.
39 C.J. p 203 note 27 [a].

(2) Agreement as to method of computing profits.
Cal.—Crome v. Allen, 125 P.2d 898, 52 Cal.App.2d 137—Sieck v. Hall, 34 P.2d 844, 139 Cal.App. 279.
Mo.—Whipple v. Edward Aaron, Inc., 74 S.W.2d 1089, 228 Mo.App. 968.

(3) Agreement for payment of salary only from profits.—Booth v. Booth & Bayliss Commercial School, 180 A. 278, 120 Conn. 221, 99 A.L.R. 1517.

(4) Agreement for salary only.
La.—Jarreau v. Diaz, App., 145 So. 297.
Mich.—O'Meara v. Electrograph Co., 246 N.W. 149, 261 Mich. 364.

(5) Agreement for salary and commissions.—Boucher v. Peasley, 272 P. 1087, 95 Cal.App. 532.

(6) Agreement to do certain work without compensation in consideration of other employment.—Williams v. Harris, La.App., 175 So. 119.

(7) Agreement to pay bonus.
U.S.—Knapp v. Imperial Oil & Gas Products Co., C.C.A.W.Va., 130 F. 2d 1.
Cal.—Langdon v. Langdon, 117 P.2d 371, 47 Cal.App.2d 28.
Tex.—American Soda Fountain Co. v. Wells, Civ.App., 294 S.W. 252.

(8) Agreement to pay extra compensation for extra work.
Cal.—MacFadden v. Compson, 254 P. 622, 81 Cal.App. 629.
Wis.—In re Gifford's Estate, 12 N. W.2d 921, 244 Wis. 570.
39 C.J. p 203 note 27 [a] (8).

(9) Agreement to pay for overtime work.—Gensman v. West Coast Power Co., 101 P.2d 316, 3 Wash.2d 404—Sullivan v. Pacific Finance Corporation of California, 72 P.2d 590, 192 Wash. 70—39 C.J. p 203 note 27 [a] (7).

(10) Provision that unpaid salary would be carried on books as running account against which amounts drawn would be credited.—Trethewey v. Green River Gorge, 136 P.2d 999, 17 Wash.2d 697.

(11) Rate or amount of compensation.
Iowa.—Crawford v. Publix Finance Corporation, 251 N.W. 57, 217 Iowa 175.
La.—Harrosh v. Fife Bros. Health Ass'n, App., 1 So.2d 323—Morgan v. Bryant, App., 152 So. 773—Jackson v. Patton, App., 152 So. 597—Duke v. Ford, Bacon & Davis, 138 So. 675, 19 La.App. 27—Abbott v. Duncan, 135 So. 729, 17 La.App. 527.
Mich.—Reid v. Bradstreet Co., 239 N.W. 509, 256 Mich. 282.
Ohio.—Bell v. Vardalides, App., 36 N.E.2d 819.
Okl.—Joy v. Litchfield, 113 P.2d 974, 189 Okl. 122.
R.I.—Newell v. Anchor Webbing Co., 129 A. 264.
W.Va.—Golden v. Salkeld Coal Co., 132 S.E. 751, 101 W.Va. 341.
Wis.—Thoma v. Class Mineral Fume Health Bath Co., 12 N.W.2d 29, 244 Wis. 347.
39 C.J. p 203 note 27 [a] (3), (4).

(12) Term of employment.—Carney v. Agurs, La.App., 197 So. 288—Thompson v. Goodman, 126 So. 527, 13 La.App. 186—39 C.J. p 203 note 27 [a] (2).

(13) Terms of agreement as to commissions.
U.S.—Thorp & Martin Co. v. Hamilton-Invincible, D.C.R.I., 36 F.Supp. 822.
Cal.—Weinberg v. Belond, App., 133 P.2d 694.
La.—Holloway v. Geo. L. Squier Mfg. Co., 14 So.2d 462, 203 La. 611—Rosenbaum v. E. Simon's Sons, App., 151 So. 225.
Minn.—Fleetham v. Lindgren, 22 N. W.2d 637, 221 Minn. 544.
Ohio.—Winchell Shoe Mfg. Co. v. Baehr, 181 N.E. 823, 42 Ohio App. 88.
Pa.—Simon v. Kahn, 155 A. 490, 304 Pa. 211.
R.I.—Baxter v. Lincoln Mills Co., 36 A.2d 106, 70 R.I. 16.
Tex.—Babb v. Mil-Po Clothes, Civ. App., 117 S.W.2d 873—Diamond Steel Highway Sign Co. v. Latham, Civ.App., 60 S.W.2d 1055.
Wash.—Mackey v. United Civil Service Training Bureaus, 61 P.2d 1311, 188 Wash. 186.
Wis.—Vogel v. Cooper, 27 N.W.2d 353, 250 Wis. 442.
39 C.J. p 203 note 27 [a] (6).

(14) Terms of agreement as to share of profits.
U.S.—Floyd v. Ring Const. Corp., D.C.Minn., 66 F.Supp. 436.
Cal.—Wildman v. Moe-Bridges Co., 31 P.2d 363, 220 Cal. 498—Fishel v. F. M. Ball & Co., 256 P. 493, 83 Cal.App. 128.
La.—Wise v. Speaker, App., 153 So. 542.
N.Y.—Meza v. Knauth, 225 N.Y.S. 700, 131 Misc. 353.
Tex.—Cooper Petroleum Co. v. Coghill, Civ.App., 198 S.W.2d 616.
39 C.J. p 203 note 27 [a] (5).

(15) That agreement for payment of wages was absolute and not dependent on realization of net profits.—Schmidt v. Van Woerden, 42 P.2d 3, 181 Wash. 39.

(16) Other particular matters.
Colo.—Milliken v. Clear Creek Corporation, 125 P.2d 143, 109 Colo. 344.
Iowa.—Hogan v. Perkins Bros. Co., 238 N.W. 608, 213 Iowa 1175.
La.—Houston v. Lewin, 120 So. 894, 10 La.App. 134.
Wis.—Shaler Umbrella Co. v. Blow, 227 N.W. 1, 199 Wis. 489.

Evidence held insufficient to establish
(1) Agreement as to payment for overtime work.
U.S.—Nazario v. West Indies Trading Corp., D.C.Puerto Rico, 69 F. Supp. 224—Kennedy v. Silas Mason Co., D.C.La., 68 F.Supp. 576.
Ark.—Gray v. Ford, Bacon & Davis, 198 S.W.2d 508.
Mont.—Erie v. Wahl, 155 P.2d 201, 116 Mont. 515.

(2) Agreement as to weekly salary guaranty.—White v. Brame & Carter, La.App., 183 So. 578.

(3) Agreement for extra compensation.—Kenyon v. Caine, 9 N.Y.S.2d 613, 256 App.Div. 900.

(4) Agreement for increase of salary.—Harris-Cortner & Co. v. Morgan, 108 So. 449, 214 Ala. 599.

(5) Agreement for share of profits.
Ky.—Ross v. Eagle Coal Co., 280 S. W. 475, 213 Ky. 87.
La.—Lynch v. Peters, 127 So. 614, 170 La. 240.
Mich.—Steketee v. Steketee, 26 N.W. 2d 724, 317 Mich. 100.
Tex.—Tulsa Pipe & Supply Co. of Texas v. Emmell, Civ.App., 10 S. W.2d 143.

(6) Agreement that commission was to be paid on sales before collections.—W. S. Badcock Corporation v. Kunze, 171 So. 657, 126 Fla. 725.

sue thereon[47] or liable thereunder.[48]

Other issues on which the sufficiency of the evidence has been considered are the identification of the contract;[49] its modification[50] and the effect thereof;[51] its abandonment;[52] its annulment, abrogation, or termination[53] and the effect thereof;[54] its renewal or extension;[55] or the continuance of services under the old contract.[56]

A prima facie case is made by proof of the rendition of services on property owned by defendant,[57] or evidence of an employment at stipulated wages and the rendition of services,[58] or evidence

(7) Agreement to pay bonus or royalty.
Cal.—Peterson v. Wolfer Printing Co., 95 P.2d 686, 35 Cal.App.2d 375.
Neb.—Ellis v. Omaha Cold Storage Co., 240 N.W. 760, 122 Neb. 567.

(8) Agreement to pay union wages.—Sublett v. Henry's Turk & Taylor Lunch, 131 P.2d 369, 21 Cal. 2d 273.

(9) Agreement to perform services without compensation.—Bank of Commerce & Trust Co. v. Brown Cotton Oil Co., 136 So. 305, 173 La. 167.

(10) Agreement to reimburse employee for sums expended.—Carney v. Agurs, La.App., 197 So. 288.

(11) Definite term of employment. —Davidson v. Citizens' Bank & Trust Co., 166 S.E. 775, 46 Ga.App. 78—39 C.J. p 203 note 27 [b] (6).

(12) Rate or amount of compensation.
Cal.—Carney v. Hayter, 145 P.2d 712, 62 Cal.App.2d 792.
Ill.—Altman v. Bliss, 25 N.E.2d 108, 303 Ill.App. 336.
La.—Garsaud v. Forrest, 116 So. 173, 165 La. 750—Goos v. Patrick, 139 So. 508, 19 La.App. 56.
N.Y.—Cummings v. Poirier & McLane Corporation, 31 N.Y.S.2d 98, 263 App.Div. 739.
Wis.—Walter v. Four Wheel Drive Auto Co., 252 N.W. 346, 213 Wis. 559.
39 C.J. p 203 note 27 [b] (2), (3).

(13) Various other terms of employment contracts.
Cal.—King v. San Jose Keystone Mining Co., 127 P.2d 286, 53 Cal. App.2d 40—Boradori v. Peterson, 261 P. 520, 86 Cal.App. 753.
La.—Morgan v. Bryant, App., 152 So. 773.
N.Y.—Gabler v. Isaac Goldman Co., 213 N.Y.S. 342, 215 App.Div. 333.
39 C.J. p 203 note 27 [b].

47. Minn.—Charron v. Pine Tree Lumber Co., 82 N.W. 679, 79 Minn. 425.
39 C.J. p 203 note 28.

48. **Defendant held shown to be liable**
Cal.—Perry v. Wolpert, 290 P. 39, 209 Cal. 742.
Ga.—Perry v. Kimberly Jewelry Co., 23 S.E.2d 471, 68 Ga.App. 568.
Ill.—Crocker v. Hatcher-Joseph, Inc., 10 N.E.2d 970, 292 Ill.App. 646.
Ky.—Clow Gas Steam Heating Co. v. Crowell, 89 S.W.2d 627, 262 Ky. 136.
Mont.—Stoican v. Withers, 65 P.2d 604, 104 Mont. 173.
N.Y.—Krehbiel v. Carroll Bros., 300 N.Y.S. 66, 252 App.Div. 923.
Okl.—Robinson v. Hanner, 271 P. 1009, 133 Okl. 212.
39 C.J. p 204 note 29 [a].

Defendant held not shown to be liable
La.—Frost Lumber Industries v. Raines, 138 So. 698, 18 La.App. 426.
R.I.—Champlin v. Stokes, 195 A. 707, 59 R.I. 441.
Wash.—Schmidt v. Van Woerden, 42 P.2d 3, 181 Wash. 39.
39 C.J. p 204 note 29 [b].

49. Or.—O'Neill v. Keith, 104 P. 725, 55 Or. 122.
39 C.J. p 204 note 30.

50. **Evidence held sufficient**
(1) To establish modification of contract in general.
Cal.—Klein Norton Co. v. Cohen, 290 P. 613, 107 Cal.App. 325.
Mont.—Davis v. Sullivan Gold Mining Co., 62 P.2d 1292, 103 Mont. 452.
Wis.—Gutknecht v. C. A. Lawton Co., 285 N.W. 411, 231 Wis. 413.
Wyo.—Long v. Forbes, 136 P.2d 242, 58 Wyo. 533.
39 C.J. p 204 note 31 [a].

(2) To show that contract had been modified to pay plaintiff on a commission basis.—Barilleau v. Paquet, La.App., 159 So. 418.

(3) To show that contract had been modified to provide for lower salary.—Lucas v. Morefield, 137 So. 633, 18 La.App. 497.

Evidence held insufficient
To establish modification of the employment contract.
Ill.—Buren v. Mercury Press, 280 Ill.App. 217.
Ind.—Schafer Co. v. Hoffman, 155 N. E. 715, 93 Ind.App. 201.
39 C.J. p 204 note 31 [b].

51. **Evidence held insufficient**
To establish that modification of contract employing salesman eliminated provision limiting right to commission on orders taken for future delivery to thirty days after salesman left employment.—Lockwood v. Embalmers' Supply Co., 251 N.Y.S. 321, 233 App.Div. 189.

52. Minn.—Langguth v. Burmeister, 111 N.W. 653, 101 Minn. 14.
39 C.J. p 204 note 32.

53. **Evidence held sufficient**
U.S.—Armand Co. v. Huegel, C.C.A. Mo., 49 F.2d 140.
Cal.—Armstrong v. Cherry, 264 P. 798, 89 Cal.App. 442.
Colo.—Shearer v. Snyder, 171 P.2d 663, 115 Colo. 232.
39 C.J. p 204 note 33 [a].

Evidence held insufficient
Cal.—Redd v. Williams Radiator Co., 296 P. 676, 112 Cal.App. 353.
Mont.—Davis v. Sullivan Gold Mining Co., 62 P.2d 1292, 103 Mont. 452.
N.Y.—Drivas v. Lekas, 54 N.E.2d 365, 292 N.Y. 204, modifying 39 N.Y.S.2d 15, 265 App.Div. 1003. Mandate conformed to 48 N.Y.S. 781, and 48 N.Y.S.2d 785, 182 Misc. 567, motion denied 56 N.E.2d 123, 292 N.Y. 718.
Wash.—Trethewey v. Green River Gorge, 136 P.2d 999, 17 Wash.2d 697.
39 C.J. p 204 note 33 [b].

54. **Evidence held sufficient**
(1) To sustain finding that termination of the employment of sales manager did not terminate right to commissions earned pursuant to the contract for sales of milk bottles because contract was a continuing contract for payment of commissions.—Schwartz v. Teunisz, 175 P. 2d 246, 77 Cal.App.2d 258.

(2) To warrant finding against employee's right to compensation for services rendered after termination of employment.—Boradori v. Peterson, 261 P. 520, 86 Cal.App. 753.

55. **Evidence held sufficient**
N.Y.—Glassberg v. Reiss, 166 N.Y. S. 1061.
Pa.—Swayne v. Pressed Steel Car Co., 147 A. 837, 298 Pa. 31.
Tex.—Coca-Cola Bottling Co. v. Dickson, Civ.App., 115 S.W.2d 1223 —Magnolia Compress & Warehouse Co. v. Davidson, Civ.App., 38 S.W.2d 634.

Evidence held insufficient
Mass.—O'Connor v. Briggs, 65 N.E. 836, 182 Mass. 387.
39 C.J. p 204 note 34 [b].

56. Md.—Travelers' Ins. Co. v. Parker, 47 A. 1042, 92 Md. 22.
39 C.J. p 204 note 35.

57. N.Y.—Dougherty v. Gallagher, 3 E.D.Smith 570.

58. Colo.—Moyle v. Hocking, 51 P. 533, 10 Colo.App. 446.
Mont.—Roach v. Rutter, 105 P. 555, 40 Mont. 167.

of an employment and services rendered at defendant's request, defendant promising to pay but not naming any fixed compensation,[59] or by evidence of a contract to pay him a share of the net profits, his performance of his obligations thereunder, and a statement by the employer of his assets and liabilities for the period sued for.[60]

Performance; happening of contingency. The courts have adjudicated the sufficiency or insufficiency of the evidence to show the performance of services[61] or excuse for nonperformance;[62] to show whether the performance of services entitles the employee to extra compensation,[63] to overtime compensation,[64] or to a bonus;[65] or to show the happening of the contingency on which the employer's indebtedness to his employee is made to depend,[66] or the employer's waiver of such condition.[67]

Conduct and competence of employee. The sufficiency of the evidence has also been adjudicated with respect to time lost by the employee from his work;[68] the misconduct of the employee;[69] the discharge of the employee for cause;[70] the employer's right to declare a forfeiture of the employee's wa-

59. Cal.—Rosenow v. Wiener, 104 P. 839, 11 Cal.App. 294.
39 C.J. p 206 note 52.

60. N.Y.—Konheim v. Harris, 132 N.Y.S. 1028, 148 App.Div. 238.

61. **Evidence held sufficient**
(1) In general.
Ind.—Lester v. Hinkle, 153 N.E. 179, 90 Ind.App. 193.
La.—Morgan v. Bryant, App., 152 So. 773—Phillips v. Vallee, App., 151 So. 441.
Wash.—Trethewey v. Green River Gorge, 136 P.2d 999, 17 Wash.2d 697.
39 C.J. p 204 note 36 [a].
(2) To show that plaintiff was the procuring cause of a sale or sales so as to be entitled to commissions.
U.S.—Alder v. Consumers Co., C.C.A. Ill., 152 F.2d 696.
Minn.—Fleetham v. Lindgren, 22 N.W.2d 637, 221 Minn. 544—Crawford v. Thurston-Hoffman Co., 225 N.W. 111, 177 Minn. 259.
Wis.—Diederich v. Wisconsin Wood Products, 19 N.W.2d 268, 247 Wis. 212.
(3) To sustain finding that sales manager performed according to terms of contract, so as to be entitled to commission for sale of bottles after cancellation and termination of contract.—Schwartz v. Teunisz, 175 P.2d 246, 77 Cal.App.2d 258.
Evidence held insufficient
(1) In general.—Bruno v. Severini, 196 P. 501, 51 Cal.App. 163—39 C.J. p 204 note 36 [b].
(2) To show such performance as would entitle employee to commissions.
U.S.—Ohio Marble Co. v. Byrd, C.C. A.Ohio, 65 F.2d 98.
La.—White v. Brame & Carter, App., 183 So. 578.
Mich.—Spindle v. Michigan Inv. Co., 240 N.W. 79, 257 Mich. 40.

62. **Evidence held sufficient**
U.S.—Jackson v. O. Hommel Co., D. C.Pa., 9 F.Supp. 373, affirmed, C.C. A., O. Hommel Co. v. Jackson, 74 F.2d 1018.

63. **Evidence held sufficient**
(1) In general.—Bartels v. Southern Yacht Club, 125 So. 184, 12 La. App. 190.
(2) To authorize finding that sale of property was not within regular duties of salaried employee claiming additional compensation.—MacFadden v. Compson, 254 P. 622, 81 Cal. App. 629.
Evidence held insufficient
(1) In general.—Perlman v. Skolnick Bldg. Corporation, Me., 39 A.2d 186.
(2) To show fair and honest dealing by employee, on which the payment of an extra commission was conditioned.—Morrison v. William H. Russell Co., 159 A. 798, 10 N.J. Misc. 488.

64. **Evidence held insufficient**
Ill.—Reams v. Fredman Bros. Furniture Corporation, 10 N.E.2d 364, 291 Ill.App. 620.
La.—Baham v. Schadwell, App., 165 So. 333.
Me.—Perlman v. Skolnick Bldg. Corporation, 39 A.2d 186.

65. **Evidence held sufficient**
(1) In general.
Ill.—Kastien v. Northwestern Steel & Wire Co., 22 N.E.2d 401, 301 Ill.App. 623.
Iowa.—Williams v. Deep Rock Oil Corporation, 247 N.W. 817, 216 Iowa 821.
(2) To establish conclusively that sale of margarine was made to customer at less than list price, precluding recovery of bonus based on such sale.—Voight v. Blanton Co., Mo.App., 46 S.W.2d 927.
Evidence held insufficient
U.S.—George A. Fuller Co. v. Brown, C.C.A.N.C., 15 F.2d 672.
Ind.—Montgomery Ward & Co. v. Guignet, 45 N.E.2d 337, 112 Ind. App. 661.

66. **Evidence held sufficient**
(1) In general.
Cal.—Nosser v. McAuliff, 148 P.2d 703, 64 Cal.App.2d 364.
La.—Ruiz v. Treadaway, App., 17 So. 2d 378.
39 C.J. p 204 note 37 [a].
(2) To show that defendant's business was increased during plaintiff's employment.—General Hotel Operating Co. v. Hunter, 189 P.2d 808, 192 Okl. 677.
(3) To show that employer made profit in which employee, under terms of employment contract, was entitled to share.—Farwell Motor Co. v. Williams, Tex.Civ.App., 10 S.W.2d 238, error dismissed.
Evidence held insufficient
To establish the existence of profits from which the employee was to be paid his compensation.
Cal.—Fishel v. F. M. Ball & Co., 256 P. 493, 83 Cal.App. 128.
Conn.—Booth v. Booth & Bayliss Commercial School, 180 A. 278, 120 Conn. 221, 99 A.L.R. 1517.
La.—Reynolds v. Horsting, App., 22 So.2d 710—Blue v. Chandler, App., 5 So.2d 210.
N.Y.—Beck v. Fybern Holding Corporation, 263 N.Y.S. 9, 238 App. Div. 25.
39 C.J. p 204 note 37 [b].

67. **Evidence held sufficient**
Ga.—Grolier Soc. v. Freeman, 165 S. E. 290, 45 Ga.App. 465.

68. N.Y.—Newman v. Garfinkel, 176 N.Y.S. 530.
39 C.J. p 205 note 38.

69. **Evidence held sufficient**
Cal.—Bank of America Nat. Trust & Savings Ass'n v. Republic Productions, 112 P.2d 972, 44 Cal.App.2d 651.
39 C.J. p 205 note 39 [a].
Evidence held insufficient
Ala.—Wayne Pump Co. v. Harrison, 23 So.2d 392, 247 Ala. 186.
Ark.—Archer Lumber Co. v. Hall, 280 S.W. 662, 170 Ark. 1192.
Mich.—Harris v. Specialties Distributing Co., 9 N.W.2d 645, 305 Mich. 373—Roger Angstman Co. v. Liggett Spring & Axle Co., 255 N.W. 428, 267 Mich. 620.
Okl.—Lumbermen's Supply Co. v. Neal, 119 P.2d 1017, 189 Okl. 544.
Pa.—Alexander v. Hunsberger, 86 Pa.Super. 386.
39 C.J. p 205 note 39 [b].

70. Colo.—St. Kevin Min. Co. v. Isaacs, 32 P. 822, 18 Colo. 400.
39 C.J. p 205 note 40.

ges[71] or his waiver thereof;[72] and the employer's loss resulting from his employee's negligence or want of skill[73] or his waiver of damages so caused.[74]

Defendant's breach. The sufficiency of the evidence has been adjudicated with respect to defendant's breach of the contract[75] and plaintiff's diligence in seeking other employment.[76]

Amount due and when due. There have been determinations of the sufficiency of the evidence to show the amount due[77] and when due,[78] including questions relating to the recovery of the reasonable value of the services rendered.[79]

Credits, set-off, and counterclaim. The sufficiency of the evidence to show defendant's right to, and the amount of, a credit, set-off, or counterclaim,[80] as for advances made to the employee[81] or overpayments,[82] has been adjudicated.

Payment; reimbursement of employee. The sufficiency of the evidence has been adjudicated with respect to the issues of payment of the amount

Evidence held sufficient
U.S.—National Manufacture & Stores Corporation v. Whitman, C.C.A.S.C., 93 F.2d 829.
Ark.—Rife v. Mote, 197 S.W.2d 277.
Cal.—Walters v. Stivers, App., 177 P.2d 40.
D.C.—Watwood v. Potomac Chemical Co., Mun.App., 42 A.2d 728.
Evidence held insufficient
La.—Signorelli v. Morice, App., 174 So. 124.

71. Okl.—Borden v. Day, 168 P.2d 646, 197 Okl. 110.
Evidence held insufficient
Ill.—Whitton v. Outdoor Advertising Agency of America, 4 N.E.2d 978, 287 Ill.App. 623.

72. Cal.—Hogan v. Titlow, 14 Cal. 255.
Evidence held sufficient
N.Y.—Clark v. Irondequoit Coal & Supply Co., 11 N.Y.S.2d 869, 257 App.Div. 63.

73. Evidence held insufficient
La.—Faulkner v. Jordan, App., 152 So. 779.
Wash.—Balmer v. Green Meadow Cheese Factory & Dairy Co., 257 P. 624, 144 Wash. 185.

74. Wis.—Wenger v. Marty, 116 N.W. 7, 135 Wis. 408.
39 C.J. p 205 note 41.

75. Evidence held sufficient
Mass.—Marshall v. Columbia Mfg. Co., 108 N.E. 1035, 221 Mass. 176.
Minn.—Schneider v. Young Motor Co., 269 N.W. 899, 198 Minn. 375.
N.J.—Roofing Sales Co. v. Rose, 137 A. 211, 103 N.J.Law 553.
N.C.—Brown v. E. H. Clement Co., 6 S.E.2d 842, 217 N.C. 47.
Tex.—Magnolia Compress & Warehouse Co. v. Davidson, Civ.App., 38 S.W.2d 634.
Evidence held insufficient
La.—Kottemann v. Gross, App., 184 So. 380.
Pa.—MacDonald v. Davis, 42 Pa.Super. 16.

76. Tex.—Lone Star Shipbuilding Co. v. Larsen, Civ.App., 217 S.W. 227.
39 C.J. p 205 note 44.

77. Evidence held sufficient
Cal.—Lopes v. Lemos, 15 P.2d 866, 127 Cal.App. 399.
Mich.—Mead v. Detroit-Traverse Realty Co., 232 N.W. 355, 251 Mich. 478.
Mo.—Whipple v. Edward Aaron, Inc., 74 S.W.2d 1089, 228 Mo.App. 968.
Mont.—Hinton v. Peterson, 169 P.2d 333.
N.Y.—Malti v. General Motors Corporation, 22 N.Y.S.2d 632, 260 App.Div. 893.
Okl.—Fagras v. Marks, 43 P.2d 108, 171 Okl. 413.
Wash.—Trethewey v. Green River Gorge, 136 P.2d 999, 17 Wash.2d 697—Powell v. Republic Creosoting Co., 19 P.2d 919, 172 Wash. 155.
Wis.—Thoma v. Class Mineral Fume Health Bath Co., 12 N.W.2d 29, 244 Wis. 347.
39 C.J. p 205 note 45 [a].
Evidence held insufficient
Ga.—Georgia Wholesale Co. v. Downs, 4 S.E.2d 107, 60 Ga.App. 441.
Hawaii.—Eisinger v. Wallace, 32 Hawaii 270.
La.—Bridges v. McClenaghan, App., 14 So.2d 652—Dennis v. J. Frank Darling Co., 120 So. 686, 10 La. App. 268.
Mont.—Jensen v. Cloud, 88 P.2d 36, 107 Mont. 593.
N.Y.—Hess v. Michigan Furniture Co., 72 N.Y.S.2d 323.
39 C.J. p 205 note 45 [b].

78. Kan.—Welde v. Carlisle Commn. Co., 214 P. 93, 113 Kan. 239.
39 C.J. p 205 note 46.
Evidence held sufficient
Kan.—Briney v. Toews, 95 P.2d 355, 150 Kan. 489.
Evidence held insufficient
Ga.—Georgia Wholesale Co. v. Downs, 4 S.E.2d 107, 60 Ga.App. 441.

79. N.Y.—Featherstone v. Fowler, 161 N.Y.S. 215, 174 App.Div. 452.
39 C.J. p 205 note 47.
Evidence held sufficient
U.S.—Lalley v. Escoett, 146 F.2d 667, 79 U.S.App.D.C. 306.
Mich.—Meyers v. Heintz, 245 N.W. 571, 261 Mich. 63.
Okl.—Pearce v. Brockway, 14 P.2d 389, 159 Okl. 94.
Evidence held insufficient
La.—Thibodeaux v. Falcon, App., 197 So. 206.

80. Evidence held sufficient
Ark.—J. F. McGehee & Co. v. Fuller, 277 S.W. 39, 169 Ark. 920.
Ill.—Geerlings v. Acme Feeds, 33 N.E.2d 727, 310 Ill.App. 258.
Iowa.—Rifkin v. Miller Oil Co., 2 N.W.2d 739, 231 Iowa 1032—Economy Hog & Cattle Powder Co. v. Honett, 270 N.W. 842, 222 Iowa 894.
La.—Sargent v. Polar Bar Ice Cream Co., App., 196 So. 541.
Evidence held insufficient
Kan.—Briney v. Toews, 95 P.2d 355, 150 Kan. 489.
La.—Bridges v. McClenaghan, App., 14 So.2d 652.
Mich.—Powers v. Superior Sand & Gravel Co., 206 N.W. 308, 233 Mich. 20.

81. Evidence held sufficient
(1) In general.
Ark.—J. H. Hamlen & Son v. Varnell, 139 S.W.2d 1, 200 Ark. 238.
La.—Morgan v. Bryant, App., 152 So. 773.
(2) To support finding in favor of salesmen on a counterclaim for overdrafts on the ground of cancellation of overdrafts by employers.—Panich v. Curtis, Owen, Fuller Corporation, Mo.App., 124 S.W.2d 619.
(3) To support verdict finding, in effect, that advances constituted compensation for services rendered, and not loans.—Title Ins. Co. of Richmond v. Howell, 164 S.E. 387, 158 Va. 713.

Evidence held insufficient
La.—Reynolds v. Horsting, App., 22 So.2d 710.

82. Evidence held insufficient
Tex.—Birk v. Jackson, Civ.App., 75 S.W.2d 918, error dismissed.

due[83] or tender of payment,[84] and reimbursement for the employee's expenses or moneys advanced to or on behalf of the employer.[85]

§ 130. Trial in General

The rules governing the determination of questions of law and fact in an action for wages are discussed infra § 131, those relating to instructions to the jury infra § 132, and those dealing with verdict and findings infra § 133.

Examine Pocket Parts for later cases.

§ 131. Questions of Law and Fact

a. In general
b. Contract of employment
c. Compensation and amount of recovery
d. Waiver or estoppel

a. In General

If an action to recover wages or other compensation is tried before a jury, questions of fact are for the exclusive consideration of the jury.

In an action, tried before a jury, to recover wages or other compensation, questions of fact are for the exclusive consideration of the jury.[86] Where the entire case rests on parol testimony, the credibility of the witnesses is for the jury and binding instructions to find for one party are not proper;[87] and the case is especially one for the jury where the evidence of plaintiff, if believed, is fully adequate to maintain his contentions, and the evidence of defendant, if believed, is sufficient to defeat them.[88] The court may properly refuse to direct a verdict for defendant where there is contradictory evidence on the material issues[89] or where there is sufficient evidence to sustain a verdict in favor of plaintiff;[90] and the direction of a verdict for defendant on the whole case may and should be refused where it is asked on a ground which relates only to a possible curtailment of damages[91] or where plaintiff's testimony establishes a prima facie case as to part of his claim;[92] but, where there is no substantial evidence on which plaintiff may recover, it is the duty of the court to direct a verdict for defendant.[93] So too, where the evidence makes out a prima facie case for the employer in his action to recover back salary paid the employee, it is error to direct a verdict for defendant.[94]

Where an action, brought by the employer to recover money overdrawn and in which the employee interposes a counterclaim and seeks an accounting, is transferred to equity, and the employer moves to

83. **Evidence held sufficient**
(1) In general.
Cal.—Hager v. Goddard, App., 179 P.2d 841—Brown v. Gow, 18 P.2d 377, 128 Cal.App. 671—Quinlan v. Osborne-Fitz-Patrick Finance Co., 12 P.2d 963, 124 Cal.App. 488.
Idaho.—People ex rel. Heartburg v. Interstate Engineering & Construction Co., 75 P.2d 997, 58 Idaho 457.
La.—Rachman v. Surker, 108 So. 130, 161 La. 76—Busby v. Childress, App., 187 So. 104—Barilleau v. Paquet, App., 159 So. 418—Trotti v. Louisiana Mortg. Corporation, App., 156 So. 663—Connery v. Noel, 120 So. 730, 9 La.App. 400.
Pa.—Cowell, to Use of Fesler, v. Builders, Inc., 11 A.2d 504, 139 Pa. Super. 192.
39 C.J. p 205 note 48 [a].
(2) To show part payment.—Martin v. Anders, 293 N.W. 385, 70 N.D. 238.
Evidence held insufficient
Cal.—Duncan v. Dormer, 270 P. 1003, 94 Cal.App. 218—Dusis v. Karnezis, 244 P. 632, 76 Cal.App. 326.
Idaho.—Weed v. Idaho Copper Co., 10 P.2d 613, 51 Idaho 737.
Pa.—Cristman v. Everite Pump & Manufacturing Co., 17 A.2d 339, 341 Pa. 79.
Wash.—Jeffs v. Stephenson, 114 P.2d 987, 9 Wash.2d 335.
39 C.J. p 205 note 48 [b].

84. **Evidence held sufficient**
Tex.—Caradine v. Waco Yellow Cab & Transfer Co., Civ.App., 148 S.W.2d 242, error dismissed.

85. **Evidence held sufficient**
Ark.—Riggs v. Blythe, 185 S.W. 438, 123 Ark. 619.
Idaho.—Weed v. Idaho Copper Co., 10 P.2d 613, 51 Idaho 737—Sarvis v. Childs Bond & Mortgage Co., 286 P. 914, 49 Idaho 79.
Evidence held insufficient
U.S.—Helfer v. Corona Products, C.C.A.Ark., 127 F.2d 612.
La.—Carney v. Agurs, App., 197 So. 288.
N.Y.—Palmer v. Thomas J. Northway, Inc., 21 N.Y.S.2d 925, affirmed 21 N.Y.S.2d 927, 259 App.Div. 1066.
R.I.—Replacement Parts Co. v. McCaughey, 40 A.2d 846, 70 R.I. 486.

86. Colo.—Stoddard v. Kuhn, 24 P.2d 747, 93 Colo. 201.
Miss.—Ross v. Fair, 110 So. 841, 145 Miss. 18.
N.Y.—Markstein v. M. Ufland & Co., 214 N.Y.S. 476, 126 Misc. 683.
Okl.—Grant G. Forsythe, Inc. v. Baker, 124 P.2d 258, 190 Okl. 343.
Pa.—Lodge v. Stone, 85 Pa.Super. 164.
Plaintiff's knowledge of employer's rules
Where the applicability of rules of an employer to plaintiff is in issue, depending on plaintiff's knowledge of such rules and their incorporation into the contract of hiring, it is for the jury to decide whether or not plaintiff had such knowledge.—Dean v. Wilder, 18 A. 87, 65 N.H. 90—Bradley v. Salmon Falls Mfg. Co., 30 N.H. 487.

87. Pa.—Besecker v. General Acceptance Corporation, 17 A.2d 916, 143 Pa.Super. 367.

88. N.C.—Drye v. Radiator Specialty Co., 14 S.E.2d 404, 219 N.C. 863.

89. R.I.—Leahy v. Hackett, 163 A. 542.
Tex.—White Sewing Mach. Co. v. Armstrong, Civ.App., 30 S.W.2d 362, error dismissed.

90. Mich.—Pelavin v. Breon, 228 N.W. 707, 249 Mich. 228.

91. N.J.—Reynier v. Associated Dyeing & Printing Co., 184 A. 780, 116 N.J.Law 481, 104 A.L.R. 1002.

92. Tex.—Hearn v. Ralph Sollitt & Sons Const. Co., Civ.App., 93 S.W.2d 551.

93. U.S.—Livermore v. Mandeville & Thompson, C.C.A.Tex., 93 F.2d 563, certiorari denied 58 S.Ct. 752, 303 U.S. 653, 82 L.Ed. 1113.

94. Ill.—National Lock Co. v. Aldeen, 271 Ill.App. 37.

dismiss at the close of the employee's evidence, but the court, instead of ruling on the motion at that time, directs plaintiff to proceed with his evidence, it is proper for the court, when subsequently ruling on the motion, to consider all the evidence offered by plaintiff.[95]

b. Contract of Employment

(1) In general
(2) Renewal, termination, or modification
(3) Performance or nonperformance by plaintiff

(1) In General

Controverted questions of fact as to the existence and terms of a contract of employment between plaintiff and defendant are to be determined by the jury; but if there is an entire absence of evidence of such a contract the court should so hold as a matter of law and dispose of the case by granting a nonsuit or directing a verdict for defendant. The construction of an undisputed and unambiguous contract of employment is a question of law for the court.

Controverted questions of fact as to the existence of the contract of employment,[96] the terms of such contract[97] and the scope of the employment thereunder,[98] the authority of an agent to bind the employer,[99] the identity of the employer,[1] and whether the contract was obtained by fraudulent representations on plaintiff's part[2] are for the jury. So too, where the trial is before the court without a jury, the question whether plaintiff was an employee of, or was engaged in a joint venture with,

95. Iowa.—Economy Hog & Cattle Powder Co. v. Honett, 270 N.W. 842, 222 Iowa 894.

96. Ill.—Smith v. Curran, 35 N.E. 2d 87, 310 Ill.App. 607.
Minn.—Potter v. Interstate Contracting Co., 252 N.W. 236, 190 Minn. 437.
Mo.—Hardy v. Stork, App., 17 S.W. 2d 562.
S.C.—Ott v. Amercian Agr. Chemical Co., 172 S.E. 304, 171 S.C. 359.
39 C.J. p 206 note 55, p 211 note 24.

Enforceable contract
Md.—Catalano v. Bopst, 170 A. 562, 166 Md. 91.

Claimed contract
Ky.—Cassin v. Ewald, 112 S.W.2d 1000, 271 Ky. 595.

Oral contract
(1) The text rule applies in respect of the existence of an alleged oral contract.
Iowa.—Rindfleisch v. Des Moines Music Co., 224 N.W. 64.
Mich.—Adolph v. Cookware Co. of America, 278 N.W. 687, 283 Mich. 561.
Pa.—Carey v. Pennsylvania Transfer Co. of Pittsburgh, 160 A. 705, 307 Pa. 170.
(2) This is true even where there is no direct evidence contradicting the testimony of plaintiff and another witness as to the making of the contract, and defendant relies wholly on evidence of circumstances tending to show that the contract was unreasonable and improbable, and tending otherwise to impair or impeach the credibility of the testimony of plaintiff and his witness, the truth or falsity of all the evidence being for the jury.—Schulte v. Ideal Food Products Co., 213 N.W. 431, 203 Iowa 676.

Implied contract
Mich.—Cojocari v. Highland Park Ginger Ale Co., 4 N.W.2d 8, 301 Mich. 559.
N.J.—Eckman v. Wood, 154 A. 862, 108 N.J.Law 105.
39 C.J. p 206 note 60.

Evidence sufficient for submission or finding
(1) Where, on conflicting evidence, it could have been found that there was or was not a special contract of employment and that, if there was not, plaintiff in any event rendered services to defendant for which he was entitled to be paid, denial of defendant's request for a ruling that there was no evidence on which jury was warranted in finding for plaintiff on either count on contract or count on account annexed was not error.—Donahue v. Dal, Inc., 50 N.E.2d 207, 314 Mass. 460.
(2) Evidence as to existence and terms of contract held sufficient to take the case to the jury.—Batnich v. Pollock, 203 S.W.2d 4, 305 Ky. 125.

97. Fla.—Miami Memorial Ass'n v. Lehman, 121 So. 802, 97 Fla. 533.
Ky.—Ross v. Eagle Coal Co., 36 S.W.2d 48, 237 Ky. 660.
Mich.—Nyman v. B. S. Chapin, Inc., 238 N.W. 195, 255 Mich. 442.
R.I.—Scherer v. J. Sarubi Co., 181 A. 556—Arava v. Bebe, 139 A. 302, 48 R.I. 478.
S.D.—Geer v. Cassem, 230 N.W. 226, 57 S.D. 34.
39 C.J. p 206 note 56, p 211 note 24.

Terms of oral contract
Mich.—O'Connor v. March Automatic Irr. Co., 223 N.W. 228, 245 Mich. 593.

Employment for straight or part time
Wash.—Myers v. Newnham, 285 P. 663, 155 Wash. 609.

98. Ill.—Merritt v. Morton Sand & Gravel Co., 3 N.E.2d 153, 285 Ill. App. 588.
Pa.—Lindholm v. Wiley Const. Co., Com.Pl., 49 Lanc.L.Rev. 126.
39 C.J. p 206 note 57.

99. N.Y.—Schwartz v. J. L. Taylor & Co., 231 N.Y.S. 341, 225 App. Div. 684.
39 C.J. p 206 note 58.

Whether president was alter ego of company in entering into and modifying manager's contract, and whether manager could look to president for terms of employment, were held to be questions for jury.—Navco Hardwood Co. v. Becks, 134 So. 4, 222 Ala. 631.

Whether particular person was defendant's foreman with authority to employ plaintiff is question for the jury on conflicting testimony.—Moss Tie & Timber Co. v. Blair, 138 S.W.2d 781, 200 Ark. 1190.

Legality of resolution conferring authority
It may, under the issues, be a question of fact whether or not the adoption of a resolution of a board of directors authorizing the manager to hire employees and fix salaries was procured as part of a fraudulent and collusive scheme between the manager and plaintiff; and, in such case, the court may not assume as a matter of law that the resolution is free from any taint of fraud or collusion and that the acts of the manager thereunder are binding on the corporation.—Schulte v. Ideal Food Products Co., 226 N.W. 174, 208 Iowa 767.

1. Mo.—Rowley v. Niles, App., 1 S.W.2d 205.
N.Y.—Bentham v. Quinault, 221 N.Y.S. 420, 220 App.Div. 263.
S.D.—Hayes v. Battle Creek Power Co., 249 N.W. 629, 61 S.D. 385.
39 C.J. p 206 note 59 [a].

Capacity
Whether plaintiff was employed by defendants acting as partners or creditors' committee was, under evidence, for jury.—Veach v. Hitchcock, 275 P. 676, 128 Or. 632.

2. N.C.—Falls v. Moore, 188 S.E. 614, 210 N.C. 839.

defendant may be one of fact for the trial court.[3] On the other hand, if there is an entire absence of evidence of any agreement, the court should so hold as a matter of law.[4] Construction of the contract of employment is a question of law for the court, and not a question for the jury,[5] where the contract is unambiguous;[6] but conflicting claims as to the construction of the contract which cannot be determined from the face of the contract present a question of fact to be determined by the jury.[7]

Whether the proof adduced to establish the contract measures up to the required standard is primarily a question for the court on a motion for nonsuit;[8] and a nonsuit may and should be granted, or a verdict for defendant directed, where the evidence does not show the rendition of any services by plaintiff for defendant, or any agreement whereby defendant employed plaintiff,[9] or undisputed evidence shows an agreement different from that alleged and full settlement and satisfaction;[10] but a motion for nonsuit may properly be denied where the testimony clearly presents a question of fact as to the employment of plaintiff by defendant;[11] and defendant's motions for an involuntary nonsuit and a directed verdict in his favor are properly denied where there is evidence from which the jury might find or infer that the person who entered into the contract on behalf of defendant had authority to do so[12] or that defendant ratified the employment.[13]

Duration and term of employment. Questions of fact on conflicting evidence as to the duration of the employment,[14] as, for example, what is a reasonable time when it is alleged that the hiring is for a reasonable time,[15] and as to the length of the employment term, whether by the month or year,[16] or by the day or month,[17] or the day or week,[18] are for the jury.

(2) Renewal, Termination, or Modification

In so far as they involve controverted issues of fact, questions connected with the renewal, continuance, termination, or modification of a contract of employment are to be determined by the jury.

It is for the jury to determine controverted issues of fact connected with the renewal,[19] continuance,[20] or termination[21] of an employment contract, or its termination and the making of a new agreement.[22] So also questions relating to changes in the scope of plaintiff's employment or other modification of the contract of employment, as far as decisions on controverted issues of fact are involved, are for the determination of the jury,[23] as, for example, whether a subsequent increase in the responsibilities and work of plaintiff, hired un-

3. Wash.—Holbert v. Wilson, 288 P. 275, 156 Wash. 704.

4. N.J.—Sellers v. Morehouse, 133 A. 174, 4 N.J.Misc. 425.
39 C.J. p 206 note 61.

5. Cal.—Purdy v. Buffums, Inc., 272 P. 770, 95 Cal.App. 299.
Ill.—Moring v. Peelle Co., 26 N.E.2d 187, 304 Ill.App. 252—Thayden v. Christiansen, 246 Ill.App. 380.

6. N.Y.—Lockwood v. Embalmers' Supply Co., 251 N.Y.S. 321, 233 App.Div. 189.
Whether one is employee is question for court, where terms of contract are undisputed and unambiguous.—Maxey v. Johnson, 242 P. 866, 29 Ariz. 452.
Nature and character of services
Court improperly submitted to jury question of nature and character of services to be performed under unambiguous contract.—Arkansas Amusement Corporation v. Kempner, 33 S.W.2d 42, 182 Ark. 897.

7. Mich.—O'Connor v. March Automatic Irr. Co., 218 N.W. 784, 242 Mich. 204, reheard 223 N.W. 228, 245 Mich. 593.

8. Pa.—Witten v. Stout, 131 A. 360, 284 Pa. 410.

9. Cal.—James v. Paramount-Famous-Lasky Corporation, 33 P.2d 63, 138 Cal.App. 585.
R.I.—Brightman v. Dring, 67 A. 449.
S.C.—Randle v. Pittsburgh Equitable Meter Co., 197 S.E. 678, 187 S.C. 207.
Lack of substantial evidence of valid consideration for agreement
Ark.—Federal Compress & Warehouse Co. v. Hall, 189 S.W.2d 922, 209 Ark. 274.

10. Iowa.—Bebensee v. Blumer, 257 N.W. 768, 219 Iowa 261.

11. N.J.—De Bourbon v. Costanzo, 19 A.2d 824, 126 N.J.Law 425.

12. N.J.—Stevenson v. North Jersey Pub. Co., 186 A. 773, 14 N.J. Misc. 747.

13. N.J.—Stevenson v. North Jersey Pub. Co., supra.
Or.—Lammers v. Hinsdale, 30 P.2d 335, 146 Or. 355.

14. U.S.—Graff Furnace Co. v. Machler, C.C.A.Pa., 19 F.2d 989, certiorari denied 48 S.Ct. 38, 275 U.S. 543, 72 L.Ed. 416.
Tex.—Panhandle & S. F. R. Co. v. Curtis, Civ.App., 245 S.W. 781.
Va.—Hoffman Specialty Co. v. Pelouze, 164 S.E. 397, 158 Va. 586.

15. Tex.—Panhandle & S. F. R. Co. v. Curtis, Civ.App., 245 S.W. 781.

16. Va.—Hoffman Specialty Co. v. Pelouze, 164 S.E. 397, 158 Va. 586—Conrad v. Ellison-Harvey Co., 91 S.E. 763, 120 Va. 458, Ann. Cas.1918B 1171.

17. Pa.—Wilson v. Lyle, 16 A. 861.

18. Okl.—Wineland v. Jones, 134 P.2d 578, 192 Okl. 147.

19. Ill.—Western Mfrs. Mut. Ins. Co. v. Boughton, 37 Ill.App. 183, affirmed 26 N.E. 591, 136 Ill. 317.
39 C.J. p 208 note 84.

20. Mich.—O'Connor v. Hayes Body Corporation, 242 N.W. 233, 258 Mich. 280.
39 C.J. p 208 note 85.

21. Mich.—O'Connor v. Hayes Body Corporation, supra.
Mo.—Cochran v. Jefferson County Lumber Co., App., 132 S.W.2d 32.
39 C.J. p 208 note 86.

22. Mo.—Daams v. Flournoy, App., 119 S.W.2d 482.
S.C.—Redmond v. Strange, 26 S.E.2d 16, 203 S.C. 35.

23. Ala.—Hosey v. Meadows, 194 So. 861, 29 Ala.App. 244.
Ga.—Evans v. Henson, 37 S.E.2d 164, 73 Ga.App. 494.
Pa.—Cristman v. Everite Pump & Manufacturing Co., 17 A.2d 339, 341 Pa. 79—Turner v. G. C. Murphy Co., 61 Pa.Super. 350.
Increase in salary
Wyo.—Long v. Forbes, 136 P.2d 242, 58 Wyo. 533.

der a contract, ambiguous in its terms, was contemplated in such original hiring as being within its scope and fully compensated thereby,[24] or whether a proposed reduction of wages or commissions has been consented to by plaintiff;[25] but in a particular case the evidence in respect of an alleged modification may be insufficient for submission to the jury.[26]

(3) Performance or Nonperformance by Plaintiff

Except where the facts are not in dispute, questions as to plaintiff's performance or nonperformance of the contract, and excuses for his nonperformance, are to be determined by the jury.

On conflicting evidence, questions arising as to the performance of the contract by plaintiff are for the jury,[27] as are questions as to the existence of excuses for nonperformance,[28] his negligence and damages resulting therefrom,[29] his misconduct,[30] his absences from his work,[31] and as to the happening of any contingency on which the employee's right to compensation is made to depend.[32]

Where the facts as to plaintiff's performance or nonperformance of his contract are not in dispute, it is for the court to decide as a question of law whether such facts constitute a breach by plaintiff of his contract barring recovery.[33]

Abandonment of, or discharge from, employment. Controverted questions of fact relating to plaintiff's abandonment of his work[34] or to his discharge[35] are within the province of the jury to determine, as, for example, whether plaintiff was discharged[36] or left of his own accord,[37] and, if he abandoned the employment, whether he did so with[38] or without[39] legal justification, or, if he was discharged, the reason for the discharge[40] and whether or not the discharge was for adequate cause.[41]

c. Compensation and Amount of Recovery

(1) In general
(2) Amount due and payment

(1) In General

Questions of fact relating to a bonus, a share of the profits, commissions or other compensation matter are to be determined by the jury where the action is tried before a jury and the evidence on such questions is conflicting.

It is within the province of the jury to determine all questions of fact, on conflicting testimony, in respect of the employee's rights to compensation,[42]

24. Ga.—Hill v. John P. King Mfg. Co., 3 S.E. 445, 79 Ga. 105.
39 C.J. p 207 note 82.

25. Or.—Krause v. Bell Potato Chip Co., 39 P.2d 363, 149 Or. 388.
Pa.—Lightcap v. Keaggy, 194 A. 347, 128 Pa.Super. 348.
39 C.J. p 208 note 83.

26. Iowa.—Hueston v. Pointer Brewing Co., 269 N.W. 754, 222 Iowa 630.

27. Md.—Catalano v. Bopst, 170 A. 562, 166 Md. 91—Johnson & Higgins v. Simpson, 163 A. 832, 163 Md. 574.
Mass.—McCrillis v. L. Q. White Shoe Co., 161 N.E. 902, 264 Mass. 32.
Mich.—Stewart v. Eghigian, 20 N.W. 2d 777, 312 Mich. 699.
Tex.—Carter v. Irvine, Civ.App., 149 S.W.2d 623, error dismissed, judgment correct.
39 C.J. p 208 note 87.

28. Ark.—Missouri Pac. R. Co. v. Ault, 216 S.W. 3, 140 Ark. 572.
39 C.J. p 208 note 88.

29. Ohio.—Burns v. Fritz, 169 N.E. 309, 33 Ohio App. 306.
Wis.—Nelson v. Chicago, M. & St. P. R. Co., 19 N.W. 52, 60 Wis. 320.

30. N.Y.—McCaskey v. Cumberland Glass Mfg. Co., 176 N.Y.S. 798, 188 App.Div. 288.
39 C.J. p 208 note 90.

31. Or.—Barlow v. Taylor Placer Mining & Milling Co., 44 P. 492, 29 Or. 132.
39 C.J. p 208 note 91.

32. Mass.—Wilson v. H. O. Robb, Inc., 134 N.E. 338, 240 Mass. 445.
39 C.J. p 208 note 92.

Procurement of orders by plaintiff's personal services
N.Y.—Binner v. George Ethridge Co., 150 N.E. 570, 241 N.Y. 598, motion denied 152 N.E. 403, 242 N.Y. 506.

33. D.C.—Fowler v. Great Falls Ice Co., 8 D.C. 14.
39 C.J. p 208 note 93.

Failure of consideration
Where the contract binds defendant to make certain payments during the progress of the work, where it is not contended that the work has been completed, and where the determinative issue is whether plaintiff has abandoned the contract, the court properly may refuse to submit an issue of failure of consideration.—Culver v. Bayliss, 141 P. 2d 578, 193 Okl. 123.

34. N.Y.—Goetz v. Weitheim, 189 N. Y.S. 80.
Okl.—Culver v. Bayliss, 141 P.2d 578, 193 Okl. 123.

35. Ill.—Reiter v. Standard Scale & Supply Co., 86 N.E. 745, 237 Ill. 374.
Pa.—Pagan v. Fort Pitt Gas Co., 27 Pa.Super. 75.

36. Ark.—Arkansas Natural Gas Corporation v. Childress, 53 S.W. 2d 6, 186 Ark. 1197—Missouri Pac. R. Co. v. Diffle, 41 S.W.2d 752, 184 Ark. 189.
R.I.—Arava v. Bebe, 139 A. 302, 48 R.I. 478.
39 C.J. p 209 notes 94, 95.

37. R.I.—Arava v. Bebe, supra.
Va.—Conrad v. Ellison-Harvey Co., 91 S.E. 763, 120 Va. 458, Ann.Cas. 1918B 1171.

38. N.Y.—Reiff v. Edward F. Caldwell Co., 63 N.Y.S.2d 467.
39 C.J. p 209 note 97.

39. Md.—Catalano v. Bopst, 170 A. 562, 166 Md. 91.
N.Y.—Reiff v. Edward F. Caldwell & Co., 63 N.Y.S.2d 467.
39 C.J. p 209 note 96.

40. N.Y.—Diamond v. Mendelsohn, 141 N.Y.S. 775, 156 App.Div. 636.
39 C.J. p 209 note 98.

41. Ill.—Trevellick v. Western Vaudeville Managers' Ass'n, 237 Ill. App. 493.
Pa.—Lindholm v. Wiley Const. Co., Com.Pl., 49 Lanc.L.Rev. 126.
39 C.J. p 209 note 99.

42. Mo.—Daams v. Flournoy, App., 119 S.W.2d 482—Renfro v. Lazerine, App., 298 S.W. 1067.
N.Y.—Griffith v. Griffith, 10 N.Y.S. 2d 292, 256 App.Div. 1009.
Or.—Pitts v. Crane, 236 P. 475, 114 Or. 593.
Pa.—Besecker v. General Acceptance Corporation, 17 A.2d 916, 143 Pa. Super. 367.

such as the rate of compensation,[43] what is a reasonable rate when that is the limit of recovery,[44] the nature of the employee's right, whether to wages or to an interest in the employer's property,[45] and questions relating to the employee's exercise of an option as to the form of compensation to which he may be entitled under the contract,[46] questions as to bonus,[47] commissions on sales,[48] shares of profits,[49] reimbursement for expenses,[50] additional compensation for extra services,[51] deductions agreed on,[52] and also such questions as may arise relating to the time[53] and manner[54] of payment of compensation. On the other hand, questions relating to compensation are to be determined by the court, and not submitted to the jury, where there is no material dispute in the evidence thereon[55] or the evidence is such that reasonable minds could not reach different conclusions;[56] and such questions obviously are not to be submitted to the jury where the evidence thereon is not sufficient for submission.[57] A question of the meaning of a contract term under business usage or custom should

R.I.—Holmes v. Hurwitz, 35 A.2d 226, 69 R.I. 472.
Tex.—Fruth v. Gaston, Civ.App., 187 S.W.2d 581, refused for want of merit.
39 C.J. p 206 note 66.

Whether services performed by plaintiff were gratuitous was a question of fact for the jury.—Walsh v. John J. Walsh & Co., 9 N.E.2d 384, 298 Mass. 37.

43. Mo.—Beerend v. Benwood-Linze Co., App., 192 S.W.2d 660.
Mont.—Jensen v. Cloud, 88 P.2d 36, 107 Mont. 593.
N.D.—Nimmins v. Forsberg, 294 N. W. 663, 70 N.D. 417.
Okl.—Wineland v. Jones, 134 P.2d 578, 192 Okl. 147.
39 C.J. p 206 note 67.

44. Ill.—Van Arman v. Byington, 38 Ill. 443.
Wash.—Thomas v. Thomas, 177 P. 680, 105 Wash. 127.

45. Mich.—Sullivan v. Deiter, 49 N. W. 261, 86 Mich. 404.

46. Tex.—Graham v. Kesseler, Civ. App., 192 S.W. 299.
39 C.J. p 207 note 70.

47. Ark.—West v. Todd, 180 S.W.2d 522, 207 Ark. 341.
Iowa.—Meredith v. Carl Youngstrom Co., 205 N.W. 749.
N.Y.—Gray v. T. N. Benedict Mfg. Co., 18 N.Y.S.2d 525, 259 App.Div. 783.
39 C.J. p 207 note 71.

48. U.S.—Armand Co. v. Huegel, C. C.A.Mo., 49 F.2d 140.
Ga.—Hutto v. Snap-On Tools Corporation, 30 S.E.2d 510, 71 Ga.App. 245.
Ky.—American Oil Pump & Tank Co. v. Sizemore, 276 S.W. 558, 210 Ky. 690.
Mass.—Cray v. Wells, 154 N.E. 848, 258 Mass. 93.
Mich.—O'Connor v. March Automatic Irr. Co., 223 N.W. 228, 245 Mich. 593.
Mo.—Fuldner v. Isaac T. Cook Co., App., 127 S.W.2d 726.
N.Y.—Sheridan v. Weber, 299 N.Y. S. 726, 252 App.Div. 398.
Pa.—McKee v. Elliott-Lewis Electrical Co., 11 A.2d 551, 139 Pa. Super. 325—Stewart v. Cunningham Piano Co., 183 A. 347, 120 Pa. Super. 317.
Tex.—White Sewing Mach. Co. v. Armstrong, Civ.App., 30 S.W.2d 362, error dismissed—American Soda Fountain Co. v. Wells, Civ. App., 294 S.W. 252.
39 C.J. p 207 note 72.

Evidence held sufficient for submission to jury
Mass.—Fenton v. Federal St. Bldg. Trust, 39 N.E.2d 414, 310 Mass. 609.

Refusal of affirmative charge held proper.—Wayne Pump Co. v. Harrison, 23 So.2d 392, 247 Ala. 186.

49. Ala.—Navco Hardwood Co. v. Becks, 134 So. 4, 222 Ala. 631.
Md.—Morris v. Phillips, 168 A. 400, 165 Md. 392.
Tex.—Fruth v. Gaston, Civ.App., 187 S.W.2d 581, refused for want of merit.
39 C.J. p 207 note 73.

50. Idaho.—Weed v. Idaho Copper Co., 10 P.2d 613, 51 Idaho 737.
Mass.—Crabbe v. Kauler, 183 N.E. 421, 281 Mass. 238.
N.J.—Cook v. Soden, 171 A. 558, 12 N.J.Misc. 337.
Okl.—Grant G. Forsythe, Inc., v. Baker, 124 P.2d 258, 190 Okl. 343.
39 C.J. p 207 note 74.

Nonsuit is improper where evidence establishes prima facie case in action to recover amount of certain hotel bills paid by plaintiff for which defendant was to reimburse plaintiff.—Sherlock v. Ansonia Shoe Corporation, 28 N.Y.S.2d 912, 262 App.Div. 914.

51. Pa.—Stukey v. Rissinger, 31 Pa. Super. 3.
39 C.J. p 207 note 75.

Evidence held sufficient to take case to jury on issue whether there had been an agreement for the payment of overtime wages.—Heggen v. Humphries Transport, 167 P.2d 432, 24 Wash.2d 771.

52. Pa.—Young v. Slatington Rolling Mills, 56 Pa.Super. 134.
39 C.J. p 207 note 76.

Half wages during disability from injury
Kan.—McAdow v. Kansas City Western R. Co., 151 P. 1113, 96 Kan. 423, 646, L.R.A.1917B 1158.
39 C.J. p 207 note 77.

53. Mich.—O'Connor v. March Automatic Irr. Co., 218 N.W. 784, 242 Mich. 204, reheard 223 N.W. 228, 245 Mich. 593.
39 C.J. p 207 note 78.

54. N.Y.—Durante v. Raimon, 120 N.Y.S. 881, 136 App.Div. 448.
39 C.J. p 207 note 79.

Payment of part of compensation by delivery of corporate stock
Iowa.—Cox v. Fleisher Const. Co., 223 N.W. 521, 208 Iowa 458.
39 C.J. p 207 note 79 [b].

55. Minn.—Allen v. Florida & Southern Dredging Co., 231 N.W. 204, 180 Minn. 514.

Direction of verdict for plaintiff on notes for back salary was held not error.—Weinzierl v. Watson, Tex.Civ.App., 110 S.W.2d 998.

Where counterclaim for advances was clearly established by defendant's evidence, and there was no evidence to contrary, court should have peremptorily told jury to allow defendant amount sued for on counterclaim and to deduct therefrom sum found due plaintiff for commissions.—American Oil Pump & Tank Co. v. Sizemore, 276 S.W. 558, 210 Ky. 690.

56. Ind.—Pittsburg, C., C. & St. L. Ry. Co. v. Baker, 125 N.E. 233, 73 Ind.App. 332.

57. U.S.—Sickelco v. Union Pac. R. Co., C.C.A.Cal., 111 F.2d 746.
Mich.—Booth v. Briggs Mfg. Co., 203 N.W. 833, 231 Mich. 134.
Mont.—Keith v. Kottas, 172 P.2d 306.
Wash.—Yanoscheck v. Montgomery Ward & Co., 28 P.2d 270, 176 Wash. 137.

Dismissal or nonsuit
(1) A nonsuit was properly granted where the evidence did not make case for jury in plaintiff's action for compensation for extra time.—Chambers v. W. L. Florence Const. Co., 36 S.E.2d 69, 73 Ga.App. 172.

(2) Employee's reconventional demand for eventual profits in accordance with contract was properly dis-

not be submitted to the jury where the compensation provision of the contract is clear and an affirmative finding would do violence to its plain and unambiguous language.[58]

Where the case is tried without a jury, it is a question of fact for the court whether plaintiff was employed to perform, and is entitled to compensation for, certain services in addition to his regular services,[59] or, in a brokerage manager's action for commissions, what sales were made through the brokerage department,[60] or questions pertaining to profits, in an action involving the employee's right, under an oral agreement, to a share of the net profits.[61]

(2) Amount Due and Payment

On conflicting evidence, questions as to the amount due plaintiff and whether or not his claim has been paid are for the jury.

The question of the amount due plaintiff, when depending on facts as to which the evidence is conflicting, is for the jury;[62] but it is proper to refuse to submit issues raised by a plea in reconvention for damages where the evidence furnishes no basis for measuring and computing such damages;[63] and it is proper to direct a verdict for plaintiff where the amount due him is stipulated and the employer concedes that the employee's breach of contract is so minor in character that no money damages accrue therefrom.[64]

Controverted issues of fact, involved in defendant's alleged payment of plaintiff's claim, are for the jury,[65] as, for example, whether there has been a payment in full,[66] or whether plaintiff signed the pay roll[67] or a receipt in full with knowledge and intent that it should operate as a release of all claims by him against his employer.[68]

Attorney's fees. The determination of the amount of attorney's fees to be allowed a successful plaintiff under the statutes authorizing it is for the court;[69] but before such fees may be allowed it is necessary that the jury should find that the statutory conditions precedent to such allowance have all been performed by plaintiff.[70]

d. Waiver or Estoppel

An issue of fact presented by the evidence in respect of waiver or estoppel on the part of the employer or employee is to be determined by the jury.

To the extent of the questions of fact involved, it is for the jury to determine whether an employer by his conduct has waived his right to object to his employee's work,[71] as, for example, by acquiescing in the manner of performance[72] or by accepting the employee's services.[73] Also the evidence in the case may be such as to present an issue of fact for the jury as to whether the employer has, by his conduct and promises, lulled the employee into a sense of security and led him to believe that he would be paid, so as to estop the employer to assert a plea of laches and stale demand.[74]

Waiver by employee. It is for the jury to determine whether an employee waived, or estopped himself to assert, his claim to a right to more wages under his contract than he is receiving by the acceptance of a smaller amount,[75] or by the acceptance of a larger amount than the contract calls

missed as of nonsuit, in view of failure to show profits with any degree of certainty.—Day Bros., Gilham & Winton v. Marsan, 131 So. 665, 171 La. 545.

58. Tex.—Giant Mfg. Co. v. Davis, 121 S.W.2d 590, 132 Tex. 220.

59. Iowa.—Heinen v. Waterloo Monument Co., 220 N.W. 62, 206 Iowa 198.

60. Tex.—Broun v. Collier, Civ.App., 35 S.W.2d 1050, error dismissed.

61. Mass.—Kavanagh v. Ellingson, 71 N.E.2d 880.

62. Mich.—Crowley v. Ohio & Michigan Coal Co., 218 N.W. 707, 242 Mich. 360.
R.I.—Scherer v. J. Sarubi Co., 181 A. 556.
S.D.—Ross v. Peter Mintener Lumber Co., 235 N.W. 119, 58 S.D. 123.
Tex.—Dugat v. Hargraves, Civ.App., 42 S.W.2d 683.
39 C.J. p 209 note 7.

Evidence held sufficient to enable jury to determine amount due without conjecture or speculation.—Cojocari v. Highland Park Ginger Ale Co., 4 N.W.2d 8, 301 Mich. 559.

63. Tex.—Shute v. McVitie, Civ. App., 72 S.W. 433.

64. N.Y.—Grosner v. Gropper Knitting Mills, 213 N.Y.S. 433, 126 Misc. 370.

Refusal to direct verdict for defendant

In salesman's action for commissions, a motion for directed verdict for defendant was properly denied in view of defendant's admission that he owed salesman a balance and defendant's failure to prove any payment made by him to the collector of internal revenue of a valid tax properly chargeable to the salesman.—Goldblatt v. Koffler, 42 A.2d 490, 71 R.I. 63.

65. Ohio.—Bell v. Vardalides, App., 36 N.E.2d 819.
Okl.—Wineland v. Jones, 134 P.2d 578, 192 Okl. 147.
39 C.J. p 209 note 9.

66. Wash.—Haefele v. Brackett, 164 P. 244, 95 Wash. 625.

67. Mich.—Bidwell v. Grand Trunk Western R. Co., 112 N.W. 122, 148 Mich. 524.

68. Iowa.—Curran v. Ryland, 153 N.W. 162, 174 Iowa 29.

69. Ill.—Bryant v. Vandalia R. Co., 184 Ill.App. 284.

70. Ill.—Bryant v. Vandalia R. Co., supra.

71. Iowa.—Schultz v. Ford, 109 N.W. 614, 133 Iowa 402, 12 Ann.Cas. 428.
Md.—Johnson & Higgins v. Simpson, 163 A. 832, 163 Md. 574.

72. Mont.—Lackman v. Simpson, 129 P. 325, 46 Mont. 518.
39 C.J. p 209 note 3.

73. Ark.—Ewing v. Janson, 21 S.W. 430, 57 Ark. 237.
39 C.J. p 209 note 4.

74. Tex.—Fruth v. Gaston, Civ.App., 187 S.W.2d 581, refused for want of merit.

75. Mich.—Stevens v. Michigan Soap Works, 96 N.W. 435, 134 Mich. 350.

for, given to him, however, on some ground other than his alleged right under the contract.[76]

§ 132. Instructions

The instructions to the jury should state the law accurately without being misleading or going beyond the issues.

In an action, tried before a jury, for wages or other compensation, the court should give instructions which clearly and accurately state the law applicable to the issues[77] and the theories or contentions of the parties,[78] provided such theories or contentions find support in the evidence.[79] The instructions given must conform to, and not go beyond, the issues[80] presented by the pleadings[81] and the evidence;[82] and they must not be confusing,[83]

Pa.—Amberlavage v. Lehigh Valley Coal Co., Com.Pl., 8 Sch.Reg. 143.

Evidence held insufficient to take the case to the jury on the issue whether the employee had voluntarily reduced his salary.—Fairchild v. Fairchild Clay Products Co., 3 N.W.2d 581, 141 Nev. 356.

76. N.Y.—Ikan v. Taranto, 161 N.Y.S. 349.
39 C.J. p 209 note 6.

77. Md.—Johnson & Higgins v. Simpson, 163 A. 832, 163 Md. 574.

Issue as to performance of contract
Iowa.—Skeels v. Storm Lake Electric Light & Power Co., 81 N.W. 688.
39 C.J. p 211 note 34.

Issue as to breach of contract
Minn.—Fist v. O'Zell Co., 190 N.W. 260, 153 Minn. 294.
39 C.J. p 211 note 35.

Instructions upheld
U.S.—Atkinson v. New Britain Mach. Co., C.C.A.Ill., 154 F.2d 895.
Ark.—Dyke Bros. v. Stokes, 272 S.W. 663, 168 Ark. 943.
Idaho.—Weed v. Idaho Copper Co., 10 P.2d 613, 51 Idaho 737.
Ill.—Glucose Sugar Refining Co. v. Flinn, 56 N.E. 400, 184 Ill. 123.
Md.—Baer v. Robbins, 83 A. 341, 117 Md. 213.
Minn.—Peterson v. Parviainen, 219 N.W. 180, 174 Minn. 297.
39 C.J. p 210 notes 16 [d], 18 [b], [c], p 211 notes 34 [c], 35 [b], [c].

Instructions held erroneous
(1) As to forfeiture of commissions.—Dondero v. Standard Emblem Co., 121 A. 401, 45 R.I. 329—39 C.J. p 211 note 35 [d].
(2) As to waiver.—Baxter v. Camp Mfg. Co., 175 S.E. 513, 173 S.C. 194.
(3) As to other matters.—Weed v. Idaho Copper Co., 10 P.2d 613, 51 Idaho 737—39 C.J. p 210 note 18 [a], p 211 note 24 [c], [d].

Requested instructions
(1) A correct requested charge on a question which should be submitted to the jury is improperly refused.—Reiff v. Edward F. Caldwell & Co., 63 N.Y.S.2d 467—39 C.J. p 212 note 45.
(2) Where plaintiff sues to recover on an express contract, a refusal to instruct that plaintiff cannot recover in quantum meruit is erroneous as being based on a misconception of the issues raised.—King v. Western Union Tel. Co., 65 S.E. 944, 84 S.C. 73.
(3) An erroneous instruction may properly be refused.
Md.—Johnson & Higgins v. Simpson, 163 A. 832, 163 Md. 574.
Mo.—Rettinghouse v. Krey Packing Co., App., 200 S.W.2d 584.

78. N.Y.—Jacob v. Katz, 176 N.Y.S. 831.
39 C.J. p 210 note 16–p 211 note 26.

Instruction held to present defendant's contention on particular issue
Ga.—Speer v. Johnson, 184 S.E. 388, 52 Ga.App. 636.

79. Ky.—Appalachian Stave Co. v. Liberman, 113 S.W.2d 48, 271 Ky. 663.

Instruction withdrawing or ignoring employer's defense, supported by evidence, that employee falsified accounts with fraudulent intent was improperly given.—Johnson & Higgins v. Simpson, 163 A. 832, 163 Md. 574.

80. Pa.—Wilson v. Lyle, 12 A. 365.
39 C.J. p 210 note 18—64 C.J. p 751 note 88.

Instructions as to amount of recovery
(1) Held to conform to issues.—Rittle v. Woodward, 153 N.W. 951, 31 N.D. 113—39 C.J. p 212 note 41 [a].
(2) Held not to conform to issues.—King v. Western Union Tel. Co., 65 S.E. 944, 84 S.C. 73—39 C.J. p 212 note 41 [b].

81. Ky.—Helfrich Lumber & Mfg. Co. v. Bland, 54 S.W. 728, 21 Ky.L. 1185.
39 C.J. p 211 note 34 [b]—64 C.J. p 752 note 23.

Instructions held justified by issues made by pleadings
Idaho.—Weed v. Idaho Copper Co., 10 P.2d 613, 51 Idaho 737.
Ky.—Cassin v. Ewald, 112 S.W.2d 1000, 271 Ky. 595.
Pa.—Kemerer v. Johnstown Bank & Trust Co., 182 A. 74, 120 Pa.Super. 173.
39 C.J. p 211 note 34 [a]—64 C.J. p 751 note 88.

Failure to instruct on a matter not pleaded is not erroneous.—Bauer Cooperage Co. v. Shelton, Ky., 114 S.W. 257—39 C.J. p 212 note 41 [c]—64 C.J. p 756 note 23.

Refusal of requested instructions is proper where they are not confined to the issues made by the pleadings.—Jones v. Schnaufer, Tex.Civ.App., 202 S.W. 367—64 C.J. p. 755 note 76.

82. Ga.—Williams v. Jeter, 64 Ga. 737.
39 C.J. p 210 note 17, p 211 note 35 [f]—64 C.J. p 774 note 29.

Instructions as to particular matters
(1) Discharge.—Mudgett v. Texas Tobacco Growing, etc., Co., Tex.Civ.App., 61 S.W. 149—39 C.J. p 212 note 38 [b].
(2) Dispute between parties as to amount due.—Dick v. Davis, 288 F. 445, 53 App.D.C. 91—39 C.J. p 211 note 34 [e].
(3) Orders on which commissions are to be allowed.—Himmel v. Levinstein, 103 A. 848, 132 Md. 317.
(4) Time for computing profits.—Pfaelzer v. Gassner, 116 N.Y.S. 15—39 C.J. p 211 note 32.

Instructions held justified by evidence
(1) Instructions as to discharge.—Mee v. Bowden Min. Co., 81 P. 980, 47 Or. 143—39 C.J. p 212 note 38 [a].
(2) Instruction as to damages under counterclaim.—J. F. McGehee & Co. v. Fuller, 277 S.W. 39, 169 Ark. 920.
(3) Instruction as to payment, where the court submitted issues of fact to the jury, although the action was in equity for an accounting.—Rubin v. Dairymen's League Co-op. Ass'n, 18 N.Y.S.2d 466, 259 App.Div. 23, affirmed 29 N.E.2d 458, 284 N.Y. 32, reargument denied 31 N.E.2d 927, 284 N.Y. 816.
(4) Instructions as to other matters.
Mo.—McKelly v. Metco Products, 193 S.W.2d 28, 354 Mo. 993.
R.I.—Arava v. Bebe, 139 A. 302, 48 R.I. 478.
39 C.J. p 210 note 17 [a]—64 C.J. p 770 note 34.

Failure or refusal to give instruction not supported by the evidence is not error.
Ga.—Speer v. Johnson, 184 S.E. 388, 52 Ga.App. 636.
Mass.—Walsh v. John J. Walsh & Co., 9 N.E.2d 384, 298 Mass. 37.
64 C.J. p 773 note 93, p 778 note 1.

83. S.C.—Baxter v. Camp Mfg. Co., 175 S.E. 513, 173 S.C. 194.

inconsistent,[84] or misleading.[85] However, an instruction is not vitiated by a slight verbal or technical inaccuracy, not calculated to mislead the jury, such as a statement that plaintiff would "forfeit" his commissions if the jury found certain facts, the contract not containing any forfeiture clause;[86] and, in view of other facts considered with a conceded fact, an instruction which treats the conceded fact as a disputed fact may not be fatally objectionable.[87] While the instructions must not invade the province of the jury,[88] it is error to submit to the jury the issue of the reasonable value of services without informing the jurors what they should take into consideration in determining what is reasonable compensation.[89]

The instructions should not assume the existence of a contract where it is in dispute;[90] but where the existence and authenticity of certain writings of the parties are not in dispute, it is the duty of the court to instruct that they do not constitute a contract of employment if such is the fact;[91] and, where the court has erred in admitting parol proof to vary the terms of a written contract, it necessarily errs in submitting to the jury the question whether the written contract was changed by such proof.[92] Where the employment contract is construed by the court to be an indefinite hiring terminable at will, the court should, on request, charge as to what would constitute a termination.[93] In case the facts are undisputed and amount to a legal justification for the discharge of the servant, the court should so charge the jury.[94]

Burden and degree of proof. The instructions should require plaintiff to establish his case by a preponderance of the evidence;[95] but it is proper to refuse a requested instruction placing on plaintiff the burden of proving that he did not do certain acts claimed to bar recovery;[96] and it is also proper to give a correct and pertinent instruction regarding the burden of proof resting on defendant in respect of affirmative matters asserted by him.[97]

§ 133. Verdict and Findings

Findings must be consistent with each other. When made by the court they must cover the material issues and support the conclusions of law.

In an action by an employee to recover compensation, the findings must be consistent with each other,[98] and, where they are by the court, they must be sufficient to support the conclusions of law.[99] A special finding does not control a general verdict, if it is consistent therewith, as where there is a special finding that commissions were not allowed by the contract for certain sales, and a general verdict allowing recovery of commissions on other sales,[1] or a special finding that there was no contract for compensating plaintiff in certain ways, and a gen-

84. N.Y.—Pollack v. Retail Tobacconist Printing & Publishing Co., Inc., 181 N.Y.S. 193.
39 C.J. p 211 note 34 [d].

85. Tex.—Pennington v. Thompson Bros. Lumber Co., Civ.App., 122 S.W. 923.
39 C.J. p 210 note 20 [e] (2), p 211 note 35 [e].

Instructions as to abandonment or discharge
Ill.—Brougham v. Paul, 138 Ill.App. 455.
39 C.J. p 212 note 37 [a].

Instructions held not misleading
(1) Instruction as to waiver.—Cox v. Fleisher Const. Co., 223 N.W. 521, 208 Iowa 521.
(2) Instructions as to the form or amount of compensation.—Pelavin v. Breon, 228 N.W. 707, 249 Mich. 228—39 C.J. p 211 note 29, p 212 note 40 [a].
(3) Other instructions.—Hermann v. Integrity Mortg. Co., 172 A. 74, 113 N.J.Law 24—39 C.J. p 210 note 20 [a]-[c], [e] (1).

Refusal to charge
It is not error to refuse to charge that, if defendant did not employ plaintiff for himself, there should be a verdict for defendant, inasmuch as defendant might have obligated himself to pay plaintiff for working for some one else.—Neff v. Williamson, 46 So. 238, 154 Ala. 329.

86. S.C.—Autrey v. Bell, 103 S.E. 749, 114 S.C. 370.

87. Mich.—Fink v. Superior Lamp & Shade Co., 213 N.W. 453, 238 Mich. 390.

88. N.Y.—Morrison v. Hurtig, 91 N.E. 842, 198 N.Y. 352.
39 C.J. p 210 note 21.

Instructions as to amount of recovery
N.J.—Kozlowski v. New Jersey Gardens Co., 94 A. 792, 87 N.J.Law 681.
39 C.J. p 212 note 39.

89. Wash.—Miller v. Puget Bridge & Dredging Co., 250 P. 64, 140 Wash. 663.

90. Ill.—Brougham v. Paul, 138 Ill. App. 455.

91. S.C.—King v. Western Union Tel. Co., 65 S.E. 944, 84 S.C. 73.
39 C.J. p 211 note 23.

92. Iowa.—Cox v. Fleisher Const. Co., 223 N.W. 521, 208 Iowa 458.

93. N.Y.—Walsh v. Chisholm-Ryder Co., 54 N.Y.S.2d 232, 269 App.Div. 728.

94. Md.—**Corpus Juris cited in** Bright v. Ganas, 189 A. 427, 432, 171 Md. 405.
39 C.J. p 212 note 36.

95. Ohio.—Rudy v. Rudy, 33 Ohio Cir.Ct. 359.
39 C.J. p 210 note 19.

96. Mass.—Walsh v. John J. Walsh & Co., 9 N.E.2d 384, 298 Mass. 37.

97. Neb.—Cornell Supply Co. v. Gilliland, 240 N.W. 297, 122 Neb. 246.

98. Tex.—Buford v. Connor, Civ. App., 118 S.W.2d 451.

Findings held not inconsistent
Cal.—Reed v. Reese, 299 P. 570, 114 Cal.App. 163—MacFadden v. Compson, 254 P. 622, 81 Cal.App. 629.
Tex.—Poynor v. Groves, Civ.App., 88 S.W.2d 657.

99. Ind.—Home Equipment Co. v. Gorham, 33 N.E.2d 99, 218 Ind. 454.
Sufficiency of findings to support judgment see infra § 134.

Purported finding which is erroneous conclusion of law, and not a finding of fact, will not be sustained.—Klein Norton Co. v. Cohen, 290 P. 613, 107 Cal.App. 325.

1. Minn.—Boushor v. Kuhlmann, 200 N.W. 748, 161 Minn. 64.

eral verdict for the value of his services.[2] In a case tried by the court without a jury, there must be a finding on a material issue of whether or not plaintiff complied with his contract to devote his entire time to defendant's business;[3] and, where the court finds that plaintiff is entitled to recover a specified lump sum for salary and expenses, it is error to refuse a written request to find additional facts showing what part of the sum was awarded for salary and what part for expenses.[4] Requested findings which are improper may be rejected.[5]

A referee commits error when he disallows plaintiff's claim for a year's conceded services due to a misconception as to the proper construction to be given to inconsistent allegations in the complaint;[6] and in an action for an accounting, brought by an employee entitled to be compensated for his services by a certain per cent of the net income of defendant's business, it is error for the auditor to base a finding on evidence improperly admitted.[7]

§ 134. Judgment

The judgment must conform to, and be supported by, the pleadings, evidence, and findings.

The judgment entered in an action for wages or other compensation must be in conformity with the law[8] and be supported by the pleadings,[9] evidence,[10] and findings.[11] A complaint for wages does not warrant a judgment for damages for breach of contract[12] or on a quantum meruit,[13] especially where the judgment is by default.[14] Where, however, it is admitted, in a suit on an employment contract, that a contract was made, but the amount of compensation is in dispute and the jury find that the parties never came to an agreement on this point, a judgment for the reasonable value of the services may be allowed;[15] and it has been held that, although an action is brought for the reasonable value of the services, plaintiff may prove a special contract to pay for the services at a certain rate and recover the reasonable value thereof not exceeding the contract price.[16] If plaintiff sues on both a contract of employment and an account annexed for services performed, he may, on sufficient evidence, recover on the account annexed, even though he fails to establish the special contract declared on;[17] and a judgment for plaintiff in conformity to the pleadings and issues is not invalidated by allegations in the complaint which are insufficient to bring plaintiff within the terms of a statute enlarging his remedy.[18] In an action to recover on a claim for labor performed, and not to establish a lien, the mere fact that another person holds money due the em-

2. Mich.—Ruttle v. Foss, 125 N.W. 790, 161 Mich. 132.

3. Cal.—Lyden v. Spohn-Patrick Co., 100 P. 236, 155 Cal. 177.

4. Tex.—Flint-Texas Oil-Drilling Trust v. Bridges, Civ.App., 23 S.W. 2d 875.

5. Idaho.—Nash v. Bertram, 155 P. 2d 603, 66 Idaho 105.

6. N.Y.—Wood v. Rockwell, 7 N. Y.S. 370, 4 Silv.Sup. 80.

7. Ga.—Craig v. Baggs, 14 S.E.2d 156, 64 Ga.App. 850.

8. La.—Travis v. Swearingen, App., 143 So. 509.

9. Mo.—Paul v. Minneapolis Threshing Mach. Co., 87 Mo.App. 647.
39 C.J. p 213 note 54 [a] (1).

Plea of recoupment instead of set-off

A defendant who elects to use his claim against plaintiff for damages by way of recoupment cannot have a balance found in his favor, as he might have if he had pleaded by way of set-off.—Brunson v. Martin, 17 Ark. 270—39 C.J. p 213 note 63.

10. Colo.—Johnson v. Lawson, 71 P. 652, 18 Colo.App. 297.
N.D.—People's Opinion Printing Co. v. Valley City Grocery Co., 257 N. W. 470, 65 N.D. 230.
39 C.J. p 213 note 54 [a] (3), [c].

Inconsistent judgment

Where, under the evidence, defendant's liability for plaintiff's expenses is dependent on liability for salary, and plaintiff is entitled to both salary and expenses or to neither one, a judgment for expenses alone is inconsistent.—Rothe v. Jones, Tex.Civ.App., 237 S.W. 581—39 C.J. p 213 note 54 [b].

Judgments held supported by evidence

Wash.—Frye v. Blackwell, 203 P. 5, 118 Wash. 107.
39 C.J. p 213 note 54 [a] (4), (5).

11. Cal.—Lyden v. Spohn-Patrick Co., 100 P. 236, 155 Cal. 177.
39 C.J. p 213 note 54 [a] (2), [e].

Where trial judge found there was actual contract, the question of implied contract disappeared from the case, and recovery on a quantum meruit was precluded.—Cowell, to Use of Fesler v. Builders, Inc., 11 A.2d 504, 139 Pa.Super. 192.

Judgment as implying finding

A judgment for plaintiff is not necessarily a finding of fact that plaintiff was not discharged; the judge may have found that plaintiff was discharged for cause.—Cassar v. Ingram-Hatch Motor Corp., 156 N. Y.S. 756.

Rejection of salesman's reconventional demand for salary and expense allowance, in employer's suit against salesman on open account, was proper where the court correctly found that the salesman's account was credited with the full amount of the basis of the reconventional demand.—Ritchie Grocer Co. v. Dean, 162 So. 62, 182 La. 518.

Findings held to support judgment

Tex.—Phœnix Furniture Co. of Port Arthur v. Kay, Civ.App., 10 S.W. 2d 422, error dismissed.
39 C.J. p 213 note 54 [f].

Findings held sufficiently definite to disclose basis of judgment

Cal.—Sieck v. Hall, 34 P.2d 844, 139 Cal.App. 279.

12. N.Y.—Reed v. Newman, 65 N.Y. S. 218, 31 Misc. 792—Elliot v. Miller, 17 N.Y.S. 526.

13. Ind.—Fulton v. Heffelfinger, 54 N.E. 1079, 23 Ind.App. 104.
39 C.J. p 213 note 56.

14. N.Y.—Reidy v. Bleistift, 61 N. Y.S. 915, 30 Misc. 203.

15. Tenn.—Rocco v. Parczyk, 9 Lea 328.

16. Mo.—Crump v. Rebstock, 20 Mo.App. 37.

17. Mass.—Donahue v. Dal, Inc., 50 N.E.2d 207, 314 Mass. 460.

18. N.Y.—Wah Kee v. Young, 61 N.Y.S. 894, 29 Misc. 658.
39 C.J. p 213 note 60.

ployer does not authorize a judgment against such person.[19]

In order to accomplish justice and avoid a multiplicity of suits, it may be necessary that the court render judgment for commissions not yet matured and stay execution until their maturities.[20] Under some statutes the judgment must state that it is for a particular class of services in order to prevent the employer from claiming exemptions against it.[21]

In an action for accounting, an order making a correct disposition of the case will be upheld;[22] but an interlocutory judgment appointing a referee to state the account cannot be had in advance of the trial on the issues raised by defendant's denial of his liability.[23]

§ 135. Appeal and Error

Questions of appellate review arising in civil actions generally, including those arising in actions by employees for compensation, are discussed in Appeal and Error § 1 et seq.

§ 136. Costs and Attorney's Fees

The general rules as to costs in civil actions apply in an action by an employee to recover compensation. An attorney's fee is allowable where there is a statute authorizing such an allowance.

In accordance with the general rules as to costs in civil cases, which general rules apply in an action by an employee to recover compensation,[24] costs in the trial court may be assessed against the employer where he admits owing the wages sued for, even though the judgment is modified on appeal by excluding a penalty also sued for.[25] In the absence of a statute or rule authorizing such allowance, the reasonable value of the services of an accountant employed by plaintiff will not be allowed as costs.[26]

An attorney's fee will be allowed when,[27] and only when,[28] there is a statute providing for such allowance and the case is within the statute. Under some statutes it is not necessary to plead or prove an attorney's fee as an item of costs;[29] but under other statutes the allowance is not made in the absence of proof.[30] The reasonableness of the award is not open to attack where it is supported by uncontradicted proof.[31]

Where state or state official is party. Under some statutes a state labor department, division, or commissioner taking assignments, and prosecuting actions for the collection, of wage claims of persons financially unable to employ counsel is, with certain specified exceptions,[32] not required to pay costs;[33] but a statute dispensing with security for costs in an action by an employee against his em-

19. S.C.—Pennington v. Wolf Const. Co., 171 S.E. 45, 170 S.C. 501.

20. Tex.—Fairbanks, Morse & Co. v. Carsey, Civ.App., 109 S.W.2d 985, error dismissed.

21. Mo.—Buis v. Cooper, 63 Mo. App. 196.
39 C.J. p 213 note 61.

22. Cal.—Hamilton v. Salopek, 161 P.2d 955, 71 Cal.App.2d 104.
N.Y.—Lamphier v. Underwriters Trust Co., 24 N.Y.S.2d 65, 260 App. Div. 1010, reargument denied 25 N.Y.S.2d 781, 261 App.Div. 817, appeal dismissed 36 N.E.2d 692, 286 N.Y. 652.

Accounting restricted as to time
Ill.—Wagner v. Milk Wagon Drivers' Union, Local 753, 50 N.E.2d 865, 320 Ill.App. 341.

Judgment held unauthorized
Ga.—Hammack v. Davis, 174 S.E. 725, 49 Ga.App. 192.

23. N.Y.—Hutchinson v. Birdsong, 207 N.Y.S. 273, 211 App.Div. 316.
39 C.J. p 215 note 97.

24. Ark.—Missouri Pacific R. Co. v. Clement, 181 S.W.2d 240, 207 Ark. 389.

25. Ark.—Missouri Pacific R. Co. v. Clement, supra.
Costs in action for statutory penalty see infra § 160 (11).

26. U.S.—Helfer v. Corona Products, C.C.A.Ark., 127 F.2d 612.

27. Mont.—Meister v. Farrow, 92 P. 2d 753, 109 Mont. 1—Britt v. Cotter Butte Mines, 89 P.2d 266, 108 Mont. 174—Swanson v. Gnose, 76 P. 2d 643, 106 Mont. 262, 115 A.L.R. 244—Gardiner v. Eclipse Grocery Co., 234 P. 490, 72 Mont. 540.
Or.—Nirschl v. Nirschl, 249 P. 1099, 119 Or. 478—Carlson v. New Amsterdam Casualty Co., 247 P. 804, 118 Or. 542.
Tex.—Campbell Cleaning & Dye Works v. Barnwell, Civ.App., 183 S.W.2d 256, error refused.
39 C.J. p 214 notes 78 [a] (1), (2), 80 [a] (2), (5), (6).
Attorney's fee in action under Fair Labor Standards Act or other statute fixing minimum wages and overtime compensation see infra § 160 (11).

Assignee of wage claim may take advantage of the statute; but, where numerous assigned claims are established in one suit, the total amount of the fee allowed should not be as much as though numerous individual suits had been brought.—Meister v. Farrow, 92 P.2d 753, 109 Mont. 1.

28. Mont.—Gahagan v. Gugler, 52 P. 2d 150, 100 Mont. 599.
39 C.J. p 214 notes 78 [a] (3), (4), 79, 80 [a] (1), (3), (4), (7).

Where judgment is for less than amount sued for, an attorney's fee is not recoverable under some statutes.—Campbell Cleaning & Dye Works v. Porter, Tex.Civ.App., 183 S.W.2d 253, error refused.

29. Mont.—Meister v. Farrow, 92 P.2d 753, 109 Mont. 1—Gardiner v. Eclipse Grocery Co., 234 P. 490, 72 Mont. 540.

Notice
Each party is chargeable at the outset with notice of the right of the successful party to include in the judgment reasonable attorney's fees, to be taxed as part of costs in the case.—Gardiner v. Eclipse Grocery Co., supra.

30. Ill.—Rowland v. Records, 43 Ill. App. 198.

31. Ill.—Chicago & A. R. Co. v. Moore, 117 Ill.App. 147.

32. Cal.—Gue v. Superior Court in and for San Diego County, 36 P.2d 202, 1 Cal.App.2d 91.

33. Cal.—Division of Labor Law Enforcement v. Moroney, 170 P.2d 3, 28 Cal.2d 344.

ployer on a wage claim is not applicable in an action against the state.[34]

§ 137. Damages and Amount of Recovery

The recovery must not exceed the amount warranted by the contract and the evidence. Interest does not run prior to the date of the judgment where the amount of compensation due and unpaid is not definitely ascertained until then.

In an action strictly for wages or commissions, ordinarily the employee's recovery is limited to the amount due at the time the action is brought;[35] but it is otherwise where the complaint is amended to cover commissions coming due after the commencement of the suit and before trial and the evidence as to such commissions is admitted.[36] The employee may not recover wages or salary for a period of time beyond the termination of the contract.[37] Where he sues on an express contract, his recovery is restricted in amount by the wages agreed on;[38] but the fact that the jury, by their verdict, find the reasonable value of plaintiff's services, rather than the stipulated compensation, is immaterial where the amount of the verdict is in fact the amount fixed by the agreement.[39]

Plaintiff is entitled to recover in accordance with a wage scale fixed in a contract made for his benefit between a labor union and defendant where the evidence does not support a claim of a subsequent contract between plaintiff and defendant for lower wages.[40] Where a labor union, having absolute control of the labor market in respect of workers of a certain class, entered into a contract whereby the employer agreed to pay his employees the rate fixed by the union for other employers in the locality, it has been held that the employer may recover from the union the loss he suffered by continuing to pay his employees a higher rate after the union lowered the rate without notifying him.[41]

The correct measure of damages for a breach of contract by failure to pay the employee the agreed salary for the entire period of his employment is not the total amount of the agreed monthly payments for the remainder of the contract period after the last payment, but is the value, as of the date of the breach, of the promise to pay the agreed amount monthly for the remainder of the period.[42] A salesman suing for breach of contract to pay commissions he would have earned may recover only the difference between the gross commissions contracted for and the necessary expenses in earning them;[43] and plaintiff, if entitled to recover for breach of contract to raise his salary, may recover only the present worth of reasonable increases not exceeding the salaries paid in the department of the business in which he was employed.[44] Special damages are not recoverable where the employer is not guilty of a breach of his contractual or other obligations to the employee;[45] and the doctrine of mitigation of damages has no place in an action on the contract of employment for the agreed compensation, as distinguished from an action for damages for breach of contract.[46] An employer who has failed to establish that he sustained damages as a result of his employee's negligence may not recover on his counterclaim in the employee's action for an accounting and recovery of commissions.[47] Damages for breach of a contract to employ are discussed supra § 11, and for wrongful discharge supra §§ 58, 59. Liquidated damages under Fair Labor Standards Act are considered infra § 160 (12).

Computation of profits or commissions. It is proper to compute commissions in the manner provided by the contract.[48] Where, under the contract, plaintiff employee is entitled to a certain per cent of net profit, it is error for the court, in com-

34. Wis.—State ex rel. Martin v. Reis, 284 N.W. 580, 230 Wis. 683.

35. Cal.—Percival v. National Drama Corp., 185 P. 972, 181 Cal. 631.
39 C.J. p 213 note 66.

36. Mo.—Panich v. Curtis, Owen, Fuller Corporation, App., 124 S.W. 2d 619.

37. Miss.—Gulf & S. I. R. Co. v. McGlohn, 184 So. 71, 183 Miss. 465.
Tex.—Gay v. Crow, Civ.App., 111 S. W.2d 782, error dismissed.

38. R.I.—Arava v. Bebe, 139 A. 302, 48 R.I. 478.

39. Mont.—Freeman v. Withers, 65 P.2d 601, 104 Mont. 166.

40. Ill.—Dierschow v. West Suburban Dairies, 276 Ill.App. 355.
Particular recovery
Motion picture theater operator employed under contract between motion picture theater owner and motion picture machine operators' union fixing operator's wage and providing operator could not be discharged except on two weeks' notice or on payment of two weeks' salary could recover from owner difference between what operator was paid before his discharge and contract wage, and two weeks' wages on his discharge without notice, notwithstanding that action was begun before operator was discharged.—Barth v. Addie Co., 2 N.E.2d 34, 271 N.Y. 31, reargument and amendment of remittitur denied 3 N.E.2d 211, 271 N.Y. 615.

41. Tenn.—Powers v. Journeymen Bricklayers' Union No. 3, 172 S. W. 284, 130 Tenn. 643, L.R.A.1915E 1006.

42. U.S.—In re Hale Desk Co., C.C. A.N.Y., 97 F.2d 372.

43. Miss.—B. Bluethenthal Co. v. McDougal, 142 So. 13, 163 Miss. 406.

44. Pa.—Machen v. Budd Wheel Co., 143 A. 482, 294 Pa. 69.

45. Mich.—Lane v. Au Sable Electric Co., 147 N.W. 546, 181 Mich. 26, Ann.Cas.1916C, 1108.
39 C.J. p 214 note 69.

46. Cal.—Payne v. Pathe Studios, 44 P.2d 598, 6 Cal.App.2d 136.

47. Iowa.—Mayberry v. Newell, 204 N.W. 413, 200 Iowa 458.

48. Mo.—Panich v. Curtis, Owen, Fuller Corporation, App., 124 S.W. 2d 619.

puting profits, to allow one of the defendants a higher salary than such defendant testified he received;[49] and where, under the contract, no item of cost is to be deducted except such as has been approved by plaintiff, an item which has not been so approved is not deductible,[50] but an item which has been so approved is deductible, even though, because of the destruction thereof by fire, defendant is not able to produce vouchers.[51]

Value of stock. The measure of recovery on a contract to pay plaintiff's salary in corporate stock is not the par value of the stock, but its actual value at the time specified for its issuance.[52] It would be unjust to allow plaintiff to recover as profits the value of stock at the time it was accepted from a third person in part payment of construction work by defendant where subsequent depreciation in the value of the stock resulted from plaintiff's own act.[53]

Reimbursement. Under a contract of employment giving the employee a right to purchase an interest in the business and providing for termination by either party, the employee is entitled, on termination, to recovery back of the sums paid by him in part payment of the interest in the business.[54]

A penalty for withholding wages after they are due cannot be recovered in the absence of valid statutory authorization.[55]

Interest from the date of the termination of the employment may be allowed, in accordance with the prayer of the complaint,[56] where there was an absolute obligation to pay plaintiff's wages at the end of each month;[57] but interest does not run prior to the date of the judgment where the claim is for the value of services requiring determination by the jury[58] or where the amount due is to be ascertained from an open account, the parties not having agreed on a balance.[59]

Nominal recovery. A judgment for defendant on the ground of failure to prove value must be reversed if there is proof of the services, plaintiff in such case being entitled at least to nominal damages.[60] In an action for commissions, plaintiff may be entitled to recover only a nominal amount where there was no specific agreement as to the basis for commissions and, under the agreement made, plaintiff was bound by the decision of defendant's sales director, as to whether he had earned a commission and, if so, the amount thereof.[61]

Inadequacy or excessiveness. Where the amount of the recovery is a mere matter of computation, a verdict is[62] or is not[63] excessive accordingly as it exceeds or equals the sum ascertained by such computation. If the amount depends on the facts of the case, the verdict or finding will be held to be excessive where it is plainly contrary to the evidence in the case;[64] otherwise it will be held to be not excessive.[65] Where the terms of employment are in dispute and the testimony is conflicting, the jury are not obliged to find that plaintiff is entitled to all he claims or nothing.[66] Nevertheless a verdict awarding plaintiff less than one sixth of what he is reasonably entitled to, if entitled to recover at all under conflicting evidence, is fatally defective and erroneous;[67] and, where no error is shown in an audit of defendant's books by an expert accountant employed by plaintiff, it is improper for the court to reduce the amount of plaintiff's claims to cover a possible error in the audit.[68]

Tex.—Fairbanks, Morse & Co. v. Carsey, Civ.App., 109 S.W.2d 985, error dismissed.

49. Tex.—Stapper v. Van Valkenburgh & Vogel, Civ.App., 128 S.W.2d 406, error dismissed, judgment correct.

50. Tex.—Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253.

51. Tex.—Neyland v. Brown, supra.

52. Md.—Challenge Clothes Corporation v. Polski, 31 A.2d 309, 181 Md. 590, followed in Challenge Clothes v. Popp, 31 A.2d 311, 181 Md. 667.

53. Tex.—Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253.

54. Kan.—Rupf v. Mason, 78 P.2d 848, 167 Kan. 703.

55. Ind.—Baltimore & O. S. W. R. Co. v. Burdalow, 106 N.E. 902, 57 Ind.App. 267.

Statutory regulations and penalties see infra §§ 151–160.

56. Ill.—Kastien v. Northwestern Steel & Wire Co., 22 N.E.2d 401, 301 Ill.App. 623.

57. Cal.—Arocena v. Sawyer, 213 P. 523, 60 Cal.App. 581.

58. Kan.—Clogston v. White, 274 P. 745, 127 Kan. 668.

59. Cal.—Arocena v. Sawyer, 213 P. 523, 60 Cal.App. 581.

60. Mo.—Owen v. O'Reilly, 20 Mo. 603.

61. Cal.—Delafield v. Searle Aero Industries, 174 P.2d 455, 76 Cal. App.2d 862.

62. Mo.—Doerr v. Laughlin, 236 S.W. 1084, 208 Mo.App. 544.

63. Ind.—Dunton v. Howell, 109 N.E. 418, 60 Ind.App. 183.
39 C.J. p 214 note 71.

Judgment in reconvention allowing employer amount by which payments to employee exceeded total amount of salary earned was proper.—Trotti v. Louisiana Mortg. Corporation, La.App., 156 So. 663.

64. Mich.—Salmer v. Hicks, 154 N.W. 155, 188 Mich. 391.
39 C.J. p 214 note 73.

65. Cal.—Hartman v. San Pedro Commercial Co., 153 P.2d 212, 66 Cal.App.2d 935.
Mich.—Cagney v. Checker Cab Mfg. Corporation, 224 N.W. 416, 246 Mich. 113.
39 C.J. p 214 note 74.

66. Kan.—Stevens v. Pfeifer, 61 P.2d 907, 144 Kan. 487.

67. Colo.—Peterson v. Rawalt, 36 P.2d 465, 95 Colo. 368.

68. Ky.—Esterman-Verkamp Co. v. Rouse, 278 S.W. 124, 211 Ky. 791.

5. Arbitration and Mediation

§ 138. Applicability of General Rules of Arbitration and Mediation

General arbitration rules apply as to the arbitration of a wage dispute.

The general rules of arbitration, discussed in Arbitration and Award § 1 et seq, and the general rules as to arbitration in labor disputes, discussed supra §§ 28 (72), 28 (73), apply as to the arbitration of a wage dispute.[69] The parties may validly contract to submit a wage dispute to arbitration,[70] and an employee may not avail himself of the wage provisions of a contract between the employer and the union without being bound by the arbitration provision of such contract;[71] but it has been held that a provision for the arbitration of disputes as to the performance and interpretation of a contract between an employer and its employees does not apply as to a claim for extra compensation under the Fair Labor Standards Act.[72] It has been held that a valid provision for the arbitration of wage disputes bars a civil action for wages until arbitration has been had in accordance with the contract,[73] but it has also been held that an agreement to arbitrate a wage dispute does not bar a civil action unless there is a further agreement which makes the award a condition precedent to an action.[74]

The arbitration award should be made within the time specified in the submission agreement, but where the parties have waived such provision the award may be made within a reasonable time.[75] The arbitrators must consider and determine all the essential issues in the dispute,[76] and the award should be final and definite.[77]

69. Wash.—Gord v. F. S. Harmon & Co., 61 P.2d 1294, 188 Wash. 134.

Appraisement

(1) Where the arbitrators or appraisers are to rely in some measure on their expert knowledge and experience, the submission is an appraisement rather than an arbitration.—Gord v. F. S. Harmon & Co., supra.

(2) Where the agreement provided for the fixing of a labor scale, or prices to be paid for merchandise, or both, it called for an appraisal or valuation.—Hegeberg v. New England Fish Co., 110 P.2d 182, 7 Wash. 2d 509.

Misconduct of arbitrator

Board of arbitrators' award in wage dispute was held not invalid on ground that arbitrator named to represent labor dominated board, where record failed to show such domination or that such member was guilty of any misconduct.—Gord v. F. S. Harmon & Co., 61 P.2d 1294, 188 Wash. 134.

70. N.J.—United Elec., Radio, and Mach. Workers of America, Local 411, C.I.O. v. National Pneumatic Co., 48 A.2d 295, 134 N.J.Law 349. 63 C.J. p 673 note 75.

Provision for arbitration of all disputes

Wage dispute was subject to arbitration under provisions of collective bargaining agreement between employer and union providing that all disputes should be promptly settled.—United Elec., Radio, and Mach. Workers of America, Local 411, C. I.O., v. National Pneumatic Co., supra.

Share of profits

Where written employment contract, providing for arbitration of parties' differences, was extended and continued in force until new salary arrangement was made, and there was no proof of cancellation of contract or release of employee's right to profits earned up to date of such arrangement, employee was entitled to arbitration for purpose of ascertaining his share of such profits.—Linne v. Stuyvesant Const. Corp., 51 N.Y.S.2d 877, 268 App.Div. 982, reargument denied 52 N.Y.S.2d 800, 268 App.Div. 1027.

Severance pay

Where contract between cable company and its employees provided for arbitration of all controversies, an order of the Defense Communications Board directing the closing of cable company's offices and facilities did not deprive employees of their right to arbitrate controversy concerning claims of employees for severance pay on their discharge, where such controversy did not involve continuance of employment or enforcement of any provision of contract which was rendered impossible of performance by the order.—Application of Selly, 37 N.Y.S.2d 398, 178 Misc. 1076, affirmed 38 N.Y.S.2d 362, 265 App.Div. 846.

Consideration

When employees returned to work in accordance with agreement for appraisal of value of wages, relied on by all parties in good faith, they furnished a consideration which was beneficial to employers.—Hegeberg v. New England Fish Co., 110 P.2d 182, 7 Wash.2d 509.

Breach of contract

A stipulation for the arbitration of wage disputes is not enforceable by one who has previously breached the contract.—In re Division 132, Amalgamated Ass'n of Street & Electric Ry. Employees, 188 N.Y.S. 353, 196 App.Div. 206—63 C.J. p 673 note 76.

71. N.Y.—P. S. Thorsen & Co. v. Neves, 37 N.Y.S.2d 113, 179 Misc. 11.

72. N.Y.—City Bank Farmers Trust Co. v. O'Donnell, 39 N.Y.S.2d 842, 179 Misc. 770.

73. N.Y.—P. S. Thorsen & Co. v. Neves, 37 N.Y.S.2d 113, 179 Misc. 11.

Waiver

Fact that in prior litigation employer had not invoked clause of contract with labor union providing for arbitration of disputes did not affect employer's right to arbitration of employee's claim for higher wages under provisions of the contract.—P. S. Thorsen & Co. v. Neves, supra.

74. Mich.—Ensley v. Associated Terminals, 8 N.W.2d 161, 304 Mich. 522.

75. Wash.—Gord v. F. S. Harmon & Co., 61 P.2d 1294, 188 Wash. 134.

Time held reasonable

Wash.—Gord v. F. S. Harmon & Co., supra.

76. N.Y.—Universal Metal Products Co. v. United Electrical Radio & Machine Workers of America, Local 1225, Union, 40 N.Y.S.2d 265, 179 Misc. 1044.

77. N.Y.—Brooklyn Daily Eagle v. McManus, 72 N.Y.S.2d 436, 272 App.Div. 933.

Award held not final and definite

Arbitrator's award providing that minimum wages prescribed by the contract should advance a specified per cent unless employer should elect within ten days after the award in an arbitration involving a third person, to substitute for such

Ordinarily a valid arbitration award is binding on the parties.[78] The payment of a wage award under protest, in order to avoid a strike and the possible taking over of the plant by the government, is not an acquiescence in the award,[79] nor does it render the controversy moot in so far as the right to a judicial review of the award is concerned.[80]

Under the Transportation Act of 1920, 45 U.S.C.A. §§ 131–146, an award by the Railroad Labor Board as to a wage dispute was advisory only[81] and the railroad was not required to procure the board's consent to a change in wage rates.[82] The right of an employee and employer to agree as to the amount of wages, however, was subject to the right of the railway labor board to investigate and give the parties the benefit of the moral sanction of its decision.[83]

Under the Railway Labor Act, 45 U.S.C.A. § 151 et seq, a carrier may not reduce wages while the controversy as to such reduction is pending before the National Mediation Board.[84]

6. Liens and Preferences

§ 139. In General

a. In general
b. Under statute

a. In General

In the absence of statute or contract conferring it, an employee has no lien for his wages.

At common law a servant has no lien for his compensation.[85] Independent of statute or a contract provision for a lien, an employee has no wage lien and is not authorized to take or retain property of his employer until his wages are paid,[86] nor is he entitled to a lien on a manufactured article which is in part the product of his labor.[87]

If, however, the workman is in fact a bailee rather than a servant he has a common-law lien, as discussed in Bailments §§ 5, 35.

b. Under Statute

(1) In general
(2) On corporate property

(1) In General

The courts have generally upheld the validity of stat-

schedule of minimum wages, the revised schedule involving third persons, was vacated because not final and definite, and matter was remitted to arbitrator to clarify award by making a final and definite award. —Brooklyn Daily Eagle v. McManus, supra.

78. U.S.—Bowles v. Biberman Bros., C.C.A.Pa., 152 F.2d 700.
Wash.—Hegeberg v. New England Fish Co., 110 P.2d 182, 7 Wash.2d 509.

Collateral issue
Where collective bargaining agreement provided that decision of impartial chairman should be binding on parties thereto, the court would not review chairman's decision in an action where it was collaterally involved.—Bowles v. Biberman Bros., C.C.A.Pa., 152 F.2d 700.

79. Ill.—Appeal of Frank Foundries Corporation, 56 N.E.2d 649, 323 Ill.App. 594.

80. Ill.—Appeal of Frank Foundries Corporation, supra.

81. U.S.—Schuppan v. Peoria Ry. Terminal Co., D.C.Ill., 9 F.2d 448, affirmed, C.C.A., Shuppan v. Peoria Ry. Terminal Co., 30 F.2d 569.

Fact that railroad employees misinterpreted rights did not warrant ordering receiver to pay difference between wages received and rate fixed by labor board.—Schuppan v. Peoria Ry. Terminal Co., D.C.Ill., 9 F.2d 448, affirmed, C.C.A., Shuppan v. Peoria Ry. Terminal Co., 30 F.2d 569.

82. U.S.—Schuppan v. Peoria Ry. Terminal Co., D.C.Ill., 9 F.2d 448, affirmed, C.C.A., Shuppan v. Peoria Ry. Terminal Co., 30 F.2d 569.

83. U.S.—Schuppan v. Peoria Ry. Terminal Co., D.C.Ill., 9 F.2d 448, affirmed Schuppan v. Peoria Ry. Terminal Co., C.C.A., 30 F.2d 569.

84. U.S.—Burke v. Morphy, C.C.A. Vt., 109 F.2d 572, certiorari denied Morphy v. Burke, 60 S.Ct. 1078, 310 U.S. 635, 84 L.Ed. 1404.

Receivership judge
As long as National Mediation Board pretended to retain jurisdiction and refused to give notice of failure of efforts, carrier was without power to impose wage cut, and receivership judge was without power to order cut.—Grand International Brotherhood of Locomotive Engineers v. Morphy, C.C.A.Vt., 109 F.2d 576, certiorari denied Morphy v. Grand International Brotherhood of Locomotive Engineers, 60 S.Ct. 1078, 310 U.S. 635, 84 L.Ed. 1404.

Notice of failure of mediation
National Mediation Board's letter stating that mediation could not proceed until legality of wage deductions had been determined and retaining jurisdiction to resume mediation as soon as pending action had been decided or settled was not a notice of failure of mediation permitting wage cut.—Grand International Brotherhood of Locomotive Engineers v. Morphy, C.C.A.Vt., 109 F.2d 576, certiorari denied Morphy v. Grand International Brotherhood of Locomotive Engineers, 60 S.Ct. 1078, 310 U.S. 635, 84 L.Ed. 1404.

85. Ga.—Downs v. Bedford, 146 S.E. 514, 39 Ga.App. 155.
N.J.—O'Brien v. Buxton, 156 A. 17, 9 N.J.Misc. 876.
39 C.J. p 215 note 99.

86. U.S.—Metropolitan Life Ins. Co. v. Whitestone Management Co., C.C.A.Ill., 77 F.2d 255, certiorari denied Drake v. Metropolitan Life Ins. Co., 56 S.Ct. 155, 296 U.S. 632, 80 L.Ed. 449, rehearing denied 56 S.Ct. 246, 296 U.S. 664, 80 L.Ed. 473, and 56 S.Ct. 247, 296 U.S. 664, 80 L. Ed. 473.
Cal.—Ex parte Corran, 41 P. 464, 5 Cal.Unrep.Cas. 92.
Ky.—**Corpus Juris cited in** Cairns v. Louisville & N. R. Co., 58 S.W.2d 248, 248 Ky. 84.

Lien held wholly statutory
Alaska.—Hansen v. Wrangell Narrows Packing Co., 8 Alaska 456.
Okl.—Pace v. National Bank of Commerce of Tulsa, 125 P.2d 178, 190 Okl. 503.

87. Cal.—Michaelson v. Fish, 81 P. 661, 1 Cal.App. 116.

utes conferring a lien or preference on an employee for his labor. While ordinarily such statutes are denied an extraterritorial or retroactive effect, they have in some cases been held subject to a rule of liberal construction.

The statutes in many of the states expressly provide for a lien or preference in favor of a servant to protect his claim for wages. These statutes vary greatly in their terms, and, while some of them provide for a lien enforceable against the property of the employer independent of his insolvency, others provide for a preference for claims for wages for work performed before the seizure of the employer's property on process or the suspension of his business by the action of creditors or before his property is, by any other means, put in the hands of a receiver or trustee, the statutory preference in itself not giving the employee a specific lien on the property.[88] The purpose of such statutes is the protection of the worker[89] and they have been generally held valid.[90] Some authorities construe them liberally in favor of the employee;[91] others hold that such statutes should be construed strictly,[92] and should not be extended by implication.[93] In this connection it has been said that such statutes should be liberally construed in the enforcement of a lien once attached,[94] but not in determining the existence of the lien.[95] In any event the statutes confer a lien only in those cases falling within their terms.[96]

Statutes giving laborers a lien for wages due are not given an extraterritorial effect,[97] and they will not be given a retroactive effect unless they expressly provide therefor.[98] The courts do not favor repeal of such statutes by implication.[99] Thus an earlier lien statute in favor of employees generally has been held not repealed by the subsequent enactment of a preference statute in favor of employees of insolvent employers,[1] and a statute providing that laborers shall have a lien on the real property of their employers for their wages is not repealed by implication by a mechanics' lien act.[2]

Distinctions. Statutory liens on the master's property intended to secure payment of employees of manufacturers and others have been distinguished from mechanics' liens.[3]

88. N.Y.—People v. Remington, 10 N.Y.St. 310, 45 Hun 329, affirmed 16 N.E. 680, 109 N.Y. 631.

Pa.—Wilkinson v. Patton, 29 A. 293, 162 Pa. 12.

Not "true lien"

Under some statutory provisions a servant does not have a lien for wages in the true sense, but merely priority in distribution of proceeds of judicial sale, and then only if notice in writing of claim is given before sale to officers making sale.—Miners Sav. Bank of Pittston v. Joyce, C.C.A.Pa., 97 F.2d 973.

89. Iowa.—Heessel v. Creston Nat. Bank, 218 N.W. 298, 205 Iowa 508.

90. Fla.—Griffith v. Hulion, 107 So. 354, 90 Fla. 582.

Ky.—Turner v. Randolph, 280 S.W. 462, 213 Ky. 55.

S.C.—Moody v. Dudley Lumber Co., 137 S.E. 141, 138 S.C. 478.

W.Va.—Raleigh County Const. Co. v. Amere Gas Utilities Co., 158 S.E. 161, 110 W.Va. 291.

39 C.J. p 215 note 7, p 216 note 12.

Statute held invalid

Ind.—McErlain v. Taylor, 192 N.E. 260, 207 Ind. 240, 94 A.L.R. 1284.

91. U.S.—Wilson v. Hall, C.C.A.Va., 81 F.2d 918.

Idaho.—Seafoam Mines Corporation v. Vaughn, 53 P.2d 1166, 56 Idaho 342.

39 C.J. p 216 note 8.

92. La.—Feibleman v. Mississippi Cane Syrup Co., 120 So. 482, 10 La.App. 60.

Pa.—Davis v. Nanty Glo Auto Co., 187 A. 227, 123 Pa.Super. 349—McCracken v. Slemmer, 170 A. 453, 112 Pa.Super. 135.

93. N.J.—Lehigh Coal & Navigation Co. v. New Jersey Cent. R. Co., 29 N.J.Eq. 252.

Okl.—Pace v. National Bank of Commerce of Tulsa, 125 P.2d 178, 190 Okl. 503.

94. Okl.—Martin Coal & Coke Co. v. Brewer, 90 P.2d 653, 185 Okl. 169.

Va.—Mathews v. Myers, 145 S.E. 352, 151 Va. 426.

Enforcement of lien see infra § 149.

Perfection of lien

Where there is a clear right to a laborer's lien under statute, and the controversy is with respect to the question whether the lienor has properly proceeded to perfect and preserve his lien, the statute should be liberally construed.—Raleigh County Const. Co. v. Amere Gas Utilities Co., 158 S.E. 161, 110 W.Va. 291.

95. Okl.—Martin Coal & Coke Co. v. Brewer, 90 P.2d 653, 185 Okl. 169.

96. Ohio.—George D. Harter Bank v. McKinley Lumber Co., 26 N.E.2d 587, 136 Ohio St. 465.

Okl.—First Nat. Bank of Alex v. Southland Production Co., 112 P. 2d 1087, 189 Okl. 9.

Tex.—Gibson v. Wood, Civ.App., 199 S.W. 893—Bush Bros. Lumber & Milling Co. v. Eastwood, 132 S.W. 389, 62 Tex.Civ.App. 473.

Distributed among creditors

Under statute creating lien for wages on property or effects of owner of manufacturing establishment when property shall in anywise come to be distributed among creditors, where employees brought actions for wages, and employer's property which was mortgaged prior to time that employees rendered services was attached and sold pursuant to agreed order, property of the employer had "come to be distributed among creditors" entitling the employees to the benefit of the statute.—Leslie's Adm'x v. Branham, 158 S.W.2d 949, 289 Ky. 409.

97. Ga.—Downs v. Bedford, 146 S.E. 514, 39 Ga.App. 155.

98. N.Y.—People v. Remington, 10 N.Y.St. 310, 45 Hun 329, affirmed 16 N.E. 680, 109 N.Y. 631.

99. Ark.—Carraway v. Phipps, 86 S.W.2d 12, 191 Ark. 326.

Okl.—Stallings v. Key, 68 P.2d 842, 180 Okl. 238.

1. Del.—Lupton v. Hughes, 47 A. 624, 18 Del. 515.

2. Ohio.—Mulwech v. Imperial Metal Products Co., 15 Ohio App. 495.

3. Ind.—Moore-Mansfield Construction Co. v. Indianapolis, N. & T. R. Co., 101 N.E. 296, 179 Ind. 356, 44 L.R.A.,N.S., 816, Ann.Cas.1915D 917.

Little analogy

A mechanic's lien bears little analogy to the modern statutory liens on the master's property intended to secure the payment of wages of a class of employees of manufacturers and others, commonly designated as "laborers" and "servants."—Moore-Mansfield Constr. Co. v. Indianapolis, N. & T. R. Co., supra.

(2) On Corporate Property

Under statutes in some jurisdictions, preferences or liens are accorded to employees of corporations.

Under statutes in some jurisdictions, employees of corporations are given liens on their property for the value of work and labor performed by them.[4] The employee's preference or lien against corporate property is purely statutory in character[5] and has been held to be unaffected by recording acts.[6] Under statutes creating wage liens for employees of corporations, an employee of an individual is not entitled to a lien.[7] Under statutes giving employees of a corporation, doing business in the state, a lien on all of the corporate property for unpaid wages for labor performed, supplies furnished to a corporation are not "labor"[8] even though labor constitutes one of the elements in the cost of the supplies furnished.[9]

Corporate contracts under which money or merchandise will become the property of the corporation on performance of the contract represent assets[10] and are corporate "property" within the meaning of such statutes,[11] and the property of an insolvent corporation subject to wage lien may be regarded as its net worth or interest after satisfaction of prior encumbrances.[12] A contract with a corporation to deliver to it certain merchandise, although the contract is assigned by the corporation before the merchandise comes into its hands, is property under the statutes.[13] Under statutes giving the employees of corporations doing business in the state a first lien for unpaid wages on all the corporate property and further providing that any employee wishing to acquire the lien shall file a notice of his intention to do so, and that, when recorded, the lien shall date from the time of his employment, a purchaser of property from a corporation takes it subject to the liens of its employees whose employment antedates the time of sale,[14] and this has been held to be so even when the property is sold to the purchaser before the notice required in the statute has been filed.[15]

§ 140. Nature and Amount of Claim

A statutory lien or preference for compensation of an employee ordinarily is based on wages or salary as distinguished from a "bonus" or damages for breach of contract, and the amount of the lien is limited to compensation for work actually done and to such limits as may be imposed by statute.

The statutory lien or preference must be based on a claim for wages or other compensation for services, as discussed infra § 141, and not on a bonus[16] or a claim for damages for breach of contract.[17] The amount is limited to compensation for the work actually done[18] at the contract rate,[19] and not exceeding statutory restrictions as to the

4. **Doing business within state**
Foreign contracting corporation maintaining local offices and plant and engaging in construction work in the state is "doing business in state" within a statute, giving its employees lien on its property for value of work and labor performed by them.—Kimball v. Sundstrom & Stratton Co., 92 S.E. 737, 80 W.Va. 522.

5. Iowa.—Soodhalter v. Reliance Coal Co., 213 N.W. 213, 203 Iowa 688.

6. Iowa.—Soodhalter v. Reliance Coal Co., supra.

7. N.C.—In re Reade's Claim, 173 S.E. 342, 206 N.C. 331.
Character of business of employer generally as affecting right to lien see infra § 142.
Particular occupations of corporate and other employees as affecting right to wage lien see infra § 143.
The word "company" in statute giving persons furnishing labor to any mining or manufacturing company, whether chartered under state laws or chartered elsewhere and doing business in state, prior liens on such company's franchises, gross earnings, and property for wages due, does not apply to individual employers, but only to corporations.—Robert Bunts Engineering & Equipment Co. v. Palmer, 192 S.E. 789, 169 Va. 206.

8. N.C.—Norfleet v. Tarboro Cotton Factory, 89 S.E. 785, 172 N.C. 833.

9. N.C.—Norfleet v. Tarboro Cotton Factory, supra.
14A C.J. p 764 note 53.

10. Ind.—Aurora Nat. Bank v. Black, 29 N.E. 396, 129 Ind. 595.

11. Ind.—Aurora Nat. Bank v. Black, supra.

12. Del.—Clough v. Superior Equipment Corporation, 156 A. 249, 18 Del.Ch. 65.
Priorities of wage liens on corporate property see infra § 147.
Subject matter to which wage lien attaches generally see infra § 145.
Meaning of "assets"
Assets of insolvent corporation on which laborer's lien is fixed consist of corporate property subject to then existing liens, and the word "assets," in statute giving laborers lien on assets of insolvent corporation, means property interest that is left after prior incumbrances are satisfied.—Clough v. Superior Equipment Corporation, supra.

13. Ind.—Aurora Nat. Bank v. Black, 29 N.E. 396, 129 Ind. 595.

14. Ind.—Aurora Nat. Bank v. Black, supra.

15. Ind.—Aurora Nat. Bank v. Black, supra.

16. S.C.—Robertson v. Wise, 151 S.E. 87, 153 S.C. 459.
Additional compensation to employee remaining in employ for definite period was not "bonus," but wages or salary, within law authorizing lien.—Robertson v. Wise, supra.

17. N.J.—Spader v. Mural Decoration Mfg. Co., 20 A. 378, 47 N.J.Eq. 18.

18. La.—Scarborough v. Stinson, 15 La.Ann. 665.
39 C.J. p 216 note 16.
Cancellation of lien
Evidence warranted cancellation of laborer's lien for work performed by night watchman in excess of ten hours per night on ground that watchman was employed to work only ten hours per night and that he was paid for ten hours per night during term of his employment.—Independence Lumber Co. v. Day, La.App., 187 So. 300.

19. W.Va.—Kimball v. Sundstrom & Stratton Co., 92 S.E. 737, 80 W.Va. 522.

amount of the claim.[20] It has been held that the lien confers no right of possession of the property to which it attaches.[21] Where, however, possession is essential under the terms of the statute, a watchman's possession of a closed mine has been held sufficient to support his lien for unpaid wages.[22]

Limitations. Under some statutes, there is a limitation of time within which wages, forming the basis of a claim for lien or preference, must have accrued.[23] Under other statutes it is immaterial how long before the date of the insolvency the wages may have accrued.[24]

§ 141. Character and Extent of Services

An employee's lien for compensation may be dependent on the character of service rendered and is usually restricted to wages for actual labor performed by the employee personally.

Under some statutory provisions the right to an employee's lien or preference is dependent on the character of his service,[25] the test being the nature of the service he was employed to perform rather than the nature of that he actually performed.[26] Under some statutes a lien for wages is allowable only when they are payable weekly or monthly,[27] but under other statutes it has been held to be immaterial whether the compensation is by the day, week, or month or by piece, weight, or measurement.[28]

Personal labor. The statutes are generally construed as intended to protect only claims for actual work or labor performed by the employees personally,[29] and to exclude claims for the use of teams[30] or machinery,[31] or for materials furnished,[32] for the labor of others hired by the employee,[33] or for the hire of other property of the employee,[34] for expenses incurred by the employee,[35] or for interest accrued on the claim for wages.[36]

§ 142. Character of Business in Which Services Performed

In order to be entitled to a lien, an employee must be employed in the kind of business or by the kind of employer specified in the statute.

20. Pa.—Allentown Nat. Bank v Helios Dry Color & Chemical Co.. 9 Pa.Super. 275.
39 C.J. p 216 note 18.

21. Tex.—Higginbotham-Bailey-Logan Co. v. Bellah, Civ.App., 79 S. W.2d 907.

Merchandise

Laborer's lien gave employee no right of possession of merchandise, or that merchandise should remain in any particular place in county.—Higginbotham-Bailey-Logan Co. v. Bellah, supra.

22. Idaho.—Seafoam Mines Corporation v. Vaughn, 53 P.2d 1166, 56 Idaho 342.

23. Pa.—Lord v. Toby Valley Supply Co., 5 Pa.Dist. 290—Bell v. Faust, 20 Pa.Co. 394.

24. N.J.—Delaware, L. & W. R. Co. v. Oxford Iron Co., 33 N.J.Eq. 192.

25. Pa.—Davis v. Nanty Glo Auto Co., 187 A. 227, 123 Pa.Super. 349.
Tex.—Gibson v. Wood, Civ.App., 199 S.W. 893.
39 C.J. p 216 note 21.

Attorneys employed for nonprofessional work

Attorneys employed to perform work for a corporation which could have been performed by persons not attorneys were entitled to a lien for their compensation.—Raleigh County Const. Co. v. Amere Gas Utilities Co., 158 S.E. 161, 110 W.Va. 291.

Exclusion of executives

Statute giving "wage claimant" preference against proceeds of sale of employer's property was not intended to give general executive officers of corporations preference, but was enacted to protect classes of laborers, mechanics, and other wage earners therein enumerated.—Davis v. Nanty Glo Auto Co., 187 A. 227, 123 Pa.Super. 349.

Overseer or superintendent

(1) Under statutory provisions conferring a lien for wages in favor of persons performing labor or services for others on the personal property of the latter on which the labor or service is performed, or which is used in the business, occupation, or employment in which the labor or service is performed, an overseer or "woods rider" for a turpentine operator has a lien for his services in supervising the manual labor of workers chipping trees, dipping gum, etc., for the turpentine operator, the character of the overseer's services being within the contemplation of the statute.—Griffith v. Hulion, 107 So. 354, 90 Fla. 582.

(2) Under such statutory provisions a superintendent of a stone manufacturer was entitled to a lien for unpaid salary on personal property used by the manufacturer in its business.—Florida Travertine Corporation v. Staples, 150 So. 599, 112 Fla. 344.

Operation of commissary

Under statutes creating a lien in favor of the employees of any mine, rolling mill, foundry, or other manufacturing establishment for their wages, one employed merely in running a store or commissary for such an establishment is not entitled to a lien for wages.—Freeman v. Craft, 294 S.W. 822, 220 Ky. 15.

26. Pa.—Davis v. Nanty Glo Auto Co., 187 A. 227, 123 Pa.Super. 349.

Voluntary performance of manual labor by an executive would not entitle him to a lien for wages accorded a manual laborer, as the executive would have been employed for different work and the test lies in the nature of his employment and not in the nature of the work actually rendered.—Davis v. Nanty Glo Auto Co., supra.

27. Cal.—Spaulding v. Mammoth Spring Min. Co., 49 P. 183, 5 Cal. Unrep.Cas. 712.
39 C.J. p 216 note 22.

28. Pa.—Jones v. Susquehanna Coal Co., 1 Pa.Super. 331.

29. Okl.—Jones v. Bodkin, 44 P.2d 38, 172 Okl. 38.
39 C.J. p 216 note 24.

30. Okl.—Bank of Earlsboro v. J. E. Crosbie, Inc., 77 P.2d 547, 182 Okl. 327—Shefts Supply v. Brady, 41 P.2d 820, 170 Okl. 590.
39 C.J. p 216 note 25.

31. Okl.—Shefts Supply v. Brady, supra.
Pa.—Dart v. McMinds, 21 Pa.Co. 43.

32. Ga.—Hilley v. Lunsford, 115 S. E. 667, 29 Ga.App. 398.

33. Okl.—Bank of Earlsboro v. J. E. Crosbie, Inc., 77 P.2d 547, 182 Okl. 327—Shefts Supply v. Brady, 41 P.2d 820, 170 Okl. 590.
39 C.J. p 216 note 28.

34. Ga.—Cox v. Cagle, 37 S.E. 176, 112 Ga. 157.

35. Tex.—Mudgett v. Texas Tobacco Growing & Mfg. Co., Civ.App., 61 S.W. 149.

36. N.J.—Delaware, L. & W. R. Co. v. Oxford Iron Co., 33 N.J.Eq. 192.

Under statutes restricting the privilege to employees in particular kinds of business or employees hired by particular kinds of employers, only such employees as are engaged in the kind of business or hired by the kind of employer designated in the statute are entitled to a lien or preference for their wages.[37] Employees of companies engaged in lumbering and transporting logs to the mills are entitled to the lien under some statutes,[38] but not under other statutes.[39] The classes of employers reached by these acts are sometimes enlarged by necessary implication beyond a literal meaning of the words used in the statute in defining the specific groups named, in order to make it correspond with the classes of employees named, the words "other business," so interpreted, including all kinds of business in which any of the classes of employees named are engaged.[40] For example, statutes giving the privilege to clerks generally and restricting their application to "works, mines, manufactory, or other business" where clerks are employed have been construed as applying to attorney's offices in which clerks are employed.[41] Under some statutes the labor must have been performed in connection with the business in which the insolvent employer was engaged[42] and must have contributed to its permanent and continuous use,[43] so that services performed in the construction and equipment of the plant preparatory to commencing the employer's business are not entitled to a preference.[44] Also it has been held that, while the words "in any manufactory or mill" should be construed to mean in or about any such place, one rendering services miles distant from the mill and having no immediate connection with its actual operation, even though furthering the business of the mill, is not entitled to the lien.[45]

§ 143. Employees Protected

a. In general
b. Particular occupations

a. In General

The terms of the statute determine what employees are entitled to a wage lien. Independent contractors ordinarily are excluded.

The right of a person to a laborer's lien is determined by the terms of the statute under which he claims,[46] and that right will not be affected by a later laborers' lien statute not repealing or modifying the earlier statute and not including claimant within its terms.[47] Where the classes entitled to the lien are enumerated, the statute is construed as excluding those not enumerated,[48] and the fact that an employee belonging to a class not enumerated in the statute sometimes performs the duties of employees who are enumerated has been held not to entitle him to a lien.[49] Under some statutes only claimants employed under written contracts are entitled to the lien;[50] but under others the written contract is required only where the employment is for a longer period than that fixed by the statute.[51] It has been held that the employee, in order to be entitled to a preference, must have been an employee at the time of the suspension of business[52]

37. Fla.—Griffith v. Hulion, 107 So. 354, 90 Fla. 582.
39 C.J. p 217 note 33.
Employees of corporations generally as entitled to lien see supra § 139 c.

Manufacturer

(1) Under statute creating lien on property or effects of owner of manufacturing establishment when property shall in anywise come to be distributed among creditors for wages coming due within six months before property shall come to be distributed, a contractor who agreed to cut, haul, and deliver logs to sawmill was a manufacturer, and his employees were entitled to benefits of statute.—Leslie's Adm'x v. Branham, 158 S.W.2d 949, 289 Ky. 409.

(2) Other cases see 39 C.J. p 217 note 33 [c].

Merchant

Under statutes providing a lien in favor of employees of "merchants, transportation companies and other corporations," one employed by an individual turpentine operator was not entitled to a lien, and the fact that such turpentine operator incidentally ran a commissary or store did not render him a "merchant" within the contemplation of the statute so as to confer a lien on his employee, who was an overseer or "woods rider" engaged in supervising the manual labor of chippers and dippers.—Griffith v. Hulion, 107 So. 354, 90 Fla. 582.

38. Wash.—Calmer v. Day, 203 P. 71, 118 Wash. 276.

39. Tex.—Bush Bros. Lumber & Milling Co. v. Eastwood, 132 S. W. 389, 62 Tex.Civ.App. 473.
39 C.J. p 217 note 35.

40. Pa.—Sproul v. Murray, 27 A. 302, 156 Pa. 293, 297.
39 C.J. p 217 note 36.

41. Pa.—Barricklow v. Howard, 22 Pa.Dist. 311.

42. Ky.—Winter v. Howell, 58 S.W. 591, 109 Ky. 163, 22 Ky.L. 697.
39 C.J. p 217 note 38.

43. Pa.—Wolf v. Krick, 3 Pa.Super. 601.

44. Pa.—Llewellyn's Appeal, 103 Pa. 458, 462.
39 C.J. p 217 note 40.

45. Tex.—Bush Bros. Lumber & Milling Co. v. Eastwood, 132 S.W. 389, 62 Tex.Civ.App. 473.

46. Tex.—Bush Bros. Lumber & Milling Co. v. Eastwood, 132 S.W. 389, 62 Tex.Civ.App. 473.
39 C.J. p 217 note 42.

47. Pa.—Hall's Est., 23 A. 992, 148 Pa. 121.

48. Tex.—Lindale Brick Co. v. Smith, 118 S.W. 568, 54 Tex.Civ. App. 297.

49. U.S.—Addison v. Pacific Coast Milling Co., C.C.Wash., 79 F. 459.
Tex.—Lindale Brick Co. v. Smith, 118 S.W. 568, 54 Tex.Civ.App. 297.

50. Ark.—Gates v. Burkett, 44 Ark. 90.

51. Okl.—Bristow First Nat. Bank v. Rogers, 103 P. 582, 24 Okl. 357.

52. N.J.—Delaware, L. & W. R. Co. v. Oxford Iron Co., 33 N.J.Eq. 192.
39 C.J. p 218 note 48.

and also that an unsuccessful claimant under the Mechanics' Lien Law cannot claim a preference under the Laborers' Lien Law as a laborer or mechanic working simply for wages.[53]

Contractors. A person cannot have a laborer's lien for work done by others hired by him, as considered supra § 141; and it is almost universally held that a contractor is not entitled to a preference or a lien[54] even though he performs manual labor in part.[55] The fact that a company advances industrial insurance premiums in behalf of alleged independent contractors is a factor for consideration, but does not of itself change the relationship to that of master and servant.[56] However, the fact that a foreman is allowed a certain amount for his own compensation and that of the workmen under him whom he employs, he receiving the balance after payment of the men's wages, does not make him an independent contractor within the meaning of the rule, where the employer pays the men and retains the control and direction of them.[57]

b. Particular Occupations

The right of persons in particular occupations, such as clerks, laborers, and others, to a wage lien is controlled by the provisions of the particular statute invoked.

The question whether one engaged in any particular occupation is entitled to a laborer's or employee's lien for his wages or salary will be determined by the provisions of the statute invoked.[58] Under statutes conferring a lien for the value of his work on every workman, laborer, or other person who shall perform any work or labor for any incorporated company doing business in the state, a general manager may be entitled to a lien as an "other person,"[59] as may a bank cashier,[60] and the fact that he is also a stockholder, director, or officer of the corporation will not deprive him of his lien.[61]

Clerks. Under statutes conferring a privilege for their salaries on clerks, secretaries and other agents of that nature, the question whether one comes within the privilege conferred will depend on the character of duties he is expected to discharge and does discharge,[62] and not on the name given to the position held.[63] The term "clerk" includes a stenographer[64] and a law clerk,[65] but does not include a traveling salesman[66] or one employed in and about a pool room to perform general work.[67] An employer who lets out the services of a bookkeeper is not entitled to a preference for his wages, since the employer himself is not a clerk.[68]

53. Pa.—In re Wells, 2 Del.Co. 172. 39 C.J. p 318 note 49.

54. Ky.—Southern Coal Co. v. Martin's Fork Coal Co., 151 S.W.2d 394, 286 Ky. 679—Katz v. Earl & John Scott, 17 S.W.2d 1024, 229 Ky. 738.
Wash.—Hollingsworth v. Robe Lumber Co., 45 P.2d 614, 182 Wash. 74.
39 C.J. p 218 note 51.

Auditor and bookkeeper
While an employee in the capacity of a bookkeeper is entitled to a lien against employer's property for wages under statute, one employed to audit the books and install a method of bookkeeping and hired on the basis of an independent contractor for such purposes is not entitled to a wage lien.—Southern Coal Co. v. Martin's Fork Coal Co., 151 S.W.2d 394, 286 Ky. 679.

Independent contractors are excluded from the benefit of a wage lien statute where they are neither expressly nor by clear implication included.—Katz v. Earl & John Scott, 17 S.W.2d 1024, 229 Ky. 738.

55. Mich.—In re Clark, 52 N.W. 637, 92 Mich. 351.

56. Wash.—Hollingsworth v. Robe Lumber Co., 45 P.2d 614, 182 Wash. 74.

Members of logging crew entering into logging contract with lumber company were not employees of lumber company, so as to be entitled to lien for wages, because lumber company paid industrial insurance premium, where crew did not have money to pay premium, and it was advanced by lumber company.—Hollingsworth v. Robe Lumber Co., 45 P.2d 614, 182 Wash. 74.

57. La.—Swain v. Kirkpatrick Lumber Co., 78 So. 140, 143 La. 30, 20 A.L.R. 665.

58. Pa.—McCracken v. Slemmer, 170 A. 453, 112 Pa.Super. 135.
Tex.—Hare & Chase v. Dunton, Civ. App., 6 S.W.2d 139.
39 C.J. p 217 note 42.

"Servant and helper"
Musician in orchestra employed by restaurant held not "servant and helper" within statute according to such class preference in payment of wages from proceeds of property sold under distress warrant.—McCracken v. Slemmer, 170 A. 453, 112 Pa.Super. 135.

59. W.Va.—Shore v. United Auto Supply Co., 146 S.E. 890, 107 W. Va. 66.
Wage lien on corporate property generally see supra § 139 c.

60. W.Va.—Charter v. Doddridge County Bank, 188 S.E. 486, 117 W. Va. 742.

61. W.Va.—Charter v. Doddridge County Bank, supra—Shore v. United Auto Supply Co., 146 S.E. 890, 107 W.Va. 66.

62. La.—Bank of Commerce & Trust Co. v. Brown Cotton Oil Co., 136 So. 305, 173 La. 167.

Keeping inventory
Employee keeping inventory, taking care of property, filling orders, preparing products for shipment, collecting accounts, and making book entries, held entitled to privilege on pledged products of plant as a clerk or secretary.—Bank of Commerce & Trust Co. v. Brown Cotton Oil Co., supra.

One employed as clerk, secretary, and stenographer was entitled to privilege to extent of amount due for services rendered.—Security Bank v. National Mut. Assur. Ass'n, 128 So. 314, 13 La.App. 380.

63. La.—Bank of Commerce & Trust Co. v. Brown Cotton Oil Co., 136 So. 305, 173 La. 167.

64. Pa.—Barricklow v. Howard, 41 Pa.Co. 33.

65. Pa.—Kelly's Estate, 22 Pa.Dist. 49.

66. Pa.—Mulholland v. Wood, 31 A. 248, 166 Pa. 486.
39 C.J. p 219 note 1.

Neither "clerk" nor "secretary"
La.—Feibleman v. Mississippi Cane Syrup Co., 120 So. 482, 10 La.App. 60.

67. Pa.—Holt v. Mullahey, 7 Pa Dist. 294, 20 Pa.Co. 426.

68. La.—Guion v. Brown, 6 La.Ann. 112.

Employees. The term "employee" is a word of more comprehensive signification than "laborers" or "operatives"[69] and has been held to include all persons who are employed.[70] As used in the body of the statute it is limited, however, to "laborers," where the latter word is the only one used in the title of the statute.[71] The persons included may be limited by other terms of the statute to employees engaged in a particular branch only of the business,[72] as, for example, to employees of a coal mining company engaged in the work of developing and opening up of coal mines, it being held that a watchman who also collected accounts for the mining company was not entitled under such statute.[73] The term has been held to include a traveling salesman,[74] a bookkeeper,[75] and one employed to assist the general manager of a corporation in keeping its books, shipping goods, etc.;[76] but it does not include a contractor,[77] or a district manager of an insurance company,[78] or one working on a commission basis.[79]

Laborers. A "laborer," as the term is used in statutes conferring wage liens on such persons, has been defined as a manual worker, one who labors with his hands.[80] The courts have also defined the term to mean one who labors in a toilsome occupation, a man who does work that requires little skill as distinguished from an artisan;[81] but the term cannot be confined exclusively to one who performs only services that require no skill.[82] The test as to whether or not one should be classified as a laborer under such statutes lies in the character of services required of him under his contract[83] and not in any arbitrary designation given his calling.[84] The courts have construed the term to apply to a bartender who is also required to keep books,[85] a driver of a milk wagon,[86] a farm laborer[87] and workers about a dairy,[88] a mechanic who performs actual manual labor for his employer,[89] and a worker in an iron foundry regardless of whether he was paid by the day or piece;[90] but it has been held not to apply to a bookkeeper,[91] a professional chemist,[92] a civil engineer,[93] a clerk, even though he performs some amount of manual labor, provided he did not in fact contract to perform labor which was mainly physical,[94] a contractor,[95] an architect's draftsman,[96] a pharmacist,[97] an officer of the em-

69. S.C.—Robertson v. Wise, 151 S.E. 87, 153 S.C. 459.
39 C.J. p 219 note 87.

70. N.Y.—People v. Beveridge Brewing Co., 36 N.Y.S. 525, 91 Hun 313.

71. U.S.—Malcomson v. Wappoo Mills, C.C.S.C., 86 F. 192.

72. Okl.—Hunt v. Stribling, 157 P. 741, 57 Okl. 507.

73. Okl.—Hunt v. Stribling, supra.

74. N.Y.—Mayer v. Stern, 47 N.Y.S. 965, 22 App.Div. 628.
Ohio.—Lewis v. Dawson, 6 Ohio Cir. Ct. 243, 3 Ohio Cir.Dec. 436.

75. N.Y.—People v. Beveridge Brewing Co., 36 N.Y.S. 525, 91 Hun 313.

76. N.Y.—Brown v. A. B. C. Fence Co., 5 N.Y.S. 95, 52 Hun 151.

77. U.S.—Vane v. Newcombe, Ind., 10 S.Ct. 60, 132 U.S. 220, 33 L.Ed. 310.
Tenn.—Knoxville Table & Chair Co. v. Kerr, 169 S.W. 623, 130 Tenn. 159.

78. Md.—Perkins v. Barr, 94 A. 533, 126 Md. 91.

79. S.C.—Moody v. Dudley Lumber Co., 137 S.E. 141, 138 S.C. 478.

80. La.—Dodd v. Horan, 121 So. 323, 12 La.App. 330, rehearing denied 122 So. 140, 12 La.App. 330, remanded 126 So. 225, 169 La. 884.

Mental or manual work

If services contemplated by employment contract consist mainly of work requiring mental skill or business capacity and involve exercise of intellectual faculties rather than physical or manual labor, employee is not a laborer within laborer's lien statute but if services to be performed by employee under employment contract consist mainly of manual labor, he is a laborer within laborer's lien statute.—Bell v. J. B. Withers Cigar Co., 26 S.E.2d 260, 196 Ga. 48.

Performance of additional duties

"Laborer," within statute giving laborer lien, is one who performs manual labor, but includes employee whose regular duties include actual manual labor, although he performs other services and a waitress was held a "laborer" entitled to laborer's lien, although, in addition to performing regular waitress' duties, she acted as cashier, purchased groceries, and made entries in books.—Aronoff v. Woodard, 171 S.E. 404, 47 Ga.App. 725.

81. Ark.—Dano v. Missouri, O. & R. R. Co., 27 Ark. 564.
39 C.J. p 218 note 55.

82. Ill.—Heckman v. Tammen, 56 N.E. 361, 184 Ill. 144.
39 C.J. p 218 note 70.

83. Ga.—Bell v. J. B. Withers Cigar Co., 26 S.E.2d 260, 196 Ga. 48.

84. Ga.—Bell v. J. B. Withers Cigar Co., supra.

85. Ga.—Bluthenthal v. Bennefield, 56 S.E. 517, 127 Ga. 444, 119 Am. S.R. 350—Lowenstein v. Meyer, 40 S.E. 726, 114 Ga. 709.

86. Pa.—Wilbur v. Hankins, 19 Pa. Co. 222.

87. Okl.—Stallings v. Key, 68 P.2d 842, 180 Okl. 238.

88. Pa.—Wilbur v. Hankins, 19 Pa. Co. 222.

89. Ga.—Adams v. Goodrich, 55 Ga. 233.

90. Pa.—Seider's App., 46 Pa. 57.

91. U.S.—Malcomson v. Wappoo Mills, C.C.S.C., 86 F. 192.

Mental work

The primary work of a bookkeeper is mental rather than manual, and for this reason he is not included within the term "laborer" in its usually accepted meaning and as the term is used in wage lien statutes.—Dodd v. Horan, 121 So. 323, 12 La.App. 330, rehearing denied 122 So. 140, 12 La.App. 330, remanded 126 So. 225, 169 La. 884.

92. Pa.—Cullum v. Lickdale Iron Co., 5 Pa.Dist. 622.
39 C.J. p 218 note 62.

93. Pa.—Pennsylvania & D. R. Co. v. Leuffer, 84 Pa. 168, 24 Am.R. 189.

94. Ga.—Tuten v. Cudahy Packing Co., 66 S.E. 249, 133 Ga. 509.
39 C.J. p 218 note 64.

95. Okl.—Shefts Supply v. Brady, 41 P.2d 820, 170 Okl. 590.
Tex.—Dunn v. Hankins, Civ.App., 127 S.W.2d 983.
39 C.J. p 218 note 65.

96. Pa.—Leinau v. Albright, 10 Pa. Co. 171.

97. Ga.—Bell v. J. B. Withers Cigar Co., 26 S.E.2d 260, 196 Ga. 48.

ployer corporation,[98] a salesman paid by commissions,[99] a manager,[1] or a superintendent.[2]

A statute defining the term "laborer" as including all persons performing labor or services of whatever character has been held to apply to a drayman[3] and to a bookkeeper who is incidentally a director of the employer corporation but with no pecuniary interest therein,[4] but not to apply to the president of the employer corporation,[5] even to the extent that he assists the manager in conducting the business at the request of the directors.[6] Under a statute giving a preference to "debts owing for labor," one employed by a manufacturer of milling machinery to install machinery to be sold to its customers is entitled to a preference,[7] but a general traveling agent is not,[8] even though he occasionally does manual work in adjusting machines sold.[9] The same statute has been held not to apply to a contractor who works with his men where the value of his own services cannot be separated from the profits of the contract,[10] or to a lumber inspector although he performs considerable manual labor.[11] Statutes similarly worded have been held to apply to a chemist,[12] a foreman who performed manual labor,[13] and to an officer of a corporation who performed manual services for the corporation clearly outside of his duties as such officer,[14] but not to apply to a bookkeeper[15] or to a salesman.[16] A statute conferring a wage lien on "common laborers" and "farm hands" does not include the manager of a farm,[17] and, despite the fact that he performs some manual labor, such a manager does not come within the purview of the statute "as one who labors with his hands for wages."[18]

Operatives. The term "operative" has no well defined meaning as distinguished from a laborer, although it is more commonly used in connection with persons employed in manufacturing establishments.[19] It does not include a secretary of a manufacturing company, although he acted as manager and superintendent and incidentally performed manual labor.[20]

Salesmen. The term "salesmen" includes a district representative located in a specific district to solicit orders for his employer and entitled to commissions on sales made by subordinate salesmen in his district.[21]

Tradesmen. A statute granting the privilege to "tradesmen" does not apply to a laundryman carrying on an independent business.[22]

§ 144. Inception and Duration of Lien

A lien may attach as of the date of performance of the labor and will last only for the time prescribed by law.

Broadly speaking, the inception and duration of an employee's or laborer's lien for wages will be controlled by the provisions of the particular statute.[23] A lien attaches under some statutes as of the

98. U.S.—Fidelity Ins., Trust & Safe-Deposit Co. v. Roanoke Iron Co., C.C.Va., 81 F. 439.

99. Pa.—Willauer's Estate, 1 Chest. Co. 533.

1. U.S.—Wright v. Chase Nat. Bank of City of New York, C.C.A.Va., 92 F.2d 271.

Neither "laborer" nor "traveling representative"

A manager, who had full charge of a manufacturing company's saw and planing mills, logging operations, and railroad running into timber lands, and had many men under his control, with right to hire and discharge them, was not a laborer or traveling representative entitled to a preferred lien for salary under statute, even though manager spent about half his time traveling, where any labor performed or services rendered as traveling representative were incidental to work as manager. —Wright v. Chase Nat. Bank of City of New York, supra.

2. Ga.—Cole v. McNeill, 25 S.E. 402, 99 Ga. 250.

39 C.J. p 218 note 69.

3. N.J.—Watson v. Watson Mfg. Co., 30 N.J.Eq. 588.

4. N.J.—Consolidated Coal Co. v. Keystone Chemical Co., 35 A. 157, 54 N.J.Eq. 309.

5. N.J.—England v. Beatty Organ Co., 4 A. 307, 41 N.J.Eq. 470.

6. N.J.—Weatherby v. Saxony Wool Co., Ch., 29 A. 326.

7. Mich.—In re George T. Smith Middlings Purifier Co., 47 N.W. 342, 83 Mich. 513.

8. Mich.—Clark's Appeal, 59 N.W. 150, 100 Mich. 448.

9. Mich.—Clark's Appeal, supra.

10. Mich.—In re Clark, 52 N.W. 637, 92 Mich. 351.

11. Mich.—In re Sayles, 52 N.W. 637, 92 Mich. 354.

12. Ind.—Johnson v. Citizens' Trust Co., 136 N.E. 49, 78 Ind.App. 487.

13. Wash.—Cavanaugh v. Art Hardware & Mfg. Co., 214 P. 152, 124 Wash. 243.

14. Wash.—Cavanaugh v. Art Hardware & Mfg. Co., supra.

15. Wash.—Cavanaugh v. Art Hardware & Mfg. Co., supra.

16. Wash.—Cavanaugh v. Art Hardware & Mfg. Co., supra.

17. Tex.—Beakley v. Lind, Civ.App., 32 S.W.2d 671.

18. Tex.—Beakley v. Lind, supra.

19. Ohio—Green v. Weller, 6 Ohio Cir.Ct. 351, 3 Ohio Cir.Dec. 488.

20. Ohio.—Green v. Weller, supra.

21. Md.—Baltimore Trust Co. v. Rowe, 118 A. 405, 141 Md. 155.

22. Pa.—Steininger v. Butler, 5 Pa. Dist. 43, 17 Pa.Co. 97.

23. Idaho.—Seafoam Mines Corporation v. Vaughn, 53 P.2d 1166, 56 Idaho 342.

Not conditional on insolvency

Preference given to clerk, secretary, etc., by law, in property of employer, was held not conditional on insolvency or cession of property. —Security Bank v. National Mut. Assur. Ass'n, 126 So. 591, 13 La.App. 303, rehearing denied 128 So. 314, 13 La.App. 380.

Watchman's lien to date of sale

Watchman in charge of closed mine property who remained in employment and was not discharged after making demand for payment of wages preparatory to foreclosing lien therefor, could claim wages and had lien to secure payment thereof

date of the performance of the labor[24] so that the lien may vest when the wages become due and are unpaid[25] or on termination of the employment,[26] and, if the employer dies indebted, his estate in the hands of his personal representatives is charged with the lien.[27] Where, however, the employee is merely given a right to a preferred claim against the property of his employer which has been levied on under attachment, execution, or writs of similar nature, the right to assert the preference and claim the statutory lien vests in claimant immediately on the levy of the writ.[28]

The lien or privilege will last only for the time prescribed by law[29] and is sometimes limited by statute to a specified number of days,[30] and it does not continue after the employer has sold his property to a bona fide purchaser for value.[31] The lien ceases after the employee has been paid[32] or after he has become indebted to his employer for a sum greater than the employer's indebtedness to him.[33] However, payment by the owner to the contractor will not affect the right of a laborer to a statutory lien for work done under the contractor, provided the owner had notice or knowledge that the laborer was engaged in work on his property.[34]

§ 145. Subject Matter to Which Lien Attaches

Generally speaking, an employee's wage lien attaches only to the property of his employer which is of a character specified in the statute.

The lien or preference attaches only to the property of the employer[35] or its proceeds,[36] and not to the property of a third person in the employer's possession.[37] Property subject to the lien has been held to include trust estates[38] and leaseholds,[39] but not funds of the employer in the hands of a garnishee.[40] The law as to choses in action differs in the various states, some holding that such property is subject to the lien,[41] others that it is not.[42] In some states there are statutes subjecting real and personal property generally of the employer to the lien, and others specifying particular articles. In such cases the statutes have been held cumulative.[43] Under statutes confining an employee's wage lien to personal property, it will not attach to any property not yet detached from realty.[44] A change in the form of the property will not necessarily destroy the lien.[45]

Production of employee's labor. In some states

up to time of sale.—Seafoam Mines Corporation v. Vaughn, 53 P.2d 1166, 56 Idaho 342.

Filing of claim
No right to a lien on specific property is established by the filing of claims after such property was sold to a third person.—Burgett v. Womer, 73 P.2d 743, 192 Wash. 307.

24. Ga.—Camp v. Mayer, 47 Ga. 414.
Md.—Everett v. Avery, 19 Md. 136.

25. Minn.—C. I. T. Corporation v. Cords, 269 N.W. 825, 198 Minn. 337.

26. Minn.—C. I. T. Corporation v. Cords, supra.

27. Md.—Everett v. Avery, 19 Md. 136.

28. Mont.—Thompson v. Twodot Fertilizer Co., 230 P. 588, 71 Mont. 486.

29. La.—Noel v. Community Co., 5 La.App. 168.

30. Cal.—Blackburn v. Bell, 57 P. 775, 125 Cal. 171.
La.—In re Sheets Lumber Co., 27 So. 809, 52 La.Ann. 1337.

31. Del.—Lupton v. Hughes, 47 A. 624, 18 Del. 515.

Sale and delivery
Sale of property of employer on which clerk has privilege for amount due for services rendered, accompanied by delivery, destroys privilege.—Security Bank v. National Mut. Assur. Ass'n, 128 So. 314, 13 La.App. 380.

32. Miss.—Starling v. Wyatt, 27 So. 526.

33. N.C.—Bruce v. Carolina Queen Cons. Min. Co., 61 S.E. 579, 147 N.C. 642.

34. Ark.—White River Land & Timber Co. v. Brooks, 194 S.W. 20, 128 Ark. 280.

35. Ga.—Farrar v. Joyce, 4 S.E.2d 708, 60 Ga.App. 675—Poss Bros. Lumber Co. v. Haynie, 139 S.E. 127, 37 Ga.App. 60—Jonas v. Central Georgia Lumber Co., 132 S.E. 236, 35 Ga.App. 172.
39 C.J. p 220 note 15.
Wage lien on corporate property see supra § 139 c.

All property
Clerk has privilege for amount due for services rendered on all property of employer.—Security Bank v. National Mut. Assur. Ass'n, 128 So. 314, 13 La.App. 380.

Property sold to third persons
The lien will not attach to property sold prior thereto to third persons—Burgett v. Womer, 73 P.2d 743, 192 Wash. 307.

36. Ohio.—In re Hobelman, 5 Ohio S. & C. P. 403, 7 Ohio N.P. 661.
39 C.J. p 220 note 16.

37. Ga.—Lanier v. Bailey, 48 S.E. 324, 120 Ga. 878.
39 C.J. p 220 note 17.

38. Ga.—Ricks v. Redwine, 73 Ga. 273.

39. Pa.—Harley v. O'Donnell, 9 Pa. Co. 56.

40. Pa.—William Edwards Co. v. Mattison Walker Ice Cream Co., 22 Pa.Dist. 491.

41. Ind.—Aurora Nat. Bank v. Black, 29 N.E. 396, 129 Ind. 595.

42. Pa.—Jones' Appeal, 102 Pa. 285.
39 C.J. p 220 note 22.

43. Wash.—Calmer v. Day, 203 P. 71, 118 Wash. 276.

Specific character of lien
Statute dealing with laborer's lien on property, franchises, etc., and statute providing how claims are to be paid by a receiver or assignee, give to one performing certain labor a specific lien on certain property.—Ernst v. Guarantee Millwork, 93 P.2d 404, 200 Wash. 195.

44. Fla.—Griffith v. Hulion, 107 So. 354, 90 Fla. 582.

Gum left on trees
Lien for services held not to attach to "scrape" or turpentine gum remaining on trees, although it would attach to gum after its separation from the trees.—Griffith v. Hulion, supra.

45. Fla.—Griffith v. Hulion, supra.

Crude turpentine changed to resin
Lien attaching to crude, or "dip," turpentine is not destroyed by change in distilling to form of spir-

the lien has been confined to the production of the employee's labor,[46] and this limitation may be restricted to claims for a special, as distinguished from a general laborers', lien.[47]

Proceeds of sale of property. In some states, where a preference is given in the proceeds of a sale of the employer's property, the property must be shown to have been used in connection with the business in the course of which the services were rendered.[48]

Property in custody of court. Where the statute provides for preferences to labor claimants, where the property of the debtor is seized under any process to pay his debts, the laborer is not entitled to a preference where the property has been released by the sheriff, and is no longer in the custody of the court.[49]

After-acquired property. In the absence of statute extending the lien to such property, an employee's wage lien will not attach to property of his employer acquired after the vesting of the lien.[50]

§ 146. Assignment

Assignment of a wage claim may carry with it any wage lien which has attached.

While it has been held that the lien or priority of a laborer's claim is personal to the laborer and does not pass to his assignee,[51] it has also been held that, where a lien for wages has attached, it may be assigned by an assignment of the claim for wages[52] without express subrogation,[53] and the assignee may assert the claim and enforce the lien in the same manner, and to the same extent, as the laborer.[54] The assignee's claim, however, in order to be entitled to preference, must be for money advanced to the laborers themselves on the faith of their preference, as distinguished from a mere advance to the employer with which to pay the laborers.[55]

A mere delivery by a laborer to a store of a store order issued by the employer without any assignment of such order does not operate as an assignment of the laborer's lien,[56] nor does a drawing by the laborer of an order on his employer to pay his wages to a third person operate as an assignment of his lien to the payee.[57] A statutory preference given to employees of insolvent corporations has been held not to give them a vested, potential, or expectant legal right, capable of assignment until a receiver is appointed,[58] and hence, where a claim for wages was assigned before such time, the assignee has no lien.[59] So also, in the states where there are statutes declaring that only persons in the employ of an insolvent corporation at the time it is declared insolvent are entitled to a preference, it follows that, where wages are assigned before the declaration of insolvency, the assignee has no right to a preference.[60]

Waiver. Where the assignor has waived a labor lien, his assignee may not recover thereon.[61]

§ 147. Priorities

Ordinarily a wage lien is preferred to subsequent, but not to prior, liens.

Ordinarily laborers' liens have priority over other liens subsequently accruing,[62] but not over liens pre-

its of turpentine or resin.—Griffith v. Hulion, supra.

46. Ark.—Taylor Radford & Co. v. Hathaway, 29 Ark. 597.
Okl.—Shefts Supply v. Brady, 41 P. 2d 820, 170 Okl. 590.
39 C.J. p 220 note 25.

47. Ga.—Boyce v. Poore, 10 S.E. 1094, 84 Ga. 574.

48. Pa.—James Rees & Sons Co. v. Hulings, 9 Pa.Super. 265—Decker's Estate, 20 Pa.Co. 318.

49. Iowa.—Majestic Co. v. Ira D. Davis Co., 151 N.W. 1069, 170 Iowa 5.

50. Minn.—C. I. T. Corporation v. Cords, 269 N.W. 825, 198 Minn. 337.

51. Ill.—Beifeld v. International Cement Co., 79 Ill.App. 318.
5 C.J. p 951 note 12.

52. La.—Brittain v. Olla Lumber Co., 5 La.App. 501.
Tenn.—Scealf v. J. R. Brady & Co., 8 Tenn.Civ.App. 485.
39 C.J. p 220 note 30—5 C.J. p 950 note 10.

53. La.—Brittain v. Olla Lumber Co., 5 La.App. 501.

54. Ala.—Drennen v. Mercantile Trust & Deposit Co., 23 So. 164, 115 Ala. 592, 67 Am.S.R. 72, 39 L.R.A. 623.
Miss.—Kerr v. Moore, 54 Miss. 286.

55. U.S.—Union Trust Co. v. Southern Sawmills & Lumber Co., N.C., 166 F. 193, 92 C.C.A. 101.

56. U.S.—Philadelphia Seventh Nat. Bank v. Shenandoah Iron Co., C.C. Va., 35 F. 436, appeal dismissed 9 S.Ct. 803, 131 U.S. 445, 33 L.Ed. 222.

57. N.Y.—People v. Remington, 45 Hun 329, 10 N.Y.St. 310, affirmed 16 N.E. 680, 109 N.Y. 631.

58. N.Y.—People v. Remington, supra.

59. N.Y.—People v. Remington, supra.

60. N.J.—Delaware, L. & W. R. Co. v. Oxford Iron Co., 33 N.J.Eq. 192—Lehigh Coal & Navigation Co. v. New Jersey Cent. R. Co., 29 N.J. Eq. 252.

61. Wash.—Baker v. Sherwood, 254 P. 457, 143 Wash. 691.
Waiver and forfeiture of labor liens generally see infra § 150.

62. Fla.—Flynn-Harris-Bullard Co. v. Johnson, 107 So. 358, 90 Fla. 654.

Attachment

Privilege for services rendered existing in favor of employee on employer's shares of stock held not lost through attachment by creditor.—Security Bank v. National Mut. Assur. Ass'n, 128 So. 314, 13 La.App. 380.

Conflict with federal statutes

As long as a state statute giving priority to debts owing to laborers or servants for services conforms to

iously acquired.[63] Liens[64] or claims under contracts[65] existing before the passage of the statute creating the laborer's lien are entitled to priority. Priority will be accorded a labor lien only on a due showing of the facts required by statute as prerequisite to such priority.[66] One set or group of laborers has been held not entitled to priority over another group claiming under the same law.[67] The costs occasioned by the seizure of the property of the employer, where the employee is given a lien on property in the hands of a receiver, officer, or other trustee, are generally expressly declared by statute to be a superior lien.[68] It has been held that an unforeclosed laborer's lien cannot participate in a fund, brought into court under other process, which is the subject of controversy in a money-rule case.[69] Statutory provisions granting employees priority for wages for services rendered within a specified period next preceding levy of writ in case of execution, attachment, and like writs are designed to include all cases in which the employer's property is sold under judicial process to satisfy his debts.[70]

General creditors. Laborers' liens have priority over general creditors both with and without notice.[71]

Purchasers. Under statutes expressly so providing, a laborers' lien has priority over the claim of a purchaser with notice,[72] but no priority over a purchaser without actual or constructive notice of the lien.[73] It has been held in some states that one who takes a transfer of his debtor's property in payment of his claim is entitled to priority over the employees of his debtor, the statute giving a lien to such employees in case of judicial, not voluntary, sales.[74] If parcels of the property subject to the lien have been sold at different times they must be exhausted in the inverse order of alienation.[75]

Mechanic's lien. Where priority provisions of a corporate employees' lien law are in direct conflict with a subsequently enacted mechanic's lien law, the latter will prevail.[76] A laborers' lien has priority over a mechanics' lien under a statute providing that laborers or employees shall be preferred creditors and shall be first paid in full,[77] or under a statute giving laborers' liens a priority over all other liens except mortgages or judgments entered before the labor is performed.[78]

the general policy of federal statutes, such as those relating to bankruptcy, the state is acting within the orbit of its authority in dealing with laborers' claims.—Emory v. St. James Distillery, Mo.App., 143 S.W. 2d 318, reversed on other grounds 62 S.Ct. 317, 314 U.S. 423, 86 L.Ed. 315.

63. Ariz.—Pryor v. Pryors, 110 P.2d 229, 50 Ariz. 572.
Fla.—Flynn-Harris-Bullard Co. v. Johnson, 107 So. 358, 90 Fla. 654.

Pledge

Bank's privilege as pledgee of negotiable warehouse receipts was held superior to privilege of employee on products sequestered, notwithstanding bank exchanged old receipts for new receipts covering same property except part sold.—Bank of Commerce & Trust Co. v. Brown Cotton Oil Co., 136 So. 305, 173 La. 167.

64. Pa.—Modes' Estate, 76 Pa. 502.

65. Pa.—Modes' Estate, supra.

66. Cal.—Steele v. International Air Race Ass'n of America, 122 P.2d 593, 50 Cal.App.2d 176.

67. Pa.—Brown v. German-American Title & Trust Co., 34 A. 335, 174 Pa. 443.

68. Iowa.—St. Paul Title Ins. & Trust Co. v. Diagonal Coal Co., 64 N.W. 606, 95 Iowa 551.
39 C.J. p 221 note 41.

69. U.S.—In re Empire Granite Co., D.C.Ga., 42 F.Supp. 450.

70. Ariz.—Pryor v. Pryors, 110 P.2d 229, 36 Ariz. 572.

Notice

Provision, in statute giving wage claimants priority over attachments and levies for giving of notice of claims at any time "within three days before the sale" of the property levied on, was complied with by giving notice six days prior to sale, since the word "within," when used in connection with the word "before," should be construed to mean "not later than" or "at any time not less than."—Pryor v. Pryors, supra.

71. Ariz.—Pryor v. Pryors, supra.
Fla.—St. Augustine First Nat. Bank v. Kirkby, 32 So. 881, 43 Fla. 376.
N.Y.—State Bank of Williamson v. Lamoka Power Corporation, 281 N.Y.S. 531, 245 App.Div. 202, modified on other grounds 198 N.E. 609, 269 N.Y. 1.

72. Fla.—St. Augustine First Nat. Bank v. Kirkby, 32 So. 881, 43 Fla. 376.

73. Ga.—Little v. Walters, 150 S.E. 201, 40 Ga.App. 447.
Tex.—Partin v. Wallace, 121 S.W. 515, 56 Tex.Civ.App. 631.

74. Pa.—Wilkinson v. Patton, 29 A. 293, 162 Pa. 12.
39 C.J. p 221 note 45.

75. Ind.—Aurora Nat. Bank v. Black, 29 N.E. 396, 129 Ind. 595.

76. Ind.—Watson v. Strohl, 46 N.E.2d 204, 220 Ind. 672.

Wage lien on corporate property generally see supra § 139 c.

Circumstances entitling mechanics' lien to priority

(1) The fact that mechanics' liens were not enforced within one year as against holders of corporation employees' liens, although enforced against original owner of realty within one year, did not prevent assertion of mechanics' liens as against one claiming through sheriff's sale resulting from foreclosure of corporation employees' liens, where corporation employees' liens were not enforced against holder of mechanics' liens within time required by statute.—Watson v. Strohl, supra.

(2) One who claimed through sheriff's sale resulting from foreclosure of corporation employees' liens did not have a claim prior to claim of holder of mechanics' liens because judgment on corporation employees' liens was rendered prior to date of judgment on mechanics' liens, where mechanics' liens had priority over corporation employees' liens, since judgment foreclosing a lien relates back to date of lien.—Watson v. Strohl, supra.

77. Iowa.—Haw v. Burch, 81 N.W. 460, 110 Iowa 234.

78. Pa.—Allentown Nat. Bank v. Helios Dry Color & Chemical Co., 9 Pa.Super. 275.

Vendor's lien. In the absence of a statute giving them protection, laborers are not entitled to have their claims take precedence over a vendor's lien,[79] but an employee's lien may be accorded priority under statute.[80]

§ 148. —— Mortgages

Ordinarily, as between employees' wage liens and mortgage liens, the lien first in time is first in right, in the absence of statutes providing otherwise.

As between a laborer's lien and a mortgage or trust deed in the nature thereof, ordinarily the lien first in time is first in right;[81] a laborer's lien is superior to a subsequent mortgage,[82] but inferior to a prior mortgage.[83] While the lien of a trust deed in the nature of a mortgage ordinarily obtains priority over a laborer's lien as of the time of filing for record or actual notice,[84] nevertheless a laborer's lien of which no notice has been recorded in the public records may be superior in time and right to the lien of a recorded mortgage,[85] as where the debt secured by the trust deed or mortgage came into existence subsequent to the acquisition of the laborer's lien.[86] In a suit to foreclose a lien for labor for a lessee of a business, the lien of the laborer has been held superior to a mortgage executed subsequent to the lease.[87]

Under some statutory provisions a laborer's lien may be granted priority over a previously recorded mortgage[88] placed on the property by the employer himself,[89] and provided, under some statutes, the labor for which the lien is claimed produces the thing on which the lien is claimed.[90] It has been held that the laborers' claim does not take precedence over a prior mortgage, where the statute gives only a preference,[91] but under other statutes it has been held that the laborers' claim has priority over the prior mortgage.[92]

One taking a mortgage at or after the time of construction work on the mortgaged premises takes subject to laborer's liens and the mortgage is inferior thereto.[93]

Purchase-money mortgages. Laborers' claims have priority over purchase-money mortgages under statutes creating liens,[94] and in some jurisdictions such priority is allowed notwithstanding the statute gives merely a preference.[95]

§ 149. Enforcement

a. In general
b. Evidence
c. Trial, judgment, and review

79. La.—World's Industrial & Cotton Centennial Exposition v. North, Central & South American Exposition, 1 So. 358, 39 La.Ann. 1.

Contract for conditional sale of automobile held superior to employee's lien for wages, since even if such lien attached to automobile, it attached only to interest which buyer acquired.—C. I. T. Corporation v. Cords, 269 N.W. 825, 198 Minn. 337.

80. Ky.—Turner v. Randolph, 280 S.W. 462, 213 Ky. 55.

81. Fla.—Guaranty Title & Trust Co. v. Thompson, 113 So. 117, 93 Fla. 983.

82. N.C.—Horne-Wilson, Inc., v. Wiggins Bros., 164 S.E. 365, 203 N.C. 85.

83. Fla.—Parker v. Gamble, 118 So. 21, 96 Fla. 343.
Ga.—Rivers v. Williams Bros. Lumber Co., 162 S.E. 699, 174 Ga. 262.
N.J.—Hinkle v. Camden Safe-Deposit & Trust Co., 21 A. 861, 47 N.J. Eq. 333.
Tex.—McQuerry v. Glenn, Civ.App., 1 S.W.2d 339, error dismissed.

Work done after foreclosure
Stone quarried and remaining on the ground on mortgaged premises, after a decree of foreclosure and the issuance of an execution, has been held subject, as between the quarrymen and the mortgagee, to a lien for the quarrymen's wages.—American Trust Co. v. North Belleville Quarry Co., 31 N.J.Eq. 89.

84. Fla.—Guaranty Title & Trust Co. v. Thompson, 113 So. 117, 93 Fla. 983.

85. Fla.—Guaranty Title & Trust Co. v. Thompson, supra.

86. Fla.—Guaranty Title & Trust Co. v. Thompson, supra.

87. Iowa.—Ford v. Dayton, 207 N. W. 565, 201 Iowa 513.

88. Ky.—Leslie's Adm'x v. Branham, 158 S.W.2d 949, 289 Ky. 409.
39 C.J. p 221 note 69—41 C.J. p 515 note 89 [g].

89. U.S.—M. A. Furbush & Son Mach. Co. v. Liberty Woolen Mills, C.C.Va., 81 F. 425.
39 C.J. p 222 note 71.

90. Ark.—Sheeks-Stephens Store Co. v. Richardson, 88 S.W. 983, 76 Ark. 282.
Okl.—Shefts Supply v. Brady, 41 P. 2d 820, 170 Okl. 590.

Reconstructed building
Laborers' liens as to reconstructed building took priority over original mortgage lien to extent of value of new building over value of original, but mortgage liens, in absence of agreement, took priority as to reconstructed building to extent of value of original building at time laborers' liens attached.—Home Building & Loan Ass'n v. White, 284 P. 889, 141 Okl. 240.

91. Ariz.—Pryor v. Pryors, 110 P.2d 229, 56 Ariz. 572.
39 C.J. p 221 note 67.

92. Iowa.—Reynolds v. Black, 58 N. W. 922, 91 Iowa 1, 3.
39 C.J. p 222 note 72.

93. Fla.—Dunlop v. Teagle, 135 So. 132, 101 Fla. 721.
Kan.—Leidigh & Havens Lumber Co. v. Wyatt, 109 P.2d 87, 153 Kan. 214—Golden Belt Lumber Co. v. McLean, 26 P.2d 274, 138 Kan. 251.

Time of record notice
Mortgagee of property where building is being constructed takes with notice of labor liens already acquired, regardless of recording or expiration of period for recording notice.—People's Bank of Jacksonville v. Virginia Bridge & Iron Co., 113 So. 680, 94 Fla. 474, followed in Atlanta & Lowry Nat. Bank v. Bicknell-Rice Residential Builders, 126 So. 493, 99 Fla. 409.

94. Ga.—Bradley v. Cassels, 43 S.E. 857, 117 Ga. 517—Georgia Loan, Savings & Banking Co. v. Dunlop, 33 S.E. 882, 108 Ga. 218.

95. Iowa.—Goodenow v. Foster, 79 N.W. 288, 108 Iowa 508.
39 C.J. p 222 note 75.

a. In General

Statutory requirements with respect to the perfection or enforcement of wage liens must be followed.

Statutory requirements with respect to the perfection or enforcement of wage liens must be followed,[96] either strictly[97] or substantially.[98] Under particular statutory provisions it has been held that the employee seeking to perfect or enforce a wage lien must make a claim[99] or affidavit[1] and file notice of a lien[2] within the time specified by the statute[3] and record it.[4]

The notice or complaint for enforcement of a wage lien should properly aver the facts essential to the proceeding[5] and the employee should allege and

96. Alaska.—Hansen v. Wrangell Narrows Packing Co., 8 Alaska 456.
Ga.—Myrick v. Dixon, 140 S.E. 920, 37 Ga.App. 536.

Appointment of commissioner
In suit for enforcement of labor lien indebtedness, plaintiff's attorney was held entitled to appointment as special commissioner to make sale of property under decree, in absence of sound reason why appointment should not be made.—Carney v. Carney Splice Protector Co., 168 S.E. 478, 113 W.Va. 431.

Publication of notice
Plaintiff, on whose motion property is to be sold under decree to satisfy lien indebtedness, should be permitted to indicate newspaper for publication of notice, if other things are equal.—Carney v. Carney Splice Protector Co., supra.

Demand
In a proceeding to enforce a laborer's lien it is sufficient to show demand of payment on the general superintendent of the corporation whose duty it is to settle with laborers in and around its works.—Hobbs v. Georgia Lumber & Turpentine Co., 74 Ga. 371.

97. Alaska.—Hansen v. Wrangell Narrows Packing Co., 8 Alaska 456.
Pa.—Davis v. Nanty Glo Auto Co., 187 A. 227, 123 Pa.Super. 349.
39 C.J. p 222 note 77.

98. U.S.—Wilson v. Hall, C.C.A.Va., 81 F.2d 918.
Okl.—Martin Coal & Coke Co. v. Brewer, 90 P.2d 653, 185 Okl. 169.
Va.—Mathews v. Myers, 145 S.E. 352, 151 Va. 426.
W.Va.—Raleigh County Const. Co. v. Amere Gas Utilities Co., 158 S.E. 161, 110 W.Va. 291.

99. Or.—Brown v. Truax, 115 P. 597, 58 Or. 572.
39 C.J. p 222 note 78.

1. Ga.—Hobbs v. Georgia Lumber & Turpentine Co., 74 Ga. 371—Harris v. Houston, 179 S.E. 645, 51 Ga.App. 116, followed in Harris v. McGuire, 179 S.E. 646, 51 Ga. App. 118.
39 C.J. p 222 note 79.

Before clerk of court
Affidavit to foreclose laborer's lien may be made before clerk of superior court, who may issue execution thereon, and clerk of city court has same power to issue execution on foreclosure on laborer's lien as clerks of superior courts.—Myrick v. Dixon, 140 S.E. 920, 37 Ga.App. 536.

Affidavit held sufficient
In action to foreclose laborer's lien, where plaintiff's affidavit stated a cause of action as to work performed in previous year, although he was barred as to all claims for the years prior thereto, the court erred in sustaining a demurrer to the affidavit.—Green v. Ford, 34 S.E. 2d 913, 72 Ga.App. 681.

2. W.Va.—Charter v. Doddridge County Bank, 188 S.E. 486, 117 W. Va. 742.

Appointment of receiver for employer does not relieve employer claiming wage lien from statutory duty to file notice of lien.—Charter v. Doddridge County Bank, supra.

Statutory purpose
Object of statute giving lien to person contributing to preparation of fish for food, in requiring lien statement to be filed, is to give notice to party against whom lien is filed as to all lien claimants and particulars of each claim, so that such party may check up and verify claims and allow such as are just and true and correct or disallow such as are unjust or untrue.—Hansen v. Wrangell Narrows Packing Co., 8 Alaska 456.

Notice on insolvency
Under statutes conferring a labor lien for work done within a specified period next preceding the filing of claim therefor, and other statutes providing that whenever a receiver or assignee is appointed the court shall require such official to pay all claims for which a lien could be filed before payment of other claims, where an employer becomes insolvent within the period prescribed for filing notice of labor lien the lien automatically matures and no notice of claim need be filed in the auditor's office, although in the absence of insolvency the employee should file notice of his claim to perfect his lien.—Ernst v. Guarantee Millwork, 93 P.2d 404, 200 Wash. 195.

3. W.Va.—Charter v. Doddridge County Bank, 188 S.E. 486, 117 W. Va. 742.
39 C.J. p 222 note 80.

From maturity date of wages
Time for laborer's filing and presentation of accounts to secure labor lien runs from maturity date of wages as fixed in original contract.—Lunsford v. Pearce, Tex.Civ.App., 19 S.W.2d 71.

Thirty days after sale
Farm laborer, whose wages for year were payable on sale of first bale of cotton, had thirty days after such first sale to fix and preserve labor lien.—Lunsford v. Pearce, supra.

Premature foreclosure not shown
Idaho.—Seafoam Mines Corporation v. Vaughn, 53 P.2d 1166, 56 Idaho 342.

4. Pa.—Donnan v. Shaw, 7 Pa.Dist. 605, 21 Pa.Co. 39.

5. La.—Noel v. Community Co., 5 La.App. 168.
Tex.—Crosby v. Carter, Civ.App., 84 S.W.2d 517.
39 C.J. p 222 note 81.

Oral notice
Under statute allowing wage preference against proceeds of sale of employer's property provided notice of claim has been given to person conducting sale, oral notice of wage claims before sale to constable conducting sale was held sufficient, and preferences were not defeated by constable's failure to announce to bidders existence of claims of preference.—Stanley Co. of America v. Anderson, 181 A. 228, 7 W.W.Harr., Del., 200.

Notice or complaint held sufficient
W.Va.—Charter v. Doddridge County Bank, 188 S.E. 486, 117 W.Va. 742—Raleigh County Const. Co. v. Amere Gas Utilities Co., 158 S.E. 161, 110 W.Va. 291.
39 C.J. p 222 note 81 [b] (1).

Complaint held insufficient
Alaska.—Hansen v. Wrangell Narrows Packing Co., 8 Alaska 456.
39 C.J. p 222 note 81 [b] (2).

Amount
Fla.—Thompson v. Wyles, 149 So. 769, 111 Fla. 513.
39 C.J. p 222 note 81 [n].

Amendment
Ga.—Myrick v. Dixon, 140 S.E. 920, 37 Ga.App. 536.
39 C.J. p 222 note 81 [p].

prove the existence of the master and servant relationship,[6] the services rendered,[7] the reasonableness of his charges,[8] and a performance of all statutory conditions.[9] The employee, however, is not called on to offer proof of facts not required by the statute,[10] as, for example, that he and his employer had the lien in mind when the employment contract was made;[11] nor is it necessary for him to prove a sworn and itemized statement of his claim where he seeks merely a preference under the statute and not a lien.[12]

Counter-affidavits. The filing of a counter-affidavit is under some statutes necessary to raise an issue,[13] and, on the filing of an affidavit setting forth the facts essential to give rise to a wage lien, execution which issues instanter constitutes final process unless arrested or controverted by counter-affidavit.[14] Where, however, the employer interposes a counter-affidavit denying that he owes the amount claimed or that the laborer has the right to the lien claimed the proceeding is converted into mesne process,[15] and issue formed is returnable to the proper court for disposition.[16] Where, in a proceeding for foreclosure of a laborer's lien, the employer elects to proceed by counter-affidavit, he may thus contest the claim without giving bond and replevying the property;[17] but, where in such a proceeding he does give a bond, the fact that plaintiff causes dismissal of the counter-affidavit for failure of the bond to meet statutory requirements does not prevent plaintiff from suing on the bond as a common-law contract.[18]

The counter-affidavit must allege facts showing that the laborer is not entitled to the lien or that the amount claimed is too large,[19] and it may be interposed at any time before the sale of defendant's property.[20] If not filed with the proper officer[21] or if it is void[22] defendant is not in a position to

6. Pa.—Davis v. Nanty Glo Auto Co., 187 A. 227, 123 Pa.Super. 349.

President of corporation, in order to be entitled to preference as wage claimant against proceeds of sale of corporation's property sold on execution, was required to establish real status of employer and employee between corporation and himself.—Davis v. Nanty Glo Auto Co., supra.

7. Ga.—Stewart v. Durham, 104 S. E. 15, 25 Ga.App. 645.
N.J.—Duryee v. U. S. Credit System Co., Ch., 32 A. 690.

8. Or.—Brown v. Truax, 115 P. 597, 58 Or. 572.

9. Ga.—Tharpe v. Foster, 52 Ga. 79. 39 C.J. p 223 note 85.

10. Wash.—Stringham v. Davis, 63 P. 230, 23 Wash. 568.

11. Wash.—Stringham v. Davis, supra.

12. Ohio.—In re Duhme Co., 6 Ohio S. & C. P. 526.

13. Ga.—Harvey v. Johnson, 111 S. E. 576, 28 Ga.App. 287.

There is no case until the filing of a counter-affidavit, and nothing to be returned to any court, even though the property may have been replevined, and attempted proceedings are coram non judice.—Kennedy v. Miller, 175 S.E. 588, 179 Ga. 234, answer conformed to 176 S.E. 102, 49 Ga.App. 505.

14. Ga.—Kennedy v. Miller, supra—Moultrie Lumber Co. v. Jenkins, 49 S.E. 678, 121 Ga. 721—Farrar v. Joyce, 4 S.E.2d 708, 60 Ga.App. 675—Harris v. Houston, 179 S.E. 645, 51 Ga.App. 116, followed in Harris v. McGuire, 179 S.E. 646, 51 Ga.App. 118.

15. Ga.—Harris v. Houston, 179 S. E. 645, 51 Ga.App. 116, followed in Harris v. McGuire, 179 S.E. 646, 51 Ga.App. 118.

16. Ga.—Harris v. Houston, 179 S. E. 645, 51 Ga.App. 116, followed in Harris v. McGuire, 179 S.E. 646, 51 Ga.App. 118.

When returnable

In proceeding to foreclose laborer's lien, where counter-affidavit was filed on Oct. 18, 1932, proceeding then became mesne process and was returnable to the next term of court, and trial judge erred in rendering judgment during October, 1932, term of court against defendant and his bondsmen.—Kennedy v. Miller, 176 S.E. 102, 49 Ga.App. 505.

17. Ga.—Harris v. Houston, 179 S. E. 645, 51 Ga.App. 116, followed in Harris v. McGuire, 179 S.E. 646, 51 Ga.App. 118.

18. Ga.—Fennell v. Davis, 130 S.E. 595, 34 Ga.App. 548.

Direction of verdict

Where suit on bond was brought in name of levying officer against principal and surety thereon, and there was no dispute as to essential facts necessary to recovery, there was no error in directing verdict for plaintiff for full amount sued for.—Fennell v. Davis, supra.

19. Ga.—Gardner v. Parker, 124 S. E. 181, 32 Ga.App. 608.

Counter-affidavit held sufficient

Counter-affidavit to foreclosure of laborer's lien sufficiently complied with statute, where counter-affidavit set up that defendants were only indebted to plaintiff in specified part of sum claimed and stated that defendants "plead the same as a tender and pay the same into court."—Harris v. Robison, 179 S.E. 647, 51 Ga.App. 118.

20. Ga.—Kennedy v. Miller, 175 S. E. 588, 179 Ga. 234, answer conformed to 176 S.E. 102, 49 Ga.App. 505—Harris v. Houston, 179 S.E. 645, 51 Ga.App. 116, followed in Harris v. McGuire, 179 S.E. 646, 51 Ga.App. 118—Gardner v. Parker, 124 S.E. 181, 32 Ga.App. 608.

Filing held timely

(1) Where laborer's lien was foreclosed September 21, case was made returnable to October term which convened October 17, and was called for trial on October 18, filing of counter-affidavit with sheriff on October 18 was timely and converted proceeding into mesne process, where sheriff filed counter-affidavit with clerk before any ruling or judgment was rendered and before property levied on was sold.—Kennedy v. Miller, 175 S.E. 588, 179 Ga. 234, answer conformed to 176 S.E. 102, 49 Ga.App. 505.

(2) Counter-affidavit to foreclosure of laborer's lien, interposed before property was sold, alleging that plaintiff had been paid in full and that defendants resided in county other than county in which affidavit was filed held timely and sufficient to form issue to be tried, requiring return of papers to proper court in county where defendants resided.—Harris v. Houston, 179 S.E. 645, 51 Ga.App. 116, followed in Harris v. McGuire, 179 S.E. 646, 51 Ga.App. 118.

21. Ga.—Harvey v. Johnson, 111 S. E. 576, 28 Ga.App. 287.

22. Ga.—Moultrie Lumber Co. v. Jenkins, 49 S.E. 678, 121 Ga. 721.

have a ruling as to the validity of the foreclosure or levy and his demurrer to claimant's affidavit is properly overruled.[23]

Labor performed in foreign state. Even if a lien for labor performed in a foreign state may be enforced in the state of the forum, it is essential first to show that a lien existed for such foreign labor by virtue either of contract or of the law of the foreign state.[24]

Claims of third persons. Where property of some one other than the employer has been levied on under execution on foreclosure of a laborers' lien, the proper proceeding for the owner to take is to move to dismiss the levy, not the foreclosure proceedings.[25] An intervener may not complain of seizure of property to enforce a laborer's lien unless he can prove ownership thereof.[26] All interested persons should be made parties to a suit to foreclose a laborer's lien.[27]

Equity jurisdiction. Power to adjudicate laborers' liens may be conferred on courts of equity.[28] It has been held that a suit for conversion of property on which plaintiff had a wage lien will lie only in equity.[29]

Estoppel of employer. Defendant in a suit on a replevin bond given in connection with proceedings to enforce a labor lien may be estopped to deny that claimant was an employee entitled to such a lien;[30] and an employer may be estopped to move to dissolve an attachment to enforce a lien claimed by his employee.[31]

Limitations may bar a proceeding to foreclose a laborer's lien.[32]

b. Evidence

Ordinarily the burden of proof rests on the claimant of a wage lien or preference to establish it. The general rules govern questions of admissibility and weight and sufficiency of the evidence arising in proceedings relative to enforcement of the lien.

Ordinarily the person claiming a preference[33] or laborer's lien[34] has the burden of proof. If the lien is given only when the wages are payable weekly or monthly, he must show such fact.[35] On the other hand, the rule placing the burden of proof on the lien claimant is inapplicable where a judgment foreclosing a labor lien is collaterally attacked by a stranger,[36] and in such a case the burden of proving that the claimant was not a laborer rests on a creditor filing a traverse.[37]

The general rules governing admissibility of evidence will ordinarily determine its admissibility in proceedings relative to enforcement of a wage lien.[38] Under general rules, evidence in particular cases has been held sufficient to support a verdict, finding, or judgment for[39] or against[40] an employee or laborer seeking to enforce his lien, or to show particular facts.[41] The rule, discussed in Evidence

23. Ga.—Moultrie Lumber Co. v. Jenkins, supra—Harvey v. Johnson, 111 S.E. 576, 28 Ga.App. 287.

24. Ga.—Downs v. Bedford, 146 S.E. 514, 39 Ga.App. 155.

25. Ga.—Dixon v. Williams, 9 S.E. 468, 82 Ga. 105.

26. La.—Dodd v. Horan, 126 So. 225, 169 La. 884.

27. Or.—Home Mortg. Co. v. Sitka Spruce Pulp & Paper Co., 36 P.2d 1038, 148 Or. 502.

Parties defendant
In suit against corporation by labor claimants' assignee to foreclose laborers' liens, judgment creditors and general creditors were necessary parties defendant.—Home Mortg. Co. v. Sitka Spruce Pulp & Paper Co., supra.

28. Fla.—Tampa & J. R. Co. v. Harrison, 46 So. 592, 55 Fla. 810, followed in Tampa & J. R. Co. v. Anderson, 46 So. 594, 55 Fla. 866.
Equitable jurisdiction to enforce liens generally see Equity § 60.

29. Ark.—McKay v. Millner, 183 S.W.2d 780, 207 Ark. 1001.

30. S.C.—Padgett v. Cunningham, 153 S.E. 280, 156 S.C. 356.

31. S.C.—Moody v. Dudley Lumber Co., 137 S.E. 141, 138 S.C. 478.

32. Ga.—Green v. Ford, 34 S.E.2d 913, 72 Ga.App. 681.

Bar of part of claims
In action to foreclose laborer's lien, where it appeared that payment for each year's labor was due at the end of each year, plaintiff was barred by limitations on all claims except for labor performed during the year preceding the bringing of the action.—Green v. Ford, supra.

33. N.Y.—People v. Remington, 45 Hun 329, 10 N.Y.St. 310, affirmed 16 N.E. 680, 109 N.Y. 631.

34. Ga.—Bell v. J. B. Withers Cigar Co., 26 S.E.2d 260, 196 Ga. 48.
39 C.J. p 223 note 1.

Status as "laborer"
Although employment of person as pharmacist and manager of drug store and to do whatever was necessary to operate it might not necessarily mean he was not a "laborer" within laborer's lien statute, burden was on him to show that general services contemplated by his oral contract of employment were to consist mainly of manual labor, and not merely that services which he did perform consisted mainly of such labor.—Bell v. J. B. Withers Cigar Co., supra.

35. Cal.—Kuschel v. Hunter, 50 P. 397, 5 Cal.Unrep.Cas. 793.

36. Ga.—Sutton v. Bank of Oglethorpe, 126 S.E. 556, 33 Ga.App. 416.

37. Ga.—Sutton v. Bank of Oglethorpe, supra.

38. S.C.—Moody v. Dudley Lumber Co., 137 S.E. 141, 138 S.C. 478.

Irrelevancy
Evidence irrelevant to the issue is not admissible, as, for example, proof of the daily capacity of a sawmill to prove that a contract of labor at the given daily rate was made and that labor as alleged was performed thereunder.—Hines v. Beers, 74 Ga. 839.

39. Ga.—Martin v. Mills, 20 S.E.2d 621, 67 Ga.App. 424.

40. Ga.—Meunier v. Beck & Gregg Hardware Co., 182 S.E. 58, 52 Ga. App. 30.

41. Wash.—Hollingsworth v. Robe Lumber Co., 45 P.2d 614, 182 Wash. 74.

Signing as witness
Evidence held insufficient to show that members of logging crew sign-

§ 1042, that evidence on the whole agreeing with and supporting a certain hypothesis is sufficient evidence to warrant a finding or verdict conforming thereto has been applied to evidence in support of a finding that the parties to the contract had agreed that no wages should be allowed for the services forming the basis of the employee's claim,[42] or that claimant was a laborer,[43] or that the contract was as alleged in claimant's affidavit.[44]

c. Trial, Judgment, and Review

In proceedings relative to enforcement of an employee's wage lien, questions of fact ordinarily are for the jury. The judgment may be limited to a special judgment against the property and may include costs and attorney's fees in a proper case.

On the trial of proceedings relative to enforcement of an employee's wage lien, questions of fact[45] and conflicts in the evidence[46] are for the jury or trial judge. A finding in favor of a lien claimant must contain an express finding of every fact required by the statute to bring the claim within its terms,[47] and so, where the statute gives laborers paid by the week or month a lien, there must be a finding of an agreement to pay claimant by the week or month to justify a judgment in his favor,[48] since such fact cannot be added to the finding by presumption.[49]

Judgment and execution. The judgment in a foreclosure proceeding may be limited to a special judgment against the property,[50] and the appointment of a receiver may be necessary to sell the property and distribute the proceeds.[51] It has been held, where the property seized on foreclosure of a laborer's lien is not replevied, that a general judgment may not be returned,[52] but that the only judgment which may be rendered is one establishing the lien.[53] Judgment in favor of a lien plaintiff may be entered against a mortgagee and his agent, both parties defendant, where the parties stipulated that a judgment for claimant might be entered if his demurrer to defendants' answers is sustained and the demurrer is sustained.[54]

The execution issued on an affidavit may, under the particular statute, operate as a final process until arrested by a valid counter-affidavit raising an issue to be passed on by the proper tribunal, as discussed supra subdivision a of this section, and judgment for claimant is properly rendered on the replevy bond where defendant's counter-affidavit is not made and filed with the proper officer at the proper time,[55] and where it is shown that the replevy bond was made by defendant and left by him at the office of the proper officer for filing, even though the latter fails to do so, the court in such case ordering an entry of its filing nunc pro tunc.[56]

One having a privilege on personal property as an employee has been held entitled to have a writ of sequestration sustained, even though another person is entitled to payment by preference over him.[57]

The right to costs and attorney's fees in proceedings for enforcement of a wage lien will be determined by the provisions of the statutes as interpreted and applied in the light of the circumstances of the particular case,[58] an allowance for attorney's

ed contract with lumber company, which had effect of making crew independent contractors, as witnesses and not as parties, so that they would be entitled to lien for wages, notwithstanding contract.—Hollingsworth v. Robe Lumber Co., supra.

42. Wash.—Pesha v. Pratt, 191 P. 639, 111 Wash. 382.

43. Ga.—Floyd County Bank v. Tolbert, 111 S.E. 69, 28 Ga.App. 253.
39 C.J. p 223 note 7.

44. Ga.—Royal v. Grant, 63 S.E. 708, 5 Ga.App. 643.

45. Ga.—Bell v. J. B. Withers Cigar Co., 26 S.E.2d 260, 196 Ga. 48.

46. Ga.—Westbrook v. Chandler, 167 S.E. 322, 46 Ga.App. 288.

Evidence held sufficient to go to jury

In action to enforce a laborer's lien, evidence presented jury question as to whether person employing plaintiffs, in defendant's lumber yard, to peel and cut poles was defendant's foreman rather than an independent contractor employed by defendant, and whether agents of defendant guaranteed that defendant would pay plaintiffs for their labor.—Moss Tie & Timber Co. v. Blair, 138 S.W.2d 781, 200 Ark. 1190.

Evidence held insufficient to go to jury

Where property on which laborer sought to foreclose lien was claimed by third person as owner, evidence was insufficient to submit to jury an issue on the question of whether third person as owner had right or assumed right or control over employees of subcontractor named as defendant in the proceeding.—Farrar v. Joyce, 4 S.E.2d 708, 60 Ga. App. 675.

47. Cal.—Kuschel v. Hunter, 50 P. 397, 5 Cal.Unrep.Cas. 793.

48. Cal.—Kuschel v. Hunter, supra.

49. Cal.—Kuschel v. Hunter, supra.

50. Ga.—Barnett v. Tant, 42 S.E. 65, 115 Ga. 659.

51. Ind.—Small v. Hammes, 60 N. E. 342, 156 Ind. 556.

52. Ga.—Farrar v. Joyce, 4 S.E.2d 708, 60 Ga.App. 675—Downs v. Bedford, 146 S.E. 514, 39 Ga.App. 155.

53. Ga.—Downs v. Bedford, supra.

54. Iowa.—Goodenow v. Foster, 79 N.W. 288, 108 Iowa 508.

55. Ga.—Harvey v. Johnson, 111 S. E. 576, 28 Ga.App. 287.

56. Ga.—Harvey v. Johnson, supra.

57. La.—Bank of Commerce & Trust Co. v. Brown Cotton Oil Co., 136 So. 305, 173 La. 167.

58. Or.—In re Irwin, 91 P.2d 518, 162 Or. 221.
Wash.—Mattocks v. Gibbons, 162 P. 19, 94 Wash. 44.

Effect of improper inclusion of attorney's fees

(1) Sale foreclosing lien on mine property for watchman's wages was held not invalid because attorney's fees were improperly included in lien claim, where balance of sale proceeds was to be paid to owner, there was no fraud, and excess could be segregated, but claimant was required to reimburse employer for excess.—Seafoam Mines Corporation

fees being denied in some instances,[59] and allowed in others,[60] provided there is evidence as to what reasonable fees would be.[61] The purpose of statutes authorizing allowance of a reasonable amount as attorney's fees on foreclosure of a labor lien is to relieve the workman of that expense and impose it on the employer,[62] and the statutes contemplate that the award will suffice in event of an appeal.[63]

Review. A judgment will be affirmed where it is supported by some of the findings of fact, even though there are others to some extent conflicting, as, for example, a judgment in favor of a lien claimant on a finding that claimant worked for defendant, even though there is another finding that he worked for defendant and some one else.[64]

§ 150. Waiver and Forfeiture

An employee's wage lien may be lost by waiver or forfeiture.

The wage privilege or lien of an employee is subject to waiver,[65] as by acceptance of a contract lien, the terms of which are inconsistent with the statutory lien,[66] or the taking of a promissory note[67] or of a bill payable at a future date with interest,[68] although it has also been held that an employee does not generally waive his lien by accepting a promissory note without security, unless an intention to waive the lien is otherwise clearly manifested,[69] or by the acceptance and negotiation of a draft where he obtains a return of the draft and offers to surrender it.[70] Filing lien claim under laws relative to mechanic's and materialman's lien has been held not such an abandonment of his claims as will preclude plaintiff from asserting his right to a lien for labor done as provided for by other statutory provisions.[71]

Right to claim waiver. The question whether a claimant has waived his lien by extending the time of payment cannot be raised by one who has not shown by his pleading or in the evidence any right or title to the property in question.[72]

Forfeiture. The right to a lien for wages is not forfeited by proving a claim in excess of that really due[73] or by presenting a claim embracing other items than wages.[74]

7. Constitutional or Statutory Regulations and Penalties

a. *Minimum Wages and Overtime Pay*

§ 151(1). In General

The Fair Labor Standards Act provides a comprehensive legislative scheme for preventing the shipment in interstate commerce of goods produced in the United States under labor conditions with respect to wages and hours which fail to conform to standards set up by the act. Some state statutes provide for a minimum wage scale to be adopted respecting any "sweatshop occupation."

The Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, sets up a comprehensive legislative scheme for preventing the shipment in inter-

v. Vaughn, 53 P.2d 1166, 56 Idaho 342.

(2) Watchman claiming lien on mine property for wages held not guilty of conversion because attorney's fees were improperly included in lien claim and property was sold for more than enough to satisfy legal claim, where there was only one bid, debtor had notice of sale and failed to object and there was no showing that less than entire amount of property would have been sufficient to satisfy legal claim.—Seafoam Mines Corporation v. Vaughn, supra.

59. Cal.—Ackley v. Black Hawk Gravel Min. Co., 44 P. 330, 112 Cal. 42.
Wash.—Mattocks v. Gibbons, 162 P. 19, 94 Wash. 44.

Watchman foreclosing lien for wages on mine property held not entitled to include in lien claim amount of attorney's fees.—Seafoam Mines Corporation v. Vaughn, 53 P.2d 1166, 56 Idaho 342.

60. Okl.—Morley v. McCaskey, 272 P. 850, 134 Okl. 54—Morley v. McCaskey, 270 P. 1107, 134 Okl. 50.
39 C.J. p 224 note 18.

61. Fla.—Empire Drug Co. v. Smith, 83 So. 458, 78 Fla. 594.

Remittitur

A judgment in favor of the lien claimant erroneously allowing an attorney's fees without proof of the reasonableness of the amount allowed may be affirmed on entering a remittitur for the amount.—Empire Drug Co. v. Smith, supra.

62. Or.—In re Irwin, 91 P.2d 518, 162 Or. 221.

63. Or.—In re Irwin, supra.

64. Wash.—Howey v. Bingham, 44 P. 886, 14 Wash. 450.

65. La.—Bank of Commerce & Trust Co. v. Brown Cotton Oil Co., 136 So. 305, 173 La. 167.
Assignor's waiver as affecting assignee see supra § 146.

66. Me.—Howe v. Wiscasset Brick & Pottery Co., 3 A. 650, 78 Me. 227.

67. N.Y.—People v. Remington, 45 Hun 329, 10 N.Y.St. 310, affirmed 16 N.E. 680, 109 N.Y. 631.

68. Pa.—Silver v. Williams, 17 Serg. & R. 292.

69. N.J.—Delaware, L. & W. R. Co. v. Oxford Iron Co., 33 N.J.Eq. 192.
Ohio.—In re Minor Fire Clay Co., 9 Ohio S. & C. P. 627, 7 Ohio N. P. 557.

70. Ga.—Balkcom v. Empire Lumber Co., 17 S.E. 1020, 91 Ga. 651, 44 Am.S.R. 58.

71. Okl.—Morley v. McCaskey, 272 P. 850, 134 Okl. 54—Morley v. McCaskey, 270 P. 1107, 134 Okl. 50.

72. Tex.—Carthage Ice & Light Co. v. Roberts, Civ.App., 166 S.W. 12.
39 C.J. p 223 note 91.

73. N.J.—Delaware, L. & W. R. Co. v. Oxford Iron Co., 33 N.J.Eq. 192.

74. N.J.—Delaware, L. & W. R. Co. v. Oxford Iron Co., supra.

state commerce of certain products and commodities produced in the United States under labor conditions with respect to wages and hours which fail to conform to standards set up by the statute.[75] It prevents the use of interstate commerce as the means of competition in the distribution of goods so produced and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states.[76] The statute also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the statute or within an industry, in accordance with specified standards, by an administrator acting in collaboration with "industry committees" appointed by him.[77] The statute was written in the interest of the employee[78] and is remedial in nature.[79]

The Fair Labor Standards Act constitutes a dec-

75. U.S.—Southland Gasoline Co. v. Bayley, Ark. & Md., 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244—U. S. v. Darby, Ga., 61 S.Ct. 451, 312 U.S. 126, 657, 85 L.Ed. 609, 132 A.L.R. 1430—Walling v. Peoples Packing Co., C.C.A.Okl., 132 F.2d 236, certiorari denied Peoples Packing Co. v. Walling, 63 S.Ct. 831, 318 U.S. 774, 87 L.Ed. 1144—Hamlet Ice Co. v. Fleming, C.C.A. N.C., 127 F.2d 165, certiorari denied 63 S.Ct. 29, 317 U.S. 634, 87 L.Ed. 511—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed Overnight Motor Transp. Co. v. Missel, 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Jackson v. Northwest Airlines, D.C.Minn., 70 F.Supp. 501—Lofther v. First Nat. Bank of Chicago, D.C.Ill., 48 F. Supp. 692, affirmed, C.C.A., 138 F. 2d 299—McNorrill v. Gibbs, D.C. S.C., 45 F.Supp. 363—Fleming v. American Stores Co., D.C.Pa., 42 F.Supp. 511, modified on other grounds, C.C.A., 133 F.2d 840—Fleming v. Goldblatt Bros., D.C. Ill., 39 F.Supp. 701, modified on other grounds, C.C.A., Walling v. Goldblatt Bros., 128 F.2d 778, certiorari denied 63 S.Ct. 528, 318 U. S. 757, 87 L.Ed. 1130—Abadie v. Cudahy Packing Co. of Louisiana, D.C.La., 37 F.Supp. 164.

Tenn.—Robinson v. Massachusetts Mut. Life Ins. Co., 158 S.W.2d 441.

Operation and effect of provisions as to minimum wages and overtime pay see infra §§ 151 (24)–151 (29).

Statutes limiting hours of service as requiring payment of extra compensation for working excessive hours see infra § 155.

76. U.S.—U. S. v. Darby, Ga., 61 S. Ct. 451, 312 U.S. 126, 657, 85 L.Ed. 609, 132 A.L.R. 1430—Walling v. Goldblatt Bros., C.C.A.Ill., 128 F. 2d 778, certiorari denied 63 S.Ct. 528, 318 U.S. 757, 87 L.Ed. 1130—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed Overnight Motor Transp. Co. v. Missel, 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Davis v. Rockton & R. R. R., D.C.S.C., 65 F.Supp. 67—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363—Fleming v. American Stores Co., D.C.Pa., 42 F.Supp. 511, modified on other grounds, C. C.A., 133 F.2d 840.

Ark.—Couch v. Ward, 168 S.W.2d 822, 205 Ark. 308.

Okl.—Brooks Packing Co. v. Henry, 137 P.2d 918, 192 Okl. 533.

Tenn.—Robinson v. Massachusetts Mut. Life Ins. Co., 158 S.W.2d 441.

Public policy

The motive and purpose of the provision of the Fair Labor Standards Act, prohibiting the shipment in interstate commerce of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to requirements of the act, is to make effective the congressional conception of "public policy" that interstate commerce should not be made the instrument of competition which is injurious to commerce and to the states from and to which the commerce flows in the distribution of goods produced under substandard labor conditions.—Chapman v. Home Ice Co., D.C.Tenn., 43 F.Supp. 424, reversed on other grounds, C.C.A., 136 F.2d 353, certiorari denied 64 S. Ct. 72, 320 U.S. 761, 88 L.Ed. 454.

77. U.S.—U. S. v. Darby, Ga., 61 S. Ct. 451, 312 U.S. 126, 657, 85 L.Ed. 609, 132 A.L.R. 1430.

Fixing of minimum wage by wage order see infra § 151 (32).

78. U.S.—Smith v. Day & Zimmerman, D.C.Iowa, 65 F.Supp. 209—Pickett v. Union Terminal Co., D. C.Tex., 33 F.Supp. 244, reversed on other grounds, C.C.A., Union Terminal Co. v. Pickett, 118 F.2d 328, certiorari denied 61 S.Ct. 1115, 313 U.S. 591, 85 L.Ed. 1546, vacated on other grounds 62 S.Ct. 55, 314 U.S. 704, 86 L.Ed. 563, affirmed 62 S. Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

Increasing compensation

The Federal Fair Labor Standards Act manifests intent of congress to benefit employees by increasing their wages rather than by diminishing their compensation in event of injury.—Black Mountain Corporation v. Adkins, 133 S.W.2d 900, 280 Ky. 617.

79. U.S.—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, Ala., 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—Armstrong Co. v. Walling, C.C.A.Mass., 161 F.2d 515—Walling v. National Ice & Fuel Corp., C.C.A.Ill., 158 F.2d 28—Walling v. Rutherford Food Corp., C.C.A.Kan., 156 F.2d 513—West Kentucky Coal Co. v. Walling, C.C.A.Tenn., 153 F.2d 582—Walling v. Comet Carriers, C.C.A. N.Y., 151 F.2d 107, certiorari dismissed Comet Carriers v. Walling, 66 S.Ct. 1007, 328 U.S. 819, 90 L. Ed. 1600—Walling v. Consumers Co., C.C.A.Ill., 149 F.2d 626—Phillips v. Star Overall Dry Cleaning Laundry Co., C.C.A.N.Y., 149 F.2d 416, certiorari denied All Service Laundry Corp. v. Phillips, 66 S. Ct. 677, 327 U.S. 780, 90 L.Ed. 1008, rehearing denied 66 S.Ct. 815, 327 U.S. 817, 90 L.Ed. 1040—Schmidtke v. Conesa, C.C.A.Puerto Rico, 141 F. 2d 634—Walling v. Mutual Wholesale Food & Supply Co., C.C.A. Minn., 141 F.2d 331—Walling v. Cohen, C.C.A.Pa., 140 F.2d 453—Conley v. Valley Motor Transit Co., C. C.A.Ohio, 139 F.2d 692—Lofther v. First Nat. Bank of Chicago, C.C.A. Ill., 138 F.2d 299—Ralph Knight, Inc. v. Mantel, C.C.A., 135 F.2d 514—Richardson v. James Gibbons Co., C.C.A.Md., 132 F.2d 627, affirmed 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616—Consolidated Timber Co. v. Womack, C.C.A.Or., 132 F.2d 101—Bayley v. Southland Gasoline Co., C.C.A.Ark., 131 F.2d 412, reversed on other grounds Southland Gasoline Co. v. Bayley, 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244—Miller Hatcheries v. Boyer, C.C.A.Iowa, 131 F.2d 283—Calaf v. Gonzalez, C.C.A.Puerto Rico, 127 F.2d 934—Carleton Screw Products Co. v. Fleming, C.C.A.Minn., 126 F.2d 537, certiorari denied 63 S.Ct. 54, 317 U.S. 634, 87 L.Ed. 511—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed Overnight Motor Transp. Co. v. Missel, 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317

laration of public policy respecting hours of employment and rates of pay of employees engaged in interstate commerce[80] and implements such policy through remedies unknown to, and often in derogation of, the common law.[81] It was passed not only to establish individual private rights but to declare solemnly on the part of the government that as a matter of public policy it is interested in seeing that its citizens are protected in such rights.[82] The primary intent is to protect certain groups of the population from substandard wages and excessive hours which endanger the national health and well-being and the free flow of goods in interstate commerce,[83] that is, to aid the unprotected, unorganized,

U.S. 706, 87 L.Ed. 563—Fleming v. Palmer, C.C.A.Puerto Rico, 123 F.2d 749, certiorari denied Caribbean Embroidery Co-op. v. Fleming, 62 S.Ct. 942, 316 U.S. 662, 86 L.Ed. 1739—Bowie v. Gonzalez, C. C.A.Puerto Rico, 117 F.2d 11—Fleming v. Hawkeye Pearl Button Co., C.C.A.Iowa, 113 F.2d 52—Pfoser v. Federal Cartridge Co., D.C. Minn., 70 F.Supp. 701—Walling v. Armstrong Co., D.C.Mass., 68 F. Supp. 870—Walling v. Northwestern-Hanna Fuel Co., D.C.Minn., 67 F.Supp. 833—Davis v. Rockton & R. R. R., D.C.S.C., 65 F.Supp. 67—Walling v. Southwestern Greyhound Lines, D.C.Mo., 65 F.Supp. 52—Rigney v. Wilson & Co., D.C. W.Va., 61 F.Supp. 801—Walling v. Peacock Corp., D.C.Wis., 58 F. Supp. 880—Aulen v. Triumph Explosive, D.C.Md., 58 F.Supp. 4—Fellabaum v. Swift & Co., D.C. Ohio, 54 F.Supp. 353—Walling v. Home Loose Leaf Tobacco Warehouse Co., D.C.Ky., 51 F.Supp. 914—International Longshoremen's Ass'n, Local 815 v. National Terminals Corporation, D.C.Wis., 50 F.Supp. 26, affirmed, C.C.A., Cabunac v. National Terminals Corporation, 139 F.2d 853—Abram v. San Joaquin Cotton Oil Co., D.C. Cal., 49 F.Supp. 393—Lofther v. First Nat. Bank of Chicago, D.C. Ill., 48 F.Supp. 692, affirmed, C.C. A., 138 F.2d 299—Lorenzetti v. American Trust Co., D.C.Cal., 45 F.Supp. 128—Fleming v. American Stores Co., D.C.Pa., 42 F.Supp. 511, modified on other grounds, C.C.A., 133 F.2d 840—Boyer v. Miller Hatcheries, D.C.Iowa, 42 F.Supp. 135, reversed on other grounds, C. C.A., Miller Hatcheries v. Boyer, 131 F.2d 283—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, D.C.Ala., 40 F.Supp. 4, modified on other grounds, C.C.A., 135 F.2d 320, rehearing denied 137 F. 2d 176, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—Collins v. Kidd, D.C.Tex., 38 F. Supp. 634, reversed on other grounds, C.C.A., Collins v. Kidd Dairy & Ice Co., 132 F.2d 79—Lowrimoore v. Union Bag & Paper Corporation, D.C.Ga., 30 F. Supp. 647, affirmed, C.C.A., Gall v. Union Bag & Paper Corporation, 116 F.2d 27, certiorari denied 61 S.Ct. 837, 313 U.S. 559, 85 L.Ed. 1519—Belanger v. Hopeman Bros., D.C.Me., 6 F.R.D. 459.

Iowa.—Umthun v. Day & Zimmerman, 16 N.W.2d 258, 235 Iowa 293.

La.—Lyons v. H. K. Ferguson Co., App., 16 So.2d 587.

Miss.—Southern Package Corporation v. Walton, 11 So.2d 912, 194 Miss. 573, reversed on other grounds 64 S.Ct. 320, 320 U.S. 540, 88 L.Ed. 298.

N.Y.—Stoike v. First Nat. Bank of City of New York, 36 N.Y.S.2d 390, 264 App.Div. 585, reversed on other grounds 48 N.E.2d 482, 290 N.Y. 195, certiorari denied 64 S. Ct. 50, 320 U.S. 762, 88 L.Ed. 455—Creno v. Caruso Produce Co., 60 N.Y.S.2d 134—Schneider v. Sports Vogue, 35 N.Y.S.2d 341.

Or.—Fullerton v. Lamm, 163 P.2d 941, 177 Or. 655, rehearing denied 165 P.2d 63, 177 Or. 655.

Tenn.—S. H. Robinson & Co. v. Larue, 156 S.W.2d 432, 178 Tenn. 197.

Wash.—Cotton v. Weyerhaeuser Timber Co., 147 P.2d 299, 20 Wash. 2d 300.

80. U.S.—Timberlake v. Day & Zimmerman, D.C.Iowa, 49 F.Supp. 28—McNorrill v. Gibbs, D.C.S.C., 45 F.Supp. 363.

N.Y.—Steiner v. Pleasantville Constructors, 46 N.Y.S.2d 120, 181 Misc. 798, modified on other grounds 49 N.Y.S.2d 42, 182 Misc. 66, affirmed 54 N.Y.S.2d 700, first case, 269 App.Div. 738.

81. U.S.—Walling v. American Needlecrafts, C.C.A.Ky., 139 F.2d 60.

82. U.S.—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009.

83. U.S.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U. S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005—Dize v. Maddrix, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Fleming v. Warshawsky & Co., C.C.A.Ill., 123 F.2d 622—Walling v. McKay, D.C.Neb., 70 F.Supp. 160—Walling v. Bank of Waynesboro, Ga., D.C. Ga., 61 F.Supp. 384—Plourde v. Massachusetts Cities Realty Co., D.C.Mass., 47 F.Supp. 668—Hutchinson v. William C. Barry, Inc., D. C.Mass., 44 F.Supp. 829—Maddox v. Jones, D.C.Ala., 42 F.Supp. 35—Fleming v. Cudahy Packing Co., D.C.Cal., 41 F.Supp. 910—Wilkinson v. Noland Co., D.C.Va., 40 F. Supp. 1009.

N.J.—Sermond v. Lotz, 47 A.2d 432, 24 N.J.Misc. 182.

N.Y.—Hurewitz v. Henry Moss & Co., 49 N.Y.S.2d 106.

Similar statements of purpose

(1) Generally.

U.S.—Walling v. Portland Terminal Co., Me., 67 S.Ct. 639, 330 U.S. 148, 91 L.Ed. —— —Walling v. Harris, D.C.Tenn., 68 F.Supp. 146—Walling v. Jacksonville Terminal Co., D.C. Fla., 55 F.Supp. 302, affirmed, C.C. A., 148 F.2d 768—Cushway v. Stork Engineering Co., D.C.Mich., 51 F.Supp. 568, affirmed, C.C.A., 142 F.2d 463—Plourde v. Massachusetts Cities Realty Co., D.C. Mass., 47 F.Supp. 668—Tolliver v. Cudahy Packing Co., D.C.Tenn., 39 F.Supp. 337—Fleming v. Tidewater Optical Co., D.C.Va., 35 F.Supp. 1015.

Conn.—Swiss Cleaners v. Danaher, 27 A.2d 806, 129 Conn. 338.

Okl.—Ile v. Travis Oil Corp., 164 P.2d 998, 196 Okl. 332.

Tex.—D. & L. Production Co. v. Cuniff, Civ.App., 165 S.W.2d 933, error dismissed.

(2) The purpose is to eliminate labor conditions detrimental to the general welfare of workers.—Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, C.C.A.Ala., 135 F.2d 320, rehearing denied 137 F.2d 176, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596.

(3) The purpose is to establish minimum wages and maximum hours.

U.S.—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616—Lynch v. Vincent, D.C.Mo., 55 F. Supp. 44.

Ohio.—Floyd v. Du Bois Soap Co., App., 38 N.E.2d 919, reversed on other grounds 41 N.E.2d 393, 139 Ohio St. 520, reversed on other grounds 63 S.Ct. 159, 317 U.S. 596, 87 L.Ed. 488.

Okl.—Skelly Oil Co. v. Jackson, 148 P.2d 182, 194 Okl. 183.

(4) The statute is intended to place a floor under wages and a ceiling over hours of employment.

U.S.—White v. Witwer Grocer Co., C.C.A.Iowa, 132 F.2d 108.

and lowest paid of the nation's working population, who lack sufficient bargaining power to secure for themselves a minimum subsistence wage.[84] It has been held that the statute is also intended to promote the reduction of working hours[85] and the spreading of employment[86] by placing financial pressure on employers through overtime pay requirements;[87] but it has been held, on the other hand, that the statute is primarily concerned with the elimination of substandard wages, regardless of the number of hours worked or the effect of fatigue on workers,[88] and that overtime pay requirements are designed to compensate employees for the burden of a work week in excess of the hours fixed by the statute.[89] The statute is also designed to eliminate labor disputes[90] and to promote economic stability through increased purchasing power.[91]

The statutory purpose is to establish a uniform national policy applicable to all industries[92] and to fix wages, not for particular individuals and companies, but industry-wide, on a basis which the industry can stand, and under conditions which, if

N.M.—Wilson Oil Co. v. Hardy, 164 P.2d 209, 49 N.M. 337, 162 A.L.R. 292.

(5) The main purpose is to maintain a decent standard of living.—Fleming v. A. H. Belo Corporation, C.C.A.Tex., 121 F.2d 207, affirmed Walling v. A. H. Belo Corporation, 62 S.Ct. 1223, 16 U.S. 624, 86 F. 1716, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Fleming v. Stone, D.C.Ill., 41 F.Supp. 1000, reversed on other grounds, C.C.A., Walling v. Stone, 131 F.2d 461.

Social progress

The Fair Labor Standards Act is designed to extend the frontiers of social progress by insuring to all able-bodied working men and women a fair day's pay for a fair day's work.

U.S.—A. H. Phillips, Inc., v. Walling, Mass., 65 S.Ct. 807, 324 U.S. 490, 89 L.Ed. 1095, 157 A.L.R. 876—Walling v. Snyder Min. Co., D.C. Minn., 66 F.Supp. 725.

Pa.—Say v. Prior Oil Co., 43 A.2d 417, 157 Pa.Super. 629.

Statutory declaration of purpose

Under provision of Fair Labor Standards Act that purpose of act is to eliminate as rapidly as practicable in industries engaged in commerce or in production of goods for commerce, labor conditions detrimental to maintenance of minimum standard of living necessary for the health, efficiency and general well-being of workers, the words "labor conditions" comprehend both wages and hours, and maintenance of "minimum standard of living" embraces both problem of eliminating starvation wages and problem of cutting down excessive hours of labor.—Bumpus v. Continental Baking Co., C.C.A.Tenn., 124 F.2d 549, 140 A.L.R. 1258, certiorari denied Continental Baking Co. v. Bumpus, 62 S.Ct. 1305, 316 U.S. 704, 86 L.Ed. 1772.

84. U.S.—D. A. Schulte, Inc., v. Gangi, N.Y., 66 S.Ct. 925, 328 U.S. 108, 90 L.Ed. 1114, 167 A.L.R. 208—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005—Dize v. Maddrix, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Davis v. Rockton & R. R. R., D.C.S.C., 65 F.Supp. 67.

Ark.—Duke v. Helena-Glendale Ferry Co., 159 S.W.2d 74, 203 Ark. 865, 139 A.L.R. 1404.

Reinforcing bargaining power

The two major purposes of the statute are to reinforce employee bargaining power concerning wages by prohibiting wage rates below a certain level and reinforce employee bargaining power concerning hours of labor by exerting financial pressure on the employer to limit hours to a certain level.—Murray v. Noblesville Milling Co., C.C.A.Ind., 131 F.2d 470, certiorari denied 63 S.Ct. 832, 318 U.S. 775, 87 L.Ed. 1145.

85. U.S.—Robertson v. Alaska Juneau Gold Min. Co., C.C.A.Cal., 157 F.2d 876.

Ky.—Harned v. Atlas Powder Co., 192 S.W.2d 378, 301 Ky. 517.

Tex.—D. & L. Production Co. v. Cuniff, Civ.App., 165 S.W.2d 933, error dismissed.

Va.—Tidewater Optical Co. v. Wittkamp, 19 S.E.2d 897, 179 Va. 545.

86. U.S.—Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, Va., 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007—Southland Gasoline Co. v. Bayley, Ark. & Md., 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244—Robertson v. Alaska Juneau Gold Min. Co., C.C.A.Cal., 157 F.2d 876—Shepler v. Crucible Fuel Co., C.C.A.Pa., 140 F.2d 371—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed Overnight Motor Transp. Co. v. Missel, 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

Reduction of unemployment

One of the purposes of the statute is to reduce unemployment without financially hurting industry or its employees.—Williams v. General Mills, D.C.Ohio, 39 F.Supp. 849, reversed on other grounds, C.C.A., 132 F.2d 367, 144 A.L.R. 1371.

87. U.S.—Walling v. Helmerich & Payne, Okl., 65 S.Ct. 11, 323 U.S. 37, 89 L.Ed. 29—Murray v. Noblesville Milling Co., C.C.A.Ind., 131 F.2d 470, certiorari denied 63 S.Ct. 832, 318 U.S. 775, 87 L.Ed. 1145.

Okl.—Ille v. Travis Oil Corp., 164 P.2d 998, 196 Okl. 332.

88. U.S.—Walling v. Comet Carriers, C.C.A.N.Y., 151 F.2d 107, certiorari dismissed Comet Carriers v. Walling, 66 S.Ct. 1007, 328 U.S. 819, 90 L.Ed. 1600.

89. U.S.—Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, Va., 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007—Walling v. Helmerich & Payne, Okl., 65 S.Ct. 11, 323 U.S. 37, 89 L.Ed. 29—Overnight Motor Transp. Co. v. Missel, 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682—White v. Witwer Grocer Co., C.C.A.Iowa, 132 F.2d 108—Fleming v. A. H. Belo Corporation, C.C.A.Tex., 121 F.2d 207, affirmed Walling v. A. H. Belo Corporation, 162 S.Ct. 1223, 316 U.S. 624, 86 L.Ed. 1716, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Fleming v. Stone, D.C. Ill., 41 F.Supp. 1000, reversed on other grounds, C.C.A., Walling v. Stone, 131 F.2d 461.

Ky.—Black Mountain Corporation v. Adkins, 133 S.W.2d 900, 280 Ky. 617.

Okl.—Ille v. Travis Oil Corp., 164 P.2d 998, 196 Okl. 332.

90. U.S.—Fleming v. Cudahy Packing Co., D.C.Cal., 41 F.Supp. 910.

91. U.S.—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed Overnight Motor Transp. Co. v. Missel, 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

92. U.S.—Walling v. Consumers Co., C.C.A.Ill., 149 F.2d 626.

classification is required in the industry, will not give one section of it a competitive advantage over another.[93] It is not the policy to put small concerns out of business but to correct and eliminate designated conditions in particular industries without substantially curtailing employment or earning power.[94] The statute protects employees against extremely low wages and sudden changes therein, and at the same time protects the employer under a plan which would justify him in expecting continuous service and the benefit of experienced and satisfied employees.[95]

Congress intended to achieve a national uniform policy of guaranteeing compensation for all work or employment engaged in by employees covered by the statute,[96] and not to codify or perpetuate those customs and contracts which allowed an employer to claim all of an employee's time while compensating him for only a part of it.[97] The statute is not intended to interfere with methods and practices by which compensation is paid,[98] and its purpose is not to create new wage liabilities, but, where a wage liability exists, to measure it by standards fixed by law.[99] The statutory intent is that both employee bargaining power and the statute shall influence hours of work, but that only employee bargaining power shall influence wages as long as they are equal to or above the statutory minimum.[1]

As a regulation of interstate commerce. The Fair Labor Standards Act is a statute regulating interstate commerce, in a matter of national concern,[2] but its purpose is not so much to regulate interstate commerce as such as it is, through the exercise of legislative power, to prohibit the shipment of goods in interstate commerce if they are produced under substandard labor conditions.[3] It has been held that the statute extends federal control in the field of working conditions throughout the farthest reaches of the channels of interstate commerce,[4] but it is not intended to be coextensive with the limits of the power of congress over commerce[5] and it does not manifest an intent to extend the

93. U.S.—Columbus & G. Ry. Co. v. Administrator of Wage and Hour Division, U. S. Department of Labor, C.C.A.5, 126 F.2d 136.

94. U.S.—Walling v. Plymouth Mfg. Corporation, D.C.Ind., 46 F.Supp. 433, affirmed, C.C.A., 139 F.2d 178, certiorari denied 64 S.Ct. 1144, 322 U.S. 741, 88 L.Ed. 1574.

95. U.S.—Green Head Bit & Supply Co. v. Hendricks, D.C.Okl., 49 F. Supp. 698.

96. U.S.—Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, Va., 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007.

Fruits of toil

The Fair Labor Standards Act is intended to secure to workmen the fruits of their toil and exertion.—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, Ala., 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S. Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596.

97. U.S.—Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, Va., 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, Ala., 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—Johnson v. Dierks Lumber & Coal Co., C.C.A.Ark., 130 F.2d 115.

98. U.S.—Southern Ry. Co. v. Black, C.C.A.N.C., 127 F.2d 280.

99. U.S.—Walling v. Jacksonville Terminal Co., C.C.A.Fla., 148 F.2d 768—Bowman v. Pace Co., C.C.A. Fla., 119 F.2d 858—Dugas v. Nashua Mfg. Co., D.C.N.H., 62 F.Supp. 846, appeal dismissed, C.C.A., 154 F.2d 655—Walling v. Jacksonville Terminal Co., D.C.Fla., 55 F.Supp. 302, affirmed, C.C.A., 148 F.2d 768—Walling v. Todd, D.C.Pa., 52 F. Supp. 62, motion denied 3 F.R.D. 490.

Existing relationships

The purpose of Fair Labor Standards Act was to apply the new law to existing relationships, and not to impose on one person a wage liability to another to whom first person had not previously been liable for wages.—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363.

1. U.S.—Murray v. Noblesville Milling Co., C.C.A.Ind., 131 F.2d 470, certiorari denied 63 S.Ct. 832, 318 U.S. 775, 87 L.Ed. 1145.

2. U.S.—Davis v. Rockton & R. R. R., D.C.S.C., 65 F.Supp. 67.

Application of statute as restricted to employees engaged in commerce or in the production of goods for commerce see infra § 151 (6)–151 (9).

3. U.S.—Roland Electrical Co. v. Walling, Md., 66 S.Ct. 413, 326 U. S. 657, 90 L.Ed. 383.

Wyo.—Atwater v. Gaylord, 184 P.2d 437.

4. U.S.—Overstreet v. North Shore Corporation, Fla., 63 S.Ct. 494, 318 U.S. 125, 87 L.Ed. 656—New Mexico Public Service Co. v. Engel, C. C.A.N.M., 145 F.2d 636—Walling v. Mutual Wholesale Food & Supply Co., C.C.A.Minn., 141 F.2d 331.

Broadened conception

The statute has greatly broadened the conception of "interstate commerce" and extended its comprehension of the instrumentalities employed as a means of removing burdensome inequalities and as a measure of social justice, striking down court opinions reflecting a narrower view and hurdling judicial abstractions thought defeative of its purpose.—Horton v. Wilson & Co., 25 S. E.2d 437, 223 N.C. 71.

5. U.S.—10 East 40th St. Bldg. v. Callus, N.Y., 65 S.Ct. 1227, 325 U.S. 578, 89 L.Ed. 1806, 161 A. L.R. 1263—E. C. Schroeder Co. v. Clifton, C.C.A.Okl., 153 F.2d 385, certiorari denied 66 S.Ct. 1351, 1353, 328 U.S. 858, 90 L.Ed. 1629, rehearing denied 67 S.Ct. 33, 329 U.S. 821, 91 L.Ed. —— —Walling v. Amidon, C.C.A.Colo., 153 F.2d 159—Rucker v. First National Bank of Miami, Okl., C.C.A.Okl., 138 F. 2d 699, certiorari denied 64 S.Ct. 524, 321 U.S. 769, 88 L.Ed. 1065—Baloc v. Foley Bros., D.C.Minn., 68 F.Supp. 533—Gillette v. Rockland Coaches, D.C.N.Y., 50 F.Supp. 617, affirmed, C.C.A., 142 F.2d 616—Ouendag v. Gibson, D.C.Mich., 49 F.Supp. 379.

Ark.—Couch v. Ward, 168 S.W.2d 822, 205 Ark. 308.

Mo.—Fountain v. St. Joseph Water Co., 180 S.W.2d 28, 352 Mo. 817.

N.Y.—In re New York Title & Mortgage Co. (Series N-103), 39 N.Y.S. 2d 893, 179 Misc. 789.

Local business

Congress did not, in the enactment of the Fair Labor Standards Act, intend to exert the full measure of

regulatory powers of the federal government to merely incidental and negligible transactions or to embrace effects on interstate commerce which are indirect and remote.[6]

The Portal-to-Portal Act of 1947, 29 U.S.C.A. §§ 251–262, to the extent that it purports to modify rights and obligations created by the Fair Labor Standards Act, was designed to promote the public interest by the exercise of a power akin to the police power of a state.[7]

State statutes. Some state statutes provide for a minimum wage scale to be adopted and to be put in effect as regards any "sweatshop occupation," that is, any business or occupation which pays to its employees an unfair and oppressive scale of wage.[8] The purpose of such a statute is to protect employees against oppression by their employers in paying them too small a wage.[9]

§ 151(2). Validity

Generally congress under its power to regulate interstate commerce may regulate the wages to be paid by employers engaged in such commerce. Some state statutes regulating wages have been held valid but other statutes have been held invalid.

Although it has been broadly stated that congress has no power to fix the price of labor,[10] as a general rule congress under its power to regulate interstate commerce may regulate the wages to be paid by employers engaged in such commerce.[11] Accordingly the Fair Labor Standards Act, 29 U.S. C.A. § 201 et seq, fixing minimum wages and prescribing additional compensation for hours worked in excess of a specified number per week has been held valid,[12] and the Portal-to-Portal Pay Act of 1947, 29 U.S.C.A. §§ 251–262, to the extent that it

its commerce power but instead proposed to leave local business to the protection of the state, thus requiring observation of limitation that courts are not free to absorb by judicial process essentially local activities which congress in the exercise of its judgment did not see fit expressly or by fair implication to bring within scope of the act.—E. C. Schroeder Co. v. Clifton, C.C.A.Okl., 153 F.2d 385, certiorari denied 66 S. Ct. 1351, 1353, 328 U.S. 858, 90 L.Ed. ——, rehearing denied 67 S.Ct. 33, 329 U.S. 821, 91 L.Ed. ——.

6. Ark.—Couch v. Ward, 168 S.W. 2d 822, 205 Ark. 308.

7. U.S.—Darr v. Mutual Life Ins. Co. of N. Y., D.C.N.Y., 72 F.Supp. 752.

8. Conn.—Swiss Cleaners v. Danaher, 27 A.2d 806, 129 Conn. 338.

9. Conn.—Swiss Cleaners v. Danaher, supra.

10. N.Y.—Cline v. Consumers' Co-op. Gas & Oil Co., 274 N.Y.S. 362, 152 Misc. 653.

Delegation of legislative power to prescribe minimum wages see Constitutional Law § 138 b (25).

Validity of minimum wage statutes under:

Due process clause see Constitutional Law § 689.

Equal protection of law clause see Constitutional Law § 515.

Liberty to contract clause see Constitutional Law § 211.

11. U.S.—Morgan v. Atlantic Coast Line R. Co., D.C.Ga., 32 F.Supp. 617—Andrews v. Montgomery Ward & Co., D.C.Ill., 30 F.Supp. 380, affirmed, C.C.A., Fleming v. Montgomery Ward & Co., 114 F.2d 384, certiorari denied Montgomery Ward & Co. v. Fleming, 61 S.Ct. 71, 311 U.S. 690, 85 L.Ed. 446.

12. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L. Ed. 624—U. S. v. Darby, Ga., 61 S.Ct. 451, 312 U.S. 126, 657, 85 L.Ed. 609, 132 A.L.R. 1430—Walling v. Peoples Packing Co., C.C.A. Okl., 132 F.2d 236, certiorari denied Peoples Packing Co. v. Walling, 63 S.Ct. 831, 318 U.S. 774, 87 L.Ed. 1144—Carleton Screw Products Co. v. Fleming, C.C.A.Minn., 126 F.2d 537, certiorari denied 63 S.Ct. 54, 317 U.S. 634, 87 L.Ed. 511—Florida Fruit & Produce v. U. S., C.C.A.Fla., 117 F.2d 506—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846—Application of Walling, D.C.N.J., 49 F.Supp. 659, reversed on other grounds, C.C.A., Walling v. News Printing Co., 148 F.2d 57, affirmed News Printing Co. v. Walling, 66 S.Ct. 494, 326 U.S. 186, 90 L.Ed. 614, 166 A.L.R. 531—Sunshine Mining Co. v. Carver, D.C.Idaho, 41 F.Supp. 60—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., Atlantic Co. v. Walling, 131 F.2d 518—Magann v. Long's Baggage Transfer Co., D. C.Va., 39 F.Supp. 742—Fleming v. Arsenal Bldg. Corporation, D.C.N. Y., 38 F.Supp. 207, reversed on other grounds, C.C.A., 125 F.2d 278, affirmed Arsenal Bldg. Corporation v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Fleming v. A. B. Kirschbaum Co., D.C. Pa., 38 F.Supp. 204, affirmed, C.C. A., 124 F.2d 567, affirmed Kirschbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Fleming v. Wood-Fruitticher Grocery Co., D.C.Ala., 37 F.Supp. 947—Berger v. Clouser, D.C.Pa., 36 F.Supp. 168—Jacobs v. Peavy-Wilson Lumber Co., D.C.La., 33 F.Supp. 206—U. S. v. Feature Frocks, D.C.Ill., 33 F. Supp. 206—U. S. v. Walters Lumber Co., D.C.Fla., 32 F.Supp. 65.

Ky.—Harrison v. Herzig Building & Supply Co., 161 S.W.2d 908, 290 Ky. 445.

N.Y.—Brennan v. Community Service Soc. of New York, 45 N.Y.S. 2d 825, 181 Misc. 637—Garrity v. Bagold Corporation, 42 N.Y.S.2d 257, 180 Misc. 120, modified on other grounds 46 N.Y.S.2d 637, 267 App.Div. 353—Atkocus v. Terker, 30 N.Y.S.2d 628.

Ohio.—Floyd v. Du Bois Soap Co., App., 38 N.E.2d 919, reversed on other grounds 41 N.E.2d 393, 139 Ohio St. 520, reversed on other grounds 63 S.Ct. 159, 317 U.S. 596, 87 L.Ed. 488.

Tex.—Camfield v. West Texas Utilities Co., Civ.App., 170 S.W.2d 552, error refused.

As applied to particular businesses or employees

(1) Building service employees of large office and loft building, separate units of which were rented to tenants who were engaged in the production of goods for interstate commerce.—Walsh v. 515 Madison Avenue Corporation, 42 N.Y.S.2d 262, 181 Misc. 219, affirmed 45 N.Y.S.2d 927, 267 App.Div. 756, affirmed 59 N.E.2d 183, 293 N.Y. 826.

(2) Employers dealing in the production or sale of commodities for transmission in interstate commerce.—U. S. v. Walters Lumber Co., D.C. Fla., 32 F.Supp. 65.

(3) Interstate carriers.—Morgan v. Atlantic Coast Line R. Co., D.C. Ga., 32 F.Supp. 617.

(4) Newspapers.

U.S.—Mabee v. White Plains Pub. Co., N.Y., 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607—Oklahoma Press Pub. Co. v. Walling, N. J. & Okl.,

modifies rights and obligations created by the Fair Labor Standards Act, has also been held valid.[13] It has also been held, in determining the validity of the Adamson Act of 1916, 39 U.S.St. at L. p 721, that, in an emergency arising from a nation-wide dispute between railroad companies engaged in interstate commerce and their employees over wages, in which a general strike and grave loss and suffering are imminent because the disputants are unable to agree, congress has the power to prescribe a standard of minimum wages not confiscatory in its effects, but obligatory on both parties, to be enforced for a reasonable time.[14]

Numerous decisions have sustained the validity of particular provisions of the Fair Labor Standards Act, as with respect to exemption of certain employees,[15] conferment of certain powers on the administrator of the wages and hours division,[16] requiring employers engaged in interstate commerce to keep records of employees and of wages and hours of employment,[17] fixing the terms on which overtime may be worked,[18] and authorizing the recovery of liquidated damages and attorney's fees.[19] It has been held that claims for minimum wages, overtime compensation, liquidated damages, and penalties under the Fair Labor Standards Act are not vested property rights within the protection of the constitution, but that they are simply statutory rights and may be withdrawn by congress at any time before ripening into final judgment.[20]

Administrative regulations under Fair Labor Standards Act. Regulations promulgated by the administrator of the wages and hours division in accordance with the provisions of the Fair Labor Standards Act have generally been held valid,[21] and it has been held that the burden is on those

66 S.Ct. 494, 327 U.S. 186, 90 L.Ed. 614, 166 A.L.R. 531—Application of Walling, D.C.N.J., 49 F.Supp. 659, reversed on other grounds, C.C.A., Walling v. News Printing Co., 148 F.2d 57, affirmed News Printing Co. v. Walling, 66 S.Ct. 494, 326 U.S. 186, 90 L.Ed. 614, 166 A.L.R. 531—Fleming v. Lowell Sun Co., D.C.Mass., 36 F. Supp. 320, vacated on other grounds, C.C.A., Lowell Sun Co. v. Fleming, 120 F.2d 213, affirmed Holland v. Lowell Sun Co., 62 S. Ct. 793, 315 U.S. 784, 86 L.Ed. 1190.

N.Y.—Mabee v. White Plains Pub. Co., 41 N.Y.S.2d 534, 180 Misc. 8, reversed on other grounds 45 N.Y.S.2d 479, 267 App.Div. 284, affirmed 58 N.E.2d 520, 293 N.Y. 781, motion denied 60 N.E.2d 488, 294 N.Y. 701, reversed on other grounds 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607.

13. U.S.—Darr v. Mutual Life Ins. Co. of N. Y., D.C.N.Y., 72 F.Supp. 752.

14. U.S.—Wilson v. New, Mo., 37 S. Ct. 298, 243 U.S. 332, 61 L.Ed. 755. 39 C.J. p 69 note 23.

15. U.S.—Oklahoma Press Pub. Co. v. Walling, N.J. & Okl., 66 S.Ct. 494, 327 U.S. 186, 90 L.Ed. 614, 166 A.L.R. 531—Florida Fruit & Produce v. U. S., C.C.A.Fla., 117 F.2d 506.

Particular exemptions

(1) Small weekly and semiweekly newspapers.

U.S.—Mabee v. White Plains Pub. Co., N.Y., 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607—Walling v. Sun Pub. Co., D.C.Tenn., 47 F.Supp. 180, affirmed, C.C.A., 140 F.2d 445, certiorari denied 64 S.Ct. 946, 322 U.S. 728, 88 L.Ed. 1564—Fleming v. Lowell Sun Co., D.C.Mass., 36 F.Supp. 320, vacated on other grounds, C.C.A., Lowell Sun Co. v. Fleming, 120 F.2d 213, affirmed Holland v. Lowell Sun Co., 62 S.Ct. 793, 315 U.S. 784, 86 L.Ed. 1190.

N.Y.—Mabee v. White Plains Pub. Co., 41 N.Y.S.2d 534, 180 Misc. 8, reversed on other grounds 45 N.Y.S.2d 479, 267 App.Div. 284, affirmed 58 N.E.2d 520, 293 N.Y. 781, motion denied 60 N.E.2d 848, 294 N.Y. 701, reversed on other grounds 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607—Mabee v. White Plains Pub. Co., 38 N.Y.S.2d 231, 179 Misc. 832.

(2) Truck drivers engaged in transportation across state lines.—Walling v. Griffin Cartage Co., D.C. Mich., 62 F.Supp. 396, affirmed, C.C.A., Griffin Cartage Co. v. Walling, 153 F.2d 587.

16. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, C.C.A.5, 111 F.2d 23, affirmed 61 S. Ct. 524, 312 U.S. 126, 657, 85 L.Ed. 624.

Particular powers

(1) To classify an industry as subject to the Fair Labor Standards Act.—Walling v. Daily Press, D.C. Va., 58 F.Supp. 792.

(2) To define "employee employed in a bona fide executive capacity." —Devoe v. Atlanta Paper Co., D.C. Ga., 40 F.Supp. 284.

(3) To promulgate regulations pertaining to conditions under which charges for merchandise and rent may be credited to an employer as wages paid.—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846.

17. U.S.—Walling v. Panther Creek Mines, C.C.A.Ill., 148 F.2d 604—Andrews v. Montgomery Ward & Co., D.C.Ill., 30 F.Supp. 380, affirmed, C.C.A., Fleming v. Montgomery Ward & Co., 114 F.2d 384, certiorari denied Montgomery Ward & Co. v. Fleming, 61 S.Ct. 71, 311 U.S. 690, 85 L.Ed. 446.

18. U.S.—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., Atlantic Co. v. Walling, 131 F.2d 518.

19. U.S.—Overnight Motor Transp. Co. v. Missel, Md., 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682—Greenberg v. Arsenal Bldg. Corporation, D.C.N.Y., 50 F.Supp. 700, modified on other grounds, C.C.A., 144 F.2d 292, reversed on other grounds Arsenal Bldg. Corporation v. Greenberg, 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Bailey v. Karolyna Co., D.C.N.Y., 50 F.Supp. 142.

Ky.—J. F. Schneider & Son v. Justice, 168 S.W.2d 591, 293 Ky. 126.

20. U.S.—Burfeind v. Eagle-Picher Co. of Texas, D.C.Tex., 71 F.Supp. 929.

21. U.S.—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846.

Validity of regulations promulgated in connection with definition of exempt employees see infra §§ 151 (11)–151 (23).

Curtailment of profits

Under provision of Fair Labor Standards Act as interpreted by administrator's regulation plainly designed to constitutional end of enforcing fair wage and hour standard, fact that curtailment of employer's profits on sale of merchandise and renting of houses to employees incidentally results cannot invalidate regulation.—Walling v. Peavy-Wilson Lumber Co., supra.

who attack the validity of the regulation to make its invalidity so manifest that the court has no choice except to hold the regulation inappropriate to the end specified in the act.[22]

Bituminous Coal Conservation Act. Provisions of the Bituminous Coal Conservation Act of 1935, 15 U.S.C.A. § 808 (g), delegating the power to fix minimum wages to part of the producers and miners of coal and in effect subjecting the dissenting minority to the will of the majority in respect of wages have been held invalid.[23]

National Industrial Recovery Act. The provisions of the National Industrial Recovery Act § 1 et seq, 15 U.S.C.A. § 701 et seq, were held invalid as far as they attempted to regulate the fixing of wages.[24]

State statutes. It has been held that the state's power does not extend generally to the regulation of wages,[25] and statutes fixing the wages of certain trades, such as barbering,[26] or requiring the payment of time and a half to employees working seven days in any work week, but exempting hotels and their dining rooms from the operation thereof,[27] have been held invalid. However, it has also been held that it is within the legislative power to establish minimum wages, to the extent necessary to protect the health or morals of employees,[28] and to confer on an administrative body the power to investigate labor conditions and to fix a minimum wage and the industries to which such wage shall be applicable.[29]

§ 151(3). Construction, Amendment, and Repeal

The Fair Labor Standards Act should be liberally construed in accordance with its obvious intent and purpose, and regulations promulgated to effectuate the act should also be so construed.

Since the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq, is remedial and humanitarian in nature, as discussed supra § 151 (1), it should be liberally construed[30] in order to accomplish its stated ob-

22. U.S.—Ralph Knight, Inc., v. Mantel, C.C.A.Mo., 135 F.2d 514.

23. U.S.—Carter v. Carter Coal Co., App.D.C., 56 S.Ct. 855, 298 U.S. 238, 80 L.Ed. 1160.
Contra.—R. C. Tway Coal Co. v. Glenn, D.C.Ky., 12 F.Supp. 570.

24. U.S.—Acme, Inc., v. Besson, D.C. N.J., 10 F.Supp. 1.

25. N.Y.—Long Island R. Co. v. Department of Labor of State of New York, 177 N.E. 17, 256 N.Y. 498.
Validity of minimum wage statutes applicable to women and minors, and public employees, see infra §§ 152, 153.

26. Ark.—Noble v. Davis, 161 S.W. 2d 189, 204 Ark. 156.

27. Ky.—Burrow v. Kapfhammer, 145 S.W.2d 1067, 284 Ky. 753.

28. Okl.—Associated Industries of Oklahoma v. Industrial Welfare Commission, 90 P.2d 899, 185 Okl. 177.

29. Okl.—Associated Industries of Oklahoma v. Industrial Welfare Commission, supra.

30. Ark.—Armstrong v. Walling, C. C.A.Mass., 161 F.2d 515—Walling v. Portland Terminal Co., C.C.A. Me., 155 F.2d 215, certiorari granted, 67 S.Ct. 85, 329 U.S. 696, 91 L. Ed. —— —E. C. Schroeder Co. v. Clifton, C.C.A.Okl., 153 F.2d 385, certiorari denied 66 S.Ct. 1351, 1353, rehearing denied 67 S.Ct. 33, 329 U.S. 821, 91 L.Ed. —— —Walling v. Consumers Co., C.C.A.Ill., 149 F.2d 626—Fox v. Summit King Mines, C.C.A.Nev., 143 F.2d 926—Schwarz v. Witwer Grocer Co., C. C.A.Iowa, 141 F.2d 341, certiorari denied 64 S.Ct. 1265, 322 U.S. 753, 88 L.Ed. 1583—Walling v. Mutual Wholesale Food & Supply Co., C. C.A.Minn., 141 F.2d 331—Walling v. Cohen, C.C.A.Pa., 140 F.2d 453—Chapman v. Home Ice Co. of Memphis, C.C.A.Tenn., 136 F.2d 353, certiorari denied 64 S.Ct. 72, 320 U.S. 761, 88 L.Ed. 454—Richardson v. James Gibbons Co., C. C.A.Md., 132 F.2d 627, affirmed 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244—Bayley v. Southland Gasoline Co., C.C.A.Ark., 131 F.2d 412, reversed on other grounds Southland Gasoline Co. v. Bayley, 63 S. Ct. 917, 319 U.S. 44, 87 L.Ed. 1244—Calaf v. Gonzalez, C.C.A.Puerto Rico, 127 F.2d 934—Hamlet Ice Co. v. Fleming, C.C.A.N.Y., 127 F.2d 165, certiorari denied 63 S.Ct. 29, 317 U.S. 634, 87 L.Ed. 511—Carleton Screw Products Co. v. Fleming, C.C.A.Minn., 126 F.2d 537, certiorari denied 63 S.Ct. 54, 317 U.S. 634, 87 L.Ed. 511—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed Overnight Motor Transp. Co. v. Missel, 62 S. Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Fleming v. Palmer, C.C.A.Puerto Rico, 123 F.2d 749, certiorari denied Caribbean Embroidery Co-op v. Fleming, 62 S.Ct. 942, 316 U.S. 662, 86 L.Ed. 1739—Bowie v. Gonzalez, C.C.A.Puerto Rico, 117 F.2d 11—Fleming v. Hawkeye Pearl Button Co., C.C.A.Iowa, 113 F.2d 52—Pfoser v. Federal Cartridge Corp., D.C.Minn., 70 F.Supp. 701—Jackson v. Northwest Airlines, D.C. Minn.., 70 F.Supp. 501—Walling v. Northwestern-Hanna Fuel Co., D. C.Minn., 67 F.Supp. 833—Walling v. Southwestern Greyhound Lines, D.C.Mo., 65 F.Supp. 52—Walling v. Moore Milling Co., D.C.Va., 62 F.Supp. 378—Rigney v. Wilson & Co., D.C.W.Va., 61 F.Supp. 801—Fellabaum v. Swift & Co., D.C. Ohio, 54 F.Supp. 353—Lofther v. First Nat. Bank of Chicago, D.C. Ill., 48 F.Supp. 692, affirmed, C. C.A., 138 F.2d 299—Lorenzetti v. American Trust Co., D.C.Cal., 45 F. Supp. 128—Tucker v. Hitchcock, D. C.Fla., 44 F.Supp. 874—Boyer v. Miller Hatcheries, D.C.Iowa, 42 F. Supp. 135, reversed on other grounds, C.C.A., Miller Hatcheries v. Boyer, 131 F.2d 283—Maddox v. Jones, D.C.Ala., 42 F.Supp. 35—Collins v. Kidd, D.C.Tex., 38 F. Supp. 634, reversed on other grounds, C.C.A., Collins v. Kidd Dairy & Ice Co., 132 F.2d 79—Brown v. Carter Drilling Co., D.C. Tex., 38 F.Supp. 489—Lefevers v. General Export Iron & Metal Co., D.C.Tex., 36 F.Supp. 838—Armani v. Crucible Steel Co. of America, D.C.N.Y., 7 F.R.D. 344—Belanger v. Hopeman Bros., D.C.Me., 6 F.R. D. 459.
Ark.—Duke v. Helena-Glendale Ferry Co., 159 S.W.2d 74, 203 Ark. 865, 139 A.L.R. 1404.
Iowa.—Umthun v. Day & Zimmerman, 16 N.W.2d 258, 235 Iowa 293.
La.—Lyons v. H. K. Ferguson Co., App., 16 So.2d 587.
Miss.—Southern Package Corporation v. Walton, 11 So.2d 912, 194 Miss. 573, reversed on other

jectives[31] and in accordance with its obvious intent and purpose.[32] In construing the statute the congressional findings and declaration of policy as set forth in its provisions must be examined with care,[33] and arguments founded on common experience furnishing the motive of congress for the legislation may be material.[34] In situations not precisely covered by the language of the statute, its legislative history as well as all the facts and circumstances should be examined to determine its applicability.[35]

It has been held that the meaning of the statute must in the first instance at least be sought in its language, and if that is plain the sole function of the court is to enforce it,[36] but it has also been held that the intent of the statute should be given effect as against mere words when mere words, construed alone, would produce legislative or judicial brigandage.[37] The words used in the statute should not be given a strained or unreasonable meaning,[38] and the statute should be interpreted to enable the administrator to carry out its provisions consistent with the constitution and accepted rules of construction.[39] The definitions contained in the act are controlling on the courts.[40]

Construction of regulations. Regulations promulgated to effectuate the act should be liberally construed to carry out the purposes of the act.[41] Where the administrator has not assigned a definite meaning to particular words and terms in regulations promulgated by him, the court must assume that such particular words or terms are to be given their ordinarily understood meaning.[42] In determining the intent and scope of orders of the administrator, his interpretive rulings are entitled to great weight and must be viewed from the standpoint of administrative convenience.[43]

Date of taking effect. The statute by its terms took effect on October 24, 1938, and applied to the week ending October 29, 1938.[44] The administra-

grounds 64 S.Ct. 320, 320 U.S. 540, 88 L.Ed. 298.

N.Y.—Stoike v. First Nat. Bank of City of New York, 36 N.Y.S.2d 390, 264 App.Div. 585, reversed on other grounds 48 N.E.2d 482, 290 N.Y. 195, certiorari denied 64 S.Ct. 50, 320 U.S. 762, 88 L.Ed. 455—Creno v. Caruso Produce Co., 60 N.Y.S.2d 134—Schneider v. Sports Vogue, 35 N.Y.S.2d 341—Atkocus v. Terker, 30 N.Y.S.2d 628.

Tenn.—S. H. Robinson & Co. v. Larue, 156 S.W.2d 432, 178 Tenn. 197.

Wash.—Cotton v. Weyerhaeuser Timber Co., 147 P.2d 299, 20 Wash.2d 300.

Liberal construction in favor of employees

U.S.—Frank v. McMeekan, D.C.N.Y., 56 F.Supp. 369.

Statute must not be interpreted or applied in a narrow grudging manner.

U.S.—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, Ala., 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—Walling v. McKay, D.C.Neb., 70 F.Supp. 160—Aulen v. Triumph Explosive, D.C.Md., 58 F.Supp. 4.

Or.—Fullerton v. Lamm, 163 P.2d 941, 177 Or. 655, rehearing denied 165 P.2d 63, 177 Or. 655.

31. U.S.—Conley v. Valley Motor Transit Co., C.C.A.Ohio, 139 F.2d 692—Lofther v. First Nat. Bank of Chicago, C.C.A.Ill., 138 F.2d 299—Ralph Knight, Inc., v. Mantel, C.C.A.Mo., 135 F.2d 514—Walling v. Peacock Corp., D.C.Wis., 58 F.Supp. 880—Bartholome v. Baltimore Fire Patrol & Despatch Co. of Baltimore City, D.C.Md., 48 F.Supp. 98.

32. U.S.—Walling v. National Ice & Fuel Corp., C.C.A.Ill., 158 F.2d 28—Walling v. Rutherford Food Corp., C.C.A.Kan., 156 F.2d 513—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616—Jackson v. Northwest Airlines, D.C.Minn., 70 F.Supp. 501—Blankenship v. W. U. Tel. Co., D.C.W.Va., 67 F.Supp. 265—Lofther v. First Nat. Bank of Chicago, D.C.Ill., 48 F.Supp. 692, affirmed, C.C.A., 138 F.2d 299.

Limitation

The provisions of the statute must be limited by the declared purpose of the act and the definition of terms.—Cecil v. Gradison, Ohio App., 40 N.E.2d 958.

33. U.S.—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed Overnight Motor Transp. Co. v. Missel, 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

34. U.S.—U. S. v. Barr & Bloomfield Shoe Mfg. Co., D.C.N.H., 35 F.Supp. 75.

35. U.S.—Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, D.C.Va., 53 F.Supp. 935, certiorari denied 64 S.Ct. 1267, 322 U.S. 756, 88 L.Ed. 1585, reversed on other grounds 145 F.2d 10, affirmed 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007.

36. U.S.—Fleming v. Hawkeye Pearl Button Co., C.C.A.Iowa, 113 F.2d 52.

Iowa.—Umthun v. Day & Zimmermann, 16 N.W.2d 258, 235 Iowa 293.

Alteration

Where the meaning of statutory language is definite and clear it cannot be altered except by congressional action.—Walling v. L. Wiemann Co., C.C.A.Wis., 138 F.2d 602, certiorari denied 64 S.Ct. 782, 321 U.S. 785, 88 L.Ed. 1077.

37. U.S.—Williams v. Jacksonville Terminal Co., D.C.Fla., 35 F.Supp. 267, affirmed, C.C.A., 118 F.2d 324, affirmed 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

38. U.S.—Dugas v. Nashua Mfg. Co., D.C.N.H., 62 F.Supp. 846, appeal dismissed, C.C.A., 154 F.2d 655—Maddox v. Jones, D.C.Ala., 42 F.Supp. 35.

39. U.S.—Fleming v. Cudahy Packing Co., D.C.Cal., 41 F.Supp. 910.

40. U.S.—Bernhard v. Metcalfe Const. Co., D.C.Neb., 64 F.Supp. 953.

41. U.S.—Walling v. Cohen, C.C.A.Pa., 140 F.2d 453—Ralph Knight, Inc. v. Mantel, C.C.A.Mo., 135 F.2d 514—Walling v. Peacock Corp., D.C.Wis., 58 F.Supp. 880.

42. U.S.—Walling v. Newman, D.C.Iowa, 61 F.Supp. 971.

43. U.S.—Walling v. Cohen, C.C.A.Pa., 140 F.2d 453.

44. U.S.—Cabunac v. National Terminals Corporation, 139 F.2d 853, affirming International Longshoremen's Ass'n, Local 815, v. National Terminals Corporation, C.C.A.Wis., 50 F.Supp. 26.

tor of the wage and hour division has no authority to fix the date on which the statute shall apply to a certain industry.[45]

Territorial application. The statute is confined in application to the territorial limits of the United States, its territories, and possessions, and has no application to work performed in a foreign country.[46]

Amendment and repeal. It has been held that the Federal Eight-Hour Law amendment of 1940 limiting employment at basic pay to eight hours per day did not repeal the provision of the Fair Labor Standards Act limiting employment at basic pay to forty hours per week.[47]

§ 151(4). Existence of Employment Relationship

a. In general
b. Who are employers
c. Who are employees

a. In General

Generally the Fair Labor Standards Act applies only to persons who stand in the relationship of employer and employee, and in this respect the common-law tests of employment are not of controlling significance and the act may apply to persons and working relationships which prior to the act were not deemed to fall within the employer-employee category.

As a general rule the Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, applies only to persons who stand in the relationship of employer and employee.[48] A contract of employment, express or implied, is a prerequisite to the right to wages, to which the protection of the statute applies.[49] Only "employers" are bound by the requirements of the act[50] and only "employees" may claim wages in accordance therewith.[51]

In determining employee rights under the Fair Labor Standards Act, the common-law tests of employment[52] or employer-employee classifications under other statutes[53] are not of controlling significance, since the act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which pri-

45. U.S.—La Guardia v. Austin-Bliss General Tire Co., D.C.N.Y., 41 F.Supp. 678.

46. U.S.—Bernhard v. Metcalfe Const. Co., D.C.Neb., 64 F.Supp. 953.
N.Y.—Filardo v. Foley Bros., 45 N.Y.S.2d 262, 181 Misc. 136.

Leased bases

The federal Fair Labor Standards Act applies in naval and air bases leased to United States by Great Britain, and an American employer, by operating in such places, does not rid himself of obligation imposed on him by such act to pay overtime wages to his employees.—Eckert v. Elmhurst Contracting Co., 56 N.Y.S.2d 98, 185 Misc. 108, affirmed 61 N.Y.S.2d 730, 186 Misc. 100.

47. U.S.—Walling v. Patton-Tulley Transp. Co., C.C.A.Tenn., 134 F.2d 945.

48. U.S.—Bowman v. Pace Co., C.C.A.Fla., 119 F.2d 858—Walling v. American Needlecrafts, D.C.Ky., 46 F.Supp. 16, reversed on other grounds, C.C.A., 139 F.2d 60—Maddox v. Jones, D.C.Ala., 42 F.Supp. 35.

49. U.S.—Walling v. Nashville, C. & St. L. Ry., D.C.Tenn., 60 F.Supp. 1004, affirmed, C.C.A., 155 F.2d 1016, certiorari granted 67 S.Ct. 85, 329 U.S. 696, 91 L.Ed. ——.

50. U.S.—Reconstruction Finance Corporation v. Merryfield, C.C.A.N.H., 134 F.2d 988.

Hiring by another

If third person acted as agent or employee of paper company in hiring fifty men to cut and deliver pulp wood to paper company, paper company and not third person was "employer" of fifty men within the act and was responsible for wages to be paid such men, but if third person was in fact the employer of such men and company did not join third person in contracting with such men, third person acted independently of company and alone was responsible for failure to carry out provisions of such act relating to minimum wages and maximum hours.—Maddox v. Jones, D.C.Ala., 42 F.Supp. 35.

Manager of corporation

Plaintiffs could not recover money paid to them as overtime compensation pursuant to the act and alleged to have been returned to defendants as a condition of employment against both corporate defendant and individual defendant, who was alleged to be principal stockholder and manager of corporate defendant, or against individual defendant if he was not plaintiffs' employer.—Anderko v. Courtland Handbag Co., D.C.N.J., 53 F.Supp. 140.

Trustee, who together with co-trustees was legal owner as tenants in common of building was not liable as trustee for liquidated damages allowed employees of building under the act after the termination of the trust after which he acted as attorney and agent for owners and made payment to employees on that basis.—Fleming v. Post, C.C.A.N.Y., 146 F.2d 441, 158 A.L.R. 1384.

51. U.S.—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616.

52. U.S.—Walling v. Portland Terminal Co., Me., 67 S.Ct. 639, 330 U.S. 148, 91 L.Ed. —— —Wabash Radio Corp. v. Walling, C.C.A. Mich., 162 F.2d 391—Walling v. Wabash Radio Corp., D.C.Mich., 65 F.Supp. 969—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923—Walling v. Merchants Police Service, D.C.Ky., 59 F.Supp. 873.

Tort

(1) The test for determining employer-employee relationship in cases involving liability in damages for tort is not necessarily decisive in determining such relationship under Fair Labor Standards Act which concerns itself with correction of economic evils through remedies which were unknown at common law.—Walling v. Rutherford Food Corp., C.C.A.Kan., 156 F.2d 513—Walling v. Jacksonville Terminal Co., C.C.A. Fla., 148 F.2d 768.

(2) The applicability of the Fair Labor Standards Act must be judged from the purposes that congress had in mind rather than from the common-law rules worked out for determining tort liability.—Blankenship v. W. U. Tel. Co., C.C.A.W.Va., 161 F.2d 168.

53. U.S.—Walling v. Portland Terminal Co., Me., 67 S.Ct. 639, 330 U.S. 148, 91 L.Ed. ——.

or to the act were not deemed to fall within the employer-employee category.[54] It has been held that whether an employer-employee relationship exists within the statute must be determined entirely by reference to the terms, history, and purposes of the legislation,[55] and that, if the act expressly or by necessary implication brings within its scope certain workers, the court is not concerned with the question whether a master-servant relationship exists under common-law rules.[56] In other words, the applicability of the statute is to be determined by the underlying economic facts concerning the employment of an employee, and not by the niceties of legal classifications.[57]

The existence of the employment relationship depends on the realities of the case, rather than on the language appearing in contracts,[58] and the real nature and characteristic features of the relationship are determinative, rather than the mere name attributed to it by the parties.[59] On the other hand, a few decisions have held that the statute does not abrogate the usual and accepted concepts of the employer and employee relationship, either in letter or in spirit, but that the substantive law remains unimpaired.[60]

It has been held that the proprietors and employees of a business may contract to continue the business as a partnership in which all are members, thus dispensing with any employer-employee relationship, and that such an arrangement is not illegal notwithstanding it is entered into with the avowed intention of avoiding the impact of the act on the business.[61] It has also been held, however, that, where an employer reorganizes the business into a coöperative, whether an employer-employee relationship still exists for purposes of the Fair Labor Standards Act depends on whether the business is controlled by the member-workers or the former employer,[62] and, where the former employer still retains control, he is liable under the act as an employer regardless of the fact that the method of payment of workers has been changed so that their compensation consists of a share of the profits.[63]

b. Who Are Employers

The term "employer" as used in the Fair Labor Standards Act is given a broad meaning to carry out the declared purpose of the act and is not limited to the narrow conception of principal and agent or master and servant.

The term "employer" as used in the Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, is not limited to the narrow conception of principal and agent or master and servant, but is given a broad meaning to carry out the declared purpose of the act.[64] The term is used in the statute as a

54. U.S.—Walling v. Portland Terminal Co., supra.

55. U.S.—Walling v. Twyeffort, Inc., D.C.N.Y., 65 F.Supp. 920—Walling v. Merchants Police Service, D.C. Ky., 59 F.Supp. 873—Fleming v. Demeritt Co., D.C.Vt., 56 F.Supp. 376.

56. U.S.—Walling v. American Needlecrafts, C.C.A.Ky., 139 F.2d 60.

57. U.S.—Walling v. Southwestern Greyhound Lines, D.C.Mo., 65 F. Supp. 52—Walling v. Merchants Police Service, D.C.Ky., 59 F.Supp. 873.

In doubtful situations, coverage under Fair Labor Standards Act is to be determined broadly by reference to underlying economic realities rather than by traditional rules governing legal classifications of master and servant on one hand, and employer and independent contractor on the other.—Walling v. Rutherford Food Corp., C.C.A.Kan., 156 F. 2d 513.

58. U.S.—Walling v. McKay, D.C. Neb., 70 F.Supp. 160.

59. U.S.—Schroepfer v. A. S. Abell Co., D.C.Md., 48 F.Supp. 88, affirmed, C.C.A., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060, rehearing denied 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595.

60. U.S.—Dugas v. Nashua Mfg. Co., D.C.N.H., 62 F.Supp. 846, appeal dismissed, C.C.A., 154 F.2d 655—Walling v. Todd, D.C.Pa., 52 F. Supp. 62, motion denied 3 F.R.D. 490—Maddox v. Jones, D.C.Ala., 42 F.Supp. 35.

The statutory definitions of "employer," "employee," and "employ" are in very general terms, and should be understood in their natural sense, and intended to describe the conventional relations of employer and employee.—Dugas v. Nashua Mfg. Co., D.C.N.H., 62 F.Supp. 846, appeal dismissed, C.C.A., 154 F.2d 655—Schroepfer v. A. S. Abell Co., D.C. Md., 48 F.Supp. 88, affirmed, C.C.A., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060, rehearing denied 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595.

State law

Whether a former employee was an independent contractor and the employer of workmen claiming benefits of Fair Labor Standards Act, or merely an employee of alleged employer, depended on state law as it existed before enactment of Fair Labor Standards Act.—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363.

61. U.S.—Walling v. Plymouth Mfg. Corporation, D.C.Ind., 46 F.Supp. 433, affirmed, C.C.A., 139 F.2d 178, certiorari denied 64 S.Ct. 1144, 322 U.S. 741, 88 L.Ed. 1574.

62. U.S.—Fleming v. Palmer, C.C.A. Puerto Rico, 123 F.2d 749, certiorari denied Caribbean Embroidery Corp. v. Fleming, 62 S.Ct. 942, 316 U.S. 662, 86 L.Ed. 1739.

Participation in organization

Although fact that former employer actively participated in organizing co-operative among employees to avoid the Fair Labor Standards Act was not an element bringing him within scope of the act, his motive had some probative value on issue of whether co-operative was controlled by member-workers or by former employer.—Fleming v. Palmer, C.C.A.Puerto Rico, 123 F.2d 749, certiorari denied Caribbean Embroidery Co-op v. Fleming, 62 S.Ct. 942, 316 U.S. 662, 86 L.Ed. 1739.

63. U.S.—Fleming v. Palmer, C.C.A. Puerto Rico, 123 F.2d 749, certiorari denied Caribbean Embroidery Co-op v. Fleming, 62 S.Ct. 942, 316 U.S. 662, 86 L.Ed. 1739.

64. U.S.—Walling v. Atlantic Greyhound Corp., D.C.S.C., 61 F.Supp. 992—Walling v. Merchants Police Service, D.C.Ky., 59 F.Supp. 873.

correlative of "employee,"[65] and may be defined as one who employs, or one who uses or engages the services of other persons for pay.[66] Under the provisions of § 3 (d) of the act, 29 U.S.C.A. § 203, "employer" includes any person acting directly or indirectly in the interest of an employer with relation to an employee,[67] and accordingly the term "employer" may extend to a managing partner employing workers in the interest of the partnership[68] or to a corporation which controls another, with respect to employees of the latter.[69]

The Fair Labor Standards Act § 3 (e), 29 U.S.C.A. § 203 (e), defines the term "employ" as including to "suffer or permit to work,"[70] and the term "employment" is used as meaning physical or mental exertion controlled or required by the employer, and pursued necessarily or primarily for the employer and his business.[71] Accordingly one may be an employer if he permits another to work for him, although he has not expressly hired or employed him,[72] provided such work is done with the knowledge of the employer,[73] and persons who are in reality employees are relieved of the necessity of proving a contract of employment.[74] However, the definition is not to be literally construed as imposing the status of an employer on every person who suffers or permits another to work,[75] and if one has not hired another expressly, or suffered nor permitted him to work under circumstances where an

Labor union

(1) If check weighman was employed at agreed daily wage by local union at mine to see that coal mined by union's members was correctly weighed and each coal digger given proper credit for the coal which such digger mined and loaded, relation of employer and employee existed between union and weighman, and parties were covered by the Fair Labor Standards Act.—Williams v. United Mine Workers of America, 172 S.W.2d 202, 294 Ky. 520, 149 A.L.R. 505.

(2) Under statutory definition of "employer" which specifically excluded labor organizations, labor union could not be considered an employer so as to be subject to injunctive provisions of Fair Labor Standards Act available against employers by reason of definition of "person" as including an organized group of persons and definition of "employer" as including any person, and hence action to enjoin labor union and employer from conspiring to force complainant to withdraw another action against employer for overtime wages was required to be dismissed as against union.—Bowe v. Judson C. Burns, Inc., D.C.Pa., 46 F.Supp. 745, affirmed, C.C.A., 137 F.2d 37.

Partnership held employer

U.S.—Wilson v. Shuman, C.C.A.Ark., 140 F.2d 644.

65. Md.—Automobile Banking Corporation v. Willison, 28 A.2d 864, 181 Md. 118.

66. Md.—Automobile Banking Corporation v. Willison, supra.

67. U.S.—Walling v. Gonzalez, D.C. Puerto Rico, 67 F.Supp. 518.

Manager of building

(1) Corporation which managed building for owner was an employer of building maintenance employees within meaning of act.

U.S.—Greenberg v. Arsenal Bldg. Corporation, C.C.A.N.Y., 144 F.2d 292, affirmed 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 564—Asselta v. 149 Madison Ave. Corp., D.C.N.Y., 65 F.Supp. 385, affirmed, C.C.A., 156 F.2d 139, certiorari denied 67 S.Ct. 124, 329 U.S. 764, 91 L.Ed. —.

N.Y.—Barrow v. Adams & Co. Real Estate, 46 N.Y.S.2d 357, 182 Misc. 641.

(2) Where realty agent managing building and building owner allegedly employed plaintiffs as elevator operators for owner, agent was not relieved of liability to plaintiffs for overtime, liquidated damages, and attorney's fees on ground that an agent for a disclosed principal cannot be held for the principal's obligations.—Brennan v. Community Service Soc. of New York, 45 N.Y.S. 2d 825, 181 Misc. 637.

68. U.S.—Walling v. Gonzalez, D.C. Puerto Rico, 67 F.Supp. 518.

69. U.S.—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923.

70. U.S.—Walling v. Portland Terminal Co., Me., 67 S.Ct. 639, 330 U.S. 148, 91 L.Ed. — —Walling v. Frank, D.C.Ky., 62 F.Supp. 261.

Intent of provision

In defining term "employ" in Fair Labor Standards Act as to suffer or permit to work, congress intended to hold every manufacturer engaged in interstate commerce responsible for connivance or collusion with anyone who assumes status of independent contractor, when in fact such individual was merely agent or servant or employee of manufacturer, and to protect employee against anyone whose real status in bringing about a contractual relationship in employment is not bona fide.—Dugas v. Nashua Mfg. Co., D.C.N.H., 62 F. Supp. 846, appeal dismissed, C.C.A., 154 F.2d 655—Maddox v. Jones, D.C. Ala., 42 F.Supp. 35.

71. U.S.—Walling v. Jacksonville Terminal Co., D.C.Fla., 55 F.Supp. 302, affirmed, C.C.A., 148 F.2d 768.

72. U.S.—Walling v. Jacksonville Terminal Co., C.C.A.Fla., 148 F.2d 768—Walling v. McKay, D.C.Neb., 70 F.Supp. 160—Schroepfer v. A. S. Abell Co., D.C.Md., 48 F.Supp. 88, affirmed, C.C.A., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060, rehearing denied 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595.

Labor supplied by foreman

Company, which controlled the hiring of labor which a foreman had contracted to supply, determined and paid wages, supplied necessary equipment, and gave orders with respect to work, was workmen's employer within act, and foreman was not an independent contractor even though his wages were determined by the cost of labor and company's sales and he obtained a social security number as workmen's employer.—Brown v. Minngas Co., D.C. Minn., 51 F.Supp. 363.

73. U.S.—Fox v. Summit King Mines, C.C.A.Nev., 143 F.2d 926.

Kan.—Jackson v. Derby Oil Co., 139 P.2d 146, 157 Kan. 53.

Okl.—Mabee Oil & Gas Co. v. Thomas, 158 P.2d 713, 195 Okl. 437.

74. U.S.—Walling v. Sanders, C.C.A. Tenn., 136 F.2d 78.

75. U.S.—Walling v. Portland Terminal Co., C.C.A.Me., 155 F.2d 215, certiorari granted 67 S.Ct. 85, 329 U.S. 696, 91 L.Ed. — —Maddox v. Jones, D.C.Ala., 42 F.Supp. 35.

Creditor

Where corporation had borrowed money from and assigned all its rents to Reconstruction Finance Corporation, but had retained control of hiring, discharging, directing and fixing wages of employees, although Reconstruction Finance Corporation drew checks on suspended credit account to pay employees, Reconstruction Finance Corporation was not an employer in ordinary sense of term so as to be subject to the act.—Reconstruction Finance Corporation v. Merryfield, C.C.A.N.H., 134 F.2d 988.

obligation to pay him will be implied, they are not employer and employee under the statute.[76]

So one is not an employer who merely "permits" another to work for a third person or the worker's own self,[77] as in the case of persons working as independent contractors,[78] or as employees of an independent contractor,[79] notwithstanding the work done under the contract is for the ultimate benefit and use of the contractee.[80] However, one may not evade the statute by colluding with a third person to interpose such person as an apparent independent contractor to perform services for the real employer, and the third person will be deemed the employer's agent to hire and pay workers for the employer.[81] Guards and watchmen furnished by an independent contractor have been held not employees of the person for whom they perform services,[82] but it has also been held that if they are compensated by the person benefiting by their services they are employees within the act notwithstanding they also have the status of police officers.[83]

In determining by whom an employee is employed, the court must consider the contract of employment, who has direction and control over the employee, who actually pays his wages or salary, and who has the power to hire or fire.[84] The criterion applied in some cases is whose work is being

76. U.S.—Walling v. Jacksonville Terminal Co., C.C.A.Fla., 148 F.2d 768—Reconstruction Finance Corporation v. Merryfield, C.C.A.N.H., 134 F.2d 988—Bowman v. Pace Co., C.C.A.Fla., 119 F.2d 858—Dugas v. Nashua Mfg. Co., D.C.N.H., 62 F.Supp. 846, appeal dismissed, C.C. A., 154 F.2d 655.
Wash.—Cotton v. Weyerhaeuser Timber Co., 147 P.2d 299, 20 Wash.2d 300.

77. U.S.—Walling v. Jacksonville Terminal Co., C.C.A.Fla., 148 F.2d 768—Walling v. McKay, D.C.Neb., 70 F.Supp. 160—Maddox v. Jones, D.C.Ala., 42 F.Supp. 35.

Person hired by agent

(1) Where trucking company continuously regarded its commission agent as such, attempted no regulation of his hours of work, number of employees, or compensation paid to them, did not know that a particular employee was working for agent until action was filed, and never paid that employee any wages, and agent knew that his authority was limited, and he hired the particular employee to work for him and paid him with his personal funds, that employee never became an employee of trucking company.—Whatley v. Great Southern Trucking Co., C.C.A.Ga., 123 F.2d 143.

(2) Where automobile finance company had employed an agent to solicit and handle its business, to service and collect delinquent accounts, and to repossess automobiles for a gross commission, the agent paid his local operating expenses, owned the office equipment, lent an automobile to an employee for use in his work, and made the employee's social security payments, the employee was not the employee of the company within the act, notwithstanding agent had agreed to abide by company's requirements, the forms were in company's name and company had furnished employee with a card stating that he was a company adjuster and employee had given a fidelity bond to company.—Automobile Banking Corporation v. Willison, 28 A.2d 864, 181 Md. 118.

(3) Mere fact that distributor of beer suffered or permitted salesmen to hire drivers did not make drivers the employees of distributor.—Walling v. Sanders, C.C.A.Tenn., 136 F.2d 78.

78. U.S.—Blankenship v. Western Union Tel. Co., C.C.A.W.Va., 161 F.2d 168.

79. U.S.—Schroepfer v. A. S. Abell Co., C.C.A.Md., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060, rehearing denied 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595—Dugas v. Nashua Mfg. Co., D.C.N.H., 62 F.Supp. 846, appeal dismissed, C.C.A., 154 F.2d 655—Maddox v. Jones, D.C.Ala., 42 F.Supp. 35—Magann v. Long's Baggage Transfer Co., D.C.Va., 39 F. Supp. 742—Fleming v. Gregory, D. C.La., 36 F.Supp. 776—David v. Boylan's Private Police, D.C.La., 34 F.Supp. 555.

Intent of statute

The act was not intended to make the manufacturer or every industry in interstate commerce responsible for conduct or all sins of omission and commission of those from whom they procure the necessary material for manufacture of goods placed on the market.—Maddox v. Jones, D.C. Ala., 42 F.Supp. 35.

Persons held independent contractors with respect to employment of others.—Schroepfer v. A. S. Abell Co., D.C.Md., 48 F.Supp. 88, affirmed, C.C.A., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060, rehearing denied 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595—Maddox v. Jones, D.C.Ala., 42 F.Supp. 35.

Persons held not employees of independent contractor

U.S.—Walling v. McKay, D.C.Neb., 70 F.Supp. 160—Walling v. Woodbine Coal Co., D.C.Ky., 64 F.Supp. 82.

80. U.S.—Maddox v. Jones, D.C.Ala., 42 F.Supp. 35.

81. U.S.—Bowman v. Pace Co., C.C. A.Fla., 119 F.2d 858.

82. U.S.—Bowman v. Pace Co., supra—David v. Boylan's Private Police, D.C.La., 34 F.Supp. 555.
La.—Dennis v. Equitable Equipment Co., App., 7 So.2d 397.

Guards employed by governmental agency to protect private plants are not employees of the plant operators. —Lewis v. Florida Power & Light Co., D.C.Fla., 69 F.Supp. 23—Dugas v. Nashua Mfg. Co., D.C.N.H., 62 F. Supp. 846, appeal dismissed, C.C.A., 154 F.2d 655.

A watchman hired by third person contracting with wholesale grocery company engaged in interstate commerce to furnish watchman service at company's premises could not assert that he was employee of company so as to be entitled to overtime wage rates from company under the act, on ground that, in addition to his service as watchman, he rendered services outside his duties as watchman at request of company, where watchman never asserted such a secondary employment and did not allege it in his petition, and there was a total lack of evidence as to how many hours he devoted to such extra service.—Bowman v. Pace Co., C.C.A.Fla., 119 F.2d 858.

83. U.S.—Holmes v. Industrial Cotton Mills Co., D.C.S.C., 64 F.Supp. 20—Timberlake v. Day & Zimmerman, D.C.Iowa, 49 F.Supp. 28.

One furnishing guard services for establishments of customers has been held the employer of the guards notwithstanding the guards acquired the status of local police officers.—Walling v. Merchants Police Service, D.C.Ky., 59 F.Supp. 873.

84. U.S.—Reconstruction Finance Corporation v. Merryfield, C.C.A. N.H., 134 F.2d 988—Helena Glendale Ferry Co. v. Walling, C.C.A. Ark., 132 F.2d 616—Lewis v. Flor-

performed and who has the power of control over the performance of this work.[85]

c. Who Are Employees

The term "employee" is defined in the Fair Labor Standards Act as including any individual employed by an employer, and the time or mode of compensation does not control the determination of whether one is an employee within the act.

Under the Fair Labor Standards Act § 3 (e), 29 U.S.C.A. § 203 (e), the term "employee" is defined as including any individual employed by an employer.[86] The time or mode of compensation does not control the determination of whether one is an employee within the act,[87] and persons may be employees whether compensated by a unit of time, by the piece, or by any other measurement.[88] Accordingly, porters serving in railroad terminals may be employees of the railroad terminal company although they receive their compensation from tips given by persons for whom they provide services.[89]

The status of one as an employee generally depends on whether the alleged employer has expressly or impliedly agreed to pay a certain sum of money to the employee, and has the control and determination of the hours of work by the employee.[90] The statute does not stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another,[91] and accordingly a person whose work serves only his own interest is not an employee of another person who gives him aid and instruction.[92] On the other hand, if the economic realities reveal that a person performs services for another, which are an integral and necessary part of the latter's interstate business, the person so rendering such service is an employee within the meaning of the statute, regardless of the

ida Power & Light Co., D.C.Fla., 69 F.Supp. 23.

85. U.S.—Walling v. McKay, D.C. Neb., 70 F.Supp. 160.

86. U.S.—Blankenship v. Western Union Tel. Co., C.C.A.W.Va., 161 F.2d 168.

"Includes" as used in the Fair Labor Standards Act provision that "employee" includes any individual employed by an employer is a term of limitation to indicate what belongs to a genus rather than a term of enlargement.—Blankenship v. Western Union Tel. Co., supra.

Partnerships as such are not "employees" within the act.—Blankenship v. Western Union Tel. Co., supra.

87. U.S.—U. S. v. Rosenwasser, Cal., 65 S.Ct. 295, 323 U.S. 360, 89 L.Ed. 301—Walling v. Southwestern Greyhound Lines, D.C.Mo., 65 F. Supp. 52.

88. U.S.—U. S. v. Rosenwasser, Cal., 65 S.Ct. 295, 323 U.S. 360, 89 L.Ed. 301.

Employment on piecework basis
U.S.—Mt. Clemens Pottery Co. v. Anderson, C.C.A.Mich., 149 F.2d 461, reversed on other grounds 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. —— —Walling v. Lippold, D.C.Neb., 72 F. Supp. 339.

The act covers salaried workers as well as employees paid on an hourly basis.—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed Overnight Motor Transp. Co. v. Missel, 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

89. U.S.—Pickett v. Union Terminal Co., Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Williams v. Jacksonville Terminal Co., Fla., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 476—Southern Ry. Co. v. Black, C.C.A.N.C., 127 F. 2d 280—Harrison v. Kansas City Terminal Ry. Co., D.C.Mo., 36 F. Supp. 434, affirmed, C.C.A., 126 F. 2d 422—Pickett v. Union Terminal Co., D.C.Tex., 33 F.Supp. 244, reversed on other grounds, C.C.A., Union Terminal Co. v. Pickett, 118 F.2d 328, certiorari denied 61 S.Ct. 1115, 313 U.S. 591, 85 L.Ed. 1546, affirmed 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

Contrary authority
It has been held, however, that redcaps who performed services for passengers at terminal station and received compensation from passengers were not wage earning employees within intent of Fair Labor Standards Act, since redcaps were working for themselves and the passengers whom they served and whose orders they obeyed in that service.—Williams v. Jacksonville Terminal Co., D.C.Fla., 35 F.Supp. 267, affirmed, C.C.A., 118 F.2d 324, affirmed 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

90. U.S.—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616 —Dugas v. Nashua Mfg. Co., D.C. N.H., 62 F.Supp. 846, appeal dismissed, C.C.A., 154 F.2d 655.

91. U.S.—Walling v. Portland Terminal Co., Me., 67 S.Ct. 639, 330 U.S. 148, 91 L.Ed. ——.

Voluntary services
Where plaintiff intended his services to defendant to be voluntary and to be rendered without compensation and plaintiff refused to be placed on defendants' pay roll because he did not wish to be listed as an employee, plaintiff was not an employee within Fair Labor Standards Act and was not entitled to compensation.—Rogers v. Schenkel, C.C.A. N.Y., 162 F.2d 596.

92. U.S.—Walling v. Portland Terminal Co., Me., 67 S.Ct. 639, 330 U.S. 148, 91 L.Ed. —— —Walling v. Nashville, S. & St. L. Ry., D.C. Tenn., 60 F.Supp. 1004, affirmed, C.C.A., 155 F.2d 1016, certiorari granted 67 S.Ct. 85, 329 U.S. 696, 91 L.Ed. ——.

Qualification for employment
Where persons in order to qualify for employment by railroad as firemen, brakemen, and switchmen voluntarily trained for one to three weeks under direct supervision of regular employee doing same type of work, but were under no obligation to do any work or accept employment with railroad at end of training period, and railroad was not obligated then to employ them and gained nothing from their work during training except possibility of a future employee, such trainees were not employees within Fair Labor Standards Act.—Walling v. Nashville, C. & St. L. Ry., Tenn., 67 S.Ct. 644, 330 U.S. 158, 91 L.Ed. —— —Walling v. Portland Terminal Co., Me., 67 S.Ct. 639, 330 U.S. 148, 91 L. Ed. —— —Walling v. Jacksonville Terminal Co., C.C.A.Fla., 148 F.2d 768.

contract terms under which such services are rendered.[93]

An officer whose duties are executive or supervisory, whose hours of work are not regulated or controlled, and whose compensation is not dependent on hours or any other measure of time actually devoted to his duties is not an employee within the contemplation of a state minimum wage act; but one who, although nominally a corporate officer, performs duties and receives compensation on a basis which, apart from his holding of his office, would place him in the category of an employee as generally understood is within the statute.[94]

Independent contractors. As a general rule persons who are independent contractors and not employees of another are not within the coverage of the Fair Labor Standards Act.[95] In determining whether one is an employee or an independent contractor under the Fair Labor Standards Act, the common-law standards unrelated to the objectives of the act are irrelevant.[96] Accordingly the fact that a worker stands in a relation to another which, under the common-law aspects of the matter might more easily be called an independent contractor than an employee, does not relieve the other of compliance with the Fair Labor Standards Act if the other suffers or permits such worker to work within the act.[97] Where the work done, in its essence, follows the usual path of an employee, the worker is under the protection of the act although called an independent contractor by the employer,[98] and it is immaterial that the work is performed off the premises of the employer,[99] as in the case of homeworkers.[1]

93. U.S.—Walling v. Rutherford Food Corp., C.C.A.Kan., 156 F.2d 513—Walling v. Southwestern Greyhound Lines, D.C.Mo., 65 F. Supp. 52.

94. Conn.—Swiss Cleaners v. Danaher, 27 A.2d 806, 129 Conn. 338.

95. U.S.—Blankenship v. Western Union Tel. Co., C.C.A.W.Va., 161 F. 2d 168.

Persons held independent contractors

(1) Partners who operated hotel and who contracted with telegraph company to establish and maintain branch office of the telegraph company in the hotel for a percentage of charges on telegrams.—Blankenship v. W. U. Tel. Co., supra.

(2) Outside tailor who employed other tailors in his shop, was not an "employee" of corporation for which he did work, but was an independent contractor.—Walling v. Twyeffort, Inc., C.C.A.N.Y., 158 F.2d 944.

(3) Newspaper distributors, known in the business as "rack-men," who were given exclusive right to sell, through street corner vending machines, newspapers for which they paid wholesale prices, who used their own means of transportation, and employed and paid their helpers without direction by the publisher which made no agreement to compensate distributors other than by weekly car allowance toward distributors' expenses of operation, were independent contractors and not employees in the employ of the publisher.—Schroepfer v. A. S. Abell Co., D.C.Md., 48 F.Supp. 88, affirmed, C.C.A., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060, rehearing denied 64 S. Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595.

96. U.S.—Walling v. American Needlecrafts, C.C.A.Ky., 139 F.2d 60—Walling v. Twyeffort, Inc., D.C. N.Y., 65 F.Supp. 920—Walling v. Woodbine Coal Co., D.C.Ky., 64 F. Supp. 82.

The law of independent contractors, as far as Fair Labor Standards Act is concerned, cannot nullify will of congress and take away benefits of statute from pieceworkers in needlework trades, even in absence of showing of domination and control.—Walling v. Wolff, D.C. N.Y., 63 F.Supp. 605, motion denied 65 F.Supp. 532.

97. U.S.—Walling v. Wolff, supra.

Integrated unit of production

Persons are employees rather than independent contractors, although working under a contract providing for payment on a piece rate basis, where their work is a part of the integrated unit of production of the employer under such circumstances that they are in reality employees of the establishment.—Rutherford Food Corp. v. McComb, Kan., 67 S.Ct. 1473, 331 U.S. 722, 91 L.Ed. ——.

Persons held employees

U.S.—Walling v. American Needlecrafts, C.C.A.Ky., 139 F.2d 60—Walling v. Southwestern Greyhound Lines, D.C.Mo., 65 F.Supp. 52—Walling v. De Soto Creamery & Produce Co., D.C.Minn., 51 F. Supp 938.

98. U.S.—Rutherford Food Corp. v. McComb, Kan., 67 S.Ct. 1473, 331 U.S. 722, 91 L.Ed. ——.

99. U.S.—Walling v. Twyeffort, Inc., D.C.N.Y., 65 F.Supp. 920—Fleming v. Demeritt Co., D.C.Vt., 56 F.Supp. 376.

1. U.S.—Walling v. Freidlin, D.C. Pa., 66 F.Supp. 710—Walling v. Wolff, D.C.N.Y., 63 F.Supp. 605, motion denied 65 F.Supp. 532.

Persons held employees

(1) Homeworkers engaged by a tailoring concern operating in interstate commerce are subject to provisions of Fair Labor Standards Act regardless of fact that they supply their equipment at their own expense, that they use helpers in their work, that some of them work for competitors of employer, that they may refuse to accept work, that they do not work under constant supervision or on a time schedule, and that they are pieceworkers paid at piece rates.—Walling v. Twyeffort, Inc., D.C.N.Y., 65 F.Supp. 920.

(2) Homeworkers, who performed handwork on bedspreads and similar articles distributed in interstate commerce by defendant corporation, were employees within Fair Labor Standards Act, notwithstanding homeworkers performed their services under contract calling for a completed job according to specifications without supervision over their work while it was being performed, and furnished their own tools and determined their own hours of employment.—Walling v. American Needlecrafts, C.C.A.Ky., 139 F.2d 60.

Persons held independent contractors

It has been held, however, that women preparing raw rags for delivery to carpet manufacturing company by ripping, sewing and skeining them at women's homes under contracts requiring women to furnish all thread, needles, and other necessary tools, providing that company should have no control over or right to control women, and obligating it to pay them for skeined rags by weight on delivery thereof to company, without fixing time therefor or hours of work, or requiring women to do work themselves, were

§ 151(5). Employments Included Generally

The Fair Labor Standards Act was intended to have a broad and comprehensive coverage, and generally applies to all employees engaged in commerce or in the production of goods for commerce other than those specifically excepted.

The Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq, was intended by congress to have a broad and comprehensive coverage,[2] subject to the exemptions provided for by particular provisions, as discussed infra §§ 151 (11)–151 (23). The statute includes all employees engaged in interstate commerce or in the production of goods for such commerce, other than those specifically excepted,[3] and, when not expressly excepted, an employer of such an employee is bound by, and required to comply with, the terms of the act.[4] So it has been held that the courts must assume that all employees in interstate commerce, as far as reasonably possible, are subject to the provisions of the act.[5] In considering the application of the act to a specific state of facts, no abstract formula can be applied, and general propositions are of little aid in determining the boundaries between what is covered by the federal legislation and what congress intended to be left to the states, but the task is one of accommodation.[6] The scope of the statute as respects application to particular employees must be defined in the gradual process of inclusion and exclusion as applied to the facts of particular cases.[7]

In determining whether employees are covered by the act, it is immaterial whether they are compensated by a unit of time, by the piece, or by any other measurement, but such mode of compensation must be translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory requirements as to wages have been fulfilled.[8] So the act applies to workmen employed at a weekly wage as well as to those employed at an hourly wage.[9] The statute is not limited in its effect to employees receiving less than the minimum wage prescribed by its provisions,[10] and employees are not to be deprived of the benefits of the act simply because they are well paid or because they are represented by strong bargaining agents.[11] The act is available for unorganized workmen as well as organized workmen.[12]

In determining whether the statute is applicable, each individual employee's status must be considered separately, and, where the employer is engaged in different types of business, careful consideration must be given to the employer's various business activities.[13] The statute may be applied to a sep-

independent contractors not "employees" of company within Fair Labor Standards Act.—Walling v. Todd, D.C.Pa., 52 F.Supp. 62, motion denied 3 F.R.D. 490.

2. U.S.—Bowie v. Gonzalez, C.C.A. Puerto Rico, 117 F.2d 11—Fleming v. Hawkeye Pearl Button Co., C.C.A.Iowa, 113 F.2d 52—Walling v. Southwestern Greyhound Lines, D.C.Mo., 65 F.Supp. 52.
N.Y.—Atkocus v. Terker, 30 N.Y.S. 2d 628.

3. U.S.—U. S. v. Rosenwasser, Cal., 65 S.Ct. 295, 323 U.S. 360, 89 L. Ed. 301—Walling v. Consumers Co., C.C.A.Ill., 149 F.2d 626—Joseph v. Ray, C.C.A.Okl., 139 F.2d 409—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616—Bayley v. Southland Gasoline Co., C.C.A.Ark., 131 F.2d 412, reversed on other grounds Southland Gasoline Co. v. Bayly, 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244—Bowie v. Gonzalez, C.C.A.Puerto Rico, 117 F.2d 11—Antis v. Montgomery Ward & Co., D.C.Mich., 63 F.Supp. 669—Martin v. Lain Oil & Gas Co., D.C.Ill., 36 F.Supp. 252.
Md.—Automobile Banking Corporation v. Willison, 28 A.2d 864, 181 Md. 118.
N.Y.—Stoike v. First Nat. Bank of City of New York, 36 N.Y.S.2d 390, 264 App.Div. 585, reversed on other grounds 48 N.E.2d 482, 290 N.Y. 195, certiorari denied 64 S.Ct. 50, 320 U.S. 762, 88 L.Ed. 455.
Restriction of statute to employments in interstate commerce see infra § 151 (6).

Employees held within statute
(1) Generally.—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923—Bowers v. Remington Rand, D.C.Ill., 64 F.Supp. 620.
(2) Office workers.—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363.

4. U.S.—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., Atlantic Co. v. Walling, 131 F.2d 518—Martin v. Lain Oil & Gas Co., D.C.Ill., 36 F.Supp. 252—Fleming v. Tidewater Optical Co., D.C.Va., 35 F.Supp. 1015.

Receiver
The purposes of the Fair Labor Standards Act cannot be defeated by a receiver employing labor any more than by a private individual or a corporation employing labor.—Walling v. Black Diamond Coal Min. Co., D.C.Ky., 59 F.Supp. 348.

5. U.S.—Fletcher v. Grinnell Bros., C.C.A.Mich., 150 F.2d 337, conformed to, D.C., 64 F.Supp. 778—Ralph Knight, Inc., v. Mantel, C.C. A.Mo., 135 F.2d 514—Helena Glendale Ferry Co. v. Walling, C.C.A. Ark., 132 F.2d 616—Fleming v. Hawkeye Pearl Button Co., C.C.A. Iowa, 113 F.2d 52—Walling v. Southwestern Greyhound Lines, D. C.Mo., 65 F.Supp. 52.

6. U.S.—Fletcher v. Grinnell Bros., D.C.Mich., 62 F.Supp. 258, reversed on other grounds, C.C.A., 150 F.2d 337, conformed to, D.C., 64 F.Supp. 778.

7. U.S.—Burton v. Zimmerman, C.C. A.S.C., 131 F.2d 377.

8. U.S.—U. S. v. Rosenwasser, Cal., 65 S.Ct. 295, 323 U.S. 360, 89 L. Ed. 301.

9. Pa.—Haddad v. Beckerman Shoe Corporation, 41 Pa.Dist. & Co. 445, 33 Berks Co.L.J. 291.

10. U.S.—Mid-Continent Pipe Line Co. v. Hargrave, C.C.A.Okl., 129 F. 2d 655—Carleton Screw Products Co. v. Fleming, C.C.A.Minn., 126 F.2d 537, certiorari denied 63 S.Ct. 54, 317 U.S. 634, 87 L.Ed. 511.

11. U.S.—Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, Va., 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007—Walling v. Newman, D.C.Iowa, 61 F. Supp. 971.

12. U.S.—Anuchick v. Transamerican Freight Lines, D.C.Mich., 46 F. Supp. 861.

13. U.S.—Fletcher v. Grinnell Bros., D.C.Mich., 62 F.Supp. 258, revers-

arate department of an employer's business, although another part is exempt,[14] and some employees in a business enterprise may be covered by the act and others not.[15] An employee engaged in the performance of both covered and noncovered work during the same work week must be compensated for all his work during the week in accordance with the standards prescribed by the act.[16]

The ultimate issue of coverage under the statute is a judicial question committed to the courts,[17] and the question whether a particular employer is covered by the act may be the subject of a judicial determination in appropriate proceedings instituted under the act.[18] An employer may be required to comply with the wage order applicable to a particular industry where his business comes within the definition of such industry,[19] and he may not claim that certain employees covered by the act do not come within the code for a certain industry on the ground that no representative of the particular industry was selected on the board charged with administration since it is not neecssary that representation be given to every specialized branch of industry.[20] Under the statute an employer at its peril must decide which employees are covered by the act, and comply with its requirements as to such employees,[21] but it has been held, where a doubt exists as to whether the act applies to a particular employee, that the court will not place a greater burden on the employer than is necessary in order to comply with the mandates of the act.[22] Unless the type of work involved is covered by the act the court cannot grant relief against inadequate pay.[23]

Adamson Act. The Adamson Act of 1916, 39 U.S.St. at L. p 721, fixing a standard of wages for certain employees of railroad companies, was held applicable only to trainmen working on engines or in cars and not to switchmen.[24]

§ 151(6). Employment in Interstate Commerce

The Fair Labor Standards Act generally concerns itself with employments involved in interstate commerce or in the production of goods for commerce.

The Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, concerns itself with employments involved in interstate commerce or in the production of goods for commerce,[25] and generally its operation extends to all employers who are "engaged in commerce or in the production of goods for commerce."[26] However, the statute does not extend its coverage over the entire field of interstate commerce ordinarily subject to federal control,[27] and it does not regulate local transactions which merely affect interstate commerce.[28] So it

ed on other grounds, C.C.A., 150 F.2d 337, conformed to, D.C., 64 F. Supp. 778.

14. U.S.—Davis v. Goodman Lumber Co., C.C.A.N.C., 133 F.2d 52.

15. U.S.—Baggett v. Henry Fischer Packing Co., D.C.Ky., 37 F.Supp. 670—Wood v. Central Sand & Gravel Co., D.C.Tenn., 33 F.Supp. 40.

Ga.—Pyron v. Arnold, 21 S.E.2d 461, 67 Ga.App. 742.

16. U.S.—Walling v. West Ky. Coal Co., D.C.Tenn., 60 F.Supp. 681—Walling v. Mutual Wholesale Food & Supply Co., D.C.Minn., 46 F. Supp. 939, modified on other grounds, C.C.A., 141 F.2d 331.

17. U.S.—Walling v. La Belle S. S. Co., C.C.A.Ohio, 148 F.2d 198.

18. U.S.—Walling v. Daily Press, D.C.Va., 58 F.Supp. 792.

19. U.S.—Walling v. Baltimore Steam Packet Co., D.C.Md., 50 F. Supp. 639, affirmed, C.C.A., 144 F. 2d 130.

A steamboat company owned or controlled by one or more railroad carriers, but which operated no equipment or facilities and performed no service in connection with rail transportation other than establishment and maintenance of through routes and joint rates with connecting carriers, was not subject to wage orders of Administrator under the Fair Labor Standards Act relative to railroad carriers industry.—Walling v. Baltimore Steam Packet Co., C.C.A.Md., 144 F.2d 130.

A company which hauled sugar and molasses in interstate commerce as a common carrier, with forty-nine per cent of its hauling being done for a certain manufacturer, was not the class of carrier referred to in wage order for railroad and property carrier industry of Puerto Rico.—McComb v. La Casa Del Transporte, D.C.Puerto Rico, 71 F. Supp. 44.

20. U.S.—Walling v. American Needlecrafts, C.C.A.Ky., 139 F.2d 60.

21. U.S.—George Lawley & Son Corporation v. South, C.C.A.Mass., 140 F.2d 439, 151 A.L.R. 1081, certiorari denied 64 S.Ct. 1156, 322 U. S. 746, 88 L.Ed. 1578—Snyder v. Wessner, D.C.Minn., 65 F.Supp. 971.

22. U.S.—S. H. Robinson & Co. v. Larue, 156 S.W.2d 432, 178 Tenn. 197.

23. U.S.—Walling v. American Needlecrafts, D.C.Ky., 46 F.Supp. 16, reversed on other grounds, C.C.A., 139 F.2d 60.

24. U.S.—Coke v. Illinois Cent. R. Co., D.C.Tenn., 255 F. 190.

25. U.S.—Camfield v. West Texas Utilities Co., D.C.Tex., 44 F.Supp. 847—Gerdert v. Certified Poultry & Egg Co., D.C.Ala., 38 F.Supp. 964.

Regulation of interstate commerce generally see Commerce 15 C.J.S. p 256 et seq.

26. U.S.—Walling v. Cimi Embroidery & Novelty Co., D.C.N.Y., 63 F.Supp. 601—Walling v. Lincoln Looseleaf Warehouse Co., D.C. Tenn., 59 F.Supp. 601—Corey v. Detroit Steel Corporation, D.C. Mich., 52 F.Supp. 138—Divine v. Levy, D.C.La., 39 F.Supp. 44—Martin v. Lain Oil & Gas Co., D.C.Ill., 36 F.Supp. 252—Fleming v. Tidewater Optical Co., D.C.Va., 35 F. Supp. 1015.

27. U.S.—Fleming v. Arsenal Bldg. Corporation, C.C.A.N.Y., 125 F.2d 278, affirmed 62 S.Ct. 1116, 316 U. S. 517, 86 L.Ed. 1638—Gerdert v. Certified Poultry & Egg Co., D.C. Fla., 38 F.Supp. 964.

N.Y.—Hewlett v. Del Balso Const. Corporation, 43 N.Y.S.2d 650, 180 Misc. 81, appeal denied 44 N.Y.S. 2d 587, 266 App.Div. 922.

28. U.S.—Higgins v. Carr Bros. Co., Me., 63 S.Ct. 337, 317 U.S. 572, 87

has been broadly held that the act is confined in application to employers engaged in commerce or in the production of goods for commerce within the scope of those activities as expressed in the law.[29] It has been held, however, that the requirement of the statute that "every employer" pay wages at a specified rate to each employee who is engaged in commerce or in the production of goods for commerce is all-embracing and includes within its scope employers whose business is not in commerce and who produce nothing for commerce,[30] and, as discussed infra § 151 (9), the applicability of the statute generally depends on the character of the work performed by the employee, rather than on the character of the employer's business. Accordingly, whether an employer is governed by the act depends in the final analysis on the degree to which the services of its employees affect interstate commerce.[31]

In determining whether an employer is engaged in commerce or in the production of goods for commerce, each transaction and business must be examined in the light of all surrounding circumstances,[32] and the special facts pertaining to the particular business are controlling.[33] The fact that some of the customers to which an employer ministered were engaged in interstate commerce does not establish that the employer is engaged in such commerce where none of the customers either sold what was received from the employer or produced with what it received any significant part for commerce that could be credited to any particular portion of the labor of the employer's employees.[34] Whether an apparently local transaction takes place at the beginning or at the end of interstate commerce is immaterial on the question whether an employer is engaged in interstate commerce within the statute.[35]

§ 151(7). —— What Constitutes Commerce, Engagement in Commerce, and Production for Commerce

a. In general
b. Production of goods for commerce
c. Particular businesses and industries

a. In General

The word "commerce" as used in provisions of the statute extending coverage to employers and employees engaged in commerce or in the production of goods for commerce means trade, commerce, transportation, or communication from any state to any place outside thereof; and generally the engagement in any one of the activities which are included in the statutory definition is sufficient to subject an employer to regulation under the act.

The word "commerce" as used in provisions of the Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, extending coverage of the act to employers and employees engaged in commerce or in the production of goods for commerce is defined by § 3 (b) of the act, 29 U.S.C.A. § 203 (b), as trade, commerce, transportation, transmission, or

L.Ed. 468—Walling v. Jacksonville Paper Co., Fla., 63 S.Ct. 332, 317 U.S. 564, 87 L.Ed. 460—Republic Pictures Corp. v. Kappler, C.C.A. Iowa, 151 F.2d 543, 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L. Ed. 1040—Noonan v. Fruco Const. Co., C.C.A.Mo., 140 F.2d 633—Walling v. Friend, D.C.Mo., 63 F.Supp. 143—Cochran v. Florida Nat. Bldg. Corporation, D.C.Fla., 45 F.Supp. 830, affirmed, C.C.A., 134 F.2d 615—Johnson v. Filstow, Inc., D.C. Fla., 43 F.Supp. 930—Chapman v. Home Ice Co., D.C.Tenn., 43 F. Supp. 424, reversed on other grounds, C.C.A., 136 F.2d 353, certiorari denied 64 S.Ct. 72, 320 U.S. 761, 88 L.Ed. 454—Veazey Drug Co. v. Fleming, D.C.Okl., 42 F. Supp. 689—Gerdert v. Certified Poultry & Egg Co., D.C.Ala., 38 F.Supp. 964.

Ala.—Cudahy Packing Co. of Alabama v. Bazanos, 15 So.2d 720, 245 Ala. 73.

N.Y.—Twyman v. Milk Bottles Federation, 44 N.Y.S.2d 416, 180 Misc. 229, affirmed 45 N.Y.S.2d 222, 180 Misc. 788, affirmed 47 N.Y.S.2d 206, 267 App.Div. 918—Hewlett v. Del Balso Const. Corporation, 43 N.Y.S 2d 650, 180 Misc. 81, appeal denied 44 N.Y.S.2d 587, 266 App. Div. 922—In re New York Title & Mortgage Co. (Series N–103), 39 N.Y.S.2d 893, 179 Misc. 789.

Okl.—Brooks Packing Co. v. Willis, 137 P.2d 923, 192 Okl. 538.

Extent of regulation

The Fair Labor Standards Act does not attempt to regulate local transactions which merely affect interstate commerce except in the matter of production of goods for commerce or the sale of goods to be shipped, sold and delivered in commerce or intended to be shipped, sold or delivered in interstate commerce.—Veazey Drug Co. v. Fleming, D.C.Okl., 42 F.Supp. 689—Gerdert v. Certified Poultry & Egg Co., D.C.Ala., 38 F.Supp. 964.

29. U.S.—General Tobacco & Grocery Co. v. Fleming, C.C.A.Mich., 125 F.2d 596, 140 A.L.R. 783—Holland v. Haile Gold Mines, D.C.S.C., 44 F.Supp. 641—Fleming v. Wood-Fruitticher Grocery Co., D.C.Ala., 37 F.Supp. 947.

Ark.—H. B. Deal & Co. v. Leonard, 196 S.W.2d 991.

N.Y.—Twyman v. Milk Bottlers Federation, 44 N.Y.S.2d 416, 180 Misc. 229, affirmed 45 N.Y.S.2d 222, 180 Misc. 788, affirmed 47 N.Y.S.2d 206, 267 App.Div. 918.

30. U.S.—Fleming v. A. B. Kirschbaum Co., C.C.A.Pa., 124 F.2d 567, affirmed Kirshbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638.

31. U.S.—Snyder v. John J. Casale, Inc., D.C.N.Y., 49 F.Supp. 926.

32. U.S.—Gerdert v. Certified Poultry & Egg Co., D.C.Fla., 38 F.Supp. 964—Fleming v. Alterman, D.C. Ga., 38 F.Supp. 94.

33. U.S.—Walling v. Jacksonville Paper Co., Fla., 63 S.Ct. 332, 317 U.S. 564, 87 L.Ed. 460.

Kan.—Baum v. A. C. Office Bldg. Co., 143 P.2d 417, 157 Kan. 558, 150 A.L.R. 581.

The facts at the time goods are produced determine the applicability of the statute.—Venero v. Hageman, Inc., 40 N.Y.S.2d 233, 179 Misc. 882.

34. U.S.—Camfield v. West Texas Utilities Co., D.C.Tex., 44 F.Supp. 847.

35. U.S.—Fleming v. Alterman, D.C. Ga., 38 F.Supp. 94.

communication among the several states or from any state to any place outside thereof.[36] The word "commerce" thus means "interstate commerce,"[37] and includes such transactions, conditions, and relationships as had theretofore been known and acknowledged as constituting interstate commerce in the constitutional sense.[38] The term includes more than transportation, and embraces all component parts of commercial intercourse among states;[39] it comprehends not only shipments but also carriers engaged in interstate commerce and the instrumentalities by which such commerce is carried on.[40]

In determining what constitutes "commerce" or "engaged in commerce" within the Fair Labor Standards Act, the courts are guided by practical considerations,[41] and it has been held that they will liberally construe the statutory language and not restrict the operation of the statute by technical interpretations of the term "commerce."[42] The words "engaged in commerce" should not be so limited by construction as to defeat the purpose of congress, but should be interpreted in a manner consistent with their practical meaning and effect in the particular situation.[43] The term "transportation" as used in the statutory definition of "commerce" is not restricted to its technical meaning as the carrying of a shipment from consignor to consignee, but is used in its general sense as well understood and legally defined in other instances and situations.[44] The transportation need not be in pursuit of trade, and it makes no difference whether the goods handled are personally owned goods of the employer or goods moving interstate for the convenience of the government.[45]

As a general rule the engagement in any one of the activities which are included in the statutory definition of "commerce" is sufficient to subject an employer to regulation under the Fair Labor Standards Act.[46] One who ships goods interstate is engaged in interstate commerce[47] and the unloading at destination of an interstate shipment is also work in interstate commerce within the statute, regardless of whether done by the carrier or another.[48] However, the mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce.[49]

Generally the acquiring of goods interstate, the

36. U.S.—Walling v. Peoples Packing Co., C.C.A.Okl., 132 F.2d 236, certiorari denied 63 S.Ct. 831, 318 U.S. 774, 87 L.Ed. 1144—Walling v. Paramount-Richards Theatres, D.C.La., 61 F.Supp. 290—Wagner v. American Service Co., D.C.Iowa, 58 F.Supp. 32—Cushway v. Stork Engineering Co., D.C.Mich., 51 F. Supp. 568, affirmed, C.C.A., 142 F. 2d 463—Dallum v. Farmers Co-Op. Trucking Ass'n, D.C.Minn., 46 F.Supp. 785.

Ga.—Orange Crush Bottling Co. v. Tuggle, 27 S.E.2d 769, 70 Ga.App. 144.

The common understanding of the term "commerce," if at variance with the statutory definition, is not to be substituted for it.—Umthun v. Day & Zimmermann, 16 N.W.2d 258, 235 Iowa 293.

The "current of commerce" test arising under statutes involving a wide flow of goods from one state to another through a throat or vent is not applicable in determining whether employees are in commerce within the meaning of the Fair Labor Standards Act.—Walling v. Goldblatt Bros., C.C.A.Ill., 128 F.2d 778, certiorari denied 63 S.Ct. 528, 318 U.S. 757, 87 L.Ed. 1130.

Activities held not in commerce within statute

U.S.—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120—Murphy v. Georgia Aero-Tech, D.C.Ga., 49 F.Supp. 982—Ouendag v. Gibson, D.C.Mich., 49 F.Supp. 379—Walling v. Mutual Wholesale Food & Supply Co., D.C. Minn., 46 F.Supp. 939, modified on other grounds, C.C.A., 141 F.2d 331.

37. U.S.—Jones v. Springfield Missouri Packing Co., D.C.Mo., 45 F. Supp. 997—Fleming v. Alterman, D.C.Ga., 38 F.Supp. 94.

38. U.S.—Atlantic Co. v. Walling, C.C.A.Ga., 131 F.2d 518.

39. U.S.—Walling v. Goldblatt Bros., C.C.A.Ill., 128 F.2d 778, certiorari denied 63 S.Ct. 528, 318 U. S. 757, 87 L.Ed. 1130.

40. U.S.—Atlantic Co. v. Walling, C.C.A.Ga., 131 F.2d 518.

41. U.S.—Overstreet v. North Shore Corp., Fla., 63 S.Ct. 494, 318 U.S. 125, 87 L.Ed. 656—Walling v. Mutual Wholesale Food & Supply Co., C.C.A.Minn., 141 F.2d 331—Walling v. Paramount-Richards Theatres, D.C.La., 61 F.Supp. 290—Abram v. San Joaquin Cotton Oil Co., D.C. Cal., 49 F.Supp. 393—Barbe v. Cummins Const. Co., D.C.Md., 49 F.Supp. 168, affirmed, C.C.A., 138 F.2d 667.

42. U.S.—Divine v. Levy, D.C.La., 39 F.Supp. 44.

43. U.S.—Overstreet v. North Shore Corporation, Fla., 63 S.Ct. 494, 318 U.S. 572, 86 L.Ed. 656—Republic Pictures Corp. v. Kappler, C.C.A. Iowa, 151 F.2d 543, 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L.Ed. 1040.

44. U.S.—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., 131 F.2d 518.

Origin of transportation

Whether transportation is from a rail head of goods in transit from another state or from any other terminal where goods are still in commerce is without distinction in so far as the Fair Labor Standards Act is concerned.—Walling v. Mutual Wholesale Food & Supply Co., D.C.Minn., 46 F.Supp. 939, modified on other grounds, C.C.A., 141 F.2d 331.

45. U.S.—Crabb v. Welden Bros., D. C.Iowa, 65 F.Supp. 369.

46. U.S.—Walling v. Rockton & Rion R. R., D.C.S.C., 54 F.Supp. 342, affirmed, C.C.A., 146 F.2d 111, certiorari denied 65 S.Ct. 1026, 324 U.S. 880, 89 L.Ed. 1431—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., 131 F.2d 518.

47. U.S.—Fleming v. Alterman, D. C.Ga., 38 F.Supp. 94.

48. Ga.—Orange Crush Bottling Co. v. Tuggle, 27 S.E.2d 769, 70 Ga. App. 144.

49. U.S.—Jewel Tea Co. v. Williams, C.C.A.Okl., 118 F.2d 202—Walling v. L. Wiemann Co., D.C. Wis., 52 F.Supp. 131, affirmed, C.C. A., 138 F.2d 602, 150 A.L.R. 878, certiorari denied 64 S.Ct. 782, 321 U.S. 785, 88 L.Ed. 1077.

processing thereof, and the shipment, or the intention that they be shipped abroad in interstate commerce constitutes one "flow of commerce" with respect to application of the statute.[50] Where orders are solicited within a state and the goods are shipped from without the state directly to the customer or to an agent for delivery to the customer, the transactions are a part of interstate commerce until the goods reach the customer.[51] So also where goods are bought for use beyond state lines and it is understood by both seller and buyer that they are to be promptly transported by the buyer in interstate commerce, the sale of such goods is in itself a part of interstate commerce, notwithstanding the sale and delivery take place entirely within one state.[52]

Where goods once enter the channels of interstate commerce, they thereby acquire an interstate status which continues until the interstate journey ends and they come to rest at the point of their intended destination,[53] and in this respect it has been held that goods do not reach their destination until actually unloaded and deposited in the yards of one ordering the goods from other states, and that neither a switch track nor cars in which the goods are carried are a place of rest or final destination.[54] Goods remain in commerce until they reach their final destination, notwithstanding a halt in their movement, where such halt is a convenient intermediate step in the process of getting them to their final destination.[55] So a mere temporary break in the interstate transportation of goods by placing them in a warehouse waiting final delivery, or a series of deliveries and transmission to and from a place of temporary rest, does not remove goods from commerce within the meaning of the statute.[56] However, where merchandise is delivered from out of the state to the place of business of one engaged strictly in local business, its interstate movement has terminated.[57] So it has been held that intra-state distribution of stock from a warehouse not on prior order or contract is not work in commerce within the meaning of the statute,[58] and

50. U.S.—Timberlake v. Day & Zimmerman, D.C.Iowa, 49 F.Supp. 28.

Payment of freight

Where the warehouse of a Minnesota wholesale grocer was the destination intended when merchandise was shipped by rail from outside the state f. o. b. Minneapolis, the merchandise was still in "interstate commerce" within this chapter when received at warehouse, and question of who paid freight was immaterial. —Walling v. Mutual Wholesale Food & Supply Co., D.C.Minn., 46 F.Supp. 939, modified on other grounds, C.C. A., 141 F.2d 331.

51. U.S.—Schroepfer v. A. S. Abell Co., C.C.A.Md., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U. S. 763, 88 L.Ed. 1060, rehearing denied 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595—Walling v. Goldblatt Bros., C.C.A.Ill., 128 F.2d 778, certiorari denied 63 S.Ct. 528, 318 U.S. 757, 87 L.Ed. 1130—Jewel Tea Co. v. Williams, C.C.A.Okl., 118 F.2d 202—Lorber v. Rosow, D. C.Conn., 58 F.Supp. 341—Walling v. L. Wiemann Co., D.C.Wis., 52 F.Supp. 131, affirmed, C.C.A., 138 F.2d 602, 150 A.L.R. 878, certiorari denied 64 S.Ct. 782, 321 U.S. 785, 88 L.Ed. 1077.

52. Ga.—Hamlet Ice Co. v. Fleming, C.C.A.N.C., 127 F.2d 165, certiorari denied 63 S.Ct. 29, 317 U. S. 634, 87 L.Ed. 511—Gordon v. Paducah Ice Mfg. Co., D.C.Ky., 41 F.Supp. 980—Divine v. Levy, D.C. La., 39 F.Supp. 44—Wood v. Central Sand & Gravel Co., D.C.Tenn., 33 F.Supp. 40.

Ga.—Orange Crush Bottling Co. v. Tuggle, 27 S.E.2d 769, 70 Ga.App. 144.

53. U.S.—Clyde v. Broderick, C.C.A. Colo., 144 F.2d 348.

54. U.S.—Walling v. Consumers Co., C.C.A.Ill., 149 F.2d 626.

Sidetrack designated by consignee

It has been held, however, that, when a railroad car on its arrival at destination is placed upon a sidetrack designated by the consignee, the interstate transportation ends with respect to question whether watchman guarding car is engaged in interstate commerce within this section.—Delcour v. Lehigh Valley Coal Sales Co., 43 N.Y.S.2d 371, 182 Misc. 289.

55. U.S.—Walling v. Jacksonville Paper Co., Fla., 63 S.Ct. 332, 317 U.S. 564, 87 L.Ed. 460.

Cal.—McDaniel v. Clavin, 136 P.2d 559, 22 Cal.2d 61.

Bulk plants

Where interstate shipments of petroleum products were unloaded at bulk plants of distributor-employer, and such products were transported in commerce to the bulk plants with intention, in advance of transportation, that all of products except incidental sales would go to retail service stations, temporary storage of products in tanks at bulk plants was merely a convenient intermediate step in process of getting them to their final destination, and hence employee, whose duties consisted of inspecting and keeping in repair the bulk plants, was engaged in commerce within statute.—Mid-Continent Petroleum Corp. v. Keen, C.C.A. Iowa, 157 F.2d 310.

56. U.S.—Republic Pictures Corp. v. Kappler, C.C.A.Iowa, 151 F.2d 543, 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 804, 327 U. S. 817, 90 L.Ed. 1040—Walling v. Northwestern-Hanna Fuel Co., D. C.Minn., 67 F.Supp. 833—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., 131 F.2d 518.

Test

In determining whether sales made by factor or agent of an out-of-state principal from stock of goods in warehouse is interstate commerce, the test is whether the interstate journey has, in good faith, come to an end before the sale is made.—Lorber v. Rosow, D.C.Conn., 58 F.Supp. 341.

If there is a practical continuity of movement from the manufacturers or suppliers without the state through a wholesale distributor's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods in the warehouse of the wholesaler.—Walling v. Jacksonville Paper Co., Fla., 63 S.Ct. 332, 317 U.S. 564, 87 L.Ed. 460.

57. U.S.—Ouendag v. Gibson, D.C. Mich., 49 F.Supp. 379—Walling v. Mutual Wholesale Food & Supply Co., D.C.Minn., 46 F.Supp. 939, modified on other grounds, C.C.A., 141 F.2d 331.

58. U.S.—Walling v. Silver Bros. Co., C.C.A.N.H., 136 F.2d 168—Fel-

that the fact that part of the employer's merchandise, after being brought to the employer's place of business from outside the state, ultimately reached consumers and retailers unchanged in form did not constitute such continuity of flow of those products in interstate commerce as would bring employees within the statute.[59]

Manufacturing. Although the manufacture or processing of goods is not in and of itself commerce within the meaning of the Fair Labor Standards Act,[60] the shipment of manufactured goods interstate is such commerce,[61] and the statute also extends to the producer of goods who has knowledge that the sale, shipment, or delivery of the goods in commerce is intended.[62]

Instrumentalities of commerce. Persons engaged in maintaining, repairing, and operating facilities constituting instrumentalities of commerce are engaged in commerce within the statute.[63] The work of keeping tracks and bridges used by interstate commerce in a proper state of repair has been held so closely related to such commerce as to be a part thereof.[64]

b. Production of Goods for Commerce

(a) In general
(b) Goods

(a) In General

Under provisions rendering the Fair Labor Standards Act applicable to employers engaged in the production of goods for commerce, the term "produced" means produced, manufactured, mined, handled, or in any other manner worked on in any state.

As discussed supra § 151 (6), the Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, generally applies to employers engaged in the production of goods for commerce, and in this connection, § 3 (j) of the act, 29 U.S.C.A. § 203 (j), defines the term "produced" as meaning produced, manufactured, mined, handled, or in any other manner worked on in any state;[65] and an em-

labaum v. Swift & Co., D.C.Ohio, 54 F.Supp. 353—Walling v. Ward's Cut-Rate Drugs, D.C.Tex., 54 F. Supp. 41—Walling v. L. Wiemann Co., D.C.Wis., 52 F.Supp. 131, affirmed, C.C.A., 138 F.2d 602, 150 A.L.R. 878, certiorari denied 64 S. Ct. 782, 321 U.S. 785, 88 L.Ed. 1077.

Cal.—McDaniel v. Clavin, 136 P.2d 559, 22 Cal.2d 61.

Recurrent orders

Goods delivered pursuant to prior order, contract, or understanding with dealer's customers must be included in the group of transactions held to be in commerce within statute; but fact that most of the customers form a fairly stable group, whose orders are recurrent as to kind and amount of merchandise desired so that manager can estimate with precision the needs of his business, does not necessarily justify the inference that the transaction is in commerce.—Ouendag v. Gibson, D. C.Mich., 49 F.Supp. 379.

59. Colo.—Bock v. Hoffman, 130 P. 2d 691, 110 Colo. 73.

60. U.S.—Timberlake v. Day & Zimmerman, D.C.Iowa, 49 F.Supp. 28.

61. U.S.—Timberlake v. Day & Zimmerman, supra.

62. U.S.—Warren-Bradshaw Drilling Co. v. Hall, Tex., 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83—Hanson v. Lagerstrom, C.C.A.Minn., 133 F.2d 120—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F. Supp. 393—Gerdert v. Certified Poultry & Egg Co., D.C.Fla., 38 F. Supp. 964.

N.C.—Crompton v. Baker, 16 S.E.2d 471, 220 N.C. 52.

Responsibility for movement

Whether a particular manufacturer who is engaged in producing goods which thereafter move in interstate commerce is responsible for such movement, or whether his activities with respect to the goods are completely terminated by delivery of his goods to another in same state who thereafter ships them in interstate commerce either in their original or changed form, has no material bearing on applicability of statute to the manufacturer.—Walling v. Kerr, D.C.Pa., 47 F.Supp. 852.

Independent contractor for rotary drilling operations on oil wells who was not financially interested in wells, but who was closely identified with business of oil production in state, could not escape applicability of Fair Labor Standards Act by claim of ignorance of interstate character of state oil industry.—Warren-Bradshaw Drilling Co. v. Hall, Tex., 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83.

63. U.S.—Overstreet v. North Shore Corporation, Fla., 63 S.Ct. 494, 318 U.S. 125, 87 L.Ed. 656—Laudadio v. White Const. Co., C.C.A.N.Y., 163 F.2d 383.

Roads and bridges

Fact that owner of toll road and drawbridge might be subject to state taxation did not imply that it was free from federal regulation or that its road and bridge were not instrumentalities of interstate commerce so as to make the statute inapplicable to employees maintaining and operating road and bridge.—Overstreet v. North Shore Corporation, Fla., 63 S.Ct. 494, 318 U.S. 125, 87 L.Ed. 656.

Facilities held not instrumentalities of commerce within rule

(1) Navy dock and dock structures being built for purpose of use by United States naval vessels to the exclusion of commercial vessels which might wish to use such structures in ordinary course of trade and commerce.—Ritch v. Puget Sound Bridge & Dredging Co., D.C. Wash., 60 F.Supp. 670.

(2) Airplanes for students at school for air pilots conducted by private concern under contract with federal government.—Murphy v. Georgia Aero-Tech., D.C.Ga., 49 F. Supp. 982.

64. U.S.—Walling v. Patton-Tulley Transp. Co., C.C.A.Tenn., 134 F. 2d 945.

65. U.S.—Warren-Bradshaw Drilling Co. v. Hall, Tex., 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83—Callus v. 10 East Fortieth St. Bldg., C.C.A. N.Y., 146 F.2d 438, reversed on other grounds 65 S.Ct. 1227, 325 U. S. 578, 89 L.Ed. 1806, 161 A.L.R. 1263.

"Production" in an economic sense includes all activity directed to increasing the number of scarce economic goods, and is not simply the manual, physical labor involved in changing the form or utility of a tangible article.—Borden Co. v. Borella, N.Y., 65 S.Ct. 1223, 325 U.S. 679, 89 L.Ed. 1865, 161 A.L.R. 1258.

Tangible goods

The statute is not limited to the producers of tangible goods.—Lenroot v. Western Union Tel. Co., D.

ployee is deemed to be engaged in the production of goods if he is employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, as is discussed infra § 151 (9) b. It has been held that the term "produced" is used in its ordinary and comprehensive economic sense,[66] but it has also been held that the word as defined has a broader meaning than the one which it has in ordinary usage.[67] The terms "handled" and "worked on" as used in the statutory definition are terms of ordinary speech, and mean what they mean in ordinary intercourse.[68]

The phrase "production for commerce" relates to all goods which at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce,[69] whether they are to be shipped by the maker or by someone else,[70] and it is immaterial that through the exigencies of the business all of the goods may not thereafter actually enter interstate commerce.[71] So the fact that goods produced by an employer are sold, delivered, and paid for in the same state where they are produced does not necssarily remove them from the classification of goods produced for interstate commerce under the statute.[72] The term "production of goods for commerce" also includes the production of goods in view, or to serve as an essential part, of interstate transportation or commerce.[73] Accordingly employees engaged in work on public roads, streets, and bridges used in interstate commerce and indispensable to the continuance of production of goods

C.N.Y., 52 F.Supp. 142, affirmed, C. C.A., 141 F.2d 400, reversed on other grounds 65 S.Ct. 335, 323 U.S. 490, 89 L.Ed. 414.

Activities held within term "produced"

(1) Generally.

U.S.—Baldwin v. Emigrant Industrial Savings Bank, C.C.A.2, 150 F. 2d 524, 161 A.L.R. 1263, certiorari denied Emigrant Industrial Savings Bank v. Baldwin, 66 S.Ct. 171, 326 U.S. 767, 90 L.Ed. 462—Fleming v. Post, C.C.A.N.Y., 146 F.2d 441, 158 A.L.R. 1384.

N.Y.—Quest v. George A. Bowman, Inc., 64 N.Y.S.2d 60.

(2) Book publisher and jobber whose employees read, edited, and prepared manuscripts for printer, corrected galley proofs and distributed finished books from the premises to customers.—Baldwin v. Emigrant Industrial Savings Bank, supra.

(3) Buying of scrap and junk for sale in interstate commerce, segregating it, breaking it up, keeping the books in connection therewith, and other labor necessary to the handling thereof.—Agnew v. Johnson, 176 S.W.2d 489, 352 Mo. 222.

(4) Conversion of passenger automobiles to buses to be delivered to owners in various states.—Walling v. Armbruster, D.C.Ark., 51 F.Supp. 166.

(5) Owner's servicing and repairing of motor vehicles, which he leased or rented to others for use by them in interstate transportation. —Hertz Drivurself Stations v. U. S., C.C.A.Mo., 150 F.2d 923.

(6) Purchase, repair, rehabilitation, and sale in interstate and foreign commerce of used or so-called "secondhand" clothing.—Walling v. Belikoff, D.C.N.Y., 59 F.Supp. 167, affirmed, C.C.A., 147 F.2d 1008.

(7) Repackaging of goods moving in interstate commerce.—Walling v. Mutual Wholesale Food & Supply Co., C.C.A.Minn., 141 F.2d 331—Ullo v. Smith, D.C.N.Y., 62 F.Supp. 757—Walling v. Staffen, D.C.N.Y., 5 F.R. D. 236.

(8) Repairing aircraft engines and parts for United States government in privately owned machine shop.—Lynch v. Embry-Riddle Co., D.C. Fla., 63 F.Supp. 992.

(9) Where laundry corporation employees were engaged in working on goods and in handling such goods, laundry corporation was engaged in producing goods within meaning of statute.—Philips v. Star Overall Dry Cleaning Laundry Co., D.C.N.Y., 55 F.Supp. 238, affirmed, C.C.A., 149 F.2d 416, certiorari denied 66 S.Ct. 677, 327 U.S. 780, 90 L.Ed. 1008, rehearing denied 60 S.Ct. 815, 327 U. S. 817, 90 L.Ed. 1040.

(10) Where livestock commission firm sorted and graded livestock and furnished facilities for sale to buyers who immediately shipped much of livestock out of state, the firm and its clerical employees, who prepared statement for sellers showing gross proceeds of sale, firm's commissions, and other expenses, and paid sellers net amount due, were engaged in production of goods for commerce.—Walling v. Friend, C.C. A.Mo., 156 F.2d 429.

Activities held not within term "produced"

A tenant engaged in sale of costume jewelry who bought some of its merchandise pursuant to design submitted to manufacturers, was not a manufacturer or handler as part of manufacturing.—Ullo v. Smith, D. C.N.Y., 62 F.Supp. 757.

66. U.S.—Borden Co. v. Barella, N. Y., 65 S.Ct. 1223, 325 U.S. 679, 89 L.Ed. 1865; 161 A.L.R. 1258.

67. U.S.—Fleming v. A. B. Kirschbaum Co., C.C.A.Pa., 124 F.2d 567 —Crabb v. Welden Bros., D.C. Iowa, 65 F.Supp. 369.

68. U.S.—Western Union Telegraph Co. v. Lenroot, N.Y., 65 S.Ct. 335, 323 U.S. 490, 89 L.Ed. 414.

69. U.S.—U. S. v. Darby, Ga., 61 S. Ct. 451, 312 U.S. 100, 657, 85 L.Ed. 609, 132 A.L.R. 1430—Gangi v. D. A. Schulte Inc., C.C.A.N.Y., 150 F. 2d 694, affirmed 66 S.Ct. 925, 328 U.S. 108, 90 L.Ed. 1114, 167 A.L.R. 208—Walling v. Peoples Packing Co., C.C.A.Okl., 132 F.2d 236, certiorari denied 63 S.Ct. 831, 318 U. S. 774, 87 L.Ed. 1144—Hill v. Jones, D.C.Ky., 59 F.Supp. 569.

70. U.S.—Bracey v. Luray, C.C.A. Md., 138 F.2d 8—Hamlet Ice Co. v. Fleming, C.C.A.N.C., 127 F.2d 165, certiorari denied 63 S.Ct. 29, 317 U.S. 634, 87 L.Ed. 511.

71. U.S.—U. S. v. Darby, Ga., 61 S. Ct. 451, 312 U.S. 100, 657, 85 L. Ed. 609, 132 A.L.R. 1430.

72. U.S.—Hill v. Jones, D.C.Ky., 59 F.Supp. 569.

A local manufacturer or processor is subject to the statute where his employees prepare goods which he knows another manufacturer will place in interstate commerce as an ingredient of a finished product or as a whole, and the applicability of the statute is not limited to a situation in which one who produces goods is responsible for their subsequent movement in commerce, but the statute applies where the work is performed on any part or ingredient of an article of commerce.—Bracey v. Luray, C.C.A.Md., 138 F.2d 8.

73. U.S.—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., 131 F.2d 518.

moving in interstate commerce are engaged in the production of goods for commerce within the coverage of the act.[74]

The term "production of goods for commerce" includes all steps, whether or not manufacture, which lead to readiness for putting goods into the stream of commerce, and every kind of incidental operation preparatory to putting goods into the stream of commerce.[75] Where local transportation of goods is a step in putting a product into interstate commerce, such step, however slight, becomes a part of production of goods for commerce within the statute,[76] but the definition of the term "produced" as including the "handling" of goods does not extend to the handling of goods in carriage or transmission in commerce.[77] The fact that the amount of goods destined for commerce is great or small is immaterial.[78]

(b) Goods

Under provisions of the Fair Labor Standards Act extending the act to employments concerned with the production of goods for commerce, the term "goods" means wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof.

The term "goods" as used in provisions of the Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, rendering the act applicable to employers and employees engaged in the "production of goods for commerce" is defined in § 3 (i) of the act, 29 U.S.C.A. § 203 (i), as meaning goods, wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof.[79] Accordingly the word has been held to mean commodities which are sent into commerce for trade and traffic in the business world, which will move into commerce and not be consumed by those engaged in such commerce.[80] Where goods play an all-important part in carrying on interstate shipments, competition of goods produced in one state with goods manufactured in another is not necessarily the sole test of whether

74. U.S.—Walling v. McCrady Const. Co., C.C.A.Pa., 156 F.2d 932.

75. U.S.—West Kentucky Coal Co. v. Walling, C.C.A.Tenn., 153 F.2d 582—Walling v. Comet Carriers, C.C.A.N.Y., 151 F.2d 107, certiorari dismissed 66 S.Ct. 1007, 328 U.S. 819, 90 L.Ed. 1600—Hertz Drivurself Stations v. U. S., C.C.A.Mo., 150 F.2d 923—Walling v. Griffin Cartage Co., D.C.Mich., 62 F.Supp. 396, affirmed, C.C.A., 153 F.2d 587.

"Handled" and "worked on"

(1) The terms "handled" and "worked on" within provision defining term "produced" as meaning handled or in any other manner worked on include every kind of incidental operation preparatory to putting goods into the stream of commerce.—Western Union Telegraph Co. v. Lenroot, U.S.N.Y., 65 S. Ct. 335, 323 U.S. 490, 89 L.Ed. 414—Walling v. Friend, C.C.A.Mo., 156 F. 2d 429—Walling v. Northwestern-Hanna Fuel Co., D.C.Minn., 67 F. Supp. 833—Asselta v. 149 Madison Ave. Corp., D.C.N.Y., 65 F.Supp. 385, affirmed, C.C.A., 156 F.2d 139—Walling v. Griffin Cartage Co., D.C.Mich., 62 F.Supp. 396, affirmed, C.C.A., 153 F.2d 587.

N.Y.—Quest v. George A. Bowman, Inc., 64 N.Y.S.2d 60.

(2) The handling of goods by manufacturer or his agent even to the point of preparation for shipment is "production" within statute. —Roberg v. Henry Phipps Estate, C.C.A.N.Y., 156 F.2d 958—Baldwin v. Emigrant Industrial Savings Bank, C.C.A.N.Y., 150 F.2d 524, 161 A.L.R. 1234, certiorari denied 66 S.Ct. 171, 326 U.S. 767, 90 L.Ed. 462.

76. U.S.—Walling v. Griffin Cartage Co., D.C.Mich., 62 F.Supp. 396, affirmed, C.C.A., 153 F.2d 587.

77. U.S.—Western Union Telegraph Co. v. Lenroot, N.Y., 65 S.Ct. 335, 323 U.S. 490, 89 L.Ed. 414.

Distributor or importer

A corporate interstate wholesaler and jobber of textile trimmings which were sometimes broken up and wound on cards by machines as means of selling smaller quantities, but material in which left premises in same condition as when received, handled them merely as distributor or transporter and was not engaged in production of goods for interstate commerce within statute.—Quest v. George A. Bowman, Inc., 64 N.Y.S.2d 60.

78. U.S.—Walling v. Northwestern-Hanna Fuel Co., D.C.Minn., 67 F. Supp. 833.

79. U.S.—Walling v. Paramount-Richards Theatres, D.C.La., 61 F. Supp. 290.

Products held "goods"

(1) Barges used in interstate commerce.—Slover v. Wathen, C.C.A. Md., 140 F.2d 258.

(2) Crude oil.—Divine v. Levy, D. C.La., 39 F.Supp. 44.

(3) Gold mined for the government.—Walling v. Haile Gold Mines, C.C.A.S.C., 136 F.2d 102.

(4) Ice.—Chapman v. Home Ice Co., C.C.A.Tenn., 136 F.2d 353, certiorari denied 64 S.Ct. 72, 320 U.S. 761, 88 L.Ed. 454—Atlantic Co. v. Walling, C.C.A.Ga., 131 F.2d 518—Wagner v. American Service Co., D. C.Iowa, 58 F.Supp. 32—Gordon v. Paducah Ice Mfg. Co., D.C.Ky., 41 F.Supp. 980.

(5) Passenger automobiles converted to buses.—Walling v. Armbruster, D.C.Ark., 51 F.Supp. 166.

"Articles of commerce"

(1) Sample books distributed free of charge to prospective customers as a means of furthering interstate sales and shipments of materials displayed therein would be deemed articles of commerce, and hence goods, rendering manufacturer thereof subject to statute notwithstanding distribution of the books in other states was made without charge.—Walling v. Higgins, D.C. Pa., 47 F.Supp. 856.

(2) Where employer was engaged in the dyeing of yarn for use of manufacturers of carpets and rugs in state, and all of employer's work was done for customers in state who thereafter shipped their carpets and rugs to various points outside of state, rugs and carpets manufactured by employer's customers and shipped interstate were articles of commerce, and employer and his employees were engaged in the production of goods for commerce.—Walling v. Kerr, D.C.Pa., 47 F.Supp. 852.

Levees and ditches

Under this section, "goods" means things which could be created or made, or materials or ingredients for such things, and did not include building levees and irrigation ditches.—Zehring v. Brown Materials, D. C.Cal., 48 F.Supp. 740.

80. Ark.—Couch v. Ward, 168 S.W. 2d 822, 205 Ark. 308.

the goods are within the terms of the statute.[81]

According to some decisions the term "goods" may include intangibles,[82] but other decisions hold that the statute uses the word as referring to tangible things only.[83] It has been held that the term "goods" includes bonds, shares of stock, commercial paper, bills of lading and the like,[84] telegraphic messages,[85] and correspondence, reports, and other documents;[86] but it has also been held that money[87] and letters or papers having no value except as records[88] are not "goods."

The statute expressly provides that the term "goods" does not include goods after their delivery into the physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.[89] The exclusion clause applies only to goods which, having come into the hands of the ultimate consumer, have been withdrawn from further traffic and sale, so that interstate transportation of the goods may take place without responsibility for a prior production in violation of standards imposed by the act;[90] it does not relate to goods considered with reference to production[91] and does not apply to goods in the course of production.[92]

c. Particular Businesses and Industries

Generally all businesses and industries "engaged in commerce" or in the "production of goods for commerce" within the meaning of those terms as used in the statute are subject to the regulations of the statute unless specifically exempted therefrom.

As a general rule, all businesses and industries "engaged in commerce" or in the "production of goods for commerce" within the meaning of those terms as used in the Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, are subject to the regulations of the act unless specifically exempted therefrom.[93] Thus if the requisite connection with

81. U.S.—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., 131 F.2d 518.

82. U.S.—Lenroot v. Western Union Telegraph Co., C.C.A.N.Y., 141 F. 2d 400, reversed on other grounds 65 S.Ct. 335, 323 U.S. 490, 89 L.Ed. 414.

83. U.S.—Bartholome v. Baltimore Fire Patrol & Despatch Co. of Baltimore City, D.C.Md., 48 F.Supp. 98.

84. U.S.—Bozant v. Bank of N. Y., C.C.A.N.Y., 156 F.2d 787.

85. U.S.—Western Union Telegraph Co. v. Lenroot, N.Y., 65 S.Ct. 335, 323 U.S. 490, 89 L.Ed. 414.

86. U.S.—Phillips v. Meeker Co-op. Light & Power Ass'n, D.C.Minn., 63 F.Supp. 733—Lofther v. First Nat. Bank of Chicago, D.C.Ill., 48 F.Supp. 692, affirmed, C.C.A., 138 F.2d 299.
N.Y.—Yunker v. Abbye Employment Agency, 32 N.Y.S.2d 715.

87. Tenn.—Robinson v. Massachusetts Mut. Life Ins. Co., 158 S.W. 2d. 441.

88. U.S.—Bozant v. Bank of New York, C.C.A.N.Y., 156 F.2d 787.

89. U.S.—Divins v. Hazeltine Electronics Corp., C.C.A.N.Y., 163 F. 2d 100—Phillips v. Star Overall Dry Cleaning Laundry Co., C.C.A. N.Y., 149 F.2d 416, certiorari denied 66 S.Ct. 677, 327 U.S. 780, 90 L.Ed. 1008, rehearing denied 66 S. Ct. 815, 327 U.S. 817, 90 L.Ed. 1040—Anderson v. Federal Cartridge Corp., D.C.Minn., 72 F.Supp. 644—Walling v. Paramount-Richards Theatres, D.C.La., 61 F.Supp. 290—Gordon v. Paducah Ice Mfg. Co., D.C.Ky., 41 F.Supp. 980—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., 131 F.2d 518.

"Ultimate consumer"

(1) A paper manufacturer which bought pulpwood from producers paying substandard wages, used pulpwood to manufacture paper, and shipped paper in interstate commerce, was not ultimate consumer of the pulpwood within provision of the Fair Labor Standards Act that "goods" does not include goods after their delivery into actual physical possession of ultimate consumer.—Southern Advance Bag & Paper Co. v. U. S., C.C.A.La., 133 F.2d 449.

(2) Building contractor was ultimate consumer of building materials obtained from outside the state rather than a producer, manufacturer or processor thereof within provision of statute defining "goods" as not including goods after delivery into actual physical possession of ultimate consumer.—Barbe v. Cummins Const. Co., D.C.Md., 49 F.Supp. 168, affirmed, C.C.A., 138 F.2d 667.

Delivery

Under the Fair Labor Standards Act provision that "goods" does not include goods after delivery into physical possession of ultimate consumer other than a producer, manufacturer or processor, the delivery contemplated is one that gives the ultimate consumer the right to deal with the goods as his own while they are being consumed.—Phillips v. Star Overall Dry Cleaning Laundry Co., C.C.A.N.Y., 149 F.2d 416, certiorari denied All Service Laundry Corp. v. Phillips, 66 S.Ct. 677, 327 U.S. 780, 90 L.Ed. 1008, rehearing denied 66 S.Ct. 815, 327 U.S. 817, 90 L.Ed. 1040.

90. U.S.—Hamlet Ice Co. v. Fleming, C.C.A.N.C., 127 F.2d 165, certiorari denied 63 S.Ct. 29, 317 U. S. 634, 87 L.Ed. 511—Gordon v. Paducah Ice Mfg. Co., D.C.Ky., 41 F.Supp. 980.

Assumption as to further commerce

The exclusion from definition of "goods" in Fair Labor Standards Act of goods after delivery to possession of ultimate consumer other than producer, manufacturer or processor, is for the benefit of the ultimate consumer on assumption that ultimate consumer will not participate further in interstate commerce.—Fleming v. Atlantic Co., D. C.Ga., 40 F.Supp. 654, affirmed, C.C. A., Atlantic Co. v. Walling, 131 F. 2d 518.

91. U.S.—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., Atlantic Co. v. Walling, 131 F.2d 518.

Ice consumed by purchasers

Ice furnished by employer for interstate railroad, express, and trucks for refrigeration of interstate freight shipments was not outside the statutory definition of goods although it was consumed by purchasers.—Chapman v. Home Ice Co., C.C.A.Tenn., 136 F.2d 353, certiorari denied 64 S.Ct. 72, 320 U.S. 761, 88 L.Ed. 454—Atlantic Co. v. Walling, C.C.A.Ga., 131 F.2d 518—Hamlet Ice Co. v. Fleming, C.C.A.N.C., 127 F.2d 165, certiorari denied 63 S.Ct. 29, 317 U.S. 634, 87 L.Ed. 511.

92. U.S.—Hamlet Ice Co. v. Fleming, C.C.A.N.C., 127 F.2d 165, certiorari denied 63 S.Ct. 29, 317 U. S. 634, 87 L.Ed. 511—Gordon v. Paducah Ice Mfg. Co., D.C.Ky., 41 F.Supp. 980.

93. U.S.—Jewell Ridge Coal Corporation v. Local No. 6167, United

commerce exists, the statute may apply to employers engaged in aircraft and aviation,[94] banking,[95] buying and selling generally,[96] coal mining and distribution,[97] communications,[98] cutting, sale, and distribution of lumber,[99] electric power generation and transmission,[1] insurance,[2] laundries,[3] manufacturing generally,[4] maritime operations,[5] mining generally,[6] newspapers and other publications,[7] oil pro-

Mine Workers of America, D.C. Va., 53 F.Supp. 935, certiorari denied 64 S.Ct. 1267, 322 U.S. 756, 88 L.Ed. 1585, reversed on other grounds 145 F.2d 10, affirmed 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007—Fleming v. Lowell Sun Co., D.C. Mass., 36 F.Supp. 320, vacated on other grounds, C.C.A., Lowell Sun Co. v. Fleming, 120 F.2d 213, affirmed Holland v. Lowell Sun Co., 62 S.Ct. 793, 315 U.S. 784, 86 L.Ed. 1190.

94. U.S.—Marian v. Lockheed Aircraft Corp., D.C.Tex., 65 F.Supp. 18.

Activities in commerce not shown

(1) Generally.—Murphy v. Georgia Aero-Tech, D.C.Ga., 49 F.Supp. 982.

(2) Privately owned training school for army aviation cadets was not engaged in commerce within meaning of statute in so far as teaching or instructing activities were concerned, notwithstanding cadets came to school from other states or were sent to other states after completion of training.—Raymond v. Parrish, 30 S.E.2d 669, 71 Ga.App. 293.

95. U.S.—Lorenzetti v. American Trust Co., D.C.Cal., 45 F.Supp. 128.

96. U.S.—Callus v. 10 East Fortieth St. Bldg., C.C.A.N.Y., 146 F. 2d 438, reversed on other grounds 65 S.Ct. 1227, 325 U.S. 578, 89 L. Ed. 1806, 161 A.L.R. 1263—Lorber v. Rosow, D.C.Conn., 58 F.Supp. 341—Drake v. Hirsch, D.C.Ga., 40 F.Supp. 290—Gerdert v. Certified Poultry & Egg Co., D.C.Fla., 38 F. Supp. 964.

Factor

Business of employer was in interstate commerce within statute, as far as he ordered and received goods from suppliers in other states, and dealt with goods as a factor for suppliers in other states.—Lorber v. Rosow, D.C.Conn., 58 F.Supp. 341.

Activities in commerce not shown

U.S.—Prescription House v. Anderson, D.C.Tex., 42 F.Supp. 874.

Colo.—Bock v. Hoffman, 130 P.2d 691, 110 Colo. 73.

97. U.S.—Walling v. Northwestern-Hanna Fuel Co., D.C.Minn., 67 F. Supp. 833—Walling v. West Ky. Coal Co., D.C.Tenn., 60 F.Supp. 681—Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, D.C.Va., 53 F.Supp. 935, certiorari denied 64 S.Ct. 1267, 322 U.S. 756, 88 L.Ed. 1585, reversed on other grounds 145 F.2d 10, affirmed 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007.

98. U.S.—Western Union Telegraph Co. v. Lenroot, N.Y., 65 S.Ct. 335, 323 U.S. 490, 89 L.Ed. 414—Howard v. Southern Continental Tel. Co., D.C.Tenn., 72 F.Supp. 276.

Interstate transmission

"Commerce" embraces the interstate transmission of information and intelligence, whether the transmission be effected by telegraph wires, the air waves, or by letters, pamphlets, publications, or other written material.—Yunker v. Abbye Employment Agency, 32 N.Y.S.2d 715.

Radio

Proof that programs of radio station were heard at points outside of state established that the station was engaged in interstate commerce, within statute.—Wilson v. Shuman, C.C.A.Ark., 140 F.2d 644.

99. U.S.—Hanson v. Lagerstrom, C. C.A.Minn., 133 F.2d 120—Consolidated Timber Co. v. Womack, C.C. A.Or., 132 F.2d 101—Walling v. Hamner, D.C.Va., 64 F.Supp. 690—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846.

1. U.S.—Lewis v. Florida Power & Light Co., C.C.A.Fla., 154 F.2d 751—Porter v. Georgia Power & Light Co., D.C.Ga., 50 F.Supp. 959.

Tex.—Camfield v. West Texas Utilities Co., Civ.App., 170 S.W.2d 552, error refused.

Coöperative associations

In determining whether employees of coöperative light and power associations were within Fair Labor Standards Act, coöperatives distributing to their customers electricity purchased from municipal light plants were held to be public utilities.—Meeker Co-op. Light & Power Ass'n v. Phillips, C.C.A.Minn., 158 F. 2d 698.

2. N.Y.—Johnston v. Firemen's Ins. Co. of Newark, N. J., 61 N.Y.S.2d 566, affirmed 71 N.Y.S.2d 713, 272 App.Div. 867.

3. U.S.—Philips v. Star Overall Dry Cleaning Laundry Co., D.C.N.Y., 55 F.Supp. 238, affirmed, C.C.A., 149 F.2d 416, certiorari denied All Service Laundry Corp. v. Phillips, 66 S.Ct. 677, 327 U.S. 780, 90 L.Ed. 1008, rehearing denied 66 S.Ct. 815, 327 U.S. 817, 90 L.Ed. 1040.

N.Y.—Koerner v. Associated Linen Laundry Suppliers, 62 N.Y.S.2d 774, 270 App.Div. 986—Barb v. Manhattan Laundries, 63 N.Y.S. 2d 886, 188 Misc. 18.

4. U.S.—Dize v. Maddrix, C.C.A.Md., 144 F.2d 584, affirmed 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846—Tucker v. Hitchcock, D.C.Fla., 44 F.Supp. 874—Fleming v. Pearson Hardwood Flooring Co., D.C.Tenn., 39 F.Supp. 300.

Containers

Where defendant manufactured boxes suitable for containing products of other manufacturing companies located in state, and such companies packed their goods in such boxes for transportation in interstate commerce, defendant was engaged in production of goods for interstate commerce, within the statute.—Walling v. Villaume Box & Lumber Co., D.C.Minn., 58 F.Supp. 150.

5. U.S.—Walling v. Sternberg Dredging Co., D.C.Mo., 64 F.Supp. 758.

Improving navigable waterways

U.S.—Ritch v. Puget Sound Bridge & Dredging Co., C.C.A.Wash., 156 F.2d 334—Walling v. Sternberg Dredging Co., D.C.Mo., 64 F.Supp. 758.

6. U.S.—Fox v. Summit King Mines, C.C.A.Nev., 143 F.2d 926—Sunshine Mining Co. v. Carver, D. C.Idaho, 41 F.Supp. 60.

Mining of gold and silver

U.S.—Fox v. Summit King Mines, C. C.A.Nev., 143 F.2d 926—Robertson v. Alaska Juneau Gold Min. Co., D.C.Cal., 61 F.Supp. 265—Walling v. Arctic Circle Exploration, D.C. Wash., 56 F.Supp. 944—Holland v. Haile Gold Mines, D.C.S.C., 44 F. Supp. 641—Sunshine Mining Co. v. Carver, D.C.Idaho, 34 F.Supp. 274.

7. U.S.—Mabee v. White Plains Pub. Co., N.Y., 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607—A. H. Belo Corporation v. Street, D.C.Tex., 36 F.Supp. 907, affirmed, C.C.A., 121 F.2d 207, affirmed 62 S.Ct. 1223, 316 U.S. 624, 86 L.Ed. 1716, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Fleming v. Lowell Sun Co., D.C.Mass., 36 F.Supp. 320, vacated on other grounds, C.C.A., 120 F.2d 213, affirmed 62 S.Ct. 793, 315 U.S. 784, 86 L.Ed. 1190.

A large metropolitan newspaper publishing company was engaged in interstate commerce within the statute with respect to publication of

duction and distribution,[8] scrap metal operations,[9] transportation,[10] warehousing and storing,[11] and other miscellaneous businesses.[12] The statute has been held to apply to employers engaged in work under government contract where such work involves commerce.[13]

Building and construction work. Employers engaged in the original construction of buildings are not generally within the scope of the Fair Labor Standards Act, even though the buildings, when completed, will be used to produce goods for commerce.[14] However, where the construction constitutes an integral part of existing plants and its purpose is to continue the operation of the plants, all of which are producing goods for commerce, the work has been held to be within the statute.[15] Similarly it has been held that new construction of telephone and railroad facilities constituting instrumentalities of interstate commerce,[16] and of roads, streets, and bridges to be used in interstate commerce and indispensable to the continuance of production of goods moving in interstate commerce,[17] constitutes an activity covered by the Fair Labor Standards Act. According to other decisions, however, a construction company engaged in the construction of highways, railroads, and bridges does not come within the purview of the act,[18] and a highway constructed on a site where no highway existed before is not an instrumentality of interstate commerce until actually used to carry interstate traffic, so that work performed in the construction thereof is not employment in commerce within the statute.[19] It has also been held that work in digging levees and irrigation ditches for a purely local irrigation project is not work in commerce.[20]

Wholesale and retail distributors. As a general rule, a wholesaler or retailer engaged solely in in-

papers, gathering of news therefor and sale of the papers sent out of the state.—Schroepfer v. A. S. Abell Co., C.C.A.Md., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060, rehearing denied 64 S. Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595.

Distributors of newspapers to street corner vending machines and dealers within the state for local sale were not engaged in interstate commerce within statute on theory that distributors' service was merely a part of publisher's whole enterprise of interstate gathering and distribution of news.—Schroepfer v. A. S. Abell Co., C.C.A.Md., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060, rehearing denied 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595.

8. U.S.—Straughn v. Schlumberger Well Surveying Corp., D.C.Tex., 72 F.Supp. 511—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120.

9. U.S.—Fleming v. Stillman, D.C. Tenn., 48 F.Supp. 609.
Mo.—Edwards v. South Side Auto Parts Co., App., 180 S.W.2d 1015.

10. U.S.—Hertz Drivurself Stations v. U. S., C.C.A.Mo., 150 F.2d 923—McComb v. La Casa Del Transporte, D.C.Puerto Rico, 71 F.Supp. 44—Torres v. American R. Co. of Puerto Rico, D.C.Puerto Rico, 66 F.Supp. 745.

Switching railroad
Where substantial part of tonnage carried by switching railroad serving industrial plants originated at out of state points or was to move to points outside state, railroad was engaged in interstate commerce and was an instrumentality of interstate commerce.—Walling v. McCrady Const. Co., D.C.Pa., 60 F.Supp. 243.

A terminal company, which furnished usual terminal facilities to four railroads regularly engaged in interstate transportation of passengers and freight, was subject to statute.—Walling v. Jacksonville Terminal Co., D.C.Fla., 55 F.Supp. 302, affirmed, C.C.A., 148 F.2d 768.

11. U.S.—Walling v. Harris, D.C. Tenn., 68 F.Supp. 146—Reliance Storage & Inspection Co. v. Hubbard, D.C.Va., 50 F.Supp. 1012—Moses v. McKesson & Robbins, D. C.Tex., 43 F.Supp. 528—Fleming v. Kenton Loose Leaf Tobacco Warehouse Co., D.C.Ky., 41 F. Supp. 255.

Activities in commerce not shown
Cal.—McDaniel v. Clavin, 136 P.2d 559, 22 Cal.2d 61.

Private truckmen engaged in intra-state shipments from warehouses to retail stores are not engaged in commerce within statute.—Fitzgerald v. Kroger Grocery & Baking Co., D.C.Kan., 45 F.Supp. 812.

12. **Particular businesses within act**
(1) Furnishing guards for protection of industrial plants and establishments of customers some of whom were engaged in interstate commerce and in production of goods for commerce.—Walling v. Merchants Police Service, D.C.Ky., 59 F. Supp. 873.

(2) Furnishing ice to railroad refrigerator cars and trucks which subsequently moved in interstate commerce.—Bohn v. B & B Ice & Coal Co., D.C.Ky., 63 F.Supp. 1020—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., 131 F.2d 518.

(3) Leasing motor vehicles to numerous corporations and persons who were engaged in production and transportation of goods in interstate commerce.—Snyder v. John J. Casale, Inc., D.C.N.Y., 49 F.Supp. 926.

(4) Sales agencies representing mining and manufacturing concerns manufacturing and shipping merchandise from factories and mines elsewhere located to customers in several states.—Callus v. 10 East Fortieth St. Bldg., C.C.A.N.Y., 146 F.2d 438, reversed on other grounds 65 S.Ct. 1227, 325 U.S. 578, 89 L.Ed. 1806, 161 A.L.R. 1263.

(5) Stockyards business, in which live stock was purchased for sale in interstate commerce.—Patton v. Williams, D.C.Okl., 61 F.Supp. 884.

13. U.S.—Walling v. McCrady Const. Co., C.C.A.Pa., 156 F.2d 932—Walling v. Patton-Tulley Transp. Co., C.C.A.Tenn., 134 F.2d 945.

14. U.S.—Kelly v. Ford, Bacon & Davis, C.C.A.Pa., 162 F.2d 555—Baloc v. Foley Bros., D.C.Minn., 68 F.Supp. 533.

15. U.S.—Walling v. McCrady Const. Co., C.C.A.Pa., 156 F.2d 932.

16. U.S.—Walling v. McCrady Const. Co., supra.

17. U.S.—Walling v. McCrady Const. Co., supra.

18. Ky.—Preston v. Louis Des Cognets & Co., 167 S.W.2d 863, 292 Ky. 646.

19. N.Y.—Hewlett v. Del Balso Const. Corporation, 43 N.Y.S.2d 650, 180 Misc. 81, appeal denied 44 N. Y.S.2d 587, 266 App.Div. 922.

20. U.S.—Zehring v. Brown Materials, D.C.Cal., 48 F.Supp. 740.

ployer predominantly engaged in intra-state commerce will not subject him to the operation of the statute.[37]

§ 151(9). —— Employee's Activities as Controlling

a. In general
b. Activities constituting engagement in commerce or production of goods for commerce
c. Work in part in interstate commerce
d. Particular employees

a. In General

Generally, the applicability of the Fair Labor Standards Act depends on the character of the work performed by the employee, rather than on the character of the employer's business, and an employee is not protected by the act unless the nature of his services is such as to constitute engagement in commerce or in the production of goods for commerce.

Under the provisions of the Fair Labor Standards Act §§ 6, 7, 29 U.S.C.A. §§ 206, 207, the coverage of the act with respect to minimum wages and overtime pay extends to employees who are "engaged in commerce or in the production of goods for commerce" within the broad scope of those activities expressed in the law.[38] The applicability of the act thus depends on the character of the work performed by the employee, rather than on the character of the employer's business,[39] and the duties of

ber were received in intra-state commerce, fact that a few shipments constituting less than one half of one per cent of jobber's purchases were made in interstate commerce would not bring jobber's business under the statute since maxim, De minimis non curat lex, applied.—Daly v. Citrin, D.C.Mich., 53 F.Supp. 876.

37. U.S.—Hill v. Jones, D.C.Ky., 59 F.Supp. 569—Hooks v. Nashville Breeko Block & Tile Co., D.C.Tenn., 39 F.Supp. 369—Gerdert v. Certified Poultry & Egg Co., D.C.Fla., 38 F.Supp. 964—Goldberg v. Worman, D.C.Fla., 37 F.Supp. 778.
Cal.—McDaniel v. Clavin, 136 P.2d 559, 22 Cal.2d 61.
La.—Rachal v. Southwestern Aircraft Service, App., 23 So.2d 637—Reynolds v. Carter, App., 9 So.2d 322.

38. U.S.—Warren-Bradshaw Drilling Co. v. Hall, Tex., 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83—Divins v. Hazeltine Electronics Corp., C.C.A.N.Y., 163 F.2d 100—Hertz Drivurself Stations v. U. S., C.C.A.Mo., 150 F.2d 923—Baldwin v. Emigrant Indus. Sav. Bank, C.C.A.N.Y., 150 F.2d 524, 161 A.L.R. 1234, certiorari denied 66 S.Ct. 171, 326 U.S. 767, 90 L.Ed. 462—Jewel Tea Co. v. Williams, C.C.A.Okl., 118 F.2d 202—Walling v. McKay, D.C.Neb., 70 F.Supp. 160—Wagner v. American Service Co., D.C.Iowa, 58 F.Supp. 32—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363—Ling v. Currier Lumber Co., D.C.Mich., 50 F.Supp. 204—Gerdert v. Certified Poultry & Egg Co., D.C.Fla., 38 F.Supp. 964—Fleming v. A. B. Kirschbaum Co., D.C.Pa., 38 F.Supp. 204, affirmed C.C.A., 124 F.2d 567, affirmed Kirschbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Martin v. Lain Oil & Gas Co., D.C.Ill., 36 F.Supp. 252—Berger v. Clouser, D.C.Pa., 36 F.Supp. 168.
N.Y.—Killingbeck v. Garment Center Capitol, 20 N.Y.S.2d 521, 259 App.Div. 691, appeal denied 21 N.Y.S.2d 610, 259 App.Div. 1076.

39. U.S.—Mabee v. White Plains Pub. Co., 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607—Overstreet v. North Shore Corporation, Fla., 63 S.Ct. 494, 318 U.S. 125, 87 L.Ed. 656—Walling v. Jacksonville Paper Co., Fla., 63 S.Ct. 332, 317 U.S. 564, 87 L.Ed. 499—Warren-Bradshaw Drilling Co. v. Hall, Tex., 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83—Kirschbaum v. Walling, N.Y. & Pa., 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Laudadio v. White Const. Co., C.C.A.N.Y., 163 F.2d 383—Divins v. Hazeltine Electronics Corp., C.C.A.N.Y., 163 F.2d 100—Phillips v. Graham Aviation Co., C.C.A.Ga., 157 F.2d 443—Lewis v. Florida Power & Light Co., C.C.A.Fla., 154 F.2d 751—Carrigan v. Provident Trust Co. of Philadelphia, C.C.A.Pa., 153 F.2d 74—Atlantic Co. v. Weaver, C.C.A.S.C., 150 F.2d 843—Engebretsen v. E. J. Albrecht Co., C.C.A.Ill., 150 F.2d 602—Kantar v. Garchell, C.C.A.Minn., 150 F.2d 47—Domenech v. Pan Am. Standard Brands, C.C.A.Puerto Rico, 147 F.2d 994—Walling v. Roland Elec. Co., C.C.A.Md., 146 F.2d 745, affirmed 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383—Schmidtke v. Conesa, C.C.A.Puerto Rico, 141 F.2d 634—Walling v. Mutual Wholesale Food & Supply Co., C.C.A.Minn., 141 F.2d 331—Fleming v. A. B. Kirschbaum Co., C.C.A.Pa., 124 F.2d 567, affirmed Kirschbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Swift & Co. v. Wilkerson, C.C.A.Tex., 124 F.2d 176—Jax Beer Co. v. Redfern, C.C.A.Tex., 124 F.2d 172—Walling v. Wyandotte Furniture Co., D.C.Mo., 72 F.Supp. 98—Baloc v. Foley Bros., D.C.Minn., 68 F.Supp. 533—Skidmore v. John J. Casale, Inc., D.C.N.Y., 66 F.Supp. 282—Bohn v. B & B Ice & Coal Co., D.C.Ky., 63 F.Supp. 1020—Antis v. Montgomery Ward & Co., D.C.Mich., 63 F.Supp. 669—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F.Supp. 775—Damon v. Ford, Bacon & Davis, D.C.Pa., 62 F.Supp. 446—Walling v. Paramount-Richards Theatres, D.C.La., 61 F.Supp. 290—Walling v. McCrady Const. Co., D.C.Pa., 60 F.Supp. 243—Kappler v. Republic Pictures Corp., D.C.Iowa, 59 F.Supp. 112, affirmed C.C.A., 151 F.2d 543, 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L.Ed. 1040—Mennicucci v. F. & P. Brakelyne Service, D.C.N.J., 58 F.Supp. 720—Lorber v. Rosow, D.C.Conn., 58 F.Supp. 341, reversed on other grounds, C.C.A., 153 F.2d 159—Scott v. Ford, Bacon & Davis, D.C.Pa., 55 F.Supp. 982—Vogelpohl v. Lane Drug Co., D.C.Ohio, 55 F.Supp. 564—Building Service Employees International Union, Local No. 238, v. Trenton Trust Co., D.C.N.J., 53 F.Supp. 129, affirmed C.C.A., 142 F.2d 257—Borella v. Borden Co., D.C.N.Y., 52 F.Supp. 952, reversed on other grounds, C.C.A., 145 F.2d 63, affirmed 65 S.Ct. 1223, 325 U.S. 679, 89 L.Ed. 1865, 161 A.L.R. 1258—Walling v. John J. Casale, Inc., D.C.N.Y., 51 F.Supp. 520—Shain v. Armour & Co., D.C.Ky., 50 F.Supp. 907—Murphy v. Georgia Aero-Tech, D.C.Ga., 49 F.Supp. 982—Ouendag v. Gibson, D.C.Mich., 49 F.Supp. 379—White v. Jacob's Pharmacy Co., D.C.Ga., 47 F.Supp. 298—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 46 F.Supp. 969—Samuels v. Houston, D.C.Ga., 46 F.Supp. 364—Gavril v. Kraft Cheese Co., D.C.Ill., 42 F.Supp. 702—Veazey Drug Co. v. Fleming, D.C.Okl., 42 F.Supp. 689—Fleming v. American Stores Co., D.C.Pa., 42 F.Supp. 511, modified,

each employee must be looked to in order to ascertain whether a substantial part of his labor is in "commerce," in the "production of goods for commerce," or in an "occupation necessary to production" of such goods so as to entitle him to the benefits of the act.[40] However, in order to classify the activities of the employee, it is necessary also to consider the activities of the employer by whom he is engaged.[41]

The statute has been held to apply to all persons employed in connection with commerce or in the production of goods for commerce without regard to the nature of the employer's business,[42] and it has been held that employees may be within the act, although the employer's entire business is not interstate in character,[43] or although the employer is primarily engaged in intra-state business[44] and his interstate transactions are merely incidental to the intra-state business,[45] or although the employer is not engaged in commerce.[46] According to other decisions, however, an employee is not "engaged in commerce" or "production of goods for commerce"

C.C.A., 133 F.2d 840—Hall v. Warren-Bradshaw Drilling Co., D.C. Tex., 40 F.Supp. 772, modified on other grounds, C.C.A., Warren-Bradshaw Drilling Co. v. Hall, 124 F.2d 42, affirmed 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83—Fleming v. Goldblatt Bros., D.C.Ill., 39 F. Supp. 701, modified on other grounds C.C.A., 128 F.2d 778, certiorari denied 63 S.Ct. 528, 318 U. S. 757, 87 L.Ed. 1130—Fleming v. A. B. Kirschbaum Co., D.C.Pa., 38 F.Supp. 204, affirmed, C.C.A., 124 F.2d 567, affirmed Kirschbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Baggett v. Henry Fischer Packing Co., D.C. Ky., 37 F.Supp. 670—Wood v. Central Sand & Gravel Co., D.C.Tenn., 33 F.Supp. 40—Rapport v. C. C. Whittemore Caterers, D.C.Mass., 7 F.R.D. 433.

Iowa.—Umthun v. Day & Zimmermann, 16 N.W.2d 258, 235 Iowa 293.

Kan.—Baum v. A. C. Office Bldg. Co., 143 P.2d 417, 157 Kan. 558, 150 A.L.R. 581—Sykes v. Lochmann, 132 P.2d 620, 156 Kan. 223, certiorari denied Lochmann v. Sykes, 63 S.Ct. 1165, 319 U.S. 753, 87 L.Ed. 1707.

Ky.—Harlan-Wallins Coal Corp. v. David, 196 S.W.2d 881, 303 Ky. 84.

La.—Dennis v. Equitable Equipment Co., 7 So.2d 397—Lyons v. H. K. Ferguson Co., App., 16 So.2d 587—Dennis v. Equitable Equipment Co., App., 7 So.2d 397.

Mo.—Fountain v. St. Joseph Water Co., 180 S.W.2d 28, 352 Mo. 817.

N.Y.—Stoike v. First Nat. Bank of City of New York, 48 N.E.2d 482, 290 N.Y. 195, certiorari denied 64 S.Ct. 50, 320 U.S. 762, 88 L.Ed. 455—McKee v. Edelbrau Brewery, 66 N.Y.S.2d 14, 271 App.Div. 841—Tinyes v. J. Rich Steers, Inc., 71 N.Y.S.2d 684, 189 Misc. 106—Cassone v. Wm. Edgar John & Associates, 57 N.Y.S.2d 169, 185 Misc. 573—McCarthy v. American Sur. Co., 52 N.Y.S.2d 601, 183 Misc. 983, appeal dismissed 61 N.Y.S.2d 369, 270 App.Div. 751—Brennan v. Community Service Soc. of New York, 45 N.Y.S.2d 825, 141 Misc. 637—Delcour v. Lehigh Valley Coal Sales Co., 43 N.Y.S.2d 371, 182 Misc. 289—Helt v. Britten-Fenton Co., 42 N.Y.S.2d 362, 180 Misc. 1076—In re New York Title & Mortgage Co. (Series N-103), 39 N.Y.S.2d 893, 179 Misc. 789.

Okl.—Crocker Packing Co. v. Julian, 145 P.2d 391, 193 Okl. 472—Brooks Packing Co. v. Henry, 137 P.2d 918, 192 Okl. 533.

Wash.—Cannon v. Miller, 155 P.2d 500, 22 Wash.2d 287, 157 A.L.R. 530.

Short-line railroad

Determination that employees of railroad operating short line railroad were engaged in interstate commerce and in production of goods for commerce within Fair Labor Standards Act were not inconsistent with determination that employer was not entitled to exemption from overtime provisions on theory that it was subject to the Interstate Commerce Act.—Rockton & R. R. v. Walling, C.C.A.S.C., 146 F.2d 111, certiorari denied 65 S.Ct. 1026.

Ownership of leases

That defendant which hired plaintiffs as members of a rotary drilling crew to drill oil wells was an independent contractor, and not the owner of the oil leases, was not determinative of question whether the wage and hour provisions of the Fair Labor Standards Act applied to plaintiffs, but it was the character of the work done and engaged in by plaintiffs for defendant that determined whether they came within the terms of the act.—Hall v. Warren-Bradshaw Drilling Co., D.C. Tex., 40 F.Supp. 272, modified on other grounds Warren-Bradshaw Drilling Co. v. Hall, 124 F.2d 42, affirmed 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83.

40. U.S.—Walling v. Goldblatt Bros., C.C.A.Ill., 128 F.2d 778, certiorari denied 63 S.Ct. 528, 318 U.S. 757, 87 L.Ed. 1130—Crabb v. Welden Bros., D.C.Iowa, 65 F.Supp. 369—Walling v. Hamner, D.C.Va., 64 F.Supp. 690—Damon v. Ford, Bacon & Davis, D.C.Pa., 62 F. Supp. 446—Fellabaum v. Swift & Co., D.C.Ohio, 54 F.Supp. 353—Samuels v. Houston, D.C.Ga., 46 F. Supp. 364.

Ala.—Cudahy Packing Co. of Alabama v. Bazanos, 15 So.2d 720, 245 Ala. 73.

41. U.S.—Gavril v. Kraft Cheese Co., D.C.Ill., 42 F.Supp. 702—Fleming v. Kenton Loose Leaf Tobacco Warehouse Co., D.C.Ky., 41 F.Supp. 255—Gerdert v. Certified Poultry & Egg Co., D.C.Fla., 38 F.Supp. 964.

Special facts

The coverage of Fair Labor Standards Act depends on special facts pertaining to particular business.—Baum v. A. C. Office Bldg. Co., 143 P.2d 417, 157 Kan. 558, 150 A.L.R. 581.

42. U.S.—Fleming v. A. B. Kirschbaum Co., C.C.A.Pa., 124 F.2d 567, affirmed Kirshbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638.

43. U.S.—Carrigan v. Provident Trust Co., C.C.A.Pa., 153 F.2d 74—Davis v. Goodman Lumber Co., C. C.A.N.C., 133 F.2d 52—Stucker v. Roselle, D.C.Ky., 37 F.Supp. 864.

N.Y.—Cassone v. Wm. Edgar John & Associates, Inc., 57 N.Y.S.2d 169, 185 Misc. 573.

44. U.S.—Prescription House v. Anderson, D.C.Tex., 42 F.Supp. 874.

Maintenance services

Where maintenance company contracted with banks to furnish banks all janitorial services and equipment on flat monthly basis and pursuant to its contract employed and paid janitors to work at banks, the fact that the maintenance company did a purely intrastate business, and that the janitors were not employed by the banks did not of itself bar the janitors from benefits of the act.—Lorenzetti v. American Trust Co., D.C.Cal., 45 F.Supp. 128.

45. U.S.—Owin v. Liquid Carbonic Corporation, D.C.Tex., 42 F.Supp. 774.

46. U.S.—Fleming v. Arsenal Bldg. Corporation, C.C.A.N.Y., 125 F.2d 278, affirmed 62 S.Ct. 1116, 316 U. S. 517, 86 L.Ed. 1638.

so as to be entitled to coverage under the act unless the employer is so engaged,[47] although in any event, to the extent that employees are "engaged in commerce or in the production of goods for commerce," the employer is himself so engaged.[48]

The act does not make complete coverage of all employees connected in any way with interstate transportation.[49] In order that an employee may be within the act, the nature of his services must be such as to constitute engagement in commerce or in the production of goods for commerce,[50] and employees engaged in occupations which merely affect or indirectly relate to commerce are not within the act.[51] The mere fact that the employer is engaged in commerce or in the production of goods for commerce does not establish that his employees are covered by the statute as engaged in work within the scope of the act.[52] Some employees may be en-

47. U.S.—Lewis v. Florida Power & Light Co., C.C.A.Fla., 154 F.2d 751—Baloc v. Foley Bros., D.C.Minn., 68 F.Supp. 533—Johnson v. Filstow, Inc., D.C.Fla., 43 F.Supp. 930.
La.—Reynolds v. Carter, App., 9 So. 2d 322.

48. U.S.—Kirschbaum v. Walling, N.Y. & Pa., 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Walling v. Paramount-Richards Theatres, D.C.La., 61 F.Supp. 290—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F.Supp. 393.

49. U.S.—Convey v. Omaha Nat. Bank, C.C.A.Neb., 140 F.2d 640, certiorari denied 64 S.Ct. 638, 321 U.S. 781, 88 L.Ed. 1074—Richardson v. James Gibbons Co., C.C.A.Md., 132 F.2d 627, affirmed 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244—Johnson v. Dallas Downtown Development Co., C.C.A.Tex., 132 F.2d 287, certiorari denied 63 S.Ct. 994, 318 U.S. 790, 87 L.Ed. 1156—Walling v. Goldblatt Bros., C.C.A.Ill., 128 F.2d 778, certiorari denied 63 S.Ct. 528, 318 U.S. 757, 87 L.Ed. 1130.

Congress did not intend that provisions with respect to those who are only engaged in commerce should be extended to cover every person whose labor is of use or convenience, or in some fashion contributes to comfort of one who is so engaged.—Wideman v. Blanchard & Calhoun Realty Co., D.C.Ga., 50 F.Supp. 626.

50. U.S.—Warren-Bradshaw Drilling Co. v. Hall, Tex., 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83—Divins v. Hazeltine Electronics Corp., C.C.A.N.Y., 163 F.2d 100—Englert v. S. Birch & Sons Const. Co., C.C.A.Wash., 163 F.2d 34—Republic Pictures Corp. v. Kappler, C.C.A.Iowa, 151 F.2d 543, 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L.Ed. 1040—Hertz Drivurself Stations v. U. S., C.C.A.Mo., 150 F.2d 923—Harris v. Hammond, C.C.A.Ga., 145 F.2d 333, certiorari denied 65 S.Ct. 858, 324 U.S. 859, 89 L.Ed. 416—Walling v. Mutual Wholesale Food & Supply Co., C.C.A.Minn., 141 F.2d 331—Walling v. Siler Bros. Co., C.C.A.N.H., 136 F.2d 168—Murray v. Noblesville Milling Co., C.C.A.Ind., 131 F.2d 470, certiorari denied 63 S.Ct. 832, 318 U.S. 775, 87 L.Ed. 1145—Mid-Continent Pipe Line Co. v. Hargrave, C.C.A.Okl., 129 F.2d 655—Jewel Tea Co. v. Williams, C.C.A.Okl., 118 F.2d 202—Kennedy v. Silas Mason Co., D.C.La., 68 F.Supp. 576—Baloc v. Foley Bros., D.C.Minn., 68 F.Supp. 533—Crabb v. Welden Bros., D.C.Iowa, 65 F.Supp. 369—Antis v. Montgomery Ward & Co., D.C.Mich., 63 F.Supp. 669—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120—Walling v. Jacksonville Terminal Co., D.C.Fla., 55 F.Supp. 302, affirmed C.C.A., 148 F.2d 768—Walling v. Ward's Cut-Rate Drugs, D.C.Tex., 54 F.Supp. 41—Bracey v. Luray, D.C.Md., 49 F.Supp. 821, reversed on other grounds C.C.A., 138 F.2d 8—Barbe v. Cummins Const. Co., D.C.Md., 49 F.Supp. 168, affirmed C.C.A., 138 F.2d 667—Walling v. Mutual Wholesale Food & Supply Co., D.C.Minn., 46 F.Supp. 939, modified on other grounds C.C.A., 141 F.2d 331—Petway v. Dobson, D.C.Tenn., 46 F.Supp. 114—Tenaglia v. Tully & Di Napoli, D.C.N.Y., 43 F.Supp. 814—Womack v. Consolidated Timber Co., D.C.Or., 43 F.Supp. 625, set aside on other grounds C.C.A., 132 F.2d 101—Chapman v. Home Ice Co., D.C.Tenn., 43 F.Supp. 424, reversed on other grounds C.C.A., 136 F.2d 353, certiorari denied 64 S.Ct. 72, 320 U.S. 761, 88 L.Ed. 454—Fleming v. Peoples Packing Co., D.C.Okl., 42 F.Supp. 868—Merryfield v. F. M. Hoyt Shoe Corporation, D.C.N.H., 41 F.Supp. 794, reversed on other grounds C.C.A., 128 F.2d 452—Gerdert v. Certified Poultry & Egg Co., D.C.Fla., 38 F.Supp. 964—Brown v. Carter Drilling Co., D.C.Tex., 38 F.Supp. 489—Foster v. National Biscuit Co., D.C.Wash., 31 F.Supp. 552.
Ark.—H. B. Deal & Co. v. Leonard, 196 S.W.2d 991.
Ill.—Orminski v. Hyland Elec. Supply Co., 62 N.E.2d 14, 326 Ill.App. 392.
Ky.—Fultz v. U. S. Trust Co., 195 S.W.2d 87, 302 Ky. 493.
Mass.—Campanale v. General Ice Cream Corporation, 49 N.E.2d 1018, 314 Mass. 387.
N.J.—Singer v. Schapiro, 39 A.2d 28, 132 N.J.Law 110, reversed on other grounds 43 A.2d 12, 133 N.J.Law 133.
N.Y.—Killingbeck v. Garment Center Capitol, 20 N.Y.S.2d 521, 259 App.Div. 691, appeal denied 21 N.Y.S.2d 610, 259 App.Div. 1076.
N.C.—Hart v. Gregory, 16 S.E.2d 837, 220 N.C. 180.
Pa.—Mullin v. Gates, 44 Pa.Dist. & Co. 683.
Tenn.—Robinson v. Massachusetts Mut. Life Ins. Co., 158 S.W.2d 441—Gibson v. Glasgow, 157 S.W.2d 814, 178 Tenn. 273.

51. U.S.—McLeod v. Threlkeld, Tex., 63 S.Ct. 1248, 319 U.S. 491, 87 L.Ed. 1538—Overstreet v. North Shore Corporation, C.C.A.Fla., 128 F.2d 450, reversed on other grounds 63 S.Ct. 494, 318 U.S. 125, 87 L.Ed. 656—Jewel Tea Co. v. Williams, C.C.A.Okl., 118 F.2d 202—Walling v. L. Wiemann Co., D.C.Wis., 52 F.Supp. 131, affirmed, C.C.A., 138 F.2d 602, 150 A.L.R. 878, certiorari denied 64 S.Ct. 782, 321 U.S. 785, 88 L.Ed. 1077—Chapman v. Home Ice Co., D.C.Tenn., 43 F.Supp. 424, reversed on other grounds, C.C.A., 136 F.2d 353, certiorari denied 64 S.Ct. 72, 320 U.S. 761, 88 L.Ed. 454—Eddings v. Southern Dairies, D.C.S.C., 42 F.Supp. 664.
Colo.—Mile High Poultry Farms v. Frazier, 157 P.2d 125, 113 Colo. 338.
N.C.—Horton v. Wilson & Co., 25 S.E.2d 437, 223 N.C. 71.
Ohio.—Cecil v. Gradison, App., 40 N.E.2d 958.

52. U.S.—Mabee v. White Plains Pub. Co., N.Y., 66 S.Ct. 511—Jax Beer Co. v. Redfern, C.C.A.Tex., 124 F.2d 172—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120—Brandell v. Continental Illinois Nat. Bank & Trust Co. of Chicago, D.C.Ill., 43 F.Supp. 781—Prescription House v. Anderson, D.C.Tex., 42 F.Supp. 874—Veazey Drug Co. v. Fleming, D.C.Okl., 42 F.Supp. 689—Merryfield v. F. M. Hoyt Shoe Corporation, D.C.N.H., 41 F.Supp. 794—Barbe v. Cummins Const. Co., D.C.Md., 49 F.Supp. 168, affirmed, C.C.A., 138 F.2d 667—Baggett v. Henry Fischer Packing Co., D.C.Ky., 37 F.Supp. 670.
Ky.—Fultz v. U. S. Trust Co., 195 S.W.2d 87, 302 Ky. 493.

gaged in commerce while others doing different work for the same employer are not.[53]

b. Activities Constituting Engagement in Commerce or Production of Goods for Commerce

(a) In general
(b) Production of goods for commerce

(a) In General

Generally, there is no fixed formula by which it may be ascertained whether an employee is engaged in commerce or in the production of goods for commerce within the provisions of the Fair Labor Standards Act, but the decision in each case must turn on the attendant facts.

It has been said that there is no fixed formula by which the courts can ascertain whether an employee is "engaged in commerce or in the production of goods for commerce" within the provisions of the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq, but the decision in each case must turn on the attendant facts.[54] The phrases "engaged in commerce" or in the "production of goods for commerce" are not synonymous but supplementary to each other; they were deliberately chosen as appropriate language to delineate entirely different fields of coverage under the act.[55] Congress intended by the last-quoted phrase to embrace a wider field of activities than by the use of the first-quoted phrase,[56] and the test as to whether an employee is engaged in commerce is somewhat more exacting than the test as to whether his occupation is necessary to production of goods for commerce.[57]

In determining the question whether an employee is "engaged in commerce" within the act, the courts are generally guided by practical considerations.[58] The test usually applied is whether the employee is actually engaged in the movement of commerce, or whether the services he performs are so closely related thereto as to be, for all practical purposes, an essential part thereof.[59] In this connection "close-

Tenn.—Robinson v. Massachusetts Mut. Life Ins. Co., 158 S.W.2d 441.

Spasmodic activity

Where employee was superintendent of employer's retail system for delivery of ice and coal and occasionally employee participated in icing of railroad refrigerator cars and freight trucks moving in interstate commerce, but such participation was of an occasional spasmodic nature and not a part of his regular duties, and employee's participation in such work was contrary to orders of management, the employee was not within the act.—Bohn v. B & B Ice & Coal Co., D.C.Ky., 63 F.Supp. 1020.

53. U.S.—Hill v. Jones, D.C.Ky., 59 F.Supp. 569.

54. U.S.—Rucker v. First Nat. Bank of Miami, Okl., C.C.A.Okl., 138 F. 2d 699—Baloc v. Foley Bros., D.C. Minn., 68 F.Supp. 533.

55. U.S.—Rucker v. First Nat. Bank of Miami, Okl., C.C.A.Okl., 138 F. 2d 699.

56. Kan.—Baum v. A. C. Office Bldg. Co., 143 P.2d 417, 157 Kan. 558, 150 A.L.R. 581.

57. U.S.—Armour & Co. v. Wantock, Ill., 65 S.Ct. 165, 323 U.S. 126—Republic Pictures Corp. v. Kappler, C.C.A.Iowa, 151 F.2d 543, 162 A. L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 807, 327 U.S. 817, 90 L.Ed. 1040—Hertz Drivurself Stations v. U. S., C.C.A.Mo., 150 F.2d 923.

Factual basis

Congress, in providing that employees engaged in work necessary to production of goods for commerce should be within statute, indicated that factual basis is less rigid for such a relationship than that which would be required in order to justify a finding that employee was engaged in commerce.—Phillips v. Meeker Co-op. Light & Power Ass'n, D.C. Minn., 63 F.Supp. 733.

58. U.S.—New Mexico Public Service Co. v. Engel, C.C.A.N.M., 145 F. 2d 636.

Well defined meaning

It has been said that the phrase "engaged in commerce," as used in the Fair Labor Standards Act to denote coverage, has come to have a well defined meaning under the adjudicated cases.—New Mexico Public Service Co. v. Engel, C.C.A.N.M., 145 F.2d 636.

59. U.S.—McLeod v. Threlkeld, Tex., 63 S.Ct. 1248, 319 U.S. 491, 87 L. Ed. 1538—Laudadio v. White Const. Co., C.C.A.N.Y., 163 F.2d 383—Divins v. Hazeltine Electronics Corp., C.C.A.N.Y., 163 F.2d 100—E. C. Schroeder Co. v. Clifton, C.C. A.Okl., 153 F.2d 385, certiorari denied 66 S.Ct. 1351, 328 U.S. 858, 90 L.Ed. 1629—Carrigan v. Provident Trust Co. of Philadelphia, C. C.A.Pa., 153 F.2d 74—Hertz Drivurself Stations v. U. S., C.C.A.Mo., 150 F.2d 923—Walling v. Consumers Co., C.C.A.Ill., 149 F.2d 626—Phillips v. Star Overall Dry Cleaning Laundry Co., C.C.A.N.Y., 149 F.2d 416, certiorari denied 66 S.Ct. 677, 327 U.S. 780, 90 L.Ed. 1008—Boutell v. Walling, C.C.A.Mich., 148 F.2d 329, certiorari granted 65 S.Ct. 1570, 325 U.S. 849, 89 L.Ed. 1970—New Mexico Public Service Co. v. Engel, C.C.A.N.M., 145 F.2d 636—Borella v. Borden Co., C.C.A. N.Y., 145 F.2d 63, affirmed 65 S. Ct. 1223, 325 U.S. 679, 89 L.Ed. 1865, 161 A.L.R. 1258—Walling v. Mutual Wholesale Food & Supply Co., C.C.A.Minn., 141 F.2d 331—Rucker v. First Nat. Bank of Miami, Okl., C.C.A.Okl., 138 F.2d 699—Schroepfer v. A. S. Abell Co., C. C.A.Md., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060, rehearing denied 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595—Walling v. Sondock, C.C.A. Tex., 132 F.2d 77, certiorari denied 63 S.Ct. 769, 318 U.S. 772, 87 L.Ed. 1142—Murray v. Noblesville Milling Co., C.C.A.Ind., 131 F.2d 470, certiorari denied 63 S.Ct. 832, 318 U.S. 775, 87 L.Ed. 1145—Walling v. Goldblatt Bros., C.C.A.Ill., 128 F.2d 778, certiorari denied 63 S.Ct. 528, 318 U.S. 757, 87 L.Ed. 1130—Skidmore v. John J. Casale, Inc., D.C.N.Y., 66 F.Supp. 282—Crabb v. Welden Bros., D.C.Iowa, 65 F.Supp. 369—Davis v. Rockton & R. R. R., D.C.S.C., 65 F.Supp. 67—Keen v. Mid-Continent Petroleum Corp., D. C.Iowa, 63 F.Supp. 120—Mennicucci v. F. & P. Brakelyne Service, D.C.N.J., 58 F.Supp. 720—Building Service Employees International Union, Local No. 238, v. Trenton Trust Co., D.C.N.J., 53 F.Supp. 129—Borella v. Borden Co., D.C.N.Y., 52 F.Supp. 952, reversed on other grounds, C.C.A., 145 F.2d 63, affirmed 65 S.Ct. 1223, 325 U.S. 679, 89 L.Ed. 1865—Ouendag v. Gibson, D.C.Mich., 49 F.Supp. 379—Fleming v. Arsenal Bldg. Corporation, D.C. N.Y., 38 F.Supp. 207, reversed on other grounds, C.C.A., 125 F.2d 278—Pickett v. Union Terminal Co., D.C.Tex., 33 F.Supp. 244, reversed on other grounds, C.C.A., 118 F.2d

ness" depends on the essentiality and indispensability of the particular work or services performed to the actual movement of commerce,[60] and, if a cessation of the services of the employee causes an interruption or interference with the free movement of commerce, it is ordinarily regarded as an essential and indispensable part thereof.[61] It is not the volume or percentage of an employee's contribution to the movement of commerce which is the test of whether he is engaged in commerce within the statute, but, if the services he performs are essential to the movement of commerce and not merely sporadic and isolated, he is engaged in commerce.[62]

The phrase "engaged in commerce" covers every employee in the channels of interstate commerce as distinguished from those who merely affect that commerce.[63] Engagement in commerce, within the act, does not include acts merely necessary to such commerce,[64] or work which is purely local in character.[65] Employees are not within the act where their duties have no relation to the movements of goods in interstate commerce, that is, where they are not so intimately connected with the interstate movement of supplies and materials as to be, in legal contemplation, a part thereof.[66] On the other hand, any employee of an owner or operator of direct instrumentalities of interstate transportation whose task is immediately connected with maintaining them or keeping them in condition for and during such use must be regarded as being "engaged in commerce."[67]

The test in determining the question whether an employee who crosses state lines is engaged in interstate commerce is what activities the employee was engaged in after he crossed the state line, unless he was transporting goods across the state line.[68] All persons are engaged in interstate commerce who contribute labor to assist in the movement of a commodity designated for an interstate journey from the time it leaves the depository of the actual consignor until the time it reaches the depository of the ultimate consignee, even though the commodity might pause in transit.[69] So, employees engaged in the unloading at destination of an interstate shipment are "engaged in commerce."[70] However, an employee is not engaged in commerce with

328, certiorari denied 61 S.Ct. 1115. 313 U.S. 591, 85 L.Ed. 1546, vacated 62 S.Ct. 55, 314 U.S. 701, 86 L.Ed 563, affirmed 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

Kan.—Baum v. A. C. Office Bldg. Co., 143 P.2d 417, 157 Kan. 558.

Mo.—Agnew v. Johnson, 176 S.W.2d 489, 352 Mo. 222.

N.Y.—Tinyes v. J. Rich Steers, Inc., 71 N.Y.S.2d 684, 189 Misc. 106.

Employees held engaged in commerce

U.S.—Laudadio v. White Const. Co., C.C.A.N.Y., 163 F.2d 383—Divins v. Hazeltine Electronics Corp., C.C.A. N.Y., 163 F.2d 100—Mornford v. Andrews, C.C.A.Ga., 151 F.2d 511—Walling v. Atlantic Greyhound Corp., D.C.S.C., 61 F.Supp. 992—Walling v. Rockton & Rion R. R., D.C.S.C., 54 F.Supp. 342, affirmed, C.C.A., 146 F.2d 111, certiorari denied 65 S.Ct. 1026, 324 U.S. 880, 89 L.Ed. 1431—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., 131 F.2d 518.

60. U.S.—New Mexico Public Service Co. v. Engel, C.C.A.N.M., 145 F. 2d 636.

The physical immediacy of connection with actual transportation movement is the determining factor as to whether an employee's activities cause him to be "engaged in commerce" within act.—Laudadio v. White Const. Co., C.C.A.N.Y., 163 F. 2d 383.

61. U.S.—Republic Pictures Corp. v. Kappler, C.C.A.Iowa, 151 F.2d 543, 162 A.L.R. 228, affirmed 66 S.Ct 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 807, 327 U S. 817, 90 L.Ed. 1040—New Mexico Public Service Co. v. Engel, C.C.A. N.M., 145 F.2d 636.

62. U.S.—New Mexico Public Service Co. v. Engel, supra.

63. U.S.—McLeod v. Threlkeld, Tex., 63 S.Ct. 1248, 319 U.S. 491, 87 L.Ed. 1538—Nieves v. Standard Dredging Corp., C.C.A.Puerto Rico, 152 F.2d 719—Republic Pictures Corp. v. Kappler, C.C.A.Iowa, 151 F.2d 543, 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 807, 327 U.S. 817, 90 L.Ed. 1040—Overstreet v. North Shore Corporation, C.C.A. Fla., 128 F.2d 450, reversed on other grounds 63 S.Ct. 494, 318 U.S. 125, 87 L.Ed. 656—Skidmore v. John J. Casale, Inc., D.C.N.Y., 66 F.Supp. 282—Walling v. Paramount-Richards Theatres, D.C.La., 61 F.Supp. 290.

64. U.S.—Laudadio v. White Const. Co., C.C.A.N.Y., 163 F.2d 383—Holmes v. Elizabeth Trust Co., D. C.N.J., 72 F.Supp. 132—Borella v. Borden Co., D.C.N.Y., 52 F.Supp. 952, reversed on other grounds, C. C.A., 145 F.2d 63, affirmed 65 S.Ct. 1223, 325 U.S. 679, 89 L.Ed. 1865, 161 A.L.R. 1258.

N.Y.—Stoike v. First Nat. Bank of City of New York, 48 N.E.2d 482, 290 N.Y. 195, certiorari denied 64 S.Ct. 50, 320 U.S. 762, 88 L.Ed. 455.

65. U.S.—Phillips v. Graham Aviation Co., C.C.A.Ga., 157 F.2d 443—E. C. Schroeder Co. v. Clifton, C.C. A.Okl., 153 F.2d 385, certiorari denied 66 S.Ct. 1351, 90 L.Ed. 1629.

Facilitation of interstate commerce

It has been held that the statute does not apply to employees of intrastate employers engaged in and actually performing intra-state acts notwithstanding such intra-state acts incidentally facilitate interstate commerce or the production of goods for such commerce carried on by others with whom they are not otherwise related.—Cecil v. Gradison, Ohio App., 40 N.E.2d 958.

66. U.S.—Maitrejean v. Metcalfe Const. Co., D.C.Minn., 72 F.Supp. 109.

67. U.S.—Hertz Drivurself Stations v. U. S., C.C.A.Mo., 150 F.2d 923—Rouch v. Continental Oil Co., D.C. Kan., 55 F.Supp. 315.

68. U.S.—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F. Supp. 120.

69. U.S.—Walling v. Harris, D.C. Tenn., 68 F.Supp. 146.

Me.—Higgins v. Carr Bros. Co., 25 A.2d 214, 138 Me. 264, affirmed 63 S.Ct. 337, 317 U.S. 572, 87 L.Ed. 468.

70. U.S.—Walling v. Consumers Co., C.C.A.Ill., 149 F.2d 626—Walling v. James V. Reuter, Inc., C.C.A.La., 137 F.2d 315, vacated on other grounds 64 S.Ct. 826, 321 U.S. 671, 88 L.Ed. 1001—Jax Beer Co. v. Redfern, C.C.A.Tex., 124 F.2d 172—Super-Cold Southwest Co. v. McBride, C.C.A.Tex., 124 F.2d 90—Vogelpohl v. Lane Drug Co., D.C.

respect to activities in connection with goods after their interstate movement has ceased and they have come to rest within a state.[71] The act does not intend to exempt from its coverage employees whose activities relate to movement in interstate commerce of personally owned goods of the employer or goods moving interstate for the convenience of the United States government.[72]

(b) Production of Goods for Commerce

An employee is deemed to be engaged in the production of goods for commerce and hence within the coverage of the Fair Labor Standards Act if he is employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on goods intended for interstate commerce, or in any process or occupation necessary to the production thereof.

Under the provisions of the Fair Labor Standards Act § 3 (j), 29 U.S.C.A. § 203 (j), an employee is deemed to be engaged in the production of goods for commerce if he is employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof,[73] and an employee so engaged is within the

Ohio, 55 F.Supp. 564—Roberts v. Barnes Packing Co., D.C.La., 50 F. Supp. 546.

Integral part of journey

Unloading of an interstate shipment is so closely related to interstate transportation as to be an integral or component part of the interstate journey, and the unloading at destination of an interstate shipment is work in "interstate transportation" whether done by the carrier or another.—Walling v. Consumers Co., C.C.A.Ill., 149 F.2d 626.

71. U.S.—Mid-Continent Petroleum Corp. v. Keen, C.C.A.Iowa, 157 F. 2d 310—Walling v. Bridgeport Tobacco Co., D.C.Ill., 57 F.Supp. 429—Walling v. Mutual Wholesale Food & Supply Co., D.C.Minn., 46 F.Supp. 939, modified on other grounds, C.C.A., 141 F.2d 331—Eddings v. Southern Dairies, D.C.S.C., 42 F.Supp. 664.

Ga.—Raymond v. Parish, 30 S.E.2d 669, 71 Ga.App. 293.

N.Y.—Delcour v. Lehigh Valley Coal Sales Co., 43 N.Y.S.2d 371, 182 Misc. 289.

Part of mass

For purpose of determining the question whether employer was engaged in interstate commerce within statute, materials purchased by employer came to a permanent rest upon delivery to the employer when it became a part of the mass of the property of the employer, thereby losing its character as "interstate commerce."—Muldowney v. Seaberg Elevator Co., D.C.N.Y., 39 F.Supp. 275.

72. U.S.—Clyde v. Broderick, C.C.A. Colo., 144 F.2d 348.

73. U.S.—Warren - Bradshaw Drilling Co. v. Hall, Tex., 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83—Chapman v. Home Ice Co., C.C.A.Tenn., 136 F.2d 353, certiorari denied 64 S.Ct. 72, 320 U.S. 761, 88 L.Ed. 454—Southern Advance Bag & Paper Co. v. U. S., C.C.A.La., 133 F.2d 449—Walling v. Peoples Packing Co., C. C.A.Okl., 132 F.2d 236, certiorari denied 63 S.Ct. 831, 318 U.S. 774, 87 L.Ed. 1144—Holmes v. Elizabeth Trust Co., D.C.N.J., 72 F.Supp. 182.

Tex.—Johnson v. Great Nat. Life Ins. Co., Civ.App., 166 S.W.2d 935, error refused.

Intent

It should be presumed that in adopting unusual definition of "produce" in this section so as to include persons in any occupation necessary to production of goods for interstate commerce, Congress enlarged the meaning of "produce" as far as it was deemed expedient.—Lyons v. H. K. Ferguson Co., La.App., 16 So.2d 587.

Employees held engaged in production

(1) Generally.—Southern Advance Bag & Paper Co. v. U. S., C.C.A.La., 133 F.2d 449—Hanson v. Lagerstrom, C.C.A.Minn., 133 F.2d 120—Walling v. Peoples Packing Co., C.C.A.Okl., 132 F.2d 236, certiorari denied 63 S. Ct. 831, 318 U.S. 774, 87 L.Ed. 1144—Mid-Continent Pipe Line Co. v. Hargrave, C.C.A.Okl., 129 F.2d 655—Walling v. De Soto Creamery & Produce Co., D.C.Minn., 51 F.Supp. 938—Holland v. Amoskeag Mach. Co., D.C.N. H., 44 F.Supp. 884—Fleming v. Kenton Loose Leaf Tobacco Warehouse Co., D.C.Ky., 41 F.Supp. 255—Hall v. Warren-Bradshaw Drilling Co., D.C. Tex., 40 F.Supp. 272, modified on other grounds, C.C.A., 124 F.2d 42—Fleming v. A. B. Kirschbaum Co., D. C.Pa., 38 F.Supp. 204, affirmed, C.C. A., 124 F.2d 567, affirmed 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638.

(2) Employees engaged in screening, processing, and preparing goods for interstate distribution.—West Ky. Coal Co. v. Walling, C.C.A.Tenn., 153 F.2d 582.

(3) Employees of cartage concern engaged in interplant transportation of unfinished steel in course of its manufacture and transportation of finished steel from mills to plants of manufacturers.—Walling v. Morris, C.C.A.Mich., 155 F.2d 832—Griffin Cartage Co. v. Walling, C.C.A.6, 153 F.2d 587.

(4) An employee engaged in repairing shoes for sale in interstate commerce.—Campbell v. Zavelo, 10 So.2d 29, 243 Ala. 361.

(5) Employees of laundry corporation engaged in working on goods and in handling such goods.—Philips v. Star Overall Dry Cleaning Laundry Co., 55 F.Supp. 238, affirmed, C. C.A., 149 F.2d 416, certiorari denied All Service Laundry Corp. v. Phillips, 66 S.Ct. 677, 327 U.S. 780, 90 L.Ed. 1008, rehearing denied 66 S.Ct. 815, 327 U.S. 817, 90 L.Ed. 1040.

(6) Employees of company engaged in repairing and reconditioning electric motors for customers producing goods for commerce.—Roland Elec. Co. v. Walling, Md., 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383.

(7) Members of rotary drilling crew employed by independent oil well drilling contractor, who had no interest in oil leases worked on, to drill holes to agreed depth short of oil sand stratum.—Warren-Bradshaw Drilling Co. v. Hall, Tex., 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83.

(8) Employees engaged in the maintenance and operation of a telephone line.—Overstreet v. North Shore Corporation, D.C.Fla., 43 F. Supp. 445, affirmed, C.C.A., 128 F.2d 450, reversed on other grounds 63 S. Ct. 494, 318 U.S. 125, 87 L.Ed. 656.

Employees held not engaged in production

(1) Generally.—Crabb v. Weldon Bros., D.C.Iowa, 65 F.Supp. 369—Lynch v. Embry-Riddle Co., D.C.Fla., 63 F.Supp. 992—Kappler v. Republic Picture Corp., D.C.Iowa, 59 F.Supp. 112, affirmed, C.C.A., 151 F.2d 543, 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 807, 327 U.S. 817, 90 L.Ed. 1040—Fitzgerald v. Kroger Grocery & Baking Co., D.C.Kan., 45 F.Supp. 812.

(2) An employee engaged in the state in the generation and transmission of electrical power to customers who utilize such power in part to transmit messages without the state. —Camfield v. West Texas Utilities Co., Tex.Civ.App., 170 S.W.2d 552, error refused.

(3) Where contractors, by contrac-

coverage of the act where the goods so produced are intended for interstate commerce.[74] The term "handling," as used in the statutory definition of "production," has been held to imply an immediate connection with the manufacturer and the manufacturing process,[75] and the term "transporting" has been held to mean only such carriage as the goods undergo within the producer's immediate province.[76]

It has been held that the words "handling and transporting" refer only to goods in the process of production and not to goods after production is completed,[77] and that one whose activities are confined to the movement of goods which have already been produced for interstate commerce is not engaged in the "production of goods for commerce," within the act.[78] However, employees who further the manufacturing process by direct work on goods, even to the point of preparation for shipment, are engaged in the production of goods within the statute,[79] and the statute applies to employees engaged in producing goods which are processed further, or changed as to form by other persons before going into interstate commerce.[80] It has been held that "production of goods for commerce" implies something tangible produced, something that comes into existence which is capable of being made the subject of commerce, and something more than the mere hope of, or attempt at, production.[81]

Under the statutory definition of "production," an employee to be within the coverage of the act need not be directly "engaged in commerce" among the several states,[82] but it is necessary and sufficient that his work be "necessary" to the production of goods for commerce.[83] Accordingly, if the employee's services are useful and essential in a proc-

tual arrangement with interstate carrier, furnished meals to maintenance-of-way employees of carrier, contractors' cook employed to prepare and serve the meals was not engaged in "production of goods for commerce" within statute.—McLeod v. Threlkeld, Tex., 63 S.Ct. 1248, 319 U.S. 491, 87 L.Ed. 1538.

74. U.S.—Wagner v. American Service Co., D.C.Iowa, 58 F.Supp. 32.

Intermediary between sale and shipment

The question whether employee is within statute where his work is necessary for production of goods for interstate commerce is not whether goods were transported by employer, but whether goods so manufactured were intended for interstate commerce, and fact that there was an intermediary between sale and shipment is immaterial.—Wagner v. American Service Co., D.C. Iowa, 58 F.Supp. 32.

Part of goods

An employee whose services are necessary to an employer's manufacture and shipment of its goods, a substantial part of which is used in filling orders of extra-state customers, is within the protection of the act, even though at the time of handling the goods the employer expected or intended part of the goods to move in intra-state commerce and part in interstate commerce.—Johnson v. Phillips-Buttorff Mfg. Co., 160 S.W.2d 893, 178 Tenn. 559, certiorari denied Phillips-Buttorff Mfg. Co. v. Johnson, 63 S.Ct. 43, 317 U.S. 648, 87 L.Ed. 521.

75. U.S.—Prescott v. Broadway & Franklin Street Corporation, D.C. N.Y., 57 F.Supp. 272.

Sorting and packaging

(1) It has been held that, where shipping clerk of jobber in converted textiles sold interstate sometimes opened cases of goods and sorted them as to color and pattern and repacked them before shipping, the sorting operation did not constitute "production of goods for commerce" within statute since such sorting did not constitute "handling" within statutory language.—Prescott v. Broadway & Franklin Street Corporation, D.C.N.Y., 57 F.Supp. 272.

(2) It has been held on the other hand that one who packages or labels a product or performs any number of tasks incidental to preparing it for shipment "handles" such product.—Walling v. DeSoto Creamery & Produce Co., D.C.Minn., 51 F.Supp. 938.

76. U.S.—Prescott v. Broadway & Franklin Street Corporation, D.C. N.Y., 57 F.Supp. 272.

77. Ga.—Texas Co. v. Pitman, 35 S. E.2d 671, 73 Ga.App. 128.

78. Ga.—Texas Co. v. Pitman, supra.

79. U.S.—Baldwin v. Emigrant Indus. Sav. Bank, C.C.A.N.Y., 150 F. 2d 524, 161 A.L.R. 1234, certiorari denied 66 S.Ct. 171, 326 U.S. 767, 90 L.Ed. 462.

80. U.S.—Bracey v. Luray, C.C.A. Md., 138 F.2d 8.

Ingredient of other goods

Employee producing goods which form ingredient or part of other goods going into interstate commerce is engaged in "production of goods for interstate commerce" within statute.—Robinson v. Massachusetts Mut. Life Ins. Co., Tenn., 158 S.W.2d 441.

81. Wyo.—Atwater v. Gaylord, 184 P.2d 437.

82. U.S.—Roland Elec. Co. v. Walling, Md., 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383.

83. U.S.—Borella v. Borden Co., C.C. A.N.Y., 145 F.2d 63, affirmed 65 S. Ct. 1223, 325 U.S. 679, 89 L.Ed. 1865, 161 A.L.R. 1258—Walling v. Goldblatt Bros., C.C.A.Ill., 128 F. 2d 778, certiorari denied 63 S.Ct. 528, 318 U.S. 757, 87 L.Ed. 1130—Phillips v. Meeker Co-op. Light & Power Ass'n, D.C.Minn., 63 F.Supp. 733—Walling v. Rockton & Rion R. R., D.C.S.C., 54 F.Supp. 342, affirmed, C.C.A., 146 F.2d 111, certiorari denied 65 S.Ct. 1026, 324 U.S. 880, 89 L.Ed. 1431—Walling v. John J. Casale, Inc., D.C.N.Y., 51 F.Supp. 520—Timberlake v. Day & Zimmerman, D.C.Iowa, 49 F.Supp. 28.

N.Y.—Stoike v. First Nat. Bank of City of New York, 48 N.E.2d 482, 290 N.Y. 195, certiorari denied 64 S.Ct. 50, 320 U.S. 762, 88 L.Ed. 455.

N.C.—Hart v. Gregory, 10 S.E.2d 644, 218 N.C. 184, 130 A.L.R. 265.

Term colored by context

In provision governing occupations "necessary to the production" of goods for commerce, "necessary" is colored by the context not only of the terms of the legislation but of its implications in the relation between state and national authority.—10 East 40th St. Bldg. v. Callus, N.Y., 65 S.Ct. 1227, 325 U.S. 578, 89 L.Ed. 1806, 161 A.L.R. 1263.

Substantially necessary

The statute uses the word "necessary" as connoting at least substantially necessary.—Bartholome v. Baltimore Fire Patrol & Despatch Co. of Baltimore City, D.C.Md., 48 F. Supp. 98.

Essentiality

"Necessary" means essential to a desirable or projected end or condition; not to be dispensed with without loss, damage, inefficiency or the like.—Lyons v. H. K. Ferguson Co., La.App., 16 So.2d 587.

ess or occupation necessary to the production of goods for commerce, it is not requisite to coverage under the act that he participate in the physical process of the making of the goods,[84] or that he come in actual physical contact with the goods produced.[85] The employee need not even be employed in the production of an article which itself becomes the subject of commerce or transportation among the several states;[86] it is sufficient that the occupation be one which is necessary to the production of a part of any other articles or subjects of commerce of any character which are produced for commerce.[87]

The criterion of whether an employee's work is necessary to production is one of degree,[88] and the determination generally depends on the facts peculiar to the particular business or industry involved, and the relationship of the employee to the production to which his activities are claimed to be necessary.[89] The test usually applied is whether the employee's work constitutes a part of the integrated effort by which goods are produced,[90] and whether the employee, in any manner, contributes to the finished product.[91] The test is not the relative importance of the work done by the employee, but the practical necessity of performance of the work to the production of goods.[92] The occupation need not be indispensable to the production under consideration,[93] and, if the work performed is convenient and appropriate, or essential and beneficial, to production, it is "necessary" within the meaning of the act.[94] There may be alternative occupations that could be substituted for it, but it is enough that the one at issue is needed in such production and would, if omitted, handicap the production.[95]

The question whether employees are engaged in work necessary to the production of goods for commerce does not depend on the amount or volume of goods produced for commerce, and it is sufficient that the production is constant and consistent.[96] An occupation is not to be excluded from the provisions of the act merely because it contributes to the economy or to the continuity of pro-

84. U.S.—Kirschbaum v. Walling, N. Y. & Pa., 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—E. C. Schroeder Co. v. Clifton, C.C.A.Okl., 153 F.2d 385, certiorari denied 66 S.Ct. 1351, 328 U.S. 858, 90 L.Ed. 1629—Engebretsen v. E. J. Albrecht Co., C.C.A.Ill., 150 F.2d 602—Noonan v. Fruco Const. Co., C.C.A.Mo., 140 F.2d 633—Menicucci v. F. & P. Brakelyne Service, D.C.N.J., 58 F. Supp. 720—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F.Supp. 393.

Remoteness

Mere separation of an occupation from the physical process of production will not preclude application of the statute, but the remoteness of the particular occupation from the physical process is relevant.—10 East 40th St. Bldg. v. Callus, N.Y., 65 S. Ct. 1227, 325 U.S. 578, 89 L.Ed. 1806, 161 A.L.R. 1263.

85. U.S.—Walling v. McCrady Const. Co., C.C.A.Pa., 156 F.2d 932—Mid-Continent Pipe Line Co. v. Hargrave, C.C.A.Okl., 129 F.2d 655—Fleming v. A. B. Kirschbaum Co., C.C.A.Pa., 124 F.2d 567.

86. U.S.—Roland Elec. Co. v. Walling, 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383.

Coal

Where more than fifty per cent. of employer's coal from a certain outlet was sold to concerns engaged in production of goods for commerce, employees who furnished the coal for such use or engaged in occupation necessary for use of coal in such production were covered by the statute.—West Ky. Coal Co. v. Walling, C.C.A.Tenn., 153 F.2d 582.

87. U.S.—Roland Elec. Co. v. Walling, 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383—Roberg v. Henry Phipps Estate, C.C.A.N.Y., 156 F.2d 958.

88. U.S.—Armour & Co. v. Wantock, Ill., 65 S.Ct. 165, 323 U.S. 126—Castaing v. Puerto Rican American Sugar Refinery, C.C.A.Puerto Rico, 145 F.2d 403.

89. U.S.—Castaing v. Puerto Rican American Sugar Refinery, supra—Noonan v. Fruco Const. Co., C.C.A.Mo., 140 F.2d 633.

90. U.S.—Armour & Co. v. Wantock, Ill., 65 S.Ct. 165, 323 U.S. 126—Walling v. Roland Elec. Co., C.C.A.Md., 146 F.2d 745, affirmed 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383.

91. U.S.—Doyle v. Johnson Bros., 28 N.Y.S.2d 452, 176 Misc. 656—Atkocus v. Terker, 30 N.Y.S.2d 628.

92. U.S.—Roberg v. Henry Phipps Estate, C.C.A.N.Y., 156 F.2d 958.

Unskilled labor

The provision of the statute indicates intent to include all workers in extensive process of production, and to avoid any effort to exclude from benefits of the chapter labor of the unskilled or those who do not actually operate the machine.—Prescott v. Broadway & Franklin Street Corporation, D.C.N.Y., 57 F.Supp. 272.

93. U.S.—Roland Elec. Co. v. Walling, 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383—10 East 40th St. Bldg. v. Callus, N.Y., 65 S.Ct. 1227, 325 U.S. 578, 89 L.Ed. 1806, 161 A.L.R. 1263—Armour & Co. v. Wantock, Ill., 65 S.Ct. 165, 323 U.S. 126—Walling v. Amidon, C.C.A.Colo., 153 F.2d 159—Fleming v. A. B. Kirschbaum Co., C.C.A.Pa., 124 F.2d 567—Walling v. Thompson, D.C.Cal., 65 F.Supp. 686—Fleming v. A. B. Kirschbaum Co., D.C.Pa., 38 F. Supp. 204, affirmed, C.C.A., 124 F.2d 567, affirmed 62 S.Ct. 1116, 316 U. S. 517, 86 L.Ed. 1638.

94. U.S.—Fleming v. A. B. Kirschbaum Co., C.C.A.Pa., 124 F.2d 567, affirmed Kirshbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Lorenzetti v. American Trust Co., D.C.Cal., 45 F.Supp. 128.

Tenn.—S. H. Robinson & Co. v. Larue, 156 S.W.2d 359, 25 Tenn.App. 284, affirmed 156 S.W.2d 432, 178 Tenn. 197.

95. U.S.—Roland Elec. Co. v. Walling, 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383.

Use of independent contractors

The fact that repair and rebuilding of electric motors and repair and installation of electrical wiring might have been obtained from a number of independent contractors did not remove from protection of statute employees of company engaged in such work for customers producing goods for commerce, on theory that employees' work was thereby not necessary to production of goods for commerce.—Walling v. Roland Elec. Co., C.C.A.Md., 146 F.2d 745, affirmed 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383.

96. U.S.—Phillips v. Meeker Co-op. Light & Power Ass'n, D.C.Minn., 63 F.Supp. 733.

duction of goods for commerce rather than to the volume of production.[97] Ordinarily, where the services of employees of a company engaged in interstate commerce are rendered in the course of, and in connection with, and necessary and incidental to, the company's business, such employees will be considered to be engaged in the production of goods for interstate commerce.[98] The administration, management, and control of various physical processes together with accompanying accounting and clerical activities are included in the production of goods for commerce within the statute.[99] On the other hand, where the work of an employee has only a tenuous relation to production and is not in any real sense necessary thereto, the employee is not engaged in the production of goods or in handling or working on goods within the provisions of the act.[1] The fact that merely because an occupation is indispensable in the sense of being included in a long line of causation which brings about a result as finished goods does not bring it within the scope of the Fair Labor Standards Act.[2]

c. Work in Part in Interstate Commerce

It is not necessary to coverage under the Fair Labor Standards Act that an employee devote his entire working time to commerce or to the production of goods for commerce, but it is sufficient and necessary that he be engaged in such work to a substantial extent during the work week for which recovery under the act is sought.

An employee, in order to be entitled to the benefits of the Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, need not devote his entire working time to "commerce,"[3] or to the "production of goods for commerce,"[4] but it is necessary[5] and sufficient[6] to coverage under the act that he be engaged in interstate commerce or in the production of goods for commerce to a substantial extent during the work week for which recovery is sought. In this connection, an employee may be within the act during one week in which he engages in interstate work and not within the act during another

97. U.S.—Armour & Co. v. Wantock, Ill., 65 S.Ct. 165, 323 U.S. 126.

98. U.S.—Fleming v. Swift & Co., D.C.Ill., 41 F.Supp. 825, affirmed, C.C.A., Walling v. Swift & Co., 131 F.2d 249—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., Atlantic Co. v. Walling, 131 F.2d 518.

99. U.S.—Hertz Drivurself Stations v. U. S., C.C.A.Mo., 150 F.2d 923.

Necessary processes or occupations

The benefits of the statute are extended to such employees as maintenance workers, watchmen, clerks, stenographers, and messengers, all of whom must be considered as engaged in processes or occupations necessary to the production of goods.—Venero v. Hageman, Inc., 40 N.Y.S. 2d 233, 179 Misc. 882.

Auditing books

One employed by certified public accountants in auditing books of corporations engaged in interstate commerce and preparing stockholders' reports, some of which were sent from state to state, was engaged in "production of goods for commerce" within act.—Rausch v. Wolf, D.C. Ill., 72 F.Supp. 658.

1. U.S.—Noonan v. Fruco Const. Co., C.C.A.Mo., 140 F.2d 633—Walling v. Peoples Packing Co., C.C.A.Okl., 132 F.2d 236, certiorari denied Peoples Packing Co. v. Walling, 63 S.Ct. 831, 318 U.S. 774, 87 L.Ed. 1144.

2. U.S.—10 East 40th St. Bldg. v. Callus, N.Y., 65 S.Ct. 1227, 325 U. S. 578, 89 L.Ed. 1806, 161 A.L.R. 1263—Kelly v. Ford, Bacon & Davis, C.C.A.Pa., 162 F.2d 555.

3. U.S.—Southern Cal. Freight Lines v. McKeown, C.C.A.Cal., 148 F.2d 890, certiorari denied 66 S.Ct. 46, 326 U.S. 736, 90 L.Ed. 439, rehearing denied 66 S.Ct. 138, 326 U. S. 808, 90 L.Ed. 493—Fleming v. Jacksonville Paper Co., C.C.A.Fla., 128 F.2d 395, modified on other grounds 63 S.Ct. 332, 317 U.S. 564, 87 L.Ed. 460—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F.Supp. 393.

N.C.—Horton v. Wilson & Co., 25 S. E.2d 437, 223 N.C. 71.

4. U.S.—Roland Elec. Co. v. Walling, Md., 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383—Bohn v. B & B Ice & Coal Co., D.C.Ky., 63 F.Supp. 1020.

5. U.S.—Divins v. Hazeltine Electronics Corp., C.C.A.N.Y., 163 F.2d 100—Walling v. Silver Bros. Co., C.C.A.N.H., 136 F.2d 168—Bohn v. B & B Ice & Coal Co., D.C.Ky., 63 F.Supp. 1020—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120—Ouendag v. Gibson, D. C.Mich., 49 F.Supp. 379.

Qualification of statutory language

The phrases "engaged in commerce" or "in the production of goods for commerce" within the statute should be qualified by the word "substantially" or some similar qualifying word.—Mile High Poultry Farms v. Frazier, 157 P.2d 125, 113 Colo. 338.

6. U.S.—Walling v. Crown Overall Mfg. Co., C.C.A.Ohio, 149 F.2d 152—Walling v. Mutual Wholesale Food & Supply Co., C.C.A.Minn., 141 F.2d 331—Reynolds v. Rogers Cartage Co., D.C.Ky., 71 F.Supp. 870—Bohn v. B & B Ice & Coal Co., D.C.Ky., 63 F.Supp. 1020—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120—Walling v. Bank of Waynesboro, Ga., D.C. Ga., 61 F.Supp. 384—Hill v. Jones, D.C.Ky., 59 F.Supp. 569—Lorber v. Rosow, D.C.Conn., 58 F.Supp. 341—Walling v. New Orleans Private Patrol Service, D.C.La., 57 F.Supp. 143—Frank v. McMeekam, D.C.N. Y., 56 F.Supp. 369—Scott v. Ford, Bacon & Davis, D.C.Pa., 55 F.Supp. 982—Brown v. Minngas Co., D.C. Minn., 51 F.Supp. 363—Walling v. Mutual Wholesale Food & Supply Co., D.C.Minn., 46 F.Supp. 939, modified on other grounds, C.C.A., 141 F.2d 331—Holland v. Amoskeag Mach. Co., D.C.N.H., 44 F.Supp. 884—Fleming v. Knox, D.C.Ga., 42 F. Supp. 948.

N.Y.—Watt v. Frank G. Shattuck Co., 62 N.Y.S.2d 111, 270 App.Div. 943—Creno v. Caruso Produce Co., 60 N. Y.S.2d 134.

Okl.—Brooks Packing Co. v. Henry, 137 P.2d 918, 192 Okl. 533.

S.D.—Colbeck v. Dairyland Creamery Co., 17 N.W.2d 262.

Wash.—Cannon v. Miller, 155 P.2d 500, 122 Wash.2d 227, 157 A.L.R. 530.

Building maintenance employees who worked part of time in building which was devoted to interstate production in substantial degree, and part of time in other buildings of employer, were entitled to judgment for overtime on the basis of the total hours of overtime in those weeks during which they performed any services covered by Fair Labor Standards Act.—Roberg v. Henry Phipps Estate, C.C.A.N.Y., 156 F.2d 958.

week in which he does no such work.[7] Where the employer is subject to the act with respect to a part of his activities, and there is no separation of the business subject to the act from the business not subject to it, the fact that a part of the work done by the employee may not have related to the employer's interstate activities does not preclude coverage under the act.[8] It has been held, however, that an employee working in both interstate and intra-state commerce must point out what part of his work was in interstate and what part in intra-state commerce,[9] and that, if the employer's operations are not an integrated effort for the production of goods for interstate commerce, the employee to bring himself within the act must show specifically that a substantial part of his mixed tasks consists of activities involving interstate commerce.[10]

Under the rule bringing employment in substantial part in interstate commerce within the coverage of the act, the phrase "substantial part" is not a phrase of mathematical precision.[11] The courts have refused to lay down any hard and fast rule or any fixed percentage in connection with the term "substantial,"[12] and it has been held that the term means the opposite of insubstantial or immaterial and may be less than fifty per cent.[13] In other words, the percentage of time occupied in covered work is not the decisive test but strong consideration must also be given to the nature of the employee's participation in the production of goods for commerce, that is, whether his work in that field is continuous, regular, and an integral part of his every day employment, or whether it is occasional, spasmodic, or casual in its nature.[14] So, where the employee's activities in connection with interstate commerce are frequent and recurring and have the character of continuity and are engaged in as part of his regular duties, he is within the act, even though he works only a relatively short time in interstate commerce.[15] On the other hand, where the employee's work in connection with interstate commerce is tenuous, incidental, insubstantial, or inconsequential,[16] and the time spent in performing

7. U.S.—Brown v. Minngas Co., D.C. Minn., 51 F.Supp. 363—Cullum v. Stevens, D.C.Tex., 46 F.Supp. 73.

8. U.S.—Guess v. Montague, C.C.A. S.C., 140 F.2d 500—Camfield v. West Texas Utilities Co., D.C.Tex., 44 F.Supp. 847—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed C.C.A., Atlantic Co. v. Walling, 131 F.2d 518.

Ga.—Orange Crush Bottling Co. v. Tuggle, 27 S.E.2d 769, 70 Ga.App. 144.

Mo.—Edwards v. South Side Auto Parts Co., App., 180 S.W.2d 1015.

Tex.—Camfield v. West Texas Utilities Co., Civ.App., 170 S.W.2d 552, error refused.

Separate departments

Employees of a wholesaler, who during a given work week interchangeably engaged in work in a department involving only intra-state business and in another involving interstate commerce, are entitled to minimum wages prescribed by act for entire time worked, including time spent in department involving only intra-state business.—Harris v. Hammond, D.C.Ga., 51 F.Supp. 91, affirmed C.C.A., 145 F.2d 333, certiorari denied 65 S.Ct. 858, 324 U.S. 859, 89 L.Ed. 1416.

Proportion of total business

It has been held that, where there is no proof available as to the time worked in interstate commerce and that worked in intra-state commerce, the court would base the employee's compensation on the ratio the amount the interstate business of the employer bore to the intra-state business.—Tucker v. Hitchcock, D.C.Fla., 44 F.Supp. 874.

9. U.S.—Super-Cold Southwest Co. v. McBride, C.C.A.Tex., 124 F.2d 90—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120—Schwarz, for Use and Benefit of Kotek, v. Witwer Grocer Co., D.C.Iowa, 49 F.Supp. 1003, affirmed C.C.A., 141 F.2d 341, certiorari denied 64 S.Ct. 1265, 322 U.S. 753, 88 L.Ed. 1583—Tucker v. Hitchcock, D.C.Fla., 44 F.Supp. 874.

Tex.—Camfield v. West Texas Utilities Co., Civ.App., 170 S.W.2d 552, error refused.

10. U.S.—Hertz Drivurself Stations v. U. S., C.C.A.Mo., 150 F.2d 923—Ling v. Currier Lumber Co., D.C. Mich., 50 F.Supp. 204.

11. U.S.—Berry v. 34 Irving Place Corporation, D.C.N.Y., 52 F.Supp. 875.

12. U.S.—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F. Supp. 120.

13. U.S.—Frank v. McMeekan, D.C. N.Y., 56 F.Supp. 369—Berry v. 34 Irving Place Corporation, D.C.N.Y., 52 F.Supp. 875.

14. U.S.—Mid-Continent Petroleum Corp. v. Keen, C.C.A.Iowa, 157 F.2d 310—Bohn v. B & B Ice & Coal Co., D.C.Ky., 63 F.Supp. 1020.

15. U.S.—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120—McKeown v. Southern California Freight Forwarders, D.C. Cal., 52 F.Supp. 331, affirmed C.C. A., 148 F.2d 890, certiorari denied 66 S.Ct. 46, 326 U.S. 736, 90 L.Ed. 439, rehearing denied 66 S.Ct. 138, 326 U.S. 808, 90 L.Ed. 493.

De minimis

(1) The maxim, De minimis non curat lex, was not applicable to exclude from coverage of Fair Labor Standards Act employees who worked in commerce or in the production of goods for commerce from fifteen minutes some weeks to more than forty-five hours other weeks, where such interstate work was of the type which they were hired to perform, and employer's interstate sales ranged from six per cent to fifty-five per cent of total sales.—Brown v. Minngas Co., D.C.Minn., 51 F. Supp. 363.

(2) Where seven per cent of employee's time was spent in interstate commerce during each day of each and every week checking invoices, freight, and bills of lading for employer engaged in transportation of goods by motor truck, the percentage of employee's time in interstate commerce was not so unsubstantial or "de minimis" as to deprive him of benefits of statute.—Southern Cal. Freight Lines v. McKeown, C.C.A. Cal., 148 F.2d 890, certiorari denied 66 S.Ct. 46, 326 U.S. 736, 90 L.Ed. 439, rehearing denied 66 S.Ct. 138, 326 U.S. 808, 90 L.Ed. 493.

16. U.S.—Bohn v. B & B Ice & Coal Co., D.C.Ky., 63 F.Supp. 1020—Scott v. Ford, Bacon & Davis, D.C. Pa., 55 F.Supp. 982.

Cal.—McDaniel v. Clavin, 136 P.2d 559, 22 Cal.2d 61.

Colo.—Mile High Poultry Farms v. Frazier, 157 P.2d 125, 113 Colo. 338.

duties of an interstate character is negligible,[17] he is not within the statute. An employee who is primarily engaged in intra-state work cannot bring himself within the act by an unauthorized extension of his duties into the field of interstate commerce.[18]

d. Particular Employees

(a) In general
(b) Maintenance employees of buildings

(a) In General

The Fair Labor Standards Act has been applied to numerous particular employees engaged in commerce or in the production of goods for commerce.

As discussed supra subdivision a of this section, the provisions of the Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, apply to every employee engaged in commerce or in the production of goods for commerce, and, where work of the requisite character is performed, the statute may apply to clerical and office employees,[19] culinary workers,[20] employees engaged in electric power generation and transmission,[21] factory employees generally,[22] employees engaged in ice production and servicing,[23] laborers generally,[24] lumber work-

Work held not substantial

Where five per cent of time of employees at central warehouse of corporation operating chain of retail drug stores was devoted to working on one and fifty-six hundredths per cent of goods of corporation in interstate commerce, a "substantial" part of employees' time was not devoted to interstate commerce.—Vogelpohl v. Lane Drug Co., D.C.Ohio, 55 F.Supp. 564.

17. U.S.—Hill v. Jones, D.C.Ky., 59 F.Supp. 569—Petway v. Dobson, D.C.Tenn., 46 F.Supp. 114—Rauhoff v. Henry Gramling & Co., D.C.Ark., 42 F.Supp. 754.

Infrequent activities of an employee in unloading from an interstate car do not alone place employee in "interstate commerce" within statute, if the rest of his work is of an intra-state character.—Walling v. Mutual Wholesale Food & Supply Co., D.C.Minn., 46 F.Supp. 939, modified on other grounds C.C.A., 141 F. 2d 331.

18. U.S.—Bohn v. B & B Ice & Coal Co., D.C.Ky., 63 F.Supp. 1020.

19. U.S.—West Ky. Coal Co. v. Walling, C.C.A.Tenn., 153 F.2d 582—Hertz Drivurself Stations v. U. S., C.C.A.Mo., 150 F.2d 923—Wilson v. Shuman, C.C.A.Ark., 140 F.2d 644—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363—Holland v. Amoskeag Mach. Co., D.C.N.H., 44 F. Supp. 884—Moss v. Postal Telegraph-Cable Co., D.C.Ga., 42 F. Supp. 807—Eddings v. Southern Dairies, D.C.S.C., 42 F.Supp. 664.

Ala.—Cudahy Packing Co. of Alabama v. Bazanos, 15 So.2d 720, 245 Ala. 73.

Fla.—Cherry Lake, Inc., v. Kearce, 26 So.2d 434, 157 Fla. 484.

N.Y.—Cassone v. Wm. Edgar John & Associates, 57 N.Y.S.2d 169, 185 Misc. 573—Flaherty v. Nick F. Helmers, Inc., 50 N.Y.S.2d 510, 181 Misc. 994, affirmed 55 N.Y.S.2d 122, 269 App.Div. 764—Simkins v. Elmhurst Contracting Co., 46 N.Y.S.2d 26, 181 Misc. 791.

N.C.—Horton v. Wilson & Co., 25 S. E.2d 437, 223 N.C. 71.

Particular employees within act

(1) Rate clerk of motor carrier.—Overnight Motor Transp. Co. v. Missel, Md., 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Clay v. Motor Freight Express, D.C. Pa., 52 F.Supp. 948.

(2) Switchboard operators, filing operators, watchmen and members of accounting, booking, publicity, accessory, shipping and maintenance and supply departments, in theatre company's central executive, administrative and supply offices.—Walling v. Paramount-Richards Theatres, D.C. La., 61 F.Supp. 290.

Held not within act

U.S.—Soderberg v. S. Birch & Sons Const. Co., C.C.A.Wash., 163 F.2d 37—Swift & Co. v. Wilkerson, C.C. A.Tex., 124 F.2d 176—Baloc v. Foley Bros., D.C.Minn., 68 F.Supp. 533—Lagier v. F. D. Carpenter Coal Co., D.C.Ill., 57 F.Supp. 314—Drake v. Hirsch, D.C.Ga., 40 F. Supp. 290—Abadie v. Cudahy Packing Co. of Louisiana, D.C.La., 37 F.Supp. 164.

20. U.S.—Hanson v. Lagerstrom, C. C.A.Minn., 133 F.2d 120—Womack v. Consolidated Timber Co., C.C.A. Or., 132 F.2d 101.

Mich.—Basik v. General Motors Corp., 19 N.W.2d 142, 311 Mich. 705, 159 A.L.R. 966.

Held not within act

N.Y.—Filardo v. Foley Bros., 45 N. Y.S.2d 262, 181 Misc. 136.

21. U.S.—Walling v. Connecticut Co., C.C.A.Conn., 154 F.2d 552—New Mexico Public Service Co. v. Engel, C.C.A.N.M., 145 F.2d 636—Reynolds v. Salt River Valley Water Users Ass'n, C.C.A.Ariz., 143 F. 2d 863, certiorari denied 65 S.Ct. 117, 323 U.S. 764, 89 L.Ed. 611—Phillips v. Meeker Co-op. Light & Power Ass'n, D.C.Minn., 63 F. Supp. 733—Walling v. Connecticut Co., D.C.Conn., 62 F.Supp. 733, affirmed C.C.A., 154 F.2d 552.

Tex.—Camfield v. West Texas Utilities Co., Civ.App., 170 S.W.2d 552, error refused.

Held not within act

Tex.—Camfield v. West Texas Utilities Co., supra.

22. U.S.—U. S. v. Darby Lumber Co., Ga., 61 S.Ct. 451, 312 U.S. 100, 657, 85 L.Ed. 609, 132 A.L.R 1430—Walling v. J. Friedman & Co., D.C. N.Y., 61 F.Supp. 325—Walling v. Reilly, D.C.Pa., 59 F.Supp. 740—Walling v. Snellings, D.C.Ala., 53 F.Supp. 851—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F. Supp. 393—Walling v. Higgins, D. C.Pa., 47 F.Supp. 856—Sauls v. Martin, D.C.S.C., 45 F.Supp. 801.

Held not within act

U.S.—Anderson v. Federal Cartridge Corp., D.C.Minn., 72 F.Supp. 644.

Mass.—Campanale v. General Ice Cream Corporation, 49 N.E.2d 1018, 314 Mass. 387.

23. U.S.—Southern United Ice Co. v. Hendrix, C.C.A.Tenn., 153 F.2d 689—Chapman v. Home Ice Co. of Memphis, C.C.A.Tenn., 136 F.2d 353, certiorari denied 64 S.Ct. 72, 320 U.S. 761, 88 L.Ed. 454—Collins v. Kidd Dairy & Ice Co., C.C.A. Tex., 132 F.2d 79—Hamlet Ice Co. v. Fleming, C.C.A.N.C., 127 F.2d 165, certiorari denied 63 S.Ct. 29, 317 U.S. 634, 87 L.Ed. 511—Gordon v. Paducah Ice Mfg. Co., D.C. Ky., 41 F.Supp. 980.

Cal.—Hansen v. Salinas Valley Ice Co., 144 P.2d 896, 62 Cal.App.2d 357.

N.J.—Sermond v. Lotz, 47 A.2d 482, 24 N.J.Misc. 182.

Held not within act

U.S.—Samuels v. Houston, D.C.Ga., 46 F.Supp. 364.

Ark.—Couch v. Ward, 168 S.W.2d 822, 205 Ark. 308.

24. U.S.—Walling v. Atlantic Greyhound Corp., D.C.S.C., 61 F.Supp. 992—Walling v. Bank of Waynesboro, Ga., D.C.Ga., 61 F.Supp. 384—Walling v. West Ky. Coal Co., D.C.Tenn., 60 F.Supp. 681—Rouch v. Continental Oil Co., D.C.Kan., 55 F.Supp. 315—Silgaro v. Port Compress Co., D.C.Tex., 45 F.Supp. 88—Klotz v. Ippolito, D.C.Tex., 40 F.Supp. 422—Muldowney v. Seaberg Elevator Co., D.C.N.Y., 39 F.

ers,[25] maritime workers,[26] mechanics and repairmen,[27] mill workers,[28] mining employees,[29] and newspaper employees.[30]

Also, where employees are engaged in commerce or in the production of goods for commerce, the statute may cover employees engaged in oil production and distribution,[31] packing house employees,[32] railroad and terminal employees,[33] salesmen,[34] scrap metal workers,[35] ship-building and ship-repair workers,[36] employees engaged in transmission and communication of messages in interstate com-

Supp. 275—Lewis v. Nailling, D.C. Tenn., 36 F.Supp. 187.

25. U.S.—Hanson v. Lagerstrom, C.C.A.Minn., 133 F.2d 120—Womack v. Consolidated Timber Co., C.C.A. Or., 132 F.2d 101—Walling v. Castle, D.C.Miss., 64 F.Supp. 707, affirmed C.C.A., 153 F.2d 923—Walling v. Hamner, D.C.Va., 64 F. Supp. 690—Harris v. Crossett Lumber Co., D.C.Ark., 62 F.Supp. 856—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846—Fleming v. Knox, D.C.Ga., 42 F.Supp. 948—Allen v. Moe, D.C. Idaho, 39 F.Supp. 5.

Held not within act

Wash.—Ikola v. Snoqualmie Falls Lumber Co., 121 P.2d 369, 12 Wash.2d 341.

26. U.S.—Walling v. W. D. Haden Co., C.C.A.Tex., 153 F.2d 196, certiorari denied 66 S.Ct. 1373, 328 U.S. 866, 90 L.Ed. 1636.

Held not within act

U.S.—Nieves v. Standard Dredging Corp., C.C.A.Puerto Rico, 152 F.2d 719.

27. U.S.—Boutell v. Walling, Mich., 66 S.Ct. 631, 327 U.S. 463, 90 L.Ed. 786—Roland Elec. Co. v. Walling, Md., 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383—Holland v. Amoskeag Mach. Co., D.C.N.H., 44 F. Supp. 884.

Okl.—Crocker Packing Co. v. Julian, 145 P.2d 391, 193 Okl. 472.

S.D.—Colbeck v. Dairyland Creamery Co., 17 N.W.2d 262.

Held not within act

U.S.—Lynch v. Embry-Riddle Co., D.C.Fla., 63 F.Supp. 992—Mennicucci v. F. & P. Brakelyne Service, D.C.N.J., 58 F.Supp. 720—Zehring v. Brown Materials, D.C.Cal., 48 F. Supp. 740.

Ga.—Texas Co. v. Pitman, 35 S.E.2d 671, 73 Ga.App. 128.

Mo.—Fountain v. St. Joseph Water Co., 180 S.W.2d 28, 352 Mo. 817.

28. U.S.—Murray v. Noblesville Milling Co., C.C.A.Ind., 131 F.2d 470, certiorari denied 63 S.Ct. 832, 318 U.S. 775, 87 L.Ed. 1145—Bowie v. Gonzalez, C.C.A.Puerto Rico, 117 F.2d 11.

29. U.S.—E. C. Schroeder Co. v. Clifton, C.C.A.Okl., 153 F.2d 385, certiorari denied 66 S.Ct. 1351, 328 U.S. 858, 1353, 90 L.Ed. 1629—Walling v. Haile Gold Mines, C.C.A.S.C., 136 F.2d 102—Shepler v. Crucible Fuel Co. of America, D.C. Pa., 60 F.Supp. 260.

Minn.—Pakarinen v. Butler Bros., 16 N.W.2d 769, 218 Minn. 496.

30. U.S.—Mabee v. White Plains Pub. Co., 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607—Sun Pub. Co. v. Walling, C.C.A.Tenn., 140 F.2d 445, certiorari denied 64 S.Ct. 946, 322 U.S. 728, 88 L.Ed. 1564.

N.Y.—Mabee v. White Plains Pub. Co., 65 N.Y.S.2d 717, 271 App.Div. 834.

31. U.S.—Mid-Continent Pipe Line Co. v. Hargrave, C.C.A.Okl., 129 F.2d 655—West v. Texas Co., D.C. La., 65 F.Supp. 97—Keen v. Mid-Continent Petroleum Corp., D.C. Iowa, 63 F.Supp. 120—Fleming v. Rex Oil & Gas Co., D.C.Mich., 43 F.Supp. 950—Divine v. Levy, D.C. La., 39 F.Supp. 44—St. John v. Brown, D.C.Tex., 38 F.Supp. 385.

Tex.—Perry v. George P. Livermore, Inc., Civ.App., 165 S.W.2d 782.

Held within act

(1) Employees of a well surveying corporation.—Straughn v. Schlumberger Well Surveying Corp., D.C.Tex., 72 F.Supp. 511.

(2) Employees engaged in drilling oil wells.—Warren-Bradshaw Drilling Co. v. Hall, Tex., 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83—Culver v. Bell & Loffland, C.C.A.Cal., 146 F.2d 29.

(3) Employees of an oil pipe line company.—Walling v. Mid-Continent Pipe Line Co., C.C.A.Okl., 143 F.2d 308.

(4) Maintenance employees of bulk oil plants.—Mid-Continent Petroleum Corp. v. Keen, C.C.A.Iowa, 157 F.2d 310.

Held not within act

Wyo.—Atwater v. Gaylord, 184 P.2d 437.

32. U.S.—Walling v. Peoples Packing Co., C.C.A.Okl., 132 F.2d 236, certiorari denied Peoples Packing Co. v. Walling, 63 S.Ct. 831, 318 U.S. 774, 87 L.Ed. 1144—Fleming v. Swift & Co., D.C.Ill., 41 F.Supp. 825, affirmed C.C.A., 131 F.2d 249.

Kan.—Sykes v. Lochmann, 132 P.2d 620, 156 Kan. 223, certiorari denied 63 S.Ct. 1165, 319 U.S. 753, 87 L.Ed. 1707.

Okl.—Brooks Packing Co. v. Mathis, 137 P.2d 922, 192 Okl. 537.

Held not within act

Okl.—Brooks Packing Co. v. Willis, 137 P.2d 923, 192 Okl. 538.

33. U.S.—Torres v. American R. Co. of Puerto Rico, D.C.Puerto Rico, 66 F.Supp. 745—Davis v. Rockton & R. R. R., D.C.S.C., 65 F.Supp. 67—Walling v. Jacksonville Terminal Co., D.C.Fla., 55 F.Supp. 302, affirmed, C.C.A., 148 F.2d 768—Fleming v. Atlantic Co., D.C.Ga., 40 F. Supp. 654, affirmed C.C.A., 131 F.2d 518.

Redcaps or porters

U.S.—Williams v. Jacksonville Terminal Co., Fla. & Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914—Southern Ry. Co. v. Black, C.C.A. N.C., 127 F.2d 280—Harrison v. Kansas City Terminal Ry. Co., D. C.Mo., 36 F.Supp. 434, affirmed C. C.A., 126 F.2d 422—Pickett v. Union Terminal Co., D.C.Tex., 33 F. Supp. 244, reversed on other grounds, C.C.A., 118 F.2d 328, affirmed 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

34. U.S.—Murray v. Noblesville Milling Co., D.C.Ind., 42 F.Supp. 808, affirmed in part and reversed in part on other grounds C.C.A., 131 F.2d 470, certiorari denied 63 S.Ct. 832, 318 U.S. 775, 87 L.Ed. 1145.

Held not within act

U.S.—Domenech v. Pan Am. Standard Brands, C.C.A.Puerto Rico, 147 F.2d 994.

35. U.S.—Bracey v. Luray, C.C.A. Md., 138 F.2d 8—Fleming v. Stillman, D.C.Tenn., 48 F.Supp. 609.

36. U.S.—Walling v. Keansburg Steamboat Co., C.C.A.N.J., 162 F.2d 405—Adams v. St. Johns River Shipbuilding Co., D.C.Fla., 69 F. Supp. 989.

N.Y.—Eckert v. Elmhurst Contracting Co., 1945, 56 N.Y.S.2d 98, 185 Misc. 108, affirmed 61 N.Y.S.2d 730, 186 Misc. 100.

Instruments of war

Employees, installing radar and radio equipment on "armed cargo transports" and "armed transports" and other ships which could be regarded as instrumentalities of commerce, were engaged in "production of goods for commerce" within act, but were not so engaged while installing radar and radio equipment on vessels which were solely instruments of war, since such vessels are not embraced within word "ships" within statutory definition of goods as including ships.—Divins v. Hazeltine Electronics Corp., C.C.A.N.Y., 163 F.2d 100.

merce,[37] trucking and delivery employees,[38] warehouse employees,[39] employees of wholesale or retail distributors,[40] and other miscellaneous employees.[41]

Construction workers. As a general rule, employees of building contractors engaged in construction work which is wholly intra-state in character are not within the Fair Labor Standards Act as engaged in commerce or in the production of goods for commerce.[42] However, the activities of an employee may be such as to bring him within

37. U.S.—Schmidt v. Peoples Telephone Union of Maryville, C.C.A. Mo., 138 F.2d 13—Moss v. Postal Telegraph-Cable Co., D.C.Ga., 42 F.Supp. 807.

38. U.S.—Walling v. Comet Carriers, C.C.A.N.Y., 151 F.2d 107, certiorari dismissed 66 S.Ct. 1007, 328 U.S. 819, 90 L.Ed. 1600—Allesandro v. C. F. Smith Co., C.C.A. Mich., 136 F.2d 75, 149 A.L.R. 382—Bowman v. Pace Co., C.C.A.Fla., 119 F.2d 858—Walling v. Griffin Cartage Co., D.C.Mich., 62 F.Supp. 396, affirmed, C.C.A., 153 F.2d 587—Harris v. Hammond, D.C.Ga., 51 F.Supp. 91, affirmed C.C.A., 145 F.2d 333, certiorari denied 65 S.Ct. 858, 324 U.S. 859, 89 L.Ed. 1416—Bracey v. Luray, D.C.Md., 49 F. Supp. 821, reversed on other grounds C.C.A., 138 F.2d 8—Walling v. Sanders, D.C.Tenn., 48 F. Supp. 9, affirmed C.C.A., 136 F.2d 78—Gavril v. Kraft Cheese Co., D. C.Ill., 42 F.Supp. 702—Drake v. Hirsch, D.C.Ga., 40 F.Supp. 290—Thompson v. Daugherty, D.C.Md., 40 F.Supp. 279—Magann v. Long's Baggage Transfer Co., D.C.Va., 39 F.Supp. 742.
N.Y.—Rahgo v. Cities Service Oil Co., 33 N.Y.S.2d 42, 177 Misc. 1059.
Tenn.—Gibson v. Glasgow, 157 S.W. 2d 814, 178 Tenn. 273.

Held not within act
U.S.—Schroepfer v. A. S. Abell Co., C.C.A.Md., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060, rehearing denied 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595—Walling v. Sanders, C.C.A. Tenn., 136 F.2d 78—Allesandro v. C. F. Smith Co., C.C.A.Mich., 136 F.2d 75, 149 A.L.R. 382—Reynolds v. Rogers Cartage Co., D.C.Ky., 71 F.Supp. 870—Lagier v. F. D. Carpenter Coal Co., D.C.Ill., 57 F. Supp. 314—Schroepfer v. A. S. Abell Co., D.C.Md., 48 F.Supp. 88, affirmed C.C.A., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060, rehearing denied 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595—Walling v. Sanders, D.C.Tenn., 48 F.Supp. 9, affirmed 136 F.2d 78—Moses v. McKesson & Robbins, D.C.Tex., 43 F.Supp. 528—Prescription House v. Anderson, D.C.Tex., 42 F.Supp. 874—Rauhoff v. Henry Gramling & Co., D.C.Ark., 42 F.Supp. 754—Gerdert v. Certified Poultry & Egg Co., D.C.Fla., 38 F.Supp. 964.
Tenn.—Gibson v. Glasgow, 157 S.W 2d 814, 178 Tenn. 273.

39. U.S.—A. H. Phillips, Inc., v. Walling, C.C.A.Mass., 144 F.2d 102, affirmed 65 S.Ct. 807, 324 U.S. 490, 89 L.Ed. 1095, 157 A.L.R. 876—Walling v. Mutual Wholesale Food & Supply Co., C.C.A.Minn., 141 F. 2d 331—Walling v. American Stores Co., C.C.A.Pa., 133 F.2d 840—Walling v. Goldblatt Bros., C. C.A.Ill., 128 F.2d 778, certiorari denied 63 S.Ct. 528, 318 U.S. 757, 87 L.Ed. 1130—Fleming v. Jacksonville Paper Co., C.C.A.Fla., 128 F.2d 395, modified on other grounds 63 S.Ct. 332, 317 U.S. 564, 87 L.Ed. 460—Antis v. Montgomery Ward & Co., D.C.Mich., 63 F.Supp. 669—Lorber v. Rosow, D.C.Conn., 58 F. Supp. 341—Vogelpohl v. Lane Drug Co., D.C.Ohio, 55 F.Supp. 564—Shain v. Armour & Co., D.C.Ky., 50 F.Supp. 907—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed C.C.A., 131 F.2d 518.
Tenn.—Gibson v. Glasgow, 157 S.W. 2d 814, 178 Tenn. 273.

Held not within act
U.S.—Schwarz v. Witwer Grocer Co., C.C.A.Iowa, 141 F.2d 341, certiorari denied 64 S.Ct. 1265, 322 U.S. 753, 88 L.Ed. 1583—Fellabaum v. Swift & Co., D.C.Ohio, 54 F.Supp. 353—Walling v. Ward's Cut-Rate Drugs, D.C.Tex., 54 F.Supp. 41—Walling v. L. Wiemann Co., D.C. Wis., 52 F.Supp. 131, affirmed C.C. A., 138 F.2d 602, 150 A.L.R. 878, certiorari denied 64 S.Ct. 782, 321 U.S. 785, 88 L.Ed. 1077—Reliance Storage & Inspection Co. v. Hubbard, D.C.Va., 50 F.Supp. 1012—Veazey Drug Co. v. Fleming, D.C. Okl., 42 F.Supp. 689.
Tex.—Carpenter v. Waxahachie Cotton Warehouse, Civ.App., 162 S.W. 2d 139.

40. U.S.—Walling v. Mutual Wholesale Food & Supply Co., C.C.A. Minn., 141 F.2d 331—James V. Reuter, Inc., v. Walling, C.C.A.La., 137 F.2d 315, vacated on other grounds 64 S.Ct. 826, 321 U.S. 671, 88 L.Ed. 1001—Collier v. New River & Pocahontas Consol. Coal Co., D.C.Va., 66 F.Supp. 288—Garchell v. Kantar, D.C.Minn., 56 F.Supp. 866, reversed on other grounds C. C.A., 150 F.2d 47.

Held not within act
U.S.—Walling v. Wyandotte Furniture Co., D.C.Mo., 72 F.Supp. 98.
Ala.—Serio v. Dee Cigar & Candy Co., 9 So.2d 909, 243 Ala. 306.
Okl.—Martin v. Bouldin Fruit Co., 181 P.2d 995.

41. U.S.—Laudadio v. White Const. Co., C.C.A.N.Y., 163 F.2d 383—West Ky. Coal Co. v. Walling, C.C.A. Tenn., 153 F.2d 582—Bowers v. Remington Rand, D.C.Ill., 64 F. Supp. 620—Walling v. West Ky. Coal Co., D.C.Tenn., 60 F.Supp. 681—Walling v. McCracken County Peach Growers Ass'n, D.C.Ky., 50 F.Supp. 900—Jordan v. Stark Bros. Nurseries & Orchards Co., D.C. Ark., 45 F.Supp. 769.
Ky.—Harlan-Wallins Coal Corp. v. David, 196 S.W.2d 881, 303 Ky. 84.
N.Y.—Reck v. Zarnocay, 33 N.Y.S.2d 582, modified on other grounds 36 N.Y.S.2d 394, 264 App.Div. 520, reargument denied 36 N.Y.S.2d 834, 265 App.Div. 817.

Held within act

(1) Booking agent for motion picture film company.—Kappler v. Republic Pictures Corp., D.C.Iowa, 59 F.Supp. 112, affirmed C.C.A., 151 F. 2d 543, 162 A.L.R. 228, affirmed 66 S. Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L.Ed. 1040.

(2) Firefighters.—Armour & Co. v. Wantock, Ill., 65 S.Ct. 165, 323 U.S. 126, 89 L.Ed. 118, rehearing denied 65 S.Ct. 427, 323 U.S. 818, 89 L.Ed. 649.

(3) Messengers.—Walling v. Allied Messenger Service, D.C.N.Y., 47 F.Supp. 773.

(4) Employees engaged in maintaining and operating toll road and drawbridge over navigable waterway.—Overstreet v. North Shore Corporation, Fla., 63 S.Ct. 494, 318 U.S. 125, 87 L.Ed. 656.

(5) Laundry workers.—Phillips v. Star Overall Dry Cleaning Laundry Co., C.C.A.N.Y., 149 F.2d 416, certiorari denied 66 S.Ct. 677, 327 U.S. 780, 90 L.Ed. 1008, rehearing denied 66 S.Ct. 815, 327 U.S. 817, 90 L.Ed. 1040.

(6) Shoe repair employees.—Campbell v. Zavelo, 10 So.2d 29, 243 Ala 361.

42. U.S.—Laudadio v. White Const Co., C.C.A.N.Y., 163 F.2d 383—Soderberg v. S. Birch & Sons Const. Co., C.C.A.Wash., 163 F.2d 37—Englert v. S. Birch & Sons Const. Co., C.C.A.Wash., 163 F.2d 34—Barbe v. Cummins Const. Corporation, C.C.A.Md., 138 F.2d 667—Maitrejean v. Metcalfe Const. Co., D.C.Minn., 72 F.Supp. 109—Baloc v. Foley Bros., D.C.Minn., 68 F. Supp. 533—Collins v. Ford, Bacon & Davis, Inc., D.C.Pa., 66 F.Supp. 424—Damon v. Ford, Bacon & Da-

the coverage of the act,[43] and, if the construction involves the repair or extension of existing facilities used for production of goods for interstate commerce, the employee's work may be considered necessary to the production.[44] It has been held that construction employees engaged in the repair of roads, bridges, and other instrumentalities of interstate commerce are within the statute.[45]

Watchmen and guards. As a general rule, watchmen and guards are within the coverage of the Fair Labor Standards Act where they are employed to guard and protect premises producing goods for interstate commerce,[46] but they are not within the act during weeks when no production for commerce is done.[47] It has also been held that the statute may extend to watchmen employed by a business engaged in interstate commerce,[48] or by a car-

vis, D.C.Pa., 62 F.Supp. 446—Brue v. J. Rich Steers, Inc., D.C.N.Y., 60 F.Supp. 668—Scott v. Ford, Bacon & Davis, D.C.Pa., 55 F.Supp. 982—Walling v. Snellings, D.C.Ala., 53 F.Supp. 851—Dollar v. Caddo River Lumber Co., D.C.Ark., 43 F.Supp. 822.

La.—Lyons v. H. K. Ferguson Co., App., 16 So.2d 587—Shannon v. Boh Bros. Const. Co., App., 8 So.2d 542.

Movement of building materials

Cement finisher, who also assisted in pouring cement, was not engaged in "interstate commerce" because materials used in constructing buildings came from outside the state, since interstate movement of building materials ended when they were unconditionally delivered to contractor at building site.—Barbe v. Cummins Const. Co., D.C.Md., 49 F.Supp. 168, affirmed C.C.A., 138 F.2d 667.

43. U.S.—Damon v. Ford, Bacon & Davis, D.C.Pa., 62 F.Supp. 446.

44. U.S.—Walling v. McCrady Const. Co., C.C.A.Pa., 156 F.2d 932.

Extra work orders

Where employee's duties were confined solely to extra work orders in connection with construction of a new factory, even though employee prepared necessary work orders in connection with changes in ventilating system in portion of completed building in which interstate manufacturer had commenced operations, the employee was not engaged in "commerce" or in "production of goods for commerce" within Fair Labor Standards Act.—Kelly v. Ford, Bacon & Davis, C.C.A.Pa., 162 F.2d 555.

45. U.S.—J. F. Fitzgerald Const. Co. v. Pedersen, N.Y., 65 S.Ct. 892, 324 U.S. 720, 89 L.Ed. 1316—Engebretsen v. E. J. Albrecht Co., C.C.A.Ill., 150 F.2d 602—Walling v. McCrady Const. Co., D.C.Pa., 60 F.Supp. 243—Walling v. Craig, D.C.Minn., 53 F.Supp. 479.

N.Y.—Pedersen v. J. F. Fitzgerald Const. Co., 56 N.E.2d 77, 293 N.Y. 126, affirmed in part and reversed in part on other grounds 65 S.Ct. 892, 324 U.S. 720, 89 L.Ed. 1316.

Held within act

(1) Draftsmen engaged in designing and laying out work to be done by others in contracted dredging and dredging plant on pier with its retaining walls, and timekeepers engaged in keeping time of all working on the project.—Ritch v. Puget Sound Bridge & Dredging Co., C.C.A.Wash., 156 F.2d 334.

(2) Employees engaged on dike and revetment construction in the Missouri and Mississippi Rivers under contracts of their employer with the United States.—Walling v. Patton-Tulley Transp. Co., C.C.A.Tenn., 134 F.2d 945.

Held not within act

(1) Road repair and reconstruction contractors' off-the-road employees, producing and preparing local materials, such as sand, gravel, rock and earth, or operating stationary bituminous plants.—Walling v. Craig, D.C.Minn., 53 F.Supp. 479.

(2) An employee engaged in repairing and constructing a city street, which after completion became a link in State Highway System, but which at time of work was a city street subject only to city authorities.—Shannon v. Boh Bros. Const. Co., La.App., 8 So.2d 542.

46. U.S.—Walton v. Southern Package Corporation, Miss., 64 S.Ct. 320, 320 U.S. 540, 88 L.Ed. 298—Slover v. Wathen, C.C.A.Md., 140 F.2d 258—Mid-Continent Pipe Line Co. v. Hargrave, C.C.A.Okl., 129 F.2d 655—Walling v. West Ky. Coal Co., D.C.Tenn., 60 F.Supp. 681—Cushway v. Stork Engineering Co., D.C.Mich., 51 F.Supp. 568, affirmed C.C.A., 142 F.2d 463—Timberlake v. Day & Zimmerman, D.C.Iowa, 49 F.Supp. 28—Hargrave v. Mid-Continent Petroleum Corporation, D.C.Okl., 42 F.Supp. 908—Lefevers v. General Export Iron & Metal Co., D.C.Tex., 36 F.Supp. 838—Wood v. Central Sand & Gravel Co., D.C.Tenn., 33 F.Supp. 40.

Ala.—Acme Lumber Co. v. Shaw, 10 So.2d 285, 243 Ala. 421.

Minn.—McMillan v. Wilson & Co., 2 N.W.2d 838, 212 Minn. 142, petition dismissed 63 S.Ct. 81, 317 U.S. 702, 87 L.Ed. 561.

N.Y.—Killingbech v. Garment Center Capitol, 20 N.Y.S.2d 521, 259 App.Div. 691, appeal denied 21 N.Y.S.2d 610, 259 App.Div. 1076—Hewlett v. Del Balso Const. Corporation, 40 N.Y.S.2d 224, 179 Misc. 856, reversed on other grounds 43 N.Y.S.2d 650, 180 Misc. 81, appeal denied Hewlett v. Del Balso & Sprague, 44 N.Y.S.2d 587, 266 App. Div. 922—Doyle v. Johnson Bros., 28 N.Y.S.2d 452, 176 Misc. 656.

Okl.—Brooks Packing Co. v. Henry, 137 P.2d 918, 192 Okl. 533.

Tenn.—Johnson v. Phillips-Buttorff Mfg. Co., 160 S.W.2d 893, 178 Tenn. 559, certiorari denied 63 S.Ct. 43, 317 U.S. 648, 87 L.Ed. 521—S. H. Robinson & Co. v. LaRue, 156 S.W.2d 432, 178 Tenn. 197.

Tex.—Milam v. Texas Spring & Wheel Co., Civ.App., 157 S.W.2d 653.

Contra Hart v. Gregory, 16 S.E.2d 837, 220 N.C. 180.

Immediate relationship to production

A night watchman's employment had so close and immediate a relationship to production of goods for interstate commerce as to bring him within protection of statute, even though he engaged in no manual activities connected with production, and was not specially employed to protect such goods, and no goods were manufactured while he was on guard.—Walton v. Southern Package Corporation, Miss., 64 S.Ct. 320, 320 U.S. 540, 88 L.Ed. 298.

Employee of patrol service

Watchman or guard employed by one furnishing patrol service to companies engaged in production of goods for commerce is within the act.—Salvo v. Keating, D.C.Pa., 61 F.Supp. 838—Walling v. Merchants Police Service, D.C.Ky., 59 F.Supp. 873—Walling v. New Orleans Private Patrol Service, D.C.La., 57 F. Supp. 143.

47. U.S.—Waller v. Humphreys, C.C.A.Miss., 133 F.2d 193.

Drilling rig

A watchman of an idle oil well drilling rig employed to watch rig during period between drilling of one well and beginning of drilling of another well was not within statute.—Brown v. Carter Drilling Co., D.C.Tex., 38 F.Supp. 489.

48. U.S.—Slover v. Wathen, C.C.A.Md., 140 F.2d 258.

Mo.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241.

rier,[49] but ordinarily the activities of watchmen are not so closely related to the movement of the commerce engaged in by the employer as to bring watchmen within the coverage of the act as "engaged in commerce."[50] Also, watchmen employed by a business engaged purely in intra-state business are not within the act.[51]

(b) Maintenance Employees of Buildings

The coverage of the Fair Labor Standards Act may extend to maintenance employees of a building occupied in whole or in substantial part by persons engaged in the manufacture or production of goods for commerce.

The coverage of the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq, may extend to maintenance employees of a building occupied by persons engaged in the manufacture or production of goods for interstate commerce,[52] or by central offices controlling the production of such goods elsewhere.[53] However, building maintenance employees are not within the act where the tenants of the building are in no way connected with the process of production of goods for commerce;[54] and, where tenants are engaged in interstate commerce, as distinguished from the production of goods for commerce, the maintenance employees are not by reason of their work so closely identified with the activities of the tenants as to come within the act.[55] So, where

N.Y.—Atkocus v. Terker, 30 N.Y.S. 2d 628.

49. U.S.—Green v. Riss & Co., D.C. Mo., 45 F.Supp. 648.

50. U.S.—Carrigan v. Provident Trust Co. of Philadelphia, C.C.A. Pa., 153 F.2d 74—Hinkler v. Eighty-Three Maiden Lane Corporation, D.C.N.Y., 50 F.Supp. 263—Farr v. Smith Detective Agency & Night Watch Service, D.C.Tex., 38 F.Supp. 105.

Ky.—Gilbert v. Home Loose Leaf Tobacco Warehouse Co., 202 S.W. 2d 1008, 305 Ky. 63—Fultz v. U. S. Trust Co., 195 S.W.2d 87, 302 Ky. 493.

N.Y.—Tinyes v. J. Rich Steers, Inc., 71 N.Y.S.2d 684, 189 Misc. 106.

51. U.S.—Noonan v. Fruco Const. Co., D.C.Mo., 50 F.Supp. 432, affirmed, C.C.A., 140 F.2d 633—Dotson v. Stowers, D.C.W.Va., 37 F. Supp. 937—Rogers v. Glazer, D.C. Mo., 32 F.Supp. 990.

Ga.—Raymond v. Parrish, 30 S.E.2d 669, 71 Ga.App. 293.

La.—Breaux v. Consolidated Cos., App., 12 So.2d 468.

N.Y.—Hewlett v. Del Balso Const. Corporation, 43 N.Y.S.2d 650, 180 Misc. 81—Delcour v. Lehigh Valley Coal Sales Co., 43 N.Y.S.2d 371, 182 Misc. 289.

52. U.S.—D. A. Schulte, Inc., v. Gangi, N.Y., 66 S.Ct. 925, 326 U.S. 712, 90 L.Ed. 421—Kirschbaum v. Walling, N.Y. & Pa., 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Roberg v. Henry Phipps Estate, C.C. A.N.Y., 153 F.2d 958—Gangi v. D. A. Schulte, Inc., C.C.A.N.Y., 150 F. 2d 694, affirmed 66 S.Ct. 925, 326 U.S. 712, 90 L.Ed. 421—Fleming v. Post, C.C.A.N.Y., 146 F.2d 441, 158 A.L.R. 1384—Fleming v. Arsenal Bldg. Corporation, C.C.A.N.Y., 125 F.2d 278, affirmed 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Fleming v. A. B. Kirschbaum Co., C.C. A.Pa., 124 F.2d 567, affirmed 62 S. Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Vaden v. Raleigh County Bank, D.C.W.Va., 66 F.Supp. 279—Ullo v. Smith, D.C.N.Y., 62 F. Supp. 757—Frank v. McMeekan, D. C.N.Y., 1944, 56 F.Supp. 369—Shain v. Armour & Co., D.C.Ky., 50 F. Supp. 907.

Mo.—Niehaus v. Joseph Greenspon's Son Pipe Corporation, 1942, 164 S. W.2d 180, 237 Mo.App. 112.

N.Y.—Rienzo v. City Bank Farmers Trust Co., 1944, 53 N.Y.S.2d 68, 183 Misc. 153—Schineck v. 386 Fourth Ave. Corporation, 49 N.Y. S.2d 872, 182 Misc. 1037—Walsh v. 515 Madison Avenue Corporation, 1943, 42 N.Y.S.2d 262, 181 Misc. 219, affirmed 45 N.Y.S.2d 927, 267 App.Div. 756, affirmed 59 N.E.2d 183, 293 N.Y. 826—Bote v. City Bank Farmers Trust Co., 66 N.Y.S. 2d 726—Quest v. George A. Bowman, Inc., 64 N.Y.S.2d 60—Floyd v. 58–64 Fortieth Street Corporation, 44 N.Y.S.2d 422—Kunz v. Emigrant Industrial Sav. Bank, 43 N.Y.S.2d 204.

Contra Merryfield v. F. M. Hoyt Shoe Corporation, D.C.N.H.1941, 41 F.Supp. 794.

Held not within act

U.S.—Rucker v. First Nat. Bank of Miami, C.C.A.Okl., 138 F.2d 699, certiorari denied 64 S.Ct. 524, 321 U.S. 769, 88 L.Ed. 1065.

Ohio.—Cecil v. Gradison, App., 40 N. E.2d 958.

53. U.S.—Borden Co. v. Borella, N. Y., 65 S.Ct. 1223, 325 U.S. 679, 89 L.Ed. 1865, 161 A.L.R. 1258.

Insignificant distinction

In determining whether building maintenance and operation employees were engaged in occupations necessary to production of goods for commerce, so as to be entitled to benefits of statute, distinction between building where production is administered, managed, and controlled, and building wherein production is carried on physically, is without significance.—Borden Co. v. Borella, supra.

54. U.S.—Blumenthal v. Girard Trust Co., C.C.A.Pa., 141 F.2d 849, followed in 142 F.2d 257—Convey v. Omaha Nat. Bank, C.C.A.Neb., 140 F.2d 640, certiorari denied 64 S.Ct. 638, 321 U.S. 781, 88 L.Ed. 1074—Vaden v. Raleigh County Bank, D.C.W.Va., 66 F.Supp. 279—Ullo v. Smith, D.C.N.Y., 62 F. Supp. 757—Prescott v. Broadway & Franklin Street Corporation, D. C.N.Y., 57 F.Supp. 272—Wideman v. Blanchard & Calhoun Realty Co., D.C.Ga., 50 F.Supp. 626.

N.Y.—Stoike v. First Nat. Bank of City of New York, 48 N.E.2d 482, 290 N.Y. 195, certiorari denied 64 S.Ct. 50, 320 U.S. 762, 88 L.Ed. 455.

Local business

Renting office space in a building exclusively set aside for unrestricted variety of office work was "local business" and employees of such building were not in an occupation "necessary to the production of goods for commerce" so as to be entitled to benefits of statute.—10 East 40th St. Bldg. v. Callus, N.Y., 65 S. Ct. 1227, 325 U.S. 578, 89 L.Ed. 1806, 161 A.L.R. 1263.

55. U.S.—Baldwin v. Emigrant Indus. Sav. Bank, C.C.A.N.Y., 150 F. 2d 524, 161 A.L.R. 1234, certiorari denied 66 S.Ct. 171, 326 U.S. 767, 90 L.Ed. 462—Blumenthal v. Girard Trust Co., C.C.A.Pa., 141 F. 2d 849, followed in 142 F.2d 257—Convey v. Omaha Nat. Bank, C.C. A.Neb., 140 F.2d 640, certiorari denied 64 S.Ct. 638, 321 U.S. 781, 88 L.Ed. 1074—Lofther v. First Nat. Bank of Chicago, C.C.A.Ill., 138 F.2d 299—Vaden v. Raleigh County Bank, D.C.W.Va., 66 F. Supp. 279—Ullo v. Smith, D.C.N. Y., 62 F.Supp. 757—Building Service Employees International Union, Local No. 238, v. Trenton Trust Co., D.C.N.J., 53 F.Supp. 129, affirmed, C.C.A., 142 F.2d 257—Berry v. 34 Irving Place Corporation, D.C.N.Y., 52 F.Supp. 875—Johnson v. Masonic Bldg. Co., D. C.Ga., 51 F.Supp. 527, affirmed, C. C.A., 138 F.2d 817, certiorari denied 64 S.Ct. 621, 321 U.S. 780,

maintenance employees work in a building in which a bank does business, and such bank, although engaged in commerce, is not engaged in the production of goods for commerce, they are not covered by the act,[56] but it has also been held that in so far as a bank's business consists of preparing, executing, or validating bonds, shares of stock, commercial paper, bills of lading, and the like, it is engaged in producing goods for commerce so as to bring maintenance employees within the coverage of the statute.[57]

Where a building is occupied both by tenants engaged in producing goods for commerce and tenants not so engaged, maintenance employees may be within the act if a substantial proportion of the tenants are in interstate commerce,[58] but they are not within the act if less than a substantial proportion of the tenants are engaged in the production of goods for commerce.[59] In determining what is a "substantial portion" of the building, some decisions have adopted as a test whether at least twenty per cent of the rentable area in the building was de-

88 L.Ed. 1072—Lofther v. First Nat. Bank of Chicago, D.C.Ill., 48 F.Supp. 692, affirmed, C.C.A., 138 F.2d 299—Cochran v. Florida Nat. Bldg. Corporation, D.C.Fla., 45 F. Supp. 830, affirmed, C.C.A., 134 F. 2d 615—Johnson v. Filstow, Inc., D.C.Fla., 43 F.Supp. 930.

Ala.—Hinkle v. Frank Nelson Bldg., 18 So.2d 374, 245 Ala. 679.

Kan.—Baum v. A. C. Office Bldg. Co., 143 P.2d 417, 157 Kan. 558, 150 A.L.R. 581.

N.Y.—Stoike v. First Nat. Bank of City of New York, 48 N.E.2d 482, 290 N.Y. 195, certiorari denied 64 S.Ct. 50, 320 U.S. 762, 88 L.Ed. 455—Killingbeck v. Garment Center Capitol, 20 N.Y.S.2d 521, 259 App.Div. 691, appeal denied 21 N.Y.S.2d 610, 259 App.Div. 1076—Burke v. Hide & Leather Realty Co., 48 N.Y.S.2d 594, 182 Misc. 319—Belies v. Pennsylvania Building, 45 N.Y.S.2d 6, 180 Misc. 1062.

N.C.—Greene v. Anchor Mills Co., 32 S.E.2d 841, 224 N.C. 714, certiorari denied 65 S.Ct. 1025, 324 U.S. 880, 89 L.Ed. 1431.

Tenn.—Connelly v. Hamilton Nat. Bank, 184 S.W.2d 173, 182 Tenn. 77—Robinson v. Massachusetts Mut. Life Ins. Co., 158 S.W.2d 441.

Tex.—Johnson v. Great Nat. Life Ins. Co., Civ.App., 166 S.W.2d 935, error refused.

Interpretation of coverage

In view of less sweeping definition of phrase "in commerce" as compared with definition of phrase "production for commerce" under statute, interpretation of coverage under statute must be broader for employees engaged in servicing building in which production for commerce is carried on than for employees engaged in servicing building in which the tenants are engaged in commerce and not in production for commerce.—Convey v. Omaha Nat. Bank, C.C.A.Neb., 140 F.2d 640, certiorari denied 64 S.Ct. 638, 321 U.S. 781, 88 L.Ed. 1074.

Distributors

It has been held, however, that services rendered by building service employees for building tenants using building facilities to acquire goods from out of state suppliers and distribute them in substantial quantities to customers outside state were so closely related to physical movement of goods in interstate commerce as to be part thereof and covered by statute as "interstate commerce."—Schineck v. 386 Fourth Ave. Corporation, 49 N.Y.S.2d 872, 182 Misc. 1037.

56. U.S.—Rucker v. First Nat. Bank of Miami, C.C.A.Okl., 138 F.2d 699, certiorari denied 64 S.Ct. 524, 321 U.S. 769, 88 L.Ed. 1065—Rosenberg v. Semeria, C.C.A.Cal., 137 F.2d 742, certiorari denied 64 S.Ct. 82, 2 cases, 83, 320 U.S. 770, 88 L.Ed. 460—Holmes v. Elizabeth Trust Co., D.C.N.J., 72 F.Supp. 182—Vaden v. Raleigh County Bank, D.C. W.Va., 66 F.Supp. 279—Brandell v. Continental Illinois Nat. Bank & Trust Co. of Chicago, D.C.Ill., 43 F.Supp. 781.

N.Y.—Stoike v. First Nat. Bank of City of New York, 48 N.E.2d 482, 290 N.Y. 195, certiorari denied 64 S.Ct. 50, 320 U.S. 762, 88 L.Ed. 455.

57. U.S.—Bozant v. Bank of New York, C.C.A.N.Y., 156 F.2d 787.

58. U.S.—D. A. Schulte, Inc., v. Gangi, N.Y., 66 S.Ct. 925, 326 U.S. 712, 90 L.Ed. 421—Roberg v. Henry Phipps Estate, C.C.A.N.Y., 156 F.2d 958—Baldwin v. Emigant Indus. Sav. Bank, C.C.A.N.Y., 150 F. 2d 524, 161 A.L.R. 1234, certiorari denied 66 S.Ct. 171, 326 U.S. 764, 90 L.Ed. 462—Ullo v. Smith, D.C. N.Y., 62 F.Supp. 757—Frank v. McMeekan, D.C.N.Y., 56 F.Supp. 369—Berry v. 34 Irving Place Corporation, D.C.N.Y., 52 F.Supp. 875—Plourde v. Massachusetts Cities Realty Co., D.C.Mass., 47 F.Supp. 668, 51 Am.Bankr.Rep.,N.S., 620.

Adjoining buildings

In determining whether substantial proportion of tenants were engaged in producing goods for interstate commerce, two adjoining buildings were properly treated as one, where buildings were joined at several floors by connecting corridors and lobbies and were provided with a single heating and electric power plant.—Roberg v. Henry Phipps Estate, C.C.A.N.Y., 156 F.2d 958.

Engagement in commerce

In determining whether employees of landlord come under statute the number or percentage of the tenants who are engaged in interstate commerce is not important, provided that the tenants are not engaged in the production of goods for commerce on the premises.—In re New York Title & Mortgage Co. (Series N–103) 39 N.Y.S.2d 893, 170 Misc. 789.

Substantial proportion shown

(1) Generally.—Ullo v. Smith, D. C.N.Y., 62 F.Supp. 757.

(2) Maintenance employees of building approximately thirty-nine and one half per cent of the rentable area of which was occupied by tenants engaged in producing on the premises goods a substantial part of which was shipped in interstate commerce were within the coverage of statute.—Baldwin v. Emigrant Indus. Sav. Bank, C.C.A.N.Y., 150 F. 2d 524, 161 A.L.R. 1234, certiorari denied 66 S.Ct. 171, 326 U.S. 767, 90 L.Ed. 462.

(3) Where an average of fifty-five and nine tenths per cent of rentable floor space during five-year period involved was occupied by tenants engaged in production of goods for interstate commerce and twenty-five per cent of total annual volume of tenants' business was in interstate commerce, building maintenance and operating employees were entitled to benefits of statute on ground that a "substantial part" of tenants' activities related to goods moving in interstate commerce.—Frank v. McMeekan, D.C.N.Y., 56 F. Supp. 369.

59. U.S.—Johnson v. Masonic Bldg. Co., C.C.A.Ga., 138 F.2d 817, certiorari denied 64 S.Ct. 621, 321 U.S. 780, 88 L.Ed. 1072—Ullo v. Smith, D.C.N.Y., 62 F.Supp. 757—Berry v. 34 Irving Place Corporation, D.C. N.Y., 52 F.Supp. 875.

N.Y.—In re New York Title & Mortgage Co. (Series N–103), 39 N.Y.S. 2d 893, 179 Misc. 789.

voted to production of goods for commerce,[60] but it has also been held that no fixed percent is determinative in all cases.[61]

§ 151(10). Learners, Apprentices, and Handicapped Persons

The provisions of the Fair Labor Standards Act extend to trainees, beginners, apprentices, or learners if they are employed to work for compensation, but the administrator is empowered to grant special certificates for their employment at less than the general minimum wage.

The requirements of the Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, extend to trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation.[62] Under the Fair Labor Standards Act § 14, 29 U.S.C.A. § 214, the administrator of the wages and hours division is empowered to grant special certificates for the employment of learners, apprentices, and handicapped persons at less than the general minimum wage,[63] and such provision means that employers who hire such persons and expressly or impliedly agree to pay them compensation must pay them the prescribed minimum wage, unless a permit not to pay such minimum has been obtained from the administrator.[64] However, the section does not imply that all instructors must get a permit or pay minimum wages to all learners since the section relates only to learners who are in "employment."[65]

§ 151(11). Exemptions

The Fair Labor Standards Act contains numerous exemptions and such exemptions should be construed in accordance with the scope and purpose of the act and should not be enlarged to the point of obstructing the statutory purpose.

The Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, was not drawn with the idea of making complete coverage of all employees engaged in commerce or the production of goods for commerce, but contains numerous exemptions.[66] The exemptions of the statute generally deal with employments of a character or with employees of a class to which application of the provisions of the act for minimum wages and maximum hours is either impracticable or impossible, or with employees in occupations in which the conditions of labor are regulated by other statutes, or with employees the greater part of whose labor is in intra-state commerce,[67] but congress intended not to exclude other employments or employees.[68] The terms of the statute relating to exemptions cannot be enlarged or diminished by rulings of the administrator of the wages and hours division,[69] and it has been held that the ultimate question of coverage under the act is a judicial question committed to the courts, and, therefore, that the administrator's definition of what may be substantial as to various exemptions under the act is not determinative of what is substantial as far as coverage of the act is concerned.[70]

The provisions of the Fair Labor Standards Act dealing with exemptions should be construed in accordance with the scope and purpose of the act,[71] and they should not be enlarged to the point of obstructing the attainment of the result that congress was seeking to achieve.[72] The detail with which

60. U.S.—Asselta v. 149 Madison Ave. Corp., D.C.N.Y., 65 F.Supp. 385, affirmed, C.C.A., 156 F.2d 139.

61. U.S.—Roberg v. Henry Phipps Estate, C.C.A.N.Y., 156 F.2d 958.

62. U.S.—Walling v. Portland Terminal Co., Me., 67 S.Ct. 639, 330 U.S. 148, 91 L.Ed. ——.

63. U.S.—Walling v. Portland Terminal Co., supra.

64. U.S.—Walling v. Portland Terminal Co., supra—Guess v. Montague, C.C.A.S.C., 140 F.2d 500.

65. U.S.—Walling v. Portland Terminal Co., Me., 67 S.Ct. 639, 330 U.S. 148, 91 L.Ed. —— —Walling v. Jacksonville Terminal Co., C.C. A.Fla., 148 F.2d 768.

Persons in training under direct supervision of regular employee of railroad doing same type of work in order to qualify for employment were not "learners" as contemplated by Fair Labor Standards Act, since they worked solely for themselves, whereas a learner is an employee who labors in the interest and for the benefit of employer and produces something or performs a service in employer's interest, but due to inexperience or some other handicap the product of his labor is inferior to that of an experienced worker.—Walling v. Nashville, C. & St. L. Ry., D.C.Tenn., 60 F.Supp. 1004, affirmed, C.C.A., 155 F.2d 1016, certiorari granted 67 S.Ct. 85, motion denied 67 S.Ct. 180.

66. U.S.—Richardson v. James Gibbons Co., C.C.A.Md., 132 F.2d 627, affirmed 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244.

67. U.S.—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F. 2d 616.

68. U.S.—Helena Glendale Ferry Co. v. Walling, supra.

Employees held not within any exemption provision

U.S.—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923.

69. U.S.—Super-Cold Southwest Co. v. McBride, C.C.A.Tex., 124 F.2d 90.

Interpretation held inapplicable

Where employment was either entirely by employer subject to Fair Labor Standards Act or jointly by such employer and exempt employer, interpretive bulletin issued by administrator pertaining to employers acting entirely independently of each other with respect to employment and to arrangement for interchange of employees, had no application.—Walling v. Wabash Radio Corp., D. C.Mich., 65 F.Supp. 969.

70. U.S.—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F. Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310.

71. U.S.—Bayley v. Southland Gasoline Co., C.C.A.Ark., 131 F.2d 412, reversed on other grounds 63 S. Ct. 917, 319 U.S. 44, 87 L.Ed. 1244.

72. U.S.—Phillips v. Star Overall Dry Cleaning Laundry Co., C.C.A. N.Y., 149 F.2d 416, certiorari denied All Service Laundry Corp. v. Phillips, 66 S.Ct. 677, 322 U.S. 780,

the exemptions are drawn in the act precludes their enlargement by implication,[73] and it has been held that the statute should be liberally construed to include all employees not expressly excepted from the act who reasonably may be deemed within its purview.[74] Exceptions to the coverage of the statute should be narrowly construed,[75] giving due regard to the plain meaning of the statutory language and the intent of congress,[76] and should be extended only to those who are plainly within their terms.[77] Persons claiming the benefit of exemptions must bring their case within both the letter and the spirit of the exemptions,[78] particularly when the exemption claimed is for an employee engaged in interstate commerce.[79]

Any declared intent of congress not to injure ailing industries by making them subject to the Fair Labor Standards Act may not be construed as indicating a general policy of exemption because a particular industry may not be financially prosperous.[80] The exemption of agricultural labor is not admissible as an argument to exempt labor in an industry from the operation of the statute.[81]

The question whether a given employee is exempt from the benefits of the act is a factual one dependent on the circumstances of the particular case.[82] Generally, in determining whether an employee is within the terms of the statute, the criterion is the character of work performed,[83] rather

90 L.Ed. 1008, rehearing denied 66 S.Ct. 815, 327 U.S. 817, 90 L.Ed. 1040.

73. U.S.—Addison v. Holly Hill Fruit Products, Fla., 64 S.Ct. 1215, 322 U.S. 607, 88 L.Ed. 1488, 153 A.L.R. 1007, rehearing denied 65 S.Ct. 29, 323 U.S. 809, 89 L.Ed. 645.

74. U.S.—Musteen v. Johnson, C.C.A.Ark., 133 F.2d 106.

75. U.S.—A. H. Phillips, Inc., v. Walling, Mass., 65 S.Ct. 807, 324 U.S. 490, 89 L.Ed. 1095, 157 A.L.R. 876—Walling v. Keansburg Steamboat Co., C.C.A.N.J., 162 F.2d 405—Armstrong v. Walling, C.C.A. Mass., 161 F.2d 515—Walling v. Friend, C.C.A.Mo., 156 F.2d 429—West Ky. Coal Co. v. Walling, C.C.A.Tenn., 153 F.2d 582—Fletcher v. Grinnell Bros., C.C.A.Mich., 150 F.2d 337, conformed to, D.C., 64 F.Supp. 778—Walling v. Consumers Co., C.C.A.Ill., 149 F.2d 626—Smith v. Porter, C.C.A.Ark., 143 F.2d 292—Schmidtke v. Conesa, C.C.A.Puerto Rico, 141 F.2d 634—Ralph Knight, Inc. v. Mantel, C.C.A.Mo., 135 F.2d 514—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616—Consolidated Timber Co. v. Womack, C.C.A.Or., 132 F.2d 101—Hatcheries v. Boyer, C.C.A.Iowa, 131 F.2d 283—Calaf v. Gonzalez, C.C.A.Puerto Rico, 127 F.2d 934—Jackson v. Northwest Airlines, D.C.Minn., 70 F.Supp. 501—Walling v. McKay, D.C.Neb., 70 F.Supp. 160—Walling v. Jacksonville Paper Co., D.C.Fla., 69 F.Supp. 599—Phillips v. Federal Cartridge Corp., D.C.Minn., 69 F.Supp. 522—Walling v. Armstrong Co., D.C.Mass., 68 F.Supp. 870—Walling v. Northwestern-Hanna Fuel Co., D.C.Minn., 67 F. Supp. 833—Walling v. Snyder Min. Co., D.C.Minn., 66 F.Supp. 725—Phillips v. Meeker Co-op. Light & Power Ass'n, D.C.Minn., 63 F.Supp. 733—Walling v. Public Quick Freezing & Cold Storage Co., D.C.Fla., 62 F.Supp. 924—Walling v. Newman, D.C.Iowa, 61 F.Supp. 971—Rigney v. Wilson & Co., D.C.W.Va., 61 F.Supp. 801—Walling v. Peacock Corp., D.C.Wis., 58 F.Supp. 880—Aulen v. Triumph Explosive, D.C.Md., 58 F.Supp. 4—Snyder v. Wessner, D.C.Minn., 55 F.Supp. 971—Fellabaum v. Swift & Co., D.C.Ohio, 54 F.Supp. 353—Walling v. Home Loose Leaf Tobacco Warehouse Co., D.C.Ky., 51 F.Supp. 914—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363—International Longshoremen's Ass'n, Local 815, v. National Terminals Corporation, D.C.Wis., 50 F.Supp. 26, affirmed, C.C.A., Cabunac v. National Terminals Corporation, 139 F.2d 853—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F.Supp. 393—Lorenzetti v. American Trust Co., D.C.Cal., 45 F.Supp. 128—Fleming v. American Stores Co., D.C.Pa., 42 F.Supp. 511, modified on other grounds, C.C.A., 133 F.2d 840.

Mo.—Edwards v. South Side Auto Parts Co., App., 180 S.W.2d 1015.

N.Y.—Schneider v. Sports Vogue, 65 N.Y.S.2d 341.

Pa.—Say v. Prior Oil Co., 43 A.2d 417, 157 Pa.Super. 629.

S.D.—Colbeck v. Dairyland Creamery Co., 17 N.W.2d 262.

76. U.S.—A. H. Phillips, Inc. v. Walling, 65 S.Ct. 807, 324 U.S. 490, 89 L.Ed. 1095, 157 A.L.R. 876—Walling v. McKay, D.C.Neb., 70 F.Supp. 160.

77. U.S.—Walling v. Friend, C.C.A. Mo., 156 F.2d 429—Conley v. Valley Motor Transit Co., C.C.A.Ohio, 139 F.2d 692—Miller Hatcheries v. Boyer, C.C.A.Iowa, 131 F.2d 283—Bowie v. Gonzalez, C.C.A.Puerto Rico, 117 F.2d 11—Gorchakoff v. California Shipbuilding Corp., D.C. Cal., 63 F.Supp. 309—International Longshoremen's Ass'n, Local 815 v. National Terminals Corporation, D.C.Wis., 50 F.Supp. 26, affirmed, C.C.A., Cabunac v. National Terminals Corporation, 139 F.2d 853.

78. U.S.—Walling v. Bay State Dredging & Contracting Co., C.C.A.Mass., 149 F.2d 346, certiorari denied 66 S.Ct. 140, 326 U.S. 760, 90 L.Ed. 457—Schmidtke v. Conesa, C.C.A.Puerto Rico, 141 F.2d 634—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616—Consolidated Timber Co. v. Womack, C.C.A.Or., 132 F.2d 101—Bowie v. Gonzalez, C.C.A.Puerto Rico, 117 F.2d 11—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F.Supp. 393.

N.Y.—Schneider v. Sports Vogue, 65 N.Y.S.2d 341.

Exemption not presumed

The applicability of statutory exemption from provisions of the act is never presumed but must be established by affirmative showing.—Rockton & R. R. v. Walling, C.C.A. S.C., 146 F.2d 111, certiorari denied 65 S.Ct. 1026, 324 U.S. 880, 89 L. Ed. 1431.

79. U.S.—Snyder v. Wessner, D.C. Minn., 55 F.Supp. 971.

80. U.S.—Fleming v. Hawkeye Pearl Button Co., C.C.A.Iowa, 113 F.2d 52.

81. U.S.—Bowie v. Gonzalez, C.C.A. Puerto Rico, 117 F.2d 11.

Recognition of differences

The exemption of agricultural labor from the operation of the act could not be cited as an argument justifying a construction which would exempt labor in an industry from its operation, since both federal and state governments have recognized a marked difference between industrial workers and agricultural laborers.—Fleming v. Hawkeye Pearl Button Co., C.C.A. Iowa, 113 F.2d 52.

82. U.S.—Stanger v. Glenn L. Martin Co., D.C.Md., 56 F.Supp. 163.

83. U.S.—Murphy v. Georgia Aero-Tech, D.C.Ga., 49 F.Supp. 982.

than the title of the employee's position,[84] and where one indivisible part of the employer's business is exempt but the remainder is not, in applying the act, the nature of the employment of the particular employee is controlling.[85] It has been held that, where an employee is engaged both in exempt and nonexempt activities, and the time spent in each cannot be segregated, he is not exempt from the act,[86] and, as discussed supra § 151 (5), an employee engaged in the performance of both covered and noncovered work during the same work week must be compensated for all his work during the week in accordance with the standards prescribed by the act. As long as an employee is engaged in commerce or in the production of goods for commerce for an employer subject to the statute, it is immaterial what type of work is being performed by the employee for a second employer who may be exempt from the act, and such employee is entitled to all the benefits of the act.[87]

The fact that exemption has been granted to certain employers under certain conditions does not mean that such employers may not be producers for commerce and within the coverage of the act under conditions not within the terms of the exemption.[88] So, when an exempt employer engages in activities different from those exempted, the employees in the nonexempt department of his business are subject to the act,[89] and it has been held that, where the exempt and nonexempt characteristics of the business are so intermingled as to be inseparable, the exemption is denied entirely.[90]

§ 151(12). —— Executive, Administrative, or Professional Employees

a. In general
b. Executive employees
c. Administrative employees

a. In General

The Fair Labor Standards Act exempts from its provisions as to minimum wages and overtime pay persons employed in a bona fide executive, administrative, or professional capacity, and it confers on the administrator the power precisely to define by regulation the terms used in describing the exempted class.

The Fair Labor Standards Act § 13 (a) (1), 29 U.S.C.A. § 213 (a) (1), exempts from its provisions as to minimum wages and overtime pay persons employed in a bona fide executive, administrative, or professional capacity,[91] and it confers on the administrator the power precisely to define and delimit by regulation the terms used in describing the exempted class.[92] The authority granted to define the terms constitutes a direction to the administrator to make a finding of fact as to what characteristics of employment will identify the exempt employees and distinguish them from the class of nonexempt employees,[93] and his definitions must be

84. U.S.—Schmidtke v. Conesa, C.C.A.Puerto Rico, 141 F.2d 634—Walling v. Sterling Ice & Cold Storage Co., D.C.Colo., 69 F.Supp. 669—Walling v. Snyder Min. Co., D.C.Minn., 66 F.Supp. 725.

85. U.S.—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 46 F. Supp. 969.

86. U.S.—North Shore Corporation v. Barnett, C.C.A.Fla., 143 F.2d 172, vacated 65 S.Ct. 275, 323 U.S. 679, 89 L.Ed. 551.

87. U.S.—Walling v. Wabash Radio Corp., D.C.Mich., 65 F.Supp. 969.

88. U.S.—Phillips v. Meeker Co-op. Light & Power Ass'n, D.C.Minn., 63 F.Supp. 733.

89. U.S.—Walling v. Connecticut Co., C.C.A.Conn., 154 F.2d 552—Davis v. Goodman Lumber Co., C.C.A.N.C., 133 F.2d 52.

90. U.S.—Wabash Radio Corp. v. Walling, C.C.A.Mich., 162 F.2d 391—Guess v. Montague, C.C.A.S.C., 140 F.2d 500.

91. U.S.—Pfoser v. Federal Cartridge Corp., D.C.Minn., 70 F.Supp. 701—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923—Bernick v. Codden, D.C.Minn., 65 F.Supp. 89—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F.Supp. 775, affirmed, C.C.A., 156 F.2d 681—Rosenthal v. Atkinson, D.C.Tex., 43 F.Supp. 96—Owin v. Liquid Carbonic Corporation, D.C.Tex., 42 F.Supp. 774—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009—Devoe v. Atlanta Paper Co., D.C.Ga., 40 F.Supp. 284.
N.Y.—Abrams v. Genauer, 29 N.Y.S. 2d 974.
N.C.—Morton v. White Parks Mills Co., 27 S.E.2d 448, 223 N.C. 860.

"The reason underlying each exemption is readily apparent. Executive, administrative and professional workers are not usually employed at hourly wages nor is it feasible in the case of such employees to provide a fixed hourly rate of pay nor maximum hours of labor."—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616, 619.

Employees held not within exemption
U.S.—Helena Glendale Ferry Co. v. Walling, supra—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923—Walling v. West Ky. Coal Co., D.C.Tenn., 60 F.Supp. 681.
N.Y.—Mabee v. White Plains Pub. Co., 68 N.Y.S.2d 906, 271 App.Div. 1026.

Failure to claim overtime
Fact that employees made no claim for overtime under the act until after cessation of their employment was not controlling in determining whether employees were exempt from the act as executive, administrative or professional employees.—Phillips v. Federal Cartridge Corp., D.C.Minn., 69 F.Supp. 522.

92. U.S.—Fanelli v. U. S. Gypsum Co., C.C.A.N.Y., 141 F.2d 216—Walling v. Yeakley, C.C.A.Colo., 140 F.2d 830—Ralph Knight, Inc. v. Mantel, C.C.A.Mo., 135 F.2d 514.
N.Y.—Berlin v. Eimer & Amend, 55 N.Y.S.2d 498, 269 App.Div. 302, affirmed 66 N.E.2d 584, 295 N.Y. 809.

93. U.S.—Mantel v. Ralph Knight, Inc., D.C.Mo., 45 F.Supp. 372, affirmed, C.C.A., Ralph Knight, Inc. v. Mantel, 135 F.2d 514.

Specific criteria
Under Fair Labor Standards Act provision exempting executive, administrative, or professional employees as such terms are defined by wage and hour administrator, congress intended to have specific criteria laid down by administrator by which employer and enforcement

consistent with the statute and reasonable.[94] Regulations promulgated pursuant to the statutory directive have been held valid,[95] where the standards established thereby are supported by facts of common knowledge and are justified by practical administrative considerations;[96] and the administrator may adopt as criteria the amount of salary earned by the employee,[97] and the proportion of exempt work and nonexempt work which the employee performs.[98] It has also been held, however, that a regulation requiring that an employee be paid a certain sum per week in order to come within the exempt class is beyond the authority of the administrator and invalid.[99]

Regulations dealing with the exemption, if valid, must be regarded as defining and delimiting the statutory phrases and setting down absolute criteria through which the question of exemption must be determined.[1] The definitions have been held to have the force of law[2] and to supersede the common or popular understanding of the term, either in common usage or by standard dictionary definition.[3] So, all the conditions provided by the regulations for the determination of the status of an employee as exempt or nonexempt must be fulfilled before the exemption may be claimed.[4] It has also been held, however, that the administrator's definition will be followed only where it is within the limits of the fair and natural meaning of the words used in the statute.[5]

In accordance with the general rules as to the construction of exemption provisions under the Fair Labor Standards Act, as discussed supra § 151 (11), the exemption of executive, administrative, or professional employees must be strictly construed.[6] In determining whether an employee is within the exemption, each case stands on its own facts,[7] and the duties and activities of the employee must be looked to rather than the mere name attributed to the position.[8] The practical interpretation which the employer and employee placed on the employee's status is entitled to considerable weight.[9]

Professional employee. An employee is exempt from the minimum wage and overtime pay requirements of the Fair Labor Standards Act, 29 U.S.C.A. §§ 206, 207, as a professional employee, when and

agency could determine with certainty whether employee fell within or without an exempted employment.—Walling v. Yeakley, C.C.A.Colo., 140 F.2d 830.

94. U.S.—Ralph Knight, Inc., v. Mantel, 135 F.2d 514, affirming Mantel v. Ralph Knight, Inc., C. C.A.Mo., 45 F.Supp. 372.

95. U.S.—Walling v. Morris, C.C.A. Mich., 155 F.2d 832—Marian v. Lockheed Aircraft Corp., D.C.Tex., 65 F.Supp. 18—Aulen v. Triumph Explosive, D.C.Md., 58 F.Supp. 4.

96. U.S.—Walling v. Sun Pub. Co., D.C.Tenn., 47 F.Supp. 180, affirmed, C.C.A., 140 F.2d 445, certiorari denied 64 S.Ct. 946, 322 U.S. 728, 88 L.Ed. 1564.

Apparently arbitrary line

Decision of wage and hour administrator fixing an apparently arbitrary line for determination of status as employee must be accepted unless wide of any reasonable mark, where line must exist and there is no mathematical or logical way of fixing it precisely.—Chepard v. May, D.C.N.Y., 71 F.Supp. 389.

97. U.S.—Chepard v. May, supra.

"It is generally true that those in executive positions assume more responsibility and are generally higher paid than those who work under the supervision and direction of others. The same is true with respect to those employed in administrative and professional capacities. Therefore, in most cases, salary is a pertinent criterion and we cannot say that it is irrational or unreasonable to include it in the definition and delimitation."—Walling v. Yeakley, C.C.A.Colo., 140 F.2d 830, 832.

98. U.S.—Ralph Knight, Inc., v. Mantel, C.C.A.Mo., 135 F.2d 514.

99. U.S.—Buckner v. Armour & Co., D.C.Tex., 53 F.Supp. 1022—Devoe v. Atlanta Paper Co., D.C.Ga., 40 F.Supp. 284.

1. U.S.—Walling v. Yeakley, C.C.A. Cal., 140 F.2d 830.

2. U.S.—Stanger v. Vocafilm Corp., C.C.A.N.Y., 151 F.2d 894, 162 A. L.R. 216—Fanelli v. U. S. Gypsum Co., C.C.A.N.Y., 141 F.2d 216—Helliwell v. Haberman, C.C.A.N.Y., 140 F.2d 833—Walling v. Moore Milling Co., D.C.Va., 62 F.Supp. 378.

3. U.S.—Aulen v. Triumph Explosive, D.C.Md., 58 F.Supp. 4.

Minn.—Pakarinen v. Butler Bros., 16 N.W.2d 769, 218 Minn. 496.

N.J.—Fox v. Armour & Co., 33 A.2d 582, 21 N.J.Misc. 262—Zaetz v. General Instrument Corporation, 30 A.2d 504, 21 N.J.Misc. 76.

4. U.S.—George Lawley & Son Corporation v. South, C.C.A.Mass., 140 F.2d 439, 151 A.L.R. 1081, certiorari denied 64 S.Ct. 1156, 322 U. S. 746, 88 L.Ed. 1578—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F. Supp. 775, affirmed, C.C.A., 156 F. 2d 681—Lorber v. Rosow, D.C. Conn., 58 F.Supp. 341, reversed on other grounds, C.C.A.10, 153 F.2d 159—Walling v. St. Mary's Sewer Pipe Co., D.C.Pa., 56 F.Supp. 345, new trial denied 57 F.Supp. 573.

5. U.S.—Devoe v. Atlanta Paper Co., D.C.Ga., 40 F.Supp. 284.

6. U.S.—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F.Supp. 775, affirmed, C.C.A., 156 F.2d 681.

7. U.S.—Phillips v. Federal Cartridge Corp., D.C.Minn., 69 F.Supp. 522—Walling v. General Industries Co., D.C.Ohio, 60 F.Supp. 549, affirmed, C.C.A., 155 F.2d 711.

8. U.S.—Walling v. Sterling Ice & Cold Storage Co., D.C.Colo., 69 F. Supp. 669—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F. Supp. 775, affirmed, C.C.A., 156 F. 2d 681—Stanger v. Glenn L. Martin Co., D.C.Md., 56 F.Supp. 163.

N.Y.—Steiner v. Pleasantville Constructors, 46 N.Y.S.2d 120, 181 Misc. 798, modified on other grounds 49 N.Y.S.2d 42, 182 Misc. 66, affirmed 54 N.Y.S.2d 700, first case, 269 App.Div. 738.

Designation in union contract

The fact that employees were designated as "head shipping clerk" and "shipping room foreman", respectively, in union contract, and that neither was ever asked to attend any executive meeting of the company, was not controlling on question whether such employees were bona fide executives within exemption.—Marshall-Wells Co. v. Hawley, D.C. Minn., 53 F.Supp. 295.

9. N.Y.—Schneider v. Sports Vogue, 35 N.Y.S.2d 341.

only when he comes within all the component parts of the administrative regulation defining the term.[10]

b. Executive Employees

Under the provision of the Fair Labor Standards Act exempting executive employees from its operation, the administrative regulation defining the term "executive" generally is determinative of who may claim the exemption and all the conditions of the regulation must be satisfied to render the employee exempt.

Under the provisions of the Fair Labor Standards Act, 29 U.S.C.A. § 213 (a) (1), executive employees are exempted from the statutory requirements as to minimum wages and overtime pay.[11] The administrative regulation defining the term "employee em-

10. U.S.—Stanger v. Vocafilm Corp., C.C.A.N.Y., 151 F.2d 894, 162 A.L.R. 216—Hofer v. Federal Cartridge Corp., D.C.Minn., 71 F.Supp. 243—Aulen v. Triumph Explosive, D.C.Md., 58 F.Supp. 4.

Application of regulation

Decisions have construed and applied a regulation in substance providing that the term "professional" employee shall mean any employee receiving more than two hundred dollars a month who is engaged in work which is predominantly intellectual and varied in character, and requires the consistent exercise of discretion and judgment in its performance, and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and whose hours of work of the same nature as that performed by nonexempt employees do not exceed twenty per cent of the hours worked in the work week by the nonexempt employees, except where such work is necessarily incident to work of a professional nature; and which requires, first, knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study; or, second, predominantly original and creative in character in a recognized field of artistic endeavor.—Stanger v. Vocafilm Corp., C.C.A.N.Y., 151 F.2d 894, 162 A.L.R. 216—Hofer v. Federal Cartridge Corp., D.C.Minn., 71 F.Supp. 243—Aulen v. Triumph Explosive, D.C. Md., 58 F.Supp. 4.

Persons held professional employees

(1) Registered nurse employed in her professional capacity.—Hofer v. Federal Cartridge Corp., D.C.Minn., 71 F.Supp. 243—Principe v. Arturo Lluberas Y Sobrinos, D.C.Puerto Rico, 71 F.Supp. 145.

(2) An employee who had Bachelor degrees from university in mathematics and architecture, to which was added three years of chemical engineering, who had four to seven draftsmen working under him, whose work required original and creative ability and special training, and who on quitting employment stepped into business for himself as an "industrial designer."—Phillips v. Federal Cartridge Corp., D.C.Minn., 69 F.Supp. 522.

(3) Machine designers who received more than two hundred dollars a month, who had taken prolonged special training, and whose work was predominantly intellectual and varied in character and required exercise of discretion and could not be standardized in relation to a given period of time and layout and detail phase of which work was a necessary incident to the more intellectual phase.—Aulen v. Triumph Explosive, D.C.Md., 58 F.Supp. 4.

(4) Senior draftsman engaged in preparing detail plans from original plans, preparing sections, plans, and elevations, designing the arrangement in the case of reinforced concrete of various members which were the components of the construction, and preparing "bills materials" to be used in placing orders with suppliers for the various component parts as required.—Dolan v. Day & Zimmerman, D.C.Mass., 65 F. Supp. 923.

(5) A designer of men's clothing exercised discretion, independent judgment, and skill, and any work as a cutter done by designer being merely incidental to designing.—Abrams v. Genauer, 29 N.Y.S.2d 974.

Persons held not professional employees

(1) Generally.

U.S.—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F.Supp. 775, affirmed, C.C.A., 156 F.2d 681.

N.Y.—Berlin v. Eimer & Amend, 55 N.Y.S.2d 498, 269 App.Div. 302, affirmed 66 N.E.2d 584, 295 N.Y. 809.

(2) Employees receiving less than two hundred dollars a month.—Walling v. Yeakley, C.C.A.Cal., 140 F.2d 830.

(3) Employees who worked on sound slide films retouching photographic prints, blocking out or subduing parts of photographic print not essential to picture, drawing in additional or concealed parts, making isometric and schematic drawings, and doing freehand drawings, paintings, and cartoons for purpose of reproducing an original machine or at most to supply emphasis to particular details to enhance its teaching value.—Stanger v. Vocafilm Corp., C.C.A.N.Y., 151 F.2d 894, 162 A.L.R. 216.

11. U.S.—Lassiter v. Guy F. Atkinson Co., C.C.A.Wash., 162 F.2d 774—Walling v. Clinchfield Coal Corp., C.C.A.Va., 159 F.2d 395—Allen v. Atlantic Co., C.C.A.Ga., 145 F.2d 761—Gruenstein v. Brust Footwear Corp., D.C.Pa., 72 F. Supp. 485—Bender v. Crucible Steel Co. of America, D.C.Pa., 71 F.Supp. 420—Gill v. Mesta Mach. Co., D.C.Pa., 69 F.Supp. 904—Phillips v. Federal Cartridge Corp., D. C.Minn., 69 F.Supp. 522—Llabres v. Bowie, D.C.Puerto Rico, 68 F. Supp. 979—Hoff v. North American Aviation, D.C.Tex., 67 F.Supp. 375—Christiansen v. U. S. Gypsum Co., D.C.Ohio, 66 F.Supp. 835—McNeal v. Central Greyhound Lines, D.C.Ohio, 66 F.Supp. 581—Dolan v. Day & Zimmerman, D.C. Mass., 65 F.Supp. 923—Bernick v. Coddon, D.C.Minn., 65 F.Supp. 89—Walling v. Southwestern Greyhound Lines, D.C.Mo., 65 F.Supp. 52—Marian v. Lockheed Aircraft Corp., D.C.Tex., 65 F.Supp. 18—Chanady v. Detroit Sheet Metal Works, D.C.Mich., 64 F.Supp. 580—Walling v. Clinchfield Coal Corp., D.C.Va., 64 F.Supp. 347—Antis v. Montgomery Ward & Co., D.C. Mich., 63 F.Supp. 669—Anderson v. Federal Cartridge Corp., D.C. Minn., 62 F.Supp. 775, affirmed, C. C.A., 156 F.2d 681—Walling v. Moore Milling Co., D.C.Va., 62 F. Supp. 378—Walling v. General Industries Co., D.C.Ohio, 60 F.Supp. 549, affirmed, C.C.A., 155 F.2d 711—Buckner v. Armour & Co., D.C. Tex., 53 F.Supp. 1022—Marshall-Wells Co. v. Hawley, D.C.Minn., 53 F.Supp. 295—Corey v. Detroit Steel Corporation, D.C.Mich., 52 F.Supp. 138—Sauls v. Martin, D. C.S.C., 45 F.Supp. 801—Rosenthal v. Atkinson, D.C.Tex., 43 F.Supp. 96—Wilkinson v. Noland Co., D. C.Va., 40 F.Supp. 1009.

N.J.—Zaetz v. General Instrument Corporation, 30 A.2d 504, 21 N.J. Misc. 76.

N.Y.—Engel v. Justrite Handkerchief Co., 43 N.Y.S.2d 688, 180 Misc. 974—Schanck v. Lehigh Valley R. R., 52 N.Y.S.2d 491.

N.C.—Pye v. Atlantic Co., 25 S.E. 2d 401, 223 N.C. 92.

Workers

The purpose of the act in relation to overtime pay for nonexempt employees is to grant right to overtime pay to that class of employees who come within commonly understood designation of workers as distin-

ployed in a bona fide executive capacity" generally is determinative of who is within the exemption,[12] and, where the component parts of the regulation are stated in the conjunctive, all the conditions must be satisfied to render the employee exempt.[13]

Thus the exemption attaches only where it ap-

guished from managers, superintendents, foremen or bosses.—Rigney v. Wilson & Co., D.C.W.Va., 61 F.Supp. 801.

Persons held entitled to exemption

(1) Manager of retail and service department of company engaged in selling tires to retail and commercial accounts, who directed activities of other employees and worked largely in a supervisory capacity having right to hire and discharge, and whose recommendations as to pay increases and working of department were followed by company.—Cyrus v. Martin-Jackson Tire & Supply Co., D.C.Kan., 56 F.Supp. 949.

(2) The manager and head of office and bookkeeping department of state branch of manufacturing and sales corporation who kept books, kept pay rolls, and had management and supervision of such business in the state as was not in hands of engineering and sales departments and had power to employ and discharge men working in his department.—Owin v. Liquid Carbonic Corporation, D.C.Tex., 42 F.Supp. 774.

(3) Head of accounting department who supervised the banking, had first contact with and recommended employment of new employees in department, and worked long and hard but not at making entries in books of record.—Burke v. Lecrone-Benedict Ways, D.C.Mich., 63 F.Supp. 883.

(4) An employee, performing substantial portion of her boss's duties after his death, becoming known in employer's office and to third parties as employer's purchasing agent and personnel director, and sufficiently executing substantially all purchase orders by her initials.—Brummel v. L. F. Dietz & Associates, 67 N.Y.S.2d 725, 187 Misc. 758, affirmed 62 N.Y.S.2d 864, 270 App.Div. 994, certiorari denied 67 S.Ct. 634, 329 U.S. 813, 91 L.Ed. ——.

(5) Employee in charge of shipping office had under his supervision some four employees, his recommendations with reference to hiring, promotion, discharge or change of status of any employee would be given particular weight, and he regularly exercised discretionary powers in laying out work of employees under his supervision and co-ordinating work of his department with operation of employer's business.—Marshall-Wells Co. v. Hawley, D.C. Minn., 53 F.Supp. 295.

Persons not entitled to exemption

(1) Generally.

U.S.—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616—Bloch v. Bell, D.C.Ky., 63 F. Supp. 863, affirmed, C.C.A., 152 F. 2d 962—Gibson v. Atlantic Co., D.C.Ga., 63 F.Supp. 492—Patton v. Williams, D.C.Okl., 61 F.Supp. 884—Walling v. West Kentucky Coal Co., D.C.Tenn., 60 F.Supp. 681, modified on other grounds, C.C.A., 153 F.2d 583—Walling v. St. Marys Sewer Pipe Co., D.C.Pa., 57 F. Supp. 573—Fellabaum v. Swift & Co., D.C.Ohio, 54 F.Supp. 353—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F.Supp. 393—Mantel v. Ralph Knight, Inc., D.C.Mo., 45 F.Supp. 372, affirmed, C.C.A., Ralph Knight v. Mantel, 135 F.2d 514—Klotz v. Ippolito, D.C.Tex., 40 F.Supp. 422.

N.J.—Fox v. Armour & Co., 33 A. 2d 582, 21 N.J.Misc. 262.

N.Y.—Brummel v. L. F. Dietz & Associates, 67 N.Y.S.2d 725, 187 Misc. 758, affirmed 62 N.Y.S.2d 864, 270 App.Div. 994, certiorari denied 67 S.Ct. 634, 329 U.S. 813, 91 L.Ed. —— —Schneider v. Sports Vogue, 35 N.Y.S.2d 341.

(2) Captain of plant guards, whose duties were indefinite, who was given no instructions on how far he was to perform executive as distinguished from ordinary duties of guard.—Timberlake v. Day & Zimmerman, D.C.Iowa, 49 F.Supp. 28.

(3) An employee in manufacturing laboratory who acted as working foreman during part of day but had no authority to hire or discharge employees and spent substantial part of time in nonexempt work of making pharmaceutical preparations.—Berlin v. Eimer & Amend, 55 N.Y. S.2d 498, 269 App.Div. 302, affirmed 66 N.E.2d 584, 295 N.Y. 809.

(4) A bookkeeper who made up pay rolls, supervised billing of customers and purchase of materials and supplies, and supervised stockroom and employees therein, and whose salary ranged from thirty-five dollars to forty-seven dollars and fifty cents a week.—Cassone v. Wm. Edgar John & Associates, 57 N.Y. S.2d 169, 185 Misc. 573.

(5) A building superintendent who was a working superintendent with the menial tasks generally attributed to a janitor, and exercising very little supervision over other employees.—Schmidt v. Emigrant Indus. Sav. Bank, C.C.A.N.Y., 148 F. 2d 294.

(6) Sergeants who were in charge of squads of civilian guards and who had no discretionary managerial authority or authority to hire or discharge other employees.—Adams v. St. Johns River Shipbuilding Co., D.C.Fla., 69 F.Supp. 989.

(7) Cashier of small manufacturing company, who kept records, received money, and did office work without assistants, was without authority to hire or fire employees and was without any real discretion or judgment relating to management policies, although a nominal director, and signed checks, disbursed funds, and attended meetings of the board of directors and kept accounts generally.—Walling v. Sterling Ice & Cold Storage Co., D.C. Colo., 69 F.Supp. 669.

12. U.S.—Walling v. Morris, C.C.A. Mich., 155 F.2d 832—Schmidt v. Emigrant Indus. Sav. Bank, C.C. A.N.Y., 148 F.2d 294—Marian v. Lockheed Aircraft Corp., D.C.Tex., 65 F.Supp. 18.

Common meaning not conclusive

U.S.—Smith v. Porter, C.C.A.Ark., 143 F.2d 292.

13. U.S.—Walling v. Morris, C.C.A. Mich., 155 F.2d 832—Schmidt v. Emigrant Industrial Sav. Bank, C. C.A.N.Y., 148 F.2d 294—Smith v. Porter, C.C.A.Ark., 143 F.2d 292—Fanelli v. U. S. Gypsum Co., C.C. A.N.Y., 141 F.2d 216—Helliwell v. Haberman, C.C.A.N.Y., 140 F.2d 833—George Lawley & Son Corporation v. South, C.C.A.Mass., 140 F. 2d 439, 151 A.L.R. 1081, certiorari denied 64 S.Ct. 1156, 322 U.S. 746, 88 L.Ed. 1578—Walling v. Southwestern Greyhound Lines, D.C.Mo., 65 F.Supp. 52—Kreeft v. R. W. Bates Piece Dye Works, D.C.N.Y., 63 F.Supp. 881—Bloch v. Bell, D.C. Ky., 63 F.Supp. 863, affirmed, C.C. A., 152 F.2d 962—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F.Supp. 775, affirmed, C.C.A., 156 F. 2d 681—Walling v. Moore Milling Co., D.C.Va., 62 F.Supp. 378—Rigney v. Wilson & Co., D.C.W.Va., 61 F.Supp. 801—Walling v. St. Marys Sewer Pipe Co., D.C.Pa., 56 F.Supp. 345, new trial denied 57 F.Supp. 573—Snyder v. Wessner, D.C.Minn., 55 F.Supp. 971.

Ill.—Martin v. Klipfel Mfg. Co., 73 N.E.2d 927, 332 Ill.App. 139.

Minn.—Pakarinen v. Butler Bros., 16 N.W.2d 769, 218 Minn. 496.

N.Y.—Berlin v. Eimer & Amend, 55 N.Y.S.2d 498, 269 App.Div. 302, affirmed 66 N.E.2d 584, 295 N.Y. 809.

pears that the employee's primary duty consists of the management of the establishment or of a customarily recognized department or subdivision thereof,[14] that he customarily and regularly directs the work of other employees therein,[15] that he has the authority to hire or discharge other employees or that his suggestions and recommendations as to the hiring or discharging and as to the advancement and promotion or any other change of status of other employees are given particular weight,[16] that he customarily and regularly exercises discretionary powers,[17] that he is compensated for his services on a salary basis[18] at not less than a prescribed amount per week,[19] and that his hours of work of the same nature as that performed by nonexempt employees do not exceed twenty per cent of the number of hours worked in the work week by the nonexempt employees under his direction,[20] except

14. U.S.—Schmidt v. Emigrant Industrial Sav. Bank, C.C.A.N.Y., 148 F.2d 294—Rigney v. Wilson & Co., D.C.W.Va., 61 F.Supp. 801—Walling v. St. Marys Sewer Pipe Co., D.C.Pa., 56 F.Supp. 345, new trial denied 57 F.Supp. 573.
Okl.—Medlin v. Safeway Stores, 157 P.2d 907, 195 Okl. 359.

Employee held within rule
U.S.—Allen v. Atlantic Co., C.C.A.Ga., 145 F.2d 761.

15. U.S.—Walling v. General Industries Co., C.C.A.Ohio, 155 F.2d 711—Schmidt v. Emigrant Industrial Sav. Bank, C.C.A.N.Y., 148 F.2d 294—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F.Supp. 775, affirmed, C.C.A., 156 F.2d 681.

An employee did not have to attend foremens' meetings to qualify as an executive employee exempt under the statute.—Phillips v. Federal Cartridge Corp., D.C.Minn., 69 F.Supp. 522.

16. U.S.—Walling v. Southwestern Greyhound Lines, D.C.Mo., 65 F. Supp. 52—Bloch v. Bell, D.C.Ky., 63 F.Supp. 863, affirmed, C.C.A., 152 F. 2d 962—Fellabaum v. Swift & Co., D.C.Ohio, 54 F.Supp. 353.
N.Y.—Schank v. Lehigh Valley R. R., 52 N.Y.S.2d 491.

Infrequent exercise of power
(1) Fact that power to discharge or suspend employees for infractions of company rules was rarely exercised did not alter fact that authority existed and that supervisors' recommendations were given particular weight.—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F. Supp. 775, affirmed, C.C.A., 156 F.2d 681.

(2) An employee whose recommendations concerning employees under him were given particular weight by employer was exempt from Fair Labor Standards Act as an "executive," notwithstanding employee could not hire employees, and he made no recommendations concerning status of an employee under him more than once.—Nadeau v. Henry Disston & Sons, D.C.Pa., 65 F.Supp. 849.

Controlling recommendations
An employee did not have to have the right "to make the controlling recommendation as to the status" of employees working under him, in order to qualify as an executive.—Phillips v. Federal Cartridge Corp., D.C. Minn., 69 F.Supp. 522.

17. U.S.—Kelly v. Ford, Bacon & Davis, C.C.A.Pa., 162 F.2d 555—Walling v. Southwestern Greyhound Lines, D.C.Mo., 65 F.Supp. 52—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F.Supp. 775, affirmed, C.C.A., 156 F.2d 681—Rigney v. Wilson & Co., D.C.W.Va., 61 F.Supp. 801—Fellabaum v. Swift & Co., D.C.Ohio, 54 F.Supp. 353.
N.Y.—Schank v. Lehigh Valley R. R., 52 N.Y.S.2d 491.

18. U.S.—Kelly v. Ford, Bacon & Davis, C.C.A.Pa., 162 F.2d 555—Walling v. Morris, C.C.A.Mich., 155 F.2d 832.

Effect of deductions
Where foremen were employed at weekly salaries, that deductions therefrom were measured by hours of absence did not convert their contracts of employment into contracts at an hourly wage in determining whether they were bona fide executive employees and not entitled to overtime compensation.—Smith v. Porter, C.C.A.Ark., 143 F.2d 92.

19. U.S.—Walling v. Yeakley, C.C.A. Colo., 140 F.2d 830—Walling v. Mutual Wholesale Food & Supply Co., D.C.Minn., 46 F.Supp. 939, modified on other grounds, C.C.A., 141 F.2d 331.

Net earnings
Where employee was paid on a commission basis and had to pay, from commissions, wages of his helpers, and retained less than thirty dollars per week including social security and withholding tax, such fact was conclusive that employee was not exempt from the act as employed in a "bona fide executive capacity" regardless of gross amount of commissions.—Walling v. Southwestern Greyhound Lines, D.C.Mo., 65 F.Supp. 52.

20. U.S.—Walling v. Morris, C.C.A. Mich., 155 F.2d 832—George Lawley & Son Corporation v. South, C. C.A.Mass., 140 F.2d 439, 151 A.L.R. 1081, certiorari denied 64 S.Ct. 1156, 322 U.S. 746, 88 L.Ed. 1578—Dolan v. Day & Zimmerman, D.C. Mass., 65 F.Supp. 923—Bloch v. Bell, D.C.Ky., 63 F.Supp. 863, affirmed, C.C.A., 152 F.2d 962—Anderson v. Federal Cartridge Corp., D. C.Minn., 62 F.Supp. 775, affirmed, C.C.A., 156 F.2d 681—Rigney v. Wilson & Co., D.C.W.Va., 61 F. Supp. 801—Lorber v. Rosow, D.C. Conn., 58 F.Supp. 341, reversed on other grounds, C.C.A., 153 F.2d 159—Porter v. Georgia Power & Light Co., D.C.Ga., 50 F.Supp. 959—Cron v. Goodyear Tire & Rubber Co., D. C.Tenn., 49 F.Supp. 1013—Walling v. Mutual Wholesale Food & Supply Co., D.C.Minn., 46 F.Supp. 939, modified on other grounds, C.C.A., 141 F.2d 331—Walling v. Emery Wholesale Corporation, D.C.Ga., 49 F.Supp. 192, affirmed, C.C.A., 138 F.2d 548—Mantel v. Ralph Knight, Inc., D.C.Mo., 45 F.Supp. 372, affirmed, C.C.A., Ralph Knight v. Mantel, 135 F.2d 514.
N.Y.—Phelan v. Carstens, Linnekin & Wilson, 62 N.Y.S.2d 214, 187 Misc. 352, reversed on other grounds 69 N.Y.S.2d 23, 188 Misc. 637—Schank v. Lehigh Valley R. R., 52 N.Y.S.2d 491.

Regulation held not arbitrary
In order for administrative regulation regarding percentage of work not exempt from Fair Labor Standards Act, which will bring employee having both executive and nonexecutive duties within protection of act, to be "arbitrary" so as to render it invalid, the particular percentage selected must be unreasonable for purpose for which it is to be used; regulation fixing twenty per cent as criterion has been held not arbitrary.—Ralph Knight, Inc., v. Mantel, C.C.A. Mo., 135 F.2d 514.

Base on which percentage taken
The nonexempt work referred to in the regulation is not only the type of nonexempt work performed by employees under direction of the executive but is nonexempt work of any nature, and the base on which the twenty per cent is to be taken is the hours worked in the work week by the nonexempt employee under direction of the executive.—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923.

A working foreman who performs the same type of work as those whom he supervises is not an executive exempt under the statute.
U.S.—Walling v. Jacksonville Paper Co., D.C.Fla., 69 F.Supp. 593.

that this last requirement does not apply where the employee is in sole charge of an independent establishment or a physically separated branch.[21] It has been held, however, that the administrator's definition will be followed only to the extent that it is within the limits of the fair and natural meaning of the words "bona fide executive capacity,"[22] and that an employee may be entitled to the exemption notwithstanding he earns less than the sum prescribed by the regulations.[23]

In determining whether an employee is exempt as a bona fide executive, each case must be determined on its own merits.[24] The court must look to the actual duties the employee performs and all the circumstances of the employment,[25] and the title given to an employee or the designation given to his employment is not conclusive.[26] The fact that an employee's compensation exceeds the amount fixed in the regulations as necessary in order to classify an employee as an executive,[27] or that he is prohibited from doing physical labor,[28] does not of itself make him an executive employee.

Generally, the word "executive" means one whose duties relate to active participation in control, supervision, and management of business, or one who administers affairs, or who directs, manages, executes, or dispenses,[29] but the term does not include one who does routine menial work,[30] or one whose duties are predominately devoted to actual manual labor.[31] However, the fact that an employee does some routine work incidental to his duties as an executive employee does not preclude his exemption if such routine work does not exceed the proportion fixed by the regulations.[32] So, also, where manual or ordinary tasks performed by an employee having executive duties are of supervisory or instructive type, they do not preclude his classification as an executive.[33] Although an employer may

N.J.—Zaetz v. General Instrument Corporation, 30 A.2d 504, 21 N.J. Misc. 76.

Compliance with requirement shown
U.S.—Allen v. Atlantic Co., C.C.A.Ga., 145 F.2d 761—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923—Bernick v. Codden, D.C.Minn., 65 F.Supp. 89.

The regulation formerly provided that to come within the exemption the employee must do no substantial amount of work of the same nature as that performed by nonexempt employees, but difficulties of interpreting and applying this provision led to revision of the regulation and adoption of a percentage guide with respect to performance of nonexempt work.—Ralph Knight, Inc. v. Mantel, C.C.A.Mo., 135 F.2d 514—Corey v. Detroit Steel Corporation, D.C.Mich., 52 F.Supp. 138.

21. U.S.—Sauls v. Martin, D.C.S.C., 45 F.Supp. 801.

Proviso held reasonable
Where administrative rule regulated percentage of work not exempt from Fair Labor Standards Act which would bring an employee having both executive and nonexecutive duties within protection of the act, proviso stating that the rule should not apply to case of an employee who is in sole charge of an independent establishment, or a physically separated branch establishment, is reasonable and did not invalidate the rule.—Ralph Knight, Inc., v. Mantel, C.C.A.Mo., 135 F.2d 514.

22. U.S.—Devoe v. Atlanta Paper Co., D.C.Ga., 40 F.Supp. 284.

23. U.S.—Devoe v. Atlanta Paper Co., supra.

Regulation held invalid
Under Fair Labor Standards Act exempting employees engaged in bona fide executive or administrative capacity wage and hour administrator's regulation that an executive receiving less than thirty dollars per week should not be exempt was held invalid.—Buckner v. Armour & Co., D.C.Tex., 53 F.Supp. 1022.

24. U.S.—Bernick v. Coddon, D.C. Minn., 65 F.Supp. 89.

25. U.S.—Walling v. General Industries Co., C.C.A.Ohio, 155 F.2d 711—Walling v. Yeakley, C.C.A.Colo., 140 F.2d 830—Walling v. Moore Milling Co., D.C.Va., 62 F.Supp. 378.

26. U.S.—Walling v. Moore Milling Co., supra.

27. U.S.—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F.Supp. 393.

28. U.S.—Walling v. St. Marys Sewer Pipe Co., D.C.Pa., 57 F.Supp. 573.

29. U.S.—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009.
N.Y.—Steiner v. Pleasantville Constructors, 46 N.Y.S.2d 120, 181 Misc. 798, modified on other grounds 49 N.Y.S.2d 42, 182 Misc. 66, affirmed 54 N.Y.S.2d 700, first case, 269 App.Div. 738.

30. U.S.—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009.

Odd jobs
Employee who had duties of a stock clerk, overtime clerk, receiving clerk and checker, and who did odd jobs was not an "executive" within provision excluding executives from wage and hour provisions of act, notwithstanding that he sometimes directed work of other employees.—Steiner v. Pleasantville Constructors, 46 N.Y.S.2d 120, 181 Misc. 798, modified on other grounds 49 N.Y.S.2d 42, 182 Misc. 66, affirmed 54 N.Y.S.2d 700, first case, 269 App.Div. 738.

31. U.S.—Joseph v. Ray, C.C.A.Okl., 139 F.2d 409—Walling v. Sterling Ice & Cold Storage Co., D.C.Colo., 69 F.Supp. 669—Burke v. Lecrone-Benedict Ways, D.C.Mich., 63 F.Supp. 883—Klotz v. Ippolito, D.C.Tex., 40 F.Supp. 422.

The chief engineer and superintendent of foremen of manufacturing plant was not exempt from act as an "executive employee" where, although he exercised many executive duties, a large percentage of his work was manual labor.—Wagner v. American Service Co., D.C.Iowa, 58 F.Supp. 32.

32. U.S.—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923.

Clerical work which foremen performed in maintaining production and personnel records and making reports in connection with their particular department was a part of supervisory duty, although resembling duty of bookkeeper, in determining whether foremen were executives.—Bender v. Crucible Steel Co. of America, D.C.Pa., 71 F.Supp. 420.

33. U.S.—Bender v. Crucible Steel Co. of America, supra—Phillips v. Federal Cartridge Corp., D.C.Minn., 69 F.Supp. 522.

Casual departures from supervisory work
The Fair Labor Standards Act did not intend that casual departures from strict supervisory work should be meticulously added together in order to determine whether an executive may have exceeded the 20 per cent. maximum referred to in regulation allowing overtime compensation to supervisory employees doing more than 20 per cent. of their work

assign a man employed to take an executive position to work not of an executive character to train him to do the job he was hired to do, the employee may not be assigned to such work for a period of time longer than is conceivably necessary to train him properly so as to exempt him for such time from the operation of the statute.[34]

"Executive" and "administrative" distinguished. Although the terms "executive" and "administrative" are largely overlapping in common usage, for the purpose of exemptions under the statute "executive" is limited to persons whose duties include some form of managerial authority, actually directing the work of other persons, and "administrative" to persons performing a variety of miscellaneous but important functions in business.[35] While an administrator is not necessarily an executive within the statutory exemption, the term "executive" is broad enough to include one who also has administrative duties.[36]

c. Administrative Employees

The Fair Labor Standards Act exempts administrative employees from its provisions as to minimum wages and overtime pay, and regulations of the administrator have been held valid and binding in the determination of what employees are within the exemption.

Administrative employees are specifically exempted from the provisions of the Fair Labor Standards Act §§ 6, 7, 29 U.S.C.A. §§ 206, 207, as to minimum wages and overtime pay,[37] and regulations of the administrator of the wages and hours division defining the term "employee employed in a bona

in other employment, particularly when it fairly appears that foremen, in performing such work, did so as incidental to and in furtherance of his work as supervisor.—Anderson v. Federal Cartridge Corp., D.C.Minn., 72 F.Supp. 639.

The operation of a machine by a supervisory employee while a subordinate employee is being instructed is an essential part of the supervisory duties and is exempt.—Gill v. Mesta Mach. Co., D.C.Pa., 69 F.Supp. 904.

34. U.S.—Crane v. International Resistance Co., D.C.Pa., 65 F.Supp. 568.

Judgment of employer

The court will not ordinarily substitute its judgment for that of employer as to exact length of time necessary for an employee to familiarize himself with requirements of his position, in determining what constitutes length of training period under the act.—Crane v. International Resistance Co., supra.

35. U.S.—Stanger v. Glenn L. Martin Co., D.C.Md., 56 F.Supp. 163.

36. U.S.—Burke v. Lecrone-Benedict Ways, D.C.Mich., 63 F.Supp. 883.

37. U.S.—Hoff v. North American Aviation, D.C.Tex., 67 F.Supp. 375—Christiansen v. U. S. Gypsum Co., D.C.Ohio, 66 F.Supp. 835—Walling v. Snyder Min. Co., D.C. Minn., 66 F.Supp. 725—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923—Ashworth v. E. B. Badger & Sons Co., D.C.Mass., 63 F.Supp. 710—Gorchakoff v. California Shipbuilding Corp., D.C.Cal., 63 F.Supp. 309—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F. Supp. 775, affirmed, C.C.A., 156 F. 2d 681—Walling v. Newman, D.C. Iowa, 61 F.Supp. 971—Walling v. General Industries Co., D.C.Ohio, 60 F.Supp. 549, affirmed, C.C.A., 155 F.2d 711—Stanger v. Glenn L. Martin Co., D.C.Md., 56 F.Supp. 163—Rosenthal v. Atkinson, D.C.Tex., 43 F.Supp. 96—Owin v. Liquid Carbonic Corporation, D.C.Tex., 42 F. Supp. 774—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009.

Persons held administrative employees

(1) A supervisor of production.—Stanger v. Glenn L. Martin Co., D.C. Md., 56 F.Supp. 163.

(2) Expediter and inspector employed to inspect pipe and fittings and other materials at plants being constructed.—Henry v. Chemical Const. Corp., 72 N.Y.S.2d 913.

(3) Assistant paymaster, who was in charge of business machines, who had two assistants to manipulate machines, who set up machines to make desired tabulations by arranging plug-boards on tabulators, who was in charge of department during paymaster's absence, and more than eighty per cent of whose work was nonmanual.—Walling v. General Industries Co., C.C.A.Ohio, 155 F.2d 711.

(4) Administrative assistant employed in personnel department to seek out sources of skilled labor, who conducted or assisted upon interviews with officials and prospective applicants, who worked upon an organization chart of the administrative department, and assembled data for a report to certain bonding and insurance companies.—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923.

(5) Employee having the title of office manager and bookkeeper and a responsible part in formulating the business policies of the firm and exercising independent judgment and discretion in managing its affairs.—Walling v. Newman, D.C.Iowa, 61 F. Supp. 971.

Persons held not administrative employees

(1) Generally.—Kelly v. Ford, Bacon & Davis, C.C.A.Pa., 162 F.2d 555—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616—Adams v. St. Johns River Shipbuilding Co., D.C.Fla., 69 F.Supp. 989—Walling v. Sterling Ice & Cold Storage Co., D. C.Colo., 69 F.Supp. 669—Lorber v. Rosow, D.C.Conn., 58 F.Supp. 341, reversed on other grounds, C.C.A.10, 153 F.2d 159—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F.Supp. 393—Timberlake v. Day & Zimmerman, D.C.Iowa, 49 F.Supp. 28.

(2) An employee in manufacturing laboratory who receives less than two hundred dollars per month and who in assisting executive superior did not perform responsible nonmanual office work directly related to management policies or general business operation.—Berlin v. Eimer & Amend, 55 N.Y.S.2d 498, 269 App.Div. 302.

(3) An employee in accounting department, who did the posting, and the greater part of whose work was manual, although she earned more than two hundred dollars per month and assisted employees employed in an executive or administrative capacity doing work to some extent not manual in nature requiring exercise of discretion and independent judgment.—Burke v. Lecrone-Benedict Ways, D.C.Mich., 63 F.Supp. 883.

(4) A chief engineer of ice manufacturing plant who was employed for definite work involving manual labor.—Walling v. Sterling Ice & Cold Storage Co., D.C.Colo., 69 F. Supp. 669.

(5) Chief clerks whose work was clerical and mental and did not involve the exercise of independent judgment and discretion but was a mere matter of routine.—Walling v. Snyder Min. Co., D.C.Minn., 66 F. Supp. 725.

fide administrative capacity" have been held valid and binding in the determination of what employees are within the exemption.[38] Where provisions of the regulation as to persons who constitute administrative employees are stated in the disjunctive, an employee is exempt if he falls within any of the provisions,[39] but he is not exempt if he fails to come within any of the provisions.[40]

The term "administrative employee" ordinarily applies only to an employee who is compensated for his services at a salary or fee of not less than a prescribed sum per month,[41] and who regularly and directly assists an employee employed in a bona fide executive or administrative capacity, where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment;[42] or who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and the exercise of discretion and independent judgment;[43] or whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment;[44] or who is engaged in transporting goods or passengers for hire, and performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and has duties requiring the exercise of discretion and independent judgment.[45]

The character of the work performed by the employee is determinative of the right to the exemp-

38. U.S.—Walling v. Morris, C.C.A. Mich., 155 F.2d 832—Walling v. Snyder Min. Co., D.C.Minn., 66 F. Supp. 725—Mariam v. Lockheed Aircraft Corp., D.C.Tex., 65 F. Supp. 18—Stanger v. Glenn L. Martin Co., D.C.Md., 56 F.Supp. 163.

39. U.S.—George Lawley & Son Corporation v. South, C.C.A.Mass., 140 F.2d 439, 151 A.L.R. 1081, certiorari denied 64 S.Ct. 1156, 322 U. S. 746, 88 L.Ed. 1578—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923—Walling v. Newman, D.C.Iowa, 61 F.Supp. 971.

40. U.S.—Walling v. Morris, C.C.A. Mich., 155 F.2d 832—George Lawley & Son Corporation v. South, C. C.A.Mass., 140 F.2d 439, 151 A.L.R. 1081, certiorari denied 64 S.Ct. 1156, 322 U.S. 746, 88 L.Ed. 1578—Dolan v. Day & Zimmerman, D.C. Mass., 65 F.Supp. 923.
N.Y.—Schank v. Lehigh Val. R. R., 52 N.Y.S.2d 491.

Training period

Where employee was hired as "production control supervisor" and was assigned to department in employer's plant to familiarize himself with operations carried on and it required about a month to train such supervisor and employee was kept in such department doing work of expediter for some four months, employee was entitled to overtime under the act throughout period during which he worked in the shop except for first month, and after leaving the shop, he was an administrative employee not subject to the act.—Crane v. International Resistance Co., D.C.Pa., 65 F.Supp. 568.

41. U.S.—Gorchakoff v. California Shipbuilding Corp., D.C.Cal., 63 F. Supp. 309—Mantel v. Ralph Knight, Inc., D.C.Mo., 45 F.Supp. 372, affirmed, C.C.A., Ralph Knight, Inc., v. Mantel, 135 F.2d 514.

Salary basis

(1) Persons not employed on a salary basis are not exempt as administrative employees.—Walling v. Morris, C.C.A.Mich., 155 F.2d 832.

(2) Employees paid on hourly basis and without two hundred dollars a month guaranty are not exempt, although they actually received more than two hundred dollars monthly.—Chepard v. May, D.C.N.Y., 71 F.Supp. 389.

Deductions for absences

Where employee suing for overtime under Fair Labor Standards Act received over two hundred dollars a month, deductions from such salary for absences from work did not convert the contract of employment into an employment contract at an hourly wage so as to defeat applicability of statutory exemptions applying to administrative employee to employee's position.—Gorchakoff v. California Shipbuilding Corp., D.C.Cal., 63 F. Supp. 309.

42. U.S.—Bender v. Crucible Steel Co. of America, D.C.Pa., 71 F.Supp. 420—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923.

Construction by general order

(1) General order of wage and hour administrator defining one employed in an administrative capacity as one assisting an employee employed in executive or administrative capacity, where such assistance is non-manual in nature "and" requires exercise of discretion and independent judgment, by the use of the word "and," requires that such assistance be both nonmanual and requiring exercise of discretion and judgment in order to qualify as an administrative employee.—Burke v. Lecrone-Benedict Ways, D.C.Mich., 63 F.Supp. 883.

(2) The general order uses "manual" in its regular connotation as meaning physical as to the use of hands in contrast to mental exertions only.—Burke v. Lecrone-Benedict Ways, supra.

Clerical supervisor who was concerned with computing quantities of material and arranging for delivery of materials to subcontractors, and who made recommendations to bona fide executive for purchase of material necessary for fabrication of parts, was exempt from overtime provisions of the act, as one assisting an employee in a bona fide "executive or administrative capacity," notwithstanding that supervisor did some clerical work incidental to his work in an administrative capacity. —Dolan v. Day & Zimmerman, D.C. Mass., 65 F.Supp. 923.

43. U.S.—Walling v. Morris, C.C.A. Mich., 155 F.2d 832.

Editor of magazine published by company in connection with its publicity, who operated only under general supervision upon tasks which were directly related to management policies or general business operations involving exercise of discretion and independent judgment and was paid more than two hundred dollars per month and whose work required specialized training, knowledge and experience was an "administrative employee."—Adams v. St. Johns River Shipbuilding Co., D.C.Fla., 69 F. Supp. 989.

44. U.S.—Adams v. St. Johns River Shipbuilding Co., supra—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923.

45. U.S.—Walling v. Snyder Min. Co., D.C.Minn., 66 F.Supp. 725.

tion, rather than the title of his position.[46] The extent to which discretion or independent judgment, and the duty of making recommendations are involved, is one of the most important elements in determining whether a person's work is of an administrative character,[47] but it is not necessary to the administrative status that the employee be constantly and continuously engaged in exercising discretion and independent judgment,[48] and in performing nonmanual labor.[49] The fact that the employer regards the work as requiring special training or experience, although not conclusive, is of considerable importance in determining whether the employee is engaged in an administrative capacity,[50] but work along specialized lines is not necessarily essential to the exemption.[51] The fact that an employee earns more than the sum prescribed by the regulation is not of itself conclusive that he is an administrative employee.[52]

§ 151(13). —— Employees Engaged in Local Retailing Capacity or as Outside Salesmen

The Fair Labor Standards Act exempts from its provisions as to minimum wages and overtime pay employees employed in a local retailing capacity or as outside salesmen.

Under the Fair Labor Standards Act § 13 (a) (1), 29 U.S.C.A. § 213 (a) (1), the requirements of the statute with respect to minimum wages and overtime pay do not apply to employees employed in a local retailing capacity.[53] This provision was designed to cover persons engaged in the actual sale of commodities and does not extend to employees whose work is entirely disconnected therewith.[54] The statute authorizes the administrator to define the term "local retailing capacity" and an employee, to be exempt, must come within the terms of a regulation, where such regulation is valid.[55] The administrator's interpretation of the regulation is of controlling weight in arriving at the correct meaning thereof in the absence of a showing that such interpretation is plainly erroneous or inconsistent with the regulation.[56]

Outside salesmen. Under the provisions of the Fair Labor Standards Act § 13 (a) (1), 29 U.S.C.A. § 213 (a) (1), persons employed in the capacity of "outside salesmen," as the term is defined and delimited by regulations of the administrator, are exempted from the operation of the statute.[57]

46. U.S.—Walling v. Sterling Ice & Cold Storage Co., D.C.Colo., 69 F. Supp. 669—Walling v. Snyder Min. Co., D.C.Minn., 66 F.Supp. 725.

47. U.S.—Adams v. St. Johns River Shipbuilding Co., D.C.Fla., 69 F. Supp. 989—Walling v. Snyder Min. Co., D.C.Minn., 66 F.Supp. 725—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F.Supp. 775, affirmed, C.C.A., 156 F.2d 681—Stanger v. Glenn L. Martin Co., D.C.Md., 56 F. Supp. 163.

Authority to make decisions

An employee possessing authority to make decisions on his own account without direction or instruction from others exercises "discretion and independent judgment" within regulation issued by wage and hour administrator, defining employment in bona fide administrative capacity within statutory exemption.—Ashworth v. E. B. Badger & Sons Co., D.C.Mass., 63 F. Supp. 710.

Differentiation between a mere clerk and one with actual "administrative" ability so as to be exempt from benefits of act lies largely in the exercise of discretion and independent judgment, and receipt of salary above that customarily paid to one engaged primarily in mere manual or clerical work.—Stanger v. Glenn L. Martin Co., D.C.Md., 56 F. Supp. 163.

Added work

An employee who, under the definition of "administrative" in regulation fulfills every requirement to make him exempt except that his work does not require him to exercise sufficient discretion and independent judgment, may become exempt when his added work requires additional exercise of discretion and independent judgment.—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923.

48. U.S.—Gorchakoff v. California Shipbuilding Corp., D.C.Cal., 63 F. Supp. 309—Walling v. Newman, D. C.Iowa, 61 F.Supp. 971.

49. U.S.—Gorchakoff v. California Shipbuilding Corp., D.C.Cal., 63 F. Supp. 309.

50. U.S.—Ashworth v. E. B. Badger & Sons Co., D.C.Mass., 63 F.Supp. 710.

51. U.S.—Ashworth v. E. B. Badger & Sons Co., supra.

52. U.S.—Stanger v. Glenn L. Martin Co., D.C.Md., 56 F.Supp. 163.

53. U.S.—Duncan v. Montgomery Ward & Co., D.C.Tex., 42 F.Supp. 879—Prescription House v. Anderson, D.C.Tex., 42 F.Supp. 874.

54. U.S.—Barrick v. South Chicago Coal & Dock Co., C.C.A.Ill., 149 F.2d 960.

Exemption held not applicable

(1) Maintenance or office employees of co-operatives distributing electricity.—Phillips v. Meeker Co-op. Light & Power Ass'n, D.C.Minn., 63 F.Supp. 733.

(2) Employees operating a bridge crane used for loading and unloading coal products from boats, barges, and freight cars.—Barrick v. South Chicago Coal & Dock Co., C.C.A.Ill., 149 F.2d 960.

(3) Employees of commissary department, engaged in the making, wrapping, and delivering of sandwiches to selling counters in railroad stations and train service department for sale on train.—Armstrong Co. v. Walling, C.C.A.Mass., 161 F.2d 515.

55. U.S.—Collier v. New River & Pocahontas Consolidated Coal Co., D. C.W.Va., 66 F.Supp. 288.

Proportion of nonexempt work

Under portion of regulation requiring that employee's hours of work of the same nature as that performed by nonexempt employees should not exceed twenty per cent of number of hours worked in work week by nonexempt employees, in determining whether manager of drug department was exempt, comparison was required to be between total time spent in each week by nonexempt shipping clerks and that spent by manager in connection with his duties in stock room as distinguished from his retail duties.—Collier v. New River & Pocahontas Consolidated Coal Co., supra.

56. U.S.—Armstrong Co. v. Walling, C.C.A.Mass., 161 F.2d 515.

57. U.S.—Jewel Tea Co. v. Williams, C.C.A.Okl., 118 F.2d 202.

§ 151(14). —— Retail or Service Establishments Engaged Mainly in Intra-State Commerce

a. In general
b. Retail establishments
c. Service establishments

a. In General

Employees of retail or service establishments the greater part of whose selling or servicing is in intra-state commerce are exempted from provisions of the Fair Labor Standards Act as to minimum wages and overtime pay, and, in determining whether the exemption applies, each case must be governed by its own facts.

The Fair Labor Standards Act § 13 (a) (2), 29 U.S.C.A. § 213 (a) (2), exempts from its requirements as to minimum wages and overtime pay any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intra-state commerce.[58] The purpose of the exemption was, in view of the legislative history of the act, to make certain that establishments located near and doing occasional business across state lines would not be covered by the provisions of the act,[59] and the language of the exemption will be so construed as to carry out the legislative purpose.[60] Such provision creates an exception to the general scope of the act, and is subject to strict construction.[61] The exemption must be applied uniformly to all engaged in commerce or the production of goods therefor, and different industries or others cannot promulgate definitions which may exempt their members from provisions of the act.[62]

In determining whether an employer is exempt as a retail or service establishment, each case must be

The reasons for excluding an outside salesman are fairly apparent. Such salesman, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day.—Jewel Tea Co. v. Williams, supra.

Persons held within exemption

Salesman employed primarily to effect sales of employer's merchandise by soliciting customers at their homes, and devoting the greater part of time to salesmanship and only a small part to delivery of goods ordered, was "outside salesman" as defined by regulations.—Jewel Tea Co. v. Williams, supra.

Persons held not within exemption

U.S.—Reynolds v. Salt River Valley Water Users Ass'n, C.C.A.Ariz., 143 F.2d 863, certiorari denied 65 S.Ct. 117, 323 U.S. 764, 89 L.Ed. 611.

58. U.S.—Harris v. Hammond, C.C.A.Ga., 145 F.2d 333, certiorari denied 65 S.Ct. 858, 324 U.S. 859, 89 L.Ed. 416—A. H. Phillips, Inc., v. Walling, C.C.A.Mass., 144 F.2d 102, affirmed 65 S.Ct. 807, 324 U.S. 490, 89 L.Ed. 1095, 157 A.L.R. 876—Walling v. Sanders, C.C.A.Tenn., 136 F.2d 78—Walling v. Goldblatt Bros., D.C.Ill., 56 F.Supp. 255, reversed on other grounds, C.C.A., 152 F.2d 475, certiorari denied 66 S.Ct. 1344, 328 U.S. 854, 90 L.Ed. 1627—Walling v. Fred Wolferman, Inc., D.C.Mo., 54 F.Supp. 917, appeal dismissed, C.C.A., 144 F.2d 354—Prescription House v. Anderson, D.C.Tex., 42 F.Supp. 874—Veazey Drug Co. v. Fleming, D.C. Okl., 42 F.Supp. 689—Stucker v. Roselle, D.C.Ky., 37 F.Supp. 864—Wood v. Central Sand & Gravel Co., D.C.Tenn., 33 F.Supp. 40.

Kan.—Gale v. Fruehauf Trailer Co., 145 P.2d 125, 158 Kan. 30.

N.Y.—Cassone v. Wm. Edgar John & Associates, 57 N.Y.S.2d 169, 185 Misc. 573.

Pa.—Russo v. Fisher, 42 Pa.Dist. & Co. 176.

Employer has burden of establishing exemption

U.S.—Snyder v. John J. Casale, Inc., D.C.N.Y., 49 F.Supp. 926—Fleming v. American Stores Co., D.C.Pa., 42 F.Supp. 511, modified on other grounds, C.C.A., 133 F.2d 840.

Employees held exempt

U.S.—White Motor Co. v. Littleton, C. C.A.Tex., 124 F.2d 92—Wideman v. Blanchard & Calhoun Realty Co., D.C.Ga., 50 F.Supp. 626—Walling v. Sanders, D.C.Tenn., 48 F.Supp. 9, affirmed, C.C.A., 136 F.2d 78—Snavely v. Shugart, D.C.Tex., 45 F. Supp. 722.

Tenn.—Bynum v. Firestone Tire & Rubber Co., 177 S.W.2d 20, 26 Tenn.App. 676, certiorari denied 64 S.Ct. 189, 320 U.S. 783, 88 L.Ed. 470.

Employees held not exempt

U.S.—Roland Electrical Co. v. Walling, Md., 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383—Antis v. Montgomery Ward & Co., D.C.Mich., 63 F.Supp. 669—Rouch v. Continental Oil Co., D.C.Kan., 55 F.Supp. 315—Walling v. Sun Pub. Co., D.C.Tenn., 47 F. Supp. 180, affirmed, C.C.A., 140 F.2d 445, certiorari denied 64 S.Ct. 946, 322 U.S. 728, 88 L.Ed. 1564—Fleming v. A. B. Kirschbaum Co., D.C. Pa., 38 F.Supp. 204, affirmed, C.C. A., 124 F.2d 567, affirmed Kirschbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Wood v. Central Sand & Gravel Co., D.C. Tenn., 33 F.Supp. 40.

59. U.S.—Phillips v. Star Overall Dry Cleaning Laundry Co., C.C.A. N.Y., 149 F.2d 416, certiorari denied All Service Laundry Corp. v. Phillips, 66 S.Ct. 677, 327 U.S. 780, 90 L.Ed. 1008, rehearing denied 66 S.Ct. 815, 327 U.S. 817, 90 L.Ed. 1040—A. H. Phillips, Inc., v. Walling, C.C.A.Mass., 144 F.2d 102, affirmed 65 S.Ct. 807, 324 U.S. 490, 89 L.Ed. 1095, 157 A.L.R. 876—Reynolds v. Salt River Valley Water Users Ass'n, C.C.A.Ariz., 143 F.2d 863, certiorari denied 65 S.Ct. 117, 323 U.S. 764, 89 L.Ed. 611—Guess v. Montague, C.C.A.S.C., 140 F.2d 500—Walling v. Wyandotte Furniture Co., D.C.Mo., 72 F.Supp. 98—Collier v. New River & Pocahontas Consolidated Coal Co., D.C.W.Va., 66 F.Supp. 288.

Mo.—Fountain v. St. Joseph Water Co., 180 S.W.2d 28, 352 Mo. 817.

Insufficiency of other exemption

Section 13 (a) (2) is a part of the act only because of the fear that section 13 (a) (1), in exempting employees regularly engaged in a "local retailing capacity," did not clearly exclude those employed by local retailers who are situated near state lines and who make occasional interstate sales.—A. H. Phillips, Inc. v. Walling, Mass., 65 S.Ct. 807, 810, 324 U.S. 490, 89 L.Ed. 1095, 157 A.L.R. 876.

60. U.S.—Roland Electrical Co. v. Walling, Md., 66 S.Ct. 413, 326 U. S. 657, 90 L.Ed. 383—Walling v. Consumers Co., C.C.A.Ill., 149 F.2d 626.

61. U.S.—Walling v. Reid, C.C.A. Neb., 139 F.2d 323—Rouch v. Continental Oil Co., D.C.Kan., 55 F. Supp. 315.

62. U.S.—Walling v. West Kentucky Coal Co., D.C.Tenn., 60 F.Supp. 681, modified on other grounds, C.C.A., 153 F.2d 582.

governed by its own facts,[63] and it has been held that the nature of the establishment where the labor is performed and the type of work done ordinarily are controlling.[64] It has also been held, however, that the exemption depends on the nature of the business conducted by the employer rather than the kind of work performed by the employee,[65] so that all employees of the industry are exempt if any are exempt.[66] It has been held that the statute is to be interpreted as though it exempts retail selling or retail servicing establishments,[67] and that the "retail" character of an employer is not to be determined by the nature of the employer's business exclusively, but, also, by the question whether the final purchaser uses the service or commodity to satisfy a personal want or necessity or uses it to satisfy a business necessity.[68]

"Establishment." The word "establishment" as used in the provision exempting retail and service establishments is intended to be taken in its ordinary meaning,[69] and it is used in the statute as it is normally used in business and in government as referring to a distinct physical place of business rather than to an employer's entire business organization.[70] An entire business or enterprise may comprise several establishments within the meaning of the exemption provision,[71] and one branch thereof may not be exempt, although another is exempt,[72] notwithstanding both branches are located under the same roof.[73]

Predominantly intra-state business. The exemption in favor of retail and service establishments may apply, although the employer does some interstate business, especially where the establishment is located near state lines,[74] but the greater part of the selling or servicing of the employer's business must be in intra-state commerce, and the exemption may not be claimed where the business is predominantly interstate in character.[75] The term "greater part" has been held to mean more than fifty per cent of the whole, and, if such proportion of the business is intra-state in character, the exemption applies,[76] notwithstanding the interstate business is substantial in amount.[77]

b. Retail Establishments

The exemption in favor of employees of retail establishments is to be construed in the light of the purpose and history of the statute, and the term "retail establishment" has been held to refer to a business making retail sales in small quantities for profit to persons who consume or use the goods rather than to persons who buy to sell again.

In determining who is within the exemption in

63. U.S.—White v. Jacobs Pharmacy Co., D.C.Ga., 47 F.Supp. 298—Wood v. Central Sand & Gravel Co., D.C. Tenn., 33 F.Supp. 40.

64. U.S.—Lorenzetti v. American Trust Co., D.C.Cal., 45 F.Supp. 128.

65. U.S.—Fletcher v. Grinnell Bros., D.C.Mich., 62 F.Supp. 258, reversed on other grounds, C.C.A., 150 F.2d 337, conformed to, D.C., 64 F.Supp. 778—White v. Jacobs Pharmacy Co., D.C.Ga., 47 F.Supp. 298—Fleming v. A. B. Kirschbaum Co., D.C. Pa., 38 F.Supp. 204, affirmed, C.C. A., 124 F.2d 567, affirmed Kirschbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638.

66. U.S.—Wood v. Central Sand & Gravel Co., D.C.Tenn., 33 F.Supp. 40.

67. U.S.—Walling v. Thompson, D. C.Cal., 65 F.Supp. 686.

68. U.S.—Walling v. Thompson, supra.

69. U.S.—Walling v. Fred Wolferman, Inc., D.C.Mo., 54 F.Supp. 917, appeal dismissed, C.C.A., 144 F.2d 354.

Authority of administrator to define

The word "establishment," although used in the immediately preceding clause of the same section of Fair Labor Standards Act, is not among the words which administrator of the act is authorized to define, and the rule expressio unius est exclusio alterius is applicable.—Walling v. Fred Wolferman, Inc., supra.

70. U.S.—A. H. Phillips, Inc., v. Walling, Mass., 65 S.Ct. 807, 324 U. S. 490, 89 L.Ed. 1095, 157 A.L.R. 876.

Contrary authority

(1) It was held, prior to determination of the question by the supreme court, that the word "establishment" referred to the entire business enterprise of an employer, although composed of several stores.—Walling v. Fred Wolferman, Inc., D.C.Mo., 54 F. Supp. 917, appeal dismissed, C.C.A., 144 F.2d 354.

(2) It was also held that it is the nature of the business rather than the locations in which it is conducted which determines coverage or exemption under the statute.—White v. Jacobs Pharmacy Co., D.C.Ga., 47 F. Supp. 298.

(3) Retail stores and general office and warehouse building of corporation engaged solely in retail business within certain state was held to constitute single "retail establishment."—Walling v. L. Wiemann Co., C.C.A.Wis., 138 F.2d 602, 150 A.L.R. 878, certiorari denied 64 S.Ct. 782, 321 U.S. 785, 88 L.Ed. 1077.

(4) It was also held that a building materials dealer operating from three offices or warehouses, at one of which was a repair shop, operated from an "establishment" within terms of Fair Labor Standards Act exempting certain retail establishments, as distinguished from a "traveling salesman" or mere "broker."—Zehring v. Brown Materials, D.C.Cal., 48 F.Supp. 740.

71. U.S.—Walling v. Armstrong Co., D.C.Mass., 68 F.Supp. 870.

72. U.S.—Davis v. Goodman Lumber Co., C.C.A.N.C., 133 F.2d 52—Walling v. Armstrong Co., D.C.Mass., 68 F.Supp. 870.

73. U.S.—Walling v. Armstrong Co., supra.

74. Tenn.—Bozeman v. Rhodes-Jennings Furniture Co., 181 S.W.2d 142, 181 Tenn. 274.

75. U.S.—Fleming v. A. B. Kirschbaum Co., C.C.A.Pa., 124 F.2d 567, affirmed Kirshbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Byus v. Traders Compress Co., D.C.Okl., 59 F.Supp. 18.
La.—Dennis v. Equitable Equipment Co., App., 7 So.2d 397.
Mo.—Agnew v. Johnson, 176 S.W.2d 489, 352 Mo. 222.

76. U.S.—Stucker v. Roselle, D.C. Ky., 37 F.Supp. 864.

77. U.S.—Stucker v. Roselle, supra.

favor of employees of a retail establishment, the term "retail establishment" is to be construed in the light of the purpose and history of the statute,[78] and it will not be literally applied where such application would lead to results plainly at variance with the policy of the legislation as a whole.[79] In ascertaining the legislative intent with respect to the scope of the term, the court is not bound by the interpretation made by the administrator of the wages and hours division[80] or by definitions evolved and accepted by a particular industry and governmental agencies connected therewith, although such definitions may be considered.[81] The word "retail" must be given a uniform meaning.[82]

The term "retail establishment" as used in the statute refers to a business making retail sales[83] and is one that sells goods in small quantities for profit[84] to persons who consume or use the materials, rather than to persons buying to sell again.[85] The intent of the provision is to exclude from the scope of the statute only business that is of a purely local nature,[86] that is, to exempt small local retail establishments, such as grocery stores, drugstores, hardware stores, and clothing shops.[87] It has been held, however, that the fact that the aggregate of sales by several retail stores operated by one employer amounts to a considerable sum does not take such employer out of the classification of operator of a retail establishment.[88]

The exemption contemplates an establishment serving ultimate consumers beyond the end of the flow of goods in commerce,[89] and, to the extent that sales are necessary for the production of goods for interstate commerce, they generally are not "sales" to an ultimate consumer for his personal use and accordingly are not retail sales within the

78. U.S.—Walling v. Consumers Co., C.C.A.Ill., 149 F.2d 626—Fleming v. American Stores Co., D.C.Pa., 42 F.Supp. 511, modified on other grounds, C.C.A., 133 F.2d 840.

79. U.S.—Walling v. American Stores Co., C.C.A.Pa., 133 F.2d 840.

80. U.S.—West Kentucky Coal Co. v. Walling, C.C.A.Tenn., 153 F.2d 582.

Authority

Although interpretations of administrator of wage and hour division are entitled to weight, the act confers no authority on administrator to extend or restrict scope of provision of the act that its wage and hour provisions are not applicable to employees engaged in retail establishments, the greater part of whose selling is in intra-state commerce.—White v. Jacobs Pharmacy Co., D.C.Ga., 47 F.Supp. 298.

Per cent of sales

A rule adopted by wage and hour division of department of labor for purposes of administration of act, that establishment may be considered retail if more than fifty per cent of the dollar value of its total sales are retail sales, is not binding on court in any given case, since the question cannot always be decided by arbitrary measurement and necessarily depends on the facts in each particular case.—Stucker v. Roselle, D.C.Ky., 37 F.Supp. 864.

81. U.S.—Walling v. West Kentucky Coal Co., D.C.Tenn., 60 F.Supp. 681, modified on other grounds, C.C.A., 153 F.2d 582.

Coal industry

(1) The special trade definition of "retail" used in coal industry, although long established, is not controlling in determining whether employees at a certain outlet were exempt from operation of act by reason of being employed in a retail establishment.—West Kentucky Coal Co. v. Walling, C.C.A.Tenn., 153 F.2d 582.

(2) The definition of a "retail dealer" by the solid fuels administrator for war, or under the terms of the bituminous coal code, or by the coal trade, is not controlling on congressional intent as to what constitutes a retail establishment under the Fair Labor Standards Act.—Walling v. Consumers Co., C.C.A.Ill., 149 F.2d 626.

82. U.S.—Walling v. Consumers Co., supra.

83. U.S.—Walling v. Consumers Co., supra.

The word "retail" is presumably used in the sense in which it is used in ordinary trade or commercial transactions.—Guess v. Montague, D.C.S.C., 51 F.Supp. 61, modified on other grounds, C.C.A., 140 F.2d 500.

84. U.S.—Armstrong Co. v. Walling, C.C.A.Mass., 161 F.2d 515—Bracey v. Luray, C.C.A.Md., 138 F.2d 8—Collins v. Kidd Dairy & Ice Co., C.C.A.Tex., 132 F.2d 79.

"There can be no question but what there is a clear distinction between retail merchants selling in small quantities to customers purchasing goods to satisfy their individual needs and enterprises which sell their goods in large lots to industrial and commercial users purchasing for a business motive. Congress intended to exempt employees in the former."—Walling v. Consumers Co., C.C.A.Ill., 149 F.2d 626, 630.

85. U.S.—Armstrong Co. v. Walling, C.C.A.Mass., 161 F.2d 515—Zehring v. Brown Materials, D.C.Cal., 48 F.Supp. 740.

86. U.S.—A. H. Phillips, Inc. v. Walling, Mass., 65 S.Ct. 807, 324 U.S. 490, 89 L.Ed. 1095, 157 A.L.R. 876.

87. U.S.—Roland Electrical Co. v. Walling, Md., 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383—A. H. Phillips, Inc. v. Walling, Mass., 65 S.Ct. 807, 324 U.S. 490, 89 L.Ed. 1095, 157 A.L.R. 876—Bracey v. Luray, C.C.A.Md., 138 F.2d 8—Walling v. American Stores Co., C.C.A.Pa., 133 F.2d 840—Fleming v. A. B. Kirschbaum Co., C.C.A.Pa., 124 F.2d 567, affirmed Kirshbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Phillips v. Meeker Co-op. Light & Power Ass'n, D.C.Minn., 63 F.Supp. 733.

Large establishment

The provision of Fair Labor Standards Act exempting from the wage and hour provisions of the act any employee engaged in a retail establishment the greater part of whose selling is in intra-state commerce was intended to apply only to ordinary retail stores and not to a large establishment shipping goods out of the state to two important retail outlets in another state.—Walling v. Goldblatt Bros., C.C.A.Ill., 128 F.2d 778. certiorari denied 63 S.Ct. 528, 318 U.S. 757, 87 L.Ed. 1130.

88. U.S.—Walling v. Wyandotte Furniture Co., D.C.Mo., 72 F.Supp. 98.

89. U.S.—Boutell v. Walling, Mich., 66 S.Ct. 631, 327 U.S. 463, 90 L.Ed. 786—Roland Electrical Co. v. Walling, Md., 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383—Martino v. Michigan Window Cleaning Co., 66 S.Ct. 379, 327 U.S. 173, 90 L.Ed. 603, rehearing denied 66 S.Ct. 699, 327 U.S. 816, 90 L.Ed. 1039—Walling v. Northwestern-Hanna Fuel Co., D.C.Minn., 67 F.Supp. 833.

meaning of the statutory exemption.[90] It has been held, however, that the exemption is not restricted to establishments which sell to private individuals as distinguished from business enterprises.[91]

The fact that a business engages in processing incidental to retail selling does not alter its retail character so as to remove it from the category of a retail establishment exempt under the statute,[92] but an employer is not exempt where the processing of goods sold is not merely incidental to retail sales made by it.[93] Generally an establishment engaged in manufacturing operations is not a retail establishment even though the goods manufactured are distributed at retail,[94] but it has been held that manufacturing conducted by a retail merchant solely to serve his customers buying at retail over his counter, with no return except as a result of such sales, is incidental to the retailing so that employees engaged in such manufacturing are within the exemption of the statute.[95] Where an employer operates a manufacturing plant and a retail establishment at the same time, the employees engaged in the retail business may be exempt while the employees of the manufacturing department are not.[96] Where an employer maintains numerous retail stores and at the same time engages in warehousing and distribution of goods to such stores, the enterprise as a whole is not a retail establishment exempt from the statute with respect to all its activities,[97] and the employees of the warehouse and central office of the chain store system are within the coverage of the act.[98]

In accordance with the foregoing rules, the employees of particular businesses have been held exempt as employed in retail establishments[99] or have

90. U.S.—Roland Electrical Co. v. Walling, Md., 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383—Walling v. Amidon, D.C.Colo., 59 F.Supp. 294.

91. U.S.—Super-Cold Southwest Co. v. McBride, C.C.A.Tex., 124 F.2d 90.

Subsequent commercial use

(1) It has been held that sales made by employer directly to consumers in small quantities were retail sales notwithstanding the products sold were used subsequently for commercial purposes.—White Motor Co. v. Littleton, C.C.A.Tex., 124 F.2d 92.

(2) A water company which sells the water to persons using it in the manufacture of foods or beverages may be entitled to claim the exemption.—Fountain v. St. Joseph Water Co., 180 S.W.2d 28, 352 Mo. 817.

92. U.S.—Samuels v. Houston, D.C.Ga., 46 F.Supp. 364.
Mo.—Fountain v. St. Joseph Water Co., 180 S.W.2d 28, 352 Mo. 817.
Tenn.—Bozeman v. Rhodes-Jennings Furniture Co., 181 S.W.2d 142, 181 Tenn. 274.

93. U.S.—Walling v. West Kentucky Coal Co., D.C.Tenn., 60 F.Supp. 681, modified on other grounds, C.C.A., 153 F.2d 582.

94. U.S.—Guess v. Montague, C.C.A.S.C., 140 F.2d 500—Walling v. Snellings, D.C.Ala., 53 F.Supp. 851—Samuels v. Houston, D.C.Ga., 46 F.Supp. 364.

Ice

An establishment engaged in the manufacture of ice and the sale thereof at retail is not exempt from the statute.—Collins v. Kidd Dairy & Ice Co., C.C.A.Tex., 132 F.2d 79—Wagner v. American Service Co., D.C.Iowa, 58 F.Supp. 32—Samuels v. Houston, D.C.Ga., 46 F.Supp. 364.

Employer held not manufacturer

Tenn.—Bozeman v. Rhodes-Jennings Furniture Co., 181 S.W.2d 142, 181 Tenn. 274.

95. U.S.—Walling v. Fred Wolferman, Inc., D.C.Mo., 54 F.Supp. 917, appeal dismissed, C.C.A., 144 F.2d 354.

96. U.S.—Fletcher v. Grinnell Bros., D.C.Mich., 62 F.Supp. 258, reversed on other grounds, C.C.A., 150 F.2d 337, conformed to, D.C., 64 F.Supp. 778—Prescription House v. Anderson, D.C.Tex., 42 F.Supp. 874.

97. U.S.—A. H. Phillips, Inc., v. Walling, Mass., 65 S.Ct. 807, 324 U.S. 490, 89 L.Ed. 1095, 157 A.L.R. 876—Fletcher v. Grinnell Bros., C.C.A.Mich., 150 F.2d 337, conformed to, D.C., 64 F.Supp. 778—Walling v. American Stores Co., C.C.A.Pa., 133 F.2d 840—Walling v. A. H. Phillips, Inc., D.C.Mass., 50 F.Supp. 749, affirmed, C.C.A., A. H. Phillips v. Walling, 144 F.2d 102, affirmed 65 S.Ct. 807, 324 U.S. 490, 89 L.Ed. 1095, 157 A.L.R. 876.

Contra Walling v. L. Wiemann Co., C.C.A.Wis., 138 F.2d 602, 150 A.L.R. 878, certiorari denied 64 S.Ct. 782, 321 U.S. 785, 88 L.Ed. 1077—Vogelpohl v. Lane Drug Co., D.C. Ohio, 55 F.Supp. 564—Veazey Drug Co. v. Fleming, D.C.Okl., 42 F.Supp. 689.

Transfers to other stores

Where employer operated six retail stores and approximately one third of all merchandise shipped in interstate commerce to main store was later transferred through requisitions and shipments to other five stores, service of main store employee in connection with such requisitions and shipments to other states was not covered by exemption applicable to any employee engaged in any retail or service establishment, the greater part of whose servicing or selling is in intrastate commerce.—Collier v. New River & Pocahontas Consolidated Coal Co., D.C.W.Va., 66 F.Supp. 288.

98. U.S.—A. H. Phillips, Inc., v. Walling, Mass., 65 S.Ct. 807, 324 U.S. 490, 89 L.Ed. 1095, 157 A.L.R. 876—Walling v. Goldblatt Bros., C.C.A.Ill., 152 F.2d 475, certiorari denied 66 S.Ct. 1344, 328 U.S. 854, 90 L.Ed. 1624—Fletcher v. Grinnell Bros., C.C.A.Mich., 150 F.2d 337, conformed to, D.C., 64 F.Supp. 778.

Contrary authority

Prior to determination of the question by the supreme court, numerous decisions held that the retail stores, warehouse, and central office of a chain store system could be considered as a single retail establishment so as to exempt all its employees.—Walling v. Block, C.C.A. Wash., 139 F.2d 268, certiorari denied 64 S.Ct. 787, 321 U.S. 788, 88 L.Ed. 1078—Walling v. L. Wiemann Co., C.C.A.Wis., 138 F.2d 602, 150 A.L.R. 878, certiorari denied 64 S.Ct. 782, 321 U.S. 785, 88 L.Ed. 1077—Walling v. Fred Wolferman, Inc., D.C.Mo., 54 F.Supp. 917, appeal dismissed, C.C.A., 144 F.2d 354—White v. Jacobs Pharmacy Co., D.C.Ga., 47 F.Supp. 298—Duncan v. Montgomery Ward & Co., D.C.Tex., 42 F.Supp. 879—Veazey Drug Co. v. Fleming, D.C. Okl., 42 F.Supp. 689.

99. U.S.—Vogelpohl v. Lane Drug Co., D.C.Ohio, 55 F.Supp. 564—Walling v. Fred Wolferman, Inc., D.C.Mo., 54 F.Supp. 917, appeal dismissed, C.C.A., 144 F.2d 354—Remington v. Shaw, D.C.Mich., 52 F.Supp. 465—Duncan v. Montgomery Ward & Co., D.C.Tex., 42 F.Supp. 879—Prescription House v. Anderson, D.C.Tex., 42 F.Supp. 874

been held nonexempt.[1]

Wholesalers. A wholesaler as distinguished from a retailer is not entitled to exemption.[2] Whether one is a wholesaler or operates a retail establishment depends on the nature of his business activities and not what he calls himself,[3] and the classification given his business by local law is not conclusive.[4] Whether an employer sells to those who sell again is the ordinary test for determining whether he is a "wholesaler."[5]

An employer who is primarily engaged in wholesale distribution but does some retail business is not exempt,[6] and it has been held that an employer whose nonretail sales exceed twenty five per cent of its monthly gross receipts may not be considered a retailer.[7] The retail branch of a business consisting of both wholesaling and retailing may not be considered a separate establishment for purposes of exemption where the proprietors treat both branches as one entire business with one set of books on

—Veazey Drug Co. v. Fleming, D.C.Okl., 42 F.Supp. 689.

Mo.—Fountain v. St. Joseph Water Co., 180 S.W.2d 28, 352 Mo. 817.

Particular businesses

(1) A camera shop ninety-nine per cent of whose sales were at retail.—Wideman v. Blanchard & Calhoun Realty Co., D.C.Ga., 50 F.Supp. 626.

(2) Retail grocery and feed store which did a nonretail business of less than twenty per cent of gross income and which did an interstate business of between fifteen and twenty per cent of total business.—Harris v. Hammond, C.C.A.Ga., 145 F.2d 333, certiorari denied 65 S.Ct. 858, 324 U.S. 859, 89 L.Ed. 416.

(3) Company engaged in purchasing coal largely from outside the state and distributing it to customers within the state for use by customers and not for resale.—Tagler v. F. D. Carpenter Coal Co., D.C.Ill., 57 F.Supp. 314.

(4) Newspaper of which approximately ten thousand copies were distributed within state and not more than three copies of which were sent out of state.—Curtis v. Segal, Ohio App., 55 N.E.2d 594.

1. U.S.—Walling v. Consumers Co., C.C.A.Ill., 149 F.2d 626—A. H. Phillips, Inc., v. Walling, C.C.A.Mass., 144 F.2d 102, affirmed 65 S.Ct. 807, 324 U.S. 490, 89 L.Ed. 1095, 157 A.L.R. 876—Bracey v. Luray, C.C.A.Md., 138 F.2d 8—Fleming v. American Stores Co., C.C.A.Pa., 133 F.2d 840—Super-Cold Southwest Co. v. McBride, C.C.A.Tex., 124 F.2d 90.

N.Y.—Watt v. Frank G. Shattuck Co., 62 N.Y.S.2d 111, 270 App.Div. 943.

Particular businesses

(1) Branch agency of company maintaining its operation of a nation-wide business, which principally engaged in retail sales, but which also to some extent sold merchandise at wholesale, taking merchandise for such purpose from a storage room which was maintained in same establishment as agency although separated by barriers.—Cron v. Goodyear Tire & Rubber Co., D.C.Tenn., 49 F.Supp. 1013.

(2) Coal, coke, and stevedoring company which sold to steamers, large office buildings, industrial plants, and apartment buildings, and about four per cent to dealers for resale, with about twenty-five per cent of all tonnage sold directly from mine at wholesale.—Barrick v. South Chicago Coal & Dock Co., C.C.A.Ill., 149 F.2d 960.

(3) Dealer in scrap metal, whose principal business was selling scrap metals to wholesalers and others who bought for shipment to large industrial and shipbuilding plants.—Bracey v. Luray, C.C.A.Md., 138 F.2d 8.

(4) Employer engaged in the sale of musical or vending machines to those who operated them.—Walling v. Sanders, C.C.A.Tenn., 136 F.2d 78.

(5) Shipyard engaged in storage, repair, reconstruction, sale, and purchase of yachts.—Cassone v. Wm. Edgar John & Associates, 57 N.Y.S.2d 169, 185 Misc. 573.

(6) Where over fifty per cent of coal from certain outlet of employer was delivered for use of factories, office buildings, large apartment houses, governmental agencies, and institutions, while from twenty-five to forty per cent of coal was sold in carload lots and barge lots to boats moving on river and price was not uniform, but was considerably lower than retail in all cases.—West Kentucky Coal Co. v. Walling, C.C.A.Tenn., 153 F.2d 582.

2. U.S.—Fleming v. Stillman, D.C.Tenn., 48 F.Supp. 609.

Coal

Sales and deliveries of coal to peddlers for resale, sales thereof to commercial and industrial customers, institutions, and governmental agencies, river and apartment sales thereof, and sales at quantity discounts, are nonretail sales, and an establishment making substantial portion of its sales to such purchasers is not a retail establishment.—Walling v. West Kentucky Coal Co., D.C.Tenn., 60 F.Supp. 681, modified on other grounds, C.C.A., 153 F.2d 582.

3. U.S.—Harris v. Hammond, D.C.Ga., 51 F.Supp. 91, affirmed, C.C.A., 145 F.2d 333, certiorari denied 65 S.Ct. 858, 324 U.S. 859, 89 L.Ed. 1416.

Grocery and feed dealer, who operated conventional retail store on which he depended primarily for his living and of whose gross sales not exceeding fifteen or twenty per cent represented goods delivered to customers outside the state, operated a retail establishment the greater part of whose selling was in intra-state commerce, so as to be exempt from wage and hour provisions of act, even though he posed as a wholesaler in some relationships and for some purposes and less than twenty per cent of his gross sales represented sales at wholesale.—Harris v. Hammond, supra.

4. U.S.—Bracey v. Luray, D.C.Md., 49 F.Supp. 821, reversed on other grounds, C.C.A., 138 F.2d 8.

5. U.S.—Harris v. Hammond, D.C.Ga., 51 F.Supp. 91, affirmed, C.C.A., 145 F.2d 333, certiorari denied 65 S.Ct. 858, 324 U.S. 859, 89 L.Ed. 1416.

Essential distinction

A wholesaler is one who sells to another for resale, who in turn is a retailer in that he sells to a person who consumes or uses the object, and essential distinction is that person buying from a retailer is the ultimate user or consumer of the commodity and does not sell it again whereas one buying from wholesaler buys only for purpose of selling again, in which event he is a retailer, or, if he buys an ingredient or part to produce goods for sale, he is not a retailer but a producer of goods.—Zehring v. Brown Materials, D.C.Cal., 48 F.Supp. 740.

Employer held not wholesaler

U.S.—Cyrus v. Martin-Jackson Tire & Supply Co., D.C.Kan., 56 F.Supp. 949—Zehring v. Brown Materials, D.C.Cal., 48 F.Supp. 740.

6. U.S.—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310—Petway v. Dobson, D.C.Tenn., 43 F.Supp. 277, vacated on other grounds 46 F.Supp. 114—Wood v. Central Sand & Gravel Co., D.C.Tenn., 33 F.Supp. 40.

7. U.S.—Walling v. Northwestern-Hanna Fuel Co., D.C.Minn., 67 F.Supp. 833—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363.

which there is no separation between the retail and wholesale business.[8]

Utilities. It has been held that the exemption of employees of retail establishments does not apply to utilities furnishing electric, gas, or water supply,[9] even though they sell, install, and service gas or electric appliances as an incident to the business;[10] but it has been held, on the other hand, that the exemption may apply to a public utility which makes such sales as to constitute it a retail establishment.[11]

c. Service Establishments

The meaning of the term "service establishment" as used in the Fair Labor Standards Act exempting employees of such establishments is to be ascertained from the legislative history of the act and the context of the term, and generally it refers to an establishment which has the ordinary characteristics of a retail establishment except that services instead of goods are sold.

The term "service establishment" may have a multiplicity of meanings, and in determining the sense in which it is used in the provision of the Fair Labor Standards Act exempting employees of such establishments, the legislative history of the exemption and the context of the term must be ascertained.[12] The test in determining the application of the exemption is the primary business of the employer, not the particular occupation of the employee, since the exemption relates to employers only.[13] The service establishment contemplated by the statute is an establishment which has the ordinary characteristics of retail establishments except that services instead of goods are sold;[14] it serves customers indiscriminately as a business and performs work or labor on the person or property of the customer or serves his physical needs or desires.[15] In other words, it is an establishment the principle activity of which is to furnish service to the consuming public, such as hotels, garages, barber shops, laundries, tailor shops, and the like.[16]

The words "retail" and "service" are required to be interpreted similarly, so that the broader meaning of "service" may be restricted to a meaning comparable to that given the narrower term "retail,"[17] and accordingly, in proportion as the meaning of the word "retail" is restricted to sales made in small quantities to ultimate consumers to meet personal rather than commercial and industrial uses of these articles, it is correspondingly appropriate to restrict the word "service" to services to ultimate users of them for personal rather than commercial purposes.[18] The exemption contemplates an establishment serving ultimate consumers beyond the end of the flow of goods in commerce,[19] and, to the ex-

8. U.S.—Petway v. Dobson, D.C. Tenn., 46 F.Supp. 114.

9. U.S.—Phillips v. Meeker Co-op. Light & Power Ass'n, D.C.Minn., 63 F.Supp. 733—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363.

10. U.S.—Brown v. Minngas Co., supra.

11. Mo.—Fountain v. St. Joseph Water Co., 180 S.W.2d 28, 352 Mo. 817.

12. U.S.—Walling v. Public Quick Freezing & Cold Storage Co., D.C. Fla., 62 F.Supp. 924—Guess v. Montague, D.C.S.C., 51 F.Supp. 61, modified on other grounds, C.C.A., 140 F.2d 500.

The term is presumably used in the sense in which it is used in ordinary trade or commercial transactions.—Guess v. Montague, supra.

13. U.S.—Fleming v. A. B. Kirschbaum Co., D.C.Pa., 38 F.Supp. 204, affirmed, C.C.A., 124 F.2d 567, affirmed Kirschbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638.

14. U.S.—New Mexico Public Service Co. v. Engel, C.C.A.N.M., 145 F.2d 636—Reynolds v. Salt River Valley Water User's Ass'n, C.C.A. Ariz., 143 F.2d 863, certiorari denied 65 S.Ct. 117, 323 U.S. 764, 89 L.Ed. 611—Consolidated Timber Co. v. Womack, C.C.A.Or., 132 F.2d 101—Fleming v. A. B. Kirschbaum Co., C.C.A.Pa., 124 F.2d 567, affirmed Kirschbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Walling v. Kerr, D.C.Pa., 47 F.Supp. 852.
N.Y.—Yunker v. Abbye Employment Agency, 32 N.Y.S.2d 715.

15. U.S.—Murphy v. Georgia Aero-Tech, D.C.Ga., 49 F.Supp. 982.

16. U.S.—Fleming v. A. B. Kirschbaum Co., C.C.A.Pa., 124 F.2d 567, affirmed Kirschbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L. Ed. 1638—Walling v. Griffin Cartage Co., D.C.Mich., 62 F.Supp. 396, affirmed, C.C.A., Griffin Cartage Co. v. Walling, 153 F.2d 587—Strand v. Garden Valley Telephone Co., D.C.Minn., 51 F.Supp. 898.

Interpretative bulletin

The definition of "service establishment" given by interpretative bulletin of wage and hour division of department of labor, for administration of act, as including restaurants, hotels, laundries, garages, barber shops, beauty parlors and funeral homes, wherein service is given to customers as chief business of the concern, or work or labor is performed upon the person of the customer or upon property left by the customer, may be followed in determining whether hat cleaner operated a "service establishment."—Stucker v. Roselle, D.C.Ky., 37 F.Supp. 864.

Restaurant

An ordinary restaurant or eating place renders a service rather than makes a sale and a restaurant is a service rather than a retail establishment.—Consolidated Timber Co. v. Womack, C.C.A.Or., 132 F.2d 101.

17. U.S.—Roland Electrical Co. v. Walling, 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383.

Modification

The word "service" is to be construed as modified by the word "retail" so as to read "retail servicing establishment."—Walling v. Thompson, D.C.Cal., 65 F.Supp. 686.

18. U.S.—Roland Electrical Co. v. Walling, Md., 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383.

Contrary authority

It has been held, however, that the exemption of service establishments is not restricted to those which perform services for private individuals as distinguished from business enterprises.—Lonas v. National Linen Service Corporation, C.C.A.Tenn., 136 F.2d 433, 150 A.L.R. 697, certiorari denied 64 S.Ct. 157, 320 U.S. 785, 88 L.Ed. 472.

19. U.S.—Roland Electrical Co. v. Walling, Md., 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383—Walling v.

tent that services are necessary for the production of goods for interstate commerce, they generally are not "services" to an ultimate consumer for his personal use.[20] The exemption for service establishments is limited to those which sell services to consumers and serve consumers directly[21] and does not extend to those which render some service incidental to the business[22] or are primarily engaged in manufacturing[23] or in processing.[24]

In accordance with the foregoing rules, numerous particular businesses have been held exempt from the act as service establishments[25] or have been held not exempt.[26] So it has been held that the exemp-

Northwestern-Hanna Fuel Co., D.C. Minn., 67 F.Supp. 833.

Independent establishment

The "service establishment" exempted by the act is not one which is part of the "production of goods for commerce" or a link in a chain to that end, but more precisely an establishment, probably independent, devoted to serving the public generally, the lesser part of its business being in interstate and the greater in intra-state commerce.—Consolidated Timber Co. v. Womack, C.C.A.Or., 132 F.2d 101.

An employer which contracts to furnish labor to establishments engaged in interstate commerce is not a service establishment.—Lorenzetti v. American Trust Co., D.C. Cal., 45 F.Supp. 128.

20. U.S.—Roland Electrical Co. v. Walling, Md., 66 S.Ct. 413, 326 U.S. 657, 90 L.Ed. 383.

Businesses held not service establishments

(1) Business of supplying messenger facilities to industrial and commercial enterprises.—Walling v. Allied Messenger Service, D.C.N.Y., 47 F.Supp. 773.

(2) Company furnishing window cleaning and similar maintenance services to producers.—Martino v. Michigan Window Cleaning Co., 66 S.Ct. 379, 327 U.S. 173, 90 L.Ed. 603, rehearing denied 66 S.Ct. 699, 327 U.S. 816, 90 L.Ed. 1039.

(3) Cookhouse operated as a necessary part of employer's production of logs for interstate commerce.—Consolidated Timber Co. v. Womack, C.C.A.Or., 132 F.2d 101.

(4) Detective agency engaged in the business of furnishing guards or watchmen to various customers and charged with protection and preservation of the buildings and machinery used to produce goods for commerce.—Walling v. Sondock, C.C.A. Tex., 132 F.2d 77, certiorari denied Sondock v. Walling, 63 S.Ct. 769, 318 U.S. 772, 87 L.Ed. 1142.

(5) Employer engaged exclusively in servicing motor transportation equipment operated by a corporation in interstate commerce.—Boutell v. Walling, 66 S.Ct. 631, 327 U.S. 463, 90 L.Ed. 786.

(6) Employer engaged in installing, servicing, and repair of burglar alarm systems.—Walling v. Thompson, D.C.Cal., 65 F.Supp. 686.

21. U.S.—Guess v. Montague, C.C.A. S.C., 140 F.2d 500—Walling v. Griffin Cartage Co., D.C.Mich., 62 F.Supp. 396, affirmed, C.C.A., Griffith Cartage Co. v. Walling, 153 F. 2d 587.

Laundry corporation employees engaged in work for another laundry were not employees of a service establishment so as to be exempt from maximum hour provisions of act, since such term is limited to concerns serving consumers directly.

U.S.—Philips v. Star Overall Dry Cleaning Laundry Co., D.C.N.Y., 55 F.Supp. 238, affirmed, C.C.A., 149 F.2d 416, certiorari denied All Service Laundry Corp. v. Phillips, 66 S.Ct. 677, 327 U.S. 780, 90 L.Ed. 1008, rehearing denied 66 S.Ct. 815, 327 U.S. 817, 90 L.Ed. 1040.

N.Y.—Koerner v. Associated Linen Laundry Suppliers, 62 N.Y.S.2d 774, 270 App.Div. 986.

22. U.S.—Fleming v. A. B. Kirschbaum Co., C.C.A.Pa., 124 F.2d 567, affirmed Kirshbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638.

Selling space in a building is not the equivalent of selling services to consumers so as to entitle building owners to exemption.—Kirschbaum v. Walling, N.Y. & Pa., 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Arsenal Bldg. Corporation v. Walling, N.Y. & Pa., 62 S.Ct. 1116, 316 U.S. 517, 86 L. Ed. 1638.

23. U.S.—Cullum v. Stevens, D.C. Tex., 46 F.Supp. 73.

Repairing

One who is engaged in manufacturing operations as distinguished from repairing may not claim the exemption.—Walling v. Armbruster, D. C.Ark., 51 F.Supp. 166.

24. U.S.—Fleming v. Peoples Packing Co., C.C.A.Okl., 132 F.2d 236, certiorari denied 63 S.Ct. 831, 318 U.S. 774, 87 L.Ed. 1144.

25. U.S.—Lonas v. National Linen Service Corporation, C.C.A.Tenn., 136 F.2d 433, 150 A.L.R. 697, certiorari denied 64 S.Ct. 157, 320 U. S. 785, 88 L.Ed. 472.

La.—Rachal v. Southwest Aircraft Service, App., 23 So.2d 637.

Particular businesses

(1) Business of milk bottlers' federation.—Twyman v. Milk Bottlers Federation, 47 N.Y.S.2d 206, 267 App.Div. 918.

(2) Corporation which, using patented mechanisms belonging to it, engaged in the business of logging wells and perforating casing of wells drilled for the production of oil or gas, for others upon the leases of others, in which the corporation had no interest.—Corbett v. Schlumberger Well Surveying Corporation, D.C. Tex., 43 F.Supp. 605.

(3) Employer engaged in hat cleaning and reblocking.—Stucker v. Roselle, D.C.Ky., 37 F.Supp. 864.

26. U.S.—Martino v. Michigan Window Cleaning Co., Mich., 66 S.Ct. 379, 327 U.S. 173, 90 L.Ed. 603, rehearing denied 66 S.Ct. 699, 327 U.S. 816, 90 L.Ed. 1039—Guess v. Montague, C.C.A.S.C., 140 F.2d 500—Schmidt v. Peoples Telephone Union of Maryville, C.C.A.Mo., 138 F.2d 13—Consolidated Timber Co. v. Womack, C.C.A.Or., 132 F.2d 101—Fleming v. Arsenal Bldg. Corporation, C.C.A.N.Y., 125 F.2d 278, affirmed Arsenal Bldg. Corporation v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Fleming v. A. B. Kirschbaum Co., C.C.A.Pa., 124 F.2d 567, affirmed Kirshbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638—Super-Cold Southwest Co. v. McBride, C.C.A. Tex., 124 F.2d 90—Straughn v. Schlumberger Well Surveying Corp., D.C.Tex., 72 F.Supp. 511—Lynch v. Embry-Riddle Co., D.C. Fla., 63 F.Supp. 992—Walling v. Armbruster, D.C.Ark., 51 F.Supp. 166—Murphy v. Georgia Aero-Tech, D.C.Ga., 49 F.Supp. 982—Cullum v. Stevens, D.C.Tex., 46 F. Supp. 73—Fleming v. Kenton Loose Leaf Tobacco Warehouse Co., D.C. Ky., 41 F.Supp. 255—Fleming v. A. B. Kirschbaum Co., D.C.Pa., 38 F.Supp. 204, affirmed, C.C.A., 124 F.2d 567, affirmed Kirschbaum v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638.

N.Y.—Barb v. Manhattan Laundries, 63 N.Y.S.2d 886, 188 Misc. 18.

Particular businesses

(1) Cold storage warehouse plant, used exclusively by concerns engaged in buying and selling merchandise which passed through the plant.—Walling v. Public Quick Freezing & Cold Storage Co., D.C. Fla., 62 F.Supp. 924.

tion does not apply to public utilities rendering services such as telephone or telegraph[27] or furnishing electricity, gas, or water.[28]

§ 151(15). —— Seamen

Persons who are employed as seamen are exempted from the provisions of the Fair Labor Standards Act as to minimum wages and overtime pay, and for the purpose of applying the exemption the term "seaman" must be taken in its ordinary meaning.

Under the provisions of the Fair Labor Standards Act, § 13 (a) (3), 29 U.S.C.A. § 213 (a) (3), the requirements of the statute with respect to minimum wages and overtime pay do not apply to any person who is employed as a seaman.[29] It has been held that the exemption must be strictly construed to effectuate the remedial purpose of congress in adopting the act[30] and that the term "seaman" is to be construed in accordance with the intent of the Fair Labor Standards Act, rather than in accordance with the meaning attributed to the term in other statutes.[31] Accordingly the term is not to be given the same broad inclusive meaning as is given to it in statutes passed for the benefit of seamen.[32]

For the purpose of applying the statutory exemption, the term "seaman" must be taken in its ordinary meaning,[33] and generally refers to an employee

(2) Duplicating, addressing, mailing, and mailing list establishment.—Hanzely v. Hooven Letters, 44 N.Y.S.2d 398.

(3) Employer engaged in repairing aircraft engines and parts for United States government in privately owned machine shop.—Lynch v. Embry-Riddle Co., D.C.Fla., 63 F. Supp. 992.

(4) Employer engaged in servicing motor transportation equipment owned and operated by a corporation in interstate commerce.—Boutell v. Walling, C.C.A.Mich., 148 F.2d 329, affirmed 66 S.Ct. 631, 327 U.S. 463, 90 L.Ed. 786.

(5) Employment agency.—Yunker v. Abbye Employment Agency, 32 N.Y.S.2d 715.

(6) Establishment engaged in the dyeing of yarn for use of manufacturers of carpets and rugs.—Walling v. Kerr, D.C.Pa., 47 F.Supp. 852.

(7) Laundry whose employees were engaged in cleaning and pressing garments for another laundry which rented garments to interstate customers.

U.S.—Phillips v. Star Overall Dry Cleaning Laundry Co., C.C.A.N.Y., 149 F.2d 416, certiorari denied All Service Laundry Corp. v. Phillips, 66 S.Ct. 677, 327 U.S. 780, 90 L.Ed. 1008, rehearing denied 66 S.Ct. 815, 327 U.S. 817, 90 L.Ed. 1040.

N.Y.—Koerner v. Associated Linen Suppliers Laundry, 57 N.Y.S.2d 92, 185 Misc. 123, affirmed 62 N.Y.S.2d 774, 270 App.Div. 986.

(8) One leasing motortrucks to persons, firms, and corporations for hire for use in both interstate and intra-state commerce and servicing such trucks.—Walling v. John J. Casale, Inc., D.C.N.Y., 51 F.Supp. 520.

(9) Private patrol service engaged in furnishing watchmen and guard service to various customers.—Walling v. New Orleans Private Patrol Service, D.C.La., 57 F.Supp. 143.

(10) Slaughtering department of packing house.—Walling v. Peoples Packing Co., C.C.A.Okl., 132 F.2d 236, certiorari denied Peoples Packing Co. v. Walling, 63 S.Ct. 831, 318 U.S. 774, 87 L.Ed. 1144.

(11) Theater company, with respect to its central executive, administrative, and supply offices.—Walling v. Paramount-Richards Theatres, D.C.La., 61 F.Supp. 290.

(12) Tobacco warehouse in which defendant engaged in selling looseleaf tobacco at public auction for growers, and owners thereof.—Walling v. Lincoln Looseleaf Warehouse Co., D.C.Tenn., 59 F.Supp. 601—Fleming v. Kenton Loose Leaf Tobacco Warehouse Co., D.C.Ky., 41 F.Supp. 255.

27. U.S.—Mexico Public Service Co. v. Engel, C.C.A.N.M., 145 F.2d 636—Schmidt v. Peoples Telephone Union of Maryville, Mo., C.C.A.Mo., 138 F.2d 13.

Other exemption

The provision of Fair Labor Standards Act, exempting switchboard operators in public telephone exchanges having less than five hundred stations from application of minimum and overtime wage provisions, negatives congress' intent to include public telephone exchanges in term "retail or service establishment," as used in provision exempting employees in such establishments.—Strand v. Garden Valley Telephone Co., D.C.Minn., 51 F.Supp. 898.

28. U.S.—Meeker Co-op. Light & Power Ass'n v. Phillips, C.C.A.Minn., 158 F.2d 698—New Mexico Public Service Co. v. Engel, C.C.A.N.M., 145 F.2d 636—Reynolds v. Salt River Valley Water Users Ass'n, C.C.A.Ariz., 143 F.2d 863, certiorari denied 65 S.Ct. 117, 323 U.S. 764, 89 L.Ed. 611.

29. U.S.—Weaver v. Pittsburgh S. S. Co., C.C.A.Ohio, 153 F.2d 597, certiorari denied Rymarkiewicz v. Pittsburgh S. S. Co., 66 S.Ct. 1351, 328 U.S. 858, 90 L.Ed. 1630—Walling v. Keansburg Steamboat Co., C.C.A.N.J., 162 F.2d 405—Walling v. Bay State Dredging & Contracting Co., C.C.A.Mass., 149 F.2d 346, certiorari denied 66 S.Ct. 140, 326 U.S. 760, 90 L.Ed. 457—Lewrimoore v. Union Bag & Paper Corporation, D.C.Ga., 30 F.Supp. 647, affirmed, C.C.A., Gall v. Union Bag & Paper Corporation, 116 F.2d 27, certiorari denied 61 S.Ct. 837, 313 U.S. 559, 85 L.Ed. 1519.

Origin of exemption

Pursuant to requests made by various maritime unions, the exemption was written into the act primarily to avoid conflict between the jurisdiction over seamen already conferred on the maritime commission with respect to wages, working conditions, and manning scales on subsidized merchant ships, 46 U.S.C.A. § 1131 (a), and that of the newly established wage and hour administration.—Anderson v. Manhattan Lighterage Corp., C.C.A.N.Y., 148 F.2d 971, certiorari denied Manhattan Lighterage Corp. v. Anderson, 66 S.Ct. 27, 326 U.S. 722, 90 L.Ed. 428.

30. U.S.—Walling v. Sternberg Dredging Co., D.C.Mo., 64 F.Supp. 758.

31. U.S.—Sternberg Dredging Co. v. Walling, C.C.A.Mo., 158 F.2d 678—Walling v. Bay State Dredging & Contracting Co., C.C.A.Mass., 149 F.2d 346, certiorari denied 66 S.Ct. 140, 326 U.S. 760, 90 L.Ed. 457—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616.

32. U.S.—Sternberg Dredging Co. v. Walling, C.C.A.Mo., 158 F.2d 678.

33. U.S.—Sternberg Dredging Co. v. Walling, supra—Walling v. W. D. Haden Co., C.C.A.Tex., 153 F.2d 196, certiorari denied W. D. Haden Co. v. Walling, 66 S.Ct. 1373, 328 U.S. 866, 90 L.Ed. 1636—Walling v. Bay State Dredging & Contracting Co., C.C.A.Mass., 149 F.2d 346, certiorari denied 66 S.Ct. 140, 326 U.S. 760, 90 L.Ed. 457—Gale v. Union Bag & Paper Corporation, C.C.A.Ga., 116 F.2d 27, certiorari denied 61 S.Ct. 837, 313 U.S. 559, 85 L.Ed. 1519.

who performs, as master or subject to the control of the master aboard a vessel, services rendered primarily as an aid in the operation of the vessel as a means of transportation,[34] or who performs duties of a maritime character on a vessel in navigable waters.[35] Accordingly whether a worker is a seaman, as the term is commonly used, depends on the character of his duties as maritime or otherwise,[36] and the mere fact that of necessity the work that an employee does is performed on navigable waters is alone not sufficient to remove him from the coverage of the statute.[37] Where an employee does some nautical work, but such work is merely incidental and occasional, and the dominant employment is work of another kind, the exemption does not apply.[38]

It has been held that the statutory exemption of seamen extends to employees on tug boats, performing commercial tug service for river boats and barge fleets moving in interstate commerce,[39] to employees on barges, whose work is necessary for their operation, welfare, and safety, notwithstanding the barges lack motive power or steering gear,[40] and to deck hands on dredges who aid in the navigation thereof.[41] It has been held, on the other hand, that the exemption does not extend to barge hands who do a substantial amount of nonexempt work[42] or to dredge workers whose work is essentially con-

34. U.S.—Walling v. Sternberg Dredging Co., D.C.Mo., 64 F.Supp. 758.

Members of crew

(1) The term "seamen" means members of the crew.—Bolan v. Bay State Dredging & Contracting Co., D.C.Mass., 48 F.Supp. 266.

(2) Term "members of a crew" as used in Longshoremen's Act, 33 U.S.C.A. § 902 (3) has been compared with, and distinguished from, the term "seamen" as used in the Fair Labor Standards Act, 29 U.S.C.A. § 213 (a) (3).—Bolan v. Bay State Dredging & Contracting Co., supra.

35. U.S.—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616.

36. U.S.—Walling v. Bay State Dredging & Contracting Co., C.C.A.Mass., 149 F.2d 346, certiorari denied 66 S.Ct. 140, 326 U.S. 760, 90 L.Ed. 457—Gale v. Union Bag & Paper Corporation, C.C.A.Ga., 116 F.2d 27, certiorari denied Gale v. Union Bag & Paper Corporation, 61 S.Ct. 837, 313 U.S. 559, 85 L.Ed. 1519.

Employees held not exempt as seamen

(1) Cashiers in ferry company's office and waiting rooms located on floating barge which was connected with shore by movable bridge, engaged principally in selling tickets, collecting charges, issuing receipts, and keeping records.—Helena Glendale Ferry Co. v. Walling, C.C.A.Ark., 132 F.2d 616.

(2) An employee who collected fares, delivered tickets to passengers, and supervised distribution of automobiles in movements from wharf to deck of an interstate ferry on the Mississippi river, but whose duties related only to the loading of the ferry.—Duke v. Helena-Glendale Ferry Co., 159 S.W.2d 74, 203 Ark. 865, 139 A.L.R. 1404.

37. U.S.—Sternberg Dredging Co. v. Walling, C.C.A.Mo., 158 F.2d 678.

A digger boat, used in unloading coal from vessels and not equipped or intended for navigation, was not a vessel, and night watchman employed to guard digger boat was not a seaman within exception to the act.—Spinner v. Waterways Fuel & Dock Co., 41 N.E.2d 144, 70 Ohio App. 121.

38. U.S.—Sternberg Dredging Co. v. Walling, C.C.A.Mo., 158 F.2d 678—Walling v. W. D. Haden Co., C.C.A.Tex., 153 F.2d 196, certiorari denied W. D. Haden Co. v. Walling, 66 S.Ct. 1373, 328 U.S. 866, 90 L.Ed. 1636—Walling v. Bay State Dredging & Contracting Co., C.C.A.Mass., 149 F.2d 346, certiorari denied 66 S.Ct. 140, 326 U.S. 760, 90 L.Ed. 457—Knudsen v. Lee & Simmons, D.C.N.Y., 68 F.Supp. 538.

39. U.S.—Walling v. West Ky. Coal Co., D.C.Tenn., 60 F.Supp. 681.

40. U.S.—Gale v. Union Bag & Paper Corporation, C.C.A.Ga., 116 F.2d 27, 61 S.Ct. 837, 313 U.S. 559, 85 L.Ed. 1519—Jordan v. American Oil Co., D.C.R.I., 51 F.Supp. 77.

Duties

Barge tenders, who were employed on pulpwood barges which were operated on inland waterways and were towed by tugs, and whose duties required them to see that barges were loaded evenly and not too near the edge, and to keep barges clean and to watch out for fire and to pump the bilge water when necessary, and to help in putting out the anchor and in tying the boat moorings, and who had no duty in connection with navigation but were subject to orders of captain of tug when in tow, were seamen so as to be exempt from minimum wage and maximum hour provisions of act.—Lowrimoore v. Union Bag & Paper Corporation, D.C.Ga., 30 F.Supp. 647, affirmed, C.C.A., Gale v. Union Bag & Paper Corporation, 116 F.2d 27, certiorari denied 61 S.Ct. 837, 313 U.S. 559, 85 L.Ed. 1519.

41. U.S.—Bolan v. Bay State Dredging & Contracting Co., D.C.Mass., 48 F.Supp. 266.

Employment by day

Fact that deck hand on a dredge was employed by day and for the most part ate and slept ashore did not necessarily prevent him from being a seaman and member of a crew, so as to be exempt.—Bolan v. Bay State Dredging & Contracting Co., supra.

42. U.S.—Anderson v. Manhattan Lighterage Corporation, C.C.A.N.Y., 148 F.2d 971, certiorari denied Manhattan Lighterage Corp. v. Anderson, 66 S.Ct. 27, 326 U.S. 722, 90 L.Ed. 428—Nelson v. Agwilines, Inc., D.C.N.Y., 70 F.Supp. 497.

Ratio of nautical to longshore duties

"Substantial," as used in wage and hour administrator's interpretive bulletin excluding from wage and hour provisions of the Fair Labor Standards Act barge tenders on nonself-propelled barges who do a substantial amount of nonexempt work, such as loading and unloading and activities relative thereto, denotes a comparison based on a ratio of nautical to longshore duties.—Anderson v. Manhattan Lighterage Corp., C.C.A.N.Y., 148 F.2d 971, certiorari denied Manhattan Lighterage Corp. v. Andersen, 66 S.Ct. 27, 326 U.S. 722, 90 L.Ed. 428.

Handling of cargo

(1) Employee on a barge who spent by far the greater part of his time in supervising, checking, and facilitating loading or unloading of cargo, and not merely caring for his barge and attending to her moorings was a "harbor worker" and not a "seaman" exempt from provisions of act.—McCarthy v. Wright & Cobb Lighterage Co., C.C.A.N.Y., 163 F.2d 92.

(2) Bargee who was employed on a lighter without means of self-propulsion and who spent most of his time in stevedoring work in connection with loading and discharging cargo was within the coverage of act

nected with excavation and not with navigation.[43] A person who worked on steamships during the fit-out and sailing seasons, and until the end of lay-up periods, and who worked, ate, and slept aboard ships during that time, has been held a seaman during the entire period of his employment.[44]

§ 151(16). —— Employees Engaged in Catching, Taking, or Harvesting of Aquatic Forms of Animal and Vegetable Life

Employees engaged in the catching, taking, or harvesting of fish or other aquatic forms of animal and vegetable life are exempted from the requirements of the Fair Labor Standards Act as to minimum wages and overtime pay.

The Fair Labor Standards Act § 13 (a) (5), 29 U.S.C.A. § 213 (a) (5), exempts from its requirements as to minimum wages and overtime pay employees employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other forms of animal and vegetable life, including the going to and returning from work,[45] and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof.[46] The manifest purpose of the exemption was to except such activities or operations connected with the maritime pursuits described as were controlled or materially influenced by natural factors or elements,[47] and in accordance with the general rule as to construction of exemptions from the statute, discussed supra § 151 (11), it has been held that the exemption must be strictly construed.[48]

The term "processing" in the exemption provision must be construed in accordance with the context and the legislative intent,[49] and refers to the immediate operations on shore which are necessary to make the catch or take marketable and not manufacturing operations having no immediate or necessary relationship in time to the catch or take, such as the making of buttons from shells.[50]

§ 151(17). —— Employees Engaged in Agriculture

The Fair Labor Standards Act exempts persons employed in agriculture from its provisions as to minimum wages and overtime pay, and the term "agriculture" is defined as farming in all its branches.

The Fair Labor Standards Act § 13 (a) (6), 29 U.S.C.A. § 213 (a) (6), expressly excludes from its requirements as to minimum wages and overtime pay any person employed in agriculture.[51] Such

and not a "seaman."—Knudsen v. Lee & Simmons, Inc., C.C.A.N.Y., 163 F.2d 95.

43. U.S.—Sternberg Dredging Co. v. Walling, C.C.A.Mo., 158 F.2d 678—Walling v. Bay State Dredging & Contracting Co., C.C.A.Mass., 149 F.2d 346, certiorari denied 66 S.Ct. 140, 326 U.S. 760, 90 L.Ed. 457—Walling v. Great Lakes Dredge & Dock Co., C.C.A.Ill., 149 F.2d 9, certiorari denied 66 S.Ct. 140, 326 U.S. 760, 90 L.Ed. 457.

44. U.S.—Weaver v. Pittsburgh S. S. Co., C.C.A.Ohio, 153 F.2d 597, certiorari denied Rymarkiewicz v. Pittsburgh S. S. Co., 66 S.Ct. 1351, 328 U.S. 858, 90 L.Ed. 1630.

Mooring intervals

If employees hired for first time during mooring intervals to repair vessel signed articles as seamen and continued to work on vessel in ensuing navigation period, they would be "seamen" exempt from benefits of Fair Labor Standards Act, but, if they did not sign articles and were employed only during the mooring interval, the exemption clause would not be applicable.—Walling v. Keansburg Steamboat Co., C.C.A.N.J., 162 F.2d 405.

45. U.S.—Waller v. Humphreys, C.C.A.Miss., 133 F.2d 193.

Dredging of shells

The provision of the act exempting persons engaged in taking, catching, and harvesting acquatic animals and plants does not include those who dredge shells which are the remains of life long ceased.—Walling v. W. D. Haden Co., C.C.A.Tex., 153 F.2d 196, certiorari denied W. D. Haden Co. v. Walling, 66 S.Ct. 1373, 328 U.S. 866, 90 L.Ed. 1636.

46. U.S.—Fleming v. Hawkeye Pearl Button Co., C.C.A.Iowa, 113 F.2d 52.

Held within exemption

(1) Plaintiffs who were employed at night by seafood packing and processing plant to raise steam on boilers with which to cure shrimp and oysters and to notify other employees at the proper hour by blowing a whistle and to cool off and wash out the boilers when plaintiffs came on duty and to mix brine for the next processing.—Waller v. Humphreys, C.C.A.Miss., 133 F.2d 193.

(2) Employee, engaged in driving truck in interstate and intra-state commerce, for purpose of loading, unloading, and delivering fish and sea food and also in handling, making ready, and preparing for shipment the sea food handled by employer and sold by it to wholesale and retail dealers.—Johnson v. Johnson & Co., D.C.Ga., 47 F.Supp. 650.

Exemption held not applicable

(1) Generally.—Walling v. Public Quick Freezing & Cold Storage Co., D.C.Fla., 62 F.Supp. 924.

(2) Employer engaged in manufacture and sale of boxes and barrels used for shipment of crabmeat and oysters in interstate commerce was not engaged in catching, taking, harvesting, etc., of fish, sponges, or other forms of animal and vegetable life including loading and packing of such products for shipment.—Dize v. Maddrix, C.C.A.Md., 144 F.2d 584, affirmed 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

47. U.S.—Fleming v. Hawkeye Pearl Button Co., C.C.A.Iowa, 113 F.2d 52.

48. U.S.—Fleming v. Hawkeye Pearl Button Co., supra.

49. U.S.—Fleming v. Hawkeye Pearl Button Co., supra.

50. U.S.—Fleming v. Hawkeye Pearl Button Co., supra.

51. U.S.—Damutz v. William Pinchbeck, Inc., C.C.A.Conn., 158 F.2d 882—Bowie v. Gonzalez, C.C.A. Puerto Rico, 117 F.2d 11.

Exemption for persons employed in processing agricultural products see infra § 151 (19).

exemption must be strictly construed in order to carry out the remedial purpose of the statute,[52] but it also must be given due effect in the case of employments within its terms.[53]

The term "agriculture" as used in the exemption provision is defined in another provision of the act, § 3(f), 29 U.S.C.A. § 203 (f), as meaning farming in all its branches,[54] including, among other things, the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities,[55] the raising of livestock, bees, fur-bearing animals, or poultry,[56] and any practices, including any forestry or lumbering operations, performed by a farmer or on a farm as an incident to, or in conjunction with, such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.[57] The word "agriculture" as so defined was intended to cover much more than what might be called ordinary farming activity,[58] and the scope of such definition may not be narrowed by applying different definitions of the word contained in other statutes.[59] However, the broad statutory definition should not be extended by construction to exempt laborers from the provisions of the act unless they are in fact employed in agriculture.[60]

An operation to be exempt from the application

Reason for exemption

(1) The manifest reason underlying the exemption is a recognition of the seasonal nature of the occupation.—Dye v. McIntyre Floral Co., 144 S.W.2d 752, 176 Tenn. 527.

(2) The exemption was adopted because agricultural labor was not subject to the usual evils of sweatshop conditions and long hours indoors at low wages and any attempt to regulate such wages would present a difficult problem in view of the fact that a substantial part of a farm laborer's income is for board and room.—Bowie v. Gonzalez, C.C.A. Puerto Rico, 117 F.2d 11—Jordan v. Stark Bros. Nurseries & Orchards Co., D.C.Ark., 45 F.Supp. 769.

52. U.S.—Damutz v. William Pinchbeck, Inc., C.C.A.Conn., 158 F.2d 882.

53. U.S.—Damutz v. William Pinchbeck, Inc., supra.

54. U.S.—Walling v. Peacock Corp., D.C.Wis., 58 F.Supp. 880.

55. U.S.—Vives v. Serralles, C.C.A. Puerto Rico, 145 F.2d 552.

Harvesting

(1) An interpretative bulletin promulgated by the administrator of the wage and hour division defining "harvesting" to include all operations customarily performed in connection with removal of crops by farmers from their growing position in the field is of some evidentiary value in determining whether sugar cane workers were exempt from act as agricultural workers.—Vives v. Serralles, supra.

(2) Employees who worked on sugar farms other than the one on which employer's sugar mill was located, who were engaged in laying portable tracks and moving them from one field to another, loading steel cars, portable track cars or oxcarts in the field, picking up cane dumped by ox-carts and loading railroad cars at the sidings, etc., were not engaged in transportation but were engaged in "harvesting" and were agricultural laborers exempt from operation of act.—Vives v. Serralles, supra.

Production

(1) The word "production" used in provision defining the term "agriculture" refers to that which is derived and produced from the soil, such as any farm produce.—Bowie v. Gonzalez, C.C.A.Puerto Rico, 117 F.2d 11.

(2) The grinding and processing operation through which sugar cane goes and which results in the production of raw sugar, are the processing of agricultural products and not the production of them, and hence employees engaged in sugar mills and transportation facilities were not excluded from the benefits of the act. —Bowie v. Gonzalez, supra.

(3) An employee who fired boilers which supplied heat for greenhouses and for sterilization of soil in which plants were grown indoors from seedlings by wholesale florist producing cut flowers from such plants, was engaged in production of horticultural commodity and hence was agricultural employee.—Damutz v. William Pinchbeck, Inc., C.C.A.Conn., 158 F.2d 882.

56. U.S.—Miller Hatcheries v. Boyer, C.C.A.Iowa, 131 F.2d 283.

Employees held not within definition

U.S.—Walling v. Friend, C.C.A.Mo., 156 F.2d 429.

Commercial hatchery

The corporate operator of a commercial chicken hatchery, located in a city and selling its baby chicks to farmers and poultry raisers, was engaged in raising of poultry within section of act defining "agriculture." —Miller Hatcheries v. Boyer, C.C.A. Iowa, 131 F.2d 283.

57. U.S.—Bowie v. Gonzalez, C.C.A. Puerto Rico, 117 F.2d 11.

Tenn.—Dye v. McIntyre Floral Co., 144 S.W.2d 752, 176 Tenn. 527.

Timber and sawmill operations

During period in which defendant's timber and sawmill operations were incidental to clearing of his land for farming operations, defendant's employees were employed in agriculture within exceptive provisions of the act.—Ridgeway v. Warren, D.C. Tenn., 60 F.Supp. 363.

58. U.S.—Damutz v. William Pinchbeck, Inc., C.C.A.Conn., 158 F.2d 882.

Types of work

Provision of the Fair Labor Standards Act exempting those engaged in agriculture, including those engaged in tilling of the soil, dairying, and the production, growing or harvesting of any agricultural or horticultural commodities, intended to include in the agricultural exemptions men who were engaged in the ordinary type of farm in types of work more like that of their brothers in the city factories than like that of the agricultural laborer of fifty years ago.—Damutz v. Wm. Pinchbeck, Inc., D.C.Conn., 66 F.Supp. 667, affirmed, C.C.A., 158 F.2d 882.

59. U.S.—Damutz v. William Pinchbeck, Inc., C.C.A.Conn., 158 F.2d 882.

60. U.S.—Jordan v. Stark Bros. Nurseries & Orchards Co., D.C. Ark., 45 F.Supp. 769.

Held not exempt

(1) Employees of co-operatives distributing electricity to persons engaged in farming and processing occupations.—Meeker Co-op. Light & Power Ass'n v. Phillips, C.C.A.Minn., 158 F.2d 698.

(2) Employees of cotton compressing plant.—Byus v. Traders Compress Co., D.C.Okl., 59 F.Supp. 18.

(3) Employees of sugar mill owners so far as they are engaged in the transportation of sugar cane from a farm owned by an independent colono and in the repair and maintenance of transportation facilities.—Calaf v. Gonzalez, C.C.A.Puerto Rico, 127 F.2d 934—Bowie v. Gonzalez, C.C. A.Puerto Rico, 117 F.2d 11.

(4) Employees of tobacco warehouse engaged in selling looseleaf tobacco at public auction for growers

of the statute under the definition of "agriculture" contained therein must be a farming operation or incident to farming,[61] and what is incident to farming must be determined on the basis of all pertinent facts, keeping in mind the purpose of the act and the circumscribed nature of exemptions.[62] The mere fact that owners of farms are also owners of mill and transportation facilities does not make transportation an incident to farming within the exemption of the statute,[63] and, where the employees engaged in transportation of agricultural products and in the repair and maintenance of transportation facilities are employed by the mill and do no agricultural work, the transportation is incidental to the milling, and not incidental to farming, so as to subject such employees to the operation of the statute.[64] Where an employer's business regularly involves the handling of commodities grown by others, those activities are not a practice incidental to farming, even though the handling and processing of his own grown commodities would be incidental to his farming operations.[65] It has been held, however, that if the employer is primarily engaged in handling commodities grown by himself, the exemption may apply although a negligible portion of his business involves commodities grown by others.[66]

The employees of a nursery or greenhouse which grows plants, flowers, and trees, prepares them for market, and sells them have been held exempt as engaged in agriculture,[67] but employees engaged in the storing, wrapping, and shipping of finished nursery stock purchased by the employer from other establishments have been held not exempt,[68] although there is some authority apparently to the contrary.[69] Where an employer operating a greenhouse handles some products not grown by himself, but such outside purchases are merely incidental to the main business and constitute but a small per cent of the total, his employees are exempt from the act.[70]

§ 151(18). —— Employees of Electric Railways or Local Trolley or Motorbus Carriers

Employees of electric railways or local trolley or motorbus carriers are exempted from requirements of the Fair Labor Standards Act as to minimum wages and overtime pay.

Under a provision of the Fair Labor Standards Act § 13 (a) (9), 29 U.S.C.A. § 213 (a) (9), the requirements of the statute with respect to minimum wages and overtime pay do not apply to employees of a street, suburban, or interurban electric railway, or local trolley or motorbus carrier.[71] Such exemption must be strictly construed to carry out the purposes and intent of the statute.[72] The term "local carrier" does not refer to one whose opera-

and owners thereof.—Walling v. Lincoln Looseleaf Warehouse Co., D.C. Tenn., 59 F.Supp. 601.

(5) Incorporated, co-operative peach growers' association and its employees who graded, packed and sold fresh peaches.—Walling v. McCracken County Peach Growers Ass'n, D.C.Ky., 50 F.Supp. 900.

(6) Live stock commission firm's clerical employees, who prepared statements for sellers showing gross proceeds of sales, firm's commissions, and other expenses and paid sellers their amount due.—Walling v. Friend, C.C.A.Mo., 156 F.2d 429.

61. U.S.—Calaf v. Gonzalez, C.C.A. Puerto Rico, 127 F.2d 934—Bowie v. Gonzalez, C.C.A.Puerto Rico, 117 F.2d 11—Walling v. Peacock Corp., D.C.Wis., 58 F.Supp. 880—Walling v. McCracken County Peach Growers Ass'n, D.C.Ky., 50 F.Supp. 900.

Processing sugar cane

Sugar producers who processed sugar cane of certain farmers, and as compensation for hauling the cane, and extracting the sugar therefrom, received approximately thirty-five per cent of the raw sugar produced from such cane, were not, in processing the cane, performing an operation as an incident to producers' own farming operations, so as to exempt them from the wage provisions of the act.—Bowie v. Gonzalez, C.C. A.Puerto Rico, 117 F.2d 11.

62. U.S.—Calaf v. Gonzalez, C.C.A. Puerto Rico, 127 F.2d 934.

63. U.S.—Calaf v. Gonzalez, supra.

64. U.S.—Calaf v. Gonzalez, supra.

65. U.S.—Walling v. Peacock Corp., D.C.Wis., 58 F.Supp. 880.

66. U.S.—Damutz v. William Pinchbeck, Inc., C.C.A.Conn., 158 F.2d 882.

67. U.S.—Jordan v. Stark Bros. Nurseries & Orchards Co., D.C.Ark., 45 F.Supp. 769.

Employees of store

Where employer engaged in agriculture in operation of a greenhouse and flower gardens maintained a store about four miles from greenhouse, in which store produce was sold at wholesale and retail, and the eight employees at store consisted of truckers, designers, and office workers, such employees were exempt from act as being engaged in practices incident to or in conjunction with farming operations.—Walling v. Rocklin, C.C.A.Iowa, 132 F.2d 3.

68. U.S.—Jordan v. Stark Bros. Nurseries & Orchards Co., D.C.Ark., 45 F.Supp. 769.

69. Tenn.—Dye v. McIntyre Floral Co., 144 S.W.2d 752, 176 Tenn. 527.

Handling commodities for market

Where employer was engaged in operating a large nursery and greenhouse and bought and contracted for and had shipped to it many items usual to nursery business consisting of shrubs, plants, trees, seeds, etc., employees who were employed in each of such operations were engaged in handling agricultural or horticultural commodities for market within exemption provisions of act. —Dye v. McIntyre Floral Co., supra.

70. U.S.—Walling v. Rocklin, C.C.A. Iowa, 132 F.2d 3.

71. U.S.—Gillette v. Rockland Coaches, C.C.A.N.Y., 142 F.2d 616—Conley v. Valley Motor Transit Co., C.C.A.Ohio, 139 F.2d 692—Walling v. Connecticut Co., D.C. Conn., 62 F.Supp. 733, affirmed, C. C.A., 154 F.2d 552, certiorari dismissed Connecticut Co. v. Walling, 67 S.Ct. 24, 329 U.S. 667, 91 L.Ed. ——.

72. U.S.—Walling v. Connecticut Co., D.C.Conn., 62 F.Supp. 733, affirmed, C.C.A., 154 F.2d 552, certiorari dismissed Connecticut Co. v. Walling, 67 S.Ct. 24, 329 U.S. 667, 91 L.Ed. ——.

tions are solely intra-state,[73] and the word "local" as used in the statute is not confined in its geographical aspect to operations adjacent to or within a commercial zone, but is used with reference to operations in commerce.[74]

It has been held that the exemption extends to employees of a local carrier engaged in producing electricity solely for operation of the local transportation system,[75] but where a substantial portion of the electricity is produced for other purposes the employees are not exempt,[76] since the exemption may not be extended to an otherwise nonexempt business in which the employer regularly and substantially engages merely because the employer's principal business is exempt.[77]

Exemption of employees of motor carriers subject to regulations of Interstate Commerce Commission is discussed infra § 151 (20).

§ 151(19). —— Employees Engaged in Processing Agricultural Products

a. Exemption from all requirements of act
b. Exemption from overtime provisions

a. Exemption from All Requirements of Act

An exemption from the requirements of the Fair Labor Standards Act as to minimum wages and overtime pay exists for persons employed within the area of production in the handling, packing, storing, or preparing in their raw or natural state of agricultural or horticultural commodities for market; and the application of the exemption depends solely on the character of the services of the particular employee, and on the location or place of employment with relation to the area of production of the agricultural commodity.

The Fair Labor Standards Act § 13 (a) (10), 29 U.S.C.A. § 213 (a) (10), exempts from its requirements as to minimum wages and overtime pay persons employed within the area of production, as defined by the administrator, engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products.[78] The exemption creates an exception to the general scope of the act and is subject to strict construction,[79] but in cases in which it is applicable it must be given effect.[80] The application of the exemption depends solely on the character of the services of the particular employee, and on the location or place of employment with relation to the area in which are produced the agricultural commodities on which the services of the employee are performed,[81] and the administrator is not authorized to make any definition or to prescribe any limitation on the operation of the exemption except to define "area of production."[82]

73. U.S.—Gillette v. Rockland Coaches, D.C.N.Y., 50 F.Supp. 617, affirmed, C.C.A., 142 F.2d 616.

"It seems to have been the intention to extend the exemption to all carriers who do a local business regardless of the fact that such business might extend into different cities and states. The growth of communities is controlled by geographic and economic influences and frequently overruns arbitrary municipal and state boundaries. It seems that the Fair Labor Standards Act recognized this fact and excluded from its provisions such operations as are local to any community."—Valley Motor Transit Co. v. Conley, D.C.Ohio, 49 F.Supp. 751, affirmed, C.C.A., Conley v. Valley Motor Transit Co., 139 F.2d 692.

Held "local" carriers

(1) A transit company which operated buses between municipalities in Rockland county, N. Y., Bergen county, N. J., and New York City, all operations being within about twenty-five miles from New York City, and which furnished transportation mainly to commuters to New York City.—Gillette v. Rockland Coaches, D.C.N.Y., 50 F.Supp. 617, affirmed, C.C.A., 142 F.2d 616.

(2) A transit company which operated busses between Steubenville, Ohio, and Beaver, Pennsylvania, and furnished transportation mainly to workers, school children, shoppers, and commuters, and which charged its fares according to zones rather than by mileage and maintained a service which was local in character as indicated by number of stops for taking on and discharging passengers.—Valley Motor Transit Co. v. Conley, D.C.Ohio, 49 F.Supp. 751, affirmed, C.C.A., Conley v. Valley Motor Transit Co., 139 F.2d 692.

74. U.S.—Gillette v. Rockland Coaches, D.C.N.Y., 50 F.Supp. 617, affirmed, C.C.A., 142 F.2d 616.

75. U.S.—Walling v. Connecticut Co., C.C.A.Conn., 154 F.2d 552, certiorari dismissed Connecticut Co. v. Walling, 67 S.Ct. 24, 329 U.S. 667, 91 L.Ed. ——.

76. U.S.—Walling v. Connecticut Co., D.C.Conn., 62 F.Supp. 733, affirmed, C.C.A., 154 F.2d 552, certiorari dismissed Connecticut Co. v. Walling, 67 S.Ct. 24, 329 U.S. 667, 91 L.Ed. ——.

77. U.S.—Walling v. Connecticut Co., D.C.Conn., 62 F.Supp. 733, affirmed, C.C.A., 154 F.2d 552, certiorari dismissed Connecticut Co. v. Walling, 67 S.Ct. 24, 329 U.S. 667, 91 L.Ed. ——.

78. U.S.—Addison v. Holly Hill Fruit Products, Fla., 64 S.Ct. 1215, 322 U.S. 607, 88 L.Ed. 1488, 153 A.L.R. 1007, rehearing denied 65 S.Ct. 27, 323 U.S. 809, 89 L.Ed. 645—Holt v. Barnesville Farmers Elevator Co., C.C.A.Minn., 145 F.2d 250, certiorari denied 65 S.Ct. 857, 324 U.S. 858, 89 L.Ed. 1416—Walling v. McCracken County Peach Growers Ass'n, D.C.Ky., 50 F.Supp. 900—Fleming v. Farmers Peanut Co., D.C.Ga., 37 F.Supp. 628, affirmed, C.C.A., 128 F.2d 404—Redlands Foothill Groves v. Jacobs, D.C.Cal., 30 F.Supp. 995.

Held not within exemption

U.S.—Bowie v. Gonzalez, C.C.A.Puerto Rico, 117 F.2d 11—Phillips v. Meeker Co-op. Light & Power Ass'n, D.C.Minn., 63 F.Supp. 733—Gordon v. Paducah Ice Mfg. Co., D.C.Ky., 41 F.Supp. 980.

79. U.S.—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 46 F.Supp. 969.

80. U.S.—Fleming v. Farmers Peanut Co., D.C.Ga., 37 F.Supp. 628, affirmed, C.C.A., 128 F.2d 404.

81. U.S.—Fleming v. Farmers Peanut Co., supra.

82. U.S.—Fleming v. Farmers Peanut Co., C.C.A.Ga., 128 F.2d 404—Clark v. Jacksonville Compress Co., D.C.Tex., 45 F.Supp. 43.

In order to come within the exemption, the employee must be engaged in work of the kind specified in the statute,[83] involving agricultural or horticultural commodities in their primitive state,[84] and the exemption does not apply to labor employed in the process of transformation from the primitive product to an artificial product, the raw and natural character having been eliminated.[85]

Area of production. In order to come within the exemption provided by the statute, the employment must exist within the area of production of the commodity as fixed by a valid regulation of the administrator,[86] and it has been held that the area of production may vary according to the particular commodity and the particular section of the country.[87] The statute casts on the administrator the authority and duty to define the term "area of production" of agricultural commodities with reference to which the exemption in subsidiary employments may operate,[88] and to the extent that his regulations proper-

83. U.S.—Silgaro v. Port Compress Co., D.C.Tex., 45 F.Supp. 88.

Work held of exempt nature

(1) Employer engaged in business of crushing and otherwise manipulating cotton seed for purpose of extracting cottonseed oil and producing cake meal.—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 46 F. Supp. 969.

(2) Grain elevator company which received, weighed, tested, graded, cleaned, stored, and loaded grain.—Holt v. Barnesville Farmers Elevator Co., C.C.A.Minn., 145 F.2d 250, certiorari denied 65 S.Ct. 857, 324 U.S. 858, 89 L.Ed. 1416—Remington v. Shaw, D.C.Mich., 52 F.Supp. 465.

(3) Nonprofit co-operative associations engaged in picking and packing citrus fruit.—Redlands Foothill Groves v. Jacobs, D.C.Cal., 30 F.Supp. 995.

(4) Shelling peanuts even though done by machinery and off the producing farm and by one not a farmer.—Fleming v. Farmers Peanut Co., C.C.A.Ga., 128 F.2d 404.

(5) Work in a gristmill.—Anderson v. Meacham, 8 S.E.2d 459, 62 Ga. App. 145.

Work held not of exempt nature

(1) Employer engaged in compressing but not in ginning cotton and an employee performing the duties of a general utility laborer were not exempt under provision exempting employees of an employer engaged in the ginning and compressing of cotton.—Silgaro v. Port Compress Co., D.C.Tex., 45 F.Supp. 88.

(2) Employee whose work consisted entirely of servicing equipment used in the transportation, distribution, and sale of ice cream after the processing had been completed was not engaged in handling, etc., agricultural commodities in their raw or natural state, nor was he engaged in the making of any dairy products within meaning of provision excluding from overtime provisions of the Fair Labor Standards Act individuals engaged in such work.—Colbeck v. Dairyland Creamery Co., S.D., 17 N.W.2d 262.

Additional duties

Where employees had duties in addition to "handling, packing, drying" agricultural commodities for market, they did not fall within provision exempting from minimum wage and overtime compensation provisions of act persons employed within area of production exclusively engaged in "handling, packing, drying" agricultural commodities for market.—Walling v. Peacock Corp., D.C.Wis., 58 F.Supp. 880.

84. U.S.—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 46 F.Supp. 969.

Activity classed as agricultural labor

In order to authorize the exemption, the preparation of commodity must bear such a proximity to its raw or natural state that the activity involved will be classified as agricultural labor within the contemplation of the act.—Abram v. San Joaquin Cotton Oil Co., supra.

The peanut is an agricultural commodity, both before and after process of shelling is performed, within meaning of provision of act.—Fleming v. Farmers Peanut Co., C.C.A.Ga., 128 F.2d 404.

Poultry

The handling of poultry for market is not included in the handling of agricultural commodities for market, within meaning of provision exempting the handling of agricultural commodities for market from the wage and hour provisions of the act.—Stratton v. Farmers Produce Co., C.C.A.Ark., 134 F.2d 825.

Exemption held not applicable

(1) Sugar producers' employees who were employed in mills and transportation service of the producers were not exempt, since processing of sugar is not expressly mentioned in the statute and production of raw sugar is not the preparation of an agricultural commodity in its raw or natural state.—Bowie v. Gonzalez, C.C.A.Puerto Rico, 117 F.2d 11.

(2) Exemption was intended to apply only to such activities as washing and grading agricultural products after full growth had been attained and did not exempt from the act one engaged in furnishing heat to commercial greenhouses, apparently including the packing room.—Damutz v. Wm. Pinchbeck, Inc., D.C. Conn., 66 F.2d 667, affirmed, C.C.A., 158 F.2d 882.

85. U.S.—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 46 F.Supp. 969.

Manipulating flax seed

The exemption did not apply to employer's business of crushing and otherwise manipulating flax seed and other oil producing vegetable commodity for purpose of extracting merchantable oil and producing cake meal.—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F.Supp. 393—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 46 F.Supp. 969.

86. U.S.—Walling v. Peacock Corp., D.C.Wis., 58 F.Supp. 880.

Employment held within area of production

U.S.—Byus v. Traders Compress Co., D.C.Okl., 59 F.Supp. 18—Silgaro v. Port Compress Co., D.C.Tex., 45 F. Supp. 88—Clark v. Jacksonville Compress Co., D.C.Tex., 45 F.Supp. 43.

Tex.—Carpenter v. Waxahachie Cotton Warehouse, Civ.App., 162 S.W. 2d 139, error refused.

Employment held not within area of production

U.S.—Walling v. Lincoln Looseleaf Warehouse Co., D.C.Tenn., 59 F. Supp. 601—Shain v. Armour & Co., D.C.Ky., 50 F.Supp. 907.

87. U.S.—Walling v. Peacock, D.C. Wis., 58 F.Supp. 880.

88. U.S.—Addison v. Holly Hill Fruit Products, Fla., 64 S.Ct. 1215, 322 U.S. 607, 88 L.Ed. 1488, 153 A.L.R. 1007, rehearing denied 65 S.Ct. 27, 323 U.S. 809, 89 L.Ed. 645—Fleming v. Farmers Peanut Co., D.C.Ga., 37 F.Supp. 628, affirmed, C.C.A., 128 F.2d 404.

Geographic lines

Under Fair Labor Standards Act § 13 (a) (10), 29 U.S.C.A. § 213 (a) (10), exempting from wage and hour provisions employees, within area of production as defined by Administrator, engaged in canning of agricultural commodities for market, congress restricted administrator to drawing of geographic lines, even though he may take into account all relevant economic factors in choice

ly delimit the area in accordance with the intent of the statute they are valid;[89] but they are invalid where they go beyond the intent of the statute,[90] as where they are not based solely on a reasonable geographical limitation, but introduce a limitation based on the number of employees within a defined area[91] or on the population of the place where the establishment is located.[92]

Where the administrator's regulation defining the term "area of production" is invalid, the court should not itself define the term but should await the promulgation of a valid definition,[93] but it has been held that the failure of the administrator to define the area of production as applied to a particular employer's business will not deprive that employer of the right, if any, to exemption, and that the courts will make the definition.[94]

b. Exemption from Overtime Provisions

The Fair Labor Standards Act exempts from its provisions as to overtime pay, either completely or for a specified period of time, employees engaged in the processing of specified agricultural and dairy products; but only the specific processes mentioned are exempt, and the employees must be exclusively engaged in work of the kind specified.

The Fair Labor Standards Act § 7 (c), 29 U.S.C.A. § 207 (c), provides for exemption from its provisions as to overtime pay, either completely or for a specified period of time, employees of an employer engaged in the processing of specified agricultural and dairy products[95] in any place of employment

of areas open to him.—Addison v. Holly Hill Fruit Products, Fla., 64 S.Ct. 1215, 322 U.S. 607, 88 L.Ed. 1488, 153 A.L.R. 1007, rehearing denied 65 S.Ct. 27, 323 U.S. 809, 89 L.Ed. 645.

Boundaries

It has been held that the authority of the administrator to "define" an area of production does not presuppose that boundaries already exist and that the administrator must merely find them.—Redlands Foothill Groves v. Jacobs, D.C.Cal., 30 F.Supp. 995.

Changed conditions

Fact that congress empowered the administrator to define the area of production indicates that it was believed that changed conditions might bring about changes in definition and that definition might vary in different localities.—Silgaro v. Port Compress Co., D.C.Tex., 45 F.Supp. 88.

Regulations construed

(1) With respect to commodities to which applicable.—Fleming v. Farmers Peanut Co., D.C.Ga., 37 F.Supp. 628, affirmed, C.C.A., 128 F.2d 404.

(2) With respect to geographical limits imposed.—Walling v. Peacock Corp., D.C.Wis., 58 F.Supp. 880—Holt v. Barnesville Farmers Elevator Co., D.C.Minn., 52 F.Supp. 468, reversed on other grounds, C.C.A., 145 F.2d 250, certiorari denied 65 S.Ct. 857, 324 U.S. 858, 89 L.Ed. 1416.

(3) Where the regulation requires that, in order to be within the area of production, the products used by the establishment must be obtained within an area of ten miles, all of the products must be so obtained and not merely a substantial part thereof.—Addison v. Holly Hill Fruit Products, Fla., 64 S.Ct. 1215, 322 U.S. 607, 88 L.Ed. 1488, 153 A.L.R. 1007, rehearing denied 65 S.Ct. 27, 323 U.S. 809, 89 L.Ed. 645.

(4) In determining whether employees performed duties exempting them from protection of act within area of production, as defined by administrator, each of administrator's successive definitions of such phrase should be applied only to portion of plaintiffs' employment period during which it was operative, not to entire period.—Holt v. Barnesville Farmers Elevator Co., D.C.Minn., 52 F.Supp. 468, reversed on other grounds, C.C.A., 145 F.2d 250, certiorari denied 65 S.Ct. 857, 324 U.S. 858, 89 L.Ed. 1416.

89. U.S.—Addison v. Holly Hill Fruit Products, Fla., 64 S.Ct. 1215, 322 U.S. 607, 88 L.Ed. 1488, 153 A.L.R. 1007, rehearing denied 65 S.Ct. 27, 323 U.S. 809, 89 L.Ed. 645—Fleming v. Farmers Peanut Co., C.C.A.Ga., 128 F.2d 404—Silgaro v. Port Compress Co., D.C.Tex., 45 F.Supp. 88—Gordon v. Paducah Ice Mfg. Co., D.C.Ky., 41 F.Supp. 980.

Presumption of validity

U.S.—Gordon v. Paducah Ice Mfg. Co., supra.

90. U.S.—Addison v. Holly Hill Fruit Products, Fla., 64 S.Ct. 1215, 322 U.S. 607, 88 L.Ed. 1488, 153 A.L.R. 1007, rehearing denied 65 S.Ct. 27, 323 U.S. 809, 89 L.Ed. 645—Holt v. Barnesville Farmers Elevator Co., C.C.A.Minn., 145 F.2d 250, certiorari denied 65 S.Ct. 857, 324 U.S. 858, 89 L.Ed. 1416—Shain v. Armour & Co., D.C.Ky., 50 F.Supp. 907—Clark v. Jacksonville Compress Co., D.C.Tex., 45 F.Supp. 43—Fleming v. Farmers Peanut Co., D.C.Ga., 37 F.Supp. 628, affirmed, C.C.A., 128 F.2d 404.

91. U.S.—Addison v. Holly Hill Fruit Products, Fla., 64 S.Ct. 1215, 322 U.S. 607, 88 L.Ed. 1488, 153 A.L.R. 1007, rehearing denied 65 S.Ct. 27, 323 U.S. 809, 89 L.Ed. 645—Holt v. Barnesville Farmers Elevator Co., C.C.A.Minn., 145 F.2d 250—Fleming v. Farmers Peanut Co., C.C.A.Ga., 128 F.2d 404—Walling v. McCracken County Peach Growers Ass'n, D.C.Ky., 50 F.Supp. 900.

Contra Silgaro v. Port Compress Co., D.C.Tex., 45 F.Supp. 88—Gordon v. Paducah Ice Mfg. Co., D.C.Ky., 41 F.Supp. 980.

Void in entirety

Administrator's regulations providing that an individual is employed within area of production exempt from wage and hour provisions of Fair Labor Standards Act if establishment obtains commodities from the immediate locality, or from the general vicinity, and if number of employees in establishment does not exceed seven, are void in their entirety because of invalid limitation as to number of employees within a defined area, since court could not assume that administrator would have defined "area of production" merely by deleting the employee provision, had he known of its invalidity.—Addison v. Holly Hill Fruit Products, Fla., 64 S.Ct. 1215, 322 U.S. 607, 88 L.Ed. 1488, 153 A.L.R. 1007, rehearing denied 65 S.Ct. 27, 323 U.S. 809, 89 L.Ed. 645—Fleming v. Farmers Peanut Co., D.C.Ga., 37 F.Supp. 628, affirmed, C.C.A., 128 F.2d 404.

Contra Fleming v. Farmers Peanut Co., C.C.A.Ga., 128 F.2d 404.

92. U.S.—Fleming v. Farmers Peanut Co., D.C.Ga., 37 F.Supp. 628, affirmed, C.C.A., 128 F.2d 404.

93. U.S.—Addison v. Holly Hill Fruit Products, Fla., 64 S.Ct. 1215, 322 U.S. 607, 88 L.Ed. 1488, 153 A.L.R. 1007, rehearing denied 65 S.Ct. 27, 323 U.S. 809, 89 L.Ed. 645.

Contra Fleming v. Farmers Peanut Co., D.C.Ga., 37 F.Supp. 628, affirmed, C.C.A., 128 F.2d 404.

94. U.S.—Silgaro v. Port Compress Co., D.C.Tex., 45 F.Supp. 88—Clark v. Jacksonville Compress Co., D.C.Tex., 45 F.Supp. 43.

95. U.S.—Shain v. Armour & Co., D.C.Ky., 50 F.Supp. 907—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F.Supp. 393.

Purpose of exemption

(1) Purpose of provision was to

where they are so engaged.[96] It has been held that such provision does not exempt industries as a whole from the overtime provisions of the act but only the specific processes therein mentioned.[97] The exemption applies only to employees exclusively engaged in work of the kind specified,[98] and the exemption provision is inapplicable if the employee during any part of the work week for which exemption is claimed does any work which does not fall within the scope of the exemption.[99]

The statute does not limit the period of exemption from overtime provisions in the case of employers engaged in the processing of certain specified commodities.[1] However, the exemption from the provisions as to overtime applies only during a period of not more than fourteen work weeks in the aggregate in any calendar year in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fruits or vegetables,[2] or in the first processing, within the area of production, of any agricultural or horticultural commodity during seasonal operations,[3] or in handling, slaughtering, or dressing poultry or livestock.[4] The employer may elect to take the benefit of the exemption during any work weeks, whether or not consecutive, if they do not exceed fourteen

relieve processors of seasonal agricultural commodities from the hour provisions of the act so as to enable them more easily to conduct their operations during peak seasons.—Abram v. San Joaquin Cotton Oil Co., supra.

(2) Purpose of exemption to employers engaged in handling, slaughtering, or dressing live stock was to enable employers to avoid burden of time and a half for overtime in those seasonal or peak periods when they must work to take care of the product on market, the amount of which depends on factors beyond their control.—Walling v. Swift & Co., C.C.A. Ill., 131 F.2d 249.

Ginning and compressing of cotton
U.S.—Byus v. Traders Compress Co., D.C.Okl., 59 F.Supp. 18.

Exemption held inapplicable
U.S.—Walling v. Home Loose Leaf Tobacco Warehouse Co., D.C.Ky., 51 F.Supp. 914.
Kan.—Sykes v. Lochmann, 132 P.2d 620, 156 Kan. 223, certiorari denied Lochmann v. Sykes, 63 S.Ct. 1165, 319 U.S. 753, 87 L.Ed. 1707.

96. U.S.—Fleming v. Swift & Co., D.C.Ill., 41 F.Supp. 825, affirmed, C.C.A., Walling v. Swift & Co., 131 F.2d 249.

Portions of plant
"Place of employment" as used in statute means those portions of plant devoted by employer to the "handling," "slaughtering," or "dressing" of livestock as the latter quoted terms are construed in meat packing industry.—Fleming v. Swift & Co., D.C.Ill., 41 F.Supp. 825, affirmed, C.C.A., Walling v. Swift & Co., 131 F.2d 249.

97. U.S.—Walling v. De Soto Creamery & Produce Co., D.C.Minn., 51 F.Supp. 938—Shain v. Armour & Co., D.C.Ky., 50 F.Supp. 907—Hendricks v. Di Giorgio Fruit Corporation, D.C.Cal., 49 F.Supp. 573—Fleming v. Swift & Co., D.C.Ill., 41 F.Supp. 825, affirmed, C.C.A., Walling v. Swift & Co., 131 F.2d 249.
S.D.—Colbeck v. Dairyland Creamery Co., 17 N.W.2d 262.

98. U.S.—Shain v. Armour & Co., D.C.Ky., 50 F.Supp. 907.

Where only a small part of duties of shipping and maintenance employees of creamery dealt with first processing, they were not exempt.—Shain v. Armour & Co., supra.

99. U.S.—Walling v. De Soto Creamery & Produce Co., D.C.Minn., 51 F.Supp. 938—Shain v. Armour & Co., D.C.Ky., 50 F.Supp. 907—Fleming v. Swift & Co., D.C.Ill., 41 F.Supp. 825, affirmed, C.C.A., Walling v. Swift & Co., 131 F.2d 249.
Kan.—Sykes v. Lochmann, 132 P.2d 620, 156 Kan. 223, certiorari denied Lochmann v. Sykes, 63 S.Ct. 1165, 319 U.S. 753, 87 L.Ed. 1707.

1. U.S.—Vives v. Serralles, C.C.A. Puerto Rico, 145 F.2d 552.

Sugar cane
U.S.—Vives v. Serralles, supra.

2. U.S.—Walling v. McCracken County Peach Growers Assn, D.C.Ky., 50 F.Supp. 900—Hendricks v. Di Giorgio Fruit Corporation, D.C.Cal., 49 F.Supp. 573.

3. U.S.—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F.Supp. 393—Gordon v. Paducah Ice Mfg. Co., D.C.Ky., 41 F.Supp. 980.

Tobacco
An employer could not claim exemption under regulation exempting employees performing operations on materials which come from farms in general vicinity of place of employment, on theory that county where employer's tobacco auction sales were had was the customary market for tobacco of noncontiguous counties, where neither custom nor convenience was prescribed as controlling test.—Walling v. Home Loose Leaf Tobacco Warehouse Co., D.C.Ky., 51 F.Supp. 914.

4. U.S.—Fleming v. Swift & Co., D.C.Ill., 41 F.Supp. 825, affirmed, C.C.A., Walling v. Swift & Co., 131 F.2d 249.

Functional limitation
The words "handling" "slaughtering," and "dressing" are a functional limitation on classes of employees for whom an exemption from overtime provisions may be claimed by an employer, and only those employees of a packing plant working in certain departments are exempt; effect will be given to the trade usage of quoted language, and the exemption will be restricted to activities embraced by such trade usage.—Fleming v. Swift & Co., D.C.Ill., 41 F.Supp. 825, affirmed, C.C.A., Walling v. Swift & Co., 131 F.2d 249.

What constitutes exempt work
(1) Within poultry and livestock exemption, "handling" refers to those operations that start when the plant takes possession of the live poultry and includes all the operations down to the slaughtering of the poultry; "slaughtering" constitutes the whole killing operations and ends when the animal life is extinct; "dressing" refers to the freeing of the body from feathers and matter not suitable for consumption, the evisceration of the carcass, and all operations performed upon the carcass after slaughtering and until it goes to the coolers; employees whose work was connected with poultry dressed prior to receipt were not exempted.—Shain v. Armour & Co., D.C.Ky., 50 F.Supp. 907.

(2) Where watchman of company engaged in meat packing business had hours of work that were the same the year around and not seasonal, company could not deduct, from its wage liability to him under the Fair Labor Standards Act of 1938, the exemptions provided by the act.
Minn.—McMillan v. Wilson & Co., 2 N.W.2d 838, 212 Minn. 142, petition dismissed Wilson & Co. v. McMillan, 63 S.Ct. 81, 317 U.S. 702, 87 L.Ed. 561.
Okl.—Brooks Packing Co. v. Henry, 137 P.2d 918, 192 Okl. 533.

work weeks in the aggregate,[5] and the exemption may be claimed at different times as to each of the employees.[6]

In order to render the exemption applicable, the employer must be engaged in the processing, or first processing, of the specified commodities,[7] and the exemption may be claimed only during the season when processing or first processing is carried on.[8] The term "first processing" means that processing which first results in a marketable product,[9] and, where operations constitute a continuous processing that may not be halted at any point prior to completion, all of such operations may be considered first processing.[10] It has been held that the exemption is applicable not only to employees actually engaged in first processing operations, but to those whose work is incidental and necessary thereto,[11] but an employee whose work consists entirely of servicing equipment used in the transportation, distribution, and sale of the product after the processing has been completed has been held not within the exemption.[12]

Exemption of employees in industries of a seasonal nature is discussed infra § 151 (21).

§ 151(20). —— Employees or Employers Subject to Provisions of Interstate Commerce Act

a. In general
b. Employees of motor carriers

a. In General

Employees of an employer subject to the provisions of the Interstate Commerce Act are exempted from the overtime pay provisions of the Fair Labor Standards Act.

The Fair Labor Standards Act § 13 (b) (2), 29 U.S.C.A. § 213 (b) (2), exempts from its requirements as to overtime pay any employee of an employer subject to the provisions of the Interstate Commerce Act §§ 1-27, 49 U.S.C.A. §§ 1-27,[13] and such exemption may apply notwithstanding the em-

5. U.S.—Selan v. Becker, D.C.Wis., 71 F.Supp. 689—Fleming v. Swift & Co., D.C.Ill., 41 F.Supp. 825, affirmed, C.C.A., Walling v. Swift & Co., 131 F.2d 249.

6. U.S.—Walling v. Swift & Co., C.C.A.Ill., 131 F.2d 249.

7. U.S.—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F. Supp. 393.

Transportation or receipt

Employees, engaged in transporting cream to creamery or in receiving it, or in pasteurizing or churning cream, are exempt.—Shain v. Armour & Co., D.C.Ky., 50 F.Supp. 907.

Butter

Creamery employees exclusively engaged in first processing of cream into butter are exempt from overtime provisions of act, but employees who handle butter churned elsewhere are not.—Shain v. Armour & Co., supra.

Cottonseed

(1) The term "processing of cottonseed," as used in provision of act exempting employer from overtime provisions of act with reference to employees engaged in processing of cottonseed, refers only to that part of employer's business which has to do with preparation and manufacture of cottonseed for the market, commonly known as the "crushing season," and all necessary laborers, watchmen, and clerical help, etc., needed to effect it.—Heaburg v. Independent Oil Mill, D.C.Tenn., 46 F. Supp. 751.

(2) The sale of bagging and ties to ginners by an employer engaged in preparation and manufacture of cottonseed as a matter of accommodation was only a service which was incidental to that of processing of cottonseed, within exemption provision.—Heaburg v. Independent Oil Mill, supra.

Eggs

Candling, grading and packing of eggs did not constitute first processing of agricultural or horticultural commodities during seasonable operations within meaning of the act.—Walling v. De Soto Creamery & Produce Co., D.C.Minn., 51 F.Supp. 938.

8. U.S.—Heaburg v. Independent Oil Mill, D.C.Tenn., 46 F.Supp. 751.

Dormant season

Employees of cottonseed oil mill plant who were actively engaged in or about the plant during dormant season were not engaged in processing of cottonseed within exemption, and hence were entitled to benefit of overtime compensation provision of the act.—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 49 F.Supp. 393—Heaburg v. Independent Oil Mill, D.C.Tenn., 46 F.Supp. 751.

9. U.S.—Hendricks v. Di Giorgio Fruit Corporation, D.C.Cal., 49 F. Supp. 573.

Distilling brandy from completely processed wine was not first processing of fresh fruit, but where brandy so distilled was used solely for fortifying wine, the operation was incidental and necessary to first processing so as to make exemption applicable.—Hendricks v. Di Giorgio Fruit Corporation, supra.

10. U.S.—Hendricks v. Di Giorgio Fruit Corporation, supra.

The entire manufacturing operation from milk to Cheddar cheese and from cream to bulk butter by creamery was the first processing of milk and cream, so that creamery employees engaged in manufacture of Cheddar cheese and butter were exempt as against contention that the first processing ended with "flash" pasteurization of the raw product.—Sugar Creek Creamery Co. v. Walker, 187 S.W.2d 178, 208 Ark. 639.

11. U.S.—Hendricks v. Di Giorgio Fruit Corporation, D.C.Cal., 49 F. Supp. 573.

12. S.D.—Colbeck v. Dairyland Creamery Co., 17 N.W.2d 262.

13. U.S.—Magnussen v. Ocean S. S. Co. of Savannah, C.C.A.N.Y., 162 F.2d 77—Schmitt v. War Emergency Pipelines, D.C.Ark., 72 F.Supp. 156—Walling v. Wabash Radio Corp., D.C.Mich., 65 F.Supp. 969.

Joint employees

Employees of an unincorporated association organized by railroads to perform weighing and inspection services for railroads, which operated under direction of a managing committee of officers of member railroads, and which had its expenses defrayed by monthly assessments on member railroads on basis of services received, were joint employees of an employer subject to Interstate Commerce Act and therefore were exempt from Fair Labor Standards Act.—Walling v. Western Weighing & Inspection Bureau, C.C.A.Ill., 160 F.2d 47.

Barge captains of lighters employed in interstate commerce by common carrier operating by rail and water under common control and management were not entitled to benefits of Fair Labor Standards Act, since carrier came within provision excepting from the act carriers by rail or water which were under the

ployee is engaged in commerce or in the production of goods necessary for commerce.[14] It has been held that the exemption depends on the nature of the employer's business and that the nature of the work done by the employees is immaterial,[15] but it has also been held that if employees are engaged in activities not subject to regulation under the Interstate Commerce Act they are not exempt from overtime requirements of the Fair Labor Standards Act notwithstanding other activities of the employer are subject to regulation under the former statute.[16] The decision of the Interstate Commerce Commission recognizing personnel of an employer as employees of a railroad carrier is not decisive of the employees' status but its reasoning may be persuasive.[17] Similarly its determination that an employer is not entitled to the status of an interstate common carrier may be given effect.[18]

b. Employees of Motor Carriers

Employees of motor carriers with respect to whom the interstate commerce commission has power to establish qualifications and maximum hours of service pursuant to the Motor Carrier Act are exempted from requirements of the Fair Labor Standards Act with respect to overtime pay but not from provisions with respect to payment of minimum wages.

The Fair Labor Standards Act § 13 (b) (1), 29 U.S.C.A. § 213 (b) (1), exempts from the provisions of the act as to overtime pay employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of the Motor Carrier Act § 204, 49 U.S.C.A. § 304.[19]

regulation of Interstate Commerce Commission.—Anderson v. Southern Pac. Co., D.C.N.Y., 62 F.Supp. 730.

Exemption held not applicable

(1) Employer who operated a short-line railroad and served shippers operating granite quarries.—Davis v. Rockton & R. R. R., D.C.S.C., 65 F.Supp. 67—Walling v. Rockton & Rion R. R., D.C.S.C., 54 F. Supp. 342, affirmed 146 F.2d 111, certiorari denied 65 S.Ct. 1026, 324 U.S. 880, 89 L.Ed. 1431.

(2) Where wholly-owned subsidiary of common carrier which was an exempt employer under the Fair Labor Standards Act was formed for purpose of obtaining a radio license and radio telegraph services performed by subsidiary were available to the public without discrimination, radio operators were entitled to overtime compensation as employees of nonexempt subsidiary although operators were subject to provisions of Carriers' Taxing Act, were eligible to privileges of Railroad Retirement Act, and were treated as employees of carrier, and over ninety-eight per cent of service rendered was for the carrier.—Wabash Radio Corp. v. Walling, C.C.A.Mich., 162 F.2d 391.

14. U.S.—Schmitt v. War Emergency Pipelines, D.C.Ark., 72 F.Supp. 156.

15. U.S.—Brittan v. Hudson & Manhattan R. Co., D.C.N.Y., 50 F.Supp. 37.

Building employees

An interstate common carrier operating railroad and maintaining office buildings over terminal was exempt, as to building employees, from provision for overtime compensation.—Brittan v. Hudson & Manhattan R. Co., supra.

16. U.S.—Nelson v. Agwilines, Inc., D.C.N.Y., 70 F.Supp. 497.

17. U.S.—Walling v. Western Weighing & Inspection Bureau, C. C.A.Ill., 160 F.2d 47.

18. U.S.—Rockton & R. R. v. Walling, C.C.A.S.C., 146 F.2d 111, certiorari denied 65 S.Ct. 1026.

19. U.S.—Levinson v. Spector Motor Service, Ill., 67 S.Ct. 931, 330 U.S. 649, 91 L.Ed. 1158—Southland Gasoline Co. v. Bayley, Ark. & Md., 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244—Boutell v. Walling, C. C.A.Mich., 148 F.2d 329, affirmed 66 S.Ct. 631, 327 U.S. 463, 90 L.Ed. 786—Walling v. Mutual Wholesale Food & Supply Co., C.C.A.Minn., 141 F.2d 331—James V. Reuter, Inc., v. Walling, C.C.A.La., 137 F.2d 315, vacated on other grounds 64 S.Ct. 826, 321 U.S. 671, 88 L.Ed. 1001—McDuffie v. Hayes Freight Lines, D.C.Ill., 71 F.Supp. 755—Crean v. M. Moran Transp. Lines, D.C.N.Y., 57 F.Supp. 212—Walling v. West Ky. Coal Co., D.C.Tenn., 60 F.Supp. 681—Walling v. Snellings, D.C.Ala., 53 F.Supp. 851—Walling v. A. H. Phillips, Inc., D.C.Mass., 50 F.Supp. 749, affirmed A. H. Phillips v. Walling, 144 F.2d 102, affirmed 65 S.Ct. 807, 324 U.S. 490, 89 L.Ed. 1095, 157 A.L.R. 876—Dallum v. Farmers Co-op. Trucking Ass'n, D.C.Minn., 46 F.Supp. 785—Fitzgerald v. Kroger Grocery & Baking Co., D.C.Kan., 45 F.Supp. 812—Corbett v. Schlumberger Well Surveying Corporation, D.C.Tex., 43 F. Supp. 605—Gavril v. Kraft Cheese Co., D.C.Ill., 42 F.Supp. 702—Tinerella v. Des Moines Transp. Co., D.C.Ill., 41 F.Supp. 798—Magann v. Long's Baggage Transfer Co., D.C. Va., 39 F.Supp. 742—Gerdert v. Certified Poultry & Egg Co., D.C. Fla., 38 F.Supp. 964.

Ga.—Kay v. Kuhlman, 33 S.E.2d 378, 72 Ga.App. 129.

Ill.—Levinson v. Spector Motor Service, 59 N.E.2d 817, 389 Ill. 466, affirmed 67 S.Ct. 931, 330 U.S. 649, 91 L.Ed. 1158.

Ky.—Searles v. Miller Dairy Products Co., 176 S.W.2d 257, 296 Ky. 150.

N.Y.—Feinman v. Philip Fleischer, Inc., 51 N.Y.S.2d 31, 182 Misc. 1074—Carroll v. Dryolin Corporation, 45 N.Y.S.2d 77, 182 Misc. 260—Helt v. Britten-Fenton Co., 44 N. Y.S.2d 58, 180 Misc. 1077.

Ohio.—Guthrie v. Emmons, 12 Ohio Supp. 45.

Purpose of exemption

(1) "By exempting the drivers of motors from the maximum hour limitations of the Fair Labor Standards Act, Congress evidently relied upon the Motor Carrier provisions to work out satisfactory adjustments for employees charged with the safety of operations in a business requiring fluctuating hours of employment, without the burden of additional pay for overtime."—Southland Gasoline Co. v. Bayley, Ark., 63 S.Ct. 917, 919, 319 U.S. 44, 87 L.Ed. 1244.

(2) Purpose of exemption was to free operators of motor vehicles from regulation by two agencies of the hours of drivers.—Boutell v. Walling, C.C.A.Mich., 148 F.2d 329, affirmed 66 S.Ct. 631, 327 U.S. 463, 90 L.Ed. 786.

Construction

(1) The particular language of sections of the Fair Labor Standards Act and the Motor Carrier Act relating to regulation of qualifications and maximum hours of service of employees of interstate motor carriers should be construed in the light of the purposes which led to enactment of the entire legislation.—Southland Gasoline Co. v. Bayley, Ark. & Md., 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244.

(2) The court should be careful in construing the provision not to restrict unduly any federal statute which gives the commission power to encompass the end of public safety.

The exemption is confined to requirements of the Fair Labor Standards Act with respect to overtime pay and does not affect the operation of provisions as to minimum wages for regular time[20] and as to the keeping of records of hours worked.[21]

Whether employees are exempt from the overtime pay provisions depends on whether the Interstate Commerce Commission has the "power to establish" maximum hours of service for them under the Motor Carrier Act,[22] and, if such power exists, the employees may be exempt although the commission has not affirmatively exercised the power[23] or although it has made no finding of need for its exercise, required as a condition to regulation of employees of private carriers.[24] Whether the commission has jurisdiction to establish qualifications and maximum hours of service of certain employees is not to be measured by regulations of the administrator of the wages and hours division but involves an interpretation of the scope of the safety program of the interstate commerce commission as determined from regulations made by the commission.[25]

With respect to the exemption of employees subject to regulation by the Interstate Commerce Commission, the power of the commission extends and is confined to employees of motor carriers engaged in the interstate transportation of passengers or goods,[26] and generally, where motor transportation is purely intra-state, originating and terminating in the same state, the commission is without jurisdiction and the employees engaged in the transportation are not exempt.[27] However, an employee may

—Richardson v. James Gibbons Co., C.C.A.Md., 132 F.2d 627, affirmed 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244.

(3) It has been held that any doubt whether an employee comes within Fair Labor Standards Act or Motor Carrier Act is generally resolved in favor of the former, unless it clearly appears that a substantial part of his time is within the Motor Carrier Act.—Creno v. Caruso Produce Co., 64 N.Y.S.2d 214.

20. U.S.—Walling v. Mutual Wholesale Food & Supply Co., C.C.A. Minn., 141 F.2d 331—Plunkett v. Abraham Bros. Packing Co., C.C.A. Tenn., 129 F.2d 419—De Loach v. Crowley's, Inc., C.C.A.Fla., 128 F. 2d 378—Walling v. Palmer, D.C. Pa., 67 F.Supp. 12.
Ky.—Richardson v. Duff, 194 S.W.2d 389, 302 Ky. 203.

21. U.S.—Walling v. Palmer, D.C. Pa., 67 F.Supp. 12.

22. U.S.—Levinson v. Spector Motor Service, Ill., 67 S.Ct. 931, 330 U.S. 649, 91 L.Ed. 1158—Boutell v. Walling, Mich., 66 S.Ct. 631, 327 U.S. 463, 90 L.Ed. 786—Reynolds v. Rogers Cartage Co., D.C.Ky., 71 F.Supp. 870—Dallum v. Farmers Co-op. Trucking Ass'n, D.C.Minn., 46 F.Supp. 785—Fitzgerald v. Kroger Grocery & Baking Co., D.C. Kan., 45 F.Supp. 812—Gavril v. Kraft Cheese Co., D.C.Ill., 42 F. Supp. 702—West v. Smoky Mountains Stages, D.C.Ga., 40 F.Supp. 296.

23. U.S.—Levinson v. Spector Motor Service, Ill., 67 S.Ct. 931, 330 U.S. 649, 91 L.Ed. 1158—Walling v. Morris, C.C.A.Mich., 155 F.2d 832—Ispass v. Pyramid Motor Freight Corp., C.C.A.N.Y., 152 F.2d 619, certiorari granted 66 S.Ct. 818, 327 U.S. 774, 90 L.Ed. 1003—Walling v. Comet Carriers, C.C.A.N.Y., 151 F.2d 107, certiorari dismissed Comet Carriers v. Walling, 66 S.Ct. 1007, 328 U.S. 819, 90 L.Ed. 1600—Fletcher v. Grinnell Bros., C.C.A. Mich., 150 F.2d 337, conformed to, D.C., 64 F.Supp. 778—Walling v. Mutual Wholesale Food & Supply Co., C.C.A.Minn., 141 F.2d 331—Richardson v. James Gibbons Co., C.C.A.Md., 132 F.2d 627, affirmed 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244—McDuffie v. Hayes Freight Lines, D.C.Ill., 71 F.Supp. 755—Epps v. Weathers, D.C.Ga., 49 F. Supp. 2—Wolfe v. Union Transfer & Storage Co., D.C.Ky., 48 F.Supp. 855—Robbins v. Zabarsky, D.C. Mass., 44 F.Supp. 867—Gavril v. Kraft Cheese Co., D.C.Ill., 42 F. Supp. 702—West v. Smoky Mountains Stages, D.C.Ga., 40 F.Supp. 296—Gerdert v. Certified Poultry & Egg Co., D.C.Fla., 38 F.Supp. 964—Faulkner v. Little Rock Furniture Mfg. Co., D.C.Ark., 32 F.Supp. 590.
Ga.—Colonial Stores v. Harris, 26 S.E.2d 144, 69 Ga.App. 476.
Ky.—Kentucky Transport Co. v. Drake, 182 S.W.2d 960, 298 Ky. 389.
N.Y.—Feinman v. Philip Fleischer Inc., 51 N.Y.S.2d 31, 182 Misc. 1074—Rozmus v. Jesse T. Davis & Sons, 23 N.Y.S.2d 821.
Ohio.—Guthrie v. Emmons, 12 Ohio Supp. 45.
S.D.—Colbeck v. Dairyland Creamery Co., 17 N.W.2d 262.

24. U.S.—Southland Gasoline Co. v. Bayley, Ark. & Md., 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244—Walling v. Silver Bros. Co., C.C.A.N.H., 136 F.2d 168.
N.Y.—Feinman v. Philip Fleischer, Inc., 51 N.Y.S.2d 31, 182 Misc. 1074.

25. U.S.—Levinson v. Spector Motor Service, Ill., 67 S.Ct. 931, 330 U.S. 649, 91 L.Ed. 1158.

Partial-duty employees

The wage and hour administrator has no jurisdiction to interpret the compulsory overtime compensation provision of Fair Labor Standards Act as including partial-duty drivers or partial-duty loaders of interstate motor carriers who spend greater part of their time during a work week on activities which do not affect safety of operation of motor carriers.—Levinson v. Spector Motor Service, supra.

Work as loader

The court in which action under the Fair Labor Standards Act for overtime compensation was brought by employees of interstate motor carrier would be required to determine whether activities of the employees consisted either wholly or in substantial part of work defined by the Interstate Commerce Commission as that of a loader and as affecting safety of motor vehicle operation in interstate commerce, so as to subject such employees to jurisdiction of the Commission under the Motor Carrier Act in matter of maximum hours of service.—Pyramid Motor Freight Corp. v. Ispass, N.Y., 67 S.Ct. 954, 330 U.S. 695, 91 L.Ed. 1184.

26. U.S.—Walling v. West Ky. Coal Co., D.C.Tenn., 60 F.Supp. 681—Dallum v. Farmers Co-op. Trucking Ass'n, D.C.Minn., 46 F.Supp. 785.
N.Y.—Wallach v. Merit Paper Corp., 58 N.Y.S.2d 531.

27. U.S.—Earle v. Brink's Inc., D.C. N.Y., 54 F.Supp. 676.

Intention of consignor

Transportation of butter by motor carrier to distributing plant within state, where butter was graded and prepared for reshipment and there was no intention by original consignor, carrier or consignee to continue transportation beyond state line, was intra-state commerce and services rendered by employees of motor carrier were covered by wage provisions of Fair Labor Standards Act.—Dallum v. Farmers Co-op.

be subject to control of the commission and hence exempt from the overtime provisions of the Fair Labor Standards Act even though his work is performed solely within a single state, provided his work forms an integral part of a continuous process of interstate commerce.[28] The exemption does not extend to workers who are not themselves employees of a carrier, although their services may affect the safety of operations of a carrier,[29] or to employees of a contract mail carrier.[30]

Generally, with respect to the exemption of employees of motor carriers, the commission has jurisdiction over the hours of service of those employees only whose activities affect the safety of operation of the motor vehicles used in interstate transportation,[31] such as drivers, drivers' helpers, loaders, and mechanics who perform inspection and repair work on vehicles,[32] but not employees whose work has no direct connection with the safety of operations,[33] such as those engaged in unloading and working in the warehouse, or in construction rather than maintenance and repair.[34] The title of the employee is immaterial and his status is determined by the actual duties performed.[35]

Trucking Ass'n, D.C.Minn., 46 F.Supp. 785.

28. N.Y.—Feinman v. Philip Fleischer, Inc., 51 N.Y.S.2d 31, 182 Misc. 1074.

Crossing state lines

(1) Motor vehicles operated by employees need not actually cross state lines in order to confer jurisdiction on Interstate Commerce Commission and exempt employees from overtime provisions of Fair Labor Standards Act, but it is necessary that the property transported in the trucks be interstate shipments.—Earle v. Brink's Inc., D.C.N.Y., 54 F.Supp. 676.

(2) Where intention of original shipper was to move goods across state line to definite interstate destinations movement of goods by motor carrier within one state to common carrier terminals in performance of such preconceived intention constituted shipment in interstate commerce which placed employees of motor carrier within jurisdiction of Interstate Commerce Commission thereby preventing application of Fair Labor Standards Act.—Dallum v. Farmers Co-op. Trucking Ass'n, D.C.Minn., 46 F.Supp. 785.

29. U.S.—Boutell v. Walling, Mich., 66 S.Ct. 631, 327 U.S. 463, 90 L.Ed. 786.

One leasing motortrucks for use by others and operating a garage for convenience of owners of other motor vehicles was not a common carrier of property for hire exempt from operation of Fair Labor Standards Act.—Walling v. John J. Casale, Inc., D.C.N.Y., 51 F.Supp. 520.

30. U.S.—Thompson v. Daugherty, D.C.Md., 40 F.Supp. 279.

31. U.S.—Levinson v. Spector Motor Service, Ill., 67 S.Ct. 931, 330 U.S. 649, 91 L.Ed. 1158—Fletcher v. Grinnell Bros., C.C.A.Mich., 150 F. 2d 337, conformed to, D.C., 64 F. Supp. 778—Gillette v. Rockland Coaches, C.C.A.N.Y., 142 F.2d 616—Walling v. Mutual Wholesale Food & Supply Co., C.C.A.Minn., 141 F. 2d 331—Richardson v. James Gibbons Co., C.C.A.Md., 132 F.2d 627, affirmed 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244—McDuffie v. Hayes Freight Lines, D.C.Ill., 71 F.Supp. 755—Crean v. M. Moran Transportation Lines, D.C.N.Y., 54 F.Supp. 765—Gillette v. Rockland Coaches, D.C.N.Y., 50 F.Supp. 617, affirmed, C.C.A., 142 F.2d 616—Crean v. M. Moran Transp. Lines, D.C.N.Y., 50 F.Supp. 107—Anuchick v. Transamerican Freight Lines, D.C.Mich., 46 F.Supp. 861—Dallum v. Farmers Co-op. Trucking Ass'n, D.C. Minn., 46 F.Supp. 785—West v. Smoky Mountains Stages, D.C.Ga., 40 F.Supp. 296.

Ark.—Potashnick Local Truck System v. Archer, 179 S.W.2d 696, 207 Ark. 220.

N.Y.—Kosofsky v. Champion Trucking Co., 43 N.Y.S.2d 5, 181 Misc. 470.

32. U.S.—Walling v. Morris, C.C.A. Mich., 155 F.2d 832—Walling v. Huber & Huber Motor Exp., D.C. Ky., 67 F.Supp. 855—Walling v. Silver Fleet Motor Exp., D.C.Ky., 67 F.Supp. 846—Epps v. Weathers, D.C.Ga., 49 F.Supp. 2—Robbins v. Zabarsky, D.C.Mass., 44 F.Supp. 867—Tinerella v. Des Moines Transp. Co., D.C.Ill., 41 F.Supp. 798.

N.Y.—Neuwirth v. Kafer, 29 N.Y.S. 2d 178, 176 Misc. 864.

Pa.—Say v. Prior Oil Co., 43 A.2d 417, 157 Pa.Super. 629.

Checkers, callers, and wheelers, whose duties included proper loading and unloading of motor carriers, inspection of physical condition of trailers, labeling of shipments designated by Interstate Commerce Commission as dangerous, and removal of leaking packages, were engaged in activities affecting safety of operation of motor carriers and were exempt from overtime provisions of Fair Labor Standards Act.—Crean v. M. Moran Transp. Lines, D.C.N.Y., 57 F.Supp. 212.

33. U.S.—Porter v. Poindexter, C.C. A.Okl., 158 F.2d 759—McDuffie v. Hayes Freight Lines, D.C.Ill., 71 F.Supp. 755—Keeling v. Huber & Huber Motor Exp., D.C.Ky., 57 F. Supp. 617—McKeown v. Southern California Freight Forwarders, D. C.Cal., 49 F.Supp. 543.

Safety of cargo

Employees engaged in work affecting safety of cargo with any activity affecting safety of operation as incidental, were not subject to Interstate Commerce Commission's regulations affecting hours of employment, but were subject to the Fair Labor Standards Act.—Anuchick v. Transamerican Freight Lines, D.C. Mich., 46 F.Supp. 861.

Breakout men, wheelers, and hostlers, employed in a freight terminal and warehouse by motor carrier operating in interstate commerce under a certificate of convenience and necessity issued by the Interstate Commerce Commission, were not excluded from Fair Labor Standards Act as employees whose qualifications and hours of service were controlled by the Interstate Commerce Commission.—Gordon's Transports v. Walling, C.C.A.Tenn., 162 F.2d 203.

Painters, washers, and dispatchers

U.S.—Walling v. Morris, C.C.A.Mich., 155 F.2d 832.

Office employees and janitor

U.S.—Walling v. Palmer, D.C.Pa., 67 F.Supp. 12.

34. U.S.—McDuffie v. Hayes Freight Lines, D.C.Ill., 71 F.Supp. 755—Walling v. Huber & Huber Motor Exp., D.C.Ky., 67 F.Supp. 855—Walling v. Silver Fleet Motor Exp., D.C.Ky., 67 F.Supp. 846.

Installation of accessories

Mechanics employed by motor carrier who devoted a substantial part of their time to installation of new accessories making it possible for carrier to begin its business with that particular piece of equipment were not engaged in work directly affecting safety of operation but were engaged in manufacturing activities.—Anuchick v. Transamerican Freight Lines, D.C.Mich., 46 F.Supp. 861.

35. U.S.—Porter v. Poindexter, C. C.A.Okl., 158 F.2d 759.

Generally the exemption of employees engaged in activities affecting the safety of operation of an interstate motor carrier may extend to an employee part of whose duties involve such work as well as to an employee who is engaged solely in such work.[36] So an employee may be exempt if the whole or a substantial part of his activities comes within a class of work defined by the commission as affecting the safety of operations,[37] but he is not exempt if none[38] or only a small part[39] of his activities comes within the commission's classification. In determining whether the work involving safety of operations is sufficient in amount to warrant the exemption, it has been held that the unit of time which is to be considered is the work week[40] and that the exemption operates on a week-to-week basis and not on an hourly or monthly basis.[41]

Exemption of employees of local carrier is discussed supra § 151 (18).

§ 151(21). —— Employees in Industries of a Seasonal Nature

Employees in an industry found by the administrator to be of a seasonal nature are exempted from the overtime pay provisions of the Fair Labor Standards Act for a period or periods of not more than fourteen work weeks.

The Fair Labor Standards Act § 7 (b) (3), 29 U.S.C.A. § 207 (b) (3), exempts from the requirement of overtime pay for a period or periods of not more than fourteen work weeks employees in an industry found by the administrator of the wages and hours division to be of a seasonal nature.[42] Where the administrator makes such a finding, the exemption is not restricted to the season of maximum operation, but may be taken at any time during the year,[43] and is applicable to all employees.[44]

Exemption of employees engaged in processing agricultural products from overtime provisions is discussed supra § 151 (19).

§ 151(22). —— Employees of Governmental Bodies

The governments of the United States, of the several states, and their subdivisions are not employers within the Fair Labor Standards Act and their employees are not subject to the requirements of the act.

The Fair Labor Standards Act §§ 1–19, 29 U.S.C.A. §§ 201–219, is designed to deal with private business and industry and § 3 (d), 29 U.S.C.A. § 203 (d) expressly excludes from the definition of "employer" subject to the act the governments of the United States, of the several states, and their subdivisions.[45] Such exemption has been held to

Ill.—Levinson v. Spector Motor Service, 56 N.E.2d 142, 323 Ill.App. 505, affirmed 59 N.E.2d 817, 389 Ill. 466, affirmed 67 S.Ct. 931, 330 U.S. 649, 91 L.Ed. ——.

36. U.S.—Levinson v. Spector Motor Service, Ill., 67 S.Ct. 931, 330 U.S. 649, 91 L.Ed. ——.

Driver and distributor

One employed seventy-five per cent of his time as a distributor-operator and twenty-five per cent of his time as a truck driver transporting flammable and explosive liquid asphalt products, had duties affecting safety of operation within terms of Motor Carrier Act defining regulatory powers of Interstate Commerce Commission, and hence was within exception in Fair Labor Standards Act of employees for whom commission has power to establish qualifications and maximum hours.—Richardson v. James Gibbons Co., C.C.A.Md., 132 F.2d 627, affirmed 63 S.Ct. 917, 319 U.S. 44, 87 L.Ed. 1244.

37. U.S.—Pyramid Motor Freight Corp. v. Ispass, N.Y., 67 S.Ct. 954, 330 U.S. 695, 91 L.Ed. —— —McDuffie v. Hayes Freight Lines, D.C. Ill., 71 F.Supp. 755—Walling v. Huber & Huber Motor Exp., D.C. Ky., 67 F.Supp. 855—Walling v. Silver Fleet Motor Exp., D.C.Ky., 67 F.Supp. 846.

Ark.—Potashnick Local Truck System v. Archer, 179 S.W.2d 696, 207 Ark. 220.

Ill.—Levinson v. Spector Motor Service, 59 N.E.2d 817, 389 Ill. 466, affirmed 67 S.Ct. 931, 330 U.S. 649, 91 L.Ed. ——.

Majority of time

In order to be exempt, employee need not be engaged for a majority of his time in work affecting the safety of operations, but it is sufficient that he be so occupied for a substantial part of the time that he works. —Crean v. M. Moran Transp. Lines, D.C.N.Y., 57 F.Supp. 212.

38. U.S.—Pyramid Motor Freight Corp. v. Ispass, N.Y., 67 S.Ct. 954, 330 U.S. 695, 91 L.Ed. ——.

39. U.S.—Walling v. Morris, C.C.A. Mich., 155 F.2d 832—West Ky. Coal Co. v. Walling, C.C.A.Tenn., 153 F. 2d 582—Walling v. Palmer, D.C. Pa., 67 F.Supp. 12.

Held not exempt

(1) Employee who spent more than fifty per cent of his time washing trucks.—Hutchinson v. William C. Barry, Inc., D.C.Mass., 50 F.Supp. 292.

(2) A wholesale or nonretail concern's truck driver, making only occasional trips into other states than that in which such concern's establishment is located and engaged for major portion of his time in his employer's activities having to do with production of goods for commerce.—Walling v. West Ky. Coal Co., D.C. Tenn., 60 F.Supp. 681.

40. U.S.—Reynolds v. Rogers Cartage Co., D.C.Ky., 71 F.Supp. 870.

41. U.S.—Hutchinson v. William C. Barry, Inc., D.C.Mass., 50 F.Supp. 292.

42. U.S.—Byus v. Traders Compress Co., D.C.Okl., 59 F.Supp. 18—Jordan v. Stark Bros. Nurseries & Orchards Co., D.C.Ark., 45 F. Supp. 769.

43. U.S.—Hendricks v. Di Giorgio Fruit Corporation, D.C.Cal., 49 F. Supp. 573.

44. U.S.—Hendricks v. Di Giorgio Fruit Corporation, supra.

45. U.S.—Kennedy v. Silas Mason Co., D.C.La., 68 F.Supp. 576—Bernhard v. Metcalfe Const. Co., D.C. Neb., 64 F.Supp. 953.

N.Y.—Steiner v. Pleasantville Constructors, 46 N.Y.S.2d 120, 181 Misc. 798, modified on other grounds 49 N.Y.S.2d 42, 182 Misc. 66, affirmed 54 N.Y.S.2d 700, first case, 269 App.Div. 738.

Provision is unambiguous and should be given effect as written.—Creekmore v. Public Belt R. Commission of New Orleans, C.C.A.La., 134 F.2d 576, certiorari denied 64 S. Ct. 43, 320 U.S. 742, 88 L.Ed. 440.

extend to a transportation system owned and operated by a municipality.[46] It has been held that employees of an independent contractor performing work for a governmental body are not government employees exempt from the act[47] notwithstanding the economic burden of the contractor's compliance with the Fair Labor Standards Act might be carried on to the governmental body employing him[48] and the government closely supervised the contractor's activities.[49] It has been held, on the other hand, that employees of a war plant operated by a private contractor under contract with the United States and producing goods only for the government are employees of the government with respect to application of the Fair Labor Standards Act.[50]

§ 151(23). —— Other Specific Exemptions

Persons employed pursuant to a collective bargaining agreement are exempt from overtime pay provisions of the Fair Labor Standards Act under circumstances fixed by the statute. The act also provides for exemption of other specified employees.

Under the Fair Labor Standards Act § 7 (b) (1), 29 U.S.C.A. § 207 (b) (1), an employer may employ a person for a work week in excess of that specified by the act without paying the compensation for overtime prescribed therein if such employee is employed in pursuance of an agreement, made as a result of valid collective bargaining, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks, and if such employee receives compensation for employment in excess of twelve hours in any work day, or for employment in excess of fifty six hours in any work week, as the case may be, at a rate not less than one and one half times the regular rate at which he is employed.[51] Only contracts which conform to the legislative standard are sufficient to establish the exemption.[52]

Exemption of learners, apprentices, and handicapped persons by regulation of the administrator of the wage and hour division is discussed supra § 151 (10).

Employees of small weekly or semi-weekly newspapers. The Fair Labor Standards Act § 13 (a) (8), 29 U.S.C.A. § 213 (a) (8), exempts from its provisions as to minimum wages and overtime pay persons employed in connection with the publication of any weekly or semi-weekly newspaper with a circulation of less than three thousand, the major part of which circulation is within the county where printed and published.[53] A newspaper having a larger circulation than that specified is not exempt from the act notwithstanding it has only a small out-of-state circulation.[54] Employees may be exempt as

Shipyards

Where shipyards in war time were one hundred per cent financed and controlled by the government and were managed by another for the government, the act did not apply and employees were not entitled to maintain action thereunder for overtime compensation and attorneys' fees.—Stewart v. Kaiser Co., D.C. Or., 71 F.Supp. 551.

46. U.S.—Creekmore v. Public Belt R. Commission of New Orleans, C. C.A.La., 134 F.2d 576, certiorari denied 64 S.Ct. 43, 320 U.S. 742, 88 L.Ed. 440.

47. U.S.—Walling v. Craig, D.C. Minn., 53 F.Supp. 479—Timberlake v. Day & Zimmerman, D.C.Iowa, 49 F.Supp. 28.
N.Y.—Steiner v. Pleasantville Constructors, 46 N.Y.S.2d 120, 181 Misc. 798, modified on other grounds 49 N.Y.S.2d 42, 182 Misc. 66, affirmed 54 N.Y.S.2d 700, first case, 269 App.Div. 738—Simkins v. Elmhurst Contracting Co., 46 N.Y. S.2d 26, 181 Misc. 791.

Patrol service

Guards and watchmen employed by a private patrol service engaged in furnishing watchmen and guard service to various customers, although holding commissions as special police officers of city were not employees of city so as to be excluded from provisions of act.—Walling v. New Orleans Private Patrol Service, D.C.La., 57 F.Supp. 143.

A contract mail carrier is an independent contractor with relation to United States, and neither he nor his employees are employees of the United States within sections of act declaring such employees not subject to provisions thereof.—Thompson v. Daugherty, D.C.Md., 40 F. Supp. 279—Magann v. Long's Baggage Transfer Co., D.C.Va., 39 F. Supp. 742—Fleming v. Gregory, D.C. La., 36 F.Supp. 776.

48. U.S.—Walling v. McCrady Const. Co., D.C.Pa., 60 F.Supp. 243, affirmed, C.C.A., 156 F.2d 932.
N.Y.—Simkins v. Elmhurst Contracting Co., 46 N.Y.S.2d 26, 181 Misc. 791.

49. N.Y.—Simkins v. Elmhurst Contracting Co., supra.

50. U.S.—Kennedy v. Silas Mason Co., D.C.La., 68 F.Supp. 576.

51. U.S.—International Longshoremen's Ass'n, Local 815, v. National Terminals Corporation, D.C.Wis., 50 F.Supp. 26, affirmed, C.C.A., Cabunac v. National Terminals Corporation, 139 F.2d 853.

52. U.S.—Cabunac v. National Terminals Corporation, C.C.A.Wis., 139 F.2d 853.

Exemption not established

Contracts providing that employment should be subject to Fair Labor Standards Act provision that no employee should be employed more than one thousand hours nor more than fifty-six hours in any one week during a period of twenty-six consecutive weeks, and providing for extension of second period after completion of first period, were insufficient to establish exemption from maximum hour provision of the act for failure to provide for "any" period of twenty-six consecutive weeks and for ignoring other provisions.—Cabunac v. National Terminals Corporation, supra.

53. U.S.—Mabee v. White Plains Pub. Co., N.Y., 66 S.Ct. 511, 513, 327 U.S. 178, 90 L.Ed. 607.

54. U.S.—Mabee v. White Plains Pub. Co., supra.

"No exemption on the basis of volume of out-of-state circulation was written into the Act. Rather the exemption of the small weeklies or semi-weeklies seems to have been adopted on the assumption that without it a newspaper with a regular out-of-state circulation, no matter how small, would be under the Act. The choice Congress made was not the exemption of newspapers with small out-of-state circulations but the exemption of certain types

employed "in connection with the publication" of a newspaper although the major part of the newspaper's income is from job printing at which the employees also work.[55]

Switchboard operators of small public telephone exchanges. The Fair Labor Standards Act § 13 (a) (11), 29 U.S.C.A. § 213 (a) (11), exempts from its requirements as to minimum pay and overtime wages switchboard operators employed in a public telephone exchange having less than five hundred stations.[56] The test of whether an employer operates a public exchange within the exemption is whether it serves the public within the area in which its facilities are located or whether the system is confined to privileged individuals.[57] An exchange maintained primarily for the convenience of a corporation engaged in a commercial venture and not organized to operate a public exchange is not entitled to exemption under this provision.[58]

Labor organization. The Fair Labor Standards Act § 3 (d), 29 U.S.C.A. § 203 (d), exempts from the provisions of the act any labor organization, other than when acting as an employer, or anyone acting in the capacity of officer or agent of such labor organization.[59] A labor organization acting as an employer is not excluded from the coverage of the act.[60]

Carriers by air subject to Railway Labor Act. The Fair Labor Standards Act § 13 (a) (4), 29 U.S.C.A. § 213 (a) (4), exempts from its provisions as to minimum wages and overtime pay any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act, 45 U.S.C.A. §§ 181–188.[61] An activity is not exempt from the provisions of the Fair Labor Standards Act merely because some of the activities of the employer are subject to the Railway Labor Act unless the activity itself is subject to the latter act.[62] In determining whether employees are exempt, the test of the applicability of the Railway Labor Act to a labor relationship is the relation of the activity to transportation, not the relationship created by the bookkeeping, accounting, purchase, and employment policies of the employer.[63]

§ 151(24). Operation and Effect

The provisions of the Fair Labor Standards Act are generally determinative of the rights and duties of employers and employees subject to the act, and the requirements of the act may not be avoided by any act or omission of the parties, or by any custom or contract inconsistent with the act.

The provisions of the Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, are generally determinative of the rights and duties of employers and employees subject to the act, with respect to minimum wages and overtime pay,[64] and the burden of regulating the observance of the act is on the employer as well as the employee.[65] The requirements of the act are mandatory, regardless of whom they affect,[66] and the statutory obligation con-

of small newspapers."—Mabee v. White Plains Pub. Co., supra.

55. U.S.—Robinson v. North Ark. Printing Co., D.C.Ark., 71 F.Supp. 921.

56. Ky.—Southern Bell Tel. & Tel. Co. v. Davis, 202 S.W.2d 753, 305 Ky. 40.

Exemption held not applicable
Public telephone exchange which had eleven hundred subscribers, meaning eleven hundred phones or stations, is not exempt.—Schmidt v. Peoples Telephone Union of Maryville, Mo., C.C.A.Mo., 138 F.2d 13.

57. Fla.—Cherry Lake, Inc., v. Kearce, 26 So.2d 434.

58. Fla.—Cherry Lake, Inc., v. Kearce, supra.

59. U.S.—Fleming v. Palmer, C.C.A. Puerto Rico, 123 F.2d 749, certiorari denied Caribbean Embroidery Co-op. v. Fleming, 62 S. Ct. 942, 316 U.S. 662, 86 L.Ed. 1739.

Co-operative
Where former employer controlled business of co-operative organized by him among employees for purpose of avoiding Fair Labor Standards Act, the co-operative was not a labor organization exempt from provisions of act.—Fleming v. Palmer, supra.

60. Ky.—Williams v. United Mine Workers of America, 172 S.W.2d 202, 294 Ky. 520, 149 A.L.R. 505.

61. U.S.—Jackson v. Northwest Airlines, D.C.Minn., 70 F.Supp. 501.

Construction
The provisions of the Railway Labor Act governing its application to a carrier by air must be construed liberally notwithstanding they are made relevant to wage controversies by an exemption to the Fair Labor Standards Act which must be construed strictly.—Jackson v. Northwest Airlines, supra.

62. U.S.—Jackson v. Northwest Airlines, supra.

Modification work performed on army planes by commercial airline for government during war, which work was not necessary to airline's continued operation, had such a remote, tenuous, and negligible relationship to transportation activities of airline that it was not within the Railway Labor Act so as to be exempt from Fair Labor Standards Act.—Jackson v. Northwest Airlines, supra.

63. U.S.—Jackson v. Northwest Airlines, supra.

64. U.S.—Gatliff Coal Co. v. Cox, C.C.A.Ky., 152 F.2d 52—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, etc., C.C.A.Ala., 137 F.2d 176, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—Magann v. Long's Baggage Transfer Co., D.C.Va., 39 F.Supp. 742.

65. U.S.—Walling v. St. Marys Sewer Pipe Co., D.C.Pa., 57 F.Supp. 573.

Unanticipated liability
The burden is on the employer to comply with the act and it is no defense that he believed he was not covered by the act and was subjected to an unanticipated liability and penalty.—Berry v. 34 Irving Place Corporation, D.C.N.Y., 52 F.Supp. 875.

66. U.S.—Walling v. Black Diamond Coal Min. Co., D.C.Ky., 59 F.Supp. 348—Travis v. Ray, D.C.Ky., 41 F.Supp. 6—Morgan v. Atlantic

tained in the act is read into and becomes a part of every employment contract between an employer and an employee subject to the act.[67] An employee electing to take the benefits of the act must accept its restrictions also.[68]

As a rule, the provisions of the statute may not be avoided by any act or omission of the parties,[69] and employers and employees cannot by contract limit the scope and effect of the act[70] or defeat its manifest purpose.[71] Contracts in violation of the act are illegal and not binding on employees[72] and any custom inconsistent with the requirements of the act must yield.[73] In other words, any custom or contract falling short of the basic policy of the act cannot be utilized to deprive employees of their statutory rights.[74] An employer's liability under the statute is something more than a debt or liability to an individual.[75]

While ordinarily the statute should not be applied so as to override the policy of collective bargaining,[76] the requirements of the act may not be avoid-

Coast Line R. Co., D.C.Ga., 32 F. Supp. 617.

Noncompliance not excused

Compliance with directions of National Labor Relations Board and Stabilization Unit of Bureau of Internal Revenue recognizing certain employees as executive or administrative and approving fixed weekly salaries paid such employees without regard to overtime did not excuse employer from noncompliance with provisions of Fair Labor Standards Act with respect to overtime compensation, where such employees were in fact within coverage of the act.—Adams v. St. Johns River Shipbuilding Co., D.C.Fla., 69 F.Supp. 989.

67. U.S.—Roland Elec. Co. v. Black, C.C.A.Md., 163 F.2d 417—Northwestern Yeast Co. v. Broutin, C. C.A.Ohio, 133 F.2d 628—Walling v. Lippold, D.C.Neb., 72 F.Supp. 339—Walling v. McKay, D.C.Neb., 70 F. Supp. 160—Fletcher v. Grinnell Bros., D.C.Mich., 64 F.Supp. 778.

"Implied contract;" lien

Fact that Fair Labor Standards Act of 1938, requiring payment of overtime to employees under certain circumstances, was in existence at time of execution of employment contract under which employees rendered services on oil and gas leasehold did not create an "implied contract" to pay overtime, within statute providing that one who, under express or implied contract, performs labor for owner of leasehold for oil and gas purposes shall have lien on the whole leasehold.—Pace v. National Bank of Commerce of Tulsa, 125 P.2d 178, 190 Okl. 503.

68. U.S.—Cissell v. Great Atlantic & Pacific Tea Co., D.C.Ky., 37 F. Supp. 913.

69. N.Y.—Rienzo v. City Bank Farmers Trust Co., 42 N.Y.S.2d 337, 180 Misc. 333, affirmed 47 N.Y.S. 2d 589, 267 App.Div. 890, appeal denied 48 N.Y.S.2d 471, 267 App. Div. 954, appeal dismissed 56 N.E. 2d 300, 293 N.Y. 690.

70. U.S.—Kappler v. Republic Pictures Corp., D.C.Iowa, 59 F.Supp. 112, affirmed, C.C.A., Republic Pictures Corp. v. Kappler, 151 F.2d 543, 162 A.L.R. 228, affirmed 66 S. Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L.Ed. 991—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009.

Validity of:

Contracts as to rate of pay with respect to application of provision for overtime pay see infra § 151 (26).

Release or settlement of liability under the act see infra § 151 (35).

71. U.S.—McNorrill v. Gibbs, D.C. S.C., 45 F.Supp. 363.

72. U.S.—Walling v. Lippold, D.C. Neb., 72 F.Supp. 339—Skidmore v. John J. Casale, Inc., D.C.N.Y., 66 F.Supp. 282—Eustice v. Federal Cartridge Corp., D.C.Minn., 66 F. Supp. 55—Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, D.C.Va., 53 F.Supp. 935, certiorari denied 64 S.Ct. 1267, 322 U.S. 756, 88 L.Ed. 1585, reversed on other grounds 145 F.2d 10, affirmed 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007.

N.M.—Wilson Oil Co. v. Hardy, 164 P.2d 209, 49 N.M. 337, 162 A.L.R. 292.

N.Y.—Franz v. 48 West Forty-Eighth Realization Corp., 60 N.Y.S.2d 160, affirmed 66 N.Y.S.2d 693.

73. U.S.—Anderson v. Mt. Clemens Pottery Co., D.C.Mich., 60 F.Supp. 146, reversed on other grounds, C.C.A., Mt. Clemens Pottery Co. v. Anderson, 149 F.2d 461, reversed on other grounds 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. —.

Continuation of abuses

Industrial custom does not warrant the continuation of abuses that the statute was created to rectify. —Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, C.C.A. Ala., 135 F.2d 320, rehearing denied 137 F.2d 176, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596.

Custom held valid

The custom in an industry of requiring certain employees to contribute toward the wages of their helpers who completed their work did not violate the statute where the employees were paid on a piecework basis for work completed by the helpers.—Anderson v. Mt. Clemens Pottery Co., D.C.Mich., 60 F. Supp. 146, reversed on other grounds C.C.A., Mt. Clemens Pottery Co. v. Anderson, 149 F.2d 461, reversed on other grounds 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

Custom of coal industry

U.S.—Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, C.C.A.Va., 145 F.2d 10, affirmed 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007.

74. U.S.—Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, Va., 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, Ala., 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—Atlantic Co. v. Broughton, C.C.A. Ga., 146 F.2d 480, certiorari denied 65 S.Ct. 1021, 324 U.S. 883, 89 L. Ed. 1433, rehearing denied 65 S.Ct. 1182, 325 U.S. 892, 89 L.Ed. 2004, certiorari denied Atlantic Co. v. Carathan, 65 S.Ct. 1021, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, 325 U.S. 892, 89 L.Ed. 2004, certiorari denied 65 S.Ct. 1023, two cases, 324 U.S. 883, 89 L.Ed. 1433—Walling v. McKay, D.C.Neb., 70 F.Supp. 160.

75. U.S.—Plourde v. Massachusetts Cities Realty Co., D.C.Mass., 47 F. Supp. 668.

76. U.S.—Addison v. Huron Stevedoring Corp., D.C.N.Y., 69 F.Supp. 956.

Objectives of agreement

Decasualization, concentration of work during daylight hours, uni-

ed by collective bargaining agreements.[77] Where a wage order is issued for a particular industry requiring the payment of certain minimum wages, it modifies previous contracts between employers and employees in that industry providing for payment of a smaller amount and all other contract provisions in conflict with the statute.[78]

The provisions of the act with respect to minimum wages and overtime pay may not be evaded by an agreement entered into by employees before or during their period of employment to work for less than the minimum wage or not to accept overtime compensation or to accept overtime compensation at rates lower than those prescribed by the act;[79] nor may the parties agree that the employee shall be paid for only a part of the hours which the employee is required to serve.[80] However, there is nothing in the act which requires employers to continue to employ or employees to continue to work except on terms mutually agreeable to both, and, provided the act is complied with, the employer and employee are free to make any terms as to wages they choose.[81] Contracts between employer and employees as to wages are not made illegal by the act except as the minimum wage or the maximum hours provisions thereof are violated,[82] and it has been held that con-

formity of compensation and simplicity of calculation are legitimate objectives of a collective labor agreement, and should not be stricken as artificially designed to defy the spirit of Fair Labor Standards Act while embracing its letter.—Addison v. Huron Stevedoring Corp., D.C.N.Y., 69 F.Supp. 956.

77. U.S.—Martino v. Michigan Window Cleaning Co., Mich., 66 S.Ct. 379, 327 U.S. 173, 90 L.Ed. 603, rehearing denied 66 S.Ct. 699, 327 U.S. 816, 90 L.Ed. 1039—Addison v. Huron Stevedoring Corp., D.C.N.Y., 69 F.Supp. 956—Greenberg v. Arsenal Bldg. Corporation, D.C.N.Y., 50 F.Supp. 700, modified on other grounds 144 F.2d 292, reversed on other grounds Arsenal Bldg. Corporation v. Greenberg, 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Bailey v. Karolyna Co., D.C.N.Y., 50 F. Supp. 142.

N.Y.—Walsh v. 515 Madison Avenue Corporation, 42 N.Y.S.2d 262, 181 Misc. 219, affirmed 45 N.Y.S.2d 927, 267 App.Div. 756, affirmed 59 N.E. 2d 183, 293 N.Y. 826—Garrity v. Bagold Corporation, 42 N.Y.S.2d 257, 180 Misc. 120, modified on other grounds 46 N.Y.S.2d 637, 267 App.Div. 353.

Estoppel

Employees' right to have compensation computed as provided in the act could not be waived by employees and was a right which employees could not be estopped to assert, notwithstanding employees through their union forced employer to adopt an illegal split day plan of computing wages.—Robertson v. Alaska Juneau Gold Min. Co., C.C.A. Cal., 157 F.2d 876.

Distinct agreements

Employee's employment agreement is distinct from collective bargaining agreement between an employers' association and union of which employee is member, for purpose of determining employee's rights under the act.—Munkens v. 1412 Broadway, D.C.N.Y., 50 F.Supp. 632.

Agreement read as written

In determining liability for overtime, liquidated damages, and attorney's fees under the act, an agreement between employers and employees' labor union, unless reformed by an equity court, would in a law court be read as written.—Brennan v. Community Service Soc. of New York, 45 N.Y.S.2d 825, 181 Misc. 637.

78. U.S.—Brotherhood of Maintenance of Way Employees v. Nashville, C. & St. L. Ry., D.C.Tenn., 56 F.Supp. 559—Brotherhood of Maintenance of Way Employees v. Nashville, C. & St. L. Ry., D.C. Tenn., 56 F.Supp. 552.

79. U.S.—Walling v. Helmerich & Payne, Okl., 65 S.Ct. 11, 323 U.S. 37, 89 L.Ed. 29—Robertson v. Alaska Juneau Gold Min. Co., C.C.A. Cal., 157 F.2d 876—Johnson v. Dierks Lumber & Coal Co., C.C.A. Ark., 130 F.2d 115—Walling v. Lippold, D.C.Neb., 72 F.Supp. 339—Walling v. United Distillers Products Corp., D.C.Conn., 63 F. Supp. 474—Walling v. Richmond Screw Anchor Co., D.C.N.Y., 59 F. Supp. 291, affirmed, C.C.A., 154 F.2d 780—Walling v. Livernois, D.C. Mich., 50 F.Supp. 978—Greenberg v. Arsenal Bldg. Corporation, D.C. N.Y., 50 F.Supp. 700, modified on other grounds C.C.A., 144 F.2d 292, reversed on other grounds Arsenal Bldg. Corporation v. Greenberg, 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 564—Mortenson v. Western Light & Telephone Co., D.C.Iowa, 42 F. Supp. 319—Travis v. Ray, D.C.Ky., 41 F.Supp. 6—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009.

N.Y.—Steiner v. Pleasantville Constructors, 46 N.Y.S.2d 120, 181 Misc. 798, modified on other grounds 49 N.Y.S.2d 42, 182 Misc. 66, affirmed 54 N.Y.S.2d 700, first case, 269 App.Div. 738—Emerson v. Mary Lincoln Candies, 17 N.Y.S. 2d 851, 173 Misc. 531, affirmed 26 N.Y.S.2d 489, 261 App.Div. 879, appeal denied 27 N.Y.S.2d 452, 261 App.Div. 1044, affirmed 38 N.E.2d 234, 287 N.Y. 577—Rubin v. Meadow Provision Co., 39 N.Y.S.2d 518—Simmons v. Rudolph Knitting Mills, 37 N.Y.S.2d 422.

N.M.—Wilson Oil Co. v. Hardy, 164 P.2d 209, 49 N.M. 337, 162 A.L.R. 292.

Okl.—Skelly Oil Co. v. Jackson, 148 P.2d 182, 194 Okl. 183.

80. U.S.—Johnson v. Dierks Lumber & Coal Co., C.C.A.Ark., 130 F.2d 115.

81. U.S.—Atlantic Co. v. Walling, C.C.A.Ga., 131 F.2d 518.

Threat of dismissal

Where managers frankly advised employees of their orders to dismiss workers who failed to sign agreements valid under the act and threatened them with dismissal if they refused to do so, signing of the contracts under such circumstances created a definite understanding and agreement as to the basis on which further relations would continue and the contracts were binding on employer and all employees who signed them.—Atlantic Co. v. Walling, supra.

New contract

Where employees, who had been paid on monthly basis, continued to work under new arrangement whereby they were paid hourly rate on basis of forty hour week at rate exceeding statutory minimum and time and a half for overtime, a new contract was created.—Shepler v. Crucible Fuel Co. of America, D.C.Pa., 60 F.Supp. 260.

82. U.S.—Mornford v. Andrews, C. C.A.Ga., 151 F.2d 511—White v. Witwer Grocer Co., C.C.A.Iowa, 132 F.2d 108.

An employer may classify the work for which employees are hired and classify employees in accordance with the work assigned to them, with respect to whether they are hired for a forty-hour work week or a variable hours work week.—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F.Supp. 775, affirmed, C.C.A., 156 F.2d 681.

gress in enacting the Fair Labor Standards Act did not intend to impose on the variety of employment situations a single, rigid form of wage agreement.[83] In determining whether there was a bona fide contract between employer and employee, it is proper to consider not only the written instrument, but also the construction placed thereon by the parties and the payment of wages made by the employer.[84]

Shipment or sale in commerce as violation of act. Under Fair Labor Standards Act § 15 (a) (1), 29 U.S.C.A. § 215 (a) (1), it is a violation of the act to ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, goods produced by employees employed in violation of the minimum wage or maximum hours provisions of the act.[85]

When wages to be paid. Under the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq, minimum wages and overtime compensation are to be paid promptly,[86] and, as a rule, an employer becomes liable under the act for any overtime compensation on the next regular pay day covering the period of employment during which the overtime was worked.[87] However, if the correct overtime compensation cannot be determined until some time after the regular pay period, the employer is not thereby excused from making the proper computation and payment, since it is only required that employees receive a fifty per cent premium for such work as soon as convenient or practicable under the circumstances.[88]

§ 151(25). —— Minimum Wages

The Fair Labor Standards Act requires payment of an hourly rate of pay at least equal to the minimum specified in the act or in a wage order of the administrator, and some state statutes similarly require the payment of wages at not less than the rate established by a wage order.

Under the provisions of the Fair Labor Standards Act § 8, 29 U.S.C.A. § 208, it is the declared objective of the act to reach, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of a specified amount per hour in each industry subject to the act.[89] Accordingly § 6 of the act, 29 U.S.C.A. § 206, establishes basic minimum statutory wages, to be stepped up during the seven years from October 23, 1938, the effective date of the section.[90] Limited flexibility was provided in accordance with the declared purpose to reach the specified level earlier if economically feasible by permitting the administrator to fix by statutory procedure a higher minimum rate on recommendation of industry committees.[91] Accordingly the scheme of the statute is a combination of "statutory" minimum wages fixed by § 6 of the act, 29 U.S.C.A. § 206, and what may be termed "committee" wages, fixed by order of the administrator on recommendation of industry committees, pursuant to § 8 of the act, 29 U.S.C.A. § 208. The former prevail in the absence of special administrative action; the latter prevail when such action has been taken to prescribe for a specific industry a higher level than the generally prevailing statutory floor.[92]

83. U.S.—149 Madison Ave. Corp. v. Asselta, N.Y., 67 S.Ct. 1178, 331 U.S. 199, 91 L.Ed. —.

84. U.S.—Walling v. Villaume Box & Lumber Co., D.C.Minn., 58 F.Supp. 150.

Formula not applied

Where wages received by employees, allegedly received under formula method for overtime announced by board of conciliation under arbitration agreement, squared only with the old rate, court was required to conclude that the formula was not applied, and employees were entitled to recover for overtime wages and liquidated damages under the Fair Labor Standards Act for such period as the formula was allegedly applied, without regard to question of validity of formula.—Watkins v. Hudson Coal Co., C.C.A.Pa., 151 F.2d 311, certiorari denied 66 S.Ct. 522, 327 U.S. 777, 90 L.Ed. 1005, rehearing denied 66 S.Ct. 701, 327 U.S. 816, 90 L.Ed. 1039.

85. U.S.—Walling v. Castle, D.C.Miss., 64 F.Supp. 707, affirmed, C.C.A., Castle v. Walling, 153 F.2d 923—Walling v. De Soto Creamery & Produce Co., D.C.Minn., 51 F.Supp. 938—Walling v. James V. Reuter, Inc., D.C.La., 49 F.Supp. 485, reversed on other grounds 137 F.2d 315, vacated on other grounds 64 S.Ct. 826, 321 U.S. 671, 88 L.Ed. 1001—Walling v. Sun Pub. Co., D.C.Tenn., 47 F.Supp. 180, affirmed, C.C.A., 140 F.2d 445, certiorari denied 64 S.Ct. 946, 322 U.S. 728, 88 L.Ed. 1564—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., Atlantic Co. v. Walling, 131 F.2d 518.

Penalties for violation see infra § 151 (34).

86. U.S.—Rigopoulos v. Kervan, C.C.A.2, 140 F.2d 506, 151 A.L.R. 1126—Black v. Roland Elec. Co., D.C.Md., 68 F.Supp. 117—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310.

87. U.S.—Keen v. Mid-Continent Petroleum Corp., supra.

88. U.S.—Walling v. Harnischfeger Corp., Wis., 65 S.Ct. 1246, 325 U.S. 427, 89 L.Ed. 1711—Walling v. Wall Wire Products Co., C.C.A.Mich., 161 F.2d 470.

89. U.S.—Gemsco, Inc., v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Maretzo v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Guiseppi v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921.

90. U.S.—Gemsco, Inc. v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Maretzo v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Guiseppi v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 721.

91. U.S.—Gemsco, Inc. v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Maretzo v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Guiseppi v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 721.

Fixing of minimum wage by wage order see infra § 151 (32).

92. U.S.—Gemsco, Inc. v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Maretzo v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Guiseppi v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 721.

In accordance with the foregoing provisions of the act, the hourly rate of pay of employees subject to the act must be at least equal to the minimum specified in the act or in a wage order of the administrator,[93] and payment of less than the specified minimum wage constitutes a violation of the act,[94] rendering the employer liable to civil and criminal penalties, as discussed infra § 151 (34). The unit of measurement of the statutory wage fixed by the Fair Labor Standards Act is the hour,[95] and, although the provisions of the act do not specifically provide for any other method of paying wages except by an hourly rate, pay by the week, to be reduced by some method to hourly rates, is also covered by the act.[96] So, where the quotient of the weekly wage divided by the number of hours worked during the week is below the statutory minimum, the employer must adopt the minimum in computing wages due to its employees.[97] The act takes as its standard a single work week consisting of seven consecutive days,[98] and a payment above the minimum wage in one week may not be credited against any deficit existing in another week.[99]

Adamson Act. The fact that the contract employing a trainman subsequent to the Adamson Act of 1916, 39 U.S.St. at L. p 721, failed to provide for certain pay or specify what should constitute a day's work does not prevent the employee from being within the statute unless it is impossible to apply the act.[1] The act does not require payment at the statutory rate where the employees are desirous of carrying out their agreement to accept less, and this is especially so where the carrier is in an insolvent condition.[2]

National Industrial Recovery Act. The National Industrial Recovery Act § 1 et seq, 15 U.S.C.A. § 701 et seq, authorized the fixing of minimum wages by the provisions of codes of fair competition established for particular industries.[3] It has been held that the act itself did not impose a liability on an employer, independent of a voluntary contract, should the employer fail to observe its provisions as to the scale of wages exacted under the act,[4] and that employees were not under obligation to accept the rates of pay ordained by the act, and were at liberty to bargain, individually or collectively for a higher rate of pay than that designated.[5] Where an employer conspired with employees to evade the minimum wages fixed by the National Recovery Act Codes, before they were declared unconstitutional, by taking receipts from them for full code wages while paying lower wages, it was held that the employees could not maintain an action to recover the difference.[6]

State statutes. A state statute providing for the adoption of a minimum wage scale in any "sweatshop occupation" requires the payment of wages to an employee at not less than the rate established in a minimum wage order.[7] Under a statute relating to codes of fair competition and trade practices, it has been held that the governor cannot fix wages generally, but only where it is established as a matter of fact to the governor's satisfaction that the fixing of wages has relation to the elimination of unfair trade practices and unfair methods of competition.[8]

§ 151(26). —— Overtime Pay

a. In general
b. Regular rate of pay
c. Agreements as to rate of pay

93. U.S.—Drake v. Hirsch, D.C.Ga., 40 F.Supp. 290.
Release or settlement of liability for minimum wage see infra § 151 (35).
Validity of agreement for payment of less than minimum wage see supra § 151 (24).

94. U.S.—Walling v. De Soto Creamery & Produce Co., D.C.Minn., 51 F.Supp. 938—Fleming v. Pearson Hardwood Flooring Co., D.C.Tenn., 39 F.Supp. 300.
Failure to discharge duty
The section of the Fair Labor Standards Act of 1938 providing that every employer shall pay specified minimum wages can be violated only by failure to discharge the affirmative duty created by the act.—Fleming v. Alderman, D.C.Conn., 51 F. Supp. 800.

95. U.S.—Fleming v. Knox, D.C.Ga., 42 F.Supp. 948.

96. U.S.—Overnight Motor Transp. Co. v. Missel, Md., 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

97. U.S.—Fleming v. Knox, D.C.Ga., 42 F.Supp. 948.

98. U.S.—Roland Elec. Co. v. Black, C.C.A.Md., 163 F.2d 417—Shain v. Armour & Co., D.C.Ky., 50 F.Supp. 907.

99. U.S.—Travis v. Ray, D.C.Ky., 41 F.Supp. 6.

1. Mo.—Nelson v. St. Joseph & G. I. Ry. R. Co., 205 S.W. 870, 199 Mo.App. 635.
39 C.J. p 69 note 24.

2. U.S.—Ft. Smith & W. R. Co. v. Mills, Ark., 40 S.Ct. 526, 253 U.S. 206, 64 L.Ed. 862.

3. N.Y.—Canton v. The Palms, Inc., 273 N.Y.S. 239, 152 Misc. 347.
Code held in effect
N.Y.—Canton v. The Palms, Inc., supra.
Piece rate system
U.S.—U. S. v. Cordele Mfg. Co., D.C. Ga., 10 F.Supp. 721.

4. Tex.—Monroe v. Morten Inv. Co., Civ.App., 101 S.W.2d 593.

5. N.J.—Bayonne Textile Corporation v. American Federation of Silk Workers, 172 A. 551, 116 N.J.Eq. 146, 92 A.L.R. 1450.

6. Tenn.—Rust v. Newby, 100 S.W. 2d 989, 171 Tenn. 127.

7. Conn.—Swiss Cleaners v. Danaher, 27 A.2d 806, 129 Conn. 338.

8. Wis.—State ex rel. Attorney General v. Fasekas, 269 N.W. 700, 223 Wis. 356.

a. In General

The Fair Labor Standards Act requires that employees who work longer than forty hours during any work week be compensated for hours worked in excess of forty at a rate not less than one and one half times the regular rate, regardless of what the rate of pay may be; there can be no averaging of hours over two or more weeks in computing the overtime, and amounts paid in excess of the overtime requirements in some weeks may not be applied as a credit against payments due in other weeks.

Under the Fair Labor Standards Act § 207 (a), 29 U.S.C.A. § 207 (a), it is provided that no employer shall, except as otherwise provided by the act, employ any of his employees who is engaged in commerce or in the production of goods for commerce for a work week longer than that prescribed, which work week is fixed at forty hours after the expiration of the second year from the date of the act, unless such employee receives compensation for his employment in excess of the hours specified at a rate not less than one and one half times the regular rate at which he is employed.[9] Employment for a work week longer than forty hours without compensating employees as required by this provision constitutes a violation of the act,[10] rendering the employer liable to civil and criminal penalties, as discussed infra § 151 (34). Payment for overtime in excess of a specified number of hours is also provided for by territorial statute,[11] but, as discussed infra § 155, it has been held that a state statute prohibiting employees of certain establishments from working more than a specified number of hours per week gives no civil remedy or private right of action for overtime services.

It has been held that the provision of the Fair Labor Standards Act regarding overtime compensation must be liberally construed.[12] The words of

9. U.S.—St. John v. Brown, D.C. Tex., 38 F.Supp. 385.
N.Y.—Stoike v. First Nat. Bank of City of New York, 36 N.Y.S.2d 390, 264 App.Div. 585, reversed on other grounds 48 N.E.2d 482, 290 N.Y. 195, certiorari denied 64 S.Ct. 50, 320 U.S. 762, 88 L.Ed. 455—Ralston v. Karp Metal Products Co., 38 N.Y.S.2d 764, 179 Misc. 282—Emerson v. Mary Lincoln Candies, 20 N.Y.S.2d 570, 174 Misc. 353, affirmed 26 N.Y.S.2d 489, 261 App.Div. 879, appeal denied 27 N.Y.S.2d 452, 261 App.Div. 1044, affirmed 38 N.E.2d 234, 287 N.Y. 577.
Effect of contracts limiting employee's right to overtime pay see supra § 151 (24).
Validity of wage agreements fixing regular and overtime rates see infra subdivision c of this section.

Purpose

(1) Fair Labor Standards Act § 7 (a), by increasing employer's labor costs by fifty per cent at end of the forty-hour week and by giving employees a fifty per cent premium for all excess hours, achieves its dual purpose of inducing employer to reduce the hours of work and to employ more men and of compensating employees for burden of a long work week.—Walling v. Youngerman-Reynolds Hardwood Co., U.S.Ala., 65 S.Ct. 1242, 325 U.S. 419, 89 L.Ed. 1705, rehearing denied 66 S.Ct. 12, 326 U.S. 804, 90 L.Ed. 489.

(2) The requirement of increased pay for overtime service is a remedial measure adapted to the needs of an economic and social program, rather than a police regulation adapted to the rigid enforcement required in a safety program.—Levinson v. Spector Motor Service, Ill., 67 S.Ct. 931, 330 U.S. 649, 91 L.Ed. 1158.

(3) Purpose of act generally see supra § 151 (1).

Independent vitality

U.S.—Bumpus v. Continental Baking Co., C.C.A.Tenn., 124 F.2d 549, 140 A.L.R. 1258, certiorari denied Continental Baking Co. v. Bumpus, 62 S.Ct. 1305, 316 U.S. 704, 86 L.Ed. 1772.

Individual right

The right of time and a half for overtime, plus liquidated damages for failure to receive it, is an individual right of the employee, not a criminal sanction or even a general right given to employees' bargaining unit, and unless employee remained in company's employ for long enough time after the adoption of an increased wage scale to be paid whatever he had coming under the act before the wage scale went into effect, he has not been compensated as the act requires.—Watkins v. Hudson Coal Co., C.C.A.Pa., 151 F.2d 311, certiorari denied 66 S.Ct. 522, 327 U.S. 777, 90 L.Ed. 1005, rehearing denied 66 S.Ct. 701, 327 U.S. 816, 90 L.Ed. 1039.

Bonuses

Under the Fair Labor Standards Act, it was not intended that an employer should compensate employees for overtime by granting them bonuses.—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009.

10. U.S.—Castle v. Walling, C.C.A. Miss., 153 F.2d 923—Walling v. West Ky. Coal Co., D.C.Tenn., 60 F.Supp. 681—Walling v. Merchants Police Service, D.C.Ky., 59 F.Supp. 873—Walling v. New Orleans Private Patrol Service, D.C.La., 57 F. Supp. 143—Walling v. De Soto Creamery & Produce Co., D.C.Minn., 51 F.Supp. 938—Walling v. James V. Reuter, Inc., D.C.La., 49 F.Supp. 485, reversed on other grounds 137 F.2d 315, vacated on other grounds 64 S.Ct. 826, 321 U.S. 671, 88 L.Ed. 1001—Walling v. Sun Pub. Co., D.C.Tenn., 47 F.Supp. 180, affirmed, C.C.A., 140 F.2d 445, certiorari denied 64 S.Ct. 946, 322 U.S. 728, 88 L.Ed. 1564—Tenaglia v. Tully & Di Napoli, D.C.N.Y., 43 F.Supp. 814—Fleming v. Pearson Hardwood Flooring Co., D.C.Tenn., 39 F.Supp. 300.

11. U.S.—Domenech v. Pan Am. Standard Brands, C.C.A.Puerto Rico, 148 F.2d 763.

Ninth hour

(1) Employee, in action for overtime compensation under territorial statute, is entitled to recover at the statutory rate for the ninth hour only in any one calendar day.—Domenech v. Pan Am. Standard Brands, D.C.Puerto Rico, 68 F.Supp. 726.

(2) If, prior to effective date of Puerto Rican act regulating working hours, employee was working seventy-two hours a week for fifteen dollars as he allegedly worked immediately thereafter, finding that parties intended that fifteen dollars should cover a seventy-two-hour week would be justified, but employee would not be precluded from recovering statutory double time for the ninth hour worked in any day.—Domenech v. Pan Am. Standard Brands, C.C.A. Puerto Rico, 148 F.2d 763.

Recovery at normal rate

Employee and employer, making contract for work in excess of maximum hours set by the law, are not in delicto to such an extent that employee cannot recover wages at normal rate for overtime actually worked in excess of nine hours per day.—Domenech v. Pan Am. Standard Brands, supra.

12. U.S.—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, etc., C.C.A.Ala., 137 F.2d 176, denying rehearing 135 F.2d 320, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed.

the statute must be given their usual and ordinary meaning and the statute requires no outside aid in its interpretation.[13] The overtime pay provision of the act is indicative of a congressional intention to guarantee either regular or overtime compensation for all actual work or employment,[14] and it necessarily implies a kind of relationship based on agreement between the employer and employee from which it is possible to determine the regular hourly rate at which the employee is employed, and contemplates a situation in which the employer agrees to pay a certain sum to the employee and has control of the hours of work by the employee.[15]

The provision for overtime pay does not regulate wages[16] but imposes a penalty on overtime work regardless of what the rate of pay may be,[17] and accordingly the requirement of overtime pay is not limited to employees receiving less than the statutory minimum per hour.[18] Also overtime beyond the maximum number of hours specified by the act must be paid at one and one half times the regular rate of pay, where that pay is above the minimum as well as where the regular pay is at the minimum,[19] and it is not enough that employees received compensation in excess of the amount they would have been paid on the basis of time and a half computed at the minimum wage provided for in the act.[20] The mere fact that a worker's hours of employment fluctuate does not insulate the worker from the protection of the overtime provisions of the act.[21]

An employer is within its rights in establishing a rule or policy prohibiting overtime work,[22] and it has the right to demand an explanation regarding the necessity for certain overtime hours worked by employees, if it acts in good faith and not for the purpose of having time worked omitted from the records.[23] However, the fact that an employee was employed for specific hours at a specific weekly wage and directed not to work overtime without the employer's permission does not affect his right to compensation for overtime work done with the knowledge of the employer.[24]

949, 152 A.L.R. 1014, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596.

13. U.S.—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, etc., supra.

14. U.S.—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, Ala., 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 137 F.2d 176, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L. Ed. 1596.

Nonbillable work

Where engineers employed by efficiency expert firm were actually paid for work that was not billable to customers, despite contract making no provision for nonbillable work, they were entitled to overtime for nonbillable work in excess of forty hours per week.—Chepard v. May, D. C.N.Y., 71 F.Supp. 389.

15. U.S.—Schroepfer v. A. S. Abell Co., D.C.Md., 48 F.Supp. 88, affirmed, C.C.A., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U. S. 763, 88 L.Ed. 1060, rehearing denied 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595.

16. U.S.—Barrett v. National Malleable & Steel Castings Co., D.C. Pa., 68 F.Supp. 410—Fleming v. Carleton Screw Products Co., D.C. Minn., 37 F.Supp. 754, affirmed, C. C.A., 126 F.2d 537, certiorari denied 63 S.Ct. 54, 317 U.S. 634, 87 L.Ed. 511.

17. U.S.—Carleton Screw Products Co. v. Fleming, C.C.A.Minn., 126 F. 2d 537, certiorari denied 63 S.Ct. 54, 317 U.S. 634, 87 L.Ed. 511—Barrett v. National Malleable & Steel Castings Co., D.C.Pa., 68 F.Supp. 410.

18. Tenn.—Thornberg v. E. T. & W. N. C. Motor Transp. Co., 157 S.W. 2d 823, 178 Tenn. 298.

19. U.S.—Overnight Motor Transp. Co. v. Missel, Md., 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Bumpus v. Continental Baking Co., C.C.A.Tenn., 124 F. 2d 549, 140 A.L.R. 1258, certiorari denied Continental Baking Co. v. Bumpus, 62 S.Ct. 1305, 316 U.S. 704, 86 L.Ed. 1772—Black v. Roland Elec. Co., D.C.Md., 68 F.Supp. 117—Garchell v. Kantar, D.C.Minn., 56 F.Supp. 866, reversed on other grounds, C.C.A., 150 F.2d 47—Perry v. Creech Coal Co., D.C.Ky., 55 F. Supp. 998—Clay v. Motor Freight Express, D.C.Pa., 52 F.Supp. 948.

Tex.—D. & L. Production Co. v. Cuniff, Civ.App., 165 S.W.2d 933, error dismissed.

20. U.S.—Walling v. Helmerich & Payne, Okl., 65 S.Ct. 11, 323 U.S. 37, 89 L.Ed. 29—Floyd v. Du Bois Soap Co., Ohio, 63 S.Ct. 159, 317 U. S. 596, 87 L.Ed. 488—Warren-Bradshaw Drilling Co. v. Hall, Tex., 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83—Overnight Motor Transp. Co. v. Missel, Md., 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed 563—Bumpus v. Continental Baking Co., C.C.A.Tenn., 124 F.2d 549, 140 A.L.R. 1258, certiorari denied Continental Baking Co. v. Bumpus, 62 S.Ct. 1305, 316 U.S. 704, 86 L.Ed. 1772—Warren-Bradshaw Drilling Co. v. Hall, C.C.A.Tex., 124 F.2d 42, affirmed 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83—Hargrave v. Mid-Continent Petroleum Corporation, D.C.Okl., 42 F.Supp. 908, affirmed, C.C.A., Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655 —Sunshine Mining Co. v. Carver, D.C.Idaho, 41 F.Supp. 60—Fleming v. Pearson Hardwood Flooring Co., D.C.Tenn., 39 F.Supp. 300—St. John v. Brown, D.C.Tex., 38 F.Supp. 385.

21. U.S.—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

22. Kan.—Jackson v. Derby Oil Co., 139 P.2d 146, 157 Kan. 53.

Courts do not look with favor on overtime claims of an employee who is forbidden by contract of employment to work overtime.—Jackson v. Derby Oil Co., supra.

23. U.S.—Walling v. Woodruff, D.C. Ga., 49 F.Supp. 52.

24. U.S.—Kappler v. Republic Pictures Corp., D.C.Iowa, 59 F.Supp. 112, affirmed, C.C.A., Republic Pictures Corp. v. Kappler, 151 F.2d 543, 162 A.L.R. 228, affirmed 66 S. Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L.Ed. 1040.

Regular and overtime rates must be computed in the manner prescribed by the act.[25] It is necessary and sufficient for compliance with the act that an employee be paid at a full one and one half times the regular rate of pay for all work in excess of forty hours during any work week,[26] and the overtime compensation must be computed by increasing the employee's regular hourly rate by fifty per cent and multiplying such figure by the number of overtime hours.[27] The overtime pay provision of the Fair Labor Standards Act does not limit the work week to forty hours,[28] and an employee may work more than forty hours per week provided he is compensated therefor as provided in the act.[29] The time worked over forty hours per week, even by piece workers, must be included in the time worked for the purpose of computing overtime.[30]

The unit of time under the act within which to distinguish regular from overtime is the week[31] and there can be no averaging of hours over two or more weeks in computing overtime compensation.[32] Also an employer may not apply amounts actually paid employees in excess of the overtime requirements of the act in some weeks, as a credit against payments in other weeks when compensation for overtime did not, in fact, equal the amounts prescribed by the act,[33] and an employer may not deduct from the amount due employees as overtime compensation the regular year-end bonuses paid to employees.[34] Where there is no evidence that an employer's payment of the full weekly wage stipulated for weeks in which the employee was absent part of the time was made under mistake of law or fact, the employer is not entitled to credit for the alleged overpayments on those weeks against the amount recoverable by the employee as overtime compensation.[35]

25. U.S.—Robertson v. Alaska Juneau Gold Min. Co., C.C.A.Cal., 157 F.2d 876—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310.

26. U.S.—Lewellen v. Hardy-Burlingham Min. Co., D.C.Ky., 73 F. Supp. 63—Ferrer v. Waterman S. S. Corp., D.C.Puerto Rico, 70 F. Supp. 1—Klotz v. Ippolito, D.C. Tex., 40 F.Supp. 422.

Ala.—Cudahy Packing Co. of Alabama v. Bazanos, 15 So.2d 720, 245 Ala. 73.

N.Y.—Mabee v. White Plains Pub. Co., 41 N.Y.S.2d 534, 180 Misc. 8, reversed on other grounds 45 N.Y. S.2d 479, 267 App.Div. 284, affirmed 58 N.E.2d 520, 293 N.Y. 781, motion denied 60 N.E.2d 848, 294 N.Y. 701, reversed on other grounds 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607.

Wis.—Katchel v. Northern Engraving & Mfg. Co., 25 N.W.2d 431, 249 Wis. 578.

Full increase

A full fifty per cent increase in labor costs and a full fifty per cent wage premium are meant to flow from the overtime provision of Fair Labor Standards Act; fact that employer was paying a premium for overtime employment so as to make the overtime rate somewhat above the piecework earnings per hour was immaterial in determining whether employer violated overtime provision of the act, since until that premium is fifty per cent of the actual hourly rate received from all regular sources, the provision has not been satisfied.—Walling v. Harnischfeger Corp., Wis., 65 S.Ct. 1246, 1250, 325 U.S. 427, 89 L.Ed. 1711.

Additional expense

Under provision of the Fair Labor Standards Act relating to compensation for overtime worked, employment for more than the statutory maximum number of hours is intended to entail additional expense to the employer no matter what the regular rate of employment may be, unless the employee falls within one of the exempted groups there listed.—Bumpus v. Continental Baking Co., C.C.A.Tenn., 124 F.2d 549, 140 A.L.R. 1258, certiorari denied Continental Baking Co. v. Bumpus, 62 S.Ct. 1305, 316 U.S. 704, 86 L.Ed. 1772.

Employment contract

The designation of compensation or period of work as "overtime" in employment contract does not make such compensation or period of work overtime within Fair Labor Standards Act providing that hours worked after forty during any work week are overtime for which extra compensation is allowed.—Ferrer v. Waterman S. S. Corp., D.C.Puerto Rico, 70 F.Supp. 1.

27. N.Y.—Reck v. Zarnocay, 36 N.Y. S.2d 394, 264 App.Div. 520, reargument denied 37 N.Y.S.2d 834, 265 App.Div. 817.

Field time reports showing number of hours of different kinds of work performed by employee, which were substantially correct, were adequate basis for computing overtime due under the Fair Labor Standards Act.—Straughn v. Schlumberger Well Surveying Corp., D.C.Tex., 72 F.Supp. 511.

28. U.S.—Landreth v. Ford, Bacon & Davis, C.C.A.Ark., 147 F.2d 446.

29. U.S.—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F.Supp. 775, affirmed, C.C.A., 156 F.2d 681.

30. U.S.—Anderson v. Mt. Clemens Pottery Co., D.C.Mich., 60 F.Supp. 146, reversed on other grounds, C.C.A., Mt. Clemens Pottery Co. v. Anderson, 149 F.2d 461, reversed on other grounds 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

31. U.S.—Overnight Motor Transp. Co. v. Missel, Md., 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

Staggered shifts

Where a work week under the Fair Labor Standards Act, as interpreted by the administrator, consisted of seven days starting with the same calendar day each week, and employer established a work week of seven consecutive days beginning on Wednesday and ending on the following Tuesday, and so staggered the shifts on which plaintiff employee worked as to allow from one to four days' rest between changes of shifts, although employee worked seven consecutive days on each shift, and he drew overtime varying from ten to fifty per cent for days worked, employer did not violate the act so as to entitle employee to recover overtime for each seventh day worked.—Harned v. Atlas Powder Co., 192 S. W.2d 378, 301 Ky. 517.

32. U.S.—Black v. Roland Elec. Co., D.C.Md., 68 F.Supp. 117.

33. U.S.—Roland Elec. Co. v. Black, C.C.A.Md., 163 F.2d 417—Black v. Roland Elec. Co., D.C.Md., 68 F. Supp. 117.

34. U.S.—Roland Elec. Co. v. Black, C.C.A.Md., 163 F.2d 417—Black v. Roland Elec. Co., D.C.Md., 68 F. Supp. 117.

35. U.S.—Hutchinson v. William C. Barry, Inc., D.C.Mass., 50 F.Supp. 292.

A work week under the act consists of seven consecutive days and it need not coincide with the calendar week but may begin on any day and at any time of any day.[36] A work schedule under which an employee has a different day off in each calendar week is not in violation of the act, so that the employee is not entitled to overtime compensation for the last day of each period of seven consecutive days worked by him.[37] Employees are entitled to time and a half, and not double time, for time worked in excess of forty hours on the seventh consecutive day,[38] and the statute does not authorize the recovery of double time for Sunday work.[39]

Employment by several employers. Generally, in the absence of collusion between several employers for whom a single employee works, a particular employer is required to pay overtime only if the employee is engaged in work for him for more than forty hours a week,[40] but it has also been held, without reference to whether the employment is joint, that where one is employed concurrently by two employers the two concurrent salaries received by the employee from both employers and the number of hours given by the employee to both jobs are to be added in determining application of provisions for minimum wages and overtime pay.[41] Where one is jointly employed by several employers, each is liable under the act for overtime compensation,[42] but, in determining whether two employers are acting independently in working an employee more than forty hours in a week, the facts of the particular case are controlling,[43] and in order to render them jointly liable for overtime compensation it must appear that both employers undertook the task involved and had joint control over its performance.[44]

b. Regular Rate of Pay

Under provisions of the Fair Labor Standards Act requiring payment of overtime at one and one half times the regular rate of pay, the "regular rate" is an actual fact and means the hourly rate actually paid for the normal, nonovertime work week, including all payments which the parties have agreed shall be received during the work week, exclusive of overtime payments.

Under Fair Labor Standards Act § 7, 29 U.S.C.A. § 207, requiring work in excess of the number of hours specified to be paid for at one and one half times the "regular rate" of pay, the computation of the overtime payment to which an employee is entitled first requires a determination of the regular rate of pay.[45] The term "regular rate" is not defined in the act, and hence its meaning is the subject of judicial interpretation having in mind the purposes of the act,[46] but it has been held that the words used in the statute are not ambiguous, and do not require, for their construction, resort to the declaration of policy and the legislative history of the act.[47] The term is not to be enlarged by reference to the definition of the term "wages" found in other statutes.[48]

The question of what is the "regular rate" of compensation, on which the amount of overtime payments required by the act depends, must be determined in each case from a consideration of the

36. Tex.—Barclay v. Magnolia Petroleum Co., Civ.App., 203 S.W.2d 626, refused no reversible error.

37. Tex.—Barclay v. Magnolia Petroleum Co., supra.

38. U.S.—Barrett v. National Malleable & Steel Castings Co., D.C. Pa., 68 F.Supp. 410.

39. N.Y.—Steiner v. Pleasantville Constructors, 49 N.Y.S.2d 42, 182 Misc. 66, affirmed 54 N.Y.S.2d 700, first case, 269 App.Div. 738—Steiner v. Pleasantville Constructors, 49 N.Y.S.2d 41, affirmed 54 N.Y.S.2d 700, second case, 269 App.Div. 738.

40. U.S.—Walling v. Twyeffort, Inc., C.C.A.N.Y., 158 F.2d 944.

Commissary

Where commissary was located on defendant employers' plant site but was owned by a third person who was local manager of employers' plant, and employees who worked at the plant at times also worked in the commissary, the time worked by employees in the commissary could not be included in determining amount due by employers under Fair Labor Standards Act, on theory that employees were jointly employed by the employers and third person.—Fleming v. Knox, D.C.Ga., 42 F.Supp. 948.

Computation of time worked

Where night watchman of defendant employers engaged in commerce or production of goods for commerce within the Fair Labor Standards Act received twenty per cent of pay from another employer, twenty per cent of time he worked would be deducted from total of hours worked during night in determining time that he had worked for defendants.—Fleming v. Stillman, D.C.Tenn., 48 F.Supp. 609.

41. U.S.—Woods v. Wilkerson, D.C. La., 40 F.Supp. 131.

42. U.S.—Morales v. Compania Azucarera Del Toa, D.C.Puerto Rico, 68 F.Supp. 346.

43. U.S.—Walling v. Friend, C.C.A. Mo., 156 F.2d 429.

Common office

Where owners of market were members of live stock commission firm and the two firms shared a common office where employee, who worked for both firms, performed all his work, and services for one employer were of no benefit to the other and employee worked more than forty hours per week, but did not work overtime for the commission firm, such firm did not violate the hour provisions of Fair Labor Standards Act.—Walling v. Friend, supra.

44. Ind.—Princeton Min. Co. v. Veach, 63 N.E.2d 306, 116 Ind.App. 332.

45. U.S.—Selan v. Becker, D.C.Wis., 71 F.Supp. 689.

46. U.S.—White v. Witwer Grocer Co., C.C.A.Iowa, 132 F.2d 108.

Wis.—Katchel v. Northern Engraving & Mfg. Co., 25 N.W.2d 431, 249 Wis. 578.

47. U.S.—Fleming v. A. H. Belo Corporation, C.C.A.Tex., 121 F.2d 207, certiorari denied 62 S.Ct. 137, 314 U.S. 601, 86 L.Ed. 484, affirmed Walling v. A. H. Belo Corporation, 62 S.Ct. 1223, 316 U.S. 624, 86 L.Ed. 1716, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

48. U.S.—McComb v. Shepard Niles Crane & Hoist Corp., D.C.N.Y., 72 F.Supp. 239.

facts and circumstances.[49] Although the parties may contract as to the rate of compensation, within the limits circumscribed by the statute, as is discussed infra subdivision c of this section, an employer and employee may not legally agree on a basis for overtime compensation under the act which is different from the actual basis of the employee's regular compensation.[50] The regular rate, however established, must be a bona fide rate,[51] and overtime must be paid on the basis of the employee's regular compensation regardless of what the components thereof are called, and how desirable, beneficial, or praiseworthy it may be to divide such compensation into artificial components.[52] The regular rate is an "actual fact,"[53] and, in ascertaining such rate for the purpose of determining the amount of overtime compensation payable under the act, the court must look not to the contract nomenclature but to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each work week.[54]

As a general rule the words "regular rate" mean the hourly rate actually paid for the normal, nonovertime work week,[55] and an employee's regular compensation is the compensation which regularly and actually reaches him, however indirectly, independently of whether it could be called a gratuity under some other circumstances or may shrink at some time, and regardless of the strict legal relationship between employer and employee.[56] Accordingly the term means the actual rate of pay which the employee is receiving, no matter how high, and not the minimum rate set forth in the statute.[57] However, where an employee's compensation is less than the minimum wage permitted by the act, the minimum wage is the "regular rate at which he is employed,"[58] and the basic wage paid for labor under the minimum rate provision rather than the rate of payment before the effective date of the act is the base to be used in determining overtime compensation.[59]

As a general rule the regular rate of pay, for purposes of computing overtime compensation, includes all payments which the parties have agreed shall be received during the work week, exclusive of overtime payments,[60] including piecework wa-

49. U.S.—Walling v. Frank Adam Elec. Co., C.C.A.Mo., 163 F.2d 277.

50. U.S.—Walling v. Richmond Screw Anchor Co., D.C.N.Y., 59 F. Supp. 291, affirmed, C.C.A., 154 F. 2d 780.

51. U.S.—Watkins v. Hudson Coal Co., C.C.A.Pa., 151 F.2d 311, certiorari denied 66 S.Ct. 522, 327 U.S. 777, 90 L.Ed. 1005, rehearing denied 66 S.Ct. 701, 327 U.S. 816, 90 L.Ed. 1039.

52. U.S.—Walling v. Richmond Screw Anchor Co., D.C.N.Y., 59 F. Supp. 291, affirmed, C.C.A., 154 F.2d 780.

53. U.S.—149 Madison Ave. Corp. v. Asselta, N.Y., 67 S.Ct. 1178, 331 U. S. 199, 91 L.Ed. —— —Walling v. Youngerman-Reynolds Hardwood Co., Ala., 65 S.Ct. 1242, 325 U.S. 419, 89 L.Ed. 1705, rehearing denied 66 S.Ct. 12, 326 U.S. 804, 90 L.Ed 489.

54. U.S.—Walling v. Harnischfeger Corp., Wis., 65 S.Ct. 1246, 1250, 325 U.S. 427, 89 L.Ed. 1711—Robertson v. Alaska Juneau Gold Min. Co., C.C.A.Cal., 157 F.2d 876—Walling v. Arctic Circle Exploration, D.C. Wash., 56 F.Supp. 944—International Longshoremen's Ass'n, Local 815, v. National Terminals Corporation, D.C.Wis., 50 F.Supp. 26, affirmed, C.C.A., Cabunac v. National Terminals Corporation, 139 F.2d 853.

55. U.S.—149 Madison Ave. Corp. v. Asselta, N.Y., 67 S.Ct. 1178, 331 U. S. 199, 91 L.Ed. 1432, 169 A.L.R. 1293—Walling v. Youngerman-Reynolds Hardwood Co., Ala., 65 S.Ct. 1242, 325 U.S. 419, 89 L.Ed. 1705, rehearing denied 66 S.Ct. 12, 326 U.S. 804, 90 L.Ed. 489—Walling v. Helmerich & Payne, Okl., 65 S.Ct. 11, 323 U.S. 37, 89 L.Ed. 29—McComb v. Shepard Niles Crane & Hoist Corp., D.C. N.Y., 72 F.Supp. 239—Walling v. Frank Adam Elec. Co., D.C.Mo., 66 F.Supp. 811.

Deductions

(1) Where employees worked with full knowledge of employer's practice to charge employees for tools used by them, their regular rate of pay for purposes of computing overtime was the pay received after such deductions.—Anderson v. Mt. Clemens Pottery Co., D.C.Mich., 60 F.Supp. 146, reversed on other grounds, C.C.A., Mt. Clemens Pottery Co. v. Anderson, 149 F.2d 461, reversed on other grounds 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. ——.

(2) What constitutes wages and compensation generally see infra § 151 (27).

56. U.S.—Walling v. Richmond Screw Anchor Co., D.C.N.Y., 59 F. Supp. 291, affirmed, C.C.A., 154 F.2d 780.

57. U.S.—Carleton Screw Products Co. v. Fleming, C.C.A.Minn., 126 F. 2d 537, certiorari denied 63 S.Ct. 54, 317 U.S. 634, 87 L.Ed. 511—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

Va.—Tidewater Optical Co. v. Wittkamp, 19 S.E.2d 897, 179 Va. 545.

58. U.S.—Fleming v. Knox, D.C.Ga., 42 F.Supp. 948—Drake v. Hirsch, D.C.Ga., 40 F.Supp. 290.

59. U.S.—White v. Witwer Grocer Co., C.C.A.Iowa, 132 F.2d 108.

60. U.S.—Walling v. Youngerman-Reynolds Hardwood Co., Ala., 65 S. Ct. 1242, 325 U.S. 419, 89 L.Ed. 1705, rehearing denied 66 S.Ct. 12, 326 U.S. 804, 90 L.Ed. 489—Walling v. Wall Wire Products Co., C.C. A.Mich., 161 F.2d 470—Walling v. Garlock Packing Co., C.C.A.N.Y., 159 F.2d 44—Robertson v. Alaska Juneau Gold Min. Co., C.C.A.Cal., 157 F.2d 876—Walling v. Alaska-Pacific Consol. Mining Co., C.C.A. Wash., 152 F.2d 812, certiorari denied 66 S.Ct. 960, 327 U.S. 803, 90 L.Ed. 1028—Fleming v. Carleton Screw Products Co., D.C.Minn., 37 F.Supp. 754, affirmed, C.C.A., 126 F.2d 537, certiorari denied 63 S.Ct. 54, 317 U.S. 634, 87 L.Ed. 511.

Gratuity

Where employees, assured that they would receive the same earnings as before, signed agreements for setting up on employer's books a wage rate lower than rate paid before date of agreements, overtime compensation was computed on lower rate, and a so-called bonus or gratuity sufficient to bring total wage for pay period to an amount equalling total hours worked during that period, multiplied by hourly rate received before date of agreements, was added, regular rate on basis of

ges,[61] differential payments for working at undesirable times, such as at night or on Sundays and holidays,[62] and the cost of board and lodging customarily furnished employees.[63] The "regular rate" of pay also ordinarily includes incentive bonus[64] or profit-sharing[65] payments made in addition to the normal base pay. So where bonuses, the amount of which could be ascertained by application of a formula, were regularly paid and employees assumed that in the normal course of events they would receive such bonuses, they constituted part of the regular rate at which they were paid and were required to be considered in the computation of overtime pay, notwithstanding the bonus payments were discretionary with the employer and could be discontinued.[66] It has been held, however, that a bonus which was provided for subsequent to the earning of the compensation on which it was based is not any part of the regular rate of compensation,[67] and that annual bonuses which, although scaled according to an employee's annual income, are actually in the nature of an outright gift may not be considered as compensation with respect to the computation of base pay and overtime compensation under the act.[68]

which overtime compensation was required to be computed under the Fair Labor Standards Act was agreed rate plus so-called bonus or gratuity paid at end of each week.—Carleton Screw Products Co. v. Fleming, C.C.A.Minn., 126 F.2d 537, certiorari denied 63 S.Ct. 54, 317 U.S. 634, 87 L.Ed. 511.

61. U.S.—Walling v. Harnischfeger Corp., Wis., 65 S.Ct. 1246, 1250, 325 U.S. 427, 89 L.Ed. 1711—Walling v. Lippold, D.C.Neb., 72 F.Supp. 339—Selan v. Becker, D.C.Wis., 71 F. Supp. 689.

Piece-rate pay system

Where contract provided for piece-rate pay system under which employees' wages could exceed an established base rate, those employees who received hourly rates at least twenty per cent higher than their guaranteed base rates were paid a regular rate identical with the higher rate, and hence employer's failure to pay them for overtime labor on basis of such higher rate violated overtime provision of Fair Labor Standards Act notwithstanding contract designation of base rate as the regular rate.—Walling v. Harnischfeger Corp., Wis., 65 S.Ct. 1246, 1250, 325 U.S. 427, 89 L.Ed. 1711.

Coincident with hourly rate

Under overtime provision of Fair Labor Standards Act, in case of piece-work wages, the regular rate coincides with hourly rate actually received for all hours worked during particular work week, such rate being the quotient of amount received during the week divided by number of hours worked.—Walling v. Youngerman-Reynolds Hardwood Co., Ala., 65 S.Ct. 1242, 325 U.S. 419, 89 L.Ed. 1705, rehearing denied 66 S.Ct. 12, 326 U.S. 804, 90 L.Ed. 489.

Mine tunnels completed

Where employer guaranteed a minimum wage, but agreed that it would pay as much over that as employees were able to make on an agreed sum per foot of mine tunnel completed and, although minimum hourly rates were guaranteed, employees were paid their piece rate earnings, and employees received a greater regular rate than guaranteed minimum base rate, such piece-work wages forming only part of their normal weekly income were required to be included within statutory regular rate under Fair Labor Standards Act.—Walling v. Alaska Pac. Consol. Min. Co., C.C.A.Wash., 152 F.2d 812, certiorari denied Alaska Pac. Consol. Min. Co. v. Walling, 66 S.Ct. 960, 327 U.S. 803, 90 L.Ed. 1028.

62. U.S.—International Longshoremen's Ass'n, Local 815, v. National Terminals Corporation, D.C.Wis., 50 F.Supp. 26, affirmed, C.C.A., Carbunac v. National Terminals Corporation, 139 F.2d 853.

Effect of agreement for higher rate for work during certain hours or on certain days see infra subdivision c of this section.

Designation as bonus

Differential payment of five cents per hour for night shift work paid to employees under union wage contract was not a gratuity but was part of regular rate for purpose of computing overtime compensation under Fair Labor Standards Act, notwithstanding differential was designated as bonus and was not included in employer's returns to workmen's compensation insurer and was distinguished on employer's books by red ink, and under National War Labor Board's form.—Walling v. Wm. Schollhorn Co., D.C.Conn., 54 F. Supp. 1022.

63. U.S.—Walling v. Alaska Pac. Consol. Min. Co., C.C.A.Wash., 152 F.2d 812, certiorari denied Alaska Pac. Consol. Co. v. Walling, 66 S. Ct. 960, 327 U.S. 803, 90 L.Ed. 1028.

Wages as including value of services furnished employees see infra § 151 (27).

64. U.S.—Walling v. Harnischfeger Corp., Wis., 65 S.Ct. 1246, 1250, 325 U.S. 427, 89 L.Ed. 1711—Walling v. Jacksonville Paper Co., D.C.Fla., 69 F.Supp. 599—Black v. Roland Elec. Co., D.C.Md., 68 F.Supp. 117.

Computation

Under the Fair Labor Standards Act, where a bonus was paid employees who turned out more work than stated minimum, overtime hourly rate should be one and a half times regular hourly rate, and bonus rate during overtime should be one and a half times regular bonus rate, so that, when shift on which bonus was earned was part regular time and part overtime, bonus would be at regular bonus rate for that fraction of bonus allocated pro rata to regular time, and at overtime bonus rate for that fraction allocated to overtime.—Walling v. Stone, C.C.A.Ill., 131 F.2d 461.

65. U.S.—Walling v. Wall Wire Products Co., C.C.A.Mich., 161 F.2d 470—Corey v. Detroit Steel Corporation, D.C.Mich., 52 F.Supp. 138.

Relation to other factors

Under provision of the Fair Labor Standards Act requiring payment of overtime at a rate not less than one and a half times the regular rate at which employee is employed, bonuses or shares of profit paid to employees need not be related to their classifications, rates, and standards for jobs, as set forth in contract, and need not be based on individual skills, wages, salaries, or accomplishments, in order to be included in the regular rate.—Walling v. Wall Wire Products Co., C.C.A.Mich., 161 F.2d 470.

66. U.S.—Walling v. Garlock Packing Co., C.C.A.N.Y., 159 F.2d 44—Walling v. Richmond Screw Anchor Co., C.C.A.N.Y., 154 F.2d 780, certiorari denied 66 S.Ct. 1383, 328 U.S. 870, 90 L.Ed. 1640.

67. U.S.—Walling v. Frank Adam Elec. Co., D.C.Mo., 66 F.Supp. 811.

68. U.S.—Black v. Roland Elec. Co., D.C.Md., 68 F.Supp. 117.

Discretionary nature

It has been held that bonuses paid employees pursuant to resolutions of the corporate employer's board of directors, which were not promised in advance and were completely discretionary with the employer's manage-

It is not necessary that the exact amounts that go to make up the "regular rate" of pay be known at the time the work is done by the employee, since they may not be susceptible of computation until a later date.[69] The word "regular" does not necessarily mean unvarying,[70] and accordingly the regular rate need not be uniform in amount from work week to work week but may be subject to fluctuation because of different component factors, such as the amount of production and the size of dividends or profits.[71]

Ordinarily, where an employee works at a fixed hourly wage, his regular rate of pay is established by his contract of employment, and he is entitled under the act to receive for all hours worked in any week in excess of forty compensation at the rate of one and one half times his contract hourly wage.[72] In the case of an employee hired on a weekly or monthly basis and receiving compensation other than on an hourly basis, a computation is necessary in order to determine his regular rate of pay.[73] The act contemplates a work week as the regular unit for computing the hourly rate,[74] and as a general rule the regular hourly rate is determined by obtaining the quotient of the amount received during the week divided by the number of hours worked.[75] The regular rate of pay is not to be computed by dividing the applicable statutory minimum hours into the weekly wage of the employee.[76]

If an employee is hired on a fixed weekly salary for a work week of a fixed number of hours, his regular rate of pay is determined by dividing the

ment, are not part of the regular rate of pay on the basis of which overtime must be computed.—McComb v. Shepard Niles Crane & Hoist Corp., D.C.N.Y., 72 F.Supp. 239.

69. U.S.—Walling v. Wall Wire Products Co., C.C.A.Mich., 161 F.2d 470.

70. U.S.—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

71. U.S.—Walling v. Wall Wire Products Co., C.C.A.Mich., 161 F.2d 470.

72. U.S.—Landreth v. Ford, Bacon & Davis, C.C.A.Ark., 147 F.2d 446.

Validity of agreements establishing regular rate of pay see infra subdivision c of this section.

73. U.S.—Landreth v. Ford, Bacon & Davis, supra.

74. U.S.—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

75. U.S.—Walling v. Youngerman-Reynolds Hardwood Co., Ala., 65 S.Ct. 1242, 325 U.S. 419, 89 L.Ed. 1705, rehearing denied 66 S.Ct. 12, 326 U.S. 804, 90 L.Ed. 489—Castle v. Walling, C.C.A.Miss., 153 F.2d 923—Walling v. Uhlmann Grain Co., C.C.A.Ill., 151 F.2d 381—Adams v. Union Dime Sav. Bank, C.C.A.N.Y., 144 F.2d 290, certiorari denied 65 S.Ct. 85, 323 U.S. 751, 89 L.Ed. 602—Patsy Oil & Gas Co. v. Roberts, C.C.A.Okl., 132 F.2d 826—Walling v. Lippold, D.C.Neb., 72 F.Supp. 339—Harrington v. Empire Const. Co., D.C.Md., 71 F.Supp. 324—Walling v. Castle, D.C.Miss., 64 F.Supp. 707, affirmed, C.C.A., Castle v. Walling, 153 F.2d 923—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310—Kappler v. Republic Pictures Corp., D.C.Iowa, 59 F.Supp. 112, affirmed, C.C.A., Republic Pictures Corp. v. Kappler, 151 F.2d 543, 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L.Ed. 1040—Lorber v. Rosow, D.C.Conn., 58 F.Supp. 341—Missel v. Overnight Motor Transp. Co., D.C.Md., 40 F.Supp. 174, reversed on other grounds, C.C.A., 126 F.2d 98, affirmed 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

Kan.—Graves v. Armstrong Creamery Co., 118 P.2d 613, 154 Kan. 365.

N.Y.—Mabee v. White Plains Pub. Co., 41 N.Y.S.2d 534, 180 Misc. 8, reversed on other grounds 45 N.Y.S.2d 479, 267 App.Div. 284, affirmed 58 N.E.2d 520, 293 N.Y. 781, motion denied 60 N.E.2d 848, 294 N.Y. 701, reversed on other grounds 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607—Quest v. George A. Bowman, Inc., 64 N.Y.S.2d 60.

Va.—Tidewater Optical Co. v. Wittkamp, 19 S.E.2d 897, 179 Va. 545.

Lump sum for period

If there is no express or implied agreement for an hourly rate of pay, but there is an agreement for a lump sum covering a particular period, the hourly rate may be determined by dividing the number of hours of actual work into the specified sum for the longer period, for purpose of determining the compensation allowable under the Fair Labor Standards Act.—Schroepfer v. A. S. Abell Co., D.C.Md., 48 F.Supp. 88, affirmed, C.C.A., 138 F.2d 111, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060, rehearing denied 64 S.Ct. 1149, 322 U.S. 770, 88 L.Ed. 1595.

Fluctuating basic rates

Employment contracts between steamship companies and longshoremen union, dividing workday into regular working day and extraordinary hours and providing varying rates of pay for each hour of working days and for holidays and for varying types of cargo, compensating for extraordinary hours and special cargo at a higher rate, did not provide for payment for overtime compensation for the extraordinary hours, but provided a series of fluctuating basic rates, and rate per hour should be determined by dividing actual compensation received by number of hours worked, and overtime compensation due should be calculated on such rate.—Ferrer v. Waterman S. S. Corp., D.C.Puerto Rico, 70 F.Supp. 1.

Monthly compensation

Where an employee is compensated at a monthly salary, established formula for computing the regular hourly rate of such compensation, for purpose of applying Fair Labor Standards Act, is to multiply monthly salary by twelve and then divide by fifty-two, thus obtaining weekly rate, and then to divide weekly rate by number of hours worked each week.—Seneca Coal & Coke Co. v. Lofton, C.C.A.Okl., 136 F.2d 359, certiorari denied 64 S.Ct. 77, 320 U.S. 772, 88 L.Ed. 462—Patsy Oil & Gas Co. v. Roberts, C.C.A.Okl., 132 F.2d 826—Lewellen v. Hardy-Burlingham Min. Co., D.C.Ky., 73 F.Supp. 63—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310—Porter v. Georgia Power & Light Co., D.C.Ga., 50 F.Supp. 959.

76. U.S.—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

agreed weekly compensation by the agreed number of hours in the week for which the compensation is paid.[77] If the employment is for a fixed weekly compensation for a week of variable or fluctuating hours, the employee's rate of pay must be determined by dividing his fixed weekly compensation by the number of hours actually worked in any work week; and in such case the regular rate of pay of an employee will necessarily vary from week to week according to the number of hours worked.[78] Where the contract does not expressly provide a regular hourly rate or the agreed compensation is not so allocated to the statutory work week and overtime hours as to make the regular rate explicit in the contract, the deficiency cannot be supplied by implication, but the regular hourly rate should be determined by dividing the total weekly compensation by the total hours worked.[79] Piecework wages must be translated into an hourly rate in the same manner, and, where the facts permit no division of piecework rates into regular and overtime segments, the court cannot arbitrarily make such division to create an artificial compliance with the act.[80]

It has been held that where employees receive more than one rate of pay during a work week, the overtime rate, at the employer's option, may be based on the average hourly rate for the entire week or on the hourly or piece rate that is applicable during the overtime hours.[81]

c. Agreements as to Rate of Pay

As a general rule, wage agreements falling within the purview of the Fair Labor Standards Act may and should establish an hourly regular rate not less than the statutory minimum and provide for overtime payments at least one and one half times the regular rate, and within the limits of the act the parties are free to establish the regular rate at any point and in any manner they see fit, but the parties may not compute the regular rate of pay in a wholly unrealistic and artificial manner so as to negate the statutory purpose for payment of overtime at one and one half times the regular rate.

As a general rule, it is necessary and sufficient that wage agreements falling within the purview

77. U.S.—Floyd v. Du Bois Soap Co., Ohio, 63 S.Ct. 159, 317 U.S. 596, 87 L.Ed. 488—Kreeft v. R. W. Bates Piece Dye Works, C.C.A.N.Y., 150 F.2d 818—Landreth v. Ford, Bacon & Davis, C.C.A.Ark., 147 F.2d 446—Kreeft v. R. W. Bates Piece Dye Works, D.C.N.Y., 63 F.Supp. 881.
Wis.—Katchel v. Northern Engraving & Mfg. Co., 25 N.W.2d 431, 249 Wis. 578.

Forty-hour week

Where an employee is hired at a fixed weekly wage for a forty-hour week, the regular rate of pay is the quotient of the weekly wage divided by forty, regardless of the number of hours actually worked during the week, and he is entitled to recover overtime pay for hours worked in excess of forty hours a week.—Kappler v. Republic Pictures Corp., D.C.Iowa, 59 F.Supp. 112, affirmed, C.C.A., Republic Pictures Corp. v. Kappler, 151 F.2d 543, 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L.Ed. 1040.

78. U.S.—Overnight Motor Transp. Co. v. Missel, Md., 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682—Anderson v. Federal Cartridge Corp., C.C.A.Minn., 156 F.2d 681—Landreth v. Ford, Bacon & Davis, C.C.A.Ark., 147 F.2d 446—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Walling v. Lippold, D.C.Neb., 72 F.Supp. 339—Harrington v. Empire Const. Co., D.C.Md., 71 F.Supp. 324—Peffer v. Federal Cartridge Corp., D.C.Minn., 63 F.Supp. 291—Rigney v. Wilson & Co., D.C.W.Va., 61 F.Supp. 801—Walling v. West Ky. Coal Co., D.C.Tenn., 60 F.Supp. 681—Kappler v. Republic Pictures Corp., D.C.Iowa, 59 F.Supp. 112, affirmed, C.C.A., Republic Pictures Corp. v. Kappler, 151 F.2d 543, 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied 66 S.Ct. 804, 327 U.S. 817, 90 L.Ed. 1040—Snyder v. Wessner, D.C.Minn., 55 F.Supp. 971—Cohn v. Decca Distributing Corporation, D.C.Pa., 50 F.Supp. 270—Walling v. Sun Pub. Co., D.C.Tenn., 47 F.Supp. 180, affirmed, C.C.A., 140 F.2d 445, certiorari denied 64 S.Ct. 946, 322 U.S. 728, 88 L.Ed. 1564—Green v. Riss & Co., D.C.Mo., 45 F.Supp. 648—Hargrave v. Mid-Continent Petroleum Corporation, D.C.Okl., 42 F.Supp. 908, affirmed, C.C.A., Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655—Muldowney v. Seaberg Elevator Co., D.C.N.Y., 39 F.Supp. 275.
S.D.—Colbeck v. Dairyland Creamery Co., 17 N.W.2d 262.
Wis.—Katchel v. Northern Engraving & Mfg. Co., 25 N.W.2d 431, 249 Wis. 578.

Admission

Fact that employer admitted that it was mistaken in its belief that employee whom it classified as a supervisory employee was not entitled to overtime compensation required by Fair Labor Standards Act could not be construed as an admission that employee was employed at a weekly wage for a work week of only forty hours instead of for a week of variable hours.—Landreth v. Ford, Bacon & Davis, C.C.A.Ark., 147 F.2d 446.

Daily tours

Where employees worked daily tours and were paid a specified wage for each tour, to compute employees' regular rate within Fair Labor Standards Act, assuming the same wages and tours, required only the simple process of dividing the wages received for each tour by the number of hours in that tour, and the regular rate was then applicable to the first forty hours regularly worked in a week on the tours and the overtime rate became effective as to all hours worked in excess of forty.—Walling v. Helmerich & Payne, Okl., 65 S.Ct. 11, 323 U.S. 37, 89 L.Ed. 29.

79. U.S.—Adams v. Union Dime Sav. Bank, C.C.A.N.Y., 144 F.2d 290, certiorari denied 65 S.Ct. 85, 323 U.S. 751, 89 L.Ed. 602—Seneca Coal & Coke Co. v. Lofton, C.C.A.Okl., 136 F.2d 359, certiorari denied 64 S.Ct. 77, 320 U.S. 772, 88 L.Ed. 462—Warren-Bradshaw Drilling Co. v. Hall, C.C.A.Tex., 124 F.2d 42, affirmed 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83—Walling v. Lippold, D.C.Neb., 72 F.Supp. 339.

80. U.S.—Walling v. Alaska Pac. Consol. Min. Co., C.C.A.Wash., 152 F.2d 812, certiorari denied Alaska Pac. Consol. Min. Co. v. Walling, 66 S.Ct. 960, 327 U.S. 803, 90 L.Ed. 1028—Walling v. Jacksonville Paper Co., D.C.Fla., 69 F.Supp. 599.

81. U.S.—International Longshoremen's Ass'n, Local 815, v. National Terminals Corporation, D.C.Wis., 50 F.Supp. 26, affirmed, C.C.A., Carbunac v. National Terminals Corporation, 139 F.2d 853.

of the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq, establish an hourly "regular rate" not less than the statutory minimum and provide for overtime payments at least one and one half times the "regular rate."[82] In other words, agreements as to wages must contain two elements: (1) Either a stated hourly rate for regular work or a limit on the total number of hours to be worked for a fixed salary. (2) An express provision that overtime shall be paid for at time and a half the regular rate.[83] Accordingly, while contracts for a base pay equal to and for overtime pay in excess of that required by the act have been held valid,[84] it has been held, where there is no understanding that any part of the amount paid should be treated as overtime compensation, that the agreement does not comply with the act in respect of payment for overtime, notwithstanding the contract specifies a wage in excess of the minimum provided by the act and the wage was established prior to the employment.[85]

Also the payment of a fixed salary regardless of the number of hours worked in a work week does not satisfy the overtime requirements of the act notwithstanding such salary equals or exceeds the statutory minimum for regular time plus time and a half for overtime, for hours actually worked, and notwithstanding the intention of the parties that the fixed salary shall cover both regular and overtime work;[86] such a general intention may not be transformed by implication into a specific intention that overtime be paid for at time and a half the regular rate.[87] It has been held, however, that a wage plan is not rendered invalid under the act simply because, instead of stating directly an hourly rate of pay in amount consistent with the statutory requirements, the parties have stipulated a weekly wage inclusive of regular and overtime compensation for a work week in excess of forty hours and have provided a formula whereby the appropriate hourly rate may be derived therefrom.[88]

The act contemplates the setting of the "regular wage rate" in a bona fide manner through wage negotiation between the employer and employee, provided the statutory minimum is respected,[89] and, within the limits of the act, employer and employee are free to establish the regular rate of pay at any point and in any manner they see fit, and they may agree to pay compensation according to any time or work measurement they desire.[90] So it has been held, where the volume of work and hours of em-

82. U.S.—149 Madison Ave. Corp. v. Asselta, N.Y., 67 S.Ct. 1178, 33 U.S. 199, 91 L.Ed. —— —Overnight Motor Transp. Co. v. Missel, Md., 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Asselta v. 149 Madison Ave. Corp., C.C.A.N.Y., 156 F.2d 139, certiorari denied 149 Madison Ave. Corp. v. Asselta, 67 S.Ct. 124, 329 U.S. 764, 91 L.Ed. 658—St. Clair v. Russell & Pugh Lumber Co., D.C.Idaho, 51 F.Supp. 47—Klotz v. Ippolito, D.C. Tex., 40 F.Supp. 422.
Ala.—Belcher v. Hubbard, App., 21 So.2d 850.
N.Y.—Quest v. George A. Bowman, Inc., 64 N.Y.S.2d 60.
Validity of agreements violating requirements of act generally see supra § 151 (24).

83. U.S.—Walling v. Stone, C.C.A. Ill., 131 F.2d 461—Walling v. L. J. Mueller Furnace Co., D.C.Wis., 50 F.Supp. 561—Bailey v. Karolyna Co., D.C.N.Y., 50 F.Supp. 142.
N.M.—Watson v. Hightower, 176 P. 2d 670, 50 N.M. 322.

84. U.S.—Shepler v. Crucible Fuel Co., C.C.A.Pa., 140 F.2d 371—Atlantic Co. v. Walling, C.C.A.Ga., 131 F.2d 518—Walling v. Sterling Ice & Cold Storage Co., D.C.Colo., 69 F.Supp. 669—Shepler v. Crucible Fuel Co. of America, D.C.Pa., 60 F. Supp. 260—St. Clair v. Russell & Pugh Lumber Co., D.C.Idaho, 51 F. Supp. 47.
N.Y.—Gurtov v. Volk, 11 N.Y.S.2d 604, 170 Misc. 322.

85. U.S.—Mid-Continent Pipe Line Co. v. Hargrave, C.C.A.Okl., 129 F. 2d 655—Bumpus v. Continental Baking Co., C.C.A.Tenn., 124 F.2d 549, 140 A.L.R. 1258, certiorari denied Continental Baking Co. v. Bumpus, 62 S.Ct. 1305, 316 U.S. 704, 86 L.Ed. 1772—Walling v. Lippold, D.C.Neb., 72 F.Supp. 339.
N.M.—Watson v. Hightower, 176 P. 2d 670, 50 N.M. 322.

Larger amounts paid

In action for overtime compensation under federal Fair Labor Standards Act, larger amounts paid plaintiff weekly for various successive periods after first period of his employment cannot be regarded as overtime compensation under federal Fair Labor Standards Act in computing his regular rate of pay per hour for purpose of determining amount of such compensation to which he is entitled in absence of agreement that such larger payments should be accepted in satisfaction of overtime payment requirements of such act.—Quest v. George A. Bowman, Inc., 64 N.Y.S.2d 60.

86. U.S.—Floyd v. Du Bois Soap Co., Ohio, 63 S.Ct. 159, 317 U.S. 596, 87 L.Ed. 488—Walling v. Stone, C.C.A. Ill., 131 F.2d 461.
Ill.—Winer v. Eckerling, 55 N.E.2d 876, 323 Ill.App. 421.
S.D.—Colbeck v. Dairyland Creamery Co., 17 N.W.2d 262.
Va.—Tidewater Optical Co. v. Wittkamp, 19 S.E.2d 897, 179 Va. 545.

87. U.S.—Walling v. Stone, C.C.A. Ill., 131 F.2d 461.

88. U.S.—149 Madison Ave. Corp. v. Asselta, N.Y., 67 S.Ct. 1178, 33 U.S. 199, 91 L.Ed. 1432, 169 A.L.R. 1293.

89. U.S.—Walling v. Helmerich & Payne, Okl., 65 S.Ct. 11, 323 U.S. 37, 89 L.Ed. 29—Fleming v. A. H. Belo Corporation, C.C.A.Tex., 121 F.2d 207, certiorari denied 62 S. Ct. 137, 314 U.S. 601, 86 L.Ed. 484, affirmed Walling v. A. H. Belo Corporation, 62 S.Ct. 1223, 316 U.S. 624, 86 L.Ed. 1716, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—St. Clair v. Russell & Pugh Lumber Co., D.C.Idaho, 51 F.Supp. 47.
Kan.—Jackson v. Derby Oil Co., 139 P.2d 146, 157 Kan. 53.
Validity of agreement reducing hourly rate see infra § 151 (29).

New contract

With respect to liability for overtime compensation under the Fair Labor Standards Act, the employee's continuance in an employment under a new method of computing pay creates a new contract and the employee's consent to the new arrangement may be found from the continuance, notwithstanding repeated protests on his part.—Shepler v. Crucible Fuel Co., C.C.A.Pa., 140 F. 2d 371.

90. U.S.—Walling v. Youngerman-

ployment fluctuate widely from week to week, that an agreement by which each employee is paid a regular basic hourly rate at or above the statutory minimum for the first forty hours of any work week and not less than one and one half times such basic hourly rate for all time over forty hours in any work week with a guarantee the employee shall receive not less than a specified amount for each work week is valid, even though the hourly rate is so related to the guaranteed flat sum that the employee becomes entitled to more than the guarantee only in weeks in which he works a number of hours far in excess of forty.[91]

It has been held, however, that freedom of contract does not include the right to compute the regular rate of pay in a wholly unrealistic and artificial manner so as to negate the statutory purpose,[92] and, where the contract formula for determining

Reynolds Hardwood Co., Ala., 65 S.Ct. 1242, 325 U.S. 419, 89 L.Ed. 1705, rehearing denied 66 S.Ct. 12, 326 U.S. 804, 90 L.Ed. 489—Walling v. A. H. Belo Corporation, Tex., 62 S.Ct. 1223, 316 U.S. 624, 86 L. Ed. 1716, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Asselta v. 149 Madison Ave. Corp., C.C.A.N.Y., 156 F.2d 139, certiorari denied 149 Madison Ave. Corp. v. Asselta, 67 S.Ct. 124, 329 U.S. 764, 91 L.Ed. 658—Mornford v. Andrews, C.C.A.Ga., 151 F.2d 511—Shepler v. Crucible Fuel Co., C.C. A.Pa., 140 F.2d 371—Williams v. General Mills, C.C.A.Ohio, 132 F.2d 367, 144 A.L.R. 1371—Shepler v. Crucible Fuel Co. of America, D.C. Pa., 60 F.Supp. 260—Walling v. Arctic Circle Exploration, D.C. Wash., 56 F.Supp. 944—Walling v. Alaska-Pacific Consol. Mining Co., D.C.Wash., 56 F.Supp. 698, reversed on other grounds, C.C.A., 152 F.2d 812, certiorari denied 66 S.Ct. 960, 327 U.S. 803, 90 L.Ed. 1028—Lynch v. Vincent, D.C.Mo., 55 F.Supp. 44 —St. Clair v. Russell & Pugh Lumber Co., D.C.Idaho, 51 F.Supp. 47—Green Head Bit & Supply Co. v. Hendricks, D.C.Okl., 49 F.Supp. 698 —Walling v. Emery Wholesale Corporation, D.C.Ga., 49 F.Supp. 192, affirmed, C.C.A., 138 F.2d 548—Snavely v. Shugart, D.C.Tex., 45 F. Supp. 722—Fleming v. Stone, D.C. Ill., 41 F.Supp. 1000, reversed on other grounds, C.C.A., Walling v. Stone, 131 F.2d 461.

N.Y.—Brummel v. L. F. Dietz & Associates, 67 N.Y.S.2d 725, 187 Misc. 758, affirmed 62 N.Y.S.2d 864, 270 App.Div. 994, certiorari denied 67 S.Ct. 634, 329 U.S. 813, 91 L.Ed. 694—Gurtov v. Volk, 11 N.Y.S.2d 604, 170 Misc. 322.

Ohio.—Mallory v. United Biscuit Co. of America, 16 Ohio Supp. 76.

Steady income

Where employer and employees have agreed on a wage arrangement which has proved mutually satisfactory, the court should not upset it and approve an inflexible and artificial interpretation of the Fair Labor Standards Act which finds no support in its text, and as a practical matter eliminates the possibility of steady income to employees with irregular hours.—Walling v. A. H. Belo Corporation, Tex., 62 S.Ct. 1223, 316 U.S. 624, 86 L.Ed. 1716, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

Advice as to legality

Where employer's advice to employees regarding legality of proposed change under contract entered into two days prior to effective date of the maximum hours provision of Fair Labor Standards Act whereby hourly wage rate was reduced but the number of hours worked and total compensation received remained the same was in accord with proper interpretation of act, it could not be considered as a basis for holding the contract void.—General Mills v. Williams, C.C.A.Ohio, 132 F.2d 367, 144 A.L.R. 1371.

Different rates for different work

Employers and employees may contract for different rates of pay for different kinds of work under Fair Labor Standards Act, as long as contract is fairly made without coercion and if regular rates agreed on are not computed in a wholly artificial manner to evade requirements of the act.—Ille v. Travis Oil Corp., 164 P. 2d 998, 196 Okl. 332.

Particular agreements held valid

(1) Where employee was paid at rate of not less than one and one-half times his agreed regular rate for each hour of overtime that he worked, and employment contract provision for computing overtime earnings at one and one-half times both his fixed base rate and a fluctuating group incentive hourly rate was simple and understandable, and divided incentive wages into regular and overtime hourly segments in a realistic and mathematically workable manner, contract conformed to requirement of the Fair Labor Standards Act.—Adams v. Macklin Co., D. C.Mich., 69 F.Supp. 262.

(2) Agreement whereby oil driller was employed at twenty dollars a day and tool dressers at eighteen dollars a day with understanding that there was included in such wages, regular wages for forty hours a week and time and a half for overtime work during six days and double time for work on seventh day, so that they were not entitled to overtime compensation under the Fair Labor Standards Act, was not in contravention of the act.—Watson v. Hightower, 176 P.2d 670, 50 N.M. 322.

(3) Employment contracts providing basic hourly pay of forty-one cents per hour, which was determined by dividing employee's prior week's earnings by expected hours of work, and for time and a half for overtime, and providing for payment of weekly advance equivalent to weekly salary currently being paid to be credited with actual earned compensation, did not violate Fair Labor Standards Act.—Walling v. Emery Wholesale Corporation, D.C. Ga., 49 F.Supp. 192, affirmed, C.C.A., 138 F.2d 548.

91. U.S.—Walling v. Halliburton Oil Well Cementing Co., Cal., 67 S.Ct. 1056, 331 U.S. 17, 91 L.Ed. 1312—Walling v. A. H. Belo Corporation, Tex., 62 S.Ct. 1223, 316 U.S. 624, 86 L.Ed. 1716, rehearing denied 63 S. Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Walling v. Sterling Ice & Cold Storage Co., D.C.Colo., 69 F.Supp. 669—Clay v. Motor Freight Express, D.C.Pa., 52 F.Supp. 948—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, affirmed, C.C.A., Atlantic Co. v. Walling, 131 F.2d 518.
Ohio.—Mallory v. United Biscuit Co. of America, 16 Ohio Supp. 76.

92. U.S.—Walling v. Youngerman-Reynolds Hardwood Co., Ala., 65 S.Ct. 1242, 325 U.S. 419, 89 L.Ed. 1705, rehearing denied 66 S.Ct. 12, 326 U.S. 804, 90 L.Ed. 489—Walling v. Helmerich & Payne, Okl., 65 S.Ct. 11, 323 U.S. 37, 89 L.Ed. 29—Asselta v. 149 Madison Ave. Corp., C.C.A.N.Y., 156 F.2d 139, certiorari denied 149 Madison Ave. Corp. v. Asselta, 67 S.Ct. 124, 329 U.S. 764, 91 L.Ed. 658—Walling v. Uhlmann Grain Co., C.C.A.Ill., 151 F.2d 381—Walling v. Alaska-Pacific Consol. Mining Co., C.C.A.Wash., 152 F.2d 812, certiorari denied 66 S.Ct. 960, 327 U.S. 803, 90 L.Ed. 1028—Murray v. Noblesville Milling Co., C.C.A.Ind., 131 F.2d 470, certiorari denied 63 S.Ct. 832, 318 U.S. 775, 87 L.Ed. 1145—Garchell v. Kantar, D.C.Minn., 56 F.Supp. 866, reversed on other grounds, C.C.A., 150 F.2d 47.

the "regular rate" does not in fact represent the "regular rate" of pay within the statutory meaning, and accordingly no adequate provision is made for overtime compensation, the agreement is invalid.[93] So, where the contract "regular rate" is fictitious and irregular and varies with the hours of labor to which it applies, with the result of substantially defeating the provisions of the act for time and a half pay for overtime, it will not be applied.[94] In such case the regular rate of pay will be computed by dividing the total compensation received by the number of hours worked during the week, and over-

It is the duty of the court to give effect to the intention of the parties to contract with respect to the regular rate of pay only as far as that intention complies with the law and intention of parties should not be allowed to defeat intent of congress in enacting Fair Labor Standards Act.—Murray v. Noblesville Milling Co., C.C.A.Ind., 131 F.2d 470, certiorari denied 65 S.Ct. 832, 318 U.S. 775, 87 L.Ed. 1145.

Real relation to earnings

The rate established under a formula as the regular wage rate, in order to be adjudged actual and not fictitious, must either bear a real relation to actual earnings or it must be a genuine contractual decrease in wages based on bargaining.—Watkins v. Hudson Coal Co., C.C.A.Pa., 151 F.2d 311, certiorari denied 66 S.Ct. 522, 327 U.S. 777, 90 L.Ed. 1005, rehearing denied 66 S.Ct. 701, 327 U.S. 816, 90 L.Ed. 1039.

Hours subject to call

Where hourly rate of pay of stock and grain brokers' employees, formerly receiving weekly salaries, was based on number of hours during which they were supposedly subject to call in each week, averaging about fifteen hours less than hours actually worked, such rate was not the actual hourly rate for purposes of overtime under Fair Labor Standards Act, especially where employees received same compensation regardless of number of hours worked.—Walling v. Uhlmann Grain Co., C.C.A.Ill., 151 F.2d 381.

93. U.S.—Walling v. Harnischfeger Corp., Wis., 65 S.Ct. 1246, 1250, 325 U.S. 427, 89 L.Ed. 1711—Walling v. Jacksonville Paper Co., D.C.Fla., 69 F.Supp. 599—Asselta v. 149 Madison Ave. Corp., D.C.N.Y., 65 F.Supp. 385, affirmed, C.C.A., 156 F.2d 139, certiorari denied 67 S.Ct. 124, 329 U.S. 764, 91 L.Ed. ——.

Particular agreements held invalid

(1) Where purpose of agreement formula for determining hourly rates of employees who were regularly employed more than forty hours per week was to reduce hourly rate sufficiently so that payment of time and a half for overtime would not bring total weekly earnings substantially above weekly rates set by agreement and effect of use of formula was to make any increase in employee's pay above regular weekly rate dependent not on overtime in excess of forty hours but on overtime computed only in excess of agreed work week, the "hourly rate" derived from use of the formula was not the "regular rate" of pay within meaning of Fair Labor Standards Act and hence the agreement did not deprive employees of right to overtime compensation and damages.—149 Madison Ave. Corp. v. Asselta, N.Y., 67 S.Ct. 1178, 331 U.S. 199, 91 L.Ed. 1432, 169 A.L.R. 1293.

(2) Where each daily shift or tour was divided into two parts to the first of which was assigned a specified hourly rate described as the base or regular rate, and second part was treated as overtime and called for payment of one and one half times the base or regular rate, but the regular and overtime rates were calculated so as to insure that total wages for each tour would continue the same as under prior contract, the contract did not satisfy the overtime requirement of the Fair Labor Standards Act.—Walling v. Helmerich & Payne, Okl., 65 S.Ct. 11, 323 U.S. 37, 89 L.Ed. 29—Walling v. Alaska Pac. Consol. Min. Co., C.C.A.Wash., 152 F.2d 812, certiorari denied Alaska Pac. Consol. Min. Co. v. Walling, 66 S.Ct. 960, 327 U.S. 803, 90 L.Ed. 1028.

(3) Arrangement whereby employee was to be paid the basic rate in excess of statutory minimum for first forty hours and one and one half times such basic rate for twenty hours but employee was to work irregular hours and put in time as having worked sixty hours each week, the contract was illegal because it fixed an arbitrary period on which computation of regular and overtime rate would be made.—Webb v. Brady Transfer Storage Co., D.C.Iowa, 72 F.Supp. 170.

(4) A wage practice plan adopted by employer of paying one hour a week or month to each employee at one rate contended to be the regular base rate, and then paying employees for all the rest of the hours of the week or month one and one half times such alleged base or regular rate, did not comply with overtime provisions of Fair Labor Standards Act.—Walling v. Arctic Circle Exploration, D.C.Wash., 56 F.Supp. 944.

(5) A split-day plan by which employees are paid a different wage scale for different hours in the day for same kind of work, one scale for regular work and a lower scale for overtime, constitutes an evasion of Fair Labor Standards Act.—Ille v. Travis Oil Corp., 164 P.2d 998, 196 Okl. 332.

(6) Where normal work day consisted of eight hours before and after passage of Fair Labor Standards Act, split-day plan under which work day was divided into two parts, the first of which was assigned a reduced straight or regular hourly rate of pay, and second of which was treated as overtime, with the result that daily wage for eight-hour work day continued substantially as it had been prior to the act, was illegal.—Robertson v. Alaska Juneau Gold Min. Co., C.C.A.Cal., 157 F.2d 876.

Artificial compliance

Where facts do not permit it, court cannot arbitrarily divide bonuses or piecework wages into regular and overtime segments, thereby creating an artificial compliance with overtime provision of Fair Labor Standards Act.—Walling v. Harnischfeger Corp., Wis., 65 S.Ct. 1246, 1250, 325 U.S. 427, 89 L.Ed. 1711.

94. U.S.—Robertson v. Alaska Juneau Gold Min. Co., C.C.A.Cal., 157 F.2d 876—Castle v. Walling, C.C.A.Miss., 153 F.2d 923—Walling v. Alaska Pac. Consol. Min. Co., C.C.A.Wash., 152 F.2d 812, certiorari denied Alaska Pac. Consol. Min. Co. v. Walling, 66 S.Ct. 960, 327 U.S. 803, 90 L.Ed. 1028—Watkins v. Hudson Coal Co., C.C.A.Pa., 151 F.2d 311, certiorari denied 66 S.Ct. 522, 327 U.S. 777, 90 L.Ed. 1005, rehearing denied 66 S.Ct. 701, 327 U.S. 816, 90 L.Ed. 1039—Walling v. L. J. Mueller Furnace Co., D.C.Wis., 50 F.Supp. 561—Scott v. Atlas Press Co., D.C.Mich., 49 F.Supp. 260—Fleming v. Carleton Screw Products Co., D.C.Minn., 37 F.Supp. 754, affirmed, C.C.A., 126 F.2d 537, certiorari denied 63 S.Ct. 54, 317 U.S. 634, 87 L.Ed. 511.

Effect of contract

Contract to pay welders a dollar an hour and helpers fifty cents per hour for regular time with provision that if overtime were worked the regular rate would be lowered so that regulate rate plus overtime rate would average the same as regular rate without overtime was in effect a contract to pay straight time regardless of time worked and did not comply with Fair Labor Standards Act.—Walling v. Green Head Bit & Supply Co., C.C.A.Okl., 138 F.2d 453.

time will be calculated on such rate, as discussed supra subdivision b of this section.

The substance of a contract, rather than its mere form, determines its compliance with the Fair Labor Standards Act,[95] and the fact that employers actually apply in all situations the hourly rates derived by the use of a certain formula does not validate such rates, since the manner in which the hourly rate is determined, and not the application of an hourly rate, is the test of its validity under the act.[96] It has been held that once the parties have decided on the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is not affected by any designation of a contrary "regular rate" in the wage contracts.[97]

It has been held that where a contract establishes a basic rate, and a higher rate is provided for work during certain hours or on certain days, and such higher rate, although called "overtime rate," bears no relation to the hours worked in excess of forty, the contract in effect establishes a series of fluctuating regular or basic rates, and the regular rate is to be determined by dividing the wages actually paid by the hours actually worked although the rates vary from week to week.[98] It has also been held, however, that the act does not forbid a bona fide agreement for a shorter work week than forty hours to which the regular rate shall apply,[99] and that an employment contract may fix regular or basic rates of pay and provide for an increase in the basic rates for excess hours or work performed at unusual or undesirable hours, and provide that the regular or basic rate be used in computing overtime, as long as the basic rate and overtime do not violate the provisions of the act.[1]

§ 151(27). —— What Constitutes Wages and Compensation

a. In general
b. Payment in cash or services

a. In General

The provisions of the Fair Labor Standards Act with respect to minimum "wages" and overtime "compensation" use the quoted words synonymously as referring to remuneration for services rendered by employees; "wages" are not limited to money passing directly from the employer to the employee.

The meaning of the word "wages" as used in the Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, must be deduced from the provisions of the act in the light of its legislative purpose,[2] and it has been held that provisions of the act with respect to minimum "wages" and overtime "compensation" use the quoted words synonymously as referring to remuneration for services rendered by employees.[3] Except for the requirement that workers in certain industries receive a compensation at least as great as that fixed by the act, an employer is left free in so far as the act is concerned to work out the compensation problem in his own way.[4]

Wages are not limited to money passing directly from the employer to the employee,[5] and, although the act generally contemplates that the employee shall be paid his wages by the employer out of the employer's funds, it does not prohibit the imposition on the employee of the duty of collecting the employer's money and granting the employee the privilege of paying himself out of it subject to accounting, provided the employer stands ready to pay promptly any balance due the employee.[6] The word "wages" has no fixed meaning in the act as

95. U.S.—Murray v. Noblesville Milling Co., C.C.A.Ind., 131 F.2d 470, certiorari denied 63 S.Ct. 832, 318 U.S. 775, 87 L.Ed. 1145.

96. U.S.—Asselta v. 149 Madison Ave. Corp., D.C.N.Y., 65 F.Supp. 385, affirmed, C.C.A., 156 F.2d 139, certiorari denied 67 S.Ct. 124, 329 U.S. 764, 91 L.Ed. ——.

97. U.S.—Walling v. Youngerman-Reynolds Hardwood Co., Ala., 65 S.Ct. 1242, 325 U.S. 419, 89 L.Ed. 1705, rehearing denied 66 S.Ct. 12, 326 U.S. 804, 90 L.Ed. 489—Asselta v. 149 Madison Ave. Corp., D.C.N.Y., 65 F.Supp. 385, affirmed, C.C.A., 156 F.2d 139, certiorari denied 67 S.Ct. 124, 329 U.S. 764, 91 L.Ed. 658.

98. U.S.—Aaron v. Bay Ridge Operating Co., C.C.A.N.Y., 162 F.2d 665—Cabunac v. National Terminals Corporation, C.C.A.Wis., 139 F.2d 853.

99. U.S.—Addison v. Huron Stevedoring Corp., D.C.N.Y., 69 F.Supp. 956.

1. U.S.—Ferrer v. Waterman S. S. Corp., D.C.Puerto Rico, 70 F.Supp. 1.

2. U.S.—Williams v. Jacksonville Terminal Co., Fla., 62 S.Ct. 659, 315 U.S. 386, 66 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Pickett v. Union Terminal Co., Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

3. La.—Johnson v. Anderson-Dunham Concrete Co., 31 So.2d 797.

4. U.S.—Williams v. Jacksonville Terminal Co., Fla., 62 S.Ct. 659, 315 U.S. 386, 66 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Pickett v. Union Terminal Co., Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

5. U.S.—Williams v. Jacksonville Terminal Co., Fla., 62 S.Ct. 659, 315 U.S. 386, 66 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Pickett v. Union Terminal Co., Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Southern Ry. Co. v. Black, C.C.A.N.C., 127 F.2d 280—Harrison v. Terminal R. Ass'n of St. Louis, Mo., C.C.A.Mo., 126 F.2d 421.

6. U.S.—Williams v. Jacksonville Terminal Co., C.C.A.Fla., 118 F.2d 324, affirmed 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing de-

either including or excluding gratuities received by employees from others,[7] so that, by agreement between employer and employee, tips received by the employee may be considered a part of the employee's wage,[8] and where such tips exceed the lawful minimum wages no recovery may be had against the employer.[9] The act was not intended to do away with tipping or to give tipping employment an earnings preference over the nonservice vocations.[10]

An employer is not entitled to a credit on its wage liability to an employee for the amount paid to the employee for two weeks' wages after his discharge.[11]

b. Payment in Cash or Services

Generally, wages due under the Fair Labor Standards Act must be paid to the employee in cash or by negotiable instrument payable at par, clear of all deductions, but it is provided that the wage paid to an employee includes the reasonable cost to the employer of board, lodging, or other facilities customarily furnished the employee by the employer.

As a general rule, the minimum wage and overtime compensation prescribed by the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq, must be paid to the employee in cash or by negotiable instrument payable at par, except as otherwise permit-

nied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

Necessity of contract

Where it did not appear that moneys collected and retained by redcaps employed by a union terminal company were personal gifts and not compensation for service which company hired redcaps to perform, no contract was necessary to make such moneys the money of the company, since proceeds of the thing which an employee is hired to do belong as a matter of law to employer.—Union Terminal Co. v. Pickett, C.C.A.Tex., 118 F.2d 328, certiorari denied 61 S.Ct. 1115, 313 U.S. 591, 85 L.Ed. 1546, vacated on other grounds 62 S.Ct. 55, 314 U.S. 704, 86 L.Ed. 563, affirmed 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L. Ed. 1224.

7. U.S.—Williams v. Jacksonville Terminal Co., Fla., 62 S.Ct. 659, 315 U.S. 386, 66 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Pickett v. Union Terminal Co., Tex., 62 S. Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 815 U.S. 830, 86 L.Ed. 1224.

8. U.S.—Townsend v. New York Cent. R. Co., C.C.A.Ill., 141 F.2d 483, certiorari denied 65 S.Ct. 47, 323 U.S. 717, 89 L.Ed. 577—Southern Ry. Co. v. Black, C.C.A.N.C., 127 F.2d 280—Union Terminal Co., v. Pickett, C.C.A.Tex., 118 F.2d 328, certiorari denied 61 S.Ct. 115, 313 U.S. 591, 85 L.Ed. 1564, vacated on other grounds 62 S.Ct. 55, 314 U. S. 704, 86 L.Ed. 563, affirmed 62 S. Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Harrison v. Kansas City Terminal Ry. Co., D.C.Mo., 36 F.Supp. 434, affirmed, C.C.A., 126 F.2d 422—Williams v. Jacksonville Terminal Co., D.C.Fla., 35 F.Supp. 267, affirmed, C.C.A., 118 F.2d 324, affirmed 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

No violation of law

(1) Redcaps could not complain that, if carriers took credit for tips received by redcaps as compensation for redcap service, it would be in effect a charge for transportation service, and, since carriers filed no covering tariff, a violation of Interstate Commerce Act, and that the provision prohibiting special rates was also violated because the indigent received redcap service without charge, since the Interstate Commerce Act provides for damages to persons injured by unlawful acts and punishment of carrier or its agents, and redcaps would have no right of action under such act.—Williams v. Jacksonville Terminal Co., Fla., 62 S.Ct. 659, 315 U.S. 386, 66 L.Ed. 914, rehearing denied 62 S. Ct. 909, 315 U.S. 830, 86 L.Ed. 1224 —Pickett v. Union Terminal Co., Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S. Ct. 909, 315 U.S. 830, 86 L.Ed. 1224 —Harrison v. Terminal R. Ass'n of St. Louis, Mo., C.C.A.Mo., 126 F.2d 421.

(2) Requirement by terminal railway company that tips received by redcaps be considered wages paid by company was not invalid on ground that there was no uniformity of "tips" which constituted a charge made to passengers for redcap service and which was therefore in violation of interstate commerce act providing that no common carrier shall by any special rate, rebate, draw back or other device charge or receive from any person or persons, greater or less compensation for services rendered than it charges or receives from others for a like service.—Harrison v. Kansas City Terminal Ry. Co., D.C.Mo., 36 F.Supp. 434, affirmed, C.C.A., 126 F.2d 422.

Effect of notice to employees

(1) A written notice to redcaps referring to Fair Labor Standards Act and requiring redcaps, in consideration of engaging in handling of baggage, to report tips received to terminal company which guaranteed that compensation including tips would equal minimum wage provided by such act, and stating that excess tips might be retained, transferred to railroads' credit so much of tips as the notice affected, in determining whether tips received by redcaps could be considered as wages within the act.—Williams v. Jacksonville Terminal Co., Fla., 62 S.Ct. 659, 315 U.S. 386, 66 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Pickett v. Union Terminal Co., Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

(2) Where redcaps, although protesting, continued to work after receiving written notice a new contract was created, since the employer after notice may keep all earnings arising from the business; but if redcap did not accept terms offered by written notice he would be a volunteer and not an employee and as a volunteer could probably keep his tips but would not be entitled to a contractual wage.—Williams v. Jacksonville Terminal Co., supra—Pickett v. Union Terminal Co., supra.

9. U.S.—Williams v. Jacksonville Terminal Co., C.C.A.Fla., 118 F.2d 324, affirmed 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L. Ed. 1224—Harrison v. Kansas City Terminal Ry. Co., C.C.A.Mo., 126 F.2d 422.

10. U.S.—Williams v. Jacksonville Terminal Co., Fla., 62 S.Ct. 659, 315 U.S. 386, 66 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Pickett v. Union Terminal Co., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

11. Minn.—McMillan v. Wilson & Co., 2 N.W.2d 838, 212 Minn. 142, petition dismissed Wilson & Co. v. McMillan, 63 S.Ct. 81, 317 U.S. 702, 87 L.Ed. 561.

ted by the act.[12] Furthermore, employers are under an absolute obligation to pay the prescribed wage clear of all deductions except those permissible on conditions imposed by a provision of the act regarding consideration of services furnished the employee as part of the "wage" paid to him.[13]

Under § 3 (m) of the act, 29 U.S.C.A. § 203 (m), the "wage" paid to any employee includes the reasonable cost, as determined by the administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.[14] Such provision relates to the situation where wages are paid partly in cash and partly in facilities for the benefit of the employee, and, where such provision applies, cash wages may be less than the statutory minimum as long as the reasonable cost of the facilities furnished makes up the difference,[15] but to be reckoned as wages, the facilities furnished must have been customarily furnished to employees as part of wages.[16]

The provision that "wages" includes the reasonable cost of facilities customarily furnished employees does not prohibit mutual accountings between employer and employees for advances and services given employees by the employer, so as to require the employer to give the employee his full wage in cash and the employee to immediately repay the employer for the advances made and the services performed.[17] Likewise, such provision does not prohibit an employer and employee from agreeing on an amount payable by the employee for house rent or for the purchase price of an article of merchandise, provided the employer does not realize a prohibited profit, and does not prevent an agreement that such rent or price may be deducted from the wage due.[18] The provision is permissive to the employer as to how a portion of the required wages may be paid, but it imposes a condition that the facility shall be charged at its reasonable cost as determined by the administrator.[19] The restrictions of the provision permitting only the reasonable cost of facilities furnished by the employer to be considered as wages are applicable regardless of whether

12. U.S.—Fleming v. Pearson Hardwood Flooring Co., D.C.Tenn., 39 F.Supp. 300.

Scrip

An employer, who was engaged in the production of goods for interstate commerce, by issuing scrip, which had no regular redemption date, and which was not negotiable at par, for wages to employees who were employed at scheduled rates equal to bare minima prescribed by Fair Labor Standards Act as payment of their regular wages and overtime compensation, was violating the act, and there was no basis for a distinction between scrip so issued at or after end of the pay period and scrip issued prior thereto.—Fleming v. Pearson Hardwood Flooring Co., supra.

13. U.S.—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846.

14. U.S.—Brotherhood of Maintenance of Way Employees v. Nashville, C. & St. L. Ry., D.C.Tenn., 56 F.Supp. 559—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F. Supp. 846—Williams v. Jacksonville Terminal Co., D.C.Fla., 35 F. Supp. 267, affirmed, C.C.A., 118 F. 2d 324, affirmed 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

Intent of congress in declaring that wage paid any employee includes reasonable cost, as determined by administrator, to employer of furnishing employee with certain facilities customarily furnished, was to protect basic minimum wage and overtime compensation required to be paid from profiteering or manipulation by employer in dealings with employees and to prevent increases in charges for rent, board, groceries and merchandise so as to offset increase in wages.—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F. Supp. 846.

The phrase "or other facilities" as used in provision declaring that wage includes reasonable cost to employer of furnishing employee with certain facilities customarily furnished, includes relation of landlord and tenant, and merchant and customer.—Walling v. Peavy-Wilson Lumber Co., supra.

The word "wage," as used in provision that wage paid to any employee includes reasonable cost as determined by the administrator to the employer of furnishing such employee with board, lodging, or other facilities, refers to wage payments other than in money.—Williams v. Jacksonville Terminal Co., C.C.A.Fla., 118 F.2d 324, affirmed 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

15. U.S.—Anderson v. Mt. Clemens Pottery Co., D.C.Mich., 60 F.Supp. 146, reversed on other grounds, C. C.A., Mt. Clemens Pottery Co. v. Anderson, 149 F.2d 461, reversed on other grounds 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

16. U.S.—Brotherhood of Maintenance of Way Employees v. Nashville, C. & St. L. Ry., D.C.Tenn., 56 F.Supp. 559—Brotherhood of Maintenance of Way Employees v. Nashville, C. & St. L. Ry., D.C. Tenn., 56 F.Supp. 552.

Housing

Where contract between railway company and its maintenance of way employees fixed compensation of section laborers at specified sum per hour, without additional benefits of housing, board, etc., and company provided housing without rental charge for some section laborers, who received same wages as those not furnished houses, before passage of Fair Labor Standards Act, company did not customarily furnish such laborers houses as part of their wages and hence was not entitled to allowance for reasonable cost of housing furnished other such laborers as part of minimum wages required to be paid them by order of Administrator of Wage and Hour Division under authority of such act.—Brotherhood of Maintenance of Way Employees v. Nashville, C. & St. L. Ry., supra.

17. U.S.—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846.

18. U.S.—Walling v. Peavy-Wilson Lumber Co., supra.

19. U.S.—Morgan v. Atlantic Coast Line R. Co., D.C.Ga., 32 F.Supp. 617.

the deductions from wages are voluntary on the part of the employee.[20]

A regulation by the administrator under the provision declaring that the wage paid to any employee includes the reasonable cost, as determined by the administrator, to the employer of furnishing the employee with certain facilities customarily furnished, is binding as legislation and cannot be set aside or modified by the courts unless palpably arbitrary or capricious or unless unconstitutional.[21] The statutory provision does not contemplate a determination of reasonable cost of facilities furnished by each individual employer, and the establishment of a general regulation pursuant to which the cost of such facilities may be calculated is sufficient.[22] Under the statute the administrator is not required to hold a formal hearing prior to promulgation of his determination of what constitutes "reasonable cost."[23]

Under a regulation promulgated pursuant to the statutory authorization, the term "reasonable cost" is defined as actual cost to the employer,[24] and is determined to be the cost of operation and maintenance including adequate depreciation plus a reasonable allowance for interest on the depreciated amount of capital invested by the employer, as arrived at under good accounting practices.[25] Such regulation is proper notwithstanding, by reason of peculiar circumstances, the actual cost of the goods or services furnished the employee is much lower than the fair value.[26] Under the regulation, "reasonable cost" does not include a profit to the employer or to any affiliated person.[27] The administrator's regulation may properly provide that the cost of furnishing facilities primarily for the benefit of the employer will not be recognized as reasonable, and that such facilities include tools of trade and other materials incidental to carrying on the employer's business.[28] However, where the pay received by employees after deductions for tools and equipment purchased from the employer equaled or exceeded the statutory minimum, there was no violation of the minimum wage requirement of the act.[29]

A deduction may properly be made on voluntary assignment by the employee to pay a sum for the benefit of the employee to a creditor, donee, or third person, provided the employer or one acting in the employer's behalf derives no profit or benefit from the transaction,[30] but a wage deduction is prohibit-

20. U.S.—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846.

21. U.S.—Walling v. Peavy-Wilson Lumber Co., supra.

Reasonableness of administrator's determination of reasonable cost to employer of furnishing employee with board, lodging, or other facilities, must be weighed in light of congressional purpose to protect basic minimum wage and overtime compensation required to be paid to employee.—Walling v. Peavy-Wilson Lumber Co., supra.

22. U.S.—Walling v. Peavy-Wilson Lumber Co., supra.

23. U.S.—Walling v. Peavy-Wilson Lumber Co., supra.

24. U.S.—Walling v. Peavy-Wilson Lumber Co., supra.

Purpose of administrator's regulation which defined "reasonable cost" as actual cost was to prevent an evasion of act through profit-making transactions between employer and employee in which employee is generally recognized not to be equal on contracting terms with employer.—Walling v. Peavy-Wilson Lumber Co., supra.

Regulation is legally correct, since reasonable cost as used does not meant "return on fair value."—Walling v. Peavy-Wilson Lumber Co., supra.

25. U.S.—Walling v. Peavy-Wilson Lumber Co., supra.

26. U.S.—Walling v. Peavy-Wilson Lumber Co., supra.

27. U.S.—Walling v. Peavy-Wilson Lumber Co., supra.

Coupons

Process by which lumber company issued coupons to employees between paydays, the face value of which was deducted from wages, and which coupons were redeemable in services at community barber shop at a profit to company or for merchandise not furnished at cost at company store at ninety per cent of face value, constituted violation of minimum wage provisions of Fair Labor Standards Act as to employees who were earning bare minimum wage.—Walling v. Peavy-Wilson Lumber Co., supra.

Profit not shown

U.S.—Walling v. Peavy-Wilson Lumber Co., supra.

28. U.S.—Walling v. Peavy-Wilson Lumber Co., supra.

Tools of trade are not "facilities" within provision that wages include reasonable cost to employer of furnishing employee with board, lodging, or other facilities customarily furnished by employer to employees, and deductions for such items cannot be made by employer if they cause wages to go below statutory minimum.—Anderson v. Mt. Clemens Pottery Co., D.C.Mich., 60 F.Supp. 146, reversed on other grounds, C.C.A., Mt. Clemens Pottery Co. v. Anderson, 149 F.2d 461, reversed on other grounds 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L. Ed. ——.

Uniforms

A private patrol service engaged in furnishing watchmen and guard service to various customers, in making monthly deductions from wages earned by its guards and watchmen to cover charged rental for necessary uniforms supplied by it to such employees, violated Fair Labor Standards Act each time that any such deduction deprived employee of any part of applicable minimum wage for which he was then working.—Walling v. New Orleans Private Patrol Service, D.C. La., 57 F.Supp. 143.

29. U.S.—Anderson v. Mt. Clemens Pottery Co., D.C.Mich., 60 F.Supp. 146, reversed on other grounds, C.C.A., Mt. Clemens Pottery Co. v. Anderson, 149 F.2d 461, certiorari granted 66 S.Ct. 91, 326 U.S. 706, 90 L.Ed. 416, reversed on other grounds 66 S.Ct. 1187, 328 U.S 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

30. U.S.—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846.

ed if the employer benefits from the transaction,[31] and, for the purposes of practical enforcement of the act, it is immaterial whether or not in a particular case the employee is any worse off by reason of the fact that the employer benefits from the assignment if the opportunity for exploiting the transaction nevertheless exists.[32]

§ 151(28). —— What Constitutes Compensable Time

What constitutes working time is a question of fact depending on the particular circumstances and must be determined in accordance with common sense and the general concept of work or employment.

Under the Fair Labor Standards Act, §§ 6, 7, 29 U.S.C.A. §§ 206, 207, providing for minimum wages and overtime pay for designated classes of employees, it is frequently necessary to determine the number of hours comprising an employee's work week; and this in turn involves determination of whether time spent by the employee in particular activities connected in one way or another with his employment is to be included in the computation of his compensable working time.[33] In general it may be said that what constitutes working time is a question of fact depending on the particular circumstances,[34] and such question must be determined in accordance with common sense and the general concept of work or employment.[35]

The "work week" under the statute has been held to include all time during which an employee is necessarily required to be on the employer's premises on duty or at a prescribed work place.[36] The

31. U.S.—Walling v. Peavy-Wilson Lumber Co., supra.

32. U.S.—Walling v. Peavy-Wilson Lumber Co., supra.

33. U.S.—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, Ala., 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014.
Number of hours of service generally see infra § 155.

34. U.S.—Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, C.C.A.Ala., 135 F.2d 320, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—Bowers v. Remington Rand, C.C.A.Ill., 159 F.2d 114—Sloat v. Davidson Ore Min. Co., D.C.Mich., 71 F.Supp. 1010.

35. U.S.—Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, C.C.A.Ala., 135 F.2d 320, rehearing denied 137 F.2d 176, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596.

The common meaning of work or employment in which sense it is used in the act is physical or mental exertion, whether burdensome or not, controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, Ala., 64 S.Ct. 698, 703, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014—Walling v. Frank, D.C.Ky., 62 F.Supp. 261.

Split-second absurdities

The work week contemplated by the Fair Labor Standards Act must be computed in the light of the realities of the industrial world, and split-second absurdities in computing the work week are not justified by the actualities of working conditions or by the policy of the act.—Anderson v. Mt. Clemens Pottery Co., Mich., 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S. Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

Time held compensable

(1) Where members of fire department in ordnance plant on a twenty-four hour day basis were on active duty for sixteen hours and on call in dormitories for eight hours and were paid straight time for all hours up to forty hours per week and time and a half for excess including any time worked while on duty, they should be paid overtime required by Fair Labor Standards Act for answering roll call, acting in relief capacities or performing similar tasks and duties necessary in connection with their employment.—Eustice v. Federal Cartridge Corp., D.C.Minn., 66 F.Supp. 55.

(2) Time consumed by employees who are employed on piecework basis in cleaning and oiling their machines and in sorting and attaching to record sheets work tickets detached from garments on which they had worked, which tickets were used for making up pay roll, should be counted as hours "worked."—Walling v. Frank, D.C.Ky., 62 F.Supp. 261.

(3) Conference time and time spent attending employer's school of instruction were spent at employer's direction, and overtime compensation should be paid therefor.—Chepard v. May, D.C.N.Y., 71 F.Supp. 389.

(4) Where night watchman was at all times watching property used in interstate commerce, time spent in selling dry ice which constituted but a small part of duties and was merely incidental to main duties as watchman, janitor and gatekeeper was not deductible in computing overtime wages due under Fair Labor Standards Act.—Martin v. Graham Ship-By-Truck Co., Mo.App., 176 S.W.2d 842.

Time held not compensable

(1) Time during which an employee is absent from work because of illness has been held not to constitute compensable work time.—Mid-Continent Petroleum Corp. v. Keen, C.C.A.Iowa, 157 F.2d 310.

(2) A bookkeeper seeking to recover for overtime compensation pursuant to Fair Labor Standards Act was not entitled to have included in his working hours the time spent by him in obtaining instruction in cost accounting.—Cassone v. Wm. Edgar John & Associates, 57 N.Y.S.2d 169, 185 Misc. 573.

Retroactive effect of determination

Where employer relied on Fair Labor Standards Act as administered and interpreted by Wage and Hour Administrator and the courts in computing work week and representative of administrator approved method of computing time and overtime at employer's plant, employer would not be retroactively liable for unpaid overtime compensation or minimum wages for preliminary activities and time consumed in walking to and from work benches and to and from cafeteria even if such activities and time were to be considered compensable under Fair Labor Standards Act.—Anderson v. Mt. Clemens Pottery Co., D.C.Mich., 69 F.Supp. 710.

36. U.S.—Anderson v. Mt. Clemens Pottery Co., Mich., 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

Vacation week

"Work week" means a week during which work is performed, and hence, overtime compensation cannot be recorded for week during which employee was on vacation and

mere fact that the employee is in some small degree deprived of some freedom of action does not alone determine the question, or constitute the time during which such deprivation occurs working time;[37] there must be a giving up by the employee of a substantial measure of time and effort.[38] On the other hand, the mere fact that a particular act necessary in the performance of an employee's task was not expressly ordered or directed by his superior does not establish that the time spent in doing such act was not working time.[39] An employee may be working, even though he is exerting no manual labor,[40] as during periods wherein he is charged with responsibility for the proper operation of machinery under his charge and periods in which he is obliged to remain on or near the premises to enable him to carry such responsibility properly.[41]

Under the Portal-To-Portal Act of 1947 § 2, 29 U.S.C.A. § 252, providing that no employer shall be subjected to liability for nonpayment of minimum wages or overtime compensation under the Fair Labor Standards Act and certain other statutes for activities performed by an employee prior to the enactment of the statute unless such activities at the time they were performed were compensable either by express contractual provision or by reason of custom or practice, it has been held that time spent by an employee in an activity which was compensable at the time under the terms of the employee's contract constitutes compensable working time under the Fair Labor Standards Act.[42] In the absence of such a statute, however, or of any other statutory provision to the contrary, it has been held that a custom or contract not to consider certain work within the compass of the work week or not to compensate employees for certain portions of their work should be disregarded if it deprives the employee of his statutory rights;[43] but this rule would not foreclose reasonable provisions of a contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible.[44]

Waiting, resting, or sleeping time. Where an employee is engaged in active work for part of the time but because of the nature of the job is also required to spend a considerable part of the time in a stand-by capacity, as in the case of a watchman or caretaker, or waiting on call or for the arrival of active work, the question frequently arises whether time so spent is working time. Although "being available for work" is by no means synonymous with "working,"[45] it has been said that there is no principle of law which precludes waiting time from being working time,[46] and this has been held

performed no work for employer.—Plourde v. Massachusetts Cities Realty Co., D.C.Mass., 47 F.Supp. 668.

Work voluntarily done

Compensation for work voluntarily done is not governed by wage and hour provisions of Fair Labor Standards Act.—Martin v. Graham Ship-By-Truck Co., Mo.App., 176 S.W.2d 842.

37. U.S.—Bowers v. Remington Rand, C.C.A.Ill., 159 F.2d 114.

38. U.S.—Anderson v. Mt. Clemens Pottery Co., Mich., 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

39. U.S.—Walling v. Anaconda Copper Min. Co., D.C.Mont., 66 F. Supp. 913.

40. U.S.—Walling v. Sun Pub. Co., D.C.Tenn., 47 F.Supp. 180, affirmed, C.C.A., 140 F.2d 445, certiorari denied 64 S.Ct. 946, 322 U.S. 728, 88 L.Ed. 1564—Fleming v. Rex Oil & Gas Co., D.C.Mich., 43 F. Supp. 950.

41. U.S.—Walling v. Sun Pub. Co., D.C.Tenn., 47 F.Supp. 180, affirmed, C.C.A., 140 F.2d 445, certiorari denied 64 S.Ct. 946, 322 U.S. 728, 88 L.Ed. 1564—Fleming v. Rex Oil & Gas Co., D.C.Mich., 43 F. Supp. 950.

42. U.S.—Lewellen v. Hardy-Burlingham Min. Co., D.C.Ky., 73 F. Supp. 63.

43. U.S.—Anderson v. Mt. Clemens Pottery Co., Mich., 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699—Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, Va., 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, Ala., 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—Bowers v. Remington Rand, C.C.A.Ill., 159 F.2d 114—Walling v. Mid-Continent Pipe Line Co., C.C.A.Okl., 143 F.2d 308—Walling v. Frank, D.C.Ky., 62 F.Supp. 261.

44. U.S.—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, Ala., 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S.Ct. 1014, 322 U.S. 771, 88 L.Ed. 1596—Bowers v. Remington Rand, C.C.A.Ill., 159 F.2d 114.

Okl.—Skelly Oil Co. v. Jackson, 148 P.2d 182, 194 Okl. 183.

Rule governing lateness

Three-minute rule of employer whereby an employee three minutes late is not allowed to go to work until a quarter of an hour following the time at which he was supposed to check in is not unreasonable, under Fair Labor Standards Act.—Fleming v. Stillman, D.C. Tenn., 48 F.Supp. 609.

Necessity of approval of overtime

Employers' rule that employees have their hours of work especially set and that, in order for them to be entitled to overtime, if they work after the hour set at which they are to quit, they must have overtime approved by manager, is reasonable.—Fleming v. Stillman, supra.

Limitation on compensable overtime

The rule permitting reasonable computation of hours actually worked by one subject to call at all hours was inapplicable where employer and employee had undertaken in advance of the work being done to say how much overtime ought to be allowed and that so much and no more would be paid for, without restriction as to how much would necessarily be required.—Wilson Oil Co. v. Hardy, 164 P.2d 209, 49 N.M. 337.

45. U.S.—Fox v. Summit King Mines, C.C.A.Nev., 143 F.2d 926.

46. U.S.—Armour & Co. v. Wantock, Ill., 65 S.Ct. 165, 323 U.S. 126, 89 L.Ed. 118, rehearing denied

true even as to waiting time devoted to idleness and recreation.[47] Nevertheless it is impossible to lay down any arbitrary rule, and the determination of whether time so spent is or is not working time depends on the facts of the particular case,[48] although considerable weight will generally be given to administrative rulings and declarations on the question.[49]

One of the tests often applied is the degree to which the employee is free to engage in personal activities during periods of idleness and the number of consecutive hours that the employee is subject to call without being required to perform active work.[50] Another consideration is whether the employee is required to remain on or about the premises during such waiting time or is required merely to leave word where he can be reached in the event of a call and is not tied down to any particular place,[51] although the fact that the employee is required to live on the premises and is subject to call at any time does not mean that he is necessarily working twenty-four hours a day;[52] and it has been held that if, in fact, provision is made for ample consecutive hours of sleep on the employer's premises, subject to calls which are infrequent enough to be inconsequential, such sleeping time is not working time;[53] but there is authority to the

65 S.Ct. 427, 323 U.S. 818, 89 L. Ed. 649—Skidmore v. Swift & Co., Tex., 65 S.Ct. 161, 323 U.S. 134, 89 L.Ed. 124—Campbell v. Jones & Laughlin Steel Corp., D.C.Pa., 70 F.Supp. 996—Bell v. Porter, D. C.Ill., 66 F.Supp. 49.

47. Minn.—Bicanic v. J. C. Campbell Co., 19 N.W.2d 7, 220 Minn. 107, followed in Czupiy v. North Star Timber Co., 19 N.W.2d 11, 220 Minn. 116, followed in 20 N. W.2d 885, 220 Minn. 115, certiorari denied 66 S.Ct. 806, 327 U.S. 787, 90 L.Ed. 1014.

"An employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a standby capacity."—Armour & Co. v. Wantok, Ill., 65 S.Ct. 165, 168, 323 U.S. 126, 89 L.Ed. 118, rehearing denied 65 S.Ct. 427, 323 U.S. 818, 89 L.Ed. 649.

48. U.S.—Armour & Co. v. Wantock, supra—Skidmore v. Swift & Co., Tex., 65 S.Ct. 161, 323 U.S. 134, 89 L.Ed. 124—Campbell v. Jones & Laughlin Steel Corp., D.C.Pa., 70 F.Supp. 996—Bridgeman v. Ford, Bacon & Davis, D.C.Ark., 64 F. Supp. 1006.

Minn.—Bicanic v. J. C. Campbell Co., 19 N.W.2d 7, 220 Minn. 107, followed in Czupiy v. North Star Timber Co., 19 N.W.2d 11, 220 Minn. 116. Followed in 20 N.W. 2d 885, 220 Minn. 115. Certiorari denied 66 S.Ct. 805, 327 U.S. 787, 90 L.Ed. 1014.

Sleeping time

Whether or not time spent in sleeping should be considered working time depends on the circumstances of the particular case.

U.S.—Bowers v. Remington Rand, D. C.Ill., 64 F.Supp. 620.

Mo.—Martin v. Graham Ship-By-Truck Co., App., 176 S.W.2d 842.

49. U.S.—Rokey v. Day & Zimmerman, C.C.A.Iowa, 157 F.2d 734—Bridgeman v. Ford, Bacon & Davis, D.C.Ark., 64 F.Supp. 1006—Buckner v. Armour & Co., D.C. Tex., 53 F.Supp. 1022—Munn v. Southwestern States Tel. Co., D. C.Tex., 52 F.Supp. 663—Thompson v. Loring Oil Co., D.C.La., 50 F. Supp. 213—Muldowney v. Seaberg Elevator Co., D.C.N.Y., 39 F.Supp. 275.

"Waiting time" defined

According to a bulletin put out by the administrator of The Fair Labor Standards Act, "waiting time" constitutes time worked and must be regarded as such whenever an employe is required to be on duty, on the employer's premises, or at a prescribed work place, or when the time is too short for the employee to spend it for his own purposes.—Thompson v. Daugherty, D.C.Md., 40 F.Supp. 279.

50. U.S.—Skidmore v. Swift & Co., Tex., 65 S.Ct. 161, 323 U.S. 134, 89 L.Ed. 124—Bowers v. Remington Rand, D.C.Ill., 64 F.Supp. 620—Walling v. Bank of Waynesboro, D.C.Ga., 61 F.Supp. 384—Buckner v. Armour & Co., D.C.Tex., 53 F. Supp. 1022—Munn v. Southwestern States Tel. Co., D.C.Tex., 52 F. Supp. 663—Travis v. Ray, D.C. Ky., 41 F.Supp. 6—Thompson v. Daugherty, D.C.Md., 40 F.Supp. 279—Muldowney v. Seaberg Elevator Co., D.C.N.Y., 39 F.Supp. 275.

51. U.S.—Super-Cold Southwest Co. v. McBride, C.C.A.Tex., 124 F.2d 90—Thompson v. Loring Oil Co., D.C.La., 50 F.Supp. 213—Gordon v. Paducah Ice Mfg. Co., D.C.Ky., 41 F.Supp. 980.

N.Y.—Hanzely v. Hooven Letters, 44 N.Y.S.2d 398.

"The time during which an employee is off duty and not required to remain at or near premises, although subject to call, is not included [in hours of work] for purposes of overtime compensation."—Bohn v. B & B Ice & Coal Co., D.C.Ky., 63 F.Supp. 1020, 1023.

52. U.S.—Buckner v. Armour & Co., D.C.Tex., 53 F.Supp. 1022—Thompson v. Loring Oil Co., D.C.La., 50 F.Supp. 213—Muldowney v. Seaberg Elevator Co., D.C.N.Y., 39 F. Supp. 275.

Tex.—Perry v. George P. Livermore, Inc., Civ.App., 165 S.W.2d 782.

Employee not subject to call

Where employee spent his time at night on employers' premises where he had an apartment, his time at night was his own for purpose of relaxation, and pursuit of private activities, and there was no showing that he was subject to call or expected to periodically inspect premises at night, time so spent at night by employee was not "working time."—Walling v. Lippold, D.C.Neb., 72 F.Supp. 339.

53. U.S.—Rokey v. Day & Zimmermann, C.C.A.Iowa, 157 F.2d 734—Plummer v. Harvester War Depot, D.C.Ohio, 70 F.Supp. 495.

"Where the only substantial interference with [the] normal mode of living and freedom of action is that the employee is required to sleep away from home, the time devoted to rest and sleep should not be considered as employment hours."—Bridgeman v. Ford, Bacon & Davis, D.C.Ark., 64 F.Supp. 1006, 1014—Bowers v. Remington Rand, D.C.Ill., 64 F.Supp. 620, 625.

Light sleepers

Court, in determining whether employees are entitled to overtime compensation for eight hour rest period provided for employees by employer, is not required to weigh individual's susceptibility to noises which result from night traffic and award compensation to those individuals whose rest is easily disturbed.—Rokey v. Day & Zimmermann, C.C.A.Iowa, 157 F.2d 734.

Fraction of night's sleep

Where night shift telephone operator was permitted to sleep in suitable sleeping facilities when her presence was not required at the switchboard and she was thus able to obtain an average of slightly more than two

contrary.[54] However, none of these tests is conclusive, and waiting time may in some cases be held to constitute working time,[55] and in other cases, sometimes apparently quite similar factually, waiting time has been held not to be working time.[56] Of course, any time spent by the employee in active work when he is required so to work during periods of waiting constitutes working time.[57] The time spent by the employee while eating his lunch or resting during the lunch period is, in the absence of ex-

hours of consecutive uninterrupted sleep per night, such sleeping time did not constitute compensable working time.—Howard v. Southern Continental Tel. Co., D.C.Tenn., 72 F. Supp. 276.

54. U.S.—Bell v. Porter, D.C.Ill., 66 F.Supp. 49.

55. U.S.—Armour & Co. v. Wantock, Ill., 65 S.Ct. 165, 323 U.S. 126, 89 L.Ed. 118, rehearing denied 65 S. Ct. 427, 323 U.S. 818, 89 L.Ed. 649.

Messengers

The time spent by messengers standing by on call waiting to work was "time worked."—Walling v. Bank of Waynesboro, D.C.Ga., 61 F. Supp. 384—Walling v. Allied Messenger Service, D.C.N.Y., 47 F.Supp. 773.

Drivers

The waiting periods between trips should be included in the total number of hours motor bus driver was employed, where driver was expected to be on the job during such periods which were not long enough to permit him to go elsewhere or to engage in other activities.—Travis v. Ray, D.C.Ky., 41 F.Supp. 6.

Watchmen and guards

(1) Plant guards of steel company who were compelled to remain at plant during strike, who were on duty for two eight hour shifts one day and one eight hour shift the next, but who were subject to call at all times and were sometimes called for service while off duty, performed "work" twenty-four hours each day. —Campbell v. Jones & Laughlin Steel Corp., D.C.Pa., 70 F.Supp. 996.

(2) Where there was substantial evidence that night watchman performed duties at all hours during the time spent at employer's place of business, any time spent in napping in intervals between arrival of trucks and performance of his duties as watchman was not deductible in determining compensation due him under Fair Labor Standards Act.—Martin v. Graham Ship-By-Truck Co., Mo.App., 176 S.W.2d 842.

(3) In computing the hours worked by a night watchman for the purpose of determining whether watchman was entitled to overtime compensation, sleeping time was not to be deducted from working time.—Aufiero v. E. A. Laboratories, 69 N.Y.S.2d 217, 271 App.Div. 1024.

Oiling and inspection

Where not in excess of forty hours per week were required by employee in which to perform actual physical work of oiling and inspecting machinery of water wells and in keeping premises and machinery clean, but employee lived on premises and was subject to call any time day or night and often received calls during nighttime, employee worked twelve hours a day.—Harris v. Crossett Lumber Co., D.C.Ark., 62 F.Supp. 856.

Firemen

Firemen employed at ordnance plant on military reservation were entitled to recover overtime compensation under the Fair Labor Standards Act, as "employees" in a standby capacity and as for "working time," for so-called sleeping period during which firemen were required to remain within hailing distance of fire station in readiness to answer fire alarms.—Bell v. Porter, D.C.Ill., 66 F.Supp. 49.

56. U.S.—Howard v. Southern Continental Co., D.C.Tenn., 72 F.Supp. 276—Bohn v. B & B Ice & Coal Co., D.C.Ky., 63 F.Supp. 1020—Muldowney v. Seaberg Elevator Co., D.C.N.Y., 39 F.Supp. 275.

Oil pumpers engaged in active work during part of the working day, and subject to call during other parts or the remainder of the day, were held not to be working during waiting periods, where during such waiting time they were not required to remain on the employer's premises or at any particular place.—Thompson v. Loring Oil Co., D.C.La., 50 F.Supp. 213.

Watchman

Where sole duty of one employed by oil well drilling contractor as watchman on lease was to live on premises adjacent to contractor's stacked oil rigs, his only other service thereon was occasional draining of water from rigs, and he was later required to live on another lease acquired by contractor and pump well thereon for five hours each day, he did not perform personal services for employer in excess of maximum hours per work week allowed under Federal Fair Labor Standards Act and could not recover overtime compensation thereunder.—Perry v. George P. Livermore, Inc., Tex.Civ. App., 165 S.W.2d 782.

Driver

In computing truck driver's compensation, continuous waiting time of one and three-fourths hours, during which he was free to follow his own personal activities and not required to be at any particular place or subject to immediate call, between trains, should be deducted.—Thompson v. Daugherty, D.C.Md., 40 F. Supp. 279.

Telephone operator

Telephone operator, in country village having forty-five telephones, who was subject to call twenty-four hours a day, was not entitled to overtime wages or penalties under the Fair Labor Standards Act, where her actual working time did not add up to more than one hour out of each twenty-four hours.—Munn v. Southwestern States Tel. Co., D.C. Tex., 52 F.Supp. 663.

Firemen

(1) Where firemen were required to be on duty for twenty-four consecutive hours, approximately one third of which time was set aside for sleeping and recreation subject to call, but there was no material interruption of such rest or sleep period by calls, the time spent by the firemen during such period otherwise than on active duty in response to calls was not working time.—Bell v. Porter, C.C.A.Ill., 159 F.2d 117—Bowers v. Remington Rand, C.C.A.Ill., 159 F.2d 114—Rokey v. Day & Zimmerman, C.C.A.Iowa, 157 F.2d 734—Plummer v. Harvester War Depot, D. C.Ohio, 70 F.Supp. 495—Eustice v. Federal Cartridge Corp., D.C.Minn., 66 F.Supp. 55—Bridgeman v. Ford, Bacon & Davis, D.C.Ark., 64 F.Supp. 1006.

(2) Where day fireman in packing company's fire-fighting department did not work in excess of maximum hours per week as provided by Fair Labor Standards Act, and fireman stayed at fire hall some nights subject to emergency calls which for each man on duty were very trivial, time spent in hall at night subject to call was not "work" within the act.—Buckner v. Armour & Co., D.C. Tex., 53 F.Supp. 1022.

57. U.S.—Eustice v. Federal Cartridge Corp., D.C.Minn., 66 F.Supp. 55.

Firemen

Where firemen were on active duty sixteen hours and had eight hour rest period required to be spent at fire stations, and some firemen spent twenty minutes of rest period each night in inspecting fire trucks, etc., time spent for such inspection constituted "employment time."—Bridgeman v. Ford, Bacon & Davis, D.C.Ark., 64 F.Supp. 1006.

press agreement, not to be considered working time.[58]

Travel or transportation time. Under the Portal-To-Portal Act of 1947, 29 U.S.C.A. §§ 251–262, an employer cannot be subjected to liability because of his failure to pay an employee minimum wages or overtime compensation in accordance with the provisions of the Fair Labor Standards Act for time spent by such employee in walking, riding, or traveling to and from the actual place of performance of the principal activity which such employee is employed to perform, unless the time so spent was, during the period for which compensation is claimed, compensable either under the terms of an express written or unwritten contract or by virtue of an existing custom or practice.[59] In the absence of such a statute, however, the question whether time spent by an employee in getting to and from the actual place of work or point of duty on the employer's premises constitutes compensable working time under the Fair Labor Standards Act has been held to depend on the facts of the particular case.[60]

Thus, it has been held that time spent in necessary travel from the place of check-in to the post of duty is time spent for the employer's benefit and subject to its control and, hence, is compensable work time;[61] and, where the employer transports the employees to and from work which is at some distance from the employer's main establishment, and such transportation is necessary for the conduct of the employer's business and maintained primarily for its benefit and not primarily for the benefit and convenience of the employees, the time spent being so transported is work time.[62] On the other hand, time spent by the employee in traveling from his home to the place of employment is not ordinarily held to constitute work time;[63] and even where the employer, for the employee's convenience, furnishes free and optional transportation to and from the place of employment and the employee's duties begin and end at such place, the time spent in traveling on such means of transportation has been held not to constitute work time.[64] In the absence of a statutory provision to the contrary, time spent by

58. U.S.—Shepler v. Crucible Fuel Co. of America, D.C.Pa., 60 F.Supp. 260—Fox v. Summit King Mines, D.C.Nev., 48 F.Supp. 952, affirmed, C.C.A., 143 F.2d 926—Sunshine Mining Co. v. Carver, D.C.Idaho, 41 F.Supp. 60.

Emergency instructions

Where employees in plant manufacturing carbon black were not required to stay on premises during lunch hour, they were not entitled to overtime for such period under Fair Labor Standards Act because of general instructions that, when power cuts off for any reason, they must within five minutes thereafter begin to turn off gas throughout the plant.—Thomas v. Peerless Carbon Co., D.C.Tex., 62 F.Supp. 154.

59. U.S.—Burfeind v. Eagle-Picher Co. of Tex., D.C., 71 F.Supp. 929.

60. U.S.—McIntyre v. Joseph E. Seagram & Sons Co., D.C.Ky., 72 F. Supp. 366—Hart v. C. D. Johnson Lumber Corp., D.C.Or., 71 F.Supp. 107—Walling v. Anaconda Copper Min. Co., D.C.Mont., 66 F.Supp. 913—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846.

61. U.S.—Chepard v. May, D.C.N.Y., 71 F.Supp. 389—Ballard v. Consolidated Steel Corp., D.C.Cal., 61 F. Supp. 996.

Offset of relief periods

An employer cannot offset employees' relief periods against times between their reporting for roll call and commencement of their work shifts in calculating their pay.—Ballard v. Consolidated Steel Corp., supra.

Walking to work bench

The minimum time necessarily spent after punching time clocks by employees in walking on the employer's premises at an ordinary rate along the most direct route from time clocks to work benches was "working time" which must be compensated for under the Fair Labor Standards Act.—Anderson v. Mt. Clemens Pottery Co., Mich., 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. —.

Effect of custom or contract

Prior to the enactment of the Portal-To-Portal Act relieving employers of liability for failure to compensate employees for time spent in walking, riding, or traveling to the actual place of performance of their principal activities except where such time was compensable under a custom or contract in existence at the time, it was held that the rule stated in the text was applicable even where there was a contrary custom or contractual provision.—Anderson v. Mt. Clemens Pottery Co., supra—Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, Va., 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007—Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, C.C.A.Ala., 135 F.2d 320, rehearing denied, C.C.A., 137 F.2d 176, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596.

62. U.S.—Walling v. Anaconda Copper Min. Co., D.C.Mont., 66 F.Supp. 913.

Test of benefit

In determining whether transportation to and from work furnished employees by employer was or was not primarily in the interest of the employer, the effect of failure to furnish transportation upon employer's business must be considered.—Walling v. Anaconda Copper Min. Co., supra.

63. U.S.—Chepard v. May, D.C.N.Y., 71 F.Supp. 389.

64. U.S.—West v. Texas Co., D.C. La., 65 F.Supp. 97—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F.Supp. 846—Bulot v. Freeport Sulphur Co., D.C.La., 45 F.Supp. 380—Dollar v. Caddo River Lumber Co., D.C.Ark., 43 F.Supp. 822.

Transportation from place of check-in

Where the work is performed at some distance from the place of check-in and the day's work ends at the place of performance, after which the employees are free to go home directly or to avail themselves of the employer's free return transportation to the place of check-in, the time spent in returning to such place is not compensable work time; but, where the employees are required, as in the case of drivers, to make the return trip to the place of check-in before being relieved of their duties, the time of such return

miners in underground travel from portal to portal, as distinguished from face to face, of the mine workings constitutes compensable work time.[65] Where the amount of time necessarily spent in traveling is negligible, the de minimis rule is applicable and such time will be disregarded in computing working hours.[66]

Time spent in preparatory activities. Except in so far as the rule has been changed by the Portal-To-Portal Act of 1947 which limits the liability of employers for time spent by their employees in preliminary activities, it has been held that time spent by employees in preliminary activities necessarily prerequisite to productive work, and required by the employer and pursued necessarily for the employer's benefit, constitutes working time for which the employees are entitled to compensation in accordance with the provisions of the Fair Labor Standards Act;[67] but time spent in preparatory activities voluntarily undertaken by employees outside of their regular working time and pursued primarily for their own convenience does not constitute work time.[68] Time required to be spent by an employee in checking in or waiting to punch a time clock will not ordinarily be deemed compensable working time where the length of time so spent is not considerable.[69] If an employee for his own convenience arrives at the plant earlier than necessary, he is not entitled to compensation for the period between the time he arrives and the time he is required to commence work.[70] As a general rule, insubstantial and insignificant periods of time spent in preliminary activities need not be included in computing the compensable work week of an employee.[71]

Conclusiveness of time records. Time sheets prepared by the employer and signed by the employee are not conclusive against the employee if they do not correctly reflect the amount of time worked by the employee;[72] they are not binding on the employee as contracts;[73] nor will the employee be held bound by such time sheets on the ground of long delay in advising the employer of the errors.[74]

trip is work time.—Walling v. Mid-Continent Pipe Line Co., C.C.A.Okl., 143 F.2d 308.

65. U.S.—Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, Va., 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, Ala., 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—Local No. 6167, United Mine Workers of America, v. Jewell Ridge Coal Corporation, C.C.A.Va., 145 F.2d 10, affirmed 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007—Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, C.C.A.Ala., 135 F.2d 320, rehearing denied 137 F.2d 176, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—Sunshine Mining Co. v. Carver, D.C.Idaho, 41 F.Supp. 60.

66. U.S.—Anderson v. Mt. Clemens Pottery Co., Mich., 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515. Rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

67. U.S.—Anderson v. Mt. Clemens Pottery Co., supra—Yellow Truck & Coach Mfg. Co. v. Edmondson, C.C.A.Mich., 155 F.2d 367.

68. U.S.—Bridgeman v. Ford, Bacon & Davis, D.C.Ark., 64 F.Supp. 1006.

Procuring and returning tools

Where employees were obliged to furnish their own tools and were free to exercise their own judgment regarding when, where, and how to procure their equipment, time spent by them in procuring and returning their tools did not constitute working time.—Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, C.C.A.Ala., 135 F.2d 320, rehearing denied 137 F.2d 176, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, D.C.Va., 53 F.Supp. 935, reversed on other grounds C.C.A., 145 F.2d 10, affirmed 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007.

Changing uniforms

The time spent by employee in obtaining clean uniforms when gotten before beginning of scheduled working period and the time spent in changing clothes was spent in activity solely for convenience of the employee, and hence was not compensable.—McIntyre v. Joseph E. Seagram & Sons Co., D.C.Ky., 72 F. Supp. 366.

69. U.S.—Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, C.C.A.Ala., 135 F.2d 320, rehearing denied 137 F.2d 176, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—McIntyre v. Joseph E. Seagram & Sons Co., D.C.Ky., 72 F. Supp. 366—Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, D.C.Va., 53 F.Supp. 935, reversed on other grounds C.C.A., 145 F.2d 10, affirmed 65 S.Ct. 1063, 325 U.S. 161, 89 L.Ed. 1534, rehearing denied 65 S.Ct. 1550, 325 U.S. 897, 89 L.Ed. 2007.

What constitutes considerable time

(1) A workable formula for determining whether the time required to punch a time clock was considerable could not be arrived at by measuring it against either the free time of the employee or his working time, but the true test was whether employee was unreasonably deprived of time which he should have had free.—Cameron v. Bendix Aviation Corp., D.C.Pa., 65 F.Supp. 510.

(2) Periods ranging from a fraction of a minute to three minutes spent standing in line in order to punch time clock at beginning of lunch period did not constitute "considerable" periods of time.—Cameron v. Bendix Aviation Corp., supra.

70. U.S.—U. S. v. Ewald Iron Co., D.C.Ky., 67 F.Supp. 67.

71. U.S.—Anderson v. Mt. Clemens Pottery Co., Mich., 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699—Bridgeman v. Ford, Bacon & Davis, C.C.A.Ark., 161 F. 2d 962—McIntyre v. Joseph E. Seagram & Sons Co., D.C.Ky., 72 F. Supp. 366.

72. N.M.—Wilson Oil Co. v. Hardy, 164 P.2d 209, 49 N.M. 337, 162 A.L.R. 292.

73. N.M.—Wilson Oil Co. v. Hardy, supra.

74. N.M.—Wilson Oil Co. v. Hardy, supra.

Likewise, time clock records are not controlling where the employee is required to be on the premises or on duty at a different time or where the payroll records or other facts indicate that work started at an earlier or later period than indicated by the time clock records.[75]

§ 151(29). —— Increase or Reduction of Wages

The Fair Labor Standards Act does not require any increase in wages to those already receiving more than the minimum, and a provision that the act shall not justify the reduction of a wage which is in excess of the applicable minimum wage does not preclude an agreement reducing the hourly rate but maintaining the number of hours worked and the total compensation received, provided the statutory minimum is respected.

The Fair Labor Standards Act § 1 et seq, 29 U.S.C.A. § 201 et seq, does not require any increase in wages to those already receiving more than the minimum.[76] Accordingly, an employer is not barred from contracting with his employees to pay them the same wages they received previously, as long as the new rate equals or exceeds the minimum required by the act.[77]

It is provided by § 18 of the act, 29 U.S.C.A. § 218, that no provision of the act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under the act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under the act.[78] Such provision was intended primarily to discourage the possible tendency that the minimum wage fixed in the act would become the maximum wage paid by employers,[79] and to preclude reliance on the act as justification for reducing wages to the minimum or increasing hours to the maximum requirements.[80] However, it has been held that the act fails to provide any penalties for violation of such provision,[81] and that the provision is to be construed as merely prohibiting any employer from breaching a binding contract for the purpose of reducing wages or increasing hours of employment.[82] The provision does not outlaw agreements between employer and employee regarding hours and wages so long as other provisions of the act relating to minimum wages and overtime pay are not violated,[83] and it does not invalidate a contract entered into shortly prior to the effective date of the act reducing the hourly rate but maintaining the number of hours worked and the total compensation received.[84] So, an employee whose wages were reduced at the time of adoption of the statute but not below the minimum requirements of the statute may not recover from the employer the amount of wages of which he was deprived by the reduction.[85] It has been held, on the other hand, that employees are entitled to overtime compensation based on the rate received at the time of a determination that they were subject to the act, rather than at the rate to which their pay was arbitrarily reduced by the employer after such determination.[86]

75. U.S.—Anderson v. Mt. Clemens Pottery Co., Mich., 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699—U. S. v. Ewald Iron Co., D.C.Ky., 67 F. Supp. 67.

76. U.S.—Watkins v. Hudson Coal Co., D.C.Pa., 54 F.Supp. 953, modified on other grounds, C.C.A., 151 F.2d 311, certiorari denied Hudson Coal Co. v. Watkins, 66 S.Ct. 522, 327 U.S. 777, 90 L.Ed. 1005, rehearing denied 66 S.Ct. 701, 327 U.S. 816, 90 L.Ed. 1039.

77. U.S.—Walling v. A. H. Belo Corporation, Tex., 62 S.Ct. 1223, 316 U.S. 624, 86 L.Ed. 1716, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 503—Lassiter v. Guy F. Atkinson Co., C.C.A.Wash., 162 F.2d 774—Bergschneider v. Peabody Coal Co., C.C.A.Ill., 142 F.2d 784—Shepler v. Crucible Fuel Co., C.C.A. Pa., 140 F.2d 371—Walling v. Helmerich & Payne, C.C.A.Okl., 138 F.2d 705, reversed on other grounds 65 S.Ct. 11, 323 U.S. 37, 89 L.Ed. 29—General Mills v. Williams, C.C.A.Ohio, 132 F.2d 367, 144 A.L.R. 1371—White v. Witwer Grocer Co., C.C.A.Iowa, 132 F.2d 108—Murray v. Noblesville Milling Co., C.C.A. Ind., 131 F.2d 470, certiorari denied 63 S.Ct. 832, 318 U.S. 775, 87 L.Ed. 1145—Vogelpohl v. Lane Drug Co., D.C.Ohio, 55 F.Supp. 564—Lynch v. Vincent, D.C.Mo., 55 F. Supp. 44—Clay v. Motor Freight Express, D.C.Pa., 52 F.Supp. 948—Walling v. Emery Wholesale Corporation, D.C.Ga., 49 F.Supp. 192, affirmed C.C.A., 138 F.2d 548—Reeves v. Howard County Refining Co., D.C.Tex., 33 F.Supp. 90.
N.Y.—Siegel v. S. Blechman & Sons, 60 N.Y.S.2d 116.
Okl.—Ille v. Travis Oil Corp., 164 P.2d 998, 196 Okl. 332.

78. U.S.—Remer v. Czaja, D.C.Md., 36 F.Supp. 629.

Construction

The court had duty to construe language of provision of Fair Labor Standards Act that no employer should reduce a wage paid by him which was in excess of minimum wage prescribed by act in such manner as would make that provision consistent with other provisions of the act.—Remer v. Czaja, supra.

79. U.S.—Missel v. Overnight Motor Transp. Co., C.C.A.Mo., 126 F.2d 98, affirmed 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

80. U.S.—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923.

81. U.S.—Remer v. Czaja, D.C.Md., 36 F.Supp. 629.

82. U.S.—Remer v. Czaja, supra.

83. U.S.—Dolan v. Day & Zimmerman, D.C.Mass., 65 F.Supp. 923—Tinerella v. Des Moines Transp. Co., D.C.Ill., 41 F.Supp. 798.

84. U.S.—General Mills v. Williams, C.C.A.Ohio, 132 F.2d 367, 144 A.L.R. 1371—White v. Witwer Grocer Co., C.C.A.Iowa, 132 F.2d 108.

85. U.S.—Remer v. Czaja, D.C.Md., 36 F.Supp. 629.

86. U.S.—Anuchick v. Transamerican Freight Lines, D.C.Mich., 46 F. Supp. 861.

§ 151(30). Powers and Duties of Administrator Generally

The Fair Labor Standards Act authorizes the appointment of an administrator of the wage and hour division and confers on him various powers and duties with respect to the administration of the act.

The Fair Labor Standards Act § 4, 29 U.S.C.A. § 204, provides for the appointment of an administrator of the wage and hour division, and generally grants him authority to appoint employees to carry out his functions and duties under the statute, requires him to make reports annually and recommendations for further legislation, and imposes other duties on him with respect to administration of the act,[87] including the duty to enforce the provisions of the act and to compel compliance therewith.[88] The character of authority delegated to the administrator is to be gauged on the assumption that the authority delegated is for the purpose of meeting practical problems arising in the administration of the act, and it will be assumed that the authority delegated is of such a nature as would not conflict with powers concurrently or previously conferred by congress on the courts.[89] Authority delegated to the administrator cannot be exercised arbitrarily or in a way which has no reasonable relation to the question involved.[90]

Valid regulations of the administrator within the power delegated under the statute have the force and effect of legislative enactments,[91] and speak with the authority of law,[92] provided they reasonably construe the language and clear intention of the act.[93] The administrator has implied power under the general terms of the act to prohibit homeworkers from doing work in a particular industry without obtaining a homework certificate.[94] The administrator has the right and duty to construe the language of the statute if fairly susceptible of more than one interpretation; but, where the meaning thereof is definite and clear, it cannot be altered.[95] The rulings and interpretations of the administrator are not controlling on the courts but constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance.[96] The weight to be given the administrator's rulings is dependent on the thoroughness evidenced in their consideration, the validity of their reasoning, and their consistency with earlier and later pronouncements.[97] The administrator's interpretation of the statute is controlling as against that of subordinate officials.[98]

Principal office. The Fair Labor Standards Act § 4 (c), 29 U.S.C.A. § 204 (c), provides that the principal office of the administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place; the function of such provision is to permit the administrator and his representatives to exercise, either within or without the District of Columbia, such powers as he possesses.[99]

Conduct of litigation. Under the Fair Labor Standards Act § 4 (b), 29 U.S.C.A. § 204 (b), providing that attorneys for the administrator may appear for and represent the administrator in any litigation, but all such litigation shall be subject to the control of the attorney general, it was the intention of congress to place ultimate responsibility for legal actions in the department of justice,[1] but the attorney general's participation in litigation by the administrator is permissive and not mandatory,[2]

87. U.S.—La Guardia v. Austin-Bliss General Tire Co., D.C.N.Y., 41 F. Supp. 678.
Particular powers:
To issue certificates for employment of learners and handicapped persons at less than minimum wage see supra § 151 (10).
To promulgate definitions with respect to exemptions see supra §§ 151 (11)–151 (23).
To sue for collection of wages due employees see infra § 160 (1).
To institute criminal prosecution for violation of act see infra § 160 (13).
To sue to enjoin violations of act see Injunctions § 138 b (2) (a) ee.

88. U.S.—Walling v. Shenandoah-Dives Mining Co., C.C.A.Colo., 134 F.2d 395.

89. U.S.—Mantel v. Ralph Knight, Inc., D.C.Mo., 45 F.Supp. 372, affirmed, C.C.A., Ralph Knight Inc. v. Mantel, 135 F.2d 514.

90. U.S.—Gordon v. Paducah Ice Mfg. Co., D.C.Ky., 41 F.Supp. 980.

91. U.S.—Walling v. Cohen, C.C.A. Pa., 140 F.2d 453.
Validity of regulations:
Generally see supra § 151 (3).
Particular regulations promulgated in connection with exemptions see supra §§ 151 (11)–151 (23).

92. U.S.—Walling v. Snyder Min. Co., D.C.Minn., 66 F.Supp. 725—Bernick v. Coddon, D.C.Minn., 65 F.Supp. 89.
N.C.—Pye v. Atlantic Co., 25 S.E.2d 401, 223 N.C. 92.

93. U.S.—Stanger v. Vocafilm Corp., C.C.A.N.Y., 151 F.2d 894, 162 A.L.R. 216—Stanger v. Glenn L. Martin Co., D.C.Md., 56 F.Supp. 163.

94. U.S.—Walling v. Wolff, D.C. N.Y., 65 F.Supp. 532.

95. U.S.—Walling v. L. Wiemann Co., C.C.A.Wis., 138 F.2d 602, certiorari denied 64 S.Ct. 782, 321 U.S. 785, 88 L.Ed. 1077.

96. U.S.—Mabee v. White Plains Pub. Co., N.Y., 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607—Skidmore v. Swift & Co., Tex., 65 S.Ct. 161, 323 U.S. 134, 89 L.Ed. 124.

97. U.S.—Skidmore v. Swift & Co., supra.

98. U.S.—Walling v. Newman, D.C. Iowa, 61 F.Supp. 971.

99. U.S.—Cudahy Packing Co. of Louisiana v. Holland, La., 62 S.Ct. 651, 315 U.S. 357, 86 L.Ed. 895.

1. U.S.—Fleming v. Cudahy Packing Co., D.C.Cal., 41 F.Supp. 910.
Institution of criminal prosecutions for violation of act see infra § 160 (13).

2. U.S.—Lowell Sun Co. v. Fleming, C.C.A.Mass., 120 F.2d 213, affirmed

and the petition in the administrator's action need not show on its face that the attorney general has authorized the action, and the attorney general need not appear as one of the attorneys of record or actually and in person or by one of his assistants direct the litigation.[3]

§ 151(31). —— Investigations and Inspections; Subpœnas

The Fair Labor Standards Act authorizes the administrator to investigate the wages, hours, and other conditions of employment in any industry subject to the act, and to conduct investigations in aid of the enforcement of the act; and he has power in a proper case to issue a subpoena duces tecum requiring the production of books and records of an employer, but the enforcement of the subpoena generally rests in the legal discretion of the court.

The Fair Labor Standards Act § 11 (a), 29 U.S.C.A. § 211 (a), authorizes the administrator or his designated representatives to investigate the wages, hours, and other conditions and practices of employment in any industry subject to the act,[4] and to conduct investigations which he may deem necessary to determine whether any person has violated any provision of the act, or which may aid in the enforcement of the act.[5] The administrator's investigative function, in searching out violations

Holland v. Lowell Sun Co., 62 S. Ct. 793, 315 U.S. 784, 86 L.Ed. 1190 —Fleming v. Cudahy Packing Co., D.C.Cal., 41 F.Supp. 910.

Official option

The power conferred on the attorney general under the provision of the Fair Labor Standards Act stating that all litigation in which the administrator is involved shall be subject to the direction and control of the attorney general is permissive and not mandatory, and the manner and extent of his participation are wholly a matter of his official option, as against contention that all litigation under the act must be instituted by the attorney general.—Cudahy Packing Co. v. Fleming, C.C.A.Minn., 122 F.2d 1005, reversed on other grounds Cudahy Packing Co. v. Holland, 62 S.Ct. 803, 315 U.S. 785, 86 L.Ed. 1191.

3. U.S.—Fleming v. Cudahy Packing Co., D.C.Cal., 41 F.Supp. 910.

Order to show cause

The attorney general's consent was not necessary to the filing of petition by wage and hour administrator for an order directing an employer to show cause why an order should not issue requiring employer to produce records as required by a subpoena duces tecum issued under administrator's authority in investigations regarding alleged violations of Fair Labor Standards Act.—Fleming v. Cudahy Packing Co., supra.

A letter from the attorney general to the administrator stating that the legal staffs of the latter's administration would handle his legal work, including litigation of a civil character, with agreement that notice would be given to the attorney general in any case involving an issue of constitutionality was not intended to prevent the administrator from instituting through his own legal staff a proceeding for an order to enforce compliance by an employer with a subpoena duces tecum issued under the Fair Labor Standards Act, and the district court did not lack jurisdiction of the proceeding because the attorney general did not file the application.—Cudahy Packing Co. v. Fleming, C.C.A.Minn., 122 F.2d 1005, reversed on other grounds Cudahy Packing Co. v. Holland, 62 S.Ct. 803, 315 U.S. 785, 86 L.Ed. 1191.

4. U.S.—Application of Holland, D. C.N.Y., 44 F.Supp. 601, affirmed C.C.A., Walling v. Standard Dredging Corporation, 132 F.2d 322, certiorari denied Standard Dredging Corporation v. Walling, 63 S.Ct. 1318, 319 U.S. 761, 87 L.Ed. 1712, rehearing denied 64 S.Ct. 29, 320 U. S. 810, 88 L.Ed. 489.

General industry

Under Fair Labor Standards Act provision that Administrator may investigate and gather data regarding wages, hours, and other conditions of employment in any "industry" subject to the act, the quoted word means the general industry as distinguished from a particular employer.—Walling v. Daily Press, D. C.Va., 58 F.Supp. 792.

Presupposition

The power of administrator under Fair Labor Standards Act to investigate conditions of employment in any industry subject to act presupposes that industry is subject to act, but in investigating conditions to determine whether any person has violated act or to aid in enforcement of act, there is no presupposition that employer is subject to act. —Oklahoma Press Pub. Co. v. Walling, C.C.A.Okl., 147 F.2d 658, affirmed 66 S.Ct. 494, 327 U.S. 186, 90 L. Ed. 614, 166 A.L.R. 531.

5. U.S.—Cudahy Packing Co. of Louisiana v. Holland, La., 62 S.Ct. 651, 315 U.S. 357, 86 L.Ed. 895—Detweiler Bros. v. Walling, C.C.A. Idaho, 157 F.2d 841—Cudahy Packing Co. v. Fleming, C.C.A.Minn., 122 F.2d 1005, reversed on other grounds Cudahy Packing Co. v. Holland, 62 S.Ct. 803, 315 U.S. 785, 86 L.Ed. 1191—Walling v. Daily Press, D.C.Va., 58 F.Supp. 792—Walling v. West Virginia Pulp & Paper Co., D.C.S.C., 2 F.R.D. 416.

Scope of powers

(1) The intended scope of powers of administrator under section of Fair Labor Standards Act giving him a plenary power to make any investigation which may aid in the enforcement of provisions of the act, must be determined from a reading of the section in conjunction with and subordinately to what congress has declared to be the purpose and policy of the act.—Walling v. Benson, C.C.A.Mo., 137 F.2d 501, 149 A. L.R. 186, certiorari denied 64 S.Ct. 206, 320 U.S. 791, 88 L.Ed. 476.

(2) "A logical line divides the two powers of investigation. The first power is apparently intended largely for statistical and informational purposes. Its object is knowledge, like that of much of the data gathered under the census, not law enforcement. It is, therefore, addressed to an 'industry' and not to an 'employer.' The second power is designed to facilitate the enforcement of a law which necessarily requires on part of the government an intimate acquaintance with working conditions, wages and hours of employment in individual establishments. The power granted is as broad as the need."—Application of Holland, D.C.N.Y., 44 F.Supp. 601, 602, affirmed C.C.A., Walling v. Standard Dredging Corporation, 132 F.2d 322, certiorari denied Standard Dredging Corporation v. Walling, 63 S.Ct. 1318, 319 U.S. 761, 87 L.Ed. 1712, rehearing denied 64 S.Ct. 29, 320 U.S. 810, 88 L.Ed. 489.

Partial examination

Where administrator had made partial examination of employer's books on employer's premises and thereafter right to further inspection was denied, such partial examination did not preclude administrator from making such further examination as was reasonably necessary to carry out purpose of Fair Labor Standards Act and compelling production of books by subpœna duces tecum.—Walling v. W. G. Golebiewski, Inc.,

with a view to securing enforcement of the act, is essentially the same as the function of a grand jury or a court in issuing pretrial orders for the discovery of evidence, and is governed by the same limitations, which are that the administrator shall not act arbitrarily or in excess of his statutory authority; but this does not mean that his inquiry must be limited by forecasts of the probable result of the investigation.[6] The administrator generally has the right to look first into either the question whether the employer is covered by the act or into the question of violation or into both questions concurrently.[7] The administrator's right of investigation is subject to judicial supervision,[8] and persons from whom he seeks relevant information are not required to submit to his demand if it is unreasonable or overreaches his authority.[9]

It is provided by § 9 of the act, 29 U.S.C.A. § 209, that for the purpose of any hearing or investigation under the act the administrator and the industry committees shall have the same power with respect to procuring the attendance of witnesses and the production of books, papers, and documents as are conferred by the Federal Trade Commission Act §§ 9, 10, 15 U.S.C.A. §§ 49, 50.[10] Under such provision, the administrator generally has power, in a proper case, to issue a subpoena duces tecum requiring the production of books and records of an employer,[11] but such power of the administrator may not be delegated to subordinates.[12] In the case of refusal to obey the administrator's subpoena, issued according to the statute's authorization, he may have the aid of the federal district court in enforcing it.[13] Although the administrator has the

D.C.N.Y., 47 F.Supp. 448, affirmed C.C.A., 142 F.2d 1015.

6. U.S.—Oklahoma Press Pub. Co. v. Walling, N.J., 66 S.Ct. 494, 327 U.S. 186, 166 A.L.R. 531, 90 L.Ed. 614.

7. U.S.—Oklahoma Press Pub. Co. v. Walling, supra—Detweiler Bros. v. Walling, C.C.A.Idaho, 157 F.2d 841—Mississippi Road Supply Co. v. Walling, C.C.A.Miss., 136 F.2d 391, certiorari denied 64 S.Ct. 57, 320 U.S. 752, 88 L.Ed. 447.

8. U.S.—Oklahoma Press Pub. Co. v. Walling, N.J., 66 S.Ct. 494, 327 U.S. 186, 166 A.L.R. 531, 90 L.Ed. 614.

Equity jurisdiction

The extent of equity jurisdiction of federal district court to correct what citizens say are unlawful acts of United States department of labor or its subordinates appointed under Fair Labor Standards Act can be determined when application for such relief is properly made and jurisdiction of the officers intended to be affected by such equitable relief has been properly obtained.—Fleming v. Arsenal Bldg. Corporation, D.C.N.Y., 38 F.Supp. 675.

9. U.S.—Oklahoma Press Pub. Co. v. Walling, N.J., 66 S.Ct. 494, 327 U.S. 186, 166 A.L.R. 531, 90 L.Ed. 614.

Burden on employer

In proceeding by administrator for enforcement of subpoena requiring employers to produce specified records to enable administrator to determine questions of coverage and violation of Fair Labor Standards Act, employers had burden of establishing reasons for not enforcing the subpoena in order to make appropriate defense.—Oklahoma Press Pub. Co. v. Walling, supra.

10. U.S.—Cudahy Packing Co. of Louisiana v. Holland, La., 62 S.Ct. 651, 315 U.S. 357, 86 L.Ed. 895—Lowell Sun Co. v. Fleming, C.C.A. Mass., 120 F.2d 213, affirmed Holland v. Lowell Sun Co., 62 S.Ct. 793, 315 U.S. 784, 86 L.Ed. 1190.

Strict construction

The provision of Federal Trade Commission Act regarding penalties, made applicable to proceedings under Fair Labor Standards Act, being "penal," should be strictly construed.—Fleming v. Arsenal Bldg. Corporation, D.C.N.Y., 38 F.Supp. 675.

11. U.S.—Cudahy Packing Co. of Louisiana v. Holland, La., 62 S.Ct. 651, 315 U.S. 357, 86 L.Ed. 895—Detweiler Bros. v. Walling, C.C.A. Idaho, 157 F.2d 841—Walling v. News Printing Co., C.C.A.N.J., 148 F.2d 57, affirmed 66 S.Ct. 494, 327 U.S. 186, 90 L.Ed. 614, 166 A.L.R. 531—Fleming v. Lowell Sun Co., D.C.Mass., 36 F.Supp. 320, vacated on other grounds C.C.A., Lowell Sun Co. v. Fleming, 120 F.2d 213, affirmed Holland v. Lowell Sun Co., 62 S.Ct. 793, 315 U.S. 784, 86 L. Ed. 1190—Andrews v. Montgomery Ward & Co., D.C.Ill., 30 F.Supp. 380, affirmed, C.C.A., Fleming v. Montgomery Ward & Co., 114 F.2d 384, certiorari denied Montgomery Ward & Co. v. Fleming, 61 S.Ct. 71, 311 U.S. 690, 85 L.Ed. 446.

Absence of seal

A subpoena duces tecum which was served on employer to require it to produce records, in connection with an investigation of the employer under the Fair Labor Standards Act was not invalid because of fact that the official seal of the United States department of labor was not placed on the subpoena.—Fleming v. Lowell Sun Co., 36 F.Supp. 320, vacated on other grounds C.C.A., Lowell Sun Co. v. Fleming, 120 F.2d 213, affirmed Holland v. Lowell Sun Co., 62 S.Ct. 793, 315 U.S. 784, 86 L.Ed. 1190.

12. U.S.—Cudahy Packing Co. of Louisiana v. Holland, La., 62 S. Ct. 651, 315 U.S. 357, 86 L.Ed. 895—Minnesota Mines v. Holland, C. C.A.Colo., 126 F.2d 824—Lowell Sun Co. v. Fleming, C.C.A.Mass., 120 F.2d 213, affirmed Holland v. Lowell Sun Co., 62 S.Ct. 793, 315 U.S. 784, 86 L.Ed. 1190.

Contra Fleming v. Easton Pub. Co., D.C.Pa., 38 F.Supp. 677—Fleming v. Arsenal Bldg. Corporation, D.C.N.Y., 38 F.Supp. 675.

Power not implied

Under the Fair Labor Standards Act, authority in regional director of wage and hour division of department of labor to issue subpœna duces tecum cannot be implied from delegated authority to investigate.—Cudahy Packing Co. of Louisiana v. Holland, La., 62 S.Ct. 651, 315 U.S. 357, 86 L.Ed. 895.

13. U.S.—Oklahoma Press Pub. Co. v. Walling, N.J., 66 S.Ct. 494, 327 U.S. 186, 166 A.L.R. 531, 90 L.Ed. 614—Detweiler Bros. v. Walling, C.C.A.Idaho, 157 F.2d 841—Walling v. American Rolbal Corporation, C.C.A.N.Y., 135 F.2d 1003, followed in Walling v. Golebiewski, 142 F. 2d 1015—General Tobacco & Grocery Co. v. Fleming, C.C.A.Mich., 125 F.2d 596, 140 A.L.R. 783—Cudahy Packing Co. of Louisiana v. Fleming, C.C.A.La., 119 F.2d 209, reversed on other grounds Cudahy Packing Co. of Louisiana v. Holland, 62 S.Ct. 651, 315 U.S. 357, 788, 86 L.Ed. 895—Walling v. Daily Press, D.C.Va., 58 F.Supp. 792—Application of Walling, D.C.N.Y., 50 F.Supp. 560—Application of Walling, D.C.N.Y., 47 F.Supp. 255—Fleming v. Cudahy Packing Co., D.C.Cal., 41 F.Supp. 910—Fleming v. Lowell Sun Co., D.C.Mass., 36 F.Supp. 320, vacated on other grounds C.C.A., Lowell Sun Co. v. Fleming, 120 F.2d 213, affirmed

initial discretion in the issuance of a subpoena which, if used impartially for statutory purposes, will be upheld by the court,[14] the enforcement of the subpoena generally rests in the legal discretion of the court,[15] and it has been held that the court must apply any constitutional limitations on the scope of the subpoena, which may involve the place at which the evidence is to be introduced, and the relevance of the evidence sought.[16] However, the administrator's subpoena and examination of witnesses and documents are not those of the federal court.[17]

In determining whether a subpoena will be enforced, it is generally sufficient that the investigation is for a lawfully authorized purpose, that the documents sought to be produced are specified, and that they are adequate, but not excessive, for the purposes of the relevant inquiry,[18] and it is not necessary that a specific charge or complaint of violation of law be pending or that the order be made pursuant to a complaint or violation.[19] The administrator, rather than the court, has authority, in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations, and in doing so to exercise his subpoena power for securing evidence on that ques-

Holland v. Lowell Sun Co., 62 S.Ct. 793, 315 U.S. 784, 86 L.Ed. 1190.

Jurisdiction

Where a subpoena duces tecum was issued under wage and hour administrator's direction ordering an employer to produce records for examination in investigations regarding alleged violations of Fair Labor Standards Act, and administrator's petition in proceedings to compel employer to produce records alleged that employer had refused to comply with subpoena, District Court has jurisdiction as against contention that mandamus was proper remedy. —Fleming v. Cudahy Packing Co., D.C.Cal., 41 F.Supp. 910.

The only purpose of a hearing before District Court on application of administrator for an order directing employer to appear before administrator or his representative and produce documentary evidence and give testimony as required by subpoena duces tecum issued by administrator for purpose of determining whether there is a violation of Fair Labor Standards Act is to obtain an order the disobedience of which would place employer in contempt of district court's authority.—Walling v. Detweiler Bros., D.C.Idaho, 58 F. Supp. 201, affirmed, C.C.A., Detweiler Bros. v. Walling, 157 F.2d 841.

By whom application made

Application to district court for order requiring respondent to appear and show cause why it should not appear and produce books and records in accordance with subpœna could be made by administrator, notwithstanding provisions of Fair Labor Standards Act respecting participation by attorney general in litigation in which administrator is involved, which were not "mandatory" but "permissive".—Lowell Sun Co. v. Fleming, C.C.A.Mass., 120 F.2d 213, affirmed Holland v. Lowell Sun Co., 62 S.Ct. 793, 315 U.S. 784, 86 L.Ed. 1190.

Petition held sufficient

Petition for order to enforce subpoena duces tecum has been upheld as against alleged defects of lack of verification, absence of certificate showing authority of notary public to take affidavit of verification, failure to make a return of proceedings theretofore had before administrator, on that witness fees were not paid when subpœna was served, that subpoena was not directed to particular officer served, and characterization as civil action of order to show cause why subpœna should not be enforced.—Walling v. W. G. Golebiewski, Inc., D.C.N.Y., 47 F. Supp. 448, affirmed C.C.A., 142 F.2d 1015.

Motive

An employer could not contend on appeal from an order requiring employer to comply with a subpœna duces tecum issued under the Fair Labor Standards Act, that the district court erred in refusing to give consideration to its allegation concerning the purpose in issuing the subpœna and in seeking a compliance order, since the motive of an administrative officer in undertaking lawful action within the sphere of his valid powers and duties cannot be made the subject of judicial inquiry. —Cudahy Packing Co. v. Fleming, C.C.A.Minn., 122 F.2d 1005, reversed on other grounds Cudahy Packing Co. v. Holland, 62 S.Ct. 803, 315 U.S. 785, 86 L.Ed. 1191.

Probable cause shown

U.S.—Oklahoma Press Pub. Co. v. Walling, N.J., 66 S.Ct. 494, 327 U. S. 186, 166 A.L.R. 531, 90 L.Ed. 614.

14. U.S.—Walling v. American Rolbal Corporation, C.C.A.N.Y., 135 F. 2d 1003, followed in Walling v. Golebiewski, 142 F.2d 1015.

15. U.S.—Walling v. News Printing Co., C.C.A.N.J., 148 F.2d 57, affirmed 66 S.Ct. 494, 327 U.S. 186, 90 L.Ed. 614, 166 A.L.R. 531.

Judicial act

U.S.—Oklahoma Press Pub. Co. v. Walling, C.C.A.Okl., 147 F.2d 658, affirmed 66 S.Ct. 494, 327 U.S. 186, 90 L.Ed. 614, 166 A.L.R. 531.

16. U.S.—Walling v. La Belle S. S. Co., C.C.A.Ohio, 148 F.2d 198.

Matters considered

(1) In general.—Oklahoma Press Pub. Co. v. Walling, C.C.A.Okl., 147 F.2d 658, affirmed 66 S.Ct. 494, 327 U. S. 186, 90 L.Ed. 614, 166 A.L.R. 531.

(2) The authority given by congress to wage and hour administrator to issue subpoenas vests in administrator great power and equal responsibility, and courts are careful to examine demands made under subpoenas and to check possible abuses of power.—Fleming v. Cudahy Packing Co., D.C.Cal., 41 F.Supp. 910.

17. U.S.—Fleming v. Arsenal Bldg. Corporation, D.C.N.Y., 38 F.Supp. 675.

Pending investigation

The fact that a subpoena alleged a pending investigation in the matter of two corporations which were defendants in an action pending in federal district court and even involving an investigation of alleged violations of the same sections of the Fair Labor Standards Act claimed to have been violated in the complaint in the pending action, did not constitute them subpoenas of the federal court so as to authorize the court to quash the subpœnas.—Fleming v. Arsenal Bldg. Corporation, supra.

18. U.S.—Oklahoma Press Pub. Co. v. Walling, N.J., 66 S.Ct. 494, 327 U.S. 186, 90 L.Ed. 614, 166 A.L.R. 531—Cudahy Packing Co. v. Fleming, C.C.A.Minn., 122 F.2d 1005, reversed on other grounds Cudahy Packing Co. v. Holland, 62 S.Ct. 803, 315 U.S. 785, 86 L.Ed. 1191.

Proceeding held valid

U.S.—Fleming v. Cudahy Packing Co., D.C.Cal., 41 F.Supp. 910.

19. U.S.—Oklahoma Press Pub. Co. v. Walling, N.Y., 66 S.Ct. 494, 327 U.S. 186, 90 L.Ed. 614, 166 A.L.R. 531—Walling v. W. G. Golebiewski, Inc., D.C.N.Y., 47 F.Supp. 448, affirmed C.C.A., 142 F.2d 1015.

tion, by seeking production of the employer's relevant books, records, and papers.[20] It is only required that the administrator satisfy the court of the existence of reasonable ground for belief that the industry being investigated is subject to the act,[21] and he need not show, as a condition to obtaining an order to enforce the subpoena, that the employer is within the coverage of the act.[22] In other words, the employer is not entitled to an adjudication that he is covered by the act as a prerequisite to enforcement of the subpoena, but the court need only have assurance that it is not giving judicial sanction to unwarranted and arbitrary action, and that reasonable ground exists for the investigation.[23]

Where an industry is subject to the act, the administrator is entitled to enforce a subpoena in aid of an investigation notwithstanding many of the employees are claimed to be exempt from provisions as to minimum wages and overtime pay,[24] and he may demand the production of the records of all of the employees, both nonexempt and exempt.[25] Also, where an employer engaged in operating several plants contends that only a part of those plants is subject to the act, the administrator has the right to inspect the shipment records of all of the plants in order to determine the scope of the operations of each and the relationship among them.[26]

It has been held, however, that the administrator is not entitled to an order for the enforcement of an investigatory subpoena as to any industry which he knows is wholly outside the scope of the coverage of the act, that is, which he has no "reasonable ground" to believe is subject to the act.[27] In this connection "reasonable ground" means that which would be equivalent relatively, in the nature and circumstances of the situation, to what in other legal situations is referred to as "probable cause,"[28] and what the extent of the showing of "reasonable ground" should be in an individual case must be left to the district court's discretion.[29] It has also been held that the purpose of evidence sought by the subpoena should be to aid in enforcement of the act, and that the scope of the subpoena should encompass only that purpose.[30] A subpoena issued and enforced according to law is not objectionable on the ground that it would subject the employer to inconvenience, expense, and harassment,[31] or

20. U.S.—Oklahoma Press Pub. Co. v. Walling, N.J., 66 S.Ct. 494, 327 U.S. 186, 166 A.L.R. 531, 90 L.Ed. 614—Walling v. Detweiler Bros., D.C.Idaho, 58 F.Supp. 201, affirmed, C.C.A., Detweiler Bros. v. Walling, 157 F.2d 841—Walling v. W. G. Golebiewski, Inc., D.C.N.Y., 47 F. Supp. 448, affirmed, C.C.A., 142 F. 2d 1015.

Assumption as to coverage
U.S.—Walling v. Daily Press, D.C. Va., 58 F.Supp. 792.

21. U.S.—Oklahoma Press Pub. Co. v. Walling, C.C.A.Okl., 147 F.2d 658, affirmed 66 S.Ct. 494, 327 U.S. 186, 90 L.Ed. 614, 166 A.L.R. 531—Walling v. Benson, C.C.A.Mo., 137 F.2d 501, 149 A.L.R. 186, certiorari denied 64 S.Ct. 206, 320 U.S. 791, 88 L.Ed. 476.

22. U.S.—Walling v. News Printing Co., C.C.A.N.J., 148 F.2d 57, affirmed 66 S.Ct. 494, 327 U.S. 186, 90 L.Ed. 614, 166 A.L.R. 531—Martin Typewriter Co. v. Walling, C. C.A.Me., 135 F.2d 918.

Contra General Tobacco & Grocery Co. v. Fleming, C.C.A.Mich., 125 F.2d 596, 140 A.L.R. 783.

Engagement in commerce
The administrator is not obliged, as a "condition" of obtaining an enforcement order of his subpoena issued in an investigation to determine whether any person has violated the act, to make any showing that the employer is engaged in commerce, since there is no limitation of the character of business done by the person investigated.—Application of Holland, D.C.N.Y., 44 F.Supp. 601, affirmed C.C.A., Walling v. Standard Dredging Corporation, 132 F.2d 322, certiorari denied Standard Dredging Corporation v. Walling, 63 S.Ct. 1318, 319 U.S. 761, 87 L.Ed. 1712, rehearing denied 64 S.Ct. 29, 320 U.S. 810, 88 L.Ed. 489.

23. U.S.—Oklahoma Press Pub. Co. v. Walling, C.C.A.Okl., 147 F.2d 658, affirmed 66 S.Ct. 494, 327 U.S. 186, 90 L.Ed. 614, 166 A.L.R. 531—Walling v. Benson, C.C.A.Mo., 137 F.2d 501, 149 A.L.R. 186, certiorari denied 64 S.Ct. 206, 320 U.S. 791, 88 L.Ed. 476.

Discretion of court
U.S.—Mississippi Road Supply Co. v. Walling, C.C.A.Miss., 136 F.2d 391, certiorari denied 64 S.Ct. 57, 320 U.S. 752, 88 L.Ed. 447.

24. U.S.—Walling v. La Belle S. S. Co., C.C.A.Ohio, 148 F.2d 198—Application of Holland, D.C.N.Y., 44 F.Supp. 601, affirmed C.C.A., Walling v. Standard Dredging Corporation, 132 F.2d 322, certiorari denied Standard Dredging Corporation v. Walling, 63 S.Ct. 1318, 319 U.S. 761, 87 L.Ed. 1712, rehearing denied 64 S.Ct. 29, 320 U. S. 810, 88 L.Ed. 489.

25. U.S.—Cudahy Packing Co. v. Fleming, C.C.A.Minn., 122 F.2d 1005, reversed on other grounds Cudahy Packing Co. v. Holland, 62 S.Ct. 803, 315 U.S. 785, 86 L.Ed. 1191.

26. U.S.—Cudahy Packing Co. v. Fleming, C.C.A.Minn., 122 F.2d 1005, reversed on other grounds Cudahy Packing Co. v. Holland, 62 S.Ct. 803, 315 U.S. 785, 86 L.Ed. 1191.

27. U.S.—Walling v. Benson, C.C.A. Mo., 137 F.2d 501, 149 A.L.R. 186, certiorari denied 64 S.Ct. 206, 320 U.S. 791, 88 L.Ed. 476.

Suspicion of delinquency
Inquiries undertaken by administrator with view of obtaining information which will permit more intelligent action with regard to performance of administrative duties without regard to any wrong may not be based on mere suspicion of delinquency, but must have some reasonable probability of a statutory violation.—Walling v. La Belle S. S. Co., C.C.A.Ohio, 148 F.2d 198.

28. U.S.—Walling v. Benson, C.C.A. Mo., 137 F.2d 501, 149 A.L.R. 186, certiorari denied 64 S.Ct. 206, 320 U.S. 791, 88 L.Ed. 476.

29. U.S.—Walling v. Benson, supra.

30. U.S.—Detweiler Bros. v. Walling, C.C.A.Idaho, 157 F.2d 841—Walling v. La Belle S. S. Co., C. C.A.Ohio, 148 F.2d 198.

Data sought by subpoena duces tecum issued in investigation under Fair Labor Standards Act must be relevant, to inquiry.—Walling v. American Rolbal Corporation, C.C.A. N.Y., 135 F.2d 1003, followed in Walling v. Golebiewski, 142 F.2d 1015.

31. U.S.—Oklahoma Press Pub. Co. v. Walling, N.J., 66 S.Ct. 494, 327

that the contents of the books sought to be produced would tend to incriminate him.[32]

§ 151(32). —— Fixing of Minimum Wage by Wage Order

a. In general
b. Requisites and sufficiency of wage order
c. Subsidiary terms and conditions
d. Judicial review

a. In General

The Fair Labor Standards Act provides an administrative procedure for establishing a minimum wage in particular industries greater than that generally prescribed; such increase over the statutory minimum may be fixed for any industry subject to the act by the administrator in collaboration with an industry committee appointed by him, after hearings by the committee and by the administrator, and after a consideration of economic conditions, competitive conditions, and the possible curtailment of employment.

The Fair Labor Standards Act § 8, 29 U.S.C.A. § 208, provides an administrative procedure for establishing a minimum wage in particular industries greater than that prescribed by § 6 of the act, 29 U.S.C.A. § 206, but not in excess of a specified amount per hour, such increase over the statutory minimum to be fixed for any industry subject to the act by the administrator in collaboration with an industry committee.[33] The statute does not contemplate that wage orders for all industries or all parts of an industry shall go into practice simultaneously, but contemplates rather that the administrator may appoint a committee to deliberate on a particular section of an industry, an industry, or a group of industries.[34]

As part of the administrative procedure for fixing wage rates in particular industries greater than that prescribed by the act, the statute authorizes the appointment of industry committees composed of equal numbers of representatives of the public, of the employers, and of the employees in the industry, selected with due regard to geographical considerations,[35] but the act lays down no standards for subcommittees.[36] Mathematical geographic apportionment of the committee is not required, but the administrator has discretion in selecting, with the purposes of the act in mind, a committee on which the geographically distributed interests of the industry shall be fairly represented.[37] An order appointing an industry committee is not void because of changes in the definition of the industry made after the appointment.[38]

Under the statutory procedure, an industry committee acts as an investigating body with the duty to report its recommendations as to the minimum wage to the administrator.[39] The statute does not require any particular method of procuring evidence or any set type of procedure before the committee;[40] and the committee is not required to conduct

U.S. 186, 166 A.L.R. 531, 90 L.Ed. 614.

32. U.S.—U. S. v. Jones, D.C.Miss., 72 F.Supp. 48.

33. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L. Ed. 624.

34. D.C.—Southern Garment Mfrs. Ass'n v. Fleming, 122 F.2d 622, 74 App.D.C. 228.

35. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L. Ed. 624.

Employers engaged in production

Administrator may appoint to an industry committee an employer engaged in the production of goods for commerce along with employers engaged in interstate commerce, and hence the application of Fair Labor Standards Act to employers engaged in the production of goods for commerce is not improper on the ground that such employers may not be represented on industry committees having the power to fix rate of wages.—Fleming v. Arsenal Bldg. Corporation, C.C.A.N.Y., 125 F.2d 278, affirmed Arsenal Bldg. Corporation v. Walling, 62 S.Ct. 1116, 316 U.S. 517, 86 L.Ed. 1638.

Representation of industry as a whole

Where sixteen of forty-eight members on industry committee appointed by administrator represented employers, and the sixteen were severally engaged in twelve of the twenty-five separate apparel industries in the groups, the industry as a whole was represented, and absence of infants' and children's wear industry representative on the committee did not violate requirements of the Fair Labor Standards Act.—Andree & Seedman v. Administrator of Wage and Hour Division of U. S. Department of Labor, 122 F.2d 634, 74 App.D.C. 240.

36. D.C.—Andree & Seedman v. Administrator of Wage and Hour Division of U. S. Department of Labor, supra.

37. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L.Ed. 624.

Abuse of discretion not shown

Where three members of industry committee for fixing wages and hours in southern textile mills, out of seven representing the public, four members out of seven representing employers, and two members out of seven representing employees, were from southern states, abuse of discretion was not shown under statute requiring due regard to be given to geographical regions in appointing members.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, supra.

38. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, supra.

39. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, supra.

Determination of committee held proper

U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, C.C.A.5, 111 F.2d 23, affirmed 61 S.Ct. 524, 312 U.S. 126, 657, 85 L.Ed. 624.

40. D.C.—Andree & Seedman v. Administrator of Wage and Hour Division of U. S. Department of

a quasi-judicial proceeding on notice and hearing, since its only function is to investigate on the basis of data which the administrator may submit, and which the committee may procure for itself, and to report its recommendations with respect to the minimum wage.[41] A final definition of the industry need not be made before the committee meets, and the definition may be amended while the matter is pending before the committee, as long as the report of the committee is based on the amended definition.[42]

The industry committee's report is the basis of proceedings before the administrator which are judicial in character, with provisions for notice and full hearing.[43] It is this hearing which has primary significance in ascertaining whether the rudiments of a proper procedure were followed, and it is the evidence adduced at such hearing that must support the findings, and it is the record made before the administrator that is open to judicial scrutiny.[44] On the hearing the industry committee may advocate approval of its own report,[45] and members of the staff of the wage and hour division may give testimony.[46] The administrator must admit all evidence offered on relevant items,[47] and the technical rules for exclusion of evidence applicable in jury trials do not apply.[48]

The issues to be determined by the administrator on the hearing are whether the recommendations of the committee are made in accordance with law, whether they are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry, whether they will carry out the purposes of the statute.[49] The statute requires a consideration of economic conditions, competitive conditions, and the possible curtailment of employment as a basis for a wage order fixing wage rates for an industry,[50] and the committee and the administrator are also required, as prerequisites of fixing

Labor, 122 F.2d 634, 74 App.D.C. 240.

41. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L. Ed. 624.

Substitute members

In determining validity of wage order made by Administrator on recommendation of industry committee, it was immaterial that substitutes were appointed for two members of committee in course of its deliberations, where it did not appear that substitutes did not consider the evidence taken and the proceedings had before their appointment to the committee.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, supra.

42. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, supra.

43. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, supra.

Delegation of duty

The act of the administrator in appointing a person to preside for him at hearing under the Fair Labor Standards Act was not an unlawful "delegation of duty."—Southern Garment Mfrs. Ass'n v. Fleming, 122 F.2d 622, 74 App.D.C. 228.

Denial of motion for adjournment to another city held proper.—Southern Garment Mfrs. Ass'n v. Fleming, supra.

44. D.C.—Andree & Seedman v. Administrator of Wage and Hour Division of U. S. Department of Labor, 122 F.2d 634, 74 App.D.C. 240.

45. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L. Ed. 624.

"Interested person"

D.C.—Southern Garment Mfrs. Ass'n v. Fleming, 122 F.2d 622, 74 App. D.C. 228.

46. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor 61 S.Ct. 524, 312 U.S. 126, 657, 85 L.Ed. 624.

D.C.—Southern Garment Mfrs. Ass'n v. Fleming, 122 F.2d 622, 74 App.D.C. 228.

47. D.C.—Andree & Seedman v. Administrator of Wage and Hour Division of U. S. Department of Labor, 122 F.2d 634, 74 App.D.C. 240.

48. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L.Ed. 624.

Statistical data

U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, supra.

49. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, supra.

Scope of review

The command of provision of Fair Labor Standards Act that Administrator, as prerequisite to a wage order, find that recommendations of industry committee are made in accordance with law, does not extend to a review of evidence at hearing before committee for investigation of mental processes by which committee members reached their conclusion to recommend the minimum wage, or extend beyond inquiry on evidence before administrator whether requirement of act and rules of administrator as to composition of committee, definition of industry, and actions required to be taken by committee have been observed.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, supra.

50. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, supra.

D.C.—Andree & Seedman v. Administrator of Wage and Hour Division of U. S. Department of Labor, 122 F.2d 634, 74 App.D.C. 240.

Administrative judgment

The weight to be given competitive conditions and other relevant factors which justify wage differentials is a matter of administrative judgment.—Southern Garment Mfrs. Ass'n v. Fleming, 122 F.2d 622, 74 App.D.C. 228.

Ability to bear increase

In fixing the minimum wage, the ultimate determination to be made by the industry committee and the administrator is the effect of the rate on curtailment of employment in the industry, rather than the economic ability of the industry to bear the increase.—Columbus & G. Ry. Co. v. Administrator of Wage and Hour Division, U. S. Department of Labor, C.C.A.5, 126 F.2d 136.

Textile industry

(1) Administrator had duty to con-

classifications of rates within any industry, to determine that it will not give a competitive advantage to any group in the industry and that the prescribed wage will not substantially curtail employment in each classification.[51] The word "industry," in this connection, means the industry on a nation-wide geographical basis,[52] and the administrator need not establish regional differentials based on competitive conditions.[53]

The statute does not require a finding on each supposititious factor bearing on conditions pertinent to the wage determination,[54] and the administrator need not specifically recite that he has considered every conceivable relevant item and make a specific finding thereon.[55] Where a committee appointed to cover a broad industry makes numerous recommendations as to classifications and wages, the administrator need not accept the entire report but may reject the proposed wage classification as to a narrow branch of the industry.[56]

b. Requisites and Sufficiency of Wage Order

Where the administrator has complied with statutory requirements, he may promulgate a wage order fixing wages for an industry, and such orders generally have the force and effect of a legislative act, are subject to the same tests as to their validity, and are governed by the same rules of construction. Wage orders must define the industries and classifications therein to which they apply.

Where the administrator has acted within the general sphere of his delegated powers and has complied with the processes necessary for their exercise, he may promulgate a wage order fixing wages for an industry, within the limits permitted by the act, and such wage orders, for all civil purposes, have the force and effect of a legislative act, are subject to the same tests as to their validity, and are governed by the same rules of construction.[57] The fact that individual members of an industry are so situated economically as to be unable to pay the wage rate fixed by the administrator is no reason for holding the administrator's order invalid unless the position of such members in the industry is so dominating that their failure to survive would seriously injure the industry and those employed in it by throwing a considerable number of them out of employment.[58]

Under Fair Labor Standards Act § 8 (f), 29 U.S.C.A. § 208 (f), it is required that wage orders promulgated by the administrator shall define the industries and classifications therein to which they apply,[59] but the administrator need not enumerate in his definition every specific product which the order was designed to cover.[60] The definition is only required to outline with reasonable clarity the general limits of the industry sought to be covered,[61] and where this has been done, and general opportunity for hearing on notice has been duly afforded, there is no injustice in administratively

sider competitive condition between cotton and wool manufacturers in making a definition of the woolen industry which resulted in placing some types of yarn under a thirty-two and one-half cent minimum and other similar yarns under a thirty-six cent minimum wage, and some mixed fabrics under a thirty-two and one-half cent wage and others under a thirty-six cent wage, even though separate committees had been appointed for the woolen and textile industries.—National Ass'n of Wool Manufacturers v. Fleming, 122 F.2d 617, 74 App.D.C. 223.

(2) Order of administrator defining the textile industry was not void because administrator placed the woolen industry in a different industry under a different committee, where, in defining the textile industry, administrator took into account competitive interrelationship of fabrics included and interchangeability of looms employed in producing them, and in excluding the woolen industry he took accunt of its competitive relationships with products included and different nature of establishments, labor forces and wage structures associated with the two types of product.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L.Ed. 624.

51. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, supra.

Determination held proper

D.C.—National Ass'n of Wool Manufacturers v. Fleming, 122 F.2d 617, 74 App.D.C. 223.

52. D.C.—Southern Garment Mfrs. Ass'n v. Fleming, 122 F.2d 622, 74 App.D.C. 228.

53. D.C.—Southern Garment Mfrs. Ass'n v. Fleming, supra.

Freight differentials

The fact that discrimination exists against a particular geographical region because of freight differentials does not require that the differential be equalized by a classification of wage rates.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, C.C.A.5, 111 F.2d 23, affirmed 61 S.Ct. 524, 312 U.S. 126, 657, 85 L.Ed. 624.

54. D.C.—Andree & Seedman v. Administrator of Wage and Hour Division of U. S. Department of Labor, 122 F.2d 634, 74 App.D.C. 240.

55. D.C.—Andree & Seedman v. Administrator of Wage and Hour Division of U. S. Department of Labor, supra.

56. D.C.—Southern Garment Mfrs. Ass'n v. Fleming, 122 F.2d 622, 74 App.D.C. 228.

57. U.S.—Pearson v. Walling, C.C.A. Ark., 138 F.2d 655, certiorari denied 64 S.Ct. 616, 321 U.S. 775, 88 L.Ed. 1069.

Order held valid

D.C.—Southern Garment Mfrs. Ass'n v. Fleming, 122 F.2d 622, 74 App. D.C. 228.

58. U.S.—Columbus & G. Ry. Co. v. Administrator of Wage and Hour Division, U. S. Department of Labor, C.C.A.5, 126 F.2d 136.

59. U.S.—Pearson v. Walling, C.C.A. Ark., 138 F.2d 655, certiorari denied 64 S.Ct. 616, 321 U.S. 775, 88 L.Ed. 1069.

60. U.S.—Pearson v. Walling, supra.

Apparel industry

U.S.—Walling v. Cohen, C.C.A.Pa., 140 F.2d 453.

61. U.S.—Pearson v. Walling, C.C.A. Ark., 138 F.2d 655, certiorari denied 64 S.Ct. 616, 321 U.S. 775, 88 L.Ed. 1069.

applying the order to any product which, by sound implication and natural interpretation, falls within the boundaries that have been set and which has not been specifically excepted.[62] As far as the definition of an industry is open to attack, it is on the record made before the administrator.[63]

Generally the inclusion of a particular business or branch of business within a certain classification is a matter within the administrator's discretion,[64] and it has been held that the inclusion by the administrator of a given product in one industry or another, where both are subject to the act, principally concerns convenience in administering the act, since provisions for classification with appropriate wage differentials afford ample opportunity for fixing an appropriate wage with respect to any product, whether it is placed in one industry or another.[65] The fact that a particular manufacturer is ordinarily considered as within a certain industry imposes no duty on the administrator to adopt such classification instead of classifying such manufacturer within another industry,[66] and the fact that some manufacturers within an industry as defined by a wage order require a higher degree of skill in their production or sell for substantially higher prices than another manufacturer within the same industry does not preclude the administrator's comprehensive interpretation of such classification.[67] The fact that a particular employer who manufactures products within a classification established by a wage order also manufactures other products not within the classification does not remove its operations with respect to the covered products from the classification.[68]

Interpretive rulings of wage orders promulgated in accordance with the act are entitled to great weight,[69] and, where the interpretation which the administrator has given a wage order embraces the production of particular articles, the court should make that effective unless it appears that the administrator's action was arbitrary.[70]

c. Subsidiary Terms and Conditions

The Fair Labor Standards Act authorizes the administrator to include in a wage order such terms and conditions as he finds necessary to carry out the purposes of such order, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.

A provision of the Fair Labor Standards Act § 8 (f), 29 U.S.C.A. § 208 (f), authorizes the administrator to include in a wage order such terms and conditions as the administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.[71] The administrator's function in this respect is to facili-

62. U.S.—Walling v. Brooklyn Braid Co., C.C.A.N.Y., 152 F.2d 938—Pearson v. Walling, C.C.A.Ark., 138 F.2d 655, certiorari denied 64 S.Ct. 616, 321 U.S. 775, 88 L.Ed. 1069.

Particular products held within definition

U.S.—Walling v. Brooklyn Braid Co., C.C.A.N.Y., 152 F.2d 938—Pearson v. Walling, C.C.A.Ark., 138 F.2d 655, certiorari denied 64 S.Ct. 616, 321 U.S. 775, 88 L.Ed. 1069—Walling v. Higgins, D.C.Pa., 47 F. Supp. 856.

63. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L.Ed. 624.

64. U.S.—Walling v. Cohen, C.C.A. Pa., 140 F.2d 453.

65. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L. Ed. 624—Pearson v. Walling, C. C.A.Ark., 138 F.2d 655, certiorari denied 64 S.Ct. 616, 321 U.S. 775, 88 L.Ed. 1069—Walling v. Cohen, D.C.Pa., 48 F.Supp. 859, affirmed, C.C.A., 140 F.2d 453.

D.C.—Art Metal Works v. Walling, 129 F.2d 50, 76 U.S.App.D.C. 67.

66. U.S.—Walling v. Cohen, C.C.A. Pa., 140 F.2d 453.

D.C.—Art Metal Works v. Walling, 129 F.2d 50, 76 U.S.App.D.C. 67.

67. U.S.—Walling v. Cohen, C.C.A. Pa., 140 F.2d 453.

68. U.S.—Pearson v. Walling, C.C.A. Ark., 138 F.2d 655, certiorari denied 64 S.Ct. 616, 321 U.S. 775, 88 L.Ed. 1069.

Order held valid

D.C.—Southern Garment Mfrs. Ass'n v. Fleming, 122 F.2d 622, 74 App. D.C. 228.

69. U.S.—Walling v. Cohen, D.C.Pa., 48 F.Supp. 859, affirmed, C.C.A., 140 F.2d 453.

Matters considered

The interpretation of a wage order by administrator must be given due weight which will in particular case depend on thoroughness evident in its consideration, validity of its reasoning, its consistency with earlier and later pronouncements, etc.—Walling v. Brooklyn Braid Co., C.C. A.N.Y., 152 F.2d 938.

70. U.S.—Walling v. Brooklyn Braid Co., supra—Walling v. Cohen, C.C. A.Pa., 140 F.2d 453.

71. U.S.—Walling v. Cimi Embroidery & Novelty Co., D.C.N.Y., 63 F.Supp. 601.

"Statutory" or "committee" wages

Under provision of Fair Labor Standards Act directing administrator to include in wage orders such terms and conditions as he finds necessary to carry out the purposes of such orders, administrator was not without power on theory that authority to prescribe terms and conditions applied only to industry committee and not to statutory wages and would expire seven years from effective date of the provision, since authority conferred by the provision must be read as of 1938 when provision took effect and power to prescribe committee wages or to include terms and conditions in order did not expire altogether at end of seven years, and case involved only committee wages.—Gemsco, Inc., v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Maretzo v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Guiseppi v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921.

Incidental conditions

A wage order direction to pay wages not less than those fixed by the administrator includes the requirement that employers observe incidental conditions lawfully included to safeguard rates and prevent their circumvention or evasion.

tate the enforcement of the minimum wage rather than to achieve other objects,[72] but he is not forbidden to take the only measures which would be effective to protect the minimum wage merely because other social or economic consequences necessarily would follow.[73] So the administrator may provide in a wage order for workers in a certain industry for the prohibition of home work, with limited exceptions, in order to make effective the minimum wage prescribed for the industry.[74] A provision of the Fair Labor Standards Act that no wage order issued under the statute shall remain in effect after seven years from the effective date of the minimum wage provision does not have the effect of causing the expiration of provisions of wage orders other than as to minimum wages which were imposed to make effective the fixation of the wage rate for a particular industry.[75]

d. Judicial Review

Review of the administrator's order fixing a minimum wage for an industry is had by petition to the circuit court of appeals on the record made before the administrator, but the review is limited to questions of law, and findings of fact by the administrator when supported by substantial evidence are conclusive.

Under Fair Labor Standards Act, § 10, 29 U.S.C.A. § 210, review of the administrator's order fixing a minimum wage for an industry is had by petition to the circuit court of appeals on the record made before the administrator.[76] Accordingly, where there has been a sufficiently clear definition of an industry in a wage order by the administrator and notice and opportunity for hearing have been duly given, any question of unreasonableness or arbitrariness in connection with issuance of the wage order may be tested judicially only by a petition for review in the proper circuit court of appeals,[77] and not by a proceeding of any other kind.[78] Under the statute review of the administrator's order by the courts is limited to questions of law, and findings of fact by the administrator when supported by substantial evidence are conclusive.[79] The weight to be given to particular evidence and the inferences to be drawn from it are for the administrator and not the courts,[80] and, where evidence was received by the administrator without objection, the admission of such evidence may not be attacked in the courts.[81]

The definition of an industry made by the administrator in a wage order will not be lightly dis-

—Walling v. Cimi Embroidery & Novelty Co., D.C.N.Y., 63 F.Supp. 601.

72. U.S.—Gemsco, Inc., v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Maretzo v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Guiseppi v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921.

73. U.S.—Gemsco, Inc., v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Maretzo v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Guiseppi v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921.

74. U.S.—Gemsco, Inc., v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Maretzo v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Guiseppi v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Walling v. Cimi Embroidery & Novelty Co., D.C.N.Y., 63 F.Supp. 601.

Statutory intent

Mention of child labor in Fair Labor Standards Act does not warrant inference, from failure expressly to mention home work, that home work was not included within general language which comprehends all necessary means to achieve the primary objects of the act, but the opposite conclusion must be drawn in view of administrator's uncontested findings concerning effect of home work in producing hidden child labor at substandard wages, thus circumventing the act in two of its primary objects.—Gemsco, Inc., v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Maretzo v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921—Guiseppi v. Walling, 65 S.Ct. 605, 324 U.S. 244, 89 L.Ed. 921.

75. U.S.—Walling v. Wolff, D.C.N.Y., 65 F.Supp. 532.

76. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L.Ed. 624.

77. U.S.—Pearson v. Walling, C.C.A. Ark., 138 F.2d 655, certiorari denied 64 S.Ct. 616, 321 U.S. 775, 88 L.Ed. 1069.

78. U.S.—Walling v. Cohen, C.C.A. Pa., 140 F.2d 453.

79. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L.Ed. 624.

D.C.—National Ass'n of Wool Manufacturers v. Fleming, 122 F.2d 617, 74 App.D.C. 223.

A definition of the woolen industry, in respect of yarns and fabrics, made by the administrator of the wage and hour division, department of labor, was an inextricable part of wage order applying to the woolen industry and was judicially reviewable.—National Ass'n of Wool Manufacturers v. Fleming, supra.

Evidence held to support administrator's findings and order

(1) Generally.

U.S.—Columbus & G. Ry. Co. v. Administrator of Wage and Hour Division, U. S. Department of Labor, C.C.A.5, 126 F.2d 136—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, C.C.A.5, 111 F.2d 23, affirmed 61 S.Ct. 524, 312 U.S. 126, 657, 85 L.Ed. 624.

D.C.—National Ass'n of Wool Manufacturers v. Fleming, 122 F.2d 617, 74 App.D.C. 223.

(2) As to classification within industry.—Southern Garment Mfrs. Ass'n v. Fleming, 122 F.2d 622, 74 App.D.C. 228.

80. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L.Ed. 624.

Inferences from evidence

Where finding of the administrator was compatible with certain inferences to be drawn from the evidence, employers could not support their case on review by merely showing another inference, without having guarded themselves against the finding by originally submitting specific evidence thereon.—National Ass'n of Wool Manufacturers v. Fleming, 122 F.2d 617, 74 App.D.C. 223.

81. U.S.—Opp Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor, 61 S.Ct. 524, 312 U.S. 126, 657, 85 L.Ed. 624.

turbed,[82] and it has been held that a court should hesitate long before nullifying a classification within an industry after approval thereof by the administrator for the purpose of a wage order.[83] If some supposititious relevant item is overlooked by the interested parties, the committee, and the administrator, the wage order will not for that reason be held invalid on judicial review.[84]

State minimum wage laws. Orders of an administrative body fixing minimum wages under state minimum wage laws have been held subject to judicial inquiry.[85]

§ 151(33). Books, Records, and Reports

The Fair Labor Standards Act requires employers subject to the act to make, keep, and preserve employment records, and to make such reports therefrom to the administrator as he may prescribe, and such duty may not be delegated or avoided by reason of difficulty of compliance.

Under the Fair Labor Standards Act § 11 (c), 29 U.S.C.A. § 211 (c), every employer subject to the act may be required to keep and preserve records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and to make such reports therefrom to the administrator as he may prescribe as necessary or appropriate for the enforcement of the statute or the regulations or orders thereunder.[86] Where some of the employees of a business are within the coverage of the act, the employer is required to keep adequate records as to all of its employees as required by the act and regulations promulgated thereunder,[87] but it has been held that the requirement as to the keeping of records does not apply to employers exempted from the provisions of the act with respect to payment of minimum wages and overtime pay for work in excess of the specified number of hours,[88] and an employer does not violate the provisions of the act relating to records where he has no employee in respect of whom records are required to be made, kept, and preserved.[89] An employer is not excused from making, keeping, and preserving necessary employment records because it may be difficult or commercially impractical to do so.[90]

Under the statute the administrator has large power over the question of records, including accounting practices,[91] and if the administrator should find that any system of accounting practically interferes with the work of the act he may promulgate a regulation correcting the situation.[92] So the administrator may require an employer to keep records of its home workers and of wages, hours, and other conditions and practices of employment maintained by it,[93] and he may require that the records plainly and objectively show the hours worked and the wages due even though employees are paid on a piecework basis.[94] The administrator is authorized to require employers to keep their records on a weekly rather than on a semi-monthly basis.[95]

The employer's failure to keep adequate records constitutes a violation of the act,[96] rendering him

82. D.C.—National Ass'n of Wool Manufacturers v. Fleming, 122 F.2d 617, 74 App.D.C. 223.

83. D.C.—Southern Garment Mfrs. Ass'n v. Fleming, 122 F.2d 622, 74 App.D.C. 228.

84. D.C.—Andree & Seedman v. Administrator of Wage and Hour Division of U. S. Department of Labor, 122 F.2d 634, 74 App.D.C. 240.

85. Okl.—Associated Industries of Oklahoma v. Industrial Welfare Commission, 90 P.2d 899, 185 Okl. 177.

Validity

An administrative order, legislative in character, or a portion thereof, by the industrial welfare commission under the minimum wage law, is void for uncertainty if it is so vague and indefinite that the courts are unable to determine with any degree of certainty what was intended thereby.—Associated Industries of Oklahoma v. Industrial Welfare Commission, supra.

86. U.S.—Walling v. Sun Pub. Co., D.C.Tenn., 47 F.Supp. 180, affirmed, C.C.A., 140 F.2d 445, certiorari denied 64 S.Ct. 946, 322 U.S. 728, 88 L.Ed. 1564—Andrews v. Montgomery Ward & Co., D.C.Ill., 30 F.Supp. 380, affirmed, C.C.A., Fleming v. Montgomery Ward & Co., 114 F.2d 384, certiorari denied Montgomery Ward & Co. v. Fleming, 61 S.Ct. 71, 311 U.S. 690, 85 L.Ed. 446.

87. U.S.—James V. Reuter, Inc., v. Walling, C.C.A.La., 137 F.2d 315, vacated on other grounds 64 S.Ct. 826, 321 U.S. 671, 88 L.Ed. 1001.

88. U.S.—Walling v. Fred Wolferman, Inc., D.C.Mo., 54 F.Supp. 917, appeal dismissed, C.C.A., 144 F.2d 354.

89. U.S.—Fleming v. Farmers Peanut Co., D.C.Ga., 37 F.Supp. 628, affirmed, C.C.A., 128 F.2d 404.

90. U.S.—Walling v. Panther Creek Mines, C.C.A.Ill., 148 F.2d 604—Walling v. Lippold, D.C.Neb., 72 F. Supp. 339.

91. U.S.—Williams v. Jacksonville Terminal Co., C.C.A.Fla., 118 F.2d 324, affirmed 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

92. U.S.—Williams v. Jacksonville Terminal Co., supra.

93. U.S.—Walling v. Cimi Embroidery & Novelty Co., D.C.N.Y., 63 F. Supp. 601.

94. U.S.—Walling v. Panther Creek Mines, C.C.A.Ill., 148 F.2d 604.

Records held insufficient

Where weavers were compensated on a piece rate basis, record keeping system which failed to determine average hourly piece rate earnings on basis of total weekly hours divided into total weekly earnings and to record such amount as regular hourly rate to form basis of overtime compensation, and which failed to record total daily or weekly straight time earnings or total weekly overtime compensation, violated record keeping requirements promulgated under Fair Labor Standards Act.—Walling v. Reilly, D.C.Pa., 59 F.Supp. 740.

95. U.S.—Walling v. Livernois, D.C. Mich., 50 F.Supp. 978.

96. U.S.—Walling v. Lippold, D.C. Neb., 72 F.Supp. 339—Walling v. United Distillers Products Corp., D.C.Conn., 63 F.Supp. 474—Walling

liable to criminal prosecution, as discussed infra § 151 (34). An employer subject to the provisions of the act may not escape his duty to make, keep, and preserve necessary employment records by delegating such duty to another,[97] and he is not relieved of this duty because the extent of his business may preclude his personal supervision and compel reliance on subordinates.[98] Ordinarily it is the duty of the employer, and not of the employee, to keep and produce records of hours worked by the employee,[99] but it has been held that where an employer relies in good faith on employees to keep and report their own time and the employer uses the record so made as the record of time required by the administrator's regulations, and where neither the employer nor his agents do or say anything to cause employees to keep an incorrect record, the employer does not violate the provisions of the act requiring the keeping of proper records.[1]

It has been held that an officer of a company whose duties are executive or supervisory, whose hours of work are not regulated or controlled, and whose compensation is not dependent on any measure of time actually devoted to his duties, is not an employee for whom the employer must keep records of hours worked and wages paid under a state minimum wage act.[2]

§ 151(34). Penalties for Violation

a. Civil liability
b. Criminal liability

a. Civil Liability

An employer who violates the provisions of the Fair Labor Standards Act relating to minimum wages and overtime pay is liable to the employee affected in the amount of his unpaid wages. Where an employer fails to pay minimum wages or overtime compensation in accordance with the requirements of the Fair Labor Standards Act, he is liable under the act for an additional equal amount as liquidated damages, whether or not the employee is compelled to sue for the wages due, but the court has discretion to deny recovery of liquidated damages if it is shown that the employer acted in good faith in failing to pay statutory wages.

Under the Fair Labor Standards Act § 16 (b), 29 U.S.C.A. § 216 (b), an employer who violates the provisions of the act relating to minimum wages and overtime pay is liable to the employee affected in the amount of his unpaid minimum wages, or his unpaid overtime compensation.[3] The effect of the act is to make an employee subject thereto a creditor of the employer for the wages required by the statute, without regard to any actual attempted agreement as to compensation, and even if payment is made in accordance with an agreement.[4] However, an employee is entitled to recover additional compensation under the act only where the employer violates the provisions of the act as to minimum wages and payment for overtime.[5]

Liquidated damages. Under the Fair Labor Standards Act § 16 (b), 29 U.S.C.A. § 216 (b), any employer who violates the minimum wage or overtime pay provision of the act and is liable to the employee for unpaid minimum wages, or overtime compensation, is also liable for an additional equal amount as liquidated damages,[6] and for a reason-

v. West Ky. Coal Co., D.C.Tenn., 60 F.Supp. 681—Walling v. Peavy-Wilson Lumber Co., D.C.La., 49 F. Supp. 846—Walling v. James V. Reuter, Inc., D.C.La., 49 F.Supp. 485, reversed on other grounds, C. C.A., 137 F.2d 315, vacated on other grounds 64 S.Ct. 826, 321 U.S. 671, 88 L.Ed. 1001—Walling v. Sun Pub. Co., D.C.Tenn., 47 F.Supp. 180, affirmed, C.C.A., 140 F.2d 445, certiorari denied 64 S.Ct. 946, 322 U.S. 728, 88 L.Ed. 1564—Fleming v. Pearson Hardwood Flooring Co., D. C.Tenn., 39 F.Supp. 300.

False records

A company engaged in interstate commerce or production of goods for commerce by failing to keep true records of hours worked each day and each work week by each employee and by making or causing to be made false entries purporting to reflect hours worked each day and each work week by each employee, the regular rate of pay, the regular straight time earnings, and additional overtime earnings of many of its employees, violated Fair Labor Standards Act.—Walling v. De Soto Creamery & Produce Co., D.C.Minn., 51 F.Supp. 938.

97. U.S.—Walling v. Sun Pub. Co., D.C.Tenn., 47 F.Supp. 180, affirmed, C.C.A., 140 F.2d 445, certiorari denied 64 S.Ct. 946, 322 U.S. 728, 88 L.Ed. 1564.

98. U.S.—Walling v. Sun Pub. Co., supra.

99. Ga.—Butler v. Carter, 32 S.E.2d 808, 198 Ga. 754.

1. U.S.—Walling v. Woodruff, D.C. Ga., 49 F.Supp. 52.

2. Conn.—Swiss Cleaners v. Danaher, 27 A.2d 806, 129 Conn. 338.

3. U.S.—Cushway v. Stork Engineering Co., D.C.Mich., 51 F.Supp. 568, affirmed, C.C.A., 142 F.2d 463.

Actions to enforce liability see infra §§ 160 (1)–160 (12).

Extent of computation

In computing damages under Fair Labor Standards Act, the regular rate and overtime rate for plaintiff in each work week must be computed to the tenth of a cent per hour.—Anderson v. Federal Cartridge Corp., D.C.Minn., 62 F.Supp. 775, affirmed, C.C.A., 156 F.2d 681.

Quasi-contractual liability

It has been held that the liability for overtime compensation is quasi-contractual only.—Lassiter v. Guy F. Atkinson Co., C.C.A.Wash., 162 F.2d 774.

4. U.S.—Adair v. Ferst, D.C.Ga., 45 F.Supp. 824.

5. U.S.—Stein v. Gordon Bros. Mfg. Co., D.C.Mo., 43 F.Supp. 249—Mason v. T. & P. Optical Mfg. Co., D.C.N.Y., 42 F.Supp. 98.

6. U.S.—Birbalas v. Cuneo Printing Industries, C.C.A.Ill., 140 F.2d 826—Davis v. Rockton & R. R. R., D. C.S.C., 65 F.Supp. 67—Cushway v. Stork Engineering Co., D.C.Mich., 51 F.Supp. 568, affirmed, C.C.A., 142 F.2d 463—Greenberg v. Arsenal Bldg. Corporation, D.C.N.Y., 50 F. Supp. 700, modified on other grounds, C.C.A., 144 F.2d 292, reversed on other grounds 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Hargrave v. Mid-Continent Petro-

able attorney's fee, as discussed infra § 160 (11). The provision constitutes a congressional recognition that failure to pay the wages required by statute may be so detrimental to the maintenance of the minimum standard of living and the free flow of commerce that double payment must be made in the event of delay in paying the required wages in order to insure restoration of the worker to that minimum standard of well-being.[7]

In determining the nature of the additional recovery permitted, the terminology used by congress in designating such recovery as "liquidated damages" is entitled to some weight,[8] and it is generally regarded as wages or compensation, not as a penalty or punishment.[9] Nevertheless it is an enforcement provision, not the least effective aspect of such remedy being the possibility that an employer who gambles on evading the act will be liable for payment not only of the wages originally due but all damages equal to the sum left unpaid.[10] The employer's liability for liquidated damages is not conditioned on default at the time suit is begun, and hence the right to recover such damages does not arise only if the employee is compelled to sue for minimum wages due.[11] So the acceptance of tardy payment of wages under the act does not preclude

leum Corporation, D.C.Okl., 42 F. Supp. 908, affirmed, C.C.A., Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655—Moss v. Postal Telegraph-Cable Co., D.C.Ga., 42 F.Supp. 807.

Ill.—Winer v. Eckerling, 55 N.E.2d 876, 323 Ill.App. 421.

Ky.—J. F. Schneider & Son v. Justice, 168 S.W.2d 591, 293 Ky. 126.

Minn.—Abree v. Lindsay Bros. Co., 300 N.W. 457, 211 Minn. 136.

N.Y.—Katz v. Film Metal Box Corporation, 47 N.Y.S.2d 454, 181 Misc. 812.

Tenn.—Tapp v. Price-Bass Co., 147 S.W.2d 107, 177 Tenn. 189.

Waiver, release, or settlement of claim for liquidated damages see infra § 151 (35).

Validity of allowance

(1) Allowance of liquidated damages for failure to pay building service employees engaged in production of goods for interstate commerce compensation for overtime work at rate prescribed is not an unconstitutional application of provision of act for liquidated damages, notwithstanding uncertainty as to applicability of act to such employees.—Adams v. Union Dime Sav. Bank, C.C.A.N.Y., 144 F.2d 290, certiorari denied 65 S.Ct. 85, 323 U.S. 751, 89 L.Ed. 602.

(2) Validity of provision for liquidated damages generally see supra § 151 (2).

Calculation

The amount due employee for overtime under overtime provisions of act and amount due for liquidated damages under act for each week should be calculated in a similar manner.—Tidewater Optical Co. v. Wittkamp, 19 S.E.2d 897, 179 Va. 545.

Estoppel

The fact that employee's course of conduct was such that his damages were increased rather than minimized did not estop employee to assert claim for liquidated damages and counsel fees.—Bailey v. Karolyna Co., D.C.N.Y., 50 F.Supp. 142.

7. U.S.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005—Dize v. Maddrix, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

8. U.S.—Culver v. Bell & Loffland, C.C.A.Cal., 146 F.2d 29.

9. U.S.—Overnight Motor Transp. Co. v. Missel, Md., 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563—Atlantic Co. v. Broughton, C.C.A.Ga., 146 F.2d 480, certiorari denied 65 S.Ct. 1021, two cases, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, two cases, 325 U.S. 892, 89 L.Ed. 2004, certiorari denied Carthan v. Atlantic Co., 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433, and Broughton v. Atlantic Co., 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433—Greenberg v. Arsenal Bldg. Corporation, C.C.A.N.Y., 144 F.2d 292, affirmed 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Warnick v. Bethlehem-Fairfield Shipyard, D.C.Md., 68 F.Supp. 857—Davis v. Rockton & R. R. R., D.C.S.C., 65 F.Supp. 67—Fletcher v. Grinnell Bros., D.C.Mich., 64 F.Supp. 778—Constance v. Gosnell, D.C.S.C., 62 F.Supp. 253—Philpott v. Standard Oil Co., D.C.Ohio, 53 F.Supp. 833—Barrineau v. Carolina Milling Co., D.C.S.C., 52 F.Supp. 197—Reliance Storage & Inspection Co. v. Hubbard, D.C.Va., 50 F.Supp. 1012—In re Fulnau Corporation, D.C.N.Y., 49 F.Supp. 570—Divine v. Levy, D.C.La., 45 F.Supp. 49—La Guardia v. Austin-Bliss General Tire Co., D.C.N.Y., 41 F.Supp. 678—Hargrave v. Mid-Continent Petroleum Corporation, D.C.Okl., 36 F.Supp. 233.

Ala.—Campbell v. Zavelo, 10 So.2d 29, 243 Ala. 361.

Cal.—Hays v. Bank of America Nat. Trust & Sav. Ass'n, 162 P.2d 679, 71 Cal.App.2d 301, certiorari denied 66 S.Ct. 979, 328 U.S. 834, 90 L.Ed. 1610, and Porteous v. Bank of America Nat. Trust & Sav. Ass'n, 66 S.Ct. 979, 328 U.S. 834, 90 L.Ed. 1610.

La.—Johnson v. Anderson-Dunham Concrete Co., 31 So.2d 797.

N.Y.—Creno v. Caruso Produce Co., 60 N.Y.S.2d 134.

R.I.—Newman v. George A. Fuller Co., 48 A.2d 345.

Tex.—Stringer v. Griffin Grocery Co., Civ.App., 149 S.W.2d 158, error refused.

Obscure damages

The liquidated damage provision of the Fair Labor Standards Act is not penal in its nature but constitutes compensation for retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005—Dize v. Maddrix, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

Remedial statute

The fact that federal Fair Labor Standards Act provides in one section for criminal prosecution of employers violating minimum wage and overtime compensation provisions and in another section for recovery of liquidated damages by civil action does not prevent consideration of statute as remedial, rather than penal, in action to enforce civil remedy.—Newman v. George A. Fuller Co., R.I., 48 A.2d 345.

10. U.S.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005—Dize v. Maddrix, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

11. U.S.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893,

recovery of the additional amount due as liquidated damages.[12] Payments in some weeks of more than the statutory requirements does not relieve the employer from the obligation to pay liquidated damages for underpayments in other weeks.[13]

Under the provisions of the Portal-to-Portal Act § 11, 29 U.S.C.A. § 260, the court is given discretion as to the award of liquidated damages provided for by the Fair Labor Standards Act if the employer shows to the satisfaction of the court that he was acting in good faith and had reasonable grounds to believe that he was not violating the statute.[14] Prior to such statute it was held that the provision for liquidated damages was mandatory on the court,[15] regardless of the employer's good faith and the reasonableness of his attitude in not paying the wages required by the statute,[16] and that the difficulty of the employer in determining whether his employees were covered by the act did not entitle him to avoid liability for liquidated damages because of the failure to pay statutory overtime.[17]

89 L.Ed. 2005—Dize v. Maddrix, N. Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

Vested right
The employer's liability to pay liquidated damages accrues on failure to pay minimum wages provided by the Fair Labor Standards Act, giving the employee a vested right thereto regardless of whether the employee is forced to institute suit to recover the amount due.—Fletcher v. Grinnell Bros., D.C.Mich., 64 F. Supp. 778.

12. U.S.—Rigopoulos v. Kervan, C.C. A.N.Y., 140 F.2d 506, conformed to, D.C., 53 F.Supp. 829, 151 A.L.R. 1126—Guess v. Montague, C.C.A. S.C., 140 F.2d 500—Philpott v. Standard Oil Co., D.C.Ohio, 53 F. Supp. 833.
Acceptance of wages as release or accord and satisfaction see infra § 151 (35).

Tender of amount which employee claimed was due him as unpaid overtime compensation did not defeat his claim for liquidated damages under the Fair Labor Standards Act, where employee after making demand on employer for liquidated damages refused such tender.—Dize v. Maddrix, C.C.A.Md., 144 F.2d 584, affirmed 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

13. U.S.—Roland Elec. Co. v. Black, C.C.A.Md., 163 F.2d 417.

14. U.S.—Roland Elec. Co. v. Black, supra—Lewellen v. Hardy-Burlingham Min. Co., D.C.Ky., 73 F.Supp. 63.

15. U.S.—Birbalas v. Cuneo Printing Industries, C.C.A.Ill., 140 F.2d 826 —Seneca Coal & Coke Co. v. Lofton, C.C.A.Okl., 136 F.2d 359, certiorari denied 64 S.Ct. 77, 320 U.S. 772, 88 L.Ed. 462—Calaf v. Gonzalez, C.C.A.Puerto Rico, 127 F.2d 934—Adams v. St. Johns River Shipbuilding Co., D.C.Fla., 69 F. Supp. 989—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F. Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310—Philpott v. Standard Oil Co., D.C.Ohio, 53 F.Supp. 833— U. S. v. Johnson, D.C.N.Y., 52 F. Supp. 382—Strand v. Garden Valley Telephone Co., D.C.Minn., 51 F. Supp. 898—Greenberg v. Arsenal Bldg. Corporation, D.C.N.Y., 50 F. Supp. 700, modified on other grounds, C.C.A., 144 F.2d 292, reversed on other grounds 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296— International Longshoremen's Ass'n, Local 815, v. National Terminals Corporation, D.C.Wis., 50 F. Supp. 26, affirmed, C.C.A., Cabunca v. National Terminals Corporation, 139 F.2d 853—Anuchick v. Transamerican Freight Lines, D.C.Mich., 46 F.Supp. 861—Thompson v. Daugherty, D.C.Md., 40 F.Supp. 279 —Magann v. Long's Baggage Transfer Co., D.C.Va., 39 F.Supp. 742—St. John v. Brown, D.C.Tex., 38 F.Supp. 385—Harrison v. Kansas City Terminal Ry. Co., D.C.Mo., 36 F.Supp. 434, affirmed, C.C.A., 126 F.2d 422—Reeves v. Howard County Refining Co., D.C.Tex., 33 F. Supp. 90.
Minn.—McMillan v. Wilson & Co., 2 N.W.2d 838, 212 Minn. 142, petition dismissed Wilson & Co. v. McMillan, 63 S.Ct. 81, 317 U.S. 702, 87 L. Ed. 561—Abroe v. Lindsay Bros. Co., 300 N.W. 457, 211 Minn. 136.
Mo.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241.
N.Y.—Emerson v. Mary Lincoln Candies, 20 N.Y.S.2d 570, 174 Misc. 353, affirmed 26 N.Y.S.2d 489, 261 App. Div. 879, appeal denied 27 N.Y.S.2d 452, 261 App.Div. 1044, affirmed 38 N.E.2d 234, 287 N.Y. 577—Schneider v. Sports Vogue, 35 N.Y.S.2d 341.

Statutory intent
The liquidated damages provision of the Fair Labor Standards Act is mandatory and not discretionary, since the use of the word "wilful" in the provision defining criminal liability under the act and its omission in the liquidated damages provision defining civil liability indicates that the employer's good faith is immaterial under the liquidated damages provision.—Missel v. Overnight Motor Transp. Co., C.C.A.Md., 126 F.2d 98, affirmed 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L. Ed. 563.

Findings of wage and hour division of United States department of labor as to amounts due employees under minimum wage regulation promulgated pursuant to Fair Labor Standards Act are merely ministerial acts, not judicial pronouncements foreclosing court from awarding liquidated damages and fixing reasonable counsel fee in employees' pending action therefor.—Asaro v. Lilienfeld, 36 N. Y.S.2d 802.

16. U.S.—Rigopoulos v. Kervan, C.C. A.N.Y., 140 F.2d 506, conformed to, D.C., 53 F.Supp. 829, 151 A.L.R. 1126—Philpott v. Standard Oil Co., D.C.Ohio, 53 F.Supp. 833.
N.M.—Wilson Oil Co. v. Hardy, 164 P.2d 209, 49 N.M. 337, 162 A.L.R. 292.
N.Y.—Cassone v. Wm. Edgar John & Associates, 57 N.Y.S.2d 169, 185 Misc. 573—Creno v. Caruso Produce Co., 60 N.Y.S.2d 134.

Decision of commission
It has been held, however, that where act excluded from its maximum hour provisions employees for whom Interstate Commerce Commission had statutory power to establish maximum hours and contract motor common carrier had violated the act prior and subsequent to commission's decision determining generally which employees were subject to its jurisdiction, the employees were not entitled to penalties before the decision of the commission, but were entitled to double damages and attorney's fees after that time where to expect the employer to construe the statutes would violate the due process of law clause, and the carriers had made laborious efforts to find out what the statutes meant.—Anuchick v. Transamerican Freight Lines, D.C.Mich., 46 F.Supp. 861.

17. U.S.—Overnight Motor Transp. Co. v. Missel, Md., 62 S.Ct. 1216, 316 U.S. 572, 86 L.Ed. 1682, rehearing denied 63 S.Ct. 76, 317 U.S. 706, 87 L.Ed. 563.

b. Criminal Liability

The Fair Labor Standards Act renders it a criminal offense to violate particular provisions of the act.

Under the Fair Labor Standards Act § 16, 29 U.S.C.A. § 216, it is made a criminal offense willfully to violate particular provisions of the act,[18] but the failure to pay liquidated damages is not a crime or misdemeanor.[19] Under a provision prohibiting the transportation or shipment in interstate commerce of goods produced under labor conditions with respect to wages and hours which fail to conform to standards set up by the statute, it is not necessary, in order to constitute a violation of the statute, for any of the defendants to have been personally present during the process of transporting or delivering, if they knowingly caused it to be done by others.[20] The fact that defendant's failure to make payments of wages in accordance with the requirements of the act may have been due to financial inability has been held not to exempt him from prosecution for violations of the act due to such failure.[21]

It is an offense under the statute to fail to keep books and records as required by the act or to make a false statement, report, or record,[22] and an employer who knowingly and intentionally, as distinguished from accidentally, makes a false record of hours worked by an employee is guilty of a willful violation of the act even though he may have had no evil motive.[23] The making of false records by the manager of a corporation has been held to be the criminal act of both the corporation and its manager within the penal provisions of the act.[24] Under the Fair Labor Standards Act § 15 (a) (3), 29 U.S.C.A. § 215 (a) (3), it is unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to the statute, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.[25] Such provision is directed against "any person" and is not limited to employers.[26]

§ 151(35). Waiver, Estoppel, Release, Settlement, and Accord and Satisfaction

a. Liability for wages and overtime compensation

b. Liability for liquidated damages

a. Liability for Wages and Overtime Compensation

Generally liability for the full compensation required by the Fair Labor Standards Act may not be avoided by waiver, estoppel, release, settlement, or accord and satisfaction; but after an employee's rights have been adjudicated and crystallized into a judgment he may take less than that judgment if he considers it to his advantage to do so.

As a general rule, since the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq, is a statute affected with a public interest, it is against public policy to preclude payment of compensation guaranteed by its terms, because of any agreement, conspiracy, or subterfuge resorted to by employer and employee, either, or both.[27] In the absence of statutory pro-

18. U.S.—Hertz Drivurself Stations v. U. S., C.C.A.Mo., 150 F.2d 923.
Criminal prosecutions under Fair Labor Standards Act see infra § 160 (13).

Alternative remedy
The provisions of Fair Labor Standards Act for injunction and criminal prosecution are alternative remedies.—Walling v. Todd, D.C.Pa., 52 F.Supp. 62, motion denied 3 F.R.D. 490.

19. U.S.—Atlantic Co. v. Broughton, C.C.A.Ga., 146 F.2d 480, certiorari denied 65 S.Ct. 1021, two cases, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, two cases, 325 U.S. 892, 89 L.Ed. 2004, certiorari denied Carthan v. Atlantic Co., 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433, and Broughton v. Atlantic Co., 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433.

20. U.S.—U. S. v. Southern Advance Bag & Paper Co., D.C.La., 46 F.Supp. 105, affirmed, C.C.A., Southern Advance Bag & Paper Co. v. U. S., 133 F.2d 449.

21. U.S.—Fleming v. North Georgia Mfg. Co., D.C.Ga., 33 F.Supp. 1005.

22. U.S.—U. S. v. Selman-Reinstein, Inc., D.C.Minn., 52 F.Supp. 208.

Incomplete records
In determining whether Fair Labor Standards Act is violated by employer whose payroll records indicate payment of time and one half for overtime and whose cash receipt books contain entries of employees' refunds as "kickbacks," the fact that government inspector is presented with records covering payroll amounts to a representation that employer's complete wage records are to be found in such records, and employer's wage records were false within prohibition of Fair Labor Standards Act, where employees' refunds were shown in cash receipt books which were not shown to inspector.—U. S. v. Selman-Reinstein, Inc., supra.

23. U.S.—Hertz Drivurself Stations v. U. S., C.C.A.Mo., 150 F.2d 923.

24. U.S.—Hertz Drivurself Stations v. U. S., supra.

25. U.S.—Meek v. U. S., C.C.A.Tenn., 136 F.2d 679.

Control over business
Evidence authorized finding that original owner of business, after transferring business to his son-in-law, exercised enough control over the business to warrant original owner's conviction for discharging employee because of filing of complaint for violation of Fair Labor Standards Act, either directly or by aiding and directing discharge by the son-in-law.—Meek v. U. S., supra.

26. U.S.—Meek v. U. S., supra.

Labor union
The term "any person" as used in provision of act is broad enough to include a labor union, its officers and members.—Bowe v. Judson C. Burns, Inc., C.C.A.Pa., 137 F.2d 37.

27. Ga.—Butler v. Carter, 32 S.E.2d 808, 198 Ga. 754.
Validity of agreements to work for less than the compensation required by statute see supra § 151 (24).

vision to the contrary, an employee may not waive his rights against an employer for the wages prescribed by the act,[28] and he cannot give a valid release of his rights against the employer in consideration of receiving payment of an amount less than that provided by the act,[29] even in the absence of fraud or coercion on the part of the employer,[30] since the rights provided the employee under the act are not his alone, but are affected with a public interest.[31] The sum paid by an employer to secure a release of claims must be applied merely as partial payments of the amount due to employees who were not paid in full.[32]

The fact that an employee was paid the sum provided for by contract and made no claim for additional compensation does not bar his right to the

Arbitration

In action for overtime, damages, and attorney's fees under the Fair Labor Standards Act of 1938, defense pleading an agreement between the parties to settle disputes by arbitration was insufficient, since no private agreement can override the express provisions of the act.—Garrity v. Bagold Corporation, 42 N.Y.S. 2d 257, 180 Misc. 120, modified on other grounds 46 N.Y.S.2d 637, 267 App. Div. 353.

Rebates

The requirement of the act for payment of minimum wages and overtime cannot be rebated by agreement between employer and employee, or by any system of bookkeeping designed for that purpose.—Garchell v. Kantar, D.C.Minn., 56 F. Supp. 866, reversed on other grounds, C.C.A., 150 F.2d 47.

Time of agreement

An employee is not bound by any agreement to accept less than the prescribed minimum wage whether such agreement is made before or after the wage has been earned and has become due, regardless of the existence of an honest dispute as to whether the act is applicable to the employee.—Cassese v. Manufacturers Trust Co., 46 N.Y.S.2d 621, 182 Misc. 344.

28. U.S.—Fleming v. Warshawsky & Co., C.C.A.Ill., 123 F.2d 622—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310—U. S. v. Johnson, D.C.N.Y., 52 F.Supp. 382—Wilkinson v. Noland Co., D. C.Va., 40 F.Supp. 1009.

N.Y.—Withers v. Herbert McLean Purdy Management Corporation, 47 N.Y.S.2d 266, 181 Misc. 724.

Retroactive contract

The right to overtime which has already accrued may not be waived by a retroactive contract.—Asselta v. 149 Madison Ave. Corp., C.C.A.N.Y., 156 F.2d 139, certiorari denied 149 Madison Ave. Corp. v. Asselta, 67 S. Ct. 124, 329 U.S. 764, 91 L.Ed. ——.

Increase of salary

In action for overtime compensation and liquidated damages under Fair Labor Standards Act where plaintiff-employee, in connection with a summary of his claim, testified that he figured the amount of overtime pay all the way through on basis of salary he was receiving during first of period involved and it appeared that employee had been uncertain as to when his salary had been increased, employee did not, by his testimony, intend to waive any part of his claim.—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310.

29. U.S.—D. A. Schulte, Inc., v. Gangi, N.Y., 66 S.Ct. 925, 328 U.S. 108, 167 A.L.R. 208, 90 L.Ed. 1114—Robertson v. Alaska Juneau Gold Min. Co., C.C.A.Cal., 157 F.2d 876—Torres v. American R. Co. of Puerto Rico, C.C.A.Puerto Rico, 157 F.2d 255—Watkins v. Hudson Coal Co., C.C.A.Pa., 151 F.2d 311, certiorari denied 66 S.Ct. 522, 327 U. S. 777, 90 L.Ed. 1005, rehearing denied 66 S.Ct. 701, 327 U.S. 816, 90 L.Ed. 1039—Gangi v. D. A. Schulte, Inc., C.C.A.N.Y., 150 F.2d 694, affirmed 66 S.Ct. 925, 328 U.S. 108, 90 L.Ed. 1114—Fleming v. Post, C.C.A.N.Y., 146 F.2d 441, 158 A.L.R. 1384—Fleming v. Warshawsky & Co., C.C.A.Ill., 123 F.2d 622—McNeal v. Central Greyhound Lines, D.C.Ohio, 66 F.Supp. 581—Walling v. Livernois, D.C.Mich., 50 F.Supp. 978—Bailey v. Karolyna Co., D.C.N.Y., 50 F.Supp. 142—Rigopoulos v. Kervan, D.C.N.Y., 47 F. Supp. 576—Hutchinson v. William C. Barry, Inc., D.C.Mass., 44 F. Supp. 829—Travis v. Ray, D.C.Ky., 41 F.Supp. 6.

Ala.—Cudahy Packing Co. of Alabama v. Bazanos, 15 So.2d 720, 245 Ala. 73.

N.Y.—Easley v. Edgord Realty Corp., 59 N.Y.S.2d 241, 270 App.Div. 184, affirmed 68 N.E.2d 873, 296 N.Y. 579.

Tenn.—Fiedler v. Potter, 172 S.W.2d 1007, 180 Tenn. 176.

Inducement for union contract

(1) The requirements of Fair Labor Standards Act could not be circumvented by mere recital in release that employees released employer of liability for sums due under the act in order to induce employer to enter into a contract with labor union governing future labor relations between employer and employees.—Cassese v. Manufacturers Trust Co., 46 N.Y.S.2d 621, 182 Misc. 344.

(2) A settlement between employers and bargaining agent for employees, providing for payment of increased wages in the future as a settlement of all claims for compensation and damages under Fair Labor Standards Act, was not a valid agreement where it was not shown how much of the increased wage scale was for payment of compensation due and how much may have resulted from economic pressure by the bargaining agent, or how much came naturally on a rising wage scale market.—Watkins v. Hudson Coal Co., C.C.A.Pa., 151 F.2d 311, certiorari denied 66 S.Ct. 522, 327 U.S. 777, 90 L.Ed. 1005, rehearing denied 66 S.Ct. 701, 327 U.S. 816, 90 L.Ed. 1039.

To whom release given

The release of claim for overtime compensation and liquidated damages under Fair Labor Standards Act executed by plaintiff to owner of building in which plaintiff was employed, even if effective, would not likewise discharge plaintiff's claim against managing agents of the building.—Phelan v. Carstens, Linnekin & Wilson, 62 N.Y.S.2d 214, 187 Misc. 352.

30. U.S.—Fleming v. Warshawsky & Co., C.C.A.Ill., 123 F.2d 622.

31. U.S.—Broughton v. Atlantic Co., D.C.Ga., 54 F.Supp. 185, affirmed in part and reversed in part on other grounds, C.C.A., 146 F.2d 480, certiorari denied 65 S.Ct. 1021, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, 325 U.S. 892, 89 L.Ed. 2004, certiorari denied 65 S.Ct. 1021, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, 325 U.S. 892, 89 L.Ed. 2004, certiorari denied 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433.

32. U.S.—Gangi v. D. A. Schulte, Inc., C.C.A.N.Y., 150 F.2d 694, affirmed 66 S.W. 925, 328 U.S. 108, 90 L.Ed. 1114—Atlantic Co. v. Broughton, C.C.A.Ga., 146 F.2d 480, certiorari denied 65 S.Ct. 1021, two cases, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, two cases, 325 U.S. 892, 89 L.Ed. 2004, certiorari denied Carthan v. Atlantic Co., 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433, and Broughton v. Atlantic Co., 65 S.Ct. 1023, 324 U. S. 883, 89 L.Ed. 1433.

minimum compensation provided for by the act[33] and to payment for overtime.[34] An employee may not, as a matter of law, by failing to report and collect for overtime hours, waive his right to overtime pay, if entitled thereto,[35] and an employee is entitled to recover for overtime worked by him regardless of any agreement or conspiracy between employer and employee to make a false record with reference to the number of hours worked.[36] Payment of less than the statutory wages due may not be sustained on the theory of an account stated.[37]

As a general rule, in the absence of statutory provision to the contrary, there can be no valid compromise or settlement which would result in payment of less than the amount required by statute,[38] at least in the absence of a bona fide dispute as to the amount of the liability.[39] The existence of a controversy as to coverage of the act does not validate a compromise for less than the amount due under the act,[40] and a dispute as to the constitutionality of the act or its application to certain employees has been held merely a dispute concerning questions of law, with respect to validity of a settlement agreement.[41] So the good faith of the employer in believing that the employment was not covered by the act does not afford a basis for a good-faith dispute between the parties so as to support an agreement of accord and satisfaction.[42]

In order to constitute a valid compromise settlement of a dispute between employer and employee as to the number of hours worked by the employee, so as to bar action for unpaid overtime wages, the facts respecting the settlement must be clear cut and definite, there must be a final meeting of the minds on the compromise, with full understanding of the dispute and the effect of the compromise, the settlement must be as to the number of hours worked, and the full benefits provided for by the act based on the hours so determined must flow from such settlement.[43] Such a settlement may not be based

33. U.S.—Travis v. Ray, D.C.Ky., 41 F.Supp. 6.

34. U.S.—Bloch v. Bell, D.C.Ky., 63 F.Supp. 863, affirmed, C.C.A., 152 F.2d 962.
Ill.—Pinkley v. Allied Oil Corp. of Ill., 60 N.E.2d 106, 325 Ill.App. 326.
N.M.—Wilson Oil Co. v. Hardy, 164 P.2d 209, 49 N.M. 337, 162 A.L.R. 292.
N.Y.—Creno v. Caruso Produce Co., 60 N.Y.S.2d 134.
Tex.—D. & L. Production Co. v. Cuniff, Civ.App., 165 S.W.2d 933, error dismissed.

35. U.S.—Collins v. Burton-Dixie Corporation, D.C.S.C., 53 F.Supp. 821.

Proof of claim
By failing to report and collect for overtime hours, an employee did not as a matter of law waive his right to overtime pay under Fair Labor Standards Act, if entitled thereto, but court would consider such failure in determining weight of employee's testimony on issue respecting whether employee had made satisfactory proof of claim for overtime.—Sauls v. Martin, D.C.S.C., 45 F.Supp. 801.

36. Ga.—Butler v. Carter, 32 S.E. 2d 808, 198 Ga. 754.

37. U.S.—De Pasquale v. Williams-Bauer Corp., C.C.A.N.Y., 151 F.2d 578, certiorari denied Williams-Bauer Corp. v. De Pasquale, 66 S. Ct. 1007, 328 U.S. 836, 90 L.Ed. 1612.
N.Y.—Caperna v. Williams-Bauer Corporation, 47 N.Y.S.2d 328.

38. U.S.—Guess v. Montague, C.C.A. S.C., 140 F.2d 500—Black v. Roland Elec. Co., D.C.Md., 68 F.Supp. 117—Vaden v. Raleigh County Bank, D.C.W.Va., 66 F.Supp. 279.

Payment of wages in future
Where the identity of employees, seeking overtime wages and damages was established, their employment was concededly covered by the act, the hours or terms on which they worked were not subject to serious dispute, and amount due under the act could be mathematically calculated, a purported settlement previously made by which employers agreed to pay certain wages in the future was not such a settlement as was valid under the act.—Watkins v. Hudson Coal Co., C.C.A.Pa., 151 F. 2d 311, certiorari denied 66 S.Ct. 522, 327 U.S. 777, 90 L.Ed. 1005, rehearing denied 66 S.Ct. 701, 327 U.S. 816, 90 L.Ed. 1039.

Approval by judge
Approval of settlement of employees' claims for minimum wages and liquidated damages by supreme court by which employer was appointed a trustee merely constituted judicial sanction for payment of moneys by the trustee, and did not determine validity or binding effect of settlement, so as to render settlement a valid defense to employees' action to recover amount due under the act.—Cassese v. Manufacturers Trust Co., 46 N.Y.S.2d 621, 182 Misc. 344.

39. U.S.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L. Ed. 2005—Dize v. Maddrix, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

Genuine dispute
In order to interpose a defense of release of a claim under the Fair Labor Standards Act, there must be a genuine dispute concerning the facts at issue in consideration for delivery of a release and payment of consideration set forth therein.—Phelan v. Carstens, Linnekin & Wilson, 62 N. Y.S.2d 214, 187 Misc. 352.

No dispute as to hours
Where there was no dispute between employer and employee as to employee's hours of work and they stipulated as to amount of overtime wages to which he would be entitled, if Fair Labor Standards Act applied to him, his action thereunder for unpaid overtime wages was not barred by any compromise or attempt to compromise between him and defendant employer.—Strand v. Garden Valley Telephone Co., D.C.Minn., 51 F. Supp. 898.

40. U.S.—D. A. Schulte, Inc., v. Gangi, N.Y., 66 S.Ct. 925, 328 U.S. 108, 167 A.L.R. 208, 90 L.Ed. 1114 —Guess v. Montague, C.C.A.S.C., 140 F.2d 500.

41. N.Y.—Cassese v. Manufacturers Trust Co., 46 N.Y.S.2d 621, 182 Misc. 344.

42. U.S.—Broughton v. Atlantic Co., D.C.Ga., 54 F.Supp. 185, affirmed in part and reversed in part on other grounds, C.C.A., 146 F.2d 480, certiorari denied 65 S.Ct. 1021, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, 325 U.S. 892, 89 L.Ed. 2004, certiorari denied 65 S.Ct. 1021, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, 325 U.S. 892, 89 L.Ed. 2004, certiorari denied 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433.

43. U.S.—Strand v. Garden Valley

on a legal dispute as to whether the employee should be considered to be working during certain hours in which the employee was on duty.[44] It has been held that the wage and hour division is to be considered a party to any arrangements affecting wage payments between the employer and the employee in settlement of liability for overtime.[45]

After an employee has had his full rights under the act adjudicated to a finality and those rights have been crystallized into a judgment, he is at liberty to take less than that judgment if he considers it to his advantage to do so.[46]

Estoppel. As a general rule, liability to an employee for unpaid minimum wages and overtime compensation may not be avoided on the ground of estoppel of the employee to claim payment thereof.[47] So the fact that the employer in reliance on a collective bargaining agreement calculated certain expenses, which could not be immediately changed, does not estop the employee to seek the recovery of unpaid overtime wages not provided for in such agreement.[48] Also the failure of employees to complain to the employer of the failure to compensate them for periods worked as required by the act does not estop them later to assert the right to such compensation,[49] and it has been held that the acceptance of payments of regular and overtime wages does not estop an employee to sue to recover the amount due him when he proves that he actually worked longer hours than those paid for.[50] It has been held, however, that an employee who failed to make claim promptly for overtime compensation is estopped to assert such claim in an action against the employer under the act,[51] and that, where the employee prepared and signed daily work reports showing only a negligible amount of overtime and permitted the employer to act thereon, without any knowledge of the falsity of such reports, the employee is estopped subsequently to assert that such daily reports were incorrect and that he was entitled to additional overtime compensation for hours worked and not shown on the records.[52]

b. Liability for Liquidated Damages

In the absence of statutory provision to the contrary, the right to liquidated damages for failure to make timely payment of compensation required by the act may not validly be waived or released, and may not be compromised or settled for less than the full amount due under the act.

Whether the statutory right to liquidated damages granted under § 1 et seq of the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq, may be waived or released depends on the intention of congress as manifested in the act.[53] In this respect the same policy considerations which forbid the

Telephone Co., D.C.Minn., 51 F. Supp. 898.

Retention of check

Where telephone switchboard operator refused to agree with her employer's representative as to number of hours she worked in addition to those spent at switchboard and refused to sign release of employer from further liability for wages or compromise agreement in settlement of her claim therefor, her retention of employer's check for sum specified therein and failure to cash it did not constitute such settlement of honest dispute respecting number of hours worked as to bind employee and bar her action under Fair Labor Standards Act for unpaid overtime wages.—Strand v. Garden Valley Telephone Co., supra.

44. U.S.—Strand v. Garden Valley Telephone Co., supra.

45. N.Y.—Schneider v. Sports Vogue, 35 N.Y.S.2d 341.

46. U.S.—Bracy v. Luray, D.C.Md., 68 F.Supp. 701.

Inability to pay

Where, after entry of judgments against employer for overtime pay and liquidated damages, employer declared inability to pay because of insolvency, an agreement for settlement of the judgments for less than their amounts by payment in part immediately and the balance in monthly installments was valid.—Bracey v. Luray, C.C.A.Md., 161 F. 2d 128.

47. U.S.—Cox v. Gatliff Coal Co., D. C.Ky., 59 F.Supp. 882—Murray v. Noblesville Milling Co., D.C.Ind., 42 F.Supp. 808, affirmed in part and reversed in part on other grounds C.C.A., 131 F.2d 470, certiorari denied 63 S.Ct. 832, 318 U. S. 775, 87 L.Ed. 1145.

N.Y.—Garrity v. Bagold Corporation, 42 N.Y.S.2d 257, 180 Misc. 120, modified on other grounds 46 N.Y. S.2d 637, 267 App.Div. 353.

48. U.S.—Greenberg v. Arsenal Bldg. Corporation, D.C.N.Y., 50 F.Supp. 700, modified on other grounds, C. C.A., 144 F.2d 292, reversed on other grounds 65 S.Ct. 895, 324 U. S. 697, 89 L.Ed. 1296—Bailey v. Karolyna Co., D.C.N.Y., 50 F.Supp. 142.

Operating costs of buildings

In building maintenance employees' action under Fair Labor Standards Act, affirmative defense claiming equitable estoppel in that in reliance on collective bargaining agreement and employees' conduct, employers' calculated operating costs and determined rentals to be charged tenants and that rentals could not be changed during period of existing tenancy was insufficient.—Rienzo v. City Bank Farmers Trust Co., 42 N. Y.S.2d 337, 180 Misc. 333, affirmed 47 N.Y.S.2d 589, 267 App.Div. 890, appeal denied 48 N.Y.S.2d 471, 267 App.Div. 954, appeal dismissed 56 N. E.2d 300, 293 N.Y. 690—Walsh v. 515 Madison Avenue Corporation, 42 N. Y.S.2d 262, 181 Misc. 219, affirmed 45 N.Y.S.2d 927, 267 App.Div. 756, affirmed 59 N.E.2d 183, 293 N.Y. 826.

49. U.S.—Ballard v. Consolidated Steel Corp., D.C.Cal., 61 F.Supp. 996—Greenberg v. Arsenal Bldg. Corporation, D.C.N.Y., 50 F.Supp. 700, modified on other grounds, C. C.A., 144 F.2d 292, reversed on other grounds 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

N.Y.—Drenne v. Mutual Life Ins. Co. of New York, 42 N.Y.S.2d 259.

Wash.—Cannon v. Miller, 155 P.2d 500, 22 Wash.2d 287, 157 A.L.R. 530.

50. U.S.—Robertson v. Alaska Juneau Gold Min. Co., C.C.A.Cal., 157 F.2d 876.

51. Wash.—Cotton v. Weyerhaeuser Timber Co., 147 P.2d 299, 20 Wash. 2d 300.

52. U.S.—Mortenson v. Western Light & Telephone Co., D.C.Iowa, 42 F.Supp. 319.

53. U.S.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.

waiver of the right to basic minimum and overtime wages under the act, discussed supra subdivision a of this section, also prohibit waiver of the employee's right to liquidated damages.[54] Accordingly, in the absence of statutory provision to the contrary, it is generally held that the right to liquidated damages for failure to make timely payment of compensation required by the act may not validly be waived or released,[55] and may not be compromised or settled for less than the full amount due under the act.[56] Such a waiver or release does not bar a subsequent action for the statutory liquidated damages, at least in the absence of a bona fide dispute between the parties as to liability,[57] and in this connection a controversy between the parties as to coverage of the act has been held not such a dispute as to permit a valid compromise for less than the full damages due.[58]

In accordance with the foregoing rules, the payment and acceptance of back minimum and overtime wages by an employee does not constitute a valid release or settlement of the employee's claim for an equal amount as liquidated damages, required to be paid under the act.[59] The employer's lia-

S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005—Dize v. Maddrix, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

Determination of intent

In absence of evidence of specific congressional intent, court must resort to a broader consideration of legislative policy behind liquidated damage provision as evidenced by its legislative history and the provisions in and structure of the act; the elimination from a predecessor bill of a provision prohibiting waiver of provisions of the Fair Labor Standards Act does not indicate congressional intent to allow employee to waive his claim to liquidated damages since such interpretation would nullify effectiveness of the act; and the fact that the act does not prohibit an employee from waiving his claim to liquidated damages does not indicate congressional intent that employee may waive such claim because other federal statutes authorizing employees to sue for wages or for damages arising from injuries sustained in course of employment contain specific provisions prohibiting waiver of rights under the acts involved, or provide means by which compromises and settlements can be approved, since congressional policy would be thwarted by permitting such waivers.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005—Dize v. Maddrix, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

54. U.S.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005—Dize v. Maddrix, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

The failure to impose criminal sanctions for violation of liquidated damage provision of the Fair Labor Standards Act or to authorize injunction to prevent its violation does not manifest a difference in congress' attitude toward waiver of employee's right to basic statutory wage as compared with his right to liquidated damages since liquidated damages are collectable as private damages by employee for failure to obey same requirements as to wages which are punished and controlled, as far as the purely public interest is concerned, by criminal sanctions and injunction.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005—Dize v. Maddrix, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

Uniformity

The prohibition of waiver of such claims accords with the congressional policy of uniformity in the application of the provisions of the act to all employers subject thereto unless expressly exempted by the provisions of the act.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005—Dize v. Maddrix, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

55. U.S.—Gangi v. D. A. Schulte, Inc., C.C.A.N.Y., 150 F.2d 694, affirmed 66 S.Ct. 925, 328 U.S. 108, 90 L.Ed. 1114, 167 A.L.R. 208—Fleming v. Post, C.C.A.N.Y., 146 F.2d 441, 158 A.L.R. 1384—Asselta v. 149 Madison Ave. Corp., D.C.N.Y., 65 F.Supp. 385, affirmed, C.C.A., 156 F.2d 139, certiorari denied 67 S.Ct. 124, 329 U.S. 764, 91 L.Ed. 658.

N.Y.—Phelan v. Carstens, Linnekin & Wilson, 62 N.Y.S.2d 214, 187 Misc. 352—Katz v. Film Metal Box Corporation, 47 N.Y.S.2d 454, 181 Misc. 812—Hurewitz v. Henry Moss & Co., 49 N.Y.S.2d 106—Asaro v. Lilienfeld, 36 N.Y.S.2d 802.

The right to liquidated damages is mandatory and cannot be bargained away by employees.—Strand v. Garden Valley Telephone Co., D.C.Minn., 51 F.Supp. 898.

Necessity of bringing suit

Where employees had been compelled to bring their demands for overtime compensation to court because of employer's refusal to pay after judgment in injunction suit by administrator requiring employer to recognize validity of claims, employees could recover liquidated damages and attorney's fees notwithstanding their previous execution of releases of claims for penalties in consideration of payment of overtime wages.—Birbalas v. Cuneo Printing Industries, C.C.A.Ill., 140 F.2d 826.

56. U.S.—Roland Elec. Co. v. Black, C.C.A.Md., 163 F.2d 417—Reid v. Solar Corp., D.C.Iowa, 69 F.Supp. 626.

Duty of court

Regardless of settlement between alleged employer and employee of liability for overtime wages under Fair Labor Standards Act, it is duty of court to determine whether right to overtime wages existed as basis for recovery of penalty and counsel fees.—Katz v. Film Metal Box Corporation, 47 N.Y.S.2d 454, 181 Misc. 812.

57. U.S.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005—Dize v. Maddrix, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Robertson v. Alaska Juneau Gold Min. Co., C.C.A.Cal., 157 F.2d 876—Hutchinson v. William C. Barry, Inc., D.C.Mass., 44 F.Supp. 829.

58. U.S.—D. A. Schulte, Inc., v. Gangi, N.Y., 66 S.Ct. 925, 328 U.S. 108, 167 A.L.R. 208, 90 L.Ed. 1114.

59. U.S.—Atlantic Co. v. Broughton, C.C.A.Ga., 146 F.2d 480, certiorari denied 65 S.Ct. 1021, two cases, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, two cases, 325

bility for unpaid compensation and liquidated damages in an additional equal amount is a single and entire liability which is not discharged in toto by paying one half of it, even though the employer asserts that he is not within the act.[60]

A few decisions, however, have held that a claim for liquidated damages may be validly released or settled by agreement,[61] and may be a proper subject of accord and satisfaction,[62] where there has been full payment of the amount due for minimum wages and overtime compensation;[63] but, where minimum wages and overtime compensation have not been fully paid under a contract of accord and satisfaction, the contract is not valid as a release of the claim for liquidated damages.[64]

§ 152. Women and Minors

a. In general
b. Construction and operation generally
c. Functions, authority, and decisions of commission
d. Effect of violation

a. In General

Statutes providing for the establishment of minimum wages for women and minors are generally held valid.

Formerly, following a decision of the United States supreme court,[65] statutes authorizing an administrative body to fix minimum wages for adult women measured by the amount necessary to meet the cost of living and to maintain them in good health and protect their morals, and not exclusively by the value and extent of the services rendered by them or the necessities of the employer, were held invalid,[66] although a statute providing for a minimum wage defined as one commensurate with the value of the service or class of service rendered or as one based solely on the reasonable value of the services rendered was held not to come within the condemnation of such holdings.[67]

U.S. 892, 89 L.Ed. 2004, certiorari denied Carthan v. Atlantic Co., 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433, and Broughton v. Atlantic Co., 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433—Rigopoulos v. Kervan, D.C.N.Y., 47 F.Supp. 576.
N.Y.—O'Neil v. Brooklyn Sav. Bank, 46 N.Y.S.2d 631, 267 App.Div. 317, affirmed 56 N.E.2d 259, 293 N.Y. 666, affirmed 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005.

Accord and satisfaction
The payment and acceptance of back minimum and overtime wages by employees did not constitute an accord and satisfaction in respect of claim for liquidated damages payable under the Fair Labor Standards Act.—Fleming v. Post, C.C.A.N.Y., 146 F.2d 441, 158 A.L.R. 1384—Asselta v. 149 Madison Ave. Corp., D.C.N.Y., 65 F.Supp. 385, affirmed, C.C.A., 156 F.2d 139, certiorari denied 67 S.Ct. 124, 329 U.S. 764, 91 L.Ed. 658.

Retention of money
An employee's retention of moneys paid her by employers under federal district court judgment, requiring restitution of unpaid minimum wages and overtime compensation, in proceeding for enforcement of Fair Labor Standards Act, did not constitute waiver of employee's vested right to recover liquidated damages under such act in state court action against employers.—Slavin v. Trachtenberg, 41 N.Y.S.2d 86, 180 Misc. 324.

60. U.S.—Gangi v. D. A. Schulte, Inc., C.C.A.N.Y., 150 F.2d 694, affirmed 66 S.Ct. 925, 328 U.S. 108, 90 L.Ed. 1114.

61. U.S.—Guess v. Montague, C.C.A. S.C., 140 F.2d 500.
N.Y.—Cassese v. Manufacturers Trust Co., 46 N.Y.S.2d 621, 182 Misc. 344.

Nature of duty
Only where the law imposes a positive duty to pay should a settlement, which is ordinarily favored by the law, be held to be prohibited, and such duty is created by Fair Labor Standards Act only with respect to minimum wages and overtime compensation, and not with respect to liability for liquidated damages.—Cassese v. Manufacturers Trust Co., supra.

62. U.S.—Atlantic Co. v. Broughton, C.C.A.Ga., 146 F.2d 480, certiorari denied 65 S.Ct. 1021, two cases, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, two cases, 325 U.S. 892, 89 L.Ed. 2004, certiorari denied Carthan v. Atlantic Co., 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433, and Broughton v. Atlantic Co., 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433.

63. U.S.—Guess v. Montague, C.C.A. S.C., 140 F.2d 500—Clour v. Jones, D.C.Okl., 42 F.Supp. 700.

Accord and satisfaction
Where payments in settlement of employer's liability for minimum wages and overtime compensation are made under such circumstances as create an agreement of accord and satisfaction, the employee's claim for liquidated damages on the amount given in settlement is extinguished.—Atlantic Co. v. Broughton, C.C.A.Ga., 146 F.2d 480, certiorari denied 65 S.Ct. 1021, two cases, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, two cases, 325 U.S. 892, 89 L.Ed. 2004, certiorari denied Carthan v. Atlantic Co., 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433, and Broughton v. Atlantic Co., 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433.

Consideration
Where there was doubt in employer's mind as to his liability for balance of minimum wages, overtime compensation, and liquidated damages, and employees were not claiming that employer was liable, payment of balance due as minimum wages and overtime compensation was a sufficient consideration for release of claim for liquidated damages.—Guess v. Montague, C.C.A.S.C., 140 F.2d 500.

64. U.S.—Guess v. Montague, supra.

65. U.S.—Adkins v. Children's Hospital, App.D.C., 43 S.Ct. 394, 261 U.S. 525, 67 L.Ed. 785.
39 C.J. p 225 note 37.

66. U.S.—Morehead v. People of State of New York ex rel. Tipaldo, N.Y., 56 S.Ct. 918, 298 U.S. 587, 80 L.Ed. 1347, 103 A.L.R. 1445, rehearing denied 57 S.Ct. 4, 299 U.S. 619, 81 L.Ed. 456—Donham v. West-Nelson Mfg. Co., Ark., 47 S.Ct. 343, 273 U.S. 657, 71 L.Ed. 825—Murphy v. Sardell, Ariz., 46 S.Ct. 22, 269 U.S. 530, 70 L.Ed. 396.
Kan.—Topeka Laundry Co. v. Court of Industrial Relations, 237 P. 1041, 119 Kan. 12, 47 A.L.R. 208.

67. U.S.—Walker v. Chapman, D.C. Ohio, 17 F.Supp. 308.

Subsequently, however, the United States supreme court took a different view of such statutes and overruled the earlier cases,[68] and laid down the rule, since followed by other courts, that a statute providing for a minimum wage for women and minors sufficient to meet the cost of living and maintain their health and morals is valid, even though such wage is not measured strictly by the value of the services rendered.[69] Accordingly, statutes prescribing minimum wages required to be paid to women and minor workers,[70] or, more specifically, authorizing administrative bodies or officials to make orders fixing a minimum wage for women as well as for minor workers,[71] or penalizing discrimination in wage rates between men and women under specified conditions,[72] are usually held valid where they supply ample standards.[73] A statute is not invalid which provides for a "guaranteed" minimum wage for women who work any part of a week,[74] where the amount of such minimum is to be measured not only by the value and class of the service rendered but also by the amount required to provide adequate maintenance and to protect health.[75]

b. Construction and Operation Generally

Statutes providing for minimum wages for women and minors should be construed so as to effectuate their aims; the persons and occupations embraced by such statutes depend on their language and terms.

Although statutes providing for minimum wages for women and minors, being penal, require a strict construction,[76] they should nevertheless be construed so as to effectuate as far as possible the purposes for which they are enacted,[77] namely, the establishment of fair wage rates[78] and the protection

68. U.S.—West Coast Hotel Co. v. Parrish, Wash., 57 S.Ct. 578, 300 U.S. 379, 81 L.Ed. 703, 108 A.L.R. 1330.

Reason for decision

The reasonableness of the exercise of the protective power of the state through enactment of minimum wage laws must be determined in light of economic conditions.—West Coast Hotel Co. v. Parrish, supra.

69. U.S.—West Coast Hotel Co. v. Parrish, supra.
N.Y.—Mary Lincoln Candies v. Department of Labor, 45 N.E.2d 434, 289 N.Y. 262, 143 A.L.R. 1078, motion denied 50 N.E.2d 99, 290 N.Y. 760—People, on Information of Siegel v. Weingrad, 26 N.Y.S.2d 841.
Ohio.—Strain v. Southerton, 62 N.E. 2d 633, 75 Ohio App. 435, affirmed 74 N.E.2d 69, 148 Ohio St. 153.
Pa.—In re Fisher, 23 A.2d 878, 344 Pa. 96.

Proper exercise of police power

U.S.—Western Union Telegraph Co. v. Industrial Commission of Minnesota, D.C.Minn., 24 F.Supp. 370.
Okl.—Associated Industries of Oklahoma v. Industrial Welfare Commission, 90 P.2d 899, 185 Okl. 177.
Utah.—McGrew v. Industrial Commission, 85 P.2d 608, 96 Utah 203.

70. Ark.—State v. Crowe, 197 S.W. 4, 130 Ark. 272, L.R.A.1918A 567, Ann.Cas.1918D 460.

"What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?"—West Coast Hotel Co. v. Parrish, Wash., 57 S.Ct. 578, 585, 300 U.S. 379, 81 L.Ed. 703, 108 A.L.R. 1330.

71. Cal.—People v. Johnson, 109 P. 2d 770, 42 Cal.App.2d Supp. 827.
Ky.—W. W. Mac Co. v. Teague, 180 S. W.2d 387, 297 Ky. 475.
Minn.—Tepel v. Sima, 7 N.W.2d 532, 213 Minn. 526.
N.Y.—People, on Information of Siegel v. Weingrad, 26 N.Y.S.2d 841.
Ohio.—Strain v. Southerton, 74 N.E. 2d 69, 148 Ohio St. 153.
Pa.—Petition of Fisher, Com.Pl., 51 Dauph.Co. 284, affirmed In re Fisher, 23 A.2d 878, 344 Pa. 96.
Utah.—McGrew v. Industrial Commission, 85 P.2d 608, 96 Utah 203.
39 C.J. p 224 note 36.

Regulations held valid

(1) The adoption of order, prohibiting employers from including female and minor restaurant employees' tips as part of their legal minimum wages fixed by such order, was within power and authority delegated to commission by statute authorizing it to fix wages of women and minor employees adequate to meet necessary cost of proper living and sustain their health and welfare.—California Drive-In Restaurant Ass'n v. Clark, 140 P.2d 657, 22 Cal. 2d 287, 147 A.L.R. 1028.

(2) Under the Minimum Wage Law a mandatory order forbidding the working of any woman or minor under eighteen years of age more than seven hours per day or forty-two and one-half hours per week or pay of less than sixteen dollars per week was not objectionable as failing to distinguish between minors and adults or between women and boys under eighteen years of age.—McGrew v. Industrial Commission, 85 P. 2d 608, 96 Utah 203.

72. Mich.—St. John v. General Motors Corporation, 13 N.W.2d 840, 308 Mich. 333—General Motors Corporation v. Read, 293 N.W. 751, 294 Mich. 558, 130 A.L.R. 429.

73. Ky.—Young v. Willis, 203 S.W. 2d 5, 305 Ky. 200.
N.Y.—People, on Information of Siegel v. Weingrad, 26 N.Y.S.2d 841.
Ohio.—Strain v. Southerton, 74 N. E.2d 69, 148 Ohio St. 153.
Okl.—Associated Industries of Oklahoma v. Industrial Welfare Commission, 90 P.2d 899, 185 Okl. 177.
Pa.—In re Fisher, 23 A.2d 878, 344 Pa. 96.
Utah.—McGrew v. Industrial Commission, 85 P.2d 608, 96 Utah 203.

74. N.Y.—People, on Information of Siegel v. Weingrad, 26 N.Y.S.2d 841.

75. N.Y.—Mary Lincoln Candies v. Department of Labor, 45 N.E.2d 434, 289 N.Y. 262, 143 A.L.R. 1078, motion denied 50 N.E.2d 99, 290 N. Y. 760.

76. Ill.—People v. Maggi, 33 N.E.2d 925, 310 Ill.App. 101, affirmed 39 N. E.2d 317, 378 Ill. 595.

77. Ill.—People v. Maggi, 39 N.E.2d 317, 378 Ill. 595.
Mich.—St. John v. General Motors Corporation, 13 N.W.2d 840, 308 Mich. 333.

"May" construed as "shall"

The word "may," as used in that part of the statute declaring what the administrative body or official "may" take into account, "may" be guided by, or "may" consider in establishing a minimum fair wage, should be interpreted as meaning "shall" in order to carry out the purposes of the statute.
Ohio.—Strain v. Southerton, 74 N.E. 2d 69, 148 Ohio St. 153.
Pa.—In re Fisher, 23 A.2d 878, 344 Pa. 96.

78. N.Y.—People, on Inf. of Shaffer, v. Curiale, 12 N.Y.S.2d 464, 171 Misc. 264.

of women and minors in their employment against exploitation and greed.[79] The term "minimum wage," as used in such a statute, means the least wage on which an ordinary individual can be self-sustaining and obtain the ordinary requirements of life;[80] and it has been said that minimum wage legislation does not contemplate the establishment of a wage scale for those who earn more than the minimum necessary for the preservation of health and morals.[81] The construction of administrative rules and regulations is governed by the usual rules applicable to the construction of statutes.[82]

Occupations or establishments within statutes. Except where the statute otherwise provides, all occupations in which women and children are employed come within the minimum wage provisions.[83] However, unless the statute so requires, it is not mandatory on the board or official or other administrative body to take jurisdiction of all employees in the state coming within the purview of the statute;[84] and the question whether or not a particular occupation or establishment comes within the statute or within an order or regulation of the commission or board is determined by the usual rules of construction.[85]

Persons within statute. In determining what persons are included within the protection of such statutes, it has been said that the statutes are designed to reach occupations which furnish the substantial livelihood to workers therein and consume their ordinary work period, and that they do not include workers who do some slight or intermittent daily or weekly service;[86] but the mere fact that a worker's service is periodic or recurrent rather than reg-

79. Ill.—People v. Maggi, 39 N.E.2d 317, 378 Ill. 595.
Mich.—St. John v. General Motors Corporation, 13 N.W.2d 840, 308 Mich. 333.

80. Okl.—Associated Industries of Oklahoma v. Industrial Welfare Commission, 90 P.2d 899, 185 Okl. 177.

81. Okl.—Associated Industries of Oklahoma v. Industrial Welfare Commission, supra.

82. Wash.—Ferber v. Wisen, 82 P. 2d 139, 195 Wash. 603.

Orders as to gratuities

(1) The statute requiring employers to post notices that gratuities given their employees by patrons go to employer and are not shared by employees or notices of extent to which such gratuities are shared between employers and employees did not impliedly annul commission's order prohibiting restaurant operators from including tips or gratuities received by their female and minor employees as part of legal minimum wages fixed by such order, as such statute and order were not irreconcilable, but entirely harmonious.—California Drive-In Restaurant Ass'n v. Clark, 140 P.2d 657, 22 Cal.2d 287, 147 A.L.R. 1028.

(2) An agreement between employer and employee that employee shall give employee's tips or parts thereof to employer is lawful contract and not in conflict with mandatory order of department of industrial relations, division of minimum wage, that tips or other gratuities shall not be considered wages.—Setree v. Falkner, Ohio App., 50 N.E.2d 412.

"Meal," as used in wage order, defined.—Greco v. Moosbrugger, Ohio App., 42 N.E.2d 211, 213.

83. Minn.—Tepel v. Sima, 7 N.W.2d 532, 213 Minn. 526.

84. N.D.—Pagel v. Trinity Hospital Ass'n, 6 N.W.2d 392, 72 N.D. 262.

85. Cal.—Hutchison v. Clark, 153 P. 2d 796, 67 Cal.App.2d 155.
Ill.—People v. Maggi, 33 N.E.2d 925, 310 Ill.App. 101, affirmed 39 N.E.2d 317, 378 Ill. 595.
Minn.—Tepel v. Sima, 7 N.W.2d 532, 213 Minn. 526.
N.D.—Pagel v. Trinity Hospital Ass'n, 6 N.W.2d 392, 72 N.D. 262.

Beauty culture operator

Order of commission promulgated under minimum wage law, which fixed minimum wage for "operators" in beauty culture industry and provided that beauty industry should include work ordinarily performed in "beauty parlors and similar establishments," was inapplicable to instructor in beauty school, even though she was qualified as an operator.—McDonald v. Goddard, 98 P. 2d 1074, 2 Wash.2d 553.

Laundry

A woman who performed all the duties of a laundry worker in establishment consisting of laundry and dry-cleaning departments operated by employer under the same roof but in separate rooms was "employed in a laundry," within statute providing that a woman thus employed shall receive compensation at double her regular rate of pay for work in excess of nine hours per day.—Campbell Cleaning & Dye Works v. Porter, Tex.Civ.App., 183 S.W.2d 253, error refused.

Public housekeeping establishment

(1) Hotels, restaurants, and inns are "public housekeeping establishments" within order fixing minimum weekly wages for women employees of such establishments, since the main purpose of such institutions is to furnish food, shelter and entertainment to guests.—Pagel v. Trinity Hospital Ass'n, 6 N.W.2d 392, 72 N. D. 262.

(2) A hospital is not a "public housekeeping establishment" within order fixing minimum weekly wages for women employees in such establishments, notwithstanding that hospital must serve food to its patients as an incident to their treatment, since the main purpose of a "hospital" is to care for and give medical attention to patients, and it is an institution in which the sick and injured are cared for, and not a place where people go for food and entertainment.—Pagel v. Trinity Hospital Ass'n, supra.

Restaurant

A drugstore soda fountain at which proprietor dispensed ice cream, sodas, soft drinks, cakes, and cookies, and packaged crackers and candy was not a "restaurant" covered by order promulgated under minimum wage law fixing minimum wages to be paid to minors engaged in establishments at occupations relating to the furnishing of food.—Greco v. Moosbrugger, Ohio App., 42 N.E.2d 211.

86. Minn.—Miller Tel. Co. v. Minimum Wage Commn., 177 N.W. 341, 145 Minn. 262.
Wash.—Sparks v. Moritz, 251 P. 583, 141 Wash. 417.

"In the application of the law, cases in the twilight zone between intermittent and regular employment may occasionally arise, and it may be that employers very near the dividing line will be acting under practically the same conditions as those on the other side of it; but we must look to general results and practical division and leave to the courts the duty of fairly and reasonably applying the distinction between intermittent and regular employment."—Tepel v. Sima, 7 N.W.2d 532, 537, 213 Minn. 526.

ular or constant does not exclude such worker, so long as the work is not also casual.[87] Such statute has been held applicable to all women without respect to their married or economic status;[88] it does not exclude a married woman living with, and partly supported by, her husband.[89] A constitutional provision for the establishment of minimum wages for women and minors has been held to contemplate the relationship of employer and employee,[90] and women who do not come within the category of employees in this sense cannot be included within the operation of a statute or administrative order adopted pursuant thereto.[91] Where the relationship between the parties is essentially that of master and servant, the master cannot escape the minimum wage requirements by designating the relationship a partnership.[92]

c. Functions, Authority, and Decisions of Commission

The functions of a commission authorized to fix minimum wage rates for women and minors pursuant to statute have been held administrative rather than judicial or legislative; and the nature and extent of its duties and authority, as well as the operation and effect of its decisions, depend on the particular statute involved.

A minimum wage commission under a statute providing for the establishment of minimum wages for women and minors has been held to be an administrative body to which neither legislative nor judicial powers are delegated.[93] Where the statute so provides, it is the commission's duty to investigate and ascertain the wages being paid to women and minors in the various occupations and, wherever necessary, to fix a minimum wage adequate to meet the statutory requirements;[94] but the commission has no arbitrary discretion or the power to make arbitrary discriminations, imposing minimum wages and other regulations on some industries and occupations and omitting them from others, according to the dictates of whim or caprice.[95] Where the administrative body is authorized to fix a minimum wage sufficient to meet the cost of living and maintain health, the fact that such minimum is not to be measured strictly by the amount or value of the services rendered does not give such body unlimited authority; its order must be reasonably fit for the enforcement of the policy of the statute under the circumstances of the particular employment.[96] Where the statute does not prescribe the unit of time for which the minimum wage shall be fixed, it has been held proper to fix a weekly minimum wage;[97] and the fact that an order fixing such a wage rate in effect "guarantees" every worker who begins the week the weekly minimum wage does not invalidate it.[98]

87. Minn.—Tepel v. Sima, supra.

Hourly rate for part-time worker

An order providing minimum hourly wage for work performed during week by women or minor apartment house employees employed for less than forty-eight hours during any one week, contemplates an intermittent, and not a full-time, employment, such as one where a woman is hired to work for fewer hours than eight each day and for fewer hours than forty-eight each week and where, after such services have been performed, her time is her own and she thereafter owes no further duty to her employer.—Evans v. Hartmann, 105 P.2d 717, 5 Wash.2d 434.

88. Minn.—Tepel v. Sima, 7 N.W.2d 532, 213 Minn. 526.

89. Minn.—Tepel v. Sima, supra.

90. Cal.—Hutchison v. Clark, 153 P. 2d 796, 67 Cal.App.2d 155.

91. Cal.—Hutchison v. Clark, supra.

92. N.Y.—People, on Inf. of Shaffer v. Curiale, 12 N.Y.S.2d 464, 171 Misc. 264.

93. Minn.—Miller Tel. Co. v. Minimum Wage Commn., 177 N.W. 341, 145 Minn. 262.

94. Cal.—People v. Johnson, 109 P. 2d 770, 42 Cal.App.2d Supp. 827.
Minn.—Martin v. Wolfson, 16 N.W.2d 884, 218 Minn. 557.
N.Y.—People, on Information of Siegel v. Weingrad, 26 N.Y.S.2d 841.

Employer's duty respecting records

The provision relating to the employer's duty respecting records of wages paid was enacted in order that commission might determine conditions in establishments employing women and minors.—People, on Inf. of Shaffer v. Curiale, 12 N.Y.S.2d 464, 171 Misc. 264.

Power to provide safeguards

The commission's power to provide safeguards to insure employees' receipt of their minimum wages and prevent evasion and subterfuge is "implied power" flowing from power delegated to commission by statute to fix minimum wages.—California Drive-In Restaurant Ass'n v. Clark, 140 P.2d 657, 22 Cal.2d 287, 147 A.L. R. 1028.

95. Cal.—People v. Johnson, 109 P. 2d 770, 142 Cal.App.2d Supp. 827.

96. N.Y.—Mary Lincoln Candies v. Department of Labor, 45 N.E.2d 434, 289 N.Y. 262, 143 A.L.R. 1078, motion denied 50 N.E.2d 99, 290 N. Y. 760.
Ohio.—Strain v. Southerton, 62 N.E. 2d 633, 75 Ohio App. 435, affirmed 74 N.E.2d 69, 148 Ohio St. 153.

Order held reasonable

Wage order requiring payment of minimum of ten dollars to any minor employee of either sex, or any adult female employee, who works three days or less in any week during peak period in confectionery industry and a minimum of seven dollars a week to any such employee who works two days or less in any week during the dull period in that industry is reasonable and is authorized by statute relating to minimum wages for women and minors.—Mary Lincoln Candies v. Department of Labor, 45 N. E.2d 434, 289 N.Y. 262, 143 A.L.R. 1078, motion denied 50 N.E.2d 99, 290 N.Y. 760.

97. N.Y.—Hutchins v. Department of Labor of New York, 18 N.Y.S.2d 656, 173 Misc. 924, appeal dismissed 47 N.Y.S.2d 615.

98. N.Y.—Mary Lincoln Candies v. Department of Labor, 45 N.E.2d 434, 289 N.Y. 262, 143 A.L.R. 1078, motion denied 50 N.E.2d 99, 290 N. Y. 760.

Reason for rule

"In a sense the order does fix a guaranteed wage since its enforcement would necessarily result in a situation where every worker who began work at the beginning of any week . . . would be 'guaranteed' a minimum week's pay. . . . But a minimum hourly or daily wage would have the same effect for those periods, respectively, since a mini-

Although a statute authorizing an industrial commission to fix a minimum wage intends a separate investigation and determination for women and minors,[99] it does not follow that the minimum wage for each must be different, and an order thereunder is not invalid because it fixes the same minimum wage for both.[1] Such statutes have been held to intend that the minimum rate shall be based on the nature of the particular occupation and not to authorize a blanket minimum for women or minors, operative on all, without regard to wage conditions in the different occupations,[2] and, where the act contemplates that, because of differences in living costs, the minimum may not be uniform throughout the state, an order is not invalid because it makes a distinction between cities based on the number of inhabitants.[3] Nevertheless, the commission may investigate all occupations together and make one order applying to "each and every occupation," provided the conditions warranting the fixing of a minimum wage in each such occupation are found to exist.[4] An order of the commission is not invalid because it fixes a different minimum for successive periods of service during the period of learning or apprenticeship;[5] nor does the fact that an order fixing minimum wages does not specifically prescribe the period during which employees might be treated as "learners" or "apprentices" render such order void.[6]

In order to make the commission's order effective, fundamental procedural requirements must be observed.[7] Thus, there must be a full and public hearing,[8] and a substantial compliance with mandatory statutory provisions requiring notice of hearings.[9] There must be proper evidence to support the findings of fact;[10] and, at least under some statutes, there must be findings embracing the facts needed to sustain the order,[11] although it has been held that a minimum wage order is neither void nor voidable because unsupported by formal recitals or findings of fact, in the absence of such a requirement in the statute.[12] There must be substantial compliance with a statutory provision requiring that a copy of the order of the commission be mailed to each employer affected as far as it is practicable.[13]

Review of decisions. In a review of the orders of the commission the court is limited to a review of such as are made without jurisdiction, or under a mistake in the interpretation of the law, or which are so arbitrary or unreasonable as to deprive one

mum wage fixed by the day would guarantee the worker a day's wage for every day in which he worked at all—likewise as to an hourly minimum. . . . In this sense, every minimum wage is a 'guaranteed' wage for some period of time and to say that this makes the wage statute or wage order invalid, would be to say that all minimum wage legislation is invalid."—Hutchins v. Department of Labor of New York, 18 N.Y.S.2d 656, 658, 173 Misc. 924, appeal dismissed 47 N.Y.S.2d 615.

99. Minn.—Miller Tel. Co. v. Minimum Wage Commn., 177 N.W. 341, 145 Minn. 262.
Wash.—Spokane Hotel Co. v. Younger, 194 P. 595, 113 Wash. 359.

1. Minn.—Miller Tel. Co. v. Minimum Wage Commn., 177 N.W. 341, 145 Minn. 262.

2. Cal.—People v. Johnson, 109 P.2d 770, 142 Cal.App.2d Supp. 827.
Minn.—Martin v. Wolfson, 16 N.W. 2d 884, 218 Minn. 557—Tepel v. Sima, 7 N.W.2d 532, 213 Minn. 526—Miller Tel. Co. v. Minimum Wage Commn., 177 N.W. 341, 145 Minn. 262.

3. Minn.—Miller Tel. Co. v. Minimum Wage Commn., supra.

4. Minn.—Tepel v. Sima, 7 N.W.2d 532, 213 Minn. 526.

Presumption
The fact that commission in promulgating minimum wage order relating to women did not investigate any particular occupation, but made a blanket investigation of all occupations, did not invalidate order, in view of presumption of existence of facts justifying specific exercise of authority by an administrative tribunal.—Martin v. Wolfson, 16 N.W.2d 884, 218 Minn. 557.

5. Minn.—Williams v. Evans, 165 N. W. 495, 139 Minn. 32, L.R.A.1918F 542, rehearing denied 166 N.W. 504, 139 Minn. 32, L.R.A.1918F 542.

6. Minn.—Miller Tel. Co. v. Minimum Wage Commn., 177 N.W. 341, 145 Minn. 262.

7. Utah.—McGrew v. Industrial Commission, 85 P.2d 608, 96 Utah 203.

8. Utah.—McGrew v. Industrial Commission, supra.

9. Cal.—People v. Johnson, 109 P.2d 770, 42 Cal.App.2d Supp. 827.

Publication
Statute authorizing fixing by commission of minimum wages for women and minors employed in industry, providing that notice of hearing by commission shall be given by advertisement in at least one newspaper published in specified cities in the state, impliedly required that purpose of the hearing should be stated in the notice.—People v. Johnson, supra.

Certainty of notice
Notice that purpose of hearing by commission was to rescind, amend, or alter orders relating to "unclassified occupations" and that minimum wages paid to women and minors would be considered was too vague and uncertain to support any hearing or order, since "unclassified" merely means not classified and "classified" means grouped in classes, and the term "unclassified occupations" standing alone would have little, if any, significance as a means of giving notice.—People v. Johnson, supra.

10. Utah.—McGrew v. Industrial Commission, 85 P.2d 608, 96 Utah 203.

11. Utah.—McGrew v. Industrial Commission, supra.

12. Minn.—Martin v. Wolfson, 16 N. W.2d 884, 218 Minn. 557.

Necessity of finding on face of order
Where trial court found that every act required by statute to be done by commission in promulgation and adoption of order was done within time and in manner and form required by statute, fact that no finding by commission that wages fixed were adequate to meet costs of proper living, as specified in statute, appeared on face of order did not invalidate it.—California Drive-In Restaurant Ass'n v. Clark, 140 P.2d 657, 22 Cal.2d 287, 147 A.L.R. 1028.

13. Minn.—State v. Allyn, 184 N.W. 787, 150 Minn. 123.

of the guaranteed protection of his property rights.[14] A determination by the commission or board within the limits of its authority and duly arrived at on substantial compliance with procedural requirements and sufficiently supported by the evidence will not be disturbed on appeal.[15] Such an order cannot be collaterally attacked except on jurisdictional or constitutional grounds.[16]

d. Effect of Violation

Violations of minimum wage requirements are, under some statutes, punishable as misdemeanors; a violation of such requirements may give rise to a cause of action for damages or for the difference between the amount paid and the amount that should have been paid.

The statutes in a number of jurisdictions denounce violations of minimum wage requirements as to women and minors as misdemeanors.[17] Such statutes have been held valid;[18] and their construction and operation are governed by the usual rules applicable to criminal statutes.[19] Under a statute penalizing discrimination against women employees, it has been held that women who have suffered financial damage by reason of such discrimination may maintain an action at law to recover such damages;[20] and some statutes expressly authorize a recovery in a civil action of the full amount of the minimum wage less any amounts actually paid, together with costs and reasonable attorney's fees,[21] notwithstanding the employee's agreement to work for less than the minimum wage.[22]

§ 153. Public Employees; Employees on Public Works

a. Under state laws

b. Under federal statutes

a. Under State Laws

(1) In general

(2) Operation and effect generally

(3) Determination of prevailing rate

(4) Remedies

(1) In General

Statutes providing that public employees or employees on public works shall be paid no less than a stated minimum or no less than the prevailing rate for similar work are generally held valid, and, except for penal provisions therein, should be liberally construed.

In a number of jurisdictions, under statutory provisions to such effect, designated classes of public employees or of employees engaged on public works are required to be paid at a rate not less than a stated or ascertainable minimum or not less than the prevailing rate for similar work in the same locality.[23] While particular statutes of this character have been held invalid for various reasons,[24] it is generally held that such statutes are valid as being

14. Minn.—Miller Tel. Co. v. Minimum Wage Commn., 177 N.W. 341, 145 Minn. 262.

Record on appeal

Pa.—Petition of Fisher, 44 Pa.Dist. & Co. 152, 52 Dauph.Co. 38.

Remand to board for further consideration.—Mary Lincoln Candies v. Department of Labor, 23 N.Y.S.2d 626, 175 Misc. 399, affirmed 34 N.Y.S. 2d 335, 263 App.Div. 1058, reversed on other grounds 45 N.E.2d 434, 289 N.Y. 262, 143 A.L.R. 1078, motion denied 50 N.E.2d 99, 290 N.Y. 760.

15. N.Y.—A. W. A. Pharmacy v. Miller, 59 N.Y.S.2d 495, 270 App. Div. 783.

16. Minn.—Martin v. Wolfson, 16 N. W.2d 884, 218 Minn. 557.

17. Mich.—St. John v. General Motors Corporation, 13 N.W.2d 840, 308 Mich. 333—General Motors Corporation v. Read, 293 N.W. 751, 294 Mich. 558, 130 A.L.R. 429.

N.Y.—People, on Information of Siegel v. Weingrad, 26 N.Y.S.2d 841.

18. Mich.—General Motors Corporation v. Read, 293 N.W. 751, 294 Mich. 558, 130 A.L.R. 429.

N.Y.—People, on Information of Siegiel v. Weingrad, 26 N.Y.S.2d 841.

Purpose of statute

The act penalizing the discrimination in wage rates between men and women under specified conditions seeks to prevent exploitation of women workers and adopts a reasonable means to do so.—General Motors Corporation v. Read, 293 N.W. 751, 294 Mich. 558, 130 A.L.R. 429.

19. Mich.—General Motors Corporation v. Read, 293 N.W. 751, 294 Mich. 558, 130 A.L.R. 429.

20. Mich.—St. John v. General Motors Corporation, 13 N.W.2d 840, 308 Mich. 333.

21. N.D.—Wiseth v. Traill County Telephone Co., 5 N.W.2d 307, 72 N. D. 165.

Provision held valid

Ky.—W. W. Mac Co. v. Teague, 180 S.W.2d 387, 297 Ky. 475.

22. N.D.—Wiseth v. Traill County Telephone Co., 5 N.W.2d 307, 72 N. D. 165.

23. Ariz.—City of Phœnix v. Kidd, 92 P.2d 513, 54 Ariz. 75, reheard 94 P.2d 428, 54 Ariz. 123, followed in City of Phœnix v. Price, 94 P.2d 433, 54 Ariz. 137, City of Phœnix v. Enriquez, 94 P.2d 434, 54 Ariz. 138, and City of Phœnix v. Wilson, 94 P.2d 434, 54 Ariz. 139.

Cal.—Shalz v. Union School Dist., 137 P.2d 762, 58 Cal.App.2d 599.

Colo.—Industrial Commission v. State Federation of Labor, 110 P.2d 253, 107 Colo. 206.

Ill.—People ex rel. Hollie v. Chicago Park Dist., 16 N.E.2d 161, 296 Ill. App. 365.

Iowa.—Young v. Sioux City, 10 N.W. 2d 62, 233 Iowa 678.

Kan.—State v. Blaser, 26 P.2d 593, 138 Kan. 447.

Md.—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.

N.J.—In re Rate of Wages on Sewage Disposal Plant at Princeton, 160 A. 408, 10 N.J.Misc. 603.

Tex.—McGuire v. City of Dallas, 170 S.W.2d 722, 141 Tex. 170—Southern Prison Co. v. Rennels, Civ.App., 110 S.W.2d 606, error dismissed.

43 C.J. p 906 note 72.

24. U.S.—Connally v. General Const. Co., Okl., 46 S.Ct. 126, 269 U.S. 385, 70 L.Ed. 322.

Ill.—Reid v. Smith, 30 N.E.2d 908, 375 Ill. 147, 132 A.L.R. 1286.

12 C.J. p 927 note 82.

Arbitrary price

The legislature is without power to require counties, cities, and towns to pay an arbitrary price for labor.—Love v. City of Dallas, 40 S.W.2d 20, 120 Tex. 351.

within the power of the state to prescribe the conditions under which it will permit work to be done in behalf of itself or any of its subdivisions.[25] Such statutes are meant not only to establish individual private rights in favor of the employees embraced by their provisions, but also to declare and carry into effect a matter of public policy;[26] they must, therefore, tend reasonably to advance the public interest.[27] The legislature may be expressly empowered by constitutional provision to regulate the wages of employees of the state or any civil division thereof, or of any contractor or subcontractor performing work for the state or a civil division thereof.[28]

In like manner, a municipality may, under the authority of its charter, fix the minimum rate of wages to be paid to laborers employed by the city or contractors on city work,[29] but it may not do so where no authority is granted in the charter.[30] Although the power of a city council to fix the minimum rate of wages to be paid by it or its contractors to laborers is subject to the implied duties to keep within the bounds of what is reasonable and proper,[31] it has been held that ordinances to enforce such a provision are valid, even if such wages are unreasonable.[32] The fact that a municipal corporation has power to fix the compensation of its officers and employees does not relieve it of the duty of complying with the limitation of minimum wage statutes or constitutional provisions.[33]

It has been held that minimum wage provisions should be liberally construed to attain the end in view,[34] and the meaning of terms used therein should be determined from the context and the

25. Ariz.—State v. Anklam, 31 P.2d 888, 43 Ariz. 362.
Md.—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.
N.Y.—Campbell v. City of New York, 155 N.E. 628, 244 N.Y. 317, 50 A.L.R. 1473—Morse v. Delaney, 155 N.E. 628, 244 N.Y. 317, 50 A.L.R. 1473—Long Island R. Co. v. Department of Labor of State of New York, 247 N.Y.S. 278, 138 Misc. 612, affirmed 177 N.E. 17, 256 N.Y. 498.
43 C.J. p 906 note 73.

In elimination of grade crossings
Provision regulating wages of laborers employed by railroad in eliminating railroad grade crossings for cost of which state or its divisions is proportionately liable is valid.—Long Island R. Co. v. Department of Labor of State of New York, 177 N.E. 17, 256 N.Y. 498.

Policemen's Minimum Wage Act held not invalid.—Littell v. City of Peoria, 29 N.E.2d 533, 374 Ill. 344.

Firemen's minimum wage acts held not invalid.
Ill.—People ex rel. Gramlich v. City of Peoria, 29 N.E.2d 539, 374 Ill. 313—People v. City of Springfield, 19 N.E.2d 598, 370 Ill. 541.
Tex.—McGuire v. City of Dallas, 170 S.W.2d 722, 141 Tex. 170—City of Fort Worth v. Morrison, Civ.App., 164 S.W.2d 771, error refused.

26. Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837.
N.Y.—Long Island R. Co. v. Department of Labor of State of New York, 177 N.E. 17, 256 N.Y. 498—Campbell v. City of New York, 155 N.E. 628, 244 N.Y. 317, 50 A.L.R. 1473—Morse v. Delaney, 155 N.E. 628, 244 N.Y. 317, 50 A.L.R. 1473—Devitt v. Haglin Co., 289 N.Y.S. 626, 248 App.Div. 298, affirmed 8 N.E.2d 481, 274 N.Y. 188, 112 A.L.R. 809.

Purpose and intent
(1) The intent of statute requiring employers to pay to employees employed on public work prevailing rate of wages as determined by body awarding the contract is the recovery of penalty by way of indemnity to the public by reason of violation of the statute, and to charge employer with pecuniary liability, and not to punish employer.—Shalz v. Union School Dist., 137 P.2d 762, 58 Cal.App.2d 599.

(2) The statute was intended for the benefit of the laborers as well as for the indirect benefit of the public agency involved.—Fata v. S. A. Healy Co., 46 N.E.2d 339, 289 N.Y. 401, 144 A.L.R. 1031.

(3) The purpose of the statute is to protect labor, in its hours of employment, and its wages and shows legislative intention to give power to do all acts in furtherance of the purposes of which statute was enacted.—Carder Realty Corporation v. State, 15 N.Y.S.2d 604, 172 Misc. 498, reversed on other grounds 23 N.Y.S.2d 395, 260 App.Div. 459, affirmed 35 N.E.2d 194, 285 N.Y. 803, motion denied 35 N.E.2d 941, 286 N.Y. 604.

(4) Other statements of purpose and intent of particular statutes.
Ill.—Patteson v. City of Peoria, 54 N.E.2d 445, 386 Ill. 460—George v. City of Danville, 42 N.E.2d 300, 315 Ill.App. 17, affirmed 50 N.E.2d 467, 383 Ill. 454.
Tex.—McGuire v. City of Dallas, 170 S.W.2d 722, 141 Tex. 170—Southern Prison Co. v. Rennels, Civ.App., 110 S.W.2d 606, error dismissed.

27. N.Y.—Long Island R. Co. v. Department of Labor of State of New York, 177 N.E. 17, 256 N.Y. 498.

28. N.Y.—Long Island R. Co. v. Department of Labor of State of New York, supra.

Grade crossing elimination
Railroads in changing highway grade at command of state were not state's agents within constitutional provision authorizing legislature to regulate wages of employees of civil divisions of state.—Long Island R. Co. v. Department of Labor of State of New York, supra.

29. Wis.—Wagner v. Milwaukee, 188 N.W. 487, 177 Wis. 410.
39 C.J. p 225 note 49.

Charter provision construed
City charter providing that public contract shall require that labor thereunder be paid not less than highest general prevailing rate manifested intention to prohibit payment of wages on contract less than prevailing rate and not to prohibit payment of more than such rate.—Hague v. Cleary, Cal., 48 P.2d 5.

Ordinance held valid as within authority granted by charter.—Hague v. Cleary, supra.

30. Md.—Harlan v. Employers' Ass'n of Maryland, 159 A. 267, 162 Md. 124, 81 A.L.R. 342.

31. Wash.—Malette v. Spokane, 137 P. 496, 77 Wash. 205, 51 L.R.A.,N.S., 686, Ann.Cas.1915D 225.
39 C.J. p 225 note 51.

32. Wash.—Jahn v. Seattle, 207 P. 667, 120 Wash. 403.

33. Ill.—Kohler v. City of Kewanee, 53 N.E.2d 479, 321 Ill.App. 479.

34. Ariz.—City of Glendale v. Dixon, 75 P.2d 683, 51 Ariz. 206.
N.Y.—Austin v. City of New York, 179 N.E. 313, 258 N.Y. 113.
"The purpose and intent of the statute is plain and its object should not be defeated by overnice construction."—Schalz v. Union School Dist., 137 P.2d 762, 766, 58 Cal.App.2d 599.

Favorable to claimant
In case of ambiguity in statutory language, that construction should

meanings generally attached to them.[35] However, such a statute should not be extended beyond its ordinary intendment,[36] and a penal provision therein should be strictly construed.[37]

Compensation of public employees apart from minimum wage provisions is discussed in Counties §§ 109–122; in the C.J.S. title Municipal Corporations §§ 720–729, also 43 C.J. p 902 note 24–p 908 note 43; in the C.J.S. title States §§ 88–99, also 59 C.J. p 152 note 97–p 161 note 14; and in the C.J.S. title United States §§ 43–48, also 65 C.J. p 1278 note 7–p 1284 note 13.

(2) Operation and Effect Generally

The operation and effect of minimum wage provisions affecting public employees depend on their terms and language; such provisions generally include public employees and employees of contractors doing public work.

The operation and effect of minimum wage provisions affecting public employees or employees on public works depend on the terms of the particular constitutional or statutory provision involved and the language employed therein,[38] and contractual provisions in contravention of the statute are void.[39] Although the statute imposes good faith and diligence on the contractor to see that the directions and purposes of the act are carried out, it does not make a contractor guarantee against every possible accidental and unintentional violation,[40]

be adopted which would be most favorable to parties seeking to obtain from city the wage rate which the statute calls for.—McKibbin v. City of New York, 51 N.Y.S.2d 50, 182 Misc. 671, affirmed 53 N.Y.S.2d 474, 269 App.Div. 696, affirmed 64 N.E.2d 288, 295 N.Y. 592.

The remedial or procedural provisions of statute under which laborers on public works must be paid not less than prevailing rate of wages will not be restricted within limits narrower than the affirmative rights and obligations which may be conveniently enforced through their application.—Heaney v. McGoldrick, 35 N.E.2d 641, 286 N.Y. 38.

35. Ariz.—State v. Miser, 72 P.2d 408, 50 Ariz. 244.
Iowa.—Young v. Sioux City, 10 N.W. 2d 62, 233 Iowa 678.
N.Y.—Austin v. City of New York, 179 N.E. 313, 258 N.Y. 113.

In "accord" with prevailing rates

A city charter provision that compensation of employees should be "in accord" with prevailing wages for like service in private employment or other comparable governmental organizations does not require that compensation be identical with, or not higher than, generally prevailing rates but that there be a reasonable or just correspondence between the rates established and those elsewhere prevailing.—City and County of San Francisco v. Boyd, 140 P.2d 666, 22 Cal.2d 685.

36. Ohio.—Clymer v. Zane, 191 N.E. 123, 128 Ohio St. 359, 93 A.L.R. 1245.

37. Ohio.—Clymer v. Zane, supra.

38. Iowa.—Young v. Sioux City, 10 N.W.2d 62, 233 Iowa 678.
N.Y.—Morse v. Delaney, 218 N.Y.S. 571, 128 Misc. 317, affirmed 219 N.Y.S. 867, 218 App.Div. 826, affirmed 155 N.E. 628, 244 N.Y. 317, 50 A.L.R. 1473.

Contracts included

(1) As respects the question whether a contract is one for "labor" so as to come within a provision requiring the payment of not less than the prevailing rate of wages to employees engaged in the performance of a contract for labor on a public work, if the contract is for the manufacture of goods or wares for a purchaser on his special order and not for the general market, it is a "contract for labor," while, if the contract is for the manufacture of goods or wares suitable for general trade or contains a stipulation by the manufacturer for future sale of articles which he is habitually making, it is "contract of sale."—Hague v. Cleary, Cal., 48 P.2d 5.

(2) A charter provision requiring minimum wages on contracts for public works was applicable only to a contract for work which was let pursuant to a resolution calling for bids, and was not applicable to a contract of city with several contiguous cities to conduct a joint survey of sewage problem, by term of which another city was to become sponsor of proposed survey.—City of Oakland v. Williams, 103 P.2d 168, 15 Cal.2d 542.

What constitutes "wages"

(1) Contributions of the city to the pension fund for the benefit of an employee are not ordinarily considered part of the wages paid him in determining whether such employee had been paid less than the minimum wage.
N.Y.—Hoof v. McGoldrick, 66 N.E.2d 60, 295 N.Y. 214—Giannettino v. McGoldrick, 66 N.E.2d 57, 295 N.Y. 208.
Contra Application of Watson, 20 N.Y.S.2d 707, 260 App.Div. 77, modified on other grounds 35 N.E.2d 645, 286 N.Y. 47.
Tex.—McGuire v. City of Dallas, 170 S.W.2d 722, 141 Tex. 170.

(2) Neither is pay for vacation time to be considered part of the wages for time during which the employee worked.—Hoof v. McGoldrick, 66 N.E.2d 60, 295 N.Y. 214—Giannettino v. McGoldrick, 66 N.E.2d 57, 295 N.Y. 208.
Contra Application of Watson, 20 N.Y.S.2d 707, 260 App.Div. 77, modified on other grounds 35 N.E.2d 645, 286 N.Y. 47.

(3) However, it has been held that an annual cash clothing allowance made by city to firemen was part of "compensation" of firemen within meaning of minimum wage law.—McGuire v. City of Dallas, 170 S.W.2d 722, 141 Tex. 170.

Grade crossings

Statute regulating wages on all work of every kind on "elimination of railroad grade crossings" is applicable to alterations in existing bridges or approaches, where there is no existing crossing at grade.—Erie R. Co. v. Department of Labor of State of New York, 251 N.Y.S. 581, 233 App. Div. 35.

Effect of other statutes

Statute fixing minimum wages on public works generally was held not impliedly repealed by subsequent statute limited to laborers or mechanics in construction, alteration, or repair of public building where contract price exceeds one thousand dollars.—State v. Jaastad, 32 P.2d 799, 43 Ariz. 458.

39. Ariz.—City of Glendale v. Dixon, 75 P.2d 683, 51 Ariz. 206.
Cal.—Shalz v. Union School Dist., 137 P.2d 762, 58 Cal.App.2d 599.
Wash.—Malcolm v. Yakima County Consol. School Dist. No. 90, 159 P. 2d 394, 23 Wash.2d 80.

Deductions

(1) Employees employed on public work and paid prevailing wage as required by law may agree with contractor for proper and reasonable deductions from pay for lodging and transportation furnished by contractor.—Shalz v. Union School Dist., 137 P.2d 762, 58 Cal.App.2d 599.

(2) Deductions from wages generally see infra § 159.

40. Kan.—State v. Midwest Constr. Co., 162 P. 1175, 99 Kan. 838.

and such a statute does not require a contractor to employ exclusively journeymen workmen, the statute being complied with where the contractor pays the prevailing rate for the particular class of labor actually employed.[41]

Employees and employments included. A provision for the payment of minimum wages to public employees extends to all employees who come within its terms.[42] Such statutes have been held applicable to municipal,[43] state,[44] and county[45] employees; and constitutional and statutory provisions, not expressly applicable to public employees but requiring the payment of no less than the prevailing rate to laborers, workmen, or mechanics in the employ of contractors engaged in performing public works have been held applicable to municipal[46] employees and the same principle also ap-

N.Y.—People v. Zimmerman, 109 N.Y.S. 396, 58 Misc. 264.

41. N.Y.—People v. Zimmerman, supra.

42. **Manual or mechanical labor**

(1) The statute prescribing a minimum wage scale for persons doing "manual or mechanical labor" for, or in behalf of, the state or its subdivisions applies to a person doing the work of a mechanic or manual laborer in the usually accepted sense of these words, and will, therefore, normally apply to a laborer whose tenure is so limited in duration that he is usually paid wages by the day rather than salary by the month or year, and whose total annual compensation is generally uncertain or fluctuating.—State v. Angle, 91 P.2d 705, 54 Ariz. 13—State v. Ash, 87 P.2d 270, 53 Ariz. 197.

(2) Accordingly, prison guards and prison matron whose duty was to watch inmates of prison to keep them from escaping, and whose compensation was fixed on annual basis for many years by the Legislature, were held not engaged in "mechanical" or "manual" labor with protection of minimum wage law.—State v. Ash, supra.

(3) However, this does not mean that such a minimum wage law does not apply to employees whose occupation is, within the generally accepted sense of the words, truly mechanical or manual labor, merely because it may happen that for some reason or another their compensation may have been fixed on an annual or monthly basis rather than a per diem.—State v. Angle, supra—State v. Ash, supra.

"Laborer employed on public work"

"Laborer," as used in city charter provision fixing minimum wages for all "laborers employed on public or municipal works" and for "all labor performed by a man and team," refers to one ordinarily engaged in construction work, or what is commonly designated as public works falling within the department of improvement of parks; hence one employed as a "houseman" at a hospital owned and operated by a city was not a "laborer employed on public or municipal work."—Carter v. City and County of Denver, 160 P.2d 991, 114 Colo. 33.

43. Colo.—Carter v. City and County of Denver, supra.
Iowa.—Young v. Sioux City, 10 N.W.2d 62, 233 Iowa 678.
43 C.J. p 906 note 75.

Self-governing cities

Ariz.—City of Phœnix v. Drinkwater, 52 P.2d 1175, 46 Ariz. 470—State v. Jaastad, 32 P.2d 799, 43 Ariz. 458.

Policemen

(1) Under the Policemen's Minimum Salaries Act, the chief of police and all patrolmen, including those who are only de facto officers of the city, are within the provisions of the statute.—Kohler v. City of Kewanee, 53 N.E.2d 479, 321 Ill.App. 479.

(2) Where plaintiffs were appointed to police department of city and completed one year's duty as regularly employed patrolmen, they became "policemen" within contemplation of Policemen's Minimum Wage Act immediately upon appointment and were then entitled to receive minimum wages, since Policemen's Minimum Wage Act applies to any member of a regularly constituted police department of a city commissioned to perform police duties, including patrolmen.—Morgan v. City of Rockford, 31 N.E.2d 596, 375 Ill. 326.

(3) Policewomen, police matrons, and clerks of identification bureau are within the protection of the Policemen's Minimum Wage Act.—Patteson v. City of Peoria, 54 N.E.2d 445, 386 Ill. 460.

Firemen

Under the Firemen's Minimum Salaries Act, the chief of the fire department and all firemen, including those who are only de facto officers of the city, are within the provisions of the statute.—Kohler v. City of Kewanee, 53 N.E.2d 479, 321 Ill.App. 479.

Discharged employees

Ordinances purporting to discharge firemen and policemen did not affect rights of plaintiffs suing to recover differences between pay received and pay fixed by Minimum Salaries Act for firemen and policemen, where no plaintiff was ever notified that he was discharged and each plaintiff was continued in his employment as regular member of department without interruption or change in compensation.—Kohler v. City of Kewanee, supra.

44. Tex.—Scott v. Vilbig Const. Co., Civ.App., 140 S.W.2d 874.

The state university, although incorporated and controlled by board of regents having statutory power to fix salaries, comes within term "state" as used in Minimum Wage Law and is subject to law under provision that stated wages shall be paid to persons doing manual or mechanical labor employed by or on behalf of the state or any of its political subdivisions, since university's separate existence is not so independent that legislature could not restrict its use of appropriated funds by requiring university to pay minimum wage to employees coming within law.—State v. Miser, 72 P.2d 408, 50 Ariz. 244.

45. Ariz.—State v. Miser, supra.
Tex.—Southern Prison Co. v. Rennels, Civ.App., 110 S.W.2d 606, error dismissed.

46. N.Y.—Gaston v. Taylor, 9 N.E.2d 9, 274 N.Y. 359—Application of Watson, 20 N.Y.S.2d 707, 260 App.Div. 77, modified on other grounds 35 N.E.2d 645, 286 N.Y. 47—Cirillo v. City of New York, 10 N.Y.S.2d 472, 170 Misc. 230, affirmed 19 N.Y.S.2d 151, 259 App.Div. 717, reargument denied 20 N.Y.S.2d 402, 259 App.Div. 875, affirmed 39 N.E.2d 273, 287 N.Y. 641—Maystrik v. City of New York, 300 N.Y.S. 479, 165 Misc. 327—Kaufman v. City of New York, 61 N.Y.S.2d 779.
43 C.J. p 906 note 75.

Particular employees included

(1) A pipe caulker in the department of water supply, gas, and electricity of the city of New York is within the provision.—Walsh v. New York City Employees' Retirement System, 8 N.E.2d 875, 274 N.Y. 319.

(2) Ungraded civil service manual workers engaged in maintenance work on independent city-owned subway system were employed on "public works" entitling them to invoke the statute.—Gaston v. Taylor, 9 N.E.2d 9, 274 N.Y. 359.

(3) A foreman of a city's gang of bridgemen and riveters was a "laborer, workman, or mechanic" within the meaning of the statute in view of the conditions of his job.—Austin

plies to state[47] employees having the title or falling within the category of "workmen, laborers, or mechanics," as well as to employees of independent contractors performing work for the state or its subdivisions.[48] Employees of independent contractors doing public work are of course within the statute where the statute expressly provides that they shall be deemed to be employed by, or on behalf of, the state or its political subdivisions.[49] It has been held that a statute governing the minimum wages to be paid employees of a contractor engaged on a public work is not applicable to an employee engaged in a private enterprise of a contractor in charge of a public work, where the two enterprises are separate in time and space.[50]

In order to invoke the protection of a statute prescribing a minimum wage scale for public employees, a claimant must have performed services or labor under authority of law.[51]

Classification of employees or employments. An employee is entitled to the minimum wage applicable to the class of employees to which he belongs and no more;[52] and he cannot compel a reclassification placing him in a category of workers into which, from the nature of his duties and conditions of his job, he does not properly fall.[53] Similarly, a person employed in one capacity cannot recover the minimum wage payable to persons employed in another capacity constituting a different category of civil servant,[54] even though he happens to perform the same duties as those performed by employees of other classes for which he has not qualified.[55]

(3) Determination of Prevailing Rate

(a) In general

(b) Effect of determination

v. City of New York, 179 N.E. 313, 258 N.Y. 113.

Particular employees excluded

(1) A person holding under a yearly employment at a fixed salary and furnished with board and lodging, without charge, by the municipality is not within the statute.—Bock v. City of New York, 63 N.Y.S. 825, 64 N.Y.S. 777, 31 Misc. 55.

(2) A person, such as a wireman in a fire alarm bureau, who is employed to respond to calls for service rather than to work regular hours is not within the statute.—McNulty v. New York, 143 N.E. 781, 238 N.Y. 29.

47. N.Y.—Wood v. City of New York, 8 N.E.2d 316, 274 N.Y. 155.

48. N.Y.—Wood v. City of New York, supra.

43 C.J. p 906 note 76.

49. Ariz.—State v. Miser, 72 P.2d 408, 50 Ariz. 244.

50. Ohio.—Clymer v. Zane, 191 N.E. 123, 128 Ohio St. 359, 93 A.L.R. 1245.

Use of product in public work

Employee in gravel pit owned and operated by highway contractor was not "employee on public improvement" within statute providing for minimum wages notwithstanding material obtained from pit was used in performing highway contract.—Clymer v. Zane, supra.

Work outside state

An employee of a contractor doing work outside the state is not within the statute.—Ewen v. Thompson-Starrett Co., 128 N.Y.S. 595, 71 Misc. 171.

51. Ariz.—City of Phœnix v. Kidd, 92 P.2d 513, 54 Ariz. 75, reheard 94 P.2d 428, 54 Ariz. 123, followed in City of Phœnix v. Price, 94 P.2d 433, 54 Ariz. 137, City of Phœnix v. Enriquez, 94 P.2d 434, 54 Ariz. 138, and City of Phœnix v. Wilson, 94 P.2d 434, 54 Ariz. 139.

Compliance with civil service law

The statute providing that prevailing rate of wages should be paid for legal day's work to laborers, workmen, or mechanics on public works is subservient to mandates of the civil service law; hence a laborer, workman, or mechanic cannot recover prevailing rate of wage for a position in service of municipality unless he shows as a condition precedent that he has been duly appointed to such position pursuant to requirements of civil service law.—Maystrik v. City of New York, 300 N.Y.S. 479, 165 Misc. 327.

Work in emergency

(1) Under a statute limiting the working day of public employees to a stated number of hours except in an emergency, an employee cannot recover for work in excess of the hours allowed unless such work was actually rendered in an emergency.—City of Glendale v. Dixon, 75 P.2d 683, 51 Ariz. 206.

(2) The necessity of looking after irrigating water delivered at regular intervals to city in large quantities to prevent flooding of property of residents was not an "emergency" which would entitle common laborer in city's irrigation department to wages for hours worked in excess of eight per day, where attention required to be given water was not an unforeseen circumstance, but was merely the work which laborer performed regularly.—City of Glendale v. Dixon, 75 P.2d 42, 51 Ariz. 86, adhered to 75 P.2d 683, 51 Ariz. 206.

(3) On the other hand, under a statute providing for payment for overtime worked generally but penalizing the municipality or official requiring or permitting overtime except in an emergency, an employee has been held entitled to compensation for overtime at the statutory rate whether or not such work was performed in an emergency.—McGuire v. City of Dallas, 170 S.W.2d 722, 141 Tex. 170.

52. Cal.—Leftridge v. City of Sacramento, 139 P.2d 112, 59 Cal.App.2d 516.

N.Y.—Morrissey v. State, 274 N.Y.S. 80, 152 Misc. 192, affirmed Callahan v. State, 285 N.Y.S. 1047, 246 App. Div. 686.

Tex.—Austin Bridge Co. v. Teague, Civ.App., 149 S.W.2d 674, reversed on other grounds 152 S.W.2d 1091, 137 Tex. 119.

53. Cal.—Goodrich v. City of Fresno, 167 P.2d 784, 74 Cal.App.2d 31.

54. N.Y.—Doyle v. City of New York, 266 N.Y.S. 227, 148 Misc. 503.

55. N.Y.—Wood v. City of New York, 8 N.E.2d 316, 274 N.Y. 155—Manning v. City of New York, 268 N.Y.S. 807, 150 Misc. 292—Doyle v. City of New York, 266 N.Y.S. 227, 148 Misc. 503.

Employee passing new examination

One appointed as a result of a civil service examination for electrical inspector, but performing the duties of an electrician after passing the examination for that position, is entitled to the benefits of the statute as applied to electricians.—Lent v. City of New York, 269 N.Y.S. 201, 150 Misc. 291, affirmed 275 N.Y.S. 342, 242 App.Div. 764.

(a) In General

Under some statutes a designated official is authorized and in some cases required to investigate, conduct an inquiry in the prescribed manner, and determine the prevailing wage rate for particular kinds of work.

While contractual provisions setting out the manner of determining the prevailing wage rate in the locality have been held valid so long as they do not contravene the statute,[56] some statutes authorize a designated official to investigate, hold hearings, and determine the prevailing rate of wages in the locality in which the work or contract is being performed.[57] Where the statute so provides, such official may institute the inquiry on his own motion[58] and, if a complaint is filed, he must investigate the charges.[59]

Under a statute providing that every contract for public work to which the state is a party must incorporate a provision for the payment of not less than the prevailing wage rates, and that a schedule of such rates must be made part of the contract, and that the invitation for bids on a particular project must set out the wage rate deemed applicable thereto, where a controversy arises as to whether the rates mentioned in the invitation are actually the prevailing rates, the administrative body is required to make a determination of the prevailing rate before the formal execution of the contract;[60] and, if no objection to the rates is made until after the contract is awarded, the administrative body is

56. N.Y.—Morse v. Delaney, 218 N.Y.S. 571, 128 Misc. 317, affirmed 219 N.Y.S. 867, 218 App.Div. 826, affirmed 155 N.E. 628, 244 N.Y. 317, 50 A.L.R. 1473.

Defining "locality"

Contract defining "locality" for determining prevailing wage rate as coterminous with city is valid.—Morse v. Delaney, supra.

57. N.Y.—Gaston v. Taylor, 9 N.E.2d 9, 274 N.Y. 359—Carder Realty Corporation v. Andrews, 269 N.Y.S. 596, 239 App.Div. 618—Booth & Flinn Co. v. Perkins, 265 N.Y.S. 871, 238 App.Div. 724—Carder Realty Corporation v. Perkins, 261 N.Y.S. 819, 237 App.Div. 152, affirmed 185 N.E. 770, 261 N.Y. 634, motion granted 185 N.E. 805, 261 N.Y. 713—Morse v. Delaney, 218 N.Y.S. 571, 128 Misc. 317, affirmed 219 N.Y.S. 867, 218 App.Div. 826, affirmed 155 N.E. 628, 244 N.Y. 317, 50 A.L.R. 1473.

Tex.—Austin Bridge Co. v. Teague, Civ.App., 149 S.W.2d 674, reversed on other grounds 152 S.W.2d 1091, 137 Tex. 119—Southern Prison Co. v. Rennels, Civ.App., 110 S.W.2d 606, error dismissed.

No conflict with constitution

The provision of the labor law requiring the fiscal officer to order a hearing with respect to prevailing rate of wages in locality within state where public work is being performed does not conflict with constitutional provision relating to hours and wages in public work, since that statute merely provides the machinery necessary to obtain the benefits of the constitutional provision.—Kaufman v. City of New York, 61 N.Y.S.2d 779.

Judicial character of investigation

N.Y.—Heaney v. McGoldrick, 35 N.E.2d 641, 286 N.Y. 38.

Notice of hearing

N.Y.—Campbell v. City of New York, 52 N.E.2d 949, 291 N.Y. 461, reargument ordered 51 N.E.2d 942, 291 N.Y. 674—Heaney v. McGoldrick, 35 N.E.2d 641, 286 N.Y. 38.

Notice of facts disclosed

N.Y.—Heaney v. McGoldrick, supra.

What constitutes "fixing" of prevailing rate

(1) Where municipal auto machinists who were civil service employees filed claim with city for difference between rate paid to auto machinists and rate paid other machinists, action of comptroller in recommending that claimants be paid such difference to avoid threatened lawsuit was not a fixing of prevailing rate of wages but only an adjustment of claims and did not constitute basis for an action by other auto machinists to recover difference between wages paid and alleged prevailing rate.—Cirillo v. City of New York, 10 N.Y.S.2d 472, 170 Misc. 230, affirmed 19 N.Y.S.2d 151, 259 App.Div. 717, reargument denied 20 N.Y.S.2d 402, 259 App.Div. 875, affirmed, 39 N.E.2d 273, 287 N.Y. 641.

(2) Report of examiner in comptroller's office that wages of electrical workers in building trades were increased under written agreement between the electrical contractors association and the electrical workers union did not constitute a prevailing rate determination, where the report was silent as to how many persons in the trade were affected by the agreement.—Ipsmiller v. City of New York, 275 N.Y.S. 827, 153 Misc. 627.

Where exclusive jurisdiction is conferred on administrative body to determine the prevailing wage rate, in the absence of such a determination the courts have no jurisdiction to adjudicate with respect thereto.—Southern Prison Co. v. Rennels, Tex. Civ.App., 110 S.W.2d 606, error dismissed.

58. N.Y.—Campbell v. City of New York, 52 N.E.2d 949, 291 N.Y. 461—Gaston v. Taylor, 9 N.E.2d 9, 274 N.Y. 359—Carder Realty Corporation v. Andrews, 269 N.Y.S. 596, 239 App.Div. 618—Booth & Flinn Co. v. Perkins, 265 N.Y.S. 871, 238 App. Div. 724—Carder Realty Corporation v. Perkins, 261 N.Y.S. 819, 237 App.Div. 152, affirmed 185 N.E. 770, 261 N.Y. 634, motion granted 185 N.E. 805, 261 N.Y. 713.

59. N.Y.—Campbell v. City of New York, 52 N.E.2d 949, 291 N.Y. 461—Gaston v. Taylor, 9 N.E.2d 9, 274 N.Y. 359—Carder Realty Corporation v. Andrews, 269 N.Y.S. 596, 239 App.Div. 618—Booth & Flinn Co. v. Perkins, 265 N.Y.S. 871, 238 App. Div. 724—Carder Realty Corporation v. Perkins, 261 N.Y.S. 819, 237 App.Div. 152, affirmed 185 N.E. 770, 261 N.Y. 534, motion granted 185 N.E. 805, 261 N.Y. 713.

Necessity of dispute

Before the commissioner of labor can take cognizance of a complaint of violation of the statute and proceed to a determination of the prevailing wage rate, a dispute regarding the prevailing rate must have arisen between the parties which cannot be adjusted by the contracting officer.—In re Rate of Wages on Sewage Disposal Plant at Princeton, 160 A. 408, 10 N.J.Misc. 603.

60. Colo.—Denver Bldg. & Const. Trades Council v. Vail, 86 P.2d 267, 103 Colo. 364.

Existence of dispute

Where trades council, speaking for union labor in lines of work involved in proposed state highway construction, complained that wage rates, incorporated in published invitation for bids, were not prevailing rates, a "dispute" arose within statute requiring provision for payment of prevailing rates in state construction contracts, so as to require industrial commission to take jurisdiction for purpose of determining prevailing rates.—Denver Bldg. & Const. Trades Council v. Vail, supra.

without jurisdiction to make a determination as to the prevailing rate applicable to such contract.[61] By statute, the legislature may withdraw from the administrative body or official the function of determining the prevailing wage rate to govern certain public contracts, and substitute therefor legislative rates.[62]

Scope and conduct of inquiry. The designated official is sometimes authorized and under a duty to adopt reasonable rules,[63] and an inquiry should cover the entire period to be affected by the finding or order;[64] and evidence of the rate prevailing at any time within such period should not be excluded.[65] Technical rules of evidence are inapplicable in such a proceeding,[66] and hearsay evidence is admissible,[67] although it cannot serve as the sole basis of the determination.[68] A wage scale fixed for another project at a considerable time previously may be taken into consideration, although it is not conclusive.[69] However, the evidence should be limited to wages prevailing among workmen of the same class and in the same locality.[70]

Under a statute so providing, where the inquiry is to determine the prevailing rate to which certain workmen are entitled, the wages paid to those very workmen should not be permitted to affect the result; in other words, those workmen should be disregarded and only the rate of wages prevailing among other workmen considered,[71] and the same has been held true in the absence of statute,[72] at least where the contract does not otherwise provide.[73] However, this rule does not prevent taking into account the wages received by other employees of the same contractor where they are engaged on other and private contracts.[74] The determination of the fiscal officer that the employees fall into a particular category will not be disturbed unless it is arbitrary.[75] Differentiation between classes of employees for the purpose of determining the prevailing rate for similar work must be based on reasonable grounds;[76] but the fact that different groups of employees perform similar work does not prevent their being differentiated on the basis of the different fields in which they work, the conditions of their employment, and the scope of their activities.[77]

(b) Effect of Determination

A prevailing rate once established is presumed to continue in the absence of contrary proof, and requires the employer to pay at such rate in the future and to make up the deficiency as to the past, at least from the time complaint was made; but such a determination is subject to modification on proof of changed circumstances.

A rate established as the prevailing rate of wages is presumed to continue in the absence of proof that it has changed,[78] and obligates the employer to pay the difference between the amounts which should have been paid at such rate and the amounts actu-

61. Colo.—Industrial Commission v. State Federation of Labor, 110 P.2d 253, 107 Colo. 206.

62. Colo.—Vail v. Denver Bldg. & Const. Trades Council, 115 P.2d 389, 108 Colo. 206.

63. N.Y.—Morse v. Delaney, 218 N.Y.S. 571, 128 Misc. 317, affirmed 219 N.Y.S. 867, 218 App.Div. 826, affirmed 155 N.E. 628, 244 N.Y. 317, 50 A.L.R. 1473.

64. N.Y.—Booth & Flinn Co. v. Perkins, 265 N.Y.S. 871, 238 App. Div. 724.

Dates specified in complaint

Industrial commissioner, in investigating prevailing rate of wages in locality in which contract for state is being performed, is not confined to dates specified in complaint.—Carder Realty Corporation v. Perkins, 261 N.Y.S. 819, 237 App.Div. 152, affirmed 185 N.E. 770, 261 N.Y. 634, motion granted 185 N.E. 805, 261 N.Y. 713.

65. N.Y.—Booth & Flinn Co. v. Perkins, 265 N.Y.S. 871, 238 App. Div. 724.

66. N.Y.—Heaney v. McGoldrick, 35 N.E.2d 641, 286 N.Y. 38—F. L. Heughes & Co. v. Andrews, 270 N.Y.S. 204, 240 App.Div. 334.

67. N.Y.—F. L. Heughes & Co. v. Andrews, 270 N.Y.S. 204, 240 App. Div. 334.

68. N.Y.—F. L. Heughes & Co. v. Andrews, supra.

69. Colo.—Industrial Commission v. State Federation of Labor, 110 P. 2d 253, 107 Colo. 206.

70. N.Y.—F. L. Heughes & Co. v. Andrews, 270 N.Y.S. 204, 240 App. Div. 334.

71. N.Y.—F. L. Heughes & Co. v. Andrews, supra.

72. N.Y.—Carder Realty Corporation v. Perkins, 261 N.Y.S. 819, 237 App. Div. 152, affirmed 185 N.E. 770, 261 N.Y. 634, motion granted 185 N.E. 805, 261 N.Y. 713.

73. N.Y.—Morse v. Delaney, 218 N.Y. S. 571, 128 Misc. 317, affirmed 219 N.Y.S. 867, 218 App.Div. 826, affirmed 155 N.E. 628, 244 N.Y. 317, 50 A.L.R. 1473.

74. N.Y.—F. L. Heughes & Co. v. Andrews, 270 N.Y.S. 204, 240 App. Div. 334.

75. N.Y.—Hoof v. McGoldrick, 66 N. E.2d 60, 295 N.Y. 214.

76. N.Y.—Watson v. McGoldrick, 35 N.E.2d 645, 286 N.Y. 47.

Income and security

The statute requiring that wages paid motor grader operators employed by city be not less than prevailing daily rate in same trade or occupation and in same locality does not permit differentiation between such employees' daily wages and those of such operators employed by private contractors because of economic security and larger annual income of operators in steady employ of city throughout year.—Watson v. McGoldrick, supra.

77. N.Y.—Watson v. McGoldrick, supra.

78. N.Y.—Carder Realty Corporation v. Perkins, 261 N.Y.S. 819, 237 App. Div. 152, affirmed 185 N.E. 770, 261 N.Y. 634, motion granted 185 N.E. 805, 261 N.Y. 713—Ipsmiller v. City of New York, 275 N.Y.S. 827, 153 Misc. 627.

Time for review

Statute providing for commencement of action within three months of "final order" of industrial commissioner determining prevailing wage for public works contemplates that defeated party have thirty-day period to review commissioner's order.—Rainville v. Keil, 266 N.Y.S. 867, 148 Misc. 795.

ally paid in the past[79] commencing, under some provisions, from the time of filing of a verified complaint or claim,[80] and to continue to pay the same rate in the future at least until modification of the order.[81] However, under a statute to such effect the contractor may at any time after such a determination, on a verified complaint, apply for and obtain a hearing, investigation, and modification of the order on proof of facts showing a change in the prevailing rate,[82] and such new determination may not be refused on the ground that the contractor had failed to comply with the original order.[83]

(4) Remedies

Various statutory remedies are available to enforce the rights of public employees or employees on public works with respect to wages; and it is held that as a general rule such rights cannot be waived.

Under some statutes, an employee who has been paid at a rate below the amount payable under the law may maintain an action for the difference between the amount paid and the amount which should have been paid.[84] A statute providing a method for enforcing the obligation to pay laborers on public works prevailing wages has been held not to supply a substitute for an effective common-law remedy but to supply an effective remedy where none existed before.[85] Since, as stated supra subdivision a (1) of this section, minimum wage laws are not intended merely to establish individual private rights but are intended to state and carry into effect public policy as well, its provisions are not subject to waiver;[86] and, unless the statute otherwise provides, an employee will not be precluded, by waiver or estoppel, from recovering the difference between

79. N.Y.—Application of Madison County Const. Co., 17 N.Y.S.2d 90, 258 App.Div. 1027—Carder Realty Corporation v. Perkins, 261 N.Y.S. 819, 237 App.Div. 152, affirmed 185 N.E. 770, 261 N.Y. 634, motion granted 185 N.E. 805, 261 N.Y. 713.

Necessity of protest

(1) Fact that city employees are within purview of constitutional provision relating to hours and wages on public works does not impair efficacy of provision of code that employee failing to note a formal protest when signing city pay roll forfeits his rights to advance his claim against the city.—McKibbin v. City of New York, 53 N.Y.S.2d 474, 269 App.Div. 696, affirmed 64 N.E.2d 288, 295 N.Y. 592.

(2) Such provision is constitutional.—McKibbin v. City of New York, 51 N.Y.S.2d 50, 182 Misc. 671, affirmed 53 N.Y.S.2d 474, 269 App.Div. 696, affirmed 64 N.E.2d 288, 295 N.Y. 592.

80. N.Y.—Hoof v. McGoldrick, 66 N.E.2d 60, 295 N.Y. 214—Campbell v. City of New York, 52 N.E.2d 949, 291 N.Y. 461—Carr v. Kern, 17 N.E.2d 762, 279 N.Y. 42—Gaston v. Taylor, 9 N.E.2d 9, 274 N.Y. 359—Cirillo v. City of New York, 10 N.Y.S.2d 472, 170 Misc. 230, affirmed 19 N.Y.S.2d 151, 259 App.Div. 717, reargument denied 20 N.Y.S.2d 402, 259 App.Div. 875, affirmed 39 N.E.2d 273, 287 N.Y. 641.

Retroactive effect

A determination fixing prevailing rate of wages was held retroactive to date of filing of respective claims.—Kaufman v. City of New York, 61 N.Y.S.2d 779.

81. N.Y.—Carder Realty Corporation v. Perkins, 261 N.Y.S. 819, 237 App.Div. 152, affirmed 185 N.E. 770, 261 N.Y. 634, motion granted 185 N.E. 805, 261 N.Y. 713.

82. N.Y.—Carder Realty Corporation v. Andrews, 269 N.Y.S. 596, 239 App.Div. 618.

Necessity of complaint

Complaint of state contractor that commissioner did not act on its application for modification of order respecting prevailing rate of wages in locality was without merit, statute requiring written verified complaint.—Carder Realty Corporation v. Perkins, 261 N.Y.S. 819, 237 App.Div. 152, affirmed 185 N.E. 770, 261 N.Y. 634, motion granted 185 N.E. 805, 261 N.Y. 713.

Petitioner is entitled to new investigation on his complaint, and it is error to repeat the identical determination of the prevailing wage rate without making any investigation or taking any new evidence.—Booth & Flinn Co. v. Andrews, 278 N.Y.S. 545, 244 App.Div. 1.

83. N.Y.—Carder Realty Corporation v. Andrews, 269 N.Y.S. 596, 239 App.Div. 618.

84. Ariz.—City of Phœnix v. Drinkwater, 52 P.2d 1175, 46 Ariz. 470—City of Glendale v. Coquat, 52 P.2d 1178, 102 A.L.R. 837.

Conflict with budget or appropriation

(1) The fact that a city budget appropriates a certain fund for particular work on the basis of paying the employees engaged in such work less than the minimum wage does not excuse it from paying such employees the prescribed minimum wage, since there is nothing to prevent the city from discontinuing the work when the fund appropriated is exhausted; but, after the fund is exhausted, employees cannot recover the difference between the wages paid them and the prescribed minimum wage, since the city will not be required by the courts to expend funds in excess of the budget except where such expenditure is authorized by the legislature.—City of Phœnix v. Kidd, 92 P.2d 513, 54 Ariz. 75, reheard 94 P.2d 428, 54 Ariz. 123, followed in City of Phœnix v. Price, 94 P.2d 433, 54 Ariz. 137, City of Phœnix v. Enriquez, 94 P.2d 434, 54 Ariz. 138, and City of Phœnix v. Wilson, 94 P.2d 434, 54 Ariz. 139.

(2) The employment after enactment of appropriation law providing less compensation than that fixed by general minimum wage law was "authorized by law" within statute prohibiting state indebtedness in excess of money appropriated unless expressly "authorized by law," and hence state was legally indebted to such employees for difference between amount paid them under appropriation law and amount fixed by minimum wage law.—State v. Angle, 91 P.2d 705, 54 Ariz. 13.

85. N.Y.—Gaston v. Taylor, 9 N.E.2d 9, 274 N.Y. 359—Fata v. S. A. Healy Co., 30 N.Y.S.2d 739, 263 App.Div. 725, reversed on other grounds 46 N.E.2d 339, 289 N.Y. 401, 144 A.L.R. 1031.

Rates fixed in contract

Where the agreement in the contract is not merely to pay wages at an unfixed rate not less than the prevailing rate, but is an agreement to pay wages at rates fixed in accordance with the statute and set forth in a schedule of wages annexed to the contract, the employee may maintain a common-law action for breach of the contract between his employer and the governmental agency.—Fata v. S. A. Healy Co., 46 N.E.2d 339, 289 N.Y. 401, 144 A.L.R. 1031.

86. Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837.

Ill.—George v. City of Danville, 43 N.E.2d 300, 315 Ill.App. 17, affirmed 50 N.E.2d 467, 383 Ill. 454,

the amount paid and the amount which should have been paid merely because he accepted such compensation without objection[87] or because he agreed to such disregard or evasion of the minimum wage provision.[88]

Deduction of amount of wages due employees before paying contractor. Under some statutes, the officer or agency whose duty it is to pay for work done for the state or a subdivision thereof is authorized to deduct from any payments made to the contractor the amounts admitted or established to be owing to employees on the project,[89] and it has been held that deductions may be made from the sums payable to the general contractor for the amount of wages admittedly due the employees of a defaulting subcontractor.[90] Where a statute imposes a penalty for violation of minimum wage provisions and provides that deduction of the amount thereof before payments are made to the contractor shall be the exclusive mode of enforcement, there can be no recovery of such penalty after final payment to the contractor has been made.[91]

Criminal liability. Under some statutes, violation of minimum wage provisions affecting public employees constitutes a criminal offense;[92] but, in the absence of a provision therefor, no criminal liability attaches for violation of such minimum wage requirements.[93]

b. Under Federal Statutes

Under federal statutes, certain contracts with the government are required to stipulate for the payment of prevailing wages to the contractor's employees, and the secretary of labor is authorized to determine prevailing wage rates and to enforce the provisions of such statutes generally.

Under a federal statute, contracts with the government for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding a specified sum must represent and stipulate for the payment of not less than the minimum wages as determined by the secretary of labor to be the prevailing minimum wage in the locality in which the goods are to be manufactured.[94] The statute is not of general applicability to industry, but only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned;[95] it does not represent an exercise by congress of regulatory power over private business or employment, but is simply a direction to its agents to fix the terms and conditions under which the government will permit goods to be sold to it.[96] The act bestows no litigable rights on those desirous of selling to the government;[97] and prospective bidders on government purchasing contracts have no standing to question the standards set by the secretary of labor as those required to be incorporated in the contracts.[98]

87. Ariz.—City of Glendale v. Coquat, 52 P.2d 1178, 46 Ariz. 478, 102 A.L.R. 837.
Tex.—McGuire v. City of Dallas, 170 S.W.2d 722, 141 Tex. 170—Scott v. Vilbig Const. Co., Civ.App., 140 S.W.2d 874.

88. Ill.—George v. City of Danville, 42 N.E.2d 300, 315 Ill.App. 17, affirmed 50 N.E.2d 467, 383 Ill. 454.

89. N.Y.—Devitt v. Haglin Co., 289 N.Y.S. 626, 248 App.Div. 298, affirmed 8 N.E.2d 481, 274 N.Y. 188, 112 A.L.R. 809.

90. N.Y.—Devitt v. Haglin Co., supra.

91. Cal.—Alameda County v. Freitas, 48 P.2d 165, 8 Cal.App.2d 653.

92. Ariz.—Borderland Const. Co. v. State, 68 P.2d 207, 49 Ariz. 523.

Intent

Under statute defining offense of violation of minimum wage law which did not require that act be knowingly or willfully done, employer who paid employee at lower wage than classification in which jury found he belonged was guilty of violation of statute notwithstanding absence of criminal intent.—Borderland Const. Co. v. State, supra.

93. Kan.—State v. Blaser, 26 P.2d 593, 138 Kan. 447.

94. U.S.—Perkins v. Lukens Steel Co., 60 S.Ct. 869, 310 U.S. 113, 84 L.Ed. 1108.

Purpose of statute

(1) The purpose of the statute is to impose obligations on those favored with government business and to obviate the possibility that any part of the tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment.—Perkins v. Lukens Steel Co., App.D.C., 60 S.Ct. 869, 310 U.S. 113, 84 L.Ed. 1108.

(2) The purpose of the act is to use the leverage of the government's immense purchasing power to raise labor standards.—Endicott Johnson Corporation v. Perkins, N.Y., 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

Employees within statute

The statute covers those employees, regardless of location of factories or departments, whose tasks are a part of, and normally associated with, production of articles under contract with the government, and the act applies in all factories where the production is a part of an uninterrupted process of manufacture; the act does not cover employees working on parts where, until after manufacture, it is impossible to determine whether the parts are suitable for use under contracts, with the government, since such employees are manufacturing for general stock, as distinguished from working on contracts even though some of the parts, after manufacture, are selected as suitable material for manufacture under contracts.—Perkins v. Endicott Johnson Corporation, D.C.N.Y., 40 F.Supp. 254, reversed on other grounds, C.C.A., 128 F.2d 208, affirmed Endicott Johnson Corporation v. Perkins, 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

95. U.S.—Endicott Johnson Corporation v. Perkins, N.Y., 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

96. U.S.—Perkins v. Lukens Steel Co., App.D.C., 60 S.Ct. 869, 310 U.S. 113, 84 L.Ed. 1108.

97. U.S.—Perkins v. Lukens Steel Co., supra.

98. U.S.—Perkins v. Lukens Steel Co., supra.

Vindication of general interest does not constitute a basis on which prospective bidders can claim the right to complain of an alleged erroneous construction of the statute by the secretary of labor.—Perkins v. Lukens Steel Co., supra.

The secretary of labor is directed to administer the act,[99] and is empowered to make investigations and findings and to prosecute any inquiry necessary to its administration,[1] and he is specifically authorized, in so doing, to hold hearings on complaint of any breach[2] and to issue orders requiring the attendance of witnesses and the production of evidence under oath,[3] which orders may be enforced in a proper proceeding in a District Court of the United States.[4] The secretary has power to make any decisions, based on findings of fact, which are deemed to be necessary to enforce the provisions of the act.[5] Findings of fact, which the secretary is directed and empowered to make after notice and hearing, are made conclusive on all parties to the contract and on all agencies of the United States, and, if supported by the preponderance of the evidence, conclusive in any court of the United States.[6] The act provides for liquidated damages for violations of required stipulations in the contract[7], and, unless the secretary of labor otherwise recommends, bars any firm or subsidiary found to have defaulted in its obligation under the act from being awarded any government contract for three years from the date the secretary determines such breach to have occurred.[8]

Under another federal statute, specifications for certain contracts with the government for construction or repair of public buildings or public works must provide for the payment to employees on such projects of prevailing minimum wages as determined by the secretary of labor, and all contracts based on such specifications must stipulate for the payment of wages at rates not less than those stat-

99. U.S.—Perkins v. Lukens Steel Co., supra.

1. U.S.—Endicott Johnson Corporation v. Perkins, N.Y., 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

Who may be investigated

The statute does not give the secretary of labor general investigatory powers, but gives such powers only over factories and employees engaged in the performance of governmental contracts.—Perkins v. Endicott Johnson Corporation, D.C.N.Y., 37 F.Supp. 604, reversed on other grounds, C.C.A., 128 F.2d 208, affirmed Endicott Johnson Corporation v. Perkins, 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

Sufficiency of preliminary data

An administrative body should not begin proceeding to determine whether act has been violated unless the body has made at least a tacit tentative determination that the data already before it is sufficient to justify the institution of such an inquiry.—Perkins v. Endicott Johnson Corporation, C.C.A.N.Y., 128 F.2d 208, affirmed Endicott Johnson Corporation v. Perkins, 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

Scope of investigation

The scope of the investigation extends to determining which employees are covered by the contract in question, whether payments to them were lower than the scale fixed pursuant to the statute, and when the last underpayment was made.—Endicott Johnson Corporation v. Perkins, N.Y., 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

Order of matters investigated

The secretary of labor is not required to investigate and determine whether particular employees or employees in a particular plant or factory are within the statute and contract before examining the pay roll and other records of such plant or factory to determine whether there have been any underpayments.—Endicott Johnson Corporation v. Perkins, supra.

2. U.S.—Endicott Johnson Corporation v. Perkins, supra.

3. **Validity of provision**

The power to issue subpoenas delegated to secretary of labor by the statute is within limits of congressional authority.—Endicott Johnson Corporation v. Perkins, supra.

4. U.S.—Endicott Johnson Corporation v. Perkins, supra.

Issues before court

Where secretary of labor sought enforcement of subpoena issued to investigate alleged underpayment of employees in particular plants by manufacturer having government contract, and the evidence sought was not plainly incompetent or irrelevant to any lawful purpose of the secretary, it was duty of district court to order its production, and court was not authorized to decide whether such plants were covered by the act and the contract.—Endicott Johnson Corporation v. Perkins, supra.

Defense to enforcement of order

Matters relating to the meaning of a government contract and of the statute, the possible retroactive effect of administrative rulings and regulations, nature of manufacturer's business organization, and practices obtaining at manufacturer's plants, although entitled to consideration in defense against complaint of violation of the statute, could not be accepted as defense against subpoena issued in investigating such violation.—Endicott Johnson Corporation v. Perkins, supra.

Decision on pleadings

Where administrative pleadings asking for enforcement of subpoenas duces tecum stated in effect that the plants whose records were sought to be examined for possible violations were covered by the contract with the government, the trial court should have accepted such preliminary determination instead of taking evidence on the question, and should have enforced the subpoenas on the pleadings.—Perkins v. Endicott Johnson Corporation, C.C.A.N.Y., 128 F.2d 208, affirmed Endicott Johnson Corporation v. Perkins, 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

Review

On appeal from order dismissing application of secretary of labor for enforcement of administrative subpoena duces tecum, it is sufficient to follow the simplified procedure of the federal rules, even though those rules may not be fully applicable to preappellate stages of that type of proceeding.—Perkins v. Endicott Johnson Corporation, C.C.A.N.Y., 128 F.2d 208, affirmed Endicott Johnson Corporation v. Perkins, 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

5. U.S.—Endicott Johnson Corporation v. Perkins, N.Y., 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

Determination of coverage

Determination of whether the statute and contracts for manufacture of shoes for the United States covered separate plants wherein parts only of the shoes were manufactured was primarily duty of the secretary of labor, not of courts.—Endicott Johnson Corporation v. Perkins, supra.

6. U.S.—Endicott Johnson Corporation v. Perkins, supra.

Tenn.—A. W. Kutsche & Co. v. Keith, 88 S.W.2d 454, 169 Tenn. 399.

7. U.S.—Endicott Johnson Corporation v. Perkins, N.Y., 63 S.Ct. 339, 317 U.S. 501, 87 L.Ed. 424.

8. U.S.—Endicott Johnson Corporation v. Perkins, supra.

ed in the specifications.[9] Where the secretary of labor makes a finding as to the prevailing wage rate as of a particular time, employees who were paid less than such prevailing wage rate are entitled to recover the difference between what they received and what they should have received after such time;[10] but they are not entitled to recover the difference for any periods prior to such date where the secretary's determination makes no finding as to the wage rate prevalent during such earlier periods.[11] It has been held that workmen on federal public projects have rights under the statute and the contracts between their employers and the United States to prevailing wages which cannot be diminished by the private contract of such workers.[12]

Under a statute providing that the wages of federal government employees or employees of contractors engaged in the performance of federal government contracts shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted on compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay, it has been held that, since the statute does not expressly so provide, a workman required to work more than eight hours a day is not entitled to maintain an action for overtime pay.[13] So, too, it has been held that an employee has no right of action against his employer for alleged violation of statutory provisions requiring the payment of prevailing wages;[14] the only remedy in such case is the administrative procedure whereby funds may be withheld by the government from sums due the employer, if claim therefor is timely made.[15]

B. Other Regulations

§ 154. In General

Under various statutes, it is an offense to fail to pay the wages of employees, under the circumstances fixed by the statute.

Under various statutes, it is an offense to fail to pay the wages of employees, under the circumstances fixed by the statute,[16] or to fail to pay wages in accordance with the provisions of the labor law prescribing the manner in which wages shall be paid.[17] It has been held that the intent of the lat-

9. U.S.—U. S. for Use of Wylie v. W. S. Barstow & Co., C.C.A.S.C., 79 F.2d 496.

Conclusiveness of secretary's determination

Determination of secretary of labor as to prevailing wage rate was conclusive on all parties to the contract in absence of contention that secretary acted arbitrarily or without substantial basis for his findings. —U. S. for Use of Wylie v. W. S. Barstow & Co., supra.

10. U.S.—U. S. for Use of Wylie v. W. S. Barstow & Co., supra.

When finding effective

Secretary of labor, having found that prevailing wage rates differed from rates being paid by contractor on public building, has no power to postpone or defer time when his findings shall become effective.—U. S. for Use of Wylie v. W. S. Barstow & Co., supra.

11. U.S.—U. S. for Use of Wylie v. W. S. Barstow & Co., supra.

12. U.S.—U. S. v. Fuller, D.C.N.Y., 51 F.Supp. 951.

Effect of kick-back racket legislation see infra § 159.

13. N.Y.—Filardo v. Foley Bros., 71 N.Y.S.2d 592, 272 App.Div. 446.

Construction of statute

The Federal Eight Hour Law should be construed so as to effect its purpose, which is to eliminate substandard working conditions.—Walling v. Patton-Tulley Transp. Co., C.C.A.Tenn., 134 F.2d 945.

Application of executive order

Employee of contractors engaged in construction of war plant could not maintain action against contractors for double time pay under executive order which provided for double time compensation for work on the seventh day to employee required to work for seven consecutive days in any regularly scheduled work week, in absence of showing that there had been a determination by secretary of labor as to whether the new rates under the executive order should apply to the contractors' contract with the defense plant corporation or to any of their employees thereunder.—Adams v. Long, Mo. App., 202 S.W.2d 112.

14. N.Y.—Greenstein v. Pan American Airways, 57 N.Y.S.2d 178, 185 Misc. 429.

Referring dispute to secretary of labor

A laborer employed in the construction of a post office is not entitled to recover the difference between the wage paid and the alleged prevailing wage for the work done by him without submitting his claim to the secretary of labor for determination.—A. W. Kutsche & Co. v. Keith, 88 S.W.2d 454, 169 Tenn. 399 —A. W. Kutsche & Co. v. Anderson, 83 S.W.2d 243, 169 Tenn. 98.

15. N.Y.—Greenstein v. Pan American Airways, 57 N.Y.S.2d 178, 185 Misc. 429.

16. Cal.—Ex parte Trombley, App., 178 P.2d 510, review denied 178 P.2d 513.

Pa.—Commonwealth v. Shaw, Quar. Sess., 8 Fay.L.J. 85.

Statute held valid

Utah.—State v. J. B. & R. E. Walker, 116 P.2d 766, 100 Utah 523.

17. N.Y.—People, on Complaint of Furnice, v. Garlock, 11 N.Y.S.2d 82, 170 Misc. 686, affirmed 24 N.Y.S. 2d 151, 260 App.Div. 919.

Strict construction

(1) The statute making it a misdemeanor to fail to pay wages of employees in accordance with provisions of Labor Law should be strictly construed, since offense did not exist at common law and is not malum in se but malum prohibitum. —People v. Grass, 11 N.Y.S.2d 803, 257 App.Div. 1.

(2) Section of Penal Law, providing that officer of corporate employer who knowingly permits corporation to violate Labor Law by failing to pay employees' wages in accordance with the provisions of the Labor Law shall be guilty of a misdemeanor, is also to be strictly construed, since offense did not exist at common law and is not "malum in se" but "malum prohibitum," and, in absence of proof that officer aided in misdemeanor charged officer may not be adjudged guilty.—People v.

ter statute is to protect the class of persons who are within the safeguards of the labor law,[18] that is, persons who are "employees" within such law and who earn wages,[19] but it has also been held that the statute is violated by nonpayment of wages to any person who is an employee within the ordinary and common connotation of that term, and that the offense is not restricted to employees as defined by the labor law.[20]

Other statutory provisions have been construed and applied which render a corporation liable for wages of employees of its "contractors,"[21] which prohibit the shipment in interstate commerce of any goods produced in an establishment situated in the United States in or about which, within a stated period prior to the removal of such goods therefrom, any oppressive child labor has been employed,[22] which require that persons working on Sunday should receive time and a half pay for all hours worked,[23] or which require an employer who is engaged as a lessee in mining or quarrying to furnish a bond to secure the payment of wages to employees, unless he owns the machinery, tools, and appliances used in operating the mine, and the value of such property is double the amount of the weekly pay roll.[24] Some provisions prohibit the receipt or acceptance of gratuities by agents, employees, or servants under agreement to act in some particular manner in relation to the business of the principal, employer, or master,[25] but in order to constitute a violation of such statute, there must be proof of payment of money to influence the employee in a way inconsistent with his duties toward the employer, and the statutory prohibition is limited to the giving of a gratuity, and not the return of expenditures incurred in serving both the donor and employer in accordance with the instructions of the employer.[26]

Wages as affected by war emergency regulations are discussed in the C.J.S. title War §§ 19–21.

§ 155. Number of Hours of Service

Hours worked in excess of the maximum allowed by statute are generally held not compensable, at least in the absence of a special agreement therefor; but there is authority holding that an employee may recover

Rowan, 38 N.Y.S.2d 648, 179 Misc. 225.

Who are employers

An attorney, although practicing a "profession," carries on a "business," within statute providing that one carrying on a "business" who does not pay wages of his employees in accordance with provisions of Labor Law is guilty of a misdemeanor.—People, on Complaint of Furnice v. Garlock, 11 N.Y.S.2d 82, 170 Misc. 686, affirmed 24 N.Y.S.2d 151, 260 App.Div. 919.

An infant was privileged to disaffirm contract for payment of wages and, upon doing so, could not be held criminally liable for failure to pay wages thereunder.—People, on Complaint of Meyers, v. Zimmerman, 6 N.Y.S.2d 90.

18. N.Y.—People v. Rowan, 38 N.Y.S.2d 648, 179 Misc. 225.

19. N.Y.—People v. Rowan, supra.

Persons held not employees

N.Y.—People v. Rowan, supra—People v. Eureka Shipbuilding Corp., 59 N.Y.S.2d 332.

20. N.Y.—People, on Complaint of Furnice, v. Garlock, 11 N.Y.S.2d 82, 170 Misc. 686, affirmed 24 N.Y.S.2d 151, 260 App.Div. 919.

21. Kan.—Brewer v. Kansas Electric Power Co., 83 P.2d 103, 148 Kan. 434.

A mechanic employed by individuals, who were operating motorbus transportation in city under contract with corporation having the franchise, was entitled under statutes to recover unpaid wages from the corporation on ground that individuals employing him were "contractors" within meaning of statute making a corporation liable for wages of employees of its "contractors."—Brewer v. Kansas Electric Power Co., supra.

22. U.S.—Lenroot v. Kemp, C.C.A. Miss., 153 F.2d 153.

Duty of courts to enforce

Courts may not refuse to enforce indirect sanctions of child labor provision of Fair Labor Standards Act merely because a simpler and more direct method might have been used. —Western Union Telegraph Co. v. Lenroot, N.Y., 65 S.Ct. 335, 323 U.S. 490, 89 L.Ed. 414.

"Produced"

Under the provision defining term "produced" as meaning handled or in any other manner worked on, a telegraph company did not "produce" goods so as to be subject to oppressive child labor prohibition, since terms "handled" and "worked on" do not include handling in carriage or transmission in commerce.—Western Union Telegraph Co. v. Lenroot, supra.

"Goods"

The application of the child labor provisions by use of words "producer" and "goods" in a context with "ship" is not limited to producers of tangible goods in view of statutory definition of "produced" to include handled, or in any other manner worked on, and "goods" to include articles or subjects of commerce of any character.—Lenroot v. Western Union Telegraph Co., D.C.N.Y., 52 F.Supp. 142, affirmed, C.C.A., 141 F.2d 400, reversed on other grounds 65 S. Ct. 335, 323 U.S. 490, 89 L.Ed. 414.

23. S.C.—Cooksey v. Beaumont Mfg. Co., 9 S.E.2d 790, 194 S.C. 395.

24. Ind.—Bell v. State, 27 N.E.2d 362, 217 Ind. 323.

25. N.Y.—People v. Graf, 24 N.Y.S. 2d 683, 261 App.Div. 188.

Labor union

The statute prohibiting receipt or acceptance of gratuities by agent, employee or servant under agreement to act in some particular manner in relation to business of principal, employer or master was not intended to include an employee of a labor union, and the word "business" was not intended to refer to an organization such as a labor union.—People v. Graf, supra.

26. N.Y.—People v. Graf, supra.

The phrase "particular manner" in statute prohibiting receipt or acceptance of gratuities by agent, employee or servant under agreement to act in some particular manner in relation to business of principal, employer or master, was intended to mean a particular manner which would serve the purpose of donor of money rather than that of employer, and that money was given and accepted with intention to affect some decision by employee involving exercise of discretion on his part with respect to his employer's interest.—People v. Graf, supra.

for such excess work on the theory of an implied promise by the employer to pay for it.

Where the statute fixes a maximum number of hours as constituting a day's labor[27] or a maximum number of days or hours in the week that an employee may be required to work,[28] an employee who works in excess of such time is generally held not entitled to extra compensation, in the absence of any special agreement in regard thereto; and it has even been held that, where a statute expressly provides that pro rata compensation shall be paid for extra time unless there is an express agreement to the contrary, an employee who has contracted with knowledge of an invariable custom not to pay for overtime and who has signed receipts acknowledging payment of wages from time to time to be in full cannot recover for extra hours of labor.[29] There is, however, authority which holds that an employee who works for longer periods of time than that allowed by law does not thereby forfeit his right to compensation for such periods;[30] and the right to compensation in such a case is sometimes placed on the ground that the law implies a promise on the part of the employer to pay for the extra work.[31] Where, as in the case of public employees, a statute prohibits a city from contracting for extra service, the prohibition is absolute and an employee cannot recover for services rendered beyond the number of hours permitted by the statute;[32] and similarly, where the statute makes the employment of workers for more than a prescribed number of hours a misdemeanor, it is held that the employee is impliedly forbidden to make a contract in excess of such hours, so that he cannot claim an express or implied contract to pay for such excess services rendered.[33]

§ 156. Time of Payment

a. During employment

b. After termination of employment

a. During Employment

Statutes requiring payment of wages to employees at stated periods and imposing penalties for violations have been held valid in some cases. It is sometimes held that statutes requiring the payment of wages at stated times should be liberally construed, except to the extent that such statutes are penal.

Statutes requiring payment of wages to employees at stated periods and imposing a penalty for failure on the part of an employer to comply with such requirements have in some cases been adjudged valid,[34] and in other cases involving similar require-

27. U.S.—Corpus Juris cited in Plummer v. Pennsylvania R. Co., D.C.Ill., 31 F.2d 123, 124, affirmed, C.C.A., 37 F.2d 874.
Minn.—Thibault v. National Tea Co., 269 N.W. 466, 198 Minn. 246, 107 A.L.R. 702.
Nev.—Martinez v. Johnson, 119 P.2d 880, 61 Nev. 125.
Tex.—City of Wichita Falls v. Long, Civ.App., 167 S.W.2d 792, affirmed 176 S.W.2d 936, 142 Tex. 202.
39 C.J. p 226 note 65.
What constitutes compensable time under Fair Labor Standards Act see supra § 151 (28).

Reëmployment agreement

Employee who worked overtime for employer who signed president's reëmployment agreement under the National Industrial Recovery Act was entitled to recover for overtime in accordance with agreement.
N.Y.—Mesloh v. Schulte, 273 N.Y.S. 699, 151 Misc. 750.
Pa.—Kappel v. Meth, 189 A. 795, 125 Pa.Super. 443.

Persons within statute

Adamson Act, temporarily fixing eight-hour day as basis of reckoning compensation of persons operating trains, is limited to members of train crews.—Plummer v. Pennsylvania R. Co., D.C.Ill., 31 F.2d 123, affirmed, C.C.A., 37 F.2d 874.

Right to make agreement

(1) Adamson Act, fixing eight-hour day as basis of reckoning compensation of certain railroad employees, did not deprive employers and employees of right to agree between themselves as to wages.—Plummer v. Pennsylvania R. Co., C.C.A.Ill., 37 F. 2d 874.

(2) Under statute fixing maximum hours of labor employee may be required to work per day, adult workman may agree to work in any employment for longer or shorter period than prescribed maximum for any compensation acceptable to him. —Thibault v. National Tea Co., 269 N.W. 466, 198 Minn. 246, 107 A.L.R. 702.

28. N.J.—Pericin v. Denburg's Modern Bakery, 33 A.2d 825, 130 N.J. Law 547.
N.Y.—Tanner v. Imperial Recreation Parlors, 39 N.Y.S.2d 99, 265 App. Div. 371, affirmed 50 N.E.2d 110, 290 N.Y. 801—Livingston v. Todd Shipyards Corp., 62 N.Y.S.2d 45, 187 Misc. 672, affirmed 66 N.Y.S. 2d 626, 271 App.Div. 864, motions dismissed 72 N.E.2d 33, 307, 296 N.Y. 744.

Employee in pari delicto

An employee, who voluntarily agreed with employer to work overtime in violation of statute limiting hours of work to 48 hours per week, was in pari delicto with the employer and not entitled to recover extra pay for overtime as against contention that she was not in pari delicto because she was a member of the class for whose benefit the statute was enacted, and that the legislature therein treated the employer alone as the perpetrator of the offense and the employee merely as its victim.—Lewis v. Ferrari, 90 P.2d 384, 34 Cal. App.2d Supp. 769.

29. Mich.—Bartlett v. Grand Rapids St. R. Co., 46 N.W. 1034, 82 Mich. 658.
39 C.J. p 227 note 67.

30. Minn.—Thibault v. National Tea Co., 269 N.W. 466, 198 Minn. 246, 107 A.L.R. 702.
N.Y.—Application of Madison County Const. Co., 17 N.Y.S.2d 90, 258 App. Div. 1027.

31. Me.—Bachelder v. Bickford, 62 Me. 526.

32. N.Y.—Burns v. New York, 105 N.Y.S. 605, 121 App.Div. 180.
Minimum wages of public employees generally see supra § 153.

33. Utah.—Short v. Bullion-Beck & Champion Min. Co., 57 P. 720, 20 Utah 20, 45 L.R.A. 603.
39 C.J. p 227 note 70.

34. Cal.—Ex parte Oswald, 244 P. 940, 76 Cal.App. 347.
39 C.J. p 227 notes 71, 73.

Particular statutes or provisions

(1) Statutory provisions requiring employers within the act to maintain two regular pay days each month within specified dates and to post notices of such days are valid.

ments have been held invalid.[35] Statutes, requiring the payment of wages at stated periods, which apply only to corporations, have been upheld as properly within the power reserved to the state over corporations,[36] although the statute prohibits the parties contracting otherwise.[37]

It is generally held that a statute requiring employers to pay their employees wages at stated periods is intended to prohibit the employer from entering into contracts of employment containing provisions at variance with such acts,[38] and that any contract made in violation of such a statute is void;[39] but the rule is otherwise where the statute is expressly limited in its operation to cases in which the parties have not otherwise stipulated in the contract of hiring, for the operation of such a statute can be and is entirely avoided by prescribing in the contract the time for payment of wages,[40] and even under a statute containing no such exception it has been held that an employment contract providing for payment at times other than those provided by statute is not void where there was no fraud or concealment by the employer in the execution thereof and it is not injurious to the public welfare.[41]

An agreement between an employer and an employee that the weekly payment of wages shall be provisional, and that fines due for any week shall be deducted from the wages of the week following, is not repugnant to a statute requiring payment of wages at stated periods;[42] nor does such a statute prohibit or make invalid a contract made by a rule of the employer, known or agreed to by the employee, that every person intending to leave the employ must give a prescribed notice of such intention, and that for failure to give such notice and work the prescribed number of days therefor, he shall forfeit whatever wages may be due to him.[43] An employer who does not pay within the required time but withholds payment of his employee's wages until the employee accounts for tools and equipment issued to him is guilty of violating the statute.[44] A statute providing that, in case of a dispute over wages, the employer shall pay within the time specified the amount of wages conceded by him to be due, leaving to the employee his remedies as to the balance, is not applicable where there is no dispute as to wages.[45]

Although the interpretation and application of each statute of this nature must depend on its own particular language,[46] it has been held that the court,

—Ex parte Moffett, 64 P.2d 1190, 19 Cal.App.2d 7.

(2) Statutory provision prohibiting withholding employees' wages more than six days is valid as applied to local corporations whose charters are subject to amendment or repeal.—Seidenberg v. Duboff & Davies, 256 N.Y.S. 17, 143 Misc. 167.

35. Md.—State v. Potomac Valley Coal Co., 81 A. 686, 116 Md. 380.
39 C.J. p 227 notes 72, 73.

36. U.S.—Erie R. Co. v. Williams, N.Y., 34 S.Ct. 761, 233 U.S. 685, 58 L.Ed. 1155, 51 L.R.A.,N.S., 1097.
39 C.J. p 228 note 76.

37. U.S.—Erie R. Co. v. Williams, supra.
39 C.J. p 228 note 77.

38. Ark.—Arkansas Stave Co. v. State, 125 S.W. 1001, 94 Ark. 27, 140 Am.S.R. 103, 27 L.R.A.,N.S., 255.
N.Y.—New York Cent. & H. R. R. Co. v. Williams, 92 N.E. 404, 199 N.Y. 108, 139 Am.S.R. 850, 35 L.R.A.,N.S., 549.

39. Ark.—Arkansas Stave Co. v. State, 125 S.W. 1001, 94 Ark. 27, 140 Am.S.R. 103, 27 L.R.A.,N.S., 255.
N.Y.—In re Wright Metal, 13 N.Y.S.2d 370, 257 App.Div. 453, reargument denied 14 N.Y.S.2d 1006, 257 App.Div. 1099, modified on other grounds 27 N.E.2d 428, 283 N.Y. 47—Seidenberg v. Duboff & Davies, 256 N.Y.S. 17, 143 Misc. 167.

Employer's ability to pay

(1) Equitable circumstances, such as inability to pay, may not be set up as a defense in prosecution for violation of statute requiring that employees' wages be paid within a stipulated period.
N.Y.—People v. Primrose Wet Wash Laundry Co., 11 N.Y.S.2d 302, 256 App.Div. 1088.
Pa.—Commonwealth v. Shaw, Quar. Sess., 8 Fay.L.J. 85.

(2) Under an employment contract whereby employee agreed to accept twelve dollars per week and difference between twelve dollars and former wages when financial condition of employer would permit, question whether employer was, or when employer would be, financially able to pay was immaterial as respects employee's right to recover the difference.—La Juett v. Coty Mach. Co., 275 N.Y.S. 822, 153 Misc. 410.

"Wages" or bonus

Under an employment contract whereby the employee agreed to accept a stated sum per week and the difference between such sum and the former wages when the financial condition of the employer would permit, in determining whether the difference was "wages" within the statute prohibiting the withholding of wages for more than six days or was merely a bonus and not within the statute, the court must look to the construction which the employer placed on the contract, and if, from a fair interpretation of the whole contract and the acts of the parties, it appears that they intended the difference to be wages, the contract is void despite the fact that it designated the difference a bonus.—La Juett v. Coty Mach. Co., supra.

40. Pa.—Commonwealth v. Muller, 31 Pa.Dist. & Co. 372, 39 Lack.Jur. 55—Commonwealth v. Hause, 25 Pa.Dist. & Co. 423, 25 Del.Co. 429—Commonwealth v. Lipschutz, 19 Pa.Dist. & Co. 415—Commonwealth v. Matthewson, Quar.Sess., 36 Luz. Leg.Reg. 29.
W.Va.—Konode v. Houston Collieries Co., 157 S.E. 407, 110 W.Va. 227.

41. Cal.—Ex parte Moffett, 55 P.2d 584, 12 Cal.App.2d 320, vacated on other grounds 57 P.2d 538, 13 Cal.App.2d 741.

42. Mass.—Gallagher v. Hathaway Mfg. Corp., 51 N.E. 1086, 172 Mass. 230.
39 C.J. p 229 note 90.

43. Mass.—Ferry v. Kinsley Iron & Mach. Co., 81 N.E. 305, 195 Mass. 548.

44. N.Y.—People v. Eureka Shipbuilding Corp., 59 N.Y.S.2d 332.

45. Cal.—Sayre v. Western Bowl, 174 P.2d 466, 76 Cal.App.2d 793.

46. N.Y.—People v. Interborough Rapid Transit Co., 154 N.Y.S. 627, 169 App.Div. 32.
39 C.J. p 229 note 93.

in construing such a statute, should be guided more by its purpose than by its phraseology.[47] Some authorities hold that such statutes should be liberally construed,[48] but others, deeming the statute essentially penal in character, require a strict construction;[49] and it has also been held that, as to a statute containing provisions which are both remedial and penal, the penal portion of such an act must be strictly, and the remedial portions liberally, construed.[50] In determining whether an employee is within such a provision it has been held that the designation given to his position or work is not controlling, but the determinative test is whether his compensation comes within the meaning of the term "wages."[51]

In at least one state an employer is liable for the penalty only on a failure or refusal to pay the wages as required by the statute after a demand made on him;[52] hence, unless a request or demand for the payment of such wages is made, a mere agreement entered into not to pay the wages as provided by the statute would not subject the employer to the penalty.[53] There is no refusal to pay within the meaning of the statute where it is shown that the employer paid by check which the employee afterward lost.[54] The penalty imposed by the statute attaches only on failure to pay the wages earned at the time payment is required.[55]

Criminal liability. Under a statute making it a criminal offense to fail to pay wages within the prescribed time, it has been held that intent is not an element of the offense.[56]

b. After Termination of Employment

(1) In general
(2) Persons within statutes; discharge
(3) Demand and refusal; tender
(4) Amount of penalty

When wages to be paid under Fair Labor Standards Act see supra § 151 (24).

Who are employers within act

(1) The statutory requirement that every person carrying on a business by lease or otherwise pay employees by the week applies to an assignee for benefit of creditors.—In re Wright Metal, 13 N.Y.S.2d 370, 257 App.Div. 453, reargument denied 14 N.Y.S.2d 1006, 257 App.Div. 1099, modified on other grounds 27 N.E.2d 428, 283 N.Y. 47.

(2) A housewife, keeping a home for herself and family, was not "carrying on a business" within statute requiring every person carrying on business to pay weekly to each employee wages earned to a day not more than six days prior to date of payment, since, generally speaking, one is "doing business" or "carrying on a business" when he is engaged in activities for purpose of continued efforts in pursuit of profit and gain and such activities are essential to those purposes.—People v. Jones, 16 N.Y.S.2d 558, 172 Misc. 368.

Wages "earned"

Statute requiring weekly payment to employees of wages "earned" to date not more than six days preceding pay day refers only to compensation which has been earned by complete performance of work and does not require that such wages shall be "due" or "payable."—Seidenberg v. Duboff & Davies, 256 N.Y.S. 17, 143 Misc. 167.

47. N.Y.—Strom v. Prince, 279 N.Y.S. 589, 154 Misc. 888.

Purpose of particular provisions

(1) The purpose of statute requiring employers to pay weekly to each employee wages earned to a day not more than six days before date of payment is to assure employees working for another for hire, at regular intervals, prompt and expeditious payment of wages they are entitled to receive.—People v. Grass, 11 N.Y.S.2d 803, 257 App.Div. 1.

(2) Sole purpose of section of semi-monthly pay day law fixing dates within which employer must maintain two regular pay days each month is to require employer of labor who comes within its terms to maintain two regular pay days each month within dates specified.—Ex parte Moffett, 64 P.2d 1190, 19 Cal. App.2d 7.

48. N.Y.—People v. Grass, 11 N.Y.S. 2d 803, 257 App.Div. 1—Strom v. Prince, 279 N.Y.S. 589, 154 Misc. 888—Seidenberg v. Duboff & Davies, 256 N.Y.S. 17, 143 Misc. 167.

49. Ark.—Arkansas Stave Co. v. State, 125 S.W. 1001, 94 Ark. 27, 140 Am.S.R. 103, 27 L.R.A.,N.S., 225.

50. S.C.—Trammell v. Victor Mfg. Co., 86 S.E. 1057, 102 S.C. 483.
39 C.J. p 229 note 94.

51. N.Y.—Seidenberg v. Duboff & Davies, 256 N.Y.S. 17, 143 Misc. 167.

Superintendent

A corporation's factory superintendent was not an "employee" within the Labor Law and was not entitled to be paid wages in accordance with section of law requiring wages earned to a day not more than six days before date of payment to be paid weekly to each employee as respects superintendent's rights as against corporation's assignee for the benefit of creditors.—In re Wright Metal, 27 N.E.2d 428, 283 N.Y. 47.

"Foreman," receiving weekly wages, was an "employee" within statute prohibiting withholding of employees' wages for over six days.—Seidenberg v. Duboff & Davies, 256 N.Y.S. 17, 143 Misc. 167.

52. Ark.—Arkansas Stave Co. v. State, 125 S.W. 1001, 94 Ark. 27, 140 Am.S.R. 103, 27 L.R.A.,N.S., 255.

53. Ark.—Arkansas Stave Co. v. State, supra.
39 C.J. p 229 note 89.

54. Mich.—Garavaglio v. Verona Min. Co., 178 N.W. 32, 210 Mich. 675.

55. Ind.—U. S. Reduction Co. v. Nussbaum, 42 N.E.2d 403, 112 Ind. App. 330.

On wrongful discharge

(1) Under a statute prescribing the time for payment of wages earned generally, and apart from any provisions dealing specifically with paying discharged employees, where one employed at a monthly wage was wrongfully discharged on the second day of the month, the amount equivalent to monthly wage which employee was entitled to recover as damages for breach of the contract of employment did not constitute "wages earned," and the employer complied with the statute by paying the wages earned for the two days at the prescribed time.—U. S. Reduction Co. v. Nussbaum, supra.

(2) Statutory provisions regulating payment of wages of discharged employees see infra subdivision b of this section.

56. N.Y.—People v. Primrose Wet Wash Laundry Co., 11 N.Y.S.2d 302, 256 App.Div. 1088.

(1) In General

A statute providing for prompt payment of an employee's wages on discharge becomes part of the contract of employment and cannot be waived by agreement or custom; but such a statute cannot be extended so as to penalize an employer for acts not contemplated by the statute.

Statutes requiring employers to pay their employees wages due on their discharge, or within a designated time thereafter, and providing a penalty for a violation of their provisions, have been generally held valid.[57] Enactments of this character under some decisions have been upheld in the case of corporations particularly by reason of the power reserved over them by the state as creatures of the state,[58] and it has been held that their operation cannot be extended to individuals;[59] but, where an act applies to both corporations and individuals, the statute will be valid as to corporations when as much of the statute as relates to its operation as applicable to individuals can be eliminated.[60]

The right to a statutory penalty for withholding wages is governed by the law determining the substantive rights of the parties to the contract of employment;[61] and the operation and effect of particular statutes regulating the payment of wages of an employee who is discharged or who quits and imposing penalties for violations is determined by the language used and the usual rules of construction.[62] A statute providing for prompt payment of an employee's earned wages on discharge becomes part of the employment contract;[63] and the employee's rights thereunder cannot be waived or relinquished by contract[64] or deemed to have been waived by custom.[65] So, a statute requiring payment "forthwith" of wages due when the employee ceases to work supersedes a contractual provision for a delay in payment where the employee leaves without notice.[66] However, where the statute permits the parties to fix times for the payment of wages other than those specified in the statute, an agreement in the contract of employment that on discharge the employee's wages shall not be due until some future time or event is not invalid.[67]

Statutes of the character under discussion are intended to compel the employer to pay promptly the regularly earned wages of an employee who was either discharged or who quit of his own accord;[68] they must be given a reasonable,[69] although necessarily strict,[70] construction, and their literal enforcement, it has been held, may yield to strong equitable defenses.[71] Such statutes cannot be employed to penalize an employer for failing to pay an unjust

57. Cal.—Davis v. Morris, 99 P.2d 345, 37 Cal.App.2d 269—Ex parte Sears, 30 P.2d 571, 137 Cal.App. 308—Sears v. Superior Court in and for Calaveras County, 24 P.2d 842, 133 Cal.App. 704.
39 C.J. p 230 note 1.

58. U.S.—St. Louis, I. M. & S. R. Co. v. Paul, Ark., 19 S.Ct. 419, 173 U.S. 404, 43 L.Ed. 746.
39 C.J. p 230 note 5.

59. Ark.—Leep v. St. Louis, I. M. & S. R. Co., 25 S.W. 75, 58 Ark. 407, 41 Am.S.R. 109, 23 L.R.A. 264, appeal dismissed 15 S.Ct. 1042, 159 U.S. 267, 40 L.Ed. 142.
39 C.J. p 230 note 6.

60. Ark.—Leep v. St. Louis, I. M. & S. R. Co., supra.

61. Cal.—Klaffki v. Kaufman, 198 P. 36, 52 Cal.App. 48.
39 C.J. p 231 note 16.

62. La.—Perryman v. Boisseau, 138 So. 141, 19 La.App. 43.

Without abatement or reduction

The phrase "without abatement or reduction," as used in statute respecting penalty for nonpayment of wages means merely without discount on account of payment thereof before wages were payable according to contract of employment.—Sayre v. Western Bowl, 174 P.2d 466, 76 Cal. App.2d 793.

63. S.C.—Cato v. Grendel Cotton Mills, 129 S.E. 203, 132 S.C. 454, 41 A.L.R. 439.

64. S.C.—Cato v. Grendel Cotton Mills, supra.

65. S.C.—Cato v. Grendel Cotton Mills, supra.

66. Wash.—Burdette v. Broadview Dairy Co., 212 P. 181, 123 Wash. 158.

67. W.Va.—Konode v. Houston Collieries Co., 157 S.E. 407, 110 W.Va. 227.

68. U.S.—Sirmon v. Cron & Gracey Drilling Corporation, D.C.La., 44 F. Supp. 29.
Ark.—Cypress Tank Co. v. Weeks, 39 S.W.2d 318, 183 Ark. 891—Chicago, R. I. & P. Ry. Co. v. Russell, 292 S.W. 375, 173 Ark. 398, 51 A.L.R. 1206.
La.—Bannon v. Techeland Oil Corporation, 17 So.2d 921, 205 La. 689.

Penalty viewed as damages

Although the sum recoverable is designated as a penalty by the statute, it has been held to be in fact a provision for compensatory and exemplary damages.—St. Louis, I. M. & S. R. Co. v. Walsh, 110 S.W. 222, 86 Ark. 147—39 C.J. p 231 note 17.

69. Ark.—McCoy-Couch Furniture Mfg. Co. v. Zahringer, 186 S.W.2d 922, 208 Ark. 581.
39 C.J. p 231 note 19.

70. Ark.—McCoy-Couch Furniture Mfg. Co. v. Zahringer, supra—Missouri Pacific R. Co. v. Clement, 181 S.W.2d 240, 207 Ark. 389—Chicago, R. I. & P. Ry. Co. v. Russell, 292 S.W. 375, 173 Ark. 398, 51 A.L.R. 1206—Fordyce v. Gorey, 65 S.W. 429, 69 Ark. 344.
La.—Bannon v. Techeland Oil Corporation, 17 So.2d 921, 205 La. 689—Binnion v. M. & D. Drugs, App., 8 So.2d 307—Oller v. Bender, App., 146 So. 780—Duke v. Ford, Bacon & Davis, 138 So. 675, 19 La.App. 27—Perryman v. Boisseau, 138 So. 141, 19 La.App. 43—Whitehead v. E. J. Deas Co., 118 So. 856, 9 La.App. 47.
Mo.—Quinn v. T. M. Sayman Products Co., App., 296 S.W. 198.

71. La.—Bannon v. Techeland Oil Corporation, 17 So.2d 921, 205 La. 689—Binnion v. M. & D. Drugs, App., 8 So.2d 307—Goodwin v. Southern Kraft Corporation, App., 6 So.2d 783—Oller v. Bender, App., 146 So. 780—Perryman v. Boisseau, 138 So. 141, 19 La.App. 43—Williamson v. National Ben. Life Ins. Co., 133 So. 515, 16 La.App. 451—Whitehead v. E. J. Deas Co., 118 So. 856, 9 La.App. 47.

Effect of garnishment

Where garnishment proceedings were had against employer who was unconditionally ordered to answer the interrogatories propounded and to pay over to the court any amount due to employee, and employee was advised of the fact and continued to

debt[72] or wages other than those earned up to the time of discharge,[73] or for refusing to pay a claim for wages where there is an honest dispute as to the amount due which results in a finding that the employer's figures are correct;[74] nor can such a statute be utilized to preclude the employer's right to interpose any valid counterclaim or defense to the claim of the employee.[75]

The employer is not subject to the penalty from the time of the discharge, where the amount due the employee is not immediately ascertainable or cannot be known by reasonable diligence,[76] or where small items are omitted under an honest mistake, not specifically called to the employer's attention when a demand is made.[77] Under a statute so providing, the penalty attaches only where the employer willfully fails to pay the wages of an employee immediately on his discharge;[78] but it has been held that willful failure means merely that the employer intentionally failed or refused to pay, and not that the refusal was necessarily based on a deliberate evil purpose to defraud the workman of wages which the employer knew to be due.[79] The recovery of a penalty which has accrued up to the date of payment is not barred by an acceptance of payment.[80]

(2) Persons within Statutes; Discharge

The language of the particular statute will determine what persons are affected by it. An employee is discharged or refused further employment when he is refused employment of the same class and kind as that called for in his contract of employment; an employee is not within some statutes as one discharged or refused further employment if he voluntarily leaves his employment.

The question of what persons come within statutes providing for prompt payment of wages after discharge is determined by the language of the particular provision as construed in accordance with the usual rules.[81] Under a statute imposing a pen-

work for garnishee and made no effort to have the seizures released, employer's refusal to pay employee the wages due him was not "arbitrary" nor actuated by ill motives and employer could not be held liable for statutory penalties for failure to pay employee by reason of garnishment.—Goodwin v. Southern Kraft Corporation, La.App., 6 So.2d 783.

Employer's ignorance of claims

Employer, who had been sick, was held not liable for penalty for failure to pay discharged employees, where on learning of suits he tried to settle claims immediately.—Deardorf v. Hunter, 106 So. 831, 160 La. 213.

Waiver

Employees, accepting cash for part of wages due and employer's note for balance, waived right to payment within twenty-four hours after discharge precluding employees' assignee from recovering penalties for employer's failure to pay wages due.—Basinger v. Mt. Vernon Oil & Gas Co., 146 So. 32, 176 La. 489.

72. Idaho.—Goodell v. Pope-Shenon Min. Co., 212 P. 342, 36 Idaho 427.
39 C.J. p 231 note 20.

73. Ark.—Hall v. Chicago, R. I. & P. R. Co., 132 S.W. 911, 96 Ark. 634.

Future wages

The statute penalizes only failure to pay discharged employee wages already earned and not wages which might have been earned during remainder of definite period of time for which he was employed.—Quinn v. T. M. Sayman Products Co., Mo.App., 296 S.W. 198.

74. Kan.—Gawthrop v. Missouri Pac. Ry. Co., 78 P.2d 854, 147 Kan. 756.

75. Ark.—Stewart & Alexander Lumber Co. v. Weaver, 104 S.W. 152, 83 Ark. 445.
39 C.J. p 231 note 22.

76. Ark.—Fordyce v. Gorey, 65 S. W. 429, 69 Ark. 344.
La.—Foreman v. Pelican Stores, App., 21 So.2d 64—Bridges v. McClenaghan, App., 14 So.2d 652—Oller v. Bender, App., 146 So. 780.

Agreement to await ascertainment

An employee was not entitled to statutory penalty for failure to pay promptly, where employee agreed to wait for his pay until certain records of employer could be checked for compensation and bonus.—Binnion v. M. & D. Drugs, La.App., 8 So.2d 307.

Settlement of accounts

(1) Company when terminating employment justifiably withheld moneys of assistant manager pending settlement of his accounts, and therefore was not subject to statutory penalties.—Williamson v. National Ben. Life Ins. Co., 133 So. 515, 16 La.App. 451.

(2) Where there was no dispute over wages between employers and manager after his discharge, employers were justified in asserting, as a condition of accounting between the parties pursuant to contractual arrangement, whereby manager was to receive profits over a certain amount, that payment of final amount found by them to be due manager should be based on a release by him of any further salary or bonus claims against employers, and therefore manager was not entitled to recover penalty under statutes.—Sayre v. Western Bowl, 174 P.2d 466, 76 Cal. App.2d 793.

77. Ark.—Hall v. Chicago, R. I. & P. R. Co., 132 S.W. 911, 96 Ark. 634.
39 C.J. p 231 note 24.

Information available to employer

Where information regarding amount of wages actully due employee was equally available to both employer and employee, employer not making payment within seven days after employee's specific demand was liable for statutory penalty.—Cypress Tank Co. v. Weeks, 39 S.W.2d 318, 183 Ark. 891.

78. Cal.—Sayre v. Western Bowl, 174 P.2d 466, 76 Cal.App.2d 793.

79. Cal.—Davis v. Morris, 99 P.2d 345, 37 Cal.App.2d 269.

80. Idaho.—Robinson v. St. Maries Lumber Co., 204 P. 671, 34 Idaho 707.
39 C.J. p 232 note 28.

81. Ark.—Combs v. Bunn W. Robertson, Inc., 166 S.W.2d 665, 205 Ark. 20.

Corporations other than railroads

The amendment adding quoted words to statute providing for continuance, until payment, of wages of the employee of a railroad from date of discharge or of refusal longer to employ such employee whose wages have not been paid, etc., "provided further that this act shall apply to all companies and corporations doing business in this state," was intended and did make the penalty apply to all corporations.—Combs v. Bunn W. Robertson, Inc., supra.

Particular persons protected

(1) An employee who is paid by the piece may recover under a statute applicable to laborers for wages.—Champion v. Hermitage Cotton Mills, 82 S.E. 672, 98 S.C. 418.

(2) A superintendent of mine was an "employee" within statute imposing penalty on employer for willful failure to pay wages of employee immediately upon his discharge.—Davis

alty on employers, one who owns property on which work is done, but who is not the employer of the men doing the work, is not liable.[82] A statute of this nature has been held to apply only to regular employees, and not to one who was not on the pay roll of regular employees or given a social security number and who was engaged only to do a specified job in an emergency;[83] on the other hand, a statute which by its terms applies to any person employed "by the hour, day, or week" has been held applicable to casual, odd job, or emergency employment.[84] The right to a penalty is not assignable.[85]

When employee quits the service. It has been held that it is within the police power of the state to enact a penal statute requiring the wages due an employee to be paid at once on his leaving the employment, whether such leaving is by reason of discharge or his quitting the service.[86]

Discharge. An employee is discharged or refused "further employment" within the meaning of the statute when he is refused employment of the same class and kind,[87] and in the same locality in which his wages were earned under the contract of employment.[88] However, where the original employment contemplated a moving from place to place and at wages varying according to the place where the work is done, a moving of the workman from one place to another at a reduced wage is not a refusal to "further employ" within the meaning of the statute.[89] Also an employee does not come within the statute as one discharged or refused further employment if he voluntarily leaves his employment;[90] but, if the employer discontinues paying his employee wages and refuses to pay him wages which have been earned and are due, such conduct constitutes a discharge or refusal further to employ such employee,[91] and the fact that such employee thereafter abandons his job in an effort to obtain other employment from which to make a livelihood does not take him out of the operation of the statute.[92]

The question whether an employee is discharged within the meaning of the statute when he leaves, on being told to do certain work or to quit, depends on whether it was his duty to do the work ordered. If it was his duty his leaving was voluntary; otherwise it was a discharge.[93] If, in such case, it is shown that the minds of the parties never met on the terms of the contract, the employer has the right to make compliance with the order a condition of continued employment, and the employee's refusal to comply is merely a refusal to enter into a contract on those terms, and hence his quitting is voluntary and not a discharge.[94] One whose employment terminates on the completion of the particular job for which he was employed is not discharged or refused further employment within the meaning of the statute.[95] An employer is not bound by the discharge of an employee by a foreman who was not himself in the employ of defendant at the time of the discharge.[96]

(3) Demand and Refusal; Tender

Under some statutes the imposition of the penalty is conditioned on a demand for payment of the wages due or for payment of such wages at a designated place and a refusal or failure to comply with such demand. A proper tender of the wages due at the time of discharge terminates the further accumulation of penalty.

Under some statutes, in order to impose liability on the employer, the employee must establish a proper demand[97] and a refusal to pay.[98] In such case, there can be no recovery of a penalty where the dis-

v. Morris, 99 P.2d 345, 37 Cal.App.2d 269.

82. Idaho.—Fenn v. Latour Creek R. Co., 160 P. 941, 29 Idaho 521.

83. Ark.—Missouri Pacific R. Co. v. Clement, 181 S.W.2d 240, 207 Ark. 389.

84. Nev.—Doolittle v. Eighth Judicial Dist. Court, 15 P.2d 684, 54 Nev. 319.

85. Idaho.—Robinson v. St. Maries Lumber Co., 204 P. 671, 34 Idaho 707.
39 C.J. p 232 note 32.

Sale and repurchase of time check
Employees' voluntary repurchase of time checks from assignees did not reinvest employees with right to penalty for employer's nonpayment of wages when due on demand, since transaction was not a repurchase of their claims for wages, but the purchase of nonnegotiable instruments for the payment of money.—Robinson v. St. Maries Lumber Co., supra.

86. Ariz.—Arizona Power Co. v. State, 166 P. 275, 19 Ariz. 114.
Kan.—Livingston v. Susquehanna Oil Co., 216 P. 296, 113 Kan. 702.
39 C.J. p 230 note 10.

87. Ark.—Missouri Pac. R. Co. v. Ault, 216 S.W. 3, 140 Ark. 572.
39 C.J. p 232 note 33.

88. Ark.—St. Louis, I. M. & S. R. Co. v. Bryant, 122 S.W. 996, 92 Ark. 425.

89. Ark.—Caldwell v. Missouri Pac. R. Co., 208 S.W. 790, 137 Ark. 439.

90. Ark.—Missouri Pacific R. Co. v. Clement, 181 S.W.2d 240, 207 Ark. 389—Caldwell v. Missouri Pac. R. Co., 208 S.W. 790, 137 Ark. 439.

91. Ark.—Combs v. Bunn W. Robertson, Inc., 166 S.W.2d 665, 205 Ark. 20.

92. Ark.—Combs v. Bunn W. Robertson, Inc., supra.

93. S.C.—Burden v. Woodside Cotton Mills, 89 S.E. 474, 104 S.C. 435.

94. S.C.—Burden v. Woodside Cotton Mills, supra.

95. Ark.—Missouri Pacific R. Co. v. Clement, 181 S.W.2d 240, 207 Ark. 389—Chicago, R. I. & P. Ry. Co. v. Russell, 292 S.W. 375, 173 Ark. 398, 51 A.L.R. 1206.

96. Ark.—St. Louis, I. M. & S. R. Co. v. Hill, 123 S.W. 760, 92 Ark. 484—St. Louis, I. M. & S. R. Co. v. Broomfield, 104 S.W. 133, 83 Ark. 288.

97. Ark.—Largent v. Arkansas Northwestern R. Co., 188 S.W. 836, 125 Ark. 355.
39 C.J. p 232 note 39.

98. Ark.—Largent v. Arkansas Northwestern R. Co., supra.

charged employee after a demand of payment prevents a compliance by his own conduct;[99] nor is there a refusal to pay where a check in payment is given to the employee which he refuses later to present for payment.[1] It has been held that a laborer who demands a greater amount than that due is not entitled to recover penalty wages from the time of such demand,[2] but there is also authority for the view that such a demand is sufficient to subject the employer to liability for the statutory penalty until he makes a proper tender of the amount due, unless the circumstances are such as to excuse a tender,[3] as, for example, where it appears that an offer to pay the amount actually due would have been refused.[4]

Designation of place or station to which wages shall be sent. Under a statute so providing, a discharged employee may demand that the wages due him be mailed or sent to a place designated by him, and, if the employer fails to comply with such demand within the proper time, he becomes liable for penalty wages from the date of discharge;[5] and it has been held that such a provision is not restricted to employees of railroad corporations.[6] In order to recover the penalty, the employee must make a sufficient demand or request;[7] and, in the absence thereof no liability accrues, even though the employee calls repeatedly for his pay at a particular place or station and the employer knows that he has been receiving his pay at that place.[8] However, where the employer or his agent tells the employee that the pay will be ready for him within the statutory time at a station designated by the employer, the employee's acquiescence is equivalent to the request required by statute, and a recovery can be had.[9]

Where the statute so requires, the request should be directed to the foreman or keeper of the employee's time,[10] but an employer is not bound by a request made to a foreman who was not himself in the employ of defendant at the time of such request.[11] A mere complaint to one not designated in the statute as the person on whom demand can be made is not sufficient.[12] Where the statute provides that demand must be made at the place where the employee is usually paid, an employee waives whatever rights he might otherwise have under the statute, by accepting an order for payment of his wages elsewhere.[13]

Tender. A tender of the wages due at the time of the discharge, if properly made and in the proper amount, terminates the further accumulation of penalty,[14] but it does not preclude the employee from recovering the penalty already accrued.[15] A tender is effective for this purpose, even though it does not include the accrued penalty,[16] or the interest, where the amount is so small as to come within the maxim, De minimis non curat lex,[17] or where the employee refuses to accept the tender on other grounds than the failure to include interest,[18] or where it appears that he would still have refused to accept it if it had included the interest.[19] A tender, however, is not effective where made to a justice before the trial in the absence of the employee and his attorney and without their knowledge.[20] A tender of an amount less than the amount of wages due is insufficient to stop the accumulation of "penalty wages".[21]

99. Idaho.—Olson v. Idora Hill Min. Co., 155 P. 291, 28 Idaho 504, error dismissed 38 S.Ct. 191, 245 U.S. 640, 62 L.Ed. 526.
39 C.J. p 232 note 41.

1. Ark.—Wisconsin & Arkansas Lumber Co. v. Reaves, 102 S.W. 206, 82 Ark. 377.

2. La.—Duke v. Ford, Bacon & Davis, 138 So. 675, 19 La.App. 27.

3. Idaho.—Marrs v. Oregon Short Line R. Co., 198 P. 468, 33 Idaho 785.

4. Idaho.—Marrs v. Oregon Short Line R. Co., supra.

5. Ark.—McCoy-Couch Furniture Mfg. Co. v. Zahringer, 186 S.W.2d 922, 208 Ark. 581.

6. Ark.—McCoy-Couch Furniture Mfg. Co. v. Zahringer, supra.

7. Ark.—Lusk v. Jones, 194 S.W. 250, 128 Ark. 312.
39 C.J. p 232 note 45.

8. Ark.—Lusk v. Jones, 194 S.W. 250, 128 Ark. 312.

9. Ark.—Missouri Pac. R. Co. v. Ault, 216 S.W. 3, 140 Ark. 572—Biggs v. St. Louis, I. M. & S. R. Co., 120 S.W. 970, 91 Ark. 122.

10. Ark.—McCoy-Couch Furniture Mfg. Co. v. Zahringer, 186 S.W.2d 922, 208 Ark. 581.

Who is foreman

Where general manager of employer had, and exercised, immediate supervision and control over employee, the general manager was the "foreman" of employee within statute imposing penalty for noncompliance with employee's demand, at time of discharge, that wages be mailed to him.—McCoy-Couch Furniture Mfg. Co. v. Zahringer, supra.

11. Ark.—St. Louis, I. M. & S. R. Co. v. Hill, 123 S.W. 760, 92 Ark. 484—St. Louis, I. M. & S. R. Co. v. Broomfield, 104 S.W. 133, 83 Ark. 288.

12. Ark.—Bush v. Coleman, 199 S.W. 87, 131 Ark. 379.
39 C.J. p 232 note 49.

13. La.—Oller v. Bender, App., 146 So. 780.

14. La.—Duke v. Ford, Bacon & Davis, 138 So. 675, 19 La.App. 27—Whitehead v. E. J. Deas Co., 118 So. 856, 9 La.App. 47.
39 C.J. p 233 note 56.

15. Idaho.—Robinson v. St. Maries Lumber Co., 204 P. 671, 34 Idaho 707.

16. Ark.—St. Louis, I. M. & S. R. Co. v. Bryant, 122 S.W. 996, 92 Ark. 425.
39 C.J. p 233 note 58.

17. Ark.—Dickinson v. Atkins, 200 S.W. 817, 132 Ark. 84.

18. Ark.—Dickinson v. Atkins, supra.

19. Ark.—Dickinson v. Atkins, supra.

20. Ark.—St. Louis, I. M. & S. R. Co. v. Bryant, 122 S.W. 996, 92 Ark. 425.

21. La.—Godfrey v. Louisiana Oil

(4) Amount of Penalty

"Penalty wages" begin to run either from the date of the employee's discharge or from the date of demand for payment depending on the terms of the statute.

Under some statutory provisions "penalty wages" begin running from the date of the employee's discharge, and not merely from the date of the employee's demand for payment,[22] but under others they begin to run only from the time of demand.[23] They stop running on the employer's tender of wages due at the time of the discharge, as discussed supra subdivision b (3) of this section, or on the commencement of an action to collect, where the action is brought within the time allowed for a maximum recovery,[24] or on the entry of final judgment in such action after appeal where the statute permits a recovery up to the entry of judgment.[25] The pending of a valid garnishment proceeding against the employer for any portion of the penalty period following the discharge of the employee arrests the running of the penalty,[26] and, if the proceedings are dismissed before the termination of the penalty period, the amount of penalty recoverable is computed for the entire penalty period minus the wages for the time such proceedings were pending.[27] It has been held that the penalty may properly be limited to the time prior to the day on which the employer was placed in receivership.[28]

§ 157. Medium of Payment

Under constitutional and statutory provisions in some jurisdictions employers are required to pay wages for work done only in lawful money or in scrip, tokens, or other evidences of debt which comply with the terms of the statute.

Under the constitutional and statutory provisions of some states wage earners are required to be paid for their labor in lawful money,[29] and such a provision has been held to cover payment of wages at any time, whether the payment is partial or entire.[30] Statutes of this nature have generally been held valid;[31] their purpose is to protect the laborer[32] against the coercion and demand of his employer that he accept in payment of his wages less than the purchasing power of the dollar.[33] It has accordingly been held that the employee cannot waive, by contract or otherwise, the protection thus afforded him,[34] and in some states it is expressly so provided by statute;[35] but there is also authority for the view that a statute requiring the payment of wages in lawful currency may be waived by the employee,[36] as by a contract that the amount due on a store account shall be taken from future wages.[37]

A statute making it unlawful to pay otherwise than in lawful currency or specifically to issue scrip or trade or time checks in payment for work done by employees does not apply to time checks issued, not as payment for work, but merely as a statement of

Refining Corporation, App., 163 So. 729.

22. Ark.—Grayson-McLeod Lumber Co. v. Johnson, 146 S.W. 141, 103 Ark. 266.

23. La.—Bannon v. Techeland Oil Corporation, 17 So.2d 921, 205 La. 689.

24. Cal.—Martin v. Going, 207 P. 935, 57 Cal.App. 631.

25. Ark.—Morgan v. St. Louis, I. M. & S. R. Co., 152 S.W. 1023, 106 Ark. 74.
39 C.J. p 232 note 53.

26. Ark.—St. Louis, I. M. & S. R. Co. v. Walsh, 110 S.W. 222, 86 Ark. 147.

27. Ark.—St. Louis, I. M. & S. R. Co. v. Walsh, supra.

28. La.—Bannon v. Techeland Oil Corporation, 17 So.2d 921, 205 La. 689.

29. Ky.—Hoskins Grocery Co. v. Creech Coal Co., 56 S.W.2d 555, 247 Ky. 8.
La.—Radford v. Louisiana Central Lumber Co., 131 So. 765, 15 La. App. 476.
Wash.—Pillatos v. Hyde, 119 P.2d 323, 11 Wash.2d 403, 137 A.L.R. 839.
Payment in cash or services furnished employees as complying with requirements of Fair Labor Standards Act see supra § 151 (27).

Implied repeal
A later statute on the subject, not repealing an earlier one in terms, is not to be taken as a repeal by implication unless it is plainly repugnant to the former or unless it fully embraces the whole subject matter. —Pearson v. Mills Mfg. Co., 64 S.E. 407, 82 S.C. 506—39 C.J. p 236 note 2.

Inability to pay is no defense to a prosecution for violation of requirement for payment in cash.—People v. Primrose Wet Wash Laundry Co., 11 N.Y.S.2d 302, 256 App.Div. 1088.

30. Ky.—Barker v. Stearns Coal & Lumber Co., 152 S.W.2d 953, 287 Ky. 340.

31. Fla.—Henderson-Waits Lumber Co. v. Croft, 103 So. 414, 89 Fla. 119, error dismissed 46 S.Ct. 23, 269 U.S. 594, 70 L.Ed. 430.
39 C.J. p 234 note 76.

Statute held invalid
La.—State v. Blake, 127 So. 592, 170 La. 175.

32. Tenn.—**Corpus Juris cited in** Cambria Coal Co. v. Cooper, 54 S.W.2d 708, 709, 165 Tenn. 269.
Wash.—Pillatos v. Hyde, 119 P.2d 323, 11 Wash.2d 403, 137 A.L.R. 839—Smaby v. Shrauger, 115 P.2d 967, 9 Wash.2d 691.
39 C.J. p 235 note 83.

33. La.—Radford v. Louisiana Central Lumber Co., 131 So. 765, 15 La.App. 476.

34. Wash.—Pillatos v. Hyde, 119 P.2d 323, 11 Wash.2d 403, 137 A.L.R. 839—Smaby v. Shrauger, 115 P.2d 967, 9 Wash.2d 691.
39 C.J. p 235 note 84.

Contract held valid
A contract by owners of majority stock in mining company to pay balance of wage claims in consideration of release of company on part payment by company was not contrary to wage and employment statute and was enforceable against owners of majority stock.—Smaby v. Shrauger, supra.

35. Ind.—Hancock v. Yaden, 23 N.E. 253, 121 Ind. 366, 16 Am.S.R. 396, 6 L.R.A. 576.

36. Pa.—Hamilton v. Jutte, 16 Pa. Co. 193.

37. Pa.—Hamilton v. Jutte, supra.

account or an acknowledgment of the amount due;[38] nor does it apply to a check which shows itself on its face to be payable in lawful money and redeemable without discount in cash[39] or to a check issued as a credit and not in payment of wages already earned.[40] Unless the statute otherwise provides, the requirement that employees be paid in lawful money does not prevent an employee from assigning any portion of his wages as security for a store account that he is running up with a merchant[41] in the absence of collusion to do what the law has forbidden;[42] nor does such a requirement prevent an arrangement whereby checkoff orders are signed by union members directing the employer to deduct from their wages union dues and assessments[43] or an arrangement whereby the employer deducts a portion of an employee's wages and applies it to the purchase price of stock pursuant to the employee's written order.[44] Where the statute so provides, the scrip is payable only in cash, notwithstanding the terms of the scrip purport to make it payable in merchandise.[45]

While the mere issuance of checks or coupons against wages not yet earned does not violate the law requiring payment of wages in lawful currency,[46] if such coupons or checks are made payable otherwise than in cash for the full face value at the time the wages become due, or if the employer refuses so to redeem them at such time, the law is violated;[47] and, under some statutes expressly so providing, any checks, punchouts, tickets, tokens, or other device, redeemable by its terms either partially or wholly in goods or merchandise, must be redeemed by the employer issuing them on demand of any legal holder thereof on the next pay day after issuance for full face value in lawful money.[48] It is immaterial by whom the order or check is issued or put in circulation if it is of a character made unlawful by the statute and is used by the employer for the payment of labor.[49] Conversely, if the order is payable in lawful currency, its legal character is not affected by the fact that it is an order on a third person to pay the specified sum.[50]

A statute prohibiting the making of a contract for the payment of wages otherwise than in lawful currency does not preclude the parties from making an accord and satisfaction after wages have been earned and services rendered.[51] A provision regulating the assignment of future wages by an employee does not render discounts made by an em-

38. Ind.—Pere Marquette R. Co. v. Baertz, 74 N.E. 51, 36 Ind.App. 408.
39 C.J. p 235 note 89.

39. Mo.—State v. Balch, 77 S.W. 547, 178 Mo. 392.
Wash.—State v. Chehalis Furniture & Mfg. Co., 92 P. 277, 47 Wash. 378.

40. La.—Radford v. Louisiana Central Lumber Co., 131 So. 765, 15 La.App. 476.
Tenn.—Cambria Coal Co. v. Cooper, 54 S.W.2d 708, 165 Tenn. 269—Henley v. Tennessee Consol. Coal Co., 79 S.W.2d 805, 18 Tenn.App. 520.
39 C.J. p 235 note 91.
"What was the mischief that this statute was intended to remedy? It was not the giving of credit to the laborer between pay days. It was the giving him, in lieu of his wages, trade checks, tokens, etc., only redeemable in merchandise at the place of business of his employer."—Radford v. Louisiana Central Lumber Co., 131 So. 765, 769, 15 La.App. 476.

Scrip issued for both purposes
Where scrip issued by coal company to its employees had been issued in part as wages, and in part as an accommodation to employees to whom company was not indebted but who were thereby entitled to credit at company's store, merchant who had acquired scrip was entitled to recover face value of that portion which had been issued as wages, but not of that portion representing an advance of credit.—Henley v. Tennessee Consolidated Coal Co., 113 S.W.2d 1199, 21 Tenn.App. 598.

41. Ky.—Corpus Juris quoted in Kentucky-Tennessee Light & Power Co. v. Moats, 162 S.W.2d 526, 527, 290 Ky. 690.
39 C.J. p 236 note 98.

42. Ky.—Kentucky-Tennessee Light & Power Co. v. Moats, 162 S.W.2d 526, 290 Ky. 690.
39 C.J. p 236 note 99.

43. Ky.—Braddom v. Three Point Coal Corporation, 157 S.W.2d 349, 288 Ky. 734.

44. Ky.—Kentucky-Tennessee Light & Power Co. v. Moats, 162 S.W.2d 526, 290 Ky. 690.
N.Y.—Caesar v. H. S. Chardavoyne, Inc., 280 N.Y.S. 279, 245 App.Div. 724.

45. Ky.—Elkhorn Piney Coal Mining Co. v. Elvove, 36 S.W.2d 3, 237 Ky. 570.

46. Ky.—Pond Creek Coal Co. v. Lester, 188 S.W. 907, 171 Ky. 811.

47. Ky.—Kentucky Coal Min. Co. v. Mattingly, 118 S.W. 350, 133 Ky. 526.
39 C.J. p 236 note 92.

48. Fla.—Henderson-Waits Lumber Co. v. Croft, 103 So. 414, 89 Fla. 119, error dismissed 46 S.Ct. 23, 269 U.S. 594, 70 L.Ed. 430.
La.—Radford v. Louisiana Central Lumber Co., 131 So. 765, 15 La.App. 476.
Wash.—Smaby v. Shrauger, 115 P.2d 967, 9 Wash.2d 691.

Credit slip, not issued in payment of wages, but entitling employee to purchase merchandise at employer's store on credit on filling in the amount of credit desired to be extended for such purchase, was not invalid as "check, punchout, tickets, tokens or other device redeemable in merchandise," since the quoted words as used in the statute refer to evidence of an obligation for a definite amount, together with a promise to pay.—Radford v. Louisiana Central Lumber Co., 131 So. 765, 15 La.App. 476.

49. W.Va.—State v. Fire Creek Coal & Coke Co., 10 S.E. 288, 33 W.Va. 188, 25 Am.S.R. 891, 6 L.R.A. 359.

Liability of employer and trader
Where a trader or merchant issues scrip and turns it over to the employer who issues it to employees as an advance on wages, the employer and the trader are both liable to pay the full face value of the scrip in lawful money, even though their liability is not joint.—Moss Federal Coal Co. v. Rhea, 284 S.W. 100, 215 Ky. 18.

50. Wash.—Agee v. Smith, 35 P. 370, 7 Wash. 471.

51. Ind.—Hancock v. Yaden, 23 N.E. 253, 121 Ind. 366, 16 Am.S.R. 396, 6 L.R.A. 576.

ployer in making payments to employees at their request before pay day illegal.[52]

Transferability of scrip. Under some statutes trade checks or store orders issued against wages to become due and redeemable by the employer issuing them are held to be redeemable in the hands of a bona fide holder at face value;[53] such orders in the hands of holders for value are presumed to be based on an adequate consideration.[54] The fact that such an order declares on its face that it is not transferable does not prevent a bona fide holder recovering its face value from the person or corporation issuing it.[55] Under some statutory provisions scrip, trade checks, or other evidence of debt for labor are expressly made transferable;[56] that is to say, a right to redeem such scrip at face value is given to any person presenting it for payment at the proper time and on compliance with the statutory conditions, even though the person presenting it is neither the laborer to whom such scrip was issued nor the person who bought it from him.[57]

It has been held that such a scrip law making scrip issued by an employer transferable must be fairly construed so as to carry out its purpose[58] and must be read into every item of scrip issued.[59] A provision in such a statute that one who paid cash for scrip in an amount less than the full face value shall, on redemption, receive only what he paid, the balance to be credited to the worker to whom the scrip was issued, does not affect the right of a buyer to recover the full amount where he has paid par in merchandise for it.[60]

A statute providing for redemption in cash at face value of transferable scrip issued against wages to become due conforms to a constitutional requirement that wage earners be paid for their labor in lawful money;[61] but such a constitutional requirement is violated by a statute permitting the issuance of non-transferable scrip or tokens representing an advance-

52. Ind.—Princeton Coal Co. v. Dorth, 133 N.E. 386, 191 Ind. 615, 24 A.L.R. 147, dissenting opinion, 133 N.E. 500, 191 Ind. 615, 24 A.L.R. 147, rehearing denied 134 N.E. 275, 191 Ind. 615, 24 A.L.R. 147.

53. Ky.—Kentucky Coal Min. Co. v. Mattingly, 118 S.W. 350, 133 Ky. 526.

Trader other than one named

An employer issuing metal discs as trade checks, on which was stamped the name of a trader, to employees as advances on their wages, and which were charged to their pay roll account, was bound to redeem the checks from a trader other than the one named who accepted them from the employees for merchandise.—Moss Federal Coal Co. v. Rhea, 284 S.W. 100, 215 Ky. 18.

54. Ky.—Kentucky Coal Min. Co. v. Mattingly, 118 S.W. 350, 133 Ky. 526.

39 C.J. p 236 note 96.

55. Ky.—Pond Creek Coal Co. v. Lester, 188 S.W. 907, 171 Ky. 811.

Tenn.—Dayton Coal & Iron Co. v. Barton, 53 S.W. 970, 103 Tenn. 604, affirmed 22 S.Ct. 5, 183 U.S. 23, 46 L.Ed. 61.

56. Ky.—Carrs Fork Coal Co. v. Johnson Drug Co., 60 S.W.2d 952, 249 Ky. 371—Elkhorn Piney Coal Mining Co. v. Elvove, 36 S.W.2d 3, 237 Ky. 570.

Wash.—Smaby v. Shrauger, 115 P.2d 967, 9 Wash.2d 691.

57. Ky.—Western Kentucky Coal Co. v. Nall & Bailey, 14 S.W.2d 400, 228 Ky. 76.

Records to be kept by purchaser

(1) The statute requires the purchaser of scrip to keep an accurate record of the amount of scrip purchased, the name of each person from whom it was purchased, the date, and the amount paid, and who issued the scrip so purchased; and a sworn statement incorporating these items must be presented when payment for the scrip is demanded.—Elkhorn Piney Coal Mining Co. v. Elvove, 36 S.W.2d 3, 237 Ky. 570.

(2) Substantial compliance with such provisions is sufficient.—Clear Fork Coal Co. v. Robertson, 148 S.W. 2d 1047, 285 Ky. 659—Elkhorn Piney Coal Mining Co. v. Elvove, supra.

(3) The statements need not show whether the scrip was paid for in money, goods, or other things of value.—Elkhorn Piney Coal Mining Co. v. Elvove, supra.

(4) If the purchaser acquired the scrip from one other than the employee to whom it was issued, the statement need not show the name of such employee.—Elkhorn Piney Coal Mining Co. v. Elvove, supra—Western Kentucky Coal Co. v. Nall & Bailey, 14 S.W.2d 400, 228 Ky. 76.

When statement unnecessary

(1) Purchaser of scrip issued by employer was not required to present itemized statement and affidavit where employer's manager refused payment on ground that employer was not redeeming scrip in cash.—Hoskins Grocery Co. v. Creech Coal Co., 56 S.W.2d 555, 247 Ky. 8—Elkhorn Piney Coal Mining Co. v. Elvove, 36 S.W.2d 3, 237 Ky. 570.

(2) In such case defendant was chargeable with a constructive knowledge of the law and must be deemed to have waived right to require presentation of statements.—Barker v. Stearns Coal & Lumber Co., 163 S.W.2d 466, 291 Ky. 184.

Time of presentation

It was coal company's duty to redeem scrip issued to employees when presented by purchaser from third person on regular pay day.—Hoskins Grocery Co. v. Creech Coal Co., 56 S.W.2d 555, 247 Ky. 8.

Interest

Under express provision in the statute, where the purchaser of scrip has paid for it in cash he is entitled on redemption to interest at the statutory rate to the date of presentation of the scrip for payment, and the amount of such interest is chargeable to the employee to whom the scrip was issued; where the purchaser paid for the scrip not in cash but in merchandise, he is not entitled to interest to the date of presentation but he is entitled to interest from the time of proper presentation, demand, and refusal.—Carrs Fork Coal Co. v. Johnson Drug Co., 60 S.W.2d 952, 249 Ky. 371.

58. Ky.—Western Kentucky Coal Co. v. Nall & Bailey, 14 S.W.2d 400, 228 Ky. 76.

59. Ky.—Barker v. Stearns Coal & Lumber Co., 163 S.W.2d 466, 291 Ky. 184—Carrs Fork Coal Co. v. Johnson Drug Co., 60 S.W.2d 952, 249 Ky. 371—Elkhorn Piney Coal Mining Co. v. Elvove, 36 S.W.2d 3, 237 Ky. 570.

60. Ky.—Western Kentucky Coal Co. v. Nall & Bailey, 14 S.W.2d 400, 228 Ky. 76.

61. Ky.—Hoskins Grocery Co. v. Creech Coal Co., 56 S.W.2d 555, 247 Ky. 8.

ment of wages earned but not yet due,[62] although it would not be violated by a provision authorizing the issuance of nontransferable scrip or tokens as an extension of credit based on an anticipated counter-obligation or unearned wages or anything other than wages earned.[63] Under a statute so providing, an employer may issue nontransferable scrip redeemable in merchandise only until pay day, at which time it must be redeemed in cash, provided such scrip is issued only against wages for labor to be performed and not in payment of wages already earned,[64] and if the scrip purports to cover both labor performed and labor to be performed the statutory proviso is not satisfied, and the scrip will be held payable only in cash.[65]

What law governs. A contract providing for the payment by promissory notes payable from the proceeds of the employer's business, lawful in the state where made and where the services were performed, will be enforced against the employee suing on an implied contract in a state of which plaintiff is a resident, although similar contracts are made illegal by the statutes of such latter state.[66]

Recovery. Some statutes expressly make employers who issue scrip to employees by way of payment for labor liable on proper and timely demand of a holder thereof for the full face value of such scrip, together with interest from the date of demand[67] and attorney's fees.[68] Where an employer issued scrip payable in merchandise to strangers as well as to employees, a holder of the scrip seeking to recover under such a statute must show that his scrip was originally issued to employees.[69] A statutory imposition of a penalty in addition to a reasonable attorney's fee on recovery of judgment in a suit for redemption of scrip has been held mandatory;[70] and, if the employer flatly refuses to redeem scrip without asking for an opportunity to inspect it, he cannot escape liability for the penalty on the ground that the scrip was presented to him in batches so that he had no opportunity to inspect.[71] Some statutes make violations thereof a criminal offense;[72] and it has been held that such statutes should be strictly construed in favor of defendant and against the state.[73]

§ 158. Basis and Measure of Compensation

In a number of jurisdictions the methods for determining the compensation of workers engaged in certain occupations in which such determination is difficult are prescribed by statute, and such a statute has been held valid.

Statutes prescribing reasonable rules for determining the compensation of workers in occupations where such determination is difficult have been held valid as within the proper exercise of police power.[74] Thus, under some statutory provisions, the compensation of hop pickers is required to be determined solely by the weight of the hops picked,[75] and the compensation of miners is in some jurisdictions regulated by statutes providing for the mode of weighing the ore mined.[76] Since such statutes

62. Ky.—Barker v. Stearns Coal & Lumber Co., 152 S.W.2d 953, 958, 287 Ky. 340.

"We may readily agree that ordinarily the legislature may declare non-negotiable or non-assignable any particular instrument representing a promise to pay money. However, if it represents wages owing a laborer for work done, the legislative authority is subject to the restriction . . . of the Constitution."—Barker v. Stearns Coal & Lumber Co., supra.

Scrip issued under such a statute, if issued for wages earned, is transferable even though by its terms it is declared nontransferable.—Barker v. Stearns Coal & Lumber Co., 163 S.W.2d 466, 291 Ky. 184—Barker v. Stearns Coal & Lumber Co., 152 S.W. 2d 953, 287 Ky. 340.

63. Ky.—Barker v. Stearns Coal & Lumber Co., 152 S.W.2d 953, 287 Ky. 340.

Reason for rule

Extension of credit by employer to an employee, based on anticipated service and contingent security, is not payment of wages within constitutional provision requiring payment in lawful money, but such extension is matter of contract between parties which is not controlled by such constitutional provision.—Barker v. Stearns Coal & Lumber Co., 152 S.W. 2d 953, 287 Ky. 340.

Nature of obligation created

Scrip issued and accepted for purposes other than wages constitute duebills or promises to pay according to their terms, coupled with general custom in relation thereto—Barker v. Stearns Coal & Lumber Co., 163 S.W.2d 466, 291 Ky. 184.

64. W.Va.—Holliday v. Elkhorn-Piney Coal Mining Co., 134 S.E. 736, 102 W.Va. 147.

65. W.Va.—Holliday v. Elkhorn-Piney Coal Mining Co., 134 S.E. 736, 102 W.Va. 147.

66. Wash.—Hatcher v. Idaho Gold & Ruby Min. Co., 179 P. 106, 106 Wash. 108.

67. Fla.—Henderson-Waits Lumber Co. v. Croft, 103 So. 414, 89 Fla. 119, error dismissed 46 S.Ct. 23, 269 U.S. 594, 70 L.Ed. 430.

68. Fla.—Henderson-Waits Lumber Co. v. Croft, supra.

69. W.Va.—Legg v. Junior Mercantile Co., 142 S.E. 259, 105 W.Va. 287.

70. Tenn.—Henley v. Tennessee Consolidated Coal Co., 113 S.W.2d 1199, 21 Tenn.App. 598.

"This provision is plainly mandatory. It requires the imposition of the penalty as a punishment for the violation of the law, not as a remedy for the injury or loss suffered by the complainant."—Henley v. Tennessee Consol. Coal. Co., 79 S.W.2d 805, 806, 18 Tenn.App. 520.

71. Tenn.—Henley v. Tennessee Consolidated Coal Co., 113 S.W.2d 1199, 21 Tenn.App. 598.

72. Wash.—Smaby v. Shrauger, 115 P.2d 967, 9 Wash.2d 69.

73. Md.—Shaffer v. Union Min. Co., 55 Md. 74.

Mo.—State v. Balch, 77 S.W. 547, 178 Mo. 392.

74. Or.—McLaughlin v. Helgerson, 241 P. 50, 116 Or. 310.

75. Or.—McLaughlin v. Helgerson, supra.

76. Ky.—Williams v. United Mine Workers of America, 172 S.W.2d 202, 294 Ky. 520, 149 A.L.R. 505.

are penal, they are as a rule to be strictly construed.[77] A statute of this character has been held not to prevent the making of a contract for payment of wages on a different basis[78] and does not apply where a contract exists between an operator and his employers for the payment of wages on a different basis than by weight,[79] but a mere custom as to weighing cannot abrogate the specific provisions of a statute.[80]

A statute requiring the weighing of all coal before it is screened, qualified by a proviso that the act shall not be so construed as to compel payment for impurities, does not preclude a screening before weighing where the mine owner can only by that means avoid paying for impurities;[81] and a statute requiring every mine owner to pay his employees for the different grades into which the coal may be divided, at such prices as may be agreed on by the respective parties, does not prohibit the mine owner from contracting with his employee to pay only for one grade of coal screened and nothing for the others.[82]

Checkweighman. Under statute in some jurisdictions, miners in proper cases may employ a checkweighman to inspect the weights and see that all coal mined is weighed and properly accounted for.[83] There must be substantial compliance with provisions in such a statute governing the manner in which the weighman shall be selected in order to impose on the mine owner the duty of permitting the weighman to use the mine premises;[84] but such a statute has been held not to preclude the selection of the weighman by other than the statutory methods if there is no objection by the mine owner to the method adopted.[85] Where the statute makes the employment of a weighman by the miners optional with them, it is not unlawful for the mine owners and miners to contract to work without enforcing such right.[86] Furthermore, under such a statute, although a checkweighman has been selected as allowed by law, a mine owner is under no obligation to continue to operate the mine,[87] and a threat by him to close down the mine unless one so selected is discharged is not, in the absence of fraud, such interference or intimidation, within the meaning of the statute, as to constitute an offense.[88]

§ 159. Deduction and Forfeiture

Statutes prohibiting deductions from wages in certain cases, or except in compliance with prescribed conditions, are generally held valid, and, being penal, should be strictly construed; in a number of jurisdictions, by virtue of express statutory provision, persons are forbidden to require employees to "kick back" any part of their wages in order to obtain or retain employment.

An act forbidding an employer to impose a fine on an employee or to withhold wages because of imperfections in the work done by him has been held unconstitutional;[89] but it would seem that such a statute would be constitutional if construed to mean merely that an employer is forbidden arbitrarily to impose a penalty for an imperfection by a deduction from the amount of the wages to which the employee is entitled under his contract, whether that amount has been determined by quantum meruit or by stipulation.[90] Statutes prohibiting deduction from wages for defective workmanship unless mutually determined to be the result of the employee's negligence or willful conduct[91] or prohibiting deduction

Tenn.—Black Diamond Coal Mining Co. v. Rankin, 98 S.W.2d 311, 170 Tenn. 651.

77. Ill.—Reinecke v. People, 15 Ill. App. 241.
39 C.J. p 238 note 27.

78. Ill.—Jones v. People, 110 Ill. 590.

79. Ill.—Jones v. People, 110 Ill. 590.

80. Tenn.—Smith v. State, 18 S.W. 248, 90 Tenn. 575.
39 C.J. p 238 note 30.

81. Ind.—Martin v. State, 42 N.E. 911, 143 Ind. 545.
39 C.J. p 238 note 31.

82. Ill.—Whitebreast Fuel Co. v. People 51 N.E. 853, 175 Ill. 51.
39 C.J. p 238 note 32.

83. Ky.—Winco Block Coal Co. v. Stewart, 125 S.W.2d 738, 277 Ky. 125.
Pa.—Commonwealth v. H. C. Frick Coke Co., Com.Pl., 2 Fay.L.J. 75.
Tenn.—Black Diamond Coal Mining Co. v. Rankin, 98 S.W.2d 311, 170 Tenn. 651—State v. Jenkins, 18 S.W. 249, 90 Tenn. 580.

84. Ky.—Williams v. United Mine Workers of America, 172 S.W.2d 202, 294 Ky. 520, 149 A.L.R. 505.
Pa.—Commonwealth v. H. C. Frick Coke Co., Com.Pl., 2 Fay.L.J. 75.

85. Ky.—Williams v. United Mine Workers of America, 172 S.W.2d 202, 294 Ky. 520, 149 A.L.R. 505.

Validity of agreement
Agreement between miners' union and operators that, if a suitable person is not available among the mineworkers at the mine, the checkweighman should be selected by mutual consent, was not void as against statute providing for selection of checkweighman by majority of workers or as against public policy since miners waived benefits of statute to extent of agreement.—Black Diamond Coal Mining Co. v. Rankin, 98 S.W.2d 311, 170 Tenn. 651.

86. Tenn.—State v. Jenkins, 18 S.W. 249, 90 Tenn. 580.

87. Tenn.—State v. Jenkins, supra.

88. Tenn.—State v. Jenkins, supra.

89. Mass.—Commonwealth v. Perry, 28 N.E. 1126, 155 Mass. 117, 31 Am.S.R. 533, 14 L.R.A. 325.
39 C.J. p 238 note 40.
Deductions, forfeitures, and fines apart from statute see supra §§ 102–106.

90. Mass.—Commonwealth v. Lancaster Mills, 98 N.E. 864, 212 Mass. 315.

91. Wis.—Zarnott v. Timken-Detroit Axle Co., 13 N.W.2d 53, 244 Wis. 596, 153 A.L.R. 860.

Purpose of statute prohibiting deduction from wages for defective workmanship unless mutually determined to result from employee's negligence is to prohibit arbitrary action by employer.—Zarnott v. Timken-Detroit Axle Co., supra.

from wages of dues payable to labor organizations[92] have been held valid. Generally speaking, the operation and effect of statutes prohibiting deductions under certain circumstances depends on the particular language employed as construed in accordance with the usual rules.[93] Since such statutes are penal in nature, they must be strictly construed.[94]

Under some statutes a penalty is imposed on an employer who makes deductions from wages in violation of their terms.[95] A statute providing that any person who shall withhold any part of the wages of an employee, because of an agreement requiring notice before leaving the employment, shall be subject to a penalty does not apply to a contract of employment by which each party agrees to give the other two weeks' notice of intention to terminate it, and in default of such notice to forfeit or pay two weeks' wages.[96] A statute requiring payment without deduction, on the discharge of an employee, means without discount for paying in advance of the time fixed by the contract, and does not prevent the corporation from offsetting the damages sustained by the employee's failure to perform his contract.[97] When the parties have stipulated that either may terminate a contract of employment if he sees proper to do so, the forfeiture provided by statute in case the employee shall depart from the service before the expiration of the term will not be incurred in such a case.[98] A statute prohibiting deductions from wages for defective workmanship, unless mutually determined to result from the employee's negligence, becomes part of the contract of employment and is binding on the parties.[99] Under a statute prohibiting the imposition of a fine on an employee unless the amount thereof is agreed on between the parties, an employee may, by acquiescence in similar conduct, expressly agree that, when he has been paid in full for one week's work, fines for the imperfections of that week may be deducted from the succeeding week's wages,[1] and, as discussed supra § 156, such an agreement is not contrary to a statute requiring employers to pay their employees weekly.

"Kick-back" statutes. Under statutes expressly so providing, and commonly designated in one way or another as statutes against "kick-backs," persons are prohibited in certain instances from requiring employees to waive, pay back, return, or contribute any part of their wages as a condition of obtaining or retaining employment,[2] and violations of such stat-

92. U.S.—Association of Rock Island Mechanical and Power Plant Employees v. Lowden, D.C.Kan., 15 F. Supp. 176, affirmed, C.C.A., Brotherhood of Railroad Shop Crafts of America, Rock Island System, Grand Lodge No. 3 v. Lowden, 86 F.2d 458, 108 A.L.R. 1128, certiorari denied Brotherhood of Railroad Shop Crafts of America v. Lowden, 57 S.Ct. 436, 300 U.S. 659, 81 L.Ed. 868.

93. **Deductions not for employer's benefit**

Where wage deductions provided in closed-shop union contract were for benefit of union and not for benefit of employer, the statutes prohibiting deductions from wages for benefit of employer had no application.—Greenwald v. Chiarella, 63 N.Y.S.2d 49, 271 App.Div. 213.

Charges held not fines

Charges made against taxicab driver by taxicab company for amount expended by company in caring for damages arising by reason of driver's operation of his cab, which were authorized by agreement under which driver, who was employed on commission basis, was responsible for damages occasioned to and by his cab while it was in driver's possession were not fines prohibited by statute making unlawful the assessment of fines by employer against employees.—Hanks v. Shreveport Yellow Cabs, La.App., 187 So. 817.

Exception held inapplicable

N.Y.—Canton v. The Palms, Inc., 273 N.Y.S. 239, 152 Misc. 347.

Reference to other statutes

It has been held that a statute allowing an employer to contract for the forfeiture of a week's wages for failure to give notice of his intention to quit the employment is not repugnant to a statute requiring the weekly payment of wages.—Veitkunas v. Morrison, 95 A. 947, 114 Me. 256—39 C.J. p 239 note 46.

94. La.—Hanks v. Shreveport Yellow Cabs, App., 187 So. 817.

95. Wis.—Zarnott v. Timken-Detroit Axle Co., 13 N.W.2d 53, 244 Wis. 596, 153 A.L.R. 860.

Amount of penalty

Under statute relating to deductions from wages for faulty workmanship, in the event opportunity to show that defect was not due to employee's negligence, carelessness, or willful and intentional misconduct is not given, employer is liable for twice the amount of deductions to which employee would be entitled from a nondefective piece of work. —Peters v. International Harvester Co., 22 N.W.2d 518, 248 Wis. 451.

96. Conn.—Pierce v. Whittlesey, 19 A. 513, 58 Conn. 104, 7 L.R.A. 286.

97. Ark.—Leep v. St. Louis, I. M. & S. R. Co., 25 S.W. 75, 58 Ark. 407, 41 Am.S.R. 109, 23 L.R.A. 264, appeal dismissed 15 S.Ct. 1042, 159 U. S. 267, 40 L.Ed. 142.

39 C.J. p 239 note 47.

98. N.C.—Steed v. McRae, 18 N.C. 435.

39 C.J. p 239 note 48.

99. Wis.—Zarnott v. Timken-Detroit Axle Co., 13 N.W.2d 53, 244 Wis. 596, 153 A.L.R. 860.

1. Mass.—Gallagher v. Hathaway Mfg. Corp., 51 N.E. 1086, 172 Mass. 230.

39 C.J. p 239 note 44.

2. U.S.—U. S. v. J. Greenbaum & Sons, C.C.A.N.Y., 123 F.2d 770—U. S. v. Golder, D.C.Pa., 11 F.Supp. 870.

N.Y.—People v. Brill, 7 N.Y.S.2d 949, 255 App.Div. 452—People v. Fay, 43 N.Y.S.2d 826, 182 Misc. 358—Caivano v. Brill, 11 N.Y.S.2d 498, 171 Misc. 298—People, on Complaint of Falzia v. Meyer, 3 N.Y.S. 2d 870, 167 Misc. 287.

Purpose of statute

(1) The purpose of the Kick-Back Racket Act is to protect not only the legal form of employment contracts, but the substantive rights of workers to receive the benefit of wage schedules provided by congress, except where diverted under authority of law or the workers' voluntary agreements.—U. S. v. Laudani, N.J., 64 S.Ct. 315, 320 U.S. 543, 88 L.Ed. 300, 149 A.L.R. 492.

(2) The purpose of the Anti-Kickback Act is to insure that workers

utes are made criminal offenses.[3] Such statutes have been held valid[4] and, being penal, should be strictly construed,[5] although it has also been held that such a statute must be read and applied in the light of the evils which gave rise to its enactment and the aims it sought to achieve[6] and that its effectiveness should not be limited unless the legislative intent to so limit it is inescapable.[7]

The operation and effect of such statutes generally depend on their language and terms.[8] The statute may by its terms be made applicable not only to individuals, associations, or corporations engaged in private business, but also to an elected public official who is authorized to appoint or hire another person for a municipality or governmental agency.[9] While such a statute necessarily applies where the employee gives up or concedes a portion of his contractual wage to, or in favor of, or at the instance of, the employer or one acting for or on behalf of the employer,[10] it is not limited to such cases[11] and

on federal projects shall receive the full wages to which they are entitled from their employers, many of whom might be found to be depriving the workers of their rights in such respect.—U. S. v. Carbone, Mass., 66 S.Ct. 734, 327 U.S. 633, 90 L.Ed. 904.

(3) The purpose of the statute is to protect workmen engaged on public projects from being compelled, through means stated in the statute, to give up any part of the compensation to which they are entitled under their contract of employment.—U. S. v. Fuller, D.C.N.Y., 51 F.Supp. 951—U. S. v. McGraw, D.C.N.Y., 47 F.Supp. 927—U. S. v. Charlick, D.C. Pa., 26 F.Supp. 203.

(4) Other statements of purpose. U.S.—U. S. v. Carbone, D.C.Mass., 56 F.Supp. 343.
Wash.—State v. Carter, 142 P.2d 403, 18 Wash.2d 590.

3. U.S.—U. S. v. Fuller, D.C.N.Y., 51 F.Supp. 951—U. S. v. Charlick, D.C.Pa., 26 F.Supp. 203—U. S. v. Golder, D.C.Pa., 11 F.Supp. 870.
N.Y.—People v. Brill, 7 N.Y.S.2d 949, 255 App.Div. 452—People v. Fay, 43 N.Y.S.2d 826, 182 Misc. 358—People, on Complaint of Falzia v. Meyer, 3 N.Y.S.2d 870, 167 Misc. 287.
Wash.—State v. Carter, 142 P.2d 403, 18 Wash.2d 590.

4. N.Y.—People v. Brill, 7 N.Y.S.2d 949, 255 App.Div. 452.

5. U.S.—U. S. v. Laudani, C.C.A. N.J., 134 F.2d 847, reversed on other grounds 64 S.Ct. 315, 320 U. S. 543, 88 L.Ed. 300, 149 A.L.R. 492—U. S. v. Charlick, D.C.Pa., 26 F.Supp. 203.
N.Y.—People v. Brill, 7 N.Y.S.2d 949, 255 App.Div. 452.

6. U.S.—U. S. v. Carbone, Mass., 66 S.Ct. 734, 327 U.S. 633, 90 L.Ed. 904.

7. U.S.—U. S. v. McGraw, D.C.N.Y., 47 F.Supp. 927.

8. U.S.—U. S. v. Carbone, Mass., 66 S.Ct. 734, 327 U.S. 633, 90 L.Ed. 904.

Nature of acts prohibited

(1) The statute does not undertake to prescribe any particular rate of wage, nor does it provide that payment of a lower wage than the parties have agreed on will constitute a crime; it is directed only against those who procure a refund under threats, express or implied, that the employee will be discharged.—People v. Brill, 7 N.Y.S.2d 949, 255 App.Div. 452.

(2) The "kick-back" statute is violated whenever employee is in essence deprived by employer of part of the prevailing wage agreed on, irrespective of how deprivation is effected or of whether money deducted was ever in employee's possession.—People, on Complaint of Falzia v. Meyer, 3 N.Y.S.2d 870, 167 Misc. 287.

(3) It is not necessary to constitute a rebate, within meaning of statute prohibiting the rebating of wages as applied to public officials and employees, that money returned or withheld from employees' wages be returned to the coffers of the public agency involved; it is sufficient if such moneys go into pocket of elected public official who has authority to appoint and to remove the employee.—State v. Carter, 142 P.2d 403, 18 Wash.2d 590.

Contractual wage protected

(1) The offense aimed at by the Kick-Back Racket Act is the inducing of an employee engaged on public work, financed in whole or in part by the United States, to give up any part of his compensation to which he is entitled under his contract of employment, which means the contract between the employee and his employer.—U. S. v. Laudani, C.C.A.N.J., 134 F.2d 847, reversed on other grounds 64 S.Ct. 315, 320 U.S. 543, 88 L.Ed. 300, 149 A.L.R. 492—U. S. v. Charlick, D.C.Pa., 26 F.Supp. 203—U. S. v. Golder, D.C.Pa., 11 F. Supp. 870.

(2) The statute is not violated where the employee receives the whole amount of the wages called for by his contract with the employer, even though the amount of such wages is less than the general wage scale fixed by the government or less than the wages fixed by the employer's contract with the government or with the general contractor, and regardless of what means were used to induce the employee to accept such lower rate of pay.—U. S. v. Charlick, supra—U. S. v. Golder, supra.

All federally financed work is embraced within the provisions of the Kick-Back Racket Act.—U. S. v. Laudani, C.C.A.N.J., 134 F.2d 847, reversed on other grounds 64 S.Ct. 315, 320 U.S. 543, 88 L.Ed. 300, 149 A.L.R. 492.

Employee as accomplice

A workman who, induced by fear that work will otherwise cease, consents to arrangement violative of "kick-back" statute, cannot be regarded as an accomplice, but a workman who, in addition to returning part of his own wages, assists employer in violating "kick-back" statute by collecting "kick backs" from other workmen is guilty as an accomplice.—People, on Complaint of Falzia v. Meyer, 3 N.Y.S.2d 870, 167 Misc. 287.

Contractual provisions required

Prior to its amendment, a statute making it a crime to require employees to pay back or return any part of their wages applied only where there was a contract for personal services between the employer and the employees or their union requiring the employees to be paid the prevailing rate of wages.—People v. Brill, 7 N.Y.S.2d 949, 255 App.Div. 452.

9. Wash.—State v. Carter, 142 P.2d 403, 18 Wash.2d 590.
Statutory provisions as to wages of public employees or employees on public works generally see supra § 153.

The county treasurer, as an elected public official authorized by law to appoint deputies and to remove them at his pleasure, is an employer within meaning of statute prohibiting the rebating of wages.—State v. Carter, 142 P.2d 403, 18 Wash.2d 590.

10. U.S.—U. S. v. Laudani, C.C.A.N. J., 134 F.2d 847, reversed on other grounds 64 S.Ct. 315, 320 U.S. 543, 88 L.Ed. 300, 149 A.L.R. 492.

11. U.S.—U. S. v. Laudani, N.J., 64 S.Ct. 315, 320 U.S. 543, 88 L.Ed. 300, 149 A.L.R. 492—U. S. v. McGraw, D.C.N.Y., 47 F.Supp. 927.

has been held applicable to a foreman having the authority to hire and fire employees even though he was acting solely on his own behalf.[12]

Such statutes have also been held applicable to union officials who extort from workmen, not union members, part of their compensation for the privilege of working,[13] but other statutory provisions of this character have been held not to apply to union officials who threaten to procure the discharge of any workers failing to make the required weekly payments until the full amount of union initiation fees is paid in accordance with the union's closed-shop agreement with the employer.[14] A statute prohibiting the rebating of wages has been held not to forbid the making of donations or contributions by the employees to the employer, whether the employer is engaged in private industry or is an elected public official, provided such contribution or donation is voluntary.[15] It has been held that payments made under a "kick-back" condition in a contract of employment are recoverable as payments made under duress.[16]

C. Actions and Criminal Prosecutions

§ 160(1). Action for Wages, Damages, or Penalties

a. In general

b. Under Fair Labor Standards Act

a. In General

The nature, form, and scope of actions for wages and penalties under statutes regulating wages and the payment thereof depend on the terms and provisions of the statute and the circumstances of the case.

The nature, form, and scope of actions for wages and penalties under statutes regulating wages or the payment thereof, which statutes are discussed supra §§ 151 (1)–159, depend on the terms and provisions of the particular statute and the circumstances of the particular case.[17] Where a statute provides for the payment of overtime pay, it is immaterial that it makes no provision for the recovery of such pay, since such provision carries with it by necessary implication the right to sue and recover such overtime compensation.[18] However, under a statute providing that an employee working an excessive number of hours shall be entitled to recover compensation at the legal minimum rate for the overtime worked, but failing to set a minimum wage, it has been held that an employee has no cause of action for overtime worked.[19] Under statutes imposing a penalty for a failure, on the part of an employer, to make payment of wages to his employees at stated periods, considered supra § 156, an action may be brought to recover the penalty alone[20] or to recover the wages and accrued penalty.[21]

12. U.S.—U. S. v. Laudani, N.J., 64 S.Ct. 315, 320 U.S. 543, 88 L.Ed. 300, 149 A.L.R. 492.

13. N.Y.—People v. Fay, 43 N.Y.S. 2d 826, 182 Misc. 358.

14. U.S.—U. S. v. Carbone, Mass., 66 S.Ct. 734, 327 U.S. 633, 90 L.Ed. 904 —U. S. v. Baker, C.C.A.Pa., 155 F. 2d 16.

Employee barred from union

The statute penalizing the compelling of workmen on public work to give up part of their compensation by threats of procuring dismissal from employment is violated by an agreement between an employer's authorized agent and union officials whereby workers are compelled to pay a part of their compensation to a local union of which they were not and could not become members, for the privilege of working on a war project, the statute not being limited to employers in view of the words "anyone" in the title, and "whoever" in the text, having such universally understood meanings that they are embodied in the maxim, Expressum facit cessare tacitum.—U. S. v. Fuller, D.C.N.Y., 51 F.Supp. 951.

Subsequent conversion of money

Where acts of union officials in threatening to procure discharge of any workers failing to make required weekly payments until full amount of union initiation fees was paid in accordance with union's closed-shop agreement with employer were not in violation of the Anti-Kickback Act, proof that union officials thereafter converted money so collected to their own use in violation of the union rules, if established, would not constitute a violation of the act.—U. S. v. Carbone, Mass., 66 S.Ct. 734, 327 U.S. 633, 90 L.Ed. 904.

15. Wash.—State v. Carter, 142 P. 2d 403, 407, 18 Wash.2d 590.

"While occasion for the manifestation of such generosity on the part of the employee may not be frequent nor the privilege often exercised, there is nothing in the statute which proscribes such efforts. Having once received his wages in full, the employee is at liberty to do what he will with his earnings, so long as he does not violate some positive rule of law governing his action. He may keep the money in his pocket, invest it, spend it, or give it away. . . . If the contribution be in fact a voluntary donation, it does not necessarily constitute a rebate of wages merely because it moves to, or for the benefit of, the employer."—State v. Carter, supra.

16. N.Y.—Caivano v. Brill, 11 N.Y.S. 2d 498, 171 Misc. 298.

17. Ky.—Consolidated Tel. Co. v. Stevens, 168 S.W.2d 1012, 293 Ky. 313.

Action held ex delicto

Under statutes establishing minimum wages and maximum hours of service for women and minors, an action to recover overtime compensation for overtime hours rendered without contract respecting pay therefor has been held to be of an ex delicto character.—Consolidated Tel. Co. v. Stevens, supra.

18. Tex.—Campbell Cleaning & Dye Works v. Porter, Civ.App., 183 S. W.2d 253, error refused.

19. Kan.—Walker v. Dixie Frocks, 73 P.2d 1009, 146 Kan. 812.

The contract rate of pay of the employee cannot be used as the basis of the action for overtime compensation under such statute.—Walker v. Dixie Frocks, supra.

20. Ark.—St. Louis, I. M. & S. R. Co. v. Pickett, 67 S.W. 870, 70 Ark. 226.

21. Ark.—Morgan v. St. Louis, I. M.

Actions for wages apart from statute are considered supra §§ 122–137.

Statutes as to public employees and employees on public works. The provisions of a statute requiring prevailing wages to be maintained in the construction of public works, and providing for fines, imprisonment, and forfeitures for violations of the statute, have been held not exclusive, and employees, as third-party beneficiaries of the statute, may maintain a civil action against their employer for the difference between the wages actually paid and the wages due under prevailing wage rates.[22] Under a provision requiring contracts between governmental agencies and contractors on public works to provide for the payment of prevailing wages to employees on such public works, and providing the remedy for the employees' recovery of the differential in wages, it has been held that the employee cannot sue on the contract but must follow the statutory remedy, which is exclusive;[23] but where the contract with the governmental agency contained an agreement to pay not merely prevailing wages, but definite wages as set forth in a schedule annexed to the contract, an employee of the contractor may maintain a common-law action against his employer for breach of such contract, and the statutory remedy is not exclusive in such case.[24]

Where a statute providing for the payment of prevailing wages to public employees provides the remedy whereby an employee may recover the difference between the wages paid and the amount which should have been paid at the prevailing rate, such remedy has been held exclusive and it must be followed by employees.[25]

b. Under Fair Labor Standards Act

An action under the Fair Labor Standards Act for unpaid minimum wages or overtime compensation and liquidated damages is an action to enforce a civil liability and may be brought only by an aggrieved employee. The remedies established by the act are exclusive; but, if the action is brought in a state court, such court's rules of practice and procedure control.

An action under the Fair Labor Standards Act to recover unpaid minimum wages or unpaid overtime compensation, and an additional equal amount as liquidated damages, is an action to enforce a civil liability, not a penal liability,[26] although the breach complained of also constitutes a criminal violation.[27] It is an action for wages due under an employment agreement,[28] an action created by statute on a contract, obligation, or liability.[29] The remedies established by the act for its enforcement are exclusive and not subject to exception;[30] and the right to recover for back wages must be enforced in the manner expressly specified in the act.[31] However, if the action is brought in a state court it must be tried

& S. R. Co., 152 S.W. 1023, 106 Ark. 74—St. Louis, I. M. & S. R. Co. v. Walsh, 110 S.W. 222, 86 Ark. 147.

22. Tex.—Austin Bridge Co. v. Teague, Civ.App., 149 S.W.2d 674, reversed on other grounds 152 S. W.2d 1091, 137 Tex. 119.

Purpose of statute

The statute requiring prevailing wage rate to be maintained in construction of public works contemplates authority of workmen to enforce their rights to be paid wages prescribed by suit against contractor in view of purpose of statute and other statutes enacted for benefit of workmen furnishing labor on public works, all of which statutes are in pari materia.—Austin Bridge Co. v. Teague, supra.

23. N.Y.—People ex rel. Rodgers v. Coler, 59 N.E. 716, 166 N.Y. 1.

24. N.Y.—Fata v. S. A. Healy Co., 46 N.E.2d 339, 341, 289 N.Y. 401, 144 A.L.R. 1031.

Reason for rule

"The obligation thus assumed by the contractor is precise, and extends beyond the scope of the statutory obligation. The statutory remedy provided for breach of the statutory obligation would be an inadequate and unsuitable remedy for a violation of this contractual obligation. An intention that the statutory remedy should be used for violation of the contractual obligation cannot be read into the statute by any reasonable construction. It would, indeed, render futile the contractual obligation."—Fata v. S. A. Healy Co., supra.

25. N.Y.—McGrail v. City of New York, 11 N.Y.S.2d 806, 171 Misc. 55, affirmed 6 N.Y.S.2d 374, 254 App.Div. 857, reargument denied 7 N.Y.S.2d 226, 255 App.Div. 758.

Statutory conditions precedent see infra § 160 (3).

26. U.S.—Fletcher v. Grinnell Bros., D.C.Mich., 64 F.Supp. 778—Maddox v. Jones, D.C.Ala., 42 F.Supp. 35.

Tex.—Stringer v. Griffin Grocery Co., Civ.App., 149 S.W.2d 158, error refused.

27. U.S.—Fletcher v. Grinnell Bros., D.C.Mich., 64 F.Supp. 778.

Criminal prosecutions under Fair Labor Standards Act see infra § 160 (13).

28. U.S.—Davis v. Rockton & R. R. R., D.C.S.C., 65 F.Supp. 67.

N.Y.—Creno v. Caruso Products Co., 60 N.Y.S.2d 134.

Nature of right of action unchanged

The Fair Labor Standards Act simply regulates minimum compensation to be paid, and by setting up a minimum does not change the quality or nature of the right of action.—Warnick v. Bethlehem-Fairfield Shipyard, D.C.Md., 68 F.Supp. 857.

29. U.S.—Northwestern Yeast Co. v. Broutin, C.C.A.Ohio, 133 F.2d 628—Davis v. Rockton & R. R. R., D.C. S.C., 65 F.Supp. 67—Constance v. Gosnell, D.C.S.C., 62 F.Supp. 253.

30. U.S.—Apple v. Shulman Publications, D.C.N.J., 65 F.Supp. 677.

31. U.S.—Fleming v. Miller, D.C. Minn., 47 F.Supp. 1004, modified on other grounds, C.C.A., Walling v. Miller, 138 F.2d 629, certiorari denied 64 S.Ct. 781, 321 U.S. 784, 88 L.Ed. 1076.

In determining the rights and liabilities thereunder, the act controls.

Mo.—Rockwood v. Crown Laundry Co., 178 S.W.2d 440, 352 Mo. 561.

Okl.—Ille v. Travis Oil Corp., 164 P. 2d 998, 196 Okl. 332.

Suit against joint employers

An employee has been held entitled to recover a claim under the act from joint employers notwithstanding the act does not specifically so provide.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241.

in accordance with the rules of practice and procedure of such state court.[32]

While the action is one to enforce a private or individual right,[33] it is one in which the public has a decided interest;[34] and public policy demands that the employee's exercise of his right to maintain suit under the act be not unnecessarily hampered.[35] Accordingly the right of an aggrieved employee to maintain an action for back wages, as granted by the act, includes not only the right to initiate it, but also the right to prosecute it to final judgment;[36] and once the action has been commenced, whether as a consolidation of claims of several employees or as an action by a designated agent on behalf of others, it may be maintained in such manner until final judgment is entered.[37] The action inures only to employees having grievances against their employers[38] and is the only one that an employee may maintain.[39] On the other hand, the administrator of the wage and hour division of the department of labor is not authorized to sue for the wages of employees under the act,[40] his authority in the enforcement of the act being limited to suit for injunction[41] and to procurement, through the United States attorney, of criminal proceedings in the name of the United States.[42]

Discovery. The rules relating to the propriety of interrogatories in civil actions generally, considered in Discovery §§ 55–68, have been held to apply in actions under the Fair Labor Standards Act.[43]

§ 160(2). —— Jurisdiction

Jurisdiction of actions to recover wages and penalties pursuant to statute generally depends on the terms of the statute.

Jurisdiction of an action to recover wages and penalties under statutes regulating wages or the payment thereof generally depends on the terms of the statute.[44] Thus it has been held that in enforcing the minimum wage rates under a statute the court exercises special, limited, statutory jurisdiction,[45] so that where conditions precedent prescribed by the statute, discussed infra § 160 (3), are not complied with the court is without jurisdiction of the action.[46]

32. Mo.—Rockwood v. Crown Laundry Co., 178 S.W.2d 440, 352 Mo. 561—Martin v. Graham Ship-By-Truck Co., App., 176 S.W.2d 842.
Okl.—Ille v. Travis Oil Corp., 164 P. 2d 998, 196 Okl. 332.

33. U.S.—Plourde v. Massachusetts Cities Realty Co., D.C.Mass., 47 F. Supp. 668.

34. U.S.—Plourde v. Massachusetts Cities Realty Co., supra.

35. U.S.—Plourde v. Massachusetts Cities Realty Co., supra.

36. U.S.—Apple v. Shulman Publications, D.C.N.J., 65 F.Supp. 677.

37. U.S.—Swettman v. Remington Rand, D.C.Ill., 65 F.Supp. 940.
Parties to actions under act see infra § 160 (6).

38. Tex.—Stringer v. Griffin Grocery Co., Civ.App., 149 S.W.2d 158, error refused.

39. U.S.—Bowe v. Judson C. Burns, Inc., C.C.A.Pa., 137 F.2d 37.

40. U.S.—Walling v. Jacksonville Paper Co., D.C.Fla., 69 F.Supp. 599—Walling v. Crane, D.C.Ga., 64 F. Supp. 88, reversed on other grounds, C.C.A., 158 F.2d 80.

41. U.S.—Walling v. Crane, supra.
Injunctions under Fair Labor Standards Act see Injunctions § 138 b (2) (a) ee.

42. U.S.—Walling v. Crane, supra.
Criminal prosecutions under Fair Labor Standards Act see infra § 160 (13).

43. **Objections to interrogatories denied**
In employees' action against employer for portal-to-portal pay under the Fair Labor Standards Act employer's objection that employees' interrogatory relating to hours worked and compensation paid was too broad and sought irrelevant information would be overruled, except in so far as inquiry related to period in which recovery was barred by limitations; and employer's objection that compilation of answers to employees' interrogatory relating to hours worked and compensation paid, necessitated large expenditures of time and money by employer was not sustained, where employer in making its own investigation would in a large measure gather together the information called for in the interrogatory.—Adelman v. Nordberg Mfg. Co., D.C.Wis., 6 F.R.D. 383.
Objection to interrogatory sustained
Since there is no reason why defendant should be required to answer an interrogatory prior to the time it has determined on its defenses, the objection in such case that plaintiff's interrogatory relating to hours worked and compensation paid is premature will be sustained.—Adelman v. Nordberg Mfg. Co., supra.

44. Me.—Stinson v. Taylor, 17 A.2d 760, 137 Me. 332.
Industrial commission held without jurisdiction
Industrial commission, as administrative body having no judicial powers, had no jurisdiction of controversy between city and patrons of city utilities who were given employment in payment for utilities' services, relating to right to additional compensation under schedule of wages on public works fixed by commission after payment in full was made in accordance with agreement of employment.—Logan City v. Industrial Commission of Utah, 38 P.2d 769, 85 Utah 131.

45. Me.—Stinson v. Taylor, 17 A.2d 760, 137 Me. 332.

46. Me.—Stinson v. Taylor, supra.
Failure to file record
Where commissioner of labor had not filed with the clerk of the superior court as required by statute the record of hearing before the wage board together with its report, findings and determinations as filed with the commissioner, and his certificate of service thereof on each employer in the state of whom he had information or record, superior court was without jurisdiction to entertain an action to enforce minimum fair wage rates established for such industry.—Stinson v. Taylor, 27 A.2d 400, 139 Me. 97.
Two months' violation
In action by commissioner of labor to enforce minimum fair wage rates established by wage board, where record did not show that any employer in such industry failed for two months or at all to pay established wages after service of board's report, but showed that action was brought within month after report was filed and served, justice of superior court was without jurisdiction and proceedings were nullity.—Stinson v. Taylor, 17 A.2d 760, 137 Me. 332.

Lack of jurisdiction cannot be waived by the parties.[47]

Under Fair Labor Standards Act. Under a section of the Fair Labor Standards Act providing that an action for wages or penalties may be maintained in any court of competent jurisdiction, it has been held that the action may be brought in such a court, whether state or federal.[48]

§ 160(3). —— Conditions Precedent

In actions to enforce statutes regulating wages or the payment thereof, there must be at least a substantial compliance with conditions precedent prescribed by the statute.

Where a statute regulating wages or the payment thereof prescribes conditions under which it may be enforced and penalties recovered, there must be at least substantial compliance with such conditions as a prerequisite to the right to recover under the statute.[49] Thus it has been held a condition precedent to an action for minimum wages that the classification and wage of the employee involved must have been fixed.[50] Under a minimum wage statute so providing, it is a condition precedent to an action by the commissioner of labor to enforce the rates established that the rates were served on the employer and that the employer failed for two months to pay such rates;[51] and these conditions precedent cannot be changed by the consent of the parties.[52]

Public employees; employees on public works. Where an employee of a contractor engaged in public work seeks to pursue the statutory remedy in enforcing his right to recover the difference between the wage paid and the prevailing wage, his compliance with the statute is a condition precedent to his right to bring such action.[53] Thus, where a statute, which provides a right and a remedy for the recovery of the difference between the sum actually paid to a public employee and the amount which should have been paid at the prevailing rate of wages, expressly so provides, it is a condition precedent to the maintenance of such action that the employee shall have applied for the fixing of the prevailing rate of wages[54] by filing a verified complaint with the proper officer.[55] On the other hand, one who has filed a verified complaint becomes a party to the proceed-

47. Me.—Stinson v. Taylor, supra.

48. Tenn.—Tapp v. Price-Bass Co., 147 S.W.2d 107, 177 Tenn. 189.
Tex.—Camfield v. West Texas Utilities Co., Civ.App., 170 S.W.2d 552, error refused.
Concurrent jurisdiction of federal and state courts under Fair Labor Standards Act see Courts § 526.

The phrase "any court of competent jurisdiction" means any lawfully constituted court, state or federal, which may reach persons of the necessary parties and have jurisdiction over the sum immediately involved.—Bell Aircraft Corp. v. Anderson, 38 S.E.2d 66, 73 Ga.App. 633.

Court of common pleas, a court of general jurisdiction, had jurisdiction of action under Fair Labor Standards Act to recover unpaid overtime compensation, attorney's fees, and liquidated damages.—Floyd v. Du Bois Soap Co., 41 N.E.2d 393, 139 Ohio St. 520, reversed on other grounds 63 S.Ct. 159, 317 U.S. 596, 87 L.Ed. 488.

49. Kan.—Brewer v. Kansas Electric Power Co., 83 P.2d 103, 148 Kan. 434.

Demand for redemption of tokens
Under a statute to that effect, where an employee has received tokens in payment of wages, it is a condition precedent to his action for the redemption of such tokens that he make demand therefor on a regular pay day.—Carver v. Vernon Parish Lumber Co., 4 La.App. 449.

Mediation condition held inapplicable
Under statute pertaining to deductions for faulty workmanship, there can be no disagreement as to cause of a defect in a piece of work which would require the mediation of the industrial commission before the bringing of a suit to recover double the deduction until the matter has been the subject of consideration at a conference between employee, or his representative, and employer to determine the cause, and in absence of such conference employee is free to sue for double the amount of deductions.—Peters v. International Harvester Co., 22 N.W.2d 518, 248 Wis. 451.

50. N.D.—Pagel v. Trinity Hospital Ass'n, 6 N.W.2d 392, 72 N.D. 262.

51. Me.—Stinson v. Taylor, 17 A.2d 760, 137 Me. 332.
Effect of noncompliance with conditions on jurisdiction see supra § 160 (2).

52. Me.—Stinson v. Taylor, supra.

53. N.Y.—Fata v. S. A. Healy Co., 30 N.Y.S.2d 739, 263 App.Div. 725, reversed on other grounds 46 N.E. 2d 339, 289 N.Y. 401, 144 A.L.R. 1031.

54. N.Y.—McGrail v. City of New York, 11 N.Y.S.2d 806, 171 Misc. 55, affirmed 6 N.Y.S.2d 374, 254 App.Div. 857, reargument denied 7 N.Y.S.2d 226, 255 App.Div. 758.

Fire telegraph dispatchers in New York City fire department were not entitled to maintain action to recover difference between wages received by them and amount allegedly due under prevailing rate of wages, where they had not complied with statutory procedure requiring fixation of prevailing rate by city comptroller as condition precedent to commencement of action.—McGrail v. City of New York, supra.

55. N.Y.—Campbell v. City of New York, 52 N.E.2d 949, 291 N.Y. 461.

Persons affected
The clause "the complainant or any other person affected," in statute authorizing the complainant or any other person affected to institute an action against a person violating statute relating to hours and wages for public work for the difference between wages paid and wages which should have been paid, does not include a person who did not file a verified complaint with the fiscal officer; and, where order of comptroller of the City of New York determining prevailing wages for wiremen in the city resulted from a statutory investigation conducted by comptroller after city wiremen not including plaintiff had filed with the comptroller verified complaints relating to prevailing wages of wiremen, and plaintiff subsequently filed a verified complaint with the comptroller, plaintiff antecedent to the order was not a "person affected" within the statute and was not entitled to recover the difference between the wages paid for his services and the amount which should have been paid under the order.—Campbell v. City of New York, supra.

ing to fix the prevailing wage rate and is entitled to avail himself of the benefits thereof;[56] and he is entitled to recover the difference in wages from the time of the filing of the original verified complaint by which the proceeding to fix the prevailing wage was instituted.[57]

Failure to pay on termination of employment. In an action by an employee to enforce a statute providing penalties for the failure of an employer to pay wages due at the time of the termination of the employment, it is a condition precedent, where the statute so provides, that the employee make a proper demand for payment[58] and designate the place for payment.[59]

Under Fair Labor Standards Act. It is not a condition precedent to an action for unpaid minimum wages or overtime compensation and liquidated damages, under the Fair Labor Standards Act, that the employee make a demand on the employer for payment of the additional compensation claimed to be due.[60] Also it has been held not a condition precedent to such actions that the employee return sums received under a settlement if he did not receive all that was owing to him:[61] and a provision in a settlement agreement making the return of sums received a condition precedent to such action has been held invalid.[62]

§ 160(4). —— Time to Sue, Limitations, and Laches

A cause of action under statutes regulating wages accrues when the employer becomes liable for payment of that which the act requires. Limitations expressly provided for in the statute control; and actions under the Fair Labor Standards Act are subject to state statutes of limitation.

A cause of action under statutes regulating wages or the payment thereof accrues to an employee when the employer becomes liable for payment of that which the act requires.[63] Accordingly an action for additional wages and liquidated damages under the Fair Labor Standards Act accrues at the end of each regular pay period.[64]

Limitations. Where a statute regulating wages or the payment thereof expressly provides a period of limitation for an action to enforce it, such provision is controlling.[65] While as far as the Fair Labor Standards Act itself is concerned, an employee may sue his employer thereunder at any time,[66] where a state statute provides a limitation period on actions for the recovery of overtime pay or premium pay, accrued or accruing, including penalties required or authorized by statute, such limitation period has been held to apply to actions for overtime and liquidated damages under the Fair Labor Standards Act;[67] and an action for additional compensation and liquidated damages under the act has also been held sub-

56. N.Y.—McKibbin v. City of New York, 51 N.Y.S.2d 50, 182 Misc. 671, affirmed 53 N.Y.S.2d 474, 269 App. Div. 696, affirmed 64 N.E.2d 288, 295 N.Y. 592.

57. N.Y.—McKibbin v. City of New York, supra.

58. Kan.—Brewer v. Kansas Electric Power Co., 83 P.2d 103, 148 Kan. 434—Gawthrop v. Missouri Pac. Ry. Co., 78 P.2d 854, 147 Kan. 756.
La.—Altom v. Mt. Vernon Oil & Gas Co., 141 So. 457, 174 La. 775.

Action against employer's joint adventurer

Where laborer employed by one joint adventurer was discharged, he could not collect statutory penalty for nonpayment of wages from other joint adventurer, without demand on latter for wages.—Perryman v. Boisseau, 138 So. 141, 19 La.App. 43.

59. Kan.—Brewer v. Kansas Electric Power Co., 83 P.2d 103, 148 Kan. 434—Gawthrop v. Missouri Pac. Ry. Co., 78 P.2d 854, 147 Kan. 756—Hurt v. Edgell, 75 P.2d 834, 147 Kan. 234.

60. U.S.—George Lawley & Son Corporation v. South, C.C.A.Mass., 140 F.2d 439, 151 A.L.R. 1081, certiorari denied 64 S.Ct. 1156, 322 U.S. 746, 88 L.Ed. 1578—Colan v. Wecksler, D.C.N.Y., 45 F.Supp. 508—Lewis v. Nailling, D.C.Tenn., 36 F.Supp. 187.

61. N.Y.—Franz v. 48 West Forty-Eighth Realization Corp., 60 N.Y.S. 2d 160, affirmed 66 N.Y.S.2d 693.

62. N.Y.—Franz v. 48 West Forty-Eighth Realization Corp., supra.
Agreements in derogation of rights under the act, see supra § 151 (24).

63. U.S.—Smith v. Continental Oil Co., D.C.N.Y., 59 F.Supp. 91.
Or.—Fullerton v. Lamm, 163 P.2d 941, 177 Or. 655, rehearing denied 165 P.2d 63, 177 Or. 655.

64. U.S.—Roland Electrical Co. v. Black, C.C.A.Md., 163 F.2d 417—Smith v. Continental Oil Co., D.C. N.Y., 59 F.Supp. 91.
Or.—Fullerton v. Lamm, 163 P.2d 941, 177 Or. 655, rehearing denied 165 P.2d 63, 177 Or. 655.

65. N.Y.—Cirillo v. City of New York, 10 N.Y.S.2d 472, 170 Misc. 230, affirmed 19 N.Y.S.2d 151, 259 App.Div. 717, reargument denied 20 N.Y.S.2d 402, 259 App.Div. 875, affirmed 39 N.E.2d 273, 287 N.Y. 641.

Public employees; employees on public works

(1) Action by municipal civil service employee to recover difference between wages actually paid and prevailing rate must be instituted within three months after service of notice of filing of order of comptroller fixing such prevailing rate.—Cirillo v. City of New York, supra.

(2) Statutory three-month period of limitations on action for underpayment of wages commenced to run on final determination of prevailing rate of wages for particular period of time, and not from time that entire period of employment was covered by final orders.—Filloramo v. Carder Realty Corporation, 284 N.Y.S. 240, 157 Misc. 662.

66. U.S.—Klotz v. Ippolito, D.C.Tex., 40 F.Supp. 422.

67. Or.—Fullerton v. Lamm, 163 P. 2d 941, 177 Or. 655, rehearing denied 165 P.2d 63, 177 Or. 655.
Application of:
General statutes of limitation see Limitations of Actions §§ 47, 67, 72, 73, 83, 89.
State statutes of limitation in federal courts generally see Federal Courts § 188.

The word "penalties" will be assumed to have been used by the legislature in a broad sense, without regard to the technical distinctions between a penalty and liquidated damages.—Fullerton v. Lamm, supra.

ject to a state statute of limitation expressly providing a period of limitation on actions for wages or for a liability for failure to pay wages[68] even though the cause of action was already in existence at the time of the enactment of the limitations statute.[69] The fact that the liability of one joint employer under the act for additional compensation is barred by limitations will not affect the other joint employer's liability which is not so barred.[70]

Laches. An action to enforce a statute regulating wages or the payment thereof,[71] such as the Fair Labor Standards Act,[72] may be barred by laches.

§ 160(5). —— Defenses

a. In general
b. Actions under Fair Labor Standards Act

a. In General

In order to constitute a good defense to an action under a statute regulating wages, the matter must be germane and must present a legal reason why the plaintiff should not recover.

In general, for matters to constitute a good defense to an action under a statute regulating wages or the payment thereof, they must be germane to the cause of action and must present a legal reason why plaintiff should not recover.[73] In actions by an employee for a statutory penalty for the failure to pay wages to the employee on his discharge or within a designated time thereafter, the employer may interpose an equitable defense against the penalty.[74] The employer may show in defense that the employee has signed vouchers acknowledging payment in full for the services for which he claims payment[75] or that the employee agreed with his foreman on an extension of time for the payment of the balance due him and that suit for the penalty was brought before the time had elapsed;[76] but it has been held not a defense that the discharged employee was still living in a house furnished him by his employer.[77]

b. Actions under Fair Labor Standards Act

Good faith of the employer has been held not a defense to an action for overtime compensation and liquidated damages under the Fair Labor Standards Act.

In general, in order for matters to constitute a good defense to an action for additional compensation and liquidated damages under the Fair Labor Standards Act, they must be germane to the cause of action and must present a legal reason why plaintiff should not recover.[78] Accordingly, in an action to

68. U.S.—Reid v. Solar Corp., D.C. Iowa, 69 F.Supp. 626.

69. U.S.—Reid v. Solar Corp., supra.

Statute subject to special scrutiny

Where a state statute of limitations relating to actions for the recovery of wages is enacted subsequent to the passage of the Fair Labor Standards Act such state statute should receive careful scrutiny as to its intent and scope.—Reid v. Solar Corp., supra.

Special provision as to existing causes of action

A statute of limitations providing that existing causes of action on claims for wages or for a liability for failure to pay wages must be commenced within six months after effective date of the statute applies to actions under the Fair Labor Standards Act.—Reid v. Solar Corp., supra.

70. U.S.—Morales v. Compania Azucarera Del Toa, D.C.Puerto Rico, 68 F.Supp. 346.

71. Ill.—George v. City of Danville, 42 N.E.2d 300, 315 Ill.App. 17, affirmed 50 N.E.2d 467, 383 Ill. 454.

Facts held not to show laches

Ill.—George v. City of Danville, supra.

72. U.S.—Murray v. Noblesville Milling Co., D.C.Ind., 42 F.Supp. 808, affirmed in part and reversed in part on other grounds, C.C.A., 131 F.2d 470, certiorari denied 63 S.Ct. 832, 318 U.S. 775, 87 L.Ed. 1145.

Facts held not to show laches

U.S.—Murray v. Noblesville Milling Co., supra.

73. N.Y.—La Juett v. Coty Mach. Co., 275 N.Y.S. 822, 153 Misc. 410.

Matters of defense involving substance of rights and liabilities under statutes see supra §§ 151–159.

Employment contract violative of statute

The fact that employment contract was itself violative of statute prohibiting withholding of employees' wages for over six days would be no defense to employee's action for wages.—La Juett v. Coty Mach. Co., supra.

74. La.—Deardorf v. Hunter, 106 So. 831, 160 La. 213—Williamson v. National Ben. Life Ins. Co., 133 So. 515, 16 La.App. 451—Whitehead v. E. J. Deas Co., 118 So. 856, 9 La. App. 47.

Shortage in employee's accounts

Where company hired route foreman who agreed to pay for all shortage that might occur in the accounts of the drivers and at time of discharge shortage in accounts existed, employer's refusal to pay amount claimed by foreman as wages at time of discharge because of shortage was justified and constituted sufficient equitable ground to refuse the allowance of penalties provided for by statute.—Yancey v. Dickson Ice Cream Co., La.App., 190 So. 837.

75. Idaho.—Goodell v. Pope-Shenon Min. Co., 212 P. 342, 36 Idaho 427.

76. Ark.—St. Louis, I. M. & S. R. Co. v. Broomfield, 104 S.W. 133, 83 Ark. 288.

77. Ark.—Grayson-McLeod Lumber Co. v. Johnson, 146 S.W. 141, 103 Ark. 266.

78. U.S.—Torres v. American R. Co. of Porto Rico, C.C.A.Puerto Rico, 157 F.2d 255.

Matters held to constitute defense

A defense of payment in full of the amount required to be paid by the act is sufficient.—Caperna v. Williams-Bauer Corporation, 47 N.Y.S.2d 328.

Matters held not to constitute defense

(1) The fact that the employer is in financial difficulties and would be rendered insolvent if it complied with the statute is not a defense.—Torres v. American R. Co. of Porto Rico, C.C.A.Puerto Rico, 157 F.2d 255.

(2) It is not a defense that plaintiff might have anticipated bringing action while still in defendant's employ, even to point of gathering evi-

enforce the minimum wage provisions of the act, it is no defense that the employees received more after the act was passed than they received before;[79] nor is it a defense to an action for overtime compensation that the contract of employment provided that the employee was not to work a greater number of hours than prescribed by law.[80] Since under the National Labor Relations Act collective bargaining agreements must be in writing, as discussed supra § 28 (39), an employer cannot assert as a defense an oral agreement made with a union's representative delaying the effective date of a written bargaining agreement.[81]

Good faith of employer. The fact that the employer committed a violation of the Fair Labor Standards Act in good faith based on a mistake of law has been held not a defense to an action for the additional compensation and liquidated damages due under the act;[82] nor is a mutual mistake of fact and law by both parties a sufficient defense.[83] More specifically, the good faith of an employer in believing that a particular employment was not covered by the act,[84] or, if subject to the act, that the employment contract and payments made thereunder constituted full compliance with it,[85] has been held not a defense. However, under an amendment to the Fair Labor Standards Act so providing, it is a defense to an action for minimum wages and overtime pay that the act or omission complained of was in good faith in conformity with, and in reliance on, an administrative regulation, order, ruling, approval, or interpretation of the agency administrating the act; but such defense will not prevail if such reliance is not shown.[86]

Payment or offer of payment. Since the right of action under the act is for liquidated damages as well as for the claimed unpaid compensation, it is not a defense that the employer, on learning that the act was applicable, expressed his willingness, or offered, to pay,[87] or voluntarily paid,[88] the additional compensation due; and it is not a valid defense to an action by an employee that the wage and hour division of the department of labor had found that he should be paid additional wages,[89] and that the employer was ready and willing to pay the amount found due, that the employee had refused to accept it, and that the employer had deposited the amount in court.[90] Moreover, the facts that the employer

dence for such purpose.—Lewis v. Nailling, D.C.Tenn., 36 F.Supp. 187.

(3) Provisions for the arbitration of disputes, contained in collective bargaining agreements, do not preclude the employee from asserting his rights as to claims arising under the Fair Labor Standards Act.—Bailey v. Karolyna Co., D.C.N.Y., 50 F. Supp. 142.

79. U.S.—Pickett v. Union Terminal Co., D.C.Tex., 33 F.Supp. 244, reversed on other grounds, C.C.A., Union Terminal Co. v. Pickett, 118 F.2d 328, certiorari denied 61 S.Ct. 1115, 313 U.S. 591, 85 L.Ed. 1546, vacated on other grounds 62 S.Ct. 55, 314 U.S. 704, 86 L.Ed. 563, affirmed 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, rehearing denied 62 S. Ct. 909, 315 U.S. 830, 86 L.Ed. 1224.

80. Ill.—Pinkley v. Allied Oil Corp. of Ill., 60 N.E.2d 106, 325 Ill.App. 326.

81. U.S.—Gatliff Coal Co. v. Cox, C. C.A.Ky., 152 F.2d 52.

82. U.S.—Seneca Coal & Coke Co. v. Lofton, C.C.A.Okl., 136 F.2d 359, certiorari denied 64 S.Ct. 77, 320 U.S. 772, 88 L.Ed. 462—Lefevers v. General Export Iron & Metal Co., D.C.Tex., 36 F.Supp. 838.

83. N.Y.—Garrity v. Bagold Corporation, 46 N.Y.S.2d 637, 267 App. Div. 353—Walsh v. 515 Madison Avenue Corporation, 42 N.Y.S.2d 262, 181 Misc. 219, affirmed 45 N.Y. S.2d 927, 267 App.Div. 756, affirmed 59 N.E.2d 183, 293 N.Y. 826.

84. U.S.—Seneca Coal & Coke Co. v. Lofton, C.C.A.Okl., 136 F.2d 359, certiorari denied 64 S.Ct. 77, 320 U.S. 772, 88 L.Ed. 462—Broughton v. Atlantic Co., D.C.Ga., 54 F.Supp. 185, affirmed in part and reversed on other grounds in part, C.C.A., 146 F.2d 480, certiorari denied 65 S.Ct. 1021, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, 325 U.S. 892, 89 L.Ed. 2004, certiorari denied 65 S.Ct. 1021, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, 325 U.S. 692, 89 L.Ed. 2004, certiorari denied 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433, two cases—Berry v. 34 Irving Place Corporation, D.C.N.Y., 52 F.Supp. 875.

N.Y.—Bell v. Ames, Conehan & Newman, 43 N.Y.S.2d 259, 179 Misc. 1059.

In the absence of any qualifying word such as "knowingly," "willfully," etc., in civil liability provisions of Fair Labor Standards Act, fact that employer and employee were unaware that goods produced by employee were passing into interstate commerce did not relieve employer of civil liability to employee for failure to comply with wage provisions of act.—Cullum v. Stevens, D.C.Tex., 46 F.Supp. 73.

Agreements based on erroneous belief

In employees' action under Fair Labor Standards Act, defense that collective bargaining agreements were entered into and carried out in mutual and bona fide belief that building service employees were not within Fair Labor Standards Act was insufficient.—Rienzo v. City Bank Farmers Trust Co., 42 N.Y.S.2d 337, 180 Misc. 333, affirmed 47 N.Y.S.2d 589, 267 App.Div. 890, appeal denied 48 N.Y.S.2d 471, 267 App.Div. 954, appeal dismissed 56 N.E.2d 300, 293 N. Y. 690.

85. U.S.—Seneca Coal & Coke Co. v. Lofton, C.C.A.Okl., 136 F.2d 359, certiorari denied 64 S.Ct. 77, 320 U.S. 772, 88 L.Ed. 462.

86. U.S.—Rausch v. Wolf, D.C.Ill., 72 F.Supp. 658.

87. U.S.—Lefevers v. General Export Iron & Metal Co., D.C.Tex., 36 F.Supp. 838.

N.Y.—Garrity v. Bagold Corporation, 42 N.Y.S.2d 257, 180 Misc. 120, modified on other grounds 46 N.Y. S.2d 637, 267 App.Div. 353—Emerson v. Mary Lincoln Candies, 17 N. Y.S.2d 851, 173 Misc. 531, affirmed 26 N.Y.S.2d 489, 261 App.Div. 879, appeal denied 27 N.Y.S.2d 452, 261 App.Div. 1044, affirmed 38 N.E.2d 234, 287 N.Y. 577.

88. U.S.—Seneca Coal & Coke Co. v. Lofton, C.C.A.Okl., 136 F.2d 359, certiorari denied 64 S.Ct. 77, 320 U. S. 772, 88 L.Ed. 462.

89. U.S.—Colan v. Wecksler, D.C.N. Y., 45 F.Supp. 508.

90. U.S.—Colan v. Wecksler, supra.

paid plaintiff in accordance with agreements between them, and that plaintiff never raised any question concerning his wages, do not constitute a defense.[91]

Employee's failure to keep accurate record of overtime. Where the employee suing for additional compensation under the act was charged by his employment with the duty of keeping a record of overtime worked, his failure in good faith to keep such record has been held not to estop him to bring such action;[92] but if he was charged with the duty of deciding whether or not he and the other employees were within the scope of the act, and he had decided erroneously that he was not, he would be estopped to recover.[93] However, where an employee deliberately falsified the record of his overtime work he would be estopped to claim compensation for overtime work additional to that shown by the record.[94]

Set-off. Since the freedom of contract contemplated by the act does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the purpose of the statute, as discussed supra § 151 (26) c, a contract for the payment of a specified sum for special or supervisory duties cannot be set-off against an employee's claim for overtime compensation under the act.[95]

§ 160(6). —— Parties

a. In general

b. Actions under Fair Labor Standards Act

a. In General

Except as the statute provides otherwise, the general rules and statutes governing questions as to parties in civil actions usually apply in actions to enforce a statute regulating wages.

Except in so far as a statute regulating wages or the payment thereof contains express provisions as to parties to actions to enforce it,[96] the rules and statutes governing questions relating to parties in civil actions generally have been held to apply.[97] It has been held that a cause of action under a prevailing rate of wages act survives the death of the employee and may be filed thereafter by the employee's personal representative.[98]

91. U.S.—McNorrill v. Gibbs, D.C.S.C., 45 F.Supp. 363.
N.Y.—Steiner v. Pleasantville Constructors, 46 N.Y.S.2d 120, 181 Misc. 798, modified on other grounds 49 N.Y.S.2d 42, 182 Misc. 66, affirmed 54 N.Y.S.2d 700, first case, 269 App.Div. 738.

Agreement with collective bargaining agent

In action to recover unpaid wages by way of overtime compensation under the act, defense that plaintiff was employed under contract between defendant and union which acted as plaintiff's collective bargaining agent, that contract provided for work in excess of eight hours on any work day to be compensated at rate of time and a half of regular rate of pay, and that defendant duly complied with contract, was insufficient as a matter of law.—Berkowitz v. Roshevsky & Co., 38 N.Y.S.2d 61.

Mutual mistake

In action to recover unpaid overtime wages, defense that collective bargaining agreements had been entered into under belief that the act was inapplicable to employee, and that, if parties were in error, mistake was a mutual one, and agreements should be reformed, was insufficient.—Bailey v. Karolyna Co., D.C.N.Y., 50 F.Supp. 142.

92. U.S.—George Lawley & Son Corporation v. South, C.C.A.Mass., 140 F.2d 439, 151 A.L.R. 1081, certiorari denied 64 S.Ct. 1156, 322 U.S. 746, 88 L.Ed. 1578.

Duty as to record

In determining whether office manager was estopped to claim overtime compensation under Fair Labor Standards Act, such manager owed a duty to his employer to see that records were kept of overtime worked by employees covered by the act and to see that such employees were paid for their overtime.—George Lawley & Son Corporation v. South, supra.

93. U.S.—George Lawley & Son Corporation v. South, supra.

Duty not shown

A corporation's office manager who worked eighty-five per cent of his time on books, and who was also its treasurer and a director, was not charged with duty of deciding for corporation whether he or any of the office workers were covered by Fair Labor Standards Act, as regards whether such manager who failed to keep a record of his own overtime was estopped to claim overtime compensation.—George Lawley & Son Corporation v. South, supra.

94. Kan.—Gale v. Fruehauf Trailer Co., 145 P.2d 125, 158 Kan. 30.

Employee keeping two records

In an action against a trailer manufacturing company by the ex-foreman of a service department connected with its retail sales branch, to recover overtime pay under the act, the trial court properly found an estoppel against the foreman, who kept one record of his overtime for the company, which paid him accordingly, and secretly kept another record of his own, allegedly because the headquarters office was insisting that overtime should be held to a minimum.—Gale v. Fruehauf Trailer Co., supra.

95. U.S.—Wagner v. American Service Co., D.C.Iowa, 58 F.Supp. 32.

96. U.S.—McNorril v. Gibbs, D.C.S.C., 45 F.Supp. 363.

97. Wis.—Peters v. International Harvester Co., 22 N.W.2d 518, 248 Wis. 451.
Substantive and procedural rules governing class actions generally see the C.J.S. title Parties §§ 13–16, also 47 C.J. p 40 note 91–p 53 note 69.

Suit by one or more

Action by employees against employer to recover double the amount of deductions from wages for alleged faulty workmanship, under statute prohibiting such deductions unless specified procedure is followed, is an action involving a question of a common interest within statute authorizing suit by one or more for the benefit of the whole when question is one of a common or general interest of many persons.—Peters v. International Harvester Co., supra.

98. N.Y.—Morrissey v. State, 274 N.Y.S. 80, 152 Misc. 192, affirmed Callahan v. State, 285 N.Y.S. 1047, 246 App.Div. 686.

b. Actions under Fair Labor Standards Act

The provision of the Fair Labor Standards Act that an action may be brought by one or more employees, or by an agent or representative designated by one or more employees, on behalf of all employees similarly situated has been held merely to permit a joinder of actions, and such an action will not bind employees who do not consent thereto. It may be affected by state statutes relating to who may bring suit.

The question of who may maintain an action under the Fair Labor Standards Act or may be parties to it is purely one of procedure, as distinguished from any question of the substantive rights which the provisions of the act afford.[99] While in designating who may maintain a proceeding to enforce the act the federal statute is supreme,[1] where the action is tried in a state court the rules of practice and procedure of the state court control.[2] The act discloses an intention to limit civil remedies against employers only.[3] In general it is discretionary with the court whether additional parties plaintiff or defendant may be ordered brought in to the case.[4] In order to question the efficacy of a regulation or a power emanating from, or vested in, an executive, such as the administrator of the wage and hour division of the department of labor, it is necessary to have that executive in the suit.[5]

Suits on behalf of others. Under an express provision of the Fair Labor Standards Act to that effect, an action for the recovery of claims arising under the act may be brought by one or more employees,[6] or by an agent or representative designated by one or more employees,[7] for and on behalf of all employees similarly situated. The purpose of this provision is to avoid multiplicity of suits;[8] and the provision should be given a liberal and remedial construction and should be liberally administered by the courts.[9] It has been held that this provision makes an exception to the general doctrine that an action must be maintained in the name of the real party in interest,[10] and it has been variously affected by state statutes relating to who may bring suit.[11] Thus it has been held that an action, under this provision, on behalf of others is maintainable under a state statute requiring suit to be brought by the real party in interest, but providing that it may be brought by a person expressly authorized by statute to sue;[12] but under the provisions of some statutes it has been held that, while joinder of employees in

99. Mo.—Niehaus v. Joseph Greenspon's Son Pipe Corporation, 164 S.W.2d 180, 237 Mo.App. 112.

Ex-employee

A cause of action under the Fair Labor Standards Act may be maintained by an ex-employee.—Frisch v. Zelart Drug Co., 46 N.Y.S.2d 44, 180 Misc. 733.

1. Mo.—Rockwood v. Crown Laundry Co., 178 S.W.2d 440, 352 Mo. 561.

2. Mo.—Rockwood v. Crown Laundry Co., supra.

3. U.S.—Bowe v. Judson C. Burns, Inc., D.C.Pa., 46 F.Supp. 745, affirmed, C.C.A., 137 F.2d 37.

The act was not intended to enlarge the jurisdiction of the federal courts to give an employee relief against persons not specified in the section relating to prohibited acts.—Bowe v. Judson C. Burns, Inc., supra.

4. Mo.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241.

Discretion held not abused

In action under Fair Labor Standards Act for unpaid minimum wages and overtime, trial court did not abuse its discretion in refusing defendant's motion to make certain other companies parties defendant on theory that plaintiff was an independent contractor acting as watchman for various firms.—Ashenford v. L. Yukon & Sons Produce Co., supra.

5. U.S.—A. H. Belo Corporation v. Street, D.C.Tex., 35 F.Supp. 430.

6. U.S.—Smith v. Stark Trucking, D.C.Ohio, 53 F.Supp. 826—McNorrill v. Gibbs, D.C.S.C., 45 F.Supp. 363—Lockwood v. Hercules Powder Co., D.C.Mo., 7 F.R.D. 24.

N.Y.—Thomas v. Keystone Silver, 22 N.Y.S.2d 796, 174 Misc. 733.

Tenn.—Hunt v. National Linen Service Corporation, 157 S.W.2d 608, 178 Tenn. 262.

7. U.S.—Mid-Continent Pipe Line Co. v. Hargrave, C.C.A.Okl., 129 F.2d 655—Hargrave v. Mid-Continent Petroleum Corporation, D.C.Okl., 36 F.Supp. 233.

N.Y.—Thomas v. Keystone Silver, 22 N.Y.S.2d 796, 174 Misc. 733.

8. U.S.—Smith v. Stark Trucking, D.C.Ohio, 53 F.Supp. 826—Winslow v. National Elec. Products Corp., D.C.Pa., 5 F.R.D. 126.

N.Y.—Thomas v. Keystone Silver, 22 N.Y.S.2d 796, 174 Misc. 733.

Tenn.—Hunt v. National Linen Service Corporation, 157 S.W.2d 608, 178 Tenn. 262.

9. U.S.—Culver v. Bell & Loffland, C.C.A.Cal., 146 F.2d 29—Barrett v. National Malleable & Steel Castings Co., D.C.Pa., 68 F.Supp. 410—Tennessee Coal, Iron & R. Co. v. Muscoda Local 123, etc., D.C.Ala., 5 F.R.D. 174.

Rational interpretation

The provision of Fair Labor Standards Act authorizing joinder in one action of claims by employees similarly situated must be given a rational interpretation, and district courts have a wide discretion in shaping up the limits of the action.—Wright v. U. S. Rubber Co., D.C.Iowa, 69 F.Supp. 621.

Disability not required

The Fair Labor Standards Act does not require that an employee be under a disability before he may empower another to maintain an action in his behalf against employer for unpaid wages and to recover liquidated damages for nonpayment thereof.—McNorrill v. Gibbs, D.C.S.C., 45 F.Supp. 363.

10. U.S.—McNorrill v. Gibbs, supra.

11. N.Y.—Asaro v. Lilienfeld, 36 N.Y.S.2d 802.

Suits by infant employees

The state statute declaring employer immune from suit by infant's parent or guardian for wages paid infant in absence of written notice to employer of claim for such wages within thirty days after commencement of infant's employment does not preclude infant employee and her attorney from bringing action against employer under federal Fair Labor Standards Act for unpaid minimum wages, overtime compensation, liquidated damages, and attorney's fees on behalf of herself and other employees pursuant to either written or parol authorization by them.—Asaro v. Lilienfeld, supra.

12. U.S.—Mid-Continent Pipe Line Co. v. Hargrave, C.C.A.Okl., 129 F.2d 655—Hargrave v. Mid-Continent

an action is permissible, one or more employees cannot maintain a representative suit on behalf of others.[13] Under the statutes of some jurisdictions it has been held that if several employees join in one action,[14] or if one employee sues for himself and on behalf of other employees similarly situated,[15] it is a misjoinder of actions.

While it has been broadly stated that the section of the Fair Labor Standards Act provides for a class action,[16] it has been more precisely described as a spurious class action.[17] This provision does not broaden or change existing rules governing class actions[18] so as to authorize the prosecution of an action on behalf of persons who have not appeared or authorized the suit and who may be unwilling to appear therein;[19] and an action under this provision is not truly a representative action in the sense that any one plaintiff truly represents a class.[20] Rather this provision sets up a permissive joinder device[21] in that it authorizes and permits,[22] but does not compel,[23] all employees similarly situated to join and have their cases heard in one action. It creates an exception to the general rule that two or more separate or distinct causes of action may not be joined for trial in the same case,[24] that is, it provides for one law suit in which the court, at the instance of one or more employees, may adjudicate the claims of different employees who are similarly situated in their relation to the employer, notwithstanding their respective claims may be different in amount and be otherwise separate and independent of each other.[25] The provision does not authorize the joinder of two or more plaintiffs who are not themselves similarly situated;[26] and the action will not affect those who

Petroleum Corporation, D.C.Okl., 36 F.Supp. 233.

13. N.Y.—Simmons v. Rudolph Knitting Mills, 35 N.Y.S.2d 494, 264 App.Div. 871.

Question of common or general interest

While it was not decided whether a representative action could be brought under a statute authorizing suit by the real party in interest or by a person expressly authorized by statute, it was held that all employees of an employer might have united in a single action under the Fair Labor Standards Act of 1938 to recover overtime wages and wages due and unpaid for regular hours of employment, but only three of the employees could not maintain a representative action on behalf of other employees under section of the civil practice act authorizing an action for the benefit of others, where question is one of common or general interest or where it is impracticable to bring in very numerous parties.—Simmons v. Rudolph Knitting Mills, supra.

Suit by assignee of claims

An action under the Fair Labor Standards Act, including a first cause of action for recovery of overtime pay claimed to be due plaintiff as an employee and thirty-nine other causes of action by plaintiff as assignee of thirty-nine other persons having like claims, could not be maintained as a class action within statute.—Archer v. Musick, 25 N.W.2d 908, 147 Neb. 1018—Archer v. Musick, 23 N.W.2d 323, 147 Neb. 344.

14. Mo.—Rockwood v. Crown Laundry Co., 178 S.W.2d 440, 352 Mo. 561.

15. Mo.—Rockwood v. Crown Laundry Co., supra.

16. U.S.—Card v. Elmer C. Breur, Inc., D.C.Ohio, 42 F.Supp. 701.

Mo.—Niehaus v. Joseph Greenspon's Son Pipe Corporation, 164 S.W.2d 180, 237 Mo.App. 112.

17. U.S.—Pentland v. Dravo Corp., C.C.A.Pa., 152 F.2d 851.

Well-considered case

U.S.—Pentland v. Dravo Corp., supra.

18. U.S.—Saxton v. W. S. Askew Co., D.C.Ga., 35 F.Supp. 519—Pentland v. Dravo Corp., D.C.Pa., 4 F.R.D. 350, reversed on other grounds, C.C.A., 152 F.2d 851.

19. U.S.—Pentland v. Dravo Corp., supra.

20. N.Y.—Morasse v. Gladiton Realty Corp., 63 N.Y.S.2d 884, 187 Misc. 873.

21. U.S.—Pentland v. Dravo Corp., C.C.A.Pa., 152 F.2d 851—Wright v. U. S. Rubber Co., D.C.Iowa, 69 F. Supp. 621.

22. U.S.—Smith v. Stark Trucking, D.C.Ohio, 53 F.Supp. 826.

N.Y.—Emanuele v. Rochester Packing Co., 45 N.Y.S.2d 164, 182 Misc. 348.

Tenn.—Hunt v. National Linen Service Corporation, 157 S.W.2d 608, 178 Tenn. 262.

23. U.S.—Smith v. Stark Trucking, D.C.Ohio, 53 F.Supp. 826.

Tenn.—Hunt v. National Linen Service Corporation, 157 S.W.2d 608, 178 Tenn. 262.

24. U.S.—McNorrill v. Gibbs, D.C. S.C., 45 F.Supp. 363.

25. U.S.—Saxton v. W. S. Askew Co., D.C.Ga., 38 F.Supp. 323.

Mo.—Niehaus v. Joseph Greenspon's Son Pipe Corporation, 164 S.W.2d 180, 237 Mo.App. 112.

Congressional intention

It cannot be implied that congress intended that question of liability for unpaid minimum wages and unpaid overtime compensation or both, or one, or part of one and part of the other, should constitute a nexus on which may be centered the similar rights of employees having one or the other, or both, of such claims to have their rights adjudged by an action maintained by another, of which they might have no knowledge.—Saxton v. W. S. Askew Co., D. C.Ga., 35 F.Supp. 519.

26. Mo.—Niehaus v. Joseph Greenspon's Son Pipe Corporation, 164 S.W.2d 180, 237 Mo.App. 112.

"Similarly situated"

(1) In interpreting words "similarly situated" as used in Fair Labor Standards Act the court should not be governed by how much or what degree of similarity there may be, but should permit such a procedure if there is any similarity.—Distelhorst v. Day & Zimmerman, D.C. Iowa, 58 F.Supp. 334.

(2) Employees of a general class, although not identically situated, may be "similarly situated."—Burns v. Gilpin, 188 S.W.2d 338, 182 Tenn. 535.

(3) Plaintiffs and interveners employed by company as officers on a salary, who claimed that they performed work similar to that engaged in by men under them, were similarly situated within provision of act.—Wright v. U. S. Rubber Co., D.C. Iowa, 69 F.Supp. 621.

(4) Where plaintiff was a building foreman, and each claimant was a foreman or held a position of similar relationship in employer's plant, even though there was a marked difference in employment of each, defense that some or all of claimants were not similarly situated with plaintiff within meaning of the act was overruled.—Distelhorst v. Day & Zimmerman, supra.

are not similarly situated.[27]

Authority to sue and repudiation thereof. In order that an agent or representative may be entitled to bring suit on behalf of employees having a grievance against the employer, the agent or representative must have been designated or authorized for that purpose;[28] but an assignment of the claim of another employee is not required.[29] Where an action is brought by one or more employees on behalf of other employees, the latter may repudiate and disclaim the authority of the former to bring suit in their behalf;[30] but, on the ground that public policy forbids an employee's loss of rights under the act by waiver, agreement, or release, it has been held that such employees are not precluded from nullifying such repudiation and disclaimer and again asserting their rights in such action.[31]

Persons affected by action. A representative action cannot be continued as far as it affects employees without whose knowledge and consent it was brought and against whose wishes it is being maintained.[32] Accordingly the action can proceed and will be binding only as to those employees who indicate, by the record, their approval of the action on their behalf.[33] In order to be entitled to the benefits of the action, unnamed claimants must at some stage of the action be named as parties or as specific beneficiaries of the action, as by an amended or supplemental pleading;[34] and the action cannot continue and will not be binding with respect to unnamed parties unless they intervene or designate someone in writing as their representative for the purpose of the action.[35] However, every opportunity possible should be given to the employees to come into court and make their complaints known.[36] A recovery can be had only by the employee who instituted the action, or by one who established that he is the representative of other employees and is specially authorized to maintain the action in their behalf, or by other employees who individually or collectively may intervene in said action.[37] It has been held that the persons "similarly situated" in whose behalf the suit is brought need not be made parties to the action, since they are not indispensable parties;[38] and the names of persons who would be benefited by the action may be ascertained through the medium of interrogatories or through some other medium.[39] Where the employees interested and involved in an action for additional compensation and liquidated damages under the act were individually named as plaintiffs, the union to which they belonged was held not a proper party plaintiff.[40]

Right to intervene. Persons within the purview of the act have the right to intervene or designate plaintiff as their representative;[41] and it has been held that the right to intervene is an unconditional right,[42] although it has been held that any employee

27. U.S.—Archer v. Cornillaud, D.C. Ky., 41 F.Supp. 435.

28. U.S.—Townsend v. Boston & M. R. R., D.C.Mass., 35 F.Supp. 938.

Filing of authorization

Agent bringing action to enforce an employee's right to receive minimum wage provided in Fair Labor Standards Act was required, on defendants' request, to file as an exhibit specific authorization from the employee.—Townsend v. Boston & M. R. R., supra.

Authorization by one employee

An agent bringing action to enforce employee's right to receive minimum wage provided in Fair Labor Standards Act need not receive authority from every employee for whose benefit the agent brings the action, it being sufficient if it is shown that he was authorized by one employee either to bring the action for that employee or for that employee and all others who were similarly situated and to be benefited thereby.—Townsend v. Boston & M. R. R., supra.

Appointment of two agents to bring action to enforce right of employee to receive minimum wage provided in Fair Labor Standards Act was unauthorized and motion to dismiss action would be granted unless within twenty days action was amended so as to stand in the name of but one agent.—Townsend v. Boston & M. R. R., supra.

29. U.S.—McNorrill v. Gibbs, D.C. S.C., 45 F.Supp. 363.

30. N.Y.—Asaro v. Lilienfeld, 36 N.Y.S.2d 802.

31. N.Y.—Asaro v. Lilienfeld, supra.

32. N.Y.—Thomas v. Keystone Silver, 22 N.Y.S.2d 796, 174 Misc. 733.

Dismissal as to unnamed employees

U.S.—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 46 F.Supp. 969.

33. U.S.—Gordon v. Paducah Ice Mfg. Co., D.C.Ky., 41 F.Supp. 980—Archer v. Cornillaud, D.C.Ky., 41 F.Supp. 435.

34. U.S.—Lockwood v. Hercules Powder Co., D.C.Mo., 7 F.R.D. 24—Tennessee Coal, Iron & R. Co. v. Muscoda Local 123, etc., D.C.Ala., 5 F.R.D. 174.

35. U.S.—Fink v. Oliver Iron Mining Co., D.C.Minn., 65 F.Supp. 316—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 46 F.Supp. 969.

Only employee himself can bring an action for overtime compensation and liquidated damages under the Fair Labor Standards Act.—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310.

36. U.S.—Schempf v. Armour & Co., D.C.Minn., 5 F.R.D. 294.

37. U.S.—Lockwood v. Hercules Powder Co., D.C.Mo., 7 F.R.D. 24.

38. U.S.—Townsend v. Boston & M. R. R., D.C.Mass., 35 F.Supp. 938.

Motion to add parties denied

U.S.—Townsend v. Boston & M. R. R., supra.

39. U.S.—Townsend v. Boston & M. R. R., supra.

40. U.S.—International Longshoremen's Ass'n, Local 815, v. National Terminals Corporation, D.C. Wis., 50 F.Supp. 26, affirmed, C.C.A., Cabunca v. National Terminals Corporation, 139 F.2d 853.

41. U.S.—Fink v. Oliver Iron Mining Co., D.C.Minn., 65 F.Supp. 316—Philpott v. Standard Oil Co., D.C.Ohio, 53 F.Supp. 833.

42. U.S.—Tennessee Coal, Iron & R. Co. v. Muscoda Local 123, etc., D.C.Ala., 5 F.R.D. 174.

The reason that the right is unconditional is that under the act one or more employees similarly situated can jointly originate an action for

desiring to intervene in the action should apply for leave to do so.[43]

§ 160(7). —— Pleading

a. In general
b. Actions under Fair Labor Standards Act

a. In General

General rules of pleading have been applied in actions under statutes regulating wages or the payment thereof.

The rules governing pleadings in civil actions generally have been applied in actions to recover wages or penalties under statutes regulating wages or the payment thereof,[44] such as statutes providing for the payment of prevailing wages to public employees or employees on public works[45] and statutes providing penalties for the failure to pay wages at specified times or on discharge of an employee.[46] While it has been held that, in order to recover for overtime under a wages and hours statute which makes a violation of the act a penal offense, the employee's complaint must allege a contract, express or implied, to pay for such overtime,[47] it has also been held that the employee is entitled to recover for overtime if the

overtime compensation regardless of ordinary requirements of law as to proper joinder of actions or proper joinder of parties plaintiff, and, if they have an absolute right to join as plaintiffs, they must have an absolute right to intervene in the action or to become plaintiffs after its commencement.—Tennessee Coal, Iron, & R. Co. v. Muscoda Local 123, etc., supra.

43. N.Y.—Morasse v. Gladiton Realty Corp., 63 N.Y.S.2d 884, 187 Misc. 873.

44. Ky.—Consolidated Tel. Co. v. Stevens, 168 S.W.2d 1012, 293 Ky. 313—Clear Fork Coal Co. v. Robertson, 148 S.W.2d 1047, 285 Ky. 659.

Standard of day's work

A declaration, in an action to recover for overtime worked, under a statute setting up eight hours as the standard of a day's work, but which has been construed as permitting the parties to agree as to hours and wages, was held to show that employee and railroad agreed on hours of service and compensation therefor, precluding employee from recovering for services rendered in excess of eight hours a day.—Plummer v. Pennsylvania R. Co., C.C.A. Ill., 37 F.2d 874.

Statute as to minimum wage and overtime

Petition in action by female telephone operator to recover extra compensation for overtime without contract or agreement respecting pay therefor, was insufficient because of failure to allege that minimum wage rates to which she was entitled had been fixed by order of industrial commission under statutes relating to minimum wages and maximum hours of service for women and minors.—Consolidated Tel. Co. v. Stevens, 168 S.W.2d 1012, 293 Ky. 313.

Unauthorized deductions

Complaint, alleging that employer carried on practice of making deductions from wages of plaintiff employees for alleged defective workmanship without following statutory procedure for determination that alleged defective work was due to plaintiffs' negligence or willful conduct, alleging that employer's record would disclose exact amount of deductions, and praying judgment for twice amount so withheld, stated a cause of action under statute.—Peters v. International Harvester Co., 22 N.W.2d 518, 248 Wis. 451.

45. N.Y.—Cirillo v. City of New York, 10 N.Y.S.2d 472, 170 Misc. 230, affirmed 19 N.Y.S.2d 151, 259 App.Div. 717, reargument denied 20 N.Y.S.2d 402, 259 App.Div. 875, affirmed 39 N.E.2d 273, 287 N.Y. 641.

Requisites and sufficiency of complaint

(1) In action by civil service employee to recover difference between wages actually paid and prevailing rate required to be paid by statute, employee must allege compliance with statutory provision having to do with making and filing by the comptroller of an order fixing the prevailing rate of wages.—Olsen v. Brooklyn Ash Removal Co., 198 N.E. 561, 268 N.Y. 693—Ziegler v. City of New York, 300 N.Y.S. 1152, 253 App. Div. 764, appeal denied 13 N.E.2d 786, 277 N.Y. 740—Cirillo v. City of New York, 10 N.Y.S.2d 472, 170 Misc. 230, affirmed 19 N.Y.S.2d 151, 259 App. Div. 717, reargument denied 20 N. Y.S.2d 402, 259 App.Div. 875, affirmed 39 N.E.2d 273, 287 N.Y. 641.

(2) However, where one employed by a contractor on public works sued on the public work contract, which contained a stipulation to pay a certain minimum wage, the complaint was held to state good cause of action, although not alleging that plaintiff or some one working on project complained to industrial commissioner, that latter fixed prevailing rate of wages, and that action was begun within three months thereafter.—Corti v. Wexler, 287 N Y.S. 243, 159 Misc. 116.

(3) In action in county court to recover wages, allegedly due by virtue of the labor law, where it did not appear whether defendant corporation was a domestic or foreign corporation, defendant's motion to dismiss the complaint on ground that it did not state facts sufficient to constitute a cause of action was denied with leave to make further appropriate motions.—Didio v. S. A. Healey Co., 40 N.Y.S.2d 278.

Issues, proof, and variance

(1) In action to recover the difference between the wages actually paid and the prevailing rate the employee must prove the making and filing by the proper officer of an order fixing the prevailing rate of wages.—Ziegler v. City of New York, 300 N.Y.S. 1152, 253 App.Div. 764, appeal denied—Cirillo v. City of New York, 10 N.Y.S.2d 472, 170 Misc. 230, affirmed 19 N.Y.S.2d 151, 259 App.Div. 717, reargument denied 20 N.Y.S.2d 402, 259 App.Div. 875, affirmed 39 N.E.2d 273, 287 N.Y. 641.

(2) So a laborer could not recover from contractor the difference between what he had received for work on county jail and what he alleged to be the general prevailing rate of per diem wages in suit in justice or county court in absence of showing that such rate had been fixed by commissioners' court, since commissioners' court is the public body directed by statute to determine and specify such rate.—Southern Prison Co. v. Rennels, Tex.Civ.App., 110 S.W.2d 606, error dismissed.

46. Nev.—Bowers v. Charleston Hill Nat. Mines, 256 P. 1058, 50 Nev. 99.

Sufficiency of complaint

(1) In general.—Bowers v. Charleston Hill Nat. Mines, supra.

(2) A complaint failing to allege a demand for payment on the employee's foreman or the timekeeper has been held defective.—St. Louis-San Francisco R. Co. v. DeVoe, 237 S.W. 433, 152 Ark. 38.

47. N.J.—Pericin v. Denburg's Modern Bakery, 33 A.2d 825, 130 N.J. Law 547.

complaint alleges an employment contract at a specified rate of pay.[48]

b. Actions under Fair Labor Standards Act

As in civil actions generally, the complaint in an action for additional compensation and liquidated damages under the Fair Labor Standards Act must state facts sufficient to constitute a good cause of action.

In accordance with the rules governing pleadings in civil actions generally, the complaint in an action for additional compensation and liquidated damages under the Fair Labor Standards Act must state a good cause of action.[49] The complaint must contain a plain and concise statement of the material facts,[50] must allege a valid claim under the act,[51] and must be sufficient to permit defendant to prepare a responsive pleading;[52] but the complaint need not state evidentiary facts which are more probably available to defendant and not within plaintiff's knowledge.[53] The complaint should state plainly and explicitly the facts establishing the jurisdiction of the court over the action.[54]

The complaint must specifically aver the contractual relationship of employer and employee,[55] must clearly identify the employer and the employee,[56] must state the period of employment of each plaintiff or groups of plaintiffs[57] or the reason for the inability so to state,[58] and must set out the employer's failure to perform his duty in carrying out the obligations imposed on the employer by the act.[59] In an action against joint defendants the complaint should show that plaintiff was employed by both defendants[60] and should allege a wrong at-

48. U.S.—Domenech v. Pan Am. Standard Brands, C.C.A.Puerto Rico, 148 F.2d 763.

Allegations held sufficient

Allegations of hours per day plaintiff worked and sums per week or per fortnight he was paid therefor were allegations of a contract at a specified rate of pay and were sufficient to authorize recovery at that same rate of pay for time worked beyond contract or customary time, under Puerto Rican law regulating working hours.—Domenech v. Pan Am. Standard Brands, supra.

49. N.Y.—Volzing v. General Public Loan Corporation, 32 N.Y.S.2d 31.

Complaints held sufficient

(1) In general.

U.S.—Patterson v. Allied Chemical & Dye Corp., D.C.N.Y., 69 F.Supp. 804—Britt v. Cole Drug Co. of Boston, D.C.Mass., 39 F.Supp. 90—Hargrave v. Mid-Continent Petroleum Corporation, D.C.Okl., 36 F.Supp. 233.

Ga.—Orange Crush Bottling Co. v. Tuggle, 27 S.E.2d 769, 70 Ga.App. 144—Kay v. Kuhlman, 22 S.E.2d 677, 68 Ga.App. 258.

Ky.—New Southland Coal Corp. v. McBurney, 192 S.W.2d 183, 301 Ky. 399.

(2) Count of complaint seeking overtime compensation prior to plaintiff's entry into military service, detailing periods of service, nature of work, date of its termination, and alleged excess of hours during time of employment, stated a cause of action.—Loker v. Allied Bldg. Credits, D.C.Mo., 7 F.R.D. 358.

(3) A petition, alleging that defendant was engaged in interstate commerce of buying, selling, and shipping produce in interstate commerce, that plaintiff was employed by defendant for a definite period of time, and that he worked a definite number of hours each week during that time, and which further alleged what plaintiff's duties were in connection with carrying on defendant's business and that defendant had refused to pay him wages provided for in Fair Labor Standards Act, stated a cause of action.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo. App. 1241.

50. N.Y.—Stangler v. Calvert Mfg. Co., 63 N.Y.S.2d 469.

Complaints held sufficient

N.Y.—Stangler v. Calvert Mfg. Co., supra—Creno v. Caruso Produce Co., 60 N.Y.S.2d 134.

51. N.Y.—Livingston v. Todd Shipyards Corp., 62 N.Y.S.2d 45, 187 Misc. 672.

Complaint held sufficient

A complaint, alleging that complainant was employed by defendant as truck driver in interstate commerce, that he never received wages in conformity with minimum wage and hour requirements of Fair Labor Standards Act, and that he was entitled to additional amount shown by defendant's records, stated claim on which relief might have been granted, if proved, so that court erred in dismissing complaint.—Plunkett v. Abraham Bros. Packing Co., C.C.A.Tenn., 129 F.2d 419.

Complaint held insufficient

A complaint, seeking recovery of extra pay under a labor agreement because employee had been required to work over five hours on stated dates without an opportunity for supper, did not state a claim for unpaid minimum wages or unpaid overtime compensation within Fair Labor Standards Act.—Livingston v. Todd Shipyards Corp., 62 N.Y.S.2d 45, 187 Misc. 672.

52. U.S.—Broughton v. Atlantic Co., D.C.Ga., 47 F.Supp. 850—Baret v. Koppers Co., D.C.Pa., 6 F.R.D. 465.

Declaration must show on its face

such specific facts as will put defendant on notice of particular facts and amount of recovery sought.—Hunt v. National Linen Service Corporation, 157 S.W.2d 608, 178 Tenn. 262.

53. U.S.—Baret v. Koppers Co., D.C. Pa., 6 F.R.D. 465.

54. U.S.—Gates v. Graham Ice Cream Co., D.C.Neb., 31 F.Supp. 854—Gustafson v. Fred Wolferman, Inc., D.C.Mo., 6 F.R.D. 503.

55. U.S.—Maddox v. Jones, D.C.Ala., 42 F.Supp. 35.

Mo.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241.

Wash.—Ikola v. Snoqualmie Falls Lumber Co., 121 P.2d 369, 12 Wash. 2d 341.

56. U.S.—Maddox v. Jones, D.C.Ala., 42 F.Supp. 35.

57. U.S.—Broughton v. Atlantic Co., D.C.Ga., 47 F.Supp. 850.

58. U.S.—Broughton v. Atlantic Co., supra.

59. U.S.—Patterson v. Allied Chemical & Dye Corp., D.C.N.Y., 69 F. Supp. 804—Maddox v. Jones, D.C. Ala., 42 F.Supp. 35.

Mo.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241.

Wash.—Ikola v. Snoqualmie Falls Lumber Co., 121 P.2d 369, 12 Wash. 2d 341.

60. U.S.—Keegan v. Jacob Ruppert, D.C.N.Y., 2 F.R.D. 8.

Complaint held insufficient

In wood cutter's action against third person and paper company, allegations that defendants employed wood cutter did not overrule positive prior allegations that third person employed wood cutter to cut pulp wood which was delivered to paper company.—Maddox v. Jones, D.C.Ala., 42 F.Supp. 35.

tributed to both defendants.[61] The complaint must also show compliance with any conditions precedent to suit that may be imposed by the employment contract.[62]

In determining whether the complaint is sufficiently specific the procedural rules of the state or court involved are controlling.[63] However, in view of the beneficent objectives and the informal procedural provisions of the act,[64] much latitude must be allowed in passing on the sufficiency of a complaint under the act;[65] and pleadings should be so construed as to do substantial justice and further the humanitarian purposes of the act.[66] Thus, where a complaint states a claim on which relief may be granted and another claim which is invalid, the court should treat the latter part of the complaint as immaterial.[67]

Pleading overtime claim. In an action under the act to recover overtime compensation the complaint must allege the performance of overtime work,[68] and must state all material circumstances relating to the overtime worked,[69] such as when and to what extent overtime was worked.[70] However, it is not fatal for the complaint to fail to state the exact hours worked, the exact amounts due, and other detailed facts which are probably not within plaintiff's knowledge.[71] Where a bona fide contract between an employer and employee is made which meets the requirements of the act as to the minimum wage to be paid, it has been held necessary, in a suit to recover overtime compensation under the act, to allege specifically the rate used in computing the unpaid deficiency of overtime compensation.[72]

Under the provisions of the Portal-to-Portal Act, which modified the Fair Labor Standards Act, a complaint seeking overtime pay for time spent in preparing for work and in checking out after work must allege that there was a contract, custom, or practice providing for such compensation.[73] In actions prior to the Portal-to-Portal Act for time spent on the employer's premises before and after the scheduled working hours, it was held that the complaint should definitely state how much extra time was involved[74] and the nature of the employee's ac-

61. N.Y.—Stangler v. Calvert Mfg. Co., 63 N.Y.S.2d 469.

Complaint held sufficient

Even though plaintiff alleged in one paragraph of complaint that he was hired at office of one defendant by a certain individual, subsequent allegations that both defendants employed plaintiff were sufficient to show a wrong attributed to both defendants and adequately alleged a cause of action against them.—Stangler v. Calvert Mfg. Co., supra.

62. U.S.—Keegan v. Jacob Ruppert, D.C.N.Y., 2 F.R.D. 8.

63. Tenn.—Hunt v. National Linen Service Corporation, 157 S.W.2d 608, 178 Tenn. 262.

64. N.Y.—Emanuele v. Rochester Packing Co., 45 N.Y.S.2d 164, 182 Misc. 348.

65. N.Y.—Emanuele v. Rochester Packing Co., supra.

66. U.S.—Plunkett v. Abraham Bros. Packing Co., C.C.A.Tenn., 129 F.2d 419.

Liberal construction

The trend of judicial thought seems to be toward a liberal construction of the pleadings with a view to permitting the parties going into every possible phase of a cause of action such as here presented by the complaint.—Schempf v. Armour & Co., D.C.Minn., 5 F.R.D. 294.

67. U.S.—Plunkett v. Abraham Bros. Packing Co., C.C.A.Tenn., 129 F.2d 419.

68. N.Y.—Volzing v. General Public Loan Corporation, 32 N.Y.S.2d 31.

Allegations held insufficient

In action to recover compensation for overtime employment under Fair Labor Standards Act, an allegation in complaint that plaintiff and other employees were not paid overtime compensation provided for in the act was insufficient, in itself, to establish that plaintiff and other employees performed overtime work.—Volzing v. General Public Loan Corporation, supra.

69. U.S.—Sirmon v. Cron & Gracey Drilling Corporation, D.C.La., 44 F.Supp. 29.

Particular circumstances

In employee's action for wages for overtime spent in traveling on employer's boat to and from the place of work, the petition should have alleged specifically when employee commenced work and when work ended, where employee resided, the number of hours worked during each week, and whether place from which boat sailed was a place at which employees were assembled to be transported to their work.—Sirmon v. Cron & Gracey Drilling Corporation, supra.

70. N.Y.—Volzing v. General Public Loan Corporation, 32 N.Y.S.2d 31.

71. U.S.—Townsend v. Boston & M. R. R., D.C.Mass., 35 F.Supp. 938.

The reason for the rule is the probability that plaintiff was without definite and exact knowledge of hours and wages in controversy, whereas defendants undoubtedly had full and complete records bearing on the matter.—Townsend v. Boston & M. R. R., supra.

Particular facts within rule

In suit by sixty-six named plaintiffs for unpaid overtime compensation, plaintiffs would not be required to furnish a bill of particulars setting out the exact amounts and exact hours each plaintiff worked, rate of pay as to each, exact period of employment, and character of services. —Dykema v. Aluminum Co. of America, D.C.Ill., 7 F.R.D. 230.

Pleading held sufficient

Ohio.—Smith v. Cory Rubber Co., Com.Pl., 69 N.E.2d 777.

72. U.S.—Anderko v. Courtland Handbag Co., D.C.N.J., 53 F.Supp. 140.

Contract held not bona fide

A complaint admitting that minimum wage requirements of act had been met, but alleging that defendants forced plaintiffs to return their overtime compensation as a condition of employment, was sufficient without setting forth rate used in computing unpaid deficiency, since contract based on such coercion was not bona fide.—Anderko v. Courtland Handbag Co., supra.

73. U.S.—Burfeind v. Eagle-Picher Co. of Tex., D.C.Tex., 71 F.Supp. 929.

74. U.S.—Grospian v. Pan American Refining Corp., D.C.Tex., 6 F.R.D. 453.

Approximate time in minutes or hours

U.S.—Grospian v. Pan American Refining Corp., supra.

tivities during such time;[75] but the complaint was not required to allege evidentiary or immaterial facts relating to such overtime.[76]

Purview of act; activity in interstate commerce. In an action under the act the allegations of the complaint must substantially bring plaintiff within the purview of the act.[77] The complaint should allege not only that the employer was engaged in interstate commerce[78] but should also allege facts showing that the employee, in the performance of his duties, was engaged in interstate commerce or in the production of goods for such commerce;[79]

75. U.S.—Grospian v. Pan American Refining Corp., supra.

Other and different activities

That portion of complaint seeking overtime compensation which alleged that employees were required each day to pursue "other and different activities" on employer's premises both preliminary to and subsequent to scheduled times for beginning and finishing work, should be made more definite by setting forth what was meant by "other and different activities."—Grospian v. Pan American Refining Corp., supra.

76. U.S.—Grospian v. Pan American Refining Corp., supra.

Character of clothing required

That portion of complaint seeking overtime compensation which alleged that employees because of nature of their work were required to change into work clothes or protective clothing, to obtain equipment, and to make other necessary preparations for work, all of which were required to be done prior to scheduled starting time, would not be made more definite by requiring plaintiffs to allege character of clothing mentioned. —Grospian v. Pan American Refining Corp., supra.

77. U.S.—Berger v. Clouser, D.C.Pa., 36 F.Supp. 168.

Mo.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241.

78. U.S.—Bagby v. Cleveland Wrecking Co., D.C.Ky., 28 F.Supp. 271.

Ga.—Pyron v. Arnold, 21 S.E.2d 461, 67 Ga.App 742.

Ky.—J. F. Schneider & Son v. Justice, 168 S.W.2d 591, 293 Ky. 126.

Sale for resale or incorporation into other goods

Elevator operator seeking to recover from employer for alleged violation of the Fair Labor Standards Act should allege that goods manufactured by employer were sold to persons, firms, or corporations within the state that resold them in interstate commerce or incorporated them into merchandise which was sold in such commerce.—Venero v. Hageman, Inc., 40 N.Y.S.2d 233, 179 Misc. 882.

Pleadings held sufficient

U.S.—Sklar Oil Corporation v. Thompson, C.C.A.Ark., 126 F.2d 872.

Ga.—Orange Crush Bottling Co. v. Tuggle, 27 S.E.2d 769, 70 Ga.App. 144.

79. U.S.—Kennedy v. Silas Mason Co., D.C.La., 68 F.Supp. 576—Lockwood v. Hercules Powder Co., D. C.Mo., 7 F.R.D. 24.

Ga.—Pyron v. Arnold, 21 S.E.2d 461, 67 Ga.App. 742.

Ky.—J. F. Schneider & Son v. Justice, 168 S.W.2d 591, 293 Ky. 126.

Mo.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241.

N.Y.—Carroll v. Dryolin Corporation, 45 N.Y.S.2d 77, 182 Misc. 260. Contra Doyle v. Johnson Bros., 25 N.Y.S.2d 603.

Allegations held sufficient

(1) In general.

U.S.—Clyde v. Broderick, C.C.A.Colo., 144 F.2d 348—McDuffie v. Hayes Freight Lines, D.C.Ill., 71 F.Supp. 755—Patterson v. Allied Chemical & Dye Corp., D.C.N.Y., 69 F.Supp. 804—Gillette v. Rockland Coaches, D.C.N.Y., 50 F.Supp. 617, affirmed, C.C.A., 142 F.2d 616—Pliner v. Nesvig, D.C.Wis., 42 F.Supp. 297—La Guardia v. Austin-Bliss General Tire Co., D.C.N.Y., 41 F.Supp. 678.

Ga.—Orange Crush Bottling Co. v. Tuggle, 27 S.E.2d 769, 70 Ga.App. 144.

(2) Complaint stated a cause of action for overtime compensation allegedly due to workmen at trucking terminal who unloaded and checked freight from incoming trucks and moved it for reloading on outgoing trucks.—Crean v. M. Moran Transp. Lines, D.C.N.Y., 50 F.Supp. 107.

(3) A complaint, which alleged that a part of complainant's duties consisted in unloading from freight cars merchandise shipped in interstate commerce and in moving, from employers' warehouse onto loading platform, merchandise to be picked up by common carriers and transported to other states, was not subject to demurrer because it was therein alleged that employee's duties consisted principally in the driving of a truck in intra-state commerce, but facts should be developed in order to give employee the opportunity to show just what duties he performed with respect to which he would be entitled to benefits of Fair Labor Standards Act.—Gibson v. Glasgow, 157 S.W.2d 814, 178 Tenn. 273.

(4) A complaint, alleging that defendant was engaged in the production of goods for interstate commerce and that between specified dates plaintiffs had worked overtime without receiving compensation therefor, was sufficient, and motion for a more definite statement by enumerating products on which plaintiffs were employed, and stating nature of work performed on products manufactured for interstate commerce, would be denied.—Baret v. Koppers Co., D.C.Pa., 6 F.R.D. 465.

Allegations held insufficient

(1) In general.

U.S.—Eddings v. Southern Dairies, D.C.S.C., 42 F.Supp. 664—Bagby v. Cleveland Wrecking Co., D.C.Ky., 28 F.Supp. 271—Gustafson v. Fred Wolferman, Inc., D.C.Mo., 6 F.R.D. 503.

N.Y.—Carroll v. Dryolin Corporation, 45 N.Y.S.2d 77, 182 Misc. 260—Venero v. Hageman, Inc., 40 N.Y. S.2d 233, 179 Misc. 882.

Wash.—Ikola v. Snoqualmie Falls Lumber Co., 121 P.2d 369, 12 Wash. 2d 341.

(2) Complaint which merely alleged that defendant was a foreign corporation engaged in interstate commerce failed to state cause of action, since act implies that corporation engaged in interstate commerce may as part of its business be engaged in purely intra-state commerce with respect to portion of its business.—Foster v. National Biscuit Co., D.C.Wash., 31 F.Supp. 552.

(3) Petition alleging that defendant employer was engaged in construction of state and national highways, and that plaintiff employee was employed by defendant as a night watchman at defendant's place of business to watch the plant, including equipment and other property, and to clean out the office, was sufficient.—Preston v. Louis Des Cognets & Co., 167 S.W.2d 863, 292 Ky. 646.

(4) Allegation that employer was engaged in interstate commerce or in the production of goods therefor was not sufficient to show that employee was entitled to benefits of the act, particularly where the complaint further alleged that a substantial portion of employer's merchandise was shipped in interstate commerce thereby implying that some merchandise was not shipped out of the state.—Helt v. Britten-Fenton Co., 42 N.Y.S.2d 362, 180 Misc. 1076.

(5) Complaint disclosing that plaintiff's duties were to watch rail-

and where the employee was engaged in both interstate and intra-state commerce the complaint must point out what part of his work was in each.[80] However, it has also been held, under the rule that a complaint should not be dismissed for informality or insufficiency of statement unless it appears certain that no basic right of action can possibly exist under any state of facts which may be proved in support of plaintiff's asserted claim, that the sufficiency of plaintiff's services must depend on the proof and disclosures at the trial, so that a complaint otherwise satisfactory will not be held insufficient as failing to state a cause of action sufficient to invoke the jurisdiction of the court.[81] The complaint should contain a concise statement of the particular kind of employment, including the place where it was performed,[82] even though the employee is unable to allege in minute detail its ultimate relation to interstate commerce.[83]

Suits in behalf of others. A complaint under the act may properly state that it is brought in behalf of plaintiff and all other employees similarly situated,[84] and the complaint must set forth the authority of plaintiff as representative or agent of employees to bring the suit;[85] but it has also been held that a failure to allege that plaintiffs were the authorized agents or representatives of the unnamed parties to the cause does not render the complaint subject to dismissal.[86] However, it has also been held that a complaint will be insufficient as to unnamed claimants where it does not appear that they are participating in the suit and are willing to be bound by the final judgment.[87]

Allegations predicating the right of recovery for employees not specifically enumerated as plaintiffs may properly be included in the complaint so that other employees similarly situated may become parties;[88] and where unnamed claimants are made parties or specific beneficiaries of a representative action under the act, as by an amended or supplemental pleading, facts must be alleged in the pleadings relative to each of such claimants establishing that they were engaged in the production of goods for interstate commerce within the meaning of the act.[89] It has been held that the complaint must state and number separately the causes of action of each of the employees on whose behalf the suit is brought;[90] but it is not necessary to state separately a cause of action as to each plaintiff, provided those who are joined in any one action are in fact employees similarly situated.[91] Where the action is brought in behalf of other employees similarly situated, intervening complainants are authorized to file an intervening complaint or such other authority as might place them within the jurisdiction of the court.[92]

Negativing defenses; exemptions. In an action under the Fair Labor Standards Act the complaint need not negative defenses that may possibly be asserted.[93] Thus the complaint is not required to negative the exemptions of the act in order to state a cause of action.[94] However, if a complaint shows on its face that plaintiff is excepted from the operation of the act as being within one of the exemptions,[95] as where he is under the jurisdiction of,

road cars filled with coal brought from Pennsylvania to New York did not establish that plaintiff was engaged in interstate commerce where complaint disclosed that, before coming under his surveillance, coal cars reached their destination upon consignee coal sales company's siding or in its yards, and where, although consignee was a wholesaler, complaint said nothing about any one being interested in receiving the coal except consignee and made no claim that consignee was the alter ego of the delivering railroad.—Delcour v. Lehigh Valley Coal Sales Co., 43 N.Y.S.2d 371, 182 Misc. 289.

80. U.S.—Jones v. Springfield Missouri Packing Co., D.C.Mo., 45 F. Supp. 997.

81. U.S.—Mennicucci v. F. & P. Brakelyne Service, D.C.N.J., 58 F. Supp. 720.

82. N.Y.—Emanuele v. Rochester Packing Co., 45 N.Y.S.2d 164, 182 Misc. 348.

83. N.Y.—Emanuele v. Rochester Packing Co., supra.

84. U.S.—Philpott v. Standard Oil Co., D.C.Ohio, 53 F.Supp. 833.

85. U.S.—Grospian v. Pan Am. Refining Corp., D.C.Tex., 6 F.R.D. 453.

86. N.Y.—Shannon v. Franklin Simon & Co., 43 N.Y.S.2d 442, 181 Misc. 939.

87. U.S.—Gordon v. Paducah Ice Mfg. Co., D.C.Ky., 41 F.Supp. 980.

88. U.S.—Smith v. Stark Trucking, D.C.Ohio, 53 F.Supp. 826.

Rules governing sufficiency of pleadings

In action by numerous employees for overtime compensation, liquidated damages, etc., under the Fair Labor Standards Act, the sufficiency of the complaint on defendant's motion for a more definite statement is to be determined by the same principles that would be applicable if there were only one plaintiff.—Baret v. Koppers Co., D.C.Pa., 6 F.R.D. 465.

89. U.S.—Lockwood v. Hercules Powder Co., D.C.Mo., 7 F.R.D. 24.

90. N.Y.—Simmons v. Rudolph Knitting Mills, 35 N.Y.S.2d 494, 264 App.Div. 871—Morasse v. Gladiton Realty Corp., 63 N.Y.S.2d 884, 187 Misc. 873.

91. N.Y.—Emanuele v. Rochester Packing Co., 45 N.Y.S.2d 164, 182 Misc. 348.

92. U.S.—Philpott v. Standard Oil Co., D.C.Ohio, 53 F.Supp. 833.

93. Tenn.—Thornberg v. E. T. & W. N. C. Motor Transp. Co., 157 S.W.2d 823, 178 Tenn. 298.

94. U.S.—Stratton v. Farmers Produce Co., C.C.A.Ark., 134 F.2d 825—Patterson v. Allied Chemical & Dye Corp., D.C.N.Y., 69 F.Supp. 804.

Regulation by Interstate Commerce Commission

Tenn.—Thornberg v. E. T. & W. N. C. Motor Transp. Co., 157 S.W.2d 823, 178 Tenn. 298.

95. Tenn.—Hunt v. National Linen Service Corporation, 157 S.W.2d 608, 178 Tenn. 262.

Complaints held sufficient

(1) In action brought against employer allegedly engaged in business

and subject to regulation by, the Interstate Commerce Commission,[96] it is insufficient.

Answer. In an action under the Fair Labor Standards Act the answer must state facts sufficient to constitute a defense,[97] and the defense so stated must be a valid defense.[98] In order that a release may be asserted as a valid defense, the answer must allege that there has been payment of all sums due under the act.[99] Matters of affirmative defense must be specially raised in defendant's pleadings.[1]

Amendment. The general rules governing the allowance of amendments in civil actions have been applied in actions to enforce the Fair Labor Standards Act.[2]

Issues, proof, and variance. As in civil actions generally, the issues in actions to recover additional compensation and liquidated damages under the Fair Labor Standards Act are determined by the pleadings,[3] the proof must correspond with the allega-

or crushing cotton seed, flax seed, and other oil producing vegetable commodities for purpose of extracting oil and for purpose of producing cake meal and other by-products, provisions of act relating to seasonal exemptions were inapplicable where pleadings did not indicate that employer was engaged in the first processing; and the complaint stated a cause of action except for the operation relating to cotton seed which was exempt.—Abram v. San Joaquin Cotton Oil Co., D.C.Cal., 46 F.Supp. 969.

(2) Complaint alleging that plaintiff was employed as a night watchman by a private police corporation and that corporation did not fall within provision of act exempting employees engaged in any service establishment, according to labor department's interpretative bulletin was not subject to an exception of no cause of action.—Brister v. Boylan's Private Police, La.App., 8 So.2d 386.

Complaints held insufficient

Declaration alleging that employer rented use of linens and sold soap to customers in two states, some of which were engaged in interstate commerce or production of goods for interstate commerce, was demurrable because showing that employer was exempt as a service establishment most of whose servicing was in intra-state commerce, since word "some" would indicate that majority of employer's customers were within the state.—Hunt v. National Linen Service Corporation, 157 S.W. 2d 608, 178 Tenn. 262.

96. N.Y.—Carroll v. Dryolin Corporation, 45 N.Y.S.2d 77, 182 Misc. 260.

Complaints held sufficient

(1) Complaint alleging that employers were engaged in transporting money from and to banks, etc., engaged in interstate commerce and in production of goods for interstate commerce, and that employees were employed as chauffeurs, custodians, and armed guards in operation of motor vehicles used in such transportation, did not warrant conclusion that the transportation was in interstate commerce within Motor Carrier Act so as to render overtime provisions of Fair Labor Standards Act inapplicable.—Earle v. Brink's Inc., D.C.N.Y., 54 F.Supp. 676.

(2) Complaint which alleged interstate character of employer's business, employment of plaintiff, and that principal service rendered by plaintiff was operation of truck between Arkansas and Oklahoma was not dismissible as showing that plaintiff was continuously engaged in driving an interstate truck for employer and hence excepted from benefits of act as an employee with respect to whom Interstate Commerce Commission has power to establish qualifications and maximum hours of service.—Musteen v. Johnson, C.C.A. Ark., 133 F.2d 106.

97. N.Y.—Cassese v. Manufacturers Trust Co., 46 N.Y.S.2d 621, 182 Misc. 344.

Answers held sufficient

(1) In general.—Walker v. West Side Fifth Ave. Corp., 51 N.Y.S.2d 380.

(2) In action for wages under Fair Labor Standards Act, answer alleging that plaintiff had previously brought action under the act, that the dispute was as to number of hours actually worked, that a settlement had been reached and employee paid in full, set up a good defense.—Withers v. Herbert McLean Purdy Management Corporation, 47 N.Y.S. 2d 260, 181 Misc. 724.

Answer held insufficient

Answer asserting a release by employees of employer's liability for wages due under Fair Labor Standards Act without alleging facts showing the existence of a bona fide dispute was insufficient to state a defense to action to recover unpaid minimum wages and liquidated damages due under the act.—Cassese v. Manufacturers Trust Co., 46 N.Y.S.2d 621, 182 Misc. 344.

98. U.S.—Rigopoulos v. Kervan, D. C.N.Y., 47 F.Supp. 576.

Defenses held sufficient

(1) In general.—Munkens v. 1412 Broadway, D.C.N.Y., 50 F.Supp. 632.

(2) In employee's action to enforce employer's double liability for unpaid overtime compensation, defenses that employee was employed in executive or professional capacity so as to be exempt from minimum wage and maximum hour provisions of the act were sufficient for pleading purposes.—Emerson v. Mary Lincoln Candies, 17 N.Y.S.2d 851, 173 Misc. 531, affirmed 26 N.Y.S.2d 489, 261 App.Div. 879, appeal denied 27 N.Y.S.2d 452, 261 App.Div. 1044, affirmed 38 N.E.2d 234, 287 N.Y. 577.

Defenses held insufficient

(1) That part of employer's answer alleging that he had paid employees wages 'in accordance with agreements between them and that employees raised no question concerning wages until after being discharged did not state a defense.—McNorrill v. Gibbs, D.C.S.C., 45 F. Supp. 363.

(2) Allegations that employer as a result of suit to enjoin violations of Fair Labor Standards Act paid employees the difference between wages paid and what should have been paid under the act, which payments were receipted for as full satisfaction of employees' claims, did not state a defense against employees' action to recover liquidated damages for failure promptly to pay overtime, in the absence of allegation that an honest dispute existed as to whether employees had worked overtime within purview of the act.—Rigopoulos v. Kervan, D.C.N.Y., 47 F.Supp. 576.

99. N.Y.—Hurewitz v. Henry Moss & Co., 49 N.Y.S.2d 106.

1. U.S.—Mid-Continent Petroleum Corp. v. Keen, C.C.A.Iowa, 157 F.2d 310.

Exemption

U.S.—Mid-Continent Petroleum Corp. v. Keen, supra.

2. U.S.—Eddings v. Southern Dairies, D.C.S.C., 42 F.Supp. 664—Armani v. Crucible Steel Co. of America, D.C.N.Y., 7 F.R.D. 344.

3. U.S.—Schmidtke v. Conesa, C.C.A. Puerto Rico, 141 F.2d 634—Kennedy v. Silas Mason Co., D.C.La., 70 F.Supp. 929—Strasser v. Fascination Candy Co., D.C.Ill., 7 F.R.D. 267.

Claims of parties only

In action by employees on behalf of themselves and other employees

tions in the pleadings,[4] and all matters which are material or essential to the cause of action or defense must not only be alleged in the pleadings but must be proved.[5] However, it has been held that questions of law as to the applicability to the employee of the act may be raised at the trial by the employer even though not specially pleaded.[6]

§ 160(8). —— Evidence

a. Presumptions and burden of proof
b. Admissibility
c. Weight and sufficiency

a. Presumptions and Burden of Proof

(a) In general
(b) Actions under Fair Labor Standards Act

(a) In General

The rules governing presumptions and the burden of proof in civil actions generally have been applied in actions under statutes regulating wages or the payment thereof.

In accordance with the rules governing presumptions in civil actions generally, considered in Evidence §§ 114–157, the courts have adjudicated the propriety and effect of particular presumptions in actions to enforce the various statutes regulating wages or the payment thereof.[7] The burden of proving facts necessary and sufficient to constitute a good cause of action under such statutes is generally on plaintiff,[8] while the burden of proving defenses and matters of avoidance is on defendant.[9]

similarly situated to recover overtime compensation under Fair Labor Standards Act, only those claims may be considered which are made by those who appear as plaintiffs or interveners in the record.—Pentland v. Dravo Corp., D.C.Pa., 4 F.R.D. 350, reversed on other grounds, C.C.A., 152 F.2d 851.

4. U.S.—Bowman v. Pace Co., C.C.A. Fla., 119 F.2d 858.

5. U.S.—Timberlake v. Day & Zimmerman, D.C.Iowa, 49 F.Supp. 28.
Mo.—Vannoy v. Swift & Co., 201 S.W.2d 350.

Particular matters required to be proved

(1) That plaintiff engaged in commerce or engaged in production of goods for commerce.
U.S.—Lockwood v. Hercules Powder Co., D.C.Mo., 7 F.R.D. 24.
Mo.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241.

(2) Type of employment, number of hours worked by each employee, and how much he is entitled to recover.—Smith v. Stark Trucking, D.C.Ohio, 53 F.Supp. 826.

6. N.Y.—Rubin v. Meadow Provision Co., 39 N.Y.S.2d 518.

7. N.Y.—Ziegler v. City of New York, 281 N.Y.S. 462, 156 Misc. 624, affirmed 291 N.Y.S. 401, 248 App. Div. 873 and 300 N.Y.S. 1152, 253 App.Div. 764.

Payment of prevailing rates

On demurrer to bill for difference between wages paid and prescribed minimum wages, where bill did not allege that the required wage scales had not been posted, presumption was that such scales had been posted.—Harris v. Owen, 176 S.W.2d 812, 180 Tenn. 492, modified on other grounds 180 S.W.2d 227, 180 Tenn. 492.

Maximum hours

In employee's action to recover for hours worked in excess of that permitted by statute, determination whether there has been such constraint by employer as to permit recovery by employee does not rest on any presumption declared by law to result from the fact of employment, but must be established by evidence.—Lewis v. Ferrari, 90 P.2d 384, 34 Cal.App.2d Supp. 767.

Redemption of scrip or tokens

In action against employer by transferee of scrip issued to laborers to recover value of scrip, it was presumed that the scrip was issued for wages earned for services rendered.—Barker v. Stearns Coal & Lumber Co., 152 S.W.2d 953, 287 Ky. 340.

8. Ark.—Missouri Pac. R. Co. v. Diffie, 41 S.W.2d 752, 184 Ark. 189—Missouri Pac. R. Co. v. Warren, 258 S.W. 130, 162 Ark. 199.
Cal.—Sayre v. Western Bowl, 174 P. 2d 466, 76 Cal.App.2d 793.
Ky.—Barker v. Stearns Coal & Lumber Co., 163 S.W.2d 466, 291 Ky. 184—West Kentucky Coal Co. v. Nall, 27 S.W.2d 965, 234 Ky. 249.
La.—Altom v. Mt. Vernon Oil & Gas Co., 141 So. 457, 174 La. 775.

Minimum wage law

In public housekeeper's action against hospital employer to recover a balance allegedly due under the state minimum wage law, in order to claim the benefits of order fixing a minimum wage for employees of public housekeeping establishments plaintiff was required to bring herself within the class covered by the order.—Pagel v. Trinity Hospital Ass'n, 6 N.W.2d 392, 72 N.D. 262.

Payment of prevailing rates

In an action by a public employee or an employee on public work to recover the difference between what he was actually paid and the alleged prevailing rate, the employee has the burden of proving a prevailing wage rate in excess of the rate at which he was paid.—McCaffrey v. State, 181 N.E. 84, 259 N.Y. 159—Queeny v. State, 279 N.Y.S. 281, 244 App.Div. 761, followed in Adwin v. State, 279 N.Y.S. 282, 244 App.Div. 761—Ziegler v. City of New York, 281 N.Y.S. 462, 156 Misc. 624, affirmed 291 N.Y.S. 401, 248 App.Div. 873 and 300 N.Y.S. 1152, 253 App.Div. 764.

Discrimination against women

In action to recover under statute penalizing discrimination in wage rates between men and women under specified conditions, where plaintiff brought action on her own behalf and as assignee of claim of twenty-eight other women employees, plaintiff had burden of showing to a computable certainty damage sustained by her and each of her assignors.—St. John v. General Motors Corporation, 13 N.W.2d 840, 308 Mich. 333.

9. Ky.—West Kentucky Coal Co. v. Nall, 27 S.W.2d 965, 234 Ky. 249.

Wages of women and minors

(1) In suit against hotel operators for overtime wages due under minimum wage order of industrial commission pursuant to statute as to wages of women and minors, hotel operators claiming that order was void because commission had failed to make an investigation of particular occupations, but instead had made a blanket investigation of all occupations, had burden of showing how order was illegal as to them as hotel operators.—Martin v. Wolfson, 16 N.W.2d 884, 218 Minn. 557.

(2) In action under minimum wage law by woman telephone operator in town of about one thousand three hundred population against telephone company to recover the difference between wages paid and standard minimum wages, burden was on compa-

(b) Actions under Fair Labor Standards Act

Generally the plaintiff has the burden of proving a cause of action under the Fair Labor Standards Act, while the defendant has the burden of proving matters of defense.

In accordance with the rules governing presumptions in civil actions generally, the courts have adjudicated the propriety and effect of particular presumptions in actions for additional compensation and liquidated damages under the Fair Labor Standards Act.[10] In such actions the burden of proof is on plaintiff[11] to prove his claim for unpaid minimum wages or unpaid overtime compensation,[12] and he has the burden of proving every statutory allegation in issue.[13] Thus plaintiff has the burden of proving that he was employed by defendant,[14] and that the employer has violated the act[15] in that plaintiff performed work for which he was not properly compensated.[16] Plaintiff also has the burden of establishing the number of hours worked[17] and the amount of wages allegedly due.[18]

In an action to recover overtime compensation under the act the employee has the burden of proving not only the fact of overtime work[19] and his employer's knowledge thereof,[20] but also the amount

ny to prove its claim that the workmen's compensation bureau had authorized departure from otherwise applicable standards by classifying company as a rural exchange.—Wiseth v. Traill County Telephone Co., 5 N.W.2d 307, 72 N.D. 165—Wiseth v. Traill County Telephone Co., 291 N.W. 689, 70 N.D. 44.

10. U.S.—White v. Witwer Grocer Co., C.C.A.Iowa, 132 F.2d 108.

Absenteeism

From fact of absenteeism on part of some employees it could not be assumed that all employees were absent during any work week.—Walling v. Anaconda Copper Min. Co., D.C. Mont., 66 F.Supp. 913.

Presumption as to overtime worked

Where employee received six dollars per week for cleaning girls' restrooms and received seven and one-half cents per case for packing popcorn, employee averaged fourteen cases per hour, for five weeks employee's earnings from packaging popcorn were thirty-seven dollars and sixty-five cents or more per week, and no records were maintained by employer showing her hours of work, court would not indulge presumption that employee's hours of work did not exceed forty hours per week and employers were violating the overtime provisions of the Fair Labor Standards Act by compensating employee on only a straight time, piece rate basis.—Walling v. Lippold, D.C.Neb., 72 F. Supp. 339.

11. U.S.—Cullum v. Stevens, D.C. Tex., 46 F.Supp. 73.

Ga.—Carter v. Butler, 31 S.E.2d 210, 71 Ga.App. 492, reversed on other grounds 32 S.E.2d 808, 198 Ga. 754, conformed to 33 S.E.2d 272, 72 Ga. App. 156.

Kan.—Jackson v. Derby Oil Co., 139 P.2d 146, 157 Kan. 53.

12. U.S.—Collins v. Burton-Dixie Corporation, D.C.S.C., 53 F.Supp. 821.

Ga.—Kay v. Kuhlman, 33 S.E.2d 378, 72 Ga.App. 129.

Kan.—Stewart v. Mabee Oil & Gas Co., 147 P.2d 731, 158 Kan. 388.

La.—Dennis v. Equitable Equipment Co., App., 7 So.2d 397.

Pa.—Say v. Prior Oil Co., 43 A.2d 417, 157 Pa.Super. 629.

13. N.Y.—Anderson v. Material Coordinating Agency, 63 N.Y.S.2d 324.

14. U.S.—Engebretsen v. E. J. Albrecht Co., C.C.A.Ill., 150 F.2d 602.

Employment by agent

Where realty agent managing building and building owner allegedly employed plaintiffs as elevator operators, plaintiffs had duty to prove that agent was their employer within the act.—Brennan v. Community Service Soc. of New York, 45 N.Y.S.2d 825, 181 Misc. 637.

15. Tenn.—Hunt v. National Linen Service Corporation, 157 S.W.2d 608, 178 Tenn. 262.

Nonperformance of valid contract

Where valid employment contract is made for payment of an amount in excess of statutory minimum wages, in order to recover minimum wages under Fair Labor Standards Act employee must show that contract has not been performed.—Mornford v. Andrews, C.C.A.Ga., 151 F.2d 511.

Amount of tips received

(1) Where employment agreement was that employer would, on demand, pay all sums necessary with tips to make up twenty-five dollars per week, the burden was on employee suing for minimum wages to prove the amount of tips he received and that they, with the amount paid him, were less than the minimum wage he was entitled to receive.—Mornford v. Andrews, supra.

(2) In suit to recover minimum wages by redcaps who worked under agreement requiring tips to be accounted for to extent necessary to make up minimum wage, burden was not on defendant employer to prove that tips reported by redcap were actually received, but burden was on each redcap to prove amount reported in excess of that received before redcap would be entitled to judgment.—Townsend v. New York Cent. R. Co., C.C.A.Ill., 141 F.2d 483, certiorari denied 65 S.Ct. 47, 323 U.S. 717, 89 L.Ed. 577.

16. U.S.—Anderson v. Mt. Clemens Pottery Co., Mich., 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699—Lewellen v. Hardy-Burlingham Min. Co., D.C.Ky., 73 F.Supp. 63—Prins v. Skaff, D.C. Mich., 47 F.Supp. 430—Snyder v. Dravo Corp., D.C.Pa., 6 F.R.D. 546—Baret v. Koppers Co., D.C.Pa., 6 F.R.D. 465—Burke v. Mesta Mach. Co., D.C.Pa., 5 F.R.D. 134—Winslow v. National Elec. Products Corp., D.C.Pa., 5 F.R.D. 126.

17. U.S.—Johnson v. Blankenship, C.C.A.Ark., 152 F.2d 99—Epps v. Weathers, D.C.Ga., 49 F.Supp. 2.

Mo.—Martin v. Graham Ship-By-Truck Co., App., 176 S.W.2d 842.

N.M.—Wilson Oil Co. v. Hardy, 164 P.2d 209, 49 N.M. 337, 162 A.L.R. 292.

18. U.S.—Johnson v. Blankenship, C.C.A.Ark., 152 F.2d 99—Epps v. Weathers, D.C.Ga., 49 F.Supp. 2.

Mo.—Martin v. Graham Ship-By-Truck Co., App., 176 S.W.2d 842—Niehaus v. Joseph Greenspon's Son Pipe Corporation, 164 S.W.2d 180, 237 Mo.App. 112.

N.M.—Wilson Oil Co. v. Hardy, 164 P.2d 209, 49 N.M. 337, 162 A.L.R. 292.

Tenn.—Hunt v. National Linen Service Corporation, 157 S.W.2d 608, 178 Tenn. 262.

19. U.S.—Bloch v. Bell, D.C.Ky., 63 F.Supp. 863, affirmed, C.C.A., 152 F.2d 962—Feldman v. Roschelle, D.C.N.Y., 49 F.Supp. 247—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009.

Ky.—Clevenger v. W. M. Ritter Lumber Co., 172 S.W.2d 625, 294 Ky. 764.

N.Y.—Ralston v. Karp Metal Products Co., 38 N.Y.S.2d 764, 179 Misc. 282.

Wash.—Cotton v. Weyerhauser Timber Co., 147 P.2d 299, 20 Wash.2d 300.

20. Okl.—Pioneer Corp. v. Kimsey, 162 P.2d 1000, 196 Okl. 83.

thereof[21] and the amount of wages due each pay period.[22] The burden of the employee to prove that he has performed work for which he was not properly compensated should not be made an impossible hurdle for the employee;[23] and due regard must be given to the fact that the employer has the duty under the act to keep proper records of employment.[24] Accordingly, where the employer's records are inadequate, and the employee produces sufficient evidence to show the amount of work for which he was not properly compensated as a matter of just and reasonable inference, the burden shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence[25] even though the employer's lack of adequate records grows out of a bona fide mistake as to whether certain activities or nonactivities constitute work.[26]

Purview of act; interstate commerce. The courts have determined whether particular presumptions as to whether an employee is within the coverage of the act are warranted by the facts of the case.[27] In general plaintiff has the burden of proving that he is within the purview of the act.[28] Thus plaintiff has the burden of showing that his employer was engaged in interstate commerce or in the production of goods for commerce and that plaintiff's occupation was necessary to such commerce or production,[29] or, without regard to the nature of

21. U.S.—George Lawley & Son Corporation v. South, C.C.A.Mass., 140 F.2d 439, 151 A.L.R. 1081, certiorari denied 64 S.Ct. 1156, 322 U.S. 746, 88 L.Ed. 1578—Bloch v. Bell, D.C.Ky., 63 F.Supp. 863, affirmed, C.C.A., 152 F.2d 962—Davies v. Onyx Oils & Resins, D.C.N.J., 63 F. Supp. 777—Snyder v. Wessner, D. C.Minn., 55 F.Supp. 971—Toppin v. 12 East 22nd Street Corporation, D. C.N.Y., 55 F.Supp. 87—Feldman v. Roschelle Bros., D.C.N.Y., 49 F. Supp. 247.
Ky.—Clevenger v. W. M. Ritter Lumber Co., 172 S.W.2d 625, 294 Ky. 764.
Minn.—Pakarinen v. Butler Bros., 16 N.W.2d 769, 218 Minn. 496.
Mo.—Martin v. Graham Ship-By-Truck Co., App., 176 S.W.2d 842.
N.Y.—Rienzo v. City Bank Farmers Trust Co., 53 N.Y.S.2d 68, 183 Misc. 153—Ralston v. Karp Metal Products Co., 38 N.Y.S.2d 764, 179 Misc. 282.
Okl.—Pioneer Corp. v. Kimsey, 162 P.2d 1000, 196 Okl. 89.
Wash.—Cotton v. Weyerhauser Timber Co., 147 P.2d 299, 20 Wash.2d 300.

Time spent in various activities
Even if employees, who orally agreed to remain on employer's premises several nights each week to be available in case of fire alarm, were entitled to overtime compensation under Fair Labor Standards Act for time actually spent waiting for an alarm as distinguished from time spent in recreation and in sleep, employees had burden of proving actual hours spent in each activity.—Skidmore v. Swift & Co., C.C.A.Tex., 136 F.2d 112, reversed on other grounds 65 S.Ct. 161, 323 U.S. 134, 89 L.Ed. 124.

22. U.S.—George Lawley & Son Corporation v. South, C.C.A.Mass., 140 F.2d 439, 151 A.L.R. 1081, certiorari denied 64 S.Ct. 1156, 322 U.S. 746, 88 L.Ed. 1578—Davies v. Onyx Oils & Resins, D.C.N.J., 63 F.Supp. 777—Toppin v. 12 East 22nd Street Corporation, D.C.N.Y., 55 F.Supp. 887.

23. U.S.—Anderson v. Mt. Clemens Pottery Co., Mich., 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

24. U.S.—Anderson v. Mt. Clemens Pottery Co., supra—Lewellen v. Hardy-Burlingham Min. Co., D.C. Ky., 73 F.Supp. 63.

25. U.S.—Anderson v. Mt. Clemens Pottery Co., Mich., 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699—Porter v. Poindexter, C.C.A.Okl., 158 F.2d 759—Lewellen v. Hardy-Burlingham Min. Co., D.C.Ky., 73 F.Supp. 63.

In earlier cases it was held that the failure of the employer to keep adequate records did not shift the burden.
U.S.—Collins v. Burton-Dixie Corporation, D.C.S.C., 53 F.Supp. 821—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009.
N.Y.—Hanzely v. Hooven Letters, 44 N.Y.S.2d 398.

26. U.S.—Anderson v. Mt. Clemens Pottery Co., Mich., 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

27. U.S.—Berry v. 34 Irving Place Corporation, D.C.N.Y., 52 F.Supp. 875.

Presumptions or inferences held not warranted
The fact that some tenants of loft and office building are engaged in commerce as distinguished from engaged in production of goods for commerce does not warrant inference that elevator operator and handyman employed by building are engaged in commerce so as to be within coverage of act.—Berry v. 34 Irving Place Corporation, supra.

Assumption in passing on sufficiency of defense
In employee's action to enforce employer's double liability for unpaid overtime compensation, supreme court would assume, in passing on legal sufficiency of employer's defense that contract of employment required employee to devote such time as was necessary to his duties as stationary engineer at fixed weekly wage, that employee was one of the class and engaged in an occupation covered by the act.—Emerson v. Mary Lincoln Candies, 17 N.Y.S.2d 851, 173 Misc. 531, affirmed 26 N.Y. S.2d 489, 261 App.Div. 879, appeal denied 27 N.Y.S.2d 452, 261 App.Div. 1044, affirmed 38 N.E.2d 234, 287 N. Y. 577.

28. U.S.—Schwarz v. Witwer Grocer Co., C.C.A.Iowa, 141 F.2d 341, certiorari denied 64 S.Ct. 1265, 322 U. S. 753, 88 L.Ed. 1583—Kelly v. Ford, Bacon & Davis, D.C.Pa., 71 F.Supp. 311—Bartholome v. Baltimore Fire Patrol & Despatch Co. of Baltimore City, D.C.Md., 48 F. Supp. 98—Berger v. Clouser, D.C. Pa., 36 F.Supp. 168.
La.—Dennis v. Equitable Equipment Co., App., 7 So.2d 397.
Tex.—Johnson v. Great Nat. Life Ins. Co., Civ.App., 166 S.W.2d 935, error refused.

29. U.S.—Engebretsen v. E. J. Albright Co., C.C.A.Ill., 150 F.2d 602—Baret v. Koppers Co., D.C.Pa., 6 F.R.D. 465—Burke v. Mesta Mach. Co., D.C.Pa., 5 F.R.D. 134—Winslow v. National Elec. Products Corp., D.C.Pa., 5 F.R.D. 126.
N.Y.—Twyman v. Milk Bottlers Federation, 44 N.Y.S.2d 416, 180 Misc. 229, affirmed 45 N.Y.S.2d 222, 180 Misc. 788, affirmed 47 N.Y.S.2d 206, 267 App.Div. 918.
Wis.—Grippentrog v. Cheese Makers' Mfg. Co., 13 N.W.2d 391, 245 Wis. 1.

Maintenance employees in building seeking to recover overtime compen-

the employer's business, that he was engaged in interstate commerce or in the production of goods for interstate commerce,[30] during the period in issue.[31]

If an employee works in both intra-state and interstate commerce he has the burden of proving what part of his work was in intra-state, and what part in interstate, commerce, and the extent of interstate work and when performed,[32] and the failure to sustain such burden bars recovery by the employee,[33] although it has been held that, where the evidence shows that a substantial part of his work was in interstate commerce, he will not be required to prove how much time he was so employed.[34] However, it has been held that after plaintiff has made a prima facie case by showing the general nature of defendant's business and that plaintiff worked on interstate and intra-state business, defendant has the burden of producing evidence to show that not all employees were engaged in interstate commerce or that their interstate work was only for a certain time.[35] Where the employer's

sation and liquidated damages under Fair Labor Standards Act had burden of proving that a substantial number of tenants were engaged in production of goods for commerce, the word "substantial" meaning that at least twenty per cent of building be occupied by tenants engaged in production of goods for commerce.—Ullo v. Smith, D.C.N.Y., 62 F.Supp. 757.

30. U.S.—Warren-Bradshaw Drilling Co. v. Hall, Tex., 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83—Soderberg v. S. Birch & Sons Const. Co., C.C.A. Wash., 163 F.2d 37—Englert v. S. Birch & Sons Const. Co., C.C.A. Wash., 163 F.2d 34—Engebretsen v. E. J. Albrecht Co., C.C.A.Ill., 150 F.2d 602—Schwarz v. Witwer Grocer Co., C.C.A.Iowa, 141 F.2d 341, certiorari denied 64 S.Ct. 1265, 322 U.S. 753, 88 L.Ed. 1583—Noonan v. Fruco Const. Co., C.C.A.Mo., 140 F. 2d 633—Joseph v. Ray, C.C.A.Okl., 139 F.2d 409—Pfoser v. Federal Cartridge Corp., D.C.Minn., 70 F. Supp. 701—Kennedy v. Silas Mason Co., D.C.La., 68 F.Supp. 576—Murphy v. Georgia Aero-Tech, D.C. Ga., 49 F.Supp. 982—Zehring v. Brown Materials, D.C.Cal., 48 F. Supp. 740—Jones v. Springfield Missouri Packing Co., D.C.Mo., 45 F.Supp. 997—Corbett v. Schlumberger Well Surveying Corporation, D.C.Tex., 43 F.Supp. 605—Drake v. Hirsch, D.C.Ga., 40 F. Supp. 290—Muldowney v. Seaberg Elevator Co., D.C.N.Y., 39 F.Supp. 275—Snyder v. Dravo Corp., D.C. Pa., 6 F.R.D. 546.
La.—Lyons v. H. K. Ferguson Co., App., 16 So.2d 587.
Minn.—Pakarinen v. Butler Bros., 16 N.W.2d 769, 218 Minn. 496.
N.Y.—McKee v. Edelbrau Brewery, 66 N.Y.S.2d 14, 271 App.Div. 841—Tinyes v. J. Rich Steers, Inc., 71 N.Y.S.2d 684, 189 Misc. 106—Delcour v. Lehigh Valley Coal Sales Co., 43 N.Y.S.2d 371, 182 Misc. 289—Rottammer v. Nick F. Helmers, 68 N.Y.S.2d 357.
Okl.—Harland Oil Co. v. Pattison, 153 P.2d 622, 194 Okl. 570—Brooks Packing Co. v. Willis, 137 P.2d 923, 192 Okl. 538—Brooks Packing Co. v. Henry, 137 P.2d 918, 192 Okl. 533.
Wash.—Cannon v. Miller, 155 P.2d 500, 22 Wash.2d 227, 150 A.L.R. 530.
Wyo.—Atwater v. Gaylord, 184 P.2d 437.

Evidence in record

The burden of proof that rests on employees to establish that they are engaged in production of goods for commerce must be met by evidence in the record.—D. A. Schulte, Inc., v. Gangi, N.Y., 66 S.Ct. 925, 328 U.S. 108, 90 L.Ed. 1114.

Substantial part of goods produced

Plaintiff had burden of offering proof that at least a substantial part of the goods which he produced were produced for interstate commerce.—Couch v. Ward, 168 S.W.2d 822, 205 Ark. 308.

Substantial portion of time

(1) An employee must show that a substantial portion of his time was devoted to the production of goods in commerce, as defined in the act.—Gibson v. Glasgow, 157 S.W.2d 814, 178 Tenn. 273.

(2) In action by engineer's assistant and handyman at an electric power plant for overtime allegedly due, where furnishing by plant of current for use outside the state was only sporadic, burden was on assistant to show that he put in overtime in such activity.—Camfield v. West Texas Utilities Co., Tex.Civ.App., 170 S.W.2d 552, error refused.

31. U.S.—Baret v. Koppers Co., D. C.Pa., 6 F.R.D. 465—Burke v. Mesta Mach. Co., D.C.Pa., 5 F.R.D. 134—Winslow v. National Elec. Products Corp., D.C.Pa., 5 F.R.D. 126.
N.Y.—Stolke v. First Nat. Bank of City of New York, 48 N.E.2d 482, 290 N.Y. 195, certiorari denied 64 S.Ct. 50, 320 U.S. 762, 88 L.Ed. 455—Gerlach v. Freeport Mach. Works, 49 N.Y.S.2d 321, 268 App. Div. 824—Rienzo v. City Bank Farmers Trust Co., 53 N.Y.S.2d 68, 183 Misc. 153—Carroll v. Dryolin Corporation, 45 N.Y.S.2d 77, 182 Misc. 260.

32. U.S.—Harris v. Hammond, D.C. Ga., 51 F.Supp. 91, affirmed, C.C.A., 145 F.2d 333, certiorari denied 65 S.Ct. 858, 324 U.S. 859, 89 L.Ed. 1416—Schwarz, for Use and Benefit of Kotek, v. Witwer Grocer Co., D.C.Iowa, 49 F.Supp. 1003, affirmed, C.C.A., 141 F.2d 341, certiorari denied 64 S.Ct. 1265, 322 U.S. 753, 88 L.Ed. 1583—Cullum v. Stevens, D. C.Tex., 46 F.Supp. 73—Snavely v. Shugart, D.C.Tex., 45 F.Supp. 722—Silgaro v. Port Compress Co., D. C.Tex., 45 F.Supp. 88—Camfield v. West Texas Utilities Co., D.C.Tex., 44 F.Supp. 847—Corbett v. Schlumberger Well Surveying Corporation, D.C.Tex., 43 F.Supp. 605.
Ga.—Billingsley v. Firestone Tire & Rubber Co., 27 S.E.2d 775, 70 Ga. App. 114.
Mo.—Franz v. Delico Meat Products Co., App., 198 S.W.2d 874.
Ohio.—Green v. Buckeye State Building & Loan Co., 14 Ohio Supp. 108.
Tex.—Camfield v. West Texas Utilities Co., Civ.App., 170 S.W.2d 552, error refused—Johnson v. Great Nat. Life Ins. Co., Civ.App., 166 S. W.2d 935, error refused.

33. U.S.—Schwarz, for Use and Benefit of Kotek, v. Witwer Grocer Co., D.C.Iowa, 49 F.Supp. 1003, affirmed, C.C.A., 141 F.2d 341, certiorari denied 64 S.Ct. 1265, 322 U.S. 753, 88 L.Ed. 1583—Silgaro v. Port Compress Co., D.C.Tex., 45 F.Supp. 88.
Ga.—Billingsley v. Firestone Tire & Rubber Co., 27 S.E.2d 775, 70 Ga. App. 114.
Tex.—Johnson v. Great Nat. Life Ins. Co., Civ.App., 166 S.W.2d 935, error refused.

34. U.S.—Rouch v. Continental Oil Co., D.C.Kan., 55 F.Supp. 315.

35. U.S.—Guess v. Montague, C.C.A. S.C., 140 F.2d 500.

Matters peculiarly within defendant's knowledge

U.S.—Guess v. Montague, supra.

Commingled activities or businesses

(1) Where employer is engaged in both interstate and intra-state business, the business being commingled with its operation with no attempt being made to distinguish between the two in payment of wages, and a substantial portion of employee's time is spent in that part of busi-

business is essentially a local one, it has been held that the employee has the burden of proving that a substantial part of his activities relate to goods moving in interstate commerce;[36] but, where the employer engages in interstate and intra-state commerce, an employee who produces goods for interstate commerce has been held not required to prove that a substantial portion of his time is so devoted.[37]

Matters of defense; exemptions. In actions under the Fair Labor Standards Act, defendant generally has the burden of proving matters of defense.[38] Accordingly, it has been held that an employer who claims that the act is inapplicable because of the exemption provisions of the act has the burden of proving such claimed exemption,[39] whether the exemption is claimed because of the business of the employer[40] or because of the nature of the particular employment of the employee;[41] and defendant

ness relating to interstate commerce, employee is entitled to recover without showing amount of time he spent in interstate as distinguished from intra-state business of employer.—Franz v. Delico Meat Products Co., Mo.App., 198 S.W.2d 874.

(2) An elevator operator or a handyman in a multi-tenant loft and office building, in action for overtime compensation does not have burden of showing what part of his work is in production of goods for interstate commerce where the employer has commingled the employee's activities.—Berry v. 34 Irving Place Corporation, D.C.N.Y., 52 F. Supp. 875.

(3) A watchman at place of business of company engaged in handling fruits, vegetables, and agricultural produce for sale in both intra-state and interstate commerce was not required to separate the time he watched over goods for interstate and intra-state shipments when they were all stored in one building.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241.

36. U.S.—Ouendag v. Gibson, D.C. Mich., 49 F.Supp. 379.

37. U.S.—Ling v. Currier Lumber Co., D.C.Mich., 50 F.Supp. 204.

38. U.S.—Garchell v. Kantar, D.C. Minn., 56 F.Supp. 866, reversed on other grounds, C.C.A., 150 F.2d 47.

Good faith in alteration of records

Where employer's records for several years showed that employee's basic wage was forty dollars per week, and employer thereafter changed books so as to show regular time pay of twenty-eight dollars and overtime pay of twelve dollars per week, it was incumbent on employer to prove that reason for alterations in his system of bookkeeping was not to avoid payment of overtime under Fair Labor Standards Act.—Garchell v. Kantar, supra.

Where defendant's answer interposed only denials, and no defenses, defendant did not have the burden of proof as to whether plaintiff was an employee within the scope of the act, especially where the complaint alleged that plaintiff was not employed in any of the capacities or occupations granted exemptions under the statute.—Anderson v. Material Co-Ordinating Agency, 63 N.Y. S.2d 324.

39. U.S.—Reynolds v. Salt River Valley Water Users Ass'n, C.C.A. Ariz., 143 F.2d 863, certiorari denied 65 S.Ct. 117, 323 U.S. 764, 89 L.Ed. 611—Joseph v. Ray, C.C.A. Okl., 139 F.2d 409—Jackson v. Northwest Airlines, D.C.Minn., 70 F.Supp. 501—Phillips v. Federal Cartridge Corp., D.C.Minn., 69 F. Supp. 522—Walling v. Armstrong Co., D.C.Mass., 68 F.Supp. 870—Walling v. Palmer, D.C.Pa., 67 F. Supp. 12—Lorber v. Rosow, D.C. Conn., 58 F.Supp. 341—Snyder v. Wessner, D.C.Minn., 55 F.Supp. 971—Cohn v. Decca Distributing Corporation, D.C.Pa., 50 F.Supp. 270.

Ill.—Martin v. Klipfel Mfg. Co., 73 N.E.2d 927, 332 Ill.App. 139.

La.—Dennis v. Equitable Equipment Co., App., 7 So.2d 397.

Within letter and spirit of exemptions

Persons claiming to be excepted from the remedial provisions of the Fair Labor Standards Act must bring themselves within letter and spirit of exemptions, which are strictly construed, particularly when exemption claimed is for an employee engaged in interstate commerce.—Fletcher v. Grinnell Bros., C.C.A. Mich., 150 F.2d 337, conformed to, D. C., 64 F.Supp. 778.

40. U.S.—Rouch v. Continental Oil Co., D.C.Kan., 55 F.Supp. 315.

Particular exemptions

(1) An employer, claiming that employees were exempt because "engaged in a retail or service establishment the greater part of whose selling or services is in intrastate commerce" had burden of proving the exemption claimed.

U.S.—Armstrong Co. v. Walling, C.C. A.Mass., 161 F.2d 515—Walling v. Armstrong Co., D.C.Mass., 68 F. Supp. 870—Walling v. Northwestern-Hanna Fuel Co., D.C.Minn., 67 F.Supp. 833—Rouch v. Continental Oil Co., D.C.Kan., 55 F.Supp. 315.

La.—Dennis v. Equitable Equipment Co., App., 7 So.2d 397.

(2) In action by telephone switchboard operator, employer had burden of showing that telephone exchange was public exchange with less than five hundred stations which would bar employee from benefits of the act.—Cherry Lake, Inc., v. Kearce, 26 So.2d 434, 157 Fla. 484.

41. U.S.—Lassiter v. Guy F. Atkinson Co., C.C.A.Wash., 162 F.2d 774—Walling v. Morris, C.C.A.Mich., 155 F.2d 832—Walling v. General Industries Co., C.C.A.Ohio, 155 F. 2d 711—Walling v. McKay, D.C. Neb., 70 F.Supp. 160—Phillips v. Federal Cartridge Corp., D.C.Minn., 69 F.Supp. 522—Walling v. Silver Fleet Motor Exp., D.C.Ky., 67 F. Supp. 846—Walling v. Snyder Min. Co., D.C.Minn., 66 F.Supp. 725—Bernick v. Coddon, D.C.Minn., 65 F.Supp. 89—Burke v. Lecrone-Benedict Ways, D.C.Mich., 63 F.Supp. 883—Gibson v. Atlantic Co., D.C. Ga., 63 F.Supp. 492.

Kan.—Bush v. Wilson & Co., 138 P.2d 457, 157 Kan. 80.

Particular exemptions

(1) Employer raising defense that certain employees were exempt, as being employed in an executive capacity, had the burden of proving existence of all the conjunctive conditions set out in the regulations defining such employees.—Walling v. General Industries Co., Ohio, 67 S.Ct. 883, 330 U.S. 545, 91 L.Ed. 1088—Helliwell v. Haberman, C.C.A.N.Y., 140 F.2d 833—Pfoser v. Federal Cartridge Corp., D.C.Minn., 70 F.Supp. 701—Lorber v. Rosow, D.C.Conn., 58 F.Supp. 341—Cohn v. Decca Distributing Corporation, D.C.Pa., 50 F. Supp. 270.

Minn.—Pakarinen v. Butler Bros., 16 N.W.2d 769, 218 Minn. 496.

Wash.—Cotton v. Weyerhaeuser Timber Co., 147 P.2d 299, 20 Wash.2d 300.

Wis.—Katchel v. Northern Engraving & Mfg. Co., 25 N.W.2d 431, 249 Wis. 578.

(2) The provisions of regulations of wage and hour administrator defining employment in professional capacity within exemption from Fair Labor Standards Act are cumulative and employer has burden of showing exemption.—Stanger v. Vocafilm Corp., C.C.A.N.Y., 151 F.2d 894, 162 A.L.R. 216.

(3) The employer has the burden of showing that its employees are exempt from the act in that they

has the burden of showing which of its employees are within a claimed exemption[42] and for what period of time they were so engaged as to be exempt from the act.[43] However, it has also been held, at least under certain conditions, that plaintiff may have the burden of proving facts to establish that he came within the act and was not within an exemption.[44] The applicability of statutory exemptions from the act is never presumed,[45] and in a proper case it may be assumed that the employer is not entitled to claim the exemption.[46]

b. Admissibility

The general rules as to admissibility of evidence in civil actions apply in actions under statutes regulating wages or the payment thereof.

The rules governing the relevancy, competency, and materiality of evidence in civil actions generally are applicable in actions by employees to enforce statutes regulating wages or the payment thereof,[47] such as actions for unpaid minimum wages or overtime compensation and liquidated damages under the Fair Labor Standards Act.[48] Thus evidence has been held admissible to show the duties actually performed[49] and the circumstances surrounding the execution of an accord and satisfaction.[50] However, evidence as to the making of claims by other employees,[51] the employer's good faith,[52] contracts be-

are subject to the jurisdiction of, and regulation by, the Interstate Commerce Commission.—Mid-Continent Petroleum Corp. v. Keen, C.C.A. Iowa, 157 F.2d 310—Ispass v. Pyramid Motor Freight Corp., C.C.A.N.Y., 152 F.2d 619, vacated in part on other grounds and remanded 67 S.Ct. 954, 330 U.S. 695, 91 L.Ed. 1184—Crean v. M. Moran Transp. Lines, D.C.N.Y., 57 F.Supp. 212—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363—Hutchinson v. William C. Barry, Inc., D.C.Mass., 50 F.Supp. 292.

42. U.S.—Ispass v. Pyramid Motor Freight Corp., C.C.A.N.Y., 152 F.2d 619, vacated in part on other grounds and remanded 67 S.Ct. 954, 330 U.S. 695, 91 L.Ed. 1184.

43. U.S.—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363.

Exemption under Motor Carrier Act

(1) An employer engaged as motor carrier in interstate commerce could have benefit of exemptions provided by provision of Fair Labor Standards Act that maximum hours provisions of the act should not apply to employee with respect to whom interstate commerce commission has power of regulation under Motor Carrier Act, only for those particular weeks in which employer sustained burden of showing that employee spent substantial part of his time at activities connected with safety of operations. —Hutchinson v. William C. Barry, Inc., D.C.Mass., 50 F.Supp. 292.

(2) In action for overtime wages under the Fair Labor Standards Act, where plaintiff was employed as a mechanic by a contract motor carrier in both intra-state and interstate work, but the greater part of plaintiff's work was such as brought him in the class affecting the safety of operations, and as such was exempt from the act as being subject to the regulations of Interstate Commerce Commission, burden was on plaintiff to show what proportion of time was allocated to such work.—Kentucky Transport Co. v. Drake, 182 S.W.2d 960, 298 Ky. 389.

44. N.Y.—Anderson v. Material Co-Ordinating Agency, 63 N.Y.S.2d 324.

Executive capacity

In a case in which defendant had established the existence of five of the six elements of the definition of an employee "employed in a bona fide executive" capacity, it was held that the burden was on plaintiff to establish the nonexistence of the sixth element, so as to entitle him to the benefits of the act.—Zaetz v. General Instrument Corporation, 30 A.2d 504, 21 N.J.Misc. 76.

Engagement in two types of employment

In action by employee to recover overtime compensation where it appeared that employee was engaged in two types of employment, one within and one exempt from the act, burden was on employee of showing that overtime, if any, devoted to his duties was performed in the employment falling within provisions of the act.—Armour & Co. v. Carpenter, 141 P.2d 797, 193 Okl. 153.

45. U.S.—Walling v. Rockton & Rion R. R., D.C.S.C., 54 F.Supp. 342, affirmed, C.C.A., 146 F.2d 111, certiorari denied 65 S.Ct. 1026, 324 U.S. 880, 89 L.Ed. 1431.

46. U.S.—Skidmore v. John J. Casale, Inc., D.C.N.Y., 66 F.Supp. 282.

Not subject to Interstate Commerce Commission

Where employer claimed it was not a common or contract carrier in interstate commerce and employees suing for unpaid overtime compensation under Fair Labor Standards Act assented to such claim, district court, without deciding the question, would assume employer was not a carrier subject to regulation by Interstate Commerce Commission, and that employees were not exempt from operation of Fair Labor Standards Act.—Skidmore v. John J. Casale, Inc., supra.

47. Ind.—Shell Petroleum Corporation v. Earnest, 187 N.E. 211, 97 Ind.App. 483.

Nonpayment on discharge

(1) In action by discharged employee for recovery of wages due from nonrailroad corporate employer and for penalty, the employee's testimony that he requested that his check be mailed to him was admissible.—McCoy-Couch Furniture Mfg. Co. v. Zahringer, 186 S.W.2d 922, 208 Ark. 581.

(2) In filling station attendant's action for wages and penalty, testimony relating to method of operation of station was held incompetent.—Shell Petroleum Corporation v. Earnest, 187 N.E. 211, 97 Ind.App. 483.

48. N.Y.—Katz v. Film Metal Box Corporation, 47 N.Y.S.2d 454, 181 Misc. 812—Mabee v. White Plains Pub. Co., 41 N.Y.S.2d 534, 180 Misc. 8, reversed on other grounds 45 N.Y.S.2d 479, 267 App.Div. 284, affirmed 58 N.E.2d 520, 293 N.Y. 781, motion denied 60 N.E.2d 848, 294 N.Y. 701, reversed on other grounds 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607.

Va.—Tidewater Optical Co. v. Wittkamp, 19 S.E.2d 897, 179 Va. 545.

49. Ark.—Potashnick Local Truck System v. Archer, 179 S.W.2d 696, 207 Ark. 220.

50. U.S.—Broughton v. Atlantic Co., D.C.Ga., 54 F.Supp. 185, affirmed in part and reversed in part on other grounds, C.C.A., 146 F.2d 480, certiorari denied 65 S.Ct. 1021, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, 325 U.S. 892, 89 L.Ed. 2004, certiorari denied 65 S.Ct. 1021, 324 U.S. 883, 89 L.Ed. 1433, rehearing denied 65 S.Ct. 1182, 325 U.S. 892, 89 L.Ed. 2004, certiorari denied 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433, and 65 S.Ct. 1023, 324 U.S. 883, 89 L.Ed. 1433.

51. Va.—Tidewater Optical Co. v. Wittkamp, 19 S.E.2d 897, 179 Va. 545.

52. U.S.—Rigopoulos v. Kervan, C.C.A.N.Y., 140 F.2d 506, conformed

tween the employer and a union,[53] or of a decree in another action involving different parties[54] has been held inadmissible.

c. Weight and Sufficiency

(a) In general
(b) Actions under Fair Labor Standards Act

(a) In General

General rules as to the requisites and weight and sufficiency of evidence in civil cases have been applied in actions under statutes regulating wages or the payment thereof.

The rules governing the weight and sufficiency of evidence in civil actions generally have been applied in actions to enforce various statutes regulating wages or the payment thereof,[55] such as statutes providing for the payment of prevailing wages to public employees and employees on public works,[56] the payment of wages on discharge of an employee,[57] minimum wages,[58] maximum hours of service or payment for overtime,[59] and statutes as to wage discrimination against women.[60]

(b) Actions under Fair Labor Standards Act

Ordinarily, in actions for additional compensation and liquidated damages under the Fair Labor Standards Act, the right to recover must be established by a preponderance of the evidence.

In accordance with general rules, the right to recover additional compensation and liquidated damages under the Fair Labor Standards Act must be established by a preponderance of the evidence,[61] al-

to, D.C., 53 F.Supp. 829, 151 A.L.R. 1126.

53. Minn.—Pakarinen v. Butler Bros., 16 N.W.2d 769, 218 Minn. 496.

54. Va.—Tidewater Optical Co. v. Wittkamp, 19 S.E.2d 897, 179 Va. 545.

55. Ga.—Chambers v. W. L. Florence Const. Co., 36 S.E.2d 69, 73 Ga.App. 172.
Minn.—French v. Lindh-Gustafson-Klopfer Co., 13 N.W.2d 479, 216 Minn. 521.

Redemption of scrip or tokens
Possession of scrip is sufficient to make out a prima facie case for redemption, where defendants did not deny that plaintiff merchants were entitled thereto.—West Kentucky Coal Co. v. Nall, 27 S.W.2d 965, 234 Ky. 249.

56. N.Y.—Queeny v. State, 279 N.Y.S. 281, 244 App.Div. 761, followed in Adwin v. State, 279 N.Y.S. 282, 244 App.Div. 761.

Evidence held sufficient
To establish the prevailing wages of workers in the locality doing similar work.—Morrissey v. State, 274 N.Y.S. 80, 152 Misc. 192, affirmed Callahan v. State, 285 N.Y.S. 1047, 246 App.Div. 686—Campbell v. City of New York, 219 N.Y.S. 131, 128 Misc. 382, affirmed 222 N.Y.S. 779, 220 App.Div. 834, error dismissed City of New York v. Campbell, 48 S.Ct. 435, 277 U.S. 573, 72 L.Ed. 994.

Evidence held insufficient
(1) Evidence was held not to establish that defendant paid less than the current rate of wages to its employees.—State v. Midwest Constr. Co., 162 P. 1175, 99 Kan. 838.

(2) Evidence was held not to entitle plaintiff to recover on ground that prevailing wage rate was higher than wage rate at which he was paid.—Queeny v. State, 279 N.Y.S. 281, 244 App.Div. 761, followed in Adwin v. State, 279 N.Y.S. 282, 244 App.Div. 761—Ziegler v. City of New York, 281 N.Y.S. 462, 156 Misc. 624, affirmed 291 N.Y.S. 401, 248 App.Div. 873 and 300 N.Y.S. 1152, 253 App.Div. 764.

57. Nev.—Eldorado-Rand Mining Co. v. Thompson, 65 P.2d 878, 57 Nev. 407.

Evidence held sufficient
(1) To establish that driver, at time he was employed, agreed to be responsible for all damages occasioned to and by his taxicab while it was in his possession.—Hanks v. Shreveport Yellow Cabs, La.App., 187 So. 817.

(2) To justify recovery of penalty for employer's failure to pay wages of discharged employee.
Ark.—Missouri Pac. R. Co. v. Biddle, 280 S.W. 626, 170 Ark. 1193.
Minn.—Harris v. North Star Amusement Co., 259 N.W. 16, 193 Minn. 480.

(3) To show that employee quit voluntarily, precluding recovery for wages under statute requiring payment within twenty-four hours after discharge.—Wood v. Southern Life & Health Ins. Co., 140 So. 115, 19 La.App. 214.

(4) To show that plaintiffs complied with statute, and that company failed to pay them their wages at time and place required.—Chicago, R. I. & P. R. Co. v. Webb, 272 S.W. 650, 168 Ark. 955.

(5) To support verdict that employee at time of discharge requested of general manager that wages be mailed to his post office address, and that general manager had, and exercised, immediate supervision and control over employee.—McCoy-Couch Furniture Mfg. Co. v. Zahringer, 186 S.W.2d 922, 208 Ark. 581.

(6) To show other facts.—Johnson v. Wright, La.App., 14 So.2d 310—39 C.J. p 233 note 67 [a].

Evidence held insufficient
(1) To entitle plaintiff to recover.—Altom v. Mt. Vernon Oil & Gas Co., 141 So. 457, 174 La. 775.

(2) To show discharge of employee within employment contract requiring three days' notice.—Neid v. Tassie's Bakery, 17 N.W.2d 357, 219 Minn. 272.

(3) To show other facts.—Eldorado-Rand Mining Co. v. Thompson, 65 P.2d 878, 57 Nev. 407—39 C.J. p 233 note 67 [b].

58. N.D.—Wiseth v. Traill County Telephone Co., 5 N.W.2d 307, 72 N.D. 165.

Evidence held sufficient
Wash.—Evans v. Hartmann, 105 P.2d 717, 5 Wash.2d 434—McDonald v. Goddard, 98 P.2d 1074, 2 Wash.2d 553—Ferber v. Wisen, 82 P.2d 139, 195 Wash. 603.

Evidence held insufficient
To establish that workmen's compensation bureau authorized departure from otherwise applicable standards for women operators by classifying company as a rural exchange.—Wiseth v. Traill County Telephone Co., 5 N.W.2d 307, 72 N.D. 165.

59. Ga.—Chambers v. W. L. Florence Const. Co., 36 S.E.2d 69, 73 Ga.App. 172.
Ill.—Caplan v. Gaytime Dress Shop, 35 N.E.2d 404, 310 Ill.App. 672.

60. Mich.—St. John v. General Motors Corp., 17 N.W.2d 226, 310 Mich. 392.

61. U.S.—Mornford v. Andrews, C.C.A.Ga., 151 F.2d 511—Ferrer v. Waterman S. S. Corp., D.C.Puerto Rico., 70 F.Supp. 1—Ballard v. Consolidated Steel Corp., D.C.Cal., 61 F.Supp. 996—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009—Lowrimoore v. Union Bag & Paper Corporation, D.C.Ga., 30 F.

though, where there has been a long delay in filing the claim for additional compensation, it has been held that the evidence must be clear and convincing.[62] Evidence which plaintiff must submit must be something more than a mere scintilla, and must not consist of vague, uncertain, irrelevant matter but must be definite and certain and something of relevant consequence and substantial nature.[63] In accordance with these rules the evidence has been held sufficient or insufficient to establish that plaintiffs were the employees of defendant;[64] the terms of the employment;[65] the method of computing compensation;[66] that a new agreement as to wage scales

Supp. 647, affirmed, C.C.A., Gale v. Union Bag & Paper Corporation, 116 F.2d 27, certiorari denied 61 S.Ct. 837, 313 U.S. 559, 85 L.Ed. 1519.
Ga.—Kay v. Kuhlman, 33 S.E.2d 378, 72 Ga.App. 129.
Mo.—Martin v. Graham Ship-By-Truck Co., App., 176 S.W.2d 842.
N.Y.—Anderson v. Material Co-ordinating Agency, 63 N.Y.S.2d 324.
Tenn.—Hunt v. National Linen Service Corporation, 157 S.W.2d 608, 178 Tenn. 262.

Evidence held sufficient

(1) To authorize judgment for plaintiff.
U.S.—Snyder v. Wessner, D.C.Minn., 55 F.Supp. 971—Magann v. Long's Baggage Transfer Co., D.C.Va., 39 F.Supp. 742—Muldowney v. Seaberg Elevator Co., D.C.N.Y., 39 F. Supp. 275—Divine v. Levy, D.C.La., 39 F.Supp. 44—Reeves v. Howard County Refining Co., D.C.Tex., 33 F.Supp. 90.
Ky.—Richardson v. Duff, 194 S.W. 2d 389, 302 Ky. 203.
N.J.—Fox v. Armour & Co., 33 A.2d 582, 21 N.J.Misc. 262.
N.Y.—O'Neil v. Brooklyn Savings Bank, Sup., 43 N.Y.S.2d 25, 180 Misc. 542, modified on other grounds 46 N.Y.S.2d 631, 267 App. Div. 317, appeal granted 47 N.Y.S. 2d 311, 267 App.Div. 869, affirmed 56 N.E.2d 259, 293 N.Y. 666, certiorari granted Brooklyn Sav. Bank v. O'Neil, 65 S.Ct. 117, 323 U.S. 698, 89 L.Ed. 563, affirmed 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005 —Johnston v. Firemen's Ins. Co. of Newark, N. J., 61 N.Y.S.2d 566.

(2) To sustain a joint judgment against defendants.—Mid-Continent Pipe Line Co. v. Hargrave, C.C.A. Okl., 129 F.2d 655.

(3) To authorize judgment for defendant.—Clevenger v. W. M. Ritter Lumber Co., 172 S.W.2d 625, 294 Ky. 764.

Evidence held insufficient

To authorize judgment for plaintiff.
U.S.—Townsend v. New York Cent. R. Co., C.C.A.Ill., 141 F.2d 483, certiorari denied 65 S.Ct. 47, 323 U.S. 717, 89 L.Ed. 577—Jax Beer Co. v. Redfern, C.C.A.Tex., 124 F.2d 172 —Vega v. Cabrera, D.C.Puerto Rico, 70 F.Supp. 913—Patton v. Williams, D.C.Okl., 61 F.Supp. 884—Woods v. Wilkerson, D.C.La., 40 F.Supp. 131.
N.Y.—Hanzely v. Hooven Letters, 44 N.Y.S.2d 398.

62. U.S.—Toppin v. 12 East 22nd Street Corporation, D.C.N.Y., 55 F. Supp. 887.

Delay indicative of unfounded claim
U.S.—Toppin v. 12 East 22nd Street Corporation, supra.

63. U.S.—Collins v. Burton-Dixie Corporation, D.C.S.C., 53 F.Supp. 821.

Judgment cannot be based on guess, speculation, and averages made up from the uncertain recollections of the employees.
U.S.—Epps v. Weathers, D.C.Ga., 49 F.Supp. 2.
Kan.—Stewart v. Mabee Oil & Gas Co., 147 P.2d 731, 158 Kan. 388.

Evidence not sufficiently definite

Evidence of number of hours worked by employees and amount of wages due to them was not sufficiently definite or certain to entitle employees to recover minimum wages allegedly due.—Epps v. Weathers, D.C.Ga., 49 F.Supp. 2.

64. **Evidence held sufficient**

(1) In general.
U.S.—Walling v. Twyeffort, Inc., C. C.A.N.Y., 158 F.2d 944—Wilson v. Shuman, C.C.A.Ark., 140 F.2d 644.
N.Y.—Atkocus v. Terker, 30 N.Y.S.2d 628.

(2) Evidence supported finding that plaintiff, in operating station for purchase of poultry, eggs and cream, was an "employee" of defendant company and not an "independent contractor," notwithstanding plaintiff's pay was dependent on a commission.—Bush v. Wilson & Co., 138 P.2d 457, 157 Kan. 80.

Evidence held insufficient

(1) In general.
U.S.—Bowman v. Pace Co., C.C.A. Fla., 119 F.2d 858—Dugas v. Nashua Mfg. Co., D.C.N.H., 62 F. Supp. 846, appeal dismissed, C.C. A., 154 F.2d 655.
Ind.—Princeton Min. Co. v. Veach, 63 N.E.2d 306, 116 Ind.App. 332.
Ky.—Williams v. United Mine Workers of America, 182 S.W.2d 237, 298 Ky. 117.

(2) Evidence that guards at electric generating plants were hired and fired by sheriff, who fixed their monthly wages, their working conditions, and duties and who carried workmen's compensation insurance on them and paid withholding taxes on their wages, authorized finding that guards were employees of sheriff notwithstanding that electric company furnished the funds with which sheriff paid guards.—Lewis v. Florida Power & Light Co., D.C. Fla., 69 F.Supp. 23.

65. U.S.—Asselta v. 149 Madison Ave. Corp., C.C.A.N.Y., 156 F.2d 139, certiorari denied 149 Madison Ave. Corp. v. Asselta, 67 S.Ct. 124.

Convincing evidence required
U.S.—Brown v. Carter Drilling Co., D.C.Tex., 38 F.Supp. 489.

Basis of payment

(1) Evidence justified inference that freight checker was employed at weekly rate of pay which he received and not at alleged hourly rates.—Porter v. Poindexter, C.C.A. Okl., 158 F.2d 759.

(2) Evidence showed that plaintiff was paid at an hourly rate and was not employed on a flat salary basis.—Sklar Oil Corporation v. Thompson, C.C.A.Ark., 126 F.2d 872 —Patton v. Williams, D.C.Okl., 61 F.Supp. 884—Shepler v. Crucible Fuel Co. of America, D.C.Pa., 60 F. Supp. 260.

Number of hours
U.S.—Harrington v. Empire Const. Co., D.C.Md., 71 F.Supp. 324—Dolan v. Day & Zimmerman, D.C. Mass., 65 F.Supp. 923—Kreeft v. R. W. Bates Piece Dye Works, D. C.N.Y., 63 F.Supp. 881—Snyder v. Wessner, D.C.Minn., 55 F.Supp. 971.

Hours and rate of pay
U.S.—Clay v. Motor Freight Express, D.C.Pa., 52 F.Supp. 948—Tenaglia v. Tully & Di Napoli, D. C.N.Y., 43 F.Supp. 814—Reeves v. Howard County Refining Co., D.C. Tex., 33 F.Supp. 90.
Ala.—Cudahy Packing Co. of Alabama v. Bazãnos, 15 So.2d 720, 245 Ala. 73.

66. N.Y.—Mabee v. White Plains Pub. Co., 68 N.Y.S.2d 906, 271 App. Div. 1026.

Evidence held sufficient

(1) Evidence established that the regular work week of newspaper publisher's editorial employees was variable and consisted of the number of hours actually worked per week and not forty hours and hence

had been made;[67] that the purpose of an arrangement by the employer was to circumvent or avoid the provisions of the act,[68] as, by failure to make proper minimum payments;[69] or to establish various matters of defense.[70]

As to claim for overtime. The requirement of a preponderance of the evidence has been applied to proof of the fact that plaintiff worked overtime,[71] with the knowledge of the employer[72] whether particular work done or particular time spent was compensable overtime;[73] the extent of the overtime worked,[74] together with the element of the failure

their overtime compensation should be computed on the basis of a regular hourly rate determined by dividing weekly salary by number of hours worked in any particular week.—Mabee v. White Plains Pub. Co., supra.

(2) Evidence established that employer maintained two rates of pay, one for hours between eight a. m. and four-thirty p. m. and the other, one and one-half times higher, for the remaining hours of the day, so that each rate was the "regular rate" and in each period, overtime compensation was required to be computed according to the applicable rate.—Roland Elec. Co. v. Black, C.C.A.Md., 163 F.2d 417.

67. **Evidence held sufficient**

(1) In general.—Bergschneider v. Peabody Coal Co., C.C.A.Ill., 142 F. 2d 784—Clay v. Motor Freight Express, D.C.Pa., 52 F.Supp. 948.

(2) To show acquiescence.—Ille v. Travis Oil Corp., 164 P.2d 998, 196 Okl. 332.

68. **Evidence held to show fraudulent purpose**

U.S.—Ridgeway v. Warren, D.C. Tenn., 60 F.Supp. 363.

Evidence held to show no fraudulent purpose

U.S.—Lassiter v. Guy F. Atkinson Co., C.C.A.Wash., 162 F.2d 774—Murray v. Noblesville Milling Co., C.C.A.Ind., 131 F.2d 470, certiorari denied 63 S.Ct. 832, 318 U.S. 775, 87 L.Ed. 1145.

Evidence held not to show conspiracy

Ga.—Butler v. Carter, 32 S.E.2d 808, 198 Ga. 754.

69. **Evidence held sufficient**

U.S.—Walling v. Lincoln Looseleaf Warehouse Co., D.C.Tenn., 59 F. Supp. 601—Reeves v. Howard County Refining Co., D.C.Tex., 33 F.Supp. 90.

Evidence held insufficient

U.S.—Mornford v. Andrews, C.C.A. Ga., 151 F.2d 511.

70. **Employer's right to credit for payment**

Evidence sustained finding that a payment to employee in addition to his regular salary, was a bonus and not a loan and employer was not entitled to a credit in amount of payment of employer's liability for violating the act.—Winer v. Eckerling, 55 N.E.2d 876, 323 Ill.App. 421.

Inadvertence and ignorance

Evidence was held insufficient to sustain asserted defense of inadvertence and ignorance.—Fleming v. Tidewater Optical Co., D.C.Va., 35 F.Supp. 1015.

Validity of settlement

Evidence was held insufficient to show that settlement of overtime claim for liquidated damages was of a bona fide dispute.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U. S. 893, 89 L.Ed. 2005—Dize v. Maddrix, 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

71. U.S.—Joseph v. Ray, C.C.A.Okl., 139 F.2d 409—Vaden v. Raleigh County Bank, D.C.W.Va., 66 F. Supp. 279—Bowers v. Remington Rand, D.C.Ill., 64 F.Supp. 620.

State or federal court

The same quantum and character of evidence is required to sustain a claim for overtime and liquidated damages whether the case is tried in a state court or a federal court. —Martin v. Graham Ship-By-Truck Co., Mo.App., 176 S.W.2d 842.

Evidence held sufficient

(1) In general.

U.S.—Sklar Oil Corporation v. Thompson, C.C.A.Ark., 126 F.2d 872—Ballard v. Consolidated Steel Corp., D.C.Cal., 61 F.Supp. 996.

N.Y.—Mabee v. White Plains Pub. Co., 68 N.Y.S.2d 906, 271 App.Div. 1026.

(2) To make a prima facie case.—Murdick v. Cities Service Oil Co., C.C.A.Kan., 145 F.2d 231.

Evidence held insufficient

U.S.—Randolph v. Calamas, C.C.A. Ga., 151 F.2d 649—Fox v. Summit King Mines, C.C.A.Nev., 143 F.2d 926—Jimenez v. Red Star Mfg. Co., D.C.Puerto Rico, 70 F.Supp. 942—Natal v. Ronrico Corp., D.C.Puerto Rico, 66 F.Supp. 601—Vaden v. Raleigh County Bank, D.C.W.Va., 66 F.Supp. 279—Patton v. Williams, D.C.Okl., 61 F.Supp. 884—Thompson v. Loring Oil Co., D.C. La., 50 F.Supp. 213—Prins v. Skaff, D.C.Mich., 47 F.Supp. 430—Stein v. Gordon Bros. Mfg. Co., D.C.Mo., 43 F.Supp. 249—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009—Woods v. Wilkerson, D.C.La., 40 F.Supp. 131.

Wash.—Cotton v. Weyerhaeuser Timber Co., 147 P.2d 299, 20 Wash. 2d 300.

72. **Evidence held sufficient**

Okl.—Pioneer Corp. v. Kimsey, 162 P.2d 1000, 196 Okl. 89.

Evidence held insufficient

(1) In general.

U.S.—Fox v. Summit King Mines, C.C.A.Nev., 143 F.2d 926.

Kan.—Jackson v. Derby Oil Co., 139 P.2d 146, 157 Kan. 53.

(2) Mere statement by former employee that he was told by district manager that all overtime work necessary in emergencies must be done but not be reported was insufficient to establish the truth of such charge as against district manager's denial.—Mortenson v. Western Light & Telephone Co., D.C.Iowa, 42 F.Supp. 319.

73. **Evidence held sufficient**

(1) In general.—Straughn v. Schlumberger Well Surveying Corp., D.C.Tex., 72 F.Supp. 511.

(2) Where firemen were required to be on employer's premises twenty-four consecutive hours on alternate days but were given eight-hour rest period, in action for overtime compensation evidence sustained determination that none of firemen performed any compensable work during eight-hour rest period with exception of truck drivers and that truck drivers only worked for twenty minutes in each eight-hour rest period.—Bridgeman v. Ford, Bacon & Davis, D.C.Ark., 161 F.2d 962.

Evidence held insufficient

U.S.—Rokey v. Day & Zimmermann, C.C.A.Iowa, 157 F.2d 734—Harrington v. Empire Const. Co., D. C.Md., 71 F.Supp. 324—Mortenson v. Western Light & Telephone Co., D.C.Iowa, 42 F.Supp. 319.

N.Y.—Quest v. George A. Bowman, Inc., 64 N.Y.S.2d 60.

74. U.S.—Joseph v. Ray, C.C.A.Okl., 139 F.2d 409—Johnson v. Dierks Lumber & Coal Co., C.C.A.Ark., 130 F.2d 115—Toppin v. 12 East 22nd Street Corporation, D.C.N.Y., 55 F.Supp. 887—Thompson v. Loring Oil Co., D.C.La., 50 F.Supp. 213.

Mo.—Martin v. Graham Ship-By-Truck Co., App., 176 S.W.2d 842.

Wash.—Cotton v. Weyerhaeuser

on part of the employer to make proper payments,[75] and the amount due therefor.[76]

In establishing a claim for overtime, the evidence must be definite and certain;[77] and evidence which is speculative and inconclusive should be disregarded.[78] However, it is not essential that the employees prove their damages for overtime work with mathematical precision.[79] Moreover, documentary evi-

Timber Co., 147 P.2d 299, 20 Wash. 2d 300.

Evidence not to be disregarded

Employees' uncontradicted testimony, corroborated by other witnesses' testimony as to employer's general plan of requiring employees to report for roll call and assignment to duties before commencement of their work shifts, that they arrived at employer's plant at certain times before shift changes, should not be disregarded in computing pay or overtime pay to which they are entitled under Fair Labor Standards Act.—Ballard v. Consolidated Steel Corp., D.C.Cal., 61 F. Supp. 996.

Evidence held sufficient

(1) In general.

U.S.—Porter v. Poindexter, C.C.A. Okl., 158 F.2d 759—Engebretsen v. E. J. Albrecht Co., C.C.A.Ill., 150 F.2d 602—Domenech v. Pan Am. Standard Brands, D.C.Puerto Rico, 68 F.Supp. 726—Bloch v. Bell, D.C. Ky., 63 F.Supp. 863, affirmed, C.C. A., 152 F.2d 962—Gorchakoff v. California Shipbuilding Corp., D. C.Cal., 63 F.Supp. 309—Wagner v. American Service Co., D.C.Iowa, 58 F.Supp. 32.

N.M.—Wilson Oil Co. v. Hardy, 164 P.2d 209, 49 N.M. 337, 162 A.L.R. 292.

Wis.—Katchel v. Northern Engraving & Mfg. Co., 25 N.W.2d 431, 249 Wis. 578.

(2) Evidence established that employer or its foremen regularly required pieceworkers to commence punching in clock about fourteen minutes before scheduled hour for commencing work and that work was often started before regular hour to circumvent spirit of wage and hour provisions of Fair Labor Standards Act.—Anderson v. Mt. Clemens Pottery Co., D.C.Mich., 60 F.Supp. 146, reversed on other grounds, C.C.A., Mt. Clemens Pottery Co. v. Anderson, 149 F.2d 461, reversed on other grounds 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

Evidence held insufficient

(1) In general.

U.S.—Bernick v. Coddon, D.C.Minn., 65 F.Supp. 89—Dollar v. Caddo River Lumber Co., D.C.Ark., 43 F. Supp. 822—Wilkinson v. Noland Co., D.C.Va., 40 F.Supp. 1009—Lowrimoore v. Union Bag & Paper Corporation, D.C.Ga., 30 F. Supp. 647, affirmed, C.C.A., Gale v. Union Bag & Paper Corporation, 116 F.2d 27, certiorari denied 61 S. Ct. 837, 313 U.S. 559, 85 L.Ed. 1519.

Kan.—Stewart v. Mabee Oil & Gas Co., 147 P.2d 731, 158 Kan. 388.

N.Y.—Ralston v. Karp Metal Products Co., 38 N.Y.S.2d 764, 179 Misc. 282.

(2) Evidence that employee could be called from his home to the plant at any time in event of emergency, and that he came and went as he pleased during his off hours but always advised the plant where he could be reached, was insufficient to show that employee's off hours should be counted in determining amount of overtime compensation to which employee was entitled.—Dumas v. King, C.C.A.Ark., 157 F.2d 463.

75. **Evidence held sufficient**

U.S.—Walling v. Lincoln Looseleaf Warehouse Co., D.C.Tenn., 59 F. Supp. 601.

N.Y.—O'Neil v. Brooklyn Savings Bank, 43 N.Y.S.2d 25, 180 Misc. 542, modified on other grounds 46 N.Y.S.2d 631, 267 App.Div. 317, affirmed 56 N.E.2d 259, 293 N.Y. 666, affirmed 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005.

Evidence held insufficient

U.S.—Mornford v. Andrews, C.C.A. Ga., 151 F.2d 511—Shepler v. Crucible Fuel Co., C.C.A.Pa., 140 F.2d 371—Davies v. Onyx Oils & Resins, D.C.N.J., 63 F.Supp. 777—Clour v. Jones, D.C.Okl., 42 F.Supp. 700.

N.M.—Watson v. Hightower, 176 P. 2d 670, 50 N.M. 322.

76. U.S.—Toppin v. 12 East 22nd Street Corporation, D.C.N.Y., 55 F. Supp. 887.

Evidence held sufficient

(1) In general.

U.S.—Porter v. Georgia Power & Light Co., D.C.Ga., 50 F.Supp. 959—Cohn v. Decca Distributing Corporation, D.C.Pa., 50 F.Supp. 270—Muldowney v. Seaberg Elevator Co., D.C.N.Y., 39 F.Supp. 275—Divine v. Levy, D.C.La., 39 F.Supp. 44.

Kan.—Bush v. Wilson & Co., 138 P. 2d 457, 157 Kan. 80.

Mo.—Niehaus v. Joseph Greenspon's Son Pipe Corporation, 164 S.W.2d 180, 237 Mo.App. 112.

N.J.—Fox v. Armour & Co., 33 A.2d 582, 21 N.J.Misc. 262.

N.Y.—Johnston v. Firemen's Ins. Co. of Newark, N. J., 61 N.Y.S.2d 566—Schanck v. Lehigh Val. R. R., 52 N.Y.S.2d 491.

(2) Where employee testified to all facts concerning hours of work and pay he received, leaving only a mathematical computation to be made to determine exact hourly rate of pay which attorney testifying as a witness made and stated result as based on plaintiff's testimony, plaintiff did not fail to sustain burden of proof by failing to show by substantial evidence that he was entitled to judgment based on excessive hours worked and overtime wages.—Edwards v. South Side Auto Parts Co., Mo.App., 180 S.W.2d 1015.

Evidence held insufficient

U.S.—Bernick v. Coddon, D.C.Minn., 65 F.Supp. 89.

77. U.S.—Johnson v. Dierks Lumber & Coal Co., C.C.A.Ark., 130 F.2d 115—Gorchakoff v. California Shipbuilding Corp., D.C.Cal., 63 F.Supp. 309—Wagner v. American Service Co., D.C.Iowa, 58 F.Supp. 32.

Mo.—Martin v. Graham Ship-By-Truck Co., App., 176 S.W.2d 842.

N.M.—Wilson Oil Co. v. Hardy, 164 P.2d 209, 49 N.M. 337, 162 A.L.R. 292.

Conjecture

The evidence must be definite enough to permit a finding without resort to conjecture that he worked some particular number of overtime hours.—George Lawley & Son Corporation v. South, C.C.A.Mass., 140 F.2d 439, 151 A.L.R. 1081, certiorari denied 64 S.Ct. 1156, 322 U.S. 746, 88 L.Ed. 1578—Davies v. Onyx Oils & Resins, D.C.N.J., 63 F.Supp. 777.

78. U.S.—Philpott v. Standard Oil Co., D.C.Ohio, 53 F.Supp. 833—Spier v. Gulf Coast Beverages, D. C.Fla., 50 F.Supp. 653.

N.Y.—Aufiero v. E. A. Laboratories, 69 N.Y.S.2d 217, 271 App.Div. 1024.

An estimated average of overtime worked has been held to be insufficient.—Gorchakoff v. California Shipbuilding Corp., D.C.Cal., 63 F.Supp. 309.

An arbitrary formula for computing average time worked by employees during particular periods as basis for determination of overtime pay to which they are entitled under Fair Labor Standards Act is not permissible, in absence of competent evidence of time worked.—Ballard v. Consolidated Steel Corp., D.C.Cal., 61 F.Supp. 996.

Evidence held insufficient

U.S.—Toppin v. 12 East 22nd Street Corporation, D.C.N.Y., 55 F.Supp. 887.

79. U.S.—Asselta v. 149 Madison Ave. Corp., D.C.N.Y., 65 F.Supp.

dence is not required;[80] and an employee's testimony from memory may be sufficient to establish a certain amount of overtime employment,[81] at least where such testimony is not inherently incredible,[82] although the employer will be given the benefit of all possible errors of recollection or other mistakes by plaintiff.[83] The employee's method of keeping time goes to the weight of the evidence;[84] and it has been held that the fact that the employees participated in the making of a false record of the time worked reflects on their credibility.[85] The fact that plaintiff made no claim for the alleged overtime worked until long after such work had been performed is a matter to be considered by the court in determining the weight to be given to plaintiff's evidence;[86] but it is not a controlling fact, although it does not assist the employee who is solely dependent on his own testimony and is interested in the cause.[87]

Where the employer fails to keep proper records, as required by the act, he cannot use such lack of records to destroy plaintiff's case, on the plea that employees have not produced complete proofs, since one should not be permitted to profit by his own wrongs;[88] and, in such case, less reliable and accurate evidence, submitted by plaintiff, may be sufficient to establish the amount to be allowed.[89] However, the failure of the employer to keep a record of overtime is not itself evidence on which plaintiff's overtime can be computed;[90] and it has been held that, even though the employer failed to keep adequate records, plaintiff's proof of the overtime worked must be reasonably definite and certain,[91] and must be established by a preponderance

385, affirmed, C.C.A., 156 F.2d 139, certiorari denied 67 S.Ct. 124, 329 U.S. 764.
N.Y.—Stangler v. Calvert Mfg. Co., 63 N.Y.S.2d 469.

80. U.S.—Bloch v. Bell, D.C.Ky., 63 F.Supp. 863, affirmed C.C.A., 152 F. 2d 962.
N.Y.—Kessler v. Cliff Frocks, 56 N. Y.S.2d 164, 184 Misc. 561, reversed on other grounds 67 N.Y.S.2d 107, 271 App.Div. 890.

Employee's lack of records

(1) An employee's lack of records of the hours he worked does not preclude recovery.—Stangler v. Calvert Mfg. Co., 63 N.Y.S.2d 469.

(2) Employer cannot complain of employee's failure to keep records of his work, since the act does not require an employee to keep such records, but does, however, require an employer to do so.—Edwards v. South Side Auto Parts Co., Mo.App., 180 S.W.2d 1015.

81. U.S.—Bloch v. Bell, D.C.Ky., 63 F.Supp. 863, affirmed C.C.A., 152 F.2d 962.
Mo.—Martin v. Graham Ship-By-Truck Co., App., 176 S.W.2d 842.
N.Y.—Kessler v. Cliff Frocks, 56 N. Y.S.2d 164, 184 Misc. 561, reversed on other grounds 67 N.Y.S.2d 107, 271 App.Div. 890.

Testimony based on recollection

Fact that plaintiff's memory was at fault with respect to extent of overtime claimed by him, did not require dismissal of action on ground that plaintiff had not sustained burden of proving his case by preponderance of evidence, notwithstanding plaintiff's testimony was based solely upon recollection and he was not corroborated and plaintiff was awarded overtime compensation to extent court held his testimony correct.—Johnston v. Firemen's Ins. Co. of Newark, N. J., 61 N.Y.S.2d 566.

82. U.S.—De Pasquale v. Williams-Bauer Corp., C.C.A.N.Y., 151 F.2d 578, certiorari denied Williams-Bauer Corp. v. De Pasquale, 66 S. Ct. 1007, 328 U.S. 836, 90 L.Ed. 1612.
N.Y.—Caperna v. Williams-Bauer Corp., 53 N.Y.S.2d 295, 184 Misc. 192.

83. N.Y.—Kessler v. Cliff Frocks, 56 N.Y.S.2d 164, 184 Misc. 561, reversed on other grounds 67 N.Y.S. 2d 107, 271 App.Div. 890.

No allowance for holidays with pay

N.Y.—Kessler v. Cliff Frocks, supra.

84. N.M.—Wilson Oil Co. v. Hardy, 164 P.2d 209, 49 N.M. 337, 162 A. L.R. 292.

85. U.S.—Feldman v. Roschelle Bros., D.C.N.Y., 49 F.Supp. 247.

86. U.S.—Collins v. Burton-Dixie Corporation, D.C.S.C., 53 F.Supp. 821—Fox v. Summit King Mines, D.C.Nev., 48 F.Supp. 952, affirmed C.C.A., 143 F.2d 926.

Denial of recovery held warranted

In action against former employer to recover unpaid overtime compensation and liquidated damages, evidence that employee had kept no record of the hours he claimed he worked each week, that employee had accepted his wages without protest, and that for four years employee delayed asserting any claim, required denial of recovery on ground of failure to establish the fact of overtime work and quantity of overtime work each week.—Ralston v. Karp Metal Products Co., 38 N.Y.S.2d 764, 179 Misc. 282.

87. U.S.—Pfoser v. Federal Cartridge Corp., D.C.Minn., 70 F.Supp. 701—Phillips v. Federal Cartridge Corporation, D.C.Minn., 69 F.Supp. 522.

88. U.S.—Ling v. Currier Lumber Co., D.C.Mich., 50 F.Supp. 204.

89. U.S.—Anderson v. Mt. Clemens Pottery Co., Mich., 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

Amount as matter of inference

(1) Where employee produces sufficient evidence to show amount of work for which employee was not properly compensated as a matter of just and reasonable inference, employer cannot complain that the damages allowed the employee lacked the exactness of measurement that would be possible had the employer kept the records required by the act. —Anderson v. Mt. Clemens Pottery Co., supra—Porter v. Poindexter, C.C.A.Okl., 158 F.2d 759—U. S. v. Ewald Iron Co., D.C.Ky., 67 F. Supp. 67.

(2) The trier of facts must draw whatever inferences can be drawn from the employee's evidence as to the amount of time spent in preliminary activities in excess of productive working time, unless the employer can provide accurate estimates.—Anderson v. Mt. Clemens Pottery Co., supra.

Evidence held sufficient

N.Y.—Mabee v. White Plains Pub. Co., 41 N.Y.S.2d 534, 180 Misc. 8, reversed on other grounds 45 N.Y. S.2d 479, 267 App.Div. 284, affirmed 58 N.E.2d 520, 293 N.Y. 781, motion denied 60 N.E.2d 848, 294 N. Y. 701, reversed on other grounds 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607.

90. U.S.—Feldman v. Roschelle Bros., D.C.N.Y., 49 F.Supp. 247.

91. U.S.—Davies v. Onyx Oils & Resins, D.C.N.J., 63 F.Supp. 777—Feldman v. Roschelle Bros., D.C. N.Y., 49 F.Supp. 247.

of the evidence.[92] Where the employer does keep adequate records, the record of an employee has been held not worthy of consideration.[93]

Purview of act; interstate commerce. The requirement of a preponderance of the evidence applies to proof that the employee is within the scope of the act,[94] in that defendant was engaged in interstate commerce,[95] or that plaintiffs were engaged in,[96] or a substantial part of their activities related to,[97] interstate commerce or the production of goods for interstate commerce.

Where an employee was engaged in both interstate and intra-state activity and is required to establish what portion of his time was devoted to interstate business, he must produce facts which amount to more than mere guess, speculation, or conjecture.[98] However, where plaintiffs prove that they worked on interstate and intra-state business, and the two classes of business were commingled in the employer's operations, and the employer did not attempt to distinguish between the two in payment of wages, a prima facie case for recovery has been established,[99] and defendant must introduce satisfactory evidence to maintain its burden.[1]

Exemptions. Where an exemption, under the pro-

92. U.S.—Collins v. Burton-Dixie Corporation, D.C.S.C., 53 F.Supp. 821.
N.Y.—Johnston v. Firemen's Ins. Co. of Newark, N. J., 61 N.Y.S.2d 566.

93. U.S.—Byus v. Traders Compress Co., D.C.Okl., 59 F.Supp. 18.

94. Mo.—Martin v. Graham Ship-By-Truck Co., App., 176 S.W.2d 842.

95. **Evidence held sufficient**
(1) In general.
U.S.—Sklar Oil Corporation v. Thompson, C.C.A.Ark., 126 F.2d 872.
Mo.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241.
(2) Proof that programs of radio station were heard at points outside of state established that the station was engaged in "interstate commerce."—Wilson v. Shuman, C.C.A. Ark., 140 F.2d 644.
Evidence held insufficient
U.S.—Borella v. Borden Co., D.C.N.Y., 52 F.Supp. 952, reversed on other grounds C.C.A., 145 F.2d 63, affirmed 65 S.Ct. 1223, 325 U.S. 679, 89 L.Ed. 1865, 161 A.L.R. 1258—Camfield v. West Texas Utilities Co., D.C.Tex., 44 F.Supp. 847.

96. U.S.—Maitrejean v. Metcalfe Const. Co., D.C.Minn., 72 F.Supp. 109—Crabb v. Welden Bros., D.C. Iowa, 65 F.Supp. 369—Timberlake v. Day & Zimmerman, D.C.Iowa, 49 F.Supp. 28—Drake v. Hirsch, D.C. Ga., 40 F.Supp. 290—Muldowney v. Seaberg Elevator Co., D.C.N.Y., 39 F.Supp. 275.
Wash.—Cannon v. Miller, 155 P.2d 500, 22 Wash.2d 227, 150 A.L.R. 530.
Convincing evidence required
U.S.—Brown v. Carter Drilling Co., D.C.Tex., 38 F.Supp. 489.
Prima facie evidence
U.S.—Mid-Continent Pipe Line Co. v. Hargrave, C.C.A.Okl., 129 F.2d 655—Ling v. Currier Lumber Co., D.C.Mich., 50 F.Supp. 204.
Evidence held sufficient
U.S.—Warren-Bradshaw Drilling Co. v. Hall, Tex., 63 S.Ct. 125, 317 U.S. 88, 87 L.Ed. 83—Asselta v. 149 Madison Ave. Corp., D.C.N.Y., 65 F.Supp. 385, affirmed, C.C.A., 156 F.2d 139, certiorari denied 67 S.Ct. 124, 329 U.S. 764.
Fla.—Cherry Lake, Inc., v. Kearce, 26 So.2d 434, 157 Fla. 484.
Mo.—Martin v. Graham Ship-By-Truck Co., App., 176 S.W.2d 842.
N.Y.—O'Neil v. Brooklyn Savings Bank, 43 N.Y.S.2d 25, 180 Misc. 542, modified on other grounds 46 N.Y.S.2d 631, 267 App.Div. 317, affirmed 56 N.E.2d 259, 293 N.Y. 666, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005—Mabee v. White Plains Pub. Co., 41 N.Y.S.2d 534, 180 Misc. 8, reversed on other grounds 45 N.Y.S.2d 479, 267 App. Div. 284, affirmed 58 N.E.2d 520, 293 N.Y. 781, motion denied 60 N.E.2d 848, 294 N.Y. 701, reversed on other grounds 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607—Kunz v. Emigrant Industrial Sav. Bank, 43 N.Y.S.2d 204.
Evidence held insufficient
U.S.—Kelly v. Ford, Bacon & Davis, C.C.A.Pa., 162 F.2d 555—Schwarz v. Witwer Grocer Co., C.C.A.Iowa, 141 F.2d 341, certiorari denied 64 S.Ct. 1265, 322 U.S. 753, 88 L.Ed. 1583—Murphy v. Georgia Aero-Tech, D.C.Ga., 49 F.Supp. 982—Drake v. Hirsch, D.C.Ga., 40 F. Supp. 290—Dotson v. Stowers, D.C. W.Va., 37 F.Supp. 937.
N.Y.—Cohen v. Cauldwell Wingate Co., 60 N.Y.S.2d 365, 270 App.Div. 478, appeal denied 62 N.Y.S.2d 870, 270 App.Div. 921—Rottammer v. Nick F. Helmers, Inc., 68 N.Y.S.2d 357.

97. **Evidence held sufficient**
U.S.—Atlantic Co. v. Weaver, C.C.A. S.C., 150 F.2d 843.
Evidence held insufficient
U.S.—Ouendag v. Gibson, D.C.Mich., 49 F.Supp. 379.

98. Mo.—Franz v. Delico Meat Products Co., App., 198 S.W.2d 874.
Evidence held insufficient
(1) In general.—Schwarz v. Witwer Grocer Co., C.C.A.Iowa, 141 F.2d 341, certiorari denied 64 S.Ct. 1265, 322 U.S. 753, 88 L.Ed. 1583—Bracey v. Luray, D.C.Md., 49 F.Supp. 821, reversed on other grounds C.C.A., 138 F.2d 8—Owin v. Liquid Carbonic Corporation, D.C.Tex., 42 F.Supp. 774.
(2) Even if employee who was employed in employer's retail meat department which was engaged solely in intrastate business also worked in employer's wholesale department which did engage in interstate commerce, evidence as to amount of work that employee did in each department was so uncertain as not to warrant a judgment for overtime compensation, damages, and attorney's fees under Fair Labor Standards Act.—Franz v. Delico Meat Products Co., Mo.App., 198 S.W.2d 874.
(3) In action by timekeepers of workmen constructing army camp, evidence failing to identify any particular individuals with portions of construction work which might be regarded as interstate commerce, or proportion of time which was devoted to such work, supported judgment denying recovery.—Cohen v. Cauldwell Wingate Co., 60 N.Y.S.2d 365, 279 App.Div. 478, appeal denied 62 N.Y.S.2d 870, 270 App.Div. 921.

99. U.S.—Guess v. Montague, C.C.A. S.C., 140 F.2d 500.

1. U.S.—Skidmore v. John J. Casale, Inc., D.C.N.Y., 66 F.Supp. 282.
Evidence held insufficient
In suit for unpaid overtime compensation by maintenance men and mechanics employed to maintain and repair trucks leased by employer to others for use in both interstate and intrastate commerce, proof of division of labor on trucks used in interstate commerce and on those used solely intra-state, and proof of how much time each man spent on trucks used in interstate commerce, would be of no significance unless it indicated segregation of workers.—Skidmore v. John J. Casale, Inc., supra.

visions of the act, is claimed, such exemption must be established by a clear preponderance of the evidence;[2] and this rule applies to exemptions claimed on the ground that plaintiffs were employed in an executive or administrative capacity within the exemptive provisions of the act,[3] or were professional employees,[4] or that the employee was the head of an establishment,[5] or was exempt as being within the jurisdiction of, and subject to regulation by, the Interstate Commerce Commission,[6] or on the ground that the industry in which plaintiffs were employed was exempt from the operation of the act,[7] or that plaintiff was employed in a retail or service establishment the greater part of whose selling or servicing is in intra-state commerce.[8]

2. U.S.—Smith v. Porter, C.C.A.Ark., 143 F.2d 292—Walling v. McKay, D.C.Neb., 70 F.Supp. 160—Walling v. Newman, D.C.Iowa, 61 F.Supp. 971—Distelhorst v. Day & Zimmerman, D.C.Iowa, 58 F.Supp. 334.

3. **Amount of salary as substantial evidence**

The payment of salary measuring up in every respect to salary paid an employee engaged in executive or administrative capacity is substantial evidence in support of employer's claim that employee is employed in bona fide executive and administrative capacity.—Pfoser v. Federal Cartridge Corp., D.C.Minn., 70 F. Supp. 701.

Evidence held sufficient

(1) In general.

U.S.—Laudadio v. White Const. Co., C.C.A.N.Y., 163 F.2d 383—Smith v. Porter, C.C.A.Ark., 143 F.2d 292—Gorchakoff v. California Shipbuilding Corp., D.C.Cal., 63 F.Supp. 309—Peffer v. Federal Cartridge Corp., D.C.Minn., 63 F.Supp. 291—Baird v. Associated Piping & Engineering Co., D.C.Cal., 61 F.Supp. 970—Distelhorst v. Day & Zimmerman, D.C.Iowa, 58 F.Supp. 334.

N.Y.—Watson v. Hazeltine Electronics Corp., 73 N.Y.S.2d 243.

Wash.—Cotton v. Weyerhaeuser Timber Co., 147 P.2d 299, 20 Wash.2d 300.

(2) Evidence that employees managed regular departments or subdivisions of the establishment, and customarily and regularly directed the work of other employees therein, and customarily exercised discretionary powers.—Anderson v. Federal Cartridge Corp., C.C.A.Minn., 156 F.2d 681—Anderson v. Federal Cartridge Corp., D.C.Minn., 72 F. Supp. 639—Nadeau v. Henry Disston & Sons, D.C.Pa., 69 F.Supp. 918.

(3) Evidence that plaintiff was employed as head of department and that his work was responsible and nonmanual, requiring special training, experience, and knowledge, and exercise of discretion and independent judgment which plaintiff was authorized to exercise.—Beebe v. Pure Oil Co., D.C.Ohio, 65 F.Supp. 449—Ashworth v. E. B. Badger & Sons Co., D.C.Mass., 63 F.Supp. 710.

(4) Evidence established that employees did not work at nonexempt tasks for a period of time that exceeded twenty per cent of the hours of the nonexempt employees under their direction, and hence such foremen were not entitled to overtime but were exempt as employees engaged in an "executive capacity."—Anderson v. Federal Cartridge Corp., D.C.Minn., 72 F.Supp. 639—Collier v. New River & Pocahontas Consol. Coal Co., D.C.W.Va., 66 F.Supp. 288—Dolan v. Day & Zimmerman, D.C. Mass., 65 F.Supp. 923—Martin v. Federal Cartridge Corp., D.C.Minn., 64 F.Supp. 552.

Evidence held insufficient

(1) In general.

U.S.—Lassister v. Guy F. Atkinson Co., C.C.A.Wash., 162 F.2d 774—Dumas v. King, C.C.A.Ark., 157 F. 2d 463—Anderson v. Federal Cartridge Corp., D.C.Minn., 72 F.Supp. 639—Crabb v. Welden Bros., D.C. Iowa, 65 F.Supp. 369—Kreeft v. R. W. Bates Piece Dye Works, D. C.N.Y., 63 F.Supp. 881—Distelhorst v. Day & Zimmerman, D.C.Iowa, 58 F.Supp. 334—Snyder v. Wessner, D.C.Minn., 55 F.Supp. 971—Shain v. Armour & Co., D.C.Ky., 50 F. Supp. 907—Cohn v. Decca Distributing Corporation, D.C.Pa., 50 F. Supp. 270—Snavely v. Shugart, D. C.Tex., 45 F.Supp. 722.

N.J.—Fox v. Armour & Co., 33 A.2d 582, 21 N.J.Misc. 262.

N.Y.—Mabee v. White Plains Pub. Co., 41 N.Y.S.2d 534, 180 Misc. 8, reversed on other grounds 45 N. Y.S.2d 479, 267 App.Div. 284, affirmed 58 N.E.2d 520, 293 N.Y. 781, motion denied 60 N.E.2d 848, 294 N.Y. 701, reversed on other grounds 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607—Anderson v. Material Co-ordinating Agency, 63 N.Y.S.2d 324.

Wis.—Katchel v. Northern Engraving & Mfg. Co., 25 N.W.2d 431, 249 Wis. 578.

(2) A corporation's office manager receiving five thousand dollars a year who was also its treasurer and a director was not exempt from act as an "executive employee" where evidence was conflicting as to whether he worked some eighty-five per cent of his time on corporation's books as ordinary bookkeeper.—George Lawley & Son Corporation v. South, C.C.A.Mass., 140 F.2d 439, 151 A.L.R. 1081, certiorari denied 64 S. Ct. 1156, 322 U.S. 746, 88 L.Ed. 1578.

(3) Evidence that engineers did highly skilled mechanical work on dangerous and complicated machinery vital to plant, but that such work, aside from application of engineering skill, did not involve exercise of discretion or power to hire or fire or give orders to any firemen and coal passers in boiler room, did not support finding that engineers were employed as foremen or supervisors so as to make them exempt from act.—Walling v. General Industries Co., C.C.A.Ohio, 155 F.2d 711.

4. **Evidence held sufficient**

U.S.—Lassiter v. Guy F. Atkinson Co., C.C.A.Wash., 162 F.2d 774—Rausch v. Wolf, D.C.Ill., 72 F.Supp. 658.

5. **Evidence held insufficient**

U.S.—Crabb v. Welden Bros., D.C. Iowa, 65 F.Supp. 369.

6. **Evidence held sufficient**

(1) In general.—Kosofsky v. Champion Trucking Co., 43 N.Y.S.2d 5, 181 Misc. 470.

(2) To show that employees were not exempt.

U.S.—Walling v. Palmer, D.C.Pa., 67 F.Supp. 12.

Ark.—Potashnick Local Truck System v. Archer, 179 S.W.2d 696, 207 Ark. 220.

Evidence held insufficient

U.S.—Atlantic Co. v. Weaver, C.C.A. S.C., 150 F.2d 843—Hutchinson v. William C. Barry, Inc., D.C.Mass., 50 F.Supp. 292.

7. **Evidence held to show exemption**

U.S.—Byus v. Traders Compress Co., D.C.Okl., 59 F.Supp. 18.

Evidence held not to show exemption

Kan.—Bush v. Wilson & Co., 138 P.2d 457, 157 Kan. 80.

8. **Evidence held sufficient**

(1) In general.—Ellinger v. Goodyear Tire & Rubber Co., D.C.Iowa, 40 F.Supp. 626—Dotson v. Stowers, D.C.W.Va., 37 F.Supp. 937.

(2) To show that employee was not exempt.—Johnson v. Phillips-Buttorff Mfg. Co., 160 S.W.2d 893, 178 Tenn. 559, certiorari denied Phillips-Buttorff Mfg. Co. v. Johnson, 63 S.Ct. 43, 317 U.S. 648, 87 L.Ed. 521.

§ 160(9). —— Trial

a. In general
b. Instructions
c. Verdict and findings

a. In General

While it is for the court to decide whether there is sufficient evidence to warrant submitting the case or issue to the jury, questions of fact on which the evidence is conflicting or doubtful are generally for the jury to determine.

The rules governing the determination of questions of law and fact in civil actions generally apply in actions under statutes regulating wages or the payment thereof.[9] While, in actions under the Fair Labor Standards Act, it is for the court to decide whether there is sufficient evidence to warrant submitting the case or issue to the jury,[10] and to dispose of issues on which the evidence is legally insufficient, or is undisputed and conclusive,[11] questions of fact on which the evidence is conflicting or doubtful are generally for the jury to determine.[12]

Thus it is for the jury to determine the liability of the employer,[13] what constitutes working time,[14] the number of hours worked,[15] whether the employee worked overtime[16] and the employer had knowledge thereof,[17] the amount of overtime worked,[18] whether the employee keeping the record of the overtime worked kept his own record honestly,[19] whether the employee was estopped from claiming overtime,[20] whether the employer was engaged in interstate commerce,[21] whether the employee was en-

9. Ky.—W. W. Mac Co. v. Teague, 180 S.W.2d 387, 297 Ky. 475—Winco Block Coal Co. v. Stewart, 125 S.W.2d 738, 277 Ky. 125.
Tex.—McGuire v. City of Dallas, 170 S.W.2d 722, 141 Tex. 170.

Nonpayment of wages on discharge
Under statutes providing a penalty for the failure to pay employees on their discharge, controverted questions of fact are for the jury.—Largent v. Arkansas Northwestern R. Co., 188 S.W. 836, 125 Ark. 355—39 C.J. p 233 note 68 [a].

Standard of day's work
Where a statute provided that ten hours of actual labor shall be taken to be a day's work, and no objection was made that the employee did not work daily as much as ten hours, it is a question for the jury whether the work done in a day was by the understanding and implied agreement of the parties to be reckoned as a day's work.—Brooks v. Cotton, 48 N.H. 50, 2 Am.R. 172.

Pay for Sunday work
In action for damages by employee employed from week to week, evidence presented jury questions whether employer breached contract of hire, by reducing employee's hourly wage without notice and evaded its obligation under the statute requiring that an employee, employed on Sunday, should receive time, and a half pay, which statute formed part of the contract for hire.—Cooksey v. Beaumont Mfg. Co., 9 S.E.2d 790, 194 S.C. 395.

10. Mo.—Martin v. Graham Ship-By-Truck Co., App., 176 S.W.2d 842.

On motion for nonsuit and dismissal
Where defendants made motion for nonsuit, and a dismissal of complaint upon the merits at the conclusion of evidence taken by plaintiffs, court was not called to pass on disputed questions of fact but to say whether there was believable evidence that plaintiffs were engaged in employment which was not concerned with safety of operation of motortrucks.—Crean v. M. Moran Transportation Lines, D.C.N.Y., 54 F.Supp. 765.

11. Ga.—Kay v. Kuhlman, 33 S.E. 2d 378, 72 Ga.App. 129.
N.Y.—Grant v. I. A. Management Corporation, 45 N.Y.S.2d 849, 267 App.Div. 355, reargument denied 47 N.Y.S.2d 115, 267 App.Div. 861.

Directed verdict for employer held proper
Ark.—Couch v. Ward, 168 S.W.2d 822, 205 Ark. 308.
Okl.—Mabee Oil & Gas Co. v. Thomas, 158 P.2d 713, 195 Okl. 437.

Affirmative charge held properly refused
Ala.—Acme Lumber Co. v. Shaw, 10 So.2d 285, 243 Ala. 421.

Directed verdict for employer held error
U.S.—Johnson v. Dierks Lumber & Coal Co., C.C.A.Ark., 130 F.2d 115.

12. U.S.—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, etc., C.C.A.Ala., 137 F.2d 176, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596.
Mo.—Martin v. Graham Ship-By-Truck Co., App., 176 S.W.2d 842—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241.

Existence of agreement for computation of hours
Okl.—Skelly Oil Co. v. Jackson, 148 P.2d 182, 194 Okl. 183.

13. U.S.—Johnson v. Dierks Lumber & Coal Co., C.C.A.Ark., 130 F.2d 115.

14. U.S.—Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, etc., C.C.A.Ala., 137 F.2d 176, affirmed 64 S.Ct. 698, 321 U.S. 590, 88 L.Ed. 949, 152 A.L.R. 1014, rehearing denied 64 S.Ct. 1257, 322 U.S. 771, 88 L.Ed. 1596—Johnson v. Dierks Lumber & Coal Co., C.C.A.Ark., 130 F.2d 115—Plummer v. Harvester War Depot, D.C.Ohio, 70 F.Supp. 495—Walling v. Anaconda Copper Min. Co., D.C.Mont., 66 F.Supp. 913.

15. U.S.—Southern Ry. Co. v. Black, C.C.A.N.C., 127 F.2d 280.

16. Okl.—Pioneer Corp. v. Kinsey, 162 P.2d 1000, 196 Okl. 89.

17. Okl.—Pioneer Corp. v. Kinsey, supra.

18. Ala.—Belcher v. Hubbard, App., 21 So.2d 850.
Minn.—Pakarinen v. Butler Bros., 16 N.W.2d 769, 218 Minn. 496.

Evidence held sufficient to go to jury
(1) In general.—Smith v. Ogle, 164 P.2d 992, 196 Okl. 295.
(2) Evidence consisting of testimony of plaintiff that he worked ten hours per day for six days a week with exception of certain weeks in which he was given a whole or half holiday, was sufficient to make case for jury.—Edwards v. South side Auto Parts Co., Mo.App., 180 S.W.2d 1015.

Plaintiff's uncontradicted testimony
Even though plaintiff's testimony as to his recollection of the amount of overtime worked was uncontradicted, his interest in the result, the fallibility of his recollection, the accuracy of his statements, and the accuracy of his memory are still to be weighed by the trier of facts.—Johnston v. Firemen's Ins. Co. of Newark, N. J., 61 N.Y.S.2d 566.

19. U.S.—George Lawley & Son Corporation v. South, C.C.A.Mass., 140 F.2d 439, 151 A.L.R. 1081, certiorari denied 64 S.Ct. 1156, 322 U.S. 746, 88 L.Ed. 1578.

20. Okl.—Pioneer Corp. v. Kinsey, 162 P.2d 1000, 196 Okl. 89.

21. Tex.—Camfield v. West Texas

tlement of claims for overtime compensation will not be entered in the absence of a showing that statutory requirements have been met, notwithstanding both employer and employees join in the application for entry of judgment.[36]

§ 160(11). —— Costs and Attorney's Fees

a. In general
b. Actions under Fair Labor Standards Act

a. In General

Under a wage statute so providing an employee bringing action to enforce such statute is entitled to reasonable attorney's fees to be taxed as costs against the employer.

Where statutes regulating wages or the payment thereof so provide, an employee bringing an action to enforce such statute against an employer who has violated it is entitled to an allowance of reasonable attorney's fees to be paid by the employer.[37] However, the employer will not be liable for costs and attorney's fees in the event claimant is unsuccessful.[38]

b. Actions under Fair Labor Standards Act

Under the Fair Labor Standards Act, the successful employee must be allowed the costs of the action and a reasonable attorney's fee.

Under a provision of the Fair Labor Standards Act to that effect, the employee recovering a judgment for additional compensation and liquidated damages under the act must also be allowed the costs of the action and a reasonable attorney's fees.[39] This provision is mandatory[40] and the court must do so, even though it would be inclined not to do so.[41] However, costs and attorney's fees will be denied if, or to the extent that, the employee's suit is

his behalf.—Grayson-McLeod Lumber Co. v. Johnson, 146 S.W. 141, 103 Ark. 266.

36. U.S.—Rogan v. Essex County News Co., D.C.N.J., 65 F.Supp. 82.

37. N.D.—Wiseth v. Traill County Telephone Co., 5 N.W.2d 307, 72 N.D. 165.

Successful party

A statute providing for allowance of attorneys' fees to successful party, whether employer or employee, in suit for recovery or collection of wages due, was not unconstitutional.—Britt v. Cotter Butte Mines, 89 P.2d 266, 108 Mont. 174.

Fee held adequate

(1) Fee of $200 allowed attorney for employee suing for wages and statutory penalties for employer's failure to pay wages on demand within twenty-four hours after termination of employment was adequate.—Bannon v. Techeland Oil Corporation, 17 So.2d 921, 205 La. 689.

(2) Where hotel waitresses demanded $1,705 under Minimum Wage Law but actually recovered a little over $200, allowance of $125 as fees for large amount of work performed by their attorney was not inadequate, since suit might possibly have been avoided.—Ferber v. Wisen, 82 P.2d 139, 195 Wash. 603.

Fee held excessive

Where total amount of recovery in action for overtime wages under Women and Minors' Employment Act was less than $600, approximately half of which was unwarranted and the case was not complicated, an allowance of attorney's fees of $250 was reduced to $150.—W. W. Mac Co. v. Teague, 180 S.W.2d 387, 297 Ky. 475.

38. Ky.—W. W. Mac Co. v. Teague, 180 S.W.2d 387, 297 Ky. 475.

39. U.S.—Straughn v. Schlumberger Well Surveying Corp., D.C.Tex., 72 F.Supp. 511—Harris v. Crossett Lumber Co., D.C.Ark., 62 F.Supp. 856—Lorber v. Rosow, D.C.Conn., 58 F.Supp. 341—Philpott v. Standard Oil Co., D.C.Ohio, 53 F.Supp. 833—Corey v. Detroit Steel Corporation, D.C.Mich., 52 F.Supp. 138—Anuchick v. Transamerican Freight Lines, D.C.Mich., 46 F.Supp. 861—Tenaglia v. Tully & Di Napoli, D.C.N.Y., 43 F.Supp. 814—Moss v. Postal Telegraph-Cable Co., D.C.Ga., 42 F.Supp. 807.
Ala.—Cudahy Packing Co. of Alabama v. Bazanos, 15 So.2d 720, 245 Ala. 73.
Ill.—Orminski v. Hyland Elec. Supply Co., 62 N.E.2d 14, 326 Ill.App. 392.
Ky.—J. F. Schneider & Son v. Justice, 168 S.W.2d 591, 293 Ky. 126.
N.Y.—Easley v. Edgord Realty Corp., 59 N.Y.S.2d 241, 270 App.Div. 184, affirmed 68 N.E.2d 873, 296 N.Y. 579—Phelan v. Carstens, Linnekin & Wilson, 62 N.Y.S.2d 214, 187 Misc. 352—Mabee v. White Plains Pub. Co., 41 N.Y.S.2d 534, 180 Misc. 8, reversed on other grounds 45 N.Y.S.2d 479, 267 App.Div. 284, affirmed 58 N.E.2d 520, 293 N.Y. 781, motion denied 60 N.E.2d 848, 294 N.Y. 701, reversed on other grounds 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607—Asaro v. Lilienfeld, 36 N.Y.S.2d 802.

Recovery based on another statute

Employees of munitions plant operated by private contractor under contract with government were "laborers and mechanics employed by the War Department" within meaning of act regulating hours and wages of such laborers and mechanics and were entitled to time and a half for overtime work but were not entitled to recover attorneys fees provided in Fair Labor Standards Act.—Kennedy v. Silas Mason Co., D.C.La., 68 F.Supp. 576.

Costs and disbursements

U.S.—Morgan v. Atlantic Coast Line R. Co., D.C.Ga., 32 F.Supp. 617.

Settlement by court on motion of parties

U.S.—Anderson v. Mt. Clemens Pottery Co., D.C.Mich., 60 F.Supp. 146, reversed on other grounds, C.C.A., Mt. Clemens Pottery Co. v. Anderson, 149 F.2d 461, reversed on other grounds 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

Effect of findings of wage and hour division

Findings of wage and hour division of United States department of labor as to amounts due employees are merely "ministerial acts," not "judicial pronouncements" foreclosing court from fixing reasonable counsel fee in employees' pending action therefor.—Asaro v. Lilienfeld, 36 N.Y.S.2d 802.

40. U.S.—Magann v. Long's Baggage Transfer Co., D.C.Va., 39 F.Supp. 742.
N.Y.—Schneider v. Sports Vogue, 35 N.Y.S.2d 341.

41. U.S.—Williams v. General Mills, D.C.Ohio, 39 F.Supp. 849, reversed on other grounds, C.C.A., 132 F.2d 367, 144 A.L.R. 1371.

Double damages

The court cannot refuse to allow attorney's fees because plaintiff recovered double damages; nor can it reduce the amount of the fee on that ground.—Hutchinson v. William C. Barry, Inc., D.C.Mass., 50 F.Supp. 292.

unsuccessful,[42] or the employee's success was not obtained through the efforts of his attorneys;[43] nor will fees be granted because of the settlement of claims by employees whom the attorney did not represent;[44] and to the extent that he is unsuccessful, costs may be taxed to the employee.[45] An employer who has violated the act cannot avoid this liability for counsel fees;[46] and an employee has been held not to lose the right to counsel fees by estoppel.[47]

It has been said that the act contemplates that the employee shall receive the full amount of any award made to him,[48] and that any contract that would allow an attorney any part of the award made to any employee would be void.[49] Ordinarily, the award of the attorney's fee is not made as a separate fee due the attorney but is merely part of the judgment in the action;[50] but it has been held that the act endows the attorney for the employee with a direct interest in the fee, so that the attorney can file a petition for the allowance of an additional fee without his client joining in the petition.[51]

The determination of the amount of attorney's fees is a matter within the discretion of the court,[52] which will not be interfered within the absence of an abuse of discretion;[53] and the court may determine the fee alone, without submitting the matter to the jury,[54] or may permit the jury to find as a separate item the amount of reasonable attorney's

42. Mass.—Campanale v. General Ice Cream Corporation, 49 N.E.2d 1018, 314 Mass. 387.

Part of claim barred

An employee seeking unpaid wages and overtime under Fair Labor Standards Act from a Louisiana employer would be denied attorney's fees with respect to that part of employee's claim which was barred by limitation.—Divine v. Levy, D.C. La., 45 F.Supp. 49.

Employee paid in full

Where employer did not believe, during the employment, that employee was within Wages and Hour Law or Fair Labor Standards Act, and it was doubtful whether employee so considered himself, and at time of employee's discharge employer paid employee all amounts due him, including overtime pay, employee could not subsequently sue for liquidated damages and attorney's fees on theory that overtime compensation was payable weekly or at least twice a month and hence due before actual payment at time of discharge.—Clour v. Jones, D.C.Okl., 42 F.Supp. 700.

Employer's successful appeal

Where it was necessary for employer to prosecute an appeal to correct judgment of lower court by reducing amount of employee's recovery, application of employee's attorney for allowance of additional attorney's fees for his services rendered in appellate court would be denied.—S. H. Robinson & Co. v. Larue, 156 S.W.2d 359, 25 Tenn.App. 284, affirmed 156 S.W.2d 432, 178 Tenn. 197.

43. U.S.—Mortenson v. Western Light & Telephone Co., D.C.Iowa, 42 F.Supp. 319.

Success based on defendant's admission

Where judgment in favor of plaintiff was only for certain overtime, which employer admitted he was entitled to and for which no claim was made in the petition, plaintiff was not entitled to attorney's fees.—Mortenson v. Western Light & Telephone Co., supra.

Employer's offer as insufficient

Where employer in general terms offered to settle the case before it was decided, but never made any firm offer, it could not be said that employer offered to avoid the need of incurring attorney's fees or that a fee was not a reasonable element of plaintiff's damage.—Aucoin v. Mystic Waste Co., D.C.Mass., 55 F.Supp. 672.

44. Tenn.—Hunt v. National Linen Service Corporation, 157 S.W.2d 608, 178 Tenn. 262.

Representative action

In action by one employee on behalf of all employees who might seek to join the action, attorneys could not recover fees merely because other employees, whom they did not represent, had settled their possible claims against employer.—Hunt v. National Linen Service Corporation, supra.

45. U.S.—Mortenson v. Western Light & Telephone Co., D.C.Iowa, 42 F.Supp. 319.

46. N.Y.—Katz v. Film Metal Box Corporation, 47 N.Y.S.2d 454, 181 Misc. 812.

Good faith; settlement

Neither good faith nor a settlement can justify a court in refusing an award of attorney's fees in an action under the act.—Greenberg v. Arsenal Bldg. Corporation, D.C.N.Y., 50 F.Supp. 700, modified on other grounds, C.C.A., 144 F.2d 292, reversed on other grounds 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

Offer of payment

Defense pleading employers' good faith offer to pay to employees overtime without damages and attorney's fees was insufficient to absolve employer from paying attorney's fees.—Garrity v. Bagold Corporation, 42 N.Y.S.2d 257, 180 Misc. 120, modified on other grounds 46 N.Y.S.2d 637, 267 App.Div. 353.

47. U.S.—Bailey v. Karolyna Co., D.C.N.Y., 50 F.Supp. 142.

Increase of damages by employee's conduct

The fact that employee's course of conduct was such that his damages were increased rather than minimized did not "estop" employee from asserting claim for counsel fees.—Bailey v. Karolyna Co., supra.

48. Kan.—Sykes v. Lochmann, 132 P.2d 620, 156 Kan. 223, certiorari denied Lochmann v. Sykes, 63 S.Ct. 1165, 319 U.S. 753, 87 L.Ed. 1707.

49. Kan.—Sykes v. Lochmann, 132 P.2d 620, 156 Kan. 223, certiorari denied Lochmann v. Sykes, 63 S.Ct. 1165, 319 U.S. 753, 87 L.Ed. 1707.

50. U.S.—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310—In re L. E. Elliott Brokerage Co., D.C.Kan., 48 F.Supp. 144.

51. U.S.—Maddrix v. Dize, C.C.A. Md., 153 F.2d 274.

52. U.S.—Montgomery Ward & Co. v. Antis, C.C.A.Mich., 158 F.2d 948—E. C. Schroeder Co. v. Clifton, C.C.A.Okl., 153 F.2d 385, certiorari denied 66 S.Ct. 1351, 328 U.S. 858, 90 L.Ed. 1629, and 66 S.Ct. 1353, 328 U.S. 858, 90 L.Ed. 1629, rehearing denied 67 S.Ct. 33, 329 U.S. 821, 91 L.Ed. 699—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310.

Tenn.—Fiedler v. Potter, 172 S.W.2d 1007, 180 Tenn. 176—S. H. Robinson & Co. v. Larue, 156 S.W.2d 432, 178 Tenn. 197.

53. U.S.—E. C. Schroeder Co. v. Clifton, C.C.A.Okl., 153 F.2d 385, certiorari denied 66 S.Ct. 1351, 328 U.S. 858, 90 L.Ed. 1629, and 66 S.Ct. 1353, 328 U.S. 858, 90 L.Ed. 1629, rehearing denied 67 S.Ct. 33, 329 U.S. 821, 91 L.Ed. 699.

54. Mo.—Edwards v. South Side Auto Parts Co., App., 180 S.W.2d 1015.

fees following the introduction of evidence on such subject.[55] The provision does not contemplate an amount in the nature of a speculative or contingent fee, but merely one that is reasonable under all the circumstances;[56] and, where bona fide issues of law or fact exist, attorney's fees should not be made larger than is reasonably required in order to secure the remedial purposes of the act.[57] The court will determine the fee in the same manner as it would have determined it if the employee were sued by his counsel for a fee.[58] It has been held proper for the court to fix the costs or attorney's fees in accordance with a state statute allowing such fees as part of the costs;[59] and in such case the attorney may have a claim against his client for a reasonable fee in addition to that allowed by the court pursuant to the state statute.[60] Moreover, it has also been held that reasonable attorney's fees may be allowed under the federal act in addition to the fee included in such statutory costs.[61]

What is a proper fee in any given case depends on all the facts and circumstances of the case,[62] and the factors to be considered include the character of the presentation by plaintiff's counsel,[63] the importance of the questions considered to other employees to whom the act may become the subject of litigation,[64] the standing and reputation of the attorney,[65] the amount of time and effort required,[66] and the amount recovered by the employee or employees.[67] The court may consider the number of claims presented,[68] the fact that counsel was required to travel in order to present his case,[69] and the fact that the cause was,[70] or probably would be,[71] appealed. It has also been held that the court may consider whether defendant's violation of the act was willful, deliberate, or flagrant.[72] A contract between the employee and his attorney as to the amount of attorney's fees will not affect the court in its determination of a reasonable fee.[73]

Settlement by court on motion of parties
U.S.—Anderson v. Mt. Clemens Pottery Co., 60 F.Supp. 146, reversed on other grounds, C.C.A., Mt. Clemens Pottery Co. v. Anderson, 149 F. 2d 461, reversed on other grounds 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

55. Ala.—Acme Lumber Co. v. Shaw, 16 So.2d 285, 243 Ala. 421.

Reason for rule
Provision of statute that the "court" in such action shall allow reasonable attorney's fees may as readily be held to mean the court having jurisdiction of the cause, that is, the court and jury, as to be held to mean the trial judge.
Ala.—Acme Lumber Co. v. Shaw, supra.
Mo.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241.

56. U.S.—Dumas v. King, C.C.A.Ark., 157 F.2d 463.

57. Mo.—Niehaus v. Joseph Greenspon's Son Pipe Corporation, 164 S.W.2d 180, 237 Mo.App. 112.

Courts invariably manifest a strong inclination to keep the allowances within such moderate limits as to maintain an even balance of justice between the employer and the employee.—Niehaus v. Joseph Greenspon's Son Pipe Corporation, supra.

58. U.S.—Hutchinson v. William C. Barry, Inc., D.C.Mass., 50 F.Supp. 292.

59. U.S.—Monty v. Christiansen, D. C.Wis., 47 F.Supp. 273.

60. U.S.—Monty v. Christiansen, supra.

61. Wis.—Katchel v. Northern Engraving & Mfg. Co., 25 N.W.2d 431, 249 Wis. 578.

62. U.S.—Dumas v. King, C.C.A.Ark., 157 F.2d 463—E. H. Clarke Lumber Co. v. Kurth, C.C.A.Or., 152 F. 2d 914—Mid-Continent Pipe Line Co. v. Hargrave, C.C.A.Okl., 129 F. 2d 655.
Mo.—Niehaus v. Joseph Greenspon's Son Pipe Corporation, 164 S.W.2d 180, 237 Mo.App. 112.

63. U.S.—Dumas v. King, C.C.A.Ark., 157 F.2d 463—E. H. Clarke Lumber Co. v. Kurth, C.C.A.Or., 152 F.2d 914.

64. U.S.—E. H. Clarke Lumber Co. v. Kurth, supra.

65. N.Y.—Cassone v. Wm. Edgar John & Associates, 57 N.Y.S.2d 169, 185 Misc. 573.

66. U.S.—Dumas v. King, C.C.A.Ark., 157 F.2d 463—Aucoin v. Mystic Waste Co., D.C.Mass., 55 F.Supp. 672—Strand v. Garden Valley Telephone Co., D.C.Minn., 51 F.Supp. 898—Hutchinson v. William C. Barry, Inc., D.C.Mass., 50 F.Supp. 292—Hargrave v. Mid-Continent Petroleum Corporation, D.C.Okl., 42 F.Supp. 908, affirmed, C.C.A., Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655.
N.Y.—Rahgo v. Cities Service Oil Co., 33 N.Y.S.2d 42, 177 Misc. 1059, affirmed 50 N.Y.S.2d 945, 182 Misc. 623—Asaro v. Lilienfeld, 36 N.Y. S.2d 802.

Briefs required
U.S.—Hargrave v. Mid-Continent Petroleum Corporation, D.C.Okl., 42 F. Supp. 908, affirmed, C.C.A., Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655.

67. U.S.—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F. Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310.

Fair and reasonable relation
U.S.—Dumas v. King, C.C.A.Ark., 157 F.2d 463—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F. Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310.

68. U.S.—Hargrave v. Mid-Continent Petroleum Corporation, D.C.Okl., 42 F.Supp. 908, affirmed, C.C.A., Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655.

69. U.S.—E. H. Clarke Lumber Co. v. Kurth, C.C.A.Or., 152 F.2d 914.

70. U.S.—Maddrix v. Dize, C.C.A. Md., 153 F.2d 274.

Allowance of additional fee for appeal
Where, after a final judgment which included attorney's fees for services up to that time, an appeal is taken, the attorney is entitled to an allowance of an additional fee for the appeal.—Maddrix v. Dize, supra.

71. U.S.—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310—Hargrave v. Mid-Continent Petroleum Corporation, D.C.Okl., 42 F.Supp. 908, affirmed, C.C.A., Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655.
N.Y.—Rahgo v. Cities Service Oil Co., 33 N.Y.S.2d 42, 177 Misc. 1059, affirmed 50 N.Y.S.2d 945, 182 Misc. 623.

72. N.Y.—Yunker v. Abbye Employment Agency, 32 N.Y.S.2d 715.

73. U.S.—Aucoin v. Mystic Waste Co., D.C.Mass., 55 F.Supp. 672.

The hardship on employers involved in litigating claims when the applicability of the statute was uncertain has been held no reason for limiting the fee of plaintiff's attorneys to less than fair compensation for their work;[74] but it has also been held that the fact that there was a serious doubt whether the employee was within the act, and that the employee never claimed to be subject to the act or to be entitled to additional compensation until after his services had been dispensed with, are matters entitled to weight in fixing the attorney's fees.[75]

In the application of these factors to particular cases, various amounts have been awarded by the courts[76] and the propriety of particular awards has

Effect of agreements generally

The Fair Labor Standards Act does not prohibit an employee from paying, or his lawyer from charging, more than the court awards as reasonable attorney's fees, but, where the agreement between employee and counsel sets a figure higher than what the court considers a reasonable fee, the agreement is not relevant, and, where the agreement sets a figure lower than what the court considers a reasonable fee, the excess would not represent damages sustained by employee, and might not fall within provision of the act for reasonable fee.—Aucoin v. Mystic Waste Co., supra.

Contract for excessive fee

If an employee makes a contract with his attorney under which attorney will receive excessive fee, the court is not required to fix accordingly the fee allowable to the employee if he is successful in the suit.—Hutchinson v. William C. Barry, Inc., D.C.Mass., 50 F.Supp. 292.

74. U.S.—Greenberg v. Arsenal Bldg. Corporation, C.C.A.N.Y., 144 F.2d 292, affirmed 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

75. Tenn.—S. H. Robinson & Co. v. Larue, 156 S.W.2d 432, 178 Tenn. 197.

Nominal compensation allowed

Tenn.—S. H. Robinson & Co. v. Larue, supra.

76. U.S.—Holmes v. Industrial Cotton Mills Co., D.C.S.C., 64 F.Supp. 20—Burke v. Lecrone-Benedict Ways, D.C.Mich., 63 F.Supp. 883—Harris v. Crossett Lumber Co., D.C.Ark., 62 F.Supp. 856—Lorber v. Rosow, D.C.Conn., 58 F.Supp. 341—Philpott v. Standard Oil Co., D.C. Ohio, 53 F.Supp. 833—Overstreet v. North Shore Corporation, D.C.Fla., 52 F.Supp. 503, affirmed, C.C.A., 143 F.2d 172, vacated on other grounds 65 S.Ct. 275, 323 U.S. 679, 89 L.Ed. 559—Scott v. North Shore Corporation, 52 F.Supp. 503, affirmed 143 F.2d 595, vacated on other grounds 65 S.Ct. 275, 323 U.S. 679, 89 L.Ed. 559—Corey v. Detroit Steel Corporation, D.C.Mich., 52 F.Supp. 138—Brown v. Minngas Co., D.C.Minn., 51 F.Supp. 363—Porter v. Georgia Power & Light Co., D.C.Ga., 50 F. Supp. 959—International Longshoremen's Ass'n, Local 815, v. National Terminals Corporation, D.C. Wis., 50 F.Supp. 26, affirmed, C.C.A., Cabunca v. National Terminals Corporation, 139 F.2d 853—Abram v. San Joaquin Cotton Oil Co., D.C. Cal., 49 F.Supp. 393—Divine v. Levy, D.C.La., 45 F.Supp. 49—Tucker v. Hitchcock, D.C.La., 44 F.Supp. 874—Hargrave v. Mid-Continent Petroleum Corporation, D.C.Okl., 42 F.Supp. 908, affirmed, C.C.A., Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655—Klotz v. Ippolito, D.C.Tex., 40 F.Supp. 422—St. John v. Brown, D.C.Tex., 38 F. Supp. 385—Morgan v. Atlantic Coast Line R. Co., D.C.Ga., 32 F. Supp. 617.

Ill.—Winer v. Eckerling, 55 N.E.2d 876, 323 Ill.App. 421.

N.Y.—Barrow v. Adams & Co. Real Estate, 46 N.Y.S.2d 357, 182 Misc. 641—Hewlett v. Del Balso Const. Corporation, 40 N.Y.S.2d 224, 179 Misc. 856, reversed on other grounds 43 N.Y.S.2d 650, 180 Misc. 81, appeal denied Hewlett v. Del Balso & Sprague, 44 N.Y.S.2d 587, 266 App.Div. 922.

Particular amounts awarded

$2,000

For services rendered in action by eighty-one employees in forty-three different job classifications.—Antis v. Montgomery Ward & Co., D.C.Mich., 63 F.Supp. 669.

$1,500

On recovery of $1,400, and an equal amount as liquidated damages, in view of attorney's standing, reputation, and work involved.—Cassone v. Wm. Edgar John & Associates, 57 N.Y.S.2d 169, 185 Misc. 573.

$750

On recovery of $2,162.09, with interest thereon, in the sum of $236.74 plus an additional amount of $2,162.09 as liquidated damages.—Schneider v. Sports Vogue, 35 N.Y.S.2d 341.

$600

On recovery of $1,400, and an equal amount as liquidated damages.—Berlin v. Eimer & Amend, 55 N.Y.S.2d 498, 269 App.Div. 302, affirmed 66 N.E. 584, 295 N.Y. 809.

$500

(1) For services on appeal resulting in affirmance of judgment for $427.—E. H. Clarke Lumber Co. v. Kurth, C.C.A.Or., 152 F.2d 914.

(2) On recovery of $1,502, and an equal amount as liquidated damages.—Cohn v. Decca Distributing Corporation, D.C.Pa., 50 F.Supp. 270.

$400

(1) On recovery of $623, and an equal amount as liquidated damages.—Snyder v. Wessner, D.C.Minn., 55 F.Supp. 971.

(2) On recovery of $323, and an equal amount as liquidated damages.—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310.

$375

On recovery of $436, and an equal amount as damages.—Johnston v. Firemen's Ins. Co. of Newark, N. J., 61 N.Y.S.2d 566.

$350

(1) For prosecuting appeal which reversed adverse decision.—Watson v. Hightower, 176 P.2d 670, 50 N.M. 322.

(2) On recovery of $4,392.—Easley v. Edgord Realty Corp., 59 N.Y.S.2d 241, 270 App.Div. 184, affirmed 68 N.E.2d 873, 296 N.Y. 579.

(3) On recovery of $1,712.—Quest v. George A. Bowman, Inc., 64 N.Y.S.2d 60.

(4) On recovery of $1,206, with interest.—Schanck v. Lehigh Val. R. R., 52 N.Y.S.2d 491.

$300

(1) On recovery of $2,580, where the issues of law were simple but issues of fact were complicated, plaintiff's counsel spent 43 hours in office work, two days in the trial and attended court on two other occasions.—Aucoin v. Mystic Waste Co., D.C.Mass., 55 F.Supp. 672.

(2) On recovery of $1,647.—Lewellen v. Hardy-Burlingham Min. Co., D.C.Ky., 73 F.Supp. 63.

(3) On recovery of $336, plus an equal amount as penalty.—Kessler v. Cliff Frocks, 67 N.Y.S.2d 107, 271 App.Div. 890.

(4) On recovery of $308, and an equal amount as liquidated damages.—Atkocus v. Terker, 30 N.Y.S.2d 628.

$250

(1) On recovery of $1,973.—Gibson v. Atlantic Co., D.C.Ga., 63 F.Supp. 492.

(2) On recovery of $805.—Green v. Riss & Co., D.C.Mo., 45 F.Supp. 648.

$200

(1) On recovery of $473, and a similar amount as liquidated damages.—Lewis v. Nailling, D.C.Tenn., 36 F.Supp. 187.

been determined with respect to whether they constituted an abuse of the court's discretion,[77] either as being inadequate[78] or in other instances also involving discretion as being excessive.[79]

(2) On recovery of $414.—Morales v. Compania Azucarera Del Toa, D.C. Puerto Rico, 68 F.Supp. 346.

$175

On recovery of $198, and an equal amount as liquidated damages, where counsel requested a fee of $350 and defendant was not guilty of a willful, deliberate, or flagrant violation of the act.—Yunker v. Abbye Employment Agency, 32 N.Y.S.2d 715.

$150

(1) On recovery of $612.—Phelan v. Carstens, Linnekin & Wilson, 62 N.Y.S.2d 214, 187 Misc. 352.

(2) On recovery of $199, and an equal amount as liquidated damages. —Magann v. Long's Baggage Transfer Co., D.C.Va., 39 F.Supp. 742.

(3) On recovery of $132, and an equal amount as liquidated damages. —Rigney v. Wilson & Co., D.C.W.Va., 61 F.Supp. 801.

(4) On recovery of $103, in view of amount of work done and probability of appeal.—Rahgo v. Cities Service Oil Co., 33 N.Y.S.2d 42, 177 Misc. 1059, affirmed 50 N.Y.S.2d 945, 182 Misc. 623.

$125

On recovery of $456.—Tenaglia v. Tully & Di Napoli, D.C.N.Y., 43 F. Supp. 814.

$100

For services rendered before appeal, and $50 for services rendered on appeal, on recovery of $423 in liquidated damages.—O'Neil v. Brooklyn Sav. Bank, 46 N.Y.S.2d 631, 267 App.Div. 317, affirmed 56 N.E.2d 259, 293 N.Y. 666, affirmed 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005.

$75

(1) On verdict of $346.—Sermond v. Lotz, 47 A.2d 432, 24 N.J.Misc. 182.

(2) On recovery of $164, and an equal amount as liquidated damages. —Fox v. Armour & Co., 33 A.2d 582, 21 N.J.Misc. 262.

(3) On recovery of $103, and an equal amount as liquidated damages. —Clay v. Motor Freight Express, D. C.Pa., 52 F.Supp. 948.

77. Kan.—Sykes v. Lochmann, 132 P.2d 620, 156 Kan. 223, certiorari denied Lochmann v. Sykes, 63 S. Ct. 1165, 319 U.S. 753, 87 L.Ed. 1707.

Discretion held not abused

(1) In general.—E. C. Schroeder Co. v. Clifton, C.C.A.Okl., 153 F.2d 385, certiorari denied 66 S.Ct. 1351, 328 U.S. 858, 90 L.Ed. 1629, and 66 S.Ct. 1353, 328 U.S. 858, 90 L.Ed. 1629, rehearing denied 67 S.Ct. 33, 329 U.S. 821, 91 L.Ed. 699—E. H. Clarke Lumber Co. v. Kurth, C.C.A. Or., 152 F.2d 914.

(2) Award of $1,000 as attorney's fees, in action in which a judgment for $13,948.04 was recovered, was not unreasonable.—Agnew v. Johnson, 176 S.W.2d 489, 352 Mo. 222.

(3) Where total amount of judgment was $4,938.36, trial court did not abuse its discretion in rendering an additional judgment against employer for attorneys' fees in the sum of $2,000.—Sykes v. Lochmann, 132 P.2d 620, 156 Kan. 223, certiorari denied Lochmann v. Sykes, 63 S.Ct. 1165, 319 U.S. 753, 87 L.Ed. 1707.

(4) $7,000 was a reasonable attorney's fee where employees recovered $18,630.—Skidmore v. John J. Casale, Inc., C.C.A.N.Y., 160 F.2d 527.

(5) In action under Fair Labor Standards Act where first attorney obtained a default judgment for overtime amounting to $823.00 and second attorney thereafter represented plaintiff, allowance of total fee for $751.40 without any attempt to allocate it between the attorneys did no constitute an abuse of discretion. —Ferraro v. Arthur M. Rosenberg Co. of New Haven, Conn., C.C.A. Conn., 156 F.2d 212.

78. **Fees held inadequate**

(1) Allowance of $100 attorney's fees, to plaintiff in suit in which amount of recovery was about $900, was increased to $200, in view of services performed.—Barrineau v. Carolina Milling Co., D.C.S.C., 52 F. Supp. 197.

(2) Award of $750 as fees for plaintiff's attorneys in action resulting in recovery of more than $10,000 was inadequate, and judgment was modified by increasing attorney's fees to $1,250.—Greenberg v. Arsenal Bldg. Corporation, C.C.A.N.Y., 144 F. 2d 292, affirmed 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

Fees held not inadequate

(1) $500 attorney's fees plus $300 in event of appeal was not so grossly inadequate as to constitute an abuse of discretion.—E. C. Schroeder Co. v. Clifton, C.C.A.Okl., 153 F.2d 385, certiorari denied 66 S.Ct. 1351, 328 U.S. 858, 90 L.Ed. 1629, and 66 S. Ct. 1353, 328 U.S. 858, 90 L.Ed. 1629, rehearing denied 67 S.Ct. 33, 329 U. S. 821, 91 L.Ed. 699.

(2) Where $400 allowed as attorney's fees exceeded the amount of overtime compensation recovered, only four witnesses were called in the case, and there was practically no dispute in the evidence, the fee allowed was not inadequate compensation for services both in District Court and on appeal.—Mid-Continent Petroleum Corp. v. Keen, C.C.A.Iowa, 157 F.2d 310.

(3) Where plaintiff's attorney obtained a judgment for $375.10 in municipal court of the city of New York and counsel fees of $250, and obtained an affirmance of that judgment after modification of the appellate term with an additional fee of $150, plaintiff's counsel was denied an additional fee for services in securing an affirmance in the appellate division.—Koerner v. Associated Linen Laundry Suppliers, 62 N.Y.S.2d 774, 270 App.Div. 986.

(4) The allowance of $250 for attorney's fees to employee recovering $629.72 for overtime compensation and an equal amount for liquidated damages was not so clearly insufficient as to amount to an injustice, but would be increased by an additional $250 for services necessary in connection with employer's appeal, where allowance was not intended to cover services beyond trial court.—Dumas v. King, C.C.A.Ark., 157 F.2d 463.

79. **Fees held excessive**

(1) Amount awarded as attorney's fees was reduced from approximately sixty-five per cent of wages recovered to an allowance of ten per cent of total recovery, in view of circumstances.—Fiedler v. Potter, 172 S.W.2d 1007, 180 Tenn. 176.

(2) Where judgments for two employees were for $1,030.20 and for $1,626.00, and case was a matter of first impression, so as to entail greater labor in preparation, but attorneys for wage and hour division aided in preparation of briefs and argument of all preliminary matters in the trial court, an aggregate allowance of $750 for attorney's fees was excessive, and the most that could reasonably have been allowed was $450.—Niehaus v. Joseph Greenspon's Son Pipe Corporation, 164 S. W.2d 180, 237 Mo.App. 112.

Fees held not excessive

(1) In general.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W. 2d 881, 237 Mo.App. 1241.

(2) Where action was brought in behalf of more than fifty separate claimants and most of them recovered, award of $750 as attorneys' fees was not objectionably excessive notwithstanding aggregate amount of overtime compensation and liquidated damages and attorneys' fees was $1,295.92.—Mid-Continent Pipe Line Co. v. Hargrave, C.C.A.Okl., 129 F.2d 655.

§ 160(12). —— Damages and Amount of Recovery

In actions by an employee under a statute regulating wages or the payment thereof, plaintiff is entitled to recover earned wages and any additional sum or penalty provided for by the statute.

In an action by an employee to enforce a statute regulating wages or the payment thereof, plaintiff is entitled to recover any earned wages that may be due and owing under, or apart from, the statute, plus any additional sum or penalty in so far as the statute may provide therefor.[80] In actions under the Fair Labor Standards Act plaintiff will be granted recovery not only for the amount of unpaid minimum wages and overtime compensation due, but also for liquidated damages.[81] In an action for earned wages brought under a statute providing that, on employer's failure to pay wages on demand on employee's discharge or resignation, the employer shall be liable for full wages from the time of such demand until payment or tender of the amount due, the employee can recover the statutory penalty only up to the date when the employer tendered payment.[82] A public employee suing for the difference between the wages received and the wages he was entitled to at the prevailing rate pursuant to statute is entitled to recover only from the time of filing his complaint with the proper fiscal officer.[83]

The amount of the recovery granted in an action for unpaid minimum wages or overtime wages under a statute providing for minimum and overtime wages,[84] such as the Fair Labor Standards Act,[85] should be in accord with the proof, plaintiff being entitled to recover overtime pay under some statutes, at the rate of one and one-half times his regular hourly rate, for each hour worked in excess of forty hours in each week.[86] Since the rule that precludes

80. La.—Hazel v. Robinson & Young, 174 So. 105, 187 La. 51.

81. U.S.—Birbalas v. Cuneo Printing Industries, C.C.A.Ill., 140 F.2d 826—Straughn v. Schlumberger Well Surveying Corp., D.C.Tex., 72 F.Supp. 511—Rigney v. Wilson & Co., D.C.W.Va., 61 F.Supp. 801—Lorber v. Rosow, D.C.Conn., 58 F. Supp. 341—Clay v. Motor Freight Express, D.C.Pa., 52 F.Supp. 948—Cushway v. Stork Engineering Co., D.C.Mich., 51 F.Supp. 568, affirmed C.C.A., 142 F.2d 463—Cohn v. Decca Distributing Corporation, D.C. Pa., 50 F.Supp. 270—Klotz v. Ippolito, D.C.Tex., 40 F.Supp. 422—Morgan v. Atlantic Coast Line R. Co., D.C.Ga., 32 F.Supp. 617.

Ill.—Orminski v. Hyland Elec. Supply Co., 62 N.E.2d 14, 326 Ill.App. 392.

N.Y.—Cassone v. Wm. Edgar John & Associates, 57 N.Y.S.2d 169, 185 Misc. 573—Mabee v. White Plains Pub. Co., 41 N.Y.S.2d 534, 180 Misc. 8, reversed on other grounds 45 N.Y.S.2d 479, 267 App.Div. 284, affirmed 58 N.E.2d 520, 293 N.Y. 781, motion denied 60 N.E.2d 848, 294 N.Y. 701, reversed on other grounds 66 S.Ct. 511, 327 U.S. 178, 90 L.Ed. 607—Hewlett v. Del Baiso Const. Corporation, 40 N.Y.S.2d 224, 179 Misc. 856, reversed on other grounds 43 N.Y.S.2d 650, 180 Misc. 81, appeal denied Hewlett v. Del Balso & Sprague, 44 N.Y.S.2d 587, 266 App.Div. 922—Quest v. George A. Bowman, Inc., 64 N.Y.S. 2d 60—Schneider v. Sports Vogue, 35 N.Y.S.2d 341.

Liquidated damages on violation of Fair Labor Standards Act see supra § 151 (34).

Settlement not at issue

In action against employer for alleged violation of Fair Labor Standards Act, court refused to allow double damages to employees under prior settlement between parties, where such settlement was not at issue in the action, and no claims for such damages were made until court was ready to write opinion on issues submitted.—Anderson v. Mt. Clemens Pottery Co., D.C.Mich., 60 F.Supp. 146, reversed on other grounds, C.C.A., Mt. Clemens Pottery Co. v. Anderson, 149 F.2d 461, reversed on other grounds 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

82. La.—Neeley v. Magnolia Gas Co., 131 So. 589, 15 La.App. 224—Whitehead v. E. J. Deas Co., 118 So. 856, 9 La.App. 47.

Sufficiency of tender of wages

Discharged employee was entitled to recover earned wages, with statutory penalties, for nonpayment thereof, only until date of tender of wages earned, not until date of payment or tender of both wages and penalties.—Hazel v. Robinson & Young, 174 So. 105, 187 La. 51.

Improper demand

Defendant's tender of correct amount due under employment contract after repeated demands for greater sum was held not to subject defendant to statutory penalties for time between first demand and tender.—Duke v. Ford, Bacon & Davis, 138 So. 675, 19 La.App. 27.

83. N.Y.—Kaufman v. City of New York, 61 N.Y.S.2d 779.

Filing of complaint as condition precedent to employee's right of action see supra § 160 (3).

84. Ky.—W. W. Mac Co. v. Teague, 180 S.W.2d 387, 297 Ky. 475.

85. U.S.—Cohn v. Decca Distributing Corporation, D.C.Pa., 50 F. Supp. 270.

N.Y.—Easley v. Edgord Realty Corp., 59 N.Y.S.2d 241, 270 App.Div. 184, affirmed 68 N.E.2d 873, 296 N.Y. 579.

Verdict held not excessive

In action under Fair Labor Standards Act to recover for unpaid minimum wages and overtime, even if there was evidence that plaintiff performed certain duties on purely intrastate business, verdict would not be set aside as grossly excessive because exact time spent by plaintiff in acting as watchman for goods in interstate commerce could not be separated from time spent in such duties as to intrastate commerce.—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241.

Erroneous computation by employee

When an employee sues for recovery of overtime compensation and liquidated damages under the Fair Labor Standards Act and in his complaint states the total amount claimed and it develops that the employee's computations were made on a mistaken and erroneous basis, and where there is no surprise so far as employer is concerned, court may allow recovery within amount claimed, computed on proper and correct basis.—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310.

86. U.S.—Lorber v. Rosow, D.C. Conn., 58 F.Supp. 341.

Ill.—Orminski v. Hyland Elec. Supply Co., 62 N.E.2d 14, 326 Ill.App. 392.

N.Y.—Quest v. George A. Bowman, Inc., 64 N.Y.S.2d 60.

the recovery of uncertain and speculative damages applies only to situations where the fact of damage is itself uncertain, as discussed in Damages § 28, recovery under the Fair Labor Standards Act will not be precluded where the uncertainty lies only in the amount of damages arising from the statutory violation by the employer.[87] It has been held that collective bargaining agreements under which employees received wage increases should not be considered in mitigation of damages.[88]

Interest. The general rules governing the allowance of interest as damages in civil actions have been held to apply in actions to enforce statutes regulating wages or the payment thereof, in the absence of provisions in the statute to the contrary.[89] Since the purpose of the provision of the Fair Labor Standards Act allowing liquidated damages was to grant compensation for delay in payment of sums due under the act,[90] an employee who obtains a judgment for unpaid minimum or overtime wages and liquidated damages under the act is not entitled to interest on the amount so recovered.[91] However, the judgment itself will bear interest at the legal rate from the date of the judgment until it is paid.[92]

Credits or deductions. In determining the amount of recovery to be awarded, the employer is entitled to be credited with payments made which the employee's claim has not recognized;[93] and it has been held that in an action under the Fair Labor Standards Act the amount of such payments should be deducted from the amount of wages due before any calculation of the additional amount as liquidated damages,[94] although it has also been held that the deduction should be made from the combined total

Computing regular hourly rate see supra § 151 (26).

87. U.S.—Anderson v. Mt. Clemens Pottery Co., Mich., 66 S.Ct. 1187, 328 U.S. 680, 90 L.Ed. 1515, rehearing denied 67 S.Ct. 25, 329 U.S. 822, 91 L.Ed. 699.

Employer keeping inadequate records

Where employer sued for unpaid minimum wages or unpaid overtime compensation has kept inadequate records, and employee has produced sufficient evidence to show amount of work for which employee was not properly compensated as a matter of just and reasonable inference, the rule precluding recovery of uncertain and speculative damages does not prevent the awarding of damages to employee.—Anderson v. Mt. Clemens Pottery Co., supra.

88. U.S.—Skidmore v. John J. Casale, Inc., D.C.N.Y., 66 F.Supp. 282.

89. Wash.—Ferber v. Wisen, 82 P. 2d 139, 195 Wash. 603.

Period for which allowed

(1) In action by hotel waitresses to recover wages due under Minimum Wage Law, where none of the parties supposed that anything was due during the course of the employment, and waitresses made excessive demands for wages, allowing interest from the date of judgment only was not error.—Ferber v. Wisen, supra.

(2) In an action for the difference between wages received and wages at the prevailing rate, pursuant to statute, laborers were entitled to interest from date of original determinations by city comptroller of back wages due such laborers, notwithstanding absence of provision in statute for allowance of interest on back wages found due.—Giannettino v. McGoldrick, 66 N.E.2d 57, 295 N.Y. 208.

90. U.S.—Fletcher v. Grinnell Bros., D.C.Mich., 64 F.Supp. 778.

Allowance of interest on interest

To allow such recovery would have effect of giving employee double compensation for damages arising from delay in payment and would tend to produce undesirable result of allowing interest on interest.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005—Dize v. Maddrix, 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296.

91. U.S.—Brooklyn Sav. Bank v. O'Neil, N.Y., 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296, rehearing denied 65 S.Ct. 1189, 325 U.S. 893, 89 L.Ed. 2005—Dize v. Maddrix, 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—Arsenal Bldg. Corp. v. Greenberg, 65 S.Ct. 895, 324 U.S. 697, 89 L.Ed. 1296—J. F. Fitzgerald Const. Co. v. Pedersen, N.Y., 65 S.Ct. 892, 324 U.S. 720, 89 L.Ed. 1316—Bell v. Block, C.C.A.Ky., 152 F.2d 962—Kreeft v. R. W. Bates Piece Dye Works, C.C.A.N.Y., 150 F.2d 818—Phillips v. Star Overall Dry Cleaning Laundry Co., C.C.A. N.Y., 149 F.2d 416, certiorari denied All Service Laundry Corp. v. Phillips, 66 S.Ct. 677, 327 U.S. 780, 90 L.Ed. 1008, rehearing denied 66 S.Ct. 815, 327 U.S. 817, 90 L.Ed. 1040—Colquette v. Crossett Lumber Co., C.C.A.Ark., 149 F.2d 116—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F.Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310.

N.Y.—Caperna v. Williams-Bauer Corp., 57 N.Y.S.2d 254, 185 Misc. 687, affirmed 58 N.Y.S.2d 876, 186 Misc. 27—Creno v. Caruso Products Co., 60 N.Y.S.2d 134—Avena v. Metropolitan Life Ins. Co., 55 N.Y.S.2d 413.

In some early cases, interest was allowed.

U.S.—Lorber v. Rosow, D.C.Conn., 58 F.Supp. 341—Rigopoulos v. Kervan, D.C.N.Y., 53 F.Supp. 829, conforming to C.C.A., 140 F.2d 506, 151 A.L.R. 1126.

N.Y.—Schanck v. Lehigh Val. R. R., 52 N.Y.S.2d 491—Schneider v. Sports Vogue, 35 N.Y.S.2d 341.

92. U.S.—Keen v. Mid-Continent Petroleum Corp., D.C.Iowa, 63 F. Supp. 120, affirmed, C.C.A., Mid-Continent Petroleum Corp. v. Keen, 157 F.2d 310.

93. U.S.—Morgan v. Atlantic Coast Line R. Co., D.C.Ga., 32 F.Supp. 617.

Reasonable cost of facilities furnished

While wages, under the statute, include the reasonable cost, as determined by the administrator, of furnishing the employee with board, lodging, or other facilities, if such facilities are customarily furnished, where employer did not apply to administrator for a determination of reasonable cost of furnishing employee with facilities, such as ice water, transportation, living quarters and fuel, in employee's action for recovery of back wages employer could not claim credit for reasonable cost of furnishing such facilities.—Morgan v. Atlantic Coast Line R. Co., supra.

94. U.S.—Bumpus v. Continental Baking Co., C.C.A.Tenn., 124 F.2d 549, 140 A.L.R. 1258, certiorari denied Continental Baking Co. v. Bumpus, 62 S.Ct. 1305, 316 U.S. 704, 86 L.Ed. 1772—Corey v. Detroit Steel Corporation, D.C.Mich., 52 F.Supp. 138.

N.Y.—Hewlett v. Del Balso Const. Corporation, 40 N.Y.S.2d 224, 179

after the wages and liquidated damages have been computed.[95] While it has been held that a bonus paid to the employee should be treated as an advance on the additional wages due the employee,[96] it has also been held that an employer's liability for additional compensation cannot be charged against such bonus.[97]

§ 160(13). Criminal Prosecutions

Except in so far as the specific statute may otherwise provide, the general rules of criminal procedure apply in prosecutions for offenses against statutes regulating wages or the payment thereof.

Offenses against statutes regulating wages or the payment thereof and providing for criminal liability for their violation should be prosecuted under, and in accordance with, the general rules of criminal procedure and the provisions of the statute.[98] Attorneys of the administrator of the wage and hour division do not have the power or duty to institute and prosecute criminal prosecutions for violation of the Fair Labor Standards Act;[99] and, likewise, a state administrative official, even though authorized by the administrator to investigate the employer's business, lacks the authority to prosecute an employer for violation of the act.[1]

Indictment or information. In criminal prosecutions for violations of statutes regulating wages and the payment thereof,[2] such as the Fair Labor Standards Act,[3] or statutes penalizing the failure to pay

Misc. 856, reversed on other grounds 43 N.Y.S.2d 650, 180 Misc. 81, appeal denied Hewlett v. Del Balso & Sprague, 44 N.Y.S.2d 587, 266 App.Div. 922.

Payment on release

Where fifty dollars was paid employee and inserted in release on his discharge to cover any overtime employee had worked in excess of fifty-four hours per week as provided in contract of employment, and thereafter district court found that employee was entitled to one hundred sixteen dollars and six cents for overtime in excess of fifty-four hours per week under Fair Labor Standards Act, which overtime had not been reported to employer, district court properly deducted the fifty dollars already paid and then allowed a like sum as liquidated damages under the act, as against employee's contention that district court should have first doubled the one hundred sixteen dollars and six cents and then deducted the fifty dollars.—Bergschneider v. Peabody Coal Co., C.C.A.Ill., 142 F.2d 784.

Straight time paid for overtime work

Where employee had received for each week straight time pay at regular rate for each hour worked, including hours over forty, he was entitled to recover one-half regular rate for each hour worked over forty.—Lorber v. Rosow, D.C.Conn., 58 F.Supp. 341.

95. U.S.—Harrington v. Empire Const. Co., D.C.Md., 71 F.Supp. 324—Barrineau v. Carolina Milling Co., D.C.S.C., 52 F.Supp. 197.

96. N.Y.—Kaufman v. City of New York, 61 N.Y.S.2d 779.

Action for prevailing wage

As respects amount recoverable in action for difference between wages received and prevailing rate, cost of living bonus was to be treated as advance on account of prospective wage differentials.—Kaufman v. City of New York, supra.

97. Ill.—Winer v. Eckerling, 55 N.E.2d 876, 323 Ill.App. 421.

Action for overtime compensation

Where employer paid employee a bonus it belonged to him, and a liability assessed against employer under the Fair Labor Standards Act for unpaid overtime compensation could not be charged against bonus.—Winer v. Eckerling, supra.

98. Cal.—Ex parte Samaha, 19 P.2d 839, 130 Cal.App. 116.

Criminal liability under Fair Labor Standards Act see supra § 151 (34).

Under statutes as to time of payment

(1) Prosecution for failure to pay discharged employees' wages may be maintained without civil judgment having been obtained against employer.—Ex parte Samaha, 19 P.2d 839, 130 Cal.App. 116.

(2) Even though a provision of the law gives an employer who is unable to pay the wages as required a period of time within which he may comply with an alternative requirement, an indictment may be returned before the expiration of such time when it is alleged that the employer was able to pay as required by the statute.—Commonwealth v. Hillside Coal Co., 58 S.W. 441, 109 Ky. 47, 22 Ky.L. 559—39 C.J. p 229 note 99.

Under anti-tipping statute

Where a statute in one sentence imposes a penalty on the company, its manager, officer, or agent in charge, for allowing a tip to be given, and in a succeeding sentence imposes a penalty for failure to post a notice of the act only on the company, an indictment against a manager for failure to post the act cannot be upheld.—State v. Angelo, 68 So. 918, 109 Miss. 624, Ann.Cas.1918D 237.

99. U.S.—Connecticut Importing Co. v. Perkins, D.C.Conn., 35 F.Supp. 414.

The word "litigation," as used in the Fair Labor Standards Act providing that the administrator may at his option appoint attorneys who may represent the administrator in any "litigation" which he may bring under certain sections of the act and that all such "litigation" is subject to direction and control of the attorney general, refers to civil actions and not to criminal proceedings.—Sunshine Mining Co. v. Carver, D.C.Idaho, 34 F.Supp. 274.

National Industrial Recovery Act

A code is enforceable under the National Industrial Recovery Act only by suit in equity to restrain violations and by criminal prosecutions, which only the United States district attorneys can institute.—Carmody v. L. L. Coryell Oil Co., 276 N.W. 383, 133 Neb. 661.

1. U.S.—Connecticut Importing Co. v. Perkins, D.C.Conn., 35 F.Supp. 414.

2. U.S.—U. S. v. Carbone, D.C.Mass., 56 F.Supp. 343.

Pa.—Commonwealth v. Muller, 31 Pa. Dist. & Co. 372, 39 Lack.Jur. 55.

Minimum wage law as to public works

Ariz.—Borderland Const. Co. v. State, 68 P.2d 207, 49 Ariz. 523.

Kick-Back Act

Indictments charging defendants with violating the so-called Kick-Back Act, which failed to charge that defendants were either employees or persons alleged to have been vested by the employer with power to fix and terminate the employer-employee status, were insufficient.—U. S. v. Carbone, D.C.Mass., 56 F.Supp. 343.

Statute requiring bond for payment of wages

Ind.—Bell v. State, 27 N.E.2d 362, 217 Ind. 323.

3. U.S.—U. S. v. Dasher, D.C.Pa., 51 F.Supp. 805.

wages, or to pay by a specified time,[4] the indictment, information, or other form of accusation should be so drawn as to charge an offense under the act, and must allege distinctly all the essential requisites that constitute the offense, so as to apprise accused of the nature of the charge against him.[5] However, the indictment or information need not allege immaterial matters;[6] nor need it allege matters of evidence,[7] although under a motion for a bill of particulars some evidentiary matter may be required to enable defendants to prepare their defenses more readily.[8] It has been held that the indictment does not have to negative matters of defense.[9]

In accordance with the rules relating to issues, proof, and variance in criminal prosecutions generally, the prosecution must prove every element of the offense alleged and all other material allegations of the indictment, information, or complaint,[10] but need

Indictments or informations held sufficient

(1) In general.—U. S. v. Barr & Bloomfield Shoe Mfg. Co., D.C.N.H., 35 F.Supp. 75.

(2) Indictments charging violation in the production or sale of commodities for transmission in interstate commerce were sufficient, notwithstanding indictments did not charge that the defendants were engaged in interstate commerce.—U. S. v. Walters Lumber Co., D.C.Fla., 32 F.Supp. 65.

4. Cal.—Ex parte Trombley, App., 178 P.2d 510, review denied 178 P. 2d 513.

Accusations held sufficient

(1) In general.—Ex parte Sears, 30 P.2d 571, 137 Cal.App. 308—Sears v. Superior Court in and for Calaveras County, 24 P.2d 842, 133 Cal.App. 704.

(2) Allegations in complaint in misdemeanor prosecution for failure to pay wages in violation of labor code, that defendant had ability to pay wages which were owing to, and were demanded by, employee who quit, and that defendant refused to pay with intent to delay and defraud employee, were sufficient to confer jurisdiction on justice court, notwithstanding absence of allegation that defendant falsely denied amount or validity of wage claim or that wage was due.—Ex parte Trombley, 178 P.2d 510, review denied 178 P.2d 513.

(3) Count of complaint alleging that employer on certain date continued to employ one or more workers in and about a sawmill without maintaining semimonthly or two monthly pay days, and particularly without paying such employees in full for their services for previous semimonthly period on or before such date, and count of complaint alleging that employer failed to post and keep posted in a conspicuous place at place of employment or elsewhere where employees could see it, or at office or nearest agency for payment kept by employer, any notice specifying any regular pay day or pay days, was held sufficiently to allege violation of provisions of semimonthly pay day law.—Ex parte Moffett, 64 P.2d 1190, 19 Cal.App.2d 7.

Accusation held insufficient

A complaint in an action for a violation of such a statute which fails to allege that the wages were due at the time when, it is alleged, defendant neglected to pay them, is fatally defective.—Commonwealth v. Dunn, 49 N.E. 110, 170 Mass. 140.

5. U.S.—U. S. v. Dasher, D.C.Pa., 51 F.Supp. 805—U. S. v. F. W. Darby Lumber Co., D.C.Ga., 32 F.Supp. 734, reversed on other grounds 61 S.Ct. 451, 312 U.S. 100, 657, 85 L. Ed. 609, 132 A.L.R. 1430.

6. U.S.—U. S. v. Southern Advance Bag & Paper Co., D.C.La., 46 F. Supp. 105, affirmed, C.C.A., Southern Advance Bag & Paper Co. v. U. S., 133 F.2d 449.

Indictment or information held sufficient

An indictment charging violations of Fair Labor Standards Act, in that defendants transported pulpwood produced for interstate commerce and in the production of which producers paid employees substandard wages, was sufficient without an allegation that defendants caused the transporting and delivering through others, or whether by rail or truck. —U. S. v. Southern Advance Bag & Paper Co., D.C.La., 46 F.Supp. 105, affirmed, C.C.A., Southern Advance Bag & Paper Co. v. U. S., 133 F.2d 449.

7. U.S.—U. S. v. Southern Advance Bag & Paper Co., D.C.La., 46 F. Supp. 105, affirmed, C.C.A., Southern Advance Bag & Paper Co. v. U. S., 133 F.2d 449.

Failure to set forth names of employees

Counts of indictment charging accused with violations of the Fair Labor Standards Act were not demurrable for failure to set forth the names of employees deprived of proper wage payments.—U. S. v. Dasher, D.C.Pa., 51 F.Supp. 805—U. S. v. Southern Advance Bag & Paper Co., D.C.La., 46 F.Supp. 105, affirmed, C.C.A., Southern Advance Bag & Paper Co. v. U. S., 133 F.2d 449.

8. U.S.—U. S. v. Southern Advance Bag & Paper Co., D.C.La., 46 F. Supp. 105, affirmed, C.C.A., Southern Advance Bag & Paper Co. v. U. S., 133 F.2d 449.

Extent to which motion granted

Where indictment charged violations of Fair Labor Standards Act, in that defendants transported pulpwood produced for interstate commerce, and in the production of which producers paid employees substandard wages, defendamts' motion for bill of particulars would be granted to extent of requiring giving of names of contractors or sellers who produced pulpwood, but government would not be required to give names of all employees who allegedly received substandard wages.—U. S. v. Southern Advance Bag & Paper Co., D.C.La., 46 F.Supp. 105, affirmed, C.C.A., Southern Advance Bag & Paper Co. v. U. S., 133 F.2d 449.

9. Ky.—Commonwealth v. Reinecke Coal Min. Co., 79 S.W. 287, 117 Ky. 885, 25 Ky.L. 2027.

Employee's presence, or demand for wages

Under a proviso that, if at any time of payment any servant or employee shall be absent from his place of labor, he shall be entitled to such payment at any time thereafter on demand, the indictment need not allege employee's presence, or if absent, his demand for wages on return, since indictment need not allege a state of facts which may be relied on as a defense.—Commonwealth v. Reinecke Coal Min. Co., supra.

10. N.Y.—People, on Complaint of Falzia, v. Meyer, 3 N.Y.S.2d 870, 167 Misc. 287.

Under kick-back statute

In prosecution for violation of "kick-back" statute, even though wage agreement allegedly violated need not recite that wages constitute the prevailing rate, mere showing that agreement specifies a particular rate and that a "kick-back" was received is not sufficient, and prevailing rate of wages must be proved.—People, on Complaint of Falzia, v. Meyer, supra.

Notice of violation

Employer's conviction for violating act requiring biweekly payment of wages was held reversible error on

not prove immaterial or unnecessary matter.[11]

Evidence. In accordance with general rules in criminal prosecutions, as discussed in Criminal Law §§ 566–599, presumptions and inferences arising from the facts and circumstances of the case will be indulged;[12] and the burden is on the prosecution to establish the existence of each of the essential elements of the offense charged.[13] In order to be admissible, the evidence offered must be competent, relevant, and material to the issues involved.[14] The prosecution must establish beyond a reasonable doubt the guilt of one accused of a violation of a statute regulating wages or the payment thereof,[15] such as the Fair Labor Standards Act,[16] statutes penalizing the failure to pay wages, or to pay by a specified time,[17] statutes providing for the payment of prevailing wages to public employees or employees on public works,[18] or statutes prohibiting a kick-back, rebate, or refund of wages.[19]

Trial. Where accused is charged with specific violations of a statute regulating wages or the payment thereof, he is entitled to be tried only for those offenses.[20] All the material facts and circumstances should be considered;[21] and immaterial matters

failing to prove notice of violation to employer.—State v. Douglas, 141 A. 561, 6 N.J.Misc. 439.

11. U.S.—U. S. v. Ewald Iron Co., D.C.Ky., 67 F.Supp. 67.

Under Fair Labor Standards Act

Proof that violation of Fair Labor Standards Act was committed with a bad purpose is unnecessary to establish a "willful" violation in view of remedial nature of act and public policy which it embodies, but a "willful" violation denotes an intentional and voluntary commission of a wrongful act.—U. S. v. Ewald Iron Co., supra.

12. U.S.—U. S. v. Ewald Iron Co., supra.

Overtime worked

Lack of accurate records of hours per week actually worked by employees in defendant's iron furnaces and mills produced a reasonable inference that all employees named in counts of information charging willful making of false reports of hours of work had engaged in activities constituting work of which defendant as employer received the benefits and for which defendant did not compensate the employees in accordance with provisions of Fair Labor Standards Act.—U. S. v. Ewald Iron Co., supra.

13. U.S.—U. S. v. Southern Advance Bag & Paper Co., D.C.La., 46 F. Supp. 105, affirmed Southern Advance Bag & Paper Co. v. U. S., 133 F.2d 449.

Production of goods for interstate commerce

U.S.—U. S. v. Southern Advance Bag & Paper Co., D.C.La., 46 F.Supp. 105, affirmed, C.C.A., Southern Advance Bag & Paper Co. v. U. S., 133 F.2d 449.

14. U.S.—U. S. v. Modern Reed & Rattan Co., C.C.A.N.Y., 159 F.2d 656.

Cal.—People v. Porter, 288 P. 22, 107 Cal.App.Supp. 782.

Evidence held admissible

U.S.—Darby v. U. S., C.C.A.Ga., 132 F.2d 928—Florida Fruit & Produce v. U. S., C.C.A.Fla., 117 F.2d 506.

Evidence held inadmissible

(1) Under the provision of the Fair Labor Standards Act that no person shall be imprisoned except for an offense committed after the conviction of such person for a prior offense under the act, evidence of a former conviction is not admissible, since it is no part of the specific offense but is only a matter for the consideration of the judge in imposing the sentence.—U. S. v. Modern Reed & Rattan Co., C.C.A.N.Y., 159 F.2d 656.

(2) In prosecution of employer for violation of minimum wage law, rejection of testimony of highway commission's employee as to construction of classifications made by commission, offered to show lack of intent to violate law, was held proper, on ground that intent was immaterial and such construction of classifications was made after commission of act charged.—Borderland Const. Co. v. State, 68 P.2d 207, 49 Ariz. 523.

15. Ind.—Bell v. State, 27 N.E.2d 362, 217 Ind. 323.

Evidence held sufficient

N.Y.—People, on Information of Siegel, v. Weingrad, 26 N.Y.S.2d 841.

Evidence held insufficient

(1) In general.—Bell v. State, 27 N.E.2d 362, 217 Ind. 323.

(2) To sustain conviction for violation of statute prohibiting receipt or acceptance of gratuities by agent under agreement to act in some particular manner in relation to business of principal, employer or master.—People v. Graf, 24 N.Y.S.2d 683, 261 App.Div. 188.

16. U.S.—U. S. v. Southern Advance Bag & Paper Co., D.C.La., 46 F. Supp. 105, affirmed Southern Advance Bag & Paper Co. v. U. S., 133 F.2d 449.

Evidence held sufficient

(1) In general.—Hertz Drivurself Stations v. U. S., C.C.A.Mo., 150 F.2d 923—Southern Advance Bag & Paper Co. v. U. S., C.C.A.La., 133 F.2d 449.

(2) To show overtime work.—U. S. v. Ewald Iron Co., D.C.Ky., 67 F. Supp. 67.

(3) To sustain conviction for violating provision prohibiting discharge of employee because of filing of complaint for violation of the act.—Meek v. U. S., C.C.A.Tenn., 136 F. 2d 679.

Evidence held insufficient

U.S.—U. S. v. Ewald Iron Co., D.C. Ky., 67 F.Supp. 67.

17. **Evidence held sufficient**

Cal.—Ex parte Samaha, 19 P.2d 839, 130 Cal.App. 116.

Evidence held insufficient

N.Y.—People v. Gerhardt, 31 N.Y.S. 2d 34, 263 App.Div. 742—People v. Grass, 11 N.Y.S.2d 803, 257 App. Div. 1.

18. N.Y.—People v. Herson, 8 N.Y. S.2d 887, 255 App.Div. 645, reargument denied People v. Abisror, 10 N.Y.S.2d 677, 256 App.Div. 932, reversed on other grounds People v. Friedlander, 21 N.E.2d 498, 280 N. Y. 437, motion denied 22 N.E. 873, 281 N.Y. 678.

Evidence held sufficient

N.Y.—People v. Herson, 8 N.Y.S.2d 887, 255 App.Div. 645, reargument denied People v. Abisror, 10 N.Y.S. 2d 677, 256 App.Div. 932, reversed on other grounds People v. Friedlander, 21 N.E.2d 498, 280 N.Y. 437, motion denied 22 N.E.2d 873, 281 N.Y. 678.

19. **Evidence held sufficient**

(1) In general.—People, on Complaint of Falzia, v. Meyer, 3 N.Y.S. 2d 870, 167 Misc. 287.

(2) To establish a prima facie case.—People, on Complaint of Rabinowitz, v. Desowitz, 2 N.Y.S.2d 87, 166 Misc. 1.

Evidence held insufficient

N.Y.—People v. Lofaro, 10 N.Y.S.2d 745, 256 App.Div. 1001.

Wash.—State v. Carter, 142 P.2d 403, 18 Wash.2d 590.

20. U.S.—U. S. v. Modern Reed & Rattan Co., C.C.A.N.Y., 159 F.2d 656.

21. U.S.—U. S. v. Ewald Iron Co., D. C.Ky., 67 F.Supp. 67.

need not be determined.[22] Where the evidence is conflicting or doubtful, questions of fact ordinarily are for the jury,[23] under proper instructions by the court.[24]

Sentence and punishment. Where the penalty or punishment for a violation of a statute regulating wages or the payment thereof is prescribed by the statute itself, such prescription is controlling,[25] and provisions for punishment of crimes generally are inapplicable.[26] Under the provision of the Fair Labor Standards Act to that effect, no person is to be imprisoned under the act except for an offense committed after the conviction of such person for a prior offense under the act,[27] and a former conviction is a matter for the consideration of the judge alone, in imposing sentence;[28] but it has been held that an imprisonment cannot be imposed except in those cases where a second offense has not only been committed, but where the indictment or information charges the fact.[29]

III. MEDICAL, SURGICAL, AND HOSPITAL ATTENTION; RELIEF FUNDS

§ 161. Medical or Surgical Attendance

An employer's duties and liabilities in connection with supplying its employees with medical attention are discussed infra §§ 162–166.

Examine Pocket Parts for later cases.

§ 162. —— Duty of Employer in General

In the absence of statute or contract an employer is not required to supply medical services to its employees except in an emergency where it is imperatively demanded to save life or serious injury.

In the absence of a statutory or contractual obligation there is, as a general rule, no duty resting on the employer to provide surgical or medical attendance or medicine for an employee who is injured or becomes ill while in its employment,[30] even though such injury or illness results from the employer's

The custom of employees to come to plant long before scheduled time for beginning of their work was one of the realities of the industry in the light of which employer's intent and attitude in computing employees' time should be considered in prosecution for willfully violating Fair Labor Standards Act.—U. S. v. Ewald Iron Co., supra.

22. U.S.—U. S. v. Ewald Iron Co., supra.

Extent of overtime worked

In prosecution for violations of Fair Labor Standards Act, determination of extent of overtime work for which defendant's employees were not compensated pursuant to act was unnecessary, and fact that employees were piece workers and were compensated for amount of work done was immaterial.—U. S. v. Ewald Iron Co., supra.

23. U.S.—U. S. v. Walters Lumber Co., D.C.Fla., 32 F.Supp. 65.
Ariz.—Borderland Const. Co. v. State, 68 P.2d 207, 49 Ariz. 523.

Evidence held to present jury question

Evidence presented question for jury as to whether defendant's alleged violations of Fair Labor Standards Act were willful, so as to be punishable under the act, where there were circumstances which tended to show that defendant made a plan to circumvent the act before it went into effect and suggested a similar plan to an employer of labor who logged defendant's sawmill.—Darby v. U. S., C.C.A.Ga., 132 F.2d 928.

24. U.S.—Darby v. U. S., supra.

Instructions held proper or sufficient
U.S.—Darby v. U. S., supra.

25. N.Y.—People v. Grass, 11 N.Y.S. 2d 803, 257 App.Div. 1.

Imprisonment held unauthorized

In prosecution for violating provisions of Labor Law relating to payment of wages under statute prescribing as the only penalty a fine of not less than one hundred dollars or more than ten thousand dollars for each offense, lower court improperly imposed sentence of twenty days in workhouse.—People v. Grass, supra.

26. N.Y.—People v. Grass, supra.

Provision as to misdemeanors held inapplicable
N.Y.—People v. Grass, supra.

27. U.S.—U. S. v. Modern Reed & Rattan Co., C.C.A.N.Y., 159 F.2d 656.

The intention of this provision, it has been held, was to provide that there should be no imprisonment as part of the punishment, but only a fine.—U. S. v. Ridgewood Garment Co., D.C.N.Y., 44 F.Supp. 435.

28. U.S.—U. S. v. Modern Reed & Rattan Co., C.C.N.Y., 159 F.2d 656.

29. U.S.—U. S. v. Berkowitz, D.C. Mo., 45 F.Supp. 564.

30. Ky.—Barley's Adm'x v. Clover Splint Coal Co., 150 S.W.2d 670, 286 Ky. 218.
N.J.—**Corpus Juris cited in** Szabo v. Pennsylvania R. Co., 40 A.2d 562, 563, 132 N.J.L. 331.
N.C.—**Corpus Juris quoted in** Batton v. Atlantic Coast Line R. Co., 188 S.E. 383, 387, 210 N.C. 756.
Tex.—Atchison, T. & S. F. Ry. Co. v. Hix, Civ.App., 291 S.W. 281.
39 C.J. p 240 note 59.

Existence of ailment

A labor contractor employing convicts is not bound to make frequent inspection of the convicts for minor ailments as sore feet and ankles, having a right to assume that the convicts will make the matter known.—Pratt Consol. Coal Co. v. Bozeman, 68 So. 887, 192 Ala. 546.

Municipal employees

A city is under no legal duty to provide hospitalization or to pay for hospitalization for an injured policeman, and acts out of generosity in making such payments.—Goldwater v. Citizens Casualty Co. of New York, 7 N.Y.S.2d 242, affirmed 36 N.Y.S.2d 413.

Railway carrier owes no duty to provide medical treatment to employee who becomes sick in service.—Cortes v. Baltimore Insular Line, C.C.A.N.Y., 52 F.2d 22, reversed on other grounds 53 S.Ct. 173, 287 U.S. 367, 77 L.Ed. 368.

Injury not arising out of or in course of employment

Corporation was not liable to render medical assistance to employee injured outside of regular employment away from corporation's premises.—Wagner v. West Penn Power Co., 168 A. 478, 110 Pa.Super. 221.

Employee injured by third person

Employer owes no common-law liability to provide medical treatment for employee injured by third person.—Beekman v. Paskin, 264 N.Y.S. 213, 147 Misc. 563.

negligence,[31] except perhaps in a case in which the employee gives his services without compensation.[32]

It is the duty of the employer, however, to provide medical or surgical assistance in the case of an emergency where it is imperatively demanded to save life or to prevent further serious bodily injury.[33] Where in the course of his employment a servant suffers serious injury or is suddenly stricken down in a manner indicating immediate and emergent need of aid to save him from death or serious harm, the master, if present, is bound to take such reasonable measure or make such reasonable effort as may be practicable to relieve him[34] even though the master is not chargeable with fault in bringing about the emergency[35] or the injury occurred through the employee's own negligence.[36] Hence, it has been held that a railroad company in the absence of any contract obligation or a statute regulating the subject is under a legal duty to use reasonable care in furnishing medical aid and suitable attention to its employees who are injured in the course of their employment, although the injury may not have been caused by the negligence of the company,[37] and there is authority in behalf of extending this rule to all employers engaged in hazardous businesses.[38]

Reasonable care. Where an employer is under a duty imposed by law to supply attention and medical care to an ill or injured employee, it must use reasonable care in the discharge of such duty,[39] and its duty is fully discharged by the exercise of such care.[40] The master is not liable to an injured servant by reason of the fact that he is taken to a public hospital against his will where the master is not shown to have authorized such act,[41] nor is the master liable for the treatment of the injured employee at the hospital where it is not shown that such treat-

31. N.J.—Szabo v. Pennsylvania R. Co., 40 A.2d 562, 132 N.J.Law 331—Koviacs v. Edison Portland Cement Co., 128 A. 542, 3 N.J.Misc. 368.

32. Ga.—Evans v. Collier, 4 S.E. 264, 79 Ga. 315.
N.C.—**Corpus Juris quoted in** Batton v. Atlantic Coast Line R. Co., 188 S.E. 383, 387, 210 N.C. 756.

33. N.J.—Szabo v. Pennsylvania R. Co., 40 A.2d 562, 132 N.J.Law 331.
N.C.—**Corpus Juris quoted in** Batton v. Atlantic Coast Line R. Co., 188 S.E. 383, 388, 210 N.C. 756.
Okl.—Gypsy Oil Co. v. McNair, 64 P.2d 885, 179 Okl. 182.
39 C.J. p 240 note 63.

Duty coexistent with emergency
The duty arises out of strict necessity and urgent exigency; it arises with the emergency and expires with it.—Szabo v. Pennsylvania R. Co., 40 A.2d 562, 132 N.J.Law 331.

"First aid" and "prompt aid" must be furnished the injured employee.—Hunicke v. Meramec Quarry Co., Mo. App., 212 S.W. 345—39 C.J. p 241 note 66 [a], [b].

Assistance by members of employee's family
Employer must take reasonably necessary action to furnish injured employee with suitable medical aid, if there are no members of employee's family present who are capable of performing and do undertake to perform such service.—Stanley's Adm'r v. Duvin Coal Co., 36 S.W.2d 630, 237 Ky. 813.

34. Minn.—Wilke v. Chicago Great Western Ry. Co., 251 N.W. 11, 190 Minn. 89.
N.C.—**Corpus Juris quoted in** Batton v. Atlantic Coast Line R. Co., 188 S.E. 383, 388, 210 N.C. 756.
Tex.—Atchison, T. & S. F. Ry. Co. v. Hix, Civ.App., 291 S.W. 281.
39 C.J. p 240 note 61.

Notice
(1) The emergency requiring employer to provide medical or other assistance to employee rendered helpless to provide for his own care must arise in presence of employer, but presence of a superior employee in charge of particular work is sufficient to charge employer.—Szabo v. Pennsylvania R. Co., 40 A.2d 562, 132 N.J.Law 331.
(2) It must appear that the employer or his agent had, or by the exercise of due care would have had, notice that the employee was helpless and unattended.—Gypsy Oil Co. v. McNail, 64 P.2d 885, 179 Okl. 182.

35. Iowa.—Carey v. Davis, 180 N.W. 889, 190 Iowa 720, 12 A.L.R. 904.
Ky.—Stanley's Adm'r v. Duvin Coal Co., 36 S.W.2d 630, 237 Ky. 813.
N.J.—Szabo v. Pennsylvania R. Co., 40 A.2d 562, 132 N.J.Law 331.
N.C.—**Corpus Juris quoted in** Batton v. Atlantic Coast Line R. Co., 188 S.E. 383, 388, 210 N.C. 756.
Tex.—Atchison, T. & S. F. Ry. Co. v. Hix, Civ.App., 291 S.W. 281.

36. Ky.—Stanley's Adm'r v. Duvin Coal Co., 36 S.W.2d 630, 237 Ky. 813.

37. N.C.—**Corpus Juris quoted in** Batton v. Atlantic Coast Line R. Co., 188 S.E. 383, 388, 210 N.C. 756.
Tex.—Atchison, T. & S. F. Ry. Co. v. Hix, Civ.App., 291 S.W. 281.
39 C.J. p 240 note 64.

Notice
(1) A railroad having notice of absence of an employee from a moving train is under no duty to use ordinary care to ascertain his whereabouts and render aid; an employer is not liable for failure to discover whereabouts of a missing injured employee when employer has no knowledge that employee is injured or that there has been an accident.—Anderson v. Atchison, T. & S. F. Ry. Co., Cal.App., 174 P.2d 28.
(2) Where freight train conductor's fellow crew members were not aware of injuries to him at time of starting train without his signal in violation of railway company's rule, they were not negligent in failing to aid him promptly, and company was not liable for his resulting death from loss of blood, exposure, and lack of prompt medical care.—Haggard v. Lowden, 134 P.2d 676, 156 Kan. 522.

38. N.C.—**Corpus Juris quoted in** Batton v. Atlantic Coast Line R. Co., 188 S.E. 383, 388, 210 N.C. 756.
39 C.J. p 241 note 65.

39. Tex.—Atchison, T. & S. F. Ry. Co. v. Hix, Civ.App., 291 S.W. 281.

Jury question
Evidence that foreman of railroad track maintenance crew directed employee suffering from heat prostration to cease work and that, with knowledge that employee could not care for himself, foreman directed fellow employees to convey incapacitated employee to his home where they left him alone where he died without care or attention, made case for jury as to foreman's negligence.—Szabo v. Pennsylvania R. Co., 40 A. 2d 562, 132 N.J.Law 331.

40. Mo.—Hunicke v. Meramec Quarry Co., App., 212 S.W. 345.

41. U.S.—Allegar v. American Car & Foundry Co., Pa., 206 F. 437, 124 C.C.A. 319.
39 C.J. p 241 note 68.

ment was by an agent of the master.[42] In any event, in order to hold the master liable for damages resulting from failure to exercise diligence and provide proper medical or surgical assistance, such failure must be the proximate cause of the injury.[43]

Statutory requirements. A statute requiring the master in certain designated employments to keep at hand specified material for the first aid of injured employees has been held valid,[44] although where penal in character it is to be strictly construed,[45] and a violation of its provisions gives rise to a cause of action[46] for an injury proximately caused thereby.[47]

The duty of an employer to supply his employees with medical services under workmen's compensation statutes is discussed in Workmen's Compensation Acts § 266 et seq, also 71 C.J. p 773 note 35 et seq.

§ 163. —— Contracts to Furnish Services

a. In general
b. Contract with third person

a. In General

An employer may contract to supply his employees with medical attention, and is liable in damages for a breach of such contract.

The employer, by a contract with the employee, may become bound to furnish him with medical or surgical attention[48] and will be liable in damages to the employee for a breach of such obligation.[49] Where the master contracts to furnish the employee free transportation to a hospital[50] and to furnish an order or permit which will admit an ill or injured employee to such hospital,[51] or where an agreement to furnish transportation may be implied,[52] any violation of the contract in such respect will render him liable for any damages which ensue therefrom. Where the employer in return for a stipulated deduction from the employee's wages agrees to furnish hospital accommodations and skilled and competent physicians and surgeons, it is liable to the employee for a breach of such contract when it fails to furnish such services,[53] and, although a hospital is conducted nominally by a hospital association composed of the employees, the master may be liable on contract because of his failure to furnish hospital services where payment of assessments for the support of the hospital is obligatory on his employees and they have no part in its management or control.[54]

Sufficiency and validity. A contract to furnish medical services may arise from the retention by the employer of a portion of the wages of the employee for that purpose.[55] A provision in the rules and regulations of a hospital department in which it is stated that employees in accordance with the rules are entitled to the benefits provided by the hospital department does not amount to a contract on the part of the employer to furnish such facilities,[56] and the employer is not responsible for the refusal or failure of those in charge of the hospital to give the employee proper service.[57] It has been held that a foreman who has power to hire and discharge employees has presumptive authority to bind the master by a statement as to the benefits employees are to receive in cash of sickness or injury, although different from that set forth in the rules of the company.[58]

42. U.S.—Allegar v. American Car & Foundry Co., supra.

43. Ark.—St. Louis, I. M. & S. R. Co. v. Allen, 111 S.W. 802, 86 Ark. 465.

44. Ala.—Smith v. Wolf, 49 So. 395, 160 Ala. 644—Wolf v. Smith, 42 So. 824, 149 Ala. 457, 9 L.R.A.,N.S., 338.

45. Ind.—Sourwine v. McRoy Clay Works, 85 N.E. 782, 42 Ind.App. 358.
39 C.J. p 241 note 72.

46. Ala.—Wolf v. Smith, 42 So. 824, 149 Ala. 457, 9 L.R.A.,N.S., 338.
39 C.J. p 241 note 73.

47. Ala.—Smith v. Wolf, 49 So. 395, 160 Ala. 644.
Pa.—Davis v. Pennsylvania Coal Co., 58 A. 271, 209 Pa. 153.
39 C.J. p 241 note 74.

48. Tex.—Galveston, H. & S. A. R. Co. v. Rubio, Civ.App., 65 S.W. 1126.
Vt.—Morse v. Powers, 45 Vt. 300.
Power of corporation to contract for medical service and medical attention for employees see Corporations § 1251.
Excepted diseases
Employee suffering from tuberculosis was held not entitled to treatment and hospitalization under alleged contract with employer.—Kansas, O. & G. Ry. Co. v. Smith, 32 P. 2d 302, 168 Okl. 190.
Ordinary contract
Master's breach of contract to furnish medical treatment to injured employee must be treated as breach of ordinary contract.—San Antonio & A. P. Ry. Co. v. Mason, Tex.Civ.App., 289 S.W. 1027.

49. Ala.—Sloss-Sheffield Steel & Iron Co. v. Maxwell, 104 So. 841, 20 Ala.App. 588, certiorari denied Ex parte Sloss-Sheffield Steel & Iron Co., 104 So. 843, 213 Ala. 327.
Ky.—Illinois Cent. R. Co. v. Gheen, 66 S.W. 639, 112 Ky. 695, 23 Ky.L. 1952, rehearing denied 68 S.W. 1087, 112 Ky. 695, 24 Ky.L. 68.

50. Ark.—St. Louis, I. M. & S. R. Co. v. Taylor, 168 S.W. 564, 113 Ark. 445.

51. Ark.—St. Louis, I. M. & S. R. Co. v. Taylor, supra.

52. Wash.—Harding v. Ostrander R. & Transfer Co., 116 P. 635, 64 Wash. 224.
39 C.J. p 241 note 82.

53. Ariz.—Kain v. Arizona Copper Co., 133 P. 412, 14 Ariz. 566.

54. Ky.—Illinois Cent. R. Co. v. Gheen, 66 S.W. 639, 112 Ky. 695, 23 Ky.L. 1952, rehearing denied 68 S.W. 1087, 112 Ky. 695, 24 Ky.L. 68.

55. Or.—Jackson v. Pacific Coast Condensed Milk Co., 120 P. 1, 61 Or. 158, 37 L.R.A.,N.S., 757.
39 C.J. p 242 note 85.

56. Ark.—St. Louis, I. M. & S. R. Co. v. Taylor, 168 S.W. 564, 113 Ark. 445.

57. Ark.—St. Louis, I. M. & S. R. Co. v. Taylor, supra.

58. Wash.—Liliopoulos v. Oregon-

Construction and operation. While a contract to furnish medical services in the future has some of the characteristics of a contract of insurance,[59] it is not technically such a contract.[60] So a hospital association formed to provide medical and surgical treatment for its members who are the employees of a particular employer has been held a mutual benefit association rather than an insurance company,[61] and its contracts with its members cannot be regarded or construed as contracts of insurance,[62] and, where the circumstances of the illness of the employee necessitate his treatment other than by the physicians of the association or at its hospital, he cannot recover the expenses thereof from the association.[63]

Where the contract requires the employer to furnish the employee with transportation to a hospital, due diligence in furnishing such transportation within a reasonable time is all that is required,[64] and where an employer contracts to supply its employees with medical services its obligation is to furnish such services as are practicable and reasonable[65] for such time as may be required,[66] and under such contract the use made by the employer of the funds collected from its employees and the fact that the employer received no personal benefit are immaterial.[67] It has been held that the employer is not required to pay for hospital or medical services apart from those provided by it,[68] nor is it required to furnish the services of a specialist.[69] Where the employer has contracted to furnish medical attention in return for a deduction from the employees' pay, it cannot by secret rules or rules not communicated to them change its obligation.[70] Where, however, the employer does not contract to supply medical or hospital services but simply deducts a sum from wages for medical services, it does not thereby assume a personal liability to supply such services, but its duty is limited to the proper administration of the fund collected[71] and it need not expend more than such sum.[72]

Notice of necessity. In order that the employer may be held liable for his failure to furnish medical attention, he must have had notice of the necessity therefor.[73] Notwithstanding the injury is not received during actual working hours, notice of the injury to the foreman of the company in charge of the force of men of which the injured employee was a part is notice to the company.[74]

Right to procure services elsewhere. Where the employer fails to furnish the services agreed on, the employee may procure them elsewhere and recover the reasonable cost thereof from the employer.[75] He must, however, apply to the employer for the services stipulated for,[76] and it is his duty to use reasonable diligence to find the employer's physician and request his services before employing another physician.[77] Where the physician arranged for by

Washington R. & Nav. Co., 151 P. 818, 87 Wash. 396.

59. Or.—Crites v. Willamette Valley Lumber Co., 169 P. 339, 87 Or. 10, Ann.Cas.1918D 1050.

60. Or.—Crites v. Willamette Valley Lumber Co., supra.

61. Tex.—International & G. N. R. Employees' Hospital Ass'n v. Bell, Civ.App., 224 S.W. 309.

62. Tex.—International & G. N. R. Employees' Hospital Ass'n v. Bell, supra.

63. Tex.—International & G. N. R. Employees' Hospital Ass'n v. Bell, supra.
39 C.J. p 242 note 93.

64. Mo.—Burlison v. Henwood, 177 S.W.2d 432, 352 Mo. 275.

65. Tex.—Southern Pac. R. Co. v. Mauldin, 46 S.W. 650, 19 Tex.Civ. App. 166.
39 C.J. p 242 note 95.

Employer not guarantor

Under contract to render medical treatment to employee, employer was not a guarantor in sense that it was bound to cure employee or to guarantee that employee's injuries would not become infected, and performed its contract if it exercised due diligence and reasonable care in treatment of employee.—Burlison v. Henwood, 177 S.W.2d 432, 352 Mo. 275.

66. Ala.—Sloss-Sheffield Steel & Iron Co. v. Maxwell, 104 So. 841, 20 Ala.App. 588, certiorari denied Ex parte Sloss-Sheffield Steel & Iron Co., 104 So. 843, 213 Ala. 327.
Tex.—Scanlon v. Galveston, H. & S. A. R. Co., Civ.App., 86 S.W. 930.

Cessation of deduction

Under contract by which employer agreed to furnish employee medical attention by deducting a specified amount each month from employee's wages, employee had until end of month within which to make payment required, where installment for preceding month had been paid and there was no suggestion that he had been discharged from his employment.—Sloss-Sheffield Steel & Iron Co. v. Maxwell, 104 So. 841, 20 Ala. App. 588, certiorari denied Ex parte Sloss-Sheffield Steel & Iron Co., 104 So. 843, 213 Ala. 327.

67. Ala.—Sloss-Sheffield Steel & Iron Co. v. Maxwell, 104 So. 841, 20 Ala.App. 588, certiorari denied Ex parte Sloss-Sheffield Steel & Iron Co., 104 So. 843, 213 Ala. 327.

68. N.C.—Gainesville & Alachua Hospital Ass'n v. Hobbs, 69 S.E. 79, 153 N.C. 188.
39 C.J. p 242 notes 98, 99.

69. Colo.—Miller v. Camp Bird, Ltd., 105 P. 1105, 46 Colo. 569.

70. Tex.—Scanlon v. Galveston, H. & S. A. R. Co., Civ.App., 86 S.W. 930.

71. Tex.—Courchesne v. Brown, Civ. App., 216 S.W. 674.

Trust fund

Fund for hospital purposes contributed by employees is trust fund. —Loeb v. Ponder, C.C.A.Tex., 24 F.2d 33.

72. Or.—Miller v. Beaver Hill Coal Co., 85 P. 502, 48 Or. 136.

73. Cal.—Willey v. Alaska Packers' Ass'n, 238 P. 1087, 73 Cal.App. 605.
39 C.J. p 243 note 4.

74. Wash.—Liliopoulos v. Oregon-Washington R. & Nav. Co., 151 P. 818, 87 Wash. 396.

75. Or.—Crites v. Willamette Valley Lumber Co., 169 P. 339, 87 Or. 10, Ann.Cas.1918D 1050.

76. Or.—Crites v. Willamette Valley Lumber Co., supra.

77. Or.—Crites v. Willamette Valley Lumber Co., supra.
39 C.J. p 243 note 7.

the employer is not at hand, the right of the employee to summon another physician depends on what is reasonable under the circumstances and the urgency of the case.[78]

Damages. The measure of damages for breach of a contract to furnish medical services is the amount which it might reasonably have cost plaintiff to obtain the same benefits.[79] Recovery may also be had for injuries which are the proximate result of the failure to furnish prompt medical attention, such as pain and suffering[80] and aggravation of the illness or injury.[81] However, the recovery of consequential damages for the breach of contract to supply medical attention is limited to injuries of which the breach is the proximate cause,[82] and in applying this rule the court is guided by the rules applicable in negligence cases, particularly malpractice cases.[83] Where death occurred after the failure to supply medical attention, it has been held that the causal relation between the breach of contract and the death is too uncertain, speculative, and conjectural to permit recovery of damages for the death.[84]

Actions. It has been held that where the employer fails to furnish medical services in accordance with his contract the action should be brought in contract and not in tort,[85] but it has also been held that an action in tort lies for the damage caused by the failure to perform the contract.[86] The physician employed by the employer may not, it has been held, be joined as a party.[87] The complaint must contain a clear, concise, intelligible statement of a cause of action,[88] and must allege the existence of a contract[89] and that plaintiff has performed his obligations under the contract.[90] The complaint may properly allege plaintiff's efforts to mitigate his damages[91] and may set forth the proximate damages of the failure to perform the contract.[92]

Plaintiff has the burden of proving all of the essential elements of his cause of action[93] and that the breach of contract was the proximate cause of the injury for which recovery is sought.[94] General rules apply as to the admissibility[95] and weight and sufficiency[96] of the evidence and as to instructions.[97]

As in other actions, questions of fact are for the jury.[98] Where the action is to recover for money expended by the employee in securing the services of a physician, the question whether the employee used due diligence in seeking the services of the

78. Or.—Crites v. Willamette Valley Lumber Co., supra.
39 C.J. p 243 note 8.

79. Idaho.—**Corpus Juris cited in** Arneson v. Robinson, 82 P.2d 249, 255, 59 Idaho 223.
Ky.—Barley's Adm'x v. Clover Splint Coal Co., 150 S.W.2d 670, 286 Ky. 218—**Corpus Juris quoted in** Black Mountain Corporation v. Thomas, 291 S.W. 737, 738, 218 Ky. 497.
39 C.J. p 243 note 9.

80. Mo.—Burlison v. Henwood, 171 S.W.2d 313, transferred, see 177 S.W.2d 432, 352 Mo. 275.
Mont.—Borgeas v. Oregon Short Line R. Co., 236 P. 1069, 73 Mont. 407.
Tex.—San Antonio & A. P. Ry. Co. v. Mason, Civ.App., 289 S.W. 1027.
39 C.J. p 241 note 82 [b].

81. Tex.—San Antonio & A. P. Ry. Co. v. Mason, supra.

82. Mo.—Snyder v. St. Louis Southwestern Ry. Co., 72 S.W.2d 504, 228 Mo.App. 626.

83. Mo.—Snyder v. St. Louis Southwestern Ry. Co., supra.

84. Ky.—Barley's Adm'x v. Clover Splint Coal Co., 150 S.W.2d 670, 286 Ky. 218.

85. Tex.—Galveston, H. & S. A. R. Co. v. Hennigan, 76 S.W. 452, 33 Tex.Civ.App. 314.
39 C.J. p 243 note 10.

86. S.C.—Busby v. W. M. Ritter Lumber Co., 174 S.E. 4, 172 S.C. 372.
W.Va.—Hamilton v. Paint Creek Coal Mining Co., 137 S.E. 535, 103 W.Va. 402.

87. Mont.—Borgeas v. Oregon Short Line R. Co., 236 P. 1069, 73 Mont. 407.

88. Mont.—Borgeas v. Oregon Short Line R. Co., supra.
39 C.J. p 243 note 11.
Complaint held sufficient
Mo.—Burlison v. Henwood, App., 171 S.W.2d 313, transferred, see 177 S.W.2d 432, 352 Mo. 275.
Mont.—Borgeas v. Oregon Short Line R. Co., 236 P. 1069, 73 Mont. 407.

89. Ala.—Hanby v. Campbell, 132 So. 893, 222 Ala. 420.

90. Ala.—Hanby v. Campbell, supra.
Deductions from earnings
Complaint alleging breach of contract to furnish medical treatment in consideration of deductions from employee's wages was held insufficient for failure to aver deductions or earnings.—Hanby v. Campbell, supra.

91. Mont.—Borgeas v. Oregon Short Line R. Co., 236 P. 1069, 73 Mont. 407.

92. Mont.—Borgeas v. Oregon Short Line R. Co., supra.

93. Mo.—Burlison v. Henwood, 177 S.W.2d 432, 352 Mo. 275.
39 C.J. p 243 note 11.
Nonsuit properly denied
Mont.—Borgeas v. Oregon Short Line R. Co., 236 P. 1069, 73 Mont. 407.

94. Mont.—Borgeas v. Oregon Short Line R. Co., supra.
39 C.J. p 243 notes 8 [b], 11 [a].

95. Cal.—Willey v. Alaska Packers' Ass'n, 238 P. 1087, 73 Cal.App. 605.

96. Mo.—Burlison v. Henwood, 177 S.W.2d 432, 352 Mo. 275.
Breach of contract not established
Mo.—Burlison v. Henwood, supra.
Mont.—Borgeas v. Oregon Short Line R. Co., 236 P. 1069, 73 Mont. 407.
Negligence not established
Mo.—Burlison v. Henwood, 177 S.W. 2d 432, 352 Mo. 275.
Evidence held insufficient to establish proximate cause
Mo.—Snyder v. St. Louis Southwestern Ry. Co., 72 S.W.2d 504, 228 Mo. App. 626.
Mont.—Borgeas v. Oregon Short Line R. Co., 236 P. 1069, 73 Mont. 407.

97. N.Y.—Stone v. Goodman, 271 N.Y.S. 500, 241 App.Div. 290.
Instructions held proper
Cal.—Willey v. Alaska Packers' Ass'n, 238 P. 1087, 73 Cal.App. 605.
Mo.—Burlison v. Henwood, App., 171 S.W.2d 313, transferred, see 177 S.W.2d 432, 352 Mo. 275.
Instructions held erroneous
N.Y.—Stone v. Goodman, 271 N.Y.S. 500, 241 App.Div. 290.

98. Cal.—Willey v. Alaska Packers' Ass'n, 238 P. 1087, 73 Cal.App. 605.
39 C.J. p 243 note 7 [b].

physician designated by the employer is a mixed question of law and fact for the jury to determine under proper instructions.[99] So, whether the purpose of the deduction of "hospital fees" from an employee's wages, as provided for in the contract, was to meet the expense of an employee's sickness is for the jury, where defendant contends that a deduction was made for other reasons,[1] and, in an action to recover damages for personal injuries resulting from the employer's breach of contract to furnish medical attendance, the question whether the damages alleged are the result of defendant's breach is for the jury.[2]

b. Contract with Third Person

An employer may arrange a contract between its employees and another for such other to furnish its employees with medical services.

Where the employer arranges a contract between its employees and another for the supplying of medical service to the employees, the employer is not liable for a failure to supply medical services where its only obligation under the contract is to make deductions from wages and transmit the funds and it has performed such obligation.[3] As a supplement to the contracts discussed in Workmen's Compensation Acts § 266, whereby an employer required by the statute to furnish his employees certain medical services discharges his liability by contracting with another to supply his employees such services, the employer may arrange for a contract between such other and his employees for the furnishing of medical services for injuries and illnesses not covered by the statute[4] and in such case the two contracts are to be construed together in the light of the statute.[5]

§ 164. —— Voluntary Assumption of Duty

Where an employer voluntarily undertakes the care of an ill or injured employee, it is bound to act with reasonable care.

Where, although not under an obligation to do so, the master undertakes the relief of an injured or incapacitated servant, it is bound to act with reasonable care so that the injury to the servant shall not be increased;[6] the employer in such case is bound to the same measure of care as though the duty existed.[7] Where the employer undertakes to transport the ill or injured employee, it is liable for injury due to the negligence of another employee intrusted with the duty of transporting the injured employee.[8] The wishes of the injured man, if he is capable of understanding conditions, should be respected and such convenient and practicable arrangements made as he desires,[9] and where the adult members of his family are present when the accident occurs or come to him before his removal, or at any time thereafter, and

99. Or.—Crites v. Willamette Valley Lumber Co., 169 P. 339, 87 Or. 10, Ann.Cas.1918D 1050.

1. Tex.—Courchesne v. Brown, Civ. App., 216 S.W. 674.

2. Wash.—Liliopoulos v. Oregon-Washington R. & Nav. Co., 151 P. 818, 87 Wash. 396.
39 C.J. p 244 note 14.

3. Wash.—Jacobsen v. King County Medical Service Corp., 160 P.2d 1019, 23 Wash.2d 324.

4. Wash.—Carmichael v. Kirkpatrick, 56 P.2d 686, 185 Wash. 609.

5. Wash.—Carmichael v. Kirkpatrick, supra.

Contract under which services rendered

Plaintiff's testimony in employee's malpractice action against physicians bound by medical aid contract with employer to render medical services to employees without compensation from them, that one defendant said in reply to plaintiff's question as to his rights under such contract that "house contract," binding defendants to furnish employees treatment for illnesses and injuries not covered by medical aid contract, "would take care of it," held insufficient to take to jury question whether valid agreement was made to treat plaintiff's injuries under house contract.—Carmichael v. Kirkpatrick, supra.

6. N.H.—Tullgren v. Amoskeag Mfg. Co., 133 A. 4, 82 N.H. 268, 46 A.L. R. 380.
S.C.—**Corpus Juris quoted in** Crawford v. Davis, 134 S.E. 247, 250, 136 S.C. 95.
Tex.—Baker v. Adkins, Civ.App., 278 S.W. 272.
39 C.J. p 244 note 15.

Assumption of duty by agent

Where employer was under no duty to furnish medical aid to employee because it did not appear that employee was in immediate need thereof, statement of employer's agent, after delivering employee to his home into custody of his wife, that he would get a doctor, was held not to place employer under duty to furnish such medical attention.—Gypsy Oil Co. v. McNair, 64 P.2d 885, 179 Okl. 182.

Selection of hospital

The employer is not liable if it selects a suitable hospital to which to transport the employee for treatment, and the employee's wife may not recover as special damages the expense of living quarters for herself near the hospital.—Crabb v. Oklahoma Gas & Electric Co., 250 P. 926, 120 Okl. 182.

Vaccination

Seventeen year old employee held of sufficient intelligence to understand and appreciate consequences of vaccination required by employer; and employee's assent to vaccination in order to retain job does not constitute "duress."—Gulf & S. I. R. Co. v. Sullivan, 119 So. 501, 155 Miss. 1, 62 A.L.R. 191.

7. Mont.—Vesel v. Jardine Mining Co., 100 P.2d 75, 110 Mont. 82, 127 A.L.R. 1093.
S.C.—**Corpus Juris quoted in** Crawford v. Davis, 134 S.E. 247, 250, 136 S.C. 95.
39 C.J. p 244 note 16.

8. N.H.—Tullgren v. Amoskeag Mfg. Co., 133 A. 4, 82 N.H. 268, 46 A.L.R. 380.
N.Y.—Kirwan v. Foos, 162 N.E. 542, 248 N.Y. 604.

Abandonment of aid

Severe headache of employee, whom employer undertook to convey home, held sufficient notice that her condition might be such as to render unsafe an attempt to travel last part of trip unaided.—Tullgren v. Amoskeag Mfg. Co., 133 A. 4, 82 N.H. 268, 46 A.L.R. 380.

9. Ky.—Troutman v. Louisville, & N. R. Co., 200 S.W. 488, 179 Ky. 145.
39 C.J. p 244 note 17.

express a desire to take charge of the injured employee, the servants of the employer present at the time should deliver over to them the care of the case and do as they advise.[10]

§ 165. —— Liability of Employer for Negligent Treatment

As a general rule, an employer who supplies an employee with medical services is required to use due care in selecting a physician, but is not liable for the physician's negligence.

Where, in the absence of a statute or a contractual obligation, the master undertakes gratuitously to furnish medical attention to an employee, it is bound to exercise reasonable care in the selection of a competent physician or other qualified person to render the services and attention required[11] and in continuing him in his employ,[12] and is liable for an injury caused by the malpractice of the physician where he has failed to exercise such care;[13] but, where it has exercised such care, it is not, according to the weight of authority, liable for the physician's negligence or lack of skill,[14] since a physician is not a servant within the doctrine of respondeat superior, but is an independent contractor.[15] However, there is some authority that the employer is liable for the physician's negligence,[16] and it has been held that, where an employer maintains a safety and health department and directs his employees to go to it for treatment in case of injury, the employer is liable for the negligence of a physician employed in such department,[17] and this has also been held true as to the negligence of a nurse,[18] although the act of the nurse may be such as to constitute the unlawful practice of medicine.[19]

10. Ky.—Troutman v. Louisville & N. R. Co., supra.
Okl.—Crabb v. Oklahoma Gas & Electric Co., 250 P. 926, 120 Okl. 182.

11. Ky.—Stanley's Adm'r v. Duvin Coal Co., 36 S.W.2d 630, 237 Ky. 813.
Mich.—Oliver v. Ford Motor Co., 255 N.W. 287, 267 Mich. 299.
Mont.—Vesel v. Jardine Mining Co., 100 P.2d 75, 110 Mont. 82, 127 A.L.R. 1093.
N.J.—**Corpus Juris cited in** Tutino v. Ford Motor Co., 168 A. 749, 751, 111 N.J.Law 435.
N.C.—Gosnell v. Southern Ry. Co., 162 S.E. 569, 202 N.C. 234.
S.C.—**Corpus Juris quoted in** Crawford v. Davis, 134 S.E. 247, 250, 136 S.C. 95.
39 C.J. p 244 note 21.

Liability same as though acting under duty

Liability of master volunteering to provide physician to treat employee is same as though he were under duty to do so.—Western Union Telegraph Co. v. Mason, 22 S.W.2d 602, 232 Ky. 237.

Employer and third person undertaking to furnish employees with physician were under implied duty to use reasonable care in selecting competent and skillful physician.—Mueller v. Winston Bros. Co., 4 P.2d 854, 165 Wash. 130.

Knowledge of incompetency

Liability of master volunteering to provide physician depends on master's knowledge regarding physician's competency or what he should have known by exercise of ordinary care.—Western Union Telegraph Co. v. Mason, 22 S.W.2d 602, 232 Ky. 237.

12. S.C.—**Corpus Juris quoted in** Crawford v. Davis, 134 S.E. 247, 250, 136 S.C. 95.
39 C.J. p 244 note 22.

13. Mont.—Vesel v. Jardine Mining Co., 100 P.2d 75, 110 Mont. 82, 127 A.L.R. 1093—Borgeas v. Oregon Short Line R. Co., 236 P. 1069, 73 Mont. 407.

Statute excluding liability for malpractice

The statutory provision that employer shall not be liable for any act in connection with treatment or malpractice in treatment of employee's injuries does not preclude action by employee against employer to recover damages for injuries, caused by negligent treatment of his injured eye by person in charge of employer's first aid station, on ground of employer's negligence in selecting and employing unskilled, incompetent person to care for injured employees.—Vesel v. Jardine Mining Co., 100 P.2d 75, 110 Mont. 82, 127 A.L.R. 1093.

14. Ga.—Timmons v. Fulton Bag & Cotton Mills, 166 S.E. 40, 45 Ga. App. 670.
Ky.—Stanley's Adm'r v. Duvin Coal Co., 36 S.W.2d 630, 237 Ky. 813—Western Union Telegraph Co. v. Mason, 22 S.W.2d 602, 232 Ky. 237.
Mich.—Oliver v. Ford Motor Co., 255 N.W. 287, 267 Mich. 299.
N.J.—**Corpus Juris cited in** Tutino v. Ford Motor Co., 168 A. 749, 751, 111 N.J.Law 435.
N.Y.—Schneider v. New York Telephone Co., 292 N.Y.S. 399, 249 App. Div. 400, affirmed 13 N.E.2d 47, 276 N.Y. 655.
N.C.—Gosnell v. Southern Ry. Co., 162 S.E. 569, 202 N.C. 234.
S.C.—**Corpus Juris quoted in** Crawford v. Davis, 134 S.E. 247, 250, 136 S.C. 95.
39 C.J. p 244 note 23.

Rule not absolute

The rule that employer is not liable for erroneous diagnosis or negligent treatment of employee's ailment by employer's physician where employer was not negligent in selecting physician and had no knowledge of his incompetency, such physician having a good reputation, is not absolute.—Knox v. Ingalls Shipbuilding Corp., C.C.A.Miss., 158 F.2d 973.

Nurse

Employer furnishing dispensary was held not liable for burns suffered by employee due to nurse's negligence, where physician and nurse were not incompetent.—Wroblewski v. Pullman Co., 166 N.E. 666, 87 Ind.App. 101.

Transportation to hospital

Where physician properly selected by employer determined necessity of employee's going to hospital and treatment he should receive on way, employer was held not liable for death resulting from loss of blood while employee was being conveyed to hospital.—Stanley's Adm'r v. Duvin Coal Co., 36 S.W.2d 630, 237 Ky. 813.

15. Ga.—Timmons v. Fulton Bag & Cotton Mills, 166 S.E. 40, 45 Ga. App. 670.
Ky.—Western Union Telegraph Co. v. Mason, 22 S.W.2d 602, 232 Ky. 237.
N.Y.—Schneider v. New York Telephone Co., 292 N.Y.S. 399, 249 App. Div. 400, affirmed 13 N.E.2d 47, 276 N.Y. 655.
39 C.J. p 244 note 23 [a].

16. Mo.—Smith v. Mallincroft Chemical Works, 251 S.W. 155, 212 Mo. App. 158.
Contra Haggerty v. St. Louis, etc., R. Co., 74 S.W. 456, 100 Mo.App. 424.

17. U.S.—Knox v. Ingalls Shipbuilding Corp., C.C.A.Miss., 158 F.2d 973.

18. Mo.—Ebert v. Emerson Electric Mfg. Co., App., 264 S.W. 453.

19. Mo.—Ebert v. Emerson Electric Mfg. Co., supra.

It has been held, where a physician is employed by the master and the relation of physician and patient does not exist between him and the servant, that the rule of respondeat superior applies and the master may be liable for his negligence,[20] and where medical services are furnished, not for the employee's benefit, but primarily for the employer's benefit, the employer is liable for the negligence of the physician.[21] In any event, in order to hold the employer liable for the negligent treatment of the employee, such negligence must be established,[22] and the complaint must positively and directly allege the facts imposing liability.[23] Where the evidence is conflicting the question of negligence and other fact questions are for the jury.[24]

Employer under duty to furnish medical attention. Where the employer is under a legal, contractual, or statutory duty to furnish medical or surgical attention, the measure of its duty according to some authorities is the use of ordinary care to furnish a reasonably competent physician,[25] and it is not liable for the negligence of the physician.[26] According to other authorities, where the employer agrees to furnish competent and skilled treatment for illness or injuries suffered while in service, it is, where the employee is injured by reason of its neglect to perform such duty, liable to the employee to the same extent that the physician would be were he sued for the injury.[27] In any event liability may not be imposed where neither negligence, malpractice, nor breach of contract is established,[28] since an undertaking to supply medical service is not an undertaking to cure.[29]

Deductions from wages of employees or collection of fees. Where, without profit to itself, the employer deducts fees from the wages of the employees for the provision of medical services or hospital attention and the entire fund is administered for the benefit of the employees, the employer is, according to the generally accepted rule, liable for ordinary care in the selection and retention of physicians,[30] and where it exercises such care it is not liable for

20. Cal.—**Corpus Juris quoted in** Rannard v. Lockheed Aircraft Corp., 157 P.2d 1, 6, 26 Cal.2d 149.
Minn.—Jones v. Tri-State Tel. & Tel. Co., 136 N.W. 741, 118 Minn. 217, 40 L.R.A.,N.S., 485.

The principal is responsible for tort of his agent, not because the former has done wrong, but because the law so declares as matter of public policy, and there is no more reason to except employers of physicians from doctrine of respondeat superior than there is to except employers of other highly skilled persons who perform technical services requiring discretion.—Knox v. Ingalls Shipbuilding Corp., C.C.A.Miss., 158 F.2d 973.

21. Cal.—Rannard v. Lockheed Aircraft Corp., 157 P.2d 1, 26 Cal.2d 149.
Mo.—Hamilton v. Standard Oil Co. of Indiana, 19 S.W.2d 679, 323 Mo. 531.

22. Cal.—**Corpus Juris quoted in** Rannard v. Lockheed Aircraft Corp., 157 P.2d 1, 6, 26 Cal.2d 149.
39 C.J. p 245 note 28.

Proximate cause

Tex.—Baker v. Adkins, Civ.App., 278 S.W. 272.

23. Cal.—**Corpus Juris quoted in** Rannard v. Lockheed Aircraft Corp., 157 P.2d 1, 6, 26 Cal.2d 149.
Ind.—Wabash R. Co. v. Reynolds, 84 N.E. 992, 41 Ind.App. 678.
La.—Ford v. Louisiana & A. Ry. Co., App., 196 So. 403.

Agency

In order to authorize recovery of damages from employer for improper treatment of employee by physicians, petition should contain allegations clearly disclosing that physicians acted as employer's agents.—Ford v. Louisiana & A. Ry. Co., La. App., 196 So. 403.

Complaint held sufficient

U.S.—Knox v. Ingalls Shipbuilding Corp., C.C.A.Miss., 158 F.2d 973.

Complaint held insufficient

Ohio.—Youngstown Park & Falls St. Ry. Co. v. Kessler, 95 N.E. 509, 84 Ohio St. 74, 36 L.R.A.,N.S., 50, Ann. Cas.1912B, 933.

24. Okl.—Oklahoma Gas & Electric Co. v. Priest, 62 P.2d 55, 178 Okl. 91.

Fact questions

In employee's action against employer for injuries resulting from negligence of employer's medical staff in failing properly to examine employee and diagnose his injury, whether physician was acting for any one other than himself when he committed the tort, and, if so, for whom, were questions of fact unless facts were undisputed and conflicting reasonable inferences might not fairly be drawn therefrom.—Knox v. Ingalls Shipbuilding Corp., C.C.A.Miss., 158 F.2d 973.

25. Ky.—Western Union Telegraph Co. v. Mason, 22 S.W.2d 602, 232 Ky. 237.
La.—Ford v. Louisiana & A. Ry. Co., App., 196 So. 403.
Mont.—Borgeas v. Oregon Short Line R. Co., 236 P. 1069, 73 Mont. 407.
N.Y.—Stone v. Goodman, 271 N.Y.S. 500, 241 App.Div. 290.
N.C.—Gosnell v. Southern Ry. Co., 162 S.E. 569, 202 N.C. 234.
Tex.—Southern Pac. R. Co. v. Mauldin, 46 S.W. 650, 19 Tex.Civ.App. 166.

26. Ky.—Western Union Telegraph Co. v. Mason, 22 S.W.2d 602, 232 Ky. 237.
La.—Ford v. Louisiana & A. Ry. Co., App., 196 So. 403.
N.Y.—Stone v. Goodman, 271 N.Y.S. 500, 241 App.Div. 290.
N.C.—Gosnell v. Southern Ry. Co., 162 S.E. 569, 202 N.C. 234.
Tex.—Thomas v. Postal Telegraph-Cable Co., Civ.App., 48 S.W.2d 422, affirmed, Com.App., 65 S.W.2d 282—Southern Pac. R. Co. v. Mauldin, 46 S.W. 650, 19 Tex.Civ.App. 166.

Rule of respondeat superior inapplicable

Relation of master and servant or principal and agent does not exist between an employer and a physician employed to treat injured employees, since employer has no control over physician, and rule of respondeat superior is inapplicable.—Borgeas v. Oregon Short Line R. Co., 236 P. 1069, 73 Mont. 407.

27. W.Va.—Neil v. Flynn Lumber Co., 88 S.E. 1090, 78 W.Va. 235, 236.
39 C.J. p 245 note 32.

28. N.Y.—Stone v. Goodman, 271 N.Y.S. 500, 241 App.Div. 290.

29. Cal.—Steiner v. Goodyear Tire & Rubber Co. of California, 300 P. 980, 115 Cal.App. 162.

30. Ky.—Black Mountain Corporation v. Thomas, 291 S.W. 737, 218 Ky. 497.
Tex.—Thomas v. Postal Telegraph-Cable Co., Com.App., 65 S.W.2d 282.
29 C.J. p 246 note 35.

their negligence.[31] Where the employer selects a competent physician to treat the employees, it may rely on the presumption that his competency will continue until notice of a change.[32] In order that the reputation of the physician may constitute constructive notice to the employer, it must be so general and notorious that ignorance shows the negligence of the employer,[33] and, where the reasons which are relied on to charge the employer with knowledge of the reputation of the physician apply with equal force to show knowledge on the part of the employee, his negligence in failing to make complaint is as great as is that of the employer in retaining the physician.[34]

Profit to employer. In order for the employer to escape liability for the negligence of the physician, it must appear that the employer did not derive any profit from the retention or selection of the physician.[35] Where deductions from the pay of the employee for the purpose of providing medical and hospital attention have resulted in direct pecuniary profit to the employer, it is responsible for the negligence or malpractice of physicians, although they have been employed after the exercise of due care,[36] and likewise it has been held that, where the employer contracts for a consideration to treat its employees for any injury received by them in its employ, it is liable for the malpractice of a physician or surgeon employed.[37]

Hospital maintained by employer. The employer or an organization formed by it which maintains a hospital for supplying medical attention to the employees is generally not liable for the negligence of physicians, surgeons, and attendants serving in the hospital where it has exercised ordinary care in selecting and retaining them.[38] The cases exempting the employer from liability are frequently placed on the theory that the maintenance of the hospital is a charity,[39] and this theory also has been applied to obviate liability on the part of the hospital association as such.[40] Obviously this theory is inapplicable where the employer operates the hospital for gain or profit, and in such case it is liable for the negligence of the physicians employed at the hospital,[41] and it has been indicated that a like rule would apply where the employer had contracted to supply medical service for a consideration.[42] It has been held that the hospital is operated for profit within this rule where deductions are made from the employees' wages for its maintenance[43] even though it does not appear whether the sums deducted from wages exceed the cost of maintaining the hospital.[44]

Other cases hold that, where a hospital is maintained by contributions deducted from the pay of the employees, the master is not liable because of the negligence of physicians, surgeons, and attendants serving in the hospital where it has exercised ordinary care in selecting and retaining them,[45] at least where the deductions from wages do not yield

31. Ky.—Black Mountain Corporation v. Thomas, 291 S.W. 737, 218 Ky. 497.
Mont.—Borgeas v. Oregon Short Line R. Co., 236 P. 1069, 73 Mont. 407.
Tex.—Thomas v. Postal Telegraph-Cable Co., Com.App., 65 S.W.2d 282.
39 C.J. p 245 note 34.

32. W.Va.—Guy v. Lanark Fuel Co., 79 S.E. 941, 72 W.Va. 728, 48 L.R.A.,N.S., 536.

33. W.Va.—Guy v. Lanark Fuel Co., supra.

34. W.Va.—Guy v. Lanark Fuel Co., supra.

35. La.—Ford v. Louisiana & A. Ry. Co., App., 196 So. 403.

Reduction in compensation payments
Fact that in many cases employer or his insurer is ultimately relieved from compensation payments in full or part through physician's services would not, in the ordinary or usual meaning of the word, be considered a profit within rule that employer must not derive a profit from physician's services in order to avoid liability for employee's death caused by physician's negligence, but physician's sharing compensation with employer, or employer's interest or ownership in hospital, would result in profit.—Ford v. Louisiana & A. Ry. Co., supra.

36. Pa.—Ulbrich v. Boone County Coal Corporation, 16 Pa.Dist. & Co. 315.
39 C.J. p 246 note 39.

37. Wash.—Sawdey v. Spokane Falls & N. R. Co., 70 P. 972, 30 Wash. 349, 94 Am.S.R. 880.

38. Kan.—Nicholson v. Atchison, Topeka & Santa Fe Hospital Ass'n 155 P. 920, 97 Kan. 480, L.R.A. 1916D 1029.
11 C.J. p 378 note 18.

Failure to give prompt treatment
Employer was liable where the hospital negligently failed to furnish the employee prompt treatment. —Fontanella v. New York Cent. R. Co., 174 N.Y.S. 537, 186 App.Div. 588, affirmed 126 N.E. 907, 228 N.Y. 546.

39. U.S.—Illinois Cent. R. Co. v. Moodie, C.C.A.Ala., 23 F.2d 902.
Kan.—Nicholson v. Atchison, Topeka & Santa Fe Hospital Ass'n, 155 P. 920, 97 Kan. 480, L.R.A.1916D 1029.
11 C.J. p 378 note 18.

40. Kan.—Nicholson v. Atchison, Topeka & Santa Fe Hospital Ass'n, 155 P. 920, 97 Kan. 480, L.R.A. 1918A 175.
Tex.—Davis v. Gulf, C. & S. F. R. Co., Civ.App., 196 S.W. 603.
11 C.J. p 378 note 18.

41. Mo.—Phillips v. St. Louis & S. F. Ry. Co., 111 S.W. 109, 211 Mo. 419, 124 Am.S.R. 786, 17 L.R.A., N.S., 1167, 14 Ann.Cas. 742.
39 C.J. p 246 note 43—11 C.J. p 378 note 19.

42. Ark.—Pearson v. Arkansas Midland R. Co., 153 S.W. 595, 106 Ark. 442.

43. Mo.—Phillips v. St. Louis & S. F. R. Co., 111 S.W. 109, 211 Mo. 419, 124 Am.S.R. 786, 17 L.R.A., N.S., 1167, 14 Ann.Cas. 742.
39 C.J. p 246 notes 43, 50—11 C.J. p 378 note 19.

44. Cal.—Bowman v. Southern Pac. Co., 204 P. 403, 55 Cal.App. 734.
11 C.J. p 378 note 19 [a].

45. U.S.—Illinois Cent. R. Co. v. Moodie, C.C.A.Ala., 23 F.2d 902.
Miss.—James v. Yazoo & M. V. R. Co., 121 So. 819, 153 Miss. 776.
39 C.J. p 246 note 41.

the employer a profit over and above the expenses of maintaining the hospital;[46] the master being considered merely as a trustee for the proper administration and expenditure of the hospital fund.[47] In any event, there is no liability where negligence is not established.[48]

The reasonable diligence required of the master extends to the retention of physicians and other attendants,[49] and includes the duty to supervise the work of the hospital[50] and to discharge any appointees who, although reasonably competent at the time of their appointment have, because of the use of intoxicants or narcotics or for other causes, since become incompetent.[51]

Where the hospital is conducted by an association of employees and is under their management, although it is recognized and aided by the employer, the acts of the hospital in furnishing medical treatment to an injured employee at his volition cannot be regarded as the act of the master[52] or of his agent,[53] and this is true although persons other than members of the association are taken to the hospital by the master for treatment at the master's expense.[54]

§ 166. —— Recovery of Compensation for Services Rendered

Independent of contract, an employer ordinarily is not liable for the payment of medical services rendered to an employee.

Where an employer has contracted to pay for medical services rendered to an ill or injured employee, it is, of course, liable therefor.[55] However, the

46. Ark.—Pearson v. Arkansas Midland R. Co., 153 S.W. 595, 106 Ark. 442.
Tex.—Poling v. San Antonio & A. P. R. Co., 75 S.W. 69, 32 Tex.Civ.App. 487.

47. Ark.—Arkansas Midland R. Co. v. Pearson, 135 S.W. 917, 98 Ark. 399, 34 L.R.A.,N.S., 317.
39 C.J. p 246 note 44.

48. Mo.—Breeze v. St. Louis & S. F. R. Co., 174 S.W. 409, 264 Mo. 258.
39 C.J. p 246 note 51.

49. Ind.—Wabash R. Co. v. Kelley, 52 N.E. 152, 153 Ind. 119, rehearing denied 54 N.E. 752, 153 Ind. 119.

50. Ind.—Wabash R. Co. v. Kelley, supra.

Equipment

Fact that railroad's charitable hospital was not equipped with portable X-ray machine was held not to show failure to furnish necessary hospital equipment where such machine was available if needed.—Illinois Cent. R. Co. v. Moodie, C.C.A. Ala., 23 F.2d 902.

51. Ind.—Wabash R. Co. v. Kelley, 52 N.E. 152, 153 Ind. 119, rehearing denied 54 N.E. 752, 153 Ind. 119.

52. U.S.—Carr v. Northern Pac. R. Co., C.C.A.Wash., 273 F. 511.

53. U.S.—Carr v. Northern Pac. R. Co., supra.

54. U.S.—Carr v. Northern Pac. R. Co., supra.

55. Mo.—Weinsberg v. St. Louis Cordage Co., 116 S.W. 461, 135 Mo. App. 553—Freeman v. Junge Baking Co., 103 S.W. 565, 126 Mo.App. 124.

Authority of:

Officer or agent of corporation to bind corporation for payment for medical or hospital treatment see Corporations § 1050.

Servant to employ medical attendance see Agency § 105 d (2).

Hospital's right to recover from employer for medical care and services rendered employee see Hospitals § 7.

Liability of one employing physician for another for payment for services see the C.J.S. title Physicians and Surgeons § 70, also 48 C.J. p 1163 note 31–p 1165 note 71.

Promises in behalf of person ill or injured generally see Frauds, Statute of, § 20.

Consideration; moral obligation

The moral obligation resting on an employer to furnish assistance and care to an injured employee, even though the employer was not responsible for the injury, constituted a sufficient consideration for the agreement of the employer's president to pay a physician for professional services rendered such servant.—Scott v. Monte Cristo Oil & Development Co., 115 P. 64, 15 Cal. App. 453.

Mistake

Employer, having employed dentist to treat injured employee, was held bound to pay therefor, although mistaken as to liability.—Capron v. Utica Ice Co., 217 N.Y.S. 732, 127 Misc. 848.

Revocation

(1) Railroad company was held not liable to doctor employed to attend a person struck by a train for services undertaken after notice that it would not be liable for further services or attention.—Vandalia R. Co. v. Bryan, 110 N.E. 218, 60 Ind. App. 223.

(2) The employment of plaintiff physicians by defendant to treat his injured employee continued while the case demanded their services or till they were discharged by defendant, so that he not having discharged them, but merely informed them, while treating the employee, that he would not pay them, as he had not employed them, he was liable for their further treatment of the employee up to the time he was in condition to be dismissed from further treatment.—Gray v. Lumpkin & Thomas, Tex.Civ.App., 159 S.W. 880, error refused.

Original undertaking

Master's promise to pay physician for medical attention to servant was held to make master liable for physician's services as on original undertaking, although sheriff procured physician to attend servant and promised to pay physician for his visit if no one else would agree to pay him.—Guy v. Riley, 180 S.E. 624, 51 Ga.App. 404.

Authority of physician to contract for hospital services

Where a physician called by the master took the injured employee to a hospital and informed the authorities that the master would pay the bill, the master was bound by such acts on the part of his agent.—Omaha General Hospital v. Strehlow, 147 N.W. 846, 96 Neb. 308.

Services covered by contract

(1) Contract written by railroad providing for doctor's services will be strictly construed against it; doctor's contract to render free medical attention to patrons and employees of railroad was held not to include surgical attention.—Missouri & N. A. R. Co. v. Fowler, 293 S.W. 47, 173 Ark. 772.

(2) A physician employed by a department store to render services to an injured employee could not recover for consultations with physicians, appointed by the court, in an action by the injured employee against the store, with a view of giving evidence in that action.—Ghio

mere fact that an employer summoned the physician or requested the performance of medical services does not necessarily establish a contract to pay[56] although such facts may, in the light of the particular circumstances, imply a binding promise to pay.[57]

Independent of contract, a physician ordinarily may not recover from an employer for services rendered an employee.[58] The employer is not liable for medical attendance even where the employee was injured in the course of his employment so as to make the employer liable for the injuries.[59]

The fact that the employer collected a fund out of the wages of its employees for medical aid does not necessarily make the employer liable to a physician for services rendered an employee.[60] Where a fund has been collected by the employer for the payment of a mine physician, one who holds an order of the employee authorizing a deduction from his wages for the payment of the holder as physician, which order is unaccepted by the employer, cannot attack the validity of the choice of another physician as the mine physician or attack his right to the fund.[61] Under a statute which provides that the entire amount deducted from the pay of the employees for the purpose of payment of a physician must be paid over to him, a physician cannot recover from the employer a balance alleged to have been withheld in the absence of a showing that there is a specified fund in the hands of defendant, withheld from the employees and laborers for the avowed purpose of paying his salary as company physician,[62] and it is not sufficient to show that there was a general understanding among the employees and laborers as to the purpose for which the fund is withheld.[63]

§ 167. Relief and Benefit Departments or Associations

The rules relating to plans, funds, or departments established and maintained by the employer either unilaterally or under contract with the employees, or associations of employees encouraged and aided by the employer, for the relief and benefit of employees or beneficiaries designated by them, are discussed infra §§ 168–170. Social security, unemployment compensation, and like matters made compulsory by statute are discussed in the C.J.S. title Social Security and Public Welfare.

Examine Pocket Parts for later cases.

§ 168. —— Organization and Membership

a. In general
b. Membership
c. Dissolution and winding up
d. Refund or recovery back of contributions or deductions from wages

a. In General

When not prohibited by charter or statute, an employer may maintain an insurance plan for the protection of its employees, form a relief department and guarantee payment of its obligations, or ad pt a pension plan where payments to be made thereunder bear a reasonable relation to the value of services rendered and to be rendered.

For the purpose of providing for relief or the payment of benefits in the case of accident, sickness, or death of their employees, various employers, particularly railroads, have from time to time organized or encouraged the formation among their employees of what are commonly known as relief departments or funds.[64] Such relief departments or associations are not insurance companies in such a sense as to bring

v. Schaper Bros. Mercantile Co., 163 S.W. 551, 180 Mo.App. 686.

Waiver

Dentist, having rendered bill to insurance carrier, was held not to have waived claim against employer.—Capron v. Utica Ice Co., 217 N.Y.S. 732, 127 Misc. 848.

56. Ga.—Norton v. Rourke, 61 S.E. 478, 130 Ga. 600, 18 L.R.A.,N.S., 173, 124 Am.S.R. 787.
39 C.J. p 247 note 57.

57. Ill.—Krieger v. Chicago Carton Co., 185 Ill.App. 582.
Miss.—Till v. Redus, 29 So. 822, 79 Miss. 125.
Mo.—Wilson v. St. Louis Envelope & Paper Box Co., App., 190 S.W. 979—Greensfelder v. Witte Hardware Co., 175 S.W. 275, 189 Mo. App. 576.
39 C.J. p 247 note 59.

Servant performing services without compensation
Vt.—Clark v. Waterman, 7 Vt. 76, 29 Am.D. 150.

58. Ala.—Johnson v. Roberts, 103 So. 563, 212 Ala. 535.
39 C.J. p 247 note 56.
Employer's liability under workmen's compensation statutes to persons supplying medical services to employees see the C.J.S. title Workmen's Compensation Acts § 275, also 71 C.J. p 782 note 63 et seq.

59. Mass.—Davis v. Forbes, 51 N.E. 20, 171 Mass. 548, 47 L.R.A. 170.
39 C.J. p 247 note 60.

60. Mo.—Perkins v. Kilpatrick, App., 193 S.W. 876.

61. Wash.—Sheets v. Coast Coal Co., 133 P. 433, 74 Wash. 327.

62. Tenn.—Wagner v. Brady, 171 S. W. 1179, 130 Tenn. 554.

63. Tenn.—Wagner v. Brady, supra.

64. Pa.—Corpus Juris quoted in Cimprich v. Pennsylvania R. Co., 180 A. 51, 54, 119 Pa.Super. 5.
39 C.J. p 247 notes 66–68.

Parties

In an action by an undertaker against a relief association to recover funeral expenses of a deceased member, a petition of the original defendant to join additional defendants will not be dismissed on a ground not appearing in the petition or in the order of court thereon.—Booth v. Pennsylvania Railroad Voluntary Relief Dept., 41 Pa.Dist. & Co. 271.

Notice unauthorized

A notice posted by a railroad yardmaster directing employees in case of accident not to call a particular physician was held not to have been authorized by an employees' beneficial association.—Peek v. Northern Pac. Ry. Co., 152 P. 421, 51 Mont. 295, L.R.A.1916B 835.

them within the operation of statutes relating to such companies, as discussed in Insurance § 59, but they are more properly regarded as beneficial societies.[65]

A corporation employer, although not an insurance company, may maintain an insurance plan for the protection of its employees engaged in the conduct of the business of the corporations where it is not contrary to the express terms of incorporation.[66] So the formation by a railroad company of a relief department together with a guaranty of the payment of its obligations will not be held ultra vires,[67] at least in the absence of evidence of the terms of the charter of the corporation.[68] An employee cannot assert that the maintenance of a relief department is ultra vires after having received the benefits secured to him by his contract,[69] and one who deals with it as a legal entity capable of transacting business, and in consequence receives from it money or other thing of value, is estopped to deny the legality of its existence or its right to contract.[70] The admission and treatment of nonmember patients at the hospital of a railroad employees' relief association is not ultra vires where there is nothing in the certificate, constitution, or by-laws which provides that the hospital shall be for the exclusive use of the members of the association or which prohibits the admission of nonmembers.[71]

Corporate pension plans provide a legitimate method of granting employees deferred compensation in addition to basic salaries where the payments to be made thereunder bear a reasonable relation to the value of services rendered and to be rendered and hence are not objectionable as a gift which majority stockholders have no right to make over the protest of a minority.[72] The validity of a statute prohibiting any corporation from directly or indirectly compelling or requiring an employee to join any company or association whatsoever, and from withholding any part of an employee's wages or salary for the payment of dues or assessments in any society or organization, has been upheld.[73] While a statute forbidding a corporation to compel an employee to contribute to a benefit or insurance fund maintained or managed for the employees by the corporation or by any other corporation or person is constitutional,[74] it does not forbid all compulsory contributions to benefit or insurance funds, but only those where the fund is maintained or managed for the employees by some one other than themselves.[75] A statute providing that an employee of a company which has established a pension system shall, after having served at least one fourth of the term required to qualify him for a pension, be qualified to receive a proportionate part of the pension has been held invalid.[76]

b. Membership

By-laws or other regulations of an employees' relief association are controlling in respect of eligibility for membership and termination of membership. False warranties as to a material matter in an application for membership may deprive the member of the right to benefits.

The eligibility of particular persons to membership in an employees' relief association must be determined by the by-laws or other regulations of the association.[77] In the case of an incorporated association, the organization cannot be required by estoppel to pay benefits to a member who is not eligible under the terms of its charter.[78] Where a relief de-

65. Pa.—**Corpus Juris quoted in** Cimprich v. Pennsylvania R. Co., 180 A. 51, 54, 119 Pa.Super. 5.
39 C.J. p 247 note 67.
Benevolent organization
Or.—Rueda v. Union Pac. R. Co., 175 P.2d 778.
Not mutual benefit association
The relief department of a particular railroad company has been held merely a department of the railroad company, and not a mutual benefit association.—Grandillo v. Pennsylvania R. Co., 162 A. 349, 5 W.W. Harr., Del., 214.

66. Ala.—U. S. Cast Iron Pipe & Foundry Co. v. Bailey, 69 So. 825, 194 Ala. 261.

67. Ala.—Harrison v. Alabama Midland R. Co., 40 So. 394, 144 Ala. 246, 6 Ann.Cas. 804.
39 C.J. p 247 note 70.

68. Fla.—Atlantic Coast Line R. Co. v. Beazley, 45 So. 761, 54 Fla. 311.
39 C.J. p 248 note 71.

69. Ill.—Eckman v. Chicago, B. & Q. R. Co., 48 N.E. 496, 169 Ill. 312, 38 L.R.A. 750.

70. Ga.—Petty v. Brunswick & W. R. Co., 35 S.E. 82, 109 Ga. 666.

71. Colo.—Denver & R. G. R. Co. Employees' Relief Ass'n v. Rishmiller, 171 P. 501, 64 Colo. 306, L. R.A.1918D 559.

72. U.S.—Nemser v. Aviation Corporation, D.C.Del., 47 F.Supp. 515.
Length of service
Fact that the amount of an annuity to which an employee would be entitled under contributory pension plan was not based on the length of his service was not in itself sufficient to render the plan unlawful.—Nemser v. Aviation Corporation, supra.

73. Ohio.—Baltimore & O. S. W. R. Co. v. Bailey, 124 N.E. 195, 99 Ohio St. 312, error dismissed 40 S.Ct. 118, 251 U.S. 564, 64 L.Ed. 416.
39 C.J. p 258 note 7.

74. N.Y.—Fajans v. R. H. Macy & Co., 296 N.Y.S. 658, 163 Misc. 182, reversed on other grounds 300 N.Y.S. 624, 165 Misc. 100, affirmed 6 N.Y.S.2d 157, 254 App.Div. 827, and motion denied 6 N.Y.S.2d 443, 255 App.Div. 702.

75. N.Y.—Fajans v. R. H. Macy & Co., 300 N.Y.S. 624, 165 Misc. 100, affirmed 6 N.Y.S.2d 157, 254 App. Div. 827, motion denied 6 N.Y.S.2d 443, 255 App.Div. 702.

76. U.S.—Standard Oil Co. of Louisiana v. Porterie, D.C.La., 12 F. Supp. 100, followed in Standard Pipe Line Co. v. Porterie, 12 F. Supp. 105.

77. Pa.—Kimbrough v. Hoffman, 6 Pa.Super. 60, 41 Wkly.N.C. 275.
39 C.J. p 248 note 82.

78. N.Y.—Fitzgerald v. Burden Benev. Ass'n, 23 N.Y.S. 647, 69 Hun 532.

partment, however, with knowledge that no formal application has been made and no examination had, deducts assessments from the pay of the employee on the basis of membership and retains them, it is estopped to deny his membership;[79] but a mere deduction of assessments by the employer is ineffective to show an acceptance of the employee's application in the absence of authorization or ratification by the relief association.[80]

False warranties as to a material matter by the member in his application will deprive him of the right to benefits[81] although it has been held that it must be shown that the vitiating statements were knowingly false or made with a fraudulent purpose to mislead the company.[82]

Termination of membership. The termination of the employment will terminate the employee's rights under a benefit certificate[83] or his membership in a relief association where its regulations so provide;[84] and, at least in respect of the right of a beneficiary to a death benefit,[85] or even in respect of sick benefits,[86] this may be true although the employment ceased because of sickness or disability. However, it has been held that the failure of the association to exercise its right to terminate the membership because of termination of employment is a waiver thereof in so far as a beneficiary is concerned and the latter's rights, after the death of the member, are the same as though employment had not been terminated.[87] A mere absence from duty not in itself terminating the employment will not terminate the membership;[88] but sometimes, under a rule of the employer issuing the certificate, the certificate is automatically canceled after a prescribed period of absence.[89] Where the employment is terminated, a retention by mistake of an assessment from the employee's pay will not continue his membership.[90]

Failure to pay assessments in advance as required by the regulations may terminate the membership,[91] and an assessment insufficient in amount to cover the next ensuing period cannot be apportioned to the first part thereof.[92]

c. Dissolution and Winding Up

On dissolution of an employees' relief society, or on discontinuance of a benefit plan where no association or organization has been formed, the funds on hand are regarded as held on a resulting trust and are to be distributed to the contributors in proportion to their contributions.

In the absence of a statutory provision therefor, a dissolution of a voluntary relief organization cannot be had in equity unless some parties representing each of the conflicting interests are before the court.[93] On dissolution of a voluntary relief society, its funds are held by the trustees for the benefit of the contributors and donors as a resulting trust,[94] and likewise, where a fund is established by contributions of the employer and of the employees from which benefits are paid to the employees, but there is no organization or association formed, the fund is held as a trust fund,[95] of which the employer is a trustee,[96] and on discontinuance of the plan the fund

79. Neb.—Burlington Voluntary Relief Dept. v. White, 59 N.W. 747, 41 Neb. 547, 43 Am.S.R. 701.
39 C.J. p 248 note 86.

80. Pa.—Baltimore & Ohio Employees' Relief Ass'n v. Post, 15 A. 885, 122 Pa. 579, 9 Am.S.R. 147, 2 L.R.A. 44.
1 C.J. p 408 note 54 [a].

81. Neb.—Blunt v. Chicago, B. & Q. R. Co., 142 N.W. 532, 93 Neb. 815.
39 C.J. p 248 note 84.

82. N.C.—Daughtridge v. Atlantic Coast Line R. Co., 80 S.E. 1080, 165 N.C. 188.

Statement substantially true
Negative answer to question whether applicant for membership in employer's relief fund ever received injury was not fraudulent misrepresentation, where prior fall did not disable him until long afterwards.—Pennsylvania R. Co. v. Shannon, C.C.A.Ohio, 32 F.2d 559.

83. Mo.—Burns v. National Lead Co., 94 S.W.2d 1126, 231 Mo.App. 180.

Employer is not obligated to continue insurance after termination of employment, where the insurance is merely a gratuity and not part of the consideration of the contract of employment.—Kowalski v. Ætna Life Ins. Co., 165 N.E. 476, 266 Mass. 255, 63 A.L.R. 1030.

84. Ga.—Young v. Minton, 176 S.E. 662, 49 Ga.App. 545.
Ill.—Przybylski v. International Harvester Co., 187 Ill.App. 235.
Mass discharge of employees see infra subdivision c of this section.

85. Mo.—Burns v. National Lead Co., 94 S.W.2d 1126, 231 Mo.App. 180.

86. N.Y.—Ulmer v. Minster, 37 N.Y.S. 679, 16 Misc. 42.

87. Pa.—Carpenter v. Pennsylvania Railroad Employees Provident & Loan Ass'n, 189 A. 469, 324 Pa. 540.

88. N.Y.—Johnson v. Pennsylvania R. Co., 55 N.Y.S. 1050, 26 Misc. 241, reversed on other grounds 60 N.Y.S. 129, 43 App.Div. 453.
39 C.J. p 249 note 90.

Employment continues, within the meaning of a benefit certificate, until it is terminated by the withdrawal of the employee or discharge by the employer, with notice to the other party; it indicates the status of the holder of the certificate with relation to the company, rather than actual employment; and it is not automatically terminated by disability.—Perkins v. Eagle Lock Co., 174 A. 77, 118 Conn. 658.

89. Mo.—Burns v. National Lead Co., 94 S.W.2d 1126, 231 Mo.App. 180.

90. Pa.—Kimbrough v. Hoffman, 6 Pa.Super. 60—Aldridge v. Baltimore & O. R. Co., 39 Pa.Co. 312.

91. Pa.—Jacobs v. Pennsylvania R. Co., 20 Pa.Dist. 375.

92. Pa.—Jacobs v. Pennsylvania R. Co., supra.
39 C.J. p 249 note 94.

93. Tenn.—Atnip v. Tennessee Mfg. Co., Ch.A., 52 S.W. 1093.

94. Mass.—Coe v. Washington Mills, 21 N.E. 966, 149 Mass. 543.

95. Mich.—Walters v. Pittsburgh & Lake Angeline Iron Co., 167 N.W. 834, 201 Mich. 379, 1 A.L.R. 624.

96. Mich.—Walters v. Pittsburgh &

is distributed, not in accordance with the rules governing the distribution of the property of a voluntary association, but as a resulting trust to all who contributed to it in proportion to their contributions.[97] In case of a voluntary discontinuance of the plan, the rights of the parties are determined as of the date of discontinuance.[98] An employees' pension fund committee may not be held personally liable for distributing the fund, on dissolution, in accordance with a plain and unambiguous rule.[99] Provisions in the by-laws for the discontinuance of the association may be waived or set aside by the members.[1]

Division and partial distribution of assets without dissolution. Where the employer is still in business and employing the larger part of the membership of an employees' benefit association, members who lost employment en masse because of the closing of one of the employer's mills have been held not entitled to a decree dissolving the association and distributing its assets as on a dissolution,[2] but they have been held entitled to a decree for division of the net assets of the association between the association, for the benefit of the members continuing to be employees, and the members who were discharged en masse, and for a distribution of their proportionate shares to the employees who were so discharged.[3]

d. Refund or Recovery Back of Contributions or Deductions from Wages

An employee who has contributed is not entitled to recover back the amount of such contributions except where the relief plan is unlawful or except to the extent provided by the plan or by regulations of a relief department.

Where, by statute, a relief plan under which the employee directly or indirectly agrees to surrender or waive any right of action against the employer for damages from personal injuries is void, as discussed infra § 170, it has been held or recognized that an action will lie by the employee to recover the amount deducted from his wages during his service for the benefit of the relief fund,[4] but ordinarily, where the employee has consented to a deduction from his wages by receipting therefor in full, he cannot recover in an action at law any part of the fund created except in accordance with the terms of the plan;[5] and an employee who has refused to permit continuance of deductions from his salary and who is not qualified for benefits is not entitled to repayment of the sum previously paid into the fund on his behalf.[6]

A fund committee will not be held to have misdistributed the fund by permitting the withdrawal of contributions by discharged employees in accordance with the rules;[7] and a return of the money so withdrawn will not be decreed in a proceeding to which the discharged employees making the withdrawals are not parties.[8] However, the provisions of some plans, and the regulations of some relief departments, relative to a return or refund on termination of employment have been construed to refer only to a refund of the unearned portion of the last month's contribution, and not to entitle an employee leaving the service to a return or refund of all the contributions made by him, less the amount, if any, received

Lake Angeline Iron Co., supra—O'Neil v. Lake Superior Iron Co., 30 N.W. 688, 63 Mich. 690.

97. Mich.—Walters v. Pittsburgh & Lake Angeline Iron Co., 167 N.W. 834, 201 Mich. 379, 1 A.L.R. 624.
39 C.J. p 249 note 7.

Pension fund
Generally assets of employees' pension fund must be distributed among members according to contributions on dissolution.—Cowles v. Morris & Co., 161 N.E. 150, 330 Ill. 11.

98. Mo.—Stein v. National Bank of Commerce, App., 181 S.W. 1072.
39 C.J. p 249 note 8.

99. Ill.—Cowles v. Morris & Co., 161 N.E. 150, 330 Ill. 11.

1. Tenn.—Atnip v. Tennessee Mfg. Co., Ch.A., 52 S.W. 1093.
39 C.J. p 249 note 9.

2. N.Y.—Longhine v. Bilson, 287 N.Y.S. 281, 159 Misc. 111.

3. N.Y.—Longhine v. Bilson, supra.

Matters not affecting right to share in assets
(1) Members of employees' benefit association who lost their employment by closing of one of employer's mills were not precluded from asserting rights in assets of association by fact that employees of another mill previously closed had asserted no such rights.—Longhine v. Bilson, supra.

(2) Also such members were entitled to share in assets of association, notwithstanding by-law providing for cessation of membership and forfeiture of all rights to benefits or to moneys paid to association when member voluntarily or involuntarily left employ of employer, since by-law was intended simply to cover case of individual members who left employ of employer, not mass discharge of employees by closing of mill.—Longhine v. Bilson, supra.

(3) Termination of membership on termination of employment generally see supra subdivision b of this section.

4. Ala.—Corpus Juris cited in Atlantic Coast Line R. Co. v. Wright, 187 So. 475, 477, 237 Ala. 410.
39 C.J. p 249 note 96.

5. Pa.—Mocomber v. Procter, 22 Pa. Super. 483.
39 C.J. p 249 note 97.

Change in system
Change in French corporation's pension system by order of French government, whereby employees' contributions ceased to be refundable on resignation or dismissal, was binding on New York employee who voluntarily resigned.—Doyle v. French Telegraph Cable Co., 280 N.Y.S. 281, 244 App.Div. 586.

6. Ohio.—Marquart v. Baltimore & O. R. Co., 195 N.E. 396, 49 Ohio App. 141.

7. Ill.—Cowles v. Morris & Co., 161 N.E. 150, 330 Ill. 11.

8. Ill.—Cowles v. Morris & Co., supra.

by him in benefits.[9] Where liabilities have accrued against the department, the member is not required to accept a tender of the assessments withheld from his pay in lieu of a discharge of the obligations incurred by the department.[10]

§ 169. —— Benefits

a. In general
b. Beneficiaries
c. Remedies and procedure within organization
d. Execution of releases
e. Actions for benefits

a. In General

The employee or beneficiary is entitled to benefits only as provided for by the accepted plan or other contract and rules and regulations embraced within the contract.

A benefit plan offered by an employer to all its employees and impliedly accepted by them through remaining in the employment constitutes a contract between the employer and employee,[11] the service rendered by the employee being a sufficient consideration to support the employer's promise to pay benefits.[12] In such case the plan is not a mere gratuity or charity conferring on the employees and their dependents no legal rights,[13] and payments of benefits under the plan are not mere gratuities to be awarded in the discretion of the corporate employer's officials.[14] However, a mere proposal on the part of the employer to pay benefits under certain specified conditions does not become a contract until the terms are accepted and complied with by the employee.[15] Where there is an association, the contract, as far as it relates to benefits, consists in the application of membership, the policy or membership certificate,[16] and the regulations of the association.[17] So too, where there is a relief department, the contract may consist of the application, certificate, and regulations.[18]

The employee or beneficiary is entitled to benefits only as provided for by the accepted plan or other contract and rules or regulations embraced within the contract,[19] this rule being applicable to a

9. Ala.—**Corpus Juris cited in** Atlantic Coast Line R. Co. v. Wright, 187 So. 475, 477, 237 Ala. 410.
39 C.J. p 249 note 98.

Administrative construction of such regulations is given much weight in construing the regulations.—Atlantic Coast Line R. Co. v. Wright, 187 So. 475, 237 Ala. 410.

10. Neb.—Burlington Voluntary Relief Dept. v. White, 59 N.W. 747, 41 Neb. 547, 43 Am.S.R. 701.
39 C.J. p 248 note 87.

11. Conn.—Perkins v. Eagle Lock Co., 174 A. 77, 118 Conn. 658—Tilbert v. Eagle Lock Co., 165 A. 205, 116 Conn. 357.
La.—**Corpus Juris cited in** Robinson v. Standard Oil Co. of Louisiana, App., 180 So. 237, 239.
Pa.—**Corpus Juris quoted in** Jensen v. Bell Telephone Co. of Pennsylvania, 29 Pa.Dist. & Co. 476, 486.
S.C.—Moore v. Postal Telegraph-Cable Co., 24 S.E.2d 361, 202 S.C. 225.
39 C.J. p 248 note 76.

12. Conn.—Tilbert v. Eagle Lock Co., 165 A. 205, 116 Conn. 357.
La.—**Corpus Juris cited in** Robinson v. Standard Oil Co. of Louisiana, App., 180 So. 237, 239.
Ohio.—Mabley & Carew Co. v. Borden, 195 N.E. 697, 129 Ohio St. 375, 100 A.L.R. 511.
Or.—McLemore v. Western Union Tel. Co., 171 P. 390, 88 Or. 228, reheard 171 P. 1049, 88 Or. 228.
Pa.—**Corpus Juris quoted in** Jensen v. Bell Telephone Co. of Pennsylvania, 29 Pa.Dist. & Co. 476, 486.
S.C.—Moore v. Postal Telegraph-Cable Co., 24 S.E.2d 361, 202 S.C. 225.

Better and more continuous service
Ample consideration to the employer to support his benefit plan as a contract with his employees is found in the attraction of more competent workmen to his employ, the inducement of better and more continuous service, and the avoidance of expense of labor turnover.—Psutka v. Michigan Alkali Co., 264 N.W. 385, 274 Mich. 318.

13. La.—Robinson v. Standard Oil Co. of Louisiana, App., 180 So. 237.

14. Pa.—Jensen v. Bell Telephone Co. of Pennsylvania, 29 Pa.Dist. & Co. 476.

15. Ky.—Stewart v. Wisconsin Steel Co., 210 S.W. 479, 183 Ky. 730.

16. Ill.—Chicago, B. & Q. R. Co. v. Hendricks, 125 Ill.App. 580.
Tex.—Swift & Co. Employes Benefit Ass'n v. Lemire, Civ.App., 145 S.W.2d 698, error dismissed, judgment correct.

Application and rules embodied in certificate
Ohio.—Fitzgibbon v. Walcutt, 185 N.E. 837, 126 Ohio St. 450.

17. Ill.—Chicago, B. & Q. R. Co. v. Hendricks, 125 Ill.App. 580.

Constitution and by-laws binding on member
Where the organization is a voluntary unincorporated association, a member who has subscribed to the constitution and by-laws on becoming a member is bound by them, however unreasonable they may seem.—Ulmer v. Minster, 37 N.Y.S. 679, 16 Misc. 42.

18. U.S.—Baltimore & O. R. Co. v. Reaux, D.C.Ohio, 59 F.Supp. 969.

Regulations binding on employee
(1) Employees of railroad on acquiring membership in railroad's relief department were bound by all regulations of the relief department, in effect at the time of the acquiring of membership and all amendments thereafter made to such regulations, where applications for membership in the relief department provided that employees should be so bound.—Brennan v. McCoy, D.C.W.Va., 34 F.Supp. 865.
(2) Regardless of Railroad Retirement Act, members are bound by regulations of the relief department.—Brennan v. McCoy, supra.

19. U.S.—Brennan v. McCoy, supra.
D.C.—Sullivan v. Washington Terminal Co., 66 F.2d 278, 62 App.D.C. 248.
39 C.J. p 250 note 10.

Office workers of coördinated railroads
The arrangement between two railroads for joint use of two short distances of track was not a "coordination" within agreement between railroads and employees providing for benefits to employees affected by a coördination, so as to entitle certain office workers of the railroads whose positions had been abolished to benefits under agreement, where it appeared that arrangement did not have slightest effect on number of office workers

contingency on which benefits are[20] or are not[21] payable, and as to the amount of payments.[22] The foregoing is especially true where the fund is contributed entirely by the employer and is administered at his expense, the employer having the right in such case to reserve to himself the manner in which the plan shall be administered,[23] and the terms of the plan,[24] together with any rule which the employer makes regarding disposition of the fund[25] or carrying out of the plan,[26] are binding on, and determinative of the rights of, an employee, or beneficiary asserting rights to benefits.

The law of the state in which an application was made and accepted and in which a policy or certificate was executed and delivered governs the rights of the parties under the contract[27] even though a bill of interpleader is filed in another state by the employer's relief department.[28]

The right to unemployment compensation benefits is discussed in the C.J.S. title Social Security and Public Welfare.

Construction of provisions for benefits generally. The general rule that an insurance policy is to be construed strictly against the insurer, discussed in Insurance § 297 c, is applicable to an employee's insurance certificate issued by his employer.[29] Likewise, the terms of a plan, when formulated by the employer, are to be taken most strongly against him.[30] A certificate, issued by a corporate employer to its employee, should be liberally construed in or-

needed to handle business of railroads.—Fort Worth & Rio Grande Ry. Co. v. Evans, Tex.Civ.App., 150 S.W.2d 408, error dismissed, judgment correct.

Failure to collect premium

Under employes' benefit association's accident insurance policy, providing for payment of weekly premiums by employer's deduction of amounts thereof from insured employes' wages after expiration of each week, one employed by such employer for definite period and not discharged or laid off within week during which she was forced to quit because of accidental injury sustained while at work could recover weekly disability benefits, even though employer failed to collect premium for such week and deduct amount thereof from such employee's money in employer's hands. —Swift & Co. Employes Benefit Ass'n v. Lemire, Tex.Civ.App., 145 S.W.2d 698, error dismissed, judgment correct.

20. Cal.—Sullivan v. Union Oil Co. of California, 105 P.2d 922, 16 Cal. 2d 229.
Ohio.—Pennsylvania R. Co. v. Giovanni, 2 N.E.2d 614, 52 Ohio App. 50.
39 C.J. p 250 note 11 [a], [b].

Accident arising out of negligence

It is not true, as a general proposition, that compensation for accident and sickness, as provided in relief department of an employer, may never cover compensation for an accident arising out of negligence.—Atlantic Coast Line R. Co. v. Moore, 181 So. 175, 132 Fla. 507.

On fulfillment of condition beneficiary becomes entitled to payment as a matter of right.—Richardson v. Pacific Power & Light Co., 118 P.2d 985, 11 Wash.2d 288.

21. N.Y.—Burgess v. First Nat. Bank, 220 N.Y.S. 134, 219 App.Div. 361.
S.C.—Ellis v. Atlantic Coast Line R. Co., 168 S.E. 860, 169 S.C. 343.

Taking advantage of old age pension law

Where railroad employees' benefit association provided for payment of benefits on dismissal from service, but that no member who had taken advantage of any old age pension law should be eligible therefor, and that indefinite leave of absence on account of permanent disability should be deemed a dismissal provided member had not attained retirement age under old age retirement law, employee who was past sixty-four when he was granted an indefinite leave of absence because of permanent disability and who thereafter received benefits under the Railroad Retirement Act, was not entitled to dismissal benefits, since employee had taken advantage of an old age pension law.—Bonner v. Railway Emp. Mut. Ass'n, Mont., 170 P.2d 400.

Discharge for fault of employee

Where service annuity contract provided for payment of annuity should employee before retirement be discharged for any reason not the fault of employee, and defined fault of employee as embracing any one of three enumerated causes, only discharge for one of such enumerated causes would relieve employer from liability for annuity; but absence of employee who when discharged had served one day of one year sentence in house of correction was within an enumerated cause of "continuous absence from duty without leave when not caused by illness or other similar disability," even though employee when sentenced was already absent due to a broken leg and would have continued absent for longer period than term of his sentence.—Marcus v. Boston Edison Co., 56 N.E.2d 910, 317 Mass. 1.

22. Or.—McLemore v. Western Union Tel. Co., 171 P. 390, 1049, 88 Or. 228.
39 C.J. p 250 note 12 [a], [b].

Double benefits

D.C.—Sullivan v. Washington Terminal Co., 66 F.2d 278, 62 App.D.C. 248.

Credit of salary paid

A beneficial association liable to an employee for payment of sick benefits since time of employee's discharge was entitled to be credited with amount of check covering four weeks' salary, less four weeks' dues, which was given to employee by employer at time of discharge.—Kahn v. Griscom, 18 A.2d 499, 144 Pa.Super. 126.

23. Tex.—Webster v. Southwestern Bell Tel. Co., Civ.App., 153 S.W.2d 498, error refused.

24. Mass.—Clark v. New England Tel. & Tel. Co., 118 N.E. 348, 229 Mass. 1.
Tex.—**Corpus Juris cited in** Magnolia Petroleum Co. v. Butler, Civ. App., 86 S.W.2d 258, 262.

25. Ky.—Stewart v. Wisconsin Steel Co., 210 S.W. 479, 183 Ky. 730.
39 C.J. p 250 note 16.

26. La.—Robinson v. Standard Oil Co. of Louisiana, App., 180 So. 237.

27. U.S.—Baltimore & O. R. Co. v. Reaux, D.C.Ohio, 59 F.Supp. 969.
S.C.—Livingston v. Atlantic Coast Line R. Co., 180 S.E. 343, 176 S.C. 385.

28. U.S.—Baltimore & O. R. Co. v. Reaux, D.C.Ohio, 59 F.Supp. 969.

29. Mo.—Rose v. National Lead Co., App., 94 S.W.2d 1047.

30. U.S.—Western Union Tel. Co. v. Hughes, S.C., 228 F. 885, 143 C.C.A. 283.
39 C.J. p 248 note 79.

Ambiguities in the plan are resolved against the employer.—Psutka v. Michigan Alkali Co., 264 N.W. 385, 274 Mich. 318.

der that the purpose of issuing it may be realized;[31] an employer's benefit plan for employees must be read as a whole;[32] and the by-laws, if any, and regulations governing the creation and administration of the fund will be given the construction placed thereon by those on whom rests the responsibility of administering the fund unless such construction conflicts with law and public policy.[33]

Pensions and retirement benefits. A pension is a stated allowance or stipend made in consideration of past services, or of the surrender of rights or emoluments, to one retired from service.[34] It involves the fundamental idea of compensation for services rendered, the payment of which is deferred until after completion of the services in order to induce long-continued and faithful service.[35] Except as created and provided for by contract or statute, the policy of promoting and assuring financial protection of deserving employees in their old age does not legally enter into the relationship of employer and employee.[36] Where a retirement plan is not included in a contract between employer and employee, the benefits described therein are entirely voluntary and gratuitous on the part of the employer;[37] and the employer may condition his bounty as he sees fit.[38] Services rendered in the past,[39] or appreciation thereof,[40] or a moral consideration,[41] or a requirement that employees report at the office for the purpose of receiving their checks[42] is not a sufficient consideration for a contract to pay employees pensions; and, where an arrangement under which pensions are paid is not supported by a valid consideration, it is revocable at the pleasure of the employer.[43]

On the other hand, where a retirement plan is not a mere benefaction, but is a contract supported by a consideration moving from the employee, the employer may not arbitrarily refuse payment of benefits thereunder.[44] Such a contract arises where, although the original offer of additional compensation, by way of a pension, for services to be rendered was voluntary and gratuitous, the services have been rendered and a pension has been awarded;[45] but even where there is a contract the offer

31. Ind.—Chicago & E. I. Ry. Co. v. Schraeder, 168 N.E. 468, 90 Ind. App. 151.

32. Conn.—Tilbert v. Eagle Lock Co., 165 A. 205, 116 Conn. 357.
Mich.—Psutka v. Michigan Alkali Co., 264 N.W. 385, 274 Mich. 318.

Conflicting provisions
Rule of plan for death benefit to employees' dependents declaring that plan constituted no contract, did not negative existence of contract, where rule conflicted with prior clauses providing positively and definitely for death benefits.—Psutka v. Michigan Alkali Co., supra.

33. Tenn.—Atnip v. Tennessee Mfg. Co., Ch.A., 52 S.W. 1093.
Tex.—**Corpus Juris cited in** Magnolia Petroleum Co. v. Butler, Civ. App., 86 S.W.2d 258, 262.

34. U.S.—Hooker v. Hoey, D.C.N.Y., 27 F.Supp. 489, affirmed, C.C.A., 107 F.2d 1016.

35. N.Y.—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented 33 N.Y.S.2d 764.
Pa.—David v. Veitscher Magnesitwerke Actien Gesellschaft, 35 A.2d 346, 348 Pa. 335.

Continuance in employment
Pension plans constitute a continuing inducement to employee to continue his loyal service to employer, and continuance in employment under that inducement constitutes the consideration moving from employee.—Wallace v. Northern Ohio Traction & Light Co., 13 N.E.2d 139, 57 Ohio App. 203.

36. U.S.—Plowman v. Indian Refining Co., D.C.Ill., 20 F.Supp. 1.

37. N.Y.—MacCabe v. Consolidated Edison Co. of New York, 30 N.Y.S. 2d 445.

38. U.S.—Menke v. Thompson, C.C. A.Mo., 140 F.2d 786—In re Missouri Pac. R. Co., D.C.Mo., 49 F. Supp. 405.

39. U.S.—Plowman v. Indian Refining Co., D.C.Ill., 20 F.Supp. 1.

40. U.S.—Plowman v. Indian Refining Co., supra.

41. U.S.—Plowman v. Indian Refining Co., supra.

42. U.S.—Plowman v. Indian Refining Co., supra.

43. U.S.—Plowman v. Indian Refining Co., supra.
Ga.—Fickling v. Pollard, 179 S.E. 582, 51 Ga.App. 54.

44. N.Y.—Gearns v. Commercial Cable Co., 32 N.Y.S.2d 856, 177 Misc. 1047.
Ohio.—Wilson v. Rudolph Wurlitzer Co., 194 N.E. 441, 48 Ohio App. 450.

Consideration
(1) Agreement by former employer, on employee's retirement, to pay stipulated pension, conditioned on employee remaining loyal and not engaging in competitive employment, was supported by sufficient consideration.—Langer v. Superior Steel Corporation, 161 A. 571, 105 Pa.Super. 579.

(2) Benefit to employer is valid consideration for contribution to employees' pension fund.—Cowles v. Morris & Co., 161 N.E. 150, 330 Ill. 11.

Promissory estoppel
(1) Employer's agreement to pay stipulated pension to employee on retirement conditioned on employee remaining loyal and not engaging in competitive employment is enforceable by employee under principle of promissory estoppel.—Langer v. Superior Steel Corporation, 161 A. 571, 105 Pa.Super. 579.

(2) Where evidence showed that employee, although ill, would have continued in employment for six more years, thereby becoming entitled to a pension under a pension plan effective as to employees employed by employer continuously for twenty years prior to attaining sixty years of age but for employee's reliance on employer's oral promise that if employee retired he would not jeopardize his right to qualify for a pension, under doctrine of promissory estoppel the employer would have been barred at expiration of six-year period from claiming that employee was not entitled to pension, notwithstanding oral agreement was within statute of frauds, if pension plan had remained in effect.—Sessions v. Southern California Edison Co., 118 P.2d 935, 47 Cal.App.2d 611.

45. Tex.—Texas & N. O. R. Co. v. Jones, Civ.App., 103 S.W.2d 1043, error refused.

Vested right
When the conditions are satisfied, retirement pay becomes a vested right of which the person entitled thereto cannot be deprived.—David v. Veitscher Magnesitwerke Actien

is accepted subject to the express conditions thereof,[46] and an employee is not entitled to a pension until he is qualified therefor according to the conditions imposed.[47]

The amount of a pension is determinable by applying the pertinent provisions of the plan.[48] A person receiving benefits has no enforceable right to different or greater benefits than those awarded him where, under the plan, the award is wholly within the discretion of the trustees,[49] nor, in the absence of a contractual obligation to do so, is the employer required to enlarge the pension payments of all pensioners in a class because it does so gratuitously, and out of its own corporate funds, for some one or more of that class.[50]

Employment contracts containing provisions for retirement pay are liberally construed to effectuate the declared intention of the parties to pay additional compensation for services rendered in the past;[51] and, where the inducement of a pension was accepted by an employee, booklets in which the employer explained the pension system will be construed most strongly against the employer;[52] but it has been held that the contract possesses none of the elements of a contract of insurance and is not to be strictly interpreted against the employer, especially where the burden it assumed was entirely voluntary and gratuitous.[53] A provision of a retirement

Gesellschaft, 35 A.2d 346, 348 Pa. 335.

Subsequent matter not nullifying contract

A contract for pension payments to employee, following due award, during balance of his life, subject to cancellation only for gross misconduct, was not nullified by commitment of former employee to state insane hospital, notwithstanding employer contributed substantially to such institution through taxation.—Texas & N. O. R. Co. v. Jones, Tex. Civ.App., 103 S.W.2d 1043, error refused.

Employer may not modify contract after board of pensions has determined employees' right to pension, made allowance thereof, and retired them.—Schofield v. Zion's Co-op. Mercantile Inst., 39 P.2d 342, 85 Utah 281, 96 A.L.R. 1083.

46. U.S.—Menke v. Thompson, C.C. A.Mo., 140 F.2d 786.

Interests of all parties are governed by contract.—Cowles v. Morris & Co., 161 N.E. 150, 330 Ill. 11.

47. U.S.—Menke v. Thompson, C.C. A.Mo., 140 F.2d 786.
Neb.—Twiss v. Lincoln Telephone & Telegraph Co., 287 N.W. 620, 136 Neb. 788.
N.Y.—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented 33 N.Y.S.2d 764.
Ohio.—Marquart v. Baltimore & O. R. Co., 195 N.E. 396, 49 Ohio App. 141.
Tex.—Magnolia Petroleum Co. v. Butler, Civ.App., 86 S.W.2d 258, error dismissed—Dowling v. Texas & N. O. R. Co., Civ.App., 80 S.W.2d 456, error refused.

Inchoate right

Right of employee to pension or retirement pay is inchoate until happening of contingency on which it was to be allowed.
Ill.—Cowles v. Morris & Co., 242 Ill. App. 548, affirmed 161 N.E. 150, 330 Ill. 11.
Pa.—David v. Veitscher Magnesitwerke Actien Gesellschaft, 35 A. 2d 346, 348 Pa. 335.

Employer may withdraw offer of pension plan at any time before an employee actually qualified under its terms, even though the employee is very close to qualifying period at time of abrogation of plan.—Wallace v. Northern Ohio Traction & Light Co., 13 N.E.2d 139, 57 Ohio App. 203.

Discontinuance of business and fund

Corporation contributing full amount agreed to employees' pension fund was held not to have impliedly contracted to continue business and fund until all claims were fully paid. —Cowles v. Morris & Co., 161 N.E. 150, 330 Ill. 11.

48. Cal.—Sessions v. Southern California Edison Co., 118 P.2d 935, 47 Cal.App.2d 611.

Month in which death occurs

Where retired officer died April 18, company, under plan contemplating annual retirement income payable in monthly installments, and cessation thereof with payment for the month in which death occurs, was obligated for entire April installment.—Trimble v. New York Life Ins. Co., 255 N.Y.S. 292, 234 App.Div. 427.

49. N.Y.—Korb v. Brooklyn Edison Co., 15 N.Y.S.2d 557, 258 App.Div. 799, reargument denied 16 N.Y.S. 2d 704, 258 App.Div. 887—MacCabe v. Consolidated Edison Co. of New York, 30 N.Y.S.2d 445.

50. Cal.—Sessions v. Southern California Edison Co., 118 P.2d 935, 47 Cal.App.2d 611.

Resolution of board of directors

A retired, pensioned employee whose name was omitted from list of pensioners entitled to receive increased pension payments under resolution of employer's board of directors providing for increased pensions for employees who would have been entitled to higher pensions if an abolished pension plan had been in effect on their retirement, could not maintain an action against employer to compel payments to be made to employee on the higher basis; and, in so holding, the court considered itself bound to read the resolution as a whole and give particular effect to specific language bearing on employee's claim rather than general language.—Sessions v. Southern California Edison Co., supra.

51. Pa.—Kline v. Morrison, 44 A.2d 267, 353 Pa. 79—Dom v. State Employes' Retirement Board, 28 A.2d 796, 345 Pa. 489.

Construction of award underlying contract

An arbitrator's award which was basis of employment contract between unions and employers, and which provided that employers should provide for payment of pensions to employees during their lives, required employers to provide pension payments for life of all employees becoming entitled thereto during employment contract period, and not merely pension payments to eligible employees during period of contract.—New York City Omnibus Corp. v. Quill, 73 N.Y.S.2d 289.

52. Ohio.—Sigman v. Rudolph Wurlitzer Co., 11 N.E.2d 878, 57 Ohio App. 4.

Old age

Words used by employer in booklets explaining its pension system that employees would receive benefits of system "when old age overtakes you," did not require an exhibition of senile decreptitude before pension became payable; and where employee continued in employment for twenty-seven years, relying on booklets, he was entitled to receive pension when discharged at age of fifty-two, because employer had no further employment to which he was suited.—Sigman v. Rudolph Wurlitzer Co., supra.

53. U.S.—Menke v. Thompson, C.C. A.Mo., 140 F.2d 786.

plan that no pension shall be paid out of capital assets of the employer will be accorded effect where the employer earns no profit;[54] and the term "profits" will be deemed to refer to net income computed by including within the items properly deductible from current receipts a fair allowance for depreciation of capital assets.[55]

b. Beneficiaries

The right of an employee to name or change a beneficiary in a death benefit certificate issued to him is qualified only by such restrictions, if any, as are imposed by statute or regulations of the department or association.

The employee may name any person whom he pleases as his beneficiary except as restricted by statute or by regulations of the association,[56] and only the association can question the eligibility of the beneficiary named by him.[57] The beneficiary named by the employee need not have an insurable interest in the life of the employee.[58] A person may have no legal right to payment of a death benefit where he was not designated beneficiary by the employee[59] or where, under the employer's regulations, any designation by the employee would be only a request, final decision as to whom payment would be made resting with a committee;[60] but, where the employer has exercised its discretion as to whom payment shall be made by paying part of the sum due, it is obligated to pay the remainder to the same person.[61]

Widow or divorced wife. Where, under the rules of the association, if no beneficiary is designated in the application benefits are payable to the wife of the employee, the widow of the employee may sue as beneficiary although no application was filed by the member.[62] Under some policies, certificates, or regulations, a divorced wife, although originally named beneficiary, is not entitled to benefits;[63] and, although divorce may not have terminated a wife's right as beneficiary under the rules of the association,[64] her rights may have been terminated by a comprehensive property settlement.[65] Under a benefit plan, it may be necessary and sufficient, in order to entitle the widow of an employee to benefits, that she should have been living with the employee[66] or dependent on him for support to at least a certain prescribed per cent of his pay[67] at the time of his death; but under other plans the relationship of husband and wife is all that is essential and the extent to which the employee was contributing to the support of his wife is immaterial.[68]

Change of beneficiary. The beneficiary in a death benefit certificate has no vested interest therein during the employee's lifetime, but only an expectancy contingent on his death and subject to a change of beneficiary.[69] In the absence of a rule of the department to the contrary, the employee has an unqualified right to change the beneficiary.[70] Con-

54. N.Y.—Gearns v. Commercial Cable Co., 32 N.Y.S.2d 856, 177 Misc. 1047.

55. N.Y.—Gearns v. Commercial Cable Co., 56 N.E.2d 67, 293 N.Y. 105, 153 A.L.R. 813, reargument denied 56 N.E.2d 749, 293 N.Y. 755.

Lack of estoppel

Corporation was not estopped to deny that item "reserve for pensions and benefits" did not constitute trust fund for employee's pension under retirement plan, notwithstanding it entered in such account various types of fines and commissions on insurance policies issued to employees, where corporation had paid out more for pensions than fund amounted to and employee did not lose benefit of insurance taken out by him under corporation's endowment pension plan antedating the present pension plan.—Gearns v. Commercial Cable Co., supra.

56. Ill.—Gallegos v. Ætna Life Ins. Co., 10 N.E.2d 875, 292 Ill.App. 123.

39 C.J. p 250 note 17.

57. Ariz.—Gristy v. Hudgens, 203 P. 569, 23 Ariz. 339.

58. Ariz.—Gristy v. Hudgens, supra.

Need not be relative

Ill.—Gallegos v. Ætna Life Ins. Co., 10 N.E.2d 875, 292 Ill.App. 123.

59. N.Y.—Trimble v. New York Life Ins. Co., 255 N.Y.S. 292, 234 App. Div. 427.

Beneficiary under superseded group policy may not recover under substituted death benefit plan where no beneficiary under such plan was designated by the employee.—Thompson v. Pacific Mills, 139 S.E. 619, 141 S. C. 303, 55 A.L.R. 1237.

60. N.Y.—Trimble v. New York Life Ins. Co., 255 N.Y.S. 292, 234 App.Div. 427.

61. N.Y.—Trimble v. New York Life Ins. Co., supra.

62. Neb.—Burlington Voluntary Relief Dept. v. White, 59 N.W. 747, 41 Neb. 547, 43 Am.S.R. 701, followed in 59 N.W. 751, 41 Neb. 561.

63. Ind.—Herdman v. McCormick, 40 N.E.2d 1009, 111 Ind.App. 169.

Ohio.—Fitzgibbon v. Walcutt, 185 N. E. 837, 126 Ohio St. 450.

Va.—Huff v. Norfolk & W. Ry. Co., 140 S.E. 335, 104 W.Va. 464, 59 A.L.R. 167.

64. Cal.—Sullivan v. Union Oil Co. of California, 105 P.2d 922, 16 Cal. 2d 229.

65. Cal.—Sullivan v. Union Oil Co. of California, supra.

66. La.—Robinson v. Standard Oil Co. of Louisiana, 195 So. 351, 194 La. 904.

Physical separation without estrangement

Employee and his wife forced by circumstances to live with relatives in separate cities, but without any estrangement or intention to end marital relationship, as evidenced by affectionate letters from employee to wife and extended visits of wife, were "living together" at time of employee's death within the meaning of the provision.—Robinson v. Standard Oil Co. of Louisiana, supra.

67. La.—Booker v. Standard Oil Co. of Louisiana, App., 6 So.2d 702.

68. S.C.—Moore v. Postal Telegraph-Cable Co., 24 S.E.2d 361, 202 S.C. 225.

Wife receiving principal support from state in a state hospital was a dependent and entitled to benefits due on employee's death.—Moore v. Postal Telegraph-Cable Co., supra.

69. Pa.—Shepler v. Pennsylvania R. Co., 5 A.2d 567, 334 Pa. 257.

70. Pa.—Shepler v. Pennsylvania R. Co., supra.

sent of the beneficiary first named is unnecessary;[71] but, where the by-laws or regulations require the written consent of the superintendent of the department, such act of the superintendent is discretionary, rather than ministerial,[72] and it may not be performed,[73] nor may performance thereof be waived by the insurer,[74] after the death of insured, and insured's written statement requesting, or purporting to make, a change of beneficiary is not alone sufficient to effect the change.[75]

In the absence of special circumstances, the former beneficiary has no standing to contest the employee's change of beneficiary.[76] While this rule does not apply if the employee agreed for a consideration to name, or not to change, a beneficiary,[77] or if he became irrevocably obligated by promissory estoppel not to make a change,[78] it does apply where it does not appear that there was any consideration for, or action or forbearance to act in reliance on, the employee's promise not to change the beneficiary.[79] Under the terms of some certificates and by-laws, only the insurer can, after the death of insured, contest a change of beneficiary made by insured and approved by the proper officer of insurer.[80]

A specific provision that marriage of a member shall immediately substitute the wife in place of the designated beneficiary has been regarded as clear and unambiguous and requiring no construction.[81] It is controlling in a situation within its terms, notwithstanding the marriage is secret[82] and although general regulations require payment of benefits to the beneficiary designated in the application and consent of the superintendent of the department to a change of beneficiary.[83]

c. Remedies and Procedure within Organization

Unless there are circumstances excusing a failure to do so, remedies before a board or committee provided for by the plan or regulations must be exhausted before resort may be had to the courts.

The regulations of relief fund organizations usually provide a method for the determination of questions arising as to the administration of the fund and the right to benefits by a particular officer or committee and frequently provide for an appeal to a higher tribunal from the decision, and such a procedure, when established, must be followed before resort may be had to the courts[84] unless circumstances exist which excuse a failure to do so.[85] As to whether a provision that the determination of the organization shall be conclusive precludes a resort to the courts, there is, in analogy to the rule applicable to beneficial associations generally, discussed in Beneficial Associations § 69, some difference of opinion. According to one view the member or his beneficiary cannot be precluded by such a regulation

71. Pa.—Shepler v. Pennsylvania R. Co., supra.

72. U.S.—Baltimore & O. R. Co. v. Reaux, D.C.Ohio, 59 F.Supp. 969.

73. U.S.—Baltimore & O. R. Co. v. Reaux, supra.
Md.—Ringler v. Ringler, 144 A. 221, 156 Md. 270.

74. Md.—Ringler v. Ringler, supra.

75. U.S.—Baltimore & O. R. Co. v. Reaux, D.C.Ohio, 59 F.Supp. 969.
Md.—Ringler v. Ringler, 144 A. 221, 156 Md. 270.

76. Pa.—Shepler v. Pennsylvania R. Co., 5 A.2d 567, 334 Pa. 257.

77. Pa.—Shepler v. Pennsylvania R. Co., supra.

78. Pa.—Shepler v. Pennsylvania R. Co., supra.

79. Pa.—Shepler v. Pennsylvania R. Co., supra.

80. Md.—Scheihing v. Baltimore & O. R. R., 23 A.2d 381, 180 Md. 168.

81. U.S.—Freeland v. Freeland, C.C.A.Ohio, 110 F.2d 966.

82. U.S.—Freeland v. Freeland, supra.

83. U.S.—Freeland v. Freeland, supra.

84. Pa.—Jaroszewski v. Pennsylvania R. Co., 5 A.2d 678, 122 N.J. Law 350—West v. Pennsylvania R. Co., 194 A. 912, 328 Pa. 156—Spahr v. Pennsylvania R. Co., 13 A.2d 919, 141 Pa.Super. 24.
S.C.—Livingston v. Atlantic Coast Line R. Co., 180 S.E. 343, 176 S.C. 385.
Tenn.—International Harvester Co. v. Campbell, 76 S.W.2d 986, 18 Tenn.App. 320.
Tex.—Fort Worth & Rio Grande Ry. Co. v. Evans, Civ.App., 150 S.W.2d 408, error dismissed, judgment correct.
39 C.J. p 259 note 22.
Contrary view has been taken.—Ellis v. Atlantic Coast Line R. Co., 174 S.E. 19, 172 S.C. 338.
Informal appeal, such as letter, was considered sufficient where regulations made no provision for place where, or to whom appeal should be presented.—Shipe v. Norfolk & W. Ry. Co., 1 N.E.2d 174, 51 Ohio App. 361.

85. N.J.—Jaroszewski v. Pennsylvania R. Co., 5 A.2d 678, 122 N.J. Law 350.
39 C.J. p 251 note 23.
Futility
The rule that members must comply with remedies within organization before suing for benefits is not applicable where compliance would be futile, illusory, and vain; but the rule of nonapplicability may not be invoked by a member who was responsible for fact that compliance with department's regulation requiring member to appeal from denial of benefits to department's board of adjustment within thirty days would be futile.—Jaroszewski v. Pennsylvania R. Co., supra.
Lack of hearing
(1) It is no defense to suit to recover benefits that claimant has not exhausted his remedy within system by seeking rehearing if claimant was never allowed first hearing, his case being arbitrarily disposed of, and if there are no rules of procedure for establishment of claims.—Jensen v. Bell Telephone Co. of Pennsylvania, 29 Pa.Dist. & Co. 476.
(2) A rule requiring an appeal from the determination of the superintendent to the advisory committee does not apply where there is no hearing before the superintendent, but his asserted determination rests merely in the writing of a letter denying the membership of the employee.—Burlington Voluntary Relief Dept. v. White, 59 N.W. 747, 41 Neb. 547, 43 Am.S.R. 701, followed in 59 N.W. 751, 41 Neb. 561.

from a resort to the courts for determination of the ultimate question as to whether he is entitled to benefits,[86] although it is held or recognized as to certain preliminary questions of fact that the determination of the organization may be conclusive.[87] According to another view, where membership of the organization is purely voluntary, the member is regarded as having submitted to the decision of its tribunals[88] and is bound by them in the absence of fraud or mistake,[89] and this is particularly true where the committee whose decision is made final is selected in part by the employer and in part by the contributing employees.[90]

Where the fund is maintained by the employer, the employee making no contribution thereto, it is peculiarly within the power of the employer establishing the plan to make the determination of a board or committee conclusive.[91] In order that such a provision may be accorded effect, it is necessary and sufficient that the investigation and action of the board or committee be full,[92] fair,[93] and reasonable,[94] and not arbitrary,[95] capricious,[96] or in bad faith.[97] Although under the plan the obligation of the company is limited to making payments from the fund on the order of the committee, the failure of the committee to act on plaintiff's claim does not bar an action for benefits.[98] The employer waives his rights to have the facts decided by a committee under a benefit plan by an answer in an action for benefits that the facts are as stated in the complaint.[99]

A provision in the plan that a decision of a board shall be conclusive on both questions of fact and questions of law is valid;[1] but, where the plan provides that questions of fact arising in administration of the regulations shall be determined conclusively for all parties by a committee, the inference is that the committee has no authority to bind either the employer or the employee by any decision on a question of law.[2]

d. Execution of Releases

Provisions in a benefit plan relative to the execution of releases as a condition to the payment of benefits have been accorded effect.

The execution of releases as specified by the plan may be made a condition to the payment of benefits,[3] but releases other than as specified cannot be required,[4] and it has been held that a requirement of a release from all persons interested as a condition to the payment of death benefits to the beneficiary named is invalid in that it may be impossible of performance.[5] Such a requirement, on the other hand, has been held valid,[6] and a release by the per-

86. Ohio.—Baltimore & O. R. Co. v. Stankard, 46 N.E. 577, 56 Ohio St. 224, 60 Am.S.R. 745, 49 L.R.A. 381.
39 C.J. p 251 note 25.

87. Ohio.—Baltimore & O. R. Co. v. Stankard, supra—Shipe v. Norfolk & W. Ry. Co., 1 N.E.2d 174, 51 Ohio App. 361.

88. N.C.—Nelson v. Atlantic Coast Line R. Co., 72 S.E. 998, 157 N.C. 194, 52 L.R.A.,N.S., 829.
39 C.J. p 251 note 27.

89. Pa.—Cimprich v. Pennsylvania R. Co., 180 A. 51, 119 Pa.Super. 5.
39 C.J. p 251 note 28.

Principles governing arbitration and award are relied on in arriving at this conclusion, the decision, viewed as an award executed pursuant to a general arbitration agreement, being held binding in the absence of bad faith, bias, or prejudice, and the employee, having agreed to the making of the award by certain officers of the employer company, being held to have waived objection to any apparent bias.—Rueda v. Union Pac. R. Co., Or., 175 P.2d 778.

90. Ky.—Pennsylvania Co. v. Reager, 154 S.W. 412, 152 Ky. 824, 52 L.R.A.,N.S., 841, Ann.Cas.1915B 312.

91. U.S.—Menke v. Thompson, C.C. A.Mo., 140 F.2d 786.
Tex.—Spiner v. Western Union Telegraph Co., Civ.App., 73 S.W.2d 566, error refused.
39 C.J. p 251 note 30.

92. Pa.—Jensen v. Bell Telephone Co. of Pennsylvania, 29 Pa.Dist. & Co. 476.

93. U.S.—Menke v. Thompson, C.C. A.Mo., 140 F.2d 786—In re Missouri Pac. R. Co., D.C.Mo., 49 F.Supp. 405.
Pa.—Jensen v. Bell Telephone Co. of Pennsylvania, 29 Pa.Dist. & Co. 476.
39 C.J. p 252 note 31.

94. U.S.—In re Missouri Pac. R. Co., D.C.Mo., 49 F.Supp. 405.
Pa.—Jensen v. Bell Telephone Co. of Pennsylvania, 29 Pa.Dist. & Co. 476.
S.C.—Moore v. Postal Telegraph-Cable Co., 24 S.E.2d 361, 202 S.C. 225.
39 C.J. p 252 note 31.

95. U.S.—In re Missouri Pac. R. Co., D.C.Mo., 49 F.Supp. 405.
S.C.—Moore v. Postal Telegraph-Cable Co., 24 S.E.2d 361, 202 S.C. 225.

96. U.S.—In re Missouri Pac. R. Co., D.C.Mo., 49 F.Supp. 405.
S.C.—Moore v. Postal Telegraph-Cable Co., 24 S.E.2d 361, 202 S.C. 225.

97. U.S.—Menke v. Thompson, C.C. A.Mo., 140 F.2d 786.
S.C.—Moore v. Postal Telegraph-Cable Co., 24 S.E.2d 361, 202 S.C. 225.
Tex.—Webster v. Southwestern Bell Tel. Co., Civ.App., 153 S.W.2d 498, error refused—Dowling v. Texas & N. O. R. Co., Civ.App., 80 S.W.2d 456, error refused—Spiner v. Western Union Telegraph Co., Civ.App., 73 S.W.2d 566, error refused.
39 C.J. p 252 note 31 [a].

Deliberate failure to provide rules of procedure, as required by the plan, is in itself such bad faith as will prevent the decision of the committee from becoming conclusive.—Jensen v. Bell Telephone Co. of Pennsylvania, 29 Pa.Dist. & Co. 476.

98. Or.—McLemore v. Western Union Tel. Co., 171 P. 390, 88 Or. 228, reheard 171 P. 1049, 88 Or. 228.

99. Or.—McLemore v. Western Union Tel. Co., supra.

1. U.S.—Menke v. Thompson, C.C.A. Mo., 140 F.2d 786.

2. Or.—McLemore v. Western Union Tel. Co., 171 P. 390, 88 Or. 228, reheard 171 P. 1049, 88 Or. 228.

3. Mich.—Frank v. Newport Min. Co., 112 N.W. 504, 148 Mich. 637, 11 L.R.A.,N.S., 182.
39 C.J. p 252 note 35.

4. U.S.—Western Union Tel. Co. v. Hughes, S.C., 228 F. 885, 143 C.C.A. 283.
39 C.J. p 252 note 36.

5. Ill.—Chicago, B. & Q. R. Co. v. Hendricks, 125 Ill.App. 580.
39 C.J. p 252 note 37.

6. Md.—Fuller v. Baltimore & Ohio Employees' Relief Ass'n, 10 A. 237, 67 Md. 433.
1 C.J. p 484 note 42—39 C.J. p 252 note 38.

son entitled to bring an action for death, executed to enable the beneficiary to obtain payments of death benefits, has been sustained.[7]

A formal release, although provided for, has been held not necessary where there is an acceptance of benefits; such acceptance is the substance of the release.[8]

e. Actions for Benefits

Where there has been a compliance with valid conditions precedent, or such compliance has been excused, an employee or beneficiary may bring an action and, on proper and sufficient allegations and proof, recover the benefits to which he is entitled and which have been withheld.

In order to sustain an action for the recovery of benefits there must be a compliance with the valid conditions precedent imposed by the regulations or the plan[9] or such compliance must have been excused.[10] An action for money had and received cannot be maintained in the absence of a showing of facts supporting such an action generally.[11] Only the person named as the beneficiary may sue to recover death benefits.[12] The trustees of the fund on whose order payment is to be made should be joined with the employer where the employer is a mere custodian of the fund.[13]

Pleadings; issues, proof, and variance. Except as excused from doing so by defendant's pleadings,[14] plaintiff must plead performance of conditions precedent or an excuse for nonperformance.[15] An allegation that defendant's representation influenced plaintiff to continue in defendant's employment may be considered as pleading a sufficient consideration for defendant's promise to pay benefits;[16] but, where the employment and insurance provisions of a contract are severable, it is not necessary, in a suit on the insurance provisions, to allege performance of the required services.[17] An amendment of the petition may be allowed where it seeks recovery of benefits up to the time of trial and disability continues that long,[18] but not, after trial, for the purpose of presenting, and obtaining a trial of, a new

7. U.S.—State v. Baltimore & O. R. Co., C.C.Md., 36 F. 655.
39 C.J. p 252 note 39.

8. Pa.—Ringle v. Pennsylvania R. Co., 30 A. 492, 164 Pa. 529, 44 Am.S. R. 628.
39 C.J. p 252 note 40.

9. Pa.—West v. Pennsylvania R. Co., 194 A. 912, 328 Pa. 156—Geddes v. Lehigh Coal & Navigation Co., 39 Pa.Super. 417—Cornman v. Pennsylvania R. Co., 22 Pa. Dist. & Co. 423, 40 Dauph.Co. 187.
39 C.J. p 253 note 43.
Exhaustion of remedies within association see supra subdivision c of this section.

Demand

Where railroad employee who was a member of railroad employee's loan association, and who had named his brother as beneficiary, failed to demand payment of balance of savings account in association as authorized by association's regulation on retirement from railroad service, his administratrix after his death was not entitled to recover the balance due from the association.—Ebersole v. Pennsylvania Railroad Employes Provident & Loan Ass'n, 23 A.2d 238, 147 Pa.Super. 5.

Substantial compliance with requirement is sufficient.—Lloyd v. Wilson Employees' Mut. Ben. Fund, 65 P.2d 314, 145 Kan. 441.

10. Mo.—Hartman v. Chicago, B. & Q. R. Co., 182 S.W. 148, 192 Mo. App. 271.
39 C.J. p 253 note 44.

Lack of prejudice

Discharged employee was not precluded from recovering from benefit fund amount equal to death benefit, even if by-laws required certificate of physician designated by fund, where demand for benefits was refused on ground of discharge, fund's physician agreed with employee's personal physician as to disability, employee was discharged because of permanent physical disability, and it was not shown that fund's rights were prejudiced by failure to furnish certificate.—Lloyd v. Wilson Employee's Mut. Ben. Fund, 65 P.2d 314, 145 Kan. 441.

Defendant's assertions before suit

Where beneficial association asserted before institution of employee's suit to recover further sick benefits that employee was no longer incapacitated and was cured and that he voluntarily terminated his employment and thus also his association membership, association was limited to those defenses and could not urge in support of its refusal to pay benefits after attempted discharge of employee that employee failed to perform one of the conditions of his contract of employment.—Kahn v. Griscom, 18 A.2d 499, 144 Pa.Super. 126.

Where answer denies all liability to plaintiff, failure of plaintiff to make tender of a release called for by the provisions of the plan is excused.—McLemore v. Western Union Tel. Co., 171 P. 390, 88 Or. 228, reheard 171 P. 1049, 88 Or. 228.

11. Ala.—U. S. Cast Iron Pipe & Foundry Co. v. Bailey, 69 So. 825, 194 Ala. 261.
39 C.J. p 253 note 45.

12. Md.—Smith v. Baltimore & O. R. Co., 32 A. 181, 81 Md. 412.
39 C.J. p 253 note 46.

13. Mo.—Legg v. Swift, 151 S.W. 230, 167 Mo.App. 427.

14. Or.—McLemore v. Western Union Tel. Co., 171 P. 390, 88 Or. 228, reheard 171 P. 1049, 88 Or. 228.

Absence of plea of prematurity

A petition which alleged an ineffectual demand by widow on deceased husband's former employer for payment of gratuitous death benefits was sufficient notwithstanding failure to allege that committee in whose power administration of benefit plan was placed had acted in bad faith or was guilty of fraud, in absence of plea of prematurity in failing to exhaust remedy before committee.—Robinson v. Standard Oil Co. of Louisiana, La.App., 180 So. 237.

15. Mo.—Legg v. Swift, 151 S.W. 230, 167 Mo.App. 427.
39 C.J. p 253 note 43 [a].

Tender of required release should be alleged.—McLemore v. Western Union Tel. Co., 171 P. 390, 88 Or. 228, reheard 171 P. 1049, 88 Or. 228.

Pleadings held sufficient

Conn.—Tilbert v. Eagle Lock Co., 165 A. 205, 116 Conn. 357.
Tenn.—International Harvester Co. v. Campbell, 76 S.W.2d 986, 18 Tenn.App. 320.

16. W.Va.—Grady v. Appalachian Electric Power Co., 29 S.E.2d 878, 126 W.Va. 546.

17. N.Y.—Wagner v. G. Gaudig & Blum Corporation, 228 N.Y.S. 139, 223 App.Div. 254.

18. Ga.—South v. A. B. & C. R. R. Ben. Ass'n, 183 S.E. 213, 52 Ga.App. 372.

issue rather than for the purpose of conforming the pleading to the evidence.[19] Exclusion of plaintiff widow as a beneficiary by the employee prior to his death is a matter of defense to be alleged by defendant.[20] Evidence admissible under the pleadings may be received,[21] and, where plaintiff seeks to recover on the ground of manifest mistake on the part of the organization's tribunal in denying the claim, he is required to present to the jury all the evidence that was before such tribunal.[22]

In a controversy between beneficiaries, a bill of interpleader is not a waiver of defects in the claim of one beneficiary;[23] and, in an action by the personal representative of a deceased member, the failure of defendant association to pay the money into court and seek an interpleader issue between plaintiff and the beneficiary named in the application for membership does not cause the association to lose any of its legal rights.[24]

Evidence. Plaintiff has the burden of establishing facts entitling him to recover.[25] The evidence admissible extends[26] and is limited[27] to that which is competent and has a material tendency to prove or disprove a matter in issue. General rules ordinarily apply with respect to the weight and sufficiency of the evidence.[28]

19. Ohio.—Shipe v. Norfolk & W. Ry. Co., 1 N.E.2d 174, 51 Ohio App. 361.

20. La.—Robinson v. Standard Oil Co. of Louisiana, App., 180 So. 237.

21. Mo.—Burns v. National Lead Co., 94 S.W.2d 1126, 231 Mo.App. 180.

Under general denial, employer had right to introduce any evidence tending to show nonexistence of cause of action, including claim that certificate had been canceled prior to employee's death.—Burns v. National Lead Co., supra.

Allegations not requiring reply

Evidence that committee empowered to administer benefit system abused its discretion and showed general want of good faith in passing on particular claim may be introduced in suit to enforce claim even though not pleaded by plaintiff if defendant set up action of committee as defense, but did not plead it as new matter so that plaintiff was required to answer it.—Jensen v. Bell Telephone Co. of Pennsylvania, 29 Pa.Dist. & Co. 476.

22. Ohio.—Bates v. Pennsylvania R. Co., App., 33 N.E.2d 678.

23. U.S.—Baltimore & O. R. Co. v. Reaux, D.C.Ohio, 59 F.Supp. 969.
Md.—Ringler v. Ringler, 144 A. 221, 156 Md. 270.

24. Pa.—Ebersole v. Pennsylvania Railroad Employes Provident & Loan Ass'n, 23 A.2d 238, 147 Pa. Super. 5.

25. Ark.—Dennis v. Equitable Life Assur. Soc., 88 S.W.2d 76, 191 Ark. 825.
D.C.—Sullivan v. Washington Terminal Co., 66 F.2d 278, 62 App.D.C. 248.
S.C.—Ellis v. Atlantic Coast Line R. Co., 174 S.E. 19, 172 S.C. 338.

Fraud or mistake on part of board or committee

U.S.—Menke v. Thompson, C.C.A.Mo., 140 F.2d 786.
39 C.J. p 252 note 31 [b].

Continuance of employment and certificate

Beneficiary, in suit by him on certificate, had burden of proving that employee was still in employer's service at time of his death and that certificate was then in full force and effect.—Burns v. National Lead Co., 94 S.W.2d 1126, 231 Mo.App. 180.

Qualification of plaintiff as beneficiary

In action by widow against employer for payments under plan providing for continuance of payment after employee's death to his widow if living with or dependent on employee at time of his death, widow had burden of showing either that she was living with the deceased at time of his death or that she was dependent on him for support.—Robinson v. Standard Oil Co. of Louisiana, 195 So. 351, 194 La. 904.

26. La.—Robinson v. Standard Oil Co. of Louisiana, App., 180 So. 237.
Md.—Johnson & Higgins v. Simpson, 163 A. 832, 163 Md. 574.
Tex.—Swift & Co. Employes Benefit Ass'n v. Lemire, Civ.App., 145 S.W. 2d 698, error dismissed, judgment correct.

Plaintiff's lack of membership

Evidence to show that plaintiff was never accepted as, or became, a member of defendant association, including, as a link in a chain, the testimony of defendant's medical examiner that plaintiff was never examined by him, as required by the rules, is admissible.—Baltimore & O. Employees' Relief Ass'n v. Post, 15 A. 885, 122 Pa. 579, 9 Am.S.R. 147, 2 L.R.A. 44—1 C.J. p 502 note 16—39 C.J. p 253 note 43 [c].

Telephone conversation between employee's wife and employer was held admissible on question of notice of disability within by-laws of employees' relief association.—Alexander v. Long Island R. R. Employees' Mut. Relief Ass'n, 233 N.Y.S. 5, 131 Misc. 610.

Letters written by general manager or secretary of company to plaintiffs notifying them that their pensions had been allowed at certain monthly sum were admissible.—Schofield v. Zion's Co-op. Mercantile Inst., 39 P.2d 342, 85 Utah 281, 96 A. L.R. 1083.

27. Pa.—Baltimore & Ohio Employees' Relief Ass'n v. Post, 15 A. 885, 122 Pa. 579, 9 Am.S.R. 147, 2 L.R.A. 44.
1 C.J. p 502 note 17.

Declarations of an employee of the master are not admissible against defendant association where declarant was not an agent, officer, or servant of the association.—Baltimore & Ohio Employees' Relief Ass'n v. Post, supra.—1 C.J. p 502 note 17.

Mortality tables are not admissible as evidence where the recovery is sought merely for weekly benefits because of disability.—Baltimore & Ohio Employees' Relief Ass'n v. Post, supra.

Receipts

The rules and regulations of the association cannot be established by receipts by plaintiff of benefits as a former member.—Baltimore & Ohio Employees' Relief Ass'n v. Post, supra.

Uncommunicated intention

In action by administratrix of deceased employee against association to recover balance of savings account due employee, trial court properly rejected administatrix' offers to prove an intention on employee's part to send in his deposit book and withdraw balance of savings account, in accordance with association's regulation, where offers contained no offer to prove that intention had been communicated to the association, or that demand had ever been made by employee in his lifetime for balance due.—Ebersole v. Pennsylvania Railroad Employes Provident & Loan Ass'n, 23 A.2d 238, 147 Pa.Super. 5.

28. **Degree of proof**

More than a preponderance of evidence was required to show such fraud, bad faith, or mistake as would vitiate board's decision denying pen-

Trial and judgment. Questions of law are to be determined by the court,[29] as are also questions of fact where the trial is before the court alone;[30] but, where the trial is before a jury, questions of fact are to be submitted to them[31] under proper instructions,[32] provided the evidence is sufficient for that purpose.[33]

The recovery is the amount provided by the charter and by-laws of the association, and not such an amount as the jury may approve as just.[34] Interest on unpaid pension installments may be included in the judgment;[35] but, under the pleadings, benefits accruing after the commencement of the action may not be recoverable.[36] When incidental to primary relief prayed for, an order recognizing an employee's status as a member may not be objectionable.[37]

§ 170. —— Election between Benefits and Actions for Injuries or Death

a. In general
b. Effect of acceptance of benefits
c. Effect of action for injury
d. Constitutional and statutory provisions

a. In General

In the absence of constitutional or statutory prohibition, a provision that an employee's acceptance of benefits under the plan shall constitute a bar to an action for injuries to, or death of, the employee, and, con-

sion claim.—Menke v. Thompson, C. C.A.Mo., 140 F.2d 786.

Evidence held sufficient

(1) In general.

Cal.—Sessions v. Southern California Edison Co., 118 P.2d 935, 47 Cal. App.2d 611.

Ill.—Stonecipher v. National Life & Accident Ins. Co., 73 N.E.2d 640, 331 Ill.App. 435.

Minn.—Holdys v. Swift & Co., 269 N. W. 468, 198 Minn. 258.

Pa.—Jensen v. Bell Telephone Co. of Pennsylvania, 29 Pa.Dist. & Co. 476.

Tex.—Texas & N. O. R. Co. v. Jones, Civ.App., 103 S.W.2d 1043, error refused.

(2) To authorize finding that employer was estopped to deny validity of certificate.—Atlantic Coast Line R. Co. v. Williams, 179 S.E. 136, 50 Ga.App. 726.

(3) To show that pensioner was eligible, and by implication had been in service of railroad the requisite length of time.—Texas & N. O. R. Co. v. Jones, Tex.Civ.App., 103 S.W.2d 1043, error refused.

(4) To support findings that employee did not voluntarily terminate his employment and that attempted discharge of employee was the act of the association and the employer without any action or acquiescence by employee and was part of a concerted effort of association and employer to take advantage of employee and deprive him unjustly of his right to receive further benefits.—Kahn v. Griscom, 18 A.2d 499, 144 Pa.Super. 126.

(5) To support finding that employee was incapacitated and was entitled to further payment of benefits.

Ohio.—Bates v. Pennsylvania R. Co., App., 33 N.E.2d 678.

Pa.—Kahn v. Griscom, 18 A.2d 499, 144 Pa.Super. 126.

(6) To support finding that member had made claim to employer for total disability in accordance with terms of benefit contract.—Simmons v. Wilson Employees' Mut. Ben. Fund, 64 P.2d 50, 145 Kan. 128.

(7) To sustain finding or decree that widow did not qualify under provision of plan for payment to her if she was living with decedent, or dependent on him to the extent at least of twenty per cent of his pay at the time of his death.

Ark.—Dennis v. Equitable Life Assur. Soc., 88 S.W.2d 76, 191 Ark. 825.

La.—Booker v. Standard Oil Co. of Louisiana, App., 6 So.2d 702.

(8) To sustain recovery for total permanent disability.—Simmons v. Wilson Employees' Mut. Ben. Fund, 64 P.2d 50, 145 Kan. 128.

(9) To warrant conclusion that employer had waived its right.—Sessions v. Southern California Edison Co., 118 P.2d 935, 47 Cal.App.2d 611.

(10) To warrant finding that plaintiff's employment was terminated for a reason not entitling him to a pension.—Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N.Y.S.2d 608, opinion supplemented 33 N.Y.S.2d 764.

Evidence held insufficient

(1) To establish alleged contract. —Gott v. Prudential Ins. Co. of America, 192 S.E. 905, 212 N.C. 830.

(2) To establish that member had been guilty of fraud in procuring membership.—Spahr v. Pennsylvania R. Co., 13 A.2d 919, 141 Pa.Super. 24.

(3) To show any fraud on part of board in rejecting pension claim on ground that claimant did not establish requisite continuous service in employment of railroad.—Menke v. Thompson, C.C.A.Mo., 140 F.2d 786.

(4) To support finding that employee did not actually retire from active service on a certain date.—Sessions v. Southern California Edison Co., 118 P.2d 935, 47 Cal.App.2d 611.

(5) To sustain determination in favor of plaintiff.—Stonecipher v. National Life & Accident Ins. Co., 73 N.E.2d 640, 331 Ill.App. 435.

29. N.Y.—Gearns v. Commercial Cable Co., 56 N.E.2d 67, 293 N.Y. 105, 153 A.L.R. 813, reargument denied 56 N.E.2d 749, 293 N.Y. 755.

Rights under plan

The determination of the rights of parties under pension plan of employer was for the court in the absence of any ambiguity.—Gearns v. Commercial Cable Co., 32 N.Y.S.2d 856, 177 Misc. 1047.

30. Kan.—Lloyd v. Wilson Employees' Mut. Ben. Fund, 65 P.2d 314, 145 Kan. 441.

31. N.J.—Frawley v. Pennsylvania R. Co., 186 A. 41, 14 N.J.Misc. 492.

32. S.C.—Ellis v. Atlantic Coast Line R. Co., 174 S.E. 19, 172 S.C. 338.

33. Ohio.—Bates v. Pennsylvania R. Co., App., 33 N.E.2d 678.

Tex.—Swift & Co. Employes Benefit Ass'n v. Lemire, Civ.App., 145 S. W.2d 698, error dismissed, judgment correct.

Defendant's motions for nonsuit and direction of verdict were rightfully denied, where the uncontradicted evidence tended to show that member had made all reasonable effort to obtain review, within organization, of his exclusion from certain benefits to which he was entitled.—Frawley v. Pennsylvania R. Co., 199 A. 34, 120 N.J.Law 161.

34. Pa.—Baltimore & Ohio Employees' Relief Ass'n v. Post, 15 A. 885, 122 Pa. 579, 9 Am.S.R. 147, 2 L.R.A. 44.

35. Tex.—Texas & N. O. R. Co. v. Jones, Civ.App., 103 S.W.2d 1043, error refused.

36. Pa.—Baltimore & Ohio Employees' Relief Ass'n v. Post, 15 A. 885, 122 Pa. 579, 9 Am.S.R. 147, 2 L.R.A. 44.

37. Pa.—Kahn v. Griscom, 18 A.2d 499, 144 Pa.Super. 126.

versely, that the maintenance of an action for the injury or death against the employer shall operate as a bar to a claim for benefits, has been held valid.

When not prohibited by constitution or statute, a provision in an employees' relief plan that an employee's acceptance of benefits under the plan shall constitute a bar to an action for injuries to, or death of, the employee, and, conversely, that the maintenance of an action for the injury or death against the employer shall operate as a bar to a claim for benefits, has ordinarily been regarded as not against public policy,[38] although there is also authority to the contrary.[39] The cases sustaining such a regulation proceed on the theory that it is not a contract to release the master from liability for future negligence, but is an agreement to elect between the benefits provided by the plan and the pursuit of such remedy as the employee may have against the employer, and that it is the acceptance of the benefits after the accident and not entering into the contract which constitutes the release.[40] An agreement that in case of acceptance of benefits the employer shall be released from liability is not void as an agreement to furnish insurance.[41]

Consideration for agreement to elect. Where the employer contributes to the relief fund and assumes a liability for its administration and for any deficit in the amount necessary to pay benefits, there is a consideration on its part which will support the contract of the employee,[42] and the contract is not void for want of mutuality.[43] On the other hand, it has been held that, where the amounts paid by the members are manifestly intended to cover the cost of insurance and a deficiency is a contingency which is not likely to happen, the fact that the employer agrees to supply any deficiency will not permit him to assert that the acceptance of benefits by the member shall operate as a release and satisfaction of claims for damages under a stipulation in the contract of membership,[44] and in consonance with this view it has been held that the mere guaranty of the employer to fulfill the obligations of the department, and his agreement to pay its operating expenses and supply the necessary facilities for the conduct of its business, do not in themselves establish a consideration for a release executed by the employee in the absence of a showing that the employee has received something for which he has not paid by his own contributions.[45]

A promise for the benefit of the employer, although made to the relief department, may be availed of by the employer.[46]

What law governs. Where under the law of the forum and of the place of the accident a contract by which the acceptance of benefits in an employer's relief department is invalid as a defense to an action by the employee for injury, a contract entered into by the employee in another state and the acceptance of the benefits provided thereunder in such state will not operate as a bar, although recognized as such in the sister state.[47] A release by acceptance of benefits under a relief department contract, the validity of which is recognized in the state wherein it is made and in which the accident occurred, will be recognized in a state wherein the action is brought.[48] A statute of the forum governs where the contract for benefits was intended by the parties to be executed in the state, although it was entered into in another state.[49] Although an application for membership in a relief department is accepted outside of the state, if the contract of employment is to be performed within the state it has been held that it is to be governed by the law thereof.[50]

b. Effect of Acceptance of Benefits

An injured employee who has accepted relief benefits in pursuance of an agreement to elect between such benefits and an action for damages, or has executed a release in consideration of benefits received, may not sue the employer for damages resulting from the injury except where the acceptance of benefits was procured by fraud or undue influence or was made in reliance on a promise which has not been fulfilled, in which case he

38. Ky.—Pittsburgh, C., C. & St. L. R. Co. v. Carmody, 222 S.W. 1070, 188 Ky. 588, 12 A.L.R. 469.
39 C.J. p 253 note 56.

39. Mo.—Hartman v. Chicago, B. & Q. R. Co., 182 S.W. 148, 192 Mo. App. 271.
39 C.J. p 254 note 57.

40. Pa.—Johnson v. Philadelphia & R. R. Co., 29 A. 854, 163 Pa. 127.
39 C.J. p 254 note 58.
Contract releasing master from liability for future injury generally see infra §§ 197–200.

41. Iowa.—Maine v. Chicago, B. & Q. R. Co., 70 N.W. 630, 109 Iowa 260, reheard 80 N.W. 315, 109 Iowa 260.

42. Ind.—Lease v. Pennsylvania Co., 37 N.E. 423, 10 Ind.App. 47.
39 C.J. p 254 note 65.

43. Ind.—Lease v. Pennsylvania Co., supra.
39 C.J. p 254 note 66.

44. U.S.—Miller v. Chicago, B. & Q. R. Co., C.C.Colo., 65 F. 305.
39 C.J. p 255 note 67.

45. N.C.—King v. Atlantic Coast Line R. Co., 72 S.E. 801, 157 N.C. 44, 48 L.R.A.,N.S., 450.
39 C.J. p 255 note 68.

46. Neb.—Chicago, B. & Q. R. Co. v. Curtis, 71 N.W. 42, 51 Neb. 442, 66 Am.S.R. 456—Chicago, B. & Q. R. Co. v. Bell, 62 N.W. 314, 44 Neb. 44.

47. Iowa.—Hamilton v. Chicago, B. & Q. R. Co., 124 N.W. 363, 145 Iowa 431.

48. N.C.—Cannaday v. Atlantic Coast Line R. Co., 55 S.E. 836, 143 N.C. 439, 118 Am.S.R. 821, 8 L.R.A., N.S., 939.

49. Fla.—Atlantic Coast Line R. Co. v. Moore, 181 So. 175, 132 Fla. 507.

50. Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Miller, 120 N.E. 706, 187 Ind. 684—Vandalia R. Co. v. Kelley, 119 N.E. 257, 187 Ind. 323.

must return, or offer to return, the benefit received before seeking to avoid the effect of the acceptance.

Where the employee has agreed that in case of injury he will elect between a taking of the benefits provided by the relief plan and his action against the employer, he cannot, after the acceptance of benefits, maintain an action against the employer,[51] even though he has been mistaken as to his rights,[52] unless the acceptance of the benefits has been procured by fraud or undue influence[53] or induced by a promise which has not been fulfilled.[54] In such case the inadequacy of the consideration received will not be considered.[55] The fact that an employee has been advised by his superintendent or foreman to join the relief department does not establish coercion, although the superintendent had the power to discharge him.[56] Without regard to the validity of the relief contract, an employee who executes releases in consideration of benefits received from the relief association cannot thereafter assert the liability of the employer.[57]

Return of benefits. Where the election to accept benefits is induced by fraud or undue influence, the employee seeking to avoid its effects should return or offer to return benefits received,[58] and if they are not returned they may be allowed in reduction of damages.[59] In case the employee accepts benefits under a mistake as to the permanent character of his injuries, he cannot avoid the effect of such acceptance without an effort to return the benefits after ascertaining the mistake.[60]

Necessity of full performance. According to some authorities a payment of a part of the benefits to which the employee is entitled will not prevent the prosecution of an action for damages in the absence of an express stipulation that the acceptance of a part shall have such effect,[61] and the master is not in a position to plead a relief fund agreement in bar of the action unless there has been a compliance with such contract on his part.[62] However, according to other authorities the acceptance of any benefit is sufficient to establish an election,[63] and thereafter the remedy of the beneficiary is confined to the enforcement of the relief department contract.[64]

c. Effect of Action for Injury

A valid contract requiring an election between the acceptance of benefits from a relief fund and an action against the employer for the same injury precludes the recovery of benefits after the recovery of damages, or after the institution of an action for damages, unless there is a voluntary nonsuit or discontinuance or a dismissal without prejudice.

Where there is a valid contract requiring an election between the acceptance of benefits from a relief fund and an action against the employer for the injury, the recovery of damages for an injury bars the recovery of benefits for the same injury,[65] and an action to recover benefits cannot be brought after an action for damages has been instituted without compliance with the conditions of the relief plan as to discontinuance thereof.[66] The widow after bringing an action as administratrix for the wrongful death of the employee which is prosecuted to judgment cannot thereafter claim as beneficiary under the benefit certificate[67] although she omits to name herself as widow among the beneficiaries in the death action;[68] and an action by the personal representative[69] or widow[70] of the employee may preclude a recovery of benefits by the mother of the employee

51. N.Y.—Colaizzi v. Pennsylvania R. Co., 101 N.E. 859, 208 N.Y. 275.
39 C.J. p 255 note 71.
Acceptance of benefits by beneficiaries as bar to action for wrongful death see Death § 47 c.

52. U.S.—Vickers v. Chicago, B. & Q. R. Co., C.C.Ill., 71 F. 139.
39 C.J. p 255 note 74.

53. N.C.—King v. Atlantic Coast Line R. Co., 72 S.E. 801, 157 N.C. 44, 48 L.R.A.,N.S., 450.
39 C.J. p 255 note 72.

54. N.C.—Wacksmuth v. Atlantic Coast Line R. Co., 72 S.E. 813, 157 N.C. 34.

55. Ind.—Lease v. Pennsylvania Co., 37 N.E. 423, 10 Ind.App. 47.

56. Ill.—Eckman v. Chicago, B. & Q. R. Co., 48 N.E. 496, 169 Ill. 312, 38 L.R.A. 750.

57. D.C.—Brown v. Baltimore & O. R. Co., 6 App.D.C. 237.
39 C.J. p 255 note 77.

58. N.C.—Wacksmuth v. Atlantic Coast Line R. Co., 72 S.E. 813, 157 N.C. 34.
39 C.J. p 256 note 78.

59. N.C.—King v. Atlantic Coast Line R. Co., 72 S.E. 801, 157 N.C. 44, 66, 48 L.R.A.,N.S., 450.

60. Iowa.—Maine v. Chicago, B. & Q. R. Co., 70 N.W. 630, 109 Iowa 260, reheard 80 N.W. 315, 109 Iowa 260.
39 C.J. p 256 note 80.

61. N.C.—King v. Atlantic Coast Line R. Co., 72 S.E. 801, 157 N.C. 44, 56, 48 L.R.A.,N.S., 450.
39 C.J. p 256 note 81.

62. Ill.—Pennsylvania Co. v. Chapman, 77 N.E. 248, 220 Ill. 428.
39 C.J. p 256 note 82.

63. Ga.—Petty v. Brunswick & W. R. Co., 35 S.E. 82, 109 Ga. 666.
39 C.J. p 256 note 83.

64. S.C.—Johnson v. Charleston & S. R. Co., 36 S.E. 851, 58 S.C. 488.
39 C.J. p 256 note 84.

65. Neb.—Koeller v. Chicago, B. & Q. R. Co., 130 N.W. 420, 88 Neb. 712, 48 L.R.A.,N.S., 440.
39 C.J. p 256 note 86.

66. Ohio.—Blaney v. Baltimore & O. R. Co., 28 O.C.A. 65.
39 C.J. p 256 note 87.

67. Neb.—Oyster v. Burlington Relief Dept., 91 N.W. 699, 65 Neb. 789, 59 L.R.A. 291.
39 C.J. p 256 note 88.

68. Neb.—Oyster v. Burlington Relief Dept., supra.

69. Iowa.—Donald v. Chicago, B. & Q. R. Co., 61 N.W. 971, 93 Iowa 284, 33 L.R.A. 492.

70. Md.—Fuller v. Baltimore & Ohio Employees' Relief Ass'n, 10 A. 237, 67 Md. 433.
Pa.—Rotonti v. Pennsylvania R. Co., 49 Pa.Super. 595.

"Double benefit"

In the constitution of a railroad relief association a provision against a "double benefit" is not limited to a cause where the same person is both

as beneficiary, or the action by the legal representative may preclude an action by the widow.[71] Where, after the death of the employee, the employer agreed to pay one half of the benefits to decedent's first wife, the beneficiary named, and one half to his second wife, it may not deduct the amount paid the second wife in settlement of her action for damages from the amount due the named beneficiary.[72]

A compulsory nonsuit is a judgment precluding an action for benefits;[73] but an action which is dismissed without prejudice[74] or in which a voluntary nonsuit is taken[75] does not bar the recovery of benefits. Where the employee has taken benefits and thereby elected to release his action for damages, the fact that he thereafter brings an action against the company does not forfeit his right to benefits.[76]

Insurance contract. Where the contract of the employee entering into an employees' relief association is held to be in the nature of insurance, a recovery of benefits under such contract and also as against the master for negligence occasioning the injury does not constitute a double indemnity for the same injury.[77]

Release in full. Notwithstanding a statute providing that the acceptance of benefits under a relief contract shall not bar the right of the employee to recover for the negligence of the employer, the employee after a settlement of his action for damages and receipt of the payment thereunder cannot recover on his relief contract, where the release purports to be in full of all claims and demands growing out of or incident to the injury.[78]

d. Constitutional and Statutory Provisions

Under the Federal Employers' Liability Act and some specific state statutes, a contractual provision in a relief plan which requires a beneficiary or injured employee to elect between acceptance of benefits and an action for damages is invalid and neither it nor the acceptance of benefits thereunder bars an action for damages; but it is otherwise under more general state constitutional or statutory provisions.

Statutory and constitutional provisions invalidating agreements between employer and employee, which have for their object the exemption of the employer from liability for negligence or from a duty imposed by statutory or constitutional provisions, have frequently been held not to invalidate the provisions contained in relief department plans whereby the beneficiary or employee is required to elect whether to sue for damages or to accept the benefits secured by the relief plan.[79] However, such provisions in a contract may be invalidated by a statutory prohibition more particularly describing them,[80] under which ordinarily the employer is permitted to diminish the amount of an employee's recovery of damages by a set-off of any sum which it has contributed to him as benefits,[81] and the validity of such statutes has been sustained.[82] A statute providing that an employee may sue and recover both for injuries arising from negligence and any benefit he may be entitled to receive by reason of having been a member of, or a contributor to, a relief department, and declaring null and void any contract provision in violation thereof, precludes a contention that plaintiff, by bringing a personal injury action, voluntarily left the service of his employer and, under his contract, forfeited any right to further payments from the relief department.[83]

A statute providing that acceptance of benefits under a relief department contract shall not operate to bar an action for negligent injury, notwithstanding the previous agreement contained in that contract that it shall have that effect and notwithstanding any subsequent receipt or release given on payment of such sum only as may be due to the employee under the contract, has been held valid.[84] Such a statute applies to a relief contract entered into before

the beneficiary of the relief association and the person legally entitled to recover, but means that no recovery may be had by any person against a relief association when the person legally entitled to damages makes a claim against the road.—Fuller v. Baltimore & Ohio Employees' Relief Ass'n, 10 A. 237, 67 Md. 433.

71. Ind.—Baltimore & O. R. Co. v. Ray, 73 N.E. 942, 36 Ind.App. 430.

72. Ark.—Texas Co. v. Kennedy, 78 S.W.2d 825, 190 Ark. 1178.

73. Pa.—Snyder v. Pennsylvania R. Co., 85 A. 991, 237 Pa. 620.

74. Neb.—Chicago, B. & Q. R. Co. v. Healy, 107 N.W. 1005, 76 Neb. 783, 124 Am.S.R. 830, 10 L.R.A.,N.S., 98, reheard 111 N.W. 598, 76 Neb. 783, 124 Am.S.R. 830, 10 L.R.A.,N.S., 98, overruling Walters v. Chicago, B. & Q. R. Co., 104 N.W. 1066, 74 Neb. 551.

75. Pa.—Watterson v. Pennsylvania R. Co., 100 A. 583, 256 Pa. 77.
39 C.J. p 257 note 94.

76. Neb.—Chicago, B. & Q. R. Co. v. Olson, 97 N.W. 831, 70 Neb. 559—Chicago, B. & Q. R. Co. v. Bigley, 95 N.W. 344, 1 Neb. (Unoff.) 225.

77. Mo.—Hartman v. Chicago, B. & Q. R. Co., 182 S.W. 148, 192 Mo. App. 271.

78. S.C.—Starr v. Atlantic Coast Line R. Co., 93 S.E. 176, 107 S.C. 528.

79. Iowa.—Donald v. Chicago, B. & Q. R. Co., 61 N.W. 971, 93 Iowa 284, 33 L.R.A. 492.
39 C.J. p 257 note 1.

80. Ind.—Baltimore & O. R. Co. v. Hagen, 109 N.E. 194, 183 Ind. 522.
39 C.J. p 257 note 3 [a]-[c].

81. Nev.—Lawson v. Halifax-Tonopah Min. Co., 135 P. 611, 36 Nev. 591, rehearing denied 138 P. 261, 36 Nev. 591, affirmed 36 S.Ct. 220, 239 U.S. 632, 60 L.Ed. 477.
39 C.J. p 257 note 4.

82. Nev.—Lawson v. Halifax-Tonopah Min. Co., supra.
39 C.J. p 258 note 5.

83. Fla.—Atlantic Coast Line R. Co. v. Moore, 181 So. 175, 132 Fla. 507.

84. S.C.—Miller v. Atlantic Coast Line R. Co., 73 S.E. 71, 90 S.C. 249,

its passage where the injury occurs thereafter,[85] but it does not affect a claim for damages for an injury sustained and for which suit was begun before its enactment.[86] While it does not make the recovery of a judgment for damages operate as a release of benefits, although the judgment has been paid and released in full,[87] it has been held not to render a release given in satisfaction of a claim null and void so that the employee may still have the right to recover his beneficial interest in the hospital fund,[88] or prevent a release given on compromise of a suit for damages from constituting a bar to an action on the relief contract.[89]

The Federal Employers' Liability Act invalidating any contract or device, the purpose of which shall be to enable a common carrier to exempt itself from any liability created by the act, applies to stipulations contained in contracts of membership in relief departments maintained by the employer.[90] This provision has been held applicable to contracts of membership entered into before its enactment,[91] and its validity as so applied has been sustained, as discussed in Commerce § 78 e (4) (b). Under it, an acceptance of benefits by the employee under a relief contract does not bar an action against his employer as to a liability created by the act[92] and does not operate to release a joint tort-feasor from liability beyond the right to set off the amount contributed by the employer to the amount recovered by plaintiff.[93]

It has been variously held that: After recovery and collection of a judgment against the railroad for damages, the employee cannot recover relief benefits notwithstanding the provision of the Employers' Liability Act;[94] where the contract is indivisible, and a part thereof is invalid under the act, the entire contract falls and no action for benefits may be based thereon;[95] where the employer contributes a sum equal to the assessments paid by members, a provision in the contract of a railroad relief society that one half of the sum insured for should be forfeited if the employee or his representative sued the railroad for damages is not void under the act;[96] and that the pendency of an action for injuries does not prevent a recovery of the benefits under a membership certificate.[97]

The provision of the act as to a set-off by the carrier of the amount it has paid or contributed to insurance or relief benefits paid to plaintiff allows such payment or contribution to be set off only against a claim for damages,[98] and not in an action for benefits[99] or on an insurance contract;[1] and it does not authorize a counterclaim on which a separate judgment may be based.[2]

IV. MASTER'S LIABILITY FOR INJURIES TO SERVANT

A. NATURE AND EXTENT IN GENERAL

§ 171. In General

In the absence of statutes modifying the rule, and except as the rule is affected by application of the doctrines of assumed risk, contributory negligence, or fellow-servant, the master is liable for personal injuries sustained by the servant while within the course and scope of his employment by reason of the master's negligence; but the master is not an insurer of the employee's safety.

Where the relation of master and servant exists, the master is liable to the servant for personal in-

affirmed 34 S.Ct. 318, 231 U.S. 741, 58 L.Ed. 462.
39 C.J. p 258 note 9.

85. S.C.—Miller v. Atlantic Coast Line R. Co., supra.
39 C.J. p 258 note 10.

86. S.C.—McDaniel v. Atlantic Coast Line R. Co., 87 S.E. 145, 102 S.C. 520.

87. S.C.—Beylot v. Atlantic Coast Line R. Co., 78 S.E. 871, 95 S.C. 210.

88. S.C.—Sturgiss v. Atlantic Coast Line R. Co., 60 S.E. 939, 80 S.C. 167, petition denied 61 S.E. 261, 80 S.C. 167.

89. S.C.—Starr v. Atlantic Coast Line R. Co., 93 S.E. 176, 107 S.C. 528.

90. U.S.—Philadelphia, B. & W. R. Co. v. Schubert, App.D.C., 32 S.Ct. 589, 224 U.S. 603, 56 L.Ed. 911.
39 C.J. p 258 note 16.
Contracts within or without application of statutory provision generally see infra § 197.

91. U.S.—Philadelphia, B. & W. R. Co. v. Schubert, supra.

92. U.S.—Chicago & A. R. Co. v. Wagner, Ill., 36 S.Ct. 135, 239 U.S. 452, 60 L.Ed. 379.
N.C.—Burnett v. Atlantic Coast Line R. Co., 79 S.E. 414, 163 N.C. 186, reversed on other grounds 36 S.Ct. 75, 239 U.S. 199, 60 L.Ed. 226.

93. U.S.—Chicago & A. R. Co. v. Wagner, Ill., 36 S.Ct. 135, 239 U.S. 452, 60 L.Ed. 379.
39 C.J. p 259 note 20.

94. Neb.—Roberson v. Chicago, B. & Q. R. Co., 191 N.W. 714, 109 Neb. 571.

95. Ind.—Baltimore & O. R. Co. v. Miller, 107 N.E. 545, 183 Ind. 323.

96. N.H.—Wilson v. Grand Trunk R. Ins. & Provident Soc., 98 A. 478, 78 N.H. 210, Ann.Cas.1918E 1191.

97. Minn.—Wise v. Chicago, B. & Q. R. Co. Relief Dept., 158 N.W. 711, 133 Minn. 434.

98. Mo.—Hughes v. Mississippi River & B. T. Ry., 274 S.W. 703, 309 Mo. 560.

99. S.C.—Keels v. Atlantic Coast Line R. Co., 89 S.E. 388, 104 S.C. 497.

1. Kan.—McAdow v. Kansas City Western R. Co., 164 P. 177, 100 Kan. 309, L.R.A.1917E 539.

2. Mo.—Hughes v. Mississippi River & B. T. Ry., 274 S.W. 703, 309 Mo. 560.

juries sustained by him which have been incurred while he is within the course and scope of his employment, by reason of the master's negligence,[3] except in so far as the common-law rules have been modified or affected by statute, discussed infra § 173, or by the application of the doctrines of assumed risk, infra §§ 357–420, contributory negligence, infra §§ 421–488, and of fellow servant, infra §§ 321–356.

Negligence on the part of the master is essential to his liability at common law for an injury sustained by the servant.[4] The employer, however, is not an insurer of the employee's safety.[5] He is lia-

3. Ark.—Safeway Stores v. Phelps, 145 S.W.2d 337, 201 Ark. 495—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056—Southwest Power Co. v. Price, 22 S.W.2d 373, 180 Ark. 567, certiorari denied 50 S.Ct. 353, 281 U.S. 753, 74 L.Ed. 1163, and appeal dismissed 50 S.Ct. 407, 281 U.S. 703, 74 L.Ed. 1128.
La.—Simmons v. Doullut & Ewin, App., 145 So. 708, rehearing denied 146 So. 772.
Mo.—**Corpus Juris cited in** De May v. Liberty Foundry Co., 37 S.W.2d 640, 645, 327 Mo. 495.
N.Y.—Meyer v. Brandt, 279 N.Y.S. 388, 244 App.Div. 845—Marra v. Hamburg-Amerikanische Pachetfahrt Actien Gessellschaft, 167 N.Y.S. 74, 180 App.Div. 75—**Corpus Juris quoted in** Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 180, 152 Misc. 716.
Okl.—Thomas v. Great Western Mining Co., 1 P.2d 165, 150 Okl. 212—**Corpus Juris quoted in** Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 430, 148 Okl. 107.
Tenn.—Hammett v. Vogue, Inc., 165 S.W.2d 577, 179 Tenn. 284.
Tex.—United East & West Oil Co. v. Dyer, 162 S.W.2d 680, 139 Tex. 318.
Va.—Roberts v. Southern Ry. Co., 144 S.E. 863, 151 Va. 815, rehearing denied 145 S.E. 255, 151 Va. 815.
Wis.—Prehn v. C. Niss & Sons, 288 N.W. 736, 233 Wis. 155.
39 C.J. p 259 note 30.
Accord and satisfaction see Accord and Satisfaction § 8.
Bailor's liability for injuries to servant of bailee see Bailments § 40 a.
Carrier's liability for injury to employee while passenger see Carriers § 546.
Contribution see Contribution § 11.
Convict laborer see infra § 176.
Course and scope of employment see infra § 181.
Federal control as affecting liability of:
Railroad company see the C.J.S. title Railroads § 31, also 51 C.J. p 450 note 66 et seq.
Telegraph and telephone companies see the C.J.S. title Telegraphs and Telephones §§ 100, 101, also 62 C.J. p 122 note 63 et seq.
Federal Employers' Liability Act as regulation of commerce see Commerce § 51.
Liability for injuries to third persons by servant see infra §§ 555–579.
Liability of:
Charitable institution see Charities § 75.
Consolidated corporation for injury by constituent see Corporations § 1630.
Corporation for injuries before incorporation see Corporations § 123.
Landlord for injury to employee of tenant see Landlord and Tenant § 421.
Promoter of corporation see Corporations § 130.
Vessel or owner for injuries to seamen see the C.J.S. title Seamen § 206, also 56 C.J. p 1105 notes 15–16.
Manslaughter in punishing servant see Homicide § 58.
Parent's right of action for injury to minor see the C.J.S. title Parent and Child, §§ 41, 42, also 46 C.J. p 1294 note 97 et seq.
Recovery by master for injury to servant by third person see infra § 622.
Relation of parties imposing liability for personal injuries see infra §§ 174–182.
Release:
Executed by mistake see the C.J.S. title Release § 25, also 53 C.J. p 1211 note 17 et seq.
Obtained by fraud see the C.J.S. title Release § 27, also 53 C.J. p 1217 note 61 et seq.
Violation of Sunday laws attending injury see the C.J.S. title Sunday § 39, also 60 C.J. p 1131 note 98 et seq.
Waiver of liability by employee traveling on pass see Carriers § 632.
What law governs:
Action for death by wrongful act see Death § 28.
Applicability of workmen's compensation acts see the C.J.S. title Workmen's Compensation Acts §§ 22–26, also 71 C.J. p 303 note 28 et seq.

Temporary employment
In determining temporary master's liability for injuries to temporary servant, temporary employment was attended with all legal consequences usually pertaining to relation of master and servant.—McBurnie v. Northrup, 27 A.2d 823, 139 Me. 149.

4. U.S.—Dobbyn v. Boat Repairing Corporation, C.C.A.N.J., 25 F.2d 283.
Ala.—Pratt Consolidated Coal Co. v. Bozeman, 68 So. 887, 192 Ala. 546.
Ariz.—Red Rover Copper Co. v. Industrial Commission, 118 P.2d 1102, 58 Ariz. 203, 137 A.L.R. 740—Robles v. Preciado, 79 P.2d 504, 52 Ariz. 113.
Ark.—Safeway Stores v. Phelps, 145 S.W.2d 337, 201 Ark. 495—Western Arkansas Telephone Co. v. Grantham, 139 S.W.2d 49, 200 Ark. 411.
Ky.—Chesapeake & O. Ry. Co. v. Lilly, 188 S.W.2d 105, 300 Ky. 100—City of Bellevue v. Hall, 174 S.W.2d 24, 295 Ky. 57—Davidson v. Perkins-Bowling Coal Co., 74 S.W.2d 1, 255 Ky. 649.
Mo.—**Corpus Juris cited in** De May v. Liberty Foundry Co., 37 S.W.2d 640, 645, 327 Mo. 495—Page v. Unterreiner, App., 106 S.W.2d 528.
N.Y.—**Corpus Juris quoted in** Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 180, 152 Misc. 716.
N.C.—Fore v. Geary, 131 S.E. 387, 191 N.C. 90.
Okl.—Parkhill Truck Co. v. Wilson, 125 P.2d 203, 190 Okl. 473—Abdo v. Mullen, 44 P.2d 102, 173 Okl. 144.
S.C.—Williamson v. Southern Ry. Co., 191 S.E. 79, 183 S.C. 312—Lyons v. R. D. Cole Mfg. Co., 183 S.E. 466, 178 S.C. 520.
39 C.J. p 260 note 36.
Effect of workmen's compensation acts see the C.J.S. title Workmen's Compensation Acts § 10, also 71 C.J. p 234 note 92 et seq.

Error of judgment
Employer is not liable for consequence of error of judgment.—Conway v. Park, 31 N.E.2d 79, 108 Ind. App. 562.

5. U.S.—Chicago & N. W. Ry. Co. v. Payne, C.C.A.Neb., 8 F.2d 332—Pennsylvania R. Co. v. Hammond, C.C.A.N.Y., 7 F.2d 1010.
Ark.—Basye v. Odom, 168 S.W.2d 1092, 205 Ark. 423—Hall v. Patterson, 166 S.W.2d 667, 205 Ark. 10—Safeway Stores v. Phelps, 145 S.W.2d 337, 201 Ark. 495—McGeorge v. Henderson, 145 S.W.2d 31, 201 Ark. 492—Berry Asphalt Co. v. Kidd, 143 S.W.2d 42, 200 Ark. 1121—Southwestern Bell Telephone Co. v. Casson, 138 S.W.2d 406, 199 Ark. 1140—Kroger Grocery & Baking Co. v. Kennedy, 136 S.W.2d 470, 199 Ark. 914—Defries v. Batesville White Lime Co., 132 S.W.2d 169, 198 Ark. 986—Odenbaugh v. St. Louis Southwestern Ry. Co., 120 S.W.2d 713, 196 Ark. 1036—Caddo

ble for the consequences of his negligence, but not of the dangers of the employment,[6] and, when the wrong charged is not willful or intentional, there must exist a duty on the part of the master to protect the servant from the injury and a failure on the part of the master to perform that duty,[7] and this is true although the employer is a railroad company,[8] a telephone company,[9] or other corporation.[10] The duty of the master arises by operation of law from the relation of master and servant, and not out of the contract of employment.[11] No contract will be implied from the contract of hiring whereby the

River Lumber Co. v. Henderson, 109 S.W.2d 425, 194 Ark. 724.
Ga.—Blair v. Fulton Bakery, 24 S.E. 2d 598, 68 Ga.App. 879.
Ind.—Conway v. Park, 31 N.E.2d 79, 108 Ind.App. 562.
Iowa.—Rehard v. Miles, 290 N.W. 702, 227 Iowa 1290.
Ky.—Burk Hollow Coal Co. v. Bills, 190 S.W.2d 338, 300 Ky. 735—City of Bellevue v. Hall, 174 S.W.2d 24, 295 Ky. 57.
La.—**Corpus Juris cited in** Harris v. Yazoo & M. V. R. Co., 183 So. 108, 111.
Miss.—Harvey v. Smith, 198 So. 739, 190 Miss. 130—Wunderlich v. Walker, 189 So. 523, 186 Miss. 149—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied Clay v. Mobile & O. R. Co., 51 S.Ct. 24, 282 U.S. 844, 75 L.Ed. 749.
Mo.—Graczak v. City of St. Louis, 202 S.W.2d 775—**Corpus Juris cited in** Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 442, 336 Mo. 228—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336 Mo. 316—Harville v. Harrison Engineering & Construction Co., App., 7 S.W.2d 1032.
N.Y.—De Graff v. New York Cent. & H. R. R. R. Co., 76 N.Y. 125—**Corpus Juris quoted in** Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 180, 152 Misc. 716.
N.C.—Murray v. Atlantic Coast Line R. Co., 11 S.E.2d 326, 218 N.C. 392—Jones v. Atlantic Coast Line R. Co., 139 S.E. 242, 194 N.C. 227—Clinard v. Clinard Electric Co., 136 S.E. 1, 192 N.C. 736—Greer v. Callahan Const. Co., 130 S.E. 739, 190 N.C. 632.
S.C.—Lyons v. R. D. Cole Mfg. Co., 183 S.E. 466, 178 S.C. 520.
Tex.—Texas & N. O. R. Co. v. Sarver, Civ.App., 113 S.W.2d 317, error refused—Dell v. Lancaster, Civ. App., 285 S.W. 685.
39 C.J. p 260 note 37, p 524 note 10.
Occupational disease acts as not making employer insurer against occupational disease see infra § 173 f.
Railroad as not insurer under Federal Employers' Liability Act of safety of employees see infra § 173 c (1).

It has been stated, however, that the employer is an insurer that the duty to exercise ordinary care shall be performed.—Morgan v. State, Tex. Civ.App., 170 S.W.2d 648, reversed on other grounds State v. Morgan, 170 S.W.2d 652, 140 Tex. 620.

Employees under age

An employer, even of persons under age, is not insurer of employee's safety.—Forbus v. Cobb Bros. Const. Co., 185 So. 243, 184 Miss. 647, suggestion of error overruled 186 So. 643, 184 Miss. 647.

Golfer is not an insurer of the safety of his caddie.—Page v. Unterreiner, Mo.App., 106 S.W.2d 528.

6. Ind.—Conway v. Park, 31 N.E.2d 79, 108 Ind.App. 562.
Ky.—City of Bellevue v. Hall, 174 S.W.2d 24, 295 Ky. 57.
La.—**Corpus Juris cited in** Harris v. Yazoo & M. V. R. Co., 183 So. 108, 111.
Miss.—Federal Compress Co. v. Craig, 7 So.2d 532, 192 Miss. 689.
Mo.—Graczak v. City of St. Louis, 202 S.W.2d 775—**Corpus Juris cited in** Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 442, 336 Mo. 228.
N.Y.—**Corpus Juris quoted in** Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 180, 152 Misc. 716.
S.C.—Lyons v. R. D. Cole Mfg. Co., 183 S.E. 466, 178 S.C. 520.
Tex.—Montgomery v. Houston Textile Mills, Com.App., 45 S.W.2d 140.
39 C.J. p 261 note 38.

7. Ark.—Wheeler v. Ellis, 35 S.W. 2d 64, 183 Ark. 133.
Ky.—Magness' Adm'x v. Hutchinson, 117 S.W.2d 1041, 274 Ky. 226—Elcomb Coal Co. v. Gray's Adm'x, 115 S.W.2d 1056, 273 Ky. 230—Yeary's Adm'r v. Hignite Coal Co., 102 S.W.2d 19, 267 Ky. 265—Codell Const. Co. v. White, 65 S.W. 2d 690, 251 Ky. 654—Fee's Adm'x v. Mahan-Ellison Coal Corporation, 43 S.W.2d 681, 241 Ky. 231.
Mo.—Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 337 Mo. 202—**Corpus Juris cited in** De May v. Liberty Foundry Co., 37 S.W.2d 640, 645, 327 Mo. 495.
Okl.—Munroe v. Schoenfeld & Hunter Drilling Co., 61 P.2d 1045, 178 Okl. 149—Gulf, C. & S. F. Ry. Co. v. Scroggins, 18 P.2d 873, 161 Okl. 294.
39 C.J. p 261 note 40.
Liability for willful or intentional injuries see infra § 192.
Proximate cause of injury see infra § 187.

No negligence in absence of duty

Ky.—Auto Livery Co. v. Stone, 36 S. W.2d 349, 237 Ky. 686—West Kentucky Coal Co. v. Parker's Adm'r, 17 S.W.2d 753, 229 Ky. 685—Faulkner v. Gatliff Coal Co., 15 S.W.2d 236, 228 Ky. 379—Horse Creek Mining Co. v. Frazier's Adm'x, 5 S.W.2d 1064, 224 Ky. 211.
39 C.J. p 261 note 40 [a].

Duty at particular time and place

Negligence for consequences of which master is liable to servant consists not merely in general breach of duty, but breach must be violation of duty that master owes to particular servant at time and place when and where servant is injured.—Lay's Adm'r v. Harlan Producers Coal Corporation, 90 S.W.2d 716, 262 Ky. 612.

Duty to particular employee

Employee can claim damages only for breach of duty due him, not due some other employee.—Mobile & O. R. Co. v. Williams, 129 So. 60, 221 Ala. 402.

Matters not under control of employer

(1) Employer cannot be charged with negligence as to matters over which he has no control, negligence being but a want of due care under all circumstances.—Holgate v. Chrysler Corporation, 271 N.W. 539, 279 Mich. 24.

(2) Employee injured on sidewalk outside plant, when struck by motorcycle driven by a boy not an employee who was bringing another employee to work, could not recover against employer at common law.—Krebs v. Industrial Commission, 227 N.W. 287, 200 Wis. 134.

Duty recognized by master

What master recognizes as a duty to a servant court will recognize as a duty.—Hughes v. Mississippi River & B. T. Ry., 274 S.W. 703, 309 Mo. 560.

8. Fla.—Ryland v. Atlantic Coast Line R. Co., 49 So. 745, 57 Fla. 143.
N.Y.—Henson v. Lehigh Valley R Co., 87 N.E. 85, 194 N.Y. 205, 1 L.R.A.,N.S., 790.

9. Wash.—Murphy v. Pacific Telephone & Telegraph Co., 124 P. 114, 68 Wash. 643.

10. U.S.—F. C. Austin Mfg. Co. v. Johnson, Kan., 89 F. 677, 32 C.C.A. 309.
N.J.—Smith v. Oxford Iron Co., 42 N.J.Law 467, 36 Am.R. 535.

11. U.S.—Gawne v. Bicknell, C.C. Me., 162 F. 587.

employer agrees to take due and ordinary care not to expose the servant to extraordinary risk and danger in the course of his employment.[12] The rules governing the employer's liability must have a practical, and not a technical or pedantic or censorious, application.[13]

Physical wants of employee. In the absence of a contract or custom to the contrary, the employer is not required to provide for the physical wants of the employee,[14] although such duty may be imposed by contract.[15]

§ 172. What Law Governs

The law of the place where the injury occurs ordinarily controls as to the existence of a cause of action against the master arising out of an injury to the servant, and the law of the forum controls as to matters relating to the remedy.

In accordance with general rules, the law of the place where the injury occurs or the lex loci delicti controls as to the existence of a cause of action against the master arising out of an injury to the servant,[16] particularly where the contract of employment is there made and to be performed[17] and the negligence complained of there occurs,[18] while the law of the forum controls as to matters relating to the remedy.[19] The rule applies although the contract was made in the state where the action is brought,[20] and the mere fact that the foreign law greatly differs from that of the forum will not prevent its application.[21] Where the contract is made within the state, however, the state may fix the liabilities as between the master and servant which will arise out of, and become incident to, the contract of employment, whether the negligent injury occurred within the state or outside of it, where the employee is outside the state on the business of the employer and pursuant to the contract made in the state.[22]

Maritime law. Where the place in which the injury to the servant is committed brings it within the jurisdiction of admiralty, but the character of the act allows an action to be brought in a state court, the rights and liabilities of the parties are, under the views of some decisions, measured by the maritime law,[23] and according to other decisions by the com-

Mass.—Lakube v. Cohen, 23 N.E.2d 144, 304 Mass. 156.
N.Y.—**Corpus Juris quoted in** Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 180, 152 Misc. 716.
Okl.—**Corpus Juris quoted in** Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 430, 148 Okl. 107.

12. N.Y.—**Corpus Juris quoted in** Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 180, 152 Misc. 716.
39 C.J. p 261 note 45.

13. Miss.—Stewart v. Kroger Grocery, etc., Co., 21 So.2d 912.

14. R.I.—King v. Interstate Cons. R. Co., 51 A. 301, 23 R.I. 583, 70 L.R.A. 924.
Wyo.—Lemos v. Madden, 200 P. 791, 28 Wyo. 1, 8.
39 C.J. p 261 note 47.
Medical or surgical attendance see supra §§ 161–166.

15. R.I.—King v. Interstate Cons. R. Co., 51 A. 301, 23 R.I. 583, 70 L.R.A. 924.
39 C.J. p 261 note 48.

16. U.S.—Moore v. Chesapeake & O. Ry. Co., Ind., 54 S.Ct. 402, 291 U.S. 205, 78 L.Ed. 755—Heiberg v. Hasler, D.C.N.Y., 45 F.Supp. 638.
Ark.—Black Diamond Lumber Co. v. Smith, 76 S.W.2d 975, 190 Ark. 91—St. Louis-San Francisco Ry. Co. v. Rogers, 290 S.W. 74, 172 Ark. 508.
Mass.—Sjostedt v. Webster, 28 N.E.2d 239, 306 Mass. 344.
Miss.—Lucius v. Harris, 153 So. 390, 169 Miss. 385.
Mo.—Mitchell v. J. A. Tobin Const. Co., 159 S.W.2d 709, 236 Mo.App. 910—Cox v. Missouri Pac. R. Co., 61 S.W.2d 962, 332 Mo. 991.
N.C.—Johnson v. Carolina, C. & O. Ry. Co., 131 S.E. 390, 191 N.C. 75.
39 C.J. p 261 note 52.
Applicability of:
Federal Employers' Liability Act see Commerce § 51.
Workmen's Compensation Act see the C.J.S. title Workmen's Compensation Acts §§ 22–26, also 71 C.J. p 303 note 28 et seq.
Effect of Federal Employers' Liability Act upon state statutes generally see Commerce § 78.
Interpretation of common law by court of place of injury controlling see Courts § 204 a.
What law governs:
Contributory negligence see infra § 426.
Liability for acts of fellow servants see infra § 326.
Ceded territory
With respect to conflict of laws, territory within state which was ceded to federal government was to be considered on same basis as though accident occurring to employee therein had occurred in another state.—Pound v. Gaulding, 187 So. 468, 237 Ala. 387.

17. Ill.—Christiansen v. William Graver Tank Works, 79 N.E. 97, 223 Ill. 142, 7 Ann.Cas. 69.
Mo.—Fogarty v. St. Louis Transfer Co., 79 S.W. 664, 180 Mo. 490, 1 Ann.Cas. 136.
Lex loci contractus held controlling where contract was made and to be performed in state where injury occurred and suit was brought.—Marra v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, 167 N.Y.S. 74, 180 App.Div. 75.

18. Ala.—Louisville & N. R. Co. v. Cook, 53 So. 190, 168 Ala. 592.
Mo.—Fogarty v. St. Louis Transfer Co., 79 S.W. 664, 180 Mo. 490, 1 Ann.Cas. 136.

19. N.C.—Johnson v. Carolina, C. & O. Ry. Co., 131 S.E. 390, 191 N.C. 75.
39 C.J. p 262 note 55.
Conflict of laws as to character and existence of remedy generally see Conflict of Laws § 9.

20. Mo.—Mitchell v. J. A. Tobin Const. Co., 159 S.W.2d 709, 236 Mo. App. 910.
39 C.J. p 262 note 56.

21. U.S.—Northern Pac. R. Co. v. Babcock, Minn., 14 S.Ct. 978, 154 U.S. 190, 198, 38 L.Ed. 958.
39 C.J. p 262 note 57.

22. Wis.—Ruck v. Chicago, M. & St. P. Ry. Co., 140 N.W. 1074, 153 Wis. 158.

23. N.Y.—Kuhn v. P. J. Carlin Const. Co., 8 N.E.2d 300, 274 N.Y. 118, reargument denied and remittitur amended 14 N.E.2d 204, 277 N.Y. 651.
39 C.J. p 262 note 64.
Jurisdiction of court of admiralty in suit to recover damages for torts generally and concurrent jurisdiction see Admiralty § 59.
Jurisdiction of action for injuries to seamen see the C.J.S. title Sea-

mon law of the state as modified by its general statutes.[24]

§ 173. Statutory Provisions

a. In general
b. State employers' liability acts
c. Federal Employers' Liability Act
d. Federal Safety Appliance Act
e. Federal Boiler Inspection Act
f. Occupational diseases acts

a. In General

The law concerning the employer's responsibility for personal injury to an employee, arising in the course of employment, may be altered by legislation in the public interest; and, where the provision is not arbitrary and unreasonable, liability may be imposed on the employer although he is not at fault.

The rules of law concerning the employer's responsibility for personal injury to an employee, arising in the course of employment may be altered by legislation in the public interest,[25] and, where the provision is not arbitrary and unreasonable, liability may be imposed on the employer, although he is not at fault.[26] Hence, as shown in the C.J.S. title Workmen's Compensation Acts § 1 et seq, also 71 C.J. p 225 note 1 et seq, there has been a widespread adoption of statutes ordinarily known as workmen's compensation acts by which the previous rights and liabilities of employee and employer in the case of injury to the servant, arising out of and in the course of his employment, are displaced by a new plan of compensation. Distinct from these statutes, as shown infra subdivisions b, c of this section, there are or have been in force in many jurisdictions statutes commonly known as employers' liability acts which, while recognizing the necessity of fault on the part of the employer, have nevertheless abrogated or limited certain of the defenses previously regarded as available to him.

Furthermore, as shown in other parts of this title, other statutes with regard to employers generally, or in particular industries, impose duties as to the furnishing of a safe place to work and proper or specified equipment or appliances, see infra § 202 et seq, or, as to safeguarding dangerous machinery, see infra § 232, or prescribe regulations as to methods of work, rules, etc., see infra § 264, these statutes being in some instances merely declaratory of the common law.[27] Such statutes do not apply to injuries occurring prior to their taking effect,[28] although they are applicable to existing employments as to injuries subsequently occurring.[29]

State statutes giving a lien or privilege against the ship for damages arising from negligence in its management have been held inapplicable to the right of seamen to recover against their employing ship for personal injuries caused by such negligence;[30] but, under a state statute permitting recovery for damages caused by ships navigating the waters of the state, it has been held that a seaman injured by reason of defective appliances aboard a ship navigating such waters may recover.[31]

The repeal of an act giving plaintiff a right of action by an act which is a substantial reënactment of its provisions, and which amplifies its scope, will not operate to deprive plaintiff of his rights.[32] Where a cause of action has accrued, it may be saved on repeal of the statute under which it arises by a general saving statute.[33]

men § 208, also 56 C.J. p 1107 note 48 et seq.

24. Minn.—Lindstrom v. Mutual S. S. Co., 156 N.W. 669, 132 Minn. 328, L.R.A.1916D 935.

25. U.S.—Arizona Copper Co. v. Hammer, Ariz., 39 S.Ct. 553, 250 U.S. 400, 419, 63 L.Ed. 1058.
Ill.—Kenna v. Calumet, H. & S. E. R. Co., 206 Ill.App. 17, affirmed 120 N.E. 259, 284 Ill. 301.
39 C.J. p 263 note 67.
Regulation of employment of:
Minors generally see Infants § 12.
Women generally see supra § 16.
Statute held inapplicable
Where employee was drowned when small boat, allegedly built to accommodate not over three people, sank while being used to transport five grown men across river, in death action against employer, federal statute making regulations regarding life-saving appliances was inapplicable.—Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259.

26. U.S.—Arizona Copper Co. v. Hammer, Ariz., 39 S.Ct. 553, 250 U. S. 400, 63 L.Ed. 1058.
39 C.J. p 263 note 68.

27. Ind.—Emerson Brantingham Co. v. Growe, 133 N.E. 919, 191 Ind. 564.
39 C.J. p 263 note 80.
Safe place statutes make no distinction between an employee and a frequenter, and language is mandatory.—Sweitzer v. Fox, 275 N.W. 546, 226 Wis. 26.

28. N.C.—Robinson v. Melville Mfg. Co., 81 S.E. 681, 165 N.C. 495, 52 L.R.A.,N.S., 385.
39 C.J. p 263 note 81.

29. Ind.—J. Wooley Coal Co. v. Tevault, 118 N.E. 921, 119 N.E. 485, 187 Ind.171—Kokomo Brass Works v. Doran, 105 N.E. 167, 59 Ind. App. 583.

30. U.S.—The Osceola, Wis., 23 S. Ct. 483, 189 U.S. 158, 47 L.Ed. 760—Tropical Fruit SS. Co. v. Towle, La., 222 F. 867, 138 C.C.A. 293.
56 C.J. p 1087 note 99.

31. Ill.—The Norway v. Jensen, 52 Ill. 373.

32. Pa.—Gardner v. Pittsburgh Clay Pot Co., Com.Pl., 87 Pittsb.Leg.J. 30.
Tex.—San Antonio, etc., R. Co. v. Keller, 32 S.W. 847, 11 Tex.Civ. App. 569.
39 C.J. p 263 note 83.
Law enlarging rights of railroad employees held repealed
Va.—Farmers' Adm'x v. Chesapeake & O. Ry. Co., 131 S.E. 334, 144 Va. 65.

33. Ill.—Wells v. Lumaghi Coal Co., 183 Ill.App. 404—Layher v. Chicago-Sandoval Coal Co., 179 Ill.App. 476.

b. State Employers' Liability Acts

The employer's liability for an injury to an employee may be governed by employers' liability acts which have been adopted in some states, and which are usually upheld and liberally construed; but in the absence of express provision such statutes do not prevent the maintenance of a common-law action.

The liability of an employer for injuries to his employee may be governed by employers' liability acts which have been adopted in some states,[34] the purpose of which is to extend the rights of the employees and to limit the defenses previously accorded to employers.[35] Such statutes have, as a rule,[36] although not without exception,[37] been held constitutional. They are liberally construed to effectuate their purposes,[38] but cannot be given a meaning plainly repugnant to their terms[39] or be held to impose burdens not contemplated and not fairly within their provisions.[40] They have operation only in the territory over which the legislature making them has authority.[41]

Negligence on the part of the master is ordinarily,[42] although not uniformly,[43] requisite to sustain an action under such statutes. Where the statute, as respects negligence, does not define the duties of an employer to his employees, the common-law of master and servant must be considered in connection therewith.[44]

Plaintiff must show that he comes within the statutory provisions,[45] and, as discussed infra § 175, the relationship of employer and employee must exist.

34. Cal.—Robinet v. Hawk, 252 P. 1045, 200 Cal. 265.

35. Idaho.—Sumey v. Craig Mountain Lumber Co., 152 P. 181, 27 Idaho 721—Chiara v. Stewart Min. Co., 135 P. 245, 24 Idaho 473.

Protection and safeguarding of employees

The purpose of the Employers' Liability Act is to protect and safeguard employees engaged in certain kinds of work embraced within the act which involve a risk or danger.
N.C.—Jones v. Atlantic Coast Line R. Co., 139 S.E. 242, 194 N.C. 227.
Or.—Jylha v. Chamberlain, 121 P.2d 928, 168 Or. 171.

36. U.S.—Twohy Bros. Co. v. Kennedy, C.C.A.Ariz., 295 F. 462, error dismissed 44 S.Ct. 636, 265 U.S. 575, 68 L.Ed. 1187—Mallatt v. Ostrander Ry. & Timber Co., D.C. Or., 46 F.Supp. 250.
Ariz.—Arizona Eastern R. Co. v. Matthews, 180 P. 159, 20 Ariz. 282, 7 A.L.R. 1149.
Ark.—Standard Pipe Line Co. v. Burnett, 66 S.W.2d 637, 188 Ark. 491, certiorari denied 54 S.Ct. 857, 292 U.S. 649, 78 L.Ed. 1499.
Ky.—Louisville & N. R. Co. v. Clark, 277 S.W. 272, 211 Ky. 315.
Neb.—United States Fidelity & Guaranty Co. v. Wickline, 170 N.W. 193, 103 Neb. 21, 6 A.L.R. 1267.
39 C.J. p 263 note 86.

37. La.—Mason v. New Orleans Terminal Co., 79 So. 26, 143 La. 616.
39 C.J. p 264 note 87.

38. U.S.—Smith v. Shevlin-Hixon Co., C.C.A.Or., 157 F.2d 51—Manchester St. Ry. Co. v. Barrett, C. C.A.N.H., 265 F. 557.
Mont.—Palmer v. Great Northern Ry. Co., 170 P.2d 768.
Nev.—Ex parte Douglass, 295 P. 447, 53 Nev. 188.
N.H.—Lizotte v. Nashua Mfg. Co., 100 A. 757, 78 N.H. 354—Martel v. White Mills, 111 A. 237, 79 N.H. 439.
Ohio.—Baltimore & O. R. Co. v. McTeer, 9 N.E.2d 627, 55 Ohio App. 217.
Or.—McCauley v. The Willamette, 215 P. 892, 109 Or. 131.
39 C.J. p 264 note 88.

Employment included

Provision of employers' liability act that generally all owners and other persons having charge of, or responsibility for, any work involving a risk or danger to employees or the public shall use every device, care and precaution that is practicable for protection and safety of life and limb, applies only to employments that are inherently dangerous.—Barker v. Portland Traction Co., Or., 173 P.2d 288—39 C.J. p 264 note 88 [h].

Engine and car held train within statute

Mass.—Shea v. New York, N. H. & H. R. Co., 53 N.E. 396, 173 Mass. 177.

Construction of word "condition" as used in statute

Ala.—Jones v. Tennessee Coal & R. Co., 50 So. 1017, 163 Ala. 266.
12 C.J. p 399 note 86 [c].

39. N.H.—Lizotte v. Nashua Mfg. Co., 100 A. 757, 78 N.H. 354.

40. Wis.—Schuster v. Bridgeman, 275 N.W. 440, 225 Wis. 547.

41. U.S.—Ford, Bacon & Davis v. Volentine, C.C.A.Miss., 64 F.2d 800.

42. U.S.—Lang v. U. S. Reduction Co., C.C.A.Ind., 110 F.2d 441—Great Northern Ry. Co. v. Nelson, C.C.A.Minn., 90 F.2d 84—Mallatt v. Ostrander Ry. & Timber Co., D. C.Or., 46 F.Supp. 250.
39 C.J. p 264 note 89.

Breach of duty

Liability under employers' liability act cannot be predicated on mere fact that work involved risk or danger; breach of duty on part of employer must be shown.—Ferretti v. Southern Pac. Co., 57 P.2d 1280, 154 Or. 97.

Excuse

A court may reduce a statutory penalty exacted by the state for the failure of a violator to appreciate his obligation to the commonwealth but there is no authority for excusing an employer for his failure to comply with legal requirements for the care of his employees.—Hicks v. Ocean Shore R. R., 117 P.2d 850, 18 Cal.2d 773.

43. Ariz.—Grasty v. Sabin, 259 P. 1049, 32 Ariz. 463.
39 C.J. p 264 note 90.

44. U.S.—Aqua System v. Kodakoski, C.C.A.Canal Zone, 88 F.2d 395.

45. Ky.—Louisville & N. R. Co. v. Clark, 277 S.W. 272, 211 Ky. 315.
N.Y.—Graham v. Laughlin, 283 N.Y. S. 218, 246 App.Div. 652.
Or.—Jylha v. Chamberlain, 121 P.2d 928, 168 Or. 171.
39 C.J. p 264 note 91.

Hazardous employments

(1) Where the statute relates to hazardous occupations, if employee is engaged in occupation classified as hazardous, employer is liable for any accident, resulting from one of conditions of occupation, even though such condition was not one which induced legislature to classify occupation as hazardous.—Tarbell v. Rivera, 251 P. 553, 31 Ariz. 214—Phoenix Tempe Stone Co. v. Jenkins, 237 P. 194, 28 Ariz. 291.

(2) The injury need not necessarily have been caused by reason of risk or danger inherent in the occupation, but may have arisen from the manner in which the business is carried on.—Tarbell v. Rivera, supra—Phoenix-Tempe Stone Co. v. Jenkins, supra—Consolidated Arizona Smelting Co. v. Egich, 199 P. 132, 22 Ariz. 543.

(3) Under some statutes the act

The employers' liability acts have been held to give a new cause of action for injury to a servant,[46] but they do not take away from an employee any cause of action which he had at common law,[47] and unless they expressly so provide they do not prevent the maintenance of a common-law action, although the negligence giving rise to it may be included in that defined by them,[48] and, where a common-law action is so brought, the common law controls as to the rights of the parties.[49] Where a particular injury does not fall within the provisions of an employers' liability act, the liability of defendant is to be determined under the common law and statutes of the state other than such act.[50]

Where an employee claimed compensation under the statute, the employer may settle all claims by having his insurance carrier pay for a release notwithstanding there was no liability under the statute.[51]

c. Federal Employers' Liability Act

(1) In general
(2) Federal or state law as controlling

(1) In General

The Federal Employers' Liability Act, which was passed to enlarge the rights of employees to recover against railroad companies when engaged in interstate commerce, is constitutional and is to be liberally construed; but it does not make the railroad an insurer nor does it authorize a recovery in the absence of negligence.

The Federal Employers' Liability Act of 1908, 45 U.S.C.A. §§ 51–59, applicable to common carriers by railroad,[52] which was passed to enlarge the rights of employees to recover against railroad companies

applies only to employments involving a risk of danger, and which are inherently dangerous, whether due to, or caused by, machinery or otherwise, and comprehends hazardous occupations in general, specifically enumerated or otherwise.
U.S.—Union Oil Co. of California v. Hunt, C.C.A.Or., 111 F.2d 269.
Or.—Freeman v. Wentworth & Irwin, 7 P.2d 796, 139 Or. 1.

(4) The business of operating service and gasoline filling station and the employment of a station attendant were not within such act.—Union Oil Co. of California v. Hunt, supra.

(5) Employer operating logging camp engaged in "hazardous occupation" within act.—Brady v. Oregon Lumber Co., 243 P. 96, 117 Or. 188, 45 A.L.R. 812, rehearing denied 245 P. 732, 118 Or. 15, 45 A.L.R. 812.

(6) Master was held not liable under hazardous employment statute for injury to mine employee performing nonhazardous work with which hazardous feature of blasting had no causal connection.—Cummer Lumber Co. v. Silas, 125 So. 372, 98 Fla. 1158.

Character of service

(1) Whether employers' liability act applies to employee depends on character of service as determined by employment contract, not work he was doing when injured.—Fitzgerald v. Oregon-Washington R. & Nav. Co., 16 P.2d 27, 141 Or. 1.

(2) Employee need not be actively engaged in his work to be within protection of act.—Fitzgerald v. Oregon-Washington R. & Nav. Co., supra.

Manual or mechanical labor

A local bill clerk for a railroad is not engaged in "manual or mechanical labor" within employers' liability act, although occasionally at other times than when injured he did manual labor in loading and unloading live stock and freight, "mechanical labor" being skilled labor employed in making and repairing tools and instruments, and "manual labor," under such paragraph, meaning actual physical contact with the dangerous instruments.—Arizona Eastern R. Co. v. Matthews, 180 P. 159, 20 Ariz. 282, 7 A.L.R. 1149.

Work directly contributing to operation of railroad

(1) State railroad employers' liability act was construed to cover injuries to railroad employees while engaged in any part of work connected with, and necessarily and directly contributing to, operation of railroad or handling or movement of any train, engine or car over it.—Palmer v. Great Northern Ry. Co., Mont., 170 P.2d 768.

(2) The employment of sweeper or laborer in and about railway company's shops, where its engines were taken down, repaired and generally overhauled, was work done by him necessarily and directly contributed to operation of railroad.—Palmer v. Great Northern Ry. Co., supra.

Word "works" in employers' liability act means employer's entire plant, including all realty, buildings, and machinery used in particular business.—Fitzgerald v. Oregon-Washington R. & Nav. Co., 16 P.2d 27, 141 Or. 1.

46. N.Y.—Uss v. Crane Co., 123 N.Y.S. 94, 138 App.Div. 256—Lass v. Volk Housewrecking Co., 129 N.Y.S. 150, 72 Misc. 62.
Statutory or common law remedy generally see infra § 482.

Vested right

Plaintiff employé's right to compensation under employers' liability act for injuries was a vested right, which could not be taken away by repeal of such act, which constituted a part of plaintiff's contract with her employer.—Reynolds v. E. Clemens Horst Co., 170 P. 1082, 35 Cal.App. 711.

47. Mass.—Dumas v. Meyer, 5 N.E.2d 14, 296 Mass. 57.

48. Mass.—Dumas v. Meyer, supra.
39 C.J. p 265 note 96.

49. N.Y.—Davenport v. Oceanic Amusement Co., 116 N.Y.S. 609, 132 App.Div. 368.
39 C.J. p 265 note 97.

50. Fla.—Cummer Lumber Co. v. Silas, 125 So. 372, 98 Fla. 1158.
39 C.J. p 265 note 98.

51. Tex.—Lawson v. Daniel Ripley & Co., Civ.App., 300 S.W. 102.

52. Md.—Rexroad v. Western Maryland Ry. Co., 160 A. 730, 162 Md. 566.
Wash.—Reynolds v. Addison Miller Co., 255 P. 110, 143 Wash. 271.
39 C.J. p 265 note 3.

The expression "by railroad" is but descriptive of the kind of common carrier to which act relates, distinguishing railroads from other kinds of common carriers to which act does not extend, and it was not intended to define the kinds of instrumentalities used on which railroads' liability for negligence should exist or by which it should be limited.—Hamarstrom v. Missouri-Kansas-Texas R. Co., 116 S.W.2d 280, 286, 233 Mo.App. 1103, certiorari quashed State ex rel. Missouri-Kansas-Texas R. Co. v. Shain, 124 S.W.2d 1141, 343 Mo. 961, certiorari denied Missouri-Kansas-Texas R. R. v. Hamarstrom, 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518.

Employee of carrier engaged in interstate commerce cannot be made

when engaged in interstate commerce,[53] is constitutional[54] and, as discussed in Commerce § 78 e (4) (a), supersedes, where the railroad and employee are engaged in interstate commerce, the laws of the several states in so far as they cover the same field. This statute is not a compensation act[55] and there is a very clear distinction between it and ordinary workmen's compensation laws.[56] The act declares two distinct and independent liabilities resting on the common foundation of a wrongful injury;[57] it is not restricted to cases where death has occurred, but applies as well to those who are injured but who are not killed.[58] While held not to create a new cause of action,[59] the act modifies common-law rules as to certain defenses.[60]

While the court cannot extend the law beyond its

liable individually in an action brought under the Federal Employers' Liability Act.
U.S.—Kelly v. Chesapeake & O. Ry. Co., D.C.Ky., 201 F. 602.
Ind.—New York Cent. R. Co. v. Verpleatse, 59 N.E.2d 916, rehearing denied 60 N.E.2d 784.

Terminal company
A terminal company engaged in furnishing terminal facilities and services which in their relation to the public demonstrate their nature as a common calling is a common carrier within the Federal Employers' Liability Act.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515.

Motor carriers
The Federal Employers' Liability Act does not apply to motor carriers. —Brannan v. Rickenbacher Transportation, D.C.Pa., 43 F.Supp. 893.

Effect of private contract
Where a railroad company under a contract to act "solely as a bridge carrier in a private capacity" agreed to furnish transportation facilities and employees to a company engaged in freight forwarding, the contract could not affect the legal rights of those not parties to it or abrogate rights of railroad's employees to compensation under Federal Employers' Liability Act for injuries received in performing services for freight forwarder.—Sherman v. Southern Pac. Co., 93 P.2d 812, 34 Cal.App.2d 490, certiorari denied Southern Pac. Co. v. Sherman, 60 S.Ct. 610, 309 U.S. 669, 84 L.Ed. 1015.

53. S.C.—Powe v. Atlantic Coast Line R. Co., 159 S.E. 473, 161 S.C. 122, reversed on other grounds Atlantic Coast Line R. Co. v. Powe, 51 S.Ct. 498, 283 U.S. 401, 75 L.Ed. 1142.
39 C.J. p 907 note 83 [a].

Modification of common-law barriers
One of main purposes of act was to modify the common-law barriers against recovery by an employee in a suit against his employer predicated on industrial accident.—Terminal R. Ass'n of St. Louis v. Schorb, C.C.A.Mo., 151 F.2d 361, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.

54. Tenn.—Southern R. Co. v. Howard, 1 Tenn.Civ.A. 599.
12 C.J. p 70 note 29.
As valid exercise of power of congress to regulate commerce see Commerce § 78 e (4) (a).

The 1939 amendment, providing that carrier's employee, any part of whose duties are in furtherance of interstate commerce, shall be considered as employed in such commerce, is not unconstitutional.—Taylor v. Lumaghi Coal Co., 181 S.W.2d 536, 352 Mo. 1212.

Act of 1906
(1) As discussed in Commerce § 78 e (4) (a), the prior act of 1906 was held unconstitutional as far as it amounted to a regulation of intrastate, as well as of interstate, commerce.

(2) It was, however, held valid as far as it related to the District of Columbia and the territories.—El Paso & Northeastern R. Co. v. Gutierrez, Tex., 30 S.Ct. 21, 215 U.S. 87, 54 L.Ed. 106—39 C.J. p 265 notes 11, 12.

(3) It applied to injuries to employees of carriers within the territories, although such carriers were engaged in interstate commerce.—Walsh v. Alaska S. S. Co., 172 P. 269, 101 Wash. 295.

55. Cal.—Perrett v. Southern Pac. Co., 165 P.2d 751, 73 Cal.App.2d 30.

56. U.S.—Pratt v. Louisiana & Arkansas Ry. Co., D.C.La., 51 F.Supp. 737.
Employers' liability acts distinguished from workmen's compensation acts see the C.J.S. title Workmen's Compensation Acts § 3, also 71 C.J. p 228 note 49.

57. U.S.—Garrett v. Louisville & N. R. Co., Tenn., 35 S.Ct. 32, 235 U.S. 308, 59 L.Ed. 242.
Tex.—**Corpus Juris cited in** Galveston, H. & S. A. Ry. Co. v. Wells, 50 S.W.2d 247, 250, 121 Tex. 310.

Liability in tort, not contract
Federal Employers' Liability Act creates liability based on tort and not on contract.—Willey v. Alaska Packers' Ass'n, D.C.Cal., 9 F.2d 937, affirmed, C.C.A., 18 F.2d 8.

58. U.S.—Garrett v. Louisville & N. R. Co., Tenn., 35 S.Ct. 32, 235 U.S. 308, 59 L.Ed. 242.
Utah.—Fogg v. Oregon Short Line R. Co., 1 P.2d 954, 78 Utah 105.
Personal representative as proper party to sue under statute where action is for death see Death § 58 a.
Who are beneficiaries in action under statute for death see Death §§ 33–37.

59. Ala.—Seaboard Air Line Ry. Co. v. Latham, 127 So. 679, 23 Ala.App. 490.
N.C.—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791.
Tex.—**Corpus Juris cited in** Galveston, H. & S. A. Ry. Co. v. Wells, 50 S.W.2d 247, 250, 121 Tex. 310.
39 C.J. p 266 note 17.

New right or liability
(1) It has been said that the act establishes a new right of action, unknown to the common law.—Bell v. Wabash Ry. Co., C.C.A.Mo., 58 F. 2d 569.

(2) "The Federal Employers' Liability Act creates liability."—Atlantic Coast Line R. Co. v. Moore, 186 So. 210, 217, 135 Fla. 485.

(3) The act creates a liability where none existed theretofore.—Omin v. Baltimore & O. S. W. R. Co., 8 Ohio App. 161.

(4) Right of action given by Act does not arise out of any state law but arises from the act of congress. —Mathewes v. Port Utilities Commission of Charleston, D.C.S.C., 32 F.2d 913.

60. U.S.—**Corpus Juris cited in** Pratt v. Louisiana & Arkansas Ry. Co., D.C.La., 51 F.Supp. 737, 738.
Mont.—Burnett v. Northern Pac. Ry. Co., 124 P.2d 307, 113 Mont. 253.
Neb.—Hensley v. Chicago, St. P., M. & O. Ry. Co., 226 N.W. 421, 118 Neb. 690.
Ohio.—Omin v. Baltimore & O. S. W. R. Co., 8 Ohio App. 161.
39 C.J. p 266 note 17.
Federal Employers' Liability Act as modifying or limiting defense of:
Assumption of risk see infra § 359.
Contributory negligence see infra § 425.
Negligence of fellow servants see infra §§ 346–355.

provisions[61] but must act on the law as stated, and not on the ideals of sympathetic justice,[62] the act, being remedial,[63] is to be liberally construed and applied to advance the remedy proposed;[64] but, as discussed infra § 175, it applies only when the relation of master and servant exists and where plaintiff at the time of the injury was engaged in the actual work of the master.[65] The rights of the parties are controlled by the law as it existed at the date of the injury.[66] The fact that plaintiff's attorney was guilty of unethical conduct in procuring his contract of retainer does not affect the legal right of plaintiff to bring the action.[67]

Negligence as basis of liability. A railroad is not an insurer under the Federal Employers' Liability Act of the safety of its employees;[68] the act does not authorize a recovery in the absence of negligence[69] and there can be no negligence on the part

61. Tex.—Rogers v. Fort Worth & D. C. Ry. Co., Civ.App., 91 S.W.2d 458, error refused.

62. U.S.—Raudenbush v. Baltimore & O. R. R., D.C.Pa., 63 F.Supp. 329.

63. U.S.—Sherman v. Pere Marquette Ry. Co., D.C.Ill., 62 F.Supp. 590.
N.C.—**Corpus Juris quoted in** Bourne v. Southern Ry. Co., 33 S.E.2d 239, 241, 225 N.C. 43.
39 C.J. p 266 note 21.

64. U.S.—Jamison v. Encarnacion, N.Y., 50 S.Ct. 440, 281 U.S. 635, 74 L.Ed. 1082—Lukon v. Pennsylvania R. Co., C.C.A.Pa., 131 F.2d 327—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F.Supp. 154—Raudenbush v. Baltimore & O. R. R., D.C.Pa., 63 F.Supp. 329—Hoepfner v. Northern Pac. Ry. Co., D.C. Mont., 61 F.Supp. 819.
Mo.—Allen v. Ross, 292 S.W. 732, reversed on other grounds 48 S. Ct. 215, 276 U.S. 165, 72 L.Ed. 513, conformed to Allen v. Toledo St. Louis & Western Ry. Co., 12 S.W. 2d 1116—Aeby v. Missouri Pac. R. Co., 285 S.W. 965, 313 Mo. 492, reversed on other grounds 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, mandate conformed to Aeby v. Missouri Pac. R. Co., 6 S.W.2d 1115.
N.C.—**Corpus Juris quoted in** Bourne v. Southern Ry. Co., 33 S.E.2d 239, 241, 225 N.C. 43.
Tenn.—Louisville & N. R. Co. v. Jackson, 3 Tenn.App. 463.
Tex.—**Corpus Juris cited in** Galveston, H. & S. A. Ry. Co. v. Wells, 50 S.W.2d 247, 250, 121 Tex. 310—Rogers v. Fort Worth & D. C. Ry. Co., Civ.App., 91 S.W.2d 458, error dismissed.
39 C.J. p 266 note 21.

Amendment of statute

(1) Amendment extending scope of act must be liberally construed.
U.S.—Ermin v. Pennsylvania R. Co., D.C.N.Y., 36 F.Supp. 936.
Md.—Albright v. Pennsylvania R. Co., 37 A.2d 870, 183 Md. 421, certiorari denied 65 S.Ct. 72, 323 U.S. 735, 89 L.Ed. 589.

(2) The purpose of the 1939 amendment was to broaden the field in which the federal remedy is applicable.
Cal.—Copley v. Industrial Accident Commission, 120 P.2d 879, 19 Cal. 2d 287, certiorari denied 62 S.Ct. 1108, 316 U.S. 678, 86 L.Ed. 1752.
Tenn.—Louisville & N. R. Co. v. Potts, 158 S.W.2d 729, 178 Tenn. 425.

(3) But amendment could not be construed on theory that purpose of amendment was to bring all cases of injuries to railroad employees within the act, and that amending act was retrospective.—Painter v. Baltimore & O. R. Co., 13 A.2d 396, 339 Pa. 271, certiorari denied 61 S. Ct. 62, 311 U.S. 683, 85 L.Ed. 441.

Contractual exemption from liability

Federal Employers' Liability Act § 5, 45 U.S.C.A. § 55, providing that any contract, the purpose or intent of which is to enable any common carrier to exempt itself from any liability created by the act, shall be to that extent void, applies to all sections of the act and not merely to the first section, which has to do with the general liability of employers.—Fleming v. Husted, D.C. Iowa, 68 F.Supp. 900.

"Casuals" not included

N.J.—Stiedler v. Pennsylvania R. Co., 109 A. 512, 94 N.J.Law 197, certiorari denied Pennsylvania R. Co. v. Stredler, 40 S.Ct. 485, 253 U.S. 489, 64 L.Ed. 1027.

65. Tex.—**Corpus Juris cited in** Galveston, H. & S. A. Ry. Co. v. Wells, 50 S.W.2d 247, 250, 121 Tex. 310.
W.Va.—Griffin v. Baltimore & O. R. Co., 126 S.E. 571, 98 W.Va. 168.
39 C.J. p 266 note 23.
Commencement, suspension, or termination of relation see infra § 180.
Scope of employment in general see infra § 181.

66. U.S.—Sassaman v. Pennsylvania R. Co., C.C.A.N.J., 144 F.2d 950.
Tex.—Wichita Falls & S. R. Co. v. Lindley, Civ.App., 143 S.W.2d 428, error dismissed, judgment correct.

Amendment of statute had no application in action involving accident which occurred prior to enactment of the amendment.—Guerierro v. Reading Co., 29 A.2d 510, 346 Pa. 187.

67. Minn.—Winders v. Illinois Cent. R. Co., 223 N.W. 291, 177 Minn. 1, reargument denied 226 N.W. 213.

68. U.S.—Ellis v. Union Pac. R. Co., Neb., 67 S.Ct. 598, 329 U.S. 649, 91 L.Ed. 572—Wolfe v. Henwood, C.C.A.Ark., 162 F.2d 998—Chicago, St. P., M. & O. R. Co. v. Arnold, C.C.A.Minn., 160 F.2d 1002—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213—Kurn v. Stanfield, C.C.A.Mo., 111 F.2d 469—Pennsylvania R. Co. v. Hammond, C.C.A.N.Y., 7 F.2d 1010—Raudenbush v. Baltimore & O. R. R., D.C.Pa., 63 F.Supp. 329.
Ga.—Southern Ry. Co. v. Bradshaw, 37 S.E.2d 150, 73 Ga.App. 438.
N.H.—Dade v. Boston & M. R. R., 30 A.2d 485, 92 N.H. 294—Sweeney v. Boston & M. R., 174 A. 676, 175 A. 243, 87 N.H. 90.
N.C.—Southwell v. Atlantic Coast Line R. Co., 131 S.E. 670, 191 N.C. 153, reversed on other grounds 48 S.Ct. 25, 275 U.S. 64, 72 L.Ed. 157.
Ohio.—Bevan v. New York, C. & St. L. R. Co., 6 N.E.2d 982, 132 Ohio St. 245, certiorari denied 57 S.Ct. 924, 301 U.S. 695, 81 L.Ed. 1351.
Or.—Waller v. Northern Pac. Terminal Co. of Or., 166 P.2d 488, 178 Or. 274, certiorari denied 67 S.Ct. 45, 329 U.S. 742, 91 L.Ed. 640—McPherson v. Oregon Trunk Ry., 102 P.2d 726, 165 Or. 1.
Utah.—Lasagna v. McCarthy, 117 P. 2d 724.
Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.
Va.—Beamer v. Virginian Ry. Co., 26 S.E.2d 43, 181 Va. 650, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060.
39 C.J. p 266 note 24 [a], p 320 note 25 [d], p 379 note 20.
Employer as not insurer of safety of employee generally see supra § 171.

69. U.S.—Ellis v. Union Pac. R. Co., Neb., 67 S.Ct. 598, 329 U.S. 649, 91 L.Ed. 572—Brady v. Southern Ry. Co., N.C., 64 S.Ct. 232, 320 U.S. 476, 88 L.Ed. 239, certiorari denied 63 S.Ct. 995, 318 U.S. 792, 87 L.Ed. 1158—Tiller v. Atlantic Coast Line R. Co., Va., 63 S.Ct. 444, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 967—Atchison T. & S. F. Ry. Co. v. Saxon, Tex., 52 S.Ct. 229, 284 U.S. 458, 76 L.Ed. 397, conformed to

of the employees of the carrier unless they fail to | discharge some duty which they owe to the injured

Saxon v. Atchison T. & S. F. Ry. Co., Tex.Com.App., 50 S.W.2d 1095—Jamison v. Encarnacion, N.Y., 50 S.Ct. 440, 281 U.S. 635, 74 L.Ed. 1082—Chesapeake & O. R. Co. v. Stapleton, Ky., 49 S.Ct. 442, 279 U. S. 587, 73 L.Ed. 861—Toledo, St. L. & W. R. Co. v. Allen, Mo., 48 S.Ct. 215, 276 U.S. 165, 72 L.Ed. 513, conformed to Allen v. Toledo, St. Louis & Western Ry. Co., 12 S.W. 2d 1116—Missouri Pac. R. Co. v. Aeby, Mo., 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, mandate conformed to Aeby v. Missouri Pac. R. Co., 6 S.W.2d 1115—Chicago M. & St. P. Ry. Co. v. Coogan, Minn., 46 S.Ct. 564, 271 U.S. 472, 70 L.Ed. 1041—New Orleans & N. E. R. Co. v. Harris, Miss., 38 S.Ct. 535, 247 U.S. 367, 62 L.Ed. 1167—Hutchins v. Akron, C. & Y. R. Co., C.C.A. Ohio, 162 F.2d 189—Sheaf v. Minneapolis, St. P. & S. S. M. R. Co., C.C.A.N.D., 162 F.2d 110—Union Pac. R. Co. v. De Vaney, C.C.A. Cal., 162 F.2d 24—Zumwalt v. Gardner, C.C.A.Mo., 160 F.2d 298—Roberts v. United Fisheries Vessels Co., C.C.A.Mass., 141 F.2d 288, certiorari denied 65 S.Ct. 81, 323 U.S. 753, 89 L.Ed. 603—Ramsouer v. Midland Valley R. Co., C.C.A. Ark., 135 F.2d 101—Pitcairn v. Perry, C.C.A.Mo., 122 F.2d 881, certiorari denied 62 S.Ct. 414, 314 U. S. 697, 86 L.Ed. 557—Chesapeake & O. Ry. Co. v. Rich, C.C.A.Ohio, 81 F.2d 584, certiorari denied 56 S.Ct. 955, 298 U.S. 684, 80 L.Ed. 1404—Chicago, B. & Q. R. Co. v. Kelley, C.C.A.Neb., 74 F.2d 80—Northern Pac. R. Co. v. Berven, C. C.A.Wash., 73 F.2d 687—Jacobson v. Chicago, M., St. P. & P. R. Co., C.C.A.Minn., 66 F.2d 688—Kansas City Southern Ry. Co. v. Williford, C.C.A.La., 65 F.2d 223, certiorari denied Williford v. Kansas City Southern Ry. Co., 54 S.Ct. 87, 290 U.S. 666, 78 L.Ed. 576—New York, C. & St. L. R. Co. v. Boulden, C. C.A.Ind., 63 F.2d 917, certiorari denied 53 S.Ct. 785, 289 U.S. 753, 77 L.Ed. 1498—Norfolk & W. Ry. Co. v. Collingsworth, C.C.A.Ohio, 32 F.2d 561—In re Southern Pac. Co., D.C.N.Y., 30 F.2d 723, affirmed, C.C.A., 30 F.2d 725—Philadelphia & R. Ry. Co. v. Thirouin, C.C.A. N.J., 9 F.2d 856, followed in Szczepanski v. Pennsylvania R. Co., 36 F.2d 1022—Eckenrode v. Pennsylvania R. Co., D.C.Pa., 71 F.Supp. 764—Raudenbush v. Baltimore & O. R. R., D.C.Pa., 63 F. Supp. 329—**Corpus Juris cited in** Pratt v. Louisiana & Arkansas Ry. Co., D.C.La., 51 F.Supp. 737, 738—Tishar v. Nicodemus, D.C.Ill., 49 F.Supp. 145.

Ala.—Alabama Great Southern R. Co. v. Davis, 18 So.2d 737, 246 Ala. 64, certiorari denied 65 S.Ct. 676, 324 U.S. 846, 89 L.Ed. 1407—Southern Ry. Co. v. Melton, 198 So. 588, 240 Ala. 244.

Ark.—Kansas City Southern Ry. Co. v. Hopson, 186 S.W.2d 946, 208 Ark. 548—Missouri Pac. R. Co. v. Keeton, 183 S.W.2d 505, 207 Ark. 793, reversed on other grounds 66 S.Ct. 135, 326 U.S. 689, 90 L.Ed. 405—St. Louis-San Francisco Ry. Co. v. Childers, 124 S.W.2d 964, 197 Ark. 527.

Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, 16 Cal.2d 460—Perrett v. Southern Pac. Co., 165 P. 2d 751, 73 Cal.App.2d 30—Matthews v. Atchison, T. & S. F. Ry. Co., 129 P.2d 435, 54 Cal.App.2d 549—Pietryzk v. Dollar S. S. Lines, 88 P. 2d 783, 31 Cal.App.2d 584.

Colo.—Denver & S. L. Ry. Co. v. Bedard, 36 P.2d 770, 95 Colo. 364.

Ill.—Walaite v. Chicago, R. I. & P. Ry. Co., 33 N.E.2d 119, 376 Ill. 59—Huff v. Illinois Cent. R. Co., 199 N.E. 116, 362 Ill. 95—Halloran v. Chicago & N. W. Ry. Co., 63 N.E. 2d 670, 327 Ill.App. 217.

Kan.—Haggard v. Lowden, 134 P.2d 676, 156 Kan. 522—Schaefer v. Lowden, 78 P.2d 48, 147 Kan. 520—Caples v. Atchison, T. & S. F. R. Co., 283 P. 53, 129 Kan. 341.

La.—Harris v. Yazoo & M. V. R. Co., App., 183 So. 108.

Me.—McLaughlin v. Bangor & A. R. Co., 140 A. 827, 127 Me. 24—Hatch v. Portland Terminal Co., 131 A. 5, 125 Me. 96.

Md.—Rexroad v. Western Maryland Ry. Co., 160 A. 730, 162 Md. 566.

Miss.—Illinois Cent. R. Co. v. Humphries, 155 So. 421, 170 Miss. 840.

Mo.—Joice v. Missouri-Kansas-Texas R. Co., 189 S.W.2d 568, 354 Mo. 439, 161 A.L.R. 383—Urie v. Thompson, 176 S.W.2d 471, 352 Mo. 211—Martin v. Wabash Ry. Co., 30 S.W.2d 735, 325 Mo. 1107—Duncan v. Thompson, App., 146 S.W.2d 112, reversed on other grounds 62 S.Ct. 422, 315 U.S. 1, 86 L.Ed. 575—Sweany v. Wabash Ry. Co., 80 S. W.2d 216, 229 Mo.App. 393—Williams v. Pryor, App., 46 S.W.2d 241, affirmed 200 S.W. 53, 272 Mo. 613, reversed on other grounds Pryor v. Williams, 41 S.Ct. 36, 254 U.S. 43, 65 L.Ed. 120.

Mont.—Burnett v. Northern Pac. Ry. Co., 124 P.2d 307, 113 Mont. 253.

Neb.—Chambers v. Chicago, B. & Q. R. Co., 293 N.W. 338, 138 Neb. 490—Christenson v. Union Pac. R. Co., 290 N.W. 246, 137 Neb. 538, certiorari dismissed 61 S.Ct. 825, 312 U.S. 710, 85 L.Ed. 1142.

Nev.—Southern Pac. Co. v. Huyck, 128 P.2d 849, 61 Nev. 365—Smith v. Southern Pac. Co., 277 P. 609, 51 Nev. 390.

N.Y.—Healy v. Erie R. Co., 180 N.E. 888, 259 N.Y. 40, certiorari denied Erie R. Co. v. Healy, 53 S.Ct. 81, 287 U.S. 628, 77 L.Ed. 545—Popadines v. Davis, 209 N.Y.S. 689, 213 App.Div. 9.

N.C.—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791.

N.D.—Cunningham v. Great Northern Ry. Co., 14 N.W.2d 753, 73 N.D. 315.

Ohio.—Bevan v. New York, C. & St. L. R. Co., 6 N.E.2d 982, 132 Ohio St. 245, certiorari denied 57 S.Ct. 924, 301 U.S. 695, 81 L.Ed. 1351.

Okl.—Wright v. Atchison, T. & S. F. Ry. Co., 38 P.2d 517, 170 Okl. 48.

Or.—Waller v. Northern Pac. Terminal Co. of Or., 166 P.2d 488, 178 Or. 274, certiorari denied 67 S.Ct. 45, 329 U.S. 742, 91 L.Ed. 640—McPherson v. Oregon Trunk Ry., 102 P.2d 726, 165 Or. 1—Adskim v. Oregon-Washington R. & Nav. Co., 276 P. 1094, 129 Or. 169.

Pa.—Blair v. Baltimore & O. R. Co., 37 A.2d 736, 349 Pa. 436, reversed on other grounds 65 S.Ct. 545, 323 U.S. 600, 89 L.Ed. 490—Guerierro v. Reading Co., 29 A.2d 510, 346 Pa. 187—Casseday v. Baltimore & O. R. Co., 22 A.2d 663, 343 Pa. 342—Carlo v. Bessemer & L. E. R. Co., 143 A. 5, 293 Pa. 343, certiorari denied 49 S.Ct. 25, 278 U.S. 622, 73 L. Ed. 543—McCully v. Monongahela Ry. Co., 137 A. 623, 289 Pa. 393, certiorari denied 48 S.Ct. 37, 275 U. S. 542, 72 L.Ed. 416.

S.C.—Game v. Atlantic Coast Line R. Co., 30 S.E.2d 33, 204 S.C. 452—Williamson v. Southern Ry. Co., 191 S.E. 79, 183 S.C. 312.

Tex.—**Corpus Juris cited in** Fox v. Gulf, C. & S. Ry. Co., Civ.App., 80 S.W.2d 1072, 1076.

Utah.—Lasagna v. McCarthy, 177 P. 2d 734—Pauly v. McCarthy, 166 P. 2d 501, 109 Utah 398, reversed on other grounds 67 S.Ct. 962, 330 U.S. 802, 91 L.Ed. 1261—Ehalt v. McCarthy, 138 P.2d 639, 104 Utah 110—Miller v. Southern Pac. Co., 21 P.2d 865, 82 Utah 46, certiorari denied Southern Pac. Co. v. Miller, 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 600.

Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U. S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.

Va.—Bly v. Southern Ry. Co., 31 S.E. 2d 564, 183 Va. 162, opinion adhered to 33 S.E.2d 659, 183 Va. 406—Beamer v. Virginian Ry. Co., 26 S.E.2d 43, 181 Va. 650, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va.

servant.[70] The employer is liable for injuries resulting from negligence within the statute,[71] and the act is broad enough to cover any negligence for which a common carrier engaged in interstate commerce can be responsible to its employees therein,[72] and it is not limited to the negligence of fellow servants.[73] The word "negligence" as used in the act may be read to include all the meanings given to it by courts, and within the word as ordinarily used,[74] and comprehends any negligence of the employer causing or proximately contributing to the injury, whether antecedent or subsequent to negligence of the employee.[75]

(2) Federal or State Law as Controlling

(a) In general

(b) As to what constitutes negligence

(a) In General

An action brought in a state court under the Federal Employers' Liability Act is governed as to matters of substantive law by such act and the principles of common law as established and applied in the federal courts; but the state law controls as to other matters which are not provided for by the federal statute and as to all matters of practice and procedure except in so far as they may have been modified by the statute. The federal law is exclusive in operation.

An action brought in a state court under the Federal Employers' Liability Act is governed as to matters of substantive law by such act and the principles of common law as established and applied in the federal courts.[76] Thus the federal law and decisions control in determining the questions of the

582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.
W.Va.—Scott v. Norfolk & W. Ry. Co., 130 S.E. 98, 100 W.Va. 88.
39 C.J. p 266 note 24.

Particulars enumerated in the statute
Iowa.—Emerson v. Chicago, R. I. & P. Ry. Co., 182 N.W. 376, 191 Iowa 1386.
Mo.—Elliott v. Payne, 239 S.W. 851, 293 Mo. 581, 23 A.L.R. 706.
39 C.J. p 266 note 25.

Defense available in action brought under Federal Employers' Liability Act is that the employer was free from negligence proximately causing the injury.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.

70. U.S.—Carfelo v. Delaware, L. & W. R. Co., C.C.A.N.Y., 54 F.2d 475 —Philadelphia & R. Ry. Co. v. Thirouin, C.C.A.N.J., 9 F.2d 856, followed in Szczepanski v. Pennsylvania R. Co., 36 F.2d 1022.
Cal.—MacDonnell v. Southern Pac. Co., 62 P.2d 201, 17 Cal.App.2d 432, certiorari denied Southern Pac. Co. v. MacDonnell, 57 S.Ct. 790, 301 U.S. 688, 81 L.Ed. 1345.
Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Swann, 169 S.W. 886, 160 Ky. 458, L.R.A.1915C 27.

71. U.S.—Chicago, M. & St. P. Ry. Co. v. Coogan, Minn., 46 S.Ct. 564, 271 U.S. 472, 70 L.Ed. 1041—Union Pac. R. Co. v. DeVaney, C.C.A.Cal., 162 F.2d 24—Cimorelli v. New York Cent. R. Co., C.C.A.Ohio, 148 F.2d 575—Burwell v. Railway Express Agency, D.C.Mass., 26 F.Supp. 26.
Idaho.—Moser v. Union Pac. R. Co., 147 P.2d 336, 65 Idaho 479, 153 A. L.R. 341.
S.C.—Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 158 S.C. 194, certiorari denied Atlantic Coast Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.

72. U.S.—De Atley v. Chesapeake & O. R. Co., D.C.Ky., 201 F. 591.
Ala.—**Corpus Juris cited in** McDuff v. Kurn, 172 So. 886, 888, 233 Ala. 619.

73. U.S.—De Atley v. Chesapeake & O. R. Co., D.C.Ky., 201 F. 591.
Liability for negligence of fellow servants see infra §§ 334–355.

74. U.S.—Jamison v. Encarnacion, N.Y., 50 S.Ct. 440, 281 U.S. 635, 74 L.Ed. 1082.

75. Mo.—Mooney v. Terminal R. Ass'n of St. Louis, 176 S.W.2d 605, 352 Mo. 245—Moran v. Atchison, T. & S. F. Ry. Co., 48 S.W.2d 881, 330 Mo. 278, certiorari denied Atchison, T. & S. F. R. Co. v. Moran, 53 S.Ct. 21, 287 U.S. 621, 77 L.Ed. 539.

76. U.S.—Chesapeake & O. Ry. Co. v. Kuhn, Ohio, 52 S.Ct. 45, 284 U.S. 44, 76 L.Ed. 157—Chesapeake & O. R. Co. v. Stapleton, Ky., 49 S.Ct. 442, 279 U.S. 587, 73 L.Ed. 861—Missouri Pac. R. Co. v. Aeby, 48 S. Ct. 177, 275 U.S. 426, 72 L.Ed. 351, mandate conformed to Aeby v. Missouri Pac. R. Co., Mo., 6 S.W.2d 1115—Jacobs v. Reading Co., C.C.A. N.J., 130 F.2d 612—Nashville, C. & St. L. Ry. Co. v. York, C.C.A. Tenn., 127 F.2d 606—Pitcairn v. Perry, C.C.A.Mo., 122 F.2d 881, certiorari denied 62 S.Ct. 414, 314 U. S. 697, 86 L.Ed. 557—Carpenter v. Baltimore & O. R. Co., C.C.A.Ohio, 109 F.2d 375.
Ala.—Southern Ry. Co. v. Melton, 198 So. 588, 240 Ala. 244—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504 —Bugg v. Sanders, 121 So. 410, 219 Ala. 129—Illinois Cent. R. Co. v. Johnston, 87 So. 866, 205 Ala. 1, certiorari denied 41 S.Ct. 218, 254 U.S. 654, 65 L.Ed. 459, and error dismissed Illinois Cent. R. Co. v. Johnson, 41 S.Ct. 375, 255 U.S. 564, 65 L.Ed. 788.
Ariz.—Southern Pac. Co. v. Gastelum, 297 P. 875, 38 Ariz. 127.
Ark.—Kansas City Southern Ry. Co. v. Hopson, 186 S.W.2d 946, 208 Ark. 548—Missouri Pac. R. Co. v. Fisher, 177 S.W.2d 725, 206 Ark. 705—St. Louis-San Francisco Ry. Co. v. Childers, 124 S.W.2d 964, 197 Ark. 527—De Queen & E. R. Co. v. Dye, 58 S.W.2d 955, 187 Ark. 219 —St. Louis-San Francisco Ry. Co. v. Fine, 44 S.W.2d 340, 184 Ark. 940, certiorari denied 52 S.Ct. 502, 286 U.S. 552, 76 L.Ed. 1287.
Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, 16 Cal.2d 460— Hoogbruin v. Atchison, T. & S. F. Ry. Co., 2 P.2d 992, 213 Cal. 582— Hines v. Industrial Accident Commission, 192 P. 859, 184 Cal. 1, 14 A.L.R. 720, certiorari denied Payne v. Industrial Accident Commission, 41 S.Ct. 218, 254 U.S. 655, 65 L.Ed. 459—Perrett v. Southern Pac. Co., 165 P.2d 751, 73 Cal.App. 2d 30—Woodward v. Southern Pac. Co., 94 P.2d 1028, 35 Cal.App.2d 130, certiorari denied Southern Pac. Co. v. Woodward, 60 S.Ct. 614, 309 U.S. 670, 84 L.Ed. 1016—Weiand v. Southern Pac. Co., 93 P.2d 1023, 34 Cal.App.2d 500, certiorari denied 60 S.Ct. 613, 309 U.S. 670, 84 L.Ed. 1016—King v. Schumacher, 89 P.2d 466, 32 Cal.App.2d 172, certiorari denied 60 S.Ct. 123, 308 U.S. 593, 84 L.Ed. 496—MacDonnell v. Southern Pac. Co., 62 P.2d 201, 17 Cal.App.2d 432, certiorari denied Southern Pac. Co. v. MacDonnell, 57 S.Ct. 790, 301 U.S. 688, 81 L.Ed. 1345—Matthews v. Southern Pac. Co., 59 P.2d 220, 15 Cal.App.2d 36— Haskins v. Southern Pac. Co., 39 P.2d 895, 3 Cal.App.2d 177—Williams v. Southern Pac. Co., 202 P. 356, 54 Cal.App. 571, certiorari denied 42 S.Ct. 315, 258 U.S. 622, 66 L.Ed. 796—Werner v. Southern

Pac. Co., 185 P. 1016, 44 Cal.App. 76.

Ga.—Atlantic Coast Line R. R. v. Anderson, 38 S.E.2d 610, 200 Ga. 801—Atlantic Coast Line R. Co. v. Anderson, 36 S.E.2d 435, 73 Ga.App. 343.

Idaho.—Roy v. Oregon Short Line R. Co., 42 P.2d 476, 55 Idaho 404, certiorari denied Oregon Short Line R. Co. v. Roy, 56 S.Ct. 89, 296 U.S. 579, 80 L.Ed. 409.

Ill.—Huff v. Illinois Cent. R. Co., 199 N.E. 116, 362 Ill. 95—Brundege v. Chicago, B. & Q. R. Co., 154 N.E. 433, 324 Ill. 74—Kusturin v. Chicago & A. R. Co., 122 N.E. 512, 287 Ill. 306—Howard v. Baltimore & O. C. T. R. Co., 63 N.E.2d 774, 327 Ill.App. 83—Speiring v. Chicago & E. I. R. Co., 60 N.E.2d 267, 325 Ill.App. 576—Lilly v. Grand Trunk Western R. Co., 37 N.E.2d 888, 312 Ill.App. 73 reversed on other grounds 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411—Helton v. Thomson, 36 N.E.2d 267, 311 Ill.App. 354, certiorari denied 62 S.Ct. 1280, 316 U.S. 688, 86 L.Ed. 1760, rehearing denied 63 S.Ct. 24, 317 U.S. 704, 87 L.Ed. 562—Grosse v. Terminal R. Ass'n of St. Louis, 29 N.E.2d 1018, 307 Ill.App. 414—Herb v. Pitcairn, 29 N.E.2d 543, 306 Ill.App. 583, reversed on other grounds 36 N.E.2d 555, 377 Ill. 405—Stott v. Thompson, 14 N.E.2d 246, 294 Ill.App. 450, certiorari denied Thompson v. Scott, 59 S.Ct. 106, 305 U.S. 639, 83 L.Ed. 411—Chestnut v. Chicago, B. & Q. R. Co., 1 N.E.2d 811, 284 Ill. App. 317—Huff v. Illinois Cent. R. Co., 279 Ill.App. 323, affirmed 199 N.E. 116, 362 Ill. 95—Union Bank of Chicago v. Chicago & N. W. Ry. Co., 267 Ill.App. 554—Miller v. Miller, 257 Ill.App. 287—Humphreys v. East St. Louis & Suburban Ry. Co., 253 Ill.App. 450—Genzel v. New York, C. & St. L. R. Co., 249 Ill.App. 164—Beck v. Baltimore & O. R. Co., 244 Ill.App. 441—Foreman Trust & Savings Bank v. Grand Trunk Western Ry. Co., 242 Ill.App. 428, certiorari denied 49 S.Ct. 252, 279 U.S. 839, 73 L.Ed. 985—Dunlavy v. Chicago, B. & Q. R. Co., 200 Ill.App. 75.

Ind.—Pennsylvania R. Co. v. Martin, 170 N.E. 554, 93 Ind.App. 258.

Iowa.—Bennett v. Atchison, T. & S. F. Ry. Co., 183 N.W. 424, 191 Iowa 1333.

Kan.—McDougall v. Atchison, T. & S. F. Ry. Co., 186 P. 1028, 106 Kan. 135, certiorari denied 41 S.Ct. 6, 254 U.S. 629, 65 L.Ed. 446—Spinden v. Atchison, T. & S. F. R. Co., 148 P. 747, 95 Kan. 474.

Ky.—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603—Louisville & N. R. Co. v. Noble's Adm'x, 54 S.W.2d 636, 246 Ky. 86—Chesapeake & O. Ry. Co. v. Howward's Adm'x, 51 S.W.2d 461, 244 Ky. 838, certiorari denied Chesapeake & O. Ry. Co. v. Howard, 53 S.Ct. 315, 287 U.S. 670, 77 L.Ed. 578—Louisville & N. R. Co. v. Grant, 27 S.W.2d 980, 234 Ky. 276.

La.—Harris v. Yazoo & M. V. R. Co., App., 183 So. 108—Snow v. Texas & P. Ry. Co., App., 166 So. 200.

Mass.—Lynch v. New York, N. H. & H. R. R., 200 N.E. 877, 294 Mass. 152—Saunders v. Boston & M. R. R., 191 N.E. 381, 287 Mass. 56—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266.

Mich.—Howe v. Michigan Cent. R. Co., 211 N.W. 111, 236 Mich. 577, certiorari denied 47 S.Ct. 576, 274 U.S. 738, 71 L.Ed. 1317.

Minn.—Feurt v. Chicago, R. I. & P. Ry. Co., 227 N.W. 212, 178 Minn. 395—Stone v. Chicago & N. W. Ry. Co., 222 N.W. 641, 176 Minn. 104.

Miss.—Favre v. Louisville & N. R. Co., 178 So. 327, 180 Miss. 843.

Mo.—Mooney v. Terminal R. Ass'n of St. Louis, 186 S.W.2d 450, 353 Mo. 1080, certiorari denied 66 S.Ct. 28, 326 U.S. 723, 90 L.Ed. 428—Cantley v. Missouri-Kansas-Texas R. Co., 183 S.W.2d 123, 353 Mo. 605—Mooney v. Terminal R. Ass'n of St. Louis, 176 S.W.2d 605, 352 Mo. 245—Seago v. New York Cent. R. Co., 164 S.W.2d 336, 349 Mo. 1249, 147 A.L.R. 372—Smith v. Thompson, 161 S.W.2d 232, 349 Mo. 396—Pritchard v. Thompson, 156 S.W.2d 652, 348 Mo. 832—Harris v. Missouri Pac. R. Co., 114 S.W.2d 988, 342 Mo. 330, certiorari denied 59 S.Ct. 77, 305 U.S. 618, 83 L.Ed. 394—Toussaint v. Cleveland, C., C. & St. L. Ry. Co., 104 S.W.2d 263, 340 Mo. 578—Drew v. Missouri Pac. R. Co., 100 S.W.2d 516, 340 Mo. 321—Williams v. St. Louis-San Francisco Ry. Co., 85 S.W.2d 624, 337 Mo. 667—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748—Milburn v. Chicago, M., St. P. & P. R. Co., 56 S.W.2d 80, 331 Mo. 1171—State ex rel. New York, C. & St. L. R. Co. v. Nortoni, 56 S.W.2d 272, 331 Mo. 764, 85 A.L.R. 345—Moran v. Atchison, T. & S. F. Ry. Co., 48 S.W.2d 881, 330 Mo. 278, certiorari denied Atchison, T. & S. F. R. Co. v. Moran, 53 S.Ct. 21, 287 U.S. 621, 77 L.Ed. 539—Riley v. Wabash Ry. Co., 44 S.W.2d 136, 328 Mo. 910—Peters v. Wabash Ry. Co., 42 S.W.2d 588, 328 Mo. 924, certiorari denied 52 S.Ct. 209, 284 U.S. 686, 76 L.Ed. 580—Martin v. Wabash Ry. Co., 30 S.W.2d 735—Norton v. Wheelock, 23 S.W.2d 142, 323 Mo. 913, certiorari denied Wheelock v. Norton, 50 S.Ct. 355, 281 U.S. 752, 74 L.Ed. 1162—Illinois State Trust Co. v. Missouri Pac. R. Co., 5 S.W.2d 368, 319 Mo. 608, certiorari denied 49 S.Ct. 25, 278 U.S. 623, 73 L.Ed. 544—Hamilton v. St. Louis-San Francisco Ry. Co., 300 S.W. 787, 318 Mo. 123—McPherson v. Thompson, App., 164 S.W.2d 80, certiorari denied 63 S. Ct. 769, 318 U.S. 773, 87 L.Ed. 1143—Sweany v. Wabash Ry. Co., 80 S.W.2d 216, 229 Mo.App. 393—Voorhees v. Chicago, R. I. & P. Ry. Co., App., 7 S.W.2d 740.

Mont.—Matti v. Chicago, M. & St. P. Ry. Co., 176 P. 154, 55 Mont. 280.

Neb.—Bocian v. Union Pac. R. Co., 289 N.W. 372, 137 Neb. 318—Lenz v. Union Pac. R. Co., 258 N.W. 33, 128 Neb. 99—Sullivan v. Chicago & N. W. Ry. Co., 258 N.W. 38, 128 Neb. 92 certiorari denied 55 S.Ct. 831, 295 U.S. 749, 79 L.Ed. 1694—Preble v. Union Stockyards Co. of Omaha, 193 N.W. 910, 110 Neb. 383—Morris v. Missouri Pac. R. Co., 187 N.W. 130, 107 Neb. 788.

N.J.—Cvelich v. Erie R. Co., 199 A. 771, 120 N.J.Law 414, affirmed 4 A. 2d 271, 122 N.J.Law 26, certiorari denied 59 S.Ct. 1033, 307 U.S. 633, 83 L.Ed. 1516.

N.Y.—Sadowski v. Long Island R. Co., 55 N.E.2d 497, 292 N.Y. 448—McMullen v. Pennsylvania R. Co., 275 N.Y.S. 592, 242 App.Div. 470, affirmed 196 N.E. 589, 267 N.Y. 580, certiorari denied 56 S.Ct. 123, 296 U.S. 607, 80 L.Ed. 431—Popadines v. Davis, 209 N.Y.S. 689, 213 App. Div. 9.

N.C.—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112—Vest v. Atlantic Coast Line R. Co., 179 S.E. 607, 208 N.C. 80—Wolfe v. Atlantic Coast Line R. Co., 155 S.E. 459, 199 N.C. 613—Pratt v. Southern Ry. Co., 154 S.E. 847, 199 N.C. 397—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791—Austin v. Southern Ry. Co., 148 S.E. 446, 197 N.C. 319—Troxler v. Southern Ry. Co., 140 S.E. 20, 194 N.C. 446—Inge v. Seaboard Air Line Ry. Co., 135 S.E. 522, 192 N.C. 522, certiorari denied Seaboard Air Line R. Co. v. Inge, 47 S.Ct. 456, 273 U.S. 753, 71 L.Ed. 874.

N.D.—Cunningham v. Great Northern Ry. Co., 14 N.W.2d 753, 73 N.D. 315.

Ohio.—Bevan v. New York, C. & St. L. R. Co., 6 N.E.2d 982, 132 Ohio St. 245, certiorari denied 57 S.Ct. 924, 301 U.S. 695, 81 L.Ed. 1351—New York, C. & St. L. R. Co. v. Biermacher, 143 N.E. 570, 110 Ohio St. 173—Omin v. Baltimore & O. S. W. R. Co., 8 Ohio App. 161—Flannery v. Cleveland, C. C. & St. L. R. Co., 26 Ohio Cir.Ct.,N.S., 49.

Okl.—Chicago, R. I. & P. Ry. Co. v. Norman, 25 P.2d 298, 165 Okl. 133.

Or.—Waller v. Northern Pacific Terminal Co. of Oregon, 166 P.2d 488, 178 Or. 274, certiorari denied 67 S. Ct. 45, 329 U.S. 742, 91 L.Ed. 640—Jackson v. United Rys. Co., 28 P.2d 836, 145 Or. 546—Christie v. Great

applicability of the federal act[77] and whether the employee at the time of his injury was engaged in interstate commerce,[78] the person entitled to sue

Northern Ry. Co., 20 P.2d 377, 142 Or. 321—Adskim v. Oregon-Washington R. & Nav. Co., 276 P. 1094, 129 Or. 169—Ebell v. Oregon-Washington R. & Nav. Co., 221 P. 1062. 110 Or. 665.

Pa.—McCully v. Monongahela Ry. Co., 137 A. 623, 289 Pa. 393, certiorari denied 48 S.Ct. 37, 275 U.S. 542, 72 L.Ed. 416—Nicholas v. Reading Co., 24 A.2d 63, 147 Pa.Super. 308—Baltimore & O. R. Co. v. Barry, 87 Pittsb.Leg.J. 351.

S.C.—Williamson v. Southern Ry. Co., 191 S.E. 79, 183 S.C. 312—Johnston v. Atlantic Coast Line R. Co., 190 S.E. 459, 183 S.C. 126—Terry v. Atlantic Coast Line R. Co., 186 S.E. 159, 181 S.C. 151—Lytle v. Southern Ry.-Carolina Division, 171 S.E. 42, 171 S.C. 221, 90 A.L.R. 915, certiorari denied Southern Ry.-Carolina Division v. Lytle, 54 S.Ct. 63, 290 U.S. 645, 78 L.Ed. 560—Southern Ry. Co. v. Moore, 155 S.E. 740, 158 S.C. 446, 73 A.L.R. 582.

S.D.—Polluck v. Minneapolis & St. L. R. Co., 166 N.W. 641, 40 S.D. 186, certiorari denied 39 S.Ct. 6, 248 U.S. 558, 63 L.Ed. 421.

Tenn.—Kurn v. Weaver, 161 S.W.2d 1005, 25 Tenn.App. 556—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn.App. 213.

Tex.—Texas & N. O. R. Co. v. Warden, 78 S.W.2d 164, 125 Tex. 193—Saxon v. Atchison, T. & S. F. Ry. Co., Com.App., 36 S.W.2d 228, rehearing denied Saxon v. Atchison, T. & S. F. Ry. Co., Com.App., 38 S.W.2d 775, reversed on other grounds 52 S.Ct. 229, 284 U.S. 458, 76 L.Ed. 397, conformed to Atchison T. & S. F. Ry. Co., Com.App., 50 S.W.2d 1095—Texas & P. Ry. Co. v. Gibson, Com.App., 288 S.W. 823, certiorari denied 47 S.Ct. 763, 274 U.S. 748, 71 L.Ed. 1330—Smithers v. Fort Worth & D. C. Ry. Co., Com.App., 272 S.W. 764—Ridgway v. Missouri-Kansas-Texas R. Co. of Tex., Civ.App., 204 S.W.2d 411—Gulf, C. & S. F. R. Co. v. Spivey, Civ.App., 56 S.W.2d 655, certiorari denied Spivey v. Gulf, C. & S. F. R. Co., 54 S.Ct. 98, 290 U.S. 676, 78 L.Ed. 583—Texas & N. O. R. Co. v. Webster, Civ.App., 53 S.W.2d 656, affirmed 70 S.W.2d 394, 123 Tex. 197, certiorari denied 55 S.Ct. 93, 293 U.S. 580, 79 L.Ed. 677, rehearing denied 55 S.Ct. 138, 293 U.S. 630, 79 L.Ed. 716—Dawson v. Texas & P. Ry. Co., Civ.App., 45 S.W. 2d 367, reversed on other grounds 70 S.W.2d 392, 123 Tex. 191, certiorari denied Texas & P. Ry. Co. v. Dawson, 55 S.Ct. 110, 293 U.S. 580, 79 L.Ed. 677—Fort Worth & D. C. Ry. Co. v. Griffith, Civ.App., 27 S.W.2d 351, error refused—Houston & T. C. R. Co. v. Robins, Civ.App., 23 S.W.2d 461, error refused—Missouri, K. & T. R. Co. v. Jordan, Civ.App., 2 S.W.2d 312—Rowe v. Colorado & S. R. Co., Civ. App., 205 S.W. 731, error refused—Ft. Worth & R. G. Ry. Co. v. Bird, Civ.App., 196 S.W. 597, reversed on other grounds Bird v. Ft. Worth & R. G. R. Co., 207 S.W. 518, 109 Tex. 323.

Utah.—Elswood v. Oregon Short Line R. Co., 23 P.2d 925, 82 Utah 235—Miller v. Southern Pac. Co., 21 P.2d 865, 82 Utah 46, certiorari denied Southern Pac. Co. v. Miller, 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 600.

Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U. S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.

Va.—Bly v. Southern Ry. Co., 31 S.E. 2d 564, 183 Va. 162, adhered to 32 S.E.2d 659, 183 Va. 406—Knowles v. Southern Ry. Co., 12 S.E.2d 821, 177 Va. 88—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.

Wis.—Lind v. Chicago, M., St. P. & P. Ry. Co., 256 N.W. 705, 216 Wis. 405—Dretzka v. Chicago & N. W. Ry. Co., 256 N.W. 703, 216 Wis. 111.

15 C.J. p 936 note 5—39 C.J. p 266 note 29.

Assumption of risk see infra § 359.

Contributory negligence see infra §§ 425, 426.

Negligence of fellow servants see infra §§ 334–355.

Refusal of federal courts to follow state law and decisions of state courts as to questions with relation to Federal Employers' Liability Act see Federal Courts § 189 b.

Rules of general application

The rules of liability under the Federal Employers' Liability Act are of general application and in such respect wholly unlike local statutes peculiar to the legislative policy of a single state.—Murnan v. Wabash R. Co., 158 N.E. 508, 246 N.Y. 244, 54 A.L.R. 1522.

Protection accorded federal rights

The rights which the Federal Employers' Liability Act creates are federal rights protected by federal rather than local rules of law, and the federal rules have been largely fashioned from the common law except as congress has written into the act different standards.

U.S.—Bailey v. Central Vermont Ry., Vt., 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444—Watkins v. Thompson, D.C.Mo., 72 F.Supp. 953.

Ariz.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A. L.R. 857.

77. Iowa.—Wright v. Interurban Ry. Co., 179 N.W. 877, 189 Iowa 1315, certiorari denied Wright v. Interurban R. Co., 41 S.Ct. 375, 255 U.S. 570, 65 L.Ed. 791.

Mo.—Allen v. St. Louis-San Francisco Ry. Co., 53 S.W.2d 884, 331 Mo. 461.

Ohio.—Moore v. Industrial Commission of Ohio, 197 N.E. 403, 49 Ohio App. 386.

Pa.—Mayers v. Union R. Co., 100 A. 967, 256 Pa. 474, certiorari denied 37 S.Ct. 482, 243 U.S. 656, 61 L.Ed. 949.

S.D.—Castle v. Thomson, 12 N.W.2d 547, 69 S.D. 527.

Wash.—Schosboek v. Chicago, M., St. P. & P. R. Co., 63 P.2d 477, 188 Wash. 672, modified on other grounds 71 P.2d 548, 191 Wash. 425.

Effect of denial of certiorari

While the action of the United States supreme court in denying a petition for certiorari is not necessarily to be considered a controlling precedent, yet, where that tribunal denied a writ of certiorari to review the judgment of a state court holding the Federal Employers' Liability Act inapplicable, it must be inferred that the denial of the writ was a ruling to the effect that the act was not applicable.—Capps v. Atlantic Coast Line R. Co., 101 S.E. 216, 178 N.C. 558, certiorari denied 40 S.Ct. 345, 252 U.S. 580, 64 L.Ed. 726.

78. Ala.—Louisville & N. R. Co. v. Pettis, 89 So. 201, 206 Ala. 96.

Ariz.—Saxton v. El Paso & S. W. R. Co., 188 P. 257, 21 Ariz. 323.

Cal.—Southern Pac. Co. v. Industrial Accident Commission, 171 P. 1071, 178 Cal. 20, certiorari denied Southern Pac. Co. v. Industrial Accident Commission of State of California, 38 S.Ct. 582, 247 U.S. 516, 62 L.Ed. 1244.

Ill.—Day v. Chicago & N. W. Ry. Co., 188 N.E. 540, 354 Ill. 469—Bartosik v. Chicago River & Indiana R. Co., 266 Ill.App. 28, certiorari denied 53 S.Ct. 401, 288 U.S. 609, 77 L.Ed. 983.

Ky.—Watson v. Louisville & N. R. Co., 45 S.W.2d 499, 242 Ky. 14.

Mass.—McCabe v. Boston Terminal Co., 22 N.E.2d 33, 303 Mass. 450, vacated on other grounds 60 S.Ct. 725, 309 U.S. 624, 84 L.Ed. 986.

Mo.—Maxwell v. Kurn, 185 S.W.2d 9—Clevinger v. St. Louis-San Francisco Ry. Co., 109 S.W.2d 369, 341 Mo. 797, certiorari denied 58 S.Ct. 366, 302 U.S. 760, 82 L.Ed. 588—Stogsdill v. St. Louis-San Francisco Ry. Co., 85 S.W.2d 447, 337 Mo. 126—McNatt v. Wabash Ry. Co., 74 S.W.2d 625, 335 Mo. 999—Berry v.

and the nature of the right,[79] the limitation of the action,[80] the burden and quantum of proof necessary to determine the issues[81] or require their submission

St. Louis-San Francisco Ry. Co., 26 S.W.2d 988, 324 Mo. 775, certiorari denied St. Louis-San Francisco Ry. Co. v. Berry, 50 S.Ct. 464, 281 U.S. 765, 74 L.Ed. 1173.
N.J.—Herzog v. Hines, 112 A. 315, 95 N.J.Law 98.
N.Y.—Hiser v. Davis, 194 N.Y.S. 275, 201 App.Div. 213, affirmed 137 N.E. 596, 234 N.Y. 300.
Or.—Donaghy v. Oregon-Washington R. & Nav. Co., 288 P. 1003, 133 Or. 663, rehearing denied 291 P. 1017, 133 Or. 663.
Pa.—Lindway v. Pennsylvania Co., 112 A. 40, 268 Pa. 491—Antonio v. Pennsylvania R. Co., 38 A.2d 705, 155 Pa.Super. 277—Jordan v. Erie R. Co., 22 A.2d 116, 146 Pa.Super. 134—Backes v. Pennsylvania R. Co., 200 A. 181, 132 Pa.Super. 29—Mason v. Reading Co., 195 A. 754, 129 Pa.Super. 289—Brown v. Lehigh Valley R. Co., 184 A. 290, 121 Pa.Super. 380—Elder v. Pennsylvania R. Co., 180 A. 183, 118 Pa. Super. 137—Dunkell v. Pennsylvania R. Co., 163 A. 70, 106 Pa.Super. 356, certiorari denied 53 S.Ct. 527, 289 U.S. 727, 77 L.Ed. 1476.
Tex.—Texas & P. Ry. Co. v. Kelly, Com.App., 51 S.W.2d 299, certiorari denied Kelly v. Texas & P. R. Co., 53 S.Ct. 90, 287 U.S. 644, 71 L.Ed. 557—Fort Worth & R. G. Ry. Co. v. Pickens, Civ.App., 153 S.W.2d 252 reversed on other grounds 162 S.W.2d 691, 139 Tex. 181.
Utah.—Steward v. Industrial Commission of Utah, 15 P.2d 334, 80 Utah 394—Utah Rapid Transit Co. v. Industrial Commission of Utah, 204 P. 87, 59 Utah 232—Kuchenmeister v. Los Angeles & S. L. R. Co., 172 P. 725, 52 Utah 116.
Wash.—Bennor v. Oregon-Washington R. & Nav. Co., 27 P.2d 1082, 175 Wash. 559—Kidder v. Marysville & A. Ry. Co., 295 P. 162, 160 Wash. 471, affirmed 300 P. 170, 160 Wash. 471.
15 C.J. p 936 note 5 [b].

79. N.Y.—McCarthy v. New York Cent. R. Co., 286 N.Y.S. 598, 247 App.Div. 50.

80. U.S.—Atlantic Coast Line R. Co. v. Burnette, N.C., 36 S.Ct. 75, 239 U.S. 199, 60 L.Ed. 226.
Conn.—Flynn v. New York, N. H. & H. R. Co., 149 A. 682, 111 Conn. 196, affirmed 51 S.Ct. 357, 283 U.S. 53, 75 L.Ed. 837, 72 A.L.R. 1311.
Fla.—Seaboard Air Line Ry. Co. v. Hess, 74 So. 500, 73 Fla. 494.
Mo.—Cox v. Missouri-Kansas-Texas R. Co., 76 S.W.2d 411, 335 Mo. 1226.
N.C.—Link v. Carolina & N. W. Ry. Co., 150 S.E. 672, 198 N.C. 78—Belch v. Seaboard Air Line Ry. Co., 96 S.E. 640, 176 N.C. 22.
Ohio.—Wade v. Franklin, 200 N.E. 644, 51 Ohio App. 318.
Wash.—Bennor v. Oregon-Washington R. & Nav. Co., 27 P.2d 1082, 175 Wash. 559.
39 C.J. p 914 note 60.

Reason for rule

The condition in the act that no action shall be maintained thereunder unless commenced within two years from the time the cause of action accrued is not an ordinary statute of limitations. It affects the right and not the remedy and makes time the essence of the right, so that the right is lost if the time is disregarded.
Ohio.—Omin v. Baltimore & O. S. W. R. Co., 8 Ohio App. 161.
Okl.—Moore v. Atchison, T. & S. F. R. Co., 104 P.2d 236, 187 Okl. 534.

General state statute inapplicable

N.J.—Gillette v. Delaware, L. & W. R. Co., 102 A. 673, 91 N.J.Law 220.
39 C.J. p 914 note 61.

Tolling or extending statute

(1) The limitation provision of the Federal Employers' Liability Act is not tolled or extended by the provisions of a state statute tolling or extending statutes of limitations because of the injured person's infancy.—Gillett v. Delaware, L. & W. R. Co., 102 A. 673, 91 N.J.Law 220—39 C.J. p 914 note 61 [a].

(2) A similar rule applies as to state statutes tolling or extending statutes of limitations because of the injured person's insanity.—Alvarado v. Southern Pac. Co., Tex.Civ.App., 193 S.W. 1108.

(3) A state statute of limitations providing that, where an action commenced in time terminates otherwise than on the merits, a new action may be commenced within a specified time, does not extend the period of limitations fixed by the Federal Employers' Liability Act on which an employee's action is based.
U.S.—Bell v. Wabash Ry. Co., C.C.A. Mo., 58 F.2d 569.
N.Y.—Norton v. Erie R. Co., 167 N.Y.S. 177.
N.C.—Belch v. Seaboard Air Line Ry. Co., 96 S.E. 640, 176 N.C. 22.

(4) But where the pleadings in the new action after dismissal are amended so as to exclude any claim for recovery under the federal act, the action is not barred if brought within the time limited by the state statute of limitations, although the period prescribed by the federal act has expired.—Phillips v. Central of Georgia R. Co., 93 S.E. 309, 20 Ga. App. 668.

81. Ala.—Zayatz v. Southern Ry. Co., 26 So.2d 545, 248 Ala. 137—Southern Ry. Co. v. Melton, 198 So. 588, 240 Ala. 244.
Ariz.—Southern Pac. Co. v. Gastelum, 297 P. 875, 38 Ariz. 127.
Ark.—Chicago, R. I. & P. Ry. Co. v. Adams, 62 S.W.2d 947, 187 Ark. 816, 89 A.L.R. 688.
Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, 16 Cal.2d 460—Hosman v. Southern Pac. Co., 83 P.2d 88, 28 Cal.App.2d 621, certiorari denied Southern Pac. Co. v. Hosman, 59 S.Ct. 645, 306 U.S. 656, 83 L.Ed. 1054.
Ill.—Hayes v. New York Cent. R. Co., 67 N.E.2d 215, 328 Ill.App. 631—Mitchell v. Louisville & N. R. Co., 35 N.E.2d 81, 310 Ill.App. 563.
Me.—Thomas v. Maine Cent. R. Co., 144 A. 212, 127 Me. 466, certiorari denied 49 S.Ct. 254, 279 U.S. 835, 73 L.Ed. 983.
Mo.—Weaver v. Mobile & O. R. Co., 120 S.W.2d 1105, 343 Mo. 223.
N.Y.—Sadowski v. Long Island R. Co., 55 N.E.2d 497, 292 N.Y. 448.
Okl.—Pryor v. Chicago, R. I. & P. Ry. Co., 39 P.2d 563, 170 Okl. 158.
S.C.—Shiver v. Atlantic Coast Line R. Co., 152 S.E. 717, 155 S.C. 531.
Tex.—Chicago, R. I. & G. Ry. Co. v. Cummings, Civ.App., 107 S.W.2d 644, error dismissed.

Negligence

(1) Rulings of the federal courts as to the kind or amount of evidence required to establish negligence govern in actions brought in state courts.
U.S.—Chicago, M. & St. P. Ry. Co. v. Coogan, Minn., 46 S.Ct. 564, 271 U.S. 472, 70 L.Ed. 1041—New Orleans & N. E. R. Co. v. Harris, Miss., 38 S.Ct. 535, 247 U.S. 367, 62 L.Ed. 1167.
Ark.—St. Louis-San Francisco Ry. Co. v. Fine, 44 S.W.2d 340, 184 Ark. 940, certiorari denied 52 S.Ct. 502, 286 U.S. 552, 76 L.Ed. 1287—St. Louis-San Francisco Ry. Co. v. Bishop, 33 S.W.2d 383, 182 Ark. 763, certiorari denied 51 S.Ct. 647, 283 U.S. 854, 75 L.Ed. 1461—St. Louis-San Francisco Ry. Co. v. Smith, 19 S.W.2d 1102, 179 Ark. 1015.
Cal.—Bobo v. Northwestern Pac. R. Co., 19 P.2d 10, 129 Cal.App. 273, reversed on other grounds 54 S.Ct. 263, 290 U.S. 499, 78 L.Ed. 462.
Ind.—Pennsylvania R. Co. v. Johnson, 169 N.E. 358, 91 Ind.App. 412.
Ky.—Louisville & N. R. Co. v. Reverman's Adm'x, 15 S.W.2d 300, 228 Ky. 500.
Mass.—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266.
Minn.—Bimberg v. Northern Pac. Ry. Co., 14 N.W.2d 410, 217 Minn. 187, followed in 14 N.W.2d 419, 217

to the jury,[82] the measure of damages,[83] and the effect of a compromise.[84]

The state law, however, controls as to all other matters which are not provided for by the federal statute,[85] such as matters of practice and proce-

Minn. 187, certiorari denied 65 S. Ct. 87, 323 U.S. 752, 89 L.Ed. 602.
Miss.—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied Clay v. Mobile & O. R. Co., 51 S.Ct. 24, 282 U.S. 844, 75 L.Ed. 749.
Mo.—Wallingford v. Terminal R. R. Ass'n of St. Louis, 88 S.W.2d 361, 337 Mo. 1147.
Neb.—Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 147 Neb. 18.
N.C.—Potter v. Atlantic Coast Line R. Co., 147 S.E. 698, 197 N.C. 17.
Ohio.—Bevan v. New York, C. & St. L. R. Co., 6 N.E.2d 982, 132 Ohio St. 245, certiorari denied 57 S.Ct. 924, 301 U.S. 695, 81 L.Ed. 1351.
39 C.J. p 994 note 43.

(2) Whether defendant successfully carried a statutory burden of proof imposed by local law, but not by the federal act, is immaterial.
Ark.—St. Louis, I. M. & S. Ry. Co. v. Steel, 197 S.W. 288, 129 Ark. 520.
Fla.—Louisville & N. R. Co. v. Rhoda, 74 So. 19, 73 Fla. 12.

82. U.S.—Western & A. R. R. v. Hughes, Ga., 49 S.Ct. 231, 278 U.S. 496, 73 L.Ed. 473—Willis v. Pennsylvania R. Co., C.C.A.N.Y., 122 F.2d 248.
Ala.—Southern Ry. Co. v. Melton, 198 So. 588, 240 Ala. 244—Southern Ry. Co. v. Glenn, 154 So. 792, 228 Ala. 563—Birmingham Belt R. Co. v. Bennett, 146 So. 265, 226 Ala. 185, certiorari denied 54 S. Ct. 52, 290 U.S. 634, 78 L.Ed. 552.
Cal.—Smith v. Schumacker, 85 P.2d 967, 30 Cal.App.2d 251, certiorari denied Schumacher v. Smith, 59 S. Ct. 1046, 307 U.S. 646, 83 L.Ed. 1526.
Ga.—Louisville & N. R. Co. v. Rudder, 147 S.E. 795, 39 Ga.App. 513.
Ky.—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603—Louisville & N. R. Co. v. Grant, 27 S.W.2d 980, 234 Ky. 276.
Mass.—Murphy v. Boston & M. R. R., 65 N.E.2d 923, 319 Mass. 413.
Miss.—Yazoo & M. V. R. Co. v. McCaskell, 79 So. 817, 118 Miss. 629.
Mo.—Lavender v. Kurn, 195 S.W.2d 460, certiorari denied 67 S.Ct. 111, 329 U.S. 762, 91 L.Ed. 656—Mooney v. Terminal R. Ass'n of St. Louis, 176 S.W.2d 605, 352 Mo. 245—Lloyd v. Alton R. Co., 159 S.W. 2d 267, 348 Mo. 1222.
S.C.—Game v. Atlantic Coast Line R. Co., 30 S.E.2d 33, 204 S.C. 452—Jester v. Southern Ry. Co., 29 S. E.2d 768, 204 S.C. 395, 156 A.L.R. 632, certiorari denied 65 S.Ct. 44, 323 U.S. 716, 89 L.Ed. 576.
Utah.—Pauly v. McCarthy, 166 P.2d 501, 109 Utah 398.
W.Va.—Harness v. Baltimore & O. R. Co., 103 S.E. 866, 86 W.Va. 284.

Reason for rule

In an action under the Federal Employers' Liability Act, the rule as to the burden and quantum of proof necessary to require a submission of the issues to the jury is of the substance of the cause of action.
Ala.—Louisville & N. R. Co. v. Hall, 135 So. 466, 223 Ala. 338, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L.Ed. 560.
W.Va.—Staton v. Virginian Ry. Co., 195 S.E. 601, 119 W.Va. 658.

Earlier cases to contrary

Ky.—Lexington & E. Ry. Co. v. Smith's Adm'r, 188 S.W. 1091, 172 Ky. 117.
Mo.—Gill v. Baltimore & O. R. Co., 259 S.W. 93, 302 Mo. 317, certiorari denied 44 S.Ct. 636, 265 U.S. 592, 68 L.Ed. 1196.
S.C.—Dutton v. Atlantic Coast Line R. Co., 88 S.E. 263, 104 S.C. 16, affirmed 38 S.Ct. 191, 245 U.S. 637, 62 L.Ed. 525.
39 C.J. p 1107 note 8 [a].

In Tennessee

(1) It was declared that the federal rule as to the quantum and character of evidence justifying submission to the jury was announced for the courts of the United States only, and that no purpose had been declared to force it on the state courts.—Brenizer v. Nashville, C. & St. L. Ry., 3 S.W.2d 1053, 156 Tenn. 479, rehearing denied 8 S.W.2d 1099, 156 Tenn. 479.

(2) In a subsequent case the state court noted such contention had been disapproved, in effect, by the United States Supreme Court, but declared that it was unnecessary to pass on the question under the facts of the particular case.—Luck v. Louisville & N. R. Co., 69 S.W.2d 899, 167 Tenn. 350.

(3) Thereafter it was said that the decision in the first case will be treated as setting forth the procedural rule to be followed in the state court.—Nashville, C. & St. L. Ry. v. Hines, 94 S.W.2d 397, 20 Tenn. App. 1.

83. U.S.—Chesapeake & O. R. Co. v. Kelly, Ky., 36 S.Ct. 630, 241 U.S. 485, 60 L.Ed. 1117, L.R.A.1917F 367.
Ala.—Mobile & O. R. Co. v. Williams, 129 So. 60, 221 Ala. 402.
Ill.—Armstrong v. Chicago & W. I. R. Co., 263 Ill.App. 126, affirmed 183 N.E. 478, 350 Ill. 426, certiorari denied Chicago & W. I. R. Co. v. Armstrong, 53 S.Ct. 523, 289 U. S. 724, 77 L.Ed. 1475—Miller v. Miller, 257 Ill.App. 287—Kennedy v. Ross, 213 Ill.App. 446.
Ind.—Baltimore & O. S. R. Co. v. Berdon, 150 N.E. 407, 195 Ind. 265, certiorari denied 45 S.Ct. 225, 266 U.S. 633, 69 L.Ed. 479—Wabash Ry. Co. v. Whitcomb, 154 N.E. 885, 94 Ind.App. 190, certiorari denied 52 S.Ct. 395, 285 U.S. 546, 76 L. Ed. 937.
Ky.—Louisville & N. R. Co. v. Noble's Adm'x, 28 S.W.2d 733, 234 Ky. 504—Cincinnati, N. O. & T. P. Ry. Co. v. McWhorter, 275 S.W. 363, 210 Ky. 108—Chesapeake & O. Ry. Co. v. Maggard's Adm'r, 235 S.W. 736, 193 Ky. 259—Cincinnati, N. O. & T. P. R. Co. v. Nolan, 170 S.W. 650, 161 Ky. 205.
La.—Simmons v. Louisiana Ry. & Nav. Co., 90 So. 24, 149 La. 686—Jones v. Kansas City Southern Ry. Co., 78 So. 568, 143 La. 307.
Mo.—Dodd v. Missouri-Kansas-Texas R. Co., 193 S.W.2d 905, 354 Mo. 1205—Laughlin v. Kansas City Southern R. Co., 205 S.W. 3, 275 Mo. 459.
Neb.—Shean v. Hines, 184 N.W. 934, 107 Neb. 36—Sweat v. Hines, 184 N.W. 927, 107 Neb. 1.
N.C.—Hubbard v. Southern Ry. Co., 166 S.E. 802, 203 N.C. 675—Mangum v. Atlantic Coast Line R. Co., 125 S.E. 549, 188 N.C. 689—Strunks v. Payne, 114 S.E. 840, 184 N.C. 582.
Okl.—St. Louis-San Francisco Ry. Co. v. Floyd, 293 P. 250, 146 Okl. 42, 77 A.L.R. 1431.
S.C.—Youngblood v. Southern Ry. Co., 149 S.E. 742, 152 S.C. 265, 77 A.L.R. 1419.
Tex.—Texas & P. Ry. Co. v. Perkins, Com.App., 48 S.W.2d 249—Fort Worth & Denver City Ry. Co. v. Burton, Civ.App., 158 S.W.2d 601, error dismissed.
Utah.—Klinge v. Southern Pac. Co., 57 P.2d 367, 89 Utah 284, 105 A. L.R. 204.

84. La.—Hamilton v. Louisiana Ry. & Nav. Co., 111 So. 184, 162 La. 841.

85. Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, 16 Cal.2d 460—Woodward v. Southern Pac. Co., 94 P.2d 1028, 35 Cal.App.2d 130, certiorari denied Southern Pac. Co. v. Woodward, 60 S.Ct. 614, 309 U. S. 670, 84 L.Ed. 1016.
39 C.J. p 266 note 30.

Excessive damages

Decided cases are not controlling, but merely advisory, on the question of excessiveness of verdict and judgment.—Sallee v. St. Louis-San Francisco Ry. Co., 12 S.W.2d 476, 321 Mo. 798.

dure[86] both in the trial court and on appeal[87] except in so far as they may have been modified by the statute.[88] Matters of substance controlled by the Federal Employers' Liability Act cannot be varied or destroyed by state laws,[89] but such rights or defenses must be asserted in the state court at such

86. U.S.—North Carolina R. Co. v. Zachary, N.C., 34 S.Ct. 305, 232 U.S. 248, 58 L.Ed. 591, Ann.Cas.1914C, 159—Kansas City Southern Ry. Co. v. Nectaux, C.C.A.La., 26 F. 2d 317, certiorari denied Kansas City Southern Ry. Co. v. Nectaux, 49 S.Ct. 24, 278 U.S. 621, 73 L.Ed. 542.
Ala.—Louisville & N. R. Co. v. Hall, 135 So. 466, 223 Ala. 338, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L.Ed. 560.
Ark.—Kansas City Southern Ry. Co. v. Sanford, 31 S.W.2d 963, 182 Ark. 484, certiorari denied 51 S. Ct. 347, 283 U.S. 825, 75 L.Ed. 1439.
Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, 16 Cal.2d 460—Woodward v. Southern Pac. Co., 94 P.2d 1028, 35 Cal.App.2d 130, certiorari denied Southern Pac. Co. v. Woodward, 60 S.Ct. 614, 309 U.S. 670, 84 L.Ed. 1016—King v. Schumacher, 89 P.2d 466, 32 Cal. App. 172, certiorari denied Schumacher v. King, 60 S.Ct. 123, 308 U.S. 593, 84 L.Ed. 496.
Idaho.—Roy v. Oregon Short Line R. Co., 42 P.2d 476, 55 Idaho 404, certiorari denied Oregon Short Line R. Co. v. Roy, 56 S.Ct. 89, 296 U. S. 579, 80 L.Ed. 409.
Ill.—Taylor v. Southern Ry. Co., 182 N.E. 805, 350 Ill. 139—Parthun v. Elgin, J. & E. Ry. Co., 60 N.E.2d 464, 325 Ill.App. 408—Avance v. Thompson, 51 N.E.2d 334, 320 Ill. App. 406, reversed on other grounds 55 N.E.2d 57, 387 Ill. 77, certiorari denied 65 S.Ct. 82, 323 U.S. 753, 89 L.Ed. 603.
Ind.—Pennsylvania R. Co. v. Martin, 170 N.E. 554, 93 Ind.App. 258.
Ky.—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603—Chesapeake & O. Ry. Co. v. Shirley's Adm'x, 291 S.W. 395, 218 Ky. 337.
Me.—Delong v. Maine Cent. R. Co., 6 A.2d 431, 136 Me. 194.
Mass.—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266—Dewing v. New York Cent. R. Co., 183 N.E. 754, 281 Mass. 351.
Mo.—Joice v. Missouri-Kansas-Texas R. Co., 189 S.W.2d 568, 354 Mo. 439, 161 A.L.R. 383—Williams v. St. Louis-San Francisco Ry. Co., 85 S.W.2d 624, 337 Mo. 667—Halt v. Cleveland, C., C. & St. L. Ry. Co., 279 S.W. 148, certiorari denied Cleveland, C., C. & St. L. Ry. Co. v. Halt, 46 S.Ct. 483, 271 U.S. 668, 70 L.Ed. 1142.
N.Y.—Murmann v. New York, N. H. & H. R. Co., 253 N.Y.S. 450, 233 App.Div. 446, reversed on other grounds 180 N.E. 114, 258 N.Y. 447, followed in Cremeans v. Pennsylvania R. Co., 255 N.Y.S. 972, 235 App.Div. 736.
N.C.—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112—Candler v. Southern Ry. Co., 149 S.E. 393, 197 N.C. 399—Troxler v. Southern Ry. Co., 140 S.E. 20, 194 N.C. 446—Inge v. Seaboard Air Line Ry. Co., 135 S.E. 522, 192 N. C. 522, certiorari denied Seaboard Air Line R. Co. v. Inge, 47 S.Ct. 456, 273 U.S. 753, 71 L.Ed. 874.
S.C.—Cato v. Atlanta & C. A. L. Ry. Co., 162 S.E. 239, 164 S.C. 123, certiorari denied Atlanta & C. A. L. Ry. Co. v. Cato, 52 S.Ct. 200, 284 U.S. 684, 76 L.Ed. 577—Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 158 S.C. 194, certiorari denied Atlantic Coast Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.
Tenn.—Kurn v. Weaver, 161 S.W.2d 1005, 25 Tenn.App. 556.
Tex.—Gulf, C. & S. F. Ry. Co. v. Moser, Civ.App., 277 S.W. 722, reversed on other grounds 48 S.Ct. 49, 275 U.S. 133, 72 L.Ed. 200, conformed to, Civ.App., 4 S.W.2d 1118.
39 C.J. p 266 note 31.

"When an action is instituted in a state court under said [Federal Employers' Liability] act, the rules of pleading, practice, and procedure of the state wherein the suit is brought control in so far as thereby no substantive right or defense arising under the act is lessened or destroyed."—Ross v. Louisville & N. R. Co., 172 So. 752, 753, 178 Miss. 69.

Nature and purport of declaration
which alleged violation of a common-law duty owed by employer to an employee, but which answer alleged set forth a cause of action exclusively governed by the Federal Employers' Liability Act was to be determined in accordance with state law, the adjudication of a federal question not being involved.—Tanona v. New York, N. H. & H. R. R., 18 N. E.2d 163, 301 Mass. 589.

Identical rules under federal and state laws
In action for personal injury sustained by switchman, where counts under common law as aided by state workmen's compensation law and under federal Employers' Liability Act were joined, it was held that the rules of evidence and elements of damages were identical under the laws.—Hatch v. Portland Terminal Co., 131 A. 5, 125 Me. 96.

Common-law rules
In administering the Federal Employers' Liability Act in a state court the rules of practice and procedure followed in the trial of common-law actions should be observed except in so far as the act itself changes or modifies those rules.
Cal.—Pietryzk v. Dollar S. S. Lines, 88 P.2d 783, 31 Cal.App.2d 584.
Ky.—Louisville & N. R. Co. v. Johnson, 171 S.W. 847, 161 Ky. 824.
Tenn.—**Corpus Juris quoted in** Brenizer v. Nashville, C. & St. L. Ry., 8 S.W.2d 1053, 1054, 156 Tenn. 479, rehearing denied 8 S.W.2d 1099, 156 Tenn. 479.

Statutory rule of evidence
State privileged communications statute, being mere rule of evidence, is applicable in action under Federal Employers' Liability Act.—New Orleans & N. E. R. Co. v. Jackson, 110 So. 586, 145 Miss. 702.

Pendency of action
Where action under Federal Employers' Liability Act was commenced within two years after injury in city court which had no jurisdiction of the subject matter because injury occurred outside territorial limits of city, and subsequently the city court entered an order purporting to transfer case to circuit court, whether any case was pending in state court was a question to be determined by state law as interpreted by state supreme court.—Herb v. Pitcairn, Ill., 65 S.Ct. 459, 324 U.S. 117, 89 L.Ed. 789.

87. Cal.—King v. Schumacher, 89 P. 2d 466, 32 Cal.App.2d 172, certiorari denied Schumacher v. King, 60 S.Ct. 123, 308 U.S. 593, 84 L.Ed. 496.

Reduction of damages
In action for injuries to switchman under Federal Employers' Liability Act, state supreme court had power to modify judgment conditionally by reducing damages.—Roy v. Oregon Short Line R. Co., 42 P.2d 476, 55 Idaho 404, certiorari denied Oregon Short Line R. Co. v. Roy, 56 S.Ct. 89, 296 U.S. 579, 80 L.Ed. 409.

88. Cal.—Woodward v. Southern Pac. Co., 94 P.2d 1028, 35 Cal.App. 2d 130, certiorari denied Southern Pac. Co. v. Woodward, 60 S.Ct. 614, 309 U.S. 670, 84 L.Ed. 1016.
La.—Harris v. Yazoo & M. V. R. Co., App., 183 So. 108.
39 C.J. p 267 note 32.

89. Cal.—King v. Schumacher, 89 P.2d 466, 32 Cal.App.2d 172, certiorari denied Schumacher v. King,

time[90] and in such manner[91] as will entitle them to consideration under the state's established system of practice and pleading.

Exclusiveness of federal remedy. The federal law is exclusive in operation, not merely cumulative,[92] and it is error to give instructions on the state law;[93] but where, under the pleadings and evidence, there is an issue of fact as to whether a federal law is applicable, cases may be submitted to the jury under proper instructions as to both aspects of it.[94] If no recovery can be had under the federal law, in a case to which it is properly applicable, plaintiff has no other remedy.[95] If a plaintiff expressly bases his action on the Federal Employers' Liability Act, that act governs;[96] so, where plaintiff resists removal of an action from the state court where it is pending to the federal court, on the ground that the federal act gives him the right to sue in the state court, it constitutes an election to proceed under the federal law and is binding on him.[97]

Where plaintiff's case was tried and submitted to the jury on the theory that he was within the protection of the federal act, he must either stand or fall on the proposition that he is entitled to recover under that act,[98] and a judgment for plaintiff in such action cannot be sustained as a judgment in a common-law action for negligence.[99] If state and federal statutes are substantially similar,[1] or the rules of law governing the trial of issues under such statutes are the same, no question of jurisdiction being involved,[2] it is immaterial whether the action is brought under the one or the other. The facts and not the pleadings determine whether the injury in any case gives a right of recovery under the federal or under a state statute,[3] and a carrier is not estopped to urge that its liability is measured by the federal act by having pleaded contributory negligence and thus having relied on the state law.[4] The federal act, although exclusive as to cases within its provisions so far as the employer is concerned, does not preclude a remedy against another party to the wrong.[5] The right to proceed under the federal statute may be waived.[6]

(b) As to What Constitutes Negligence

Since the Federal Employers' Liability Act does not define negligence, the question of whether the acts complained of amount to negligence is to be determined according to the common law as applied in the federal courts.

Since the Federal Employers' Liability Act does not define negligence, the question whether the acts complained of amount to negligence is to be deter-

60 S.Ct. 123, 308 U.S. 593, 84 L.Ed. 496.

90. U.S.—Atlantic Coast Line R. Co. v. Mims, S.C., 37 S.Ct. 188, 242 U.S. 532, 61 L.Ed. 476.
39 C.J. p 267 note 34.

91. U.S.—Atlantic Coast Line R. Co. v. Mims, S.C., supra.
Cal.—King v. Schumacher, 89 P.2d 466, 32 Cal.App.2d 172, certiorari denied Schumacher v. King, 60 S. Ct. 123, 308 U.S. 593, 84 L.Ed. 496.
39 C.J. p 267 note 34.

92. U.S.—Mastrandrea v. Pennsylvania R. Co., C.C.A.Pa., 132 F.2d 318.
Ill.—Dunlavy v. Chicago, B. & Q. R. Co., 200 Ill.App. 75.
Neb.—Hensley v. Chicago, St. P., M. & O. Ry. Co., 226 N.W. 421, 118 Neb. 690.
Or.—Adskin v. Oregon-Washington R. & Nav. Co., 276 P. 1094, 129 Or. 169.
39 C.J. p 267 note 35, p 908 notes 93, 94.
Federal law as superseding state law covering same field see Commerce § 78 e (4) (a).

Not governed by common-law
Right of action, under employers' liability law, is not governed by rules of common-law actions for damages or to that action as modified by statute.—Grasty v. Sabin, 259 P. 1049, 32 Ariz. 463.

Statutory amendment held not to change rule
Cal.—Copley v. Industrial Accident Commission, 120 P.2d 879, 9 Cal. 2d 287, certiorari denied 62 S.Ct. 1108, 316 U.S. 678, 86 L.Ed. 1752.

Common-law remedy held available
It has been said that a servant engaged in interstate commerce, who is injured, may recover under the common law, where the facts and circumstances would entitle him to maintain an action thereunder regardless of the statute.—Grow v. Oregon Short Line R. Co., 138 P. 398, 44 Utah 160, Ann.Cas.1915B 481.

93. N.Y.—Sadowski v. Long Island R. Co., 55 N.E.2d 497, 292 N.Y. 448.
39 C.J. p 267 note 36.

94. S.C.—Koennecke v. Seaboard Air Line R. Co., 85 S.E. 374, 101 S.C. 86, affirmed 36 S.Ct. 126, 239 U.S. 352, 60 L.Ed. 324—Howell v. Atlantic Coast Line R. Co., 83 S.E. 639, 99 S.C. 417.

95. U.S.—New York, Central R. Co. v. Winfield, N.Y., 37 S.Ct. 546, 244 U.S. 147, 61 L.Ed. 1045.
39 C.J. p 267 note 38, p 908, notes 93, 94.

96. Mo.—Kilburn v. Chicago, M. & St. P. R. Co., 232 S.W. 1017, 289 Mo. 75.
Neb.—Hensley v. Chicago, St. P., M. & O. Ry. Co., 226 N.W. 421, 118 Neb. 690.

97. Wash.—Killes v. Great Northern R. Co., 161 P. 69, 93 Wash. 416.

98. Neb.—Hensley v. Chicago, St. P., M. & O. Ry. Co., 226 N.W. 421, 118 Neb. 690.

99. Neb.—Hensley v. Chicago, St. P., M. & O. Ry. Co., supra.

1. Kan.—Kasper v. Kansas City, L. & W. Ry. Co., 207 P. 203, 111 Kan. 267.

2. U. S.—Illinois Cent. R. Co. v. Nelson, Iowa, 212 F. 69, 128 C.C.A. 525.

3. Me.—Hatch v. Portland Terminal Co., 131 A. 5, 125 Me. 96.
Mass.—Corbett v. Boston & M. R. R. Co., 107 N.E. 60, 219 Mass. 351, 12 A.L.R. 683.

4. U.S.—St. Louis, I. M. & S. R. Co. v. Hesterly, Ark., 33 S.Ct. 703, 228 U.S. 702, 57 L.Ed. 1031.

5. N.Y.—Cott v. Erie R. Co., 131 N. E. 737, 231 N.Y. 67.
Wash.—Schosboek v. Chicago, M., St. P. & P. R. Co., 71 P.2d 548, 191 Wash. 425.

6. Wis.—Graber v. Duluth, S. S. & A. Ry. Co., 150 N.W. 489, 159 Wis. 414—Hanson v. Chicago M. & St. P. Ry. Co., 146 N.W. 524, 157 Wis. 455—Leora v. Minneapolis, St. P. & S. S. M. Ry. Co., 146 N.W. 520, 156 Wis. 386.

mined according to the common law[7] as applied in the federal courts,[8] and it has been held that, in the case of a conflict between the decisions of the state and of the federal courts as to what constitutes common-law negligence, the federal rule prevails.[9] Some courts have, however, taken the view that since there is no federal common law, the common law of the state is the law of the case.[10]

d. Federal Safety Appliance Act

The Federal Safety Appliance Act is to be construed liberally and applied in view of practical railroad operation. While the rights of the parties must be determined by the decisions of the federal courts which have construed and applied the act, the nature and incidents of the remedy are left to state law.

While the Federal Safety Appliance Act is to be construed liberally[11] so as to accomplish the purpose for which it is intended[12] and not to defeat the object of the legislation,[13] it must be interpreted and applied in view of practical railroad operation.[14] It does not operate retrospectively.[15] The rights of the parties must be determined by the decisions of the federal courts which have construed and applied the act,[16] but the nature and incidents of the

7. U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.
Ark.—Kansas City Southern Ry. Co. v. Larsen, 114 S.W.2d 1081, 195 Ark. 808, certiorari denied 59 S. Ct. 82, 305 U.S. 621, 83 L.Ed. 397.
Ill.—Brundege v. Chicago, B. & Q. R. Co., 154 N.E. 433, 324 Ill. 74.
Me.—Hatch v. Portland Terminal Co., 131 A. 5, 125 Me. 96.
Md.—Western Maryland R. Co. v. Sanner, 101 A. 587, 130 Md. 581, certiorari denied 38 S.Ct. 61, 245 U.S. 661, 62 L.Ed. 536.
Mich.—Watts v. Pere Marquette R. Co., 203 N.W. 859, 231 Mich. 40.
Mo.—Brimer v. Davis, 245 S.W. 404, 211 Mo.App. 47.
Neb.—Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 147 Neb. 18.
N.J.—Deputla v. Pennsylvania R. Co., 166 A. 87, 110 N.J.Law 515, certiorari denied Pennsylvania R. Co. v. Deptula, 54 S.Ct. 62, 290 U. S. 643, 78 L.Ed. 559.
N.C.—Potter v. Atlantic Coast Line R. Co., 147 S.E. 698, 197 N.C. 17.

8. U.S.—Raudenbush v. Baltimore & O. R. R., D.C.Pa., 63 F.Supp. 329.
Ark.—Kansas City Southern Ry. Co. v. Larsen, 114 S.W.2d 1081, 195 Ark. 808, certiorari denied 59 S. Ct. 82, 305 U.S. 621, 83 L.Ed. 397—Kansas City Southern Ry. Co. v. Brock, 98 S.W.2d 949, 193 Ark. 210—Missouri Pac. R. Co. v. Montgomery, 55 S.W.2d 68, 186 Ark. 537, certiorari denied 53 S.Ct. 690, 289 U.S. 747, 77 L.Ed. 1493—Missouri Pac. R. Co. v. Remel, 48 S. W.2d 548, 185 Ark. 598, certiorari denied 53 S.Ct. 85, 287 U.S. 634, 77 L.Ed. 550—St. Louis-San Francisco Ry. Co. v. Bishop, 33 S.W.2d 383, 182 Ark. 763, certiorari denied 51 S.Ct. 647, 283 U.S. 854, 75 L.Ed. 1461—Missouri Pac. R. Co. v. Skipper, 298 S.W. 849, 174 Ark. 1083, certiorari denied 248 S.Ct. 322, 276 U.S. 629, 72 L.Ed. 740.
Mo.—Urie v. Thompson, 176 S.W.2d 471, 352 Mo. 211—Lloyd v. Alton R. Co., 175 S.W.2d 819, 351 Mo. 1156.
N.H.—Sweeney v. Boston & M. R. R., 174 A. 676, 87 N.H. 90, affirmed 175 A. 243, 87 N.H. 90, certiorari denied 55 S.Ct. 638, 294 U.S. 728, 79 L.Ed. 1258.
N.Y.—Sadowski v. Long Island R. Co., 55 N.E.2d 497, 292 N.Y. 448.
Okl.—Missouri-Kansas-Texas R. Co. v. Highfill, 293 P. 182, 146 Okl. 84, certiorari denied 51 S.Ct. 483, 283 U.S. 834, 75 L.Ed. 1446.
Or.—Makino v. Spokane, P. & S. Ry. Co., 63 P.2d 1082, 155 Or. 317.
Tex.—Rio Grande, E. P. & S. F. R. Co. v. Dupree, Com.App., 55 S.W. 2d 522.

Proximate cause
In determining whether alleged negligence was the proximate cause of an employee's injuries, the state court is bound by the decisions of the United States supreme court.—Fitzgerald v. Pennsylvania R. R., 184 A. 299, 121 Pa.Super. 461.

Res ipsa loquitur
The question of whether or not the doctrine of res ipsa loquitur applies is to be determined by the decisions of the federal courts, particularly by those rendered by the supreme court.
Cal.—Connor v. Atchison, T. & S. F. Ry. Co., 207 P. 378, 189 Cal. 1, 22 A.L.R. 1462.
Ky.—Louisville & N. R. Co. v. Grant, 2 S.W.2d 1063, 223 Ky. 39.
Mo.—Cantley v. Missouri-Kansas-Texas R. Co., 183 S.W.2d 123, 353 Mo. 605—Noce v. St. Louis-San Francisco Ry. Co., 85 S.W.2d 637, 337 Mo. 689.

9. Neb.—Diller v. Chicago, B. & Q. R. Co., 229 N.W. 888, 119 Neb. 494.
Wis.—Kalashian v. Hines, 177 N.W. 602, 171 Wis. 429.
39 C.J. p 267 note 46.

10. Ill.—Arens v. Baltimore & O. C. T. R. Co., 213 Ill.App. 273.
39 C.J. p 267 note 45.

In Kentucky
(1) The rule of the text was adhered to in some early cases.—Cincinnati, N. O. & T. P. R. Co. v. Swann, 169 S.W. 886, 160 Ky. 458, L.R.A.1915C 27—Helm v. Cincinnati R. Co., 160 S.W. 945, 156 Ky. 240.
(2) But later cases recognize the rule that the common law as interpreted by the federal courts is controlling.—Chesapeake & O. Ry. Co. v. Craig, 17 S.W.2d 224, 225, 229 Ky. 365—Cincinnati, N. O. & T. P. Ry. Co. v. Heinz, 14 S.W.2d 138, 227 Ky. 816—Louisville & N. R. Co. v. Grant, 2 S.W.2d 1063, 223 Ky. 39.

11. Minn.—Frye v. Chicago, R. I. & P. R. Co., 195 N.W. 629, 157 Minn. 52.

12. Miss.—New Orleans & N. E. R. Co. v. Jackson, 105 So. 770, 140 Miss. 375.

13. U.S.—Johnson v. Southern Pac. Co., Utah, 25 S.Ct. 158, 196 U.S. 1, 49 L.Ed. 363.

14. Ga.—Davis v. Manry, 117 S.E. 283, 30 Ga.App. 213.
Requirements imposed see infra §§ 225–230.

15. U.S.—U. S. v. Colorado Midland R. Co., Colo., 202 F. 732, 121 C.C.A. 194.

16. Cal.—Scott v. Industrial Accident Commission of California, 70 P.2d 940, 9 Cal.2d 315.
Ill.—Lavigne v. Chicago, M., St. P. & P. R. Co., 4 N.E.2d 785, 287 Ill. App. 253, 268, certiorari denied 58 S.Ct. 32, 302 U.S. 688, 82 L.Ed. 532—Davidson v. Peoria & P. U. Ry. Co., 203 Ill.App. 498.
Iowa.—Thornton v. Minneapolis & St. L. R. Co., 175 N.W. 71, 187 Iowa 1158.
Mo.—Meek v. New York C. & St. L. R. Co., 88 S.W.2d 333, 337 Mo. 1188, certiorari denied New York, C. & St. L. R. Co. v. Meek, 56 S.Ct. 668, 297 U.S. 722, 80 L.Ed. 1006—Kimberling v. Wabash Ry. Co., 85 S.W.2d 736, 337 Mo. 702—Hiatt v. Wabash Ry. Co., 69 S.W.2d 627, 334 Mo. 895, certiorari denied Wabash Ry. Co. v. Hiatt, 55 S.Ct. 72, 293 U.S. 560, 79 L.Ed. 661—Peters v. Wabash Ry. Co., 42 S.W.2d 588, 328 Mo. 924, certiorari denied 52 S.Ct. 209, 284 U.S. 686, 76 L. Ed. 580—Illinois State Trust Co. v. Missouri Pac. R. Co., 5 S.W.2d 368, 319 Mo. 608, certiorari denied 49 S. Ct. 25, 278 U.S. 623, 73 L.Ed. 544.
Refusal of federal courts to follow state law and decisions of state courts as to questions with rela-

remedy under the act are left to state law.[17] Where an action is based on a violation of the Federal Safety Appliance Act, the liability will be enforced by the courts of one state without reference to the laws of another state in which the injury occurred.[18] The fact that the employment was procured through false representations by the employee as to his former employment[19] and as to his physical condition[20] has been held not available as a defense. Where it is not clear whether plaintiff relies on the Federal Employers' Liability Act or the Safety Appliance Act, the former necessarily applies, since it controls the liability of an employer to the employee, whether the employer has violated the Safety Appliance Act or has been guilty of general negligence.[21]

e. Federal Boiler Inspection Act

The construction placed on the Federal Boiler Inspection Act by the federal courts is binding on state courts in interstate cases. The act prescribes no form of action to be pursued for a recovery of damages for its breach.

The construction placed upon the Federal Boiler Inspection Act by the federal courts is binding on state courts in interstate cases,[22] and a state court must follow the federal rule in determining the sufficiency of the evidence to show a violation of the act.[23] The act prescribes no form of action to be pursued for a recovery of damages for its breach.[24]

f. Occupational Diseases Acts

Statutes requiring the employer to adopt approved devices or means for the prevention of occupational diseases are constitutional if not too vague, indefinite, uncertain, or incomplete. They do not make an employer an insurer against any occupational disease, but make him liable if such a disease is contracted by an employee as a direct result of his failure to comply with their requirements.

Under the statutes in some jurisdictions the employer is required to adopt and provide reasonable and approved devices or means for the prevention of occupational diseases.[25] Such statutes have been held constitutional,[26] but not where their provisions are so vague, indefinite, uncertain, or incomplete that no sufficiently clear and intelligible standard of duty is defined thereby.[27] They must be given a reasonable construction which will tend to effect the purpose of the legislature.[28] These statutes do not make an employer an insurer against any occupational disease;[29] they make him liable if such a disease is contracted by an employee as a direct result of his failure to comply with their requirements.[30] In order to bring a case within the provisions of such a statute, it must be shown that the disease contracted by an employee is an occupational disease incident or peculiar to his work.[31]

tion to Federal Safety Appliance Act see Federal Courts § 189 b.

Whether plaintiff was employee depends on the decisions of the supreme court of the United States, if any have been rendered on that question.—St. Louis-San Francisco Ry. Co. v. Barron, 267 S.W. 582, 166 Ark. 641.

17. U.S.—Breisch v. Central R. R. of New Jersey, Pa., 61 S.Ct. 662, 312 U.S. 484, 85 L.Ed. 964, 132 A.L.R. 918—Tipton v. Atchison, T. & S. F. Ry. Co., Cal., 56 S.Ct. 715, 298 U.S. 141, 80 L.Ed. 1091, 104 A.L.R. 831.

18. Tex.—Southern Pac. Co. v. Henderson, Civ.App., 208 S.W. 561, error refused—Texas & P. R. Co. v. Sprole, Civ.App., 202 S.W. 985.

19. U.S.—Payne v. Daugherty, C.C.A.Neb., 283 F. 353.

False statements as insufficient to terminate relation of master and servant existing at time of injury see infra § 180 c.

20. U.S.—Payne v. Daugherty, supra.

21. Ill.—Hunt v. Illinois Southern R. Co., 196 Ill.App. 539.

Mo.—Gill v. Baltimore & O. R. Co., 259 S.W. 93, 302 Mo. 317.

Necessity of bringing case within liability statute

Employee, to recover under federal law for alleged violation of Safety Appliance Act, must bring himself within Federal Employers' Liability Act.—Gieseking v. Litchfield & M. Ry. Co., 94 S.W.2d 375, 339 Mo. 1.

22. Ohio.—Scrabic v. Cincinnati, N. O. & T. P. Ry. Co., 182 N.E. 528, 42 Ohio App. 473.

23. Mo.—Hardin v. Illinois Cent. R. Co., 70 S.W.2d 1075, 324 Mo. 1169, certiorari denied Illinois Cent. R. Co. v. Hardin, 55 S.Ct. 86, 293 U.S. 574, 79 L.Ed. 672.

N.H.—Watkins v. Boston & M. R. R., 138 A. 315, 83 N.H. 10.

24. Ala.—Atlantic Coast Line R. Co. v. Wetherington, 16 So.2d 720, 245 Ala. 313.

25. U.S.—St. Joseph Lead Co. v. Jones, C.C.A.Mo., 70 F.2d 475.

Mo.—Lockhart v. Kansas City, 175 S.W.2d 814, 351 Mo. 1218.

Pa.—Graszkowski v. White Brothers Smelting Corporation, 18 Pa.Dist. & Co. 438.

26. U.S.—St. Joseph Lead Co. v. Jones, C.C.A.Mo., 70 F.2d 475.

Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259, 216 Ind. 180.

Occupational diseases acts and workmen's compensation acts distinguished see Workmen's Compensation Acts § 4, also 71 C.J. p 229 notes 51, 52.

Occupational disease within Workmen's Compensation Acts see the C.J.S. title Workmen's Compensation Acts § 169, also 71 C.J. p 599 note 69–p 603 note 90.

27. Ill.—Vallat v. Radium Dial Co., 196 N.E. 485, 360 Ill. 407, 99 A.L.R. 607—Boshuizen v. Thompson & Taylor Co., 195 N.E. 625, 360 Ill. 160.

28. Ill.—Jannusch v. Weber Bros. Metal Works, 249 Ill.App. 1.

Mo.—Dodd v. Independent Stove & Furnace Co., 51 S.W.2d 114, 330 Mo. 662.

29. Mo.—Smith v. Harbison-Walker Refractories Co., 100 S.W.2d 909, 340 Mo. 389.

Employer as not insurer of safety of employee generally see supra § 171.

Railroad as not insurer under Federal Employers' Liability Act of safety of employees see supra subdivision c (1) of this section.

30. Mo.—Smith v. Harbison-Walker Refractories Co., supra.

31. Ill.—Wilcox v. International Harvester Co., 198 Ill.App. 33.

§ 174. Relation of Parties; Course and Scope of Employment

As a general rule, before one can claim the status of an employee entitled to recover as such against his employer for personal injuries, he must be engaged by another person to perform work or services as directed and controlled by the employer and on the latter's promise to pay compensation for such services.

As affecting the question of the master's liability for injuries to his servant, a master has the absolute right to say who his servants shall be[32] and to fix the scope of their employment and the limits of their authority.[33] As a general rule, before one can claim the status of an employee entitled to recover as such against his employer for personal injuries, he must be engaged by another person to perform work or services as directed and controlled by the employer and on the latter's promise to pay compensation for such services.[34]

There must be a contract between the employer and employee, and a meeting of the minds,[35] although an express contract is not required.[36] This relation is usually dependent on the right to direct the manner in which the work should be done,[37] but not necessarily so,[38] and its existence is determined by ascertaining whose work was being performed at the time of the injury.[39] Although it is sometimes difficult to determine whose servant one is when performing a particular duty,[40] direction and control of the work being done are usually determinative,[41] and the test is the right to exercise such control rather than the actual exercise of the power to control.[42] Relevant considerations are selection and engagement,[43] the right of immediate discharge of the employee by the employer,[44] the right of the

32. U.S.—Howland v. Tri-State Theatres Corporation, C.C.A.Neb., 139 F.2d 560.
Right of master to select his employees generally see supra § 2.

33. U.S.—Howland v. Tri-State Theatres Corporation, supra.
Necessity that injuries be received within scope of employment see infra § 181.

34. Ark.—Armour & Co. v. Rice, 134 S.W.2d 529, 199 Ark. 89.
Essentials of relation generally see supra § 2.

35. Ark.—Armour & Co. v. Rice, 134 S.W.2d 529, 199 Ark. 89.
Cal.—Larson v. Lewis-Simas-Jones Co., 84 P.2d 296, 29 Cal.App.2d 83.
Ill.—Porter v. Terminal R. Ass'n of St. Louis, 65 N.E.2d 31, 327 Ill.App. 645.
Ky.—Codell Const. Co. v. White, 65 S.W.2d 690, 251 Ky. 574.
Mass.—Lessard v. Kneeland, 154 N.E. 94, 257 Mass. 455.
Okl.—Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 148 Okl. 107.
Or.—Jylha v. Chamberlain, 121 P.2d 928, 168 Or. 171.
Pa.—Reis v. Mosebach, 12 A.2d 37, 337 Pa. 412.
Tex.—Johnson v. Murray Co., Civ. App., 90 S.W.2d 920, error dismissed.
Contract as essential of relation generally see supra § 2.

Employment by partner or firm
The question whether employee was employed by partnership, or only one partner, when injured, is immaterial as to latter's liability.—Dillard v. Justus, 3 S.W.2d 392, 222 Mo.App. 362.

36. Iowa.—Ganzhorn v. Reep, 12 N.W.2d 154, 234 Iowa 495.
Or.—Jylha v. Chamberlain, 121 P.2d 928, 168 Or. 171.
Employment by master's servants see infra § 177.

37. U.S.—Dennis v. Mabee, C.C.A.Tex., 139 F.2d 941, certiorari denied 64 S.Ct. 1261, 322 U.S. 750, 88 L.Ed. 1581—Stevenson v. Lake Terminal R. Co., C.C.A.Ohio, 42 F.2d 357—Watkins v. Thompson, D.C.Mo., 72 F.Supp. 953.
39 C.J. p 268 note 57 [a].
Direction and control as consideration in determination of existence of relation generally see supra § 2.
Transfer of service of employee see infra § 180.

38. Okl.—Chicago, R. I. & P. Ry. Co. v. Norman, 25 P.2d 298, 165 Okl. 133.
Va.—Atlantic Coast Line R. Co. v. Tredway's Adm'x, 93 S.E. 560, 120 Va. 735, 10 A.L.R. 1411, certiorari denied 38 S.Ct. 191, 245 U.S. 670, 62 L.Ed. 540.
Traffic arrangements and other contracts between railroads see infra § 178.

39. U.S.—Docheney v. Pennsylvania R. Co., C.C.A.Pa., 60 F.2d 808, certiorari denied 53 S.Ct. 222, 287 U.S. 665, 77 L.Ed. 573—Stevenson v. Lake Terminal R. Co., C.C.A.Ohio, 42 F.2d 357—Watkins v. Thompson, D.C.Mo., 72 F.Supp. 953.
Mich.—Buskirk v. Ide, 4 N.W.2d 504, 302 Mich. 154.
Okl.—Chicago, R. I. & P. Ry. Co. v. Norman, 25 P.2d 298, 165 Okl. 133.
Va.—Atlantic Coast Line R. Co. v. Tredway's Adm'x, 93 S.E. 560, 120 Va. 735, 10 A.L.R. 1411, certiorari denied 38 S.Ct. 191, 245 U.S. 670, 62 L.Ed. 540.

As between manager or store
Delivery boy employed by manager of tea company's store, unless otherwise informed, had right to assume he was rendering services for company and not for manager personally, as regards question of relationship in determining company's liability for boy's injuries.—La Pointe v. Chevrette, 250 N.W. 272, 264 Mich. 482.

40. Mo.—Hurlbut v. Wabash R. Co., 31 S.W. 1051, 130 Mo. 657.

41. U.S.—Docheney v. Pennsylvania R. Co., C.C.A.Pa., 60 F.2d 808, certiorari denied 53 S.Ct. 222, 287 U.S. 665, 77 L.Ed. 573—Stevenson v. Lake Terminal R. Co., C.C.A. Ohio, 42 F.2d 357.
Cal.—Larson v. Lewis-Simas-Jones Co., 84 P.2d 296, 29 Cal.App.2d 83.
Fla.—Hartquist v. Tamiami Trail Tours, 190 So. 533, 139 Fla. 328.
Mass.—Bell v. Sawyer, 47 N.E.2d 1, 313 Mass. 250.
Mich.—Buskirk v. Ide, 4 N.W.2d 504, 302 Mich. 154.
Tex.—Johnson v. Murray Co., Civ. App., 90 S.W.2d 920, error dismissed.

42. Iowa.—Ganzhorn v. Reep, 12 N.W.2d 154, 234 Iowa 495.
Mass.—Bell v. Sawyer, 47 N.E.2d 1, 313 Mass. 250.
Or.—Hust v. Moore-McCormack Lines, 158 P.2d 275, 176 Or. 662, reversed on other grounds 66 S.Ct. 1218, 328 U.S. 707, 90 L.Ed. 1534—Jylha v. Chamberlain, 121 P.2d 928, 168 Or. 171.

43. U.S.—Stevenson v. Lake Terminal R. Co., C.C.A.Ohio, 42 F.2d 357.
Or.—Hust v. Moore-McCormack Lines, 158 P.2d 275, 176 Or. 662, reversed on other grounds 66 S.Ct. 1218, 328 U.S. 707, 90 L.Ed. 1534.

44. U.S.—Stevenson v. Lake Terminal R. Co., C.C.A.Ohio, 42 F.2d 357.
Cal.—Larson v. Lewis-Simas-Jones Co., 84 P.2d 296, 29 Cal.App.2d 83.
Or.—Hust v. Moore-McCormack Lines, 158 P.2d 275, 176 Or. 662, reversed on other grounds 66 S.Ct. 1218, 328 U.S. 707, 90 L.Ed. 1534.

employee to quit at any time,[45] and loss, if any, to be stood by the employer;[46] but they are not conclusive,[47] and each case must be decided on its peculiar facts.[48] Where performance of his duties by the servant would, because of his condition, be a violation of the law, he is a trespasser when he comes on the master's premises to undertake such performance.[49]

Where the statute has defined "employer" and "employee," the statutory definitions prevail over the common-law definitions of the terms in cases coming within the purview of the statute.[50] In the absence of statutory definition of the terms, the courts will construe in their natural sense, to describe the conventional relation of master and servant, the words "employee" and "employed" as used in the federal[51] and state[52] employers' liability acts; and such terms refer to persons who are working for the employer at his request and under agreement to compensate them for their services.[53]

Compensation. As a general rule employment connotes a promise, express or implied, to pay for the work performed,[54] and the payment of wages is a relevant consideration where one claims the status of an employee entitled to recover against his alleged employer for personal injuries,[55] but it is not

45. Cal.—Larson v. Lewis-Simas-Jones Co., 84 P.2d 296, 29 Cal.App. 2d 83.

46. Cal.—Larson v. Lewis-Simas-Jones Co., supra.

47. U.S.—Stevenson v. Lake Terminal R. Co., C.C.A.Ohio, 42 F.2d 357.
Fla.—Hartquist v. Tamiami Trail Tours, 190 So. 533, 139 Fla. 328.
Okl.—Chicago, R. I. & P. Ry. Co. v. Norman, 25 P.2d 298, 165 Okl. 133.
Va.—Atlantic Coast Line R. Co. v. Tredway's Adm'x, 93 S.E. 560, 120 Va. 735, 10 A.L.R. 1411, certiorari denied 38 S.Ct. 191, 245 U.S. 670, 62 L.Ed. 540.

48. U.S.—Cimorelli v. New York Cent. R. Co., C.C.A.Ohio, 148 F.2d 575.

Relation of master and servant or employer and employee held to exist between:

(1) Automobile owner and person who at former's request assisted him in starting stalled automobile.—Watson v. Watson, 163 So. 476, 121 Fla. 173.

(2) Gasoline production companies and individual employed as "trouble shooter" at both companies' gasoline plants as needed.—Cate v. Orfic Gasoline Production Co., Tex.Civ.App., 78 S.W.2d 635, error refused.

(3) Paper mill and resident manager of mill who was subject to direction and control of general manager.—Wemyss v. Wyoming Valley Paper Co., 172 A. 438, 86 N.H. 587.

(4) Petroleum company and person employed by agent in charge of its bulk sales station to drive agent's truck used to deliver company's products.—Texas Co. v. Mills, 156 So. 866, 171 Miss. 231.

(5) Terminal railroad and car inspector, who was engaged by railroad to see that safety devices on cars on shipper's premises complied with federal law.—Small v. Ralston-Purina Co., Mo.App., 202 S.W.2d 533.

(6) Other persons.
N.Y.—Aken v. Barnet & Aufsesser Knitting Co., 103 N.Y.S. 1078, 118 App.Div. 463, affirmed 85 N.E. 1105, 192 N.Y. 554.
Ohio.—Kraemer v. Bates Motor Transport Lines, 11 N.E.2d 105, 56 Ohio App. 427.
Tenn.—Southern Ry. Co. v. McCarroll, 7 Tenn.App. 297.
Tex.—Fort Worth & D. C. Ry. Co. v. Mills, Civ.App., 140 S.W.2d 513, error dismissed, judgment correct.

Relation of master and servant or employer and employee held not to exist between:

(1) Landlord and tenant cultivating farm on shares who assisted landlord in pulling stumps.—Pleasants v. Barnes, 19 S.E.2d 627, 221 N.C. 173.

(2) School district and pupil.—Sullivan v. School Dist. No. 1 of City of Tomah, 191 N.W. 1020, 179 Wis. 502.

(3) Teacher and pupil in public school.—Fulgoni v. Johnston, 19 N.E.2d 542, 302 Mass. 421.

49. Ga.—Seaboard Air-Line R. Co. v. Chapman, 62 S.E. 488, 4 Ga.App. 706.
39 C.J. p 269 note 65.

50. Ala.—Daves v. Rain, 178 So. 59, 28 Ala.App. 54, certiorari granted Ex parte Board of School Com'rs of Mobile County, 178 So. 63, 235 Ala. 82.

51. U.S.—Hull v. Philadelphia & R. Ry. Co., Md., 40 S.Ct. 358, 252 U.S. 475, 64 L.Ed. 670—Robinson v. Baltimore & O. R. Co., Md., 35 S.Ct. 491, 237 U.S. 84, 59 L.Ed. 849—Cimorelli v. New York Cent. R. Co., C.C.A.Ohio, 148 F.2d 575—Stevenson v. Lake Terminal R. Co., C.C.A.Ohio, 42 F.2d 357—Watkins v. Thompson, D.C.Mo., 72 F.Supp. 953.
N.J.—Stiedler v. Pennsylvania R. Co., 109 A. 512, 94 N.J.Law 197, certiorari denied Pennsylvania R. Co. v. Stiedler, 40 S.Ct. 485, 253 U.S. 489, 64 L.Ed. 1027.
N.C.—Bourne v. Southern Ry. Co., 33 S.E.2d 239, 225 N.C. 43.
Tenn.—Wilson v. Nashville, C. & St. L. Ry., 65 S.W.2d 637, 16 Tenn.App. 695.
Va.—Atlantic Coast Line R. Co. v. Tredway's Adm'x, 93 S.E. 560, 120 Va. 735, 10 A.L.R. 1411, certiorari denied 38 S.Ct. 191, 245 U.S. 670, 62 L.Ed. 540.

Employee causing injury

Where employee of interstate carrier was killed while employed in employer's yard by an engine of another carrier which was negligently operated by an employee of such other carrier, the employee of the carrier whose act caused employee's death was held an employee of defendant employer within Federal Employers' Liability Act.—Lovett v. Calloway, D.C.Ga., 69 F.Supp. 532.

52. Or.—Jylha v. Chamberlain, 121 P.2d 928, 168 Or. 171.

53. Okl.—Missouri, K. & T. Ry. Co. v. West, 134 P. 655, 38 Okl. 581, appeal dismissed 34 S.Ct. 471, 232 U.S. 682, 58 L.Ed. 795.
Or.—Jylha v. Chamberlain, 121 P.2d 928, 168 Or. 171.

54. Or.—Jylha v. Chamberlain, supra.

Implied promise

Where one performs for another, with the other's knowledge, a useful service of a character that is usually charged for, and the other expresses no dissent or avails himself of the service, a promise to pay the reasonable value of the service is implied, as respects determination of whether master-servant relation is created.—Morrison v. Lewis, 199 S.E. 782, 58 Ga.App. 677.

55. U.S.—Stevenson v. Lake Terminal R. Co., C.C.A.Ohio, 42 F.2d 357.

Reimbursement by third party

Where employee who was engaged by railroad to deliver mail in pushcart from depot to post office was injured while thus delivering mail, employee was at time of accident in the employ of railroad and not in employ of United States government, so as to hold railroad liable for injuries resulting from accident irrespective of whether railroad received

conclusive.[56] The compensation need not be stated,[57] and it is possible for the relation of employer and employee to exist without any compensation promised or expected for the services rendered,[58] as in the case of students part of whose instruction consists in the performance of services for the master.[59]

§ 175. —— Necessity for Relation of Master and Servant

Existence of the relation of master and servant between the parties at the time of the injury is essential in order to charge one as master in an action for personal injuries sustained by an alleged servant, and, accordingly, a contractee who has not reserved the right to direct the manner of performance of the contract is not liable, as master, for personal injuries suffered by an independent contractor.

Existence of the relation of master and servant between the parties at the time of the injury is essential in order to charge one as master in an action for personal injuries sustained by an alleged servant,[60] as in actions brought under the Federal Employers' Liability Act,[61] state employers' liability acts,[62] or, likewise, in actions brought under the

reimbursement of salary it paid to employee by government.—Taylor v. Texas & N. O. R. Co., La.App., 22 So.2d 771.

Method of payment

In determining whether injured workman was employee of owner of sawmill or of an alleged independent contractor who operated mill, the method of payment to workman of his wages was important.—Enga v. Sparks, 51 N.E.2d 984, 315 Mass. 120.

56. U.S.—Stevenson v. Lake Terminal R. Co., C.C.A.Ohio, 42 F.2d 357.
Fla.—Hartquist v. Tamiami Trail Tours, 190 So. 533, 139 Fla. 328.

Method of payment

(1) The method of payment to workman of his compensation is not conclusive.—Enga v. Sparks, 51 N.E.2d 984, 315 Mass. 120.

(2) Where carpenter had agreed to do work in payment of note and payee had made arrangement with owner of house whereby carpenter would do work on the owner's house, carpenter's work was to be credited upon note and payee was to receive certain material from house owner, but payee had no title or interest in the house and exercised no control or direction over carpenter or his work at the house, the carpenter was not an employee of the payee who was not liable for injuries sustained by the carpenter.—Buskirk v. Ide, 4 N.W.2d 504, 302 Mich. 154.

57. Or.—Jylha v. Chamberlain, 121 P.2d 928, 168 Or. 171.

58. U.S.—Watkins v. Thompson, D.C.Mo., 72 F.Supp. 953.
Iowa.—Ganzhorn v. Reep, 12 N.W.2d 154, 234 Iowa 495.
Or.—Jylha v. Chamberlain, 121 P.2d 928, 168 Or. 171.

59. Ky.—Chesapeake & O. R. Co. v. Harmon, 189 S.W. 1135, 173 Ky. 1, Ann.Cas.1918B 41.
Minn.—Rief v. Great Northern R. Co., 148 N.W. 309, 126 Minn. 430.
Mo.—Brown v. Chicago, R. I. & P. Ry. Co., 286 S.W. 45, 315 Mo. 409.

The tests by which to determine whether student yard clerk was an employee of railroad within Federal Employers' Liability Act were the right to control manner in which work should be done and whose work was being performed and not the tests of learning duties, compensation, displacement of a regular employee, and benefits derived by railroad.—Watkins v. Thompson, D.C. Mo., 72 F.Supp. 953.

60. U.S.—Watkins v. Thompson, D.C.Mo., 72 F.Supp. 953.
Ariz.—Hammels v. Britten, 85 P.2d 992, 53 Ariz. 112.
Ark.—Armour & Co. v. Rice, 134 S.W.2d 529, 199 Ark. 89—Booth & Flynn v. Price, 39 S.W.2d 717, 183 Ark. 975, 76 A.L.R. 957.
Idaho.—**Corpus Juris cited in** Larson v. Independent School Dist. No. 11J of King Hill, 22 P.2d 299, 302, 53 Idaho 49.
Ill.—Trust v. Chicago Motor Club, 276 Ill.App. 289.
N.C.—Pafford v. J. A. Jones Const. Co., 9 S.E.2d 408, 217 N.C. 730—Greer v. Callahan Const. Co., 130 S.E. 739, 190 N.C. 632.
Or.—Hornschuch v. Southern Pac. Co., 203 P. 886, 101 Or. 280.
Tex.—Johnson v. Murray Co., Civ. App., 90 S.W.2d 920, error dismissed.
Va.—Raven Red Ash Coal Co. v. Griffith, 27 S.E.2d 360, 181 Va. 911.
39 C.J. p 268 note 57.
Effect of consolidation of railroad companies on liability for torts generally see the C.J.S. title Railroads § 361 also 51 C.J. p 1098 note 1 et seq.
Liability for injury to convict laborer see infra § 176.
Persons not employees working on or about railroad cars see the C.J. S. title Railroads § 924, also 52 C.J. p 619 note 68 et seq.
Servants of different masters in same work as fellow servant see infra § 330.

61. U.S.—Chesapeake & O. Ry. Co. v. Bryant, Va., 50 S.Ct. 167, 280 U.S. 404, 74 L.Ed. 513—Hull v. Philadelphia & R. Ry. Co., Md., 40 S.Ct. 358, 252 U.S. 475, 64 L.Ed. 670—Robertson v. Yazoo & M. V. R. Co., C.C.A.Miss., 159 F.2d 31—Docheney v. Pennsylvania R. Co., C.C.A.Pa., 60 F.2d 808, certiorari denied 53 S.Ct. 222, 287 U.S. 665, 77 L.Ed. 573—Stevenson v. Lake Terminal R. Co., C.C.A.Ohio, 42 F.2d 357—Watkins v. Thompson, D.C. Mo., 72 F.Supp. 953.
Cal.—Adams v. American President Lines, 146 P.2d 1, 23 Cal.2d 681.
Ill.—Franke v. Chicago & A. R. Co., 221 Ill.App. 516—Cousley v. Chicago & A. R. Co., 207 Ill.App. 565.
Mo.—Woosley v. Wabash Ry. Co., App., 274 S.W. 871.
N.Y.—Cott v. Erie R. Co., 179 N.Y.S. 488, 189 App.Div. 571, affirmed 131 N.E. 737, 231 N.Y. 67, certiorari denied Erie R. Co. v. Cott, 42 S.Ct. 48, 257 U.S. 636, 66 L.Ed. 409, and 42 S.Ct. 49, 257 U.S. 636, 66 L.Ed. 409.
N.C.—**Corpus Juris quoted in** Bourne v. Southern Ry. Co., 33 S.E.2d 239, 241, 225 N.C. 43—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L. Ed. 1112.
Ohio.—Payne v. Lind, 138 N.E. 366, 106 Ohio St. 14—Baltimore & O. R. Co. v. Shober, 176 N.E. 88, 38 Ohio App. 216.
Tenn.—Wilson v. Nashville, C. & St. L. Ry., 65 S.W.2d 637, 16 Tenn. App. 695.
Tex.—**Corpus Juris cited in** Galveston, H. & S. A. Ry. Co. v. Wells, 50 S.W.2d 247, 250, 251, 121 Tex. 310.
39 C.J. p 266 note 22.

62. Ariz.—Swansea Lease, Inc. v. Molloy, 183 P. 740, 20 Ariz. 531.
Ind.—Standard Oil Co. v. Allen, App., 121 N.E. 329, rehearing denied 123 N.E. 693, reversed on other grounds 126 N.E. 674, 189 Ind. 398.
Mass.—Gooch v. Citizens' Electric St. Ry. Co., 88 N.E. 591, 202 Mass. 254, 23 L.R.A.,N.S., 960.
Or.—Jylha v. Chamberlain, 121 P.2d 928, 168 Or. 171—Brady v. Oregon Lumber Co., 243 P. 96, 117 Or. 188, 45 A.L.R. 812, rehearing denied 245 P. 732, 118 Or. 15, 45 A.L.R. 812—Saylor v. Enterprise Electric, 212 P. 477, 106 Or. 421.
Puerto Rico.—Vargas v. Hijos, 15 Puerto Rico 26.
39 C.J. p 265 note 92.

Federal Safety Appliance Act;[63] and it has been held that, even though the relation exists, a master will be absolved from liability when, from the character of his business and the influence of organizations controlling labor, he has no power of selection in the employment of servants.[64]

It follows that a contractee is not liable, as master, for personal injuries suffered by an independent contractor;[65] but, where the contractee reserves the right to direct the manner of performance of the contract in any particular, he is liable as an employer for his negligence.[66] Since the relation of master and servant, as discussed supra § 3 (1), does not exist between one employing an independent contractor and the servants of the independent contractor, and since the servants of the independent contractor and the servants of the contractee, as considered infra § 330, are not as a rule fellow servants, the liability of the contractee for injuries to servants of an independent contractor is treated infra §§ 600–606 in connection with the liability of a master for injuries to third persons. An independent contractor is liable for negligent injuries to his servant, however, regardless of whether another party may also be liable.[67]

§ 176. —— Employment of Convict Labor

According to some authority there is no relation of master and servant between a contractor who contracts with the state for convict labor and a convict, and a convict cannot recover for injuries resulting from the negligence of the contractor, at least where the state retains full control and management of the convict.

There is authority holding that there is no relation of master and servant between a contractor who contracts with the state for labor of convicts and the convicts,[68] and that the contractor is not liable to the convict for injuries resulting from such contractor's negligence,[69] at least where the state retains full control and management of the convict.[70] On the other hand, it is generally held, in the absence of complete control by the state, that a convict is the servant of the contractor to whom he is hired out, although his wages go to the county or the state, and he may maintain an action against the contractor if he is injured by reason of his negligence, or by defective machinery furnished by him,[71] although as far as his injuries affect his ability to labor during the period of his imprisonment, he cannot recover.[72] If he has petitioned the legislature for relief and obtained it, the convict cannot afterward maintain an action against the contractor to recover damages for the same injury.[73]

Travelers crossing railroad
The Employers' Liability Act has no application to injuries sustained in a railroad crossing collision where there was no contractual relation between the owner of the railroad and the owner or occupants of the automobile.—Hornschuch v. Southern Pac. Co., 203 P. 886, 101 Or. 280.

63. U.S.—Stevenson v. Lake Terminal R. Co., C.C.A.Ohio, 42 F.2d 357.

64. La.—Farmer v. Kearney, 39 So. 967, 115 La. 722, 3 L.R.A.,N.S., 1105.
39 C.J. p 268 note 58.

65. U.S.—Gammage v. International Agricultural Corp., C.C.A.Ga., 268 F. 246.
Ariz.—Swansea Lease Inc. v. Molloy, 183 P. 740, 20 Ariz. 531.
Ark.—Fordyce Lumber Co. v. Wardlaw, 176 S.W.2d 241, 206 Ark. 35.
Ill.—Trust v. Chicago Motor Club, 276 Ill.App. 289.
La.—Clements v. Luby Oil Co., 130 So. 851, 15 La.App. 384.
Mass.—Noble v. Greenbaum, 42 N.E.2d 823, 311 Mass. 722—Parker v. Taylor, 3 N.E.2d 25, 295 Mass. 51—Taunton v. Hoar, 192 N.E. 831, 288 Mass. 326.
Mich.—**Corpus Juris cited in** Holgate v. Chrysler Corporation, 271 N.W. 539, 541, 279 Mich. 24.
N.M.—Sucetti v. Jones' Estate, 32 P.2d 815, 38 N.M. 327.
N.Y.—Flower v. Buck, 159 N.Y.S. 1042, 173 App.Div. 506.
N.C.—**Corpus Juris cited in** Deaton v. Board of Trustees of Elon College, 38 S.E.2d 561, 564, 226 N.C. 433.
Ohio.—Hilleary v. Bromley, 64 N.E.2d 832, 146 Ohio St. 212—Montgomery v. Board of Com'rs of Erie County, 158 N.E. 278, 25 Ohio App. 440.
Wash.—Scheiber v. Grigsby, 182 P.2d 745.
39 C.J. p 268 note 60.
Tests of relationship in determination of whether one employed is independent contractor or servant see supra §§ 3 (2)–3 (9).

66. U.S.—Pennsylvania R. Co. v. Roth, C.C.A.Ohio, 163 F.2d 161.
Ariz.—Arizona Binghampton Copper Co. v. Dickson, 195 P. 538, 22 Ariz. 163.
Ark.—Meyer v. Moore, 115 S.W.2d 1087, 195 Ark. 1114.
Ohio.—Hilleary v. Bromley, 64 N.E.2d 832, 146 Ohio St. 212.
39 C.J. p 1349 note 72 [a].

67. Wash.—Lund v. Griffiths & Sprague Stevedoring Co., 183 P. 123, 108 Wash. 220.

68. Ohio.—Rayborn v. Patton, 11 Ohio Dec. (Reprint) 100, 24 Cinc. L.Bul. 434.
Liability of prison officers for injury to prisoners in general see the C.J.S. title Prisons § 13, also 50 C.J. p 339 note 44 et seq.

69. Ark.—Taylor v. Arkansas Light & Power Co., 293 S.W. 1007, 173 Ark. 868.
Ohio.—Rayborn v. Patton, 11 Ohio Dec. (Reprint) 100, 24 Cinc.L.Bul. 434.

70. Ala.—Parker v. Sloss-Sheffield Steel & Iron Co., 76 So. 924, 200 Ala. 566.
Ark.—Taylor v. Arkansas Light & Power Co., 293 S.W. 1007, 173 Ark. 868.
Ga.—Mason v. Hamby, 64 S.E. 569, 6 Ga.App. 131.
13 C.J. p 922 note 56.

71. Md.—Jones Holloware Co. v. Hawkins, 97 A. 365, 128 Md. 160—Baltimore Boot & Shoe Mfg. Co. v. Jamar, 49 A. 847, 93 Md. 404, 86 Am.S.R. 428.
N.C.—Smith v. Raleigh Granite Co., 162 S.E. 731, 202 N.C. 305.
12 C.J. p 922 note 57.
Negligence
In order to recover for the death of a convict leased to defendant and worked in its mine when injured, it must appear that defendant knew of his condition, or was negligent in failing to discover it.—Pratt Consol. Coal Co. v. Bozeman, 68 So. 887, 192 Ala. 546.

72. U.S.—Dalheim v. Lemon, C.C. Minn., 45 F. 225.

73. Iowa.—Metz v. Soule, 40 Iowa 236.

§ 177. —— Volunteers

One who voluntarily assumes to act as the servant of another cannot recover for personal injuries as a servant, although requested to act by a servant of the master, but the rule is otherwise where the volunteer has an interest in the work.

A person who voluntarily assumes to act as the servant of another cannot recover for personal injuries as a servant.[74] The fact that a volunteer was requested or ordered by a servant of the master to give his assistance will not authorize him to recover for personal injuries on the ground that he thereby became a servant of the employer,[75] in the absence of acquiescence or consent,[76] or unless, by reason of his position or the necessities of the case, such servant had the authority to make the request,[77] as in the case of a sudden emergency.[78]

74. Ark.—Booth & Flynn v. Price, 39 S.W.2d 717, 183 Ark. 975, 76 A.L.R. 957—Henry Quellmalz Lumber & Mfg. Co. v. Hays, 291 S.W. 982, 173 Ark. 43.
Mass.—Lawson v. Royal Riding Stables, 26 N.E.2d 348, 305 Mass. 494.
Mich.—Diefenbach v. Great Atlantic & Pacific Tea Co., 273 N.W. 783, 280 Mich. 507.
Mo.—Daugherty v. Spuck Iron & Foundry Co., App., 175 S.W.2d 45.
N.Y.—Duschnik v. Deco Restaurants, 12 N.E.2d 536, 276 N.Y. 439—Harrington v. L. T. Stevenson, Inc., 8 N.Y.S.2d 658, 255 App.Div. 1017—Bernhardt v. American Ry. Express Co., 218 N.Y.S. 123, 218 App. Div. 195.
N.C.—Reaves v. Catawba Mfg. & Electric Power Co., 174 S.E. 413, 206 N.C. 523.
Okl.—Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 148 Okl. 107.
Or.—Jylha v. Chamberlain, 121 P.2d 928, 168 Or. 171.
Tex.—Stallcup v. United Gas Public Service Co., Civ.App., 119 S.W.2d 574, error dismissed.
Vt.—Lucas v. Kelley, 147 A. 281, 102 Vt. 173.
39 C.J. p 269 note 67.
As affecting fellow servant rule see infra § 328.
Care required of master as to volunteers see infra § 184.

Held not volunteer

(1) Boy on company's truck at the invitation of the driver for some purpose and benefit to himself in addition to assisting the driver in the performance of driver's duties for the company, with consent of the company and without knowledge of any rule prohibiting his employment by the driver.—Krull v. Triangle Dairy, 17 N.E.2d 291, 59 Ohio App. 107.

(2) Bystander requested by owner of stalled automobile to aid in starting automobile.—Kavigian v. Lonero, 45 N.E.2d 823, 312 Mass. 603.

(3) Garage partner injured while assisting oil company's employees in lowering stone necessitated by gasoline pump installation.—Bloss v. Pure Oil Co., 232 N.Y.S. 332, 133 Misc. 486.

(4) Servant assisting servant of another to facilitate business of former's master.—Hughes v. Weekley Elevator Co., 138 S.E. 633, 37 Ga.App. 130.

(5) Other persons.—Arkansas Power & Light Co. v. Dutton, 140 S.W.2d 689, 200 Ark. 761—W. P. Brown & Sons Lumber Co. v. Oaties, 72 S.W.2d 213, 189 Ark. 338.

75. U.S.—Howland v. Tri-State Theatres Corporation, C.C.A.Neb., 139 F.2d 560.
Ark.—Armour & Co. v. Rice, 134 S.W.2d 529, 199 Ark. 89—Henry Quellmalz Lumber & Mfg. Co. v. Hays, 291 S.W. 982, 173 Ark. 43.
Ind.—Robertson v. Commercial Telephone Co., 180 N.E. 492, 96 Ind. App. 47.
Ky.—Reynolds' Adm'r v. Black Mountain Corporation, 42 S.W.2d 916, 240 Ky. 673—**Corpus Juris cited in** Auto Livery Co. v. Stone, 36 S.W. 2d 349, 350, 237 Ky. 686.
Mass.—Lawson v. Royal Riding Stables, 26 N.E.2d 348, 305 Mass. 494—Coulombe v. Horne Coal Co., 175 N.E. 631, 275 Mass. 226.
Mich.—Diefenbach v. Great Atlantic & Pacific Tea Co., 273 N.W. 783, 280 Mich. 507.
Mo.—**Corpus Juris cited in** Menard v. Goltra, 40 S.W.2d 1053, 1059, 328 Mo. 368.
N.Y.—Duschnik v. Deco Restaurants, 12 N.E.2d 536, 276 N.Y. 439—Alfino v. Manufacturers Trust Co., 45 N.Y.S.2d 843, 267 App.Div. 827, affirmed 60 N.E.2d 128, 293 N.Y. 917—Bernhardt v. American Ry. Express Co., 218 N.Y.S. 123, 218 App. Div. 195—Mandala v. Wells, 209 N.Y.S. 35, 212 App.Div. 370.
N.C.—**Corpus Juris cited in** Bourne v. Southern Ry. Co., 33 S.E.2d 239, 242, 225 N.C. 43—Reaves v. Catawba Mfg. & Electric Power Co., 174 S.E. 413, 206 N.C. 523.
Pa.—Reis v. Mosebach, 12 A.2d 37, 337 Pa. 412—D'Allesandro v. Bentivoglia, 131 A. 592, 285 Pa. 72.
S.C.—Polly v. Walton, 179 S.E. 667, 176 S.C. 72.
Tenn.—Armstrong v. Bowman, 115 S.W.2d 229, 21 Tenn.App. 673.
Tex.—Stallcup v. United Gas Public Service Co., Civ.App., 119 S.W.2d 574, error dismissed.
39 C.J. p 269 note 70.

Licensee

An experienced railroad engineer who was on engine under railroad's permit to learn the road over a new run and who was left in charge of engine by regular engineer in violation of railroad rule was not an "employee" of railroad within Federal Employers' Liability Act so as to render railroad liable for death while on such run, but at most was a "licensee."—Bourne v. Southern Ry. Co., 33 S.E.2d 239, 225 N.C. 43.

76. Ga.—Howard v. Georgia Power Co., 176 S.E. 69, 49 Ga.App. 420—Spivey v. Lovett & Brinson, 172 S.E. 658, 48 Ga.App. 335.
Idaho.—Larson v. Independent School Dist. No. 11J of King Hill, 22 P.2d 299, 53 Idaho 49.
Ky.—Armour & Co. v. Young, 35 S.W.2d 906, 237 Ky. 444.
Va.—Clover Creamery Co. v. Kanode, 129 S.E. 222, 142 Va. 542.

77. U.S.—Howland v. Tri-State Theatres Corporation, C.C.A.Neb., 139 F.2d 560.
Ark.—Midland Coal Mining Co. v. Rodden, 41 S.W.2d 777, 184 Ark. 157—Booth & Flynn v. Price, 39 S.W.2d 717, 183 Ark. 975, 76 A.L.R. 957.
Cal.—Callahan v. Harm, 277 P. 529, 98 Cal.App. 568.
Ky.—Powell v. Commercial Standard Ins. Co., 170 S.W.2d 857, 294 Ky. 7—Standard Oil Co. v. Adams, 111 S.W.2d 668, 271 Ky. 221—**Corpus Juris cited in** Auto Livery Co. v. Stone, 36 S.W.2d 349, 350, 237 Ky. 686.
Mo.—**Corpus Juris cited in** Menard v. Goltra, 40 S.W.2d 1053, 1059, 328 Mo. 368.
N.C.—Perkins v. Spray Wood & Coal Co., 127 S.E. 677, 189 N.C. 602.
Ohio.—Meyer Dairy Products Co. v. Gill, 196 N.E. 428, 129 Ohio St. 633.
Tenn.—Armstrong v. Bowman, 115 S.W.2d 229, 21 Tenn.App. 673.
Wash.—Freeman v. Smit, 75 P.2d 575, 193 Wash. 346.
39 C.J. p 269 note 71.

Necessity of direct contract

(1) A direct contract between the employer and employee is not necessary in such case.
Ala.—Tennessee Coal, Iron & Railroad Co. v. Hayes, 12 So. 98, 97 Ala. 201.
Ind.—Gasco v. Tracas, 155 N.E. 179, 85 Ind.App. 591.
Mass.—Lawson v. Royal Riding Stables, 26 N.E.2d 348, 305 Mass. 494.
Or.—Ringue v. Oregon Coal & Navigation Co., 75 P. 704, 44 Or. 407.
(2) Contract of employment generally see supra §§ 5–11.

78. Ark.—Missouri Pac. R. Co. v.

Interest in work. Where the servant of one master has an interest in the work in any proper capacity and at the request or with the consent of another servant undertakes to assist in the work, he does not do so at his own risk, and, if he is injured by their carelessness, their master is responsible.[79]

Minors. The rule that a volunteer cannot recover for personal injuries as a servant applies equally to minors,[80] and this is particularly so where the minor acts on the invitation of a servant of the employer in violation of a statute forbidding the employment of infants.[81]

§ 178. —— Traffic Arrangements and Other Contracts between Railroads

As a general rule the liability of a railroad company for injury to its employees resulting from its own negligence is unaffected by the existence of a traffic arrangement or other contract with another railroad; but the authorities differ as to whether such an employer is liable for injuries to its employees resulting from negligence of the other railroad.

Where two railroad companies have a servant in common who is injured while working for, and under the control of, one of them, that one is liable;[82] and a servant in the general employment and pay of one road, but engaged in special services for another through an agreement between the roads, may recover from the one for whom such special services are performed for an injury received by rea-

Davis, 122 S.W.2d 546, 197 Ark. 396—**Corpus Juris cited in** Bryant Truck Line v. Nance, 116 S.W.2d 1047, 1048, 196 Ark. 1177—Booth & Flynn v. Price, 39 S.W.2d 717, 183 Ark. 975, 76 A.L.R. 957—**Corpus Juris cited in** Henry Quellmalz Lumber & Mfg. Co. v. Hays, 291 S.W. 982, 983, 173 Ark. 43.
Mass.—Lawson v. Royal Riding Stables, 26 N.E.2d 348, 305 Mass. 494.
Mich.—Marschall v. Glaeser, 282 N. W. 832, 284 Mich. 56.
Ohio.—Ohm v. Miller, 167 N.E. 482, 31 Ohio App. 446.
Pa.—Reis v. Mosebach, 12 A.2d 37, 337 Pa. 412.
Tenn.—Louisville & N. R. Co. v. Ginley, 45 S.W. 348, 100 Tenn. 472.
Tex.—Dillingham v. Cavett, Civ.App., 91 S.W.2d 868.
39 C.J. p 554 notes 75, 77.

"Emergency employee" is one who renders aid to the servant of another at the request of the servant and under circumstances which create a necessity for aid.—Cannon v. Fargo, 122 N.Y.S. 576, 579, 138 App. Div. 20—20 C.J. p 1244 note 34.

What constitutes emergency

(1) Authority in servant to employ another to assist him in master's service may only be implied when emergency confronting servant is a real one, and it is not sufficient tnat servant or person employed believes that emergency exists when in fact it does not.
U.S.—Howland v. Tri-State Theatres Corporation, C.C.A.Neb., 139 F.2d 560.
Ky.—Standard Oil Co. v. Adams, 111 S.W.2d 668, 271 Ky. 221.

(2) An emergency authorizing servant to employ others to assist him must be one which arises unexpectedly in master's absence and requires servant to act for immediate protection of master's interests.
U.S.—Howland v. Tri-State Theatres Corporation, supra.
Ky.—Powell v. Commercial Standard Ins. Co., 170 S.W.2d 857, 294 Ky. 7.
N.C.—Reaves v. Catawba Mfg. & Electric Power Co., 174 S.E. 413, 206 N.C. 523.
Ohio.—Meyer Dairy Products Co. v. Gill, 196 N.E. 428, 129 Ohio St. 633.

(3) Emergency impliedly authorizing servant to employ assistant must be such as renders it impossible for servant to do work himself.
Ky.—Powell v. Commercial Standard Ins. Co., supra—Standard Oil Co. v. Adams, 111 S.W.2d 668, 271 Ky. 221.
N.C.—Reaves v. Catawba Mfg. & Electric Power Co., supra.
Ohio.—Meyer Dairy Products Co. v. Gill, supra.
Wash.—Freeman v. Smit, 75 P.2d 575, 193 Wash. 346.

(4) Facilitation of employer's business or employee's task will not authorize latter to employ help.—Henry Quellmalz Lumber & Mfg. Co. v. Hays, 291 S.W. 982, 173 Ark. 43.

(5) Liability of master must be determined on facts of each case.—Bernhardt v. American Ry. Express Co., 218 N.Y.S. 123, 218 App.Div. 195.

Presence or availability of master

Even in emergency, servant is not authorized to employ others in master's work if master is present or may be easily and immediately consulted.—Howland v. Tri-State Theatres Corporation, C.C.A.Neb., 139 F.2d 560.

Request of third person

A mechanic, who was engaged by filling station attendant at request of customer to repair customer's automobile which was stalled on filling station driveway, and was injured while examining such automobile, could not recover of attendant's employer on ground of emergency employment doctrine, since such repair work was at request of customer, although mechanic's knowledge of such fact was immaterial, and was not a part of attendant's duty, as no repair work was done at the station.—Standard Oil Co. v. Adams, 111 S.W.2d 668, 271 Ky. 221.

Held not emergency employee

Bus passenger injured when complying with driver's request to press down on accelerator, so that driver could make repairs.—Tri-State Transit Co. of Louisiana v. Miller, 65 S.W.2d 9, 188 Ark. 149, 90 A.L.R. 1389.

79. Ky.—**Corpus Juris cited in** Paxton's Adm'x v. Kentucky & Indiana Terminal R. Co., 185 S.W.2d 536, 537, 299 Ky. 348.
Ohio.—Krull v. Triangle Dairy, 17 N. E.2d 291, 59 Ohio App. 107.
39 C.J. p 270 note 72.

80. Ark.—Armour & Co. v. Rice, 134 S.W.2d 529, 199 Ark. 89.
Va.—Clover Creamery Co. v. Kanode, 129 S.E. 222, 142 Va. 542.
39 C.J. p 270 note 73.
Care required as to:
Minor servants see infra § 185.
Volunteers see infra § 184.

81. N.Y.—Woerz v. Rosenfeld, 185 N.Y.S. 96, 195 App.Div. 19, affirmed 134 N.E. 598, 232 N.Y. 625—Goldberg v. Borden's Condensed Milk Co., 172 N.Y.S. 828, 185 App.Div. 222, affirmed 125 N.E. 807, 227 N.Y. 465.
39 C.J. p 270 note 74.
Injury to minors employed in violation of statutory prohibition or regulation generally see infra § 194.

82. Ala.—Dean v. East Tennessee, V. & G. R. Co., 13 So. 489, 98 Ala. 586.
Tex.—Houston, E. & W. T. R. Co. v. Jackman, Civ.App., 217 S.W. 410.
39 C.J. p 270 note 77.
Parties in actions for injuries see infra § 488.
Traffic arrangements and other contracts between railroads as affecting question as to who are fellow servants see infra § 330.

son of its negligence,[83] and cannot recover from the other, even though the power to direct and control the work was in the latter.[84] The fact that one company's train while on another's tracks was subject to the orders of the latter's trainmaster is not conclusive as to the general employment of the train crew.[85] If another railroad employed defendant railroad to do certain work and defendant used and controlled its own construction crew to perform the work, the relationship of master and servant existed between defendant and an injured member of the crew.[86]

By some authorities it is held that an employee of a railroad permitting another to use its tracks jointly may recover from his employer for injury caused by the negligence of the agents of the licensee,[87] and that a railroad company using the yards of another is liable for that other's negligence in operating a switch engine resulting in injury to one of the user's employees;[88] but on the other hand there is authority to the effect that a railroad company's liability for injuries to one of its employees by cars negligently operated over its tracks by the grantee of a joint operating privilege is not based on its responsibility for the licensee's negligence, and, if its duty as employer has been performed, it is not liable for the negligence of another company using its tracks.[89] A railroad company permitting another company to use its tracks and the latter company are both liable for injuries to an employee of one resulting from negligence chargeable to both companies.[90] Where two railway companies incorporated under the laws of different states, having tracks connecting at the state line and together forming a continuous line of railway, operate through trains over both lines of road having the same operating officers, using the same crews and equipment indiscriminately and paying the operating expenses from a common fund made up from the earnings, an employee so employed who is injured by the negligence of one or both of such companies may recover damages from one or both;[91] and it has been held that, when an agreement between two railroad companies is secret, an employee is not expected to ascertain, when orders are given him by a superior, whether he is working for one or both companies, and he may recover for injuries sustained either against one of the companies or against both jointly.[92] A traffic arrangement whereby, for the purpose of having a continuous line, one company operates the railroads of two others, and the three companies divide the freight, does not constitute an agency making the employees of the operating company the employees of the other two.[93]

Leases. According to one view, where a railroad

83. U.S.—Linstead v. Chesapeake & O. Ry. Co., Ky., 48 S.Ct. 241, 276 U.S. 28, 72 L.Ed. 453.
Va.—Atlantic Coast Line R. Co. v. Tredway's Adm'x, 93 S.E. 560, 120 Va. 735, 10 A.L.R. 1411, certiorari denied 38 S.Ct. 191, 245 U.S. 670, 62 L.Ed. 540.
39 C.J. p 271 note 78.

Special employment held not to exist under facts
U.S.—Hull v. Philadelphia & R. Ry. Co., Md., 40 S.Ct. 358, 252 U.S. 475, 64 L.Ed. 670—Robertson v. Yazoo & M. V. R. Co., C.C.A.Miss., 159 F.2d 31.

84. Okl.—Chicago, R. I. & P. Ry. Co. v. Norman, 25 P.2d 298, 165 Okl. 133.

85. U.S.—Stevenson v. Lake Terminal R. Co., C.C.A.Ohio, 42 F.2d 357.

86. Miss.—Gulf, M. & N. R. Co. v. Graham, 117 So. 881, 153 Miss. 72.

87. U.S.—Kansas City Southern R. Co. v. Nectaux, C.C.A.La., 26 F.2d 317, certiorari denied 49 S.Ct. 24, 278 U.S. 621, 73 L.Ed. 542.
Mo.—Miller v. Terminal R. Ass'n of St. Louis, 163 S.W.2d 1034, 349 Mo. 944, certiorari denied Terminal Railroad Ass'n v. Miller, 63 S.Ct. 160, 317 U.S. 678, 87 L.Ed. 544, rehearing denied 63 S.Ct. 256, 317 U.S. 710, 87 L.Ed. 566.
51 C.J. p 1103 note 68.
Liability of railroad licensor for injury to employees of licensee see the C.J.S. title Railroads § 364, also 39 C.J. p 271 notes 81–83; and 51 C.J. 1102 note 64 et seq.

88. Ill.—Offner v. Chicago & E. R. Co., 174 Ill.App. 82.
Liability of railroad licensee for injury to employees of licensor see the C.J.S. title Railroads § 365, also 51 C.J. p 1105 note 12, p 1106 note 13.

89. Ky.—Hunsaker v. Chesapeake & O. R. Co., 215 S.W. 552, 185 Ky. 686, 28 A.L.R. 117.
39 C.J. p 271 note 84.

90. U.S.—Toledo, St. L. & W. R. Co. v. Bartley, Ohio, 172 F. 82, 96 C.C.A. 570.
Ill.—Armstrong v. Chicago & W. I. R. Co., 183 N.E. 478, 350 Ill. 426, certiorari denied Chicago & W. I. R. Co. v. Armstrong, 53 S.Ct. 523, 289 U.S. 724, 77 L.Ed. 1475.
Concurring negligence see infra § 195.

Employer-employee relation held to have existed as between both companies and injured party and as between both companies and negligent person.—Armstrong v. Chicago & W. I. R. Co., 263 Ill.App. 126, affirmed 183 N.E. 478, 350 Ill. 426, certiorari denied Chicago & W. I. R. Co. v. Armstrong, 53 S.Ct. 523, 289 U.S. 724, 77 L.Ed. 1475.

Negligence held chargeable to both companies
Ill.—Armstrong v. Chicago & W. I. R. Co., 183 N.E. 478, 350 Ill. 426, certiorari denied Chicago & W. I. R. Co. v. Armstrong, 53 S.Ct. 523, 289 U.S. 724, 77 L.Ed. 1475.

Proportionate recovery
If an injury to an employee of a railway while riding in the cars of his employer over another railway is jointly caused by the trucks or cars of the one and the track of the other, he is entitled to recover from the two in the proportion in which the cars of the one and the track of the other contributed to the injury.—Killian v. Augusta & K. R. Co., 4 S.E. 165, 79 Ga. 234, 11 Am.S.R. 410.

91. Okl.—Wichita Falls & N. W. R. Co. v. Puckett, 157 P. 112, 53 Okl. 463.

92. S.C.—Pinckney v. Atlantic Coast Line R. Co., 75 S.E. 964, 92 S.C. 528.

93. La.—Williams v. Kansas City, C. & G. R. Co., 45 So. 924, 120 La. 870.

is operated by a lessee, the lessor is liable to its own employees who are injured by the negligence of the lessee in the operation of its trains[94] to the same extent as it would be to a stranger so injured;[95] but the view has been taken that the servant of the lessor is not a third person or member of the public and that the lessor is not liable to him except for its failure to maintain the road, stations, houses, and the like in a reasonably safe condition.[96] A railroad using under lease or running privileges a track of another railroad is not relieved from liability to its employees for defects in its construction or condition because the other company maintains it.[97] An illegal lease of the equipment of a railroad does not of itself make an injured employee pro hac vice the servant of the lessor.[98] As regards liability for injury to an employee of the lessee resulting from the negligence of the switching crew of a railroad leasing terminal facilities, such crew has been held employees of the lessee in the absence of a showing that, while serving the lessee, they were under the sole direction and control of the lessor.[99]

§ 179. —— Arrangements and Other Contracts between Railroads and Companies Other than Railroad Companies

An employee of a company such as a Pullman, express, or construction company, having an arrangement or other contract with a railroad company, has been held not an employee of the latter so as to make it liable as master for personal injuries to such employee.

An employee of a Pullman company, amenable only to the orders of such company[1] and having no responsibility for the running of a railroad company's trains,[2] even though he customarily collected railroad tickets during the night hours and delivered them to the train conductor[3] and was required to keep the Pullman cars free from trespassers,[4] is not an employee of such railway company, while being transported in the course of his employment under a contract between the two companies, so as to make the latter liable to him as an employee for injuries sustained.

Also, a contract between a railway company and an express company to furnish transportation for messengers in charge of express matter has been held not to make such a messenger an employee of the railroad company,[5] but an express agent acting not only as a messenger for the express company, but also in a capacity of baggage master for the railroad, is an employee of both.[6] Where a railroad company is constructing a railroad through a corporation created, officered, and financed by it, an employee on such construction work is an employee of the railroad company and may recover from it for injuries due to negligent construction and inspection.[7] A railroad company which has become the owner of a portion of a railroad track, on payment of the cost of construction to a construction company, is not liable for injuries to an employee of the latter caused by the negligence of other employees of that company on a portion of the track not yet turned over to the railroad, even though the stock-

94. La.—Barnes v. Red River & G. R. Co., App., 128 So. 724.
39 C.J. p 292 note 60.
Liability of railroad lessor for injury to employees of lessee generally see the C.J.S. title Railroads § 356, also 51 C.J. p 1093 note 78 et seq.

Employees of lessee regarded as employees of lessor
Ill.—Lucas v. Peoria & E. R. Co., 171 Ill.App. 1.

95. La.—Barnes v. Red River & G. R. Co., App., 128 So. 724.
51 C.J. p 1094 note 1.
Liability of railroad lessor to third persons and members of public generally for negligence of lessee see the C.J.S. title Railroads § 352, also 51 C.J. p 1090 note 23 et seq.

96. Ky.—Raikes v. Payne, 249 S.W. 1020, 198 Ky. 820.

Effect of statute
The rule relating to liability of a lessor company which has leased its tracks for operation by another does not apply where the lessor company is obliged by statute to permit a joint use of its tracks with others, and especially where the operating agreement provides that each company shall be liable only for the negligence of its own agents and servants.—Smith v. Philadelphia, B. & W. R. Co., 46 App.D.C. 275.

97. Ind.—Evansville R. Co. v. Cooksey, 112 N.E. 541, 63 Ind.App. 482.

Reason for rule
The duty to provide a safe place in which employees do their work is nondelegable.—Evansville R. Co. v. Cooksey, supra.

98. U.S.—Stevenson v. Lake Terminal R. Co., C.C.A.Ohio, 42 F.2d 357.

99. Ky.—Louisville & N. R. Co. v. Wingo's Adm'x, 281 S.W. 170, 213 Ky. 336.

1. U.S.—Lindsay v. Chicago, B. & Q. R. Co., Ill., 226 F. 23, 141 C.C.A. 131.
Ga.—Cato v. Southern R. Co., 107 S. E. 98, 26 Ga.App. 578.
Liability of contractee to servants of contractor or subcontractor generally see infra §§ 600–606.
Liability of railroad as carrier to employees of others see Carriers §§ 547, 548.

2. Tenn.—Wilson v. Nashville, C. & St. L. Ry., 65 S.W.2d 637, 16 Tenn. App. 695.
39 C.J. p 272 note 97.

3. U.S.—Robinson v. Baltimore & O. R. Co., Md., 35 S.Ct. 491, 237 U.S. 84, 59 L.Ed. 849.
Tenn.—Wilson v. Nashville, C. & St. L. Ry., 65 S.W.2d 637, 16 Tenn.App. 695.

4. Tenn.—Wilson v. Nashville, C. & St. L. Ry., supra.

5. U.S.—Wells, Fargo & Co. v. Taylor, Miss., 41 S.Ct. 93, 254 U.S. 175, 65 L.Ed. 205.

6. Ohio.—Baltimore & O. R. Co. v. McCamey, 12 Ohio Cir.Ct. 543, 5 Ohio Cir.Dec. 631.

7. Kan.—Nicholson v. Atchison, T. & S. F. R. Co., 147 P. 1123, 95 Kan. 13, L.R.A.1915E 417.
Wis.—Bosanich v. Chicago, N. S. & M. R. Co., 181 N.W. 297, 173 Wis. 280.

holders and general officers of the two companies are largely the same.[8] A railroad leasing the use of its track to a construction company is not liable for negligence of the lessee to an employee of the lessor, unless the negligence of the lessor concurred with the negligence of the lessee in bringing about the result.[9]

§ 180. —— Commencement, Suspension, or Termination of Relation

a. In general
b. Incidental interruptions
c. After working hours
d. Transfer of master's business or service of employee
e. Fraud or misrepresentation

a. In General

A master's duty to protect his servant, and liability for injuries resulting from his failure to do so, are not necessarily confined to the precise period during which the services are actively rendered, but continue as long as the servant may be said to be actually or constructively in his employment and under his control, and may exist while the servant is on the premises of the master in anticipation of his work or while he is on his way to or from his work.

A master's duty to protect his servant, and liability for injuries resulting from his failure to do so, are not necessarily confined to the precise period during which the services are actively rendered,[10] but continue as long as the servant may be said to be actually or constructively in his employment and under his control.[11] Although there is some authority to the contrary,[12] the general rule is that the relation exists when the servant is on the premises of his master in anticipation of his work, although the actual time of taking up his duties has not arrived,[13] but it has been held not to exist where the servant is on the premises unreasonably early and contrary to custom.[14]

The duty and liability also arise in respect of a newly employed servant on the premises in preparation or ready for work,[15] or even to such a servant on his way to employment when he is at the time under the control of the master,[16] but they do not exist in respect of one on the premises seeking work in response to information that men were needed,[17] or where his presence is not reasonably referable to preparation to take up his actual duties.[18] Any activity undertaken by an employee for a private purpose is not within his employment.[19]

On way to and from work. The duty is also held to exist during the servant's carriage to and from

8. Tex.—Angelina & N. R. R. Co. v. Due, Civ.App., 166 S.W. 918.

9. Tex.—Schaff v. Ellison, Civ.App., 255 S.W. 680, error refused, certiorari dismissed Sumner Sollit Co. v. Ellison, 45 S.Ct. 10, 266 U.S. 638, 69 L.Ed. 482.
Liability of lessor for injury resulting to its employee from negligence of railroad lessee see supra § 178.

10. U.S.—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F.Supp. 154.
Ala.—**Corpus Juris cited in** W. B. Davis & Son v. Ruple, 130 So. 772, 774, 222 Ala. 52.
Mass.—Watkins v. New York, N. H. & H. R. Co., 195 N.E. 888, 290 Mass. 448.
Mo.—**Corpus Juris cited in** Mangiaracino v. Laclede Steel Co., 145 S.W.2d 388, 390, 347 Mo. 36, certiorari denied 61 S.Ct. 941, 313 U.S. 565, 85 L.Ed. 1524—**Corpus Juris cited in** Gardner v. Stout, 119 S.W. 2d 790, 793, 342 Mo. 1206—Marshall v. United R. Co., App., 184 S.W. 159, reversed on other grounds, Sup., 209 S.W. 931.
Tex.—Foster v. Carle, Civ.App., 160 S.W.2d 999, error refused.
Care required of master generally see infra §§ 183–185.

11. Ky.—**Corpus Juris cited in** Auto Livery Co. v. Stone, 36 S.W. 2d 349, 350, 237 Ky. 686.
Miss.—Mississippi Utilities Co. v. Smith, 145 So. 896, 166 Miss. 105.
39 C.J. p 272 note 4.
Fellow-servant rule as applied to injury to servant not on duty see infra § 329.

Assistance by master

Master and servant relation continued and did not cease to subsist, although master assisted servant in work necessary to execute master's order.—Le Blanc v. Sturgis, 147 A. 701, 128 Me. 374.

12. Fla.—Dykes v. Simkins, 197 So. 327, 143 Fla. 625.

13. Ky.—High Splint Coal Co. v. Ramey's Adm'x, 112 S.W.2d 1007, 271 Ky. 532—**Corpus Juris cited in** Auto Livery Co. v. Stone, 36 S.W. 2d 349, 350, 237 Ky. 686.
39 C.J. p 272 note 6.

Going to toilet

U.S.—Chicago, M., St. P. & P. R. Co. v. Kane, C.C.A.Mont., 33 F.2d 866.
Mo.—Arnold v. Graham, 272 S.W. 90, 219 Mo.App. 249.

14. Ala.—Louisville & N. R. Co. v. Chamblee, 54 So. 681, 171 Ala. 188, Ann.Cas.1913A 977.
Mo.—Flanigan v. Kansas City Southern R. Co., 208 S.W. 441, 276 Mo. 656.

15. Utah.—Geanakoules v. Union Portland Cement Co., 126 P. 329, 41 Utah 486.
39 C.J. p 272 note 8.

16. La.—Powers v. Calcasieu Sugar Co., 19 So. 455, 48 La.Ann. 483.
39 C.J. p 272 note 9.

17. Ky.—Dickerson v. Bornstein, 137 S.W. 773, 144 Ky. 19.

Agreement for future employment

Where miners entered mine seeking employment, agreement, if any, with owner's representative for future employment did not give them status of employees, respecting owner's liability for injury.—Black Mountain Corporation v. Partin's Adm'r, 49 S.W.2d 1014, 243 Ky. 791.

18. Ala.—Louisville & N. R. Co. v. Chamblee, 54 So. 681, 171 Ala. 188, Ann.Cas.1913A 977.

Procuring clothes to take to laundry

Where plaintiff came to a pharmacy about one-half hour before time to start work in order to get an apron to take to laundry and was hurt in falling through open trap door over a stairway in the rear of the building occupied by her employer, plaintiff, at the time of accident, had the status of an invitee, rather than that of an employee or trespasser, as regarded her right to recover for the injury from her employer.—Whisler v. U. S. National Bank of Portland, 82 P.2d 1079, 160 Or. 10.

19. U.S.—Mostyn v. Delaware, L. & W. R. Co., C.C.A.N.Y., 160 F.2d 15.

his business by his master, by consent, custom, or contract;[20] and a railroad employee who has been discharged but has returned by agreement, to turn over his duties to his successor, is, while returning home thereafter on one of the company's trains, still in the employ of the railroad.[21] It has been held, however, that the mere permission[22] or custom[23] to ride to and from work on the cars of an employer will not establish the relation in the absence of evidence to show that such was because of, and a part of, the contract of employment; and the master is not liable for injuries resulting to the servant while riding from work on the vehicle of an independent contractor in the absence of an agreement or obligation on the part of the master to provide transportation.[24]

It has also been held that an employee, being carried to her work on an elevator operated by her employer for the benefit of all the occupants of the building and the public generally as well as its employees was not a servant at such time, but a passenger.[25] The relation continues during the servant's progress to or from his place of work along a path or way over his master's premises which he and other employees are accustomed to use;[26] and, where the duties or place of employment of a railroad employee involve the use of the railroad tracks of the employer in going to and from his work, the relation will continue while they are so being used,[27] but the duty of a master does not extend to one whose duties are not of such a character,[28] or to an employee who uses tracks to an unnecessary extent,[29] or in a dangerous way.[30]

An injured servant, being transported on the master's train to a place where medical attention may be obtained, is not an employee of the railroad company so as to entitle him to the care which the company would owe him under other circumstances,[31] but, where the contract of employment expressly requires the company to furnish medical treatment, free transportation on the employer's railroad from the place of work to the company doctor is impliedly

20. U.S.—Westcott v. U. S. Fidelity & Guaranty Co., C.C.A.N.C., 158 F. 2d 20.
Ark.—Jonesboro, Lake City & E. R. Co. v. Wright, 281 S.W. 374, 170 Ark. 815.
Cal.—Koskela v. Albion Lumber Co., 142 P. 851, 25 Cal.App. 12.
Mich.—Bernard v. Michigan United Traction Co., 178 N.W. 43, 210 Mich. 333.
Mo.—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748—Watson v. Energy Const. Co., 286 S.W. 715, 220 Mo.App. 362.
N.Y.—Hendricks v. New York, N. H. & H. R. Co., 167 N.E. 449, 251 N. Y. 297, reargument denied 168 N.E. 439, 251 N.Y. 591, certiorari denied New York, N. H. & H. R. Co. v. Hendricks, 50 S.Ct. 82, 280 U.S. 601, 74 L.Ed. 646.
Pa.—Knorr v. Central Railroad of New Jersey, 110 A. 797, 268 Pa. 172, certiorari denied Central R. Co. of New Jersey v. Knorr, 41 S. Ct. 15, 254 U.S. 644, 65 L.Ed. 454.
Utah.—Shurtliff v. Oregon Short Line R. Co., 241 P. 1058, 66 Utah 161.
39 C.J. p 273 note 12—10 C.J. p 633 note 81 [b], [e], [f] (2).
Employees of carriers carried to and from work as passengers or not passengers see Carriers § 546.
Going to and from work as within scope of employment generally see infra § 181 a.
Interstate character of employment of employee while on way to or from work see Commerce § 51 h.
On way to or from living or sleeping place provided by employer see infra subdivision c of this section.

Handcar
Ark.—**Corpus Juris cited in** Producers Gravel & Sand Co. v. Jones, 126 S.W.2d 99, 103, 197 Ark. 767.
39 C.J. p 273 note 12 [a].

Transportation in own vehicle
Generally, an employee on the way to work is not in the course of employment, and is not in actual performance of duty, but where employer furnishes transportation, the employee is actually on duty when he begins to use such transportation, whether it be in a vehicle supplied by the employer or one of his own substituted for the same mission.—Heaps v. Cobb, 45 A.2d 73, 185 Md. 372.

Test in determining whether employee is considered on duty while using transportation furnished by employer is whether the transportation was furnished by the employer as an incident of employment and the nature of the mission on which employee was engaged.—Heaps v. Cobb, supra.

Even though transportation afforded is not compulsory, employment may extend to servant's transportation to and from work.—Fay v. De Camp, 178 N.E. 677, 257 N.Y. 407.

21. N.C.—Mitchell v. Southern R. Co., 97 S.E. 628, 176 N.C. 645.

22. Miss.—Hamilton Bros. Co. v. Weeks, 124 So. 798, 155 Miss. 754.
Wash.—Baird v. Northern Pac. R. Co., 138 P. 325, 78 Wash. 67.

23. N.Y.—Green v. Travelers Ins. Co., 36 N.E.2d 620, 286 N.Y. 358.
39 C.J. p 273 note 15.

24. N.C.—Mehaffey v. Appalachian Const. Co., 140 S.E. 716, 194 N.C. 717.

25. Or.—Putnam v. Pacific Monthly Co., 130 P. 986, 68 Or. 36, 45 L.R. A.,N.S., 338, L.R.A.1915F 782, Ann. Cas.1915C 256, reheard 136 P. 835, 68 Or. 36, 45 L.R.A.,N.S., 338, L.R. A.1915F 782, Ann.Cas.1915C 256.

26. Pa.—Coleman v. Reading Co., 29 A.2d 499, 346 Pa. 289.
39 C.J. p 273 note 17.

Sailor returning from shore leave
Relation of master and servant, although suspended during shore leave, was held revived on sailor's return to entrance gate and demanding admittance.—Holliday v. Merchants' & Miners' Transp. Co., 132 S. E. 210, 161 Ga. 949.

27. U.S.—Erie R. Co. v. Winfield, N. J., 37 S.Ct. 556, 244 U.S. 170, 61 L.Ed. 1057, Ann.Cas.1918B 662.
Pa.—Coleman v. Reading Co., 29 A.2d 499, 346 Pa. 289.
S.C.—Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 158 S.C. 194, certiorari denied Atlantic Const. Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.
39 C.J. p 274 note 18.

28. N.Y.—McIntyre v. Long Island R. Co., 135 N.Y.S. 309, 150 App.Div. 783.
39 C.J. p 274 note 19.

29. U.S.—Hoyer v. Central R. Co. of New Jersey, N.Y., 255 F. 493, 166 C.C.A. 569.
N.Y.—Listorti v. New York Cent. R. Co., 167 N.E. 458, 251 N.Y. 327.

30. Ky.—Treadway's Adm'r v. Louisville & N. R. Co., 288 S.W. 1060, 217 Ky. 1.
Mich.—Buell v. Hines, 188 N.W. 422, 218 Mich. 353.

31. Md.—Baltimore & O. R. Co. v. State, 41 Md. 268.

included, and hence an employee so riding is not a mere licensee.[32]

A servant, temporarily laid off, who goes on the master's premises, is a mere trespasser.[33]

b. Incidental Interruptions

Neither the period nor continuity of service is changed by an incidental cessation from work or by a brief incidental absence from the scene of work, although an interruption solely for the employee's convenience and advantage will suspend the relation.

Neither the period nor continuity of service is changed by an incidental cessation from work or by a brief incidental absence from the scene of work,[34] but an interruption permitted solely for the employees's convenience and advantage will suspend the relation.[35] Thus, the relation continues when the servant has left his place of work merely to obtain a drink of water[36] or milk,[37] and it is not interrupted by an intermission for lunch or dinner,[38] although there is some authority holding that the relation does not exist while the employee was on the employer's premises during the lunch hour, but was off duty at the time.[39]

The relation does not continue in respect of a servant who leaves the premises for luncheon at a place of his own selection,[40] or who is on his way in disobedience of orders,[41] or who has left the premises during the noon hour on business of his own,[42] or who voluntarily and unnecessarily leaves his place of employment and assumes a position of peril merely for his own pleasure or convenience.[43] An employee who was injured during a rest period while on the premises of the employer cannot recover from the employer on the theory that he had been invited on the premises other than as an employee.[44]

c. After Working Hours

Although the master generally is not liable for injuries to his servant occurring after working hours, the relation continues and the duty exists for a reasonable time after the work has actually ceased. Where living or sleeping quarters are provided for a servant as incidental to his employment, the duty of the master continues while the servant is on the premises so provided and during his progress to and from such premises.

Although, in general, a master is not liable to his servant for injuries occurring after working hours,[45] the relation continues and the duty exists

32. Ark.—Boyle-Farrell Land Co. v. Haynes, 256 S.W. 43, 161 Ark. 183.

33. Tenn.—Westborne Coal Co. v. Willoughby, 180 S.W. 322, 133 Tenn. 257.

34. U.S.—Virginian Ry. Co. v. Early, C.C.A.W.Va., 130 F.2d 548—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F.Supp. 154.
Ky.—**Corpus Juris cited in** Auto Livery Co. v. Stone, 36 S.W.2d 349, 350, 237 Ky. 686.
Mass.—Watkins v. New York, N. H. & H. R. Co., 195 N.E. 888, 290 Mass. 448.
Mo.—**Corpus Juris cited in** Mangiaracino v. Laclede Steel Co., 145 S.W. 2d 388, 390, 347 Mo. 36, certiorari denied 61 S.Ct. 941, 313 U.S. 565, 85 L.Ed. 1524—Trout v. Chicago, R. I. & P. Ry. Co., App., 39 S.W.2d 424, certiorari denied Chicago, R. I. & P. Ry. Co. v. Trout, 51 S.Ct. 649, 283 U.S. 856, 75 L.Ed. 1463.
39 C.J. p 274 note 25.
Brief cessation from work as not taking employee outside scope of employment see infra § 181 d.
Engaging in consistent or incidental activity as not affecting interstate character of employment see Commerce § 51 h.

35. Ga.—**Corpus Juris quoted in** Holman v. American Auto Ins. Co., 39 S.E.2d 850, 201 Ga. 454.
Mass.—Gooch v. Citizens' Electric St. R. Co., 88 N.E. 591, 202 Mass. 254, 23 L.R.A.,N.S., 960.
39 C.J. p 274 note 28.

36. Ga.—**Corpus Juris quoted in** Holman v. American Auto Ins. Co., 39 S.E.2d 850, 201 Ga. 454.
39 C.J. p 274 note 27.

37. Ga.—**Corpus Juris quoted in** Holman v. American Auto Ins. Co., 39 S.E.2d 850, 201 Ga. 454.
Vt.—Ingram v. Rutland R. Co., 95 A. 544, 89 Vt. 278, Ann.Cas.1918A 1191.

38. U.S.—Virginian Ry. Co. v. Early, C.C.A.W.Va., 130 F.2d 548.
Mo.—**Corpus Juris cited in** Mangiaracino v. Laclede Steel Co., 145 S. W.2d 388, 390, 347 Mo. 36, certiorari denied 61 S.Ct. 941, 313 U.S. 565, 85 L.Ed. 1524—Carter v. St. Louis, T. & E. R. Co., 271 S.W. 358, 307 Mo. 595—Trout v. Chicago, R. I. & P. Ry. Co., App., 39 S.W.2d 424, certiorari denied Chicago, R. I. & P. Ry. Co. v. Trout, 51 S.Ct. 649, 283 U.S. 856, 75 L.Ed. 1463.
39 C.J. p 274 note 29.
In employer's cafeteria
Where employer maintains on his premises, and in the immediate vicinity of the work, a cafeteria to which he invites, expressly or by fair implication, his employees to lunch, and they accept the invitation by using the facilities offered, the relation of master and servant is not temporarily suspended during the noon hour, and it is the duty of the master to keep and maintain cafeteria, as a part of the premises, as a reasonably safe place for the employees to eat. —Holman v. American Auto Ins. Co., 39 S.E.2d 850, 201 Ga. 454.

39. Fla.—Ball v. I. C. Helmly Furniture Co., Inc., 182 So. 435, 132 Fla. 882.

40. Ga.—**Corpus Juris quoted in** Holman v. American Auto Ins. Co., 39 S.E.2d 850, 201 Ga. 454.
Mich.—Moronen v. McDonnell, 143 N. W. 8, 177 Mich. 691.

41. Cal.—Gardstrom v. L. E. White Lumber Co., 132 P. 842, 21 Cal.App. 744.
Ga.—**Corpus Juris quoted in** Holman v. American Auto Ins. Co., 39 S.E. 2d 850, 201 Ga. 454.
39 C.J. p 275 note 31.

42. U.S.—Ellsworth v. Metheney, Ohio, 104 F. 119, 44 C.C.A. 484, 51 L.R.A. 389.
Ga.—**Corpus Juris quoted in** Holman v. American Auto Ins. Co., 39 S.E. 2d 850, 201 Ga. 454.
39 C.J. p 275 note 32.

43. Va.—Raven Red Ash Coal Co. v. Griffith, 27 S.E.2d 360, 181 Va. 911.

44. Mo.—Mangiaracino v. Laclede Steel Co., 145 S.W.2d 388, 347 Mo. 36, certiorari denied 61 S.Ct. 941, 313 U.S. 565, 85 L.Ed. 1524.

45. N.C.—Colvin v. Atlantic Coast Line R. Co., 170 S.E. 639, 205 N.C. 168.
39 C.J. p 275 note 33.
Voluntarily riding on handcar
Where section hand was injured after day's work while voluntarily riding on handcar with others to grocery store in opposite direction from home, railroad was held not liable.— Colvin v. Atlantic Coast Line R. Co., supra.

for a reasonable time after work has actually ceased for purposes incidental to the employment,[46] and until the employee has been given an opportunity to leave the premises.[47] While the fact that an employee is subject to call in an emergency does not prolong the hours of labor so as to continue the relation,[48] where a living or sleeping place is provided for a servant as incidental to his employment and for the convenience of the employer, the duty of the employer continues not only while the servant is on the premises so provided,[49] but also during his progress to and from such premises,[50] or while he was sleeping on the ground outside the place provided because such place was unfit for sleeping.[51] So, it has been held that, where but a short time intervenes between the finishing of an employee's duties on a particular day and his regular hours of work of the following day, remaining on the employer's premises to sleep does not suspend the relation.[52]

d. Transfer of Master's Business or Service of Employee

Where the servant has not been informed of any change, the liability of a master to a servant does not ordinarily cease, although as between the master and a third person a change is made by which thereafter the work is to be done for such third person; but a servant furnished by a general employer to perform a particular service for another under the latter's control is the servant of the latter, and not of the former.

The liability of a master to a servant does not cease, the servant not having been informed of any change, although, as between the master and a third person, a change is made by which thereafter the work is to be done for such third person;[53] nor is the relation ended by reason of the fact that one joint employer, in accordance with an arrangement between himself and the other joint employer, takes on himself the function of a workman.[54] Where a servant is under the control and subject to the orders of the master and under his employ owes obedience to such master and is ordered by such master to assist a third person to do a piece of work, and while so doing he remains under the control and subject to the orders of his master, he does not in such case become the servant of such third person, but remains the servant of his master.[55] Thus, where the owner of a machine hires it, together with the crew to operate it, to a third person, the relation of master and servant exists between the owner and the crew.[56]

On the other hand, a servant furnished by a general employer to perform a particular service for another under the latter's control is the servant of

46. U.S.—National Biscuit Co. v. Litzky, C.C.A.Mich., 22 F.2d 939, 56 A.L.R. 853.
Tex.—Foster v. Carle, Civ.App., 160 S.W.2d 999, error refused.
39 C.J. p 275 note 34.

47. Pa.—Coleman v. Reading Co., 29 A.2d 499, 346 Pa. 289.

48. N.Y.—Best v. New York Cent. & H. R. R. Co., 102 N.Y.S. 957, 117 App.Div. 739.
Tex.—Perez v. Atchison, T. & S. F. R. Co., Civ.App., 192 S.W. 274.

49. U.S.—Mostyn v. Delaware, L. & W. R. Co., C.C.A.N.Y., 160 F.2d 15 —Guest v. Wabash R. Co., C.C.A. Ill., 147 F.2d 579.
Mo.—**Corpus Juris quoted in** Watson v. Pitcairn, App., 139 S.W.2d 552 554, 555.
39 C.J. p 275 note 36.

50. Minn.—Moore v. Minneapolis & St. L. R. Co., 142 N.W. 152, 123 Minn. 191, reheard 143 N.W. 326, 123 Minn. 191.
Mo.—**Corpus Juris quoted in** Watson v. Pitcairn, App., 139 S.W.2d 552, 554, 555.
39 C.J. p 275 note 37.
On way to or from work see supra subdivision a of this section.

On way to or from caboose
(1) A railroad employee while going to and from a caboose used by him for sleeping purposes at the invitation of a company is an employee.—Moore v. Minneapolis & St. L. R. Co., 142 N.W. 152, 123 Minn. 191, reheard 143 N.W. 326, 123 Minn. 191.
(2) Railroad employee, injured while going from caboose to restaurant, was held not "trespasser."—St. Louis, B. & M. Ry. Co. v. Knight, Tex.Civ.App., 295 S.W. 945.

51. U.S.—Mostyn v. Delaware, L. & W. R. Co., C.C.A.N.Y., 160 F.2d 15.

52. Colo.—Taylor v. Saunders, 204 P. 608, 71 Colo. 160.
39 C.J. p 275 note 33.

53. U.S.—Marion Steam Shovel Co. v. Bertino, C.C.A.Mo., 82 F.2d 541, rehearing denied 82 F.2d 945, certiorari denied 57 S.Ct. 17, 299 U.S. 556, 81 L.Ed. 409.
N.H.—Ocean Accident & Guarantee Corporation v. Connell, 35 A.2d 385, 93 N.H. 77, 150 A.L.R. 1163.
Ohio.—**Corpus Juris cited in** Manchester v. Youngstown Sheet & Tube Co., App., 46 N.E.2d 780, 785.
39 C.J. p 275 note 39.
Servant lent or hired to another generally see supra § 2.

Unilateral agreement, whereby a railroad company which employed plaintiff delivered its property to the second company to operate and pay over the proceeds to the first, would not make plaintiff an employee of second company where he was not notified of the change and did not agree to become an employee of the second.—Costigan v. New York & S. R. Co., 145 N.Y.S. 1029, 160 App.Div. 597.

54. Me.—Rhoades v. Varney, 39 A. 552, 91 Me. 222.

55. U.S.—Marion Steam Shovel Co. v. Bertino, C.C.A.Mo., 82 F.2d 541, rehearing denied 82 F.2d 945, certiorari denied 57 S.Ct. 17, 299 U.S. 556, 81 L.Ed. 409—McLamb v. E. I. Du Pont De Nemours & Co., C.C. A.N.C., 79 F.2d 966.
Minn.—Wegman v. Great Northern Ry. Co., 249 N.W. 422, 189 Minn. 325.
Okl.—Palmer v. Skelly Oil Co., 263 P. 440, 129 Okl. 32—New v. McMillan, 191 P. 160, 79 Okl. 70.
Pa.—Gyarmati v. Linde Air Products Co., 157 A. 485, 305 Pa. 188.
39 C.J. p 276 note 41.
Status as fellow servant see infra § 330.

Switching within consignee's plant
Freight conductor in charge of engine and crew sent by railroad to do switching within consignee's plant was held not servant of consignee, where consignee's yardmaster merely directed placement of cars without controlling switching operations. —Geraghty v. Lehigh Valley R. Co., C.C.A.N.Y., 70 F.2d 300.

56. Can.—Algoma Steel Corp., Ltd. v. Dube, 53 Can.S.C. 481.

the latter, and not of the former,[57] and the special employer controlling both the employee and the working appliances furnished by the general employer is liable for injuries to him because of neglect to perform the master's duties.[58] Where servants of two persons jointly engage in work of mutual interest to their employers, each employee remains the servant of his own master, although one of them takes orders as to details of the work from the other.[59]

The determining factor is control and supervision,[60] that is, the right to direction and control,[61] rather than actuality of direction and control[62] or payment of wages;[63] and another test is whether the servant willingly and knowingly subjected himself to the other's orders under a new agreement with a new master.[64] As long as the employee is furthering the business of his general employer by the service rendered to another, there will be no inference of a new relation unless command has been surrendered.[65]

A purchaser of a business is not responsible for injuries sustained by an employee before his purchase thereof,[66] and the recording of the lease which provided that the transfer should be regarded as having taken place at a time before the injuries were received cannot alter the fact that the relation of master and servant did not then exist so as to make him liable.[67]

e. Fraud or Misrepresentation

The fact that false statements were made by the servant at the time he secured employment is insufficient to terminate the relation of master and servant existing at the time of the injury, and recovery may be had from the employer for negligent injury to the employee where there is no causal connection between the injury and the misrepresentation or where the latter did not affect the

57. U.S.—Dennis v. Mabee, C.C.A. Tex., 139 F.2d 941, certiorari denied 64 S.Ct. 1261, 322 U.S. 750, 88 L.Ed. 1581—Norfolk & W. Ry. Co. v. Hall, C.C.A.W.Va., 57 F.2d 1004.
Ariz.—Inspiration Consol. Copper Co. v. Bryan, 276 P. 846, 35 Ariz. 285.
Cal.—Miller v. Cookson, 265 P. 374, 89 Cal.App. 602.
Mich.—Buskirk v. Ide, 4 N.W.2d 504, 302 Mich. 154—Rockwell v. Grand Trunk Western Ry. Co., 250 N.W. 515, 264 Mich. 626.
Okl.—Thomas v. Great Western Mining Co., 1 P.2d 165, 150 Okl. 212.
General and special employers, and employers of lent employees under workmen's compensation acts see the C.J.S. title Workmen's Compensation Acts § 47, also 71 C.J. p 403 note 30 et seq.
Liability of master for acts of servant lent or hired to him by third person see infra § 566.

Golf caddie

Although caddie was in general service of golf club, when he was transferred to service of a golf player he became servant of player, with all attendant legal consequences of new relation.—Biskup v. Hoffman, 287 S.W. 865, 220 Mo.App. 542.

Mail clerk

United States, not railway company, was master of employee furnished by company to assist in transporting mails in storage car also furnished by it.—Norfolk & W. Ry. Co. v. Hall, C.C.A.W.Va., 57 F.2d 1004.

Former employee of servant

One of subcontractors who, following default, was placed on salary by surety which superintended completion of highway, was held merely surety's servant, and surety was liable for injury to subcontractors' former employee.—U. S. Fidelity & Guaranty Co. v. Antle, 42 S.W.2d 1, 240 Ky. 243.

58. U.S.—Norfolk & W. Ry. Co. v. Hall, C.C.A.W.Va., 57 F.2d 1004.

Railroad's control of car furnished another

Railway company's necessary control of storage mail car, furnished government by it with servant in charge, to perform functions as common carrier, did not constitute such servant its employee.—Norfolk & W. Ry. Co. v. Hall, supra.

59. U.S.—Marion Steam Shovel Co. v. Bertino, C.C.A.Mo., 82 F.2d 541, rehearing denied 82 F.2d 945, certiorari denied 57 S.Ct. 17, 299 U. S. 556, 81 L.Ed. 409.

60. U.S.—Dennis v. Mabee, C.C.A. Tex., 139 F.2d 941, certiorari denied 64 S.Ct. 1261, 322 U.S. 750, 88 L.Ed. 1581—Marion Steam Shovel Co. v. Bertino, C.C.A.Mo., 82 F.2d 541, rehearing denied 82 F.2d 945, certiorari denied 57 S.Ct. 17, 299 U.S. 556, 81 L.Ed. 409—Halderman v. Pennsylvania R. Co., C.C.A.N. Y., 53 F.2d 365.
Essentials of relation as affecting liability of master to servant generally see supra § 174.

61. U.S.—Dennis v. Mabee, C.C.A. Tex., 139 F.2d 941, certiorari denied 64 S.Ct. 1261, 322 U.S. 750, 88 L.Ed. 1581—Marion Steam Shovel Co. v. Bertino, C.C.A.Mo., 82 F.2d 541, rehearing denied 82 F. 2d 945, certiorari denied 57 S.Ct. 17, 299 U.S. 556, 81 L.Ed. 409.
Mich.—Buskirk v. Ide, 4 N.W.2d 504, 302 Mich. 154.

62. U.S.—Dennis v. Mabee, C.C.A. Tex., 139 F.2d 941, certiorari denied 64 S.Ct. 1261, 322 U.S. 750, 88 L.Ed. 1581.
Mich.—Buskirk v. Ide, 4 N.W.2d 504, 302 Mich. 154.

63. U.S.—Halderman v. Pennsylvania R. Co., C.C.A.N.Y., 53 F.2d 365.
Mich.—Buskirk v. Ide, 4 N.W.2d 504, 302 Mich. 154.

64. U.S.—Marion Steam Shovel Co. v. Bertino, C.C.A.Mo., 82 F.2d 541, rehearing denied 82 F.2d 945, certiorari denied 57 S.Ct. 17, 299 U.S. 556, 81 L.Ed. 409.
Okl.—Palmer v. Skelly Oil Co., 263 P. 440, 129 Okl. 32.

Consent of employee required

Change of master to make general employee special employee of another requires consent of employee.—Lisanti v. William F. Kenny Co., 232 N.Y.S. 103, 225 App.Div. 129, affirmed 166 N.E. 347, 250 N.Y. 621.

65. N.Y.—La Rose v. Donnelly, 219 N.Y.S. 148, 219 App.Div. 181.

66. Pa.—Wieder v. Bethlehem Steel Co., 54 A. 778, 205 Pa. 186.

Executory contract

(1) Owner of property on date of injury was liable as master for servant's injury, notwithstanding existence of contract to sell property, and contract, completed after employee's injury, would not be allowed to relate back to time before injury as regards original owner's liability as master.—Mississippi Power & Light Co. v. Smith, 153 So. 376, 169 Miss. 447.

(2) Superintendent of cotton gin was held to operate gin as such at risk of master, after entering executory contract to purchase property, until such contract was fully executed.—Mississippi Power & Light Co. v. Smith, supra.

67. Pa.—Wieder v. Bethlehem Steel Co., 54 A. 778, 205 Pa. 186.

workman's physical fitness to perform his duties; but a contract obtained by fraud through impersonation will bar recovery.

The fact that false statements were made by a servant at the time he secured employment is insufficient to terminate the relation of master and servant existing at the time of the injury,[68] even though they may constitute grounds for rescission of the contract of employment,[69] and recovery may be had from the employer for negligent injury to the employee, at least were there is no causal connection between the injury and the misrepresentation,[70] or where the untrue statement did not affect the workman's physical fitness to perform his duties,[71] even though the misrepresentation concerned the employee's age, and the effect of his injuries might be more serious because of his age than if he were younger.[72] A contract obtained by fraud through another impersonating the employee, however, will bar recovery in an action by the employee for personal injuries.[73]

§ 181. —— Scope of Employment in General

a. General rule
b. Measure of scope
c. Emergencies
d. Brief cessations from work

a. General Rule

In order to render a master liable as such for personal injuries to his servant, the injuries must have been received in the line of the servant's duty, since the master ordinarily is not liable where the injury is sustained while the servant is acting without the scope of his employment.

In order to render a master liable as such for personal injuries to his servant, the injuries must have been received in the line of the servant's duty, or, as usually expressed, within the scope of his employment.[74] The master is ordinarily not liable where the injury is sustained while the servant is acting

68. U.S.—Minneapolis, St. P. & S. S. M. R. Co. v. Borum, Minn., 52 S.Ct. 612, 286 U.S. 447, 76 L.Ed. 1218.
Cal.—Newkirk v. Los Angeles Junction Ry. Co., 131 P.2d 535, 21 Cal. 2d 308—Matthews v. Atchison, T. & S. F. Ry. Co., 129 P.2d 435, 54 Cal.App.2d 549—Phillips v. Southern Pac. Co., 58 P.2d 688, 690, 14 Cal.App.2d 454.
Ky.—Louisville & N. R. Co. v. Lewis, 291 S.W. 401, 218 Ky. 197.
N.C.—**Corpus Juris cited in** Laughter v. Powell, 14 S.E.2d 826, 829, 219 N.C. 689, 136 A.L.R. 1116, certiorari denied Powell v. Laughter, 62 S.Ct. 128, 314 U.S. 666, 86 L.Ed. 533.
Tex.—Texas & N. O. R. Co. v. Webster, 70 S.W.2d 394, 123 Tex. 197, certiorari denied 55 S.Ct. 93, 293 U.S. 580, 79 L.Ed. 677, rehearing denied 55 S.Ct. 138, 293 U.S. 630, 79 L.Ed. 716—**Corpus Juris cited in** Dawson v. Texas & P. Ry. Co., 70 S.W.2d 392, 393, 394, 123 Tex. 191, certiorari denied Texas & P. R. Co. v. Dawson, 55 S.Ct. 110, 293 U.S. 580, 79 L.Ed. 677.
39 C.J. p 276 note 45.
Effect of false representation in securing employment on right to recover under workmen's compensation acts see the C.J.S. title Workmen's Compensation Acts § 61, also 71 C.J. p 435 note 8 et seq.
False statements of servant as not rendering contract of employment void generally see supra § 6.
Misrepresentation as to age:
As affecting liability for employment of minor see infra § 194.
As depriving employee of duty required as to servant see infra § 185.
Relation held to exist notwithstanding misrepresentation where plaintiff had worked as switchman for railroad more than ninety days when he was injured and had not been rejected, under railroad's rule relating to applicants for position in its yard service.—Blanton v. Northern Pac. Ry. Co., 10 N.W.2d 382, 215 Minn. 442.

69. Cal.—Newkirk v. Los Angeles Junction Ry. Co., 131 P.2d 535, 21 Cal.2d 308—**Corpus Juris cited in** Phillips v. Southern Pac. Co., 58 P.2d 688, 690, 14 Cal.App.2d 454.
Tex.—**Corpus Juris cited in** Dawson v. Texas & P. Ry. Co., 70 S.W.2d 392, 393, 394, 123 Tex. 191, certiorari denied Texas & P. R. Co. v. Dawson, 55 S.Ct. 110, 293 U.S. 580, 79 L.Ed. 677.
39 C.J. p 276 note 45.

70. Cal.—Newkirk v. Los Angeles Junction Ry. Co., 131 P.2d 535, 21 Cal.2d 308—Matthews v. Atchison, T. & S. F. Ry. Co., 129 P.2d 435, 54 Cal.App.2d 549—Phillips v. Southern Pac. Co., 58 P.2d 688, 14 Cal.App.2d 454—Qualls v. Atchison, T. & S. F. Ry. Co., 296 P. 645, 112 Cal.App. 7.
Ill.—Powers v. Michigan Cent. R. Co., 268 Ill.App. 493.
Ky.—Louisville & N. R. Co. v. Lewis, 291 S.W. 401, 218 Ky. 197.
Tex.—Texas & N. O. R. Co. v. Webster, 70 S.W.2d 394, 123 Tex. 197, certiorari denied 55 S.Ct. 93, 293 U.S. 580, 79 L.Ed. 677, rehearing denied 55 S.Ct. 138, 293 U.S. 630, 79 L.Ed. 716—Dawson v. Texas & P. Ry. Co., 70 S.W.2d 392, 123 Tex. 191, certiorari denied Texas & P. R. Co. v. Dawson, 55 S.Ct. 110, 293 U.S. 580, 79 L.Ed. 677.
Fraud of parent
In action by alleged minor employee for personal injuries, employer may defend on ground that plaintiff was a trespasser at time he was injured and that his employment was procured through the fraudulent and unauthorized conduct of his father.—Kilgore v. Hudson, 4 So.2d 865, 148 Fla. 580.

71. Ky.—Louisville & N. R. Co. v. Lewis, 291 S.W. 401, 218 Ky. 197.
Tex.—Texas & N. O. R. Co. v. Webster, 70 S.W.2d 394, 123 Tex. 197, certiorari denied 55 S.Ct. 93, 293 U.S. 580, 79 L.Ed. 677, rehearing denied 55 S.Ct. 138, 293 U.S. 630, 79 L.Ed. 716—Dawson v. Texas & P. Ry. Co., 70 S.W.2d 392, 123 Tex. 191, certiorari denied Texas & P. Ry. Co. v. Dawson, 55 S.Ct. 110, 293 U.S. 580, 79 L.Ed. 677.

72. Cal.—Matthews v. Atchison, T. & S. F. Ry. Co., 129 P.2d 435, 54 Cal.App.2d 549.

73. U.S.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Rock, Ill., 49 S.Ct. 363, 279 U.S. 410, 73 L.Ed. 766, rehearing denied 50 S.Ct. 79—Stafford v. Baltimore & O. R. Co., D.C. W.Va., 262 F. 807.
39 C.J. p 276 note 46.

74. U.S.—Watkins v. Thompson, D.C.Mo., 72 F.Supp. 953—**Corpus Juris cited in** Bethlehem Steel Co. v. Parker, D.C.Md., 64 F.Supp. 615, 617.
Ark.—Harrison Electric Co. v. Bumgardner, 272 S.W. 688, 168 Ark. 1074.
Ga.—Austin v. Henry Grady Hotel Co., 200 S.E. 466, 58 Ga.App. 861—**Corpus Juris cited in** Moore v. Ross, 153 S.E. 575, 576, 41 Ga.App. 509.

without the scope of his regular employment at the command or request of another servant;[75] and, where the master has forbidden the servant to do a particular act, he is not liable for an injury sustained when the act was performed with the permission of another servant.[76] The servant is within the general scope of his employment, however, where he acts in obedience to an express order of the master,[77] or performs work not strictly within the line of his duty at the command or request of another servant having either express or implied authority to make such command or request,[78] and this is particularly true when a servant is hired by the day, acting under instructions,[79] or when an employee is not engaged for any particular task but to do whatever he may be directed to do.[80] The scope of employment includes not only actual service, but also those things necessarily incident thereto,[81] such as going to and from the place of employment on the employer's premises.[82]

Under safety appliance acts. Under the Federal Safety Appliance Act, an employer is liable for a violation of the act which is the proximate cause of injury irrespective of the position the employee occupied at the time of the injury,[83] and any contract rule or regulation, of which the purpose is to enable any common carrier to exempt itself from the liability created by the act, is void to that extent.[84] Under the statutes of some states requiring

Ill.—Trust v. Chicago Motor Club, 276 Ill.App. 289.
Iowa.—Bell v. Brown, 239 N.W. 785, 214 Iowa 370.
Ky.—City of Bellevue v. Hall, 174 S.W.2d 24, 295 Ky. 57—Lay's Adm'r v. Harlan Producers Coal Corporation, 90 S.W.2d 716, 262 Ky. 612—Lutz's Adm'r v. W. J. Hughes & Sons Co., 24 S.W.2d 578, 232 Ky. 675.
La.—Baton v. Hammond Lumber Co., 2 La.App. 739.
Mich.—Anderson v. Schust Co., 247 N.W. 167, 262 Mich. 236.
Miss.—Forbus v. Cobb Bros. Const. Co., 185 So. 243, 184 Miss. 647, suggestion of error overruled 186 So. 643, 184 Miss. 647.
Mo.—Kincaid v. Birt, 29 S.W.2d 97—Clark v. Wheelock, App., 293 S.W. 456.
N.C.—**Corpus Juris cited in** Bourne v. Southern Ry. Co., 33 S.E.2d 239, 241, 225 N.C. 43—Barnes v. Phœnix Utility Co., 130 S.E. 1, 190 N.C. 382.
Or.—Barker v. Portland Traction Co., 178 P.2d 706—Brady v. Oregon Lumber Co., 245 P. 732, 118 Or. 15, 45 A.L.R. 812.
Tex.—Dell v. Lancaster, Civ.App., 285 S.W. 685.
39 C.J. p 276 note 48.
Acting outside scope of employment as contributory negligence see infra § 439.
Assumption of risk see infra §§ 407–409.
Commencement, suspension, or termination of relation see supra § 180.
Rule applicable to youthful and inexperienced servants see infra § 182.
Scope of employment as affecting fellow-servant rule see infra § 323.
Warning and instruction to servant see infra § 302.

Inapplicability of employers' liability acts

(1) Where employee was not engaged within scope of his employment at time of his injury, neither the state nor Federal Employers' Liability Act applied.—Fowler v. Western & A. R. R., Ga.App., 42 S.E.2d 499.

(2) For an injured employee to be able to claim a right of action under Federal Employers' Liability Act, it must appear that his injuries were sustained either upon the premises where he normally performed duties of his employment or upon premises so closely adjacent thereto as to be part of the working premises in the sense that employee was required to traverse them in going to or upon leaving his work.—Sassaman v. Pennsylvania R. Co., C.C.A.N.J., 144 F.2d 950.

(3) A train dispatcher, who rode on employer's intrastate train while going home after work and who was injured while alighting from train on station platform some nine miles from normal place of work, was not on employer's premises as a necessary incident to discharge of duties of his employment within contemplation of Federal Employers' Liability Act.—Sassaman v. Pennsylvania R. Co., supra.

75. Miss.—Burch v. Southern Bell Telephone & Telegraph Co., 173 So. 300, 178 Miss. 407—Latimer v. Dent, 172 So. 126, 177 Miss. 869—McKinnon v. Braddock, 104 So. 154, 139 Miss. 424.
Nev.—Smith v. Southern Pac. Co., 277 P. 609, 51 Nev. 390.
N.C.—Bourne v. Southern Ry. Co., 33 S.E.2d 239, 225 N.C. 43.
Tenn.—Knox v. Pioneer Coal Co., 18 S.W. 255, 90 Tenn. 546.
39 C.J. p 277 note 49.

76. Miss.—Von Scoter v. Megginson, 110 So. 247, 144 Miss. 510.

77. Ala.—**Corpus Juris cited in** Taylor v. Atlantic Coast Line R. Co., 168 So. 181, 183, 232 Ala. 378.
Ga.—**Corpus Juris cited in** Moore v. Ross, 153 S.E. 575, 41 Ga.App. 509—Gable v. Central of Georgia Ry. Co., 147 S.E. 135, 39 Ga.App. 350.
Or.—**Corpus Juris quoted in** Walters v. Dock Commission of City of Portland, 266 P. 634, 637, 126 Or. 487, motion denied 270 P. 778, 126 Or. 487.
39 C.J. p 277 note 50.
Servant of two masters may be acting within scope of his employment by each at same instant and in performance of same act, and may make both liable where both have right of control over servant, even though masters are not joint employers and their purposes do not coincide.—Koontz v. Messer, 181 A. 792, 320 Pa. 487.

78. Ala.—**Corpus Juris cited in** Taylor v. Atlantic Coast Line R. Co., 168 So. 181, 183, 232 Ala. 378.
Ga.—**Corpus Juris cited in** Moore v. Ross, 153 S.E. 575, 41 Ga.App. 509.
Or.—**Corpus Juris quoted in** Walters v. Dock Commission of City of Portland, 266 P. 634, 637, 126 Or. 487, motion denied 270 P. 778, 126 Or. 487.
39 C.J. p 278 note 51.

79. La.—Mathews v. Kerlin, 48 So. 123, 122 La. 606.

80. Iowa.—Mericle v. Acme Cement Plaster Co., 136 N.W. 916, 155 Iowa 692.
39 C.J. p 278 note 53.

81. U.S.—Virginian Ry. Co. v. Early, C.C.A.W.Va., 130 F.2d 548.

82. U.S.—Virginian Ry. Co. v. Early, supra.
Existence of relation of master and servant while going to and from work see supra § 180.

83. Minn.—Clapper v. Dickinson, 163 N.W. 752, 137 Minn. 415.

84. Tex.—St. Louis, S. W. R. Co. v. Hosey, Civ.App., 247 S.W. 327.
39 C.J. p 280 note 72.
Contracts against Federal Employers' Liability Act generally see infra § 197.

safety appliances for factories, the protection afforded extends only to persons acting within the scope of their employment,[85] but such a statute is not limited in its application to workmen engaged in their ordinary duties only, but is designed to protect persons employed in such establishments while in the performance of any duty, whether ordinary and general or exceptional and occasional.[86]

b. Measure of Scope

The scope of a servant's duties is to be defined by what he was employed to perform, and by what, with knowledge and approval of his master, he actually did perform.

The scope of a servant's duties is to be defined by what he was employed to perform, and by what, with knowledge and approval of his master, he actually did perform, rather than by the mere verbal designation of his position.[87] Where it is shown that the

85. Kan.—Caspar v. Lewin, 109 P. 657, 82 Kan. 604, 83 Kan. 799, 49 L.R.A.,N.S., 544.
Okl.—Curtis & Gartside Co. v. Pribyl, 134 P. 71, 38 Okl. 511, 49 L.R. A.,N.S., 471.
39 C.J. p 281 note 73.

86. Kan.—Caspar v. Lewin, 109 P. 657, 82 Kan. 604, 83 Kan. 799, 49 L.R.A.,N.S., 526.
39 C.J. p 281 note 74.

87. Ala.—**Corpus Juris cited in** Taylor v. Atlantic Coast Line R. Co., 168 So. 181, 183, 232 Ala. 378.
Iowa.—**Corpus Juris cited in** Bell v. Brown, 239 N.W. 785, 788, 214 Iowa 370.
Ky.—**Corpus Juris cited in** Auto Livery Co. v. Stone, 36 S.W.2d 349, 350, 237 Ky. 686.
Or.—**Corpus Juris quoted in** Walters v. Dock Commission of City of Portland, 266 P. 634, 637, 126 Or. 487, motion denied 270 P. 778, 126 Or. 487.
S.C.—Pelfrey v. Oconee County, 86 S.E.2d 297, 207 S.C. 433.
Va.—**Corpus Juris quoted in** Chesapeake & O. Ry. Co. v. Golladay, 180 S.E. 400, 406, 164 Va. 292.
39 C.J. p 278 note 54.

Test of scope of employment

(1) The test to determine whether the plaintiff was acting within the scope of his employment when he was injured is not to inquire whether he was told in so many words to do the act in question, but whether the defendants ought to have anticipated that such a man might do it.
Ark.—Ward Furniture Mfg. Co. v. Pickle, 295 S.W. 727, 174 Ark. 463.
N.H.—Ambrosio v. Boston & M. R. Co., 124 A. 551, 81 N.H. 119.
Va.—Chesapeake & O. Ry. Co. v. Golladay, 180 S.E. 400, 164 Va. 292.

(2) The test is whether the ordinary man in employee's situation would have understood that he was expected to do it.
U.S.—Zeidman v. Gutterson & Gould, C.C.A.N.H., 139 F.2d 160.
N.H.—Saunders v. Boston & M. R. R., 136 A. 264, 82 N.H. 476, 50 A.L.R. 367—Roussel v. Nashua Mfg. Co., 116 A. 441, 81 N.H. 119.

Express authorization not necessary

In order to render railroad liable for death of clerk in its storerooms from asphyxiation when he allegedly used carbon tetrachloride in cleaning floor, it was not necessary that railroad expressly authorized clerk to use carbon tetrachloride for cleaning the floor.—Symons v. Great Northern Ry. Co., 293 N.W. 303, 208 Minn. 240.

Injury arising out of, and in course of, employment

(1) The term "arising out of," in respect to an accident arising out of employment, implies some causal relation between employment and injury.—Casey v. Hansen, Iowa, 26 N. W.2d 50.

(2) The term "in the course of," in respect to an accident arising in the course of employment, means during the period of employment and at a place where employee may be performing duties of his employment or doing something incident thereto.—Casey v. Hansen, supra.

(3) An employee does not cease to be in the course of his employment, so as to be precluded from recovering from employer for injuries caused by employer's negligence, merely because he is not engaged in doing some specifically prescribed task, if, in course of his employment, he does some act which he deems necessary for benefit or interest of employer. —Casey v. Hansen, supra.

(4) When an employee is transported to and from his work by the employer, injuries suffered by the employee en route are injuries arising out of and in course of employment.—Lunt v. Fidelity & Casualty Co. of New York, 28 A.2d 736, 139 Me. 218.

(5) Injuries to telegraph messenger when his motorcycle collided with automobile while going to boarding house for flashlight for delivering messages in evening were held not within course of employment.—Western Union Telegraph Co. v. Mason, 22 S.W.2d 602, 232 Ky. 237.

(6) Alleged store employee who fell into elevator shaft in attempt to move freight elevator, was as matter of law acting outside course of employment, where employee was not carrying merchandise and employer's officer had instructed employee not to run elevator.—Meloche v. Flowers, Inc., 265 N.W. 309, 274 Mich. 385.

(7) One injured on hotel grounds before employment in hotel began was not employee at time of injury, which therefore did not arise out of or in course of employment, though she was residing in hotel at owner's invitation.—Powers v. Raymond, 239 P. 1069, 197 Cal. 126.

(8) Injuries arising out of, and in course of, employment as compensable under workmen's compensation acts see the C.J.S. title Workmen's Compensation Acts §§ 208–257, also 71 C.J. p 642 note 20 et seq.

Performance of contractual duties

An employee is in the service of his master whenever he is doing that which under his contract of employment he is bound to do.—Todahl v. Sudden & Christenson, C.C.A.Cal., 5 F.2d 462—Lamphere v. Oregon R. & Nav. Co., C.C.A.Wash., 196 F. 336.

Servant held within scope of employment at time of injury

U.S.—Chicago, M., St. P. & P. R. R. Co. v. Linehan, C.C.A.Minn., 66 F. 2d 373.
Ark.—Arkansas Power & Light Co. v. Dutton, 140 S.W.2d 689, 200 Ark. 761.
Fla.—Putnam Lumber Co. v. Berry, 2 So.2d 133, 146 Fla. 595.
Ill.—Rogers v. New York, C. & St. L. R. Co., 65 N.E.2d 243, 328 Ill. App. 123.
La.—Snow v. Texas & P. Ry. Co., App., 166 So. 200.
Md.—Heaps v. Cobb, 45 A.2d 73, 185 Md. 372—Boyer v. Pennsylvania R. Co., 159 A. 909, 162 Md. 328.
Miss.—Curry & Turner Const. Co. v. Bryan, 185 So. 256, 184 Miss. 44.
Mo.—Doyle v. St. Louis Merchants' Bridge Terminal Ry. Co., 31 S.W. 2d 1010, 326 Mo. 425, certiorari denied St. Louis Merchants' Bridge Terminal R. R. v. Doyle, 51 S.Ct. 345, 283 U.S. 820, 75 L.Ed. 1435.
N.C.—Barnes v. Phoenix Utility Co., 130 S.E. 1, 190 N.C. 382.
Tex.—United East & West Oil Co. v. Dyer, 162 S.W.2d 680, 139 Tex. 318.
39 C.J. p 278 note 54 [j].

Servant held not within scope of employment at time of injury

Ky.—Lay's Adm'r v. Harlan Producers Coal Corporation, 90 S.W.2d 716, 262 Ky. 612.
N.J.—O'Brien v. Central R. Co. of New Jersey, 146 A. 59, 105 N.J.

servants were in the habit of exchanging work or assisting each other in their duties, a servant so engaged is held to be within the scope of his employment,[88] and an employee may show that conditions under which his work had been previously performed by him were such as to warrant the inference that the enlargement of the scope of his employment had been acquiesced in so as to include the work being done at the time of an injury,[89] or his presence at the place where the injury occurred.[90] Although generally the servant departs from the ordinary and usual manner of the performance of his duties for his master at his own peril,[91] where there are two ways equally safe and feasible of performing his duty, the employee may adopt one in preference to the other without going beyond the scope of his employment.[92]

c. Emergencies

An employee may be within the scope of his employment when in the presence of an emergency he steps outside the strict bounds of his duty.

Where the circumstances are such as to justify a man of ordinary prudence in regarding the thing as a part of his duty, the servant will be deemed to be acting within the scope of such duty.[93] Thus, when, in the presence of an emergency, an employee steps outside the strict bounds of his duties, he is held to be within the general scope of his employment where such action is taken to preserve or protect the lives of himself or others,[94] or the property of his master,[95] or even where such a course is reasonably called for in order that the master's business may properly proceed,[96] and the right of an employee so to act in an emergency is not affected by the fact that the necessary work is ordinarily done by others under his charge and on whom he had a right to call.[97]

d. Brief Cessations from Work

An employee is not taken outside the scope of his employment by brief cessations from work for a purpose fairly within the contemplation of the parties when the contract was made.

There may be a cessation from work by the servant without loss of the right to recover when such a cessation is for a purpose fairly within the contemplation of the parties when the contract was made.[98] Thus an employee is not taken outside the scope of his employment by a mere pause for rest,[99] to warm himself,[1] to take a drink of water,[2] or to exchange a few words with a fellow servant,[3]

Law 544, affirmed 148 A. 919, 106 N.J.Law 585.

88. Or.—**Corpus Juris quoted in** Walters v. Dock Commission of City of Portland, 266 P. 634, 637, 126 Or. 487, motion denied 270 P. 778, 126 Or. 487.
Va.—**Corpus Juris quoted in** Chesapeake & O. Ry. Co. v. Golladay, 180 S.E. 400, 406, 164 Va. 292.
39 C.J. p 279 note 55.

89. Or.—**Corpus Juris quoted in** Walters v. Dock Commission of City of Portland, 266 P. 634, 637, 126 Or. 487, motion denied 270 P. 778, 126 Or. 487.
39 C.J. p 279 note 56.

90. Or.—**Corpus Juris quoted in** Walters v. Dock Commission of City of Portland, 266 P. 634, 637, 126 Or. 487, motion denied 270 P. 778, 126 Or. 487.
39 C.J. p 279 note 57.

91. Okl.—Graney v. Midland Valley Ry. Co., 288 P. 838, 111 Okl. 128.

92. Ky.—Louisville & N. R. Co. v. Wilson, 266 S.W. 13, 205 Ky. 533.

93. Ky.—Louisville & N. R. Co. v. Hays, 128 S.W. 289.
Okl.—**Corpus Juris quoted in** Thurlow v. Failing, 272 P. 368, 372, 133 Okl. 277.
39 C.J. p 279 note 59.

94. Miss.—Legan & McClure Lumber Co. v. Fairchild, 124 So. 336, 155 Miss. 271.
N.H.—Saunders v. Boston & M. R. R., 136 A. 264, 82 N.H. 476, 50 A.L.R. 367.
Okl.—**Corpus Juris quoted in** Thurlow v. Failing, 272 P. 368, 372, 133 Okl. 277.
39 C.J. p 279 note 60.

95. Okl.—**Corpus Juris quoted in** Thurlow v. Failing, 272 P. 368, 372, 133 Okl. 277.
39 C.J. p 279 note 61.

Implied invitation
Where mill employee had gone upon his employer's premises at night while mill was on fire and had assisted in preserving mill from fire, an invitation of employer to render services was implied by law.—Shoaf v. Fitzpatrick, C.C.A.Tenn., 104 F.2d 290, certiorari denied 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 518.

96. Okl.—**Corpus Juris quoted in** Thurlow v. Failing, 272 P. 368, 372, 133 Okl. 277.
39 C.J. p 280 note 62.

97. Okl.—**Corpus Juris quoted in** Thurlow v. Failing, 272 P. 368, 372, 133 Okl. 277.
39 C.J. p 280 note 63.

98. U.S.—Thomson v. Boles, 123 F. 2d 487, certiorari denied 62 S.Ct. 632, 315 U.S. 804, 86 L.Ed. 1204.
N.H.—Perkins v. Nashua Mfg. Co., 16 A.2d 700, 91 N.H. 211.
Or.—**Corpus Juris cited in** Fitzgerald v. Oregon-Washington R. & Nav. Co., 16 P.2d 27, 30, 141 Or. 1.
39 C.J. p 280 note 64.

Incidental cessation from work as not changing period or continuity of service see supra § 180 b.

Injuries to saleswoman in elevator during lunch hour while going to another part of store on own affairs were held sustained within scope of employment.—Woodward & Lothrop v. Lineberry, 50 F.2d 314, 60 App.D.C. 164, followed in 50 F.2d 317, 60 App.D.C. 167, and certiorari denied Lineberry v. Woodward & Lothrop, 52 S.Ct. 29, 284 U.S. 648, 76 L.Ed. 550.

99. Mo.—Arkell v. Baltimore & O. R. Co., 131 S.W.2d 590.
39 C.J. p 280 note 65.

1. U.S.—Geneva Mill Co. v. Andrews, C.C.A.Fla., 11 F.2d 924.
Kan.—Parkinson Sugar Co. v. Riley, 81 P. 1090, 50 Kan. 401, 34 Am.S.R. 123.

2. Colo.—Rapson Coal Min. Co. v. Micheli, 164 P. 311, 62 Colo. 330.

3. Mo.—Arkell v. Baltimore & O. R. Co., 131 S.W.2d 590.
39 C.J. p 280 note 68.

Payment of personal debt
An employee in mill, who was injured when she left her place of work, and walked through passageway in mill to pay a personal debt to mill nurse was not injured while outside scope of employment, where errand was permitted by employee's foreman, errand did not take employee away from mill premises.

and a servant eating lunch near his place of work on the employer's premises is still within his line of duty,[4] but the rule is otherwise where the servant wanders to out-of-the-way or dangerous places on the premises or uses parts thereof for purposes wholly disconnected from, and in no way pertaining to, the business in hand or the objects of his employment.[5]

§ 182. —— Youthful and Inexperienced Servants

In order to make a master liable for personal injuries to youthful and inexperienced servants, the injuries must have been received within the scope of the servant's employment. An employer may assign a minor employee to any employment incident to the employer's work unless prohibited by statute.

The general rule, as discussed supra § 181 a that, in order to make a master liable for personal injuries to his servant, the injuries must have been received within the scope of the servant's employment, applies as well to youthful and inexperienced servants as to adult and experienced employees.[6] An employer hiring a minor under a general contract with the approval of his parent may assign the employee to any character of employment incident to the employer's work unless prohibited from doing so by statute.[7]

§ 183. Care Required of Master

a. In general
b. Under Federal Employers' Liability Act

a. In General

A master is under a duty to exercise ordinary or reasonable care to protect his servant from injury.

While, as discussed supra § 171, a master is not an insurer of his servant's safety, the duty of a master is to exercise due care to protect his servant from injury.[8] The degree of care exacted is that of ordinary[9] or reasonable[10] care; generally no

only a few minutes were required for errand, and errand was not a preparatory or final incident in connection with employee's work.—Perkins v. Nashua Mfg. Co., 16 A.2d 700, 91 N.H. 211.

4. U.S.—Virginian Ry. Co. v. Early, C.C.A.Va., 130 F.2d 548.
Ind.—Domestic Block Coal Co. v. Holden, 103 N.E. 73, 56 Ind.App. 634.

5. Ga.—Austin v. Henry Grady Hotel Co., 200 S.E. 466, 58 Ga.App. 861.

6. U.S.—Watkins v. Thompson, D.C. Mo., 72 F.Supp. 953.
Cal.—Humphreys v. San Francisco Area Council, Boy Scouts of America, 139 P.2d 941, 22 Cal.2d 436.
39 C.J. p 280 note 70.

7. Tex.—Houston Pipe Line Co. v. Beasley, Civ.App., 49 S.W.2d 950.
Employments in violation of statute see infra § 194.

8. Md.—Virginia Dare Stores v. Schuman, 1 A.2d 897, 175 Md. 287.
N.C.—Southwell v. Atlantic Coast Line R. Co., 127 S.E. 361, 189 N.C. 417.
39 C.J. p 281 note 75.

One hiring convict labor owes a convict the duty of care.—Smith v. Raleigh Granite Co., 162 S.E. 731, 202 N.C. 305.

Railroad leasing tracks

A railway company running its trains over the leased tracks of another company is not relieved of the duty it owes to its employees to use reasonable care to provide for the safe operation of its trains while upon such leased tracks.—Floody v. Chicago, St. P. M. & O. R. Co., 123 N.W. 815, 109 Minn. 228, 134 Am.S.R. 771, 18 Ann.Cas. 274.

9. U.S.—Garrett Const. Co. v. Aldridge, C.C.A.Ark., 73 F.2d 814—Cochran v. Pittsburgh & L. E. R. Co., D.C.Ohio, 31 F.2d 769.
Ark.—**Corpus Juris cited in** Mercury Mining Co. v. Chambers, 102 S.W. 2d 543, 544, 193 Ark. 771.
Iowa.—Bell v. Brown, 239 N.W. 785, 214 Iowa 370.
Mo.—Walser v. Kuhlmann, App., 176 S.W.2d 658—Pietraschke v. Pollnow, App., 147 S.W.2d 167—Page v. Unterreiner, App., 106 S.W.2d 528.
N.C.—McLaughlin v. Black, 1 S.E.2d 130, 215 N.C. 85.
S.C.—Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259.
Tex.—El Paso Electric Co. v. Gregston, Civ.App., 170 S.W.2d 515.
39 C.J. p 281 note 77.

10. Ga.—Blair v. Fulton Bakery, 24 S.E.2d 598, 68 Ga.App. 879.
Minn.—Jenkins v. Jenkins, 19 N.W. 2d 389, 220 Minn. 216—Symons v. Great Northern Ry. Co., 293 N.W. 303, 208 Minn. 240.
Miss.—Stewart v. Kroger Grocery, Etc., Co., 21 So.2d 912, 198 Miss. 371—Harvey v. Smith, 198 So. 739, 190 Miss. 130.
Mo.—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228—Smith v. Southern Illinois & Missouri Bridge Co., 30 S.W.2d 1077, 326 Mo. 109—Marsanick v. Luechtefeld, App., 157 S.W. 2d 537—Sweeney v. Terminal R. Ass'n of St. Louis, App., 110 S.W. 2d 852.
N.H.—Hussey v. Boston & M. R. R., 133 A. 9, 82 N.H. 236.
N.J.—Clayton v. Ainsworth, 4 A.2d 274, 122 N.J.Law 160.
N.C.—Clinard v. Clinard Electric Co., 136 S.E. 1, 192 N.C. 736.
S.C.—Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259.
Tex.—Dell v. Lancaster, Civ.App., 285 S.W. 685.
W.Va.—Linville v. Chesapeake & O. Ry. Co., 177 S.E. 538, 115 W.Va. 610.
Wyo.—Chicago & N. W. Ry. Co. v. Ott, 237 P. 238, 33 Wyo. 200, rehearing denied 238 P. 287, 33 Wyo. 200, certiorari denied 46 S.Ct. 201, 269 U.S. 585, 70 L.Ed. 425.
39 C.J. p 281 note 78.

Reasonable precautions

A master must adopt all reasonable means and precautions to provide for the safety of his employees while they are engaged in his employment.
U.S.—Sandidge v. Atchison, T. & S. F. R. Co., Cal., 193 F. 867, 113 C.C. A. 653.
Mo.—Sweeney v. Terminal R. Ass'n of St. Louis, App., 110 S.W.2d 852.

Drinking water

While employers who undertake to furnish water for employees are bound to take reasonable precaution to see that such water is free from germs and dangerous impurities, where the water is part of a city water supply which is regularly tested it would not ordinarily be necessary for the employer to test the water again before furnishing it to employees although he should see that the means by which it is brought to his employees are kept uncontaminated; but, where water is brought from a well or spring, the exercise of ordinary care would indicate that

higher degree of care is required,[11] and a master may be liable although not guilty of gross negligence.[12] In the proper performance of his duties as master, he is bound to exercise care and prudence to prevent his employees from being subjected to unreasonable risks or dangers,[13] and he agrees by implication of law not to subject a servant employed by him to extraordinary or unusual perils.[14] He must exercise reasonable care to eliminate those elements of danger to the servant's life and limb which are not the usual and natural incident of the service when the master has exercised reasonable care,[15] and he must not expose his employees to perils or hazards against which they may be guarded by proper diligence on his part.[16] While under the provisions of a state employers' liability act a much higher degree of care has been required of an employer than is required under the common law[17] and the employer must exercise every care and precaution for the safety of his employees,[18] another state enactment has been held to be declaratory of the common law as to the duties imposed on those coming within its terms.[19] Where a contractee reserves the right to direct the manner of performance of a contract in any particular, he owes an independent contractor thereunder the duty of exercising reasonable care with respect thereto.[20]

Subject to the requirement of the exercise of reasonable care, a master may conduct his business as he chooses,[21] and he is not required to foresee the negligence of his servant and to guard against it,[22] nor is he required to take better care of the servant than the servant may reasonably be expected to take of himself,[23] but a master's liability may be measured by his own knowledge of the actual facts, and not by his knowledge of the servant's ignorance of the facts.[24] The fact that an employer is not financially able to act otherwise does not excuse his negligence.[25]

Under the general rules as to negligence the question of what constitutes reasonable or ordinary care must be determined with regard to the circumstances of the employment,[26] and the standard resorted to is that of the conduct of an ordinarily prudent person under such circumstances[27] and looking at the situation in advance of the accident.[28] While the duty of a master is that of exercising reason-

it should be regularly tested before furnished to employees and this is so even though it comes from a well which has been used with apparent immunity by the community for one hundred years.—Union Mining Co. v. Blank, 28 A.2d 568, 181 Md. 62.

11. Ga.—Blair v. Fulton Bakery, 24 S.E.2d 598, 68 Ga.App. 879.
39 C.J. p 281 note 79.

The utmost of a master's duty is the exercise of reasonable care.—Basye v. Odom, 168 S.W.2d 1092, 205 Ark. 423.

12. Ky.—Kington Coal Co. v. Aaron, 144 S.W. 371, 147 Ky. 480.

13. Ill.—McCulloch v. Illinois Steel Co., 90 N.E. 664, 243 Ill. 464.

14. U.S.—Gravelle v. Minneapolis & St. L. R. Co., C.C.Minn., 10 F. 711, 3 McCrary 352.

15. Iowa.—Rehard v. Miles, 290 N.W. 702, 227 Iowa 1290.

16. U.S.—Hough v. Railway Co., Tex., 100 U.S. 213, 25 L.Ed. 612—Sandidge v. Atchison, T. & S. F. R. Co., 193 F. 867, 113 C.C.A. 653.
Mo.—Sweeney v. Terminal R. Ass'n of St. Louis, App., 110 S.W.2d 852.

17. Or.—Hoffman v. Broadway Hazelwood, 10 P.2d 349, 139 Or. 519, 83 A.L.R. 1008, rehearing denied 11 P.2d 814, 139 Or. 519, 83 A.L.R. 1008.

Care commensurate with danger
The care required of an employer is commensurate with the degree of danger in the nature of the employment involved.—Union Oil Co. of California v. Hunt, C.C.A.Or., 111 F.2d 269.

18. Or.—Coomer v. Supple Inv. Co., 274 P. 302, 128 Or. 224.

19. Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259, 216 Ind. 180.

20. Ariz.—Arizona Binghampton Copper Co. v. Dickson, 195 P. 538, 22 Ariz. 163.
Liability of contractee as employer for injury to independent contractor see supra § 175.
Liability and care required of contractee to independent contractor generally see infra § 607.

21. Mo.—Gunning v. J. R. Kelley Cooperage Co., 165 S.W. 1140, 178 Mo.App. 244—Dickinson v. Jenkins, 128 S.W. 280, 144 Mo.App. 132.

22. U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.
Ala.—**Corpus Juris quoted in** Seaboard Air Line Ry. Co. v. Hackney, 115 So. 869, 873, 217 Ala. 382.
39 C.J. p 282 note 95.

A master may assume servant will take precautions for his own safety.—Clark v. Wheelock, Mo.App., 293 S.W. 456.

23. Ala.—**Corpus Juris quoted in** Seaboard Air Line Ry. Co. v. Hackney, 115 So. 869, 873, 217 Ala. 382.
N.C.—Scott v. Western Union Telegraph Co., 153 S.E. 413, 198 N.C. 795.
Pa.—Wood v. William Kane Mfg. Co., 101 A. 73, 257 Pa. 13.

24. Mo.—Hamilton v. Standard Oil Co. of Indiana, 19 S.W.2d 679, 323 Mo. 531.

25. Idaho.—Warner v. Pittsburg-Idaho Co., 220 P. 492, 38 Idaho 254.

26. N.C.—Ridge v. Norfolk Southern R. Co., 83 S.E. 762, 167 N.C. 510, 526, L.R.A.1917E 215.
39 C.J. p 281 note 82.

In the case of a corporation employer, reasonable diligence implies such watchfulness, caution, and foresight as under all the circumstances of the particular service a corporation controlled by careful and prudent officers ought to exercise.—Sweeney v. Terminal R. Ass'n of St. Louis, Mo.App., 110 S.W.2d 852—39 C.J. p 282 note 89.

27. Ark.—Seaman Store Co. v. Bonner, 113 S.W.2d 1106, 195 Ark. 563—Burden v. Hughes, 55 S.W.2d 502, 186 Ark. 707.
Iowa.—Rehard v. Miles, 290 N.W. 702, 227 Iowa 1290.
Miss.—Harvey v. Smith, 198 So. 739, 190 Miss. 130.
Mo.—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228—Sweeney v. Terminal R. Ass'n of St. Louis, App., 110 S.W.2d 852.
N.C.—Clinard v. Clinard Electric Co., 136 S.E. 1, 192 N.C. 736.
39 C.J. p 281 note 83.

28. N.Y.—Watson v. New York Contracting Co., 111 N.Y.S. 277, 127 App.Div. 134.
Duty to anticipate consequences see infra § 188.

able care whether the business is comparatively safe or is extremely dangerous,[29] the degree of care required should be measured by the dangers to be apprehended or avoided.[30] The acts of care and precaution required by ordinary prudence are to be determined as matters of fact from a consideration of the danger incident to the agency employed as well as from other circumstances and conditions,[31] and the precautions required increase with the known dangers.[32]

Extraordinary risks. The fact that a servant is experienced does not relieve the master from the duty to protect him from risks which are not natural and ordinary incidents to the conduct of the business and which could have been removed by the exercise of due diligence.[33] Where the nature of the work is such that the employee cannot by the exercise of ordinary care know of the danger, it is the duty of the employer to take the necessary precautions for the protection of the employee,[34] and the master owes the employee the duty of exercising ordinary care not to create or expose him to new or unanticipated danger.[35]

Emergencies. In the case of an emergency, the employer must act as an ordinarily careful and prudent man would under the same circumstances,[36] and, in case of the immediate peril of an employee, the servants of the master on hand must use such care as might be reasonably expected from such persons.[37] It has been held, however, that in such an emergency, when there is no time for deliberation or thought, negligence cannot be imputed from the fact that a wrong course was pursued in endeavoring to avert injury.[38]

Customs and usages. While the standard of conduct required of an employer for the protection of his employees is prescribed by law and not by custom or practice,[39] and although custom and usage may not be controlling as fixing the standard of care required of an employer with respect to the safety of his employees,[40] custom and usage may be accepted where the custom or practice is not in itself negligent or in disregard of the safety of the employee.[41] In determining the question of negligence, the rules and general practice governing the conduct of those engaged in the particular employment may be considered,[42] and usage is of more import in determining the gauge of care of a master toward his servant than of persons in other relations.[43]

Physical condition of servant. Ordinarily an employer of labor does not owe a person seeking em-

29. Ind.—Decatur v. Eady, 115 N.E. 577, 186 Ind. 205, L.R.A.1917E 242.
39 C.J. p 282 note 85.

30. U.S.—Sandidge v. Atchison, T. & S. F. R. Co., Cal., 193 F. 867, 113 C.C.A. 653.
Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.
Miss.—Stewart v. Kroger Grocery, Etc., Co., 21 So.2d 912, 198 Miss. 371.
Mo.—Sweeney v. Terminal R. Ass'n of St. Louis, App., 110 S.W.2d 852.
N.H.—Lafontaine v. St. John, 30 A. 2d 476, 92 N.H. 319.
N.C.—McGraw v. Southern Ry. Co., 175 S.E. 286, 206 N.C. 873.
Tenn.—Nashville Bridge Co. v. Hudgins, 137 S.W.2d 327, 23 Tenn. App. 677.
Va.—Chesapeake & O. Ry. Co. v. Steele's Adm'x, 135 S.E. 677, 146 Va. 22.
Wyo.—Chicago & N. W. Ry. Co. v. Ott, 237 P. 238, 33 Wyo. 200, rehearing denied 238 P. 287, 33 Wyo. 200, certiorari denied 46 S.Ct. 201, 269 U.S. 585, 70 L.Ed. 425.

Similar statements

(1) The nature of the business and particular dangers involved determine amount of care required by a master in any particular case.—Roberts v. United Fisheries Vessels Co., C.C.A.Mass., 141 F.2d 288, certiorari denied 65 S.Ct. 81, 323 U.S. 753, 89 L.Ed. 603.

(2) The character and risk of the work engaged in have been held to be the measure of negligence as between employer and employee, and an employer must exercise such ordinary and reasonable care and precaution for the safety of his employee as the nature and danger of the business admit of and demand.—Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259.

31. Ind.—Decatur v. Eady, 115 N.E. 577, 186 Ind. 205, L.R.A.1917E 242.

32. Miss.—Hercules Powder Co. v. Williamson, 110 So. 244, 145 Miss. 172.
39 C.J. p 282 note 87.

A master using explosives must exercise the highest degree of care to safeguard his servants.—Hercules Powder Co. v. Williamson, supra.

Railroads operating freight trains are held to high standard of care reasonably commensurate with dangers usually attendant on work.—McGraw v. Southern Ry. Co., 175 S. E. 286, 206 N.C. 873.

33. Cal.—Brown v. Sharp-Hauser Contracting Co., 112 P. 874, 159 Cal. 89.
39 C.J. p 282 note 91.

34. Md.—Wood v. Heiges, 34 A. 872, 83 Md. 257, 268.
39 C.J. p 282 note 92.

35. Tenn.—Harrison v. Graham, 107 S.W.2d 517, 21 Tenn.App. 189.

36. Ala.—Bessemer Land & Improvement Co. v. Campbell, 25 So. 793, 121 Ala. 50, 77 Am.S.R. 17.

37. U.S.—Hossack v. Metzger, C.C. A.S.D., 156 F.2d 501.
39 C.J. p 283 note 99.

Ignorance of that which should be known may be the basis of negligence in the case of an emergency.—Raolaslovic v. New York Cent. R. Co., 156 N.E. 625, 245 N.Y. 91.

38. Ill.—Todd v. Daniels, 153 Ill. App. 223.

39. Tex.—El Paso Electric Co. v. Gregston, Civ.App., 170 S.W.2d 515.
Customary methods of work see infra § 267.
Customs and usages as to relationship of master and servant generally see Customs and Usages § 19 i.

40. U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.

41. U.S.—McGivern v. Northern Pac. Ry. Co., supra.

42. U.S.—Canadian Northern R. Co. v. Senske, Minn., 201 F. 637, 120 C.C.A. 65.
39 C.J. p 282 note 90.

43. Mo.—Zesch v. Abrasive Co. of Philadelphia, 183 S.W.2d 140, 353 Mo. 558, 156 A.L.R. 469.

ployment the duty not to hire him if he is physically unfit for the labor he wishes to undertake.[44] Where a servant is aware of his unfitness for a particular work, the master is not negligent in allowing him to continue in the employment when the servant sustains injury therefrom.[45] In order that the employer may be guilty of negligence in allowing the employee to work in a place of peculiar danger to him because of his physical condition, it must be shown not only that the master had knowledge of such physical condition and that the employee was ignorant thereof, but also that the employer did not know of the employee's ignorance.[46] The duty of the master, if any, to protect the servant from dangers arising from the servant's intoxicated condition must be predicated on the fact that the master knew or ought to have known of the servant's condition.[47]

Occupational diseases. The common-law rule of nonliability of a master for injuries to his servant from occupational diseases does not apply to injuries that are preventable by the exercise of reasonable diligence, where the law imposes a duty on the master to use such care to protect the servant from such injuries,[48] and it is just as much the duty of a master to use reasonable care to protect his servants against disease-producing dangers of employment as it is his duty to use reasonable care to protect them against dangers of the employment which produce physical injuries.[49] In determining whether an employer is negligent within the meaning of a state occupational disease act, the test is what a reasonably prudent person would have done under a similar situation, rather than what some other person did or did not do.[50]

Transportation of employee. An employer undertaking to, or under an obligation to, transport his employee to and from work has the duty of exercising reasonable or ordinary care to convey him safely.[51] Where a carrier is transporting one of its employees as an employee and not as a passenger, it has been held to the exercise of reasonable care to avoid his injury,[52] and it has been held that, although he is not, strictly speaking, a passenger, if he is rightfully upon the train, he is entitled to the care required toward passengers.[53]

b. Under Federal Employers' Liability Act

Under the Federal Employers' Liability Act an employer owes his employee the duty of due care and the measure of his conduct is that of a reasonable and prudent man under the circumstances of the situation.

Under the Federal Employers' Liability Act an employer's liability is to be determined under the

44. Me.—Glidden v. Bath Iron Works Corp., 54 A.2d 528.

45. Okl.—Knox v. Schomaker, 129 P.2d 841, 191 Okl. 337.

Reason for rule

The servant must determine for himself whether his health and strength are adequate for performance of the labor agreed to be performed under the terms of his employment, and the master is not liable for injuries to the servant sustained by overexertion in performing the stipulated labor.—Knox v. Schomaker, supra—Warden-Pullen Coal Co. v. Wallace, 56 P.2d 802, 176 Okl. 604.

46. Mass.—Crowley v. Appleton, 18 N.E. 675, 148 Mass. 98.

47. Minn.—Parker v. Winona & St. P. R. Co., 86 N.W. 2, 83 Minn. 212.

48. Ala.—Gentry v. Swann Chemical Co., 174 So. 530, 234 Ala. 313.

Liability for injury to employee from occupational diseases generally see infra § 187.

49. Ga.—Blair v. Fulton Bakery, 24 S.E.2d 598, 68 Ga.App. 879—Connell v. Fisher Body Corporation, 192 S. E. 484, 56 Ga.App. 203.

Tenn.—Nashville Bridge Co. v. Hudgins, 137 S.W.2d 327, 23 Tenn.App. 677.

50. U.S.—Scroggs v. American Stove Co., C.C.A.Ind., 142 F.2d 297.

51. U.S.—Standard Oil Co. of Louisiana v. Martin, C.C.A.Ark., 21 F. 2d 912.

Ark.—Producers Gravel & Sand Co. v. Jones, 126 S.W.2d 99, 197 Ark. 767—Haraway v. Mance, 56 S.W.2d 1023, 186 Ark. 971—Jonesboro, Lake City & E. R. Co. v. Wright, 281 S.W. 374, 170 Ark. 815.

Cal.—Hurtado v. San Diego Electric Ry. Co., 268 P. 620, 204 Cal. 446.

Conn.—Kruy v. Smith, 144 A. 304, 108 Conn. 628.

Fla.—Kendrick v. Ideal Holding Co., 188 So. 778, 137 Fla. 600.

N.C.—Mehaffey v. Appalachian Const. Co., 146 S.E. 72, 197 N.C. 22—Williams v. Atlantic Coast Line R. Co., 129 S.E. 816, 190 N.C. 366.

Okl.—Sears, Roebuck & Co. v. Robinson, 80 P.2d 938, 183 Okl. 253—Jamison v. Independent Oil & Gas Co., 12 P.2d 697, 158 Okl. 128—Cushing Refining & Gasoline Co. v. Deshan, 300 P. 312, 149 Okl. 225—Shunkamolah v. Delco, 268 P. 270, 131 Okl. 272—Producers' & Refiners' Corporation v. Castile, 246 P. 615, 118 Okl. 42—Producers & Refiners Corporation v. Castile, 214 P. 121, 89 Okl. 261—Pine Belt Lumber Co. v. Riggs, 193 P. 990, 80 Okl. 28.

Employee traveling for own convenience or pleasure on master's vehicle see infra § 184.

Horses and vehicles as tools and appliances for work see infra § 218.

Negligence not shown

Ark.—J. E. Parham Const. Co. v. Parker, 37 S.W.2d 879, 183 Ark. 673.

Miss.—Charles Weaver & Co. v. Harding, 180 So. 825, 182 Miss. 345.

52. U.S.—Dayton Coal & Iron Co. v. Dodd, Tenn., 188 F. 597, 110 C.C.A. 395, 37 L.R.A.,N.S., 456.

39 C.J. p 283 note 6.

Status of employee as passenger see Carriers § 546.

Employee traveling on "identification slip"

A railroad employee traveling to his place of employment on an "identification slip" naming him as an employee and containing no provision exempting railroad from liability for injury resulting from its negligence could recover from railroad for injuries resulting from negligent operation of train, even though he paid conductor no fare.—Missouri Pac. R. Co. v. Blackman, 126 S.W.2d 285, 197 Ark. 957.

53. Ark.—Chicago, R. I. & P. R. Co. v. Smith, 172 S.W. 829, 115 Ark. 473.

39 C.J. p 283 note 7.

general rule which defines negligence as the lack of due care under the circumstances,[54] or the failure to do what a reasonable and prudent man ordinarily would have done under the circumstances of the situation,[55] or doing what such a person, under the existing circumstances, would not have done;[56] and a master is liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.[57] Under the act the standard of care must be commensurate with the dangers of the business,[58] and the duty of an employer becomes more imperative as the risk increases.[59] However, the act has been held not to subject an employer to that degree of liability imposed by workmen's compensation laws.[60] The negligence of an employer, under the act, may be determined by viewing his conduct as a whole,[61] especially where the elements indicating negligence are closely interwoven and where each imparts character to the others.[62] An employer may rightfully presume that his employee will exercise care for his own safety,[63] and an employer is not negligent because of not guarding against his employee's negligence.[64]

§ 184. —— As to Volunteers and Trespassers

A master's duty toward a servant who has become a trespasser is merely to refrain from willful or wanton injury, but toward a volunteer he may owe a higher duty of care.

Where a servant who is not acting within the scope of his employment has become a mere trespasser, the duty of the master is merely to refrain from willful or wanton injury.[65] Similarly, where a servant is traveling for his own convenience or pleasure and not in the service of the master, or in the performance of any duty for him, although he is upon a vehicle belonging to the master, the duty of the master is simply to refrain from willful or wanton injury.[66] However, a master owes a much higher duty than merely refraining from willfully

54. U.S.—Tiller v. Atlantic Coast Line R. Co., Va., 63 S.Ct. 444, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 967—Wolfe v. Henwood, C.C.A. Ark., 162 F.2d 998—Hutchins v. Akron, C. & Y. R. Co., C.C.A.Ohio, 162 F.2d 189—Sheaf v. Minneapolis, St. P. & S. S. M. R. Co., C.C.A. N.D., 162 F.2d 110—Chesapeake & O. Ry. Co. v. Richardson, C.C.A. Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531.
Mo.—Joice v. Missouri-Kansas-Texas R. Co., 189 S.W.2d 568, 354 Mo. 439, 161 A.L.R. 383.
Ohio.—Beam v. Baltimore & O. R. Co., 68 N.E.2d 159, 77 Ohio App. 419.
Va.—Beamer v. Virginian Ry. Co., 26 S.E.2d 43, 181 Va. 650, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060.

55. U.S.—Tiller v. Atlantic Coast Line R. Co., Va., 63 S.Ct. 444, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 967—Wolfe v. Henwood, C.C.A. Ark., 162 F.2d 998—Hutchins v. Akron, C. & Y. R. Co., C.C.A.Ohio, 162 F.2d 189—Sheaf v. Minneapolis, St. P. & S. S. M. R. Co., C.C.A. N.D., 162 F.2d 110.
Mo.—Joice v. Missouri-Kansas-Texas R. Co., 189 S.W.2d 568, 354 Mo. 439, 161 A.L.R. 383.
N.Y.—Sadowski v. Long Island R. Co., 41 N.Y.S.2d 611, 266 App.Div. 782, reversed on other grounds 55 N.E.2d 497, 292 N.Y. 448, conformed to 50 N.Y.S.2d 171, 268 App.Div. 777.
Ohio.—Beam v. Baltimore & O. R. Co., 68 N.E.2d 159, 77 Ohio App. 419.
Va.—Beamer v. Virginian Ry. Co., 26 S.E.2d 43, 181 Va. 650, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060.

The test to be applied in determining the standard of care on the part of an employer under the Federal Employers' Liability Act is that of a reasonable person.—Holl v. Southern Pac. Co., D.C.Cal., 71 F.Supp. 21.

56. U.S.—Tiller v. Atlantic Coast Line R. Co., Va., 63 S.Ct. 444, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 967—Wolfe v. Henwood, C.C.A. Ark., 162 F.2d 998—Hutchins v. Akron, C. & Y. R. Co., C.C.A.Ohio, 162 F.2d 189—Sheaf v. Minneapolis, St. P. & S. S. M. R. Co., C.C.A. N.D., 162 F.2d 110.
Mo.—Joice v. Missouri-Kansas-Texas R. Co., 189 S.W.2d 568, 354 Mo. 439, 161 A.L.R. 383.
Ohio.—Beam v. Baltimore & O. R. Co., 68 N.E.2d 159, 77 Ohio App. 419.
Va.—Beamer v. Virginian Ry. Co., 26 S.E.2d 43, 181 Va. 650, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060.

57. U.S.—Tiller v. Atlantic Coast Line R. Co., Va., 63 S.Ct. 444, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 967.

58. U.S.—Bailey v. Central Vermont Ry., Inc., 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433—Tiller v. Atlantic Coast Line R. Co., Va., 63 S.Ct. 444, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 967—Wolfe v. Henwood, C.C.A.Ark., 162 F.2d 998.

Except possibly for added emphasis on the accepted corollary that the standard of care must be commensurate with the dangers of the business, the definition of "negligence" under the Federal Employers' Liability Act differs in nowise from its definition under the general law.—Eckenrode v. Pennsylvania R. Co., D. C.Pa., 71 F.Supp. 764.

59. U.S.—Blair v. Baltimore & O. R. Co., Pa., 65 S.Ct. 545, 323 U.S. 600, 89 L.Ed. 490.

60. U.S.—Wolfe v. Henwood, C.C.A. Ark., 162 F.2d 998.

61. U.S.—Blair v. Baltimore & O. R. Co., Pa., 65 S.Ct. 545, 323 U.S. 600, 89 L.Ed. 490.
Mo.—Joice v. Missouri-Kansas-Texas R. Co., 189 S.W.2d 568, 354 Mo. 439, 161 A.L.R. 383.

62. U.S.—Blair v. Baltimore & O. R. Co., Pa., 65 S.Ct. 545, 323 U.S. 600, 89 L.Ed. 490.

63. U.S.—New York, C. & St. L. R. Co. v. Boulden, C.C.A.Ind., 63 F.2d 917, certiorari denied 53 S.Ct. 785, 289 U.S. 753, 77 L.Ed. 1498.

64. U.S.—New York, C. & St. L. R. Co. v. Boulden, supra.

65. Mo.—Weed v. American Car & Foundry Co., 14 S.W.2d 652, 322 Mo. 137.
39 C.J. p 283 note 3.
Scope of employment in general see supra § 181.

"Actual notice," such as requires master to refrain from willfully or wantonly injuring trespassing servant, often means knowledge of facts enabling reasonably cautious person to ascertain ultimate fact.—Weed v. American Car & Foundry Co., supra.

66. N.C.—Shaw v. National Handle Co., Inc., 124 S.E. 325, 188 N.C. 222.

injuring a servant who does some act not within the contractual scope of his employment, but for the master's benefit, although such servant is merely a volunteer.[67]

While it has been held that a master generally owes no duty to a person voluntarily assisting a servant except the duty not wantonly or willfully to injure him,[68] the fact that a person is a volunteer has been held not to deprive him of his right to be protected by the same degree of care which the master owes to other strangers,[69] and it has also been held that a volunteer, assisting or taking the place of a regular employee, is entitled to the exercise of that degree of care owing to persons rightfully upon the employer's premises.[70] It has further been held that reasonable care is required as to a volunteer requested by a servant of the master, with authority to do so, to give his assistance, even though such service is gratuitous,[71] and that a master owes as high a duty to one who accepts without compensation or contract the position of a servant as to an employee.[72] It has been held that a master must exercise ordinary care to protect a person rendering temporary assistance on a servant's request for help to meet an emergency.[73]

§ 185. —— As to Inexperienced or Minor Servants

Ordinarily an employer of minor servants must observe a higher degree of care for their safety than he is required to exercise toward adult servants, and an analogous rule prevails as to inexperienced servants.

The mere fact that a servant is a minor does not necessarily impose on the master any other or greater degree of care with respect to such servant than would be the case if he had attained full age,[74] and a minor employed contrary to the rule of a company is entitled to the ordinary care due from an employer to an employee when he performs services without notice of the rule and has been employed by one authorized to hire him for such purpose.[75] However, the duty of persons who employ minors to anticipate the ordinary behavior of children and to take notice of their lack of judgment must be taken into consideration in the determination of whether due care has been exercised, and to this extent it must be considered to be the duty of the master to exercise greater care for and toward them than is required by law to be exercised toward and for adults.[76] So, where a minor is employed in a business, the danger of which he is unable, by reason of his immature judgment, to comprehend, and is by reason thereof injured, the master has been held liable.[77]

The employment of a minor in a dangerous occupation or place is not negligence per se,[78] or, as it is often stated, no presumption of negligence on

67. U.S.—Western Coal & Mining Co. v. McCallum, Ark., 237 F. 1003, 151 C.C.A. 65.
39 C.J. p 283 note 4.

68. Ohio.—Ohm v. Miller, 167 N.E. 482, 31 Ohio App. 446.

69. Or.—Rook v. Schultz, 198 P. 234, 100 Or. 482.
39 C.J. p 269 note 68.
Volunteer as servant within rule relating to liability for injuries see supra § 177.

70. Okl.—Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 148 Okl. 107.

71. Mo.—Menard v. Goltra, 40 S.W. 2d 1053, 328 Mo. 368.

72. Mass.—Lakube v. Cohen, 23 N. E.2d 144, 304 Mass. 156.

73. Ohio.—Ohm v. Miller, 167 N.E. 482, 31 Ohio App. 446.

74. Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 744, 181 Miss. 573.
Mo.—Shey v. Central Coal & Coke Co., 21 S.W.2d 772, 323 Mo. 1058.
39 C.J. p 283 note 11.

75. Kan.—Brown v. Atchison, T. & S. F. R. Co., 180 P. 211, 104 Kan. 505.

76. Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 744, 181 Miss. 573.
39 C.J. p 283 note 12.

Notice of apparent age and ability
It is the duty of one who employs young persons in his service to take notice of their apparent age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they ought not to be exposed, and the failure to perform such duty leaves the employer subject to the same liability with respect to such risks as though the minors were not employees.
Md.—Chambers v. Woodbury Mfg. Co., 68 A. 290, 106 Md. 496, 501, 14 L.R.A.,N.S., 383.
N.C.—McLaughlin v. Black, 1 S.E.2d 130, 215 N.C. 85.

Capacity as test
(1) Age and experience of injured employee and his capacity to observe and appreciate danger must be considered in determining liability.—Fowler v. Carolina Cross Arm & Conduit Co., 133 S.E. 188, 192 N.C. 14.

(2) The known incapacity of servant, owing to tender age, to appreciate danger is factor to be considered in determining whether master is negligent in ordering servant to work under conditions where danger to servant is patent to master.—Jordan v. Batavias, 186 S.E. 451, 53 Ga. App. 538.

(3) Other similar statements see 39 C.J. p 283 note 12 [e].

The degree of care required is commensurate with the minor's youth and inexperience.—Pietraschke v. Pollnow, Mo.App., 147 S.W.2d 167—39 C.J. p 283 note 12 [g].

Acts held not negligent
(1) Employer sending a ten-year old employee to make delivery with hand wagon has been held not negligent in subjecting employee to traffic hazards so as to be liable for negligent injury of employee by motorist in street where boy was free to use sidewalks.—Stucker v. American Stores Corporation, Del., 171 A. 230, 5 W.W.Harr. 594.

(2) Other acts see 39 C.J. p 283 note 12 [j].

77. Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 744, 181 Miss. 573.
39 C.J. p 284 note 13.

78. Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 744, 181 Miss. 573.
39 C.J. p 285 note 14.

the part of the master arises from the mere employment of a child about dangerous work[79] unless, as discussed infra § 194, the employment is in violation of statute. A recovery for injuries sustained by a minor employee is not authorized merely because he is a child.[80]

Misrepresentation of age. The fact that a minor answers falsely as to his age, and secures employment by so doing, in violation of a known rule against employing minors, does not make him a trespasser, or deprive him of his right to the same care for his protection that is due to any other employee, when actually engaged in his employer's service.[81] However, if the minor's age led to the injury, such misrepresentation has been held to relieve the employer of the higher duty which he owes to the minor and the minor is entitled only to the protection given an adult employee.[82]

Consent of parent. While in an action in behalf of the injured minor it has been held that the failure to secure the consent of the parent to the employment of the minor in a dangerous employment is in itself negligence,[83] there is also authority to the contrary,[84] and it has been held merely evidence of negligence.[85] A minor who, without notice of a rule forbidding the employment of minors without the written consent of their parents, performs service for a railway company at the instance of its foreman, is entitled to the care ordinarily due from an employer to an employee.[86]

As to inexperienced servants. An employer of inexperienced servants must observe a higher degree of care for their safety than he is required to exercise toward experienced servants,[87] the rule being analogous to that existing with respect to minors.[88]

§ 186. Delegation of Duties

The performance of the primary or absolute duties required of a master with respect to the safety of his servants may not be so delegated by him as to relieve him from liability for the consequences of the failure properly to discharge them.

The rule as laid down in Corpus Juris, which has been quoted and cited with approval, is that certain primary or absolute duties are imposed by law on a master, such as the provision of a safe place to work, the furnishing of safe and suitable appliances and instrumentalities for work, the employment of a sufficient number of servants, the selection of competent servants, and the establishment of proper rules and methods of work.[89] The performance of such primary or absolute duties may not be so delegated by the master as to relieve him from liability for the consequences of a failure properly to discharge them,[90] but the negligence of one to whom their performance is intrusted by the master is regarded as that of the master, for which he is responsible,[91] even though they are intrusted to a person of approved skill and fitness.[92]

79. Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 744, 181 Miss. 573.
39 C.J. p 285 note 15.

80. Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 744, 181 Miss. 573.
39 C.J. p 285 note 17.

81. Kan.—Lupher v. Atchison, T. & S. F. R. Co., 106 P. 284, 81 Kan. 585, 25 L.R.A.,N.S., 707.
39 C.J. p 285 note 19, p 903 note 36.
Misrepresentation as defense to statutory liability see infra § 194.

82. Colo.—Denver & R. G. R. Co. v. Reiter, 107 P. 1100, 47 Colo. 417.
39 C.J. p 285 note 20, p 904 note 37.

83. U.S.—Goff v. Norfolk & W. R. Co., C.C.Va., 36 F. 299.
39 C.J. p 285 note 21.

84. W.Va.—Ewing v. Lanark Fuel Co., 65 S.E. 200, 65 W.Va. 726, 29 L.R.A.,N.S., 487.

85. W.Va.—Ewing v. Lanark Fuel Co., supra.
39 C.J. p 285 note 23.

86. Kan.—Brown v. Atchison, T. & S. F. R. Co., 180 P. 211, 104 Kan. 505.

87. Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 744, 181 Miss. 573.
39 C.J. p 283 note 8.

88. Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 744, 181 Miss. 573.
39 C.J. p 283 note 9.

89. Ky.—**Corpus Juris cited in** Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 59, 263 Ky. 309.
Miss.—**Corpus Juris quoted in** Masonite Corporation v. Lochridge, 140 So. 223, 225, 163 Miss. 364, suggestion of error overruled 141 So. 758, 163 Miss. 364.
Tex.—**Corpus Juris cited in** Morton Salt Co. v. Wells, 70 S.W.2d 409, 411, 123 Tex. 151—**Corpus Juris cited in** Morton Salt Co. v. Wells, Civ.App., 35 S.W.2d 454, 457.
39 C.J. p 285 note 25.

90. Miss.—**Corpus Juris quoted in** Masonite Corporation v. Lochridge, 140 So. 223, 225, 163 Miss. 364, suggestion of error overruled 141 So. 758, 163 Miss. 364.
N.C.—McLaughlin v. Black, 1 S.E.2d 130, 215 N.C. 85—Nichols v. Champion Fibre Co., 128 S.E. 471, 190 N.C. 1.
39 C.J. p 286 note 26.
Delegation of duty as to:
Appliances see infra § 204.
Competency of fellow servants see infra § 311.
Methods of work see infra § 266.
Safe place to work see infra § 204.
Warning and instruction see infra § 285.

91. Miss.—**Corpus Juris quoted in** Masonite Corporation v. Lochridge, 140 So. 223, 225, 163 Miss. 364, suggestion of error overruled 141 So. 758, 163 Miss. 364.
N.J.—Clayton v. Ainsworth, 4 A.2d 274, 122 N.J.Law 160.
39 C.J. p 286 note 27.
Nondelegable character of act as test of relationship of fellow servant see infra § 333.

92. Miss.—**Corpus Juris quoted in** Masonite Corporation v. Lochridge, 140 So. 223, 225, 163 Miss. 364, suggestion of error overruled 141 So. 758, 163 Miss. 364.
N.Y.—Stewart v. Ferguson, 54 N.Y.S. 615, 34 App.Div. 515.

§ 187. Nature and Cause of Injury

a. In general

b. Occupational diseases.

a. In General

A master is liable for injury to a servant occurring in the course of his employment when, and only when, the latter's injury was proximately caused by the master's negligence, and this rule applies under the Federal Employers' Liability Act.

A master is liable for injury to a servant occurring in the course of his employment when, and only when, the latter's injury was proximately caused by the negligence of the master,[93] and where the proximate cause of the employee's injury is his own negligence, and not that of the employer, the employer is not liable therefor.[94] In order to establish proximate cause, it is essential in the first place that there be a causal connection between the negligent act and the injury,[95] and there can be no recovery where the cause of injury is purely conjectural.[96] Where several alleged acts of negligence concur, the master is not liable unless some one of them for which he is responsible is the efficient cause of the injury.[97]

Where the flow of events set in motion by the negligent act of the employer is broken by any new or independent cause the employer's negligence has been held not to be the proximate cause of the injury.[98] Thus, where the negligence complained of merely furnished a condition by which the injury was possible and a subsequent independent act caused the injury, the condition ordinarily is not the proximate cause of the injury.[99] So too, where the evidence does not show which of several possible causes, some of which do not involve negligence on the part of the master, produced the injury, the master has been held not liable.[1] However, where the master's negligence is the efficient cause of the injury, he is liable, although events of causative influence, or constituting a co-operative cause, may intervene between the negligence of the master and the final result,[2] and, where an employer is guilty of negligence without which an accident would not have happened, the fact that it would not have happened except for another intervening cause which was an act of God does not relieve the employer.[3] The fact that the injury might have occurred in the same manner in the absence of negligence on the part of a master does not relieve the master of liability therefor where it was in fact caused by his negligence.[4]

Under Federal Employers' Liability Act. Under the Federal Employers' Liability Act an employer is liable for injury or death of an employee when, and

93. U.S.—Dobbyn v. Boat Repairing Corporation, C.C.A.N.J., 25 F.2d 283.
Cal.—Worley v. Spieckels Bros. Commercial Co., 124 P. 697, 163 Cal. 60.
Mo.—**Corpus Juris cited in** Cain v. Humes-Deal Co., 49 S.W.2d 90, 94, 329 Mo. 1107—State ex rel. Boeving v. Cox, 276 S.W. 869, 310 Mo. 367.
N.C.—Boyd v. Seaboard Air Line Ry. Co., 156 S.E. 507, 200 N.C. 324—Clinard v. Clinard Electric Co., 136 S.E. 1, 192 N.C. 736—Nichols v. Champion Fibre Co., 128 S.E. 471, 190 N.C. 1.
Okl.—Traders Compress Co. v. Steigler, 169 P.2d 205, 197 Okl. 204—Parkhill Truck Co. v. Wilson, 125 P.2d 203, 190 Okl. 473—Munroe v. Schoenfeld & Hunter Drilling Co., 61 P.2d 1045, 178 Okl. 149—Singer Sewing Mach. Co. v. Odom, 45 P. 2d 473, 172 Okl. 411—Abdo v. Mullen, 44 P.2d 102, 173 Okl. 144—Thurlow v. Failing, 272 P. 368, 133 Okl. 277.
Pa.—Rice v. Kring, 165 A. 833, 310 Pa. 550.
39 C.J. p 261 note 40, p 286 note 30.

Test of master's liability
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S. C. 213.

Breach of duties by master or employer resulting as the proximate cause of injuries to servant or employee fixes on master or employer liability for damages for injuries sustained by servant or employee.—Greer v. Callahan Const. Co., 130 S. E. 739, 190 N.C. 632.

94. Ky.—Chesapeake & O. Ry. Co. v. Coleman, 294 S.W. 809, 220 Ky. 64.
Contributory negligence of servant generally see infra §§ 421–481.

Overtaxing strength
A master may not be held responsible if servant voluntarily overtaxes strength and injures himself.—Southern Mining Co. v. Cox, 50 S. W.2d 80, 243 Ky. 802.

95. Okl.—Abdo v. Mullen, 44 P.2d 102, 173 Okl. 144—Thurlow v. Failing, 272 P. 368, 133 Okl. 277.
Tex.—Guess v. Texas & N. O. R. Co., Civ.App., 55 S.W.2d 642.
39 C.J. p 287 note 33.

96. Tex.—Emmons v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 167, error dismissed, judgment correct.
39 C.J. p 287 note 34.

Some reasonable and probable connection must exist between an employee's injury and the negligence charged against his employer.—Emmons v. Texas & P. Ry. Co., supra.

97. Okl.—Traders Compress Co. v. Steigler, 169 P.2d 205, 197 Okl. 204.
39 C.J. p 287 note 35.

Chain of circumstances
The proximate cause of an injury to a servant must be the efficient cause which sets in motion a chain of circumstances leading to the injury.—Traders Compress Co. v. Steigler, supra.

98. Tex.—Fort Worth & D. C. Ry. Co. v. Rowe, Civ.App., 69 S.W.2d 169.

Mere remote negligence has been held not a sufficient basis of liability of an employer for injury to his employee under a state employers' liability act.—Detroit & T. Shore Line R. Co. v. Seigel, Ohio App., 153 N.E. 870.

99. Okl.—Traders Compress Co. v. Steigler, 169 P.2d 205, 197 Okl. 204.

1. Utah.—Tremelling v. Southern Pacific Co., 170 P. 80, 51 Utah 189.
39 C.J. p 287 note 36.

2. Mo.—Lawrence v. Heidbreder Ice Co., 93 S.W. 897, 119 Mo.App. 316, 328.
39 C.J. p 287 note 37.
Last clear chance doctrine generally see infra § 423.

3. Ill.—Casey v. Kelly-Atkinson Constr. Co., 146 Ill.App. 551, affirming 88 N.E. 982, 240 Ill. 416.
39 C.J. p 288 note 38.

4. Colo.—Denver, etc., R. Co. v. Smock, 48 P. 681, 23 Colo. 456.

only when, the injury or death was proximately caused by the employer's negligence.[5] An employer's liability for injury to his employee is predicated on a causal connection between the negligence of the employer and the injury sustained by the employee.[6] However, the act has enlarged the field of proximate cause so that where, and only where, injury or death of an employee is the result, in whole or in part, of his employer's negligence, the employer is liable therefor, even though there be a plurality of causes,[7] and an employer has been held liable for injury or death of an employee, where the negligence of the employer, although not the sole cause thereof, contributed thereto proximately as a substantial factor of causation.[8] However, an employer is not liable for an injury to his employee in the course of his employment where there was a direct, independent, and efficient intervening cause between the employer's negligence and the employee's injury.[9] In order to constitute an injury under the act, it need not occur on one specific date or result from one specific incident.[10]

b. Occupational Diseases

Ordinarily at common law an employer is not liable for injury to his servant caused by an occupational disease contracted in the course of his employment as an incident thereto unless the negligence of the employer is the cause of the employee's disease.

At common law, and in the absence of statute otherwise providing, an employer is not liable for injury to his servant caused by an occupational disease contracted in the course of his employment as an incident thereto[11] unless the negligence of the the

5. U.S.—Tiller v. Atlantic Coast Line R. Co., Va., 63 S.Ct. 444, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 967—Tennant v. Peoria & Pekin Union Ry. Co., C.C.A.Ill., 134 F.2d 860, reversed on other grounds 64 S.Ct. 409, 321 U.S. 29, 88 L.Ed. 520, rehearing denied 64 S.Ct. 610, 321 U.S. 802, 88 L.Ed. 1089—Raudenbush v. Baltimore & O. R. R., D.C.Pa., 63 F.Supp. 329—Tishar v. Nicodemus, D.C.Ill., 49 F.Supp. 145.
Cal.—Dryden v. Western Pac. R. Co., 36 P.2d 394, 1 Cal.App.2d 49.
Mo.—Hamilton v. St. Louis-San Francisco Ry. Co., 300 S.W. 787, 318 Mo. 123—Kidd v. Chicago, R. I. & P. Ry. Co., 274 S.W. 1079, 310 Mo. 1, certiorari denied R. I. & P. Ry. Co. v. Kidd, 46 S.Ct. 119, 269 U.S. 582, 70 L.Ed. 424.
Okl.—Gulf, C. & S. F. Ry. Co. v. Scroggins, 18 P.2d 873, 161 Okl. 294.
Tex.—Kansas City Southern Ry. Co. v. Chandler, Civ.App., 192 S.W.2d 304—Atchison, T. & S. F. Ry. Co. v. Saxon, Civ.App., 21 S.W.2d 686, reversed on other grounds Saxon v. Atchison, T. & S. F. Ry. Co., Com.App., 46 S.W.2d 228, rehearing denied 38 S.W.2d 775, reversed on other grounds Atchison, T. & S. F. Ry. Co. v. Saxon, 52 S.Ct. 229, 284 U.S. 458, 76 L.Ed. 397, conformed to Saxon v. Atchison T. & S. F. Ry. Co., Com.App., 50 S.W.2d 1095—Atchison, T. & S. F. Ry. Co v. Hix, Civ.App., 291 S.W. 281.
Utah.—Miller v. Southern Pac. Co., 21 P.2d 865, 82 Utah 46, certiorari denied Southern Pac. Co. v. Miller, 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 600.

Federal Employers' Liability Act generally see supra § 173.

Proximate or legal cause

To hold an employer liable for injuries or death of his employee, the negligence of the employer must have been the proximate or legal cause of such injuries or death.—Haggard v. Lowden, 134 P.2d 676, 156 Kan. 522.

Mere remote negligence of an employer does not render him liable for injuries to his employee.—Detroit & T. Shore Line R. Co. v. Seigel, Ohio App., 153 N.E. 870.

6. U.S.—Sheaf v. Minneapolis, St. P. & S. S. M. R. Co., C.C.A.N.D., 162 F.2d 110—Northern Pac. R. Co. v. Berven, C.C.A.Wash., 73 F.2d 687—Tishar v. Nicodemus, D.C.Ill., 49 F.Supp. 145.
Ala.—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504.
Mo.—Rowe v. Missouri-Kansas-Texas R. Co., 100 S.W.2d 480, 339 Mo. 1145, certiorari denied Missouri-Kansas-Texas R. Co. v. Rowe, 57 S.Ct. 671, 300 U.S. 680, 81 L.Ed. 884—Hamilton v. St. Louis-San Francisco Ry. Co., 300 S.W. 787, 318 Mo. 123.
Va.—Bly v. Southern Ry. Co., 31 S.E.2d 564, 183 Va. 162, opinion adhered to 33 S.E.2d 659, 183 Va. 406.

7. U.S.—Chicago, M. & St. P. Ry. Co. v. Coogan, Minn., 46 S.Ct. 564, 271 U.S. 472, 70 L.Ed. 1041—Eglsaer v. Scandrett, C.C.A.Wis., 151 F.2d 562.
Nev.—Smith v. Southern Pac. Co., 277 P. 609, 51 Nev. 390.
N.Y.—Popadines v. Davis, 209 N.Y.S. 689, 213 App.Div. 9.
Okl.—St. Louis-San Francisco Ry. Co. v. Landers, 243 P. 959, 116 Okl. 142, certiorari denied 47 S.Ct. 92, 273 U.S. 695, 71 L.Ed. 844.
S.C.—Owens v. Atlantic Coast Line R. Co., 139 S.E. 779, 141 S.C. 359—Youngblood v. Southern Ry. Co., 184 S.E. 660, 137 S.C. 47.
Utah.—Lasagna v. McCarthy, 177 P. 2d 734.

Accidental nature of injury

The fact that an employee's injury is not an accidental one has been held to be immaterial under the act, where it is the result, in whole or in part, of negligence on the part of the employer.—Bayer v. Chicago, B. & Q. R. Co., 220 N.W. 459, 53 S.D. 116.

8. Minn.—McDermott v. Minneapolis, N. & S. Ry. Co., 283 N.W. 116, 204 Minn. 215.

9. Tex.—Paris & G. N. Ry. Co. v. Stafford, Com.App., 53 S.W.2d 1019.

10. Tex.—Kansas City Southern Ry. Co. v. Chandler, Civ.App., 192 S.W.2d 304, refused no reversible error.

Repeated traumas

If an injury to an employee is caused by repeated traumas proximately resulting from the negligence of the employer, the fact that the injury was caused by repeated traumas rather than one specific injury does not preclude liability therefor on the part of the employer.—Kansas City Southern Ry. Co. v. Chandler, supra.

11. Ill.—Grutzius v. Armour & Co. of Delaware, 38 N.E.2d 773, 312 Ill.App. 366—Sylvester v. Buda Co., 281 Ill.App. 139.
Mo.—Whiteley v. Eagle-Picher Lead Co., 115 S.W.2d 536, 232 Mo.App. 178.
Ohio.—Ewers v. Buckeye Clay Pot Co., 163 N.E. 577, 29 Ohio App. 396.
Tex.—Gordon v. Travelers' Ins. Co., Civ.App., 287 S.W. 911.

Extrahazardous work

An employer is not liable for injury or death of his employee from disease contracted in the course of his employment on the ground of the extrahazardous nature of the work, since the liability of the employer must arise out of the employer's negligence, and not out of the inherent nature of the work.—

employer is the cause of the employee's disease.[12] Also the disease must be the proximate result of the employer's negligence[13] and an employer is not liable for injury to his employee from any occupational disease not the proximate result of the employer's negligence.[14] The fact that fellow employees did not contract the disease has been held not to indicate conclusively that the working conditions were not the cause of the injury.[15]

Occupational disease within rule. It has been held that an "occupational disease" is one which is a natural incident of a particular occupation and must attach to that occupation a hazard which distinguishes it from the usual run of occupations and which is in excess of that attending employment in general.[16] It has further been held, as affecting the employer's liability for injury to his employee from occupational disease, that there is no basis for distinction between a "true occupational disease," and an "ordinary occupational disease."[17] The word "injury" in a state employers' liability law has been held to be a generic term of broad designation and it may apply to a disability to an employee from an occupational disease[18] so that under such an act an employer may be liable to his employee for an injury from an occupational disease.[19]

§ 188. —— Accidental or Improbable Injury

No liability for negligence attaches to a master when, in the prosecution of a lawful act, injury to his servant is caused by a pure accident; nor is a master negligent merely because he fails to make provision against an accident which he could not reasonably be expected to foresee.

No liability for negligence attaches to a master when, in the prosecution of a lawful act, injury to his servant is caused by a pure accident; nor can a master be said to be negligent merely because he fails to make provision against an accident which he could not reasonably be expected to foresee.[20]

Christopher's Adm'r v. Blanton Stone Co., 80 S.W.2d 590, 258 Ky. 587.

Compliance with compensation provisions

Where it is finally adjudicated by an industrial commission that a particular occupational disease is not compensable, and the injury is not one for which an action at law may be maintained, an employer is not liable therefor under constitutional and statutory provisions that employers complying with compensation provisions shall not be responsible at common law.—Ewers v. Buckeye Clay Pot Co., 163 N.E. 577, 29 Ohio App. 396.

12. U.S.—Rowe v. Gatke Corporation, C.C.A.Ind., 126 F.2d 61, petition dismissed Gatke Corporation v. Rowe, 63 S.Ct. 81, 317 U.S. 702, 87 L.Ed. 561.
Ala.—American Mut. Liability Ins. Co. v. Agricola Furnace Co., 183 So. 677, 236 Ala. 535.
Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259, 216 Ind. 180.
Mich.—Koetsier v. Cargill Co., 217 N.W. 51, 241 Mich. 370.
Mo.—Whiteley v. Eagle-Picher Lead Co., 115 S.W.2d 536, 232 Mo.App. 178.
Ohio.—Triff v. National Bronze & Aluminum Foundry Co., 20 N.E.2d 232, 135 Ohio St. 191, 121 A.L.R. 1131.
W.Va.—Jones v. Rinehart & Dennis Co., 168 S.E. 482, 113 W.Va. 414.

Unknown at common law

An "occupational disease" was unknown at the common law but an employee had a right of action for a disease arising from his employment through the negligence of his employer.—Steiner v. Spencer, 145 S.W.2d 547, 24 Tenn.App. 389.

13. Ind.—Dalton Foundries v. Jefferies, 51 N.E.2d 13, 114 Ind.App. 271, followed in Dalton Foundries v. Dean, 51 N.E.2d 397, 114 Ind. App. 289—Dean v. Dalton Foundries, 34 N.E.2d 145, 109 Ind.App. 377.

14. Ind.—Dean v. Dalton Foundries, supra.

General negligence

Under some statutory provisions it has been held that an employer is not liable to his employee, on the ground of general negligence, for injury from an occupational disease contracted by the latter in the course of his employment.—Grutzius v. Armour & Co. of Delaware, 38 N.E.2d 773, 312 Ill.App. 366.

15. Mo.—Wolf v. Mallinckrodt Chemical Works, 81 S.W.2d 323, 336 Mo. 746—Cleveland v. Laclede-Christy Clay Products Co., App., 113 S.W.2d 1065.

16. Neb.—Russo v. Swift & Co., 286 N.W. 291, 136 Neb. 406.

Particular diseases

(1) Silicosis is a disease resulting from the inhalation of silica dust and bronchitis resulting from the inhalation of silica dust is a form of silicosis, and bronchitis contracted in employment by inhalation of silica dust is occupational disease with respect to employee's right to recover damages.—Wurst v. American Car & Foundry Co., Mo.App., 103 S.W.2d 6.

(2) Pulmonary tuberculosis has been held to be within an occupational diseases act.—Jannusch v. Weber Bros. Metal Works, 249 Ill. App. 1.

(3) Echinococcosis contracted by beef washer employed in packing plant for which he sought to recover from his employer under the common law, has been held not an occupational disease incident to the employment.—Russo v. Swift & Co., 286 N.W. 291, 136 Neb. 406.

17. Ind.—Dean v. Dalton Foundries, 34 N.E.2d 145, 109 Ind.App. 377.

Time element

As affecting employer's liability, there is no basis for distinction between true occupational disease such as silicosis, which affects employee drop by drop, little by little, day by day, for weeks and months, until finally enough is accumulated to produce symptoms, and ordinary occupational disease such as benzol poisoning, which results more quickly from less prolonged and continuous exposure.—Dean v. Dalton Foundries, supra.

18. Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259, 216 Ind. 180.

19. Ind.—Illinois Steel Co. v. Fuller, supra—Dean v. Dalton Foundries, 34 N.E.2d 145, 109 Ind.App. 377.

20. Mo.—**Corpus Juris cited in** Cain v. Humes-Deal Co., 49 S.W.2d 90, 93, 329 Mo. 1107.
N.C.—Crisp v. Kitchen Lumber Co., 154 S.E. 311, 199 N.C. 343—Goddard v. Southern Desk Co., 153 S.E. 608, 199 N.C. 22—Fore v. Geary, 131 S.E. 387, 191 N.C. 90.
Tex.—Louisiana Ry. & Nav. Co. of Texas v. Reynolds, Civ.App., 278 S.W. 954.
39 C.J. p 288 note 42.
Hidden or improbable dangers see infra § 246.
Improper or unusual use or test see infra § 251.

A master is not compelled to foresee and guard against an accident which reasonable and prudent men would not expect to happen, and, where an injury to a servant could not reasonably have been anticipated, a failure to take precautionary measures is not negligence on the part of the master for which he is liable to the servant.[21] However, where the facts are such that the consequences attributable to the negligence of a master are within the field of reasonable anticipation, he is liable for an injury received by a servant in consequence thereof.[22] Thus, while an employer is not negligent in failing to protect his employee from the possibility of contracting an occupational disease, where such possibility is not probable,[23] he must protect his servant against dangers of employment which may reasonably be expected to produce disease.[24]

It is not necessary to make a master liable for a negligent omission or act that he should have contemplated or should have been able to anticipate the particular consequences, the form of the accident, or the nature of the injury,[25] and, where the act or omission of the master threatened danger, the fact that the accident itself was unusual, extraordinary, or even unheard of does not relieve him from liability.[26] Thus a master whose negligent act results in an injury to his servant is liable therefor although the consequences of the act prove more injurious than would ordinarily be anticipated,[27] and if the full consequences attributable to the negligent act are the natural and probable result thereof the master may be liable although the consequences may not have been specifically contemplated.[28]

Knowledge of consequences of defects generally see infra § 244.
Latent defects see infra § 247.

Similar statement

An employer is not responsible for an accident simply because it happened, but only when he has contributed to it by some act or omission of duty.—Callahan v. Roberts, 193 S.E. 265, 212 N.C. 223—Thomas v. Lawrence, 127 S.E. 585, 189 N.C. 521.

Unavoidable accident

An employer is not responsible to his employee for injury caused by an unavoidable accident.

Ark.—St. Louis-San Francisco Ry. Co. v. Bryan, 112 S.W.2d 641, 195 Ark. 350.

N.C.—Wiley v. Olmsted, 192 S.E. 686, 212 N.C. 98.

Injury held not accidental

N.C.—Thomas v. Lawrence, 127 S.E. 585, 189 N.C. 521.

21. Ark.—Hayes v. Missouri Pac. R. Co., 186 S.W.2d 780, 208 Ark. 370—St. Louis-San Francisco Ry. Co. v. Bryan, 112 S.W.2d 641, 195 Ark. 350.

Kan.—**Corpus Juris quoted in** Allen v. Shell Petroleum Corporation, 68 P.2d 651, 656, 146 Kan. 67.

Miss.—Stewart v. Kroger Grocery, etc., Co., 21 So.2d 912, 198 Miss. 371—Harvey v. Smith, 198 So. 739, 190 Miss. 130—Wunderlich v. Walker, 189 So. 523, 186 Miss. 149—Veney v. Samuels, 107 So. 517, 142 Miss. 476.

Mo.—Lawson v. Higgins, 169 S.W.2d 881, 350 Mo. 1066—Walser v. Kuhlmann, App., 176 S.W.2d 658—Pietraschke v. Pollnow, App., 147 S.W.2d 167.

Neb.—**Corpus Juris quoted in** Russo v. Swift & Co., 286 N.W. 291, 295, 136 Neb. 406.

N.H.—Chiuchiolo v. New England Wholesale Tailors, 150 A. 540, 84 N.H. 329.

N.C.—Crisp v. Kitchen Lumber Co., 154 S.E. 311, 199 N.C. 343—Fore v. Geary, 131 S.E. 387, 191 N.C. 90.

Tex.—Railway Express Agency v. Robinson, Civ.App., 162 S.W.2d 984, error refused.

W.Va.—Linville v. Chesapeake & O. Ry. Co., 177 S.E. 538, 115 W.Va. 610.

39 C.J. p 289 note 43.

Natural and probable consequences

A master is liable only for the natural and probable consequences of his negligence.—Kemplin v. H. W. Golden & Son, 157 A. 872, 52 R.I. 89.

Manner of performing duties

An employer may not reasonably be held to foresee that his employee will perform his duties in such a manner as to bring injury to himself.—Gulf, C. & S. F. Ry. Co. v. Bell, Tex.Civ.App., 101 S.W.2d 363, error dismissed.

22. Kan.—**Corpus Juris quoted in** Allen v. Shell Petroleum Corporation, 68 P.2d 651, 656, 146 Kan. 67.

Miss.—Russell v. Williams, 151 So. 372, 168 Miss. 181, overruling suggestion of error 150 So. 528, 168 Miss. 181.

Mo.—Smith v. Southern Illinois & Missouri Bridge Co., 30 S.W.2d 1077, 326 Mo. 109.

Neb.—**Corpus Juris quoted in** Russo v. Swift & Co., 286 N.W. 291, 295, 136 Neb. 406.

N.C.—Smith v. Ritch, 144 S.E. 537, 196 N.C. 72, 59 A.L.R. 1084.

39 C.J. p 290 note 44.

If an employer, on careful thought, would conclude that there is a likelihood of injury to his employee, the failure so to conclude and take precaution is a failure of his duty to anticipate injury and constitutes negligence.—Chiuchiolo v. New England Wholesale Tailors, 150 A. 540, 84 N.H. 329.

23. Mich.—Koetsier v. Cargill Co., 217 N.W. 51, 241 Mich. 370.

24. Ga.—Blair v. Fulton Bakery, 24 S.E.2d 598, 68 Ga.App. 879—Connell v. Fisher Body Corporation, 192 S.E. 484, 56 Ga.App. 203.

Tenn.—Nashville Bridge Co. v. Hudgins, 137 S.W.2d 327, 23 Tenn.App. 677.

25. U.S.—**Corpus Juris cited in** Maty v. Graselli Chemical Co., C.C.A.N.J., 98 F.2d 877, 880—**Corpus Juris quoted in** Boal v. Electric Storage Battery Co., C.C.A.Pa., 98 F.2d 815, 819.

Mass.—Watkins v. New York, N. H. & H. R. Co., 195 N.E. 888, 290 Mass. 448.

Mo.—Funk v. Fulton Iron Works Co., 277 S.W. 566, 311 Mo. 77—Walser v. Kuhlmann, App., 176 S.W.2d 658.

N.C.—Collins v. Hyde County Land & Lumber Co., 141 S.E. 580, 195 N.C. 849—Jefferson v. City of Raleigh, 140 S.E. 76, 194 N.C. 479.

39 C.J. p 290 note 45.

26. U.S.—**Corpus Juris quoted in** Boal v. Electric Storage Battery Co., C.C.A.Pa., 98 F.2d 815, 819.

39 C.J. p 290 note 46.

Inexperienced or youthful servant

Where a young, inexperienced employee is injured while performing work, according to directions, by a method in itself dangerous, the master is chargeable with actual knowledge of the dangers to be apprehended, and it is immaterial that the immediate cause of the injury was a wholly chance occurrence.

Ky.—Capital Laundry Co. v. McRoy, 227 S.W. 787, 190 Ky. 440.

Mont.—Forquer v. North, 112 P. 439, 42 Mont. 272.

27. Okl.—Black Gold Petroleum Co. v. Webb, 99 P.2d 868, 186 Okl. 584.

28. Okl.—Black Gold Petroleum Co. v. Webb, supra.

A master is not liable for a loss or injury to a servant which is due to an act of God, that is, when it is occasioned exclusively by natural causes such as could not have been prevented by human care and foresight,[29] but if there is any contributing negligence to cause the damage on the part of the employer he will not be excused by reason of such causes.[30] Thus, although an injury resulted from an unusual or extraordinary storm or wind, the employer is not relieved from liability when such a natural force could have been anticipated.[31] However, it has been held, where an employee is injured or dies as a result of an unanticipated and unusual windstorm, that the employer is not liable therefor.[32]

Operation of railroads. A railroad is not liable for an injury to an employee resulting from pure accident[33] or from causes which could not have been reasonably anticipated,[34] and a railroad is not liable where the injury to the servant is not the natural and probable consequence of its negligence.[35] Where, however, in the exercise of reasonable care it might have foreseen that some injury would result from its act or omission, or might have anticipated consequences of a generally injurious nature, it will be liable for injuries resulting from such act or omission[36] although the particular consequences might not have been anticipated.[37]

§ 189. —— Acts or Omissions of Third Persons

Ordinarily a master is not liable for injuries to his servant caused by the acts or omissions of third persons over whom he has no control.

A master is not, as a general rule, liable for injuries to his servant caused by the acts or omissions of third persons over whom he has no control.[38] This is true notwithstanding at the time of the injury the employee was acting in a manner provided for by the rules of the employer.[39] Thus ordinarily an employer is not liable for injury to an employee

29. Ark.—Livingston Oil Corporation v. Granger, 295 S.W. 969, 174 Ark. 1180.

30. Cal.—Rodgers v. Central Pac. R. Co., 8 P. 377, 67 Cal. 607.
Ill.—Welfelt v. Illinois Cent. R. Co., 149 Ill.App. 317.

31. Mo.—Jones v. Kansas City, Ft. S. & M. R. Co., 77 S.W. 890, 178 Mo. 528, 101 Am.S.R. 434.
39 C.J. p 290 note 49.

32. Ark.—Livingston Oil Corporation v. Granger, 295 S.W. 969, 174 Ark. 1180.

33. Ark.—St. Louis-San Francisco Ry. Co. v. Bryan, 112 S.W.2d 641, 195 Ark. 350.
N.C.—Lloyd v. Railroad, 85 S.E. 10, 168 N.C. 646.
Tex.—Turnbow v. Panhandle & S. F. Ry. Co., Civ.App., 127 S.W.2d 982, error refused—Louisiana Ry. & Nav. Co. of Texas v. Reynolds, Civ.App., 278 S.W. 954.
39 C.J. p 290 note 51.
Methods of operation of railroads see infra § 261.
Warnings and signals in operation of railroads see infra § 263.

34. Ark.—Hayes v. Missouri Pac. R. Co., 186 S.W.2d 780, 208 Ark. 370—St. Louis-San Francisco Ry. Co. v. Bryan, 112 S.W.2d 641, 195 Ark. 350;
Ind.—Southern Ry. Co. v. Harpe, 58 N.E.2d 346, 223 Ind. 124.
Tex.—Turnbow v. Panhandle & S. F. Ry. Co., Civ.App., 127 S.W.2d 982, error refused—Gulf, C. & S. F. Ry. Co. v. Bell, Civ.App., 101 S.W.2d 363, error refused.
W.Va.—Linville v. Chesapeake & O. Ry. Co., 177 S.E. 538, 115 W.Va. 610.
39 C.J. p 291 note 52.

Under Federal Employers' Liability Act

(1) A railroad is not required to anticipate and guard against unexpected and improbable dangers to employees.—Morey v. Maine Cent. R. Co., 142 A. 585, 127 Me. 190.

(2) Events too remote to require reasonable prevision need not be anticipated.
U.S.—Brady v. Southern Ry. Co., 64 S.Ct. 232, 320 U.S. 476, 88 L.Ed. 239.
Utah.—Pauly v. McCarthy, 166 P.2d 501, 109 Utah 398, reversed on other grounds 67 S.Ct. 962, 330 U.S. 802, 91 L.Ed. 1261.

35. Ark.—Hayes v. Missouri Pac. R. Co., 186 S.W.2d 780, 208 Ark. 370.

36. Va.—Froman v. Chesapeake & O. Ry. Co., 138 S.E. 658, 148 Va. 148.
39 C.J. p 291 note 53.

37. Mass.—Watkins v. New York, N. H. & H. R. Co., 195 N.E. 888, 290 Mass. 448.
Mo.—Kidd v. Chicago, R. I. & P. Ry. Co., 274 S.W. 1079, 310 Mo. 1, certiorari denied Chicago, R. I. & P. Ry. Co. v. Kidd, 46 S.Ct. 119, 269 U.S. 582, 70 L.Ed. 424.
Va.—Froman v. Chesapeake & O. Ry. Co., 138 S.E. 658, 148 Va. 148.
39 C.J. p 291 note 54.

38. N.C.—Madden v. J. F. Mulligan Co., 137 S.E. 311, 193 N.C. 438.
Tex.—Corpus Juris quoted in Fort Worth & D. C. Ry. Co. v. Rowe, Civ.App., 69 S.W.2d 169, 171.
Wyo.—Corpus Juris quoted in Galicich v. Oregon Short Line R. Co., 87 P.2d 27, 30, 54 Wyo. 123.
39 C.J. p 291 note 56.
Defects in appliances or places for work furnished by, or under control of, third person see infra § 210.
Leases and traffic arrangements between railroads see supra § 178.

A master has no absolute duty to protect his servants against the acts of third persons causing them injury.—Madison v. Phillips Petroleum Co., C.C.A.Tex., 88 F.2d 515, certiorari denied 57 S.Ct. 946, 301 U.S. 703, 81 L.Ed. 1358.

Injury sustained in master's vehicle

A master has been held not to be liable for injuries sustained by his servant while being transported in the master's vehicle where the injuries resulted from a third person's negligence.—Charles Weaver & Co. v. Harding, 180 So. 825, 182 Miss. 345.

Ferryboat

Contractor was held not responsible for condition, maintenance, operation, and navigation of ferryboat used to transport workmen to and from island although the boat was operated under agreement with contractor, where it was under exclusive control of boat's captain, was not used exclusively for transportation of workmen, and each workman paid his own transportation charges.—Kuhn v. P. J. Carlin Const. Co., 8 N.E.2d 300, 274 N.Y. 118, reargument and remittitur amended 14 N.E.2d 204, 277 N.Y. 651.

39. Kan.—Drake v. Topeka R. Co., 153 P. 539, 96 Kan. 727, L.R.A. 1916E 332.
39 C.J. p 292 note 59.

caused by trespassers[40] or by thieves or robbers.[41] Similarly an employer usually has no duty to protect his employee from mob violence or assault by strikers[42] or by hoboes,[43] and ordinarily the employer is not liable to his employee for injury from such sources even where the injury inflicted on the employee by the hoboes or strikers was with the connivance of his fellow employees, in the absence of notice on the part of the employer of the hostility of such fellow employees.[44]

A master is liable to his servant for injuries sustained by the latter where the master's negligence contributed to the injury, even though there was concurring negligence on the part of a third person,[45] where the injury would not have occurred but for the master's negligence.[46] The concurrent or succeeding negligence of a third person which does not break the sequence of events is not an independent intervening cause and does not relieve the master of liability for the original wrongdoing although in the absence of such concurrent or succeeding negligence the accident would not have occurred and the servant would not have sustained the injury.[47] However, where the flow of events set in motion by the alleged negligent act of the employer is broken by any new or independent act on the part of a third person resulting in injury to an employee, the employer is not liable therefor.[48]

Where an employee is injured by the negligence of a third person for whom he is performing services at the instance of his employer and within the scope of his employment, the master is not relieved from liability for injuries so received;[49] and this is particularly so when such an employee has been assigned, without warning of danger, to assist a third person in work of a hazardous nature.[50] Ordinarily a servant may not delegate his duties to a substituted servant so as to make the master liable for the acts of such substituted servant resulting in injury to another servant.[51]

§ 190. —— Acts or Omissions of Persons Compulsorily Employed

A master has been held not liable to his servant for injury to the latter caused by one compulsorily employed by the master, but there is also authority to the contrary.

There is a conflict of authority as to whether a master is responsible to his servants for the acts of one compulsorily employed under statutes which have been enacted in some jurisdictions to secure the safety of workmen in certain hazardous industries, particularly mining, requiring that a master employ licensed foremen or superintendents.[52] According to one view, a statutory mine foreman is to be regarded as a fellow servant of the miners, and the mine owner may defend on that ground in an action brought against him for an injury received through the negligence of the foreman.[53] On the other hand, a compulsory mine foreman has been regarded as a vice principal[54] for whose negligence the mine owner is liable regardless of the good faith of the foreman[55] or his willful failure to perform

40. Ga.—Ficken v. Southern Cotton Oil Co., 151 S.E. 688, 40 Ga.App. 841.
N.C.—Ward v. Southern Ry. Co., 174 S.E. 443, 206 N.C. 530.
Under the Federal Employers' Liability Act an employer has been held not negligent in failing to foresee or anticipate a trespass on its right of way by third persons causing an injury to an employee, where the act of the trespassing third person was the direct, proximate cause of the injury to the employee.—Paris & G. N. Ry. Co. v. Stafford, Tex.Civ. App., 53 S.W.2d 1019.

41. N.C.—Ward v. Southern Ry. Co., 174 S.E. 443, 206 N.C. 530.
Okl.—McMillin v. Barton-Robison Convoy Co., 78 P.2d 789, 182 Okl. 553.

42. Kan.—Weigand v. Chicago, R. I. & P. Ry. Co., 249 P. 615, 121 Kan. 610.
Ky.—Lewis v. Taylor Coal Co., 66 S.W. 1044, 112 Ky. 845, 23 Ky.L. 2218, 57 A.L.R. 447.
Tex.—Dell v. Lancaster, Civ.App., 285 S.W. 685.
39 C.J. p 291 note 56 [b].
Contract to protect against strikers see infra § 196.

43. Kan.—Weigand v. Chicago, R. I. & P. Ry. Co., 249 P. 615, 121 Kan. 610.

44. Kan.—Weigand v. Chicago, R. I. & P. Ry. Co., supra.

45. Miss.—Gulf Refining Co. v. Ferrell, 147 So. 476, 165 Miss. 296.
Tex.—Fort Worth & D. C. Ry. Co. v. Rowe, Civ.App., 69 S.W.2d 169.

46. Mo.—Johnson v. Waverly Brick & Coal Co., 205 S.W. 615, 276 Mo. 42.
39 C.J. p 288 note 39.

47. Utah.—Ehalt v. McCarthy, 138 P.2d 639, 104 Utah 110.
Infant employee
The negligent subjection to traffic hazards of infant employee unable to take care of himself is not excused or chain of causation broken by negligent injury of infant by motorist.—Stucker v. American Stores Corporation, 171 A. 230, 5 W.W.Harr. Del., 594.

48. Tex.—Fort Worth & D. C. Ry. Co. v. Rowe, Civ.App., 69 S.W.2d 169.

49. Ky.—Evansville R. Co. v. Ligon, 189 S.W. 898, 172 Ky. 631.

50. Ind.—Naylor v. Holland-St. Louis Sugar Co., 130 N.E. 152, 75 Ind. App. 132.
Okl.—New v. McMillan, 191 P. 160, 79 Okl. 70.

51. Ky.—Auto Livery Co. v. Stone, 36 S.W.2d 349, 237 Ky. 686.

52. Mass.—Fitzgerald v. Whidden, 118 N.E. 183, 229 Mass. 41.
39 C.J. p 292 note 63.

53. U.S.—Holly v. McDowell Coal & Coke Co., W.Va., 203 F. 668, 122 C.C.A. 64.
39 C.J. p 292 note 64.

54. Ind.—Antioch Coal Co. v. Rockery, 82 N.E. 76, 169 Ind. 247.
39 C.J. p 292 note 65.

55. Ill.—Kemp v. Southern Coal & Mining Co., 197 Ill.App. 17—Leverich v. Danville Collieries Co., 193 Ill.App. 627.

his statutory duties,[56] although in the performance of duties not imposed on him by statute the foreman is held not a vice principal, but is regarded as a servant of the operator and a fellow servant of the miners.[57]

In a jurisdiction in which the rule that the mine foreman is a fellow servant has been recognized, the view has also been taken that the foreman is a state official over whose acts the mine owner has no control and for which he is not liable,[58] and it has also been held that he is not such a servant of the mine owner as to be within the contemplation of an employers' liability act.[59] The master has been held not liable for the negligence of a mine foreman on the theory that the relation of master and servant does not exist as between the foreman and the owner,[60] and the situation has been held analogous to that existing where a vessel is in the hands of a compulsory pilot.[61]

Nevertheless a mine owner may be liable for the negligence of the mine foreman, regardless of his legal status, when, with knowledge of improper conditions, the owner allows them to persist.[62] He may also be liable when there has not been full compliance with the statute compelling the employment of a qualified mine foreman[63] or when the foreman is engaged in the performance of duties outside those prescribed by statute.[64] In any case the compulsory employment of a mine foreman does not relieve the mine owner of responsibility for nondelegable master's duties.[65]

Under a statute making it unlawful for anyone to act in certain capacities in mines, including a fire boss, without having obtained a certificate of competency, an employer selecting a fire boss who holds such certificate has been held not liable for injuries to an employee where the charge is the general incompetency of the fire boss not connected with his particular acts with relation to the injury of the employee.[66]

A statutory provision imposing liability on the mine owner for negligence of the foreman has been held invalid,[67] but there is also authority sustaining the validity of a like statute.[68]

§ 191. —— Violation of Statutes

Ordinarily a master's violation of a statute intended to protect the life, health, and safety of employees constitutes actionable negligence, but such negligence must be shown to be the proximate cause of the injury to the servant.

Ordinarily the violation by a master of a statute intended to protect the life, health, and safety of employees constitutes actionable negligence.[69] It

56. Ill.—Donk Bros. Coal & Coke Co. v. Lucas, 80 N.E. 560, 226 Ill. 23.
39 C.J. p 292 note 67.

57. Ill.—Daly v. New Staunton Coal Co., 117 N.E. 413, 280 Ill. 175.

58. U.S.—Philadelphia & Reading Coal & Iron Co. v. Kever, C.C.A. Pa., 4 F.2d 531.
39 C.J. p 292 note 70.

59. Pa.—Rafferty v. National Min. Co., 82 A. 1089, 234 Pa. 66.
39 C.J. p 293 note 71.

60. Tenn.—Tennessee Coal, Iron & R. Co. v. Hooper, 175 S.W. 1146, 131 Tenn. 611.
39 C.J. p 293 note 72.

61. Tenn.—Sale Creek Coal & Coke Co. v. Priddy, 96 S.W. 610, 117 Tenn. 168, 10 Ann.Cas. 745.
39 C.J. p 293 note 73.
Liability for collision due to fault of compulsory pilot see Collision § 161 d.

62. Pa.—Dempsey v. Buck Run Coal Co., 76 A. 745, 227 Pa. 571.
39 C.J. p 293 note 74.

63. U.S.—Holly v. McDowell Coal & Coke Co., W.Va., 203 F. 668, 122 C.C.A. 64.
39 C.J. p 293 note 75.

64. Iowa.—Poli v. Numa Block Coal Co., 127 N.W. 1105, 149 Iowa 104, 33 L.R.A.,N.S., 646.
39 C.J. p 293 note 76.

65. Pa.—Whittaker v. Valley Camp Coal Co., 103 A. 594, 260 Pa. 209.
39 C.J. p 293 note 77.

66. Okl.—Adamson v. Allende, 38 P. 2d 917, 170 Okl. 154.

67. Pa.—Dempsey v. Buck Run Coal Co., 76 A. 745, 227 Pa. 571—Durkin v. Kingston Coal Co., 33 A. 237, 171 Pa. 193, 50 Am.S.R. 801, 29 L.R. A. 808.

68. U.S.—Ducktown Sulphur, Copper & Iron Co. v. Galloway, C.C.A. Tenn., 262 F. 669.
39 C.J. p 294 note 79.

69. Mo.—Soukop v. Employers' Liability Assur. Corporation, Limited, of London, England, 108 S.W.2d 86, 341 Mo. 614, 112 A.L.R. 149—Dodd v. Independence Stove & Furnace Co., 51 S.W.2d 114, 330 Mo. 662.
N.Y.—Stern v. Great Island Corporation, 293 N.Y.S. 608, 250 App. Div. 115.
39 C.J. p 294 note 81.

Duties not implied
Statutory duties of an employer to protect his employees do not arise by implication but must be imposed by express legislative authority and must be clearly set forth.—Prattico v. Hudson Coal Co., 32 A.2d 733, 347 Pa. 490.

Negligence as matter of law
(1) In general.—Teller v. Prospect Heights Hospital, 21 N.E.2d 504, 280 N.Y. 456.
(2) Where statute provided that drivers of trucks should come to complete stop and look for approaching trains before crossing railroad tracks, and trucking concern specifically instructed truck driver to obey all traffic laws, and truck driver made no attempt to stop at grade crossing where collision with train occurred, truck driver was negligent as a matter of law.—Cohen v. Schaetzel, 103 P.2d 1060, 106 Colo. 266.

Negligence is implied from the failure of an employer to comply with the requirements of such statutory enactments.—Ford v. New York, N. H. & H. R. Co., C.C.A.N.Y., 54 F. 2d 342, certiorari denied 52 S.Ct. 405, 285 U.S. 549, 76 L.Ed. 939.

Effect of general negligence
Under a workmen's occupational disease act the word "negligence" has been held not to mean general or ordinary negligence, in view of a proviso that an employer's violation of a statute intended for an employee's health or violation of rules of a commission pursuant to a health and safety act should constitute negligence within the meaning of the provision, so that the failure of the legislature to enact a statute for the protection of the health

has been held that the failure of an employer to comply with such a statute constitutes negligence per se[70] when one of the protected class is injured from a cause against which the statute is designed to protect him.[71] While a violation of the statutes usually is a sufficient showing of negligence, the negligence must be shown to be the proximate cause of the injury.[72]

While a statute relating to the health and safety of employees which is regulatory and penal has been held not to indicate a legislative intent to make an employer absolutely liable to his employees for injuries caused by the employer's failure to comply with the requirements thereof,[73] it has also been held that, although an act does not, in so many words, authorize the bringing of a civil action for damages because of its violation, the violation of the duties thereby imposed on employers constitutes negligence[74] without regard to the applicability or nonapplicability of the penal clause of such a statute.[75] The fact that a penalty is attached for a violation of a statute, or that a violation is made a crime, has been held not to preclude a person injured by reason of the violation from bringing an action to recover damages for injuries which he sustained[76] unless the penalty imposed is given to the person injured.[77]

§ 192. —— Willful Injury

Where a servant is injured by reason of the willful negligence of the master, the latter is liable therefor.

Where a servant is injured by reason of the willful negligence of the master, the latter is liable therefor.[78] A direct intent is not necessary to establish willfulness,[79] but a mere failure to use ordinary care will not constitute willful or wanton negligence.[80] Where a statute gives a right of action to an employee for a willful violation thereof[81] it is sufficient to show any conscious acts or omission, irrespective of evil intent,[82] provided the act or omission charged to be willful is an act or omission prohibited by the statute.[83] The omission

of employees since the adoption of the workmen's occupational diseases act and failure of the commission to promulgate rules for the protection of the health of employees pursuant to a health and safety act, precluded the employee from recovering damages for injury to health suffered as a result of the employer's general negligence.—Grutzius v. Armour & Co. of Delaware, 38 N.E.2d 773, 312 Ill.App. 366.

70. U.S.—Cropper v. Titanium Pigment Co., C.C.A.Mo., 47 F.2d 1038, 78 A.L.R. 737.
La.—Lemee v. Texas & P. R. Co., 75 So. 676, 141 La. 769.
39 C.J. p 294 note 81 [a].

Federal Employers' Liability Act

(1) It has been held that the violation of a state statute imposing a duty on an employer for the benefit of its employees is actionable negligence even though the employer is subject to the provisions of the Federal Employers' Liability Act. —Luton Mining Co. v. Louisville & N. R. Co., 123 S.W.2d 1055, 276 Ky. 321.

(2) However, it has also been held that, in a suit brought under the Federal Employers' Liability Act, the violation of a state statute or of a town or city ordinance does not constitute negligence per se on the part of an employer.—Moore v. Southern Ry. Co., 161 S.E. 525, 163 S.C. 342, reversed on other grounds Southern Ry. Co. v. Moore, 52 S.Ct. 38, 284 U.S. 581, 76 L.Ed. 503.

71. N.Y.—Stern v. Great Island Corporation, 293 N.Y.S. 608, 250 App. Div. 115.
39 C.J. p 296 note 92.

Construction of statute

A statute designed to protect a particular class of servants against a particular class of injuries should be reasonably construed with reference to its apparent purpose and to those considerations which address themselves to the plain and observant minds of those persons whose conduct is to be governed by it.—Lockhart v. Hoffman, 90 N.E. 943, 197 N.Y. 331—39 C.J. p 296 note 91.

72. U.S.—Sherry v. Baltimore & O. R. Co., C.C.A.Ohio, 30 F.2d 487, certiorari denied 50 S.Ct. 16, 280 U.S. 555, 74 L.Ed. 611.
Kan.—Griffith v. Atchison, T. & S. F. Ry. Co., 295 P. 687, 132 Kan. 282.
Miss.—Meridian Laundry Co. v. James, 195 So. 689, 190 Miss. 119.
Neb.—Smith v. Morton Motor Co., 16 N.W.2d 843, 145 Neb. 396.
39 C.J. p 294 note 82.

Under state employers' liability act, proximate cause of an injury is not meant the last act of cause or nearest act to the injury, but such act of commission or omission violating or failing to comply with provisions of the act as actually aided in producing the injury as a direct and existing cause, and it need not be the sole cause, but it must be a concurring cause such as might reasonably have been contemplated as involving the result under the attending circumstances.—Ludwig v. Zidell, 118 P.2d 1073, 167 Or. 488.

Occupational disease

U.S.—Rowe v. Gatke Corporation, C. C.A.Ind., 126 F.2d 61, petition dismissed Gatke Corporation v. Rowe, 63 S.Ct. 81, 317 U.S. 702, 87 L.Ed. 561.

73. N.H.—Fasekis v. J. J. Newbury Co., 44 A.2d 817, 93 N.H. 468.

74. Cal.—Cragg v. Los Angeles Trust Co., 98 P. 1063, 154 Cal. 663, 16 Ann.Cas. 1061.
39 C.J. p 295 note 83.

75. Or.—Fitzgerald v. Oregon-Washington R. & Nav. Co., 16 P.2d 27, 141 Or. 1.

76. Mont.—Maronen v. Anaconda Copper Min. Co., 136 P. 968, 48 Mont. 249.
39 C.J. p 295 note 84.

77. Wis.—Klatt v. N. C. Foster Lumber Co., 73 N.W. 563, 97 Wis. 641.

78. Ky.—Louisville & N. R. Co. v. Potts, 17 S.W. 185, 92 Ky. 30, 13 Ky.L. 344.
39 C.J. p 296 note 95.
Contributory negligence of servant as defense see infra § 424.
Willful act of fellow servant see infra § 325.

79. U.S.—Shumacher v. St. Louis & S. F. R. Co., C.C.Ark., 39 F. 174, reversed on other grounds 14 S.Ct. 479, 152 U.S. 77, 38 L.Ed. 361.

80. Ala.—Adams v. Southern R. Co., 51 So. 987, 166 Ala. 449.
S.C.—Bouchillon v. Charleston & W. R. Co., 72 S.E. 634, 90 S.C. 42, Ann. Cas.1913D 1.

81. Ill.—Labanoski v. Hoyt Metal Co., 126 N.E. 548, 292 Ill. 218.
39 C.J. p 296 note 99.

82. Kan.—Le Roy v. Missouri, R. & T. R. Co., 138 P. 646, 91 Kan. 548, 552.
39 C.J. p 296 note 1.

83. Ill.—Hughes v. Eldorado Coal & Mining Co., 197 Ill.App. 259.

must be more than a mere inadvertence or a failure to use ordinary care,[84] but if it is a conscious omission the good faith of the employer with respect to the observance of the statutory requirements is immaterial.[85]

In some states, in order to authorize a verdict in a suit against a railroad company for the death of an employee, it is necessary to show that the life of the deceased was lost by the willful neglect of defendant or his agents or servants.[86] However, it has been held that the maintenance by a railroad of a bridge over its tracks at such a height that a brakeman cannot perform his duties with reasonable safety constitutes willful negligence.[87]

§ 193. Injury in Unlawful Act or Employment

A master is not liable to a servant for an injury received by the latter in the voluntary performance of an unlawful act.

Where a servant is injured in the voluntary performance of an unlawful act, he cannot recover therefor as against his master,[88] as, for example, where the act is a violation of a statute intended for the protection of both the employee and the public.[89] The fact that the act in which the employee was injured was unlawful on the part of his employer does not give him a right to recover as against the employer where the unlawful character of the act did not contribute to his injury.[90]

§ 194. —— Minors Employed in Violation of Statutory Prohibition or Regulation

a. In general
b. Right or cause of action
c. Defenses

a. In General

With respect to the liability of an employer to a minor employee injured in the course of his employment, a child labor statute should be liberally construed.

With respect to the liability of an employer for injury to a minor employee, child labor statutes should be liberally construed[91] to accomplish their objects,[92] and the law should be rendered intelligible and absurdities avoided.[93] The words used should be given their ordinary and usual meaning.[94] In accordance with these rules and those relating to the construction of statutes generally, numerous statutory provisions have been construed and applied to determine what constitutes an employment of a minor in violation of law,[95] such as what constitutes dangerous, hazardous, extrahazardous, or especially hazardous work or employment,[96] as well

84. Ill.—Odin Coal Co. v. Denman, 57 N.E. 192, 185 Ill. 413, 76 Am. S.R. 45—Girard Coal Co. v. Wiggins, 52 Ill.App. 69.

85. Ill.—Karkowski v. La Salle County Carbon Coal Co., 93 N.E. 780, 248 Ill. 195.
39 C.J. p 296 note 4.

86. Ky.—Armstrong v. Pennsylvania Co., 12 Ky.Op. 273.
39 C.J. p 296 note 5.

87. Ky.—Cincinnati, N. O. & T. P. R. Co. v. Sampson, 30 S.W. 12, 97 Ky. 65, 16 Ky.L. 819.
39 C.J. p 296 note 6.

88. Miss.—**Corpus Juris cited in** Downing v. City of Jackson, 24 So. 2d 661, 664, 199 Miss. 464.
39 C.J. p 296 note 7.

89. N.C.—Lloyd v. North Carolina R. Co., 66 S.E. 604, 151 N.C. 536, 45 L.R.A.,N.S., 378.
39 C.J. p 297 note 8.

90. Wis.—Waszkiewicz v. Milwaukee Electric R. & Light Co., 133 N.W. 596, 147 Wis. 422.
39 C.J. p 297 note 9.

91. U.S.—Perry v. Western Union Telegraph Co., C.C.A.Tenn., 27 F. 2d 197.
Fla.—J. Ray Arnold Lumber Corporation of Olustee v. Richardson, 141 So. 133, 105 Fla. 204.
Construction of child labor statutes generally see Infants § 12.

92. U.S.—Perry v. Western Union Telegraph Co., C.C.A.Tenn., 27 F.2d 197.

Purpose of statutes

(1) The purpose of statute making it unlawful to require female infant employee to remain standing constantly is to protect health of female infants.—Hooven & Allison Co. v. Cox' Adm'r, 104 S.W.2d 969, 268 Ky. 266.

(2) It has been held that a statute prohibiting the employment of children between specified ages in certain cases, and requiring employment certificates of children between other ages, is not enacted solely to procure the education of children, but also to prevent children from working where they are mentally and physically incapable of doing the work required.—Buffum v. F. W. Woolworth Co., 273 S.W. 176, 221 Mo.App. 345.

(3) The purpose of a statute prohibiting the employment of minors under a given age in manufacturing plants is to protect children in premises where there is power-operated machinery.—Langston v. Degelia, Tex.Civ.App., 186 S.W.2d 738.

(4) Other purposes.—Kilgore v. Hudson, 4 So.2d 855, 148 Fla. 580.

93. Tenn.—Roberts v. Cahill Forge & Foundry Co., 184 S.W.2d 29, 181 Tenn. 688.

94. Miss.—Graham v. Goodwin, 156 So. 513, 170 Miss. 896.

95. Ill.—Gill v. Boston Store of Chicago, 168 N.E. 895, 337 Ill. 70.
La.—Picou v. J. B. Luke's Sons, 16 So.2d 466, 204 La. 881.
Miss.—Gulf & S. I. R. Co. v. Sullivan, 119 So. 501, 155 Miss. 1, 62 A.L.R. 191.
N.Y.—Warney v. Board of Education of School Dist. No. 5 of Town of Irondequoit, 49 N.E.2d 466, 290 N. Y. 329.
Pa.—Cutillo v. Kern, 19 Pa.Dist. & Co. 274, 47 York Leg.Rec. 137.
Tex.—Associated Indemnity Corporation v. Wilson, Civ.App., 21 S.W. 2d 314, error refused.
Wis.—Jeffery v. Kewaunee, G. B. & W. Ry. Co., 207 N.W. 283, 189 Wis. 207.
39 C.J. p 298 note 27 [b]-[e], [g]-[i].

96. Cal.—Shannon v. Fleishhacker, 2 P.2d 835, 116 Cal.App. 258.
Mich.—Meloche v. Flowers, Inc., 265 N.W. 309, 274 Mich. 385.
S.D.—Koenekamp v. Picasso, 249 N. W. 749, 61 S.D. 456.
W.Va.—Hammack v. Hope Natural Gas Co., 140 S.E. 1, 104 W.Va. 344.
39 C.J. p 298 note 27 [f] (2).

The facts of a particular case control as to whether a minor's employ-

as what constitutes a violation of a statute forbidding the employment of a minor in certain places,[97] or forbidding the employment of a minor to operate or assist in operating certain machinery.[98] Under some statutory provisions, minors of a certain age group may, subject to certain conditions, be lawfully employed in occupations or establishments not forbidden as hazardous,[99] but statutory prohibitions or regulations concerning the employment of children of one age group in specified occupations or places have no application to children of another age group.[1]

The question whether a child labor statute repeals an earlier one depends on whether the later act, although it contains no words to that effect, must, in the principles of law, as well as in reason and common sense, operate to repeal the former,[2] and a repeal of such statute is implied where the later statute covers the whole of the field covered by the earlier statute.[3]

b. Right or Cause of Action

Ordinarily, an employer's violation of a child labor statute gives rise to a right or cause of action for any injury of which it is the proximate cause in favor of a plaintiff for whose benefit the statute was enacted, although the statute provides no special remedy.

By statute in many jurisdictions, the employment of children of less than specified ages is either entirely prohibited or prohibited with respect to particular unsuitable or hazardous employments, or is made the subject of specific regulations, and, in accordance with the general rules by which a finding of negligence may be predicated on a violation of a duty imposed by statute, the violation of such a statute by a master ordinarily is negligence per se,[4] or prima facie evidence of negligence,[5] giving rise to a right or cause of action,[6] for any injury of

ment is extrahazardous in violation of law.—Kowalczyk v. Swift & Co., 160 N.E. 588, 329 Ill. 308.

Test of "occupation especially hazardous to life and limb"

Question whether child is employed in "occupation especially hazardous to life and limb" depends on whether employment considering inevitable strain on child renders occupation dangerous.—Employers' Casualty Co. v. Underwood, 286 P. 7, 142 Okl. 208.

An employment is dangerous within a statute prohibiting the employment of children under a given age in certain employments whenever there is reasonable cause to anticipate injury to a person engaged in it, whether the risk comes from the inherent character of the work, or whether it comes from the manner in which the work is done.—Harvey v. Ruff, 204 N.W. 634, 164 Minn. 21.

97. Miss.—Graham v. Goodwin, 156 So. 513, 170 Miss. 896.
Tex.—Associated Indemnity Corporation v. Wilson, Civ.App., 21 S.W. 2d 314, error refused.
W.Va.—Waldron v. Leevale Collieries, 33 S.E.2d 227, 127 W.Va. 443
Wis.—Jeffery v. Kewaunee, G. B. & W. Ry. Co., 207 N.W. 283, 189 Wis. 207.

98. Okl.—Employers' Casualty Co. v. Underwood, 286 P. 7, 142 Okl. 208.
Pa.—Williams v. Rheas, Inc., 99 Pa. Super. 438.
39 C.J. p 298 note 27 [f] (1), (3).

99. Pa.—Mitchell v. Mione Mfg. Co., 171 A. 114, 112 Pa.Super. 394.

1. La.—Picou v. J. B. Luke's Sons, 16 So.2d 466, 204 La. 881.
Minn.—Dally v. Ward, 26 N.W.2d 217, 223 Minn. 265.
Tex.—Woodard v. Wilkinson, Civ. App., 173 S.W.2d 222.

2. Pa.—Devine v. John Lang Paper Co., 162 A. 206, 307 Pa. 566.

3. Pa.—Devine v. John Lang Paper Co., supra—Williams v. Rheas, Inc., 99 Pa.Super. 438.

4. Ga.—Carruthers v. City of Hawkinsville, 156 S.E. 634, 42 Ga.App. 476.
Ky.—Chesapeake & O. Ry. Co. v. Stapleton's Guardian, 3 S.W.2d 209, 223 Ky. 154, reversed on other grounds Chesapeake & O. R. Co. v. Stapleton, 49 S.Ct. 442, 279 U.S. 587, 73 L.Ed. 861.
Mich.—Besonen v. Campbell, 220 N. W. 301, 243 Mich. 209—Sundstrom v. Fruit Growers' Package Co., 219 N.W. 617, 242 Mich. 442, 243 Mich. 66.
Miss.—Hartwell Handle Co. v. Jack, 115 So. 586, 149 Miss. 465.
Mo.—American Veterinary Laboratories v. Glidden Co., 59 S.W.2d 53, 227 Mo.App. 799—Buffum v. F. W. Woolworth Co., 273 S.W. 176, 221 Mo.App. 345.
N.Y.—Murphy v. Elmwood Country Club, 50 N.Y.S.2d 331.
Tenn.—**Corpus Juris cited in** Ballow v. Postal Tel. Co., 12 Tenn.App. 348, 350.
Tex.—Langston v. Degelia, Civ.App., 186 S.W.2d 738.
Va.—Ocean Accident & Guarantee Corporation, Limited, of London, England v. Washington Brick & Terra Cotta Co., 139 S.E. 513, 148 Va. 829.
39 C.J. p 297 note 14.
Degree of care required of master toward minor servants generally see supra § 185.

Any violation of statutory provisions prohibiting or regulating the employment of minors has been held to constitute negligence per se.—Mitchell v. Mione Mfg. Co., 171 A. 114, 112 Pa.Super. 394.

Negligence as matter of law
Ill.—Gill v. Boston Store of Chicago, 168 N.E. 895, 337 Ill. 70.
39 C.J. p 297 note 14 [g].

An employer's failure to apply for a determination as to whether an occupation is dangerous to children within a statute is not negligence where the statute does not require any such action on the part of the employer.—Haynesworth v. Hall Const. Co., 163 S.E. 273, 44 Ga.App. 807.

5. Minn.—Fitzgerald v. International Flax Twine Co., 116 N.W. 475, 104 Minn. 138.
39 C.J. p 298 note 15.
Admissibility of evidence of violations of statutes generally see infra § 508.

Subsequent repeal of statute
The violation of a child labor statute subsequently repealed has been held not to be prima facie evidence of negligence on the part of an employer.—Galveston, H. & H. R. Co. v. Anderson, Tex.Civ.App., 229 S.W. 998, error refused.

6. Ga.—Carruthers v. City of Hawkinsville, 156 S.E. 634, 42 Ga.App. 476.
Mich.—Sundstrom v. Fruit Growers' Package Co., 219 N.W. 617, 242 Mich. 442.
N.J.—Zisko v. Travelers Ins. Co., 189 A. 389, 117 N.J.Law 366—Terlingo v. Belz-Parr, 147 A. 480, 106 N.J.Law 221.
Pa.—King v. Darlington Brick & Mining Co., 131 A. 241, 284 Pa. 277.
Tenn.—Highland Coal & Lumber Co. v. Cravens, 8 Tenn.App. 419.
Va.—Ocean Accident & Guarantee Corporation, Limited, of London,

which it is the proximate cause,[7] in favor of a plaintiff for whose benefit the statute was enacted,[8] although the statute provides no special remedy.[9] Thus, although the violation of a statute may be made a crime, and the statute is merely penal, containing no provisions for a civil action, nevertheless the employer may be liable in a civil action for injuries to the minor wrongfully employed.[10] However, a statute imposing a penalty to be recovered by the party injured in satisfaction for the injury may be so worded as to be exclusive of other remedies.[11] The rule has been applied to numerous statutes prohibiting or regulating the employment of minors,[12] such as statutes prohibiting or regulating the employment of minors under specified ages,[13] the employment of minors in specified occupations or places,[14] the employment of minors for more than a specified number of hours,[15] and the employment of minors without an employment certificate.[16]

Although the violation of such a statute may be held to be negligence per se, there must be a causal relation between the act and the injury to render the master liable.[17] Where a minor sustains injuries in the course of his duty, the unlawful employment may be regarded as in itself the proximate cause of injury,[18] unless other negligence inter-

England, v. Washington Brick & Terra Cotta Co., 139 S.E. 513, 148 Va. 829.
39 C.J. p 298 notes 19, 27.

Trespass

(1) A minor employed in violation of a child labor statute may maintain an action of trespass for personal injuries received during the course of his employment.—Williams v. Rheas, Inc., 99 Pa.Super. 438.

(2) Where employment of minor is lawful, but minor is injured while directed, or permitted, to perform work in violation of a child labor act, minor may recover damages in trespass.—Mitchell v. Mione Mfg. Co., 171 A. 114, 112 Pa.Super. 394.

7. Ala.—Nichols v. Smith's Bakery, 119 So. 638, 218 Ala. 607.
Ga.—Carruthers v. City of Hawkinsville, 156 S.E. 634, 42 Ga.App. 476.
Ill.—Gill v. Boston Store of Chicago, 168 N.E. 895, 337 Ill. 70.
Ky.—Wynn Coal Co. v. Lindsey, 18 S.W.2d 864, 230 Ky. 53.
Miss.—Hartwell Handle Co. v. Jack, 115 So. 586, 149 Miss. 465.
Pa.—Williams v. Rheas, Inc., 99 Pa. Super. 438.
Tenn.—Jones v. Noel, App., 204 S.W.2d 336—Highland Coal & Lumber Co. v. Cravens, 8 Tenn.App. 419.
Tex.—Langston v. Degelia, Civ.App., 186 S.W.2d 738.
39 C.J. p 298 note 27.

8. Ga.—Platt v. Southern Photo Material Co., 60 S.E. 1068, 4 Ga. App. 159.
Parents' right of action for injury to child in general see the C.J.S. title Parent and Child §§ 41–44, also 46 C.J. p 1294 note 97–p 1302 note 2.

A minor not within the contemplation of an act has no cause of action under such act.—Ping v. Indianapolis Soap Co., 184 N.E. 903, 206 Ind. 287.

9. Minn.—Perry v. Tozer, 97 N.W. 137, 90 Minn. 431, 101 Am.S.R. 416.
39 C.J. p 298 note 20.

10. Mont.—Daly v. Swift & Co., 300 P. 265, 90 Mont. 52.
Vt.—Wlock v. Fort Dummer Mills, 129 A. 311, 98 Vt. 449.
39 C.J. p 298 note 21.

11. Pa.—Belles v. Jackson, 4 Pa. Dist. 194.
39 C.J. p 298 note 22.

12. Ill.—Beauchamp v. Sturgis, etc., Mfg. Co., 95 N.E. 204, 250 Ill. 303, affirmed 34 S.Ct. 60, 231 U.S. 320, 58 L.Ed. 245, L.R.A.1915A 1196.
39 C.J. p 298 note 27.

13. Ga.—Carruthers v. City of Hawkinsville, 156 S.E. 634, 42 Ga. App. 476.
Miss.—Hartwell Handle Co. v. Jack, 115 So. 586, 149 Miss. 465.
Vt.—Wlock v. Fort Dummer Mills, 129 A. 311, 98 Vt. 449.
39 C.J. p 298 note 27 [a] (2).

14. Pa.—Williams v. Rheas, Inc., 99 Pa.Super. 438.
39 C.J. p 298 note 27 [a] (3).

15. Tenn.—Ballow v. Postal Tel. Co., 12 Tenn.App. 348.
39 C.J. p 298 note 27 [a] (4).

Accident prior to expiration of permitted time

It has been held that, where a child is employed for more hours per day than permitted by statute, he may have a cause of action for injuries sustained by him, although the accident may have occurred prior to the expiration of the permitted time.—Ballow v. Postal Tel. Co., supra.

16. Ill.—Gill v. Boston Store of Chicago, 168 N.E. 895, 337 Ill. 70.
39 C.J. p 298 note 27 [a] (7).

17. U.S.—Miller v. American Cyanamid Co., C.C.A.N.J., 61 F.2d 389.
Ark.—Hogan v. Bateman Contracting Co., 43 S.W.2d 721, 184 Ark. 842.
Cal.—Williams v. Southern Pac. Co., 160 P. 660, 173 Cal. 525.
39 C.J. p 300 note 31.

The test of an employer's liability is whether the injury to the minor employee is the proximate result of the unlawful employment.—Perry v. Western Union Telegraph Co., C.C.A.Tenn., 27 F.2d 197.

Employment for more than specified hours

Where a child unlawfully employed must work more than the hours per day specified by statute and is injured while working, in order to sustain a cause of action for injuries the violation of the statute must have been the proximate cause of the injuries.—Williamson v. Old Dominion Box Co., 171 S.E. 335, 205 N.C. 350.

Violation held not proximate cause of injury

U.S.—Miller v. American Cyanamid Co., C.C.A.N.J., 61 F.2d 389.
Ark.—Hogan v. Bateman Contracting Co., 43 S.W.2d 721, 184 Ark. 842.
Cal.—Shannon v. Fleishhacker, 2 P.2d 835, 116 Cal.App. 258, rehearing denied 3 P.2d 1020.
La.—Picou v. J. B. Luke's Sons, 16 So.2d 466, 204 La. 881—Cropper v. Mills, App., 27 So.2d 764.
Neb.—Benner v. Evans Laundry Co., 222 N.W. 630, 117 Neb. 701, 60 A.L.R. 830.
N.C.—Williamson v. Old Dominion Box Co., 171 S.E. 335, 205 N.C. 350.
R.I.—Rossi v. Ronci, 195 A. 401, 59 R.I. 307.

18. Conn.—Knybel v. Cramer, 29 A.2d 576, 129 Conn. 439.
Ill.—Gill v. Boston Store of Chicago, 168 N.E. 895, 337 Ill. 70.
Ky.—**Corpus Juris quoted in** Hooven & Allison Co. v. Cox' Adm'r, 104 S.W.2d 969, 971, 268 Ky. 266.
Mich.—Sundstrom v. Fruit Growers' Package Co., 219 N.W. 617, 242 Mich. 442.
Mo.—American Veterinary Laboratories v. Glidden Co., 59 S.W.2d 53, 227 Mo.App. 799—Buffum v. F. W. Woolworth Co., 273 S.W. 176, 221 Mo.App. 345.
Tenn.—**Corpus Juris cited in** Ballow v. Postal Tel. Co., 12 Tenn.App. 348, 350—Highland Coal & Lumber Co. v. Cravens, 8 Tenn.App. 419.
Va.—Ocean Accident & Guarantee

venes,[19] but the employer is not, as matter of law, chargeable with all injuries that result during the unlawful employment.[20] He is liable only for those injuries against which the statute is intended to guard,[21] or for injuries that naturally and probably,[22] or reasonably and naturally,[23] follow the statute's violation.

Although the violation of law furnished merely the occasion for the injury and was not technically its proximate cause, it has been held that, where an infant is injured through the occurrence of one of the dangers against which child labor statutes are designed to protect him, the employer is liable therefor.[24] It has further been held that it is not necessary in order to charge a master that the child be engaged in the duties for which he is employed,[25] but that, when the statute prohibits only the hiring for a particular kind of work, the fact that one under the prescribed age was injured when employed in such work will not render the master liable when such work was without the scope of employment.[26]

Relationship of parties. Under some statutory provisions, the existence of the technical relation of master and servant is not a prerequisite to recovery.[27] However, in order that liability may attach to one under a statute dealing with the employment of minors, he must have retained such supervision and control that he could have prevented the unlawful employment.[28] Knowledge on the part of the employer that the services were performed by the infant has been held necessary to render him liable for injury to the infant,[29] but, where a minor is knowingly permitted or directed to work as an employee and that permission or direction is given by a foreman who has supervision of the work, the statute is violated,[30] although minors sometimes voluntarily assisting and performing personal services for an employee have been held not employed or permitted to work by the master so as to render him liable for injury to them.[31] Under some statutory provisions, knowingly permitting a minor to work near unguarded gearing constitutes a violation of law.[32]

c. Defenses

In an action against an employer for injuries suffered by a minor employee in the course of his employment founded on the violation of a child labor statute, the employer may show that the circumstances of the employment did not fall within the purview of the statute.

In an action against an employer for injuries suffered by a minor employee in the course of his employment founded on the violation of a statute con-

Corporation, Limited, of London, England v. Washington Brick & Terra Cotta Co., 139 S.E. 513, 148 Va. 829.
39 C.J. p 300 note 32.

19. Mo.—American Veterinary Laboratories v. Glidden Co., 59 S.W. 2d 53, 227 Mo.App. 799.

20. Ky.—**Corpus Juris quoted in** Hooven & Allison Co. v. Cox' Adm'r, 104 S.W.2d 969, 971, 268 Ky. 266.
39 C.J. p 301 note 33.

Master held not insurer
A master employing a minor in violation of a statute is not an insurer of the safety of the child from every injury that may occur while the child is employed.—Hooven & Allison Co. v. Cox' Adm'r, 104 S.W.2d 969, 268 Ky. 266.

21. Ky.—**Corpus Juris quoted in** Hooven & Allison Co. v. Cox' Adm'r, 104 S.W.2d 969, 971, 268 Ky. 266.
39 C.J. p 301 note 34.

22. Ky.—**Corpus Juris quoted in** Hooven & Allison Co. v. Cox' Adm'r, 104 S.W.2d 969, 971, 268 Ky. 266.
39 C.J. p 301 note 35.

23. Ky.—**Corpus Juris quoted in** Hooven & Allison Co. v. Cox' Adm'r, 104 S.W.2d 969, 971, 268 Ky. 266.
39 C.J. p 301 note 36.

24. Ky.—Hooven & Allison Co. v. Cox' Adm'r, 104 S.W.2d 969, 268 Ky. 266.

25. Minn.—Jacobson v. Merrill, etc., Mill Co., 119 N.W. 510, 107 Minn. 74, 22 L.R.A.,N.S., 309.
39 C.J. p 301 note 37.

26. Mo.—Boesel v. Wells, 169 S.W. 110, 260 Mo. 463.
39 C.J. p 302 note 38.

27. Miss.—Graham v. Goodwin, 156 So. 513, 170 Miss. 896.
39 C.J. p 298 note 24.

28. Ala.—Brilliant Coal Co. v. Sparks, 81 So. 185, 16 Ala.App. 665.
Ga.—Talmage v. Tift, 104 S.E. 91, 25 Ga.App. 639.

Statute not applicable to trespassers
Ill.—Donaldson v. Spring Valley Coal Co., 175 Ill.App. 224.

Caddie at golf club
Under some statutory provisions, a golf player, assigned a caddie not specially engaged by him and who when not engaged in the service of players is under the control of the club, is not an "employer" of the caddie so as to require a permit for the caddie and render the player liable for injury to the caddie resulting from the failure to obtain such permit.—Biskup v. H..man, 287 S.W. 865, 220 Mo.App. 542.

29. Ky.—Armstrong's Adm'r v. Sumne & Ratterman Co., 278 S.W. 111, 211 Ky. 750.

Knowledge of servant receiving benefits of services of infant has been held not imputable to employer to render latter liable.—Armstrong's Adm'r v. Sumne & Ratterman Co., supra.

Duty to prevent child from engaging in work
Under a statute providing that no child under a stated age shall be employed, "permitted or suffered to work," etc., the words, "permitted or suffered to work" have been held not to impose on employer any duty to prevent or to use reasonable care to prevent a child from engaging in his work, except where he permits or suffers the child to remain in his employ after acquiring knowledge that the child is within the prohibited age, but only prohibits the employment by him of a child under the stated age.—Clover Creamery Co. v. Kanode, 129 S.E. 222, 142 Va. 542.

30. Miss.—Graham v. Goodwin, 156 So. 513, 170 Miss. 896.

31. U.S.—Silver King Coalition Mines Co. v. Lindseth, C.C.A.Utah, 19 F.2d 221.

32. Ala.—Vida Lumber Co. v. Courson, 112 So. 737, 216 Ala. 248.

cerning the employment of minors, it is open to the employer to show that the circumstances of the employment did not fall within the purview of the statute.[33] The employment of a minor under a specified age may be declared unlawful, but, if at the time of his injury that child has attained the minimum age sanctioned by statute, the employer is not liable.[34] Under a statute prohibiting employment of a minor in an occupation dangerous to life or limb, the employer has been held not liable for something done without his authority.[35] However, the fact that a child was only temporarily employed and not on the regular pay roll,[36] that he had not taken up his tasks on the morning of the injury,[37] that he was given full instructions,[38] that the employer had no knowledge of the dangerous character of the employment or place,[39] or that the minor was attending night school,[40] is not available as a defense to the employer when sued for damages for an injury received by the minor while employed contrary to statutory prohibition.

The failure of other employers, in a like situation, to obtain employment certificates,[41] or the fact that the employer was innocent or ignorant of the minor's age because of the child's physique or mentality,[42] or that the minor has the physical qualifications to do the work,[43] has been held no defense. However, the employment has been held not unlawful where the employer in good faith procured and relied on a welfare officer's certificate authorizing employment of the minor.[44]

Since child labor statutes are aimed at the employer,[45] it is no defense that the child by accepting employment violated the statute.[46] Also, it is no defense to the child's right of action that the parent acquiesced in the unlawful employment.[47] While in some jurisdictions the rule obtains that the employment of a minor in good faith after the exercise of proper vigilance to ascertain his age does not relieve the master from the operation of the statute,[48] in other jurisdictions it is a defense that the employer has exercised proper vigilance and is justified in his belief that the employee is of sufficient age to authorize his employment,[49] and it has been held that an employer may show that his act in employing the injured minor was not a willful and known violation of the statute.[50] Where the employer has recognized the employment, it is no defense that the employment manager, having complete authority, entered an employee's age as being older than he actually was, with the employee's knowledge.[51]

Misrepresentation of age. Misrepresentation or concealment of his age by a child,[52] his parent or

33. Mich.—Tabinski v. A. Harvey's Sons Mfg. Co., 134 N.W. 653, 168 Mich. 392.
39 C.J. p 302 note 40.
Assumption of risk see infra § 419.
Contributory negligence see infra § 480.

34. Me.—Cote v. Jay Mfg. Co., 98 A. 817, 115 Me. 300.

35. Ky.—Vincennes Bridge Co. v. Guinn's Guardian, 22 S.W.2d 300, 231 Ky. 772.

36. N.C.—McGowan v. Ivanhoe Mfg. Co., 82 S.E. 1028, 167 N.C. 192.

37. Ala.—Nichols v. Smith's Bakery, 119 So. 638, 218 Ala. 607.

38. Pa.—Stehle v. Jaeger Automatic Mach. Co., 69 A. 1116, 220 Pa. 617, 14 Ann.Cas. 122.
39 C.J. p 304 note 57.
Duty to instruct and warn inexperienced servant generally see infra § 306.

39. Kan.—Casteel v. Pittsburg Vitrified Pav. & Bldg. Co., 112 P. 145, 83 Kan. 533.
39 C.J. p 304 note 58.
Knowledge of dangerous conditions generally see infra §§ 244–248.

40. Cal.—Maryland Casualty Co. v. California Industrial Accident Commn., 178 P. 858, 179 Cal. 716.

41. Fla.—United Independent Laundries v. Holden, 193 So. 544, 141 Fla. 410, followed in 193 So. 546, 141 Fla. 414.

42. Fla.—United Independent Laundries v. Holden, 193 So. 544, 141 Fla. 410, followed in 193 So. 546, 141 Fla. 414.

43. Ill.—Gill v. Boston Store of Chicago, 168 N.E. 895, 337 Ill. 70.

44. N.C.—Williamson v. Old Dominion Box Co., 171 S.E. 335, 205 N.C. 350.

45. Ind.—Inland Steel Co. v. Yedinak, 87 N.E. 229, 172 Ind. 423, 139 Am.S.R. 389.
39 C.J. p 302 note 43.

46. Mass.—Moran v. Dickinson, 90 N.E. 1150, 204 Mass. 559, 48 L.R.A., N.S., 675.
39 C.J. p 302 note 44.

47. N.Y.—Stenson v. J. H. Flick Constr. Co., 130 N.Y.S. 555, 146 App.Div. 66.
39 C.J. p 302 note 45.

48. Vt.—Wlock v. Fort Dummer Mills, 129 A. 311, 98 Vt. 449.
39 C.J. p 302 note 46.

49. N.Y.—Koester v. Rochester Candy Works, 87 N.E. 77, 194 N.Y. 92, 19 L.R.A.,N.S., 783, 16 Ann.Cas. 589.
39 C.J. p 303 note 47.

50. Ky.—Caldwell v. Jarvis, 185 S.W.2d 552, 299 Ky. 439.

51. Mich.—Fontana v. Ford Motor Co., 270 N.W. 266, 278 Mich. 199.

52. Fla.—Tampa Shipbuilding & Engineering v. Adams, 181 So. 403, 132 Fla. 419, rehearing denied 181 So. 893, 132 Fla. 419.
Ky.—Wynn Coal Co. v. Lindsey, 18 S.W.2d 864, 230 Ky. 53.
Mo.—Buffum v. F. W. Woolworth Co., 273 S.W. 176, 221 Mo.App. 345.
Pa.—Mitchell v. Mione Mfg. Co., 171 A. 114, 112 Pa.Super. 394.
Vt.—Wlock v. Fort Dummer Mills, 129 A. 311, 98 Vt. 449.
Va.—Ocean Accident & Guarantee Corporation, Limited, of London, England, v. Washington Brick & Terra Cotta Co., 139 S.E. 513, 148 Va. 829.
W.Va.—Dale v. Wheeling Steel Corporation, 164 S.E. 245, 112 W.Va. 138.
39 C.J. p 303 note 49, p 903 note 36.
Misrepresentation of age as fraud avoiding relationship of master and servant see supra § 6.

Estoppel

Minor unlawfully employed has been held not estopped to maintain action for injuries by misrepresentation of age.
Tenn.—Knoxville News Co. v. Spitzer, 279 S.W. 1043, 152 Tenn. 614—Highland Coal & Lumber Co. v. Cravens, 8 Tenn.App. 419.
Tex.—Langston v. Degelia, Civ.App., 186 S.W.2d 738.

guardian,[53] or his friend,[54] is no defense to an employer, when sued by a child who is injured while unlawfully employed, unless allowed by statute.[55] The defense is also properly denied an employer where a parental affidavit of age,[56] employment certificate,[57] or other record,[58] required by statutes, is not furnished.

§ 195. Joint and Several Liability

Ordinarily, where a servant is injured by reason of the concurrent negligence of the employer and others, they are jointly and severally liable, provided there is a community of interest of wrong or fault.

Ordinarily, where a servant is injured by reason of the concurrent negligence of the employer and others, they are jointly and severally liable,[59] provided there is a community of purpose or of wrong or fault.[60] It has been held that, where the original owner of a business and a purchaser thereof are jointly responsible for an injury to an employee, they are severally liable therefor.[61] Where a master delegates his duty to protect his servant to another and the servant is injured by reason of such person's negligence, they have been held jointly liable therefor.[62] However, the violation of a statute placing a duty on an "owner or person in charge" of an institution to protect an employee does not render an owner and person in charge of such institution jointly liable to a servant injured by the failure to comply with the provisions of the statute.[63]

The rule of joint and several liability where there is a community of purpose or of wrong or fault applies to employees of railroads,[64] or of other employers,[65] who are injured through the joint negligence of their employers and others, as, for example, in the case of the concurring negligence of railroads operating under joint traffic agreements.[66] The fact that the employee is acting outside of the scope of his employment at the time of the injury is not a defense to a third person guilty of negligence toward him.[67]

§ 196. Express Contracts Affecting Master's Liability

The validity, form, and sufficiency of express contracts affecting the master's liability for injury to his servant are discussed infra § 197, what law governs such contract, infra § 199, waiver of contract against liability, infra § 200, and the effect of acceptance of benefits from relief or benefit department or association, supra § 170.

Examine Pocket Parts for later cases.

§ 197. —— Validity, Form, and Sufficiency

a. In general
b. Constitutional and statutory provisions

a. In General

While, in the absence of constitutional or statutory prohibition, it has been held that a contract exempting an employer from liability for future injury to his employee resulting from the employer's negligence or breach of duty is valid, it has also been held that such a contract is invalid as against public policy.

While, in the absence of constitutional or statutory prohibition, it has been held that a contract exempting an employer from liability for future injury to his employee resulting from the employer's negligence or breach of duty is valid,[68] and the supreme court of the United States has given at least partial assent to this rule,[69] it has also been

53. Vt.—Wlock v. Fort Dummer Mills, 129 A. 311, 98 Vt. 449.
39 C.J. p 303 note 50.

54. Mich.—Braasch v. Michigan Stove Co., 118 N.W. 366, 153 Mich. 652, 20 L.R.A.,N.S., 500.
W.Va.—Blankenship v. Ethel Coal Co., 70 S.E. 863, 69 W.Va. 74.

55. Ohio.—Cleveland Worsted Mills Co. v. Coates, 26 Ohio Cir.Ct.,N.S., 353.

56. Minn.—Dusha v. Virginia Rainy Lake Co., 176 N.W. 482, 145 Minn. 171, 23 A.L.R. 632.
39 C.J. p 303 note 53.

57. Pa.—Krutlies v. Bulls Head Coal Co., 94 A. 459, 249 Pa. 162, L.R.A. 1915F 1082.

58. N.J.—Feir v. Weil, 106 A. 402, 92 N.J.Law 610.

59. Kan.—Fliege v. Kansas City Western R. Co., 107 P. 555, 82 Kan. 147, 30 L.R.A.,N.S., 734.
39 C.J. p 304 note 61.
Concurrent negligence of master and fellow servant as affecting application of fellow-servant rule see infra § 356.
Liability of third persons for injuries to servant generally see infra § 623.

60. Mass.—Bagley v. Wonderland Co., 91 N.E. 317, 205 Mass. 238.
39 C.J. p 304 note 62.

61. N.H.—Musgrave v. Great Falls Mfg. Co., 169 A. 583, 86 N.H. 375.

62. Ky.—Luton Mining Co. v. Louisville & N. R. Co., 123 S.W.2d 1055, 276 Ky. 321.

63. U.S.—Hane v. Mid-Continent Petroleum Corporation, D.C.Okl., 43 F.2d 406.

64. Fla.—Louisville, & N. R. Co. v. Allen, 65 So. 8, 67 Fla. 257, L.R.A. 1915C 20.
39 C.J. p 305 note 63.

65. Ariz.—Verde Tunnel & Smelter R. Co. v. Stevenson, 196 P. 164, 22 Ariz. 188.
39 C.J. p 305 note 64.

66. Ky.—Ligon v. Evansville R. Co., 176 S.W. 968, 165 Ky. 202.
39 C.J. p 305 note 65.

67. Mo.—Lofty v. Lynch-McDonald Constr. Co., 256 S.W. 83, 215 Mo. App. 163.
39 C.J. p 305 note 66.

68. Ga.—Fulton Bag & Cotton Mills v. Wilson, 15 S.E. 322, 89 Ga. 318.
39 C.J. p 305 note 69.
Contracts as to acceptance of benefits under relief plans see supra § 170.

69. U.S.—Wells Fargo & Co. v. Taylor, Miss., 41 S.Ct. 93, 254 U.S. 175, 65 L.Ed. 205.

held that a contract, in so far as it attempts to accomplish such result, is invalid[70] as against public policy.[71] It has further been held that a master, under the guise of an adoption of rules and regulations, may not relieve himself from liability to his servant for negligence.[72] An express agreement by which an employee assumes risks which he would in the absence of agreement assume by implication is not, however, invalid;[73] and it is competent for an employee to waive the advantage of any provision of law which was intended solely for his benefit, so long as the waiver does not violate public policy.[74]

Form and sufficiency. Assuming that an agreement for the release of an employer from liability for injury to his employee may be regarded as valid, in order to prevail as a defense it must be plainly expressed in the contract of employment,[75] and must be supported by a consideration.[76] In the absence of fraud or imposition the contract is not invalidated by the fact that the employee signs it without reading or understanding it.[77]

Contracts for benefit of employee. An employer may contract to assume risks ordinarily assumed by an employee.[78] Where, as a part of the contract of employment, an employer agrees to protect his employee against violence by strikers or strike sympathizers the employee may recover damages resulting to him from a breach of such agreement.[79] An agreement of this character, although agreeing to furnish absolute protection from violence, is not invalid as impossible of performance,[80] or as against public policy as necessitating the employment of a private armed force,[81] or as a contract of insurance not complying with the requirements of the laws as to contracts of insurance.[82]

Past injuries. An employee, failing, without his employer's fault, to read a written release of the employer from further liability for injuries to the employee in consideration of the payment of a stated sum, has been held bound by its terms.[83]

b. Constitutional and Statutory Provisions

Under some constitutional and statutory provisions, a contract, in so far as it attempts to relieve or exempt a master from liability for future injury to his servant resulting from the master's negligence or breach of duty, is invalid.

Under some constitutional and statutory provisions, a contract, in so far as it attempts to relieve or exempt a master from liability for future injury to his servant resulting from the master's negligence or breach of duty, is invalid,[84] as where the liability contracted against is one imposed by statute.[85] The validity of such statutes has been sustained,[86] and they may not be evaded by indirection.[87] They are, however, construed to apply only to contracts clearly within their provisions,[88] and have been held not to invalidate releases executed after an injury has been sustained.[89]

70. Ark.—E. L. Bruce Co. v. Leake, 3 S.W.2d 988, 176 Ark. 705.
39 C.J. p 305 note 71.

71. La.—Haven v. Munson, App., 169 So. 819.
N.Y.—Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 152 Misc. 716.
Tex.—Wichita Falls & S. R. Co. v. Lindley, Civ.App., 143 S.W.2d 428, error dismissed, judgment correct.
39 C.J. p 305 note 72.

72. Ill.—Himrod Coal Co. v. Clark, 64 N.E. 282, 197 Ill. 514.
39 C.J. p 306 note 75.

73. R.I.—Wilson v. New York, N. H. & H. R. Co., 69 A. 364, 29 R.I. 146.

74. Mont.—Shea v. North-Butte Min. Co., 179 P. 499, 55 Mont. 522.

75. Mich.—Cottrell v. Michigan United Tract. Co., 150 N.W. 857, 184 Mich. 221.
39 C.J. p 307 note 3.

76. Mo.—State ex rel. St. Louis Car Co. v. Hughes, 152 S.W.2d 193, 348 Mo. 125, mandate conformed to Slabon v. St. Louis Car Co., App., 153 S.W.2d 827.
39 C.J. p 307 note 4.

77. U.S.—New York Cent. & H. R. R. Co. v. Difendaffer, Ill., 125 F. 893, 62 C.C.A. 1.

78. Iowa.—Rork v. Klein, 221 N.W. 460, 206 Iowa 809, 60 A.L.R. 469.

79. Tex.—Kansas, O. & G. R. Co. v. Pike, Civ.App., 264 S.W. 593.

80. Wash.—Hansen v. Dodwell Dock & Warehouse Co., 170 P. 346, 100 Wash. 46, L.R.A.1918C 925.

81. Wash.—Hansen v. Dodwell Dock & Warehouse Co., supra.

82. Wash.—Hansen v. Dodwell Dock & Warehouse Co., supra.

83. Tex.—Fort Worth & D. C. Ry. Co. v. Larson, Civ.App., 169 S.W. 2d 260.

84. Mass.—Lakube v. Cohen, 23 N. E.2d 144, 304 Mass. 156.
Mont.—Carlson v. Northern Pac. Ry. Co., 268 P. 549, 82 Mont. 559, 58 A.L.R. 1304.
39 C.J. p 306 note 73.

85. Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Ross, 80 N.E. 845, 169 Ind. 3.
39 C.J. p 306 note 74.

86. N.C.—Coley v. North Carolina R. Co., 40 S.E. 195, 129 N.C. 407, 57 L.R.A. 817.
39 C.J. p 306 note 84.

87. Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 49 N.E. 582, 152 Ind. 1, 71 Am.S.R. 301, 69 L.R.A. 875.
39 C.J. p 307 note 85.

88. Ind.—Cleveland, C., C. & St. L. R. Co. v. Henry, 83 N.E. 710, 170 Ind. 94.
39 C.J. p 307 note 86.

Contract held not within prohibition

A statute prohibiting contracts between a master and servant releasing the master from liability for injury to the servant resulting from the master's negligence is not contravened by an application for employment by which the servant undertakes to make a careful examination of all things near to the railroad tracks, so that he may understand the dangers attending them.—Quinn v. New York, N. H. & H. R. Co., 55 N.E. 891, 175 Mass. 150.

89. Mont.—Carlson v. Northern Pac. Ry. Co., 268 P. 549, 82 Mont. 559, 58 A.L.R. 1304.
Ohio.—Bowers v. Detroit Southern R., 26 Ohio Cir.Ct. 518.

Under the Federal Employers' Liability Act, any contract, the purpose of which is to enable a common carrier by railroad to exempt itself from any liability created by the act, is to that extent void.[90] This provision has been sustained as against an objection that it interferes with the liberty of contract guaranteed by the federal constitution.[91] It applies to existing, as well as to future, contracts and regulations of the proscribed character.[92] It applies, however, only to liabilities created by the act.[93] It does not apply to a contract between a railroad company and an independent contractor,[94] or to a contract between an express company and its messengers,[95] or between a Pullman car company and its employee,[96] although it applies to a contract with a porter employed by a railroad and a Pullman company jointly.[97] Also it does not apply to agreements for settlements or releases entered into after an injury has been sustained.[98]

§ 198. —— What Law Governs

The law of the state where the injury to a servant occurs has been held to govern whether a contract attempting to release a master from liability for injury to his servant will be enforced.

Although the courts of the state in which a contract of employment is made may regard a contract attempting to release the employer from liability for injury to an employee as against public policy, they will enforce it as to an injury occurring in a state wherein such a contract is recognized as valid.[99] Where a contract of employment contemplates that a portion of the services is to be performed in another state wherein the injury complained of is received and wherein a contract releasing the employer from liability is void, the courts of the state wherein the contract is made will regard it as void as governed by the law of the state of the injury.[1] It has been held that no contract made in one state purporting to release an employer from liability to his employee for future negligence will be enforced in another state, where an injury is sustained by the employee in the latter state, if such contract violates the public policy of such state.[2]

§ 199. —— Construction

A contract by an employee releasing an employer from liability for injury to the employee should be strictly construed. The fact that a master agrees to take all risk of any accident which may occur to a servant does not impose on the master a liability for injuries caused by the servant's contributory negligence.

A contract by an employee releasing the employer from liability for injury to the employee is to be strictly construed.[3] General words are limited by a

90. U.S.—Thompson v. Missouri Pac. R. Co., C.C.A.Mo., 15 F.2d 28—Davis v. Crane, C.C.A.Mo., 12 F.2d 355.
39 C.J. p 307 note 89.

Regardless of the intention of the parties, if the practical effect of a contract or device is to exempt such common carrier from any liability imposed by the act, the contract or device is void.
Cal.—Larson v. Lewis-Simas-Jones Co., 84 P.2d 296, 29 Cal.App.2d 83.
Utah.—Petersen v. Ogden Union Ry. & Depot Co., 175 P.2d 744.

What constitutes "liability" under act
The liableness to a judicial pronouncement of liability in any of the courts enumerated in venue provision of the Federal Employers' Liability Act is itself a "liability" within other provision of the act invalidating a contract by which such common carrier exempts itself from liability, so that a provision in contract between injured employee and carrier by which employee agreed not to maintain suit in any other court than the federal district court for a specified district was invalid under provision in the Employers' Liability Act invalidating any contract by which a common carrier exempts itself from liability created by the act.—Petersen v. Ogden Union Ry. & Depot Co., supra.

Contract to keep rolling stock in repair
A contract whereby another company agrees to keep a railroad's rolling stock in repair has been held to be void to the extent that its purpose or intent is to enable the railroad to exempt itself from any liability created by the Federal Employers' Liability Act.—Moore v. Industrial Commission of Ohio, 197 N.E. 403, 49 Ohio App. 386.

91. U.S.—Mondou v. New York, N. H. & H. R. Co., Conn., Mass. & Minn., 32 S.Ct. 169, 223 U.S. 1, 56 L.Ed. 327, 38 L.R.A.,N.S., 44.
39 C.J. p 307 note 90.

92. U.S.—Philadelphia, B. & W. R. Co. v. Schubert, App.D.C., 32 S.Ct. 589, 224 U.S. 603, 56 L.Ed. 911.

93. U.S.—Robinson v. Baltimore & O. R. Co., App.D.C., 35 S.Ct. 491, 237 U.S. 84, 59 L.Ed. 849.

94. U.S.—Chicago, R. I. & P. R. Co. v. Bond, Okl., 36 S.Ct. 403, 240 U.S. 449, 60 L.Ed. 735.
N.J.—Drago v. New Jersey Cent. R. Co., 106 A. 803, 93 N.J.Law 176, certiorari denied 40 S.Ct. 118, 251 U.S. 553, 64 L.Ed. 411.

95. U.S.—Wells Fargo & Co. v. Taylor, Miss., 41 S.Ct. 93, 254 U.S. 175, 65 L.Ed. 205.
N.J.—Delaware, L. & W. R. Co. v. Smyth, 115 A. 65, 93 N.J.Eq. 80.

96. U.S.—Robinson v. Baltimore & O. R. Co., App.D.C., 35 S.Ct. 491, 237 U.S. 84, 59 L.Ed. 849.

97. U.S.—Oliver v. Northern Pac. R. Co., D.C.Wash., 196 F. 432.

98. Tex.—Panhandle & S. F. Ry. Co. v. Fitts, 188 S.W. 528, reversed on other grounds, Com.App., 222 S.W. 158.
Utah.—Anderson v. Oregon Short Line R. Co., 155 P. 446, 47 Utah 614.
39 C.J. p 307 note 97.

99. U.S.—Lindsay v. Chicago, B. & Q. R. Co., Ill., 226 F. 23, 141 C.C.A. 131.

1. Utah.—Stone v. Union Pac. R. Co., 89 P. 723, 32 Utah 207—Stone v. Union Pac. R. Co., 89 P. 715, 32 Utah 185.

2. U.S.—Bradford Electric Light Co. v. Clapper, C.C.A.N.H., 51 F.2d 992, reversed on other grounds 52 S.Ct. 571, 286 U.S. 145, 76 L.Ed. 1026, 82 A.L.R. 696.

3. Kan.—Smith v. Chicago, R. I. & P. R. Co., 107 P. 635, 82 Kan. 136, 28 L.R.A.,N.S., 1255.
39 C.J. p 308 note 6.

by furnishing in the first instance a safe place to work and safe instrumentalities.[17]

The determination of what is safe depends on the particular circumstances.[18] While the servant may assume that the master has performed such duty,[19] the rule is to be applied in harmony with the doctrine of assumed risk,[20] discussed infra §§ 363, 364, and the master may assume that the servant will exercise some care for his own safety.[21] It has been held, however, that the master's duty of furnishing safe appliances is independent of the servant's duty to exercise ordinary care in using the appliances,[22] and the fact that an employee had or might have had sufficient inventive skill and genius to have devised means of self-protection does not absolve the employer of furnishing ordinary safety appliances.[23]

The rule does not apply where the place becomes unsafe during the progress of the work, as discussed infra § 219, or where the servant is engaged in the work of making a dangerous place safe, discussed infra § 250.

Scope of employment. In order to render a master liable for personal injuries to his servant arising out of failure to furnish safe tools, machinery, appliances, and places for work, the injuries must have been received within the scope of the servant's employment.[24]

Appliances furnished by servant. The master is not liable for an injury resulting from a defect in tools, machinery, or appliances furnished by the servant.[25]

§ 202. Degree of Care Required

A master is not an insurer of the safety of the instrumentalities or places for work furnished his servant, but is liable only for negligence or the failure to exercise due, ordinary, or reasonable care.

In furnishing tools, machinery, and appliances for an employee, or a place for his work, an employer must exercise due care.[26] He is not an insurer of the safety of the tools, machinery, appliances, and places for work, nor is he an insurer of the

303 U.S. 651, 82 L.Ed. 1112—McCord v. Harrison-Wright Co., 153 S.E. 406, 198 N.C. 742.
Ohio.—Bevan v. New York, C. & St. L. R. Co., 6 N.E.2d 982, 132 Ohio St. 245, certiorari denied 57 S.Ct. 924, 301 U.S. 695, 81 L.Ed. 1351.
Okl.—Kansas City Bridge Co. v. Gravitt, 105 P.2d 767, 188 Okl. 30.
Pa.—Verna v. Lopresti, 42 A.2d 170, 157 Pa.Super. 163.
R.I.—Faltinali v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 438.
S.C.—Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 184 S.C. 471.
Tex.—Morton Salt Co. v. Wells, 70 S.W.2d 409, 123 Tex. 151.
Vt.—Landing v. Town of Fairlee, 22 A.2d 179, 112 Vt. 127.
39 C.J. p 312 note 14.

17. U.S.—Phillips Petroleum Co. v. Manning, C.C.A.Ark., 81 F.2d 849.
Miss.—Scott Burr Stores Corporation v. Morrow, 180 So. 741, 182 Miss. 743.
Duty of master to keep machinery and appliances in safe condition by making inspections and repairs see infra § 235.

18. U.S.—Grosscup v. Chicago & N. W. Ry. Co., D.C.Wyo., 14 F.Supp. 276.
Okl.—Kansas City Southern Ry. Co. v. Hoyle, 90 P.2d 1042, 185 Okl. 211.
39 C.J. p 312 note 15.
Particular circumstances as affecting determination of what is reasonably safe see infra § 206.
"Safe" or "safety," within safe place statute, means such freedom from danger to life, health, safety, or welfare of employees as nature and place of employment will reasonably permit.—Baker v. Janesville Traction Co., 234 N.W. 912, 204 Wis. 452.

19. Ark.—Tucker Duck & Rubber Co. v. Harvey, 154 S.W.2d 828, 202 Ark. 1033—Safeway Stores v. Phelps, 145 S.W.2d 337, 201 Ark. 495.
S.C.—Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259.
Wash.—**Corpus Juris cited in** Cummins v. Dufault, 139 P.2d 308, 312, 18 Wash.2d 274.
39 C.J. p 313 note 16.

20. Ky.—Bell v. Louisville & N. R. Co., 287 S.W. 219, 216 Ky. 42.
Miss.—Crosby v. Burge, 1 So.2d 504, 190 Miss. 739.

21. Ark.—Caddo River Lumber Co. v. Henderson, 109 S.W.2d 425, 194 Ark. 724.
Improper or unusual use or test as affecting master's liability see infra § 251.

22. Mo.—Schmeer v. Anchor Cold Storage Co., 12 S.W.2d 433.

23. U.S.—U. S. Steel Products Co. v. Noble, C.C.A.N.Y., 10 F.2d 89.

24. La.—Evans v. Campbell, App., 9 So.2d 91.
Miss.—Forbus v. Cobb Bros. Const. Co., 185 So. 243, 184 Miss. 647, suggestion of error overruled 186 So. 643, 184 Miss. 647.
Scope of employment as affecting master's liability generally see supra § 181.

25. Pa.—Hartz v. Schafer, 154 A. 713, 303 Pa. 449.
Where employer had no control over the streets or employee's motorcycle used by employee in his work, employer was not liable for injury due to skidding on an icy street while employee was engaged in serving employer.—Pfiester 'Adm'r v. Jones, 163 S.W.2d 304, 291 Ky. 151.

26. U.S.—Davis v. Crane, C.C.A.Mo., 12 F.2d 355.
Ala.—Gentry v. Swann Chemical Co., 174 So. 530, 234 Ala. 313.
Me.—Spence v. Bath Iron Works Corporation, 37 A.2d 174, 140 Me. 287.
Md.—Curtis Bay Towing Co. v. Dean, 199 A. 521, 174 Md. 498, certiorari denied 59 S.Ct. 92, 305 U.S. 628, 83 L.Ed. 402—M. A. Long Co. v. State Acc. Fund, 144 A. 775, 156 Md. 639.
Mo.—Stone v. Missouri Pac. Ry. Co., 293 S.W. 367.
N.C.—Holeman v. Pensacola Shipbuilding Co., 134 S.E. 647, 192 N.C. 236.
S.C.—Davis v. Atlantic Coast Line R. Co., 147 S.E. 834, 150 S.C. 130, reversed on other grounds Atlantic Coast Line R. Co. v. Davis, 49 S.Ct. 210, 279 U.S. 34, 73 L.Ed. 601.
Tex.—Railway Express Agency v. Robinson, Civ.App., 162 S.W.2d 984, error refused.
Va.—Bly v. Southern Ry. Co., 31 S.E. 2d 564, 183 Va. 162, opinion adhered to 32 S.E.2d 659, 183 Va. 406.
Due care is "the care which the exigencies of the work reasonably demand."—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 684, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791.

safety of the employee in using the instrumentalities furnished,[27] but, according to the decisions on

27. U.S.—Baltimore & O. S. W. R. Co. v. Carroll, Ind., 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed. 566—Slayton v. Noonan, C.C.A.Ala., 133 F.2d 793, applying law of Mississippi—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213—Buffington v. Owosso Mfg. Co., C.C.A.Ark., 105 F.2d 692—Shoaf v. Fitzpatrick, C.C.A.Tenn., 104 F.2d 290, certiorari denied 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 518—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 93 F.2d 736—Aqua System v. Kodakoski, C.C.A.Canal Zone, 88 F.2d 395—Grant Storage Battery Co. v. De Lay, C.C.A.Neb., 87 F.2d 726—Phillips Petroleum Co. v. Manning, C.C.A.Ark., 81 F.2d 849—Grammer v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 71 F.2d 38, certiorari denied 55 S.Ct. 82, 293 U.S. 571, 79 L.Ed. 670—Green v. Standard Wholesale Phosphate & Acid Works, D.C.Md., 29 F.2d 746—Erickson v. Pacific States Lumber Co., C.C.A.Or., 18 F.2d 513—Chicago & N. W. Ry. Co. v. Payne, C.C.A.Neb., 8 F.2d 332.

Ark.—Tucker Duck & Rubber Co. v. Harvey, 154 S.W.2d 828, 202 Ark. 1033—A. A. Electric Co. v. Ray, 149 S.W.2d 38, 202 Ark. 85—Heard v. Arkansas Power & Light Co., 147 S.W.2d 362, 201 Ark. 915—McGeorge v. Henderson, 145 S.W.2d 31, 201 Ark. 492—Berry Asphalt Co. v. Kidd, 143 S.W.2d 42, 200 Ark. 1121—Southwestern Bell Telephone Co. v. Casson, 138 S.W.2d 406, 199 Ark. 1140—Kroger Grocery & Baking Co. v. Kennedy, 136 S.W.2d 470, 199 Ark. 914—Caddo River Lumber Co. v. Henderson, 109 S.W.2d 425, 194 Ark. 724—Mercury Mining Co. v. Chambers, 102 S.W.2d 543, 193 Ark. 771—Missouri Pac. R. Co. v. Martin, 57 S.W.2d 1047, 186 Ark. 1101—Mississippi River Fuel Corporation v. Senn, 43 S.W.2d 255, 184 Ark. 554—Gerig v. Furr, 39 S.W.2d 1021, 183 Ark. 1036—J. E. Parham Const. Co. v. Parker, 37 S.W.2d 879, 183 Ark. 673—Mosley v. Raines, 37 S.W. 2d 78, 183 Ark. 569—Sandusky v. Warren, 6 S.W.2d 15, 177 Ark. 271—Cleaver v. Bert Johnson Orchards, 298 S.W. 1016, 175 Ark. 223.

Del.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr. 339.

Ga.—Tankersley v. Southern Ry. Co., 35 S.E.2d 522, 73 Ga.App. 88.

Ill.—Huff v. Illinois Cent. R. Co., 199 N.E. 116, 362 Ill. 95.

Ind.—Conway v. Park, 31 N.E.2d 79, 108 Ind.App. 562.

Iowa.—Johnson v. Kinney, 7 N.W.2d 188, 232 Iowa 1011, 144 A.L.R. 997—Anderson v. Sheuerman, 6 N.W. 2d 125, 232 Iowa 705.

Kan.—Allen v. Shell Petroleum Corporation, 68 P.2d 651, 146 Kan. 67.

Ky.—Grigsby v. Louisville & N. R. Co., 114 S.W.2d 775, 272 Ky. 709—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603—Perkins-Harlan Coal Co. v. Creech's Adm'r, 103 S.W.2d 943, 268 Ky. 174—Codell Const. Co. v. White, 65 S.W.2d 690, 251 Ky. 574—Fee's Adm'x v. Mahan-Ellison Coal Corporation, 43 S.W.2d 681, 241 Ky. 231—Big Sandy & C. R. Co. v. Measell's Adm'r, 42 S.W.2d 747, 240 Ky. 571—Hall v. Proctor Coal Co., 34 S.W.2d 425, 236 Ky. 813.

Me.—Spence v. Bath Iron Works Corporation, 37 A.2d 174, 140 Me. 287—Charpentier v. Great Atlantic & Pacific Tea Co., 157 A. 237, 130 Me. 423—Loring v. Maine Cent. R. Co., 152 A. 527, 129 Me. 369—Millett v. Maine Cent. R. Co., 146 A. 903, 128 Me. 314—Blacker v. Oxford Paper Co., 142 A. 776, 127 Me. 228—Morey v. Maine Cent. R. Co., 142 A. 585, 127 Me. 190.

Md.—McVey v. Gerrald, 192 A. 789, 172 Md. 595.

Mass.—Lynch v. New York, N. H. & H. R. R., 200 N.E. 877, 294 Mass. 152—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266.

Miss.—Masonite Corp. v. Graham, 25 So.2d 322—Crosby v. Burge, 1 So. 2d 504, 190 Miss. 739—Wunderlich v. Walker, 189 So. 523, 186 Miss. 149—Eagle Cotton Oil Co. v. Sollie, 187 So. 506, 185 Miss. 475—Aponaug Mfg. Co. v. Hammond, 187 So. 227, 185 Miss. 198—Wilson & Co. v. Holmes, 177 So. 24, 180 Miss. 361—Meridian Grain & Elevator Co. v. Jones, 169 So. 771, 176 Miss. 764—Dr. Pepper Bottling Co. v. Gordy, 164 So. 236, 174 Miss. 392—Allen Gravel Co. v. Curtis, 161 So. 670, 173 Miss. 416—Columbus & G. R. Co. v. Coleman, 160 So. 277, 172 Miss. 514—**Corpus Juris cited in** Gulfport Creosoting Co. v. White, 157 So. 86, 87, 171 Miss. 127—Hammontree v. Cobb Const. Co., 152 So. 279, 168 Miss. 844—Barron Motor Co. v. Bass, 150 So. 202, 167 Miss. 786—Seifferman v. Leach, 138 So. 563, 161 Miss. 853—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied Clay v. Mobile & O. R. Co., 51 S.Ct. 24, 282 U.S. 844, 75 L.Ed. 749.

Mo.—Fischer v. City of Cape Girardeau, 131 S.W.2d 521, 345 Mo. 122—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336 Mo. 316—Compton v. Louis Rich Const. Co., 287 S.W. 474, 315 Mo. 1068—Sabol v. St. Louis Cooperage Co., 282 S.W. 425, 313 Mo. 527—Hunter v. Busy Bee Candy Co., 271 S.W. 800, 307 Mo. 656—Hoover v. Baldwin, App., 111 S.W.2d 1011—Emrick v. City of Springfield, App., 110 S.W.2d 840—Mattingly v. Broderick, 36 S.W.2d 415, 225 Mo. App. 377—Davis v. Brown-Cloughly Drug Co., App., 14 S.W.2d 533—Welty v. S. H. Kress & Co., 295 S.W. 501, 221 Mo.App. 1089—Clark v. Wheelock, App., 293 S.W. 456—Pronnecke v. Westliche Post Pub. Co., 291 S.W. 139, 220 Mo.App. 640—Lutgen v. Standard Oil Co., 287 S.W. 885, 221 Mo.App. 773.

Neb.—Smith v. Morton Motor Co., 16 N.W.2d 843, 145 Neb. 396.

N.H.—Fortier v. Concord Electric Co., 33 A.2d 801, 92 N.H. 492.

N.J.—Cichocki v. Geigy Co., 183 A. 463.

N.C.—Murray v. Atlantic Coast Line R. Co., 11 S.E.2d 326, 218 N.C. 392—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112—Highfill v. Washington Mills Co., 174 S.E. 457, 206 N.C. 582—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791—Jones v. Atlantic Coast Line R. Co., 139 S.E. 242, 194 N.C. 227—Holeman v. Pensacola Shipbuilding Co., 134 S.E. 647, 192 N.C. 236—Hall v. Rinehart & Dennis, 132 S.E. 787, 191 N.C. 685—Boswell v. Whitehead Hosiery Mills, 132 S.E. 598, 191 N.C. 549—Greer v. Callahan Const. Co., 130 S.E. 739, 190 N.C. 632—Riggs v. Empire Mfg. Co., 129 S.E. 595, 190 N.C. 256.

Ohio.—Bevan v. New York, C. & St. L. R. Co., 6 N.E.2d 982, 132 Ohio St. 245, certiorari denied 57 S.Ct. 924, 301 U.S. 695, 81 L.Ed. 1351.

Okl.—Stephan v. Apartment Hotels, 77 P.2d 539, 182 Okl. 274.

Or.—Wychgel v. States S. S. Co., 296 P. 863, 135 Or. 475, certiorari denied States S. S. Co. v. Wychgel, 52 S.Ct. 11, 284 U.S. 625, 76 L.Ed. 533—Leavitt v. Stamp, 293 P. 414, 134 Or. 191.

R.I.—Faltinali v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 438.

S.C.—Wilson v. Atlantic Coast Line R. Co., 131 S.E. 777, 134 S.C. 31.

Tex.—City of Denton v. White, Civ. App., 179 S.W.2d 834, error refused—D-Bar Ranch v. Maxwell, Civ. App., 170 S.W.2d 303, error refused—Harbin v. City of Beaumont, Civ. App., 146 S.W.2d 297, error dismissed, judgment correct—Texas & N. O. R. Co. v. Sarver, Civ.App., 113 S.W.2d 317, error refused—**Corpus Juris quoted** in Johnson v. Wichita Valley Ry. Co., Civ.App., 104 S.W.2d 128, 129—Fort Worth & D. C. Ry. Co. v. Rogers, Civ. App., 62 S.W.2d 151, error refused.

Utah.—Pauly v. McCarthy, 166 P.2d

the question, is liable only for negligence.[28] The employer is not required to exercise extraordinary care in the premises.[29] The degree of care exacted is that of ordinary [30] or, as it has been said

501, 109 Utah 398, reversed on other grounds 67 S.Ct. 962, 330 U.S. 802, 91 L.Ed. 1261—Elswood v. Oregon Short Line R. Co., 23 P.2d 925, 82 Utah 235.
Va.—Crosswhite v. Southern Ry. Co., 23 S.E.2d 777, 181 Va. 40—Farmers' Adm'x v. Chesapeake & O. Ry. Co., 131 S.E. 334, 144 Va. 65.
Wash.—Gessner v. Ramwell, 248 P. 61, 140 Wash. 78.
39 C.J. p 313 note 21.

28. U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213—Traffic Motor Truck Corporation v. Claywell, C.C.A.Mo., 12 F.2d 419.
Ark.—Mississippi River Fuel Corporation v. Senn, 43 S.W.2d 255, 184 Ark. 554—J. E. Parham Const. Co. v. Parker, 37 S.W.2d 879, 183 Ark. 673—Mosley v. Raines, 37 S.W.2d 78, 183 Ark. 569.
Ky.—Home Lumber Co. v. Turley, 139 S.W.2d 435, 282 Ky. 633.
Mass.—Doherty v. Paul's For Tires, 49 N.E.2d 430, 314 Mass. 83.
Me.—Charpentier v. Great Atlantic & Pacific Tea Co., 157 A. 237, 130 Me. 423.
Miss.—Brown v. Coley, 152 So. 61, 168 Miss. 778—Seifferman v. Leach, 138 So. 563, 161 Miss. 853.
Mo.—Markley v. Kansas City Southern Ry. Co., 90 S.W.2d 409, 338 Mo. 436—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228—Hoover v. Baldwin, App., 111 S.W.2d 1011—Emrick v. City of Springfield, App., 110 S.W. 2d 840.
N.Y.—Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 152 Misc. 716.
N.C.—Greer v. Callahan Const. Co., 130 S.E. 739, 190 N.C. 632.
Tex.—Stallings v. Whisenant, Civ. App., 159 S.W.2d 559.
Va.—Farmers' Adm'x v. Chesapeake & O. Ry. Co., 131 S.E. 334, 144 Va. 65.
39 C.J. p 320 note 23.

Breach of promise to make safer an already ordinarily safe place does not afford a basis for liability for damages for negligence.—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228.

Employer of domestic servants is liable for failure to furnish safe place of employment only if he is negligent.—Fontenot v. Raftery, La. App., 14 So.2d 77.

29. Me.—Charpentier v. Great Atlantic & Pacific Tea Co., 157 A. 237, 130 Me. 423.

Master, exercising ordinary care to furnish reasonably safe appliance, is not negligent for failing to furnish additional device making appliance more safe.—Samuel v. National Bag Co., Mo.App., 15 S.W.2d 376.

30. U.S.—Slayton v. Noonan, C.C.A. Ala., 133 F.2d 793, applying law of Mississippi—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F. 2d 213—Bufflington v. Owosso Mfg. Co., C.C.A.Ark., 105 F.2d 692—Shoaf v. Fitzpatrick, C.C.A.Tenn., 104 F.2d 290, certiorari denied 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 518—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 93 F.2d 736—McNeal v. Otto, C.C.A.N.M., 91 F. 2d 289—Grant Storage Battery Co. v. De Lay, C.C.A.Neb., 87 F.2d 726—Harrison v. L. E. Myers Const. Co., C.C.A.Ark., 42 F.2d 950, certiorari denied 51 S.Ct. 103, 282 U. S. 887, 75 L.Ed. 782—Whitehurst v. Standard Oil Co., C.C.A.Ga., 8 F. 2d 728.
Ark.—Tucker Duck & Rubber Co. v. Harvey, 154 S.W.2d 828, 202 Ark. 1033—A. A. Electric Co. v. Ray, 149 S.W.2d 38, 202 Ark. 85—Heard v. Arkansas Power & Light Co., 147 S.W.2d 362, 201 Ark. 915—Harmon v. Morrison, 147 S.W.2d 35, 201 Ark. 820—McGeorge v. Henderson, 145 S.W.2d 31, 201 Ark. 492—Berry Asphalt Co. v. Kidd, 143 S.W.2d 42, 200 Ark. 1121—Southwestern Bell Telephone Co. v. Casson, 138 S.W.2d 406, 199 Ark. 1140—Kroger Grocery & Baking Co. v. Kennedy, 136 S.W.2d 470, 199 Ark. 914—Seaman Store Co. v. Bonner, 113 S.W.2d 1106, 195 Ark. 563—Kennedy v. Griffin, 112 S.W. 2d 644, 195 Ark. 379—Norton & Wheeler Stave Co. v. Wright, 106 S.W.2d 178, 194 Ark. 115—Union Compress & Warehouse Co. v. Eason, 104 S.W.2d 459, 193 Ark. 1044—L. C. Burr & Co. v. Greenlee, 102 S.W.2d 77, 193 Ark. 705—Pekin Wood Products Co. v. Burkhardt, 96 S.W.2d 776, 192 Ark. 1025—Bumpas v. Sinclair Refining Co., 87 S.W.2d 29, 191 Ark. 571—Clark v. Patterson, 77 S.W.2d 978, 190 Ark. 148—Missouri Pac. R. Co. v. Martin, 57 S.W.2d 1047, 186 Ark. 1101—Smith v. McEachin, 57 S.W. 2d 1043, 186 Ark. 1132—Capital City Casket Co. v. Szurgot, 54 S. W.2d 285, 186 Ark. 421—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056—Shultz Const. Co. v. Lovett, 24 S.W.2d 330, 180 Ark. 1104—Covington v. Little Fay Oil Co., 13 S.W.2d 306, 178 Ark. 1046—Ft. Smith-Spadra Mining Co. v. Shirley, 13 S.W.2d 14, 178 Ark. 1007—Sandusky v. Warren, 6 S.W.2d 15, 177 Ark. 271—Cleaver v. Bert Johnson Orchards, 298 S.W. 1016, 175 Ark. 223—Ault v. McGaughey, 292 S.W. 359, 173 Ark. 322—New Union Coal Co. v. Sult, 290 S.W. 580, 172 Ark. 753.
Ga.—Holman v. American Auto. Ins. Co., 39 S.E.2d 850, 201 Ga. 454—Blair v. Fulton Bakery, 24 S.E.2d 598, 68 Ga.App. 879—Williamson v. Kidd, 15 S.E.2d 801, 65 Ga.App. 285—Powell v. Shurling, 179 S.E. 653, 51 Ga.App. 67.
Ind.—Conway v. Park, 31 N.E.2d 79, 108 Ind.App. 562.
Iowa.—Johnson v. Kinney, 7 N.W.2d 188, 232 Iowa 1016, 144 A.L.R. 997—Nelson v. Smeltzer, 265 N.W. 924, 221 Iowa 972.
Kan.—**Corpus Juris cited in** Allen v. Shell Petroleum Corporation, 68 P. 2d 651, 146 Kan. 67.
Ky.—Home Lumber Co. v. Turley, 139 S.W.2d 435, 282 Ky. 633—Perkins-Harlan Coal Co. v. Creech's Adm'r, 103 S.W.2d 943, 268 Ky. 174—Southern Mining Co. v. Saylor, 95 S.W.2d 236, 264 Ky. 655—Gibraltar Coal Mining Co. v. Miller, 25 S.W.2d 38, 233 Ky. 129—Nugent Sand Co. v. Howard, 11 S.W.2d 985, 227 Ky. 91—Long Fork Ry. Co. v. Ferrell, 293 S.W. 953, 219 Ky. 458.
Md.—McVey v. Gerrald, 192 A. 789, 172 Md. 595.
Miss.—Gulfport Fertilizer Co. v. Bilbo, 174 So. 65, 178 Miss. 791—Morgan Hill Paving Co. v. Morris, 138 So. 229, 160 Miss. 79.
Mo.—Fischer v. City of Cape Girardeau, 131 S.W.2d 521, 345 Mo. 122—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336 Mo. 316—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 335 Mo. 1148—Wall v. Philip A. Rohan Boat, Boiler & Tank Co., 62 S.W.2d 764, 333 Mo. 619—Anderson v. Asphalt Distributing Co., 55 S. W.2d 688, 86 A.L.R. 1033—Wickham v. St. Louis-San Francisco Ry. Co., 31 S.W.2d 1007—Baker v. Scott County Milling Co., 20 S.W. 2d 494, 323 Mo. 1089—Warner v. Oriel Glass Co., 8 S.W.2d 846, 319 Mo. 1196, 60 A.L.R. 448—Oglesby v. St. Louis-San Francisco Ry. Co., 1 S.W.2d 172, 318 Mo. 79, certiorari denied St. Louis-San Francisco R. Co. v. Oglesby, 48 S. Ct. 434, 277 U.S. 587, 72 L.Ed. 1001—Goucan v. Atlas Portland Cement Co., 298 S.W. 789, 317 Mo. 919—Hoffman v. Peerless White Lime Co., 296 S.W. 764, 317 Mo. 86—Compton v. Louis Rich Const. Co., 287 S.W. 474, 315 Mo. 1068—Sabol v. St. Louis Cooperage Co., 282 S.W. 425, 313 Mo. 527—Fischer v. M-K Express Co., App., 158 S. W.2d 458—Morton v. Alton R. Co., App., 118 S.W.2d 59—Emrick v. City of Springfield, App., 110 S.W. 2d 840—Gerta v. Ross, 37 S.W.2d 969, 225 Mo.App. 673—Craven v.

in some decisions, the degree is that of reasonable[31] care.

Halpin-Boyle Const. Co., App., 15 S.W.2d 853—Samuel v. National Bag Co., App., 15 S.W.2d 376—Neely v. Chicago Great Western R. Co., App., 14 S.W.2d 972, certiorari quashed State ex rel. Chicago Great Western R. Co. v. Trimble, 14 S.W.2d 978—Davis v. National Refining Co., App., 294 S.W. 114—Guldner v. International Shoe Co., App., 293 S.W. 428—Walker v. Mitchell Clay Mfg. Co., App., 291 S.W. 180—Gehbauer v. J. Hahn Bakery Co., App., 285 S.W. 170—Schulte v. Carmichael-Cryder Co., App., 282 S.W. 181—Ray v. Marquette Cement Mfg. Co., App., 273 S.W. 1078—Brown v. American Car & Foundry Co., App., 271 S.W. 540—McGowan v. American Mfg. Co., App., 270 S.W. 423.

Neb.—Smith v. Morton Motor Co., 16 N.W.2d 843, 145 Neb. 396—Hansen v. Jasmer, 203 N.W. 552, 113 Neb. 372.

N.H.—Burke v. Boston & M. R. R., 134 A. 574, 82 N.H. 350.

N.C.—Murray v. Atlantic Coast Line R. Co., 11 S.E.2d 326, 218 N.C. 392—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112—Eaker v. International Shoe Co., 154 S.E. 667, 199 N.C. 379—Grubbs v. Lewis, 145 S.E. 769, 196 N.C. 391—O'Brien v. Parks Cramer Co., 145 S.E. 684, 196 N.C. 359—Craver v. Franklin Cotton Mills, 145 S.E. 570, 196 N.C. 330—Taylor v. J. A. Jones Const. Co., 141 S.E. 492, 195 N.C. 30—Ledford v. Tallassee Power Co., 138 S.E. 424, 194 N.C. 98—Watson v. Sylva Tanning Co., 136 S.E. 117, 192 N.C. 790—Boswell v. Whitehead Hosiery Mills, 132 S.E. 598, 191 N.C. 549—Lindsey v. Suncrest Lumber Co., 130 S.E. 713, 190 N.C. 844—Riggs v. Empire Mfg. Co., 129 S.E. 595, 190 N.C. 256—Cable v. Kitchen Lumber Co., 128 S.E. 329, 189 N.C. 840.

Ohio.—Bevan v. New York, C. & St. L. R. Co., 6 N.E.2d 982, 132 Ohio St. 245, certiorari denied 57 S.Ct. 924, 301 U.S. 695, 81 L.Ed. 1351.

Okl.—Casualty Reciprocal Exchange v. Sutfin, 166 P.2d 434, 196 Okl. 567—Wright v. Clark, 61 P.2d 192, 177 Okl. 628.

Or.—Erickson v. Meier & Frank Co., 18 P.2d 207, 142 Or. 76—Leavitt v. Stamp, 293 P. 414, 134 Or. 191—Adskin v. Oregon-Washington R. & Nav. Co., 276 P. 1094, 129 Or. 169.

Pa.—Lemon v. Lonker, 97 Pa.Super. 240.

S.D.—Breen v. Kreen, 225 N.W. 223, 55 S.D. 150.

Tenn.—Mebane v. Baptist Memorial Hospital, 166 S.W.2d 622, 179 Tenn. 381—Jessie v. Chattanooga Golf and Country Club, 121 S.W.2d 557, 173 Tenn. 536.

Tex.—City of Austin v. Johnson, Civ. App., 195 S.W.2d 222—City of Denton v. White, Civ.App., 179 S.W. 2d 834, error refused—Morgan v. State, Civ.App., 170 S.W.2d 648, reversed on other grounds State v. Morgan, 170 S.W.2d 652, 140 Tex. 620—D-Bar Ranch v. Maxwell, Civ. App., 170 S.W.2d 303, error refused—Crews v. Texas & P. Ry. Co., Civ. App., 149 S.W.2d 1079, error dismissed, judgment correct—Harbin v. City of Beaumont, Civ.App., 146 S.W.2d 297, error dismissed, judgment correct—New Gin Co. v. Dowell, Civ.App., 117 S.W.2d 810—Rio Bravo Oil Co. v. Matthews, Civ.App., 20 S.W.2d 342—J. C. Stout Lumber Co. v. Mouton, Civ. App., 293 S.W. 688.

Utah.—Elswood v. Oregon Short Line R. Co., 23 P.2d 925, 82 Utah 235.

Va.—Bly v. Southern Ry. Co., 32 S. E.2d 659, 183 Va. 406—Stevens v. Mirakian, 12 S.E.2d 780, 177 Va. 123—Thacker v. Klotz, 7 S.E.2d 883, 175 Va. 267—Colonna Shipyard v. Dunn, 145 S.E. 342, 151 Va. 740, certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986—Farmers' Adm'x v. Chesapeake & O. Ry. Co., 131 S.E. 334, 144 Va. 65.

Wash.—Miller v. Western Stevedore Co., 268 P. 177, 148 Wash. 155, rehearing denied 270 P. 310, 149 Wash. 698.

W.Va.—Barr v. Knotts, 133 S.E. 114, 101 W.Va. 440.

Wyo.—Chicago, B. & Q. R. Co. v. Murray, 277 P. 703, 40 Wyo. 324.

39 C.J. p 314 note 22.

The employer is an "insurer" that his duty of exercising ordinary care will be performed.—Morgan v. State, Civ.App., 170 S.W.2d 648, reversed on other grounds State v. Morgan, 170 S.W.2d 652, 140 Tex. 620.

31. U.S.—Bailey v. Central Vermont Ry., Vt., 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433—Baltimore & O. S. W. R. Co. v. Carroll, Ind., 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed. 566—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F. 2d 213—Harrison Engineering & Construction Corporation v. Rollison, C.C.A.Miss., 109 F.2d 602—Steedley v. Atlantic Coast Line R. Co., C.C.A.Ga., 107 F.2d 754—Chapman & Dewey Lumber Co. v. Hanks, C.C.A.Tenn., 106 F.2d 482, applying law of Arkansas—L. E. Whitham Const. Co. v. Remer, C. C.A.Okl., 93 F.2d 736—Aqua System v. Kodakoski, C.C.A.Canal Zone, 88 F.2d 395—Newbern v. Great Atlantic & Pacific Tea Co., C.C.A.N.C., 68 F.2d 523, 91 A.L.R. 781—Pennsylvania Pulverizing Co. v. Butler, C.C.A.N.J., 61 F.2d 311—Wisconsin & Arkansas Lumber Co. v. Ward, C.C.A.Ark., 32 F.2d 974—Whitehurst v. Standard Oil Co., C.C.A.Ga., 8 F.2d 728—Chicago & N. W. Ry. Co. v. Payne, C.C.A. Neb., 8 F.2d 332—Raudenbush v. Baltimore & O. R. R., D.C.Pa., 63 F.Supp. 329.

Ariz.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A. L.R. 857.

Ark.—Aluminum Ore Co. v. George, 186 S.W.2d 656, 208 Ark. 419—Safeway Stores v. Phelps, 145 S.W.2d 337, 201 Ark. 495—Arkansas-Louisiana Gas Co. v. Tillman, 144 S.W. 2d 1077, 201 Ark. 437—Sparkman Hardwood Lumber Co. v. McCann, 80 S.W.2d 53, 190 Ark. 552—Arkadelphia Sand & Gravel Co. v. Knight, 79 S.W.2d 71, 190 Ark. 386—Chapman v. Henderson, 67 S.W. 2d 570, 188 Ark. 714—Spadra Coal Co. v. White, 66 S.W.2d 1072, 188 Ark. 568—Williams Bros. v. Witt, 43 S.W.2d 237, 184 Ark. 606—Mosley v. Raines, 37 S.W.2d 78, 183 Ark. 569—Rice & Holiman v. Henderson, 35 S.W.2d 1016, 183 Ark. 355—Booth & Flinn Co. v. Pearsall, 33 S.W.2d 404, 182 Ark. 854—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1036—Missouri Pac. R. Co. v. Horner, 15 S.W.2d 994, 179 Ark. 321—Milner v. Standard Veneer Co., 8 S.W.2d 456, 177 Ark. 986—Western Coal & Mining Co. v. Burns, 272 S.W. 357, 168 Ark. 976.

Del.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr. 339.

Fla.—Holstun v. Embry, 169 So. 400, 124 Fla. 554—W. B. Harbeson Lumber Co. v. Anderson, 136 So. 557, 102 Fla. 731.

Ga.—Tankersley v. Southern Ry. Co., 35 S.E.2d 522, 73 Ga.App. 88—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.

Ill.—Worthey v. Cleveland, C., C. & St. L. Ry. Co., 251 Ill.App. 585.

Iowa.—Anderson v. Sheuerman, 6 N. W.2d 125, 232 Iowa 705—Rehard v. Miles, 290 N.W. 702, 227 Iowa 1290—Nelson v. Smeltzer, 265 N.W. 924, 221 Iowa 972—Degner v. Anderson, 239 N.W. 790, 213 Iowa 588.

Kan.—Allen v. Shell Petroleum Corporation, 68 P.2d 651, 146 Kan. 67.

Ky.—Brooks v. Arnett, 69 S.W.2d 1029, 253 Ky. 491—Payne v. High Splint Coal Co., 40 S.W.2d 299, 239 Ky. 634—Duvin Coal Co. v. Fike, 38 S.W.2d 201, 238 Ky. 376—Hall v. Proctor Coal Co., 34 S.W.2d 425, 236 Ky. 813—Kelly & Shields v. Miller, 33 S.W.2d 662, 236 Ky. 698

In determining the liability of the employer as in other cases in which it becomes a question of whether or not due, ordinary, or reasonable care and diligence has been exercised there is no absolute standard to which the conduct of the master must have conformed, but the question is always one to be determined with reference to the facts of the particular case,[32] and regard must be had for the nature and extent of danger of the work,[33]

—Faulkner v. Gatliff Coal Co., 15 S.W.2d 236, 228 Ky. 379.

La.—Fontenot v. Raftery, App., 193 So. 896.

Me.—Boober v. Bicknell, 191 A. 275, 135 Me. 153—Kimball v. Clark, 177 A. 183, 133 Me. 263—Charpentier v. Great Atlantic & Pacific Tea Co., 157 A. 237, 130 Me. 423—Blacker v. Oxford Paper Co., 142 A. 776, 127 Me. 228.

Md.—Curtis Bay Towing Co. v. Dean, 199 A. 521, 174 Md. 498, certiorari denied 59 S.Ct. 92, 305 U.S. 628, 83 L.Ed. 402—McVey v. Gerrald, 192 A. 789, 172 Md. 595.

Mass.—Ryan v. Gray, 55 N.E.2d 700, 316 Mass. 259—Doherty v. Paul's For Tires, 49 N.E.2d 430, 314 Mass. 83—Roberts v. Frank's Inc., 49 N.E.2d 427, 314 Mass. 42—Mucha v. Northeastern Crushed Stone Co., 30 N.E.2d 870, 307 Mass. 592— Keough v. E. M. Loew's, 21 N.E.2d 971, 303 Mass. 364—Lynch v. New York, N. H. & H. R. R., 200 N.E. 877, 294 Mass. 152—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266—Campbell v. Dearborn, 55 N.E. 1042, 175 Mass. 183.

Minn.—Gonyea v. Duluth, M. & I. R. Ry. Co., 19 N.W.2d 384, 220 Minn. 225—Natalino v. St. Paul Bridge & Terminal Ry. Co., 251 N.W. 9, 190 Minn. 118.

Miss.—Masonite Corp. v. Graham, 25 So.2d 322—Stewart v. Kroger Grocery, etc., Co., 21 So.2d 912—Wilkie v. West Const. Co. of Tennessee, 16 So.2d 154, 196 Miss. 233, suggestion of error overruled 16 So.2d 617, 196 Miss. 233—Wade-Stevens Lumber Co. v. Addy, 194 So. 303, 187 Miss. 851—Wunderlich v. Walker, 189 So. 523, 186 Miss. 149—Eagle Cotton Oil Co. v. Sollie, 187 So. 506, 185 Miss. 475—Aponaug Mfg. Co. v. Hammond, 187 So. 227, 185 Miss. 198—Curry & Turner Const. Co. v. Bryan, 185 So. 256, 184 Miss. 44—Forbus v. Cobb Bros. Const. Co., 185 So. 243, 184 Miss. 647, suggestion of error overruled 186 So. 643, 184 Miss. 647—Adams v. Hicks, 178 So. 484, 181 Miss. 165—Wilson & Co. v. Holmes, 177 So. 24, 180 Miss. 361—Gulfport Fertilizer Co. v. Bilbo, 174 So. 65, 178 Miss. 791—Gulf, M. & N. R. Co. v. Kelly, 171 So. 883, 178 Miss. 531, certiorari denied 57 S.Ct. 938, 301 U.S. 705, 81 L.Ed. 1359—Norton v. Standard Oil Co., 171 So. 691, 177 Miss. 758—Meridian Grain & Elevator Co. v. Jones, 169 So. 771, 176 Miss. 764—Eagle Cotton Oil Co. v. Pickett, 166 So. 764, 175 Miss. 577—Allen Gravel Co. v. Curtis, 161 So. 670, 173 Miss. 416—Newell Contracting Co. v. Flynt, 161 So. 298, 172 Miss. 719, motion overruled 161 So. 743, 172 Miss. 719—Columbus & G. R. Co. v. Coleman, 160 So. 277, 172 Miss. 514—**Corpus Juris cited in** Gulfport Creosoting Co. v. White, 157 So. 86, 87, 171 Miss. 127—Hammontree v. Cobb Const. Co., 152 So. 279, 168 Miss. 844—Brown v. Coley, 152 So. 61, 168 Miss. 778—Barron Motor Co. v. Bass, 150 So. 202, 167 Miss. 786—Goodyear Yellow Pine Co. v. Mitchell, 149 So. 792, 168 Miss. 152, suggestion of error overruled 150 So. 810, 168 Miss. 152—Anderson v. McGrew, 122 So. 492, 154 Miss. 291.

Mo.—Fischer v. City of Cape Girardeau, 131 S.W.2d 521, 345 Mo. 122—Wall v. Philip A. Rohan Boat, Boiler & Tank Co., 62 S.W.2d 764, 333 Mo. 619—Gray v. Doe Run Lead Co., 53 S.W.2d 877, 331 Mo. 481—Marsanick v. Luechtefeld, App., 157 S.W.2d 537—Alexander v. Forum Cafeteria, 37 S.W.2d 670, 225 Mo.App. 679—Meyer v. Johnson, 30 S.W.2d 641, 224 Mo.App. 565—Braziel v. St. Louis Terra Cotta Co., App., 9 S.W.2d 155—Howard v. Fred Schmitt Realty & Investment Co., App., 7 S.W.2d 448—Spina v. Union Biscuit Co., App., 299 S.W. 136—Welty v. S. H. Kress & Co., 295 S.W. 501, 221 Mo.App. 1089—Curtie v. Koch, App., 282 S.W. 1045.

Neb.—Phillips v. Chicago, B. & Q. R. Co., 227 N.W. 931, 119 Neb. 182.

N.J.—Huels v. General Elec. Co., 46 A.2d 654, 134 N.J.Law 165—Cichocki v. Geigy Co., 183 A. 463, 14 N.J.Misc. 232.

N.Y.—Schmidt v. Merchants Despatch Transp. Co., 280 N.Y.S. 836, 244 App.Div. 606, modified Schmidt v. Merchants Despatch Transp. Co., 200 N.E. 824, 270 N.Y. 287, reargument denied 2 N.E.2d 680, 271 N.Y. 531—Smith v. Onondaga Pottery Co., 300 N.Y.S. 298, 164 Misc. 883.

N.C.—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112—Highfill v. Washington Mills Co., 174 S.E. 457, 206 N.C. 582—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791—Crawford v. Michael & Bivens, 154 S.E. 58, 199 N.C. 224—Richardson v. American Cotton Mills, 130 S.E. 164, 190 N.C. 874—Barnes v. Phœnix Utility Co., 130 S.E. 1, 190 N.C. 382.

Ohio.—Detroit & T. Shore Line R. Co. v. Seigel, App., 153 N.E. 870.

Okl.—Rudco Oil & Gas Co. v. Lofland, 135 P.2d 494, 192 Okl. 256—Marrs v. Richardson, 87 P.2d 131, 184 Okl. 342—Stephan v. Apartment Hotels, 77 P.2d 539, 182 Okl. 274—Beasley v. Bond, 48 P.2d 299, 173 Okl. 355—Producers' & Refiners' Corporation v. Castile, 246 P. 615, 118 Okl. 42.

Or.—Wychgel v. States S. S. Co., 296 P. 863, 135 Or. 475, certiorari denied States S. S. Co. v. Wychgel, 52 S.Ct. 11, 284 U.S. 625, 76 L.Ed. 533.

S.C.—Gowns v. Watts Mill, 133 S.E. 550, 135 S.C. 163—Wilson v. Atlantic Coast Line R. Co., 131 S.E. 777, 134 S.C. 31.

Tex.—Stallings v. Whisenant, Civ. App., 159 S.W.2d 559—Texas & P. R. Co. v. Meek, Civ.App., 72 S.W.2d 616, error refused—Louisiana Ry. & Nav. Co. of Texas v. Eldridge, Civ.App., 293 S.W. 901.

39 C.J. p 314 note 22.

32. U.S.—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 93 F.2d 736—Grosscupp v. Chicago & N. W. Ry. Co., D.C.Wyo., 14 F.Supp. 276.

Fla.—Holstun v. Embry, 169 So. 400, 124 Fla. 554—W. B. Harbeson Lumber Co. v. Anderson, 136 So. 557, 102 Fla. 731.

Ky.—Yeary's Adm'r v. Hignite Coal Co., 102 S.W.2d 19, 267 Ky. 265.

Md.—Curtis Bay Towing Co. v. Dean, 199 A. 521, 174 Md. 498, certiorari denied 59 S.Ct. 92, 305 U.S. 628, 83 L.Ed. 402—M. A. Long Co. v. State Acc. Fund, 144 A. 775, 156 Md. 639.

Miss.—Gulf, M. & N. R. Co. v. Kelly, 171 So. 883, 178 Miss. 531, certiorari denied 57 S.Ct. 938, 301 U.S. 705, 81 L.Ed. 1359.

Mo.—Oglesby v. St. Louis-San Francisco Ry. Co., 1 S.W.2d 172, 318 Mo. 79, certiorari denied St. Louis-San Francisco R. Co. v. Oglesby, 48 S.Ct. 434, 277 U.S. 587, 72 L.Ed. 1001—Morton v. Alton R. Co., App., 118 S.W.2d 59.

Neb.—Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 147 Neb. 18.

33. U.S.—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 93 F.2d 736.

Fla.—Holstun v. Embry, 169 So. 400, 124 Fla. 554.

Mo.—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336

the place where the work is performed,[34] and the instrumentalities furnished,[35] and the equipment, appliances, and information known to, and available in, the particular industry or work.[36] The test resorted to is what a reasonably prudent person would ordinarily have done in the same situation or under similar circumstances.[37] Although the employer's duty is that of exercising ordinary or reasonable care, whether the work is comparatively safe or is extremely dangerous,[38] his duty becomes more imperative as the risk increases,[39] as do the acts and precautions required by ordinary prudence.[40] While the employer must anticipate and guard against all such dangers as will likely flow from the conditions of the place in which his employees work, and the instrumentalities with which they are provided to work,[41] when used in the usual way they are intended to be used,[42] he is not bound to foresee and provide against every possible danger[43] and can be held liable only for injuries which he should have reasonably foreseen.[44]

Generally it is not the duty of a master to establish and maintain conditions which are safe for every employee;[45] it is enough that the conditions are reasonably safe for the average employee.[46] The fact that dangers may be connected with the general class of work in which the servant is engaged, which the required degree of care of the master could not remove, does not excuse the master from liability for injuries due to dangers which the exercise of the requisite degree of care would remove.[47]

Momentary forgetfulness may in an emergency excuse negligence on the part of a servant, as discussed infra § 436, but it does not create liability

Mo. 316—Morton v. Alton R. Co., App., 118 S.W.2d 59—Clark v. Wheelock, App., 293 S.W. 456.
N.C.—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112.

34. Fla.—Holstun v. Embry, 169 So. 400, 124 Fla. 554.

35. Ark.—Smith v. McEachin, 57 S. W.2d 1043, 186 Ark. 1132.
Fla.—Holstun v. Embry, 169 So. 400, 124 Fla. 554.
Miss.—Stewart v. Kroger Grocery, etc., Co., 21 So.2d 912—Gulf, M. & N. R. Co. v. Kelly, 171 So. 883, 178 Miss. 531, certiorari denied 57 S. Ct. 938, 301 U.S. 705, 81 L.Ed. 1359.
S.C.—Gowns v. Watts Mill, 133 S.E. 550, 135 S.C. 163.

36. Del.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr. 339.

37. U.S.—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 93 F.2d 736—Chicago & N. W. Ry. Co. v. Payne, C.C.A.Neb., 8 F.2d 332.
Ark.—Aluminum Ore Co. v. George, 186 S.W.2d 656, 208 Ark. 419—Hall v. Patterson, 166 S.W.2d 667, 205 Ark. 10—Arkansas-Louisiana Gas Co. v. Tillman, 144 S.W.2d 1077, 201 Ark. 437—Gerig v. Furr, 39 S. W.2d 1021, 183 Ark. 1036—St. Louis, I. M. & So. Ry. Co. v. Copeland, 167 S.W. 71, 113 Ark. 60.
Md.—M. A. Long Co. v. State Acc. Fund, 144 A. 775, 156 Md. 639.
Mo.—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228—Newhouse v. St. Louis Bank Building & Equipment Co., 33 S.W.2d 932, 326 Mo. 1047—Emrick v. City of Springfield, App., 110 S.W.2d 840—Lutgen v. Standard Oil Co., 287 S.W. 885, 221 Mo. App. 773.
N.C.—Murray v. Atlantic Coast Line R. Co., 11 S.E.2d 326, 218 N.C. 392—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112.
Va.—Bly v. Southern Ry. Co., 31 S. E.2d 564, 183 Va. 162, opinion adhered to 32 S.E.2d 659, 183 Va. 406.
39 C.J. p 319 note 22 [c].
The usual and customary method employed by ordinarily prudent men in the same work under similar circumstances affords the measure of the degree of care required of the employer.—Reynolds v. Security Trust Co., 225 N.W. 575, 246 Mich. 670.

38. U.S.—Bailey v. Central Vermont Ry., Vt., 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433—L. E. Whitham Const. Co. v. Remer, C.C. A.Okl., 93 F.2d 736.

39. U.S.—Bailey v. Central Vermont Ry., Vt., 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.

40. U.S.—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 93 F.2d 736.
Miss.—Stewart v. Kroger Grocery, etc., Co., 21 So.2d 912—Gulf, M. & N. R. Co. v. Kelly, 171 So. 883, 178 Miss. 531, certiorari denied 57 S. Ct. 938, 301 U.S. 705, 81 L.Ed. 1359—E. L. Bruce Co. v. Brogan, 166 So. 350, 175 Miss. 208.
Mo.—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228.
Or.—Wychgel v. States S. S. Co., 296 P. 863, 135 Or. 475, certiorari denied States S. S. Co. v. Wychgel, 52 S.Ct. 11, 284 U.S. 625, 76 L.Ed. 533.
39 C.J. p 314 note 22 [d].

41. Ark.—Aluminum Ore Co. v. George, 186 S.W.2d 656, 208 Ark. 419—Arkansas-Louisiana Gas Co. v. Tillman, 144 S.W.2d 1077, 201 Ark. 437—St. Louis, I. M. & So. Ry. Co. v. Copeland, 167 S.W. 71, 113 Ark. 60.

42. Miss.—Stewart v. Kroger Grocery, etc., Co., 21 So.2d 912—Wellinger v. Terminal R. Ass'n of St. Louis, 183 S.W.2d 908, 353 Mo. 670.
Improper or unusual use as affecting liability of employer see infra § 251.

43. Ark.—Arkansas-Louisiana Gas Co. v. Tillman, 144 S.W.2d 1077, 201 Ark. 437—St. Louis, I. M. & So. Ry. Co. v. Copeland, 167 S.W. 71, 113 Ark. 60.
Tex.—Magnolia Petroleum Co. v. Ford, Civ.App., 14 S.W.2d 97, error denied, Sup., Ford v. Magnolia Petroleum Co., 17 S.W.2d 36, 118 Tex. 461.

44. Ark.—Gerig v. Furr, 39 S.W.2d 1021, 183 Ark. 1036.
Mass.—Bigos v. United Rayon Mill, 16 N.E.2d 44, 301 Mass. 76.
Miss.—Veney v. Samuels, 107 So. 517, 142 Miss. 476.
N.M.—Maestas v. Alameda Cattle Co., 14 P.2d 733, 36 N.M. 323.
N.C.—Goddard v. Southern Desk Co., 153 S.E. 608, 199 N.C. 22—Potter v. Atlantic Coast Line R. Co., 147 S.E. 698, 197 N.C. 17.
Tex.—Magnolia Petroleum Co. v. Ford, Civ.App., 14 S.W.2d 97, error denied, Sup., Ford v. Magnolia Petroleum Co., 17 S.W.2d 36, 118 Tex. 461.

45. Del.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr. 339.

46. Del.—Bowing v. Delaware Rayon Co., supra.

47. Okl.—Wright v. Clark, 61 P.2d 192, 177 Okl. 628.

where the master has exercised the required degree of care for the servant's safety.[48]

Rule as affected by statute. Unless the statute imposes an absolute duty on the part of the employer or in terms sets up a different measure of care,[49] under the various statutes regulating the matter the master is not a guarantor or insurer of the servant's safety,[50] but the common-law rule requiring a master only to use ordinary or reasonable care will be held to apply.[51]

§ 203. —— Care Required Dependent on Knowledge and Experience of Servant

Whether the master has exercised reasonable care in furnishing his servant reasonably safe instrumentalities and a place for work depends in some degree on the experience, maturity, intelligence, and discretion of the servant.

While the duty of the master to provide his servants with a reasonably safe place in which to work is owed alike to the young and the old,[52] the skilled and the unskilled,[53] whether the master has exercised ordinary or reasonable care in furnishing his servant reasonably safe instrumentalities and a place for work depends in some degree on the experience, maturity, intelligence, and discretion of the servant employed,[54] and in the case of youthful employees he must exercise a degree of care which has regard for their youth and inexperience.[55] Where, however, the master has furnished a suitable place to work and suitable appliances, if the servant is mature and sensible and has had some experience in the work being done he must look after himself as to all obvious dangers in the de-

48. Miss.—Eagle Cotton Oil Co. v. Pickett, 166 So. 764, 175 Miss. 577.

49. U.S.—Mallatt v. Ostrander Ry. & Timber Co., D.C.Or., 46 F.Supp. 250.
Mo.—Cantley v. Missouri-Kansas-Texas R. Co., 183 S.W.2d 123, 353 Mo. 605—Blittschau v. American Car & Foundry Co., App., 144 S.W. 2d 196.
Neb.—Johnson v. Weborg, 7 N.W.2d 65, 142 Neb. 516.
N.Y.—Bellows v. Merchants Despatch Transp. Co., 12 N.Y.S.2d 655, 257 App.Div. 15, affirmed 27 N.E.2d 440, 283 N.Y. 581.
Pa.—Graszkowski v. White Brothers Smelting Corporation, 18 Pa.Dist. & Co. 438.
Wis.—Lu May v. Van Drisse Motors, 226 N.W. 301, 199 Wis. 310.
39 C.J. p 320 note 24.

Violation of statute conclusive
The violation of a statute imposing duty to furnish safeguards for employees is conclusive as to negligence of person charged with violation.—Kolenko v. Certain-Teed Products Corporation, D.C.N.Y., 20 F. Supp. 920.

Violation of Federal Safety Appliance Acts is negligence per se.—Gieseking v. Litchfield & M. Ry. Co., 94 S.W.2d 375, 339 Mo. 1.

50. Ill.—Huff v. Illinois Cent. R. Co., 199 S.E. 116, 362 Ill. 95—Speiring v. Chicago & E. I. R. Co., 60 N.E. 2d 267, 325 Ill.App. 576.
Wis.—Northwestern Casualty & Surety Co. v. Industrial Commission, 216 N.W. 485, 194 Wis. 337.

Protection against willful, unlawful, or negligent acts of others held not required by statute.—Baker v. Janesville Traction Co., 234 N.W. 912, 204 Wis. 452.

51. U.S.—Bailey v. Central Vermont Ry., Vt., 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A. 2d 365, 113 Vt. 433—Mescall v. W. T. Grant Co., C.C.A.Ind., 133 F.2d 209, applying Ohio statute, and certiorari denied 63 S.Ct. 1176, 319 U.S. 759, 87 L.Ed. 1711, rehearing denied 63 S.Ct. 1445, 320 U.S. 214, 87 L.Ed. 1851.
Ill.—Huff v. Illinios Cent. R. Co., 199 S.E. 116, 362 Ill. 95.
Me.—McLaughlin v. Bangor & A. R. Co., 140 A. 827, 127 Me. 24.
N.Y.—Dittiger v. Isal Realty Corporation, 35 N.Y.S.2d 311, 264 App. Div. 279.
39 C.J. p 320 note 25.

52. R.I.—Faltinali v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 438.

53. Tex.—City of Austin v. Johnson, Civ.App., 195 S.W.2d 222.

54. U.S.—Harrison v. L. E. Myers Const. Co., C.C.A.Ark., 42 F.2d 950, certiorari denied 51 S.Ct. 103, 282 U.S. 887, 75 L.Ed. 782—**Corpus Juris quoted in** Grosscupp v. Chicago & N. W. Ry. Co., D.C.Wyo., 14 F.Supp. 276, 278.
Ark.—Odenbaugh v. St. Louis Southwestern Ry. Co., 120 S.W.2d 713, 196 Ark. 1036.
Kan.—**Corpus Juris quoted in** Fishburn v. International Harvester Co., 138 P.2d 471, 475, 157 Kan. 43.
Mass.—Sheridan v. Boston & A. R. R., 149 N.E. 150, 253 Mass. 446.
Miss.—**Corpus Juris cited in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 744—Middleton v. Faulkner, 178 So. 583, 180 Miss. 737.
Mo.—Morton v. Alton R. Co., App., 118 S.W.2d 59.
N.C.—Fowler v. Carolina Cross Arm & Conduit Co., 133 S.E. 188, 192 N.C. 14.
39 C.J. p 321 note 27.
Care required of master generally as to inexperienced or minor servants see supra § 185.

Mentally deficient servant
The master's duty of due care, to give special protection to a servant mentally deficient, arises from latter's failure, without fault, to appreciate dangers ordinarily obvious.—Dziedzie v. Newmarket Mfg. Co., 129 A. 271, 81 N.H. 516—Smith v. American Woolen Co., 92 A. 334, 77 N.H. 391.

Where employee was an epileptic, employer's knowledge of his disease was a circumstance in light of which employer's conduct in furnishing a place for him to work was to be judged, but employer owed employee no duty of special protection except as related to an attack.—Monteith v. Manchester Rendering Co., 131 A. 440, 82 N.H. 175.

Lineman not inexperienced
One employed by electric company as a lineman for one year and three months was not entitled to special protection against risks incident to his employment on ground of inexperience.—Fortier v. Concord Electric Co., 33 A.2d 801, 92 N.H. 492.

55. U.S.—**Corpus Juris quoted in** Grosscupp v. Chicago & N. W. Ry. Co., D.C.Wyo., 14 F.Supp. 276, 278.
Kan.—**Corpus Juris quoted in** Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.
Mich.—La Pointe v. Chevrette, 250 N.W. 272, 264 Mich. 482—Belmer v. Boyne City Tanning Co., 125 N.W. 726, 160 Mich. 669.
Miss.—**Corpus Juris cited in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 744—Middleton v. Faulkner, 178 So. 583, 180 Miss. 737.
N.C.—Fowler v. Carolina Cross Arm & Conduit Co., 133 S.E. 188, 192 N. C. 14.
39 C.J. p 321 note 28.

tails of the work.[56] Further, the master cannot be held liable for failure to furnish a safe place to work if the danger is so obvious and is before the servant's eyes to such extent that he must know, by the use of ordinary intelligence, the danger that confronts him,[57] nor can the master be held liable for failure to furnish the servant with safe tools where the servant has equal knowledge with the master as to the safety thereof,[58] as where the tools furnished are of a simple nature in which defects can be readily observed.[59] A master cannot escape liability, however, where the servant had no knowledge of defective conditions and the danger was not so obvious that he should have observed it,[60] and it has been held that the degree of care which the law requires of a master is greater than that which is required of the servant, and a master may be chargeable with negligence in failing to ascertain a danger where the servant is not so chargeable.[61]

§ 204. Delegation of Duty

a. In general

b. To servant injured

a. In General

The duty to furnish safe tools, machinery, appliances, and places for work is a positive duty resting on the master and cannot be delegated to another so as to relieve the master of his primary liability.

The duty to furnish safe tools, machinery, appliances, and places for work is a positive, affirmative duty resting on the master, and cannot be delegated to another,[62] or, rather, cannot be delegated to an-

56. Miss.—Brown v. Coley, 152 So. 61, 168 Miss. 778.

Assumption of ordinary risks by servant see infra § 372.

57. Ky.—Phillips v. Keltner's Adm'r, 124 S.W.2d 71, 276 Ky. 254—Grigsby v. Louisville & N. R. Co., 114 S.W.2d 775, 272 Ky. 709.

Employer's duty to consider employee's physical condition in assigning work is discharged unless employee was justifiably ignorant of danger.—Sweeney v. Winebaum, 149 A. 77, 84 N.H. 217.

58. Okl.—Leierer v. Thompson, 122 P.2d 387, 190 Okl. 233—Nelson v. Wolverine Petroleum Corporation, 117 P.2d 787, 189 Okl. 351—Chicago, R. I. & P. R. Co. v. Lillard, 141 P. 8, 42 Okl. 109.

59. U.S.—**Corpus Juris quoted in** Grosscupp v. Chicago & N. W. Ry. Co., D.C.Wyo., 14 F.Supp. 276, 278.

Fla.—C. F. Hamblen, Inc. v. Owens, 172 So. 694, 127 Fla. 91.

Kan.—**Corpus Juris quoted in** Fishburn v. International Harvester Co., 138 P.2d 471, 475, 157 Kan. 43.

Okl.—Leierer v. Thompson, 122 P. 2d 387, 190 Okl. 233—Nelson v. Wolverine Petroleum Corporation, 117 P.2d 787, 189 Okl. 351.

39 C.J. p 321 note 29.

Simple tools generally see infra § 216.

60. Kan.—**Corpus Juris quoted in** Fishburn v. International Harvester Co., 138 P.2d 471, 475, 157 Kan. 43.

39 C.J. p 321 note 30.

61. Kan.—**Corpus Juris quoted in** Fishburn v. International Harvester Co., 138 P.2d 471, 475, 157 Kan. 43.

39 C.J. p 322 note 31.

62. U.S.—Southern Package Corporation v. Mitchell, C.C.A.Miss., 109 F.2d 609—Bonner v. Texas Co., C. C.A.Tex., 89 F.2d 291—Yates v. Atlantic Ice & Coal Co., C.C.A.Fla., 76 F.2d 86—Grammer v. Mid-Continent Petroleum Corporation, C.C. A.Okl., 71 F.2d 38, certiorari denied 55 S.Ct. 82, 293 U.S. 571, 79 L. Ed. 670—Hane v. Mid-Continent Petroleum Corporation, D.C.Okl., 47 F.2d 244—James Baird Co. v. Boyd, C.C.A.N.C., 41 F.2d 578—J. R. Hanify Co. v. Westberg, C.C.A. Or., 16 F.2d 552.

Ala.—Belcher v. Chapman, 7 So.2d 859, 242 Ala. 653.

Ark.—Clark v. Patterson, 77 S.W.2d 978, 190 Ark. 148—Fraser v. Norman, 42 S.W.2d 569, 184 Ark. 434—Gaster v. Hicks, 25 S.W.2d 760, 181 Ark. 299.

Fla.—Putnam Lumber Co. v. Berry, 2 So.2d 133.

Iowa.—Rehard v. Miles, 284 N.W. 829, superseded on other grounds 290 N.W. 702, 227 Iowa 1290.

Kan.—Allen v. Shell Petroleum Corporation, 68 P.2d 651, 146 Kan. 67.

Ky.—Luton Mining Co. v. Louisville & N. R. Co., 123 S.W.2d 1055, 276 Ky. 321—Big Sandy & C. R. Co. v. Measell's Adm'r, 42 S.W.2d 747, 240 Ky. 571—Kelly & Shields v. Miller, 33 S.W.2d 662, 236 Ky. 698—Nugent Sand Co. v. Howard, 11 S.W.2d 985, 227 Ky. 91.

Mass.—Ryan v. Gray, 55 N.E.2d 700, 316 Mass. 359—Cronan v. Armitage, 190 N.E. 12, 285 Mass. 520.

Minn.—Novonty v. Bouley, 27 N.W. 2d 813, 223 Minn. 592.

Miss.—Willsie v. West Const. Co. of Tennessee, 16 So.2d 154, 196 Miss. 233, suggestion of error overruled 16 So.2d 617, 196 Miss. 233—Price v. Taylor, 1 So.2d 784, 191 Miss. 392—Wade-Stevens Lumber Co. v. Addy, 194 So. 303, 187 Miss. 851—Adams v. Hicks, 178 So. 484, 181 Miss. 165—Norton v. Standard Oil Co., 171 So. 691, 177 Miss. 758—Gow Co. v. Hunter, 168 So. 264, 175 Miss. 896—E. L. Bruce Co. v. Brogan, 166 So. 350, 175 Miss. 208—Mississippi Utilities Co. v. Smith, 145 So. 896, 166 Miss. 105—Wilbe Lumber Co. v. Calhoun, 140 So. 680, 163 Miss. 80—Planters' Oil Mill v. Wiley, 122 So. 365, 154 Miss. 113.

Mo.—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 335 Mo. 1148—Wall v. Philip A. Rohan Boat, Boiler & Tank Co., 62 S.W.2d 764, 333 Mo. 619—Anderson v. Asphalt Distributing Co., 55 S.W.2d 688, 86 A.L.R. 1033—Gordon v. Muehling Packing Co., 40 S.W.2d 693, 328 Mo. 123—Kemper v. Gluck, 39 S.W.2d 330, 327 Mo. 733, certiorari denied Gluck v. Kemper, 52 S.Ct. 29, 284 U.S. 649, 76 L.Ed. 551—Warren v. American Car & Foundry Co., 38 S.W.2d 718, 327 Mo. 755—Cunningham v. Doe Run Lead Co., 26 S.W.2d 957—Messing v. Judge & Dolph Drug Co., 18 S. W.2d 408, 322 Mo. 901—Snyder v. American Car & Foundry Co., 14 S. W.2d 603, 322 Mo. 147—Warner v. Oriel Glass Co., 8 S.W.2d 846, 319 Mo. 1196, 60 A.L.R. 448—Dixon v. Frazier-Davis Const. Co., 298 S. W. 827, 318 Mo. 50—Stahl v. St. Louis-San Francisco Ry. Co., 287 S.W. 628—Jablonowski v. Modern Cap Mfg. Co., 279 S.W. 89, 312 Mo. 173—Wright v. Kansas City Structural Steel Co., 157 S.W.2d 582, 236 Mo.App. 872, applying law of Kansas—Daniels v. Luechtefeld, App., 155 S.W.2d 307—Jenkins v. Kansas City, 91 S.W.2d 98, 230 Mo.App. 337—Whitehead v. Fogelman, App., 44 S.W.2d 261—Alexander v. Forum Cafeteria, 37 S.W.2d 670, 225 Mo.App. 679—Manuel v. American Car & Foundry Co., App., 23 S.W. 2d 1073—Jaycrest v. St. Louis Screw Co., App., 6 S.W.2d 1015—Dillard v. Justus, 3 S.W.2d 392, 222 Mo.App. 362—Reynolds v. Al. G. Barnes Amusement Co., 390 S.

other so as to relieve the master of his primary liability,[63] and the agency or person to whom the duty is attempted to be delegated is immaterial.[64] This is true no matter how carefully the person or agency to whom the duty is attempted to be delegated is selected[65] or how competent or reputable he

W. 1062, 221 Mo.App. 1169—Hopkins v. American Car & Foundry Co., App., 295 S.W. 841, opinion quashed on other grounds State ex rel. Hopkins v. Daues, 6 S.W.2d 893, 319 Mo. 733—Green v. Kurtz, App., 292 S.W. 1073—Watson v. Carthage Marble & White Lime Co., App., 290 S.W. 649—Watson v. Energy Const. Co., 286 S.W. 715, 220 Mo.App. 362—Schulte v. Carmichael-Cryder Co., App., 282 S.W. 181—Crowley v. American Car & Foundry Co., App., 279 S.W. 212—Bushong v. Barrett Co., App., 273 S.W. 761—Evans v. Southern Wheel Co., App., 273 S.W. 749—Schleef v. Schoen, 270 S.W. 410, 216 Mo.App. 499—House v. St. Louis Car Co., App., 270 S.W. 135.

N.H.—Dowling v. L. H. Shattuck, Inc., 17 A.2d 529, 91 N.H. 234—Pickett v. Norwood Calef & Co., 196 A. 627, 89 N.H. 244—Burke v. Boston & M. R. R., 134 A. 574, 82 N.H. 350.

N.J.—Clayton v. Ainsworth, 4 A.2d 274, 122 N.J.Law 160.

N.Y.—Wohlfron v. Brooklyn Edison Co., 265 N.Y.S. 18, 238 App.Div. 463, affirmed 189 N.E. 691, 263 N.Y. 547—Buckley v. Cunard S. S. Co., 253 N.Y.S. 254, 233 App.Div. 361—Blosky v. Overseas Shipping Co., 220 N.Y.S. 95, 219 App.Div. 438.

N.C.—Potter v. Atlantic Coast Line R. Co., 147 S.E. 698, 197 N.C. 17—Ellis v. Durham Herald Co., 145 S.E. 283, 196 N.C. 262—Taylor v. J. A. Jones Const. Co., 141 S.E. 492, 195 N.C. 30—Richardson v. American Cotton Mills, 130 S.E. 164, 190 N.C. 874—Barnes v. Phoenix Utility Co., 130 S.E. 1, 190 N.C. 382—Perkins v. Spray Wood & Coal Co., 127 S.E. 677, 189 N.C. 602—Thomas v. Lawrence, 127 S.E. 585, 189 N.C. 521.

Okl.—Oklahoma City v. Dobbs, 142 P.2d 369, 193 Okl. 183—Buxton v. Hicks, 131 P.2d 1015, 191 Okl. 573—McCracken v. Franco-Dominion Development Corporation, 117 P.2d 135, 189 Okl. 354—Kansas City Bridge Co. v. Gravitt, 105 P.2d 767, 188 Okl. 30—Wright v. Clark, 61 P.2d 192, 177 Okl. 628—Singer Sewing Mach. Co. v. Odom, 45 P.2d 473, 172 Okl. 411—Southern Drilling Co. v. McKee, 42 P.2d 265, 171 Okl. 409.

Or.—Wychgel v. States S. S. Co., 296 P. 863, 135 Or. 475, certiorari denied States S. S. Co. v. Wychgel, 52 S.Ct. 11, 284 U.S. 625, 76 L.Ed. 533—Warner v. Synnes, 235 P. 305, 114 Or. 451.

Pa.—Venzel v. Valley Camp Coal Co., 156 A. 240, 304 Pa. 583.

S.C.—Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259—Nuckolls v. Great Atlantic & Pacific Tea Co., 5 S.E.2d 862, 192 S.C. 156—Leslie v. Southern Paving Const. Co., 169 S.E. 139, 169 S.C. 414.

Tex.—Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 123 Tex. 128—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580—City of Beaumont v. Silas, Civ.App., 200 S.W.2d 690—City of Austin v. Johnson, Civ. App., 195 S.W.2d 222—Morgan v. State, Civ.App., 170 S.W.2d 648, reversed on other grounds State v. Morgan, 170 S.W.2d 652, 140 Tex. 620—Magnolia Petroleum Co. v. Studdard, Civ.App., 83 S.W.2d 1047, error dismissed—Jackson v. Houston, E. & W. T. Ry. Co., Civ.App., 293 S.W. 865, reversed on other grounds Houston E. & W. T. Ry. Co. v. Jackson, Com.App., 299 S.W. 885.

Va.—Bly v. Southern Ry. Co., 31 S.E.2d 564, 183 Va. 162, opinion adhered to 32 S.E.2d 659, 183 Va. 406—Aronovitch v. Ayres, 193 S.E. 524, 169 Va. 308—Colonna Shipyard v. Dunn, 145 S.E. 342, 151 Va. 740, certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986.

Wash.—Blessing v. Camas Prairie R. Co., 100 P.2d 416, 3 Wash.2d 266—White v. Consolidated Freight Lines, 73 P.2d 358, 192 Wash. 146—Cockerline v. Anderson, 52 P.2d 321, 184 Wash. 701—Stanke v. Spokane, C. D. & P. Ry. Co., 43 P.2d 961, 181 Wash. 472—McGinn v. North Coast Stevedoring Co., 270 P. 113, 149 Wash. 1—Christansen v. Puget Sound Nav. Co., 244 P. 569, 138 Wash. 239.

Wis.—American Mut. Liability Ins. Co. of Boston v. Chain Belt Co., 271 N.W. 828, 224 Wis. 155.

39 C.J. p 322 note 33.

Delegation of duty:

Generally see supra § 186.

To fellow servant see infra § 333.

Statutory duty

Mo.—Guthrie v. Gillespie, 6 S.W.2d 886, 319 Mo. 1137.

N.Y.—Griebsch v. B. T. Babbitt, Inc., 298 N.Y.S. 848, 164 Misc. 7, affirmed 2 N.Y.S.2d 848, 254 App.Div. 601.

Or.—Hollopeter v. Palm, 291 P. 380, 134 Or. 546, modified on other grounds 294 P. 1056, 134 Or. 546, appeal dismissed 52 S.Ct. 15, 284 U.S. 572, 76 L.Ed. 497—Moen v. Aitken, 271 P. 730, 127 Or. 246.

Wash.—Pellerin v. Washington Veneer Co., 2 P.2d 658, 163 Wash. 555.

Wis.—Tiemann v. May, 292 N.W. 612, 235 Wis. 100.

As to complicated machinery, master has nondelegable duty to furnish servant with safe machinery and keep it in reasonably safe condition.—Hercules Powder Co. v. Tyrone, 124 So. 74, 155 Miss. 75, suggestion of error overruled 124 So. 475, 155 Miss. 75.

63. U.S.—Phillips Petroleum Co. v. Manning, C.C.A.Ark., 81 F.2d 849.

Ark.—Eudora Motor Co. v. Womack, 111 S.W.2d 530, 195 Ark. 74.

Fla.—Putnam Lumber Co. v. Berry, 2 So.2d 133.

Ky.—**Corpus Juris cited in** Duvin Coal Co. v. Fike, 38 S.W.2d 201, 202, 238 Ky. 376.

Mass.—Lamberti v. Neal, 148 N.E. 463, 253 Mass. 99.

Miss.—Mississippi Power & Light Co. v. Smith, 153 So. 376, 169 Miss. 447.

Mo.—Snyder v. American Car & Foundry Co., 14 S.W.2d 603, 322 Mo. 147—Lutgen v. Standard Oil Co., 287 S.W. 885, 221 Mo.App. 773—Peters v. St. Louis & S. F. R. Co., 140 S.W. 1197, 160 Mo.App. 629.

N.H.—Racette v. Sunlight Baking Co., 155 A. 254, 85 N.H. 171.

N.J.—Clayton v. Ainsworth, 4 A.2d 274, 122 N.J.Law 160.

N.C.—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112.

Okl.—Buxton v. Hicks, 131 P.2d 1015, 191 Okl. 573.

Or.—Wychgel v. States S. S. Co., 296 P. 863, 135 Or. 475, certiorari denied States S. S. Co. v. Wychgel, 52 S.Ct. 11, 284 U.S. 625, 76 L.Ed. 533.

Tex.—Morton Salt Co. v. Wells, 70 S.W.2d 409, 123 Tex. 151—Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 123 Tex. 128.

Wis.—Koehler v. Thiensville State Bank, 14 N.W.2d 15, 245 Wis. 281.

39 C.J. p 322 note 33.

Employment of floor cleaner will not absolve employer from liability for employee's injury from slipping on floor without proof of performance.—Barnes v. National Biscuit Co., Mo.App., 3 S.W.2d 254.

64. U.S.—Bonner v. Texas Co., C.C.A.Tex., 89 F.2d 291.

N.J.—Clayton v. Ainsworth, 4 A.2d 274, 122 N.J.Law 160.

Tex.—Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 123 Tex. 128.

65. Tex.—Fort Worth Elevators Co. v. Russell, supra.

Reasonable care in selecting the person or firm will not relieve the master of liability.—Lutgen v.

or it may be.[66] Since the duty of the master in respect of reasonably safe instrumentalities and places of work is a continuing one, as discussed supra § 201, the duty of inspection, discussed infra § 235, resting on the employer in consequence thereof cannot be delegated so as to relieve him from the consequences of a failure to inspect or of an inadequate inspection.[67]

b. To Servant Injured

As a general rule it is competent for the master to delegate to the servant, and for the servant to accept, the burden of inspection, or under some circumstances the maintenance of the appliances or places he is required to use, so as to relieve the master of liability for injuries to the servant resulting from the servant's failure to perform the duties delegated to him.

In the absence of a statute to the contrary[68] or a paramount contract limiting the master's power,[69] as a general rule, it is competent for the master to delegate to the servant, and for the servant to accept, by contract or mutual understanding, the burden of inspection, examination, or even under some circumstances the maintenance, of the appliances or places he is required to use, so as to relieve the master of liability for injuries to the servant resulting from the servant's failure to perform the duties delegated to him.[70] Thus the master may trust the servant to perform the intermediate, ordinary, and

Standard Oil Co., 287 S.W. 885, 221 Mo.App. 773.

66. N.H.—Racette v. Sunlight Baking Co., 155 A. 254, 85 N.H. 171.

67. U.S.—J. R. Hanify Co. v. Westberg, C.C.A.Or., 16 F.2d 552.
S.C.—Langston v. Fiske-Carter Const. Co., 185 S.E. 62, 180 S.C. 113.
Tex.—Morton Salt Co. v. Wells, 70 S.W.2d 409, 123 Tex. 151.
Wis.—Koehler v. Thiensville State Bank, 14 N.W.2d 15, 245 Wis. 281.
39 C.J. p 324 note 36.
Delegation to fellow servant see infra § 333.

68. Or.—Schmidt v. Multnomah Operating Co., 61 P.2d 95, 155 Or. 53.
39 C.J. p 324 note 37 [f].

69. **Employer's contractual duty with employees' union** to protect union members by certain means while working could not be shifted to employee to protect himself.—Cato v. Atlanta & C. A. L. Ry. Co., 162 S.E. 239, 164 S.C. 123, certiorari denied Atlanta & C. A. L. Ry. Co. v. Cato, 52 S.Ct. 200, 284 U.S. 684, 76 L.Ed. 577.

70. U.S.—Darden v. Nashville, C. & St. L. Ry. Co., C.C.A.Ky., 71 F.2d 799, certiorari denied Darden v. Nashville, C. & St. L. Ry., 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690—U. S. Steel Products Co. v. Noble, C.C.A.N.Y., 10 F.2d 89.
Iowa.—**Corpus Juris cited in** Oesterreich v. Leslie, 234 N.W. 229, 232, 212 Iowa 105.
Ky.—Brewer's Adm'x v. Louisville & N. R. Co., 34 S.W.2d 949, 237 Ky. 1.
La.—Radford v. Gibert, App., 12 So. 2d 612—Watkins v. Jahncke Dry Docks, 125 So. 469, 12 La.App. 350.
Mass.—Pittsley v. Allen, 7 N.E.2d 442, 297 Mass. 83.
Mich.—Greene v. Miller, 204 N.W. 722, 232 Mich. 19.
Miss.—Wilkie v. West Const. Co. of Tennessee, 16 So.2d 154, 196 Miss. 233, suggestion of error overruled 16 So.2d 617, 196 Miss. 233—Price v. Taylor, 1 So.2d 784, 191 Miss. 392—Gulf, M. & N. R. Co. v. Madden, 200 So. 119, 190 Miss. 374—Wade-Stevens Lumber Co. v. Addy, 194 So. 303, 187 Miss. 851—Eagle Cotton Oil Co. v. Sollie, 187 So. 506, 185 Miss. 475—E. L. Bruce Co. v. Brogan, 166 So. 350, 175 Miss. 208—Edward Hines Lumber Co. v. Dickinson, 125 So. 93, 155 Miss. 674.
Mo.—Probst v. Heisinger Motor Co., App., 16 S.W.2d 1005—Carter v. Wolff, App., 296 S.W. 187—Davis v. National Refining Co., App., 294 S.W. 114.
Or.—Schmidt v. Multnomah Operating Co., 61 P.2d 95, 155 Or. 53.
S.C.—Nuckolls v. Great Atlantic & Pacific Tea Co., 5 S.E.2d 862, 192 S.C. 156.
Tenn.—Jessie v. Chattanooga Golf and Country Club, 121 S.W.2d 557, 173 Tenn. 536—Coalfield Coal Co. v. Mellhorn, 2 Tenn.App. 219.
Va.—Chesapeake & O. Ry. Co. v. Butler, 177 S.E. 195, 163 Va. 626.
39 C.J. p 324 note 37.

Superior servants or vice principals intrusted with full control

(1) The rule imposing on a master the nondelegable duty to furnish a reasonably safe place to work and reasonably safe tools and appliances with which to work has no application to a skilled and experienced superior servant or vice principal intrusted by employer with complete control of the work and the method of doing it, and on whom rests the responsibility of advising employer if additional tools, appliances, or helpers are necessary for safe performance of work, in absence of advice by vice principal that such are needed and a request that they be furnished.—Atchison, T. & S. F. Ry. Co. v. Kennard, Okl., 181 P.2d 234—City of Edmond v. Washam, 121 P.2d 300, 190 Okl. 140.

(2) An employee of a construction company engaged in construction of a pipe line tunnel under tracks of a railroad who was in charge of crew engaged in this operation with complete supervision of digging tunnel and full control of the men under him, including the right to hire and fire men for such purpose, and who was experienced in such work, was a superior servant or vice principal within the meaning of the rule.—Atchison T. & S. F. Ry. Co. v. Kennard, supra.

(3) Other persons held to be superior servants or vice principals within the meaning of the rule.—City of Edmond v. Washam, supra.

Servant without authority or competency to make repairs

The rule that the master cannot delegate his duty to furnish safe tools, machinery and appliances cannot be abrogated by intrusting the duty of inspection and repair to a servant with no authority to have the repairs made by some competent workman at the expense of the master, and who is not competent to make the repairs himself, and who has not been employed for the purpose of keeping the instrumentality in repair.—Price v. Taylor, 1 So.2d 784, 191 Miss. 392.

Maintenance and inspection of poles

(1) The duty of maintaining and caring for the poles of the employer does not necessarily include a duty to keep the poles in a safe condition, and hence the acceptance of such duty does not bar the recovery of appropriate damages for an injury suffered by an employee because of the unsafe condition of a pole.—Kirkland v. City of Gainesville, 166 So. 460, 122 Fla. 765.

(2) A lineman's acceptance of a general duty to make such reasonable inspection of each pole he climbed as was necessary or appropriate to discover defects, if any, in the pole that would make it unsafe to climb does not relieve the employer of liability for a defect below the surface of the ground in the absence of a showing that the employee was required to inspect the pole below the surface.—Peninsular Telephone Co. v. Dority, 174 So. 446, 128 Fla. 106.

simple duties incidental to the servant's employment and resting on the servant's knowledge and skill,[71] as, for instance, the keeping of simple tools in repair and making light repairs.[72] Likewise an employer may delegate to the servant the preparation of his own place in which to do his work,[73] and a servant engaged in, or charged with the duty of, making or keeping the place of work safe cannot recover for injuries resulting from his own negligence in this respect.[74] Furthermore the master may delegate to the servant the application of instrumentalities or the erection of structures necessary to carry on his work,[75] and, when the master has exercised reasonable care in furnishing suitable materials or appliances, in sufficient quantities for such purposes, he may intrust to the servant the selection of material or appliances therefrom,[76] and he will be relieved from liability in such case for injuries resulting from the improper use of or failure to use such material or appliances,[77] or from the use of defective materials or appliances,[78] unless all are defective[79] or the defect is one which is known or should be known by the master but cannot be discovered by the inspection which the employee could be expected to make.[80] The mere fact that a servant is to a certain extent directing the work does not, however, lessen the master's duty to provide safe appliances with which to do the work.[81]

Where the work necessarily changes the character of the place or appliances, the duty of care for the safety of the place and appliances has been held to devolve on the servants to whom the work is intrusted.[82]

§ 205. Failure to Furnish Proper and Sufficient Tools or Appliances

It is actionable negligence on the part of a master to fail to furnish, or to fail to exercise ordinary or reasonable care to furnish, his servant with such proper tools and appliances as may be required for the reasonably safe prosecution of the work.

It is actionable negligence on the part of a master to fail to furnish,[83] or to fail to exercise ordi-

71. Mo.—Probst v. Heisinger Motor Co., App., 16 S.W.2d 1005.
39 C.J. p 325 note 38.

A vice principal may be intrusted to employ an expert to make repairs.—Price v. Taylor, 1 So.2d 784, 191 Miss. 392.

72. Miss.—Texas Co. v. Mills, 156 So. 866, 171 Miss. 231.
Va.—Farmers' Adm'x v. Chesapeake & O. Ry. Co., 131 S.E. 334, 144 Va. 65.
39 C.J. p 325 note 39.

73. La.—Watkins v. Jahncke Dry Docks, 125 So. 469, 12 La.App. 350.
R.I.—Faltinali v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R. I. 438.
S.C.—Nuckolls v. Great Atlantic & Pacific Tea Co., 5 S.E.2d 862, 192 S.C. 156—Cline v. Southern R. Co., 86 S.E. 17, 101 S.C. 493.
39 C.J. p 325 note 40.

74. U.S.—Darden v. Nashville, C. & St. L. Ry. Co., C.C.A.Ky., 71 F.2d 799, certiorari denied Darden v. Nashville, C. & St. L. Ry., 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690.
La.—Radford v. Gibert, App., 12 So. 2d 612.
Miss.—Edward Hines Lumber Co. v. Dickinson, 125 So. 93, 155 Miss. 674.
Mo.—Carter v. Wolff, App., 296 S.W. 187.
Tex.—**Corpus Juris quoted in** Great Atlantic & Pacific Tea Co. v. Garner, Civ.App., 170 S.W.2d 502, 504, error refused.
Va.—Chesapeake & O. Ry. Co. v. Butler, 177 S.E. 195, 163 Va. 626.
39 C.J. p 325 note 41.

Acting manager of store
Employer was not liable for injuries to acting manager of employer's store sustained when acting manager slipped on floor, since acting manager was vice principal or representative of the employer, and it was acting manager's duty, as much as duty of employer, to maintain the floor in reasonably safe condition.—Nuckolls v. Great Atlantic & Pacific Tea Co., 5 S.E.2d 862, 192 S.C. 156.

75. N.C.—Fowler v. Carolina Cross Arm & Conduit Co., 133 S.E. 188, 192 N.C. 14.
39 C.J. p 325 note 43.

Construction of scaffold
Generally, where master leaves to servant matter of construction of scaffold upon which servant is to work, unless master furnishes defective materials, he is not liable for injury sustained by servant due to faulty construction of scaffold, and, for a stronger reason, the master is not liable to a servant, under such circumstances when the servant constructs his own scaffold from his own materials.—Jessie v. Chattanooga Golf and Country Club, 121 S.W.2d 557, 173 Tenn. 536.

76. Mich.—Greene v. Miller, 204 N. W. 722, 232 Mich. 19.
Miss.—**Corpus Juris cited in** E. L. Bruce Co. v. Brogan, 166 So. 350, 352, 175 Miss. 208.
Mo.—Probst v. Heisinger Motor Co., App., 16 S.W.2d 1005—King v. Terry, App., 14 S.W.2d 969.
N.H.—Ireland v. E. J. Pinney, Inc., 18 A.2d 750, 91 N.H. 323.
N.C.—Fowler v. Carolina Cross Arm & Conduit Co., 133 S.E. 188, 192 N.C. 14.
Okl.—Oklahoma Pipe Line Co. v. Perrymore, 126 P.2d 518, 190 Okl. 687.
39 C.J. p 325 note 44.

77. Mich.—Greene v. Miller, 204 N. W. 722, 232 Mich. 19.
N.H.—Ireland v. E. J. Pinney, Inc., 18 A.2d 750, 91 N.H. 323.
39 C.J. p 326 note 46.

78. Miss.—**Corpus Juris cited in** E. L. Bruce Co. v. Brogan, 166 So. 350, 352, 175 Miss. 208.
Mo.—Probst v. Heisinger Motor Co., App., 16 S.W.2d 1005.
39 C.J. p 326 note 45.

79. Mo.—Probst v. Heisinger Motor Co., supra.

80. Mo.—Probst v. Heisinger Motor Co., supra.

81. Ind.—Kelly-Atkinson Constr. Co. v. Lawrence, 101 N.E. 740, 54 Ind. App. 544.
39 C.J. p 860 note 84.

82. U.S.—Westinghouse v. Callaghan, Mo., 155 F. 397, 83 C.C.A. 669, 19 L.R.A.,N.S., 361.
39 C.J. p 325 note 42.
Changing conditions as affecting master's duty to furnish safe place of work see infra § 219.

83. Cal.—Lewis v. Curran, 62 P.2d 800, 17 Cal.App.2d 689.
Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43—Crouch v. Missouri Pac. R. Co., 276 P. 81, 128 Kan. 26, certiorari denied Missouri Pac. R. Co. v. Crouch, 50 S.Ct. 31, 280 U. S. 576, 74 L.Ed. 627.
La.—**Corpus Juris cited in** Snow v.

nary or reasonable care to furnish,[84] his servant with such proper tools and appliances as may be required for the reasonably safe prosecution of the work, and he cannot escape liability for failing to furnish proper safety appliances because they might not have been effectual or might not have been used even if at hand.[85] In order to make a master liable for failure to furnish proper tools and appliances, however, it must be shown that such tools and appliances were necessary[86] and that none was at hand.[87] If the master places proper tools and appliances where they are available to the servant, the latter cannot complain of a mere inconvenience to which he must submit in procuring them,[88] although a master does not discharge his duties by having proper appliances at hand when the workmen are not allowed to use them except by consent of their foreman.[89] Where the lack of them arises from a temporary condition in the progress of the work caused by the negligence of fellow workmen, no liability attaches to the master;[90] nor is a master liable for the failure to furnish appliances to prevent an injury which could not be anticipated by the exercise of ordinary care and foresight.[91]

§ 206. Nature and Kind of Appliances and Places

As a general rule it is necessary and sufficient for the master to furnish such instrumentalities and places for work as are reasonably safe and suitable.

A master is not required to furnish his servant with tools, machinery, appliances, and places for work which are absolutely safe,[92] or perfect,[93] or most expensive,[94] or the newest, safest and best, as discussed infra § 207, or similar to those used by others, although they may be less dangerous than his own,[95] nor need he furnish those of a particular kind;[96] but, broadly speaking, it is necessary for him to furnish such instrumentalities and places for work as are reasonably safe and suitable,[97] and it is

Texas & P. Ry. Co., App., 166 So. 200, 202.
Miss.—Masonite Corp. v. Graham, 25 So.2d 322, 199 Miss. 833—F. W. Woolworth Co. v. Freeman, 11 So. 2d 447, 193 Miss. 838.
Mo.—Warner v. Oriel Glass Co., 8 S.W.2d 846, 319 Mo. 1196, 60 A.L.R. 448—Sabol v. St. Louis Cooperage Co., 282 S.W. 425, 313 Mo. 527—McGowan v. American Mfg. Co., App., 270 S.W. 423.
Okl.—Stockett v. Steele, 169 P.2d 195, 197 Okl. 134.
39 C.J. p 326 note 47.

Whether based on violation of statute or rule of industrial board, an action for recovery of injuries allegedly sustained because of failure to furnish proper safety devices is grounded in negligence.—Teller v. Prospect Heights Hospital, 21 N.E.2d 504, 280 N.Y. 456.

84. Mo.—Warner v. Oriel Glass Co., 8 S.W.2d 846, 319 Mo. 1196, 60 A.L.R. 448.
Okl.—Beasley v. Bond, 48 P.2d 299, 173 Okl. 355.

85. La.—**Corpus Juris cited in** Snow v. Texas & P. Ry. Co., App., 166 So. 200, 202.
39 C.J. p 327 note 48.

86. U.S.—Wolfe v. Henwood, C.C.A. Ark., 162 F.2d 998.
Me.—Blacker v. Oxford Paper Co., 142 A. 776, 127 Me. 228.
N.H.—Saunders v. Boston & M. R. R., 136 A. 264, 82 N.H. 476, 50 A.L.R. 367.
Tex.—Texas & P. Ry. Co. v. Rampy, Civ.App., 71 S.W.2d 387, error dismissed—St. Louis Southwestern Ry. Co. of Texas v. Weatherly, Civ.App., 2 S.W.2d 555.
39 C.J. p 327 note 49.

Failure to furnish goggles held not negligence
Mo.—Brooks v. Kansas City Gas Co., 127 S.W.2d 427, 343 Mo. 1226—Schaum v. Southwestern Bell Tel. Co., 78 S.W.2d 439, 336 Mo. 228.
Tex.—Johnson v. Wichita Valley Ry. Co., Civ.App., 104 S.W.2d 128.
39 C.J. p 327 note 49 [b].

87. Mo.—Brooks v. Kansas City Gas Co., 127 S.W.2d 427, 343 Mo. 1226.
N.H.—Ireland v. E. J. Pinney, Inc., 18 A.2d 750, 91 N.H. 323.
39 C.J. p 328 note 50.

88. **Reason for rule**
"The time and labor of the servant belong to the master, and the master has the right, if he sees proper, in arranging the conduct of his business, to require a part of that time and labor to be consumed in procuring from established storage places the tools and appliances which the servant is to use."—St. Louis Southwestern Ry. Co. of Texas v. Weatherly, Tex.Civ.App., 2 S.W.2d 555, 558.

89. U.S.—Mardis v. Miller, Neb., 241 F. 470, 154 C.C.A. 302.

90. Mass.—Cogan v. Burnham, 56 N.E. 585, 175 Mass. 391.
39 C.J. p 328 note 52.
Negligence of coemployee charged with duty of furnishing see infra § 333.

91. Ark.—Gerig v. Furr, 39 S.W.2d 1021, 183 Ark. 1036—La Grand v. Arkansas Oak Flooring Co., 245 S.W. 38, 155 Ark. 585.
39 C.J. p 328 note 53.

92. Ark.—Harmon v. Morrison, 147 S.W.2d 35, 201 Ark. 820—Norton & Wheeler Stave Co. v. Wright, 106 S.W.2d 178, 194 Ark. 115—Pekin Wood Products Co. v. Burkhardt, 96 S.W.2d 776, 192 Ark. 1025.
Miss.—Stewart v. Kroger Grocery, etc., Co., 21 So.2d 912, 198 Miss. 371.
Utah.—Pauly v. McCarthy, 166 P.2d 501, 109 Utah 398, certiorari granted 67 S.Ct. 102, 329 U.S. 698, 91 L. Ed. 609, reversed on other grounds 67 S.Ct. 962, 330 U.S. 802, 91 L.Ed. 1261.

93. Miss.—Stewart v. Kroger Grocery, etc., Co., 21 So.2d 912, 198 Miss. 371.

94. W.Va.—Berns v. Gaston Gas Coal Co., 27 W.Va. 285, 55 Am.R. 304.

95. Mo.—State ex rel. Fogel Const. Co. v. Trimble, 274 S.W. 1028, 310 Mo. 248.
39 C.J. p 328 note 57.

96. N.Y.—Adlam v. Konvalinka, 50 N.E.2d 535, 291 N.Y. 40.
Or.—Freeman v. Wentworth & Irwin, 7 P.2d 796, 139 Or. 1.
39 C.J. p 328 note 56.

97. U.S.—Raudenbush v. Baltimore & O. R. Co., C.C.A.Pa., 160 F.2d 363—Holliday v. Fulton Band Mill, C.C.A.Miss., 142 F.2d 1006—F. W. Martin & Co. v. Cobb, C.C.A.Ark., 110 F.2d 159—O'Brien v. Calmar S. S. Corporation, D.C.Pa., 25 F.Supp. 752, affirmed, C.C.A., 104 F.2d 148, certiorari denied 60 S.Ct. 111, 308 U.S. 555, 84 L.Ed. 467.
Ark.—Eudora Motor Co. v. Womack, 111 S.W.2d 530, 195 Ark. 74—Mercury Mining Co. v. Chambers, 102 S.W.2d 543, 193 Ark. 771.
Cal.—Thomas v. Southern Pac. Co., 2 P.2d 544, 116 Cal.App. 126, certiorari denied Southern Pac. Co. v. Thomas, 53 S.Ct. 265, 284 U.S. 689, 76 L.Ed. 582.
Conn.—Rescigno v. Rosner, 198 A. 751, 124 Conn. 253.

sufficient if he does so.[98] Strictly speaking, it has been held that it is not necessary for the master to

Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.
D.C.—Decatur v. Chas. H. Tompkins Co., 25 F.2d 526, 58 App.D.C. 102, 60 A.L.R. 402.
Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650—Holstun v. Embry, 169 So. 400, 124 Fla. 554—McGee v. C. Ed De Brauwere & Co., 162 So. 510, 117 Fla. 859—Southern States Power Co. v. Clark, 159 So. 881, 118 Fla. 521.
Ga.—McClain v. Seaboard Air Line Ry. Co., 129 S.E. 876, 34 Ga.App. 86.
Ill.—McCreery v. Libby-Owens-Ford Glass Co., 2 N.E.2d 290, 363 Ill. 321, 105 A.L.R. 75—Sprickerhoff v. Baltimore & O. R. Co., 55 N.E.2d 532, 323 Ill.App. 340.
Iowa.—Lang v. Hedrick, 295 N.W. 107, 229 Iowa 766—Bell v. Brown, 239 N.W. 785, 214 Iowa 370—Nelson v. Smeltzer, 265 N.W. 924, 221 Iowa 972—Oestereich v. Leslie, 234 N.W. 229, 212 Iowa 105.
Ky.—City of Bellevue v. Hall, 174 S.W.2d 24, 295 Ky. 57—Grigsby v. Louisville & N. R. Co., 114 S.W.2d 775, 272 Ky. 709—Big Sandy & C. R. Co. v. Measell's Adm'r, 42 S.W. 2d 747, 240 Ky. 571—**Corpus Juris cited in** Duvin Coal Co. v. Fike, 38 S.W.2d 201, 202, 238 Ky. 376—Bell v. Louisville & N. R. Co., 287 S.W. 219, 216 Ky. 42—Cincinnati, N. O. & T. P. R. Co. v. Lay, 282 S.W. 550, 214 Ky. 21—Blackaby v. Louisville & N. R. Co., 280 S.W. 1093, 213 Ky. 368.
La.—Snow v. Texas & P. Ry. Co., App., 166 So. 200, 202—Borde v. New Orleans & G. N. R. Co., App., 140 So. 810—Simmons v. Doullut & Ewin, App., 145 So. 708, rehearing denied 146 So. 772.
Mass.—Reidy v. Crompton & Knowles Loom Works, 60 N.E.2d 589, 318 Mass. 135—Rivers v. Kraskowski, 22 N.E.2d 114, 303 Mass. 409—Fraioli v. New York, N. H. & H. R. Co., 190 N.E. 605, 286 Mass. 450—McPhail v. Boston & M. R. R., 181 N. E. 739, 280 Mass. 113—Lamberti v. Neal, 148 N.E. 463, 253 Mass. 99.
Mich.—Muchler v. Johnson, 273 N.W. 794, 280 Mich. 527—Sheltrown v. Michigan Cent. R. Co., 222 N.W. 163, 245 Mich. 58—Thiel v. Verschoor, 209 N.W. 53, 235 Mich. 373—Newell v. Detroit, T. & I. R. Co., 205 N.W. 579, 232 Mich. 528.
Miss.—Crosby v. Burge, 1 So.2d 504, 190 Miss. 739.
Mo.—Wellinger v. Terminal R. Ass'n of St. Louis, 183 S.W.2d 908, 353 Mo. 670—Pritchard v. Thompson, 156 S.W.2d 652, 348 Mo. 832—**Corpus Juris cited in** Gimmarro v. Kansas City, 116 S.W.2d 11, 15, 342 Mo. 428—Davis v. City of Independence, 49 S.W.2d 95, 330 Mo. 201—Hulsey v. Tower Grove Quarry & Construction Co., 30 S.W.2d 1018, 326 Mo. 194—Sabol v. St. Louis Cooperage Co., 282 S.W. 425, 313 Mo. 527—Hunter v. Busy Bee Candy Co., 271 S.W. 800, 307 Mo. 656—De Bastiani v. Lesser-Goldman Cotton Co., App., 297 S.W. 174—Stokes v. Springfield Wagon Co., App., 289 S.W. 987.
Mont.—Morelli v. Great Northern Ry. Co., 300 P. 210, 89 Mont. 603.
Nev.—**Corpus Juris cited in** Musser v. Los Angeles & S. L. R. Co., 299 P. 1020, 1022, 53 Nev. 304.
N.H.—Moore v. Morse & Malloy Shoe Co., 197 A. 707, 89 N.H. 332—Harvey v. Welch, 163 A. 417, 86 N.H. 72.
N.Y.—Adlam v. Konvalinka, 50 N. E.2d 535, 291 N.Y. 40—Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 152 Misc. 716.
N.C.—Ellis v. Durham Herald Co., 145 S.E. 283, 196 N.C. 262.
Ohio.—Hale v. Kohler, App., 35 N.E. 2d 967.
Okl.—Pure Transp. Co. v. Newman, 155 P.2d 977, 195 Okl. 173—Oklahoma City v. Dobbs, 142 P.2d 369, 193 Okl. 183—Luper Transp. Co. v. Campbell, 133 P.2d 197, 192 Okl. 45—Buxton v. Hicks, 131 P.2d 1015, 191 Okl. 573—McCracken v. Franco-Dominion Development Corporation, 117 P.2d 135, 189 Okl. 354—Kansas City Bridge Co. v. Gravitt, 105 P.2d 767, 188 Okl. 30—McMillin v. Barton-Robison Convoy Co., 78 P.2d 789, 182 Okl. 553—Stephan v. Apartment Hotels, 77 P.2d 539, 182 Okl. 274—Wright v. Clark, 61 P.2d 192, 177 Okl. 628—Joy v. Pope, 53 P.2d 683, 175 Okl. 540—Singer Sewing Mach. Co. v. Odom, 45 P.2d 473, 172 Okl. 411—Southern Drilling Co. v. McKee, 42 P.2d 265, 171 Okl. 409.
Or.—Hoffman v. Broadway Hazelwood, 10 P.2d 349, 139 Or. 519, 83 A.L.R. 1008, rehearing denied 11 P.2d 814, 139 Or. 519, 83 A.L.R. 1008.
Pa.—Verna v. Lopresti, 42 A.2d 170, 157 Pa.Super. 163.
R.I.—Faltinali v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 438.
S.C.—Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213—Nuckolls v. Great Atlantic & Pacific Tea Co., 5 S.E.2d 862, 192 S.C. 156—McGuire v. Steinberg, 193 S.E. 205, 185 S.C. 97—Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 184 S.C. 471—Davis v. Atlantic Coast Line R. Co., 147 S.E. 834, 150 S.C. 130, reversed on other grounds Atlantic Coast Line R. Co. v. Davis, 49 S.Ct. 210, 279 U.S. 34, 73 L.Ed. 601.
Tex.—**Corpus Juris cited in** Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 401, 123 Tex. 128—City of Austin v. Johnson, Civ. App., 195 S.W.2d 222—Clevenger v. Burgess, Civ.App., 31 S.W.2d 675, error refused.
Utah.—Kaumans v. White Star Gas & Oil Co., 63 P.2d 231, 92 Utah 24.
Vt.—Landing v. Town of Fairlee, 22 A.2d 179, 112 Vt. 127.
Wash.—**Corpus Juris cited in** Cummins v. Dufault, 139 P.2d 308, 312, 18 Wash.2d 274—Kantonen v. Braley Motor Co., 30 P.2d 245, 176 Wash. 577.
W.Va.—Thorn v. Addison Bros. & Smith, 194 S.E. 771, 119 W.Va. 479.
39 C.J. p 308 note 13.

Fact that machine was purchased from reputable manufacturer does not discharge whole duty of employer, where the dangerous condition complained of was in not attaching adequate safety device or in other ways making it reasonably safe.—Lamberti v. Neal, 148 N.E. 463, 253 Mass. 99.

98. U.S.—Steele v. Erie R. Co., D. C.N.Y., 54 F.2d 688, affirmed, C.C.A., 54 F.2d 690, certiorari denied Erie R. Co. v. Steele, 52 S.Ct. 395, 285 U.S. 546, 76 L.Ed. 937.
Iowa.—Anderson v. Sheuerman, 6 N. W.2d 125, 232 Iowa 705.
Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Gossett, 18 S.W.2d 986, 230 Ky. 240.
Miss.—Brown v. Coley, 152 So. 61, 168 Miss. 778—Mitchell v. Brooks, 147 So. 660, 165 Miss. 826.
Mo.—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228—Pevesdorf v. Union Electric Light & Power Co., 64 S.W.2d 939, 333 Mo. 1155—State ex rel. Fogel Const. Co. v. Trimble, 274 S.W. 1028, 310 Mo. 248—Braden v. Friederichsen Floor & Wall Tile Co., 15 S.W.2d 923, 223 Mo.App. 700—Clark v. Wheelock, App., 293 S. W. 456.
N.Y.—Adlam v. Konvalinka, 50 N.E. 2d 535, 291 N.Y. 40—Healy v. Carter & Weeks Stevedoring Co., 210 N.Y.S. 75, 213 App.Div. 122.
N.C.—Grubbs v. Lewis, 145 S.E. 769, 196 N.C. 391.
Or.—Freeman v. Wentworth & Irwin, 7 P.2d 796, 139 Or. 1.
Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.
39 C.J. p 328 note 54, p 329 note 58.

Duty not enlarged by promise
If appliance or place of work is reasonably safe, liability for damages for negligence cannot be cre-

furnish reasonably safe and suitable instrumentalities and places for work;[99] that is, the master's obligation is to use due, reasonable, or ordinary care to furnish his servant with reasonably safe and suitable instrumentalities and places for work,[1] and, even though the instrumentalities or places for work furnished are not reasonably safe and suitable, still there is no liability on the part of the master if he has exercised the requisite degree of care to make them reasonably safe and suitable.[2] The phrase "reasonably safe" is a term of relative application,[3] and what is reasonably safe often depends on the facts and circumstances in the particular case,[4] and it is essential that regard should be had not only to the character of the work to be performed, but also to the ordinary hazards of the employment,[5] when the servant exercises reasonable care for his own safety.[6]

§ 207. —— Newest, Safest, and Best Appliances and Places

The master is not required to furnish the newest, safest, and best machinery, appliances, and places for work, but in all occupations attended with great dangers he must use all appliances readily obtainable for the prevention of accidents.

The master is not required to furnish the newest, safest, and best machinery, appliances, and places for work,[7] but his obligation is met when he

ated by promise to furnish something which will make work safer.—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228.

99. Ark.—Basye v. Odom, 168 S.W.2d 1092, 205 Ark. 423.

1. U.S.—Bosarge v. Gaines, C.C.A. Miss., 93 F.2d 800—Phillips Petroleum Co. v. Manning, C.C.A.Ark., 81 F.2d 849—Davis v. Crane, C.C.A. Mo., 12 F.2d 355.
Ark.—Basye v. Odom, 168 S.W.2d 1092, 205 Ark. 423—Kennedy v. Griffin, 112 S.W.2d 644, 195 Ark. 379—Caddo River Lumber Co. v. Henderson, 109 S.W.2d 425, 194 Ark. 724—Norton & Wheeler Stave Co. v. Wright, 106 S.W.2d 178, 194 Ark. 115—Mercury Mining Co. v. Chambers, 102 S.W.2d 543, 193 Ark. 771—L. C. Burr & Co. v. Greenlee, 102 S.W.2d 77, 193 Ark. 705.
Ga.—Williamson v. Kidd, 15 S.E.2d 801, 65 Ga.App. 285.
Me.—Boober v. Bicknell, 191 A. 275, 135 Me. 153—Blacker v. Oxford Paper Co., 142 A. 776, 127 Me. 228.
Miss.—Masonite Corp. v. Graham, 25 So.2d 322, 199 Miss. 833—Forbus v. Cobb Bros. Const. Co., 185 So. 243, 184 Miss. 647, suggestion of error overruled 186 So. 643, 184 Miss. 647—Wilson & Co. v. Holmes, 177 So. 24, 180 Miss. 361—Meridian Grain & Elevator Co. v. Jones, 169 So. 771, 176 Miss. 764—Newell Contracting Co. v. Flynt, 161 So. 298, 172 Miss. 719, motion overruled 161 So. 743, 172 Miss. 719—Gulfport Creosoting Co. v. White, 157 So. 86, 171 Miss. 127—Gulf Refining Co. v. Ferrell, 147 So. 476, 165 Miss. 296.
Mo.—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336 Mo. 316—Thomas v. American Sash & Door Co., 14 S.W.2d 1, 321 Mo. 1024—Emrick v. City of Springfield, App., 110 S.W.2d 840—Watson v. Energy Const. Co., 286 S.W. 715, 220 Mo.App. 362.
Neb.—Phillips v. Chicago, B. & Q. R. Co., 227 N.W. 931, 119 Neb. 182.
N.J.—Cichocki v. Geigy Co., 183 A. 463, 14 N.J.Misc. 232.
N.C.—Murray v. Atlantic Coast Line R. Co., 11 S.E.2d 326, 218 N.C. 392—Highfill v. Washington Mills Co., 174 S.E. 457, 206 N.C. 582—Eaker v. International Shoe Co., 154 S.E. 667, 199 N.C. 379—McCord v. Harrison-Wright Co., 153 S.E. 406, 198 N.C. 742—Smith v. Kitchen Lumber Co., 153 S.E. 324, 198 N.C. 736—Potter v. Atlantic Coast Line R. Co., 147 S.E. 698, 197 N.C. 17—Street v. Erskine-Ramsey Coal Co., 145 S.E. 11, 196 N.C. 178—Richardson v. American Cotton Mills, 130 S.E. 164, 190 N.C. 874—Barnes v. Phoenix Utility Co., 130 S.E. 1, 190 N.C. 382—Riggs v. Empire Mfg. Co., 129 S.E. 595, 190 N.C. 256.
Okl.—Casualty Reciprocal Exchange v. Sutfin, 166 P.2d 434, 196 Okl. 567.
S.C.—Taylor v. Winnsboro Mills, 143 S.E. 474, 146 S.C. 28.
W.Va.—Moll v. Bayha, 150 S.E. 515, 108 W.Va. 173—Barr v. Knotts, 133 S.E. 114, 101 W.Va. 440.
Wyo.—Chicago, B. & Q. R. Co. v. Murray, 277 P. 703, 40 Wyo. 324.

2. Ark.—Basye v. Odom, 168 S.W.2d 1092, 205 Ark. 423.
Miss.—Meridian Grain & Elevator Co. v. Jones, 169 So. 771, 176 Miss. 764.

3. U.S.—Raudenbush v. Baltimore & O. R. Co., C.C.A.Pa., 160 F.2d 363.

4. Va.—Southern Ry. Co v. Chadwick, 132 S.E. 191, 144 Va. 443.
W.Va.—Moll v. Bayha, 150 S.E. 515, 108 W.Va. 173.
39 C.J. p 312 note 15.

5. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.
Kan.—**Corpus Juris quoted in** Fishburn v. International Harvester Co., 138 P.2d 471, 475, 157 Kan. 43.
Ky.—Big Sandy & C. R. Co. v. Measell's Adm'r, 42 S.W.2d 747, 240 Ky. 571—Bell v. Louisville & N. R. Co., 287 S.W. 219, 216 Ky. 42.
Me.—Blacker v. Oxford Paper Co., 142 A. 776, 127 Me. 228.
Miss.—Brown v. Coley, 152 So. 61, 168 Miss. 778.
Okl.—Buxton v. Hicks, 131 P.2d 1015, 191 Okl. 573.
R.I.—Faltinali v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 438.
Wis.—Baker v. Janesville Traction Co., 234 N.W. 912, 204 Wis. 452.
39 C.J. p 312 note 15.

6. Ga.—Walters v. Berry Schools, 151 S.E. 544, 40 Ga.App. 751—Fulton Bakery v. Williams, 141 S.E. 922, 37 Ga.App. 780.
Miss.—Newell Contracting Co. v. Flynt, 161 So. 298, 172 Miss. 719, motion overruled 161 So. 743, 172 Miss. 719.

7. U.S.—Baltimore & Ohio R. Co. v. Groeger, Ohio, 45 S.Ct. 169, 266 U.S. 521, 69 L.Ed. 419—Chicago & N. R. Co. v. Bower, Neb., 36 S.Ct. 624, 241 U.S. 470, 60 L.Ed. 1107—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213—Pieczonka v. Pullman Co., C.C.A.N.Y., 102 F.2d 432—Thomson v. Pennsylvania R. Co., C.C.A.Ohio, 88 F.2d 148—Louisville & N. R. Co. v. Davis, C.C.A.Tenn., 75 F.2d 849, certiorari denied 56 S.Ct. 119, 296 U.S. 603, 80 L.Ed. 427—Grammer v. Mid-Continent Petroleum Corporation, C.C.A. Okl., 71 F.2d 38, certiorari denied 55 S.Ct. 82, 293 U.S. 571, 79 L.Ed. 670—Petition of Langnes, D.C. Wash., 32 F.2d 284, reversed on other grounds The Aloha, C.C.A., 35 F.2d 447, reversed on other grounds Langnes v. Green, 51 S.Ct. 243, 282 U.S. 531, 75 L.Ed. 520.
Fla.—Duncan v. Growers Equipment Co., 1 So.2d 458, 146 Fla. 516.
Ga.—Southern Ry. Co. v. Bradshaw, 37 S.E.2d 150, 73 Ga.App. 438.
Ill.—Auschwitz v. Wabash Ry. Co., 178 N.E. 403, 346 Ill. 190.
Iowa.—**Corpus Juris cited in** Ander-

furnishes such as are reasonably safe and suitable for the purpose had in view, as discussed supra § 206. In all occupations attended with great and unusual dangers, however, there must be used all appliances readily obtainable for the prevention of accidents, and the neglect to provide such appliances is proof of culpable negligence.[8] An employer before adopting and installing a new and untried appliance is required to select that which seems to be the safest and most suitable for his purpose, and to consult the best available known sources of information for reliable advice as to the wisdom of the proposed experiment.[9]

§ 208. —— Appliances and Methods in Ordinary Use

The general custom or ordinary usage in vogue among others engaged in the same work under similar circumstances is an important, although not conclusive, factor or test to be used in determining whether the master has performed his duty of furnishing safe tools, machinery, and appliances.

Although conformity to custom or usage will not of itself excuse or justify negligence on the part of the master in furnishing tools, machinery, and appliances,[10] and the ultimate test of the master's liability is whether or not he has exercised due, ordinary, or reasonable care, and not whether he has conformed to custom or usage,[11] the general cus-

son v. Sheuerman, 6 N.W.2d 125, 128, 232 Iowa 705.
Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Gossett, 18 S.W.2d 986, 230 Ky. 240.
Mass.—Walsh v. Boston & M. R. R., 187 N.E. 554, 284 Mass. 250.
Mich.—Newell v. Detroit, T. & I. R. Co., 205 N.W. 579, 232 Mich. 528.
Miss.—Stewart v. Kroger Grocery Etc., Co., 21 So.2d 912, 198 Miss. 371—Eagle Cotton Oil Co. v. Sollie, 187 So. 506, 185 Miss. 475—Columbus & G. R. Co. v. Coleman, 160 So. 277, 172 Miss. 514—Mitchell v. Brooks, 147 So. 660, 165 Miss. 826—Morgan Hill Paving Co. v. Morris, 133 So. 229, 160 Miss. 79—**Corpus Juris cited in** Vehicle Woodstock Co. v. Bowles, 128 So. 98, 99, 158 Miss. 346.
Mo.—Fischer v. City of Cape Girardeau, 131 S.W.2d 521, 345 Mo. 122—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228—Shey v. Central Coal & Coke Co., 21 S.W.2d 772, 323 Mo. 1058—State ex rel. Fogel Const. Co. v. Trimble, 274 S.W. 1028, 310 Mo. 248—Emrick v. City of Springfield, App., 110 S.W.2d 840—Birdsong v. Jones, 30 S.W.2d 1094, 225 Mo.App. 242—Braden v. Friedericksen Floor & Wall Tile Co., 15 S.W.2d 923, 223 Mo.App. 700—Samuel v. National Bag Co., App., 15 S.W.2d 376.
Neb.—Phillips v. Chicago, B. & Q. R. Co., 227 N.W. 931, 119 Neb. 182.
N.J.—Cichocki v. Geigy Co., 183 A. 463, 14 N.J.Misc. 232.
N.Y.—Adlam v. Konvalinka, 50 N.E.2d 535, 291 N.Y. 40.
N.C.—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791—Grubbs v. Lewis, 145 S.E. 769, 196 N.C. 391.
Okl.—Atchison, T. & S. F. Ry. Co. v. Ford, 43 P.2d 459, 171 Okl. 516.
Or.—Freeman v. Wentworth & Irwin, 7 P.2d 796, 139 Or. 1.
Pa.—Prattico v. Hudson Coal Co., 32 A.2d 733, 347 Pa. 490—Vasey v. McLean, 165 A. 241, 310 Pa. 282—Magyar v. Pennsylvania R. Co., 144 A. 765, 294 Pa. 585—Pursglove v. Monongahela Ry. Co., 131 A. 477, 285 Pa. 27, certiorari denied 46 S. Ct. 352, 270 U.S. 654, 70 L.Ed. 783.
Tex.—**Corpus Juris cited in** Tullos v. Texas Pipe Line Co., Civ.App., 145 S.W.2d 267, 271.
Vt.—Bailey v. Central Vermont Ry., 35 A.2d 365, 113 Vt. 438.
Wash.—Wehtje v. Porter, 48 P.2d 212, 183 Wash. 177—Parker v. Pantages Theater Co., 254 P. 1083, 143 Wash. 176.
39 C.J. p 329 note 58.

Employer need not furnish best-known appliances
N.Y.—Schein v. Feder, 278 N.Y.S. 653, 154 Misc. 830.

Want of genius in anticipating the latest inventions is not a ground for penalizing the employer.
U.S.—Mallatt v. Ostrander Ry. & Timber Co., D.C.Or., 46 F.Supp. 250.
Or.—Camenzind v. Freeland Furniture Co., 174 P. 139, 89 Or. 175.

8. U.S.—Mather v. Rillston, Mich., 15 S.Ct. 464, 156 U.S. 391, 39 L. Ed. 464—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 93 F.2d 736.
39 C.J. p 330 note 59.
Duty of railroad companies to make use of tested improvements see infra § 226.

Mask for sandblasting
Measuring the cost against the risk, the jury may fix the best mask available as the minimum equipment required for sandblasters.—Pieczonka v. Pullman Co., C.C.A.N.Y., 102 F.2d 432.

Under statute
(1) A statute requiring persons having charge of work involving risk or danger to use every practicable safety device applies only when employment is considered as in class inherently dangerous or is rendered so by conditions.—Barker v. Portland Traction Co., Or., 173 P.2d 288, rehearing denied 178 P.2d 706—Bottig v. Polsky, 201 P. 188, 101 Or. 530.

(2) Street car operator who slipped and fell on icy street while cleaning snow from switch was not entitled to recover for injuries under the statute on ground that the work was inherently dangerous.—Barker v. Portland Traction Co., supra.

9. D.C.—U. S. Express Co. v. Ball, 36 App.D.C. 269, 280 Ann.Cas. 1912C 331.
39 C.J. p 331 note 61.

10. U.S.—Grammer v. Mid-Continent Petroleum Corporation, C.C.A. Okl., 71 F.2d 38, certiorari denied 55 S.Ct. 82, 293 U.S. 571, 79 L.Ed. 670—James Baird Co. v. Boyd, C. C.A.N.C., 41 F.2d 578—Green v. Standard Wholesale Phosphate & Acid Works, D.C.Md., 29 F.2d 746.
Kan.—Walker v. Colgate-Palmolive-Peet Co., 139 P.2d 157, 157 Kan. 170.
Mass.—Lamberti v. Neal, 148 N.E. 463, 253 Mass. 99.
Minn.—Bimberg v. Northern Pac. Ry. Co., 14 N.W.2d 410, 217 Minn. 187, followed in 14 N.W.2d 419, 217 Minn. 187, certiorari denied 65 S. Ct. 87, 323 U.S. 752, 89 L.Ed. 602.
N.Y.—Schein v. Feder, 278 N.Y.S. 653, 154 Misc. 830.
Pa.—Price v. New Castle Refractories Co., 3 A.2d 418, 332 Pa. 507.
Tex.—El Paso Electric Co. v. Gregston, Civ.App., 170 S.W.2d 515.
39 C.J. p 332 note 66.

11. U.S.—Grammer v. Mid-Continent Petroleum Corporation, C.C. A.Okl., 71 F.2d 38, certiorari denied 55 S.Ct. 82, 293 U.S. 571, 79 L.Ed. 670.
Kan.—Walker v. Colgate-Palmolive-Peet Co., 139 P.2d 157, 157 Kan. 170.
Tex.—El Paso Electric Co. v. Gregston, Civ.App., 170 S.W.2d 515.

tom or ordinary usage in vogue among others engaged in the same work under similar circumstances is an important factor or test to be used in determining whether the master has performed his duty in this respect.[12] Ordinarily a master is deemed to have complied with the requirements of the law when he has furnished machinery, appliances, and ways, in conformity with common and ordinary custom or usage,[13] provided such custom or usage is such as a reasonably prudent person would ordinarily employ under similar circumstances[14] and is not in contravention of positive law,[15] and, on the other hand, his failure so to conform with such custom or usage may constitute negligence.[16] The fact that an appliance furnished is in common use is no defense to a charge of negligence based on the theory that it was not adapted to the particular purpose for which it was used and was negligently installed and maintained.[17]

§ 209. —— Uniform Character of Appliances

The master is not required to furnish uniform appliances.

The law does not require that the master shall furnish uniform machinery and appliances.[18]

12. U.S.—James Baird Co. v. Boyd, C.C.A.N.C., 41 F.2d 578.
Kan.—Walker v. Colgate-Palmolive-Peet Co., 139 P.2d 157, 157 Kan. 170.
Ky.—Christopher's Adm'r v. Blanton Stone Co., 80 S.W.2d 590, 258 Ky. 587.
La.—Borde v. New Orleans & G. N. R. Co., App., 140 So. 810.
Mo.—Choate v. City of Springfield, 124 S.W.2d 1127, 343 Mo. 935—Smith v. Harbison-Walker Refractories Co., 100 S.W.2d 909, 340 Mo. 389—**Corpus Juris cited in** Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 442, 336 Mo. 228—Pevesdorf v. Union Electric Light & Power Co., 64 S.W.2d 939, 333 Mo. 1155—Emrick v. City of Springfield, App., 110 S.W.2d 840.
N.C.—Brady v. Southern Ry. Co., 23 S.E.2d 334, 222 N.C. 367, affirmed 64 S.Ct. 232, 320 U.S. 476, 88 L.Ed. 239—Eaker v. International Shoe Co., 154 S.E. 667, 199 N.C. 379.
Pa.—Prattico v. Hudson Coal Co., 32 A.2d 733, 347 Pa. 490—Price v. New Castle Refractories Co., 3 A.2d 418, 332 Pa. 507.
Va.—Thacker v. Klotz, 7 S.E.2d 883, 175 Va. 267—Roberts v. Southern Ry. Co., 145 S.E. 255, 151 Va. 815—Atlantic Coast Line R. Co. v. Bell, 141 S.E. 838, 149 Va. 720.
39 C.J. p 331 note 62.
Evidence of custom relating to instrumentalities and places for work furnished:
Admissibility see infra § 512.
Weight and sufficiency see infra § 524.

13. U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213—Grammer v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 71 F.2d 38, certiorari denied 55 S.Ct. 82, 293 U.S. 571, 79 L.Ed. 670—Petition of Langnes, D.C.Wash., 32 F.2d 284, reversed on other grounds The Aloha, C.C.A., 35 F.2d 447, reversed on other grounds Langnes v. Green, 51 S.Ct. 243, 282 U.S. 531, 75 L.Ed. 520.
Ky.—Harlan Central Coal Co. v. Gemmeno's Adm'r, 178 S.W.2d 217, 296 Ky. 828.
Mich.—Newell v. Detroit, T. & I. R. Co., 205 N.W. 579, 232 Mich. 528.
Miss.—Eagle Cotton Oil Co. v. Sollie, 187 So. 506, 185 Miss. 475—Brown v. Coley, 152 So. 61, 168 Miss. 778—Seifferman v. Leach, 138 So. 563, 161 Miss. 853—**Corpus Juris cited in** Vehicle Woodstock Co. v. Bowles, 128 So. 98, 100, 158 Miss. 346.
Mo.—**Corpus Juris cited in** Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 442, 336 Mo. 228—Birdsong v. Jones, 30 S.W.2d 1094, 225 Mo.App. 242.
Neb.—Rzeszotarski v. American Smelting & Refining Co., 277 N.W. 334, 133 Neb. 825—Ahrens v. American Smelting & Refining Co., 272 N.W. 235, 132 Neb. 460.
N.J.—Huels v. General Electric Co., 46 A.2d 654, 134 N.J.Law 165.
N.C.—Grubbs v. Lewis, 145 S.E. 769, 196 N.C. 391—Mahaffey v. Forsyth Furniture Lines, 145 S.E. 237, 196 N.C. 810.
Pa.—Prattico v. Hudson Coal Co., 32 A.2d 733, 347 Pa. 490.
Va.—Beamer v. Virginian Ry. Co., 26 S.E.2d 43, 181 Va. 650, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060.
Wash.—Wehtje v. Porter, 48 P.2d 212, 183 Wash. 177—Friermood v. Oregon-Washington R. & Nav. Co., 235 P. 17, 134 Wash. 178.
39 C.J. p 332 note 64.
Use of customary methods of doing work generally as relieving master of liability for injuries to servant see infra § 267.

Negligence is never imputed from the use of machinery in general use in the business.—Prattico v. Hudson Coal Co., 32 A.2d 733, 347 Pa. 490—Reeder v. Lehigh Valley Coal Co., 80 A. 1121, 231 Pa. 563.

Selection of standard make of appliance in general use is what the ordinarily prudent person would do under like circumstances.—City of Teague v. Radford, Tex.Civ.App., 105 S.W.2d 336.

Fact that in some instances particular safety appliance is used does not by implication establish a custom on which the employee can rely.—Missouri Pac. R. Co. v. Hathcock, 139 S.W.2d 35, 200 Ark. 294.

14. Fla.—Duncan v. Growers Equipment Co., 1 So.2d 458, 146 Fla. 516.
Mich.—Reynolds v. Security Trust Co., 225 N.W. 575, 246 Mich. 670.
Miss.—Eagle Cotton Oil Co. v. Sollie, 187 So. 506, 185 Miss. 475—Jefferson v. Denkmann Lumber Co., 148 So. 237, 167 Miss. 246.
Mo.—Smith v. Harbison-Walker Refractories Co., 100 S.W.2d 909, 340 Mo. 389—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228—Birdsong v. Jones, 30 S.W.2d 1094, 225 Mo.App. 242.
Va.—Roberts v. Southern Ry. Co., 145 S.E. 255, 151 Va. 815.

15. Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259, 216 Ind. 180.
Mo.—Smith v. Stanolind Pipe Line Co., 189 S.W.2d 244, 354 Mo. 250—Smith v. Harbinson-Walker Refractories Co., 100 S.W.2d 909, 340 Mo. 389.
Pa.—Price v. New Castle Refractories Co., 3 A.2d 418, 332 Pa. 507—King v. Darlington Brick & Mining Co., 131 A. 241, 284 Pa. 277.
Va.—Atlantic Coast Line R. Co. v. Bell, 141 S.E. 838, 149 Va. 720.
Wis.—Tiemann v. May, 292 N.W. 612, 235 Wis. 180.
39 C.J. p 333 note 67.

16. U.S.—Maty v. Grasselli Chemical Co., C.C.A.N.J., 98 F.2d 377.
N.C.—Clinard v. Clinard Electric Co., 136 S.E. 1, 192 N.C. 736.
39 C.J. p 332 note 65.

17. **Door check**
An employer could not escape liability for injuries to employee while attempting to repair door check, on ground that check was a type of appliance in common use and was not inherently dangerous, where employee based his case on theory that particular door check was too light for the heavy door to which it was attached and was negligently installed and maintained.—Walser v. Kuhlmann, Mo.App., 176 S.W.2d 658.

18. W.Va.—Soward v. American Car

§ 210. Appliances or Places Furnished by, or in Control of, Third Persons

As a general rule the duties and liabilities of the employer with respect to furnishing his employee with safe instrumentalities and places for work do not extend to instrumentalities and places owned by, and in the possession or control of, third persons.

As a general rule the duties and liabilities of the employer with respect to furnishing his employee with safe instrumentalities and places for work do not extend to instrumentalities and places owned by, and in the possession or control of, third persons,[19] and which the master has neither the duty nor the right to repair.[20] However, the mere fact that the place of work or appliance causing the injury is owned[21] or controlled[22] by another does not absolve the master of his ordinary duties and liabilities, and where the master is in control of the appliances used or of the premises or of the particular work done thereon by his servants, he is liable for any injuries resulting to them by reason of his negligence in failing to furnish them with reasonably safe appliances or a reasonably safe place of work, irrespective of the ownership of such premises or appliances.[23] So, if a master so uses and deals with instrumentalities or appliances in his business as practically to adopt them as his own, he becomes, as to his servant, the owner and is under the same duty to the servant as though he were the owner.[24] The master is not liable in any case, however, if he uses ordinary care to ascertain that the instrumentality or place is fit for its intended use.[25]

Duty of employer to furnish safe place for work

& Foundry Co., 66 S.E. 329, 66 W. Va. 266.

Wis.—Whitwam v. Wisconsin & M. R. Co., 17 N.W. 124, 58 Wis. 408.

19. U.S.—Stankus v. Jamison, N.Y., 237 F. 813, 151 C.C.A. 55.

Ark.—Carson v. Dierks Lumber & Coal Co., 117 S.W.2d 39, 196 Ark. 163—Neely v. Goldberg, 114 S.W.2d 455, 195 Ark. 790—Sparkman Hardwood Lumber Co. v. McCann, 80 S.W.2d 53, 190 Ark. 552.

Ky.—Pfiester Adm'r v. Jones, 163 S.W.2d 304, 291 Ky. 151—Gillespie's Ex'rs v. Howard, 294 S.W. 154, 219 Ky. 721.

Mich.—Holgate v. Chrysler Corporation, 271 N.W. 539, 279 Mich. 24.

Miss.—Dravo Corporation v. Copeland, 199 So. 769, 190 Miss. 269.

Mo.—**Corpus Juris quoted in** Allen v. Larabee Flour Mills Corporation, 40 S.W.2d 597, 601, 328 Mo. 226—**Corpus Juris quoted in** Small v. Ralston-Purina Co., App., 202 S.W.2d 533, 537—Fesler v. Hunter, App., 35 S.W.2d 641.

N.H.—Burke v. Boston & M. R. R. Co., 134 A. 574, 82 N.H. 350.

N.Y.—Kuhn v. P. J. Carlin Const. Co., 8 N.E.2d 300, 274 N.Y. 118, reargument and remittitur amended on other grounds 14 N.E.2d 204, 277 N.Y. 651.

N.C.—Atkinson v. Corriher Mills Co., 158 S.E. 554, 201 N.C. 5—Crawford v. Michael & Bivens, 154 S.E. 58, 199 N.C. 224.

39 C.J. p 333 note 72.

Liability of master for injuries due to defects in appliances furnished by servant see supra § 201.

Property of employer's wife

If an employee sustains an injury on property owned by the employer's wife, it has been held that an action therefor will not lie against the employer.—Merrick v. Street, Tex. Civ.App., 91 S.W.2d 851, error refused.

Company which recharges electric trucks of another company at its maintenance station, but makes no use of such trucks as a part of its plant, is not liable for defects in them in the absence of actual knowledge.—McKale v. Hines, 106 S.E. 583, 26 Ga.App. 516.

20. Ark.—Neely v. Goldberg, 114 S.W.2d 455, 456, 195 Ark. 790.

Miss.—Dravo Corporation v. Copeland, 199 So. 769, 190 Miss. 269.

21. Ga.—Thompson v. Hanes, 132 S.E. 250, 35 Ga.App. 136.

Iowa.—Rehard v. Miles, 284 N.W. 829, superseded on other grounds 290 N.W. 702, 227 Iowa 1290—Nelson v. Smeltzer, 265 N.W. 924, 221 Iowa 972.

La.—Fontenot v. Raftery, App., 193 So. 896.

Mass.—Cronan v. Armitrage, 190 N.E. 12, 285 Mass. 520.

Mo.—Jamison v. Flour City Ornamental Iron Co., 30 S.W.2d 984.

N.H.—Brock v. Ireland-Grafton Co., 141 A. 912, 83 N.H. 290.

Place where employee directed to do all his work

An employee who had been directed by his employer to do all his work on another's premise under agreement between his employer and the third person that the latter was to pay his salary, was entitled to receive from his employer a reasonably safe place wherein to work.—Ryan v. Twin City Wholesale Grocer Co., 297 N.W. 705, 210 Minn. 21.

22. Mo.—Jamison v. Flour City Ornamental Iron Co., 30 S.W.2d 984.

Part of premises where employee directed to work

Employer could not escape liability because of its failure to furnish employee a safe place to work on ground that the particular part of the premises where accident happened was not within employer's control, where employer directed employee to work in that portion of the premises.—Salzberg v. Grossman Nassau Hotel Corporation, 16 N.Y.S. 2d 811, 258 App.Div. 926.

23. Ga.—Thompson v. Hanes, 132 S.E. 250, 35 Ga.App. 136.

Kan.—Howard v. Jones Store Co., 256 P. 1019, 123 Kan. 620, 53 A.L.R. 139.

Mo.—Jamison v. Flour City Ornamental Iron Co., 30 S.W.2d 984.

39 C.J. p 333 note 73.

Control over bridge repairs

In action by truck driver against employer for injuries sustained when truck crashed through a defective bridge, and employer had control over the bridge as to making necessary repairs, employer would be liable to the same extent as though it owned the road and bridge.—Carson v. Dierks Lumber & Coal Co., 117 S.W.2d 39, 196 Ark. 163.

Electrical contractor carrying out contract in buildings owned by others owed his employee duty to furnish reasonably safe place to work. —Cronan v. Armitage, 190 N.E. 12, 285 Mass. 520.

24. Mo.—Rose v. Missouri Dist. Telegraph Co., 43 S.W.2d 562, 328 Mo. 1009, 81 A.L.R. 400.

39 C.J. p 334 note 74.

Master, if directing servant to use particular road and bridge, would have duty to exercise reasonable care to keep bridge in repair, and would also have such duty if servant was required to cross bridge to perform job assigned him.—Sparkman Hardwood Lumber Co. v. McCann, 80 S.W.2d 53, 190 Ark. 552.

25. N.H.—Burke v. Boston & M. R. R., 134 A. 574, 82 N.H. 350.

as including ways to and from such place of work is considered infra § 219 b.

§ 211. —— Effect of Statutory Provisions

The master's liability to his servant for injuries received where the instrumentalities used or place of work is furnished by, or is in the control of, third persons may be affected by statutory provisions.

The master's liability to his servant for injuries received where the instrumentalities used or place of work is furnished by, or is in the control of, third persons may be affected by statutory provisions.[26] Whether or not under an employers' liability act a place or instrumentality furnished by another than the master, because of whose defective condition injuries result to an employee, is a part of the "ways, works, and machinery," or plant of the employer, connected with or used in his business, is usually dependent on the control exercised or exercisable over it by the master.[27] The rule is ordinarily the same under statutes of a less general character enacted for the protection of employees[28] except where the statute imposes an absolute duty.[29]

§ 212. —— Operation of Railroads

a. In general
b. Cars of other companies
c. Improper loading of cars
d. Railroad tracks and roadbeds
e. Obstructions on, over, or near railroad tracks
f. Liability of consignor or consignee to employees loading or unloading freight

a. In General

A carrier's statutory duty to furnish its employees with safe instrumentalities and places for work has been held to follow the employer even though the employee is sent upon the premises of another to do his work.

Under the Federal Employers' Liability Act a railroad company owes its employees the duty of furnishing a reasonably safe place to work, machinery, and instrumentalities, as discussed infra § 226, and this duty has been held to follow the employer even though the employee is sent upon the premises of another to do his work.[30] Where a railroad company is operating its train on the track of another under a traffic arrangement, the track is "its" property within the meaning of the Federal Employers' Liability Act[31] and the Federal Safety Appliance Act.[32] Where, under an agreement for running continuous trains over connected roads, one company has the exclusive right to employ and discharge trainmen, and is required to repair the locomotives for both roads, even though they are under the control of the other road while on its branch, it is liable for an injury to a servant caused by a defective engine, although it occurs on the other road.[33]

b. Cars of Other Companies

Ordinarily the duty of a railroad company in respect of a car received by it for transportation over its road is one of inspection only, and it is not responsible for latent defects which cannot be discovered by such an inspection as the exigencies of traffic will permit in the exercise of reasonable care.

Constitutional and statutory provisions which compel railroad companies to receive and transport over their lines the cars of other companies, without delay or discrimination, do not require them to receive cars in an unsafe condition, or so defective in their construction as to make it dangerous for their servants to handle them, and do not relieve the receiving company from liability for injuries sustained by one of its servants from such defective cars.[34]

While it has been held in some decisions that the responsibilities of a railroad company to its servants are the same in respect of cars of other com-

26. **Farm laborer working on third person's farm**

A farm hand, directed by his employer to work for another farmer, on whose farm he was injured in feeding corn shredding machine without statutory safety guards, was engaged in farm labor, and hence could not recover damages from his employer under safe place of work statute, excluding any place where persons are employed in farm labor when the employer is a farmer operating the farm, although employer was not operating the farm where the injury occurred.—Redman v. Hobart, 22 N.W.2d 532, 248 Wis. 508.

27. N.Y.—Webb v. B. F. Sturtevant Co., 141 N.Y.S. 906, 157 App.Div. 19.

39 C.J. p 335 note 75.

Hatchways and hatches are not part of "ways, works, and machinery" of stevedore in the absence of a contract governing the relation between the shipowner and the stevedore.—Crimmins v. Booth, 88 N.E. 449, 202 Mass. 17, 132 Am.S.R. 468.

28. Mich.—Lobenstein v. Whitehead Kales Iron Works, 146 N.W. 293, 179 Mich. 279.

39 C.J. p 335 note 77.

29. Ill.—Claffy v. Chicago Dock & Canal Co., 94 N.E. 551, 249 Ill. 210, affirmed 33 S.Ct. 715, 228 U.S. 680, 57 L.Ed. 1022.

39 C.J. p 335 note 78.

30. Ill.—Porter v. Terminal R. Ass'n of St. Louis, 65 N.E.2d 31, 327 Ill.App. 645.

31. Minn.—Campbell v. Canadian Northern R. Co., 144 N.W. 772, 124 Minn. 245.

39 C.J. p 335 note 76.

32. U.S.—Gray v. Louisville & N. R. Co., D.C.Tenn., 197 F. 874.

33. Mo.—Hurlbut v. Wabash R. Co., 31 S.W. 1051, 130 Mo. 657.

34. Pa.—Dooner v. Delaware & Hudson Canal Co., 30 A. 269, 164 Pa. 17.

39 C.J. p 336 note 80.

panies which the servants are compelled to handle, as in respect of its own,[35] especially where the defect is not latent,[36] ordinarily the duty of such a company in respect of a car received by it for transportation over its road, in the ordinary course of business, is one of inspection only, and it is not held responsible for latent defects which cannot be discovered by such an inspection as the exigencies of traffic will permit in the exercise of reasonable care.[37] The fact that cars are used only for a brief time or carried a short distance will not excuse a railroad company from its duty of inspecting them,[38] but, since the negligence of the connecting line before the delivery of cars to another cannot be imputed to the latter, the duty to inspect will be measured only by what the company ought to have done while the cars were in its possession.[39] Lack of opportunity of inspection furnishes no excuse where a railroad company assumes control of a borrowed car and directs its servant to work on or about it.[40]

Under a statute imposing liability on a railroad for injuries to its employees caused by defective cars hauled or permitted to be hauled or used on its line, a railroad is not liable for an injury occurring while one of its employees is engaged in inspecting a car for the purpose of determining whether his employer should assume control,[41] and the employee's right of action under such circumstances is against the company delivering the car.[42] Where a railroad company receives a car of another company, and it is examined, and notice is given that it is defective and is to be returned, the company has fulfilled its duty with respect to the car, and is not liable for injuries resulting from such defect which a servant receives while the car is shifting about the yard.[43]

c. Improper Loading of Cars

Where a servant of a railroad company is injured by reason of the improper loading of a car by a third person, the company is not liable unless it has been in the habit of receiving and transporting such cars or has failed to provide a proper system of inspection.

Where a servant of a railroad company is injured by reason of the improper loading of a car received from another company,[44] or which has been loaded by the shipper,[45] the company is not liable unless it has been in the habit of receiving and

35. Okl.—Frisco Lumber Co. v. Spivey, 140 P. 157, 40 Okl. 633.
39 C.J. p 336 note 81.

Federal Safety Appliance Act

(1) Under the Federal Safety Appliance Act a carrier is liable for substandard or defective appliances on cars used in interstate commerce even though the carrier does not own the cars.
Ark.—Baldwin v. Sears, 91 S.W.2d 266, 192 Ark. 257.
Mo.—Radler v. St. Louis-San Francisco Ry. Co., 51 S.W.2d 1011, 330 Mo. 968.
N.J.—Hendershot v. New York, S. & W. R. Co., 138 A. 206, 5 N.J.Misc. 727, affirmed 140 A. 919, 104 N.J. Law 436, certiorari denied New York, S. & W. R. Co. v. Hendershot, 48 S.Ct. 562, 277 U.S. 602, 72 L.Ed. 1009.

(2) Thus it has been held that on acceptance of a car with an insecurely fastened grabiron the carrier has the same responsibility of care as though it owned car.—Baldwin v. Sears, 91 S.W.2d 266, 192 Ark. 257.

(3) Use of the brake on a car constitutes a "use" of the car within the meaning of the act.—Cusson v. Canadian Pac. Ry. Co., C.C.A.Vt., 115 F.2d 430.

36. Okl.—Frisco Lumber Co. v. Spivey, 140 P. 157, 40 Okl. 633.

37. Ariz.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A.L.R. 857.
Cal.—Dryden v. Western Pac. R. Co., 36 P.2d 394, 1 Cal.App.2d 49.
Ky.—Brewer's Adm'x v. Louisville & N. R. Co., 34 S.W.2d 949, 237 Ky. 71.
Mass.—Mackin v. Boston & A. R. Co., 135 Mass. 201, 46 Am.R. 456.
Mich.—Kurtz v. Detroit, T. & I. R. Co., 213 N.W. 169, 238 Mich. 289, certiorari denied 48 S.Ct. 31, 275 U.S. 535, 72 L.Ed. 412.
Wis.—Rupert v. Chicago, M., St. P. & P. R. Co., 232 N.W. 550, 202 Wis. 563, certiorari denied 51 S. Ct. 488, 283 U.S. 840, 75 L.Ed. 1451.
39 C.J. p 336 note 82.

Inspection no defense

Railway company's inspection of car with automatic uncoupler lever on top of end sill, thus rendering it unsafe for brakeman, on receipt of such car from connecting carrier, has been held no defense to an action against company for brakeman's death as result of fall when he encountered such obstruction to his footing, as inspection did not remove hazard.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A.L.R. 857.

Defect in original construction of hanger

A railroad which accepts transfer of foreign car is not liable for any insufficiencies in the original construction of the brake beam safety hanger.—Rupert v. Chicago, M., St. P. & P. R. Co., 232 N.W. 550, 202 Wis. 563, certiorari denied 51 S.Ct. 488, 283 U.S. 840, 75 L.Ed. 1451.

38. Kan.—Atchison, T. & S. F. R. Co. v. Penfold, 45 P. 574, 57 Kan. 148.

39. Ill.—Illinois Cent. R. Co. v. Barslow, 94 Ill.App. 206.
39 C.J. p 337 note 84.

40. N.Y.—Cline v. Northern Cent. R. Co., 168 N.Y.S. 303, 181 App. Div. 203.

41. U.S.—Brady v. Terminal R. Ass'n of St. Louis, Mo., 58 S.Ct. 426, 303 U.S. 10, 82 L.Ed. 614.
Mo.—Brady v. Wabash Ry. Co., 49 S.W.2d 24, 329 Mo. 1123, certiorari denied 53 S.Ct. 20, 287 U.S. 619, 77 L.Ed. 538.

42. U.S.—Brady v. Terminal R. Ass'n of St. Louis, Mo., 58 S.Ct. 426, 303 U.S. 10, 82 L.Ed. 614.
Liability of company owning or using cars for injuries generally see the C.J.S. title Railroads § 368, also 51 C.J. p 1107 note 51–p 1108 note 60.

43. U.S.—Atchison, T. & S. F. R. Co. v. Meyers, Ill., 76 F. 443, 22 C.C.A. 268.

44. Cal.—Dryden v. Western Pac. R. Co., 36 P.2d 394, 1 Cal.App.2d 49.
39 C.J. p 337 note 88.

45. Cal.—Dryden v. Western Pac. R. Co., supra.
Iowa.—Haugh v. Chicago, R. I. & P. R. Co., 35 N.W. 116, 73 Iowa 66.
39 C.J. p 337 note 89.

transporting cars loaded in such a manner[46] or unless it has failed to provide a system of inspection and proper persons to inspect cars after they have been loaded and before they have been received for transportation.[47]

d. Railroad Tracks and Roadbeds

A railroad company as between itself and its servant must exercise reasonable care to make its road safe whether it owns the road or uses it under a contract with the owner.

A railroad company as between itself and its servant must exercise reasonable care and diligence to make its road safe whether it owns the road or uses it under contract with the owner.[48] Although a servant's employer, as owner of the road, has leased tracks to another company, it is not thereby relieved from the duty to keep safe the place where its servant is required to work;[49] and, where it has allowed another corporation to run its trains over its track, it has been held that such consenting company remains liable for the negligence of the other company as much as it would be for that of its own.[50] It has been held, however, that where two or more companies use a track in common, it is, although the exclusive property of one of the companies, for the time being the track of each company using it, and the proprietary company is not liable to its servants for injuries caused by the negligent use of the track by the servants of another company.[51] Where two railroads jointly lease and operate a connecting railroad, the duty of keeping the track and switch of such railroad in proper condition for the use of their employees rests on the two railroads jointly,[52] and, where a spur track is maintained for the mutual benefit of two companies, both are required to exercise ordinary care to see that the premises are reasonably safe.[53]

Conditions on land near tracks. A railroad owes a duty to its employees to be reasonably informed as to what has been or will be done by others on land near the railroad tracks affecting the safety of the roadbed and to use due care to guard against dangers resulting therefrom.[54]

e. Obstructions on, over, or near Railroad Tracks

Where a railroad company permits an obstruction to remain on, over, or near the tracks, and by reason of such obstruction its servant is injured, it has been held that the company is liable even though the obstruction belongs to, or is under the control of, a third person.

A railroad company is bound to exercise reasonable care to prevent obstructions on, over, or near the tracks which are a source of danger to its employees, as discussed infra § 230, and where a railroad company permits an obstruction, of which it has actual or constructive knowledge, to remain on, over, or near the tracks, and by reason of such obstruction its servant is injured, it has been held that the company is liable even though the obstruction belongs to, or is under the control of, a third person.[55] It has been held, however, that a railroad company may not be liable for injuries sustained by an employee where the obstruction causing the injury was maintained by a third person without the consent of the company and was not under its control.[56]

46. Mo.—McIntosh v. Missouri Pac. R. Co., 58 Mo.App. 281.

47. N.Y.—Byrnes v. New York, L. E. & W. R. Co., 21 N.E. 50, 113 N.Y. 251, 4 L.R.A. 151—Bushby v. New York, L. E. & W. R. Co., 14 N.E. 407, 107 N.Y. 374, 1 Am.S.R. 844.

48. Mo.—Brum v. Wabash Ry. Co., 74 S.W.2d 566, 335 Mo. 876—Schlueter v. East St. Louis Connecting Ry. Co., 296 S.W. 105, 316 Mo. 1266.

39 C.J. p 337 note 92.

Defects not discoverable by reasonable inspection

Where a roadbed is acquired from another, on whose skill and judgment in constructing it the employer reasonably relies, the employer is not liable to its employees for injuries caused by defects therein not discoverable by reasonable inspection. —Burke v. Boston & M. R. R., 134 A. 574, 82 N.H. 350.

49. La.—Barnes v. Red River & G. R. R., 128 So. 724, 14 La.App. 188.

Mo.—Bequette v. Pittsburgh Plate Glass Co., 207 S.W. 852, 200 Mo. App. 506.

50. N.C.—Sellars v. Richmond & D. R. Co., 94 N.C. 654.

Negligence of licensee's servant

Where the operation out of which the injury arises is under a mere license, and the use remains one of ordinary railroad operation, the owner and licensor remains liable to one of its employees injured through the negligence of an employee of the licensee.—Wegman v. Great Northern Ry. Co., 249 N.W. 422, 189 Minn. 325.

51. Ga.—Georgia R. & Banking Co. v. Friddell, 7 S.E. 214, 79 Ga. 489, 11 Am.S.R. 444.

52. N.Y.—Cott v. Erie R. Co., 179 N.Y.S. 488, 189 App.Div. 571, affirmed 131 N.E. 737, 231 N.Y. 67.

53. Colo.—Great Western Sugar Co. v. Parker, 123 P. 670, 22 Colo.App. 18.

Ind.—Chicago & E. R. Co. v. Dinius, 103 N.E. 652, 180 Ind. 596.

54. **Change of highway**

A highway, which protected the roadbed of the railroad from surface waters until it was changed, was part of the condition under which the railroad's employees' work place was furnished, and the railroad was under a duty toward its employees to be reasonably informed as to the situation resulting from the change in the highway and to act accordingly.—Burke v. Boston & M. R. R., 134 A. 574, 82 N.H. 350.

55. Ill.—Sprickerhoff v. Baltimore & O. R. Co., 55 N.E.2d 532, 323 Ill. App. 340.

S.C.—Driggers v. Atlantic Coast Line R. Co., 148 S.E. 889, 151 S.C. 164, reversed on other grounds Atlantic Coast Line R. Co. v. Driggers, 49 S.Ct. 490, 279 U.S. 787, 73 L.Ed. 957.

39 C.J. p 338 note 98.

56. Cal.—Myers v. Southern Pac.

f. Liability of Consignor or Consignee to Employees Loading or Unloading Freight

A consignor or consignee of freight is not liable for injuries to his servant received, while loading or unloading a railroad car, by reason of the defective condition of the car; but it has also been held instrumentalities belonging to the railroad when used by the consignee in unloading freight are adopted by him, and he is responsible for their safety to his servants.

A consignor or consignee of freight is not liable for injuries to his servant received, while loading or unloading a railroad car, by reason of the defective condition of the car.[57] It has been held, however, that instrumentalities belonging to the railroad when used by the consignee in unloading freight are adopted by him, and he is responsible for their safety to his servants,[58] but that a depot platform is not an instrumentality within the meaning of this rule.[59]

2. PARTICULAR APPLIANCES AND PLACES

§ 213. In General

The rules as to the liability of the master for injuries to a servant resulting from his failure to furnish reasonably safe appliances of a particular kind or reasonably safe places of a particular nature are considered infra §§ 213–230.

Examine Pocket Parts for later cases.

§ 214. —— Dangerous Instrumentalities, Places, and Substances

a. In general
b. Health protection and disease prevention
c. Explosives

a. In General

Negligence may not be imputed to a master merely because the instrumentality or place furnished by him is dangerous; but he must make reasonable provisions to protect the servant from dangers to which he is exposed where the services required are of a dangerous character.

Negligence may not be imputed to a master merely by reason of the fact that the instrumentalities or places furnished by him are dangerous;[60] but where the services required of a servant are of a peculiarly dangerous character it is the duty of the master to make reasonable provisions to protect him from the dangers to which he is exposed while in the discharge of his duties,[61] and he must avoid enhancing the natural risks of the employment.[62] He

Co., 58 P.2d 387, 14 Cal.App.2d 287, hearing denied 59 P.2d 1001, 14 Cal.App.2d 287.
Neb.—**Corpus Juris quoted in** Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 311, 147 Neb. 18, reversed on other grounds 67 S.Ct. 598, 329 U. S. 649, 91 L.Ed. 572.
39 C.J. p 398 note 13.

57. Ky.—Gillespie's Ex'rs v. Howard, 294 S.W. 154, 219 Ky. 721.
Mo.—Allen v. Larabee Flour Mills Corporation, 40 S.W.2d 597, 328 Mo. 226.

Hole in floor

Employer was not liable for injuries to employee stepping through hole in floor of car.—Gillespie's Ex'rs v. Howard, 294 S.W. 154, 219 Ky. 721.

58. U.S.—Bosarge v. Gaines, C.C.A. Miss., 93 F.2d 800.
Mich.—Rockwell v. Grand Trunk Western Ry. Co., 250 N.W. 515, 264 Mich. 626.

59. U.S.—Bosarge v. Gaines, C.C.A. Miss., 93 F.2d 800.

Rights against railroad are independent of any rights the employee may have against his employer.—Bosarge v. Gaines, supra.

60. Mo.—Morton v. Alton R. Co., App., 118 S.W.2d 59.
N.Y.—Kowalsky v. Conreco Co., 190 N.E. 206, 264 N.Y. 125, reargument denied 191 N.E. 620, 264 N.Y. 674.
39 C.J. p 338 note 1.

Business of dangerous character

Before an employer who is engaged in business of a dangerous character may be held liable for injury or death of an employee, it must appear that the dangerous condition attending the place of work was not only reasonably subject to be remedied or abated, but also that the employer failed to take those steps which an ordinarily prudent person would have taken in order to eliminate it.—Morton v. Alton R. Co., Mo.App., 118 S.W.2d 59.

61. U.S.—Green v. Standard Wholesale Phosphate & Acid Works, D.C. Md., 29 F.2d 746.
Ga.—**Corpus Juris cited in** Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 685, 63 Ga.App. 620.
Miss.—E. L. Bruce Co. v. Brogan, 166 So. 350, 175 Miss. 208.
Mo.—Dixon v. Frazier-Davis Const. Co., 298 S.W. 827, 318 Mo. 50—Wainwright v. Westborough Country Club, App., 45 S.W.2d 86—Howard v. Fred Schmitt Realty & Investment Co., App., 7 S.W.2d 448.
Tex.—Fort Worth & D. C. Ry. Co. v. Rogers, Civ.App., 62 S.W.2d 151, error refused.
39 C.J. p 338 note 2.

Rescue

Employer, manufacturing fertilizer creating carbon dioxide, was liable for injuries to employees in attempt to rescue fellow servant overcome by gas.—Green v. Standard Wholesale Phosphate & Acid Works, D.C. Md., 29 F.2d 746.

Risk or danger

(1) Place of work is to be considered on question of whether work involved risk or danger within Employers' Liability Act.—Jodoin v. Luckenbach S. S. Co., 268 P. 51, 125 Or. 634—39 C.J. p 338 note 2 [a].

(2) Where, if hoist cable had been properly attached to boom on a truck equipped to lift or move heavy objects or structures and no slack had been permitted, boom would not have fallen to the ground and it was practicable to have used cribs for support of the boom, employer while extending the boom was engaged in dangerous and hazardous business, and employee who was struck by falling boom was engaged in work involving a risk or danger within meaning of employers' liability act.—Lawrence v. Gladitsch, Or., 169 P. 2d 877.

62. Mo.—Smith v. Southern Illinois & Missouri Bridge Co., 30 S.W.2d 1077, 326 Mo. 109—Goucan v. Atlas Portland Cement Co., 298 S.W. 789, 317 Mo. 919.

must furnish suitable appliances for the dangerous work,[63] such as appliances in general use for such work.[64]

b. Health Protection and Disease Prevention

While it has been held that at common law the servant could not recover for injuries resulting from occupational diseases, he may do so where the master fails to comply with the requirements of a statute designed to protect the servant from the danger of illness or disease incident to the dangerous character of his occupation.

While it has been held that there is no common-law duty on an employer to furnish a healthful and sanitary place of work, as distinguished from a safe place to work,[65] and that there can be no recovery for occupational diseases resulting from his failure to do so in the absence of a statute properly defining the employer's liability for occupational diseases,[66] it has also been held that the duty of providing a reasonably safe place to work operates to protect employees against dangers of employment which may reasonably be expected to produce disease, as well as those reasonably expected to produce ordinary physical injuries;[67] and that a disease resulting from the tort of the master in failing to furnish a proper place to work is not an occupational disease for which, at common law, the master would not be liable.[68]

In some states laws have been enacted for the purpose of protecting the employee from the danger of illness or disease incident to the dangerous character of his occupation,[69] and an employee may recover for an injury sustained by him, through illness or disease, by reason of the failure of the employer to comply with the requirements thereof,[70] and it has been held that such recovery may be

63. Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W. Harr. 564.

64. N.C.—Clinard v. Clinard Electric Co., 136 S.E. 1, 192 N.C. 736.

65. Ill.—McCreery v. Libby-Owens-Ford Glass Co., 2 N.E.2d 290, 363 Ill. 321, 105 A.L.R. 75.

66. Ill.—Vogel v. Johns-Manville Products Corporation, 2 N.E.2d 716, 363 Ill. 473—McCreery v. Libby-Owens-Ford Glass Co., 2 N.E.2d 290, 363 Ill. 321, 105 A.L.R. 75.
Ohio.—Ewers v. Buckeye Clay Pot Co., 163 N.E. 577, 29 Ohio App. 396.

Blower Act
Act making the use of metal polishing machinery without providing blowers for protection of employees a misdemeanor was held to create no cause of action in favor of employee for occupational disease resulting gradually from employee's work with metal polishing machinery which was not provided with blower.—Vogel v. Johns-Manville Products Corporation, 2 N.E.2d 716, 363 Ill. 473.

67. U.S.—Jacque v. Locke Insulator Corporation, C.C.A.N.Y., 70 F.2d 680, certiorari denied Locke Insulator Corporation v. Jacque, 55 S.Ct. 99, 293 U.S. 585, 79 L.Ed. 681.
Ga.—Connell v. Fisher Body Corporation, 192 S.E. 484, 56 Ga.App. 203.
W.Va.—Blatt v. United Zinc Smelting Corporation, 188 S.E. 491, 117 W.Va. 733.

68. Ala.—American Mut. Liability Ins. Co. v. Agricola Furnace Co., 183 So. 677, 236 Ala. 535—Gentry v. Swann Chemical Co., 174 So. 530, 234 Ala. 313.
Iowa.—Gay v. Hocking Coal Co., 169 N.W. 360, 184 Iowa 949.
Tenn.—Steiner v. Spencer, 145 S.W. 2d 547, 24 Tenn.App. 389—Nashville Bridge Co. v. Hudgins, 137 S.W.2d 327, 23 Tenn.App. 677.

69. **The primary purpose of statutes** requiring exhaust fans or similar apparatus to be used to protect employees against dust filaments or injurious gases was to guard workmen's health, and a factory, workshop, or other establishment may not place a workman on the outside of a building at exhaust end of a dust pipe and require him to perform duties within flow of exhaust and escape requirements of statute on theory that workman was placed in the open air and that the statute was inoperative with respect to him.—Tennessee Eastman Corporation v. Newman, 121 S.W.2d 130, 22 Tenn. App. 270.

Characteristics of statutes
(1) Statute requiring proper ventilation imposes no new rule or measure of conduct on employer, but, at most, extends and defines common-law duty of reasonable care; it establishes new standards of care but not new causes of action.—Schmidt v. Merchants Despatch Transp. Co., 280 N.Y.S. 836, 244 App. Div. 606, motion granted 198 N.E. 534, 268 N.Y. 639, modified on other grounds Schmidt v. Merchants Despatch Transp. Co., 200 N.E. 824, 270 N.Y. 287, reargument denied 2 N.E. 2d 680.

(2) The provisions of statute concerning furnishing safe working conditions are merely declaratory of common law and provide a means by which the ends may be reached as required by common law.
U.S.—Whittle v. Atlas Powder Co., D.C.Tenn., 34 F.Supp. 563.
Tenn.—Tennessee Eastman Corporation v. Newman, 121 S.W.2d 130, 22 Tenn.App. 270.

Statutes construed
U.S.—Michalek v. U.S. Gypsum Co., D.C.N.Y., 16 F.Supp. 708.
Mo.—Smith v. Harbison-Walker Refractories Co., 100 S.W.2d 909, 340 Mo. 389.

70. U.S.—Goodall Co. v. Sartin, C.C. A.Tenn., 141 F.2d 427, certiorari denied 65 S.Ct. 34, two cases, 323 U.S. 709, 89 L.Ed. 571—Grant Storage Battery Co. v. De Lay, C.C.A. Neb., 87 F.2d 726—Michalek v. U. S. Gypsum Co., D.C.N.Y., 16 F. Supp. 708.
Ill.—Jannusch v. Weber Bros. Metal Works, 249 Ill.App. 1.
Ind.—Dean v. Dalton Foundries, 34 N.E.2d 145, 109 Ind.App. 377.
Mo.—Blittschau v. American Car & Foundry Co., App., 144 S.W.2d 196.
N.Y.—Bellows v. Merchants Despatch Transp. Co., 12 N.Y.S.2d 655, 257 App.Div. 15, affirmed 27 N.E.2d 440, 283 N.Y. 581.
Pa.—Price v. New Castle Refractories Co., 3 A.2d 418, 332 Pa. 507.
Tenn.—Steiner v. Spencer, 145 S.W. 2d 547, 24 Tenn.App. 389.
39 C.J. p 339 note 4.

Floor drainage
The words "stand while working," in statute requiring floors of workshops in which wet processes are used to be so drained that there is no measurable depth of water in which employees must stand while working, did not mean that employee must remain stationary while performing his work.—Fredrickson v. Arrowhead Co-op. Creamery Ass'n, 277 N.W. 345, 202 Minn. 12.

Places within ventilation statutes
Under statute requiring every factory, workshop, association, or other establishment where work or process is carried on by which dust filaments or injurious gases liable to be inhaled by employees are produced or generated, to be provided with exhaust fans or other means to pur-

had irrespective of the employer's negligence.[71] The injury or illness, however, must be the result of the employer's violation of the statute,[72] and must be such as against which the statute was intended to protect;[73] and the work engaged in must be within the terms of the statute.[74] It is not enough that a certificate of approval of conditions in the place of work has been issued by the proper authorities.[75] One who makes no effort whatever to comply with such a statute may not complain that the statute is indefinite.[76]

Under statutes requiring safety devices, whether the particular device adopted is sufficient to comply with the statute depends on the facts of the particular case.[77] An inefficient device does not fulfill the employer's duty.[78] An approved device within the meaning of a statute requiring the employer to furnish approved safety devices does not mean one approved by the employers for whose use it was made;[79] and, where the statute so requires, it is not enough that the device be approved but it must also be adequate;[80] but the adoption of any one of several approved and adequate devices may be a sufficient compliance with the statute.[81]

c. Explosives

A master who manufactures, stores, or uses explosives or materials likely to explode in his business must exercise a degree of care for the safety of his servants commensurate with the danger reasonably to be anticipated.

A master who is engaged in the business of manufacturing or storing explosives[82] or who employs dynamite or other explosives as instrumentalities in carrying on his business[83] must exercise a degree of care for the safety of his servants commensurate with the danger reasonably to be anticipated, and a failure to discharge his duty in this respect constitutes negligence. There can, however, be no recovery by an employee against the employer for injuries caused by an explosion in the absence of negligence on the part of the employer.[84] So also a master who, in the course of his business, uses substances or material of a highly explosive character,[85] or employs contrivances, appliances, or expedients likely to cause explosion,[86] or whose business is of such a character that explosions are to be anticipated from the nature of substances on

ify air, a small house beside which cars of soda ash were brought to be unloaded, and which became filled with dust stirred up by rapidly moving cup-chain scooping up ash, was required to be furnished with apparatus to expel dust.—Tennessee Eastman Corporation v. Newman, 121 S.W.2d 130, 22 Tenn.App. 270.

71. U.S.—Michalek v. U. S. Gypsum Co., D.C.N.Y., 16 F.Supp. 708.

72. Neb.—Rzeszotarski v. American Smelting & Refining Co., 277 N.W. 334, 133 Neb. 825.
Wash.—Calhoun v. Washington Veneer Co., 15 P.2d 943, 170 Wash. 152.

73. Miss.—Robertson v. Yazoo & M. V. R. Co., 122 So. 371, 372, 154 Miss. 182.

74. Mo.—Kolbow v. Haynes-Langenburg Mfg. Co., 3 S.W.2d 226, 318 Mo. 1243.

Grain elevators are covered by statute requiring ventilation to remove fumes and vapors from place where employees are required to work.—Clark v. Banner Grain Co., 261 N.W. 596, 195 Minn. 44.

Industries using poisons
Ill.—Parks v. Libbey-Owens-Ford Glass Co., 195 N.E. 616, 360 Ill. 130.

Extrahazardous occupations held not included
Ill.—Boshuizen v. Thompson & Taylor Co., 195 N.E. 625, 360 Ill. 160.

75. Mo.—Smith v. Harbison-Walker Refractories Co., 100 S.W.2d 909, 340 Mo. 389.

76. Mo.—Boll v. Condie-Bray Glass & Paint Co., 11 S.W.2d 48, 321 Mo. 92.

77. Pa.—Rebel v. Standard Sanitary Mfg. Co., 16 A.2d 534, 340 Pa. 313.

78. Pa.—Price v. New Castle Refractories Co., 3 A.2d 418, 332 Pa. 507.

Regardless of custom in industry and defendant's finding from its own experience in handling sour crude oil that masks were unnecessary, defendant was required by statute to use approved and effective devices to render the place of work reasonably safe and to protect employee from danger of contracting fibrosis of lungs and enlargement of heart if such diseases were incident to work, trade, or processes in which employee was engaged.—Smith v. Stanolind Pipe Line Co., 189 S.W.2d 244, 354 Mo. 250.

79. Ill.—Jannusch v. Weber Bros. Metal Works, 249 Ill.App. 1.

80. Mo.—Reaves v. Kramer, 97 S.W. 2d 136, 231 Mo.App. 368.

81. N.Y.—Teller v. Prospect Heights Hospital, 21 N.E.2d 504, 280 N.Y. 456.

82. Tex.—Texas Fireworks Co. v. Gunn, Civ.App., 189 S.W. 528.
39 C.J. p 339 note 6.

83. U.S.—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 93 F.2d 736.
Okl.—Tankersley v. Ferrin, 238 P. 853, 113 Okl. 68.
39 C.J. p 339 note 7.

84. U.S.—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 93 F.2d 736.
39 C.J. p 340 note 8.

85. Neb.—Sorensen v. Selden-Breck Constr. Co., 154 N.W. 222, 98 Neb. 689.
39 C.J. p 340 note 9.

Gasoline in open can
If a mechanic's use of an open can of gasoline in priming an engine was inherently dangerous and was necessary because of the employer's negligence in not furnishing a safe priming can, and where even though the mechanic used the can carefully the gasoline ignited and he threw it onto his helper, the employer would be liable for damages attributable to its negligence.—Proctor & Gamble Defense Corp. v. Bean, C.C. A.Miss., 146 F.2d 598.

Use of lamp
In action for injuries from burns caused by ignition of gasoline fumes from flame of kerosene lamp, proof that employer directed plaintiff to use kerosene lamp temporarily, promising to have electric light fixed in a few days, and that, relying on such promise, plaintiff, although aware of danger, used lamp, justified verdict for plaintiff.—Solomon v. Koontz, 127 S.E. 516, 189 N.C. 837.

86. Mass.—Redmund v. Butler, 47 N.E. 108, 168 Mass. 367.
39 C.J. p 341 note 10.

such premises[87] or from gases accumulating thereon[88] will be liable to an employee for injuries resulting from his failure to exercise that degree of care which the character of the business would demand from a reasonably prudent person.

A master will not be liable for injuries resulting from an explosion when the explosive came upon the premises of the place of work without his knowledge and without negligence on his part,[89] and the fact that injuries resulted to its employees from an explosion on premises where dynamite was handled in proximity to the place of work does not make the master liable for such injuries on the ground that it furnished an unsafe place to work.[90]

§ 215. —— Dangerous or Defective Machinery

The mere fact that the master requires the servant to work on machinery which is inherently dangerous does not constitute negligence, and the master is not liable for the servant's injury if he has exercised such reasonable care in the installation, maintenance, and operation of such machinery as is commensurate with the dangers involved.

While the master's duty to furnish reasonably safe machinery and appliances does not forbid him to place a servant at work on machinery which is inherently dangerous, and the mere fact that injuries have resulted in the course of such employment does not of itself constitute negligence,[91] the master is nevertheless required to exercise such reasonable care in respect of the installation, maintenance, and operation of such machinery as is commensurate with the dangers involved, and he will be liable for injuries resulting from his failure to exercise such care[92] or from his failure to comply with any statutory provisions with respect thereto.[93] The word "defect," as used in an employers' liability act has been held to refer to the condition of machinery with regard to the safety of employees rather than the working capacity of the machine,[94] and to remedy a defect requires that the dangerous condition must have ended rather than that the machine must have been made perfect for working purposes.[95]

It has been held to be immaterial that the servant knows as much about a complicated instrumentality as the employer, as far as the duty of the latter to furnish safe instrumentalities is concerned.[96]

§ 216. —— Simple Tools and Appliances

The rule as to the duty of the master to furnish safe tools and appliances does not apply to simple tools in common use, but the master is not absolved in all cases from liability for injury to the servant from the use of a simple tool.

The rule as to the duty of the master in furnishing the servant with safe tools and appliances does not apply to simple tools in common use and with which the master and servant are equally familiar,[97] and selection by the employer of one simple

87. Ill.—Schultz v. National Brewing Co., 195 Ill.App. 385.
Pa.—Reed v. American Dyewood Co., 80 A. 873, 231 Pa. 481.
39 C.J. p 341 note 11.

88. Ill.—Riverton Coal Co. v. Shepherd, 69 N.E. 921, 207 Ill. 395.
39 C.J. p 341 note 12.

89. Mo.—**Corpus Juris quoted in** Fesler v. Hunter, App., 35 S.W.2d 641, 643.
39 C.J. p 341 note 13.

90. U.S.—Maryland v. General Stevedoring Co., D.C.Md., 213 F. 51, affirmed 219 F. 827, 135 C.C.A. 497.
39 C.J. p 341 note 14.

91. Kan.—Chandler v. Bowersock, 106 P. 54, 81 Kan. 606.
39 C.J. p 341 note 16.

92. Ala.—Going v. Alabama Steel and Wire Co., 37 So. 784, 141 Ala. 537.
Ark.—Milner v. Standard Veneer Co., 8 S.W.2d 456, 177 Ark. 986.
Fla.—**Corpus Juris cited in** Holstun v. Embry, 169 So. 400, 402, 124 Fla. 554.
Mass.—Rivers v. Krasowski, 22 N.E. 2d 114, 303 Mass. 409.
Okl.—Rudco Oil & Gas Co. v. Lofland, 135 P.2d 494, 192 Okl. 256.
39 C.J. p 341 note 17.

Employee having duty to repair

City was not liable to city's waterworks superintendent for injuries caused by explosion of air compressor where compressor was of standard make in general use and it was the duty of the superintendent to keep it in repair.—City of Teague v. Radford, Tex.Civ.App., 105 S.W.2d 336.

93. Tenn.—Pearson Hardwood Flooring Co. v. Phillips, 120 S.W. 2d 973, 22 Tenn.App. 206.
39 C.J. p 342 note 18.

94. Mass.—Lamberti v. Neal, 148 N. E. 463, 253 Mass. 99.

Lack of safety device

"Defect" in condition of machinery, within the meaning of the statute, may be want of a safety device or appliance.—Lamberti v. Neal, 148 N.E. 463, 253 Mass. 99.

95. Mass.—Lamberti v. Neal, supra.

96. Miss.—Mississippi Power & Light Co. v. Merritt, 12 So.2d 527, 194 Miss. 794—Hercules Powder Co. v. Tyrone, 124 So. 74, 155 Miss. 75, suggestion of error overruled 124 So. 475, 155 Miss. 75.
Care required as dependent on knowledge and experience of servant see supra § 203.

97. U.S.—**Corpus Juris cited in** Spain v. Powell, C.C.A.Va., 90 F.2d 580, 582—**Corpus Juris cited in** Newbern v. Great Atlantic & Pacific Tea Co., C.C.A.N.C., 68 F.2d 523, 525, 91 A.L.R. 781—Middleton v. National Box Co., D.C.Miss., 38 F.2d 89.
Ark.—Williamson & Williams v. Cates, 37 S.W.2d 88, 183 Ark. 579.
Fla.—C. F. Hamblen, Inc., v. Owens, 172 So. 694, 127 Fla. 91.
Ga.—**Corpus Juris cited in** Southern Ry. Co. v. Cowan, 183 S.E. 331, 334, 52 Ga.App. 360.
Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.
Ky.—High Gravity Oil Co. v. Row's Adm'r, 270 S.W. 53, 207 Ky. 823.
Mich.—Rule v. Giuglio, 7 N.W.2d 227, 304 Mich. 73, 145 A.L.R. 537.
Minn.—Dally v. Ward, 26 N.W.2d 217, 223 Minn. 265—Hedicke v. Highland Springs Co., 239 N.W. 896, 185 Minn. 79.
Miss.—Middleton v. Faulkner, 178

tool, suitable for the work and not demonstrated to be dangerous, rather than some other tool, is not negligence.[98] However, the employer is not absolved in all cases from liability for injury to the servant from the use of a simple tool[99] and he is negligent if he furnishes a simple tool not reasonably safe to be used.[1] A master cannot be relieved from liability for injury to a servant on the ground

So. 583, 180 Miss. 737—Jones v. Southern United Ice Co., 150 So. 652, 167 Miss. 886.

Neb.—**Corpus Juris cited in** Phillips v. Chicago, B. & Q. R. Co., 227 N.W. 931, 932, 119 Neb. 182.

N.Y.—Adlam v. Konvalinka, 34 N.Y.S.2d 578, 264 App.Div. 127, reversed on other grounds 50 N.E.2d 535, 291 N.Y. 40.

Okl.—Oklahoma Pipe Line Co. v. Perrymore, 126 P.2d 518, 190 Okl. 687.

S.C.—Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259—**Corpus Juris quoted in** Roper v. Ware Shoals Mfg. Co., 137 S.E. 210, 139 S.C. 481.

S.D.—Maher v. Wagner, 252 N.W. 647, 62 S.D. 227.

Wash.—**Corpus Juris cited in** McGillivary v. Montgomery Ward & Co., 143 P.2d 550, 553, 19 Wash.2d 107.

39 C.J. p 342 note 20.

Assumption of risk as to simple tools see infra § 390.

A simple tool, within the rule, is one which has no complications in structure and is of such ordinary use that any normally intelligent person of mature age or of experience would have substantially as much knowledge as another and could use tool in ordinary manner without incurring more than bare possibility of injury.—Middleton v. Faulkner, 178 So. 583, 180 Miss. 737.

Tools and appliances within rule

(1) Chisel.—Middleton v. National Box Co., D.C.Miss., 38 F.2d 89.

(2) Cleaning pad composed of fine wire.

N.Y.—Adlam v. Konvalinka, 34 N.Y.S.2d 578, 264 App.Div. 127, reversed on other grounds 50 N.E.2d 535, 291 N.Y. 40.

S.D.—Maher v. Wagner, 252 N.W. 647, 62 S.D. 227.

(3) Crate used by employee in delivering bottle.—Hedicke v. Highland Springs Co., 239 N.W. 896, 185 Minn. 79.

(4) Electric light incased in steel mesh frame.—Mitchell v. Brooks, 147 So. 660, 165 Miss. 826.

(5) Floor scale.—Newbern v. Great Atlantic & Pacific Tea Co., C.C.A.N.C., 68 F.2d 523, 91 A.L.R. 781.

(6) Hammer.—Leierer v. Thompson, 122 P.2d 387, 190 Okl. 233.

(7) Hammer and chisel.

Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Gossett, 18 S.W.2d 986, 230 Ky. 240.

La.—Borde v. New Orleans & G. N. R. Co., App., 140 So. 810.

(8) Ice tongs.—Jones v. Southern United Ice Co., 150 So. 652, 167 Miss. 886.

(9) Ladder.

Mich.—Rule v. Giuglio, 7 N.W.2d 227, 304 Mich. 73, 145 A.L.R. 537.

Okl.—Nelson v. Wolverine Petroleum Corporation, 117 P.2d 787, 189 Okl. 351.

S.C.—Rodgers v. Pacific Mills, 159 S.E. 655, 161 S.C. 376—Roper v. Ware Shoals Mfg. Co., 137 S.E. 210, 139 S.C. 48.

Utah.—Proctor v. Town Club, 141 P.2d 156, 105 Utah 72.

(10) Rope.—Fields v. Texas Co., 162 S.E. 441, 164 S.C. 478.

(11) Truck or dolly.—McGillivary v. Montgomery Ward & Co., 143 P.2d 550, 19 Wash.2d 107.

(12) Wire rope.—High Gravity Oil Co. v. Row's Adm'r, 270 S.W. 53, 207 Ky. 823.

Tools and appliances not within rule

(1) Automobile truck.—Mississippi Utilities Co. v. Smith, 145 So. 896, 166 Miss. 105.

(2) Chicken ladder.—Nugent Sand Co. v. Howard, 11 S.W.2d 985, 227 Ky. 91.

(3) Electric sausage grinder.—Lee v. Roberson, 16 S.E.2d 459, 220 N.C. 61.

(4) Gangplank and truck.—Nance v. Swift & Co., 186 S.E. 389, 180 S.C. 470.

(5) Hose attached to boiler of locomotive for cleaning locomotive.—Hercules Powder Co. v. Tyrone, 124 So. 74, 155 Miss. 75, suggestion of error overruled 124 So. 475, 155 Miss. 75.

(6) Jack and jack bar used in threading pipe.—Natural Gas & Fuel Co. v. Lyles, 294 S.W. 395, 174 Ark. 146.

(7) Neb and clearer board of spinner frame.—J. W. Sanders Cotton Mill v. Moody, 195 So. 683, 189 Miss. 284.

(8) Railroad track jack.—Gulf, M. & N. R. Co. v. Graham, 117 So. 881, 153 Miss. 72.

Federal Employers' Liability Act

Simple as well as complex tools are within the Federal Employers' Liability Act, making the carrier liable for injury to an employee through a defect, due to its negligence, in its appliances and equipment.

U.S.—Pitt v. Pennsylvania R. Co., D.C.Pa., 66 F.Supp. 443.

N.C.—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791.

Or.—Gekas v. Oregon-Washington R. & Nav. Co., 146 P. 970, 75 Or. 243.

Injury not resulting from defect

The master is not liable for injuries to a domestic servant resulting from the slipping or tipping over of a ladder where the ladder was not defective.

Mass.—Sjostedt v. Webster, 28 N.E.2d 239, 306 Mass. 344.

Mich.—Nichols v. Bush, 289 N.W. 219, 291 Mich. 473.

98. Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Gossett, 18 S.W.2d 986, 230 Ky. 240.

Neb.—Phillips v. Chicago, B. & Q. R. Co., 227 N.W. 931, 119 Neb. 182.

99. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.

Kan.—Palmer v. Julian, 170 P.2d 813, 161 Kan. 619—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.

S.C.—Fields v. Texas Co., 162 S.E. 441, 164 S.C. 478.

1. Mo.—Gray v. Doe Run Lead Co., 53 S.W.2d 877, 331 Mo. 481—Neely v. Chicago Great Western R. Co., App., 14 S.W.2d 972, certiorari quashed State ex rel. Chicago Great Western R. Co. v. Trimble, Sup., 14 S.W.2d 978—McGowan v. American Mfg. Co., App., 270 S.W. 423.

Tex.—Henwood v. Neal, Civ.App., 198 S.W.2d 125.

Care in selection

In determining whether master has exercised ordinary care in selecting and inspecting tool, simplicity of tool and skill required in its use should be considered.—Smith v. McEachin, 57 S.W.2d 1043, 186 Ark. 1132.

Unsafe tool

A shovel with a worn edge is not necessarily an unsafe tool for negligence in furnishing which master would be liable, since shovel with worn edge is not inherently dangerous and, unless subject to use not ordinarily intended, such condition would not reasonably be anticipated to cause injury, although worn edge might increase amount of labor expended in doing work.—Fischer v. City of Cape Girardeau, 131 S.W.2d 521, 345 Mo. 122.

Short ladder

Master is obligated to furnish ladder of sufficient length or timbers long enough to make ladder of sufficient length, and hence was liable

that the instrumentality causing the injury was a simple appliance and that danger did not inhere in the appliance itself, but arose from the manner in which it was used, where the injury occurred from the use of the appliance in the manner that the master expected and required the servant to use it,[2] nor will he be relieved of liability where the defect is of a kind that reasonably imports menace of substantial injury.[3]

Since one element of the simple-tool rule is the servant's equal opportunity with the master to inspect the tools and appliances,[4] the rule does not apply where the servant's duties are such as not to afford him such opportunity.[5] The simple-tool doctrine operates only when the workman injured is using the particular tool from which the injury results,[6] and has been held not to operate when the tool is not being used as such.[7]

§ 217. —— Temporary Appliances, Structures, or Dangers

The rule requiring the master to furnish a safe place in which to work has been held not to apply to structures or instrumentalities of a temporary nature.

The general rule requiring a master to furnish a safe place in which to work is usually applied to a permanent or quasi-permanent place and not to structures or instrumentalities of a temporary nature employed by the servants in preparation for, or in the progress of, their work;[8] nor will a master be liable for injuries resulting to the employee from mere temporary conditions interfering with the safety of the place to work[9] or for injuries resulting from conditions giving rise to perils of a transitory character.[10]

§ 218. —— Horses and Vehicles

The rule requiring the master to furnish reasonably safe instrumentalities extends to and includes horses and other animals used in his work, and vehicles and appurtenances, connected therewith.

The rule that a master must use reasonable care to furnish his servant with reasonably safe instrumentalities extends to and includes horses and other animals used in his work, wagons, and other vehicles, harnesses, and appliances connected therewith.[11] Thus, when a master knows or should

where journeyman carpenter, to compensate for insufficient length of ladder, nailed timber to tank for use as handhold with master's knowledge, and was injured when timber gave way.—Fellsmere Sugar Co. v. Marshall, 167 So. 649, 123 Fla. 378.

2. U.S.—Newbern v. Great Atlantic & Pacific Tea Co., C.C.A.N.C., 68 F.2d 523, 91 A.L.R. 781.
Mo.—Neely v. Chicago Great Western R. Co., App., 14 S.W.2d 972, certiorari quashed State ex rel. Chicago Great Western R. Co. v. Trimble, Sup., 14 S.W.2d 978.
Wash.—Schmidt v. Pelz, 87 P.2d 278, 198 Wash. 80.
39 C.J. p 343 note 21.

3. N.C.—Rogerson v. Houtz, 93 S.E. 376, 174 N.C. 27.

4. Okl.—Anthony v. Colvin, 130 P.2d 819, 191 Okl. 476, rehearing denied 145 P.2d 384, 191 Okl. 476.

5. Okl.—Anthony v. Colvin, supra.

6. Ky.—C. N. O. & T. P. Ry. Co. v. Guinn, 173 S.W. 357, 163 Ky. 157—Nugent Sand Co. v. Howard, 11 S.W.2d 985, 227 Ky. 91—Reed v. Nelson Ck. Coal Co., 6 S.W.2d 252, 224 Ky. 322.

7. S.C.—Langston v. Fiske-Carter Const. Co., 185 S.E. 62, 180 S.C. 113.

Ladder used as stairway

Where ladder was placed by employer in building under construction for use as stairway by employees and over which employee, who carried drinking water to second floor of building, had no control, employee who was injured when ladder broke held not barred from recovering for injuries on ground that ladder was a simple tool, since it was not being used as such at time of injuries.—Langston v. Fiske-Carter Const. Co., supra.

8. Fla.—American Box & Lumber Co. v. Chandler, 138 So. 29, 102 Fla. 907.
Md.—M. A. Long Co. v. State Acc. Fund, 144 A. 775, 156 Md. 639.
Mo.—Stone v. Missouri Pac. Ry. Co., 293 S.W. 367.
N.H.—McIntyre v. McIntyre, 171 A. 329, 86 N.H. 479.
39 C.J. p 343 note 24.

Ways, works, machinery or plant

Temporary contrivance for digging well was not part of "ways, works, machinery, or plant" within employers' liability act.—Riley v. Chancey Bros., 112 So. 830, 216 Ala. 176.

9. Mass.—Healy v. Gilchrist Co., 91 N.E. 389, 205 Mass. 393.
39 C.J. p 343 note 25.

10. U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.
Miss.—**Corpus Juris cited in** Goodyear Yellow Pine Co. v. Clark, 142 So. 443, 445, 163 Miss. 661.
Okl.—Kansas City Bridge Co. v. Gravitt, 105 P.2d 767, 188 Okl. 30.
39 C.J. p 343 note 26.

11. Fla.—Holstun v. Embry, 169 So. 400, 124 Fla. 554.
Miss.—Crosby v. Burge, 1 So.2d 504, 190 Miss. 739—Central Lumber Co. v. Porter, 103 So. 506, 139 Miss. 66, 42 A.L.R. 221.
Mo.—Warner v. Oriel Glass Co., 8 S.W.2d 846, 319 Mo. 1196, 60 A.L.R. 448—State ex rel. Pevely Dairy Co. v. Daues, 289 S.W. 835, 316 Mo. 418—Juncker v. Keisel, App., 16 S.W.2d 690.
Mont.—Demarais v. Johnson, 3 P.2d 283, 90 Mont. 366, 77 A.L.R. 573.
N.C.—Holeman v. Pensacola Shipbuilding Co., 134 S.E. 647, 192 N.C. 236.
S.C.—Googe v. Speaks, 9 S.E.2d 439, 194 S.C. 206.
S.D.—Breen v. Kreen, 225 N.W. 223, 55 S.D. 150.
Wash.—White v. Consolidated Freight Lines, 73 P.2d 358, 192 Wash. 146.
39 C.J. p 343 note 28.

Duty held not breached

Miss.—Crosby v. Burge, 1 So.2d 504, 190 Miss. 739.
Tex.—Railway Express Agency v. Robinson, Civ.App., 162 S.W.2d 984, error refused.

Repair

Master's duty to exercise ordinary care in making safe truck tire for employee's use was fully discharged by sending tire to independent contractors, experts, for making repairs and showing by them of how repairs were made and return of tire in apparently first-class condition.—Kemp v. Hunter Transfer Co., 41 S.W.2d 981, 184 Ark. 13.

Servants of agent

Where, under facts, petroleum company's agent in charge of its bulk sales station was company's servant rather than independent con-

know that an animal used by him is vicious[12] or that his harness or vehicle is not reasonably safe,[13] he is liable for injuries to his servant caused thereby. Although ordinarily knowledge, actual or constructive, on the part of the master of the vicious nature of an animal furnished to a servant is essential to liability,[14] it has been held that the liability of the master is governed rather by his duty to use reasonable care to furnish the servant a reasonably safe instrumentality with which to perform his work.[15] The employer has been held not negligent in furnishing an animal where the servant knew its condition as well as the master did.[16]

A motor vehicle operated on a public highway has been considered a dangerous instrumentality,[17] and it is the duty of the master to equip his vehicles with proper safety appliances.[18] A statute specifying how motor vehicles shall be equipped, although penal, has been held to set the standard of care required of an employer.[19] Where the master has fulfilled his obligation by furnishing a reasonably safe vehicle, it has been held that he cannot be held liable for failure to furnish equipment which might make it more safe.[20]

A domestic servant required to ride in a vehicle of the master in the course of employment is not a guest[21] and is entitled to recover for injuries resulting from the employer's negligence.[22]

A master must furnish a reasonably safe appliance for unloading a vehicle,[23] and a master is also liable for injuries sustained by a servant through the premature starting of his team resulting from the master's negligence while the servant is in a dangerous position about the vehicle in the prosecution of his duties.[24]

§ 219. —— Buildings and Places for Work

a. In general
b. What constitutes place of work
c. Lights

tractor, and driver employed to drive agent's delivery truck was likewise company's servant, company, notwithstanding agent's like duty, was required to furnish driver safe truck and keep it in repair, so that company was liable to driver for injury caused by alleged defect in truck.—Texas Co. v. Mills, 156 So. 866, 171 Miss. 231.

Lights

(1) Where an employer furnished employee with pushcart not equipped with lights, and employee was required to operate it at night on public highways, the employer would be liable to its employee for injuries sustained by him when he was struck at night by automobile while delivering mail in pushcart from depot to post office, if equipping pushcart with lights tended to promote his safety and failure to do so caused the accident; and the standard by which it was to be judged whether the employer was negligent was not care required by any of the provisions of state highway regulatory act, but the care which an ordinarily prudent person would exercise under similar circumstances.—Taylor v. Texas & N. O. R. Co., La.App., 22 So.2d 771.

(2) Cause of action of truck driver against truck owner for injuries sustained in accident allegedly caused by failure of lighting system on truck does not fall within the scope of the Oregon Employers' Liability Act.—White v. Consolidated Freight Lines, 73 P.2d 358, 192 Wash. 146.

Vehicle furnished by servant for use on streets

Where employer had no control over the streets or employee's motorcycle used by employee in making deliveries, employer was not liable for employee's death by being thrown against a light pole when employee's motorcycle skidded on an icy street while employee was making a delivery since rule requiring the master to use ordinary care to furnish his servant with safe appliances and a reasonably safe place to work is based on possession and control by master of the appliances used in premises where the work is performed.—Pfiester's Adm'r v. Jones, 163 S.W.2d 304, 291 Ky. 151.

12. Wyo.—Boatman v. Miles, 199 P. 933, 27 Wyo. 481, 26 A.L.R. 864.
39 C.J. p 344 note 29.
Knowledge by master of defect generally see infra § 244.

13. Ga.—Cooper v. Robert Portner Brewing Co., 38 S.E. 91, 112 Ga. 894.
39 C.J. p 344 note 30.

14. Ky.—Broadway Coal Min. Co. v. Render, 119 S.W. 198.
39 C.J. p 344 note 31.

15. U.S.—Nooney v. Pacific Express Co., Mo., 208 F. 274, 125 C.C.A. 474, L.R.A.1915B 433.
39 C.J. p 344 note 32.

16. Iowa.—Hansen v. Jensen, 216 N. W. 677, 204 Iowa 1063.

17. Fla.—Holstun v. Embry, 169 So. 400, 124 Fla. 554.

18. Va.—Aronovitch v. Ayres, 193 S.E. 524, 169 Va. 308.

19. Mo.—Anderson v. Asphalt Distributing Co., 55 S.W.2d 688, 86 A. L.R. 1033.

Lights

Where the only negligence in respect of lights charged against owner of truck parked on highway was the violation of statutes requiring lights between specified hours, and instructions were based entirely on such statutes, negligence of truck owner to employee could not be predicated on failure to maintain lights if evidence supported jury's finding that accident did not occur between the statutory hours.—Bohlmann v. Penn Electric Corporation, 286 N.W. 552, 232 Wis. 232.

20. Mo.—Samuel v. National Bag Co., App., 15 S.W.2d 376.

Skid chains

Where a motor vehicle furnished a servant is reasonably safe, the master is not liable for failure to furnish skid chains to servant breaking arm when automobile he was driving skidded, even though he has promised to furnish chains.—Samuel v. National Bag Co., Mo.App., 15 S. W.2d 376.

21. Fla.—Peery v. Mershon, 5 So. 2d 694, 149 Fla. 351.
Iowa.—Knutson v. Lurie, 251 N.W. 147, 217 Iowa 192.

22. Fla.—Peery v. Mershon, 5 So.2d 694, 149 Fla. 351.
Iowa.—Knutson v. Lurie, 215 N.W. 147, 217 Iowa 192.

23. Mo.—Beard v. American Car Co., 63 Mo.App. 382.

24. Mo.—Borden v. Falk Co., 71 S. W. 478, 97 Mo.App. 566.
39 C.J. p 344 note 34.

d. Construction, reconstruction, or demolition of building
e. Fire escapes

a. In General

As a general rule a master owes it to his servant to furnish him with a reasonably safe building or other place in which to do his work, and is liable for injuries occasioned by his negligence in this respect.

As a general rule a master owes it to his servant to furnish him with a reasonably safe building or other place in which to do his work, and is liable for injuries occasioned by his negligence in this respect.[25] His duty is substantially the same as that

25. U.S.—Sykes v. Bensinger Recreation Corporation, C.C.A.Wis., 117 F.2d 964—Chapman & Dewey Lumber Co. v. Hanks, C.C.A.Tenn., 106 F.2d 482—Shoaf v. Fitzpatrick, C.C.A.Tenn., 104 F.2d 290, certiorari denied 60 S.Ct. 295, 308 U.S. 620, 84 L.Ed. 518—Grammer v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 71 F.2d 38, certiorari denied 55 S.Ct. 82, 293 U.S. 571, 79 L.Ed. 670—Nelson v. Jadrijevics, C.C.A. Canal Zone, 68 F.2d 631, certiorari denied 54 S.Ct. 862, 292 U.S. 652, 78 L.Ed. 1501.
Ark.—Missouri Pac. R. Co. v. Martin, 57 S.W.2d 1047, 186 Ark. 1101.
Ga.—Nashville, C. & St. L. Ry. v. Hilderbrand, 172 S.E. 87, 48 Ga. App. 140.
Ind.—Chesapeake & O. Ry. Co. v. Russo, 163 N.E. 283, 91 Ind.App. 648, certiorari denied 51 S.Ct. 25, 282 U.S. 846, 75 L.Ed. 750.
Iowa.—**Corpus Juris quoted in** Nelson v. Smeltzer, 265 N.W. 924, 926, 221 Iowa 972.
Kan.—Dodd v. Wilson & Co. of Kansas, 88 P.2d 1116, 149 Kan. 605.
Ky.—City of Bellevue v. Hall, 174 S.W.2d 24, 295 Ky. 57—Hall's Adm'x v. West Kentucky Coal Co., 11 S.W.2d 971, 226 Ky. 847.
La.—Vidrine v. Evangeline Gravel Co., 4 La.App. 687.
Mass.—Wood v. National Theatre Co., 42 N.E.2d 536, 311 Mass. 550.
Miss.—Wade-Stevens Lumber Co. v. Addy, 194 So. 303, 187 Miss. 851—McLemore & McArthur v. Rogers, 152 So. 883, 169 Miss. 650—Nelms & Blum Co. v. Fink, 131 So. 817, 159 Miss. 372.
Mo.—State ex rel. McCrory v. Bland, 197 S.W.2d 669, 355 Mo. 706—State ex rel. S. S. Kresge Co. v. Shain, 101 S.W.2d 14, 340 Mo. 145—Kemper v. Gluck, 39 S.W.2d 330, 327 Mo. 733, certiorari denied Gluck v. Kemper, 52 S.Ct. 29, 284 U.S. 649, 76 L.Ed. 551—Reynolds v. Al. G. Barnes Amusement Co., 300 S.W. 1062, 221 Mo.App. 1169—Hutson v. Missouri Stair Co., App., 296 S.W. 216—Sanders v. Armour & Co. of Delaware, App., 292 S.W. 443.
N.Y.—Bellows v. Merchants Despatch Transp. Co., 12 N.Y.S.2d 655, 257 App.Div. 15, affirmed 27 N.E.2d 440, 283 N.Y. 581—Kennealy v. State, 238 N.Y.S. 719, 135 Misc. 467.
N.C.—Street v. Erskine-Ramsey Coal Co., 145 S.E. 11, 196 N.C. 178.
Ohio.—Shoemaker v. Electric Auto-Lite Co., 41 N.E.2d 433, 69 Ohio App. 169.
Okl.—Crabb v. Oklahoma Gas & Electric Co., 250 P. 926, 120 Okl. 182.
Or.—Beckman v. Doernbecher Mfg. Co., 59 P.2d 688, 154 Or. 408.
R.I.—Faltinali v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 438.
S.C.—Nuckolls v. Great Atlantic & Pacific Tea Co., 5 S.E.2d 862, 192 S.C. 156—Boling v. Woodside Cotton Mills, 171 S.E. 9, 171 S.C. 34.
Tex.—**Corpus Juris cited in** Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 401, 123 Tex. 128—City of Beaumont v. Silas, Civ. App., 200 S.W.2d 690—Harbin v. City of Beaumont, Civ.App., 146 S.W.2d 297, error dismissed, judgment correct—Rio Bravo Oil Co. v. Matthews, Civ.App., 20 S.W.2d 342.
Wash.—Freeman v. Smit, 75 P.2d 575, 193 Wash. 346.
39 C.J. p 344 note 36.

Continuing duty

Employer, in discharge of its continuing duty to provide employee receiving buckets of molten asphalt on porch roof and delivering buckets to main roof with reasonably safe place to work and to maintain place in reasonably safe condition, was required to guard against injuries which reasonably prudent person could have foreseen as reasonably likely to occur.—Hamilton Bros. Co. v. Narciese, 158 So. 467, 172 Miss. 24.

Dangerous coemployee

A restaurateur who had knowledge that his wife employed in restaurant was belligerent and was guilty of vicious conduct was liable for injuries sustained by employee assaulted by the wife on theory that restaurateur breached his nondelegable duty to furnish a safe place of work to the employee.—Bomba v. Borowicz, 38 N.Y.S.2d 403, 265 App. Div. 198.

Facts held not to show negligence

U.S.—Dennis v. Mabee, C.C.A.Tex., 139 F.2d 941, certiorari denied 64 S.Ct. 1261, 322 U.S. 750, 88 L.Ed. 1581.
Ark.—A. A. Electric Co. v. Ray, 149 S.W.2d 38, 202 Ark. 85—Southwestern Bell Telephone Co. v. Casson, 188 S.W.2d 406, 199 Ark. 1140.
Iowa.—Nelson v. Smeltzer, 265 N.W. 924, 221 Iowa 972.
Me.—Blacker v. Oxford Paper Co., 142 A. 776, 127 Me. 228.
Mass.—O'Brien v. Boston & M. R. R., 164 N.E. 446, 265 Mass. 527.
Mich.—Roselip v. Great Atlantic & Pacific Tea Co., 262 N.W. 408, 272 Mich. 560.
Miss.—Masonite Corp. v. Graham, 25 So.2d 322—Fromme v. Borchman, 193 So. 811, 188 Miss. 535.
Mo.—Lawson v. Higgins, 169 S.W.2d 881, 350 Mo. 1066—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228—Pietraschke v. Pollnow, App., 147 S.W.2d 167.
N.Y.—Fedick v. Fenton, 2 N.Y.S.2d 436, 166 Misc. 707, affirmed 3 N.Y.S.2d 870, 254 App.Div. 704—Menaged v. Emigrant Industrial Sav. Bank, 21 N.Y.S.2d 238.
N.C.—Owenby v. Tallassee Power Co., 138 S.E. 529, 194 N.C. 129.
Okl.—Warden-Pullen Coal Co. v. Wallace, 56 P.2d 802, 176 Okl. 604.
S.C.—Stroman v. Hooper Const. Co., 172 S.E. 417, 171 S.C. 393.
Tex.—United East & West Oil Co. v. Dyer, Civ.App., 144 S.W.2d 989, affirmed 162 S.W.2d 680, 139 Tex. 318—Gulf, C. & S. F. Ry. Co. v. Bell, Civ.App., 101 S.W.2d 363, error dismissed—San Antonio & A. P. Ry. Co. v. Cook, Civ.App., 293 S.W. 193.
Va.—Beamer v. Virginian Ry. Co., 26 S.E.2d 43, 181 Va. 650, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060.
Wash.—Freeman v. Smit, 75 P.2d 575, 193 Wash. 346—Saunders v. Longview, P. & N. Ry. Co., 296 P. 835, 161 Wash. 280.
39 C.J. p 344 note 36 [n].

Relative matter

A reasonably safe place in which to work is a relative matter, and whether master has exercised ordinary care to provide reasonably safe place depends on facts of each case.—Southern Mining Co. v. Lawson, 131 S.W.2d 831, 279 Ky. 659—High Splint Coal Co. v. Baker, 57 S.W.2d 60, 247 Ky. 426.

Opening and closing door which injured employee was element of environment as regards master's liability.—Johnson v. Corn Products Refining Co., 6 S.W.2d 568, 319 Mo. 958.

of a property owner to an invitee.[26]

The rule does not apply when the place of work and conditions as to safety are constantly changing as the work progresses and the prosecution of the work itself makes the place and creates the danger.[27] Likewise the rule does not apply when the place of work becomes dangerous only by the carelessness or negligence of the workmen,[28] nor does it apply where the servant selects his own place of work[29] or where the place was one in which the servant had no duty to perform and to which he was not required to go.[30] However, even where the progress of the work enhances the danger, the employer must use ordinary care to make the place as safe as it can be made under the conditions of the work to be performed.[31] This exception to the rule has been abrogated by some statutes and the ordinary rule applies even when by reason of the acts of the servants the conditions are constantly changing[32] or the nature of the employment is hazardous.[33] The exception to the general rule has no application where the master has assumed personal direction of such a place of work,[34] where the injuries to an employee, although received in a place of work constantly changing in character, were not caused by any changing condition in the prosecution of the work,[35] or where the nature and conditions of the work remain constant although there are different steps in the work.[36]

The employer has been held not to be obligated to furnish a place which is safe for everyone, but the place must be safe for the average employee.[37]

Farm labor does not generally come within a statute requiring the employer to furnish a safe place to work[38] except where farming is carried on by means of mechanical power.[39]

Permanent construction
Employer need not change structure of his buildings.—Fraioli v. New York, N. H. & H. R. Co., 190 N. E. 605, 286 Mass. 450—39 C.J. p 344 note 36 [e].

26. Iowa.—Nelson v. Smeltzer, 265 N.W. 924, 221 Iowa 972.

27. U.S.—Tombigbee Mill & Lumber Co. v. Hollingsworth, C.C.A.Miss., 162 F.2d 763—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213—C. B. Foster Packing Co. v. Lamey, C.C.A.Miss., 5 F.2d 23.
Ark.—Wallace v. Long, 197 S.W.2d 20—M. E. Gillioz, Inc., v. Lancaster, 113 S.W.2d 709, 195 Ark. 688—Missouri Pac. R. Co. v. Hunnicutt, 104 S.W.2d 1070, 193 Ark. 1128—Howell v. Harvill, 50 S.W.2d 597, 185 Ark. 977.
Ga.—Powell v. Shurling, 179 S.E. 653, 51 Ga.App. 67—Flippin v. Central of Georgia Ry. Co., 132 S.E. 918, 35 Ga.App. 243.
Ky.—Southern Mining Co. v. Lawson, 131 S.W.2d 831, 279 Ky. 659—Jones v. Chambers' Adm'r, 106 S.W.2d 72, 269 Ky. 98—Yeary's Adm'r v. Hignite Coal Co., 102 S.W.2d 19, 267 Ky. 265—Baker v. High Splint Coal Co., 81 S.W.2d 577, 258 Ky. 786—High Splint Coal Co. v. Baker, 57 S.W.2d 60, 247 Ky. 426—Duvin Coal Co. v. Fike, 38 S.W.2d 201, 238 Ky. 376.
Miss.—City of Tupelo v. Payne, 168 So. 283, 176 Miss. 245—**Corpus Juris cited in** Goodyear Yellow Pine Co. v. Clark, 142 So. 443, 445, 163 Miss. 661—Gulf, M. & N. R. Co. v. Brown, 108 So. 503, 143 Miss. 890.
Mo.—Pritchard v. Thompson, 156 S.W.2d 652, 348 Mo. 832.
N.Y.—Kowalsky v. Conreco Co., 190 N.E. 206, 264 N.Y. 125, reargument denied 191 N.E. 620, 264 N.Y. 674—Dinkuhn v. Western New York Water Co., 297 N.Y.S. 376, 252 App. Div. 51, affirmed 17 N.E.2d 460, 279 N.Y. 606.
Okl.—Kansas City Bridge Co. v. Gravitt, 105 P.2d 767, 188 Okl. 30.
S.C.—Stroman v. Hooper Const. Co., 172 S.E. 417, 171 S.C. 393—Grier v. Winyah Lumber Co., 141 S.E. 685, 144 S.C. 10.
Tenn.—Moon v. City of Chattanooga, 10 Tenn.App. 82.
Tex.—City of Timpson v. Powers, Civ.App., 119 S.W.2d 145—Chisos Mining Co. v. Hernandez, Civ.App., 96 S.W.2d 292, error dismissed—Hailey v. Missouri, K. & T. R. Co., Civ.App., 70 S.W.2d 249, error refused—Davis v. W. T. Carter & Bro., Civ.App., 19 S.W.2d 336, error refused.
Vt.—Landing v. Town of Fairlee, 22 A.2d 179, 112 Vt. 127.
39 C.J. p 346 note 37.

Duty of servant
Where experienced logger was engaged in clearing reservoir site and skidding and piling logs and work changed from place to place as site was cleared, it was logger's duty to use ordinary care to make his own place of work safe and master could not be held liable for alleged failure to furnish safe place to work.—M. E. Gillioz, Inc., v. Lancaster, 113 S.W.2d 709, 195 Ark. 688.

When progress of work develops incidental dangers, although place be safe at beginning, master fulfills duty if he furnishes men with proper facilities to obviate dangers as they emerge from time to time.—Buckley v. Cunard S. S. Co., 253 N.Y.S. 254, 233 App.Div. 361.

28. U.S.—Petroleum Iron Works Co. v. Wright, C.C.A.Ark., 5 F.2d 935, certiorari denied 46 S.Ct. 25, 269 U.S. 567, 70 L.Ed. 415.
39 C.J. p 348 notes 41, 42.

29. Ark.—Lee v. Pate, 131 S.W.2d 8, 198 Ark. 723.

30. Miss.—Forbus v. Cobb Bros. Const. Co., 186 So. 643, 184 Miss. 647.

31. Okl.—Kansas City Bridge Co. v. Gravitt, 105 P.2d 767, 188 Okl. 30.

Recurrent dangerous condition
A master cannot escape his continuing duty to use ordinary care to provide reasonably safe place for his servants to work on ground that dangerous condition was temporary, due to changing conditions of work as ordinary incident thereto, when such condition is known to be constantly recurring, and is bound to use ordinary care to guard against dangerous condition.—McCracken v. Franco-Dominion Development Corporation, 117 P.2d 135, 189 Okl. 354—Kansas City Bridge Co. v. Gravitt, 105 P.2d 767, 188 Okl. 30.

32. Wis.—Rosholt v. Worden-Allen Co., 144 N.W. 650, 155 Wis. 168.
39 C.J. p 348 note 38.

33. U.S.—Mallatt v. Ostrander Ry. & Timber Co., D.C.Or., 46 F.Supp. 250.

34. Ark.—Wallace v. Long, 197 S.W.2d 20.
Miss.—Odom v. Walker, 11 So.2d 452, 193 Miss. 862.
39 C.J. p 348 note 39.

35. Ga.—Moody v. Hardeman, 162 S.E. 653, 44 Ga.App. 676.
Miss.—Gow Co. v. Hunter, 168 So. 264, 175 Miss. 896.
39 C.J. p 348 note 40.

36. U.S.—Carey Reed Co. v. McDavid, C.C.A.Miss., 120 F.2d 843.

37. Del.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr. 339.

38. Wis.—Vandre v. Trachte, 12 N.W.2d 48, 244 Wis. 233.

39. Ala.—Louisville & N. R. Co. v. Naugher, 84 So. 262, 203 Ala. 557.

b. What Constitutes Place of Work

The duty of the employer to furnish a reasonably safe place to work extends to places where the servants are expressly or impliedly invited and permitted to use, and requires the employer to provide reasonably safe means of ingress and egress and passageways.

While ordinarily the duty of the employer to furnish employees a reasonably safe place to work is limited to the premises where the employees are required to be for the purposes of their employment[40] when used in the ordinary way for the purpose for which they were intended,[41] it nevertheless extends to such other places as they are expressly or impliedly invited and permitted to use;[42] and this includes rooms and places properly resorted to by them incidentally to their employment, by virtue of such an invitation or permission,[43] but not to places when the employee goes for his own convenience and where he is not expected to be.[44]

Ways. The master's duty to use ordinary care to furnish the servant with a reasonably safe place for his work is not restricted to the identical situs of the labor, but extends to the exercise of ordinary care to see that the means of egress and ingress and ways customarily used by the servant in passing from one part of the premises to another in the course of his employment are reasonably safe,[45]

Wis.—Dugenske v. Wyse, 215 N.W. 829, 194 Wis. 159.

40. Ga.—**Corpus Juris cited in** Austin v. Henry Grady Hotel Co., 200 S.E. 466, 467, 58 Ga.App. 861.
Miss.—Forbus v. Cobb Bros. Const. Co., 185 So. 243, 184 Miss. 647, suggestion of error overruled 186 So. 643, 184 Miss. 647.
Mo.—Arnold v. Graham, 272 S.W. 90, 219 Mo.App. 249.
Tex.—Rio Bravo Oil Co. v. Matthews, Civ.App., 20 S.W.2d 342.
Va.—Raven Red Ash Coal Co. v. Griffith, 27 S.E.2d 360, 181 Va. 911.
39 C.J. p 348 note 43.

Length of time in one place
Employee's place of work is that where his employment puts him to work, the length of time an employee works in one place not being determinative.—Baker v. High Splint Coal Co., 81 S.W.2d 577, 258 Ky. 786.

Machine
The place of work of an employee is the location, the situs, or the premises, and if an injury occurs there by force of an independent defect in a machine which is being used at the place, the wrong must be laid on, and proved against, the machine, and is not to be ascribed to the more general conception of a safe place to work.—J. W. Sanders Cotton Mill v. Moody, 195 So. 683, 189 Miss. 284.

Place used in enterprise
The words "place of employment" as used in statute requiring employer to furnish a safe place of employment for employees and frequenters are descriptive, furnish an outline of a definition, and indicate a purpose to protect employees and lawful frequenters, and carry the idea of a place necessarily used by one or more persons engaged in an enterprise for the purpose of gain or profit, direct or indirect.—Mennetti v. West Side Businessmen's Ass'n, 18 N.W.2d 487, 246 Wis. 586.

Wagon may constitute a place of work although standing in street.—Brann v. Hydraulic Press Brick Co., Mo.App., 288 S.W. 941.

41. Ind.—S. W. Little Coal Co. v. O'Brien, 113 N.E. 465, 63 Ind.App. 504, rehearing denied 114 N.E. 96, 63 Ind.App. 504.
Tex.—International & G. N. R. Co. v. Reiden, 107 S.W. 661, 48 Tex. Civ.App. 401.

42. U.S.—Harrison v. L. E. Myers Const. Co., C.C.A.Ark., 42 F.2d 950, certiorari denied 51 S.Ct. 103, 282 U.S. 887, 75 L.Ed. 782.
Ky.—West Kentucky Coal Co. v. Hazel's Adm'x, 129 S.W.2d 1000, 279 Ky. 5.
Mo.—Watson v. Energy Const. Co., 286 S.W. 715, 220 Mo.App. 362.
Va.—Raven Red Ash Coal Co. v. Griffith, 27 S.E.2d 360, 181 Va. 911.
39 C.J. p 349 note 45.

43. Ky.—High Splint Coal Co. v. Ramey's Adm'x, 112 S.W.2d 1007, 271 Ky. 532.
Tex.—Foster v. Carle, Civ.App., 160 S.W.2d 999, error refused.
39 C.J. p 349 note 46.

Living quarters
With respect to oil company's liability for injuries sustained by oil pumper in gas explosion in two-room bunkhouse whereto pumper returned to obtain heavier shoes preparatory to further inspection and adjustment of machinery on lease, fact that pumper paid a monthly rental and used bunkhouse also as his living quarters would not deprive such bunkhouse of the characteristic of premises being furnished by the company.—United East & West Oil Co. v. Dyer, Tex.Civ.App., 144 S.W.2d 989, affirmed 162 S.W.2d 680, 139 Tex. 318.

Lunch room
Ga.—Holman v. American Auto. Ins. Co., 39 S.E.2d 850, 201 Ga. 454.
39 C.J. p 349 note 46 [b].

44. Ky.—High Splint Coal Co. v. Bailey's Adm'r, 37 S.W.2d 22, 238 Ky. 217.

45. U.S.—Smith v. Shevlin-Hixon Co., C.C.A.Or., 157 F.2d 51.
Ark.—Scott-Burr Stores Corporation v. Foster, 122 S.W.2d 165, 197 Ark. 232.
Ill.—**Corpus Juris cited in** Miller v. Russell, 23 N.E.2d 775, 778, 302 Ill. App. 165.
Ky.—**Corpus Juris cited in** City of Bellevue v. Hall, 174 S.W.2d 24, 29, 295 Ky. 57.
Mo.—Busby v. Southwestern Bell Telephone Co., 287 S.W. 434—Ryon v. American Car & Foundry Co., 297 S.W. 430, 220 Mo.App. 1142—Steinkamp v. F. B. Chamberlain Co., App., 294 S.W. 762—Smith v. American Car & Foundry Co., App., 288 S.W. 982.
N.H.—Perkins v. Nashua Mfg. Co., 16 A.2d 700, 91 N.H. 211.
N.Y.—Dinkuhn v. Western New York Water Co., 297 N.Y.S. 376, 252 App. Div. 51, affirmed 17 N.E.2d 460, 279 N.Y. 606—**Corpus Juris cited in** Reed v. Davis, 251 N.Y.S. 704, 705, 141 Misc. 36, affirmed 249 N.Y.S. 929, 232 App.Div. 868, certiorari denied Davis v. Reed, 52 S.Ct. 314, 285 U.S. 542, 76 L.Ed. 934.
N.C.—Batson v. City Laundry Co., 170 S.E. 136, 205 N.C. 93—**Corpus Juris cited in** Bennett v. Powers, 135 S.E. 535, 537, 192 N.C. 599—Boswell v. Whitehead Hosiery Mills, 132 S.E. 598, 191 N.C. 549.
Okl.—Kansas City Bridge Co. v. Gravitt, 105 P.2d 767, 188 Okl. 30.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 218.
Tex.—Rio Bravo Oil Co. v. Matthews, Civ.App., 20 S.W.2d 342.
W.Va.—Moll v. Bayha, 150 S.E. 515, 108 W.Va. 173.
39 C.J. p 349 note 48.

Facts held not to show negligence
U.S.—Buffington v. Owosso Mfg. Co., C.C.A.Ark., 105 F.2d 692.
Ala.—Bankers' Mortg. Bond Co. v. Sproull, 124 So. 907, 220 Ala. 245.
Mass.—Manning v. Smith, 12 N.E.2d 845, 299 Mass. 318.
Miss.—Supreme Instruments Corporation v. Lehr, 1 So.2d 242, 190 Miss. 600.
Mo.—Newhouse v. St. Louis Bank Building & Equipment Co., 33 S.W. 2d 932, 326 Mo. 1047.
N.Y.—Angus v. De Graff, 279 N.Y.S. 805, 244 App.Div. 864.

since a place provided for employees in going to and from work is a place of work.[46] The mere fact that an unusual way was occasionally used by employees for convenience as a means of egress and ingress will not convert it into a passageway,[47] and, where an employee sustains injuries while unnecessarily taking a dangerous route instead of a safe route, he cannot contend that it was the duty of the employer to keep the route free from obstructions,[48] but the fact that there was another route, and that the route used was merely a private passageway, is immaterial where it has been used regularly to the knowledge of the employer.[49] At common law and in the absence of contract the duty of the employer does not extend to furnishing ways over premises not under his control.[50] Where, however, the employer contracts to do work on the premises of another, it has been held that he is under a duty to see that the means of ingress and egress on such premises are kept reasonably safe, even though he has no control over such means so that he can directly remedy conditions therein, where he can compel the owner to do so or refuse to proceed with the work until the condition is remedied.[51]

c. Lights

The duty to furnish a safe place of work includes the duty of furnishing sufficient light when necessary.

The duty of the master to furnish the servant with a safe place of work includes the duty of furnishing sufficient light when necessary for the place of work,[52] and this duty extends to passageways and stairways used by the servant in going to and from his work and from place to place in the course of his employment.[53] A master, however, will not

N.C.—King v. Bynum Printing Co., 166 S.E. 325, 203 N.C. 478.
39 C.J. p 349 note 48 [j].

Employer was only required to maintain factory floor in reasonably safe condition and guard against such accidents as reasonably prudent person under circumstances could have foreseen, as respects liability to employee injured when conveyor loaded with empty boxes turned over.—Wilson & Co. v. Holmes, 177 So. 24, 180 Miss. 361.

Floors

Particular circumstances often determine what is reasonably safe way.—Moll v. Bayha, 150 S.E. 515, 108 W.Va. 173.

Steps

An employer in furnishing a step to a rest room was required only to furnish a step which under the circumstances was reasonably safe, and the step was not required to be absolutely safe, or reasonably safe, provided the employer had used reasonable care to make it so; and reasonableness of an employer in maintaining a place or way must be defined in terms of an expectation that the servant will exercise reasonable care in using the place or way, and that is particularly true where injury is caused by a servant's missing his step.—Supreme Instruments Corporation v. Lehr, 1 So.2d 242, 190 Miss. 600.

46. N.Y.—Reed v. Davis, 251 N.Y.S. 704, 141 Misc. 36, affirmed 249 N.Y.S. 929, 232 App.Div. 868, certiorari denied Davis v. Reed, 52 S.Ct. 314, 285 U.S. 542, 76 L.Ed. 934—Landrigan v. Baker, Smith & Co., 151 N.Y.S. 29, 88 Misc. 555.

47. Ky.—Staley v. Wehmeier, 219 S.W. 408, 187 Ky. 445.
39 C.J. p 350 note 49.

48. Ill.—Convery v. Ramsey, 176 Ill. App. 542.
N.C.—Bennett v. Powers, 135 S.E. 535, 192 N.C. 599.

Private excursion

Employer's duty toward employee is limited to furnishing reasonably safe place to work, with proper facilities for ingress and egress, and does not extend to her protection while on private excursion outside such place.—Powers v. Raymond, 239 P. 1069, 197 Cal. 126.

49. Mo.—Arnold v. Graham, 272 S.W. 90, 219 Mo.App. 249.

50. Minn.—Novotny v. Bouley, 27 N.W.2d 813, 223 Minn. 592.
Miss.—Dravo Corporation v. Copeland, 199 So. 769, 190 Miss. 269.
N.Y.—Bryan v. Hines, 281 N.Y.S. 420, 245 App.Div. 322.
N.C.—Allen v. American Cotton Mills, 183 S.E. 380, 209 N.C. 238.
Okl.—Traders Compress Co. v. Steigler, 169 P.2d 205, 197 Okl. 204.

An invitation by the employer, not amounting to a direction, to use the premises of another as a means of ingress or egress does not impose liability.—Rio Bravo Oil Co. v. Matthews, Tex.Civ.App., 20 S.W.2d 342.

Employer's premises under control of third person

Employer was held not liable for injuries to employee while on way customarily used by employee across property owned by employer but which was under the exclusive control of a third person to whom the employer had granted a right of way.—Atkinson v. Corriher Mills Co., 158 S.E. 554, 201 N.C. 5.

51. Mo.—Arnold v. Graham, 272 S.W. 90, 219 Mo.App. 249.

52. Minn.—Corpus Juris cited in Gonyea v. Duluth, M. & I. R. Ry. Co., 19 N.W.2d 384, 388, 220 Minn. 225.
Mo.—Corpus Juris quoted in Cain v. Humes-Deal Co., 49 S.W.2d 90, 92, 329 Mo. 1107—Corpus Juris cited in King v. City of St. Louis, App., 155 S.W.2d 557, 561—Reynolds v. Al. G. Barnes Amusement Co., 300 S.W. 1062, 221 Mo.App. 1169.
39 C.J. p 350 note 51.

Facts held not to show negligence

Mass.—O'Brien v. Boston & M. R. R., 164 N.E. 446, 265 Mass. 527.
N.C.—King v. Bynum Printing Co., 166 S.E. 325, 203 N.C. 478.
Or.—Freeman v. Wentworth & Irwin, 7 P.2d 796, 139 Or. 1.
Tex.—San Antonio & A. P. Ry. Co. v. Biggs, Civ.App., 283 S.W. 627.
39 C.J. p 350 note 51 [b].

War-time dimout regulations

A hospital corporation, complying with proper governmental authority, whether civil or military, in lighting entrance way to hospital during war time in dimout area, cannot be charged with negligence, rendering it liable for injuries to nurse entering hospital, in insufficiently lighting entrance way.—Fellman v. Lebanon Hospital Ass'n of City of New York, 44 N.Y.S.2d 352, 180 Misc. 838.

53. Ill.—Corpus Juris cited in Miller v. Russell, 23 N.E.2d 775, 778, 302 Ill.App. 165.
Miss.—Supreme Instruments Corporation v. Lehr, 1 So.2d 242, 190 Miss. 600.
Wis.—Pettric v. Gridley Dairy Co., 232 N.W. 595, 202 Wis. 289.
39 C.J. p 351 note 52.

Domestic servant

(1) Domestic servant was not entitled to recover damages for injuries received in fall down stairs in her employers' home because hallway was not left lighted after all occupants of house retired at night

be guilty of negligence because of the absence of light where he has furnished a proper and complete equipment for lighting the place and has intrusted the turning on and off of the light, as an operative detail of the business, to a competent servant,[54] nor will he be liable for the failure of the coemployees as between themselves to avail themselves of the means of lighting at hand.[55] Liability for failure to furnish lights is not affected by the doctrine that the employer is not liable for injury resulting from a shifting character and condition of risk.[56]

d. Construction, Reconstruction, or Demolition of Building

Except as otherwise provided by statute or ordinance, the duty to furnish a reasonably safe place to work does not extend to buildings in the process of construction or of demolition or dismantling.

In general the obligation of a master to provide reasonably safe places and structures for his servant to work upon does not extend to buildings in process of construction,[57] or of demolition or dismantling,[58] where the successive temporary conditions through which such structures must pass in such operations must from the very nature thereof be dangerous; but the master has been held liable for injuries to a servant whose work, although part of construction, was not of a shifting character[59] or where the situation existed for such time as to give the employer notice thereof.[60]

A number of statutes have been enacted providing for the protection and safety of persons in and about the construction, repairing, alteration, or removal of buildings and other structures.[61] An employer is charged with notice of dangerous methods he is using in violation of the provisions of such a statute,[62] and ignorance of the statute offers no excuse for its violation,[63] and it has been held that a palpable violation of such a law will constitute gross negligence;[64] but an employee cannot predicate his action on a violation of the statute when his injuries were not due to any defects in the appliances or instrumentalities mentioned in the statute.[65] Such statutes are to be reasonably construed.[66] A statute providing that a person employing or directing an-

or because head of stairway was not protected by gate.—Bruce v. Baer, Mo.App., 76 S.W.2d 423.

(2) House owner was held not negligent, where domestic servant fell down open stairway to basement while groping for light switch, where no defect was shown in approach to steps or in steps.—Martin v. Davis, 170 A. 307, 111 Pa.Super. 420.

(3) Domestic servant employed in private dwelling house was not entitled to recover for injuries suffered in falling down unlighted stairway while engaged in performance of her duties, under statute requiring stairways, machinery, and dangerous places to be kept properly lighted during working hours, which was inapplicable to domestic service or agricultural labor.—Dahlen v. Polinsky, 263 N.W. 602, 195 Minn. 470.

54. Wis.—Miller v. Centralia Pulp & Water Power Co., 113 N.W. 954, 134 Wis. 316, 13 L.R.A.,N.S., 742.

55. U.S.—Buffington v. Owosso Mfg. Co., C.C.A.Ark., 105 F.2d 692.
Mich.—**Corpus Juris cited in** Walker v. Ginsburg, 222 N.W. 192, 244 Mich. 568.
N.Y.—Foster v. International Paper Co., 75 N.E. 933, 183 N.Y. 45.

56. Ga.—Evans v. Central of Georgia Ry. Co., 135 S.E. 760, 36 Ga. App. 58.
Exceptions to general rule as to conditions which are constantly changing see supra subdivision a of this section.

57. D.C.—**Corpus Juris quoted in** Decatur v. Chas. H. Tompkins Co., 25 F.2d 526, 528, 58 App.D.C. 102, 60 A.L.R. 402.
Fla.—Moody v. Hanlon, 179 So. 164, 131 Fla. 129.
Md.—**Corpus Juris quoted in** M. A. Long Co. v. State Acc. Fund, 144 A. 775, 781, 156 Md. 639.
Mass.—Beique v. Hosmer, 48 N.E. 338, 169 Mass. 541.
Mich.—Pentz v. Wetsman, 257 N. W. 735, 269 Mich. 496.
Miss.—**Corpus Juris cited in** Craig v. Craig, 5 So.2d 673, 674, 192 Miss. 271.
Mo.—**Corpus Juris cited in** Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 535, 337 Mo. 202—**Corpus Juris cited in** Cain v. Humes-Deal Co., 49 S.W.2d 90, 92, 329 Mo. 1107.
Neb.—Christenson v. Union Pac. R. Co., 290 N.W. 246, 137 Neb. 538, certiorari dismissed 61 S.Ct. 825, 312 U.S. 710, 85 L.Ed. 1142.
39 C.J. p 351 note 55.
Rule is not manifestly wrong or mischievous in operation
Miss.—Craig v. Craig, 5 So.2d 673, 192 Miss. 271.

58. D.C.—**Corpus Juris quoted in** Decatur v. Chas. H. Tompkins Co., 25 F.2d 526, 528, 58 App.D.C. 102, 60 A.L.R. 402.
Ky.—E. J. O'Brien & Co. v. Shelton's Adm'r, 55 S.W.2d 352, 246 Ky. 537.
Md.—**Corpus Juris quoted in** M. A. Long Co. v. State Acc. Fund, 144 A. 775, 781, 156 Md. 639.
Mich.—Reynolds v. Security Trust Co., 225 N.W. 575, 246 Mich. 670—**Corpus Juris cited in** Walker v. Ginsburg, 222 N.W. 192, 244 Mich. 568—McParland v. Stewart, 222 N. W. 191, 244 Mich. 565.
Mo.—**Corpus Juris cited in** Cain v. Humes-Deal Co., 49 S.W.2d 90, 92, 329 Mo. 1107.
39 C.J. p 351 note 56.

59. Miss.—Hamilton Bros. Co. v. Narciese, 158 So. 467, 172 Miss. 24.

60. Mo.—Farley v. Lehrack, App., 272 S.W. 987.

61. **General statute**
Statute relating to duty to provide safe place to work is applicable to a building under construction, alteration, or repair.—Sgandurra v. 220 Estates, 56 N.Y.S.2d 684, 185 Misc. 283, affirmed 61 N.Y.S.2d 910, 270 App.Div. 834, appeal denied 61 N.Y. S.2d 920, 270 App.Div. 884.

62. N.Y.—Flanagan v. F. W. Carlin Constr. Co., 118 N.Y.S. 953, 134 App.Div. 236.

63. Cal.—Hoffman v. Department of Industrial Relations, Division of Industrial Accidents and Safety, 287 P. 974, 209 Cal. 383, 68 A.L.R. 294.

64. Neb.—Butera v. J. C. Mardis Co., 157 N.W. 1024, 99 Neb. 815.

65. N.Y.—Giardina v. Bricken Textile Corporation, 276 N.Y.S. 352, 243 App.Div. 608, affirmed 198 N. E. 410, 268 N.Y. 572.
39 C.J. p 352 note 60.

66. Ind.—Lagler v. Byer, 85 N.E. 36, 42 Ind.App. 592.
39 C.J. p 352 note 61.
Temporary floors
(1) Where two stories of building intended to consist of more than

other to perform labor in the erection, repairing, altering, or painting of a house, building, or "structure" shall not furnish or erect any improper or defective scaffolding has been held to have no application to the work of tearing down a building.[67] It has also been held that, where the servant was injured by reason of a defective platform, the employer's liability could not be predicated on a failure to provide a safe place of work under a state employers' liability act, as he was not bound to guard against dangers incident to the work of razing structures.[68] An ordinance requiring the construction of a roof over the part of the sidewalk required to be kept clear in front of a building in process of erection is not limited to the protection of travelers on the street but is also for the benefit of employees at work on the building.[69]

e. Fire Escapes

In the absence of statute the safe-place rule does not require the master to provide fire escapes unless the business is hazardous because of its liability to fire.

It is no part of the duty of a master to a servant employed in a building properly constructed for the ordinary business carried on within it, in the absence of a statutory requirement,[70] to provide a means of escape from a fire which is not caused by his negligence,[71] although it has been held that, where the business is hazardous because of its liability to fire, the common law imposes on the master the duty to exercise ordinary care to provide means of escape for servants in case of fire.[72]

Statutes requiring the equipping of factories and mercantile establishments with sufficient and reasonable fire escapes are mandatory,[73] and an employer is not excused by the fact that no notice to provide such escapes has been given by any factory inspector,[74] nor can the requirement be dispensed with by a factory inspector when the enforcement has been intrusted to a state officer[75] or by the board of aldermen when jurisdiction is vested in a city department.[76] Substantial compliance with the statute is sufficient,[77] but the fact that a fire escape is built pursuant to the statute does not prove it to be adequate when the state prescribes no standard,[78] and the duty of the employer is not fulfilled by providing any number of means of egress, if the means of escape provided are not sufficient and reasonable means of escape in case of fire.[79]

§ 220. —— Platforms, Scaffolds, and Supports

The master must exercise ordinary care to see that a platform, scaffold, staging, or like structure furnished by him or built under his direction and control is reasonably safe for the purpose contemplated.

Where a master furnishes or causes to be built under his direction and control a platform, scaffold, staging, or like structure for the use of his servants in the furtherance of their work, it is his duty to exercise ordinary care to see that it is reasonably safe for the purpose contemplated,[80] although the

two stories are erected, statute requiring temporary floors to protect workmen requires that temporary floors be laid.—Hoffman v. Department of Industrial Relations, Division of Industrial Accidents and Safety, 287 P. 974, 209 Cal. 383, 68 A.L.R. 294.

(2) Duty of planking over, in compliance with labor law and city's building code, spaces on floors where iron workers were engaged is on general contractor.—Caminiti v. Matthews Const. Co., 272 N.Y.S. 245, 241 App.Div. 879.

(3) Contractor or builder is not required to lay temporary floor, where plans do not require permanent floors.—Crabb v. Oklahoma Gas & Electric Co., 250 P. 926, 120 Okl. 182.

(4) Other decisions with respect to temporary floors see 39 C.J. p 352 note 61 [b], [e]-[g].

Guarding of shafts

(1) Under a statute requiring temporary flooring every two floors of a building under construction, the space which need not be covered with temporary floors to protect workmen constructing building is space for elevator shaft or similar space.—Hoffman v. Department of Industrial Relations, Division of Industrial Accidents and Safety, 287 P. 974, 209 Cal. 383, 68 A.L.R. 294.

(2) Owner in control of building being erected was liable for death of contractor's employee, caused by failure to guard elevator shaft opening.—Lotocka v. Elevator Supplies Co., 158 N.E. 874, 246 N.Y. 295.

(3) Other decisions with respect to guarding shafts see 39 C.J. p 352 note 61 [f].

67. N.Y.—Burger v. Kirchhof, 168 N.Y.S. 239, 180 App.Div. 731.
39 C.J. p 352 note 63.

68. N.Y.—Kelly v. Battle Island Paper Co., 106 N.Y.S. 736, 122 App. Div. 185.

69. Mo.—Ward v. Ely-Walker Dry Goods Bldg. Co., 154 S.W. 478, 248 Mo. 348, 45 L.R.A.,N.S., 550.

70. Ala.—Birmingham R., Light & Power Co. v. Milbrat, 78 So. 224, 201 Ala. 368.
39 C.J. p 352 note 65.

71. Ala.—Birmingham R., Light & Power Co. v. Milbrat, supra.
39 C.J. p 353 note 66.

72. Mo.—Dakan v. G. W. Chase & Son Mercantile Co., 94 S.W. 944, 197 Mo. 238, 260.
39 C.J. p 353 note 67.

73. Ill.—Lichtenstein v. L. Fish Furniture Co., 111 N.E. 729, 272 Ill. 191, Ann.Cas.1918A 1087.
39 C.J. p 353 note 68.

74. Ill.—Lichtenstein v. L. Fish Furniture Co., supra.
39 C.J. p 353 note 69.

75. N.Y.—Maiorca v. Myers, 115 N.Y.S. 923, 131 App.Div. 210.

76. N.Y.—Gaspero v. Myers, 115 N.Y.S. 925, 131 App.Div. 915—Maiorca v. Myers, 115 N.Y.S. 923, 131 App.Div. 210.

77. N.Y.—Pauley v. Steam Gauge & Lantern Co., 29 N.E. 999, 131 N.Y. 90, 15 L.R.A. 194.
39 C.J. p 353 note 72.

78. Ill.—Lichtenstein v. L. Fish Furniture Co., 111 N.E. 729, 272 Ill. 191, Ann.Cas.1918A 1087.

79. Ill.—Devine v. L. Fish Furniture Co., 189 Ill.App. 136.

80. U.S.—E. I. Du Pont De Nemours & Co. v. Frechette, C.C.A.Minn., 161 F.2d 318.
Ark.—Fraser v. Norman, 42 S.W.2d

master is not held to the same quantum of care in the erection of platforms and scaffolds intended for temporary use as he is in the building and maintenance of more permanent structures;[81] and where the structure is erected by the workmen from material furnished by the master, and the master has no direction or control of the construction, he is not liable for injuries sustained by one of the workmen by reason of defects in the structure,[82] provided he has used reasonable care in his selection of proper and suitable material.[83] A master may adopt a platform or scaffold so constructed by his servants, and if he then furnishes such a structure to them for use in their work he will be liable for any injuries resulting from the defective manner of its construction.[84]

Statutory regulations. It has generally been held that a platform, scaffold, or support, although portable or temporary in character, is within the meaning of the words "ways, works, and machinery," or "plant" of the employer as used in the state employers' liability acts;[85] and, in the case of a scaffold, it has been held that this is true, even though the employee participated in the construction thereof,[86] although there is also authority to the contrary.[87] The duty of the master in respect of platforms, scaffolds, and supports has been specifically regulated by some statutes which generally impose an absolute duty on the employer,[88] and this duty requires an employer to furnish safe scaffolds and

569, 184 Ark. 434—Saxon v. Barksdale, 272 S.W. 647, 168 Ark. 973.
Iowa.—Casey v. Hansen, 26 N.W.2d 50.
Kan.—Sunderland v. Steanson, 252 P. 221, 122 Kan. 250.
Mo.—Miller v. Collins, 40 S.W.2d 1062, 328 Mo. 313—Brackett v. James Black Masonry & Contracting Co., 32 S.W.2d 288, 326 Mo. 387—Guthrie v. Gillespie, 6 S.W.2d 886, 319 Mo. 1137—Wright v. Kansas City Structural Steel Co., 157 S.W.2d 582, 236 Mo.App. 872—Klaber v. Fidelity Bldg. Co., App., 19 S.W.2d 758.
N.C.—Butler v. Armour & Co., 137 S.E. 813, 193 N.C. 632—Fowler v. Carolina Cross Arm & Conduit Co., 133 S.E. 188, 192 N.C. 14.
S.D.—Voet v. Lampert Lumber Co., 15 N.W.2d 579.
Vt.—Travelers' Ins. Co. v. Evans, 143 A. 290, 101 Vt. 250.
Wash.—Hamre v. Rothschild & Co., 240 P. 909, 136 Wash. 522.
39 C.J. p 353 note 77.

If employer furnishes defective timbers to injured laborers, and directs them to use them, it is immaterial to employer's liability that employer had nondefective timbers available.—Miller v. Collins, 40 S.W.2d 1062, 328 Mo. 313.

Facts held not to show negligence
Ark.—Gerig v. Furr, 39 S.W.2d 1021, 183 Ark. 1036.
Mass.—Carroll v. Wilcutt, 39 N.E. 1016, 163 Mass. 221.
Wash.—Broughton v. Oregon-Washington R. & Nav. Co., 244 P. 558, 138 Wash. 298.
39 C.J. p 353 note 77 [g].

81. U.S.—Phœnix Bridge Co. v. Castleberry, S.C., 131 F. 175, 65 C.C.A. 418.
39 C.J. p 355 note 78.

82. Ark.—Fraser v. Norman, 42 S.W.2d 569, 184 Ark. 434.
Fla.—American Box & Lumber Co. v. Chandler, 138 So. 29, 102 Fla. 907.
Mass.—Adasken v. Gilbert, 43 N.E. 199, 165 Mass. 443—Burns v. Washburn, 36 N.E. 199, 160 Mass. 457.
N.H.—Ireland v. E. J. Pinney, Inc., 18 A.2d 750, 91 N.H. 323.
N.C.—Fowler v. Carolina Cross Arm & Conduit Co., 133 S.E. 188, 192 N.C. 14.
Tex.—Hunt v. Robinson, Civ.App., 55 S.W.2d 166.
Vt.—La Coe v. Kinsley, 169 A. 901, 106 Vt. 109.
Wash.—Hamre v. Rothschild & Co., 240 P. 909, 136 Wash. 522.
39 C.J. p 355 note 79.

Duty of employee to select material
A carpenter's employer which furnished material for construction of staging by carpenter was not liable for injuries sustained by carpenter when defective plank in staging floor broke while carpenter was standing thereon where there was no evidence that supply of planks used for staging did not contain a sufficient number of suitable quality for use in staging, or evidence that any planks were defective when brought to premises, or that defect and cement coating on plank did not arise during course of work on project in which carpenter was engaged, and carpenter knew that it was part of his work to determine whether planks were fit for use and to reject unsuitable ones, and carpenter had no reason to believe that employer had inspected planks after they were brought to premises.—Ireland v. E. J. Pinney, Inc., 18 A.2d 750, 91 N.H. 323.

Skill of employee
With respect to employer's liability for furnishing defective timbers, carpenters but not laborers are charged with detecting defective wood.—Miller v. Collins, 40 S.W.2d 1062, 328 Mo. 313.

83. Fla.—American Box & Lumber Co. v. Chandler, 165 So. 382, 122 Fla. 169.
Mich.—Clingenpeel v. Hill, 213 N.W. 703, 238 Mich. 493.
N.H.—Ireland v. E. J. Pinney, Inc., 18 A.2d 750, 91 N.H. 323.
Vt.—La Coe v. Kinsley, 169 A. 901, 106 Vt. 109.
Wash.—Hamre v. Rothschild & Co., 240 P. 909, 136 Wash. 522.
39 C.J. p 355 note 80.

Duty of employee
Ordinarily duty of adjusting planks, laid down loosely on scaffold in usual way, devolves on servants using scaffold, and a contractor, taking over scaffold erected by building contractor and leaving arrangement of loose planks thereon to his workmen or their tenders, is not guilty of negligence rendering him liable to workman for injuries caused by tender's selection of planks too short to span uprights.—McIntyre v. McIntyre, 171 A. 329, 86 N.H. 479.

Error of judgment
Employee has no cause of action against employer for injuries from using defective materials for scaffolding because of mistake in judgment.—Vasey v. McLean, 165 A. 241, 310 Pa. 282.

84. Ind.—Wolfe v. Griner, 119 N.E. 839, 67 Ind.App. 698.
N.H.—Vaisbord v. Nashua Mfg. Co., 69 A. 520, 74 N.H. 470.
Wash.—Cheatham v. Hogan, 97 P. 499, 50 Wash. 465, 22 L.R.A.,N.S., 951.

85. U.S.—Delaware, L. & W. R. Co. v. Perrotta, 238 F. 78, 151 C.C.A. 154.
39 C.J. p 356 note 83.

86. N.Y.—Keyser v. Reid-Palmer Constr. Co., 138 N.Y.S. 452, 78 Misc. 393.

87. Ala.—Gulf States Steel Co. v. Jones, 83 So. 356, 203 Ala. 450, 23 A.L.R. 702.
39 C.J. p 356 note 85.

88. N.Y.—Johnson v. Johnson, 292 N.Y.S. 921, 249 App.Div. 859.
Or.—Hollopeter v. Palm, 291 P. 380,

act.[19] Where a statute requires an employer to examine frequently and keep in sound condition the ropes, gearing, and other parts of an elevator, an absolute liability on the part of the employer is not thereby created and he does not, by reason thereof, become an insurer of the safety of an employee, but his duty is discharged if there is such a frequent examination, and the parts of the elevator are kept as free from danger as the nature of the employment reasonably permits.[20]

§ 222. —— Mines, Quarries, and Excavations

a. In general
b. Mines
c. Trenches, tunnels, and other excavations
d. Blasting

a. In General

A master employing a servant in a mine, quarry, tunnel, pit, trench, or other excavation must use reasonable care to make his place of work as reasonably safe as the nature of the work permits, and must comply with statutory requirements enacted for the protection of servants engaged in such employment.

Where a servant is employed in a mine, quarry, tunnel, pit, trench, or other excavation, the master owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work permits.[21] Where, however, it is the duty of the workmen to shore up, or otherwise make safe, the place of work as the work progresses, the master's duty is fulfilled when he furnishes them with suitable material for the purpose,[22] nor does the general rule apply to a place which is constantly changing by reason of the work done[23] except where the servant's work does not contribute to the unsafe condition.[24]

Statutory regulations. The negligent failure of a master to comply with statutory requirements which have been enacted for the protection of a servant engaged in such employment will render him liable for injuries resulting to the latter therefrom.[25] The right to recover under such a statute may be based on an inadvertent failure to comply with its requirements as well as on an intentional violation thereof,[26] and where a statute gives a cause of action for a willful violation thereof, it is only necessary to show an intentional and conscious refusal to comply therewith and it is no defense to such an action that the employer acted in good faith.[27] Under such a statute it has been held that the employer is liable not only when the dangerous conditions are known to him, but also when, by the exercise of reasonable care, he could have discovered them.[28] In order to hold a master liable for a violation of the statute, the servant must be shown to be within the class contemplated by the statute and within the purpose and protection for which the law was enacted.[29] Such statutes must be construed according to the natural, obvious, and popular meaning of their language.[30] The fact that a statute fixes a penalty for its violation does not exclude an action for damages.[31]

b. Mines

(1) In general
(2) Timbering or propping root
(3) Elevators and hoists
(4) Ventilation
(5) Escapements and places of refuge

(1) In General

A mine owner or operator must exercise reasonable care to keep all places used in general by the miners in the prosecution of the work of the mine in as reasonably safe a condition as the nature of the work

19. Or.—Nielsen v. Portland Gas, etc., Co., 147 P. 554, 76 Or. 505.
39 C.J. p 361 note 13.

20. Ohio.—Kuhn v. Cincinnati Tract. Co., 142 N.E. 370, 109 Ohio St. 263.
"Sound" as used in statute requiring owner or operator to keep elevator in sound condition is not synonymous with "perfect" but is synonymous with "safe" as defined by statute, namely, as free from danger to the life, safety, and welfare of the employee as the nature of the employment will reasonably permit.—Wilms v. Klein, Ohio App., 49 N.E. 2d 76.

21. Okl.—**Corpus Juris cited in** Oklahoma City v. Caple, 105 P.2d 209, 212, 187 Okl. 600.
39 C.J. p 361 note 16.

22. Ark.—Mammoth Vein Coal Co. v. Bubliss, 104 S.W. 210, 83 Ark. 567.
39 C.J. p 362 note 17.

23. Okl.—**Corpus Juris cited in** Oklahoma City v. Caple, 105 P.2d 209, 212, 187 Okl. 600.
39 C.J. p 363 note 18.

24. Ark.—Mercury Mining Co. v. Chambers, 102 S.W.2d 543, 193 Ark. 771.
Ky.—Helton v. Gunn Coal Mining Co., 79 S.W.2d 695, 258 Ky. 168—Duvin Coal Co. v. Fike, 38 S.W.2d 201, 238 Ky. 376.

25. U.S.—Brown v. Pacific Coast Coal Co., Wash., 36 S.Ct. 701, 241 U.S. 571, 60 L.Ed. 1177.
39 C.J. p 363 note 19.

26. Ala.—Wolf v. Smith, 42 So. 824, 149 Ala. 457, 9 L.R.A.,N.S., 338.
39 C.J. p 364 note 20.

27. Ill.—Cook v. Big Muddy-Carterville Min. Co., 94 N.E. 90, 249 Ill. 41.
39 C.J. p 364 note 21.

28. Ill.—Souleyret v. O'Gara Coal Co., 161 Ill.App. 60.
39 C.J. p 364 note 22.

29. Ill.—Brunnworth v. Kerens-Donnewald Coal Co., 103 N.E. 178, 260 Ill. 202.
39 C.J. p 364 note 23.

30. Ark.—Harger v. Harger, 222 S. W. 736, 144 Ark. 375.
39 C.J. p 364 note 24.

31. Tenn.—American Zinc Co. v. Graham, 179 S.W. 138, 152 Tenn. 586.

permits, and must comply with statutory provisions enacted for the protection of miners with respect to their place of work.

It is the duty of a mine owner or operator to use ordinary care and diligence to keep its entries, passageways, and other places used in general by the miners in the prosecution of the work of the mine in as reasonably safe a condition as the nature of the work permits,[32] but, where the place of work is constantly changing by reason of the progress of the work of the miner himself, the rule that it is the master's duty to furnish a safe place of work does not apply.[33] So also a mine owner or operator will not be liable for the injuries occurring while the employee is engaged in making a dangerous place safe;[34] but this rule does not apply to an employee whose work is not mining but cleaning debris from a chamber.[35]

A number of statutes have been enacted for the protection of miners in respect of their place of work.[36] Such statutes are to be reasonably construed,[37] and in order to recover the miner must show that he is within the class contemplated by the statute and within its purpose and protection.[38] A mine owner or operator who negligently fails to comply with the requirements of the statute will be liable for resulting injuries,[39] and may be liable although the statute neither attaches a penalty nor provides a remedy for failure to comply with its terms.[40]

The provisions of an act that no one shall be allowed to enter a mine to work therein except under the directions of the mine manager "until all conditions have been made safe" apply to all dangerous places whether such places are dangerous by virtue of their original construction or conditions subsequently arising;[41] and to permit a miner to enter a mine to work therein otherwise than under the direction of the mine manager renders the mine owner liable for a willful violation of the act.[42] Noncompliance with a statutory requirement that the mine examiners shall inspect all places where men are expected to pass or work and when a dangerous condition is discovered shall make a mark

32. Ark.—Bates Coal & Mining Co. v. Mannon, 168 S.W.2d 408, 205 Ark. 215—New Union Coal Co. v. Sult, 290 S.W. 580, 172 Ark. 753.
Ky.—Harlan Central Coal Co. v. Gemmeno's Adm'r, 178 S.W.2d 217, 296 Ky. 828.
Okl.—Adamson v. Allende, 62 P.2d 1229, 178 Okl. 464.
Tenn.—McGinniss v. Brown, App., 204 S.W.2d 334.
Tex.—Hernandez v. Malakoff Fuel Co., Civ.App., 109 S.W.2d 356, error dismissed.
39 C.J. p 364 note 26.

Prevailing circumstances to be considered
The duty of a mining company to furnish a servant a safe place for work depends on circumstances prevailing at time of injury and on the facts shown by the proof.—Billiter & Shurtleff Coal Co. v. Luster, 190 S.W.2d 683, 301 Ky. 17—Duvin Coal Co. v. Fike, 38 S.W.2d 201, 238 Ky. 376.

General instructions to coal loaders to inspect working place were held not to preclude operation of safe-place doctrine.—Duvin Coal Co. v. Fike, 38 S.W.2d 201, 238 Ky. 376.

Blacksmith shop
Mine company, knowing of miners' custom to leave picks in blacksmith shop, must use ordinary care to make shop safe, and is liable for miner's injuries in explosion if by ordinary care it could have known that carbide cans were exposed at place which miners might frequent.—W. A. Wickliffe Coal Co. v. Ryan, 44 S.W.2d 525, 241 Ky. 537.

Rules or customs of coal mine are not conclusive in determining whether master was required to furnish servant safe place to work.—Duvin Coal Co. v. Fike, 38 S.W.2d 201, 238 Ky. 376.

33. Ark.—New Union Coal Co. v. Sult, 290 S.W. 580, 172 Ark. 753.
Ky.—Duvin Coal Co. v. Fike, 38 S.W. 2d 201, 238 Ky. 376.
39 C.J. p 365 note 27.

Removal of supporting pillar
Experienced miner is without remedy, as matter of law, for injuries from fall of slate and rock from roof of mine, when supporting pillar, from which he was removing coal, gave way, since he was working at a place where he had no right to work and was doing what he was not employed to do, and must have known that to remove the pillar was dangerous.—Quinn v. O'Bryan, 281 S.W. 1020, 213 Ky. 776.

34. Ky.—Williamson v. Blue Grass Fluorspar Co., 160 S.W. 920, 156 Ky. 226.
39 C.J. p 365 note 28.

35. U.S.—Splint Coal Corporation v. Anderson, C.C.A.Ky., 109 F.2d 896, certiorari denied 61 S.Ct. 18, 311 U.S. 661, 85 L.Ed. 424.

36. **Protection from gas**
(1) The duty of a fire boss of a mine to examine the conditions of the mine, when gas is known to exist therein, before men are permitted to enter for work, is a duty of "superintendence," within employers' liability act making an employee liable for injury caused by the negligence of one intrusted with superintendence, while in the exercise of such superintendence, and this is true irrespective of code providing that when gas is known to exist in a mine the operator must employ a competent fire boss to examine every place in the mine before men are permitted to enter for work.—Pratt Cons. Coal Co. v. Davidson, 55 So. 886, 173 Ala. 667.
(2) Statutory provision for safeguards and protection from gas in abandoned parts of mine applied only to gaseous mines and not to a mine where no gaseous condition had been previously found or known to exist.—Raven Red Ash Coal Co. v. Griffith, 27 S.E.2d 360, 181 Va. 911.

The absence of safety appliances on coal cars constitutes a defect in the ways, works, machinery or appliances within employers' liability act.—Burnwell Coal Co. v. Setzer, 67 So. 604, 191 Ala. 398.

37. Ark.—Harger v. Harger, 222 S. W. 736, 144 Ark. 375.
39 C.J. p 366 note 34, p 367 note 42.

38. Ariz.—Moreno v. Moore, 57 P. 2d 316, 47 Ariz. 529.
39 C.J. p 368 note 43.

39. U.S.—Pocahontas Cons. Collieries Co., Inc., v. Johnson, Va., 244 F. 368, 156 C.C.A. 654.
39 C.J. p 366 note 30.

40. Ala.—Wolf v. Smith, 42 So. 824, 149 Ala. 457, 9 L.R.A.,N.S., 338.

41. Ill.—Dunham v. Black Diamond Coal Co., 146 Ill.App. 140, affirmed 88 N.E. 216, 239 Ill. 457.

42. Ill.—Olson v. Kelly Coal Co., 86 N.E. 88, 236 Ill. 502.
39 C.J. p 366 note 33.

thereat will make the employer liable for resulting injuries,[43] and a servant employed for the purpose of making dangerous places safe is entitled under such a provision to receive notice, and be informed, of all dangerous places found by the mine examiner,[44] but, when such places have been marked, the statutory provision that all dangerous places in a mine shall be made safe before a company man engaged for that purpose shall be permitted to enter under the direction of the mine manager does not apply, and the master may send a servant to make a place safe without incurring liability during the progress of the work.[45] A mine foreman statute does not absolve the mine operator from his duty to exercise reasonable care to provide a safe place to work except in so far as such duty is devolved on the mine foreman.[46] Where a duty is imposed in part on the mine foreman and in part on the operator, the latter will be liable for injuries arising from his failure to comply with the statute.[47] If an employer who has employed a mine boss in compliance with the statutory requirements ousts him from the discharge of his duty and undertakes the performance of such duty himself, it is liable for injuries resulting from its negligence with respect thereto.[48] Where a mine foreman statute requires a foreman if employees in the mine exceed a certain number, an employee working outside the mine is not to be included in determining whether the number comes within the provision.[49]

What constitutes a mine within the terms of a specific statute depends on the facts of the particular case;[50] and the size of the mine has been held immaterial on the question whether a particular statute is applicable.[51] Statutes regulating the employer's duty as to mine safety have been held not abrogated by passage of a workmen's compensation act.[52] A statute requiring the furnishing of respirators to certain classes of employees has been held not applicable to miners.[53]

(2) Timbering or Propping Roof

At common law the master has the duty to keep roofs of entries and other parts of a mine used in general by the miners in a safe condition, while the miner must timber the roof of the particular room where he is working. There must be a compliance with statutory provisions relative to the duty of the owner or operator to keep roofs in a safe condition and to furnish mine props.

Under the common law it is the duty of the master to keep the roofs of entries, haulways, and other parts of the mine used in general by the miners in a safe condition,[54] but the owner is not an insurer of the safety thereof.[55] On the other hand, under the general rule, discussed supra § 219, that, where the place of work is constantly changing as the work progresses, a master will not be liable for injuries sustained by the workman by reason of the dangers arising in the progress of such work, it is the duty of the miner to timber the roof of a particular room where he is working,[56] although it has been held that this duty on the part of the miner may be changed by the custom of the mine.[57] However, the mere fact that the miner was at his place of work when injured is not determinative of the question whether it was his duty to look out for his own safety,[58] and the mere fact that he was working at a particular place does not constitute such place his working place.[59] Moreover, the general rule in re-

43. Ill.—Mertens v. Southern Coal & Mining Co., 85 N.E. 743, 235 Ill. 540.
39 C.J. p 367 note 35.

44. Ill.—Piazzi v. Kerens-Donnewald Coal Co., 104 N.E. 200, 262 Ill. 30.
39 C.J. p 367 note 36.

45. Ill.—Piazzi v. Kerens-Donnewald Coal Co., 104 N.E. 200, 262 Ill. 30.
39 C.J. p 367 note 37.

46. U.S.—Barnes & Tucker Coal Co. v. Vozar, 227 F. 25, 141 C.C.A. 579.
39 C.J. p 367 note 39.

47. Pa.—Saylor v. Chartiers Coal & Coke Co., 31 Pa.Super. 447.

48. W.Va.—May v. Davis Coal & Coke Co., 76 S.E. 342, 71 W.Va. 220.

49. W.Va.—Powell v. Mitchell, 196 S.E. 153, 120 W.Va. 9.

50. Ill.—Shomidie v. Brewerton, 234 Ill.App. 173.

51. Colo.—Dalrymple v. Sevcik, 251 P. 134, 80 Colo. 297.

52. Mo.—Span v. Jackson, Walker Coal & Mining Co., 16 S.W.2d 190, 322 Mo. 158—Maurizi v. Western Coal & Mining Co., 11 S.W.2d 268, 321 Mo. 378.

53. U.S.—Pryor v. National Lead Co., C.C.A.Mo., 87 F.2d 461.

54. Ky.—Gibralter Coal Mining Co. v. Collins, 36 S.W.2d 372, 237 Ky. 765—Gibraltar Coal Mining Co. v. Miller, 25 S.W.2d 38, 233 Ky. 129.
Mo.—Biondi v. Central Coal & Coke Co., App., 297 S.W. 171, affirmed 9 S.W.2d 596, 320 Mo. 1130.
39 C.J. p 368 note 44.

55. Ky.—Hall v. Proctor Coal Co., 34 S.W.2d 425, 236 Ky. 813.

56. Ky.—Perkins-Harlan Coal Co. v. Mercer, 32 S.W.2d 14, 235 Ky. 618.
39 C.J. p 368 note 45.

Duty as affected by foreman's order
Where it is duty of miner to timber roof of room where he is working, coal company is not liable to miner, injured by fall of slate, on theory that he was ordered to work in a dangerous place, because foreman had instructed him to remove slate or timber it.—Perkins-Harlan Coal Co. v. Mercer, supra.

57. Ky.—Stringer v. York. 170 N.W. 527, 161 Ky. 125.

Where miner operator or agent undertakes to perform timbering work in mine himself, he is bound to perform it with reasonable care, and, where mine foreman sent experienced timberman to see about rendering room in mine safe, it was timberman's duty as operator's representative, to place timbers so that miner would be reasonably safe from danger, even if it was originally duty of miner to place the timbers.—Cain v. Sisk, 72 S.W.2d 1061, 18 Tenn. App. 84.

58. Mo.—Schillings v. Big Creek Coal Co., App., 277 S.W. 964.

59. Mo.—Biondi v. Central Coal & Coke Co., 9 S.W.2d 596, 320 Mo. 1130.

spect of the duty of the mine operator does not extend to a servant who has been employed for the specific purpose of making a dangerous place safe.[60]

Statutory provisions. Under statutes in effect declaratory of the common law it is the mine operator's duty to keep the roofs of passageways and places used in general by the miner in a safe condition[61] and the miner's duty to prop and protect his place of work;[62] but it has been held that the statutory duty of the miner properly to support the roof and entries under his control may be modified by agreement.[63] A statute requiring every workman in need of props and timbers to give notification of such fact to the owner does not in turn impose on every miner the duty of complying with the statute, but the custom of the mine may be proved for the purpose of showing on whom the duty of propping rests,[64] and even if the company's rules imposed such a duty on every miner such rules may be shown to have been waived.[65]

Under some statutes mine owners must furnish suitable props when required for the working place of the miner,[66] and in some cases it is required that such props shall be kept in a place of easy access to the miner.[67] Under other statutes the duty of the master to furnish sufficient props and timbers arises only after demand by the employee.[68] Where the statute imposes the duty on the mine owner of supplying props without qualification, it is not necessary that a request for them should have been made by the miner in order to hold the owner liable.[69] Where the statute gives the right to the miner to determine the length and dimensions of the props desired, the master must furnish the particular and specified kind, if the demand is not unusual,[70] but, where the demand is general and not specific, the master will not be deemed guilty of a willful violation of the act if he has furnished what in his best judgment will suffice for the purpose.[71] Where the duty of the operator to furnish props is dependent on the miner's first having selected and marked the props he desired from a supply to be maintained by the operator within a reasonable distance from the mine, the miner cannot recover because of the operator's failure to furnish the props unless he had previously selected and marked such as he needed,[72] and, when so provided by statute, unless he has designated the places of delivery of the timber selected,[73] and his failure cannot be excused by a custom of the mine;[74] but where the operator has not kept such a supply conveniently accessible the miner is not required to select and mark, and his request will be sufficient to impose on the operator the duty of furnishing props.[75]

The failure of the owner to comply with statutory requirements as to furnishing of props or timbers constitutes actionable negligence[76] although it has been held that the defense of contributory negligence may be availed of by the operator.[77] Only those having use for props and the right to demand them may complain of a willful violation on the part of the mine manager to comply with such demand.[78]

(3) Elevators and Hoists

The owner or operator must use reasonable care to furnish and maintain in proper repair suitable elevators and hoists, and appliances used in connection therewith, and he must comply with appropriate statutory requirements.

The master must use reasonable care to provide proper elevators and hoists in mines and appliances

60. Ky.—Stohega Coke & Coal Co. v. Clark, 269 S.W. 1021, 205 Ky. 745.
39 C.J. p 369 note 47.

61. Ind.—Antioch Coal Co. v. Rockey, 82 N.E. 76, 169 Ind. 247.
39 C.J. p 369 note 49.

62. Iowa.—Erickson v. Mapel Block Coal Co., 167 N.W. 105, 183 Iowa 1292.
39 C.J. p 369 note 50.

63. Iowa.—Braddich v. Phillips Coal Co., 138 N.W. 406, 159 Iowa 402.
39 C.J. p 369 note 51.

64. Ky.—Borderland Coal Co. v. Kirk, 203 S.W. 534, 180 Ky. 691, 695.
39 C.J. p 369 note 52.

65. Ky.—Borderland Coal Co. v. Kirk, 203 S.W. 534, 180 Ky. 691.

66. Ark.—Southern Anthracite Coal Min. Co. v. Rice, 245 S.W. 805, 156 Ark. 94.
39 C.J. p 369 note 54.

67. Kan.—Henry v. Missouri, K. & T. R. Co., 155 P. 578, 97 Kan. 682, 15 A.L.R. 1427.
39 C.J. p 370 note 55.

68. Ill.—Springfield Coal Min. Co. v. Gedutis, 81 N.E. 9, 227 Ill. 9—Morris v. Taylor Coal Co., 206 Ill.App. 100.
39 C.J. p 370 note 56.

69. Okl.—Consolidated Fuel Co. v. Coursen, 219 P. 911, 96 Okl. 40.

70. Ill.—Hackart v. Decatur Coal Co., 90 N.E. 257, 243 Ill. 49.
39 C.J. p 370 note 58.

71. Ill.—Hackart v. Decatur Coal Co., 90 N.E. 257, 243 Ill. 49—Sugar Creek Min. Co. v. Peterson, 52 N. E. 475, 177 Ill. 324—Meunier v. Chicago & Carterville Coal Co., 180 Ill.App. 114.

72. Ky.—Thacker v. Shelby Coal Min. Co., 197 S.W. 633, 177 Ky. 193.
39 C.J. p 370 note 60.

73. Ala.—Altoona Coal Co. v. Kelly, 83 So. 62, 203 Ala. 338—Clark v. Choctaw Min. Co., 78 So. 372, 201 Ala. 466.

74. Ky.—Palmer v. Empire Coal Co., 172 S.W. 97, 162 Ky. 130.
39 C.J. p 370 note 62.

75. Ky.—Thacker v. Shelby Coal Min. Co., 197 S.W. 633, 177 Ky. 193.
39 C.J. p 370 note 63.

76. Ark.—Brown v. Hames, 179 S.W. 2d 689, 207 Ark. 196.
Mo.—Reed v. Blue Jay Coal & Mining Co., App., 287 S.W. 852.
39 C.J. p 370 note 64.

77. Ark.—Mammoth Vein Coal Co. v. Johnson, 127 S.W. 971, 94 Ark. 621.
39 C.J. p 371 note 65.

78. Ill.—Southern Coal & Mining Co. v. Hopp, 133 Ill.App. 239.
Mo.—McKinnon v. Western Coal & Mining Co., 96 S.W. 485, 120 Mo. App. 148.
39 C.J. p 371 note 66.

used in connection therewith and must maintain them in proper repair,[79] and in many states the nature and use of such places and equipment has been made the subject of statutory regulations so that an employee may recover in an action for injuries based on negligence in not complying with such a statute when the object of the statute is the protection of the employee.[80] The fact that a penalty is imposed for a violation thereof does not make an operator violating such a statute immune from civil liability,[81] and the employer cannot excuse nonperformance on the ground that he cannot comply with the statute by exercising ordinary care.[82] Such statutes are in general to be reasonably construed[83] although it has been held that they should receive a liberal construction to give the greatest effect to their purposes.[84]

(4) Ventilation

The owner of a mine must furnish sufficient ventilation in the mine for the safety of his employees.

It is the common-law duty of the operator to use ordinary care to furnish sufficient ventilation in the mine for the safety of his employees.[85] Under some statutes the duty is imposed on a mine owner or operator to maintain a certain amount of ventilation and to keep the mine free from noxious gases[86] and he will be liable for injuries resulting from his failure to comply with the provisions of such a statute.[87] It is no defense to an action for negligence based on noncompliance with the statute that it is not practicable to comply therewith.[88] In order to impose liability failure need not be willful,[89] and a conscious neglect to comply with such a statute is "willful" neglect within the meaning of that term as used in the statute.[90] The duty imposed by such a statute cannot be avoided by the owner entering into a contract with a third person for the operation of the mine.[91] Where a mine has progressed to the extent that coal has been taken therefrom, it is within the purview of the statute whose application is not restricted to cases where the coal is being marketed and sold.[92] Where, however, the owner or operator has provided and maintained ample means of ventilation prescribed by the statute, he will not be liable for the negligence with respect thereto of a competent mine boss employed pursuant to a statute.[93] Although there is authority to the contrary,[94] statutory provisions requiring elimination of smoke and noxious gases have been held not to impose a duty on the employer to eliminate dust incident to mining operations,[95] and whether the employer is liable in such case must be determined by whether he furnished a safe place to work as measured by the standards of the common law.[96]

(5) Escapements and Places of Refuge

Reasonable care must be exercised to provide reasonably safe means of escape from a mine.

Under statutes so providing[97] as well as at com-

79. U.S.—Lehigh Valley Coal Co. v. Shandalla, N.Y., 205 F. 715, 124 C.C.A. 83.
39 C.J. p 371 note 67.

A signal rope in a mine extending from the hoisting engine on top into the mine, used to signal the engineer, is part of the "ways, works, machinery, or plant."—New Connellsville Coal & Coke Co. v. Kilgore, 50 So. 205, 209, 162 Ala. 642.

80. Mo.—Welch v. Kansas City Midland Coal & Mining Co., 132 S.W. 49, 151 Mo.App. 438.
39 C.J. p 371 note 69.

81. Mont.—Maronen v. Anaconda Copper Min. Co., 136 P. 968, 48 Mont. 249.

82. Mont.—Maronen v. Anaconda Copper Min. Co., supra.

83. Mont.—Maronen v. Anaconda Copper Min. Co., supra.
39 C.J. p 371 note 72.

84. Nev.—Ex parte Douglass, 295 P. 447, 53 Nev. 188.
39 C.J. p 371 note 73.

85. Pa.—Venzel v. Valley Camp Coal Co., 156 A. 240, 304 Pa. 583.
39 C.J. p 371 note 75.

86. Minn.—Applequist v. Oliver Iron Mining Co., 296 N.W. 13, 209 Minn. 230.

87. Minn.—Applequist v. Oliver Iron Mining Co., supra.
Mo.—Knaup v. Western Coal & Mining Co., 114 S.W.2d 969, 342 Mo. 210.
Pa.—Kashuba v. Glen Alden Coal Co., Com.Pl., 37 Luz.Leg.Reg. 425.
39 C.J. p 372 note 77.

Employer as insurer

An employer is made an insurer pro tanto under a statute requiring employer to provide an air current sufficient to remove smoke and noxious gases and to insure safety of every employee along every passageway and working place.—Stornelli v. U. S. Gypsum Co., C.C.A.N.Y., 134 F.2d 461, certiorari denied United States Gypsum Co. v. Stornelli, 63 S.Ct. 1317, 319 U.S. 760, 87 L.Ed. 1712, rehearing denied 63 S.Ct. 1445, 320 U.S. 214, 87 L.Ed. 1851.

88. Ark.—Central Coal & Coke Co. v. Barnes, 233 S.W. 683, 149 Ark. 533.

89. Mo.—Knaup v. Western Coal & Mining Co., 114 S.W.2d 969, 342 Mo. 210.

90. Kan.—Cheek v. Missouri, K. & T. R. Co., 131 P. 617, 89 Kan. 247.
39 C.J. p 372 note 79.

91. Ky.—Stearns Coal Co. v. McPherson, 139 S.W. 971, 144 Ky. 730.
39 C.J. p 372 note 80.

92. Ky.—Interstate Coal Co. v. Baxavenie, 137 S.W. 859, 144 Ky. 172.

93. W.Va.—Squilache v. Tidewater Coal & Coke Co., 62 S.E. 446, 64 W.Va. 337.
39 C.J. p 372 note 82.

94. U.S.—Stornelli v. U. S. Gypsum Co., C.C.A.N.Y., 134 F.2d 461, certiorari denied United States Gypsum Co. v. Stornelli, 63 S.Ct. 1317, 319 U.S. 760, 87 L.Ed. 1712, rehearing denied 63 S.Ct. 1445, 320 U.S. 214, 87 L.Ed. 1851.

95. Pa.—Prattico v. Hudson Coal Co., 32 A.2d 733, 347 Pa. 490.

96. Pa.—Prattico v. Hudson Coal Co., supra.

97. U.S.—Roberts v. Tennessee Coal, Iron & R. Co., Ala., 255 F. 469, 166 C.C.A. 545, certiorari denied 40 S. Ct. 9, 250 U.S. 659, 63 L.Ed. 1194.
39 C.J. p 372 note 83.

mon law,[98] it is the duty of the owner or operator of a coal mine to exercise reasonable care to see that a place which a servant is invited to use as an escape way is reasonably safe. The company will be liable for its negligent failure to keep such a way reasonably safe for a miner who was invited to use it as a passage whether or not he was actually engaged in his duties.[99]

c. Trenches, Tunnels, and Other Excavations

It is the duty of the master to furnish a reasonably safe place of work to employees working in quarries, pits, trenches, and other excavations.

It is the duty of the master to furnish a reasonably safe place of work to employees working in quarries, pits, trenches, and other excavations,[1] and, although he will not be liable for injuries resulting from the fact that the place of work is made dangerous by the progress of the work itself,[2] he will be liable where the injury results from a danger, outside of the ordinary progress of the work, of which he had, or should have had, knowledge,[3] or where the work is being done under his direction or control or the direction and control of his agent.[4] When an employee has called to the attention of a foreman in charge a dangerous condition and is ordered to work notwithstanding, and injury or death results, recovery may be had against the master.[5] Furthermore a master will be liable for injuries resulting from "cave ins" due to conditions which the master knew, or which in the exercise of reasonable care he should have discovered,[6] but not where he has furnished suitable materials for bracing.[7]

d. Blasting

A master must use ordinary care in regulating the time and manner in which his employees conduct their blasting operations, and must furnish reasonably safe appliances for such work.

A master who fails to use ordinary care in regulating the time and manner in which the employees shall fire their blasts is liable for injuries sustained through his negligently allowing them to fire them so as to cause injuries to his employees.[8] Likewise he will be liable for negligence in not furnishing reasonably safe appliances for such work.[9] The rule does not apply, however, where the cause of injury is not furnished by the master who is not charged with the duty of providing it,[10] where the alleged defective implements were of a simple character and furnished to an experienced employee at his request and accepted by him without complaint,[11] or where the injury resulted from negligence in respect of a duty clearly and unequivocally put by the statute on the miner, the workman, or shot firer who was exploding the shots.[12] A mine owner supplying dynamite for use in blasting must exercise reasonable care commensurate with a known danger to store it so as not to cause injury to his employees.[13]

Missed hole. Where two or more shifts are en-

98. Ala.—Robinson v. Maryland Coal & Coke Co., 72 So. 161, 196 Ala. 604.

99. Ala.—Robinson v. Maryland Coal & Coke Co., supra.

1. Ark.—Ault v. McGaughey, 292 S.W. 359, 173 Ark. 322.
Mo.—Dillard v. Justus, 3 S.W.2d 392, 222 Mo.App. 362.
N.H.—Maltais v. City of Concord, 166 A. 267, 86 N.H. 211.
N.C.—Darden v. Robert G. Lassiter & Co., 152 S.E. 32, 198 N.C. 427.
Okl.—**Corpus Juris cited in** Oklahoma City v. Caple, 105 P.2d 209, 212, 187 Okl. 600.
39 C.J. p 373 note 86.

Braces
Excavation contractor owed trench digger duty to provide reasonably safe braces for adjacent wall.—Dell v. J. A. Schaefer Const. Co., Mo., 29 S.W.2d 76.

Facts held not to show negligence
Ky.—Phillips v. Keltner's Adm'r, 124 S.W.2d 71, 276 Ky. 254.
39 C.J. p 373 note 86 [d].

Ventilation
In employee's action against electric company for injuries sustained in explosion in underground transformer vault, failure of the company to furnish fans in the vault was not negligence where the only purpose fans could have served would have been to blow out gas from the vault and proof was undisputed that there was no gas in the vault or manhole prior to explosion. —Heard v. Arkansas Power & Light Co., 147 S.W.2d 362, 201 Ark. 915.

2. Okl.—**Corpus Juris cited in** Oklahoma City v. Caple, 105 P.2d 209, 212, 187 Okl. 600.
39 C.J. p 373 note 87.

3. Idaho.—Maloney v. Winston Bros. Co., 111 P. 1080, 18 Idaho 740, 47 L.R.A.,N.S., 634.
39 C.J. p 373 note 88.

Ventilation
Contractor is negligent in not eliminating known danger of gas after placing servant at work in tunnel.—Totten v. Smith Bros., Mo.App., 3 S.W.2d 740.

4. Mo.—Medley v. Parker-Russel Min. & Mfg. Co., App., 207 S.W. 887.
Wash.—Hilgar v. Walla Walla, 97 P. 498, 50 Wash. 470, 19 L.R.A.,N.S., 367.

5. Mich.—Baucino v. Fitzpatrick, 152 N.W. 927, 186 Mich. 1.
N.Y.—Leddy v. Carley, 139 N.Y.S. 227, 78 Misc. 546.

6. Cal.—Brown v. Sharp-Hauser Contracting Co., 112 P. 874, 159 Cal. 89.
39 C.J. p 373 note 91.

7. Mo.—King v. Terry, App., 14 S.W.2d 969.

8. Ill.—Houghland v. Avery Coal & Mining Co., 93 N.E. 40, 246 Ill. 609.
39 C.J. p 374 note 92.

9. Conn.—Schneider v. Raymond, 136 A. 874, 106 Conn. 72.
Mo.—Shey v. Central Coal & Coke Co., 21 S.W.2d 772, 323 Mo. 1058.
39 C.J. p 374 note 93.

10. U.S.—Lehigh & Wilkes-Barre Coal Co. v. Sawickas, N.Y., 247 F. 432, 159 C.C.A. 486.
39 C.J. p 374 note 94.

11. Mo.—Mann v. Phœnix Brick & Construction Co., 132 S.W. 19, 151 Mo.App. 586.

12. Ill.—Streeb v. St. Louis & O'Fallon Coal Co., 165 Ill.App. 304.

13. Iowa.—Brown v. West Riverside Coal Co., 120 N.W. 732, 143 Iowa 662, 28 L.R.A.,N.S., 1260.
39 C.J. p 374 note 97.

gaged in a work requiring blasting, and a hole, of several fired by one shift, fails to explode, leaving a missed hole charged with an explosive, the danger arising therefrom to the members of another shift is one which it is the duty of the master to make known to the servants, and for failure to do so he will be liable for injuries resulting therefrom,[14] but he will not be liable where the injured employee was engaged in the duty of looking for such unexploded blasts and carrying the explosive to a place of safety,[15] or where it does not appear that the explosive was put there by an employee of the operator and where it might have been left by a stranger.[16] It has also been held that the rule that the master must furnish the servant a reasonably safe place to work is subject to the qualification that regard must be had to the dangerous character of mining, where the use of dynamite, being necessarily dangerous, depends somewhat on the care taken by the servant,[17] and this is particularly true where the injured employee was, at the time of the accident, engaged in drilling out an unexploded blast.[18]

§ 223. —— Electrical Apparatus and Structures

Where a master employs electricity in his business, he must exercise every reasonable precaution to protect his servants from injury.

Where a master employs electricity in his business, he must exercise every reasonable precaution known to those possessed of the knowledge requisite for the safe treatment of electricity to protect his servants from injury,[19] and must see to it that his poles and other places for work are in a reasonably safe condition.[20] As in other cases, however, the master is not required to adopt a new device merely because it is new, where its practical utility has not been demonstrated.[21]

§ 224. —— Shipping

The rules as to furnishing safe tools and appliances and a safe place to work apply to shipowners and others employing labor on or about vessels.

Shipowners and others employing labor on or about vessels are bound to the same rule of care with respect to furnishing their servants with reasonably

14. Minn.—Stahl v. Duluth, 74 N. W. 143, 71 Minn. 341.
39 C.J. p 374 note 98.

15. Ill.—Hobbs v. Fairview Fluor Spar & Lead Co., 212 Ill.App. 190.

16. Iowa.—Lanza v. Le Grand Quarry Co., 88 N.W. 805, 115 Iowa 299.

17. Mo.—Livengood v. Joplin-Galena Cons. Lead & Zinc Co., 77 S.W. 1077, 179 Mo. 229.
39 C.J. p 375 note 2.

18. U.S.—Davis v. Trade Dollar Cons. Min. Co., Idaho, 117 F. 122, 54 C.C.A. 636.
39 C.J. p 375 note 3.

19. Mass.—Lamberti v. Neal, 148 N. E. 463, 253 Mass. 99.
Tenn.—Memphis Power & Light Co. v. Telghman, 11 Tenn.App. 395.
39 C.J. p 375 note 4.
Care required in maintenance of electric wires or appliances in general see Electricity §§ 39–49.

Gross negligence

Owner of coal mine and foremen were guilty of gross negligence in permitting high voltage electric wires to dangle from roof of air course, the track in which was used to spot empty and loaded cars, with respect to liability for death of miner who was electrocuted while switching loaded car onto air course track pursuant to order of foreman.—West Kentucky Coal Co. v. Hazel's Adm'x, 129 S.W.2d 1000, 279 Ky. 5.

Personal duty of employer

Employer was not discharged of personal duty to use reasonable care to see that coal conveyor and motor were so erected and maintained that they would not carry fatal electrical current, because he had no knowledge that safety ground wire would be additional protection.—Lamberti v. Neal, 148 N.E. 463, 253 Mass. 99.

Facts held not to show negligence

U.S.—Kreger v. Baltimore & O. R. Co., C.C.A.Pa., 25 F.2d 728.
N.H.—Fortier v. Concord Electric Co., 33 A.2d 801, 92 N.H. 492.
39 C.J. p 375 note 4 [j].

20. Fla.—Tampa Electric Co. v. Hardy, 190 So. 478, 139 Fla. 142—Winter Park Telephone Co. v. Strong, 179 So. 289, 130 Fla. 755, rehearing denied 182 So. 927.
Ky.—Pacific Coal Mining Co. v. Horn, 277 S.W. 511, 211 Ky. 444.
Miss.—Masonite Corporation v. Lochridge, 140 So. 223, 163 Miss. 364, suggestion of error overruled 141 So. 758, 163 Miss. 364.
Mo.—Rose v. Missouri Dist. Telegraph Co., 43 S.W.2d 562, 328 Mo. 1009, 81 A.L.R. 400—Horn v. Kansas City Power & Light Co., 274 S.W. 673.
39 C.J. p 376 note 5.

Hazardous work

(1) Under a statute classifying all work in construction, alteration, or repair of pole lines for telegraph, telephone, or other purposes as hazardous, work on a steel frame supporting electric transmission line is work in construction of "pole lines" within the statute.—Inspiration Consol. Copper Co. v. Bryan, 252 P. 1012, 31 Ariz. 302.

(2) Injuries suffered by lineman while trimming trees for proposed electrical transmission line, which work was as hazardous as climbing poles and which was part of the work of construction, were due to a condition or conditions of employment.—Salt River Valley Water Users' Ass'n v. Wheeler, 236 P. 1108, 28 Ariz. 350.

Machinery and appliances

(1) If employer sets employees to work on or near a machine, with the concealed danger of its becoming charged with current of electricity which, in exercise of reasonable care, he ought to have made safe, even if machine is perfect in mechanism, but if unsuitable and unsafe, and employer in exercise of reasonable care ought to have known it, it is no defense to show that same kind of machines are commonly used in work similar to his.—Lamberti v. Neal, 148 N.E. 463, 253 Mass. 99.

(2) Employer could not disclaim liability for employee's death caused by explosion of electrical apparatus used to pump gasoline on ground that employer could not foresee presence of explosive vapor in pump which caused explosion where evidence established necessity of priming pump by flowing gasoline into pipe, which employee did.—Neiss v. Burwen, 191 N.E. 654, 287 Mass. 82.

21. Minn.—Lorimer v. St. Paul City R. Co., 51 N.W. 125, 48 Minn. 391.
39 C.J. p 376 note 6.

safe appliances and places for work as other masters and will be held liable for injuries caused by negligence in this respect.[22] This duty extends to means of ingress and egress.[23] The master is not liable for an injury arising from negligence in a mere detail of the work temporary in its character[25] or for injuries resulting from a danger arising in the progress of the work;[26] nor is he liable where he has furnished suitable materials and appliances, which are either not used or improperly used,[27] where the accident could not be reasonably anticipated,[28] or where the servants themselves furnish an appliance not required of the master;[29] and, where the use of certain appliances is neither customary nor practicable, negligence cannot be predicated on a failure to furnish them.[30]

§ 225. Railroads

The application of the rules governing appliances or places furnished by, or in the control of, third persons to the operation of railroads is discussed supra § 212.

Examine Pocket Parts for later cases.

§ 226. —— Degree of Care Required

a. In general

b. Rule as affected by statute

a. In General

A railroad company is required to exercise such reasonable care for the safety of its servants as the nature of, and the dangers incident to, its business require.

A railroad company is not an insurer of the safety of its employees,[31] and, in the absence of a statute to the contrary, is required to exercise only such reasonable care for the safety of its servants as the nature of, and the dangers incident to, its business require,[32] and is not liable in the absence of negli-

22. U.S.—Puleo v. H. E. Moss & Co., D.C.N.Y., 66 F.Supp. 78.
N.Y.—Albano v. Mediterranean Stevedoring Co., 207 N.Y.S. 12, 211 App.Div. 121.
Wash.—Gessner v. Ramwell, 248 P. 61, 140 Wash. 78—Reynolds v. International Stevedoring Co., 245 P. 1, 138 Wash. 690—Jackson v. Mitsui & Co., 232 P. 317, 132 Wash. 395, affirmed on rehearing 236 P. 806, 135 Wash. 695.
39 C.J. p 377 note 8.

Rule in admiralty and common law is same with reference to furnishing safe place to work and assumption of risk.—McPherson v. Twin Harbor Stevedoring & Tug Co., 245 P. 747, 139 Wash. 61.

Contractor for loading ship, in exercise of care to provide longshoreman safe appliances, may rely somewhat on shipowner's duty as to appliances.—Luckenbach S. S. Co. v. Buzynski, C.C.A.Tex., 19 F.2d 871, reversed on other grounds 48 S.Ct. 440, 277 U.S. 226, 72 L.Ed. 860, conformed to, C.C.A., Luckenbach S. S. Co. v. Buzynski, 31 F.2d 1015, certiorari denied Buzynski v. Luckenbach S. S. Co., 49 S.Ct. 483, 279 U.S. 867, 73 L.Ed. 1004.

Particular causes of injury

(1) Defective winches.—Reynolds v. International Stevedoring Co., 245 P. 1, 138 Wash. 690.

(2) Hatch cover on the deck of a vessel which forms part of the gangway over which employees were required to move cargo.—La Compagnie Generale Transatlantique v. Maguire, N.Y., 168 F. 34, 93 C.C.A. 385, certiorari denied 27 S.Ct. 697, 214 U.S. 516, 53 L.Ed. 1064.

(3) Lights.—Crimmins v. Booth, 88 N.E. 449, 202 Mass. 17, 132 Am.S.R. 468.

(4) Platform used in operating valves of ferry boat.—Christansen v. Puget Sound Nav. Co., 244 P. 569, 138 Wash. 239.

(5) Other causes see 39 C.J. p 377 note 8 [a].

Facts held not to show negligence
N.Y.—Bentsen v. O'Boyle, 159 N.E. 906, 247 N.Y. 187—Brick v. Long Island R. Co., 157 N.E. 93, 245 N.Y. 222.
39 C.J. p 377 note 8 [g].

23. U.S.—Standard Oil Co. (N. J.) v. Robbins Dry Dock & Repair Co., D.C.N.Y., 25 F.2d 339, affirmed, C.C.A., Standard Oil Co. v. Robins Dry Dock & Repair Co., 32 F.2d 182.
N.Y.—Brancoleone v. Northern Stevedoring Co., 231 N.Y.S. 489, 224 App.Div. 562.

24. U.S.—Todahl v. Sudden & Christenson, C.C.A.Cal., 5 F.2d 462.
Cal.—Kennedy v. Chase, 52 P. 33, 119 Cal. 637, 63 Am.S.R. 153.
39 C.J. p 377 note 8 [h].

25. U.S.—Wood v. Davis, C.C.A. Fla., 290 F. 1.
Mich.—Lapier v. Beaubien Ice & Coal Co., 127 N.W. 692, 162 Mich. 533, 35 L.R.A.,N.S., 199.
Tex.—Direct Nav. Co. v. Anderson, 69 S.W. 174, 29 Tex.Civ.App. 65.

26. Miss.—International Shipbuilding Co. v. Carter, 83 So. 413, 121 Miss. 103.
39 C.J. p 377 note 10.

27. R.I.—Francis v. Providence, F. R. & N. Steamboat Co., 86 A. 902.
39 C.J. p 377 note 11.

28. U.S.—Luckenbach S. S. Co. v. Buzynski, C.C.A.Tex., 19 F.2d 871, reversed on other grounds 48 S.Ct. 440, 277 U.S. 226, 72 L.Ed. 860, conformed to, C.C.A., Luckenbach S. S. Co. v. Buzynski, 31 F.2d 1015, certiorari denied Buzynski v. Luckenbach S. S. Co., 49 S.Ct. 483, 279 U.S. 867, 73 L.Ed. 1004.
39 C.J. p 378 note 12.

29. U.S.—Jeffries v. De Hart, D.C. Pa., 96 F. 494, affirmed 102 F.2d 765, 42 C.C.A. 615.

30. U.S.—Red River Line v. Smith, La., 99 F. 520, 39 C.C.A. 620.

31. U.S.—Chicago & N. W. Ry. Co. v. Payne, C.C.A.Neb., 8 F.2d 332—Pennsylvania R. Co. v. Hammond, C.C.A.N.Y., 7 F.2d 1010.
Ark.—Oldenbaugh v. St. Louis Southwestern Ry. Co., 120 S.W.2d 713, 196 Ark. 1036—Caddo River Lumber Co. v. Henderson, 109 S.W.2d 425, 194 Ark. 724.
Miss.—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied Clay v. Mobile & O. R. Co., 51 S.Ct. 24, 282 U.S. 844, 75 L.Ed. 749.
Mo.—Bird v. St. Louis-San Francisco R. Co., 78 S.W.2d 389, 336 Mo. 316.
N.Y.—De Graff v. New York Central & H. R. R. Co., 76 N.Y. 125.
N.C.—Murray v. Atlantic Coast Line R. Co., 11 S.E.2d 326, 218 N.C. 392—Jones v. Atlantic Coast Line R. Co., 139 S.E. 242, 194 N.C. 227.
Tex.—Texas & N. O. R. Co. v. Sarver, Civ.App., 113 S.W.2d 317, error refused—Dell v. Lancaster, Civ.App., 285 S.W. 685.
39 C.J. p 260 note 37, p 378 note 16.

Railroad as not insurer of safety of employees under Federal Employers' Liability Act see supra § 173 c (1).

32. U.S.—Virginian Ry. Co. v. Staton, C.C.A.W.Va., 84 F.2d 133—

gence.[33] Fault or negligence may not be inferred from the mere existence of danger.[34]

It has been held that a railroad company must furnish its employees a reasonably[35] safe place to work,[36] and that this does not mean the absolute elimination of all dangers, but the elimination of those dangers which can be removed by the exercise of reasonable care on the part of the company.[37] Other holdings are that a railroad company is required to exercise ordinary or reasonable care to provide a reasonably[38] safe place for its employees to work,[39] and to exercise due or ordinary care to maintain that place in a reasonably[40] safe

Wheelock v. Freiwald, C.C.A.Mo., 66 F.2d 694—Chicago & N. W. Ry. Co. v. Payne, C.C.A.Neb., 8 F.2d 332—Pennsylvania R. Co. v. Hammond, C.C.A.N.Y., 7 F.2d 1010.
Miss.—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied Clay v. Mobile & O. R. Co., 51 S.Ct. 24, 282 U.S. 844, 75 L.Ed. 749.
N.Y.—De Graff v. New York Cent. & H. R. R. Co., 76 N.Y. 125.
Ohio.—Detroit & T. Shore Line R. Co. v. Seigel, App., 153 N.E. 870.
Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.
39 C.J. p 378 note 17.

Safe transportation

Where car repairer employed by railroad company was being conveyed to scene of wreck, company owed him duty of exercising ordinary care to furnish reasonably safe transportation to and from such place, as well as safe means of ingress to, and egress from car in which he was conveyed.—Cannell v. Missouri Pac. R. Co., Mo.App., 277 S.W. 583.

Train operations in terminal

Running of trains upon network of tracks in and about a union station is complex business, dangerous to employees if not properly conducted, and therefore it is incumbent on terminal corporation to adopt all reasonable measures to avoid subjecting its employees to unnecessary dangers.—Terminal R. Ass'n of St. Louis v. Farris, C.C.A.Mo., 69 F.2d 779.

Climatic conditions; snow and ice

(1) The general rule is that a railroad company is not liable to its employees for injuries resulting from climatic conditions, such as snow and ice.
U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.
Tex.—Wichita Falls & S. R. Co. v. Burton, Civ.App., 35 S.W.2d 476.
39 C.J. p 378 note 17 [g], p 392 note 79.

(2) Since railroad companies have no control over the vagaries of the weather or climatic conditions, it is a general rule of wide acceptance that they are not liable for injuries resulting to employees from the mere existence of ice or snow, disconnected from other circumstances. —Raudenbush v. Baltimore & O. R. Co., C.C.A.Pa., 160 F.2d 363.

33. La.—Miller v. Missouri Pac. R. Co., 121 So. 241, 9 La.App. 477.
39 C.J. p 379 note 18.

Facts held not to show negligence

Md.—Maryland Electric Rys. Co. v. Lapp, 120 A. 250, 142 Md. 163.
N.C.—Owens v. Southern Ry. Co., 145 S.E. 560, 196 N.C. 307.
39 C.J. p 379 note 18 [b].

34. U.S.—Toledo, St. L. & W. R. Co. v. Allen, 48 S.Ct. 215, 276 U.S. 165, 72 L.Ed. 513, conformed to Allen v. Toledo, St. Louis & Western Ry. Co., Mo., 12 S.W.2d 1116.
"The operation of a railroad is necessarily attended by some danger and it is impossible to eliminate all of that danger."—Crosswhite v. Southern Ry. Co., 23 S.E.2d 777, 781, 181 Va. 40.

Inexperienced servant

The fact that the work of a railroad employee is inherently dangerous does not of itself render the railroad company liable for injuries to an inexperienced servant, in the absence of any showing of negligence on the part of the company. —Chesapeake & O. Ry. Co. v. Walker, 167 S.W. 128, 159 Ky. 237.

35. U.S.—Raudenbush v. Baltimore & O. R. Co., C.C.A.Pa., 160 F.2d 363.
Ark.—Odenbaugh v. St. Louis Southwestern Ry. Co., 120 S.W.2d 713, 196 Ark. 1036.
Mo.—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336 Mo. 316.
Duty of master to provide safe place to work generally see supra §§ 201, 219.

36. U.S.—Norfolk & W. Ry. Co. v. Hall, C.C.A.W.Va., 49 F.2d 692.
Tex.—San Antonio & A. P. Ry. Co. v. Mason, Civ.App., 289 S.W. 1027.

37. U.S.—Raudenbush v. Baltimore & O. R. Co., C.C.A.Pa., 160 F.2d 363.

38. U.S.—Virginian Ry. Co. v. Staton, C.C.A.W.Va., 84 F.2d 133.
Ark.—Caddo River Lumber Co. v. Henderson, 109 S.W.2d 425, 194 Ark. 724.
Mass.—Lynch v. New York, N. H. & H. R. R., 200 N.E. 877, 294 Mass. 152—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266.
Miss.—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied Clay v. Mobile & O. R. Co., 51 S.Ct. 24, 282 U.S. 844, 75 L.Ed. 749.
Mo.—Cooper v. Atchison, T. & S. F. R. Co., 148 S.W.2d 773, 347 Mo. 555, certiorari denied Atchison, T. & S. F. R. Co. v. Cooper, 61 S.Ct. 1116—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336 Mo. 316—Cannell v. Missouri Pac. R. Co., App., 277 S.W. 583.
Okl.—Kansas, O. & G. Ry. Co. v. Ballew, 61 P.2d 181, 177 Okl. 500.

Duty at common law

U.S.—Lowden v. Hanson, C.C.A. Minn., 134 F.2d 348.
Me.—Loring v. Maine Central R. Co., 152 A. 527, 129 Me. 369.
Va.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.
W.Va.—Hammack v. Hope Natural Gas Co., 140 S.E. 1, 104 W.Va. 344.

"Ordinary care," in this connection, means that degree of care which a man of ordinary prudence would exercise or use under like circumstances having regard for his own safety if he were providing for himself a place to work.—Murray v. Atlantic Coast Line R. Co., 11 S.E.2d 326, 218 N.C. 392.

Accumulation of snow and ice

Railroad, in providing employees in switchyard a reasonably safe place to work, is required to exercise a reason degree of care to prevent an accumulation of snow and ice in such quantity and location as would constitute a menace to the safety of employees in performance of their various duties.—Raudenbush v. Baltimore & O. R. Co., C.C. A.Pa., 160 F.2d 363.

39. U.S.—Chicago & N. W. Ry. Co. v. Payne, C.C.A.Neb., 8 F.2d 332.
Ark.—St. Louis-San Francisco Ry. Co. v. Rogers, 290 S.W. 74, 172 Ark. 608.
Tex.—Texas & N. O. R. Co. v. Sarver, Civ.App., 113 S.W.2d 317, error refused.

Duty at common law

Ill.—Adamaitis v. Gardner, 63 N. E.2d 135, 326 Ill.App. 594.

40. Mo.—Wickham v. St. Louis-San Francisco Ry. Co., 31 S.W.2d 1007.
Inspection and repair see infra §§ 235–243.

Continuing duty

U.S.—Lowden v. Hanson, C.C.A. Minn., 134 F.2d 348.

condition,[41] taking into consideration the nature of the work.[42] On the other hand, no duty rests on a railroad company to provide absolutely a safe place to work,[43] and it is not held to an absolute responsibility for the reasonably safe condition of the place,[44] and it is not an insurer of the safety of the place for work.[45]

A railroad company has also been held to have the duty of using ordinary or reasonable care,[46] although not the absolute duty[47] or responsibility[48] to furnish reasonably safe tools and appliances for the use of its employees and to maintain them in a reasonably safe condition.[49] It has also been held that railroad companies are bound to avail themselves of all new inventions and improvements known to them, whenever their utility has been thoroughly tested and demonstrated.[50]

A shipper owes its employee the duty of using ordinary care to provide him with a reasonably safe place in which to perform his work of unloading a box car.[51]

b. Rule as Affected by Statute

Under the Federal Employers' Liability Act, a railroad company has the duty to provide, or to exercise ordinary or reasonable care to provide, reasonably safe equipment and places for work.

Under the Federal Employers' Liability Act a

Protection from motorists at grade crossing
N.C.—Murray v. Atlantic Coast Line R. Co., 11 S.E.2d 326, 218 N.C. 392.

41. Tex.—Texas & N. O. R. Co. v. Sarver, Civ.App., 113 S.W.2d 317, error refused.

42. Mo.—Wickham v. St. Louis-San Francisco Ry. Co., 31 S.W.2d 1007.

43. Miss.—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied Clay v. Mobile & O. R. Co., 51 S.Ct. 24, 282 U.S. 844, 75 L.Ed. 749.
N.C.—Murray v. Atlantic Coast Line R. Co., 11 S.E.2d 326, 218 N.C. 392.
Tex.—Texas & N. O. R. Co. v. Sarver, Civ.App., 113 S.W.2d 317, error refused.

44. Mass.—Lynch v. New York, N. H. & H. R. R., 200 N.E. 877, 294 Mass. 152—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266.

45. U.S.—Chicago & N. W. Ry. Co. v. Payne, C.C.A.Neb., 8 F.2d 332.
Ark.—Odenbaugh v. St. Louis Southwestern Ry. Co., 120 S.W.2d 713, 196 Ark. 1036—Caddo River Lumber Co. v. Henderson, 109 S.W.2d 425, 194 Ark. 724.
Va.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.
However, it has been said that "there is no rule better settled than this, that it is the duty of railroad companies to keep their road and works, and all portions of the track, in such repair and so watched and tended, as to insure the safety of all who may be lawfully upon them, whether passengers . . . or servants, or others. They are bound to furnish a safe road, and sufficient and safe machinery and cars."—Chicago & N. W. R. Co. v. Swett, 45 Ill. 197, 203, 92 Am.D. 206—Sprickerhoff v. Baltimore & O. R. Co., 55 N.E.2d 532, 535, 323 Ill.App. 340.

46. U.S.—Lowden v. Hanson, C.C.A. Minn., 134 F.2d 348—Norwalk & W. Ry. Co. v. Hall, C.C.A.W.Va., 49 F.2d 692.
Ark.—Odenbaugh v. St. Louis Southwestern Ry. Co., 120 S.W.2d 713, 196 Ark. 1036.
Me.—Loring v. Maine Central R. Co., 152 A. 527, 129 Me. 369.
Mass.—Lynch v. New York, N. H. & H. R. R., 200 N.E. 877, 294 Mass. 152—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266.
Miss.—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied Clay v. Mobile & O. R. Co., 51 S.Ct. 24, 282 U.S. 844, 75 L.Ed. 749.
Mo.—Allen v. Missouri Pac. Ry. Co., 294 S.W. 80.
N.C.—Murray v. Atlantic Coast Line R. Co., 11 S.E.2d 326, 218 N. C. 392.
Va.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 21, 282 U.S. 878, 75 L.Ed. 775.
Wash.—Friermood v. Oregon-Washington R. & Nav. Co., 235 P. 17, 134 Wash. 178.

Company not insurer
At common law a railroad company is not an insurer of the safety of tools, equipment, and appliances.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.

Goggles
Railroad was under duty to furnish shop machinist with goggles, if foreman's instructions or railroad's rules required use of hammer and chisel in tightening nut; railroad fulfilled duty by keeping them at place where such articles were usually kept for employees' use.—St. Louis Southwestern Ry. Co. of Texas v. Weatherly, Tex.Civ.App., 2 S.W.2d 555.

Motor car
A railroad company employing man to travel along its tracks within designated district and keep company's signs adjacent to tracks freshly painted owed duty to supply him with motor car reasonably suitable and safe for operation in usual manner.—Metz v. Southern Pac. Co., 124 P.2d 670, 51 Cal.App.2d 260.

Rule requiring inspection
Where it was shown to be impracticable for a brakeman to inspect appliances at every stop, defendant could not, by adopting such a rule, relieve itself from liability for failure to furnish safe appliances.—Karns v. Atchison, T. & S. F. Ry. Co., 123 P. 758, 87 Kan. 154, L.R.A. 1916D 1042.
Inspection and repair see infra §§ 235–243.

47. N.C.—Murray v. Atlantic Coast Line R. Co., 11 S.E.2d 326, 218 N. C. 392.

48. Mass.—Lynch v. New York, N. H. & H. R. R., 200 N.E. 877, 294 Mass. 152—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266.

49. U.S.—Lowden v. Hanson, C.C.A. Minn., 134 F.2d 348.
Wash.—Friermood v. Oregon-Washington R. & Nav. Co., 235 P. 17, 134 Wash. 178.

50. N.Y.—Smith v. New York & Harlem R. Co., 19 N.Y. 127, 75 Am.D. 305.
39 C.J. p 331 note 60.

Detector bar
Railroad was not shown to be negligent in not equipping interlocking system at railroad intersections with a detector bar, where there was no showing that device was in general use or that plaintiff would not have been injured in any event while operating derail lever.—Louisville & N. R. Co. v. Berry, 272 S.W. 6, 208 Ky. 795.

51. Ark.—Chicago, R. I. & P. Ry. Co. v. Sampson, 142 S.W.2d 221, 200 Ark. 906.

railroad company is required to exercise reasonable or ordinary care, for the safety of its employees, in view of all the circumstances,[52] and its duty of care becomes even greater as the risk increases;[53] but it is not required to anticipate and guard against every possible danger which may befall its employees,[54] but only such as are likely to occur and as, by the exercise of reasonable care, it could foresee and anticipate.[55] However, under a statute imposing an absolute duty on the company, ordinary care is not sufficient.[56]

As far as concerns the duty of an employer to furnish a safe place in which to work, the interpretation of the Federal Employers Liability Act is derived from, and is consistent with, the general common law.[57] Under the act it has been variously held that a railroad company has the duty to provide a reasonably[58] safe place for work,[59] and the duty of

52. U.S.—Delaware, L. & W. R. Co. v. Koske, N.J., 49 S.Ct. 202, 279 U.S. 7, 73 L.Ed. 578—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213—Pennsylvania R. Co. v. Hammond, C.C.A.N.Y., 7 F.2d 1010.

Cal.—Haskins v. Southern Pac. Co., 39 P.2d 895, 3 Cal.App.2d 177.

Ohio.—Detroit & T. Shore Line R. Co. v. Siegel, App., 153 N.E. 870.

Care required of master generally see supra § 183.

Matters not specially covered by Safety Appliance Act

Interstate carrier owes to employee only ordinary care in matters not specially covered by federal Safety Appliance Act.—Cochran v. Pittsburgh & L. E. R. Co., D.C.Ohio, 81 F.2d 769.

Dangerous work or place

Facts that work performed is dangerous or is performed in dangerous place, and injury results, do not necessarily show negligence by railroad company.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.

Objects on premises

Duty of employer, under Federal Employers' Liability Act, to employee in respect of objects on the premises where the employee works is the same as the duty owed by landowner to persons employed or invited thereon, or the duty of a proprietor to invited guests.—Waller v. Northern Pac. Terminal Co. of Or., 166 P.2d 488, 178 Or. 274, certiorari denied 67 S.Ct. 45, 329 U.S. 742, 91 L.Ed. 640.

53. U.S.—Union Pac. R. Co. v. De Vaney, C.C.A.Cal., 162 F.2d 24.

Minn.—Bimberg v. Northern Pac. Ry. Co., 14 N.W.2d 410, 217 Minn. 187, followed in 14 N.W.2d 419, 217 Minn. 187, certiorari denied 65 S.Ct. 87, 323 U.S. 752, 89 L.Ed. 602.

54. Me.—Loring v. Maine Cent. R. Co., 152 A. 527, 129 Me. 369.

55. Me.—Loring v. Maine Cent. R. Co., supra.

56. Ga.—Seaboard Air Line Ry. Co. v. D'Avignon, 153 S.E. 96, 41 Ga. App. 263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441.

39 C.J. p 380 note 23.

57. U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.

Ill.—Adamaitis v. Gardner, 63 N.E.2d 135, 326 Ill.App. 594.

Or.—Waller v. Northern Pac. Terminal Co. of Or., 166 P.2d 488, 178 Or. 274, certiorari denied 67 S.Ct. 45, 329 U.S. 742, 91 L.Ed. 640.

58. U.S.—Union Pac. Co. v. De Vaney, C.C.A.Cal., 162 F.2d 24—Raudenbush v. Baltimore & O. R. Co., C.C.A.Pa., 160 F.2d 363.

Ky.—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603.

Mo.—Francis v. Terminal R. Ass'n of St. Louis, 193 S.W.2d 909, 354 Mo. 1232.

Absolute duty

Okl.—Carter v. Chicago, R. I. & P. Ry. Co., 65 P.2d 469, 179 Okl. 292.

Continuous or continuing duty

Ill.—Porter v. Terminal R. Ass'n of St. Louis, 65 N.E.2d 31, 327 Ill. App. 645—Werner v. Illinois Cent. R. Co., 33 N.E.2d 121, 309 Ill.App. 292, reversed on other grounds 42 N.E.2d 82, 379 Ill. 559.

Mo.—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336 Mo. 316.

Affirmative duty

Ill.—Porter v. Terminal R. Ass'n of St. Louis, 65 N.E.2d 31, 327 Ill. App. 645.

Nondelegable duty

Ill.—Porter v. Terminal R. Ass'n of St. Louis, supra.

Wash.—Blessing v. Camas Prairie R. Co., 100 P.2d 416, 3 Wash.2d 266.

Place where employee required to work

(1) Railroad's duty to protect employees is limited to place of work.

U.S.—Philadelphia & R. Ry. Co. v. Thirouin, 9 F.2d 856, followed in Szczepanski v. Pennsylvania R. Co., C.C.A.N.J., 36 F.2d 1022.

Neb.—Ellis v. Union Pac. R. Co., 19 N.W.2d 641, 146 Neb. 397, opinion adhered to 22 N.W.2d 305.

(2) Railroad owes no duty to protect employee in place where he is not required to be.—Philadelphia & R. Ry. Co. v. Bartsch, C.C.A.N.J., 9 F.2d 858—Philadelphia & R. Ry. Co. v. Allen, C.C.A.N.J., 9 F.2d 854.

Dangers to be removed

This rule does not mean that the company must remove all possible danger, but all such danger as it can remove or guard against by the exercise of reasonable care.—Pauly v. McCarthy, 166 P.2d 501, 109 Utah 398, reversed on other grounds 67 S.Ct. 962, 330 U.S. 802, 91 L.Ed. 1261.

Provision and supervision of tracks and cars

Under the statute a railroad company must provide such tracks and cars and such supervision and regulation of their use as will afford its employees a reasonably safe place in which to work.—Sanderson v. Boston & M. R. R. Co., 101 A. 40, 91 Vt. 419.

59. U.S.—Schilling v. Delaware & H. R. Corporation, C.C.A.N.Y., 114 F.2d 69—Northwestern Pac. R. Co. v. Fiedler, C.C.A.Cal., 52 F.2d 400.

Ariz.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A.L.R. 857.

La.—Borde v. New Orleans & G. N. R. Co., App., 140 So. 810.

Mo.—Joice v. Missouri-Kansas-Texas R. Co., 189 S.W.2d 568, 354 Mo. 439, 161 A.L.R. 383—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336 Mo. 316.

Station platform

(1) Station platform was part of "equipment" or "works" used for railway purposes, within act, which makes interstate carrier liable to employees for injuries resulting from defect in equipment or works.

U.S.—Missouri Pac. R. Co. v. Aeby, Mo., 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, mandate conformed to Aeby v. Missouri Pac. R. Co., Mo., 6 S.W.2d 1115.

Neb.—Sullivan v. Chicago & N. W. Ry. Co., 258 N.W. 38, 128 Neb. 92, certiorari denied 55 S.Ct. 831, 295 U.S. 749, 79 L.Ed. 1694—Lindley v. Wabash Ry. Co., 231 N.W. 812, 120 Neb. 195, modified on other grounds 233 N.W. 450, 120 Neb. 195, certiorari denied Wabash R. Co. v. Lindley, 51 S.Ct. 655, 283 U.S. 863, 75 L.Ed. 1468.

Okl.—Atchison, T. & S. F. Ry. Co. v. Ford, 43 P.2d 459, 171 Okl. 516.

(2) Railroad employer is not, under the act, required to have any particular type or kind of platform at stations for employees' benefit.

U.S.—Missouri Pac. R. Co. v. Aeby, Mo., 48 S.Ct. 177, 275 U.S. 426, 72

exercising ordinary or reasonable care in maintaining that place in a reasonably[60] safe condition;[61] that the company is not obliged to furnish an absolutely safe,[62] or the most convenient,[63] place for work, or to keep the premises absolutely safe;[64] that it does not have the absolute duty to furnish its employees a safe and suitable place to work,[65] but only a duty to use reasonable care according to the circumstances,[66] or to use due, ordinary, or reasonable care or prudence to provide a reasonably[67]

L.Ed. 351, mandate conformed to Aeby v. Missouri Pac. R. Co., Mo., 6 S.W.2d 1115.
Okl.—Atchison, T. & S. F. Ry. Co. v. Ford, 43 P.2d 459, 171 Okl. 516.

Hazard of particular employee

Question of railroad's negligence in failing to furnish member of bridge-painting crew a safe place to work would be considered in light of duty railroad owed to him in the work he was personally assigned to do, and not in light of more hazardous work which other members of crew were required to do.—Morton v. Alton R. Co., Mo.App., 118 S.W.2d 59.

Inhalation of gas in pit under track

Action against railroad by hostler for damage to his health allegedly caused by inhalation of carbon monoxide gas from smoldering cinders while in pit under track working on locomotive came under the Federal Employers' Liability Act.—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603.

"Engineering necessity"

(1) The doctrine of "engineering necessity," that carriers have much freedom in providing facilities and places for the use of their employees, and that where they are established in accordance with reasonable and scientific judgment, they are not subject to review by a jury, relates only to a condition of fact and not to a rule of law, and neither statute nor common law forbids a trier of fact to try a question of negligence involved between master and servant, merely because there may be involved a matter of engineering; before a matter may be considered an engineering problem, beyond the reach of court and jury, it must appear that there existed a necessity therefor and that the things done could not reasonably have been done otherwise.—Southern Pac. Co. v. Huyck, 128 P.2d 849, 61 Nev. 365.

(2) Matters of engineering as to obstructions or erections on, over or near tracks see infra § 230.

60. U.S.—Griswold v. Gardner, C.C.A.Ill., 155 F.2d 333, certiorari denied Gardner v. Griswold, 67 S.Ct. 74, 329 U.S. 725, 91 L.Ed. 628.

Primary duty

Ind.—Chesapeake & O. Ry. Co. v. Russo, 163 N.E. 283, 91 Ind.App. 648, certiorari denied 51 S.Ct. 25, 282 U.S. 846, 75 L.Ed. 750.

Continuing duty

U.S.—Lowden v. Hanson, C.C.A. Minn., 134 F.2d 348.

Mo.—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 335 Mo. 1148.
Wash.—Blessing v. Camas Prairie R. Co., 100 P.2d 416, 3 Wash.2d 266.

Nondelegable duty

Mo.—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 335 Mo. 1148.

61. Ariz.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A.L.R. 857.
Wash.—Blessing v. Camas Prairie R Co., 100 P.2d 416, 3 Wash.2d 266.
Inspection and repair see infra §§ 235–243.

Station platform

(1) A railroad company is not required to maintain a station platform in the safest and best possible condition.
U.S.—Missouri Pac. R. Co. v. Aeby, Mo., 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, mandate conformed to Aeby v. Missouri Pac. R. Co., 6 S.W.2d 1115.
Okl.—Atchison, T. & S. F. Ry. Co. v. Ford, 43 P.2d 459, 171 Okl. 516.

(2) Railroad company's failure to remove snow and ice from station platform held not to violate any duty to station agent; its obligation to passengers, or others coming on the premises on business, is greater, with respect to station platform and the like, than that due employees, who, being familiar with the situation, are deemed voluntarily to take the risk of known conditions and dangers.—Missouri Pac. R. Co. v. Aeby, Mo., 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, mandate conformed to Aeby v. Missouri Pac. R. Co., Mo., 6 S.W.2d 1115.

Unless accumulation of grease on loading platform adjacent to railroad was permitted to such extent as to be readily observable, place of work was not rendered unsafe thereby, as basis for contention that employer was negligent.—Luck v. Louisville & N. R. Co., 69 S.W.2d 899, 167 Tenn. 350.

62. Ky.—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603.
Utah.—Pauly v. McCarthy, 166 P.2d 501, 109 Utah 398, reversed on other grounds 67 S.Ct. 962, 330 U.S. 802, 91 L.Ed. 1261—Elswood v. Oregon Short Line R. Co., 23 P.2d 925, 82 Utah 235.

Conforming to standards of good practice

Va.—Beamer v. Virginian Ry. Co., 26 S.E.2d 43, 181 Va. 650, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060.

63. Ky.—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603.

64. Or.—Waller v. Northern Pac. Terminal Co. of Or., 166 P.2d 488, 178 Or. 274, certiorari denied 67 S.Ct. 45, 329 U.S. 742, 91 L.Ed. 640.

Station platform

Neb.—Sullivan v. Chicago & M. Ry. Co., 258 N.W. 38, 128 Neb. 92, certiorari denied 55 S.Ct. 831, 295 U.S. 749, 79 L.Ed. 1694.

65. U.S.—Baltimore & Ohio S. W. R. Co. v. Carroll, Ind., 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed. 566.
Mass.—Lynch v. New York, N. H. & H. R. R., 200 N.E. 877, 294 Mass. 152—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266.
Or.—McPherson v. Oregon Trunk Ry., 102 P.2d 726, 165 Or. 1.
39 C.J. p 379 note 22.

66. Or.—McPherson v. Oregon Trunk Ry., supra.

Station platform

(1) Railroad employer must exercise reasonable care, having regard to circumstances, to keep station platform safe for employees.
U.S.—Missouri Pac. R. Co. v. Aeby, Mo., 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, mandate conformed to Aeby v. Missouri Pac. R. Co., Mo., 6 S.W.2d 1115.
Minn.—Reams v. Chicago, M., St. P. & P. R. Co., 231 N.W. 236, 180 Minn. 534.
Neb.—Sullivan v. Chicago & N. W. Ry. Co., 258 N.W. 38, 128 Neb. 92, certiorari denied 55 S.Ct. 831, 295 U.S. 749, 79 L.Ed. 1694.
Okl.—Atchison, T. & S. F. Ry. Co. v. Ford, 43 P.2d 459, 171 Okl. 516.

(2) Railroad's duty was to exercise ordinary care to keep depot platform in such condition that conductor could use it with reasonable safety in performance of his functions.—Pierce v. Spokane International Ry. Co., 131 P.2d 139, 15 Wash.2d 431.

67. U.S.—Baltimore & Ohio S. W. R. Co. v. Carroll, Ind., 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed 566—Toledo, St. L. & W. R. Co. v. Allen, 48 S.Ct. 215, 276 U.S. 165, 72 L.Ed. 513, conformed to Allen v. Toledo, St. Louis, & Western Ry. Co., Mo., 12 S.W.2d 1116—Griswold v. Gardner, C.C.A.Ill., 155 F.2d 333, certiorari denied Gardner v. Griswold, 67 S.Ct. 74, 329 U.S. 725, 91 L.Ed. 628—Lowden v. Hanson, C.C.A.Minn.,

safe place for work;[68] and that the company is not | an insurer,[69] or a guarantor[70] of the safety of the

134 F.2d 348—Handy v. Reading Co., D.C.Pa., 66 F.Supp. 246.
Me.—Loring v. Maine Cent. R. Co., 152 A. 527, 129 Me. 369—Morey v. Maine Cent. R. Co., 142 A. 585, 127 Me. 190.
Mass.—Lynch v. New York, N. H. & H. R. R., 200 N.E. 877, 294 Mass. 152—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266.
Miss.—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied Clay v. Mobile & O. R. Co., 51 S.Ct. 24, 282 U.S. 844, 75 L.Ed. 749.
Mo.—Goslin v. Kurn, 173 S.W.2d 79, 351 Mo. 395—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336 Mo. 316.
Nev.—Southern Pac. Co. v. Huyck, 128 P.2d 849, 61 Nev. 365.
Or.—Campbell v. Southern Pac. Co., 250 P. 622, 120 Or. 122.
Pa.—McCully v. Monongahela Ry. Co., 137 A. 623, 289 Pa. 393, certiorari denied 48 S.Ct. 37, 275 U.S. 542, 72 L.Ed. 416.
S.C.—Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 158 S.C. 194, certiorari denied Atlantic Coast Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.
Utah.—Elswood v. Oregon Short Line R. Co., 23 P.2d 925, 82 Utah 235.
Va.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.
39 C.J. p 379 note 22.

Primary duty
Me.—Morey v. Maine Central R. Co., 133 A. 92, 125 Me. 272.

Continuing duty
U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.
Mo.—Tash v. St. Louis-San Francisco Ry Co., 76 S.W.2d 690, 335 Mo. 1148.

Nondelegable duty
Ky.—Luton Mining Co. v. Louisville & N. R. Co., 123 S.W.2d 1055, 276 Ky. 321.
Mo.—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 335 Mo. 1148.
N.C.—Potter v. Atlantic Coast Line R. Co., 147 S.E. 698, 197 N.C. 17.

Limitation on carrier's undertaking
A railroad company does not undertake to provide a reasonably safe place for the use of its employees; but it does undertake to use due care to do so, and that is the measure of its duty.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.

68. U.S.—Wolfe v. Henwood, C.C.A. Ark., 162 F.2d 998.
Ala.—Atlantic Coast Line R. Co. v. Hardwick, 193 So. 730, 239 Ala. 58—Seaboard Air Line Ry. Co. v. Latham, 127 So. 679, 23 Ala.App. 490.
Cal.—Smith v. Schumacker, 85 P.2d 967, 30 Cal.App.2d 251, certiorari denied Schumacher v. Smith, 59 S.Ct. 1046, 307 U.S. 646, 83 L.Ed. 1526.
Ill.—Huff v. Illinois Cent. R. Co., 199 N.E. 116, 362 Ill. 95.
N.C.—Southwell v. Atlantic Coast Line R. Co., 131 S.E. 670, 191 N.C. 153, reversed on other grounds 48 S.Ct. 25, 275 U.S. 64, 72 L.Ed. 157.
Okl.—Chicago, R. I. & P. Ry. Co. v. Brooks, 11 P.2d 142, 155 Okl. 53, certiorari denied Chicago, R. I. & P. R. Co. v. Squire, 52 S.Ct. 502, 286 U.S. 552, 76 L.Ed. 1287.
Or.—McPherson v. Oregon Trunk Ry., 102 P.2d 726, 165 Or. 1.
Tenn.—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn. App. 213.
Va.—Beamer v. Virginian Ry. Co., 26 S.E.2d 43, 181 Va. 650, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060.

Continuing duty
U.S.—Bailey v. Central Vermont Ry. Co., 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433—Raudenbush v. Baltimore & O. R. R., D. C.Pa., 63 F.Supp. 329.
Ariz.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A.L. R. 857.
Conn.—Wells v. New York, N. H. & H. R. Co., 128 A. 700, 102 Conn. 361.
Minn.—Bimberg v. Northern Pac. Ry. Co., 14 N.W.2d 410, 217 Minn. 187, followed in 14 N.W.2d 419, 217 Minn. 187, certiorari denied 65 S. Ct. 87, 323 U.S. 752, 89 L.Ed. 602.

Nature of reasonable care
(1) The reasonable care becomes a demand of higher supremacy, but in all cases it is a question of reasonableness of care depending on the danger attending the place or the machinery.
U.S.—Bailey v. Central Vermont Ry., 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.
Ariz.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A.L.R. 857.

(2) What is reasonable care depends on the particular circumstances and the danger attending the place where the employee of necessity is required or accustomed to work in the performance of his duties.—Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 147 Neb. 18.

Increase of risk
This duty becomes more imperative as the risk increases.
U.S.—Bailey v. Central Vermont Ry., 63 S.Ct. 1062, 319 U.S. 350, 87 L. Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.
Ariz.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A. L.R. 857.
Minn.—Bimberg v. Northern Pac. Ry. Co., 14 N.W.2d 410, 217 Minn. 187, followed in 14 N.W.2d 419, 217 Minn. 187, certiorari denied 65 S. Ct. 87, 323 U.S. 752, 89 L.Ed. 602.

Failure as negligence
Failure to use such care constitutes actionable negligence.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A.L.R. 857.

Removal of snow
Where fall of snow in railroad switchyard had terminated shortly before accident and had left a thin coating of snow on sill of a gondola car, railroad was under no duty to remove snow, so as to be liable for the death of a brakeman who apparently slipped on sill while attempting to apply the brakes of the gondola and had fallen between the cars.—Raudenbush v. Baltimore & O. R. Co., C.C.A.Pa., 160 F.2d 363.

69. U.S.—Missouri Pac. R. Co. v. Aeby, Mo, 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, mandate conformed to Aeby v. Missouri Pac. R. Co., Mo., 6 S.W.2d 1115—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213—New York, C. & St. L. R. Co. v. Boulden, C.C.A.Ind., 63 F.2d 917, certiorari denied 53 S.Ct. 785, 289 U.S. 753, 77 L.Ed. 1498.
Me.—Loring v. Maine Cent. R. Co., 152 A. 527, 129 Me. 369—Morey v. Maine Cent. R. Co., 142 A. 585, 127 Me. 190.
Minn.—Reams v. Chicago, M., St. P. & P. R. Co., 231 N.W. 236, 180 Minn. 534.
Miss.—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied Clay v. Mobile & O. Ry. Co., 51 S.Ct. 24, 282 U.S. 844, 75 L.Ed. 749.
Okl.—Atchison, T. & S. F. Ry. Co. v. Ford, 43 P.2d 459, 171 Okl. 516.
Va.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.
Employer as not insurer of safety of employees under act see supra § 173.

70. Ill.—Huff v. Illinois Cent. R. Co., 199 N.E. 116, 362 Ill. 95—Speiring v. Chicago & E. I. R. Co., 60 N.E. 2d 267, 325 Ill.App. 576.
Me.—Loring v. Maine Cent. R. Co., 152 A. 527, 129 Me. 369.
Pa.—McCully v. Monongahela Ry. Co., 137 A. 623, 289 Pa. 393, certio-

place of work.

In fixing the scope of such duty, courts have kept in mind the fact that the work of a railroad is attended with danger, and can be carried on only by means that are hazardous to employees.[71] In this connection a railroad company has been held not to owe its employees as high a degree of care as that due to passengers or others coming on its premises for the transaction of business, in view of the employees' familiarity with the situation and the dangers.[72]

The carrier is not relieved of the duty to furnish a safe place to work by the fact that the employee's work in the place in question is fleeting or infrequent.[73]

Under the act the carrier is also under the duty of using due, ordinary, or reasonable care to furnish its employees with reasonably[74] safe and suitable appliances, equipment, and tools for doing the work,[75] and to maintain them in a reasonably safe condition;[76] but it is not an insurer[77] or a guarantor[78] of the safety of the appliances, equipment, machinery, or tools, and it is not held to an absolute responsibility for the reasonably safe condition of

rari denied 48 S.Ct. 37, 275 U.S. 542, 72 L.Ed. 416.

Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.

Station platform

U.S.—Missouri Pac. R. Co. v. Aeby, Mo., 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, mandate conformed to Aeby v. Missouri Pac. R. Co., Mo., 6 S.W.2d 1115.

Minn.—Reams v. Chicago, M., St. P. & P. R. Co., 231 N.W. 236, 180 Minn. 534.

Neb.—Sullivan v. Chicago & N. W. Ry. Co., 258 N.W. 38, 128 Neb. 92, certiorari denied 55 S.Ct. 831, 295 U.S. 749, 79 L.Ed. 1694.

Okl.—Atchison, T. & S. F. Ry. Co., v. Ford, 43 P.2d 459, 171 Okl. 516.

71. Ill.—Werner v. Illinois Cent. R. Co., 33 N.E.2d 121, 309 Ill.App. 292, reversed on other grounds 42 N.E.2d 82, 379 Ill. 559.

72. U.S.—Toledo, St. L. & W. R. Co. v. Allen, 48 S.Ct. 215, 276 U.S. 165, 72 L.Ed 513, conformed to Allen v. Toledo, St. Louis & Western Ry. Co., Mo., 12 S.W.2d 1116—Missouri Pac. R. Co. v. Aeby, Mo., 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed 351, mandate conformed to Aeby v. Missouri Pac. R. Co., Mo., 6 S.W. 2d 1115.

73. U.S.—Ellis v. Union Pac. R. Co., Neb., 67 S.Ct. 598, 329 U.S. 649, 91 L.Ed. 572—Bailey v. Central Vermont Ry., 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.

Minn.—Bimberg v. Northern Pac. Ry. Co., 14 N.W.2d 410, 217 Minn. 187, followed in 14 N.W.2d 419, 217 Minn. 187, certiorari denied 65 S.Ct. 87, 323 U.S. 752, 89 L.Ed. 602.

74. U.S.—Baltimore & Ohio S. W. R. Co. v. Carroll, Ind., 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed. 566—Chicago & N. W. R. Co. v. Bower, Neb., 36 S.Ct. 624, 241 U.S. 470, 60 L.Ed. 1107—Lowden v. Hanson, C.C.A. Minn., 134 F.2d 348.

Ga.—Southern Ry. Co. v. Bradshaw, 37 S.E.2d 150, 73 Ga.App. 438.

Ill.—Porter v. Terminal R. Ass'n of St. Louis, 65 N.E.2d 31, 327 Ill. App. 645.

Me.—Loring v. Maine Cent. R. Co., 152 A. 527, 129 Me. 369—Morey v. Maine Central R. Co., 133 A. 92, 125 Me. 272.

Mass.—Lynch v. New York, N. H. & H. R. R., 200 N.E. 877, 294 Mass. 152—Shipp v. Boston & N. R. R., 186 N.E. 653, 283 Mass. 266.

Miss.—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied Clay v. Mobile & O. R. Co., 51 S.Ct. 24, 282 U.S. 844, 75 L.Ed. 749.

Or.—Campbell v. Southern Pac. Co., 250 P. 622, 120 Or. 122.

Pa.—Pursglove v. Monongahela Ry. Co., 131 A. 477, 285 Pa. 27, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 783.

Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.

Va.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.

Absolute duty

Okl.—Carter v. Chicago, R. I. & P. Ry. Co., 65 P.2d 469, 179 Okl. 292.

Primary duty

Me.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.

Continuing duty

U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.

Ball-peen hammer

A carrier which furnishes its employee with a ball-peen or machinist hammer to do carpenter work does not perform its duty when such hammer is not efficient or suitable for carpenter work.—Pitt v. Pennsylvania R. Co., D.C.Pa., 66 F.Supp. 443.

Dangerous work

Where railway tracks high above ore docks were being repaired, it was railway's duty to use all appliances reasonably attainable to prevent accident because of the great and unusual danger incident to the work.—Gonyea v. Duluth, M. & I. R. Ry. Co., 19 N.W.2d 384, 220 Minn. 225.

75. Ala.—Atlantic Coast Line R. Co. v. Hardwick, 193 So. 730, 239 Ala. 58.

Conn.—Wells v. New York, N. H. & H. R. Co., 128 A. 700, 102 Conn. 361.

Ill.—Huff v. Illinois Cent. R. Co., 199 N.E. 116, 362 Ill. 95—Cash v. Cleveland, C., C. & St. L. Ry. Co., 244 Ill.App. 1.

Or.—McPherson v. Oregon Trunk Ry., 102 P.2d 726, 165 Or. 1.

Signaling devices

U.S.—Terminal R. Ass'n of St. Louis v. Farris, C.C.A.Mo., 69 F.2d 779.

Railroad held not negligent

Iowa.—Kempe v. Illinois Cent. R. Co., 232 N.W. 657, 211 Iowa 812, 74 A.L.R. 148.

La.—Borde v. New Orleans & G. N. R. Co., App., 140 So. 810.

Neb.—Phillips v. Chicago, B. & Q. R. Co., 227 N.W. 931, 119 Neb. 182.

S.D.—Bayer v. Chicago, B. & Q. R. Co., 220 N.W. 459, 53 S.D. 116.

76. U.S.—Lowden v. Hanson, C.C.A. Minn., 134 F.2d 348

Conn.—Wells v. New York, N. H. & H. R. Co., 128 A. 700, 102 Conn. 361.

Ill.—Cash v. Cleveland, C., C. & St. L. Ry. Co., 244 Ill.App. 1.

Inspection and repair see infra §§ 235–243.

77. Me.—Loring v. Maine Central R. Co., 152 A. 527, 129 Me. 369.

Or.—Campbell v. Southern Pac. Co., 250 P. 622, 120 Or. 122.

Va.—Crosswhite v. Southern Ry. Co., 23 S.E.2d 777, 181 Va. 40—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.

Employer as not insurer of safety of employees under act see supra § 173.

78. Ill.—Huff v. Illinois Cent. R. Co., 199 N.E. 116, 362 Ill. 95—Speiring v. Chicago & E. I. R. Co., 60 N.E.2d 267, 325 Ill.App. 576.

Me.—Loring v. Maine Cent. R. Co., 152 A. 527, 129 Me. 369.

the tools and appliances.[79] The carrier is not required to furnish the latest, best, and safest appliances,[80] or to discard standard appliances, reasonably safe and suitable or efficient, on the discovery of later improvements.[81]

Under a state statute making railroad operators liable for injuries to their employees from any defect or insufficiency, due to their negligence, in appliances, works, or other equipment, the term "appliance" includes all machinery and equipment furnished by the carrier to use in connection with the conduct and management of its business.[82] Where a state statute requiring railroad platforms to be constructed to insure, as far as possible, the safety of employees is indefinite as to the mode of construction, it should be reasonably construed with reference to another section of the statute authorizing notice, so that the carrier is not to be held guilty of violating the statute until it has been notified to make alterations in its platforms.[83]

§ 227. —— Locomotives

a. In general
b. Statutory regulations

a. In General

A railroad company must exercise reasonable care to provide and maintain reasonably safe locomotives.

A railway company is required to exercise reasonable care and diligence to provide and maintain reasonably safe and suitable locomotives;[84] its conduct is to be judged in the light of possible danger.[85] A master, however, has been held not to be liable for injuries resulting from a defect in a locomotive developing while on the run when it started in good condition,[86] although, as discussed infra subdivision b (3) of this section, a different holding has been made under the Federal Boiler Inspection Act; and ordinarily the master will be relieved of liability where it has purchased a locomotive of standard type from a reliable manufacturer without knowledge of defects, design, or construction.[87]

Overloading tenders. Where an employee of a railway company is injured by the fall of coal from a locomotive tender which has been improperly loaded, the company has been held to be liable.[88]

b. Statutory Regulations

(1) In general

79. U.S.—Baltimore & Ohio S. W. R. Co. v. Carroll, Ind., 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed. 566.
Me.—Morey v. Maine Central R. Co., 133 A. 92, 125 Me. 272.
Mass.—Lynch v. New York, N. H. & H. R. R., 200 N.E. 877, 294 Mass. 152—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266.

80. U.S.—Chicago & N. W. R. Co. v. Bower, Neb., 36 S.Ct. 624, 241 U.S. 470, 60 L.Ed. 1107.
Pa.—Pursglove v. Monongahela Ry. Co., 131 A. 477, 285 Pa. 27, certiorari denied 46 S.Ct. 352, 270 U. S. 654, 70 L.Ed. 783.
Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.
Newest, safest, and best appliances and places generally see supra § 207.

81. U.S.—Chicago & N. W. R. Co. v. Bower, Neb., 36 S.Ct. 624, 241 U.S. 470, 60 L.Ed. 1107.
Pa.—Pursglove v. Monongahela Ry. Co., 131 A. 477, 285 Pa. 27, certiorari denied 46 S.Ct. 352, 270 U. S. 654, 70 L.Ed. 783.
Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.

82. Mont.—Palmer v. Great Northern Ry. Co., 170 P.2d 768.
Safety shoes used by laborer in railroad shops were appliances and equipment within the act; and the fact that laborer, furnished safety shoes by railway company's storekeeper pursuant to order signed by laborer's superior officer, notwithstanding knowledge imputed to company that laborer had hammer toes rendering such shoes defective and dangerous, paid for shoes, as required by company, did not absolve it from liability for injuries to laborer as result of wearing such shoes.—Palmer v. Great Northern Ry. Co., supra.
Sand elevator
In a statute relating to liability for an employee's injury caused by a defect in any appliance required by a railroad to be used by its employees includes an appliance by which sand is elevated to a container from which it may be discharged into compartments provided therefor in locomotives or tenders.—Baltimore & O. R. Co. v. McTeer, 9 N.E.2d 627, 55 Ohio App. 217.

83. Mo.—Williams v. Atchison, T. & S. F. R. Co., 136 S.W. 304, 233 Mo. 666.
39 C.J. p 296 note 93.

84. N.Y.—Racine v. New York Cent. & H. R. R. Co., 24 N.Y.S. 388, 70 Hun 453.
39 C.J. p 380 note 26.
Under common law
U.S.—Baltimore & O. R. Co. v. Groeger, Ohio, 45 S.Ct. 169, 69 L.Ed. 419—McCarthy v. Pennsylvania R. Co., C.C.A.Ind., 156 F.2d 877.
Ill.—Auschwitz v. Wabash Ry. Co., 178 N.E. 403, 346 Ill. 190.
N.Y.—Luce v. New York, C. & St. L. R. Co., 211 N.Y.S. 184, 213 App. Div. 374.
N.C.—Gerow v. Seaboard Air Line Ry., 128 S.E. 345, 189 N.C. 813, certiorari denied Seaboard Air Line Ry. Co. v. Gerow, 46 S.Ct. 121, 269 U.S. 584, 70 L.Ed. 425.
Wyo.—Chicago, B. & Q. R. Co. v. Murray, 277 P. 703, 40 Wyo. 324.
Precautions as to bell
It is the duty of a railroad company to supply an engine with a bell which is adequate for the purpose and its duty in this regard is not discharged if the bell is cracked or otherwise defective and does not sound loud enough to warn persons under ordinary circumstances.—Northern Pac. R. Co. v. Krohne, Mont., 86 F. 230, 29 C.C.A. 674.

85. N.H.—Watkins v. Boston & M. R. R., 138 A. 315, 83 N.H. 10.

86. Miss.—Alabama & V. Ry. Co. v. White, 63 So. 345, 106 Miss. 141.

87. Minn.—Beaton v. Duluth, W. & P. Ry. Co., 191 N.W. 44, 153 Minn. 505.
39 C.J. p 381 note 28.

88. Neb.—Union Pac. R. Co. v. Erickson, 59 N.W. 347, 41 Neb. 1, 29 L.R.A. 137.
39 C.J. p 382 note 41.

(2) Federal Safety Appliance Acts
(3) Federal Boiler Inspection Act

(1) In General

The provision and maintenance of safe locomotives is regulated by various federal and state statutes.

In addition to the Federal Safety Appliance Act and Boiler Inspection Act, discussed in succeeding subdivisions of this section, the providing and maintaining of reasonably safe and suitable locomotives has been regulated by other federal and state statutes.[89] Under the Federal Employers' Liability Act a railroad company is liable for injury to an employee resulting from a defect or insufficiency due to its negligence in its engines and appliances.[90]

Under some authorities neither the Boiler Inspection Act, the Safety Appliance Act, nor the orders of the Interstate Commerce Commission absolutely limit the carrier's liability to a violation of them alone, and negligence may be predicated on other conditions, and if the conditions constitute negligence the employee may recover;[91] but there is also authority to the contrary.[92]

(2) Federal Safety Appliance Acts

The duty under the Federal Safety Appliance Acts, as affecting locomotives, to provide and keep in safe condition the appliances specified in the acts, is an absolute and continuing one. Liability under the act does not depend on negligence.

Under the Federal Safety Appliance Acts, 45 U.S. C.A. § 1 et seq, as affecting locomotive appliances and equipment, there is imposed on common carriers, while engaged in interstate commerce, an absolute and continuing duty to provide, and keep in proper and safe condition at all times and in all circumstances, the appliances specified in the acts,[93] as dis-

89. **State statute requiring grab irons and handholds**
U.S.—Heskett v. Pennsylvania Co., Ohio, 245 F. 326, 157 C.C.A. 518.
39 C.J. p 381 note 29 [a].

State statute requiring foot stirrups
Tex.—St. Louis Southwestern R. Co. v. Martin, Civ.App., 161 S.W. 405.
39 C.J. p 381 note 29 [b].

Fire preventives; personal injuries
(1) Statute making railroad liable for damage resulting from fire set by locomotive is limited to property damage and has no application to bodily injuries, such as injuries to railroad employee.—Hayes v. Missouri Pac. R. Co., 186 S.W.2d 780, 208 Ark. 370.

(2) State statute requiring railroads to place spark arresters on top of the chimneys of engines was enacted to prevent injuries resulting from sparks of fire, and was not intended to apply to cinders small enough to enter the human eye.—Cincinnati, N. O. & T. P. Ry. Co. v. Baxter, 110 S.W. 248, 33 Ky.L. 305, 18 L.R.A.,N.S., 241.

90. U.S.—Chesapeake & O. Ry. Co. v. Rich, C.C.A.Ohio, 81 F.2d 584, certiorari denied 56 S.Ct. 955, 298 U.S. 684, 80 L.Ed. 1404.
Cal.—Edginton v. Southern Pac. Co., 55 P.2d 553, 12 Cal.App.2d 200.
39 C.J. p 381 note 30.

Where snow accumulated on footboard of switch engine on which there were tools which could be used to remove snow and ice, and footboard was cleared at one time by a switchman, but snow and ice again accumulated, railroad could not be held liable under Federal Employers' Liability Act for death of switch foreman resulting from injuries sustained in fall caused by slipping on the icy footboard on theory that railroad failed to provide reasonably safe place in which to work by allowing ice to accumulate on footboard, and failed to furnish proper equipment and material to remove snow and ice.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F. 2d 213.

Lights; headlights
(1) Where engine was not connected with gondola or other cars at time of injury, although it had spotted them a short time before, failure of railroad to have headlight on was not negligence with respect to liability of railroad for death of brakeman who slipped from sill of gondola car on which there was a light covering of snow.—Raudenbush v. Baltimore & O. R. R., D.C.Pa., 63 F.Supp. 329.

(2) An auxiliary tender, attached to locomotive tender for purpose of furnishing water, was integral part of complete locomotive, so as to render federal statute and Interstate Commerce Commission's rule, requiring light on locomotive at night, applicable to such tender.—Speiring v. Chicago & E. I. R. Co., 60 N.E.2d 267, 325 Ill.App. 576.

(3) Switch engine, striking brakeman of pick-up freight train while backing to pick up cars to be coupled thereto, was not road service locomotive, picking up detached portion of its train, or making terminal movement, within Interstate Commerce Commission's rule as to rear headlights on backing road service locomotives not so engaged, but yard service locomotive, within rule requiring front and rear lights thereon.—Chesapeake & O. Ry. Co. v. Wood, C.C.A.Ohio, 59 F.2d 1017, certiorari denied 53 S.Ct. 92, 287 U.S. 646, 77 L.Ed. 559.

(4) The company is not relieved of the charge of negligence in operating its locomotives without a headlight by a provision in a penal statute that, when a headlight becomes defective, the locomotive may be operated until it reaches its destination.—Salabrin v. Ann Arbor R. Co., 160 N.W. 552, 194 Mich. 458—39 C.J. p 381 note 31.

91. U.S.—Baltimore & O. R. R. Co. v. Groeger, C.C.A.Ohio, 288 F. 321, reversed on other grounds Baltimore & O. R. Co. v. Groeger, 45 S.Ct. 169, 266 U.S. 521, 69 L.Ed. 419.
Wis.—Grundman v. Davis, 190 N.W. 839, 179 Wis. 35.

Failure to keep lamp burning
Even if engine in yard service was equipped with lamps on front and rear in good condition, in compliance with Boiler Inspection Act, failure of railroad's servants to keep lamp burning as engine proceeded at night constituted negligence rendering railroad liable under Federal Employers' Liability Act for resulting injury sustained by switchman. —Chesapeake & O. Ry. Co. v. Rich, C.C.A.Ohio, 81 F.2d 584, certiorari denied 56 S.Ct. 955, 298 U.S. 684, 80 L.Ed. 1404.

92. Tex.—Lancaster v. Allen, 217 S. W. 1032, 110 Tex. 213.
39 C.J. p 381 note 33.

93. U.S.—Zumwalt v. Gardner, C. C.A.Mo., 160 F.2d 298—Chesapeake & O. Ry. Co. v. Rich, C.C.A.Ohio, 81 F.2d 584, certiorari denied 56 S.Ct. 955, 298 U.S. 684, 80 L.Ed. 1404—Ford v. New York, N. H. & H. R. Co., C.C.A.N.Y., 54 F.2d 342, certiorari denied 52 S.Ct. 405, 285 U.S. 549, 76 L.Ed. 939—Central Vermont Ry. Co. v. Perry, C.C.A. N.H., 10 F.2d 132.
Ga.—Seaboard Air Line Ry. Co. v. D'Avignon, 153 S.E. 96, 41 Ga.App.

tinguished from the qualified duty at common law to use ordinary care;[94] and a carrier failing in the performance of that duty cannot escape liability by showing that it exercised reasonable care and diligence in providing and maintaining the safety appliances.[95] Accordingly liability under the act does not depend on negligence.[96] On the other hand, the act does not contemplate that railroad engines shall be so equipped as to eliminate all danger of employees being hurt;[97] and the mere fact of the injury of an employee does not of itself mean that the act has been violated.[98]

The act must be construed liberally[99] and together with the Federal Employers' Liability Act;[1] and in an action brought under the latter act it has been held that recovery may be had for injuries caused by failure to comply with the Safety Appliance Act.[2]

Compliance with a duty imposed by the Interstate Commerce Commission pursuant to the act cannot be said to constitute negligence.[3]

(3) Federal Boiler Inspection Act

The duty to comply with the requirements of the Federal Boiler Inspection Act with respect to the safety of locomotives and their appurtenances is absolute, and liability thereunder is not based on negligence.

The section of the Federal Safety Appliance Acts known as the Boiler Inspection Act, 45 U.S.C.A. § 23, making it unlawful for any carrier to use, or permit to be used, on its line any locomotive unless it, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which they are put, without unnecessary peril to life or limb, was enacted to promote the safety and protection of railroad employees and others.[4] It has been held that the Boiler Inspec-

263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441.
Mo.—Riley v. Wabash Ry. Co., 44 S.W.2d 136, 328 Mo. 910.
39 C.J. p 381 note 40.

A "locomotive" and a "car" are not the same for all the purposes of the Safety Appliance Acts.—Lehigh Valley R. Co. v. Beltz, C.C.A.N.Y., 10 F.2d 74, certiorari denied 46 S.Ct. 205, 270 U.S. 641, 70 L.Ed. 775.

Automatic couplers
(1) Locomotives are within the phrase "any car" in the provision of the Federal Safety Appliance Act, 45 U.S.C.A. § 2 et seq., prohibiting common carriers from using in moving interstate traffic any car not equipped with couplers coupling automatically by impact and capable of being uncoupled without the necessity of men going between the ends of the cars.
U.S.—Johnson v. Southern Pac. Co., Utah, 25 S.Ct. 158, 196 U.S. 1, 49 L.Ed. 363.
Mass.—Crowe v. Boston & M. R. R. Co., 136 N.E. 189, 242 Mass. 389.
(2) However, the act does not require an automatic coupler between a locomotive and its tender, which are a single thing, never separated in their ordinary and essential use, and the act is satisfied if there is an automatic coupler at the rear end of the tender.—Pennell v. Philadelphia & Reading R. Co., Pa., 34 S.Ct. 220, 231 U.S. 675, 58 L.Ed. 430.

Switch engine engaged in movement of interstate commerce is locomotive engine which, under act, must be equipped with nondefective power driving-wheel brake.—Missouri-Kansas-Texas R. Co. v. Herron, 55 P.2d 95, 176 Okl. 162.

Gasoline engine or tractor used in yards for switching and frequently hauling long lines of cars was within Safety Appliance Act requiring power driving-wheel brake on locomotives and similar vehicles.—Hoffman v. New York, N. H. & H. R. Co., C.C.A.N.Y., 74 F.2d 227, certiorari denied New York, N. H. & H. R. Co. v. Hoffman, 55 S.Ct. 513, 294 U.S. 715, 79 L.Ed. 1248.

Sill steps
Provision for secure sill steps for railroad employees requires steps furnishing secure footing, and applies to sill steps of engine.—Edwards v. Southern Ry. Co., 184 S.E. 370, 52 Ga.App. 557.

Footboards on tender
Safety Appliance Act and rules of Interstate Commerce Commission do not prescribe footboards at rear end of tender of engine, but only provide manner of construction and application, if footboards are used.—Central Vermont Ry. Co. v. Perry, C.C.A.N.H., 10 F.2d 132.

Drawbar out of line
If locomotive drawbar was four or five inches out of line so as to require brakeman to move it four or five inches to make it couple with freight car, it was not such coupler as act requires.—Hampton v. Des Moines & C. I. R. Co., C.C.A.Iowa, 65 F.2d 899.

Ash pan device on locomotive which a man could operate while standing on ground something over two feet from rails although eighteen inches above his head, and extending out five or six inches over that side of his person next to engine, was held to comply with act making it unlawful to use locomotive not equipped with ash pan which can be dumped or emptied and cleaned without necessity of any employee going under locomotive.—Smithers v. Fort Worth & D. C. Ry. Co., Tex.Com.App., 272 S.W. 764.

94. U.S.—Zumwalt v. Gardner, C.C.A.Mo., 160 F.2d 298.

95. Ga.—Seaboard Air Line Ry. Co. v. D'Avignon, 153 S.E. 96, 41 Ga.App. 263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441.
Mo.—Riley v. Wabash Ry. Co., 44 S.W.2d 136, 328 Mo. 910.

96. U.S.—Zumwalt v. Gardner, C.C.A.Mo., 160 F.2d 298—Ford v. New York, N. H. & H. R. Co., C.C.A.N.Y., 54 F.2d 342, certiorari denied 52 S.Ct. 405, 285 U.S. 549, 76 L.Ed. 939—Central Vermont Ry. Co. v. Perry, C.C.A.N.H., 10 F.2d 132.
Mo.—Fryer v. St. Louis-San Francisco Ry. Co., 63 S.W.2d 47, 333 Mo. 740.

97. Mo.—Zachritz v. St. Louis-San Francisco Ry. Co., 81 S.W.2d 608, 336 Mo. 801, certiorari denied 56 S.Ct. 95, 296 U.S. 584, 80 L.Ed. 413.

98. Mo.—Zachritz v. St. Louis-San Francisco Ry. Co., supra.

99. Mo.—Riley v. Wabash Ry. Co., 44 S.W.2d 136, 328 Mo. 910.

1. U.S.—McCarthy v. Pennsylvania R. Co., C.C.A.Ind., 156 F.2d 877—Central Vermont Ry. Co. v. Perry, C.C.A.N.H., 10 F.2d 132.
Mo.—Fryer v. St. Louis-San Francisco Ry. Co., 63 S.W.2d 47, 333 Mo. 740.

2. U.S.—Central Vermont Ry. Co. v. Perry, C.C.A.N.H., 10 F.2d 132.

3. Pa.—Pursglove v. Monongahela Ry. Co., 131 A. 477, 285 Pa. 27, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 783.

Manner of fastening footboards
Pa.—Pursglove v. Monongahela Ry. Co., supra.

4. U.S.—Lilly v. Grand Trunk Western R. Co., Ill., 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411—Baltimore & O. R. Co. v. Groeger, Ohio, 45 S.Ct. 169, 266 U.S. 521, 69 L.Ed. 419.

tion Act is to be read or construed[5] and applied[6] in connection with the Federal Employers' Liability Act, the two being companion acts,[7] and is also to be read in connection with the Safety Appliance Acts.[8] Recovery for injuries caused by failure to comply with the Boiler Inspection Act may be had in an action under the Federal Employers' Liability Act.[9]

The duty to comply with the requirements of the Boiler Inspection Act is absolute[10] and mandatory,[11]

Ark.—De Queen & E. R. Co. v. Dye, 58 S.W.2d 955, 187 Ark. 219.
Ill.—Auschwitz v. Wabash Ry. Co., 178 N.E. 403, 346 Ill. 190.
Mo.—Cantley v. Missouri-Kansas-Texas R. Co., 183 S.W.2d 123, 353 Mo. 605—Harlan v. Wabash Ry. Co., 73 S.W.2d 749, 335 Mo. 414.
N.C.—Gerow v. Seaboard Air Line Ry., 128 S.E. 345, 189 N.C. 813, certiorari denied Seaboard Air Line Ry. Co. v. Gerow, 46 S.Ct. 121, 269 584, 70 L.Ed. 425.
Va.—Virginian R. Co. v. Andrews, 27 S.E. 577, 118 Va. 482.
Wyo.—Chicago, B. & I. R. Co. v. Murray, 277 P. 703, 40 Wyo. 324.

Furnishing safe equipment
The primary purpose of the act is to require the railway companies to furnish their employees safe standard equipment, free from mechanical defects.—Riley v. Wabash Ry. Co., 44 S.W.2d 136, 328 Mo. 910.

5. U.S.—Baltimore & O. R. Co. v. Groeger, Ohio, 45 S.Ct. 169, 266 U.S. 521, 69 L.Ed. 419.
Ark.—De Queen & E. R. Co. v. Dye, 58 S.W.2d 955, 187 Ark. 219.
Ill.—Auschwitz v. Wabash Ry. Co., 178 N.E. 403, 346 Ill. 190.
Ky.—Louisville & N. R. Co. v. Stephens, 182 S.W.2d 447, 298 Ky. 328.
Minn.—O'Dea v. Byram, 222 N.W. 519, 176 Minn. 67.
Mo.—Fryer v. St. Louis-San Francisco Ry. Co., 63 S.W.2d 47, 333 Mo. 740.
N.C.—Gerow v. Seaboard Air Line Ry., 128 S.E. 345, 189 N.C. 813, certiorari denied Seaboard Air Line Ry. Co. v. Gerow, 46 S.Ct. 121, 269 U.S. 584, 70 L.Ed. 425.
Pa.—Pursglove v. Monongahela Ry. Co., 131 A. 477, 285 Pa. 27, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 783.

6. U.S.—Baltimore & O. R. Co. v. Groeger, Ohio, 45 S.Ct. 169, 266 U.S. 521, 69 L.Ed. 419.
Ark.—De Queen & E. R. Co. v. Dye, 58 S.W.2d 955, 187 Ark. 219.
Ill.—Auschwitz v. Wabash Ry. Co., 178 N.E. 403, 346 Ill. 190.
Minn.—O'Dea v. Byram, 222 N.W. 519, 176 Minn. 67.

7. N.C.—Gerow v. Seaboard Air Line Ry., 128 S.E. 345, 189 N.C. 813, certiorari denied Seaboard Air Line Ry. Co. v. Gerow, 46 S.Ct. 121, 269 U.S. 584, 70 L.Ed. 425.

8. Pa.—Pursglove v. Monongahela Ry. Co., 131 A. 477, 285 Pa. 27, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 783.

9. U.S.—Lilly v. Grand Trunk Western R. Co., Ill., 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411—McCarthy v. Pennsylvania R. Co., C.C.A.Ind., 156 F.2d 877.
Kan.—Cochran v. Atchison, T. & S. F. Ry. Co., 198 P. 685, 109 Kan. 303.
Mo.—Urie v. Thompson, 176 S.W.2d 471, 352 Mo. 211—Drew v. St. Louis-San Francisco Ry. Co., 293 S. W. 468, 220 Mo.App. 720.

Form of action
Federal Employers' Liability Act may be used to prescribe proper form of action based on breach of duty owing by interstate carrier as prescribed by Boiler Inspection Act.—Atlantic Coast Line R. Co. v. Wetherington, 16 So.2d 720, 245 Ala. 313.

10. U.S.—Lilly v. Grand Trunk Western R. Co., Ill., 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411—Southern Ry. Co. v. Lunsford, Ga., 56 S.Ct. 504, 297 U.S. 398, 80 L.Ed. 740, rehearing denied 56 S.Ct. 667, 297 U.S. 729, 80 L.Ed. 1011—Baltimore & O. R. Co. v. Groeger, Ohio, 45 S.Ct. 169, 266 U.S. 521, 69 L.Ed. 419—McCarthy v. Pennsylvania R. Co., C.C.A.Ind., 156 F.2d 877—Eker v. Pettibone, C.C.A.Ind., 110 F.2d 451—Ford v. New York, N. H. & H. R. Co., C.C.A.N.Y., 54 F. 2d 342, certiorari denied 52 S. Ct. 405, 285 U.S. 549, 76 L.Ed. 939.
Ark.—De Queen & E. R. Co. v. Dye, 58 S.W.2d 955, 187 Ark. 219.
Ga.—Seaboard Air Line Ry. Co. v. D'Avignon, 153 S.E. 96, 41 Ga.App. 263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441.
Ill.—Auschwitz v. Wabash Ry. Co., 178 N.E. 403, 346 Ill. 190.
Ky.—Louisville & N. R. Co. v. Stephens, 182 S.W.2d 447, 298 Ky. 328.
Minn.—O'Dea v. Byram, 222 N.W. 519, 176 Minn. 67—Larsen v. Northern Pac. R. Co., 220 N.W. 159, 175 Minn. 1.
Mo.—Cantley v. Missouri-Kansas-Texas R. Co., 183 S.W.2d 123, 353 Mo. 605—Urie v. Thompson, 176 S.W.2d 471, 352 Mo. 211—Harlan v. Wabash Ry. Co., 73 S.W.2d 749, 335 Mo. 414—Robison v. Chicago & E. I. Ry. Co., 64 S.W.2d 660, 334 Mo. 81, certiorari denied 54 S.Ct. 558, 291 U.S. 682, 78 L.Ed. 1069—Riley v. Wabash Ry. Co., 44 S.W. 2d 136, 328 Mo. 910.
N.H.—Watkins v. Boston & M. R. R., 146 A. 865, 84 N.H. 124, certiorari denied Boston & M. R. R. v. Watkins, 50 S.Ct. 35, 280 U.S. 584, 74 L.Ed. 633.
N.Y.—Luce v. New York, C. & St. L. R. Co., 211 N.Y.S. 184, 213 App. Div. 374.
N.C.—Gerow v. Seaboard Air Line Ry., 128 S.E. 345, 189 N.C. 813, certiorari denied Seaboard Air Line Ry. Co. v. Gerow, 46 S.Ct. 121, 269 U.S. 584, 70 L.Ed. 425.
Okl.—Carter v. Chicago, R. I. & P. Ry. Co., 65 P.2d 469, 179 Okl. 292.
Utah.—Ehalt v. McCarthy, 138 P.2d 639, 104 Utah 110.
Wyo.—Chicago, B. & Q. R. Co. v. Murray, 277 P. 703, 40 Wyo. 324.
39 C.J. p 381 note 34.

Nature of absolute duty
An "absolute" duty, as the term is used in this connection, is one which is not subject to any limitation or condition; it is positive and not dependent, and is unqualified by any conditions or considerations whatsoever.—Lehigh Valley R. Co. v. Beltz, C.C.A.N.Y., 10 F.2d 74, 77, certiorari denied 46 S.Ct. 205, 270 U.S. 641, 70 L.Ed. 775.

The carrier's ignorance of the defect does not relieve it of liability under the act.—Scarlett v. Atchison, T. & S. F. Ry. Co., 60 P.2d 462, 7 Cal.2d 181, reversed on other grounds Atchison, T. & S. F. Ry. Co., 57 S. Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U. S. 712, 81 L.Ed. 1365.

Literal compliance
Railway companies must literally comply with the statute.—De Queen & E. R. Co. v. Dye, 58 S.W.2d 955, 187 Ark. 219.

Matter not within province of court or jury
Mo.—Satterlee v. St. Louis-San Francisco Ry. Co., 82 S.W.2d 69, 336 Mo. 943.
N.H.—Watkins v. Boston & M. R. R., 138 A. 315, 83 N.H. 10.

Vehicles covered
Gasoline engine or tractor used in yards for switching and frequently hauling long line of cars was held a locomotive within Boiler Inspection Act and Safety Appliance Act.—Hoffman v. New York, N. H. & H. R. Co., C.C.A.N.Y., 74 F.2d 227, certiorari denied New York, N. H. & H. R. Co. v. Hoffman, 55 S.Ct. 513, 294 U.S. 715, 79 L.Ed. 1248.

11. U.S.—Eker v. Pettibone, C.C.A. Ind., 110 F.2d 451.

whether or not the carrier is at fault.[12] The act, however, does not make the carrier an insurer[13] except with respect to the matters mentioned in the act,[14] and does not contemplate that railroad engines shall be so equipped as to eliminate all danger of employees being hurt;[15] and the mere fact of the injury of an employee does not of itself mean that the act has been violated.[16]

Negligence is not the basis for liability under the act[17] and no question of reasonable or ordinary care on the part of the carrier is involved in a case brought under the act.[18] When there has been a compliance, the statute does not require locomotives and their appurtenances to be kept in perfect condition, but merely that they be in proper and safe condition for the purposes of operating in the service to which they are put,[19] and the carriers are left

12. Mo.—Cantley v. Missouri-Kansas-Texas R. Co., 183 S.W.2d 123, 353 Mo. 605.

13. Minn.—O'Dea v. Byram, 222 N.W. 519, 176 Minn. 67—Larsen v. Northern Pac. R. Co., 220 N.W. 159, 175 Minn. 1.

Va.—Crosswhite v. Southern Ry. Co., 23 S.E.2d 777, 181 Va. 40—Virginia Ry. Co. v. Andrews, 87 S.E. 577, 118 Va. 482.

14. Mo.—Cantley v. Missouri-Kansas-Texas R. Co., 183 S.W.2d 123, 353 Mo. 605.

15. Mo.—Zachritz v. St. Louis-San Francisco Ry. Co., 81 S.W.2d 608, 336 Mo. 801, certiorari denied 56 S.Ct. 95, 296 U.S. 584, 80 L.Ed. 413.

Dropping of dirt or coal

In the absence of a defect in an appliance, the act does not impose on a carrier liability for an injury apparently resulting from the dropping of particles of dirt or coal upon the appliance in the course of fixing the boiler.—O'Dea v. Byram, 222 N.W. 519, 176 Minn. 67.

Failure to construct railing around deck of tender, which was not required by Boiler Inspection Act or order of Interstate Commerce Commission and was not used by any other railroad, did not subject brakeman to unnecessary peril or cause top of tender to be in improper condition and unsafe, in violation of act, so as to render railroad liable for death of brakeman falling from tender, notwithstanding construction of doghouse on top of tender for brakeman's use.—Satterlee v. St. Louis-San Francisco Ry. Co., 82 S.W.2d 69, 336 Mo. 943.

16. Mo.—Zachritz v. St. Louis-San Francisco Ry. Co., 81 S.W.2d 608, 336 Mo. 801, certiorari denied 56 S.Ct. 95, 296 U.S. 584, 80 L.Ed. 413.

Va.—Crosswhite v. Southern Ry. Co., 23 S.E.2d 777, 181 Va. 40.

17. U.S.—Lilly v. Grand Trunk Western R. Co., Ill., 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411.

Ala.—Atlantic Coast Line R. Co. v. Wetherington, 16 So.2d 720, 245 Ala. 313.

Cal.—Scarlett v. Atchison, T. & S. F. Ry. Co., 60 P.2d 462, 7 Cal.2d 181, reversed on other grounds Atchison, T. & S. F. Ry. Co., 57 S.Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365.

Mo.—Cantley v. Missouri-Kansas-Texas R. Co., 183 S.W.2d 123, 353 Mo. 605—Urie v. Thompson, 176 S.W.2d 471, 352 Mo. 211—Aly v. Terminal R. R. Ass'n of St. Louis, 78 S.W.2d 851, 336 Mo. 340—Fryer v. St. Louis-San Francisco Ry. Co., 63 S.W.2d 47, 333 Mo. 740.

"Be it ever so careful it is liable if it permits an unsafe engine to be used on its line."—Ehalt v. McCarthy, 138 P.2d 639, 645, 104 Utah 110.

Negligence per se

(1) A violation of the act is negligence per se.

U.S.—McCarthy v. Pennsylvania R. Co., C.C.A.Ind., 156 F.2d 877.

Mo.—Fryer v. St. Louis-San Francisco Ry. Co., 63 S.W.2d 47, 333 Mo. 740—Drew v. St. Louis-San Francisco Ry. Co., 293 S.W. 468, 220 Mo.App. 720.

(2) A violation of the act implies or constitutes negligence.

U.S.—Ford v. New York, N. H. & H. R. Co., C.C.A.N.Y., 54 F.2d 342, certiorari denied 52 S.Ct. 405, 285 U.S. 549, 76 L.Ed. 939.

Minn.—O'Dea v. Byram, 222 N.W. 519, 176 Minn. 67—Larsen v. Northern Pac. R. Co., 220 N.W. 159, 175 Minn. 1.

(3) If there is a violation, negligence is presumed.—Pursglove v. Monongahela Ry. Co., 131 A. 477, 285 Pa. 27, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 783.

The duty is fastened on the carrier regardless of negligence.

Ala.—Atlantic Coast Line R. Co. v. Wetherington, 16 So.2d 720, 245 Ala. 313.

Utah.—Ehalt v. McCarthy, 138 P.2d 639, 104 Utah 110.

The only defense of carrier sued for employee's injuries under act is that proper appliances were provided and were maintained in good condition, or that defective appliance was not contributing cause of injuries.—Southern Ry. Co. v. Lunsford, 179 S.E. 571, 50 Ga.App. 829, reversed on other grounds 56 S.Ct. 504, 297 U.S. 398, 80 L.Ed. 740, rehearing denied 56 S.Ct. 667, 297 U.S. 729, 80 L.Ed. 1011—Seaboard Air Line Ry. Co. v. D'Avignon, 153 S.E. 96, 41 Ga.App. 263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441.

18. Ark.—De Queen & E. R. Co. v. Dye, 58 S.W.2d 955, 187 Ark. 219.

Cal.—Scarlett v. Atchison, T. & S. F. Ry. Co., 60 P.2d 462, 7 Cal.2d 181, reversed on other grounds Atchison, T. & S. F. Ry. Co., 57 S. Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365.

Mo.—Riley v. Wabash Ry. Co., 44 S.W.2d 136, 328 Mo. 910.

Change from common-law rule

. By Boiler Inspection Act § 2 defendant was bound absolutely to furnish what before, under the common law, it was its duty to exercise ordinary care to provide.

U.S.—Baltimore & O. R. Co. v. Groeger, Ohio, 45 S.Ct. 169, 266 U.S. 521, 69 L.Ed. 419.

Ill.—Auschwitz v. Wabash Ry. Co., 178 N.E. 403, 346 Ill. 190.

N.Y.—Luce v. New York, C. & St. L. R. Co., 211 N.Y.S. 184, 213 App. Div. 374.

N.C.—Gerow v. Seaboard Air Line Ry., 128 S.E. 345, 189 N.C. 813, certiorari denied Seaboard Air Line Ry. Co. v. Gerow, 46 S.Ct. 121, 269 U.S. 584, 70 L.Ed. 425.

19. U.S.—Baltimore & O. R. Co. v. Groeger, Ohio, 45 S.Ct. 169, 266 U.S. 521, 69 L.Ed. 419.

39 C.J. p 381 note 35, p 997 note 74.

Failure to replace defective locomotive held violation of act.—Kidd v. Chicago, R. I. & P. Ry. Co., 274 S.W. 1079, 310 Mo. 1, certiorari denied Chicago, R. I. & P. Ry. Co. v. Kidd, 46 S.Ct. 119, 269 U.S. 582, 70 L.Ed. 424.

Operation of drain cock

Railroad had duty of seeing that drain cock was so fitted to engine that application of manual force in closing it would not pull it loose; drain cock fitted to locomotive so as to invite use of both hands must be so fitted to withstand two-hand pull.—Fredericks v. Erie R. Co., C.C.A.N.Y., 36 F.2d 716.

Grease on handholds

Where the carrier has complied with the statute by providing handholds and maintaining them in good repair, in accordance with the re-

free to determine how their boilers[20] and tenders,[21] with their appurtenances,[22] shall be kept in proper condition for use without unnecessary danger.

The act is to be liberally construed[23] in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment,[24] although this does not mean a construction such as to include cases beyond the plain intent and scope of the act.[25] Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute,[26] but mere experimental devices or gadgets, which do not increase the peril but may prove help-

quirement of the Interstate Commerce Commission, the fact that a locomotive tender becomes unsafe because of the presence of grease on the handholds does not render the carrier liable under the statute, even if the presence of the grease was due to negligence.—Ford v. New York, N. H. & H. R. Co., C.C.A.N.Y., 64 F.2d 342, certiorari denied 52 S. Ct. 405, 285 U.S. 549, 76 L.Ed. 939.

Failure to check water level of boiler

Where water in boiler of engine was low when engine was turned over to hostler and his helper, who did not check water level, and boiler exploded about one half hour thereafter, helper could not recover under act for injuries sustained in explosion, since explosion resulted from working of engine and the inattention of the employees, and no defect or danger inherent in the equipment was involved.—Ehalt v. McCarthy, 138 P.2d 639, 104 Utah 110.

20. U.S.—Baltimore & O. R. Co. v. Groeger, Ohio, 45 S.Ct. 169, 266 U. S. 521, 69 L.Ed. 419.
Ill.—Auschwitz v. Wabash Ry. Co., 178 N.E. 403, 346 Ill. 190.
N.C.—Gerow v. Seaboard Air Line Ry., 128 S.E. 345, 189 N.C. 813, certiorari denied Seaboard Air Line Ry. Co. v. Gerow, 46 S.Ct. 121, 269 U.S. 584, 70 L.Ed. 425.

21. Ill.—Auschwitz v. Wabash Ry. Co., 178 N.E. 403, 346 Ill. 190.

22. Ill.—Auschwitz v. Wabash Ry. Co., supra.

23. U.S.—Lilly v. Grand Trunk Western R. Co., Ill., 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411.
Mo.—Riley v. Wabash Ry. Co., 44 S. W.2d 136, 328 Mo. 910.
39 C.J. p 381 note 36.

All parts and appurtenances of a locomotive are included within the application of the act.—Arnold v. Alton R. Co., 124 S.W.2d 1092, 342 Mo. 1049.

Conditions other than mechanical

(1) Conditions other than mechanical imperfections can render equipment unsafe to operate, within the act.
U.S.—Lilly v. Grand Trunk Western R. Co., Ill., 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411.
Ala.—Atlantic Coast Line R. Co. v. Wetherington, 16 So.2d 720, 245 Ala. 313.
Ky.—Louisville & N. R. Co. v. Stephens, 182 S.W.2d 447, 298 Ky. 328.
Mo.—Urie v. Thompson, 176 S.W. 2d 471, 352 Mo. 211.

(2) There may be a recovery under act when improper or unsafe condition of boiler results because of some foreign matter added to it which, when so added and used, makes boiler unsafe, as well as from some mechanical defect.—Atlantic Coast Line R. Co. v. Wetherington, 16 So.2d 720, 245 Ala. 313.

(3) Action based on improper operation must be brought under Federal Employers' Liability Act, and not under Boiler Inspection Act.—Ehalt v. McCarthy, 138 P.2d 639, 104 Utah 110.

Gasoline engine or tractor used in yards for switching and frequently hauling long line of cars was held a locomotive within the act.—Hoffman v. New York, N. H. & H. R. Co., C.C.A.N.Y., 74 F.2d 227, certiorari denied New York, N. H. & H. R. Co. v. Hoffman, 55 S.Ct. 513, 294 U.S. 715, 79 L.Ed. 1248.

Water affecting accuracy of water gauge

Where type of water furnished by railroad for use in locomotive boilers causes foaming affecting accuracy of water gauge and causing an unusual exhaustion of water, thereby allowing crown sheet to overheat, resulting in explosion when more water is added, railroad is liable for engineer's resulting death although the boiler and all its appurtenances were otherwise in proper and safe condition.—Atlantic Coast Line R. Co. v. Wetherington, 16 So.2d 720, 245 Ala. 313.

Absence of gangway chains on locomotive with loose apron, although not actionable fault in itself, was material in deciding whether there was negligence in maintaining loose apron.—Watkins v. Boston & M. R. R., 138 A. 315, 83 N.H. 10.

24. U.S.—Lilly v. Grand Trunk Western R. Co., Ill., 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411.

25. Mo.—Riley v. Wabash Ry. Co., 44 S.W.2d 136, 328 Mo. 910.

Misplaced clinker hook

Brakeman's fall from top of tender after stumbling over clinker hook, due to negligent misplacement of hook, would not be caused by violation of the act, so as to render railroad liable for brakeman's death, since the misplacing of the clinker hook did not constitute violation of such act.—Satterlee v. St. Louis-San Francisco Ry. Co., 82 S.W.2d 69, 336 Mo. 943.

26. U.S.—Southern Ry. Co. v. Lunsford, Ga., 56 S.Ct. 504, 297 U.S. 398, 80 L.Ed. 740, rehearing denied 56 S.Ct. 667, 297 U.S. 729, 80 L.Ed. 1011.
Ky.—Louisville & N. R. Co. v. Stephens, 182 S.W.2d 447, 298 Ky. 328.
39 C.J. p 381 note 36 [a].

Sprinkler hose

N.Y.—Battles v. Rutland R. Co., 292 N.Y.S. 532, 249 App.Div. 905.

Tank sill, draw bar, and draw-bar pin

Ga.—Seaboard Air Line Ry. Co. v. D'Avignon, 153 S.E. 96, 41 Ga.App. 263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441.

Water glass disclosing level of water in boiler

Ky.—Louisville & N. R. Co. v. Stephens, 182 S.W.2d 447, 298 Ky. 328.

Drifting throttle and grate shaker

Mo.—Kidd v. Chicago, R. I. & P. Ry. Co., 274 S.W. 1079, 310 Mo. 1, certiorari denied Chicago, R. I. & P. Ry. Co. v. Kidd, 46 S.Ct. 119, 269 U.S. 582, 70 L.Ed. 424.

Ice on tender; "clean"

The use of a tender, upon whose top an employee must go in course of his duties, and which is covered with ice, involves unnecessary peril to life or limb, within the act; the Interstate Commerce Commission, in using the word "clean" in promulgating rule providing that top of tender behind fuel space shall be kept clean and a means provided to carry off waste water meant something more than mere manner of construction or mechanical operation, because "clean" does not naturally lend itself to such a limited connotation, but the commission meant a continuing duty of promoting the safety of employees by removing from the top of the tender all extraneous substances which might make standing there hazardous.—Lilly v. Grand Trunk Western R. Co., Ill., 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411.

ful in an emergency, are not within the statute.[27]

Time and place as affecting requirements. The duty imposed on the carrier by the statute is a continuing one;[28] it has the continuous duty to have its locomotives equipped with parts and appurtenances which are safe when in their normal place,[29] and it makes no difference where the unfit condition arises.[30]

Service to which appliance put. The phrase "in the service to which the same are put," in the statute, must, it has been held, be taken to mean the service for which the appliance is designed or to which it is put with the employer's knowledge and acquiescence.[31] Under other authority, while a failure to comply with the statute gives rise to no cause of action in favor of an injured employee unless such failure is a proximate cause of the accident, as discussed infra § 257, where such failure is a proximate cause of the accident the employee can recover even though not engaged at the time in an operation in which the safety appliances are specifically designed to furnish him protection.[32]

Use on carrier's line; repairs. The Boiler Inspection Act has been construed as applying only when the locomotive is in use on the carrier's line or in moving traffic,[33] so as to exclude a locomotive removed from active service for repairs.[34]

Action by Interstate Commerce Commission. A rule adopted by the Interstate Commerce Commission in the exercise of its authority to set standards of compliance with the act acquires the force of law and becomes an integral part of the act;[35] and any violation of the commission's rules or orders in this respect has been held to constitute such a violation

27. U.S.—Southern Ry. Co. v. Lunsford, Ga., 56 S.Ct. 504, 297 U.S. 398, 80 L.Ed. 740, rehearing denied 56 S.Ct. 667, 297 U.S. 729, 80 L.Ed. 1011.

Device to apply air brakes automatically whenever front truck of locomotive left rails, which device, although in use for seven years, was in experimental stage, was not within act, so as to be absolutely required to be in proper condition.
U.S.—Southern Ry. Co. v. Lunsford, supra.
Ga.—Southern Ry. Co. v. Goree, 187 S.E. 297, 54 Ga.App. 134.

28. U.S.—Lilly v. Grand Trunk Western R. Co., Ill., 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411—Southern Ry. Co. v. Lunsford, Ga., 56 S.Ct. 504, 297 U.S. 398, 80 L.Ed. 740, rehearing denied 56 S.Ct. 667, 297 U.S. 729, 80 L.Ed. 1011—Baltimore & O. R. Co. v. Groeger, Ohio, 45 S.Ct. 169, 266 U.S. 521, 69 L.Ed. 419.
Ga.—Seaboard Air Line Co. v. D'Avignon, 153 S.E. 96, 41 Ga.App. 263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441.
Ky.—Louisville & N. R. Co. v. Stephens, 182 S.W.2d 447, 298 Ky. 328.
Mo.—Urie v. Thompson, 176 S.W.2d 471, 352 Mo. 211—Robison v. Chicago & E. I. Ry. Co., 64 S.W.2d 660, certiorari denied 54 S.Ct. 558, 291 U.S. 682, 78 L.Ed. 1069.
N.H.—Watkins v. Boston & M. R. R., 146 A. 865, 84 N.H. 124, certiorari denied Boston & M. R. R. v. Watkins, 50 S.Ct. 35, 280 U.S. 584, 74 L.Ed. 633.

29. U.S.—McCarthy v. Pennsylvania R. Co., C.C.A.Ind., 156 F.2d 877.
Minn.—O'Dea v. Byram, 222 N.W. 519, 176 Minn. 67—Larsen v. Northern Pac. R. Co., 220 N.W. 159, 175 Minn. 1.

30. U.S.—McCarthy v. Pennsylvania R. Co., C.C.A.Ind., 156 F.2d 877.

Arising or becoming apparent after leaving

(1) The act was violated by railroad although engine was in apparent good condition when it left, and the defect became apparent along the way.—McCarthy v. Pennsylvania R. Co., supra.

(2) The use of an engine which becomes defective by reason of a broken piston and cylinder head after it has started on its run so as to be dangerous to life and limb is a violation of the act, although it is used only for the purpose of completing its run and although it is not violative of the provision of the Federal Safety Appliance Act which applies only to brake equipment of an engine.—Kilburn v. Chicago, M. & St. P. Ry. Co., 232 S.W. 1017, 289 Mo. 75.

31. Cal.—Edgington v. Southern Pac. Co., 55 P.2d 553, 12 Cal.App. 2d 200.
Wyo.—Chicago, B. & Q. R. Co. v. Murray, 277 P. 703, 40 Wyo. 324.

Maintenance of defective placard board on water car by railroad resulting in injuries to brakeman, who grasped board to balance himself, was held to render railroad liable under act, where jury found that board was used by brakeman for purpose for which it was customarily used with knowledge and consent of railroad.—Edgington v. Southern Pac. Co., 55 P.2d 553, 12 Cal.App.2d 200.

32. U.S.—Anderson v. Baltimore & O. R. Co., C.C.A.N.Y., 89 F.2d 629, certiorari denied Baltimore & O. R. Co. v. Anderson, 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 538.

33. Cal.—Compton v. Southern Pac. Co., 161 P.2d 40, 70 Cal.App.2d 267.

The test to determine whether an employee working in a roundhouse on an engine undergoing running repairs or servicing, the engine being nominally engaged in interstate commerce, is engaged in interstate commerce, within the meaning of the Federal Employers' Liability Act, and the test to determine whether such an engine is in use and on railroad's line within the Safety Appliance or Boiler Inspection Acts, are not synonymous.—Compton v. Southern Pac. Co., supra.

34. Cal.—Compton v. Southern Pac. Co., supra.

35. U.S.—Lilly v. Grand Trunk Western R. Co., Ill., 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411—Raudenbush v. Baltimore & O. R. Co., C.C.A.Pa., 160 F.2d 363.
Ky.—Louisville & N. R. Co. v. Stephens, 182 S.W.2d 447, 298 Ky. 328.

Failure to have horizontal handhold attached to rear end of tender below top was held not to violate order of commission.—Satterlee v. St. Louis-San Francisco Ry. Co., 82 S.W.2d 69, 336 Mo. 943.

Locomotive "in use;" lights

Locomotive in railroad switchyard, which had been temporarily uncoupled from a string of cars and moved a few feet distant, where it was resting with the expectation that it would shortly be recoupled to cars, was in use in switchyard within meaning of rule requiring each locomotive used in yard service between sunset and sunrise to have head and rear lights of a stipulated power and capacity.—Raudenbush v. Baltimore & O. R. Co., C.C.A.Pa., 160 F.2d 363.

of the act as to render the railroad company liable regardless of negligence[36] or to constitute negligence per se.[37] A carrier using equipment approved by the commission cannot be held negligent, under the act, for failure to install equipment not required by it.[38]

The failure of the commission to make a rule or order covering every defective condition or construction within the meaning of the act does not relieve the carrier of the obligation to comply with the statute.[39]

§ 228. —— Cars

a. In general
b. Statutory regulations
c. Improper loading

a. In General

A railroad company must use reasonable care and diligence to provide reasonably safe cars.

It is the duty of a railroad company to use reasonable care and diligence to provide reasonably safe and suitable cars and rolling stock.[40] The rule requiring safe and suitable cars does not apply where defective cars are being removed to the shop for repairs,[41] nor does it apply to an employee whose duty it is to handle cars out of repair.[42]

Hand cars and trucks. The duty of a railroad to use reasonable care to provide reasonably safe and suitable cars and rolling stock includes hand and push cars furnished the employee for use in the business of the company[43] and extends to such cars provided by the company for transporting its employees to and from their homes[44] although the journey is commenced after the usual working day has ceased.[45]

b. Statutory Regulations

(1) In general
(2) Federal Safety Appliance Acts

(1) In General

An absolute duty is imposed on railroad companies, by various statutes, to provide safe cars.

The duty of a railroad company to provide safe and suitable cars and rolling stock imposed under a number of statutes, both federal and state, is an absolute one, and an employee injured by reason of a violation thereof may recover in an action against the employer.[46] The employment of repairmen on

36. U.S.—Fort Worth & D. C. Ry. Co. v. Jones, C.C.A.Tex., 294 F. 858. 39 C.J. p 381 note 34 [d].

37. Mo.—Satterlee v. St. Louis-San Francisco Ry. Co., 82 S.W.2d 69, 336 Mo. 943.

Matter not within province of court or jury
Mo.—Satterlee v. St. Louis-San Francisco Ry. Co., supra.

38. Minn.—Mahutga v. Minneapolis, St. P. & S. S. M. Ry. Co., 234 N. W. 474, 182 Minn. 362, certiorari denied 51 S.Ct. 494, 283 U.S. 847, 75 L.Ed. 1456.

Ladder
Railroad was not negligent in failing to construct ladder at rear end of tender with loop or handle extending above top on left as well as on right side of ladder, so as to be liable for death of brakeman falling from tender, where ladder complied with rule of Interstate Commerce Commission.—Satterlee v. St. Louis-San Francisco Ry. Co., 82 S.W.2d 69, 336 Mo. 943.

39. U.S.—Baltimore & O. R. Co. v. Groeger, C.C.A.Ohio, 288 F. 321, reversed on other grounds Baltimore & O. R. Co. v. Groeger, 45 S.Ct. 169, 266 U.S. 521, 69 L.Ed. 419.

40. Ill.—Chicago & N. W. R. Co. v. Swett, 45 Ill. 197, 92 Am.D. 206—Sprickerhoff v. Baltimore & O. R. Co., 55 N.E.2d 532, 323 Ill.App. 340.
39 C.J. p 382 note 43.

Search for defects and dangerous objects
(1) Railroad has duty to search for defects and dangerous objects in its cars as part of duty to exercise ordinary care in furnishing reasonably safe place for servants to work.—Kansas, O. & G. Ry. Co. v. Ballew, 61 P.2d 181, 177 Okl. 500.
(2) Duty to furnish safe place to work generally see supra § 226.
(3) Inspection and repair see infra §§ 235–243.

Safe passage for brakemen
(1) In safeguarding its employees from injury, the railroad is bound to use due care to make its cars and their loads reasonably safe for the passage of its brakemen.—Morey v. Maine Cent. R. Co., 142 A. 585, 127 Me. 190.
(2) Where brakeman, accustomed to caboose having small cupola and side railings, fell while attempting to pass from end to end of caboose which had wider cupola and no side railings, which equipment was within interstate commerce commission's requirements, railroad was not liable.—Friermood v. Oregon-Washington R. & Nav. Co., 235 P. 17, 134 Wash. 178.

41. U.S.—Southern R. Co. v. Lyons, Ala., 169 F. 557, 95 C.C.A. 55, 25 L.R.A.,N.S., 335.

42. Tex.—Gulf, C. & S. F. Ry. Co. v. Mayo, 37 S.W. 659, 14 Tex.Civ. App. 253.

43. Wis.—Hardt v. Chicago, M. & St. P. Ry. Co., 110 N.W. 427, 130 Wis. 512.
39 C.J. p 384 note 46.

44. N.J.—Cicalese v. Lehigh Valley R. Co., 69 A. 166, 75 N.J.Law 897.

45. N.J.—Cicalese v. Lehigh Valley R. Co., supra.

46. Ill.—Luken v. Lake Shore & M. S. Ry. Co., 94 N.E. 175, 248 Ill. 377, 140 Am.S.R. 220, 21 Ann.Cas. 82.
39 C.J. p 384 note 50.

Under Federal Employers' Liability Act
(1) A railroad company is liable for injuries to an employee resulting from a defect or insufficiency, due to its negligence, in its cars.—Joice v. Missouri-Kansas-Texas R. Co., Mo., 189 S.W.2d 568, 161 A.L.R. 383—39 C.J. p 384 note 50 [c].
(2) Where brakeman was injured in attempt to alight from slowly moving caboose when he slipped on a worn burlap bag nailed to caboose platform for a mat, railroad could not escape liability for injuries under the so-called simple tool doctrine, since caboose was defective because of presence of mat in its worn condition, and fact that condition could have been easily remedied did not alter the fact that caboose was actually defective due to negligence of railroad.—McCarthy v.

defective cars to repair defects does not violate, but strictly complies with, a statute requiring a railroad company to keep its cars free from defects and safe for use in the operation of its road.[47]

(2) Federal Safety Appliance Acts
(a) In general
(b) Brakes
(c) Couplers

(a) In General

The liability imposed on railroad companies by the Federal Safety Appliance Acts, relating to safety appliances on cars, is absolute and does not depend on the company's negligence. The acts are to be liberally construed to effectuate their purpose of safe-guarding employees.

The Federal Safety Appliance Acts, 45 U.S.C.A. § 1 et seq, relating to safety appliances and equipment on railroad cars and the protection of railroad employees and travelers, have a humanitarian[48] and remedial[49] purpose; they are designed to protect and promote the safety of employees and the public,[50] although primarily to protect employees,[51] and to minimize the dangers of a calling made dangerous in part by defects in the equipment which employees are required to use.[52] They are remedial statutes[53] and are to be construed liberally[54] and

Palmer, C.C.A.N.Y., 113 F.2d 721, certiorari denied Palmer v. McCarthy, 61 S.Ct. 50, 311 U.S. 680, 85 L.Ed. 438.

(3) Hauling of defective car and injury to employee does not render railroad liable unless it was negligent.—Wilson v. Missouri Pac. R. Co., 5 S.W.2d 19, 319 Mo. 308. Certiorari denied 49 S.Ct. 25, 278 U.S. 622, 73 L.Ed. 543.

(4) Defendant held not negligent with respect to snow or ice.
Ill.—Halloran v. Chicago & N. W. Ry. Co., 63 N.E.2d 670, 327 Ill.App. 217.
Me.—Morey v. Maine Cent. R. Co., 142 A. 585, 127 Me. 190.

(5) Railroad held not liable for negligence in causing death of section foreman.
Mass.—Lynch v. New York, N. H. & H. R. R., 200 N.E. 877, 294 Mass. 152.
Va.—Chesapeake & O. Ry. Co. v. Butler, 177 S.E. 195, 163 Va. 626.

Under state employers' liability act, allowing recovery by an employee injured as a result of a defect in the condition of the ways, works, or machinery used by the employer in his business, which had not been discovered or remedied owing to the negligence of the employer or of someone intrusted by him with the duty in that respect, railroad company in possession and control of freight car, used in its work, is liable for injuries to employee because of defect in floor thereof, if discoverable and remediable in exercise of reasonable care.—Griffin v. New York, N. H. & H. R. Co., 181 N.E. 839, 279 Mass. 511.

State statutes requiring automatic couplers
Ill.—Erlinger v. St. Louis & O. Ry. Co., 152 Ill.App. 640, affirmed 92 N.E. 153, 245 Ill. 304.
Mich.—Betterly v. Boyne City, G. & A. R. Co., 122 N.W. 635, 158 Mich. 385.
Ohio.—Lake Shore & M. S. Ry. Co. v. Benson, 97 N.E. 417, 85 Ohio St. 215, 41 L.R.A.,N.S., 49, Ann.Cas. 1913A 945.
39 C.J. p 384 note 50 [h].

Automatic or power brakes
Under Code § 2082, prohibiting the running of a train of cars not having a sufficient number of cars with automatic or power brakes enabling the engineer to control the train without requiring brakemen to go between the ends, or on top, of the cars to use the handbrake, the brakes need not, as a matter of law, be coupled up so as to be operated by the engineer, especially where the engine is switching or spotting cars.—Stearns v. Chicago, R. I. & P. Ry. Co., 148 N.W. 128, 166 Iowa 566.

Repair of rolling stock
A state statute making railroads liable to injured employees because of negligent handling of cars, or defect or insufficiency in cars or other equipment, includes the repair of rolling stock.
U.S.—Great Northern Ry. Co. v. Wojtala, C.C.A.Mont., 112 F.2d 609.
Mont.—Regan v. Montana Logging Co., 162 P. 388, 53 Mont. 153.

47. U.S.—Noftz v. Baltimore & O. Ry. Co., C.C.A.Ohio, 13 F.2d 389.

48. U.S.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515—Gray v. Louisville & N. R. Co., D.C.Tenn., 197 F. 874—Southern R. Co. v. Snyder, Tenn., 187 F. 492, 109 C.C.A. 344.

49. U.S.—New York Central R. Co. v. U. S., Pa., 44 S.Ct. 436, 265 U.S. 41, 68 L.Ed. 893—Johnson v. Southern Pac. Co., Utah, 25 S.Ct. 158, 196 U.S. 1, 49 L.Ed. 363—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515—Cusson v. Canadian Pac. Ry. Co., C.C.A.Vt., 115 F.2d 430—Gray v. Louisville & N. R. Co., D.C.Tenn., 197 F. 874—Southern R. Co. v. Snyder, 187 F. 492, 109 C.C.A. 344—U. S. v. New York Cent. R. Co., D.C.N.Y., 70 F.Supp. 761—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F.Supp. 154.

Act is in force in Puerto Rico
U.S.—American R. Co. of Porto Rico v. Didricksen, Puerto Rico, 33 S.Ct. 224, 227 U.S. 145, 57 L.Ed. 456.

50. U.S.—Cusson v. Canadian Pac. Ry. Co., C.C.A.Vt., 115 F.2d 430—Tipton v. Atchison, T. & S. F. Ry. Co., C.C.A.Cal., 78 F.2d 450, affirmed 56 S.Ct. 715, 298 U.S. 141, 80 L.Ed. 1091, 104 A.L.R. 831—Keenan v. Director General of Railroads, C.C.A.N.Y., 285 F. 286, certiorari denied 261 U.S. 616, 43 S.Ct. 361, 67 L.Ed. 828—Southern R. Co. v. Snyder, Tenn., 187 F. 492, 109 C.C.A. 344—U. S. v. New York Cent. R. Co., D.C.N.Y., 70 F.Supp. 761.
Ariz.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A.L.R. 857.
Ark.—De Queen & E. R. Co. v. Dye, 58 S.W.2d 955, 187 Ark. 219.
Fla.—Atlantic Coast Line R. Co. v. Moore, 181 So. 374, 135 Fla. 485, modified on other grounds 186 So. 210, 135 Fla. 485.
Tenn.—Southern Ry. Co. v. Woods, 86 S.W.2d 903, 19 Tenn.App. 314.
39 C.J. p 386 note 57.

Furnishing safe equipment
The primary purpose of the acts is to require the railway companies to furnish their employees safe standard equipment, free from mechanical defects.—Riley v. Wabash Ry. Co., 44 S.W.2d 136, 328 Mo. 910.

51. U.S.—Swinson v. Chicago, St. P., M. & O. Ry. Co., Minn., 55 S.Ct. 517, 294 U.S. 529, 79 L.Ed. 1041, 96 A.L.R. 1136, rehearing denied 55 S.Ct. 642, 295 U.S. 767, 79 L.Ed. 1708.

52. U.S.—Cusson v. Canadian Pac. Ry. Co., C.C.A.Vt., 115 F.2d 430.

53. U.S.—Gray v. Louisville & N. R. Co., D.C.Tenn., 197 F. 874.

54. U.S.—Brady v. Terminal R. Ass'n of St. Louis, Mo., 58 S.Ct. 426, 303 U.S. 10, 82 L.Ed. 614—New York Central R. Co. v. U. S., Pa., 44 S.Ct. 436, 265 U.S. 41, 68

in the light of their remedial purposes,[55] although this does not mean a construction such as to include cases beyond the plain intent and scope of the acts.[56] On the other hand, the acts will not be given an unreasonable construction,[57] or, it has been held, one which makes their requirements impractical or impossible to perform,[58] although other authority holds that impracticability is no defense.[59] The acts do not contemplate that railroad cars shall be so equipped as to eliminate all danger of employees being hurt,[60] and the mere fact of the injury of an employee does not of itself mean that the acts have been violated.[61] The acts are to be construed[62] and applied[63] with the Federal Employers' Liability Act. The standards prescribed by the Safety Appliance Acts must be strictly conformed to, and equivalents or substitutes are not permitted;[64] a literal compliance with the terms of the acts is required.[65]

The duty to comply with the provisions of the acts is absolute and failure to comply renders the company liable to an employee injured by such fail-

L.Ed. 893—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307, certiorari denied 62 S. Ct. 82, 314 U.S. 642, 86 L.Ed. 515—Gray v. Louisville & N. R. Co., D.C.Tenn., 197 F. 874—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F.Supp. 154.

Cal.—Scarlett v. Atchison, T. & S. F. Ry., 60 P.2d 462, 7 Cal.2d 181, reversed on other grounds 57 S.Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U. S. 712, 81 L.Ed. 1365—Maurice v. State, 110 P.2d 706, 43 Cal.App.2d 270.

Ga.—Western & A. R. R. v. Meister, 140 S.E. 905, 37 Ga.App. 570.

Mo.—Riley v. Wabash Ry. Co., 44 S. W.2d 136, 328 Mo. 910.

39 C.J. p 386 note 57.

"The Safety Appliance Act . . . has been liberally construed so as to give a right of recovery for every injury the approximate cause of which was a failure to comply with a requirement of the act."—Swinson v. Chicago, St. P., M. & O. Ry. Co., Minn., 55 S. Ct. 517, 294 U.S. 529, 79 L.Ed. 1041, 96 A.L.R. 1136, rehearing denied 55 S.Ct. 642, 295 U.S. 767, 79 L.Ed. 1708.

Train as unit involved

Where a train is the unit involved in a personal injury action brought by an employee of an interstate railroad, the provisions of the act apply, but if a car is the unit, the act does not apply.—Conrad v. Baltimore & O. R. Co., 133 S.W.2d 350, 345 Mo. 335.

Tender; engine

(1) The term "cars" includes tenders.

Del.—Philadelphia & R. R. Co. v. Winkler, 56 A. 112, 4 Pennew. 387.

Mo.—Moore v. St. Joseph & G. I. Ry. Co., 186 S.W. 1035, 268 Mo. 31, affirmed 37 S.Ct. 278, 243 U.S. 311, 61 L.Ed. 741.

(2) While under Safety Appliance Act word "car" or "cars" will be construed to include engine and tender, yet, when wording and context of order or rule of Interstate Commerce Commission indicates otherwise, it will not be so construed.—Satterlee v. St. Louis-San Francisco Ry. Co., 82 S.W.2d 69, 336 Mo. 943.

"Secure"

(1) The word "secure," as used in the act in the requirement of "secure" equipment of specified character, refers only to the mechanical and structural character of the equipment.—Tobin v. Detroit, T. & I. R. Co., 13 N.E.2d 739, 57 Ohio App. 306.

(2) Thus a light fall of snow upon a sill step does not render it insecure within such requirement.—Raudenbush v. Baltimore & O. R. Co., C.C.A.Pa., 160 F.2d 363—Raudenbush v. Baltimore & O. R. R., D.C. Pa., 65 F.Supp. 6.

(3) Likewise, accumulation of frost thereon did not render running board on tank car insecure.—Tobin v. Detroit, T. & I. R. Co., 13 N.E. 2d 739, 57 Ohio App. 306.

(4) Word "secure" means more than firmly fastened, and means safe for use in purpose for which it is intended.

U.S.—Davis v. Reynolds, C.C.A.Va., 280 F. 363.

Cal.—Scarlett v. Atchison, T. & S. F. Ry., 60 P.2d 462, 7 Cal.2d 181, reversed on other grounds 57 S.Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365.

(5) "Secure steps" mean steps which furnish secure footing for employees having to use them.—Davis v. Reynolds, C.C.A.Va., 280 F. 363.

55. U.S.—New York Central R. Co. v. U. S., Pa., 44 S.Ct. 436, 265 U. S. 41, 68 L.Ed. 893—Johnson v. Southern Pac. Co., Utah, 25 S.Ct. 158, 196 U.S. 1, 49 L.Ed. 363—Gray v. Louisville & N. R. Co., D.C. Tenn., 197 F. 874—Fort Street Union Depot Co. v. Hillen, C.C.A. Mich., 119 F.2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515—Cusson v. Canadian Pac. Ry. Co., C.C.A.Vt., 115 F.2d 430—U. S. v. New York Cent. R. Co., D.C.N.Y., 70 F.Supp. 761—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F.Supp. 154.

Cal.—Scarlett v. Atchison, T. & S. F. Ry., 60 P.2d 462, 7 Cal.2d 181, reversed on other grounds 57 S. Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365.

Maintenance of equipment in dangerous position

The Federal Safety Appliance Acts and Interstate Commerce Commission's regulations standarizing certain railroad equipment cannot be so construed as to authorize maintenance of equipment in position which will destroy safety of employee's place of work by creating unnecessary hazard, as by placing automatic coupler lever on top of end sill of gondola freight car.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 159 A.L. R. 857, 62 Ariz. 359.

56. Mo.—Riley v. Wabash Ry. Co., 44 S.W.2d 136, 328 Mo. 910.

57. U.S.—St. Louis, Iron Mountain & Southern R. Co. v. Taylor, Ark., 28 S.Ct. 616, 210 U.S. 281, 52 L.Ed. 1061—Siegel v. New York Central & H. R. R. R. Co., C.C.Pa., 178 F. 873.

Kan.—Missouri Pac. R. Co. v. Brinkmeier, 77 Kan. 14, 93 P. 621.

39 C.J. p 387 note 59.

58. Kan.—Missouri Pac. Ry. Co. v. Brinkmeier, supra.

59. U.S.—Payne v. Colvin, 276 F. 15, certiorari denied 42 S.Ct. 921, 257 U.S. 652, 66 L.Ed. 418.

39 C.J. p 385 note 52 [a].

60. Mo.—Zachritz v. St. Louis-San Francisco Ry. Co., 81 S.W.2d 608, 336 Mo. 801, certiorari denied 56 S.Ct. 95, 296 U.S. 584, 80 L.Ed. 413.

61. Mo.—Zachritz v. St. Louis-San Francisco Ry. Co., supra.

62. Ark.—De Queen & E. R. Co. v. Dye, 58 S.W.2d 955, 187 Ark. 219.

Tenn.—Southern Ry. Co. v. Woods, 86 S.W.2d 903, 19 Tenn.App. 314.

63. Ark.—De Queen & E. R. Co. v. Dye, 58 S.W.2d 955, 187 Ark. 219.

64. Ark.—De Queen & E. R. Co. v. Dye, supra.

39 C.J. p 386 note 54.

65. Ark.—De Queen & E. R. Co. v. Dye, supra.

ure[66] despite the absence from the acts of any express language conferring a right of action,[67] pro-

66. U.S.—Myers v. Reading Co., Pa., 67 S.Ct. 1334, 331 U.S. 477, 91 L.Ed. 1615—Brady v. Terminal R. Ass'n of St. Louis, Mo., 58 S.Ct. 426, 303 U.S. 10, 82 L.Ed. 614—Atchison, T. & S. F. Ry. Co. v. Scarlett, Cal., 57 S.Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365—Moore v. Chesapeake & O. Ry. Co., Ind., 54 S.Ct. 402, 291 U.S. 205, 78 L.Ed. 755—Great Northern R. Co. v. Otoes, Minn., 36 S.Ct. 124, 239 U.S. 349, 60 L.Ed. 322—Swinson v. Chicago, St. P., M. & O. Ry. Co., C.C.A.Minn., 72 F.2d 649, reversed on other grounds 55 S.Ct. 517, 294 U.S. 529, 79 L.Ed. 1041, 96 A.L.R. 1136, rehearing denied 55 S.Ct. 642, 295 U.S. 767, 79 L.Ed. 1708—Ford v. New York, N. H. & H. R. Co., C.C.A. N.Y., 54 F.2d 342, certiorari denied 52 S.Ct. 405, 285 U.S. 549, 76 L.Ed. 939—Cochran v. Pittsburgh & L. E. R. Co., D.C.Ohio, 31 F.2d 769—Sherry v. Baltimore & O. R. Co., C.C.A.Ohio, 30 F.2d 487, certiorari denied 50 S.Ct. 16, 280 U.S. 555, 74 L.Ed. 611—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F.Supp. 154—Raudenbush v. Baltimore & O. R. Co., D.C. Pa., 65 F.Supp. 6.

Ark.—Baldwin v. Sears, 91 S.W.2d 266, 192 Ark. 257.

Cal.—Newkirk v. Los Angeles Junction Ry. Co., 131 P.2d 535, 21 Cal.2d 308—Atchison, T. & S. F. Ry. Co. v. Superior Court in and for Contra Costa County, 86 P.2d 85, 12 Cal.2d 549, certiorari denied Atchison, T. & S. F. R. Co. v. Superior Court of California, 59 S. Ct. 774, 306 U.S. 657, 83 L.Ed. 1055.

Ga.—Western & A. R. R. v. Meister, 140 S.E. 905, 37 Ga.App. 570.

Ill.—Herb v. Pitcairn, 29 N.E.2d 543, 306 Ill.App. 583, reversed on other grounds 36 N.E.2d 555, 377 Ill. 405—Stott v. Thompson, 14 N.E.2d 246, 294 Ill.App. 450, certiorari denied Thompson v. Stott, 59 S.Ct. 106, 305 U.S. 639, 83 L.Ed. 411.

Minn.—Schendel v. Chicago, M. & St. P. Ry. Co., 206 N.W. 436, 165 Minn. 223—Coleman v. Illinois Cent. R. Co., 155 N.W. 763, 132 Minn. 22.

Mo.—Rush v. Thompson, 202 S.W.2d 800—Riley v. Wabash Ry. Co., 44 S.W.2d 136, 328 Mo. 910—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005—Moore v. St. Joseph & G. I. Ry. Co., 186 S.W. 1035, 268 Mo. 31, affirmed 37 S.Ct. 278, 243 U.S. 311, 61 L.Ed. 741.

S.C.—Link v. Seaboard Air Line Ry. Co., 156 S.E. 481, 159 S.C. 538, certiorari denied Seaboard Air Line Ry. Co. v. Link, 51 S.Ct. 212, 282 U.S. 900, 75 L.Ed. 792.

39 C.J. p 385 note 52.

Duty supplants common-law duty

U.S.—Tipton v. Atchison, T. & S. F. Ry. Co., Cal., 56 S.Ct. 715, 298 U.S. 141, 80 L.Ed. 1091, 104 A.L.R. 831—St. Louis, Iron Mountain, & Southern R. Co. v. Taylor, Ark., 28 S.Ct. 616, 210 U.S. 281, 52 L.Ed. 1061—Central R. of New Jersey v. Breisch, C.C.A.Pa., 112 F.2d 595, reversed on other grounds 61 S.Ct. 662, 312 U.S. 484, 85 L.Ed. 964, 132 A.L.R. 918—Myers v. Reading Co., D.C.Pa., 63 F.Supp. 817, affirmed, C.C.A., 155 F.2d 523, reversed on other grounds 67 S.Ct. 1334, 331 U.S. 477, 91 L.Ed. 1615.

Liability not absolute

Under the acts, the carrier is not subject to an absolute liability to its employees comparable to that established by a workmen's compensation law, but it is subject to liability resulting from its violation of its absolute duty to comply with the acts.—Myers v. Reading Co., Pa., 67 S.Ct. 1334, 331 U.S. 477, 91 L.Ed. 1615.

The carrier's ignorance of the defect does not relieve it of liability.—Scarlett v. Atchison, T. & S. F. Ry., 60 P.2d 462, 7 Cal.2d 181, reversed on other grounds 57 S.Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365.

Handholds; grabirons

(1) Railroad which fails to provide and maintain safe handholds or grabirons on train is liable, under Federal Safety Appliance Act § 4, 45 U.S.C.A. § 4, for damages to employee proximately resulting from such failure.

U.S.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515—Chicago & N. W. Ry. Co. v. Kelly, C.C.A. Minn., 74 F.2d 31.

N.H.—Grew v. Boston & M. R. R., 142 A. 707, 83 N.H. 383.

(2) A grabiron on a passenger car is within the requirements of the act, notwithstanding it was attached in a perpendicular position to the side of the steps of the vestibule of the car, since the position and location of the grabiron was immaterial in view of the underlying purpose of the act to safeguard the lives of railroad employees.—Atlantic Coast Line R. Co. v. Moore, 181 So. 374, 135 Fla. 485, modified on other grounds 186 So. 210, 135 Fla. 485.

(3) The presence of snow and ice on grabirons of freight car is not a violation of the act.—Halloran v. Chicago & N. W. Ry. Co., 63 N.E.2d 670, 327 Ill.App. 217.

(4) Wire wrapped around grabiron on railroad car was held no part of grabiron, with respect to railroad's liability for switchman's injuries.—Chicago, R. I. & P. Ry. Co. v. Benson, 185 N.E. 244, 352 Ill. 195, certiorari denied Chicago, R. I. & P. Ry. Co. v. Benson, 54 S.Ct. 53, 290 U.S. 636, 78 L.Ed. 553.

The absence of a drawhead or end sill is a violation of the act.—Ward v. Erie R. Co., 129 N.E. 886, 230 N.Y. 230, certiorari denied 41 S.Ct. 536, 256 U.S. 696, 65 L.Ed. 1176.

Draw bars

Draw bars of unloaded freight cars are required by Federal Safety Appliance Act § 5, 45 U.S.C.A. § 5, to be of uniform and standard height; but those of loaded cars need not be of uniform height, provided that they do not vary more than the three inches prescribed as the maximum permitted variation from the standard; the statutory duty imposed on carriers in absolute terms is not discharged by furnishing cars constructed with draw bars of the standard height, and by furnishing to competent inspectors and train men a sufficient number of metallic wedges or shims, to use, as occasion demands, to raise to the legal standard draw bars lowered by the natural effect of proper use.—St. Louis, I. M. & S. Ry. Co. v. Taylor, Ark., 28 S.Ct. 616, 210 U.S. 281, 52 L.Ed. 1061.

A door handle on a box car is not one of the safety appliances mentioned in the act.—Campbell v. Southern Pac. Co., 250 P. 622, 120 Or. 122.

67. U.S.—Texas & P. R. Co. v. Rigsby, Tex., 36 S.Ct. 482, 241 U.S. 33, 60 L.Ed. 1110.

N.H.—Grew v. Boston & M. R. R., 142 A. 707, 83 N.H. 383.

Right to recover for death of employee is implied.

U.S.—Pennsylvania R. Co. v. Logansport Loan & Trust Co., C.C.A.Ind., 29 F.2d 1—Ross v. Schooley, Ill., 257 F. 290, 168 C.C.A. 374, certiorari denied 39 S.Ct. 390, 249 U.S. 615, 63 L.Ed. 797.

Ala.—Mobile, J. & K. C. R. Co. v. Bromberg, 37 So. 395, 141 Ala. 258.

Minn.—Kraemer v. Chicago & N. W. R. Co., 181 N.W. 847, 148 Minn. 310.

Enforcement according to common law or state death statute

U.S.—Moore v. Chesapeake & O. Ry. Co., Ind., 54 S.Ct. 402, 291 U.S. 205, 78 L.Ed. 755.

vided the employee is one of the class for whose benefit the statute was enacted.[68]

Liability under the act is not based, and does not depend, on the carrier's negligence, in the general sense of want of care,[69] and the carrier is not excused by any showing of care, however assiduous;[70] violation of the acts has been said to constitute negligence[71] or negligence per se[72] for which recovery may be had under the Federal Employers' Liability Act.[73] The liability does not arise from the carrier's common-law duties growing out of the relation of master and servant[74] nor does it depend on the carrier's general duty to exercise ordinary

Effect of Federal Employers' Liability Act

An injured employee's right to recover under the Federal Safety Appliance Act is not affected by the subsequent passage of the Federal Employers' Liability Act, since the latter provides that nothing therein shall be held to impair the rights of employees under other acts of congress.—Grew v. Boston & M. R. R., 142 A. 707, 83 N.H. 383.

68. U.S.—Swinson v. Chicago, St. P., M. & O. Ry. Co., C.C.A.Minn., 72 F.2d 649, reversed on other grounds 55 S.Ct. 517, 294 U.S. 529, 79 L.Ed. 1041, 96 A.L.R. 1136, rehearing denied 55 S.Ct. 642, 295 U.S. 767, 79 L.Ed. 1708.

Beneficiaries other than primary

The fact that certain classes of persons were intended to be primarily protected by the discharge of such statutory duty will not necessarily prevent others, neither named nor intended as primary beneficiaries, from maintaining an action to recover for injuries caused by a violation of such legislative command.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515.

69. U.S.—Myers v. Reading Co., Pa., 67 S.Ct. 1334, 331 U.S. 477, 91 L.Ed. 1615—Brady v. Terminal R. Ass'n of St. Louis, Mo., 58 S.Ct. 426, 303 U.S. 10, 82 L.Ed. 614—Sherry v. Baltimore & O. R. Co., C.C.A.Ohio, 30 F.2d 487, certiorari denied 50 S.Ct. 16, 280 U.S. 555, 74 L.Ed. 611—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F.Supp. 154.

Cal.—Newkirk v. Los Angeles Junction Ry. Co., 131 P.2d 535, 21 Cal. 2d 308—Atchison, T. & S. F. Ry. Co. v. Superior Court in and for Contra Costa County, 86 P.2d 85, 12 Cal.2d 549, certiorari denied Atchison, T. & S. F. R. Co. v. Superior Court of California, 59 S.Ct. 774, 306 U.S. 657, 83 L.Ed. 1055—Scarlett v. Atchison, T. & S. F. Ry. Co., 60 P.2d 462, 7 Cal.2d 181, reversed on other grounds Atchison, T. & S. F. Ry. Co., 57 S.Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365.

Ga.—Western & A. R. R. v. Meister, 140 S.E. 905, 37 Ga.App. 570—Western & A. R. R. v. Townsend, 135 S.E. 439, 36 Ga.App. 70.

Ill.—Stott v. Thompson, 14 N.E.2d 246, 294 Ill.App. 450, certiorari denied Thompson v. Stott, 59 S.Ct. 106, 305 U.S. 639, 83 L.Ed. 411.

Ind.—Chicago, I. & L. Ry. Co. v. Stierwalt, 153 N.E. 807, 87 Ind. App. 478, certiorari denied 49 S. Ct. 32, 278 U.S. 633, 73 L.Ed. 551.

Mo.—Rush v. Thompson, 202 S.W.2d 800—Colwell v. St. Louis-San Francisco Ry. Co., 73 S.W.2d 222, 335 Mo. 494—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005.

S.C.—Link v. Seaboard Air Line Ry. Co., 156 S.E. 481, 159 S.C. 538, certiorari denied Seaboard Air Line Ry. Co. v. Link, 51 S.Ct. 212, 282 U.S. 900, 75 L.Ed. 792.

39 C.J. p 386 note 55.

"Where an injury results from the inefficient operation of an appliance, whether such inefficiency was due to negligence of employer is immaterial."—Wilson v. Thompson, 133 S.W.2d 331, 333, 345 Mo. 319—Kimberling v. Wabash Ry. Co., 85 S.W. 2d 736, 738, 337 Mo. 702—Henry v. Cleveland, C., C. & St. L. Ry. Co., 61 S.W.2d 340, 341, 332 Mo. 1072, certiorari denied Cleveland, C. C. & St. L. R. Co. v. Henry, 54 S.Ct. 70, 290 U.S. 627, 78 L.Ed. 546.

70. U.S.—Myers v. Reading Co, Pa., 67 S.Ct. 1334, 331 U.S. 477, 91 L.Ed. 1615—Brady v. Terminal R. Ass'n of St. Louis, Mo., 58 S.Ct. 426, 303 U.S. 10, 82 L.Ed. 614—Siegel v. New York Cent. & H. R. R. R. Co., C.C.A.Pa., 178 F. 873—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F.Supp. 154.

Mo.—Rush v. Thompson, 202 S.W.2d 800.

Reasonable care

Ark.—Baldwin v. Sears, 91 S.W.2d 266, 192 Ark. 257.

Mo.—Riley v. Wabash Ry. Co., 44 S.W.2d 136, 328 Mo. 910—Moore v. St. Joseph & G. I. Ry. Co., 186 S.W. 1035, 268 Mo. 31, affirmed 37 S.Ct. 278, 243 U.S. 311, 61 L.Ed. 741.

Ordinary care

Cal.—Scarlett v. Atchison, T. & S. F. Ry., 60 P.2d 462, 7 Cal.2d 181, reversed on other grounds 57 S,Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U.S. 702, 81 L.Ed. 1365.

71. U.S.—San Antonio & A. P. R. Co., v. Wagner, Tex., 36 S.Ct. 626, 241 U.S. 476, 60 L.Ed. 1110—Philadelphia & R. Ry. Co. v. Auchenbach, C.C.A.N.J., 16 F.2d 550—Summers v. Louisville & N. R. Co., D. C.Ky., 4 F.Supp. 410.

Cal.—Maurice v. State, 110 P.2d 706, 43 Cal.App.2d 270—Ballard v. Sacramento Northern Ry. Co., 14 P.2d 1045, 126 Cal.App. 486, rehearing denied 15 P.2d 793, 126 Cal.App. 486.

Fla.—Atlantic Coast Line R. Co. v. Moore, 186 So. 210, 135 Fla. 485.

72. U.S.—Moore v. Chesapeake & O. Ry. Co., Ind., 54 S.Ct. 402, 291 U. S. 205, 78 L.Ed. 755—San Antonio, & A. P. R. Co. v. Wagner, Tex., 36 S.Ct. 626, 241 U.S. 476, 60 L.Ed. 1110.

Cal.—Maurice v. State, 110 P.2d 706, 43 Cal.App.2d 270.

Minn.—Schendel v. Chicago, M. & St. P. Ry. Co., 206 N.W. 436, 165 Minn. 223.

Mo.—Giesecking v. Litchfield & M. Ry. Co., 94 S.W.2d 375, 339 Mo. 1—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W. 2d 791, 324 Mo. 1005.

Ohio.—Tobin v. Detroit T. & I. R. Co., 13 N.E.2d 739, 57 Ohio App. 306.

N.D.—Johnson v. Minneapolis, St. P. & S. S. M. Ry. Co., 209 N.W. 786, 54 N.D. 351.

Tex.—Chicago, R. I. & G. Ry. Co. v. Harris, Civ.App., 28 S.W.2d 611, error dismissed.

73. U.S.—Moore v. Chesapeake & O. Ry. Co., Ind., 54 S.Ct. 402, 291 U.S. 205, 78 L.Ed. 755—San Antonio & A. P. R. Co. v. Wagner, Tex., 36 S.Ct. 626, 241 U.S. 476, 60 L.Ed. 1110—Summers v. Louisville & N. R. Co., D.C.Ky., 4 F. Supp. 410.

Cal.—Maurice v. State, 110 P.2d 706, 43 Cal.App.2d 270.

"Due to its negligence"

The clause in the Federal Employers' Liability Act, "due to its negligence," must be construed to mean that congress intended to treat a violation of the Safety Appliance Acts as negligence per se.—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005.

74. U.S.—St. Louis, I. M. & S. R. Co. v. Taylor, Ark., 28 S.Ct. 616, 210 U.S. 281, 52 L.Ed. 1061—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F.Supp. 154.

care for the safety of its employees.[75]

The fact that the employee at time of the injury was acting in violation of orders[76] or of rules prescribed by the carrier,[77] or was himself negligent,[78] does not preclude him from claiming the benefit of the statute.

The test of the carrier's duty under the acts is the performance of the appliances.[79] Although the equipment of cars complies with the statute, if the carrier so operates the cars that the appliances cannot be used without doing the thing which the acts seek to avoid it violates the statutes as fully as though it had failed to install the appliances.[80]

Service to which appliance put. While, as discussed infra § 258, a violation of the statutes gives rise to no cause of action in favor of an injured employee unless it occasions or contributes to the injury, where the failure to comply with the requirements of the acts is a proximate cause of the accident, or a material factor in causing it, the employee may recover, although not engaged at the time in an operation in which the safety appliances are specifically designed to furnish him protection,[81] nor is it necessary that the injured person be using the defective device.[82] So, although it is provided that the requirement with respect to grabirons and handholds is "for greater security to men in coupling and uncoupling cars," an employee may nevertheless recover for injuries resulting from such defective appliances although at the time he was not engaged in coupling or uncoupling cars.[83]

Car as "used" or "in use;" repairs. In the determination of the applicability of the Federal Safety Appliance Acts, cars, in particular circumstances, have been held to be "used" or "in use."[84] Although the statute relieves the carrier from the statutory penalty while a car is being hauled to the nearest available point for repairs, it is still liable to a civil action by its employees for injuries received, by reason of the defective equipment, while the car is being so hauled;[85] but the statute does not apply

75. U.S.—Bocook v. Louisville & N. R. Co., supra.

76. U.S.—Spokane & I. E. R. Co. v. Campbell, Wash., 36 S.Ct. 683, 241 U.S. 497, 60 L.Ed. 1125.
Ala.—Alabama Great Southern R. Co. v. Cornett, 106 So. 242, 214 Ala. 23.
Minn.—McDonald v. Great Northern Ry. Co., 207 N.W. 194, 166 Minn. 87.

77. U.S.—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F.Supp. 154.
Ala.—Alabama Great Southern R. Co. v. Cornett, 106 So. 242, 214 Ala. 23.

78. Mo.—Wilson v. Thompson, 133 S.W.2d 331, 345 Mo. 319.
Contributory negligence see infra §§ 421-481.

79. Cal.—Hosman v. Southern Pac. Co., 83 P.2d 88, 28 Cal.App.2d 621, certiorari denied Southern Pac. Co. v. Hosman, 59 S.Ct. 645, 306 U.S. 656, 83 L.Ed. 1054.
Mo.—Wilson v. Thompson, 133 S.W. 2d 331, 345 Mo. 319—Kimberling v. Wabash Ry. Co., 85 S.W.2d 736, 337 Mo. 702—Henry v. Cleveland, C., C. & St. L. Ry. Co., 61 S.W.2d 340, 332 Mo. 1072, certiorari denied Cleveland, C. C. & St. L. R. Co. v. Henry, 54 S.Ct. 70, 290 U.S. 627, 78 L.Ed. 546.

80. Mo.—Christy v. Wabash R. Co., 191 S.W. 241, 195 Mo.App. 232.

81. U.S.—Swinson v. Chicago, St. P., M. & O. Ry. Co., Minn., 55 S.Ct. 517, 294 U.S. 529, 79 L.Ed. 1041, 96 A.L.R. 1136, rehearing denied 55 S.Ct. 642, 295 U.S. 767, 79 L.Ed. 1708—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515—Anderson v. Baltimore & O. R. Co., C.C.A. N.Y., 89 F.2d 629, certiorari denied Baltimore & O. R. Co. v. Anderson, 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 538—Lehigh Valley R. Co. v. Howell, C.C.A.N.Y., 6 F.2d 784.
Minn.—Ross v. Duluth, Missabe & Iron Range Ry. Co., 281 N.W. 76, 203 Minn. 312.
Mo.—Conrad v. Baltimore & O. R. Co., 133 S.W.2d 350, 345 Mo. 335 —Carter v. St. Louis, T. & E. R. Co., 271 S.W. 358, 307 Mo. 595.
N.Y.—Saxton v. Delaware & H. Co., 176 N.E. 425, 256 N.Y. 363.
39 C.J. p 388 note 61.

82. U.S.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515.

83. U.S.—Director General of Railroads v. Ronald, C.C.A.N.Y., 265 F. 138.
39 C.J. p 388 note 62.

84. **Cars awaiting repairs**

(1) Where train broke apart on bridge because of defective coupling, and brakeman, in attempting repairs so that train could proceed, fell from bridge and was injured, such defective car was still "in use" at time of injury, within act.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Goneau, Minn., 46 S.Ct. 129, 269 U.S. 406, 70 L.Ed. 335.

(2) A car with a defective coupler, which was billed for the repair shop, but which was not sent there but was left on a track in ordinary use in a switch yard, to be repaired by the switchmen and then coupled to other cars, was being "used," within the meaning of the statute.—Erie R. Co. v. Russell, C.C.A.N.Y., 183 F. 722, 106 C.C.A. 160, certiorari denied 31 S.Ct. 722, 220 U.S. 607, 55 L.Ed. 607.

Car not withdrawn from service

Club car which had not been withdrawn from service was in use within the act, although it was standing motionless in union depot yards.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515.

Car awaiting unloading

N.Y.—Lang v. New York Cent. R. Co., 172 N.Y.S. 196, 104 Misc. 634, affirmed 175 N.Y.S. 908, 187 App. Div. 967.

85. U.S.—Brady v. Terminal R. Ass'n of St. Louis, Mo., 58 S.Ct. 426, 303 U.S. 10, 82 L.Ed. 614.
39 C.J. p 387 note 58.

Convenience in repairing

(1) Under act repairs to defective couplers must be made on the spot, if possible, and if so it is unlawful to move the car.—Lorick v. Seaboard Air Line Ry., 93 S.E. 332, 108 S.C. 100.

(2) Where car having a broken coupler could reasonably have been repaired where it stood on a switch track, the mere fact that it could be repaired more conveniently at another place did not justify its being moved in its defective condition.—Chicago Junction Ry. Co. v. King, Ill., 169 F. 372, 94 C.C.A. 652, affirmed 32 S.Ct. 79, 222 U.S. 222, 56 L.Ed. 173.

Exclusion from commercial use; intra-state train

While a railroad may move empty cars by themselves to repair shops for the purpose of having them

where withdrawal of the car from service for repair has been completed and the car is in course of repair,[86] since such a car is not "in use" within the act.[87] A brakeman attempting repairs to a train, which broke apart because of defective coupling, so that the train could proceed has been held engaged in coupling, and not in repair work, within the statute.[88]

Scope of acts; intra-state commerce. The statutes embrace all locomotives, cars, and similar vehicles used on any railway that is a highway of interstate commerce, and is not confined exclusively to vehicles engaged in such commerce;[89] thus an employee of a carrier which conducts and carries interstate traffic over its railway has a right of action under the statutes although he was engaged, at the time of the injury, in intra-state, and not interstate, commerce.[90] However, it has been held that, where the Federal Employers' Liability Act is invoked as the basis of liability, it must be shown that the employer is a common carrier by railroad engaged in interstate commerce and that the injury to the employee came while he was employed by the carrier in such commerce;[91] but where jurisdiction

placed in condition to comply with the safety appliance acts without being guilty of a violation of those acts, yet in so moving them for the purpose of repair they must, in order not to be subject to the acts, be wholly excluded from commercial use themselves, and from connection with other vehicles which are commercially employed; cars being hauled to a place of repair in a purely intra-state train, composed only of such cars, or while on a repair track out of all connection with vehicles in commercial use, are not subject to acts.—Southern Ry. Co. v. Snyder, C.C.A.Tenn., 187 F. 492, 109 C.C.A. 344.

86. U.S.—New York, C. & St. L. R. Co. v. Kelly, C.C.A.Ind., 70 F.2d 548, certiorari denied Kelly v. New York, C. & St. L. R. Co., 55 S.Ct. 110, 293 U.S. 595, 79 L.Ed. 689—Sherry v. Baltimore & O. R. Co., C.C.A.Ohio, 30 F.2d 487, certiorari denied 50 S.Ct. 16, 280 U.S. 555, 74 L.Ed. 611—Southern Ry. Co. v. Snyder, Tenn., 187 F. 492, 109 C.C.A. 344.
Minn.—Kaminski v. Chicago, M., St. P. & P. R. Co., 231 N.W. 189, 180 Minn. 519, certiorari denied 51 S. Ct. 78, 282 U.S. 872, 75 L.Ed. 770.

Removal of safety appliances to effect repairs
After freight car reached repair place and was out of service, carrier could take off handhold or any other safety appliance necessary to effect repairs, without violating act.—New York, C. & St. L. R. Co. v. Kelly, C.C.A.Ind., 70 F.2d 548, certiorari denied Kelly v. New York, C. & St. L. R. Co., 55 S.Ct. 110, 293 U.S. 595, 79 L.Ed. 689.

87. U.S.—New York, C. & St. L. R. Co. v. Kelly, supra.
Cal.—Compton v. Southern Pac. Co., 161 P.2d 40, 70 Cal.App.2d 267.

Mere shifting of cars within the place of repair does not put the car in use within the meaning of the statute.—New York, C. & St. L. R. Co. v. Kelly, supra.

88. U.S.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Goneau, Minn., 46 S.Ct. 129, 269 U.S. 406, 70 L.Ed. 335.

Brakeman's testimony that he was engaged in repairing car did not transform the status of his act from that of coupling cars to that of repairing cars.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Goneau, supra.

89. U.S.—Brady v. Terminal R. Ass'n of St. Louis, Mo., 58 S.Ct. 426, 302 U.S. 688, 82 L.Ed. 531—San Antonio & A. P. R. R. Co. v. Wagner, Tex., 36 S.Ct. 626, 241 U.S. 476, 60 L.Ed. 1110—Central R. of New Jersey v. Breisch, C.C.A.Pa., 112 F.2d 595, reversed on other grounds 61 S.Ct. 662, 312 U.S. 484, 85 L.Ed. 964, 132 A.L.R. 918—Didinger v. Pennsylvania R. Co., C.C.A.Ohio, 39 F.2d 798—Geraghty v. Lehigh Valley R. Co., D.C.N.Y., 11 F.Supp. 378.
Minn.—Bresky v. Minneapolis & St. L. R. Co., 132 N.W. 337, 115 Minn. 386.
Pa.—Miller v. Reading Co., 140 A. 618, 292 Pa. 44.
39 C.J. p 386 note 57 [e].
Interstate commerce as involved in application to railroads of:
Federal Employers' Liability Act see Commerce § 51.
Federal Safety Appliance Acts generally see Commerce § 40.

By the act of March 2, 1903, c 976, § 1, 45 U.S.C.A. § 8, the duty was extended to all cars used upon any railroad which is a highway of interstate commerce; the act of March 2, 1893, 45 U.S.C.A. § 2, had applied only to vehicles used in moving interstate traffic.—Tipton v. Atchison, T. & S. F. Ry. Co., Cal., 56 S.Ct. 715, 298 U.S. 141, 80 L.Ed. 1091, 104 A.L.R. 831—Gilvary v. Cuyahoga Valley Ry. Co., Ohio, 54 S.Ct. 573, 292 U.S. 57, 78 L.Ed. 1123—Brinkmeier v. Missouri Pac. R. Co., Kan., 32 S.Ct. 412, 224 U.S. 268, 56 L.Ed. 758—Geraghty v. Lehigh Valley R. Co., C.C.A.N.Y., 70 F.2d 300—Detroit United Ry. v. Craven, C.C.A. Mich., 13 F.2d 352, certiorari denied 47 S.Ct. 107, 273 U.S. 713, 71 L.Ed. 854.

Occasional movement in interstate commerce
The acts are applicable to any movement of cars by railroad upon tracks over which interstate commerce occasionally moves, since such cars are part of "railroad engaged in interstate commerce."—Geraghty v. Lehigh Valley R. Co., C.C.A.N.Y., 70 F.2d 300, 303.

Cars not leaving yard
Smelting company's cars which never left its yard, but which were used on interstate carrier's line, were within statutes.—Geraghty v. Lehigh Valley R. Co., D.C.N.Y., 3 F.Supp. 376.

90. U.S.—Breisch v. Central R. R. of New Jersey, Pa., 61 S.Ct. 662, 312 U.S. 484, 85 L.Ed. 964, 132 A.L.R. 918—Gilvary v. Cuyahoga Valley Ry. Co., Ohio, 54 S.Ct. 573, 292 U.S. 57, 78 L.Ed. 1123—Geraghty v. Lehigh Valley R. Co., C.C.A.N.Y., 70 F.2d 300—Didinger v. Pennsylvania R. Co., C.C.A.Ohio, 39 F.2d 798—Pennsylvania R. Co. v. Logansport Loan & Trust Co., C.C.A. Ind., 29 F.2d 1—Detroit United Ry. v. Craven, C.C.A.Mich., 13 F.2d 352, certiorari denied 47 S.Ct. 107, 273 U.S. 713, 71 L.Ed. 854—Hohenleitner v. Southern Pac. Co., C.C.Or., 177 F. 796—Geraghty v. Lehigh Valley R. Co., D.C.N.Y., 11 F.Supp. 378.
Cal.—Ballard v. Sacramento Northern Ry. Co., 14 P.2d 1045, 126 Cal.App. 486, rehearing denied 15 P.2d 793, 126 Cal.App. 486.
Ill.—Anderson v. Chesapeake & O. Ry. Co., 186 N.E. 185, 352 Ill. 561, certiorari denied Chesapeake & O. Ry. Co. v. Anderson, 54 S.Ct. 93, 290 U.S. 675, 78 L.Ed. 583.
Pa.—Miller v. Reading Co., 140 A. 618, 292 Pa. 44.
Tex.—Texas & P. Ry. Co. v. Lester, Civ.App., 207 S.W. 555, error refused.
39 C.J. p 388 note 63.

91. Minn.—Hurley v. Illinois Cent. R., 157 N.W. 1005, 133 Minn. 101.
39 C.J. p 388 note 64.

.s acquired under the Employers' Liability Act the employee may recover, on showing negligence, without showing a violation of the Safety Appliance Acts.[92]

Action by Interstate Commerce Commission. An appliance on a car which complies with the regulations of the Interstate Commerce Commission, made in pursuance of the Federal Safety Appliance Acts, is not defective;[93] a railroad company which strictly complies with such regulations has discharged its full duty as far as the requirements of the acts with respect to that appliance are concerned,[94] and the judgment of a trial court or a jury cannot be substituted for that of the commission.[95] On the other hand, the failure of a railway company engaged in interstate commerce to equip and maintain its cars as required by a rule of the commission, in pursuance of the authority conferred on it by the act, amounts to a violation of both the rule and the statute.[96]

Such rules of the commission should be liberally construed for the purpose of relieving trainmen of danger.[97] However, orders of the commission issued in excess of, or without, authorization by the statute do not become part of the law[98] even though generally complied with,[99] and compliance with such an order does not relieve the railroad company from liability for resulting injuries to employees.[1]

Where the commission has not made a rule with respect to a particular matter, the test as to the carrier's liability is whether the appliance is safe or secure within the meaning of the statute.[2]

(b) Brakes

The requirements of the Federal Safety Appliance Act as to hand and power brakes on railroad cars are absolute, and liability for noncompliance does not depend on negligence.

The prohibition in the Federal Safety Appliance Act, 45 U.S.C.A. § 11, against the use, by a common carrier engaged in interstate commerce by railroad, of any car not equipped with efficient hand brakes is absolute and unqualified,[3] regardless of any caus-

92. Wash.—Aldread v. Northern Pac. R. Co., 160 P. 429, 93 Wash. 209.

93. U.S.—Atchison, T. & S. F. Ry. Co. v. Scarlett, Cal., 57 S.Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365.
Ariz.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 159 A.L.R. 857.

Standardization by commission under statute

Provision of act requiring secure ladders and other equipment was operative pending action by commission under succeeding provision that safety appliances should conform to standard prescribed by commission, and in the interim prescribed absolute duty of making ladders and other appliances secure, but succeeding provision relating to standardization contemplated that appliances should be standardized by commission.—Atchison, T. & S. F. Ry. Co. v. Scarlett, Cal., 57 S.Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365—Illinois Cent. R. Co. v. Williams, Miss., 37 S.Ct. 128, 242 U.S. 462, 61 L.Ed. 437.

Ladder; brace rod

The rule stated in the text applies to a ladder; but a round brace running diagonally across the side of the car and beneath a ladder does not constitute a part of the ladder within the statute, but is a separate and distinct contrivance, designed and used for an entirely separate purpose, and whether the proximity of the two gives a right of recovery is determined by the common-law rule of negligence, and not by the inflexible rule of the statute.—Atchison, T. & S. F. Ry. Co. v. Scarlett, Cal., 57 S.Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365.

94. U.S.—Atchison, T. & S. F. Ry. Co. v. Scarlett, supra.
Ariz.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A.L.R. 857.

95. U.S.—Atchison, T. & S. F. Ry. Co. v. Scarlett, Cal., 57 S.Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365.
Ariz.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A.L.R. 857.

96. Ga.—Grant v. Atlantic Coast Line R. Co., 147 S.E. 919, 39 Ga. App. 596.

Coupling levers

The commission's order, providing generally for placing of uncoupling levers either on top of, at end of, or underneath sills of freight cars did not justify company in placing such a lever on tops of gondola car's end sill, so as to create hazardous footing for brakemen required to use such sill, even if commission had power to standardize such levers, and maintenance of lever in such place constituted actionable negligence rendering company liable for resulting death of brakeman.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A.L.R. 857.

97. Cal.—Scarlett v. Atchison, T. & S. F. Ry., 60 P.2d 462, 7 Cal.2d 181, reversed on other grounds 57 S.Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365.

98. Ariz.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 62 Ariz. 359, 159 A.L.R. 857.

Standardized appliances specified in acts

Railroads complying with commission's orders standardizing railroad equipment are free from responsibility for their employees' injuries as result of using such equipment only with respect to standardized appliances specified in Safety Appliance Acts.—Apache Ry. Co. v. Shumway, supra.

99. Ariz.—Apache Ry. Co. v. Shumway, supra.

1. Ariz.—Apache Ry. Co. v. Shumway, supra.

2. Cal.—Scarlett v. Atchison, T. & S. F. Ry., 60 P.2d 462, 7 Cal.2d 181, reversed on other grounds 57 S.Ct. 541, 300 U.S. 471, 81 L.Ed. 748, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365.

3. U.S.—Myers v. Reading Co., Pa., 67 S.Ct. 1334, 331 U.S. 477, 91 L. Ed. 1615.
Ind.—Pennsylvania R. Co. v. Hough, 161 N.E. 705, 88 Ind.App. 601.

Purpose of provision

(1) The purpose of the provision is to increase the protection of operating trainmen to an extent beyond that furnished by the common law, and to supplant the qualified duty of the common law with an absolute duty, deemed more just.—Spotts v. Baltimore & O. R. Co., C.C.A.Ind., 102 F.2d 160, certiorari denied Baltimore & O. R. Co. v. Spotts, 59 S.Ct. 1039, 307 U.S. 641, 83 L.Ed. 1522.

(2) The obvious purpose of the

es or reasons for its not being so equipped.[4] The railroad company has the absolute and mandatory obligation to comply with the requirement both in equipping a car with efficient hand brakes[5] and in maintaining such brakes for its employees' use,[6] and is liable for the damages suffered by an employee by reason of inefficient brakes.[7] There is no provision in the statute for any excuse for not so doing,[8] and the company's negligence[9] or reasonable care[10] is immaterial, since its liability is not founded on neg-

law was to provide safety for trainmen by having efficient brakes when they were lawfully and dutifully touched or taken hold of in furtherance of the operation of the car.—Lehigh Valley R. Co. v. Howell, C.C.A.N.Y., 6 F.2d 784.

"Efficient" defined; test

(1) The word "efficient," as used in the act, means adequate in performance, producing properly a desired effect; and "inefficient" means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate.—Myers v. Reading Co., Pa., 67 S.Ct. 1334, 331 U.S. 477, 91 L.Ed. 1615—Spotts v. Baltimore & O. R. Co., C.C.A.Ind., 102 F.2d 160, certiorari denied Baltimore & O. R. Co. v. Spotts, 59 S.Ct. 1039, 307 U.S. 641, 83 L.Ed. 1522.

(2) The act fixes no standard by which the efficiency of brakes may be measured.

Ark.—De Queen & E. R. Co. v. Dye, 55 S.W.2d 955, 187 Ark. 219.

Ga.—Western & A. R. R. v. Meister, 140 S.E. 905, 37 Ga.App. 570.

(3) Test of whether hand brake is efficient, as required by act, is its ability to produce expected results when properly applied.—Anderson v. Chesapeake & O. Ry. Co., 186 N.E. 185, 352 Ill. 561, and certiorari denied Chesapeake & O. Ry. Co. v. Anderson, 54 S.Ct. 93, 290 U.S. 675, 78 L.Ed. 583.

(4) The brakes must be so efficient as to hold cars securely under ordinary circumstances.—Atchison, T. & S. F. Ry. Co., 296 P. 645, 112 Cal.App. 7.

(5) Proof of an actual break or visible defect in coupling appliance is not a prerequisite to a finding that the requirement of efficient hand brakes has been violated.—Spotts v. Baltimore & O. R. Co., C.C.A.Ind., 102 F.2d 160, certiorari denied Baltimore & O. R. Co. v. Spotts, 59 S.Ct. 1039, 307 U.S. 641, 83 L.Ed. 1522.

Marking car to show defective hand brake would not relieve railroad company of liability for violation of act.—Summers v. Louisville & N. R. Co., D.C.Ky., 4 F.Supp. 410.

4. Ind.—Pennsylvania R. Co. v. Hough, 161 N.E. 705, 88 Ind.App. 601.

5. U.S.—Spotts v. Baltimore & O. R. Co., C.C.A.Ind., 102 F.2d 160, certiorari denied Baltimore & O. R. Co. v. Spotts, 59 S.Ct. 1039, 307 U.S. 641, 83 L.Ed. 1522—Lehigh Valley R. Co. v. Howell, C.C.A. N.Y., 6 F.2d 784.

Cal.—Newkirk v. Los Angeles Junction Ry. Co., 131 P.2d 535, 21 Cal. 2d 308—Hosman v. Southern Pac. Co., 83 P.2d 88, 28 Cal.App.2d 621, certiorari denied Southern Pac. Co. v. Hosman, 59 S.Ct. 645, 306 U.S. 656, 83 L.Ed. 1054—Qualls v. Atchison, T. & S. F. Ry. Co., 296 P. 645, 112 Cal.App. 7.

Ill.—Anderson v. Chesapeake & O. Ry. Co., 186 N.E. 185, 352 Ill. 561, certiorari denied Chesapeake & O. Ry. Co., v. Anderson, 54 S.Ct. 93, 290 U.S. 675, 78 L.Ed. 583.

Ind.—Pennsylvania R. Co. v. Hough, 161 N.E. 705, 88 Ind.App. 601.

Mo.—Wild v. Pitcairn, 149 S.W.2d 800, 347 Mo. 915, certiorari denied Pitcairn v. Wild, 62 S.Ct. 72, 314 U.S. 638, 86 L.Ed. 512—Colwell v. St. Louis-San Francisco Ry. Co., 73 S.W.2d 222, 335 Mo. 494—Radler v. St. Louis-San Francisco Ry. Co., 51 S.W.2d 1011, 330 Mo. 968.

Continuous duty

Ill.—Herb v. Pitcairn, 29 N.E.2d 543, 306 Ill.App. 583, reversed on other grounds 36 N.E.2d 555, 377 Ill. 405.

Mo.—Henry v. Cleveland, C., C. & St. L. Ry. Co., 61 S.W.2d 340, 332 Mo. 1072, certiorari denied Cleveland, C. C. & St. L. R. Co. v. Henry, 54 S.Ct. 70, 290 U.S. 627, 78 L.Ed. 546.

6. U.S.—Lehigh Valley R. Co. v. Howell, C.C.A.N.Y., 6 F.2d 784.

Cal.—Hosman v. Southern Pac. Co., 83 P.2d 88, 28 Cal.App.2d 621, certiorari denied Southern Pac. Co. v. Hosman, 59 S.Ct. 645, 306 U.S. 656, 83 L.Ed. 1054—Ballard v. Sacramento Northern Ry. Co., 14 P.2d 1045, 126 Cal.App. 486, rehearing denied 15 P.2d 793, 126 Cal.App. 486—Qualls v. Atchison, T. & S. F. Ry. Co., 296 P. 645, 112 Cal. App. 7.

Ill.—Anderson v. Chesapeake & O. Ry. Co., 186 N.E. 185, 352 Ill. 561, certiorari denied Chesapeake & O. Ry. Co. v. Anderson, 54 S.Ct. 93, 290 U.S. 675, 78 L.Ed. 583.

Ind.—Pennsylvania R. Co. v. Hough, 161 N.E. 705, 88 Ind.App. 601.

Mo.—Colwell v. St. Louis-San Francisco Ry. Co., 73 S.W.2d 222, 335 Mo. 494—Sallee v. St. Louis-San Francisco Ry. Co., 12 S.W.2d 476, 321 Mo. 798.

Continuous duty

Mo.—Henry v. Cleveland, C., C. & St. L. Ry. Co., 61 S.W.2d 340, 332 Mo. 1072, certiorari denied Cleveland, C. C. & St. L. R. Co. v. Henry, 54 S.Ct. 70, 290 U.S. 627, 78 L. Ed. 546.

7. U.S.—Spotts v. Baltimore & O. R. Co., C.C.A.Ind., 102 F.2d 160, certiorari denied Baltimore & O. R. Co. v. Spotts, 59 S.Ct. 1039, 307 U.S. 641, 83 L.Ed. 1522—Detroit, T. & I. R. Co. v. Hahn, C.C.A.Ohio, 47 F.2d 59, certiorari denied 51 S. Ct. 489, 283 U.S. 842, 75 L.Ed. 1452.

Tex.—International-Great Northern R. Co. v. Hailey, Civ.App., 9 S.W. 2d 182, certiorari denied 50 S.Ct. 17, 280 U.S. 558, 74 L.Ed. 613.

Use for purpose intended

Where the giving way of a defective hand brake was the proximate cause of the injury of a brakeman, who took hold of the wheel to assist him in climbing to the top of the car, in course of duty, to release the brake, the fact that he was not using the brake at the time for the purpose for which it was intended did not defeat his right to recovery, since the handling of the brake for the purpose of releasing it was as necessary as setting it.—Lehigh Valley R. Co. v. Howell, C.C.A.N.Y., 6 F.2d 784.

8. Ind.—Pennyslvania R. Co. v. Hough, 161 N.E. 705, 88 Ind.App. 601.

The carrier's knowledge of the defective condition and inefficiency of the hand brake is not an issuable fact in a case brought under the act.—Sallee v. St. Louis & San Francisco Ry. Co., 12 S.W.2d 476, 321 Mo. 798.

9. Ill.—Herb v. Pitcairn, 29 N.E.2d 543, 306 Ill.App. 583, reversed on other grounds 36 N.E.2d 555, 377 Ill. 405.

Mo.—Wild v. Pitcairn, 149 S.W.2d 800, 347 Mo. 915, certiorari denied Pitcairn v. Wild, 62 S.Ct. 72, 314 U.S. 638, 86 L.Ed. 512—Colwell v. St. Louis-San Francisco Ry. Co., 73 S.W.2d 222, 335 Mo. 494—Radler v. St. Louis-San Francisco Ry. Co., 51 S.W.2d 1011, 330 Mo. 968.

10. Mo.—Radler v. St. Louis-San Francisco Ry. Co., supra.

Discovering and repairing defects

The use of care and diligence by the carrier in discovering and repairing defects in the hand brakes is no defense to an action under the act.—Sallee v. St. Louis-San Francisco Ry. Co., 12 S.W.2d 476, 321 Mo. 798.

ligence[11] or lack of diligence,[12] although it has also been held that permitting the operation of a car with defective brakes is negligence per se.[13]

In order to comply with the act and the rules promulgated thereunder, it is necessary that the brakes can be operated with safety, and the question is not simply one of their efficiency;[14] however, the act does not make a railroad company the insurer of the safety of employees in operating hand brakes[15] or require brakes necessitating any given number of turns of the brake wheel.[16]

The requirement in the Federal Safety Appliance Act, 45 U.S.C.A. § 1, of power or train brakes such that the engineer can control the speed of the train without requiring brakemen to use the common hand brake for that purpose is absolute and imperative,[17] and the duty to have the brake appliances in proper working condition is likewise absolute;[18] but the requirement does not apply to switching operations in railroad yards and terminals.[19]

The provision of the Federal Safety Appliance Act, 45 U.S.C.A. § 9, that whenever, as provided in other sections, any train is operated with power or train brakes not less than a specified per cent of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing the train is not limited in its application to operations on main-line tracks.[20] A moving locomotive with cars attached is outside the provision only when it is not a train, as where the operation is that of switching, classifying, and assembling cars within railroad yards for the purpose of making up trains.[21]

Action by Interstate Commerce Commission. In order to recover for a violation of the statutory requirement as to hand brakes, plaintiff need not show the violation of any rule of the Interstate Commerce Commission with respect to such brakes;[22] and compliance with the orders of the commission will not necessarily constitute a compliance with the statute.[23] The commission's approval of a particular brake mechanism cannot be inferred from the fact that it has been in common use on various railroads for a number of years and that the commission has made no rule or regulation concerning it.[24]

(c) Couplers

The requirement of automatic couplers under the Federal Safety Appliance Acts is absolute and liability for noncompliance does not depend on negligence. The test of compliance is the operating efficiency of the couplers with which cars are equipped.

11. Cal.—Newkirk v. Los Angeles Junction Ry. Co., 131 P.2d 535, 21 Cal.2d 308.
Ga.—Western & A. R. R. v. Meister, 140 S.E. 905, 37 Ga.App. 570.

12. Ga.—Western & A. R. R. v. Meister, supra.

13. Tex.—Texas & P. Ry. Co. v. Baldwin, Civ.App., 25 S.W.2d 969, affirmed, Com.App., 44 S.W.2d 909, certiorari denied 53 S.Ct. 11, 287 U.S. 606, 77 L.Ed. 527.

14. Cal.—Ballard v. Sacramento Northern Ry. Co., 14 P.2d 1045, 126 Cal.App. 486, rehearing denied 15 P.2d 793, 126 Cal.App. 486.

15. Ark.—De Queen & E. R. Co. v. Dye, 58 S.W.2d 955, 187 Ark. 219.

16. Ark.—De Queen & E. R. Co. v. Dye, supra.

17. Colo.—Auslender v. Boettcher, 242 P. 672, 78 Colo. 427.
Requirements as to power or air brakes under Federal Safety Appliance Act generally see the C.J.S. title Railroads § 425, also 51 C.J. p 1033 note 75–p 1036 note 10.

Negligence as matter of law
In action for death of engineer of wrecking train in collision, railroad was negligent as matter of law in failing to have eighty-five per cent of cars in train equipped with air brakes.—Southern Ry. Co. v. Woods, 86 S.W.2d 903, 19 Tenn.App. 314.

Placing defective cars in rear
Carrier operating freight train composed partly of cars with defective brakes violates act and is liable for resulting death of employee unless it shows that defective cars were placed behind all cars properly equipped.—Auslender v. Boettcher, 242 P. 672, 78 Colo. 427.

Electric motors and trains drawn by them operating on interurban and interstate railroads are within statute.—Spokane & Inland Empire R. Co. v. Campbell, Wash., 36 S.Ct. 683, 241 U.S. 497, 60 L.Ed. 1125.

18. Minn.—McDonald v. Great Northern Ry. Co., 207 N.W. 194, 166 Minn. 87.

19. U.S.—Philadelphia & R. Ry. Co. v. Bartsch, C.C.A.N.J., 9 F.2d 858.
N.C.—Worley v. Southern Ry. Co., 85 S.E. 397, 169 N.C. 105.
39 C.J. p 387 note 58 [j].

20. Cal.—Maurice v. State, 110 P. 2d 706, 43 Cal.App.2d 270.

21. Cal.—Maurice v. State, supra.

Train movement or switching operation
In determining whether the movement of freight cars constitutes a train movement rather than a switching operation the decision turns on the particular facts of the case, and the controlling test of statute's application lies in the essential nature of the work being done.—Maurice v. State, supra.

22. Ga.—Western & A. R. R. v. Meister, 140 S.E. 905, 37 Ga.App. 570.

23. Ga.—Western & A. R. R. v. Meister, supra.

Reason for rule
The observance of reasonable regulations promulgated by that authority would in every case be the minimum of what the railroad should do within the law, but might not be the maximum; the commission could not require less than "efficient hand brakes."—Western & A. R. R. v. Meister, supra.

Order to comply with statute
A railroad could not escape liability on ground that order of commission providing for the kind of hand brakes that might be used on cars was in effect an approval of brake complained of, where order was merely a direction to comply with the Safety Appliance Act requiring an "efficient hand brake."—Spotts v. Baltimore & O. R. Co., C.C. A.Ind., 102 F.2d 160, certiorari denied Baltimore & O. R. Co. v. Spotts, 59 S.Ct. 1039, 307 U.S. 641, 83 L.Ed. 1522.

24. Ga.—Western & A. R. R. v. Meister, 140 S.E. 905, 37 Ga.App. 570.

The duty imposed by the Federal Safety Appliance Act, 45 U.S.C.A. § 2, as amended by 45 U.S.C.A. § 8, on common carriers engaged in interstate commerce by railroad to equip all cars, with the exception of trains composed of four-wheel cars or certain logging cars,[25] with couplers coupling automatically by impact, and capable of being uncoupled without the necessity of men going between the ends of the cars, is an absolute and unqualified one,[26] which cannot be evaded by the carrier by

25. U.S.—Schlemmer v. Buffalo, R. & P. Co., Pa., 27 S.Ct. 407, 205 U. S. 1, 51 L.Ed. 681.

26. U.S.—Delk v. St. Louis & S. F. R. Co., Tenn., 31 S.Ct. 617, 220 U.S. 580, 55 L.Ed. 590—Chicago, St. P., M. & O. Ry. Co. v. Muldowney, C.C.A.Minn., 130 F.2d 971, certiorari denied 63 S.Ct. 526, 317 U.S. 700, 87 L.Ed. 560—Philadelphia & R. Ry. Co. v. Auchenbach, C.C.A.N.J., 16 F.2d 550, certiorari denied 47 S.Ct. 476, 273 U.S. 761, 71 L.Ed. 878—Philadelphia & R. Ry. Co. v. Eisenhart, C.C.A.Pa., 280 F. 271, certiorari denied 260 U.S. 723, 43 S.Ct. 13, 67 L.Ed. 482—Johnson v. Great Northern Ry. Co., C.C.A.Minn., 178 F. 643, 102 C.C.A. 89.
Ga.—Western & Atlantic R. R. v. Gentle, 198 S.E. 257, 58 Ga.App. 282, certiorari denied Gentle v. Western & A. R. R., 59 S.Ct. 252, 305 U.S. 654, 83 L.Ed. 424—Seaboard Air Line Ry. Co. v. Shensky, 136 S.E. 178, 36 Ga.App. 163.
Ind.—Chicago, I. & L. Ry. Co. v. Stierwalt, 153 N.E. 807, 87 Ind. App. 478, certiorari denied 49 S.Ct. 32, 278 U.S. 633, 73 L.Ed. 551.
Minn.—Ross v. Duluth, Missabe & Iron Range Ry. Co., 281 N.W. 76, 203 Minn. 312—Schendel v. Chicago, M. & St. P. Ry. Co., 206 N. W. 436, 165 Minn. 223.
Mo.—Crabtree v. Kurn, 173 S.W.2d 851, 351 Mo. 628—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005—Moore v. St. Joseph & G. I. Ry. Co., 186 S.W. 1035, 268 Mo. 31, affirmed 37 S.Ct. 278, 243 U.S. 311, 61 L.Ed. 741—Soderstrom v. Missouri Pac. R. Co., App., 141 S.W. 2d 73.
N.Y.—Saxton v. Delaware & H. Co., 176 N.E. 425, 256 N.Y. 363.
Okl.—Essary v. Lowden, 116 P.2d 712, 189 Okl. 257, certiorari denied 62 S.Ct. 489, 315 U.S. 798, 86 L.Ed. 1199, rehearing denied 62 S. Ct. 638, 315 U.S. 828, 86 L.Ed. 1223.
S.C.—Sessions v. Atlantic Coast Line R. Co., 169 S.E. 543, 170 S.C. 15—Steele v. Atlantic Coast Line R. Co., 87 S.E. 639, 103 S.C. 102.
Tex.—Henwood v. Gary, Civ.App., 196 S.W.2d 958, error refused no reversible error.
39 C.J. p 385 note 52.

Purpose of act

(1) The purpose of the provision was to eliminate evils attending old-fashioned link and pin coupling, where it was necessary for men to go between the ends of cars to couple and uncouple them, and where the cars, when coupled to a train, sometimes separated by reason of the insecurity of the coupling.
U.S.—St. Louis & S. F. R. Co. v. Conarty, Ark., 35 S.Ct. 785, 238 U. S. 243, 59 L.Ed. 1290.
Ga.—Western & Atlantic R. R. v. Gentle, 198 S.E. 257, 58 Ga.App. 282, certiorari denied Gentle v. Western & A. R. R., 59 S.Ct. 252, 305 U.S. 654, 83 L.Ed. 424.

(2) The evil sought to be eliminated by the act was necessity of workmen going between cars, and especially for purpose of coupling or uncoupling them.—Crabtree v. Kurn, 173 S.W.2d 851, 351 Mo. 628.

The common-law duty of due care is changed to that of an absolute duty in this respect.—Alabama Great Southern Ry. Co. v. Cornett, 106 So. 242, 214 Ala. 23.

Operation in reasonable and proper manner

Act imposes on railroad absolute duty to equip cars used in interstate commerce with automatic couplers which will function without necessity of men going between cars when operated in ordinary, reasonable, and proper manner.
U.S.—Chicago, M., St. P. & P. R. R. Co. v. Linehan, C.C.A.Minn., 66 F. 2d 373.
Minn.—Willett v. Illinois Cent. R. Co., 142 N.W. 883, 122 Minn. 513—Popplar v. Minneapolis, St. P. & S. S. R. Co., 141 N.W. 798, 121 Minn. 413, Ann.Cas.1914D 383, affirmed 35 S.Ct. 209, 237 U.S. 369, 59 L.Ed. 1000—Burho v. Minneapolis & St. L. R. Co., 141 N.W. 300, 121 Minn. 326.

Coupling and uncoupling included

(1) The protection of the act extends to men when coupling, as well as when uncoupling, cars.
U.S.—San Antonio & Arkansas Pass R. Co. v. Wagner, Tex., 36 S.Ct. 626, 241 U.S. 476, 60 L.Ed. 1110—Johnson v. Southern Pac. R. Co., Utah, 25 S.Ct. 158, 196 U.S. 1, 49 L.Ed. 363—Chicago, M. & St. P. R. Co. v. Voelker, Iowa, 129 F. 522, 65 C.C.A. 226, 70 L.R.A. 264.
Tex.—Henwood v. Gary, 196 S.W.2d 958, Civ.App., error refused no reversible error.
Va.—Southern R. Co. v. Simmons, 55 S.E. 459, 105 Va. 651.

(2) The provision extends to the act of preparing the coupler for the impact by which it is operated.—Atchison, T. & S. F. Ry. Co. v. Keddy, C.C.A.Cal., 28 F.2d 952, certiorari denied 49 S.Ct. 351, 279 U.S. 856, 73 L.Ed. 997—Chicago, M. & St. P. R. Co. v. Voelker, Iowa, 129 F. 522, 65 C.C.A. 226, 70 L.R.A. 264.

Employee not engaged in coupling; adjustment

(1) Railroad employee was entitled to protection of statute although not engaged in coupling or uncoupling cars, if he was engaged in the discharge of his duties.
U.S.—Chicago, M., St. P. & P. R. Co. v. Goldhammer, C.C.A.Minn., 79 F. 2d 272, certiorari denied 56 S.Ct. 382, 296 U.S. 655, 80 L.Ed. 467—Keenan v. Director General of Railroads, C.C.A.N.Y., 285 F. 286, certiorari denied 261 U.S. 616, 43 S.Ct. 361, 67 L.Ed. 828.
Mo.—Carter v. St. Louis, T. and E. R. Co., 271 S.W. 358, 307 Mo. 595.
N.Y.—Saxton v. Delaware & H. Co., 176 N.E. 425, 256 N.Y. 363.

(2) The protection afforded by the act is not limited to employee injured by colliding cars while actually making coupling, but applies as well to employee injured while between cars for purpose of adjusting coupler in order to effect coupling; switchman, who went between cars in use in interstate commerce, on failure of cars to couple by impact, to adjust coupler, and who was injured when knuckle with broken lip fell, was not engaged in repairing the coupler, and was within protection of act.—Baltimore & O. R. Co. v. Tittle, C.C.A.Ohio, 4 F.2d 818, certiorari denied 46 S.Ct. 20, 269 U.S. 558, 70 L.Ed. 410.

(3) But it has also been held that, in order to recover for employee's death on ground of railroad's violation of automatic coupler requirement, deceased must have gone between cars to effect coupling operation.—Geraghty v. Lehigh Valley R. Co., C.C.A.N.Y., 70 F.2d 300.

Lack of knowledge of defects

It is no defense that the car was moved by the carrier without knowledge of defects.—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005.

Use in moving interstate traffic

(1) The words "any car used in moving interstate traffic," used in the act of March 2, 1893, 45 U.S.C.A. § 2, amended by the act of March 2, 1903, c. 976, § 1, 45 U.S.C.A. § 8, in limiting to such cars the obligation to provide automatic couplers, was not to be taken in a narrow sense.—Schlemmer v. Buffalo, R. &

assignment or otherwise.[27] A violation of the duty, resulting in an injury to the employee, gives rise to liability,[28] irrespective of actual negligence on the part of the carrier other than failure to comply with the requirements of the act.[29] Such liability is not dependent on lack of reasonable[30] or proper[31] care, nor does the use of ordinary or reasonable care or diligence in furnishing, repairing, or inspecting couplers discharge the duty or relieve carriers of liability for nonperformance.[32] A violation of the act has been held to constitute negligence[33] or negligence per se[34] within the Federal Employers' Lia-

P. R. Co., Pa., 27 S.Ct. 407, 205 U.S. 1, 51 L.Ed. 681.

(2) A car may be in process of being used in interstate traffic, within the statute, even though it is left, during the course of a trip, at a station by one train to be picked up by another.—Johnson v. Southern Pac. Co., Utah, 25 S.Ct. 158, 196 U.S. 1, 49 L.Ed. 363.

27. U.S.—Chicago Junction R. Co. v. King, Ill., 169 F. 372, 94 C.C.A. 652, affirmed 32 S.Ct. 79, 222 U.S. 222, 56 L.Ed. 173.

Act of conductor or other employee in this respect is act of railroad company.—Chicago Junction R. Co. v. King, supra.

28. U.S.—Louisville & Nashville R. Co. v. Layton, Ga., 37 S.Ct. 456, 243 U.S. 617, 61 L.Ed. 931—Chicago, B. & Q. Ry. Co. v. U. S., Neb., 31 S.Ct. 612, 220 U.S. 559, 55 L.Ed. 582—Chicago, St. P., M. & O. Ry. Co. v. Muldowney, C.C.A.Minn., 130 F.2d 971, certiorari denied 63 S. Ct. 526, 317 U.S. 700, 87 L.Ed. 560—Chicago, M. & S. P. R. Co. v. Voelker, Iowa, 129 F. 522, 65 C.C.A. 226, 70 L.R.A. 264.
Del.—Philadelphia & R. R. Co. v. Winkler, 56 A. 112, 4 Pennew. 387.
Ga.—Western & Atlantic R. R. v. Gentle, 198 S.E. 257, 58 Ga.App. 282, certiorari denied Gentle v. Western & A. R. R., 59 S.Ct. 252, 305 U.S. 654, 83 L.Ed. 424.
Mo.—Crabtree v. Kurn, 173 S.W.2d 851, 351 Mo. 628—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005.
N.J.—Oelfke v. Hudson & M. R. Co., 135 A. 659, 5 N.J.Misc. 2.
N.Y.—Saxton v. Delaware & H. Co., 176 N.E. 425, 256 N.Y. 363.
S.C.—Steele v. Atlantic Coast Line R. Co., 87 S.E. 639, 103 S.C. 102.
39 C.J. p 385 note 52.

Hand car operated in connection with gasoline locomotive was within requirement of act.—Hoffman v. New York, N. H. & H. R. Co., C.C.A. N.Y., 74 F.2d 227, certiorari denied New York, N. H. & H. R. Co. v. Hoffman, 55 S.Ct. 513, 294 U.S. 715, 79 L.Ed. 1248.

A steam shovel car is a car within the statute.—Schlemmer v. Buffalo, R. & P. R. Co., Pa., 27 S.Ct. 407, 205 U.S. 1, 51 L.Ed. 681.

Particular use of car; empty car

(1) The particular use made of a defectively equipped car at a particular time does not affect the liability.—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F.Supp. 154.

(2) The requirement of the statute applies to cars in use in carrying interstate traffic, although at the time they are being hauled empty.—Johnson v. Southern Pac. Co., Utah, 25 S.Ct. 158, 196 U.S. 1, 49 L.Ed. 363—Johnson v. Great Northern Ry. Co., 178 F. 643, 102 C.C.A. 89—Voelker v. Chicago, M. & St. P. R. Co., C.C.Iowa, 116 F. 867, reversed on other grounds 129 F. 522, 65 C.C.A. 226, 70 L.R.A. 264.

Switching

(1) Switching movements are within the requirement.
U.S.—Erie R. Co. v. Russell, N.Y., 183 F. 722, 106 C.C.A. 160, certiorari denied 31 S.Ct. 722, 220 U.S. 607, 55 L.Ed. 607—Johnson v. Great Northern Ry. Co., Minn., 178 F. 643, 102 C.C.A. 89.
Mo.—Carter v. St. Louis, T. & E. R. Co., 271 S.W. 358, 307 Mo. 595.
39 C.J. p 387 note 59 [i].

(2) Where there were no defects in appliances and ordinarily coal car and engine could have been uncoupled with appliances at hand and without necessity of brakeman's being between car and engine, but during a flying switch it was duty of brakeman to uncouple cars and he could not reasonably do so, with appliances available, without necessity of his being between car and engine, there was a violation of act; no imperfection in appliances was needed to create hazard imposing liability, since the operation itself implied a violation of the act.—Crabtree v. Kurn, 173 S.W.2d 851, 351 Mo. 628.

Train made up and held in place

Where train was made up and was being held in place by brakes controlled from locomotive, it was past time for train to have departed, and defective brake coupling was the cause of injuries sustained by car inspector while examining cars for defects in airbrake system, the provisions of the act were applicable.—Conrad v. Baltimore & O. R. Co., 183 S.W.2d 350, 345 Mo. 335.

29. U.S.—San Antonio & Arkansas Passenger R. Co. v. Wagner, Tex., 36 S.Ct. 626, 241 U.S. 476, 60 L.Ed. 1110—Chicago, St. P., M. & O. Ry. Co. v. Muldowney, C.C.A.Minn., 130 F.2d 971, certiorari denied 63 S.Ct. 526, 317 U.S. 700, 87 L.Ed. 560—Southern Ry. Co. v. Stewart, C.C.A.Mo., 119 F.2d 85, reversed on other grounds 62 S.Ct. 616, 315 U.S. 283, 86 L.Ed. 849.
Mo.—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005.

30. Ga.—Western & Atlantic R. R. v. Gentle, 198 S.E. 257, 58 Ga.App. 282, certiorari denied Gentle v. Western & A. R. R., 59 S.Ct. 252, 305 U.S. 654, 83 L.Ed. 424.
S.C.—Sessions v. Atlantic Coast Line R. Co., 169 S.E. 543, 170 S.C. 15.

31. U.S.—Southern Ry. Co. v. Stewart, C.C.A.Mo., 119 F.2d 85, reversed on other grounds 62 S.Ct. 616, 315 U.S. 283, 86 L.Ed. 849.

32. U.S.—Delk v. St. Louis & S. F. R. Co., Tenn., 31 S.Ct. 617, 220 U.S. 580, 55 L.Ed. 590—Chicago, B. & Q. Ry. Co. v. U. S., Neb., 31 S. Ct. 612, 220 U.S. 559, 55 L.Ed. 582—Philadelphia & R. Ry. Co. v. Eisenhart, C.C.A.Pa., 280 F. 271, certiorari denied 43 S.Ct. 13, 260 U.S. 723, 67 L.Ed. 482.
Ind.—Chicago, I. & L. Ry. Co. v. Stierwalt, 153 N.E. 807, 87 Ind. App. 478, certiorari denied 49 S. Ct. 32, 278 U.S. 633, 73 L.Ed. 551.
Mo.—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005.
N.Y.—Saxton v. Delaware & H. Co., 176 N.E. 425, 256 N.Y. 363.
Okl.—Essary v. Lowden, 116 P.2d 712, 189 Okl. 257, certiorari denied 62 S.Ct. 489, 315 U.S. 798, 86 L.Ed. 1199, rehearing denied 62 S.Ct. 638, 315 U.S. 828, 86 L.Ed. 1223.
S.C.—Steele v. Atlantic Coast Line R. Co., 87 S.E. 639, 103 S.C. 102.

33. U.S.—Philadelphia & R. Ry. Co. v. Auchenbach, C.C.A.N.J., 16 F.2d 550, certiorari denied 47 S.Ct. 476, 273 U.S. 761, 71 L.Ed. 878.
Mo.—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005.

34. Del.—Philadelphia & R. R. Co. v. Winkler, 56 A. 112, 4 Pennew. 387.
Ga.—Western & Atlantic R. R. v. Gentle, 198 S.E. 257, 58 Ga.App. 282, certiorari denied Gentle v. Western & A. R. R., 59 S.Ct. 252, 305 U.S. 654, 83 L.Ed. 424.
Minn.—Schendel v. Chicago, M. & St. P. Ry. Co., 206 N.W. 436, 165 Minn. 223.
Mo.—Soderstrom v. Missouri Pac. R. Co., App., 141 S.W.2d 73.

bility Act, or negligence as a matter of law.[35]

A failure to keep the required couplers in proper working order or operative condition at all times is a violation of the statute,[36] and the test of compliance is the operating efficiency of the couplers with which the car is equipped.[37] The law does not compel the use of any particular type or design of coupler;[38] but a coupler which cannot perform its function does not measure up to the statutory standard[39] and it is immaterial whether the defect is in the coupler itself or in adjuncts without which it cannot operate;[40] further, a coupler may be defective within the act without being actually broken or containing a visible defect.[41] It has been said to be the railroad's duty to keep such couplers in such operative condition that they will always perform their functions;[42] but it has also been held that the failure of couplers to couple is not per se a violation of the act[43] and that the failure of couplers to couple on impact on a given occasion does not deprive them of their character of "couplers coupling automatically by impact," as the phrase is used in the statute.[44] Thus a railroad has been held to have complied with the law when it equips its cars with couplers, designed to couple automatically by impact, which are in general use among well-regulated railroads[45] and not to be responsible for injury unless the failure of the couplers to couple on a given occasion results from some defect therein.[46]

35. Minn.—Schendel v. Chicago, M. & St. P. Ry. Co., 206 N.W. 436, 165 Minn. 223.

36. U.S.—Philadelphia & R. Ry. Co. v. Auchenbach, C.C.A.N.J., 16 F.2d 550, certiorari denied 47 S.Ct. 476, 273 U.S. 761, 71 L.Ed. 878—Philadelphia & R. Ry. Co. v. Eisenhart, C.C.A.Pa., 280 F. 271, certiorari denied 260 U.S. 723, 43 S.Ct. 13, 67 L.Ed. 482.
Ala.—Alabama Great Southern R. Co. v. Cornett, 106 So. 242, 214 Ala. 23.
Ga.—Western & Atlantic R. R. v. Gentle, 198 S.E. 257, 58 Ga.App. 282, certiorari denied Gentle v. Western & A. R. R., 59 S.Ct. 252, 305 U.S. 654, 83 L.Ed. 424.
Mo.—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005—Carter v. St. Louis, T. & E. R. Co., 271 S.W. 358, 307 Mo. 595.

37. U.S.—Chicago, St. P., M. & O. Ry. Co. v. Muldowney, C.C.A.Minn., 130 F.2d 971, certiorari denied 63 S.Ct. 526, 317 U.S. 700, 87 L.Ed. 560—Southern Ry. Co. v. Stewart, C.C.A.Mo., 119 F.2d 85, reversed on other grounds 62 S.Ct. 616, 315 U.S. 283, 86 L.Ed. 849—Philadelphia & R. Ry. Co. v. Auchenbach, C.C.A.N.J., 16 F.2d 550.
Mo.—Crabtree v. Kurn, 173 S.W.2d 851, 351 Mo. 628—Wilson v. Thompson, 133 S.W.2d 331, 345 Mo. 319—Kimberling v. Wabash Ry. Co., 85 S.W.2d 736, 337 Mo. 702.

Tracks laid on curve
The act is violated where the failure to couple automatically is due to the fact that the tracks are so laid on a curve that the couplers will not meet without men going between the cars to adjust them.—Hohenleitner v. Southern Pacific Co., C.C.Or., 177 F. 796.

Couplers operable from side of car
The requirement is sufficiently complied with by providing couplers which could be operated from side of cars, thus avoiding the necessity of going between them.—Chesapeake & O. R. Co. v. Charlton, Va., 247 F. 34, 159 C.C.A. 252.

38. U.S.—Johnson v. Southern Pac. Co., Utah, 196 U.S. 1, 25 S.Ct. 158, 49 L.Ed. 363—Hohenleitner v. Southern Pacific Co., C.C.Or., 177 F. 796.
Mo.—Crabtree v. Kurn, 173 S.W.2d 851, 351 Mo. 628.

39. N.Y.—Saxton v. Delaware & H. Co., 176 N.E. 425, 256 N.Y. 363.

Couplers of different types
The statute is violated, although cars are provided with automatic couplers, if they are of different types so that they will not work automatically together.—Johnson v. Southern Pac. R. Co., Utah, 25 S.Ct. 158, 196 U.S. 1, 49 L.Ed. 363.

Opening of knuckles
(1) A coupler which will not couple by impact, unless the knuckles have been opened by hand, is not such as is contemplated by the act.—Hurley v. Illinois Cent. R. Co., 157 N.W. 1005, 133 Minn. 101.

(2) Coupler, knuckle of which does not open after application of force sufficient to open it, if coupler is in proper condition, without requiring man to go between cars for purpose, does not meet statutory requirements; facts that freight cars might have been coupled, if knuckles of both couplers were open, and were later coupled, would not relieve railroad company from liability for injuries to switching crew foreman as result of having to go between cars to place knuckles in such position.—Chicago, M., St. P. & P. R. R. Co. v. Linehan, C.C.A.Minn., 66 F.2d 373.

Use of lever
A coupler which fails to open by the use of the lever provided for that purpose, when an honest and reasonable effort is made to operate it, does not comply with the act.—Holz v. Chicago, M., St. P. & P. R. Co., 224 N.W. 241, 176 Minn. 575.

40. N.Y.—Saxton v. Delaware & H. Co., 176 N.E. 425, 256 N.Y. 363.

41. Ind.—Chicago, I. & L. Ry. Co. v. Stierwalt, 153 N.E. 807, 87 Ind. App. 478, certiorari denied 49 S.Ct. 32, 278 U.S. 633, 73 L.Ed. 551.
Mo.—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005.
"It is not broken or mechanically defective devices which the law prohibits."—Crabtree v. Kurn, 173 S.W.2d 851, 855, 351 Mo. 628.

42. U.S.—Chicago, St. P., M. & O. Ry. Co. v. Muldowney, C.C.A.Minn., 130 F.2d 971, certiorari denied 63 S.Ct. 526, 317 U.S. 700, 87 L.Ed. 560.
Mo.—Soderstrom v. Missouri Pac. R. Co., App., 141 S.W.2d 73.

43. Ga.—Western & Atlantic R. R. v. Gentle, 198 S.E. 257, 262, 58 Ga. App. 282, certiorari denied Gentle v. Western & A. R. R., 59 S.Ct. 252, 305 U.S. 654, 83 L.Ed. 424.

44. U.S.—Western & Atlantic R. R. v. Gentle, supra.
"By the use of the above term, we do not apprehend that it was the intention of Congress to require railroads to equip their cars with couplers designed to couple automatically upon impact, without the necessity of men going between the ends of the cars, which would, upon all occasions and under all circumstances, actually couple, without fail, upon impact."—Western & Atlantic R. R. v. Gentle, supra.

45. Ga.—Western & Atlantic R. R. v. Gentle, supra.

46. U.S.—Western & Atlantic R. R. v. Gentle, supra.

Defects unavoidable by ordinary care
A railway company has complied with the act when it equips its cars with automatic couplers under the act, and it will not be thereafter subject to the penalties imposed be-

c. Improper Loading

A railroad company must use reasonable care to see that its cars are properly loaded so as not to cause injury to its employees.

It is the duty of a railway company to use reasonable care to see that its cars are properly loaded so as not to cause injury to its employees[47] and it will be liable even though the injury was caused by the manner in which the car was loaded by the consignor.[48] A rule of the company that no car must go forward which exceeds the clearance dimensions or is loaded in an unsafe manner does not enlarge its legal duty, but is an injunction to employees to observe its legal duty.[49]

§ 229. —— Tracks and Roadbeds

a. In general
b. Blocking frogs, switches, and guard rails
c. Fences and cattle guards
d. Bridges, trestles, and culverts

a. In General

A railroad company's duty to its servants is to use reasonable care in putting and keeping its roadbed and track in reasonably safe condition.

The general rule is that a railway company, as to its servants, is not bound to furnish a safe roadbed and track; its duty in that respect is to use all reasonable care and precaution in putting and keeping the roadbed and track in reasonably safe and good condition, and what constitutes reasonable care must depend on the surroundings, and the dangers to be fairly apprehended and encountered.[50] Under a statute, however, imposing liability on a railroad company for negligence by reason of defects in its track, roadbed, etc., it has been held that the duty rests on the company to furnish its employee a safe place to work with respect to its tracks and right of way, where the performance of his duties necessitates his use thereof.[51] The general rule has no application where the place of work is constantly changing by reason of the work itself or is necessarily incomplete and dangerous;[52] and generally it is sufficient if the tracks and roadbeds were substantial and durable at the time of their construction by competent engineers, and were properly supervised thereafter.[53] If a servant knows of the danger, or it is obvious, he is bound to exercise ordinary care to avoid it.[54]

The courts will not prescribe any particular standard for the spacing or construction of tracks or yards.[55]

cause of subsequent defects occurring to the couplers which ordinary care could not have avoided.—Missouri Pac. Ry. Co. v. Brinkmeier, 93 P. 621, 77 Kan. 14.

47. U.S.—Norfolk & W. Ry. Co. v. Riggs, C.C.A.Ohio, 98 F.2d 612.
39 C.J. p 388 note 66.

Fastening trucks on flat car

Railroad company had duty to fasten trucks on flat car securely, and where it did not do so, it failed in its duty to provide brakeman reasonably safe and proper place to work. —Union Pac. R. Co. v. De Vaney, C.C.A.Cal., 162 F.2d 24.

48. Wis.—Sparrow v. Menasha Paper Co., 143 N.W. 317, 154 Wis. 459.
39 C.J. p 389 note 67.

49. Me.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.

50. U.S.—Handy v. Reading Co., D.C.Pa., 66 F.Supp. 246.
Ark.—Caddo River Lumber Co. v. Henderson, 109 S.W.2d 425, 194 Ark. 724.
Mo.—Brum v. Wabash Ry. Co., 74 S.W.2d 566, 335 Mo. 876.
S.C.—McClain v. Charleston & W. C. Ry. Co., 4 S.E.2d 280, 191 S.C. 332.
Tex.—Texas & N. O. R. Co. v. Sarver, Civ.App., 113 S.W.2d 317, error refused.
Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.
Va.—Southern Ry. Co. v. Chadwick, 132 S.E. 191, 144 Va. 443.
Wash.—Blessing v. Camas Prairie R. Co., 100 P.2d 416, 3 Wash.2d 266.
39 C.J. p 389 note 69.

Absolute and continuing duty

Under the Federal Employers' Liability Act, a railroad is charged with the absolute and continuing duty of using reasonable care to furnish its employees a clear track.—Kansas City Southern Ry. Co. v. Nectaux, C.C.A.La., 26 F.2d 317, certiorari denied 49 S.Ct. 24, 278 U.S. 621, 73 L.Ed. 542.

A defective crossing plank causing injury to section hand was part of "track" or "roadbed," within Federal Employers' Liability Act, bringing case within its provisions.—Woosley v. Wabash Ry. Co., Mo.App., 274 S.W. 871.

Due care held shown

La.—Miller v. Missouri Pac. R. Co., 121 So. 241, 9 La.App. 477.
W.Va.—Hammack v. Hope Natural Gas Co., 140 S.E. 1, 104 W.Va. 344.

Negligence held shown

Ill.—Popp v. Terminal R. Ass'n of St. Louis, 45 N.E.2d 298, 316 Ill. App. 670.

Statute held inapplicable

A statute making a railroad company liable for a death "resulting from or caused by the negligence, unskilfulness or criminal intent of any officer, servant or employee while running, conducting, or managing any locomotive, car or train of cars," does not apply where an employee walking along a railroad track is injured because of a defect in the construction of the track.—McKenna v. Missouri Pac. R. Co., 54 Mo.App. 161.

51. Ga.—Louisville & N. R. Co. v. Crapps, 8 S.E.2d 413, 62 Ga.App. 437.

52. Ark.—Caddo River Lumber Co. v. Henderson, 109 S.W.2d 425, 194 Ark. 724.
39 C.J. p 391 note 70.

53. Tex.—Houston & T. C. R. Co. v. Fowler, 56 Tex. 452.
39 C.J. p 391 note 71.

54. Ind.—Baltimore & O. S. W. R. Co. v. Hunsucker, 70 N.E. 556, 33 Ind.App. 27.
39 C.J. p 391 note 72.

Fact that train crew knew dangerous condition of track did not relieve railroad of duty to repair crew to control movement of trains by giving proper orders to train crew or posting flagman.—Chesapeake & O. Ry. Co. v. Russo, 163 N.E. 283, 91 Ind.App. 648, certiorari denied 51 S. Ct. 25, 282 U.S. 846, 75 L.Ed. 750.

55. Mo.—Cooper v. Atchison, T. & S. F. R. Co., 148 S.W.2d 773, 347

With respect to the application of a statute requiring an employer to provide a safe place of employment, a street car company has no control over a street, and no right to place any obstructions therein, so as to protect a motorman when changing the trolley.[56]

Inequalities and other defects in surface. A railroad company is bound to use reasonable care to keep its roadbed free from such inequalities and other defects in the surface as it may be reasonably anticipated will cause injuries to its employees,[57] but it will not be liable for injuries resulting from defects arising in the progress of an employee's work,[58] or for injuries which could not reasonably have been anticipated when the roadbed is reasonably fitted for the purpose for which it is used.[59] At least within its yard limits, where workmen in considerable numbers are constantly engaged, a railroad company must exercise a degree of care commensurate with the risk to prevent the accumulation of snow or ice in such quantity, form, and location as to be a menace to the safety of its employees working therein.[60]

Mo. 555, certiorari denied Atchison, T. & S. F. R. Co. v. Cooper, 61 S.Ct. 1116, 313 U.S. 591, 85 L.Ed. 1546.

Engineering questions; drainage

(1) Fault or negligence of railroad company may not be found from mere existence, between tracks, of drain for draining yard, and fact that employee fell therein; company had much freedom in selecting method of drainage and in choice of facilities and places for use of employees, and courts will not prescribe standards in respect to such matters or leave to juries such engineering questions as are involved in the construction and maintenance of railroad yards and the drainage system therein.—Delaware, L. & W. R. Co. v. Koske, N.J., 49 S.Ct. 202, 279 U.S. 7, 73 L.Ed. 578.

(2) Under the "engineering necessity doctrine," carriers have much freedom of choice in providing facilities and places for the use of their employees, and where they are established in accordance with reasonable and scientific judgment on roadbeds and yards, they are not subject to review by a jury, but it is essential to the application of the doctrine that the facility or place of use of the employees must be suitable for the practical operation of the employer's business.—Southern Pac. Co. v. Huyck, 128 P.2d 849, 61 Nev. 365.

Safe place to work

Rule holding employer to ordinary care to provide his employees a reasonably safe place in which to work does not impose on a railroad company any obligation to adopt or maintain any particular standard for the spacing of its tracks; the railroad does not owe as high a degree of care to an employee, in this connection, as it does to passengers or others coming on its premises on business, since his knowledge of the dangers existing because of the narrow space between the tracks is at least equal to that chargeable against the railroad.—Toledo, St. L. & W. R. Co. v. Allen, Mo., 48 S.Ct. 215, 276 U.S. 165, 72 L.Ed. 513, conformed to Allen v. Toledo, St. L. & W. Ry. Co., Mo., 12 S.W.2d 1116.

Negligence held shown

Mo.—Cooper v. Atchison, T. & S. F. R. Co., 148 S.W.2d 773, 347 Mo. 555, certiorari denied Atchison, T. & S. F. R. Co. v. Cooper, 61 S.Ct. 1116, 313 U.S. 591, 85 L.Ed. 1546.

Negligence held not shown

Neb.—Lenz v. Union Pac. R. Co., 258 N.W. 33, 128 Neb. 99.

56. Wis.—Baker v. Janesville Traction Co., 234 N.W. 912, 204 Wis. 452.

57. U.S.—Waddell v. Chicago & E. I. R. Co., C.C.A.Ill., 142 F.2d 309, certiorari denied 65 S.Ct. 69, 323 U.S. 732, 89 L.Ed. 587—Chicago Great Western Ry. Co. v. Peeler, C.C.A.Minn., 140 F.2d 865—Schilling v. Delaware & H. R. Corporation, C.C.A.N.Y., 114 F.2d 69.

Mo.—Stewart v. St. Louis-San Francisco Ry. Co., App., 52 S.W.2d 231.

39 C.J. p 391 note 76.

Concealed hole in roadbed

S.C.—McClain v. Charleston & W. C. Ry. Co., 4 S.E.2d 280, 191 S.C. 332.

Statute requiring roadbed level with ties

The statute requiring railroad companies to keep grade of roadbed at stations level with the ties was a legislative enactment of standard of care to be used for protection of all citizens in ordinary use of depot, including railroad employees.—McClain v. Charleston & W. C. Ry. Co., supra.

Small amount of loose gravel was held not to constitute a hazard or to show failure to exercise care to maintain reasonably safe working place for employees.—Miller v. Missouri Pac. R. Co., 121 So. 241, 9 La. App. 477.

Defective condition held not shown

Ky.—Smith's Adm'rs v. Louisville & N. R. Co., 32 S.W.2d 1003, 236 Ky. 174.

58. Ind.—Davis v. Hostetter, 142 N. E. 723, 81 Ind.App. 524.

Mo.—Baker v. Lusk, 201 S.W. 357, 199 Mo.App. 44.

Injury from condition within scope of employment

(1) Railroad was held not negligent in permitting hole between ties on roadbed, and hence not liable for injuries to section hand having leg run over by car he was pushing when he slipped in hole, since it was part of his work and duty to discover and correct such condition.—Stewart v. St. Louis-San Francisco Ry. Co., Mo.App., 52 S.W.2d 231.

(2) Railroad did not owe duty of reasonable care in furnishing safe place to work where section hand, replacing bolts in rails, stepped back when defective wrench slipped, and dirt between ties caved in, although surface appeared solid since the safety and condition of the thing itself which caused his injuries come clearly within the scope of his employment, and it was his duty to keep in reasonably safe condition the rails, ties, and roadbed within his section.—Texas & P. R. Co. v. Meek, Tex.Civ.App., 72 S.W.2d 616, error refused.

59. Mo.—Stewart v. St. Louis-San Francisco Ry. Co., App., 52 S.W.2d 231.

Tex.—Texas & P. R. Co. v. Meek, Civ.App., 72 S.W.2d 616, error refused.

39 C.J. p 391 note 78.

Duty to tamp embankment

A railroad company owed no duty to employees, who were engaged in replacing rails, to tamp embankment along tracks in order to discover latent defects consisting of concealed holes covered by crust of unbroken earth, notwithstanding locality was infested with burrowing rodents.—Texas & N. O. R. Co. v. Sarver, Tex.Civ.App., 113 S.W.2d 317, error refused.

60. U.S.—Raudenbush v. Baltimore & O. R. R., D.C.Pa., 63 F.Supp. 329.

39 C.J. p 392 note 80.

Snow and ice in snowshed

As to deceased brakeman who, after either jumping or falling from top of a freight train passing through a snowshed, fell against a

Sidetracks. Railroad companies have generally not been held to the same degree of care in maintaining their sidetracks as their main tracks, and not liable for injuries to servants caused by defects in their construction, unless it appears that they are guilty of gross carelessness in handling their cars.[61]

Switches. It is the duty of a railroad company to use reasonable care to furnish and to keep in order, and rightly placed, switches which are free from defects and reasonably safe and suitable for the purpose in view.[62] Where this is done, the company's duty is performed and it is not liable for injuries involving switches sustained by a servant in the performance of his duties.[63] Switches of a form in common use have been held sufficient or proper.[64]

Ties and rails. A railroad operator is bound to use ordinary care to furnish reasonably safe rails and ties and maintain them in such condition,[65] but it is not liable for injuries resulting from accidents due to minor defects not rendering the track unfit for use.[66]

b. Blocking Frogs, Switches, and Guard Rails

In the absence of a statute to the contrary, a railroad company is not negligent in leaving its frogs, switches, or guard rails unblocked, unless blocking is general in that area, or unless it undertakes to maintain blocking and allows it to become defective.

At common law, it is generally held that a railway company is not guilty of negligence in leaving its frogs, switches, or guard rails unblocked,[67] unless blocking is generally used in the same section of the country,[68] or unless the company undertakes to maintain blocking and allows it to become defective.[69] As the object of blocking is only to prevent the feet from catching, a servant cannot recover for injuries received by reason of his arm's catching in an unblocked guard rail.[70]

Statutory regulations. Where railroads are required by statute to block frogs, switches, guard rails, and crossings, a failure to comply with the statutory provisions constitutes negligence.[71] Lia-

bank of snow and ice and slid under the train, railroad was held not negligent in allowing accumulation of snow and ice along tracks at that point, where it was not near any station or yard, and deceased had no duties to perform on ground along track.—Burtis v. Freeman, 235 P. 342, 77 Colo. 120.

61. U.S.—Tuttle v. Detroit, G. H. & M. R. Co., Mich., 7 S.Ct. 1166, 122 U.S. 189, 30 L.Ed. 1114.
39 C.J. p 392 note 81.

Passing track not "place to work"
In conductor's action for injuries sustained when he alighted in the nighttime from caboose standing on bridge on single track main line, opposite passing tracks, to examine defective brake shoes, and fell into creek bed, the passing track was not a "place to work" which railroad must keep in reasonably safe condition.—Pauly v. McCarthy, 166 P.2d 501, 109 Utah 398, 329 U.S. 698, 91 L.Ed. 609, reversed on other grounds 67 S.Ct. 962, 330 U.S. 802, 91 L.Ed. 1261.

62. Iowa.—**Corpus Juris quoted in** McCall v. Pitcairn, 6 N.W.2d 415, 419, 232 Iowa 867.
39 C.J. p 393 note 82.

Leaving switch open and unguarded constitutes negligence on part of railroad.—Wiggins v. Powell, C.C.A. Fla., 119 F.2d 751, certiorari denied Powell v. Wiggins, 62 S.Ct. 94, 314 U.S. 649, 86 L.Ed. 520.

Lights
(1) Generally.—Norfolk & W. R. Co. v. Whitehurst, 99 S.E. 568, 125 Va. 260—39 C.J. p 393 note 82 [a].

(2) Charge to deny recovery for death of switchman by failure to have lights, if ordinarily careful person in same situation as employee would have appreciated danger, properly stated railroad's duty regarding lights.—Derrington v. Southern Ry. Co., 40 S.W.2d 1069, 328 Mo. 283, certiorari denied Southern Ry. Co. v. Derrington, 52 S.Ct. 37, 284 U. S. 662, 76 L.Ed. 561.

Derailer; worn rail
When empty gondola-shaped coal car on which brakeman was standing in order to signal switching operations at night struck a derailer, causing car to derail, striking a derailer from the unexpected direction was so unusual and contrary to purpose of derailer that provision to guard against such happening was beyond requirement of due care; fact that rail opposite derailer was worn does not impose liability on railroad where rail was sufficient for ordinary use and railroad was not obliged to foresee, and guard against misuse of derailer, notwithstanding misuse sometimes occurred.—Brady v. Southern Ry. Co., N.C., 64 S.Ct. 232, 320 U.S. 476, 88 L.Ed. 239.

63. U.S.—Chicago, M. & St. P. R. Co. v. Riley, Ill., 145 F. 137, 76 C.C. A. 107, 7 Ann.Cas. 327.
39 C.J. p 393 note 83.

64. U.S.—Lowden v. Hanson, C.C.A. Minn., 134 F.2d 348.
39 C.J. p 393 note 83 [e].

65. U.S.—Virginian Ry. Co. v. Staton, C.C.A.W.Va., 84 F.2d 133—National Box Co. v. Wroten, C.C. A.Miss., 66 F.2d 86.
Or.—McPherson v. Oregon Trunk Ry., 102 P.2d 726, 165 Or. 1.
Tex.—Louisiana Ry. & Nav. Co. of Texas v. Eldridge, Civ.App., 293 S.W. 901.
39 C.J. p 391 note 73.

66. U.S.—Nelson v. Southern R. Co., N.C., 38 S.Ct. 233, 246 U.S. 253, 62 L.Ed. 699.
39 C.J. p 391 note 75.

Tie projecting above bottom of rails
Railroad permitting bent tie to project a few inches above bottom of rails, thereby injuring employee dangling foot from push car, was not negligent, where usual and customary method of placing ties in roadbeds was followed.—Southern Ry. Co. v. Chadwick, 132 S.E. 191, 144 Va. 443.

67. Minn.—Dolge v. Northern Pac. R. Co., 119 N.W. 1066, 107 Minn. 242, 26 L.R.A.,N.S., 600.
39 C.J. p 394 note 84.

68. U.S.—Southern Pac. Co. v. Seley, Utah, 14 S.Ct. 530, 152 U.S. 145, 38 L.Ed. 391.
39 C.J. p 394 note 85.

69. U.S.—St. Louis Merchants' Bridge Terminal R. Co. v. Schuerman, Mo., 237 F. 1, 150 C.C.A. 203, certiorari denied 37 S.Ct. 246, 242 U.S. 652, 61 L.Ed. 546.
39 C.J. p 394 note 86.

70. Mo.—Rutledge v. Missouri Pac. R. Co., 19 S.W. 38, 110 Mo. 312.
39 C.J. p 395 note 88.

71. U.S.—Cooper v. Baltimore & O. R. Co., 159 F. 82, 86 C.C.A. 272, 16 L.R.A.,N.S., 715, 14 Ann.Cas. 693.
39 C.J. p 395 note 90.

bility under such statutes is generally held not to be absolute and there can be no recovery unless the violation was the cause of the injury,[72] and an employee cannot recover when he was acting in violation of the rules of the company at the time the injuries were sustained.[73] Some statutes apply only to railroad corporations,[74] while the application of others is not confined to common carriers, but extends to railroads used in connection with mills and logging companies.[75]

c. Fences and Cattle Guards

A railroad company has no common-law duty to its employees to fence its track and provide cattle guards.

As between a railway company and its employees, there is no common-law duty on the company to fence its track and provide cattle guards.[76] Where, however, a company has fenced its right of way, thereby creating changed conditions which enter into and affect the work done by its employees to operate its trains, the degree of care required on the part of an engineer to avoid animals on the track is different from that required where there is no fence, and the failure of the company to exercise ordinary care and maintain such fence in a proper and safe condition will constitute actionable negligence,[77] although the fact that a railroad has voluntarily fenced a part of its track does not impose on it the obligation to fence more of it.[78] Furthermore, an employee may recover for an injury resulting from the defective construction of such guards or from the negligence of the company in improperly locating them.[79]

Under some decisions, since statutes requiring railroad companies to fence their tracks and erect cattle guards are primarily for the protection of stock, a company is not liable to its servants for injuries received by reason of a failure to comply with the statutory requirements,[80] while under the terms of others it has been held that the intent is to afford protection to employees as well as to animals.[81] It has also been held that where, under a statutory requirement, the company has erected a guard at a point where its employees are constantly compelled to be in the course of their employment, the guard must be made reasonably safe for that purpose, it not being enough that it be made sufficient and safe to turn stock, and an employee may recover for injuries accruing from negligence of the company in locating or constructing such a guard.[82] The mere fact that such guards had been constructed at places not required by the statute does not constitute negligence as to an employee.[83]

d. Bridges, Trestles, and Culverts

A railroad company is liable to its servant for injuries resulting from its failure to exercise reasonable care and diligence to construct and maintain reasonably safe and sufficient bridges and culverts.

It is the duty of a railway company to exercise reasonable care and diligence to construct and maintain reasonably safe and sufficient bridges and culverts on its line, and it will be liable to its servant for injuries sustained by reason of its failure to do so.[84] This rule applies, even though the road was in course of construction and not open for trade

72. U.S.—Atkyn v. Wabash R. Co., C.C.Ohio, 41 F. 193.
Wis.—Holum v. Chicago, M. & St. P. R. Co., 50 N.W. 99, 80 Wis. 299.

73. Mich.—Grand v. Michigan Cent. R. Co., 47 N.W. 837, 83 Mich. 564, 11 L.R.A. 402.

74. U.S.—Taggart v. Republic Iron & Steel Co., Ohio, 141 F. 910, 73 C.C.A. 144.
39 C.J. p 395 note 93.

75. Wash.—Alberg v. Campbell Lumber Co., 119 P. 6, 66 Wash. 84.

76. Iowa.—Patton v. Central Iowa R. Co., 35 N.W. 149, 73 Iowa 306.
39 C.J. p 395 note 96.

77. Tex.—Galveston, H. & S. A. R. Co. v. Salisbury, Civ.App., 143 S. W. 252.
39 C.J. p 395 note 97.

78. La.—Crilly v. Texas & P. R. Co., 10 So. 400, 44 La.Ann. 95.

79. N.Y.—Fredenburg v. Northern Cent. R. Co., 21 N.E. 1409, 114 N.Y. 582, 11 Am.S.R. 697.
39 C.J. p 396 note 99.

80. U.S.—Gill v. Louisville & N. R. Co., C.C.Tenn., 160 F. 260, affirmed 165 F. 438, 91 C.C.A. 613.
39 C.J. p 396 note 1.

Assumption of risk

Although the failure of a railway company to fence its track as required by statute is evidence of negligence, this liability is subject to the qualification that, if an employee enters and continues in his employment, knowing that the road is not fenced, he assumes the risks naturally incident to such condition.—Kommerstad v. Great Northern Ry. Co., 139 N.W. 713, 120 Minn. 376—Fleming v. St. Paul & D. R. Co., 6 N.W. 448, 27 Minn. 111.

81. Ark.—Sands v. Linch, 182 S.W. 561, 122 Ark. 93, L.R.A.1916D 204.
39 C.J. p 396 note 2.

82. Iowa.—Ford v. Chicago, R. I. & P. R. Co., 59 N.W. 5, 91 Iowa 179, 24 L.R.A. 657.

83. Tex.—Galveston, H. & S. A. R. Co. v. Slinkard, Civ.App., 39 S.W. 961.

84. U.S.—Bailey v. Central Vermont Ry., 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.
Minn.—Bimberg v. Northern Pac. Ry. Co., 14 N.W.2d 410, 217 Minn. 187, followed in 14 N.W.2d 419, 217 Minn. 187, certiorari denied 65 S. Ct. 87, 323 U.S. 752, 89 L.Ed. 602.
Tex.—Fort Worth & D. C. Ry. Co. v. Burton, Civ.App., 158 S.W.2d 601, error refused.
Va.—Bly v. Southern Ry. Co., 31 S. E.2d 564, 183 Va. 162, opinion adhered to 32 S.E.2d 659, 183 Va. 406.
39 C.J. p 396 note 5.

Custom not controlling

Propriety of using bents or other additional supports to prevent bridge from falling, after withdrawal of bolts from truss arm, cannot be governed by custom, since custom cannot be used to excuse an act of negligence.—Roberts v. Southern Ry. Co., 145 S.E. 255, 151 Va. 815.

Falling of bridge

Railroad's failure to exercise reasonable care to prevent bridge falling on employee working thereon

or travel,[85] and though such structures had been erected by another company from whom the road was bought by the employer.[86] There can be no recovery, however, in the absence of negligence on the part of the company,[87] and thus, where the company has exercised such reasonable care as usual and ordinary conditions require, it will not be held liable for injuries sustained by reason of storms and floods which are of unusual and extraordinary violence, and which could not have been reasonably foreseen by competent and skillful persons.[88]

A railroad company is not bound, under the law, to erect any particular type or character of bridge,[89] and its failure to use the safer of two recognized methods of constructing a bridge is not in itself negligence.[90] Likewise, it is not as a matter of law required to maintain bannisters on trestles.[91]

§ 230. —— Obstructions or Erections on, over, or near Tracks

a. In general
b. Permanent structures and matters of engineering
c. Overhead bridges

a. In General

A railroad company is liable to its employee for injuries caused by its failure to exercise reasonable care and diligence to prevent dangerous obstructions on, over, or near its tracks.

A railroad company is bound to exercise reasonable care and diligence to prevent obstructions on, over, or near its tracks, which are a source of danger to its servants, and will be held liable for injuries occasioned by its neglect of such duty,[92] and

constituted negligence.—Roberts v. Southern Ry. Co., 144 S.E. 863, 151 Va. 815, rehearing denied 145 S.E. 255, 151 Va. 815.

Walkway on bridge

(1) A railroad's duty to exercise reasonable care in furnishing a safe place to work did not pertain to any particular area on walkway on railroad bridge, which walkway was maintained by railroad for use of trainmen.—Thomson v. Boles, C.C.A. Minn., 123 F.2d 487, certiorari denied 62 S.Ct. 632, 315 U.S. 804, 86 L.Ed. 1204.

(2) Reasonable protection for those who might use walkway on railroad bridge was necessary, and failure to provide such reasonable protection would be actionable negligence.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.

"Unbending test" of negligence, that use of methods pursued by others in similar work is evidence of exercise of reasonable care, held not conclusive in action for injuries to employee by fall of bridge after withdrawal of bolts from truss arm. —Roberts v. Southern Ry. Co., 145 S.E. 255, 151 Va. 815.

85. La.—Van Amberg v. Vicksburg, S. & P. R. Co., 37 La.Ann. 650, 55 Am.R. 517.

86. N.Y.—Vosburgh v. Lake Shore & M. S. R. Co., 94 N.Y. 374, 46 Am. R. 148.

87 Mich.—Howe v. Michigan Cent. R. Co., 211 N.W. 111, 236 Mich. 577, certiorari denied 47 S.Ct. 576, 274 U.S. 738, 71 L.Ed. 1317.
Minn.—O'Brien v. Minnesota Western R. Co., 226 N.W. 209, 178 Minn. 110.
Tenn.—Peters v. Tennessee Cent. Ry., 167 S.W.2d 973, 179 Tenn. 509.
39 C.J. p 396 note 8.

Following usage and custom

Fact that bridge was constructed and maintained in accordance with usage and custom of railroads tended to show an absence of negligence, but was not conclusive of exercise of due care by railroad.—Bly v. Southern Ry. Co., 31 S.E.2d 564, 183 Va. 162, opinion adhered to 32 S.E.2d 659, 183 Va. 406.

Absence of guard railings held not to constitute negligence.
U.S.—Reetz v. Chicago & E. R. Co., C.C.A.Ohio, 46 F.2d 50.
Mich.—Howe v. Michigan Cent. R. Co., 211 N.W. 111, 236 Mich. 577, certiorari denied 47 S.Ct. 576, 274 U.S. 738, 71 L.Ed. 1317.

Lights; walkways

(1) In absence of evidence that such lights are, or could be, used, that due care requires their use, or that such lights as could have been made available would have avoided the accident, fact that there were no lights at bridge did not render railroad liable for death of freight brakeman when, during night switching operation, he stepped off side ladder of boxcar which had been stopped on unrailed bridge.—Kenney v. Boston & M. R. R., 33 A.2d 557, 92 N.H. 495.

(2) The court cannot declare as a matter of law that the absence of walkways from a particular bridge does not render it unsafe for employees.—Bly v. Southern Ry. Co., 31 S.E.2d 564, 183 Va. 162, opinion adhered to 32 S.E.2d 659, 183 Va. 406.

(3) Walkways on bridges and trestles need not be provided by a railroad company for the protection of its employees.
U.S.—Reetz v. Chicago & E. R. Co., C.C.A.Ohio, 46 F.2d 50.
W.Va.—Hull v. Virginian R. Co., 88 S.E. 1060, 78 W.Va. 25.

"Reasonably safe place to work" rule held inapplicable

Mo.—Pritchard v. Thompson, 156 S.W.2d 652, 348 Mo. 832.
N.H.—Kenney v. Boston & M. R. R., 33 A.2d 557, 92 N.H. 495.

88. Ala.—Columbus & W. R. Co. v. Bridges, 5 So. 864, 86 Ala. 448, 11 Am.S.R. 58.
39 C.J. p 397 note 9.

89. Mich.—Howe v. Michigan Cent. R. Co., 211 N.W. 111, 236 Mich. 577, certiorari denied 47 S.Ct. 576, 274 U.S. 738, 71 L.Ed. 1317.
Tex.—Fort Worth & Denver City Ry. Co. v. Burton, Civ.App., 158 S.W.2d 601, error dismissed.

90. Neb.—Christenson v. Union Pac. R. Co., 290 N.W. 246, 137 Neb. 538, certiorari granted 61 S.Ct. 733, 312 U.S. 673, 85 L.Ed. 1114, certiorari dismissed 61 S.Ct. 825, 312 U.S. 710, 85 L.Ed. 1142.

91. Ark.—Missouri Pac. R. Co. v. Hathcock, 139 S.W.2d 35, 200 Ark. 294.

Effect of occasional maintenance

Fact that in some instances this extraordinary care is exercised does not establish by implication custom on which employees may rely to extent that they are relieved of obligation due themselves to observe physical conditions where the means of so doing are provided.—Missouri Pac. R. Co. v. Hathcock, supra.

92. Ark.—E. L. Bruce Co. v. Leake, 3 S.W.2d 988, 176 Ark. 705.
Ill.—Werner v. Illinois Cent. R. Co., 33 N.E.2d 121, 309 Ill.App. 292, reversed on other grounds 42 N.E. 2d 82, 379 Ill. 559.
Neb.—**Corpus Juris quoted in** Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 311, 147 Neb. 18, reversed on other grounds 67 S.Ct. 598, 329 U.S. 649, 91 L.Ed. 572.

the employee has a right to assume that the employer has done its duty in this respect,[93] and it has been held that he is not required to make any investigation or inspection to find out whether the employer has been guilty of negligence.[94] On the other hand, the company will not be liable for injuries sustained by an employee where it was neither necessary nor customary for him to be in a position where he would be in danger of coming in contact with such an obstruction.[95]

Other cars or vehicles. The rule requiring a railway company to exercise reasonable care and diligence to prevent obstructions on or near its tracks which are a source of danger to its servants applies also to the presence of cars or vehicles of the company on adjacent tracks, switches, or sidings, as where they are dangerously close to other cars.[96]

b. Permanent Structures and Matters of Engineering

While a railroad company, where it can reasonably do so, must place structures at such a reasonably safe distance from the track as not to endanger employees, the maintenance of necessary structures so close to the tracks as to require caution on their part, or the narrowing of clearance space between tracks as a matter of necessary engineering, will not raise a presumption of negligence on the company's part.

It has generally been held that the maintenance of structures necessary for the proper conducting of the business of a railroad company so close to the track as to require caution on the part of employees against injury,[97] or the mere narrowing of the clearance space between tracks when compelled or advised as a matter of engineering,[98] will not raise a presumption of negligence on the part of the company, although it may be liable when a change in its rolling stock or equipment has increased the danger to the employee;[99] and, if a yard or house

Tenn.—Tennessee Cent. Ry. Co. v. Shacklett, 147 S.W.2d 1054, 24 Tenn.App. 563.
W.Va.—Looney v. Norfolk & W. Ry. Co., 135 S.E. 262, 102 W.Va. 40, 48 A.L.R. 806, rehearing denied 137 S.E. 756, 102 W.Va. 40, 48 A.L.R. 806.
39 C.J. p 397 note 11, p 455 note 78.
Obstruction belonging to or under control of third person see supra § 212.

Structure standing for years
Fact that a structure has been permitted to stand too near railroad track for years, without attracting attention until accident occurs, does not relieve railroad company of charge of negligence in so constructing road or in permitting it to remain in a condition dangerous to safety of its servants.
U.S.—Harvey v. Texas & P. R. Co., Tex., 166 F. 385.
Ill.—Sprickerhoff v. Baltimore & O. R. Co., 55 N.E.2d 532, 323 Ill.App. 340.

Stock pen gates dangerously close to tracks
Mo.—Howser v. Chicago Great Western R. Co., 5 S.W.2d 59, 319 Mo. 1015.

Mail crane
Railroad was held chargeable with negligence in permitting a mail crane to be unnecessarily near the track, where it was about four feet high and but three or four inches from the outside of a passing coach.—Central of Georgia Ry. Co. v. Davis, C.C.A.Ala., 7 F.2d 269, certiorari denied 46 S.Ct. 104, 269 U.S. 578, 70 L. Ed. 422.

Danger as ordinary incident to work
Danger caused by material taken from railroad car and deposited on ground between tracks was ordinary incident to work of one employed in railroad's repair yard.—Wickham v. St. Louis-San Francisco Ry. Co., Mo., 31 S.W.2d 1007.

93. Ark.—E. L. Bruce Co. v. Leake, 3 S.W.2d 988, 176 Ark. 705.

94. Ark.—E. L. Bruce Co. v. Leake, supra.

95. Minn.—Stone v. Chicago & N. W. Ry. Co., 222 N.W. 641, 176 Minn. 104.
Neb.—**Corpus Juris quoted in** Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 311, 147 Neb. 18, reversed on other grounds 67 S.Ct. 598, 329 U.S. 649, 91 L.Ed. 572.
39 C.J. p 398 note 12.

96. N.H.—McAllister v. Suncook Val. R. R., 42 A.2d 733, 93 N.H. 400.
39 C.J. p 398 note 14.

Tracks dangerously close together
Ind.—New York, C. & St. L. R. Co. v. Peele, 164 N.E. 705, 88 Ind.App. 532, certiorari denied 49 S.Ct. 263, 279 U.S. 842, 73 L.Ed. 988.

97. Tenn.—Tennessee Cent. Ry. Co. v. Shacklett, 147 S.W.2d 1054, 24 Tenn.App. 563.
39 C.J. p 398 note 15.
"Close clearance alone is not enough to sustain a charge of negligence."—McCully v. Monongahela Ry. Co., 137 A. 623, 624, 289 Pa. 393, certiorari denied 48 S.Ct. 37, 275 U.S. 542, 72 L.Ed. 416.

Coal tipple
U.S.—McCully v. Monongahela Ry. Co., 137 A. 623, 624, 289 Pa. 393, certiorari denied 48 S.Ct. 37, 275 U.S. 542, 72 L.Ed. 416.

Loading platform
Minn.—Stone v. Chicago & N. W. Ry. Co., 222 N.W. 641, 176 Minn. 104.

Semaphore
U.S.—Atlantic Coast Line R. Co. v. Powe, S.C., 51 S.Ct. 498, 283 U.S. 401, 75 L.Ed. 1142.

Switchstand
(1) Railroad maintaining three and one half feet from track switchstand on which employee was injured was held not negligent, where switchstand was standard equipment in use by railway systems throughout the country.—Cincinnati, N. O. & T. P. Ry. Co. v. Heinz, 14 S.W.2d 138, 227 Ky. 816.
(2) Location of switchstand so close to track that switchman was struck while on passing car does not present engineering question precluding judicial inquiry, where evidence shows that less dangerous location could have been made.—Houston & T. C. R. Co. v. Robins, Tex.Civ.App., 23 S.W.2d 461, error refused.

Water plug
Recovery for brakeman's death, allegedly caused by contact with water plug, not authorized unless carrier was negligent in locating plug too near track; railroad was held not negligent where plug was over seven feet from center of track, as required by statute, and train was of usual construction, and no defects in roadbed were shown.—Pennsylvania R. Co. v. Johnson, 169 N.E. 358, 91 Ind.App. 412.

98. U.S.—Reese v. Philadelphia & R. R. Co., Pa., 36 S.Ct. 134, 239 U.S. 463, 60 L.Ed. 384.
39 C.J. p 399 note 16.

99. Minn.—Clay v. Chicago, M. & St. P. R. Co., 115 N.W. 949, 104 Minn. 1.
39 C.J. p 399 note 17.

was reasonably safe when constructed, continuing to use it without rearranging the tracks, walls, or roof is not negligence,[1] unless it appears that such yards or houses are no longer in common use, or that changed conditions require greater clearance.[2] Where, however, a railroad company can reasonably do so, it is bound to place structures used in its business at such a reasonably safe distance from the track as not to endanger employees while discharging their duties.[3]

c. Overhead Bridges

A railroad company maintaining a dangerously low bridge over its track is liable to an employee who, not knowing the dangerous character of the bridge, is struck by it while performing his duties. A railroad company is liable to an employee injured as a result of its failure to comply with a statute requiring it to maintain telltales or other guards to warn of low bridges; in the absence of such statute authorities differ as to whether failure to maintain such guards constitutes negligence.

If a railroad company knowingly maintains or permits a bridge over its track so low that an employee cannot perform his duty on the top of the cars with reasonable safety, it is liable to such an employee, who, having no knowledge of the dangerous character of the bridge, is struck by it and injured while in the performance of his duties,[4] and this is true, even though the bridge was established by public authority before the company owned the road.[5]

Where a statute regulating the clearance of overhead bridges carried across railroad tracks relates only to bridges constructed after its enactment, minor repairs will not constitute such a subsequent rebuilding as to bring the bridge within the purview of the statute.[6]

Whipping straps, telltales, and other mechanical warnings. The failure of a railway company to maintain whipping straps, telltales, or bridge guards to warn employees who are on top of a train that it is about to pass under a bridge or viaduct so low as to imperil their lives has been held to constitute negligence on the part of the company;[7] but it has also been held that such failure is not legal negligence unless such devices are so manifestly serviceable that intelligent railroad men do not honestly differ in judgment as to their utility,[8] and that negligence cannot be predicated, in any event, on the company's failure to provide such telltales when it appears that they would have been of no service under the circumstances of the particular case.[9] Likewise, it is not negligence on the part of a company to fail to illuminate a low bridge on its tracks, in the absence of proof that such illumination is customary.[10]

The negligence of a railroad company in maintaining a low overhead bridge may be overcome by the use of proper safeguards and by proper warnings to its employees;[11] a device used for this purpose must be adequate to warn all the employees who, in the normal performance of their duties, will run the risk of being injured.[12]

Where railroad companies are required by statute to maintain telltales or other suitable guards as warnings against the danger from low bridges crossing their right of way, a railroad will be liable for injuries to its employees resulting from its failure to provide such guards as required by statute,[13] or from its negligence in improperly constructing or locating them,[14] or in permitting them

1. U.S.—New York, N. H. & H. R. Co. v. Dailey, N.Y., 179 F. 289, 102 C.C.A. 660.
39 C.J. p 399 note 18.

2. Minn.—McNamee v. Hines, 184 N. W. 675, 150 Minn. 97.

3. Ill.—Werner v. Illinois Cent. R. Co., 33 N.E.2d 121, 309 Ill.App. 292, reversed on other grounds 42 N.E. 2d 82, 379 Ill. 559.
39 C.J. p 399 note 20.

Car retarder
W.Va.—Looney v. Norfolk & W. Ry. Co., 135 S.E. 262, 102 W.Va. 40, 48 A.L.R. 806, rehearing denied 137 S.E. 756, 102 W.Va. 40, 48 A.L.R. 806.

4. U.S.—Cincinnati, N. O. & T. P. R. Co. v. Jones, Tenn., 192 F. 769, 113 C.C.A. 55, 47 L.R.A.,N.S., 483.
39 C.J. p 400 note 22.
Assumption of known risk see infra § 390.

5. U.S.—Portland Terminal Co. v. Jarvis, Me., 227 F. 8, 141 C.C.A. 562.

6. U.S.—Boston & M. R. Co. v. Baxter, Mass., 228 F. 257, 142 C.C.A. 549.
39 C.J. p 400 note 27.

7. Tex.—Missouri Pac. R. Co. v. Steen, Civ.App., 288 S.W. 532, certiorari denied 47 S.Ct. 765, 274 U.S. 753, 71 L.Ed. 1333.

Legislative requirement of viaduct
Fact that railroad company, required by statute to build viaduct over its tracks, had no discretion in formulating plans or prescribing details of construction was no defense to charge of negligence in location and maintenance, several years later, of new railroad tracks beneath, and failure to erect and maintain telltale across track.—Missouri Pac. R. Co. v. Steen, supra.

8. Ala.—Louisville & N. R. Co. v. Hall, 8 So. 371, 91 Ala. 112, 24 Am. S.R. 863.

9. Ala.—Schlaff v. Louisville & N. R. Co., 14 So. 105, 100 Ala. 377.
39 C.J. p 401 note 29.

10. N.J.—Raub v. Lehigh Valley R. Co., 94 A. 567, 87 N.J.Law 603, L.R.A.1915F 838.

11. U.S.—Reading Co. v. Geary, C. C.A.Md., 47 F.2d 142, 79 A.L.R. 226, certiorari denied 51 S.Ct. 492, 283 U.S. 844, 75 L.Ed. 1454.

12. U.S.—Reading Co. v. Geary, supra.

Fireman on extreme right or left of tender
Telltales erected over railroad tracks in proximity to low bridge should be sufficient to warn locomotive fireman working on extreme right or left of engine tender.—Reading Co. v. Geary, supra.

13. N.Y.—Heck v. Lehigh Valley R. Co., 149 N.E. 835, 241 N.Y. 212.
39 C.J. p 401 note 32.

14. N.Y.—Wallace v. Central Vermont R. Co., 33 N.E. 1069, 138 N.Y. 302.
39 C.J. p 401 note 33.

to become out of order or defective, so that they fail to perform the office intended,[15] and the rule applies to a railroad using the tracks of another railroad for the operation of its trains thereon.[16] Furthermore, the company will be liable for its negligence in improperly constructing or maintaining such guards, although the injuries did not result from their failure to function against the danger contemplated by the statute.[17] It has also been held that the erection of the signals required by statute does not render the railroad immune from the liability resulting from its negligence in having a dangerously low bridge or tunnel.[18]

A company's duty under the statute is discharged on proper warning,[19] unless there are defects of construction exaggerating the peril.[20]

3. Covering or Guarding Dangerous Machinery or Places

§ 231. In General

The failure of a master to provide guards, coverings, barriers, or railings for the machinery, appliances, or place of work does not of itself constitute negligence, but it is his duty to do so where the nature of the work and the circumstances are such as reasonably to require such precaution.

Although the failure on the part of the master to furnish protection for his servants against dangerous conditions by providing guards, coverings, barriers, or railings for the machinery or appliances, or place of work, will not of itself constitute negligence,[21] under the general rule that the master must exercise reasonable care to provide his servants with a reasonably safe place to work and with reasonably safe machinery and appliances, it is his duty to cover or otherwise guard dangerous machinery or places where the nature of the work and the circumstances are such as reasonably will require such precaution.[22]

§ 232. Machinery

a. In general
b. Statutory regulations

a. In General

In the absence of a statute to the contrary, the failure of a master to cover or otherwise guard his machinery is not negligence per se, but the question of negligence depends on the circumstances of each case.

In the absence of a statute to the contrary, it is not negligence per se for a master to leave his machinery uncovered or otherwise unguarded,[23] but the question depends on the circumstances of each case, the nature of the service, the degree of exposure, and notice thereof to the servant.[24] Where

15. N.Y.—Harrison v. New York Cent. & H. R. R. Co., 87 N.E. 802, 195 N.Y. 86.
39 C.J. p 401 note 34.

16. Ga.—King v. Seaboard Air-Line R. Co., 58 S.E. 252, 1 Ga.App. 88.
39 C.J. p 401 note 35.

17. Mass.—Warden v. Old Colony R. Co., 137 Mass. 204.
39 C.J. p 401 note 36.

18. Va.—Chesapeake & O. R. Co. v. Rowsley, 62 S.E. 363, 108 Va. 632, 638.
39 C.J. p 401 note 37.

19. N.Y.—Heck v. Lehigh Valley R. Co., 149 N.E. 835, 241 N.Y. 212.

Where telltales had been placed in compliance with statute, fact that bridges were low, standing by itself, would not lay basis for a finding that operation of railroad was negligent, under federal Employers' Liability Act.—Heck v. Lehigh Valley R. Co., supra.

20. N.Y.—Heck v. Lehigh Valley R. Co., 149 N.E. 835, 241 N.Y. 212.

21. U.S.—Reetz v. Chicago & E. R. Co., C.C.A.Ohio, 46 F.2d 50.
39 C.J. p 401 note 39.
Construction, reconstruction, or demolition of buildings see supra § 219.
Platforms, scaffolds, and supports see supra § 220.

22. Ark.—Temple Cotton Oil Co. v. Brown, 96 S.W.2d 401, 192 Ark. 877.
Fla.—**Corpus Juris cited in** Smith v. Coleman, 132 So. 198, 204, 100 Fla. 1707.
Miss.—Federal Compress Co. v. Craig, 7 So.2d 532, 192 Miss. 689—Albert v. Doullut & Ewin, 178 So. 312, 180 Miss. 626—McLemore & McArthur v. Rogers, 152 So. 883, 169 Miss. 650.
N.M.—**Corpus Juris cited in** Maestas v. Alameda Cattle Co., 14 P.2d 733, 737, 36 N.M. 323.
N.Y.—Kennealy v. State, 238 N.Y.S. 719, 135 Misc. 467.
N.C.—Perkins v. Spray Wood & Coal Co., 127 S.E. 677, 189 N.C. 602.
39 C.J. p 402 note 40.

Abandonment of safety appliances
An employer could not render place of work unsafe to save time or expedite work by abandoning use of safety appliances, by letting them get in disrepair, and by requiring employee to perform hazardous duty in carrying out work.—Pearson Hardwood Flooring Co. v. Phillips, 120 S.W.2d 973, 22 Tenn.App. 206.

Under the Federal Employers' Liability Act the master must take reasonable care to erect guards.—Ross v. Louisville & N. R. Co., 172 So. 752, 178 Miss. 69.

Railroad bridge walkway
Railroad must maintain guardrail for wooden walkway on railroad bridge in adequate and safe condition taking into consideration the manner in which its employees generally and customarily carry on the duties assigned to them.—Thomson v. Boles, C.C.A.Minn., 123 F.2d 487, certiorari denied 62 S.Ct. 632, 315 U.S. 804, 86 L.Ed. 1204.

23. Mont.—Cameron v. Judith Mercantile & Cattle Co., 201 P. 575, 61 Mont. 118.
39 C.J. p 403 note 41.

24. N.M.—Maestas v. Alameda Cattle Co., 14 P.2d 733, 36 N.M. 323.
39 C.J. p 403 note 42.

Test
The test whether machines are properly guarded and provided with proper safety devices is whether the employer provided for protection against injuries reasonably to be anticipated.—Beale v. State, 46 N.Y.S. 2d 824.

Steam shovel
Owner of steam shovel owed employee working under dipper which could be released by one accidentally stepping on clutch duty to guard it. —Perkins v. Spray Wood & Coal Co., 127 S.E. 677, 189 N.C. 602.

Negligence held not shown
Ark.—Sinclair Refining Co. v. Duff,

there are special circumstances enhancing the danger, the general rule that the master is under no duty to protect with guards moving parts of machinery is not applicable.[25] An express statutory exemption of agricultural pursuits from the application of a statute requiring guards or other protection for dangerous machinery does not relieve persons engaged in such pursuits of their common-law obligation to furnish employees with reasonably safe machinery with which to work.[26]

b. Statutory Regulations

(1) In general
(2) Construction in general
(3) Nature of employer's business
(4) Persons entitled to protection
(5) Particular machines and machinery
(6) Sufficiency of guards

(1) In General

Statutes requiring employers to cover, guard, or otherwise protect dangerous machinery are mandatory and impose liability on an employer for injuries to an employee caused by a failure to comply therewith.

Statutes requiring employers to cover, guard, or otherwise protect dangerous machinery are mandatory.[27] An employer's failure to comply with such a statute is negligence per se;[28] and, where an employee is injured thereby, the employer will be liable,[29] even though he was not negligent with respect to the construction, care, and maintenance of the machine itself.[30] Common practice and usage is not conclusive on the question of the employer's duty to guard a machine and will not excuse his failure to comply with a statutory requirement therefor.[31]

In order that an employee may recover for injuries alleged to have resulted from the master's noncompliance with the statute, it must be shown that the injury complained of resulted from a danger against which the statute was intended to provide,[32] that the person sued is the person on whom the duty to provide guards for the machinery is imposed,[33] and that the noncompliance with the

88 S.W.2d 322, 191 Ark. 888—Milner v. Standard Veneer Co., 8 S.W.2d 456, 177 Ark. 986.

Set screw
Employer's leaving set screw on adjusting collar within frame, exposed and unguarded in accordance with common practice, was held not negligence.—Seifferman v. Leach, 138 So. 563, 161 Miss. 853.

25. Tex.—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580.

26. Iowa.—Lang v. Hedrick, 295 N.W. 107, 229 Iowa 766.

Effect of statute on negligence
The statutory exemption absolves the farmer only from negligence as a matter of law for failure to have guards or safety appliances, but it does not absolve him from negligence in fact, if guards, or safety appliances, are necessary to make his machinery reasonably safe.—Lang v. Hedrick, supra.

27. Mo.—Smith v. Harbison-Walker Refractories Co., 100 S.W.2d 909, 340 Mo. 389.
W.Va.—Tarr v. Keller Lumber & Construction Co., 144 S.E. 881, 106 W.Va. 99, 60 A.L.R. 570.

28. Mo.—Smith v. Harbison-Walker Refractories Co., supra—Busen v. Chevrolet Motor Co. of St. Louis, 100 S.W.2d 277, 339 Mo. 1098.

29. Mo.—Busen v. Chevrolet Motor Co. of St. Louis, supra—Kitchen v. Schlueter Mfg. Co., 20 S.W.2d 676, 323 Mo. 1179—Guidice v. V. Viviano & Bros. Macaroni Mfg. Co., 8 S.W.2d 964, 320 Mo. 1005—Grott v. Johnson, Stephens & Shinkle Shoe Co., 2 S.W.2d 785—Goodson v. Luce, App., 24 S.W.2d 682—Bishop v. Musick Plating Works, 3 S.W.2d 256, 222 Mo.App. 370—Mabe v. Gille Mfg. Co., 271 S.W. 1023, 219 Mo.App. 234.
N.Y.—Revelant v. State, 300 N.Y.S. 1186, 165 Misc. 798.
N.C.—Mahaffey v. Forsyth Furniture Lines, 145 S.E. 237, 196 N.C. 810.
Pa.—Rebel v. Standard Sanitary Mfg. Co., 16 A.2d 534, 340 Pa. 313.
W.Va.—Tarr v. Keller Lumber & Construction Co., 144 S.E. 881, 106 W.Va. 99, 60 A.L.R. 570.
39 C.J. p 404 note 45.
Validity of statutes requiring employer to guard dangerous machinery see supra § 25.

Silicosis
Under statute requiring employers to provide ventilating devices to carry off dust from dust-creating machinery, employer cannot escape liability for silicosis resulting from failure to comply with act merely because silicosis, as a specific disease, was unknown to medical science when employee was first exposed.—Dalton Foundries v. Jefferies, 51 N.E.2d 13, 114 Ind.App. 271, followed in Dalton Foundries v. Dean, 51 N.E.2d 397, 114 Ind.App. 289.

30. Mo.—Kitchen v. Schlueter Mfg. Co., 20 S.W.2d 676, 323 Mo. 1179.

31. Pa.—King v. Darlington Brick & Mining Co., 131 A. 241, 284 Pa. 277.
Va.—Atlantic Coast Line R. Co. v. Bell, 141 S.E. 838, 149 Va. 720.

32. Mo.—Isaacs v. Smith, App., 275 S.W. 555.
39 C.J. p 406 note 51.

33. U.S.—Hane v. Mid-Continent Petroleum Corporation, D.C.Okl., 47 F.2d 244.

Another's machinery
A farm owner, sending farm hand to work on another's neighboring farm, was not liable for injuries, sustained by farm hand in machine on other farm, on ground of violation of statute requiring person using such a machine to provide safety devices, as neighboring farmer, not farm hand's employer, was using and operating machine at time of accident.—Redman v. Hobart, 22 N.W.2d 532, 248 Wis. 508.

Lessor
Under some statutes liability for injury from failure to guard machinery is limited to the employer in charge of the plant or establishment and does not extend to the owner of leased premises.—Chicago & N. W. Ry. Co. v. Booten, C.C.A. Neb., 57 F.2d 786.

Owner or person in charge
(1) Under statute imposing duty to guard machinery on owner or person in charge, owner only is liable for failure properly to guard machinery, unless person in charge is lessee or independent contractor. —Hane v. Mid-Continent Petroleum Corporation, D.C.Okl., 47 F.2d 244.

(2) Such a statute applies to a person having charge of the machinery for the purpose of changing the building, tearing it down, or otherwise handling, removing, or con-

statute was the proximate cause of the injury, as considered infra § 254.

Effect of statutory duty of factory inspector to direct or give notice. Notwithstanding the powers and duties of a factory inspector under such a statute, the duty of the employer is absolute, and in an action by an employee to recover for injuries resulting from the noncompliance with the statute, it has generally been held that the failure of the master properly to protect his machinery will not be excused by the failure of the factory inspector to direct the use of guards,[34] or to give notice of the necessity of guarding.[35] Also, it has been held that a statute requiring an owner of a factory to supply, in the discretion of the factory inspector, shifters for throwing belts on or off the pulleys, and declaring that all gearing or belting shall be provided with proper safeguards, requires an owner of a factory to safeguard the gearing or belting without reference to the discretion of the factory inspector,[36] although under some statutes the liability depends on the fact of the factory inspector ordering the master to guard machinery and giving notice thereof.[37] The approval of machinery by a factory inspector will not of itself excuse a failure to comply with the statute.[38]

The testimony of a factory inspector as to what he did with respect to particular machinery may be important evidence on the question whether such machinery was so located or used that there was reasonable possibility of injury to employees therefrom, or whether it was practicable to house or guard it.[39] Also, evidence that the machinery had been examined and found without fault by such an inspector may be considered.[40]

Waiver. It has been held that an employee may waive the duty imposed on a master by statute to guard machinery;[41] but there is other authority to the contrary.[42]

(2) Construction in General

Statutes requiring employers to cover, guard, or otherwise protect dangerous machinery are remedial in character and should be reasonably and liberally construed so as to carry into effect the legislative intent, although not so as to extend them beyond the limits intended.

Statutes requiring employers to cover or guard dangerous machinery are to be given a reasonable construction.[43] They are remedial in character,[44] and should not receive a narrow construction.[45] They should be liberally[46] or favorably[47] construed to carry into effect the legislative intent. Such statutes, however, are not to be extended by construction beyond the limit of their plain intendment[48] or express terms,[49] or so as to impose liability on strangers to the enterprise;[50] and the courts are not warranted in adding features not

structing it.—Hane v. Mid-Continent Petroleum Corporation, D.C.Okl., 43 F.2d 406.

(3) The phrase "or person in charge of a factory or institution" refers to a lessee or contractor who employs the laborers engaged in operating the business.—Hane v. Mid-Continent Petroleum Corporation, supra.

(4) Superintendent in charge of operation is not "person in charge" liable for failure to guard the machinery.—Hane v. Mid-Continent Petroleum Corporation, supra.

34. U.S.—Chicago & N. W. Ry. Co. v. Booten, C.C.A.Neb., 57 F.2d 786.
39 C.J. p 407 note 53.

35. U.S.—Chicago & N. W. Ry. Co. v. Booten, supra.
39 C.J. p 407 note 54.

36. Mich.—Swick v. Ætna Portland Cement Co., 111 N.W. 110, 147 Mich. 454.

37. Mich.—Kerr v. National Fulton Brass Mfg. Co., 118 N.W. 925, 155 Mich. 191.
39 C.J. p 407 note 56.

38. Pa.—Booth v. Stokes, 88 A. 490, 241 Pa. 349.
W.Va.—Tarr v. Keller Lumber & Construction Co., 144 S.E. 881, 106 W.Va. 99, 60 A.L.R. 570.

39. U.S.—Chicago & N. W. Ry. Co. v. Booten, C.C.A.Neb., 57 F.2d 786.

40. Kan.—Truman v. Kansas City, M. & O. R. Co., 161 P. 587, 98 Kan. 761.

41. N.Y.—Rossiter v. Peter Cooper's Glue Factory, 134 N.Y.S. 162, 149 App.Div. 752.
39 C.J. p 407 note 60.
Express contracts affecting master's liability generally see supra §§ 196–200.

42. Mo.—Austin v. Bluff City Shoe Co., 158 S.W. 709, 176 Mo.App. 546.

43. Mo.—Johnson v. Bear, 40 S.W. 2d 481, 225 Mo.App. 1097.
39 C.J. p 409 note 68.

44. U.S.—Humble Oil & Refining Co. v. Hendrix, C.C.A.Okl., 2 F.2d 33.
Mo.—Stein v. Battenfeld Oil & Grease Co., 39 S.W.2d 345, 327 Mo. 804—Henderson v. Heman Const. Co., 199 S.W. 1045, 198 Mo.App. 423.
W.Va.—Tarr v. Keller Lumber & Construction Co., 144 S.E. 881, 106 W.Va. 99, 60 A.L.R. 570.
39 C.J. p 408 note 63 [a].

45. U.S.—Humble Oil & Refining Co. v. Hendrix, C.C.A.Okl., 2 F.2d 33.

46. Iowa.—Plew v. James Horrabin & Co., 157 N.W. 453, 176 Iowa 584.
Mo.—Stein v. Battenfeld Oil & Grease Co., 39 S.W.2d 345, 327 Mo. 804—Grott v. Johnson, Stephens & Shinkle Shoe Co., 2 S.W. 2d 785—Bishop v. Musick Plating Works, 3 S.W.2d 256, 222 Mo.App. 370—Poppen v. Wagner Electric Corporation, App., 2 S.W.2d 199—Henderson v. Heman Const. Co., 199 S.W. 1045, 198 Mo.App. 423.
39 C.J. p 408 note 61.

Purpose of statute indicates its meaning.—Lilley v. Eberhardt, Mo., 37 S.W.2d 599.

47. U.S.—Pieczonka v. Pullman Co., C.C.A.N.Y., 89 F.2d 353.

48. Mo.—Johnson v. Bear, 40 S.W. 2d 481, 225 Mo.App. 1097.

The effect of statute requiring machinery to be guarded must be restricted within circumference of its plain meaning, and to classification clearly designated.—Johnson v. Bear, supra.

49. Mo.—Bishop v. Musick Plating Works, 3 S.W.2d 256, 222 Mo.App. 370.

50. U.S.—Chicago & N. W. Ry. Co. v. Booten, C.C.A.Neb., 57 F.2d 786.

specified.[51] Such a statute does not as a rule impose on the master the duty of guarding against every possible danger.[52] When a right of action for injuries to an employee by reason of a violation of the statute is given in terms by the statute, such an action is not an action for a penalty or forfeiture but is an action for injuries to the rights of another not arising on contract.[53]

Absence of guard during repairs. The absence of a guard from a machine while being repaired, or while being tested for the purpose of seeing whether it has been properly repaired, has been held not to constitute negligence,[54] although other authority has held that the removal of a guard for the purpose of repair constitutes a violation of a statutory requirement for such a guard when the dangerous machinery is permitted to remain in use while thus exposed.[55]

(3) Nature of Employer's Business

Statutes requiring employers to cover, guard, or otherwise protect dangerous machinery do not apply to all businesses and occupations where machinery is in use, but generally are limited to industrial plants or enterprises.

Statutes requiring employers to cover, guard, or otherwise protect dangerous machinery do not apply to all businesses and occupations where machinery is in use;[56] and, in order to recover under the statute, an employee must show that his employer's business and the source of injury is within the scope of the statute.[57] In general such statutes have been construed as intended to apply to industrial plants or enterprises wherein machines are used and in or about which laborers are employed.[58] They have been applied to varying manufacturing[59] and industrial[60] enterprises, and to mercantile establishments.[61] Some statutes have been held to apply only to machinery used in factories, mills, or workshops.[62] On the other hand, such statutes have been held not applicable to hospital kitchens,[63] butcher shops,[64] or a sand pit operated by a county in connection with road and bridge work.[65] Such statutes have also been held not to apply to farm and agricultural pursuits,[66] except where the statute makes specific reference to farming pursuits wherein machines involving the use of mechanical power are used,[67] or where the statute expressly imposes on any person, firm, or

51. U.S.—Pieczonka v. Pullman Co., C.C.A.N.Y., 89 F.2d 353.

52. Mo.—Isaacs v. Smith, App., 275 S.W. 555.
39 C.J. p 408 note 64.

53. Kan.—Slater v. Atchison, T. & S. F. R. Co., 137 P. 943, 91 Kan. 226, L.R.A.1916F 949.
39 C.J. p 408 note 63.

A regulatory measure
Statute imposing duty to guard machinery is regulatory measure rather than criminal or penal measure.—Hane v. Mid-Continent Petroleum Corporation, D.C.Okl., 43 F.2d 406.

54. U.S.—Shenandoah Abattoir Co. v. Sustock, Pa., 239 F. 284, 152 C.C.A. 272.
39 C.J. p 409 note 67.

55. Ohio.—George v. City of Youngstown, 41 N.E.2d 567, 139 Ohio St. 591.

56. Mo.—Johnson v. Bear, 40 S.W.2d 481, 225 Mo.App. 1097.

57. Mo.—Johnson v. Bear, supra.
Neb.—Groat v. Clausen, 298 N.W. 563, 139 Neb. 689.
39 C.J. p 409 note 68.

Municipalities
The statute requiring owners of shops to safeguard machinery therein is applicable to municipalities in so far as concerns the protection of lives, health, and safety of their own employees and invitees employed by their contractors.—George v. City of Youngstown, 41 N.E.2d 567, 139 Ohio St. 591.

58. Iowa.—Hainer v. Churchill, 173 N.W. 882.
Mo.—Johnson v. Bear, 40 S.W.2d 481, 225 Mo.App. 1097.
Neb.—Groat v. Clausen, 298 N.W. 563, 139 Neb. 689.

All factories
A statute requiring machinery creating dust to be equipped with proper hoods and pipes connected to exhaust fan has been held to apply to all factories.—Pieczonka v. Pullman Co., C.C.A.N.Y., 89 F.2d 353.

59. Kan.—Pack v. Grimes, 193 P. 330, 107 Kan. 704.
39 C.J. p 409 note 68.

60. U.S.—Hane v. Mid-Continent Petroleum Corporation, D.C.Okl., 43 F.2d 406.

Pumping station
Statute requiring guarding of machinery is applicable to machinery operated in pumping station or pump house.—Humble Oil & Refining Co. v. Hendrix, C.C.A.Okl., 2 F.2d 33—Hane v. Mid-Continent Petroleum Corporation, D.C.Okl., 43 F.2d 406—39 C.J. p 409 note 68 [j].

61. Mo.—Stoll v. Frank Adams Electric Co., 240 S.W. 245, 213 Mo. App. 395.

62. Wash.—De Haas v. Cascade Frozen Foods, 162 P. 284, 23 Wash. 2d 754.

Bean cleaning
Employee injured while working on bean-cleaning machine used by employer as a part of its food freezing operations was held not engaged in work in a factory, mill, or workshop.—De Haas v. Cascade Frozen Foods, supra.

63. Kan.—Newberry v. Atchison, T. & S. F. Hospital Ass'n, 40 P.2d 471, 141 Kan. 273, 96 A.L.R. 1349.

64. N.Y.—O'Connor v. Webber, 114 N.E. 799, 219 N.Y. 439.

65. Kan.—Smith v. Higgins, 87 P.2d 544, 149 Kan. 477.

66. Iowa.—Lang v. Hedrick, 295 N. W. 107, 229 Iowa 766—Hainer v. Churchill, 172 N.W. 882.
Kan.—Whipple v. McLean, 257 P. 735, 124 Kan. 206.
Mo.—Johnson v. Bear, 40 S.W.2d 481, 225 Mo.App. 1097.
Neb.—Groat v. Clausen, 298 N.W. 563, 139 Neb. 689.

67. Wis.—Tiemann v. May, 292 N.W. 612, 235 Wis. 100.

Degree of care required
Under the safe-place statute, devices used for carrying on agricultural pursuits and involving use of mechanical power must be so constructed and so guarded as to make the employment and place of employment as safe as its nature will reasonably permit.—Tiemann v. May, supra.

Prior statute
An earlier statute requiring the guarding of machinery and applying to "factories, workshops and other places of employment" was held not intended to extend to all places where persons are employed to perform labor and not intended to in-

corporation using specified farm machinery the duty of providing safety appliances therefor.[68]

Statutes requiring the guarding of machines and machinery in manufacturing establishments, factories, work shops, etc., have been held not limited in their application to buildings in which machinery is installed and used,[69] or to a permanent place where the enterprise is conducted.[70] They apply to any place where machinery is used for manufacturing purposes,[71] including an open yard,[72] or temporary locations,[73] such as highways and streets where portable appliances and machinery are used in paving operations.[74]

Manufacturing incidental to other business. The fact that a manufacturing establishment conducted by a railway company is a mere incident to its business as a common carrier, and that manufacturing is not within its charter powers, does not relieve a railway company from complying with a statute affecting factories.[75]

(4) Persons Entitled to Protection

In order to authorize recovery under statutes requiring employers to safeguard machinery, the person injured must be an employee within the class protected by the statute, and his activity at the time of injury must have been within the scope of the protection of the statute.

In order to authorize recovery under statutes requiring employers to safeguard machinery the person injured must be an employee[76] within the class protected by the statute,[77] and it must appear that at the time of the injury he was acting within the scope of his employment.[78]

Such statutes are intended to protect employees who are not required to be within the danger zone, but who may become engrossed in their work, or from lapse of memory or inattention place themselves in a position to be injured.[79] They ordinarily are held not only to protect workmen while doing those things naturally connected with, or incidental to, their regular tasks,[80] but also those engaged in exceptional or occasional duties.[81]

Statutes of the character under consideration have also been construed as not limited in their application to employees who work with and about the machinery when it is operated for the production of the product;[82] they apply to all employees who may be reasonably expected to come in contact with such machinery in the course of their employment,[83] and include those whose duties cover the testing of machines after they have been installed.[84] Furthermore, the protection extends to all places which employees might reasonably be ex-

clude a threshing machine as a "place."—Chapman v. Piechowski, 141 N.W. 259, 153 Wis. 356, 358, 45 L.R.A.,N.S., 687.

68. Wis.—Redman v. Hobart, 22 N. W.2d 532, 248 Wis. 508.

69. Iowa.—Plew v. James Horrabin & Co., 157 N.W. 453, 176 Iowa 584.
Mo.—Henderson v. Heman Const. Co., 199 S.W. 1045, 198 Mo.App. 423.

70. Mo.—Lilley v. Eberhardt, 37 S. W.2d 599—Henderson v. Heman Const. Co., 199 S.W. 1045, 198 Mo. App. 423.

Enterprise held not temporary
A sawmill of substantial dimensions and running sixteen months after an injury to an employee was held not a mere shifting contrivance, temporarily located.—Sanders v. Quercus Lumber Co., 173 S.W. 740, 187 Mo.App. 408.

71. Mo.—Lilley v. Eberhardt, 37 S. W.2d 599.

72. U.S.—Pieczonka v. Pullman Co., C.C.A.N.Y., 89 F.2d 353.
39 C.J. p 409 note 68 [k].

73. Mo.—Henderson v. Heman Const. Co., 199 S.W. 1045, 198 Mo. App. 423.

74. Iowa.—Plew v. James Horrabin & Co., 157 N.W. 453, 176 Iowa 584.
Mo.—Lilley v. Eberhardt, 37 S.W.2d 599.
39 C.J. p 409 notes 68 [a], 70 [a].

75. Kan.—Bubb v. Missouri, K. & T. R. Co., 131 P. 575, 89 Kan. 303.
39 C.J. p 409 note 69.

76. Mo.—Stein v. Battenfeld Oil & Grease Co., 39 S.W.2d 345, 327 Mo. 804.

Independent contractor
Statute requiring guarding of machinery dangerous to "persons employed" did not cover independent contractor.—Stein v. Battenfeld Oil & Grease Co., supra.

77. Iowa.—Hainer v. Churchill, 173 N.W. 882.
Mo.—Stein v. Battenfeld Oil & Grease Co., 39 S.W.2d 345, 327 Mo. 804.
39 C.J. p 411 note 81.

All persons employed in manufacturing plants whether working at or with the machines or about them are included.—Guidice v. V. Viviano & Bros. Macaroni Mfg. Co., 8 S.W.2d 964, 320 Mo. 1005—Simon v. St. Louis Brass Mfg. Co., 250 S.W. 74, 298 Mo. 70—Mabe v. Gille Mfg. Co., 271 S.W. 1023, 219 Mo.App. 234.

Wife of employee
Employee's wife is entitled to recover from employer for injuries she received from dangerous pump machinery while obtaining water for family use, where employer furnished employee with house and pump for obtaining water as a part of the compensation paid.—Vidrine v. Evangeline Gravel Co., 4 La.App. 687.

Prisoners assigned to work in shops in penal institutions were held not to be within the protection of the statute.—Beale v. State, 46 N.Y. S.2d 824.

78. Wash.—Talkington v. Washington Veneer Co., 112 P. 261, 61 Wash. 137, 44 L.R.A.,N.S., 1061.
39 C.J. p 411 note 82.

79. Mo.—Mabe v. Gille Mfg. Co., 271 S.W. 1023, 219 Mo.App. 234.

80. Pa.—Lanahan v. Arasapha Mfg. Co., 87 A. 286, 240 Pa. 292.
39 C.J. p 411 note 83.

Ordinary duties
Employee, directed to watch expert's operation of machine, was held engaged in "ordinary duties" within "guarding statute."—Poppen v. Wagner Electric Corporation, Mo.App., 2 S.W.2d 199.

81. Kan.—Caspar v. Lewin, 109 P. 657, 82 Kan. 604, 49 L.R.A.,N.S., 526.
39 C.J. p 411 note 84.

82. Mo.—Guidice v. V. Viviano & Bros. Macaroni Mfg. Co., 8 S.W.2d 964, 320 Mo. 1005.

83. Mo.—Guidice v. V. Viviano & Bros. Macaroni Mfg. Co., supra.
39 C.J. p 411 note 85.

84. Mo.—Guidice v. V. Viviano & Bros. Macaroni Mfg. Co., supra.

pected to use in the performance of their duties.[85] An employee is protected while passing to and from his ordinary post of duty,[86] and while resting under a rule permitting him to do so.[87]

The failure of a servant to give his employer notice of the condition of machinery at which he was working will not preclude him from recovering under the Factory Act for injuries suffered because of its unguarded condition, since the failure to give the notice provided for in the act is not a prerequisite to recovery, but is solely to enable a workman to procure an inspection by the commissioner of labor of a defective machine which the employer neglected or refused to remedy.[88]

(5) Particular Machines and Machinery

An employer has the duty, if possible to do so, to cover, guard, or otherwise protect machines and machinery expressly designated as those which must be guarded or within the scope of a general statutory provision.

The employer has the duty, if possible to do so, to cover, guard, or otherwise protect machines and machinery of a kind specifically designated by statute,[89] or by rule adopted by an administrative agency under authority of a statute,[90] as those which must be guarded, or which are within the scope of a statute requiring machines and machinery generally in various designated establishments to be guarded.[91] On the other hand there can be recovery by the employee only where the machine, because of whose unguarded condition injuries resulted, was of the kind specifically designated[92] or within the scope of a general phrase.[93]

Such statutes do not impose on the employer the duty of guarding every piece of machinery regardless of its location,[94] although enumerated in the statute.[95] The duty to guard exists, under a statute requiring dangerous machinery, or machinery so located or used that employees may receive injury thereby, to be guarded, where danger may reasonably be anticipated from the use of the machine or machinery without protection.[96] The fact that the injury occurred is a fact to be considered in determining whether a machine is dangerous to persons employed therein or thereabouts.[97]

Some statutes requiring employers to cover or guard dangerous machinery have been held to apply to the operation of the machinery for any purpose including its operation for testing purposes, after its installation, and before its operation in connection with the production of the output of the factory.[98] Various statutes have been held not to apply to farm machinery;[99] but they are not rendered inapplicable by the mere fact that the machine is similar in principle to machines ordinarily employed in residences or on farms.[1] Other statutes, however, have been held to apply to farm machinery involving the use of mechanical power.[2]

85. Kan.—Pittsburg Vitrified Pav. & Building Co. v. Fisher, 100 P. 507, 79 Kan. 576.

86. Ohio.—Lee v. Standard Tool Co., 14 Ohio Cir.Ct.,N.S., 540, 33 Ohio Cir.Ct. 54, affirmed 94 N.E. 1115, 83 Ohio St. 501.
39 C.J. p 411 note 87.

87. Kan.—Pittsburg Vitrified Pav. & Building Co. v. Fisher, 100 P. 507, 79 Kan. 576.

88. Wash.—McIntosh v. Saw Mill Phœnix, 94 P. 930, 49 Wash. 152.

89. W.Va.—Tarr v. Keller Lumber & Construction Co., 144 S.E. 881, 106 W.Va. 99, 60 A.L.R. 570.
39 C.J. p 410 note 72 [f], [g], [h].

90. N.Y.—Revelant v. State, 300 N.Y.S. 1186, 165 Misc. 798.

91. Mo.—Goodson v. Luce, App., 24 S.W.2d 682—Mabe v. Gille Mfg. Co., 271 S.W. 1023, 219 Mo.App. 234—Henderson v. Heman Const. Co., 199 S.W. 1045, 198 Mo.App. 423.

Machines and appliances intended to be guarded

(1) Punch press.—Mabe v. Gille Mfg. Co., 271 S.W. 1023, 219 Mo.App. 234.

(2) Revolving cogwheels.—Vidrine v. Evangeline Gravel Co., 4 La.App. 687.

(3) Swinging cargo hook.—Grammer v. Wiggins-Meyer S. S. Co., 270 P. 759, 126 Or. 694.

(4) Other machines intended see 39 C.J. p 410 note 73 [b], [f].

Term "machine" includes every mechanical device or combination of mechanical powers and devices to perform some function or produce some certain effect or result.—Lumatz v. American Car & Foundry Co., 273 S.W. 1089, 217 Mo.App. 94.

92. Wis.—Kruck v. Wilbur Lumber Co., 133 N.W. 1117, 148 Wis. 76.
39 C.J. p 410 note 72.

93. Pa.—McCosh v. Jones & Laughlin Steel Co., 96 A. 1091, 251 Pa. 494.
39 C.J. p 410 note 73.

94. Mo.—Phillips v. Hamilton Brown Shoe Co., 165 S.W. 1183, 178 Mo.App. 196.
39 C.J. p 408 note 65.

95. N.Y.—Wynkoop v. Ludlow Valve Mfg. Co., 89 N.E. 827, 196 N.Y. 324, 30 L.R.A.,N.S., 36.
39 C.J. p 408 note 66.

96. U.S.—Chicago & N. W. Ry. Co. v. Booten, C.C.A.Neb., 57 F.2d 786.
Mo.—Grott v. Johnson, Stephens & Shinkle Shoe Co., 2 S.W.2d 785—Phillips v. Hamilton Brown Shoe Co., 165 S.W. 1183, 178 Mo.App. 196—Strode v. Columbia Box Co., 101 S.W. 1099, 124 Mo.App. 511.

Power-driven saw is dangerous machine.—Tarr v. Keller Lumber & Construction Co., 144 S.E. 881, 106 W.Va. 99, 60 A.L.R. 570.

97. Mo.—Goodson v. Luce, App., 24 S.W.2d 682—Austin v. Bluff City Shoe Co., 158 S.W. 709, 176 Mo. App. 546.

98. Mo.—Guidice v. V. Viviano & Bros. Macaroni Mfg. Co., 8 S.W.2d 964, 320 Mo. 1005.

99. Mo.—Johnson v. Bear, 40 S.W.2d 481, 225 Mo.App. 1097.
39 C.J. p 409 note 70 [b].
Application of statute requiring guarding of dangerous machinery to employers engaged in farm and agricultural pursuits see supra subdivision b (3) of this section.

1. Mo.—Goodson v. Luce, App., 24 S.W.2d 682.

2. Wis.—Tiemann v. May, 292 N.W. 612, 235 Wis. 100.

Machines dangerous from contact or from flying particles. Statutes of the character under consideration apply to machines where the danger is from contact with the machine.[3] However, they have been held not to be limited to such machines,[4] and to apply to machines and machinery which is so located as to be dangerous by reason of breakage and flying particles caused by its ordinary operation,[5] including machines in which the danger is that material fed into it may be thrown back so as to injure the employee.[6] Other authority, however, has held that only the machines and not the material fed into them must be guarded,[7] and that the employer is under no duty to guard or protect the employee from flying particles thrown from the machine.[8]

Guards difficult to provide. Ordinarily there is no requirement, in some cases under statutes expressly so providing,[9] to guard machines where it is impossible to do so,[10] or where guards are not practicable and would not permit a proper use of the machinery without interfering with its efficiency.[11] The statutory requirement, however, may carry with it, at times, the duty to change the machinery so as to make a guard possible and practicable.[12]

Application of ejusdem generis rule. Although the general rule is that general words must take their meanings from and be presumed to embrace only things or persons of the kind designated in the specific words, the rule will not be applied when the specific words embrace all objects of their class, so that general words must bear a meaning different from the specific words or be meaningless,[13] or where the specific words signify subjects greatly different from one another and the apparent purpose of the statute as evidenced by its title is to protect operators in factories in every particular consistent with reasonable operations, and in such a case the general term must receive its natural and wide meaning.[14] Where the word "machinery" precedes the enumerated parts of machines to be guarded and is one of the things enumerated, the statute applies to the dangerous completed machines as well as to the particular machine parts specified,[15] although the opposite rule would seem to prevail where the word "machinery" follows, instead of precedes, the enumerated parts.[16] However, it has been held that, even though a general phrase follows particular designations, the doctrine of ejusdem generis cannot be applied so that the words "and machinery of every description" shall be limited by a prior enumeration when such enumeration is not an enumeration of machines.[17]

(6) Sufficiency of Guards

Guards are sufficient, within statutes requiring employers to safeguard machinery, where they guard against accidents which may be reasonably expected or which should be anticipated, and where they do not interfere with the use of the machine.

In general a machine is properly guarded, within a statute requiring employers to safeguard machinery, when it is guarded against accidents which may be reasonably expected to occur, or which, in the exercise of ordinary care, the master should have anticipated.[18] The guard required is some

3. Mo.—Phillips v. Hamilton Brown Shoe Co., 165 S.W. 1183, 178 Mo. App. 196.

4. Mo.—Phillips v. Hamilton Brown Shoe Co., supra—Strode v. Columbia Box Co., 101 S.W. 1099, 124 Mo.App. 511.

5. Mo.—Bishop v. Musick Plating Works, 3 S.W.2d 256, 222 Mo.App. 370—Lumatz v. American Car & Foundry Co., 273 S.W. 1089, 217 Mo.App. 94—Phillips v. Hamilton Brown Shoe Co., 165 S.W. 1183, 178 Mo.App. 196—Strode v. Columbia Box Co., 101 S.W. 1099, 124 Mo. App. 511.

6. Mo.—Bishop v. Musick Plating Works, 3 S.W.2d 256, 222 Mo.App. 370.

7. Wash.—Gilbert v. Chicago, M. & P. S. R. Co., 134 P. 471, 75 Wash. 31.
39 C.J. p 410 note 74.

8. Miss.—Vehicle Woodstock Co. v. Bowles, 128 So. 98, 158 Miss. 346.
39 C.J. p 406 note 51 [c].

9. Mich.—Norris v. Elmdale El. Co., 185 N.W. 696, 216 Mich. 548.
39 C.J. p 406 note 47.
Sufficiency of guard which renders machine unsuitable for work required to be performed see infra subdivision b (6) of this section.

When guard possible
Guard is "possible" when it does not unreasonably interfere with the efficiency of the machine.—Tarr v. Keller Lumber & Construction Co., 144 S.E. 881, 106 W.Va. 99, 60 A.L.R. 570.

10. Ky.—Leger v. A. Rollyson & Co., 47 S.W.2d 708, 242 Ky. 802.

11. U.S.—Pieczonka v. Pullman Co., C.C.A.N.Y., 89 F.2d 353.
39 C.J. p 406 note 46.
Evidence admissible to show practicability of guarding machinery see infra § 512.

12. Wis.—Krueck v. Phœnix Chair Co., 147 N.W. 41, 157 Wis. 266, Ann. Cas.1916B 291.

13. Ind.—U. S. Cement Co. v. Cooper, 88 N.E. 69, 172 Ind. 599.

14. Wash.—Ward v. National Lumber & Box Co., 103 P. 1, 54 Wash. 304.
39 C.J. p 410 note 77.

15. W.Va.—McClary v. Knight, 80 S.E. 866, 73 W.Va. 385.

16. Ind.—Pein v. Miznerr, 83 N.E. 784, 41 Ind.App. 255.
W.Va.—McClary v. Knight, 80 S.E. 866, 73 W.Va. 385.

17. Okl.—Sulzberger & Sons Co. v. Strickland, 159 P. 833, 60 Okl. 158.
39 C.J. p 411 note 80.

18. Mo.—Mabe v. Gille Mfg. Co., 271 S.W. 1023, 219 Mo.App. 234.
39 C.J. p 412 note 90.

Duty of employer to determine
Employer is required to determine when and what equipment is necessary to comply with statute.—Smith v. Harbison-Walker Refractories Co., 100 S.W.2d 909, 340 Mo. 389.

Light
Failure to place artificial light close to grinders of mill was held not breach of Factory Act.—Wulf-

device in the nature of a shield or defense between the employee and danger, placed so as to protect him from injury while in the performance of some service required of him; and it is not necessary to make such a change in the structure of the machine, or to attach such a device thereto, as will relieve the employee from the performance of the service required of him.[19] A machine designed and used for one purpose need not be furnished with a guard which will render it safe when used for other purposes.[20] A statute requiring a specific device to be attached to a certain type of machine as a protection against a specific danger does not render inapplicable thereto a general statute requiring employers to cover or guard dangerous machinery.[21] It has been held unnecessary for the employer to guard against the employee's negligence or the negligence of a fellow servant, unless it appears that the employer should have anticipated that they would be negligent.[22]

In the absence of statutory specification, the question what constitutes a sufficient guard is to be determined by the circumstances of each particular case.[23] If the guard used safely and securely guards the machine it has been held unnecessary that it be the latest, or most improved, or any particular style of guard.[24]

It has been held the duty of the employer to use approved guards in general use,[25] and, if a master furnishes such a guard as is in general use among employers of ordinary care under the same or similar circumstances, he has discharged his duty, unless such appliance is obviously dangerous.[26] However, it has been held that the custom or practice prevailing in the particular industry, although a factor to be considered, will not of itself determine the sufficiency of the safety appliances and guards used.[27] Also, under various statutes it has been held that the machinery must be so guarded as to make the employment and place of employment as safe as its nature will reasonably permit,[28] or protected to the fullest extent that the proper operation of the machine will permit;[29] or that the master is required to use the most efficient and best known guards for the purpose.[30]

As a general rule, the employer is not only required to furnish a proper guard but must also see that it is so adjusted and used as to be effective for the purpose intended,[31] and the duty is not discharged by providing a guard which may be installed and used or laid aside at the caprice of the servant.[32] However, it has been held that the master will not be liable merely because, when a sufficient guard has been provided, it fails to function.[33] A worn guard has been held insufficient.[34]

Interference with use of machine. The master is not required to provide a guard which will materially interfere with the practical use and efficiency of the machine.[35] In order for the guard furnished to be proper it must not so interfere with the use of the instrumentality sought to be guarded as to make it unsuitable for the work required to be

kuhle v. Reynolds, 262 P. 498, 125 Kan. 59.

Sufficiency of guard

(1) Guards should protect the employee against all danger that can be reasonably expected no matter from what source the danger may arise.—Isaacs v. Smith, Mo.App., 275 S. W. 555.

(2) Guard on "gang saw" was held sufficient only if capable of stopping missiles thrown by saw.—Levesque v. American Box & Lumber Co., 153 A. 10, 84 N.H. 543.

(3) Building of special walkways along revolving shaft, for use of employees, was held insufficient compliance with statute requiring guarding of machinery.—Chicago & N. W. Ry. Co. v. Booten, C.C.A.Neb., 57 F. 2d 786.

(4) Requirement for safety guards on power-driven circular saws was held to require that safety guards and kick-back dogs on edger protect employees only until board has passed through edger, but not after boards have left edger and are ready to be carried away.—Isaacs v. Smith, supra.

19. Mo.—Shephard v. Century Electric Co., 299 S.W. 90, 220 Mo.App. 1152.
39 C.J. p 412 note 90 [d].

20. Mo.—Denkman v. Prudential Fixture Co., 289 S.W. 591.

21. Mo.—Bishop v. Musick Plating Works, 3 S.W.2d 256, 222 Mo.App. 370.

22. Mo.—Isaacs v. Smith, App., 275 S.W. 555.

23. Mo.—Isaacs v. Smith, supra.
39 C.J. p 412 note 90 [c] (2).

Matters considered

The term "guard" is of general significance, and its application is to be determined from the character of the machine and the nature of the peril to be avoided.—Mabe v. Gille Mfg. Co., 271 S.W. 1023, 219 Mo.App. 234.

24. Mo.—Denkman v. Prudential Fixture Co., 289 S.W. 591.

25. N.C.—Mahaffey v. Forsyth Furniture Lines, 145 S.E. 237, 196 N.C. 810.

26. Wash.—Burns v. Leudinghaus, 118 P. 305, 65 Wash. 448.
39 C.J. p 412 note 94.

27. Ky.—Roy Lumber Co. v. Donnelly, 103 S.W. 255, 31 Ky.L. 601.
Pa.—Rebel v. Standard Sanitary Mfg. Co., 16 A.2d 534, 340 Pa. 313.

28. Wis.—Tiemann v. May, 292 N. W. 612, 235 Wis. 100.

29. Or.—Rorvick v. Astoria Box & Paper Co., 299 P. 333, 136 Or. 381.

30. Iowa.—Murray v. Daley, 146 N. W. 451, 164 Iowa 612.

31. Or.—Camenzind v. Freeland Furniture Co., 174 P. 139, 89 Or. 158.
39 C.J. p 412 note 91.

32. Iowa.—Nodland v. Kreutzer, 168 N.W. 889, 184 Iowa 476.

33. Mo.—State v. Ellison, 230 S. W. 611, 287 Mo. 647.
39 C.J. p 412 note 93.

34. Minn.—Jaroszeski v. Osgood & Blodgett Mfg. Co., 83 N.W. 389, 80 Minn. 393.

35. Va.—Atlantic Coast Line R. Co. v. Bell, 141 S.E. 838, 149 Va. 720.

done.[36] Where it is not practicable to guard dangerous machinery fully, a partial compliance will comply with the statute.[37]

Substitutes for statutory requirements. While an employer may, as a substitute for the statutory requirement, make regulations to guard against any approach to such machinery unless it has been previously stopped, if he adopts such an alternative, he must be scrupulously careful to make the substituted method efficient.[38]

§ 233. Elevators, Hoistways, and Shafts

It is the duty of an employer to exercise ordinary and reasonable care to guard his elevators, hoistways, and shafts, or to comply with statutory requirements for safeguarding them, so as to protect his employees against such dangers therefrom as may be reasonably apprehended.

It is the duty of a master to exercise ordinary and reasonable care to guard his elevators, hoistways, or shafts so as to protect his servants against such dangers therefrom as may be reasonably apprehended.[39]

Statutes which require the safeguarding of elevators, hoistways, and shafts have a humane purpose[40] and are not to be given a restricted narrow construction.[41] An employer who fails to comply with the provisions of such a statute is guilty of actionable negligence.[42] The employer, however, is not an insurer of the employee's safety,[43] and it has been held that a violation of such a statutory provision is not conclusive evidence and does not in itself give a cause of action.[44] Also a statute requiring elevator shafts to be protected by guard rails and the use of due diligence to keep them closed when not in actual use has been held to impose no greater duty with respect to keeping the guard in position when the elevator is not in use than exists at common law.[45]

In order to authorize recovery under such a statute it must appear that the employee is within the class protected by the statute;[46] that the injury complained of resulted from a violation of the statutory requirement,[47] and from a danger against which the statute was intended to provide;[48] that the employer was within the class on whom the statute imposed the duty;[49] and that the business conducted by him,[50] and the appliances or place, because of whose unguarded condition the injury arose,[51] were within the purview of the provisions of the statute.

Duty dependent on requirement by public officer. Under some statutes provisions for the installation of safety devices are not mandatory, and an employer is not bound to install such devices unless required to do so by the factory inspector.[52]

36. U.S.—Kokesch v. Excelsior Powder Mfg. Co., C.C.A.Mo., 16 F.2d 574.
39 C.J. p 412 note 90 [c] (1).

Guard required to be removed

Where a master required to guard a machine uses a guard which will not permit the workmen to do the work which they are required to do on it unless they remove the guard, he has not fulfilled his duty of furnishing suitable and adequate protection.—Kokesch v. Excelsior Powder Mfg. Co., supra.

37. Ind.—Illinois Car & Mfg. Co. v. Brown, 116 N.E. 4, 67 Ind.App. 315.

38. U.S.—Alpha Portland Cement Co. v. Corsi, N.Y., 229 F. 381, 143 C.C.A. 501.
39 C.J. p 407 note 59.

39. Mo.—Birdsong v. Jones, 30 S.W.2d 1094, 225 Mo.App. 242.
39 C.J. p 413 note 96.

40. R.I.—Wojtyna v. Bazar Bros. & Co., 132 A. 384, 47 R.I. 221.

41. Kan.—Alkire v. Cudahy Packing Co., 111 P. 440, 83 Kan. 373.
R.I.—Wojtyna v. Bazar Bros. & Co., 132 A. 384, 47 R.I. 221—Weeks v. Fletcher, 69 A. 294, 29 R.I. 112.

42. R.I.—Wojtyna v. Bazar Bros. & Co., supra.
39 C.J. p 413 note 98.

Extent of duty

A statutory requirement to provide "good and sufficient fences, gates, or other safeguards" does not require an employer to provide all the safeguards which are practicable.—Gardner v. Seymour, Wash., 180 P.2d 564.

43. Mo.—Pronnecke v. Westliche Post Pub. Co., 291 S.W. 139, 220 Mo.App. 640.
R.I.—Wojtyna v. Bazar Bros. & Co., 132 A. 384, 47 R.I. 221.

44. N.Y.—Ursprung v. Winter Garden Co., 169 N.Y.S. 738, 183 App. Div. 718.

45. Mo.—Hake v. Buck's Stove & Range Co., App., 234 S.W. 1061.
39 C.J. p 413 note 1.

46. Mo.—Latapie-Vignaux v. Askew Saddlery Co., 91 S.W. 496, 193 Mo. 1.
39 C.J. p 414 note 2.

Elevator operator

Some statutes have been held not intended to protect persons operating elevators.—Pronnecke v. Westliche Post Pub. Co., 291 S.W. 139, 220 Mo.App. 640.

47. Kan.—Alkire v. Cudahy Packing Co., 111 P. 440, 83 Kan. 373.
Mich.—Murphy v. Grand Rapids Veneer Works, 106 N.W. 211, 142 Mich. 677.
R.I.—Weeks v. Fletcher, 69 A. 294, 29 R.I. 112.
Tex.—San Jacinto Bldg. v. Washington, Civ.App., 122 S.W.2d 289, error refused.
Wash.—Gardner v. Seymour, 180 P.2d 564.

48. R.I.—Wells v. Joslin Mfg. Co., 82 A. 258, 33 R.I. 498.
39 C.J. p 414 note 3.

49. N.Y.—Anderson v. Pelham Hod El. Co., 113 N.Y.S. 989, 129 App. Div. 639.
39 C.J. p 414 note 4.

50. N.Y.—Ursprung v. Winter Garden Co., 169 N.Y.S. 738, 183 App. Div. 718.
39 C.J. p 414 note 5.

51. N.Y.—Stokes v. Barber Asphalt Pav. Co., 100 N.E. 597, 207 N.Y. 252.
39 C.J. p 414 note 6.

As machinery

An elevator is within the term "machinery" within the meaning of a statute requiring an employer to use precautions.—Chatfield v. Zeller, 147 P.2d 222, 174 Or. 59.

52. Ind.—Indianapolis Abattoir Co. v. Neidlinger, 92 N.E. 169, 174 Ind. 400.
39 C.J. p 414 note 7.

§ 234. Hatchways and Chutes

The master has the duty, sometimes imposed by statute, to guard hatchways, chutes, and floor openings so as to protect his employees from dangers which may be reasonably anticipated therefrom.

The master is bound to use ordinary care to protect his servants from dangers which may be reasonably anticipated from open and unguarded hatchways and chutes,[53] although it has been held that stevedores have no general duty to guard under deck hatchways when their employees are not working, especially on decks where no cargo operations are going on.[54]

Statutes requiring hatchways, chutes, and floor openings to be guarded are to be reasonably construed,[55] and the employer's violation of such a statute has been held to be negligence per se.[56] It has been held, however, that a statute imposing a duty to guard hatchways does not require hatchways to be fenced while in use, in addition to providing covering therefor while not in use.[57]

4. Inspection and Repair

§ 235. In General

a. General rule
b. Effect of statutory regulations

a. General Rule

An employer is liable to his employees for injuries resulting from a failure to use ordinary care to inspect from time to time his machinery, appliances, and place of work and to make repairs so as to maintain them in a reasonably safe condition.

It is not only the duty of a master to use ordinary care to furnish his servant with a reasonably safe place to work, and with reasonably safe machinery and appliances, but he must also, by inspection from time to time, and by the use of ordinary care and diligence, in making repairs, keep them in a safe condition.[58] Nevertheless, actionable negligence cannot be predicated on the mere failure of the

53. U.S.—The Omsk, C.C.A.Va., 266 F. 200.
39 C.J. p 414 note 8.
Open stairway properly constructed in private residence has been held not to be a "hatchway" or "trap," requiring owner to have gates or barriers to protect employees.—Martin v. Davis, 170 A. 307, 111 Pa. Super. 420.

54. N.Y.—Williams v. Trecartin, 152 N.Y.S. 340, 166 App.Div. 745.
39 C.J. p 415 note 9.

55. Mo.—**Corpus Juris cited in** Rouchene v. Gamble Const. Co., 89 S.W.2d 58, 61, 338 Mo. 123.
39 C.J. p 415 note 11.

56. Mo.—Rouchene v. Gamble Const. Co., 89 S.W.2d 58, 338 Mo. 123.

57. Ill.—Wajer v. U. S. Brewing Co., 184 Ill.App. 545.
39 C.J. p 415 note 12.

58. U.S.—Lowden v. Hanson, C.C.A. 8, 134 F.2d 348—Schilling v. Delaware & H. R. Corporation, C.C.A. 2, 114 F.2d 69—F. W. Martin & Co. v. Cobb, C.C.A.Ark., 110 F.2d 159—**Corpus Juris quoted in** McNeal v. Otto, C.C.A.10, 91 F.2d 289, 291.
Ark.—Carson v. Dierks Lumber & Coal Co., 117 S.W.2d 39, 196 Ark. 163—Kennedy v. Griffin, 112 S.W.2d 644, 195 Ark. 379—**Corpus Juris cited in** Mercury Mining Co. v. Chambers, 102 S.W.2d 543, 544, 193 Ark. 771—L. C. Burr & Co. v. Greenlee, 102 S.W.2d 77, 193 Ark. 705—Dixie Bauxite Co. v. Webb, 63 S.W.2d 634, 187 Ark. 1024—Burden v. Hughes, 55 S.W.2d 502, 186 Ark. 707—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056—Jonesboro, Lake City & E. R. Co. v. Wright, 281 S.W. 374, 170 Ark. 815.
Cal.—Lewis v. Curran, 62 P.2d 800, 17 Cal.App.2d 689.
Fla.—C. F. Hamblen, Inc., v. Owens, 172 So. 694, 127 Fla. 91.
Ga.—Bowers v. Louisville & N. R. Co., 127 S.E. 667, 33 Ga.App. 692.
Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.
Me.—Boober v. Bicknell, 191 A. 275, 135 Me. 153.
Mich.—Rule v. Giuglio, 7 N.W.2d 227, 304 Mich. 73, 145 A.L.R. 537—Sheltrown v. Michigan Cent. R. Co., 222 N.W. 163, 245 Mich. 58.
Minn.—Natalino v. St. Paul Bridge & Terminal Ry. Co., 251 N.W. 9, 190 Minn. 118.
Mo.—State ex rel. Govro v. Hostetter, 107 S.W.2d 22, 341 Mo. 262—**Corpus Juris cited in** Stoutimore v. Atchison, T. & S. F. Ry. Co., 92 S.W.2d 658, 665, 338 Mo. 463—**Corpus Juris cited in** Hoffman v. Peerless White Lime Co., 296 S.W. 764, 770, 317 Mo. 86—Jenkins v. Kansas City, 91 S.W.2d 98, 230 Mo. App. 337—Genta v. Ross, 37 S.W. 2d 969, 225 Mo.App. 673—Lutgen v. Standard Oil Co., 287 S.W. 885, 221 Mo.App. 773—Crowley v. American Car & Foundry Co., App., 279 S.W. 212.
N.H.—Turner v. Globe Automatic Sprinkler Co., 128 A. 529, 81 N.H. 443.
N.Y.—Clayton v. Tottenville Shipyard Co., 219 N.Y.S. 788, 219 App. Div. 742, affirmed 157 N.E. 892, 245 N.Y. 644.
S.C.—Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 184 S.C. 471—Tuttle v. Hanckel, 183 S.E. 484, 179 S.C. 60.
Tenn.—Mebane v. Baptist Memorial Hospital, 166 S.W.2d 622, 179 Tenn. 381.
Tex.—City of Denton v. White, Civ. App., 179 S.W.2d 834, error refused—Morgan v. State, Civ.App., 170 S.W.2d 648, reversed on other grounds State v. Morgan, 170 S.W.2d 652, 140 Tex. 620—Morton Salt Co. v. Wells, Civ.App., 35 S.W.2d 454, affirmed 70 S.W.2d 409, 123 Tex. 151—Louisiana Ry. & Nav. Co. of Texas v. Eldridge, Civ.App., 293 S.W. 901.
Vt.—Landing v. Town of Fairlee, 22 A.2d 179, 112 Vt. 127.
Va.—Colonna Shipyard v. Dunn, 145 S.E. 342, 151 Va. 740, certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986.
Wash.—White v. Consolidated Freight Lines, 73 P.2d 358, 192 Wash. 146—Cockerline v. Anderson, 52 P.2d 321, 184 Wash. 701.
39 C.J. p 415 note 15.
Duty of:
Electric company to inspect its wires and appliances generally see Electricity § 47.
Employee to inspect see infra § 380.
Negligence of fellow servant performing duties of master see infra § 333.
Absolute duty
The duty of inspecting appliances for defects is one of the absolute duties of the master.—Alford v. Zeigler, 16 S.E.2d 69, 65 Ga.App. 294.
Appliances master held required to inspect
(1) Complicated tools.—McCord v.

master to inspect, where an inspection would have disclosed no defects or dangers other than those which are already fully known and appreciated by the servant or which are already known to the servant and all others,[59] or where the employee is as well situated as the employer to discover the danger of injury.[60] It has also been held that an employer is under no duty to alter the condition of his premises in order to make them safe for his employee, except in cases of hidden defects.[61] A master is not liable when an accident happens to his servant on the first occasion when an appliance is used, if the method of use is the same method as would be required in order to make a proper test.[62]

It has been held that, if suitable tools and materials furnished the employee become unsuitable from their use in the progress of the work, the employer has no duty of inspection;[63] and that it is not the master's duty to repair defects arising in the daily use of an appliance, for which proper and suitable materials are supplied, and which may easily be remedied by the workmen, and are not of a permanent character, or do not require the help of skilled mechanics.[64] The master is not under a duty to inspect for trivial defects,[65] and he will not be liable for failure to inspect with regard to a transitory risk.[66] Although an employer is bound to keep his machinery in a reasonably safe condition, he need not keep it in the best possible order.[67] An employer has been held not to be liable for injuries to an employee resulting from the employee's improper repair of an appliance used.[68]

Harrison-Wright Co., 153 S.E. 406, 198 N.C. 742.

(2) Cold cutter selected by foreman for use of employee.—Warren & O. V. Ry. Co. v. Ederington, 28 S.W.2d 1073, 181 Ark. 1037.

(3) Freight cars.—Dominices v. Monongahela Connecting R. Co., 195 A. 747, 328 Pa. 203.

(4) Handholds on railroad car.—Baltimore & O. R. Co. v. Brandenberger, C.C.A.6, 74 F.2d 593.

(5) Scaffold.—Forbis v. Hessing, 41 S.W.2d 378, 328 Mo. 699.

(6) Wrench.—Allen v. Missouri Pac. Ry. Co., Mo., 294 S.W. 80.

Basis of duty

The basis of the duty of employer to inspect appliances used by employees is the tendency of appliances to deteriorate while in use.—McCarthy v. Eddings, 127 P.2d 883, 109 Colo. 526.

Cost of repair

A master is bound to remedy dangerous conditions whenever it can be done at a comparatively small cost.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.

Danger of disease

The master is required to exercise due care to discover the danger of disease incident to, or caused by, the employment and to inform his employee of the danger.—Steiner v. Spencer, 145 S.W.2d 547, 24 Tenn. App. 389.

Duty to expect deterioration

Master is chargeable with knowledge that appliances deteriorate, and are likely to cause injury to servants if not repaired.—Colonna Shipyard v. Dunn, 145 S.E. 342, 151 Va. 740, certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986.

Electrical equipment

(1) Operator of streetcar line with electricity is bound to inspect frequently and constantly test apparatus to see that there is nothing to cause charge injuring employee.—Foster v. Kansas City, C. C. & S. J. Ry. Co., 26 S.W.2d 770, 325 Mo. 18.

(2) Other electrical equipment see 39 C.J. p 415 note 15 [j].

Employees along railroad right of way

It is railway company's duty to anticipate presence of employees along its right of way, and to exercise ordinary care to avoid injuries to such persons by inspecting its trains to discover and eliminate objects which project or may be thrown therefrom.—Whittle v. Thompson, 179 S.W.2d 22, 352 Mo. 637—Noce v. St. Louis-San Francisco Ry. Co., 85 S.W.2d 637, 337 Mo. 689.

Failure to repair after notice

(1) Where employee operating tool informs employer of its defective condition, but employer does not repair it, the employer is negligent and the employee is entitled to recover for damages for personal injuries suffered.—Rivers v. Krasowski, 22 N.E.2d 114, 303 Mass. 409.

(2) Employee who notified employer of defective condition of tool is not obliged to show a promise by employer to repair defective condition or to prove a reliance on such a promise in order to recover for personal injuries suffered.—Rivers v. Krasowski, supra.

Want of knowledge

Employer's want of knowledge of defect in appliance does not relieve him from liability for injury from breach of duty to inspect.—Burgess v. North Carolina Electrical Power Co., 136 S.E. 711, 193 N.C. 223.

59. U.S.—**Corpus Juris quoted in** McNeal v. Otto, C.C.A.N.M., 91 F. 2d 289, 291.
Mo.—McLaughlin v. Butler Mfg. Co., App., 275 S.W. 772.
Pa.—**Corpus Juris cited in** Freedom Oil Works Co. v. Beaver County, 148 A. 67, 70, 298 Pa. 174, 68 A. L.R. 600—**Corpus Juris quoted in** Lentz v. Allentown Bobbin Works, 140 A. 541, 542, 291 Pa. 526.
Va.—Farmer's Adm'x v. Chesapeake & O. Ry. Co., 131 S.E. 334, 144 Va. 65.
39 C.J. p 419 note 16.

60. Mo.—Small v. Ralston-Purina Co., App., 202 S.W.2d 533.
Employee's assumption of risk of defects or dangers of which he has equal or greater knowledge than employer see infra § 391.

61. Mass.—Williams v. United Men's Shop, 58 N.E.2d 2, 317 Mass. 319.

62. N.J.—Bauman v. Cowdin, 66 A. 914, 75 N.J.Law 193, affirmed 74 A. 1135, 76 N.J.Law 575.

63. N.H.—Ireland v. E. J. Pinney, Inc., 18 A.2d 750, 91 N.H. 323.

64. U.S.—**Corpus Juris quoted in** McNeal v. Otto, C.C.A.N.M., 91 F.2d 289, 291.
Mich.—**Corpus Juris quoted in** Rule v. Giuglio, 7 N.W.2d 227, 229, 304 Mich. 73, 145 A.L.R. 537—**Corpus Juris quoted in** Sheltrown v. Michigan Cent. R. Co., 222 N.W. 163, 165, 245 Mich. 58.
39 C.J. p 420 note 20.

65. U.S.—**Corpus Juris quoted in** McNeal v. Otto, C.C.A.N.M., 91 F. 2d 289, 291.
39 C.J. p 419 note 17.

66. U.S.—**Corpus Juris quoted in** McNeal v. Otto, C.C.A.N.M., 91 F. 2d 289, 291.
39 C.J. p 419 note 18.

67. U.S.—**Corpus Juris quoted in** McNeal v. Otto, C.C.A.N.M., 91 F. 2d 289, 291,
39 C.J. p 420 note 21.

68. Va.—Farmers' Adm'x v. Chesapeake & O. Ry. Co., 131 S.E. 334, 144 Va. 65.

Inspection after blasting. An employer using explosives in the prosecution of his work is bound to make a careful inspection to see that unexploded charges are not left after a blast.[69] This duty on the part of the employer continues, even though a contract for the driving of a tunnel in a mine has been let to a third person,[70] although it has been held that, since the danger from missed shots is incident to the work of drilling a mine, it is not the duty of a master to make inspection for them after each explosion.[71] The nature of the inspection which the employer should make to ascertain whether they are unexploded charges depends on the circumstances of the case.[72] The failure of a mine operator to inspect the rooms, used by a miner in the course of his work, after shots have been fired to discover defects in the roof and misplaced props in such room, does not constitute negligence.[73]

Poles and wires carried thereon. A telephone, telegraph, or electric light company owes a duty to its employees to inspect its poles and lines to keep them in a safe condition for its employees,[74] unless such duty had been devolved on the employee either by his contract of employment with the master, or by the master's method of conducting its business to the servant's knowledge,[75] and this duty extends to such parts of the poles as are below the surface of the ground.[76] A contractor has been held not to have a duty to inspect poles used in the construction of a temporary lighting system where no system of inspection is in use and the poles are so small and of such character that any ordinary laborer is able to ascertain whether they are safe to use.[77]

Simple or common tools and appliances. An employer is under no obligation to his servants to inspect during their use those common tools and appliances with which every one is familiar,[78] to discover defects which result from ordinary use and

69. Mo.—Cunningham v. Doe Run Lead Co., 4 S.W.2d 802.
39 C.J. p 420 note 24.

70. Wash.—McMillan v. North Star Min. Co., 73 P. 685, 32 Wash. 579, 98 Am.S.R. 908.
39 C.J. p 421 note 25.

71. U.S.—Browne v. King, Colo., 100 F. 561, 40 C.C.A. 545.

72. Ky.—Chesapeake Stone Co. v. Holbrook, 181 S.W. 953, 168 Ky. 128, L.R.A.1916D 311.
39 C.J. p 421 note 27.

73. Kan.—Brooks v. Central Coal & Coke Co., 152 P. 616, 96 Kan. 530.
39 C.J. p 421 note 28.

74. Fla.—Peninsular Telephone Co. v. Dority, 174 So. 446, 128 Fla. 106.
Mo.—Rose v. Missouri Dist. Telegraph Co., 43 S.W.2d 562, 328 Mo. 1009, 81 A.L.R. 400.
N.C.—Burgess v. North Carolina Electrical Power Co., 136 S.E. 711, 193 N.C. 223.
39 C.J. p 421 note 29.

75. N.Y.—Griffin v. New York Tel. Co., 125 N.Y.S. 642, 141 App.Div. 1.
39 C.J. p 421 note 30.

76. U.S.—Jupollo Public Service Co. v. Grant, C.C.A.4, 42 F.2d 18.
Fla.—Peninsular Telephone Co. v. Dority, 174 So. 446, 128 Fla. 106.
39 C.J. p 421 note 31.

77. Ark.—Stevenson v. Phillips, 86 S.W.2d 422, 191 Ark. 418.

78. U.S.—Jacob v. City of New York, C.C.A.N.Y., 119 F.2d 800, reversed on other grounds 62 S.Ct. 854, 315 U.S. 752, 86 L.Ed. 1166—**Corpus Juris quoted in** McNeal v. Otto, C. C.A.N.M., 91 F.2d 289, 291.
Ark.—Stevenson v. Phillips, 86 S.W.2d 422, 191 Ark. 418.
Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.
Mich.—**Corpus Juris quoted in** Rule v. Giuglio, 7 N.W.2d 227, 229, 304 Mich. 73, 145 A.L.R. 537—**Corpus Juris quoted in** Sheltrown v. Michigan Cent. R. Co., 222 N.W. 163, 165, 245 Mich. 58.
Minn.—Natalino v. St. Paul Bridge & Terminal Ry. Co., 251 N.W. 9, 190 Minn. 118.
Miss.—Middleton v. Faulkner, 178 So. 583, 180 Miss. 737.
N.C.—McCord v. Harrison-Wright Co., 153 S.E. 406, 198 N.C. 742.
Va.—Thacker v. Klotz, 7 S.E.2d 883, 175 Va. 267.
39 C.J. p 419 note 19.
Latent or concealed defects see infra § 238.

Discoverable defect

Under "simple tools" rule railroad is not liable for injury to car repairer on breaking of jack, where defect was discoverable by slight inspection.—Sheltrown v. Michigan Cent. R. Co., 222 N.W. 163, 245 Mich. 58.

Hammers

(1) A hammer has been held a simple tool.—Dally v. Ward, 26 N.W. 2d 217, 223 Minn. 265.

(2) Spike maul specially designed for use in driving and removing iron spikes used to fasten steel rails of railway, and which requires in its construction or reconditioning experience and great skill in tempering, is not a "simple tool."—Natalino v. St. Paul Bridge & Terminal Ry. Co., 251 N.W. 9, 190 Minn. 118.

(3) Set hammers and sledge hammers have been held not to be simple tools.
Ill.—Herricks v. Chicago & E. I. R. Co., 180 Ill.App. 565.
Tex.—Santa Fe Tie & Lumber Preserving Co. v. Collins, Civ.App., 198 S.W. 164.
39 C.J. p 419 note 19 [b], [h].

Jack

(1) A jack used to raise and lower railroad cars has been held a simple tool.—Sheltrown v. Michigan Cent. R. Co., 222 N.W. 163, 245 Mich. 58.

(2) Other authority has held a jack used to raise and lower railroad cars not a simple or common tool.—Missouri, K. & T. R. Co. v. Odom, Tex.Civ.App., 152 S.W. 730.

Ladders

(1) An ordinary homemade ladder is a simple tool.—Nelson v. Wolverine Petroleum Corporation, 117 P.2d 787, 189 Okl. 351.

(2) A separate section of an extension ladder of the usual type of wooden construction, when used without the other section, was held a "simple tool."—Rule v. Giuglio, 7 N.W.2d 227, 304 Mich. 73, 145 A.L.R. 537.

(3) Generally a stepladder is held a simple tool.
Mich.—Nichols v. Bush, 289 N.W. 219, 291 Mich. 473—Kelley v. Brown, 247 N.W. 900; 262 Mich. 356.
Minn.—Mozey v. Erickson, 234 N.W. 687, 182 Minn. 419.
Utah.—Proctor v. Town Club, 141 P. 2d 156, 105 Utah 72.

(4) However, in particular instances stepladders have been held not simple tools.—C. F. Hamblen, Inc. v. Owens, 172 So. 694, 127 Fla. 91 —39 C.J. p 419 note 19 [c] (1).

(5) Other ladders see 39 C.J. p 419 note 19 [c] (2)-(4).

are, or should be, as well-known to the servant as to the master,[79] provided, it has been held, the employer has exercised ordinary care to furnish tools which are reasonably safe.[80] A simple tool within the rule is one which has no complications in structure and is of such ordinary use that any normally intelligent person of mature age or of experience will have substantially as much knowledge as another and can use it in the ordinary and normal manner without incurring more than a bare possibility of injury.[81]

Mere simplicity of the tool or appliance, however, will not relieve the master of all duty to inspect in every situation.[82] The question whether he is relieved of that duty is dependent on the facts and circumstances of the particular case,[83] and not on the tool or appliance alone.[84] Nonliability in such cases rests on the assumption that the employee is in as good, if not better, position to observe the defect as the employer.[85] The comparative knowledge of the master and servant is the test of the master's liability for injury occasioned by the use of simple tools;[86] and, where the conditions are such that the employee does not have such an opportunity for inspection of the tool, the simple tool rule is not applicable.[87] The application of the rule depends, among other things, on the nature of the employment;[88] the locality where the work is to be performed;[89] the use to which the tool is to be put by the employee;[90] whether the tool is subjected to any other stress than the muscular effort of the person using it;[91] and on the employee's age and experience,[92] his intelligence and skill,[93] ca-

Appliances held "simple tools"

(1) Chisel.—Middleton v. National Box Co., D.C.Miss., 38 F.2d 89.

(2) Pick.—Pennsylvania R. Co. v. Martin, 170 N.E. 554, 93 Ind.App. 258.

(3) Tie tongs.—Blackaby v. Louisville & N. R. Co., 280 S.W. 1093, 213 Ky. 368.

(4) Wooden crates.—Hedicke v. Highland Springs Co., 239 N.W. 896, 185 Minn. 79.

(5) Wrench.—Taylor v. Atlantic Coast Line R. Co., 165 S.E. 357, 203 N.C. 218.

Appliances held not "simple tools"

(1) Compressed air drill.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.

(2) Electric drop cord used to provide light in repairing ship.—Colonna Shipyard v. Dunn, 145 S.E. 342, 151 Va. 740, certiorari denied 49 S. Ct. 253, 279 U.S. 840, 73 L.Ed. 986.

(3) Stairway.—L. C. Burr & Co. v. Greenlee, 102 S.W.2d 77, 193 Ark. 705.

(4) Wheelbarrow.—McEachin & McEachin Const. Co. v. Burks, 75 S.W.2d 794, 189 Ark. 947.

(5) Other tools and appliances see 39 C.J. p 419 note 19 [d], [f].

79. Fla.—C. F. Hamblen, Inc., v. Owens, 172 So. 694, 127 Fla. 91.
Minn.—Natalino v. St. Paul Bridge & Terminal Ry. Co., 251 N.W. 9, 190 Minn. 118.

80. Ark.—Arkansas Quicksilver Co. v. McGhee, 63 S.W.2d 280, 187 Ark. 883.
Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.
Duty of employer to furnish employees with safe tools and appliances as not applicable to simple tools and appliances see supra § 216.

81. Miss.—Middleton v. Faulkner, 178 So. 583, 180 Miss. 737.

82. Tex.—Drake v. San Antonio & P. Ry. Co., 89 S.W. 407, 99 Tex. 240—City of Panhandle v. Byrd, Civ.App., 77 S.W.2d 904, reversed on other grounds 106 S.W.2d 660, 130 Tex. 96.

83. U.S.—Quanah, A. & P. Ry. Co. v. Gray, C.C.A.5, 63 F.2d 410.
Ark.—McEachin & McEachin Const. Co. v. Burks, 75 S.W.2d 794, 189 Ark. 947.
Fla.—C. F. Hamblen, Inc. v. Owens, 172 So. 694, 127 Fla. 91.
Tex.—Drake v. San Antonio & P. Ry. Co., 89 S.W. 407, 99 Tex. 240—Buchanan v. Blanchard, Civ.App., 127 S.W. 1153.
39 C.J. p 419 note 19 [a].

84. Va.—Thacker v. Klotz, 7 S.E.2d 883, 175 Va. 267.

85. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.
Mich.—Rule v. Giuglio, 7 N.W.2d 227, 304 Mich. 73, 145 A.L.R. 537—Nichols v. Bush, 289 N.W. 219, 291 Mich. 473—Kelley v. Brown, 247 N.W. 900, 262 Mich. 356.

86. Fla.—C. F. Hamblen, Inc. v. Owens, 172 So. 694, 127 Fla. 91.

87. Minn.—Thompson v. Chicago Great Western R. Co., 205 N.W. 439, 164 Minn. 494.
N.C.—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U. 898, 75 L.Ed. 791.

88. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.
Mich.—Rule v. Giuglio, 7 N.W.2d 227, 304 Mich. 73, 145 A.L.R. 537—Nichols v. Bush, 289 N.W. 219, 291 Mich. 473—Kelley v. Brown, 247 N.W. 900, 262 Mich. 356—Sheltrown v. Michigan Cent. R. Co., 222 N.W. 163, 245 Mich. 58.

89. Ark.—McEachin & McEachin Const. Co. v. Burks, 75 S.W.2d 794, 189 Ark. 947.

90. Ark.—McEachin & McEachin Const. Co. v. Burks, supra.
Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.
Mich.—Rule v. Giuglio, 7 N.W.2d 227, 304 Mich. 73, 145 A.L.R. 537—Nichols v. Bush, 289 N.W. 219, 291 Mich. 473—Kelley v. Brown, 247 N.W. 900, 262 Mich. 356—Sheltrown v. Michigan Cent. R. Co., 222 N.W. 163, 245 Mich. 58.
Va.—Thacker v. Klotz, 7 S.E.2d 883, 175 Va. 267.

Hazardous use

Even though the appliance is a simple one, if it is put to a hazardous use the employer owes the employee the duty of inspection.—Siebert v. Liggett & Myers Tobacco Co., 273 S.W. 153, 217 Mo.App. 163.

91. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.
Mich.—Nichols v. Bush, 289 N.W. 219, 291 Mich. 473—Kelley v. Brown, 247 N.W. 900, 262 Mich. 356—Sheltrown v. Michigan Cent. R. Co., 222 N.W. 163, 245 Mich. 58.

92. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.
Mich.—Rule v. Giuglio, 7 N.W.2d 227, 304 Mich. 73, 145 A.L.R. 537—Nichols v. Bush, 289 N.W. 219, 291 Mich. 473—Kelley v. Brown, 247 N.W. 900, 262 Mich. 356—Sheltrown v. Michigan Cent. R. Co., 222 N.W. 163, 245 Mich. 58.
Miss.—Middleton v. Faulkner, 178 So. 583, 180 Miss. 737.

93. Va.—Thacker v. Klotz, 7 S.E.2d 883, 175 Va. 267.

pacity to appreciate danger,[94] and familiarity with the work to be done.[95]

Employees as to whom duty exists. The duty of the employer to inspect exists as to those employees who are strangers to the premises, or whose information is not such as to give them an appreciation of risks equal to that of the master.[96] It does not exist as to employees whose knowledge equals or surpasses that of the employer,[97] particularly where they have been hired because of a superior knowledge in the line of work;[98] to employees whose job is to inspect and repair the machinery and appliances involved,[99] even though at the time of injury they are not engaged in inspecting or repairing the particular place or appliance which caused the injury;[1] to employees whose work is of such a nature that its progress constantly produces changes in the conditions and surroundings;[2] or where there is a constant shifting of position and the task is such that the employee has the same opportunity of examination, inspection, and the capacity to appraise the risk as the employer.[3]

b. Effect of Statutory Regulations

(1) In general
(2) Statutes applying to mines

(1) In General

Under statutes so providing employers are required to inspect, test, and maintain in a reasonably safe condition the employee's place of work and the machinery and appliances used, and they are liable for injuries to employees resulting from a violation of such duties.

Under various employer's liability acts the absolute and continuing duty is imposed on employers to inspect and test the employee's place of work and the machinery and appliances used so as to detect any defects therein and maintain a reasonably safe place of work.[4] A statute which predicates negligence on the failure to discover defects in the condition of the ways, machinery, etc., contemplates inspection, and the duty to inspect exists just as the duty to remedy defects exists.[5] A statute invalidating any contract or rule enabling the carrier to exempt itself from liability to employees forbids the shifting to employees of the duty of inspecting appliances.[6] Under some statutes which impose absolute duties on the employer, he is made liable for injuries resulting from his failure to comply with the statutory requirements irrespective of inspection.[7]

Since, as discussed supra §§ 226–228, the Federal Safety Appliance Acts, 45 U.S.C.A. § 1 et seq., including the Boiler Inspection Act, 45 U.S.C.A. § 23, are absolute in their requirements, they are applicable where there is some mechanical defect in the engine, tender, car, or some appliance or tool appurtenant thereto, causing injury to the employee,[8] and without regard to whether the employer had

94. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.
Mich.—Rule v. Giuglio, 7 N.W.2d 227, 304 Mich. 73, 145 A.L.R. 537—Nichols v. Bush, 289 N.W. 219, 291 Mich. 473—Kelley v. Brown, 247 N.W. 900, 262 Mich. 356—Sheltrown v. Michigan Cent. R. Co., 222 N.W. 163, 245 Mich. 58.

95. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.
Mich.—Rule v. Giuglio, 7 N.W.2d 227, 304 Mich. 73, 145 A.L.R. 537—Nichols v. Bush, 289 N.W. 219, 291 Mich. 473—Kelley v. Brown, 247 N.W. 900, 262 Mich. 356—Sheltrown v. Michigan Cent. R. Co., 222 N.W. 163, 245 Mich. 58.

96. Ark.—White v. St. Louis Southwestern Ry. Co., 183 S.W.2d 781, 207 Ark. 1005.

97. Ark.—Stevenson v. Phillips, 86 S.W.2d 422, 191 Ark. 418—McEachin v. Yarborough, 74 S.W.2d 228, 189 Ark. 434.
Okl.—Nelson v. Wolverine Petroleum Corporation, 117 P.2d 787, 189 Okl. 351.

98. Ark.—McEachin v. Yarborough, 74 S.W.2d 228, 189 Ark. 434.

99. Ky.—Brewer's Adm'r v. Louisville & N. R. Co., 34 S.W.2d 949, 237 Ky. 71.

1. Tex.—Texas & P. R. Co. v. Meek, Civ.App., 72 S.W.2d 616, error refused.

2. Vt.—Landing v. Town of Fairlee, 22 A.2d 179, 112 Vt. 127.

3. Ark.—White v. St. Louis Southwestern Ry. Co., 183 S.W.2d 781, 207 Ark. 1005.

4. Or.—Moen v. Aitken, 271 P. 730, 127 Or. 246.
39 C.J. p 421 note 32.

Time of inspection
Railroad, when placing carload of wheat for unloading at its elevator, is not required to make inspection of floor or car.—Chojinski v. New York Cent. R. Co., 151 A. 122, 8 N.J.Misc. 576.

Simple tools
(1) Under Federal Employers' Liability Act, employer is not ordinarily required to inspect simple tools furnished to employees.
Ga.—Southern Ry. Co. v. Bradshaw, 37 S.E.2d 150, 73 Ga.App. 438.
Ind.—Pennsylvania R. Co. v. Martin, 170 N.E. 554, 93 Ind.App. 258.
N.C.—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791.
(2) However, if the employee has no power of selection or opportunity for inspection, the rule regarding employer's duty to inspect tools is not relaxed in the case of simple tools.—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791.
(3) The simple tool rule does not apply to a scaffold erected under order of the gang boss who selected the materials.—Smith v. Hines, 194 P. 318, 108 Kan. 151.

5. Ala.—Epsey v. Cahaba Coal Co., 64 So. 753, 186 Ala. 160.

6. Tex.—Missouri, K. & T. R. Co. v. Odom, Civ.App., 152 S.W. 730.

7. Wis.—Calhoun v. Great Northern R. Co., 156 N.W. 198, 162 Wis. 264.
39 C.J. p 421 note 34.

8. Mo.—Riley v. Wabash Ry. Co., 44 S.W.2d 136, 328 Mo. 910.

Negligent use
Boiler Inspection Act does not cover negligent use of a safe and proper appliance which is not mechanically defective.—Harlan v. Wabash Ry. Co., 73 S.W.2d 749, 335 Mo. 414.

made a proper inspection thereof,[9] provided, as considered in Commerce § 40, they are in use in interstate commerce.

(2) Statutes Applying to Mines

Under statutes so providing mine operators have the duty of inspecting the mine and its machinery and appliances, and they are liable for injuries to employees resulting from a failure to comply with that duty.

Under statutes so providing operators of mines have the duty of inspecting the mine and the machinery and mining appliances used therein,[10] and an employer who fails to comply with the statutory duty to inspect is liable for injuries to an employee resulting therefrom.[11] A statute, imposing on mine owners the duty to keep careful watch to see that as the miners advance their excavations all loose coal, slate, and rock overhead are carefully secured against falling, requires more than ordinary diligence to furnish a safe place to work, and was not intended merely to declare the common-law duty already imposed.[12] Any failure of the owner or operator of a mine to employ, pursuant to such a statute, a mine boss who shall make inspection will render him liable in damages for injury to a miner which would have been obviated by compliance with such statute.[13] A statute requiring an examiner to inspect a mine and mark dangerous places is mandatory,[14] and the operator cannot excuse himself on the ground that the mine examiner thought in good faith that the place was safe.[15] The master is not relieved from the duty imposed by the statute, although the miner is required by another provision of the same act to sound and thoroughly examine the roof of his working place.[16] The duty imposed by the statute extends to workmen engaged in making a dangerous place safe.[17] Such a statute, however, imposes liability only for a willful failure to comply with its terms,[18] and, where a proper examination is made and no dangerous condition has been discovered, the employer is not liable for a miner's injuries, although the premises were not marked as dangerous.[19] A statute requiring examination of a working place in a mine does not apply to a place where an employee is not required to work or where he is not reasonably required to go.[20]

Inspection against accumulation of gas. A statute requiring examination of coal mines generating fire damp applies to all mines generating such gas in appreciable quantities,[21] and a statutory provision as to the examination of mines known to generate explosive gases is applicable whether or not gases existed in sufficient quantity to make mines unsafe or dangerous.[22] However, various statutes requiring the inspection of gaseous mines or mines generating gas or fire damp have been construed as not applicable to mines not generating gas or where a gaseous condition was not found or known to exist previous to the employee's injury.[23] The duty imposed by a statute requiring inspection for protection against the accumulation of gas is personal and cannot be delegated.[24]

§ 236. Places of Work Belonging to, and Instrumentalities Belonging to or Provided by, Third Person

a. In general
b. Railroad cars

a. In General

An employer has the duty to inspect and keep in repair premises or instrumentalities of another which are used by his employees where he has control thereof, or the right to inspect and repair, or if he directs his employees to use them; but this duty does not extend to premises over which he has no control and to which the employee goes on a temporary service.

The fact that the work of an employee is being performed on the premises of another[25] or on public

9. Wis.—Calhoun v. Great Northern Ry. Co., 156 N.W. 198, 162 Wis. 264.
39 C.J. p 421 note 34 [a].

10. Ky.—Southern Mining Co. v. Saylor, 95 S.W.2d 236, 264 Ky. 655—West Kentucky Coal Co. v. Shoulders' Adm'r, 28 S.W.2d 479, 234 Ky. 427.

11. Ky.—Southern Mining Co. v. Saylor, 95 S.W.2d 236, 264 Ky. 655—West Kentucky Coal Co. v. Shoulders' Adm'r, 28 S.W.2d 479, 234 Ky. 427.
39 C.J. p 422 note 37.

12. Kan.—Little v. Norton Coal Co., 109 P. 768, 83 Kan. 232.

13. Kan.—Baisdrenghien v. Missouri K. & T. R. Co., 139 P. 428, 91 Kan. 730.
Liability for acts of statutory employee see supra § 190.

14. Ill.—Aetitus v. Spring Valley Coal Co., 92 N.E. 579, 246 Ill. 32, 138 Am.S.R. 221.
39 C.J. p 422 note 40.

15. Ill.—Aetitus v. Spring Valley Coal Co., supra—Monasterolo v. Superior Coal Co., 206 Ill.App. 513.

16. Ill.—Alsdurf v. Big Four Wilmington Coal Co., 198 Ill.App. 15—Davis v. Missouri & Illinois Coal Co., 186 Ill.App. 478.

17. Ill.—Wilson v. Danville Collieries Coal Co., 106 N.E. 194, 264 Ill. 143.

18. Ill.—Eichhorn v. St. Louis & O'Fallon Coal Co., 123 N.E. 603, 288 Ill. 351—Gallez v. Kelly Coal Co., 151 Ill.App. 178.

19. Ill.—Eichhorn v. St. Louis & O'Fallon Coal Co., 123 N.E. 603, 288 Ill. 351.

20. Va.—Raven Red Ash Coal Co. v. Griffith, 27 S.E.2d 360, 181 Va. 911.

21. Kan.—Cheek v. Missouri, K. & T. R. Co., 131 P. 617, 89 Kan. 247.

22. Utah.—Eleganti v. Standard Coal Co., 168 P. 266, 50 Utah 585.

23. Va.—Raven Red Ash Coal Co. v. Griffith, 27 S.E.2d 360, 181 Va. 911.
39 C.J. p 422 note 48.

24. U.S.—Brown v. Pacific Coast Coal Co., Wash., 36 S.Ct. 701, 241 U.S. 571, 60 L.Ed. 1177.

25. Ark.—Carson v. Dierks Lumber & Coal Co., 117 S.W.2d 39, 196 Ark. 163.
Mo.—Rose v. Missouri Dist. Tele-

property[26] does not relieve the master from the duty of using reasonable care to inspect such premises when, during the progress of the work, they are under his control or he has authority to inspect them. If an employer adopts and uses the instrumentalities of a third person in the performance of his work, he is under the duty to use reasonable care to inspect them;[27] and the fact that he neither owns nor controls them does not relieve him, as to his employees, of that duty.[28] He is guilty of negligence if he permits the use of obviously defective gear furnished by a third person,[29] although he may to some extent rely on the duty of such third person to furnish appliances which are initially safe.[30] This duty to inspect includes equipment furnished by another with whom the employer is carrying on a joint operation,[31] and appliances or tools which are rented[32] or borrowed[33] from another.

The employer also has the duty to inspect and keep in repair premises and appliances he directs his employees to use.[34] If he has no right or is not in a position to make inspection and repair instrumentalities[35] or a place of work[36] furnished by a third person, he must refrain from directing their use, whereby the safety of employees is imperiled.

On the other hand, an employer has been held to have no duty to inspect and repair premises not under his control, which are used by his employees.[37] He is under no obligation to inspect premises to which a servant has been sent on a temporary service and which are fully under the control of another,[38] or premises over which the servant may or must travel before or after engaging in the employment for which he was hired.[39]

Stevedores. A contracting stevedore has the duty to inspect for obvious and patent defects the ship on which his employees work and the gear furnished by the shipowner, and he is guilty of negligence if he permits the use by his employees of obviously defective gear furnished by the shipowner.[40] However, he may to some extent rely on the duty of the shipowner to furnish initially safe appliances;[41] and, in the absence of any condition to excite suspicion or to suggest defects or dangers, the contracting stevedore may accept as safe the place furnished by the ship and assume the safety of appliances and that due care has been used by the shipowner to keep and maintain them in a reasonably safe condition.[42]

b. Railroad Cars

A railroad company has the same duty to inspect foreign rolling stock hauled over its roads as it has to inspect its own rolling stock, except that it need not make tests to discover hidden defects in construction or material.

The railroad owes the duty to its employees to

graph Co., 43 S.W.2d 562, 328 Mo. 1009, 81 A.L.R. 400.
39 C.J. p 423 note 50.

26. Ark.—Carson v. Dierks Lumber & Coal Co., 117 S.W.2d 39, 196 Ark. 163.

Bridge

Where employer had control over a bridge over which its truck drivers passed, employer was required to inspect the bridge.—Carson v. Dierks Lumber & Coal Co., supra.

27. Mo.—Rose v. Missouri Dist. Telegraph Co., 43 S.W.2d 562, 328 Mo. 1009, 81 A.L.R. 400.
39 C.J. p 423 note 52.

28. Mo.—Rose v. Missouri Dist. Telegraph Co., supra.

29. U.S.—Gucciardi v. Chisholm, C. C.A.N.Y., 145 F.2d 514.

30. U.S.—Gucciardi v. Chisholm, supra.

31. Fla.—Putnam Lumber Co. v. Berry, 2 So.2d 133, 146 Fla. 595.

32. Tex.—Texas Tract. Co. v. Morrow, Civ.App., 145 S.W. 1069.

33. U.S.—Earles v. Howard, D.C.Me., 270 F. 225.
39 C.J. p 423 note 54.

34. Ark.—Carson v. Dierks Lumber & Coal Co., 117 S.W.2d 39, 196 Ark. 163.

35. Minn.—De Maries v. Jameson, 108 N.W. 830, 98 Minn. 453.

36. Ark.—Carson v. Dierks Lumber & Coal Co., 117 S.W.2d 39, 196 Ark. 163.

Negligence to require

If telegraph company's arrangement in leasing portion of telephone company's pole did not permit it to inspect pole and cross-arms, it was negligent in requiring employee to use such instrumentalities.—Rose v. Missouri Dist. Telegraph Co., 43 S.W.2d 562, 328 Mo. 1009, 81 A.L.R. 400.

37. Ark.—Carson v. Dierks Lumber & Coal Co., 117 S.W.2d 39, 196 Ark. 163—Neely v. Goldberg, 114 S.W. 2d 455, 195 Ark. 790.

38. Ark.—Ward Furniture Co. v. Ortner, 280 S.W. 371, 170 Ark. 581.
39 C.J. p 423 note 51.

39. Miss.—Dravo Corporation v. Copeland, 199 So. 769, 190 Miss. 269.

Ferryboat

(1) Contractor engaged in construction of buildings on island was not responsible for inspection of ferryboat used in transporting workmen to and from island, where boat was under exclusive control of boat's captain.—Kuhn v. P. J. Carlin Const. Co., 8 N.E.2d 300, 274 N.Y. 118, reargument denied and remittitur amended 14 N.E.2d 204, 277 N.Y. 651.

(2) Contractor whose men are transported to and from their place of work by ferryboat is entitled to rely on the owner's guarantee of the boat's seaworthiness.—Kuhn v. P. J. Carlin Const. Co., supra.

40. U.S.—Port of New York Stevedoring Corporation v. Castagna, C. C.A.2, 280 F. 618, certiorari denied 42 S.Ct. 463, 258 U.S. 631, 66 L.Ed. 801.
Pa.—Sharpley v. Wright, 54 A. 896, 205 Pa. 253.

41. U.S.—Luckenbach S. S. Co. v. Buzynski, C.C.A.5, 19 F.2d 871, reversed on other grounds Busynski v. Luckenbach S. S. Co., 48 S.Ct. 440, 277 U.S. 226, 72 L.Ed. 865.

42. U.S.—The Pacific, D.C.Md., 23 F.2d 218, modified on other grounds, C.C.A., Fauntleroy v. Argonaut S. S. Line, 27 F.2d 50.
N.Y.—Barbaro v. Auditore Contracting Co., 214 N.Y.S. 221, 215 App. Div. 595.
Wash.—Miller v. Western Stevedore Co., 268 P. 177, 148 Wash. 155, rehearing denied 270 P. 310, 149 Wash. 698.
39 C.J. p 423 note 59.

use reasonable care in inspecting all rolling stock used, and this includes foreign cars hauled over its roads.[43] This duty is to make careful inspection of their obvious or apparent condition.[44] However, it is not required to make tests to discover hidden defects in construction or material.[45] Also it is under no duty to inspect cars or parts thereof with respect to employees whose work is that of inspecting and repairing such cars or parts,[46] or with respect to car repairers whose duty it is to repair such cars.[47] A consignee is not required to inspect, before they are loaded, cars supplied by a common carrier which his employees will unload, and, in the absence of obvious defects or knowledge thereof, he is not liable for injuries to his employees while unloading a defective car.[48]

§ 237. Purchases from Reputable Manufacturer

An employer has been held not to be required to inspect simple tools and appliances furnished his employees where they are purchased from a reputable manufacturer, although it has also been held that he is not thereby relieved from all duty to inspect.

It has been held that an employer who purchases simple or common tools from a reputable manufacturer need not make inspection thereof to ascertain their fitness for use.[49] This rule, however, has been held not to relieve the employer of all duty to inspect.[50] In such case it is the employer's duty to examine and discover patent defects,[51] but he is not guilty of negligence for a failure to test for and to discover latent defects.[52] An employer is not entitled to assume that a tool bought from a reputable manufacturer will remain fit after being in use for a long time.[53]

§ 238. Latent Defects

An employer owes the duty to his employees to make a reasonable inspection of his place of work, tools, and appliances to discover latent defects.

It has been held that as a part of his duty to furnish reasonably safe appliances and a reasonably safe place to work, an employer must make a reasonable inspection to discover latent or concealed defects or dangers,[54] and to remedy them;[55] and that whether or not a defect is open to observation,

43. Pa.—Dominices v. Monongahela Connecting R. Co., 195 A. 747, 328 Pa. 203.
S.C.—Rhodes v. Southern Ry. Co., 198 S.E. 382, 188 S.C. 228.
39 C.J. p 423 note 56.

Before acceptance
The railroad has the duty of inspection before accepting cars tendered by another, and it is negligent if it accepts a defective car.—Kurtz v. Detriot, T. & I. R. Co., 213 N.W. 169, 238 Mich. 289, certiorari denied 48 S.Ct. 31, 275 U.S. 535, 72 L.Ed. 412.

Transfer to other road
Railroad's transfer of defective foreign car to another road is negligence.—Kurtz v. Detroit, T. & I. R. Co., supra.

Under Federal Safety Appliance Act
A railroad company, sued for injuries, caused by the giving way of a defective handhold, cannot escape liability on the ground that the car belonged to a different company, which it was bound to inspect only for apparent defects.—Missouri, O. & G. R. Co. v. Plemmons, Tex.Civ. App., 171 S.W. 259.

44. Ky.—Brewer's Adm'r v. Louisville & N. R. Co., 34 S.W.2d 949, 237 Ky. 71.

45. Mo.—Near v. St. Louis & S. F. R. Co., 168 S.W. 1186, 261 Mo. 80.
39 C.J. p 423 note 57.

46. Ky.—Brewer's Adm'r v. Louisville & N. R. Co., 34 S.W.2d 949, 237 Ky. 71.

47. Wis.—Berry v. Director General of Railroads, 180 N.W. 824, 173 Wis. 473.
39 C.J. p 423 note 58.

48. Mo.—Allen v. Larabee Flour Mills Corporation, 40 S.W.2d 597, 328 Mo. 226.
39 C.J. p 423 note 56 [a]-[c].

49. U.S.—**Corpus Juris quoted in** Henson v. Fidelity & Columbia Trust Co., D.C.Ky., 3 F.Supp. 950, 952.
39 C.J. p 424 note 60.

50. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Ewing, Com. App., 222 S.W. 198—Alamo Dressed Beef Co. v. Yeargan, 123 S.W. 721, 58 Tex.Civ.App. 92.

51. Mo.—Siebert v. Liggett & Myers Tobacco Co., 273 S.W. 153, 217 Mo.App. 163.

52. U.S.—**Corpus Juris quoted in** Henson v. Fidelity & Columbia Trust Co., D.C.Ky., 3 F.Supp. 950, 952.
Mo.—McLaughlin v. Butler Mfg. Co., App., 275 S.W. 772, certiorari quashed State ex rel. McLaughlin v. Trimble, Sup., 274 S.W. 391—Siebert v. Liggett & Myers Tobacco Co., 273 S.W. 153, 217 Mo.App. 163.
39 C.J. p 424 note 62.

53. Mo.—Nolen v. Halpin-Dwyer Const. Co., 29 S.W.2d 215, 225 Mo. App. 224.

54. Ark.—Dixie Bauxite Co. v. Webb, 63 S.W.2d. 634, 187 Ark. 1024—Burden v. Hughes, 55 S.W.2d 502, 186 Ark. 707—International Harvester Co. of America v. Hawkins, 24 S. W.2d 340, 180 Ark. 1056.
Mo.—Gordon v. Muehling Packing Co., 40 S.W.2d 693, 328 Mo. 123—Dixon v. Frazier-Davis Const. Co., 298 S.W. 827, 318 Mo. 50.
N.C.—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112.
39 C.J. p 424 note 63.
Duty of employee to inspect for latent defects or dangers see infra § 381.

What constitutes latent defect
(1) Latent defects are those which are discoverable only by proper inspection.—Moody v. Hardeman, 162 S.E. 653, 44 Ga.App. 676—Rountree v. Seaboard Air Line Ry. Co., 120 S. E. 654, 31 Ga.App. 231—Cochrell v. Langley Mfg. Co., 63 S.E. 244, 5 Ga. App. 317.

(2) No defect in instrumentality furnished by master for servant's use can be considered latent which is discoverable by exercise of due care.—Stoutimore v. Atchison, T. & S. F. Ry. Co., 92 S.W.2d 658, 338 Mo. 463—Forbis v. Hessing, 41 S.W.2d 378, 328 Mo. 699.

55. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.

Spring gun
Employee injured by spring gun deliberately concealed on the premises by the employer to ward off burglars is entitled to recover therefor.—Weis v. Allen, 35 P.2d 478, 147 Or. 670.

if there is a discoverable defect, the master is negligent if he does not make a proper inspection.[56] In so far as latent defects are concerned the employer has been held to a higher standard of care and to be bound to discover them sooner than his employees.[57]

Where there is nothing to indicate to an employer exercising ordinary care that latent defects exist, he is under no duty to discover them.[58] The failure of an employer to find and remove latent defects, which he is unable to discover by reasonable and proper care, tests, or inspection, ordinarily constitutes no negligence on his part,[59] at least where the appliance is not complicated or dangerous and is purchased from a reputable manufacturer.[60] If a proper inspection would not have disclosed the defect which caused the injury, the mere failure to inspect will not warrant holding the employer liable.[61] This rule, however, has no application where the defects are created or augmented by the negligence of the employer.[62] An employer who makes the tool or erects the building, either in person or by the hand of another, has been held to be responsible to his employees for injuries resulting from negligent fabrication.[63] The rule which relieves the employer of the duty to inspect simple tools, as considered supra § 235 a, has been held not to apply where the defect in the tool or appliance is caused by faulty construction or reconditioning, which is not apparent or discoverable by ordinary inspection, and which is not caused by ordinary use of the tool.[64]

§ 239. Manner and Extent of Inspection or Test

The inspection of his machinery, appliances, and places of work which an employer is required to make must be adequate and proper, and the question what is an adequate and proper inspection depends on the circumstances of the particular case.

The inspection of his machinery, appliances, and place of work which an employer is required to make, as discussed supra § 235, must be adequate[65] and proper.[66] The question what is an adequate and proper inspection or test depends on the circumstances of the particular case,[67] and must be such as a reasonably prudent man, in the exercise of reasonable care, would deem necessary under the same or similar circumstances.[68] The manner and extent of the inspection depend, among other things, on the character or nature of the place, appliance, or machine to be inspected,[69] the materials

56. Ark.—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056.

57. Ga.—Moody v. Hardeman, 162 S.E. 653, 44 Ga.App. 676.

58. Tex.—Texas & N. O. R. Co. v. Sarver, Civ.App., 113 S.W.2d 317, error refused.

59. U.S.—McNeal v. Otto, C.C.A.10, 91 F.2d 289—Noftz v. Baltimore & O. Ry. Co., C.C.A.Ohio, 13 F.2d 389.
Ala.—Louisville & N. R. R. Co. v. Allen's Adm'r, 78 Ala. 494.
N.H.—Burke v. Boston & M. R. R., 134 A. 574, 82 N.H. 350.
Tex.—Texas & P. R. Co. v. Meek, Civ.App., 72 S.W.2d 616, error refused.

60. Mo.—Siebert v. Liggett & Myers Tobacco Co., 273 S.W. 153, 217 Mo. App. 163.

61. Ark.—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056.
Md.—McVey v. Gerrald, 192 A. 789, 172 Md. 595.
Mass.—Sheridan v. Boston & A. R. R., 149 N.E. 150, 253 Mass. 446.
Mo.—Corpus Juris cited in Stoutimore v. Atchison, T. & S. F. Ry. Co., 92 S.W.2d 658, 665, 338 Mo. 463—Hoffman v. Peerless White Lime Co., 296 S.W. 764, 317 Mo. 86.
Pa.—Lentz v. Allentown Bobbin Works, 140 A. 541, 291 Pa. 526.
Va.—Farmer's Adm'x v. Chesapeake & O. Ry. Co., 131 S.E. 334, 144 Va. 65.
39 C.J. p 425 note 64.
Question for jury whether proper inspection would have disclosed defect see infra § 534.

62. Wash.—Mahlum v. Seattle School Dist. No. 1, 149 P.2d 918, 21 Wash.2d 89.

63. N.H.—Burke v. Boston & M. R. R., 134 A. 574, 82 N.H. 350.

64. Minn.—Natalino v. St. Paul Bridge & Terminal Ry. Co., 251 N.W. 9, 190 Minn. 118.

65. U.S.—Schilling v. Delaware & H. R. Corporation, C.C.A.N.Y., 114 F.2d 69.

66. U.S.—Lowden v. Hanson, C.C.A. 8, 134 F.2d 348.
Ark.—Dixie Bauxite Co. v. Webb, 63 S.W.2d 634, 187 Ark. 1024.
Fla.—Peninsular Telephone Co. v. Dority, 174 So. 446, 128 Fla. 106.

67. Md.—McVey v. Gerrald, 192 A. 789, 172 Md. 595.
Mo.—Siebert v. Liggett & Myers Tobacco Co., 273 S.W. 153, 217 Mo. App. 163.
Tex.—City of Denton v. White, Civ. App., 179 S.W.2d 834, error refused.
Va.—Colonna Shipyard v. Dunn, 145 S.E. 342, 151 Va. 740, certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986.
39 C.J. p 425 note 66 [g].

Careful inspection
If a defective condition can be discovered only by a careful inspection, that character of inspection is required, at least where a potentially dangerous situation is involved.—Louisiana Ry. & Nav. Co. of Texas v. Eldridge, Tex.Civ.App., 293 S.W. 901—39 C.J. p 425 note 66 [d].

Repair of moving machinery
It cannot be said as fixed rule that employer having belt repaired while machinery is moving is negligent.—Seifferman v. Leach, 138 So. 563, 161 Miss. 853.

68. Mo.—McLaughlin v. Butler Mfg. Co., App., 275 S.W. 772, certiorari quashed State ex rel. McLaughlin v. Trimble, Sup., 274 S.W. 391.
N.C.—Burgess v. North Carolina Electrical Power Co., 136 S.E. 711, 193 N.C. 223.
39 C.J. p 425 note 66.
Reasonableness and sufficiency of inspection as question of fact for jury see infra § 534.

More careful than employee
Railroad is required to make a more careful inspection than that required on the part of an employee under the doctrine of assumed risks.—Rhodes v. Southern Ry. Co., 198 S.E. 382, 188 S.C. 228.

69. Md.—McVey v. Gerrald, 192 A. 789, 172 Md. 595.
Mo.—Forbis v. Hessing, 41 S.W.2d 378, 328 Mo. 699—Tallman v. Nel-

composing it,[70] the uses to which it is put,[71] the danger to which the employee is subjected,[72] the danger to be anticipated if inspections are not made,[73] the length of time the appliance has been in use,[74] and to some extent on the source from which the appliance was obtained[75] and the circumstances attending its procurement.[76]

An employer who has had notice of the probable existence of a defect should make more than a perfunctory examination;[77] but he is not required, unless put on notice as to the probable existence of defects, to employ unusual or extraordinary tests,[78] or to adopt the latest and most improved methods of testing machinery or appliances.[79] Infrequent inspections may be sufficient where the structure is permanent and does not deteriorate rapidly.[80]

A smaller degree of care in the inspection of machinery and appliances may be required where they were purchased from a reputable manufacturer.[81] Accordingly, a minute inspection for latent defects is not required to be made of a simple appliance purchased from a reputable manufacturer;[82] but, where the instrumentalities purchased are not of such character as to be termed simple or common tools, the employer is required to use reasonable care to inspect them.[83] An employer performs his duty where a machine, tool, or appliance purchased from a reputable manufacturer appears to be in good condition for the services required, and he is not required to take it apart or otherwise test it to discover whether there is any defect in its construction,[84] except where the instrumentality or appliance is to be put to an extraordinarily hazardous use.[85] An employer who leases equipment has been held to be entitled to rely on its being in proper condition to operate for the purposes for which it is leased, and is not required to disassemble it in order to discover whether a defective condition exists therein.[86]

In order to be adequate, a test of handholds or grabirons on railroad cars, it has been held, must be similar to that which they will receive in use,[87] but other authority has also held that it is unnecessary to use physical force to test their condition, unless some indication of weakness or a defect is perceived on careful inspection in the ordinary way

son, 125 S.W. 1181, 141 Mo.App. 478.

70. Mo.—Siebert v. Liggett & Myers Tobacco Co., 273 S.W. 153, 217 Mo.App. 163.

71. Mo.—Siebert v. Liggett & Myers Tobacco Co., supra—Tallman v. Nelson, 125 S.W. 1181, 141 Mo.App. 478.
N.C.—Burgess v. North Carolina Electrical Power Co., 136 S.E. 711, 193 N.C. 223.

72. Mo.—Forbis v. Hessing, 41 S.W. 2d 378, 328 Mo. 699—Siebert v. Liggett & Myers Tobacco Co., 273 S.W. 153, 217 Mo.App. 163.

73. Md.—McVey v. Gerrald, 192 A. 789, 172 Md. 595.

74. Colo.—McCarthy v. Eddings, 127 P.2d 883, 109 Colo. 526.

Increased vigilance

The necessity for vigilance on the employer's part constantly increases the longer the use of the tool or appliance continues.—McCarthy v. Eddings, supra.

75. Mo.—Forbis v. Hessing, 41 S.W. 2d 378, 328 Mo. 699.

76. Mo.—Forbis v. Hessing, supra.

77. Ark.—Eudora Motor Co. v. Womack, 111 S.W.2d 530, 195 Ark. 74.

78. Va.—Farmers' Adm'x v. Chesapeake & O. Ry. Co., 131 S.E. 334, 144 Va. 65.
39 C.J. p 426 note 67.

Microscope

Employer was not required to use microscope to discover latent defects.—Farmer's Adm'x v. Chesapeake & O. Ry. Co., supra.

79. N.Y.—Bell v. Consolidated Gas, Electric Light, Heat & Power Co., 56 N.Y.S. 780, 36 App.Div. 242.

80. Md.—McVey v. Gerrald, 192 A. 789, 172 Md. 595.

Barn ladder

Stationary barn ladder is not a dangerous instrumentality or one whose liability to disrepair requires periodic or particular examination for special purpose of discovering whether any defects exist.—McVey v. Gerrald, supra.

81. Mo.—Forbis v. Hessing, 41 S.W. 2d 378, 328 Mo. 699.

82. Mo.—Gehbauer v. J. Hahn Bakery Co., App., 285 S.W. 170—Siebert v. Liggett & Myers Tobacco Co., 273 S.W. 153, 217 Mo. App. 163.

Quality of metal of a hammer which shows no patent defects need not be tested.—McLaughlin v. Butler Mfg. Co., Mo.App., 275 S.W. 772, certiorari quashed State ex rel. McLaughlin v. Trimble, Sup., 274 S.W. 391.

83. U.S.—**Corpus Juris quoted in** Henson v. Fidelity & Columbia Trust Co., D.C.Ky., 3 F.Supp. 950, 952.
39 C.J. p 424 note 61.

84. U.S.—Lowden v. Hanson, C.C.A. Minn., 134 F.2d 348.
Mo.—Lutgen v. Standard Oil Co., 287 S.W. 885, 221 Mo.App. 773—McLaughlin v. Butler Mfg. Co., App., 275 S.W. 772, certiorari quashed State ex rel. McLaughlin v. Trimble, Sup., 274 S.W. 391—Tallman v. Nelson, 125 S.W. 1181, 141 Mo.App. 478.

Steering apparatus

Employer of truck driver was not negligent in failing to inspect steering gear of truck, which locked, where employer lacked actual knowledge of defect, which could not have been discovered except by dismantling steering apparatus, and truck had been completely overhauled approximately a year before accident, and employer had directed truck driver to take truck to a reputable garage at least once a month for an inspection.—Home Lumber Co. v. Turley, 139 S.W.2d 435, 282 Ky. 633.

85. Mo.—Tallman v. Nelson, 125 S. W. 1181, 141 Mo.App. 478.

86. U.S.—Wujnovich v. Equipment Corporation of America, D.C.Pa., 54 F.Supp. 465.

87. U.S.—Felton v. Bullard, Ohio, 94 F. 781, 37 C.C.A. 1.
Ky.—Baltimore & O. R. Co. v. Smith, 184 S.W. 1108, 169 Ky. 593, L.R.A. 1918F 1205, affirmed 38 S.Ct. 335, 246 U.S. 653, 62 L.Ed. 922.
Mo.—Brady v. Terminal R. Ass'n of St. Louis, 102 S.W.2d 903, 340 Mo. 841, reversed on other grounds 58 S.Ct. 426, 303 U.S. 10, 82 L.Ed. 614.

by the eye.[88] An intervening carrier is only required to inspect cars originating on another line in an ordinarily prudent manner;[89] and it is not required to test the proper loading of a sealed car by breaking the seal and examining its contents where there is no indication of anything unusual and a normal check indicates that the car is properly loaded.[90]

§ 240. —— Customary Methods

The adoption of customary and generally approved methods of inspection or tests by an employer for the discovery of defects or dangers in his machinery, appliances, or place of work is ordinarily held sufficient; but a custom not to inspect will not relieve the employer of a duty to do so.

While not conclusive on the question of negligence,[91] the adoption by the master of the customary and approved means or tests for the discovery of defects in his machinery or appliances will, as a rule, discharge his duty to his servants in that regard, and an injury sustained by a servant notwithstanding must be accepted as resulting from one of the risks of the occupation.[92] However, a custom not to inspect will not relieve the employer of the duty to do so.[93]

§ 241. Time and Opportunity for Inspection and Repair

a. In general
b. Opportunity to remedy defects

a. In General

The duty of an employer to inspect his machinery, appliances, and place of work for dangers and defects therein is a continuing one, which must be performed at reasonably frequent intervals.

Although an employer is entitled to a reasonable opportunity for inspection,[94] the duty to inspect is a continuing one,[95] which must be performed at reasonably frequent intervals,[96] and whenever the circumstances are such as to suggest the propriety of an inspection.[97] A master is not required to exercise that exquisite and exhaustive care in the constant examination and overhauling of his machinery and work which would be incompatible with the proper furtherance of business,[98] and need not make an examination of a tool before each and every operation thereof.[99]

The fact that the master has purchased a completed and presumably tested structure from another does not relieve him of the obligation to take reasonable care to know or ascertain the safety of its design and construction, and he will be charged with knowledge of defects which a competent examination would have disclosed.[1]

b. Opportunity to Remedy Defects

An employer is entitled to a reasonable time after knowledge, actual or constructive, of defects or dangers in his place for work, machinery, or appliances in which to remedy them, unless he caused or was responsible for the defect or danger.

Actual or constructive knowledge by the employer of the defective condition of his places for work, machinery, or appliances does not make him liable for injuries resulting therefrom, unless he has had a reasonable opportunity after acquiring such knowledge to remedy the defects,[2] and the same

88. Utah.—Allen v. Union Pac. R. Co., 26 P. 297, 7 Utah 239.

89. Cal.—Dryden v. Western Pac. R. Co., 36 P.2d 394, 1 Cal.App.2d 49.

90. Cal.—Dryden v. Western Pac. R. Co., supra.

91. N.J.—Coll v. Lehigh Valley R. Co., 130 A. 225, 3 N.J.Misc. 869, affirmed 132 A. 922, 102 N.J.Law 713.
39 C.J. p 427 note 70.

92. U.S.—Lowden v. Hanson, C.C.A. Minn., 134 F.2d 348.
39 C.J. p 427 note 71.

Customary instruments for inspection

Employer, in providing safe working place for transitman supervising work of placing wall plates in timbering tunnel, had duty not only to exercise ordinary care in making inspection of tunnel, but to use usual, customary, and reasonably necessary instruments in making of inspection considering condition and circumstances under which inspection was made.—Big Sandy & C. R. Co. v. Measell's Adm'r, 42 S.W.2d 747, 240 Ky. 571.

93. Mo.—Killion v. King Lumber Co., App., 16 S.W.2d 730.
Va.—Colonna Shipyard v. Dunn, 145 S.E. 342, 151 Va. 740, certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986—American Locomotive Co. v. Chalkley, 75 S.E. 90, 113 Va. 485.

94. Miss.—Gulfport Creosoting Co. v. White, 157 So. 86, 171 Miss. 127.
Tex.—Magnolia Petroleum Co. v. Studdard, Civ.App., 83 S.W.2d 1047, error dismissed.
39 C.J. p 427 note 72.

95. Mo.—Hayes v. Sheffield Ice Co., 221 S.W. 705, 282 Mo. 446.
39 C.J. p 427 note 73.

96. Fla.—Kenan v. Walker, 173 So. 836, 127 Fla. 245.
39 C.J. p 427 note 74.

97. Okl.—St. Louis-San Francisco R. Co. v. Stitt, 233 P. 1073, 108 Okl. 42, certiorari denied 45 S. Ct. 636, 268 U.S. 700, 69 L.Ed. 1164.
39 C.J. p 428 note 75.

98. U.S.—**Corpus Juris quoted in** McNeal v. Otto, C.C.A.N.M., 91 F. 2d 289, 291.
Miss.—**Corpus Juris cited in** Dr. Pepper Bottling Co. v. Gordy, 164 So. 236, 240, 174 Miss. 392—**Corpus Juris cited in** Gulfport Creosoting Co. v. White, 157 So. 86, 89, 171 Miss. 127.
39 C.J. p 420 note 22.

99. Miss.—Dr. Pepper Bottling Co. v. Gordy, 164 So. 236, 174 Miss. 392—Gulfport Creosoting Co. v. White, 157 So. 86, 171 Miss. 127.

1. N.Y.—Vosburgh v. Lake Shore & M. S. R. Co., 94 N.Y. 374, 46 Am. R. 148—Devlin v. Smith, 89 N.Y. 470, 42 Am.R. 311.
39 C.J. p 428 note 76.

2. Tex.—Magnolia Petroleum Co. v.

rule applies under an employers' liability act.[3] Conversely, an employer has a duty to remedy or remove a defect or danger within a reasonable time after acquiring knowledge of it,[4] and he is liable for injuries caused by a failure to remedy defects of which he was notified or had knowledge or could have discovered in the exercise of ordinary care.[5]

The right to a reasonable time within which to make reasonable repairs is not involved where the defect is in a machine or appliance constructed by the employer himself,[6] where the employer is charged with a specific act of negligence in placing an obstruction in a position likely to cause injury,[7] or where the defect would have been earlier discovered if a custom established by the employer had been adhered to.[8] Also the rule does not apply where an employer with knowledge of the defective condition of an appliance or apparatus nevertheless orders an employee to continue work thereon.[9]

§ 242. Inspection by Public Authorities

An official inspection and test of the employer's place of work, machinery, or appliances by a public official, pursuant to a statute therefor, do not relieve the employer from the duty of making further tests or from liability for negligence in respect thereto.

An official inspection and test of the employer's place of work, machinery, or appliances by a public official or officials, pursuant to a statute providing therefor, do not necessarily relieve the employer from the duty, with respect an employee, of making further tests.[10] The fact that appliances or machinery have not been condemned,[11] or that notice of defects therein has not been given to the employer, by a statutory inspector,[12] is not conclusive on the question whether such machinery or appliances are safe and does not relieve the master from the duty of safeguarding such apparatus as required by statute, and the fact that a factory inspector has approved machinery or appliances does not relieve the employer from liability for negligence in respect thereof.[13]

A contractor who arranges with the owner of a ferryboat to transport his workmen to and from their place of work has been held entitled to rely on a certificate of the boat's seaworthiness provided by United States authorities charged with the duty of inspection and responsible for the release of the vessel for service, unless notice of its unseaworthiness is brought home to the contractor.[14]

§ 243. Operation and Effect

An employer may be relieved from liability for injuries to an employee resulting from defects not disclosed by a proper test and inspection.

In the absence of a statute to the contrary, where machinery or appliances have been carefully tested and found to be in good condition, the master may not be liable for injuries resulting from defects which were not disclosed by such a test.[15] However, in order to excuse him from liability it must appear not only that the inspector was competent, but also that the inspection was a reasonably careful one,[16] and a master, by having appliances inspected to determine whether they are safe and fit for a certain use, does not relieve himself from responsibility to a servant who, acting under orders, devotes them to a use totally different from that with respect to which such inspection was made.[17]

If, in doing the work of keeping the working place safe, the employer creates a more dangerous condition than ordinarily exists, it may not be held, as a matter of law, that the employer is not negligent.[18]

Studdard, Civ.App., 83 S.W.2d 1047, error dismissed.
39 C.J. p 428 note 77.

3. Ala.—U. S. Rolling Stock Co. v. Weir, 11 So. 436, 96 Ala. 396.

4. Mo.—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336 Mo. 316.

5. N.C.—O'Brien v. Parks Cramer Co., 145 S.E. 684, 196 N.C. 359.

6. Ind.—Indianapolis Abattoir Co. v. Neidlinger, 92 N.E. 169, 174 Ind. 400.

7. Okl.—Missouri, O. & G. R. Co. v. Miller, 145 P. 367, 45 Okl. 173.

8. Mo.—Reynolds v. Al. G. Barnes Amusement Co., 253 S.W. 140, 214 Mo.App. 391.

9. Mo.—Stubbs v. American Press, Mo.App., 254 S.W. 105, certiorari quashed State ex rel. American Press v. Allen, Sup., 256 S.W. 1049.
39 C.J. p 429 note 82.

10. Wash.—Noelle v. Hoquiam Lumber & Shingle Co., 92 P. 372, 47 Wash. 519.
39 C.J. p 429 note 84.

11. Tex.—Lancaster v. Allen, Civ. App., 207 S.W. 984.

12. Or.—Hill v. Saugestad, 98 P. 524, 53 Or. 178, 22 L.R.A.,N.S., 634.
39 C.J. p 429 note 86.

13. Pa.—Booth v. Stokes, 88 A. 490, 241 Pa. 349.
39 C.J. p 430 note 87.

14. N.Y.—Kuhn v. P. J. Carlin Const. Co., 8 N.E.2d 300, 274 N.Y. 118, reargument denied and remittitur amended 14 N.E.2d 204, 277 N.Y. 651.

15. N.Y.—Young v. Mason Stable Co., 86 N.E. 15, 193 N.Y. 188, 127 Am.S.R. 939, 21 L.R.A.,N.S., 592.
39 C.J. p 430 note 88.
Inspection to discover latent defects see supra § 238.

16. U.S.—Jupollo Public Service Co. v. Grant, C.C.A.N.C., 42 F.2d 18.
39 C.J. p 430 note 89.

17. Ohio.—Stewart v. Toledo Bridge Co., 15 Ohio Cir.Ct. 601, 8 Ohio Cir. Dec. 454.

18. Mo.—Spina v. Union Biscuit Co., App., 299 S.W. 136.

5. Knowledge by Master of Defect or Danger

§ 244. In General

The master's liability for injuries to a servant arising from defects in the place for work, or in the machinery or appliances, is dependent on his knowledge, actual or constructive, of such defects.

The master's liability for injuries to a servant arising from defects in the place for work, or in the machinery or appliances, is dependent on his knowledge, actual or constructive, of such defects. If he knew or should have known, by the exercise of reasonable care and diligence, of their existence, he is liable, since negligent ignorance is equivalent to knowledge,[19] and an employer chargeable with knowledge has the duty to warn his servant of dangers and to provide reasonable means of avoiding them.[20] On the other hand, actual or constructive knowledge of the danger or defect is essential in order to establish the employer's liability for negligence;[21] the dangerous condition must be shown to have existed for a sufficient time to permit its discovery and correction by the use of ordinary care,[22] and if the employer had no knowledge of the de-

19. Ark.—Scott-Burr Stores Corporation v. Foster, 122 S.W.2d 165, 197 Ark. 232—Baldwin v. Dickinson, 100 S.W.2d 968, 193 Ark. 1179—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056.

Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.

Iowa.—Degner v. Anderson, 239 N.W. 790, 213 Iowa 588.

Ky.—Helton v. Gunn Coal Mining Co., 79 S.W.2d 695, 258 Ky. 168—Hall v. Proctor Coal Co., 34 S.W.2d 425, 236 Ky. 813—**Corpus Juris quoted in** Gibralter Coal Mining Co. v. Nalley, 283 S.W. 416, 418, 214 Ky. 431.

Mo.—Craven v. Halpin-Boyle Const. Co., App., 15 S.W.2d 853—Walker v. Mitchell Clay Mfg. Co., App., 291 S.W. 180.

N.H.—Ireland v. E. J. Pinney, Inc., 18 A.2d 750, 91 N.H. 323—Dubuc v. Amoskeag Industries, 15 A.2d 867, 91 N.H. 173.

N.C.—Fowler v. Carolina Cross Arm & Conduit Co., 133 S.E. 188, 192 N.C. 14—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791.

Ohio.—Akron, C. & Y. Ry. Co. v. Whittaker, 166 N.E. 694, 31 Ohio App. 507.

R.I.—Faltinali v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 438.

S.C.—**Corpus Juris quoted in** Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 311, 195 S.C. 213—**Corpus Juris cited in** Tuttle v. Hanckel, 183 S.E. 484, 487, 179 S.C. 60—Maddox v. Steel Heddle Mfg. Co., 147 S.E. 327, 149 S.C. 284.

S.D.—**Corpus Juris quoted in** Koenekamp v. Picasso, 249 N.W. 749, 750, 61 S.D. 456.

39 C.J. p 430 note 92.

Anticipating result

Where employer was charged with the knowledge of defective condition of locomotive, and was charged with knowledge, that any prudent men would have possessed, that the use of such engine would probably result in injury to those using it, the employer was chargeable with knowledge that some injury might result even though it could not foresee the precise injury that did occur, and under the circumstances there could be no issue as to defendant's anticipating results of its use.—Galveston, H. & S. A. Ry. Co. v. Ford, Tex.Civ.App., 275 S.W. 463.

Sending employee into trap

Employer, with knowledge of danger, sending employee unwittingly into trap, is liable for resulting injury.—Gallespie v. Thornton, 117 So. 714, 95 Fla. 5.

Watchfulness

Master's duty includes reasonable watchfulness for continued safety of work place against danger, of which it knows or ought to know, however created; and, if there was sufficient occasion for anticipation of danger to work place and for adoption of precautionary measures, failure to take reasonable precautions establishes master's fault.—Burke v. Boston & M. R. R., 184 A. 574, 82 N.H. 350.

20. Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.

Ky.—Combs v. W. P. Sullivan & Co., 114 S.W.2d 754, 272 Ky. 522.

Warning and instructing servant generally see infra §§ 284–306.

Defective brake

Employers, who had notice of defective condition of brake on machine operated by employee, were charged with attending to and adjusting brake.—Tatum v. Torson, 36 S.W.2d 939, 327 Mo. 275.

Noxious fumes

An employer has the duty to warn his employees and furnish them with means to avoid inhaling fumes which are poisonous or injurious to their health, the duty being based on an assumption of the master's greater knowledge of the dangers incident to the employment.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.

Slippery floors

N.H.—Jacques v. Cote, 14 A.2d 649, 91 N.H. 107.

N.Y.—Yaconi v. Brady & Gioe, 158 N.E. 876, 246 N.Y. 300, certiorari denied 48 S.Ct. 421, 276 U.S. 636, 72 L.Ed. 744.

Unsuitable safety shoes

A railway company was bound to use reasonable care to furnish laborer in its shops reasonably safe and proper safety shoes which would not cause him injury, particularly where he wore such shoes at express direction of, and was fitted by, company's employees, with knowledge, imputed to company from its physician's physical examination of such laborer, that his feet were in such condition that such shoes could not be safely worn by him.—Palmer v. Great Northern Ry. Co., Mont., 170 P.2d 768.

21. U.S.—St. Joseph Lead Co. v. Jones, C.C.A.Mo., 70 F.2d 475.

Cal.—Matthews v. Southern Pac. Co., 59 P.2d 220, 15 Cal.App.2d 36.

Ga.—Bowers v. Louisville & N. R. Co., 127 S.E. 667, 33 Ga.App. 692.

Ky.—Louisville & N. R. Co. v. Parsons, 281 S.W. 519, 213 Ky. 432.

Miss.—Eagle Cotton Oil Co. v. Sollie, 187 So. 506, 185 Miss. 475—Gulf, M. & N. R. Co. v. Brown, 108 So. 503, 143 Miss. 890.

Mo.—Hoover v. Baldwin, App., 111 S.W.2d 1011—Creighton v. Missouri Pac. R. Co., 66 S.W.2d 980, 229 Mo. App. 325, certiorari denied Missouri Pac. R. Co. v. Creighton, 55 S.Ct. 70, 293 U.S. 558, 79 L.Ed. 659.

N.C.—Hill v. Moseley, 17 S.E.2d 676, 220 N.C. 485.

Tenn.—Moore Coal Co. v. Brown, 64 S.W.2d 3, 166 Tenn. 516.

Va.—Stevens v. Mirakian, 12 S.E.2d 780, 177 Va. 123.

22. Cal.—Matthews v. Southern Pac. Co., 59 P.2d 220, 15 Cal.App.2d 36.

Okl.—Jamison v. Reda Pump Co., 126 P.2d 71, 190 Okl. 593.

Prior explosions

Fact that gauge had exploded ten

fects in such working place or in the machinery or appliances and his ignorance was not the result of want of due care he is not liable.[23]

Animals. The rule of nonliability of the owner of a domestic animal for injuries resulting from a vicious propensity of which the owner has no knowledge or notice has been applied in an action for injuries to a servant.[24]

Under statute. The fact that a liability is imposed on the master by statute for negligence of his agents or employees does not affect the rule that he is not liable for injuries to his servant caused by defects in machinery, appliances, or place of work of which he has neither actual nor constructive knowledge.[25] However, constructive knowledge will suffice,[26] and if the master has failed to comply with the mandatory requirements of a statute with respect to machinery or appliances, or place for work, the master will be liable for injuries resulting therefrom regardless of his knowledge.[27] Under some statutes the master is deemed to have knowledge of defects and this presumption stands as prima facie evidence of knowledge,[28] and in some cases the statute imposes the duty on the master of knowing the condition of his premises in respect of dangerous elements.[29]

§ 245. Structural Defects

Where the defect in an appliance or building is shown to be structural and is of such a character as to render it unsafe, it may be inferred that the employer was aware of the defect, and an employee who has been injured by such an appliance need not show that the master knew that it was defective.

Where the defect in an appliance or building is shown to be structural and is of such a character as to render it unsafe, it may be inferred that the employer was aware of the defect, and an employee

times warranted inference that employer had notice of tendency, with duty to consider probable fright to employee; and the fact that no injury, as from fright, had followed explosions of steam gauge, did not prove that employer exercised care by disregarding future probability.—Chiuchiolo v. New England Wholesale Tailors, 150 A. 540, 84 N.H. 329.

23. Del.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr. 389.
Ga.—Bryan v. Moncrief Furnace Co., 149 S.E. 424, 40 Ga.App. 239.
Ky.—Leatherwood Lumber Co. v. Hall, 66 S.W.2d 76, 252 Ky. 119—**Corpus Juris quoted in** Gibralter Coal Mining Co. v. Nalley, 283 S. W. 416, 418, 214 Ky. 431.
Miss.—Dravo Corporation v. Copeland, 199 So. 769, 190 Miss. 269—City of Tupelo v. Payne, 168 So. 283, 176 Miss. 245.
Mo.—Schneider v. Pevely Dairy Co., 40 S.W.2d 647, 328 Mo. 801—Tatum v. Torson, 86 S.W.2d 939, 327 Mo. 275—Bello v. Steuever, 44 S.W.2d 619—Williams v. Terminal Railroad Ass'n of St. Louis, App., 20 S. W.2d 584—Probst v. Heisinger Motor Co., App., 16 S.W.2d 1005.
N.Y.—Schmidt v. Carper, 61 N.Y.S. 2d 185, 270 App.Div. 411.
N.C.—Highfill v. Washington Mills Co., 174 S.E. 457, 206 N.C. 582—Craver v. Franklin Cotton Mills, 145 S.E. 570, 196 N.C. 330.
Or.—McPherson v. Oregon Trunk Ry., 102 P.2d 726, 165 Or. 1.
S.C.—**Corpus Juris cited in** Tuttle v. Hanckel, 183 S.E. 484, 487, 179 S.C. 60.
S.D.—**Corpus Juris quoted in** Koenekamp v. Picasso, 249 N.W. 749, 750, 61 S.D. 456.
Wash.—Cummins v. Dufault, 139 P. 2d 308, 18 Wash.2d 274.
39 C.J. p 432 note 93.

Defective chair
An employer was not liable, as for breach of common-law duty to servant, for injuries to waitress resulting from collapse of defective chair in which waitress sat, in absence of showing that employer knew, or by exercise of ordinary care should have known, of chair's defective condition.—Stevens v. Mirakian, 12 S.E.2d 780, 177 Va. 123.

Slippery floor
Tex.—Eisenberg v. Great Atlantic & Pacific Tea Co., Civ.App., 169 S. W.2d 221.

Use of goggles
Master was not negligent in failure to furnish goggles, where there was no showing that employer knew or had reason to believe that there was peril, protection against which required use of goggles.—Kolbow v. Haynes-Langenburg Mfg. Co., 3 S.W. 2d 226, 318 Mo. 1243.

24. N.C.—Banks v. Maxwell, 171 S. E. 70, 205 N.C. 233—Rector v. Southern Coal Co., 136 S.E. 113, 192 N.C. 804.
Necessity of knowledge of vicious propensity generally see Animals § 148 a.

25. N.Y.—Kern v. Welz, 136 N.Y. S. 412, 151 App.Div. 432.
39 C.J. p 433 note 94.

Defective tool
Statute prohibiting use of any tool known to be cracked or otherwise defective was inapplicable in action against employers for injury suffered by employee when struck in eye by steel chip from hammer, in absence of evidence that employers knew of any defect in hammer.—Dally v. Ward, 26 N.W.2d 217, 223 Minn. 265.

Federal Employers' Liability Act
Actual or constructive knowledge of defective condition of car causing employee's death is necessary to render railroad liable for negligence under Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–59.—Wilson v. Missouri Pac. R. Co., 5 S.W.2d 19, 319 Mo. 308, certiorari denied 49 S.Ct. 25, 278 U.S. 622, 73 L.Ed. 543—39 C.J. p 433 note 94 [b] (3).

Under a safe-place statute the employer has been held not to be liable unless he had notice, either actual or constructive, of the defect.—Dierkes v. White Paving Co., 283 N.W. 446, 229 Wis. 660—Pettric v. Gridley Dairy Co., 232 N.W. 595, 202 Wis. 289.

26. Ind.—N. O. Nelson Mfg. Corporation v. Dickson, 53 N.E.2d 640, 114 Ind.App. 668.

27. Mo.—Smith v. Harbison-Walker Refractories Co., 100 S.W.2d 909, 340 Mo. 389.
39 C.J. p 434 note 95.

Under Federal Safety Appliance Acts
(1) In general.—Baldwin v. Sears, 91 S.W.2d 266, 192 Ark. 257.
(2) Boiler Inspection Act.
U.S.—McCarthy v. Pennsylvania R. Co., C.C.A.Ind., 156 F.2d 877.
Ga.—Seaboard Air Line Ry. Co. v. D'Avignon, 153 S.E. 96, 41 Ga.App. 263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441.
Mo.—Fryer v. St. Louis-San Francisco Ry. Co., 63 S.W.2d 47, 333 Mo. 740.

28. U.S.—Pittsburgh & W. R. Co. v. Thompson, Ohio, 82 F. 720, 27 C. C.A. 333.
39 C.J. p 434 note 96.

29. Pa.—Fritz v. Elk Tanning Co., 101 A. 958, 258 Pa. 180.
39 C.J. p 434 note 97.

who has been injured by such an appliance need not show that the master knew that it was defective.[30] This is particularly true where it is shown that the master himself constructed the defective appliance or structure.[31] If, however, a particular structure, machine, or appliance is without fault as to plan, mode of construction, and character of material, so that it was originally sufficient for all the purposes for which it was designed, and if the master has it afterward properly inspected by competent and skillful men, who exercise ordinary diligence to keep it in repair, the master has discharged his duty, and is not liable to a servant for an injury received by reason of a defect therein, unless it is shown that he had knowledge of such defect, and failed to remedy it.[32]

§ 246. Hidden or Improbable Dangers

A master is not liable for the result of hidden or improbable dangers, of which he did not have, and by the exercise of reasonable care could not obtain, knowledge.

While there is a presumption that a master having knowledge of defects in the place for work, or in the machinery or appliances, has knowledge of the consequences which may result therefrom,[33] and will be held liable for injuries to a servant resulting from known or probable dangers,[34] he is not liable for the result of hidden or improbable dangers, of which he did not have, and by the exercise of reasonable care could not obtain, knowledge.[35] Facts which do not necessarily operate to charge a servant with notice of the danger arising from the defective condition of machinery may operate to charge the master with such notice, since the obligation on each arising from the mere knowledge of the defective condition is not alike.[36]

§ 247. Latent Defects

An employer is not responsible for injuries to his servant resulting from latent dangers or defects unless he knew or should have known thereof.

A master is not liable for injuries resulting to a servant by reason of latent defects of which he was ignorant and which could not be discovered in the exercise of reasonable care and diligence.[37] An employer, however, has been presumed to be familiar with both latent and patent dangers ordinarily accompanying the business in which he is engaged,[38] and he has been held to be liable where he knew or should have known of the danger or defect despite its latent character.[39]

§ 248. Constructive Notice

a. In general
b. Time and opportunity for discovery
c. Notice to servants or agents

a. In General

Generally speaking an employer is chargeable with notice or constructive knowledge of any danger or defect which he should have discovered by the exercise of reasonable care and diligence.

In order to render a master liable for an injury to a servant caused by a defect in the place of work or in the machinery or appliances, it is not necessary that the master should have had actual knowledge of the defect; it is sufficient to show that he could have discovered it by the exercise of reasonable, proper, and ordinary care and diligence in performing the duties of master.[40] Thus an employer, ir-

30. Colo.—Jackson v. Yak Mining, Milling & Tunnel Co., 119 P. 1058, 51 Colo. 551.
39 C.J. p 434 note 98.

31. Ga.—**Corpus Juris cited in** Southern Ry. Co. v. Cowan, 183 S.E. 331, 336, 52 Ga.App. 360.
39 C.J. p 434 note 99.

32. N.Y.—Warner v. Erie R. Co., 39 N.Y. 468.
39 C.J. p 434 note 1.

33. U.S.—Dailey v. New York, N. H. & H. R. R. Co., C.C.N.Y., 167 F. 592, reversed on other grounds 179 F. 289, 102 C.C.A. 660.
39 C.J. p 435 note 2.

Duty to foresee
Where due care required that workman be protected from dangerous machinery, whether employer should have foreseen that particular accident might happen is immaterial in determining its liability for servant's injury in machinery.—Wemyss v. Wyoming Valley Paper Co., 172 A. 438, 86 N.H. 587.

34. Mo.—Hysell v. Swift, 78 Mo. App. 39.
39 C.J. p 435 note 3.

35. Ark.—McEachin v. Yarborough, 74 S.W.2d 228, 189 Ark. 434.
39 C.J. p 435 note 4.

Improbable danger not shown
In action for personal injuries sustained by employee by reason of working out of bolt, causing door to fall open and permit plaintiff's hand to come in contact with gear, such situation was not such an unusual or unknown danger that defendant could not have anticipated it.—Ducas v. International Cotton Mills, 130 A. 156, 81 N.H. 543.

36. Ill.—Union Show Case Co. v. Blindauer, 75 Ill.App. 358.

37. U.S.—Lowden v. Hanson, C.C.A. Minn., 134 F.2d 348.
Ark.—Manhattan Const. Co. v. Atkisson, 88 S.W.2d 819, 191 Ark. 920.
Mo.—Stoutimore v. Atchison, T. & S. F. Ry. Co., 92 S.W.2d 658, 338 Mo. 463—Schneider v. Pevely Dairy Co., 40 S.W.2d 647, 328 Mo. 301.
N.C.—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112.
Pa.—Martin v. Wentz, 21 A.2d 444, 145 Pa.Super. 424.
39 C.J. p 435 note 6.

38. Or.—Voshall v. Northern Pacific Terminal Co., 240 P. 891, 116 Or. 237.
Pa.—Baumgartner v. Pennsylvania R. Co., 140 A. 622, 292 Pa. 106.

Defective machine
Knowledge of defective condition of machine is imputable to master, even if defect is latent.—Hopkins v. Southern Cotton Oil Co., 142 S.E. 615, 144 S.C. 395.

39. Pa.—Lemon v. Lonker, 97 Pa. Super. 240.

40. U.S.—Maty v. Grasselli Chemical Co., C.C.A.N.J., 98 F.2d 877—

respective of his actual ignorance thereof, is chargeable with constructive knowledge of the usual and ordinary dangers and hazards to which he exposes his employees,[41] and is bound to know the normal condition of his premises,[42] the nature and properties of substances used in his business,[43] and the operation of familiar physical laws on such substances.[44] The employer is also chargeable with notice of dangers or defects where information with respect thereto is available through general scientific knowledge.[45] On the other hand, an employer is chargeable with constructive knowledge of only such conditions as would be revealed by the exercise of ordinary care.[46]

b. Time and Opportunity for Discovery

The presence of sufficient time and opportunity for discovery of a danger or defect ordinarily charges an employer with constructive knowledge of its existence.

A master will be charged with constructive knowledge of a defect which has existed such a length of time that it must have been discovered in the exercise of ordinary and reasonable care and diligence on his part,[47] but where the time during which a danger or defect exists is too short to charge the employer with notice none will be imputed to him.[48] How long a defect must have existed in order to charge the master with notice is generally a question of fact, depending on the facts and circumstances of the particular case.[49] Where

Davidson v. Riley, C.C.A.Miss., 17 F.2d 345.
Ga.—Martin v. Tubize-Chatillon Corporation, 17 S.E.2d 915, 66 Ga.App. 481.
Kan.—Sunderland v. Steanson, 252 P. 221, 122 Kan. 250.
Miss.—Odom v. Walker, 11 So.2d 452, 193 Miss. 862.
Mo.—Cooper v. Atchison, T. & S. F. R. Co., 148 S.W.2d 773, 347 Mo. 555, certiorari denied Atchison, T. & S. F. R. Co. v. Cooper, 61 S.Ct. 1116—Kemper v. Gluck, 39 S.W.2d 330, certiorari denied Gluck v. Kemper, 52 S.Ct. 29, 284 U.S. 649, 76 L.Ed. 551—Cleveland v. Laclede-Christy Clay Products Co., App., 113 S.W.2d 1065—Jenkins v. Kansas City, 91 S.W.2d 98, 230 Mo. App. 337—Riggs v. Meeker Co., App., 8 S.W.2d 1035—Crowley v. American Car & Foundry Co., App., 279 S.W. 212.
N.H.—Stone v. Howe, 32 A.2d 484, 92 N.H. 425—Musgrave v. Great Falls Mfg. Co., 169 A. 583, 86 N.H. 375.
S.D.—Turbeville v. Avery Lumber Co., 152 S.E. 439, 155 S.C. 202.
Tex.—Louisiana Ry. & Nav. Co. of Texas v. Eldridge, Civ.App., 293 S.W. 901—Galveston, H. & S. A. Ry. Co. v. Ford, Civ.App., 275 S. W. 463.
Wash.—Etel v. Grubb, 288 P. 931, 157 Wash. 311.
39 C.J. p 436 note 7.

"Constructive knowledge" has been defined as that knowledge chargeable to the master from an opportunity, by the exercise of ordinary care, to know.—Louisville, E. & St. L. Consolidated R. Co. v. Miller, 40 N.E. 116, 140 Ind. 685—Zeller v. Vinardi, 85 N.E. 378, 380, 42 Ind.App. 232.

Facts held not to show constructive notice
Mo.—Kolbow v. Haynes-Langenburg Mfg. Co., 8 S.W.2d 226, 318 Mo. 1243.
39 C.J. p 436 note 7 [f].

Household appliance
Master furnishing a domestic servant with a household appliance with which to work was presumed to know any danger which a reasonable inspection of the appliance would have disclosed.—Adlam v. Konvalinka, 50 N.E.2d 535, 291 N. Y. 40.

Knowledge of business
Master is presumed to have such knowledge of his business as persons specially acquainted with subjects involved.—Baumgartner v. Pennsylvania R. Co., 140 A. 622, 292 Pa. 106.

41. Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.
Mass.—Cotoia v. Seale, 27 N.E.2d 706, 306 Mass. 101.

42. Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.

Condition of box covers
Employer was chargeable with knowledge of condition of covers on agitator boxes of machine in paper mill, and of unsuitableness of covers, where covers were installed by employer's mechanics.—Wemyss v. Wyoming Valley Paper Co., 172 A. 438, 86 N.H. 587.

43. Ga.—Peerless Woolen Mills v. Pharr, 40 S.E.2d 106, 74 Ga.App. 459—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.
Pa.—Baumgartner v. Pennsylvania R. Co., 140 A. 622, 292 Pa. 106.

Character of dust in sandblasting room
Pa.—Rebel v. Standard Sanitary Mfg. Co., 16 A.2d 534, 340 Pa. 313.

Dangerous chemicals
Rule that master is charged with knowledge of ordinary dangers to which employee is exposed and with knowledge of constituents and nature of substances used in his business was applicable to use of dangerous chemicals.—American Sand & Gravel Co. v. Reeves, 151 So. 477, 168 Miss. 608.

44. Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.

Poisonous character of fumes or dust given off by substances used in his business is within the constructive knowledge of an employer. —Middlebrooks v. Atlanta Metallic Casket Co., supra.

45. U.S.—Boal v. Electric Storage Battery Co., C.C.A.Pa., 98 F.2d 815.
N.H.—Musgrave v. Great Falls Mfg. Co., 169 A. 583, 86 N.H. 375.

46. Mo.—Wilson v. Missouri Pac. R. Co., 5 S.W.2d 19, 319 Mo. 308, certiorari denied 49 S.Ct. 25, 278 U.S. 622, 73 L.Ed. 543.

Rare disease
The rare and unusual disease of echinococcosis, which beef washer employed in packing plant contracted, and for which he sought recovery from his employer under the common law, did not constitute such danger of employment as to require the employer to anticipate or to know, with a reasonable degree of certainty, of its existence in the packing plant.—Russo v. Swift & Co., 286 N.W. 291, 136 Neb. 406.

47. U.S.—Grand Trunk Western R. Co. v. Boylen, C.C.A.Ind., 81 F. 2d 91.
Ark.—Safeway Stores v. Phelps, 145 S.W.2d 337, 201 Ark. 495.
Mo.—Hicks v. Missouri Pac. R. Co., 40 S.W.2d 512, 225 Mo.App. 1053, 226 Mo.App. 362—Zein v. Pickel Stone Co., App., 273 S.W. 165.
39 C.J. p 437 note 8.

48. Miss.—Gulfport Creosoting Co. v. White, 157 So. 86, 171 Miss. 127.
N.Y.—Macauley v. Barr & Lane, 34 N.Y.S.2d 429, 264 App.Div. 741.
Okl.—Jamison v. Reda Pump Co., 126 P.2d 71, 190 Okl. 593.

49. R.I.—Faltinali v. Great Atlantic & Pacific Tea Co., 182 A. 605, 55 R.I. 438.
39 C.J. p 438 note 9.

there is nothing to show the length of time during which a danger or defect existed, ordinarily the employer may not be charged with constructive knowledge of its existence.[50]

c. Notice to Servants or Agents

Notice to a servant or agent who stands in the position of a vice principal and who is charged with those duties of the master, the neglect of which occasions the injury of which complaint is made, is notice to the master.

A master is not charged with constructive notice by reason of a notice to a fellow servant,[51] or to a servant or agent who has no control or supervision over the place of work, machinery, or appliances, the defective condition of which is the cause of the injury complained of,[52] but notice to a servant or agent who stands in the position of a vice principal, and who is charged with those duties of the master, the neglect of which occasioned the injury, is notice to the master,[53] and if such representative, instead of performing his duties himself, enjoins their performance on another servant in his employ, he is chargeable with whatever notice such servant has or ought to have while performing such duties.[54] It is immaterial whether notice, had by one acting in the capacity of a vice principal, was given by the injured employee or some one else.[55] Notice to an employer's prior vice principal of defects is notice to the employer, although the vice principal did not occupy such position at the time of the accident.[56] It has also been held that if, during the existence of the relation of principal and agent, the agent receives notice in his private capacity of facts not then concerning his principal, but afterward acts for the principal in a matter in which such facts are material, the notice so received by the agent should be imputed to the principal.[57]

Mines. The rule that notice to a servant or agent who stands in the position of a vice principal and who is charged with those duties of the master, the neglect of which occasioned the injury, is notice to the master, applies to the owners and operators of mines.[58] In some jurisdictions a mine examiner[59] or a mine boss[60] whom the operator is required to employ by statute and on whom the statute imposes certain duties is the vice principal of the operator, and notice to him is notice to the operator. In other jurisdictions it has been held that a mine boss[61] or a fire boss[62] appointed pursuant to statute who does not perform any duties except those imposed on him by statute does not represent the master and that notice to him of defects will not bind the master.

50. Or.—Waller v. Northern Pac. Terminal Co. of Or., 166 P.2d 488, certiorari denied 67 S.Ct. 45, 329 U.S. 742, 91 L.Ed. 640.

51. N.Y.—Scano v. Turner, 204 N.Y.S. 372, 209 App.Div. 41.
39 C.J. p 438 note 10.

52. U.S.—Schilling v. Delaware & H. R. Corporation, C.C.A.N.Y., 114 F.2d 69.
N.Y.—Kuhn v. P. J. Carlin Const. Co., 8 N.E.2d 300, 274 N.Y. 118, reargument denied and remittitur amended 14 N.E.2d 204, 277 N.Y. 651.
39 C.J. p 438 note 11.

53. Ark.—Producers Gravel & Sand Co. v. Jones, 126 S.W.2d 99, 197 Ark. 767.
Idaho.—**Corpus Juris cited in** Claris v. Oregon Short Line R. Co., 33 P.2d 348, 350, 54 Idaho 568.
Miss.—Randolph Lumber Co. v. Minchew, 159 So. 849, 172 Miss. 535.
Mo.—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336 Mo. 316—Guthrie v. Gillespie, 6 S.W.2d 886, 319 Mo. 1137—Mooney v. Monark Gasoline & Oil Co., 298 S.W. 69, 317 Mo. 1255—Marsanick v. Luechtefeld, App., 157 S.W.2d 537.
N.H.—Maltais v. City of Concord, 166 A. 267, 86 N.H. 211.
Or.—Hennig v. Carstens Packing Co., 297 P. 1055, 136 Or. 267—Thompson v. Union Fisherman's Co-op. Packing Co., 235 P. 694, 118 Or. 486, reheard Thompson v. Union Fishermen's Co-op. Packing Co., 246 P. 733, 118 Or. 436.
Va.—Aronovitch v. Ayres, 193 S.E. 524, 169 Va. 308.
39 C.J. p 438 note 12.

Company doctor

Knowledge acquired by railway company's physician in physical examination of applicant for employment to determine his eligibility for job as laborer in company's shops that he had hammer toes, rendering it unsafe for him to wear safety shoes furnished him by company, was imputed to company.—Palmer v. Great Northern Ry. Co., Mont., 170 P. 2d 768.

Foremen

Mo.—Tatum v. Torson, 36 S.W.2d 939, 327 Mo. 275—Williams v. Terminal Railroad Ass'n of St. Louis, App., 20 S.W.2d 584—Hutson v. Missouri Stair Co., App., 296 S.W. 216—Todd v. American Ry. Express Co., 271 S.W. 880, 219 Mo. App. 405—Stuba v. American Car & Foundry Co., App., 270 S.W. 145.

Treasurer

N.H.—Nason v. Lord-Merrow Excelsior Co., 29 A.2d 464, 92 N.H. 251.

54. Ohio.—Wellston Coal Co. v. Smith, 61 N.E. 143, 65 Ohio St. 70, 87 Am.S.R. 547, 55 L.R.A. 99.
39 C.J. p 439 note 13.

55. U.S.—Anderson Lumber Corp. v. Lehto, C.C.A.S.C., 282 F. 485.

56. Wis.—Fleming v. Northern Tissue Paper Mill, 114 N.W. 841, 135 Wis. 157, 15 L.R.A.,N.S., 701.

57. Neb.—Henry v. Omaha Packing Co., 115 N.W. 777, 81 Neb. 237.

58. Pa.—Jaras v. Wright, 106 A. 798, 263 Pa. 486—Ham v. Hudson Coal Co., Com.Pl., 40 Lack.Jur. 61.
39 C.J. p 440 note 17.

Knowledge of danger

In miner's action for injuries sustained when motorman moved loaded coal car from under wheel of which miner was attempting to remove a wedge, mine operator could not escape liability on ground that miner was a volunteer if motorman knew that miner was in a position of danger so that he would likely be injured by movement of car.—High Splint Coal Co. v. Cowans, 155 S.W. 2d 488, 288 Ky. 66.

59. Ill.—Olson v. Kelly Coal Co., 86 N.E. 88, 236 Ill. 502.

60. Ind.—Antioch Coal Co. v. Rockey, 82 N.E. 76, 169 Ind. 247.

61. Pa.—Lineoski v. Susquehanna Coal Co., 27 A. 577, 157 Pa. 153.
39 C.J. p 440 note 20.

62. U.S.—Lehigh Valley Coal Co. v. Calausky, N.Y., 222 F. 664, 138 C.C.A. 188.

6. DANGEROUS OPERATIONS AND IMPROPER OR UNUSUAL USE OR TEST

§ 249. Dangerous Operations

A master is not bound to provide a safe place where the work on which the servant is engaged is such as to render the place where it is done temporarily insecure.

A master is not bound to provide a safe place where the work on which the servant is engaged is such as to render the place where it is done temporarily insecure.[63]

§ 250. —— Making Dangerous Place Safe; Repairs

The rule requiring an employer to furnish his employees with a safe place to work is inapplicable to employees hired to make a dangerous place safe or to effect repairs.

The rule as to the duty of the master with regard to the place of work, machinery, and appliances does not apply to cases in which the work on which the servant is engaged consists of making repairs[64] or to cases in which the employee is engaged in the work of making a dangerous place safe.[65] However, this exception to the general rule that a master must furnish his servant with a safe place to work cannot be relied on by the master when the servant has been injured by reason of a danger not attendant on such work, and in respect of which a duty rested on the master;[66] nor does the exception apply when the employee is engaged at the time of the injury on such work on the order, or under the direction, of the master or his vice principal.[67] Even where an employee is engaged in repair work, a duty rests on the employer to make the place as safe as may reasonably be done in view of the conditions.[68]

§ 251. Improper or Unusual Use or Test

Where the place of work, machinery, or appliance is reasonably safe and suitable for the purpose for which it was intended, a servant cannot hold his master liable for personal injuries resulting from its inappropriate, unauthorized, unnecessary, careless, improper, or unusual use or test.

Where the place of work, machinery, or appliance is reasonably safe and suitable for the purpose for which it was intended, a servant cannot hold his master liable for personal injuries resulting from its inappropriate, unauthorized, unnecessary, careless, improper, or unusual use or test.[69] The law does not exact of the master the extraordinary diligence which would be requisite if it were required that instrumentalities intended for one use should be safe and suitable for every unintended use to which they might casually or unexpectedly be

63. Ill.—Clark v. Liston, 54 Ill.App. 578.
39 C.J. p 440 note 23.

64. Ky.—Hobson v. Turner, 185 S.W.2d 550, 299 Ky. 342.
Mo.—**Corpus Juris cited in** Stone v. Missouri Pac. Ry. Co., 293 S.W. 367, 369.
Tex.—City of Timpson v. Powers, Civ.App., 119 S.W.2d 145.
Va.—Roberts v. Southern Ry. Co., 144 S.E. 863, 151 Va. 815, rehearing denied 145 S.E. 255, 151 Va. 815.
39 C.J. p 440 note 24.

Repairs on viaduct over railroad tracks

Kan.—McCoy v. Atchison, T. & S. F. Ry. Co., 284 P. 417, 129 Kan. 781.

Test of whether place of making minor repairs is safe is whether employer, as reasonably prudent man, could assume that particular employee could safely do particular work at particular place, if he took reasonable care.—Seifferman v. Leach, 138 So. 563, 161 Miss. 853.

Work not connected with repairs

Where plaintiff's employment was not connected with making of repairs causing condition of floor through which plaintiff fell, there was no exception to safe-place rule.—Fisher v. Laclede Gas Light Co., Mo., 81 S.W.2d 770.

65. Ky.—Clover Splint Coal Co. v. Lorenz, 110 S.W.2d 457, 270 Ky. 676—Yeary's Adm'r v. Hignite Coal Co., 102 S.W.2d 19, 267 Ky. 265—Baker v. High Splint Coal Co., 81 S.W.2d 577, 258 Ky. 786—High Splint Coal Co. v. Baker, 57 S.W. 2d 60, 247 Ky. 426.
Mo.—**Corpus Juris cited in** Stone v. Missouri Pac. Ry. Co., 293 S.W. 367, 369.
N.Y.—Kowalsky v. Conreco Co., 190 N.E. 206, 264 N.Y. 125, reargument denied 191 N.E. 620, 264 N.Y. 674.
Tenn.—Moon v. City of Chattanooga, 10 Tenn.App. 82.
39 C.J. p 441 note 25.

Inspector

Railroad, ignorant of presence of wire in journal box packing, was not liable for death of employee, required to inspect box, from cut by wire.—Brewer's Adm'x v. Louisville & N. R. Co., 34 S.W.2d 949, 237 Ky. 71.

66. Ark.—St. Louis, I. M. & S. R. Co. v. Yates, 165 S.W. 282, 111 Ark. 486.
Tex.—Houston & T. C. R. Co. v. Long, Civ.App., 219 S.W. 212.

Cleaning up rubbish

The work of plaintiff in cleaning up rubbish accumulating in building during course of its construction was not work making safe an unsafe place, and hence was not an exception to general rule that master must exercise ordinary care to provide reasonably safe place to work.—State ex rel. Lehrack v. Trimble, 274 S.W. 416, 308 Mo. 597.

67. Ark.—St. Louis, I. M. & S. R. Co. v. Baker, 163 S.W. 152, 110 Ark. 241.

68. Okl.—Champlin Refining Co. of New Mexico v. Huntington, 69 P. 2d 31, 180 Okl. 280.

69. Ark.—St. Louis-San Francisco Ry. Co. v. Rogers, 290 S.W. 74, 172 Ark. 508.
Fla.—Gallespie v. Thornton, 117 So. 714, 95 Fla. 5.
Ky.—Louisville & N. R. Co. v. Parsons, 281 S.W. 519, 213 Ky. 432.
Miss.—Stewart v. Kroger Grocery, etc., Co., 21 So.2d 912, 198 Miss. 371.
Okl.—Beasley v. Bond, 48 P.2d 299, 173 Okl. 355—St. Louis & S. F. Ry. Co. v. Hartless, 241 P. 482, 115 Okl. 38.
Or.—Campbell v. Southern Pac. Co., 250 P. 622, 120 Or. 122.
Tenn.—**Corpus Juris quoted in** Jessie v. Chattanooga Golf and Country Club, 121 S.W.2d 557, 559, 173 Tenn. 536.
39 C.J. p 441 note 28.

applied,[70] and an employer is not chargeable with negligence because he omits to inspect an instrumentality to determine its suitability for such unexpected and unintended uses.[71] The employer is under no duty to guard against improper or unusual methods of use by an employee unless the improper use has, to the knowledge of the employer, become habitual among employees,[72] and the employer's acquiescence in such a secondary use must be shown before he may be held negligent in not furnishing a safe instrumentality for such secondary purpose.[73] When, however, an appliance is improperly used with the knowledge of the master, it makes no difference, as far as his liability for such improper use is concerned, whether or not it was originally built for such purpose;[74] and where a master subjects an appliance to an unusual and uncontemplated service or strain, by reason of which a servant is injured, he may be held liable.[75]

7. Proximate Cause of Injury

§ 252. In General

In order to hold a master liable for injury to a servant alleged to have been caused by defects in the place for work, or in the machinery or appliances, the alleged defects must be shown to have been the proximate cause of the injury.

In order to hold a master liable for injury to a servant alleged to have been caused by defects in the place for work, or in the machinery or appliances, the alleged defects must be shown to have been the proximate cause of the injury,[76] and this is true

70. Ga.—Babcock Bros. Lumber Co. v. Johnson, 48 S.E. 438, 120 Ga. 1030—McClain v. Seaboard Air Line Ry. Co., 129 S.E. 876, 34 Ga. App. 86.

71. Ga.—Babcock Bros. Lumber Co. v. Johnson, 48 S.E. 438, 120 Ga. 1030—McLain v. Seaboard Air Line Ry. Co., 129 S.E. 876, 34 Ga.App. 86.

72. Miss.—Stewart v. Kroger Grocery, etc., Co., 21 So.2d 912, 198 Miss. 371.

73. Wyo.—Chicago, B. & Q. R. Co. v. Murray, 277 P. 703, 40 Wyo. 324.

Forbidden custom

Custom to use box car door handle for purpose not designed could not make railroad liable to switchman, where railroad forbade practice.—Campbell v. Southern Pac. Co., 250 P. 622, 120 Or. 122.

Occasional improper use of appliance, not in pursuance of recognized custom, is not sufficient to render master liable for resulting injuries.—Gallespie v. Thornton, 117 So. 714, 95 Fla. 5.

74. Utah.—**Corpus Juris cited in** Kaumans v. White Star Gas & Oil Co., 63 P.2d 231, 236, 92 Utah 24. 39 C.J. p 442 note 29.

New use directed by employer

Okl.—Beasley v. Bond, 48 P.2d 299, 173 Okl. 355.

Utah.—Kaumans v. White Star Gas & Oil Co., 63 P.2d 231, 92 Utah 24.

75. Fla.—Gallespie v. Thornton, 117 So. 714, 95 Fla. 5.

Mo.—Compton v. Louis Rich Const. Co., 287 S.W. 474, 315 Mo. 1068.

Utah.—**Corpus Juris cited in** Kaumans v. White Star Gas & Oil Co., 63 P.2d 231, 236, 92 Utah 24. 39 C.J. p 442 note 30.

76. U.S.—Phillips Petroleum Co. v. Manning, C.C.A.Ark., 81 F.2d 849—Johns-Manville v. Pocker, C.C.A. Mo., 26 F.2d 204.

Ark.—McNeese v. Raines, 35 S.W.2d 1026, 183 Ark. 320.

Ga.—Fisher v. Georgia Northern Ry. Co., 134 S.E. 827, 35 Ga.App. 733.

Ky.—Hobson v. Turner, 185 S.W.2d 550, 299 Ky. 342—Jessie's Adm'x v. Gulf Refining Co., 121 S.W.2d 909, 275 Ky. 533.

La.—Thomas v. Weil Bros., 128 So. 685, 13 La.App. 684.

Mass.—Sjostedt v. Webster, 28 N.E. 2d 239, 306 Mass. 344.

Miss.—Wilson & Co. v. Holmes, 177 So. 24, 180 Miss. 361.

Mo.—Carlisle v. Tilghmon, 159 S.W. 2d 663—Hunter v. Busy Bee Candy Co., 271 S.W. 800, 307 Mo. 656—Penny v. Southeastern Express Co., App., 35 S.W.2d 940—Koenig v. Heitz, App., 282 S.W. 107—Bushong v. Barrett Co., App., 273 S.W. 761.

N.C.—Hill v. Moseley, 17 S.E.2d 676, 220 N.C. 485.

Okl.—Janow v. Lewis, 172 P.2d 315, 197 Okl. 415.

Or.—Brady v. Oregon Lumber Co., 243 P. 96, 117 Or. 188, 45 A.L.R. 812, rehearing denied 245 P. 732, 118 Or. 15, 45 A.L.R. 812.

Pa.—Rice v. Kring, 165 A. 833, 310 Pa. 550.

Tex.—Harbin v. City of Beaumont, Civ.App., 146 S.W.2d 297, error dismissed, judgment correct—St. Louis Southwestern Ry. Co. of Texas v. Weatherly, Civ.App., 2 S.W.2d 555.

39 C.J. p 442 note 32.

Defective step on pole

In order to recover for negligence of employer in failing to drive step far enough into electric light pole, it was necessary for injured lineman to allege and prove that negligence in that respect caused injuries.—Kramer v. Kansas City Power & Light Co., 279 S.W. 43, 311 Mo. 369.

Insufficient lighting

(1) Where insufficient lighting is not the proximate cause of the injury, the employer may not be held liable therefor on the ground that he failed to furnish sufficient light.—Cain v. Humes-Deal Co., 49 S.W.2d 90, 329 Mo. 1107—Kolbow v. Haynes-Langenburg Mfg. Co., 3 S.W.2d 226, 318 Mo. 1243.

(2) Where it is feasible to furnish light for construction work by employees, dangers in which would ordinarily be discovered with reasonably sufficient light, failure to furnish such light may be the proximate cause of injury.—Gonyea v. Duluth, M. & I. R. Ry. Co., 19 N.W.2d 384, 220 Minn. 225.

Unavoidable accident

If the injury is the result of an unavoidable accident, the master may not be held liable for negligence.

Ark.—Williams Bros. v. Witt, 43 S.W.2d 237, 184 Ark. 606—Booth & Flinn Co. v. Pearsall, 33 S.W.2d 404, 182 Ark. 854.

N.C.—Parks v. Sandford & Brooks, 144 S.E. 364, 196 N.C. 36.

Where employer's negligence was proximate cause of the injury, he may be held liable therefor.

Ark.—Safeway Stores v. Phelps, 145 S.W.2d 337, 201 Ark. 495—F. Keich Mfg. Co. v. Wallace, 286 S.W. 815, 171 Ark. 647.

Fla.—Peninsular Telephone Co. v. Dority, 174 So. 446, 128 Fla. 106—Sutton v. Hancock, 141 So. 532, 105 Fla. 497.

Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga. App. 620.

Ky.—Nugent Sand Co. v. Howard, 11 S.W.2d 985, 227 Ky. 91.

even where the defect arose from the master's failure to comply with the requirements of a statute which imposes on him particular duties for the securing of the safety of the working place, tools, machinery or appliances furnished to its servant,[77] since the master is not liable for violation of the statute unless the particular hazard against which the statute was intended to guard was the cause of the injury.[78] In order to be the proximate result of the unsafe or defective place or appliance, the employee's injury must have been the natural and probable result thereof,[79] and the circumstances must have been such that in the exercise of reasonable care the employer might have anticipated injury to an employee as a result of the unsafe place or appliance,[80] although it is not necessary that the employer should have foreseen the particular injury that did occur,[81] and the employer may be held responsible for any injury to his employee which was a natural or probable consequence of the employer's failure to provide a safe appliance or place to work.[82]

The proximate cause is the dominant, efficient cause without which injury to the employee would not have occurred,[83] and if an instrumentality unrelated to the employer's negligence operated as an independent, intervening cause of the employee's injury, the employer is not liable.[84] The proximate

Mass.—Watkins v. New York, N. H. & H. R. Co., 195 N.E. 888, 290 Mass. 448.

Mo.—Mooney v. Monark Gasoline & Oil Co., 298 S.W. 69, 317 Mo. 1255—Loduca v. St. Louis-San Francisco Ry. Co., 289 S.W. 908, 315 Mo. 331—Baries v. St. Louis Independent Packing Co., App., 46 S.W.2d 952—Bushong v. Barrett Co., App., 273 S.W. 761.

Neb.—Ellis v. Union Pac. R. Co., 19 N.W.2d 641, 146 Neb. 397, opinion adhered to 22 N.W.2d 305, 147 Neb. 18.

N.C.—Ellis v. Durham Herald Co., 145 S.E. 283, 196 N.C. 262—Holeman v. Pensacola Shipbuilding Co., 134 S.E. 647, 192 N.C. 236—Boswell v. Whitehead Hosiery Mills, 132 S. E. 598, 191 N.C. 549—Paderick v. Goldsboro Lumber Co., 130 S.E. 29, 190 N.C. 308.

Okl.—Joy v. Pope, 53 P.2d 683, 175 Okl. 540.

Tenn.—Nashville Bridge Co. v. Hudgins, 137 S.W.2d 327, 23 Tenn.App. 677.

Tex.—El Paso Electric Co. v. Sawyer, Civ.App., 291 S.W. 667, affirmed, Com.App., 298 S.W. 267.

77. U.S.—Atchison, T. & S. F. Ry. Co. v. Toops, Kan., 50 S.Ct. 281, 281 U.S. 351, 74 L.Ed. 896—Anderson v. Baltimore & O. R. Co., C.C.A.N.Y., 89 F.2d 629, certiorari denied Baltimore & O. R. Co. v. Anderson, 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 538—Southern Pac. Co. v. Ralston, C.C.A.Utah, 67 F.2d 958—Wheelock v. Freiwald, C.C.A. Mo., 66 F.2d 694.

Ark.—St. Louis-San Francisco Ry. Co. v. Childers, 124 S.W.2d 964, 197 Ark. 527.

Fla.—Taton v. Seaboard Air Line R. Co., 113 So. 671, 93 Fla. 1046.

Ga.—Tankersley v. Southern Ry. Co., 35 S.E.2d 522, 73 Ga.App. 88—Powell v. Waters, 190 S.E. 615, 55 Ga. App. 307.

Mo.—Clark v. Chicago, R. I. & P. Ry. Co., 300 S.W. 758, 318 Mo. 453.

N.C.—Ford v. Atlantic Coast Line R. Co., 182 S.E. 717, 209 N.C. 108—Southwell v. Atlantic Coast Line R. Co., 131 S.E. 670, 191 N.C. 153, reversed on other grounds 48 S. Ct. 25, 275 U.S. 64, 72 L.Ed. 157.

N.Y.—Stern v. Great Island Corporation, 293 N.Y.S. 608, 250 App.Div. 115.

39 C.J. p 445 note 33.

Failure to employ foreman

The alleged violation by mine owner of his statutory duty to employ a foreman did not give rise to cause of action by employee for injuries sustained when rock in mine fell on him, where a careful inspection by a foreman would not have disclosed an unsafe condition, since negligence or violation of a statutory duty is not actionable unless it is the proximate cause of the injury.—Powell v. Mitchell, 196 S.E. 153, 120 W.Va. 9.

78. N.Y.—Balser v. Gammel, 12 N.Y. S.2d 312, 257 App.Div. 85, appeal denied 14 N.Y.S.2d 496, 257 App. Div. 1044, affirmed 31 N.E.2d 923, 284 N.Y. 797.

79. U.S.—New York, C. & St. L. R. Co. v. Boulden, C.C.A.Ind., 63 F.2d 917, certiorari denied 53 S.Ct. 785, 289 U.S. 753, 77 L.Ed. 1498.

Ga.—Blair v. Fulton Bakery, 24 S.E. 2d 598, 68 Ga.App. 879.

Mo.—Wack v. F. E. Schoenberg Mfg. Co., 53 S.W.2d 28, 331 Mo. 197.

80. Ark.—Alaska Lumber Co. v. Spurlin, 37 S.W.2d 82, 183 Ark. 576.

Ga.—Blair v. Fulton Bakery, 24 S.E. 2d 598, 68 Ga.App. 879.

Tex.—Railway Express Agency v. Robinson, Civ.App., 162 S.W.2d 984, error refused.

Bare possibility

In order to warrant recovery under Federal Employers' Liability Act, the carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events, bare possibility not being sufficient, and events too remote to require reasonable provision need not be anticipated.—Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 22 Neb. 18.

81. U.S.—Smith v. Shevlin-Hixon Co., C.C.A.Or., 157 F.2d 51—Maty v. Grasselli Chemical Co., C.C.A.N.J., 98 F.2d 877.

Ind.—Baltimore & O. R. Co. v. Ranier, 149 N.E. 361, 84 Ind.App. 542.

Miss.—Veney v. Samuels, 107 So. 517, 142 Miss. 476.

Mo.—Wack v. F. E. Schoenberg Mfg. Co., 53 S.W.2d 28, 331 Mo. 197—Stegemann v. Heil Packing Co., App., 2 S.W.2d 169—McGowan v. American Mfg. Co., App., 270 S. W. 423.

N.H.—Bagley v. Small, 26 A.2d 23, 92 N.H. 107.

N.C.—O'Brien v. Parks Cramer Co., 145 S.E. 684, 196 N.C. 359.

Cancer

A storage battery manufacturer in whose plant a "pickler" developed cancer as alleged result of sulphuric acid mist in the air could not excuse its negligence in failing to take proper precautionary measures by alleging that various expert witnesses could not recall any other case in which inhalation of sulphuric acid fumes actually resulted in cancer.—Boal v. Electric Storage Battery Co., C.C.A.Pa., 98 F.2d 815.

82. Mo.—Struckel v. Busch Sulzer Bros. Diesel Engine Co., App., 300 S.W. 993—Maier v. American Car & Foundry Co., App., 296 S.W. 212.

83. N.C.—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791.

84. N.C.—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791.

Okl.—Janow v. Lewis, 172 P.2d 315, 197 Okl. 415.

Act of third person in knocking ironing board off hook on door was an intervening efficient cause as re-

cause of injury must be the efficient cause which set in motion the chain of circumstances leading to the injury;[85] if the negligence complained of merely furnished a condition by which the injury was possible and a subsequent independent act caused the injury, the existence of such condition is not the proximate cause of the injury.[86] It is not necessary that the proximate cause have been immediate in time, and the fact that the injury occurred some time after the negligent act may be immaterial,[87] and in seeking the proximate cause of an employee's injury one must look to conditions as they actually were at the time of injury and not as they might have been.[88]

Sole or several causation. The master's negligence need not have been the sole cause of his employee's injury in order to impose liability,[89] and the master may be held responsible where his negligence was a concurring proximate cause of the injury.[90] If the injury would not have occurred but for the unsafe place or appliance which intervened proximately to cause the injury, it constituted one of the proximate concurring causes of the injury no matter what set in motion the train of events culminating in such injury.[91] On the other hand, an employer is not liable for injury to his employee in an accident resulting from any of several causes, where it appears that the employer was responsible for some but not for others.[92]

§ 253. Buildings

A defect in a building for which the employer is responsible must be the proximate cause of his employee's injury or there can be no recovery against him.

Where plaintiff alleges a breach of the employer's duty to furnish him a safe building as a place for work, he can recover only where defects in or about such building are shown to be the proximate cause of the injury.[93] This is true where the defects consist of the master's failure to comply with a statutory requirement in respect of such place of work.[94]

§ 254. Defective or Dangerous Machinery

In order to hold a master liable for injuries to a servant alleged to have been caused by reason of defective machinery or appliances, such defective condition must be shown to have been the proximate cause of the injury.

In order to hold a master liable for injuries to a servant alleged to have been caused by reason of

spected liability of employer for injuries to servant struck by ironing board.—Leavitt v. Stamp, 293 P. 414, 134 Or. 191.

85. Okl.—**Corpus Juris quoted in** Munroe v. Schoenfeld & Hunter Drilling Co., 61 P.2d 1045, 1047, 178 Okl. 149.
Va.—Farmer's Adm'x v. Chesapeake & O. Ry. Co., 131 S.E. 334, 144 Va. 65.
39 C.J. p 445 note 34.

86. U.S.—Anderson v. Baltimore & O. R. Co., C.C.A.N.Y., 89 F.2d 629, certiorari denied Baltimore & O. R. Co. v. Anderson, 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 538.
Ga.—Powell v. Waters, 190 S.E. 615, 55 Ga.App. 307.
Miss.—Wilkie v. West Const. Co. of Tennessee, 16 So.2d 617, 196 Miss. 233.
Okl.—**Corpus Juris quoted in** Munroe v. Schoenfeld & Hunter Drilling Co., 61 P.2d 1045, 1047, 178 Okl. 149.
39 C.J. p 446 note 35.

Operation of defective chute
Employee, sustaining inguinal hernia by heavy lifting in operating coal chute, with knowledge that apron hinges were bent, was held not to have shown injury resulting from employer's negligence.—Bayer v. Chicago, B. & Q. R. Co., 220 N.W. 459, 53 S.D. 116.

87. Wis.—Freeman v. Dells Paper & Pulp Co., 135 N.W. 540, 150 Wis. 93.

88. Va.—Farmer's Adm'x v. Chesapeake & O. Ry. Co., 131 S.E. 334, 144 Va. 65.

89. Ky.—Kelly & Shields v. Miller, 33 S.W.2d 662, 236 Ky. 698.
Mo.—Wack v. F. E. Schoenberg Mfg. Co., 53 S.W.2d 28, 331 Mo. 197.

90. Ky.—Kelly & Shields v. Miller, 33 S.W.2d 662, 236 Ky. 698.
Miss.—Adams v. Hicks, 178 So. 484, 181 Miss. 165—Gulf Refining Co. v. Ferrell, 147 So. 476, 165 Miss. 296.
Mo.—Wack v. F. E. Schoenberg Mfg. Co., 53 S.W.2d 28, 331 Mo. 197—Brackett v. James Black Masonry & Contracting Co., 32 S.W.2d 288, 326 Mo. 387.
Okl.—Beasley v. Bond, 48 P.2d 299, 173 Okl. 355.

Failure to deënergize wire
Power company was not relieved of liability for negligence in action for death of lineman falling against high-powered wire which had not been deënergized, where lineman in falling involuntarily threw up the hand that came in contact with the wire.—Mississippi Power & Light Co. v. Merritt, 12 So.2d 527, 194 Miss. 794.

91. Mo.—Klaber v. Fidelity Bldg. Co., App., 19 S.W.2d 758.

Narrow scaffold held proximate concurring cause of plaintiff's death when he stood up and struck his head against overhanging eaves resulting in loss of balance and fatal fall.—Klaber v. Fidelity Bldg. Co., supra.

92. U.S.—New York Cent. R. Co. v. Ambrose, N.J., 50 S.Ct. 198, 280 U.S. 486, 74 L.Ed. 562.

93. Ark.—Union Compress & Warehouse Co. v. Eason, 104 S.W.2d 459, 193 Ark. 1044.
Me.—Charpentier v. Great Atlantic & Pacific Tea Co., 157 A. 237, 130 Me. 423.
Miss.—Supreme Instruments Corporation v. Lehr, 1 So.2d 242, 190 Miss. 600, sustaining suggestion of error 199 So. 294, 190 Miss. 600.
Mo.—Cain v. Humes-Deal Co., 49 S.W.2d 90, 329 Mo. 1107.
39 C.J. p 446 note 37.

94. Minn.—Golden v. Lerch Bros., 281 N.W. 249, 203 Minn. 211.
39 C.J. p 446 note 38.

Breach of statutory duty to ventilate the place of work so as to preclude gathering of silica dust, from which an employee suffered through particles entering his lungs and causing silicosis, later developing into superimposed tuberculosis, from which he died, imposed liability on a copartnership which had employed decedent for twelve years in such unsafe place of work, but did not impose liability on a successor corporation which had employed the decedent only a short period during which he had little exposure to silica dust, as the breach of the duty to ventilate by the corporation did not cause, or even aggravate, decedent's condition in view of the very short time that he was exposed during the corporation's employment of him.—Golden v. Lerch Bros., Inc., supra.

defective machinery or appliances, such defective condition must be shown to have been the proximate cause of the injury;[95] and, although negligence is alleged in respect of the master's failure to comply with a statute requiring the guarding of machinery for the safety of employees, there can be no recovery for injuries alleged to have been received by reason of noncompliance with such a statute unless a causal connection is shown between such negligence and the injuries complained of.[96] However, an employer may be held liable for injuries sustained by his employee where the injury was proximately caused by dangerous or defective machinery,[97] even though the precise manner of injury could not have been foreseen,[98] and the fact that the master's negligence was combined with another independent intervening cause does not preclude recovery.[99] Moreover, the fact that an employee was injured as a result of his normal reaction to the stimulus of a situation created by defective or dangerous machinery rather than directly by such machinery does not destroy the chain of causation.[1]

§ 255. Railroads

In order to hold a railroad liable for injuries to a servant alleged to have been caused by defects in its structures or equipment, the alleged defects must be shown to have been the proximate cause of the injury.

The general rule, discussed supra § 252, that in order to hold a master liable for injuries to a servant alleged to have been caused by defects in the place of work, or in the machinery or appliances, the alleged defects must be shown to have been the proximate cause of the injury applies to actions against railroads.[2] The injury sustained must be one reasonably to have been foreseen as a natural consequence of the railroad's default in such respect in order to render it liable,[3] and the railroad will not be responsible where an independent intervening agency was the cause of injury.[4] Where, however, the danger or defect for which the railroad is responsible constituted the proximate cause of the injury, liability is imposed,[5] and an employee may recover for injuries proximately caused by the rail-

95. Ind.—Piepho v. Gesse, 18 N.E.2d 468, 106 Ind.App. 450.
Mo.—Stokes v. Springfield Wagon Co., App., 289 S.W. 987.
Tex.—McCann v. Grider, Civ.App., 83 S.W.2d 707, error refused.
39 C.J. p 446 note 39.

Intervening act of servant

Where servant put his hand through opening in front end of boll extractor, to remove stick lodged in a defective screen, and fingers on his hand were amputated when knocked against the saws which were running in extractor, voluntary act of servant in extending his hand and arm into machine while it was in operation constituted independent intervening cause of accident, and negligence of master in permitting machine to be out of repair was not direct or proximate cause of servant's injury.—State ex rel. Boeving v. Cox, 276 S.W. 869, 310 Mo. 367.

96. Kan.—Byland v. E. I. Du Pont de Nemours Powder Co., 144 P. 251, 93 Kan. 288, L.R.A.1915F 1000, rehearing denied 144 P. 282, 93 Kan. 668.
Mo.—Mabe v. Gille Mfg. Co., 271 S.W. 1023, 219 Mo.App. 234.
39 C.J. p 447 note 41, p 407 note 52.

97. Fla.—H. & C. Operating Co. v. Fossum, 176 So. 865, 129 Fla. 480 —Kelly v. Florida Nat. Bldg. Corporation, 172 So. 926, 127 Fla. 180.
Ga.—Walters v. Berry Schools, 151 S.E. 544, 40 Ga.App. 751.
N.C.—Ellis v. Durham Herald Co., 145 S.E. 283, 196 N.C. 262.
Tenn.—Pearson Hardwood Flooring Co. v. Phillips, 120 S.W.2d 973, 22 Tenn.App. 206.
39 C.J. p 446 note 39 [c].

98. N.H.—Nason v. Lord-Merrow Excelsior Co., 29 A.2d 464, 92 N.H. 251.

Probability of harm

Employer could not disclaim liability for injuries to employee while operating an excelsior machine on ground that no reasonable person in position of employer could have been expected to anticipate that circumstances would coincide to cause the accident, since it is sufficient if it appears that negligent act of defendant would probably cause harm to another even though precise manner in which it occurred could not have been foreseen.—Nason v. Lord-Merrow Excelsior Co., supra.

99. Ga.—Walters v. Berry Schools, 151 S.E. 544, 40 Ga.App. 751.
Mo.—Craven v. Halpin-Boyle Const. Co., App., 15 S.W.2d 853—Fishell v. American Press, App., 253 S.W. 508.
Okl.—McDuff v. McFarlin, 95 P.2d 636, 185 Okl. 569.

1. U.S.—Somogyi v. Cincinnati, N. O. & T. P. Ry. Co., C.C.A.Ky., 101 F.2d 480.

Backing into machinery

Where workman, after being struck by pulley from a defective machine, backed into another machine and was knocked to the floor, causal relation between defect and injuries was not destroyed so as to preclude recovery from employer for workman's death.—Somogyi v. Cincinnati, N. O. & T. P. Ry. Co., supra.

2. U.S.—Atlantic Coast Line R. Co. v. Southwell, N.C., 48 S.Ct. 25, 275 U.S. 64, 72 L.Ed. 157—Kreger v Baltimore & O. R. Co., C.C.A.Pa., 25 F.2d 728.
Ga.—Grant v. Atlantic Coast Line R. Co., 147 S.E. 919, 39 Ga.App. 596.
Kan.—Weigand v. Chicago, R. I. & P. Ry. Co., 249 P. 615, 121 Kan. 610.
Ky.—Chesapeake & O. Ry. Co. v. Holbrook, 271 S.W. 583, 208 Ky. 488.
Mass.—O'Brien v. Boston & M. R. R., 164 N.E. 446, 265 Mass. 527.
Mich.—Risk v. Pere Marquette Ry. Co., 219 N.W. 685, 242 Mich. 433.
N.Y.—Popadines v. Davis, 209 N.Y.S. 689, 213 App.Div. 9.
Ohio.—New York, C. & St. L. Ry. Co. v. Wolf, 159 N.E. 861, 26 Ohio App. 292.
Okl.—Atchison, T. & S. F. Ry. Co. v. Ford, 43 P.2d 459, 171 Okl. 516.

Failure of railroad to provide toilet was not proximate cause of injuries to cook for railroad bridge gang tripping into ditch while emptying slop jar.—Panhandle & S. F. Ry. Co. v. Sledge, Tex.Civ.App., 31 S.W.2d 146, affirmed Sledge v. Panhandle & S. F. R. Co., Com.App., 45 S.W.2d 1112.

3. U.S.—Wolfe v. Henwood, C.C.A. Ark., 162 F.2d 998.
Ill.—Knaus v. Southern Ry. Co., 245 Ill.App. 192.

4. U.S.—Wolfe v. Henwood, C.C.A. Ark., 162 F.2d 998.

5. U.S.—Reading Co. v. Geary, C.C.A.Md., 47 F.2d 142, 79 A.L.R. 226,

road's breach of statutory duty in respect of safe appliances even though the employee was not at the time of injury engaged in an operation in which the particular appliance was designed to protect him, as discussed supra §§ *227*, *228*. The railroad may be held responsible where its negligence contributed with other agencies as a concurring proximate cause of the employee's injury.[6]

§ 256. —— Tracks and Roadbeds

In an action against a railroad company for injuries alleged to have been caused by a defective condition of the tracks or roadbed, in order for plaintiff to recover it must be shown that the violation of the employer's duty in that respect was the proximate cause of the injury.

In an action against a railroad company for injuries alleged to have been caused by a defective condition of the tracks or roadbed, in order for plaintiff to recover it must be shown that the violation of the employer's duty in that respect was the proximate cause of the injury,[7] and this is true where the negligence is predicated on a violation of a statute or a municipal ordinance.[8] It is not essential to liability of the railroad that it should have been able to anticipate the precise character of the accident or injury to an employee resulting from defective tracks or roadbed.[9] The company will not be relieved from liability because other causes contributed to the accident,[10] but it will not be liable where the injuries were caused by the intervening wrongful act of a third person.[11]

§ 257. —— Locomotives

In an action by an employee against a railroad company for injuries alleged to be due to the defective condition of a locomotive, recovery can be had only when such defects were the proximate cause of the injury.

In an action by an employee against a railroad company for injuries alleged to be due to the defective condition of a locomotive, recovery can be had only when such defects were the proximate cause of the injury.[12] In the absence of a proximate causal relation between violation and injury, the railroad may not be held liable even though it violated safety regulations imposed by statute[13] or

certiorari denied 51 S.Ct. 492, 283 U.S. 844, 75 L.Ed. 1454.
Ga.—Grant v. Atlantic Coast Line R. Co., 147 S.E. 919, 39 Ga.App. 596.
La.—Taylor v. Texas & N. O. R. Co., App., 22 So.2d 771.
Minn.—McDermott v. Minneapolis, N. & S. Ry. Co., 283 N.W. 116, 204 Minn. 215.
Okl.—Carter v. Chicago, R. I. & P. Ry. Co., 65 P.2d 469, 179 Okl. 292—Chicago, R. I. & P. Ry. Co. v. Brooks, 11 P.2d 142, 155 Okl. 53, certiorari denied Chicago, R. I. & P. R. Co. v. Squire, 52 S.Ct. 502, 286 U.S. 552, 76 L.Ed. 1287.

6. Mich.—Thrall v. Pere Marquette Ry. Co., 229 N.W. 488, 249 Mich. 440.

7. Ga.—Southern Ry. Co. v. Lunsford, 194 S.E. 602, 57 Ga.App. 53, certiorari denied 59 S.Ct. 78, 305 U.S. 619, 83 L.Ed. 395.
Ky.—Louisville & N. R. Co. v. Berry, 272 S.W. 6, 208 Ky. 795.
Mo.—Talbert v. Chicago, R. I. & P. Ry. Co., 284 S.W. 499, 314 Mo. 352.
Tex.—Paris & G. N. Ry. Co. v. Stafford, Com.App., 53 S.W.2d 1019.
39 C.J. p 447 note 42.

Condition rather than cause
Railroad signal maintainer, jumping from railroad track car, stalled at highway crossing by cinders in flangeways of rails, because of imminent collision with motorist who attempted to pass to rear of track car instead of stopping, could not recover from employer for injuries sustained, since presence of cinders in flangeways was a condition rather than cause of accident.—Morse v. Pennsylvania R. Co., C.C.A.N.Y., 74 F.2d 677, certiorari denied 55 S.Ct. 655, 295 U.S. 743, 79 L.Ed. 1689.

Negligence held proximate cause of injury
Wash.—Blessing v. Camas Prairie R. Co., 100 P.2d 416, 3 Wash.2d 266.
39 C.J. p 447 note 42 [a].

8. U.S.—Cogswell v. Chicago & E. I. R. Co., C.C.A.Ill., 153 F.2d 94, reversed on other grounds 66 S. Ct. 1122, 328 U.S. 820, 90 L.Ed. 1601.
N.Y.—Heck v. Lehigh Valley R. Co., 149 N.E. 835, 241 N.Y. 212.
39 C.J. p 448 note 43.

Unbroken chain of causation
The mere fact that with a sound rail opposite the derailer which caused derailing of a car and death of brakeman the accident might not have happened was insufficient to impose liability on railroad under Federal Employers' Liability Act since railroad's negligence must be a link in unbroken chain of reasonably foreseeable events.—Brady v. Southern Ry. Co., N.C., 64 S.Ct. 232, 320 U.S. 476, 88 L.Ed. 239.

9. U.S.—Virginian Ry. Co. v. Staton, C.C.A.W.Va., 84 F.2d 133.

Some injury anticipated
Railroad could not escape liability for brakeman's loss of leg during switching operation when in course of duty brakeman attempted to uncouple freight cars on ground that injury from protruding spikes to brakeman engaged in switching operation was so improbable that it was not reasonable to anticipate it, since liability is not dependent on prevision of precise event, it being sufficient if some injury may be reasonably expected, unless precaution is taken.—Virginian Ry. Co. v. Staton, supra.

10. Ga.—Southern Ry. Co. v. Lunsford, 194 S.E. 602, 57 Ga.App. 53, certiorari denied 59 S.Ct. 78, 305 U. S. 619, 83 L.Ed. 395.
Wash.—Blessing v. Camas Prairie R. Co., 100 P.2d 416, 3 Wash.2d 266.
39 C.J. p 448 note 44.

Clear track
Where breach of obligation to furnish clear track is concurring cause, negligence of another cannot defeat recovery.—Kansas City Southern Ry. Co. v. Nectaux, C.C.A.La., 26 F.2d 317, certiorari denied Kansas City Southern Ry. Co. v. Nectaux, 49 S.Ct. 24, 278 U.S. 621, 73 L.Ed. 542.

11. La.—McDoniel v. Arkansas, L. & G. R. Co., 53 So. 981, 127 La. 757.
39 C.J. p 448 note 45.

12. U.S.—Cogswell v. Chicago & E. I. R. Co., C.C.A.Ill., 153 F.2d 94, reversed on other grounds 66 S.Ct. 1122, 328 U.S. 820, 90 L.Ed. 1601.
Ala.—Louisville & N. R. Co. v. Allen's Adm'r, 78 Ala. 494.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Johns, Civ.App., 286 S.W. 281.
39 C.J. p 448 note 46.

13. U.S.—Anderson v. Baltimore & O. R. Co., C.C.A.N.Y., 89 F.2d 629, certiorari denied Baltimore & O. R. Co. v. Anderson, 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 538—Boghich v. Louisville & N. R. Co., C.C.A.Fla., 26 F.2d 361—Lehigh

administrative rule,[14] and, although the Federal Employers' Liability Act imposes liability for an injury "resulting in whole or in part" from the negligence of a railroad company in failing to maintain its engines or cars in the prescribed condition, it necessarily remains true that the partial negligence must be of the same causal nature as though no other element of negligence were present.[15] However, if the danger or defect in respect of the locomotive was the proximate cause of an employee's injury the railroad may be held responsible for its negligence in such respect,[16] and this is true although other instrumentalities may have concurred with the railroad's negligence in causing the injury.[17]

§ 258. —— Cars

In an action against a railroad company for injuries to an employee caused by allegedly defective cars, the employer is not liable therefor unless the injuries were proximately caused by the alleged defects.

Defects in railroad cars alleged as a cause of injury will not make the employer liable unless such defects were the proximate cause of the injury complained of,[18] and this rule is applicable even in cases where the defect constitutes a violation of the railroad's statutory duty,[19] such as under the Federal Employer's Liability Act.[20] On the other hand, recovery may be had against the railroad company where the injury was caused, wholly or in part, by a defective car.[21]

Federal Safety Appliance Act. In order to sustain a recovery on the ground that a railway company has violated the Federal Safety Appliance Act in respect of the equipment of its cars, there must be a causal relation between the fact of delinquency and the fact of injury, and the act has not changed the rule of law as to proximate cause, or broken down distinctions between the occasion and the cause of injury,[22] and a violation of such statute gives rise to no cause of action in favor of an injured employee unless it occasions or contributes to the injury.[23] On the other hand, where proximate cause is shown the railroad may be held responsible,[24]

Valley R. Co. v. Beltz, C.C.A.N.Y., 10 F.2d 74, certiorari denied 46 S.Ct. 205, 270 U.S. 641, 70 L.Ed. 775.

Ga.—Seaboard Air Line Ry. Co. v. D'Avignon, 153 S.E. 96, 41 Ga.App. 263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441—Watson v. Georgia Southern & F. Ry. Co., 136 S.E. 921, 36 Ga.App. 452, affirmed 146 S.E. 843, 167 Ga. 841, certiorari denied 49 S.Ct. 352, 279 U.S. 857, 73 L.Ed. 998.

Ky.—Louisville & N. R. Co. v. Stephens, 182 S.W.2d 447, 298 Ky. 328.

Va.—Crosswhite v. Southern Ry. Co., 23 S.E.2d 777, 181 Va. 40.

39 C.J. p 448 note 48.

14. U.S.—Raudenbush v. Baltimore & O. R. R., D.C.Pa., 63 F.Supp. 329.

15. U.S.—Seaboard Air Line R. Co. v. Horton, N.C., 36 S.Ct. 180, 233 U.S. 595, 60 L.Ed. 458—Phillips v. Pennsylvania R. Co., C.C.A.Ind., 283 F. 381, certiorari denied 43 S.Ct. 93, 260 U.S. 731, 67 L.Ed. 486.

39 C.J. p 448 note 49.

16. Tex.—Atchison, T. & S. F. R. Co. v. Mills, 116 S.W. 852, 53 Tex.Civ.App. 359.

17. Ill.—O'Brien v. Chicago & N. W. Ry. Co., 68 N.E.2d 638, 329 Ill.App. 382.

Tex.—Atchison, T. & S. F. R. Co. v. Mills, 116 S.W. 852, 53 Tex.Civ.App. 359.

Act of third person

The fact that railroad brakeman, in his natural haste to escape from locomotive engine cab to avoid death or injury from steam, smoke, and embers escaping from boiler, which burst because of engineer's negligence in failing to keep sufficient water therein, knocked fireman from cab, causing his death, did not relieve railroad company from liability therefor on ground that such negligence was not proximate cause of death.—Louisville & N. R. Co. v. Stephens, 182 S.W.2d 447, 298 Ky. 328.

18. Ky.—Louisville & N. R. Co. v. Napier, 3 S.W.2d 1070, 223 Ky. 417, 64 A.L.R. 513—Long Fork Ry. Co. v. Ferrell, 293 S.W. 953, 219 Ky. 458.

N.H.—Saunders v. Boston & M. R. R., 136 A. 264, 82 N.H. 476, 50 A.L.R. 367.

39 C.J. p 448 note 50.

19. Ga.—Powell v. Waters, 190 S.E. 615, 55 Ga.App. 307.

Mich.—Risk v. Pere Marquette Ry. Co., 219 N.W. 685, 242 Mich. 433.

20. Mich.—Risk v. Pere Marquette Ry. Co., supra—Kurtz v. Detroit, T. & I. R. Co., 213 N.W. 169, 238 Mich. 289, certiorari denied 48 S.Ct. 31, 275 U.S. 535, 72 L.Ed. 412.

N.H.—Kenney v. Boston & Maine R. R., 33 A.2d 557, 92 N.H. 495.

Tex.—Payne v. Robey, Com.App., 257 S.W. 873.

21. U.S.—Philadelphia & R. Ry. Co. v. Auchenbach, C.C.A.N.J., 16 F.2d 550, certiorari denied 47 S.Ct. 476, 273 U.S. 761, 71 L.Ed. 878.

Tex.—Fort Worth & D. C. Ry. Co. v. Williams, Civ.App., 275 S.W. 415, certiorari denied 46 S.Ct. 356, 270 U.S. 661, 70 L.Ed. 786.

22. U.S.—Cusson v. Canadian Pac. Ry. Co., C.C.A.Vt., 115 F.2d 430—Vigor v. Chesapeake & O. Ry. Co., C.C.A.Ind., 101 F.2d 865, certiorari denied Chesapeake & O. R. Co. v. Vigor, 59 S.Ct. 1031, 307 U.S. 635, 83 L.Ed. 1517.

Ga.—Powell v. Waters, 190 S.E. 615, 55 Ga.App. 307.

N.D.—Johnson v. Minneapolis, St. P. & S. S. M. Ry. Co., 209 N.W. 786, 54 N.D. 351.

39 C.J. p 448 note 52.

23. U.S.—Chicago, M., St. P. & P. R. R. Co. v. Linehan, C.C.A.Minn., 66 F.2d 373.

39 C.J. p 387 note 60.

24. U.S.—Brady v. Terminal R. Ass'n of St. Louis, Mo., 58 S.Ct. 426, 303 U.S. 10, 82 L.Ed. 614—Swinson v. Chicago, St. P., M. & O. Ry. Co., Minn., 55 S.Ct. 517, 294 U.S. 529, 79 L.Ed. 1041, 96 A.L.R. 1136, rehearing denied 55 S.Ct. 642, 295 U.S. 767, 79 L.Ed. 1708—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515—Cusson v. Canadian Pac. Ry. Co., C.C.A.Vt., 115 F.2d 430—McCarthy v. Palmer, C.C.A.N.Y., 113 F.2d 721, certiorari denied Palmer v. McCarthy, 61 S.Ct. 50, 311 U.S. 680, 85 L.Ed. 438—Hoffman v. New York, N. H. & H. R. Co., C.C.A.N.Y., 74 F.2d 227, certiorari denied New York, N. H. & H. R. Co. v. Hoffman, 55 S.Ct. 513, 294 U.S. 715, 79 L.Ed. 1248—Auchenbach v. Philadelphia & R. Ry. Co., C.C.A.N.J., 8 F.2d 350.

Ill.—Herb v. Pitcairn, 29 N.E.2d 543, 306 Ill.App. 583, reversed on other grounds 36 N.E.2d 555, 377 Ill. 405.

Mo.—Gray v. Kurn, 137 S.W.2d 558, 345 Mo. 1027.

and failure to comply with the act may be held the proximate cause of injury even though at the time thereof the employee was not engaged in an operation in which the safety appliances were specially designed to afford protection.[25]

Provisions of the act relative to automatic coupling devices are construed as requiring that recovery be limited to injuries proximately caused by a failure of cars to couple automatically or by the fact that they were not capable of being uncoupled without necessity of men going between the ends of the cars,[26] and where the defect in the coupling merely creates a condition under which, or an incidental situation in which, the employee is injured, but where the defective coupling is not in itself an efficient cause of the injury, no recovery may be had.[27] On the other hand, the railroad may be held responsible for its negligence in respect of defective couplings where the employee was injured as a proximate result of such defect,[28] as where at the time of the accident he was engaged in the act of coupling or uncoupling,[29] or was injured an instant before beginning[30] or an instant after completing[31] such act. This does not mean, however, that the injured employee must have been engaged in the act of coupling or uncoupling at the time of the accident,[32] since the act extends its protection to employees other than those engaged in coupling

N.C.—Spencer v. Seaboard Air Line Ry. Co., 160 S.E. 763, 201 N.C. 537, certiorari denied Seaboard Air Line Ry. Co. v. Spencer, 52 S.Ct. 312, 285 U.S. 539, 76 L.Ed. 932.

39 C.J. p 448 note 52 [a].

Injury resulting "in part" from violation

In railroad injury cases the concept of proximate cause has been expanded to include a violation of Safety Appliance Act which contributes to injury or death of an employee or has such causal relation thereto that such injury or death results "in part" from violation.—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F.Supp. 154.

25. U.S.—Chesapeake & O. Ry. Co. v. Smith, C.C.A.Ohio, 42 F.2d 111, certiorari denied 51 S.Ct. 32, 282 U.S. 856, 75 L.Ed. 758.

26. U.S.—Vigor v. Chesapeake & O. Ry. Co., C.C.A.Ind., 101 F.2d 865, certiorari denied Chesapeake & O. Ry. Co. v. Vigor, 59 S.Ct. 1031, 307 U.S. 635, 83 L.Ed. 1517.

Mo.—Martin v. St. Louis-San Francisco Ry. Co., 19 S.W.2d 470, 323 Mo. 450—Illinois State Trust Co. v. Missouri Pac. R. Co., 5 S.W.2d 368, 319 Mo. 608, certiorari denied 49 S.Ct. 25, 278 U.S. 623, 73 L.Ed. 544.

Crossing track after completing coupling

If switchman who was crushed between couplers was in clear after cars uncoupled and then went back between cars to get on other side of track and not for any purpose connected with uncoupling cars, defective condition of coupler was not proximate cause of his death.—Truesdale v. Wheelock, 74 S.W.2d 585, 335 Mo. 924.

Remaining in danger

Violation of Safety Appliance Act was not proximate cause of death of switchman remaining in dangerous position after completing coupling.—Peters v. Wabash Ry. Co., 42 S.W.2d 588, 328 Mo. 924, certiorari denied 52 S.Ct. 209, 284 U.S. 686, 76 L.Ed. 580.

27. U.S.—Reetz v. Chicago & E. R. Co., C.C.A.Ohio, 46 F.2d 50.

Mo.—Peters v. Wabash Ry. Co., 42 S.W.2d 588, 328 Mo. 924, certiorari denied 52 S.Ct. 209, 284 U.S. 686, 76 L.Ed. 580.

Inspection trip

Where a freight train parted because of defective couplings, and the conductor made an inspection trip along the stalled train at night to discover the trouble and fell off a bridge and suffered injuries from which he died, the defective coupling created the condition necessitating the trip which ended in the fall but could not be regarded as an efficient or proximate cause of such fall so as to permit recovery for injuries resulting from violation of the safety appliance act provisions relative to couplings.—Reetz v. Chicago & E. R. Co., C.C.A.Ohio, 46 F.2d 50.

28. Ala.—Alabama Great Southern R. Co. v. Cornett, 106 So. 242, 214 Ala. 23.

Natural and probable consequences

In action for personal injuries sustained in coupling cars, instruction not to allow damages for injuries received as sole result of negligent act of defendant's employees in backing engine into cars for purpose of releasing plaintiff was properly refused, inasmuch as such attempted release was a connected and natural consequence flowing from the defects in coupling and attachment which caused plaintiff's original injuries, and damages could not be diminished because such attempted release aggravated plaintiff's injuries.—Fort Worth & D. C. Ry. Co. v. Williams, Tex.Civ.App., 275 S.W. 415, certiorari denied 46 S.Ct. 356, 270 U.S. 661, 70 L.Ed. 786.

29. Minn.—Holz v. Chicago, M., St. P. & P. R. Co., 224 N.W. 241, 176 Minn. 575.

Fall from bridge

Where train broke apart on bridge because of defective coupling, and brakeman, in attempting repairs so that train could proceed, fell from bridge and was injured, defective coupling was proximate cause of injury.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Goneau, Minn., 46 S.Ct. 129, 269 U.S. 406, 70 L.Ed. 335.

30. Mo.—Christy v. Wabash R. Co., 191 S.W. 241, 195 Mo.App. 232, error dismissed Pryor v. Kearney, 38 S.Ct. 424, 246 U.S. 656, 62 L.Ed. 924.

31. Mo.—Crabtree v. Kurn, 173 S.W.2d 851, 351 Mo. 628.

On way out

If switchman who was crushed between couplers went between cars because of defective condition of coupler and was on way out when caught between draw bars, foreman's act in giving kick signal without knowing he was there was merely concurring cause and the defective coupler remained the proximate cause of the accident.—Truesdale v. Wheelock, 74 S.W.2d 585, 335 Mo. 924.

Reasonable time to get out

In action for death of switchman crushed between couplers, defective coupler did not cease to operate as proximate cause of his going between cars until he had reasonable time to get out.—Truesdale v. Wheelock, supra.

32. U.S.—Vigor v. Chesapeake & O. Ry. Co., C.C.A.Ind., 101 F.2d 865, certiorari denied Chesapeake & O. Ry. Co. v. Vigor, 59 S.Ct. 1031, 307 U.S. 635, 83 L.Ed. 1517—Hoffman v. New York, N. H. & H. R. Co., C.C.A.N.Y., 74 F.2d 227, certiorari denied New York, N. H. & H. R. Co. v. Hoffman, 55 S.Ct. 513, 294 U.S. 715, 79 L.Ed. 1248.

Mo.—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005.

or uncoupling operations,[33] and defective couplings may constitute the proximate cause of injury irrespective of the character of work or the physical position of the employee at the time of the accident.[34] The defective condition of the coupler need not be the sole cause of injury in order to render the railroad liable.[35]

§ 259. Mines and Excavations

In order to hold a master liable for injuries alleged to have resulted from dangers or defects in mines or other excavations, it is essential to show that his negligence in such respect was the proximate cause of the injury.

In order to hold a master liable for injuries to a servant employed in a mine or other excavation, alleged to have been caused by defects in the place of work or of the machinery and appliances, the defects alleged must be shown to have been the proximate cause of the injuries,[36] even where the defects consist in the master's failure to comply with a statutory requirement.[37]

C. METHODS OF WORK; RULES AND ORDERS

§ 260. Methods of Work in General

In order to protect his servants, a master must provide, or use ordinary care to provide, reasonably safe and suitable methods of work.

At least where the work is complex and the conditions which may arise are uncertain and obscure,[38] a master must provide, or use ordinary care to provide, methods of work reasonably calculated to secure the safety of his employees,[39] even though the

33. U.S.—Vigor v. Chesapeake & O. Ry. Co., C.C.A.Ind., 101 F.2d 865, certiorari denied Chesapeake & O. Ry. Co. v. Vigor, 59 S.Ct. 1031, 307 U.S. 635, 83 L.Ed. 1517.

Defectively coupled car leaving tracks

Failure of defendant railroad to have its freight car equipped with a coupler as required by Safety Appliance Act so that it was necessary to pull car by chains attached to locomotive was a proximate cause of conductor's fatal injury, occurring when car left the rails.—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F. Supp. 154.

34. Mo.—Kimberling v. Wabash Ry. Co., 85 S.W.2d 736, 337 Mo. 702.

35. U.S.—Philadelphia & R. Ry. Co. v. Auchenbach, C.C.A.N.J., 16 F.2d 550, certiorari denied 47 S.Ct. 476, 273 U.S. 761, 71 L.Ed. 878.

Mo.—Truesdale v. Wheelock, 74 S.W.2d 585, 335 Mo. 924—Alcorn v. Missouri Pac. R. Co., 63 S.W.2d 55, 333 Mo. 828, certiorari denied Missouri Pac. Ry. Co. v. Alcorn, 54 S.Ct. 228, 290 U.S. 701, 78 L.Ed. 602—Peters v. Wabash Ry. Co., 42 S.W.2d 588, 328 Mo. 924, certiorari denied 52 S.Ct. 209, 284 U.S. 686, 76 L.Ed. 580.

36. Ark.—Presley v. Actus Coal Co., 289 S.W. 474, 172 Ark. 498.

Ky.—Davidson v. Perkins-Bowling Coal Co., 74 S.W.2d 1, 255 Ky. 649—Ford v. Perkins-Bowling Coal Corporation, 32 S.W.2d 544, 236 Ky. 36.

39 C.J. p 449 note 53.

Failure to inspect

Failure of master to inspect place where miner received injuries when struck by falling slate was held not proximate cause of miner's injuries where neither miner nor foreman, had they examined wall rock, could have discovered its insecurity of place.—Baker v. High Splint Coal Co., 81 S.W.2d 577, 258 Ky. 786.

Negligence held proximate cause of injury

Mo.—Totten v. Smith Bros., Mo.App., 3 S.W.2d 740.

37. Colo.—Colorado Capital Coal Min. Co. v. Chatfield, 143 P. 1095, 58 Colo. 161.

Ill.—Shomidie v. Brewerton, 234 Ill. App. 173.

39 C.J. p 449 note 54.

38. Miss.—Hammontree v. Cobb Const. Co., 152 So. 279, 168 Miss. 844—Brown v. Coley, 152 So. 61, 168 Miss. 778.

39. U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.

Ala.—Belcher v. Chapman, 7 So.2d 859, 242 Ala. 653.

Ky.—E. J. O'Brien & Co. v. Shelton's Adm'rs, 55 S.W.2d 352, 246 Ky. 537.

Miss.—Masonite Corp. v. Graham, 25 So.2d 322—F. W. Woolworth Co. v. Freeman, 11 So.2d 447, 193 Miss. 838—Federal Compress Co. v. Craig, 7 So.2d 532, 192 Miss. 689—Curry & Turner Const. Co. v. Bryan, 185 So. 256, 184 Miss. 44—Ross v. Louisville & N. R. Co., 172 So. 752, 178 Miss. 69—Gow Co. v. Hunter, 168 So. 264, 175 Miss. 896—McLemore & McArthur v. Rogers, 152 So. 883, 169 Miss. 650.

Mo.—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876—Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 337 Mo. 202—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228—Jacob v. Peerless White Lime Co., 40 S.W.2d 556, 327 Mo. 868—Spencer v. Quincy, O. & K. C. R. Co., 297 S.W. 353, 317 Mo. 492—Ballard v. Kansas City Power & Light Co., 298 S.W. 131, 221 Mo. App. 1116—Welty v. S. H. Kress & Co., 295 S.W. 501, 221 Mo.App. 1089—Orth v. General Const. Co., App., 272 S.W. 1076—Gaska v. American Car & Foundry Co., 105 S.W. 3, 127 Mo.App. 169.

N.H.—Moore v. Morse & Malloy Shoe Co., 197 A. 707, 89 N.H. 332—McLaine v. Head & Dowst Co., 52 A. 545, 71 N.H. 294, 58 L.R.A. 462, 93 Am.S.R. 522.

N.C.—Smith v. Kitchen Lumber Co., 153 S.E. 324, 198 N.C. 736—Maulden v. High Point Bending & Chair Co., 144 S.E. 557, 196 N.C. 122—Jefferson v. City of Raleigh, 140 S.E. 76, 194 N.C. 479—Noble v. John L. Roper Lumber Co., 65 S.E. 622, 151 N.C. 76, 134 Am.S.R. 974.

Okl.—Oklahoma City v. Dobbs, 142 P.2d 369, 193 Okl. 183—McCracken v. Franco-Dominion Development Corporation, 117 P.2d 135, 189 Okl. 354—Kansas City Bridge Co. v. Gravitt, 105 P.2d 767, 188 Okl. 30—Wright v. Clark, 61 P.2d 192, 177 Okl. 628—Joy v. Pope, 53 P.2d 683, 175 Okl. 540—Southern Drilling Co. v. McKee, 42 P.2d 265, 171 Okl. 409.

Or.—Freeman v. Wentworth & Irwin, 7 P.2d 796, 139 Or. 1.

S.C.—Boling v. Woodside Cotton Mills, 171 S.E. 9, 171 S.C. 34.

39 C.J. p 450 note 57, p 451 note 59.

Degree of care required see infra § 265.

Warning servants of changes in methods of work see infra § 293.

Primary and absolute duty

N.C.—Bradford v. English, 130 S.E. 705, 190 N.C. 742.

Establishment and maintenance of method

Where a reasonably safe plan or method is reasonably available and

work is essentially of a hazardous nature.[40] The master must see that the machinery and appliances are used and operated in a reasonable or proper manner,[41] in order to enable the employee to do his work as safely as the hazards incident to employment will permit.[42] Failure to use a reasonably safe method constitutes negligence for which the master is liable to the employee,[43] where such a method is practicable and available.[44] If he selects a method of performing the work which enhances its hazards,[45] or fails to adopt a method or plan customarily and usually employed by reasonably prudent persons engaged in similar work,[46] he is liable for a resulting injury.

The use of the best[47] or safest[48] method is not required; nor is the master required to adopt unreasonable or impracticable means or methods,[49] or those which will not be effective, or would be effective only in rare instances.[50] Although the master

practicable, it is the duty of master to use reasonable care to see to it not only that such a plan or method is established, but that at all times it is actually maintained and observed.—Federal Compress Co. v. Craig, 7 So.2d 532, 192 Miss. 689.

Methods and systems held to show negligence

(1) Method of moving materials.—Nelson v. Heine Boiler Co., 20 S.W.2d 906, 323 Mo. 826.

(2) Methods of doing other work.
Ind.—Union Traction Co. of Indiana v. McCullough, 154 N.E. 41, 87 Ind.App. 27.
N.Y.—Novitz v. Maine, 7 N.E.2d 698, 273 N.Y. 573—Schmitt v. City of New York, 55 N.Y.S.2d 865.
S.C.—Hill v. Broad River Power Co., 148 S.E. 870, 151 S.C. 280.
Tex.—Galveston, H. & S. A. Ry. Co. v. Contois, Civ.App., 279 S.W. 929, affirmed, Com.App., 288 S.W. 154, certiorari denied 47 S.Ct. 659, 274 U.S. 747, 71 L.Ed. 1328.
39 C.J. p 451 note 59 [e].

Methods and systems held safe or not to show negligence

(1) Method of loading materials.—Zitzmann v. Glueck Box Co., Mo., 276 S.W. 23.

(2) Method of cleaning machinery.—Blankenship v. Cox, 162 S.W.2d 918, 204 Ark. 427.

(3) Method of scrubbing floor.—Jutras v. Amoskeag Mfg. Co., 147 A. 753, 84 N.H. 171.

(4) Other methods.
U.S.—Burnett v. Amalgamated Phosphate Co., C.C.A.Fla., 96 F.2d 974, certiorari denied 59 S.Ct. 153, 305 U.S. 647, 83 L.Ed. 418.
Ark.—Howell v. Harvill, 50 S.W.2d 597, 185 Ark. 977.
Mich.—Williams v. Sealander, 286 N.W. 101, 288 Mich. 617.
Mo.—Braziel v. St. Louis Terra Cotta Co., App., 9 S.W.2d 155.
N.Y.—Brick v. Long Island R. Co., 157 N.E. 93, 245 N.Y. 222.
N.C.—Owens v. Hill, 195 S.E. 357, 213 N.C. 202—Key v. Home Chair Co., 156 S.E. 135, 199 N.C. 794—Watson v. Warsaw Const. Co., 150 S.E. 20, 197 N.C. 586.
39 C.J. p 450 note 57 [j].

Decision of employer's managing officers of doubtful questions relating to methods of operation are deemed to be presumptively right, and generally they may not be made foundation of liability to an employee.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.

40. Ky.—Southern Mining Co. v. Lawson, 131 S.W.2d 831, 279 Ky. 659—E. J. O'Brien & Co. v. Shelton's Adm'r, 55 S.W.2d 352, 246 Ky. 537.
Precautions against unusual dangers see infra § 262.

Using explosives
Miss.—Hercules Powder Co. v. Williamson, 110 So. 244, 145 Miss. 172.

Coemployee's failure to follow method

(1) Where an employee is injured through the negligence of a coemployee, by failure to follow the employer's approved method for doing hazardous work, where the fellow-servant rule does not apply, the employer will be liable.—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531.

(2) Fellow-servants see infra §§ 307–356.

41. Ind.—Chesapeake & O. Ry. Co. v. Russo, 163 N.E. 283, 91 Ind.App. 648, certiorari denied 51 S.Ct. 25, 282 U.S. 846, 75 L.Ed. 750.
N.H.—Demers v. Becker, 23 A.2d 375, 91 N.H. 519.

General and special orders

(1) Characteristic elements of employer's duty to see that instrumentalities are safely used are general orders, issued for guidance of servants, and particular orders with reference to details of work during its progress.—Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 337 Mo. 202.

(2) Orders generally see infra §§ 278–283.

42. Me.—Millett v. Maine Cent. R. Co., 146 A. 903, 128 Me. 314.

43. Ind.—Republic Iron & Steel Co. v. Ohler, 68 N.E. 901, 161 Ind. 393.
Miss.—Hercules Powder Co. v. Williamson, 110 So. 244, 145 Miss. 172.
Mo.—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 699, 81 L.Ed. 876—Grandstaff v. Wabash Ry. Co., App., 71 S.W.2d 174.
N.C.—Bradford v. English, 130 S.E. 705, 190 N.C. 742.
39 C.J. p 453 note 63.

Excessive hours of employment
The employer may be liable where overexertion due to excessive hours of employment exacted by employer caused or contributed to accidental injury.—Casualty Reciprocal Exchange v. Sutfin, 166 P.2d 434, 196 Okl. 567.

44. Ky.—E. J. O'Brien & Co. v. Shelton's Adm'r, 55 S.W.2d 352, 246 Ky. 537.
Mo.—Spencer v. Quincy, O. & K. C. R. Co., 297 S.W. 353, 317 Mo. 492.

45. Ark.—McEachin & McEachin Const. Co. v. Burks, 75 S.W.2d 794, 189 Ark. 947.
Ky.—Southern Mining Co. v. Lawson, 131 S.W.2d 831, 279 Ky. 659—E. J. O'Brien & Co. v. Shelton's Adm'r, 55 S.W.2d 352, 246 Ky. 537.
Miss.—Hercules Powder Co. v. Williamson, 110 So. 244, 145 Miss. 172.
39 C.J. p 451 note 59 [c].

46. Ky.—Southern Mining Co. v. Lawson, 131 S.W.2d 831, 279 Ky. 659—E. J. O'Brien & Co. v. Shelton's Adm'r, 55 S.W.2d 352, 246 Ky. 537.
N.C.—Street v. Erskine-Ramsey Coal Co., 145 S.E. 11, 196 N.C. 178.
Customary methods generally see infra § 267.

47. Mo.—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228—Welty v. S. H. Kress & Co., 295 S.W. 501, 221 Mo.App. 1089.

48. Mo.—Welty v. S. H. Kress & Co., supra.
Tex.—Galveston, H. & S. A. Ry. Co. v. Contois, Civ.App., 279 S.W. 929, affirmed, Com.App., 288 S.W. 154, certiorari denied 47 S.Ct. 659, 274 U.S. 747, 71 L.Ed. 1328.

49. Miss.—Hammontree v. Cobb Const. Co., 152 So. 279, 168 Miss. 844.

50. Miss.—Hammontree v. Cobb Const. Co., supra.

must properly plan, coördinate, and supervise the work,[51] the law does not require him to oversee and supervise the details of the work,[52] and he is not an insurer of the safety of the manner in which he directs the work to be done.[53]

Employee's use of own judgment. An employer supplying suitable tools and fellow servants is not liable for an injury sustained by an employee using his own judgment as to the method of work;[54] and, where an employee is allowed to exercise his own judgment as to how the work should be done, he may recover against the master only if the injury resulted from some omission or defect on the latter's part, of a kind from which injury might be expected.[55]

Youthful and inexperienced servants. A master may not prescribe methods of work for youthful servants, which, while reasonably safe for adults, would be fraught with unnecessary danger to youthful servants.[56]

§ 261. —— Operation of Railroads

a. In general
b. Duty to employees riding, or seeking to ride, on trains or cars
c. Collisions

a. In General

In order to protect its employees, a railroad company must adopt methods commensurate with the dangers involved. In special circumstances, a high rate of speed may constitute negligence.

While railroad employees are presumed to look out for themselves[57] and must look out for passing trains,[58] railroad companies must adopt such methods and regulations to protect their employees as are commensurate with the dangers involved in the operation of railroads,[59] although, in the absence of

51. S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213—Weatherford v. Fiske-Carter Const. Co., 189 S.E. 224, 182 S.C. 294—Boling v. Woodside Cotton Mills, 171 S.E. 9, 171 S.C. 34.

Reasonable care
U.S.—Aqua System v. Kodakoski, C. C.A.Canal Zone, 88 F.2d 395.
Mo.—Meyer v. Johnson, 30 S.W.2d 641, 224 Mo.App. 565.

52. Ark.—Arkansas Power & Light Co. v. Dutton, 140 S.W.2d 689, 200 Ark. 761.
Okl.—Joy v. Pope, 53 P.2d 683, 175 Okl. 540.
39 C.J. p 451 note 58.
Supervision generally see infra § 320.

53. Mo.—Meyer v. Johnson, 30 S. W.2d 641, 224 Mo.App. 565.

54. N.C.—Austin v. Walter J. Bryson Paving Co., 156 S.E. 773, 200 N.C. 213—Merritt v. Charlotte Pipe & Foundry Co., 155 S.E. 873, 199 N.C. 775.

55. N.C.—Allen v. Brown Bros. Lumber Co., 107 S.E. 310, 181 N.C. 505.

56. Mo.—Timmerman v. Frankel, 157 S.W. 1051, 172 Mo.App. 174.
39 C.J. p 453 note 64.
Care required as to youthful or inexperienced servants generally see supra § 185.

57. Kan.—Griffith v. Atchison, T. & S. F. Ry. Co., 295 P. 687, 132 Kan. 282.
Wyo.—Hartung v. Union Pac. R. Co., 247 P. 1071, 35 Wyo. 188.

Primary duty
Wyo.—Hartung v. Union Pac. R. Co., supra.

Railroad's lack of care
While a railroad company has a right to assume that its employees will look out for their own safety against all dangers naturally incident to their work, it has no right to expect them to protect themselves against injuries which are due to the company's failure to exercise ordinary care for their safety.—Froman v. Chesapeake & O. Ry. Co., 138 S.E. 658, 148 Va. 148.

58. Mass.—Hanley v. Boston & M. R. R., 190 N.E. 501, 286 Mass. 390, certiorari denied Boston & M. R. R. v. Hanley, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690—Murphy v. Boston & M. R. R., 190 N.E. 501, 286 Mass. 390, certiorari denied Boston & M. R. R. v. Murphy, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690.

59. U.S.—Terminal R. Ass'n of St. Louis v. Schorb, C.C.A.Mo., 151 F.2d 361, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.
Ala.—Louisville & N. R. Co. v. Hall, 135 So. 466, 223 Ala. 338, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L.Ed. 560.
Ind.—Chesapeake & O. Ry. Co. v. Russo, 163 N.E. 283, 91 Ind.App. 648, certiorari denied 51 S.Ct. 25, 282 U.S. 846, 75 L.Ed. 750.
Ky.—Louisville & N. R. Co. v. Bryant's Adm'r, 285 S.W. 245, 215 Ky. 401.
Mo.—Case v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 1069, certiorari denied St. Louis-San Francisco Ry. Co. v. Case, 51 S.Ct. 107, 282 U.S. 893, 75 L.Ed. 787—Hughes v. Mississippi River & B. T. Ry., 274 S.W. 703, 309 Mo. 560.
Tenn.—Cincinnati, N. O. & T. P. Ry. Co. v. Frady, 139 S.W.2d 417, 24 Tenn.App. 38.
39 C.J. p 453 note 66.

Reasonable care
S.C.—Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 158 S.C. 194, certiorari denied Atlantic Coast Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.

"Spotting" car
Ark.—Missouri Pac. R. Co. v. Skipper, 298 S.W. 849, 174 Ark. 1083, certiorari denied 48 S.Ct. 322, 276 U.S. 629, 72 L.Ed. 740.

Switching operations
U.S.—Kensey v. Central R. Co. of New Jersey, C.C.A.N.J., 68 F.2d 562, certiorari denied 54 S.Ct. 561, 291 U.S. 684, 78 L.Ed. 1071.
Ala.—Mobile & O. R. Co. v. Williams, 121 So. 722, 219 Ala. 238—Atlantic Coast Line R. Co. v. Russell, 111 So. 753, 215 Ala. 600.
Ky.—Louisville & N. R. Co. v. Wingo's Adm'x, 281 S.W. 170, 213 Ky. 336.
La.—Houpy v. Morgan's Louisiana & T. R. & S. S. Co., 119 So. 750, 10 La.App. 100.
Mo.—Shaw v. Chicago & A. R. Co., 282 S.W. 416, 314 Mo. 123.
N.J.—Noon v. Delaware, L. & W. R. Co., 144 A. 590, 105 N.J.Law 431.

Superior's agreement to look out for safety
(1) Railroad would be liable for employee's injuries, if yardmaster directing his work agreed to look out for his safety and negligently failed to do so.—Reed v. Terminal R. Ass'n of St. Louis, Mo., 62 S.W.2d 747.

(2) State lookout statute was held not involved in action under federal Employers' Liability Act for death of freight conductor, struck by switched car; lack of federal law requiring warning was held not to affect action for death of freight conductor, based on negligence after discovery of peril.—Missouri Pac. R. Co. v. Skipper, 298 S.W. 849, 174 Ark.

specific statutory requirements, a railroad discharges its full duties to its employees in adopting and using standard railroad methods or systems.[60] Violation of a known railroad custom has been said to constitute negligence,[61] although it has also been declared not strictly accurate to say that every violation of a custom having the force of a rule is negligence, such violations not necessarily constituting negligence as a matter of law.[62]

The failure of a railroad engineer to respond to an unauthorized[63] or unexpected[64] flag stop signal does not in itself constitute negligence, but the company will be responsible for the disregard of such a signal when the presence of a flagman at a particular point should have been anticipated;[65] likewise, an engineer's failure to obey, as required by the company's rules and common prudence, a brakeman's signal to stop the train constitutes negligence rendering the company liable.[66]

The mere use of a single track or of tracks interchangeably for trains going in either direction does not constitute negligence,[67] although it imposes on the railroad company the necessity of taking greater precautions in respect of their employees.[68] The company will be liable for injuries resulting from its failure to notify an employee of a change

1083, certiorari denied 48 S.Ct. 322, 276 U.S. 629, 72 L.Ed. 740.

Methods or regulations in use held to show negligence

(1) Generally.

Ark.—Kansas City Southern Ry. Co. v. Brock, 98 S.W.2d 949, 193 Ark. 210.

Ill.—Popp v. Terminal R. Ass'n of St. Louis, 45 N.E.2d 298, 316 Ill. App. 670.

Ind.—Chicago & E. I. Ry. Co. v. Wright, 166 N.E. 778, 89 Ind.App. 634.

Miss.—Ross v. Louisville & N. R. Co., 172, So. 752, 178 Miss. 69.

Mo.—Joice v. Missouri-Kansas-Texas R. Co., 189 S.W.2d 568, 354 Mo. 439, 161 A.L.R. 383—Mrazek v. Terminal R. Ass'n of St. Louis, 111 S.W. 2d 26, 341 Mo. 1054, certiorari denied Terminal R. Ass'n of St. Louis, v. Mrazek, 58 S.Ct. 760, 303 U.S. 656, 82 L.Ed. 1116.

S.C.—Geddings v. Atlantic Coast Line R. Co., 75 S.E. 284, 91 S.C. 477.

(2) Running a railway train at night without a headlight.

Ill.—Baltimore & O. S. W. R. Co. v. Alsop, 71 Ill.App. 54, affirmed 52 N.E. 253, 176 Ill. 471.

Mo.—Kippenbrock v. Wabash R. Co., 194 S.W. 50, 270 Mo. 479.

(3) Operating interurban car at night without signal lights required by rule of company.—Humphreys v. East St. Louis & Suburban Ry. Co., 253 Ill.App. 450.

Methods or regulations in use held not to show negligence

(1) Generally.

U.S.—Pennsylvania R. Co. v. Brubaker, C.C.A.Ohio, 31 F.2d 939.

Conn.—Wells v. New York, N. H. & H. R. Co., 128 A. 700, 102 Conn. 361.

Ky.—Webber's Adm'x v. Louisville & N. R. Co., 87 S.W.2d 348, 261 Ky. 257.

La.—Harris v. Yazoo & M. V. R. Co., App., 183 So. 108.

Mo.—Coble v. St. Louis-San Francisco Ry. Co., 38 S.W.2d 1031—Morton v. Alton R. Co., App., 118 S.W.2d 59.

N.Y.—Kawacz v. Delaware, L. & W. R. Co., 181 N.E. 87, 259 N.Y. 166, reargument denied 191 N.E. 513, 264 N.Y. 459, certiorari denied 53 S.Ct. 121, 287 U.S. 659, 77 L.Ed. 569—Buffinton v. Boston & M. R. R., 226 N.Y.S. 302, 222 App.Div. 315, motion granted Buffington v. Boston & M. R. R., 164 N.E. 566, 249 N.Y. 514.

Tex.—Texas & P. Ry. Co. v. Rampy, Civ.App., 71 S.W.2d 387, error dismissed.

Wis.—Dretzka v. Chicago & N. W. Ry. Co., 256 N.W. 703, 216 Wis. 111.

39 C.J. p 453 note 66 [k].

(2) Operation of locomotive backwards.

Ky.—Hollifield's Adm'x v. Louisville & N. R. Co., 16 S.W.2d 472, 229 Ky. 16.

N.Y.—D'Aurio v. Long Island R. Co., 148 N.E. 333, 240 N.Y. 241.

Wis.—Lind v. Chicago, M., St. P. & P. Ry. Co., 256 N.W. 705, 216 Wis. 405.

(3) Method of loading rails.—Chesapeake & O. Ry. Co. v. Lilly, 188 S.W.2d 105, 300 Ky. 100.

60. U.S.—Kemmerer v. Reading Co., C.C.A.Pa., 16 F.2d 924, certiorari denied 47 S.Ct. 586, 274 U.S. 740, 71 L.Ed. 1320.

N.C.—Potter v. Atlantic Coast Line R. Co., 147 S.E. 698, 197 N.C. 17.

Or.—Adams v. Corvallis & E. R. Co., 152 P. 504, 78 Or. 117.

Tex.—Johnson v. Wichita Valley Ry. Co., Civ.App., 104 S.W.2d 128.

Fact that train was equipped with automatic couplers did not relieve railway of liability for engineer's negligence causing death of brakeman manually lifting coupling.—Chicago, R. I. & P. Ry. Co. v. Calloway, 291 P. 111, 145 Okl. 84, certiorari denied 51 S.Ct. 179, 282 U.S. 894, 75 L.Ed. 788.

System not used by others

Opinions of witnesses, in action against railroad company, that a system of warnings could and should have been employed are not sufficient to charge company with negligence in failing to use it, in the absence of evidence that it was actually used on other railroads.—Reading Co. v. Haldeman, C.C.A.N.J., 20 F.2d 53, certiorari denied Haldeman v. Reading Co., 48 S.Ct. 119, 275 U.S. 560, 72 L.Ed. 426.

Assuming safety of chemical

Railroad conforming to procedure of other railroads and purchasing from a reliable manufacturer a compound, for use in water, in general use by those engaged in similar business, had right to assume that compound could be safely used.—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied Clay v. Mobile & O. R. Co., 51 S.Ct. 24, 282 U.S. 844, 75 L.Ed. 749.

61. Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, 16 Cal.2d 460.

Requiring knowledge of fellow employee's whereabouts before cars on which he is riding are coupled.—Showalter v. Western Pac. R. Co., supra.

62. Mo.—Case v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 1069, certiorari denied St. Louis-San Francisco Ry. Co. v. Case, 51 S.Ct. 107, 282 U.S. 893, 75 L.Ed. 787.

63. Minn.—McGillivray v. Great Northern R. Co., 176 N.W. 200, 145 Minn. 51.

64. N.Y.—Rock v. New York Cent. & H. R. R. Co., 105 N.E. 796, 212 N.Y. 112, reargument denied 106 N.E. 1042, 212 N.Y. 609.

39 C.J. p 454 note 71.

65. Mo.—Monk v. Wabash R. Co., 150 S.W. 1083, 166 Mo.App. 692.

39 C.J. p 454 note 72.

66. S.C.—Gillis v. Atlantic Coast Line R. Co., 179 S.E. 62, 175 S.C. 223, certiorari denied Atlantic Coast Line R. Co. v. Gillis, 55 S. Ct. 545, 294 U.S. 718, 79 L.Ed. 1251.

67. N.Y.—Smith v. Delaware & H. Co., 237 N.Y.S. 297, 227 App.Div. 269.

39 C.J. p 454 note 73.

68. U.S.—Southern R. Co. v. McGuin, Va., 240 F. 649, 153 C.C.A. 447.

in the direction of traffic on a particular track;[69] but the latter principle has been held not applicable to a crossing flagman to whom a suitable signal of an approaching train has been given,[70] or to an experienced trackman who knew that the blockage of the regular track would probably require the use of another.[71] The company may likewise be liable for injuries resulting from its failure to notify employees of its intention to run a train past the point where a work train, with its crew, was located.[72] An accident is not actionable simply because a train is run as a double-header, and the reason why it is so run is immaterial in an action by an employee for injuries.[73]

In the absence of special circumstances, those in charge of trains have been held to owe no duty to fellow employees working on or near tracks to protect them from injury.[74] Under other authority, a railroad's responsibility for an accident to an employee on its track depends, not on whether the engineer did all that might possibly have been done to avoid the accident, but on whether he used the appliances at his command with the promptness expected of a prudent and skillful man in his situation.[75]

The failure of a helper on the footboard of a switch engine to see an employee in front of the engine in time to avoid a collision has been held not negligence;[76] nor can negligence be predicated on his choice of a wrong means to avoid injury in an emergency.[77]

Speed. In the absence of statutory regulations or special circumstances imposing a duty as to the speed of a train at the time and place of an accident, a railroad may run a train at any speed it sees fit,[78] although a high rate of speed may become negligence in particular circumstances,[79] as where the track is in a defective or weakened condition,[80] or where excessive speed is used in switching operations.[81]

Wanton misconduct in running down an employee

69. N.Y.—Smith v. Delaware & H. Co., 237 N.Y.S. 297, 227 App.Div. 269—Sacco v. Delaware & H. Co., 210 N.Y.S. 668, 213 App.Div. 471, judgment affirmed 150 N.E. 553, 241 N.Y. 556, certiorari denied 46 S.Ct. 484, 271 U.S. 669, 70 L.Ed. 1142.
39 C.J. p 455 note 75.

70. N.J.—Cyphers v. Erie R. Co., 166 A. 342, 110 N.J.Law 405.

71. Pa.—Amoroso v. Baltimore & O. R. Co., 157 A. 463, 305 Pa. 195.

72. U.S.—Mumma v. Reading Co., C.C.A.Pa., 146 F.2d 215.

73. Ky.—Louisville & N. R. Co. v. Keiffer, 113 S.W. 433, 132 Ky. 419.

74. Mass.—Hanley v. Boston & M. R. R., 190 N.E. 501, 286 Mass. 390, certiorari denied Boston & M. R. R. v. Hanley, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690—Murphy v. Boston & M. R. R., 190 N.E. 501, 286 Mass. 390, certiorari denied Boston & M. R. R. v. Murphy, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690.

Flagman
Mo.—Voorhees v. Chicago, R. I. & P. Ry. Co., 30 S.W.2d 22, 325 Mo. 835, 70 A.L.R. 1106.

75. La.—Woods v. Longville Lumber Co., 74 So. 990, 141 La. 267.

76. Kan.—Ryan v. Atchison, T. & S. F. Ry. Co., 293 P. 763, 131 Kan. 706, certiorari denied 51 S.Ct. 648, 283 U.S. 855, 75 L.Ed. 1462.

77. Kan.—Ryan v. Atchison, T. & S. F. Ry. Co., supra.

78. U.S.—Chicago, M., St. P. & P. R. Co. v. Kane, C.C.A.Mont., 33 F.2d 866, certiorari denied 50 S.Ct. 37, 280 U.S. 588, 74 L.Ed. 637.
Ala.—Southern Ry. Co. v. Melton, 198 So. 588, 240 Ala. 244.
N.C.—Owens v. Southern Ry. Co., 145 S.E. 560, 196 N.C. 307.
39 C.J. p 453 note 66 [k] (7), p 454 note 68.

Reasonable speed not required
Ky.—Nelson's Adm'x v. Southern Ry. Co., 194 S.W.2d 518, 302 Ky. 243.

Open or thinly populated country
Rapid speed in open country is not independent ground of negligence.
Iowa.—Hamilton v. Chicago, B. & Q. R. Co., 234 N.W. 810, 211 Iowa 924.
Neb.—Omaha & R. V. R. Co. v. Krayenbuhl, 67 N.W. 447, 48 Neb. 553.
N.Y.—O'Brien v. Erie R. Co., 103 N.E. 895, 210 N.Y. 96.
Wyo.—Hartung v. Union Pac. R. Co., 247 P. 1071, 35 Wyo. 188.

Speed violating city ordinance
Recovery for death of railroad employee struck by train cannot be based merely on operation at speed violating city ordinance.—Brundege v. Chicago, B. & Q. R. Co., 245 Ill. App. 440.

79. U.S.—Chicago, M., St. P. & P. R. Co. v. Kane, C.C.A.Mont., 33 F.2d 866, certiorari denied 50 S.Ct. 37, 280 U.S. 588, 74 L.Ed. 637.
Mo.—Hughes v. Mississippi River & B. T. Ry., 274 S.W. 703, 309 Mo. 560.
39 C.J. p 454 note 69, p 455 note 79.

Exercise of ordinary care as test
Cal.—Leet v. Atchison, T. & S. F. Ry. Co., 152 P.2d 351, 66 Cal.App.2d 413.

Dangerous speed over public crossing
Operating engine at dangerous speed over public crossing, without warning, is sufficient evidence of negligence by railroad to authorize recovery by switchman injured in collision with truck.—Beal v. Chicago, B. & Q. R. Co., Mo., 285 S.W. 482.

Speed held not excessive
Tex.—Saxon v. Atchison, T. & S. F. Ry. Co., Civ.App., 72 S.W.2d 327, certiorari denied 55 S.Ct. 651, 295 U.S. 735, 79 L.Ed. 1683.

80. Ind.—Chesapeake & O. Ry. Co. v. Russo, 163 N.E. 283, 91 Ind.App. 648, certiorari denied 51 S.Ct. 25, 282 U.S. 846, 75 L.Ed. 750.

Fact that trains had previously passed over defective track was no defense to suit for employee's death by derailment of train due to negligent failure to have speed reduced.—Chesapeake & O. Ry. Co. v. Russo, supra.

81. Mo.—Beal v. Chicago, B. & Q. R. Co., 285 S.W. 482.
39 C.J. p 454 note 69 [d].

The test as to whether railroad was guilty of negligence in shunting cars into a track at excessive speed, so as to be liable for injuries sustained by switchman who was struck by cars, was not custom or usage in such regard, but what reasonable prudence would require under the circumstances.—Terminal R. Ass'n of St. Louis v. Schorb, C.C.A. Mo., 151 F.2d 361, certiorari denied 66 S.Ct. 470, 326 U.S. 786, 90 L.Ed. 477.

is negligence under the Federal Employees' Liability Act.[82]

b. Duty to Employees Riding, or Seeking to Ride, on Trains or Cars

A railroad must employ methods which will safeguard employees riding, or seeking to ride, on its trains. This rule applies to employees boarding, or alighting from, trains, and with respect to unusually violent jerks or bumps.

A railroad sending out a train is bound to adopt and employ methods which will properly safeguard the persons and lives of its trainmen and other employees properly on its trains.[83] Where an employee riding on a work train has left it to carry out an order, it is the duty of the company to allow him sufficient time to perform the service and return to a safe place on the train.[84] The fact that a forbidden practice, by those immediately in charge of a locomotive, of allowing employees to ride in a position of danger thereon, has been continued for some time has been held not to render the railroad liable for injury.[85]

Boarding or alighting from train. When trainmen in charge of a freight train know it to be the duty of an employee to board the train while in motion, they must run it at a speed which will enable him to board it with reasonable safety;[86] likewise, when those in charge knew that an employee must get off at a particular station, they are under the duty, in the exercise of due care, to stop or slow down so that he may alight in safety;[87] and it has been held negligence to order a group of employees to get on a moving engine on a dark and rainy night,[88] although there is other authority to the contrary.[89] An engineer, however, is not required to slow up or stop a train for the convenience of employees seeking to ride without right,[90] or to board it in violation of rule;[91] and it has been held that failure to stop a work train, as was customary, to permit laborers to alight at their boarding place, is not negligence per se.[92] An employee negligently injured while alighting from a car used to take him to work may recover from the railroad.[93] A conductor ordering a brakeman to alight at a point which, unknown to either, is dangerous is under no duty to ascertain whether the brakeman can alight safely, or to warn of the danger, being in no superior position to gain knowledge of the danger.[94]

Jerks and bumps; unexpected stops. While no negligence on the part of a railroad can be predicated on the usual and ordinary jerks and bumps incident to the operation of a train,[95] if injuries to a

82. Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 598, 81 L.Ed. 434.

83. Ala.—Southern Ry. Co. v. Smith, 128 So. 228, 221 Ala. 273.
39 C.J. p 455 note 77.

Conductor's failure personally to supervise injured brakeman's actions or switching of cars was held not to constitute negligence on railroad's part, where brakeman knew as much of situation as conductor did.—Louisville & N. R. Co. v. Noble's Adm'x, 54 S.W.2d 636, 246 Ky. 86.

Loading and operating handcar, or motor car

(1) It was duty of foreman of section crew, in loading hand car with tools and operating it, to exercise due care for protection of members of crew riding on hand car.—Kruk v. Minneapolis, St. P. & S. S. M. Ry. Co., 241 N.W. 162, 257 Mich. 152.

(2) To permit claw bar to ride on top of other tools while railroad motor car was running, instead of depositing them on floor of tray, as was customary and proper, was held evidence of negligence.—Clift v. St. Louis-San Francisco Ry. Co., 9 S.W. 2d 972, 320 Mo. 791.

84. N.C.—Hill v. North Carolina R. Co., 105 S.E. 184, 180 N.C. 490.

85. Tenn.—Buckner v. Southern Ry. Co., 96 S.W.2d 600, 20 Tenn.App. 212.

Rule as showing lack of authority

Knowledge of existence of a rule prohibiting riding by unauthorized persons on portions of locomotive was notice in and of itself that those extending the invitation to ride thereon were exceeding their authority.—Buckner v. Southern Ry. Co., supra.

86. D.C.—Washington & O. D. Ry. Co. v. McPherson, 26 F.2d 989, 58 App.D.C. 211, certiorari denied 49 S.Ct. 13, 278 U.S. 610, 73 L.Ed. 535.
39 C.J. p 455 note 81.

87. Tex.—International-Great Northern R. R. v. Lowry, Civ.App., 98 S.W.2d 383, reversed on other grounds International Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272.

88. Tex.—Texas & N. O. R. Co. v. Thompson, Civ.App., 1 S.W.2d 938, affirmed, Com.App., 12 S.W.2d 963.

89. Va.—Seaboard Air Line Ry. Co. v. De Loatch, 141 S.E. 121, 149 Va. 338.

Reason for rule

Conductor's ordering switchman to board moving tender on rainy day held not negligence since it would be impossible for railroads to discharge their duties if they were required, during and after every rain, to bring their engines to a standstill before a switchman was allowed to get on or off.—Seaboard Air Line Ry. Co. v. De Loatch, supra.

90. La.—Winbush v. Texas & P. R. Co., 78 So. 557, 143 La. 275.

91. Wis.—Richter v. Chicago, M. & St. P. R. Co., 186 N.W. 616, 176 Wis. 188.

92. Tex.—Panhandle & S. F. R. Co. v. Kornegay, Com.App., 227 S.W. 1100.
39 C.J. p 455 note 84.

93. N.J.—Mullen v. Central R. Co. of New Jersey, 156 A. 318, 9 N.J. Misc. 1033, affirmed 162 A. 424, 109 N.J.Law 414.

Fact that another train was provided for taking employee to work could not relieve employer from responsibility incurred by permissive use of car by injured employee.—Mullen v. Central R. Co. of New Jersey, supra

94. U.S.—Baltimore & O. R. Co. v. Berry, Mo., 52 S.Ct. 510, 286 U.S. 272, 76 L.Ed. 1098.

95. Ark.—Missouri Pac. R. Co. v. Keeton, 183 S.W.2d 505, 207 Ark. 793, reversed on other grounds 66 S.Ct. 135, 326 U.S. 689, 90 L.Ed. 405.
Ky.—Cincinnati, N. O. & T. Ry. Co. v. Jacobs, 294 S.W. 1050, 220 Ky. 217.
Mo.—Mullen v. Lowden, 124 S.W.2d 1152, 344 Mo. 40.
N.Y.—Salisbury v. New York Cent.

trainman are the result of an unusual and unnecessary jerk or bump so violent as to show want of ordinary care, a recovery may be had,[96] unless the impact is the result of his own failure to signal in accordance with his duty.[97] So, also, the sudden stopping of a train with an unusual jar or bump, in the absence of ordinary care, may be negligence entitling the servant injured thereby to recover,[98] and, if there is a uniform course of practice by which brakemen are given warning of the stopping of a train at unexpected places, it is the duty of the company to have such warnings given.[99]

c. Collisions

A railroad owes its servants the duty to use reasonable care to regulate the running of its cars and the disposition of its rolling stock so as to avoid collisions.

A railroad company owes to its servants the duty to use reasonable care so to regulate the time and manner of running its cars and the disposition of its rolling stock along its tracks that collisions may be avoided.[1] As to collisions at crossings, the measure of this duty is the maintenance of a warning device and statutory signals reasonably tending to prevent collisions,[2] and the failure to keep a lookout to avoid a collision at a crossing has been held not excused by reliance on a watchman employed by another company.[3] The failure of a railroad company to discharge the duty which it owes to a third person to prevent a collision has been held not to render the company liable to an employee.[4]

The failure of employees of a preceding train to flag one following when forced to stop does not absolve the engineman of the latter train from the duty to maintain a reasonable lookout for the presence of the former on the track,[5] although it will preclude such employees from recovery;[6] but, when a following train is duly warned of the stopping of a preceding train by the giving of proper signals, the duty of the company toward the employees on the former train is fully performed,[7] even though such

R. Co., 222 N.Y.S. 38, 220 App.Div. 491.

39 C.J. p 455 note 85.

Rule applied to weed-burning machine

Ark.—Missouri Pac. R. Co. v. Guy, 157 S.W.2d 11, 203 Ark. 166, certiorari dismissed 63 S.Ct. 22, 317 U.S. 702, 87 L.Ed. 561.

96. Ga.—Gay v. Hurst, 155 S.E. 346, 42 Ga.App. 148.

Ky.—Cincinnati, N. O. & T. Ry. Co. v. Jacobs, 294 S.W. 1050, 220 Ky. 217.

N.Y.—Salisbury v. New York Cent. R. Co., 222 N.Y.S. 38, 220 App.Div. 491.

39 C.J. p 455 note 86.

What constitutes unexpected jerk

In determining whether unexpected jerk is negligence, unexpected is measured in light of what was normal performance of duty involved, and jerk is unexpected when it was was not reasonably to be expected as part of normal performance of duty.—Ayres v. Union Pac. R. Co., Utah, 176 P.2d 161.

Position of person in danger

(1) In order to justify employee's recovery for fall resulting from jerk of train, jerk must have been dangerous to one in such reasonably safe position as was available.—Southern Ry. Co. v. Smith, 128 So. 228, 221 Ala. 273.

(2) Sudden movement of engine was not breach of duty to fireman, unless engineer knew, or should have known, that fireman was in position of danger.—New Orleans & N. E. R. Co. v. James, 128 So. 766, 157 Miss. 607.

(3) Where a railroad detective was injured while concealed between two standing cars, because of the fact that the switch crew, who had no reason to anticipate his presence and therefore owed him no duty, allowed a third car to bump into the other two, the crew were not chargeable with actionable negligence, however hard the bump.—Cincinnati, N. O. & T. P. R. Co. v. Helm, 148 S.W. 25, 149 Ky. 340.

97. Mich.—Beauchamp v. Michigan Cent. R. Co., 204 N.W. 752, 231 Mich. 546, certiorari denied 46 S. Ct. 210, 270 U.S. 643, 70 L.Ed. 777.

98. La.—Williams v. Pickering Lumber Co., 52 So. 167, 125 La. 1087, 136 Am.S.R. 365, 19 Ann.Cas. 1224.

39 C.J. p 456 note 87.

99. N.Y.—Curran v. Lake Champlain & M. R. Co., 105 N.E. 105, 211 N.Y. 60.

1. U.S.—Sandri v. Byram, C.C.A. Mich., 30 F.2d 784.

Ky.—Louisville & N. R. Co. v. Carter, 10 S.W.2d 1064, 226 Ky. 561—Chesapeake & O. Ry. Co. v. Dixon, 280 S.W. 93, 212 Ky. 738.

Mo.—Lloyd v. Alton R. Co., 159 S.W.2d 267, 348 Mo. 1222—Beal v. Chicago, B. & Q. R. Co., 285 S.W. 482.

Tenn.—Southern Ry. Co. v. Woods, 86 S.W.2d 903, 19 Tenn.App. 314.

39 C.J. p 456 note 90.

Flagman not under duty to warn

Where duties of flagman in tower at crossing did not involve giving of signals with respect to trains or motor cars on same railway, but were to indicate by signals on which of two railway lines approaching trains had the right of way, negligence of railroad could not be predicated on his failure to give warning to train crew of lineman's presence upon the track in a speeder.—Cunningham v. Great Northern Ry. Co., 14 N.W.2d 753, 73 N.D. 315.

2. Ky.—Louisville & N. R. Co. v. Carter, 10 S.W.2d 1064, 226 Ky. 561.

Permitting bell to remain out of order

Railroad permitting bell at dangerous crossing to remain out of order failed to exercise ordinary care for protection of employees.—Louisville & N. R. Co. v. Carter, supra.

3. Mo.—Beal v. Chicago, B. & Q. R. Co., 285 S.W. 482.

4. Mo.—Karr v. Chicago, R. I. & P. Ry. Co., 108 S.W.2d 44, 341 Mo. 536.

Tex.—Brittain v. Fort Worth & D. C. Ry. Co., Civ.App., 128 S.W.2d 874, error dismissed, judgment correct.

Duty to regulate speed in approaching crossing is for benefit of traveling public, and not a duty to employees.—Karr v. Chicago, R. I. & P. Ry. Co., 108 S.W.2d 44, 341 Mo. 536.

5. Tex.—International & G. N. R. Co. v. Brice, 97 S.W. 461, 100 Tex. 203.

W.Va.—Culp v. Virginian R. Co., 92 S.E. 236, 80 W.Va. 98.

6. U.S.—New York, C. & St. L. R. Co. v. Niebel, Ohio, 214 F. 952, 131 C.C.A. 248.

7. N.Y.—Tuell v. Lehigh Valley R. Co., 196 N.Y.S. 883, 203 App.Div. 254.

Va.—New York, P. & N. R. Co. v. Wilson, 64 S.E. 1060, 109 Va. 754.

signals were not observed.[8] Where a railroad has established an efficient block system giving such warning, it is not negligence for a railroad company to fail to give warning through its train dispatcher that a train ahead was stalled.[9]

An employee on a locomotive not having the right of way is not in the position of a trespasser as to whom the engineer of an oncoming train has no duty to exercise care to avoid injury by collision.[10] The agents and servants in charge of a train owe no duty to the operator or a passenger of a railway motor or handcar to give warning of the approach of the train;[11] but an engineer who sees such an operator ahead on the track, oblivious of the train's approach, and does not stop the train or slacken its speed, is negligent.[12] The driver of a railway motor car is guilty of no breach of duty toward a fellow employee in failing to stop, although seeing an approaching automobile, unless he perceived that the automobile driver would not stop and thereafter failed to exercise reasonable care.[13]

§ 262. Precautions against Injury; Warnings and Signals

a. In general

b. Unusual dangers

a. In General

A master must take reasonable precautions to protect his servants from injury, and must give such reasonable signals and warnings to a servant in a dangerous position as a reasonably prudent man would deem necessary.

A master must take such reasonable precautions as the circumstances demand to protect his servants from injury.[14] He must be careful to avoid emergencies likely to expose the servant to danger,[15] and may not carelessly create a situation of emergency, even though the terms of service may call for the servant to act therein.[16]

The master will be held liable for injuries resulting from his failure to give such reasonable signals and warnings to, or to keep such a lookout for, a servant in a dangerous position as a reasonably prudent man would deem necessary,[17] even

8. Va.—New York, P. & N. R. Co. v. Wilson, supra.

9. U.S.—Copeland v. Hines, C.C.A. Ohio, 269 F. 361.

10. Ill.—Taylor v. Atchison, T. & S. F. Ry. Co., 11 N.E.2d 610, 292 Ill. App. 457, certiorari denied Atchison, T. & S. F. R. Co. v. Taylor, 58 S.Ct. 942, 304 U.S. 560, 82 L. Ed. 1528.

11. Ky.—Nelson's Adm'x v. Southern Ry. Co., 194 S.W.2d 518, 302 Ky. 243.

12. Mo.—Dodd v. Missouri-Kansas-Texas R. Co., 184 S.W.2d 454, 353 Mo. 799.

13. U.S.—Kansas City, C. & S. R. Co. v. Shoemaker, Mo., 245 F. 117, 157 C.C.A. 413, rehearing denied 249 F. 458, 161 C.C.A. 416.

14. U.S.—Kane v. Federal Match Corporation, D.C.Pa., 5 F.Supp. 507.
Ala.—Louisville & N. R. Co. v. Hall, 135 So. 466, 223 Ala. 338, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L.Ed. 560.
Fla.—Rivers v. City of Gainesville, 143 So. 235, 106 Fla. 267, 107 Fla. 774, adhered to 144 So. 481, 106 Fla. 267, 107 Fla. 774.
N.Y.—Novitz v. Maine, 284 N.Y.S. 117, 246 App.Div. 774, 7 N.E.2d 698, 273 N.Y. 573.
Pa.—Wagner v. Jayne Chemical Co., 23 A. 772, 147 Pa. 475, 30 Am.S.R. 745.
39 C.J. p 451 note 59.

Anticipable danger
Where anticipable danger is created by the usual process of the work, the master's duty is to take precautions to avoid or remove the danger.—Moore v. Morse & Malloy Shoe Co., 197 A. 707, 89 N.H. 332.

Reliance on information from employee
Employers of laborer in charge of sewer excavation, and killed by cave-in, could rely on him for information as to material needed for shoring purposes.—King v. Terry, Mo. App., 14 S.W.2d 969.

Employer knowing employee was physically unable to do work directed without probable injury had duty to use every reasonable precaution which ordinary care and prudence would dictate to avoid subjecting employee to injury.—Hamilton v. Standard Oil Co. of Indiana, 19 S. W.2d 679, 323 Mo. 531.

Adequacy of mask furnished to employee engaged in sandblasting operations depended on how completely mask protected wearer and what other expedients were available.—Pieczonka v. Pullman Co., C. C.A.N.Y., 89 F.2d 353.

Test of compliance with statutory requirements
Test for determining whether mine foreman was negligent in observance of statutory requirements for safety of miner was what reasonable person would have done in his position, giving proper consideration to matters which would ordinarily affect judgment of prudent men engaged in coal mining.—Southern Mining Co. v. Saylor, 95 S.W.2d 236, 264 Ky. 655.

Preventing use of dangerous elevator
Duty of employer, knowing that elevator being repaired was in dangerous condition, was to take necessary precautions to prevent employees from using it.—Dobson v. Otis Elevator Co., 26 S.W.2d 942, 324 Mo. 1147.

15. N.H.—Clairmont v. Cilley, 153 A. 465, 85 N.H. 1.

16. N.H.—Clairmont v. Cilley, supra.

17. U.S.—Barbarino v. Stanhope S. S. Co., C.C.A.N.Y., 151 F.2d 553—Carey Reed Co. v. McDavid, C.C.A. Miss., 120 F.2d 843.
Ark.—Newark Gravel Co. v. Barber, 18 S.W.2d 331, 179 Ark. 799.
Ky.—Wilder's Adm'r v. Southern Mining Co., 96 S.W.2d 436, 265 Ky. 219.
Miss.—Gulf Refining Co. v. Ferrell, 147 So. 476, 165 Miss. 296.
Mo.—**Corpus Juris cited in** Goodwin v. Missouri Pac. R. Co., 72 S.W.2d 988, 993, 335 Mo. 398.
N.H.—Tremblay v. J. Rudnick & Sons, 13 A.2d 153, 91 N.H. 24.
Okl.—Oklahoma City v. Dobbs, 142 P.2d 369, 193 Okl. 183.
S.C.—Hill v. Broad River Power Co., 148 S.E. 870, 151 S.C. 280.
Tex.—Fort Worth & D. C. Ry. Co. v. Rogers, Civ.App., 62 S.W.2d 151, error refused.
39 C.J. p 456 note 97.
Warning by fellow servant see infra § 333.

Safe employment
Requirement that employer provide "safe employment" has been construed to require more than place of

though the work is simple.[18] However it is not necessary to warn an employee where a danger is obvious or normally incidental to the work on which a servant may be engaged,[19] and, where no system of warning had been instituted, the absence of one under such circumstances is not evidence of negligence on the part of the employer.[20] There is no negligence in failing to warn, or keep a lookout for, an employee who has unnecessarily and without authority assumed a position of danger which could not reasonably have been anticipated.[21]

Customary warnings and signals. A servant has the right to rely on the warnings and signals customarily given in the conduct of the business, and, if the master fails to give these, he is negligent.[22]

b. Unusual Dangers

Where the work is unusually dangerous or complex, a master should take appropriate precautions to protect his servants.

Where the work is accompanied by unusual dangers known to the employer,[23] or is of a complex nature,[24] or where an employer adopts a method of doing his work which involves risks and danger greater than the nature of the work calls for,[25] he should take correspondingly appropriate precautions, and adopt approved methods, to guard against the increased danger and risk to his employees, where such methods are practicable and are customarily used by employers similarly situated;[26] and he has been required to use reasonable care to provide a safe method of doing unusually dangerous work.[27] Likewise, if he knows, or by the exercise of reasonable diligence could have known, that he is using dangerous instrumentalities, he is called on to use a degree of care, for the servant's protection, that is reasonably commensurate with the danger.[28]

employment safe in physical sense.—Miller v. Paine Lumber Co., 230 N.W. 702, 202 Wis. 77.

Dynamiting

(1) An employer engaged in dynamiting had duty to use reasonable care to see to it that employee both heard and understood warnings in due time that dynamite fuse had been lit, so that he sould reach a place of reasonable safety.—Hercules Powder Co. v. Palmer, Miss., 30 So. 2d 804.

(2) Person using dynamite to blow out stumps in right of way of drainage canal and having other men engaged in setting up dredging boat within range of missiles is under duty to see that such warning is given as will come to notice of each of such persons.—Evans v. Brown, 106 So. 281, 141 Miss. 346.

18. U.S.—Carey Reed Co. v. McDavid, C.C.A.Miss., 120 F.2d 843.

19. Ky.—Louisville & N. R. Co. v. Davis' Adm'x, 51 S.W.2d 942, 245 Ky. 79.
Miss.—Lambert v. Mississippi Cent. R. Co., 120 So. 177, 152 Miss. 450.
N.Y.—Brick v. Long Island R. Co., 157 N.E. 93, 245 N.Y. 222.
39 C.J. p 458 note 98.

20. U.S.—Olsen v. North Pac. Lumber Co., C.C.Or., 106 F. 298.
39 C.J. p 458 note 99.

21. Tex.—Fort Worth & D. C. Ry. Co. v. Rogers, Civ.App., 62 S.W.2d 151, error refused.

22. Cal.—**Corpus Juris cited in** McComb v. Atchison, T. & S. F. Ry. Co., 294 P. 81, 110 Cal.App. 303, certiorari denied Atchison, T. & S. F. Ry. Co. v. McComb, 51 S.Ct. 486, 283 U.S. 838, 75 L.Ed. 1449.
Mo.—Case v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 1069, certiorari denied St. Louis-San Francisco Ry. Co. v. Case, 51 S.Ct. 107, 282 U.S. 893, 75 L.Ed. 787—Koonse v. Missouri Pac. R. Co., 18 S.W.2d 467, 322 Mo. 813, certiorari denied Missouri Pac. R. Co. v. Koonse, 50 S.Ct. 34, 280 U.S. 582, 74 L.Ed. 632.
Tenn.—John J. Craig Co. v. Chambers, 13 Tenn.App. 570.
Utah.—**Corpus Juris cited in** Peterson v. Union Pac. R. Co., 8 P.2d 627, 632, 79 Utah 213—**Corpus Juris cited in** Winegar v. Oregon Short Line R. Co., 298 P. 948, 950, 77 Utah 594.
39 C.J. p 458 note 1, p 468. note 71 [a].

Warning as to movement of vehicle or implement

Mo.—State ex rel. Kroger Grocery & Baking Co. v. Haid, 18 S.W.2d 478, 323 Mo. 9.

23. U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213—Chesapeake & C. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531.
Ark.—Missouri Pac. R. Co. v. Sanders, 117 S.W.2d 720, 196 Ark. 269.
Ky.—Wilder's Adm'r v. Southern Mining Co., 96 S.W.2d 436, 265 Ky. 219.
Miss.—Albert v. Doullut & Ewin, 178 So. 312, 180 Miss. 626.
Mo.—**Corpus Juris cited in** Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 443, 336 Mo. 228.
39 C.J. p 453 note 60.
Knowledge of danger generally see infra § 268.

Storage and handling of gasoline and kerosene

Miss.—Curry & Turner Const. Co. v. Bryan, 185 So. 256, 184 Miss. 44.

Manufacture and transportation of nitroglycerine

U.S.—American Glycerin Co. v. Brown, C.C.A.Tex., 30 F.2d 316.

24. U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531.
Miss.—Albert v. Doullut & Ewin, 178 So. 312, 180 Miss. 626.
Mo.—**Corpus Juris cited in** Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 443, 336 Mo. 228.
39 C.J. p 453 note 61.

25. U.S.—The P. P. Miller, D.C.N.Y., 180 F. 288.
La.—Smith v. Rock Island, A. & L. R. Co., 44 So. 290, 119 La. 537.

26. Ky.—E. J. O'Brien & Co. v. Shelton's Adm'r, 55 S.W.2d 352, 246 Ky. 537.
Customary methods generally see infra § 267.

27. Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W. Harr. 564.

Master using explosives must exercise highest degree of care to safeguard his servants in method or plan of carrying on business.—Hercules Powder Co. v. Williamson, 110 So. 244, 145 Miss. 172.

28. Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W. Harr. 564.

The test is whether the master has done all that a competent person could reasonably be required to do, and would do in a like case.—Hendrickson v. Continental Fibre Co., supra.

§ 263. —— Operation of Railroads

a. In general
b. Duty to trainmen
c. Duty to employees working on or about standing cars or locomotives
d. Duty to employees on or near tracks
e. Duty to employees engaged in coupling or switching cars, or employees in railroad yards

a. In General

Failure to warn a railroad employee of danger may constitute negligence under the Federal Employers' Liability Act. Such an employee has the right to rely on the warnings and signals customarily given in the conduct of the business.

Failure to warn a railroad employee of danger may constitute negligence under the Federal Employers' Liability Act.[29] It is the duty of a railroad company, in giving signals, to do so at a reasonable distance so as to afford an endangered employee opportunity to seek a safe place.[30] The rule, as considered supra § 262, that a servant has the right to rely on the warnings and signals customarily given in the conduct of the business, and, if the master fails to give these he is negligent, has been applied to the operation of railroads.[31] However, a railroad employee has a right to rely, with respect to warnings and signals, only on a breach of duty to him.[32]

Noise as warning. Where a statute or rule requires a railroad to give a warning of an approaching train by ringing a bell or blowing a whistle, it cannot escape liability to an employee by showing that the train made enough noise to have warned him of the danger, without also proving that he actually heard the noise in time to escape injury.[33]

b. Duty to Trainmen

It is ordinarily the duty of one in charge of a train to warn a fellow trainman before starting the engine; but there is no liability for failing to warn a brakeman or signalman of a train, sent forward or to the rear, of its ordinary movements.

It is the duty of one in charge of a train to give warning to a fellow trainman before starting the

29. Mich.—Sumner v. Ann Arbor R. Co., 209 N.W. 184, 235 Mich. 293.
Mo.—Parker v. St. Louis-San Francisco Ry. Co., App., 297 S.W. 146.

Custom not contrary to reasonable care

Railroad's custom and rule requiring lookout for superior train was held not contrary to requirement of reasonable care as to flagman injured by train passing way station.—Hartung v. Union Pac. R. Co., 247 P. 1071, 35 Wyo. 188.

Failure to install an automatic block signal system prior to an accident does not imply negligence on the part of a railroad company.—Keith v. Wheeling & L. E. Ry. Co., C.C.A.Ohio, 160 F.2d 654.

Continuous train movement

In action for death of brakeman on a train moving up-grade where driving wheels of locomotive were constantly slipping and repeated sanding was necessary, to claim that each momentary pause of the train when the wheels slipped terminated a movement, and that a bell should have been rung, and a whistle blown, each time they took hold again was without merit, since there was only one continuous train movement and a proper warning was given at its inception.—Eckenrode v. Pennsylvania R. Co., D.C.Pa., 71 F.Supp. 764.

Marking car to show defective brake

A railroad owes a switchman no duty to mark a car so as to show the presence of a defective handbrake.—Summers v. Louisville & N. R. Co., D.C.Ky., 4 F.Supp. 410.

Employee as trespasser

Employee who climbed standing freight train on way to work was held trespasser whom railroad owed no duty of warning of train movements.—Macchia v. Pennsylvania R. Co., 162 A. 654, 109 N.J.Law 404.

Lookout

Operator of railway motor car must maintain lookout while approaching a public crossing.—Jonesboro, Lake City & E. R. Co. v. Wright, 281 S.W. 374, 170 Ark. 815.

30. Ky.—Louisville & N. R. Co. v. Bryant's Adm'r, 285 S.W. 245, 215 Ky. 401.

31. Cal.—McComb v. Atchison, T. & S. F. Ry. Co., 294 P. 81, 110 Cal. App. 303, certiorari denied Atchison, T. & S. F. Ry. Co. v. McComb, 51 S.Ct. 486, 283 U.S. 838, 75 L.Ed. 1449.
Ky.—Chesapeake & O. Ry. Co. v. Kennard, 3 S.W.2d 649, 223 Ky. 262.
Mo.—Evans v. Atchison, T. & S. F. Ry. Co., 131 S.W.2d 604, 345 Mo. 147—Case v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 1069, certiorari denied St. Louis-San Francisco Ry. Co. v. Case, 51 S.Ct. 107, 282 U.S. 893, 75 L.Ed. 787—O'Donnell v. Baltimore & O. R. Co., 26 S.W.2d 929, 324 Mo. 1097.
Utah.—Peterson v. Union Pac. R. Co., 8 P.2d 627, 79 Utah 213—Winegar v. Oregon Short Line R. Co., 298 P. 948, 77 Utah 594.

Absence of light to show derailer

In determining railroad's liability for death of brakeman crushed under the wheels when empty car on which he was standing in order to signal switching operations at night struck a derailer, causing car to derail, fact that there was no light on small target indicating the position of the derailer would not alone be evidence of negligence in absence of showing that placing light on such target was in accord with general and approved usage.—Brady v. Southern Ry. Co., 23 S.E.2d 334, 222 N.C. 367, certiorari denied 63 S.Ct. 995, 318 U.S. 792, 87 L.Ed. 1158, affirmed 64 S.Ct. 232, 320 U.S. 476, 88 L.Ed. 239.

32. U.S.—Chesapeake & O. Ry. Co. v. Mihas, Ill., 50 S.Ct. 42, 280 U.S. 102, 74 L.Ed. 207—Sumney v. Southern Ry. Co., C.C.A.N.C., 89 F.2d 437.

Movement of extra trains

Railroad owes no duty to warn its section employees of movement of extra trains.
U.S.—Jacobson v. Chicago, M., St. P. & P. R. Co., C.C.A.Minn., 66 F.2d 688.
N.H.—Sweeney v. Boston & M. R. R., 175 A. 243, 87 N.H. 90, certiorari denied 55 S.Ct. 638, 294 U.S. 728, 79 L.Ed. 1258.

Signals intended for others

Question whether station and crossing signals were blown was held not determinative of defendant's negligence, injuring employee on track; such signals not being for his protection.—Norfolk & W. Ry. Co. v. Kratzer, C.C.A.Ohio, 37 F.2d 522.

33. Tex.—Missouri, K. & T. R. Co. v. Taff, 74 S.W. 89, 31 Tex.Civ. App. 657, error refused.

engine,[34] but warning is not required where there is a custom to the contrary and the presence of such an employee in a place of danger was not to have been anticipated,[35] nor is the company liable for injuries resulting from the ordinary movements of a train without warning to brakemen or signalmen of that train who have been sent forward or to the rear and who, it is assumed, are alert and watchful.[36] An engineer whose train is on schedule ordinarily owes no duty to give warning to trainmen in general of the starting or approach of his train.[37] It has been held the common-law duty of a railroad to give warning to a brakeman of a low bridge which the train is approaching.[38]

c. Duty to Employees Working on or about Standing Cars or Locomotives

A railroad company ordinarily has the duty to give reasonable warnings and signals of the movements of trains, cars, or locomotives likely to endanger employees working in or about standing cars or locomotives.

It is the duty of a railroad company to give reasonable warnings and signals of the movements of trains, cars, or locomotives, which are likely to endanger employees working on or about standing cars or locomotives, and to keep a lookout before moving trains or cars in such circumstances,[39] and, where it is the rule or custom of a railroad to give warnings of such movements, the failure of those in charge to give the customary warning will constitute negligence;[40] likewise, where it is the custom not to move cars without a signal from an employee known to be working in a place where he cannot be seen, moving cars without such signal constitutes negligence.[41] On the other hand, the company will not be liable for a failure to warn when those in charge of such movements had no reason to anticipate the presence of such employees

34. Ala.—**Corpus Juris cited in** Alabama Great Southern R. Co. v. Davis, 18 So.2d 737, 740, 246 Ala. 64.
Tex.—**Corpus Juris cited in** Fort Worth & Denver City Ry. Co. v. Rogers, Civ.App., 62 S.W.2d 151, 155.
39 C.J. p 458 note 2.

35. Ky.—Barnes' Adm'r v. Chesapeake & O. R. Co., 145 S.W. 1115, 147 Ky. 805.

36. Ohio.—Creech v. New York, C. & St. L. Ry. Co., 153 N.E. 299, 22 Ohio App. 216.
39 C.J. p 458 note 4.
Absence of outcry of warning is not negligence where it would have served no useful purpose.—Kurn v. Denson, 10 So.2d 198, 193 Miss. 763.

37. N.Y.—Schowerer v. New Jersey & N. Y. R. Co., 150 N.Y.S. 439, 164 App.Div. 865.
39 C.J. p 458 note 5.

38. N.Y.—Marus v. New Jersey Cent. R. Co., 155 N.Y.S. 586, 170 App.Div. 158.
39 C.J. p 458 note 6.
Telltales and whipping straps see supra § 230.

39. Ala.—**Corpus Juris cited in** Alabama Great Southern R. Co. v. Davis, 18 So.2d 737, 740, 246 Ala. 64—**Corpus Juris cited in** Mobile & O. R. Co. v. Williams, 129 So. 60, 65, 221 Ala. 402.
Ill.—Walaite v. Chicago R. I. & P. Ry. Co., 33 N.E.2d 119, 376 Ill. 59.
Mo.—Goodwin v. Missouri Pac. R. Co., 72 S.W.2d 988, 335 Mo. 398—Grange v. Chicago & E. I. Ry. Co., 69 S.W.2d 955, 334 Mo. 1040.
N.J.—Erickson v. Lehigh Valley R. Co., 134 A. 892, 4 N.J.Misc. 905.
Tex.—**Corpus Juris cited in** Fort Worth & Denver City Ry. Co. v. Rogers, Civ.App., 62 S.W.2d 151, 155.
Utah.—Bruner v. McCarthy, 142 P.2d 649, 105 Utah 399, certiorari dismissed 65 S.Ct. 126, 323 U.S. 673, 89 L.Ed. 547.
39 C.J. p 458 note 7.

Employee observed by foreman
In action against railroad for injuries sustained by employee while he was on top of stationary refrigerator car, examining vents, where foreman, who was switching cars, observed employee, but nevertheless ordered the cars to be cut, and violent jolt threw employee to ground, foreman's act of moving cars without warning employee constituted negligence.—Kansas City Southern Ry. Co. v. Larsen, 114 S.W.2d 1081, 195 Ark. 808, certiorari denied 59 S.Ct. 82, 305 U.S. 621, 83 L.Ed. 397.

Failure to flag passing train
Where work train conductor instructed flagman to flag all trains while crew was loading coal on adjoining tracks, but after setting torpedoes flagman failed to flag train, which proceeded to pass work train without warning and struck conductor as he stepped off work train onto adjoining track, railroad company was guilty of negligence.—Mumma v. Reading Co., C.C.A.Pa., 146 F.2d 215.

Statement as to time of return of engine
Foreman's direction to member of work train crew to fasten ditcher on car for trip and statement that engine would be back in ten minutes imposed no duty on railroad to signal return of engine.—McClellan v. Pennsylvania R. Co., C.C.A.N.Y., 62 F.2d 61.

Licensee
Terminal railroad association's crew for removal of passenger train to storage yards pursuant to custom known to icer, waiting in mail car for another train, owed no special duty to warn him that train was about to be moved, he being mere licensee, waiting in mail car for his own comfort and without duties therein.—Allen v. Terminal R. R. Ass'n of St. Louis, Mo., 68 S.W.2d 709.

40. U.S.—McClellan v. Pennsylvania R. Co., C.C.A.N.Y., 62 F.2d 61.
Cal.—**Corpus Juris cited in** McComb v. Atchison, T. & S. F. Ry. Co., 294 P. 81, 83, 110 Cal.App. 303, certiorari denied Atchison, T. & S. F. Ry. Co. v. McComb, 51 S.Ct. 486, 283 U.S. 838, 75 L.Ed. 1449.
Ill.—Walaite v. Chicago, R. I. & P. Ry. Co., 33 N.E.2d 119, 376 Ill. 59.
Tex.—Missouri, O. & G. R. Co. v. Dereberry, Civ.App., 167 S.W. 30.
Utah.—Bruner v. McCarthy, 142 P.2d 649, 105 Utah 399, certiorari dismissed 65 S.Ct. 126, 323 U.S. 673, 89 L.Ed. 547.

Negligent employee not foreman
Fact that employee, who was alleged to have been keeping lookout while car inspector went between cars was not a foreman and did not give directions to inspector, would not absolve railroad from liability under Federal Employers' Liability Act for injuries sustained by reason of employee's failure to keep lookout, since employee was railroad's agent and was negligent.—Perry v. Missouri-Kansas-Texas R. Co., 104 S.W.2d 332, 340 Mo. 1052.

41. Utah.—Bruner v. McCarthy, 142 P.2d 649, 105 Utah 399, certiorari dismissed 65 S.Ct. 126, 323 U.S. 673, 89 L.Ed. 547.

in a place of danger;[42] and the mere butting against a car in the ordinary method of making couplings without warning will not warrant recovery for injuries sustained by an employee working on such a car,[43] unless done with such force that injury might have been foreseen.[44]

Where those engaged in work about cars are entitled to notice of their movement, the duty to give such notice is owing to them alone,[45] and failure to give it cannot be relied on as negligence by one to whom the duty is not owing.[46]

d. Duty to Employees on or near Tracks

A railroad ordinarily has no duty to keep a lookout, to give signals of approach, or reduce speed, in anticipation that employees may be found along the track, but the rule does not apply where there are special circumstances affecting the company's duty.

Although it has been held that the operatives of a train must use ordinary care to discover persons who have a right to be on the track,[47] ordinarily, in the absence of statute or ordinance,[48] and provided the business of the railroad is conducted in a reasonably safe manner,[49] a railroad company owes no duty to keep a lookout, to give signals of approach, or to reduce the speed of trains, in anticipation that sectionmen, trackwalkers, flagmen, and others employed along the line of track may be found on the track, such employees being presumed to be familiar with the character of their employment and the schedules of trains.[50] This rule has

42. U.S.—McClellan v. Pennsylvania R. Co., C.C.A.N.Y., 62 F.2d 61—Flannery v. New York, O. & W. R. Co., C.C.A.N.Y., 29 F.2d 18.
39 C.J. p 459 note 9.

Duty to anticipate presence

(1) A railroad company is under the humane duty to anticipate the presence of employees under or between cars, and to take such precautions for their safety as a proper lookout and timely warning of approaching cars will afford; and this duty is owing whether or not the injured employee protects himself by means of a blue flag.
Ind.—Harris v. Chicago & E. I. Ry. Co., 158 N.E. 636, 87 Ind.App. 11.
Ky.—Louisville & N. R. Co. v. Payne's Adm'r, 197 S.W. 928, 177 Ky. 462, L.R.A.1918C 376.

(2) The presence of inspectors on or about cars in railroad yards where numerous cars are being made up and inspected at all times of the day may be anticipated at any time.—Louisville & N. R. Co. v. Wingo's Adm'r, 281 S.W. 170, 213 Ky. 336.

Concealment rendering lookout unavailing

Where a lookout upon a car which bumped into a standing car and caused employee's injury would have been unavailing by reason of employee having intentionally concealed himself, the want of a lookout was not negligence.—Cincinnati, N. O. & T. P. Ry. Co. v. Helm, 148 S.W. 25, 149 Ky. 340.

43. N.C.—Lassiter v. Seaboard Air Line R. Co., 88 S.E. 335, 171 N.C. 283.

44. Tex.—Missouri, K. & T. R. Co. v. Perryman, Civ.App., 160 S.W. 406.

45. U.S.—Sumney v. Southern Ry. Co., C.C.A.N.C., 89 F.2d 437.

46. U.S.—Chesapeake & O. Ry. Co. v. Mihas, Ill., 50 S.Ct. 42, 280 U.S. 102, 74 L.Ed. 207—Sumney v. Southern Ry. Co., C.C.A.N.C., 89 F.2d 437.

47. Tex.—Howard v. Waterman Lumber & Supply Co., 134 S.W. 387, 63 Tex.Civ.App. 535.

48. Ala.—Sanders v. Southern Ry. Co., 21 So.2d 673, 674.
Statutory regulations generally see infra § 264.

Effect of law requiring crossing sign

Under Tennessee law, the burden is upon county road overseers to place a crossing sign at every public road crossing a railroad, and no signals are required to be given by railroad employees of approach of trains to a crossing that is not so marked.—Southern Ry. Co. v. Melton, 198 So. 588, 240 Ala. 244.

Train rounding curve

There is no statute requiring a railway company to whistle merely because the train is rounding a curve.—Vaundry v. Chicago & N. W. R. Co., 109 N.W. 926, 130 Wis. 233.

49. Okl.—Atchison, T. & S. F. Ry. Co. v. Myers, 69 P.2d 62, 179 Okl. 637, appeal dismissed Myers v. Atchison, T. & S. F. R. Co., 58 S.Ct. 29, 302 U.S. 636, 82 L.Ed. 495.

Discovery of employee's peril

Railroad need not exercise reasonable diligence to discover employee's peril if its business is conducted in reasonable manner.—Roy v. St. Louis-San Francisco Ry. Co., 4 P.2d 1038, 153 Okl. 270—Lancaster v. St. Louis & S. F. Ry. Co., 261 P. 960, 128 Okl. 176.

50. U.S.—Chesapeake & O. Ry. Co. v. Nixon, Va., 46 S.Ct. 495, 271 U.S. 218, 70 L.Ed. 914, followed in Ahlgren v. Pennsylvania R. Co., C.C.A.N.Y., 35 F.2d 1015, and Austin v. New York Cent. R. Co., 184 N.E. 116, 260 N.Y. 616, reargument denied 185 N.E. 764, 261 N.Y. 620—Central Vermont Ry. v. Sullivan, C.C.A.Mass., 86 F.2d 171—Thomson v. Downey, C.C.A.Ill., 78 F.2d 487, certiorari denied Downey v. Thomson, 56 S.Ct. 154, 296 U.S. 630, 80 L.Ed. 448—Bernola v. Pennsylvania R. Co., C.C.A.Pa., 68 F.2d 172.
Ala.—**Corpus Juris quoted in** Sanders v. Southern Ry. Co., 21 So.2d 673, 674—Southern Ry. Co. v. Melton, 198 So. 588, 240 Ala. 244—**Corpus Juris cited in** Louisville & N. R. Co. v. Parker, 138 So. 231, 240, 223 Ala. 626, certiorari dismissed 53 S. Ct. 94, 287 U.S. 569, 77 L.Ed. 501.
Colo.—Denver & S. L. Ry. Co. v. Bedard, 36 P.2d 770, 95 Colo. 364.
Ill.—Hines v. Pennsylvania R. Co., 255 Ill.App. 541.
Iowa.—Hamilton v. Chicago, B. & Q. R. Co., 234 N.W. 810, 211 Iowa 924.
Ky.—Hollifield's Adm'x v. Louisville & N. R. Co., 16 S.W.2d 472, 229 Ky. 16.
Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 598, 81 L.Ed. 434—Renaldi v. New York Cent. R. Co., 152 N.E. 373, 256 Mass. 337.
Minn.—Feurt v. Chicago, R. I. & P. Ry. Co., 227 N.W. 212, 178 Minn. 395.
Mo.—Karr v. Chicago, R. I. & P. Ry. Co., 108 S.W.2d 44, 341 Mo. 536—Hughes v. Mississippi River & B. T. Ry., 274 S.W. 703, 309 Mo. 560—Landes v. Thompson, 148 S.W.2d 78, 235 Mo.App. 772.
Neb.—Lenz v. Union Pac. R. Co., 258 N.W. 33, 128 Neb. 99.
N.J.—Cyphers v. Erie R. Co., 166 A. 342, 110 N.J.Law 405.
N.Y.—Sacco v. Delaware & H. Co., 210 N.Y.S. 668, 213 App.Div. 471, judgment affirmed 150 N.E. 553, 241 N.Y. 556, certiorari denied 46 S.Ct. 484, 271 U.S. 669, 70 L.Ed. 1142.
Okl.—Lancaster v. St. Louis-San Francisco Ry. Co., 4 P.2d 1038, 153 Okl. 270—Roy v. St. Louis-San Francisco Ry. Co., 4 P.2d 1038, 153 Okl. 270—Lancaster v. St. Lou-

been applied to crossing signals,[51] but there is also authority for the view that a railroad's duty to the public to give a suitable warning on the approach of a train or a car to a crossing applies to employees.[52]

In general, even though an engineer knows that trackmen, flagmen, or other employees are ahead of him, or sees them, he has a right to assume that they will leave the track in time to escape injury.[53] Where, however, the circumstances show that an employee is unconscious of his danger, it is the duty of the engineer or other employee seeing him to give warning by signal or bell,[54] regardless of whether or not a practice or custom of doing so exists,[55] but, having given such warning, he may act on the assumption that such a person will protect himself,[56] and it is not until the latter's immediate peril is apparent that it becomes the former's duty to use all means in his power to stop the train.[57]

is & S. F. Ry. Co., 261 P. 960, 128 Okl. 176—St. Louis-San Francisco Ry. Co. v. Tyler, 232 P. 414, 107 Okl. 240.
Pa.—Amoroso v. Baltimore & O. R Co., 157 A. 463, 305 Pa. 195.
Tenn.—Thornton v. Nashville, C. & St. L. Ry. Co., 5 Tenn.App. 6.
Wis.—Lind v. Chicago, M., St. P. & P. Ry. Co., 256 N.W. 705, 216 Wis. 405—Dretzka v. Chicago & N. W. Ry. Co., 256 N.W. 703, 216 Wis. 111.
Wyo.—Hartung v. Union Pac. R. Co., 247 P. 1071, 35 Wyo. 188.
39 C.J. p 459 note 13.
"The very nature of the railroad business demands such a rule."—Kurn v. Weaver, 161 S.W.2d 1005, 1012, 25 Tenn.App. 556.

Basis or foundation of rule
The rule does not go on the theory that employees in charge of trains are absolved from the exercise of ordinary care, but on the idea that those employed about the tracks are aware of the constant shifting about of trains and the other exigencies incident to the normal operation of railroads, and that, this being true, the trainmen may proceed on the assumption that they will look out for themselves and not expect a warning, and hence will not be endangered by the movement of the trains without a warning.—Kurn v. Weaver, supra.

Truck in wrong place
Federal rule that railroad yard and track employees must look out for trains and that company owes them no duty to keep lookout would not apply where freight truck being pulled by tractor collided with parked freight trucks between which clerk was standing, since he was in place where tractor and trucks pulled by it should not have gone.—Mrazek v. Terminal R. Ass'n of St. Louis, 111 S.W.2d 26, 341 Mo. 1054, certiorari denied Terminal R. Ass'n of St. Louis v. Mrazek, 58 S.Ct. 760, 303 U.S. 656, 82 L.Ed. 1116.

51. Iowa.—Hamilton v. Chicago, B. & Q. R. Co., 234 N.W. 810, 211 Iowa 924.
Ky.—Hollifield's Adm'x v. Louisville & N. R. Co., 16 S.W.2d 472, 229 Ky. 16.

52. U.S.—Chicago, M. & St. P. Ry. Co. v. Donovan, C.C.A.Minn., 160 F. 826, 87 C.C.A. 600.
N.C.—Rigsbee v. Atlantic Coast Line R. Co., 129 S.E. 580, 190 N.C. 231.

Employee near, but not at, crossing
Where employee was rightfully on track, within several hundred feet of a crossing, and near enough to the crossing to have had the benefit of signals prescribed by statute, had they been given, the fact that he was not directly on the crossing will not preclude a recovery.—Missouri, K. & T. R. Co. v. Taff, 74 S.W. 89, 31 Tex.Civ.App. 657, error refused.

53. U.S.—Iowa Cent. Ry. Co. v. Walker, Iowa, 203 F. 685, 121 C.C.A. 579.
Idaho.—Elder v. Idaho & W. N. R. R., 141 P. 982, 26 Idaho 209—Neil v. Idaho & W. N. R. R., 125 P. 331, 22 Idaho 74.
Ky.—Reynolds' Adm'r v. Cincinnati, N. O. & T. P. Ry. Co., 146 S.W. 416, 148 Ky. 252.
Mo.—Degonia v. St. Louis, I. M. & S. R. Co., 123 S.W. 807, 224 Mo. 564—Williamson v. Wabash R. Co., 122 S.W. 1113, 139 Mo.App. 481.
N.C.—Exum v. Atlantic Coast Line R. Co., 70 S.E. 845, 154 N.C. 408, 33 L.R.A.,N.S., 169.
39 C.J. p 461 note 20.

54. Ala.—Louisville & N. R. Co. v. Parker, 138 So. 231, 223 Ala. 626, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501.
Idaho.—Elder v. Idaho-W. N. R. R., 141 P. 982, 26 Idaho 209—Neil v. Idaho & W. N. R. R., 125 P. 331, 22 Idaho 74.
La.—Barnes v. Red River & G. R. R., 128 So. 724, 14 La.App. 188.
Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434.
Minn.—Feurt v. Chicago, R. I. & P. Ry. Co., 227 N.W. 212, 178 Minn. 395.
Mo.—Karr v. Chicago, R. I. & P. Ry. Co., 108 S.W.2d 44, 341 Mo. 536—Lynch v. Chicago & A. Ry. Co., 106 S.W. 68, 208 Mo. 1—Landes v. Thompson, 148 S.W.2d 78, 235 Mo.App. 772—Williamson v. Wabash R. Co., 122 S.W. 1113, 139 Mo.App. 481.
Okl.—Lancaster v. St. Louis-San Francisco Ry. Co., 4 P.2d 1038, 153 Okl. 270—Roy v. St. Louis-San Francisco Ry. Co., 4 P.2d 1038, 153 Okl. 270.
Tenn.—Kurn v. Weaver, 161 S.W.2d 1005, 25 Tenn.App. 556.
Wis.—Lind v. Chicago, M., St. P. & P. Ry. Co., 256 N.W. 705, 216 Wis. 405.
39 C.J. p 461 note 21.

Ordinary care
Mo.—Voorhees v. Chicago, R. I. & P. Ry. Co., App., 7 S.W.2d 740.

55. Mo.—Evans v. Atchison, T. & S. F. Ry. Co., 131 S.W.2d 604, 345 Mo. 147.

56. Idaho.—Elder v. Idaho-W. N. R. R., 141 P. 982, 26 Idaho 209—Neil v. Idaho & W. N. R. R., 125 P. 331, 22 Idaho 74.
Minn.—Feurt v. Chicago, R. I. & P. Ry. Co., 227 N.W. 212, 178 Minn. 395—Greisch v. Minneapolis, S. P. & S. S. M. R. Co., 199 N.W. 517, 160 Minn. 83.
Mo.—Williamson v. Wabash R. Co., 122 S.W. 1113, 139 Mo.App. 481.
Philippine.—U. S. v. Azajar, 30 Philippine 556.

Warning held insufficient
The fact that engine bell was rung for considerable distance before train struck employee who was walking along track, and was observed by trainmen who realized that employee was oblivious to his peril, did not excuse railroad's failure to warn the employee by blowing whistle on the engine; nor did the whistling for public crossing at a point about a half mile west of station constitute sufficient warning, although such employee was struck at a point west of the station.—Evans v. Atchison, T. & S. F. Ry. Co., 131 S.W.2d 604, 345 Mo. 147.

57. U.S.—Iowa Cent. Ry. Co. v. Walker, Iowa, 203 F. 685, 121 C.C.A. 579, certiorari denied 34 S. Ct. 319, 231 U.S. 746, 58 L.Ed. 464.
Idaho.—Elder v. Idaho-W. N. R. R., 141 P. 982, 26 Idaho 209—Neil v. Idaho & W. N. R. R., 125 P. 331, 22 Idaho 74.

The rule as to the nonexistence of any duty to keep a lookout or to give warnings to employees on or near tracks does not apply where a departure by the railroad from the usual custom,[58] or from its rule,[59] is shown, or where there are special or extraordinary circumstances affecting the railroad company's duty,[60] as where an employee is exposed to some unusual danger,[61] or where the presence of employees in a particular place should have been anticipated,[62] and particularly in the case of employees engaged in making repairs.[63] So, also, it is negligence to fail to give warning before starting a train standing near where construction employees are working.[64] Also, although there is authority to the contrary,[65] it has been held that warning may be required in respect to employees along the line

Ky.—Reynolds' Adm'r v. Cincinnati, N. O. & T. P. Ry. Co., 146 S.W. 416, 148 Ky. 252—Chesapeake & O. R. Co. v. Lang, 121 S.W. 993, 135 Ky. 76.
La.—Barnes v. Red River & G. R. R., 128 So. 724, 14 La.App. 188.
Minn.—Feurt v. Chicago, R. I. & P. Ry. Co., 227 N.W. 212, 178 Minn. 395.
Mo.—Lynch v. Chicago & A. Ry. Co., 106 S.W. 68, 208 Mo. 1—Williamson v. Wabash R. Co., 122 S.W. 1113, 139 Mo.App. 481.
Wis.—Lind v. Chicago, M., St. P. & P. Ry. Co., 256 N.W. 705, 216 Wis. 405.
39 C.J. p 461 note 23.

58. Mo.—Hughes v. Mississippi River & B. T. Ry., 274 S.W. 703, 309 Mo. 560.
Neb.—Lenz v. Union Pac. R. Co., 258 N.W. 33, 128 Neb. 99.

59. Mo.—Hughes v. Mississippi River & B. T. Ry., 274 S.W. 703, 309 Mo. 560.

60. Ala.—**Corpus Juris quoted in** Sanders v. Southern Ry. Co., 21 So.2d 673, 674—**Corpus Juris cited in** Louisville & N. R. Co. v. Parker, 138 So. 231, 240, 223 Ala. 626, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501.
Mo.—Hughes v. Mississippi River & B. T. Ry., 274 S.W. 703, 309 Mo. 560.
Tenn.—**Corpus Juris cited in** Kurn v. Weaver, 161 S.W.2d 1005, 1012, 25 Tenn.App. 556.
39 C.J. p 460 note 16.

A lookout, to be effective, must be such as will enable a party maintaining it to discover, by the exercise of reasonable care, the presence of persons on or about the track in time to give them warning of the danger from the approaching train and to prevent injury to them by application of brakes and other means at hand.—Louisville & N. R. Co. v. Bryant's Adm'r 235 S.W. 245, 215 Ky. 401.

Train proceeding on opposite-bound track

(1) The rule as to the absence of any duty to keep a lookout and give warnings has been held not to apply where the train was proceeding on an opposite-bound track.—Louisville & N. R. Co. v. Parker, 138 So. 231, 223 Ala. 626, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501.

(2) However, the railroad was held not liable where the injured employee was an experienced trackman who knew that the train would probably use that track because the other was blocked.—Amoroso v. Baltimore & O. R. Co., 157 A. 463, 305 Pa. 195.

Disregarding custom as to track used

Tenn.—Kurn v. Weaver, 161 S.W.2d 1005, 25 Tenn.App. 556.

No special circumstances shown

U.S.—Thomson v. Downey, C.C.A. Ill., 78 F.2d 487, certiorari denied Downey v. Thomson, 56 S.Ct. 154, 296 U.S. 630, 80 L.Ed. 448—Bernola v. Pennsylvania R. Co., C.C.A.Pa., 68 F.2d 172.

61. U.S.—Thomson v. Downey, C.C. A.Ill., 78 F.2d 487, certiorari denied Downey v. Thomson, 56 S. Ct. 154, 296 U.S. 630, 80 L.Ed. 448.

Noise; obstruction of vision

Where air compressor used on railroad bridge produced considerable noise and obstructed vision of employee, railroad company was under duty to adopt some means of warning employee against possible danger from passing trains.—Chesapeake & O. Ry. Co. v. Kennard, 3 S.W.2d 649, 223 Ky. 262.

No unusual danger shown

U.S.—Thomson v. Downey, C.C.A. Ill., 78 F.2d 487, certiorari denied Downey v. Thomson, 56 S.Ct. 154, 296 U.S. 630, 80 L.Ed. 448.

62. Ala.—**Corpus Juris quoted in** Sanders v. Southern Ry. Co., 21 So.2d 673, 674—**Corpus Juris cited in** Louisville & N. R. Co. v. Parker, 138 So. 230, 243, 223 Ala. 626, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501.
Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 297 U.S. 598, 81 L.Ed. 434.
Minn.—Konmerstad v. Great Northern R. Co., 151 N.W. 177, 128 Minn. 505.
Mo.—Hughes v. Mississippi River & B. T. Ry., 274 S.W. 703, 309 Mo. 560.
Tenn.—**Corpus Juris cited in** Kurn v. Weaver, 161 S.W.2d 1005, 1012, 25 Tenn.App. 556.
39 C.J. p 460 note 17.

Moving cars at night

Railroad must exercise ordinary care, as by having light on front of leading car, to prevent injury to crossing flagman when moving freight cars at night on spur tracks near main tracks at crossing.—Primus v. Atlantic Coast Line R. Co., 171 S.E. 1, 171 S.C. 199, certiorari denied Atlantic Coast Line R. Co. v. Primus, 54 S.Ct. 56, 290 U.S. 639, 78 L. Ed. 555.

63. Ala.—**Corpus Juris quoted in** Sanders v. Southern Ry. Co., 21 So.2d 673, 674—**Corpus Juris cited in** Louisville & N. R. Co. v. Parker, 138 So. 230, 243, 223 Ala. 626, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501.
Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434.
39 C.J. p 460 note 18.

Section or bridge crews

Ark.—St. Louis-San Francisco Ry. Co. v. Fine, 44 S.W.2d 340, 184 Ark. 940, certiorari denied 52 S.Ct. 502, 286 U.S. 552, 76 L.Ed. 1287.
39 C.J. p 460 note 18 [b].

Protection only on track being repaired

Where north-bound track was being repaired, it was railroad's duty to protect trackmen by placing signal flags to warn engineers of trains approaching from either direction on such track, since trains sometimes run against traffic, but it was not required to place warning signals interfering with traffic on southbound track, which was not being repaired.—Sacco v. Delaware & H. Co., 210 N.Y.S. 668, 213 App.Div. 471, judgment affirmed, 150 N.E. 553, 241 N.Y. 556, certiorari denied 46 S.Ct. 484, 271 U.S. 669, 70 L.Ed. 1142.

64. Tex.—Angelina & N. R. R. Co. v. Due, Civ.App., 166 S.W. 918.

65. Iowa.—Hamilton v. Chicago, B. & Q. R. Co., 234 N.W. 810, 211 Iowa 924.
Mass.—Casey v. Boston & M. R. R., 121 N.E. 403, 231 Mass. 529.
Minn.—Olson v. St. Paul, M. & M. R. Co., 35 N.W. 866, 38 Minn. 117.

of track when a train is not running on schedule,[66] or even when running on schedule where the accident is the result of misinformation given the injured employee that the train was running late,[67] or when an unexpected or unannounced train movement is made.[68]

An employee who is not in discharge of a duty while proceeding along the tracks is not entitled to protection, except for the duty to avoid injuring him after his peril is discovered.[69]

e. Duty to Employees Engaged in Coupling or Switching Cars, or Employees in Railroad Yards

The authorities are not consistent as to whether a railroad has a duty to give warning of the approach of engines and cars to men employed about, and familiar with, the operation of the yards, as where they are engaged in switching movements or in coupling or uncoupling cars.

In some cases it is held that, in railroad yards, where engines and cars are constantly moving to and fro, there is ordinarily no duty on the railroad to give warning or notice of their approach to or keep a lookout for, men employed about, and familiar with the operation of, the yards,[70] or to those employees who are accustomed to cross the yard in going to and from their work,[71] at least in the absence of any knowledge or ground for belief that they are in a position of danger,[72] or unless they are actually seen to be in immediate peril and oblivious thereof;[73] and this rule is applied to all yard employees, regardless of their class and the character of their work, and of their precise and particular duties.[74] However, if the rule of a railroad company, or the custom or usage in the yards, required a warning, the failure to warn will be actionable negligence;[75] and, if the manner of use of a yard is changed, it is the duty of the company to warn

66. Mont.—Nelson v. Northern Pac. R. Co., 148 P. 388, 50 Mont. 516.
39 C.J. p 460 note 14.

67. Ky.—Chesapeake & O. R. Co. v. White, 143 S.W. 1046, 147 Ky. 15, Ann.Cas.1913D 239.

68. Mo.—Hughes v. Mississippi River & B. T. Ry., 274 S.W. 703, 309 Mo. 560.

69. Mo.—Koonse v. Missouri Pac. R. Co., 18 S.W.2d 467, 322 Mo. 813, certiorari denied Missouri Pac. R. Co. v. Koonse, 50 S.Ct. 34, 280 U. S. 582, 74 L.Ed. 632.

70. U.S.—Sumney v. Southern Ry. Co., C.C.A.N.C., 89 F.2d 437—Fernald v. Boston & M. R. R., C.C.A.N. Y., 62 F.2d 782—Southern Ry. Co. v. Verelle, C.C.A.N.C., 57 F.2d 1008—Reading Co. v. Haldeman, C.C.A. N.J., 20 F.2d 53, certiorari denied Haldeman v. Reading Co., 48 S.Ct. 119, 275 U.S. 560, 72 L.Ed. 426.
Idaho.—Neil v. Idaho & W. N. R. R., 125 P. 331, 22 Idaho 74.
Kan.—Ryan v. Atchison, T. & S. F. Ry. Co., 293 P. 763, 131 Kan. 706, certiorari denied 51 S.Ct. 648, 283 U.S. 855, 75 L.Ed. 1462.
Ky.—Louisville & N. R. Co. v. Philpot's Adm'r, 286 S.W. 1078, 215 Ky. 682.
La.—Peterson v. Louisiana Ry. & Nav. Co., 119 So. 759, 9 La.App. 714.
Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U. S. 589, 81 L.Ed. 434.
Minn.—Beecroft v. Great Northern R. Co., 158 N.W. 800, 134 Minn. 86, affirmed 37 S.Ct. 213, 242 U.S. 618, 61 L.Ed. 530.
Mo.—Grosvener v. New York Cent. R. Co., 123 S.W.2d 173, 343 Mo. 611—Goodwin v. Missouri Pac. R. Co., 72 S.W.2d 988, 335 Mo. 398—Armstrong v. Mobile & O. R. Co., 55 S.W.2d 460, 331 Mo. 1224, certiorari denied Mobile & O. R. Co. v. Armstrong, 53 S.Ct. 689, 289 U. S. 743, 77 L.Ed. 1490, stating general federal rule—Ingram v. Mobile & O. R. Co., 30 S.W.2d 989, 326 Mo. 163—Martin v. Wabash Ry. Co., 30 S.W.2d 735—Jones v. St. Louis-San Francisco Ry. Co., 30 S. W.2d 481, 325 Mo. 1153, stating general federal rule—O'Donnell v. Baltimore & O. R. Co., 26 S.W.2d 929, 324 Mo. 1097.
Tex.—**Corpus Juris cited in** Chicago, R. I. & G. Ry. Co. v. Cummings, Civ.App., 107 S.W.2d 644, 646, error dismissed.
Wash.—Colacci v. Chicago, M. & St. P. Ry. Co., 251 P. 880, 141 Wash. 587.
39 C.J. p 461 note 24.

Protection for others not available to employee
Railroad employee, familiar with conditions in switching yard, cannot expect same protection, with respect to lights and lookouts, which railroad must exercise toward passengers or others who have come on premises for business, and had no right to expect there would be lights or other warning on switching cars.—Caples v. Atchison, T. & S. F. R. Co., 283 P. 53, 129 Kan. 341.

Reliance on employee's precautions
Persons in charge of switching operations had right to believe that employees having knowledge of conditions in yard would take precautions for own safety, and not rely on warnings to be given by those in charge of switching movements.—Caples v. Atchison, T. & S. F. R. Co., supra.

Rule limited to yard movements
Ky.—Chesapeake & O. Ry. Co. v. Howard's Adm'x, 51 S.W.2d 461, 244 Ky. 838, certiorari denied Chesapeake & O. Ry. Co. v. Howard, 53 S.Ct. 315, 287 U.S. 670, 77 L.Ed. 578.

Brakeman's lantern
Brakeman's lantern was not intended for switch oiler's protection; hence it was immaterial where brakeman was located on train at time oiler was injured.—Norfolk & W. Ry. Co. v. Collingsworth, C.C.A. Ohio, 32 F.2d 561.

71. Ky.—Louisville & N. R. Co. v. Philpot's Adm'r, 286 S.W. 1078, 215 Ky. 682.
39 C.J. p 461 note 25.

Employees not using track
Where employees habitually crossed yards in going to and from work, but did not use track, railroad was not required to expect that employees might be on track, or be on lookout for them.—Crossno v. Terminal R. Ass'n of St. Louis, 62 S.W. 2d 1092, 333 Mo. 733.

72. U.S.—Chesapeake & O. Ry. Co. v. Mihas, Ill., 50 S.Ct. 42, 280 U. S. 102, 74 L.Ed. 207—Pennsylvania R. Co. v. Lutton, C.C.A.Ohio, 29 F. 2d 689, certiorari denied 50 S.Ct. 29, 280 U.S. 574, 74 L.Ed. 626.

73. Mo.—Martin v. Wabash Ry. Co., 30 S.W.2d 735.

74. Mo.—Martin v. Wabash Ry. Co., supra.

75. U.S.—Sumney v. Southern Ry. Co., C.C.A.N.C., 89 F.2d 437—Wyatt v. New York, O. & W. R. Co., C. C.A.N.Y., 45 F.2d 705, certiorari denied New York, O. & W. R. Co. v. Wyatt, 51 S.Ct. 353, 283 U.S. 829,

its employees of such new use.[76] It has been held that the fact that the yards were dark and unlighted is not negligence on the part of the railroad,[77] even though it was the practice of a number of railroads to light their yards.[78]

On the other hand it has been held that while it is primarily the duty of employees in railroad yards to take precautions for their own safety in passing over or along the tracks, there is a concurrent or secondary duty, independent of statute or rule, on the part of those in charge of moving engines or cars to take such precautions, and give such warnings, as are reasonably necessary to avoid injury to an employee who may neglect to protect himself,[79] as where those in charge know or have reason to believe, that others are in positions where they will be endangered by such movements.[80] Thus, it is held that it is the duty of the railroad to see that reasonable precautions are taken and warnings given by those in charge of the movements of trains, cars, or engines to those assisting in such movements as involve switching,[81] or the coupling or uncoupling of cars,[82] where those in charge knew, or should have known, of the presence of employees engaged in coupling,[83] or to those whose duties are

75 L.Ed. 1442—Pacheco v. New York, N. H. & N. R. Co., C.C.A.N.Y., 15 F.2d 467.

Cal.—McComb v. Atchison, T. & S. F. Ry. Co., 294 P. 81, 110 Cal.App. 303, certiorari denied Atchison, T. & S. F. Ry. Co. v. McComb, 51 S.Ct. 486, 283 U.S. 838, 75 L.Ed. 1449.

Miss.—New Orleans & N. E. R. Co. v. Benson, 183 So. 505, 183 Miss. 171.

Mo.—Grosvener v. New York Cent. R. Co., 123 S.W.2d 173, 343 Mo. 611—Clark v. Terminal R. Ass'n of St. Louis, 111 S.W.2d 168—Goodwin v. Missouri Pac. R. Co., 72 S.W.2d 988, 355 Mo. 398—Armstrong v. Mobile & O. R. Co., 55 S.W.2d 460, 331 Mo. 1224, certiorari denied Mobile & O. R. Co. v. Armstrong, 53 S.Ct. 689, 289 U.S. 743, 77 L.Ed. 1490—Martin v. Wabash Ry. Co., 30 S.W.2d 735—Jones v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 481, 325 Mo. 1153—O'Donnell v. Baltimore & O. R. Co., 26 S.W.2d 929, 324 Mo. 1097—Norton v. Wheelock, 23 S.W.2d 142, 323 Mo. 913, certiorari denied Wheelock v. Norton, 50 S.Ct. 355, 281 U.S. 752, 74 L.Ed. 1162.

Tex.—**Corpus Juris cited in** Chicago, R. I. & G. Ry. Co. v. Cummings, Civ.App., 107 S.W.2d 644, 646, error dismissed.

39 C.J. p 462 note 28.

Custom held not shown

U.S.—Michigan Cent. R. Co. v. Zimmerman, C.C.A.Ohio, 24 F.2d 23.

Pa.—Magyar v. Pennsylvania R. Co., 144 A. 765, 294 Pa. 585.

Employee not engaged in railroad work

The rule stated in the text applies even where the employee, when injured, is not engaged in work for the company, but in activity for his own comfort and that of his fellow employees, where the practice was of long enough duration to charge the railroad company with knowledge thereof.—Wyatt v. New York, O. & W. R. Co., C.C.A.N.Y., 45 F.2d 705, certiorari denied New York, O. & W. R. Co. v. Wyatt, 51 S.Ct. 353, 283 U.S. 829, 75 L.Ed. 1442.

76. Me.—Concannon v. Davis, 123 A. 820, 123 Me. 450.

39 C.J. p 462 note 29.

77. Ga.—Medlock v. McAdoo, 105 S. E. 643, 26 Ga.App. 92.

La.—Travis v. Kansas City Southern R. Co., 46 So. 909, 121 La. 885.

78. La.—Travis v. Kansas City Southern R. Co., supra.

79. Ala.—**Corpus Juris cited in** Mobile & O. R. Co. v. Williams, 129 So. 60, 65, 221 Ala. 402.

Mo.—**Corpus Juris cited in** Goodwin v. Missouri Pac. R. Co., 72 S.W.2d 988, 993, 335 Mo. 398.

39 C.J. p 462 note 30.

Due care

Railroad owed conductor, killed while crossing tracks in yard in returning to train with orders from dispatcher, due care to maintain reasonably safe working place.—Candler v. Southern Ry. Co., 149 S.E. 393, 197 N.C. 399.

80. U.S.—Sumney v. Southern Ry. Co., C.C.A.N.C., 89 F.2d 437—Michigan Cent. R. Co. v. Zimmerman, C. C.A.Ohio, 24 F.2d 23.

Ala.—Mobile & O. R. Co. v. Williams, 129 So. 60, 221 Ala. 402.

Miss.—New Orleans & N. E. R. Co. v. Benson, 183 So. 505, 183 Miss. 171.

Duty toward strike guards

Ky.—Louisville & N. R. Co. v. Bryant's Adm'r, 285 S.W. 245, 215 Ky. 401.

Where switchyards were used by large number of employees, so that their presence on main line tracks in the performance of their duties was reasonably to be anticipated, ordinary care on part of those in charge of engine required keeping of lookout and timely warning of approach.—Chesapeake & O. Ry. Co. v. Howard's Adm'x, 51 S.W.2d 461, 244 Ky. 838, certiorari denied Chesapeake & O. Ry. Co. v. Howard, 53 S.Ct. 315, 287 U.S. 670, 77 L.Ed. 578.

81. U.S.—Sumney v. Southern Ry. Co., C.C.A.N.C., 89 F.2d 437.

Mo.—Carbaugh v. St. Louis-San Francisco Ry. Co., App., 2 S.W.2d 195.

39 C.J. p 462 note 31.

Opportunity to warn

Engineer on train striking freight brakeman engaged in switching operation was held not negligent in failing to give warning signal for private crossing in absence of showing that he had opportunity to give warning in time to avert accident.—Noon v. Delaware, L. & W. R. Co., 144 A. 590, 105 N.J.Law 431.

Danger from truck on loading platform

Switch foreman, in exercise of ordinary care, was required to notify switchman making flying switch to kick gondola car on another track of imminent danger of being struck by factory truck on loading platform near track.—Grand Trunk Western R. Co. v. Boylen, C.C.A.Ind., 81 F.2d 91.

Warning or signal held sufficient

(1) Generally.—Alabama Great Southern R. Co. v. Davis, 18 So.2d 737, 246 Ala. 64, certiorari denied 65 S.Ct. 676, 324 U.S. 846, 89 L.Ed. 1407.

(2) In absence of proof that trainmaster, directing switching operations, was exposed to some unusual danger by reason of departure from practice generally followed, railroad was not bound to give him any additional warning of movement of train other than customary ringing of bell.—Williamson v. Southern Ry. Co., 191 S.E. 79, 183 S.C. 312.

82. Ky.—McKee v. Cincinnati, F. & S. E. R. Co., 152 S.W. 759, 151 Ky. 698.

39 C.J. p. 463 note 32.

83. N.Y.—Clark v. Delaware & H. R. Corporation, 287 N.Y.S. 1, 246 App.Div. 347, reargument denied 285 N.Y.S. 1045, 246 App.Div. 861, affirmed 3 N.E.2d 847, 272 N.Y. 413, certiorari denied 57 S.Ct. 118, 299 U.S. 591, 81 L.Ed. 436.

Custom as to coupling air

(1) Long experience of switchman and his familiarity with custom or rule respecting time for coupling air hose authorized coemployees to

associated with, or dependent on, persons in charge of the movements of trains, cars, or engines;[84] but a railroad is not required to look under stationary cars in its switching yard before moving them, in order to ascertain whether someone is under a car.[85]

A railroad owes a switchman the duty of seeing that the engine and cars are not moved except in compliance with his signals, in accordance with its rules.[86]

§ 264. Statutory Regulations

a. In general

b. Applicability of particular statutes to employees

a. In General

An employee may proceed against his employer for violation of a statute or ordinance governing methods of work or precautions against injury only if the duty imposed is for the employee's protection.

In order that an employee may predicate an action against his employer on the violation of a statute or ordinance governing methods of work or precautions against injury, it must appear that the duty imposed is for the protection of the employee.[87] It has, however, been held that in an action for a breach of a common-law duty owing by a master to his servant, evidence of acts amounting to negligence may be shown, although such acts may also show a violation of a statute enacted for the benefit of the public generally, and not for the class of persons to which the servant belonged,[88] and the fact that the legislature has required the sounding of a whistle or the ringing of a bell by railroad companies at certain places does not relieve such companies from giving a signal at other places where none is exacted by statute, provided reasonable care for the safety of its employees or others makes it necessary.[89]

A provision in the mining laws which requires that in shaft mines there shall be maintained the ordinary means of signaling to and from the top and bottom of the shaft imposes the duty to install and use a signaling system equal in efficiency and safety to that in general use, and the use of a system less safe is negligence per se,[90] as are the violation of an ordinance by a railroad while operating within the city limits[91] and the violation of a railroad speed ordinance[92] and of an ordinance regulating the movements of locomotives and cars.[93] The mere violation by an interstate carrier of the Hours of Service Law, at the time an employee is injured, is not sufficient of itself to justify a recovery, in the absence of some act of negligence of the carrier concurring with, or attributable to, the act contributing to the injury.[94] However, in the absence of statutory authorization, a

act on theory that he would comply with such custom and rule.—Southern Ry. Co. v. Glenn, 154 So. 792, 228 Ala. 563.

(2) Decedent and fellow servants knowing of custom not to couple air for switching involved, such servants were not bound to anticipate decedent would be between or under cars coupling air before moving train, especially where that was not decedent's work.—Mobile & O. R. Co. v. Williams, 139 So. 337, 224 Ala. 125.

84. Mich.—Sonsmith v. Pere Marquette R. Co., 138 N.W. 347, 173 Mich. 57, rehearing denied 141 N.W. 1091, 175 Mich. 675.
39 C.J. p 463 note 33.

85. La.—Peterson v. Louisiana Ry. & Nav. Co., 119 So. 759, 9 La.App. 714.

86. Mo.—Case v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 1069, certiorari denied St. Louis-San Francisco Ry. Co. v. Case, 51 S.Ct. 107, 282 U.S. 893, 75 L.Ed. 787.

Anticipating injury from movement without signal

Switching engineer was held bound to anticipate that movements of cars forward without signal from switchman was likely to cause injury to him.—Case v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 1069, certiorari denied St. Louis-San Francisco Ry. Co. v. Case, 51 S.Ct. 107, 282 U.S. 893, 75 L.Ed. 787.

87. Miss.—Gulf, M. & N. R. Co. v. Walters, 134 So. 831, 161 Miss. 313.
39 C.J. p 463 note 34.
Statutory provisions as to nature and extent of master's liability for injuries to servant generally see supra § 173.
Violation of statutes generally see supra § 191.

Work involving risk or danger

Employee working about machinery in motion was held engaged in work "involving risk or danger," within statute imposing on employers duty of using every device, care, and precaution for benefit of employees engaged in such work.—Peluck v. Pacific Machine & Blacksmith Co., 293 P. 417, 134 Or. 171.

88. Okl.—Slick Oil Co. v. Coffey, 177 P. 915, 72 Okl. 32.
39 C.J. p 463 note 35.

89. N.D.—Davy v. Great Northern R. Co., 128 N.W. 311, 21 N.D. 43.

90. Mo.—Miles v. Central Coal & Coke Co., 157 S.W. 867, 172 Mo. App. 229.
39 C.J. p 463 note 37.

91. Ind.—Baltimore & O. S. W. R. Co. v. Peterson, 59 N.E. 1044, 156 Ind. 364.
Kan.—Griffith v. Atchison, T. & S. F. Ry. Co., 295 P. 687, 132 Kan. 282.

92. Mo.—Kidd v. Chicago, R. I. & P. Ry. Co., 274 S.W. 1079, 310 Mo. 1, certiorari denied Chicago, R. I. & P. Ry. Co. v. Kidd, 46 S.Ct. 119, 269 U.S. 582, 70 L.Ed. 424.

Railroad right of way and yards held within application of ordinance.—Kidd v. Chicago, R. I. & P. Ry. Co., 274 S.W. 1079, 310 Mo. 1, certiorari denied Chicago, R. I. & P. Ry. Co. v. Kidd, 46 S.Ct. 119, 269 U.S. 582, 70 L.Ed. 424.

93. Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser, 71 N.E. 218, 163 Ind. 247, rehearing denied 71 N.E. 660, 163 Ind. 247.

94. U.S.—St. Louis, I. M. & S. R. Co. v. McWhirter, Ky., 33 S.Ct. 858, 229 U.S. 265, 57 L.Ed. 1179.
Ky.—Osborne v. Cincinnati, N. O. & T. P. R. Co., 164 S.W. 818, 158 Ky. 176, Ann.Cas.1915D 449.

municipality cannot impose regulations on railroad companies in respect of switching cars in their private switching yards.[95]

A statute requiring a locomotive engineer to blow a whistle or ring a bell at short intervals while moving within, or passing through, a town or village does not require such signal before or when making a coupling in a railroad yard;[96] and a statute requiring railroads to give signals on approaching highway crossings has been held not to apply to crossings in cities and incorporated towns where the railroads are subject to police regulations and city ordinances regulating speed and signals.[97] A statute prohibiting railroads from making certain kinds of switches and providing for damages for injuries caused by a violation, without regard to contributory negligence of the party injured, is a legitimate exercise of the police power of the state.[98]

Violation by employee. Where a statute provides that it shall be unlawful for any person to use dynamite in a mine except under such rules and regulations as may be agreed on between the employer and the employees, an employee injured while using dynamite, without any rule having been provided, cannot recover for such injuries, notwithstanding no rules could have been entered into which would have prevented his injury if he had acted as he did;[99] but, if such rules had been made, the fact that they permitted plaintiff to do what he did would not have prevented recovery.[1]

b. Applicability of Particular Statutes to Employees

The authorities are not consistent as to whether statutes and ordinances regulating the operation of railroads in such matters as speed, signals, and lookouts may be availed of by employees, or are only for the protection of the general public.

It has been held in some cases that statutes or ordinances requiring the fencing of railroad tracks,[2] or the giving of signals at crossings, stations, or similar places by those in charge of trains,[3] or the keeping of a lookout,[4] or regulating the speed of trains,[5] are for the protection of the public in general, and that a violation thereof cannot be made the basis of an action for injuries by the employee against his employer. In other cases, it is held that the protection intended by ordinances or statutes regulating the speed of trains,[6] or requiring warning signals to be given of their approach,[7] extend to railroad employees. Furthermore, it has been held in some decisions that an employee may base an action on a violation of a statute requiring a lookout to be kept,[8] the presence of a flagman,[9] or the maintenance of a headlight at night,[10] and the latter statutory requirement has been held to apply to employees even in a state where the requirement of giving signals for crossings has been held not to apply.[11] Also it has been held that a conductor of a street railway company is within the protection of a statute making it the duty of a motorman to bring his car to a stop at a certain distance from a railroad crossing.[12]

Where, however, an employee was not using a public crossing when the injuries complained of

95. Ill.—Smith v. Chicago Junction Ry. Co., 127 Ill.App. 89.

96. U.S.—Mullin v. Louisville & N. R. Co., C.C.A.Ala., 261 F. 156.

97. Ind.—Cleveland, C. C. & St. L. Ry. Co. v. Lynn, 95 N.E. 577, 177 Ind. 311, modified on other grounds 98 N.E. 67, 177 Ind. 311.

98. Miss.—Jones v. Alabama & V. R. Co., 16 So. 379, 72 Miss. 22.

99. Kan.—Richards v. Fleming Coal Co., 179 P. 380, 104 Kan. 330.

1. Kan.—Richards v. Fleming Coal Co., supra.

2. U.S.—Newsom, Adm'r v. Norfolk & W. R. Co., C.C.Va., 81 F. 133, construing West Virginia statute—Carper v. Norfolk & W. R. Co., Va., 78 F. 94, 23 C.C.A. 669, 35 L.R.A. 135, construing Virginia statute.

3. Ill.—Nardoni v. Chicago & E. I. Ry. Co., 261 Ill.App. 339.
Mo.—Degonia v. St. Louis, I. M. & S. R. Co., 23 S.W. 807, 224 Mo. 564.
39 C.J. p 463 note 41.

4. Kan.—Griffith v. Atchison, T. & S. F. Ry. Co., 295 P. 687, 132 Kan. 282.
39 C.J. p 464 note 42.

5. Iowa.—Martin v. Chicago, R. I. & P. R. Co., 91 N.W. 1034, 118 Iowa 148, 96 Am.S.R. 371, 59 L.R.A. 698.
39 C.J. p 464 note 43.

In Mississippi

(1) The rule stated in the text has been upheld.—Gulf, M. & N. R. Co. v. Walters, 134 So. 831, 161 Miss. 313—Dowell v. Vicksburg R. R. Co., 61 Miss. 519.

(2) It has also been held that a statute giving employees the same rights and remedies as persons not employed for an injury suffered through the act or omission of a railroad company makes a statute regulating the speed of railroad trains applicable to employees.—Illinois Cent. R. Co. v. Ford, 67 So. 145, 108 Miss. 616.

6. Tex.—Houston, E. & W. T. R. Co. v. Powell, Civ.App., 41 S.W. 695, error dismissed.
39 C.J. p 464 note 44.

7. Ky.—Illinois Cent. R. Co. v. McIntosh, 80 S.W. 496, 118 Ky. 145, 81 S.W. 270, 26 Ky.L. 14, 26 Ky.L. 347.
39 C.J. p 464 note 45.

8. Ark.—Kansas City Southern R. Co. v. Morris, 98 S.W. 363, 80 Ark. 528, 10 Ann.Cas. 618.
39 C.J. p 464 note 46.

9. U.S.—Kansas City, Ft. S. & M. R. Co. v. Kirksey, Tenn., 60 F. 999, 9 C.C.A. 321.

10. Ark.—St. Louis, I. M. & S. R. Co. v. White, 125 S.W. 120, 93 Ark. 368.
Ill.—Purinton v. Chicago Belt R. Co., 204 Ill.App. 382.

11. Mich.—Salabrin v. Ann Arbor R. Co., 160 N.W. 552, 194 Mich. 458.

12. Mo.—McKim v. Metropolitan St. R. Co., App., 209 S.W. 622.

were sustained, it is unimportant whether or not the crossing signals required by statute were given or the train was proceeding at a speed prohibited by ordinance.[13] Likewise, a statute requiring signals on the approach of a train to a public road crossing has no bearing on an action for injuries to a brakeman by coming in contact with a highway bridge across the railroad track, and it is error to consider it;[14] nor can the violation of a statute requiring a warning signal to be given by the engineer when about to start a train be relied on by an employee riding on that train.[15]

Where the authority of a town to enact ordinances regulating the speed of trains is limited to the protection of highway crossings, a railroad employee working elsewhere than at a crossing is not within the protection of the ordinance.[16]

§ 265. Degree of Care Required

In adopting methods of work, a master is held to such reasonable care as is commensurate with the danger to be reasonably apprehended.

Such reasonable or ordinary care is required of the master in the methods of work adopted by him as is commensurate with the danger to be reasonably apprehended, and as reasonable and prudent men would exercise under similar circumstances.[17] An engineer, or others in charge of a train, has been required to exercise only reasonable care in the management or operation of the train;[18] and the degree of care to be exercised by a locomotive fireman in watching the track is the most reasonable care under the existing circumstances, taking into consideration his other duties.[19]

§ 266. Delegation of Duty

As a general rule a master cannot delegate his duty of providing reasonably safe methods of work.

In most cases it is held that a master cannot delegate to a servant or agent his duty of providing reasonably safe methods of work, so as to relieve himself of responsibility for injuries caused by the negligence of his agent in adopting improper methods,[20] while others hold that, where the master has employed a competent and experienced superintendent or foreman, and has furnished the proper and usual appliances for the performance of the work, he is not liable for injuries resulting from the method adopted by such agent for doing the work.[21] The master is justified in leaving to the judgment and discretion of the servant arrangements for carrying out mere details of the work,[22] and, although a duty to warn rests on the master, when a servant has been in fact warned it is immaterial whether the warning was given by a person in authority or by a coemployee.[23] Although a company had leased the tracks on which work is being done, it is not relieved of its duty to give warning to its servants engaged in making repairs thereon.[24]

§ 267. Customary Methods

A master who employs the usual and customary methods employed by prudent and careful men engaged in similar business is generally not liable for injuries to

13. Iowa.—Girl v. U. S. Railroad Administration, 189 N.W. 834, 194 Iowa 1382.
39 C.J. p 464 note 52.

14. Ala.—Louisville & N. R. Co. v. Hall, 6 So. 277, 87 Ala. 708, 13 Am.S.R. 84, 4 L.R.A. 710.

15. Ala.—Lacy-Buek Iron Co. v. Holmes, 51 So. 236, 164 Ala. 96, 102.
39 C.J. p 464 note 54.

16. Ind.—Southern Ry. Co. v. Harpe, 58 N.E.2d 346, 223 Ind. 124.

17. Mo.—Menard v. Goltra, 40 S.W. 2d 1053, 328 Mo. 368.
N.Y.—Gustavson v. Thomas, 237 N. Y.S. 479, 227 App.Div. 303.
Tex.—Fort Worth & D. C. Ry. Co. v. Rogers, Civ.App., 62 S.W.2d 151, error refused.
39 C.J. p 465 note 57.
Care required of master generally see supra § 183.
Same duty as to nonemployee
U.S.—Eckenrode v. Pennsylvania R. Co., D.C.Pa., 71 F.Supp. 764.

18. Idaho.—Neil v. Idaho & W. N. R. R., 125 P. 331, 22 Idaho 74.
Mo.—Wilkerson v. St. Louis & S. F. R. Co., 124 S.W. 543, 140 Mo.App. 306.
N.Y.—O'Brien v. Erie R. Co., 103 N. E. 895, 210 N.Y. 96.
Use of the utmost diligence is not required.—Chesapeake & O. R. Co. v. Lang, 121 S.W. 993, 135 Ky. 76.

19. Wash.—Anest v. Columbia & P. S. R. Co., 154 P. 1100, 89 Wash. 609.

20. Ky.—Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 263 Ky. 309.
Miss.—Federal Compress Co. v. Craig, 7 So.2d 532, 192 Miss. 689—Albert v. Doullut & Ewin, 178 So. 312, 180 Miss. 626—Gow Co. v. Hunter, 168 So. 264, 175 Miss. 896.
N.C.—Bradford v. English, 130 S.E. 705, 190 N.C. 742.
Okl.—Oklahoma City v. Dobbs, 142 P.2d 369, 193 Okl. 188—McCracken v. Franco-Dominion Development Corporation, 117 P.2d 135, 189 Okl. 354—Kansas City Bridge Co. v. Gravitt, 105 P.2d 767, 188 Okl. 30—Wright v. Clark, 61 P.2d 192, 177 Okl. 628—Joy v. Pope, 53 P.2d 683, 175 Okl. 540—Southern Drilling Co. v. McKee, 42 P.2d 265, 171 Okl. 409.
39 C.J. p 465 note 59.
Delegation of duty:
Generally see supra § 186.
To enforce obedience of rules see infra § 272.
Injunction to be careful
An employer which had duty to see that care was exercised by its electrician by using suitable method in removal of machine could not discharge duty by the mere injunction to him to be careful, since that amounted merely to shifting employer's duty to electrician.—Moore v. Morse & Malloy Shoe Co., 197 A. 707, 89 N.H. 332.

21. N.Y.—Murray v. Crimmins, 85 N.Y.S. 1023, 14 Misc. 466.
39 C.J. p 466 note 60.

22. Mont.—Markinovich v. Northern Pac. R. Co., 174 P. 183, 55 Mont. 139.
39 C.J. p 466 note 61.

23. Ky.—Kentucky Midland Coal Co. v. Vincent, 166 S.W. 815, 159 Ky. 175.

24. Mo.—Bequette v. Pittsburgh Plate Glass Co., 207 S.W. 852, 200 Mo.App. 506.

a servant, provided such methods do not disregard the servant's safety.

While the test of a master's liability is the exercise of reasonable and ordinary care for the safety of the servant, and not whether he has employed customary methods,[25] as a general rule a master will not be held liable for injuries to a servant in the course of his employment where the usual and customary methods of work are employed,[26] provided such methods are generally employed by prudent and careful men engaged in similar business[27] and provided they do not disregard the safety of the servant.[28] The existence of a general custom, however, is immaterial when its effect is to nullify the requirements of a statute;[29] and the general rule does not apply where the unsafeness in the method or system is so evident that impartial persons could not well be in disagreement on the issue;[30] and usage cannot make an unreasonably or unnecessarily dangerous practice reasonably safe,[31] or safe as a matter of law,[32] or the standard of care.[33]

Where a servant, knowing the hazards of his employment as the business is conducted, is injured while engaged therein, he cannot recover merely on the ground that there was a safer mode in which the business might have been conducted, the adoption of which would have prevented the injury.[34] On the other hand, a servant has the right to rely on the continued observance by the master of such methods of work and precaution as he has been accustomed to follow and observe,[35] even though they

25. Ark.—**Corpus Juris quoted in** Arkansas Drilling Co. v. Gross, 17 S.W.2d 889, 893, 179 Ark. 631.
Kan.—**Corpus Juris cited in** Walker v. Colgate-Palmolive-Peet Co., 139 P.2d 157, 173, 157 Kan. 170.
La.—**Corpus Juris quoted in** Harris v. Yazoo & M. V. R. Co., App., 183 So. 108.
Tex.—Galveston, H. & S. A. Ry. Co. v. Andrews, Civ.App., 291 S.W. 590.
39 C.J. p 466 note 65.

Unusual methods

A master may refuse to adopt the customary and ordinary method and still not be liable if he exercises reasonable and ordinary care.—Arkansas Drilling Co. v. Gross, 17 S.W. 2d 889, 179 Ark. 631—39 C.J. p 466 note 65 [a].

26. U.S.—Willis v. Pennsylvania R. Co., C.C.A.N.Y., 122 F.2d 248, certiorari denied 62 S.Ct. 187, 314 U.S. 684, 86 L.Ed. 547—American Heating & Plumbing Co. v. Keene, C.C.A.Miss., 96 F.2d 170.
Ark.—Howell v. Harvill, 50 S.W.2d 597, 185 Ark. 977—**Corpus Juris quoted in** Arkansas Drilling Co. v. Gross, 17 S.W.2d 889, 893, 179 Ark. 631.
La.—**Corpus Juris quoted in** Harris v. Yazoo & M. V. R. Co., App., 183 So. 108, 111.
Miss.—Mitchell v. Brooks, 147 So. 660, 165 Miss. 826.
Mo.—Bruce v. Baer, App., 76 S.W.2d 423—Orth v. General Const. Co., App., 272 S.W. 1076.
Pa.—Guerierro v. Reading Co., 29 A.2d 510, 346 Pa. 187—Titus v. Bradford, B. & K. R. Co., 20 A. 517, 136 Pa. 618.
Tex.—Galveston, H. & S. A. Ry. Co. v. Contois, Civ.App., 279 S.W. 929, affirmed, Com.App., 288 S.W.2d 154, certiorari denied 47 S.Ct. 659, 274 U.S. 747, 71 L.Ed. 1328.
39 C.J. p 332 note 64, p 466 note 66.
"Negligence is never imputed from the employment of methods . . . in general use in the business."—Prattico v. Hudson Coal Co., 32 A.2d 733, 736, 347 Pa. 490—Reeder v. Lehigh Valley Coal Co., 80 A. 1121, 1124, 231 Pa. 563.

The unbending test of negligence in methods is the general custom or ordinary usage of the business.
D.C.—Washington Asphalt Block & Tile Co. v. Mackey, 15 App.D.C. 410.
Mo.—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876.
Pa.—Titus v. Bradford, B. & K. R. Co., 20 A. 517, 136 Pa. 618.
Va.—Roberts v. Southern Ry. Co., 145 S.E. 255, 151 Va. 815.

Custom as important factor

Custom or practice prevailing in a particular business in use of methods is a most important factor in determining question of employer's negligence.—Price v. New Castle Refractories Co., 3 A.2d 418, 332 Pa. 507.

27. Ark.—**Corpus Juris quoted in** Arkansas Drilling Co. v. Gross, 17 S.W.2d 889, 893, 179 Ark. 631.
Fla.—Duncan v. Growers Equipment Co., 1 So.2d 458, 146 Fla. 516.
Ky.—Louisville & N. R. Co. v. Yett, 168 S.W.2d 556, 293 Ky. 71—E. J. O'Brien & Co. v. Shelton's Adm'r, 55 S.W.2d 352, 246 Ky. 537.
La.—**Corpus Juris quoted in** Harris v. Yazoo & M. V. R. Co., App., 183 So. 108, 111.
Miss.—Eagle Cotton Oil Co. v. Sollie, 187 So. 506, 185 Miss. 475—Newell Contracting Co. v. Flynt, 161 So. 298, 172 Miss. 719, motion overruled 161 So. 743, 172 Miss. 719—**Corpus Juris cited in** Hammontree v. Cobb Const. Co., 152 So. 279, 281, 168 Miss. 844.
Mo.—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228.
39 C.J. p 467 note 67.

28. Ark.—**Corpus Juris quoted in** Arkansas Drilling Co. v. Gross, 17 S.W.2d 889, 893, 179 Ark. 631.
La.—**Corpus Juris quoted in** Harris v. Yazoo & M. V. R. Co., App., 183 So. 108, 111.
39 C.J. p 467 note 68.

29. La.—**Corpus Juris quoted in** Harris v. Yazoo & M. V. R. Co., App., 183 So. 108, 111.
39 C.J. p 468 note 69.

30. Miss.—Virginia-Carolina Chemical Co. v. Jefferson, 192 So. 306, 186 Miss. 861—Eagle Cotton Oil Co. v. Sollie, 187 So. 506, 185 Miss. 475—Newell Contracting Co. v. Flynt, 161 So. 298, 172 Miss. 719, motion overruled 161 So. 743, 172 Miss. 719—Hammontree v. Cobb Const. Co., 152 So. 279, 168 Miss. 844.

31. Mo.—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228.

32. Mo.—Rupp v. Chicago, B. & Q. R. Co., App., 234 S.W. 1050.

33. Mo.—Zesch v. Abrasive Co. of Philadelphia, 183 S.W.2d 140, 353 Mo. 558, 156 A.L.R. 469.
Tex.—Galveston, H. & S. A. Ry. Co. v. Contois, Civ.App., 279 S.W. 929, affirmed, Com.App., 288 S.W.2d 154, certiorari denied 47 S.Ct. 659, 274 U.S. 747, 71 L.Ed. 1328.

34. Ky.—E. J. O'Brien & Co. v. Shelton's Adm'r, 55 S.W.2d 352, 246 Ky. 537.
La.—**Corpus Juris quoted in** Harris v. Yazoo & M. V. R. Co., App., 183 So. 108, 111.
39 C.J. p 468 note 70.
Assumption of risk as to method of conducting business in general see infra § 390.

35. Cal.—Showalter v. Western Pac. R. Co., 106 P.2d 895, 16 Cal.2d 460.
Mo.—Bequette v. National Lead Co., App., 31 S.W.2d 575.
39 C.J. p 468 note 71.

are not required by the printed rules of the master.[36] In the absence of any rule governing a particular situation, it is proper to consider the existence of an established custom with respect thereto,[37] and a method of protecting employees, established by a master, may be equivalent to a rule.[38] In order for conduct of employees to amount to a custom binding on the employer, it must amount to a regular course of practice and be known to the employer.[39]

An employer who permits a dangerous custom to exist in the operation of his business and acquiescing therein must answer in damages for all foreseeable consequences.[40] So, where a custom or practice is adopted by employees from which it is likely that injuries may result, it becomes the employer's duty to exercise reasonable precaution to prevent the continuance of such practice;[41] but, where a servant is injured by reason of a violation of his duty, the fact that he and other employees of his class had been in the habit of so violating their duty, with the knowledge of, and in pursuance of a custom known to, the agents of the master, will not give a right of action.[42]

§ 268. Knowledge of Danger

In order to hold a master liable for injuries caused by his unsafe methods of work or his failure to warn the servant, ordinarily it must be shown that he had, or ought to have had, knowledge of the danger.

In order to hold a master liable for injuries alleged to have been caused by the unsafe methods of work adopted by him, or by his failure to warn the servant, it must be shown that he had, or ought to have had, knowledge of the danger;[43] as where reasonable inquiry would have disclosed it[44] or

Ascertaining danger in train movement

Freight engineer operating train on main line has right to rely on custom, having force of rule, that persons operating coal train from side tracks onto main line would telephone to operator at next station to find out possibility of danger in moving train onto main track.—Goodman v. Chicago, B. & Q. R. Co., 7 N.E.2d 393, 289 Ill.App. 320, certiorari denied Chicago, B. & Q. R. Co. v. Goodman, 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.

36. Ill.—Goodman v. Chicago, B. & Q. R. Co., 7 N.E.2d 393, 289 Ill. App. 320, certiorari denied Chicago, B. & Q. R. Co. v. Goodman, 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.

39 C.J. p 469 note 72.

37. Ill.—Yeates v. Illinois Cent. R. Co., 89 N.E. 338, 241 Ill. 205—Goodman v. Chicago, B. & Q. R. Co., 7 N.E.2d 393, 289 Ill.App. 320, certiorari denied Chicago, B. & Q. R. Co. v. Goodman, 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.

38. Mo.—Whittington v. Westport Hotel Operating Co., 33 S.W.2d 903, 326 Mo. 1117.

39. U.S.—Illinois Cent. R. Co. v. Hart, Tenn., 178 F. 245, 100 C.C.A. 49, 52 L.R.A.,N.S., 1117.

39 C.J. p 469 note 73.

Custom not one of trade or locality

The customary practice of mail and baggage handlers, in alighting from trucks, of using that part of truck's superframework most readily available at the time, was not such a custom or usage of a particular trade or locality as must be pleaded and proved to be certain and uniform in order to charge employer with knowledge thereof and consent thereto.—Wellinger v. Terminal R. Ass'n of St. Louis, 183 S.W.2d 908, 353 Mo. 670.

40. N.C.—Ward v. Southern Ry. Co., 174 S.E. 443, 206 N.C. 530.

41. Tex.—Waldo v. Galveston, H. & S. A. Ry. Co., Com.App., 50 S.W.2d 274.

39 C.J. p 469 note 74.

Effect of general rules

Employer failing to issue specific instructions forbidding practice among employees of shooting paper clips was not free from negligence causing injury to employee struck by clip because of preëxisting general rules against such conduct.—Galveston, H. & S. A. Ry. Co. v. Waldo, Tex.Civ.App., 77 S.W.2d 326, error dismissed.

42. Ga.—Chattanooga Southern R. Co. v. Myers, 37 S.E. 439, 112 Ga. 237.

Ill.—Ebbing v. Springfield Boiler & Mfg. Co., 145 Ill.App. 594.

43. U.S.—T. A. Pittman, Inc., v. La Fontaine, C.C.A.Miss., 68 F.2d 469—American Glycerin Co. v. Brown, C.C.A.Tex., 30 F.2d 316.

Ala.—**Corpus Juris cited in** Mobile & O. R. Co. v. Williams, 129 So. 60, 65, 221 Ala. 402.

N.H.—Jutras v. Amoskeag Mfg. Co., 147 A. 753, 84 N.H. 171—Hook v. Consolidation Coal Co., 129 A. 490, 82 N.H. 75.

Tex.—Texas & N. O. R. Co. v. Sturgeon, Civ.App., 177 S.W.2d 340, reversed on other grounds 177 S.W. 2d 264, 142 Tex. 222.

Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.

39 C.J. p. 469 note 76.

Knowledge by master of:

Danger from giving of order see infra § 281.

Defect or danger in place of work, machinery, or appliances see supra §§ 244–248.

Knowledge imputed to master

(1) Knowledge of foreman.—Hamilton v. Standard Oil Co. of Indiana, 19 S.W.2d 679, 323 Mo. 531.

(2) Knowledge of physician.—Merrick v. Missouri-Kansas-Texas R. Co., 42 P.2d 950, 141 Kan. 591.

Nature of object on railroad track

Where engineer had no actual knowledge, as distinguished from means of knowledge, that object on track was human being, railroad was held not liable for flagman's death.—Voorhees v. Chicago, R. I. & P. Ry. Co., 30 S.W.2d 22, 325 Mo. 835, 70 A.L.R. 1106.

"Known" dangers; occupational diseases

Term "known," in statute relative to occupational diseases and requiring employer to post notices of known dangers to health and known means of avoiding injurious consequences of work, refers to dangers and means known at time of enactment of act and from time to time thereafter with growth of knowledge and development of industry.—Wolf v. Mallinckrodt Chemical Works, 81 S.W.2d 323, 336 Mo. 746.

44. Minn.—Symons v. Great Northern Ry. Co., 293 N.W. 303, 208 Minn. 240.

Mo.—Bagby v. Culberson, App., 273 S.W. 209.

Dangers incident to operation of machinery

Gravel company operating machine for crushing rock containing high per cent of silica had duty to make reasonable inquiry into dan-

where the circumstances were such as to convey to the mind of an ordinarily prudent person the fact that an employee's safety was imperiled;[45] but it has also been held that the master is bound to know whether the methods he prescribes are reasonably safe, or liability attaches.[46]

Knowledge that an employee might be in a place of danger renders the master liable for injuries to one in that place, although he had no knowledge that the particular employee was there;[47] and where a general custom has continued for a long time, without protest or objection on the part of the employer, he is charged with knowledge of the actions of employees under such custom[48] and of their presence in places in which they are accustomed to be under such practice.[49] On the other hand, the fact that an injured employee, mature and in full possession of his faculties, was familiar with all the danger involved in a particular activity must be considered;[50] and recovery against the master on the ground of negligence has been denied where the servant had knowledge, or means of knowledge, of the danger equal[51] or superior[52] to that of the master.

Sending into place of danger. There is generally a duty on the part of the master not to send the servant into a place of danger where such danger, although known to the master, is not known to the servant and is of such a character that it cannot be discovered by the exercise of ordinary care and caution on his part;[53] and the violation of such duty constitutes negligence.[54]

§ 269. Proximate Cause of Injury

In order to recover for injury on the ground of the master's unsafe method of work, the servant must show that the method was the proximate cause of the injury.

The master's method of work must be shown to have been the proximate cause of the injury to warrant a recovery by his servant on the ground of unsafe method.[55] Failure to comply with an established custom of warning employees is actionable

gers incident to operation of machinery, such as danger to employee in breathing dust generated by machine.—Allen Gravel Co. v. Curtis, 161 So. 670, 173 Miss. 416.

45. Cal.—King v. Schumacher, 89 P.2d 466, 32 Cal.App.2d 172, certiorari denied Schumacher v. King, 60 S.Ct. 123, 308 U.S. 593, 84 L. Ed. 496.

Reasonable diligence on the part of the employer's agent in analyzing the situation is required.—King v. Schumacher, 89 P.2d 466, 32 Cal.App. 2d 176, certiorari denied Schumaker v. King, 60 S.Ct. 123, 308 U.S. 593, 84 L.Ed. 496.

46. Mo.—Welty v. S. H. Kress & Co., 295 S.W. 501, 221 Mo.App. 1089.

Knowledge of physical laws; absence of prior accident

Employer, using emery wheel in shop, must be charged with knowledge of fundamental physical laws involved in its use; and where employer, with actual or constructive knowledge of danger and of speed at which wheel should have been operated, had it operated at speed greater than that recommended by manufacturer for safety, fact that he had operated similar wheels for twenty years at same rate of speed without accident did not exonerate him from imputation of negligence.—Bagby v. Culberson, Mo.App., 273 S.W. 209.

47. Tex.—Texas & P. R. Co. v. Hall, Civ.App., 173 S.W. 548.

48. Ky.—Nelson Creek Coal Co. v. Bransford, 225 S.W. 1070, 189 Ky. 741.

39 C.J. p 469 note 78.

49. N.C.—Farris v. Southern R. Co., 66 S.E. 457, 151 N.C. 483, 40 L.R.A., N.S., 1115.

39 C.J. p 469 note 79.

50. U.S.—Eckenrode v. Pennsylvania R. Co., D.C.Pa., 71 F.Supp. 764.

51. Ga.—Champney Island Co. v. Bell, 163 S.E. 513, 44 Ga.App. 826.

52. Tex.—City of Munday v. Shaw, Civ.App., 100 S.W.2d 765, error dismissed.

53. Del.—Stucker v. American Stores Co., 159 A. 848, 5 W.W.Harr. 586, affirmed Stucker v. American Stores Corporation, 171 A. 230, 5 W.W.Harr. 594.

54. Del.—Stucker v. American Stores Co., 159 A. 848, 5 W.W.Harr. 586, affirmed Stucker v. American Stores Corporation, 171 A. 230, 5 W.W.Harr. 594.

55. U.S.—Swaner v. Utah Idaho Cent. R. Co., C.C.A.Utah, 54 F.2d 863, certiorari denied Utah Idaho Cent. R. Co. v. Swaner, 53 S.Ct. 6, 287 U.S. 600, 77 L.Ed. 522—Louisiana Ry. & Nav. Co. v. McGlory, C. C.A.La., 20 F.2d 545, certiorari denied 48 S.Ct. 157, 275 U.S. 570, 72 L.Ed. 432.

Ark.—Newark Gravel Co. v. Barber, 18 S.W.2d 331, 179 Ark. 799.

Mo.—Kidd v. Chicago, R. I. & P. Ry. Co., 274 S.W. 1079, 310 Mo. 1, certiorari denied Chicago, R. I. & P. Ry. Co. v. Kidd, 46 S.Ct. 119, 269 U.S. 582, 70 L.Ed. 424.

Okl.—Joy v. Pope, 53 P.2d 683, 175 Okl. 540.

Wyo.—Hartung v. Union Pac. R. Co., 247 P. 1071, 35 Wyo. 188.

39 C.J. p 453 note 63, p 469 note 80.

Situation as unit

In determining the question of proximate cause as between contributory negligence of injured employee and acts or omissions of fellow employee, the situation as a practical unit must be considered rather than inquiring into a purely logical priority.

U.S.—Union Pac. R. Co. v. Hadley, Neb., 38 S.Ct. 318, 246 U.S. 330, 62 L.Ed. 751.

Ga.—Atlantic Coast Line R. Co. v. Anderson, 38 S.E.2d 610, 200 Ga. 801.

Excessively long hours of work

Colo.—Auslender v. Boettcher, 242 P. 672, 78 Colo. 427.

N.C.—Austin v. Southern Ry. Co., 148 S.E. 446, 197 N.C. 319.

Va.—Norfolk Southern R. Co. v. Mabe, 132 S.E. 692, 146 Va. 813.

Facts held to show master's negligence proximate cause of injury

(1) Generally.

Cal.—Hayden v. Paramount Productions, 91 P.2d 231, 33 Cal.App.2d 287.

Ky.—Louisville & N. R. Co. v. Wingo's Adm'x, 281 S.W. 170, 213 Ky. 336.

Mo.—Johnson v. Chicago & E. I. Ry. Co., 64 S.W.2d 674, 334 Mo. 22—Howard v. Fred Schmitt Realty & Investment Co., App., 7 S.W.2d 448.

Tex.—International-Great Northern R. Co. v. Hawthorne, 116 S.W.2d 1056, 131 Tex. 622, certiorari denied 59 S.Ct. 487, 306 U.S. 639, 83 L.Ed. 1040—Fort Worth & D. C. Ry. Co. v. Westrup, Com.App., 285 S.W. 1053—Texas & P. Ry. Co. v. Guidry, Civ.App., 9 S.W.2d 284, affirmed 50 S.Ct. 159, 280 U.S. 531, 74 L.Ed. 596.

negligence when such failure is the proximate cause of injury to one whom the custom was created to protect.[56]

§ 270. Rules

Rules as to methods of work are discussed infra §§ 271–277; rules and regulations as to the performance of the employment contract are discussed supra § 75.

Examine Pocket Parts for later cases.

§ 271. —— Duty to Adopt and Promulgate

a. In general

b. Effect of custom of others

a. In General

With respect to a master's duty to adopt and promulgate rules for his employees' safety, the authorities impose a general requirement of this nature or limit the duty to businesses which are complex or dangerous.

It may be stated generally that a master must promulgate reasonable rules and regulations for the safety of his employees,[57] and that if ordinary care in the conduct of his business,[58] the nature of the work,[59] or surrounding conditions[60] require or demand that he provide such rules and regulations his duty to do so arises. More specifically, where a master is engaged in a complex or dangerous business, or where the safety and protection of employees depend on the adoption and enforcement of rules, he must adopt and promulgate such rules and regulations for the conduct of his business and the government of his servants in the discharge of their duties as will afford reasonable protection,[61] although it has also been held that the ob-

Va.—Andrews v. Chesapeake & O. Ry. Co., 37 S.E.2d 29, 184 Va. 951.
39 C.J. p 469 note 80 [a].

(2) Failure to flag train.—Mumma v. Reading Co., C.C.A.Pa., 146 F.2d 215.

(3) Moving railroad cars without warning employee.—Kansas City Southern Ry. Co. v. Larsen, 114 S.W. 2d 1081, 195 Ark. 808, certiorari denied 59 S.Ct. 82, 305 U.S. 621, 83 L. Ed. 397.

Facts held not to show master's negligence proximate cause of injury

(1) Generally.
U.S.—Cogswell v. Chicago & E. I. R. Co., C.C.A.Ill., 153 F.2d 94, reversed on other grounds 66 S.Ct. 1122, 328 U.S. 820, 90 L.Ed. 1601—Chesapeake & O. Ry. Co. v. Kerns, C.C.A.Ohio, 12 F.2d 770.
Ky.—Jones v. Chambers' Adm'r, 106 S.W.2d 72, 269 Ky. 98.
Miss.—Gulf, M. & O. R. Co. v. Joiner, 29 So.2d 255—Lambert v. Mississippi Cent. R. Co., 120 So. 177, 152 Miss. 450.
Nev.—Smith v. Southern Pac. Co., 277 P. 609, 51 Nev. 390.
N.H.—Kenney v. Boston & Maine R. R., 33 A.2d 557, 92 N.H. 495—Gelinas v. J. J. Newberry Co., 8 A.2d 753, 90 N.H. 312.
Tex.—Texas & N. O. R. Co. v. Sturgeon, Civ.App., 177 S.W.2d 340, reversed on other grounds 177 S.W. 2d 264, 142 Tex. 222.

(2) Failure to give warning signal.
Ky.—Louisville & N. R. Co. v. Chapman's Adm'x, 190 S.W.2d 542, 300 Ky. 835.
Mo.—Karr v. Chicago, R. I. & P. Ry. Co., 108 S.W.2d 44, 341 Mo. 536.

(3) Speed of train.—Atlantic Coast Line R. Co. v. Driggers, S.C., 49 S.Ct. 490, 279 U.S. 787, 73 L.Ed. 957.

Failure to have lookout not contributing cause

Failure to have an employee stationed on tender of backing engine did not contribute to death of telegraph operator, where operator, having signaled to engineer to proceed slowly and without stopping receive a written order from operator, suddenly stepped in front of tender, instead of stopping beside track to hand up order.—Louisville & N. R. Co. v. Chapman's Adm'x, 190 S.W.2d 542, 300 Ky. 835.

56. U.S.—McClellan v. Pennsylvania R. Co., C.C.A.N.Y., 62 F.2d 61.

Failure to have lookout with light on end of railroad car.—Texas & N. O. R. Co. v. Neill, Civ.App., 97 S.W. 2d 279, error refused 100 S.W.2d 348, 128 Tex. 580, certiorari granted 57 S.Ct. 791, 301 U.S. 674, 81 L.Ed. 1336, certiorari dismissed 58 S.Ct. 118, 302 U.S. 645, 82 L.Ed. 501, rehearing denied 58 S.Ct. 268, 302 U.S. 778, 82 L. Ed. 602.

57. Ala.—Northern Alabama R. Co. v. Key, 43 So. 794, 150 Ala. 641.
Ill.—Yeates v. Illinois Cent. R. Co., 89 N.E. 338, 241 Ill. 205—Goodman v. Chicago, B. & Q. R. Co., 7 N.E.2d 393, 289 Ill.App. 320, certiorari denied Chicago, B. & Q. R. Co. v. Goodman, 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.
Miss.—Curry & Turner Const. Co. v. Bryan, 185 So. 256, 184 Miss. 44.
N.H.—Tremblay v. J. Rudnick & Sons, 13 A.2d 153, 91 N.H. 24—Moore v. Morse & Malloy Shoe Co., 197 A. 707, 89 N.H. 332—Sirois v. J. E. Henry & Sons, 59 A. 936, 73 N.H. 148—McLaine v. Head & Dowst Co., 52 A. 545, 71 N.H. 294, 93 Am.S.R. 522, 58 L.R.A. 462.
N.Y.—Reed v. Davis, 251 N.Y.S. 704, 141 Misc. 36, affirmed 249 N.Y.S. 929, 232 App.Div. 868, certiorari denied Davis v. Reed, 52 S.Ct. 314, 285 U.S. 542, 76 L.Ed. 934.
Tex.—**Corpus Juris cited in** Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 401, 123 Tex. 128—Morgan v. State, Civ.App., 170 S.W. 2d 648, reversed on other grounds State v. Morgan, 170 S.W.2d 652, 140 Tex. 620.
Utah.—Lasagna v. McCarthy, 177 P. 2d 734.
39 C.J. p 450 note 57.

Under Employers' Liability Act the master, even when a corporation, may be liable, although it has employed competent persons to promulgate rules, the duty to promulgate the same being nondelegable.—Sloss-Sheffield Steel & Iron Co. v. Capps, 76 So. 968, 200 Ala. 610.

58. N.H.—Sirois v. J. E. Henry & Sons, 59 A. 936, 73 N.H. 148.

59. N.H.—McLaine v. Head & Dowst Co., 52 A. 545, 71 N.H. 294, 93 Am. S.R. 522, 58 L.R.A. 462.

60. Mo.—State ex rel. Kroger Grocery & Baking Co. v. Haid, 18 S.W. 2d 478, 323 Mo. 9.

61. Ark.—Arkansas Mining Co. v. Eaton, 288 S.W. 399, 172 Ark. 323.
Minn.—Jacobson v. Chicago & N. W. Ry. Co., 22 N.W.2d 455, 221 Minn. 454.
Miss.—Albert v. Doullut & Ewin, 178 So. 312, 180 Miss. 626.
Tex.—Texas & N. O. R. Co. v. Bingle, 42 S.W. 971, 91 Tex. 287—**Corpus Juris quoted in** Sloan v. Leger Mill Co., Civ.App., 161 S.W.2d 333, 335, error refused—Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, error dismissed, judgment correct.
39 C.J. p 470 note 81.

Coal mines
Ark.—New Union Coal Co. v. Sult, 290 S.W. 580, 172 Ark. 753.

ligation arises only when, in addition to being dangerous, the work is complex and the conditions which may arise are uncertain and obscure.[62] The master is not, however, required to prescribe rules with reference to the execution of minor details which may properly be left to the discretion of the servant in charge.[63]

The duty of a master to establish rules for conduct of his work is a continuing one,[64] and where there has been a change in the manner of the operation of his business, with the knowledge or assent of the master, the duty devolves on the master to provide other rules for the protection of his servants.[65]

The mere failure to adopt rules, or any particular rule, is not proof of negligence unless it appears that the master, in the exercise of reasonable care, should have foreseen the necessity for so doing.[66] Thus it is held that no duty is imposed on the master to adopt rules where the work or business is not complex or not hazardous,[67] where simple tools and appliances are used,[68] where the dangers incident to the work are obvious[69] or of common knowledge and fully understood by the servant,[70] where the duty of the servants to avoid the danger is manifest,[71] where the practice or custom actually in force renders a rule unnecessary,[72] where the adoption of a rule is impracticable,[73] or where rules could not have prevented the injury;[74] nor is the master bound to make rules as to how his servants shall conduct themselves outside the scope

Railroad
Ind.—New York Cent. R. Co. v. Verpleatse, 59 N.E.2d 916, 116 Ind. App. 1, rehearing denied 60 N.E.2d 784, 116 Ind.App. 1—Chesapeake & O. Ry. Co. v. Russo, 163 N.E. 283, 91 Ind.App. 648, certiorari denied 51 S.Ct. 25, 282 U.S. 846, 75 L.Ed. 750.
Mo.—Case v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 1069, certiorari denied St. Louis-San Francisco Ry. Co. v. Case, 51 S.Ct. 107, 282 U.S. 893, 75 L.Ed. 787—Hughes v. Mississippi River & B. T. Ry., 274 S.W. 703, 309 Mo. 560.

Storage and handling of gasoline
Miss.—Curry & Turner Const. Co. v. Bryan, 185 So. 256, 184 Miss. 44.

Danger to one group of workmen from another
Employer must prescribe rules where business is intricate and complex and one group of workmen is likely to endanger safety of another engaged in different task.—Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 337 Mo. 202—Jacob v. Peerless White Lime Co., 40 S.W.2d 556, 327 Mo. 868—Gaska v. American Car & Foundry Co., 105 S.W. 3, 127 Mo.App. 169.

Personal supervision
If the work is dangerous and of such character and extent that the master and his foreman cannot personally supervise it, it is the master's duty to adopt and publish rules and regulations reasonably adapted to guard his servants against dangers of which he has knowledge, or of which he could have known by the exercise of due care, and of which the servant did not have knowledge and of which he could not have known by the exercise of due care.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr., Del., 664.

62. U.S.—Proctor & Gamble Defense Corp. v. Bean, C.C.A.Miss., 146 F. 2d 598—Holliday v. Fulton Band Mill, C.C.A.Miss., 142 F.2d 1006—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.
Miss.—Eagle Cotton Oil Co. v. Pickett, 166 So. 764, 175 Miss. 577—Hammontree v. Cobb Const. Co., 152 So. 279, 168 Miss. 844—Brown v. Coley, 152 So. 61, 168 Miss. 778—Tatum v. Crabtree, 94 So. 449, 130 Miss. 462.

63. W.Va.—Jackson v. Wheeling Terminal R. Co., 64 S.E. 450, 65 W.Va. 415.
39 C.J. p 471 note 82.

Climbing trees
Ga.—Southern Ry. Co. v. Bradshaw, 37 S.E.2d 150, 73 Ga.App. 438.

Removing snow and ice
U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.

64. Iowa.—Hamm v. Bettendorf Axle Co., 125 N.W. 186, 147 Iowa 681.

65. Pa.—Miller v. Lehigh Valley R. Co., 41 Pa.Super. 625.
39 C.J. p 472 note 84.

66. U.S.—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.
Tex.—**Corpus Juris quoted in** Sloan v. Leger Mill Co., Civ.App., 161 S.W.2d 333, 335, error refused.
39 C.J. p 472 note 85.

67. U.S.—Proctor & Gamble Defense Corp. v. Bean, C.C.A.Miss., 146 F. 2d 598—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213.
Ga.—Southern Ry. Co. v. Bradshaw, 37 S.E.2d 150, 73 Ga.App. 438.
Miss.—Brown v. Coley, 152 So. 61, 168 Miss. 778.
Tex.—**Corpus Juris quoted in** Sloan v. Leger Mill Co., Civ.App., 161 S.W.2d 333, 335, error refused.
39 C.J. p 472 note 86.

The work around a sawmill is not so complex as to require the making of rules.
U.S.—Holliday v. Fulton Band Mill, C.C.A.Miss., 142 F.2d 1006.
Miss.—Tatum v. Crabtree, 94 So. 449, 130 Miss. 462.

Operation of a few trucks is not a complex or dangerous business requiring employer to make rules and regulations for safety of experienced drivers.—Sloan v. Leger Mill Co., Tex.Civ.App., 161 S.W.2d 333, error refused.

68. U.S.—Proctor & Gamble Defense Corp. v. Bean, C.C.A.Miss., 146 F. 2d 598.

69. Miss.—Brown v. Coley, 152 So. 61, 168 Miss. 778.
Tex.—**Corpus Juris quoted in** Sloan v. Leger Mill Co., Civ.App., 161 S.W.2d 333, 335, error refused.
39 C.J. p 472 note 87.

Use of railroad push car
Va.—Southern Ry. Co. v. Chadwick, 132 S.E. 191, 144 Va. 443.

70. Tex.—**Corpus Juris quoted in** Sloan v. Leger Mill Co., Civ.App., 161 S.W.2d 333, 335, error refused.
39 C.J. p 472 note 88.

71. Miss.—Brown v. Coley, 152 So. 61, 168 Miss. 778—Tatum v. Crabtree, 94 So. 449, 130 Miss. 462.

72. Or.—Jodoin v. Luckenbach S. S. Co., 268 P. 51, 125 Or. 634.
Tex.—**Corpus Juris quoted in** Sloan v. Leger Mill Co., Civ.App., 161 S. W.2d 333, 335, error refused—Harris v. Missouri-Kansas-Texas R. Co., Civ.App., 283 S.W. 895.
39 C.J. p 473 note 89.

73. Tex.—**Corpus Juris quoted in** Sloan v. Leger Mill Co., Civ.App., 161 S.W.2d 333, 335, error refused.
39 C.J. p 473 note 90.

74. N.Y.—Carr v. North River Constr. Co., 48 Hun 266, 17 N.Y.St. 945.
Pa.—McAvoy v. Philadelphia & R. Ry. Co., 128 A. 824, 283 Pa. 133.
Tex.—**Corpus Juris quoted in** Sloan v. Leger Mill Co., Civ.App., 161 S. W.2d 333, 335, error refused.

of their employment, or as to how business shall be carried on, or any act done, which is not carried on or done with his knowledge and permission.[75]

b. Effect of Custom of Others

While the adoption or nonadoption of rules by others in the same business is not conclusive as to a master's duty in this respect, as a general rule he is relieved of liability where he follows the general practice, and his failure to prescribe rules generally provided by others is evidence of his negligence.

While the adoption or nonadoption of rules by others in the same line of business is not conclusive as to the duty of the master in this respect,[76] as a rule his adoption of such regulations as are in general use will relieve him from liability,[77] and, where there is no evidence that any rules relating to the business had been adopted by others or were necessary or practicable, he is not chargeable with negligence in failing to adopt any.[78] On the other hand, if persons of ordinary prudence, engaged in the same line of business, have found it necessary to provide rules for its management, the failure of the master to prescribe such rules is evidence of negligence,[79] but the custom of providing rules in a particular business, of which proof is offered, must be a general one,[80] and negligence cannot be imputed to a railroad company on the sole ground that it failed to adopt the same methods for operating its road that other roads had in use unless it is shown that conditions are the same[81] and that the result of experience is in favor of such methods.[82]

§ 272. —— Duty to Enforce Obedience

It is the master's duty to enforce his safety rules, or to use reasonable care to see that they are complied with, and he is responsible for injuries resulting from his failure to enforce them.

It is the duty of the master to enforce the rules adopted by him for the safety of the servants, or to use reasonable care to see that they are complied with, and if he fails to do so he will be responsible for injuries resulting from noncompliance therewith;[83] and employees have a right to rely on the reasonable enforcement of the rules.[84] This duty cannot be delegated so as to relieve the master of liability for failure therein,[85] the employer being an insurer that such duty be performed.[86] It is no

75. Me.—Moran v. Rockland, T. & C. St. R. Co., 58 A. 676, 99 Me. 127.
N.Y.—Matrusciello v. Milliken, 126 N.Y.S. 739, 141 App.Div. 769, affirmed 101 N.E. 1110, 207 N.Y. 699.

76. Or.—Brundage v. Southern Pac. R. Co., 174 P. 1139, 89 Or. 483.
39 C.J. p 473 note 93.

77. W.Va.—Jackson v. Wheeling Terminal R. Co., 64 S.E. 450, 65 W.Va. 415.
39 C.J. p 473 note 94.

78. Okl.—Oklahoma-Portland Cement Co. v. Brown, 146 P. 6, 45 Okl. 476, L.R.A.1915E 699.
39 C.J. p 473 note 95.

79. W.Va.—Keathley v. Chesapeake & O. R. Co., 102 S.E. 244, 85 W.Va. 173.
39 C.J. p 473 note 96.

80. Tex.—St. Louis & S. F. R. Co. v. Nelson, 49 S.W. 710, 20 Tex.Civ. App. 536.
39 C.J. p 473 note 97.

81. N.Y.—Carr v. North River Constr. Co., 48 Hun 266, 17 N.Y.St. 945.
39 C.J. p 473 note 98.

82. N.Y.—Pearsall v. New York & H. R. R. Co., 82 N.E. 752, 189 N.Y. 474.

83. U.S.—Holliday v. Fulton Band Mill, C.C.A.Miss., 142 F.2d 1006—Southern Package Corporation v. Mitchell, C.C.A.Miss., 109 F.2d 609—Gildner v. Baltimore & O. R. Co., C.C.A.N.Y., 90 F.2d 635
Ark.—Arkansas Mining Co. v. Eaton, 288 S.W. 399, 172 Ark. 323.
Cal.—Southern Ry. Co. v. Smith, 137 So. 398, 223 Cal. 583.
Ill.—Yeates v. Illinois Cent. R. Co., 89 N.E. 338, 241 Ill. 205—Goodman v. Chicago, B. & Q. R. Co., 7 N.E. 2d 393, 289 Ill.App. 320, certiorari denied Chicago, B. & Q. R. Co. v. Goodman, 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.
Minn.—Jacobson v. Chicago & N. W. Ry. Co., 22 N.W.2d 455, 221 Minn. 454.
Miss.—Scott Burr Stores Corporation v. Morrow, 180 So. 741, 182 Miss. 743—Albert v. Doullut & Ewin, 178 So. 312, 180 Miss. 626—Hammontree v. Cobb Constr. Co., 152 So. 279, 168 Miss. 844.
Mo.—Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 337 Mo. 202—Case v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 1069, certiorari denied St. Louis-San Francisco Ry. Co. v. Case, 51 S.Ct. 107, 282 U.S. 893, 75 L.Ed. 787—State ex rel. Kroger Grocery & Baking Co. v. Haid, 18 S.W.2d 478, 323 Mo. 9—Weed v. American Car & Foundry Co., 14 S.W.2d 652, 322 Mo. 137—Hughes v. Mississippi River & B. T. Ry., 274 S.W. 703, 309 Mo. 560.
N.Y.—Reed v. Davis, 251 N.Y.S. 704, 141 Misc. 36, affirmed 249 N.Y.S. 929, 232 App.Div. 868, certiorari denied Davis v. Reed, 52 S.Ct. 314, 285 U.S. 542, 76 L.Ed. 934.
S.C.—Wesley v. Holly Hill Lumber Co., 43 S.E.2d 619, 211 S.C. 40—Gillis v. Atlantic Coast Line R. Co., 179 S.E. 62, 175 S.C. 223, certiorari denied Atlantic Coast Line R. Co. v. Gillis, 55 S.Ct. 545, 294 U.S. 718, 79 L.Ed. 1251.
Tex.—Morgan v. State, Civ.App., 170 S.W.2d 648, reversed on other grounds State v. Morgan, 170 S.W. 2d 652, 140 Tex. 620—City of Austin v. Johnson, Civ.App., 195 S.W. 2d 222—Chicago, R. I. & G. Ry. Co. v. Cummings, Civ.App., 107 S. W.2d 644, error dismissed.
Utah.—Lasagna v. McCarthy, 177 P. 2d 734.
39 C.J. p 473 note 2.

Relaxation by experienced employees
Negligence will not be imputed to an employer of experienced men, so as to render him liable for injuries sustained by them, because he permits them to relax his regulations when they do so for their own convenience and with knowledge of the risk.—Gallespie v. Thornton, 117 So. 714, 95 Fla. 5.

84. Ind.—New York Cent. R. Co. v. Verpleatse, 59 N.E.2d 916, rehearing denied 60 N.E.2d 784, 116 Ind. App. 1.

85. Miss.—Scott Burr Stores Corporation v. Morrow, 180 So. 741, 182 Miss. 743—Albert v. Doullut & Ewin, 178 So. 312, 180 Miss. 626.
Tex.—Morgan v. State, Civ.App., 170 S.W.2d 648, reversed on other grounds State v. Morgan, 170 S.W. 2d 652, 140 Tex. 620.

86. Tex.—Morgan v. State, Civ.App., 170 S.W.2d 648, reversed on other grounds State v. Morgan, 170 S. W.2d 652, 140 Tex. 620.
Employer as not insurer of safety generally see supra § 171.

defense in an action brought for injuries resulting from noncompliance with rules that the employee causing the accident did not know the existence of such rules.[87] Evidence of a single violation of a rule is, however, not sufficient to show that the master had such knowledge that the rules were being habitually violated as to make him liable for a failure to enforce them.[88]

§ 273. —— Reasonableness and Sufficiency

A master's safety rules must be reasonable and sufficient, possible of performance, specific and definite, and must afford reasonable protection to the servant.

Under a presumption in their favor,[89] rules which a master has adopted for the government of his servants, to prevent injuries to them, must be reasonable and sufficient.[90] Thus a railroad company may establish rules of precedence among its several classes of employees and vehicles and require one class to give way to the right of another thereunder.[91] To be sufficient, rules must be specific and definite, and not too general,[92] and must afford reasonable protection to the servant.[93]

In order to require obedience, a rule must be practicable and possible of performance;[94] and where, under the guise of rules, a master seeks to evade duties imposed on him by law, the servant is not bound thereby.[95] Thus the master cannot by promulgating a rule requiring its employees to perform their work in a particular way, defeat an action for an injury caused by its failure to meet the requirements of a statute,[96] and it cannot relieve itself by a rule by which the employee assumes all the risk of his employment[97] or by a rule which amounts to a contract against negligence;[98] but a stipulation in a contract of employment that an employee would obey prescribed rules and see for himself that they were carried out is not void as against public policy where it does not exempt the employer from liability or limit its liability for the consequences of its own negligence.[99]

§ 274. —— Notice to Servant

In order to relieve a master of liability for injuries to a servant resulting from the latter's disregard of the safety rules, the servant must have had actual or constructive knowledge of the rules.

Rules as to details of work
It is not the absolute duty of the master to insure obedience to rules in respect of mere details of the work.—Arveson v. Boston Coal, Dock & Wharf Co., 150 N.W. 810, 128 Minn. 178—39 C.J. p 474 note 5.

87. Ala.—Northern Alabama R. Co. v. Key, 43 So. 794, 150 Ala. 641.
39 C.J. p 474 note 3.

Presumption of employer's knowledge
Railroad is presumed to know rules promulgated for employees' safety.—Carbaugh v. St. Louis-San Francisco Ry. Co., Mo.App., 2 S.W. 2d 195.

88. Ky.—Little v. Consolidation Coal Co., 184 S.W. 873, 169 Ky. 514.
Customary violation see infra § 275.

89. U.S.—Little Rock & M. R. Co. v. Barry, Ark., 84 F. 944, 28 C.C.A. 644, 43 L.R.A. 349.
39 C.J. p 474 note 7.

90. Ga.—Southern Ry. Co. v. Perdue, 154 S.E. 793, 171 Ga. 134.
Ind.—New York Cent. R. Co. v. Verpleatse, 60 N.E.2d 784, 116 Ind. App. 1.
Mo.—Uhl v. Century Electric Co., App., 295 S.W. 127.
Tex.—**Corpus Juris cited in** Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 401, 123 Tex. 128.
39 C.J. p 475 note 8.

Entire period of employment
The right of an employer to make reasonable rules for the safety and efficiency of the work includes his right to make such rules for the entire time during which the working force is on his premises.—Midland Steel Products Co. v. National Labor Relations Board, C.C.A.6, 113 F.2d 800.

Rules held reasonable or sufficient
U.S.—Midland Steel Products Co. v. National Labor Relations Board, supra.
39 C.J. p 475 note 8 [c].

91. Mo.—Lancaster v. Atchison, T. & S. F. R. Co., 127 S.W. 607, 143 Mo.App. 163.
39 C.J. p 475 note 9.

92. Ga.—Southern Ry. Co. v. Perdue, 154 S.E. 793, 171 Ga. 134.
39 C.J. p 476 note 15.

Instruction insufficient to constitute rule
Iowa.—Hedberg v. Lester, 270 N.W. 447, 222 Iowa 1025.

93. Iowa.—Hunter v. Northern Iowa Brick & Tile Co., 136 N.W. 515, 156 Iowa 257.
39 C.J. p 476 note 16.

94. Cal.—Holmes v. Southern Pac. Co., 52 P. 652, 120 Cal. 357.
39 C.J. p 475 note 10.

95. Ala.—Mobile & O. R. Co. v. Williams, 139 So. 337, 224 Ala. 125.
Ga.—Southern Ry. Co. v. Perdue, 154 S.E. 793, 171 Ga. 134.
Ky.—Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 263 Ky. 309.
39 C.J. p 476 note 11.

Rule requiring self-protection
Rule promulgated by railroad that workmen should protect themselves, contrary to contractual obligation of railroad to protect them, cannot be used by railroad as device to escape liability for breach of duty.—Cato v. Atlanta & C. A. L. Ry. Co., 162 S.E. 239, 164 S.C. 123, certiorari denied Atlanta & C. A. L. Ry. Co. v. Cato, 52 S.Ct. 200, 284 U.S. 684, 76 L.Ed. 577.

Federal Employers' Liability Act
Railroad company's rules requiring employees to look in each direction before stepping on, crossing, or standing too close to tracks, forbidding them to stand or walk on tracks except when necessary in the performance of duty, and requiring them to look out for their own safety rather than depending on a foreman or other persons, do not contravene provision of the Federal Employers' Liability Act prohibiting contracts, rules, etc., exempting common carriers from liability created by the act.—Grosvener v. New York Cent. R. Co., 123 S.W.2d 173, 343 Mo. 611.

96. Ill.—Chicago & A. R. Co. v. Walters, 120 Ill.App. 152, affirmed 75 N.E. 441, 217 Ill. 87.
39 C.J. p 476 note 12.

97. W.Va.—Petry v. Cabin Creek Cons. Coal Co., 88 S.E. 105, 77 W. Va. 654.

98. Mo.—Uhl v. Century Electric Co., App., 295 S.W. 127.
Stipulations against liability for negligence generally see supra § 197.

99. Ohio.—New York, C. & St. L. R. Co. v. Ropp, 81 N.E. 748, 76 Ohio St. 449, 11 L.R.A.,N.S., 413.

While it has been broadly stated that an employee is held to know and observe the rules promulgated by the employer in the operation of its business,[1] ordinarily to relieve the master of liability for injuries to a servant resulting from the latter's disregard of the rules adopted by the master for the management of his business and the government of his servants, the servant must have had knowledge, actual or constructive, of the rules.[2] The duty of the master as to giving notice is ordinarily performed when he has made the rules known to his servants, which rules, if observed and followed by all concerned, will bring such personal notice to every one entitled to it.[3] The actual delivery of a copy of the rules to a servant[4] or the reading of a rule to him[5] is not necessary to charge him with knowledge. While posting in a conspicuous place ordinarily is sufficient,[6] it is not necessary as to a rule established by custom.[7] The printing of rules is not required in every case,[8] and the servant may properly be instructed orally,[9] and even knowledge of the existence and terms of rules, acquired by oral tradition, is sufficient to bind the servant.[10]

§ 275. —— Waiver and Customary Violation

Where the master's rules are habitually disobeyed with his knowledge or express consent, they are regarded as waived or abrogated, and he cannot rely on them to defeat an injured employee's action.

Where the rules and regulations established by the master are habitually disobeyed with his knowledge or express consent,[11] or have been disregarded without his express consent in such a manner, and for such a length of time, as to raise a presumption that he must, or, in the exercise of ordinary care and diligence should, have become aware of such habitual disregard,[12] or a practice has been established by the master inconsistent with such rules and regulations,[13] such rules and regulations will be regarded as waived or abrogated, and the master cannot rely on them to defeat an action by an injured employee. It has, however, been held that the general rule does not apply in the case of regulations or rules designed solely for the protection of servants and that a greater degree of proof is required to establish the abrogation of such rules.[14]

Notice to servant or agent of master. Generally the master will be charged with the knowledge of a servant or agent that a rule which it is such servant's duty to enforce is habitually violated.[15]

§ 276. —— Construction, Operation, and Effect

a. Construction
b. Operation and effect

a. Construction

An employer's rules are to be construed reasonably. Such rules will be applied only against, and in favor of, those to whom they were clearly intended to apply.

While all of an employer's rules are to receive a

1. Me.—McLaughlin v. Bangor & A. R. Co., 140 A. 827, 127 Me. 24.

2. Ark.—St. Louis-San Francisco Ry. Co. v. Fine, 44 S.W.2d 340, 184 Ark. 940, certiorari denied 52 S.Ct. 502, 286 U.S. 552, 76 L.Ed. 1287—New Union Coal Co. v. Sult, 290 S.W. 580, 172 Ark. 753.
Mo.—Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 337 Mo. 202.
39 C.J. p 476 note 18.
Notice as affecting contributory negligence see infra § 457.

3. N.Y.—Daley v. Brown, 60 N.E. 752, 167 N.Y. 381—Slater v. Jewett, 85 N.Y. 61, 39 Am.R. 627.

4. Ky.—Alexander v. Louisville & N. R. Co., 83 Ky. 589.
39 C.J. p 476 note 20.

5. Mass.—Buchanan v. New York, N. H. & H. R. Co., 100 N.E. 609, 213 Mass. 473.
39 C.J. p 476 note 21.

6. Ky.—Louisville & N. R. Co. v. Heinig, 171 S.W. 853, 162 Ky. 14.
39 C.J. p 477 note 23.

7. Or.—Jodoin v. Luckenbach S. S. Co., 268 P. 51, 125 Or. 634.

8. U.S.—Grady v. Southern R. Co., Tenn., 92 F. 491, 34 C.C.A. 494.
39 C.J. p 477 note 24.

9. Mich.—Whalen v. Michigan Cent. R. Co., 72 N.W. 323, 114 Mich. 512.

10. Ga.—Port Royal & W. C. R. Co. v. Davis, 22 S.E. 833, 95 Ga. 292.
39 C.J. p 477 note 26.

11. Okl.—Covington Coal Products Co. v. Stogner, 72 P.2d 491, 181 Okl. 35.
Va.—Chesapeake & O. Ry. Co. v. Golladay, 180 S.E. 400, 164 Va. 292.
39 C.J. p 477 note 28, p 478 note 31.
Customary violation of rules as affecting contributory negligence see infra § 458.

12. Ala.—Southern Ry. Co. v. Smith, 137 So. 398, 223 Ala. 583.
N.C.—Byers v. Boice Hardwood Co., 159 S.E. 3, 201 N.C. 75.
Okl.—Covington Coal Products Co. v. Stogner, 72 P.2d 491, 181 Okl. 35.
39 C.J. p 477 note 29, p 478 note 31.
Habitual violation not shown
W.Va.—Hudson v. Norfolk & W. Ry. Co., 146 S.E. 525, 106 W.Va. 437, certiorari denied 49 S.Ct. 481, 279 U.S. 866, 73 L.Ed. 1004, rehearing denied 50 S.Ct. 79.

13. U.S.—Consolidation Coal Co. v. Marcum, Ky., 257 F. 287, 168 C.C.A. 371.
Okl.—Covington Coal Products Co. v. Stogner, 72 P.2d 491, 181 Okl. 35.
39 C.J. p 478 notes 30, 31.

14. Mo.—Smith v. Chicago, B. & Q. R. Co., 15 S.W.2d 794, 321 Mo. 960.
39 C.J. p 478 note 32.
Knowledge
Rule of employer for protection of employees cannot be considered abandoned, no officer or agent of employer, other than those violating rule, being shown to have known, or had reason to know, of disregard thereof.—Unadilla Valley Ry. Co. v. Dibble, C.C.A.N.Y., 31 F.2d 239, certiorari denied Dibble v. Unadilla Valley Ry. Co., 50 S.Ct. 25, 280 U.S. 565, 74 L.Ed. 618.

15. Fla.—Coons v. Pritchard, 68 So. 225, 69 Fla. 362, L.R.A.1915F 558.
39 C.J. p 478 note 33.

reasonable construction,[16] there is a presumption that they have been carefully considered and accurately expressed, and they ought to be construed more strongly against the master who has made and adopted them than against the servant who has merely assented to, and agreed to be bound by, them.[17] Rules of the employer,[18] or separate and distinct clauses embodied in a single rule,[19] should be considered and construed together so as to give effect to all, if possible, and not to abrogate any.[20] Resort may be had to custom to interpret, but not to contradict, explicit rules and positive orders.[21] The understanding of employees as to the application of a rule is not controlling,[22] although it may be considered,[23] and a long and uninterrupted construction by employees at variance with the rule may modify its requirements;[24] but a rule susceptible of two constructions will not be given the con-

16. N.H.—Gelinas v. J. J. Newberry Co., 8 A.2d 753, 90 N.H. 312.
39 C.J. p 479 note 34.

Operation of railroads generally

(1) In general.
U.S.—Atchison, T. & S. F. Ry. Co. v. Ballard, C.C.A.Tex., 108 F.2d 768, rehearing denied 109 F.2d 1012, certiorari denied Ballard v. Atchison, T. & S. F. R. Co., 60 S.Ct. 1096, 310 U.S. 646, 84 L.Ed. 1413—Van Derveer v. Delaware, L. & W. R. Co., C.C.A.N.Y., 84 F.2d 979, certiorari denied 57 S.Ct. 120, 299 U.S. 595, 81 L.Ed. 438—Miller v. Central R. Co. of New Jersey, C.C.A.N.Y., 58 F.2d 635, certiorari denied Central R. Co. of New Jersey v. Miller, 53 S.Ct. 18, 287 U.S. 617, 77 L.Ed. 536—Paster v. Pennsylvania R. R., C.C.A.N.Y., 43 F.2d 908.
Ga.—Southern Ry. Co. v. Perdue, 154 S.E. 793, 171 Ga. 134.
Ill.—Goodman v. Chicago, B. & Q. R. Co., 7 N.E.2d 393, 289 Ill.App. 320, certiorari denied Chicago, B. & Q. R. Co. v. Goodman, 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.
Tex.—Missouri Pac. R. Co. v. Jones, Civ.App., 12 S.W.2d 1050, reversed on other grounds, Com.App., 24 S.W.2d 32.
Va.—Chesapeake & O. Ry. Co. v. Golladay, 180 S.E. 400, 164 Va. 292.
39 C.J. p 479 note 34 [a]-[l].

(2) Motor car carrying railroad officials and operated as special train on schedule, becomes train, exempt from rules governing motor cars.—Rowe v. Chesapeake & O. Ry. Co., 286 S.W. 784, 215 Ky. 525.

(3) Rule requiring section foreman to inspect hand car for obvious defects did not require him to inspect car for concealed defects.—Nellis v. Chicago, M., St. P. & P. R. Co., 236 N.W. 668, 205 Wis. 397, certiorari denied Chicago, M., St. P. & P. R. Co. v. Nellis, 52 S.Ct. 393, 285 U.S. 543, 76 L.Ed. 935.

(4) Rule that yard crews, in shoving cuts of cars back into yard, should place man on rear to protect move, held to include complete movement until cut was stopped and secured in place, not merely portion of movement occurring while locomotive was attached and pushing.—Norfolk & W. Ry. Co. v. Fraley, C.C.A. Ohio, 69 F.2d 775.

Warnings; signals

(1) In general.
U.S.—Central Vermont Ry. v. Sullivan, C.C.A.Mass., 86 F.2d 171.
Mo.—Mech v. Terminal Railroad Ass'n of St. Louis, 18 S.W.2d 510, 322 Mo. 937—Smith v. Chicago, B. & Q. R. Co., 15 S.W.2d 794, 321 Mo. 960.
N.C.—McCrowell v. Southern Ry. Co., 20 S.E.2d 352, 221 N.C. 366.
39 C.J. p 479 note 34 [b].

(2) Rule requiring fixed signals, when obscured, to be approached under control held not to apply to road protected by block system of warning signals.—Cincinnati, N. O. & T. P. Ry. Co. v. Brown, 12 S.W.2d 381, 158 Tenn. 75.

(3) Rule and custom of railroad respecting protection of train held inapplicable to speed car.—Reynolds v. New York, O. & W. Ry. Co., C.C.A. N.Y., 42 F.2d 164.

(4) Rules respecting operation of trains stopped by block signals and responsibility of engineer held strictly applicable only when location of signal can be known.—Wolf v. Baltimore & O. R. Co., 189 N.E. 780, 264 N.Y. 57.

(5) Rule requiring extra and delayed regular trains to sound whistle to warn section men, bridge men, and others operating motor cars applies only to section men operating motor cars, and does not include section men working with hand cars.—Watts v. Pere Marquette R. Co., 203 N.W. 859, 231 Mich. 40.

The railroad "track" is not merely the rails and ties upon which cars are run, with respect to applicability of railroad's safety rules as to employees, but includes the road, course, way, and embankment upon which rails and ties are laid, and section hand struck by engine while cutting weeds near track was not required to be working between the rails to be considered as "working upon the tracks."—New York Cent. R. Co. v. Verpleatse, 59 N.E.2d 916, rehearing denied 60 N.E.2d 784, 116 Ind.App. 1.

17. Ga.—Southern Ry. Co. v. Perdue, 154 S.E. 793, 171 Ga. 134.
39 C.J. p 480 note 35.

18. Ind.—New York Cent. R. Co. v. Verpleatse, 60 N.E.2d 784, 116 Ind. App. 1.
39 C.J. p 480 note 36.

Definitions

Railroad's rules for operating trains and definitions forming part thereof must be construed together.—Mech v. Terminal Railroad Ass'n of St. Louis, 18 S.W.2d 510, 322 Mo. 937.

19. Wis.—Collins v. Mineral Point & N. R. Co., 117 N.W. 1014, 136 Wis. 421.
39 C.J. p 480 note 37.

20. Ind.—New York Cent. R. Co. v. Verpleatse, 60 N.E.2d 784, 116 Ind. App. 1.
Mo.—Stuart v. Dickinson, 235 S.W. 446, 290 Mo. 516.

Rules held not inconsistent

U.S.—Atchison, T. & S. F. Ry. Co. v. Ballard, C.C.A.Tex., 108 F.2d 768, rehearing denied 109 F.2d 1012, certiorari denied Ballard v. Atchison, T. & S. F. R. Co., 60 S.Ct. 1096, 310 U.S. 646, 84 L.Ed. 1413.
Ind.—New York Cent. R. Co. v. Verpleatse, 59 N.E.2d 916, rehearing denied 60 N.E.2d 784, 116 Ind.App. 1.

21. Mo.—Smith v. Chicago, B. & Q. R. Co., 15 S.W.2d 794, 321 Mo. 960.
Or.—Chadwick v. Oregon-Washington R. & Nav. Co., 144 P. 1165, 74 Or. 19.

22. Ind.—**Corpus Juris cited in** New York Cent. R. Co. v. Verpleatse, 60 N.E.2d 784, 785, 116 Ind.App. 1.
Vt.—Davis v. Rutland R. Co., 71 A. 724, 82 Vt. 24.

Foremen

The interpretation put on railroad's safety rules by railroad's foremen, although entitled to consideration, cannot be permitted to contradict or abrogate an explicit rule made for the safety of an employee.—New York Cent. R. Co. v. Verpleatse, 60 N.E.2d 784, 116 Ind.App. 1.

23. Ind.—**Corpus Juris cited in** New York Cent. R. Co. v. Verpleatse, 60 N.E.2d 784, 116 Ind.App. 1.
Va.—Houston v. Seaboard Air Line R., 96 S.E. 270, 123 Va. 290.

24. Mo.—Finnegan v. Missouri Pac. R. Co., 169 S.W. 969, 261 Mo. 481.

struction claimed by the party asserting it, when it has never been so construed by the employer and was not relied on by such party.[25]

A rule will not be construed to require an enforcement which would make impossible the operation which the rule was intended to make safe.[26] Under a rule requiring each employee to do his work in a manner not jeopardizing fellow employees, whether a duty is imposed on a railroad employee to warn a fellow employee depends on the circumstances of each case and the situation created thereby.[27] A rule requiring train crew members to familiarize themselves with the rules governing the duties of others and to be prepared in the case of an emergency to act in any capacity to insure safety contemplates that, if an employee is incapacitated to perform his duties, the next lower employee shall take over,[28] but it does not contemplate that a subordinate employee shall by force take over the duties of a superior employee who is violating some rule.[29]

Persons to whom rules apply. Rules of an employer will be applied only against,[30] and in favor of,[31] those to whom the rules were clearly intended to apply, and will not be extended to those not intended to be covered thereby.

General and special rules. Where there is a general rule regulating the conduct of servants, which applies under ordinary conditions, and there is a special rule which applies under extraordinary conditions, the special rule supersedes the general rule when the extraordinary conditions exist, and a violation of the special rule under extraordinary conditions is not excused by an observance of the general rule.[32]

b. Operation and Effect

Disregard by an employee of reasonable rules of the employer will preclude recovery for injury unless obedience thereto would have augmented the danger or been impracticable; but the mere adoption of rules will not exempt the employer from liability for negligence.

Where a master adopts reasonable rules which are brought to the knowledge of his servant, such rules constitute an element of the contract of hiring[33] and govern the legal relation of the parties when they are observed as well as when they are

25. Neb.—Merkouras v. Chicago, B. & Q. R. Co., 164 N.W. 719, 101 Neb. 717.

26. N.Y.—Kasesak v. New Jersey Cent. R. Co., 100 N.E. 743, 207 N. Y. 246.

27. Mo.—Shane v. Lowden, 106 S.W. 2d 956, 232 Mo.App. 360.

Circumstances requiring warning

In order to impose liability for violation of such rule, opportunity to give warning, necessity that it be prudent under circumstances to give it, and necessity for giving warning or some useful purpose to be served thereby, are required; liability does not arise, on the ground of such violation, where no opportunity existed for fellow employee to give warning except at expense of his own safety or where employee had full notice without being so informed by fellow employee.—Shane v. Lowden, supra.

28. Mo.—Williamson v. Wabash R. Co., 196 S.W.2d 129, 355 Mo. 248, certiorari denied 67 S.Ct. 860, 330 U.S. 824, 91 L.Ed. 1274.

29. Mo.—Williamson v. Wabash R. Co., supra.

Reminding superior of train orders

Where a train order directed inferior train to stop at a particular siding unless it could make a second siding by designated time for a superior train, and trainman, when inferior train reached first siding, told engineer, "We can't make it", trainmen did all that was required of him, by railroad rule directing trainmen to be prepared, in case of emergency, to act in any capacity to insure safety, and to remind their conductors or enginemen of contents of train orders, and hence was not precluded from recovering for injuries sustained in resulting collision with superior train.—Williamson v. Wabash R. Co., supra.

30. Iowa.—Pelton v. Illinois Cent. R. Co., 150 N.W. 236, 171 Iowa 91.
39 C.J. p 480 note 44.

31. U.S.—Central Vermont Ry. v. Sullivan, C.C.A.Mass., 86 F.2d 171—Thomson v. Downey, C.C.A.Ill., 78 F.2d 487, certiorari denied Downey v. Thomson, 56 S.Ct. 154, 296 U.S. 630, 80 L.Ed. 448—Reynolds v. New York, O. & W. Ry. Co., C.C.A.N.Y., 42 F.2d 164.
N.H.—Sweeney v. Boston & M. R. R., 175 A. 243, 87 N.H. 90, certiorari denied 55 S.Ct. 638, 294 U.S. 728, 79 L.Ed. 1258.
39 C.J. p 480 note 45.

Employees as well as public intended

Railroad's rule requiring foremen to give such careful attention to their men from time they enter on tracks until they leave them as is necessary to see that work is done with safety and efficiency, even if promulgated with reference to interest, welfare, and safety of public and shippers, also referred to safety of railroad's employees.—New York Cent. R. Co. v. Verpleatse, 59 N.E.2d 916, rehearing denied 60 N.E.2d 784, 116 Ind.App. 1.

Employees on engine or track

A provision in a railroad company's rules for the ringing of the bell when an engine is about to move is as much for the protection of employees on or about the engine as for persons on the track.—Montgomery v. Baltimore & O. R. Co., C.C.A. Ohio, 22 F.2d 359.

Persons on track in position of danger

Railroad company's rule, requiring railroad to give ample warning by whistle to persons on track, bridge, or trestle required warning only to persons seen or known to be on track in position of danger.—Central Vermont Ry. v. Sullivan, C.C.A.Mass., 86 F.2d 171.

Yard clerk

Railroad rule that when cars are pushed by an engine, except when shifting or making up trains in yards, a trainman must take a conspicuous position on front of leading car, applies to employees whose safety may be impaired by its nonobservance, so that yard clerk engaged in checking freight cars was within its intended protection.—McCrowell v. Southern Ry. Co., 20 S.E. 2d 352, 221 N.C. 366.

32. Ala.—Birmingham R. Light & Power Co. v. Mosely, 51 So. 424, 164 Ala. 111.
Effect of special orders on standing rules see infra § 278.

33. Me.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.
39 C.J. p 481 note 50.

disregarded;[34] and disregard or disobedience thereof will preclude recovery for injury sustained[35] unless obedience thereto would have augmented the danger or been impracticable,[36] or the proper performance of his duty, on the part of the employee, necessitated such a violation,[37] or unless, as discussed infra § *277*, such disobedience is not the proximate cause of the injury. However, the mere adoption of rules and regulations will not exempt the master from liability for negligence,[38] and an employee's failure to observe a rule intended for his safety does not exempt the employer from exercising due care.[39] The adoption of rules admits the reasonable necessity for the conduct thereby prescribed,[40] and specific directions made part of rules constitute standards of care, presumably demanded by the exigencies of the business, to which all persons employed in the business are required to conform.[41]

§ 277. —— Proximate Cause of Injury

In order for a servant to recover for injuries on the ground of the master's failure to adopt or enforce rules, such failure must have been the proximate cause of the injury; and an employee's disobedience of rules, to bar his recovery for injury, must have been the proximate cause thereof.

In order that the servant may recover for injuries alleged to have been caused by the failure of the master to adopt or, having adopted, to enforce, reasonable rules for the government of his servants, such failure must be shown to have been the proximate cause of the injury.[42] For disobedience of rules to bar an employee's recovery for injury, such disobedience must have been the proximate cause of the injury.[43]

§ 278. Orders

A special order has been held to prevail over a general rule; but the contrary has also been held.

A railroad employee given a specific order incon-

Superseded rule

(1) Agreement between railroad and employees' brotherhood as to protection for repairmen prevailed in case of conflict with rules of railroad previously in effect.—Cato v. Atlanta & C. A. L. Ry. Co., 162 S.E. 239, 164 S.C. 123, certiorari denied Atlanta & C. A. L. Ry. Co. v. Cato, 52 S.Ct. 200, 284 U.S. 684, 76 L.Ed. 577—Cato v. Atlanta & C. A. L. Ry. Co., 152 S.E. 522, 155 S.C. 304.

(2) Car repairman was not bound to observe superseded rule merely because of statement in written application of employment.—Cato v. Atlanta & C. A. L. Ry. Co., 152 S.E. 522, 155 S.C. 304.

34. Me.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.

35. Minn.—Cedargren v. Minnesota Steel Co., 247 N.W. 235, 188 Minn. 331.
W.Va.—Hudson v. Norfolk & W. Ry. Co., 146 S.E. 525, 106 W.Va. 437, certiorari denied 49 S.Ct. 481, 279 U.S. 866, 73 L.Ed. 1004, rehearing denied 50 S.Ct. 79.
39 C.J. p 481 note 51.
Disobedience of rules as contributory negligence see infra §§ 457–459.

Negligence per se

The violation of a railroad rule has been held negligence per se.—Kidd v. Chicago, R. I. & P. Ry. Co., 274 S.W. 1079, 310 Mo. 1, certiorari denied Chicago, R. I. & P. Ry. Co. v. Kidd, 46 S.Ct. 119, 269 U.S. 582, 70 L.Ed. 424.

36. Cal.—Holmes v. Southern Pac. Co., 52 P. 652, 120 Cal. 357.
39 C.J. p 481 note 52.

37. Minn.—Burho v. Minneapolis & St. L. R. Co., 141 N.W. 300, 121 Minn. 326.
39 C.J. p 481 note 53.

38. Ky.—Louisville & N. R. Co. v. Payne, 197 S.W. 928, 177 Ky. 462, L.R.A.1918C 376.
39 C.J. p 481 note 54.

Measure of requirements

In determining railroad's liability for death of employee struck by train, what an applicable rule of railroad requires may be evidence in the nature of an admission of what should be done, but what should be done is measured by what the standard of prudence requires to be done, or by what applicable authoritative enactments, legislative or otherwise, require to be done, regardless of the rule.—Smith v. Thompson, 161 S.W. 2d 232, 349 Mo. 396.

39. Ind.—Southern Ry. Co. v. Wilkins, 178 N.E. 454, 95 Ind.App. 130, certiorari denied 53 S.Ct. 85, 287 U.S. 635, 77 L.Ed. 550.

Providing safe place to work

Contract rule requiring machine operators in mine to prop roof did not relieve employer from duty of furnishing safe working place for loader.—New Union Coal Co. v. Sult, 290 S.W. 580, 172 Ark. 753.

40. Minn.—Jacobson v. Chicago & N. W. Ry. Co., 22 N.W.2d 455, 221 Minn. 454.
N.H.—Topore v. Boston & M. R. R., 103 A. 72, 78 N.H. 536.

41. Minn.—Jacobson v. Chicago & N. W. Ry. Co., 22 N.W.2d 455, 221 Minn. 454.

42. U.S.—Proctor & Gamble Defense Corp. v. Bean, C.C.A.Miss., 146 F. 2d 598—Hylton v. Southern Ry. Co., C.C.A.Tenn., 87 F.2d 393, certiorari denied 57 S.Ct. 929, 301 U.S. 699, 81 L.Ed. 1354.
Ark.—St. Louis-San Francisco Ry. Co. v. Bryan, 112 S.W.2d 641, 195 Ark. 350.
39 C.J. p 482 note 55.

Concurring negligence

Tex.—Fort Worth & R. G. Ry. Co. v. Pickens, Civ.App., 153 S.W.2d 252, reversed on other grounds 162 S.W.2d 691, 139 Tex. 181.

Where railroad employee fell from scaffold while doing work on trestle, striking a pile stub projecting above the ground, fact that railroad safety rule prohibiting employees from working on scaffolding over pile stubs was thereby violated did not establish any negligence of railroad having any causal connection with the fall.—Missouri Pac. R. Co. v. Davis, 186 S.W.2d 20, 208 Ark. 86.

Failure held proximate cause

(1) Generally.—Adams v. Chicago & E. R. Co., 41 N.E.2d 991, 314 Ill. App. 404.

(2) Violation of rule in running railroad motorcar at excessive speed.—Alabama Great Southern Ry. Co. v. Norrell, 143 So. 904, 225 Ala. 503.

(3) Engineer's failure to observe rules requiring relieving engineer to obtain special orders from engineer relieved.—Southern Ry. Co. v. Pearce, 149 S.E. 155, 40 Ga.App. 166.

Failure held not proximate cause

Kan.—Haggard v. Lowden, 134 P.2d 676, 156 Kan. 522.

43. Minn.—Cedargren v. Minnesota Steel Co., 247 N.W. 235, 188 Minn. 331—Le Duc v. Northern Pac. R. Co., 100 N.W. 108, 92 Minn. 287.

sistent with a general rule has been held required to obey the order rather than the rule;[44] but special orders made necessary by an accident temporarily interrupting the regular service of a railroad should be construed merely to require the employee to adhere to them as closely as due regard for safety permits, and not to abrogate the standing rules of the company,[45] and the partial supersession of yard-limit rules by the adoption and use of certain orders inconsistent therewith does not wholly dispense with them, and they still apply in a modified form.[46] If an order has been read to an employee, he is charged with the duty of understanding it.[47]

Compliance with commands as affecting assumption of risk is discussed infra §§ 398–403, disobedience of orders as contributory negligence infra §§ 457–459, and compliance with commands or orders as affecting contributory negligence infra §§ 463–467.

§ 279. —— Authority to Give

A master is bound by orders given by an authorized agent, and is liable for injuries to a servant proximately caused by obedience to such orders.

The master is bound by orders given to a servant by an authorized agent, and will be liable to the servant for injuries received while acting in obedience thereto[48] if, as discussed infra § 283, such obedience is the proximate cause of the injury; and this is true even though the act ordered is in violation of the provisions of a statute[49] or the agent has no right to give such orders.[50] Where two agents are over one servant, he may obey the superior of the two,[51] but a master will not be bound by orders given by an unauthorized person,[52] even though the servant believed that it was his duty to obey such orders,[53] unless the master clothed the person giving the order with such apparent authority as to justify the servant in believing that he was in fact authorized.[54] The mere fact, however, that an authorized order was transmitted through a fellow servant, and not received directly from one in authority, will not relieve the master from liability.[55]

§ 280. —— Negligence in Giving Orders

A master must use reasonable care to protect his servants from danger in executing orders, and is liable for negligence in giving orders; but he cannot be held liable in the absence of negligence or where a servant goes beyond what the order can be held to have contemplated.

Since it is the duty of a servant to obey an order given by one in authority over him, if not manifestly unreasonable, the master must use reasonable care to protect his servants from danger in the execution of orders, and will be held liable for his own or his vice principal's negligence in giving orders.[56]

44. Ill.—Goodman v. Chicago, B. & Q. R. Co., 7 N.E.2d 393, 289 Ill. App. 320, certiorari denied Chicago, B. & Q. R. Co. v. Goodman, 58 S. Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.

45. U.S.—St. Louis & S. F. R. Co. v. Dewees, Kan., 153 F. 56, 82 C.C.A. 190.

46. W.Va.—Jackson v. Wheeling Terminal R. Co., 64 S.E. 450, 65 W. Va. 415.

47. Ky.—Sinclair v. Illinois Cent. R. Co., 112 S.W. 910, 129 Ky. 828.

48. Mo.—Moore v. James Black Masonry & Construction Co., App., 27 S.W.2d 765.
39 C.J. p 482 note 57.

49. U.S.—Delaware, L. & W. R. Co. v. Petrosky, N.Y., 250 F. 554, 162 C.C.A. 570, certiorari denied 38 S. Ct. 427, 247 U.S. 508, 62 L.Ed. 1241.
39 C.J. p 482 note 58.

50. Me.—Walczenko v. Oxford Paper Co., 75 A. 328, 106 Me. 108.
39 C.J. p 482 note 59.

51. Mo.—Sims v. Omaha, K. C. & E. R. Co., 89 Mo.App. 197.
39 C.J. p 482 note 60.

52. Miss.—Brown v. Coley, 152 So. 61, 168 Miss. 778—Gulfport & M. Coast Traction Co. v. Faulk, 80 So. 340, 118 Miss. 894.
39 C.J. p 482 note 61.

53. Iowa.—Newbury v. Getchell & Martin Lumber & Mfg. Co., 69 N. W. 743, 100 Iowa 441, 62 Am.S.R. 582.

54. Tex.—The Oriental v. Barclay, 41 S.W. 117, 16 Tex.Civ.App. 193.
39 C.J. p 483 note 63.

55. Ohio.—Stubbins v. Buckeye Steel Castings Co., 33 Ohio Cir.Ct. 597.
Servant performing duty of master see infra § 333.

Delegation of right to give orders
Fact that foreman, irrespective of authority delegated right to give orders, made employer liable to employee injured while obeying orders.—Moore v. James Black Masonry & Construction Co., Mo.App., 27 S.W. 2d 765.

56. Ark.—Neely v. Goldberg, 114 S. W.2d 455, 195 Ark. 790.
Miss.—Masonite Corp. v. Graham, 25 So.2d 322, 199 Miss. 833.
Mo.—Phares v. Century Electric Co., 82 S.W.2d 91, 336 Mo. 961—Mitchell v. Wabash Ry. Co., 69 S.W.2d 286, 334 Mo. 926—**Corpus Juris quoted in** Crane v. Liberty Foundry Co., 17 S.W.2d 945, 955, 322 Mo. 592—Wright v. Kansas City Structural Steel Co., 157 S.W.2d 582, 236 Mo.App. 872—Williams v. Terminal Railroad Ass'n of St. Louis, App., 20 S.W.2d 584—Lewis v. American Car & Foundry Co., App., 3 S.W.2d 282.
Mont.—Palmer v. Great Northern Ry. Co., 170 P.2d 768.
N.C.—Smith v. Ritch, 144 S.E. 537, 196 N.C. 72, 59 A.L.R. 1084.
39 C.J. p 483 note 65.

Formally imperative directions need not be shown; it is sufficient that the employee was proceeding in compliance with the employer's request made in the manner usually used by the latter in directing the work of employees.
Cal.—Miller v. Cookson, 265 P. 374, 89 Cal.App. 602.
Ind.—Vandalia R. Co. v. Kendall, 119 N.E. 816, 68 Ind.App. 1.

A suggestion, in this connection, is not an order or a command.—Martin v. Beck, 171 So. 14, 177 Miss. 303.

Reasonable grounds to expect safety
Whether boss was negligent in ordering attempt to pull log over stump, resulting in injury to member of crew, depends on whether he had reasonable grounds to believe it

In the absence of negligence the master cannot be held liable;[57] thus a general order given by the master to a servant to do work in the usual course of employment[58] or a peremptory order to a servant to do a certain thing of a simple everyday character[59] does not make the master liable for injuries received by the servant while acting under the orders or obeying the command; and this is so even though the business is dangerous, where it is the regular business of the master and the servant is not inexperienced.[60] The master, a superior servant, or vice principal may give such orders about the work as are essential to induce a prompt and attentive discharge of the duties imposed on the servant without breaching the obligation to exercise ordinary care for the safety of the servant.[61]

The master is not liable where a servant goes beyond what the order given him can be held to have contemplated.[62] It is not the employee's interpretation of the order which controls, but the reasonable and fair inference to be drawn from all the language used;[63] the obvious meaning of an order cannot be changed by the construction placed on it by one or more servants.[64]

Customary methods. The master may show, in defense to an action for personal injuries, that the course pursued by him in giving the order complained of was that followed by other well regulated companies in the same line of business[65] or that the work which the servant was ordered to do was customarily done by servants of this class and that he was willing to do the work for the extra pay.[66]

§ 281. —— Knowledge of Defect or Danger

A master is not liable for injuries received by a servant while obeying an authorized command unless the person giving it knew, or by the exercise of reasonable care should have known, of the defect or danger which resulted in the injury.

could be done safely.—Jones v. Gilloz, Mo.App., 9 S.W.2d 89, quashal of opinion denied State ex rel. Jones v. Cox, Sup., 23 S.W.2d 112.

Ordering use of defective equipment
Ohio.—Kraemer v. Bates Motor Transport Lines, 11 N.E.2d 105, 56 Ohio App. 427.

Order rendering place of work unsafe
Mo.—Morris v. Atlas Portland Cement Co., 19 S.W.2d 865, 323 Mo. 307.

Ordering use of unsafe method
Miss.—Brown v. Coley, 152 So. 61, 168 Miss. 778.

57. Miss.—Superior Oil Co. v. Richmond, 159 So. 850, 172 Miss. 407.
Mo.—Emrick v. City of Springfield, App., 110 S.W.2d 840.
39 C.J. p 484 note 66.

Exposure to peril beyond ordinary risks
In order to constitute negligent order, it must have been reasonably apparent to master or vice principal that execution of command would expose servant to peril beyond ordinary risks of service, against which reasonable care on servant's part would probably not protect him; if peril was obvious to servant and might readily be avoided by him while executing order, master had right to assume that servant would observe and avoid peril.—Seaboard Air Line Ry. Co. v. Hackney, 115 So. 869, 217 Ala. 382—Woodward Iron Co. v. Wade, 68 So. 1008, 192 Ala. 651.

Overexertion
(1) Employer is not guilty of negligence in ordering work in which employee strains himself by overexertion, unless it is clearly beyond powers of ordinary man.—Bowers v. J. D. Halstead Lumber Co., 236 P. 124, 28 Ariz. 122.

(2) An order to an employee to do the best he can does not require him to exert himself beyond his strength.—Maciejewski v. Graton & Knight Co., Mass., 70 N.E.2d 796.

(3) An order to employees to lift a heavy object does not mean that they should exert themselves to the extent that injury would follow as a result.—Batson v. Smith, 117 S.W.2d 731, 196 Ark. 386.

Orders held not to constitute negligence
Ala.—Seaboard Air Line Ry. Co. v. Hackney, 115 So. 869, 217 Ala. 382.
Ariz.—Bowers v. J. D. Halstead Lumber Co., 236 P. 124, 28 Ariz. 122.
Ark.—Tucker Duck & Rubber Co. v. Harvey, 154 S.W.2d 828, 202 Ark. 1033—Batson v. Smith, 117 S.W.2d 731, 196 Ark. 386.
Ind.—Louisville & N. Ry. & Lighting Co. v. Beck, 147 N.E. 776, 196 Ind. 238.
Mass.—Sylvain v. Boston & M. R. R., 182 N.E. 835, 280 Mass. 503.
Miss.—Eastman Gardiner Hardwood Co. v. Chatham, 151 So. 556, 168 Miss. 471.
Mo.—Mitchell v. Westport Hotel Operating Co., 19 S.W.2d 528, 225 Mo.App. 181.
N.Y.—Reed v. Davis, 162 N.E. 576, 249 N.Y. 35.
Tex.—Turnbow v. Panhandle & S. F. Ry. Co., Civ.App., 127 S.W.2d 982, error refused
W.Va.—Miller v. Douglas, 5 S.E.2d 799, 121 W.Va. 638.
39 C.J. p 484 note 66 [a]-[c], [e].

58. Ill.—Kalinski v. Williamson County Coal Co., 104 N.E. 1097, 263 Ill. 257—McMahon v. Owsley, 102 N.E. 1010, 260 Ill. 43, L.R.A. 1916F 1208.

59. Mo.—Pulley v. Standard Oil Co., 116 S.W. 430, 136 Mo.App. 172.
39 C.J. p 485 note 68.

60. Miss.—Eastman Gardiner Hardwood Co. v. Chatham, 151 So. 556, 168 Miss. 471.
Mo.—**Corpus Juris cited in** Mitchell v. Westport Hotel Operating Co., 19 S.W.2d 528, 530, 225 Mo.App. 181.
39 C.J. p 485 note 69.

61. Kan.—White v. Berkson Eros. Cloak & Suit Co., 187 P. 670, 106 Kan. 239.
39 C.J. p 485 note 70.

62. Miss.—Superior Oil Co. v. Richmond, 159 So. 850, 172 Miss. 407.

Assisting in putting out fire
Miss.—Superior Oil Co. v. Richmond, supra.

63. Miss.—Eastman Gardiner Hardwood Co. v. Chatham, 151 So. 556, 168 Miss. 471.

A simple order to take a designated train is not an order to take it at all hazards or otherwise than in the usual manner and by the usual means.—Vinger v. Central R. Co. of New Jersey, 160 A. 575, 109 N.J.Law 93.

64. Ind.—Louisville & N. R. & Lighting Co. v. Beck, 145 N.E. 886, 196 Ind. 238.

65. Ala.—Holland v. Tennessee Coal Iron & R. Co., 8 So. 524, 91 Ala. 444, 12 L.R.A. 232.
Customary methods generally see supra § 267.

66. Ky.—Wadlington v. Newport News & M. V. R. Co., 20 S.W. 783, 14 Ky.L. 559.

A master is not liable for injuries to a servant received by the latter while obeying an authorized command unless the person giving the command knew, or by the exercise of reasonable care should have known, of the defect or danger which resulted in the injury.[67] It is generally not negligence for an employer to direct an employee to perform services the risks of which are apparent to, and appreciated by, the employee;[68] but a servant acting in obedience to a command, on the assurance of the one giving it that there is no danger, may rely on such assurance and the master will be liable for resulting injuries.[69] Where an employer knows, or by the exercise of reasonable care should know, that some injury will probably result to an employee doing the work negligently ordered, it is not essential to recovery to show the employer's knowledge of the precise injury resulting.[70]

§ 282. —— Duty toward Inexperienced or Youthful Servant

A master knowing that a servant is inexperienced or too young to appreciate the danger which the master knows, or ought to know, is incident to an act ordered is liable for injuries received by the servant while executing the order.

Where the master knows that a servant is inexperienced or not of an age to appreciate the danger incident to an act which he is ordered to do, the master will be held liable to the servant for injuries received by him while executing an order which the master knows, or ought to know, involves danger,[71] but it is not negligence for a master to set his servant to a piece of work where such servant is of sufficient age and intelligence to appreciate the risk, which is both patent and incident to the particular work;[72] nor will the mere fact that a servant was under age show negligence on the part of the master where the servant had worked for some time in the capacity in which he was working when injured and understood the duties and responsibilities of the position.[73]

§ 283. —— Proximate Cause of Injury

In order to recover for injuries allegedly resulting from obedience to a negligent order, a servant must show that such obedience was the proximate cause of the injury.

In an action for personal injuries alleged to have resulted from obedience to a negligent order, there can be no recovery unless it is shown that the act of the servant in obeying such order was the proximate cause of the injury.[74]

D. WARNING AND INSTRUCTING SERVANT

§ 284. Duty and Liability of Master Generally

It is the duty of the master to warn and instruct his servant as to the defects and dangers of which he knows, or ought, in the exercise of reasonable care and diligence, to know, and of which the servant has no knowledge, actual or constructive.

67. Ind.—Conway v. Park, 31 N.E.2d 79, 108 Ind.App. 562.
Mo.—Morris v. Atlas Portland Cement Co., 19 S.W.2d 865, 323 Mo. 307—Emrick v. City of Springfield, App., 110 S.W.2d 840.
Tex.—Doty v. Fort Worth & D. C. Ry. Co., 95 S.W.2d 104, 127 Tex. 521.
39 C.J. p 485 note 73.
Actual notice charged by law
Foreman held chargeable, as matter of law, with actual notice or knowledge that switch of track for conveying ladles of molten metal was open when he signaled laborer to proceed since, if he had looked at switch, as it was his duty to do, he would have discovered its actual condition.—Crane v. Liberty Foundry Co., 17 S.W.2d 945, 322 Mo. 592.

68. Mich.—La Pointe v. Chevrette, 250 N.W. 272, 264 Mich. 482—Lewis v. Phelps, 240 N.W. 60, 256 Mich. 646.

69. Mich.—**Corpus Juris quoted in** La Pointe v. Chevrette, 250 N.W. 272, 274, 264 Mich. 482.
39 C.J. p 485 note 74.

70. Mo.—Hamilton v. Standard Oil Co. of Indiana, 19 S.W.2d 679, 323 Mo. 531.

71. N.C.—Jackson v. Royal & Borden Mfg. Co., 141 S.E. 282, 195 N. C. 18—Howard v. Buckeye Cotton Oil Co., 94 S.E. 412, 174 N.C. 651.
Tex.—**Corpus Juris cited in** Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 401, 123 Tex. 128.
39 C.J. p 485 note 76.
Care required as to youthful or inexperienced servant generally see supra § 185.
Duty toward inexperienced or youthful servant with respect to methods see supra § 260.
Warning or instructing inexperienced or youthful servants see infra § 306.

72. Mo.—Fulwider v. Trenton Gas, Light & Power Co., 116 S.W. 508, 216 Mo. 582.
N.Y.—Evans v. Vogt Mfg. Co., 25 N.Y.S. 509, 5 Misc. 330.

73. Mich.—Greenwald v. Marquette, H. & O. R. Co., 13 N.W. 513, 49 Mich. 197.

74. N.C.—Jackson v. Royal & Borden Mfg. Co., 141 S.E. 282, 195 N. C. 18—Howard v. Buckeye Cotton Oil Co., 94 S.E. 412, 174 N.C. 651.
Tex.—International-Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272.
39 C.J. p 486 note 80.
Obedience of order held proximate cause of injury
Mo.—Hamilton v. Standard Oil Co. of Indiana, 19 S.W.2d 679, 323 Mo. 531.
Obedience of order held not proximate cause of injury
(1) Generally.
R.I.—Kemplin v. H. W. Golden & Son, 157 A. 872, 52 R.I. 89.
W.Va.—Miller v. Douglas, 5 S.E.2d 799, 121 W.Va. 638.
(2) Negligence, if any, of railroad in blocking street and requiring employee to divert traffic, held as matter of law not proximate cause of employee's death when struck by automobile.—Fort Worth & D. C. R. Co. v. Garrett, Tex.Civ.App., 28 S.W. 2d 301, error refused.

It is the duty of the master to warn and instruct his servant as to defects and dangers of which he knows, or ought, in the exercise of reasonable care and diligence, to know, and of which the servant has no knowledge, actual or constructive;[75] prima facie this duty requires the master to warn and instruct the servant with reference to all abnormal or unusual, peculiar or extraordinary risks or hazards of the employment,[76] and, where the business is complex or dangerous in its nature, the master is

75. U.S.—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 105 F.2d 371—Bosarge v. Gaines, C.C.A.Miss., 93 F.2d 800—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 93 F.2d 736—Madison v. Phillips Petroleum Co., C.C.A.Tex., 88 F.2d 515, certiorari denied 57 S.Ct. 946, 301 U.S. 703, 81 L.Ed. 1358—Pennsylvania Pulverizing Co. v. Butler, C.C.A.N.J., 61 F.2d 311—M. T. Stevens & Sons Co. v. Daigneault, C.C.A.N.H., 4 F.2d 53—Kane v. Federal Match Corporation, D.C. Pa., 5 F.Supp. 507—Village of Harbor Springs, Mich., v. U. S., 72 Ct. Cl. 32.

Ala.—**Corpus Juris cited in** Seaboard Air Line Ry. Co. v. Latham, 127 So. 679, 680, 23 Ala.App. 490.

Ariz.—**Corpus Juris cited in** Wylie v. Moore, 84 P.2d 450, 451, 52 Ariz. 537.

Ark.—Harmon v. Ward, 149 S.W.2d 575, 202 Ark. 54—J. L. Williams & Sons v. Tompkins, 114 S.W.2d 845, 195 Ark. 1146—Kurn v. Faubus, 84 S.W.2d 602, 191 Ark. 232.

Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.

Idaho.—**Corpus Juris cited in** Claris v. Oregon Short Line R. Co., 51 P. 2d 217, 219, 56 Idaho 169, certiorari denied Oregon Short Line R. Co. v. Claris, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.

Ill.—Collins v. Kurth, 247 Ill.App. 156, affirmed 153 N.E. 355, 322 Ill. 250.

Ky.—Combs v. W. P. Sullivan & Co., 114 S.W.2d 754, 272 Ky. 522—Robinette v. Norfolk & W. Ry. Co., 60 S.W.2d 344, 249 Ky. 93.

La.—Simmons v. Doullut & Ewin, App., 145 So. 708, rehearing denied 146 So. 772.

Me.—Spence v. Bath Iron Works Corporation, 37 A.2d 174, 140 Me. 287—McBurnie v. Northrup, 27 A.2d 823, 139 Me. 149—Kimball v. Clark, 177 A. 183, 133 Me. 263—Ward v. Maine Cent. R. Co., 166 A. 826, 132 Me. 88—Loring v. Maine Cent. R. Co., 152 A. 527, 129 Me. 369.

Mass.—Reidy v. Crompton & Knowles Loom Works, 60 N.E.2d 589, 318 Mass. 135—Cotoia v. Seale, 27 N.E. 2d 706, 306 Mass. 101.

Mo.—Neal v. Curtis & Co. Mfg. Co., 41 S.W.2d 543, 328 Mo. 389—Thomas v. American Sash & Door Co., 14 S.W.2d 1, 321 Mo. 1024—Dixon v. Frazier-Davis Const. Co., 298 S.W. 827, 318 Mo. 50—Small v. Ralston-Purina Co., App., 202 S.W. 2d 533—Marsanick v. Luechtefeld, App., 157 S.W.2d 587.

Neb.—Hansen v. Jasmer, 203 N.W. 552, 113 Neb. 372.

N.H.—Tremblay v. J. Rudnick & Sons, 13 A.2d 153, 91 N.H. 24.

N.J.—Cichocki v. Geigy Co., 183 A. 463, 14 N.J.Misc. 232.

N.C.—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112—Crawford v. Michael & Bivens, 154 S.E. 58, 199 N.C. 224—Watson v. Warsaw Const. Co., 150 S.E. 20, 197 N. C. 586.

Okl.—Britt v. Doty, 161 P.2d 521, 195 Okl. 620—**Corpus Juris cited in** Lowden v. Larson, 102 P.2d 144, 147, 187 Okl. 226—Oklahoma Gas & Electric Co. v. Oliphant, 45 P.2d 1077, 172 Okl. 1077—**Corpus Juris cited in** Thurlow v. Failing, 272 P. 368, 372, 133 Okl. 277.

Pa.—Faulks v. Fischer, 37 A.2d 574, 349 Pa. 485—**Corpus Juris quoted in** Baumgartner v. Pennsylvania R. Co., 140 A. 622, 625, 292 Pa. 106—Graszkowski v. White Brothers Smelting Corporation, 18 Pa.Dist. & Co. 438.

Tenn.—Moon v. City of Chattanooga, 10 Tenn.App. 82.

Tex.—City of Austin v. Johnson, Civ. App., 195 S.W. 222—Morgan v. State, Civ.App., 170 S.W.2d 648, reversed on other grounds State v. Morgan, 170 S.W.2d 652, 140 Tex. 620.

Utah.—Pauly v. McCarthy, 166 P.2d 501, 109 Utah 398, reversed on other grounds 67 S.Ct. 962, 330 U.S. 802, 91 L.Ed. 1261.

Wash.—Cummins v. Dufault, 139 P. 2d 308, 18 Wash.2d 274.

W.Va.—**Corpus Juris cited in** Trimble v. Steele, 157 S.E. 166, 167, 110 W.Va. 170.

Wis.—American Mut. Liability Ins. Co. of Boston v. Chain Belt Co., 271 N.W. 828, 224 Wis. 155.

39 C.J. p 486 note 82.

Disregarding warnings as contributory negligence see infra §§ 460–462.

Precautions against injury see supra §§ 262, 263.

Agreement with third person

Master's duty to disclose to servant dangers in process known to him and unknown to servant is not avoided by contract with third person to keep secret materials used in process.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr., Del., 564.

Common-law duty

It is common-law duty of employer, independent of statute, to warn employee of dangers incident to employment.—Miller v. Paine Lumber Co., 227 N.W. 933, 202 Wis. 77, defendant's motion denied and plaintiff's motion granted 229 N.W. 35, and affirmed 230 N.W. 702, 202 Wis. 77.

Dangers not obvious

A master's duty to warn servant of dangers is to warn of dangers that are not obvious to the servant, or which are not as obvious to the servant as to the master.—Bohlmann v. Penn Electric Corporation, 286 N.W. 552, 232 Wis. 232.

Excusably ignorant

It is the duty of employer to instruct employee regarding a risk of employment of which the employee is excusably ignorant.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.

Imperative duty

Master's duty to warn servant of dangerous situation, known only to master, is imperative.—Baumgartner v. Pennsylvania R. Co., 140 A. 622, 292 Pa. 106.

Risks from concealed causes

Where risks to which employee is exposed arise from causes which are concealed, employer must notify employee thereof, provided employer himself knows or by exercise of ordinary care ought to have known of them.—Le Vonas v. Acme Paper Bd. Co., 40 A.2d 43, 184 Md. 16.

76. U.S.—Aqua System v. Kodakoski, C.C.A.Canal Zone, 88 F.2d 395.

Mo.—Missouri Dist. Telegraph Co. v. Southwestern Bell Telephone Co., 93 S.W.2d 19, 338 Mo. 692—Benjamin v. C. Hager & Sons Hinge Mfg. Co., App., 273 S.W. 754.

N.H.—Moore v. Morse & Malloy Shoe Co., 197 A. 707, 89 N.H. 332.

Pa.—**Corpus Juris quoted in** Baumgartner v. Pennsylvania R. Co., 140 A. 622, 625, 292 Pa. 106.

Tex.—Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 123 Tex. 128.

39 C.J. p 488 note 83.

"The master owes a duty to his servant to warn him of danger connected with the work which a man of ordinary prudence could not comprehend from the operation involved."—Cummins v. Dufault, 139 P.2d 308, 316, 18 Wash.2d 274.

bound to point out to servants the particular defects and dangers incident thereto.[77]

Whether warning or instruction is necessary may depend on the age,[78] intelligence,[79] and experience[80] of the employee, as well as on the nature of the danger,[81] the character of the work,[82] and the surrounding conditions and circumstances;[83] but the duty does not depend on custom.[84]

Where there is a duty to warn, the master is negligent where he fails so to warn,[85] and he cannot escape responsibility for his failure, even though the danger is one which in the ordinary course of business cannot be avoided,[86] or by reason of his having used the utmost care to reduce the danger as much as possible,[87] nor is it material how or by whom the dangerous conditions were created[88] or that the servant could not have avoided the danger had he known of it.[89]

While it is recognized that the purposes of the law requiring the master to instruct his servant touching his duties, and the nature of the work to which he is assigned, and to warn him of dangers attendant on its execution, are to give to the servant the information which the master has, or ought to have,[90] and which it is presumed that the servant does not have,[91] and to impress on him the necessity of bearing in mind the danger[92] so that he

Latent or unusual dangers

A master has a primary duty to warn the servant of any latent or unusual dangers that might attend the employment.—Clayton v. Ainsworth, 4 A.2d 274, 122 N.J.Law 160.

Transitory dangers

If, by reason of the nature of an employment, transitory conditions arise which at times render the employment hazardous, and which the servant cannot anticipate by reason of his ignorance, an employer should give warning of the danger.—Baumgartner v. Pennsylvania R. Co., 140 A. 622, 292 Pa. 106—39 C.J. p 488 note 83 [d].

77. Ala.—Gentry v. Swann Chemical Co., 174 So. 530, 234 Ala. 313.
Ariz.—**Corpus Juris cited in** Wylie v. Moore, 84 P.2d 450, 451, 52 Ariz. 537.
Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.
Miss.—Federal Compress Co. v. Craig, 7 So.2d 532, 192 Miss. 689—Ross v. Louisville & N. R. Co., 172 So. 752, 178 Miss. 69—McLemore & McArthur v. Rogers, 152 So. 883, 169 Miss. 650.
Mo.—Gettys v. American Car & Foundry Co., 16 S.W.2d 85, 322 Mo. 787.
Pa.—**Corpus Juris quoted in** Baumgartner v. Pennsylvania R. Co., 140 A. 622, 625, 292 Pa. 106.
39 C.J. p 488 note 84.

Premises or place of work

Mass.—Ryan v. Gray, 55 N.E.2d 700, 316 Mass. 259.
Miss.—Masonite Corporation v. Lochridge, 140 So. 223, 163 Miss. 364, suggestion of error overruled 141 So. 758, 163 Miss. 364.
N.J.—Clayton v. Ainsworth, 4 A.2d 274, 122 N.J.Law 160.

Use of materials

A master is under a duty to warn the servant of any danger incident to the use of any materials which the master furnishes.—Symons v. Great Northern Ry. Co., 293 N.W. 303, 208 Minn. 240.

78. U.S.—Grant Storage Battery Co. v. De Lay, C.C.A.Neb., 87 F.2d 726.
Fla.—German-American Lumber Co. v. Hannah, 53 So. 516, 60 Fla. 76, 30 L.R.A.,N.S., 882.
Me.—McBurnie v. Northrup, 27 A.2d 823, 139 Me. 149—Ward v. Maine Cent. R. Co., 166 A. 826, 132 Me. 88.
N.H.—Bilodeau v. Gale Bros., 140 A. 172, 83 N.H. 196.
Instructing minors see infra § 306.

79. U.S.—Grant Storage Battery Co. v. De Lay, C.C.A.Neb., 87 F.2d 726.
Me.—McBurnie v. Northrup, 27 A.2d 823, 139 Me. 149—Ward v. Maine Cent. R. Co., 166 A. 826, 132 Me. 88.
N.H.—Bilodeau v. Gale Bros., 140 A. 172, 83 N.H. 196.
39 C.J. p 488 note 86.

80. U.S.—Grant Storage Battery Co. v. DeLay, C.C.A.Neb., 87 F.2d 726.
Me.—McBurnie v. Northrup, 27 A.2d 823, 139 Me. 149—Ward v. Maine Cent. R. Co., 166 A. 826, 132 Me. 88.
39 C.J. p 489 note 87.
Experience of employee see infra §§ 304–306.

81. U.S.—Grant Storage Battery Co. v. De Lay, C.C.A.Neb., 87 F.2d 726.
Me.—McBurnie v. Northrup, 27 A.2d 823, 139 Me. 149—Ward v. Maine Cent. R. Co., 166 A. 826, 132 Me. 88.
39 C.J. p 489 note 88.

82. U.S.—Grant Storage Battery Co. v. De Lay, C.C.A.Neb., 87 F.2d 726.
Del.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr. 339.

83. U.S.—Grant Storage Battery Co. v. De Lay, C.C.A.Neb., 87 F.2d 726.
Del.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr. 339.
39 C.J. p 489 note 89.

84. Iowa.—Kirchoff v. Hohnsbehn Creamery Supply Co., 123 N.W. 210, 148 Iowa 508.
Md.—Pennsylvania Steel Co. v. Nace, 77 A. 1121, 113 Md. 460, 45 L.R.A., N.S., 281.

85. U.S.—Village of Harbor Springs, Mich., v. U. S., 72 Ct.Cl. 32.
Ark.—J. L. Williams & Sons v. Tompkins, 114 S.W.2d 845, 195 Ark. 1146—Kurn v. Faubus, 84 S.W.2d 602, 191 Ark. 232.
Tex.—City of Austin v. Johnson, Civ.App., 195 S.W.2d 222.
39 C.J. p 486 note 82 [a].
Failure to warn as proximate cause of injury see infra § 291.

Negligence and deceit

Employer intentionally concealing character of dangerous instrumentality used in employee's work, is guilty of negligence and deceit.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr., Del., 564.

86. Mass.—Reidy v. Crompton & Knowles Loom Works, 60 N.E.2d 589, 318 Mass. 135—Wood v. Canadian Imperial Dry Inc., 5 N.E.2d 8, 296 Mass. 80.

87. Cal.—Pigeon v. Fuller, 105 P. 976, 156 Cal. 691.
39 C.J. p 489 note 91.

88. Mo.—Neal v. Curtis & Co. Mfg. Co., 41 S.W.2d 543, 328 Mo. 389.
39 C.J. p 489 note 92.

89. N.H.—Blaisdell v. Davis Paper Co., 77 A. 485, 75 N.H. 497, 139 Am. S.R. 735.

90. Del.—**Corpus Juris cited in** Derrickson v. Commissioners of Town of Harrington, 138 A. 645, 647, 3 W.W.Harr. 412.
39 C.J. p 489 note 94.

91. Del.—**Corpus Juris cited in** Derrickson v. Commissioners of Town of Harrington, 138 A. 645, 647, 3 W.W.Harr. 412.
Me.—Ward v. Maine Cent. R. Co., 166 A. 826, 132 Me. 88.
39 C.J. p 489 note 95.

92. N.C.—**Corpus Juris cited in** Watson v. Warsaw Const. Co., 150 S.E. 20, 22, 197 N.C. 586.
39 C.J. p 489 note 96.

can take steps to protect himself,[93] it is also true that the purpose of the requirement is to give the servant the proper information to enable him to determine whether he will avoid the dangers by refusing to continue in the service[94] or proceed with the work, assuming the risk.[95]

Distinctions. The master's duty to warn a servant has its well-defined limitations as a general proposition of law. Ordinarily it relates only to those nonobvious dangers which are not known to the servant, and which are known or ought to be known to the master. It has its most frequent application in favor of the newly employed or inexperienced servant. In common speech the terms "warn" and "warning" have a much broader application, and they are often used as designating the cries and signals which are used by experienced workmen for mutual convenience and protection and as a part of the method of coöperation.[96] The duty of warning and instructing is entirely distinct from, and independent of, the duty of furnishing reasonably safe premises and appliances, as much so as the duty of furnishing reasonably safe premises is distinct from reasonably safe appliances.[97]

Suspension of relationship. The duty of the master to instruct and warn his servant has been held not to apply where the relationship has been suspended.[98]

§ 285. —— Delegation of Duty

Ordinarily the duty of warning and instructing a servant is a primary duty of the master, and the delegation of such a duty to another servant cannot relieve the master of the responsibility imposed on him by the law.

Ordinarily the duty of warning and instructing a servant is a primary duty of the master, and the delegation of such duty to another servant, whether higher or lower in the scale of employment than the one exposed to danger, cannot relieve the master of the responsibility imposed on him by the law,[99] and nothing short of actual notice of the danger to the workman who is to encounter it will satisfy the requirement of the law.[1] This rule applies with full force and vigor as to warning a young or inexperienced servant,[2] or warning a servant with respect to a new or increased danger[3] or abnormal or extraordinary risks.[4] The delegation of the duty to a person other than a servant does not relieve

93. Ky.—Robinette v. Norfolk & W. Ry. Co., 60 S.W.2d 344, 249 Ky. 93.
39 C.J. p 489 note 97.

"The object of the warning is to permit the person warned to take precautions to avoid the danger."—Madison v. Phillips Petroleum Co., C.C.A.Tex., 88 F.2d 515, 519, certiorari denied 57 S.Ct. 946, 301 U.S. 703, 81 L.Ed. 1358.

94. N.C.—**Corpus Juris cited in** Watson v. Warsaw Const. Co., 150 S.E. 20, 22, 197 N.C. 586.
39 C.J. p 489 note 98.

95. Me.—Gillespie v. Great Northern R. Co., 144 N.W. 466, 124 Minn. 1.
N.Y.—Connolly v. Hall & Grant Constr. Co., 84 N.E. 807, 192 N.Y. 182.
Knowledge as affecting assumption of risk see infra §§ 379–392.

96. Iowa.—Scherer v. Alfalfa Meal Co., 140 N.W. 826, 159 Iowa 683—Galloway v. J. W. Turner Impr. Co., 126 N.W. 1033, 148 Iowa 93.
Warning signals see supra § 262.

97. Ky.—Gaines v. Johnson, 105 S.W. 381, 133 Ky. 507, 32 Ky.L. 58.

98. Mich.—Moronen v. McDonnell, 143 N.W. 8, 177 Mich. 691.
N.C.—Watson v. Warsaw Const. Co., 150 S.E. 20, 22, 197 N.C. 586.
39 C.J. p 486 note 82 [g].

"If the object of warning is to save the employee from injury while engaged in the service for which he is employed, the employer's failure to warn him will not, as a general principle, be held for actionable negligence, where no injury is sustained during the continuance of the service; and will not be regarded as having contributed to an injury which did not occur during the period to which the instruction was intended to apply."—Watson v. Warsaw Const. Co., supra.

99. U.S.—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 105 F.2d 371—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 93 F.2d 736—Yates v. Atlantic Ice & Coal Co., C.C.A.Fla., 76 F.2d 86.
Mass.—Ryan v. Gray, 55 N.E.2d 700, 316 Mass. 259.
Miss.—Yazoo & M. V. R. Co. v. Smith, 117 So. 339, 150 Miss. 882.
Mo.—Gettys v. American Car & Foundry Co., 16 S.W.2d 85, 322 Mo. 787—Cunningham v. Doe Run Lead Co., 4 S.W.2d 802—Clark v. Rock Hill Quarry & Construction Co., App., 7 S.W.2d 716—Landcaster v. National Enameling & Stamping Co., App., 1 S.W.2d 238.
N.J.—Clayton v. Ainsworth, 4 A.2d 274, 122 N.J.Law 160.
S.C.—Brewer v. Brooklyn Cooperage Co., 166 S.E. 85, 167 S.C. 152.
Tex.—Morgan v. State, Civ.App., 170 S.W.2d 648, reversed on other grounds, State v. Morgan, 170 S.W.2d 652, 140 Tex. 620—Magnolia Petroleum Co. v. Studdard, Civ. App., 83 S.W.2d 1047, error dismissed.
Wash.—Roalsen v. Oregon Stevedoring Co., 267 P. 433, 147 Wash. 672.
39 C.J. p 489 note 4.

1. U.S.—Peters v. George, Pa., 154 F. 634, 83 C.C.A. 408.

2. U.S.—**Corpus Juris cited in** The State of Maryland, C.C.A.Va., 85 F.2d 944, 946.
N.H.—Bilodeau v. Gale Bros., 140 A. 172, 83 N.H. 196.
Tex.—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580.
39 C.J. p 490 note 6.

3. Miss.—Yazoo & M. V. R. Co. v. Smith, 117 So. 339, 150 Miss. 882.
Mo.—Clark v. Rock Hill Quarry & Construction Co., App., 7 S.W.2d 716.
39 C.J. p 490 note 7.

Arising out of progress of work
Master has nondelegable duty to warn his employees of dangers arising out of progress of work.—Britt v. Doty, 161 P.2d 521, 195 Okl. 620—Oklahoma Gas & Electric Co. v. Oliphant, 45 P.2d 1077, 172 Okl. 635—Thurlow v. Failing, 272 P. 368, 133 Okl. 277.

4. U.S.—Peters v. George, Pa., 154 F. 634, 639, 83 C.C.A. 408.
39 C.J. p 490 note 8.

Unusual dangers
When a master owes a duty to his servants to warn of unusual dangers which are not obvious, duty remains regardless of what agency he may employ for its performance, and he cannot escape liability for its negligent fulfillment by delegating its performance to the very class to whom such duty is owing.—Clayton

the master of liability for a failure to instruct and warn.[5]

On the other hand, it has been held that, where a servant has notice of the general risks and dangers of his employment, the duty of warning the servant of each particular defect is not an absolute nondelegable duty, and the neglect of the servant on whom devolves the duty of giving warning in such a case is not chargeable to the master.[6] This rule applies to such cases as dangers from a defect in a car, where the servant has notice that many of the cars which he is required to handle are defective,[7] or the failure of a station agent to deliver a message containing information as to a specific washout to servants engaged in the repair of a railroad destroyed by a storm at a time when the storm has not yet spent itself,[8] or the fall of material caused by the ordinary operation of excavating in a clay or gravel pit,[9] or the failure of a servant to give notice to other servants of the movement of apparatus being used by them, at least where the master has properly selected and instructed the servant charged with giving notice.[10]

§ 286. —— Knowledge of Master of Defect or Danger

a. In general

b. Imputed knowledge

a. In General

The master's liability with respect to warning and instructing his servant depends on his knowledge, actual or constructive, of the defect or danger to which his servant is exposed, and negligence cannot be imputed to him unless he knows, or, in the exercise of reasonable and ordinary care and diligence, ought to know, that a warning is necessary.

The master's liability with respect to warning and instructing his servant depends on his knowledge, actual or constructive, of the defect or danger to which his servant is exposed, and negligence cannot be imputed to him unless he knows, or, in the exercise of reasonable and ordinary care and diligence, ought to know, that a warning is necessary.[11] The rule is not applicable where the danger arises, and the injury is caused, from the negligent act of the master, or of those whose negligent act is attributable to him.[12] Although in a particular case an employer may not be obliged to discover the dan-

v. Ainsworth, 4 A.2d 274, 122 N.J. Law 160.

5. Md.—Pennsylvania Steel Co. v. Nace, 77 A. 1121, 113 Md. 460, 45 L.R.A.,N.S., 281.
39 C.J. p 490 note 9.

6. Mich.—Graham v. Detroit, G. H. & M. R. Co., 115 N.W. 993, 151 Mich. 629, 25 L.R.A.,N.S., 326.
39 C.J. p 490 note 10.

Incidental instructions

As to instructions reasonably required to furnish safe conditions, master is liable if they are not given, but as to those incidental to nature of work, and need for which arises out of its course and progress, duty to give them may be delegated. —Dziedzic v. Newmarket Mfg. Co., 129 A. 271, 81 N.H. 516.

7. U.S.—Chesapeake & O. R. Co. v. Hennessey, Ky., 96 F. 713, 38 C.C.A. 307.

8. Mich.—Graham v. Detroit, G. H. & M. R. Co. 115 N.W. 993, 151 Mich. 629, 25 L.R.A.,N.S., 326.

9. Iowa.—Fredericks v. Ft. Dodge Brick & Tile Co., 131 N.W. 766, 151 Iowa 637, 48 L.R.A.,N.S., 925.

10. Wis.—Portance v. Lehigh Valley Coal Co., 77 N.W. 875, 101 Wis. 574, 70 Am.S.R. 932.

11. U.S.—Madison v. Phillips Petroleum Co., C.C.A.Tex., 88 F.2d 515, certiorari denied 57 S.Ct. 946, 301 U.S. 703, 81 L.Ed. 1358—Aqua System v. Kodakoski, C.C.A.Canal Zone, 88 F.2d 395—Atchison, T. & S. F. Ry. Co. v. Wyer, C.C.A.Okl., 8 F.2d 30—M. T. Stevens & Sons Co. v. Daigneault, C.C.A.N.H., 4 F. 2d 53.
Miss.—**Corpus Juris quoted in** Allen Gravel Co. v. Curtis, 161 So. 670, 671, 173 Miss. 416.
Neb.—Russo v. Swift & Co., 286 N.W. 291, 136 Neb. 406.
N.H.—Quimly v. Shattuck, 187 A. 479, 88 N.H. 262.
Okl.—Mid-Continent Petroleum Corp. v. Jamison, 171 P.2d 976, 197 Okl. 387—**Corpus Juris quoted in** Thurlow v. Failing, 272 P. 368, 373, 133 Okl. 277.
Pa.—Faulks v. Fischer, 37 A.2d 574, 349 Pa. 485.
Tenn.—Crane Enamelware Co. v. Bowen, 15 Tenn.App. 217.
39 C.J. p 490 note 19.
Knowledge of servant's age or inexperience see infra § 306.

Man of ordinary prudence

Whether employers were negligent in failing to warn employee concerning approximate weight of section of culvert which employee was assisting in removing depended on whether a man of ordinary prudence under same or similar circumstances would have given warning, and, if so, then employers should have given such a warning.—Batson v. Smith, 117 S.W. 2d 731, 196 Ark. 386.

Carbon disulphide gas

Whether employer had duty to warn employees in reeling room in rayon factory of danger of carbon disulphide gas depended on whether employer knew or should have known of possible presence of gas in such degree as to be dangerous to average person.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr., Del., 339.

Rare and unusual disease

The rare and unusual disease of echinococcosis, which beef washer employed in packing plant contracted, has been held not to constitute such danger of employment as to require the employer to anticipate or to know, with a reasonable degree of certainty, of its existence in the packing plant.—Russo v. Swift & Co., 28 N.W. 291, 136 Neb. 406.

Possibility of continuance of dangerous condition

Where lease provided that landlord should repair heating plant and tenant should do inside painting, and while premises were still under landlord's control, tenant saw hole in floor negligently left by employees of heating contractor engaged by landlord, but left premises before painter employed by him returned from errand, it has been held that painter could not complain of tenant's failure to warn him against possibility of continuance of the dangerous condition, and could not recover from tenant for injuries resulting from falling through the hole.—Weinfeld v. Kaplan, 26 N.E.2d 287, 282 N.Y. 348, reargument denied 27 N.E.2d 209, 282 N.Y. 804.

12. Tex.—El Paso & S. W. R. Co. v. Welter, 125 S.W. 45, 59 Tex.Civ. App. 22.

ger, as, for instance, where a servant is engaged in tearing down and repairing the premises,[13] or where his duties are those of an inspector,[14] if the employer has actual knowledge of the danger it is his duty to warn the servant thereof where the latter cannot by the exercise of ordinary care discover it.[15] An employer who orders a servant to work in a place without warning that the place may become dangerous by the unexpected starting of machinery cannot escape liability on the ground that the servant's presence is unknown to another servant whose act in starting the machinery causes the injury, where the injured servant has no knowledge of the threatened danger.[16]

b. Imputed Knowledge

With respect to the duty to warn employees of the hazards of the work, the master is charged with knowledge of the usual and ordinary dangers and hazards to which he is exposing his employees and with knowledge of the nature of the constituents and general characteristics of the substances used in his business.

With respect to the duty to warn employees of the hazards of the work, the master is charged with knowledge of the usual and ordinary dangers and hazards to which he is exposing his employees,[17] and is bound to know the normal condition of his premises[18] and to know of the nature of the constituents and general characteristics of the substances used in his business so that he can give directions for the conduct thereof with ordinary safety to his servants performing the work with ordinary care;[19] and particularly is the master chargeable with a knowledge of risks ascertainable only through a knowledge of scientific facts which an uneducated man is not presumed to know.[20] The

13. Mich.—McParland v. Stewart, 222 N.W. 191, 244 Mich. 565.
39 C.J. p 491 note 22.

14. Ga.—Lucas v. Southern R. Co., 57 S.E. 1041, 1 Ga.App. 810.

15. Mich.—McParland v. Stewart, 222 N.W. 191, 244 Mich. 565.
Mo.—Neal v. Curtis & Co. Mfg. Co., 41 S.W.2d 543, 328 Mo. 389.
39 C.J. p 491 note 24.

16. Ark.—St. Louis, I. M. & S. R. Co. v. Yates, 165 S.W. 282, 111 Ark. 486.

17. U.S.—**Corpus Juris cited in** Maty v. Grasselli Chemical Co., C.C.A. N.J., 98 F.2d 877, 880.
Fla.—Wilson & Toomer Fertilizer Co. v. Lee, 106 So. 462, 90 Fla. 632.
Ga.—**Corpus Juris quoted in** Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 686, 63 Ga.App. 620.
Miss.—**Corpus Juris quoted in** Allen Gravel Co. v. Curtis, 161 So. 670, 671, 173 Miss. 416—**Corpus Juris cited in** American Sand & Gravel Co. v. Reeves, 151 So. 477, 168 Miss. 608.
Okl.—**Corpus Juris quoted in** Mid-Continent Petroleum Corp. v. Jamison, 171 P.2d 976, 981, 197 Okl. 387.
Pa.—Verna v. Loprcsti, 42 A.2d 170, 157 Pa.Super. 163.
S.C.—Turbeville v. Avery Lumber Co., 152 S.E. 439, 155 S.C. 202.
39 C.J. p 491 note 26.

Negligence in creating dangerous situation

"Where the employer is guilty of negligence as a matter of law in creating a dangerous situation, knowledge of the existence of such situation is imputed to him and it is his duty to notify his employee of such dangerous situation."—Oklahoma Gas & Electric Co. v. Oliphant, 45 P.2d 1077, 1081, 172 Okl. 635.

18. Ga.—**Corpus Juris quoted in** Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 686, 63 Ga.App. 620.
Miss.—**Corpus Juris quoted in** Allen Gravel Co. v. Curtis, 161 So. 670, 671, 173 Miss. 416.
Okl.—**Corpus Juris quoted in** Mid-Continent Petroleum Corp. v. Jamison, 171 P.2d 976, 981, 197 Okl. 387.
39 C.J. p 491 note 27.

Dangerous conditions

The master is chargeable with knowledge of dangerous conditions existing in and about place of business, or which reasonably may be expected to develop and to exist, having regard for particular industry in which he is engaged.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr., Del., 339.

19. U.S.—**Corpus Juris quoted in** Boal v. Electric Storage Battery Co., C.C.A.Pa., 98 F.2d 815, 819.
Ala.—Gentry v. Swann Chemical Co., 174 So. 530, 234 Ala. 313.
Del.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr. 339.
Ga.—**Corpus Juris quoted in** Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 686, 63 Ga.App. 620.
Miss.—**Corpus Juris quoted in** Allen Gravel Co. v. Curtis, 161 So. 670, 671, 173 Miss. 387—**Corpus Juris cited in** American Sand & Gravel Co. v. Reeves, 151 So. 477, 168 Miss. 608.
Mo.—Marsanick v. Luechtefeld, App., 157 S.W.2d 537.
N.H.—**Corpus Juris cited in** Harvey v. Welch, 163 A. 417, 418, 86 N.H. 72.
Okl.—**Corpus Juris quoted in** Mid-Continent Petroleum Corp. v. Jamison, 171 P.2d 976, 981, 197 Okl. 387.
Or.—Voshall v. Northern Pacific Terminal Co., 240 P. 891, 116 Or. 237.
Tenn.—Brown v. Tennessee Consol. Coal Co., 83 S.W.2d 568, 19 Tenn. App. 123.
Wis.—Graass v. Westerlin & Campbell Co., 216 N.W. 161, 194 Wis. 470.
39 C.J. p 492 note 28.

Gasoline

Filling station operator has been held chargeable with knowledge of properties of gasoline and bound to warn attendant.—Mooney v. Monark Gasoline & Oil Co., 298 S.W. 69, 317 Mo. 1255.

20. Ala.—Gentry v. Swann Chemical Co., 174 So. 530, 234 Ala. 313.
Ga.—**Corpus Juris quoted in** Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 686, 63 Ga.App. 620.
Miss.—**Corpus Juris quoted in** Allen Gravel Co. v. Curtis, 161 So. 670, 671, 173 Miss. 416.
Mo.—Mooney v. Monark Gasoline & Oil Co., 298 S.W. 69, 317 Mo. 1255—Marsanick v. Luechtefeld, App., 157 S.W.2d 537.
Okl.—**Corpus Juris quoted in** Mid-Continent Petroleum Corp. v. Jamison, 171 P.2d 976, 981, 197 Okl. 387.
Tenn.—Brown v. Tennessee Consol. Coal Co., 83 S.W.2d 568, 19 Tenn. App. 123.
39 C.J. p 492 note 29.

It is master's common-law duty to acquaint servant with latent dangers incident to service, arising from substances and processes used in employment, which can be ascertained through knowledge of scientific principles, and instruct him as to their avoidance.—Hardy v. City of Dothan, 176 So. 449, 234 Ala. 664.

Familiar physical laws

With respect to master's duty to warn servant of risks not ordinarily incident to the employment, master must take into account the action of familiar physical laws.—Moore v.

doctrine which imputes this knowledge to the master is called the doctrine of "assumption of skill,"[21] and for the purpose of determining this knowledge the law has a standard which does not vary with the actual capacity of the particular master,[22] and consequently his ignorance is no excuse for a failure to warn.[23]

On the other hand, it is not proper to make the question of excusing the master for not discovering latent defects turn on the point whether they were such as to deceive human judgment,[24] and the master will not be held liable for a failure to warn where his opportunity for knowledge of a danger is no greater than that of the servant,[25] having in mind that the master's primary duty to make inquiry is superior to that of the servant.[26] A knowledge of conditions indicative of dangers as to which a warning should be given may be charged to the employer where similar occurrences have taken place[27] or where his foreman or other representative has knowledge of the facts.[28] As to dangers arising merely from the manner in which servants perform their duty, amounting to transitory perils, the master is not chargeable with notice thereof.[29]

§ 287. —— Premises Owned by Another

Where a servant is required to perform work on premises owned by another, the master has the duty of warning and instructing the servant of dangerous conditions on such premises of which he has knowledge.

Where a servant is required to perform work on premises owned by another, the master has the duty of warning and instructing the servant of dangerous conditions on such premises of which he has knowledge.[30] While it has been said that the duty of discovering dangerous conditions and instructing the servant with respect thereto where the servant is required to perform work on premises other than the master's is the same as though the ownership of the premises were in the employer,[31] it has also been held that as to a danger incident to employment existing on premises not the master's he need warn only if he knows of it and knows of the servant's ignorance of it.[32] In any event the duty of the master in such a case is no greater than if the ownership were in him.[33]

§ 288. —— Agreement of Master to Give Warning

Where there is a special agreement by the master to warn the servant, the nonperformance of which is the occasion of injury to the latter, the master will be held liable.

Where there is a special agreement by the master to warn the servant, the nonperformance of which is the occasion of injury to the latter, the master will be held liable.[34]

§ 289. —— Duty as Affected by Statute

The duty of an employer to warn and instruct his

Morse & Malloy Shoe Co., 197 A. 707, 89 N.H. 332.

21. Ga.—**Corpus Juris quoted in** Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 686, 63 Ga.App. 620—Beard v. Georgian Mfg. Co., 70 S.E. 57, 8 Ga.App. 618.
Miss.—**Corpus Juris quoted in** Allen Gravel Co. v. Curtis, 161 So. 670, 671, 173 Miss. 416.
Okl.—**Corpus Juris quoted in** Mid-Continent Petroleum Corp. v. Jamison, 171 P.2d 976, 981, 197 Okl. 387.

22. Ga.—**Corpus Juris quoted in** Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 686, 63 Ga.App. 620—Beard v. Georgian Mfg. Co., 70 S.E. 57, 8 Ga.App. 618.
Miss.—**Corpus Juris quoted in** Allen Gravel Co. v. Curtis, 161 So. 670, 671, 173 Miss. 416.
Okl.—**Corpus Juris quoted in** Mid-Continent Petroleum Corp. v. Jamison, 171 P.2d 976, 981, 197 Okl. 387.

23. Ga.—**Corpus Juris quoted in** Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 686, 63 Ga.App. 620.
Miss.—**Corpus Juris quoted in** Allen Gravel Co. v. Curtis, 161 So. 670, 671, 173 Miss. 416.
Okl.—**Corpus Juris quoted in** Mid-Continent Petroleum Corp. v. Jamison, 171 P.2d 976, 981, 197 Okl. 387.
39 C.J. p 492 note 32.

Physiological effect of oxalic acid fumes

The fact that service station operator had no actual knowledge of physiological effect of oxalic acid fumes has been held not to absolve him from liability for employee's poisoning resulting from use of oxalic acid solution in cleaning radiators.—Harvey v. Welch, 163 A. 417, 86 N.H. 72.

24. Ga.—Holland v. McRae Oil & Fertilizer Co., 68 S.E. 555, 134 Ga. 678.
Miss.—**Corpus Juris quoted in** Allen Gravel Co. v. Curtis, 161 So. 670, 671, 173 Miss. 416.

25. U.S.—M. T. Stevens & Sons Co. v. Daigneault, C.C.A.N.H., 4 F.2d 53.
Miss.—**Corpus Juris quoted in** Allen Gravel Co. v. Curtis, 161 So. 670, 671, 173 Miss. 416.
Mo.—Kolbow v. Haynes-Langenburg Mfg. Co., 3 S.W.2d 226, 318 Mo. 1243.
39 C.J. p 492 note 34.

26. N.D.—Torgerson v. Minneapolis, St. Paul & S. S. M. R. Co., 194 N.W. 741, 49 N.D. 1096.

27. Miss.—**Corpus Juris quoted in** Allen Gravel Co. v. Curtis, 161 So. 670, 671, 173 Miss. 416.
39 C.J. p 492 note 36.

28. Miss.—**Corpus Juris quoted in** Allen Gravel Co. v. Curtis, 161 So. 670, 671, 173 Miss. 416.
39 C.J. p 492 note 37.

29. Miss.—**Corpus Juris quoted in** Allen Gravel Co. v. Curtis, 161 So. 670, 671, 173 Miss. 416.
39 C.J. p 492 note 38.

30. U.S.—Southern Ry. Co. v. Hobbs, C.C.A.N.C., 35 F.2d 298.
Mo.—**Corpus Juris cited in** Kolbow v. Haynes-Langenburg Mfg. Co., 3 S.W.2d 226, 228, 318 Mo. 1243.
39 C.J. p 492 note 42.

31. Ga.—Fulton Ice & Coal Co. v. Pece, 116 S.E. 57, 29 Ga.App. 507.
39 C.J. p 492 note 41.

32. Mass.—Walsh v. Turner Centre Dairying Ass'n, 111 N.E. 889, 223 Mass. 386.

33. Mass.—Cross v. Sprague, Breed & Brown R. Co., 111 N.E. 676, 223 Mass. 144.

34. N.J.—Wendell v. Pennsylvania R. Co., 31 A. 720, 57 N.J.Law 467.
39 C.J. p 492 note 45.

employee has been made the subject of statutory regulation.

The duty of an employer to warn and instruct his employee has been made the matter of statutory regulation;[35] and in some instances the duty has been confined to particular occupations, such as mining.[36] It is requisite to an action for injuries resulting from the failure of a statutory duty to warn that the injuries resulted from a failure to warn.[37] Where an employer fails to warn his employee of dangers from machinery not guarded as required by statute, he is liable for any resulting injury unless the employee is guilty of contributory negligence.[38] The rule requiring the master to give a young and inexperienced servant such instructions against the dangers of his employment as will reasonably enable him to avoid injury becomes imperative and inflexible when the servant is employed in violation of a statute.[39] It has been held that, where an employer accepts the provisions of an employers' liability and workmen's compensation act, the only duty he owes is to notify experienced employees of the unusual or extraordinary dangers of the service.[40] Under statutes limiting the fellow-servant doctrine, the master is liable for injuries to a servant resulting from the negligence of fellow servants in failing to warn him of danger.[41]

§ 290. —— Sufficiency and Effect of Warnings and Instructions

The sufficiency of the warning or instruction required to be given to an employee as to the dangers of his employment may depend on a number of factors, including the age, intelligence, and experience of the employee, the nature of the danger, and the character of the work. The failure of a servant to heed a warning constitutes a defense to an action for injuries.

The sufficiency of the warning or instruction required to be given to an employee as to the dangers of his employment may depend on a number of factors, including the age, intelligence, and experience of the employee,[42] the nature of the danger,[43] the character of the work to which the employee is assigned,[44] and other circumstances.[45] Ordinarily, in order to be sufficient, a warning or instruction must be so plain and explicit that the servant will understand and appreciate the danger and know how to avoid it by the exercise of due care,[46] and, where extraordinary risks may be encountered, the servant should be warned of their character and extent, as far as possible.[47] A mere

35. Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.
39 C.J. p 492 note 46.

Latent defects or dangers incident to employment

(1) Under some statutes the master is required to give the servant warning of latent defects in machinery or dangers incident to the employment, if unknown to the servant, and if the master knows or ought to know thereof.—Middlebrooks v. Atlanta Metallic Casket Co., supra—Simowitz v. Register, 3 S.E.2d 231, 60 Ga.App. 180—Moore v. Ross, 153 S.E. 575, 41 Ga.App. 509—39 C.J. p 492 note 46 [a].

(2) Master is under absolute duty to servant to warn him of any unusual or newly developed dangers which arise in the course of the employment and which are likely to escape an ordinarily prudent servant's knowledge under the circumstances.—Simowitz v. Register, supra.

(3) The statutory provision is especially applicable where the servant is a child of tender years.—Moore v. Ross, supra.

(4) If the danger is obvious and as easily known to the servant as the master, the latter will not be liable for failure to give warning thereof.—Hendrix v. Vale Royal Mfg. Co., 68 S.E. 483, 134 Ga. 712—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620—Simowitz v. Register, supra—Western & A. R. R. v. Edwards, 148 S.E. 628, 40 Ga.App. 66.

Statute construed

A statutory provision requiring that an employer "shall do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees" has been construed to impose on employers the duty to warn employees of dangers incident to their employment.—Miller v. Paine Lumber Co., 230 N.W. 702, 202 Wis. 77.

36. Ky.—Southern Mining Co. v. Saylor, 95 S.W.2d 236, 264 Ky. 655.
39 C.J. p 493 note 47.

37. Va.—Edwards v. Laurel Branch Coal Co., 114 S.E. 108, 133 Va. 534.
39 C.J. p 493 note 48.

38. Pa.—Jones v. American Caramel Co., 74 A. 613, 225 Pa. 644.
39 C.J. p 493 note 49.

39. Ind.—Inland Steel Co. v. Yedinak, 87 N.E. 229, 172 Ind. 423, 139 Am.S.R. 389.
Okl.—Curtis & Gartside Co. v. Pigg, 134 P. 1125, 39 Okl. 31.

40. N.H.—Bergeron v. Fellows & Sons Co., 116 A. 440, 80 N.H. 231.

41. Minn.—Maijala v. Great Northern R. Co., 158 N.W. 430, 133 Minn. 301.
39 C.J. p 493 note 52.

42. U.S.—Grant Storage Battery Co. v. De Lay, C.C.A.Neb., 87 F.2d 726.

Sufficiency as affected by age or inexperience see infra § 306.

43. U.S.—Grant Storage Battery v. De Lay, supra.
39 C.J. p 494 note 54.

Ordinary care

Employer was required to exercise only ordinary care to warn and instruct employee as to such dangers or hazards of his occupation as were not obvious.
U.S.—Grant Storage Battery Co. v. De Lay, supra.
Neb.—Smith v. Morton Motor Co., 16 N.W.2d 843, 145 Neb. 396.

44. U.S.—Grant Storage Battery Co. v. De Lay, C.C.A.Neb., 87 F.2d 276.

45. U.S.—Grant Storage Battery Co. v. De Lay, supra.

The degree or measure of instruction or warning required to be given to an employee as to the dangers of his employment necessarily depends on the hazards and circumstances of each case.—Warren v. Harlan Hollingsworth Corp., 84 A. 215, 26 Del. 182—39 C.J. p 494 note 54.

46. N.C.—Crawford v. Michael & Bivens, 154 S.E. 58, 199 N.C. 224.
39 C.J. p 494 note 55.

"Fully inform"

The warning or instruction must be sufficient to "fully inform" him of the danger.—Upton v. Conway Lumber Co., 128 A. 802, 81 N.H. 489.

47. Wis.—Fidelity Trust Co. v. Wis-

general warning of the dangers to be encountered by the servant is insufficient[48] and an insufficient warning is in legal effect no warning.[49] A warning or instruction as to certain dangers is not sufficient to put the servant on notice as to different perils,[50] and an instruction to an employee not to leave his place of work will not be construed as a warning of the danger of doing so where the purpose of the instruction was to keep the employee at his station until replaced.[51]

It is not necessary that the servant should be warned of every possible manner in which injury may occur to him, or of risks which are as obvious to him as to the master, or which are readily discoverable by him by the use of ordinary care, with such knowledge, experience, and judgment as he actually possesses, or as the master is justified in believing him to possess,[52] and a warning or instruction which gives reasonable notice of the danger[53] or which, if followed, provides for a safe way of doing the work[54] is sufficient. In order to be sufficient the warning should also be given in time to enable the servant to profit by it,[55] or, as has been said, it must be given to the employee before the service involving the danger is required.[56] The ample sufficiency of instructions as to the performance of a particular operation requiring the coöperation of a number of workmen in the course of which a servant is injured may appear from the fact that all the workmen, including the injured servant, without any hesitation and without any further instructions, proceed to perform the work in the manner outlined to them.[57]

Person by whom given. While a master cannot escape the responsibility of giving warning and instructions by delegating the duty to another, the warning or instruction when actually given is sufficient to charge the servant with notice whether given by a person in authority for the master,[58] or a fellow servant,[59] or a stranger;[60] but the instruction so given must be sufficient.[61]

Effect. The failure of a servant to heed a warning constitutes a defense in an action for injuries brought by him,[62] and the giving of due warning relieves the master of liability.[63] While dangers from defects are among the dangers as to which the master must instruct and warn the servant, the master by rules or instructions relating to the use of appliances cannot evade responsibility for the violation of a statute requiring those appliances to be safeguarded.[64]

§ 291. —— Proximate Cause of Injury

In an action for personal injuries alleged to have re-

consin Iron & Wire Works, 129 N. W. 615, 145 Wis. 385.
39 C.J. p 494 note 56.

Hidden or unusual danger
Master's warning to servant of hidden or unusual danger should be commensurate with risk and should be explicit.
U.S.—Philadelphia & R. Ry. Co. v. Marland, C.C.A.Pa., 239 F. 1.
Tex.—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580.

48. Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.
39 C.J. p 494 note 57.

One without special knowledge
When one without special knowledge of all the elements of danger is sent to do a job inherently dangerous, he should not be merely warned of danger, but should be instructed in all the elements of danger.—City of Dothan v. Hardy, 188 So. 264, 237 Ala. 603, 122 A.L.R. 637.

49. Wis.—Fidelity Trust Co. v. Wisconsin Iron & Wire Works, 129 N.W. 615, 145 Wis. 385.

50. Iowa.—Obenchain v. Harris, 126 N.W. 960, 148 Iowa 86.
39 C.J. p 494 note 59.

51. La.—Rochelle v. White Castle Lumber & Shingle Co., 45 So. 449, 120 La. 588.

52. N.J.—Matarani v. Reading Co., 194 A. 246, 119 N.J.Law 43, certiorari denied Matarani v. Reading Co., 58 S.Ct. 481, 302 U.S. 766, 82 L.Ed. 595.
39 C.J. p 495 note 61.

53. N.C.—Crawford v. Michael & Bivens, 154 S.E. 58, 199 N.C. 224.
Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.
39 C.J. p 495 note 62.

54. Mich.—Oest v. Hendershot, 141 N.W. 557, 175 Mich. 140.
N.J.—Matarani v. Reading Co., 194 A. 246, 119 N.J.Law 43, certiorari denied Matarani v. Reading Co., 58 S.Ct. 481, 302 U.S. 766, 82 L.Ed. 595.
39 C.J. p 495 note 63.

55. N.C.—Riggs v. Empire Mfg. Co., 129 S.E. 595, 190 N.C. 256.
39 C.J. p 495 note 64.

56. Ind.—Standard Oil Co. v. Fordeck, 71 N.E. 163, 34 Ind.App. 181.

57. Wis.—Tesch v. Chicago, M. & St. P. R. Co., 195 N.W. 317, 181 Wis. 449.

58. Iowa.—Freeby v. Sibley, 186 N. W. 685, 191 N.W. 867, 195 Iowa 200.
39 C.J. p 495 note 68.

59. Mich.—Martin v. Jerry Madden Shingle Co., 130 N.W. 614, 168 Mich. 175, Ann.Cas.1913C 124.
39 C.J. p 495 note 69.

60. Mich.—Martin v. Jerry Madden Shingle Co., supra.

61. U.S.—Porter v. Titusville Fruit & Farm Lands Co., Fla., 238 F. 759, 151 C.C.A. 609.
39 C.J. p 495 note 71.

62. Ky.—Carter Coal Co. v. Hill, 179 S.W. 2, 166 Ky. 213.
39 C.J. p 496 note 72.
Disregarding warnings as contributory negligence see infra § 460.

63. Ind.—Davis v. Hostetter, 142 N. E. 723, 81 Ind.App. 524.
Mass.—Lauria v. Umana, 193 N.E. 725, 289 Mass. 238.
Neb.—Rzeszotarski v. American Smelting & Refining Co., 277 N.W. 334, 133 Neb. 825—Ahrens v. American Smelting & Refining Co., 272 N.W. 235, 132 Neb. 460.

64. Kan.—Caspar v. Lewin, 109 P. 657, 82 Kan. 604, 83 Kan. 799, 49 L.R.A.,N.S., 526.

sulted from the failure of the master properly to warn and instruct the servant, a recovery can be had only where the master's negligence was the proximate cause of the injury.

In an action for personal injuries alleged to have resulted from the failure of the master properly to warn and instruct the servant, a recovery can be had only where the master's negligence was the proximate cause of the injury.[65] The master's failure to warn is the proximate cause of an injury to a servant from a danger unknown to him, and which he could not, by ordinary care, discover, and of which it was the master's duty to warn.[66] The master's failure to instruct and warn the servant of the dangers of his work is not the proximate cause of an injury where it results from an unanticipatable accident[67] or from the negligence of a fellow servant.[68] However, where a master places his servant at a work made dangerous by the nature of the work of other servants, or persons otherwise performing work of which the master has or should have knowledge, he cannot, when injury arises, escape on the plea that, but for the negligence of the coservant or third person, the injury would not have happened.[69] Although a servant without any fault on his part or that of his master has come to a condition of some injury which, unless changed, must result in greater injury, but which condition is not changed because the master has not instructed the servant as to the device at hand for the purpose, the failure of the master to instruct is the proximate cause of the additional injury.[70]

In order to render a master liable for failure to instruct an inexperienced servant, it must appear that injury was the result of servant's unskillfulness or lack of knowledge;[71] hence the failure of an employer to instruct as to the operation of a machine affords no basis for recovery in a suit for injuries caused by it if the servant was not operating it when injured.[72] So, where a servant sustains an injury by reason of a danger which could not have been obviated by warning or instructions, the master's neglect to warn and instruct cannot be said to be the proximate cause of the injury;[73] neither can the master's neglect in this respect be said to be the proximate cause of the injury where the servant is aware of the danger which inflicted his injury,[74] and it is immaterial that the servant is a minor[75] or an inexperienced person.[76] A precise application of this principle is found in those cases wherein the injury results from the fall of material in a mine, the person injured previously having been sufficiently aware of the unsafe conditions.[77] An employer will not be relieved from liability on the ground that the servant was injured by reason of his own negligence where his alleged negligent act was directly induced by the master's negligence in exposing the servant to dangers without any warnings with respect thereto and instructions as to how they could be avoided.[78] If the duty to warn and instruct as to a dangerous agency has not been performed, the fact that the particular manner in which the injury resulted from the agency cannot be determined does not relieve the master from liability.[79]

65. Ark.—Ward Furniture Mfg. Co. v. Mounce, 31 S.W.2d 531, 182 Ark. 380—Arkansas Portland Cement Co. v. Taylor, 18 S.W.2d 904, 179 Ark. 915.
Del.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr. 339.
Ky.—Davidson v. Perkins-Bowling Coal Co., 74 S.W.2d 1, 255 Ky. 649.
Minn.—Turner v. Northern Pac. Ry. Co., 290 N.W. 563, 207 Minn. 187.
39 C.J. p 496 note 77.

66. Ala.—Seaboard Air Line Ry. Co. v. Latham, 127 So. 679, 23 Ala.App. 490.
Ark.—Barber v. Parker, 76 S.W.2d 973, 190 Ark. 34.
Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.
Va.—Atlantic Coast Line R. Co. v. Wheeler, 132 S.E. 517, 147 Va. 1, affirmed 136 S.E. 570, 147 Va. 1.
39 C.J. p 496 note 78.

67. U.S.—Madison v. Phillips Petroleum Co., C.C.A.Tex., 88 F.2d 515, certiorari denied 57 S.Ct. 946, 301 U.S. 703, 81 L.Ed. 1358.
N.H.—Kenney v. Boston & Maine R. R., 33 A.2d 557, 92 N.H. 495.
Tex.—San Antonio & A. P. Ry. Co. v. Biggs, Civ.App., 283 S.W. 627.
39 C.J. p 496 note 79.

68. Ala.—Vandiver v. De Bardeleben Coal Co., 81 So. 569, 202 Ala. 627.
Ga.—Henderson v. Mingledorff, 107 S.E. 884, 27 Ga.App. 165.

69. Minn.—Gillespie v. Great Northern R. Co., 144 N.W. 466, 124 Minn. 1.
Mo.—Neal v. Curtis & Co. Mfg. Co., 41 S.W.2d 543, 328 Mo. 389.
39 C.J. p 496 note 81.

70. N.Y.—Collins v. Waterbury Co., 129 N.Y.S. 661, 144 App.Div. 670.
39 C.J. p 496 note 82.

71. N.C.—Watson v. Warsaw Const. Co., 150 S.E. 20, 197 N.C. 586.
39 C.J. p 496 note 83.

72. Ky.—McCulley v. Elkhorn Coal Corp., 259 S.W. 53, 202 Ky. 182.
39 C.J. p 496 note 84.

73. Ark.—St. Louis, I. M. & S. R. Co. v. Wells, 124 S.W. 524, 93 Ark. 153.
39 C.J. p 496 note 85.

74. Ark.—Tennison v. Hankins, 298 S.W. 1014, 175 Ark. 1170.
Me.—Ward v. Maine Cent. R. Co., 166 A. 826, 132 Me. 88.
Miss.—Masonite Corp. v. Stevens, 30 So.2d 77.
39 C.J. p 497 note 86.
Dangers known to servant see infra § 295.

75. Tex.—Dallas Fair Park Amusement Assoc. v. Barrentine, Civ.App., 187 S.W. 710.
39 C.J. p 497 note 87.

76. Wyo.—Carney Coal Co. v. Benedict, 129 P. 1024, 21 Wyo. 163.

77. Ala.—Merriweather v. Sayre Min. Mfg. Co., 62 So. 70, 182 Ala. 665.
39 C.J. p 497 note 89.

78. N.C.—Ensley v. Sylva Lumber & Mfg. Co., 81 S.E. 1010, 165 N.C. 687.

79. Me.—Hill v. Libby, 85 A. 487, 110 Me. 150.
39 C.J. p 497 note 91.

§ 292. Particular Defects and Dangers

The duty of the master to warn and instruct his servant as to particular defects and dangers is considered infra §§ 293–303.

Examine Pocket Parts for later cases.

§ 293. —— Changes in Appliances or Methods of Work

It is the duty of the master to warn his servants of new or increased dangers caused by a change in his machinery, appliances, or place or methods of work.

It is the duty of the master to warn his servants of new or increased dangers caused by a change in his machinery, appliances, or place or methods of work, and he will be held liable for injuries resulting from his neglect of duty in this respect.[80] This principle applies as well where the place may become dangerous by reason of perils arising from the doing of other work pertaining to the master's business, different from that in which the particular servant is engaged.[81] The fact that the effect of a change made in machinery was to reduce risk of accident to the employees generally who work on it is immaterial in an action for injuries based on the fact that it was rendered unsafe for the injured employee, who, without notice of the change, had a right to suppose that he encountered no risks in operating it other than those to which he was exposed when operating the machine before the change was made.[82] A master is not required to warn a servant regarding dangers arising from a change in conditions where the very nature of the servant's employment puts him on inquiry as to the dangers likely to arise from the changing conditions.[83]

§ 294. —— Dangers from Negligence of Fellow Servants

Ordinarily the master need not warn his servant against possible or probable dangers from the negligence of fellow servants.

Ordinarily the master has a right to assume that his servants, being competent, will not be negligent, and it is not his duty, on employing a servant, to warn him against possible or probable dangers in case he is negligent,[84] and it is immaterial that the servant so employed is a minor and inexperienced.[85] The principle, however, is not applicable where the danger arises from the continued and repeated negligent acts of a fellow servant so that the master is presumed to know of the dangers;[86] and a master who knows that a need of warning an inexperienced servant has arisen is bound to give it, although the danger arose from the negligence of a fellow servant.[87] A master may not stand by without giving warning where the negligence of a fellow servant has become apparent to him.[88]

§ 295. —— Dangers Known to Servant

Where a servant knows and appreciates the dangers of his employment, the master is under no obligation to give warning and instructions thereof, and a like result follows where, by the exercise of reasonable care, the servant could have known of the dangers likely to be encountered by him.

Where a servant knows and appreciates the dangers of his employment, the master is under no obligation to give warning and instructions thereof,[89]

80. U.S.—Norfolk & W. Ry. Co. v. Hall, C.C.A.W.Va., 49 F.2d 692—Petroleum Iron Works Co. v. Wright, C.C.A.Ark., 5 F.2d 935, certiorari denied 46 S.Ct. 25, 269 U.S. 567, 70 L.Ed. 415.
Mo.—Dobson v. Otis Elevator Co., 26 S.W.2d 942, 324 Mo. 1147.
39 C.J. p 497 note 92.

81. N.Y.—Blanchard v. Delaware, L. & W. R. Co., 105 N.E. 90, 211 N.Y. 79.
39 C.J. p 498 note 93.

82. Pa.—Coll v. Westinghouse Electric & Mfg. Co., 79 A. 163, 230 Pa. 86.

83. Iowa.—Beard v. J. C. Hubinger Bros. Co., 141 N.W. 418, 159 Iowa 524.
39 C.J. p 498 note 95.

84. U.S.—**Corpus Juris cited in** Norfolk & W. Ry. Co. v. Hall, C.C.A. W.Va., 49 F.2d 692, 695.
Mo.—Burge v. American Car & Foundry Co., App., 274 S.W. 842.
39 C.J. p 498 note 96.

Transitory dangers
Master using reasonable care to select competent vice principal and colaborers and furnish safe place and proper instrumentalities for work is not required to warn colaborers of transitory dangers, arising out of performance of mere details, caused by acts of fellow servants.—Sutton v. Hancock, 141 So. 532, 105 Fla. 497.

85. Ala.—Republic Iron & Steel Co. v. Woody, 57 So. 441, 174 Ala. 625.
39 C.J. p 498 note 97.

86. U.S.—**Corpus Juris cited in** Norfolk & W. Ry. Co. v. Hall, C.C.A. W.Va., 49 F.2d 692, 695.
D.C.—Standard Oil Co. v. Brown, 31 App.D.C. 371.

87. Wash.—Pearson v. Arlington Dock Co., 189 P. 559, 111 Wash. 14.
39 C.J. p 498 note 99.

88. Wis.—Hamann v. Milwaukee Bridge Co., 106 N.W. 1081, 127 Wis. 550, 7 Ann.Cas. 458.

89. U.S.—Traffic Motor Truck Corporation v. Claywell, C.C.A.Mo., 12 F.2d 419—Atchison, T. & S. F. Ry. Co. v. Wyer, C.C.A.Okl., 8 F.2d 30.
Ky.—Westinghouse Elec. & Mfg. Co. v. Deakins, 204 S.W.2d 434, 305 Ky. 385—Robinette v. Norfolk & W. Ry. Co., 60 S.W.2d 344, 249 Ky. 93—Louisville & N. R. Co. v. White, 297 S.W. 808, 221 Ky. 1.
Me.—McBurnie v. Northrup, 27 A 2d 823, 139 Me. 149—Ward v. Maine Cent. R. Co., 166 A. 826, 132 Me. 88.
Mich.—**Corpus Juris cited in** Jarmszko v. Myslywiec, 234 N.W. 105, 253 Mich. 204.
Miss.—Masonite Corp. v. Stevens, 30 So.2d 77—Poplarville Lumber Co. v. Kirkland, 115 So. 191, 149 Miss. 116.
Mo.—**Corpus Juris quoted in** Brooks v. Kansas City Gas Co., 127 S.W. 2d 427, 430, 343 Mo. 1226—**Corpus Juris cited in** Kirkpatrick v. American Creosoting Co., 37 S.W.2d 996, 1004, 225 Mo.App. 774.
Or.—**Corpus Juris cited in** Hopkins,

and a like result follows where, by the exercise of reasonable care, the servant could have known of the dangers likely to be encountered by him.[90] Accordingly, where the servant is as familiar as the master with the situation and the manner of performing the work, the master is under no duty to instruct him as to any risks,[91] nor need a master warn or instruct as to dangers arising from matters of common knowledge,[92] including those arising from the well-known operation of natural forces.[93]

The source of the servant's knowledge and appreciation is wholly immaterial, whether gained from his own observations and experience, from information and advice given him by others,[94] or

P. & S. Ry. Co., 298 P. 914, 916, 137 Or. 287, rehearing denied 2 P.2d 1105, 137 Or. 287.
Tenn.—Wind Rock Coal & Coke Co. v. Robbins, 1 Tenn.App. 734.
Tex.—City of Munday v. Shaw, Civ. App., 100 S.W.2d 765, error dismissed.
Wash.—Hartford v. Northwestern Stevedoring Co., 269 P. 831, 148 Wash. 501.
39 C.J. p 499 note 3.

Reason for rule

A warning is never required from a master to a servant when the servant is apprised of the peril, or where it is obvious and appreciated, and this because the law does not require a useless thing to be done.—Clark v. Wheelock, Mo.App., 293 S. W. 456—39 C.J. p 499 note 3 [a].

Knowledge of various dangers precluding necessity for warning

(1) In general.—American Heating & Plumbing Co. v. Keene, C.C.A. Miss., 96 F.2d 170—Raudenbush v. Baltimore & O. R. R., D.C.Pa., 63 F. Supp. 329—39 C.J. p 499 note 3 [f].

(2) Danger to station agent of ice-covered platform.—Missouri Pac. R. Co. v. Aeby, Mo., 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, mandate conformed to Aeby v. Missouri Pac. R. Co., 6 S.W.2d 1115.

(3) Danger from coming in contact with ensilage cutter.—Collins v. Kurth, 247 Ill.App. 156, affirmed 153 N.E. 355, 322 Ill. 250.

(4) Danger from handling creosoted ties.—Sweany v. Wabash Ry. Co., 80 S.W.2d 216, 229 Mo.App. 393.

(5) Danger from movement of trains.
Ky.—Louisville & N. R. Co. v. White, 297 S.W. 808, 221 Ky. 1.
Me.—Ward v. Maine Cent. R. Co., 166 A. 826, 132 Me. 88.
N.H.—Jennings v. Boston & M. R. R., 132 A. 614, 82 N.H. 323.

(6) Danger from side sweep of cable used to move cars.—Hook v. Consolidation Coal Co., 129 A. 490, 82 N.H. 75.

90. Mo.—**Corpus Juris quoted in** Brooks v. Kansas City Gas Co., 127 S.W.2d 427, 430, 343 Mo. 1226.
Tex.—City of Munday v. Shaw, Civ. App., 100 S.W.2d 765, error dismissed—Dell v. Lancaster, Civ. App., 285 S.W. 685.
Wash.—Cummins v. Dufault, 139 P. 2d 308, 18 Wash.2d 274.
39 C.J. p 500 note 4.

"An employer's duty to warn extends only to dangers of which his employee is justifiably ignorant."—Fasekis v. J. J. Newbury Co., 44 A. 2d 817, 820, 93 N.H. 468.

Dangers readily ascertainable

A master is not required to point out dangers where they are readily ascertainable by servant himself if he makes an ordinarily careful use of such knowledge, experience, and judgment as he possesses, or where servant had all means necessary for ascertaining the conditions and there was no concealed danger which could not be discovered.
Ark.—Tucker Duck & Rubber Co. v. Harvey, 154 S.W.2d 828, 202 Ark. 1033—Williams Cooperage Co. v. Kittrell, 155 S.W. 119, 107 Ark. 341.
Or.—Parker v. Norton, 21 P.2d 790, 143 Or. 165.

Reasonably careful man

Employer owes no duty to inform servant of conditions which are open and comprehensible to reasonably careful man.—Murphy v. Furness, Withy & Co., 156 N.E. 836, 259 Mass. 394.

91. U.S.—Hardie v. New York Harbor Dry Dock Corporation, C.C.A. N.Y., 9 F.2d 545.
Ark.—White v. St. Louis Southwestern Ry. Co., 183 S.W.2d 781, 207 Ark. 1005—A. A. Electric Co. v. Ray, 149 S.W.2d 38, 202 Ark. 85.
Ga.—Western & A. R. R. v. Michael, 157 S.E. 226, 42 Ga.App. 603.
Mo.—**Corpus Juris quoted in** Brooks v. Kansas City Gas Co., 127 S.W. 2d 427, 430, 343 Mo. 1226.
Neb.—Campbell v. Chicago, R. I. & P. R. Co., 234 N.W. 395, 120 Neb. 499.
N.H.—Owen v. Elliot Hospital, 136 A. 133, 82 N.H. 497.
39 C.J. p 500 note 5.

Equal knowledge

(1) Where employee's knowledge of the perils of the employment equal or surpass that of the master, there is no duty on the master to apprise the employee of something already well known to him.—J. L. Williams & Sons v. Tompkins, 114 S.W.2d 845, 195 Ark. 1146—Kurn v. Fanbus, 84 S.W.2d 602, 191 Ark. 232.

(2) Where employee who had spent most of life on farm was gored by employer's bull when he came within about six inches from stanchion from which bull, as employee knew, was able to withdraw head, employer had no superior knowledge of risk so as to impose duty on him to warn employee.—Quimby v. Shattuck, 187 A. 479, 88 N.H. 262.

(3) City secretary who was office man and ignorant of method of operating tractor owed no duty to instruct city employee as to use of tractor, where such employee had greater knowledge of tractors than secretary.—City of Munday v. Shaw, Tex.Civ.App., 100 S.W.2d 765, error dismissed.

92. Iowa.—**Corpus Juris cited in** Anderson v. Sheuerman, 6 N.W.2d 125, 128, 232 Iowa 705.
Mo.—**Corpus Juris quoted in** Brooks v. Kansas City Gas Co., 127 S.W.2d 427, 430, 343 Mo. 1226.
Pa.—Faulks v. Fischer, 37 A.2d 574, 349 Pa. 485.
Wash.—**Corpus Juris quoted in** Cummins v. Dufault, 139 P.2d 308, 316, 18 Wash.2d 274.
39 C.J. p 501 note 6.

Facts held not to be matter of common knowledge

(1) Danger of external burns from creosoted ties.—Robinette v. Norfolk & W. Ry. Co., 60 S.W.2d 344, 249 Ky. 93.

(2) Other facts held not to be matter of common knowledge see 39 C.J. p 501 note 6 [b].

93. Iowa.—**Corpus Juris cited in** Anderson v. Sheuerman, 6 N.W. 2d 125, 128, 232 Iowa 705.
Mo.—**Corpus Juris quoted in** Brooks v. Kansas City Gas Co., 127 S. W.2d 427, 430, 343 Mo. 1226.
Wash.—**Corpus Juris quoted in** Cummins v. Dufault, 139 P.2d 308, 315, 18 Wash.2d 274.
39 C.J. p 501 note 7.

94. U.S.—Jones v. Pennsylvania R. Co., D.C.N.Y., 35 F.Supp. 1017.
Ill.—Collins v. Kurth, 247 Ill.App. 156, affirmed 153 N.E. 355, 322 Ill. 250.
Or.—Hopkins v. Spokane, P. & S. Ry. Co., 298 P. 914, 137 Or. 287, rehearing denied 2 P.2d 1105, 137 Or. 287.
39 C.J. p 502 note 8.

from the very nature of the work itself.[95] It has been held that where the servant has the requisite knowledge it is immaterial that the particular danger arose out of an act performed by the servant in obedience to an order of his foreman.[96] The mere fact that the servant momentarily forgot the perils surrounding him does not show any fault on the part of the master.[97]

Where the employee knows and appreciates that there is serious danger, the duty to warn him of possible danger does not arise simply because he does not appreciate the precise extent of the danger.[98] If, however, the servant has knowledge of the facts, but is entirely ignorant of the risks involved, it is the duty of the master to warn him,[99] particularly where the condition is extrahazardous.[1]

It has been held that the master need not warn or instruct the servant as to the danger of being caught between the rollers of machinery.[2] It has also been held that no warning or instruction need be given to an experienced carpenter,[3] or to linemen as to various operations connected with their employment,[4] or to a machinist as to the use of a vise and wrench in fitting gas pipes,[5] or to a person familiar with the operation of machinery as to the dangers thereof,[6] or to painters as to the use of a ladder,[7] or to a logger as to the hazards of his trade,[8] or to an experienced employee engaged in blasting as to the hazards of his work,[9] or to an experienced foreman as to the proper manner of lowering structural steel,[10] or to a "rigger" as to moving timbers along crossbeams,[11] or to a cooper as to the proper method of swelling barrels with steam and water,[12] or to an experienced servant as to the proper way of putting a belt over a pulley,[13] or to an experienced freight handler of the insecurity of an unfinished pile of bales,[14] or to an experienced mine worker as to the various risks likely to be met by him,[15] or to an experienced teamster as to the dangers of a hinged seat on a wagon,[16] or as to the absence of a hood in a dough mixer to a servant who has operated a dough mixer equipped with a hood and is familiar with machinery and was educated as an electrical engineer.[17]

§ 296. —— Obvious Dangers

A master is not bound to warn and instruct his servant as to dangers which are patent and obvious.

A master is not bound to warn and instruct his servant as to dangers which are patent and obvious.[18] A danger is generally considered as within

95. Ga.—Lowry v. Atlanta Joint Terminals, 89 S.E. 832, 145 Ga. 782.
39 C.J. p 502 note 9.

96. Mo.—Penny v. Southeastern Express Co., App., 35 S.W.2d 940.
Tex.—Kirby Lumber Co. v. Hardy, Civ.App., 196 S.W. 211.

97. N.H.—Fontaine v. Johnson Lumber Co., 80 A. 338, 76 N.H. 163.
39 C.J. p 502 note 13.

98. Wis.—Hanson v. Superior Mfg. Co., 118 N.W. 180, 136 Wis. 617.

99. Wyo.—Carney Coal Co. v. Benedict, 129 P. 1024, 21 Wyo. 163.
39 C.J. p 502 note 15.

1. Ill.—Wysocki v. Mineral Point Zinc Co., 154 Ill.App. 363.

2. Wis.—Davis v. Wendlandt, 246 N.W. 320, 210 Wis. 322.
39 C.J. p 502 note 17.

3. Miss.—Crossett Lumber Co. v. Land, 84 So. 15, 121 Miss. 834.
39 C.J. p 502 note 18.

4. Mass.—MacLellan v. Boston El. R. Co., 108 N.E. 767, 221 Mass. 20.
39 C.J. p 502 note 19.

5. Mass.—Pearson v. Boston Gas Light Co., 87 N.E. 571, 201 Mass. 176.

6. Tex.—City of Munday v. Shaw, Civ.App., 100 S.W.2d 765, error dismissed.
39 C.J. p 502 note 21.

7. Mass.—Jacobson v. Favor, 78 N.E. 763, 193 Mass. 85.

8. S.C.—Singleton v. McLeod, 8 S.E.2d 908, 193 S.C. 378.
39 C.J. p 502 note 23.

9. Ky.—Louisville & N. R. Co. v. Morgan's Adm'r, 9 S.W.2d 212, 225 Ky. 447.
Minn.—Stanich v. Pearson Min. Co., 141 N.W. 1100, 122 Minn. 29.

10. N.Y.—Fioranza v. Rinehart & Dennis Co., 150 N.Y.S. 210, 164 App. Div. 462.
Pa.—Seybert v. Hay Walker Brick Co., 92 A. 704, 246 Pa. 558.

11. Me.—Murinelli v. T. Stuart & Son Co., 102 A. 824, 117 Me. 87.

12. Pa.—Stitzel v. A. Wilhelm Co., 69 A. 996, 220 Pa. 564.

13. N.Y.—Mattos v. Feigenhauer, 139 N.Y.S. 379, 154 App.Div. 699.

14. Mass.—Cusick v. New York, N. H. & H. R. Co., 100 N.E. 539, 213 Mass. 306.

15. Ky.—High Splint Coal Co. v. Bailey's Admr., 37 S.W.2d 22, 238 Ky. 217—Perkins-Harlan Coal Co. v. Mercer, 32 S.W.2d 14, 235 Ky. 618.
Tenn.—Wind Rock Coal & Coke Co. v. Robbins, 1 Tenn.App. 734.
39 C.J. p 502 note 31.

16. Ill.—Liebnow v. Wisconsin Lime & Cement Co., 95 N.E. 1030, 251 Ill. 42.

17. Iowa.—Sutton v. Des Moines Bakery Co., 112 N.W. 836, 135 Iowa 390.

18. U.S.—Kane v. Federal Match Corporation, D.C.Pa., 5 F.Supp. 507.
Ark.—Tucker Duck & Rubber Co. v. Harvey, 154 S.W.2d 828, 202 Ark. 1033—Missouri Pac. R. Co. v. Martin, 57 S.W.2d 1047, 186 Ark. 1101.
Ga.—Western & A. R. R. v. Michael, 157 S.E. 226, 42 Ga.App. 603.
Iowa.—Anderson v. Sheuerman, 6 N.W.2d 125, 232 Iowa 705.
Me.—McBurnie v. Northrup, 27 A.2d 823, 139 Me. 149—Ward v. Maine Cent. R. Co., 166 A. 826, 132 Me. 88.
Mass.—Reidy v. Crompton & Knowles Loom Works, 60 N.E.2d 589, 318 Mass. 135—Fraioli v. New York, N. H. & H. R. Co., 190 N.E. 605, 286 Mass. 450—Walsh v. Boston & M. R. R., 187 N.E. 554, 284 Mass. 250—Cary v. Streeter & Sons Co., 169 N.E. 782, 270 Mass. 175—Breskin v. Boston & M. R. R., 157 N.E. 581, 260 Mass. 414—Ray v. Western Union Telegraph Co., 154 N.E. 853, 258 Mass. 303—Burke v. Crimmins, 152 N.E. 43, 256 Mass. 14.
Mich.—Jarmoszko v. Myslywiec, 234 N.W. 105, 253 Mich. 204.
Miss.—Brown v. Coley, 152 So. 61, 168 Miss. 778.
Mo.—**Corpus Juris cited in** Brooks v. Kansas City Gas Co., 127 S.W.2d 427, 430, 343 Mo. 1226—Johnson v. Keen, App., 168 S.W.2d 952—

the rule where it is open and obvious to the senses of any man of ordinary intelligence,[19] or where it is as easily discernible by the employee as by the master,[20] or where it is discoverable in the exercise of that reasonable care which persons of ordinary intelligence may be expected to take for their own safety.[21] An employer, however, is not relieved of the duty to warn an employee whom he puts to work in a place of danger by the fact that the conditions constituting the danger are obvious, if the employee does not know or appreciate, and reasonably should not know or appreciate, the danger thus created.[22]

Particular dangers. A master is not required to give either warning or instruction as to the operation of a machine where the dangers therefrom are obvious to the servant;[23] nor need warning be given of the obvious danger of coming into contact with moving machinery,[24] or coming into contact with revolving shafting[25] or set screws, there being no factor present which makes their presence a source of hidden danger,[26] or getting hands into contact with sharp edges of wood-working machinery,[27] or putting hands under the die or plunger of a press machine[28] or a descending pile,[29] or between revolving rollers;[30] nor generally need warning be given to the servant against placing his hands into dangerous places,[31] or danger from flying particles when steel or other hard substance is struck by a hammer or other instrument, there being no circumstances present relieving the servant from taking notice of the obvious risks therefrom,[32] or apparent dangers connected with work performed

Marsanick v. Luechtefeld, App., 157 S.W.2d 537—Kirkpatrick v. American Creosoting Co., 37 S.W.2d 996, 225 Mo.App. 774—Norwood v. St. Louis-San Francisco Ry. Co., App., 296 S.W. 222—Clark v. Wheelock, App., 293 S.W. 456.

N.H.—Hook v. Consolidation Coal Co., 129 A. 490, 82 N.H. 75.

Okl.—Janow v. Lewis, 172 P.2d 315, 197 Okl. 415—Phillips v. Tackett, 32 P.2d 29, 168 Okl. 143.

Pa.—Faulks v. Fischer, 37 A.2d 574, 349 Pa. 485—Rice v. Kring, 165 A. 833, 310 Pa. 550—Baumgartner v. Pennsylvania R. Co., 140 A. 622, 292 Pa. 106.

Tenn.—Tennessee Cent. Ry. Co. v. Williams, 9 Tenn.App. 529.

Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.

Wash.—Cummins v. Dufault, 139 P.2d 308, 18 Wash.2d 274—Hartford v. Northwestern Stevedoring Co., 269 P. 831, 148 Wash. 501.

39 C.J. p 503 note 35.

Effect of youth and inexperience see infra § 306.

A situation or a thing may be so obviously dangerous that there need be no warning by the employer to his employee as to its existence or as to its effect.—Breece-White Mfg. Co. v. Baker, C.C.A.Ark., 106 F.2d 815.

19. U.S.—Standard Oil Co. of Louisiana v. Martin, C.C.A.Ark., 21 F.2d 912.

Ark.—Tennison v. Hankins, 298 S.W. 1014, 175 Ark. 1170.

Mass.—Drake v. Boston Safe Deposit & Trust Co., 30 N.E.2d 226, 307 Mass. 399.

Minn.—**Corpus Juris cited in** Liptak v. Karsner, 293 N.W. 612, 613, 208 Minn. 168—Hetager v. Moran, 210 N.W. 390, 168 Minn. 491, rehearing denied 210 N.W. 864, 168 Minn. 491.

Mo.—Johnson v. Keen, App., 168 S.W.2d 952.

39 C.J. p 503 note 36.

"The test of whether a danger is or is not apparent or obvious to the servant will depend upon whether it would be apparent or discoverable by the average person of the same age, intelligence and experience."—Hendrickson v. Continental Fibre Co., 140 A. 659, 663, 3 W.W.Harr., Del., 564.

Person of ordinary intelligence, knowledge, or experience

Ky.—Crouch v. Noland, 38 S.W.2d 471, 238 Ky. 575.

Person of ordinary prudence

Ky.—Robinette v. Norfolk & W. Ry. Co., 60 S.W.2d 344, 249 Ky. 93.

20. Iowa.—Anderson v. Sheuerman, 6 N.W.2d 125, 232 Iowa 705.

Minn.—Liptak v. Karsner, 293 N.W. 612, 208 Minn. 168.

Mo.—Johnson v. Keen, App., 168 S.W.2d 952.

39 C.J. p 504 note 37.

Danger from approaching trucks

Where truck owner temporarily employed one to repair the truck while standing on the highway, danger from approaching trucks was as obvious to the servant as to the master, and hence truck owner had no duty to warn servant of the danger.—Bohlmann v. Penn Electric Corporation, 286 N.W. 552, 232 Wis. 232.

21. Iowa.—Hardy v. Chicago, R. I. & P. R. Co., 115 N.W. 8, 139 Iowa 314, 19 L.R.A.,N.S., 997.

22. Mass.—Cotoia v. Seale, 27 N.E.2d 706, 306 Mass. 101.

Special experience or scientific knowledge

A danger which could be apprehended only by persons possessing special experience or scientific knowledge is not so obvious as to render unnecessary a warning to an employee who did not have such knowledge or experience.—Cotoia v. Seale, supra.

23. Mass.—Currier v. Whitin Mach. Works, 154 N.E. 518, 258 Mass. 82.

Mich.—Jarmoszko v. Myslywiec, 234 N.W. 105, 253 Mich. 204.

Miss.—Brown v. Coley, 152 So. 61, 168 Miss. 778.

39 C.J. p 504 note 40.

24. Mo.—Kirkpatrick v. American Creosoting Co., 37 S.W.2d 996, 225 Mo.App. 774.

39 C.J. p 504 note 41.

25. Mass.—Goulding v. Eastern Bridge & Structural Co., 96 N.E. 71, 210 Mass. 52.

39 C.J. p 504 note 42.

26. Ark.—National Drain. Co. v. Bell, 180 S.W. 984, 121 Ark. 633.

39 C.J. p 504 note 43.

27. Wis.—Montevilla v. Northern Furniture Co., 141 N.W. 279, 153 Wis. 292, 297.

39 C.J. p 504 note 44.

28. Wis.—Rahles v. J. Thompson & Sons Mfg. Co., 118 N.W. 350, 137 Wis. 506, 23 L.R.A.,N.S., 296, rehearing denied 119 N.W. 289, 137 Wis. 506, 23 L.R.A.,N.S., 296.

39 C.J. p 504 note 45.

29. Cal.—Mugford v. Atlantic, G. & P. Co., 95 P. 674, 7 Cal.App. 672.

30. N.D.—Hanel v. Obrigewitsch, 168 N.W. 45, 39 N.D. 540, 3 A.L.R. 1029.

39 C.J. p 504 note 47.

31. Mass.—Cary v. Streeter & Sons Co., 169 N.E. 782, 270 Mass. 175.

39 C.J. p 504 note 48.

32. Iowa.—Meyers v. Bennett Auto Supply Co., 151 N.W. 444, 169 Iowa 383.

39 C.J. p 504 note 49.

on a roof,[33] or danger from falling where the servant is working in a perilous position,[34] or where the fall was caused by a condition actually known to the servant,[35] or plainly obvious to him.[36]

A master need not warn as to obvious dangers connected with the handling of heavy objects,[37] or apparent dangers connected with the tearing down of structures,[38] or where the injury results from the fall of a pile of materials, the danger being apparent,[39] or from overhanging banks in gravel pits,[40] or from the fall of material during the operation of a steam shovel,[41] or dangers from falling of trees or limbs to those engaged in logging or wood cutting operations,[42] or from being struck by a logging cable,[43] or danger to a workman engaged in painting iron columns while they are being loaded on a car,[44] or dangers arising from an obvious defect in the insulation of an electric wire[45] or from the presence of splinters or nails in planks forming part of a staging,[46] or from stepping on a visibly loose board or plank.[47]

A master is not bound to warn employees of mature age and discretion of the obvious danger of stepping into a pool of steaming water in plain view,[48] or of the danger to a fireman using sawdust and shavings for fuel, as a result of which a backfire or explosion ensues.[49] A servant is not required to be warned of the danger of boarding cars while in motion,[50] or alighting therefrom and landing on a place made dangerous by gravel, the presence of which was known by the servant,[51] or of getting a foot under a car wheel;[52] nor need railway employees be warned of dangers because of the limited clearance between a car and a doorway entry,[53] or a freight platform;[54] nor is a railroad company bound to instruct and point out to an experienced servant the location and distance of the abutments, bridges, poles, and switches along the line of its track;[55] neither is it negligence to direct an employee to board a switch engine, and to fail to warn him of the danger of engines or trains moving on the tracks,[56] or to fail to warn a servant of the dangers of operating a small push car in railroad yards.[57] A master need not warn an employee of ordinary intelligence of the approach of airplanes.[58]

33. Pa.—Hanley v. Carnegie Steel Co., 100 A. 543, 256 Pa. 44.
39 C.J. p 504 note 50.

34. Mich.—Walker v. Ginsburg, 222 N.W. 192, 244 Mich. 568.
39 C.J. p 504 note 51.

35. Mo.—Johnson v. Keen, App., 168 S.W.2d 952.
39 C.J. p 505 note 52.

36. Ark.—Tucker Duck & Rubber Co. v. Harvey, 154 S.W.2d 828, 202 Ark. 1033—Missouri Pac. R. Co. v. Martin, 57 S.W.2d 1047, 186 Ark. 1101.
Mo.—Johnson v. Keen, App., 168 S.W.2d 952.
39 C.J. p 505 note 53.

37. Minn.—Hetager v. Moran, 210 N.W. 390, 168 Minn. 491, rehearing denied 210 N.W. 864, 168 Minn. 491.
39 C.J. p 505 note 54.

Piling ties
Ark.—Arkansas Portland Cement Co. v. Taylor, 18 S.W.2d 904, 179 Ark. 915.

Unloading sheet metal
Ark.—Tennison v. Hankins, 298 S.W. 1014, 175 Ark. 1170.

38. Wash.—Broughton v. Oregon-Washington R. & Nav. Co., 244 P. 558, 138 Wash. 298.
39 C.J. p 505 note 55.

39. Wis.—Baetz v. Valentine-Clark Co., 140 N.W. 54, 152 Wis. 494.
39 C.J. p 505 note 56.

40. Ill.—Montgomery v. Robertson, 82 N.E. 396, 229 Ill. 466.
39 C.J. p 505 note 57.

41. Ky.—Hassett v. Richardson, 183 S.W. 900, 169 Ky. 342.

42. Ind.—Simon v. Shaffer, 151 N.E. 836, 84 Ind.App. 651.
Mass.—Drake v. Boston Safe Deposit & Trust Co., 30 N.E.2d 226, 307 Mass. 399.
S.C.—Stroman v. Hooper Const. Co., 172 S.E. 417, 171 S.C. 393—Grier v. Winyah Lumber Co., 141 S.E. 685, 144 S.C. 10.
39 C.J. p 505 note 59.

43. Wash.—O'Dell v. Northern Coast Timber Co., 115 P. 1085, 63 Wash. 546.

44. Del.—American Bridge Co. v. Valente, 73 A. 400, 23 Del. 370, Ann.Cas.1912D 69.

45. Mass.—Pembroke v. Cambridge Electric Light Co., 84 N.E. 331, 197 Mass. 477.

46. Mass.—Noonan v. Foley, 105 N.E. 558, 217 Mass. 566, L.R.A.1915F 1036.

47. Ark.—Chicago, R. I. & P. R. Co. v. Hicks, 198 S.W. 529, 131 Ark. 593.
39 C.J. p 505 note 64.

48. Ark.—Pekin Cooperage Co. v. Love, 202 S.W. 824, 133 Ark. 599.

49. Wash.—Props v. Washington Pulley & Mfg. Co., 111 P. 888, 61 Wash. 8, 45 L.R.A.,N.S., 658.

50. N.C.—Wiggins v. Seaboard Air Line R. Co., 70 S.E. 932, 154 N.C. 577.
Pa.—Vilsock v. Youghiogheny & Ohio Coal Co., 100 A. 530, 256 Pa. 90.

51. Ark.—Louisiana & A. R. Co. v. Miles, 103 S.W. 158, 82 Ark. 534, 11 L.R.A.,N.S., 720.

52. Ky.—McCulley v. Elkhorn Coal Corp., 259 S.W. 53, 202 Ky. 182.
Pa.—Vilsock v. Youghiogheny & Ohio Coal Co., 100 A. 530, 256 Pa. 90.

53. Mich.—Sage v. Wyandotte Terminal R. Co., 159 N.W. 139, 193 Mich. 194.
39 C.J. p 505 note 70.

54. Wis.—Haring v. Great Northern R. Co., 119 N.W. 325, 137 Wis. 367.

55. Mass.—Cross v. Sprague, Breed & Brown R. Co., 111 N.E. 676, 223 Mass. 144.

Unprotected opening in bridge
Va.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.

56. Mich.—Kaski v. Chicago, M. & St. P. R. Co., 133 N.W. 790, 116 Minn. 137.

57. Minn.—Mattson v. Chicago, St. P. M. & O. R. Co., 114 N.W. 759, 103 Minn. 239.

58. **Employee working near airplane runway**
Where only danger to which employee was exposed while lighting flares and placing flags along a ditch opened near an airplane runway was that from an airplane which in landing might miss runway or land on runway and continue off of it, which danger was obvious to a man of ordinary intelligence, master was not negligent in failing to send some one

§ 297. —— Work Done in Improper Manner

As a general rule a master need not anticipate that his servant will perform his work in an improper manner, and he is not bound to warn his servant of dangers resulting from an improper method adopted by the servant of performing his task.

A master is not bound to warn his servant of dangers resulting from an improper method adopted by the servant of performing his task, and, as a rule, need not anticipate that the work will not be performed in a proper manner,[59] and need not give warning of dangers which can arise only through the servant's disobedience of instructions.[60] Although, where there are two ways to perform work, one safe and one unsafe, the servant must adopt the safe way if he knows or might know of it in the exercise of ordinary care,[61] in the absence of this knowledge on the part of the servant, it is the duty of the employer to instruct as to the proper method of doing the work,[62] and point out the dangers connected with the unsafe method,[63] and on his failure to do so, he cannot complain that the servant has adopted the unsafe method of doing the work,[64] but, on the contrary, will be held liable for any resulting injury;[65] and in such case it is immaterial that the servant had some knowledge of the dangers involved in his method of doing the work.[66]

§ 298. —— Unusual or Improbable Dangers

The master is not required to warn his servant of unexpected, improbable, or unusual dangers.

A master is under no obligation to warn his servant of a special danger which springs out of a particular fact, which in its details cannot be anticipated,[67] or generally of any dangers which cannot be reasonably apprehended;[68] in other words, the master is not required to caution a servant against unexpected, improbable, and unusual occurrences,[69] where there is no appearance of danger,[70] and his duty to warn is limited to such perils as may reasonably be anticipated.[71]

along with deceased employee to warn him of approach of airplanes so as to make master liable for employee's wrongful death.—Janow v. Lewis, 172 P.2d 315, 197 Okl. 415.

59. Ga.—Howard v. Central of Georgia R. Co., 75 S.E. 624, 138 Ga. 537.
39 C.J. p 505 notes 75, 76.

Performance in customary way
A master has the right to assume that a servant will perform his duties in the customary way and that he will particularly follow a course for a long time observed by his fellow workmen.—Moon v. City of Chattanooga, 10 Tenn.App. 82.

60. Mich.—Aphoresmenos v. McIntosh, 155 N.W. 715, 189 Mich. 680.
Minn.—Ludwig v. Spicer, 109 N.W. 832, 99 Minn. 400.
N.Y.—Dillon v. Matthews Slate Co., 134 N.Y.S. 365, 150 App.Div. 1.
39 C.J. p 505 note 77.

61. N.D.—Hanel v. Obrigewitsch, 168 N.W. 45, 39 N.D. 540, 3 A.L.R. 1029.
Va.—Washington-Southern R. Co. v. Cheshire, 65 S.E. 27, 109 Va. 741.

62. N.H.—Musgrave v. Great Falls Mfg. Co., 169 A. 583, 86 N.H. 375.
N.C.—Williams v. Seaboard Air Line Ry. Co., 155 S.E. 861, 199 N.C. 767.
39 C.J. p 505 note 79.
Simple methods and appliances see infra § 300.

Dangerous practice
An employer's failure to warn employees of dangerous practice when such warning should be given is violation of positive duty.—Isabelle v. Crystal Laundry, 41 A.2d 241, 93 N.H. 264.

Tools and appliances
Master does not discharge his full duty toward his employees merely by furnishing suitable tools and appliances, if instructions are necessary as to purposes and manner of use.—Musgrave v. Great Falls Mfg. Co., 169 A. 583, 86 N.H. 375.

63. Mo.—Evans v. General Explosives Co., 239 S.W. 487, 293 Mo. 364.
N.H.—Musgrave v. Great Falls Mfg. Co., 169 A. 583, 86 N.H. 375.

64. Mass.—Dagis v. Walworth Mfg. Co., 100 N.E. 620, 213 Mass. 524.
39 C.J. p 506 note 82.

65. Mass.—Dagis v. Walworth Mfg. Co., 100 N.E. 620, 213 Mass. 524.
39 C.J. p 506 note 82.

66. Pa.—Long v. Greenough Red Ash Coal Co., 59 Pa.Super. 235.
Tex.—Gulf, C. & S. F. R. Co. v. Archambault, Civ.App., 94 S.W. 1108.
39 C.J. p 506 note 83.

67. Wyo.—**Corpus Juris quoted in** Galicich v. Oregon Short Line R. Co., 87 P.2d 27, 30, 54 Wyo. 123.
39 C.J. p 506 note 84.

68. U.S.—Madison v. Phillips Petroleum Co., C.C.A.Tex., 88 F.2d 515, certiorari denied 57 S.Ct. 946, 301 U.S. 703, 81 L.Ed. 1358—Traffic Motor Truck Corporation v. Claywell, C.C.A.Mo., 12 F.2d 419—Atchison, T. & S. F. Ry. Co. v. Wyer, C.C.A.Okl., 8 F.2d 30.
Ark.—Milner v. Standard Veneer Co., 8 S.W.2d 456, 177 Ark. 986.
N.H.—Kenney v. Boston & Maine R. R., 33 A.2d 557, 92 N.H. 495—Trombly v. H. P. Hood & Sons, 146 A. 815, 84 N.H. 119—Owen v. Elliot Hospital, 136 A. 133, 82 N.H. 497.
Tex.—Dell v. Lancaster, Civ.App., 285 S.W. 685.
Wyo.—**Corpus Juris quoted in** Galicich v. Oregon Short Line R. Co., 87 P.2d 27, 30, 54 Wyo. 123.
39 C.J. p 506 note 85.

Otherwise stated
The master need not warn of dangers which he cannot be deemed to have foreseen.
Mo.—Marsanick v. Luechtfeld, App., 157 S.W.2d 537.
Pa.—Baumgartner v. Pennsylvania R. Co., 140 A. 622, 292 Pa. 106.

69. Ala.—**Corpus Juris quoted in** Seaboard Air Line Ry. Co. v. Hackney, 115 So. 869, 873, 217 Ala. 382.
Ga.—Blair v. Fulton Bakery, 24 S.E. 2d 598, 68 Ga.App. 879.
Wyo.—**Corpus Juris quoted in** Galicich v. Oregon Short Line R. Co., 87 P.2d 27, 30, 54 Wyo. 123.
39 C.J. p 507 note 86.

70. Ala.—**Corpus Juris quoted in** Seaboard Air Line Ry. Co. v. Hackney, 115 So. 869, 873, 217 Ala. 382.
Wyo.—**Corpus Juris quoted in** Galicich v. Oregon Short Line R. Co., 87 P.2d 27, 30, 54 Wyo. 123.
39 C.J. p 507 note 87.

71. Ala.—**Corpus Juris quoted in** Seaboard Air Line Ry. Co. v. Hackney, 115 So. 869, 873, 217 Ala. 382.
Ga.—Blair v. Fulton Bakery, 24 S. E.2d 598, 68 Ga.App. 879.
Tex.—San Antonio & A. P. Ry. Co. v. Biggs, Civ.App., 283 S.W. 627.
Va.—Norfolk & W. Ry. Co. v. Lumpkins, 144 S.E. 485, 151 Va. 173.
W.Va.—Linville v. Chesapeake & O.

§ 299. —— Risks Naturally Incident to Service

Where the risks or dangers are naturally incident to the employment, there is no obligation on the master to warn or instruct, unless secret dangers exist of which he has knowledge and the servant has not.

Where the risks or dangers are naturally incident to the employment, there is no obligation on the master to warn or instruct,[72] unless secret dangers exist of which he has knowledge and the servant has not,[73] and the master has knowledge of the servant's ignorance.[74]

§ 300. —— Simple Methods and Appliances

The master is not bound to instruct the servant as to simple tasks, or as to the use of simple appliances or devices.

Where a master employs workmen to do simple tasks, requiring only average strength and intelligence, he is not bound either to instruct the laborers or to inquire into their experience,[75] and the same rule holds true where the appliances and devices which the servant is required to use are of a simple character.[76]

§ 301. —— Dangers from Extraneous Causes

Where the master has knowledge that the particular employment is, from extraneous causes, hazardous or dangerous to a degree beyond what it fairly imports or is understood by the servant to be, he is bound to inform him of the fact.

Where the master has knowledge that the particular employment is, from extraneous causes, hazardous or dangerous to a degree beyond what it fairly imports or is understood by the servant to be, he is bound to inform him of the fact, and, if he fails to do so, he is liable for such damages as the servant may sustain by reason of such causes.[77]

§ 302. —— Dangers from Work outside Scope of Employment

Where a servant is ordered to do work outside of the scope of his employment, the master is under the same obligation to warn and instruct him as though he were engaged in his regular employment.

Where a servant is ordered to do work outside of the scope of his employment, the master is under the same obligation to warn and instruct him as though he were engaged in his regular employment,[78] but

Ry. Co., 177 S.E. 538, 115 W.Va. 610.

Wyo.—**Corpus Juris quoted in** Gallcich v. Oregon Short Line R. Co., 87 P.2d 27, 30, 54 Wyo. 123.

39 C.J. p 507 note 88.

Determinative inquiry in action against employer for injuries to employee, on whom sign fell when fellow employee, whom plaintiff was assisting to raise it to top of post, released his hold thereon as result of post tipping, was not whether defendant's representative, directing work, should have anticipated that accident would happen precisely as it did, but whether chance of sign falling because of insecure post was so great that ordinary employer in defendant's position would have recognized danger and warned plaintiff thereof.—Perreault v. Allen Oil Co., 179 A. 365, 87 N.H. 306.

Ordinarily prudent man

Employer must warn only against dangers which an ordinarily prudent man might reasonably anticipate might occur in ordinary course of employment.—Miller v. Paine Lumber Co., 227 N.W. 933, 202 Wis. 77, reheard 230 N.W. 702, 202 Wis. 77—Montevilla v. Northern Furniture Co., 141 N.W. 279, 153 Wis. 292.

72. U.S.—Kane v. Federal Match Corporation, D.C.Pa., 5 F.Supp. 507.

Ill.—Nardoni v. Chicago & E. I. Ry. Co., 261 Ill.App. 339.

La.—Simmons v. Doullut & Ewin, App., 145 So. 708, rehearing denied 146 So. 772.

Mo.—Benjamin v. C. Hager & Sons Hinge Mfg. Co., App., 273 S.W. 754.

Tenn.—Moon v. City of Chattanooga, 10 Tenn.App. 82.

39 C.J. p 507 note 89.

Assumption of ordinary risks see infra §§ 371–378.

Foreseeable dangers

The master is not obliged to warn of dangers which the servant may be deemed to have foreseen as necessarily incidental to the employment.

Mo.—Marsanick v. Luechtefeld, App., 157 S.W.2d 537.

Pa.—Baumgartner v. Pennsylvania R. Co., 140 A. 622, 292 Pa. 106.

73. Ala.—Seaboard Air Line Ry. Co. v. Latham, 127 So. 679, 23 Ala.App. 490.

39 C.J. p 507 note 90.

74. N.J.—Murphy v. Rockwell Engineering Co., 57 A. 444, 70 N.J. Law 374.

75. U.S.—Aqua System v. Kodakoski, C.C.A.Canal Zone, 88 F.2d 395.

Ala.—**Corpus Juris quoted in** Seaboard Air Line Ry. Co. v. Hackney, 115 So. 869, 873, 217 Ala. 382.

Va.—Southern Ry. Co. v. Chadwick, 132 S.E. 191, 144 Va. 443.

39 C.J. p 507 note 92.

76. U.S.—Traffic Motor Truck Corporation v. Claywell, C.C.A.Mo., 12 F.2d 419.

Ala.—**Corpus Juris quoted in** Seaboard Air Line Ry. Co. v. Hackney, 115 So. 869, 873, 217 Ala. 382.

39 C.J. p 507 note 93.

Particular appliances or devices held within rule

(1) Axe.—Davidson v. Perkins-Bowling Coal Co., 74 S.W.2d 1, 255 Ky. 649.

(2) Railroad push car.—Southern Ry. Co. v. Chadwick, 132 S.E. 191, 144 Va. 443.

(3) Stanchions in railway mail car.—Norfolk & W. Ry. Co. v. Hall, C.C.A.W.Va. 49 F.2d 692.

(4) Two-wheeled truck.—Hetager v. Moran, 210 N.W. 390, 168 Minn. 491, rehearing denied 210 N.W. 864, 168 Minn. 491.

(5) Footstool.—Fasckis v. J. J. Newbury Co., 44 A.2d 817, 93 N.H. 468.

(6) Wire mesh basket leaf burner.—Anderson v. Sheuerman, 6 N.W.2d 125, 232 Iowa 705.

(7) Other appliances or devices see 39 C.J. p 507 note 93 [a].

77. Okl.—Ft. Smith & W. R. Co. v. Ketis, 110 P. 661, 26 Okl. 696.

Tex.—Texarkana & Ft. Smith Ry. Co. v. Smith, Civ.App., 270 S.W. 867.

39 C.J. p 508 note 94.

78. Va.—Norfolk & W. Ry. Co. v. Lumpkins, 144 S.E. 485, 151 Va. 173.

39 C.J. p 508 note 95.

the duty does not exist merely because of the change of employment; it arises only when the scope of the new employment is of such character that a warning is required.[79] The master is not chargeable with negligence for failing to warn a servant of danger where he is injured while working outside of the scope of his employment, voluntarily and without orders,[80] or where he performs a dangerous act which has been forbidden,[81] or works in a place where he has been forbidden to work.[82]

§ 303. —— Miscellaneous

The rule requiring warning and instruction as to dangers of which the employer has actual or constructive knowledge, and knowledge of which is not charged to the employee, has been applied to particular dangers.

The rule requiring warning and instruction as to dangers of which the employer has actual or constructive knowledge, and knowledge of which is not charged to the employee, has been applied to dangers from falling objects;[83] from the fall of the walls or roof of a mine,[84] quarry,[85] excavation,[86] or structure;[87] from the fall of materials improperly piled;[88] dangers from coming into contact with wires[89] or other places[90] charged with dangerous electric current; dangers involved in the handling of heavy objects;[91] or from the vicious propensities of animals;[92] or defects in a track,[93] or from obstructions in too close proximity therewith.[94]

The rule has also been applied to dangerous machinery,[95] or appliances,[96] or defects therein;[97] as to the properties of dangerous chemicals,[98] or the presence of poisonous fumes,[99] or dust;[1] or the dangers of occupational disease;[2] the dangerous

79. Iowa.—Haskell v. L. J. Kurtz Co., 162 N.W. 598, 181 Iowa 30, L. R.A.1917F 369.
39 C.J. p 509 note 96.

80. N.J.—Marshall v. Burt, 69 A. 183, 75 N.J.Law 624.
39 C.J. p 509 note 97.

81. Ala.—Louisville & N. R. Co. v. Pettis, 89 So. 201, 206 Ala. 96.
Miss.—Forbus v. Cobb Bros. Const. Co., 186 So. 643, 184 Miss. 647.

82. Ky.—Clark County Constr. Co. v. Richard, 259 S.W. 331, 202 Ky. 276.

83. N.H.—Turner v. Globe Automatic Sprinkler Co., 128 A. 529, 81 N.H. 443.
39 C.J. p 509 note 1.

84. Va.—Osborn v. Darby Coal Min. Co., 86 S.E. 834, 118 Va. 157.
39 C.J. p 509 note 2.

85. Ky.—Frazier v. Danner, 142 S. W. 216, 146 Ky. 76.

86. Cal.—Brown v. Sharp-Hauser Contracting Co., 112 P. 874, 159 Cal. 89.
39 C.J. p 509 note 4.

87. Md.—Pennsylvania Steel Co. v. Nace, 77 A. 1121, 113 Md. 460, 45 L.R.A.,N.S., 281.
39 C.J. p 509 note 5.

88. N.C.—McMahan v. Carolina Spruce Co., 105 S.E. 439, 180 N.C. 636.
39 C.J. p 509 note 6.

89. Tex.—City of Austin v. Johnson, Civ.App., 195 S.W.2d 222.
Va.—Norfolk & W. Ry. Co. v. Lumpkins, 144 S.E. 485, 151 Va. 173.
39 C.J. p 509 note 7.

90. Ky.—Citizens' Tel. Co. v. Wakefield, 126 S.W. 127.
39 C.J. p 509 note 8.

91. Wash.—Meigs v. Porter, 126 P. 411, 70 Wash. 164.
39 C.J. p 510 note 9.

92. Cal.—Fererira v. Silvey, 176 P. 371, 38 Cal.App. 346.
39 C.J. p 510 note 10.

93. Mich.—Graham v. Detroit, G. H. & M. R. Co., 115 N.W. 993, 151 Mich. 629, 25 L.R.A.,N.S., 326.
39 C.J. p 510 note 11.

94. Tex.—Houston & T. C. R. Co. v. Robins, Civ.App., 23 S.W.2d 461, error refused.
39 C.J. p 510 note 12.

95. Wis.—Kaczmarek v. Geuder, Paeschke & Frey Co., 134 N.W. 348, 148 Wis. 46, 44 L.R.A.,N.S., 779, Ann.Cas.1913A 1139.
39 C.J. p 510 note 13.

96. Kan.—Turner v. Atchison, T. & S. F. R. Co., 111 P. 433, 83 Kan. 315, reheard 116 P. 482, 85 Kan. 6.
39 C.J. p 510 note 14.

97. Mo.—Henley v. United Farmers' Gin Co., App., 293 S.W. 481.
39 C.J. p 510 note 15.

Particular defects

(1) Defect in derrick.—Wilson & Toomer Fertilizer Co. v. Lee, 106 So. 462, 90 Fla. 632.

(2) Defects in motor vehicles.
U.S.—Breece-White Mfg. Co. v. Baker, C.C.A.Ark., 106 F.2d 815.
Cal.—Metz v. Southern Pac. Co., 124 P.2d 670, 51 Cal.App.2d 260.
Okl.—Casualty Reciprocal Exchange v. Sutfin, 166 P.2d 434, 196 Okl. 567.

(3) Other particular defects see 39 C.J. p 510 note 15 [b].

98. Minn.—**Corpus Juris cited in** Symons v. Great Northern Ry., 293 N.W. 303, 307, 208 Minn. 240.
Miss.—**Corpus Juris cited in** American Sand & Gravel Co. v. Reeves, 151 So. 477, 168 Miss. 608.
Or.—Voshall v. Northern Pacific Terminal Co., 240 P. 891, 116 Or. 237.

Particular chemicals or manner of injury

(1) Oxalic acid solution.—Harvey v. Welch, 163 A. 417, 86 N.H. 72.

(2) Sulphuric acid solution.—Musgrave v. Great Falls Mfg. Co., 169 A. 583, 86 N.H. 375.

(3) Danger of external burns from creosoted ties.—Robinette v. Norfolk & W. Ry. Co., 60 S.W.2d 344, 249 Ky. 93.

(4) Other particular chemicals or manner of injury see 39 C.J. p 511 note 16 [a].

99. Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.
Minn.—**Corpus Juris cited in** Symons v. Great Northern Ry. 293 N.W. 303, 307, 208 Minn. 240.
N.H.—Harvey v. Welch, 163 A. 417, 86 N.H. 72.
Pa.—Baumgartner v. Pennsylvania R. Co., 140 A. 622, 292 Pa. 106.
39 C.J. p 511 note 17.

1. Ark.—Harmon v. Ward, 149 S. W.2d 575, 202 Ark. 54.
Mass.—Thompson v. United Laboratories Co., 108 N.E. 1042, 221 Mass. 276.

Silica dust

U.S.—Galeota v. U. S. Gypsum Co., C.C.A.N.Y., 123 F.2d 947, certiorari denied U. S. Gypsum Co. v. Galeota, 62 S.Ct. 798, 315 U.S. 813, 86 L.Ed. 1211—Jacque v. Lock Insulator Corporation, C.C.A.N.Y., 70 F.2d 680, certiorari denied Locke Insulator Corporation v. Jacque, 55 S.Ct. 99, 293 U.S. 585, 79 L.Ed. 681.
Mass.—Reidy v. Crompton & Knowles Loom Works, 60 N.E.2d 589, 318 Mass. 135.

2. Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.
Me.—Spence v. Bath Iron Works

properties of dynamite,[3] detonating caps,[4] or other explosive agencies,[5] or of their presence;[6] or dangers in a passageway used by the servant in the performance of his duties;[7] or from a defect in,[8] or other dangerous condition of, a floor or place of work,[9] or openings therein, the presence of which is not chargeable to the knowledge of the servant;[10] or generally, the dangerous condition of any place to which the employee's duties carry him;[11] or of the dangerous characteristics of the various instrumentalities used in the prosecution of the work.[12]

§ 304. Age and Experience of Employee

The duty of the master to warn and instruct a servant where he is mature and experienced is considered infra § 305, and where he is inexperienced and youthful, infra § 306.

Examine Pocket Parts for later cases.

§ 305. —— Experienced Employee

Although no duty rests on the employer to warn experienced employees of dangers ordinarily incident to the employment, he is bound to warn them of latent, abnormal, or unusual dangers of which he is aware, and of which they are not aware.

Although no duty rests on the employer to warn experienced employees of dangers ordinarily incident to the employment,[13] he is bound to warn them of latent, abnormal, or unusual dangers of which he is aware, and of which they are not aware.[14] An employee of mature years is presumed to be acquainted with the dangers incident to the service;[15] and the employer may assume that an adult servant possesses such ordinary intelligence, judgment, and discretion as will enable him to appreciate obvious danger,[16] and that the servant knows those facts of common experience and observation which are known to persons of his age and experience,[17] and no duty rests on the master to warn and instruct him as to the possible or probable dangers of the employment, where he is mature, intelligent, and experienced in the work, and the master has no notice or reason to believe that he is not fully competent and acquainted with such dangers.[18] Where a servant solicits employment in a particular

Corporation, 37 A.2d 174, 140 Me. 287.
Mass.—Reidy v. Crompton & Knowles Loom Works, 60 N.E.2d 589, 318 Mass. 135.
Tenn.—Steiner v. Spencer, 145 S.W. 2d 547, 24 Tenn.App. 389.
39 C.J. p 511 note 19.

3. Mich.—Kreft v. Great Lakes Stone & Lime Co., 184 N.W. 397, 215 Mich. 700.
39 C.J. p 511 note 20.

4. Ky.—Thrasher v. Emke, 159 S. W. 565, 154 Ky. 744.
39 C.J. p 511 note 21.

5. Miss.—American Sand & Gravel Co. v. Reeves, 151 So. 477, 168 Miss. 608.
39 C.J. p 511 note 22.

6. U.S.—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 105 F.2d 371.
39 C.J. p 511 note 23.

7. Mass.—Manning v. Prouty, 157 N.E. 364, 260 Mass. 299.
39 C.J. p 512 note 24.

8. Or.—Moulton v. St. Johns Lumber Co., 120 P. 1057, 61 Or. 62.
39 C.J. p 512 note 25.

9. N.H.—Turner v. Globe Automatic Sprinkler Co., 128 A. 529, 81 N.H. 443.
39 C.J. p 512 note 26.

10. Mass.—Manning v. Prouty, 157 N.E 364, 260 Mass. 399—Crimmins v. Booth, 88 N.E. 449, 202 Mass. 17, 132 Am.S.R. 468.
39 C.J. p 512 note 27.

11. Miss.—Yazoo & M. V. R. Co. v. Smith, 117 So. 339, 150 Miss. 882
39 C.J. p 512 note 28.

12. Idaho.—Claris v. Oregon Short Line R. Co., 51 P.2d 217, 56 Idaho 169, certiorari denied Oregon Short Line R. Co. v. Claris, 56 S. Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.
Ohio.—Haslem v. Jackson, 40 N.E.2d 692, 68 Ohio App. 433.
Wis.—American Mut. Liability Ins. Co. of Boston v. Chain Belt Co., 271 N.W. 828, 224 Wis. 155.
39 C.J. p 512 note 29.

13. Tex.—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580—Clayton v. Chicago, R. I. & G. Ry. Co., Civ.App., 129 S.W. 2d 693, affirmed 154 S.W.2d 453, 137 Tex. 441.

14. Tex.—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580—Clayton v. Chicago R. I. & G. Ry. Co., Civ.App., 129 S. W.2d 693, affirmed 154 S.W.2d 453, 137 Tex. 441.

Special and extraordinary dangers
Although the servant is experienced, the master must warn him of any special and extraordinary dangers known to him and unknown to the servant.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W. Harr., Del., 564—Seininski v. Wilmington Leather Co., 83 A. 20, 3 Boyce, Del., 288.

15. Iowa.—Hardy v. Chicago, R. I. & P. R. Co., 115 N.W. 8, 139 Iowa 314, 19 L.R.A.,N.S., 997.
Tenn.—Coalfield Coal Co. v. Mellhorn, 2 Tenn.App. 219.
39 C.J. p 512 note 31.

16. Ark.—Batson v. Smith, 117 S. W.2d 731, 196 Ark. 386.
N.H.—Quimby v. Shattuck, 187 A. 479, 88 N.H. 262.
Pa.—Faulks v. Fischer, 37 A.2d 574, 349 Pa. 485.
Va.—Farmer's Adm'x v. Chesapeake & O. Ry. Co., 131 S.E. 334, 144 Va. 65.
Wash.—Saunders v. Longview, P. & N. Ry. Co., 296 P. 835, 161 Wash. 280.
39 C.J. p 512 note 32.
Obvious dangers generally see supra § 296.

17. U.S.—Traffic Motor Truck Corporation v. Claywell, C.C.A.Mo., 12 F.2d 419.
N.H.—Quimby v. Shattuck, 187 A. 479, 88 N.H. 262.
Pa.—Faulks v. Fischer, 37 A.2d 574, 349 Pa. 485.
39 C.J. p 512 note 33.

18. U.S.—Traffic Motor Truck Corporation, C.C.A.Mo., 12 F.2d 49—Aqua System v. Kodakoski, C.C.A. Canal Zone, 88 F.2d 395.
Ariz.—Bowers v. J. D. Halstead Lumber Co., 236 P. 124, 28 Ariz. 122.
Ark.—A. A. Electric Co. v. Ray, 149 S.W.2d 38, 202 Ark. 85—Batson v. Smith, 117 S.W.2d 731, 196 Ark. 386—Tennison v. Hankins, 298 S. W. 1014, 175 Ark. 1170.
Iowa.—Hansen v. Jensen, 216 N.W. 677, 204 Iowa 1063.
Ky.—High Splint Coal Co. v. Bailey's Adm'r, 37 S.W.2d 22, 238 Ky. 217—Perkins-Harlan Coal Co. v. Mercer, 32 S.W.2d 14, 235 Ky. 618—

calling or for the performance of a certain piece of work, the master has the right to assume that the servant is qualified therefor and need not warn the servant as to the dangers incident to the service,[19] and particularly is this true where the servant makes express representations as to his experience and capacity.[20]

§ 306. —— Inexperienced or Youthful Servants

a. In general
b. Dangers known to servant
c. Obvious dangers
d. Applications of rule
e. Sufficiency of warnings or instructions

a. In General

Where the master knows, or ought to know, the dangers of the employment, and knows, or ought to know, that the servant by reason of his immature years or inexperience, is ignorant of, or unable to appreciate, such dangers, it is his duty to give him such instruction and warning of the dangerous character of the employment as may reasonably enable him to understand its perils.

Where the master knows, or ought to know, the dangers of the employment,[21] and knows, or ought to know, that the servant, by reason of his immature years or inexperience, is ignorant of, or unable to appreciate, such dangers,[22] it is his duty to give him such instruction and warning of the dangerous character of the employment as may reasonably enable him to understand its perils.[23] This rule applies, although the dangers likely to be en-

Louisville & N. R. Co. v. Morgan's Adm'r, 9 S.W.2d 212, 225 Ky. 447.
La.—Robinson v. Atkinson, App., 3 So.2d 600, annulled 3 So.2d 604, 198 La. 238.
Me.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.
Mass.—Walsh v. Boston & M. R. R., 187 N.E. 554, 284 Mass. 250—Cary v. Streeter & Sons Co., 169 N.E. 782, 270 Mass. 175.
Miss.—Seifferman v. Leach, 138 So. 563, 161 Miss. 853.
N.H.—Lafontaine v. St. John, 30 A. 2d 476, 92 N.H. 319—Quimby v. Shattuck, 187 A. 479, 88 N.H. 262.
Pa.—Faulks v. Fischer, 37 A.2d 574, 349 Pa. 485.
S.C.—Singleton v. McLeod, 8 S.E.2d 908, 193 S.C. 378.
Tex.—San Antonio & A. P. Ry. Co. v. Biggs, Civ.App., 283 S.W. 627.
Va.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775—Farmer's Adm'x v. Chesapeake & O. Ry. Co., 131 S. E. 334, 144 Va. 65.
Wash.—Saunders v. Longview, P. & N. Ry. Co., 296 P. 835, 161 Wash. 280—Friermood v. Oregon-Washington R. & Nav. Co., 235 P. 17, 134 Wash. 178.
39 C.J. p 512 note 34.

19. Miss.—**Corpus Juris cited in** Masonite Corp. v. Stevens, 30 So. 2d 77, 80.
39 C.J. p 513 note 35.

20. Me.—Evans v. Harper, etc., Co., 102 A. 225, 116 Me. 514.
39 C.J. p 513 note 36.

21. Ark.—Barber v. Parker, 76 S. W.2d 973, 190 Ark. 34.
Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.
Ky.—Combs v. W. P. Sullivan & Co., 114 S.W.2d 754, 272 Ky. 522.
Minn.—Jenkins v. Jenkins, 19 N.W. 2d 389, 220 Minn. 216.
Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 743, 181 Miss. 573.
N.C.—Watson v. Warsaw Const. Co., 150 S.E. 20, 197 N.C. 586.
Okl.—Mid-Continent Petroleum Corp. v. Jamison, 171 P.2d 976, 197 Okl. 387.
39 C.J. p 514 note 38.
Knowledge by master of defects and dangers see supra §§ 244–248.

The fact that death had not previously resulted from inhaling sulphuric dioxide fumes escaping from heavy oil lube agitator did not relieve employer from liability for death of inexperienced employee who had not been warned against dangers of such employment, where employer knew that employees had previously been seriously stricken and by reason of procuring relief through use of medicine had recovered.—Mid-Continent Petroleum Corp. v. Jamison, 171 P.2d 976, 197 Okl. 387.

22. Ark.—Western Union Telegraph Co. v. Ponder, 128 S.W.2d 246, 198 Ark. 207—Barber v. Parker, 76 S. W.2d 973, 190 Ark. 34.
Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564—Derrickson v. Commissioners of Town of Harrington, 138 A. 645, 3 W.W.Harr. 412.
Ky.—Combs v. W. P. Sullivan & Co., 114 S.W.2d 754, 272 Ky. 522.
Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 743, 181 Miss. 573.
Minn.—Jenkins v. Jenkins, 19 N.W. 2d 389, 220 Minn. 216.
Mo.—Benjamin v. C. Hager & Sons, Hinge Mfg. Co., App., 273 S.W. 754.
N.C.—McLaughlin v. Black, 1 S.E.2d 130, 215 N.C. 85—Watson v. Warsaw Const. Co., 150 S.E. 20, 197 N. C. 586.
Okl.—Mid-Continent Petroleum Corp. v. Jamison, 171 P.2d 976, 197 Okl. 387—Chicago, R. I. & P. Ry. Co. v. Hurst, 263 P. 113, 129 Okl. 1.
39 C.J. p 514 note 39.

Exercise of ordinary prudence
Employer's duty to warn and instruct young and inexperienced employee extends only to those dangers which employer in exercise of ordinary prudence has reason to believe are not known to employees and will not be discovered by them in time to protect themselves from injury. —Parker v. Norton, 21 P.2d 790, 143 Or. 165.

23. U.S.—Holliday v. Fulton Band Mill, C.C.A.Miss., 142 F.2d 1006—**Corpus Juris cited in** The State of Maryland, C.C.A.Va., 85 F.2d 944, 946.
Ariz.—Wylie v. Moore, 84 P.2d 450, 52 Ariz. 537.
Ark.—White v. St. Louis Southwestern Ry. Co., 183 S.W.2d 781, 207 Ark. 1005—Barber v. Parker, 76 S. W.2d 973, 190 Ark. 34—Ward Furniture Mfg. Co. v. Mounce, 31 S.W. 2d 531, 182 Ark. 380—Sandusky v. Warren, 6 S.W.2d 15, 177 Ark. 271.
Del.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr. 339—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564 —Derrickson v. Commissioners of Town of Harrington, 138 A. 645, 3 W.W.Harr. 412.
Kan.—Wheeler v. Boyer, 17 P.2d 931, 136 Kan. 648.
Ky.—Combs v. W. P. Sullivan & Co., 114 S.W.2d 754, 272 Ky. 522—**Corpus Juris cited in** Christopher's Adm'r v. Blanton Stone Co., 80 S. W.2d 590, 591, 258 Ky. 587—Helton v. Cincinnati N. O. & T. P. Ry. Co., 283 S.W. 395, 214 Ky. 392.
Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 743, 181 Miss. 573.
Mo.—Smiley v. Jessup, App., 282 S. W. 110—Benjamin v. C. Hager &

countered are ordinarily incident to the employment,[24] and applies as well to a servant who is engaged in making a dangerous place safe as to any other class of employees.[25]

Although the duty of a master to warn and instruct an inexperienced servant is more imperative when the servant is a minor,[26] the duty is owed as well to employees of more mature age who by reason of inexperience do not appreciate the dangers of their employment;[27] and this has been held to be true, even though they are experienced in similar work.[28] A master need not warn an inexperienced servant of possible dangers in the performance of his duties, where experience and instruction are not necessary to enable him to do his work with safety.[29] Where an employer not only fails to warn an inexperienced servant of danger but induces him to perform a dangerous act by an assurance of safety, the employer is guilty of negligence unless the danger is obvious to a person of ordinary intelligence.[30]

Assumption of employee's knowledge or experience. In the absence of knowledge to the contrary, a master may assume that a servant has the knowledge and discernment which a person of his age and intelligence ordinarily possesses;[31] on the other hand, the employer must anticipate that a minor will exercise such care only as is usual among children of the same age, capacity, and experience, and must instruct and warn him accordingly,[32] and it has been held that a master cannot assume that a school-boy working during vacation is experienced.[33] The rule has been laid down that, where a master knows the great danger to an inexperienced man in doing a particular kind of work, which can be done safely only after experience and training, he cannot assume that every adult man in possession of his ordinary faculties has the skill and experience necessary to do that work, the nature of the work being a fact which must be taken into consideration in determining the master's negligence in directing or permitting a servant to engage in such extrahazardous occupation,[34] and it has been declared that, where the dangers are hidden, the mas-

Sons Hinge Mfg. Co., App., 273 S. W. 754.
N.H.—Stone v. Howe, 32 A.2d 484, 92 N.H. 425, stating Vermont rule.
N.C.—McLaughlin v. Black, 1 S.E.2d 130, 215 N.C. 85—Watson v. Warsaw Const. Co., 150 S.E. 20, 197 N.C. 586.
Okl.—Mid-Continent Petroleum Corp. v. Jamison, 171 P.2d 976, 197 Okl. 387.
Or.—Hopkins v. Spokane, P. & S. Ry. Co., 298 P. 914, 137 Or. 287, rehearing denied 2 P.2d 1105, 137 Or. 287.
Tenn.—Coalfield Coal Co. v. Mellhorn, 2 Tenn.App. 219.
39 C.J. p 515 note 40.

Actionable negligence

A master who with knowledge of the dangerous character of an act he desires to have done commands a young and inexperienced servant who is unaware of the dangers and risks involved to perform it without apprising him of the dangers or giving adequate instruction as to how to do it with safety is guilty of actionable negligence.—Jenkins v. Jenkins, 19 N.W.2d 389, 220 Minn. 216.

Operation of machinery

Master must warn inexperienced minor employees of dangers, known, or reasonably to be anticipated, in operation of machinery.—Milner v. Standard Veneer Co., 8 S.W.2d 456, 177 Ark. 986.

"The servant has the right, without inquiry on his part, to rely on the master for the performance of this duty."—Bowing v. Delaware Rayon Co., Del.Super., 192 A. 598, 601, 8 W.W.Harr., Del., 339.

24. Ark.—Everton Silica Sand Co. v. Hicks, 125 S.W.2d 793, 197 Ark. 980—Perkins Oil Co. of Delaware v. Fitzgerald, 121 S.W.2d 877, 197 Ark. 14.
La.—Roy v. Mutual Rice Co. of Louisiana, App., 143 So. 668, modified on other grounds 149 So. 508, 177 La. 883.
Minn.—Jenkins v. Jenkins, 19 N.W.2d 389, 220 Minn. 216.
Mo.—Benjamin v. C. Hager & Sons Hinge Mfg. Co., App., 273 S.W. 754.
N.C.—McLaughlin v. Black, 1 S.E.2d 130, 215 N.C. 85.
Tex.—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580.
39 C.J. p 516 note 41.

25. Okl.—Silurian Oil Co. v. Morrell, 176 P. 964, 71 Okl. 250.

26. Mo.—Biskup v. Hoffman, 287 S. W. 865, 220 Mo.App. 542.
39 C.J. p 516 note 43.

There is no presumption of law that minor over fourteen years, applying for position involving dangerous service, is aware of danger and needs no instruction.—Atlanta & West Point R. Co., 20 S.E. 763, 94 Ga. 107—Thompson v. Hanes, 132 So. 250, 35 Ga.App. 136.

Minor emancipated by marriage

Seventeen-year-old minor, employee in rice mill, even though emancipated by marriage, is entitled to have employer warn him of dangers incidental to employment.—Roy v. Mutual Rice Co. of Louisiana, App., 143 So. 688, modified on other grounds 149 So. 508, 177 La. 883.

27. Ark.—Perkins Oil Co. of Delaware v. Fitzgerald, 121 S.W.2d 877, 197 Ark. 14—Southern Lumber Co. v. Green, 53 S.W.2d 229, 186 Ark. 209.
Mo.—Nagy v. St. Louis Car Co., 37 S.W.2d 513.
N.H.—Stone v. Howe, 32 A.2d 484, 92 N.H. 425, stating Vermont rule.
39 C.J. p 517 note 44.

28. Mo.—Nagy v. St. Louis Car Co., 37 S.W.2d 513—Thornsberry v. St. Louis & S. F. Ry. Co., 178 S.W. 197—Clark v. Wheelock, App., 293 S.W. 456—Smiley v. Jessup, App., 282 S.W. 110.

29. Ark.—St. Louis, I. M. & S. R. Co. v. Wells, 124 S.W. 524, 93 Ark. 153—Ford v. Bodcaw Lumber Co., 83 S.W. 346, 73 Ark. 49.

30. Wis.—Schmitt v. Hamilton Mfg. Co., 115 N.W. 353, 135 Wis. 117.
39 C.J. p 517 note 46.
Assurance of safety as affecting:
Assumption of risk see infra §§ 404–406.
Contributory negligence see infra § 429.

31. Del.—Derrickson v. Commissioners of Town of Harrington, 138 A. 645, 3 W.W.Harr. 412.
39 C.J. p 517 note 48.

32. Utah.—Stam v. Ogden Packing & Provision Co., 177 P. 218, 53 Utah 248.

33. Mo.—Evans v. General Explosives Co., 239 S.W. 487, 293 Mo. 364.

34. Mo.—Batesell v. American Zinc, Lead & Smelting Co., 207 S.W. 742, 276 Mo. 210.

ter may not assume that the servant is familiar with them but must warn and instruct the servant unless the latter has actual knowledge of the dangers.[35]

Representations by servant as to age or experience. The rule that a master need not warn and instruct a servant where the latter makes express representations as to his experience and capacity, as discussed supra § 305, has been applied to an infant employee who has reached the age of discretion, and who assures his employer that he understands the duties of his position.[36] A mere expression of willingness by a minor employee who is inexperienced,[37] or by an inexperienced employee,[38] to undertake perilous work, does not relieve the employer of the duty to give proper instructions. Where the master has actual knowledge of the servant's inexperience, the representation of the servant that he has had experience in the work for which he was hired does not operate as an estoppel so as to preclude the necessity for warning.[39] It has been held that the mere fact that a minor servant misrepresented his age would not estop him from showing that he was young and inexperienced, and should be treated as only a circumstance the jury might consider in solving the question whether or not the master had exercised reasonable care in not warning him of the presence of a danger which would be unknown to an inexperienced laborer.[40]

b. Dangers Known to Servant

The mere fact of a servant's inexperience or minority does not charge the master with the duty to warn and instruct him, if he in fact knows and appreciates the dangers of the employment.

The mere fact of the servant's inexperience or minority does not charge the master with the duty to warn and instruct him, if he in fact knows and appreciates the dangers of the employment.[41] However, the mere fact that a young or inexperienced servant knows that the employment is dangerous is not sufficient to relieve the master from the duty of warning and instructing him where he does not fully appreciate the risks.[42]

c. Obvious Dangers

As a general rule, the master is not required to warn and instruct an inexperienced or youthful servant as to risks and dangers which are patent and obvious to persons of ordinary intelligence.

As a general rule, the master is not required to warn and instruct an inexperienced or youthful servant as to risks and dangers which are patent and obvious to persons of ordinary intelligence.[43] In determining what dangers are obvious and apparent, within the rule, the experience or lack of experience of the servant must be considered;[44] and, if, through youth, inexperience, or other cause, a servant is incompetent fully to understand and

35. Tex.—Texarkana & Ft. S. R. Co. v. Brandon, 126 S.W. 703, 59 Tex.Civ.App. 451.
Wash.—Schneider v. South Tacoma Mill Co., 118 P. 750, 65 Wash. 590.

36. Ala.—Woodstock Iron Works v. Kline, 43 So. 362, 149 Ala. 391—King v. Woodstock Iron Co., 42 So. 27, 143 Ala. 632.

37. Ala.—Woodstock Iron Works v. Kline, 43 So. 362, 149 Ala. 391.
39 C.J. p 518 note 55.

38. Ala.—Robinson Mining Co. v. Swiney, 91 So. 476, 206 Ala. 617.
Mo.—Willgues v. Pennsylvania R. Co., 298 S.W. 817, 318 Mo. 28.

39. Neb.—Elliott v. General Constr. Co., 140 N.W. 1024, 93 Neb. 453.
39 C.J. p 518 note 56.

40. Mo.—Zimmerman v. Pryor, App., 190 S.W. 26—Wilks v. St. Louis & S. F. R. Co., 141 S.W. 910, 159 Mo.App. 711.

41. Ark.—Western Union Telegraph Co. v. Ponder, 128 S.W.2d 246, 198 Ark. 207.
Ga.—Western & A. R. R. v. Michael, 157 S.E. 226, 42 Ga.App. 603.
Mo.—Benjamin v. C. Hager & Sons Hinge Mfg. Co., App., 273 S.W. 754.
N.C.—McLaughlin v. Black, 1 S.E.2d 130, 215 N.C. 85—Boswell v. Whitehead Hosiery Mills, 132 S.E. 598, 191 N.C. 549.
Tex.—Clayton v. Chicago, R. I. & G. Ry. Co., Civ.App., 129 S.W.2d 693, affirmed 154 S.W.2d 453, 137 Tex. 441.
39 C.J. p 502 note 11, p 518 note 59.
Dangers known to servant generally see supra § 295.
Seventeen-year-old railroad employee has been held prima facie charged with common sense of adult in realizing danger of going between cars.—Louisville & N. R. Co. v. White, 297 S.W. 808, 221 Ky. 1.

42. Ark.—Burrows v. Ozark White Lime Co., 101 S.W. 744, 82 Ark. 343.
39 C.J. p 518 note 60.
Child of tender years
Master directing child of tender years to do act attended with danger must take into consideration child's incapacity to appreciate and understand danger.—Moore v. Ross, 153 S.E. 575, 41 Ga.App. 509.

43. Ariz.—**Corpus Juris cited in** Wylie v. Moore, 84 P.2d 450, 451, 52 Ariz. 537.
Ark.—Ward Ice Co. v. Bowers, 80 S.W.2d 641, 190 Ark. 587.
Kan.—Wheeler v. Boyer, 17 P.2d 931, 136 Kan. 648.
Ky.—Phillips v. Keltner's Adm'r, 124 S.W.2d 71, 276 Ky. 254.
Me.—Blacker v. Oxford Paper Co., 142 A. 776, 127 Me. 228.
Mass.—Ray v. Western Union Telegraph Co., 154 N.E. 853, 258 Mass. 303.
Mont.—Shaw v. Kendall, 136 P.2d 748, 114 Mont. 323.
N.C.—McLaughlin v. Black, 1 S.E. 2d 130, 215 N.C. 85.
Or.—Parker v. Norton, 21 P.2d 790, 143 Or. 165—Hopkins v. Spokane, P. & S. Ry. Co., 298 P. 914, 137 Or. 287, rehearing denied 2 P.2d 1105, 137 Or. 287.
39 C.J. p 518 note 61.
Obvious dangers generally see supra § 296.
Dangers held obvious
(1) Danger that gasoline or kerosene would explode when close to fire.—Wheeler v. Boyer, 17 P.2d 931, 136 Kan. 648.
(2) Danger involved in jumping from moving train.—Ray v. Western Union Telegraph Co., 154 N.E. 853, 258 Mass. 303.
(3) Other dangers held obvious see 39 C.J. p 518 note 61 [a].

44. Vt.—Bailey v. Central Vermont Ry., 28 A.2d 639, 113 Vt. 8, reversed on other grounds, 63 S.Ct. 1062, 319 U.S. 350, 87 L.Ed. 1444, conformed to 35 A.2d 365, 113 Vt. 433.
39 C.J. p 519 note 62.

appreciate the danger, although patent and obvious, it is the duty of the master to warn and instruct him fully, and, failing so to do, he is liable.[45]

d. Applications of Rule

The rule requiring the master to warn and instruct his inexperienced or youthful servant as to the dangers of the employment has been applied to particular dangers.

The rule requiring the master to warn and instruct his inexperienced or youthful servant as to the dangers of the employment has been applied where the servant was injured while working in a new or more dangerous service than that to which he had been accustomed;[46] or working outside the scope of his employment;[47] or where the servant has been injured while working about[48] or operating[49] dangerous or complicated machinery, and specifically such machines as a laundry mangle,[50] elevator,[51] planer,[52] saw,[53] or tractor;[54] or where the servant was injured while working with dangerous or defective apparatus;[55] or while engaged in excavating[56] or building operations,[57] or mining.[58]

A master should warn and instruct his young or inexperienced servant where the latter is working as a lineman,[59] or about places dangerously charged with electricity,[60] or where his duties require him to work with dynamite or other dangerous explosive,[61] or where he is required to couple cars,[62] or perform various duties when employed by a railroad company;[63] and it has been held that a master should warn and instruct his inexperienced workman with respect to the dangers incident to the use of simple appliances when it is the reasonable thing to do.[64] An employer has been held liable for injuries in the absence of warning or instruction where he ordered a boy to splice a wire, broken in the course of winding on a spool;[65] where his foreman directed inexperienced and ignorant employees to go on a disarranged and slippery pile of lumber;[66] where his inexperienced laborer worked

45. N.H.—Dziedzie v. Newmarket Mfg. Co., 129 A. 271, 81 N.H. 516.

Deficient intelligence

Where employer has knowledge of employee's deficient intelligence, duty to use due care for employee's safety imposed consideration of such fact, and, although situation contained no danger connected with employee's injury, which was not obvious to one of average intelligence, to one below such intelligence, danger might make it negligence either not to warn and instruct him about it or to let him do the work at all. —Dziedzie v. Newmarket Mfg. Co., supra.

46. U.S.—Breece-White Mfg. Co. v. Baker, C.C.A.Ark., 106 F.2d 815.
Ark.—Ward Furniture Mfg. Co. v. Pickle, 295 S.W. 727, 174 Ark. 463.
Mo.—Evans v. Southern Wheel Co., App., 273 S.W. 749.
39 C.J. p 520 note 64.

47. Mich.—Lobenstein v. Whitehead & Kales Iron Works, 146 N.W. 293, 179 Mich. 279.
39 C.J. p 520 note 65.

48. Ark.—Everton Silica Sand Co. v. Hicks, 125 S.W.2d 793, 197 Ark. 980.
Pa.—Verna v. Lopresti, 42 A.2d 170, 157 Pa.Super. 163.
S.C.—Brewer v. Booklyn Cooperage Co., 166 S.E. 85, 167 S.C. 152.
39 C.J. p 520 note 66.

Servicing

Where twenty-one-year-old employee in cottonseed oil mill, who had been directed to fix any machinery he saw broken down or clogged up while engaged in his duties of oiling machinery, was both youthful and inexperienced, employer had duty to instruct employee concerning best method of servicing cleaning machines and to warn of hidden danger from revolving cylinder which mangled employee's arms as he attempted to clear machine of congested condition.—Perkins Oil Co. of Delaware v. Fitzgerald, 121 S.W.2d 877, 197 Ark. 14.

49. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.
Miss.—J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 181 Miss. 573.
N.H.—Bilodeau v. Gale Bros., 140 A. 172, 83 N.H. 196.
Okl.—Chicago, R. I. & P. Ry. Co. v. Hurst, 263 P. 113, 129 Okl. 1.
39 C.J. p 520 note 67.

50. Minn.—Ludwig v. Spicer, 109 N. W. 832, 99 Minn. 400.
39 C.J. p 521 note 68.

51. Wash.—Mueller v. Dennis, 145 P. 218, 83 Wash. 123.
39 C.J. p 521 note 69.

52. Mass.—Fitzgerald v. Young, 113 N.E. 777, 225 Mass. 116.
39 C.J. p 521 note 70.

53. Ky.—Combs v. W. P. Sullivan & Co., 114 S.W.2d 754, 272 Ky. 522.
N.H.—Nichols v. Moulton, 130 A. 28, 82 N.H. 110.
Okl.—Chicago, R. I. & P. Ry. Co. v. Hurst, 263 P. 113, 129 Okl. 1.
39 C.J. p 521 note 71.

54. U.S.—Breece-White Mfg. Co. v. Baker, C.C.A.Ark., 106 F.2d 815.

55. Fla.—Goulding Fertilizer Co. v. Watts, 58 So. 362, 63 Fla. 155.
39 C.J. p 521 note 72.

56. Neb.—Moore v. Naponee, 166 N. W. 548, 102 Neb. 211.
39 C.J. p 521 note 73.

57. Ark.—Barber v. Parker, 76 S.W. 2d 973, 190 Ark. 34.
39 C.J. p 521 note 74.

58. Pa.—Jelic v. Jamison Coal & Coke Co., 103 A. 300, 259 Pa. 447.
39 C.J. p 521 note 75.

59. Fla.—Southern States Power Co. v. Clark, 159 So. 881, 118 Fla. 521.
39 C.J. p 521 note 76.

60. Mo.—Werner v. Metropolitan St. R. Co., 119 S.W. 1076, 138 Mo.App. 1.
39 C.J. p 521 note 77.

61. Ariz.—Lorden v. Stapp, 192 P. 246, 21 Ariz. 646.
39 C.J. p 521 note 78.

62. La.—Morris v. St. Bernard Cypress Co., 73 So. 345, 140 La. 511.
Wash.—Stark v. Port Blakely Mill Co., 87 P. 339, 44 Wash. 309.

63. N.Y.—Healy v. Erie R. Co., 180 N.E. 888, 259 N.Y. 40, certiorari denied Erie R. Co. v. Healy, 53 S.Ct. 81, 287 U.S. 628, 77 L.Ed. 545.
39 C.J. p 521 note 80.

Unloading rails

Ky.—Helton v. Cincinnati, N. O. & T. P. Ry. Co., 283 S.W. 395, 214 Ky. 392.
N.C.—Williams v. Seaboard Air Line Ry. Co., 155 S.E. 861, 199 N.C. 767.

64. N.H.—Marston v. Portsmouth, 99 A. 93, 78 N.H. 223.
39 C.J. p 522 note 81.

65. Mo.—Warnke v. A. Leschen & Sons Rope Co., 171 S.W. 643, 186 Mo.App. 30.

66. Or.—Prement v. Wells, 133 P. 647, 65 Or. 336.

near a mass of kainit made dangerous by the softening effect of rain;[67] where he impliedly directed his young and inexperienced servant to return a boat across a stream with an extraordinarily swift current;[68] and where a minor servant fell into a vat of boiling water and oil while skimming it with unsafe appliances furnished by the master without warning of the danger in doing the work under such conditions.[69]

e. Sufficiency of Warnings or Instructions

It is the duty of a master who employs a servant in a place of danger to give him such warning and instruction as are reasonably required by his youth, inexperience, or want of capacity, and as will enable him, with the exercise of reasonable care, to perform the duties of his employment with reasonable safety to himself.

It is the duty of a master who employs a servant in a place of danger to give him such warning and instruction as is reasonably required by his youth, inexperience, or want of capacity, and as will enable him, with the exercise of reasonable care, to perform the duties of his employment with reasonable safety to himself;[70] to this end the danger and its nature and extent should be pointed out,[71] and the method of avoiding it shown.[72] Where the servant is a minor, the master must put his warning in such plain language as to be sure that the servant understands and appreciates the danger. It is not enough that he should do his best to make the servant understand; he must actually understand and appreciate the danger.[73]

While it is doubtless true that it is the servant's duty to observe the instructions of his employer,[74] and on this assumption it has been held that in the absence of knowledge that his minor employee is not, the master has a right to assume that he is conforming to them,[75] it has also been held that the employer in the proper discharge of his duty must not only warn a child of tender years against danger but take additional precautions against the servant's carelessness and forgetfulness,[76] and that the warning must be repeated if necessary.[77] Although it has been held that a minor servant need not be warned of the danger of disobeying the orders of his superior,[78] there is also authority to the contrary.[79] The giving of proper instructions will not relieve an employer from liability to a youthful and inexperienced employee, if the work required of him is not such as ought to be required of a person of his capacity.[80]

67. Ga.—Smith v. Smith & Kelly Co., 76 S.E. 770, 12 Ga.App. 19.

68. Ky.—Payne v. Henry, 244 S.W. 884, 196 Ky. 467.

69. La.—Parrenin v. Crescent City Stockyard & Slaughterhouse Co., 44 So. 990, 120 La. 75.

70. Ark.—Ward Furniture Mfg. Co. v. Mounce, 31 S.W.2d 531, 182 Ark. 380.
Mass.—Cotoia v. Seale, 27 N.E.2d 706, 306 Mass. 101—Lawson v. Royal Riding Stables, 26 N.E.2d 348, 305 Mass. 494.
Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 743, 181 Miss. 573.
Okl.—Mid-Continent Petroleum Corp. v. Jamison, 171 P.2d 976, 197 Okl. 387—Chicago, R. I. & P. Ry. Co. v. Hurst, 263 P. 113, 129 Okl. 1.
39 C.J. p 522 note 87.

Warnings and instructions held sufficient
Ark.—Western Union Telegraph Co. v. Ponder, 128 S.W.2d 246, 198 Ark. 207.
39 C.J. p 522 note 87 [e].

71. Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 743, 181 Miss. 573.
39 C.J. p 522 note 88.

Full information
An inexperienced servant should be given full information by the master as to dangers incident to his employment.—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580—Missouri Pacific Ry. Co. v. Watts, 64 Tex. 568.

Patent and latent dangers
Where an employee, by reason of either youth or inexperience, does not fully realize or appreciate danger of a particular service he is directed to perform, it is employer's duty to give proper instructions and to warn employee of patent as well as latent dangers.—Ideal Cement Co. v. Hardwick, 185 S.W.2d 266, 208 Ark. 163.

72. Ky.—Helton v. Cincinnati, N. O. & T. P. Ry. Co., 283 S.W. 395, 214 Ky. 392.
Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 743, 181 Miss. 573.
39 C.J. p 522 note 89.

73. Miss.—**Corpus Juris quoted in** J. W. Sanders Cotton Mill Co. v. Bryan, 179 So. 741, 743, 181 Miss. 573.
N.C.—McLaughlin v. Black, 1 S.E.2d 130, 215 N.C. 85.
39 C.J. p 522 note 90.

74. N.Y.—Civetti v. American Hatters' & Furriers' Corp., 108 N.Y.S. 663, 124 App.Div. 345.
Pa.—Verna v. Lopresti, 42 A.2d 170, 157 Pa.Super. 163.

75. N.Y.—Civetti v. American Hatters' & Furriers' Corp., 108 N.Y.S. 663, 124 App.Div. 345.
39 C.J. p 523 note 92.

76. Ky.—Southern R. Co. v. Mauck, 153 S.W. 729, 152 Ky. 498.
39 C.J. p 523 note 93.

Operation of cumbersome combine
An experienced farmer, knowing of danger of operating cumbersome combine, driven by him, on hilly ground, having notice of probability that it might overturn on steep decline, and failing to look to see whether boy employed by him to fill, tie, and release bags of threshed oats was on platform of combine or walking behind it as instructed, has been held guilty of negligence for boy's death as result of combine overturning on curve down hill while boy was on platform.—Verna v. Lopresti, 42 A.2d 170, 157 Pa.Super. 163.

77. Ky.—Chess & Wymond Co. v. Gohagan, 105 S.W. 890, 32 Ky.L. 372.

78. Tenn.—National Hosiery & Yarn Co. v. Napper, 135 S.W. 780, 124 Tenn. 155.
39 C.J. p 523 note 95.

79. Ark.—Mixon v. Pekin Cooperage Co., 170 S.W. 1163, 115 Ark. 380.
39 C.J. p 523 note 96.

80. Vt.—Hayes v. Colchester Mills, 37 A. 269, 270, 69 Vt. 1, 60 Am. S.R. 915.
39 C.J. p 523 note 97.

E. FELLOW SERVANTS

1. Number, Competency, and Supervision

§ 307. Number

The master is under a duty to furnish a sufficient number of persons to perform the required services or to do the particular piece of work in hand, and the master may be liable for injury to his servant which is caused by a violation of such duty.

It is the duty of the master to furnish a sufficient number of persons to perform the services required[81] or to do the particular piece of work in hand,[82] his duty resting on the principle that the master is bound to furnish proper tools and appliances,[83] or, according to some cases, on the principle that the master is bound to exercise due care to provide reasonably safe means and methods of work.[84] The duty is primary and absolute[85] and is nondelegable,[86] and generally, when the master's failure to perform it is the proximate cause of an injury to the servant, he must answer therefor,[87]

81. U.S.—Herrin Motor Lines v. Jarvis, C.C.A.Miss., 156 F.2d 276—Montgomery Ward & Co. v. Lindsey, C.C.A.Miss., 104 F.2d 882.
Fla.—**Corpus Juris cited in** McGee v. C. Ed De Brauwere & Co., 162 So. 510, 511, 117 Fla. 859.
Ky.—Illinois Central R. Co. v. Langin, 76 S.W. 32, 116 Ky. 318.
Miss.—**Corpus Juris cited in** Goodyear Yellow Pine Co. v. Mitchell, 149 So. 792, 793, 168 Miss. 152, suggestion of error overruled 150 So. 810, 168 Miss. 152.
Mo.—Hulsey v. Tower Grove Quarry & Construction Co., 30 S.W.2d 1018, 326 Mo. 194.
Mont.—Leonidas v. Great Northern Ry. Co., 72 P.2d 1007, 105 Mont. 302, affirmed 59 S.Ct. 51, 305 U. S. 1, 83 L.Ed. 3.
N.Y.—Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 152 Misc. 716.
N.C.—Smith v. Kitchin Lumber Co., 153 S.E. 324, 198 N.C. 736—Jarvis v. Erwin Cotton Mills Co., 140 S.E. 602, 194 N.C. 687—Bradford v. English, 130 S.E. 705, 190 N.C. 742.
Okl.—Beasley v. Bond, 48 P.2d 299, 173 Okl. 355.
Tex.—Western Union Telegraph Co. v. Coker, Civ.App., 202 S.W.2d 710.
39 C.J. p 523 note 98.

Importance of duty

This duty ranks in importance with the duty of an employer to furnish a safe place to work.—Jarvis v. Erwin Cotton Mills Co., 140 S.E. 602, 194 N.C. 687.

82. Ala.—Seymour v. Holman, 158 So. 525, 229 Ala. 634.
Fla.—**Corpus Juris cited in** McGee v. C. Ed. De Brauwere & Co., 162 So. 510, 511, 117 Fla. 859.
Miss.—Hardaway Contracting Co. v. Rivers, 180 So. 800, 181 Miss. 727—Gow Co. v. Hunter, 168 So. 264, 175 Miss. 896.
N.C.—Clinard v. Clinard Electric Co., 136 S.E. 1, 192 N.C. 736—Bradford v. English, 130 S.E. 705, 190 N.C. 742.
39 C.J. p 524 note 99.

83. Ky.—Cravens v. Poston, 71 S.W. 2d 1044, 254 Ky. 542.
Mo.—Hulsey v. Tower Grove Quarry & Construction Co., 30 S.W.2d 1018, 326 Mo. 194—Hunter v. Busy Bee Candy Co., 271 S.W. 800, 307 Mo. 656—Hamilton v. St. Louis-San Francisco Ry. Co., App., 279 S.W. 177.
39 C.J. p 524 note 1.
Duty as to tools, machinery, appliances, and places of work generally see supra §§ 201–259.

84. Miss.—Goodyear Yellow Pine Co. v. Mitchell, 149 So. 792, 168 Miss. 152, suggestion of error overruled 150 So. 810, 168 Miss. 152.
N.C.—Smith v. Kitchen Lumber Co., 153 S.E. 324, 198 N.C. 736—Bradford v. English, 130 S.E. 705, 190 N.C. 742.
Duty as to methods of work generally see supra §§ 260–283.

85. N.C.—Jarvis v. Erwin Cotton Mills Co., 140 S.E. 602, 194 N.C. 687—Bradford v. English, 130 S. E. 705, 190 N.C. 742.

86. U.S.—Herrin Motor Lines v. Jarvis, C.C.A.Miss., 156 F.2d 276—Montgomery Ward & Co. v. Lindsey, C.C.A.Miss., 104 F.2d 882.
Ala.—Alabama Great Southern R. Co. v. Vail, 38 So. 124, 142 Ala. 134, 100 Am.S.R. 23.
Fla.—**Corpus Juris cited in** McGee v. C. Ed. De Brauwere & Co., 162 So. 510, 511, 117 Fla. 859.
Miss.—Hardaway Contracting Co. v. Rivers, 180 So. 800, 181 Miss. 727—Gow Co. v. Hunter, 168 So. 264, 175 Miss. 896—Jefferson v. Denkmann Lumber Co., 148 So. 237, 167 Miss. 246—Natural Gas Engineering Co. v. Bazor, 137 So. 788.
Mo.—Haggard v. Rogers, App., 249 S. W. 712.
N.C.—Jarvis v. Erwin Cotton Mills Co., 140 S.E. 602, 194 N.C. 687—Bradford v. English, 130 S.E. 705, 190 N.C. 742.
Tex.—Morgan v. State, Civ.App., 170 S.W.2d 648, reversed on other grounds State v. Morgan, 170 S.W. 2d 652, 140 Tex. 620.
39 C.J. p 524 note 2.
Delegation of duties generally see supra § 186.

87. U.S.—Herrin Motor Lines v. Jarvis, C.C.A.Miss., 156 F.2d 276—Deere v. Southern Pac. Co., C.C.A. Or., 123 F.2d 438, certiorari denied 62 S.Ct. 916, 315 U.S. 819, 86 L. Ed. 1217—Montgomery Ward & Co. v. Lindsey, C.C.A.Miss., 104 F.2d 882.
Fla.—McGee v. C. Ed. De Brauwere & Co., 162 So. 510, 117 Fla. 859.
Ky.—Illinois Central R. Co. v. Langan, 76 S.W. 32, 116 Ky. 318.
Miss.—Hardaway Contracting Co. v. Rivers, 180 So. 800, 181 Miss. 727—Goodyear Yellow Pine Co. v. Mitchell, 149 So. 772, 168 Miss. 152, suggestion of error overruled 150 So. 810, 168 Miss. 152—Jefferson v. Denkmann Lumber Co., 148 So. 237, 167 Miss. 246—Natural Gas Engineering Co. v. Bazor, 137 So. 788.
Mo.—Hulsey v. Tower Grove Quarry & Construction Co., 30 S.W.2d 1018, 326 Mo. 194—Duvall v. Brooklyn Cooperage Co., App., 275 S.W. 586.
Mont.—Leonidas v. Great Northern Ry. Co., 72 P.2d 1007, 105 Mont. 302, affirmed Great Northern Ry. Co. v. Leonidas, 59 S.Ct. 51, 305 U. S. 1, 83 L.Ed. 3.
N.C.—Smith v. Kitchen Lumber Co., 153 S.E. 324, 198 N.C. 736—Bradford v. English, 130 S.E. 705, 190 N.C. 742.
Okl.—Beasley v. Bond, 48 P.2d 299, 173 Okl. 355.
Tex.—Western Union Telegraph Co. v. Coker, Civ.App., 202 S.W.2d 710—St. Louis Southwestern Ry. Co. v. Gillenwater, Civ.App., 284 S.W. 268, affirmed St. Louis Southwestern Ry. Co. of Texas v. Gillenwater, Com.App., 294 S.W. 193.
39 C.J. p 523 note 98, p 524 note 99.

Request for help

Where a servant requests additional help to perform the work and is directed by the foreman to proceed, and the servant proceeds and is injured without any negligence on his part, the master is liable.—Lewis v. American Car & Foundry Co., Mo. App., 3 S.W.2d 282.

unless the servant has assumed the risk, as discussed infra § 390, or is guilty of contributory negligence, as discussed infra § 451. So the master is liable where, by misrepresentation of the conditions of a particular piece of labor as to which his knowledge is greater than that of the servant, he induces the servant to attempt to perform it with an inadequacy of fellow servants, to the servant's resulting injury.[88]

Want of funds does not excuse a failure to employ a sufficient number of servants for the work.[89]

§ 308. —— Extent of Duty, and Degree of Care Required

Generally it is the duty of the master to furnish a force sufficient to do the work with reasonable safety to those engaged in the accomplishment of the work.

As the rule is ordinarily stated, it is the duty of the master to furnish a sufficient number of men to do the work in which the servant is engaged with reasonable safety[90] or with reasonable safety to all those engaged in its accomplishment,[91] or, as sometimes stated, it is the duty of the master to furnish sufficient servants or workmen to prevent the exposure of a servant to unnecessary risk or peril[92] or to prevent exposure to that class of hazards which results from an inadequate force to do the work.[93] The master, however, is not an insurer, as discussed supra § 171, and is liable only in case he has been negligent,[94] the duty imposed on him being that of exercising reasonable[95] or ordinary[96] care, and the precautions which he is required to take are only such as a reasonably prudent person might have foreseen as necessary to prevent the injury.[97]

88. Ga.—Beard v. Georgian Mfg. Co., 70 S.E. 57, 8 Ga.App. 618.

89. N.Y.—Graham v. Chapman, 11 N.Y.S. 318.

90. Mo.—Hamilton v. St. Louis-San Francisco Ry. Co., App., 279 S.W. 177.
Mont.—Leonidas v. Great Northern Ry. Co., 72 P.2d 1007, 105 Mont. 302, affirmed Great Northern Ry. Co. v. Leonidas, 59 S.Ct. 51, 305 U.S. 1, 83 L.Ed. 3.
N.C.—Crawford v. Michael & Bivens, 154 S.E. 58, 199 N.C. 224.
Okl.—Beasley v. Bond, 48 P.2d 299, 173 Okl. 355.
39 C.J. p 524 note 8.

91. Fla.—McGee v. C. Ed. De Brauwere & Co., 162 So. 510, 117 Fla. 859.
Mo.—Hulsey v. Tower Grove Quarry & Construction Co., 30 S.W.2d 1018, 326 Mo. 194.
Tex.—Western Union Telegraph Co. v. Coker, Civ.App., 202 S.W.2d 710.
39 C.J. p 524 note 9.

92. N.Y.—Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 152 Misc. 716.

93. Ala.—Seymour v. Holman, 158 So. 525, 229 Ala. 634—Alabama Great Southern R. Co. v. Vail, 38 So. 124, 142 Ala. 124, 100 Am.S.R. 23.

94. U.S.—Lang v. U. S. Reduction Co., C.C.A.Ind., 110 F.2d 441.
Ill.—Chicago & N. W. R. Co. v. Donahue, 75 Ill. 196.
Mass.—Craven v. Mayers, 42 N.E. 1131, 165 Mass. 271.
Mich.—Erickson v. Leach, 281 N.W. 324, 285 Mich. 554.
N.Y.—Riordan v. Ocean SS. Co., 26 N.E. 1027, 124 N.Y. 655—Herrick v. State, 32 N.Y.S.2d 607, 177 Misc. 1009.
Pa.—Guerierro v. Reading Co., 29 A. 2d 510, 346 Pa. 187.
39 C.J. p 524 note 11.

Safe and reasonable method with available force
Employer is not negligent for inadequacy of force to do specific work where safe and reasonable way exists to do work with force in hand. —Seymour v. Holman, 158 So. 525, 229 Ala. 634.

Prior performance with same force
Fact that track laborer had loaded seven rails with same assistance showed work could be accomplished with safety by force then employed, with respect to alleged negligence in failing to furnish sufficient men.—Lloyd v. Norfolk & W. Ry. Co., 145 S.E. 372, 151 Va. 409.

Facts not constituting negligence
(1) Refusal to furnish help to telephone linesman in setting pole, where, in requesting help, he did not inform district manager that pole was dangerous and too heavy to handle alone.—Western Arkansas Telephone Co. v. Grantham, 139 S.W. 2d 49, 200 Ark. 411.

(2) Requiring stock boy and assistant manager of chain store to carry sacks of potatoes weighing one hundred pounds seventy-five or eighty feet without assistance, where employee was a strong young man accustomed to doing such work for chain store and other previous employers and employees in other grocery stores customarily did the same character of work.—Great Atlantic & Pacific Tea Co. v. Evans, 175 S.W.2d 249, 142 Tex. 1.

(3) Failure of operator of filling station to have some employee on hand to direct drivers of automobiles coming into station to stop their automobiles at such places as would avoid injuring other employees engaged in the duties of servicing automobiles, in the absence of evidence that it was customary for operators of filling stations to take such precaution.—Fuller v. Texas Park Lot, Tex.Civ.App., 133 S.W.2d 605.

(4) Other facts.
Ariz.—Bowers v. J. D. Halstead Lumber Co., 236 P. 124, 28 Ariz. 122.
Ark.—Batson v. Smith, 117 S.W.2d 731, 196 Ark. 386.
39 C.J. p 524 note 11 [a]-[c].

95. Fla.—McGee v. C. Ed. De Brauwere & Co., 162 So. 510, 117 Fla. 859.
Miss.—Gow Co. v. Hunter, 168 So. 264, 175 Miss. 896.
Mont.—Leonidas v. Great Northern Ry. Co., 72 P.2d 1007, 105 Mont. 302, affirmed Great Northern Ry. Co. v. Leonidas, 59 S.Ct. 51, 305 U.S. 1, 83 L.Ed. 3.
39 C.J. p 524 note 12.

96. N.C.—Jarvis v. Erwin Cotton Mills Co., 140 S.E. 602, 194 N.C. 687.
Tex.—Western Union Telegraph Co. v. Coker, Civ.App., 202 S.W.2d 710 —Morgan v. State, Civ.App., 170 S.W.2d 648, reversed on other grounds State v. Morgan, 170 S.W. 2d 652, 140 Tex. 620.
39 C.J. p 525 note 13.

97. Okl.—Chicago, R. I. & P. R. Co. v. Watson, 127 P. 693, 36 Okl. 1.
39 C.J. p 525 note 14.

Notice of physical condition
Employer, not being advised of workman's condition, was entitled to assume that workman was in ordinary physical condition and was not chargeable with negligence for failing to provide sufficient number of men to assist with assigned task unless employer failed to provide sufficient workmen to assist a person of ordinary physique to perform in safety the work required.
Ky.—Louisville & N. R. Co. v. Willhite, 187 S.W.2d 1010, 300 Ky. 75.
Tex.—Texas & P. Ry. Co. v. Rampy,

The employer discharges his duty in this respect where he has provided sufficient help presently available and subject to the request for assistance.[98] The master is chargeable with knowledge of the facts which it is his duty to know in the conduct of his business.[99]

§ 309. —— Maintaining Force

Generally it is the duty of the master to see that a sufficient number of servants remains sufficient for the reasonable safety of each of them.

The obligation of the master to furnish an adequate number of servants is not relaxed at any time.[1] It is his duty to see that the number of servants engaged in the work in hand remains sufficient for the reasonable safety of each of them,[2] and not to withdraw a portion of the force employed on a particular piece of work undertaken until the portion withdrawn can safely be dispensed with.[3] In case, however, the master has provided an adequate number of servants, he is not liable for injuries caused by the absence of one of them from his post of duty without the master's knowledge or consent.[4] On the other hand, the temporary absence of a servant does not justify the undertaking of the work by the master with an insufficient number,[5] nor does the failure of some of those hired for the work to appear,[6] and where, by reason of the employer's conduct, it becomes necessary for employees temporarily to absent themselves, it is the duty of the master to suspend the work or supply others for their places during their absence.[7] Where the absence is that of a vice principal, and by reason of his absence the work is without proper superintendence, the master is liable for an injury occurring by reason of his absence.[8]

§ 310. —— Proximate Cause

In order to render the master liable for injury to a servant on the alleged ground of failure to comply with the duty to furnish a sufficient number of servants, such failure must be the proximate cause of the injury.

The fact alone that the master fails to employ a sufficient number of men to do the work does not in itself give rise to a cause of action.[9] The inadequacy of the force must be the proximate cause of the injury,[10] and the master is not liable where the injury results from pure accident,[11] or from the negligent acts or conduct of the men assisting the injured servant,[12] or from the act of the employee in voluntarily doing work alone without assistance,[13] or directing his assistants to leave him and do other things.[14]

Civ.App., 71 S.W.2d 387, error dismissed.

98. N.C.—Jarvis v. Erwin Cotton Mills Co., 140 S.E. 602, 194 N.C. 687.

99. Ga.—Beard v. Georgian Mfg. Co., 70 S.E. 57, 8 Ga.App. 618.
Tex.—Galveston, H. & S. A. R. Co. v. Brown, Civ.App., 181 S.W. 238.

1. Mont.—Sorenson v. Northern Pac. R. Co., 163 P. 560, 53 Mont. 268.
Tex.—Bonn v. Galveston, H. & S. A. R. Co., Civ.App., 82 S.W. 808.

2. Tex.—Western Union Telegraph Co. v. Coker, Civ.App., 202 S.W.2d 710—Bonn v. Galveston, H. & S. A. R. Co., Civ.App., 82 S.W. 808.

3. Miss.—**Corpus Juris cited** in Goodyear Yellow Pine Co. v. Mitchell, 149 So. 792, 793, 168 Miss. 152, suggestion of error overruled 150 So. 810, 168 Miss. 152.
39 C.J. p 525 note 18.

4. N.Y.—Potter v. New York Cent. & H. R. R. Co., 32 N.E. 603, 136 N.Y. 77.
39 C.J. p 525 note 19.

5. La.—Wallace v. Tremont & G. R. Co., 74 So. 179, 140 La. 873, L.R.A.1917D 959.

6. La.—Wallace v. Tremont & G. R. Co., supra.
N.Y.—Flike v. Boston & A. R. Co., 53 N.Y. 549, 13 Am.R. 545.

7. Ind.—Pennsylvania Co. v. McCaffrey, 38 N.E. 67, 139 Ind. 430, 29 L.R.A. 104.
39 C.J. p 525 note 22.

8. Conn.—Gerrish v. New Haven Ice Co., 27 A. 235, 63 Conn. 9—McElligott v. Randolph, 22 A. 1094, 61 Conn. 157, 29 Am.S.R. 181.

9. Mo.—Lutgen v. Missouri Pac. R. Co., App., 294 S.W. 444.
39 C.J. p 525 note 24.

10. U.S.—Deere v. Southern Pac. Co., C.C.A.Or., 123 F.2d 438, certiorari denied 62 S.Ct. 916, 315 U.S. 819, 86 L.Ed. 1217—Jacobson v. Chicago, M., St. P. & P. R. Co., C.C.A.Minn., 66 F.2d 688.
Minn.—Marshall v. Chicago, R. I. & P. R. Co., 155 N.W. 208, 131 Minn. 392.
Mo.—Hamilton v. St. Louis-San Francisco Ry. Co., App., 279 S.W. 177.
N.H.—Kenney v. Boston & Maine R. R., 33 A.2d 557, 92 N.H. 495.
N.Y.—Herrick v. State, 32 N.Y.S.2d 607, 177 Misc. 1009.
S.C.—Wesley v. Holly Hill Lumber Co., 43 S.E.2d 619, 211 S.C. 40.
Tex.—Texas & P. Ry. Co. v. Rampy, Civ.App., 71 S.W.2d 387, error dismissed.
39 C.J. p 525 note 25.

Overexertion

(1) Where the injury to a servant results from overexertion due to his overestimation of his own strength, such overexertion, and not the failure of the master to furnish sufficient help, has been regarded as the proximate cause of the injury, so that the master is not liable.—Lutgen v. Missouri Pac. R. Co., Mo.App., 294 S.W. 444—39 C.J. p 525 note 25 [d].

(2) This was especially true where the injured servant had failed to give the representative or vice principal of the employer information of facts showing the necessity of furnishing help.—Hunter v. Busy Bee Candy Co., 271 S.W. 800, 307 Mo. 656.

(3) Assumption of risk with respect to overexertion see infra §§ 390, 401.

11. Mass.—Craven v. Mayers, 42 N. E. 1131, 165 Mass. 271.

12. Ohio.—Scanlon v. Lake Shore & M. S. R. Co., 24 Ohio Cir.Ct. 256.

13. Tex.—Melton v. Texas & N. O. R. Co., Civ.App., 254 S.W. 510—Hines v. Ross, Civ.App., 230 S.W. 1066.
39 C.J. p 525 note 28.

14. Ky.—Hanning Distilling Co. v. Nischan, 149 S.W. 994, 149 Ky. 683.
39 C.J. p 525 note 29.

§ 311. Competency

A master owes to his servant the duty to employ and retain only competent fellow servants or coemployees; such duty is nondelegable and generally the master is liable for an injury caused by a violation of such duty.

A master owes to his servant the duty to employ and retain only competent fellow servants or coemployees.[15] The duty of the master to use due care in this respect is one which is imposed by law[16] and this duty is positive[17] and personal or primary[18] and is nondelegable.[19]

Where a master negligently or knowingly employs or retains in his service an incompetent servant, in violation of his duty in this respect, generally he is liable for an injury sustained by a coservant by reason of such incompetency[20] unless the circumstances are such that the injured servant must be regarded as having assumed the risk, under rules discussed infra §§ 362, 390, or as having been guilty of contributory negligence in relying on the care of a fellow servant, under rules discussed infra § 430. The rule that the master is liable does not apply, however, where the employee has made it a condition of his consent to accept the service that the employer will yield in his favor the right of freedom of action as to selection and superintendence,[21] or, under some circumstances, where the injured servant is a vice principal intrusted by the master with complete control and supervision of the work and the method of doing it.[22] The mere fact, however, that the injured servant selected the servants to work with him does not relieve the master of liability where his right of selection was limited to a group in which no competent servants were available.[23] The rule imposing liability on the master in such case has been regarded as an exception to the rule, discussed infra § 321, that the master is not liable to one servant for injuries due to the negligence of another servant.[24]

15. Mo.—Curtie v. Koch, App., 282 S.W. 1045—Isaacs v. Smith, App., 275 S.W. 555.
N.Y.—Healey v. Carter & Weeks Stevedoring Co., 210 N.Y.S. 75, 213 App.Div. 122—Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 152 Misc. 716.
Okl.—Lowden v. Larsen, 102 P.2d 144, 187 Okl. 226—Singer Sewing Mach. Co. v. Odom, 45 P.2d 473, 172 Okl. 411.
Tex.—Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 123 Tex. 128—Magnolia Petroleum Co. v. Studdard, Civ.App., 83 S.W. 1047, error dismissed.
Va.—Aronovitch v. Ayres, 193 S.E. 524, 169 Va. 308.
39 C.J. p 450 note 57, p 526 note 31.

16. Conn.—Furlong v. New York, N. H. & H. R. Co., 78 A. 489, 83 Conn. 568, 21 Ann.Cas. 937.
39 C.J. p 527 note 35.

17. Mo.—Houston v. American Car & Foundry Co., App., 282 S.W. 170.

18. U.S.—Pittsburgh R. Co. v. Thomas, Pa., 174 F. 591, 98 C.C.A. 437.
Mo.—Courtois v. American Car & Foundry Co., App., 282 S.W. 484.
39 C.J. p 527 note 35.

19. Ala.—**Corpus Juris cited in** Jenkins v. Mann, 127 So. 230, 233, 220 Ala. 661.
Mo.—Houston v. American Car & Foundry Co., App., 282 S.W. 170.
Okl.—Lowden v. Larson, 102 P.2d 144, 187 Okl. 226—Singer Sewing Mach. Co. v. Odom, 45 P.2d 473, 172 Okl. 411.
Tex.—**Corpus Juris cited in** Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 401, 123 Tex. 128—Magnolia Petroleum Co. v. Studdard, Civ.App., 83 S.W.2d 1047, error dismissed.
39 C.J. p 527 note 35.

20. U.S.—Rhodes v. Dierks-Lumber & Coal Co., C.C.A.Ark., 108 F.2d 846.
Ala.—McDuff v. Kurn, 172 So. 886, 233 Ala. 619.
Ariz.—Robies v. Preciado, 79 P.2d 504, 52 Ariz. 113.
Cal.—Worley v. Spreckles Bros. Commercial Co., 124 P. 697, 163 Cal. 60.
Fla.—Cummer Lumber Co. v. Silas, 125 So. 372, 98 Fla. 1158.
Ky.—Central Truckaway System v. Moore, 201 S.W.2d 725, 304 Ky. 533.
Miss.—Hamilton Bros. Co. v. Weeks, 124 So. 798, 155 Miss. 754.
Mo.—Courtois v. American Car & Foundry Co., App., 282 S.W. 484—Houston v. American Car & Foundry Co., App., 282 S.W. 170.
N.H.—Coughlin v. Arms Textile Co., 46 A.2d 130, 94 N.H. 57.
N.C.—Shorter v. Mooresville Cotton Mills, 150 S.E. 499, 198 N.C. 27.
Okl.—Singer Sewing Mach. Co. v. Odom, 45 P.2d 473, 172 Okl. 411—Producers' & Refiners' Corporation v. Castile, 246 P. 615, 118 Okl. 42.
Va.—Aronovitch v. Ayres, 193 S.E. 524, 169 Va. 308.
39 C.J. p 526 note 31, p 546 note 70.

Negligence of fellow servant does not preclude recovery by injured employee when master has been negligent in selection of incompetent or unfit fellow servant.—Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 123 Tex. 128.

Ability to ascertain whether other servants negligent
If in the nature of things one workman cannot ascertain whether other workmen are careful or negligent, it would be unfair to hold such workman, rather than the master who has the duty to employ competent workmen, responsible for the negligence of a coworker.—Curtie v. Koch, Mo.App., 282 S.W. 1045.

Grounds of liability not shown
Miss.—Great Southern Lumber Co. v. May, 103 So. 363, 138 Miss. 27.
N.Y.—Healy v. Carter & Weeks Stevedoring Co., 210 N.Y.S. 75, 213 App.Div. 122.

21. La.—Farmer v. Kearney, 39 So. 967, 115 La. 722, 3 L.R.A.,N.S., 1105.
39 C.J. p 527 note 34.

22. Okl.—Atchison, T. & S. F. Ry. Co. v. Kennard, 181 P.2d 234—City of Edmond v. Washam, 121 P.2d 300, 190 Okl. 140.

Duty and liability of master
Rule imposing on master nondelegable duty to furnish reasonably competent fellow servants has no application to skillful and experienced vice principal, who is injured, where such vice principal is intrusted with complete control of work and method of doing it and has responsibility of advising employer if additional helpers are necessary for safe performance of work, in absence of advice by vice principal that such are needed and a request that they be furnished.—Atchison, T. & S. F. Ry. Co. v. Kennard, Okl., 181 P.2d 234—City of Edmond v. Washam, 121 P.2d 300, 190 Okl. 140.

23. Okl.—Lowden v. Larson, 102 P. 2d 144, 187 Okl. 226.

24. Okl.—Producers' & Refiners' Corporation v. Castile, 246 P. 615, 118 Okl. 42.
S.C.—Game v. Atlantic Coast Line R. Co., 30 S.E.2d 33, 204 S.C. 452.
39 C.J. p 526 note 31, p 546 note 70.

The fellow servant or coemployee must actually have been incompetent in order to render the master liable.[25] It has been held that the master is not liable on the theory of his failure to employ or provide a competent employee for acts of an employee which are not within the scope of the employment,[26] including the acts of a vice principal,[27] and that this rule applies with respect to acts which may be classified as pranks.[28]

§ 312. —— Care Required of Master

At common law the master is not an insurer of the competency of his servants; the obligation imposed on him in this respect is to exercise ordinary or reasonable care under all the circumstances.

The master is not at common law an insurer of the competency of his servants;[29] his duty is measured by the exercise of ordinary[30] or reasonable[31] care under all the circumstances, regard being had to the consequences which may result from incompetency,[32] such care as men of ordinary care and prudence acting under the same or similar circumstances, or engaged in the same or similar business on their own account, are in the habit of exercising.[33] It is not necessary that the servants be the best that can be secured.[34] The mere fact that a fellow servant is careless does not establish negligence of the master in failing to furnish a competent and skillful fellow servant.[35] However, the employment or retention of a dangerous or vicious servant whose presence may expose coemployees to greater dangers than the work necessarily entails may constitute negligence.[36]

§ 313. —— Definition and Tests of Competency

a. In general
b. Inexperience or youth
c. Physical disability
d. Habits

a. In General

In order to be competent, a servant must be both capable and reasonably careful, and what constitutes incompetency of a servant depends on and varies with the nature of the duties he is called on to perform.

A competent servant within the meaning of the rule under consideration is one who is reasonably safe for the performance of the duties assigned to him,[37] "competency" in this connection requiring

25. Me.—Cote v. Jay Mfg. Co., 98 A. 817, 115 Me. 300.
Mo.—Houston v. American Car & Foundry Co., App., 282 S.W. 170—Isaacs v. Smith, App., 275 S.W. 555.

26. Fla.—Crowder v. Wolary, 198 So. 9, 144 Fla. 149.

27. Fla.—Crowder v. Wolary, supra.

28. Fla.—Crowder v. Wolary, supra.

29. Ill.—McMahon v. Owsley, 102 N.E. 1010, 260 Ill. 43, L.R.A.1916F 1208.
39 C.J. p 527 note 36.
Statutory requirements see infra § 314.

Insane patients

A nurse who was employed in a sanitarium for the insane, and whose duty it was to supervise women patients who worked in sanitarium's laundry, could not recover from corporation which operated sanitarium and which employed her, for burns sustained by her when a patient tripped on a floor mat and caused steam press to close on nurse's forearm, merely because corporation permitted incompetent patients to perform laundry work.—Cox v. Sanitarium Co., Or., 184 P.2d 386.

30. Ga.—Roberts v. Ethridge, 36 S.E.2d 883, 73 Ga.App. 400.
Mo.—Courtois v. American Car & Foundry Co., App., 282 S.W. 484—Houston v. American Car & Foundry Co., App., 282 S.W. 170—Isaacs v. Smith, App., 275 S.W. 555.
Tex.—Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 123 Tex. 128—Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, error dismissed, judgment correct—Magnolia Petroleum Co. v. Studdard, Civ.App., 83 S.W.2d 1047, error dismissed.
Va.—Aronovitch v. Ayres, 193 S.E. 524, 169 Va. 308.
39 C.J. p 527 note 37.

31. U.S.—Holliday v. Fulton Band Mill, C.C.A.Miss., 142 F.2d 1006.
Ariz.—Robles v. Preciado, 79 P.2d 504, 52 Ariz. 113.
Miss.—Country Club of Jackson v. Turner, 4 So.2d 718, 192 Miss. 510.
Okl.—Singer Sewing Mach. Co. v. Odom, 45 P.2d 473, 172 Okl. 411.
Va.—P. L. Farmer, Inc., v. Cimino, 41 S.E.2d 1, 185 Va. 965.
39 C.J. p 528 note 38.

32. U.S.—Wabash R. Co. v. McDaniels, Ind., 2 S.Ct. 932, 107 U.S. 454, 27 L.Ed. 605.
39 C.J. p 528 note 39.

Investigation and affirmative inquiry

(1) Where the service in which the servant is to be employed is such as to endanger the lives of persons and coemployees, the master, before engaging such servant, is required to make reasonable investigation into such servant's character, skill, and habits.—Producers' & Refiners' Corporation v. Castile, 246 P. 615, 118 Okl. 42—Producers' & Refiners' Corporation v. Castile, 214 P. 121, 89 Okl. 261.

(2) The master is bound to institute affirmative inquiries in order to ascertain the qualifications of a servant whom he transfers to a more responsible position, for which special qualifications are necessary, unless the servant has given proof of his capacity in some similar position.—Producers' & Refiners' Corporation v. Castile, 246 P. 615, 118 Okl. 42—Producers' & Refiners' Corporation v. Castile, 214 P. 121, 89 Okl. 261.

33. Wis.—Rankel v. Buckstaff-Edwards Co., 120 N.W. 269, 138 Wis. 442, 20 L.R.A.,N.S., 1180.
39 C.J. p 529 note 40.

34. Ala.—Holland v. Tennessee Coal, Iron & R. Co., 8 So. 524, 91 Ala. 444, 12 L.R.A. 232.
Mich.—Lyttle v. Chicago & W. M. R. Co., 47 N.W. 571, 84 Mich. 289.
39 C.J. p 529 note 41.

35. N.Y.—Ginsberg v. Wolf, 144 N.Y.S. 678, 159 App.Div. 412.

36. Miss.—Country Club of Jackson v. Turner, 4 So.2d 718, 192 Miss. 510.
N.Y.—Bomba v. Borowicz, 38 N.Y.S.2d 403, 265 App.Div. 198.

37. Del.—Warren v. Harlan & Hollingsworth Corp., 84 A. 215, 26 Del. 182.
39 C.J. p 529 note 43.

Reliability

(1) It has been laid down that a competent man is a reliable man.—Coppins v. New York Cent. & H. R. R. Co., 25 N.E. 915, 122 N.Y. 557, 19

that the servant be both capable and reasonably careful.[38] What constitutes incompetency in an employee depends on, and varies with, the nature of the duties he is called on to perform[39] and his relation to other persons.[40] So an employee may be incompetent because of physical deficiencies, discussed infra subdivision c of this section, or mental deficiencies,[41] such as lack of knowledge,[42] skill,[43] or experience, discussed infra subdivision b of this section, or his youth, discussed infra subdivision b of this section. So also an employee may be incompetent because of the lack of a disposition to use his ability and experience properly whether arising from carelessness[44] or viciousness.[45] The inefficiency must, however, exist to such a degree as to affect the general character of the employee in the capacity in which he is employed and to indicate that he is not a reasonably reliable and safe man for the work.[46]

b. Inexperience or Youth

Lack of experience or youth does not necessarily render a servant incompetent, but either may be an element of incompetency.

In the absence of statutory regulation, discussed infra § 314, an employee is not necessarily incompetent merely because he is inexperienced in the particular work in which he is employed,[47] but, where the nature of a servant's work is such as to require experience for its reasonably safe performance, his inexperience may be sufficient to show his incompetency.[48] Likewise ordinarily a servant is not in-

Am.S.R. 523—39 C.J. p 529 note 43 [b].

(2) The view has been taken, however, that the law does not impose on the master the requirement that the coemployee shall be reliable, in addition to being reasonably careful and competent.—Isaacs v. Smith, Mo.App., 275 S.W. 555.

38. Mo.—Houston v. American Car & Foundry Co., App., 282 S.W. 170—Isaacs v. Smith, App., 275 S.W. 555.
N.Y.—Daurizio v. Merchants' Despatch Transp. Co., 274 N.Y.S. 174, 152 Misc. 716.
Okl.—Lowden v. Larsen, 102 P.2d 144, 187 Okl. 226—Singer Sewing Mach. Co. v. Odom, 45 P.2d 473, 172 Okl. 411.
Tex.—Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 123 Tex. 128—Magnolia Petroleum Co. v. Studdard, Civ.App., 83 S.W.2d 1047, error dismissed—Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, error dismissed, judgment correct.
39 C.J. p 529 note 44.

39. Mass.—Beers v. Isaac Prouty Co., 85 N.E. 864, 200 Mass. 19, 128 Am.S.R. 374, 20 L.R.A.,N.S., 39.
39 C.J. p 529 note 45.

40. Del.—Warren v. Harlan & Hollingsworth Corp., 84 A. 215, 26 Del. 182.
Mass.—Beers v. Isaac Prouty Co., 85 N.E. 864, 200 Mass. 19, 22, 128 Am. S.R. 374, 20 L.R.A.,N.S., 39.
39 C.J. p 529 note 46.

41. Okl.—Producers' & Refiners' Corporation v. Castile, 246 P. 615, 118 Okl. 42.
39 C.J. p 530 note 48.

Particular type of work

Employer had duty of employing men whose judgment and mental capacity was such that trees which they were employed to cut would be felled so as not unnecessarily to endanger fellow servants.—Putnam Lumber Co. v. Tompkins, 150 So. 712, 112 Fla. 635.

42. Cal.—Still v. San Francisco & N. W. R. Co., 98 P. 672, 154 Cal. 559, 129 Am.S.R. 177, 20 L.R.A., N.S., 322.
39 C.J. p 530 note 49.

Ignorance of language

(1) With respect to the employment of persons who cannot understand and speak the English language, the question as to the responsibility of the master involves the competency of such persons for the particular tasks to which they are assigned.—Courtois v. American Car & Foundry Co., Mo.App., 282 S. W. 484.

(2) Employment of such persons is not of itself negligence.—Courtois v. American Car & Foundry Co., supra.

(3) Their employment constitutes negligence, however, where the work requires coöperation, coördination, and action in response to spoken orders and is unsafe in the absence of such elements.—Courtois v. American Car & Foundry Co., supra.

43. Okl.—**Corpus Juris cited in** Lowden v. Larson, 102 P.2d 144, 147, 187 Okl. 226—Producers' & Refiners' Corporation v. Castile, 246 P. 615, 118 Okl. 42.
39 C.J. p 530 note 50.

Element of competency

One of the elements of competency of a fellow servant is reasonable skill or experience in the duties assigned and his qualifications or fitness to perform such duties.—Lowden v. Larson, 102 P.2d 144, 187 Okl. 226.

44. Me.—Robbins v. Lewiston, A. & W. R. Co., 77 A. 537, 107 Me. 42, 30 L.R.A.,N.S., 109, Ann.Cas.1912C 92.
39 C.J. p 530 note 53, p 529 note 43 [c] (1).

45. Miss.—Hines v. Green, 87 So 649, 125 Miss. 476.

Assault

Employer who had knowledge that his employee was belligerent and was guilty of vicious conduct, was liable for injuries sustained by fellow employee assaulted by the first employee on ground that employer was guilty of breach of duty of care to select and retain in his employ only servants from whose conduct there was not an unreasonable risk of harm to other servants.—Bomba v. Borowicz, 38 N.Y.S.2d 403, 265 App.Div. 198.

Individual nature or disposition

A vicious or dangerous tendency on part of employee, on which liability of employer for employee's acts may be predicated, must inhere in the nature or disposition of the employee as an individual, and such innate proclivity must be prone to a ready revelation in an unwarranted display of excessive force, and there must exist such a deviation from normal temper as to make exposure to probability of its manifestation an unusual hazard.—Country Club of Jackson v. Turner, 4 So.2d 718, 192 Miss. 510.

46. Wis.—Kliefoth v. Northwestern Iron Co., 74 N.W. 356, 98 Wis. 495.
39 C.J. p 530 note 55.

There was no negligence in master's employing person to drive truck for workmen's convenience, where such person, although not a mechanic, had two years' experience in driving truck.—J. E. Parham Const. Co. v. Parker, 37 S.W.2d 879, 183 Ark. 673.

47. Mich.—Timm v. Michigan Cent. R. Co., 57 N.W. 116, 98 Mich. 226.
39 C.J. p 530 note 57.

48. Or.—Statts v. Twohy Bros. Co., 123 P. 909, 61 Or. 602.
39 C.J. p 531 note 58.

competent merely because he is youthful,[49] but the youth of a servant may be considered on the question of his competency to do the work assigned him;[50] and it has been held that a boy less than fourteen years of age is presumed to be incompetent to perform duties involving the personal safety of others, which require judgment, discretion, and care greater than usually possessed by boys of such age.[51]

c. Physical Disability

A physical disability of a servant does not necessarily render him incompetent, but a disability which prevents a proper discharge of duties may constitute incompetency.

An employee is not incompetent merely because he has a physical disability[52] unless his disability is such as to prevent the proper performance of his duties.[53]

d. Habits

Habits of a servant, such as habitual carelessness or drinking intoxicating liquors to excess, may render such servant incompetent.

A servant otherwise competent may be rendered incompetent by reason of habits which make it imprudent to employ or retain him in the particular work assigned him.[54] Thus a person may be incompetent if he is habitually careless[55] or if his acts of negligence characterize him as a careless workman.[56] Generally, where habitual negligence of a fellow servant is relied on to impose liability on the master, it must be shown that the negligence which caused the injury was habitual.[57] Ordinarily a single act of negligence does not show that negligence is a characteristic of the employee,[58] although the act may be of such a character as per se to show incompetence.[59]

A servant may be incompetent because of the habit of drinking intoxicating liquors to excess,[60] but the fact that an employee is occasionally under the influence of drink does not ordinarily authorize a finding that he was rendered incompetent thereby,[61] and even the fact that a servant is an habitual drunkard does not necessarily show incompetency.[62]

§ 314. —— Statutory Requirements

The master may be the insurer of the competency of servants under statutes which require particular qualifications for servants employed in designated positions, and the master may be liable for injuries to a fellow servant caused by an incompetent servant employed in violation of a statute.

Statutory provisions sometimes require particular qualifications as to servants employed in designated positions,[63] and the master may be made an insurer of the competency of such servants,[64] thus abrogating the common-law rule, discussed supra § 312, that only reasonable care and diligence in ascertaining the competence of servants are required of the master.[65] Generally the employment of a servant by a master in violation of statutory provisions constitutes negligence per se,[66] or at least is compe-

49. Mo.—Isaacs v. Smith, App., 275 S.W. 555.
39 C.J. p 531 note 59.

50. Wis.—Zabawa v. Oberbeck Bros. Mfg. Co., 131 N.W. 826, 146 Wis. 621, Ann.Cas.1912C 419.
39 C.J. p 531 note 60.

51. Wis.—Molaske v. Ohio Coal Co., 56 N.W. 475, 86 Wis. 220.

52. Me.—Wing v. L. A. Bradstreet & Co., 96 A. 782, 114 Me. 481.
39 C.J. p 531 note 62.

53. Okl.—Producers' & Refiners' Corporation v. Castile, 246 P. 615, 118 Okl. 42.
39 C.J. p 531 note 63.

54. N.H.—Coughlin v. Arms Textile Co., 46 A.2d 130, 94 N.H. 57.
Okl.—Producers' & Refiners' Corporation v. Castile, 246 P. 615, 118 Okl. 42—Producers' & Refiners' Corporation v. Castile, 214 P. 121, 89 Okl. 261.
39 C.J. p 531 note 65, p 532 notes 66, 69.

55. Ill.—St. Louis Cons. Coal Co. v. Seniger, 53 N.E. 733, 179 Ill. 370.
39 C.J. p 531 note 65, p 529 note 43 [c] (2), (3).

56. Ala.—First Nat. Bank v. Chandler, 39 So. 822, 144 Ala. 286, 113 Am.S.R. 39.
39 C.J. p 532 note 66.

57. Mo.—Reed v. Koch, 282 S.W. 515, 220 Mo.App. 175—Houston v. American Car & Foundry Co., App., 282 S.W. 170—Isaacs v. Smith, App., 275 S.W. 555.

58. Me.—Cote v. Jay Mfg. Co., 98 A. 817, 115 Me. 300.
39 C.J. p 532 note 67.

59. Mo.—Burns v. R. L. McDonald Mfg. Co., 252 S.W. 984, 213 Mo. App. 640.
39 C.J. p 532 note 68.

60. Ala.—Corpus Juris cited in McDuff v. Kern, 172 So. 886, 887, 233 Ala. 619.
39 C.J. p 532 note 69, p 529 note 44 [b].

61. Cal.—Cosgrove v. Pitman, 37 P. 232, 103 Cal. 268.
39 C.J. p 532 note 70.

62. Tex.—Galveston, H. & S. A. R. Co. v. Davis, 48 S.W. 570, 92 Tex. 372.
39 C.J. p 532 note 71.

63. Ky.—Majestic Collieries Co. v. Bradley, 116 S.W. 738, 132 Ky. 533.
39 C.J. p 532 note 72.
Liability of master for acts of servant compulsorily employed see supra § 190.

64. Mich.—Capeling v. Saginaw Coal Co., 117 N.W. 182, 156 Mich. 437, reheard 121 N.W. 475, 156 Mich. 437—Layzell v. J. H. Somers Coal Co., 117 N.W. 179, 156 Mich. 268, adhered to 120 N.W. 996, 156 Mich. 268.
39 C.J. p 532 note 73.

65. Mich.—Capeling v. Saginaw Coal Co., 117 N.W. 182, 156 Mich. 437, reheard 121 N.W. 475, 156 Mich. 437—Layzell v. J. H. Somers Coal Co., 117 N.W. 179, 156 Mich. 268, adhered to 120 N.W. 996, 156 Mich. 268.

66. Cal.—Cragg v. Los Angeles Trust Co., 98 P. 1063, 154 Cal. 663, 16 Ann.Cas. 1061.
Ky.—Majestic Collieries Co. v. Bradley, 116 S.W. 738, 132 Ky. 533.
39 C.J. p 532 note 76.

tent evidence of the negligence of the master, as discussed infra § 508, so as to charge the master with liability for injuries to a fellow servant caused by the incompetent employee.[67] Under statutes abolishing the fellow-servant rule, discussed infra § 345, it is not material whether the master negligently or knowingly employs or retains incompetent servants whose incompetence caused the injury.[68]

§ 315. —— Servant Temporarily Substituted for Another

A servant who is temporarily designated to perform the duties of another servant must be competent to perform such duties.

Where a servant is temporarily designated to perform the duties of another servant, he must be competent to perform those duties properly.[69]

§ 316. —— Retention of Incompetent Servant

The retention by the master of an incompetent servant after the master has reasonable notice of incompetency may constitute negligence.

Since it is the duty of the master to use due care to see that fellow servants are competent, the retention of an incompetent employee after the master has reasonable notice, either actual or constructive, of such incompetence will constitute negligence on the part of the master.[70] Accordingly, where an employer has notice of vicious conduct on the part of an employee, the retention of such employee may constitute negligence rendering him liable to a fellow employee for injuries sustained by reason of an assault.[71] In the absence of knowledge of the employee's incompetence, the master may act on the presumption that a servant found to be competent will continue so.[72]

§ 317. —— Master's Knowledge of Incompetency

The master is chargeable with knowledge of the incompetency of a servant if in the exercise of due care he could have ascertained it; and he is also chargeable with knowledge which has been, or should have been, obtained by one who represents him in respect of his duty to hire and retain competent servants.

In order to charge a master with negligence in employing or retaining an incompetent servant in his service it must be shown, in the absence of statutory regulation, discussed supra § 314, that the master had either actual or constructive knowledge of such incompetency.[73] Actual knowledge on the part of the master of the incompetency is not essential;[74] the knowledge may be constructive[75] and the master is chargeable with knowledge of the incompetency if in the exercise of due care he could have ascertained it.[76] Generally, constructive knowledge which will bind the master may also be the knowledge possessed by one who represents him in respect of his positive duty to exercise reasonable care in the selection or retention of his servants,[77] or such knowledge as the representative ought to have acquired in the proper discharge of his duties as a representative of his master.[78] However, according to some cases, it seems that, unless such representative has the power to hire and discharge employees, his knowledge is not im-

67. Mich.—Layzell v. J. H. Somers Coal Co., 117 N.W. 179, 156 Mich. 268, adhered to 120 N.W. 996, 156 Mich. 268.
39 C.J. p 533 notes 76, 78.

68. Wis.—Hovaneck v. Great Northern R. Co., 162 N.W. 927, 165 Wis. 511.
39 C.J. p 533 note 80.

69. W.Va.—Core v. Ohio River R. Co., 18 S.E. 596, 38 W.Va. 456.
39 C.J. p 533 note 81.

Negligence
Employer was not liable for injuries sustained by superintendent of logging crew on ground that employer was negligent in employing incompetent men to operate skidder merely because on day of accident engineer was sick and fireman was operating engine, although fireman may have been negligent on particular occasion, in view of fact that fireman was experienced in operating a skidder.—Wesley v. Holly Hill Lumber Co., 43 S.E.2d 619, 211 S.C. 40.

70. N.C.—Shorter v. Mooresville Cotton Mills, 150 S.E. 499, 198 N.C. 27.
Okl.—Producers' & Refiners' Corporation v. Castile, 246 P. 615, 118 Okl. 42—Producers' & Refiners' Corporation v. Castile, 214 P. 121, 89 Okl. 261.
39 C.J. p 533 note 84.

71. N.Y.—Bomba v. Borowicz, 38 N.Y.S.2d 403, 265 App.Div. 198.

72. Mich.—Walkowski v. Penokee & Gogebic Cons. Mines, 73 N.W. 895, 115 Mich. 629, 41 L.R.A. 33.
N.Y.—Chapman v. Erie R. Co., 55 N.Y. 579.

73. Ark.—J. E. Parham Const. Co. v. Parker, 37 S.W.2d 879, 183 Ark. 673.
Ga.—Gunn v. Willing, 36 S.E. 804, 111 Ga. 427—Strickland v. Foughner, 12 S.E.2d 371, 63 Ga.App. 805.
Mo.—Reed v. Kock, 282 S.W. 515, 220 Mo.App. 175—Houston v. American Car & Foundry Co., App., 282 S.W. 170—Isaacs v. Smith, App., 275 S.W. 555.
39 C.J. p 533 note 87.

74. Wash.—Roswall v. Grays Harbor Stevedore Co., 244 P. 723, 138 Wash. 390, 50 A.L.R. 445.
39 C.J. p 534 note 88.

75. Okl.—Producers' & Refiners' Corporation v. Castile, 246 P. 615, 118 Okl. 42.
39 C.J. p 533 note 87, p 534 note 88, p 535 notes 89, 90.

76. Miss.—**Corpus Juris cited in** Hamilton Bros. Co. v. Weeks, 124 So. 798, 801, 155 Miss. 754.
Wash.—Roswall v. Grays Harbor Stevedore Co., 244 P. 723, 138 Wash. 390, 50 A.L.R. 445.
39 C.J. p 534 note 88.

77. Md.—McCall's Ferry Power Co. v. Price, 69 A. 832, 108 Md. 96.
39 C.J. p 535 note 89.

Knowledge of foreman as to incompetency of employee is knowledge of master.—Reed v. Koch, 282 S.W. 515, 220 Mo.App. 175.

78. Vt.—Griffin v. Boston & M. R. R., 89 A. 220, 87 Vt. 278.
39 C.J. p 535 note 90.

putable to the master.[79] Under some circumstances the law may impute to the master knowledge of an employee's incompetency by reason of such employee's general reputation for incompetency[80] which has existed for a sufficient period.[81]

§ 318. —— Proximate Cause of Injury

The incompetency of the servant must be the proximate cause of the injury in order to render a master liable on the theory that he employed or retained an incompetent servant.

In order to render a master liable for injuries to an employee on the ground of negligence in employing or retaining an incompetent servant, the incompetency of such servant must be the proximate cause of the injury.[82] According to some cases, the master is liable for the act of an unskillful fellow servant, where there has been negligence in the employment of such servant, on the theory that the negligence in employing such servant is the proximate cause of the injury.[83] The master may be liable where the injury sustained is the natural and probable consequence of negligence in employing incompetent fellow servants or coemployees, even though the particular injury could not have been foreseen.[84] The fact that the incompetent servant acted in violation of orders will not relieve the master from liability where the act would not have been done by a competent servant.[85]

§ 319. —— Concurrent Negligence of Competent Fellow Servant

The fact that a competent fellow servant was also negligent does not necessarily relieve the master of liability for an injury which would not have happened without the negligence of an incompetent servant.

A master is not relieved from liability for injuries which would not have happened but for the negligence of an incompetent servant, of whose incompetency he had actual or constructive notice by reason of the fact that a competent fellow servant was also negligent.[86]

§ 320. Supervision

The master has the duty to provide for such general supervision or direction with respect to his servants as will render the conduct of his business reasonably safe for them, and such duty is nondelegable.

The master may without the employment of a superintendent personally supervise the work in which his servants are engaged, if he is himself competent,[87] but he must either himself or through a vice principal exercise such general supervision or direction over his servants as will render the conduct of his business reasonably safe for them.[88] This duty of general supervision is nondelegable,[89] as is, in some jurisdictions, the duty of superintendence of the particular work in hand.[90]

79. Pa.—Reiser v. Pennsylvania Co., 25 A. 175, 152 Pa. 38, 34 Am.S.R. 620.
39 C.J. p 535 note 91.

80. Tex.—Missouri, K. & T. R. Co. v. Day, 136 S.W. 435, 104 Tex. 237, 34 L.R.A.,N.S., 111.
39 C.J. p 535 note 92.

81. Or.—Browning v. Smiley-Lampert Lumber Co., 137 P. 777, 68 Or. 502.
39 C.J. p 535 note 93.

82. Miss.—Buckley v. United Gas Public Service Co., 168 So. 462, 176 Miss. 282—**Corpus Juris cited in** Hamilton Bros. Co. v. Weeks, 124 So. 798, 801, 155 Miss. 754.
Mo.—Courtois v. American Car & Foundry Co., App., 282 S.W. 484.
Va.—Aronovitch v. Ayres, 193 S.E. 524, 169 Va. 308.
39 C.J. p 535 note 94.

Otherwise stated

It must be shown that the injury was caused by the same character of negligence of which the evidence shows the negligent servant to have been habitually guilty, or that the incompetency of the servant was of the same character shown in the particular case.—Houston v. American Car & Foundry Co., Mo.App., 282 S.W. 170—Isaacs v. Smith, Mo.App., 275 S.W. 555.

Particular instances

(1) Where gas company employee was injured when struck by truck which was backed into him while crew was engaged in removing truck from mudhole, while crew was being transported from work, fact that gas company knew that truck driver sometimes was reckless as to speed was not ground of recovery by employee on theory that truck driver was retained in service of gas company which knew of incompetency, since injury complained of was not proximate result of alleged incompetency.—Buckley v. United Gas Public Service Co., 168 So. 462, 176 Miss. 282.

(2) Where habitual negligence of a fellow servant is relied on to impose liability on the master, it must be shown that such negligence was proximate cause of injury.
Mo.—Reed v. Koch, 282 S.W. 515, 220 Mo.App. 175.

Negligence held proximate cause of injury

Tex.—Fort Worth Elevator Co. v. Russell, Civ.App., 28 S.W.2d 320, reversed on other grounds Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 123 Tex. 128.

83. U.S.—Rhodes v. Dierks-Lumber & Coal Co., C.C.A.Ark., 108 F.2d 846.
Ark.—Duff v. Ayers, 246 S.W. 508, 156 Ark. 17.

84. Mo.—Courtois v. American Car & Foundry Co., App., 282 S.W. 484.

85. U.S.—American Steel & Wire Co. v. Keefe, Pa., 165 F. 189, 91 C.C.A. 223.

86. N.Y.—Coppins v. New York Cent. & H. R. R. Co., 25 N.E. 915, 122 N.Y. 557, 19 Am.S.R. 523.
W.Va.—Wilkinson v. Kanawha & Hocking Coal & Coke Co., 61 S.E. 875, 64 W.Va. 93, 20 L.R.A.,N.S., 331.

87. Iowa.—Haworth v. Seevers Mfg. Co., 51 N.W. 68, 87 Iowa 765, reheard 62 N.W. 325, 87 Iowa 765.

88. S.C.—Kell v. Rock Hill Fertilizer Co., 116 S.E. 97, 123 S.C. 199.
39 C.J. p 536 note 98.

89. Miss.—Edwards v. Haynes-Walker Lumber Co., 74 So. 284, 113 Miss. 378.
S.C.—Kell v. Rock Hill Fertilizer Co., 116 S.E. 97, 123 S.C. 199.
39 C.J. p 536 note 99.
Employees charged with general superintendence as vice principals see infra § 332.

90. Wash.—Olson v. Erickson, 102 P. 400, 53 Wash. 458.

The duty of supervision extends only to the use of ordinary and reasonable care.[91] The master is not bound to follow out the execution of every order which he gives to a servant,[92] nor does the duty of supervision extend to dangers and risks which are apparent and obvious,[93] or which may be discovered by the servant by the exercise of reasonable care and prudence,[94] or to work which is commonly performed by men without supervision.[95] However, the duty of superintendence may arise from the facts of any particular case.[96]

2. Common-Law Liability of Master for Injuries by Fellow Servant

§ 321. In General

The general rule at common law is that a master is not liable for injuries to his servant caused by the negligence of a fellow servant. The rule ordinarily is based on public policy, or on the doctrine of assumption of risk, but has been said to be unpopular with the courts.

Unless the parties have made an express contract to the contrary,[97] the general rule at common law and in the absence of statute otherwise providing is that a master is not liable to one servant for injuries caused by the negligence of a fellow servant.[98] This doctrine, commonly referred to as the

Supervision and direction as determinative of status of coemployee see infra § 333.

91. Iowa.—Wolters v. Summerfield Co., 140 N.W. 388, 160 Iowa 127.
39 C.J. p 537 note 3.

92. Mo.—Schmeizer v. Central Furniture Co., 114 S.W. 1043, 134 Mo. App. 493.
39 C.J. p 537 note 4.

Prior instructions for protection of worker

Where an employee who was engaged in stacking mine timber at the foot of a hill was injured by a timber which was slid down the hill by another employee who was engaged with others farther up in cutting, splitting, and sliding down timber, the master was not liable, in view of the facts that he had previously given due instructions as to warning before sliding timber and the like and that just prior to the injury he had merely ordered a fellow servant to slide timber nearer to the stack below.—Owens v. Mays, 294 S.W. 781, 220 Ky. 37.

Statute not imposing duty

The provisions of an employer's liability statute have been held not to require employer to supervise every detail of employee's work.—Van Norden v. Chas. R. McCormick Lumber Co. of Delaware, C.C.A.Or., 17 F.2d 568, certiorari denied 47 S. Ct. 768, 274 U.S. 758, 71 L.Ed. 1337.

93. Minn.—Dixon v. Union Iron Works, 97 N.W. 375, 90 Minn. 492.
39 C.J. p 537 note 5.
Duty to warn and instruct as to obvious dangers generally see supra § 296.

94. Minn.—Dixon v. Union Iron Works, supra.
39 C.J. p 537 note 6.

95. Wash.—Beck v. International Harvester Co., 148 P. 35, 84 Wash. 413.
39 C.J. p 537 note 7.

96. Wash.—Engelking v. Spokane, 110 P. 25, 59 Wash. 446, 29 L.R.A., N.S., 481.
39 C.J. p 537 note 8.

Facts not imposing duty

The mere fact that two or more persons are engaged in a like undertaking does not of itself impose the duty of superintendence on employer.—Bremer v. Shoultes, 110 P.2d 641, 7 Wash.2d 604.

97. Ind.—Ohio and Mississippi R. Co. v. Hammersley, 28 Ind. 371.
39 C.J. p 537 note 11.
Express contracts affecting master's liability see supra §§ 196–200.

98. U.S.—Holliday v. Fulton Band Mill, C.C.A.Miss., 142 F.2d 1006—Jenkins v. Pullman Co., C.C.A.Cal., 96 F.2d 405, affirmed 59 S.Ct. 347, 305 U.S. 534, 83 L.Ed. 334—Norfolk & W. Ry. Co. v. Hall, C.C.A.W. Va., 49 F.2d 692.
Ala.—General Exchange Ins. Corporation v. Findlay, 121 So. 710, 219 Ala. 193.
Ariz.—Red Rover Copper Co. v. Industrial Commission, 118 P.2d 1102, 58 Ariz. 203, 137 A.L.R. 740—Robles v. Preciado, 79 P.2d 504, 52 Ariz. 113.
Ark.—Hill v. Hardy, 157 S.W.2d 494, 203 Ark. 79—Perkins v. Pogue, 137 S.W.2d 927, 200 Ark. 81—Rodgers v. Crumpton, 113 S.W.2d 480, 196 Ark. 1179—May v. Sharp, 89 S.W. 2d 735, 191 Ark. 1142—Black Diamond Lumber Co. v. Smith, 76 S. W.2d 975, 190 Ark. 91—Dellinger v. Tilghmon, 65 S.W.2d 915, 188 Ark. 146—Haraway v. Mance, 56 S.W.2d 1023, 186 Ark. 971—J. E. Parham Const. Co. v. Parker, 37 S.W.2d 879, 183 Ark. 673—Walsh v. Eubanks, 34 S.W.2d 762, 183 Ark. 34.
D.C.—Martin v. Morrison, 32 F.2d 410, 59 App.D.C. 19—Southern Ry. Co. v. Taylor, 16 F.2d 517, 57 App. D.C. 21, certiorari denied Taylor v. Southern Ry. Co., 47 S.Ct. 571, 273 U.S. 767, 71 L.Ed. 882.
Fla.—Porter v. Sprague, 126 So. 759, 99 Fla. 371—Cummer Lumber Co. v. Silas, 125 So. 372, 98 Fla. 1158—Wilson & Toomer Fertilizer Co. v. Lee, 106 So. 462, 90 Fla. 632.
Ga.—Roberts v. Ethridge, 36 S.E.2d 883, 73 Ga.App. 400—Blanchard v. Gallahar, 33 S.E.2d 379, 72 Ga.App. 132.
Ill.—Lamar v. Collins, 252 Ill.App. 238.
La.—Duke v. Dixie Bldg. Material Co., App., 23 So.2d 822.
Mass.—Bell v. Sawyer, 47 N.E.2d 1, 313 Mass. 250.
Minn.—Novotny v. Bouley, 27 N.W.2d 813, 223 Minn. 592.
Miss.—Ozen v. Sperier, 117 So. 117, 150 Miss. 458.
Mo.—**Corpus Juris cited in** Graczak v. City of St. Louis, 202 S.W.2d 775, 777—**Corpus Juris cited in** Greenan v. Emerson Elec. Mfg. Co., 191 S.W.2d 646, 650, 354 Mo. 781—**Corpus Juris cited in** Cain v. Humes-Deal Co., 49 S.W.2d 90, 92, 329 Mo. 1107—Chappee v. Gus V. Brecht Butchers' Supply Co., 30 S.W.2d 35—State ex rel. Kroger Grocery & Baking Co. v. Haid, 18 S.W.2d 478, 323 Mo. 9—Funk v. Fulton Iron Works Co., 277 S.W. 566, 311 Mo. 77—Bender v. Kroger Grocery & Baking Co., 276 S.W. 405, 310 Mo. 488—Guldner v. International Shoe Co., App., 293 S. W. 428—Daggett v. American Car & Foundry Co., App., 284 S.W. 855.
N.H.—Dziedzic v. Newmarket Mfg. Co., 129 A. 271, 81 N.H. 516.
N.J.—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law 569.
N.Y.—Buchalski v. Kramer, 277 N. Y.S. 91, 243 App.Div. 703—Glennie v. Falls Equipment Co., 263 N.Y.S. 124, 238 App.Div. 7—Setzkorn v. City of Buffalo, 219 N.Y.S. 351, 219 App.Div. 416, affirmed 159 N.E. 670, 246 N.Y. 605—Connors v. International Ry. Co., 162 N.Y.S. 1085, 176 App.Div. 941—Schwartz v. Forty-Second St., M. & St. N. A. Ry. Co., 22 N.Y.S.2d 752, 175 Misc. 49.
N.C.—Pleasants v. Barnes, 19 S.E.2d 627, 221 N.C. 173—Shorter v.

"fellow-servant" rule,[99] is not founded in abstract or natural justice,[1] and is an exception to the ordinary rule of agency[2] and to the general rule that a master is responsible for injury caused to a third person by any negligence or misconduct of his servants while acting within the scope of their employment.[3]

The most usual ground assigned for the fellow-servant doctrine is that the negligence of a fellow servant is one of the risks incident to the employment and is assumed by the servant;[4] this, it is said, is an implied term of the contract of employment.[5] Public policy is also frequently asserted to be the true basis of the fellow-servant doctrine, on the theory that it is calculated to make servants in a common employment watchful of each other and thereby to promote carefulness in the performance of their duties.[6] Thus, it has been said, it provides for the safety and welfare of the public while it works no injury to the servant, since his entry on the service is voluntary, with a knowledge of its hazards and with the power and right to demand such wages as he shall deem compensatory.[7] The rule does not rest on the ground that the negligence of the coemployee is imputed to the servant[8] but on the ground that it is not imputed to the master.[9]

It has been said that the fellow-servant rule is not a popular one with the courts,[10] and that the courts have refused to make it the basis for defeating recovery for an injured workman except in

Mooresville Cotton Mills, 150 S.E. 499, 198 N.C. 27.

Ohio.—Pollock v. Reitz, 176 N.E. 478, 38 Ohio App. 487.

Okl.—Mid-Continent Petroleum Corp. v. Fleming, 167 P.2d 366, 196 Okl. 607.

R.I.—**Corpus Juris cited in** Ryan v. Unsworth, 157 A. 869, 870, 52 R.I. 86.

S.C.—Whirenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213.

Tex.—Zurich General Accident & Liability Ins. Co. v. Fort Worth Laundry Co., Civ.App., 63 S.W.2d 236.

Wash.—Reynolds v. Addison Miller Co., 255 P. 110, 143 Wash. 271.

W.Va.—Towns v. Monongahela Ry. Co., 144 S.E. 289, 105 W.Va. 572.

39 C.J. p 537 note 12.

Fellow-servant doctrine as defense in action for wrongful death see Death § 45.

Action against wrongdoer as sole remedy

The law furnishes no protection against the risk of injury by a fellow servant except by action against the wrongdoer.—American Sugar Refining Co. v. Gilbert, 125 A. 692, 143 Md. 251—O'Connell v. Baltimore & Ohio R. R. Co., 20 Md. 212, 83 Am.D. 549.

Historical development

(1) This rule as to the nonliability of the master for the negligence of a coemployee was announced in comparatively early English decisions, the most widely cited of which was decided in 1837.—Priestly v. Fowler, 3 M. & W. 1, 150 Reprint 1030.

(2) The rule was announced in the United States in South Carolina in 1841.—Murray v. South Carolina R. Co., 26 S.C.L. 385, 400, 36 Am.D. 268—39 C.J. p. 540 note 22.

(3) In 1842 the rule of these two decisions was adopted and amplified by the supreme court of Massachusetts, in an opinion written by Chief Justice Shaw, and because of the great learning and ability displayed by the justice this decision has taken rank as the leading American decision on the fellow-servant doctrine.—Farwell v. Boston & W. R. Corp., 4 Metc. (Mass.) 49, 38 Am.D. 339.

99. Ga.—Roberts v. Ethridge, 36 S.E.2d 883, 73 Ga.App. 400.

Mo.—Graczak v. City of St. Louis, 202 S.W.2d 775.

N.Y.—Setzkorn v. City of Buffalo, 215 N.Y.S. 584, 126 Misc. 858, affirmed 219 N.Y.S. 351, 219 App.Div. 416, affirmed 159 N.E. 670, 246 N.Y. 605.

Okl.—Mid-Continent Petroleum Corp. v. Fleming, 167 P.2d 366, 196 Okl. 607.

1. N.Y.—Setzkorn v. City of Buffalo, 215 N.Y.S. 584, 126 Misc. 858, affirmed 219 N.Y.S. 351, 219 App. Div. 416, affirmed 159 N.E. 670, 246 N.Y. 605.

2. N.Y.—Setzkorn v. City of Buffalo, supra.

3. Mo.—Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 337 Mo. 202—Parker v. Nelson Grain & Milling Co., 48 S.W.2d 906, 330 Mo. 95.

4. Ark.—Walsh v. Eubanks, 34 S.W.2d 762, 183 Ark. 34.

N.J.—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law 569.

N.Y.—Setzkorn v. City of Buffalo, 215 N.Y.S. 584, 126 Misc. 858, affirmed 219 N.Y.S. 351, 219 App. Div. 416, affirmed 159 N.E. 670, 246 N.Y. 605.

39 C.J. p 540 note 25.

Assumption of risk generally see infra §§ 357–420.

5. N.Y.—Setzkorn v. City of Buffalo, 215 N.Y.S. 584, 126 Misc. 858, affirmed 219 N.Y.S. 351, 219 App.Div. 416, affirmed 159 N.E. 670, 246 N.Y. 605.

39 C.J. p 541 note 26.

6. N.Y.—Setzkorn v. City of Buffalo, supra.

39 C.J. p 542 note 27.

"The reason for the adoption of the fellow-servant rule rests upon the fact that the relationship of the servants to each other is such that each can observe the conduct of the other, and if that conduct be so negligent as likely to cause injury to a fellow workman, the party exposed to the danger can report the delinquency to a correcting power and secure relief from the danger."—Curtis v. Koch, Mo.App., 282 S.W. 1045, 1046.

7. R.I.—Hanna v. Granger, 28 A. 659, 18 R.I. 507.

39 C.J. p 542 note 28.

Receipt of wages differentiates position of servant who is suing his master from that of a person who is suing a stranger.—Setzkorn v. City of Buffalo, 215 N.Y.S. 584, 126 Misc. 858, affirmed 219 N.Y.S. 351, 219 App.Div. 416, affirmed 159 N.E. 670, 246 N.Y. 605.

8. U.S.—American Car & Foundry Co. v. Uss, Mo., 211 F. 862, 128 C.C.A. 240.

Contributory negligence

(1) It has been said that negligence of a coemployee is not to be regarded as contributory negligence on the part of the employee.—Cooper v. New York, O. & W. Ry. Co., 82 N.Y.S. 98, 84 App.Div. 42.

(2) However, in an instruction given in a particular case the court spoke of the acts of fellow servants of plaintiff as constituting contributory negligence.—Stevenson v. Chicago & A. R. Co., C.C.Mo., 18 F. 493, 5 McCrary 634.

9. U.S.—American Car & Foundry Co. v. Uss, Mo., 211 F. 862, 128 C.C.A. 240.

10. Wash.—Buss v. Wachsmith, 70 P.2d 417, 190 Wash. 673, adhered to 74 P.2d 999, 193 Wash. 600—Frengen v. Stone & Webster Engineering Corporation, 119 P. 193, 66 Wash. 204.

those cases in which it is so plainly applicable that there seems no escape unless the doctrine is to be entirely abrogated;[11] and it has also been judicially observed that distinctions have been recognized in the relations of the employees of a common master which tend to soften the rigor of the rule as it was originally formulated by the courts.[12]

Civil law. The fellow-servant rule generally is not recognized as a doctrine of the civil law.[13]

§ 322. Extent and Applicability of Rule

a. In general
b. Persons subject

a. In General

The fellow-servant rule does not apply where the tortious act is that of the master or of a coemployee who is not a fellow servant; nor does it apply where the act of a fellow servant is not the proximate cause of the injury.

The fellow-servant rule has been applied to relieve the master from liability in a wide variety of cases;[14] application of the rule, in the final analysis, is wholly dependent on the facts and circumstances in the particular case.[15] The fellow-servant rule is not involved where the act complained of is that of the master and not that of a fellow servant,[16] nor does it apply where the act of an alleged fellow servant is not shown to have been the proximate cause of the injury[17] or where the proximate cause of the injury is the default of the master in respect of a primary or nondelegable duty.[18]

The servant does not assume the risk of injuries from coemployees who are not fellow servants,[19] since this is not regarded as a risk ordinarily incident to the employment,[20] and their negligence will be imputed to the master.[21] Also he will not be held to have assumed the risk of the acts of a negligent person who is at the time acting as the master's representative[22] or agent,[23] or who is in the status of a vice principal, as discussed infra § 332c; and in jurisdictions recognizing the superior-servant rule, discussed infra § 332 e (1), an employee does not assume the risk of the negligence of a superior servant.

The fellow-servant rule ordinarily absolves the employer from liability to an employee for inju-

11. Wash.—Buss v. Wachsmith, 70 P.2d 417, 190 Wash. 673, adhered to 74 P.2d 999, 193 Wash. 600—Frengen v. Stone & Webster Engineering Corporation, 119 P. 193, 66 Wash. 204.

12. Wash.—Buss v. Wachsmith, 70 P.2d 417, 190 Wash. 673, adhered to 74 P.2d 999, 193 Wash. 600.

13. U.S.—Arzuaga v. Ortiz, C.C.A. Puerto Rico, 266 F. 449.
39 C.J. p 540 note 24.

14. Iowa.—Beresford v. American Coal Co., 98 N.W. 902, 124 Iowa 34, 70 L.R.A. 256.
39 C.J. p 542 note 35.

Tort or contract
In an action by an employee who was injured while being transported to his place of work by one who had entered into a contract of transportation with the employer, it was held that a defense of fellow-servant rule, if established, would bar recovery whether the action was in tort or for breach of implied contract to furnish safe transportation.—Pittsburgh Valve Foundry & Construction Co. v. Gallagher, C.C.A.Ohio, 32 F.2d 436.

Mere commitment of force to servant, such as operation of piece of machinery, does not render employer liable for negligence of employee in using such power or force to injury of a fellow servant.—Burge v. American Car & Foundry Co., Mo.App., 274 S.W. 842.

Throwing lighted match
Employer was not liable under common law for injuries sustained by employee while painting inside of tank, as result of fellow servant's negligence in throwing lighted match to bottom of tank, igniting paint or fumes.—Baughman v. Pitchfork Land & Cattle Co., C.C.A.Tex., 86 F.2d 778.

Pulling stumps
A tenant cultivating farm on shares could not recover from landlord for injury received while pulling stumps, even if master-servant relation existed, where injury was caused by negligence of landlord's employee operating tractor, in absence of evidence that landlord hired or retained employee with knowledge of employee's incompetency.—Pleasants v. Barnes, 19 S.E.2d 627, 221 N.C. 173.

15. Ark.—Jolly v. Smith, 65 S.W.2d 908, 188 Ark. 446.

16. U.S.—Phillips Petroleum Co. v. Manning, C.C.A.Ark., 81 F.2d 849.
Ark.—J. E. Parham Const. Co. v. Parker, 37 S.W.2d 879, 183 Ark. 673.
N.H.—Fears v. Noel, 145 A. 664, 83 N.H. 575.
39 C.J. p 543 note 36.

17. Wash.—Schwaninger v. McNeeley, 87 P. 514, 44 Wash. 447.
39 C.J. p 544 note 38.

18. Ga.—Roberts v. Ethridge, 36 S.E.2d 883, 73 Ga.App. 400.
Mo.—Graczak v. City of St. Louis, 202 S.W.2d 775—Green v. Kurtz, App., 292 S.W. 1073—Bushong v. Barrett Co., App., 273 S.W. 761.
N.H.—Moore v. Morse & Malloy Shoe Co., 197 A. 707, 89 N.H. 332.
39 C.J. p 544 note 39.
Character of act as determining whether servant is fellow servant see infra § 333.

19. Miss.—Curry & Turner Const. Co. v. Bryan, 185 So. 256, 184 Miss. 44.
Mo.—State ex rel. Al. G. Barnes Amusement Co. v. Trimble, 300 S.W. 1064, 318 Mo. 274.
39 C.J. p 544 note 40.
Who are fellow servants see infra §§ 327–333.

20. Ill.—Chicago & E. I. Ry. Co. v. White, 70 N.E. 588, 209 Ill. 124.

21. Tex.—Texas & N. O. R. Co. v. Barwick, 110 S.W. 953, 50 Tex. Civ.App. 544.

22. Fla.—Wilson & Toomer Fertilizer Co. v. Lee, 106 So. 462, 90 Fla. 632.
Mo.—Funk v. Fulton Iron Works Co., 277 S.W. 566, 311 Mo. 77.
39 C.J. p 544 note 43.

Presence and supervision of foreman
The act of a fellow servant in the presence and under the supervision of the foreman is an act of the master.—Hopkins v. American Car & Foundry Co., App., 295 S.W. 841, opinion quashed on other grounds State ex rel. Hopkins v. Daues, 6 S.W.2d 893, 319 Mo. 733.

23. N.H.—Martin v. Kimball, 4 A.2d 653, 90 N.H. 91.
"The negligence of a servant for the consequences of which to a fellow servant the master is not liable is limited to conduct in the execution of work as a matter of service rather than agency."—Dziedzic v. Newmarket Mfg. Co., 129 A. 271, 273, 81 N.H. 516.

ries occasioned by the negligence, as distinguished from the incompetence, of another employee;[24] but, as considered infra § 325, the rule is sometimes available to relieve the employer of liability for willful acts committed by an employee. The master is not liable for injuries caused to one of his servants by acts or omissions of another servant which are not shown to have been negligent or tortious.[25]

Statutory duty. The fellow-servant rule does not apply where the proximate cause of the injury is the violation of a statutory duty imposed on the master.[26] The servant does not assume the risk of neglect by a fellow servant of a duty imposed by statute[27] unless the danger is obvious.[28]

Prior negligence. The servant on entering the employment ordinarily takes the risk of any existing negligence of his fellow servant as well as of that which may thereafter occur,[29] and the fact that the negligence complained of antedates the injury does not preclude the application of the fellow-servant doctrine.[30]

Damage to servant's property. It has been held that the fellow-servant rule does not absolve a master for the act of a servant in negligently damaging the property, rather than injuring the person, of a fellow servant.[31]

Employment on Sunday. The rule that a master is not liable for an injury caused to his servant by a fellow servant is in no way affected by the fact that both servants at the time of the accident were illegally employed on Sunday.[32]

b. Persons Subject

The fellow-servant rule may be applicable to employees of a corporation or of the government; but it has been held inapplicable to persons in compulsory service and also to minors unlawfully employed or unable to appreciate the dangers of the employment.

Servants who do not come within the letter of the fellow-servant rule are not bound by its consequences.[33]

Minors. The fact that the servant who sustains the injuries which constitute the ground of complaint is a minor ordinarily will not prevent the application of the fellow-servant doctrine[34] if he has sufficient capacity to take care of himself and knows and can properly appreciate the risk.[35] The doctrine does not, however, apply if by reason of his tender years the employee is incapable of appreciating the dangers and hazards of his employment.[36] Further, where a minor is employed in violation of a statute, the negligence of a fellow servant is no defense against his recovery from the master for injuries resulting therefrom.[37]

Persons in compulsory service. The fellow-servant doctrine does not apply to persons in compulsory service.[38]

Employees of corporation or of government. In

24. Mo.—Graczak v. City of St. Louis, 202 S.W.2d 775.

25. La.—Williams v. Westdale Corporation, App., 3 So.2d 684.
Mo.—Karlin v. Kansas City Public Service Co., App., 30 S.W.2d 1032.
Tex.—Lancaster v. Taylor, Civ.App., 281 S.W. 654.
39 C.J. p 543 note 37.

Closing railroad switch
Railroad employees in closing switch against south-bound traffic were not negligent with respect to section hand operating hand car, where no trains were due from north. —Towns v. Monongahela Ry. Co., 153 S.E. 919, 109 W.Va. 204.

Direction to stand on running board
Truck driver's alleged direction to laborer to stand on running board would constitute negligence with respect to liability of truck owner, by whom driver and laborer were employed, for injuries sustained by laborer in collision.—Russell v. Williams, 150 So. 528, 168 Miss. 181, suggestion of error overruled 151 So. 372, 168 Miss. 181.

26. Va.—Edwards v. Laurel Branch Coal Co., 114 S.E. 108, 133 Va. 534 —Clinchfield Coal Corp. v. Hawkins, 108 S.E. 704, 130 Va. 698.

27. Ky.—Majestic Collieries Co. v. Bradley, 116 S.W. 738, 132 Ky. 533.
39 C.J. p 545 note 50.

28. Ky.—Majestic Collieries Co. v. Bradley, supra.

29. Mass.—O'Conner v. Rich, 42 N.E. 111, 164 Mass. 560, 49 Am.S.R. 483.
39 C.J. p 545 note 52.
Fellow servant discharging duty of master see infra § 333.

30. Me.—Loud v. Lane, 69 A. 270, 103 Me. 309, 19 L.R.A.,N.S., 680.
39 C.J. p 545 note 53.

31. N.Y.—Setzkorn v. City of Buffalo, 215 N.Y.S. 584, 586, 126 Misc. 858, affirmed 219 N.Y.S. 351, 219 App.Div. 416, affirmed 159 N.E. 670, 246 N.Y. 605.
"It is not one of the risks contemplated by the master or servant, nor compensated for in increased wages. So far as concerns the property of a fellow servant that is being used in the service of the master as a convenience to the fellow servant, it is as though his property were that of a stranger, to whom the master would be liable for the negligent act of his servant."—Setzkorn v. City of Buffalo, supra.

32. Tex.—Houston & T. C. R. Co. v. Rider, 62 Tex. 267.

33. Ark.—Jolly v. Smith, 65 S.W.2d 908, 188 Ark. 446.

34. Fla.—**Corpus Juris quoted in** Kendrick v. Ideal Holding Co., 188 So. 778, 780, 137 Fla. 600.
39 C.J. p 548 note 99.

35. Fla.—**Corpus Juris quoted in** Kendrick v. Ideal Holding Co., 188 So. 778, 780, 137 Fla. 600.
39 C.J. p 548 note 1.

36. Fla.—**Corpus Juris quoted in** Kendrick v. Ideal Holding Co., 188 So. 778, 780, 137 Fla. 600.
39 C.J. p 548 note 2.

37. Mich.—Kucinski v. City Laundry & Cleaning Works, 218 N.W. 773, 242 Mich. 352.
R.I.—Huling v. Finn, 24 A.2d 620, 67 R.I. 369.
Tenn.—Knoxville News Co. v. Spitzer, 279 S.W. 1043, 152 Tenn. 614.
39 C.J. p 549 note 6.

38. Ala.—Sloss-Sheffield Steel & Iron Co. v. Weir, 60 So. 851, 179 Ala. 227.
39 C.J. p 548 note 3.

the absence of statute, the rule that a master is not liable to a servant for injuries caused by the negligence of a fellow servant, where the master himself is not at fault, is applicable to corporations as well as to individuals employing servants.[39] The rule has been applied to the employees of a municipal corporation[40] or of a state.[41] However, persons who are not city employees, but governmental agents of the state performing duties of a public character for the benefit of all citizens of the community, have been held not to be fellow servants.[42]

Employees on vessels. The fellow-servant rule applies in the case of seamen and other employees on vessels,[43] and, where the status of fellow servant exists, at the common law such an employee cannot hold his employer responsible for an injury caused by the negligence of a coemployee,[44] nor can he recover under the maritime law unless the vessel is unseaworthy as to him.[45]

§ 323. —— Scope of Employment

a. Of servant injured
b. Of servant occasioning injury

a. Of Servant Injured

The fellow-servant rule applies to a servant injured while acting within the scope of his employment although outside the line of his regular duties.

The rule exempting the master from liability for injuries to a servant due to the negligence of a fellow servant, when under the facts and circumstances it is otherwise applicable, may apply although the injuries were received by the servant while acting outside the line of his regular duties.[46] However, the fellow-servant rule applies only where the servant was injured while acting within the scope of his employment or in connection therewith,[47] and has no application to one who, although in the employment of the principal whose servant's negligence occasions the injury, is not, when injured, engaged in the performance of his duties as such employee, but has left the scene of his labors and is engaged in the pursuit of his own ends.[48] Further, if a servant, although acting outside the line of his regular employment, is engaged in the master's service and with his assent or the assent of one having implied authority to accept his services, the master may be liable for the negligence of a coemployee as to a nondelegable duty of the master.[49]

Overtime work. The fellow-servant rule may apply although the employee is working overtime if in the line of his employment.[50]

b. Of Servant Occasioning Injury

The fact that an employee could have prevented injury to another employee by going outside his duties does not enable the employer to rely on the fellow-servant rule. The master is not liable for injuries to one employee caused by another employee who is not acting within the scope of his employment, but rather in a private affair of his own.

The negligence which will relieve the master from liability is an omission by the fellow servant to perform some act which is his duty to perform, or the doing of some act, in the course of his duties, in such a negligent manner as to cause the injury,[51] and the master cannot invoke the fellow-servant rule so as to escape liability by claiming that a fellow servant of the injured employee could have prevented the injury by going outside his regular duties and acting without authority or direction.[52]

The master's liability, if any, for an injury to a

39. U.S.—Gravelle v. Minneapolis & St. Louis Ry. Co., C.C.Minn., 10 F. 711, 3 McCrary 352.
39 C.J. p 549 note 7.

40. Mass.—McDermott v. Boston, 133 Mass. 349.
39 C.J. p 549 note 8.

41. N.Y.—Loughlin v. State, 11 N.E. 371, 105 N.Y. 159.
39 C.J. p 549 note 9.

42. N.Y.—Miller v. City of Albany, 287 N.Y.S. 889, 158 Misc. 720, affirmed 286 N.Y.S. 326, 247 App. Div. 848.

Firemen and policemen
N.Y.—Miller v. City of Albany, supra.

43. U.S.—Pacific Mail SS. Co. v. Beneby, Canal Zone, 250 F. 444, 162 C.C.A. 514.
39 C.J. p 549 note 11.

44. U.S.—Wood v. Davis, C.C.A.Fla., 290 F. 1—The Daisy, C.C.A.Cal., 282 F. 261.

45. U.S.—Wood v. Davis, C.C.A.Fla., 290 F. 1.
39 C.J. p 549 note 14.

46. Mich.—Moyer v. Ann Arbor R. Co., 124 N.W. 542, 159 Mich. 645.
39 C.J. p 545 note 55.

47. Mass.—Levin v. Twin Tanners, 60 N.E.2d 6, 318 Mass. 13.

48. Fla.—Ball v. I. C. Helmly Furniture Co., 182 So. 435, 132 Fla. 882.

49. Iowa.—Hitchcock v. Arctic Creamery Co., 150 N.W. 727, 170 Iowa 352.
39 C.J. p 545 note 56.
Scope of employment generally see supra § 181.

50. Mich.—Kehoe v. Allen, 52 N.W. 740, 92 Mich. 464, 31 Am.S.R. 608.
"It is never a test of the application of the fellow servant doctrine to any given case whether or not the injury was received during working hours or when he was at work after working hours. The sole test of its application is whether at the time of the injury the servant was doing something which it was his duty or he had a right to do under the contract. If he was so acting the doctrine applies; if not, it does not apply."
U.S.—Dishon v. Cincinnati, N. O. & T. P. Ry. Co., C.C.Ky., 126 F. 194, 198, affirmed 133 F. 471, 66 C.C.A. 345.
Tenn.—Oman v. Delius, 10 Tenn.App. 467, 477.

51. S.D.—Gates v. Chicago, M. & St. P. Ry. Co., 50 N.W. 907, 2 S.D. 422.
39 C.J. p 545 note 60.

52. S.D.—Gates v. Chicago, M. & St. P. Ry. Co., supra.

servant by the act of a coemployee rests on an application of the doctrine of respondeat superior.[53] A master cannot be held liable for injuries to his servant caused by an alleged agent or coemployee of the master where it does not appear that the party causing the injury was in fact the master's agent or employee,[54] and in determining the existence of such relationship each case must stand or fall on its own particular facts, in the light of all the surrounding circumstances.[55] Further, in order to impose liability on the master for injuries caused to one employee by a coemployee, the act or omission of the coemployee must have been within the scope of his employment;[56] and if a servant commits a negligent act, whereby another is injured, in the prosecution of an affair wholly his own and not in the furtherance of the master's business, even if the turning aside from the master's service is only for the instant, if it is complete the relation of master and servant does not exist and the master is not liable for the injuries so caused.[57] However, if the act of the coemployee is committed in the course of his employment, although unauthorized or even forbidden by the master, the master may be liable.[58] Although a negligent act of the servant may not be within the scope of his authority, the circumstances may be such as to render the master negligent in failing to restrain the servant from doing the act while within his control.[59]

Joint employers. Where a servant is employed by two employers jointly, they may be jointly and severally liable for his wrongful act.[60]

§ 324. —— Incompetent Fellow Servants

The competency of fellow servants is considered generally supra §§ 311–319, and the extent to which a recovery based on the incompetency of fellow servants may be affected by the doctrine of assumption of risk infra §§ 357–420.

Examine Pocket Parts for later cases.

§ 325. —— Gross Negligence, and Willful, Malicious, or Reckless Acts of Fellow Servants

a. In general
b. Willful, malicious, or reckless acts

a. In General

The fellow-servant rule is generally held to apply notwithstanding the employee causing the injury is guilty of gross negligence, although there is some authority to the contrary where the gross negligence is that of a superior employee.

53. Mont.—Allen v. Bear Creek Coal Co., 115 P. 673, 43 Mont. 269.
39 C.J. p 545 note 61, p 276 note 48 [a].

54. U.S.—Lion Oil Refining Co. v. Lawrence, C.C.A.Ark., 37 F.2d 256.
Pa.—Frederick v. Fitzgerald, 200 A. 39, 330 Pa. 577.
39 C.J. p 553 note 64.

55. La.—McAllister v. Jackson Brewing Co., App., 6 So.2d 179.

Relative of employer

Where a temporary employee, who was engaged only to spray trees, was injured while assisting defendant's son-in-law in removing a stump from defendant's property by the use of dynamite, mere fact that property was owned by defendant and that the person requesting employee's assistance was a relative did not constitute the son-in-law a servant of defendant so as to impose liability on defendant for employee's injuries which were caused by alleged negligence of son-in-law.—Frederick v. Fitzgerald, 200 A. 39, 330 Pa. 577.

Engine crew of independent contractor

Tex.—Harris v. Missouri-Kansas-Texas R. Co., Civ.App., 283 S.W. 895.

Plant guards controlled by military authorities

U.S.—Barnes v. Chrysler Corp., D.C.Ill., 65 F.Supp. 806.

Helper assisting insurance investigator

Ky.—Powell v. Commercial Standard Ins. Co., 170 S.W.2d 857, 294 Ky. 7.

56. Ala.—Southern Ry. Co. v. Smith, 137 So. 398, 223 Ala. 583.
Ark.—Pickens v. Westbrook, 83 S.W.2d 830, 191 Ark. 156—Hough v. Leech, 62 S.W.2d 14, 187 Ark. 719.
Kan.—Zamora v. Wilson & Co., 282 P. 719, 129 Kan. 285.
Mass.—Dewing v. New York Cent. R. Co., 183 N.E. 754, 281 Mass. 351.
Miss.—McCarty v. Mitchell, 151 So. 567, 169 Miss. 82.
Tex.—Foster v. Carle, Civ.App., 160 S.W.2d 999, error refused.
39 C.J. p 545 note 62.
Scope of authority of supervisory employees see infra § 332 b.

Authority to make automobile trip

(1) Where the general contract of employment between a master and a servant relieves the master of any obligation to transport the servant to and from the place of work, but an emergency requires the presence of the servant at the work and a subforeman sent for this servant undertakes to transport the servant to the job, the act of the subforeman or servant is within his implied power or authority, and the furnishing of transportation under such circumstances supersedes the general contract between the master and servant.—Ford v. Holt, 131 P.2d 67, 191 Okl. 534.

(2) Where officer of corporation was instructed to accompany salesman to another city and was injured when corporation's automobile was involved in an accident, corporation could not escape liability on ground that there was no proof that it specifically directed the manner of driving the automobile by salesman, since it was sufficient that the corporation instructed the salesman to make the trip.—Horne Motors v. Latimer, Tex.Civ.App., 148 S.W.2d 1000, error dismissed, judgment correct.

57. Miss.—Petroleum Iron Works v. Bailey, 86 So. 644, 124 Miss. 11.
Tex.—Butler v. Gulf Pipe Line Co., Civ.App., 144 S.W. 340.

58. Ala.—Corpus Juris quoted in Southern Ry. Co. v. Smith, 137 So. 398, 402, 223 Ala. 583.
39 C.J. p 546 note 65.

59. Minn.—Nettle v. Flour City Ornamental Iron Works, 148 N.W. 43, 126 Minn. 530.
39 C.J. p 546 note 66.

60. N.C.—Moore v. Southern R. Co., 81 S.E. 603, 165 N.C. 439, 51 L.R.A., N.S., 866.
39 C.J. p 546 note 67.

It has generally been held, under the fellow-servant rule, that the employee can have no recovery although his fellow servants may have been guilty of gross negligence.[61] However, there is authority holding the master liable for an injury to a subordinate employee caused by the gross negligence of a superior employee[62] although the master would not have been liable for ordinary negligence.[63] What, in a given case, will constitute willful or gross negligence necessarily depends on the peculiar facts and circumstances.[64]

b. Willful, Malicious, or Reckless Acts

Misconduct of an employee may fall within the scope of the fellow-servant rule; but in cases in which the rule is inapplicable the master may be liable for reckless or malicious acts of an employee, committed in furtherance of the master's business, whereby another employee is injured.

It has been judicially observed that, although the fellow-servant rule is generally stated in terms of negligence only, misconduct of a coemployee is also within its scope.[65] In cases not falling within the application of the fellow-servant rule, the master may be liable to an employee for a wrong done by a coemployee in performing the master's business with a wanton or reckless purpose to accomplish it in an unlawful manner,[66] and the master under this rule may be liable for the malicious act of the coemployee[67] or for his reckless act.[68] When the willful act is committed outside the scope of the offending servant's employment, the master is plainly not liable.[69]

Sportive acts. The master is not liable for an injury occasioned by sportive acts or horseplay not in the scope and course of the employment.[70]

Assault. Under the operation of the fellow-servant rule, where the master has not been negligent in employing a quarrelsome or incompetent servant or retaining him in his employment after knowledge of his dangerous character, he is not liable for an assault made by the employee on a fellow servant[71] although the assault and the quarrel from which it arose occurred in the prosecution of the master's business.[72] In cases to which the fellow-servant rule is not applicable the master may be liable for an assault committed by an employee without regard to his negligence in employing and retaining him,[73] provided, however, the guilty servant is acting within the course of his employment.[74] The master is not liable for an assault by one servant on the other where the act of the guilty servant is outside the scope of his employment[75] or when neither was acting within the course of his employ-

61. Mo.—**Corpus Juris cited in** Kemmler v. City of Richmond Heights, 114 S.W.2d 994, 997.
39 C.J. p 547 note 78.

62. Ky.—Louisville & N. R. Co. v. Hamblen, 269 S.W. 344.
39 C.J. p 547 note 79.
Superior-servant rule see infra § 332 e.

63. Ky.—Borderland Coal Co. v. Edwards, 199 S.W. 792, 178 Ky. 659.
39 C.J. p 547 note 80.

64. Ky.—Chesapeake & O. Ry. Co. v. Shamblen, 179 S.W. 837, 166 Ky. 789.
39 C.J. p 547 note 82.

65. N.Y.—Encarnacion v. Jamison, 167 N.E. 422, 251 N.Y. 218, affirmed 50 S.Ct. 440, 281 U.S. 635, 74 L.Ed. 1082.
Willful acts of supervisory employees see infra § 332 b.

66. N.H.—Richard v. Amoskeag Mfg. Co., 109 A. 88, 79 N.H. 380, 8 A.L.R. 1426.

67. Tex.—Texas & P. Ry. Co. v. Wiley, Civ.App., 155 S.W. 356.

68. La.—Lanis v. Illinois Cent. R. Co., 72 So. 788, 140 La. 1, affirmed 38 S.Ct. 334, 246 U.S. 652, 62 L. Ed. 922.
39 C.J. p 548 note 87.

69. La.—Queen v. Schwann, 44 So. 276, 119 La. 495.
39 C.J. p 548 note 88.

70. Va.—Crowder v. Wolary, 198 So. 9, 144 Va. 149.
39 C.J. p 546 note 68.

Jerking chair

Act of coemployee in jerking chair and thereby causing employee to fall was not within scope of employment, and hence employer was not liable for injuries.—Gens v. Wagner Electric Mfg. Co., 31 S.W.2d 785, 326 Mo. 503.

Turning compressed air hose on coemployee.
Fla.—Crowder v. Wolary, 198 So. 9, 144 Fla. 149.
N.C.—Ferguson v. Rex Spinning Co., 146 S.E. 597, 196 N.C. 614, 62 A.L. R. 1430—Rivenbark v. Hines, 104 S.E. 524, 180 N.C. 240.

71. Ga.—Holliday v. Merchants' & Miners' Transp. Co., 132 S.E. 210, 161 Ga. 949.
Miss.—McCarty v. Mitchell, 151 So. 567, 169 Miss. 82.
S.C.—Thompson v. J. A. Jones Const. Co., 19 S.E.2d 226, 199 S.C. 304.
39 C.J. p 548 note 90.
Employment or retention of incompetent employee see supra §§ 311–319.

72. Miss.—Great Southern Lumber Co. v. May, 102 So. 854.

73. Miss.—Hines v. Cole, 85 So. 199, 123 Miss. 254.

74. U.S.—Cain v. Alpha S. S. Corporation, C.C.A.N.Y., 35 F.2d 717, affirmed 50 S.Ct. 443, 281 U.S. 642, 74 L.Ed. 1086.
Miss.—Hines v. Cole, 85 So. 199, 123 Miss. 254.
Assault by supervisory employee see infra § 332 b.

Detention of employee by house detective

House detective who was authorized to enforce hotel's rules, and maintain law and order among guests and employees, was acting within scope of employment in arresting employee who left a package containing a pistol, and detaining him pending arrival of police, and hence hotel was liable for assault committed by house detective on the employee.—Baker Hotel of Dallas v. Rogers, Civ.App., 157 S.W.2d 940, error refused 160 S.W.2d 522, 138 Tex. 398.

75. La.—Wilson v. Yazoo & M. V. R. Co., App., 181 So. 600.
39 C.J. p 548 note 94.
"Under the doctrine of respondeat superior there is no liability for a wrongful assault committed by one employee on another unless the assault is committed, whether wisely or unwisely, in furtherance of or in an attempt to further the master's business or in other words in connection with some act which an assaulter is authorized to do for the

ment;[76] and in any case where the assault is merely a wanton and willful act done to satisfy the temper or spite of the employee the master is not liable.[77] Clearly an employer is not liable to an employee for an assault committed by another employee if the assault was not wrongfully made;[78] but the fact that an employee may be authorized under the circumstances to use a reasonable degree of force to compel obedience to his orders does not absolve the master of responsibility for the employee's negligence in using unreasonable force.[79]

§ 326. What Law Governs

The law of the place where the cause of action arose generally determines the applicability of the fellow-servant rule, provided such law does not violate the public policy of the law of the forum.

In accordance with the general rule adopted as to the law governing an action for tort, discussed in Conflict of Laws § 12 a, in an action for injury to a servant the application of the rule as to fellow servants is ordinarily held to depend on the law of the place where the cause of action arose and not on the law of the forum,[80] provided, however, such law does not conflict with the public policy of the latter state.[81] However, in a jurisdiction where the servant is not allowed to recover for an injury sustained through the negligence of the fellow servant, it has been held that a statute of a foreign state where the injury occurred, imposing liability on the employer in such cases, will not be recognized to afford the employee a greater remedy than he would have under the law of the forum.[82]

§ 327. Who Are Fellow Servants

a. In general
b. Riding in master's conveyance
c. Particular employments

a. In General

While there is no general definition of fellow servants which will apply in all jurisdictions, in general fellow servants are those serving a common master, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business.

It has frequently been stated that all serving a common master working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, although in different grades or departments, are fellow servants.[83] More briefly, it is sometimes stated that all persons are,[84] at least prima facie,[85] fellow servants who are in the common service of,

master."—Lykes Bros. S. S. Co. v. Grubaugh, C.C.A.Tex., 128 F.2d 387, 391, modified on other grounds 130 F.2d 25.

Gratuitous interference in personal altercation

A caddie could not recover from a club for an assault by employee of club on theory that employee committed assault in course of his employment and in furtherance of club's business, where assault occurred as an incident to a gratuitous interference by employee with a purely personal altercation between caddie and another employee, neither of whom was subject to control of employee committing assault.—Country Club of Jackson v. Turner, 4 So. 2d 718, 192 Miss. 510.

Fear of assault

Employee could not recover from employer for injuries sustained in dodging a person he feared was about to assault him, on ground that earlier assaults produced mental state rendering such act involuntary and mere injurious consequence of preëxisting cause of action, where plaintiff testified that the previous assaults did not impair his general health, and there was no evidence that they had any continuing effect.—Dewing v. New York Cent. R. Co., 183 N.E. 754, 281 Mass. 351.

76. Miss.—Petroleum Iron Works v. Bailey, 86 So. 644, 124 Miss. 11.

77. U.S.—Lykes Bros. S. S. Co. v. Grubaugh, C.C.A.Tex., 128 F.2d 387, modified on other grounds 130 F.2d 25.

78. Ky.—Bass v. Louisville & N. R. Co., 288 S.W. 738, 216 Ky. 796.

79. Minn.—Nettle v. Flour City Ornamental Iron Works, 148 N.W. 43, 126 Minn. 530.
N.H.—Richard v. Amoskeag Mfg. Co., 109 A. 88, 79 N.H. 380, 8 A.L.R. 1426.

80. Tex.—McGuire & Cavender v. Edwards, Civ.App., 48 S.W.2d 1010, error refused.
39 C.J. p 549 note 16.

81. Minn.—Herrick v. Minneapolis & St. L. Ry. Co., 16 N.W. 413, 31 Minn. 11, 47 Am.S.R. 771, affirmed 8 S.Ct. 1176, 127 U.S. 210, 32 L.Ed. 109.
39 C.J. p 550 note 17.

82. Wis.—Anderson v. Milwaukee & St. Paul R. Co., 37 Wis. 321.
39 C.J. p 549 note 16 [d].

83. D.C.—Southern Ry. Co. v. Taylor, 16 F.2d 517, 57 App.D.C. 21, certiorari denied Taylor v. Southern Ry. Co., 47 S.Ct. 571, 273 U.S. 767, 71 L.Ed. 882.
Fla.—Sutton v. Hancock, 141 So. 542, 105 Fla. 497—Wilson & Toomer Fertilizer Co. v. Lee, 106 So. 462, 90 Fla. 632.
Kan.—**Corpus Juris cited in** Burroughs v. Michel, 52 P.2d 633, 634, 142 Kan. 814.
N.J.—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law 569.
Va.—Aronovitch v. Ayres, 193 S.E. 524, 169 Va. 308.
39 C.J. p 550 note 25.

Similar statements

(1) Fellow servants are those engaged under the control of the same master, in the same common business, the purpose of which is to accomplish a single result.—Hill v. Hardy, 157 S.W.2d 494, 203 Ark. 79—Jolly v. Smith, 65 S.W.2d 908, 188 Ark. 446—Haraway v. Mance, 56 S.W.2d 1023, 186 Ark. 971.

(2) Two persons subject to control and direction by the same general master, in the same common object, are fellow servants.—Hamby v. Union Paper Mills Co., 35 S.E. 297, 110 Ga. 1—Blanchard v. Gallahar, 33 S.E.2d 379, 72 Ga.App. 132.

84. Ark.—Walsh v. Eubanks, 34 S.W.2d 762, 764, 183 Ark. 34.
N.J.—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law 569—McAndrews v. Burns, 39 N.J.Law 117.
R.I.—Ryan v. Unsworth, 157 A. 869, 870, 52 R.I. 86.
39 C.J. p 550 note 26, p 552 notes 56–58.
Servants of separate masters see infra § 330.

85. U.S.—Baltimore & O. R. Co. v. Baugh, Ohio, 13 S.Ct. 914, 149 U.S. 368, 384, 37 L.Ed. 772.
39 C.J. p 552 notes 56–58.

and controlled by, a common master. It is not necessary that they be hired or discharged by the same superior agent of the master,[86] or that they be employed for the same time,[87] or that the amount[88] or manner and time of payment[89] of wages be the same; and in contemplation of law one may be a fellow servant without having been actually employed by the master himself.[90]

There is no fixed rule, however, by which to determine under what circumstances workmen are fellow servants,[91] and it has been said to be impossible to reconcile the definitions of the different courts as to who are fellow servants.[92] Particularly is it impossible to lay down a general rule for the determination of who are or who are not fellow servants which will be applicable in all jurisdictions,[93] for consideration must be given to the prevalence in the particular jurisdiction of the "superior-servant" rule, discussed infra § 332 e, the "different-department" rule, discussed infra § 331 b, the "consociation" rule, discussed infra § 331 c, and the effect of the character of the act involved as fixing the status of the employees, discussed infra § 333. Thus in the final analysis the question must be determined with regard to the circumstances of the particular case.[94]

b. Riding in Master's Conveyance

The determination of whether those riding in the master's conveyance are fellow servants depends, as a rule, on whether the employer in furnishing the transportation, and the employees in using it, are engaged in performing the duties of the employment.

In determining whether the fellow-servant rule is applicable in a given case of injury to a person while riding to or from his work in his employer's conveyance, it has been said that the test is whether the employer in furnishing the transportation, and the employee in using it, were engaged in performing one of the express or implied duties of the employment.[95] The mere fact that one is employed by the master in whose conveyance he is riding does not make him a fellow servant with the driver or operator of such conveyance if he is at such time not on duty and the transportation from place to place is no part of the service he had contracted to render; in other words, if he is acting as a member of the general public, he is a passenger, notwithstanding he may be transported free.[96] On the other hand, the general rule is that employees who are being carried as a part of their contract of service to and from their places of work are, subject to the rules recognized in the particular jurisdiction as to the existence of the relation, fellow servants of other employees, and not passengers.[97] There need

86. N.Y.—Slater v. Jewett, 85 N.Y. 61, 39 Am.R. 627.
39 C.J. p 551 note 49.

87. N.J.—Ewan v. Lippincott, 47 N. J.Law 192, 199, 54 Am.R. 148.
39 C.J. p 551 note 50.

88. Miss.—Hercules Powder Co. v. Hammack, 110 So. 676, 145 Miss. 304—McMaster v. Illinois Cent. R. R. Co., 4 So. 59, 65 Miss. 264—New Orleans, J. & G. N. R. Co. v. Hughes, 49 Miss. 258.

89. N.J.—Ewan v. Lippincott, 47 N.J.Law 192, 54 Am.R. 148.
39 C.J. p 552 note 52.

90. R.I.—Tanguay v. Warwick Chemical Co., 173 A. 540, 54 R.I. 445.
Volunteers and emergency servants see infra § 328 b.
Riding at request of employee
(1) One who was riding in the master's automobile on a business trip at the request of an employee who was driving the automobile, to afford protection to the driver and to assist him in case of mishap, was held a fellow servant of the driver.—Morrison v. Lewis, 199 S.E. 782, 58 Ga.App. 677.
(2) Where one employed by insurance counsel to investigate claims employed another to assist him and thereupon slept while helper drove investigator's automobile, insurance counsel was not liable to investigator for injuries resulting from helper's negligence, since helper, if in the employ of insurance counsel, was a fellow servant of investigator.—Powell v. Commercial Standard Ins. Co., 170 S.W.2d 857, 294 Ky. 7.

91. Mo.—Curtie v. Koch, App., 282 S.W. 1045.

92. Or.—Johnson v. Ladd, 5 P.2d 1062, 138 Or. 371.

93. Conn.—Peterson v. New York, N. H. & H. R. Co., 59 A. 502, 77 Conn. 351.
39 C.J. p 552 note 54.

94. Mo.—Curtie v. Koch, App., 282 S.W. 1045.
39 C.J. p 552 note 55.
Held fellow servants
U.S.—American Heating & Plumbing Co. v. Keene, C.C.A.Miss., 96 F.2d 170.
Ark.—Rodgers v. Crumpton, 113 S.W. 2d 480, 196 Ark. 1179—Mississippi River Fuel Corporation v. Morris, 35 S.W.2d 607, 183 Ark. 207.
Ky.—Owens v. Mays, 294 S.W. 781, 220 Ky. 37.
Mo.—Chasteen v. Singer Sewing Mach. Co., 41 S.W.2d 621, 226 Mo. App. 57.
Okl.—Singer Sewing Mach. Co. v. Odom, 45 P.2d 473, 172 Okl. 411.

95. Conn.—Pigeon v. Lane, 67 A. 886, 80 Conn. 237—Sullivan v. New York, N. H. & H. R. Co., 47 A. 131, 73 Conn. 203.
Fla.—Bryant v. Moss Packing Co., 158 So. 713, 118 Fla. 176.

96. U.S.—Pittsburgh Valve Foundry & Construction Co. v. Gallagher, C.C.A.Ohio, 32 F.2d 436.
Ill.—Lamar v. Collins, 252 Ill.App. 238.
Miss.—Hamilton Bros. Co. v. Weeks, 124 So. 798, 155 Miss. 754.
Pa.—Koontz v. Messer, 181 A. 792, 320 Pa. 487.
39 C.J. p 556 note 99.
Sick employee taken home in employer's automobile was held not fellow servant of driver.—Tullgren v. Amoskeag Mfg. Co., 133 A. 4, 82 N.H. 268, 46 A.L.R. 380.

97. Ark.—Black Diamond Lumber Co. v. Smith, 76 S.W.2d 975, 190 Ark. 91.
Fla.—**Corpus Juris quoted in** Kendrick v. Ideal Holding Co., 188 So. 778, 780, 137 Fla. 600.
Ga.—Roberts v. Ethridge, 36 S.E. 2d 883, 76 Ga.App. 400.
Miss.—Charles Weaver & Co. v. Harding, 180 So. 825, 182 Miss. 345—Continental Casualty Co. v. Pierce, 154 So. 279, 170 Miss. 67.
Mo.—**Corpus Juris cited in** Kemmler v. City of Richmond Heights, 114 S.W.2d 994, 997.
N.Y.—Fay v. De Camp, 178 N.E. 677, 257 N.Y. 407.
Tenn.—**Corpus Juris cited in** Oman v. Delius, 10 Tenn.App. 467, 477.
39 C.J. p 556 note 93.

not be an express agreement for such carriage,[98] nor is it necessary that the employee ride upon a particular conveyance;[99] and the rule does not cease to apply by reason of the mere fact that the carriage is had after the day's work has ceased.[1]

The fellow-servant rule has been held not to apply where the duty to transport employees is one which the master has impliedly contracted to perform in person, and the duty is performed by another under authority of, and as agent for, the master, and for whose negligent act the master is liable as though he were present personally and himself breached the duty;[2] and it has also been held that where a servant in obeying the orders of his master, and without negligence on his part, is injured by the negligent operation of the master's automobile by another servant of the master, and the injured servant is not permitted to participate in, or direct the operation of, and has no control over, the injuring instrumentality or the operator thereof, the master is liable if the negligent servant was acting within the scope of his employment when the injury was sustained.[3]

Guest of driver. One who rides in a vehicle as a mere guest of the driver thereof with the consent of the owner does not thereby become a fellow servant of the driver.[4]

Transportation from city to summer residence. In determining whether a domestic employee is the fellow servant of a chauffeur while being transported from the city residence of the master to his summer residence, the court should consider what is customarily done by persons shifting from city to summer residence in connection with transporting the household.[5]

c. Particular Employments

(1) Railroads
(2) Shipping
(3) Other employments

(1) Railroads

(a) In general
(b) Particular employees

(a) In General

Railroad employees, including the crews of the same or different trains, may be fellow servants as to each other.

Subject to the qualifications and limitations on the fellow-servant rule recognized in the particular jurisdiction, railroad employees have frequently been held to be fellow servants.[6]

Employees operating trains have frequently been held fellow servants of track employees injured by the negligence of the former;[7] and this rule has

Operation of vehicle as part of master's work

The fact that the master contracts to supply a vehicle, or that the supplying of a means of access to the work is one of the inducements to the employment, indicates that the operation of the vehicle is part of the master's work.—Carlson v. P. F. Collier & Son Corporation 67 P.2d 842, 190 Wash. 301.

Individuals held fellow servants

Ark.—Walsh v. Eubanks, 34 S.W.2d 762, 183 Ark. 34.

Kan.—Nelson v. City of Salina, 256 P. 123, 123 Kan. 522.

Minn.—Novotny v. Bouley, 27 N.W. 2d 813, 223 Minn. 592.

Mo.—Boston v. Kroger Grocery & Baking Co., 7 S.W.2d 1006, 320 Mo. 408.

N.J.—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law 569.

98. Fla.—**Corpus Juris quoted in** Kendrick v. Ideal Holding Co., 188 So. 778, 780, 137 Fla. 600.

39 C.J. p 556 note 94.

99. U.S.—Dayton Coal & Iron Co. v. Dodd, Tenn., 188 F. 597, 602, 110 C.C.A. 395, 37 L.R.A.,N.S., 456.

Fla.—**Corpus Juris quoted in** Kendrick v. Ideal Holding Co., 188 So. 778, 780, 137 Fla. 600.

1. U.S.—Dayton Coal & Iron Co. v. Dodd, Tenn., 188 F. 597, 602, 110 C.C.A. 395, 37 L.R.A.,N.S., 456.

Fla.—**Corpus Juris quoted in** Kendrick v. Ideal Holding Co., 188 So. 778, 780, 137 Fla. 600.

R.I.—Ryan v. Unsworth, 157 A. 869, 52 R.I. 86.

Transportation home from work

Employee of highway contractor could not recover from contractor for injuries sustained when thrown from contractor's truck while being transported home from work if injuries resulted from negligence of truck driver, since contractor was not, under fellow-servant rule, liable for negligence of driver of its own truck.—Charles Weaver & Co. v. Harding, 180 So. 825, 182 Miss. 345.

2. Ark.—Haraway v. Mance, 56 S.W. 2d 1023, 186 Ark. 971.

Truck driver and cotton pickers

A truck driver transporting cotton pickers to and from the plantation for the employer has been held not a fellow servant of the transported laborers so as to preclude recovery by a laborer for injuries resulting from the negligence of the driver. —French v. Cherry, 57 S.W.2d 404, 186 Ark. 991—Haraway v. Mance, 56 S.W.2d 1023, 186 Ark. 971.

3. Or.—Johnson v. Ladd, 5 P.2d 1062, 138 Or. 371.

Nursemaid and gardener

Where nursemaid, obeying master's order, took child riding with gardener, authorizedly operating master's automobile, and was negligently injured, nursemaid and gardener were not fellow servants.—Johnson v. Ladd, supra.

4. Tenn.—Lea v. Gentry, 73 S.W. 2d 170, 167 Tenn. 664.

5. N.Y.—Fay v. De Camp, 178 N.E. 677, 257 N.Y. 407.

Maid held fellow servant of chauffeur

N.Y.—Fay v. De Camp, supra.

6. Minn.—Neal v. Northern Pac. R. Co., 59 N.W. 312, 57 Minn. 365.

39 C.J. p 563 note 32.

Railroad employees as fellow servants:

As affected by character of act or omission see infra § 333.

Under:

Consociation doctrine see infra § 331 c.

Different-department rule see infra § 331 b.

Superior-servant rule see infra § 332 e.

7. U.S.—Illinois Cent. R. Co. v.

been applied, inter alia, to track inspectors,[8] bridge gangs,[9] and a car repairer or inspector injured by the negligence of trainmen.[10]

Employees who are injured while merely riding upon a train are ordinarily fellow servants of the train crew[11] although there is some authority to the contrary on the ground that the employees are regarded as engaged on different pieces of work.[12]

Trainmen working on different trains for the same railroad company are generally held fellow servants[13] although it has also been held that they are not in common employment.[14] Likewise employees on different cars of a street railroad have been held fellow servants.[15]

(b) Particular Employees

A brakeman, conductor, engineer, fireman, yard employee, or switchman may, depending on the circumstances, be a fellow servant of other railroad employees.

Subject to the qualifications and limitations on the fellow-servant rule recognized in the particular jurisdiction, an employee whose work is connected with railroad yards generally cannot recover for injuries received from the negligence of train or other employees using the yards, since they are fellow servants.[16] Members of the same[17] or different[18] switching crews may be fellow servants, and the same rule applies to employees on a switch or other engine whose negligence was the cause of injury to car employees or switchmen.[19] A hostler may be a fellow servant of a yard helper injured by the negligence of the former.[20] The negligence of a switch tender, where the master has used due care in employing a competent person for the position, resulting in injuries to other employees, is generally held the negligence of a fellow servant.[21]

Brakeman has been held a fellow servant of a conductor injured by the negligence of the former;[22] and brakemen on the same train have been held fellow servants of each other,[23] although the negligent brakeman was at the time the acting conductor.[24] A brakeman may be a fellow servant of laborers on a construction train[25] or of an employee charged with the duty of placing sand in the sand boxes of the locomotive.[26]

Conductor of one train has been held the fellow servant of other employees who are working on another train,[27] such as a fireman,[28] brakeman,[29] baggage master,[30] or a laborer on a work train;[31] and a conductor has also been held to be the fellow servant of the engineer on another train,[32] although as to this the contrary has also been held.[33]

Engineer. A railroad engineer has often been held a fellow servant of other members of the train crew injured by his negligence,[34] such as the fire-

Hart, Tenn., 176 F. 245, 100 C.C.A. 49, 52 L.R.A.,N.S., 1117.
39 C.J. p 564 note 34.

8. Iowa.—Sullivan v. Mississippi & M. R. Co., 11 Iowa 421.

9. Tex.—St. Louis, A. & T. Ry. Co. v. Welch, 10 S.W. 529, 72 Tex. 298, 2 L.R.A. 839.
39 C.J. p 564 note 36.

10. Del.—Shuster v. Philadelphia, B. & W. R. Co., 62 A. 689.
W.Va.—Unfried v. Baltimore & O. R. Co., 12 S.E. 512, 34 W.Va. 260.

11. Ga.—White v. Kennon, 9 S.E. 1082, 83 Ga. 343.
39 C.J. p 564 note 39.

12. Utah.—Jachetta v. San Pedro, L. A. & S. L. R. Co., 105 P. 100, 36 Utah 470, 52 L.R.A.,N.S., 1106.
39 C.J. p 564 note 40.

13. Del.—Wheatley v. Philadelphia, W. & B. R. Co., 30 A. 660, 15 Del. 305.
39 C.J. p 566 note 73.

14. Ga.—Cooper v. Mullins, 30 Ga. 146, 76 Am.D. 638.
W.Va.—Madden v. Chesapeake & O. R. Co., 28 W.Va. 610, 57 Am.R. 695.

15. Ill.—Chicago City R. Co. v. Leach, 70 N.E. 222, 208 Ill. 198, 100 Am.S.R. 216.
39 C.J. p 566 note 75.

16. Ind.—Sheets v. Chicago & I. Coal Ry. Co., 39 N.E. 154, 139 Ind. 682.
39 C.J. p 565 note 65.

17. U.S.—Union Pac. R. Co. v. Brady, Mo., 161 F. 719, 88 C.C.A. 579.
39 C.J. p 566 note 67.

18. U.S.—Nelson v. Southern R. Co., Tenn., 158 F. 92, 85 C.C.A. 560.
39 C.J. p 566 note 66.

19. U.S.—Hudson v. Charleston, C. C.N.C., 55 F. 248.
39 C.J. p 566 note 69.

20. Ill.—Clay v. Chicago, B. & Q. R. Co., 56 Ill.App. 235—Chicago, W. I. R. Co. v. Massig, 50 Ill.App. 666.

21. Ill.—Swisher v. Illinois Cent. R. Co., 55 N.E. 555, 182 Ill. 533.
39 C.J. p 566 note 71.

22. Cal.—Brown v. Central Pac. R. Co., 14 P. 138, 72 Cal. 523.

23. Kan.—Higgins v. Atchison, T. & S. F. R. Co., 79 P. 679, 70 Kan. 814.
39 C.J. p 565 note 62.

24. Mass.—Hayes v. Western R. Corp., 3 Cush. 270.

25. U.S.—Lukic v. Southern Pac. Co., C.C.Utah, 160 F. 135.
39 C.J. p 565 note 61.

26. Miss.—Louisville, N. O. & T. R. Co. v. Petty, 7 So. 351, 67 Miss. 255, 19 Am.S.R. 304.

27. U.S.—St. Louis, I. M. & S. R. Co. v. Needham, Ark., 63 F. 107, 11 C.C.A. 56, 25 L.R.A. 833.
39 C.J. p 566 note 76.

28. U.S.—Crosby v. Lehigh Valley R. Co., N.Y., 137 F. 765, 70 C.C.A. 199.
39 C.J. p 566 note 79.

29. U.S.—Northern Pac. R. Co. v. Poirier, Wash., 17 S.Ct. 741, 167 U.S. 48, 42 L.Ed. 72.
39 C.J. p 566 note 80.

30. U.S.—Kerlin v. Chicago, P. & St. L. R. Co., C.C.Ind., 50 F. 185.
39 C.J. p 566 note 81.

31. U.S.—Northern Pac. R. Co. v. Smith, Wash., 59 F. 993, 8 C.C.A. 663.

32. U.S.—Oakes v. Mase, Minn., 17 S.Ct. 345, 165 U.S. 363, 41 L.Ed. 746.

33. Ky.—Louisville, C. & L. R. Co. v. Cavens, 9 Bush 559.
W.Va.—Madden v. Chesapeake & O. Ry. Co., 28 W.Va. 610, 57 Am.R. 695.

34. Wis.—Ewald v. Chicago & N. W. R. Co., 36 N.W. 12, 591, 70 Wis. 420, 5 Am.S.R. 178.
39 C.J. p 564 note 44.

man[35] and brakeman.[36] An engineer in charge of a switch engine is a fellow servant of a switch conductor[37] or a member of the switching crew.[38] The engineer in charge of a construction train may be a fellow servant of laborers connected therewith who are injured through his negligence.[39] An engineer has also been held a fellow servant of an injured engine cleaner[40] or other yard workman.[41] However, an engineer has been held not a fellow servant of a common laborer engaged in unloading material from a car located at some distance from the engine, where the individuals were engaged in different operations and different elements of railroading.[42]

An engineer whose negligence causes the injury may be a fellow servant of employees on another train,[43] such as the engineer,[44] the fireman,[45] the brakeman,[46] or a laborer on a work train.[47]

Fireman may be a fellow servant of a brakeman,[48] a trackman,[49] or a switch tender.[50] A student fireman has been held a fellow servant with the regular train crew.[51]

(2) Shipping

Members of the crew of a ship, or employees working on or about the ship, may be fellow servants with respect to each other.

Subject to the qualifications and limitations on the fellow-servant rule recognized in the particular jurisdiction, all the members of the crew or employees working on or about the ship are generally fellow servants.[52] The members of a stevedore's crew ordinarily are fellow servants;[53] but those loading a vessel at one port are not fellow servants of those who unload it some time later at a distant port.[54] Stevedores and longshoremen employed by the ship are fellow servants of the members of the crew where all are engaged in the common work of loading or unloading,[55] but not, it seems, where the crew members had nothing to do with the loading or unloading.[56] A longshoreman unloading cargo from a lighter, who is employed by the hour and is not a member of the crew, is not a fellow servant of the captain of the lighter.[57]

(3) Other Employments

The general rules governing the existence of the fellow-servant relationship have been applied to employees engaged in mining, quarrying, operating an elevator, or erecting a building.

Subject to the qualifications and limitations on the fellow-servant rule recognized in the particular jurisdiction, an elevator operator has been held to be a fellow servant of other employees working in and about the building.[58] Also, subject to such

35. U.S.—Baltimore & O. R. Co. v. Baugh, Ohio, 13 S.Ct. 914, 149 U.S. 368, 37 L.Ed. 772.
39 C.J. p 564 note 45.

36. U.S.—Missouri Pac. R. Co. v. Texas & P. Ry. Co., C.C.La., 31 F. 527.
39 C.J. p 565 note 46.

37. Ill.—Columbus, C. & I. C. R. Co. v. Troesch, 68 Ill. 545, 18 Am. R. 578—Chicago, R. I. & P. R. Co. v. Henry, 7 Ill.App. 322.

38. La.—Day v. Louisiana Western R. Co., 46 So. 203, 121 La. 180.
Engineer and brakeman who are members of the same switching crew are fellow servants.
Mo.—Warmington v. Atchison, T. & S. F. Ry. Co., 46 Mo.App. 159.
Wis.—Fowler v. Chicago & N. W. Ry. Co., 21 N.W. 40, 61 Wis. 159.

39. U.S.—O'Connor v. Atchison, T. & S. F. R. Co., Ill., 137 F. 503, 70 C.C.A. 87.
39 C.J. p 565 note 47.

40. Ind.—Spencer v. Ohio & M. R. Co., 29 N.E. 915, 130 Ind. 181.
Wis.—Ewald v. Chicago & N. W. Ry. Co., 36 N.W. 12, 591, 70 Wis. 420, 5 Am.S.R. 178.

41. Tex.—Texas & P. R. Co. v. Harrington, 62 Tex. 597.
W.Va.—Beuhring v. Chesapeake & O. Ry. Co., 16 S.E. 435, 37 W.Va. 502.

42. Fla.—Atlanta & St. Andrews Bay Ry. Co. v. Pittman, 178 So. 297, 130 Fla. 624.

43. Ark.—St. Louis Southwestern R. Co. v. Henson, 32 S.W. 1079, 61 Ark. 302.
Mich.—Enright v. Toledo, A. A. & N. M. Ry. Co., 53 N.W. 536, 93 Mich. 409.

44. U.S.—Van Avery v. Union Pac. R. Co., C.C.Colo., 35 F. 40.
39 C.J. p 567 note 84.

45. U.S.—Maher v. Union Pac., D. & G. Ry. Co., Colo., 106 F. 309, 45 C.C.A. 301.
39 C.J. p 567 note 85.

46. U.S.—Northern Pac. R. Co. v. Poirier, Wash., 17 S.Ct. 741, 167 U.S. 48, 42 L.Ed. 72.
39 C.J. p 567 note 86.

47. U.S.—Northern Pac. R. Co. v. Smith, Wash., 59 F. 993, 8 C.C.A. 663.
Mo.—Corbett v. St. Louis, I. M. & S. R. Co., 26 Mo.App. 621.

48. U.S.—Louisville & N. R. Co. v. Kelly, Ill., 63 F. 407, 11 C.C.A. 260.
39 C.J. p 565 notes 53, 46 [a].

49. Ga.—Ellington v. Beaver Dam Lumber Co., 19 S.E. 21, 93 Ga. 53.

50. Me.—Tillson v. Maine Cent. R. Co., 67 A. 407, 102 Me. 463.

51. Ga.—Smith v. Western & A. R. Co., 67 S.E. 813, 134 Ga. 216.
Student employees as fellow servants generally see infra § 328.

52. U.S.—Quebec SS. Co. v. Merchant, N.Y., 10 S.Ct. 397, 133 U.S. 375, 33 L.Ed. 656.
39 C.J. p 567 note 89.
Watchman and sailor
Watchman at gate to guard property and control entrance and exit of employees was held fellow servant of sailor returning from shore leave and demanding entrance to go on ship.—Holliday v. Merchants' & Miners' Transp. Co., 132 S.E. 210, 161 Ga. 949.

53. U.S.—Taylor v. Munson SS. Line, D.C.Ala., 204 F. 695.
39 C.J. p 567 note 91.

54. Hawaii.—Monroe v. The American, 4 Hawaii Fed. 285.

55. U.S.—The Daisy, C.C.A.Cal., 282 F. 261.
39 C.J. p 567 note 92.

56. U.S.—Sansol v. Compagnie Générale Transatlantique, C.C.A.N.Y., 101 F. 390—Ferguson v. The Terrier, D.C.Pa. 73 F. 265.

57. U.S.—The Howell, C.C.A.N.Y., 273 F. 513.

58. D.C.—Woodward & Lothrop v. Lineberry, 50 F.2d 314, 60 App.D.C. 164, followed in 50 F.2d 317, 60 App.D.C. 167, and certiorari denied Lineberry v. Woodward & Lothrop,

qualifications and limitations, employees engaged in the erection of a building[59] or working in or about a mine, quarry, or other excavation[60] have generally been held to be fellow servants.

§ 328. —— Existence of Relation of Master and Servant in General

a. In general
b. Volunteers and emergency servants

a. In General

The defense of fellow servant does not apply unless the injured and offending persons were at the time of the injury servants of the person sought to be charged.

The defense of fellow servant can be availed of only where both the person injured and the person whose act or neglect caused the injury stood at the time of the injury in the relation of servant and master to the person or corporation sought to be charged;[61] and the negligence of a coemployee of the injured person is not a defense in an action against one who was not at the time the master of the injured person.[62] Thus the fellow-servant rule does not apply where the injured person was at the time no longer in the employ of the master although it was because of his previous service that he happened to be at the place where he was injured[63] or although the injury was the alleged proximate result of an act of negligence occurring during the common employment.[64]

Persons acting in place of servant. Where one servant acts in the place of, or as a substitute for, another, he stands in the same relation to the other servants of the master as the servant in whose place he is acting; if the latter is a fellow servant, he is a fellow servant,[65] and vice versa.[66]

Student employees. The fellow-servant rule is applicable as between the regular employees of the master and student employees who are under his control preparing themselves for his service and performing parts thereof as they acquire knowledge of the details thereof, although they may not receive wages.[67]

b. Volunteers and Emergency Servants

A volunteer or emergency servant may be a fellow servant within the meaning of the fellow-servant rule; but one who in furtherance of his own interests assists

52 S.Ct. 29, 284 U.S. 648, 76 L.Ed. 550.
39 C.J. p 562 note 26.

Engineer

The operator of an elevator in the master's building has been held a fellow servant of an engineer employed by the same master and called on to perform a mechanical piece of work in connection with the operation of the elevator.—Southern Ry. Co. v. Taylor, 16 F.2d 517, 57 App. D.C. 21, certiorari denied Taylor v. Southern Ry. Co., 47 S.Ct. 571, 273 U. S. 767, 71 L.Ed. 882.

59. Ky.—Moreland v. Indian Refining Co., 143 S.W. 395, 146 Ky. 760.
39 C.J. p 562 note 28.
Employees engaged in building and construction work as fellow servants under different-department rule see infra § 331 b.

60. Ark.—Howell v. Harvill, 50 S.W. 2d 597, 185 Ark. 977.
39 C.J. p 563 note 30.
Mine employees as fellow servants:
As affected by character of act or omission see infra § 333.
Under:
Consociation doctrine see infra § 331 c.
Different-department rule see infra § 331 b.
Doctrine of vice principalship see infra § 332 c (2).

61. La.—**Corpus Juris cited in** Walton v. Louisiana Power & Light Co., App., 152 So. 760, 763.
39 C.J. p 552 note 61.
Scope of employment see supra § 323.

Injury to employee's wife

The fellow-servant rule does not apply where the action is brought against the master by an employee for an injury to his wife occasioned by the negligence of another employee.—Campbell v. Harris, 23 S.W. 35, 4 Tex.Civ.App. 636.

Stranger

Excusing of the master for the negligence of a fellow servant is based on contract, and is personal to the master; and a stranger, whose negligence, combined with the negligence of a servant, injures a fellow servant, is not entitled to the benefits of the contract between the master and servant, but the two are liable as joint tort-feasors for their negligent acts.—East Ohio Gas Co. v. O'Hara, 17 Ohio App. 352.

Domestic worker held not independent contractor

In action by woman engaged to do the laundry and to close a summer home for personal injuries sustained through negligence of owner's servants, where plaintiff had no established place of business and did domestic work for different employers and used the tools and materials of the employers, and was paid by the hour, and performed the same general task as defendant's servants, plaintiff was not an independent contractor, but was a servant, and hence was barred of recovery under the fellow-servant rule.—Bell v. Sawyer, 47 N.E.2d 1, 313 Mass. 250.

62. Mo.—Chappee v. Gus V. Brecht Butchers' Supply Co., 30 S.W.2d 35.
N.D.—Asch v. Washburn Lignite Coal Co., 186 N.W. 757, 48 N.D. 734.
39 C.J. p 553 note 62.

63. Tex.—Missouri, K. & T. Ry. Co. v. Hendricks, 108 S.W. 745, 49 Tex.Civ.App. 314.
39 C.J. p 553 note 69.

64. Tex.—Smith v. Humphreyville, 104 S.W. 495, 47 Tex.Civ.App. 140.

65. Mich.—Rodman v. Michigan Cent. R. Co., 20 N.W. 788, 55 Mich. 57, 54 Am.R. 348.
39 C.J. p 555 note 82.

Substitute hired by an employee stands in the employee's place, with relation to the master and the other servants, and is a fellow servant with such others of the master's servants as the regular employee is or would have been, although no contractual relation exists between the substitute and the master, and the employee alone is responsible for the substitute's wages.
U.S.—Saunders v. The Coleridge, D. C.N.Y., 72 F. 676.
Wash.—Anderson v. Guineau, 37 P. 449, 9 Wash. 304.

66. Ky.—Louisville & N. R. Co. v. Moore, 83 Ky. 675.
39 C.J. p 555 note 83.

67. Neb.—Justus v. Lincoln Tract. Co., 131 N.W. 941, 89 Neb. 542.
39 C.J. p 553 note 66.

the servants of another in their work has been held not to become thereby a fellow servant of the others.

One who, having no interest in the work, voluntarily assists the servant of another, whether or not at the request of such servant, and is injured by the negligence or misconduct of such servant, stands in the position of a fellow servant with such employee and cannot recover from the master, since he can impose no greater liability on the master than a hired servant;[68] the master owes to him no higher duty than to a trespasser, and is liable, if at all, only for his own or his servant's willful or wanton negligence;[69] and for injuries received by a servant from the negligence or fault of a volunteer the master is not liable where he was in no wise responsible for the presence or acts of such volunteer.[70]

Emergency servants. An emergency or pressing necessity which makes impossible, without further assistance, the full performance of a servant's work may of itself arm the servant with power to employ or accept assistance immediately and essentially necessary to fulfill his task, and thereby clothe the one employed or assisting with the rights of a servant of the master, even though the one employing or accepting the assistance otherwise has no authority to employ anyone or to accept any service on behalf of the master, and even though the one so employed or assisting may recover no compensation therefor from the master.[71] A person so employed or assisting is referred to as an "emergency servant,"[72] and it has been held that while the emergency continues the liability of the master for an injury to him is governed by the ordinary rules as to the liability of the master for an injury to a servant caused by acts of fellow servants,[73] although it has been held to the contrary that, while he is entitled to the same protection from the master as any other servant engaged in like employment, he is not a fellow servant with those regularly engaged.[74] Where the servant who calls a stranger to assist acts as a superior or controls the emergency servant, he is charged with the master's duty to provide a safe place to work, and the master is liable for a failure thereof.[75]

In order to become an emergency servant, the person assisting must be called on because of necessity, since it is the emergency which gives rise to the implied authority, and if it does not in fact exist the implication of a servant's authority to hire him does not arise;[76] and if the servant calling on another for help can do the work himself there is no occasion of necessity to imply power in him to employ assistance.[77]

Interest in work. One who, in furtherance of his own interests, assists the servants of another in the performance of their work is not a trespasser,

68. Miss.—**Corpus Juris quoted in** Beale & Strayhorn v. Clayborn, 120 So. 812, 813, 152 Miss. 681.
Tex.—Stallcup v. United Gas Public Service Co., Civ.App., 119 S.W.2d 574, error dismissed—**Corpus Juris cited in** Serano v. Garza, Civ.App., 119 S.W.2d 413, 415—**Corpus Juris cited in** Dillingham v. Cavett, Civ. App., 91 S.W.2d 868, 869.
39 C.J. p 554 note 72.
Liability of master for injury to volunteers generally see supra § 177.

Compensation immaterial

Where employee was directed by employer to deliver truck load of merchandise to another town, and employee's brother accompanied employee and was killed in collision on return trip, question whether brother went along as a volunteer or whether employee agreed to pay brother for assistance was immaterial, with respect to employer's common-law liability for death, since brother's legal status with relation to employer would be that of a fellow servant in either case and recovery would be barred by fellow-servant rule.—Serano v. Garza, Tex.Civ. App., 119 S.W.2d 413.

69. Miss.—**Corpus Juris quoted in** Beale & Strayhorn v. Clayborn, 120 So. 812, 813, 152 Miss. 681.
39 C.J. p 554 note 73.

70. N.D.—Wallin v. Great Northern R. Co., 151 N.W. 291, 29 N.D. 469.
39 C.J. p 554 note 74.

71. Ark.—**Corpus Juris cited in** Henry Quellmalz Lumber & Mfg. Co. v. Hays, 291 S.W. 982, 983, 173 Ark. 43.
Tex.—**Corpus Juris quoted in** Dillingham v. Cavett, Civ.App., 91 S. W.2d 868, 869.
39 C.J. p 554 note 75.

72. Tex.—**Corpus Juris quoted in** Dillingham v. Cavett, Civ.App., 91 S.W.2d 868, 869.
39 C.J. p 554 note 75.

73. Ark.—**Corpus Juris cited in** Booth & Flynn v. Price, 89 S.W. 2d 717, 719, 183 Ark. 975.
N.Y.—Mandala v. Wells, 209 N.Y.S. 35, 212 App.Div. 370—Fiesel v. New York Edison Co., 108 N.Y.S. 130, 123 App.Div. 676.
Tex.—**Corpus Juris quoted in** Dillingham v. Cavett, Civ.App., 91 S. W.2d 868, 869.
Wash.—Freeman v. Smit, 75 P.2d 575, 193 Wash. 346.
39 C.J. p 554 note 77.

74. Ky.—Baringer v. Zachery, 267 S. W. 182, 206 Ky. 229.

75. Iowa.—Hitchcock v. Arctic Creamery Co., 150 N.W. 727, 170 Iowa 352.
S.C.—Jackson v. Southern R. Co., 54 S.E. 231, 73 S.C. 557.

76. Ark.—Henry Quellmalz Lumber & Mfg. Co. v. Hays, 291 S.W. 982, 173 Ark. 43.
N.Y.—Fiesel v. New York Edison Co., 108 N.Y.S. 130, 123 App.Div. 676.
Wash.—Freeman v. Smit, 75 P.2d 575, 193 Wash. 346.

Emergency not shown

One employed to look after business in a distant part of state was not confronted with such emergency as would warrant employment of assistant driver without employer's knowledge so as to render employer liable for employee's injuries resulting from assistant driver's negligence, where employee could have reached place of business by railroad or, at least, without driving all night.—Powell v. Commercial Standard Ins. Co., 170 S.W.2d 857, 294 Ky. 7.

77. N.Y.—Fiesel v. New York Edison Co., 108 N.Y.S. 130, 123 App. Div. 676.
Wash.—Freeman v. Smit, 75 P.2d 575, 193 Wash. 346.

because he is lawfully in his place; he is not a fellow servant with the other servants, because he is not directly or indirectly retained or employed by the master of such servants; he is not a mere volunteer, because he does the work to further his own interests or those of his master.[78] Therefore the master of such other servants is liable to him for injuries received as a result of their neglect or misconduct, and the fellow-servant rule is not applicable.[79] This is true, even though the service is not wholly voluntary, but is induced by the request of a servant in the master's employ.[80]

§ 329. —— Injury to Servants Not on Duty

Although the mere fact that a servant has ceased his work does not automatically and instantly remove him from the operation of the fellow-servant rule, a servant who is not on duty, but is acting as a member of the general public, ordinarily is not considered a fellow servant of those engaged by the same master.

As a general rule a servant who is not on duty, but rather is acting in a proper way as a member of the general public, is not a fellow servant of those engaged by the same master so as to relieve the master from liability to him for injuries resulting from their negligence.[81] However, although the injured employee may have ceased work at the termination of his working hours, he may still be within the application of the fellow-servant rule while the incidents of employment continue,[82] as where he is gathering up and putting away his tools,[83] or is procuring or adjusting clothing which he has laid aside during his work,[84] or is preparing to leave the place of employment;[85] and, for the same reason, servants on their way to and from work have been held, although not actually on duty, to be fellow servants of others of the master's employees engaged in the same common employment, so as to relieve him of liability for injuries received by them through the negligence of such other employees.[86] It has been held that, where the servant of a railroad company, when not on duty, occupies a building or car furnished by the company, his relation to the other employees of the company is not changed by reason of the fact that he was not actually on duty when injured, because his presence in such place can be accounted for only by the fact that he is an employee, and not merely a member of the general public.[87]

§ 330. —— Servants of Separate Masters

a. In general
b. Servant of one master controlled by another
c. Independent contractors

a. In General

Employees, in order to be fellow servants, must be servants of a common master; and the servant of one master does not necessarily become the fellow servant of the employees of another master by the fact that, to further the interests of his own master, he assists them in their work.

Servants of separate masters, although engaged in a common undertaking, are not fellow servants.[88] In order to constitute that relation, servants must be in the employ of, or controlled by, a common master.[89] If, with a view to expediting the busi-

78. Tex.—**Corpus Juris quoted in** Dillingham v. Cavett, Civ.App., 91 S.W.2d 868, 869.

79. Pa.—**Corpus Juris cited in** Dunmire v. Fitzgerald, 37 A.2d 596, 598, 349 Pa. 511.
Tex.—**Corpus Juris quoted in** Dillingham v. Cavett, Civ.App., 91 S.W.2d 868, 869.
39 C.J. p 554 note 80.
Liability of master generally to volunteer who has interest in work see supra § 177.
Loading of logs by owner
Where owner of logs voluntarily assisted in loading logs, he was not a fellow servant of employee of truckers who had undertaken to haul logs to mill so as to preclude recovery against truckers under fellow-servant rule for injuries sustained by owner.—Rice v. Isbell, 71 N.Y.S.2d 791, 272 App.Div. 405.

80. Pa.—**Corpus Juris cited in** Dunmire v. Fitzgerald, 37 A.2d 596, 598, 349 Pa. 511.
Tex.—**Corpus Juris quoted in** Dillingham v. Cavett, Civ.App., 91 S.W.2d 868, 869.
39 C.J. p 554 note 81.

81. Ga.—Doby v. W. L. Florence Const. Co., 32 S.E.2d 527, 71 Ga. App. 888.
Mass.—Levin v. Twin Tanners, 60 N.E.2d 6, 318 Mass. 13.
39 C.J. p 555 note 85.
Riding in master's conveyance see supra § 327 b.
Employee attending to own automobile
Where employee attending to his own automobile for his own benefit on street and off premises of employer was injured by employer's truck, employer could not defeat common-law liability on ground that the injured employee and the truck driver were fellow servants.—Levin v. Twin Tanners, supra.

82. Del.—Taylor v. George W. Bush, etc., Co., 66 A. 884, 22 Del. 306, 12 L.R.A.,N.S., 853.
39 C.J. p 555 note 87.

83. U.S.—Willmarth v. Cardoza, R. I., 176 F. 1, 99 C.C.A. 475, 27 L.R.A.,N.S., 376.

84. U.S.—Willmarth v. Cardoza, supra.
39 C.J. p 555 note 89.

85. U.S.—Willmarth v. Cardoza, supra.

86. Mo.—**Corpus Juris cited in** Kemmler v. City of Richmond Heights, 114 S.W.2d 994, 997.
39 C.J. p 555 note 92.

87. U.S.—Dishon v. Cincinnati, N. O. & T. P. R. Co., C.C.Ky., 126 F. 194, affirmed 133 F. 471, 66 C.C.A. 345.
39 C.J. p 555 note 86.

88. Cal.—**Corpus Juris quoted in** Moss v. Chronicle Pub. Co., 258 P. 88, 90, 201 Cal. 610.
N.J.—Byram v. Warner-Quinlan Co., 141 A. 809, 104 N.J.Law 534.
Tenn.—**Corpus Juris quoted in** Rice-Stix Dry Goods Co. v. Self, 101 S.W.2d 132, 137, 20 Tenn.App. 498.
39 C.J. p 557 note 2.

89. Cal.—**Corpus Juris quoted in**

ness or furthering the interests of his general master, the servant assists the servants of another in their work, he is not the fellow servant of those whom he is assisting,[90] although, acting under general orders from his employer to assist such servants, he does so at their request.[91]

Servants of different railroads having traffic arrangements. The fact that one railroad company uses the tracks and stations of another under contract between them does not as a rule make the employees of either company fellow servants with the employees of the other.[92]

b. Servant of One Master Controlled by Another

A servant of one master who is lent to, and becomes subject to the control of, another master is generally regarded, as far as concerns the application of the fellow-servant rule, as a servant of the master to whom he is lent.

Where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him.[93] Thus, if the servant injures,[94] or receives injuries in such employment from the negligence of,[95] a servant of the person to whom he is lent, the fellow-servant rule may bar recovery therefor from the person to whom he is lent. Further, if any liability should arise for the negligence of such servant in the particular employment of another master, it does not attach to the general master,[96] but attaches rather to the special master.[97]

In determining whether a servant lent by one master to another has become the servant of the latter, the test ordinarily is whether, in the particular service which the lent servant is engaged to perform, he continues liable to the direction and control of his general master or becomes subject to that of the person to whom he is lent or hired.[98] Nevertheless, the servant so lent must consent to the change of master, expressly or impliedly;[99] and to bring the case within the fellow-servant rule the services rendered by the employee for the third person must be such as to create the legal relation of master and servant.[1] Actual exercise of the right to control the servant of the general employ-

Moss v. Chronicle Pub. Co., 258 P. 88, 90, 201 Cal. 610.
Minn.—Wicklund v. North Star Timber Co., 287 N.W. 7, 205 Minn. 595.
N.H.—Martel v. Wallace, 141 A. 470, 83 N.H. 276.
N.J.—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law 569—Byram v. Warner-Quinlan Co., 141 A. 809, 810, 104 N.J.Law 534.
Tenn.—**Corpus Juris quoted in** Rice-Stix Dry Goods Co. v. Self, 101 S.W.2d 132, 137, 20 Tenn.App. 498.
39 C.J. p 557 note 2.

90. Cal.—**Corpus Juris quoted in** Moss v. Chronicle Pub. Co., 258 P. 88, 90, 201 Cal. 610.
Fla.—**Corpus Juris cited in** Hartquist v. Tamiami Trail Tours, 190 So. 533, 538, 139 Fla. 328.
Ohio.—**Corpus Juris quoted in** Manchester v. Youngstown Sheet & Tube Co., App., 46 N.E.2d 780, 785.
39 C.J. p 558 note 3.
Volunteers having interest in work generally see supra § 177.

Consignor and carrier
Where there was no evidence that common carrier's truck driver had authority from carrier to secure assistance in loading barrel onto truck, consignor's employee, who was injured while carrying out instruction to assist carrier's truck driver in loading barrel onto truck, but who remained subject to control of consignor, was not a fellow servant of the common carrier's truck driver.—Schiano v. McCarthy Freight System, R.I., 53 A.2d 527.

91. Cal.—**Corpus Juris quoted in** Moss v. Chronicle Pub. Co., 258 P. 88, 90, 201 Cal. 610.
Ohio.—**Corpus Juris quoted in** Manchester v. Youngstown Sheet & Tube Co., App., 46 N.E.2d 780, 785.
39 C.J. p 558 note 4.

92. Mo.—Erickson v. Kansas City, O. & S. R. Co., 71 S.W. 1022, 171 Mo. 647.
39 C.J. p 561 note 16.

93. La.—**Corpus Juris quoted in** Duke v. Dixie Bldg. Material Co., App., 23 So.2d 822, 823.
Minn.—**Corpus Juris cited in** Wicklund v. North Star Timber Co., 287 N.W. 7, 12, 205 Minn. 595.
N.J.—Errickson v. F. W. Schwiers, Jr., Co., 158 A. 482, 108 N.J.Law 481.
39 C.J. p 558 note 5.

94. Mo.—Thompson v. Kansas City, App., 153 S.W.2d 127.

Truck driver and repair crew
Member of city's street repair crew, and truck driver who with truck was rented by owner to city to transport the crew, tools, and materials, were fellow servants, and hence city was not liable for death of member of crew resulting from negligence of truck driver.—Thompson v. Kansas City, supra.

95. La.—**Corpus Juris quoted in** Duke v. Dixie Bldg. Material Co., App., 23 So.2d 822, 823.
39 C.J. p 558 note 5.

96. La.—**Corpus Juris quoted in** Duke v. Dixie Bldg. Material Co., App., 23 So.2d 822, 823.
Mo.—**Corpus Juris cited in** Thompson v. Kansas City, App., 153 S.W. 2d 127, 128.
N.J.—Decker v. Ransome Concrete Machinery Co., 191 A. 755, 118 N.J.Law 173.
39 C.J. p 558 note 6.

97. Cal.—Kimball v. Pacific Gas & Electric Co., 30 P.2d 39, 220 Cal. 203.

98. La.—**Corpus Juris quoted in** Duke v. Dixie Bldg. Material Co., App., 23 So.2d 822, 823—**Corpus Juris quoted in** Spaaja v. Thibodaux Boiler Works, App., 2 So.2d 668, 673.
39 C.J. p 558 note 7.

Mechanic held not lent servant
Where bus driver made arrangements with garage to have mechanic employed by garage repair disabled bus, bus company could not avoid liability for injuries sustained by mechanic when engine of bus backfired as starter was pressed by bystander directed by bus driver to operate starter for mechanic, on ground that mechanic was a lent servant.—Tennessee Coach Co. v. Reece, 156 S.W. 2d 404, 178 Tenn. 126.

99. La.—**Corpus Juris quoted in** Duke v. Dixie Bldg. Material Co., App., 23 So.2d 822, 823.
39 C.J. p 559 note 8.

1. La.—**Corpus Juris quoted in** Duke v. Dixie Bldg. Material Co., App., 23 So.2d 822, 823.
39 C.J. p 559 note 9.

er in the service of a special master is not necessary where the special master is willing to rely on the experience and skill of the lent servant.[2] The fact that the general master pays the wages of the servant does not preclude him from becoming pro hac vice the particular servant of another.[3]

c. Independent Contractors

An employee is generally not considered a fellow servant of one engaged by his master as an independent contractor or of the servants of such contractor, although there are circumstances under which he may become their fellow servant.

Where a servant of a principal works side by side with one employed by his master as an independent contractor[4] or with a servant of such contractor,[5] or where the servant of an independent contractor works with the servant of a subcontractor,[6] they are not fellow servants even though they are engaged in a common work or act for the benefit of the same ultimate employer. Where, however, the principal has control over the employees of the contractor and power to dismiss them, such employees become fellow servants with the employees of the principal,[7] and the servant of a general master is prima facie the fellow servant of the servants of an independent contractor when his master directs him to assist the servants of such independent contractor,[8] but the fact that the independent contractor instructs his foreman to obey the orders of the general superintendent of the principal does not make his employees and those of the latter fellow servants.[9]

§ 331. —— Common Employment

a. In general
b. Different-department rule
c. Consociation doctrine

a. In General

Coemployees, in order to fall within the fellow-servant rule, must be engaged in a common employment, that is, work of the same general character or such as to bring them into necessary and frequent contact; and in determining the question of common employment consideration is sometimes given to circumstances such as exposure to or apprehension of injury from the other servants, and ability to take precautions.

In order that the relation of fellow servant may exist, the coemployees must not only be in the service of a common master, as discussed supra § 330, but must be engaged in a common employment,[10] that is, in work of the same general character.[11]

2. La.—**Corpus Juris quoted in** Duke v. Dixie Bldg. Material Co., App., 23 So.2d 822, 823.
39 C.J. p 560 note 10.

3. La.—**Corpus Juris quoted in** Duke v. Dixie Bldg. Material Co., App., 23 So.2d 822, 823.
39 C.J. p 560 note 11.

4. Fla.—Electrical Equipment Co. v. Cook, 151 So. 483, 113 Fla. 312.
Pa.—McKnight v. S. S. Kresge Co., 132 A. 575, 285 Pa. 489—Grogan v. Hinkle & Co., 70 Pa.Super. 585.

5. Ga.—Doby v. W. L. Florence Const. Co., 32 S.E.2d 527, 71 Ga. App. 888.
N.H.—Martel v. Wallace, 141 A. 470, 83 N.H. 276.
Pa.—McKnight v. S. S. Kresge Co., 132 A. 575, 285 Pa. 489.
39 C.J. p 560 note 12.

6. Ga.—Doby v. W. L. Florence Const. Co., 32 S.E.2d 527, 71 Ga. App. 888.
Pa.—McKnight v. S. S. Kresge Co., 132 A. 575, 285 Pa. 489—Grogan v. Hinkle & Co., 70 Pa.Super. 585.

Direction and supervision by principal contractor

The fact that work was to be done by subcontractor under principal contractor's direction and supervision did not make two contractors' servants coservants, so as to absolve subcontractor from liability for injuries as result of such servants' alleged negligence.—Doby v. W. L. Florence Const. Co., 32 S.E.2d 527, 71 Ga. App. 888.

7. U.S.—The Slingsby, N.Y., 120 F. 748, 57 C.C.A. 52, certiorari denied 23 S.Ct. 849, 188 U.S. 741, 47 L.Ed. 678.
39 C.J. p 560 note 13.

8. Wis.—Hoveland v. National Blower Works, 114 N.W. 795, 134 Wis. 342, 14 L.R.A.,N.S., 1254.
39 C.J. p 560 note 14.

9. Ill.—Pittsburg, C. C. & St. L. R. Co. v. Bovard, 79 N.E. 128, 223 Ill. 176.
39 C.J. p 560 note 15.

10. Fla.—Wilson & Toomer Fertilizer Co. v. Lee, 106 So. 462, 90 Fla. 632.
Minn.—Wicklund v. North Star Timber Co., 287 N.W. 7, 13, 205 Minn. 620.
N.H.—Martel v. Wallace, 141 A. 470, 83 N.H. 276.
N.J.—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law 569.
39 C.J. p 561 note 18.

Trucker as bailor

A trucker whose truck at time of injury thereto, as result of negligence of another trucker, was being driven by substitute driver while trucker was off duty was not precluded under fellow-servant doctrine from recovering from company for the damage thereto, since trucker as bailor of the truck at time of injury was not then engaged in common employment.—Wicklund v. North Star Timber Co., 287 N.W. 7, 205 Minn. 595.

Laborer and driver of tractor

Where cane cutter with other farm laborers was transported in wagon which was hauled by motor tractor, relation of fellow servant was held not to exist between laborer and driver of tractor so as to preclude recovery for injuries sustained when laborer fell from wagon, since laborer had nothing to do with driving of tractor.—Lewis v. A. Moresi Co., La. App., 196 So. 70.

A road foreman who had control over tractors and graders when they were on the job was not a fellow servant of employee whose work was confined to greasing machinery and acting as night watchman, so as to preclude recovery for death of foreman crushed by heavy road scraper when it accidentally started while being greased by other employee.—Hill v. Hardy, 157 S.W.2d 494, 203 Ark. 79.

11. U.S.—Johnson v. Armour, C.C. Mo., 18 F. 490, 5 McCrary 629.

Similar tests

(1) Engagement in the same general business or enterprise.—Setzkorn v. City of Buffalo, 219 N.Y.S. 351, 219 App.Div. 416, affirmed 159 N.E. 670, 246 N.Y. 605—39 C.J. p 550 note 31.

(2) Engagement in the same gen-

In order to be a fellow servant, an employee must be working to accomplish a result which the other employees are also working to bring about,[12] or the character of their respective occupations must be such as to bring them into habitual association or necessary and frequent contact.[13] Employees are not engaged in the same common employment where they are working separately and independently of each other, at different places, and at separate pieces of work.[14]

On the other hand, it has been held not an indispensable requisite that they be at the time engaged in the same operation or particular work,[15] or that they work at the same place[16] or time[17] or be in sight of each other,[18] or that their trades or functions be identical;[19] and those engaged in the master's service in effecting a common purpose may be deemed fellow servants although the work is done in successive stages, different parts thereof being done by different persons, and the labor performed by one set of employees being prior in time to that performed by another set.[20]

Exposure to, or apprehension of, injury. It has been stated that in order to be fellow servants it must appear that the individuals are employed by the same master to accomplish one common object and are so related in their labors and services as ordinarily to be exposed to injury caused by each other's negligence.[21] It has been held that the employee must know that he is exposed to the risk of being injured by the negligence of another[22] or should know it by the exercise of ordinary sagacity,[23] and that it must appear that the injured servant can be said to have apprehended the possibility of injury from another servant while engaged in the service for which he is hired.[24]

Ability to take precautions. In determining the existence of a fellow-servant relationship, consideration is sometimes given to the questions whether the individuals involved are so associated in their work that they can observe and have an influence over each other's conduct promotive of proper caution[25] and can also report delinquencies to a common power or head,[26] and whether they are so far

eral business and similar line of work.—Mesich v. Tamarack Min. Co., 151 N.W. 564, 184 Mich. 363—39 C.J. p 550 note 32.

(3) Prosecution of a common enterprise or undertaking.—Green v. Kurtz, 292 S.W. 1073, 222 Mo.App. 586—39 C.J. p 550 note 27.

(4) Acting together in the same work.

Conn.—Morgan v. Ryan-Unmack Co., 96 A. 172, 90 Conn. 712.

Ga.—Krogg v. Atlanta & W. P. R. Co., 77 Ga. 202, 4 Am.S.R. 77.

12. Pa.—Sloppy v. Pennsylvania R. Co., 77 A. 1010, 228 Pa. 636.

39 C.J. p 562 note 20.

Similar tests or expressions

(1) Promotion of one common object.—Ohio & M. R. Co. v. Hammersley, 28 Ind. 371—39 C.J. p 550 note 28.

(2) Employment to perform duties and services tending to accomplish the same general purpose.—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law 569—39 C.J. p 550 note 29.

(3) Prosecution of activities in the business of the master which have for their purpose the attainment of one common end.—Funk v. Fulton Iron Works Co., 277 S.W. 566, 311 Mo. 77.

(4) Contribution by the coemployees directly to the common object of their common employer in that enterprise for which their services were engaged.—Fay v. De Camp, 178 N.E. 677, 257 N.Y. 407.

(5) Joint engagement in performing the act causing the injury.—Atlanta & St. Andrews Bay Ry. Co. v. Pittman, 178 So. 297, 130 Fla. 624.

(6) Engagement in common and single purpose.—Crawford v. Kansas City Bolt & Nut Co., Mo., 278 S.W. 373.

13. Ill.—Kaminsky v. Chicago Rys. Co., 121 N.E. 596, 286 Ill. 271—Lyons v. Ryerson, 90 N.E. 288, 242 Ill. 409—Lamar v. Collins, 252 Ill. App. 238.

39 C.J. p 562 note 21.

14. Tex.—Missouri, K. & T. R. Co. v. Romans, Civ.App., 114 S.W. 157, reversed on other grounds 121 S. W. 1104, 103 Tex. 4.

39 C.J. p 562 note 23.

Electrician and shoe repairer

N.H.—Moore v. Morse & Malloy Shoe Co., 197 A. 707, 89 N.H. 332.

15. N.J.—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law 569.

39 C.J. p 551 note 43.

16. Wash.—Drewaneak v. Walville Lumber Co., 126 P. 536, 70 Wash. 257.

39 C.J. p 551 note 44.

17. Mich.—Kangas v. Cleveland Cliffs Iron Co., 154 N.W. 41, 188 Mich. 255.

39 C.J. p 551 note 45.

18. Wash.—Drewaneak v. Walville Lumber Co., 126 P. 536, 70 Wash. 257.

19. N.Y.—Fay v. De Camp, 178 N.E. 677, 257 N.Y. 407—Butler v. Townsend, 26 N.E. 1017, 126 N.Y. 105.

20. N.Y.—Citrone v. O'Rourke Engineering Constr. Co., 80 N.E. 1092, 188 N.Y. 339, 19 L.R.A.,N.S., 340.

39 C.J. p 552 note 53.

21. Ark.—Kenefick-Hammond Co. v. Rohr, 91 S.W. 179, 77 Ark. 290.

39 C.J. p 551 note 37.

"When servants are employed and paid by the same master, and their duties are such as to bring them into such a relation that the negligence of the one in doing his work may injure the other in the performance of his, then they are engaged in the same common business, and, being subject to the control of the same master, they are fellow servants, within the generally accepted meaning of the rule, no matter how different the grades of service or compensation may be, or how diverse or distinct their duties may be."—Hercules Powder Co. v. Hammack, 110 So. 676, 677, 145 Miss. 304—McMaster v. Illinois Cent. R. R. Co., 4 So. 59, 65 Miss. 264.

22. Kan.—Donnelly v. Cudahy Packing Co., 75 P. 1017, 68 Kan. 653.

23. N.J.—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law 569—McAndrews v. Burns, 39 N.J.Law 117.

12 C.J. p 156 note 30—39 C.J. p 551 note 39.

24. W.Va.—Jackson v. Norfolk & W. R. Co., 27 S.E. 278, 31 S.E. 258, 43 W.Va. 380, 46 L.R.A. 337.

39 C.J. p 551 note 40.

25. Ill.—Kaminsky v. Chicago Rys. Co., 121 N.E. 596, 286 Ill. 271—Lyons v. Ryerson, 90 N.E. 288, 242 Ill. 409—Lamar v. Collins, 252 Ill. App. 238.

26. Mo.—Wall v. Philip A. Rohan Boat, Boiler & Tank Co., 62 S.W.2d 764, 333 Mo. 619—Landcaster v. National Enameling & Stamping

working together as to be practically coöperating and to have opportunity to control or influence the conduct of each other and have no superiority of the one over the other.[27] Employees are not engaged in the same common employment, according to the view expressed by some authorities, where they have no opportunity to use precautions against each other's negligence.[28]

Control. Tests laid down as to the existence of a fellow servant relationship sometimes include the element of control over the employees, and some courts in determining the existence of such relationship have given consideration to the circumstance of whether the individuals are engaged in the same common service under the same general control,[29] whether they are working together under one common directing superior,[30] whether they are engaged in the same work, under one common control, for the same general purpose, and to accomplish one common result,[31] or whether they are in the same common service of master in conducting and carrying on the same general business, and neither is in any sense under the control or direction of the other.[32]

b. Different-Department Rule

(1) In general
(2) What constitutes a department

(1) In General

Under the different-department rule, which prevails in some jurisdictions, an employee engaged in one department of his employer's business is not deemed the fellow servant of an employee engaged in another department unless they are brought into necessary and frequent contact or are actually coöperating at the time of the injury.

In some jurisdictions those who are employed by a common master but who are not engaged in the same work or in the same department of service are not fellow servants.[33] This rule has met with frequent application in the case of railroad employees,[34] mine employees,[35] and employees engaged in logging operations,[36] building and construction work,[37] or in other particular industries or employments.[38] This rule, known as the "different-department rule," has been expressly or impliedly repudiated in a number of states,[39] at least in cases other than those wherein the departments are so far separated from each other as to exclude the possibility of contact and danger from the negligent per-

Co., App., 1 S.W.2d 238—Jones v. Liggett & Myers Tobacco Co., App., 284 S.W. 513—Curtie v. Koch, App., 282 S.W. 1045.
39 C.J. p 551 note 42.
Departmental doctrine see infra subdivision b of this section.

27. Pa.—Sloppy v. Pennsylvania R. Co., 77 A. 1010, 228 Pa. 636.
39 C.J. p 551 note 41.

28. Ky.—Powell v. Commercial Standard Ins. Co., 170 S.W.2d 857, 294 Ky. 7—Louisville R. Co. v. Hibbitt, 129 S.W. 319, 139 Ky. 43.
39 C.J. p 562 note 24.

29. U.S.—Dougherty v. Thompson-Lockhart Co., D.C.Pa., 211 F. 224.
39 C.J. p 551 note 33.

30. Del.—American Bridge Co. v. Valente, 73 A. 400, 23 Del. 370, Ann.Cas.1912D 69.
39 C.J. p 551 note 34.

Structural worker and millwrights under different foremen

Where structural iron worker was engaged in placing iron uprights in defendant's plant, millwrights installing machinery and placing fans and motors about same building under a different foreman were held not his fellow servants.—Stuba v. American Car & Foundry Co., Mo. App., 270 S.W. 145.

31. N.Y.—Butler v. Townsend, 26 N.E. 1017, 126 N.Y. 105.

32. Neb.—Waxham v. Fink, 125 N.W. 145, 86 Neb. 180, 28 L.R.A., N.S., 367, 21 Ann.Cas. 301.
39 C.J. p 551 note 36.

33. Mo.—Landcaster v. National Enameling & Stamping Co., App., 1 S.W.2d 238.
39 C.J. p 567 note 97.
Different-department statutes see infra § 342.

Cleaner and cement finisher

Where the employees were working under different foremen, in different departments, and at different tasks, the fellow-servant rule was held inapplicable in action for injuries to employee falling through hole in floor of building under construction, while clearing rubbish therefrom, as result of stepping on inadequate piece of tin placed over it by member of cement finishers' gang.—Farley v. Lehrack, Mo.App., 272 S.W. 987.

34. U.S.—St. Louis & S. F. R. Co. v. Furry, Ark., 114 F. 898, 52 C.C.A. 518, certiorari denied 22 S.Ct. 944, 186 U.S. 486, 46 L.Ed. 1267.
39 C.J. p 568 note 98.
Railroad employees as fellow servants generally see supra § 327 c (1).

Riding to or from work

(1) It has been held that a servant riding to or from work in the master's train is not a fellow servant with the crew thereof, because not in the same department of service.—Central Kentucky Tract. Co. v. Smedley, 150 S.W. 658, 150 Ky. 598—39 C.J. p 556 note 97.

(2) Riding in master's conveyance generally see supra § 327 b.

35. Wash.—Asbury v. Hecla Min. Co., 175 P. 179, 103 Wash. 542.
39 C.J. p 569 note 99.
Mine employees as fellow servants generally see supra § 327 c (3).

36. Idaho.—Brayman v. Russell & Pugh Lumber Co., 169 P. 932, 31 Idaho 140.
39 C.J. p 569 note 1.

37. Mo.—Schumacher v. Kansas City Breweries Co., 152 S.W. 13, 247 Mo. 141.
39 C.J. p 569 note 2.
Employees engaged in erection of building as fellow servants generally see supra § 327 c (3).

38. Neb.—Ault v. Nebraska Tel. Co., 118 N.W. 73, 82 Neb. 434, 130 Am. S.R. 686.
39 C.J. p 569 notes 3, 4.

Stockroom clerk

Chemical company's clerk in charge of stockroom was held not fellow servant of employee working in finishing department.—Green v. Kurtz, Mo.App., 292 S.W. 1073.

39. N.J.—Butler v. Eberstadt, 175 A. 159, 113 N.J.Law 569.
N.Y.—Fay v. De Camp, 178 N.E. 677, 257 N.Y. 407—Setzkorn v. City of Buffalo, 215 N.Y.S. 584, 126 Misc. 858, affirmed 219 N.Y.S. 351, 219 App.Div. 416, affirmed 159 N.E. 670, 246 N.Y. 605.
Va.—Aronovitch v. Ayres, 193 S.E. 524, 169 Va. 308.
39 C.J. p 569 note 5.

formance of their duties by employees of the different departments.[40] Since the basis of the departmental rule, both in its general statement and as defined by the consociation doctrine, discussed infra subdivision c of this section, is the ordinary danger to one servant from the negligence of another servant, and his opportunity to guard against that danger by exercising and promoting caution, it is apparent that the relation of fellow servant exists where the character of their respective occupations bring the people engaged in them into necessary and frequent contact, even if they have no personal relation;[41] and obviously servants who are actually coöperating, or who are performing duties permitting the exercise of influence over each other, are fellow servants although employed in different departments.[42] In the absence of statute, the doctrine of different departments is not limited to cases involving railroad employees, and applies wherever the reason for the rule exists.[43]

(2) What Constitutes a Department

The nature of the employer's business ordinarily determines whether servants are employed in different departments thereof, consideration being given, among other things, to whether they are habitually associated in their duties and are under the same superior.

In general, whether servants are in the same or different departments of the master's business depends not on theory, or on any artificial division, but on the nature of the business itself.[44] The question of identity of department is to be determined by inquiring, among other things, whether the employees in question are habitually associated or brought together in the performance of their duties, whether they are under the immediate direction and control of the same superior, and whether the duties of one have any relation to, or connection with, those of the other,[45] so that the safety of the one must in the natural course of things depend on the care and skill of the other.[46] In order to form an exception to the general rule of the master's nonliability, the person whose neglect caused the injury must be one engaged in an essentially distinct department, and not in a mere separate piece of work in one of the branches of service within a department.[47] The difficulty of applying the department rule has been one of the chief reasons for the disfavor in which it is held, since it is nowhere stated what constitutes a department.[48] It has been held that there is no room for applying the rule where only a few servants are employed, and they are so closely associated, and the area of operations is so circumscribed or so compact, that only one superintendent over all is required.[49]

c. Consociation Doctrine

Under the consociation doctrine, only those employees are fellow servants who are brought into habitual association by their duties or who are directly coöperating at the time of the injury in the particular business in hand, although personal acquaintanceship or the length of time they have worked together is immaterial.

Apparently as a further definition of the different-department rule, there has been evolved the so-called "consociation doctrine," under which those only are fellow servants who are directly coöperating at the time of the injury in the particular business in hand, or whose usual duties are of a nature to bring them into habitual association, so that they may exercise an influence on each other promotive of proper caution.[50] This doctrine has been applied in the case of railroad employees,[51] employees en-

40. Kan.—Atchison & E. Bridge Co. v. Miller, 80 P. 18, 71 Kan. 13, 1 L.R.A.,N.S., 682.
39 C.J. p 570 note 6.

41. U.S.—Beutler v. Grand Trunk Junction R. Co., 32 S.Ct. 402, 224 U.S. 85, 56 L.Ed. 679—Northern Pac. R. Co. v. Dixon, 24 S.Ct. 683, 194 U.S. 338, 48 L.Ed. 1006.

42. Ill.—Chicago & E. I. R. Co. v. White, 70 N.E. 588, 209 Ill. 124.
39 C.J. p 570 note 10.

Driver and assistants
A driver of a truck and trailer used by a factory to haul finished products and other material to and from the railway stations, who helps to load and unload the material hauled, is a fellow servant of the workmen who are selected to assist in loading and unloading such material, while they are doing such work and while going to, and returning from, the station, although he may be working under a different foreman and in a different department of the same factory.—Carter v. Uhrich, 264 P. 31, 125 Kan. 192.

43. Mo.—Koerner v. St. Louis Car Co., 107 S.W. 481, 209 Mo. 141, 17 L.R.A.,N.S., 292.
Different-department statutes as affecting railroad employees see infra § 350.

44. U.S.—Westinghouse v. Callaghan, Mo., 155 F. 397, 83 C.C.A. 699, 19 L.R.A.,N.S., 361.
39 C.J. p 570 note 14.

45. Cal.—Judd v. Letts, 111 P. 12, 158 Cal. 359, 41 L.R.A.,N.S., 156.
39 C.J. p 571 note 15.

46. U.S.—Lukic v. Southern Pac. Co., C.C.Utah, 160 F. 135, 136.
39 C.J. p 571 note 16.

47. Mo.—Relyea v. Kansas City Ft. S. & G. R. Co., 20 S.W. 480, 112 Mo. 86, 18 L.R.A. 817.
39 C.J. p 571 note 17.

48. Mo.—Grattis v. Kansas City, P. & G. R. Co., 55 S.W. 108, 153 Mo. 380, 77 Am.S.R. 721, 48 L.R.A. 399.
39 C.J. p 571 note 18.

49. Ky.—Dana v. Blackburn, 90 S. W. 237, 121 Ky. 706, 28 Ky.L. 695.
39 C.J. p 571 note 19.

50. Ill.—Chicago & E. I. R. Co. v. Kneirim, 39 N.E. 324, 152 Ill. 458, 43 Am.S.R. 259.
12 C.J. p 529 note 75—39 C.J. p 571 note 20.

51. Ill.—Aldrich v. Illinois Cent. R. Co., 89 N.E. 702, 241 Ill. 402, 132 Am.S.R. 220.
39 C.J. p 571 note 22.
Railroad employees as fellow servants generally see supra § 327 c (1).

gaged in mining or quarrying,[52] and in other employments.[53] Direct coöperation in a particular business or task is to be distinguished from indirect coöperation, or coöperation in the general business of the master.[54] The basis of the doctrine is that, where servants are habitually consociated in their daily duties, they may well be supposed to have an influence over one another, and a power to promote in one another caution by counsel, exhortation, and example, equal to or greater than the power of the master; but unless either their duties are such that they usually bring about personal association between such servants or they are actually coöperating at the time of the injury in the business at hand they have generally no power to incite caution in one another, and the reason for the fellow-servant doctrine is gone.[55] The relation of fellow servant does not depend on personal acquaintance[56] or actual previous association between the servants,[57] and is not prevented from arising by the fact that one or both of them were only temporarily engaged at a particular task at the time of the injury.[58] The length of time they have worked together[59] or the nature of their previous employment[60] is immaterial. Likewise the fact that servants have previously coöperated or worked in association will not constitute them fellow servants if they have been separated, so that they are no longer engaged in the same department or task or in habitual association.[61] The consociation test has been expressly or impliedly repudiated in several jurisdictions.[62]

§ 332. —— Effect of Distinctions in Rank or Authority of Servants

a. In general
b. Scope of authority in general
c. Vice principals
d. General managers or heads of departments
e. Superior-servant rule
f. Dual-capacity doctrine

a. In General

Mere superiority in the grade or rank of employment does not necessarily prevent the superior employee from being the fellow servant of an inferior employee of the same master, particularly with respect to the application of the fellow-servant rule in the case of injury to a supervisory employee.

Generally speaking a mere superiority in the grade or rank of employment does not prevent the employee of superior grade from sustaining the relation of fellow servant to other employees of the same master.[63]

Injury to servant authorized to direct, supervise, or manage. As a rule, employees subject to the control, management, or supervision of another employee are his fellow servants in so far as the responsibility of the master to him for their acts is concerned,[64] and the master is not liable for an injury to the superior resulting from the negligence of his subordinates.[65] However, it has been held that a superior servant who also performs duties of an inferior nature is, while acting in the latter capacity, entitled to the rights pertaining to such capacity.[66] Further, where a superior servant is injured by the negligence of an inferior one, the in-

52. Ill.—Duffy v. Kivilin, 63 N.E. 503, 195 Ill. 630.
39 C.J. p 572 note 23.
Mine employees as fellow servants generally see supra § 327 c (3).

53. Ill.—Williams v. Morris, 86 N.E. 729, 237 Ill. 254.
39 C.J. p 572 note 24.

54. Ill.—Kaminsky v. Chicago Rys. Co., 121 N.E. 596, 286 Ill. 271—Lamar v. Collins, 252 Ill.App. 238.
39 C.J. p 572 note 25.

55. Ill.—Chicago & N. W. R. Co. v. Moranda, 93 Ill. 302, 34 Am.R. 168.

56. Ill.—Chicago & E. I. R. Co. v. White, 70 N.E. 588, 209 Ill. 124.
39 C.J. p 572 note 27.

57. Ill.—Chicago City R. Co. v. Leach, 70 N.E. 222, 208 Ill. 198, 100 Am.S.R. 216.

58. Mo.—Card v. Eddy, 28 S.W. 979, 129 Mo. 510, 36 L.R.A. 806.
39 C.J. p 572 note 29.

59. Ill.—Chicago & A. R. Co. v. Hoyt, 12 N.E. 225, 122 Ill 369.
Mo.—Card v. Eddy, 28 S.W. 979, 129 Mo. 510, 36 L.R.A. 806.

60. Ill.—Peterson v. Chicago & O. P. El. R. Co., 103 N.E. 252, 260 Ill. 280.
39 C.J. p 572 note 31.

61. Utah.—Dryburg v. Mercur Gold Min., etc., Co., 55 P. 367, 18 Utah 410.

62. Ind.—Wallace v. Thompson, 97 N.E. 26, 49 Ind.App. 211.
Mich.—Kangas v. Cleveland Cliffs Iron Co., 154 N.W. 41, 188 Mich. 255.

63. Kan.—**Corpus Juris quoted in** Nelson v. City of Salina, 256 P. 123, 124, 123 Kan. 522.
Miss.—Hercules Powder Co. v. Hammack, 110 So. 676, 145 Miss. 304.
39 C.J. p 551 note 47, p 573 note 34.
Liability of master determined by character of act rather than by rank see infra § 333.
"Grade" as applied to employees denotes the rank or relative positions occupied by them while engaged in the common service of their master.—Gulf, C. & S. F. R. Co. v. Warner, 35 S.W. 364, 89 Tex. 475, 478.
Capacity or training
The status of an employee as a fellow servant is to be determined by the scope of his authority rather than his capacity or training.—Guthrie v. Gillespie, 6 S.W.2d 886, 319 Mo. 1137, disapproving Curtie v. Koch, Mo.App., 282 S.W. 1045.

64. Mont.—**Corpus Juris quoted in** Nelson v. Stukey, 300 P. 287, 293, 89 Mont. 277, 78 A.L.R. 483.
39 C.J. p 593 note 24.

65. Ky.—Harris v. Lam Coal Co., 190 S.W. 121, 172 Ky. 767.
39 C.J. p 593 note 25.
Liability as affected by nondelegable character of duty see infra § 333.

66. Mo.—Hedrick v. Kahmann, 160 S.W. 28, 174 Mo.App. 57.
39 C.J. p 592 note 12.

jured party may recover if the act of the inferior servant is the act of the master.[67]

b. Scope of Authority in General

The master ordinarily is not liable for injuries to an employee caused by tortious acts of a superior employee committed outside the scope of his employment, although the master is not necessarily relieved of liability by the mere fact that a superior acted recklessly or in violation of the master's rules.

Generally the master is not liable for acts of an employee authorized to direct, supervise, or manage other employees where such acts are outside the scope of the authority conferred.[68] This includes negligence[69] and also willful torts.[70] However, the master has been held liable for a willful tort committed by an employee in authority where such tort was connected with the exercise of the authority conferred,[71] and it has been held that the mere fact that the superior servant acted recklessly in the exercise of his duties[72] or violated rules of the master[73] does not necessarily relieve the latter from liability. With respect to the scope of employment of a vice principal for whose acts or omissions the master may be held liable to an employee, it has been held that he is authorized to do anything which is fairly and reasonably regarded as incidental to the work specifically directed, or which is usually done in connection with such work;[74] and it has also been held that in this respect the scope of employment may include acts which as between master and servant the servant is not privileged to do.[75]

c. Vice Principals

(1) In general
(2) Who are vice principals

(1) In General

The master cannot invoke the fellow-servant rule to escape liability for injuries to his servant where the offending servant was a vice principal.

The doctrine of vice-principalship is a qualification of the fellow-servant doctrine,[76] and under it, where the negligence is that of an employee who is regarded as a vice principal, while acting as such, the master cannot invoke the fellow-servant rule to escape liability.[77]

(2) Who Are Vice Principals

The term "vice principal" has been variously applied to employees performing the personal or nondelegable duties of the master, or to those occupying a position of control or authority; but the status of vice principal does

67. Mo.—Carter v. Wolff, App., 296 S.W. 187.

68. Fla.—Crowder v. Wolary, 198 So. 9, 12, 144 Fla. 149.
39 C.J. p 546 note 63, p 592 note 14.
Scope of employment of fellow servants generally see supra § 323.
"The principal is not responsible for the personal conduct of the vice-principal in matters which in nowise come within the scope of the employment."—Crowder v. Wolary, supra.
The fundamental consideration in determining the liability of the master for the act of his managing servant is the nature and character of the power of control, direction, and superintendence with which the master has clothed the actor.—Gwin v. Carter, 129 So. 597, 158 Miss. 196.

69. Miss.—Gwin v. Carter, supra.
39 C.J. p 592 note 15.

70. Kan.—Crelly v. Missouri & Kansas Tel. Co., 113 P. 386, 84 Kan. 19, 33 L.R.A.,N.S., 328.
39 C.J. p 592 note 16.
Gross negligence and willful, malicious, or reckless acts of fellow servants generally see supra § 325.
Assault occasioned by anger of supervisor
(1) The master is not liable for an assault on an employee occasioned by the anger of a supervising employee rather than from a purpose upon his part to promote the work of the master.
N.H.—Weir v. Watkins, 123 A. 122, 81 N.H. 130.
Pa.—Cherillo v. Steinberg, 180 A. 115, 118 Pa.Super. 485.
(2) Language addressed by employee to foreman, however insulting or abusive, does not justify foreman in assaulting employee.—Gray v. Phillips Bldg. Co., Mo.App., 51 S.W.2d 181.

71. N.H.—Richard v. Amoskeag Mfg. Co., 109 A. 88, 79 N.H. 380, 8 A.L.R. 1426.
39 C.J. p 592 note 17.
Prevention of increase in wages
If assault on employee by foreman having duty to fix wages was made to intimidate employees demanding increased wages, it was in course of employment and in furtherance of master's business.—Alden Mills v. Pendergraft, 115 So. 713, 149 Miss. 595.
Control of manner of working
A foreman was acting for the master, and not in the capacity of a fellow servant, where he committed an assault in an effort to control the manner in which the injured servant should do the work, and because the foreman felt that such servant was doing the work in an improper manner.—Gwin v. Carter, 129 So. 597, 158 Miss. 196.

72. La.—Lanis v. Illinois Cent. R. Co., 72 So. 788, 140 La. 1, affirmed 38 S.Ct. 334, 246 U.S. 652, 62 L. Ed. 922.

73. Utah.—Dahlquist v. Denver & R. G. R. Co., 174 P. 833, 52 Utah 438.
39 C.J. p 592 note 19.

74. Wash.—Carlson v. P. F. Collier & Son Corporation, 67 P.2d 842, 190 Wash. 301.

75. Wash.—Carlson v. P. F. Collier & Son Corporation, supra.

76. Fla.—Crenshaw Bros. Produce Co. v. Harper, 194 So. 353, 142 Fla. 27.

77. Ind.—Parkhurst v. Swift, 68 N. E. 620, 31 Ind.App. 521.
Mo.—Chappee v. Gus V. Brecht Butchers' Supply Co., 30 S.W.2d 35—Crane v. Liberty Foundry Co., 17 S.W.2d 945, 322 Mo. 592—Timmermann v. St. Louis Architectural Iron Co., 1 S.W.2d 791, 318 Mo. 421—Guldner v. International Shoe Co., App., 293 S.W. 428.
Wash.—Carlson v. P. F. Collier & Son Corporation, 67 P.2d 842, 190 Wash. 301.
39 C.J. p 545 note 44, p 573 note 46.
Carelessness as to minor
Employer was liable for injury to minor employee caused by carelessness of vice principal in requiring employee to approach place of danger.—Maddox v. Steel Heddle Mfg. Co., 147 S.E. 327, 149 S.C. 284.

not necessarily depend on the title given to the employee or on whether he possesses power to hire and discharge other employees.

Some authorities apply the term "vice principal" to an employee who performs the personal or nondelegable duties of the master.[78] However, in a jurisdiction adhering to the superior-servant rule the question whether an employee has been placed in a position of control or authority, rather than the nature or character of the act, has been held the controlling and governing test as to whether he is vice principal or a fellow servant,[79] and thus it has been laid down that, where the master gives to a person power to superintend, control, and direct the men engaged in the performance of work, such person is as to the men under him a vice principal.[80] One who directs workmen as to how and in what manner their duties shall be discharged, supervises them while they are discharging these duties, and keeps their time may be a vice principal although he assists at times in the actual performance of the work.[81]

To put the mere details of the work under one man does not make him a vice principal over the others;[82] nor is the fact that one is called a superintendent, boss, or foreman controlling in the determination of whether he is a vice principal.[83] It has been asserted that, in order to constitute one a vice principal, the master must have committed to him the substantial control of the business, or a branch of it, and the power to do all acts necessary to its conduct.[84] Where the employer himself assumes control and gives an express order not only what to do but how to do it, a vice principal becomes for the time being a mere coemployee, whatever his general authority under other circumstances.[85] In the final analysis, the application of the doctrine of vice principal,[86] as, for example, accord-

78. Fla.—Crenshaw Bros. Produce Co. v. Harper, 194 So. 353, 142 Fla. 27.

Ga.—Haynie v. Foremost Dairies, 187 S.E. 907, 54 Ga.App. 369.

39 C.J. p 573 note 45, p 574 note 54 [f] (1).

Employee performing personal or nondelegable duties of master as vice principal generally see infra § 333 b.

Duties imposed by law

An agent is a vice principal with respect to the delegation of those duties imposed on the employer by law.—McKinnon v. Parrill, 38 N.E. 2d 1008, 111 Ind.App. 343.

79. Ohio.—Kelly Island Lime & Transport Co. v. Pachuta, 69 N.E. 988, 69 Ohio St. 462, 100 Am.S.R. 706—J. B. Foote Fdy. Co. v. Young, 29 Ohio Cir.Ct. 420.

Superior-servant rule see infra subdivision e of this section.

80. Mo.—Funk v. Fulton Iron Works Co., 277 S.W. 566, 311 Mo. 77—Freese v. Rogers-Schmitt Wire & Iron Co., 274 S.W. 778—Miller v. Missouri Pacific R. Co., 19 S.W. 58, 109 Mo. 350, 32 Am.S.R. 673.

39 C.J. p 574 note 54 [c] (1), [d] (1), [f].

Similar statements of rule

(1) "Where an employer tells an employee to work under the instructions of a coemployee, the coemployee is a vice principal of the employer."—Carlson v. P. F. Collier & Son Corporation, 67 P.2d 842, 847, 190 Wash. 301.

(2) "If the superior servant was directing and exercising authority over the inferior relative to those matters about which he was given authority to direct him, the superior servant was acting as vice principal."—Evans v. Southern Wheel Co., Mo.App., 273 S.W. 749, 751.

(3) The general rule is that a principal who intrusts an employee with authority to control other employees is responsible for the manner in which it is exercised and for the omission properly to exercise it.—Southwell v. Atlantic Coast Line R. Co., 127 S.E. 361, 189 N.C. 417.

81. Ark.—May v. Sharp, 89 S.W.2d 735, 191 Ark. 1142.

82. Ark.—Koss Const. Co. v. Vanderburg, 47 S.W.2d 41, 185 Ark. 316.

Selection of assistants

A shipping clerk who selects workmen from other departments of the establishment to accompany him in taking finished products to the railway station and assist him in loading and unloading them is not necessarily a vice principal, especially while he is returning with the men on the truck to the factory.—Carter v. Uhrich, 264 P. 31, 125 Kan. 192.

83. Minn.—Novotny v. Bouley, 27 N.W.2d 813, 223 Minn. 592—Dixon v. Union Ironworks, 97 N.W. 375, 90 Minn. 492.

Mo.—Funk v. Fulton Iron Works Co., 277 S.W. 566, 311 Mo. 77—Freese v. Rogers-Schmitt Wire & Iron Co., 274 S.W. 778—Miller v. Missouri Pacific R. Co., 19 S.W. 58, 109 Mo. 350, 32 Am.S.R. 673.

84. Or.—Johnson v. Ladd, 5 P.2d 1062, 138 Or. 371.

85. Pa.—Prevost v. Citizens' Ice & Refrigerating Co., 40 A. 88, 185 Pa. 617, 64 Am.S.R. 659.

86. Ark.—Jolly v. Smith, 65 S.W.2d 908, 188 Ark. 446.

Held vice principals

(1) Generally.

Mo.—Freese v. Rogers-Schmitt Wire & Iron Co., 274 S.W. 778—Phillips v. American Car & Foundry Co., App., 287 S.W. 810.

Pa.—Groves v. McNeil, 75 A. 600, 226 Pa. 345.

(2) Chainman giving signals to start crane.—Daggett v. American Car & Foundry Co., Mo.App., 284 S.W. 855.

(3) Employee in exclusive control and supervision of the operation of a heavy motortruck on public highways in employer's business.—Crenshaw Bros. Produce Co. v. Harper, 194 So. 353, 142 Fla. 27.

(4) Foreman assisting with work who struck gad with sledge causing slag to hit plaintiff.—House v. St. Louis Car Co., Mo.App., 270 S.W. 135.

(5) Husband who was in complete charge of operation of wife's farm.—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.

(6) Manager and treasurer of grain and milling company who directed stationary engineer to repair car mover and participated in work.—Parker v. Nelson Grain & Milling Co., 48 S.W.2d 906, 330 Mo. 95.

(7) Operator of cut-off saw, with authority to direct and control performance of work by ripsaw operator.—Thomas v. American Sash & Door Co., 14 S.W.2d 1, 321 Mo. 1024.

(8) Partnership contracting with dredge boat owner on contingent compensation basis with right to quit.—Savant v. Goetz & Lawrence, 2 La.App. 474, affirmed 107 So. 621, 160 La. 916.

(9) Shoveler in mine.—Cunningham v. Doe Run Lead Co., 285 S.W. 757, 220 Mo.App. 38.

(10) Superintendent, who represented master in directing construc-

ing to the decisions on the question, in railroading,[87] shipping,[88] or mining and excavating,[89] is wholly dependent on the facts and circumstances in the particular case.

Power to hire and discharge. The general rule is that the determination of whether a servant is a vice principal does not depend on whether the authority to hire and discharge exists;[90] thus the existence of such authority does not of itself make a servant a vice principal[91] except with respect to the discharge of the nondelegable duty of selecting competent and careful servants,[92] while, on the other hand, a servant may be a vice principal although he has no power to hire and discharge.[93] In some cases it has been held that the determination of the question depends on whether or not those who act under orders have just reason for believing that the failure or refusal to obey the superior will be followed by a discharge from the service in which they are engaged.[94]

The authority to hire and discharge is, however, frequently mentioned as a circumstance worthy of consideration in determining whether a servant because of his rank and authority to manage and control is a vice principal.[95] Further, there is some authority holding, in so far as the rule has not been modified by statute, that a superior servant is not a vice principal unless he has the authority to hire and discharge the injured servant,[96] except in so far as the liability is based on the performance of a nondelegable duty of the master,[97] although the mere fact that the right to hire and discharge is subject to the approval of another does not prevent the superior servant from being a vice principal.[98]

Necessity for actual authority. In the absence of actual authority, express or implied, a fellow servant does not merely by the assumption of authority become a vice principal.[99]

Employee temporarily vested with authority. An employee who is temporarily occupying the position of one who is a vice principal is for the time being himself a vice principal.[1] However, the master is not liable unless, at the time of the injury, the substitute was invested with the powers conferred on the vice principal whose place he has taken.[2]

Representatives of corporations. The directors,[3] general superintendent,[4] or other managing agents[5]

tion of scaffold.—Sutton v. Hancock, 141 So. 532, 105 Fla. 497.

Held not vice principals

(1) Generally.—Bremer v. Shoultes, 110 P.2d 641, 7 Wash.2d 604.

(2) Driver of mules used in operating stump-pulling machine.—Walters v. Berry Schools, 151 S.E. 544, 40 Ga.App. 751.

(3) Sawyer who, although having control of the saw carriage and directing the setting of blocks to determine the cut of the saw, worked with the crew and was not charged by the master with looking out for any of the master's absolute duties.—Holliday v. Fulton Band Mill, C.C.A.Miss., 142 F.2d 1006.

(4) Superintendent of ranch who was working with another employee injured while shaving edge of board with drawing knife.—Jones v. Baker, 35 P.2d 1103, 179 Wash. 25.

87. Ga.—Southern Ry. Co. v. Heaton, 6 S.E.2d 339, 61 Ga.App. 386.
39 C.J. p 577 note 78 [b], [c].

A station agent who has charge of the tracks in and about the station is not a vice principal, but is a fellow servant of a train employee.—Toner v. Chicago, M. & St. P. R. Co., 31 N.W. 104, 69 Wis. 188, reheard 33 N.W. 433, 69 Wis. 188—39 C.J. p 574 note 51.

88. **A foreman** who has complete charge of the loading or unloading of a ship and complete control of the men employed in the work has been regarded as a vice principal.

U.S.—Siebert v. Patapsco Ship Ceiling & Stevedore Co., D.C.Md., 253 F. 685.
Cal.—Brown v. Sennett, 9 P. 74, 68 Cal. 225, 58 Am.R. 8, criticized in Congrave v. Southern Pac. R. Co., 26 P. 175, 88 Cal. 360.

89. Wash.—Olson v. Erickson, 102 P. 400, 53 Wash. 458.
39 C.J. p 579 note 10.

A foreman in a mine has been held to be a vice principal.—Wellston Coal Co. v. Smith, 61 N.E. 143, 65 Ohio St. 70, 87 Am.S.R. 547, 55 L.R.A. 99—39 C.J. p 579 note 11.

90. Mich.—Belmer v. Boyne City Tanning Co., 125 N.W. 726, 160 Mich. 669.
39 C.J. p 588 note 90.

91. N.Y.—Buchalski v. Kramer, 277 N.Y.S. 91, 243 App.Div. 703.
39 C.J. p 588 note 91.

92. Pa.—Staebler v. Warren-Ehret Co., 72 A. 554, 223 Pa. 129, 132.
39 C.J. p 589 note 92.
Performance of nondelegable duty by coemployee generally see infra § 333 b.

93. U.S.—Russell v. Champion Fiber Co., N.C., 214 F. 963, 131 C.C.A. 259, certiorari denied 35 S.Ct. 200, 235 U.S. 700, 59 L.Ed. 432.
39 C.J. p 589 note 93.

94. N.C.—Beal v. Champion Fiber Co., 69 S.E. 834, 154 N.C. 147.
39 C.J. p 589 note 94.

95. U.S.—Moss v. Gulf Compress Co., 202 F. 657, 121 C.C.A. 67.
39 C.J. p 588 note 89.

96. Tex.—Suderman & Dolson v. Kriger, 109 S.W. 373, 376, 50 Tex. Civ.App. 29.
39 C.J. p 589 note 95.

97. Tex.—Lantry-Sharpe Contracting Co. v. McCracken, 150 S.W. 1156, 105 Tex. 407.
39 C.J. p 589 note 96.

98. Tex.—San Antonio Portland Cement Co. v. Gschwender, Civ.App., 207 S.W. 967—Sullivan-Sanford Lumber Co. v. Cooper, 126 S.W. 35, 59 Tex.Civ.App. 536, reversed on other grounds 142 S.W. 1168, 105 Tex. 21.

99. Wash.—Frengen v. Stone, etc., Engineering Corp., 119 P. 193, 66 Wash. 204.
39 C.J. p 592 note 20, p 601 note 66 [a].

1. Cal.—Ryan v. Los Angeles Ice & Cold Storage Co., 44 P. 471, 112 Cal. 244, 32 L.R.A. 524.
39 C.J. p 592 note 22.

2. Mich.—Morch v. Toledo, S. & M. R. Co., 71 N.W. 464, 113 Mich. 154.

3. N.H.—Fifield v. Northern R. Co., 42 N.H. 225.

4. Tex.—**Corpus Juris cited in** Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 400, 123 Tex. 128.
39 C.J. p 587 note 60.

5. Tex.—Modern Order of Prætorians v. Nelson, Civ.App., 162 S.W. 17.
39 C.J. p 587 note 61.

of a corporation have been regarded as vice principals.

d. General Managers or Heads of Departments

(1) In general
(2) What constitutes separate department or branch

(1) In General

A general manager of the employer's business, or a person charged with the entire management and supervision of a distinct department or branch thereof, is generally held not to be a fellow servant of employees under him.

Although there are decisions which have apparently repudiated or failed to recognize the rule,[6] there is authority for the view that an employee intrusted with the entire management and supervision of the business of the master,[7] or with the entire management and supervision of a distinct department or branch of the business,[8] is a vice principal and not a fellow servant of other employees. In order to bring a case within the foregoing rules the master must have committed the virtual and substantial control of the business to his representative,[9] and one who is subject to superior authority in carrying on the work is not a vice principal.[10] The nonresidence of the master does not of itself make a foreman a vice principal.[11]

Extent of liability generally. While in some jurisdictions the liability of the master for the negligence of a general manager or the head of a department does not depend on whether or not the negligence occurred in connection with a nondelegable duty,[12] in other jurisdictions in which an employee, to whom the master has intrusted the management of his business or a department thereof, is said to be a vice principal for whose negligence the master is liable, it appears that in most, if not all, cases in which the master has been held liable the negligence was in connection with a personal or nondelegable duty,[13] and in the final analysis it seems that the determination as to the liability of the master generally depends on whether the negligence is in connection with a personal duty of the master, the performance of which is within the scope of the authority of the negligent employee.[14]

Railroads. Certain persons in the employ of railroad companies have been regarded as vice principals, on the ground of being managers or heads of departments or branches of the business, as, for example, a superintendent,[15] an assistant superintendent,[16] a division superintendent,[17] a wreckmaster or roadmaster,[18] an assistant roadmaster,[19] and a master mechanic.[20] However, the courts have refused to recognize certain employees as heads of departments or branches of the service, although they exercised some authority over other em-

6. N.J.—Knutter v. New York & N. J. Tel. Co., 52 A. 565, 67 N.J.Law 646, 58 L.R.A. 808.
39 C.J. p 585 note 48.
Performance by employee of personal or nondelegable duties of master see infra § 333.

7. Tex.—City of Teague v. Radford, Com.App., 63 S.W.2d 376.
39 C.J. p 585 note 49, p 586 note 56.

8. Ark.—Kroger Grocery & Baking Co. v. Taylor, 157 S.W.2d 5, 203 Ark. 154.
D.C.—Southern Ry. Co. v. Taylor, 16 F.2d 517, 57 App.D.C. 21, certiorari denied Taylor v. Southern Ry. Co., 47 S.Ct. 571, 273 U.S. 767, 71 L.Ed. 882.
Ill.—Worthey v. Cleveland, C., C. & St. L. Ry. Co., 251 Ill.App. 585.
Ind.—Taylor v. Evansville & T. H. R. Co., 22 N.E. 876, 121 Ind. 124, 6 L.R.A. 584—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.
N.C.—Robinson v. J. B. Ivey & Co., 138 S.E. 173, 193 N.C. 805.
Okl.—**Corpus Juris cited in** City of Edmond v. Washam, 121 P.2d 300, 301, 190 Okl. 140.
Tex.—**Corpus Juris cited in** Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 400, 123 Tex. 128—City of Teague v. Radford, Com. App., 63 S.W.2d 376.
39 C.J. p 586 notes 50, 56.
Driver of car and occupant were not fellow servants of common employer where driver was manager of branch office of company and occupant was employee under his supervision.—General Automobile Owners' Ass'n v. State, 140 A. 48, 154 Md. 204.

9. Or.—Willis v. Oregon R. & Nav. Co., 4 P. 121, 11 Or. 257.
39 C.J. p 586 note 51.

10. U.S.—Minneapolis v. Lundin, Minn., 58 F. 525, 7 C.C.A. 344.
39 C.J. p 586 note 52.

11. Wis.—Hoth v. Peters, 13 N.W. 219, 55 Wis. 405.

12. Va.—Curtis & Shumway, Inc. v. Williams, 86 S.E. 848.
39 C.J. p 586 note 55.
Nondelegable character of duty as affecting relation of coemployees generally see infra § 333.

13. Pa.—Groves v. McNeil, 75 A. 600, 226 Pa. 345.
39 C.J. p 586 note 56, p 587 note 57.

14. N.Y.—Vogel v. American Bridge Co., 73 N.E. 1, 180 N.Y. 373, 70 L.R.A. 725.
39 C.J. p 586 note 56, p 587 note 58.
Nondelegable character of duty as affecting liability of master generally see infra § 333.

15. Tenn.—Washburn v. Nashville & C. R. Co., 3 Head 638, 75 Am.D. 784.
39 C.J. p 588 note 71.
Railroad employees as superior servants, see infra subdivision e of this section.

16. Ill.—Chicago, B. & Q. R. Co. v. McLallen, 84 Ill. 109.

17. Del.—Shuster v. Philadelphia, B. & W. R. Co., 62 A. 689, 6 Pennew. 4.
Mich.—Town v. Michigan Cent. R. Co., 47 N.W. 665, 84 Mich. 214.

18. Mo.—Tabler v. Hannibal & St. J. R. Co., 5 S.W. 810, 93 Mo. 79.
39 C.J. p 588 note 74.

19. Mich.—Palmer v. Michigan Cent. R. Co., 53 N.W. 397, 93 Mich. 363; 32 Am.S.R. 507, 17 L.R.A. 636.
39 C.J. p 588 note 75.

20. U.S.—Mealman v. Union Pac. R. Co., C.C.Colo., 37 F. 189, 2 L.R.A. 192.
Ohio.—Baltimore & O. R. Co. v. Sutherland, 12 Ohio Cir.Ct. 309, 4 Ohio Cir.Dec. 115, affirmed 44 N. E. 1144, 52 Ohio St. 676.

ployees,[21] such as a yardmaster,[22] a station agent,[23] the foreman of a crew of section or rail men,[24] a conductor,[25] and a locomotive engineer.[26]

(2) What Constitutes Separate Department or Branch

In order to render the head-of-department rule applicable, there must be separate departments and not merely separate pieces of work in the same branch of service.

In order to render the head-of-department rule applicable there must be an actual separation of departments,[27] and a mere separate piece of work in one of the branches of service is not a department.[28] The performance of a separate piece of work independent of any control by the superior agents of a corporate master may constitute a separate department or branch of the business,[29] as, for example, certain independent construction operations.[30] A local plant[31] or a separate branch or shop in a single plant[32] may, according to some decisions, constitute a separate branch or department.

e. Superior-Servant Rule

(1) In general
(2) Repudiation of rule

(1) In General

Under the superior-servant rule, a servant given the power to control other servants is not deemed their fellow servant.

The so-called superior-servant rule, under which a servant given the power to control other servants is not their fellow servant where his negligence is the cause of an injury to an inferior servant, has been followed by some authorities,[33] and liability for the negligence of a superior servant in the performance of duties which otherwise would be regarded as delegable has been held imputable to the master.[34]

A suggested basis for the superior-servant rule is that the duty of using reasonable care in giving orders to servants[35] or the duty of superintending the work of employees where such work requires superintendence[36] is one of those obligations which the master cannot delegate so as to absolve himself from liability for their nonperformance or improper performance. In other cases the duty of the inferior servant to obey his superior servant seems to be the controlling idea.[37]

Generally speaking the decision as to whether the

21. U.S.—Thom v. Pittard, Va., 62 F. 232, 10 C.C.A. 352.
39 C.J. p 588 note 77.

22. U.S.—Thomas v. Cincinnati, N. O. & T. P. R. Co., C.C.Ky., 97 F. 245.

23. Minn.—Brown v. Minneapolis & St. L. R. Co., 18 N.W. 834, 31 Minn. 553.

24. U.S.—Northern Pac. R. Co. v. Peterson, Minn., 16 S.Ct. 843, 162 U.S. 346, 40 L.Ed. 994.
39 C.J. p 588 note 80.

25. U.S.—New England R. Co. v. Conroy, R. I., 20 S.Ct. 85, 175 U.S. 323, 44 L.Ed. 181.
39 C.J. p 588 note 81.

26. U.S.—Baltimore & O. R. Co. v. Baugh, Ohio, 13 S.Ct. 914, 149 U.S. 368, 37 L.Ed. 772.
39 C.J. p 588 note 82.

27. U.S.—Baltimore & O. R. Co. v. Baugh, Ohio, 13 S.Ct. 914, 149 U. S. 368, 37 L.Ed. 772.
39 C.J. p 587 note 63.
Performance by employee of personal or nondelegable duties of master see infra § 733.

28. U.S.—Northern Pac. R. Co. v. Peterson, Minn., 16 S.Ct. 843, 162 U.S. 346, 40 L.Ed. 994.
39 C.J. p 587 note 64.

29. U.S.—Moss v. Gulf Compress Co., Miss., 202 F. 657, 121 C.C.A. 67.
39 C.J. p 587 note 65.

30. U.S.—Cogdill v. Whiting Mfg. Co., N.C., 212 F. 658, 129 C.C.A. 194.
39 C.J. p 588 note 66.

31. U.S.—International Agricultural Corp. v. Slappey, Ga., 261 F. 279.

32. U.S.—Klauder-Weldon Dyeing Mach. Co. v. Gagnon, N.Y., 183 F. 962, 106 C.C.A. 302.

33. U.S.—Holliday v. Fulton Band Mill, C.C.A.Miss., 142 F.2d 1006.
Ky.—McDonald v. Louisville & N. R. Co., 24 S.W.2d 585, 232 Ky. 734.
Mo.—Thomas v. American Sash & Door Co., 14 S.W.2d 1, 321 Mo. 1024—Killion v. King Lumber Co., App., 16 S.W.2d 730—Dillard v. Justus, 3 S.W.2d 392, 222 Mo.App. 362—Guldner v. International Shoe Co., App., 293 S.W. 428—Phillips v. American Car & Foundry Co., App., 287 S.W. 810—Daggett v. American Car & Foundry Co., App., 284 S.W. 855.
39 C.J. p 545 note 46, p 574 notes 53, 54.
Statutes affecting superior-servant rule see infra § 340.

Head of wrecking company directing work was not fellow servant of employee engaged in wrecking building.—Killion v. King Lumber Co., Mo.App., 16 S.W.2d 730.

Employee in charge of foreign corporation's local office during manager's absence was held not fellow servant of employee assaulted by him; hence corporation was liable therefor.—Gulf Refining Co. v. Nations, 145 So. 327, 167 Miss. 315.

Tunneling operation
Where employee of construction company which was engaged in construction of pipe line tunnel under tracks of railroad was put in charge of crew engaged in this operation, with complete supervision of digging tunnel and full control of the men under him, including the right to hire and fire men for such purpose, and employee was experienced in such work, employee was held a superior servant or vice principal.—Atchison, T. & S. F. Ry. Co. v. Kennard, Okl., 181 P.2d 234.

Placing knife on table
Foreman or vice principal employed by garage was held not a fellow servant in placing drawing knife on table to assist employee in welding operation so as to absolve master from liability for injuries to employee from knife.—Barron Motor Co. v. Bass, 150 So. 202, 167 Miss. 786.

34. Tex.—Sweeney v. Gulf, C. & S. F. R. Co., 19 S.W. 555, 84 Tex. 433, 31 Am.S.R. 71.
39 C.J. p 577 note 71.

35. Ohio.—Cleveland, C. & C. R. Co. v. Keary, 3 Ohio St. 201.
Performance of nondelegable duty by servant generally see infra § 333.

36. Wash.—Hall v. Northwest Lumber Co., 112 P. 369, 61 Wash. 351.
39 C.J. p 576 note 61.
Duty of superintendence see supra § 320.

37. Ill.—Chicago & A. R. Co. v. May, 108 Ill. 288.
39 C.J. p 576 note 63.

rule is to be applied depends on whether or not the so-called superior servant has the authority to superintend or control the injured servant,[38] and not merely on the grade or rank of the so-called superior servant;[39] and in the absence of such authority the master is not liable on the theory that the negligent servant is a superior servant.[40] The fact that the superior servant is subject to the orders of another does not render the former a fellow servant of those subject to his authority.[41]

Source of and manner of conferring authority. While the authority of the superior servant must come either from the master or from one standing in the place of the master,[42] a servant who has been duly authorized by an admitted agent or vice principal of the master may become a superior servant for whose negligence the master is liable.[43] In some jurisdictions at least there is a sufficient showing of authority by proof either that the master or his representative by direct act placed the superior servant in charge, or that the inferior servant was directed to assist, or to take instructions from, the superior servant.[44]

Railroads. In jurisdictions in which the superior-servant doctrine is recognized, under the general rule and subject to the qualifications of such rule, it has been held that certain superior servants in the employ of railroad companies are not fellow servants of other employees subject to their authority.[45] Thus as a general rule a foreman,[46] such as the foreman of a section or rail crew,[47] the foreman of a switching crew,[48] or a yard foreman,[49] is not in such jurisdictions regarded as a fellow servant of other employees working under him. Moreover, it has been held that the conductor of a train is not a fellow servant of other employees on the same train,[50] such as an engineer,[51] a fireman,[52] or a brakeman;[53] and there is authority for the view that a conductor is not a fellow servant of a car repair man whom the conductor has directed to repair a brake on the train[54] or of a section man who is temporarily working under the conductor.[55] The conductor in complete control of a work train is not regarded as the fellow servant of laborers on such train.[56]

The view has been taken that the conductor on a train is not the fellow servant of an employee on another train who is subordinate in rank and authority to such conductor.[57] There is authority for the view that a locomotive engineer is not a fellow servant of subordinates on the same train,[58] such as a fireman,[59] a brakeman,[60] or a porter;[61] and a like rule has been laid down in respect of the rela-

38. Miss.—**Corpus Juris quoted in** Gwin v. Carter, 129 So. 597, 598, 158 Miss. 196.
Ky.—McDonald v. Louisville & N. R. Co., 24 S.W.2d 585, 232 Ky. 734.
39 C.J. p 576 note 56.

39. Miss.—**Corpus Juris quoted in** Gwin v. Carter, 129 So. 597, 598, 158 Miss. 196.
39 C.J. p 576 note 57.

40. Ky.—Dana v. Blackburn, 90 S. W. 237, 28 Ky.L. 695.
39 C.J. p 576 note 58.

41. Ky.—Illinois Cent. R. Co. v. Elliott, 82 S.W. 374, 26 Ky.L. 669.
Wash.—Durante v. Great Northern R. Co., 116 P. 870, 64 Wash. 395.

42. Ohio.—Toomey v. Avery Stamping Co., 20 Ohio Cir.Ct. 183, 11 Ohio Cir.Dec. 216.
39 C.J. p 577 note 64.
Assumption of foremanship
Fact that alleged superior foreman assumed such position or declared himself as occupying it is not sufficient to constitute him superior foreman so as to make master liable for foreman's negligence; but where alleged superior foreman has acted as such over considerable period of time with principal's knowledge and consent principal is as much bound as though authority were expressly conferred.—Russell v. Williams, 151 So. 372, 168 Miss. 181.

43. La.—Miller v. Tall Timber Co., 78 So. 555, 143 La. 269.
39 C.J. p 577 note 66.

44. Wash.—Berger v. Metropolitan Press Printing Co., 111 P. 872, 61 Wash. 35.
39 C.J. p 577 note 67.

45. La.—Thode v. Louisiana R. & Nav. Co., 76 So. 587, 142 La. 138.
39 C.J. p 577 note 78.

46. Ky.—McDonald v. Louisville & N. R. Co., 24 S.W.2d 585, 232 Ky. 734.
Foreman in charge of quarrying and transporting rock
Wash.—McDonough v. Great Northern R. Co., 46 P. 334, 15 Wash. 244.

47. Ky.—Gordon v. Chesapeake & O. R. Co., 179 S.W. 210, 166 Ky. 339.
39 C.J. p 578 note 79.

48. Utah.—Armstrong v. Oregon Shortline & U. N. R. Co., 32 P. 693, 8 Utah 420.
39 C.J. p 578 note 80.

49. Ky.—Howard v. Chesapeake & O. R. Co., 90 S.W. 950, 28 Ky.L. 891.

50. Utah.—Stephani v. Southern Pac. Co., 57 P. 34, 19 Utah 196.
39 C.J. p 578 note 82.

51. La.—Van Amburg v. Vicksburg, S. & P. R. Co., 37 La.Ann. 650, 55 Am.R. 517.
39 C.J. p 578 note 83.

52. Ky.—Chesapeake & O. R. Co. v. Shamblen, 179 S.W. 837, 166 Ky. 789.
39 C.J. p 578 note 84.

53. Utah.—Dahlquist v. Denver & R. G. R. Co., 174 P. 833, 52 Utah 438.
39 C.J. p 578 note 85.

54. Ky.—Ritt v. Louisville & N. R. Co., 4 S.W. 796, 9 Ky.L. 307.

55. U.S.—Slavens v. Northern Pac. R. Co., Wash., 97 F. 255, 38 C.C.A. 151.

56. Neb.—Burlington & M. R. R. Co. v. Crockett, 26 N.W. 921, 19 Neb. 138.
39 C.J. p 578 note 86.

57. Ky.—Kentucky Cent. R. Co. v. Ackley, 8 S.W. 691, 87 Ky. 278, 10 Ky.L. 170, 12 Am.S.R. 480—Louisville, C. & L. R. Co. v. Cavens, 9 Bush 559.

58. Ky.—Louisville & N. R. Co. v. Collins, 2 Duv. 114, 87 Am.D. 486.

59. Ky.—Chesapeake & O. R. Co. v. Shamblen, 179 S.W. 837, 166 Ky. 789.
39 C.J. p 578 note 88.

60. Wash.—Morrison v. Northern Pac. R. Co., 74 P. 1064, 34 Wash. 70.
39 C.J. p 578 note 89.

61. Ky.—Cincinnati, N. O. & T. P. R. Co. v. Palmer, 33 S.W. 199, 98 Ky. 382, 17 Ky.L. 998.

tion between an engineer on a yard engine and a switchman.[62]

Even in some jurisdictions in which the superior-servant doctrine is recognized, however, to some extent at least, the conductor of a train has been regarded as a fellow servant of the brakeman[63] and of the fireman[64] on such conductor's train; and the engineer has been regarded as a fellow servant of the fireman[65] and of the brakeman,[66] at least where by the rules of the company the train is under the control of the conductor.[67] The conductor[68] and the gripman[69] of a grip car have been regarded as fellow servants of the conductor of a trailer attached to such grip car. A section foreman[70] and a roadmaster[71] have been regarded as fellow servants of employees subject to their authority.

Shipping. Under the general rule it has been held that the master[72] or mate[73] and an inferior member of the crew are not fellow servants. A hatch tender having the duty to give signals to start and stop a winch used in loading materials on the ship, and also to see that the materials loaded are properly handled, has been held not a fellow servant with the operator of the winch.[74]

(2) Repudiation of Rule

In some jurisdictions the superior-servant rule has been repudiated and the master held entitled to rely on the fellow-servant rule notwithstanding the employee who caused the injury was of a higher grade or had control over the injured servant.

In many jurisdictions the superior-servant rule is either expressly or impliedly repudiated,[75] and it is held that the fact that the person whose negligence caused the injury was a servant of a higher grade than the injured servant, or that the latter was subject to the direction or control of the former, and was engaged at the time in executing the orders of the former, does not necessarily prevent the application of the fellow-servant rule to free the master from liability.[76] In these jurisdictions a mere foreman or superintendent[77] who is subordinate to other employees[78] is generally considered the fellow servant of those working under him.

Railroads. The general rule repudiating the superior-servant doctrine has frequently been applied with respect to servants of railroad companies,[79] as, for example, the foreman of a crew of section or track men,[80] a wreckmaster or roadmaster,[81]

62. Ky.—Howard v. Chesapeake & O. R. Co., 90 S.W. 950, 28 Ky.L. 891—Louisville & N. R. Co. v. Sheets, 13 S.W. 248, 11 Ky.L. 781.

63. Tex.—Campbell v. Cook, 26 S.W. 486, 86 Tex. 630, 40 Am.S.R. 878.
39 C.J. p 578 note 93.

64. Ill.—Illinois Cent. R. Co. v. Meyer, 65 Ill.App. 531, affirmed 52 N.E. 848, 177 Ill. 591.
39 C.J. p 578 note 94.

65. N.C.—Hobbs v. Atlantic & N. C. R. Co., 12 S.E. 124, 107 N.C. 1, 9 L.R.A. 838.
Tex.—Gulf, C. & S. F. R. Co. v. Blohn, 11 S.W. 867, 73 Tex. 637, 4 L.R.A. 764.

66. N.C.—Hagins v. Cape Fear & Y. V. R. Co., 11 S.E. 590, 106 N.C. 537.
39 C.J. p 578 note 96.

67. Ohio.—Pittsburg, C. & St. L. R. Co. v. Ranney, 37 Ohio St. 665.
39 C.J. p 579 note 97.

68. Ill.—North Chicago St. R. Co. v. Dudgeon, 69 Ill.App. 57.

69. Ill.—North Chicago St. R. Co. v. Dudgeon, supra.

70. Ill.—Chicago & A. R. Co. v. Goltz, 71 Ill.App. 414.

71. Tex.—Galveston, H. & S. A. R. Co. v. Smith, 13 S.W. 562, 76 Tex. 611, 18 Am.S.R. 78.

72. Wash.—Woods v. Globe Nav. Co., 82 P. 401, 40 Wash. 376—Keating v. Pacific Steam-Whaling Co., 58 P. 224, 21 Wash. 415.

73. Wash.—Nelson v. Western Steam Nav. Co., 100 P. 325, 52 Wash. 177.
39 C.J. p 579 note 7.

74. Wash.—McPherson v. Twin Harbor Stevedoring & Tug Co., 245 P. 747, 139 Wash. 61.

75. Kan.—**Corpus Juris quoted in** Nelson v. City of Salina, 256 P. 123, 124, 123 Kan. 522.
39 C.J. p 579 note 12.
Statutes affecting superior-servant rule see infra § 340.

76. Ga.—Hamby v. Union Paper Mills Co., 35 S.E. 297, 110 Ga. 1—Blanchard v. Gallahar, 33 S.E.2d 379, 72 Ga.App. 132—Strickland v. Foughner, 12 S.E.2d 371, 63 Ga.App. 805.
39 C.J. p 545 note 48, p 579 note 12.

77. Ark.—Williamson & Williams v. Cates, 37 S.W.2d 88, 183 Ark. 579—Orr v. Johnson, 9 S.W.2d 563, 177 Ark. 1165.
D.C.—Southern Ry. Co. v. Taylor, 16 F.2d 517, 57 App.D.C. 21, certiorari denied Taylor v. Southern Ry. Co., 47 S.Ct. 571, 273 U.S. 767, 71 L. Ed. 882.
Ga.—Clance v. Melton, 9 S.E.2d 200, 62 Ga.App. 628.
Mass.—Greem v. Cohen, 11 N.E.2d 492, 298 Mass. 439.
39 C.J. p 581 note 13.
"The foreman, in the management of the work intrusted to him by his employer, is a fellow servant of the members of the gang under his direction and control in the performance of the work."—Encarnacion v. Jamison, 167 N.E. 422, 251 N.Y. 218, affirmed 50 S.Ct. 440, 281 U.S. 635, 74 L.Ed. 1082.

Failure to wait until danger past

In absence of direct evidence touching necessity of defendant's giving verbal order to employees to stand clear before applying power to cable to move car, and workman's compliance therewith, failure of foreman to wait until men were out of danger before applying power to cable would be negligence of fellow servant.—Hook v. Consolidation Coal Co., 129 A. 490, 82 N.H. 75.

78. U.S.—City of Minneapolis v. Lundin, Minn., 58 F. 525, 7 C.C.A. 344.
39 C.J. p 582 note 14.

79. Miss.—Givens v. Southern R. Co., 49 So. 180, 94 Miss. 830, 22 L.R.A.,N.S., 971.
39 C.J. p 573 note 48, p 582 note 20.

80. U.S.—Texas & P. R. Co. v. Bourman, La., 29 S.Ct. 319, 212 U.S. 536, 53 L.Ed. 641.
39 C.J. p 583 note 21.

Failure to see danger signal

Foreman who negligently failed to see danger signal at closed switch in time to avoid injury to section hands operating hand car was held fellow servant, for whose negligence employer was not responsible.—Towns v. Monongahela Ry. Co., 153 S.E. 919, 109 W.Va. 204.

81. Minn.—O'Niel v. Great Northern

the foreman of a repair train,[82] the foreman of car repairers,[83] the foreman in repair shops,[84] and a yardmaster or foreman.[85] Likewise a conductor has been regarded as a fellow servant of those on the train subject to his control,[86] as, for example, a fireman[87] or a brakeman.[88] Moreover, an engineer and a fireman[89] and an engineer and a brakeman[90] on the same train are regarded as fellow servants. A laborer on a construction or work train is generally held a fellow servant of a conductor[91] and an engineer thereon.[92]

Even in some jurisdictions in which the superior-servant rule has been rejected, however, there is authority for the view that the conductor of a train is not the fellow servant of employees under his direction and control.[93] Moreover, it has been held that if a conductor takes charge of the unloading of a car and his action is reasonably necessary for the orderly and timely running of his train, he is the representative of the railroad company as to another employee who assists in such unloading.[94]

Shipping. The relation of fellow servant has without adherence to the superior-servant doctrine been regarded as existing between the master or captain of a vessel and the mate,[95] between the master and other members of the crew,[96] and between the master and a subordinate member of the crew,[97] at least when the master of the vessel is on board;[98] and a like rule has been applied with respect to the relation between the engineer and an oiler.[99] However, even in jurisdictions in which the superior-servant rule has been rejected, the view has been taken that the master or captain of the vessel is not a fellow servant of other members of the crew[1] or at least is not a fellow servant of a common seaman.[2]

Generally a foreman of longshoremen and those working under him are regarded as fellow servants.[3]

Mines, quarries, and excavations. Under general rules particular employees engaged in mining or quarrying[4] or excavating[5] operations have been regarded as fellow servants of other employees subject to their authority.

f. Dual-Capacity Doctrine

Under the dual-capacity doctrine, where an employee is required to supervise the work and also to engage in common service with other employees, the master is liable for acts of the employee performed in his supervisory capacity but may rely on the fellow-servant rule to avoid liability for injuries resulting from acts attributable to the common service.

Some authorities, in determining the availability of the fellow-servant rule as a defense to the master, have applied the dual-capacity doctrine, under which the master is liable for what may be called the official acts of the superior employee resulting in the injury for which suit is brought, but not for his acts, such as assisting in manual labor, which are not within his duties to control, supervise, or manage, but which are the duty of inferior servants under his control.[6] In other words, where

R. Co., 82 N.W. 1086, 80 Minn. 27, 51 L.R.A. 532.
39 C.J. p 583 note 22.

82. Pa.—Peterson v. Philadelphia, B. & W. R. Co., 66 A. 660, 217 Pa. 401.

83. N.Y.—Keenan v. New York, L. E. & W. R. Co., 39 N.E. 711, 145 N.Y. 190, 45 Am.S.R. 604.
39 C.J. p 583 note 24.

84. N.H.—Hilton v. Fitchburg R. Co., 59 A. 625, 73 N.H. 116, 68 L.R.A. 428.

85. U.S.—Cincinnati, N. O. & T. P. R. Co. v. Gray, Ky., 101 F. 623, 41 C.C.A. 535, 50 L.R.A. 47.
39 C.J. p 583 note 26.

86. U.S.—New England R. Co. v. Conroy, R.I., 20 S.Ct. 85, 175 U.S. 323, 44 L.Ed. 181.
39 C.J. p 583 note 27.

87. N.Y.—Hayes v. New York, N. H. & H. R. Co., 105 N.Y.S. 592, 121 App.Div. 198.
39 C.J. p 583 note 28.

88. U.S.—Delaware, L. & W. R. Co. v. Royce, N.Y., 176 F. 331, 99 C.C.A. 256.
39 C.J. p 583 note 29.

89. U.S.—Baltimore & O. R. Co. v. Baugh, Ohio, 13 S.Ct. 914, 149 U.S. 368, 37 L.Ed. 772.
39 C.J. p 583 note 32.

90. Mich.—Greenwald v. Marquette, H. & O. R. Co., 13 N.W. 513, 49 Mich. 197.
39 C.J. p 583 note 33.

91. Cal.—Fagundes v. Central Pac. R. Co., 21 P. 437, 79 Cal. 97, 3 L. R.A. 824.
39 C.J. p 574 note 50.

92. Mo.—Higgins v. Missouri Pac. R. Co., 16 S.W. 409, 104 Mo. 413.
39 C.J. p 574 note 50.

93. Ga.—Spencer v. Brooks, 25 S.E. 480, 97 Ga. 681.
39 C.J. p 584 note 34.

94. Minn.—Fleck v. Chicago Great Western R. Co., 133 N.W. 66, 116 Minn. 47.

95. Wis.—Matthews v. Case, 21 N. W. 513, 61 Wis. 496, 50 Am.R. 151.

96. N.Y.—Gabrielson v. Waydell, 31 N.E. 969, 135 N.Y. 1, 31 Am.S.R. 793, 17 L.R.A. 228.
39 C.J. p 584 note 38.

97. U.S.—Smith v. Lehigh Valley R. Co., D.C.N.J., 141 F. 192.
39 C.J. p 584 note 39.

98. U.S.—The Egyptian Monarch, D.C.N.J., 36 F. 773.

99. Pa.—Hollis v. Widener, 77 A. 819, 228 Pa. 466, 139 Am.S.R. 1010, 21 Ann.Cas. 108.
39 C.J. p 584 note 41.

1. U.S.—Fallon v. Cornell Steamboat Co., C.C.N.Y., 162 F. 329.
39 C.J. p 588 note 85.

2. Wis.—Thompson v. Hermann, 3 N.W. 579, 47 Wis. 602, 32 Am.R. 784.

3. U.S.—The Louisiana, La., 74 F. 748, 21 C.C.A. 60.
39 C.J. p 584 note 43.

4. U.S.—United Zinc Companies v. Wright, Mo., 156 F. 571, 84 C.C.A. 337.
39 C.J. p 584 note 46.

5. Wis.—Gereg v. Milwaukee Gas Light Co., 107 N.W. 289, 128 Wis. 35, 7 L.R.A.,N.S., 367.
39 C.J. p 584 note 47.

6. Ind.—McKinnon v. Parrill, 38 N. E.2d 1008, 111 Ind.App. 343.
Iowa.—Rehard v. Miles, 290 N.W. 702, 227 Iowa 1290.
Minn.—Novotny v. Bouley, 27 N.W. 2d 813, 223 Minn. 592—Dixon v.

an employee is required to engage in a common service with his coemployees, and also to superintend the work in some measure, the master's liability for his negligent act depends on whether such act was attributable to his employment in the common service or whether it was one of superintendence.[7] Thus it is the act from which the injury results, performed by the person occupying this dual capacity, and not the rank, which is the true test of the master's liability thereunder.[8] While the dual-capacity doctrine applies where the master, by the terms of the employment, confers on the servant the duties of a vice principal and of a fellow servant,[9] no question as to dual capacity can arise where the employee's sole duties are to superintend, since in such case whatever he does within the scope of his employment he necessarily does as superintendent.[10]

Under the dual-capacity doctrine the mere fact that an employee sometimes or even generally labors with other employees subject to his authority does not relieve the master from liability;[11] in order to relieve the master from liability for the negligent act of the servant it must appear that the act was committed by the servant in his capacity as a fellow servant and not in his capacity as a vice principal;[12] and if the order given,[13] or the negligent act or omission,[14] which causes the injury is the exercise of the authority over others vested in the negligent employee his negligence is imputable to the master. On the other hand, the fact that one employee has authority to direct and control others is not of itself sufficient to render the master liable for the negligence of the employee having such authority;[15] and if the negligence of such employee consists of some act or omission which relates to his duty as a common laborer or servant with those under his control the master is not liable.[16] The relation of foreman or superior employee ends and that of fellow servant begins when,

Union Ironworks, 97 N.W. 375, 90 Minn. 492.

Miss.—Harper v. Public Service Corporation of Mississippi, 154 So. 266, 170 Miss. 39—Barron Motor Co. v. Bass, 150 So. 202, 167 Miss. 786.

Mo.—Parker v. Nelson Grain & Milling Co., 48 S.W.2d 906, 330 Mo. 95—Bennett v. Hood, App., 296 S.W. 1028—Burge v. American Car & Foundry Co., App., 274 S.W. 842.

39 C.J. p 590 note 3.

Dual-capacity doctrine where question as to performance of nondelegable duty involved see infra § 333 b (1).

"It is no longer open to question but that the 'dual capacity' doctrine is firmly established in our law."—Barnes v. Commercial Auto Body Co., Mo.App., 13 S.W.2d 553, 554.

Care as to mentally deficient employee

Where defendant's foreman took plaintiff, who was mentally deficient, with him to help do work at which plaintiff was injured, foreman was at same time both agent and servant of defendant in relation with plaintiff, as he stood in defendant's place in discharge of latter's duty to use due care in deciding what work plaintiff might do, considering plaintiff's mental deficiency.—Dziedzie v. Newmarket Mfg. Co., 129 A. 271, 81 N.H. 516.

7. Mo.—Funk v. Fulton Iron Works Co., 277 S.W. 566, 311 Mo. 77.

Foreman's decision as act of service

Leaving it to a foreman to decide what work plaintiff might and might not safely do and how far he might need special warning and instruction for work assigned to him did not make the foreman's decision an act of service.—Dziedzie v. Newmarket Mfg. Co., 129 A. 271, 81 N.H. 516.

8. Mo.—Barnes v. Commercial Auto Body Co., App., 13 S.W.2d 553—Lewis v. American Car & Foundry Co., App., 3 S.W.2d 282.

9. Mo.—Acebedo v. American Car & Foundry Co., App., 291 S.W. 505.

10. Mo.—Funk v. Fulton Iron Works Co., 277 S.W. 566, 311 Mo. 77.

Acts incidental to duty to direct work

Where superintendent, whose sole duty was to direct other workmen, seized metal ram and struck part of machinery to force it into position, his action was within scope of employment as master's representative, and merely incidental to duty of directing work, rendering the master liable for an injury to a servant caused thereby, if the act was negligent.—Funk v. Fulton Iron Works Co., supra.

11. Ill.—Marquette Cement Mfg. Co. v. Williams, 82 N.E. 424, 230 Ill. 26.

39 C.J. p 591 note 6.

12. Mo.—Acebedo v. American Car & Foundry Co., App., 291 S.W. 505.

13. Ind.—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.

39 C.J. p 591 note 7.

14. Mo.—Bennett v. Hood, App., 296 S.W. 1028—Acebedo v. American Car & Foundry Co., App., 291 S.W. 505.

39 C.J. p 591 note 8.

15. Ind.—Taylor v. Evansville & T. H. R. Co., 22 N.E. 876, 121 Ind. 124, 16 Am.S.R. 372, 6 L.R.A. 584—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.

Iowa.—Rehard v. Miles, 290 N.W. 702, 227 Iowa 1290—Newbury v. Getchell & Martin Lumber & Mfg. Co., 69 N.W. 743, 100 Iowa 441.

Miss.—Barron Motor Co. v. Bass, 150 So. 202, 167 Miss. 786.

39 C.J. p 591 note 4.

16. Ga.—Haynie v. Foremost Dairies, 187 S.E. 907, 54 Ga.App. 369.

Ind.—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.

Iowa.—Rehard v. Miles, 290 N.W. 702, 227 Iowa 1290—Newbury v. Getchell & Martin Lumber & Mfg. Co., 69 N.W. 743, 100 Iowa 441.

Miss.—Buckley v. United Gas Public Service Co., 168 So. 462, 176 Miss. 282—Harper v. Public Service Corporation of Mississippi, 154 So. 266, 170 Miss. 39.

Mo.—Lewis v. American Car & Foundry Co., App., 3 S.W.2d 282.

39 C.J. p 591 note 5.

"One under whom other workmen are employed is merely a fellow servant with such workmen when he is engaged solely in accomplishing with them the common object of their employment."—May v. Sharp, 89 S.W.2d 735, 737, 191 Ark. 1142.

Operation of car

Superintendent who operated car in course of employment was held a fellow employee of deceased employee, riding with superintendent, this not being supervisory work.—Jenkins v. Mann, 127 So. 230, 220 Ala. 661.

Handling of merchandise in warehouse

A foreman directing several employees in the handling of merchandise in a warehouse, in working with the other employees in the performance of their common duties, is,

and not until, the superior employee actually and actively engages in the particular manual work which gives existence to the changed relation.[17] In determining in which capacity an employee was acting under given circumstances each case must be decided on its own facts.[18]

In some jurisdictions the dual-capacity doctrine is either expressly repudiated or not fully recognized and the master is held liable without regard to the nature or the quality of the negligent act of the vice principal.[19]

§ 333. —— Effect of Character of Act or Omission

a. In general
b. Delegable or nondelegable duties generally
c. Safe place to work
d. Tools and appliances
e. Maintenance, inspection, and repair
f. Supervision and direction
g. Instructions and warnings
h. Rules
i. Orders
j. Signals
k. Selection, retention, and number of coemployees

a. In General

The general rule is sometimes laid down that it is the character of the act or service of the offending servant, and not his grade, rank, or title, which determines whether he is a fellow servant of other employees injured through his negligence.

In many jurisdictions in determining whether the master may escape liability on the ground that the employees concerned were fellow servants it is announced as the general rule that the character of the act or service performed by the negligent servant governs, and not the relation between servants;[20] or, as otherwise stated, the character of the act or service governs and not the grade, rank, or title of the negligent servant,[21] or even, as is said in some cases, the authority with which such servant is invested.[22]

Necessity for, and source of, authority. Generally it must appear that the negligent servant has duly been authorized, directly or by implication, to act in respect of the matter involved,[23] although there is authority for the view that the master may be liable if the negligence is in respect of a matter within the apparent scope of the authority of the negligent servant.[24] It may become important to consider the rank of the alleged vice principal in order to determine what duties are intrusted to him,[25] and in this connection it has been said that the extent of the authority of the negligent servant is always a material factor in determining whether he was empowered to act in those matters for the negligent performance or nonperformance of which the master is liable.[26] However, the mere fact that an employee is a foreman does not show that he is a representative of the master as to the latter's personal or nondelegable duties to his servants.[27] Where an employee on whom is imposed

with respect to such employees, a fellow workman.—Barnaby v. Sears, Roebuck & Co., 295 P. 715, 132 Kan. 447.

17. Miss.—Barron Motor Co. v. Bass, 150 So. 202, 167 Miss. 786.

18. Ill.—William Graver Tank Works v. O'Donnell, 60 N.E. 831, 191 Ill. 236.
39 C.J. p 591 note 9.

19. Tex.—Texas & P. R. Co. v. Reed, 31 S.W. 1058, 88 Tex. 439.
39 C.J. p 591 note 10.

20. S.C.—Price v. American Agr. Chemical Co., 176 S.E. 352, 173 S.C. 518.
39 C.J. p 593 note 26.

21. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650—Sutton v. Hancock, 141 So. 532, 105 Fla. 497.
Ga.—Haynie v. Foremost Dairies, 187 S.E. 907, 54 Ga.App. 369.
Ind.—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.
Md.—F. Jarka Co. v. Gancl, 131 A. 754, 149 Md. 425.
Minn.—Novotny v. Bouley, 27 N.W.2d 813, 223 Minn. 592—Dixon v. Union Ironworks, 97 N.W. 375, 90 Minn. 492.
Mo.—**Corpus Juris cited in** Kemmler v. City of Richmond Heights, 114 S.W.2d 994, 997.
N.H.—Hook v. Consolidation Coal Co., 129 A. 490, 82 N.H. 75—Tilley v. Rockingham County Light & Power Co., 67 A. 946, 74 N.H. 316.
N.Y.—Lodico v. Brooks, 2 N.Y.S.2d 788, 254 App.Div. 572.
R.I.—Boettger v. Mauran, 12 A.2d 285, 64 R.I. 340.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213—Price v. American Agr. Chemical Co., 176 S.E. 352, 173 S.C. 518.
Wash.—Jones v. Baker, 85 P.2d 1103, 179 Wash. 25.
W.Va.—Towns v. Monongahela Ry. Co., 153 S.E. 919, 109 W.Va. 204—Jackson v. Norfolk & W. R. Co., 27 S.E. 278, 43 W.Va. 380, 31 S.E. 258, 46 L.R.A. 337.
39 C.J. p 593 note 27.

Necessity of oversight by independent agency
If the character of the work is such that general oversight by an independent agency can be dispensed with, without depriving the injured servant of a substantial right, then the fellow-servant relation will exist.—Jones v. Baker, 35 P.2d 1103, 179 Wash. 25.

22. Minn.—Pasco v. Minneapolis Steel & Machinery Co., 117 N.W. 479, 105 Minn. 132, 18 L.R.A.,N.S., 153.
39 C.J. p 594 note 28.

23. Mo.—**Corpus Juris cited in** Guthrie v. Gillespie, 6 S.W.2d 886, 891, 319 Mo. 1137.
39 C.J. p 601 note 66.

24. Fla.—Florala Saw Mill Co. v. Smith, 46 So. 332, 55 Fla. 447—Camp v. Hall, 22 So. 792, 39 Fla. 535.

25. U.S.—James Stewart & Co. v. Newby, Va., 266 F. 287.

26. Iowa.—Beresford v. American Coal Co., 98 N.W. 902, 124 Iowa 34, 70 L.R.A. 256.
39 C.J. p 594 note 29.

27. Ind.—Southern Indiana R. Co. v.

the performance of a personal or nondelegable duty of the master has authority to authorize another servant to perform such duty,[28] the master is liable for negligence of the servant so authorized in connection with such duty.[29]

b. Delegable or Nondelegable Duties Generally

(1) In general

(2) Distinctions between delegable and nondelegable duties

(1) In General

The master cannot escape liability under the fellow-servant rule where the negligent act of an employee constitutes a breach of a personal or nondelegable duty of the master, such as caring for a dangerous agency or providing reasonably safe methods of work.

Personal or absolute duties of a master cannot be delegated by him to a servant so as to relieve himself from liability on the ground that the negligence with respect thereto was that of a fellow servant.[30] A fortiori the master cannot escape liability where the duty is expressly imposed on him by the contract with the injured servant,[31] where the duty is imposed on him by statute,[32] or where he has assumed the duty.[33] Such duties are usually termed "nondelegable duties," and the servant on whom they are imposed is, in the exercise of such duties, a representative of the master or a vice principal,[34] and the grade, rank, or title of such servant is immaterial;[35] moreover, the liability of the master is not affected by the rank of the injured servant.[36] The rule that the master is liable although the default or neglect as to a nondelegable duty is on the part of an employee intrusted with its performance applies in the case of individuals[37] and of corporations.[38] If the specific act complained of is one which can be properly regarded as within the personal duty of the master, he is liable without regard to whether it is an act of negligent performance or one of omission.[39]

On the other hand, the general rule is that a servant is not a vice principal where he is supervising[40] or carrying out[41] the merely executive details of the work, or, as sometimes stated specifically or substantially, where the negligent servant is not performing a duty which the law imposes on the master,[42] or a duty which the alleged vice principal

Martin, 66 N.E. 886, 160 Ind. 280—New Pittsburgh Coal & Coke Co. v. Peterson, 35 N.E. 7, 136 Ind. 398, 43 Am.S.R. 327.

28. Mich.—McDonnell v. Central Drug Co., 136 N.W. 383, 170 Mich. 291.

29. Or.—Hough v. Grants Pass Power Co., 69 P. 655, 41 Or. 531.
39 C.J. p 601 note 71.

30. U.S.—Holliday v. Fulton Band Mill, C.C.A.Miss., 142 F.2d 1006—Carey Reed Co. v. McDavid, C.C.A. Miss., 120 F.2d 843.
Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650—Sutton v. Hancock, 141 So. 542, 105 Fla. 497.
Ga.—Roberts v. Ethridge, 36 S.E.2d 883, 73 Ga.App. 400.
Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.
Miss.—Gow Co. v. Hunter, 168 So. 264, 175 Miss. 896.
Mo.—Johnson v. Corn Products Refining Co., 6 S.W.2d 568, 319 Mo. 958.
N.J.—Clayton v. Ainsworth, 4 A.2d 274, 122 N.J.Law 160—Laragay v. East Jersey Pipe Co., 72 A. 57, 77 N.J.Law 516.
S.C.—**Corpus Juris cited in** Nuckolls v. Great Atlantic & Pacific Tea Co., 5 S.E.2d 862, 864, 192 S.C. 156—**Corpus Juris quoted in** Leslie v. Southern Paving Const. Co., 169 S.E. 139, 141, 169 S.C. 414.
39 C.J. p 594 note 33.

Safe transportation of employee
The employer is liable for injuries to an employee resulting from breach by a coemployee of a nondelegable duty of the employer to exercise due care to secure safe transportation of the employee.—Headline v. Great Northern R. Co., 128 N.W. 1115, 113 Minn. 74.

31. Minn.—Headline v. Great Northern R. Co., supra.
39 C.J. p 596 note 36.

32. U.S.—Michalek v. U. S. Gypsum Co., D.C.N.Y., 16 F.Supp. 708.
39 C.J. p 596 note 37.

33. Mich.—Scendar v. Winona Copper Co., 135 N.W. 951, 169 Mich. 665.
N.H.—Tierney v. New England Granite Works, 106 A. 481, 79 N.H. 166.

34. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.
R.I.—Boettger v. Mauran, 12 A.2d 285, 64 R.I. 340.
S.C.—**Corpus Juris cited in** Nuckolls v. Great Atlantic & Pacific Tea Co., 5 S.E.2d 862, 864, 192 S.C. 156—**Corpus Juris quoted in** Leslie v. Southern Paving Const. Co., 169 S.E. 139, 141, 169 S.C. 414.
39 C.J. p 596 note 40.
Delegation of duties generally see supra § 186.

35. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.
S.C.—**Corpus Juris quoted in** Leslie v. Southern Paving Const. Co., 169 S.E. 139, 141, 169 S.C. 414.
39 C.J. p 597 note 41.
Effect of distinctions in rank or authority of servants see supra § 332.

36. U.S.—Philyaw v. Arundel Corporation, C.C.A.S.C., 51 F.2d 183.
S.C.—**Corpus Juris quoted in** Leslie v. Southern Paving Const. Co., 169 S.E. 139, 141, 169 S.C. 414.
39 C.J. p 598 note 42.

37. N.Y.—Corcoran v. Holbrook, 59 N.Y. 517, 17 Am.R. 369.

38. Miss.—Mississippi Power & Light Co. v. Merritt, 12 So.2d 527, 194 Miss. 794.
39 C.J. p 596 note 35.

39. Iowa.—Beresford v. American Coal Co., 98 N.W. 902, 124 Iowa 34, 70 L.R.A. 256.
39 C.J. p 600 note 57.

40. U.S.—Union Pac. R. Co. v. Marone, Neb., 246 F. 916, 159 C.C.A. 188.
39 C.J. p 598 note 51.

41. N.Y.—Foster v. International Paper Co., 75 N.E. 933, 183 N.Y. 45.
39 C.J. p 599 note 52.

Repair of vehicle
The acts of repairing a motortruck and placing of materials taken therefrom near and around it were duties which could be safely intrusted by the master to the discretion of the servant, and negligence, if any, of the servant resulting in injuries to a fellow servant, was not imputable to the master.—Hopkins v. Barron, 6 S.E.2d 96, 61 Ga.App. 168.

42. Minn.—Pasco v. Minneapolis Steel & Machinery Co., 117 N.W.

owes only to the master,[43] regardless of his rank.[44] Where a statute imposes a particular duty on an employee as a servant and not as a representative of the master, the negligence of such employee is not imputable to the master.[45]

Employment of dangerous agencies. The duty of the master to care for a dangerous agency employed in his business cannot be so delegated as to relieve the master from responsibility.[46]

Methods of work. A master is liable for the negligence of a servant who is discharging the master's primary and nondelegable duty to provide a reasonably safe method of work[47] although where a proper method of work has been provided mere details in the performance thereof may be committed to fellow servants.[48]

Dual capacity. A servant may sustain a dual relation toward other servants in that he is a vice principal as to those duties imposed on him for the due performance of which the master cannot relieve himself from liability, while he is a mere fellow servant with reference to those acts in the performance of the work not connected with the personal duties of the master.[49]

Notice to employee on whom performance of nondelegable duties imposed. Where a master imposes the performance of his own primary or positive duty on an employee, notice to the latter with respect to matters affecting the performance of such duty is notice to the master,[50] regardless of the rank of such employee.[51]

(2) Distinctions between Delegable and Nondelegable Duties

The distinction is sometimes made that work of construction, preparation, and preservation is the absolute duty of the master, whereas work of operation is the duty of the servants; but this line is not clearly defined and has been said not to be applicable to every state of facts.

Much difficulty is encountered in determining whether the duty neglected in the particular case is that of the master or is the duty of a servant relating merely to the details of the work,[52] notwithstanding the rule that the line of demarcation between the absolute duty of the master and the duty of the servants is the line that separates the work of construction, preparation, and preservation from the work of operation.[53] This line, however, is not clearly defined,[54] and there is authority for the view that the test based on the distinction between the duty of construction, preparation, or repair on the one hand and the duty of operation on the other will not fit every state of facts,[55] and that there are personal duties of the master in connection with the carrying on of the work in hand for the negligent performance of which he may be liable although he has intrusted performance to a coemployee of the injured servant.[56] Another distinction sometimes resorted to is that between providing all permanent conditions of safety for the service required on the

479, 105 Minn. 132, 18 L.R.A.,N.S., 153.
39 C.J. p 600 note 53.

43. Ind.—Chicago, I. & L. R. Co. v. Barker, 83 N.E. 369, 169 Ind. 670, 17 L.R.A.,N.S., 542, 14 Ann.Cas. 375.
39 C.J. p 600 note 54.

44. N.J.—Knutter v. New York & New Jersey Tel. Co., 52 A. 565, 67 N.J.Law 646, 58 L.R.A. 808.
39 C.J. p 600 note 55.

45. Ill.—Streeb v. St. Louis & O'-Fallon Coal Co., 165 Ill.App. 304.

46. Fla.—Crenshaw Bros. Produce Co. v. Harper, 194 So. 353, 142 Fla. 27.
39 C.J. p 625 note 28.
Care required as to dangerous instrumentalities, places, and substances see supra § 214.

A motor vehicle when in operation is a dangerous agency or instrumentality to which the principle of owner's nondelegable duty regarding dangerous instrumentalities applies.—Crenshaw Bros. Produce Co. v. Harper, supra.

Electricity
The duty of a public utility corporation to handle and control electricity with the highest degree of care which skill and foresight can make possible is absolute and cannot be delegated to a fellow servant.—Mississippi Power & Light Co. v. Merritt, 12 So.2d 527, 194 Miss. 794.

47. Ky.—**Corpus Juris cited in** Gatliff Coal Co. v. Hill's Adm'r, 92 S.W.2d 56, 59, 263 Ky. 309.
Miss.—Virginia-Carolina Chemical Co. v. Jefferson, 192 So. 306, 186 Miss. 861—Jefferson v. Virginia-Carolina Chemical Co., 185 So. 230, 184 Miss. 23.
Okl.—Pure Transp. Co. v. Newman, 155 P.2d 977, 195 Okl. 173—Joy v. Pope, 53 P.2d 683, 175 Okl. 540.
39 C.J. p 630 note 63.

Permitting continuance of dangerous practice
Where the employer permits a dangerous practice in the method of work to continue in his plant until a workman is thereby hurt, he will not be permitted to avoid liability on the hypothesis that the negligence was that of a fellow servant.—Granneman v. Commercial Auto Body Co., Mo.App., 296 S.W. 437.

48. N.H.—Moore v. Morse & Malloy Shoe Co., 197 A. 707, 89 N.H. 332.
39 C.J. p 630 note 64.

49. Minn.—Novotny v. Bouley, 27 N.W.2d 813, 223 Minn. 592.
Miss.—Harper v. Public Service Corporation of Mississippi, 154 So. 266, 170 Miss. 39.
39 C.J. p 601 note 73.
Dual capacity of employee authorized to manage, supervise, or control see supra § 332 f.

50. Iowa.—Poli v. Numa Block Coal Co., 127 N.W. 1105, 149 Iowa 104, 33 L.R.A.,N.S., 646.
39 C.J. p 600 note 58.

51. Utah.—Merrill v. Oregon Short Line R. Co., 81 P. 85, 29 Utah 264, 110 Am.S.R. 695.

52. N.D.—Ell v. Northern Pac. R. Co., 48 N.W. 222, 1 N.D. 336, 26 Am.S.R. 621, 12 L.R.A. 97.
39 C.J. p 600 note 60.

53. Conn.—Peterson v. New York, N. H. & H. R. Co., 59 A. 502, 77 Conn. 351.
39 C.J. p 600 note 61.

54. Ind.—Consolidated Stone Co. v. Ellis, 91 N.E. 1095, 46 Ind.App. 80.

55. Ind.—Consolidated Stone Co. v. Ellis, supra.

56. Ind.—Consolidated Stone Co. v. Ellis, supra.

one hand and providing those conditions which are only incidentally necessary to safety on the other.[57]

c. Safe Place to Work

(1) In general
(2) Temporary or changing places and places prepared by servants
(3) Railroads
(4) Shipping
(5) Mines, quarries, and excavations

(1) In General

In general the master's duty to furnish his servants with a safe place to work and to keep such place reasonably safe cannot be delegated so as to enable him to rely on the fellow-servant rule to avoid liability for injury to an employee resulting from a breach of such duty.

The duty devolving on the master to furnish his servants a safe place to work in the first instance is one that cannot be delegated so as to relieve the master from liability on the ground that the negligence was the act of a fellow servant;[58] and a like rule applies with respect to the master's personal or primary duty with reference to keeping or maintaining the place reasonably safe,[59] although there is some authority to the effect that the master is not liable for the negligence of a servant to whom he has delegated the duty of maintaining the place in a reasonably safe condition if such servant has been carefully selected for his competency and fitness.[60]

While the master cannot escape liability on the ground that the place was rendered unsafe by the act of a fellow servant where he knew or should have known of its unsafe condition and failed to remedy the defect within a reasonable time,[61] as a general rule the master is not liable for the negligent act of a fellow servant which makes the place unsafe,[62] as where the danger is a transient one growing out of the negligence of a fellow servant[63] or where the defective condition is created by a fellow servant of the injured employee during

57. U.S.—Regan v. Parker-Washington Co., Ill., 205 F. 692, 123 C.C.A. 648, L.R.A.1915F 810.

58. U.S.—Whittle v. Atlas Powder Co., D.C.Tenn., 34 F.Supp. 563.
Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.
Miss.—Scott Burr Stores Corporation v. Morrow, 180 So. 741, 182 Miss. 743—Albert v. Doullut & Ewin, 178 So. 312, 180 Miss. 626—Russell v. Williams, 151 So. 372, 168 Miss. 181—Gulf Refining Co. v. Ferrell, 147 So. 476, 165 Miss. 296—Wilbe Lumber Co. v. Calhoun, 140 So. 680, 163 Miss. 80—Masonite Corporation v. Lochridge, 140 So. 223, 163 Miss. 364, suggestion of error overruled 141 So. 758, 163 Miss. 364—Gulf, M. & N. R. Co. v. Brown, 108 So. 503, 103 Miss. 890.
Mo.—Greenan v. Emerson Elec. Mfg. Co., 191 S.W.2d 646, 354 Mo. 781—Wall v. Philip A. Rohan Boat, Boiler & Tank Co., 62 S.W.2d 764, 333 Mo. 619—Cunningham v. Doe Run Lead Co., 26 S.W.2d 957—Timmermann v. St. Louis Architectural Iron Co., 1 S.W.2d 791, 318 Mo. 421—Bender v. Kroger Grocery & Baking Co., 276 S.W. 405, 310 Mo. 488—Sheppard v. Robinson, App., 299 S.W. 842—Bennett v. Hood, App., 296 S.W. 1028—Carter v. Wolff, App., 296 S.W. 187—Bender v. Kroger Grocery & Baking Co., App., 294 S.W. 732—Watson v. Energy Const. Co., 286 S.W. 715, 220 Mo.App. 362—Jones v. Liggett & Myers Tobacco Co., App., 284 S.W. 513—Farley v. Lehrack, App., 272 S.W. 987—House v. St. Louis Car Co., App., 270 S.W. 135.
N.H.—Dziedzie v. Newmarket Mfg. Co., 129 A. 271, 81 N.H. 516.
N.Y.—Yaconi v. Brady & Gioe, 158 N.E. 876, 246 N.Y. 300, certiorari denied 48 S.Ct. 421, 276 U.S. 636, 72 L.Ed. 744.
R.I.—Boettger v. Mauran, 12 A.2d 285, 64 R.I. 340.
S.C.—Nuckolls v. Great Atlantic & Pacific Tea Co., 5 S.E.2d 862, 192 S.C. 156.
Tex.—City of Austin v. Johnson, Civ.App., 195 S.W.2d 222.
39 C.J. p 602 note 79.
Delegation of duty as to safe place generally see supra § 204.

Mental condition of servant

Where mentally deficient servant was injured while assisting foreman, it being left to foreman to decide what work servant was capable of, and necessity for special warning, if servant's condition was such as to make place where he was injured unsafe or to entitle him to special warning employer is liable for his injury, but if it was safe to do work master is not liable.—Dziedzie v. Newmarket Mfg. Co., 129 A. 271, 81 N.H. 516.

Particular acts or omissions

(1) Detachment of trailer from tractor.—Bender v. Kroger Grocery & Baking Co., 276 S.W. 405, 310 Mo. 488—Bender v. Kroger Grocery & Baking Co., Mo.App., 294 S.W. 732.

(2) Maintenance of lights.—Reynolds v. Al. G. Barnes Amusement Co., 300 S.W. 1062, 221 Mo.App. 1169.

(3) Opening and closing of doors.—Johnson v. Corn Products Refining Co., 6 S.W.2d 568, 319 Mo. 958.

(4) Operation of truck.—Buss v. Wachsmith, 70 P.2d 417, 190 Wash. 673, adhered to 74 P.2d 999, 193 Wash. 600.

(5) Precautions against electric shock.
Miss.—Masonite Corporation v. Lochridge, 140 So. 223, 163 Miss. 364, suggestion of error overruled 141 So. 758, 163 Miss. 364.
Tex.—City of Austin v. Johnson, Civ. App., 195 S.W.2d 222.

(6) Setting up movable steps.—Boettger v. Mauran, 12 A.2d 285, 64 R.I. 340.

(7) Spilling oil on floor.—Safeway Stores v. Phelps, 145 S.W.2d 337, 201 Ark. 495.

(8) Other acts or omissions.
Miss.—Albert v. Doullut & Ewin, 178 So. 312, 180 Miss. 626.
Mo.—Greenan v. Emerson Elec. Mfg. Co., 191 S.W.2d 646, 354 Mo. 781.

59. Miss.—Gulf Refining Co. v. Ferrell, 147 So. 476, 165 Miss. 296.
Mo.—Acebedo v. American Car & Foundry Co., App., 291 S.W. 505.
N.H.—Dziedzie v. Newmarket Mfg. Co., 129 A. 271, 81 N.H. 516.
39 C.J. p 604 note 80.

60. Ala.—Hardy v. City of Dothan, 176 So. 449, 234 Ala. 664.
39 C.J. p 605 note 81.
Competency of fellow servants generally see supra § 311–319.

61. N.Y.—Thorsen v. Slattery Contracting Co., 71 N.Y.S.2d 77, 272 App.Div. 931.
39 C.J. p 606 note 84.

62. Mo.—Graczak v. City of St. Louis, 202 S.W.2d 775—Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 337 Mo. 202.
39 C.J. p 606 note 85.

63. N.H.—Dziedzie v. Newmarket Mfg. Co., 129 A. 271, 81 N.H. 516.

the progress of the work and as an incident thereto.[64] So the negligence is generally regarded as that of a fellow servant for which the master is not liable where the act or omission[65] or, in some jurisdictions at least, the order given[66] which produces the unsafe condition is one involving merely operative details, even where the negligence relates to details of arrangement and execution in making[67] or keeping[68] a place safe, although in some jurisdictions a more liberal rule in favor of the injured servant in respect of the details of keeping a place safe has apparently been applied.[69] Broadly stated, the distinction observed in determining the liability of the master is between the furnishing of a suitable working place on the one hand and the use to which it is put on the other.[70]

Authority, duty, and scope of employment of negligent employee. In order to charge the master for the act of a negligent employee affecting the safety of the place it must appear that such employee was intrusted with the performance of the master's duty in respect of a safe place,[71] but the right of an employee charged with this duty to intrust such duty to a third person so as to charge the master has been recognized.[72] The master cannot rely on the alleged failure of a fellow servant to perform an act which would have made the place safe where it does not appear that the master had imposed on such fellow servant the duty to perform the act in question.[73] The master is not liable for an act of an employee which renders the place unsafe where in performing the act such employee was not engaged in the master's business.[74]

Places under control of third persons. Even though the place is under the control of a third person, the master cannot rely on the fellow-servant rule to avoid liability for the negligence of the employee to whom was intrusted the duty of protecting the injured servant from a danger known to the master.[75]

Statutory duty as to safety of place. Where a statute imposes on the master an absolute or personal duty as to a safe place to work he cannot in turn impose such duty on a servant so as to relieve himself from liability on the ground that the negligence with respect thereto was that of a fellow servant.[76]

Covering or guarding dangerous places. The duty to guard or to cover a dangerous place has been regarded as a personal duty of the master who cannot avoid liability for an injury resulting from negligence in connection with such duty by setting up the claim that the negligence was that of a fellow servant.[77] On the other hand, where the unsafe condition arises from the omission to use, or a careless use of, materials or appliances furnished or available for guarding or covering a dangerous place, the covering or guarding of the place is generally regarded merely as a detail of the work and the duty involved as that of a fellow servant and not of the master.[78] However, where the material available is not the proper material for guarding a dangerous place, the master cannot avoid liability on the ground that available material was negligently arranged about the place by fellow servants.[79] Where certain material is negligently

N.Y.—Allen v. Old Dominion S. S. Co., 211 N.Y.S. 80, 213 App.Div. 590.
39 C.J. p 606 note 86.

64. U.S.—Cybur Lumber Co. v. Erkhart, Miss., 238 F. 751, 151 C.C.A. 601.
39 C.J. p 606 note 87.

Test
"Where injury to one servant is caused by the negligent act of another, the test, to be applied in determining whether the master is liable for failing to exercise ordinary care to furnish a reasonably safe place in which to work, is: Did the negligent act have a direct relation to the place of work?, or was it merely incidental to the work itself?"—Greenan v. Emerson Elec. Mfg. Co., 191 S.W.2d 646, 650, 354 Mo. 781.

65. N.Y.—Di Tommaso v. East Coast Coaling Co., 209 N.Y.S. 422, 212 App.Div. 592.
39 C.J. p 607 note 88.

66. Wis.—Knudsen v. LaCrosse Stone Co., 130 N.W. 519, 145 Wis. 394, 33 L.R.A.,N.S., 223.
39 C.J. p 607 note 89.

67. Cal.—Bridges v. Los Angeles Pac. R. Co., 105 P. 586, 156 Cal. 492, 25 L.R.A.,N.S., 914.
39 C.J. p 607 note 90.

68. Pa.—Shank v. Edison Electric Illuminating Co., 74 A. 210, 225 Pa. 393, 30 L.R.A.,N.S., 46, 17 Ann.Cas. 465.
39 C.J. p 607 note 91.

69. Wash.—Britton v. Rumbaugh, 222 P. 899, 128 Wash. 445.
39 C.J. p 608 note 92.

70. N.H.—McLaine v. Head & Dowst Co., 52 A. 545, 71 N.H. 294, 93 Am. S.R. 522, 58 L.R.A. 462.
39 C.J. p 608 note 93.

71. Mo.—**Corpus Juris cited in** Guthrie v. Gillespie, 6 S.W.2d 886, 891, 319 Mo. 1137.
39 C.J. p 601 note 66.

72. Wash.—Barney v. Anderson, 199 P. 452, 116 Wash. 352.
39 C.J. p 608 note 97.

73. S.C.—Henry v. Norris, 98 S.E. 197, 111 S.C. 437.

74. Tex.—Sherrill v. American Well & Prospecting Co., Civ.App., 176 S.W. 658.

75. Minn.—Lindgren v. William Bros. Boiler Mfg. Co., 127 N.W. 626, 112 Minn. 186.
Duty of master as to place under control of third person generally see supra § 210.

76. U.S.—Brown v. Pacific Coast Coal Co., Wash., 36 S.Ct. 701, 241 U.S. 571, 60 L.Ed. 1177.
39 C.J. p 609 note 4.

77. Miss.—Wilbe Lumber Co. v. Calhoun, 140 So. 680, 163 Miss. 80.
39 C.J. p 610 note 24.

78. Va.—Morris v. Alvis, 107 S.E. 664, 130 Va. 434.
39 C.J. p 611 note 25.

79. Mass.—Simpson v. Phillipsdale Paper Mill Co., 116 N.E. 828, 227 Mass. 430.

placed by fellow servants and the conditions are known to, and have been adopted by, the master, such negligence is imputable to the master.[80]

Starting machinery or other appliances. The negligence ordinarily has been regarded as relating to details of operation and that of a fellow servant where the injury resulted from the act or omission of a coemployee in starting, or in failing to prevent the starting of, machinery or other appliances.[81] However, the right of the master to rely on the fellow-servant rule has been denied where the employee to whom such duty was intrusted started, or failed to prevent the starting of, machinery, and the duty breached was the duty to keep the place reasonably safe.[82]

(2) Temporary or Changing Places and Places Prepared by Servants

Where employees have the duty of making their own place of work, the fellow-servant rule ordinarily may be invoked to excuse the employer from liability for a breach of such duty resulting in injury to a coemployee; but the mere fact that a place of work is temporary or changes from time to time does not necessarily relieve the employer of liability.

As a rule an employee whose negligence affects the safety of the place is regarded as the fellow servant of the injured servant, and such negligence is not imputable to the master, where the employees, including the injured servant, are employed to make their own place in which to work, so that the place is the result of the very work for which they are employed,[83] even though, it has been held, the work is done in successive stages and the labor performed by one set of employees is prior in time to that performed by another set,[84] or where the place in which all are employed necessarily changes from time to time as the work progresses and the danger is an incident of the work.[85] Thus negligence in respect of mere details of the work looking to the protection of employees is ordinarily regarded as that of a fellow servant.[86] So the master may rely on the fellow-servant rule to avoid liability where the work consists in making safe the place and condition of which the injured servant complains,[87] especially where the injured servant is directly engaged in such work[88] or where the work itself involves the making of a reasonably safe place dangerous;[89] but the master may relieve the injured servant from the duty of making the place safe and thus prevent himself from setting up that the negligence was that of a fellow servant.[90] There is authority for the view that the master is not liable for the negligent act of a foreman or superintendent in making a place safe for employees, where such negligent act results in direct injury to another servant while the work of making the place safe is in progress.[91]

The fact, however, that a place of work is temporary[92] and changes from time to time,[93] or that the employees move from place to place in the course of their work,[94] does not necessarily relieve the master from liability for the negligence of an employee to whom the master's duty of maintaining the place in a reasonably safe condition has been intrusted; and the master may be charged with the negligence of employees in preparing a place which is subsequently furnished to the injured employee as a means by which the work is to be performed[95] or a place in which the work is to be carried on;[96] but there is authority for the view that the fact

80. Mass.—Simpson v. Phillipsdale Paper Mill Co., supra.

81. Mo.—Burge v. American Car & Foundry Co., App., 274 S.W. 842.
39 C.J. p 611 note 29.
Duty of servant to give warning see infra subdivision g of this section.

82. Mo.—Carter v. Wolff, App., 296 S.W. 187.
N.C.—Perkins v. Spray Wood & Coal Co., 127 S.E. 677, 189 N.C. 602.
Tex.—Texas Pacific Coal & Oil Co. v. Robertson, Civ.App., 39 S.W.2d 912, reversed on other grounds 79 S.W.2d 830, 125 Tex. 4, 98 A.L.R. 262.
39 C.J. p 611 note 31.

83. N.H.—McLaine v. Head & Dowst Co., 52 A. 545, 71 N.H. 294, 93 Am.S.R. 522, 58 L.R.A. 462.
39 C.J. p 609 note 6.

84. N.Y.—Mullin v. Genesse County Electric Light, Power & Gas Co., 95 N.E. 689, 202 N.Y. 275.
39 C.J. p 609 note 7.

85. U.S.—Westinghouse, Church, Kerr & Co. v. Callaghan, Mo., 155 F. 397, 83 C.C.A. 669, 19 L.R.A.,N.S., 361.
39 C.J. p 609 note 8.

86. Wis.—Knudsen v. La Crosse Stone Co., 130 N.W. 519, 145 Wis. 394, 33 L.R.A.,N.S., 223.
39 C.J. p 609 note 9.

87. U.S.—American Bridge Co. v. Seeds, Kan., 144 F. 605, 75 C.C.A. 407, 11 L.R.A.,N.S., 1041.
39 C.J. p 609 note 10.

88. Mich.—Juntunen v. Quincy Min. Co., 151 N.W. 571, 184 Mich. 341.
39 C.J. p 610 note 11.

89. U.S.—American Bridge Co. v. Seeds, Kan., 144 F. 605, 75 C.C.A. 407, 11 L.R.A.,N.S., 1041.
39 C.J. p 610 note 12.

90. Mich.—Scendar v. Winona Copper Co., 135 N.W. 951, 169 Mich. 665.

91. N.Y.—Meeker v. C. R. Remington & Son Co., 65 N.Y.S. 1116, 53 App.Div. 592.

92. Mo.—Corby v. Missouri & Kansas Tel. Co., 132 S.W. 712, 231 Mo. 417.
39 C.J. p 610 note 15.

93. Pa.—Klenzing v. Greenfield Lumber Co., 100 A. 460, 255 Pa. 516.
39 C.J. p 610 note 16.

94. Mo.—Erwin v. Missouri & Kansas Tel. Co., 158 S.W. 913, 173 Mo. App. 508.
39 C.J. p 610 note 17.

95. Ky.—Reffitt v. Southern Sheet & Tin Plate Co., 186 S.W. 155, 170 Ky. 362.
39 C.J. p 610 note 18.

96. N.Y.—Kranz v. Long Island R. Co., 25 N.E. 206, 123 N.Y. 1, 20 Am.S.R. 716.
39 C.J. p 610 note 19.

that the injured servant did not, and was not required to, construct the place as a means by which the work is to be performed does not necessarily prevent his being regarded as a fellow servant of those who did construct it.[97]

The master may not avoid liability for an injury to a servant while engaged in erecting a structure, on the ground that the negligence was that of a fellow servant, where the injury was due to a faulty design or plan of construction selected by the negligent employee.[98] There is authority for the view that, even though all servants are employed in a common construction enterprise, the negligence of those who are engaged in the performance of the duty of providing so-called permanent conditions of safety, which results in an injury to a servant not so engaged, is imputable to the master.[99]

(3) Railroads

Railroad companies have been held liable, the same as other employers, for injuries to an employee resulting from the negligence of another employee to whom has been intrusted the duty of furnishing or maintaining a safe place in which to work.

Under general rules a railroad company cannot avoid liability for the negligence of an employee to whom has been intrusted the duty of furnishing to other employees a safe place to work[1] or of keeping a place reasonably safe[2] on the ground that the negligent employee is a fellow servant of the injured employee, especially where the duty is imposed by statute.[3] This applies to the original construction of the roadway, including the track,[4] and to keeping it in a reasonably safe condition.[5]

Where the roadway is safe but is rendered temporarily unsafe by the act of a fellow servant, the company is not liable where it had no actual or constructive notice thereof.[6] So the view is generally taken that, where the unsafe condition of the roadway or other place at which the injured servant is working arises only because of the negligent act or omission of a fellow servant in connection with details of operation, the employer is not liable,[7] even, it has been held, where the negligent act occurs in connection with keeping the place safe,[8] especially where the injured servant was engaged in the work of rendering the roadway safe.[9] Thus the duty of opening and closing a railroad switch is not as a general rule regarded as one of the personal duties of a master but is a duty of a servant as a duty connected with operation;[10] it is not a defect in the roadbed for which a person thereby injured can recover from the company on an allegation of failure to maintain its roadbed in safe condition;[11] but there is authority for the view that a failure of an employee properly to operate a switch may constitute a breach of the master's duty to provide a safe track.[12]

Obstructions causing injuries to employees on trains. Where the duty of keeping the track free from obstructions is intrusted to a servant, he is not a fellow servant of train employees injured by the former's negligence.[13] So the company has been held liable for injuries to servants on trains caused by obstructions near the track even though the obstructions were put or left there by other servants of the company,[14] although the rule seems to be otherwise where the obstruction is merely temporary and arises out of acts or omissions connected with details of the work.[15]

97. Mich.—Beesley v. Wheeler, 61 N.W. 658, 103 Mich. 196, 27 L.R.A. 266.
39 C.J. p 610 note 20.

98. Conn.—Nichols v. Harvey Hubbell, Inc., 103 A. 835, 92 Conn. 611, 19 A.L.R. 221.

99. U.S.—Regan v. Parker-Washington Co., Ill., 205 F. 692, 123 C.C.A. 648, L.R.A.1915F 810.

1. Ark.—St. Louis & S. F. R. Co. v. Rie, 163 S.W. 149, 110 Ark. 495.
39 C.J. p 611 note 33.

2. Kan.—Jones v. Atchison, T. & S. F. R. Co., 238 P. 1019, 118 Kan. 116.
39 C.J. p 611 note 34.
Inspection and repair see infra subdivision e of this section.

3. Ohio.—New York, C. & St. L. R. Co. v. Lambright, 5 Ohio Cir.Ct. 433, 3 Ohio Cir.Dec. 213.

4. Mo.—Bowen v. Chicago, B. & K. C. R. Co., 8 S.W. 230, 95 Mo. 268.
39 C.J. p 612 note 36.

5. U.S.—Winters v. Baltimore & O. R. Co., Ohio, 177 F. 44, 100 C.C.A. 462.
39 C.J. p 612 note 37.

6. Mich.—Wickham v. Detroit United R. Co., 125 N.W. 22, 160 Mich. 277, 136 Am.S.R. 436, 52 L.R.A.,N.S., 1082, Ann.Cas.1913E 1069.
39 C.J. p 612 note 38.

7. U.S.—Illinois Cent. R. Co. v. Hart, Tenn., 176 F. 245, 100 C.C.A. 49, 52 L.R.A.,N.S., 1117.
39 C.J. p 612 note 39.

8. N.Y.—Filbert v. Delaware & H. Canal Co., 23 N.E. 1104, 121 N.Y. 207.
39 C.J. p 613 note 40.

9. U.S.—Florence & C. C. R. Co. v. Whipps, Colo., 138 F. 13, 70 C.C.A. 443.
39 C.J. p 613 note 41.

10. U.S.—St. Louis, I. M. & S. R. Co. v. Needham, Ark., 63 F. 107, 11 C.C.A. 56, 25 L.R.A. 833.
39 C.J. p 613 note 42.

11. N.C.—Pleasants v. Raleigh & A. Air-Line R. Co., 28 S.E. 267, 121 N.C. 492, 61 Am.S.R. 674.
39 C.J. p 613 note 42.

12. S.C.—Richey v. Southern R. Co., 48 S.E. 285, 69 S.C. 387.
39 C.J. p 613 note 44.

13. Wis.—Hulehan v. Green Bay, W. & St. P. R. Co., 32 N.W. 529, 68 Wis. 520.
39 C.J. p 613 note 45.

14. Ala.—Northern Alabama R. Co. v. Mansell, 36 So. 459, 138 Ala. 548.
39 C.J. p 613 note 46.

15. Mich.—Wickham v. Detroit United R. Co., 125 N.W. 22, 160 Mich. 277, 136 Am.S.R. 436, 52 L.R.A.,N.S., 1082, Ann.Cas.1913E 1069.
39 C.J. p 613 note 47.

Servant working about cars or locomotives. Where a servant, such as a car repairer or the like, is injured while at work under, between, or about engines or cars by the starting or backing of engines or cars, the negligent servant is usually considered a fellow servant.[16] However, the courts in some instances have refused to apply the fellow-servant rule on the ground that the negligence charged was that of an employee in connection with the master's duty to provide a safe place,[17] that, where one in authority orders a subordinate into a place of peril, it is the duty of the superior to furnish protection,[18] or that the one in authority required of the injured servant a service outside the line of the latter's employment and at a place other than that provided for the performance of his regular and ordinary duties.[19]

(4) Shipping

The general rules precluding reliance on the fellow-servant rule where the duty breached was that of furnishing a safe place to work or maintaining it in a reasonably safe condition have been applied in cases involving shipping.

The general rules which prevent the master from avoiding liability on the ground that an employee who has negligently failed to comply with the duty of furnishing a safe place to work[20] or of maintaining the place in reasonably safe condition[21] was a fellow servant have been applied in the case of injuries received on vessels. Moreover, the employer may not avoid liability by relying on the fellow-servant rule, although the place of work was rendered unsafe by another servant where the employer knew or should have known of its unsafe condition and failed to remedy it.[22] Ordinarily, however, where the injury results from the negligence of a servant with respect to mere details of the work,[23] even in connection with details of keeping the place safe,[24] such negligence is not imputed to the master. So negligence in connection with an ordinary duty in the management or the operation of a vessel has been regarded as that of a fellow servant.[25]

Uncovered hatchways. The negligence of a servant in covering, or in failing to cover, a hatchway is usually regarded as that of a fellow servant for which the master is not liable;[26] but the negligence charged has in some cases been regarded as that of an employee to whom has been intrusted the duty to provide a safe place.[27]

Lighting. The negligence of a servant in failing to use, or to make proper use of, available lighting facilities is usually regarded as that of a fellow servant for which the master is not liable;[28] but the failure properly to light the place at which the injured servant was working has been regarded as the negligence of an employee to whom has been intrusted the duty of providing a safe place.[29]

(5) Mines, Quarries, and Excavations

The master ordinarily is liable for a breach by his servant of the duty to provide and maintain a safe place to work, whereby other employees engaged in mining, quarrying, or excavating operations are injured.

Under the general rule, discussed supra subdivision c (1) of this section, the master has been held liable for the negligence of an employee to whom has been intrusted the duty of providing a safe place to work which resulted in an injury to an employee engaged in the work of excavating,[30] as where the trench or ditch in which the servant injured is working has been prepared by other employees in the performance of the master's duty to furnish a suitable place for the servant injured to carry on his work.[31] On the other hand, where the

16. W.Va.—Kniceley v. West Virginia Midland R. Co., 61 S.E. 811, 64 W.Va. 278, 17 L.R.A.,N.S., 370.
39 C.J. p 613 note 48.
Failure to warn see infra subdivision g of this section.

17. Va.—Chesapeake & O. R. Co. v. Swartz, 80 S.E. 568, 115 Va. 723.
39 C.J. p 614 note 49.

18. Ky.—Ritt v. Louisville & N. R. Co., 4 S.W. 796, 9 Ky.L. 307.
Tex.—Wall v. Texas & P. R. Co., 2 Posey Unrep.Cas. 432.

19. Ind.—Louisville, E. & St. L. Consol. R. Co. v. Hanning, 31 N.E. 187, 131 Ind. 528, 31 Am.S.R. 443.

20. U.S.—The Kinghorn, C.C.A.N.Y., 297 F. 621.
39 C.J. p 614 note 55.

21. N.Y.—Yaconi v. Brady & Gioe, 158 N.E. 876, 246 N.Y. 300, certiorari denied 48 S.Ct. 421, 276 U.S. 636, 72 L.Ed. 744.
Wash.—Haverty v. International Stevedoring Co., 235 P. 360, 134 Wash. 235, reheard 238 P. 581, 134 Wash. 235, affirmed International Stevedoring Co. v. Haverty, 47 S. Ct. 19, 27 U.S. 50, 71 L.Ed. 157.
39 C.J. p 614 note 56.

22. U.S.—Pacific American Fisheries v. Hoof, C.C.A.Wash., 291 F. 306, certiorari denied 44 S.Ct. 38, 263 U.S. 712, 68 L.Ed. 520.

23. Minn.—Elmer v. Mutual SS. Co., 130 N.W. 1104, 114 Minn. 257, Ann. Cas.1912B 1062.
39 C.J. p 614 note 58.

24. U.S.—The Louisiana, La., 74 F. 748, 21 C.C.A. 60.
39 C.J. p 614 note 59.

25. U.S.—Sievers v. Eyre, D.C.N.Y., 122 F. 734.
39 C.J. p 614 note 60.

26. U.S.—The Louisiana, La., 74 F. 748, 21 C.C.A. 60.
39 C.J. p 615 note 61.

27. Pa.—Mumford v. Philadelphia Ship Repairing Co., 107 A. 371, 263 Pa. 573.
39 C.J. p 615 note 62.

28. U.S.—The Clan Graham, D.C.Or., 163 F. 961.
39 C.J. p 615 note 63.

29. U.S.—Sunney v. Holt, C.C.Ohio, 15 F. 880.

30. U.S.—Regan v. Parker-Washington Co., Ill., 205 F. 692, 123 C.C.A. 648, L.R.A.1915F 810.
39 C.J. p 615 note 67.

31. N.Y.—Kranz v. Long Island R.

place is rendered unsafe by the failure of a fellow servant duly to perform his work, his negligence is not imputable to the master.[32] So the failure properly to brace or shore a ditch or trench has been regarded as the negligence of a fellow servant,[33] even where such failure is that of the employee in immediate charge of the work,[34] where sufficient material for bracing or shoring has been furnished. However, it has been held that this rule does not apply in the case of a latent defect of which the servant injured has no knowledge, but of which the representative of the master is informed;[35] and there is authority for the view that an employee who is especially charged with the duty of determining when a trench should be braced is not in respect of such duty a fellow servant of one employed as a laborer in the trench.[36]

Mines and quarries. The operator of a mine or quarry cannot avoid liability on the ground that the negligence complained of is that of a fellow servant where the duty to furnish a safe place to work[37] or to maintain it in reasonably safe condition[38] was intrusted to the negligent employee, although in some jurisdictions the employee whom the master has designated to perform the duty of maintaining the place of work in reasonably safe condition is regarded as a fellow servant, and the master is not liable where the employee so designated was carefully selected for his competency and fitness.[39]

The negligence of one acting merely in the capacity of a fellow servant of the injured servant in rendering the place unsafe, or in failing to provide for the safety of the place, is not imputable to the master.[40] Thus, where the place is continually changing as the work in which the servant injured is engaged is progressing, the master is not ordinarily liable for the negligence of a fellow servant which is the immediate cause of the injury,[41] and in such case negligence in the matter of making the place safe has been regarded as that of a fellow servant for which the master is not liable,[42] especially where the servant injured is one on whom is actually imposed the duty to engage in the operation of making the place safe,[43] although it has been held that, where the master has relieved the servant injured from the duty of making the place safe, liability cannot be avoided on the ground that the servant to whom such duty was intrusted was a fellow servant of the injured servant.[44] Negligence in connection with details of keeping the place safe has also been regarded as that of a fellow servant.[45]

Where a statute looking to the safety of a mine as a place to work is construed as imposing an absolute or primary duty on the master, he cannot avoid liability for the negligence of an employee to whom the duty has been intrusted on the ground that such employee is a fellow servant.[46] However, where a statute imposes a particular duty on an employee as a servant, and not as a representative of the master, the negligence of such employee is not imputable to the master.[47] Some statutes specifically provide that certain superior employees in discharging certain duties imposed by statute shall be regarded as acting as vice principals for mine owners or operators.[48]

Co., 25 N.E. 206, 123 N.Y. 1, 20 Am.S.R. 716.
39 C.J. p 615 note 68.

32. N.Y.—Russell v. Lehigh Valley R. Co., 81 N.E. 122, 188 N.Y. 344, 19 L.R.A.,N.S., 348.
39 C.J. p 615 note 69.

33. Minn.—Jacobsen v. Minneapolis, 132 N.W. 341, 115 Minn. 397.

34. Vt.—Brown v. People's Gas Light Co., 71 A. 204, 81 Vt. 477, 22 L.R.A.,N.S., 738.
39 C.J. p 615 note 71.

35. N.J.—Van Steenburgh v. Thornton, 33 A. 380, 58 N.J.Law 160.
39 C.J. p 616 note 72.

36. Cal.—Ryan v. Oakland Gas, Light & Heat Co., 130 P. 693, 21 Cal.App. 14.
39 C.J. p 616 note 73.

37. N.C.—Smith v. Raleigh Granite Co., 162 S.E. 731, 202 N.C. 305.
39 C.J. p 616 note 74.

Absence of crossbars
W.Va.—Stanton v. Ruthbell Coal Co., 34 S.E.2d 257, 127 W.Va. 654, certiorari denied 66 S.Ct. 53, 326 U.S. 740, 90 L.Ed. 442.

Failure to prop roof
Ark.—New Union Coal Co. v. Sult, 290 S.W. 580, 172 Ark. 753.

38. U.S.—Bunker Hill & Sullivan Mining & Constructing Co. v. Jones, Or., 130 F. 813, 65 C.C.A. 363, certiorari denied 25 S.Ct. 787, 195 U.S. 629, 49 L.Ed. 352.
39 C.J. p 616 note 75.

39. Ala.—Whitmore v. Alabama Cons. Coal & Iron Co., 51 So. 397, 164 Ala. 125, 137 Am.S.R. 31.
39 C.J. p 617 note 76.

40. Iowa.—Cavanaugh v. Centerville Block Coal Co., 109 N.W. 303, 131 Iowa 700, 7 L.R.A.,N.S., 907.
39 C.J. p 617 note 77.

41. Mich.—Petaja v. Aurora Iron Min. Co., 64 N.W. 335, 106 Mich. 463, 58 Am.S.R. 505, 32 L.R.A. 435, reheard 66 N.W. 951, 106 Mich. 463, 58 Am.S.R. 505, 32 L.R.A. 435.
39 C.J. p 617 note 78.

42. Mich.—Kaaro v. Ahmeek Min. Co., 146 N.W. 149, 178 Mich. 661.
39 C.J. p 617 note 79.

43. Mich.—Koskell v. Newport Min. Co., 148 N.W. 699, 182 Mich. 586.
39 C.J. p 617 note 80.

44. Mich.—Scendar v. Winona Copper Co., 135 N.W. 951, 169 Mich. 665.

45. Mich.—Lahti v. Tamarack Min. Co., 152 N.W. 907, 186 Mich. 18, L.R.A.1916D 405.
39 C.J. p 617 note 82.

46. U.S.—Deserant v. Cerillos Coal R. Co., N.M., 20 S.Ct. 967, 178 U.S. 409, 44 L.Ed. 1127.
39 C.J. p 617 note 83.

47. Ill.—Streeb v. St. Louis & O'Fallon Coal Co., 165 Ill.App. 304.

48. U.S.—Big Vein Pocahontas Co. v. Repass, Va., 238 F. 332, 151 C.C.A. 348.
39 C.J. p 618 note 85.

d. Tools and Appliances

(1) In general

(2) Appliances constructed as part of work

(1) In General

The master is liable for the negligence of a servant intrusted with the nondelegable duty of the master to furnish safe tools, machinery, and other appliances; but ordinarily he may rely on the fellow-servant rule to escape liability for negligence in matters of detail in the management of safe machinery and appliances.

The master's duty to furnish safe tools, machinery, and other appliances is nondelegable, discussed supra § 204, and a servant to whom such duty is intrusted is a vice principal and the master is liable for his omission or negligence with respect thereto.[49] There are, however, many matters of detail in the management of safe and adequate machinery and appliances which must be intrusted to the operatives and as to which the master owes no duty except the employment of competent workmen,[50] and the line of division between the duty of the master to furnish and maintain safe and adequate machinery and appliances and that of the operative to manage and handle it with prudence and care is difficult to define by any general description.[51]

It has been held that, where the master has furnished safe appliances and the negligence consists in their use[52] or in the failure to use them at all, or the use of improper instead of proper appliances furnished, or the use of defective appliances where other safe appliances of the same kind had been furnished,[53] the negligence relates to a detail of the work, and the master is not liable on the theory of inability to delegate a personal duty. So, where the master has furnished safe tools and appliances, he is not responsible for an injury resulting from the use of a defective or insufficient appliance selected by a coemployee from the aggregate furnished,[54] but the master is not relieved from liability by the fact that he has furnished other safe material where the unsafe material is mingled with it and the defect is not discernible by a coemployee using such care as might reasonably be expected of him.[55] There is also authority for the view that, where a safe appliance has been furnished but the right of the servants generally to use it depends on the consent of another servant, the negligence of

49. U.S.—Southern Kraft Corporation v. Parnell, C.C.A.Miss., 65 F.2d 785—J. R. Hanify Co. v. Westberg, C.C.A.Or., 16 F.2d 552.
Fla.—Crenshaw Bros. Produce Co. v. Harper, 194 So. 353, 142 Fla. 27.
Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.
Ky.—Nugent Sand Co. v. Howard, 11 S.W.2d 985, 227 Ky. 91.
Miss.—Price v. Taylor, 1 So.2d 784, 191 Miss. 392—Wilbe Lumber Co. v. Calhoun, 140 So. 680, 163 Miss. 80.
Mo.—**Corpus Juris cited in** Graczak v. City of St. Louis, 202 S.W.2d 775, 777—Wall v. Philip A. Rohan Boat, Boiler & Tank Co., 62 S.W.2d 764, 333 Mo. 619—Warner v. Oriel Glass Co., 8 S.W.2d 846, 319 Mo. 1196, 60 A.L.R. 448—Allen v. Missouri Pac. Ry. Co., 294 S.W. 80—Sheppard v. Robinson, App., 299 S.W. 842—Watson v. Energy Const. Co., 286 S.W. 715, 220 Mo.App. 362.
N.C.—Bradford v. English, 130 S.E. 705, 190 N.C. 742.
S.C.—Nuckolls v. Great Atlantic & Pacific Tea Co., 5 S.E.2d 862, 182 S.C. 156.
Va.—Colonna Shipyard v. Dunn, 145 S.E. 342, 151 Va. 740, certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986.
Wash.—Miller v. Alaska S. S. Co., 246 P. 296, 139 Wash. 207.
39 C.J. p 618 note 88.

Absence of gross negligence
It is no defense to the master in an action brought against him for injuries resulting from the failure to furnish the servant with appliances reasonably safe for the purposes intended that the superior servant intrusted with the duty of furnishing the appliances was not guilty of gross negligence.—Nugent Sand Co. v. Howard, 11 S.W.2d 985, 227 Ky. 91.

Defective electric cord
Electrician's negligence in furnishing fellow employee repairing ship with defective electric cord causing injuries did not relieve employer.—Colonna Shipyard v. Dunn, 145 S.E. 342, 151 Va. 740, certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986.

Keeping truck in safe condition
Employee discharging employer's nondelegable duty to keep truck in reasonably safe condition was held not fellow servant of employee injured in cranking truck.—Mississippi Utilities Co. v. Smith, 145 So. 896, 166 Miss. 105.

Failure to furnish proper chocks
Fellow-servant doctrine did not apply if employer did not furnish proper chocks to hold reels of paper which crushed employee's leg, and men were instructed not to use wooden plugs, which could have been used as chocks.—Southern Kraft Corporation v. Parnell, C.C.A.Miss., 65 F.2d 785.

50. Mich.—Lahti v. Tamarack Min. Co., 152 N.W. 907, 186 Mich. 18, L.R.A.1916D 405.
39 C.J. p 619 note 89.

51. Cal.—Helling v. Schindler, 78 P. 710, 145 Cal. 303.

52. Mo.—Graczak v. City of St. Louis, 202 S.W.2d 775.
39 C.J. p 620 note 91.
"Where an appliance is reasonably safe to operate, and its operation necessarily rests upon the care, intelligence, and fidelity of the fellow servants of the person injured, the master will not be held responsible for an accident the nature of which indicates that it must have been due to the manner in which the appliance was operated."—Graczak v. City of St. Louis, Mo., 202 S.W.2d 775, 777.

53. N.H.—Ireland v. E. J. Pinney, Inc., 18 A.2d 750, 91 N.H. 323.
39 C.J. p 620 note 92.

54. N.H.—Ireland v. E. J. Pinney, Inc., supra.
39 C.J. p 621 note 93.

55. Mass.—Cushing v. G. W. & F. Smith Iron Co., 80 N.E. 596, 194 Mass. 310.
"Where a quantity of appliances are furnished, all presumably suitable for the work, but some of them defective, the fact that a selection must be made by a fellow servant of an injured workman is unimportant, and the use of one of them which is defective will not shift the responsibility."—J. R. Hanify Co. v. Westberg, C.C.A.Or., 16 F.2d 552, 553.

the latter is chargeable to the master.[56]

Appliances furnished by servant. Where a servant is authorized or required by the employment himself to furnish his own appliances for the work, the master is not liable where a fellow servant is injured because of defects therein.[57] A fortiori where machinery is furnished by a fellow servant against the master's orders, the master is not liable.[58]

Statutory duties. Under statutes requiring the guarding of machinery the negligence of a coemployee in failing to replace a statutory guard is not that of a fellow servant,[59] and the same rule applies to the failure to use a guard.[60] However, a statute requiring the furnishing of safe appliances does not make the master liable for the negligence of a coservant in operating a safe appliance.[61] A master cannot escape liability under a statute requiring him to guard dangerous machinery by ordering a subordinate employee to erect or assemble machinery in the erection or assembling of which the superiors are also engaged.[62] A statutory duty to avoid projecting set screws or bolts on revolving machinery cannot be delegated.[63]

Applications of rule to railroads. The duty of a railroad company to furnish its servants safe cars and locomotives is nondelegable.[64] On the other hand, where the injury does not result from the failure to furnish safe cars and locomotives but from the negligence of a fellow servant in the use thereof, the railroad company ordinarily is not liable.[65] For instance, where proper car couplers are furnished by the railroad company, it is not liable to a servant for the negligence of a coservant in using defective couplers.[66] Where a railroad company provided a proper headlight for its locomotive, the negligence of its servants in failing to light it was held the negligence of a fellow servant.[67]

(2) Appliances Constructed as Part of Work

(a) In general

(b) Platforms, scaffolds, and runways

(a) In General

Where the master undertakes merely to furnish the materials for the construction of an appliance by the workmen, the negligence of an employee in constructing the appliance is generally held to be that of a fellow servant for which the master is not liable.

The rule as to the nondelegable duty to furnish a safe place and appliances is subject to the exception that, where the master undertakes merely to furnish the materials needed for the construction of some appliance which is to be constructed by the workmen themselves as incident to the main work, the master's duty is performed if he furnishes suitable material and competent workmen, and the negligence of a coservant who constructs the appliance by which the employee is injured is that of a fellow servant for which the master is not liable.[68] In other words, if the preparation of the appliance is a part of the work which the servant is required to perform, the master is not liable for any defect in its preparation owing to the negligence of another servant.[69] The fact that an injured servant did not become an employee until after the negligent act complained of does not alter the relation of fellow servants.[70] However, where an appliance is constructed by one set of employees and is afterward used by other employees under the direction of the master, the servants constructing it are not regarded as the fellow servants of those using it,[71] and in construction work "it has been held that a portion of the work when completed may become an appliance furnished by the master by which the remaining work is to be prosecuted.[72] Where the

56. U.S.—Mardis v. Miller, Neb., 241 F. 470, 154 C.C.A. 302.
39 C.J. p 621 note 95.

57. Pa.—Corpus Juris cited in Hartz v. Schafer, 154 A. 713, 303 Pa. 449.
39 C.J. p 621 note 96.

58. U.S.—Callaway v. Allen, Ill., 64 F. 297, 12 C.C.A. 114.
Md.—McGee v. Cuyler, 75 A. 970, 112 Md. 314.

59. Minn.—Davidson v. Flour City Ornamental Iron Works, 119 N.W. 483, 107 Minn. 17, 131 Am.S.R. 433, 28 L.R.A.,N.S., 332.
39 C.J. p 624 note 17.

60. Iowa.—Murray v. Daley, 146 N. W. 451, 164 Iowa 612.
39 C.J. p 624 note 18.

61. N.Y.—Walters v. George A. Fuller Co., 81 N.Y.S. 919, 82 App. Div. 254.

62. Wis.—Herning v. Holt Lumber Co., 140 N.W. 1102, 153 Wis. 101.

63. U.S.—National Fire Proofing Co. v. Andrews, Ohio, 158 F. 294, 85 C. C.A. 526.

64. S.C.—Scott v. Atlantic Coast Line R. Co., 96 S.E. 305, 109 S.C. 471.
39 C.J. p 624 note 23.

65. Wis.—Whitwam v. Wisconsin & M. R. Co., 17 N.W. 124, 58 Wis. 408.
39 C.J. p 624 note 24.

66. Mass.—Thyng v. Fitchburg R. Co., 30 N.E. 169, 156 Mass. 13, 32 Am.S.R. 425.
N.Y.—Sweeney v. New York, N. H. & H. R. Co., 10 N.Y.S. 305, 58 N.Y. Super. 223.

67. Md.—Pennsylvania R. Co. v. Wachter, 60 Md. 395.
Minn.—Collins v. St. Paul & S. C. R. Co., 14 N.W. 60, 30 Minn. 31.

68. Wis.—Hoveland v. National Blower Works, 114 N.W. 795, 134 Wis. 342, 14 L.R.A.,N.S., 1254.
39 C.J. p 621 note 98.

69. Cal.—Leishman v. Union Iron Works, 83 P. 30, 148 Cal. 274, 3 L. R.A.,N.S., 500.
39 C.J. p 621 note 99.

70. Mass.—O'Conner v. Rich, 42 N. E. 111, 164 Mass. 560, 49 Am.S.R. 483.
39 C.J. p 622 note 1.

71. Wash.—McKenzie v. North Coast Colliery Co., 104 P. 801, 55 Wash. 495, 28 L.R.A.,N.S., 1244.
39 C.J. p 622 note 2.

72. Cal.—Majors v. Conner, 121 P. 371, 162 Cal. 131.

preparation of the appliances is neither intrusted to, nor assumed by, the employees, the master may be guilty of negligence in furnishing defective appliances, although the workmen themselves are employed in the preparation of them.[73]

(b) Platforms, Scaffolds, and Runways

Negligence of an employee in constructing a scaffold, platform, runway, or the like is generally held that of a fellow servant, where the master has furnished proper materials for the work; but the master is liable where he has supplied defective materials.

Where a master furnishes proper materials for a scaffold, platform, runway, or the like, and it is constructed by coservants of one injured because of a defect therein, as a part of the work which they are employed to do, the master ordinarily is not liable.[74] On the other hand, it has generally been held that, where the appliance is furnished by the master as a completed instrumentality for the use of the employees who are to work thereon, the fellow-servant rule is not applicable;[75] and in some cases the master has been held liable on the theory that the scaffold was of a permanent character.[76] The master is liable for the furnishing of improper or defective materials to be used in constructing the scaffold, and where the duty to furnish the materials is delegated to a servant, he becomes a vice principal with respect thereto.[77] An employer is not liable for negligence of his superintendent in sending a workman on staging constructed by other contractors with their own planks and for their own purposes.[78]

Statutory duty. The master is generally held liable where the duty to furnish safe and suitable scaffolding and like appliances is imposed by statute.[79] There is, however, some authority holding that the defense of fellow service is available as respects responsibility for the construction of a working place, such as a scaffold, despite a statute providing that all scaffolds or structures used in the erection of any building shall be well and safely supported and so secured as to insure the safety of persons working thereon.[80]

Supervision of foreman. In those jurisdictions in which the superior-servant rule is not followed, as discussed supra § 332 e (2), the master is not liable under the general rule exempting him from liability where the appliance is constructed by coservants of the one injured, although it was constructed and erected under the supervision of a foreman.[81] Under the superior-servant rule, however, negligence of a foreman may be attributed to the master.[82]

e. Maintenance, Inspection, and Repair

(1) In general
(2) Railroads

(1) In General

Although the authorities are not unanimous, the general rule is that an employee discharging the master's duty of inspection and repair is not a fellow servant of an employee injured by his default; but this rule does not apply to simple incidental repairs of a temporary character.

The duty of the master to furnish a safe place and appliances is a continuing one and is nondelegable, as discussed supra §§ 201, 204. Hence it is the rule in most jurisdictions that, although the master

73. Minn.—Blomquist v. Chicago, M. & St. P. R. Co., 62 N.W. 818, 60 Minn. 426.
Mo.—Adair v. Kansas City Terminal R. Co., 220 S.W. 920, 282 Mo. 133.

74. Ark.—Saxon v. Barksdale, 272 S. W. 647, 168 Ark. 973.
N.H.—Martin v. Kimball, 4 A.2d 653, 90 N.H. 91.
39 C.J. p 622 note 5.

Improper installation of blocks and tackles
Where fact that fellow employees and not employer, usually installed blocks and tackles for use of pipe fitters was undisputed, pipe fitter, who was injured by fall of block and tackle, could not recover for employee's failure to install it properly, regardless of what class of employees actually installed it.—Gallagher v. California Brick Co., C.C.A. Fla., 5 F.2d 464.

Selection of short planks
Plasterer's tender, selecting or rearranging planks on scaffold as ordered by foreman, was injured plasterer's fellow servant, for whose negligence in selecting planks too short to span uprights plastering contractor was not liable.—McIntyre v. McIntyre, 171 A. 329, 86 N.H. 479.

Presence of employer
Fact that employer was present during erection of scaffold did not make fellow servant defense inapplicable where employer did not direct work.—Guthrie v. Gillespie, 6 S.W.2d 886, 319 Mo. 1137.

75. N.H.—Martin v. Kimball, 4 A.2d 653, 90 N.H. 91.
39 C.J. p 623 note 7.

76. Ill.—Edward Hines Lumber Co. v. Ligas, 60 N.E. 225, 172 Ill. 315, 64 Am.S.R. 38.
39 C.J. p 623 note 9.

77. Fla.—**Corpus Juris cited in** American Box & Lumber Co. v. Chandler, 165 So. 382, 383, 122 Fla. 169.
Kan.—Sunderland v. Steanson, 252 P. 221, 122 Kan. 250.
N.C.—Butler v. Armour & Co., 137 S. E. 813, 193 N.C. 632.
39 C.J. p 623 note 8.

78. Mass.—Granara v. Jacobs, 98 N. E. 1029, 212 Mass. 271.

79. Wis.—Fonder v. General Constr. Co., 130 N.W. 884, 146 Wis. 1.
39 C.J. p 622 note 6.

80. Mo.—Wall v. Philip A. Rohan Boat, Boiler & Tank Co., 62 S.W. 2d 764, 333 Mo. 619—Guthrie v. Gillespie, 6 S.W.2d 886, 319 Mo. 1137—Williams v. Ransom, 136 S. W. 349, 234 Mo. 55.

81. N.H.—Frame v. Houston, 100 A. 545, 78 N.H. 375.
39 C.J. p 624 note 13.

82. Mo.—Neves v. Green, 86 S.W. 508, 111 Mo.App. 634.
Tenn.—Griffin v. Parker, 164 S.W. 1142, 129 Tenn. 446, L.R.A.1917F 497.

has employed a competent servant for the purpose of keeping the place and appliances safe and discharging his duty of inspection and repair, such servant is not a fellow servant of one who has been injured by his default.[83] Accordingly, under the ordinarily accepted rule, the duty to inspect a mine and its appliances cannot be delegated so as to relieve the master from responsibility where a miner is injured because of the failure to do so.[84] Likewise the duty to take precautions to avoid injuries from unexploded blasts is regarded as nondelegable.[85] An employee making repairs ordinarily is regarded as performing a nondelegable duty of the master and as such not a fellow servant of an employee injured by his negligence while so engaged,[86] although there is also authority to the contrary.[87] In some jurisdictions the rule seems to be that, if the master has exercised due care in selecting a competent servant to inspect and repair, such servant is a mere fellow servant while in the performance of that duty.[88]

There is no nondelegable duty of inspection of an appliance constructed by the servants in the course of their employment.[89] If both the negligent and the injured servant were engaged in repair work, the master has been held not liable.[90] The master is not liable where the duty devolving on the negligent servant could have been fulfilled by merely replacing the defective appliance with a sound appliance from a stock furnished by the master.[91] A failure to report to the proper servant an appliance that is out of order and needs repairs does not of itself make the master liable for an injury resulting from the failure of repair.[92]

Incidental inspection and repair. The rule that a servant intrusted with the duty to inspect and repair is not a fellow servant does not apply to defects arising in the daily use of the machines or appliances, which are not of a permanent character and do not require the help of skilled mechanics to repair, but which may easily be and are usually remedied by the workmen, and to repair which proper and suitable materials are supplied;[93] and, when the employee's duty to inspect or repair is incidental to his duty to use the apparatus in the common employment, he is not intrusted with the master's duty to his fellow servants, and the master is not responsible to his fellow servants for his negligence.[94] The master is not bound to inspect simple hand tools while in the possession of his servants to see that they do not become defective, as discussed supra § 235, and, when he has furnished a sufficient number of tools of this character which remain in the possession of the employee, the master is not liable for the act of an employee who is not charged by him with any duty to look after or provide tools of this character in selecting one which is defective and unfit for use.[95] Where the work which the servants are employed to do necessarily changes the character of the appliances as to safety as the work progresses, the duty of care for the safety of appliances in such cases devolves on the servants to whom the work is intrusted.[96]

(2) Railroads

As a general rule, although the authorities are not

83. Va.—Colonna Shipyard v. Dunn, 145 S.E. 342, 151 Va. 740, certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986.
39 C.J. p 625 note 31.

Motor vehicles

(1) The employers of automobile salesman, injured while demonstrating an allegedly defective automobile, could not escape liability for his injuries on ground that alleged negligent inspection of automobile was that of salesman's fellow servant for which employers were not liable.—Eudora Motor Co. v. Womack, 111 S.W.2d 530, 195 Ark. 74.

(2) Master's liability to truck driver's helper for injuries sustained in truck accident could not be defeated on ground that master's negligence in failing to repair brakes was negligence of truck driver who was fellow servant of injured helper, where driver had burden of seeing that truck was kept in condition, since he was vice principal with respect to such duty.—Aronovitch v. Ayres, 193 S.E. 524, 169 Va. 308.

84. U.S.—Gowen v. Bush, Ind.T., 76 F. 349, 22 C.C.A. 196.
39 C.J. p 626 note 33.

85. Mass.—Hooe v. Boston & N. St. R. Co., 72 N.E. 341, 187 Mass. 67.
39 C.J. p 627 note 34.

86. Or.—Field v. Northwest Steel Co., 135 P. 320, 67 Or. 126.
39 C.J. p 627 note 38.

87. Iowa.—Fosburg v. Phillips Fuel Co., 61 N.W. 400, 93 Iowa 54.
N.Y.—Meeker v. C. R. Remington & Son Co., 65 N.Y.S. 1116, 53 App. Div. 592.

88. Md.—Harris v. Consolidation Coal Co., 73 A. 805, 111 Md. 209.
39 C.J. p 626 note 32.

89. U.S.—Phœnix Bridge Co. v. Castleberry, S.C., 131 F. 175, 65 C.C.A. 481.

90. Cal.—Gardstrom v. L. E. White Lumber Co., 132 P. 842, 21 Cal.App. 744.
39 C.J. p 628 note 45.

91. Mich.—Avikainen v. Baltic Min. Co., 125 N.W. 545, 160 Mich. 375, 136 Am.S.R. 443.
39 C.J. p 627 note 36.

92. Mass.—Dodge v. Boston & A. R. Co., 29 N.E. 1086, 155 Mass. 448.
39 C.J. p 627 note 37.

93. Mass.—Rice v. King Phillip Mills, 11 N.E. 101, 144 Mass. 229, 59 Am.R. 80.
39 C.J. p 627 note 40.

94. N.H.—Jaques v. Great Falls Mfg. Co., 22 A. 552, 66 N.H. 482, 13 L.R.A. 824.
39 C.J. p 627 note 41.

95. Ind.—American Car & Foundry Co. v. Nachand, 93 N.E. 1083, 47 Ind.App. 204.
39 C.J. p 628 note 43.

96. U.S.—Westinghouse, Church, Kerr & Co. v. Callaghan, Mo., 155 F. 397, 83 C.C.A. 669, 19 L.R.A., N.S., 361.

unanimous, a servant having the duty to repair or inspect cars or other railroad appliances is not considered a fellow servant of other railroad employees injured by improper performance of such duty so as to relieve the railroad company of liability.

The general rule is that a servant employed to repair or inspect cars, engines, or other appliances is not a fellow servant of other employees of the railroad engaged in working on the trains or about the yards, where the latter are injured by the negligence of the former in failing properly to inspect or repair.[97] In other words, the duty of a railroad company to furnish safe appliances and a place to work extends to the inspection and repair thereof.[98] There are decisions, however, exempting the railroad company, where it has used due care in selecting a competent servant to inspect and make repairs,[99] at least where the negligence was in inspecting the loading of a car[1] or where the duty of inspection is incidental to the use of an appliance.[2] Where defects are latent and not discoverable by an ordinary inspection, it has been held that the master is not liable where he has employed a competent inspector.[3]

Car inspector. A car inspector ordinarily is regarded as vested with a duty of the master so as to be a vice principal.[4] He is not a fellow servant of a trainman so as to relieve the master from liability for the negligence of such inspector in failing to discover a defect which caused an injury to the trainman.[5] There is, however, authority to the effect that all that is required of the master is the furnishing of a competent servant.[6]

Track repairers or inspectors. Although there is some authority to the contrary,[7] an inspector of the roadbed of a railway,[8] or track repairers, including a section foreman, whose negligence in keeping the road in repair is the cause of the injury,[9] ordinarily are not regarded as fellow servants of injured train employees. A similar rule applies as to employees charged with the duty of repairing a railroad bridge.[10]

Cars of another railroad company. A railroad company is bound to inspect the cars of another company used upon its road, just as it would inspect its own cars. It owes this duty as master, and is responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it from another road, which cars have defects, visible or discernible by ordinary examination, it must either remedy such defects or refuse to take the cars, and one to whom such duty is delegated has been held a vice principal.[11]

f. Supervision and Direction

An employee performing the master's primary duty of directing or supervising the work, and adopting necessary precautions to permit the work to be carried on safely, ordinarily is not considered a fellow servant of those injured by his neglect.

One to whom the master has intrusted his primary duty to exercise such direction, control, and supervision over the work as may be required to carry it on with reasonable safety to those employed therein is, in the performance of such duty, not a fellow servant.[12]

As a general rule, an employee to whom is delegated the duty of the master to protect other employees against injury and to exercise reasonable care to keep the working place safe cannot be regarded as a fellow servant of those injured by his

97. U.S.—Atchison, T. & S. F. R. Co. v. Mulligan, Ill., 67 F. 569, 14 C.C.A. 547, certiorari denied 16 S. Ct. 1198, 163 U.S. 676, 41 L.Ed. 311.
39 C.J. p 628 note 51.

98. U.S.—Texas & P. R. Co. v. Barrett, Tex., 67 F. 214, 14 C.C.A. 373, affirmed 17 S.Ct. 707, 166 U.S. 617, 41 L.Ed. 1136.
39 C.J. p 629 note 52.

99. Ala.—Mobile & O. R. Co. v. Thomas, 42 Ala. 672.
39 C.J. p 629 note 53.

1. Mich.—Lellis v. Michigan Cent. R. Co., 82 N.W. 828, 124 Mich. 37, 70 L.R.A. 589.
39 C.J. p 629 note 54.
Liability for improper loading generally see supra § 212.

2. Pa.—Sage v. Baltimore & O. R. Co., 67 A. 985, 219 Pa. 129—Shugard v. Union Tract. Co., 51 A. 325, 201 Pa. 562.

3. Ind.—Indiana, I. & I. R. Co. v. Snyder, 32 N.E. 1129, reheard 39 N.E. 912, 140 Ind. 647.

4. U.S.—Erie R. Co. v. Schomer, Ohio, 171 F. 798, 96 C.C.A. 458.
39 C.J. p 630 note 57.

5. U.S.—Terre Haute & I. R. Co. v. Mansberger, Ill., 65 F. 196, 12 C. C.A. 574, rehearing denied 67 F. 67, 14 C.C.A. 306.
39 C.J. p 630 note 58.

6. Ark.—St. Louis, I. M. & S. R. Co. v. Rice, 11 S.W. 699, 51 Ark. 467, 4 L.R.A. 173.
39 C.J. p 630 note 59.

7. N.C.—Rittenhouse v. Wilmington St. R. Co., 26 S.E. 922, 120 N.C. 544.
39 C.J. p 628 note 47.

8. U.S.—Long Pole Lumber Co. v. Gross, Va., 180 F. 5, 103 C.C.A. 359.
39 C.J. p 628 note 48.

9. Ind.—Indiana Union Tract. Co. v. Long, 96 N.E. 604, 176 Ind. 532.
39 C.J. p 628 note 49.

10. Or.—Carlson v. Oregon Short-Line & U. N. R. Co., 28 P. 497, 21 Or. 450.
39 C.J. p 628 note 50.

11. N.Y.—Eaton v. New York Cent. & H. R. R. Co., 57 N.E. 609, 163 N.Y. 391, 79 Am.S.R. 600.
39 C.J. p 630 note 61.

12. N.C.—Bradford v. English, 130 S.E. 705, 190 N.C. 742.
Wash.—Reynolds v. International Stevedoring Co., 245 P. 1, 138 Wash. 690.
39 C.J. p 631 note 66.
Master's duty of superintendence see supra § 320.

neglect.[13] So the act of an employee is that of a vice principal where he assigns employees to their various tasks,[14] or specifies the places where they shall work,[15] or instructs them as to the work which they are to do.[16]

g. Instructions and Warnings

(1) In general
(2) Warnings during progress of work

(1) In General

The duty of a master to warn servants of the dangers of the employment ordinarily cannot be delegated to an employee so as to permit the master to escape liability for a breach of such duty.

A master who owes a duty to instruct and warn the servant as to the dangers of the employment ordinarily cannot escape liability for injuries resulting from a breach of such duty on the ground that the employee to whom such duty was intrusted was a fellow servant of the injured employee,[17] although there is some authority to the effect that the negligence, if any, may be that of a fellow servant where the work is of such a character as to require no special skill or instruction[18] or where the danger is obvious and the servant has had experience.[19]

Assurances of safety and promises to warn. An employee acting within the scope of his authority in making assurance of safety,[20] and in promising to warn the coemployee in case of danger,[21] or to protect him,[22] has been held to be acting as a vice principal and not as a fellow servant. On the other hand, it has been held not to have been within the authority of a particular employee to agree to guard other employees against danger,[23] and also that the master is not bound by an assurance given as a mere detail of the work.[24] In order to constitute an assurance of safety it is not necessary that the employer, represented in the person of his foreman, should in express terms assure the employee of the safety of the work, but it is sufficient if under the circumstances the foreman's acts and words are in effect such an assurance.[25]

(2) Warnings during Progress of Work

As a rule the master is not responsible for an employee's breach of a duty to warn of dangers arising from execution of the details of the work; but he may be liable for an employee's failure to warn of a danger impending because of some independent act performed for the master's purpose.

It is difficult to reconcile the authorities on the question whether the neglect of a servant charged with the duty of warning the employees of dangers arising during the progress of the work is to be regarded as that of the master or that of a fellow servant.[26] On the proposition that the duty to instruct and warn as to dangers arising from the execution of the general details of the work relates to the duties of the servants as between themselves

13. Kan.—Kreigh v. Westinghouse, 122 P. 890, 86 Kan. 838.
39 C.J. p 631 note 70.
Precautions against injury generally see supra § 262.
Precautions against electric shock
Where lineman was working near high-powered wire, the duty of power company to deënergize wire by either turning off switch or requiring lineman to insulate the wire with a rubber blanket could not be delegated to foreman in charge of work.—Mississippi Power & Light Co. v. Merritt, 12 So.2d 527, 194 Miss. 794.

14. Wis.—Horn v. La Crosse Box Co., 101 N.W. 935, 123 Wis. 399.

15. Pa.—Mapes v. Pittsburg Provision & Packing Co., 31 Pa.Super. 453.

16. Mich.—McDonnell v. Central Drug Co., 136 N.W. 383, 170 Mich. 291.
39 C.J. p 631 note 73.

17. Minn.—Jenkins v. Jenkins, 19 N.W.2d 389, 220 Minn. 216.
Mo.—Gettys v. American Car & Foundry Co., 16 S.W.2d 85, 322 Mo. 787—Stuba v. American Car & Foundry Co., App., 270 S.W. 145.
N.H.—Bilodeau v. Gale Bros., 140 A. 172, 83 N.H. 196.
R.I.—Boettger v. Mauran, 12 A.2d 285, 64 R.I. 340.
Tex.—**Corpus Juris cited in** Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 401, 123 Tex. 128.
39 C.J. p 631 note 75.
Master's duty to instruct and warn see supra §§ 284–306.

18. Mich.—Roepcke v. Michigan Cent. R. Co., 59 N.W. 243, 100 Mich. 541.
39 C.J. p 632 note 77.

19. Mass.—Wolfe v. New Bedford Cordage Co., 76 N.E. 222, 189 Mass. 591.
39 C.J. p 632 note 78.

20. Cal.—Taylor v. Albion Lumber Co., 168 P. 348, 176 Cal. 347, L.R.A.1918B 185.
39 C.J. p 635 note 2.

21. Mont.—Hill v. Nelson Coal Co., 104 P. 876, 40 Mont. 1.
39 C.J. p 635 note 3.

22. N.C.—Taylor v. Tallahassee Power Co., 94 S.E. 432, 174 N.C. 583.
39 C.J. p 635 note 4.

23. Mich.—Guest v. Edison Illuminating Co., 114 N.W. 226, 150 Mich. 438.
39 C.J. p 635 note 5.

24. N.Y.—Schott v. Onondaga County Sav. Bank, 63 N.Y.S. 631, 49 App.Div. 503.
39 C.J. p 635 note 6.

25. Mo.—Dobromilsky v. American Car & Foundry Co., App., 293 S.W. 451.
Foreman's order after worker's remonstrance
Foreman's order to move heavy iron sill nearer end of bench after workman remonstrated was held tantamount to assurance of safety.—Dobromilsky v. American Car & Foundry Co., supra.
Assurance held not given
Foreman's statement that, if deceased and another could not move heavy timber he could get two men who would, was held not assurance that timber could be safely moved as regards liability for deceased's death from cerebral hemorrhage, resulting from moving timber.—Fort Worth & D. C. Ry. Co. v. Doty, Civ.App., 64 S.W.2d 796, affirmed Doty v. Fort Worth & D. C. Ry. Co., 95 S.W.2d 104, 127 Tex. 521.

26. Minn.—Anderson v. Pittsburgh Coal Co., 122 N.W. 794, 108 Minn. 455, 26 L.R.A.,N.S., 624.

so that a failure or negligence with respect thereto is that of a fellow servant, exempting the master from liability, the decisions are in substantial accord,[27] except in so far as a contrary view is demanded by the importance attached to the grade, rank, or control of the offending servant in the particular jurisdiction, as discussed supra § 332. Where the duty of giving warning is expressly imposed by statute on the employee, the master is not liable for his neglect.[28]

On the other hand, it has been held that a failure to warn of a danger impending because of some independent act performed for the master's purpose is a failure in a primary obligation for which the master is liable,[29] as where the employee is at work in a place safe in itself which will become dangerous unless a prior warning of the impending danger is given and the master has required such warning to be given or customarily has assumed to give it through an employee,[30] or in cases in which the employee can be protected in his place of work only by a warning that it is about to become dangerous.[31] The duty of the master to warn his employees of dangers arising out of the progress of the work which are known to him but unknown to them cannot be delegated in such a manner as to relieve the master from the results of its nonperformance.[32]

Starting machinery. It has been held that, where an employee is in a position which will become dangerous on the starting of machinery, the negligence of a coemployee in starting such machinery without warning is attributable to the master;[33] but there is also authority holding the act of an employee in starting machinery without a signal to be the negligence of a fellow servant.[34]

Moving cars. According to some authorities, where an employee is in a work place which will become dangerous if railroad cars are moved without warning, the negligence of a coemployee in failing to give such warning is attributable to the master.[35] According to other authorities, however, the negligence is held to be that of a fellow servant.[36]

Approach of trains. The negligence of an employee in failing to give notice to other employees of approaching trains has been held to be the negligence of the master,[37] particularly where the custom to give warning is established,[38] but the con-

27. Ark.—McGeorge v. Henderson, 145 S.W.2d 31, 201 Ark. 492.
Mo.—**Corpus Juris cited in** Graczak v. City of St. Louis, 202 S.W.2d 775, 777—State ex rel. Kroger Grocery & Baking Co. v. Haid, 18 S.W. 2d 478, 323 Mo. 9.
N.H.—Sweeney v. Boston & M. R. R., 175 A. 243, 87 N.H. 90, certiorari denied 55 S.Ct. 638, 294 U.S. 728, 79 L.Ed. 1258.
S.C.—Brewer v. Brooklyn Cooperage Co., 166 S.E. 85, 167 S.C. 152.
39 C.J. p 633 note 81.

28. Ill.—Streeb v. St. Louis & O'Fallon Coal Co., 165 Ill.App. 304.

29. U.S.—Western Electric Co. v. Hanselmann, N.Y., 136 F. 564, 566, 69 C.C.A. 346, 70 L.R.A. 765, certiorari denied 25 S.Ct. 800, 197 U. S. 624, 49 L.Ed. 911.
39 C.J. p 633 note 84.

30. Mo.—**Corpus Juris cited in** Goodwin v. Missouri Pac. R. Co., 72 S.W.2d 988, 993, 335 Mo. 398—Landcaster v. National Enameling & Stamping Co., App., 1 S.W.2d 238.
39 C.J. p 633 note 85.

31. Kan.—Crist v. Wichita Gas, Electric Light & Power Co., 83 P. 199, 72 Kan. 135.
39 C.J. p 634 note 86.

Inability to see dipper
Where servant was required to shovel gravel in railroad car in such a position that he could not see heavy dipper traveling into and out of car, master's duty to warn servant when dipper was swung into car was nondelegable, and obligation to be diligent about giving warning was continuous, so that master's duty was not performed by ordering another servant to give warning, and negligence of such other servant in failing to give warning was negligence of master.—Carey Reed Co. v. McDavid, C.C.A.Miss., 120 F.2d 843.

32. N.H.—Dubuc v. Amoskeag Industries, 15 A.2d 867, 91 N.H. 173.
39 C.J. p 634 note 88.
Duty of master to warn generally see supra § 284.

Inexperienced helper
Corporation operating steam shovel was held liable for negligence of machinist in failing to warn inexperienced helper of danger involved when helper put his arm through spokes of wheel while at rest.—Philyaw v. Arundel Corporation, C. C.A.S.C., 51 F.2d 183.

33. Mo.—Bentley v. American Car & Foundry Co., App., 13 S.W.2d 562.
39 C.J. p 634 note 89.

Duty to ascertain situation
Plant superintendent, if authorized as representative of employer to start machinery, owed servant charged with duty of starting machinery reasonable care to ascertain whether servant was in perilous situation before starting machinery.—Price v. American Agr. Chemical Co., 176 S.E. 352, 173 S.C. 518.

Power saw
The action of a vice principal, in turning on the power which started a saw while plaintiff, pursuant to a general order of the vice principal and in plain sight of the latter, was oiling, the saw was held negligence.—Thomas v. American Sash & Door Co., 14 S.W.2d 1, 321 Mo. 1024.

34. Iowa.—Peterson v. Chicago, R. I. & P. R. Co., 128 N.W. 932, 149 Iowa 496, 46 L.R.A.,N.S., 766.
39 C.J. p 634 note 90.

35. U.S.—American Car & Foundry Co. v. Rocha, Mo., 257 F. 297, 168 C.C.A. 381, certiorari denied 40 S. Ct. 11, 250 U.S. 663, 63 L.Ed. 1196.
39 C.J. p 634 note 91.

36. Mich.—Jurkiewicz v. American Car & Foundry Co., 111 N.W. 183, 147 Mich. 622.
39 C.J. p 634 note 92.

37. Ky.—Cincinnati, N. O. & T. P. R. Co. v. Hill, 89 S.W. 523, 28 Ky. L. 530.
39 C.J. p 635 note 93.

38. Ky.—Glacken v. Cincinnati, N. O. & T. P. R. Co., 272 S.W. 23, 209 Ky. 28.
39 C.J. p 635 note 94.

Railroad section crew
A railroad company may be found liable for the negligent failure of one member of a section crew to warn his fellows, when the person injured has reasonably intrusted his safety to the watchfulness of others, and, acting in reliance on some-

trary has also been held.[39]

Blasting. The failure to give warning of a blast where such work is being carried on continuously has been held by some authorities to be the negligence of a fellow servant,[40] while by other authorities it has been held to be a default in the duty of the master.[41] So the duty to warn a succeeding shift of miners of an unexploded blast has been held not delegable,[42] although, on the other hand, it has been held that a failure to warn an employee engaged in making preparations for a blast as to unexploded charges is the negligence of a fellow servant.[43]

h. Rules

The master cannot escape responsibility for failure to promulgate rules necessary for the conduct of his business by delegating the duty to an employee; but where he has performed such duty he cannot ordinarily be held liable for failure of an employee to observe the rules.

The duty of the master to promulgate necessary rules for the conduct of the business cannot be delegated so as to shield him from responsibility.[44] However, where the master has performed his duty in this respect, he cannot be held liable, where he has used reasonable care in selecting competent servants, for their failure to observe such rules,[45] although the contrary has been held where the violation results in a failure of the master to discharge one of his nondelegable duties.[46] Where the master knows that one set of servants have so negligently done their work as to occasion danger to a fellow servant, it is his duty to interpose and take reasonable means to see that the rules are complied with, the work properly done, and the danger removed.[47]

i. Orders

An employee's order given in the direct exercise of authority conferred on him by the master, as, for example, where such employee directs the performance of work in a dangerous place, is not usually considered an act of a fellow servant.

An act in the direct exercise of the authority conferred by the master on one employee over his coemployees is not that of a fellow servant.[48] Accordingly, where the negligence complained of is in the giving of an order which it is the duty of the employee to obey, it is not that of a fellow servant but is that of a representative of the master;[49] and an order by one in control which in effect assigns the servant a dangerous place at which to work without warning of the risk incurred partakes of the duty of the master and is not merely that of a fellow servant.[50] A like rule has been applied when the order is coupled with an assurance of safety,[51] or where dangerous work is directed to be performed in an unsafe manner,[52] or where one in control orders a servant into a dangerous place and then with knowledge of his presence renders the place more dangerous by his negligent act.[53] However, an order as to a mere detail of the work not involving an affirmative duty of the master does

one else's care, has maintained no lookout for himself.
Ky.—Glacken v. Cincinnati, N. O. & T. P. R. Co., supra.
N.H.—Sweeney v. Boston & M. R. R., 175 A. 243, 87 N.H. 90, certiorari denied 55 S.Ct. 638, 294 U.S. 728, 79 L.Ed. 1258.

Advising workmen to maintain lookout

A railroad which was under a duty to keep a lookout to warn employees of approaching trains could not delegate such duty so as to be relieved from liability from injuries sustained by an employee on the ground that the foreman having the duty to keep a lookout told the workmen to look out for themselves.—Chesapeake & O. Ry. Co. v. Kennard, 3 S.W.2d 649, 223 Ky. 262.

39. N.Y.—House v. Lehigh Valley R. Co., 113 N.Y.S. 155, 128 App.Div. 756—Curran v. Manhattan R. Co., 103 N.Y.S. 351, 118 App.Div. 347.

40. Ohio.—Kelly Island Lime & Transport Co. v. Pachuta, 69 N.E. 988, 69 Ohio St. 462, 100 Am.S.R. 706.
39 C.J. p 635 note 96.

41. Iowa.—Hendrickson v. U. S. Gypsum Co., 110 N.W. 322, 133 Iowa 89, 9 L.R.A.,N.S., 555, 12 Ann. Cas. 246.
39 C.J. p 635 note 97.

42. Wash.—Shannon v. Consolidated Tiger & Poorman Min. Co., 64 P. 169, 24 Wash. 119.
39 C.J. p 635 note 98.

43. N.Y.—Vitto v. Keogan, 44 N.Y.S. 1, 15 App.Div. 329.

44. N.Y.—Blosky v. Overseas Shipping Co., 220 N.Y.S. 95, 219 App. Div. 438.
Tex.—**Corpus Juris cited in** Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 401, 123 Tex. 128—Morgan v. State, Civ.App., 170 S.W.2d 648, reversed on other grounds State v. Morgan, 170 S.W. 2d 652, 140 Tex. 620.
39 C.J. p 635 note 9.
Duty to adopt and promulgate rules generally see supra § 271.

45. U.S.—C. B. Foster Packing Co. v. Lamey, C.C.A.Miss., 5 F.2d 23.
Mo.—**Corpus Juris cited in** G aczak v. City of St. Louis, 202 S.W.2d 775, 779.
39 C.J. p 635 note 10.

46. Minn.—Arveson v. Boston Coal, Dock & Wharf Co., 150 N.W. 810, 128 Minn. 178.
39 C.J. p 636 note 11.

47. N.Y.—Henry v. Hudson & M. R. Co., 94 N.E. 623, 201 N.Y. 140.

48. Minn.—Barrett v. Reardon, 104 N.W. 309, 95 Minn. 425.
39 C.J. p 636 note 13.

49. Ga.—Moore v. Ross, 153 S.E. 575, 41 Ga.App. 509.
39 C.J. p 636 note 14.

50. Minn.—Carlson v. Northwestern Tel. Exch. Co., 65 N.W. 914, 63 Minn. 428.
39 C.J. p 636 note 15.

51. Mo.—Clark v. Union Iron & Foundry Co., 137 S.W. 577, 234 Mo. 436, 45 L.R.A.,N.S., 295.
39 C.J. p 637 note 16.

52. Vt.—Barclay v. Wetmore & Morse Granite Co., 102 A. 493, 92 Vt. 195.
39 C.J. p 637 note 17.

53. Minn.—Berneche v. Hilliard, 112 N.W. 392, 101 Minn. 366.
39 C.J. p 637 note 18.

not make the employee giving it a vice principal[54] although it may result in putting the servant into a dangerous place.[55]

Order to do work outside employment. The general rule that servants of the same master who are directly coöperating with each other in the particular business are fellow servants, discussed supra § 327, does not apply in certain cases where a servant is ordered to do work outside his regular employment,[56] particularly where it exposes him to a danger not contemplated in the contract of service;[57] and this rule has been applied in cases where one having the control and direction of a minor employee orders him to undertake an act outside of the scope of his employment and of a hazardous character,[58] although there is also authority to the contrary.[59]

Train dispatcher. Although there is some authority to the contrary,[60] a train dispatcher having control of the movements of trains upon a railroad is, in the performance of his duties as such, ordinarily held to be a vice principal as to other employees of the railroad injured by reason of his negligence;[61] and one who performs the duties of a train dispatcher,[62] such as a station agent,[63] is a vice principal while acting as train dispatcher.

Telegraph operators and other servants transmitting orders. One who merely transmits orders has been held a fellow servant.[64] Thus a telegraph operator whose duty it is to transmit information with respect to the location of trains upon the road and communicate instructions for running them, received by him from the train dispatchers, is the fellow servant of employees in charge of such train.[65] A telegraph operator whose duty it is to display signals to govern the running of trains is a fellow servant of those in charge of a train injured in a collision caused by the operator's neglect of such duty.[66]

j. Signals

A servant giving signals during the performance of the work ordinarily is not regarded as performing a primary duty of the master, at least where the employment is not dangerous.

A servant, whose duty it is to give signals during the performance of the work, ordinarily is not regarded as performing a primary duty of the master.[67] However, he is by some authorities so regarded where the employment is necessarily dangerous[68] or where the employee is at work in a place safe in itself but which by independent work for the master's purposes is rendered dangerous unless signals are given.[69] Where the safety of the place where the servant is at work is under the control of the master and the servant depends on signals being conveyed to him by others for his protection, the negligence of an employee charged with the duty of giving signals is that of a vice principal.[70] Further, an employee who is directing the

54. Ga.—Moore v. Ross, 153 S.E. 575, 41 Ga.App. 509.
Mo.—Graczak v. City of St. Louis, 202 S.W.2d 775.
39 C.J. p 637 note 19.

55. N.Y.—Rettagliata v. Hayward, 72 N.E. 1150, 180 N.Y. 512.
39 C.J. p 637 note 20.

56. Iowa.—Hitchcock v. Artic Creamery Co., 150 N.W. 727, 170 Iowa 352.
39 C.J. p 637 note 22.

57. U.S.—Gilmore v. Northern Pac. R. Co., C.C.Or., 18 F. 866, 9 Sawy. 558.
39 C.J. p 637 note 23.

58. Colo.—Orman v. Mannix, 30 P. 1037, 17 Colo. 564, 31 Am.S.R. 340, 17 L.R.A. 602.
39 C.J. p 637 note 24.

59. N.Y.—Crown v. Orr, 35 N.E. 648, 140 N.Y. 450.
39 C.J. p 637 note 25.

60. Md.—Norfolk & W. R. Co. v. Hoover, 29 A. 994, 79 Md. 253, 47 Am.S.R. 392, 25 L.R.A. 710.
Miss.—Millsaps v. Louisville, N. O. & T. R. Co., 13 So. 696, 69 Miss. 423.

61. U.S.—Santa Fe Pac. R. Co. v. Holmes, Cal., 26 S.Ct. 676, 202 U.S. 438, 50 L.Ed. 1094.
39 C.J. p 637 note 27.

62. Mo.—Edge v. Southwest. Missouri Electric R. Co., 104 S.W. 90, 206 Mo. 471.
39 C.J. p 638 note 28.

63. Idaho.—Palmer v. Utah & N. R. Co., 13 P. 425, 2 Idaho, Hasb., 315.

64. Mo.—Card v. Eddy, 28 S.W. 979, 129 Mo. 510, 36 L.R.A. 806.
39 C.J. p 638 note 30.

65. U.S.—Northern Pac. R. Co. v. Dixon, 24 S.Ct. 683, 194 U.S. 338, 48 L.Ed. 1006.
39 C.J. p 638 note 31.

66. U.S.—Cincinnati, N. O. & T. P. R. Co. v. Clark, Tenn., 57 F. 125, 6 C.C.A. 281.
N.Y.—Monaghan v. New York Cent. & H. R. R. Co., 45 Hun 113.

67. Mo.—Corpus Juris cited in Graczak v. City of St. Louis, 202 S.W.2d 775, 777.
39 C.J. p 638 note 34.

Operation of steam hammer
Blacksmith employed by city could not recover from city for injuries resulting from his helper's failure to give proper signal of intention to operate heavy steam hammer, which struck blacksmith's hand.—Graczak v. City of St. Louis, Mo., 202 S.W.2d 775.

Temporary absence of signalmen
Stevedoring company, which provided extra men to take place of any gangwaymen temporarily absent from duties in course of loading vessel, was not liable for negligence of such men in failing to perform their assigned duties during temporary absence of signalmen whose duty it was to signal lowering of draft into hold, resulting in injuries to longshoreman.—Healy v. Carter & Weeks Stevedoring Co., 210 N.Y.S. 75, 213 App.Div. 122.

68. Minn.—Elenduck v. Crookston Lumber Co., 140 N.W. 125, 121 Minn. 53.
39 C.J. p 638 note 35.

69. Minn.—Burke v. Ash, 139 N.W. 705, 120 Minn. 388.
39 C.J. p 639 note 36.

70. Wash.—Frengen v. Stone & Webster Engineering Corp., 119 P. 193, 66 Wash. 204.
39 C.J. p 639 note 37.

work by signals has been held to be a vice principal.[71] The master is liable where the negligence is in the system of signals provided rather than in the default of the signalmen.[72]

k. Selection, Retention, and Number of Coemployees

An employee ordinarily is not deemed a fellow servant in so far as he represents the master in the discharge of the master's duties as to the selection and retention of suitable and sufficient servants.

A servant who represents the master in the discharge of his duty as to the selection and retention of suitable servants is a vice principal and not a fellow servant.[73] Where a servant becomes incompetent, the negligence of the employee whose duty it is to employ and discharge, in thereafter retaining him, is the negligence of a vice principal.[74] Where a statute prohibits the employment of minors in certain hazardous employments, a servant who under express or implied delegation of authority puts a minor at work in violation of the statute is discharging a primary or nondelegable duty of the master.[75]

Assignment to particular task. Although there is some authority to the contrary,[76] the selection and assignment of employees for a particular task has been held a delegable detail as to which an employee acts as a fellow servant.[77] A railroad company has been held liable where a railroad engineer leaves his engine in the management of the fireman or other employee unskilled in running an engine, and a fellow servant is injured thereby;[78] but there are also contrary holdings.[79]

Supply of sufficient number of servants. The duty of using reasonable care to supply a sufficient number of servants to perform the work with reasonable and ordinary safety to those engaged in it is one which cannot be delegated to a servant so as to relieve the master from liability,[80] but the assignment of a sufficient number to a particular task when an adequate force is available ordinarily has been held a matter of detail as to which negligence is that of a fellow servant.[81]

3. Constitutional or Statutory Provisions as to Master's Liability for Injuries by Fellow Servant

§ 334. In General

Constitutional or statutory provisions have abrogated or modified the common-law fellow-servant doctrine in many jurisdictions.

Statutes making the master liable for personal injuries sustained by an employee through the negligence of a fellow servant have been construed as abrogating the common-law rule under which it is a defense to the employer when the injury was due to the negligence of a fellow servant in the course of a common employment.[82] In other jurisdictions the common-law doctrine of the fellow servant, as far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master, is abrogated as to employees in certain hazardous occupations by an article of the constitution,[83] or by statute,[84] or by a legislative act declaring certain occupations to be hazardous in compliance with the constitutional mandate.[85] Such an article of the constitution is self-executing and abrogates the common-law doctrine, as affecting the master's liability for injury to the servant from

71. Wash.—Parr v. Spokane, 121 P. 453, 67 Wash. 164—Sroufe v. Moran Bros. Co., 68 P. 896, 28 Wash. 381, 92 Am.S.R. 847, 58 L.R.A. 313.

72. Mo.—Corpus Juris cited in Goodwin v. Missouri Pac. R. Co., 72 S.W.2d 988, 993, 335 Mo. 398.
39 C.J. p 639 note 39.

73. Okl.—Choctaw Electric Co. v. Clark, 114 P. 730, 28 Okl. 399.
39 C.J. p 639 note 41.

74. N.Y.—Laning v. New York Cent. R. Co., 49 N.Y. 521, 10 Am.R. 417.
39 C.J. p 639 note 42.

75. Minn.—Gutmann v. Anderson, 175 N.W. 303, 142 Minn. 141.
Minors as subject to fellow-servant rule generally see supra § 322 b.

76. Ill.—Fraser v. Schroeder, 45 N.E. 288, 163 Ill. 459.
39 C.J. p 639 note 45.

77. N.H.—Hilton v. Fitchburg R. Co., 59 A. 625, 73 N.H. 116, 68 L.R.A. 428.
39 C.J. p 639 note 44.

78. W.Va.—Core v. Ohio River R. Co., 18 S.E. 596, 38 W.Va. 456.
39 C.J. p 640 note 46.

79. Fla.—South Florida R. Co. v. Price, 13 So. 638, 32 Fla. 46.
39 C.J. p 640 note 47.

80. U.S.—Mason v. Edison Mach. Works, C.C.N.Y., 28 F. 228.
39 C.J. p 640 note 48.

81. N.Y.—Dair v. New York & P. R. SS. Co., 97 N.E. 711, 204 N.Y. 341, 40 L.R.A.,N.S., 918.
39 C.J. p 640 note 49.

82. U.S.—Jamison v. Encarnacion, N.Y., 50 S.Ct. 440, 281 U.S. 635, 74 L.Ed. 1082—Petition of Crosby Fisheries, D.C.Wash., 31 F.2d 1004.
Cal.—Adams v. American President Lines, 146 P.2d 1, 23 Cal.2d 681, prior opinion 140 P.2d 47.
39 C.J. p 654 note 49.

83. Okl.—Oklahoma Coal Co. v. Corrigan, 168 P. 1024, 67 Okl. 90.
39 C.J. p 654 note 50.

84. Ill.—Stevenson v. Avery Coal & Mining Co., 152 Ill.App. 565, affirmed 93 N.E. 40, 246 Ill. 609.
39 C.J. p 654 note 51.

85. U.S.—United Verde Copper Co. v. Kuchan, Ariz., 253 F. 425, 165 C.C.A. 167.
39 C.J. p 655 note 52.

Employer not common carrier
Operator of automobiles for hire, even though not common carrier, is liable, under statute, for injury to employee by fellow servant's negligence; employee not being negligent.—Ryan v. Noble, 116 So. 766, 95 Fla. 830.

acts of a fellow servant, as to an employee of a mining company who may recover as if the negligence of the fellow servant was the negligence of the master.[86] The constitutional provision is not restricted to those employees only who are engaged in the specially hazardous work, but extends to all employees doing work essential in carrying on the business.[87]

The master will be liable for injuries suffered by a servant through the negligence of a fellow servant in cases falling within the purview of constitutional or statutory provisions changing the common-law rule.[88] The liability of a master may be either primary, as arising from breach of a nondelegable duty, or secondary, as arising from the maxim, Qui facit per alium facit per se.[89]

§ 335. Validity, Construction, and Effect in General

The courts have upheld the validity of statutes modifying or abrogating the common-law fellow-servant doctrine and construed them liberally to effectuate their purpose.

The courts have upheld the validity of statutes modifying or abrogating the fellow-servant doctrine.[90] While statutes of this character are in derogation of the common law and, therefore, not to be extended by implication,[91] it has been held that they should be liberally construed to effect the purposes for which they were enacted.[92] The purpose of such provisions is to restrict the use of the fellow-servant doctrine as a defense,[93] and to stimulate employers to greater diligence for the safety of their employees.[94] Such statutes do not take away any common-law remedy the servant may have;[95] neither do they relieve him of that care and caution required of him by the common law,[96] but in the cases to which they apply they are construed to preclude the defense of assumption of the risk of injury from the negligence of fellow servants.[97] The servant is held not to assume the risk of injury from the negligent act of a fellow servant until he has knowledge and appreciates the danger,[98] the rules applied being the same as those applied in determining the question of assumption of the risk of other dangers of the employment,[99] and the servant is entitled to assume that the fellow servant will exercise due care.[1]

Where a statute modifies or abrogates the fellow-servant doctrine only in respect of certain classes of employers, the doctrine is under such a statute changed only with respect to the class designated,[2] and a statute abrogating the common-law fellow-servant rule does not create a liability against particular classes of corporations where no liability existed prior to the enactment of the statute.[3] Some statutes apply where, and only where, the employer is a corporation,[4] and have no application to an in-

86. Okl.—Oklahoma Coal Co. v. Corrigan, 168 P. 1024, 67 Okl. 90.

87. Okl.—Kreps v. Brady, 133 P. 216, 37 Okl. 754, 47 L.R.A.,N.S., 106.
39 C.J. p 655 note 54.

88. Ark.—May v. Sharp, 89 S.W.2d 735, 191 Ark. 1142.
Fla.—Porter v. Sprague, 126 So. 759, 99 Fla. 371.
Ga.—Moore v. Ross, 153 S.E. 575, 41 Ga.App. 569.
Ky.—McDonald v. Louisville & N. R. Co., 24 S.W.2d 585, 232 Ky. 734.
Mo.—Parker v. Nelson Grain & Milling Co., 48 S.W.2d 906, 330 Mo. 95.
N.C.—Richardson v. American Cotton Mills, 127 S.E. 834, 189 N.C. 653.

89. N.C.—Nichols v. Champion Fibre Co., 128 S.E. 471, 190 N.C. 1.
Delegation of duties by master generally see supra § 186.

90. U.S.—Phillips Petroleum Co. v. Jenkins, Ark., 56 S.Ct. 611, 297 U.S. 629, 80 L.Ed. 943, rehearing denied 56 S.Ct. 745, 298 U.S. 691, 80 L.Ed. 1409.
Ark.—Postal Telegraph-Cable Co. v. White, 80 S.W.2d 633, 190 Ark. 365, appeal dismissed 56 S.Ct. 102, 296 U.S. 534, 80 L.Ed. 380.
39 C.J. p 640 note 53, p 654 notes 49 [b] (1), [c] (1), 51 [c] (1).

91. Mo.—Gray v. Wabash R. Co., 137 S.W. 324, 157 Mo.App. 92.
39 C.J. p 640 note 55.

92. U.S.—Jamison v. Encarnacion, N.Y., 50 S.Ct. 440, 281 U.S. 635, 74 L.Ed. 1082.
39 C.J. p 640 note 54.
Application of fellow-servant doctrine in actions for death generally see Death § 45.

93. Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259, 216 Ind. 180.

94. U.S.—Jamison v. Encarnacion, N.Y., 50 S.Ct. 440, 281 U.S. 635, 74 L.Ed. 1082.

95. Mass.—Ryalls v. Mechanics' Mills, 22 N.E. 766, 150 Mass. 190, 5 L.R.A. 667.
39 C.J. p 641 note 56.

96. Ala.—Sloss-Sheffield Steel & Iron Co. v. Stapp, 70 So. 267, 195 Ala. 340.
39 C.J. p 641 note 57.

97. U.S.—Union Oil Co. of California v. Hunt, C.C.A.Or., 111 F.2d 269—American Sugar Refining Co. v. Nassif, C.C.A.Mass., 45 F.2d 321 —Erie R. Co. v. Vajo, C.C.A.Ohio, 41 F.2d 738.
Fla.—Tampa Electric Co. v. Jandreau, 112 So. 558, 93 Fla. 520.
Or.—Peluck v. Pacific Machine & Blacksmith Co., 293 P. 417, 134 Or. 171—Hollopeter v. Palm, 291 P. 380, 134 Or. 546, modified in other respects 294 P. 1056, 134 Or. 546, and appeal dismissed 52 S.Ct. 15, 284 U.S. 572, 76 L.Ed. 497—Jodoin v. Luckenbach S. S. Co., 268 P. 51, 125 Or. 634.
39 C.J. p 641 note 58.

98. Ark.—Hollingshead v. American Railway Express Co., 220 S.W. 462, 143 Ark. 422.

99. Ark.—Hollingshead v. American Railway Express Co., supra.
39 C.J. p 641 note 60.
Assumption of risk generally see infra §§ 357–420.

1. Ark.—St. Louis, I. M. & S. R. Co. v. Booth, 135 S.W. 811, 98 Ark. 227.

2. Ark.—Graham v. Thrall, 129 S. W. 532, 95 Ark. 560.

3. Ark.—Ft. Smith Sewer Dist. No. 2 v. Moreland, 127 S.W. 469, 94 Ark. 380, 21 Ann.Cas. 957.
39 C.J. p 642 note 70.

4. Ark.—Southwestern Bell Telephone Co. v. Casson, 138 S.W.2d 406, 199 Ark. 1140—Missouri Pac. Transp. Co. v. Baxter, 76 S.W.2d 958, 189 Ark. 1147—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056—

dividual employer[5] or to a partnership.[6]

Statutes not expressly relating to servants. Before the passage of the employers' liability acts in this country, certain statutes were enacted making railroad or other companies liable to "any person" injured by reason of their negligence in certain particulars, and it was held that such statutes did not change the common-law rule as to a master's nonliability to a servant for injuries due to the negligence of a fellow servant.[7]

Acts out of scope of employment. The statutes do not make the master liable for an injury to an employee caused by a servant acting without authority wholly outside the scope of his employment.[8]

Willful acts. Where the case is within the statute, the fact that the injury is from the willful, wanton, reckless, or intentional wrong of the fellow-servant does not prevent a recovery.[9]

Proceedings in rem. The provisions of such a statute have been held applicable to proceedings in rem against a vessel under another statute providing that, in cases of negligent injury by a boat or vessel, an action may be brought against the boat or vessel by name rather than in personam against the owner.[10]

§ 336. Effect on Care Required of Fellow Servant

Under statutes modifying or abrogating the fellow-servant doctrine there is no obligation on a servant to exercise extraordinary care, but the master may be held responsible for injuries to an employee proximately resulting from the fellow servant's failure to exercise ordinary care.

The statutes making employers liable to an employee for injuries caused by the negligence of a fellow servant do not have the effect of requiring the exercise of extraordinary diligence and care on the part of the latter.[11] It is sufficient if he exercises toward the injured servant that degree of care which prudent persons ordinarily exercise under like circumstances.[12] Where men are working together, each has a right to expect his fellow workman to exercise due care in the premises for the safety of the other,[13] and to devote his attention to the business in hand,[14] and a fellow servant's failure to observe due care will be regarded as negligence rendering his employer liable under such statutes, for injuries to an employee proximately caused thereby,[15] but, if the act of the fellow servant claimed to have caused the injury did not constitute negligence or other wrong, the employer may not be held responsible in damages.[16]

Customary methods. As a general rule, it is not negligence in a fellow servant to follow the customary methods of work,[17] unless the circumstances are such as to render such methods dangerous.[18] On the other hand the master will be held liable for injuries to a servant caused by the negligence of a fellow servant in failing to observe the customary methods of work.[19]

Texas Pipe Line Co. v. Johnson, 275 S.W. 329, 169 Ark. 235.
39 C.J. p 642 note 71, p 654 note 49 [a].

5. Ark.—Rodgers v. Crumpton, 113 S.W.2d 480, 196 Ark. 1179—Haraway v. Mance, 56 S.W.2d 1023, 186 Ark. 971—Howell v. Harvill, 50 S.W.2d 597, 185 Ark. 977.
Ind.—Acme Bedford Stone Co. v. McPhetridge, 73 N.E. 838, 35 Ind.App. 79.

6. Ark.—May v. Sharp, 89 S.W.2d 735, 191 Ark. 1142—Haraway v. Mance, 56 S.W.2d 1023, 186 Ark. 971.
39 C.J. p 642 note 73, p 654 note 49 [a] (3).

7. U.S.—Randall v. Baltimore & O. R. Co., W.Va., 3 S.Ct. 322, 109 U.S. 478, 27 L.Ed. 1003.
39 C.J. p 642 note 64.
Railroad employees generally see infra §§ 346–355.

8. Wash.—Reeve v. Northern Pac. R. Co., 144 P. 63, 82 Wash. 268, L.R.A.1915C 37.
39 C.J. p 642 note 62.

Willful assault
U.S.—Pittsburgh S. S. Co. v. Scott, C.C.A.Ohio, 159 F.2d 373.

9. Ala.—Southern R. Co. v. Moore, 29 So. 659, 128 Ala. 434.
39 C.J. p 642 note 63.

10. U.S.—The Bee, D.C.Or., 216 F. 709.

11. Iowa.—Hunt v. Chicago & N. W. R. Co., 26 Iowa 363.

12. U.S.—Duncan v. Montgomery Ward & Co., C.C.A.Ark., 108 F.2d 848, motion denied 60 S.Ct. 1073, 310 U.S. 612, 84 L.Ed. 1389, modified in other respects 61 S.Ct. 189, 311 U.S. 243, 85 L.Ed. 147.
39 C.J. p 643 note 82.

13. U.S.—Duncan v. Montgomery Ward & Co., supra.

14. Ark.—Smith v. Stuart C. Irby Co., 151 S.W.2d 996, 202 Ark. 736.

15. U.S.—Duncan v. Montgomery Ward & Co., C.C.A.Ark., 108 F.2d 848, motion denied 60 S.Ct. 1073, 310 U.S. 612, 84 L.Ed. 1389, modified on other grounds 61 S.Ct. 189, 311 U.S. 243, 85 L.Ed. 147.
Ark.—Smith v. Stuart C. Irby Co., 151 S.W.2d 996, 202 Ark. 736—Southwest Power Co. v. Price, 22 S.W.2d 373, 180 Ark. 567, certiorari denied 50 S.Ct. 353, 281 U.S. 753, 74 L.Ed. 1163, and appeal dismissed 50 S.Ct. 407, 281 U.S. 703, 74 L.Ed. 1128.

Reversing valve without warning
Employee, who was injured, while exercising due care, by another employee's negligence in reversing valve causing dust to fill employee's eyes without warning or notice, could recover from employer.—Gilliam v. Bradley Lumber Co. of Arkansas, 67 S.W.2d 595, 188 Ark. 615.

16. Ark.—Missouri Pac. R. Co. v. Vinson, 118 S.W.2d 672, 196 Ark. 500—Vincennes Steel Corporation v. Derryberry, 106 S.W.2d 571, 194 Ark. 37.

17. Iowa.—Gorman v. Minneapolis & St. L. R. Co., 43 N.W. 303, 78 Iowa 509.

18. Iowa.—Knott v. Dubuque & S. C. R. Co., 51 N.W. 57, 84 Iowa 462.
39 C.J. p 643 note 84.

19. Iowa.—Romick v. Chicago, I. R. & P. R. Co., 17 N.W. 458, 62 Iowa 167.
Minn.—Moran v. Eastern R. Co., 50 N.W 930, 48 Minn. 46.

Proximate cause of injury. Where the right of recovery is predicated on the negligence of a fellow servant, such negligence must be the proximate cause of the injury.[20]

§ 337. Effect of Absence of Negligence of Master in Respect of Methods of Work

The employer's exercise of due care in respect of methods of work and providing competent fellow servants will not preclude his liability for injuries to an employee resulting from the negligence of fellow servants under statutes changing the common-law doctrine.

Under statutes modifying or abrogating the fellow-servant doctrine, a master will be liable for injuries to a servant resulting from the negligence of a fellow servant, although the master has been guilty of no negligence in respect of his methods of work,[21] or in providing competent fellow servants,[22] provided the servant could not, by the exercise of ordinary care, have avoided the consequences to himself of such negligence, and provided further that he was not himself guilty of any contributory negligence.[23]

§ 338. Statutes Declaratory of Common Law

Some statutes are substantially declaratory of the common-law doctrine as to liability for injuries caused by fellow servants.

In the course of a development of legislation affecting the liability of the master for injuries to his servant, laws have been enacted in some states which are merely declaratory of the common-law rule as it existed in those states which had adopted neither the superior-servant nor the different-department rule;[24] and, in some states, it has been provided by statute that, except in case of railroad companies, the master is not liable to a servant for injuries arising from the negligence or misconduct of other servants about the same business.[25]

§ 339. Statutes Defining "Fellow Servant" and "Vice Principal"

Statutes defining the terms "fellow servant" and "vice principal" do not change the common-law liabilities of masters for the negligence of their servants, but merely afford an authoritative definition of such terms.

In some jurisdictions, the terms "fellow servant" and "vice principal" are defined by statute.[26] The purpose and effect of such statutes are not to change and extend the liabilities of masters for the negligence of their servants,[27] but their sole object and effect are to give an authoritative legislative definition to the terms "vice principal" and "fellow servant," and to leave the liabilities of the masters for the acts of their servants as they were before the laws were enacted.[28]

§ 340. Superior Servant Rule

a. In general
b. Superintendence

a. In General

Under statutory provisions existing in some jurisdictions the employer may be held responsible for injuries caused by the negligence of a superior, as distinguished from a fellow servant.

In several jurisdictions the superior-servant rule which had been adopted in some of the states before the enactment of any statute, as discussed supra § 332, is now recognized with more or less qualification by statutory provision,[29] and particularly in the case of employees engaged in hazardous occupations.[30] In some states the liability of a master is extended by statute to injuries caused by the negligence of any person engaged as superintendent, manager, foreman, or any other person in charge or control of works, plants, or machinery, or by the negligence of any person in charge of or directing the particular work in which the employee was engaged at the time of the injury or death.[31] It is not

20. Ark.—American Co. of Arkansas v. Baker, 60 S.W.2d 572, 187 Ark. 492.
39 C.J. p 643 note 86.

21. Wis.—Sparks v. Wisconsin Cent. R. Co., 120 N.W. 858, 139 Wis. 108.
39 C.J. p 644 note 87.

22. Okl.—Chicago, I. R. & P. R. Co. v. Dennis, 144 P. 368, 44 Okl. 258.

23. Ga.—Central R. Co. v. Lanier, 10 S.E. 279, 83 Ga. 587.

24. U.S.—Northern Pac. R. Co. v. Hambly, 14 S.Ct. 983, 154 U.S. 349, 38 L.Ed. 1009.
39 C.J. p 644 note 89.
Different-department and superior-servant rules at common law see supra §§ 331, 332.

25. Ga.—Blanchard v. Gallahar, 33 S.E.2d 379, 72 Ga.App. 132.
39 C.J. p 644 note 90.
Provisions as to railroad employees generally see infra §§ 346–355.

26. Tex.—Texas Bldg. Co., v. Reed, Civ.App., 169 S.W. 211, error dismissed.
39 C.J. p 644 note 91, p 553 note 65.
Shoveler in mine employed by defendant, whose gross negligence in failing to discharge dynamite discovered in drifts causing death of driller, was held to be "vice principal" of defendant and not fellow servant of driller, with respect to duty to inspect drift for undischarged shots of dynamite, and to warn driller of such missed charge, in view of statute.—Cunningham v. Doe Run Lead Co., 285 S.W. 757, 759, 220 Mo.App. 38.

27. U.S.—Lukic v. Southern Pac. Co., C.C.Utah, 160 F. 135.
39 C.J. p 645 note 92.

28. U.S.—Southern Pac. Co. v. Schoer, Utah, 114 F. 466, 52 C.C.A. 268, 57 L.R.A. 707.
39 C.J. p 645 note 93.

29. U.S.—Leary Constr. Co. v. Matson, C.C.A.Va., 272 F. 461.
39 C.J. p 645 note 96.

30. Or.—Wheeler v. Nehalem Timber & Logging Co., 155 P. 1188, 79 Or. 506.
39 C.J. p 645 note 97.

31. U.S.—Aqua System v. Kodakoski, C.C.A.Canal Zone, 88 F.2d 395.
39 C.J. p 645 note 98.

necessary, in order to render the statute applicable, that the foreman, whose negligence caused the injury, should have power to hire and discharge men,[32] and the mere fact that the foreman performed an act of manual labor will not make him a fellow servant when it was done in the line of his duty as such foreman.[33] Such a statute, however, does not constitute every person doing the manual labor of operating the levers of an engine a vice principal of the employer, for whose negligence the latter would be liable to other employees,[34] and the fact that the statute provides that the master may be held liable for negligence of a foreman, manager, "or other person" in authority does not enlarge the scope of the act so as to exclude the fellow-servant defense in every case of negligence of an employee in charge of any machine or device used in the employer's business.[35] Statutes of this character operate to exclude the defense of fellow servant only where the injury was caused by one in authority over the injured employee.[36] Where the vice principal undertakes work in simple co-operation with other servants, he becomes for the time being a mere fellow servant with them and the statute has no application.[37]

b. Superintendence

Under some statutory provisions an employer is liable for injuries to an employee caused by negligence of another employee engaged in superintendence or direction of the work.

In some jurisdictions the statute imposes liability on the master where the injury to his servant is caused by the negligence of a coservant intrusted with and exercising superintendence.[38] In other jurisdictions, the master is made liable only for the negligence of one whose "principal or sole" duty is that of superintendence, while intrusted with and exercising superintendence,[39] although in some jurisdictions it is further provided by statute that the master is liable for the negligence of any person acting as superintendent with the authority or consent of the employer, in the absence of one whose "principal or sole" duty is that of superintendence.[40] These statutes in so far as adopted in those states which have rejected the superior-servant doctrine change the common-law rule and enlarge the liability of the master.[41]

Who are superintendents. The question whether an employee is a superintendent,[42] or one whose "sole and principal" duty is that of superintendence,[43] within the meaning of the statute, is usually to be determined under the circumstances of the particular case. It is not necessary to show that the superintendence was over the servant who complains of the negligence of the person intrusted with it.[44] Under such statutes an employee may be a superintendent, although there is a general superintendent over him,[45] and even though a superior of the servant exercising superintendence was present at the time of the injury,[46] or although he incidentally performs manual labor a part of the time.[47] However, an employee is not ordinarily regarded as one whose "sole or principal" duty is that of superintendence, where he does the same work as other laborers,[48] or where he works with his hands in doing manual labor the greater portion of his time,[49] although an employee may be so engaged under such peculiar circumstances that quite continuous laboring with his

32. Pa.—Wiles v. Emerson-Brantingham Co., 110 A. 280, 267 Pa. 47.

33. Pa.—Anderson v. Keystone Type Fdy., 98 A. 696, 253 Pa. 510.
39 C.J. p 646 note 1.

34. Pa.—Golien v. Susquehanna Coal Co., 54 Pa.Super. 299.

35. U.S.—Van Norden v. Chas. R. McCormick Lumber Co. of Delaware, C.C.A.Or., 17 F.2d 568, certiorari denied 47 S.Ct. 768, 274 U.S. 758, 71 L.Ed. 1337.

36. U.S.—Van Norden v. Chas. R. McCormick Lumber Co. of Delaware, supra.

37. Pa.—Sorden v. Parker, 53 Pa. Super. 539.

38. Ala.—Tennessee Coal, Iron & R. R. Co. v. Spicer, 89 So. 293, 206 Ala. 141.
39 C.J. p 646 note 4.

39. N.J.—Beagle v. Lehigh & Wilkes-Barre Coal Co., 82 A. 890, 82 N.J.Law 707.
39 C.J. p 646 note 5.

40. Mass.—Hargrave v. American Steel & Wire Co., 106 N.E. 637, 219 Mass. 6.
N.Y.—Faith v. New York Cent. & H. R. R. Co., 95 N.Y.S. 774, 109 App.Div. 222, 17 N.Y.Ann.Cas. 277, affirmed 77 N.E. 1186, 185 N.Y. 556.
39 C.J p 647 note 6.

41. N.Y.—Lopisi v. Degnon Constr. Co., 134 N.Y.S. 927, 76 Misc. 279.
39 C.J. p 647 note 7.

42. Ala.—Dantzler v. De Bardeleben Coal & Iron Co., 14 So. 10, 101 Ala. 309, 22 L.R.A. 361.
39 C.J. p 647 note 9.

43. Mass.—Moses v. Sprague, Nugent Co., 106 N.E. 562, 563, 219 Mass. 144.
39 C.J. p 647 note 10.

44. U.S.—Larkin v. Burke, N.Y., 212 F. 148, 129 C.C.A. 86.
39 C.J. p 648 note 11.

45. U.S.—Proctor & Gamble Co. v. Williams, N.Y., 183 F. 695, 106 C.C.A. 45.
39 C.J. p 648 note 12.

46. N.Y.—Smith v. Milliken, 93 N. E. 184, 200 N.Y. 21.

47. Ala.—Linderman v. Tennessee Coal, Iron & R. Co., 58 So. 900, 177 Ala. 378.
39 C.J. p 648 note 14.

48. Mass.—Stevens v. Strout, 86 N. E. 907, 200 Mass. 432.
39 C.J. p 648 note 15.

A weaver who operates a loom is not person "intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence," merely because it is also her duty where her loom gets out of repair to notify the loom fixer to put it in order.—Roseback v. Ætna Mills, 33 N.E. 577, 158 Mass. 379.

49. Mass.—Cunningham v. Lynn & B. R. Co., 49 N.E. 440, 170 Mass. 298.
39 C.J. p 649 note 16.

hands is a necessary part of the duty of superintendence.[50]

Employee acting as superintendent in absence of superintendent. Under a provision making the master liable for the negligence of any person acting as superintendent with the authority or consent of the employer, in the absence of the superintendent, whose sole or principal duty is that of superintendence, such an acting superintendent need not be a person whose "sole or principal" duty is that of superintendence if he acts with the knowledge of the employer.[51] The fact that the absence of the superintendent was brief and temporary does not relieve an employer of liability for the negligence of an acting superintendent, if, in fact, he was authorized to act during such absence.[52] The master, however, is not liable under the statute where the work was such that he was not bound to furnish a superintendent;[53] and, although a master may have several employees whose sole and principal duty is superintendence, yet a master is not liable for the negligence of an employee who is clothed only with some powers of direction in the absence of the regular superintendent, when it does not appear that the regular superintendent was absent from the work at the time.[54]

Nature of negligent act. Under statutes of this kind it is generally held that the negligent act must be one of, or pertaining to, superintendence,[55] and the negligence complained of must occur not only during the superintendence, but substantially in the exercise of it.[56] However, it has been held, under a statute providing that the fellow servant defense is not available where injuries to a servant are caused by the negligence of one intrusted with superintendence or authority to direct, that a master is liable, although the negligent act was in what would otherwise be a detail of the work,[57] and that the master's liability is not limited to injuries resulting from negligence occurring in the exercise of superintendence, but extends to negligence in the performance of such an act as would naturally be performed by ordinary fellow servants.[58]

An act may be one of superintendence where it relates to the furnishing of a safe place to work or safe appliances or to the keeping of them in a safe condition.[59] On the other hand, the act is not one of superintendence where, at the time and in doing the act complained of, the servant whose negligence is complained of is engaged in mere manual labor which is the duty of a common workman.[60] However, it is held that the servant is engaged in an act of superintendence, although he is at the time of the injury performing an act of manual labor, where it is done pursuant to directing the work and in furtherance thereof.[61] An act done voluntarily while superintending, where not within the scope of the duties of a servant so acting and without the direction or consent of the master, is not an act of superintendence.[62]

§ 341. Negligence of Person to Whose Orders Injured Employee Was Bound to Conform

Under some statutory provisions liability is imposed on an employer for injuries to his employee resulting from negligence of another employee to whose orders the injured one is bound to conform.

Under some statutory provisions, liability is imposed on the master for injuries resulting from negligence of any person in its service to whose orders or direction the injured employee at the time of the injury was bound to conform, and did conform.[63] Under such statutes it has been held that there can be no recovery unless the injured servant is acting under some special order in respect of the particular service in which he was engaged when injured, as distinguished from general instructions as to duties connected with his employment generally.[64] The

50. U.S.—New England Tel. & Tel. Co. v. Butler, Mass., 156 F. 321, 84 C.C.A. 217.
39 C.J. p 649 note 17.

51. Mass.—Carney v. A. B. Clark Co., 93 N.E. 647, 207 Mass. 200.
39 C.J. p 649 note 19.

52. Mass.—Hargrave v. American Steel & Wire Co., 106 N.E. 637, 219 Mass. 6.

53. N.Y.—Shanley v. New York, 133 N.Y.S. 752, 149 App.Div. 187.

54. N.Y.—Williams v. Citizens' Steamboat Co., 106 N.Y.S. 975, 122 App.Div. 188.

55. N.Y.—Gallagher v. Newman, 83 N.E. 480, 190 N.Y. 444, 447, 16 L.R.A.,N.S., 146.
39 C.J. p 649 note 23.

56. S.C.—Rippy v. Southern R. Co., 61 S.E. 1010, 80 S.C. 539, 21 L.R.A., N.S., 601.

57. N.Y.—Guirizinski v. American Radiator Co., 118 N.E. 215, 222 N.Y. 85.
39 C.J. p 650 note 25.

58. N.Y.—Pelow v. Oswego Constr. Co., 112 N.E. 379, 217 N.Y. 506.
39 C.J. p 650 note 26.

59. S.C.—Rippy v. Southern R. Co., 61 S.E. 1010, 80 S.C. 539, 21 L.R.A., N.S., 601.
39 C.J. p 651 note 27.

60. S.C.—Rippy v. Southern R. Co., 61 S.E. 1010, 80 S.C. 539, 21 L.R.A., N.S., 601.
39 C.J. p 651 note 28.

61. S.C.—Rippy v. Southern R. Co., supra.
39 C.J. p 651 note 29.

62. Ala.—Jones v. Kirkpatrick Sand, etc., Co., 94 So. 595, 208 Ala. 365.
Mass.—Shea v. Wellington, 40 N.E. 173, 163 Mass. 364.

63. Ohio.—Ohm v. Miller, 167 N.E. 482, 31 Ohio App. 446.
39 C.J. p 652 note 32.

Instructions held "peremptory"
Ohio.—Tuck v. Chapple, 152 N.E. 660, 115 Ohio St. 177.

64. Ala.—Mobile & O. R. Co. v. George, 10 So. 145, 94 Ala. 199.
39 C.J. p 652 note 33.

injury must be caused by the negligence of such superior servant[65] who must have had authority to give the order,[66] and the injury must have resulted from obedience to the order.[67] Furthermore, the injured servant must have been bound to conform to the order.[68]

§ 342. Different Department Statutes

Under some statutory provisions the fellow servant doctrine is abrogated as to servants in different departments.

The different-department rule, as discussed supra § 331, is expressly adopted by statute in some states, and an employee may recover for injuries caused by the negligence of a servant in a different department.[69]

§ 343. Acts or Omissions in Obedience to Rules

Under statutes making the master liable for injuries to his servant resulting from obedience to rules, he will not be responsible for injuries resulting from disobedience.

A statutory provision making the master liable where the injury results from the act or omission of any person done or made in obedience to any rule, regulation, or by-law of the corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf, does not make the master liable where a duty is enjoined by rule, etc., on a servant and the duty is neglected or negligently performed,[70] or where the injury did not result from the order.[71] Under statutes broadly imposing liability on the master for injuries to an employee caused by the negligence of a fellow servant, the matter may be held liable notwithstanding the negligent act was in direct disobedience of rules promulgated by the master.[72]

§ 344. Defects in Ways, Works, Machinery, Etc.

Under statutes making an employer liable where injury to his employee results from defects in the ways, works, or machinery not discovered or remedied because of the negligence of one intrusted by the employer with the duty of seeing that they are in proper condition, it must be shown that the person so intrusted either knew or should have known of the defect.

Under statute in some jurisdictions, the master is liable where the injury results from defects in the ways, works, machinery, etc., not discovered or remedied, owing to the negligence of some person intrusted by the master with the duty of seeing that they are in proper condition;[73] but it must be shown that the servant intrusted with such duty had knowledge of the defect or was negligent in not discovering it.[74] Such provisions seem to be, at least in part, merely a statutory reiteration of the common-law rule that the master cannot escape liability for the failure to furnish a safe place to work or safe appliances by delegating the duty to a coservant of the injured employee.[75] A statute providing that, in actions to recover from an employer for injuries to an employee, the negligence of a fellow servant is not a defense where the injury was caused or contributed by any defects in the appliances or the negligence of any person in charge applies to all employers as far as it relates to defects in the works or plants under their control, and of which defects they can have knowledge, through ordinary care.[76] Under statutes providing that an employee shall not be deemed to have assumed the risks of his employment in any case where injury or death results in whole or in part from negligence of the master, it has been held that an employee operating machinery does not assume the risk of negligence of a fellow servant charged with the duty of inspecting such machinery.[77]

§ 345. Extraterritorial and Retroactive Effect

Statutes modifying or abrogating the common-law fellow-servant doctrine are ordinarily denied an extraterritorial or retroactive effect.

Statutes abrogating or modifying the common-law fellow-servant rule have no extraterritorial effect and consequently do not create a right of ac-

65. Pa.—Sterner v. S. Morgan Smith Co., 81 A. 889, 233 Pa. 27.
39 C.J. p 652 note 34.

66. Ind.—Muncie Pulp Co. v. Davis, 70 N.E. 875, 162 Ind. 558.
39 C.J. p 653 note 35.

67. Ind.—Indiana Mfg. Co. v. Buskirk, 68 N.E. 925, 32 Ind.App. 414.
39 C.J. p 653 note 36.

68. Ala.—Georgia Pac. R. Co. v. Propst, 4 So. 711, 85 Ala. 203.

69. Cal.—Judd v. Letts, 111 P. 12, 158 Cal. 359, 41 L.R.A.,N.S., 156.
39 C.J. p 653 note 40.

70. Ala.—Laughran v. Brewer, 21 So. 415, 113 Ala. 509.
39 C.J. p 653 notes 41, 42.

71. Pa.—Sterner v. S. Morgan Smith Co., 81 A. 889, 233 Pa. 27.

72. Cal.—Adams v. American President Lines, 146 P.2d 1, 23 Cal.2d 681.

73. Or.—Jodoin v. Luckenbach S. S. Co., 268 P. 51, 125 Or. 634.
39 C.J. p 653 note 44.

74. Ala.—Southern R. Co. v. Cooper, 55 So. 211, 172 Ala. 505.
39 C.J. p 654 note 45.

75. Ind.—Indiana Union Tract. Co. v. Long, 96 N.E. 604, 176 Ind. 532.

76. Pa.—Toward v. Meadow Lands Coal Co., 79 A. 129, 229 Pa. 553.
39 C.J. p 654 note 47.

77. Miss.—Planters' Oil Mill v. Wiley, 122 So. 365, 113 Miss. 113.
Assumption of risk generally see infra §§ 357–420.

tion for an injury sustained by a servant in another state through the negligence of a fellow servant.[78] Also the statutes do not apply to injuries received prior to the time of their taking effect,[79] but, where the injuries were received after the passage of the act, the statute applies, although the contract of employment antedated the act.[80] It has been held that the repeal of the statute will not affect an action for injuries which occurred while it was in force.[81]

§ 346. Railroad Employees

The courts have upheld the validity of constitutional and statutory provisions changing the fellow-servant doctrine in respect of railroads, and under such provisions railroad employees are entitled to recover for injuries caused by the negligence of a fellow servant in a case falling within the terms of the particular provision invoked.

The courts have upheld the validity of statutory provisions modifying or abrogating the common-law fellow-servant doctrine in respect of railroads.[82] A statute which is made to apply to employers of five or more persons engaged in business, trade, or commerce, has been held to apply to railroads, although there was already in force a statute fixing the liability of railroads to their employees.[83] Under statutes modifying or abrogating the fellow-servant doctrine and generally or specifically applicable to railroads, recovery may be had against a railroad for injuries to its employees caused by the negligence of a fellow servant.[84]

A state constitutional provision abolishing the fellow servant rule with respect to a railroad employee is not in conflict with the federal constitution or its amendments.[85] A constitutional provision abrogating the fellow-servant doctrine with regard to certain employments does not limit the power of the legislature to make further abrogation with respect to employees of railroads.[86]

§ 347. —— Employers Affected by Statutes

a. In general
b. Logging or mining roads
c. Street railroads

a. In General

Some statutes abrogating or modifying the fellow-servant doctrine have been held applicable irrespective of whether the railroad company was public or private in character while other statutes have been held inapplicable to private railroad companies.

Statutes relating to liability of railroad companies for injuries caused by fellow servants do not apply to companies in no way engaged in railroading,[87] or to employees of corporations not operating the classes of railroads described in the statute,[88] and the question precisely what employers are included within such statutes will depend on their particular provisions as construed in the light of the purpose of the act and the circumstances of the

78. Ind.—Baltimore & O. S. W. R. Co. v. Reed, 62 N.E. 488, 158 Ind. 25, 92 Am.S.R. 293.
39 C.J. p 643 note 75.

79. U.S.—Wright v. Southern R. Co., C.C.N.C., 80 F. 260.
39 C.J. p 643 note 77.

80. Ind.—J. Wooley Coal Co. v. Tevault, 118 N.E. 921, 187 Ind. 171, dissenting opinion 119 N.E. 485, 187 Ind. 171—Kokomo Brass Works v. Doran, 105 N.E. 167, 59 Ind.App. 583.

81. Tex.—Culpepper v. International & G. N. R. Co., 40 S.W. 386, 90 Tex. 627.

82. U.S.—Chicago, Indianapolis & Louisville R. Co. v. Hackett, Ill., 33 S.Ct. 581, 228 U.S. 559, 57 L. Ed. 966.
39 C.J. p 655 note 57.

83. Ind.—Vandalia R. Co. v. Stillwell, 104 N.E. 289, 181 Ind. 267, Ann.Cas.1916D 258, affirmed 36 S. Ct. 445, 239 U.S. 637, 241 U.S. 638, 60 L.Ed. 480, 1215.

84. Ark.—Chicago, R. I. & P. Ry. Co. v. Daniel, 273 S.W. 15, 169 Ark. 23.
Mo.—Gray v. Kurn, 137 S.W.2d 558, 345 Mo. 1027.

Act of employee as act of master

In personal injury action against railroad by engine hostler alleging defendant's negligence in permitting coal to remain in passageway between tracks near roundhouse, act of other employees in leaving coal in passageway was that of master under Federal Employers' Liability Act.—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 335 Mo. 1148.

Anticipation of injury

In order to render railroad liable for negligence of servant's fellow servant, it was not necessary that fellow servant should have anticipated injury to servant's eye would result therefrom.—Hogue v. St. Louis-San Francisco Ry. Co., Mo.App., 20 S.W.2d 301.

Knowledge of injured employee

Although Employer's Liability Act does not deprive employer of defense of assumption of risk, where injury is result of negligent acts of fellow servant of which injured employee had knowledge, neither does injured employee assume risk of injury from negligence of fellow servant of which he did not have knowledge and did not appreciate.—Chicago, R. I. & P. Ry. Co. v. Daniel, 273 S.W. 15, 169 Ark. 23.

85. U.S.—Day v. Atlantic Coast Line R. Co., Va., 179 F. 26, 102 C.C.A. 654, certiorari denied 31 S.Ct. 720, 220 U.S. 617, 55 L.Ed. 611.

86. Miss.—Easterling Lumber Co. v. Pierce, 64 So. 461, 106 Miss. 672, appeal dismissed 35 S.Ct. 133, 235 U.S. 380, 59 L.Ed. 279.

87. Fla.—Fruit Growers' Express Co. v. Norton, 116 So. 234, 95 Fla. 429.
Tex.—Consumers' Cotton Oil Co. v. Jonte, 80 S.W. 847, 36 Tex.Civ.App. 18.
39 C.J. p 655 note 60.

"Railroading"

The term in statute relating to personal injury actions means business of common carrier transporting persons and goods for hire.—Fruit Growers' Express Co. v. Norton, 116 So. 234, 95 Fla. 429.

Corporation building refrigerator cars and furnishing services to railroads was held not railroading within state statutes changing fellow-servant doctrine.—Fruit Growers' Express Co. v. Norton, supra.

88. Miss.—Hercules Powder Co. v. Hammack, 110 So. 676, 145 Miss. 304.

case.[89] Some statutes have been held applicable irrespective of whether the railroad was public or private in character,[90] while other statutes have been held inapplicable to private railroads.[91] In some states such statutes have been held not to apply to persons or companies engaged in the construction of railways,[92] although the contrary view is held under other statutes.[93]

Railroads in hands of receivers or trustees. In a number of states the statutes making railroad companies liable for injuries to a servant from the negligence of a fellow servant have been held to apply to railroad companies operated by receivers,[94] or trustees in charge under a deed for the benefit of creditors.[95] In other states the contrary view is maintained,[96] although the receiver was appointed on the company's own petition.[97] These latter decisions have been based on the principle that special statutes which relate expressly and exclusively to railroad companies cannot be held applicable to receivers of a railroad operating it under the orders of a court, for the reason that such receivers are not themselves railroad companies.[98]

The Federal Employers' Liability Act abrogates the fellow-servant doctrine as to railroads engaged in interstate commerce,[99] but is restricted to common carriers engaged in commerce,[1] and does not include a railroad merely owning an office building and operating an elevator therein.[2]

b. Logging or Mining Roads

Some statutes changing the fellow servant doctrine as to railroads have been held applicable to logging and mining roads, but others have been held inapplicable.

While the statutes of some states have been held not to apply to railroads used in connection with the logging or lumber business,[3] or in the operation of mines,[4] it is generally held that the dangers and hazards incident to the use of such roads are of the sort contemplated by the statute and that the operation of logging or lumber roads,[5] or of roads used in the business of mining,[6] is within the purview of such statutes.

89. Ala.—Woodward Iron Co. v. Lewis, 54 So. 566, 171 Ala. 233.
39 C.J. p 655 note 61.
Ala.—Western Union Tel. Co. v. Howington, 73 So. 550, 198 Ala. 311.
39 C.J. p 655 note 61 [c].

90. Ala.—Woodward Iron Co. v. Lewis, 54 So. 566, 171 Ala. 233.
N.C.—Goodman v. Tallassee Power Co., 94 S.E. 408, 174 N.C. 661.
39 C.J. p 655 note 61 [a], [e], [f], [h], [i], p 640 note 54 [a].

91. Ga.—Ellington v. Beaver Dam Lumber Co., 19 S.E. 21, 93 Ga. 53.
39 C.J. p 655 note 61 [g] (1).

92. Kan.—Beeson v. Busenbark, 25 P. 48, 44 Kan. 669, 10 L.R.A. 839.
39 C.J. p 656 note 62.

93. Fla.—Gulf, F. & A. R. Co. v. King, 74 So. 475, 73 Fla. 325.
39 C.J. p 656 note 63.

94. U.S.—Peirce v. Van Dusen, Ohio, 78 F. 693, 24 C.C.A. 280, 69 L.R.A. 705, error dismissed 19 S.Ct. 879, 43 L.Ed. 1184.
39 C.J. p 658 note 73.

95. N.C.—Wright v. Caney River R. Co., 66 S.E. 588, 151 N.C. 529, 19 Ann.Cas. 384.
39 C.J. p 658 note 74.

96. Ga.—Robinson v. Huidekoper, 25 S.E. 440, 98 Ga. 306.
39 C.J. p 658 note 75.

97. Ga.—Brown v. Comer, 25 S.E. 176, 97 Ga. 801.

98. Tex.—Campbell v. Cook, 26 S.W. 486, 86 Tex. 630, 40 Am.S.R. 878.
39 C.J. p 658 note 77.

99. D.C.—Washington & O. D. Ry. Co. v. McPherson, 26 F.2d 989, 58 App.D.C. 211, certiorari denied 49 S.Ct. 13, 278 U.S. 610, 73 L.Ed. 535.
Railroad employees within scope of act see infra § 355.

1. D.C.—Southern Ry. Co. v. Taylor, 16 F.2d 517, 57 App.D.C. 21, certiorari denied Taylor v. Southern Ry. Co., 47 S.Ct. 571, 273 U.S. 767, 71 L.Ed. 882.

2. D.C.—Southern Ry. Co. v. Taylor, 16 F.2d 517, 57 App.D.C. 21, certiorari denied Taylor v. Southern Ry. Co., 47 S.Ct. 571, 273 U.S. 767, 71 L.Ed. 882.

3. Fla.—Cosson v. W. B. Harbeson Lumber Co., 149 So. 581, 111 Fla. 566.
39 C.J. p 656 note 64.
However, an employee engaged in railroading was held protected by Hazardous Occupation Act, although employer was not engaged in railroading in using skidder to pile logs.—Geneva Mill Co. v. Andrews, C.C.A. Fla., 11 F.2d 924.

4. Fla.—Taylor v. Prairie Pebble Phosphate Co., 54 So. 904, 61 Fla. 455.
39 C.J. p 656 note 65.

5. N.C.—Hawkins v. Rowland Lumber Co., 152 S.E. 169, 198 N.C. 475 —Lilley v. Interstate Cooperage Co., 139 S.E. 369, 194 N.C. 250—Stewart v. Blackwood Lumber Co., 136 S.E. 385, 193 N.C. 138.
Okl.—Frisco Lumber Co. v. Spivey, 140 P. 157, 40 Okl. 633.
39 C.J. p 656 note 66.

Purpose of statute
Purpose of statute modifying fellow-servant doctrine as applied to injured employee of logging railroad is to protect employees in railroad operations, or in work, service, or employment reasonably incidental thereto.—Gurganous v. Camp Mfg. Co., 168 S.E. 833, 204 N.C. 525.

Use or dismantling of skidder
(1) Where injured employee of lumber company was employed, under supervision of skidder foreman, as drum operator on skidder, and drums were operated by stationary steam engine on the skidder which was located on tracks and could be moved from place to place, employee was held within statute abolishing fellow-servant rule as to employee of railroad or other corporation using engines or cars propelled by steam or lever power and running on tracks. —Edward Hines Lumber Co. v. Harriel, 158 So. 146, 171 Miss. 670.
(2) On the other hand, the fellow-servant rule is not abrogated as to servants of common employer dismantling skidder, not being operated at time of injury, caused by assault of one servant on another, and master is not liable where he was not negligent.—Great Southern Lumber Co. v. May, 103 So. 363, 138 Miss. 27.

6. Ala.—Woodward Iron Co. v. Lewis, 54 So. 566, 171 Ala. 233.
39 C.J. p 657 note 67.

Statutes relating to mines
Fellow-servant doctrine was held inapplicable under statute to mine railroad worker's suit for injuries because the injury occurred in the operation of a mine.—Gray v. Doe Run Lead Co., 53 S.W.2d 877, 331 Mo. 481.

c. Street Railroads

Some statutes changing the fellow-servant rule as to railroads operate to change it as to street railroads, but others have been held not applicable to them.

In some states street railroad companies are not deemed to be within the scope of statutes modifying or abrogating the fellow-servant doctrine in respect of railroad corporations or railroad employees,[7] while in other states the contrary view is held.[8]

Elevated trains; subways. An elevated railway company operating in a subway has been held not to constitute a "railroad" within the provisions of a statute relating to railroads.[9] A statute modifying the fellow-servant doctrine as to employees of elevated trains does not apply to surface cars connecting with such trains on the elevated structure.[10]

§ 348. —— Superior Servant Rule

Under some statutory provisions railroads are held liable for injuries caused to a railroad employee by the negligence of a superior servant.

In several of the states the superior servant rule which had been adopted in some of the states before the enactment of any statutes, as discussed supra § 332, has been applied in whole or in part to railroad employees under constitutional or statutory provisions.[11] The test of whether a servant is a superior servant within such provisions is not the power to hire and discharge.[12] It is not necessary that the negligent servant shall have been in charge or control of the injured servant if in fact the former was in charge or control of other servants,[13] and the negligent servant may be in charge or control under the statute, although he himself is subject to the control of another.[14] A servant with authority to direct does not lose his status of a superior by performing an act of manual labor pursuant to, and in furtherance of, his orders,[15] but he may lose such status and become a mere fellow servant where at the time of injury he was engaged as a volunteer in helping the injured employee in a matter unconnected with his usual supervisory work.[16]

The following have been held superior servants within such provisions so as to make the master liable for their negligence: Engine foreman;[17] foreman of switching crew;[18] foreman of section gang;[19] section master as to farmer in temporary employ of railroad as a section hand;[20] track foreman as to members of repair gang;[21] foreman of a train crew in directing a brakeman to arrange cars for coupling;[22] foreman of construction work on bridge;[23] railroad fireman as to boiler maker;[24] mill carpenter as to his helpers;[25] conductor and engineer where brakeman is injured;[26] conductor and train dispatcher as to fireman;[27] conductor of a railroad train as to an engineer;[28] conductor as to brakeman;[29] conductor as to fireman;[30] conductor as to master mechanic riding on locomotive;[31] conductor of street car as to motorman;[32] engineer where locomotive fireman is injured;[33] engineer as

7. Minn.—Funk v. St. Paul City R. Co., 63 N.W. 1099, 61 Minn. 435, 52 Am.S.R. 608, 29 L.R.A. 208.
39 C.J. p 657 note 68.

8. Cal.—Patton v. Los Angeles Pac. Co., 123 P. 613, 18 Cal.App. 522.
39 C.J. p 658 note 69.

9. Mass.—McGilvery v. Boston El. R. Co., 86 N.E. 893, 200 Mass. 551.
39 C.J. p 658 note 70.

10. Mass.—Dow v. Boston El. R. Co., 93 N.E. 655, 207 Mass. 486.
39 C.J. p 658 note 72.

11. S.C.—Williams v. Seaboard Air Line R. Co., 90 S.E. 27, 105 S.C. 468.
39 C.J. p 658 note 79.

12. Ark.—St. Louis, I. M. & S. R. Co. v. Touhey, 54 S.W. 577, 67 Ark. 209, 77 Am.S.R. 109.
39 C.J. p 658 note 79 [e] (2).

13. Ark.—St. Louis, I. M. & S. R. Co. v. McCain, 55 S.W. 165, 67 Ark. 377.

14. U.S.—Kane v. Erie R. Co., Ohio, 142 F. 682, 73 C.C.A. 672.

15. S.C.—Rippy v. Southern R. Co., 61 S.E. 1010, 80 S.C. 539, 21 L.R.A., N.S., 601.
Tex.—Missouri, R. & T. R. Co. v. Dean, Civ.App., 89 S.W. 797.

16. Wis.—Hartford v. Northern Pac. R. Co., 64 N.W. 1033, 91 Wis. 374.

17. Ark.—St. Louis, I. M. & S. R. Co. v. Touhey, 54 S.W. 577, 67 Ark. 209, 77 Am.S.R. 109.

18. Ark.—St. Louis, I. M. & S. R. Co. v. McCain, 55 S.W. 165, 67 Ark. 377.

19. N.Y.—La Placa v. Lake Shore & M. S. Ry. Co., 111 N.Y.S. 797, 799, 127 App.Div. 843, affirmed 87 N.E. 1121, 194 N.Y. 562.
39 C.J. p 660 note 86.

20. S.C.—Williams v. Seaboard Air Line Co., 90 S.E. 27, 105 S.C. 468.

21. N.Y.—Inglese v. New York, N. H. & H. R. Co., 117 N.Y.S. 392, 133 App.Div. 198, reargument denied 118 N.Y.S. 1115, 134 App.Div. 932.

22. Mo.—McGuire v. Quincy, O. & K. C. R. Co., 107 S.W. 411, 128 Mo. App. 677.

23. Tex.—San Antonio & A. P. R. Co. v. McDonald, Civ.App., 31 S.W. 72.

24. Tex.—St. Louis Southwestern R. Co. v. Freles, Civ.App., 166 S. W. 91.

25. Tex.—Missouri, K. & T. R. Co. v. Bailey, 115 S.W. 601, 53 Tex.Civ. App. 295.

26. Mont.—Crisswell v. Montana Cent. R. Co., 42 P. 767, 17 Mont. 189.
39 C.J. p 660 note 93.

27. Ark.—Choctaw, O. & G. R. Co. v. Doughty, 91 S.W. 768, 77 Ark. 1.

28. U.S.—Snipes v. Southern R. Co., S.C., 166 F. 1, 91 C.C.A. 593.
39 C.J. p 660 note 95.

29. N.Y.—Brown v. New York Cent., C. & H. R. Co., 110 N.Y.S. 514, 126 App.Div. 240, affirmed 89 N.E. 1096, 196 N.Y. 542.
Tex.—Galveston, S. H. & A. R. Co. v. Robinett, Civ.App., 54 S.W. 263.

30. Ga.—Southern R. Co. v. Diseker, 81 S.E. 269, 13 Ga.App. 799.

31. Mo.—Tabor v. St. Louis, I. M. & S. R. Co., 109 S.W. 764, 210 Mo. 385, 124 Am.S.R. 728.

32. N.Y.—Simons v. Brooklyn Heights R. Co., 126 N.Y.S. 792, 142 App.Div. 36, rehearing denied and appeal to Ct. of App. granted 127 N.Y.S. 1144, 143 App.Div. 945.

33. Miss.—Cheaves v. Southern R. Co., 33 So. 649, 82 Miss. 48, suggestion of error overruled 34 So. 385, 82 Miss. 48.
39 C.J. p 660 note 1.

to brakeman;[34] engineer of a freight train as to conductor of such train;[35] motorman as to employees riding on electric car;[36] train dispatcher where engineer is injured;[37] and an engineer operating engine engaged in removing an obstruction and having charge of the other employees engaged on the work.[38]

On the other hand, the following employees have been held not superior servants or officers: Carpenter engaged with laborers in setting posts along a railroad who works under the direction of foreman in charge of the work;[39] temporary foreman of switching crew who had no authority to command the switchman to pursue any particular line of action;[40] members of train crew setting cars on spur track as to brakeman injured on another passing train;[41] telegraph operator as to engineer;[42] station agent as to freight brakeman;[43] engineer as to flagman;[44] conductor removing trolley pole from current wire as to motorman;[45] engineer acting without orders from the conductor as to car coupler acting under the latter's orders;[46] and conductor having no authority over the injured engineer in matters affecting the engine.[47]

§ 349. —— Common Service Statutes

Under some statutes a railroad is liable for injuries to an employee caused by the negligence of another employee who is not engaged in a common service within the meaning of the statute and therefore not to be regarded as a fellow servant under such statutory provisions.

The effect of statutes providing that all railroad employees in the same grade of employment and who are working together at the same time and place and to a common purpose, none being intrusted with the power to control employees, are fellow servants, provided they are in the same department or branch of service, is to limit the risk assumed by an employee because of acts or omissions of others in the service of the same employer to the neglect of those who are fellow servants within the meaning of the statute, and to impose on the master liability for injuries suffered through neglect of all other fellow employees in the discharge of their duties.[48] In order to be fellow servants under statutes of this character, employees must be: (1) Engaged in the common service.[49] (2) In the same grade of employment.[50] (3) Working at substantially the same time and place.[51] (4) Working to a common purpose.[52] Under some statutory provisions it has also been held that employees must be engaged on the same piece of work[53] and doing the same character of work or service.[54]

Under such statutory provisions the following have been held fellow servants: Hostler and boiler washer, both under the orders of the roundhouse foreman;[55] engineer and switchman, members of the same switching crew working under a common foreman;[56] employees engaged in the common work of cleaning an engine;[57] station telegraph operator and locomotive engineer;[58] conductors of switch engines in the same yard engaged in moving cars

34. N.Y.—Breed v. Lehigh Valley R. Co., 115 N.Y.S. 1019, 131 App. Div. 492.
39 C.J. p 660 note 2.

35. N.Y.—Payne v. Lehigh Valley R. Co., 143 N.Y.S. 319, 158 App. Div. 105, affirmed 107 N.E. 1082, 213 N.Y. 687.

36. N.Y.—Connors v. International R. Co., 162 N.Y.S. 1085.

37. U.S.—Baltimore & O. R. Co. v. Camp, Ohio, 65 F. 952, 13 C.C.A. 233.

38. Tex.—Galveston, H. & S. A. R. Co. v. Roth, 84 S.W. 1112, 37 Tex. Civ.App. 610.

39. U.S.—Hunter v. Kansas City & M. Railway & Bridge Co., Tenn., 85 F. 379, 29 C.C.A. 206.
39 C.J. p 660 note 7.

40. U.S.—Fenwick v. Illinois Cent. R. Co., Miss., 100 F. 247, 40 C.C.A. 369.

41. Mo.—Ham v. St. Louis & S. F. R. Co., 117 S.W. 108, 109, 136 Mo. App. 17.

42. U.S.—Baltimore & O. R. Co. v. Camp, Ohio, 65 F. 952, 13 C.C.A. 233.

43. N.Y.—Hallock v. New York, O. & W. R. Co., 90 N.E. 1124, 197 N.Y. 450, 52 L.R.A.,N.S., 1142.

44. S.C.—Lyon v. Charleston & W. C. R. Co., 56 S.E. 18.

45. N.Y.—Larson v. Nassau Electric R. Co., 151 N.Y.S. 694, 165 App. Div. 887, reversed on other grounds 119 N.E. 92, 223 N.Y. 14.

46. U.S.—Atlantic Coast Line R. Co. v. Farmer, 176 F. 692, 100 C.C.A. 244.

47. U.S.—Snipes v. Southern R. Co., 166 F. 1, 91 C.C.A. 593.
Tex.—Culpepper v. International, etc., R. Co., 40 S.W. 386, 90 Tex. 627.

48. Ark.—Kansas City, Ft. S. & M. R. Co. v. Becker, 53 S.W. 406, 67 Ark. 1, 77 Am.S.R. 78, 46 L.R.A. 814.
39 C.J. p 661 note 15.

49. Tex.—Gulf, C. & S. F. R. Co. v. Warner, 35 S.W. 364, 89 Tex. 475.
39 C.J. p 661 note 16.

50. Ark.—St. Louis, I. M. & S. R. Co. v. Thurmond, 68 S.W. 488, 70 Ark. 411.
39 C.J. p 661 note 17.

51. Tex.—Gulf, C. & S. F. R. Co. v. Warner, 35 S.W. 364, 89 Tex. 475.
39 C.J. p 661 note 18.

52. Tex.—Gulf, C. & S. F. R. Co. v. Warner, supra.
39 C.J. p 661 note 19.

53. Tex.—International & G. N. R. Co. v. Still, 101 S.W. 442, 100 Tex. 499.
39 C.J. p 661 note 20.

54. Tex.—Texas & N. O. R. Co. v. Barwick, 110 S.W. 953, 50 Tex. Civ.App. 544.
39 C.J. p 662 note 21.

55. Tex.—Missouri, K. & T. R. Co. v. Whitaker, 33 S.W. 716, 11 Tex. Civ.App. 668.

56. Tex.—Gulf, C. & S. F. R. Co. v. Warner, 35 S.W. 364, 89 Tex. 475.

57. Tex.—Cloyd v. Galveston, H. & S. A. R. Co., 84 S.W. 408, 37 Tex. Civ.App. 506—Galveston, H. & S. A. R. Co. v. Cloyd, Civ.App., 78 S. W. 43.

58. Mo.—Strottman v. St. Louis, I. M. & S. R. Co., 109 S.W. 769, 211 Mo. 227.

under a superior, although their duties were separate and distinct.[59]

On the other hand, the following employees have been held not fellow servants: Train crew and other employees;[60] engineer and brakeman;[61] brakemen and car inspector;[62] car inspector and engine foreman;[63] station agent and train crew;[64] locomotive engineer and hostler;[65] car repairer in one yard and hostler or switchman in another yard;[66] fireman of a switch engine and part of an "outside crew," and switchman of an "inside crew;"[67] crews of through freight and of local freight trains;[68] two switch crews;[69] locomotive engineer and yard employees;[70] yardmaster and brakeman;[71] foreman of section hand and section men;[72] members of a train crew and section hands;[73] railroad conductor in charge of a gravel train and car inspector;[74] brakeman of one train and train crew of another;[75] car inspector and engine foreman;[76] timber sealer and log train operators;[77] night hostler inspecting engine and employee putting steam into another engine;[78] and foreman and members of yard crew and engineer of road engine temporarily in the yards.[79] An engineer is not necessarily a fellow servant of the train dispatcher and telegraph operators.[80]

§ 350. —— Different Department Statutes

Where not defined by statute it has been held that "departments" and "branches of service" should not be so limited as merely to embrace those large divisions created for convenience in administering the affairs of the company, but that they relate to those minute ones which concern the daily duties of the employee.

The different-department rule which, independent of statute, has been rejected in some jurisdictions under principles discussed supra § 331, has been expressly adopted by statute in several of the states as to railway employees.[81] The term "different department or branch of service" has been used without defining what shall be deemed a different department or branch of service, and hence it must be determined on principles analogous to those laid down in cases where the departmental limitation has been adopted and applied independent of statute or constitution.[82] It has been held that "departments" and "branches of service" should not be so limited as merely to embrace those large divisions created for convenience in administering the affairs of the company, but that they relate to those minute ones which concern the daily duties of the employee.[83]

An engineer and a brakeman on the same train are considered to be in the same department,[84] while, on the other hand, an engineer on one train is in a different department from the brakeman on another train.[85] So also the following employees have been held to be in different departments or branches of service: A yard helper and an engineer who were engaged in operating locomotives;[86] a switch tender and the conductor and engineer of a yard engine;[87] employees in locomotive and train depart-

59. Tex.—Texas & N. O. R. Co. v. Tatman, 31 S.W. 333, 10 Tex.Civ. App. 434.

60. Ark.—St. Louis, I. M. & S. R. Co. v. Harmon, 109 S.W. 295, 85 Ark. 503.
39 C.J. p 662 note 27.

61. Tex.—San Antonio & A. P. R. Co. v. Bowles, Civ.App., 30 S.W. 89.

62. Ark.—St. Louis, I. M. & S. R. Co. v. Holmes, 114 S.W. 221, 88 Ark. 181.

63. Ark.—St. Louis, I. M. & S. R. Co. v. Dupree, 105 S.W. 878, 84 Ark. 377, 120 Am.S.R. 74.

64. Tex.—Gulf, C. & S. F. R. Co. v. Calvert, 32 S.W. 246, 11 Tex. Civ.App. 297.

65. Tex.—Texas & P. R. Co. v. Leighty, Civ.App., 32 S.W. 799.

66. Tex.—San Antonio & A. P. R. Co. v. Keller, 32 S.W. 847, 11 Tex. Civ.App. 569.

67. Tex.—Masterson v. Galveston, H. & S. R. Co., Civ.App., 42 S.W. 1001.

68. Tex.—Galveston, H. & S. R. Co. v. Worthy, Civ.App., 32 S.W. 557 —Galveston, H. & S. R. Co. v. Worthy, Civ.App., 27 S.W. 426, reversed on other grounds 29 S.W. 376, 87 Tex. 459.

69. Tex.—Masterson v. Galveston, H. & S. R. Co., Civ.App., 42 S.W. 1001.

70. Tex.—San Antonio & A. P. R. Co. v. Harding, 33 S.W. 373, 11 Tex.Civ.App. 497.

71. Tex.—International & G. N. R. Co. v. Sipole, Civ.App., 29 S.W. 686.

72. Ark.—St. Louis, I. M. & S. R. Co. v. Harmon, 109 S.W. 295, 85 Ark. 503.

73. Ark.—St. Louis, I. M. & S. R. Co. v. Harmon, supra.

74. Ark.—St. Louis Southwestern R. Co. v. Lewis, 121 S.W. 268, 91 Ark. 343.

75. Tex.—Patterson v. Houston & T. C. R. Co., Civ.App., 40 S.W. 442.

76. Ark.—St. Louis, I. M. & S. R. Co. v. Dupree, 105 S.W. 878, 84 Ark. 377, 120 Am.S.R. 74.

77. Tex.—Keystone Mills Co. v. Chambers, Civ.App., 118 S.W. 178.

78. Tex.—Galveston, H. & N. R. Co. v. Cochran, 109 S.W. 261, 49 Tex.Civ.App. 591.

79. Tex.—Missouri, K. & T. R. Co. v. Whitlock, 41 S.W. 407, 16 Tex. Civ.App. 176.

80. Tex.—Hogan v. Missouri, K. & T. R. Co., 32 S.W. 1035, 88 Tex. 679.

81. Miss.—Illinois Cent. R. Co. v. Hunter, 12 So. 482, 70 Miss. 471.
39 C.J. p 662 note 49, p 668 note 98 [b]–[d], [f].

82. Ohio.—Hill v. Lake Shore & Michigan Southern R. Co., 22 Ohio Cir.Ct. 291, 12 Ohio Cir.Dec. 241.
39 C.J. p 662 note 50.

83. Ohio.—Cincinnati, H. & D. R. Co. v. Margrat, 37 N.E. 11, 51 Ohio St. 130.

84. Ohio.—Cleveland, L. & W. R. Co. v. Shanower, 71 N.E. 279, 70 Ohio St. 166—Hill v. Lake Shore & Michigan Southern R. Co., 22 Ohio Cir.Ct. 291, 12 Ohio Cir.Dec. 241.

85. Ohio.—Cincinnati, H. & D. R. Co. v. Margrat, 37 N.E. 11, 51 Ohio St. 130.

86. Ohio.—New York, Chicago & St. Louis R. Co. v. Roe, 25 Ohio Cir. Ct. 628.

87. Ohio.—Lake Shore & Michigan

ments;[88] a fireman and a telegraph operator;[89] chief inspector of cars and brakeman;[90] and two switching crews handling different trains in the same yard.[91] A yardmaster whose duty it is to make up trains and select the employees who are to operate them, and who has full control over all employees whose duties take them into the yard, is not the fellow servant of a brakeman on a train made up under such yardmaster's direction.[92]

§ 351. —— Negligence of Person to Whose Orders Injured Employee Was Bound to Conform

Under some statutes recovery may be had against a railroad for injuries to an employee caused by the negligence of another employee to whose orders the injured employee was bound to conform and did conform.

Under some statutes liability is imposed on railroad corporations, as well as on other corporations, for injuries resulting from the negligence of any persons in its service to whose order the injured employee at the time of the injury was bound to conform, and did conform.[93] Such a statute applies only to such railroad employees as are in the course of their employment exposed to the particular hazards incident to the use and operation of engines and trains, and whose injuries are caused thereby.[94] Under such statutes there can be no recovery unless the injured employee is acting under some special order in respect of the particular service in which he was engaged when injured,[95] and the injury must be caused by the negligence of such superior servant.[96]

§ 352. —— Acts or Omissions in Obedience to Rules

Under statutes making a railroad liable for injuries to its employees caused by obedience to rules, it may not be held responsible for those caused by disobedience.

A statutory provision making the master liable where the injury results from the act of omission of any person done or made in obedience to any rule, regulation, or by-law of the corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf, does not make the master liable where a duty is enjoined by rule, etc., on a servant and the duty is neglected or negligently performed.[97] The duty of a railroad employee to obey the orders of a superior servant does not depend, within the contemplation of the federal employers' liability act, on whether the employee violating the rule knew, or reasonably should have known, that disobedience might be dangerous to a fellow employee.[98]

§ 353. —— Negligence of Employee at Time Acting in Place and Performing Duty of Corporation

Under some statutes a railroad may be held responsible for injuries to an employee resulting from negligence of another employee acting in the place and performing the duty of the railroad corporation.

Under the provisions of some statutes, a railroad is liable for injury to its employees where caused by the negligence of a fellow servant engaged in the same common service, where the negligent servant is at the time acting in the place and performing the duty of the corporation.[99]

§ 354. —— Negligence of Particular Employees

a. In general
b. Employees in charge of engines
c. Employees in charge of trains

a. In General

Under some constitutional or statutory provisions a railroad may be held liable for injuries to its employees caused by the negligence of specified employees, such as those in charge of signals, switches, or tracks.

Under some constitutional or statutory provisions

Southern R. Co. v. Pero, 22 Ohio Cir.Ct. 130, 12 Ohio Cir.Dec. 25.

88. Tex.—Houston & T. C. R. Co. v. Talley, 39 S.W. 206, 15 Tex.Civ. App. 115.

89. Miss.—Illinois Cent. R. Co. v. Hunter, 12 So. 482, 70 Miss. 471.
39 C.J. p 663 note 57.

90. Ohio.—Columbus, H. V. & T. R. Co. v. Erick, 37 N.E. 128, 51 Ohio St. 146.

91. U.S.—Erie R. Co. v. Kane, Ohio, 118 F. 223, 55 C.C.A. 129.
39 C.J. p 663 note 59.

92. Ohio.—McCann v. Pennsylvania Co., 10 Ohio Cir.Ct. 139, 6 Ohio Cir. Dec. 610.

93. Ind.—Evansville & T. H. R. Co. v. Lipking, 109 N.E. 47, 183 Ind. 572.
37 C.J. p 663 note 61.

94. Ind.—Indianapolis Traction & Terminal Co. v. Kinney, 85 N.E. 954, 171 Ind. 612, 23 L.R.A.,N.S., 711.

95. Ind.—Evansville & T. H. R. Co. v. Lipking, App., 103 N.E. 371, affirmed 109 N.E. 47, 183 Ind. 572.
39 C.J. p 663 note 63.

96. Ind.—Indianapolis, etc., Rapid Transit Co. v. Foreman, 69 N.E. 669, 162 Ind. 85, 102 Am.S.R. 185.
39 C.J. p 663 note 64.

97. Ind.—Thacker v. Chicago, I. & L. R. Co., 64 N.E. 605, 159 Ind. 82, 59 L.R.A. 792—Baltimore & O. S. W. R. Co. v. Little, 48 N.E. 862, 149 Ind. 167.

98. Fla.—Atlantic Coast Line R. Co. v. McIntosh, 198 So. 92, 144 Fla. 356.

Right to move train without signal from conductor
Fla.—Atlantic Coast Line R. Co. v. McIntosh, supra.

99. Ind.—Evansville & T. H. R. Co. v. Lipking, 109 N.E. 47, 183 Ind. 572.
39 C.J. p 664 note 67.

an employer may be held liable for injuries to its employees caused by the negligence of particular railroad employees designated in the statute,[1] such as those in charge of cars,[2] engines, as discussed infra subdivision b of this section, signals,[3] switches,[4] switch yards,[5] tracks,[6] or trains, as considered infra subdivision c of this section. These statutes are generally held not to apply to street railroads.[7]

In order to recover under such a statute the injured employee must prove that he was employed in or about a railroad,[8] and that the employee whose negligence is complained of was in charge of an engine, car, train, place, or device designated in the statute,[9] and the injuries must have been caused by a hazard involved in train operations,[10] although the statute applies to an employee injured through the negligence of other employees in the operation of a train, although he was not employed to assist in the operation of a train and was not so engaged at the time of the injury,[11] provided he was engaged in a duty connected with the operation of a railroad.[12]

An employee may recover under such a provision without showing that he was acting at the time under the direction of his superior,[13] and even though he was of superior rank to the employee whose negligence allegedly caused the injury.[14] The railroad company is liable thereunder, although no gross or willful negligence is shown,[15] and without regard to the company having used due care in selecting its employees,[16] but it must be shown that the employee whose negligence is alleged as the cause of the injury was negligent in the performance of his duty.[17]

b. Employees in Charge of Engines

In order to recover under constitutional or statutory provisions making railroads liable for injuries caused by the negligence of an engineer or other person in charge of an engine, it must be shown that both the person and the instrumentality were within the contemplation of the provision.

Under some constitutional or statutory provisions an employer may be held liable for injuries to railroad employees caused by the negligence of an engineer or other person in charge of an engine.[18]

In order to establish a case under such a provision for injuries suffered by any employee through the negligence of any person in charge of a locomotive, it must appear that the case is within its terms and that the negligence complained of was the negligence of a servant who in the line of his employment had charge of the locomotive.[19] The engineer

1. Va.—Chesapeake & Ohio Ry. Co. v. Swartz, 80 S.E. 568, 115 Va. 723.
39 C.J. p 664 note 71.

"Conductor" distinguished from "foreman"

Under statutes providing that every railroad shall be liable for injuries to an employee occurring without his contributory negligence where such injury was caused by the negligence of specified employees, including a "conductor," it has been said that: "It could not be sincerely claimed that the word 'conductor' can be applied to the foreman of a section gang or a bridge crew, because he merely conducts or manages the work, or that it can be applied to any other conductor than the one who manages the railroad train."—Reinke v. Northern Pacific Ry. Co., C.C.Mont., 145 F. 988, 990—12 C.J. p 413 note 79 [d] (1).

"Superintendent"

Under a statute providing that railroad corporations shall be liable for death or lesser injury caused an employee through the negligence of designated employees, including a "superintendent," a shop foreman could not be regarded as a "superintendent" within the contemplation of the statute.—Hartford v. Northern Pacific R. Co., 64 N.W. 1033, 91 Wis. 374.

2. Ala.—Woodward Iron Co. v. Lewis, 54 So. 566, 171 Ala. 233.
39 C.J. p 664 note 69.

3. Ind.—Chicago, I. & L. R. Co. v. Wicker, App., 71 N.E. 223, reheard 72 N.E. 614, 34 Ind.App. 215.
39 C.J. p 664 note 74.

4. Va.—Washington Southern R. Co. v. Cheshire, 65 S.E. 27, 109 Va. 741.
39 C.J. p 664 note 72.

5. U.S.—Chicago, Indianapolis & Louisville R. Co. v. Hackett, Ill., 33 S.Ct. 581, 228 U.S. 559, 57 L.Ed. 966.
Ind.—Indianapolis & G. Rapid Transit Co. v. Andis, 72 N.E. 145, 33 Ind. App. 625.
39 C.J. p 664 note 73.

6. Ala.—Southern R. Co. v. Howell, 34 So. 6, 135 Ala. 639.
39 C.J. p 665 note 75.

7. Ind.—Indianapolis & G. Rapid Transit Co. v. Andis, 72 N.E. 145, 33 Ind.App. 625.
39 C.J. p 665 note 77.

8. Ala.—Woodward Iron Co. v. Thompson, 88 So. 438, 205 Ala. 490.
39 C.J. p 665 note 78.

9. Ala.—Woodward Iron Co. v. Curl, 44 So. 969, 153 Ala. 215.
39 C.J. p 665 note 79.

10. Ind.—Vandalia R. Co. v. Parker, 98 N.E. 705, 178 Ind. 138.
39 C.J. p 665 note 80.

11. Ind.—American Car & Foundry Co. v. Inzer, 101 N.E. 676, 53 Ind. App. 316.

12. Ala.—Boggs v. Alabama Cons. Coal & Iron Co., 52 So. 878, 167 Ala. 251, 140 Am.S.R. 28.
39 C.J. p 665 note 82.

13. Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Montgomery, 49 N.E. 582, 152 Ind. 1, 71 Am.S.R. 301, 69 L. R.A. 875.
39 C.J. p 665 note 83.

14. N.Y.—Hildebrant v. Lehigh Valley R. Co., 143 N.Y.S. 247, 157 App.Div. 828, affirmed 107 N.E. 1078, 213 N.Y. 682.

15. Ala.—Alabama Great Southern R. Co. v. Williams, 37 So. 255, 140 Ala. 230.
39 C.J. p 665 note 85.

16. Ala.—Culver v. Alabama Midland R. Co., 18 So. 827, 108 Ala. 330.

17. N.Y.—Utess v. Erie R. Co., 97 N.E. 722, 204 N.Y. 324, Ann.Cas. 1913D 46.
39 C.J. p 665 note 87.

18. Va.—Chesapeake R. Co. v. Swartz, 80 S.E. 568, 115 Va. 723.
39 C.J. p 664 note 68.

Locomotive engineer

U.S.—Reinke v. Northern Pac. R. Co., C.C.Mont., 145 F. 988.
20 C.J. p 1261 note 44 [a].

19. Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Rogers, 87 N.E. 28, 45 Ind.App. 230.

usually is the employee in charge of the engine,[20] although a fireman may be,[21] and a hostler may assume such charge as to make the company liable under the statute.[22] Two employees cannot be in control of an engine at the same time.[23]

A pile driver[24] and a stationary engine[25] have been held not to be within the purview of the statute. Where the statute refers to an engine upon the railroad, it does not include an engine which is stalled in a roundhouse for the purpose of repairs.[26]

c. Employees in Charge of Trains

Under some constitutional or statutory provisions an employer may be held liable for injuries to railroad employees caused by the negligence of the conductor or other person in charge or control of a train.

Under some constitutional or statutory provisions recovery may be had against a railroad for injuries to its employees caused by the negligence of an employee in charge or control of a train.[27] The words "charge" or "control" have not been defined, although it would seem they are not intended to mean different things, but are to be regarded, while not perhaps synonymous, as explanatory of each other, and used together, as describing more fully one and the same thing.[28] It is the charge or control of the train as a connected whole which is meant, rather than the charge or control of portions which together form a whole.[29] A person is in charge or control where for the time being at least he has immediate authority to direct the movements and management of the train as a whole and of the men engaged upon it.[30] It is not necessary that he should be actually upon the train itself,[31] and more than one person may have "charge or control" of a train at the same time.[32]

The conductor is usually an employee in charge of a train,[33] and the same is true of an engineer.[34] Under certain circumstances, however, a brakeman may be in control of a train,[35] and it has been held that a yardmaster whose right to control and cause the moving of cars in the yard is exclusive and whose orders to the switching crew are obeyed is in control of a train within the statute.[36] On the other hand, the foreman of a switching gang,[37] a station agent,[38] a towerman,[39] and employees making up trains[40] have been held not in charge or control of a train.

What constitutes a train. The courts have refused to define what, under all circumstances, will constitute a train within the meaning of the statute.[41] It has been said, however, that a locomotive with one or more cars attached to it, with or without passengers or freight, in motion upon a railroad from one point to another, by means of power furnished by the locomotive, constitutes a "train."[42] The term generally signifies cars in motion,[43] with power furnished by a locomotive,[44] although a train does not cease to be such when moving by its own momentum after the power is shut off from the locomotive.[45]

20. Ind.—Cleveland, C. C. & St. L. R. Co. v. Bergschicker, 69 N.E. 1000, 162 Ind. 108.

21. Ala.—Brown v. Louisville & N. R. Co., 19 So. 1001, 111 Ala. 275.
39 C.J. p 666 note 96.

22. Va.—Chesapeake & O. R. Co. v. Swartz, 80 S.E. 568, 115 Va. 723.
39 C.J. p 666 note 97.

23. Ala.—Louisville & N. R. Co. v. Richardson, 14 So. 209, 100 Ala. 232.

24. Ind.—Jarvis v. Hitch, 67 N.E. 1057, 161 Ind. 217.
39 C.J. p 665 note 90.

25. U.S.—Reinke v. Northern Pac. R. Co., C.C.Mont., 145 F. 988.
39 C.J. p 666 note 92.

26. Mass.—Perry v. Old Colony R. Co., 41 N.E. 289, 164 Mass. 296.

27. Colo.—Denver & R. G. R. Co. v. Vitello, 121 P. 112, 21 Colo.App. 51.
39 C.J. p 664 note 70.

28. Mass.—Caron v. Boston & A. R. Co., 42 N.E. 112, 164 Mass. 523.
39 C.J. p 666 note 5.

29. Mass.—Thyng v. Fitchburg R. Co., 30 N.E. 169, 156 Mass. 13, 32 Am.S.R. 425.

30. Colo.—Denver & R. G. R. Co. v. Vitello, 81 P. 766, 34 Colo. 50.
39 C.J. p 666 note 8.

31. Mass.—Caron v. Boston & A. R. Co., 42 N.E. 112, 164 Mass. 523—Donahoe v. Old Colony R. Co., 26 N.E. 868, 153 Mass. 356.

32. Mass.—Caron v. Boston & A. R. Co., 42 N.E. 112, 164 Mass. 523.

33. Mass.—Devine v. Boston & A. R. Co., 34 N.E. 539, 159 Mass. 384.
39 C.J. p 666 note 11.

34. N.Y.—Payne v. Lehigh Valley R. Co., 143 N.Y.S. 319, 158 App. Div. 105.
39 C.J. p 667 note 12.

35. Colo.—Denver & R. G. R. Co. v. Vitello, 121 P. 112, 21 Colo.App. 51.
Mass.—Flaherty v. New York Cent. & H. R. Co., 98 N.E. 606, 211 Mass. 570.

36. U.S.—Chicago, Indianapolis & Louisville R. Co. v. Hackett, Ill., 33 S.Ct. 581, 228 U.S. 559, 57 L. Ed. 966.
Mass.—Brady v. New York, N. H. & H. R. Co., 68 N.E. 227, 184 Mass. 225.

37. Mass.—Caron v. Boston & A. R. Co., 42 N.E. 112, 164 Mass. 523.

38. Mass.—Fairman v. Boston & A. R. Co., 47 N.E. 613, 169 Mass. 170.

39. Mass.—Fairman v. Boston & A. R. Co., supra.

40. Mass.—Thyng v. Fitchburg R. Co., 30 N.E. 169, 156 Mass. 13, 32 Am.S.R. 425.

41. Mass.—Caron v. Boston & A. R. Co., 42 N.E. 112, 164 Mass. 523.
39 C.J. p 666 note 99.

42. Mass.—Caron v. Boston & A. R. Co., supra—Dacey v. Old Colony R. Co., 26 N.E. 437, 153 Mass. 112.

43. Mass.—Caron v. Boston & A. R. Co., 42 N.E. 112, 164 Mass. 523—Thyng v. Fitchburg R. Co., 30 N. E. 169, 156 Mass. 13, 32 Am.S.R. 425.

44. Mass.—Caron v. Boston & A. R. Co., 42 N.E. 112, 164 Mass. 523.

45. Mass.—Caron v. Boston & A. R. Co., supra.
39 C.J. p 666 note 4.

§ 355. —— Statutes as Applicable to All Injured Employees

a. In general
b. Employees operating railroad
c. Employees operating cars, locomotives, or trains
d. Federal Employers' Liability Act

a. In General

Under some constitutional or statutory provisions the fellow-servant rule is substantially abrogated as to all railroad employees, but under other provisions abrogation of such rule is restricted to certain employees, such as those at the time of the accident engaged in the use and operation of a railroad, or injured through negligence arising from its use and operation or from hazards peculiar to railroading.

In some of the states the fellow-servant rule is practically abrogated by statutory or constitutional provisions as far as railroad employees are concerned.[46] While all employees of a railroad company seem to be within the protection of some of the provisions,[47] and an injured employee is entitled to recover whether or not his injuries are connected with the running of trains,[48] and notwithstanding his engagement in the business is not immediately connected with running and operating the company's train,[49] other provisions, although broad enough to include all injured employees of a railroad, have been limited by judicial construction to injured employees engaged in work at the time of the accident which exposes them to some element of hazard or condition of danger peculiar to railroads.[50] Under such a provision a railroad may be held liable for injuries to an employee who is vice principal to the employee injuring him, provided the negligence of the subordinate caused his injury;[51] but if the injury is caused while the subordinate is acting, without negligence, under the orders and directions of his superior, then there is no negligence for which the company will be liable, because in such case the negligence is that of the vice principal himself.[52]

Under the express provisions of some statutes the negligence must be connected with the use and operation of a railway,[53] or with the movement of a train or engine,[54] or the movement of machinery on the track.[55] The accident must grow out of the use and operation of the road.[56] In order to authorize a recovery under such provisions, the employee must show that he belonged to the class of employees to whom the statute affords a remedy, and that the act which occasioned the injury was one of the class of acts for which a remedy is given.[57] However, the negligent employee need not be one actually upon the train,[58] and the injured employee, in order to be entitled to recover, need not be employed in the operation of the road if he is injured by its operation,[59] it being sufficient that he is engaged in work exposing him to the dangers peculiar to the operation of a railroad[60] at the time of the accident.[61]

The applicability of such a statute to an employee depends on the nature of the hazards to which he is actually exposed, and not of those which may have been contemplated in his employment.[62] Thus his

46. N.M.—Morstad v. Atchison, T. & S. F. R. Co., 170 P. 886, 23 N.M. 663.
S.C.—Bussey v. Charleston & Western Carolina R. Co., 58 S.E. 1015, 78 S.C. 352, construing Georgia statute.
39 C.J. p 667 note 19.

Similarity to Federal Employers' Liability Act

(1) Railroad is liable to employee injured by coemployee's negligence under statute, provisions of which are similar to those of Federal Employers' Liability Act.—Stritzke v. Chicago Great Western Ry. Co., 251 N.W. 532, 190 Minn. 323.

(2) Work of railway company's supply man in checking engine tools held so closely related to transportation as to be part thereof and authorize recovery from company for injuries to him because of engine hostler's negligence under state statutes similar to federal act and providing broadly for recovery against railroads engaged in commerce within state for injuries to employees caused, inter alia, by negligence of officers, agents, or employees of railroad.—Chesapeake & O. Ry. Co. v. McCracken, 61 S.W.2d 618, 249 Ky. 767.

(3) Federal Employers' Liability Act is discussed infra subdivision d of this section.

47. Tex.—Payne v. Harris, Com. App., 241 S.W. 1008.
39 C.J. p 668 note 20.

48. Ga.—Georgia R. Banking Co. v. Miller, 16 S.E. 939, 90 Ga. 571.
39 C.J. p 668 note 21.

49. Ga.—Georgia R. & Banking Co. v. Hicks, 22 S.E. 613, 95 Ga. 301.
39 C.J. p 669 note 22.

50. Kan.—Missouri, K. & T. R. Co. v. Medaris, 55 P. 875, 60 Kan. 151.
39 C.J. p 669 note 23.

51. Ark.—St. Louis, I. M. & S. R. Co. v. Cobb, 190 S.W. 107, 126 Ark. 225.

52. Ark.—St. Louis, I. M. & S. R. Co. v. Cobb, supra.

53. Mont.—Moyse v. Northern Pac. R. Co., 108 P. 1062, 41 Mont. 272—Dillon v. Great Northern R. Co., 100 P. 960, 38 Mont. 485.

54. Iowa.—Akeson v. Chicago, B. & Q. R. Co., 75 N.W. 676, 106 Iowa 54.
39 C.J. p 671 note 76.

55. Iowa.—Reddington v. Chicago, M. & St. P. R. Co., 75 N.W. 679.
39 C.J. p 671 note 77.

56. Iowa.—Willson v. Waterloo, C. F. & N. R. Co., 166 N.W. 579, 182 Iowa 1299.
39 C.J. p 670 note 28.

57. Iowa.—Malone v. Burlington, C. R. & N. R. Co., 21 N.W. 756, 65 Iowa 417, 54 Am.R. 11.

58. Iowa.—Keatley v. Illinois Cent. R. Co., 72 N.W. 545, 103 Iowa 282.
39 C.J. p 672 note 78.

59. Iowa.—Russell v. Chicago, R. I. & P. R. Co., 141 N.W. 1077, 160 Iowa 503.
39 C.J. p 670 note 29.

60. Iowa.—Williams v. Iowa Cent. R. Co., 96 N.W. 774, 121 Iowa 270—Keatley v. Illinois Cent. R. Co., 63 N.W. 560, 94 Iowa 685.

61. Iowa.—Akeson v. Chicago, B. & Q. R. Co., 75 N.W. 676, 106 Iowa 54.

62. Iowa.—Canon v. Chicago, M. &

employment need not be connected with the running of trains where it requires him to go thereon.[63] An employee of the company, when in the performance of any matters connected with the operation of the railway, is within the protection of the statute, regardless of whether the duty neglected is magisterial in character or otherwise,[64] and the company may be liable although the negligent servant was under the control of the injured servant.[65]

Particular employees and injuries. Under the rules limiting recovery for injuries occasioned by the negligence of a fellow servant to those cases in which the injured employee is at the time of the accident engaged in work exposing him to a hazard peculiar to railroads, or wherein the negligence is connected with the use and operation of a railroad, among those held entitled to recover are: Foreman of repair gang;[66] sectionman,[67] such as one engaged in repairing the track[68] or in propelling or riding on a hand car or taking it from the track;[69] laborer on construction train who rides on the train;[70] laborer loading car of dirt train where injured by fall of impending bank;[71] shoveler unloading gravel from a gravel car;[72] employee whose duty it is to ride on train and remove snow obstructions as encountered;[73] employee operating ditching machine carried on car and worked by movement of car;[74] detective walking along track to discover persons guilty of obstructing it and injured by being run into by engine while insensible on the track;[75] car repairer or cleaner working on car standing on sidetrack;[76] and a car inspector.[77] Also those held entitled to recover include an employee unloading freight trains;[78] employee unloading, from car used in transportation, lumber from old bridge;[79] employee unloading ties to be used in repairing of tracks;[80] employees loading and unloading car by means of cable,[81] skids,[82] locomotive,[83] or a steam loader;[84] employee standing between track and warehouse, working on warehouse, and injured by moving train;[85] yard employee injured while stepping from platform to top of passing car;[86] coal handlers while coaling a standing engine;[87] fireman sorting and discarding waste material from the coal while firing engine;[88] employee whose business it is to remove ashes and fire from locomotives, to supply them with water and sand, and to aid in moving engine tanks in the railroad yard;[89] roundhouse employee putting an engine in condition for use;[90] roundhouse wiper, injured while assisting in coaling an engine, by the negligent moving of the engine by a coemployee;[91] wiper employed in roundhouse injured while assisting in straightening a cable used to pull a plow in unloading gravel from cars in repairing the track;[92]

St. P. R. Co., 70 N.W. 755, 101 Iowa 613.

63. U.S.—Chicago & N. W. R. Co. v. O'Brien, Iowa, 132 F. 593, 67 C.C.A. 421.
Iowa.—Schroeder v. Chicago, R. I. & P. R. Co., 47 Iowa 375.

64. Iowa.—Melody v. Des Moines Union R. Co., 141 N.W. 438, 161 Iowa 695.
39 C.J. p 670 note 34.

65. Iowa.—Houser v. Chicago, R. I. & P. R. Co., 14 N.W. 778, 60 Iowa 230, 46 Am.R. 65.

66. Iowa.—Haden v. Sioux City & P. R. Co., 60 N.W. 537, 92 Iowa 226.

67. Iowa.—Rayburn v. Central Iowa R. Co., 35 N.W. 606, 74 Iowa 637, rehearing denied 38 N.W. 520, 74 Iowa 637.
39 C.J. p 671 note 37.

68. Kan.—Smith v. Missouri Pac. R. Co., 108 P. 76, 82 Kan. 248, 47 L.R.A.,N.S., 113.
39 C.J. p 671 note 38.

69. Iowa.—Cahill v. Illinois Cent. R. Co., 125 N.W. 331, 148 Iowa 241, 28 L.R.A.,N.S., 1121.
39 C.J. p 671 note 39.

70. Iowa.—Handelun v. Burlington, C. R. & N. R. Co., 32 N.W. 4, 72 Iowa 709.

71. Iowa.—Deppe v. Chicago, R. I. & P. R. Co., 36 Iowa 52.

72. Iowa.—McKnight v. Iowa & M. R. Constr. Co., 43 Iowa 406.

73. Iowa.—Smith v. Humeston & S. R. Co., 43 N.W. 545, 78 Iowa 583.

74. Iowa.—Nelson v. Chicago, M. & St. P. R. Co., 35 N.W. 611, 73 Iowa 576.

75. Iowa.—Pyne v. Chicago, B. & Q. R. Co., 6 N.W. 281, 54 Iowa 223, 37 Am.R. 198.

76. Iowa.—Jensen v. Omaha & St. L. R. Co., 88 N.W. 952, 115 Iowa 404.
39 C.J. p 671 note 46.

77. Iowa.—Canon v. Chicago, M. & St. P. R. Co., 70 N.W. 755, 101 Iowa 613.

78. N.D.—Gunn v. Minneapolis, St. P. & S. S. M. R. Co., 158 N.W. 1004, 34 N.D. 418.
39 C.J. p 671 note 48.

79. U.S.—Chicago, K. & W. R. Co. v. Pontius, Kan., 15 S.Ct. 585, 157 U.S. 209, 39 L.Ed. 675.

80. Kan.—Atchison, T. & S. F. R. Co. v. Brassfield, 32 P. 814, 51 Kan. 167.

81. Iowa.—Williams v. Iowa Cent. R. Co., 96 N.W. 774, 121 Iowa 270.

82. Kan.—Atchison, T. & S. F. R. Co. v. Koehler, 15 P. 567, 37 Kan. 463.

83. Iowa.—Stebbins v. Crooked Creek R. & Coal Co., 90 N.W. 355, 116 Iowa 513.

84. Miss.—Hunter v. Ingram-Day Lumber Co., 70 So. 901, 110 Miss. 744.

85. Wis.—Bain v. Northern Pac. R. Co., 98 N.W. 241, 120 Wis. 412, construing Minnesota statute.

86. Minn.—Leier v. Minnesota Belt-Line R. & Transfer Co., 65 N.W. 269, 63 Minn. 203.

87. Iowa.—Akeson v. Chicago, B. & Q. R. Co., 75 N.W. 676, 106 Iowa 54.

88. Minn.—Swartz v. Great Northern R. Co., 101 N.W. 504, 93 Minn. 339.

89. Iowa.—Butler v. Chicago, B. & Q. R. Co., 54 N.W. 208, 87 Iowa 206.

90. U.S.—Chicago, R. I. & P. R. Co. v. Stahley, Kan., 62 F. 363, 11 C.C.A. 88.

91. Minn.—Mikkelson v. Truesdale, 65 N.W. 260, 63 Minn. 137.

92. Minn.—Nichols v. Chicago, M. & St. P. R. Co., 62 N.W. 386, 60 Minn. 319.

employee in railroad shop engaged in moving brake beam in shop to roundhouse;[93] member of a railroad bridge crew working on a railroad trestle unloading piling from a car;[94] and an employee building a retaining wall along an embankment, where injured by the negligence of employees in operating trains.[95] Where the negligence is that of a locomotive fireman,[96] or a wiper in charge of an engine,[97] or one intrusted with the duty of inspecting and repairing a bridge[98] it is the negligence of a servant connected with the use and operation of the railroad.

On the other hand, employees not engaged in the operation of the road or subject to the hazards peculiar to railroading have been held to include roundhouse employees;[99] employees merely loading cars;[1] laborers pushing tram cars into shop;[2] lumber manufacturer employee engaged in dismantling plant and transporting it over a spur track;[3] workmen employed in the machine shop;[4] members of a construction gang injured by the negligence of another of the crew;[5] stone mason working around depot and injured by falling of curbstone;[6] employee injured by falling of loose coal while standing on tender of engine;[7] bridge repairers;[8] blacksmith for a force engaged in building bridges for the construction of a railroad;[9] boiler maker;[10] and pitman engaged in operating steam shovel in a gravel pit and injured in the course of the work.[11]

b. Employees Operating Railroad

Statutes making a railroad liable for injuries to an employee caused by the negligence of a fellow servant "while engaged in the work of operating" has been held to include those engaged in all work that is directly necessary for running trains over a track.

Under some statutes the master is liable for all damages sustained by any agent or servant thereof "while engaged in the work of operating such railroad," by reason of the negligence of any other agent or servant thereof.[12] Such a statute is not limited to employees actually engaged in the movement of trains, cars, or locomotives upon a track, but includes those engaged in all work that is directly necessary for running trains over a track.[13] Such statutory provisions have been held to include a car repairer doing repair work on cars in repair yard;[14] carpenter engaged in building coal chute in railroad yard;[15] carpenter repairing box car;[16] employee engaged in work of loading freight car[17] or unloading ties from wagon to roadbed;[18] lineman moving electric wires used to operate street railway cars;[19] members of section crew working together;[20] section hand assisting and repairing track on railroad;[21] section hand riding on a hand car;[22] operator of rail-bending machine in repair shop;[23] switchman injured by negligence of switch tender;[24] and

93. Mo.—Madden v. Missouri Pac. R. Co., 151 S.W. 489, 167 Mo.App. 143.

94. Ark.—St. Louis, I. M. & S. R. Co. v. Ingram, 176 S.W. 692, 118 Ark. 377.

95. Iowa.—Keatley v. Illinois Cent. R. Co., 63 N.W. 560, 94 Iowa 685.

96. Iowa.—Larson v. Illinois Cent. R. Co., 58 N.W. 1076, 91 Iowa 81.

97. Iowa.—Whalen v. Chicago, R. I. & P. R. Co., 39 N.W. 894, 75 Iowa 563.

98. Iowa.—Locke v. Sioux City & P. R. Co., 46 Iowa 109.

99. Iowa.—Malone v. Burlington, C. R. & N. R. Co., 16 N.W. 203, 61 Iowa 326, 47 Am.R. 813.
39 C.J. p 671 note 66.

1. Minn.—Pearson v. Chicago, M. & St. P. R. Co., 49 N.W. 302, 47 Minn. 9.
39 C.J. p 671 note 67.

2. Va.—Sutphin v. Norfolk & W. Ry. Co., 144 S.E. 436, 151 Va. 278.

3. N.C.—Gurganous v. Camp Mfg. Co., 168 S.E. 833, 204 N.C. 525.

4. Iowa.—Potter v. Chicago, R. I. & P. R. Co., 46 Iowa 399.

5. Iowa.—Matson v. Chicago, R. I. & P. R. Co., 25 N.W. 911, 68 Iowa 22.
39 C.J. p 671 note 69.

6. Kan.—Missouri, K. & T. R. Co. v. Medaris, 55 P. 875, 60 Kan. 151.

7. Minn.—Weisel v. Eastern R. Co., 82 N.W. 576, 79 Minn. 245.

8. Minn.—O'Neil v. Great Northern R. Co., 82 N.W. 1086, 80 Minn. 27, 51 L.R.A. 532—Johnson v. St. Paul & D. R. Co., 45 N.W. 156, 43 Minn. 222, 8 L.R.A. 419.

9. N.C.—O'Neal v. South & W. R. Co., 67 S.E. 1022, 152 N.C. 404.

10. Minn.—Lavallee v. St. Paul, M. & M. R. Co., 41 N.W. 974, 40 Minn. 249.

11. Minn.—Jemming v. Great Northern R. Co., 104 N.W. 1079, 96 Minn. 302, 1 L.R.A.,N.S., 696.

Not operating railroad

The negligent servants are not engaged in operating a railroad where using a steam shovel in a gravel pit on a track some distance from the main line.—Jemming v. Great Northern R. Co., supra.

12. Mo.—Powers v. Missouri Pac. R. Co., 172 S.W. 1, 262 Mo. 701.
39 C.J. p 672 note 83.

13. Mo.—Turner v. Terminal R. Ass'n, 111 S.W. 841, 132 Mo.App. 38.
39 C.J. p 672 note 84.

14. Mo.—Powers v. Missouri Pac. R. Co., 172 S.W. 1, 262 Mo. 701.

15. Mo.—Voris v. Chicago, M. & St. P. R. Co., 157 S.W. 835, 172 Mo. App. 125.

16. Mo.—Scott v. Dickinson, App., 223 S.W. 1080.

17. Mo.—Salmon v. Chicago & A. R. Co., 168 S.W. 829, 181 Mo.App. 414—Orendorff v. Terminal R. Ass'n, 92 N.W. 148, 116 Mo.App. 348.

18. Mo.—Sartain v. Jefferson City Transit Co., 170 S.W. 411, 183 Mo. App. 237.

19. Mo.—Frese v. Wells, 40 S.W.2d 652.

20. Mo.—Miller v. St. Louis & S. F. R. Co., 174 S.W. 166, 188 Mo.App. 402—Stubbs v. Omaha, Kansas City & Eastern R. Co., 85 Mo.App. 192.

21. Mo.—Thompson v. Chappell, 91 Mo.App. 297.

22. Mo.—Miller v. St. Louis & S. F. R. Co., 174 S.W. 166, 188 Mo.App. 402.
39 C.J. p 672 note 89.

23. Mo.—Hellriegel v. Dunham, 179 S.W. 763, 192 Mo.App. 43.

24. Mo.—Phippin v. Missouri Pac. R. Co., 93 S.W. 410, 196 Mo. 321.

field switchman injured by negligence of engine switchman.[25]

c. Employees Operating Cars, Locomotives, or Trains

Under some statutory provisions a railroad is liable for injuries caused its employee by the negligence of another employee where the injured servant was at the time engaged in operating cars, locomotives, or trains.

Under some statutes a railroad company is liable for all damages sustained by any servant while engaged in the work of operating cars, locomotives, or trains, by reason of the negligence of a fellow servant.[26] The protection against the negligence of a fellow servant under such a statute is not given those employed to operate a car, locomotive, or train, but to those who at the time of injury are actually engaged in the act or work of such operation.[27] However, the word "operating" does not require that the car shall be actually moving at the time[28] or that the injured employee shall at the particular time be actively engaged in the performance of manual or other labor.[29] Such a statute is not limited to train crews, but includes a switchman employed in coupling cars while the train is being made up in the yard[30] and employees operating locomotives in yards, at stations, roundhouses, or coal chutes.[31] An employee is not engaged in "operating" while on his way to take charge of a locomotive.[32] Merely loading or unloading a car is not "operating" it,[33] although if the employee not only loads and unloads, but also works in connection with the transfer of the car to another place, he is engaged in operating it.[34] The operation of cars includes hand cars,[35] tram cars,[36] and push cars.[37] Placing a hand car on the track is operating it,[38] as are putting it in motion[39] and removing it from the track.[40]

d. Federal Employers' Liability Act

The Federal Employers' Liability Act abrogates the common-law fellow-servant doctrine as to railroad employees within the purview of the statute.

The Federal Employers' Liability Act abrogates the common-law fellow-servant rule as to railroad employees within its provisions[41] and makes the carrier liable for injuries resulting in whole or in part

25. Mo.—Briscoe v. Chicago & A. R. Co., 208 S.W. 885, 200 Mo.App. 691.

26. Tex.—Texas & N. O. R. Co. v. Walton, 104 S.W. 415, 47 Tex.Civ. App. 43.
39 C.J. p 672 note 96.
Moving coupler
Railroad was held chargeable with negligence of employee aiding another employee in moving coupler.—St. Louis Southwestern Ry. Co. of Texas v. Gillenwater, Tex.Com.App., 294 S.W. 193.

27. Tex.—Houston Belt & Terminal Co. v. Glover, Com.App., 213 S.W. 597.

28. Tex.—St. Louis Southwestern R. Co. v. Blevins, Civ.App., 173 S.W. 281.
39 C.J. p 673 note 98.

29. Tex.—St. Louis Southwestern R. Co. v. Blevins, supra.

30. Tex.—Missouri, K. & T. R. Co. v. Baker, Civ.App., 58 S.W. 964.
39 C.J. p 673 note 1.

31. Tex.—Gulf, C. & S. F. R. Co. v. Howard, Civ.App., 75 S.W. 803, certiorari question answered 75 S.W. 805, 96 Tex. 582, and reversed on other grounds 80 S.W. 229, 97 Tex. 513.

32. Tex.—Gulf, C. & S. F. R. Co. v. Howard, 80 S.W. 229, 97 Tex. 513.

33. Tex.—Houston Belt & Terminal Co. v. Glover, Com.App., 213 S.W. 597.
39 C.J. p 673 note 4.

34. Tex.—Freeman v. Shaw, 126 S. W. 53, 59 Tex.Civ.App. 294.
39 C.J. p 673 note 5.

35. Tex.—San Antonio & A. P. R. Co. v. Stevens, 83 S.W. 235, 37 Tex. Civ.App. 80.
39 C.J. p 674 note 6.

36. Tex.—Missouri, K. & T. R. Co. v. Smith, 99 S.W. 743, 45 Tex.Civ. App. 128.
39 C.J. p 674 note 7.

37. Tex.—Seery v. Gulf, C. & S. F. R. Co., 77 S.W. 950, 34 Tex.Civ. App. 89.
39 C.J. p 674 note 8.

38. Tex.—Missouri, K. & T. R. Co. v. Smith, 99 S.W. 743, 45 Tex.Civ. App. 128.
39 C.J. p 674 note 9.

39. Tex.—St. Louis Southwestern R. Co. v. Blevins, Civ.App., 173 S.W. 281.

40. Tex.—Texas & P. R. Co. v. Hervey, Civ.App., 89 S.W. 1095.
39 C.J. p 674 note 11.

41. U.S.—Owens v. Union Pac. R. Co., Wash., 63 S.Ct. 1271, 319 U.S. 715, 87 L.Ed. 1683, conformed to, C.C.A., 142 F.2d 145, certiorari denied 65 S.Ct. 57, 323 U.S. 740, 89 L.Ed. 593—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213—Grand Trunk Western R. Co. v. Boylen, C.C.A.Ind., 81 F.2d 91.
Cal.—Perrett v. Southern Pac. Co., 165 P.2d 751, 73 Cal.App.2d 30.
Conn.—Wells v. New York, N. H. & H. R. Co., 128 A. 700, 102 Conn. 361.
Ill.—Adams v. Chicago & E. R. Co., 41 N.E.2d 991, 314 Ill.App. 404—Taylor v. Atchison, T. & S. F. Ry. Co., 11 N.E.2d 610, 292 Ill.App. 457, certiorari denied Atchison, T. & S. F. R. Co. v. Taylor, 58 S.Ct. 942, 304 U.S. 560, 82 L.Ed. 1528.
Ind.—Baltimore & O. S. W. R. Co. v. Carroll, 163 N.E. 99, 200 Ind. 589, set aside 171 N.E. 923, 202 Ind. 37, and reversed on other grounds 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed. 566.
Ky.—Chesapeake & O. Ry. Co. v. Craig, 17 S.W.2d 224, 229 Ky. 365.
Me.—Hatch v. Portland Terminal Co., 131 A. 5, 125 Me. 96.
Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434.
Mo.—Joice v. Missouri-Kansas-Texas R. Co., 189 S.W.2d 568, 354 Mo. 439, 161 A.L.R. 383.
N.H.—Tondreau v. Boston & M. R. R., 157 A. 76, 85 N.H. 235—Ingalls v. Maine Cent. R. R., 142 A. 695, 83 N.H. 397.
N.C.—Inge v. Seaboard Air Line Ry. Co., 135 S.E. 522, 192 N.C. 522, certiorari denied Seaboard Air Line R. Co. v. Inge, 47 S.Ct. 456, 273 U.S. 753, 71 L.Ed. 874.
S.C.—McClain v. Charleston & W. C. Ry. Co., 4 S.E.2d 280, 191 S.C. 332—Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 158 S.C. 194, certiorari denied Atlantic Coast Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.
Tenn.—**Corpus Juris cited in** Cincinnati, N. O. & T. P. Ry. Co. v. Frady, 139 S.W.2d 417, 419, 24 Tenn. App. 38.

from the negligence of any of its employees.[42] The gist of an action under the statute is negligence, which must be proved,[43] and it must also appear that the wrongful act of the servant was committed

Utah.—Fogg v. Oregon Short Line R. Co., 1 P.2d 954, 78 Utah 105.

39 C.J. p 674 note 19.

Railroads within scope of act see supra § 347.

Recrudescence of doctrine under different label

The theory that a servant is completely barred from recovery for injuries resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow-servant rule, and assumption of risk, must not, contrary to the will of congress, be allowed recrudescence under any other label in common-law lexicon.—Tiller v. Atlantic Coast Line R. Co., Va., 63 S. Ct. 444, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 967.

Fellow servant's negligence is imputable to the master.

U.S.—Reynolds v. New York, O. & W. Ry. Co., C.C.A.N.Y., 42 F.2d 164.

Idaho.—Claris v. Oregon Short Line R. Co., 51 P.2d 217, 56 Idaho 169, certiorari denied Oregon Short Line R. Co. v. Claris, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.

Okl.—Kansas, O. & G. Ry. Co. v. Hawkins, 64 P.2d 266, 178 Okl. 639.

Proximate cause

Mo.—Johnson v. Terminal R. Ass'n of St. Louis, 8 S.W.2d 891, 320 Mo. 884, certiorari denied 49 S.Ct. 80, 278 U.S. 644, 73 L.Ed. 558, 61 A. L.R. 572.

42. U.S.—Union Pac. R. Co. v. De Vaney, C.C.A.Cal., 162 F.2d 24—Norfolk & W. Ry. Co. v. Hall, C. C.A.W.Va., 49 F.2d 692—Louisville & N. R. Co. v. Mount, C.C.A.Ohio, 35 F.2d 634.

Ala.—Southern Ry. Co. v. Smith, 128 So. 228, 221 Ala. 273—Seaboard Air Line Ry. Co. v. Johnson, 115 So. 168, 217 Ala. 251, certiorari dismissed 49 S.Ct. 95, 278 U.S. 676, 73 L.Ed. 515.

Conn.—Wells v. New York, N. H. & H. R. Co., 128 A. 700, 102 Conn. 361.

Ga.—Southern Ry. Co. v. Heaton, 6 S.E.2d 339, 61 Ga.App. 386.

Idaho.—Claris v. Oregon Short Line R. Co., 51 P.2d 217, 56 Idaho 169, certiorari denied Oregon Short Line R. Co. v. Claris, 56 S.Ct. 590, 297 U.S. 714, 80 L.Ed. 1000.

Ill.—Walaite v. Chicago, R. I. & P. Ry. Co., 33 N.E.2d 119, 376 Ill. 59—Bryant v. Illinois Cent. R. Co., 252 Ill.App. 428.

Mich.—Sumner v. Ann Arbor R. Co., 209 N.W. 184, 235 Mich. 293.

Mo.—Wilday v. Missouri-Kansas-Texas R. Co., 147 S.W.2d 431, 347 Mo. 275.

N.H.—Tondreau v. Boston & M. R. R., 157 A. 76, 85 N.H. 235.

N.J.—Deputla v. Pennsylvania R. Co., 166 A. 87, 110 N.J.Law 515, certiorari denied Pennsylvania R. Co. v. Deptula, 54 S.Ct. 62, 290 U. S. 643, 78 L.Ed. 559—James v. Pennsylvania R. Co., 146 A. 52, 105 N.J.Law 504—Erickson v. Lehigh Valley R. Co., 134 A. 892, 4 N.J. Misc. 905.

N.Y.—Healy v. Erie R. Co., 180 N.E. 888, 259 N.Y. 40, certiorari denied Erie R. Co. v. Healy, 53 S.Ct. 81, 287 U.S. 628, 77 L.Ed. 545.

Ohio.—New York, C. & St. L. R. Co. v. Biermacher, 162 N.E. 720, 28 Ohio App. 421, certiorari denied 49 S.Ct. 19, 278 U.S. 614, 73 L.Ed. 538.

Pa.—Moseley v. Reading Co., 145 A. 293, 295 Pa. 342—Fox v. Lehigh Valley R. Co., 141 A. 157, 292 Pa. 321—Baumgartner v. Pennsylvania R. Co., 140 A. 622, 292 Pa. 106.

Va.—Southern R. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.

W.Va.—Towns v. Monongahela Ry. Co., 144 S.E. 289, 105 W.Va. 572.

39 C.J. p 675 note 20.

Negligence of two fellow servants

In employee's action against railroad under the act for injuries allegedly resulting from negligence of two fellow servants, whether injuries were caused by negligence of one fellow servant or by both of them did not affect railroad's liability.—Southern Ry. Co. v. Heaton, 6 S.E. 2d 339, 61 Ga.App. 386.

43. Mont.—Burnett v. Northern Pac. Ry. Co., 124 P.2d 307, 113 Mont. 253.

39 C.J. p 675 note 25.

Willful acts

(1) It has been held that the word "negligence," as used in the act, includes a deliberate and intentional injury of an employee by another employee of equal station.—Steeley v. Kurn, 157 S.W.2d 212, 384 Mo. 1142.

(2) It has also been held that the act of a foreman in brushing against a railroad laborer, although willful and intentional and amounting to assault, was negligence within the act, rendering the railroad liable for resulting injury.—Baker v. Chicago, B. & Q. R. Co., 39 S.W.2d 535, 327 Mo. 986.

(3) On the other hand, there is authority to the effect that recovery cannot be had under the act for "willful injury," but only for negligence.—Southwell v. Atlantic Coast Line R. Co., 131 S.E. 670, 191 N.C. 153, reversed on other grounds 48 S.Ct. 25, 275 U.S. 64, 72 L.Ed. 157.

Conditions at time of accident

Negligence of workmen in violently shoving motor car forward without warning, knocking down foreman as he stepped back over rail while helping place car on track, must be determined by conditions as they appeared to workmen at the time.—Jones v. St. Louis-San Francisco Ry. Co., 63 S.W.2d 94, 333 Mo. 802.

Knowledge of circumstances

In determining whether railroad was guilty of negligence rendering it liable for death of engineer fatally injured in collision between engines, the engineer's fireman, who was an experienced railroad man accustomed to the run involved, was chargeable with knowledge of all pertinent circumstances.—Bowser v. Baltimore & O. R. Co., C.C.A.Pa., 152 F.2d 436.

Duty to warn

(1) Fellow servant is not required to give warning until he knows or has reason to believe that coemployee is oblivious of situation.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L. Ed. 775.

(2) Railroad was held as matter of law not liable for death of experienced head brakeman familiar with road who fell from bridge over creek when alighting from engine as against contention that engineer had duty to warn brakeman of danger.—Yazoo & M. V. R. Co. v. Sudduth, 157 So. 527, 171 Miss. 619, certiorari denied Sudduth v. Yazoo & M. V. R. Co., 55 S.Ct. 827, 295 U.S. 748, 79 L.Ed. 1693.

Foreman's obligations

(1) Foreman of bridge repair crew, as vice principal, was bound to see that tools were carefully loaded on railroad motor car.—Clift v. St. Louis-San Francisco Ry. Co., 9 S.W.2d 972, 320 Mo. 791.

(2) One operating a railroad motor car under the direct supervision of section foreman was entitled to rely on and obey a signal given by foreman as between himself and such foreman, particularly when foreman was occupying a more advantageous position to see and determine whether motor car could safely pass ahead of approaching truck and operator was looking at and operating the controls.—Gulf, M. & O. R. Co. v. Joiner, Miss., 29 So.2d 255.

Negligence of fellow servants shown

(1) Generally.

Ky.—Chesapeake & O. Ry. Co. v. Craig, 17 S.W.2d 224, 229 Ky. 365.

Mo.—Johnson v. Chicago & E. I. Ry. Co., 64 S.W.2d 674, 334 Mo. 22.

in the course of his employment[44] or was authorized or directed by the master.[45] Recovery may be denied where the acts of the fellow servant were prompted by personal motives not connected with his employment,[46] as in the case of horseplay,[47] skylarking,[48] or a willful assault not connected with the railroad's business.[49] Where there is no showing that a railroad negligently employed a dangerous man with notice of his proclivities, an employee injured in an assault by his fellow servant cannot successfully claim that he should recover for failure of the railroad to furnish a safe place to work.[50]

(2) Failure to slacken speed when traveling over known defective track.—Chesapeake & O. Ry. Co. v. Russo, 163 N.E. 283, 91 Ind.App. 648, certiorari denied 51 S.Ct. 25, 282 U.S. 846, 75 L.Ed. 750.

(3) Failure of driver of motorized hand car to keep lookout.—McPherson v. Thompson, Mo.App., 164 S.W. 2d 80, certiorari denied Thompson v. McPherson, 63 S.Ct. 769, 318 U.S. 773, 87 L.Ed. 1143.

(4) Violation of known custom or duty.—Matthews v. Atchison, T. & S. F. Ry. Co., 129 P.2d 435, 54 Cal. App.2d 549.

Negligence of fellow servants not shown

(1) Generally.—Missouri Pac. R. Co. v. Davis, 186 S.W.2d 20, 208 Ark. 86.

(2) Act in sudden emergency.—Fort Worth & D. C. Ry. Co. v. Williams, Tex.Civ.App., 275 S.W. 415, certiorari denied 46 S.Ct. 356, 270 U. S. 661, 70 L.Ed. 786.

(3) Obedience to rules by fellow servants constitutes exercise of due care on their part.—Atchison, T. & S. F. Ry. Co. v. Ballard, C.C.A.Tex., 108 F.2d 768, rehearing denied 109 F.2d 1012, certiorari denied Ballard v. Atchison, T. & S. F. R. Co., 60 S.Ct. 1096, 310 U.S. 646, 84 L.Ed. 1413.

44. U.S.—Sheaf v. Minneapolis, St. P. & S. S. M. R. Co., C.C.A.N.D., 162 F.2d 110.
Ala.—Taylor v. Atlantic Coast Line R. Co., 168 So. 181, 232 Ala. 378.
Conn.—Wells v. New York, N. H. & H. R. Co., 128 A. 700, 102 Conn. 361.
Neb.—Bocian v. Union Pac. R. Co., 289 N.W. 372, 137 Neb. 318.
N.Y.—Zoccano v. Long Island R. Co., 65 N.Y.S.2d 32.
39 C.J. p 675 note 26.

Act as mere volunteer cannot render railroad liable for injuries claimed to have been caused by a fellow servant.—Smith v. Southern Pac. Co., 277 P. 609, 51 Nev. 390.

Apparent authority

Railroad agents are confined to particular duties, and their authority does not extend beyond apparent authority unless greater authority is shown.—Smith v. Southern Pac. Co., supra.

Test of master's liability to injured servant for a fellow servant's act is the fellow servant's purpose to further the master's business.—Sheaf v. Minneapolis, St. P. & S. S. M. R. Co., C.C.A.N.D., 162 F.2d 110.

Authority for particular act

In order to hold master liable for servant's act, servant need not have authority to do particular act, but it must be done within scope of his general authority in furtherance of master's business.—Texas & N. O. R. Co. v. Webster, Civ.App., 53 S.W. 2d 656, affirmed 70 S.W.2d 394, 123 Tex. 197, certiorari denied 55 S.Ct. 93, 293 U.S. 580, 79 L.Ed. 677, rehearing denied 55 S.Ct. 138, 293 U. S. 630, 79 L.Ed. 716.

45. Mo.—Osment v. Pitcairn, 159 S. W.2d 666, 349 Mo. 137, certiorari denied 63 S.Ct. 21, 317 U.S. 587, 87 L.Ed. 481, certiorari denied 64 S.Ct. 206, 320 U.S. 792, 88 L.Ed. 477.
N.Y.—Zoccano v. Long Island R. Co., 65 N.Y.S.2d 32.

Ratification not shown

A railroad company did not ratify the act of an engineer in attacking a conductor by retaining him in its service where, in making the attack, the engineer did not assume to be acting for or on behalf of the railroad, and it was not charged with having received any benefit from the assault.—Sheaf v. Minneapolis, St. P. & S. S. M. R. Co., C.C.A.N.D., 162 F. 2d 110.

46. Neb.—Bocian v. Union Pac. R. Co., 289 N.W. 372, 137 Neb. 318.

47. Mo.—Osment v. Pitcairn, 159 S. W.2d 666, 349 Mo. 137, certiorari denied 63 S.Ct. 21, 317 U.S. 587, 87 L.Ed. 481, certiorari denied 64 S. Ct. 206, 320 U.S. 792, 88 L.Ed. 477.
39 C.J. p 642 note 62 [a].

Employees in separate departments

(1) A member of interstate switching crew could not recover from railroad under the act for injuries received when messenger employed by railroad assaulted crew member while engaged in rough horseplay, where crew member and messenger were in separate departments and had no business together, and assault did not occur in course of messenger's employment, and was not in furtherance of railroad's business and was unauthorized and not directed by railroad.—Osment v. Pitcairn, supra.

(2) A special policeman in railroad's special service department, having knowledge of propensity of messenger for rough horseplay and failing to stop messenger who engaged in horseplay on switchman, did not thereby render railroad liable under the act for injuries sustained by switchman, notwithstanding railroad voluntarily created special service department, and that policeman's failure to act may have been proximate cause of switchman's injuries, where messenger was acting outside scope of his employment.—Osment v. Pitcairn, supra.

48. N.Y.—Popadines v. Davis, 209 N.Y.S. 689, 213 App.Div. 9.

Slipping on ice

Where railroad trackman, whose cap was pulled over his eyes by fellow employee engaged in "skylarking," slipped on icy tie and fractured his spine, employer was not liable under the act, as fellow employee's act was not done in course of duty.—Popadines v. Davis, supra.

49. U.S.—Sheaf v. Minneapolis, St. P. & S. S. M. R. Co., C.C.A.N.D., 162 F.2d 110.
39 C.J. p 675 note 26 [a].

Although regarded as negligence, rather than trespass, fellow servant's unprovoked assault on railroad employee did not render railroad liable for resultant injury unless aggressor was, at time of assault, acting within scope of his employment.—Sheaf v. Minneapolis, St. P. & S. S. M. R. Co., supra.

Assault by section foreman

(1) Under the act, an interstate railroad carrier is not liable for assault by a section foreman on member of section crew unless the assault was committed within scope of foreman's employment or under direction or authorization of carrier.—Bocian v. Union Pac. R. Co., 289 N. W. 372, 137 Neb. 318.

(2) In such a case, the law that permits a conductor on a passenger car to make a reasonable assault on a dangerous person, when necessary for protection of passengers on train, did not apply, in action against railroad under the act, to a wrongful assault by foreman of a section crew on a member thereof.—Bocian v. Union Pac. R. Co., supra.

50. N.Y.—Zoccano v. Long Island R. Co., 65 N.Y.S.2d 32.

4. Concurrent Negligence of Master and Fellow Servant

§ 356. Rules Stated and Applied

Where the negligence of the master or of his vice principal concurs with that of a fellow servant of the injured employee in causing the injury, the master is not freed from liability through the operation of the fellow-servant rule.

Where the negligence of the master or of his vice principal concurs with that of a fellow servant of the injured employee in causing the injury, the master is not freed from liability through the operation of the fellow-servant rule,[51] or, as the principle is sometimes stated, the negligence of a fellow servant will not defeat an action for an injury to the servant if it is not the sole cause thereof.[52] It is not necessary that the negligence of the master shall have been the sole cause,[53] or in itself alone the efficient cause,[54] of the injury, but it must have contributed thereto,[55] and in a number of cases the master's liability has been made to depend on whether his negligence was the proximate or remote cause of the accident.[56] Where the negligence of the master or vice principal is the proximate or efficient cause of the injury,[57] or if the injury would not have been sustained but for his negligence,[58] or where the negligence of the master and fellow servant combine to create the proximate cause,[59] or if the negligence of a fellow servant is the proximate cause of the injury but the negligence of the master is the proximate cause of the negligence of the fellow servant,[60] the master is liable; and this is true although the injury might have been prevented by the exercise of greater care on the part of the fellow servant;[61] nor will the fact that the master's negligence was slight as compared with that of the fellow servant defeat a recovery.[62] The fact that an injury to an employee would not have occurred but for a fellow servant's negligence may not relieve the master of responsibility for his concurrent negligence.[63] Where, however, the negligence of the servant is such as to have caused the injury even had the master not been negligent,[64] or where the accident results from a new or distinct cause other than the master's negligence,[65] the master is not liable.

The rule imposing liability on the master notwithstanding the concurring negligence of the fellow servant has been applied in the case of a failure in his duty to furnish competent coemployees,[66] or to furnish a sufficient number of employees,[67] or to provide and maintain a reasonably safe place to

51. U.S.—Virginian Ry. Co. v. Staton, C.C.A.W.Va., 84 F.2d 133.
Ga.—Moody v. Hardeman, 162 S.E. 653, 44 Ga.App. 676.
Miss.—Curry & Turner Const. Co. v. Bryan, 185 So. 256, 184 Miss. 44.
Mo.—**Corpus Juris cited in** Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 537, 337 Mo. 202—Wall v. Philip A. Rohan Boat, Boiler & Tank Co., 62 S.W.2d 764, 333 Mo. 619—**Corpus Juris cited in** Cain v. Humes-Deal Co., 49 S.W.2d 90, 92, 329 Mo. 1107—State ex rel. Greer v. Cox, 274 S.W. 373—Alexander v. Forum Cafeteria, 37 S.W.2d 670, 225 Mo.App. 679—Ryan v. Sheffield Car & Equipment Co., App., 24 S.W.2d 166—Lewis v. American Car & Foundry Co., App., 3 S.W.2d 282—Motz v. Watson, App., 284 S.W. 837—Houston v. American Car & Foundry Co., App., 282 S.W. 170.
N.H.—Dziedzie v. Newmarket Mfg. Co., 129 A. 271, 81 N.H. 516.
39 C.J. p 676 note 28.

Selection of building materials
Employer was held liable to plasterer injured by collapse of building caused by employer's negligence in selecting materials and planning building's construction, regardless of fellow servant's negligence.—Moody v. Hardeman, 162 S.E. 653, 44 Ga. App. 676.

52. Miss.—Curry & Turner Const. Co. v. Bryan, 185 So. 256, 184 Miss. 44.
39 C.J. p 677 note 29.

53. N.H.—Vaisbord v. Nashua Mfg. Co., 69 A. 520, 74 N.H. 470.
39 C.J. p 677 note 30.

54. N.C.—Steele v. Grant, 82 S.E. 1038, 166 N.C. 635.
39 C.J. p 677 note 31.

55. Tex.—Serano v. Garza, Civ.App., 119 S.W.2d 413.
39 C.J. p 677 note 32.

56. Ind.—Vandalia Coal Co. v. Price, 97 N.E. 429, 178 Ind. 546.
39 C.J. p 677 note 33.

57. Iowa.—Madden v. Saylor Coal Co., 111 N.W. 57, 133 Iowa 699.
Wyo.—Engen v. Rambler Copper & Platinum Co., 121 P. 867, 20 Wyo. 95, rehearing denied 123 P. 413, 20 Wyo. 95.
39 C.J. p 678 note 34.

58. Ind.—Cook v. Ormsby, 89 N.E. 525, 45 Ind.App. 352.
39 C.J. p 679 note 35.

59. Mo.—Genta v. Ross, 37 S.W.2d 969, 225 Mo.App. 673.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213.
39 C.J. p 679 note 36.

60. Miss.—Curry & Turner Const. Co. v. Bryan, 185 So. 256, 184 Miss. 44.

61. N.Y.—Chiavaroli v. Union Bag & Paper Co., 115 N.Y.S. 327, 131 App.Div. 372—Auld v. Manhattan L. Ins. Co., 54 N.Y.S. 222, 34 App. Div. 491, affirmed 58 N.E. 1085, 165 N.Y. 610.
39 C.J. p 679 note 37.

62. N.Y.—O'Laughlin v. New York Cent. & H. R. Co., 9 N.Y.St. 384, affirmed 20 N.E. 876, 113 N.Y. 623.

63. Utah.—Ehalt v. McCarthy, 138 P.2d 639, 104 Utah 110.
39 C.J. p 679 note 39.

64. Mo.—Lewis v. American Car & Foundry Co., App., 3 S.W.2d 282.
39 C.J. p 679 note 40.

65. Ind.—Haskell & Barker Car Co. v. Przezdziankowski, 83 N.E. 626, 170 Ind. 1, 127 Am.S.R. 352, 14 L.R.A.,N.S., 972.
39 C.J. p 680 note 41.

66. D.C.—Southern Ry. Co. v. Taylor, 16 F.2d 517, 57 App.D.C. 21, certiorari denied Taylor v. Southern Ry. Co., 47 S.Ct. 571, 273 U.S. 767, 71 L.Ed. 882.
39 C.J. p 680 note 42.

67. Va.—Chesapeake & O. R. Co. v. Newton, 85 S.E. 461, 117 Va. 260.
39 C.J. p 680 note 43.

work,[68] or safe tools, machinery, and appliances,[69] or to adopt suitable rules, regulations, and methods for executing the work,[70] or to discharge his duty with reference to instructing and warning the servant concerning defects and dangers,[71] or to warn youthful or inexperienced servants concerning hazardous places or employments,[72] or to exclude them from such places[73] or from places where they cannot be lawfully employed.[74] The rule has also been applied in cases where the concurring negligence of the master or vice principal related to the giving of orders[75] or supervision or inspection of the work.[76]

Dual capacity. Where a servant's injury is due to the negligence of a foreman, or other representative of the master, as vice principal, combined with his negligence as a fellow servant, the master is liable.[77]

F. ASSUMPTION OF RISK

1. In General

§ 357. Definition, Nature, and Basis of Doctrine

a. In general
b. Distinguished from contributory negligence
c. Basis of doctrine

a. In General

"Assumption of risk" is a voluntary agreement by a servant or employee that certain dangers of injury arising in the course of his employment shall be at his risk.

"Assumption of risk," in the law of master and servant, is a phrase commonly used to describe a term or condition in the contract of employment, either express or implied from the circumstances of the employment, by which the employee or servant agrees that certain dangers of injury, while he is engaged in the service for which he is hired, shall be at the risk of the employee or servant.[78] "As-

68. U.S.—Southern Package Corporation v. Mitchell, C.C.A.Miss., 109 F.2d 609.
D.C.—Southern Ry. Co. v. Taylor, 16 F.2d 517, 57 App.D.C. 21, certiorari denied Taylor v. Southern Ry. Co., 47 S.Ct. 571, 273 U.S. 767, 71 L.Ed. 882.
Ky.—Kelly & Shields v. Miller, 33 S.W.2d 662, 236 Ky. 698.
Mo.—Snyder v. American Car & Foundry Co., 14 S.W.2d 603, 322 Mo. 147—Genta v. Ross, 37 S.W.2d 969, 225 Mo.App. 673—Mattingly v. Broderick, 36 S.W.2d 415, 225 Mo.App. 377.
N.C.—Thomas v. Lawrence, 127 S.E. 585, 189 N.C. 521.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213.
39 C.J. p 680 note 44.

69. D.C.—Southern Ry. Co. v. Taylor, 16 F.2d 517, 57 App.D.C. 21, certiorari denied Taylor v. Southern Ry. Co., 47 S.Ct. 571, 273 U.S. 767, 71 L.Ed. 882.
Mo.—Wair v. American Car & Foundry Co., App., 300 S.W. 1048.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213.
39 C.J. p 681 note 45.

70. S.C.—Whisenhunt v. Atlantic Coast Line R. Co., supra.
39 C.J. p 682 note 46.

Operation of railroad
An action by a railway employee for injuries received from being struck by a train running at a prohibited rate of speed will not be defeated because the train was in charge of coemployees, where they were running the train pursuant to a time card prepared and promulgated by the company.—Bluedorn v. Missouri Pac. R. Co., 18 S.W. 1103, 108 Mo. 439, 32 Am.S.R. 615.

71. Minn.—Jenkins v. Jenkins, 19 N.W.2d 389, 220 Minn. 216.
N.H.—Dziedzic v. Newmarket Mfg. Co., 129 A. 271, 81 N.H. 516.
39 C.J. p 683 note 47.

Highway dangers
Negligence of superintendent of filling station in failing to give warning to employee painting "no park" sign on concrete street adjoining was held concurring proximate cause of employee's injuries when struck by truck.—Gulf Refining Co. v. Ferrell, 147 So. 476, 165 Miss. 296.

72. Minn.—Jenkins v. Jenkins, 19 N.W.2d 389, 220 Minn. 216.

73. Ky.—Payne v. Henry, 244 S.W. 884, 196 Ky. 467.
Wis.—Jones v. Florence Min. Co., 28 N.W. 207, 66 Wis. 268, 57 Am.R. 269.

74. Ill.—Morris v. Stanfield, 81 Ill. App. 264.

75. Ky.—Cincinnati, N. O. & T. R. Co. v. Gardner, 176 S.W. 351, 165 Ky. 48.
39 C.J. p 683 note 50.

76. N.Y.—Henry v. Hudson & M. R. Co., 94 N.E. 623, 201 N.Y. 140.

77. Wash.—Nelson v. S. Willey SS. & Nav. Co., 67 P. 237, 26 Wash. 548.
39 C.J. p 684 note 52.

78. U.S.—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531—Lang v. U. S. Reduction Co., C.C.A.Ind., 110 F.2d 441.
Ark.—Wisconsin & Arkansas Lumber Co. v. Otts, 10 S.W.2d 364, 178 Ark. 283.
Fla.—H. & C. Operating Co. v. Fossum, 176 So. 865, 129 Fla. 480—Swanson v. Miami Home Milk Producers' Ass'n, 157 So. 415, 117 Fla. 110.
Idaho.—Schuppenies v. Oregon Short Line R. Co., 225 P. 501, 38 Idaho 672.
Iowa.—Girl v. U. S. Railroad Administration, 189 N.W. 834, 194 Iowa 1382.
Md.—Westinghouse Electric & Mfg. Co. v. State, 98 A. 206, 129 Md. 59.
Mich.—Parker v. Grand Trunk Western R. Co., 246 N.W. 125, 261 Mich. 293.
Minn.—Moquin v. Minneapolis, St. P. & S. S. M. Ry. Co., 231 N.W. 829, 181 Minn. 56.
Mo.—Pringle v. Carthage Quarry Co., 199 S.W. 561—Biskup v. Hoffman, 287 S.W. 865, 220 Mo.App. 542.
N.H.—Clairmont v. Cilley, 153 A. 465, 85 N.H. 1.
N.C.—Hux v. Reflector Co., 91 S.E. 591, 173 N.C. 97.
Okl.—**Corpus Juris quoted in** Kansas City Southern Ry. Co. v. Hoyle, 90 P.2d 1042, 1048, 185 Okl. 211.
Pa.—Elliott v. Philadelphia Transp. Co., 50 A.2d 537, 160 Pa.Super. 291.

sumption of risk" has been variously defined as the voluntary act of an ordinarily prudent man who, for hire, takes the chance of a known or obvious danger incident to his employment;[79] the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability therefor;[80] the voluntary exposure, without remonstrance, to the ordinary hazards of the particular use of machinery or appliances, claimed by an employee to be defective or unfit, but of which conditions he knew, or must necessarily have acquired knowledge in the ordinary pursuit of his duties;[81] in effect a waiver of defects and dangers and a consent on the part of the employee to assume them, no matter whether he be careful or negligent in his conduct.[82]

It has been said that the phrase is used in a dual sense; on the one hand, it is used to indicate the employee's assumption of risks inherent in the nature of the employment without regard to negligence on either his part or that of the employer, and on the other hand, it is used to indicate a situation in which an employee with knowledge that his safety is endangered by some neglect on the part of his employer nevertheless continues to work without complaint.[83] Although circumstances justifying its application in other connections may sometimes arise, as a general rule the doctrine of assumption of risk pertains to controversies between master and servant[84] and to controversies between master and serv-

S.D.—Maher v. Wagner, 252 N.W. 647, 62 S.D. 227.
W.Va.—State ex rel. Cashman v. Sims, 43 S.E.2d 805.
39 C.J. p 684 note 2.
"The doctrine of assumption of risk means that the law implies, as a part of the contract of service, that the servant agrees to and assumes all the ordinary risks of personal injury incident to the business and not caused by the direct negligence of his employer."—Schuh v. R. H. Herron Co., 169 P. 682, 684, 177 Cal. 13.

Historical development

"Assumption of risk is a judicially created rule which was developed in response to the general impulse of common law courts at the beginning of this period [the past one hundred years] to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry."—Tiller v. Atlantic Coast Line R. Co., Va., 63 S.Ct. 444, 447, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 967.

Similar definitions

(1) A term in a contract of employment, either express or implied from the circumstances of the employment, by which the employee agrees that the dangers ordinarily or obviously incident to the discharge of his duty in the particular employment shall be at his own risk. —**Corpus Juris quoted in** Johnson v. Butterworth, La.App., 152 So. 166, 169—5 C.J. p 1413 note 7.

(2) A term which the law imports into the contract, when nothing is said to the contrary, that the servant will assume the ordinary risks of the service for which he is paid.
Ark.—Ward Furniture Mfg. Co. v. Weigand, 293 S.W. 1002, 173 Ark. 762.
La.—**Corpus Juris quoted in** Johnson v. Butterworth, App., 152 So. 166, 169.
5 C.J. p 1413 note 11.

(3) Other similar definitions.
U.S.—United Production Corporation v. Chesser, C.C.A.Tex., 95 F.2d 521, certiorari denied Chesser v. United Production Corporation, 59 S.Ct. 75, 305 U.S. 616, 83 L.Ed. 393.
S.C.—Hice v. Dobson Lumber Co., 185 S.E. 742, 180 S.C. 259.

79. Fla.—**Corpus Juris cited in** H. & C. Operating Co. v. Fossum, 176 So. 865, 868, 129 Fla. 480.
La.—**Corpus Juris quoted in** Johnson v. Butterworth, App., 152 So. 166, 169.
Mo.—Harbacek v. Fulton Iron Works Co., 229 S.W. 803, 287 Mo. 479—Dale v. Hill-O'Meara Constr. Co., 82 S.W. 1092, 108 Mo.App. 90.
Wis.—Cox v. Chicago, M. & St. P. Ry. Co., 149 N.W. 709, 159 Wis. 491.

80. La.—**Corpus Juris quoted in** Johnson v. Butterworth, App., 152 So. 166.
Okl.—Chicago, R. I. & P. Ry. Co. v. King, 25 P.2d 304, 165 Okl. 169.
5 C.J. p 1413 note 10.

81. La.—**Corpus Juris quoted in** Johnson v. Butterworth, App., 152 So. 166.
Tex.—Winnsboro Cotton Oil Co. v. Carson, Civ.App., 185 S.W. 1002.
5 C.J. p 1413 note 12.

82. Iowa.—Miller v. White Bronze Monument Co., 118 N.W. 518, 141 Iowa 701, 18 Ann.Cas. 957.
La.—**Corpus Juris quoted in** Johnson v. Butterworth, App., 152 So. 166, 169.

83. U.S.—Tiller v. Atlantic Coast Line R. Co., C.C.A.Va., 128 F.2d 420, reversed on other grounds 63 S.Ct. 444, 318 U.S. 54, 87 L.Ed 610, 143 A.L.R. 967—Chesapeake & O. Ry. Co. v. Richardson, C.C.A. Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531—Chicago, B. & Q. R. Co. v. Kelley, C.C.A.Neb., 74 F.2d 80.
Okl.—Kansas City Southern Ry. Co. v. Hoyle, 90 P.2d 1042, 185 Okl. 291.
Tex.—Hawthorne v. International-Great Northern R. Co., Civ.App., 63 S.W.2d 243.
Va.—Lloyd v. Norfolk & W. Ry. Co., 145 S.E. 372, 151 Va. 409.
39 C.J. p 684 note 2.
Assumption of risks arising from master's negligence see infra §§ 362–370.
Assumption of ordinary risks see infra §§ 371–378.

Necessity of negligence

(1) It has been held on the one hand that the doctrine of assumption of risk negatives the prima facie liability of the employer and does not involve the creation of the peril by the employee.—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, 863, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531.

(2) However, it has also been held that there is never any occasion for application of the doctrine unless there has been some question of original negligence on the part of the master; if the master has been free from negligence, there is no liability and the question of assumption of risk does not arise.—Knowles v. Southern Ry. Co., 12 S.E.2d 821, 177 Va. 88—Morris & Co. v. Alvis, 107 S.E. 664, 130 Va. 434.

84. Ark.—Chicago, R. I. & P. Ry. Co. v. Sampson, 142 S.W.2d 221, 200 Ark. 906.
Cal.—Schleif v. Grigsby, 263 P. 255, 88 Cal.App. 174.
Fla.—Cooney-Eckstein Co. v. King, 67 So. 918, 69 Fla. 246.
Ill.—Pennsylvania Co. v. Backes, 24

ant exclusively,[85] and it is in this connection that the doctrine is discussed in this Title.

Voluntary action as element. In order that a risk may be assumed, it is essential that the act of the servant should be voluntary.[86]

b. Distinguished from Contributory Negligence

It has generally been held, at least by authorities holding that the doctrine of assumption of risk is based on contract, that one of the principal distinctions between that doctrine and the doctrine of contributory negligence is that the latter rests in tort while the former rests in contract; another distinction is that contributory negligence involves fault or breach of duty on the servant's part, while assumption of risk may exist without such fault.

It has frequently been stated, and with good reason, that assumption of risk and contributory negligence are so closely allied that it is sometimes difficult to draw the true line of distinction.[87] Expressions have been made to the effect that in a broad sense assumption of risk shades into contributory negligence, the difference being one of degree rather than kind;[88] and it has been declared that the point where the two concepts approximate is where the danger is so obvious and imminent that no one of ordinary prudence would encounter it.[89] Nevertheless the two concepts are by no means absolutely identical for all purposes and under all circumstances,[90] and, while the same state of facts may raise issues of assumed risk and contributory negligence[91] and even show the presence of both,[92] "contributory negligence" and "assumption of risk" are not, as ordinarily used, synonymous terms,[93] but are distinguishable.[94] Indeed, they have been held to

N.E. 563, 133 Ill. 255—Minters v. Mid-City Management Corp., 72 N.E.2d 729, 331 Ill.App. 64—Continental & C. T. & S. Bank v. Illinois Terra Cotta Lumber Co., 192 Ill.App. 629—Casey v. Biscuit Co., 163 Ill.App. 145.
La.—Johnson v. Butterworth, App., 152 So. 166.
Mich.—Parker v. Grand Trunk Western R. Co., 246 N.W. 125, 261 Mich. 293.
Mo.—Fish v. Chicago, R. I. & P. R. Co., 172 S.W. 340, 263 Mo. 106.
N.Y.—Dowd v. New York, O. & W. R. Co., 63 N.E. 541, 170 N.Y. 459.
Pa.—Elliott v. Philadelphia Transp. Co., 50 A.2d 537, 160 Pa.Super. 291.

85. Mo.—Fish v. Chicago, R. I. & P. Ry. Co., 172 S.W. 340, 263 Mo. 106, Ann.Cas.1916B 147.
N.H.—Wentworth v. Boston & M. R. R., 166 A. 265, 86 N.H. 251.
Tex.—West Texas Utilities Co. v. Renner, 32 S.W.2d 264, modified on other grounds 53 S.W.2d 451, error granted.

86. U.S.—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 105 F.2d 371.
Utah.—Kuchenmeister v. Los Angeles & S. L. R. Co., 172 P. 725, 52 Utah 116.
Vt.—Tinney v. Crosby, 22 A.2d 145, 112 Vt. 95.
39 C.J. p 689 note 66.
Compliance with commands or threats see infra §§ 398–408.

Opportunity for choice

Assumption of risk, being contractual, implies choice, which requires opportunity to choose.—Louisville & N. R. Co. v. Dobbs, 143 S.E. 601, 38 Ga.App. 239.

87. Ga.—Gray v. Harrison, 176 S.E. 412, 49 Ga.App. 472.
Mass.—Bigos v. United Rayon Mill, 16 N.E.2d 44, 301 Mass. 76.
Mo.—**Corpus Juris cited in** Evans v. Atchison, T. & S. F. Ry. Co., 131 S.W.2d 604, 608, 345 Mo. 147.
N.J.—**Corpus Juris cited in** Harenburg v. August, 194 A. 152, 154, 119 N.J.Law 83.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213—McClain v. Charleston & W. C. Ry. Co., 4 S.E.2d 280, 191 S.C. 332—Stogner v. Great Atlantic & Pacific Tea Co., 192 S.E. 406, 184 S.C. 406.
39 C.J. p 684 note 7.

"The common-law defenses, assumption of risk, contributory negligence, and the fellow-servant rule were originated and developed in common ground. Not entirely identical in conception, they conjoined and overlapped in many applications. The overlapping areas first concealed, then created a confusion which only served to create more; so that in time the three became more, rather than less, indistinguishable."—Owens v. Union Pac. R. Co., Wash., 63 S.Ct. 1271, 1274, 319 U.S. 715, 87 L.Ed. 1683, conformed to, C.C.A., 142 F.2d 145, certiorari denied 65 S.Ct. 57, 323 U.S. 740, 89 L.Ed. 593.

"Voluntary" assumption

(1) "Voluntary" assumption of risk as distinguished from so-called "contractual" assumption of risk is closely related to contributory negligence.—Engel v. Boston Ice Co., 4 N.E.2d 455, 295 Mass. 428—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434.

(2) "Voluntary" assumption of risk, as used in one sense, is synonymous with "contributory negligence." Elliott v. Philadelphia Transp. Co., 50 A.2d 537, 160 Pa.Super. 291.

88. N.J.—Harenburg v. August, 194 A. 152, 119 N.J.Law 83.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213—Stogner v. Great Atlantic & Pacific Tea Co., 192 S.E. 406, 184 S.C. 406.
39 C.J. p 684 note 8.

89. S.C.—Stogner v. Great Atlantic & Pacific Tea Co., 192 S.E. 406, 184 S.E. 406.
39 C.J. p 684 note 9.

90. Minn.—Wheeler v. Tyler 152 N.W. 137, 129 Minn. 206.
Wis.—Campshure v. Standard Mfg. Co., 118 N.W. 633, 137 Wis. 155.

91. Tex.—Mayo v. Ft. Worth & D. C. R. Co., Civ.App., 234 S.W. 937.
39 C.J. p 684 note 11.

92. Cal.—**Corpus Juris cited in** Ury v. Fredkin's Markets, 79 P.2d 749, 750, 26 Cal.App.2d 501.
Minn.—Westcott v. Chicago Great Western R. Co., 196 N.W. 272, 157 Minn. 325.
Tex.—Gulf, C. & S. F. Ry. Co. v. Cooper, Civ.App., 191 S.W. 579.
39 C.J. p 684 note 12.

93. Ga.—Gray v. Garrison, 176 S.E. 412, 49 Ga.App. 472.
Okl.—St. Louis & S. F. Ry. Co. v. Sears, 49 P.2d 489, 173 Okl. 483.
Wis.—Knauer v. Joseph Schlitz Brewing Co., 149 N.W. 494, 159 Wis. 7.
39 C.J. p 684 note 13.

94. U.S.—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531—Chesapeake & O. Ry. Co. v. Cochran, C.C.A.W.Va., 22 F.2d 22.
Ala.—Louisville & N. R. Co. v. Morrill, 99 So. 297, 211 Ala. 39.
Fla.—Swanson v. Miami Home Milk Producers' Ass'n, 157 So. 415, 117 Fla. 110—Wilson v. Toomer Fertilizer Co. v. Lee, 106 So. 462, 90 Fla. 632.
Ga.—Gray v. Garrison, 176 S.E. 412, 49 Ga.App. 472.
Ill.—Minters v. Mid-City Management Corp., 72 N.E.2d 729, 331 Ill. App. 64.

constitute entirely distinct defenses,[95] founded on distinct principles of law.[96]

Tort and contract basis as distinction. While the statement has been criticized,[97] and while, as discussed infra subdivision c of this section, it is the rule in some jurisdictions that assumption of risk is based on the principle expressed by the maxim, Volenti non fit injuria, and cannot rest on contract, it generally has been stated, as one of the principal distinctions between assumption of risk and contributory negligence, that the latter rests in tort while the former rests in contract.[98] Another view of the distinction is that, while contributory negligence involves some fault or breach of duty on the part of the employee and his failure to use such care for his safety as ordinarily prudent employees in the same circumstances would use, as discussed infra § 421, assumption of risk may exist, although the servant is entirely free from negligence,[99] and, when shown, assumption of risk constitutes a perfect defense, although the servant was free from contributory negligence,[1] or although he exercised more than ordinary care for his safety.[2]

Degree of proximity to particular harm. In distinguishing between the two concepts it has been held, following a statement by the supreme court of the United States,[3] that the practical difference between the two ideas is in the degree of their proximity to the particular harm; the preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk, while the act immediately leading to a specific accident is called negligent.[4]

Ky.—Poole v. Lutz & Schmidt, 117 S.W.2d 575, 273 Ky. 586.
Mo.—Schlueter v. East St. Louis Connecting Ry. Co., 296 S.W. 105, 316 Mo. 1266.
S.C.—McClain v. Charleston & W. C. Ry. Co., 4 S.E.2d 280, 191 S.C. 332.
Tex.—Gulf, C. & S. F. Ry. Co. v. Cooper, Civ.App., 191 S.W. 579.
Utah.—Elswood v. Oregon Short Line R. Co., 23 P.2d 925, 82 Utah 235.
Wis.—Knauer v. Joseph Schlitz Brewing Co., 149 N.W. 494, 159 Wis. 7.
39 C.J. p 685 note 14.

95. Ill.—Wheeler v. Chicago & W. I. R. Co., 108 N.E. 330, 267 Ill. 306.
Kan.—Lively v. Chicago, R. I. & P. Ry. Co., 225 P. 103, 115 Kan. 784.
Minn.—Westcott v. Chicago Great Western R. Co., 196 N.W. 272, 157 Minn. 325.
Mo.—Schlueter v. East St. Louis Connecting Ry. Co., 296 S.W. 105, 316 Mo. 1266.
Okl.—St. Louis & S. F. Ry. Co. v. Sears, 49 P.2d 489, 173 Okl. 483—Chicago, R. I. & P. Ry. Co. v. King, 25 P.2d 304, 165 Okl. 169—Chicago, R. I. & P. Ry. Co. v. Rogers, 159 P. 1132, 60 Okl. 249.
Tex.—Galveston, H. & S. A. Ry. Co. v. Contois, 288 S.W. 154, certiorari denied 47 S.Ct. 659, 274 U.S. 747, 71 L.Ed. 1328.
Vt.—Tinney v. Crosby, 22 A.2d 145, 112 Vt. 95.
Va.—Knowles v. Southern Ry. Co., Va., 12 S.E.2d 821, 177 Va. 88.
39 C.J. p 685 note 15.
Assumption of risk as defense generally see infra § 358.

96. N.C.—Cobia v. Atlantic Coast Line R. Co., 125 S.E. 18, 188 N.C. 487.
Okl.—Chicago, R. I. & P. Ry. Co. v. Rogers, 159 P. 1132, 60 Okl. 249.
S.D.—Grandpre v. Chicago, M. & St. P. Ry. Co., 190 N.W. 323, 46 S.D. 32.
Tex.—Galveston, H. & H. R. Co. v. Hodnett, 163 S.W. 13, 106 Tex. 190.

97. Minn.—Rase v. Minneapolis, St. P. & S. S. M. R. Co., 120 N.W. 360, 107 Minn. 260, 21 L.R.A.,N.S., 138.

98. Fla.—Swanson v. Miami Home Milk Producers' Ass'n, 157 So. 415, 117 Fla. 110—Wilson & Toomer Fertilizer Co. v. Lee, 106 So. 462, 90 Fla. 632.
Ga.—Gray v. Garrison, 176 S.E. 412, 49 Ga.App. 472.
N.C.—Cobia v. Atlantic Coast Line R. Co., 125 S.E. 18, 188 N.C. 487.
Okl.—Chicago, R. I. & P. Ry. Co. v. King, 25 P.2d 304, 165 Okl. 169.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213—Stogner v. Great Atlantic & Pacific Tea Co., 192 S.E. 406, 184 S.C. 406.
S.D.—Grandpre v. Chicago, M. & St. P. Ry. Co., 190 N.W. 323, 46 S.D. 32.
Tex.—Gulf, C. & S. F. Ry. Co. v. Cooper, Civ.App., 191 S.W. 579.
39 C.J. p 685 note 19.

Contract and conduct

Assumption of risk is a matter of contract, and . . . contributory negligence is a matter of conduct.
Ky.—Poole v. Lutz & Schmidt, 117 S.W.2d 575, 273 Ky. 586.
N.C.—Cobia v. Atlantic Coast Line R. Co., 125 S.E. 18, 188 N.C. 487.
Va.—Knowles v. Southern Ry. Co., 12 S.E.2d 821, 177 Va. 88.
39 C.J. p 685 note 19 [a].

99. U.S.—Tiller v. Atlantic Coast Line R. Co., C.C.A.Va., 128 F.2d 420, reversed on other grounds 63 S.Ct. 444, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 967—Chesapeake & O. Ry. Co. v. Richardson, C.C.A. Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531—Chesapeake & O. Ry. Co. v. Cochran, C.C.A.W.Va., 22 F.2d 22.
Ala.—Louisville & N. R. Co. v. Morrill, 99 So. 297, 211 Ala. 39—Porter v. Louisville & N. R. Co., 78 So. 375, 201 Ala. 469.
Ark.—Ward Furniture Mfg. Co. v. Weigand, 293 S.W. 1002, 173 Ark. 762.
Ill.—Wheeler v. Chicago & W. I. R. Co., 108 N.E. 330, 267 Ill. 306—Minters v. Mid-City Management Corp., 72 N.E.2d 729, 331 Ill.App. 64.
Kan.—Lively v. Chicago, R. I. & P. Ry. Co., 225 P. 103, 115 Kan. 784.
Minn.—Westcott v. Chicago Great Western R. Co., 196 N.W. 272, 157 Minn. 325.
Mo.—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748.
Okl.—St. Louis & S. F. Ry. Co. v. Sears, 49 P.2d 489, 173 Okl. 483.
Utah.—Elswood v. Oregon Short Line R. Co., 23 P.2d 925, 82 Utah 235.
Va.—Knowles v. Southern Ry. Co., 12 S.E.2d 821, 177 Va. 88.
39 C.J. p 686 note 22.

1. Tenn.—Tennessee Cent. Ry. Co. v. Williams, 9 Tenn.App. 529.
Tex.—City of Weatherford Water, Light & Ice Co. v. Veit, 196 S.W. 986.
39 C.J. p 686 note 24.
Assumption of risk as defense generally see infra § 358.

2. Tenn.—Tennessee Cent. Ry. Co. v. Williams, 9 Tenn.App. 529.
39 C.J. p 686 note 25.

3. U.S.—Schlemmer v. Buffalo, R. & P. R. Co., Pa., 27 S.Ct. 407, 205 U.S. 1, 12, 51 L.Ed. 681.

4. Ark.—Johnson v. Manmoth Vein Coal Co., 114 S.W. 722, 88 Ark. 243, 19 L.R.A.,N.S., 646.
39 C.J. p 686 note 26.

Other distinctions between assumption of risk and contributory negligence are that the latter constitutes a breach of a legal duty imposed by law on the servant however unwilling or unprotesting he may be, while assumption of risk is not a duty, but a voluntary undertaking on the part of the servant.[5] Again, the defense of assumption of risk does not impliedly admit negligence on the part of defendant and defeat the right of action therefor as does the defense of contributory negligence.[6] So, if assumption of risk is the issue, knowledge of defective conditions, and acquiescence therein, are fatal to plaintiff's case; if contributory negligence is the issue, knowledge of defective conditions and acquiescence therein, may or may not be fatal,[7] depending on whether a person of ordinary prudence, under all the circumstances, would have done what the injured person did.[8] It has also been said that, when the injury arises from a failure to choose correctly between two ways of discharging duties imposed on the servant, one of which is safe and the other hazardous, the servant has not assumed the risk but has negligently contributed to the injury;[9] but, as discussed infra § 390, this distinction has not been very generally adhered to, many decisions holding that, where there are two or more ways in which a servant may perform his duties and he voluntarily chooses an unusual or more hazardous method, knowing it to be unsafe, he assumes the risk of injury from so doing.

c. Basis of Doctrine

Some authorities hold that the doctrine of assumption of risk is based on contract, at least as far as ordinary risks are concerned; others hold that the doctrine is based not on contract but on the principle of the maxim, Volenti non fit injuria; and some authorities hold that the doctrine is based on contract and at the same time comes within the maxim.

It is broadly stated in numerous decisions that the doctrine of assumption of risk by the servant is based on contract either express or implied, without any distinction being drawn between ordinary risks incidental to the service and that class of risks generally described as extraordinary, which are caused by the master's negligence.[10] However, in many cases discussing the basis of the doctrine the distinctions between the various kinds of risks are observed; and among such cases it is generally held that as to ordinary risks the doctrine that assumption of risks is based on contract cannot be seriously questioned, and that in the absence of express contract the law implies as a part of the contract of service that a servant agrees to assume and does assume all the ordinary risks of injury incident to the nature of the work which he has undertaken to perform;[11] and some authorities go even further

5. Me.—Dempsey v. Sawyer, 49 A. 1035, 95 Me. 295.
Tex.—El Paso & S. W. R. Co. v. Foth, 100 S.W. 171, 45 Tex.Civ.App. 275, reversed on other grounds 105 S.W. 322, 101 Tex. 133.

6. Ark.—Ward Furniture Mfg. Co. v. Weigand, 293 S.W. 1002, 173 Ark. 762.
Ind.—Cleveland, C., C. & St. L. R. Co. v. Wolf, App., 114 N.E. 236.

7. Ind.—D. H. Davis Coal Co. v. Polland, 62 N.E. 492, 158 Ind. 607, 92 Am.S.R. 319.
39 C.J. p 686 note 29.

8. Ind.—D. H. Davis Coal Co. v. Polland, supra.

9. U.S.—Anzolotti v. McAdoo, D.C. N.Y., 262 F. 568, reversed on other grounds, C.C.A., 271 F. 268.

10. U.S.—Lang v. U. S. Reduction Co., C.C.A.Ind., 110 F.2d 441—Hallstein v. Pennsylvania R. Co., C.C.A.Ohio, 30 F.2d 594—The New Zealand, D.C.N.Y., 49 F.2d 781.
Fla.—Swanson v. Miami Home Milk Producers' Ass'n, 157 So. 415, 117 Fla. 110.
Ga.—Gray v. Garrison, 176 S.E. 412, 49 Ga.App. 472.
Idaho.—Schuppenies v. Oregon Short Line R. Co., 225 P. 501, 38 Idaho 672.
Kan.—Parker v. City of Wichita, 92 P.2d 86, 150 Kan. 249.
Ky.—Poole v. Lutz & Schmidt, 117 S.W.2d 575, 273 Ky. 586.
Mich.—Parker v. Grand Trunk Western R. Co., 246 N.W. 125, 261 Mich. 293.
Mo.—Burt v. Nichols, 173 S.W. 681, 264 Mo. 1, L.R.A.1917E 250—Farley v. Lehrack, App., 272 S.W. 987.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213—Hice v. Dobson Lumber Co., 185 S.E. 742, 180 S.C. 259.
Tex.—West Texas Utilities Co. v. Renner, Civ.App., 32 S.W.2d 264, modified, Com.App., 53 S.W.2d 451, error granted.
Wis.—Knauer v. Joseph Schlitz Brewing Co., 149 N.W. 494, 159 Wis. 7.
39 C.J. p 687 note 44.

11. U.S.—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F. 2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531.
Ark.—Wisconsin & Arkansas Lumber Co. v. Otts, 10 S.W.2d 364, 178 Ark. 283.
Cal.—Schuh v. R. H. Herron Co., 169 P. 682, 177 Cal. 13.
Ill.—Genzel v. New York, C. & St. L. R. Co., 261 Ill.App. 176.
Iowa.—Girl v. U. S. Railroad Administration, 189 N.W. 834, 194 Iowa 1382.
Mich.—Bradburn v. Wabash R. Co., 96 N.W. 929, 134 Mich. 575.
Mo.—Harbacek v. Fulton Iron Works Co., 229 S.W. 803, 287 Mo. 479—Oney v. Dierks Lumber & Coal Co., App., 296 S.W. 470.
S.D.—Grandpre v. Chicago, M. & St. P. Ry. Co., 190 N.W. 323, 46 S.D. 32.
Tex.—Wichita Falls & S. R. Co. v. Lindley, Civ.App., 143 S.W.2d 428, error dismissed, judgment correct—Gulf, C. & S. F. Ry. Co. v. Cooper, Civ.App., 191 S.W. 579.
Vt.—Carleton v. E. & T. Fairbanks & Co., 93 A. 462, 88 Vt. 537.
39 C.J. p 687 note 48.
"The doctrine of assumption of risk is contractual in its nature, and rests upon an agreement of a servant with his master, ordinarily implied, that the master shall not be liable for any injury to the servant resulting from the ordinary and usual risks and perils incident to the nature of the employment."—Biskup v. Hoffman, 287 S.W. 865, 220 Mo. App. 542.
"The conception underlying the doctrine is that in contracting to perform certain work the servant as an implied part of the agreement assumes and accepts responsibility

and hold that the assumption of extraordinary, as well as of ordinary, risks grows out of express or implied terms of the contract.[12] It is very generally declared that the consideration for such assumption of ordinary risks by the servant is the fixing of the compensation with respect to the risks so assumed.[13]

On the other hand, some decisions hold without qualification that the doctrine of assumption of risk does not and cannot rest on contract, but is based upon the principle expressed by the maxim, Volenti non fit injuria,[14] that is to say, on the principle that he who consents to an act will not be heard to claim that he has been injured by it.[15] Under the rule formulated by these cases the defense of assumption of risk and that of contributory negligence are equally peculiar to the law of torts and both are usually implied from conduct.[16] So, also, there is a class of decisions which, while not going so far as those just considered, hold that the assumption of extraordinary risks depends solely on the maxim, Volenti non fit injuria.[17] In still another class of decisions, the courts, while holding that assumption of risk rests on contract usually implied, further declare that the defense also comes within the maxim, Volenti non fit injuria.[18] The maxim, Volenti non fit injuria, as applied to assumption of risk, is described by some decisions as a species of waiver.[19]

Public policy. As an additional ground for imposing assumption of risks on the servant, some of the courts have held that it is a matter of public policy to impose such risks on the servants,[20] it being assumed that the servant will be more careful if he knows that he will not receive compensation for injuries received in the course of his employment;[21] but this principle has been rejected as unsound.[22]

§ 358. As a Defense in General

Although the doctrine of assumption of risk is not favored and should not be extended beyond its reasonable limits, nevertheless, where it is applicable and established it constitutes a complete bar to recovery, except in so far as its effect may be limited by statute.

Although, except where abrogated or modified by statute,[23] the defense of assumption of risk is established as a part of the law and will be applied in all cases fairly within the rule,[24] it is, nevertheless,

for any bodily hurt resulting from the 'ordinary risks' incident to the work which he has agreed to perform."—Hennessy v. Ginsberg, 180 N.W. 796, 800, 46 N.D. 229.

12. U.S.—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531.
39 C.J. p 687 note 50.

13. U.S.—Benson Lumber Co. v. McCann, C.C.A.Cal., 223 F. 1.
Tex.—Wichita Falls & S. R. Co. v. Lindley, Civ.App., 143 S.W.2d 428, error dismissed, judgment correct.
39 C.J. p 687 note 52.

14. Colo.—Denver & R. G. R. Co. v. Gannon, 90 P. 853, 40 Colo. 195, 11 L.R.A.,N.S., 216.
39 C.J. p 688 note 54.

15. Mont.—Osterholm v. Boston & Montana Cons. Copper & Silver Co., 107 P. 499, 40 Mont. 508.

16. Minn.—Rase v. Minneapolis, St. P. & S. S. M. R. Co., 120 N.W. 360, 107 Minn. 260, 21 L.R.A.,N.S., 138.

17. Vt.—Tinney v. Crosby, 22 A.2d 145, 112 Vt. 95.
39 C.J. p 688 note 59.

18. U.S.—Hallstein v. Pennsylvania R. Co., C.C.A.Ohio, 30 F.2d 594.
Fla.—Swanson v. Miami Home Milk Producers' Ass'n, 157 So. 415, 117 Fla. 110.
39 C.J. p 688 note 60.

19. Ill.—Ross v. Chicago, R. I. & P. R. Co., 90 N.E. 701, 243 Ill. 440.
39 C.J. p 688 note 62.

20. N.C.—Gaddy v. North Carolina R. Co., 95 S.E. 925, 175 N.C. 515.
39 C.J. p 688 note 63.

21. N.C.—Gaddy v. North Carolina R. Co., supra.

22. U.S.—Chicago, M. & St. P. R. Co. v. Ross, Minn., 5 S.Ct. 184, 112 U.S. 377, 28 L.Ed. 787.
39 C.J. p 689 note 65.

23. Ind.—Piepho v. Gesse, 18 N.E. 2d 468, 106 Ind.App. 450.
W.Va.—State ex rel. Cashman v. Sims, 43 S.E.2d 805.
Wis.—Neitzke v. Kraft-Phenix Dairies, 253 N.W. 579, 214 Wis. 441.

Assumption after employment

It has been held that contractual assumption of risk is still a defense to an action for injuries by an employee, but that assumption of risks arising after the employment is no longer a defense to such an action.—Bigos v. United Rayon Mill, 16 N.E.2d 44, 301 Mass. 76.

Doctrine held not changed by statute

U.S.—Chapman & Dewey Lumber Co. v. Hanks, C.C.A.Tenn., 106 F.2d 482, stating Arkansas law.

The Federal Safety Appliance Acts, 45 U.S.C.A. § 1 et seq, modify enforcement, by civil action, of employee's common-law right only by withdrawing defense of assumed risk, and in other respects leave nature and incidents of remedy to state law in so far as the state law is applicable.—Tipton v. Atchison, T. & S. F. Ry. Co., Cal., 56 S.Ct. 715, 298 U. S. 141, 80 L.Ed. 1091, 104 A.L.R. 831.

24. U.S.—Denver & R. G. R. Co. v. Norgate Co., Colo., 141 F. 247, 72 C.C.A. 265, 6 L.R.A.,N.S., 981, 5 Ann.Cas. 448, certiorari denied 26 S.Ct. 764, 202 U.S. 616, 50 L.Ed. 1172.
Ark.—**Corpus Juris quoted in** Bradley Lumber Co. of Arkansas v. Clanton, 147 S.W.2d 14, 15, 201 Ark. 657—**Corpus Juris quoted in** Haynes Drilling Corporation v. Smith, 143 S.W. 27, 30, 200 Ark. 1098—**Corpus Juris quoted in** Goodin v. Boyd-Sicard Coal Co., 122 S.W.2d 548, 551, 197 Ark. 175—**Corpus Juris quoted in** Burden v. Hughes, 55 S.W.2d 502, 503, 186 Ark. 707—**Corpus Juris quoted in** Seaman-Dunning Corporation v. Haralson, 29 S.W.2d 1085, 1087, 182 Ark. 93.
Cal.—**Corpus Juris quoted in** Hoogbruin v. Atchison, T. & S. F. Ry. Co., 2 P.2d 992, 996, 213 Cal. 582.
Fla.—Fruit Growers' Express Co. v. Norton, 116 So. 234, 95 Fla. 429.
Ind.—Piepho v. Gesse, 18 N.E.2d 468, 106 Ind.App. 450.
Kan.—Thoman v. Farmers & Bankers Life Ins. Co., 130 P.2d 551, 155 Kan. 806.
Ky.—Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 274 Ky. 410—Clark v. Wells-Elkhorn Coal Co., 284 S.W. 91, 215 Ky. 128.
Me.—Boober v. Bicknell, 191 A. 275, 135 Me. 153.

not a favored doctrine,[25] but at best is artificial and harsh and should not be extended beyond its reasonable limits.[26] Nevertheless, except as otherwise provided by statute, where assumption of risk is established, it constitutes a complete bar to an action by the servant for injuries sustained in the course of his employment.[27]

§ 359. —— Effect of Federal Employers' Liability Act

The defense of assumption of risk is not available in any cases arising under the Federal Employers' Liability Act for the recovery of damages for injuries or death resulting from the negligence of the employer.

Under the Federal Employers' Liability Act § 4, as amended by the Act of Aug. 11, 1939, c. 685, § 1, 45 U.S.C.A. § 54, providing that in any action brought by virtue of the act the employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of the carrier, and that no employee shall be held to have assumed the risks of his employment in any case where the violation by such carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee, the doctrine of assumption of risk as a defense to negligence on the part of the carrier is eliminated,[28] and for practical purposes the only question remaining is whether or not the

Minn.—Davison v. Ressler, 150 N.W. 802, 128 Minn. 204.

Or.—**Corpus Juris cited in** Makino v. Spokane, P. & S. Ry. Co., 63 P.2d 1082, 1085, 155 Or. 317.

W.Va.—State ex rel. Cashman v. Sims, 43 S.E.2d 805.

25. Ark.—**Corpus Juris quoted in** Bradley Lumber Co. of Arkansas v. Clanton, 147 S.W.2d 14, 15, 201 Ark. 657—**Corpus Juris quoted in** Haynes Drilling Corporation v. Smith, 143 S.W.2d 27, 30 200 Ark. 1098—**Corpus Juris quoted in** Goodin v. Boyd-Sicard Coal Co., 122 S.W.2d 548, 551, 197 Ark. 175—**Corpus Juris quoted in** Burden v. Hughes, 55 S.W.2d 502, 503, 186 Ark. 707—**Corpus Juris quoted in** Seaman-Dunning Corporation v. Haralson, 29 S.W.2d 1085, 1087, 182 Ark. 93.

Cal.—**Corpus Juris quoted in** Hoogbruin v. Atchison, T. & S. F. Ry. Co., 2 P.2d 992, 996, 213 Cal. 582.

Ill.—**Corpus Juris cited in** Lilly v. Grand Trunk Western R. Co., 37 N.E.2d 888, 892, 312 Ill.App. 73, reversed on other grounds 63 S.Ct 347, 317 U.S. 481, 87 L.Ed. 411.

Minn.—Davison v. Ressler, 150 N.W. 802, 128 Minn. 204.

Or.—**Corpus Juris cited in** Makino v. Spokane, P. & S. Ry. Co., 63 P.2d 1082, 1085, 155 Or. 317.

26. Ark.—**Corpus Juris quoted in** Bradley Lumber Co. of Arkansas v. Clanton, 147 S.W.2d 14, 15, 201 Ark. 657—**Corpus Juris quoted in** Haynes Drilling Corporation v. Smith, 143 S.W.2d 27, 30, 200 Ark. 1098—**Corpus Juris quoted in** Goodin v. Boyd-Sicard Coal Co., 122 S.W.2d 548, 551, 197 Ark. 175—**Corpus Juris quoted in** Burden v. Hughes, 55 S.W.2d 502, 503, 186 Ark. 707—**Corpus Juris quoted in** Seaman-Dunning Corporation v. Haralson, 29 S.W.2d 1085, 1087, 182 Ark. 93.

Cal.—**Corpus Juris quoted in** Hoogbruin v. Atchison, T. & S. F. Ry. Co., 2 P.2d 992, 996, 213 Cal. 582.

Ill.—**Corpus Juris cited in** Lilly v. Grand Trunk Western R. Co., 37 N.E.2d 888, 892, 312 Ill.App. 73, reversed on other grounds 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411.

Va.—Knowles v. Southern Ry. Co., 12 S.E.2d 821, 177 Va. 88.

Wash.—Hull v. Davenport, 159 P. 1072, 93 Wash. 16.

27. U.S.—Kreger v. Baltimore & O. R. Co., D.C.Pa., 25 F.2d 726, affirmed, C.C.A., 25 F.2d 728—New York, C. & St. L. R. Co. v. McDougall, C.C.A.Ohio, 15 F.2d 283.

Ariz.—Red Rover Copper Co. v. Industrial Commission, 118 P.2d 1102, 58 Ariz. 203, 137 A.L.R. 740.

Ga.—Gray v. Garrison, 176 S.E. 412, 49 Ga.App. 472.

Ill.—Huff v. Illinois Cent. R. Co., 279 Ill.App. 323, affirmed 199 N.E. 116, 362 Ill. 95.

Ohio.—Baltimore & O. R. Co. v. Shober, 176 N.E. 88, 38 Ohio App. 216.

Tenn.—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn.App. 213—Lee v. Tennessee Central Ry. Co., 9 Tenn.App. 284.

Tex.—Zurich General Accident & Liability Ins. Co. v. Fort Worth Laundry Co., Civ.App., 63 S.W.2d 236.

39 C.J. p 689 note 68.

Disregard of ultimate ground

The effect of the doctrine of voluntary assumption of risk is to render unnecessary an analysis which might determine whether the ultimate ground of denial of recovery is absence of duty or breach of duty, want of proximate causal relation or contributory negligence.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S. Ct. 116, 299 U.S. 589, 81 L.Ed. 434.

28. U.S.—Tiller v. Atlantic Coast Line R. Co., Va., 63 S.Ct. 444, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 961—Thompson v. Camp, C.C.A. Tenn., 163 F.2d 396—Roberts v. United Fisheries Vessels Co., C.C. A.Mass., 141 F.2d 288, certiorari denied 65 S.Ct. 81, 323 U.S. 753, 89 L.Ed. 603—Chicago Great Western Ry. Co. v. Peeler, C.C.A.Minn., 140 F.2d 865—Stewart v. Baltimore & O. R. Co., C.C.A.N.Y., 137 F.2d 527—Pratt v. Louisiana & A. Ry. Co., C.C.A.La., 135 F.2d 692—Ramsouer v. Midland Valley R. Co., C.C.A.8, 135 F.2d 101—McGivern v. Northern Pac. Ry. Co., C.C.A.Minn., 132 F.2d 213—Eckenrode v. Pennsylvania R. Co., D.C.Pa., 71 F.Supp. 764—Gray v. Pennsylvania R. Co., D.C.N.Y., 71 F.Supp. 683—Raudenbush v. Baltimore & O. R. R., D.C. Pa., 63 F.Supp. 329—Tishar v. Nicodemus, D.C.Ill., 49 F.Supp. 145.

Ark.—St. Louis-San Francisco Ry. Co. v. Wacaster, 199 S.W.2d 948—Kansas City Southern Ry. Co. v. Hopson, 186 S.W.2d 946, 208 Ark. 548.

Cal.—Perrett v. Southern Pac. Co., 165 P.2d 751, 73 Cal.App.2d 30—Leet v. Union Pac. R. Co., 142 P.2d 37, 60 Cal.App.2d 814.

Ga.—Tankersley v. Southern Ry. Co., 35 S.E.2d 522, 73 Ga.App. 88.

Ill.—Howard v. Baltimore & O. C. T. R. Co., 63 N.E.2d 774, 327 Ill.App. 83.

Iowa.—McCall v. Pitcairn, 6 N.W.2d 415, 232 Iowa 867.

Minn.—Jacobson v. Chicago & N. W. Ry. Co., 22 N.W.2d 455, 221 Minn. 454.

Mo.—Francis v. Terminal R. Ass'n of St. Louis, 193 S.W.2d 909, 354 Mo. 1232.

Neb.—Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 147 Neb. 18.

N.H.—Kenney v. Boston & Maine R. R., 33 A.2d 557, 92 N.H. 495.

N.Y.—Sadowski v. Long Island R. Co., 55 N.E.2d 497, 292 N.Y. 448—Henry v. Norton, 66 N.Y.S.2d 317.

Tenn.—Tennessee Cent. Ry. Co. v. Shacklett, 147 S.W.2d 1054, 24 Tenn.App. 563.

Tex.—Kansas City Southern Ry. Co. v. Chandler, Civ.App., 192 S.W.2d 304, ref. n. r. e.

Utah.—Pauly v. McCarthy, 166 P.2d 501, 109 Utah 398, reversed on oth-

carrier's negligence was the proximate cause of the injury.[29] In other words, cases under the act must be handled as though no doctrine of assumption of risk ever existed;[30] and the courts will not allow resort to hazy distinctions so as to leave the defense available under some other name or designation,[31] such as nonnegligence[32] or contributory negligence.[33] On the other hand, some courts have held that this removal of the defense in cases where the injury is due to the carrier's negligence implies that it has not been abolished in other instances.[34]

Under the Federal Employers' Liability Act §§ 1–10, 45 U.S.C.A. §§ 51–60, as it stood prior to its amendment in 1939, the defense of assumption of risk was available in actions coming within the purview of the act to the same extent as at common law except as otherwise provided in the statute,[35]

er grounds 67 S.Ct. 962, 330 U.S. 802, 91 L.Ed. 1261.

Va.—Beamer v. Virginian Ry. Co., 26 S.E.2d 43, 181 Va. 650, certiorari denied 64 S.Ct. 486, 321 U.S. 763, 88 L.Ed. 1060.

Wash.—Pierce v. Spokane International Ry. Co., 131 P.2d 139, 15 Wash.2d 431.

Amendment held not retroactive so as to apply to accidents occurring prior to the effective date thereof.

Ill.—Lilly v. Grand Trunk Western R. Co., 37 N.E.2d 888, 312 Ill.App. 73, reversed on other grounds 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411.

N.C.—Brady v. Southern Ry. Co., 23 S.E.2d 334, 222 N.C. 367, certiorari denied 63 S.Ct. 995, 318 U.S. 792, 87 L.Ed. 1158, affirmed, C.C.A., 64 S.Ct. 232, 320 U.S. 476, 88 L.Ed. 339—McCrowell v. Southern Ry. Co., 20 S.E.2d 352, 221 N.C. 366.

S.C.—Game v. Atlantic Coast Line R. Co., 30 S.E.2d 33, 204 S.C. 452.

Tex.—Wichita Falls & S. R. Co. v. Lindley, Civ.App., 143 S.W.2d 428, error dismissed, judgment correct.

Public policy

The abrogation of the defense of assumption of risk by the amendment expresses the public policy to do away with defenses of this character.—Patznsky v. Lowden, 47 N.E. 2d 338, 317 Ill.App. 613.

29. U.S.—Stewart v. Baltimore & O. R. Co., C.C.A.N.Y., 137 F.2d 527—Pratt v. Louisiana & A. Ry. Co., C. C.A.La., 135 F.2d 692.

30. U.S.—Tiller v. Atlantic Coast Line R. Co., Va., 63 S.Ct. 444, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 967—Gray v. Pennsylvania R. Co., D.C.N.Y., 71 F.Supp. 683.

31. Cal.—Perrett v. Southern Pac. Co., 165 P.2d 751, 73 Cal.App.2d 30.

Mo.—Joice v. Missouri-Kansas-Texas R. Co., 189 S.W.2d 568, 354 Mo. 439, 161 A.L.R. 383.

"The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label in common-law lexicon."—Tiller v. Atlantic Coast Line R. Co., Va., 63 S. Ct. 444, 451, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 967.

32. U.S.—Tiller v. Atlantic Coast Line R. Co., supra—Gray v. Pennsylvania R. Co., D.C.N.Y., 71 F. Supp. 683.

Tex.—Kansas City Southern Ry. Co. v. Chandler, Civ.App., 192 S.W.2d 304, ref. n. r. e.

33. Minn.—Jacobson v. Chicago & N. W. Ry. Co., 22 N.W.2d 455, 221 Minn. 454.

34. Neb.—Ellis v. Union Pac. R. Co., 27 N.W.2d 921, 148 Neb. 515.

Wash.—Pierce v. Spokane International Ry. Co., 131 P.2d 139, 15 Wash.2d 431.

Ordinary dangers

Under the act, assumption of risk is not a defense if employer is negligent, but the employee still assumes the risk of those ordinary dangers in his employment which are naturally inherent in the business and are not caused by or the result of defendant's negligence.—Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 147 Neb. 18.

35. U.S.—Owens v. Union Pac. R. Co., Wash., 63 S.Ct. 1271, 319 U.S. 715, 87 L.Ed. 1683, conformed to, C.C.A., 142 F.2d 145, certiorari denied 65 S.Ct. 57, 323 U.S. 740, 89 L.Ed. 593—Great Northern Ry. Co. v. Leonidas, Mont., 59 S.Ct. 51, 305 U.S. 1, 83 L.Ed. 3—Missouri Pac. R. Co. v. David, Mo., 52 S.Ct. 242, 284 U.S. 460, 76 L.Ed. 399—Delaware, L. & W. R. Co. v. Koske, N. J., 49 S.Ct. 202, 279 U.S. 7, 73 L.Ed. 578—Toledo, St. Louis & Western R. Co. v. Allen, Mo., 48 S.Ct. 215, 276 U.S. 165, 72 L.Ed. 513, conformed to Allen v. Toledo, St. Louis & Western Ry. Co., 12 S.W. 2d 1116—Ramsouer v. Midland Valley R. Co., C.C.A.8, 135 F.2d 101—Spain v. Powell, C.C.A.Va., 90 F. 2d 580—Chicago, B. & Q. R. Co. v. Kelley, C.C.A.Neb., 74 F.2d 80—New York, C. & St. L. R. Co. v. Kelly, C.C.A.Ind., 70 F.2d 548, certiorari denied Kelly v. New York, C. & St. L. R. Co., 55 S.Ct. 110, 293 U.S. 595, 79 L.Ed. 689—Wheelock v. Freiwald, C.C.A.Mo., 66 F.2d 694—Fernald v. Boston & M. R. R., C. C.A.N.Y., 62 F.2d 782—Southern Ry. Co. v. Verelle, C.C.A.N.C., 57 F.2d 1008—Erie R. Co. v. Irons, C. C.A.N.J., 48 F.2d 60, certiorari denied 51 S.Ct. 649, 283 U.S. 857, 75 L.Ed. 1463—Norfolk & W. Ry. Co. v. Collingsworth, C.C.A.Ohio, 32 F. 2d 561—Pennsylvania R. Co. v. Brubaker, C.C.A.Ohio, 31 F.2d 939—Kreger v. Baltimore & O. R. Co., D.C.Pa., 25 F.2d 726, affirmed, C. C.A., 25 F.2d 728—New York, C. & St. L. R. Co. v. McDougall, C.C.A. Ohio, 15 F.2d 283—Davis v. Crane, C.C.A.Mo., 12 F.2d 355—Ramsouer v. Midland Valley R. Co., D.C.Ark., 44 F.Supp. 523, reversed on other grounds, C.C.A., 135 F.2d 101.

Ala.—Birmingham Belt R. Co. v. Bennett, 146 So. 265, 226 Ala. 185, certiorari denied 54 S.Ct. 52, 290 U.S. 634, 78 L.Ed. 552—Louisville & N. R. Co. v. Parker, 138 So. 231, 223 Ala. 626, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501—Seaboard Air Line Ry. Co. v. Johnson, 115 So. 168, 217 Ala. 251, certiorari dismissed 49 S.Ct. 95, 278 U.S. 576, 73 L.Ed. 515.

Ark.—**Corpus Juris quoted in** Missouri Pac. R. Co. v. Guy, 157 S.W. 2d 11, 14, 203 Ark. 166, certiorari dismissed 63 S.Ct. 22, 317 U.S. 702, 87 L.Ed. 561—Missouri Pac. R. Co. v. Bryant, 128 S.W.2d 268, 198 Ark. 193—St. Louis-San Francisco Ry. Co. v. Childers, 124 S.W.2d 964, 197 Ark. 527—Chicago, R. I. & P. Ry. Co. v. Abel, 32 S.W.2d 1059, 182 Ark. 651—Louisiana & A. Ry. Co. v. Muldrow, 27 S.W.2d 516, 181 Ark. 674—Dozier v. Missouri Pac. R. Co., 3 S.W.2d 678, 176 Ark. 651.

Cal.—Atchison, T. & S. F. Ry. Co. v. Superior Court in and for Contra Costa County, 86 P.2d 85, 12 Cal.2d 549, certiorari denied 59 S.Ct. 774, 306 U.S. 657, 83 L.Ed. 1055—Matthews v. Atchison, T. & S. F. Ry. Co., 129 P.2d 435, 54 Cal.App.2d 549—King v. Schumacher, 89 P.2d 466, 32 Cal.App.2d 172, certiorari denied Schumacher v. King, 60 S. Ct. 123, 308 U.S. 593, 84 L.Ed. 496—Bobo v. Northwestern Pac. R. Co., 19 P.2d 10, 129 Cal.App. 273, reversed on other grounds Northwestern Pac. R. Co. v. Bobo, 54 S. Ct. 263, 290 U.S. 499, 78 L.Ed. 462.

Fla.—Tatom v. Seaboard Air Line R. Co., 113 So. 671, 93 Fla. 1046.

Ga.—Southern Ry. Co. v. Lunsford, 194 S.E. 602, 57 Ga.App. 53, certiorari denied 59 S.Ct. 78, 305 U.S. 619, 83 L.Ed. 395—Southern Ry.

that is to say, except in cases where the railroad | company had violated some statute enacted for the

Co. v. Blanton, 192 S.E. 437, 56 Ga. App. 232—Louisville & N. R. Co. v. Hicks, 176 S.E. 698, 49 Ga.App. 846, certiorari dismissed Hicks v. Louisville & N. R. Co., 186 S.E. 662, 182 Ga. 595—Gray v. Garrison, 176 S.E. 412, 49 Ga.App. 472—Brady v. Bugg, 142 S.E. 304, 38 Ga.App. 48.

Idaho.—Girany v. Oregon Short Line R. Co., 58 P.2d 841, 56 Idaho 740.

Ill.—Powers v. Michigan Cent. R. Co., 268 Ill.App. 493—Nardoni v. Chicago & E. I. Ry. Co., 261 Ill. App. 339—Worthey v. Cleveland, C., C. & St. L. Ry. Co., 251 Ill.App. 585—Brundege v. Chicago, B. & Q. R. Co., 245 Ill.App. 440—Cash v. Cleveland, C., C. & St. L. Ry. Co., 244 Ill.App. 1.

Iowa.—Kempe v. Illinois Cent. R. Co., 232 N.W. 657, 211 Iowa 812, 74 A. L.R. 148.

Kan.—Schaefer v. Lowden, 78 P.2d 48, 147 Kan. 520.

Ky.—Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 274 Ky. 410—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603—Louisville & N. R. Co. v. Reverman's Adm'x, 15 S.W.2d 300, 228 Ky. 500—York v. Rockcastle River Ry. Co., 284 S.W. 79, 215 Ky. 11—Vanhoose v. Chesapeake & O. Ry. Co., 283 S.W. 953, 214 Ky. 594—Hubbard v. Louisville & N. R. Co., 273 S.W. 436, 209 Ky. 614.

La.—Harris v. Yazoo & M. V. R. Co., App., 183 So. 108—Snow v. Texas & P. Ry. Co., App., 166 So. 200.

Me.—McLaughlin v. Bangor & A. R. Co., 140 A. 827, 127 Me. 24—Richards v. Maine Cent. R. Co., 133 A. 911, 125 Me. 347—Hatch v. Portland Terminal Co., 131 A. 5, 125 Me. 96.

Mass.—Hietala v. Boston & A. R. R., 8 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U. S. 589, 81 L.Ed. 434.

Mich.—Howe v. Michigan Cent. R. Co., 211 N.W. 111, 236 Mich. 577, certiorari denied 47 S.Ct. 576, 274 U.S. 738, 71 L.Ed. 1317—Sumner v. Ann Arbor R. Co., 209 N.W. 184, 235 Mich. 293—Safranski v. Detroit, G. H. & M. Ry. Co., 206 N.W. 485, 233 Mich. 318, modified on other grounds 209 N.W. 588, 233 Mich. 326—Watts v. Pere Marquette R. Co., 203 N.W. 859, 231 Mich. 40.

Minn.—Holz v. Chicago, M., St. P. & P. R. Co., 224 N.W. 241, 176 Minn. 575.

Miss.—Illinois Cent. R. Co. v. Humphries, 164 So. 22, 174 Miss. 459, 102 A.L.R. 549—Illinois Cent. R. Co. v. Humphries, 155 So. 421, 170 Miss. 840—Louisville & N. R. Co. v. Russell, 144 So. 478, 164 Miss. 529—Gulf, M. & N. R. Co. v. Collins, 117 So. 593, 151 Miss. 240—Graves v. Gulf & S. I. R. Co., 110 So. 234, 146 Miss. 130.

Mo.—Finley v. St. Louis-San Francisco Ry. Co., 160 S.W.2d 735, 349 Mo. 330—Evans v. Atchison, T. & S. F. Ry. Co., 131 S.W.2d 604, 345 Mo. 147—Arnold v. Scandrett, 131 S.W.2d 542, 345 Mo. 115—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876—McDaniel v. Chicago, R. I. & P. Ry. Co., 92 S. W.2d 118, 338 Mo. 481—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336 Mo. 316—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 335 Mo. 1148—Jenkins v. Wabash Ry. Co., 73 S. W.2d 1002, 335 Mo. 748—Webber v. Terminal R. Ass'n of St. Louis, 70 S.W.2d 863, 335 Mo. 11—Grange v. Chicago & E. I. Ry. Co., 69 S.W.2d 955, 334 Mo. 1040—Moran v. Atchison, T. & S. F. Ry. Co., 48 S.W.2d 881, 330 Mo. 278, certiorari denied Atchison, T. & S. F. Ry. Co. v. Moran, 53 S.Ct. 21, 287 U.S. 621, 77 L.Ed. 539—State ex rel. St. Louis-San Francisco Ry. Co. v. Cox, 46 S. W.2d 849, 329 Mo. 292—Martin v. Wabash Ry. Co., 30 S.W.2d 735—Van Loon v. St. Louis Merchants' Bridge Terminal Ry. Co., 6 S.W.2d 587, 319 Mo. 948, certiorari denied St. Louis Merchants Bridge Terminal R. Co. v. Van Loon, 49 S.Ct. 31, 278 U.S. 632, 73 L.Ed. 549—McIntyre v. St. Louis & S. F. Ry. Co., 227 S.W. 1047, 286 Mo. 234—Morton v. Alton R. Co., App., 118 S.W.2d 59—Sweeney v. Terminal R. Ass'n of St. Louis, App., 110 S.W.2d 852—Sweany v. Wabash R. Co., 80 S.W.2d 216, 229 Mo. App. 393—Grandstaff v. Wabash Ry. Co., App., 71 S.W.2d 174—Weber v. Terminal Railroad Ass'n of St. Louis, App., 20 S.W.2d 601—Heath v. St. Louis-San Francisco Ry. Co., App., 286 S.W. 148.

Mont.—Leonidas v. Great Northern Ry. Co., 72 P.2d 1007, 105 Mont. 302, affirmed 59 S.Ct. 51, 305 U.S. 1, 83 L.Ed. 3.

Neb.—Christenson v. Union Pac. R. Co., 290 N.W. 246, 137 Neb. 538, certiorari dismissed 61 S.Ct. 825, 312 U.S. 710, 85 L.Ed. 1142—Hayes v. Chicago, B. & Q. Ry. Co., 269 N. W. 623, 131 Neb. 687—Campbell v. Chicago, R. I. & P. R. Co., 234 N. W. 395, 120 Neb. 499.

N.H.—Sweeney v. Boston & M. R. R., 174 A. 676, 87 N.H. 90, affirmed 175 A. 243, 87 N.H. 90, certiorari denied 55 S.Ct. 638, 294 U.S. 728, 79 L.Ed. 1258.

N.J.—Loffler v. Delaware, L. & W. R. Co., 172 A. 497, 113 N.J.Law 113.

N.Y.—Yaconi v. Brady & Gioe, 158 N.E. 876, 246 N.Y. 300, certiorari denied 48 S.Ct. 421, 276 U.S. 636, 72 L.Ed. 744—Negro v. Boston & M. R. R., 48 N.Y.S.2d 819, 268 App. Div. 59, affirmed 59 N.E.2d 31, 293 N.Y. 791, certiorari denied 65 S.Ct. 867, 324 U.S. 862, 89 L.Ed. 1419.

N.C.—McCrowell v. Southern Ry. Co., 20 S.E.2d 352, 221 N.C. 366—Winfree v. Seaboard Air Line Ry. Co., 155 S.E. 259, 199 N.C. 590—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791—Potter v. Atlantic Coast Line R. Co., 147 S.E. 698, 197 N.C. 17.

N.D.—DeMoss v. Great Northern Ry. Co., 272 N.W. 506, 67 N.D. 412.

Ohio.—Baltimore & O. R. Co. v. Shober, 176 N.E. 88, 38 Ohio App. 216.

Okl.—Davis v. Midland Valley R. Co., 153 P.2d 823, 194 Okl. 619—Chicago, R. I. & P. Ry. Co. v. Murphy, 86 P.2d 629, 184 Okl. 240—Missouri-Kansas-Texas R. Co. v. Herron, 55 P.2d 95, 176 Okl. 162—St. Louis-San Francisco Ry. Co. v. Stuart, 47 P.2d 177, 173 Okl. 221—Fisher v. Kansas City, M. & O. Ry. Co., 36 P.2d 744, 169 Okl. 282—Gulf, C. & S. F. Ry. Co. v. Scroggins, 18 P.2d 873, 161 Okl. 294—St. Louis-San Francisco Ry. Co. v. Holt, 11 P.2d 761, 156 Okl. 135, certiorari denied 53 S.Ct. 16, 287 U.S. 613, 77 L.Ed. 533.

Or.—**Corpus Juris cited in** Makino v. Spokane, P. & S. Ry. Co., 63 P.2d 1082, 1083, 155 Or. 317—Donaghy v. Oregon-Washington R. & Nav. Co., 288 P. 1003, 133 Or. 663, rehearing denied 291 P. 1017, 133 Or. 663—Cheffings v. Hines, 206 P. 726, 104 Or. 81.

Pa.—Casseday v. Baltimore & O. R. Co., 22 A.2d 663, 343 Pa. 342—Magyar v. Pennsylvania R. Co., 144 A. 765, 294 Pa. 585—Pursglove v. Monongahela Ry. Co., 131 A. 477, 285 Pa. 27, certiorari denied 46 S. Ct. 352, 270 U.S. 654, 70 L.Ed. 783—Backes v. Pennsylvania R. Co., 200 A. 181, 132 Pa.Super. 29—Mrkich v. Pennsylvania R. Co., Com.Pl., 23 West.Co. 182.

S.C.—McClain v. Charleston & W. C. Ry. Co., 4 S.E.2d 280, 191 S.C. 332—Williamson v. Southern Ry. Co., 191 S.E. 79, 183 S.C. 312—Gillis v. Atlantic Coast Line R. Co., 179 S.E. 62, 175 S.C. 223, certiorari denied Atlantic Coast Line R. Co. v. Gillis, 55 S.Ct. 545, 294 U.S. 718, 79 L.Ed. 1251.

S.D.—Bayer v. Chicago, B. & Q. R. Co., 220 N.W. 459, 53 S.D. 116.

Tenn.—Peters v. Tennessee Cent. Ry., 167 S.W.2d 973, 179 Tenn. 509—Luck v. Louisville & N. R. Co., 69 S.W.2d 899, 167 Tenn. 350—Tennessee Cent. Ry. Co. v. Shacklett, 147 S.W.2d 1054, 24 Tenn.App. 563—Nashville, C. & St. L. Ry. v. Hines,

protection of its servants,[36] and except in cases | where the injury was due to the negligence of a

94 S.W.2d 397, 20 Tenn.App. 1—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn.App. 213—Lee v. Tennessee Central Ry. Co., 9 Tenn.App. 284.

Tex.—Fort Worth & R. G. Ry. Co. v. Pickens, Civ.App., 153 S.W.2d 252, error granted, reversed on other grounds 162 S.W.2d 691, 139 Tex. 181—Robertson v. Texas & N. O. R. Co., Civ.App., 133 S.W.2d 819, error dismissed, judgment correct—Clayton v. Chicago, R. I. & G. Ry. Co., Civ.App., 129 S.W.2d 693, affirmed 154 S.W.2d 453, 137 Tex. 441—**Corpus Juris cited in** Fox v. Gulf, C. & S. F. Ry. Co., Civ.App., 80 S.W.2d 1072, 1076, error dismissed—Gulf, C. & S. F. R. Co. v. Spivey, Civ.App., 56 S.W.2d 655, certiorari denied Spivey v. Gulf, C. & S. F. R. Co., 54 S.Ct. 98, 290 U. S. 676, 78 L.Ed. 583—**Corpus Juris cited in** St. Louis Southwestern Ry. Co. of Texas v. Steele, Civ. App., 50 S.W.2d 342, 343—**Corpus Juris cited in** Gulf, C. & S. F. Ry. Co. v. Houston, Civ.App., 45 S.W. 2d 771, 776—Texas & Pac. Ry. Co. v. Kelly, Civ.App., 35 S.W.2d 749, reversed on other grounds, Com. App., 51 S.W.2d 299, certiorari denied Kelly v. Texas & P. R. Co., 53 S.Ct. 90, 287 U.S. 644, 71 L.Ed. 557—Louisiana Ry. & Nav. Co. of Texas v. Disheroon, Civ.App., 295 S.W. 250—Gulf, C. & S. F. Ry. Co. v. Young, Civ.App., 284 S.W. 664.

Utah.—Elswood v. Oregon Short Line R. Co., 23 P.2d 925, 82 Utah 235—**Corpus Juris cited in** Roach v. Los Angeles & S. S. R. Co., 280 P. 1053, 1059, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.

Va.—Knowles v. Southern Ry. Co., 12 S.E.2d 821, 177 Va. 88—Lloyd v. Norfolk & W. Ry. Co., 145 S.E. 372, 151 Va. 409—Seaboard Air Line Ry. Co. v. De Loatch, 141 S.E. 121, 149 Va. 338.

Wash.—Cross v. Spokane, P. & S. Ry. Co., 291 P. 336, 158 Wash. 428, 71 A.L.R. 451, certiorari denied Spokane, P. & S. Ry. Co. v. Cross, 51 S.Ct. 345, 283 U.S. 821, 75 L.Ed. 1436—McGinn v. North Coast Stevedoring Co., 270 P. 113, 149 Wash. 1.

W.Va.—Shiflett v. Western Maryland Ry. Co., 195 S.E. 849, 119 W.Va. 676—Childress v. Norfolk & W. Ry. Co., 160 S.E. 564, 111 W.Va. 92—Looney v. Norfolk & W. Ry. Co., 135 S.E. 262, 102 W.Va. 40, 48 A.L.R. 806, rehearing denied 137 S. E. 756, 102 W.Va. 40, 48 A.L.R. 806.

Wis.—Ewig v. Chicago, M. & S. P. Ry. Co., 167 N.W. 442, 167 Wis. 597.

39 C.J. p 710 note 39, p 717 note 97, p 689 note 74.

36. U.S.—Spain v. Powell, C.C.A.Va., 90 F.2d 580—New York, C. & St. L. R. Co. v. Kelly, C.C.A.Ind., 70 F.2d 548, certiorari denied Kelly v. New York, C. & St. L. R. Co., 55 S.Ct. 110, 293 U.S. 595, 79 L.Ed. 689—Southern Ry. Co. v. Verelle, C.C.A.N.C., 57 F.2d 1008—Davis v. Crane, C.C.A.Mo., 12 F.2d 355—Ramsouer v. Midland Valley R. Co., D.C.Ark., 44 F.Supp. 523, reversed on other grounds 135 F.2d 101.

Cal.—Bobo v. Northwestern Pac. R. Co., 19 P.2d 10, 129 Cal.App. 273, reversed on other grounds 54 S.Ct. 263, 290 U.S. 499, 78 L.Ed. 462.

Ga.—Southern Ry. Co. v. Blanton, 192 S.E. 437, 56 Ga.App. 232—Gray v. Garrison, 176 S.E. 412, 49 Ga. App. 472.

Idaho.—Girany v. Oregon Short Line R. Co., 58 P.2d 841, 56 Idaho 740.

Ill.—Huff v. Illinois Cent. R. Co., 279 Ill.App. 323, affirmed 199 N.E. 116, 362 Ill. 95—Beard v. Baltimore & O. R. Co., 243 Ill.App. 537.

Ind.—Baltimore & O. S. W. R. Co. v. Carroll, 163 N.E. 99, 200 Ind. 589, set aside on other grounds 171 N. E. 923, 202 Ind. 37, reversed on other grounds 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed. 566—New York, C. & St. L. R. Co. v. Connaughton, App., 198 N.E. 472.

Ky.—Luton Mining Co. v. Louisville & N. R. Co., 123 S.W.2d 1055, 276 Ky. 321—Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 274 Ky. 410—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603—Chesapeake & O. Ry. Co. v. Craig, 17 S.W.2d 224, 229 Ky. 365—Louisville & N. R. Co. v. Reverman's Adm'x, 15 S.W.2d 300, 228 Ky. 500—Louisville & N. R. Co. v. Morgan's Adm'r, 9 S.W.2d 212, 225 Ky. 447—Vanhoose v. Chesapeake & O. Ry. Co., 283 S.W. 953, 214 Ky. 594.

La.—Harris v. Yazoo & M. V. R. Co., App., 183 So. 108—Devore v. Louisiana & Arkansas Ry. Co., App., 178 So. 706—Snow v. Texas & P. Ry. Co., App., 166 So. 200—Borde v. New Orleans & G. N. R. Co., App., 140 So. 810.

Me.—Hatch v. Portland Terminal Co., 131 A. 5, 125 Me. 96.

Mich.—Watts v. Pere Marquette R. Co., 203 N.W. 859, 231 Mich. 40.

Miss.—Gulf, M. & N. R. Co. v. Brown, 108 So. 503, 103 Miss. 890.

Mo.—Hoch v. St. Louis-San Francisco Ry. Co., 287 S.W. 1047, 315 Mo. 1199.

Mont.—Leonidas v. Great Northern Ry. Co., 72 P.2d 1007, 105 Mont. 302, affirmed 59 S.Ct. 51, 305 U.S. 1, 83 L.Ed. 3.

Neb.—Christenson v. Union Pac. R. Co., 290 N.W. 246, 137 Neb. 538, certiorari dismissed 61 S.Ct. 825, 312 U.S. 710, 85 L.Ed. 1142.

N.Y.—Yaconi v. Brady & Gioe, 158 N. E. 876, 246 N.Y. 300, certiorari denied 48 S.Ct. 421, 276 U.S. 636, 72 L.Ed. 744.

N.D.—DeMoss v. Great Northern Ry. Co., 272 N.W. 506, 67 N.D. 412.

Ohio.—Baltimore & O. R. Co. v. Shober, 176 N.E. 88, 38 Ohio App. 216.

Okl.—Davis v. Midland Valley R. Co., 153 P.2d 823, 194 Okl. 619—Chicago, R. I. & P. Ry. Co. v. Murphy, 86 P.2d 629, 184 Okl. 240—Carter v. Chicago, R. I. & P. Ry. Co., 65 P.2d 469, 179 Okl. 292—Missouri-Kansas-Texas R. Co. v. Herron, 55 P.2d 95, 176 Okl. 162.

Pa.—Casseday v. Baltimore & O. R. Co., 22 A.2d 663, 343 Pa. 342—Mrkich v. Pennsylvania R. Co., Com.Pl., 23 West Co. 182.

Tenn.—Tennessee Cent. Ry. Co. v. Shacklett, 147 S.W.2d 1054, 24 Tenn.App. 563—Nashville, C. & St. L. Ry. v. Hines, 94 S.W.2d 397, 20 Tenn.App. 1—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn.App. 213—Lee v. Tennessee Central Ry. Co., 9 Tenn.App. 284.

Tex.—**Corpus Juris cited in** Gulf, C. & S. F. Ry. Co. v. Houston, Civ. App., 45 S.W.2d 771, 776—Fort Worth & D. C. Ry. Co. v. Smithers, Civ.App., 249 S.W. 286, judgment affirmed, Com.App., 272 S.W. 764.

Va.—Knowles v. Southern Ry. Co., 12 S.E.2d 821, 177 Va. 88.

39 C.J. p 690 note 75.

Particular statutes the violation of which barred the defense of assumption of risk:

(1) Safety Appliance Acts, 45 U. S.C.A. §§ 1-16.

U.S.—Great Northern Ry. Co. v. Leonidas, Mont., 59 S.Ct. 51, 305 U. S. 1, 83 L.Ed. 3—Brady v. Terminal R. Ass'n of St. Louis, Mo., 58 S.Ct. 426, 303 U.S. 10, 82 L.Ed. 614, certiorari denied 58 S.Ct. 24, 302 U.S. 688, 82 L.Ed. 531, vacated 58 S.Ct. 134, 302 U.S. 678, 82 L.Ed. 523—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515—Cusson v. Canadian Pac. Ry. Co., C.C.A.Vt., 115 F.2d 430—Sherry v. Baltimore & O. R. Co., C.C.A.Ohio, 30 F.2d 487, certiorari denied 50 S.Ct. 16, 280 U.S. 555, 74 L.Ed. 611.

Cal.—Newkirk v. Los Angeles Junction Ry. Co., 131 P.2d 535, 21 Cal. 2d 308—Atchison, T. & S. F. Ry. Co. v. Superior Court in and for Contra Costa County, 86 P.2d 85, 12 Cal.2d 549, certiorari denied Atchison, T. & S. F. R. Co. v. Superior Court of State of California, 59 S.Ct. 774, 306 U.S. 657, 83 L.Ed. 1055—Ballard v. Sacramento

fellow servant, of which the injured person was not aware, and which an ordinarily prudent person would not have observed.[37] It was said that, inasmuch as the act specifically designated the cases to which the doctrine of assumption of risk was applicable, it clearly showed the legislative intent that in all other cases the defense of assumption of risk should have its common-law effect.[38] The defense of assumption of risk was held available in proper cases even where the master was found to have been negligent.[39] In order to render the defense available to the employer, it was essential that the statute violated should be a federal statute;[40] and the act had no application to a violation of a state statute.[41] The provisions of the Employers' Liability Act could not affect the availability of the defense of assumption of risk in an action not coming within the act.[42]

It is generally held that, as to all cases within the provision of the Federal Employers' Liability Act, all state law, common or statutory, is superseded by it, and the availability of assumption of risk as a defense in all actions by servants of railroad companies injured in interstate commerce is to be determined by the law as formulated and applied by the federal courts.[43] Hence it was held,

Northern Ry. Co., 14 P.2d 1045, 126 Cal.App. 486, rehearing denied 15 P.2d 793, 126 Cal.App. 486.
Fla.—Tatom v. Seaboard Air Line R. Co., 113 So. 671, 93 Fla. 1046.
Ind.—New York, C. & St. L. R. Co. v. Connaughton, 5 N.E.2d 904, 211 Ind. 419.
Minn.—Holz v. Chicago, M., St. P. & P. R. Co., 224 N.W. 241, 176 Minn. 575.
Mo.—Truesdale v. Wheelock, 74 S.W. 2d 585, 335 Mo. 924—Alcorn v. Missouri Pac. R. Co., 63 S.W.2d 55, 333 Mo. 828, certiorari denied Missouri Pac. Ry. Co. v. Alcorn, 54 S. Ct. 228, 290 U.S. 701, 78 L.Ed. 602 —McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005—Clark v. Chicago, R. I. & P. Ry. Co., 300 S.W. 758, 318 Mo. 453—Carter v. St. Louis, T. & E. R. Co., 271 S. W. 358, 307 Mo. 595.
N.H.—Grew v. Boston & M. R. R., 142 A. 707, 83 N.H. 383.
Or.—Donaghy v. Oregon-Washington R. & Nav. Co., 288 P. 1003, 133 Or. 663, rehearing denied 291 P. 1017, 133 Or. 663.
S.C.—Barton v. Southern Ry. Co., 171 S.E. 5, 171 S.C. 46, certiorari denied Southern Ry. Co. v. Barton, 54 S.Ct. 51, 290 U.S. 632, 78 L.Ed. 550.

(2) Boiler Inspection Acts, 45 U.S. C.A. §§ 22–34.
U.S.—Lilly v. Grand Trunk Western R. Co., Ill., 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411—Lehigh Valley R. Co. v. Beltz, C.C.A.N.Y., 10 F. 2d 74, certiorari denied 46 S.Ct. 265, 270 U.S. 641, 70 L.Ed. 775.
Mo.—Cantley v. Missouri-Kansas-Texas R. Co., 183 S.W.2d 123, 353 Mo. 605—Drew v. St. Louis-San Francisco Ry. Co., 293 S.W. 468, 222 Mo.App. 720.
Wyo.—Chicago, B. & Q. R. Co. v. Murray, 277 P. 703, 40 Wyo. 324.

(3) Hours of Service Acts, 45 U. S.C.A. §§ 61–66.
U.S.—Great Northern Ry. Co. v. Leonidas, Mont., 59 S.Ct. 51, 305 U.S. 1, 83 L.Ed. 3.
Tenn.—Mitchell v. Southern Ry. Co., 12 Tenn.App. 523.

Violation of Federal Employers' Liability Act was not a violation of a "statute enacted for the safety of employees" within the meaning of the section thereof abolishing the defense of assumption of risk in cases of violation of such statutes.—Great Northern Ry. Co. v. Leonidas, Mont., 59 S.Ct. 51, 305 U.S. 1, 83 L. Ed. 3.

37. U.S.—Owens v. Union Pac. R. Co., Wash., 63 S.Ct. 1271, 319 U.S. 715, 87 L.Ed. 1683, conformed to, C.C.A., 142 F.2d 145, certiorari denied 65 S.Ct. 57, 323 U.S. 740, 89 L.Ed. 593.
Ark.—St. Louis-San Francisco Ry. Co. v. Norman, 277 S.W. 524, 169 Ark. 1062.
Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434.
Minn.—Holz v. Chicago, M., St. P. & P. R. Co., 224 N.W. 241, 176 Minn. 575.
N.C.—Wimberley v. Atlantic Coast Line R. Co., 130 S.E. 116, 190 N.C. 444, judgment reversed on other grounds 47 S.Ct. 475, 273 U.S. 673.
Tex.—Gulf, C. & S. F. Ry. Co. v. Houston, Civ.App., 45 S.W.2d 771.
Wis.—Ewig v. Chicago, M. & St. P. Ry. Co., 167 N.W. 442, 167 Wis. 597.
Assumption of risk as affected by knowledge generally see infra §§ 379–392.
Assumption of risk of fellow servant's negligence generally see infra § 362.

38. U.S.—Great Northern Ry. Co. v. Leonidas, Mont., 59 S.Ct. 51, 305 U.S. 1, 83 L.Ed. 3.
39 C.J. p 690 note 77.

39. Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434.
Mo.—Hoch v. St. Louis-San Francisco Ry. Co., 287 S.W. 1047, 315 Mo. 1199.

40. U.S.—Seaboard Air Line R. Co. v. Horton, N.C., 34 S.Ct. 635, 233 U.S. 492, 58 L.Ed. 1062, L.R.A. 1915C 1, Ann.Cas.1915B 475.
39 C.J. p 690 note 78.

41. Wash.—Lauer v. Northern Pac. R. Co., 145 P. 606, 83 Wash. 465.
39 C.J. p 690 note 78.

42. Ky.—McDonald v. Louisville & N. R. Co., 24 S.W.2d 585, 232 Ky. 734—Louisville & N. R. Co. v. Morgan's Adm'r, 9 S.W.2d 212, 225 Ky. 447.
Tex.—Texas & N. O. R. Co. v. Tilley, Civ.App., 297 S.W. 1063, affirmed, Com.App., 6 S.W.2d 86, certiorari denied 49 S.Ct. 36, 278 U.S. 642, 73 L.Ed. 556.

43. Cal.—Bobo v. Northwestern Pac. R. Co., 19 P.2d 10, 129 Cal. App. 273, reversed on other grounds 54 S.Ct. 263, 290 U.S. 499, 78 L.Ed. 462.
Fla.—Taton v. Seaboard Air Line R. Co., 113 So. 671, 93 Fla. 1046.
Ill.—Bryant v. Illinois Cent. R. Co., 252 Ill.App. 428—Burns v. Jackson, 224 Ill.App. 519—See Roberts v. Cleveland, C., C. & St. L. Ry. Co., 202 Ill.App. 480, affirmed 117 N.E. 97, 279 Ill. 493.
Ky.—Chesapeake & O. Ry. Co. v. Craig, 17 S.W.2d 224, 229 Ky. 365.
Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434.
Mo.—Barrett v. St. Louis Southwestern Ry. Co., 143 S.W.2d 60—Arnold v. Scandrett, 131 S.W.2d 542, 345 Mo. 115—Rowe v. Missouri-Kansas-Texas R. Co., 100 S.W.2d 480, 339 Mo. 1145, certiorari denied Missouri-Kansas-Texas R. Co. v. Rowe, 57 S.Ct. 671, 300 U.S. 680, 81 L.Ed. 884—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L. Ed. 876—McDaniel v. Chicago, R. I. & P. Ry. Co., 92 S.W.2d 118, 338

before the amendment abolishing the defense, that, if the facts of the case were such as to render assumption of risk available as a defense under the federal statute, there could be no recovery, although the defense would not have been available under the state law.[44] However, it was also held that, where an action was brought in a state court and the defense of assumption of risk was, on a proper application of the Federal Employers' Liability Act, found to be available in the action, the common-law rule governing assumption of risk as formulated and enforced by the courts of the state in which the action is brought applies, and not the common-law rule of the federal courts.[45]

§ 360. —— Effect of State Employers' Liability Acts

Under a number of the state employers' liability acts the defense of assumption of risk is abrogated in toto or is made unavailable in certain specified instances; but, in the absence of such a statute, or where the statute is inapplicable, the doctrine applies.

Under a number of the state employers' liability acts the defense of assumption of risk is abrogated in toto or is made unavailable in certain specified instances.[46] In the absence of such a statute, how-

Mo. 481—Webber v. Terminal R. Ass'n of St. Louis, 70 S.W.2d 863, 335 Mo. 11—State ex rel. St. Louis-San Francisco Ry. Co. v. Cox, 46 S.W.2d 849, 329 Mo. 292—Kamer v. Missouri-Kansas-Texas R. Co., 32 S.W.2d 1075, 326 Mo. 792, certiorari denied Missouri-Kansas-Texas R. Co. v. Kamer, 51 S.Ct. 216, 282 U.S. 903, 75 L.Ed. 795—Hoch v. St. Louis-San Francisco Ry. Co., 287 S.W. 1047, 315 Mo. 1199—Pope v. Terminal R. Ass'n of St. Louis, 254 S.W. 43—Williams v. St. Joseph & G. I. Ry. Co., App., 112 S.W.2d 118—Sweeney v. Terminal R. Ass'n of St. Louis, App., 110 S.W.2d 852—Weber v. Terminal Railroad Ass'n of St. Louis, App., 20 S.W.2d 601.

N.J.—McGarry v. Central R. Co. of New Jersey, 147 A. 472, 105 N.J. Law 590.

N.Y.—Sadowski v. Long Island R. Co., 55 N.E.2d 497, 292 N.Y. 448.

N.C.—Laughter v. Powell, 14 S.E.2d 826, 219 N.C. 689, 136 A.L.R. 1116, certiorari denied 62 S.Ct. 128, 314 U.S. 666, 86 L.Ed. 533.

N.D.—DeMoss v. Great Northern Ry. Co., 272 N.W. 506, 67 N.D. 412.

Pa.—Reed v. Director General of Railroads, 110 A. 254, 267 Pa. 86, reversed on other grounds 42 S.Ct. 191, 258 U.S. 92, 66 L.Ed. 480.

Tex.—Texas & P. Ry. Co. v. Perkins, Com.App., 48 S.W.2d 249—Atchison, T. & S. F. Ry. Co. v. Francis, Civ.App., 227 S.W. 342, affirmed Francis v. Atchison, T. & S. F. Ry. Co., 253 S.W. 819, 113 Tex. 202, 30 A.L.R. 114.

Utah.—McAfee v. Ogden Union Ry. & Depot Co., 218 P. 98, 62 Utah 115—Guitron v. Oregon Short Line R. Co., 217 P. 971, 62 Utah 76.

Wash.—Stanke v. Spokane, C. D. & P. R. Co., 43 P.2d 961, 181 Wash. 472—Imbler v. Spokane, P. & S. Ry. Co., 2 P.2d 895, 164 Wash. 299—Cross v. Spokane, P. & S. Ry. Co., 291 P. 336, 158 Wash. 428, 71 A.L.R. 451, certiorari denied Spokane, P. & S. R. Co. v. Cross, 51 S.Ct. 345, 283 U.S. 821, 75 L.Ed. 1436.

W.Va.—Harness v. Baltimore & O. R. Co., 103 S.E. 866, 86 W.Va. 284.

39 C.J. p 690 note 82.

44. Fla.—Tatom v. Seaboard Air Line R. Co., 113 So. 671, 93 Fla. 1046.

39 C.J. p 690 note 83.

45. Mo.—Fish v. Chicago, R. I. & P. R. Co., 172 S.W. 340, 263 Mo. 106, Ann.Cas.1916B 147.

39 C.J. p 690 note 81.

46. U.S.—Union Oil Co. of California v. Hunt, C.C.A.Or., 111 F.2d 269.

Ariz.—Grasty v. Sabin, 259 P. 1049, 32 Ariz. 463—Tarbell v. Rivera, 251 P. 553, 31 Ariz. 214—Phœnix-Tempe Stone Co. v. Jenkins, 237 P. 194, 28 Ariz. 291.

Cal.—Robinet v. Hawk, 252 P. 1045, 200 Cal. 265.

Fla.—Smoak v. City of Tampa, 167 So. 528, 123 Fla. 716—City of Gainesville v. Kirkland, 156 So. 601, 116 Fla. 319—City of Sebring v. Avant, 117 So. 383, 95 Fla. 960.

Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259, 216 Ind. 180.

Iowa.—Lang v. Hedrick, 295 N.W. 107, 229 Iowa 766.

Ky.—Louisville & N. R. Co. v. Alexander, 127 S.W.2d 395, 277 Ky. 719—Chesapeake & O. Ry. Co. v. Music, 49 S.W.2d 311, 243 Ky. 491—Hubbard v. Louisville & N. R. Co., 273 S.W. 436, 209 Ky. 614.

Minn.—Clark v. Banner Grain Co., 261 N.W. 596, 195 Minn. 44—Suess v. Arrowhead Steel Products Co., 230 N.W. 125, 180 Minn. 21.

Miss.—Mississippi Power & Light Co. v. Merritt, 12 So.2d 527, 194 Miss. 794—Meridian Laundry Co. v. James, 195 So. 689, 190 Miss. 119—Hardaway Contracting Co. v. Rivers, 180 So. 800, 181 Miss. 727—Randolph Lumber Co. v. Minchew, 159 So. 849, 172 Miss. 535.

Mo.—Maurizi v. Western Coal & Mining Co., 11 S.W.2d 268, 321 Mo. 378.

N.Y.—Griebsch v. B. T. Babbitt, Inc., 298 N.Y.S. 843, 164 Misc. 7, affirmed 2 N.Y.S.2d 848, 254 App.Div. 601—Butterly v. The Westover, Inc., 67 N.Y.S.2d 634.

N.C.—Moore v. Rawls, 144 S.E. 552, 196 N.C. 125—Stewart v. Blackwood Lumber Co., 136 S.E. 385, 193 N.C. 138.

Ohio.—Hauer v. French Bros. Bauer Co., 183 N.E. 186, 43 Ohio App. 333.

Or.—Ferretti v. Southern Pac. Co., 57 P.2d 1280, 154 Or. 97—Nordlund v. Lewis & C. R. Co., 15 P.2d 980, 141 Or. 83—Peluck v. Pacific Machine & Blacksmith Co., 293 P. 417, 134 Or. 171—Hollopeter v. Palm, 291 P. 380, 134 Or. 546, modified on other grounds 294 P. 1056, 134 Or. 546, and appeal dismissed 52 S.Ct. 15, 284 U.S. 572, 76 L.Ed. 497—Donaghy v. Oregon-Washington R. & Nav. Co., 288 P. 1003, 133 Or. 663, rehearing denied 291 P. 1017, 133 Or. 663.

Pa.—Price v. New Castle Refractories Co., 3 A.2d 418, 332 Pa. 507.

Tenn.—Holliston Mills of Tennessee v. McGuffin, 145 S.W.2d 1, 177 Tenn. 1, rehearing denied 146 S.W.2d 357, 177 Tenn. 1—Steiner v. Spencer, 145 S.W.2d 547, 24 Tenn. App. 389.

Tex.—Renegar v. Fort Worth Transit Co., Civ.App., 143 S.W.2d 443—Chicago, R. I. & G. Ry. Co. v. Bernnard, Civ.App., 275 S.W. 505.

Va.—Lloyd v. Norfolk & W. Ry. Co., 145 S.E. 372, 151 Va. 409—Atlantic Coast Line R. Co. v. Bell, 141 S.E. 838, 149 Va. 720—Farmer's Adm'x v. Chesapeake & O. Ry. Co., 131 S.E. 334, 144 Va. 65.

Wash.—White v. Consolidated Freight Lines, 73 P.2d 358, 192 Wash. 146—Hatcher v. Globe Union Mfg. Co., 16 P.2d 824, 170 Wash. 494—Depre v. Pacific Coast Forge Co., 276 P. 89, 151 Wash. 430.

Wis.—Neitzke v. Kraft-Phenix Dairies, 253 N.W. 579, 214 Wis. 441.

39 C.J. p 691 notes 85, 86, 88.

Assumption of risk as affected by noncompliance by master with statutory requirements generally see infra §§ 369, 370.

Assumption of risk as affected by

ever, or in instances in which the statute is not applicable, the doctrine of assumption of risk applies.[47]

2. Nature of Risks

§ 361. Extraordinary Risks; Definition

Subject to the exception of known or obvious dangers, a servant does not assume extraordinary risks, that is, risks which are not normally or usually an incident of the employment and which may be obviated by the exercise of reasonable care on the master's part.

The general rule is that the servant assumes only such risks as ordinarily are incident to the service;[48] and accordingly, in the absence of a contract providing otherwise,[49] and subject to the exception of known or obvious dangers, discussed infra §§ 379–391, extraordinary risks are not assumed by the servant.[50] This rule has been affirmed by express statutory provision in some jurisdictions,[51] and its operation and effect were not changed by the Federal Employers' Liability Act prior to the amendment of the act so as to eliminate assumption of the risks of the employment in any case where the injury or death of the employee resulted in

violation of statute prohibiting employment of minors see infra § 419.

Availability under Workmen's Compensation Acts see the C.J.S. title Workmen's Compensation Acts § 941, also 71 C.J. p 1495 note 62–p 1497 note 79.

Statute held inapplicable to case not involving master and servant.—Ford v. Independent School Dist. of Shenandoah, 273 N.W. 870, 223 Iowa 795.

47. U.S.—Lang v. U. S. Reduction Co., C.C.A.Ind., 110 F.2d 441—Buffington v. Owosso Mfg. Co., C.C.A. Ark., 105 F.2d 692—Montgomery Ward & Co. v. Lindsey, C.C.A.Miss., 104 F.2d 882.

Ark.—Ward Furniture Mfg. Co. v. Weigand, 293 S.W. 1002, 173 Ark. 762.

Fla.—Atlantic Coast Line R. Co. v. Moore, 181 So. 374, 135 Fla. 485, modified on other grounds 186 So. 210, 135 Fla. 485—Smoak v. City of Tampa, 167 So. 528, 123 Fla. 716.

Ky.—Louisville & N. R. Co. v. Alexander, 127 S.W.2d 395, 277 Ky. 719—Chesapeake & O. Ry. Co. v. Music, 49 S.W.2d 311, 243 Ky. 491—Hubbard v. Louisville & N. R. Co., 273 S.W. 436, 209 Ky. 614.

Miss.—Meridian Laundry Co. v. James, 195 So. 689, 190 Miss. 119.

Va.—Lloyd v. Norfolk & W. Ry. Co., 145 S.E. 372, 151 Va. 409—Farmer's Adm'x v. Chesapeake & O. Ry. Co., 131 S.E. 334, 144 Va. 65.

39 C.J. p 691 note 87.

Employee not in commerce

Defense of assumption of risk is not denied by state employers' liability act unless employee was engaged in commerce.—Louisville & N. R. Co. v. Morgan's Adm'r, 9 S.W.2d 212, 225 Ky. 447.

48. Ark.—Simms Oil Co. v. Seago, 63 S.W.2d 834, 187 Ark. 1089—Central Coal & Coke Co. v. Porter, 280 S.W. 12, 170 Ark. 498.

Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650—Swanson v. Miami Home Milk Producers' Ass'n, 157 So. 415, 117 Fla. 110.

Ill.—Chicago, R. I. & P. Ry. Co. v. Benson, 185 N.E. 244, 352 Ill. 195, certiorari denied 54 S.Ct. 53, 290 U.S. 636, 78 L.Ed. 553.

Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.

La.—**Corpus Juris cited in** Cannella v. Gulf Refining Co., App., 154 So. 406, 414—Johnson v. Butterworth, App., 152 So. 166, rehearing refused 153 So. 58, reversed on other grounds 157 So. 121, 180 La. 586—Simmons v. Doullut & Ewin, App., 145 So. 708, rehearing denied 146 So. 772.

Mass.—Engle v. Boston Ice Co., 4 N.E.2d 455, 295 Mass. 428.

Mo.—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228—Dixon v. Frazier-Davis Const. Co., 298 S.W. 827, 318 Mo. 50—Bagby v. Culberson, App., 273 S.W. 209.

N.H.—Moore v. Morse & Malloy Shoe Co., 197 A. 707, 89 N.H. 332.

N.C.—Loflin v. High Point, T. & D. R. Co., 194 S.E. 104, 212 N.C. 595.

Pa.—Fox v. Lehigh Valley R. Co., 141 A. 157, 292 Pa. 321.

S.C.—Tuttle v. Hanckel, 183 S.E. 484, 179 S.C. 60—Lyons v. R. D. Cole Mfg. Co., 183 S.E. 466, 178 S.C. 520—Leslie v. Southern Pav. Const. Co., 169 S.E. 139, 169 S.C. 414—Mann v. Seaboard Air Line Ry. Co., 136 S.E. 234, 138 S.C. 241.

39 C.J. p 691 note 94.

Assumption of ordinary risks see infra §§ 371–378.

49. Idaho.—Kangas v. National Copper Min. Co., 187 P. 792, 32 Idaho 602.

39 C.J. p 692 note 95.

New source of danger

Where source of danger arising from work could not have been within contemplation of parties when relation of master and servant began, there was no contractual assumption of risk.—McCarthy v. New York, N. H. & H. R. R., 189 N.E. 30, 285 Mass. 211—Demaris v. Van Leeuwen, 186 N.E. 69, 283 Mass. 169.

Lack of implication

Agreement of employee to expose himself to risks not ordinarily incidental to obviously dangerous condition cannot be implied from contract of employment.—Doherty v. Paul's For Tires, 49 N.E.2d 430, 314 Mass. 83—Engel v. Boston Ice Co., 4 N.E. 2d 455, 295 Mass. 428.

50. Ala.—Seaboard Air Line Ry. Co. v. Latham, 127 So. 679, 23 Ala.App. 490.

Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.

Ga.—Roberts v. Ethridge, 36 S.E.2d 883, 36 Ga.App. 400—Pollard v. Weeks, 4 S.E.2d 722, 60 Ga.App. 664—Simowitz v. Register, 3 S.E.2d 231, 60 Ga.App. 180—Gray v. Harrison, 176 S.E. 412, 49 Ga.App. 472.

Ky.—Royal Collieries Co. v. Wells, 50 S.W.2d 948, 244 Ky. 303—Royal Collieries Co. v. Wells, 276 S.W. 515, 210 Ky. 600.

La.—Weadcock v. Eagle Indemnity Co., App., 15 So.2d 132—**Corpus Juris cited in** Cannella v. Gulf Refining Co., App., 154 So. 406, 414.

Mo.—Clift v. St. Louis-San Francisco Ry. Co., 9 S.W.2d 972, 320 Mo. 791.

N.C.—West v. Fontana Mining Corporation, 150 S.E. 884, 198 N.C. 150.

S.C.—Lyons v. R. D. Cole Mfg. Co., 183 S.E. 466, 178 S.C. 520—Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 158 S.C. 194, certiorari denied Atlantic Coast R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.

Tex.—Louisiana Ry. & Nav. Co. of Texas v. Disheroon, Civ.App., 295 S.W. 250.

39 C.J. p 692 note 97.

51. Ga.—Central of Georgia R. Co. v. Allen, 78 S.E. 1052, 140 Ga. 333.

39 C.J. p 692 note 98.

whole or in part from the negligence of the officers, agents, or employees of the carrier.[52]

What are extraordinary risks. An extraordinary risk is not one which is uncommon or unusual in the sense that it is rare;[53] nor is the word "extraordinary" used to denote magnitude or as a mark of degree.[54] An extraordinary risk is one lying outside the sphere of the normal,[55] arising out of conditions not usual in the master's business,[56] and, in applying the doctrine of assumption of risk, one which may be obviated by the exercise of reasonable care on the master's part.[57] As discussed infra § 362, risks arising from the master's negligence are extraordinary risks; and it has been said that, as the expression "extraordinary risks" is generally used to describe "risks arising from the negligence of the master,"[58] the two terms deal with but one class of risks and, for all practical purposes, are synonymous, the difference between them being in nomenclature only.[59]

§ 362. Risks Arising from Master's Negligence

a. In general

b. Incompetency or negligence of fellow servants

a. In General

It is a general rule that a servant does not assume risks arising from the negligence of the master.

Risks which arise from the negligence of the master or those representing him are not "ordinary risks" incident to the employment,[60] but are "extra-

52. Ala.—Louisville & N. R. Co. v. Hall, 135 So. 466, 223 Ala. 338, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L.Ed. 560.
Ill.—Chicago, R. I. & P. Ry. Co. v. Benson, 185 N.E. 244, 352 Ill. 195, certiorari denied Chicago, R. I. & P. Ry. Co. v. Benson, 54 S.Ct. 53, 290 U.S. 636, 78 L.Ed. 553.
La.—Snow v. Texas & P. Ry. Co., App., 166 So. 200.
Miss.—Graves v. Gulf & S. I. R. Co., 110 So. 234, 146 Miss. 130.
N.D.—De Moss v. Great Northern Ry. Co., 272 N.W. 506, 67 N.D. 412.
S.C.—Primus v. Atlantic Coast Line R. Co., 171 S.E. 1, 171 S.C. 199, certiorari denied Atlantic Coast Line R. Co. v. Primus, 54 S.Ct. 56, 290 U.S. 639, 78 L.Ed. 555.
39 C.J. p 692 note 99.

Employee might assume that employer would not subject him to extraordinary **risks.**—Looney v. Norfolk & W. Ry. Co., 135 S.E. 262, 102 W.Va. 40, 48 A.L.R. 806, rehearing denied 137 S.E. 756, 102 W.Va. 40, 48 A.L.R. 806.

53. Tex.—**Corpus Juris cited in** Louisiana Ry. & Nav. Co. of Texas v. Disheroon, Civ.App., 295 S.W. 250, 252.
39 C.J. p 691 note 89.

54. Conn.—Baer v. Baird Mach. Co., 79 A. 673, 84 Conn. 269.
Ga.—Roberts v. Ethridge, 36 S.E.2d 883, 73 Ga.App. 400.
S.C.—Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 184 S.C. 471.
Tex.—**Corpus Juris cited in** Louisiana Ry. & Nav. Co. of Texas v. Disheroon, Civ.App., 295 S.W. 250, 252.

55. Ala.—**Corpus Juris cited in** Seaboard Air Line Ry. Co. v. Latham, 127 So. 679, 680, 23 Ala.App. 490.
Conn.—Baer v. Baird Mach. Co., 79 A. 673, 84 Conn. 269.
S.C.—**Corpus Juris quoted in** Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 43, 184 S.C. 471—**Corpus Juris quoted in** Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 443, 158 S.C. 194, certiorari denied Atlantic Coast R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.

Similar definitions

(1) A risk that is not normally and necessarily an incident to the employment.—Southern Ry. Co. v. Blanton, 10 S.E.2d 430, 63 Ga.App. 93—Southern Ry. Co. v. Blanton, 192 S.E. 437, 56 Ga.App. 232.

(2) A risk which is not naturally incident to the occupation.—Snow v. Texas & P. Ry. Co., La.App., 166 So. 200.

56. S.C.—**Corpus Juris quoted in** Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 43, 184 S.C. 471—**Corpus Juris quoted in** Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 443, 158 S.C. 194, certiorari denied Atlantic Coast R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.
39 C.J. p 691 note 92.

Other definition

A risk which is only indirectly connected with the employment, owing to the special nature of the employment.—Emerick v. Slovonian Roman Greek Catholic Union, 108 A. 223, 93 N.J.Law 282.

57. Ala.—**Corpus Juris cited in** Seaboard Air Line Ry. Co. v. Latham, 127 So. 679, 680, 23 Ala.App. 490.
S.C.—**Corpus Juris quoted in** Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 43, 184 S.C. 471—**Corpus Juris quoted in** Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 443, 158 S.C. 194.
Tex.—**Corpus Juris cited in** Louisiana Ry. & Nav. Co. of Texas v. Disheroon, Civ.App., 295 S.W. 250, 252.
39 C.J. p 691 note 93.

Similar definition

A risk which ought not to exist and did not exist, except for the master's negligence.—Roberts v. Ethridge, 36 S.E.2d 883, 73 Ga.App. 400.

58. Ga.—Emanuel v. Georgia & F. R. Co., 83 S.E. 230, 142 Ga. 543—Roberts v. Ethridge, 36 S.E.2d 883, 73 Ga.App. 400—Pollard v. Weeks, 4 S.E.2d 722, 60 Ga.App. 664—Simowitz v. Register, 3 S.E.2d 231, 60 Ga.App. 180.
Ky.—Royal Collieries Co. v. Wells, 50 S.W.2d 948, 244 Ky. 303.
39 C.J. p 691 note 93 [a].

59. Iowa.—Vohs v. Shorthill, 107 N.W. 417, 130 Iowa 538.
39 C.J. p 691 note 93 [a].

Controlling fact in determining whether risk of servant was ordinary or extraordinary is whether master was negligent in that he failed to exercise due care, regardless of whether the negligence is ordinary or gross.—Roberts v. Ethridge, 36 S.E.2d 883, 73 Ga.App. 400.

Terms used interchangeably

Ky.—Royal Collieries Co. v. Wells, 276 S.W. 515, 210 Ky. 600.
Mo.—State ex rel. St. Louis-San Francisco Ry. Co. v. Cox, 46 S.W.2d 849, 329 Mo. 292.

60. U.S.—Great Northern Ry. Co. v. Nelson, C.C.A.Minn., 90 F.2d 84.
Ark.—Kansas City Southern Ry. Co. v. Diggs, 167 S.W.2d 879, 205 Ark. 150.
S.C.—**Corpus Juris quoted in** Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 43, 184 S.C. 471.
Tex.—Gulf, C. & S. F. R. Co. v. Spivey, Civ.App., 56 S.W.2d 655, certiorari denied Spivey v. Gulf, C. & S. F. R. Co., 54 S.Ct. 98, 290 U.S. 676, 78 L.Ed. 583.
39 C.J. p 692 note 2, p 705 note 17.
What constitutes ordinary risks generally see infra § 371.

ordinary risks;"[61] and it is a general rule that a servant does not assume risks arising from the negligence of the master.[62]

The rule as to the assumption of risk where the

61. U.S.—Great Northern Ry. Co. v. Nelson, C.C.A.Minn., 90 F.2d 84.
Ga.—Southern Ry. Co. v. Blanton, 192 S.E. 437, 56 Ga.App. 232—Southern Ry. Co. v. Wessinger, 124 S.E. 100, 32 Ga.App. 551.
N.H.—Stone v. Howe, 32 A.2d 484, 92 N.H. 425.
Or.—Hamilton v. Redeman, 97 P.2d 194, 163 Or. 324.
S.C.—**Corpus Juris quoted in** Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 43, 184 S.C. 471.
Tex.—Texas & P. Ry. Co. v. Short, Civ.App., 62 S.W.2d 995—Louisiana Ry. & Nav. Co. of Texas v. Disheroon, Civ.App., 295 S.W. 250.
39 C.J. p 692 note 3.
What constitutes extraordinary risks generally see supra § 361.

62. U.S.—Herrin Motor Lines v. Jarvis, C.C.A.Miss., 156 F.2d 276—Yates v. Atlantic Ice & Coal Co., C.C.A.Fla., 76 F.2d 86—Martin v. Eagle Picher Lead Co., D.C.Mo., 21 F.Supp. 142.
Ala.—Louisville & N. R. Co. v. Jacobson, 118 So. 565, 218 Ala. 384.
Ark.—Haynes Drilling Corporation v. Smith, 143 S.W.2d 27, 200 Ark. 1098—Federal Compress & Warehouse Co. v. Harmon, 118 S.W.2d 239, 196 Ark. 417—L. C. Burr & Co. v. Greenlee, 102 S.W.2d 77, 193 Ark. 705—Mississippi River Fuel Corporation v. Morris, 35 S.W.2d 607, 183 Ark. 207—Owosso Mfg. Co. v. Drennan, 31 S.W.2d 762, 182 Ark. 389—Mississippi Valley Power Co. v. Hubbard, 26 S.W.2d 118, 181 Ark. 487—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056—E. L. Bruce Co. v. Leake, 3 S.W.2d 988, 176 Ark. 705—Texas Pipe Line Co. v. Johnson, 275 S.W. 329, 169 Ark. 235.
Fla.—Gordon v. Gandy Bridge Co., 7 So.2d 350, 150 Fla. 28—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650—Swanson v. Miami Home Milk Producers' Ass'n, 157 So. 415, 117 Fla. 110—**Corpus Juris cited in** Smith v. Coleman, 132 So. 198, 204, 100 Fla. 1707—Wilson & Toomer Fertilizer Co. v. Lee, 106 So. 462, 90 Fla. 632.
Ind.—Chicago & E. I. Ry. Co. v. Schraeder, 163 N.E. 534, 89 Ind. App. 100.
Iowa.—Anderson v. Sheuerman, 6 N.W.2d 125, 232 Iowa 705—Rehard v. Miles, 290 N.W. 702, 227 Iowa 1290—Nelson v. Smeltzer, 265 N.W. 924, 221 Iowa 972.
Ky.—Bell v. Louisville & N. R. Co., 287 S.W. 219, 216 Ky. 42.
La.—Weadcock v. Eagle Indemnity Co., App., 15 So.2d 132.
Mo.—Webber v. Terminal R. Ass'n of St. Louis, 70 S.W.2d 863, 335 Mo. 11—Dodd v. Independence Stove & Furnace Co., 51 S.W.2d 114, 330 Mo. 662—Davis v. City of Independence, 49 S.W.2d 95, 330 Mo. 201—Whittington v. Westport Hotel Operating Co., 33 S.W.2d 963, 326 Mo. 1117—Macklin v. Fogel Const. Co., 31 S.W.2d 14, 326 Mo. 38—Sloan v. Polar Wave Ice & Fuel Co., 19 S.W.2d 476, 323 Mo. 363—Vordemark v. Hill-Behan Lumber Co., 12 S.W.2d 498—Warner v. Oriel Glass Co., 8 S.W.2d 846, 319 Mo. 1196, 60 A.L.R. 448—Grott v. Johnson, Stephens & Shinkle Shoe Co., 2 S.W.2d 785—Dixon v. Frazier-Davis Const. Co., 298 S.W. 827, 318 Mo. 50—Hoffman v. Peerless White Lime Co., 296 S.W. 764, 317 Mo. 86—Loduca v. St. Louis-San Francisco Ry. Co., 289 S.W. 908, 315 Mo. 331—Eaton v. Wallace, 287 S.W. 614, 48 A.L.R. 1291—Aeby v. Missouri Pac. Ry. Co., 285 S.W. 965, 313 Mo. 492, reversed on other grounds 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, and mandate conformed to Aeby v. Missouri Pac. R. Co., 6 S.W.2d 1115—Doody v. California Woolen Mills Co., 274 S.W. 692—Pietraschke v. Pollnow, App., 147 S.W.2d 167—Whiteley v. Eagle-Picher Lead Co., 115 S.W.2d 536, 232 Mo.App. 178—Williams v. St. Joseph & G. I. Ry. Co., App., 112 S.W.2d 118—Langeneckert v. St. Louis Sulphur & Chemical Co., App., 65 S.W.2d 648—Craven v. Halpin-Boyle Const. Co., App., 15 S.W.2d 853—Kieth v. American Car & Foundry Co., App., 9 S.W.2d 644—Howard v. Fred Schmitt Realty & Investment Co., App., 7 S.W.2d 448—Oney v. Dierks Lumber & Coal Co., App., 296 S.W. 470—Davis v. National Refining Co., App., 294 S.W. 114—Gulder v. International Shoe Co., App., 293 S.W. 428—Sanders v. Armour & Co. of Delaware, App., 292 S.W. 443—Bagby v. Culberson, App., 273 S.W. 209—Mabe v. Gille Mfg. Co., 271 S.W. 1023, 219 Mo.App. 234—House v. St. Louis Car Co., App., 270 S.W. 135.
Mont.—Kvia v. Fedderson, 122 P.2d 207, 113 Mont. 97.
Neb.—Large v. Johnson, 248 N.W. 400, 124 Neb. 821.
S.C.—Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259.
S.D.—Finger v. Northwest Properties, 257 N.W. 121, 63 S.D. 176.
Tex.—Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, error dismissed, judgment correct—City of Panhandle v. Byrd, Civ.App., 77 S.W.2d 904, reversed on other grounds 106 S.W.2d 660, 130 Tex 96—**Corpus Juris cited in** Gulf, C. & S. F. R. Co. v. Spivey, Civ.App., 56 S.W.2d 655, 656, certiorari denied Spivey v. Gulf, C. & S. F. R. Co., 54 S.Ct. 98, 290 U.S. 676, 78 L. Ed. 583—St. Louis Southwestern Ry. Co. of Texas v. Steele, Civ. App., 50 S.W.2d 342—Louisiana Ry. & Nav. Co. of Texas v. Disheroon, Civ.App., 295 S.W. 250.
Va.—Norfolk Southern R. Co. v. Lewis, 141 S.E. 228, 149 Va. 318—Froman v. Chesapeake & O. Ry. Co., 138 S.E. 658, 148 Va. 148.
Wash.—McGinn v. North Coast Stevedoring Co., 270 P. 113, 149 Wash. 1.
39 C.J. p 692 note 6, p 695 notes 19, 26.

Disease arising from negligence
U.S.—Boal v. Electric Storage Battery Co., C.C.A.Pa., 98 F.2d 815.

Failure to exercise reasonable care
(1) A servant does not assume risks that are due to, or arise from, the master's failure to exercise reasonable care for his safety and protection.
U.S.—Herrin Motor Lines v. Jarvis, C.C.A.Miss., 156 F.2d 276.
Ill.—Chicago, R. I. & P. Ry. Co. v. Benson, 185 N.E. 244, 352 Ill. 195, certiorari denied 54 S.Ct. 53, 290 U.S. 636, 78 L.Ed. 553.
Va.—Colonna Shipyard v. Dunn, 145 S.E. 342, 151 Va. 740, certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986.
(2) An employee, without his consent, does not bear additional perils arising from employer's failure to exercise reasonable care.—Hamilton v. Redeman, 97 P.2d 194, 163 Or. 324.
(3) A servant does not assume hazards unnecessarily augmented by a specific want of care on the part of the master.—Moore v. Morse & Malloy Shoe Co., 197 A. 707, 89 N.H. 332.
(4) Generally a servant does not assume risks that may be obviated by reasonable care on the master's part.
Mo.—David v. Missouri Pac. R. Co., 41 S.W.2d 179, 328 Mo. 437, reversed on other grounds 52 S.Ct. 242, 284 U.S. 460, 76 L.Ed. 399.
N.H.—Chatman v. Maine Cent. R. R., 167 A. 559, 86 N.H. 317.
39 C.J. p 692 note 6.
(5) Care required of master generally see supra §§ 183–185.
(6) Right of servant to rely on care of master see infra § 380.

Hazard known to employee contributing to injury
(1) If the controlling proximate cause of an injury to a servant is an independent act of negligence on the part of a master which the servant could not have avoided by ordinary

danger is known or obvious, discussed infra § 382, obtains in most states, wherein it is not provided otherwise by statute, even though the risk is the result of the master's negligence, as considered infra § 384. In a few jurisdictions, however, it has been said that it is a rule, to which there is no exception,[63] that a servant never assumes a risk growing out of the negligence of the master.[64] In such jurisdictions assumption of risk is not a defense at all where the risk arises from the master's negligence;[65] and, where the master's negligence is proved or conceded, the doctrine of assumption of risk, in its technical acceptation, is eliminated from the case[66] and the servant's conduct with reference to the risk is considered only from the point of view of whether or not it is contributory negligence.[67] Also, in such jurisdictions, the only risks assumed by the servant are those which remain after the master has exercised ordinary care.[68] Indeed, in some jurisdictions it has been stated broadly,[69] or in connection with ordinary risks,[70] that the only risks assumed are those which arise or exist after the master has exercised due care in the performance of the duties which the law casts on him.

care, the master is liable, although a hazard of the employment known to the servant may have contributed to the injury.—Seaboard Air-Line R. Co. v. Witt, 60 S.E. 1012, 4 Ga.App. 149.

(2) Defects or dangers of which servant has actual or constructive knowledge generally see infra §§ 382–390.

Lack of contractual assumption

An employee does not, merely by his contract of employment, assume, or impliedly agree to assume, the risk of his employer's negligence.

Ky.—McDonald v. Louisville & N. R. Co., 24 S.W.2d 585, 232 Ky. 734.

Me.—Le Blanc v. Sturgis, 147 A. 701, 128 Me. 374.

Mass.—Engel v. Boston Ice Co., 4 N.E.2d 455, 295 Mass. 428.

Negligence held not excused by usage

Mo.—Killion v. King Lumber Co., App., 16 S.W.2d 730.

Negligence of master or others

A servant does not assume risk caused by master's negligence or the negligence of those for whom the master is responsible to the servant injured.

Fla.—Crenshaw Bros. Produce Co. v. Harper, 194 So. 353, 142 Fla. 27.

Pa.—Ruhl v. City of Philadelphia, 29 A.2d 784, 346 Pa. 214.

Statutory rule

(1) Under the express provisions of some statutes an employee is held not to have assumed risks of his employment where his injury or death results in whole or in part from the negligence of the master.

U.S.—Ingalls Shipbuilding Corp. v. Trehern, C.C.A.Miss., 155 F.2d 202—Southern Kraft Corporation v. Parnell, C.C.A.Miss., 65 F.2d 785—Motor Wheel Corporation v. Dodson, C.C.A.Miss., 23 F.2d 282.

Miss.—Graham v. Brummett, 181 So. 721, 182 Miss. 580—Standard Oil Co. v. Franks, 149 So. 798, 167 Miss. 282—Planters' Oil Mill v. Wiley, 122 So. 365, 154 Miss. 113—Central Lumber Co. v. Porter, 103 So. 506, 139 Miss. 66.

(2) A risk increased by the employer's negligence is within the statute.—Mississippi Power & Light Co. v. Smith, 153 So. 376, 169 Miss. 447.

(3) Employer's failure to disclose to employee her true physical condition, and permitting her to continue heavy work with full knowledge, through employer's doctors, of probability of hernia which later actually developed, was negligence within statute.—Blue Bell Globe Mfg. Co. v. Lewis, Miss., 27 So.2d 900.

(4) In action against employer under statute dealing with enumerated hazardous occupations, doctrine of assumption of risk does not apply where injury was attributable to negligence of employer.—Peninsular Telephone Co. v. Dority, 174 So. 446, 128 Fla. 106.

63. Mo.—Corpus Juris quoted in Grott v. Johnson, Stephens & Shinkle Shoe Co., 2 S.W.2d 785, 790—Storey v. Williams Bros., App., 50 S.W.2d 698.

39 C.J. p 695 notes 19, 26.

64. Mo.—Fischer v. City of Cape Girardeau, 131 S.W.2d 521, 345 Mo. 122—Goodwin v. Missouri Pac. R. Co., 72 S.W.2d 988, 335 Mo. 398—Grott v. Johnson, Stephens & Shinkle Shoe Co., 2 S.W.2d 785—Vaccaro v. City of St. Louis, App., 123 S.W.2d 230—Williams v. St. Joseph & G. I. Ry. Co., App., 112 S.W.2d 118—Storey v. Williams Bros., App., 50 S.W.2d 698—Lutgen v. Standard Oil Co., 287 S.W. 885, 221 Mo.App. 773—Bagby v. Culberson, App., 273 S.W. 209.

39 C.J. p 695 note 19.

65. Mo.—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876—Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 336 Mo. 228.

66. Mo.—Jaycrest v. St. Louis Screw Co., App., 6 S.W.2d 1015—Struckel v. Busch Sulzer Bros. Diesel Engine Co., App., 300 S.W. 993—Hilderbrand v. St. Louis-San Francisco Ry. Co., 298 S.W. 1069, 220 Mo.App. 1229—Farley v. Lehrack, App., 272 S.W. 987.

39 C.J. p 695 note 22, p 696 note 27.

67. Mo.—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876—Webber v. Terminal R. Ass'n of St. Louis, 70 S.W.2d 863, 335 Mo. 11.

N.C.—Loflin v. High Point, T. & D. R. Co., 194 S.E. 104, 212 N.C. 595.

39 C.J. p 695 note 20, p 696 note 27.

Contributory negligence of servant generally see infra §§ 421–481.

Contributory negligence is only defense available where the servant is injured by a peril created by the master's negligence.—Fish v. Chicago, R. I. & P. R. Co., 172 S.W. 340, 263 Mo. 106, Ann.Cas.1916B 147.

68. Mo.—Goodwin v. Missouri Pac. R. Co., 72 S.W.2d 988, 335 Mo. 398—Williams v. St. Joseph & G. I. Ry. Co., App., 112 S.W.2d 118—Storey v. Williams Bros., App., 50 S.W.2d 698—Webster v. International Shoe Co., App., 18 S.W.2d 131.

69. Miss.—Stricklin v. Harvey, 179 So. 345, 181 Miss. 606—Gow Co. v. Hunter, 168 So. 264, 175 Miss. 896.

39 C.J. p 694 note 11.

Rule of assumption of risk presupposes that the employer has performed the duty of caution, care, and vigilance which the law casts on him.—Spencer v. Beadle S. S. Co., 48 P.2d 678, 4 Cal.2d 313, affirmed 56 S.Ct. 712, 298 U.S. 124, 80 L.Ed. 1082—39 C.J. p 694 notes 9, 11 [a].

Assumption of risk is based on absence of negligence by employer.—Stoffel v. W. J. McCahan Sugar Refining & Molasses Co., D.C.Pa., 35 F.2d 602, affirmed, C.C.A., W. J. McCahan Sugar Refining & Molasses Co. v. Stoffel, 41 F.2d 651.

70. Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.

"Ordinary risks" as meaning risks remaining after master has exercised due care see infra § 371.

b. Incompetency or Negligence of Fellow Servants

In the absence of a statutory rule to the contrary, as a general rule a servant assumes the risk of injury from the negligence, but not from the incompetency, of a fellow servant.

A servant does not assume the risk of injuries due to the incompetency of his fellow servants,[71] and, according to some decisions, negligence on the part of a fellow servant is not an incident[72] or ordinary risk[73] of the employment, and the risk of injury caused thereby is not assumed by the servant.[74] According to the weight of authority, however, the risk of injury from the negligence of a fellow servant is assumed by a servant[75] as one of the ordinary risks of his employment,[76] in the absence of a claim that the employer failed to exercise reasonable care in selecting the fellow servant.[77] In some jurisdictions following the majority rule it has been held that the assumption of risk of the negligence of a fellow servant is an implied term in the contract of employment,[78] but it has also been held that such risk is not assumed contractually.[79] Assumption of risk of the negligence of a coemployee of a railroad company is discussed infra § 366.

§ 363. —— Place of Work in General

It is a general rule that a servant does not assume the risk of the master's neglect of duty to furnish a reasonably safe place for work.

It has been said that assumption of risk must be considered with reference to the employer's primary duty to furnish reasonably safe surroundings.[80] The master's neglect of duty to furnish a reasonably safe place for work is not an ordinary risk of the employment,[81] and a servant does not assume the risk thereof,[82] whether the master assumes to per-

71. Iowa.—Scott v. Iowa Tel. Co., 102 N.W. 432, 126 Iowa 524.
39 C.J. p 546 note 71.
Competency of fellow servants see supra §§ 311–319.

72. Ark.—Kansas City Southern Ry. Co. v. Diggs, 167 S.W.2d 879, 205 Ark. 150—Smith v. Stuart C. Irby Co., 151 S.W.2d 996, 202 Ark. 736—Missouri Pac. R. Co. v. Pipkin, 75 S.W.2d 801, 189 Ark. 890, certiorari denied 55 S.Ct. 637, 294 U.S. 728, 79 L.Ed. 1258.

73. U.S.—Great Northern Ry. Co. v. Nelson, C.C.A.Minn., 90 F.2d 84.
Extraordinary risk
If hazards are increased by what other servants do, and injured servant has no part in increasing them, they are extraordinary.—Stone v. Howe, 32 A.2d 484, 92 N.H. 425, stating Vermont law.

74. U.S.—Duncan v. Montgomery Ward & Co., C.C.A.Ark., 108 F.2d 848, motion denied 60 S.Ct. 1073, 310 U.S. 612, 84 L.Ed. 1389.
Ark.—Smith v. Stuart C. Irby Co., 151 S.W.2d 996, 202 Ark. 736—Federal Compress & Warehouse Co. v. Harmon, 118 S.W.2d 239, 196 Ark. 417—L. C. Burr & Co. v. Greenlee, 102 S.W.2d 77, 193 Ark. 705—Missouri Pac. Transp. Co. v. Baxter, 76 S.W.2d 958, 189 Ark. 1147—Missouri Pac. R. Co. v. Remel, 48 S.W.2d 548, 185 Ark. 598, certiorari denied 53 S.Ct. 85, 287 U.S. 634, 77 L.Ed. 550—Seaman-Dunning Corporation v. Haralson, 29 S.W.2d 1085, 182 Ark. 93.
Risks created by negligent acts of master acting through fellow servant
Ark.—Simms Oil Co. v. Seago, 63 S.W.2d 834, 187 Ark. 1089.
Risk of negligence of any other employee
Ark.—Haynes Drilling Corporation v. Smith, 143 S.W.2d 27, 200 Ark. 1098—Mississippi River Fuel Corporation v. Morris, 35 S.W.2d 607, 183 Ark. 207—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056.

75. Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Gossett, 18 S.W.2d 986, 230 Ky. 240.
N.H.—Shurkus v. Gate City Foundry Co., 138 A. 302, 83 N.H. 43.
Pa.—Neves v. Pennsylvania R. Co., 145 A. 602, 295 Pa. 551.
39 C.J. p 540 note 25.
Fellow-servant rule generally see supra § 321.
Risk that fellow servants may not always be careful
U.S.—Holliday v. Fulton Band Mill, C.C.A.Miss., 142 F.2d 1006.
Superintendent
Employee voluntarily assumes risk of negligence of fellow servants, although their duties are those of superintendence or direction.—Philyaw v. Arundel Corporation, C.C.A.S.C., 51 F.2d 183—Union Pac. Ry. Co. v. Marone, 246 F. 916, 159 C.C.A. 188—Missouri Valley Bridge & Iron Co. v. Walquist, C.C.A.Mo., 243 F. 120.

76. Ga.—Strickland v. Foughner, 12 S.E.2d 371, 63 Ga.App. 805.
Kan.—Barnaby v. Sears, Roebuck & Co., 295 P. 715, 132 Kan. 447.
Mo.—Guthrie v. Gillespie, 6 S.W.2d 886, 319 Mo. 1137.
39 C.J. p 540 note 25.
Assumption of ordinary risks generally see infra § 372.

77. D.C.—Woodward & Lothrop v. Lineberry, 50 F.2d 314, 60 App.D.C. 164, followed in 50 F.2d 317, 60 App.D.C. 167, and certiorari denied Lineberry v. Woodward & Lothrop, 52 S.Ct. 29, 284 U.S. 648, 76 L.Ed. 550.

78. U.S.—Phillips Petroleum Co. v. Jenkins, Ark., 56 S.Ct. 611, 297 U.S. 629, 80 L.Ed. 943, rehearing denied 56 S.Ct. 745, 298 U.S. 691, 80 L.Ed. 1409.
Mo.—**Corpus Juris cited in** Guthrie v. Gillespie, 6 S.W.2d 886, 892, 319 Mo. 1137.
39 C.J. p 541 note 26.

79. Mass.—Tardiff v. Lynn Sand & Stone Co., 193 N.E. 55, 288 Mass. 472.
Voluntary assumption where risk known or obvious and patent see infra § 390.
In case where fellow servant rule does not apply
Mass.—Demaris v. Van Leeuwen, 186 N.E. 69, 283 Mass. 169.
Foreman supervising work of driver of tip cart did not contractually assume risk of driver's negligence.—Baldwin v. Sommer, 180 N.E. 133, 278 Mass. 346.

80. Ky.—Chesapeake & O. R. Co. v. Shaw, 182 S.W. 653, 168 Ky. 537.

81. Ill.—Hinchliff v. Robinson, 118 Ill.App. 450.
39 C.J. p 696 note 31.

82. U.S.—Galeota v. U. S. Gypsum Co., C.C.A.N.Y., 123 F.2d 947, certiorari denied U. S. Gypsum Co. v. Galeota, 62 S.Ct. 798, 315 U.S. 813, 86 L.Ed. 1211.
Cal.—Spencer v. Beadle S. S. Co., 48 P.2d 678, 4 Cal.2d 313, affirmed 56 S.Ct. 712, 298 U.S. 124, 80 L.Ed. 1082.
Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.
Ga.—Nashville, C. & St. L. Ry. v. Hilderbrand, 172 S.E. 87, 48 Ga. App. 140—Moody v. Hardeman, 162 S.E. 653, 44 Ga.App. 676.

form the duty in person or delegates it to another,[83] unless, as considered infra § 390, the servant knew of and appreciated the risk of his failure to do so, or unless the defects and dangers due to his failure to provide a safe place of work are so open and obvious that an ordinarily prudent man under the circumstances would have observed and appreciated them, or unless the assumption of such risk is embraced in the contract of employment.[84]

Construction of place of work by servant. An exception to the rule occurs where the servant assumes the duty of constructing or preparing the place in which he works; in these circumstances the master is relieved from all liability for injuries caused by defects therein.[85]

§ 364. —— Machinery, Tools, and Appliances in General

Generally a servant does not assume the risk of injury from the negligent failure of the master to furnish him with reasonably safe machinery, tools, or appliances for the prosecution of the work he is employed to do.

A servant does not assume the risk of injury from the negligent failure of the master to furnish him with reasonably safe machinery, tools, or appliances for the prosecution of the work for which he is employed,[86] unless, as discussed infra § 390, the danger is known to him or is so open as to be readily observable by him, or by contract he voluntarily assumes the risk;[87] and in some jurisdictions it has been held that he never assumes such risk.[88] Such a risk of injury has been said not to be a risk ordinarily incident to the employment.[89] Assumption of risk of injury from a simple tool is discussed infra § 390.

§ 365. —— Mining, Quarrying, and Excavating

Ordinarily risks due to the master's negligence are not assumed by a servant engaged in mining, quarrying, or excavating.

The general rule that risks due to the master's negligence are not assumed by the servant, discussed infra § 362 a, has been applied to the work of mining, quarrying, and excavating.[90] Where it is the duty of another employee, after finding missed

Ky.—Breslin v. Blair, 60 S.W.2d 337, 249 Ky. 178—Big Sandy & C. R. Co. v. Measell's Adm'r, 42 S.W.2d 747, 240 Ky. 571.
Miss.—Stricklin v. Harvey, 179 So. 345, 181 Miss. 606—Wilbe Lumber Co. v. Calhoun, 140 So. 680, 163 Miss. 80.
N.J.—Clayton v. Ainsworth, 4 A.2d 274, 122 N.J.Law 160.
Tex.—City of Austin v. Johnson, Civ. App., 195 S.W.2d 222.
39 C.J. p 696 note 33.
Assumption of ordinary risks where master has exercised ordinary care see infra § 375.

Gas
There is no merit in a suggestion that a machinist helper assumed the risk of gas unexpectedly rushing into gas producer wherein he was working.—Miller v. Walsh Fire Clay Products Co., 282 S.W. 141, 219 Mo. App. 590.

Electricity
Employee who was ordered to replace insulator on steel structure of substation did not assume the risk of city's negligence in failing to deenergize corner of structure and in failing to warn employee that corner was energized before ordering him to go upon the structure to work.—City of Austin v. Johnson, Tex.Civ. App., 195 S.W.2d 222.

In view of statute, where danger arose after contract of employment was made, employer could not relieve himself from responsibility of furnishing reasonably safe place in which to work by proving employee's assumption of risk.—De Marco v. Pease, 149 N.E. 208, 253 Mass. 499.

83. U.S.—Northern Pac. R. Co. v. Schoeffler, Wash., 193 F. 627, 113 C.C.A. 495.
N.C.—Yarborough v. F. C. Geer Co., 88 S.E. 474, 171 N.C. 334.

Duty of another employee
Employee did not assume risk of injury from falling over piece of veneering which it was another employee's duty to remove.—Poinsett Lumber & Mfg. Co. v. Duncan, 300 S.W. 400, 175 Ark. 777.

84. Ky.—Roffitt v. Southern Sheet & Tin Plate Co., 186 S.W. 155, 170 Ky. 362.

85. Ark.—Fraser v. Norman, 42 S. W.2d 569, 184 Ark. 434.
39 C.J. p 697 note 38, p 711 note 50 [f].

86. Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W. Harr. 564.
Miss.—Wilbe Lumber Co. v. Calhoun, 140 So. 680, 163 Miss. 80.
Mo.—Compton v. Louis Rich Const. Co., 287 S.W. 474, 315 Mo. 1068—Jenkins v. Kansas City, 91 S.W.2d 98, 230 Mo.App. 337.
N.C.—Holeman v. Pensacola Shipbuilding Co., 134 S.E. 647, 192 N.C. 236.
Pa.—Keough v. Markus, 173 A. 768, 114 Pa.Super. 80.
S.C.—Leslie v. Southern Paving Const. Co., 169 S.E. 139, 169 S.C. 414.
39 C.J. p 697 note 41.
Assumption of ordinary risks where master has used ordinary care see infra § 375.

Refusal of request for proper equipment
Okl.—Luper Transp. Co. v. Campbell, 133 P.2d 197, 192 Okl. 45.

Failure to furnish proper appliances to avoid exposure to silica dust
U.S.—Galeota v. U. S. Gypsum Co., C.C.A.N.Y., 123 F.2d 947, certiorari denied U. S. Gypsum Co. v. Galeota, 62 S.Ct. 798, 315 U.S. 813, 86 L. Ed. 1211.

Inattention to proper maintenance and repair
Fla.—H & C Operating Co. v. Fossum, 176 So. 865, 129 Fla. 480.

Failure to provide another workman with safe tool
Where employee was injured through employer's failure to provide another workman with safe tool, defense of assumption of risk was unavailable.—Whitehead v. Fogelman, Mo.App., 44 S.W.2d 261.

87. Me.—Dempsey v. Sawyer, 49 A. 1035, 95 Me. 295.

88. Mo.—Warner v. Oriel Glass Co., 8 S.W.2d 846, 319 Mo. 1196, 60 A.L. R. 448—Allen v. Missouri Pac. Ry. Co., 294 S.W. 80.

89. N.C.—Holeman v. Pensacola Shipbuilding Co., 134 S.E. 647, 192 N.C. 236.
39 C.J. p 697 note 44.

90. Ark.—Midland Coal Mining Co. v. Rodden, 41 S.W.2d 777, 184 Ark. 157.
Ky.—Big Sandy & C. R. Co. v. Meas-

shots, to explode them, the neglect of that duty precipitates a hazard which a servant does not assume as an ordinary incident to his work.[91]

§ 366. —— Operation of Railroads

a. In general
b. Negligence of fellow servant

a. In General

Generally speaking, a servant of a railroad company does not assume the risk of injury due to the negligence of the master.

Generally speaking, a servant of a railroad company does not assume the risk of injury due to the negligence of the master,[92] since such negligence is not an ordinary incident of employment by a railroad company.[93] The rule is not different under the Federal Employers' Liability Act[94] or under various state statutes.[95] The effect of statutes on the common-law exception of known or obvious risks is discussed infra § 383, the effect on such exception of noncompliance with statutes enacted for the safety of employees infra § 369, and the effect of noncompliance with statutes not designed solely for the protection of employees infra § 370.

The rule under consideration has often been applied in case of injuries sustained by reason of the master's failure of duty to provide reasonably safe cars or locomotives,[96] or hand cars,[97] bridges,[98]

ell's Adm'r, 42 S.W.2d 747, 240 Ky. 571.

39 C.J. p 697 note 47.

Doctrine of assumption of risks in mines presupposes that the master has performed the duties of caution, care, and vigilance which the law casts on him.—Mount v. Western Coal & Mining Co., 242 S.W. 943, 294 Mo. 603.

In absence of knowledge, actual or constructive, that city failed to exercise due care in furnishing protection against danger of cave-in, ditcher would assume only those risks of cave-in which remained after city performed its duty.—Maltais v. City of Concord, 166 A. 267, 86 N.H. 211.

91. Mo.—Cunningham v. Doe Run Lead Co., 4 S.W.2d 802.

92. U.S.—Wabash Ry. Co. v. Beez, C.C.A.Ohio, 36 F.2d 480.
Ill.—Armstrong v. Chicago & W. I. R. Co., 183 N.E. 478, 350 Ill. 426, certiorari denied Chicago & W. I. R. Co. v. Armstrong, 53 S.Ct. 523, 289 U.S. 724, 77 L.Ed. 1475.
Ky.—Louisville & N. R. Co. v. Reverman's Adm'x, 15 S.W.2d 300, 228 Ky. 500.
Mo.—Schlueter v. East St. Louis Connecting Ry. Co., 296 S.W. 105, 316 Mo. 1266.
39 C.J. p 697 note 51.

Servant is not bound to anticipate dangers arising from the master's negligence.—Texas & N. O. R. Co. v. Middleton, 103 S.W. 203, 46 Tex.Civ. App. 497.

93. Ark.—Chicago, R. I. & P. Ry. Co. v. Allison, 287 S.W. 197, 171 Ark. 983.
Ky.—Louisville & N. R. Co. v. Reverman's Adm'x, 15 S.W.2d 300, 228 Ky. 500.
39 C.J. p 697 note 51 [a], p 699 note 61 [a], [b], [d].
Assumption of ordinary risks see infra § 378.

94. U.S.—Edwards v. Baltimore & O. R. Co., C.C.A.Ill., 131 F.2d 366—Grand Trunk Western R. Co. v Boylen, C.C.A.Ind., 81 F.2d 91—Norfolk & W. Ry. Co. v. Fraley, C. C.A.Ohio, 69 F.2d 775.
Ariz.—Apache Ry. Co. v. Shumway, 158 P.2d 142, 159 A.L.R. 857.
Cal.—Devaney v. Atchison, T. & S. F. Ry. Co., 27 P.2d 635, 219 Cal. 487—Leet v. Union Pac. R. Co., 142 P.2d 37, 60 Cal.App.2d 814.
Ill.—Chicago, R. I. & P. Ry. Co. v. Benson, 185 N.E. 244, 352 Ill. 195, certiorari denied Chicago, R. I. & P. Ry. Co. v. Benson, 54 S.Ct. 53, 290 U.S. 636, 78 L.Ed. 553—Maher v. New York, C. & St. L. R. Co., 280 Ill.App. 222.
Kan.—Crouch v. Missouri Pac. R. Co., 276 P. 81, 128 Kan. 26, certiorari denied Missouri Pac. R. Co. v. Crouch, 50 S.Ct. 31, 280 U.S. 576, 74 L.Ed. 627.
Me.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.
Minn.—Holz v. Chicago, M., St. P. & P. R. Co., 224 N.W. 241, 176 Minn. 575.
Miss.—Graves v. Gulf & S. I. R. Co., 110 So. 234, 146 Miss. 130.
Mo.—Berry v. St. Louis-San Francisco Ry. Co., 26 S.W.2d 988, 324 Mo. 775, certiorari denied St. Louis-San Francisco Ry. Co. v. Berry, 50 S.Ct. 464, 281 U.S. 765, 74 L.Ed. 1173—Vaughan v. St. Louis Merchants' Bridge Terminal Ry. Co., 18 S.W.2d 62, 322 Mo. 980—Sweeney v. Terminal R. Ass'n of St. Louis, App., 110 S.W.2d 852—Hasenjaeger v. Missouri-Kansas-Texas R. Co., 53 S.W.2d 1083, 227 Mo.App. 413—Karn v. Missouri Pac. R. Co., App., 269 S.W. 407.
Neb.—Ellis v. Union Pac. R. Co., 27 N.W.2d 921, 148 Neb. 515.
N.C.—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112.
Okl.—Fisher v. Kansas City, M. & O Ry. Co., 36 P.2d 744, 169 Okl. 282—Chicago, R. I. & P. Ry. Co. v Brooks, 11 P.2d 142, 155 Okl. 53 certiorari denied Chicago, R. I. & P. R. Co. v. Squire, 52 S.Ct. 502 286 U.S. 552, 76 L.Ed. 1287.
Tex.—Texas & N. O. R. Co. v. Sturgeon, Civ.App., 177 S.W.2d 340, reversed on other grounds 177 S.W. 2d 264, 142 Tex. 222—Texas & P. Ry. Co. v. Short, Civ.App., 62 S.W. 2d 995, error refused.
Utah.—Ward v. Denver & R. G. W. R. R. Co., 85 P.2d 837, 96 Utah 564.
Va.—Seaboard Air Line Ry. Co. v. De Loatch, 141 S.E. 121, 149 Va. 338.

Gross negligence
U.S.—Davis v. Hynde, C.C.A.Miss., 4 F.2d 656.

95. Ind.—Central Indiana Ry. Co. v. Mitchell, 199 N.E. 439, 102 Ind.App. 121.
Mo.—Hogue v. St. Louis-San Francisco Ry. Co., App., 20 S.W.2d 301.
Mont.—Palmer v. Great Northern Ry. Co., 170 P.2d 768.
Tex.—Texas & P. Ry. Co. v. Presley, 152 S.W.2d 1105, 137 Tex. 232.
39 C.J. p 694 note 15, p 695 note 16.

96. Cal.—Leet v. Union Pac. R. Co., 142 P.2d 37, 60 Cal.App.2d 814.
Ind.—Chesapeake & O. Ry. Co. v. Fultz, 161 N.E. 835, 91 Ind.App. 639, certiorari denied 51 S.Ct. 31, 282 U.S. 855, 75 L.Ed. 757.
Tex.—St. Louis, S. F. & T. Ry. Co. v. Barr, Civ.App., 67 S.W.2d 1063.
39 C.J. p 697 note 41 [a] (1), p 698 note 55.

Open trapdoor in rear platform
Cal.—Hackley v. Southern Pac. Co., 45 P.2d 447, 6 Cal.App.2d 611, certiorari denied Southern Pac. Co. v. Hackley, 56 S.Ct. 153, 296 U.S. 630, 80 L.Ed. 447.

Motorman, even if he assumes the risk of a collision, does not assume the risk incurred in operating a car rendered unsafe by the negligence of defendant.—Amarillo Traction Co. v. Russell, Tex.Civ.App., 290 S.W. 905.

97. Tex.—St. Louis Southwestern R. Co. v. Browning, 118 S.W. 245, 54 Tex.Civ.App. 521.
39 C.J. p 698 note 56.

98. Cal.—Dolan v. Sierra R. Co., 67 P. 686, 135 Cal. 435.

railroad yards,[99] tracks or roadbeds,[1] and trestles.[2] It has also been applied to injuries sustained by reason of obstructions on, over, or near tracks negligently placed or permitted to remain there,[3] negligence in the movement or operation of trains, cars, or locomotives,[4] negligence in leaving a car on a crossover too near the main track,[5] negligence in the inspection of cars,[6] bridges,[7] or of an approach to a bridge,[8] negligence in permitting "tell tales" to become and remain out of repair,[9] negligence in furnishing a poor quality of oil for use in a lantern,[10] negligence in the giving of directions,[11] or negligence in the loading of cars or tenders.[12]

b. Negligence of Fellow Servant

Ordinarily a railroad employee does not assume the risk of injury from the negligence of a coemployee or fellow servant.

Negligence on the part of a coemployee or fellow servant is not an ordinary incident of employment by a railroad company,[13] and generally the risk of injury from such negligence is not assumed by a railroad employee.[14] This is true under the Federal Employers' Liability Act[15] and under some state

99. N.J.—Shortway v. Erie R. Co., 148 A. 172, 8 N.J.Misc. 29.
39 C.J. p 698 note 58.

1. Mo.—Schlueter v. East St. Louis Connecting Ry. Co., 296 S.W. 105, 316 Mo. 1266.
39 C.J. p 698 note 59.

2. Mass.—Houlihan v. Connecticut River R. Co., 42 N.E. 108, 164 Mass. 555.

3. Ky.—Louisville & N. R. Co. v. Lewis, 278 S.W. 143, 211 Ky. 830.
39 C.J. p 699 note 61.

4. U.S.—Chicago, B. & Q. R. Co. v. Kelley, C.C.A.Neb., 74 F.2d 80—Halges v. Central R. Co. of New Jersey, C.C.A.N.Y., 58 F.2d 169, certiorari denied Central R. Co. of New Jersey v. Halges, 53 S.Ct. 11, 287 U.S. 607, 77 L.Ed. 528.
Cal.—Qualls v. Atchison, T. & S. F. Ry. Co., 296 P. 645, 112 Cal.App. 7.
Mo.—Grange v. Chicago & E. I. Ry. Co., 69 S.W.2d 955, 334 Mo. 1040.
Tex.—Fort Worth & D. C. Ry. Co. v. Stovall, Civ.App., 272 S.W. 594, certiorari denied 46 S.Ct. 356, 270 U.S. 660, 70 L.Ed. 786.
39 C.J. p 699 note 62.

Negligent starting without warning or signal
Mo.—Busch v. Louisville & N. R. Co., 17 S.W.2d 337, 322 Mo. 469, certiorari denied Louisville & N. R. Co. v. Busch, 50 S.Ct. 27, 280 U.S. 569, 74 L.Ed. 622.
39 C.J. p 699 note 62 [b] (1).

Negligent and unusual rate of speed
Mo.—McDaniel v. Chicago, R. I. & P. Ry. Co., 92 S.W.2d 118, 338 Mo. 481.
39 C.J. p 699 note 62 [d].

Sudden increase in speed
Ill.—Kiefer v. Elgin, J. & E. Ry. Co., 184 N.E. 870, 351 Ill. 634.

Sudden stopping without notice
Utah.—Ward v. Denver & R. G. W. R. Co., 85 P.2d 837, 96 Utah 564.

Sudden application of brakes without warning
Cal.—Reif v. Schumacker, App., 99 P.2d 593, reheard 102 P.2d 375.

5. U.S.—Pennsylvania R. Co. v. Hammond, C.C.A.N.Y., 7 F.2d 1010.

6. Tex.—Missouri, K. & T. R. Co. v. Chambers, 43 S.W. 1090, 17 Tex. Civ.App. 487.

7. U.S.—Long Pole Lumber Co. v. Gross, Va., 180 F. 5, 103 C.C.A. 359.

8. Kan.—Nicholson v. Atchison, T. & S. F. R. Co., 147 P. 1123, 95 Kan. 13, L.R.A.1915E 417.

9. Ill.—Brant v. Chicago & A. R. Co., 214 Ill.App. 126, affirmed 128 N.E. 732, 294 Ill. 606.

10. Ky.—Louisville & N. R. Co. v. Goodman, 273 S.W. 526, 210 Ky. 13.

11. Ala.—Kansas City, M. & B. R. Co. v. Thornhill, 37 So. 412, 141 Ala. 215.

12. Kan.—Croll v. Atchison, T. & S. F. R. Co., 46 P. 972, 57 Kan. 548.
39 C.J. p 700 note 68 [a].

13. Ark.—Chicago, R. I. & P. Ry. Co. v. Allison, 287 S.W. 197, 171 Ark. 983.
39 C.J. p 697 note 51 [a].

14. Ala.—Birmingham Belt R. Co. v. Hendrix, 110 So. 312, 215 Ala. 285, certiorari denied 47 S.Ct. 472, 273 U.S. 758, 71 L.Ed. 877.
Ill.—Surinak v. Elgin, J. & E. Ry. Co., 235 Ill.App. 431.
Minn.—Baird v. Chicago, M., St. P. & P. R. Co., 228 N.W. 552, 179 Minn. 127.

Unexpected or unanticipated negligence
U.S.—Pitcairn v. Landis, C.C.A.Ind., 82 F.2d 578.
Mo.—Norton v. Wheelock, 23 S.W.2d 142, certiorari denied Wheelock v. Norton, 50 S.Ct. 355, 281 U.S. 752, 74 L.Ed. 1162.

Negligence of fellow servants and vice principal
Mass.—Pagano v. Worcester Consol. St. Ry. Co., 163 N.E. 764, 265 Mass. 89.

Negligence of engineer
(1) Freight train brakeman did not assume risk of injury from being thrown against desk in caboose by violent jar caused by engineer's negligence in applying brakes.—Missouri Pac. R. Co. v. Montgomery, 55 S.W. 2d 68, 186 Ark. 537, certiorari denied 53 S.Ct. 690, 289 U.S. 747, 77 L.Ed. 1493.

(2) Doctrine of assumption of risk is inapplicable, if negligence of engineer, which brakeman could not have foreseen, was proximate cause of injury.—Moran v. Hines, 152 N.E. 664, 115 Ohio St. 226.

(3) Switchman did not assume risk of being crushed between cars when engineer negligently moved cars.—Midland Valley R. Co. v. Bradley, C.C.A.Okl., 37 F.2d 666.

(4) Negligence of enginemen in sanding flues held not assumed.—Houston & T. C. R. Co. v. Shepherd, Tex.Civ.App., 6 S.W.2d 410—Texas & N. O. R. Co. v. Tilley, Tex.Civ. App., 297 S.W. 1063, affirmed, Com. App., 6 S.W.2d 86, certiorari denied 49 S.Ct. 36, 278 U.S. 642, 73 L.Ed. 556.

Negligence of foreman or person working under him
Colo.—Denver & S. L. Ry. Co. v. Lombardi, 287 P. 648, 87 Colo. 311, certiorari denied 51 S.Ct. 37, 282 U.S. 865, 75 L.Ed. 765.
Ky.—McDonald v. Louisville & N. R. Co., 24 S.W.2d 585, 232 Ky. 734.
Tex.—Louisiana Ry. & Nav. Co. of Texas v. Disheroon, Civ.App., 295 S.W. 250.

15. U.S.—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F. 2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531—Montgomery v. Baltimore & O. R. Co., C.C.A.Ohio, 22 F.2d 359.
Ark.—Missouri Pac. R. Co. v. Sanders, 117 S.W.2d 720, 196 Ark. 269—Kansas City Southern Ry. Co. v. Larsen, 114 S.W.2d 1081, 195 Ark. 808, certiorari denied 59 S.Ct. 82, 305 U.S. 621, 83 L.Ed. 397—Kansas City Southern Ry. Co. v. Brock, 98 S.W.2d 949, 193 Ark. 210—St. Louis-San Francisco Ry. Co. v. Miller, 292 S.W. 986, 173 Ark. 597.
Ga.—Southern Ry. Co. v. Heaton, 6 S.E.2d 339, 61 Ga.App. 386.
Idaho.—Girany v. Oregon Short Line R. Co., 58 P.2d 841, 56 Idaho 740.
Ill.—Wetterer v. Atchison, T. & S. F. Ry. Co., 277 Ill.App. 275, certiorari denied Atchison, T. & S. F. Ry. Co. v. Wetterer, 55 S.Ct. 835, 295 U.S. 754, 79 L.Ed. 1698.
Ind.—Chicago & E. I. Ry. Co. v. Wright, 166 N.E. 778, 89 Ind.App.

634—Baltimore & O. S. W. R. Co. v. Hill, 148 N.E. 489, 84 Ind.App. 354, motion granted 47 S.Ct. 96, 71 L.Ed. 1313 and certiorari denied 47 S.Ct. 246, 273 U.S. 738, 71 L.Ed. 867.

Iowa.—Farwark v. Chicago, M. & St. P. Ry. Co., 211 N.W. 875, 202 Iowa 1229.

Ky.—Chesapeake & O. Ry. Co. v. Craig, 17 S.W.2d 224, 229 Ky. 365.

Mass.—Cunningham v. Boston & M. R. R., 34 N.E.2d 697, 309 Mass. 215, certiorari denied Boston & M. R. R. v. Cunningham, 62 S.Ct. 185, 314 U.S. 682, 86 L.Ed. 546—Hietala v. Boston & A. R. R., 3 N.E. 2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434—Hanley v. Boston & M. R. R., 190 N.E. 501, 286 Mass. 390, certiorari denied Boston & M. R. R. v. Hanley, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690—Murphy v. Boston & M. R. R., 190 N.E. 501, 286 Mass. 390, certiorari denied Boston & M. R. R. v. Murphy, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690.

Mich.—Thrall v. Pere Marquette Ry. Co., 229 N.W. 488, 249 Mich. 440.

Mo.—Dodd v. Missouri-Kansas-Texas R. Co., 184 S.W.2d 454, 353 Mo. 799—Rowe v. Missouri-Kansas-Texas R. Co., 100 S.W.2d 480, 339 Mo. 1145, certiorari denied Missouri-Kansas-Texas R. Co. v. Rowe, 57 S.Ct. 671, 300 U.S. 680, 81 L.Ed. 884—Johnson v. Chicago & E. I. Ry. Co., 64 S.W.2d 674, 334 Mo. 22—Jones v. St. Louis-San Francisco Ry. Co., 63 S.W.2d 94, 333 Mo. 802—Vaughan v. St. Louis Merchants' Bridge Terminal Ry. Co., 18 S.W.2d 62, 322 Mo. 980—Shaw v. Chicago & A. R. Co., 282 S.W. 416, 314 Mo. 123—Hasenjaeger v. Missouri-Kansas-Texas R. Co., 53 S.W.2d 1083, 227 Mo.App. 413.

Mont.—Kakos v. Bryam, 292 P. 909, 88 Mont. 309.

N.J.—Erickson v. Lehigh Valley R. Co., 134 A. 892, 4 N.J.Misc. 905.

N.D.—Sullivan v. Minneapolis, St. P. & S. S. M. Ry. Co., 213 N.W. 841, 55 N.D. 353.

Ohio.—New York, C. & St. L. R. Co. v. Biermacher, 162 N.E. 720, 28 Ohio App. 421, certiorari denied 49 S.Ct. 19, 278 U.S. 614, 73 L.Ed. 538.

Okl.—Fisher v. Kansas City, M. & O. Ry. Co., 36 P.2d 744, 169 Okl. 282—St. Louis-San Francisco Ry. Co. v. Holt, 11 P.2d 761, 156 Okl. 135, certiorari denied 53 S.Ct. 16, 287 U.S. 613, 77 L.Ed. 533.

S.C.—Mann v. Seaboard Air Line Ry. Co., 136 S.E. 234, 138 S.C. 241.

Tex.—Galveston, H. & S. A. Ry. Co. v. Contois, Com.App., 288 S.W. 154 certiorari denied 47 S.Ct. 659, 274 U.S. 747, 71 L.Ed. 1328—Texas & P. Ry. Co. v. Short, Civ.App., 62 S.W.2d 995, error refused—Gulf, C. & S. F. Ry. Co. v. Houston, Civ. App., 45 S.W.2d 771.

Utah.—Peterson v. Union Pac. R. Co., 8 P.2d 627, 79 Utah 213—Fogg v. Oregon Short Line R. Co., 1 P.2d 954, 78 Utah 105.

39 C.J. p. 718 note 13, p. 720 note 41.

Act places negligence of fellow employee and employer on same basis with reference to assumption of risk.—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn.App. 213—39 C.J. p. 675 note 23.

Lookout

It has been held, however, that trackman assumed risk of fireman's negligent failure to keep lookout, even though it was custom to give signal when man was seen on track.—Biernacki v. Pennsylvania R. Co., C.C.A.N.Y., 45 F.2d 677, certiorari denied 51 S.Ct. 488, 283 U.S. 841, 75 L.Ed. 1451.

Risk is extraordinary, rather than ordinary

U.S.—Rocco v. Lehigh Valley R. Co., N.Y., 53 S.Ct. 343, 288 U.S. 275, 77 L.Ed. 743.

Ga.—Southern Ry. Co. v. Blanton, 192 S.E. 437, 56 Ga.App. 232—Southern Ry. Co. v. Wessinger, 124 S.E. 100, 32 Ga.App. 551.

Mo.—Koonse v. Missouri Pac. R. Co., 18 S.W.2d 467, 322 Mo. 813, certiorari denied Missouri Pac. R. Co. v. Koonse, 50 S.Ct. 34, 280 U.S. 582, 74 L.Ed. 632.

Tex.—Texas & P. Ry. Co. v. Short, Civ.App., 62 S.W.2d 995, error refused.

Wash.—Cross v. Spokane, P. & S. Ry. Co., 291 P. 336, 158 Wash. 428, 71 A.L.R. 451, certiorari denied Spokane, P. & S. Ry. Co. v. Cross, 51 S.Ct. 345, 283 U.S. 821, 75 L.Ed. 1436.

Lack of general assumption of risk

(1) Under the act, employment does not involve the employee in a general assumption of risk resulting from the negligence of his co-employees.

U.S.—Owens v. Union Pac. R. Co., Wash., 63 S.Ct. 1271, 319 U.S. 715, 87 L.Ed. 1683, conformed to C.C.A., 142 P.2d 145, certiorari denied 65 S.Ct. 57, 323 U.S. 740, 89 L.Ed. 593.

Ala.—Louisville & N. R. Co. v. Parker, 138 So. 231, 223 Ala. 626, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501.

(2) Employee does not assume the risk of fellow servants' negligence merely by accepting or continuing in employment or by conduct in a particular situation which amounts to no more than contributory negligence.—Owens v. Union Pac. R. Co., supra.

(3) There is no contractual assumption of risk of negligence of fellow servant.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434.

Negligence of company's superior officer or agents

Tenn.—Alabama Great Southern Ry. Co. v. Hale, 15 Tenn.App. 369.

Negligence of foreman

Mo.—Kamer v. Missouri-Kansas-Texas R. Co., 32 S.W.2d 1075, 326 Mo. 792, certiorari denied Missouri-Kansas-Texas R. Co. v. Kamer, 51 S.Ct. 216, 282 U.S. 903, 75 L.Ed. 795—Holman v. St. Louis-San Francisco Ry. Co., 278 S.W. 1000, 312 Mo. 342.

Tenn.—Cincinnati, N. O. & T. P. Ry. Co. v. Frady, 139 S.W.2d 417, 24 Tenn.App. 38—Alabama Great Southern Ry. Co. v. Hale, 15 Tenn. App. 369.

Tex.—Texas & Pac. Ry. Co. v. Kelly, Civ.App., 35 S.W.2d 749, reversed on other grounds, Com.App., 51 S.W.2d 299, certiorari denied Kelly v. Texas & P. R. Co., 53 S.Ct. 90, 287 U.S. 644, 71 L.Ed. 557.

Unusual negligent act

U.S.—Pitcairn v. Devlin, C.C.A.Ohio, 111 F.2d 735.

N.C.—McCrowell v. Southern Ry. Co., 20 S.E.2d 352, 221 N.C. 366.

Negligence which could not have been foreseen or expected by injured employee

U.S.—Reed v. Director General of Railroads, Pa., 42 S.Ct. 191, 258 U.S. 92, 66 L.Ed. 480.

Colo.—Denver & Salt Lake Ry. Co. v. Granier, 89 P.2d 245, 104 Colo. 131.

Ill.—Williams v. Southern Ry. Co., 258 Ill.App. 34.

Mo.—O'Donnell v. Baltimore & O. R. Co., 26 S.W.2d 929, 324 Mo. 1097.

N.J.—Deputla v. Pennsylvania R. Co., 166 A. 87, 110 N.J.Law 515, certiorari denied Pennsylvania R. Co. v. Deptula, 54 S.Ct. 62, 290 U.S. 643, 78 L.Ed. 559.

Pa.—Fox v. Lehigh Valley R. Co., 141 A. 157, 292 Pa. 321.

Tenn.—Alabama Great Southern Ry. Co. v. Hale, 15 Tenn.App. 369.

Utah.—Fogg v. Oregon Short Line R. Co., 1 P.2d 954, 78 Utah 105.

Wash.—Rasmussen v. Twin Harbor Stevedoring & Tug Co., 265 P. 1085, 147 Wash. 260.

Injury received during emergency created by negligence of co-worker

Ill.—Adams v. Chicago & E. R. Co., 41 N.E.2d 991, 314 Ill.App. 404.

W.Va.—Shiflett v. Western Maryland Ry. Co., 195 S.E. 849, 119 W.Va. 676—Webb v. Chesapeake & O. Ry. Co., 144 S.E. 100, 105 W.Va. 555, certiorari denied Chesapeake & O. R. Co. v. Webb, 49 S.Ct. 82, 278 U. S. 646, 73 L.Ed. 559.

Disobedience of positive signal

S.C.—Gillis v. Atlantic Coast Line R. Co., 179 S.E. 62, 175 S.C. 223,

statutes referring expressly to railroad employees;[16] but such a state statute does not apply where the employer is not a railroad company or engaged in railroading, as where it merely builds refrigerator cars and furnishes refrigerator service to corporations engaged in railroading;[17] and, according to some authorities, a railroad employee will be held, in an action not brought under a state or federal statute, to have assumed the risk of the negligence of a fellow servant.[18]

§ 367. —— Personal Direction of Work by Master

The risk of injury from the negligence of the master who is personally supervising and directing the work is not assumed by a servant.

A servant does not assume the risk of injury from the negligence of the master while the latter is personally supervising and directing the work,[19] especially where he has been assured that he may perform the work with safety.[20]

§ 368. —— Concurrent Negligence of Master and Fellow Servant

A servant does not assume the risk of injury from the concurrent negligence of the master and a fellow servant.

A servant does not assume the risk of injury from the concurrent negligence of the master and a fellow servant.[21]

§ 369. —— Noncompliance with Statutory Requirements for Safety of Servant

a. Statutes expressly abrogating defense
b. Statutes not expressly abrogating defense

a. Statutes Expressly Abrogating Defense

The express provisions of some federal and state statutes preclude application of the doctrine of assumption of risk where the employer's violation of a statute enacted for the safety of employees contributed to the death or injury of an employee.

Under the Federal Employers' Liability Act § 4, 45 U.S.C.A. § 54, an employee shall not be held to have assumed the risks of his employment in any case where the violation by the common carrier of any statute enacted for the safety of employees contributed to the death or injury of the employee,[22] that is, where the carrier's violation of a federal safety act,[23] such as the Boiler Inspection Act[24]

certiorari denied Atlantic Coast Line R. Co. v. Gillis, 55 S.Ct. 545, 294 U.S. 718, 79 L.Ed. 1251.

Following unapproved method
Under a contract of employment, it is implied that employee will obey lawful rules, orders, and instructions which promote his safety, and where the employer has adopted an approved method for doing hazardous work, the burden of assumption of risk as to the method followed by other employees is removed, except as to the approved method.—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531.

Prior to amendment of act
The opinion was expressed in one case that, prior to the amendment of the act, the fact that the injury arose from the negligence of a fellow servant had little to do with the application of the doctrine of assumption of risk, the negligence of a fellow employee neither barring nor aiding assumption of risk.—McCrowell v. Southern Ry. Co., 20 S.E. 2d 352, 221 N.C. 336.

Where coemployee is not negligent there is no room for application of any rule as to the assumption of the risk of his negligence.
Iowa.—Kempe v. Illinois Cent. R. Co., 232 N.W. 657, 211 Iowa 812, 74 A.L.R. 148.
Neb.—Laf Ferry v. Chicago, B. & Q. R. Co., 206 N.W. 737, 114 Neb. 219.

16. Fla.—Atlantic Coast Line R. Co. v. Fogleman, 158 So. 108, 117 Fla. 334.
Ga.—Atlanta & B. Air Line R. Co. v. McManus, 58 S.E. 258, 1 Ga.App. 302.
Mo.—Hogue v. St. Louis-San Francisco Ry. Co., App., 20 S.W.2d 301.
39 C.J. p. 718 note 13, p. 720 note 41.

17. Fla.—Fruit Growers' Express Co. v. Norton, 116 So. 234, 95 Fla. 429.

18. N.Y.—Lorenz v. Erie R. Co., 214 N.Y.S. 672, 216 App.Div. 246.
39 C.J. p. 718 note 12, p. 720 note 40.

19. Ark.—Neely v. Goldberg, 114 S. W.2d 455, 195 Ark. 790.
39 C.J. p. 700 note 69.

20. Ill.—Nix v. Brunswick-Balke-Collender Co., 191 Ill.App. 503.
Assurances or representations of master as affecting assumption of risk generally see infra §§ 404–406.

21. W.Va.—Humphreys v. Raleigh Coal & Coke Co., 80 S.E. 803, 73 W. Va. 495, L.R.A.1916C 1270.
39 C.J. p. 700 note 71.
Assumption of risk of negligence of fellow servant see supra § 362.
Liability of master for servant's injury caused by concurrent negligence of master and fellow servant see supra § 356.

22. U.S.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Goneau, Minn., 46 S. Ct. 129, 269 U.S. 406, 70 L.Ed. 335.
Ark.—St. Louis-San Francisco Ry. Co. v. Childers, 124 S.W.2d 964, 197 Ark. 527.
Cal.—Qualls v. Atchison, T. & S. F. Ry. Co., 296 P. 645, 112 Cal.App. 7.
Ga.—Southern Ry. Co. v. Heaton, 6 S.E.2d 339, 61 Ga.App. 386—Edwards v. Southern Ry. Co., 184 S.E. 370, 52 Ga.App. 557—Brady v. Bugg, 142 S.E. 304, 38 Ga.App. 48.
Ohio.—Baltimore & O. R. Co. v. Shober, 176 N.E. 88, 38 Ohio App. 216.
Pa.—Fitzgerald v. Pennsylvania R. R., 184 A. 299, 121 Pa.Super. 461.
Tenn.—Peters v. Tennessee Cent. Ry., 167 S.W.2d 973, 179 Tenn. 509.
39 C.J. p. 700 note 74.

23. U.S.—Kansas City Southern Ry. Co. v. Williford, C.C.A.La., 65 F.2d 223, certiorari denied Williford v. Kansas City Southern Ry. Co., 54 S.Ct. 87, 290 U.S. 666, 78 L.Ed. 576.
Tenn.—Cincinnati, N. O. & T. P. Ry. Co. v. Brown, 12 S.W.2d 381, 158 Tenn. 75—Cincinnati, N. O. & T. P. Ry. Co. v. Frady, 139 S.W.2d 417, 24 Tenn.App. 38.

24. U.S.—Lilly v. Grand Trunk Western R. Co., Ill., 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411—McCarthy v. Pennsylvania R. Co., C. C.A.Ind., 156 F.2d 877.
N.C.—Gerow v. Seaboard Air Line Ry., 128 S.E. 345, 189 N.C. 813, certiorari denied Seaboard Air Line

or the Safety Appliance Act,[25] contributed to the death or injury of the employee; and this is true irrespective of the employee's knowledge of the violation of the statute;[26] but the provision refers to federal, rather than state, statutes,[27] and it is not accorded effect where there has been no violation of a federal safety statute.[28] Under § 8 of the Safety Appliance Act, 45 U.S.C.A. § 7, any employee injured by any locomotive, car, or train in use contrary to the provisions of the act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.[29]

Under the express provision of some state statutes the defense of assumption of risk is abrogated where the master has violated the provisions of a statute in respect of duties imposed on him thereby for the safety of his servants.[30] Further, aside from these express provisions, where the statute also imposes a penalty for violation thereof, there can be no assumption of risk, it has been said, by contract, either express or implied, because a contract of this character is against public policy.[31] Where these statutes are in force, an employee cannot assume a risk consequent on his employer's neglect of the statutory duty imposed in the exercise of the police power, notwithstanding his knowledge of the master's breach of duty and the consequent danger.[32] These statutes are of no avail unless the master has violated a statute enacted for the safety of employees[33] and such violation has contributed to the injury or death of the employee.[34]

b. Statutes Not Expressly Abrogating Defense

Noncompliance by an employer with a statute requiring him to take designated precautions for the protection and safety of his employees deprives him of the defense of assumption of risk even though it is not expressly so provided by statute.

Notwithstanding some authority to the contrary,[35] the weight of authority supports the rule that, where statutes require employers to take designated precautions for the protection and safety of their employees, a noncompliance therewith operates to deprive them of the defense of assumption of risk, although the statutes contain no express provision to that effect.[36] The rule applies whether the statute takes the form of a command to furnish safe

Ry. Co. v. Gerow, 46 S.Ct. 121, 269 U.S. 584, 70 L.Ed. 425.

25. U.S.—Erie R. Co. v. Irons, C.C.A. N.J., 48 F.2d 60, certiorari denied 51 S.Ct. 649, 283 U.S. 857, 75 L.Ed. 1463—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F.Supp. 154.
N.J.—Oelfke v. Hudson & M. R. Co., 135 A. 659, 5 N.J.Misc. 2.

26. U.S.—McCarthy v. Pennsylvania R. Co., C.C.A.Ind., 156 F.2d 877.
39 C.J. p. 295 note 89[b].
Knowledge as affecting assumption of risk in general see infra §§ 379–392.

27. U.S.—Gilmer v. Yazoo & M. V. R. Co., C.C.A.Mass., 4 F.2d 963, certiorari denied 45 S Ct. 639, 268 U.S. 705, 69 L.Ed. 1167.
39 C.J. p. 690 notes 78, 79.

28. U.S.—New York, C. & St. R. Co. v. Kelly, C.C.A.Ind., 70 F.2d 548, certiorari denied Kelly v. New York, C. & St. L. R. Co., 55 S.Ct. 110, 293 U.S. 595, 79 L.Ed. 689—Erie R. Co. v. Lindquist, C.C.A.Pa., 27 F.2d 98.
Pa.—Pursglove v. Monongahela Ry. Co., 131 A. 477, 285 Pa. 27, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 783.
39 C.J. p. 700 note 74[a], [b].

29. Okl.—Essary v. Lowden, 116 P. 2d 712, 189 Okl. 257, certiorari denied 62 S.Ct. 489, 315 U.S. 798, 86 L.Ed. 1199, rehearing denied 62 S. Ct. 638, 315 U.S. 828, 86 L.Ed. 1223.
39 C.J. p. 295 note 89, p. 701 note 76.

Brakes
Under Federal Employers' Liability and Safety Appliance Acts, brakeman assumed risk of operating hand brake as located on box car, but did not assume any additional hazard by reason of any looseness, defect, or inefficient brake assembly.—Karberg v. Southern Pac. Co., 52 P.2d 285, 10 Cal.App.2d 234.

30. Ark.—Barksdale v. Silica Products Co., 137 S.W.2d 901, 200 Ark. 32.
39 C.J. p. 701 note 77.

31. Vt.—Kilpatrick v. Grand Trunk R. Co., 52 A. 531, 74 Vt. 288, 93 Am.S.R. 887.

32. Ohio.—Lee v. Standard Tool Co., 33 Ohio Cir.Ct. 54, affirmed 94 N.E. 1115, 83 Ohio St. 501.
39 C.J. p. 701 note 79.
Knowledge as affecting assumption of risk generally see infra §§ 379–392.

33. Ark.—Barksdale v. Silica Products Co., 137 S.W.2d 901, 200 Ark. 32.
Ky.—Cincinnati, N. O. & T. P. Ry. Co. v. Gossett, 18 S.W.2d 986, 230 Ky. 240.
Minn.—Kaminski v. Chicago, M., St. P. & P. R. Co., 231 N.W. 189, 180 Minn. 519, certiorari denied 51 S. Ct. 78, 282 U.S. 872, 75 L.Ed. 770.
39 C.J. p. 701 note 77[i].

34. Ark.—Barksdale v. Silica Products Co., 137 S.W.2d 901, 200 Ark. 32.
Conn.—Farley v. New York, N. H. & H. R. Co., 91 A. 650, 88 Conn. 409.

35. R.I.—Langlois v. Dunn Worsted Mills 57 A. 910, 25 R.I. 645.
39 C.J. p. 295 note 87, p. 704 note 8.

36. U.S.—**Corpus Juris cited in** Michalek v. U. S. Gypsum Co., D.C. N.Y., 16 F.Supp. 708, 709.
Kan.—Thoman v. Farmers & Bankers Life Ins. Co., 130 P.2d 551, 155 Kan. 806.
Ky.—Royal Collieries Co. v. Wells, 50 S.W.2d 948, 244 Ky. 303.
Mo.—Dodd v. Independence Stove & Furnace Co., 51 S.W.2d 114, 330 Mo. 662—Maurizi v. Western Coal & Mining Co., 11 S.W.2d 268, 321 Mo. 378—Langeneckert v. St. Louis Sulphur & Chemical Co., App., 65 S.W.2d 648—Mabe v. Gille Mfg. Co., 271 S.W. 1023, 219 Mo.App. 234.
Or.—Freeman v. Wentworth & Irwin, 7 P.2d 796, 139 Or. 1.
Tenn.—Holliston Mills of Tennessee v. McGuffin, 145 S.W.2d 1, 177 Tenn. 1, rehearing denied 146 S.W. 2d 357, 177 Tenn. 1.
Tex.—**Corpus Juris cited in** Jones v. Ross, 173 S.W.2d 1022, 1024, 141 Tex. 415.
Va.—Atlantic Coast Line R. Co. v. Bell, 141 S.E. 838, 149 Va. 720.
Wash.—Hatcher v. Globe Union Mfg. Co., 16 P.2d 824, 170 Wash. 494.
Wis.—Mennetti v. West Side Businessmen's Ass'n, 18 N.W.2d 487, 246 Wis. 586.
39 C.J. p. 295 note 88, p. 701 note 82.
Violation of statutes designed for

appliances or is an express prohibition against furnishing unsafe or improper appliances;[37] and its operation is not affected by the fact that the noncompliance with the statute by the master[38] and the dangers resulting therefrom[39] were obvious, or that the servant had actual knowledge that the master had not complied with the statute[40] and continued to work with knowledge of such violation and an appreciation of the dangers.[41] If the rule were otherwise, the statutes would be of no effect whatever.[42] Also it has been held or recognized that the rule applies, although the servant continued to work in violation of rules promulgated by the employer in evasion of the statute,[43] or voluntarily adopted an unsafe way of work where a safe way existed.[44]

The rule has been applied in cases of noncompliance with statutory requirements to erect "tell tales" within a specified distance from the approach of an overhead bridge,[45] to equip locomotives properly with headlights,[46] to provide cars with automatic couplers,[47] to provide a safe roadbed,[48] to furnish proper fire escapes,[49] to hire competent servants,[50] to establish and maintain a code of elevator signals,[51] to furnish an efficient alarm to a train in a mine,[52] to furnish sufficient timbers for

protection of minors see infra § 419.

Reason for rule is that assumption of risk is a result of the contract of employment and that it is unlawful and against public policy for parties to contract, either expressly or impliedly, to violate a statute enacted by the state in the exercise of its police power for the protection of its citizens.
Tenn.—Tennessee Eastman Corporation v. Newman, 121 S.W.2d 130, 22 Tenn.App. 270.
Wash.—Kelly v. The Vogue, 153 P.2d 277, 21 Wash.2d 785.
39 C.J. p. 703 note 91.

In Minnesota

(1) A rule to the contrary obtained at one time.—Anderson v. C. N. Nelson Lumber Co., 69 N.W. 630, 67 Minn. 79—39 C.J. p. 704 note 8.

(2) However, in view of a change in public policy, Anderson v. C. N. Nelson Lumber Co., supra, and cases following it, have been overruled.—Suess v. Arrowhead Steel Products Co., 230 N.W. 125, 180 Minn. 21.

In New York

(1) It was formerly the rule that statutes of the character under consideration did not affect the right of the master to set up the defense of assumption of risk.—Knisley v. Pratt, 42 N.E. 986, 148 N.Y. 372, 32 L.R.A. 367—39 C.J. p. 701 note 82[a] (1).

(2) But the rule is now in accordance with that stated in the text.—Fitzwater v. Warren, 99 N.E. 1042, 206 N.Y. 355, 42 L.R.A.,N.S., 1229—39 C.J. p. 701 note 82[a] (2).

(3) In a federal case involving violation of a New York statute, the later view was conformed to.—Michalek v. U. S. Gypsum Co., D.C. N.Y., 16 F.Supp. 708.

(4) In other federal cases, however, the former view was adhered to.—Kolenko v. Certain-Teed Products Corporation, D.C.N.Y., 20 F. Supp. 920—E. S. Higgins Carpet Co. v. O'Keefe, N.Y., 79 F. 900, 255 C. C.A. 220.

37. N.Y.—Christiensen v. Morse Dry Dock & Repair Co., 167 N.Y. S. 57, 179 App.Div. 825.
Tex.—**Corpus Juris quoted in** Ross v. Jones, Civ.App., 166 S.W.2d 169, 172, reversed on other grounds Jones v. Ross, 173 S.W.2d 1022, 141 Tex. 415.

Particular methods or appliances

Whether mandatory statute prescribes, or leaves employer to adopt, the particular methods or appliances for carrying out its purpose is immaterial.—Atlantic Coast Line R. Co. v. Bell, 141 S.E. 838, 149 Va. 720.

38. Pa.—Louth v. N. Z. Graves, 21 Pa.Dist. 1045.
Tex.—**Corpus Juris quoted in** Ross v. Jones, Civ.App., 166 S.W.2d 169, 172, reversed on other grounds Jones v. Ross, 173 S.W.2d 1022, 141 Tex. 415.

39. Tex.—**Corpus Juris quoted in** Ross v. Jones, Civ.App., 166 S.W. 2d 169, 172, reversed on other grounds Jones v. Ross, 173 S.W.2d 1022, 141 Tex. 415.
39 C.J. p. 703 note 85.

40. U.S.—Michalek v. U. S. Gypsum Co., D.C.N.Y., 16 F.Supp. 708.
Tenn.—Tennessee Eastman Corporation v. Newman, 121 S.W.2d 130, 22 Tenn.App. 270.
Tex.—**Corpus Juris quoted in** Ross v. Jones, Civ.App., 166 S.W.2d 169, 172, reversed on other grounds Jones v. Ross, 173 S.W.2d 1022, 141 Tex. 415.
39 C.J. p. 703 note 86.
Knowledge as affecting assumption of risk in general see infra §§ 379–392.

41. Minn.—Fredrickson v. Arrowhead Co-op. Creamery Ass'n, 277 N. W. 345, 202 Minn. 12.
Tex.—**Corpus Juris quoted in** Ross v. Jones, Civ.App., 166 S.W.2d 169, 172, reversed on other grounds Jones v. Ross, 173 S.W.2d 1022, 141 Tex. 415.
39 C.J. p. 703 note 87.
Continuing to work after knowledge of danger generally see infra §§ 393–397.

42. Tex.—**Corpus Juris quoted in** Ross v. Jones, Civ.App., 166 S.W. 2d 169, 172, reversed on other grounds Jones v. Ross, 173 S.W.2d 1022, 141 Tex. 415.
39 C.J. p. 703 note 88.

43. Tex.—**Corpus Juris quoted in** Ross v. Jones, Civ.App., 166 S.W.2d 169, 172, reversed on other grounds Jones v. Ross, 173 S.W.2d 1022, 141 Tex. 415.
39 C.J. p. 703 note 89.
Employee's disobedience of rules as affecting assumption of risk generally see infra § 410.

44. Ind.—Sare v. Hoadley Stone Co., 105 N.E. 582, 57 Ind.App. 464.
Tex.—**Corpus Juris quoted in** Ross v. Jones, Civ.App., 166 S.W.2d 169, 172, reversed on other grounds Jones v. Ross, 173 S.W.2d 1022, 141 Tex. 415.
Assumption of risk by selection of more hazardous method of work generally see infra § 390.

45. La.—Hailey v. Texas & P. R. Co., 37 So. 131, 113 La. 533.

46. Ark.—St. Louis, I. M. & P. R. Co. v. White, 125 S.W. 120, 93 Ark. 368.

47. Mich.—Betterly v. Boyne City, G. & A. R. Co., 122 N.W. 635, 158 Mich. 385.
39 C.J. p. 703 note 3.

48. Ark.—McCarty v. Nelson, 195 S.W. 689, 129 Ark. 280.

49. La.—Dotson v. Louisiana Cent. Lumber Co., 80 So. 205, 144 La. 78.

50. Mich.—Wallin v. Arcadia & B. R. Co., 138 N.W. 270, 172 Mich. 466.

51. Ind.—Island Coal Co. v. Swaggerty, 62 N.E. 1103, 159 Ind. 664, rehearing denied 65 N.E. 1026, 159 Ind. 664.

52. Pa.—McCollom v. Pennsylvania Coal Co., 95 A. 380, 250 Pa. 27.

mining purposes,[53] to maintain sufficient space in a mine entrance to permit the driver of a car to keep clear of cars,[54] to adopt and provide approved and effective devices, means, or methods for the prevention of such industrial or occupational diseases as are incident to the work, trade, or process engaged in by the employer,[55] to ventilate properly mines, factories, workrooms, or other places of work,[56] to provide mechanical means or devices for carrying off dust, fumes, or gases,[57] to take precautions against fire damp,[58] or to provide suitable guards for machinery.[59] Of course, if the statute in question is not applicable, and hence has not been violated, the rule does not apply.[60]

§ 370. —— Noncompliance with Statutes Not Designed Solely for Protection of Servant

Public policy may forbid an employee from assuming a risk created by a violation of a statute or a rule or regulation having the effect of law.

Public policy may forbid an employee from assuming a risk created by violation of a statute or rule or regulation having the effect of law.[61] An ordinance requiring all stairs to be provided with handrails is clearly for the protection of both employees and the public rightfully in buildings and is as effective to abolish the assumption of risk as a statute would be.[62]

Statutes directed to railroad companies. It has been held that, although a statute requires railroad companies to fence their rights of way and maintain cattle guards, and provides that a noncompliance with the statute shall render a railroad company liable for all damages sustained by any person in consequence thereof, a servant who is injured by reason of a noncompliance with the statutory duty assumes the risk if he entered and continued in the service knowing that the road was not fenced;[63] but the opposite conclusion has also been reached.[64] Likewise, it has been held that statutes which prohibit the running of trains within corporate limits in excess of a designated rate of speed are intended for the benefit of employees as well as the general public, and that a servant does not assume the risk of injury for a violation of this statute where he did not know that it was customarily violated;[65] and, on the other hand, that if he does know that the statute is customarily violated he does assume the risk of injury.[66]

§ 371. Ordinary Risks

The ordinary risks of an employment are those which are normally and necessarily incident thereto, and which cannot be obviated or avoided by the exercise of due care on the part of the master.

The ordinary risks of an employment are those which are normally[67] and necessarily[68] incident thereto, without negligence on the part of the master.[69] They are such as are to be expected from the

53. Ark.—Brown v. Hames, 179 S.W. 2d 689, 207 Ark. 196.
39 C.J. p. 703 note 97.

54. Pa.—Smith v. Stoner, 89 A. 795, 243 Pa. 57.

55. Mo.—Langeneckert v. St. Louis Sulphur & Chemical Co., App., 65 S.W.2d 648.

56. U.S.—Michalek v. U. S. Gypsum Co., D.C.N.Y., 16 F.Supp. 708.
Minn.—Clark v. Banner Grain Co., 261 N.W. 596, 195 Minn. 44.
Wash.—Pellerin v. Washington Veneer Co., 2 P.2d 658, 163 Wash. 555—Depre v. Pacific Coast Forge Co., 276 P. 89, 151 Wash. 430.
39 C.J. p. 703 note 2.

57. Pa.—Price v. New Castle Refractories Co., 3 A.2d 418, 332 Pa. 507—Plazak v. Allegheny Steel Co., 188 A. 130, 324 Pa. 422.
Tenn.—Steiner v. Spencer, 145 S.W. 2d 547, 24 Tenn.App. 389—Tennessee Eastman Corporation v. Newman, 121 S.W.2d 130, 22 Tenn. App. 270.

58. Kan.—Cheek v. Missouri, K. & T. R. Co., 131 P. 617, 89 Kan. 247.

59. Mo.—Grott v. Johnson, Stephens & Shinkle Shoe Co., 2 S.W.2d 785.
Va.—Atlantic Coast Line R. Co. v. Bell, 141 S.E. 838, 149 Va. 720.
39 C.J. p. 703 note 5.

60. U.S.—Pieczonka v. Pullman Co., C.C.A.N.Y., 89 F.2d 353.

61. U.S.—Continental Casualty Co. v. Shankel, C.C.A.Okl., 88 F.2d 819.

62. Wash.—Kelly v. The Vogue, 153 P.2d 277, 21 Wash.2d 785.

63. Minn.—Fleming v. St. Paul & Duluth R. Co., 6 N.W. 448, 27 Minn. 111.
39 C.J. p. 704 note 9.

64. Wis.—Jacoby v. Chicago, M. & St. P. R. Co., 161 N.W. 751, 164 N.W. 88, 165 Wis. 610—Quackenbush v. Wisconsin & M. R. Co., 37 N.W. 834, 71 Wis. 472.

65. Iowa.—Girl v. U. S. Railroad Administration, 189 N.W. 834, 194 Iowa 1382—Camp v. Chicago Great Western R. Co., 99 N.W. 735, 124 Iowa 238.

66. Iowa.—Martin v. Chicago, etc., R. Co., 91 N.W. 1034, 118 Iowa 148, 96 Am.S.R. 371, 59 L.R.A. 698.

67. Ga.—Southern Ry. Co. v. Blanton, 10 S.E.2d 430, 63 Ga.App. 93—Southern Ry. Co. v. Blanton, 192 S.E. 437, 56 Ga.App. 232.
Tenn.—Peters v. Tennessee Cent. Ry., 167 S.W.2d 973, 179 Tenn. 503.
Risks regularly connected with employee's regular occupation
La.—Snow v. Texas & P. Ry. Co., App., 166 So. 200.

68. Ga.—Southern Ry. Co. v. Blanton, 10 S.E.2d 430, 63 Ga.App. 93—Southern Ry. Co. v. Blanton, 192 S.E. 437, 56 Ga.App. 232.
Risks directly connected with employment
N.J.—Emerick v. Slavonian Roman Greek Catholic Union, 108 A. 223, 93 N.J.Law 282.

69. Ga.—Emanuel v. Georgia, etc. R. Co., 83 S.E. 230, 142 Ga. 453—Roberts v. Ethridge, 36 S.E.2d 883, 73 Ga.App. 400—Pollard v. Weeks, 4 S.E.2d 722, 60 Ga.App. 664—Simowitz v. Register, 3 S.E.2d 231, 60 Ga.App. 180.
Ky.—Royal Collieries Co. v. Wells, 50 S.W.2d 948, 244 Ky. 303.
Mo.—State ex rel. St. Louis-San Francisco Ry. Co. v. Cox, 46 S.W. 2d 849, 329 Mo. 292.
39 C.J. p 705 note 15[a].
Risks arising from negligence of master or fellow servant as not constituting ordinary risks or in-

particular character of the service in which the employee is engaged[70] and as cannot be obviated or avoided by the exercise of due care on the part of the master,[71] or, in other words, they are the risks which remain after the master, or one rightly exercising the authority of the master, has exercised due care to prevent or avoid them.[72]

§ 372. —— Rule as to Assumption of Such Risks

a. In general

b. Dangerous or extrahazardous character of employment

c. Maturity, experience, or infirmity of employee

a. In General

It is a general common-law rule that a servant assumes all the risks which are ordinarily incident to his employment and which are not attributable to the master's negligence.

In the absence of an agreement to the contrary,[73] and except as the rule is modified by statute,[74] a servant by his contract of employment, either expressly or impliedly from the circumstances of the employment, agrees to assume all the risks ordinarily or obviously incident to the discharge of his duties in the particular employment[75] and which are

cidents of employment see supra §§ 362–366.

70. N.C.—McCrowell v. Southern Ry. Co., 20 S.E.2d 352, 221 N.C. 366.
S.C.—**Corpus Juris quoted in** Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 43, 184 S.C. 471—**Corpus Juris quoted in** Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 443, 158 S.C. 194, certiorari denied Atlantic Coast Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.
39 C.J. p. 704 note 14.

Accident which does not result from very nature of work involved does not occur out of an ordinary risk.—McDonald v. Levinson Steel Co., 153 A. 424, 302 Pa. 287.

Risks inseparable from service
Ordinary risks are such as are inseparable from the service and inhere in the nature of the work.—Royal Collieries Co. v. Wells, 50 S.W.2d 948, 244 Ky. 303.

71. U.S.—Atlantic Ice & Coal Corp. v. Van, C.C.A.Tenn., 276 F. 646.
N.C.—McCrowell v. Southern Ry. Co., 20 S.E.2d 352, 221 N.C. 366.
S.C.—**Corpus Juris quoted in** Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 43, 184 S.C. 471—**Corpus Juris quoted in** Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 443, 158 S.C. 194, certiorari denied Atlantic Coast Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.

72. Ga.—Roberts v. Ethridge, 36 S.E.2d 883, 73 Ga.App. 400.
N.C.—McCrowell v. Southern Ry. Co., 20 S.E.2d 352, 221 N.C. 366.
S.C.—**Corpus Juris quoted in** Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 43, 184 S.C. 471—**Corpus Juris quoted in** Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 443, 158 S.C. 194, certiorari denied Atlantic Coast Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.
39 C.J. p 705 note 15.

73. Kan.—**Corpus Juris quoted in** Hunter v. Barnsdall Refining Co., 268 P. 86, 88, 126 Kan. 277.
Utah.—**Corpus Juris cited in** Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 1059, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.
39 C.J. p. 705 note 20.

Assumption by employer of risk of specific danger about which employee complained was not assumption by employer of ordinary risks incident to business.—Rork v. Klein, 221 N.W. 460, 206 Iowa 809, 60 A.L.R. 469.

74. Ala.—Boggs v. Alabama Cons. Coal & Iron Co., 52 So. 878, 167 Ala. 251, 140 Am.S.R. 28.
39 C.J. p. 710 note 41.
Effect of Federal Employers' Liability Act and amendment thereto see infra § 378.

Statutes held not to abolish rule
Miss.—Meridian Laundry Co. v. James, 195 So. 689, 190 Miss. 119.
Tex.—Rio Bravo Oil Co. v. Matthews, Civ.App., 29 S.W.2d 342.
39 C.J. p. 710 note 41[a].

75. U.S.—Herrin Motor Lines v. Jarvis, C.C.A.Miss., 156 F.2d 276—Holliday v. Fulton Band Mill, C.C.A.Miss., 142 F.2d 1006—Wheelock v. Friewald, C.C.A.Mo., 66 F.2d 694—New York, C. & St. L. R. Co. v. Boulden, C.C.A.Ind., 63 F.2d 917, certiorari denied 53 S.Ct. 785, 289 U.S. 753, 77 L.Ed. 1498—W. J. McCahan Sugar Refining & Molasses Co. v. Stoffel, C.C.A.Pa., 41 F.2d 651—Chicago, M., St. P. & P. R. Co. v. Busby, C.C.A.Mont., 41 F.2d 617—Wagner Electric Corporation v. Snowden, C.C.A.Mo., 38 F.2d 599—Standard Oil Co. of Louisiana v. Martin, C.C.A.Ark., 21 F.2d 912—Kane v. Federal Match Corporation, D.C.Pa., 5 F.Supp. 507.
Ark.—Hall v. Patterson, 166 S.W.2d 667, 205 Ark. 10—Haynes Drilling Corporation v. Smith, 143 S.W.2d 27, 200 Ark. 1098—Lee v. Pate, 131 S.W.2d 8, 198 Ark. 723—Federal Compress & Warehouse Co. v. Harmon, 118 S.W.2d 239, 196 Ark. 417—L. C. Burr & Co. v. Greenlee, 102 S.W.2d 77, 193 Ark. 705—Manhattan Const. Co. v. Atkisson, 88 S.W.2d 819, 191 Ark. 920—McEachin & McEachin Const. Co. v. Burks, 75 S.W.2d 794, 189 Ark. 947—Missouri Pac. R. Co. v. Montgomery, 55 S.W.2d 68, 186 Ark. 537, certiorari denied 53 S.Ct. 690, 289 U.S. 747, 77 L.Ed. 1493—Fraser v. Norman, 42 S.W.2d 569, 184 Ark. 434—Rice & Holiman v. Henderson, 35 S.W.2d 1016, 183 Ark. 355—Mississippi River Fuel Corporation v. Morris, 35 S.W.2d 607, 183 Ark. 207—Owosso Mfg. Co. v. Drennan, 31 S.W.2d 762, 182 Ark. 389—Seaman-Dunning Corporation v. Haralson, 29 S.W.2d 1085, 182 Ark. 93—Federal Compress & Warehouse Co. v. Parrott, 28 S.W.2d 728, 181 Ark. 946—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056—Southwest Power Co. v. Price, 22 S.W.2d 373, 180 Ark. 567, certiorari denied 50 S.Ct. 353, 281 U.S. 753, 74 L.Ed. 1163, and appeal dismissed 50 S.Ct. 407, 281 U.S. 703, 74 L.Ed. 1128—Wisconsin & Arkansas Lumber Co. v. Otts, 10 S.W.2d 364, 178 Ark. 283—Temple Cotton Oil Co. v. Skinner, 2 S.W.2d 676, 176 Ark. 17—Chicago, R. I. & P. Ry. Co. v. Allison, 287 S.W. 197, 171 Ark. 983—Breece-White Mfg. Co. v. Green, 287 S.W. 173, 171 Ark. 968—Western Coal & Mining Co. v. Burns, 272 S.W. 357, 168 Ark. 976.
Cal.—Slyter v. Clinton Const. Co. of California, 290 P. 643, 107 Cal.App. 348—Dick v. Atchison, T. & S. F. Ry. Co., 287 P. 538, 105 Cal.App. 363.
Colo.—Denver & S. L. Ry. Co. v. Lombardi, 287 P. 648, 87 Colo. 311, certiorari denied 51 S.Ct. 37, 282 U.S. 865, 75 L.Ed. 765.
Fla.—Gordon v. Gandy Bridge Co., 7 So.2d 350, 150 Fla. 28.
Ga.—Pollard v. Weeks, 4 S.E.2d 722,

not attributable to the master's negligence;[76] and the master is not liable for an injury to the servant

60 Ga.App. 664—Bowers v. Louisville & N. R. Co., 127 S.E. 667, 33 Ga.App. 692.
Ill.—Benson v. Chicago, R. I. & P. Ry. Co., 267 Ill.App. 11, affirmed Chicago, R. I. & P. Ry. Co. v. Benson, 185 N.E. 244, 352 Ill. 195, certiorari denied 54 S.Ct. 53, 290 U.S. 636, 78 L.Ed. 553—Genzel v. New York, C. & St. L. R. Co., 261 Ill. App. 176—Worthey v. Cleveland, C., C. & St. L. Ry. Co., 251 Ill.App. 585.
Ind.—New York, C. & St. L. R. Co. v. Peele, 164 N.E. 705, 88 Ind.App. 532, certiorari denied 49 S.Ct. 263, 279 U.S. 842, 73 L.Ed. 988.
Iowa.—Anderson v. Sheuerman, 6 N. W.2d 125, 232 Iowa 705—Rehard v. Miles, 290 N.W. 702, 227 Iowa 1290—Laws v. Richards, 231 N.W. 321, 210 Iowa 608.
Kan.—Barnaby v. Sears, Roebuck & Co., 295 P. 715, 132 Kan. 447—**Corpus Juris quoted in** Hunter v. Barnsdall Refining Co., 268 P. 86, 88, 126 Kan. 277.
Ky.—Louisville & N. R. Co. v. Smith, 155 S.W.2d 28, 287 Ky. 671—Breslin v. Blair, 60 S.W.2d 637, 249 Ky. 178—Royal Collieries Co. v. Wells, 50 S.W.2d 948, 244 Ky. 303—Big Sandy & C. R. Co. v. Measell's Adm'r, 42 S.W.2d 747, 240 Ky. 571—Chesapeake & O. Ry. Co. v. Craig, 17 S.W.2d 224, 229 Ky. 365—Cincinnati, N. O. & T. P. Ry. Co. v. Owens, 11 S.W.2d 131, 226 Ky. 472—Green v. Pennsylvania R. Co., 8 S.W.2d 418, 225 Ky. 243—Royal Collieries Co. v. Wells, 276 S.W. 515, 210 Ky. 600.
La.—Weadock v. Eagle Indemnity Co., App., 15 So.2d 132—Snow v. Texas & P. Ry. Co., App., 166 So. 200.
Minn.—Liberty Mut. Ins. Co. v. Great Northern Ry. Co., 219 N.W. 755, 174 Minn. 466.
Miss.—Crosby v. Burge, 1 So.2d 504, 190 Miss. 739.
Mo.—Smith v. Thompson, 182 S.W.2d 63—Davis v. City of Independence, 49 S.W.2d 95, 330 Mo. 201—Hoffman v. Peerless White Lime Co., 296 S.W. 764, 317 Mo. 86—Allen v. Missouri Pac. Ry. Co., 294 S.W. 80—Compton v. Louis Rich Const. Co., 287 S.W. 474, 315 Mo. 1068—Pietraschke v. Pollnow, App., 147 S.W.2d 167—Walls v. Thompson, App., 119 S.W.2d 43—Whiteley v. Eagle-Picher Lead Co., 115 S.W.2d 536, 232 Mo.App. 178—Sweeney v. Terminal R. Ass'n of St. Louis, App., 110 S.W.2d 852—Johnson v. Boaz-Kiel Const. Co., App., 22 S. W.2d 881—De Bastiani v. Lesser-Goldman Cotton Co., App., 297 S.W. 174—Woosley v. Wabash Ry. Co., App., 274 S.W. 871.
Neb.—Chambers v. Chicago, B. & Q. R. Co., 293 N.W. 338, 138 Neb. 490—Ahrens v. American Smelting & Refining Co., 272 N.W. 235, 132 Neb. 460.
N.H.—Fortier v. Concord Electric Co., 33 A.2d 801, 92 N.H. 492—Stone v. Howe, 32 A.2d 484, 92 N. H. 425—Perreault v. Allen Oil Co., 179 A. 365, 87 N.H. 306.
N.J.—Huels v. General Elec. Co., 46 A.2d 654, 134 N.J.Law 165—Clayton v. Ainsworth, 4 A.2d 274, 122 N.J.Law 160—Ducjack v. New Jersey Zinc Co., 141 A. 791, 104 N.J. Law 575—Cichocki v. Geigy Co., 183 A. 463, 14 N.J.Misc. 232.
N.C.—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112—Hubbard v. Southern Ry. Co., 166 S.E. 802, 203 N.C. 675—McCord v. Harrison-Wright Co., 153 S.E. 406, 198 N.C. 742.
Or.—Schnell v. Howitt, 76 P.2d 1130, 158 Or. 586—Christie v. Great Northern Ry. Co., 20 P.2d 377, 142 Or. 321—Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 136 Or. 18, certiorari denied Oregon-Washington R. & Nav. Co. v. Bevin, 52 S.Ct. 21, 284 U.S. 639, 76 L.Ed. 543.
Pa.—Keough v. MarKus, 173 A. 768, 114 Pa.Super. 80.
S.C.—Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259—Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 184 S.C. 471—Hice v. Dobson Lumber Co., 185 S.E. 742, 180 S.C. 259—Scott v. International Agr. Corporation, 184 S.E. 133, 180 S.C. 1—Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 158 S.C. 194.
S.D.—Breen v. Kreen, 225 N.W. 223, 55 S.D. 150—Bayer v. Chicago, B. & Q. R. Co., 220 N.W. 459, 53 S.D. 116.
Tenn.—Peters v. Tennessee Cent. Ry., 167 S.W.2d 973, 179 Tenn. 509—Nashville, C. & St. L. Ry. v. Pollard, 14 Tenn.App. 388.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Barnaby, Civ.App., 167 S.W. 235, error refused—Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, error dismissed, judgment correct—City of Timpson, Civ.App., 119 S.W.2d 145—Gilbert v. Mayer, Civ.App., 99 S.W.2d 1021—International-Great Northern R. R. v. Lowry, Civ.App., 98 S.W.2d 383, reversed on other grounds International-Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272—Hawthorne v. International-Great Northern R. Co., Civ.App., 63 S.W.2d 243, error refused—Houston & T. C. R. Co. v. Shepherd, Civ.App., 6 S.W.2d 410—Louisiana Ry. & Nav. Co. of Texas v. Disheroon, Civ.App., 295 S.W. 250—Amarillo Traction Co. v. Russell, Civ.App., 290 S.W. 905.
Utah.—**Corpus Juris cited in** Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 1059, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.
Vt.—Landing v. Town of Fairlee, 22 A.2d 179, 112 Vt. 127.
Va.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775—Norfolk & W. Ry. Co. v. Lumpkins, 144 S.E. 485, 151 Va. 173.
Wash.—McGinn v. North Coast Stevedoring Co., 270 P. 113, 149 Wash. 1—Lander v. Shannon, 268 P. 145, 148 Wash. 93.
W.Va.—State ex rel. Cashman v. Sims, 43 S.E.2d 805—Towns v. Monongahela Ry. Co., 144 S.E. 289, 105 W.Va. 572—Skidmore v. West Virginia & P. R. Co., 23 S.E. 713, 41 W.Va. 293.
Wyo.—Chicago & N. W. Ry. Co. v. Ott, 237 P. 238, 33 Wyo. 200, rehearing denied 238 P. 287, 33 Wyo. 200.
39 C.J. p. 705 note 21.
General limitation of risks assumed to those ordinarily incident to employment see supra § 361.

Ordinary risks and hazards incident to employment

Ark.—Bendum-Trees Oil Co. v. Sutton, 130 S.W.2d 720, 198 Ark. 699—Carson v. Dierks Lumber & Coal Co., 117 S.W.2d 39, 196 Ark. 163—Union Saw Mill Co. v. Hayes, 90 S.W.2d 209, 192 Ark. 17—Arkadelphia Sand & Gravel Co. v. Knight, 79 S.W.2d 71, 190 Ark. 386—McEachin v. Yarborough, 74 S.W.2d 228, 189 Ark. 434—Seaman-Dunning Corporation v. Haralson, 29 S. W.2d 1085, 182 Ark. 93.
Tenn.—Luck v. Louisville & N. R. Co., 69 S.W.2d 899, 167 Tenn. 350.

Ordinary hazards incident to employment

Ark.—Frazer v. Norman, 42 S.W.2d 569, 184 Ark. 434.
Conn.—Rescigno v. Rosner, 198 A. 751, 124 Conn. 253.
Ky.—Cincinnati, N. O. & T. P. R. Co. v. Lay, 282 S.W. 550, 214 Ky. 21.

Ordinary dangers and risks of employment

Utah.—Ward v. Denver & R. G. W. R. Co., 85 P.2d 837, 96 Utah 564.
39 C.J. p 705 note 21 [a] (1).

76. U.S.—Atchison, T. & S. F. Ry. Co. v. Wyer, C.C.A.Okl., 8 F.2d 30.
Cal.—Metz v. Southern Pac. Co., 124 P.2d 670, 51 Cal.App.2d 260.
Conn.—Wells v. New York, N. H. & H. R. Co., 128 A. 700, 102 Conn. 361.

resulting from a risk so assumed.[77] It will be presumed that the contract was made with reference to such risks.[78] The servant's assumption of such risks is in the nature of things a part of his employment, and the employer violates no legal duty to the employee in failing to protect him from dangers which cannot be escaped by anyone doing such work.[79] However, the doctrine that a servant assumes the ordinary and usual risks of his employment is not favored and should not be extended beyond its reasonable limits.[80]

b. Dangerous or Extrahazardous Character of Employment

The rule as to the servant's assumption of risks ordinarily incident to his employment applies notwithstanding the employment is of a dangerous character or the work is of a peculiarly hazardous character.

The general rule that the servant assumes the risks ordinarily incident to his employment, discussed supra subdivision a of this section, applies whether the employment is[81] or whether the employment is not[82] of a dangerous or hazardous character, or even though the work is of a peculiarly hazardous character.[83] The dangerous nature of the service adds nothing to the liability of the master.[84] As applied to plain and obvious dangers connected with the place of work, the rule is said to constitute an exception to the rule discussed supra § 202, requiring the master to use ordinary

Fla.—Gallespie v. Thornton, 117 So. 714, 95 Fla. 5.

Ill.—Huff v. Illinois Cent. R. Co., 279 Ill.App. 323, affirmed 199 N.E. 116, 362 Ill. 95—Worthey v. Cleveland, C., C. & St. L. Ry. Co., 251 Ill.App. 585.

Iowa.—Anderson v. Sheuerman, 6 N.W.2d 125, 232 Iowa 705.

Ky.—Bell v. Louisville & N. R. Co., 287 S.W. 219, 216 Ky. 42—Royal Collieries Co. v. Wells, 276 S.W. 515, 518, 210 Ky. 600—Hubbard v. Louisville & N. R. Co., 273 S.W. 436, 209 Ky. 614.

Minn.—Moquin v. Minneapolis, St. P. & S. S. M. Ry. Co., 231 N.W. 829, 181 Minn. 56, reversed on other grounds 51 S.Ct. 501, 283 U.S. 520, 75 L.Ed. 1243, followed in 231 N.W. 920, 181 Minn. 626.

Miss.—Wilbe Lumber Co. v. Calhoun, 140 So. 680, 163 Miss. 80.

Mo.—Zesch v. Abrasive Co. of Philadelphia, 183 S.W.2d 140, 353 Mo. 558, 156 A.L.R. 469—Clift v. St. Louis-San Francisco Ry. Co., 9 S.W.2d 972, 320 Mo. 791—Hunter v. Busy Bee Candy Co., 271 S.W. 800, 307 Mo. 656.

N.H.—Stone v. Howe, 32 A.2d 484, 92 N.H. 425.

Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Barnaby, Civ.App., 167 S.W.2d 235, error refused—International-Great Northern R. R. v. Lowry, Civ.App., 98 S.W.2d 383, reversed on other grounds International Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272.

Lack of assumption of risk arising from master's negligence see supra § 362.

Exercise of reasonable care

(1) A servant assumes all the ordinary, usual, and normal risks of the business after master has used reasonable care for his protection.—Knowles v. Southern Ry. Co., 12 S.E.2d 821, 177 Va. 88—Roberts v. Southern Ry. Co., 145 S.E. 255, 151 Va. 815.

(2) Employee assumes those risks which are incident to his employment after master has discharged his duty of reasonable care to prevent them.—Sacco v. Delaware & H. Co., 210 N.Y.S. 668, 213 App.Div. 471, affirmed 150 N.E. 553, 241 N.Y. 556, certiorari denied 46 S.Ct. 484, 271 U.S. 669, 70 L.Ed. 1142.

(3) Ordinary risks which are assumed by servant are those existing after master has done everything he is bound to do for purpose of securing servant's safety.—Lander v. Shannon, 268 P. 145, 148 Wash. 93.

77. Ark.—Rice & Holiman v. Henderson, 35 S.W.2d 1016, 183 Ark. 355—Mississippi River Fuel Corporation v. Morris, 35 S.W.2d 607, 183 Ark. 207.

Kan.—**Corpus Juris quoted in** Hunter v. Barnsdall Refining Co., 268 P. 86, 88, 126 Kan. 277.

Tex.—International & G. N. R. Co. v. Schubert, Civ.App., 130 S.W. 708.

Wash.—Cummins v. Dufault, 139 P. 2d 308, 18 Wash.2d 274.

78. Kan.—**Corpus Juris quoted in** Hunter v. Barnsdall Refining Co., 268 P. 86, 88, 126 Kan. 277.

Pa.—Falyk v. Pennsylvania R. Co., 100 A. 961, 256 Pa. 397.

Utah.—**Corpus Juris cited in** Roach v. Los Angeles & S. S. R. Co., 280 P. 1053, 1059, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.

79. Kan.—**Corpus Juris quoted in** Hunter v. Barnsdall Refining Co., 268 P. 86, 88, 126 Kan. 277.

39 C.J. p 708 note 24.

Injury not preventable by ordinary care

The servant assumes the risk of an injury that cannot reasonably be anticipated and guarded against by exercise of ordinary care.—Lawson v. Higgins, 169 S.W.2d 881, 350 Mo. 1066—Pietraschke v. Pollnow, Mo. App., 147 S.W.2d 167.

80. Ark.—Federal Compress & Warehouse Co. v. Harmon, 118 S.W.2d 239, 196 Ark. 417.

81. U.S.—Pitcairn v. Hunault, C.C.A.Ind., 86 F.2d 664.

Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.

Mo.—Morton v. Alton R. Co., App., 118 S.W.2d 59.

Tenn.—Tennessee Cent. Ry. Co. v. Williams, 9 Tenn.App. 529.

Wash.—Cummins v. Dufault, 139 P. 2d 308, 18 Wash.2d 274.

W.Va.—State ex rel. Cashman v. Sims, 43 S.E.2d 805.

39 C.J. p 709 note 27.

Work inherently dangerous

Mo.—Mitchell v. Westport Hotel Operating Co., 19 S.W.2d 528, 225 Mo. App. 181.

Tex.—Rio Bravo Oil Co. v. Matthews, Civ.App., 20 S.W.2d 342.

39 C.J. p 709 note 27 [c].

Obvious dangers

Where the employment presents special features of danger which are plain and obvious or are apparent to ordinary observation, the risk thereof is assumed by the servant. Tex.—Wichita Falls & S. R. Co. v. Lindley, Civ.App., 143 S.W.2d 428, error dismissed, judgment correct.

W.Va.—State ex rel. Cashman v. Sims, 43 S.E.2d 805—Skidmore v. West Virginia & P. R. Co., 23 S.E. 713, 41 W.Va. 293.

82. W.Va.—State ex rel. Cashman v. Sims, 43 S.E.2d 805.

83. Kan.—**Corpus Juris quoted in** Barlovich v. Union Pac. R. Co., 58 P.2d 1061, 1063, 144 Kan. 186.

39 C.J. p 709 note 27.

84. Ind.—Myers v. W. C. De Pauw Co., 38 N.E. 37, 138 Ind. 590.

Kan.—**Corpus Juris quoted in** Barlovich v. Union Pac. R. Co., 58 P. 2d 1061, 1063, 144 Kan. 186.

Miss.—**Corpus Juris quoted in** Anderson-Tully Co. v. Goodin, 163 So. 536, 538, 174 Miss. 162.

care to provide a safe place of work for the servant.[85]

Nevertheless the rule does not apply where the servant is required by his master to enter on a hazardous task under an unfulfilled promise to point out its hazards to him.[86]

c. Maturity, Experience, or Infirmity of Employee

Generally all the ordinary risks of his employment are assumed by a mature or experienced servant; but it has been held that a servant who is of subnormal intelligence, or physically infirm, or both, does not assume ordinary risks to the same extent as do able-bodied employees of normal intelligence.

The risks, dangers, or hazards ordinarily or necessarily incident to his employment or occupation are assumed by an adult servant,[87] a workman of mature years,[88] or an experienced employee.[89] According to some decisions, where to the knowledge of the master the servant is of subnormal intelligence, or physically infirm, or both, he does not assume all the ordinary risks of the employment as do able-bodied employees of normal intelligence, but only such risks as one with his disabilities is able to realize and understand,[90] and the view has been taken that it is the duty of the master to see that the servant is competent for his position.[91] However, there is also authority to the effect that as far as his own safety is concerned, it is for the servant to determine for himself whether physical infirmities known to himself shall bar him from any particular employment,[92] and if by reason of any physical infirmity he is injured while doing work which he has undertaken to do he assumes the risk of the injury and cannot recover therefor.[93] Youth or inexperience of servant as affecting assumption of risk is discussed infra §§ 412–420, and assumption of risk of injury from overexertion infra §§ 390, 401.

§ 373. —— Risks Caused by Changing Condition of Place as Work Progresses

A servant assumes the risk of injury from changing conditions where he is engaged in work which, as it progresses, necessarily and constantly changes the condition of the place of work and the character thereof for safety.

Where a servant is engaged in work that, in its progress, necessarily and constantly changes the condition of the place of work and the character thereof for safety, he assumes the risk of injury therefrom.[94] Stating this proposition in another form, the servant assumes the risk of injury where the very work in which he is engaged creates the danger as the work progresses.[95] This constitutes a well-established exception to the general rule, discussed supra § 201, that it is the duty of the master to furnish a reasonably safe place to work.[96] However, the servant does not assume every risk of

85. Md.—Gans Salvage Co. v. Byrnes, 62 A. 155, 102 Md. 230, 1 L.R.A.,N.S., 272.
39 C.J. p 710 note 30.

86. Ill.—McCormick Harvesting Mach. Co. v. Burandt, 26 N.E. 588, 136 Ill. 170.
Assurances of master generally see infra § 404.

87. Ark.—Everton Silica Sand Co. v. Hicks, 125 S.W.2d 793, 197 Ark. 980.

88. Ill.—Johnson v. Scandrett, 16 N.E.2d 171, 296 Ill.App. 198.
Mo.—Russell v. Missouri Pac. R. Co., 295 S.W. 102, 316 Mo. 1303, certiorari denied Missouri Pac. R. Co. v. Russell, 48 S.Ct. 114, 275 U.S. 551, 72 L.Ed. 421.

89. Ark.—Louis B. Siegel & Co. v. Moore, 161 S.W.2d 387, 204 Ark. 50.

90. Ark.—Warren Vehicle Stock Co. v. Siggs, 120 S.W. 412, 91 Ark. 102.
Kan.—Haines v. Payne, 203 P. 707, 110 Kan. 269.

91. Ark.—Warren Vehicle Stock Co. v. Siggs, 120 S.W. 412, 91 Ark. 102.
39 C.J. p 710 note 34.

92. Ala.—Tennessee Coal, Iron & R. Co. v. Moody, 68 So. 274, 192 Ala. 364, L.R.A.1915E 369.

Workman not complaining of physical incapacity
A workman presenting himself for work carrying logs and taking wages therefor and not complaining of physical incapacity represents himself as capable of carrying more than a light load on soft and uneven ground.—Harris v. Pounds, 187 So. 891, 185 Miss. 688.

93. Ala.—Tennessee Coal, Iron & R. Co. v. Moody, 68 So. 274, 192 Ala. 364, L.R.A.1915E 369.
39 C.J. p 710 note 36.

94. Ark.—M. E. Gillioz, Inc., v. Lancaster, 113 S.W.2d 709, 195 Ark. 688—Howell v. Harvill, 50 S.W.2d 597, 185 Ark. 977.
Ga.—Powell v. Shurling, 179 S.E. 653, 51 Ga.App. 67.
Kan.—McCoy v. Atchison, T. & S. F. Ry. Co., 284 P. 417, 129 Kan. 781.
Miss.—City of Tupelo v. Payne, 168 So. 283, 176 Miss. 245.
Mo.—Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 337 Mo. 202—**Corpus Juris quoted in** Karlin v. Kansas City Public Service Co., App., 30 S.W.2d 1032, 1034.
Okl.—McCracken v. Franco-Dominion Development Corporation, 117 P.2d 135, 189 Okl. 354.
39 C.J. p 710 note 43.

Demolition of structure
La.—Radford v. Gibert, App., 12 So. 2d 612.
39 C.J. p 710 note 43 [d].

95. Mo.—**Corpus Juris quoted in** Karlin v. Kansas City Public Service Co., App., 30 S.W.2d 1032, 1034.
39 C.J. p 711 note 44.

Changed conditions brought about by servant
U.S.—Atchison, T. & S. F. Ry. Co. v. Wyer, C.C.A.Okl., 8 F.2d 30.
N.H.—Stone v. Howe, 32 A.2d 484, 92 N.H. 425.
Vt.—Landing v. Town of Fairlee, 22 A.2d 179, 112 Vt. 127.

96. Kan.—McCoy v. Atchison, T. & S. F. Ry. Co., 284 P. 417, 129 Kan. 781.
Mo.—**Corpus Juris quoted in** Karlin v. Kansas City Public Service Co., App., 30 S.W.2d 1032, 1034.
Vt.—Landing v. Town of Fairlee, 22 A.2d 179, 112 Vt. 127.
39 C.J. p 711 note 45.

Temporary dangers
Obligation rests on servant, and not on master, to look after safety of working place as to all temporary

danger from changing conditions, but only such as are necessarily incident to the work;[97] and if the master enhances the danger by any negligent act or omission the servant does not assume the risk of injury therefrom.[98] Also the rule does not apply where the master, after his attention had been called by the servant to the probable danger of the work, directed him to continue unless the dangers were so obvious that no ordinarily prudent person would have done the work.[99]

Construction and alteration. Where the work in which the servant is engaged is that of construction, he assumes the risks incident to the constantly changing condition of the uncompleted building or structure on which he is at work, as these are risks which are ordinarily incident to the work which he has undertaken.[1] Nevertheless, if the danger incident to the work is increased by the negligence of the master in any duty devolving on him for the servant's protection, the latter does not assume the increased risk.[2]

Generally, where a servant assists in making alterations in the place of work where he is employed, he assumes the risk incident to so doing;[3] but where the litter left by a carpenter is, with other debris left by other workmen, swept along the place where it is necessary for him to walk, it has been held that the risk of slipping on such debris is not an ordinary incident of his work.[4]

§ 374. —— Risks Incident to Duty of Discovering or Remedying Defects

A servant assumes the risks arising out of defects in the place of work, or in the tools, appliances, or instrumentalities for doing work, which it is his duty, under the contract of employment, to discover or remedy.

Where by the terms of the contract of hiring, it is the duty of the servant to make an inspection for and to discover defects in the place of work, or in the tools, appliances, or instrumentalities for doing the work, or to remedy such defects, or to do both, the risks assumed by him are materially different from those assumed by a servant working in or about such place or with such tools, appliances, and instrumentalities, and he assumes the risks arising out of these defects,[5] although the very nature of the work enlarges or multiplies the risks.[6] This is an exception to the general rule, discussed supra § 201, that the master is bound to furnish the servant with a reasonably safe place to work and with reasonably safe tools, appliances, and instrumentalities for doing the work,[7] and also to the well-settled general rule discussed infra § 381, that the servant ordinarily is not charged with the duty of inspection for the purpose of discovering latent defects or dangers.[8] The rule is not affected by a state statute authorizing a recovery for an injury

dangers which ordinarily arise in usual progress of particular work; and when two employees work side by side on task of manual labor this obligation rests on each of them.—Barron Motor Co. v. Bass, 150 So. 202, 167 Miss. 786.

97. Mo.—**Corpus Juris quoted in** Karlin v. Kansas City Public Service Co., App., 30 S.W.2d 1032, 1034.
Wash.—McLeod v. Chicago, M. & P. S. R. Co., 117 P. 749, 65 Wash. 62.

98. Mo.—**Corpus Juris quoted in** Karlin v. Kansas City Public Service Co., App., 30 S.W.2d 1032, 1034.
39 C.J. p 711 note 47.

99. Ky.—Owensboro v. Gabbert, 122 S.W. 178, 135 Ky. 346, 135 Am.S. R. 462, 21 Ann.Cas. 705.
39 C.J. p 711 note 48.
Obeying order after notice or complaint generally see infra § 402.

1. Kan.—**Corpus Juris quoted in** Barlovich v. Union Pac. R. Co., 58 P.2d 1061, 1063, 144 Kan. 186.
Miss.—City of Tupelo v. Payne, 168 So. 283, 176 Miss. 245.
Okl.—**Corpus Juris cited in** Kansas City Bridge Co. v. Gravitt, 105 P. 2d 767, 771, 188 Okl. 30.
39 C.J. p 711 note 50.

2. Colo.—Colorado Midland R. Co. v. Naylon, 30 P. 249, 17 Colo. 501, 31 Am.S.R. 335.
39 C.J. p 712 note 51.

3. Pa.—Rooney v. Carson, 28 A. 996, 161 Pa. 26.

4. Mo.—Becker v. Federal Garage Co., 38 S.W.2d 473.

5. U.S.—Baltimore & O. R. Co. v. Brandenberger, C.C.A.Ohio, 74 F. 2d 593.
Minn.—Leonard v. Northern Pac. Ry. Co., 263 N.W. 436, 195 Minn. 484.
Mo.—Brooks v. Kansas City Gas Co., 127 S.W.2d 427, 343 Mo. 1226.
N.Y.—Kowalsky v. Conreco Co., 190 N.E. 206, 264 N.Y. 125, reargument denied 191 N.E. 620, 264 N.Y. 674.
Tex.—City of Teague v. Radford, Com.App., 63 S.W.2d 376—**Corpus Juris cited in** Thomas v. Missouri Pac. R. Co., Civ.App., 289 S.W. 448, 449.
Va.—**Corpus Juris quoted in** Chesapeake & O. Ry. Co. v. Butler, 177 S.E. 195, 197, 163 Va. 626.
39 C.J. p 712 note 54.

Ordinary risks
These risks are classified as risks ordinarily incident to the employment.
Minn.—Fraker v. St. Paul, M. & M. R. Co., 19 N.W. 349, 32 Minn. 54.
Va.—**Corpus Juris quoted in** Chesapeake & O. Ry. Co. v. Butler, 177 S.E. 195, 197, 163 Va. 626.

Master mechanic having duty to see that platform was safe
U.S.—Consolidated Textile Corporation v. Shipp, C.C.A.N.C., 41 F.2d 479.

It is implied in contract of employment that the employee is to work on the premises in the condition in which, if he makes a reasonable examination, the premises will appear to be, and he assumes the risk of the condition of the premises except as to defects which such an examination would fail to reveal.—Starr v. Chafitz, 57 N.E.2d 567, 317 Mass. 227—Keough v. E. M. Loew's, 21 N.E.2d 971, 303 Mass. 364.

6. Va.—**Corpus Juris quoted in** Chesapeake & O. Ry. Co. v. Butler, 177 S.E. 195, 197, 163 Va. 626.
39 C.J. p 713 note 55.

7. Va.—**Corpus Juris quoted in** Chesapeake & O. Ry. Co. v. Butler, 177 S.E. 195, 197, 163 Va. 626.
39 C.J. p 713 note 57.

8. Va.—Chesapeake & O. Ry. Co. v. Butler, 177 S.E. 195, 163 Va. 626.

to the servant caused by any defect in the ways, works, machinery, or plant of the master,[9] or which provides that it shall not be an assumption of risk for an employee to remain in the employment after knowledge of the defect or negligence causing the injury unless it is his duty to remedy the defect.[10]

This rule has been applied with respect to a considerable variety of places of work and tools, appliances, and instrumentalities for work, such as cross arms on telephone poles,[11] drift pins,[12] electric light wires,[13] elevators,[14] poles used by electric light, telephone, telegraph, or traction companies,[15] roofs of buildings,[16] and truck wheels.[17]

It does not apply where the facts do not bring the case within it,[18] as where the duty of inspection[19] or of making a dangerous place safe[20] does not rest on the employee in question as part of his employment. It has no application to risks caused by the master's negligence;[21] a servant, although engaged in making a dangerous place safe, assumes only the risk usual and incident after the master has used due care to discover the extent of the dangers of the place.[22]

§ 375. —— Application of Foregoing Principles Generally

Where the master has exercised ordinary care to furnish the servant with a reasonably safe place for work, or with reasonably safe machinery, tools, and appliances, the servant assumes all risks ordinarily incident thereto.

Where the master has exercised ordinary care to furnish the servant with a reasonably safe place for work,[23] or with reasonably safe machinery, tools, and appliances,[24] the servant assumes all risks ordinarily incident thereto.

9. Ala.—Maddox v. Chilton Warehouse & Mfg. Co., 55 So. 93, 171 Ala. 216.
Effect of Federal Employers' Liability Act see infra § 378.

10. Ala.—Clinton Min. Co. v. Bradford, 69 So. 4, 192 Ala. 576—Lookout Fuel Co. v. Phillips, 66 So. 946, 11 Ala.App. 657.

11. Mo.—Roberts v. Missouri & K. Tel. Co., 66 S.W. 155, 166 Mo. 370.

12. N.J.—Campbell v. T. A. Gillespie Co., 55 A. 275, 69 N.J.Law 279.
39 C.J. p 713 note 67.

13. La.—Smart v. Louisiana Electric Light Co., 17 So. 346, 47 La. Ann. 869.
N.C.—White v. Thomasville Light & Power Co., 66 S.E. 210, 151 N.C. 356.

14. U.S.—Reed v. Moore & McFerrin, Tenn., 153 F. 358, 82 C.C.A. 434, 25 L.R.A.,N.S., 331.
Mass.—Archer v. Eldredge, 90 N.E. 525, 204 Mass. 323.

15. Tex.—Abilene Light, etc., Co. v. Robinson, 131 S.W. 299, 62 Tex.Civ. App. 219.
39 C.J. p 713 note 70 [a], [b].

16. Ky.—Daisey v. Wagner, 172 S. W. 942, 162 Ky. 554, L.R.A.1915D 157.
39 C.J. p 713 note 71.

17. Mich.—Riffel v. Union Truck Co., 147 N.W. 522, 180 Mich. 673.

18. Ark.—Simms Oil Co. v. Seago, 63 S.W.2d 834, 187 Ark. 1089.

Concealed negligence of fellow servant

An employee having the duty, among others, of cleaning up around oil wells did not assume the risk of stumbling over a broken bolt which another employee, charged with the same duty, negligently left on a platform and covered with sand so that it was not discoverable by an ordinary inspection on the part of plaintiff.—Simms Oil Co. v. Seago, supra.

19. N.H.—Glidden v. Public Service Co. of New Hampshire, 183 A. 865, 88 N.H. 4.

20. Wash.—Rustan v. Southern Alaska Canning Co., 205 P. 369, 119 Wash. 350.
39 C.J. p 712 note 54 [b], p 713 note 65 [a].

21. Ind.—Domestic Block Coal Co. v. Holden, 103 N.E. 73, 56 Ind.App. 634.
39 C.J. p 713 note 73.
Lack of assumption of risks due to master's negligence generally see supra § 362.

22. Mo.—Fleming v. What Cheer Min. Co., 186 S.W. 1115, 194 Mo. App. 206.

23. Ark.—Southwestern Bell Telephone Co. v. Casson, 138 S.W.2d 406, 199 Ark. 1140.
Or.—Leavitt v. Stamp, 293 P. 414, 134 Or. 191.
39 C.J. p 714 note 77.

Oil on driveway of filling station

Oil, dripped from automobiles, on the driveway of a filling station is a usual and natural condition, and the risk arising therefrom is assumed by a filling station employee as an ordinary, natural, and necessary incident to the conduct of the business.—Hunter v. Barnsdall Refining Co., 268 P. 86, 126 Kan. 277.

Risks attending use of railroad depot platform are, with respect to the master, assumed by an employee of a consignee who, under his employment involving such use, is removing cement from a railroad car and placing it on the platform.—Bosarge v. Gaines, C.C.A.Miss., 93 F.2d 800.

Use of streets and highways by servants in performance of their duties requires them to assume and to bear the same relation to other users of streets and highways as they would use in their own private affairs.—Traders Compress Co. v. Steigler, 169 P.2d 205, 197 Okl. 204.

24. Fla.—Duncan v. Growers Equipment Co., 1 So.2d 458, 146 Fla. 516.
Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43—Crouch v. Missouri Pac. R. Co., 276 P. 81, 128 Kan. 26.
S.D.—Breen v. Kreen, 225 N.W. 223, 55 S.D. 150.
Tex.—City of Panhandle v. Byrd, Civ.App., 77 S.W.2d 904, reversed on other grounds 106 S.W.2d 660, 130 Tex. 96.
39 C.J. p 714 note 80.

Siphon

If there was any risk in the use of a siphon, it was an ordinary risk incident to the business and was assumed by the employee.—Arkansas-Louisiana Gas Co. v. Tillman, 144 S.W.2d 1077, 201 Ark. 437.

Obvious condition of stepladder, if the stepladder was less rigid or stable than an ordinary stepladder, was a known risk incident to employment, which risk became a part of contract of employment.—Sjostedt v. Webster, 28 N.E.2d 239, 306 Mass. 344.

Employee in charge of machines

Corporation was not liable for employee's death caused by burns from explosion while employee was at work in a room where machines in his charge were making a fuel mixture of air and natural gas and of air and vapor of gasoline, since employee assumed risk of his employment.—Bonner v. Texas Co., C.C.A. Tex., 89 F.2d 291.

The general rule, discussed supra § 372 a, that a servant assumes all the risks ordinarily incident to his employment has been applied to the risks ordinarily incident to the respective employments of a carpenter's helper,[25] farm worker,[26] fireman,[27] ginner,[28] laborer in a clay tile factory,[29] lineman,[30] night watchman,[31] physician[32] or nurse[33] in a state hospital or sanitarium, sawyer,[34] steel worker,[35] and truck driver.[36] So too a servant engaged in picking up trash assumes a risk from dust that is obviously inherent in the work he is employed to do.[37]

Occupational disease. Apart from statute, the risk of contracting a disease incident to an occupation, and not attributable to the master's negligence, is regarded as an ordinary one[38] assumed by the servant;[39] and the master is not liable in such case.[40]

§ 376. —— Mining, Quarrying, and Excavating

An employee engaged in mining or excavating is within the rule that a servant assumes the risks ordinarily incident to his employment, as well as the rule that he assumes the risks arising from the constantly changing condition of his place of work, and, where it is his duty under the contract of employment, to discover or remedy defects, the rule that he assumes the risks attendant on the performance of such duty.

The rule, discussed supra § 372 a, that a servant assumes the risks ordinarily incident to the employment applies to risks ordinarily incident to the work of mining, quarrying, and excavating.[41] So too, in accordance with the rule discussed supra § 373 employees engaged in mining or excavating assume the risks arising from the constantly changing character of their working place as caused by the work itself as it progresses,[42] at least as far as their employment permits them to make an examination thereof or to make alterations looking to their greater security;[43] and for obvious reasons, where it is an incident of the employment for a miner to make his own place of work, any dangers arising from the work as it progresses, due to changing conditions, are assumed by him.[44] Furthermore, the rule, discussed supra § 374, that a servant whose duty it is to make inspection for defects in the place of work or in the tools, instrumentalities, or appliances for work, or to remedy such defects, or to do both, assumes the risk incident to the work, applies in the case of servants of mining companies whose contracts of employment require them to do this class of work.[45]

§ 377. —— Shipping

A servant in a shipping industry is within the rule that a servant assumes all the risks ordinarily incident to his employment.

The rule, discussed supra § 372 a, that servants assume all the risks which are ordinarily incident to the employment in which they are engaged applies to persons engaged as servants in shipping industries.[46]

Assisting in work

Employee of stave mill operator injured in assisting with work on equalizing saw assumed the risk of injury.—Froman v. J. R. Kelley Stave & Heading Co., 123 S.W.2d 1081, 197 Ark. 545.

25. U.S.—Great Northern Ry. Co. v. Nelson, C.C.A.Minn., 90 F.2d 84.

26. S.D.—Breen v. Kreen, 225 N.W. 223, 55 S.D. 150.

Risk attendant on handling and care of cow

Or.—Schnell v. Howitt, 76 P.2d 1130, 158 Or. 586.

27. N.Y.—Miller v. City of Albany, 287 N.Y.S. 889, 158 Misc. 720, affirmed 286 N.Y.S. 326, 247 App.Div. 848.

28. Ga.—Abercrombie v. Ivey, 200 S.E. 551, 55 Ga.App. 296.

29. Mo.—Braden v. Friederichsen Floor & Wall Tile Co., 15 S.W.2d 923, 223 Mo.App. 700.

30. N.H.—Fortier v. Concord Electric Co., 33 A.2d 801, 92 N.H. 492.

31. Ga.—Newman v. Griffin Foundry & Machine Co., 144 S.E. 386, 38 Ga.App. 518.

32. W.Va.—State ex rel. Cashman v. Sims, 43 S.E.2d 805.

33. N.Y.—Herrick v. State, 32 N.Y.S.2d 607, 177 Misc. 1009.

34. Ark.—Chicago, R. I. & P. Ry. Co. v. Daniel, 273 S.W. 15, 169 Ark. 23.

Miss.—Vehicle Woodstock Co. v. Bowles, 128 So. 98, 158 Miss. 346.

S.C.—Singleton v. McLeod, 8 S.E.2d 908, 193 S.C. 378.

35. Mo.—Mitchell v. Westport Hotel Operating Co., 19 S.W.2d 528, 225 Mo.App. 181.

36. N.C.—Holeman v. Pensacola Shipbuilding Co., 134 S.E. 647, 192 N.C. 236.

37. Mo.—Hogue v. St. Louis-San Francisco Ry. Co., App., 20 S.W.2d 301.

38. Ala.—American Mut. Liability Ins. Co. v. Agricola Furnace Co., 183 So. 677, 236 Ala. 535.

Occupational disease is hazard of industry

U.S.—Grammer v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 71 F.2d 38, certiorari denied 55 S.Ct. 82, 293 U.S. 571, 79 L.Ed. 670.

39. U.S.—Martin v. Eagle Picher Lead Co., D.C.Mo., 21 F.Supp. 142.

39 C.J. p 705 note 21 [b].

40. U.S.—Martin v. Eagle Picher Lead Co., D.C.Mo., 21 F.Supp. 142.

39 C.J. p 705 note 21 [b].

41. Ark.—Western Coal & Mining Co. v. Harrison, 182 S.W. 525, 122 Ark. 125.

39 C.J. p 714 note 84.

Missed shots

A miner assumes the risk and hazard incident to missed shots in the place where he is working after ordinary precautions to remove them have been taken.—Cunningham v. Doe Run Lead Co., Mo., 4 S.W.2d 802.

42. Ky.—Mackie, Thompson, Tamm Corporation v. Capps, 17 S.W.2d 215, 229 Ky. 388.

39 C.J. p 715 note 87.

43. Mont.—Morelli v. Twohy Bros. Co., 170 P. 757, 54 Mont. 366.

44. Mont.—Allen v. Bear Creek Coal Co., 115 P. 673, 43 Mont. 269.

39 C.J. p 715 note 89.

45. Ky.—Boyd v. Crescent Coal Co., 133 S.W. 777, 141 Ky. 787.

39 C.J. p 715 note 91.

46. Wash.—Hartford v. Northwest-

§ 378. —— Operation of Railroads

a. In general
b. Operation or switching of trains, cars, or locomotives
c. Working on or near track

a. In General

At common law, and under some statutes, a servant of a railroad company assumes all the risks ordinarily incident to his employment.

In accordance with the rule as to other servants, discussed supra § 372, in the absence of a statute to the contrary,[47] a servant of a railroad company assumes all the risks ordinarily incident to his employment.[48] The rule is the same under some state railroad employers' liability acts.[49] A state constitutional provision relieving certain railroad employees from the doctrine of assumed risk has been held not to apply to employees not engaged in any hazardous railroad work.[50]

Discovery or remedy of defects. The general rule, discussed supra § 374, that a servant, whose duty it is to discover or remedy defects in the place of work or in the tools, appliances or instrumentalities furnished for work, or to do both, assumes the risks ordinarily incidental to that character of work, applies to servants of a railroad company who are hired for the performance of these duties, such as servants performing services of the character under consideration on bridges,[51] tunnels,[52] cars,[53] locomotives,[54] or railroad tracks and roadbeds.[55] So also the rule was applied under the Federal Employers' Liability Act prior to its amendment.[56]

Defective cars or locomotives being hauled for repair. Where the service for which the servant is employed is the handling of defective locomotives and cars which are being hauled to a place where they may be repaired, the servant assumes the extra risk incident to the defective condition thereof, since this is a risk incident to the employment.[57]

Cars of other railroad companies. The risk attending the transportation or use by a railroad company of cars of other railroad companies has been held to be one of the risks which a servant assumes in undertaking the employment.[58] However, it has also been held that a railroad company's duty of inspection requires more careful inspection by it of a car of another railroad company than is required of an employee under the doctrine of assumed risk.[59]

b. Operation or Switching of Trains, Cars, or Locomotives

In the absence of a statute to the contrary, brakemen, switchmen, or other employees engaged in the

ern Stevedoring Co., 269 P. 831, 148 Wash. 501.
39 C.J. p 715 note 93.

Rule in admiralty and at common law is same with reference to assumption of risk.—McPherson v. Twin Harbor Stevedoring & Tug Co., 245 P. 747, 139 Wash. 1.

47. Fla.—Atlantic Coast Line R. Co. v. Fogleman, 158 So. 108, 117 Fla. 334.
Effect of Federal Employers' Liability Act, including amendment of Aug. 11, 1939, c 685, § 1, 45 U.S. C.A. § 54, on defense of assumption of risk see supra § 359.

48. U.S.—Deere v. Southern Pac. Co., C.C.A.Or., 123 F.2d 438, certiorari denied 62 S.Ct. 916, 315 U.S. 819, 86 L.Ed. 1217—Reynolds v. New York, O. & W. Ry. Co., C.C.A. N.Y., 42 F.2d 164.
Ark.—**Corpus Juris quoted in** Missouri Pac. R. Co. v. Guy, 157 S.W. 2d 11, 14, 203 Ark. 166, certiorari granted Guy v. Missouri Pac. R. Co., 62 S.Ct. 1046, 316 U.S. 655, 86 L.Ed. 1735, certiorari dismissed 63 S.Ct. 22, 317 U.S. 702, 87 L.Ed. 561.
Ill.—Chicago, R. I. & P. Ry. Co. v. Benson, 185 N.E. 244, 352 Ill. 195, certiorari denied Chicago, R. I. & P. Ry. Co. v. Benson, 54 S.Ct. 53, 290 U.S. 636, 78 L.Ed. 553.
Kan.—Hunt v. Missouri Pac. R. Co., 255 P. 70, 123 Kan. 346.
Tex.—Louisiana Ry. & Nav. Co. of Texas v. Disheroon, Civ.App., 295 S.W. 250.
Utah.—**Corpus Juris cited in** Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 1059, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.
W.Va.—Towns v. Monongahela Ry. Co., 144 S.E. 289, 105 W.Va. 572.
Wyo.—Chicago & N. W. Ry. Co. v. Ott, 237 P. 238, 33 Wyo. 200, rehearing denied 238 P. 287, 33 Wyo. 200, certiorari denied 46 S.Ct. 201, 269 U.S. 585, 70 L.Ed. 425.
39 C.J. p 716 note 96.

49. U.S.—Norfolk & W. Ry. Co. v. Kratzer, C.C.A.Ohio, 37 F.2d 522.
Mont.—Palmer v. Great Northern Ry. Co., 170 P.2d 768.

50. Va.—Sutphin v. Norfolk & W. Ry. Co., 144 S.E. 436, 151 Va. 278.

51. Va.—Roberts v. Southern Ry. Co., 144 S.E. 863, 151 Va. 815, rehearing denied 145 S.E. 255, 151 Va. 815.
39 C.J. p 721 note 49.

52. Ky.—Payne v. Blondell, 270 S. W. 725, 208 Ky. 122.

53. La.—Borde v. New Orleans & G. N. R. Co., App., 140 So. 810.
Tex.—Thomas v. Missouri Pac. R. Co., Civ.App., 289 S.W. 448.
39 C.J. p 721 note 50 [a] (1).

54. Okl.—Kansas City Southern Ry. Co. v. Hoyle, 90 P.2d 1042, 185 Okl. 211.
39 C.J. p 721 note 50 [a] (2).

55. Ga.—Southern Ry. Co. v. Coleman, 157 S.E. 239, 42 Ga.App. 649.
Mo.—Stewart v. St. Louis-San Francisco Ry. Co., App., 52 S.W.2d 231.
39 C.J. p 721 note 51.

56. Tenn.—Luck v. Louisville & N. R. Co., 69 S.W.2d 899, 167 Tenn. 350.
W.Va.—Reynolds v. Virginian Ry. Co., 180 S.E. 271, 116 W.Va. 331.
39 C.J. p 713 note 61.

Fire patrolman following trains to watch for fires
N.Y.—Keppler v. New York Cent. R. Co., 32 N.Y.S.2d 673, 263 App.Div. 199.

57. U.S.—Chesapeake & O. R. Co. v. Hennessey, Ky., 96 F. 713, 38 C.C. A. 307.
39 C.J. p 719 note 17.

58. Mo.—Thomas v. Missouri Pac. R. Co., 18 S.W. 980, 109 Mo. 187.
39 C.J. p 721 note 45.

59. S.C.—Rhodes v. Southern Ry. Co., 198 S.E. 382, 188 S.C. 228.

operation or switching of trains, cars, or locomotives assume the risks ordinarily incident to their respective employments.

In the absence of a statute to the contrary, an employee of a railroad company assumes the risk attending the ordinary and necessary operation of trains.[60] Servants engaged in the operation of trains, cars, or locomotives,[61] such as conductors,[62] brakemen,[63] and firemen,[64] assume the risks ordinarily incident to their respective employments; and likewise a switchman assumes the risks ordinarily incident to his duties.[65] Among the risks so assumed are those arising from the boarding of, and riding on, moving cars or locomotives as the occasion demands,[66] the bumping, jarring, jerking, and jolting of trains as usually operated[67] or when stopped suddenly as the result of an emergency,[68] the switching of cars according to the ordinary and customary methods,[69] the making of flying switches[70] although against the rules where the rules have been abrogated by habitual disregard,[71] inclement weather conditions,[72] low overhead bridges,[73] and the operation known as "bucking" snow, when conducted in the customary manner.[74] However, the risk incurred by a brakeman while aiding in repairing a split switch is not an ordinary risk of his employment precluding recovery under the Federal Employers' Liability Act where repairing a split switch is not a part of his regular duties and

60. Tenn.—Thornton v. Nashville, C. & St. L. Ry. Co., 5 Tenn.App. 6.

61. Utah.—**Corpus Juris cited in** Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 1059, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.
39 C.J. p 717 note 99.
Effect of Federal Employers' Liability Act on defense of assumption of risk see supra § 359.
Under Federal Employers' Liability Act prior to its amendment, a trainman assumed the risk of usual and ordinary handling of a train.—Mullen v. Lowden, 124 S.W.2d 1152, 344 Mo. 40.

62. S.C.—Hilton v. Southern Ry. Co., 7 S.E.2d 161, 192 S.C. 476.
Under Federal Employers' Liability Act before amendment
Tex.—Houston & T. C. R. Co. v. Shepherd, Civ.App., 6 S.W.2d 410.

63. Ky.—Grigsby v. Louisville & N. R. Co., 114 S.W.2d 775, 272 Ky. 709.
Me.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.
Pa.—McAvoy v. Philadelphia & R. Ry. Co., 128 A. 824, 283 Pa. 133.
Wash.—Friermood v. Oregon-Washington R. & Nav. Co., 235 P. 17, 134 Wash. 178.
39 C.J. p 717 notes 2 [a], 3 [a], 7 [a], p 718 note 16 [d].
Under Federal Employers' Liability Act prior to amendment
Ky.—Louisville & N. R. Co. v. Noble's Adm'x, 54 S.W.2d 636, 246 Ky. 86.
Me.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.
Pa.—Carlo v. Bessemer & L. E. R. Co., 143 A. 5, 293 Pa. 343, certiorari denied 49 S.Ct. 25, 278 U. S. 622, 73 L.Ed. 543.
Tenn.—Cincinnati, N. O. & T. P. Ry. Co. v. Brown, 12 S.W.2d 381, 158 Tenn. 75.

64. **Under Federal Employers' Liability Act prior to amendment**
U.S.—Reading Co. v. Geary, C.C.A. Md., 47 F.2d 142, 79 A.L.R. 226, certiorari denied 51 S.Ct. 492, 283 U.S. 844, 75 L.Ed. 1454—Fredericks v. Erie R. Co., C.C.A.N.Y., 36 F. 2d 716.

65. U.S.—Wheelock v. Freiwald, C. C.A.Mo., 66 F.2d 694.
39 C.J. p 717 note 5 [a], p 718 note 16 [b] (2), [c].
Under Federal Employers' Liability Act prior to amendment
Mo.—Westover v. Wabash Ry. Co., 6 S.W.2d 843, certiorari denied Wabash Ry. Co. v. Westover, 49 S.Ct. 31, 278 U.S. 632, 73 L.Ed. 550.
Risk from use of worn rails for side-tracks in railroad yards
Mich.—Michigan Cent. R. Co. v. Austin, 40 Mich. 247.

66. U.S.—Wheelock v. Friewald, C. C.A.Mo., 66 F.2d 694.
S.C.—Shiver v. Atlantic Coast Line R. Co., 152 S.E. 717, 155 S.C. 531.
Utah.—**Corpus Juris cited in** Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 1059, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.
39 C.J. p 717 note 2.
Going on running board of engine in motion
U.S.—Southern Pac. Co. v. Johnson, Nev., 69 F. 559, 16 C.C.A. 317.
Riding on running board of tender of backing engine
S.C.—Hilton v. Southern Ry. Co., 7 S.E.2d 161, 192 S.C. 476.
Federal Employers' Liability Act
(1) Under the Federal Employers' Liability Act § 4, prior to the amendment of Aug. 11, 1939, c 685, § 1, 45 U.S.C.A. § 54, the text rule applied.—Seaboard Air Line Ry. Co. v. Johnson, 115 So. 168, 217 Ala. 251, certiorari dismissed 49 S.Ct. 95, 278 U.S. 576, 73 L.Ed. 515—39 C.J. p 717 note 2 [b].
(2) Under such statute the doctrine of assumption of risk had no application where the negligence of a fellow servant, which the injured person could not have foreseen or expected, was the sole, direct, and immediate cause of the injury.—Reed v. Director General of Railroads, Pa., 42 S.Ct. 191, 258 U.S. 92, 66 L.Ed. 480.

67. U.S.—Wheelock v. Friewald, C. C.A.Mo., 66 F.2d 694—Slocum v. Erie R. Co., C.C.A.N.Y., 37 F.2d 42.
39 C.J. p 717 note 3.

68. Ala.—St. Louis & S. F. R. Co. v. Dorman, 89 So. 70, 205 Ala. 609.
39 C.J. p 717 note 4.

69. Utah.—**Corpus Juris cited in** Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 1059, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.
39 C.J. p 717 note 5.
Under Federal Employers' Liability Act prior to amendment
N.C.—Wolfe v. Atlantic Coast Line R. Co., 155 S.E. 459, 199 N.C. 613.
Pa.—Carlo v. Bessemer & L. E. R. Co., 143 A. 5, 293 Pa. 343, certiorari denied 49 S.Ct. 25, 278 U.S. 622, 73 L.Ed. 543.

70. **Under Federal Employers' Liability Act prior to amendment**
Mo.—Jones v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 481, 325 Mo. 1153.

71. Ark.—St. Louis, I. M. & S. R. Co. v. Rodgers, 167 S.W. 106, 113 Ark. 86.

72. Ky.—O'Bannon v. Louisville & N. R. Co., 6 S.W. 434, 9 Ky.L. 706.
39 C.J. p 717 note 7.

73. U.S.—New York, C. & St. L. R. Co. v. McDougall, C.C.A.Ohio, 15 F.2d 283.
N.Y.—Harrison v. New York Cent. & H. R. R. Co., 87 N.E. 802, 195 N.Y. 86.

74. Iowa.—Bryant v. Burlington, C. R. & N. R. Co., 23 N.W. 678, 66 Iowa 305, 55 Am.R. 275.
39 C.J. p 718 note 9.

the method employed is not the usual method of doing that kind of work.[75]

Coupling or uncoupling cars. Servants of a railroad company, whose duties require them to couple or uncouple cars, assume all the ordinary and usual risks incident to such employment.[76]

c. Working on or Near Track

In the absence of a statute providing otherwise, section hands and other employees working on or near tracks or in railroad yards assume the risk of being struck by moving trains, cars, or locomotives, as well as other risks ordinarily incident to their respective employments, including the risks ordinarily incident to the operation, handling, and use of hand cars and like conveyances on which they ride to and from work.

In the absence of a statute providing otherwise, servants working on or near a railroad track or roadbed,[77] or in a railroad yard,[78] such as section hands,[79] track laborers,[80] flagmen,[81] and the like, assume the risks ordinarily incident to their respective employments, although it is generally conceded that the risk is very great.[82] Among these risks is the risk of being struck by moving locomotives, cars, or trains,[83] whether the trains are regular, extra, or "wild,"[84] or although the trains are run on tracks intended for those coming in the opposite

75. Mo.—Barrett v. St. Louis Southwestern Ry. Co., 143 S.W.2d 60.

76. Utah.—**Corpus Juris cited in** Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 1059, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.
39 C.J. p 718 note 16.

77. U.S.—Pitcairn v. Landis, C.C.A. Ind., 82 F.2d 578.
39 C.J. p 719 note 19.

Working on tracks subject to switching operations
Mo.—Norton v. Wheelock, 23 S.W.2d 142, 323 Mo. 913, certiorari denied Wheelock v. Norton, 50 S.Ct. 355, 281 U.S. 752, 74 L.Ed. 1162.

Federal Employers' Liability Act did not, prior to its amendment, affect the operation of the rule.
Ill.—Nardoni v. Chicago & E. I. Ry. Co., 261 Ill.App. 339.
Mo.—Jones v. St. Louis-San Francisco Ry. Co., 30 S.W.2d 481, 325 Mo. 1153.
39 C.J. p 720 note 22.
Effect of Federal Employers' Liability Act, including amendment of Aug. 11, 1939, c 685 § 1, 45 U.S.C.A. § 54, on defense of assumption of risk generally see supra § 359.

78. Ill.—Mobile & Ohio R. R. Co. v. Healy, 100 Ill.App. 586.
39 C.J. p 719 note 19.

Under Federal Employers' Liability Act before amendment
(1) In general.
Mo.—York v. St. Louis-San Francisco Ry. Co., 62 S.W.2d 475, 333 Mo. 105.
Pa.—Carlo v. Bessemer & L. E. R. Co., 143 A. 5, 293 Pa. 343, certiorari denied 49 S.Ct. 25, 278 U.S. 622, 73 L.Ed. 543.
(2) If men employed about, and familiar with, operation of yard where engines and cars are constantly moving to and fro, fail to take precautions for their own safety in passing over and along tracks they assume risk of injury.—Chicago, R. I. & G. Ry. Co. v. Cummings, Tex. Civ.App., 107 S.W.2d 644, error dismissed.

Risks incident to mode of construction of yards, switches, and side tracks
Ga.—McKay v. Atlanta, B. & C. R. Co., 3 S.E.2d 456, 60 Ga.App. 212.

Risk incident to existence of many tracks and switches in yard
Ill.—Mobile & Ohio R. R. Co. v. Healy, 100 Ill.App. 586.

79. U.S.—Thomson v. Downey, C.C.A.Ill., 78 F.2d 487, certiorari denied Downey v. Thomson, 56 S.Ct. 154, 296 U.S. 630, 80 L.Ed. 448.
Ky.—Louisville & N. R. Co. v. Oliver, 275 S.W. 367, 210 Ky. 25.
Tex.—Texas & P. R. Co. v. Meek, Civ.App., 72 S.W.2d 616, error refused.
39 C.J. p 719 note 19.

Under Federal Employers' Liability Act before amendment
U.S.—Chesapeake & O. Ry. Co. v. Kuhn, Ohio, 52 S.Ct. 45, 284 U.S. 44, 76 L.Ed. 157—Bernola v. Pennsylvania R. Co., C.C.A.Pa., 68 F.2d 172—Carfelo v. Delaware, L. & W. R. Co., C.C.A.N.Y., 54 F.2d 475.
Iowa.—Hamilton v. Chicago, B. & Q. R. Co., 234 N.W. 810, 211 Iowa 924—Kempe v. Illinois Cent. R. Co., 232 N.W. 657, 211 Iowa 812, 74 A.L.R. 148.
Kan.—Harper v. Chicago, R. I. & P. Ry. Co., 28 P.2d 972, 138 Kan. 782.
Mo.—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876.
Neb.—Campbell v. Chicago, R. I. & P. R. Co., 234 N.W. 395, 120 Neb. 499.
Tex.—Texas & P. Ry. Co. v. Perkins, Com.App., 48 S.W.2d 249.
W.Va.—McGraw v. New York Cent. R. Co., 161 S.E. 9, 111 W.Va. 175.

Explosion
Section hand burning grass assumed risk of explosion of nitroglycerin can where the can was evidently concealed in the grass by a third person and there is nothing in the evidence to suggest negligence on the part of the railroad company or its section foreman or to indicate that the company was in any way responsible for the presence of the can on its right of way.—Ochoa v. Fort Worth & D. C. Ry. Co., Tex. Civ.App., 293 S.W. 879.

80. Ky.—Chesapeake & O. Ry. Co. v. Coleman, 294 S.W. 809, 220 Ky. 64.

81. Pa.—Dewald v. Hines, 124 A. 328, 280 Pa. 169.
39 C.J. p 719 note 19.

Under Federal Employers' Liability Act before amendment
S.C.—Primus v. Atlantic Coast Line R. Co., 171 S.E. 1, 171 S.C. 199, certiorari denied Atlantic Coast Line R. Co. v. Primus, 54 S.Ct. 56, 290 U.S. 639, 78 L.Ed. 555—Neal v. Southern Ry., Carolina Division, 160 S.E. 837, 162 S.C. 288, certiorari denied Southern Ry.-Carolina Division v. Neal, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530.

Risk that engine cannot be stopped before reaching flag
Pa.—Dewald v. Hines, 124 A. 328, 280 Pa. 169.

82. U.S.—Lehigh Valley R. Co. v. Doktor, C.C.A.N.J., 290 F. 760.

83. U.S.—Pitcairn v. Landis, C.C.A. Ind., 82 F.2d 578.
39 C.J. p 720 note 23.

Under Federal Employers' Liability Act before amendment
U.S.—Carfelo v. Delaware, L. & W. R. Co., C.C.A.N.Y., 54 F.2d 475.
Ill.—Johnson v. Scandrett, 16 N.E.2d 171, 296 Ill.App. 198.
N.J.—McGarry v. Central R. Co. of New Jersey, 147 A. 472, 105 N.J. Law 590.

84. Mich.—Watts v. Pere Marquette R. Co., 203 N.W. 859, 231 Mich. 40.
39 C.J. p 720 note 24.

Under federal statute prior to amendment
U.S.—Jacobson v. Chicago, M., St. P. & P. R. Co., C.C.A.Minn., 66 F.2d 688.

direction,[85] or although the trains may belong to a railroad company other than the employer;[86] the risk incident to repairing the place where the servant is at work, thereby causing constant changes as the work progressed;[87] the risk of injury from clearing away the débris of a landslide from the track;[88] the risk from sparks and cinders thrown off by the engines in the ordinary operation of the road while the servant is necessarily standing beside the track as trains pass;[89] and the risk of a team, being used in grading a railroad right of way, becoming frightened by the blowing off of steam from the locomotive except where the engineer senses that the laborers are endangered thereby.[90] However, under the Federal Employers' Liability Act prior to its amendment, a railroad employee whose work took him near or on tracks where there was danger of his being run down by a train did not assume all risk of injury.[91]

While the rule as to assumption of the risk of being injured by a moving locomotive, car, or train has been applied where the movement was made without signals[92] or notice,[93] and there was no rule or custom requiring the giving of a warning,[94] an employee does not, by walking between tracks, assume the risk of being struck where there is a noncompliance with a rule requiring the ringing of the bell when an engine is about to move,[95] and it has been held that a street crossing watchman whose duties require him to be almost constantly on the track does not assume the risk of failure to warn him of the approach of trains by ringing a bell or otherwise.[96]

Use of hand car or like conveyance. The ordinary risks of his employment assumed by a section hand or like employee include the risks ordinarily incident to the operation, handling, or use of a railroad hand car, motor car, or velocipede on which he rides in going to and from work,[97] such as the risk of a collision between a train and the car or velocipede,[98] the risk of derailment of the car by a tool falling off,[99] or the risk connected with the explosion of signal torpedoes placed on the track and run over by the car,[1] or with placing the car on,[2] or removing it from,[3] the track.

3. Knowledge as Affecting Assumption of Risk in General

§ 379. Necessity of Knowledge

A servant does not assume the risks of his employment unless he has actual or constructive knowledge of such risks.

Inasmuch as voluntary action on the part of a servant is essential to the invocation of the doctrine of assumption of risk, as considered supra § 357, it is well settled that in all cases the basis for

85. U.S.—Southern R. Co. v. McGuin, Va., 240 F. 649, 153 C.C.A. 447.

86. Or.—Martini v. Oregon-Washington R. & Nav. Co., 144 P. 104, 73 Or. 283.

87. Minn.—Kletschka v. Minneapolis & St. L. R. Co., 83 N.W. 133, 80 Minn. 238.

88. U.S.—Florence & C. C. R. Co. v. Whipps, Colo., 138 F. 13, 70 C.C.A. 443.

89. Iowa.—Duree v. Chicago, M. & St. P. R. Co., 92 N.W. 890, 118 Iowa 640.

90. Mo.—Maynard v. Chicago, B. & Q. R. Co., 137 S.W. 58, 155 Mo.App. 352.

91. Mass.—Murphy v. Boston & M. R. R., 190 N.E. 501, 286 Mass. 390, certiorari denied Boston & M. R. R. v. Murphy, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690.

On way home for meal

It would be foolish to say that one whose work requires him to be on the track all day should leave the track and take a circuitous route home for his meals, and that, if he does not do so, he assumes all risk of injury received while walking on the track.—Barnes v. Red River & G. R. R., 128 So. 724, 14 La.App. 188.

92. Ill.—Pfeiffer v. Chicago, M. & St. P. R. Co., 73 Ill.App. 416.

93. Minn.—Olson v. St. Paul, M. & M. R. Co., 35 N.W. 866, 38 Minn. 117.

94. **Under Federal Employers' Liability Act before amendment**

U.S.—Sumney v. Southern Ry. Co., C.C.A.N.C., 89 F.2d 437.

N.J.—McGarry v. Central R. Co. of New Jersey, 147 A. 472, 105 N.J. Law 590.

95. U.S.—Gildner v. Baltimore & O. R. Co., C.C.A.N.Y., 90 F.2d 635.

96. N.C.—Wolfe v. Seaboard Air Line R. Co., 70 S.E. 993, 154 N.C. 569.

39 C.J. p 721 note 44.

97. Utah.—Owens v. San Pedro, L. A. & S. L. R. Co., 89 P. 825, 32 Utah 208.

39 C.J. p 717 note 1.

Under Federal Employers' Act before amendment

Mich.—Risk v. Pere Marquette Ry. Co., 219 N.W. 685, 242 Mich. 433.

98. U.S.—Chesapeake & O. Ry. Co. v. Nixon, Va., 46 S.Ct. 495, 271 U.S. 218, 70 L.Ed. 914, followed in, C.C.A.N.Y., Ahlgren v. Pennsylvania R. Co., 35 F.2d 1015, and Austin v. New York Cent. R. Co., 184 N.E. 116, 260 N.Y. 616, reargument denied 185 N.E. 764, 261 N.Y. 620.

39 C.J. p 720 notes 29, 34.

Under Federal Employers' Liability Act prior to amendment

U.S.—Thomson v. Downey, C.C.A.Ill., 78 F.2d 487, certiorari denied Downey v. Thomson, 56 S.Ct. 154, 296 U.S. 630, 80 L.Ed. 448.

Iowa.—Hamilton v. Chicago, B. & Q. R. Co., 234 N.W. 810, 211 Iowa 924.

99. Wash.—Kalivas v. Northern Pac. R. Co., 165 P. 96, 96 Wash. 309.

1. Ky.—Gordon v. Chesapeake & O. R. Co., 179 S.W. 210, 166 Ky. 339—Mize v. Louisville & N. R. Co., 105 S.W. 908, 127 Ky. 496, 16 L.R.A.,N.S., 1084, 32 Ky.L. 415.

2. **Under Federal Employers' Liability Act before amendment**

Ark.—St. Louis-San Francisco Ry. Co. v. Childers, 124 S.W.2d 964, 197 Ark. 527.

3. Tex.—Texas & P. R. Co. v. Myers, 125 S.W. 49, 58 Tex.Civ.App. 403.

charging the servant with assumption of the risks of his employment is knowledge by him of such risks either actual or constructive.[4]

Ordinary risks. Where the risks are ordinary, the servant assumes them, as considered supra §§ 371–378, although he had no actual knowledge thereof; it is his duty to know of and appreciate these risks, and the law charges him with knowledge thereof.[5]

Extraordinary risks. Notwithstanding the general rule that the servant does not assume extraordinary or unusual risks, as considered supra § 361, as a general rule it is held that he may assume them when they are or ought to be known to, and ap-

4. U.S.—Rowe v. Gatke Corporation, C.C.A.Ind., 126 F.2d 61, petition dismissed Gatke Corporation v. Rowe, 63 S.Ct. 81, 317 U.S. 702, 87 L.Ed. 561—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, certiorari denied 61 S. Ct. 961, 313 U.S. 574, 85 L.Ed. 1531—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 105 F.2d 371—Norfolk & W. Ry. Co. v. Brumfield, C.C.A.Ohio, 64 F.2d 961—Cornec v. Baltimore & O. R. Co., C. C.A.Md., 48 F.2d 497, certiorari denied Baltimore & O. R. Co. v. Cornec, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530—Erie R. Co. v. Irons, C. C.A.N.J., 48 F.2d 60, certiorari denied 51 S.Ct. 649, 283 U.S. 857, 75 L.Ed. 1463—Emch v. Pennsylvania R. Co., C.C.A.Ohio, 37 F.2d 828—Port Angeles Western R. Co. v. Tomas, C.C.A.Wash., 36 F.2d 210—Los Angeles & S. L. R. Co. v. Shields, C.C.A.Utah, 33 F.2d 23—New York, C. & St. L. R. Co. v. McDougall, C.C.A.Ohio, 15 F.2d 283—Michalek v. U. S. Gypsum Co., D.C.N.Y., 16 F.Supp. 708.

Ala.—Edwards v. Southern Ry. Co., 169 So. 715, 233 Ala. 65, 106 A.L.R. 1133.

Ark.—Kansas City Southern Ry. Co. v. Diggs, 167 S.W.2d 879, 205 Ark. 150—Bradley Lumber Co. of Arkansas v. Clanton, 147 S.W.2d 14, 201 Ark. 657—Missouri Pac. R. Co. v. Sullivan, 122 S.W.2d 947, 197 Ark. 360—Kennedy v. Griffin, 112 S.W.2d 644, 195 Ark. 379—McEachin & McEachin v. Hill, 97 S.W.2d 70, 192 Ark. 1139—Missouri Pac. R. Co. v. Pipkin, 75 S.W.2d 801, 189 Ark. 890, certiorari denied 55 S. Ct. 637, 294 U.S. 728, 79 L.Ed. 1258—McEachin v. Yarborough, 74 S. W.2d 228, 189 Ark. 434—Standard Pipe Line Co. v. Gwaltney, 53 S. W.2d 597, 186 Ark. 230—Midland Coal Mining Co. v. Rodden, 41 S. W.2d 777, 184 Ark. 157—Chicago, R. I. & P. Ry. Co. v. Allison, 287 S.W. 197, 171 Ark. 983—Chicago, R. I. & P. Ry. Co. v. Daniel, 273 S.W. 15, 169 Ark. 23.

Cal.—Crabtree v. Western Pac. R. Co., 90 P.2d 835, 33 Cal.App.2d 35.

Colo.—Cohen v. Schaetzel, 103 P.2d 1060, 106 Colo. 266—Chicago, R. I. & P. Ry. Co. v. Cline, 14 P.2d 495, 91 Colo. 255.

Del.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr. 339—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.

Ga.—Martin v. Tubize-Chatillon Corporation, 17 S.E.2d 915, 66 Ga.App. 481—Pollard v. Weeks, 4 S.E.2d 722, 60 Ga.App. 664—Simowitz v. Register, 3 S.E.2d 231, 60 Ga.App. 180—Louisville & N. R. Co. v. Hicks, 176 S.E. 698, 49 Ga.App. 846, certiorari dismissed Hicks v. Louisville & N. R. Co., 186 S.E. 662, 182 Ga. 595—Gable v. Central of Georgia Ry. Co., 147 S.E. 135, 39 Ga.App. 350.

Ind.—Baltimore & O. S. W. R. Co. v. Carroll, 163 N.E. 99, 200 Ind. 589, reversed on other grounds, 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed. 566, mandate conformed to 171 N.E. 923, 202 Ind. 37.

Kan.—Parker v. City of Wichita, 92 P.2d 86, 150 Kan. 249—Sunderland v. Steanson, 252 P. 221, 122 Kan. 250.

Ky.—Robinette v. Norfolk & W. Ry. Co., 60 S.W.2d 344, 249 Ky. 93.

Me.—Hatch v. Portland Terminal Co., 131 A. 5, 125 Me. 96.

Minn.—Symons v. Great Northern Ry. Co., 293 N.W. 303, 208 Minn. 240.

N.H.—Blais v. Flanders Hardware Co., 42 A.2d 332, 93 N.H. 370—Perreault v. Allen Oil Co., 179 A. 365, 87 N.H. 306—Wemyss v. Wyoming Valley Paper Co., 172 A. 438, 86 N.H. 587—Clairmont v. Cilley, 153 A. 465, 85 N.H. 1—Kruger v. Exeter Mfg. Co., 149 A. 872, 84 N.H. 290.

N.J.—Walz v. Public Service Electric & Gas Co., 147 A. 654, 7 N.J.Misc. 993.

Pa.—Baumgartner v. Pennsylvania R. Co., 140 A. 622, 292 Pa. 106.

S.C.—Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259—McClain v. Charleston & W. C. Ry. Co., 4 S.E.2d 280, 191 S.C. 332—Stogner v. Great Atlantic & Pacific Tea Co., 192 S.E. 406, 184 S.C. 406—Lyons v. R. D. Cole Mfg. Co., 183 S.E. 466, 178 S.C. 520.

Tenn.—Sternberg v. Lanier, 3 Tenn. App. 383.

Tex.—Texas & N. O. R. Co. v. Neill, Civ.App., 97 S.W.2d 279, error refused 100 S.W.2d 348, 128 Tex. 580, certiorari granted 57 S.Ct. 791, 301 U.S. 674, 81 L.Ed. 1336, certiorari dismissed 58 S.Ct. 118, 302 U.S. 645, 82 L.Ed. 501, rehearing denied 58 S.Ct. 268, 302 U.S. 778, 82 L.Ed. 602—Hawthorne v. International-Great Northern R. Co., Civ.App., 63 S.W.2d 243, error refused—Missouri Pac. R. Co. v. Steen, Civ.App., 288 S.W. 532, certiorari denied 47 S.Ct. 765, 274 U.S. 753, 71 L.Ed. 1333.

Utah.—Morgan v. Ogden Union Ry. & Depot Co., 294 P. 541, 77 Utah 325.

39 C.J. p. 721 note 54.

Appreciation of danger see infra § 389.

Character of knowledge sufficient see infra § 388.

Knowledge as affecting contributory negligence see infra § 431.

Warning and instructing servant see supra §§ 284–291.

5. U.S.—New York, C. & St. L. R. Co. v. Boulden, C.C.A.Ind., 63 F.2d 917, certiorari denied 53 S.Ct. 785, 289 U.S. 753, 77 L.Ed. 1498.

Ark.—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056.

Ind.—New York, C. & St. L. R. Co. v. Peele, 164 N.E. 705, 88 Ind.App. 532, certiorari denied 49 S.Ct. 263, 279 U.S. 842, 73 L.Ed. 988.

Me.—McLaughlin v. Bangor & A. R. Co., 140 A. 827, 127 Me. 24.

Mo.—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876.

Neb.—Christenson v. Union Pac. R. Co., 290 N.W. 246, 137 Neb. 538, certiorari granted 61 S.Ct. 733, 312 U.S. 673, 85 L.Ed. 1114, certiorari dismissed 61 S.Ct. 825, 312 U.S. 710, 85 L.Ed. 1142—Campbell v. Chicago, R. I. & P. R. Co., 234 N. W. 395, 120 Neb. 499.

Or.—Makino v. Spokane, P. & S. Ry. Co., 63 P.2d 1082, 155 Or. 317.

Tenn.—Peters v. Tennessee Cent. Ry., 167 S.W.2d 973, 179 Tenn. 509.

W.Va.—Childress v. Norfolk & W. Ry. Co., 160 S.E. 564, 111 W.Va. 92.

Wyo.—Chicago & N. W. Ry. Co. v. Ott, 237 P. 238, 33 Wyo. 200, rehearing denied 238 P. 287, 33 Wyo. 200.

39 C.J. p. 721 note 56.

Presumption of knowledge see infra § 501.

Servant necessarily knows of dangers reasonably inherent in his undertaking.—City of Timpson v. Powers, Tex.Civ.App., 119 S.W.2d 145.

preciated by, him.[6]

Risk of master's negligence. Where the risks are not ordinary but are due to the master's negligence, in order to charge the servant with assumption thereof it is necessary either that he should have actual knowledge of the risks or that an ordinarily careful or prudent person would have observed and appreciated the risks and refused to work.[7] Prior to the amendment of August 11, 1939 chapter 685 §

6. U.S.—Great Northern Ry. Co. v. Nelson, C.C.A.Minn., 90F.2d 84—Yates v. Atlantic Ice & Coal Co., C.C.A.Fla., 76 F.2d 86—Wheelock v. Freiwald, C.C.A.Mo., 66 F.2d 694—Wagner Electric Corporation v. Snowden, C.C.A.Mo., 38 F.2d 599—Wabash Ry. Co. v. Beez, C. C.A.Ohio, 36 F.2d 480—Norfolk & W. Ry. Co. v. Collingsworth, C.C. A.Ohio, 32 F.2d 561—Atchison, T. & S. F. Ry. Co. v. Wyer, C.C.A. Okl., 8 F.2d 30.
Colo.—Chicago, R. I. & P. Ry. Co. v. Cline, 14 P.2d 495, 91 Colo. 255.
Ga.—Roberts v. Ethridge, 36 S.E. 2d 883, 73 Ga.App. 400—Pollard v. Weeks, 4 S.E.2d 722, 60 Ga.App. 664—Simowitz v. Register, 3 S.E. 2d 231, 60 Ga.App. 180—Southern Ry. Co. v. Blanton, 192 S.E. 437, 56 Ga.App. 232—Louisville & N. R. Co. v. Maffett, 137 S.E. 404, 36 Ga.App. 513.
Ill.—Chicago, R. I. & P. Ry. Co. v. Benson, 185 N.E. 244, 352 Ill. 195, certiorari denied 54 S.Ct. 53, 290 U.S. 636, 78 L.Ed. 553—Genzel v. New York, C. & St. L. R. Co., 261 Ill.App. 176.
Ky.—Chesapeake & O. Ry. Co. v. Howard's Adm'x, 51 S.W.2d 461, 244 Ky. 838, certiorari denied Chesapeake & O. Ry. Co. v. Howard, 53 S.Ct. 315, 287 U.S. 670, 77 L.Ed. 578—Royal Collieries Co. v. Wells, 50 S.W.2d 918, 244 Ky. 303—Chesapeake & O. Ry. Co. v. Craig, 17 S.W.2d 224, 229 Ky. 365.
La.—Weadock v. Eagle Indemnity Co., App., 15 So.2d 132—Snow v. Texas & P. Ry. Co., App., 166 So. 200.
Miss.—Gulf, M. & N. R. Co. v. Walters, 134 So. 831, 161 Miss. 313.
Neb.—Groat v. Clausen, 298 N.W. 563, 139 Neb. 689—Christenson v. Union Pac. R. Co., 290 N.W. 246, 137 Neb. 538, certiorari granted 61 S.Ct. 733, 312 U.S. 673, 85 L.Ed. 1114, certiorari dismissed 61 S.Ct. 825, 312 U.S. 710, 85 L.Ed. 1142—Corley v. Hubbard, 260 N.W. 551, 129 Neb. 38.
N.H.—Stone v. Howe, 32 A.2d 484, 92 N.H. 425, stating Vermont law.
Okl.—St. Louis-San Francisco Ry. Co. v. Stuart, 47 P.2d 177, 173 Okl. 221.
S.C.—Brazeale v. Piedmont Mfg. Co., 193 S.E. 39, 184 S.C. 471—Scott v. International Agr. Corporation, 184 S.E. 133, 180 S.C. 1—Gillis v. Atlantic Coast Line R. Co., 179 S.E. 62, 175 S.C. 223, certiorari denied Atlantic Coast Line R. Co. v. Gillis, 55 S.Ct. 545, 294 U.S. 718, 79 L.Ed. 1251—Leslie v. Southern Paving Const. Co., 169 S.E. 139, 169 S.C. 414—Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 158 S.C. 194, certiorari denied Atlantic Coast Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.
Tenn.—Luck v. Louisville & N. R. Co., 69 S.W.2d 899, 167 Tenn. 350—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn.App. 213.
Tex.—Chicago, R. I. & G. Ry. Co. v. Frederick, Civ.App., 74 S.W.2d 275, error refused, certiorari denied 55 S.Ct. 915, 295 U.S. 758, 79 L.Ed. 1701.
Utah.—Ward v. Denver & R. G. W. R. Co., 85 P.2d 837, 96 Utah 564—Morgan v. Ogden Union Ry. & Depot Co., 294 P. 541, 77 Utah 325—Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.
Vt.—Blaisdell v. Blake, 11 A.2d 215, 111 Vt. 123.
Wash.—Imbler v. Spokane, P. & S. Ry. Co., 2 P.2d 895, 164 Wash. 299—McGinn v. North Coast Stevedoring Co., 270 P. 113, 149 Wash. 1—Lander v. Shannon, 268 P. 145, 148 Wash. 93.
W.Va.—Childress v. Norfolk & W. Ry. Co., 160 S.E. 564, 111 W.Va. 92—Looney v. Norfolk & W. Ry. Co., 135 S.E. 262, 102 W.Va. 40, 48 A.L.R. 806, rehearing denied 137 S.E. 756, 102 W.Va. 40, 48 A.L.R. 806.
39 C.J. p. 721 note 60.
Divergent holdings as to assumption of risks arising from master's negligence see supra § 362.

Under State Railroad Employers' Liability Act, employee does not assume other and extraordinary risks and those due to employer's negligence until he is made aware thereof or they become so obvious and immediately dangerous that ordinarily prudent person would observe and appreciate them.—Palmer v. Great Northern Ry. Co., Mont., 170 P.2d 768.

Rescue of person in danger.
In action for death of employee while attempting to rescue children in mine air shaft filled with deadly gas, instruction on issue of assumed risk was properly refused where it did not embody the idea that a rescuer does not assume extraordinary risks when performing emergency acts to save life unless they are rash and reckless.—Central Coal & Coke Co. v. Porter, 280 S.W. 12, 170 Ark. 498.

7. U.S.—Pitcairn v. Perry, C.C.A. Mo., 122 F.2d 881, certiorari denied 62 S.Ct. 414, 314 U.S. 697, 86 L.Ed. 557—Kuptz v. Ralph Sollitt & Sons Const. Co., C.C.A.Tex., 88 F.2d 532, certiorari denied 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 537—Cornec v. Baltimore & O. R. Co., C.C.A.Md., 48 F.2d 497, certiorari denied Baltimore & O. R. Co. v. Cornec, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 530—Reading Co. v. Geary, C.C.A.Md., 47 F.2d 142, 79 A.L.R. 226, certiorari denied 51 S.Ct. 492, 283 U.S. 844, 75 L.Ed. 1454—Wabash Ry. Co. v. Beez, C.C.A.Ohio, 36 F.2d 480—Voorhees v. Central R. Co. of New Jersey, C.C.A.N.J., 14 F.2d 899—Davis v. Crane, C.C.A. Mo., 12 F.2d 355.
Ark.—Kansas City Southern Ry. Co. v. Diggs, 167 S.W.2d 879, 205 Ark. 150—Everton Silica Sand Co. v. Hicks, 125 S.W.2d 793, 197 Ark. 980—Missouri Pac. R. Co. v. Sullivan, 122 S.W.2d 947, 197 Ark. 360—Carson v. Dierks Lumber & Coal Co., 117 S.W.2d 39, 196 Ark. 163—Mercury Mining Co. v. Chambers, 102 S.W.2d 543, 193 Ark. 771—Arkadelphia Sand & Gravel Co. v. Knight, 79 S.W.2d 71, 190 Ark. 386—Clark v. Patterson, 77 S.W.2d 978, 190 Ark. 148—Missouri Pac. R. Co. v. Montgomery, 55 S.W.2d 68, 186 Ark. 537, certiorari denied 53 S.Ct. 690, 289 U.S. 747, 77 L.Ed. 1493—Missouri Pac. R. Co. v. Remel, 48 S.W.2d 548, 185 Ark. 598, certiorari denied 53 S.Ct. 85, 287 U.S. 634, 77 L.Ed. 550—Missouri Pac. R. Co. v. Harville, 46 S.W.2d 17, 185 Ark. 47, certiorari denied 53 S.Ct. 13, 287 U.S. 610, 77 L.Ed. 530—Rice & Holiman v. Henderson, 35 S.W.2d 1016, 183 Ark. 355—Federal Compress & Warehouse Co. v. Parrott, 28 S.W.2d 728, 181 Ark. 946—Southwest Power Co. v. Price, 22 S.W.2d 373, 180 Ark. 567, certiorari denied 50 S.Ct. 353, 281 U.S. 753, 74 L.Ed. 1163, and appeal dismissed 50 S.Ct. 407, 281 U.S. 703, 74 L.Ed. 1128—Wisconsin & Arkansas Lumber Co. v. Otts, 10 S. W.2d 364, 178 Ark. 283—E. L. Bruce Co. v. Leake, 3 S.W.2d 988, 176 Ark. 705—Chicago, R. I. & P. Ry. Co. v. Allison, 287 S.W. 197, 171 Ark. 983.
Cal.—Metz v. Southern Pac. Co., 124 P.2d 670, 51 Cal.App.2d 260.
Fla.—Gallespie v. Thornton, 117 So. 714, 95 Fla. 5.
Ga.—Gray v. Garrison, 176 S.E. 412,

1, 45 U.S.C.A. § 54, this rule was not changed by the Federal Employers' Liability Act,[8] although, as discussed supra § 359, the amendment has the effect of abolishing the defense of assumption of risk when asserted by a negligent employer as a defense in an action brought under the act.

Risk of negligence of fellow servant. In order to charge the servant with assumption of risks due to the negligence of a fellow servant, it is essential that the servant should have actual knowledge of the risks or that an ordinarily careful or prudent person would have observed and appreciated them.[9]

49 Ga.App. 472—Southern Ry. Co. v. Woodward, 146 S.E. 561, 39 Ga. App. 173—Louisville & N. R. Co. v. Maffett, 137 S.E. 404, 36 Ga.App. 513.

Ky.—Louisville & N. R. Co. v. Reverman's Adm'x, 15 S.W.2d 300, 228 Ky. 500—Louisville & N. R. Co. v. Wingo's Adm'x, 281 S.W. 170, 213 Ky. 336—Royal Galleries Co. v. Wells, 276 S.W. 515, 210 Ky. 600.

La.—Weadock v. Eagle Indemnity Co., App., 15 So.2d 132—Snow v. Texas & P. Ry. Co., App., 166 So. 200.

Me.—Richards v. Maine Cent. R. Co., 133 A. 911, 125 Me. 347.

Miss.—Hercules Powder Co. v. Williamson, 110 So. 244, 145 Miss. 172.

Mont.—Leonidas v. Great Northern Ry. Co., 72 P.2d 1007, 105 Mont. 302, affirmed Great Northern Ry. Co. v. Leonidas, 59 S.Ct. 51, 305 U.S. 1, 83 L.Ed. 3.

N.H.—Stone v. Howe, 32 A.2d 484, 92 N.H. 425, stating Vermont law—Chatman v. Maine Cent. R. R., 167 A. 559, 86 N.H. 317.

N.C.—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112.

N.D.—De Moss v. Great Northern Ry. Co., 272 N.W. 506, 67 N.D. 412.

Okl.—Kansas, O. & G. Ry. Co. v. Dillon, 135 P.2d 498, 191 Okl. 671—Champlin Refining Co. of New Mexico v. Huntington, 69 P.2d 31, 180 Okl. 280—Missouri-Kansas-Texas R. Co. v. Herron, 55 P.2d 95, 176 Okl. 162—Cushing Refining & Gasoline Co. v. Deshan, 300 P. 312, 149 Okl. 225—St. Louis-San Francisco Ry. Co. v. Landers, 243 P. 959, 116 Okl. 142, certiorari denied 47 S.Ct. 92, 273 U.S. 695, 71 L.Ed. 844.

Or.—Freeman v. Wentworth & Irwin, 7 P.2d 796, 139 Or. 1—Engfors v. Nelson S. S. Co., 280 P. 337, 131 Or. 108.

Pa.—Ruhl v. City of Philadelphia, 29 A.2d 784, 346 Pa. 214—Keough v. Markus, 173 A. 768, 114 Pa.Super. 80.

S.C.—Scott v. International Agr. Corporation, 184 S.E. 133, 180 S.C. 1—Primus v. Atlantic Coast Line R. Co., 171 S.E. 1, 171 S.C. 199, certiorari denied Atlantic Coast Line R. Co. v. Primus, 54 S.Ct. 56, 290 U.S. 639, 78 L.Ed. 555—Davis v. Atlantic Coast Line R. Co., 147 S.E. 834, 150 S.C. 130, reversed on other grounds Atlantic Coast Line R. Co. v. Davis, 49 S.Ct. 210, 279 U.S. 34, 73 L.Ed. 601—Tyner v. Atlantic Coast Line R. Co., 146 S.E. 663, 149 S.C. 89.

Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Barnaby, Civ.App., 167 S.W.2d 235, error refused—International-Great Northern R. R. v. Lowry, Civ.App., 98 S.W.2d 383, reversed on other grounds International-Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272—Chicago, R. I. & G. Ry. Co. v. Frederick, Civ.App., 74 S.W.2d 275, error refused, certiorari denied 55 S.Ct. 915, 295 U.S. 758, 79 L.Ed. 1701—St. Louis Southwestern Ry. Co. of Texas v. Steele, Civ.App., 50 S.W.2d 342—Missouri Pac. R. Co. v. Jones, Civ.App., 12 S.W.2d 1050, reversed on other grounds, Com.App., 24 S.W.2d 32—Houston & T. C. R. Co. v. Shepherd, Civ.App., 6 S.W.2d 410.

Utah.—Ward v. Denver & R. G. W. R. Co., 85 P.2d 837, 96 Utah 564—Morgan v. Ogden Union Ry. & Depot Co., 294 P. 541, 77 Utah 325—Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.

Vt.—Tinney v. Crosby, 22 A.2d 145, 112 Vt. 95.

Va.—Colonna Shipyard v. Dunn, 145 S.E. 342, 151 Va. 740, certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986—Roberts v. Southern Ry. Co., 144 S.E. 863, 151 Va. 815, rehearing denied 145 S.E. 255, 151 Va. 815.

Wash.—Imbler v. Spokane, P. & S. Ry. Co. 2 P.2d 895, 164 Wash. 299.

W.Va.—Thomas v. Chesapeake & O. Ry. Co., 162 S.E. 169, 111 W.Va. 389, certiorari denied Chesapeake & O. Ry. Co. v. Thomas, 52 S.Ct. 645, 286 U.S. 564, 76 L.Ed. 1296.

39 C.J. p 698 note 54, p 722 note 63.

Assumption of risks arising from master's negligence generally see supra §§ 362–370.

Effect of negligence of master where servant has knowledge see infra § 384.

Where injury is occasioned by single act, as distinguished from a series of acts of negligence, creating a sudden emergency, without warning and opportunity to judge of the danger and to decline meeting it, defense of assumption of risk is inapplicable.

Ga.—Louisville & N. R. Co. v. Dobbs, 143 S.E. 601, 38 Ga.App. 239.

Ind.—Baltimore & O. S. W. R. Co. v. Carroll, 163 N.E. 99, 200 Ind. 589, reversed on other grounds 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed. 566, mandate conformed to 171 N.E. 923, 202 Ind. 37.

Mich.—Sumner v. Ann Arbor R. Co., 209 N.W. 184, 235 Mich. 293.

Mo.—Finley v. St. Louis-San Francisco Ry. Co., 160 S.W.2d 735, 349 Mo. 330—Jenkins v. Kurn, 156 S.W.2d 668, 348 Mo. 942.

8. Cal.—Metz v. Southern Pac. Co., 124 P.2d 670, 51 Cal.App.2d 200.

Ill.—Werner v. Illinois Cent. R. Co., 33 N.E.2d 121, 309 Ill.App. 292, reversed on other grounds 42 N.E.2d 82, 279 Ill. 559.

Mo.—Evans v. Atchison, T. & S. F. Ry. Co., 131 S.W.2d 604, 345 Mo. 147—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336 Mo. 316—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748—York v. St. Louis-San Francisco Ry. Co., 62 S.W.2d 475, 333 Mo. 105—Gately v. St. Louis-San Francisco Ry. Co., 56 S.W.2d 54, 332 Mo. 1—State ex rel. St. Louis-San Francisco Ry. Co. v. Cox, 46 S.W.2d 849, 329 Mo. 292—Doyle v. St. Louis Merchants' Bridge Terminal Ry. Co., 31 S.W.2d 1010, 326 Mo. 425, certiorari denied St. Louis Merchants' Bridge Terminal R. R. v. Doyle, 51 S.Ct. 345, 283 U.S. 820, 75 L.Ed. 1435—Kidd v. Chicago, R. I. & P. Ry. Co., 274 S.W. 1079, 310 Mo. 1, certiorari denied Chicago, R. I. & P. Ry. Co. v. Kidd, 46 S.Ct. 119, 269 U.S. 582, 70 L.Ed. 424—Voorhees v. Chicago, R. I. & P. Ry. Co., App., 7 S.W.2d 740.

N.C.—McCrowell v. Southern Ry. Co., 20 S.E.2d 352, 221 N.C. 366—Hubbard v. Southern Ry. Co., 166 S.E. 802, 203 N.C. 675—Pyatt v. Southern Ry. Co., 154 S.E. 847, 199 N.C. 397.

Okl.—Kansas City Southern Ry. Co. v. Hoyle, 90 P.2d 1042, 185 Okl. 211—Chicago, R. I. & P. Ry. Co. v. King, 25 P.2d 304, 165 Okl. 169.

39 C.J. p 722 note 64.

9. U.S.—The Norland, C.C.A.Alaska, 101 F.2d 967—Norfolk & W. Ry. Co. v. Brumfield, C.C.A.Ohio, 64 F.2d 961—Reading Co. v. Geary, C.C.A.Md., 47 F.2d 142, 79 A.L.R. 226, certiorari denied 51 S.Ct. 492, 283 U.S. 844, 75 L.Ed. 1454.

Ala.—Birmingham Belt R. Co. v.

This rule has been followed in actions under the Federal Employers' Liability Act,[10] although, as considered supra § 359, the doctrine of assumption of risks has been abolished to the extent indicated by the amendment of August 11, 1939, chapter 685 § 1, 45 U.S.C.A. § 54.

§ 380. Right to Rely on Care of Master

In the absence of actual or constructive knowledge to the contrary, the servant has the right to assume that the master has used due care to fulfill the obligations imposed on him by law to protect the servant from injury.

In the absence of actual knowledge to the contrary, or of facts which would charge the servant with knowledge to the contrary,[11] the servant has the right to assume that the master has used due care and diligence to fulfill the obligations imposed on him by law to protect the servant from injury;[12]

Bennett, 146 So. 265, 226 Ala. 185, certiorari denied 54 S.Ct. 52, 290 U.S. 634, 78 L.Ed. 552.

Ark.—Kansas City Southern Ry. Co. v. Diggs, 167 S.W.2d 879, 205 Ark. 150—Everton Silica Sand Co. v. Hicks, 125 S.W.2d 793, 197 Ark. 980—Missouri Pac. R. Co. v. Sullivan, 122 S.W.2d 947, 197 Ark. 360—Missouri Pac. R. Co. v. Pipkin, 75 S.W.2d 801, 189 Ark. 890, certiorari denied 55 S.Ct. 637, 294 U.S. 728, 79 L.Ed. 1258—Missouri Pac. R. Co. v. Brown, 66 S.W.2d 1070, 188 Ark. 1167—Federal Compress & Warehouse Co. v. Parrott, 28 S.W.2d 728, 181 Ark. 946—Southwest Power Co. v. Price, 22 S.W.2d 373, 180 Ark. 567, certiorari denied 50 S.Ct. 353, 281 U.S. 753, 74 L.Ed. 1163, and appeal dismissed 50 S.Ct. 407, 281 U.S. 703, 74 L.Ed. 1128—Wisconsin & Arkansas Lumber Co. v. Otts, 10 S.W. 2d 364, 178 Ark. 283—Sun Oil Co. v. Hedge, 293 S.W. 9, 173 Ark. 729—Chicago, R. I. & P. Ry. Co. v. Allison, 287 S.W. 197, 171 Ark. 983.

Colo.—Denver & S. L. Ry. Co. v. Lombardi, 287 P. 648, 87 Colo. 311, certiorari denied 51 S.Ct. 37, 282 U.S. 865, 75 L.Ed. 765.

Kan.—Blevins v. Union Pac. R. Co., 299 P. 593, 133 Kan. 185.

S.C.—Scott v. International Agr. Corporation, 184 S.E. 133, 180 S.C. 1.

Tex.—Texas & N. O. R. Co. v. Webster, Civ.App., 53 S.W.2d 656, affirmed 70 S.W.2d 394, 123 Tex. 197, certiorari denied 55 S.Ct. 93, 293 U.S. 580, 79 L.Ed. 677, rehearing denied 55 S.Ct. 138, 293 U.S. 630, 79 L.Ed. 716—Texas & N. O. R. Co. v. Cammack, Civ.App., 280 S.W. 864, certiorari denied 47 S.Ct. 111, 273 U.S. 720, 71 L.Ed. 858.

39 C.J. p 546 note 72.

Effect of negligence of fellow servant where servant has knowledge see infra § 390.

Reason for rule

Such negligence is not one of the ordinary and usual hazards which the servant assumes by his contract of hiring.

Ark.—Chicago, R. I. & P. Ry. Co. v. Allison, 287 S.W. 197, 171 Ark. 983.

39 C.J. p. 547 note 73.

Risks arising from noncustomary, unknown, and not to be anticipated negligence of a fellow servant are not assumed.

Mo.—Brock v. Mobile & O. R. Co., 51 S.W.2d 100, 330 Mo. 918, certiorari denied Mobile & O. R. Co. v. Brock, 53 S.Ct. 87, 287 U.S. 638, 77 L.Ed. 552.

Tex.—Hawthorne v. International-Great Northern R. Co., Civ.App., 63 S.W.2d 243, error refused.

Where employer is corporation, servant does not assume risk of negligence of fellow servant, unless he is aware of danger or danger is obvious.—Arkadelphia Sand & Gravel Co. v. Knight, 79 S.W.2d 71, 190 Ark. 386.

Employee's waiver of employer's negligence in furnishing incompetent fellow servant does not extend to negligence of fellow servant.—Atlantic Coast Line R. Co. v. Cox, 156 S.E. 733, 42 Ga.App. 439.

10. Ala.—Louisville & N. R. Co. v. Hall, 135 So. 466, 223 Ala. 338, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L.Ed. 560—Seaboard Air Line Ry. Co. v. Johnson, 115 So. 168, 217 Ala. 251, certiorari granted 48 S.Ct. 436, 277 U.S. 579, 72 L. Ed. 997, and certiorari dismissed 49 S.Ct. 95, 278 U.S. 576, 73 L.Ed. 515.

Ark.—Missouri Pac. R. Co. v. Montgomery, 55 S.W.2d 68, 186 Ark. 537, certiorari denied 53 S.Ct. 690, 289 U.S. 747, 77 L.Ed. 1493—Missouri Pac. R. Co. v. Harville, 46 S. W.2d 17, 185 Ark. 47, certiorari denied 53 S.Ct. 13, 287 U.S. 610, 77 L.Ed. 530.

Cal.—Matthews v. Atchison, T. & S. F. Ry. Co., 129 P.2d 435, 54 Cal. App.2d 549—Crabtree v. Western Pac. R. Co., 90 P.2d 835, 33 Cal. App.2d 35.

Ga.—Southern Ry. Co. v. Woodward, 146 S.E. 561, 39 Ga.App. 173.

Ill.—Grosse v. Terminal R. Ass'n of St. Louis, 29 N.E.2d 1018, 307 Ill. App. 414.

Ky.—Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 274 Ky. 410.

Mass.—Messina v. Trustees of New York, N. H. & H. R. Co., 51 N.E. 2d 312, 314 Mass. 757—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434.

Mich.—Sumner v. Ann Arbor R. Co., 209 N.W. 184, 235 Mich. 293.

Mo.—Johnson v. Chicago & E. I. Ry. Co., 64 S.W.2d 674, 334 Mo. 22.

Okl.—Kansas, O. & G. Ry. Co. v. Hawkins, 64 P.2d 266, 178 Okl. 639.

Wis.—Schiefelbein v. Chicago, M., St. P. & P. R. Co., 265 N.W. 386, 221 Wis. 35, certiorari denied Chicago, M., St. P. & P. R. Co. v. Schifelbein, 57 S.Ct. 20, 299 U.S. 558, 81 L.Ed. 411.

39 C.J. p 675 notes 21, 22.

"If we turn then to the other alternative, the fellow-servant doctrine contemplated that an employee knew and assumed, when he accepted employment, the risks which negligence of his fellow employees might create. It was in fact a branch of the assumption of risk. When therefore Congress abolished the fellow-servant rule as a defense under the statute, it necessarily abolished the defense of assumption of risk to this extent. In other words, it eliminated the general anticipation of fellow servants' negligence upon which the fellow-servant rule was founded. If anything of assumption of rest remained in relation to the negligence of a fellow employee, it was such as required a showing that the injured one knew of and accepted the risk in the particular incident or situation which brought about his injury."—Owens v. Union Pac. R. Co., 63 S.Ct. 1271, 1275, 319 U.S. 715, 87 L.Ed. 1683, conformed to, C.C.A., 142 F.2d 145, certiorari denied 65 S.Ct. 57, 323 U.S. 740, 89 L.Ed. 593.

Fellow-servant rule see supra §§ 321–355.

11. Ark.—Missouri Pac. R. Co. v. Boyd, 106 S.W.2d 165, 194 Ark. 121—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056.

Wyo.—Chicago & N. W. Ry. Co. v. Ott, 237 P. 238, 33 Wyo. 200, rehearing denied 238 P. 287, 33 Wyo. 200, certiorari denied 46 S.Ct. 201, 269 U.S. 585, 70 L.Ed. 425.

39 C.J. p 723 note 67.

12. U.S.—Great Northern Ry. Co. v. Nelson, C.C.A.Minn., 90 F.2d 84—United Iron Works v. Woolsey, C. C.A.Ark., 39 F.2d 385.

and as a corollary it may be stated that the servant is not obliged to exercise ordinary care to see that the master has performed his duty.[13] The true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employee.[14]

The rule does not apply where the servant is charged with the duty of keeping the appliance by which he is injured in proper repair,[15] or where he is injured while making an unsafe place safe,[16] or where the servant is creating the place of work or where it is constantly being changed in character by the workman,[17] or where the servant makes an improper use of the appliances furnished.[18]

Selection of fellow servants. A servant is entitled to assume that the master has exercised due care and diligence in the selection and retention of reasonably competent and careful servants.[19] He is under no obligation to investigate the fitness of a fellow servant.[20] Nevertheless, a servant has no right to assume that the master has performed his duty in properly selecting fellow servants where the servant knew, or ought to have known, that such was not the case.[21]

§ 381. Duty to Inspect for Latent Defects or Dangers

The servant ordinarily is not charged with the duty of inspecting the master's place of work or his tools, machinery, appliances, etc., for the purpose of discovering latent defects or dangers.

Ark.—Tucker Duck & Rubber Co. v. Harvey, 154 S.W.2d 828, 202 Ark. 1033—McEachin & McEachin v. Hill, 97 S.W.2d 70, 192 Ark. 1139—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056—E. L. Bruce Co. v. Leake, 3 S.W.2d 988, 176 Ark. 705.

Cal.—King v. Schumacher, 89 P.2d 466, 32 Cal.App.2d 172, certiorari denied Schumacher v. King, 60 S. Ct. 123, 308 U.S. 593, 84 L.Ed. 496.

Colo.—Denver & Salt Lake Ry. Co. v. Granier, 89 P.2d 245, 104 Colo. 131.

Del.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr. 339.

Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga. App. 620.

Ill.—Grosse v. Terminal R. Ass'n of St. Louis, 29 N.E.2d 1018, 307 Ill. App. 414.

Iowa.—Laws v. Richards, 231 N.W. 321, 210 Iowa 608.

Me.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.

Mass.—Kavigian v. Lonero, 45 N.E. 2d 823, 312 Mass. 603.

Mo.—Marsanick v. Luechtefeld, App., 157 S.W.2d 537.

N.D.—DeMoss v. Great Northern Ry. Co., 272 N.W. 506, 67 N.D. 412.

Okl.—Chicago, R. I. & P. Ry. Co. v. King, 25 P.2d 304, 165 Okl. 169.

Pa.—Fox v. Lehigh Valley R. Co., 141 A. 157, 292 Pa. 321.

S.C.—Gillis v. Atlantic Coast Line R. Co., 179 S.E. 62, 175 S.C. 223, certiorari denied Atlantic Coast Line R. Co. v. Gillis, 55 S.Ct. 545, 294 U.S. 718, 79 L.Ed. 1251.

Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Barnaby, Civ.App., 167 S.W.2d 235, error refused—Texarkana & Ft. Smith Ry. Co. v. Smith, Civ.App., 270 S.W. 867.

Wash.—Kantonen v. Braley Motor Co., 30 P.2d 245, 176 Wash. 577.

Wyo.—Chicago & N. W. Ry. Co. v. Ott, 237 P. 238, 33 Wyo. 200, rehearing denied 238 P. 287, 33 Wyo. 200, certiorari denied 46 S.Ct. 201, 269 U.S. 585, 70 L.Ed. 425.

39 C.J. p 723 note 68, p 698 note 53.

Continuing in employment after knowledge of danger see infra §§ 393–397.

Duty of master to warn servant see supra §§ 284–291.

Reliance on care of master as affecting question of contributory negligence see infra §§ 428, 429.

Servant may rely on master's judgment as to danger not obvious.—Ault v. McGaughey, 292 S.W. 359, 173 Ark. 322.

Servant, although assuming temporary risk of exposure to cold, has right to expect relief from it at earliest practicable time.—Pullman Co. v. Montimore, C.C.A.Tex., 17 F. 2d 2, certiorari denied 47 S.Ct. 659, 274 U.S. 746, 71 L.Ed. 1328.

Violation of rule

Employer's violation of its rule or fixed custom relieves employee from application of assumption of risk doctrine.—MacDonnell v. Southern Pac. Co., 62 P.2d 201, 17 Cal. App.2d 432, certiorari denied Southern Pac. Co. v. MacDonnell, 57 S.Ct. 790, 301 U.S. 688, 81 L.Ed. 1345.

13. U.S.—United Iron Works v. Woolsey, C.C.A.Ark., 39 F.2d 385.

Ark.—Missouri Pac. R. Co. v. Boyd, 106 S.W.2d 165, 194 Ark. 121.

Ill.—Armstrong v. Chicago & W. I. R. Co., 183 N.E. 478, 350 Ill. 426, certiorari denied Chicago & W. I. R. Co. v. Armstrong, 53 S.Ct. 523, 289 U.S. 724, 77 L.Ed. 1475.

Minn.—Moquin v. Minneapolis, St. P. & S. S. M. Ry. Co., 231 N.W. 829, 181 Minn. 56, reversed on other grounds Minneapolis, St. P. & S. S. M. R. Co. v. Moquin, 51 S. Ct. 501, 283 U.S. 520, 75 L.Ed. 1243. Followed in 231 N.W. 920, 181 Minn. 626.

Okl.—Cushing Refining & Gasoline Co. v. Deshan, 300 P. 312, 149 Okl. 225—St. Louis-San Francisco Ry. Co. v. Landers, 243 P. 959, 116 Okl. 142, certiorari denied 47 S.Ct. 92, 273 U.S. 695, 71 L.Ed. 844.

S.C.—Gillis v. Atlantic Coast Line R. Co., 179 S.E. 62, 175 S.C. 223, certiorari denied Atlantic Coast Line R. Co. v. Gillis, 55 S.Ct. 545, 294 U.S. 718, 79 L.Ed. 1251.

Tex.—Wichita Falls & S. R. Co. v. Holbrook, Civ.App., 50 S.W.2d 428, affirmed 78 S.W.2d 938, 125 Tex. 184, certiorari denied 56 S.Ct. 139, 296 U.S. 618, 80 L.Ed. 439.

39 C.J. p 724 note 69.

Duty to inspect for latent defects or dangers see infra § 381.

Under Federal Employers' Liability Act, employee need not exercise care to discover dangers not ordinarily incident to his employment.—Tillian v. Atchison, T. & S. F. Ry. Co., 55 P.2d 34, 40 N.M. 80.

14. U.S.—Choctaw, Oklahoma, & Gulf R. Co. v. McDade, Tenn., 24 S.Ct. 24, 191 U.S. 64, 48 L.Ed. 96.

15. Mass.—Drum v. New England Cotton Yarn Co., 61 N.E. 812, 180 Mass. 113.

16. Colo.—Metallic Gold Min. Co. v. Watson, 117 P. 609, 51 Colo. 278, Ann.Cas.1913A, 1276.

39 C.J. p 725 note 72.

17. Mont.—Kallio v. Northwestern Impr. Co., 132 P. 419, 47 Mont. 314, Ann.Cas.1915A 1228.

18. W.Va.—Robinson v. Virginia-Pocahontas Coal Co., 88 S.E. 620, 78 W.Va. 94.

19. Mass.—Guilfoil v. Everett, 101 N.E. 1091, 214 Mass. 571.

Mo.—Weber v. Terminal Railroad Ass'n of St. Louis, App., 20 S.W. 2d 601.

39 C.J. p 725 note 76.

Competency of fellow servant see supra § 311 et seq.

20. Mass.—Guilfoil v. Everett, 101 N.E. 1091, 214 Mass. 571.

21. Fla.—Taylor v. Prairie Pebble Phosphate Co., 54 So. 904, 61 Fla. 455.

In accordance with the rule that the servant, in the absence of actual knowledge to the contrary or in the absence of facts which would charge him with knowledge to the contrary, has the right to assume that the master has used due care and diligence to fulfill the obligations imposed on him by law to protect the servant from injury, as considered supra § 380, it is very generally held that the servant is not charged with the duty of inspecting the master's place of work or his tools, machinery, appliances, and instrumentalities for work for the purpose of discovering latent defects or dangers, that is, such defects or dangers as are not discoverable by ordinary observation,[22] except where, as considered supra § 374, the terms of the contract of hiring itself impose on the servant the duty of inspection or of remedying defects, or both.

The exercise of the ordinary care and diligence imposed on an employee in the discharge of his duties does not extend to this length[23] and require the exercise of even ordinary care and diligence in discovering latent defects and dangers.[24] It is not expected that the servant will make close scrutiny into all the details of the instrumentalities with which he deals; the employment forbids him to spend his time in this manner.[25] This rule is not affected by the fact that the servant had an opportunity of ascertaining defects or dangers by investigation.[26]

Applications of rule. The rule that the servant is under no duty to make an inspection for latent defects or dangers has been applied with respect to various places for work, tools, appliances, and instrumentalities,[27] such as boilers,[28] cars,[29] chairs,[30] gates,[31] platforms,[32] rails and railroad ties,[33] roofs of mines,[34] scaffolds,[35] set screws,[36] trapdoors,[37] trestles,[38] tongs,[39] and walls of a pit which were the servant's place of work for repairing engines.[40]

§ 382. Defects or Dangers of Which Servant Has Actual or Constructive Knowledge

The servant generally assumes the risk of injury from defects or dangers of which he has actual knowledge or which are so patent and obvious that he should know of their existence.

Except in so far as modified or abrogated by statute, as considered infra § 383, and in the absence of a contract to the contrary,[41] as a general rule, where the servant has actual knowledge of the dangers to which the service exposes him or where the defects or dangers are so patent and obvious that in the exercise of ordinary care, in the performance of the services for which he was employed, he

22. Ark.—Lee v. Pate, 131 S.W.2d 8, 198 Ark. 723—Producers Gravel & Sand Co. v. Jones, 126 S.W.2d 39, 197 Ark. 767—Carson v. Dierks Lumber & Coal Co., 117 S.W.2d 39, 196 Ark. 163—L. C. Burr & Co. v. Greenlee, 102 S.W.2d 77, 193 Ark. 705—Breece-White Mfg. Co. v. Green, 287 S.W. 173, 171 Ark. 968.
Cal.—Emery v. Pacific Telephone & Telegraph Co., 110 P.2d 1079, 43 Cal.App.2d 402.
Ga.—Alford v. Zeigler, 16 S.E.2d 69, 65 Ga.App. 294.
Ind.—Baltimore & O. S. W. R. Co. v. Carroll, 163 N.E. 99, 200 Ind. 589, set aside on other grounds 171 N.E. 923, 202 Ind. 37, reversed on other grounds 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed. 566.
Mo.—Westover v. Wabash Ry. Co., 6 S.W.2d 843, certiorari denied Wabash Ry. Co. v. Westover, 49 S.Ct. 31, 278 U.S. 632, 73 L.Ed. 550.
S.C.—Stogner v. Great Atlantic & Pacific Tea Co., 192 S.E. 406, 184 S.C. 406.
Tex.—City of Panhandle v. Byrd, Civ.App., 77 S.W.2d 904, reversed on other grounds 106 S.W.2d 660, 130 Tex. 96—Texas & P. Ry. Co. v. Bradley, Civ.App., 298 S.W. 149, reversed on other grounds Bradley v. Texas & P. Ry. Co., Com.App., 1 S.W.2d 861—Louisiana Ry. & Nav. Co. of Texas v. Eldridge, Civ.App., 293 S.W. 901.
Wash.—Cockerline v. Anderson, 52 P.2d 321, 184 Wash. 701.
39 C.J. p 725 note 81.
Latent defects generally see infra § 392.

Master has duty to apprise servant of existence of latent danger known to master and unknown to servant.—Cummins v. Dufault, 139 P.2d 308, 18 Wash.2d 274.

23. Colo.—Burnside v. Peterson, 96 P. 256, 43 Colo. 382, 17 L.R.A.,N.S., 76.
Tex.—Wichita Falls Motor Co. v. Bridge, Civ.App., 158 S.W. 1161.

24. Mo.—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748—State ex rel. St. Louis-San Francisco Ry. Co. v. Cox, 46 S.W.2d 849, 329 Mo. 292.
39 C.J. p 726 note 84.

25. Or.—Millen v. Pacific Bridge Co., 95 P. 196, 51 Or. 538.

26. Iowa.—Brusseau v. Lower Brick Co., 110 N.W. 577, 133 Iowa 245.

27. Ark.—Jewel Coal & Mining Co. v. Whitner, 279 S.W. 1031, 170 Ark. 393.

28. Ill.—Schumann v. Mealiff, 178 Ill.App. 254.

29. Ga.—Pollard v. Weeks, 4 S.E.2d 722, 60 Ga.App. 664.
39 C.J. p 726 note 88.

30. Ark.—Capital City Casket Co. v. Szurgot, 54 S.W.2d 285, 186 Ark. 421.

31. Ky.—Webster v. Stewart Iron Works Co., 104 S.W. 708, 31 Ky.L. 1045.

32. Iowa.—Kroeger v. Marsh Bridge Co., 116 N.W. 125, 138 Iowa 376.

33. Ill.—Courtney v. Illinois Cent. R. Co., 161 Ill.App. 577.
Kan.—Smith v. Chicago, R. I. & P. R. Co., 107 P. 635, 82 Kan. 136, 28 L.R.A.,N.S., 1255.

34. Mont.—Allen v. Bear Creek Coal Co., 115 P. 673, 43 Mont. 269.

35. Mich.—Porth v. Cadillac Motor Car Co., 176 N.W. 554, 209 Mich. 89.

36. Cal.—Schellin v. North Alaska Salmon Co., 138 P. 723, 167 Cal. 103.

37. Colo.—Burnside v. Peterson, 96 P. 256, 43 Colo. 382, 17 L.R.A.,N.S., 76.

38. Or.—Emerson v. Portland, E. & E. R. Co., 166 P. 946, 85 Or. 229.

39. Colo.—Colorado Fuel & Iron Co. v. Gardner, 121 P. 680, 21 Colo. App. 273.

40. Nev.—Ames v. Western Pac. R. Co., 227 P. 1009, 48 Nev. 78.

41. Idaho.—Kangas v. National Copper Min. Co., 187 P. 792, 32 Idaho 602.

should have known of their existence, he assumes the risk of injury incident to their existence.[42]

42. U.S.—Chapman & Dewey Lumber Co. v. Hanks, C.C.A.Tenn., 106 F.2d 482, stating Arkansas law—Buffington v. Owosso Mfg. Co., C.C.A.Ark., 105 F.2d 692—United Production Corporation v. Chesser, C.C.A.Tex., 95 F.2d 521, certiorari denied Chesser v. United Production Corporation, 59 S.Ct. 75, 305 U.S. 616, 83 L.Ed. 393—Kuptz v. Ralph Sollitt & Sons Const. Co., C.C.A.Tex., 88 F.2d 532, certiorari denied 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 537—Hylton v. Southern Ry. Co., C.C.A.Tenn., 87 F.2d 393, certiorari denied 57 S.Ct. 929, 301 U.S. 699, 81 L.Ed. 1354—Pitcairn v. Hunault, C.C.A.Ind., 86 F.2d 664—Yates v. Atlantic Ice & Coal Co., C.C.A.Fla., 76 F.2d 86—Wheelock v. Freiwald, C.C.A.Mo., 66 F.2d 694—Wisconsin & Arkansas Lumber Co. v. Ward, C.C.A.Ark., 32 F.2d 974—Standard Oil Co. of Louisiana v. Martin, C.C.A.Ark., 21 F.2d 912.

Ariz.—Robles v. Preciado, 79 P.2d 504, 52 Ariz. 113.

Ark.—Hall v. Patterson, 166 S.W.2d 667, 205 Ark. 10—Lee v. Pate, 131 S.W.2d 8, 198 Ark. 723—Carson v. Dierks Lumber & Coal Co., 117 S.W.2d 39, 196 Ark. 163—M. E. Gillioz, Inc., v. Lancaster, 113 S.W.2d 709, 195 Ark. 688—Bruner Ivory Handle Co. v. West, 86 S.W.2d 919, 191 Ark. 479—Fraser v. Norman, 42 S.W.2d 569, 184 Ark. 434—Mississippi Valley Power Co. v. Hubbard, 26 S.W.2d 118, 181 Ark. 487—Gaster v. Hicks, 25 S.W.2d 760, 181 Ark. 299—International Harvester Co. of America v Hawkins, 24 S.W.2d 340, 180 Ark. 1056—Missouri Pac. R. Co. v. Horner, 15 S.W.2d 994, 179 Ark. 321—Jewel Coal & Mining Co. v. Whitner, 279 S.W. 1031, 170 Ark. 393—Wisconsin and Arkansas Lumber Co. v. McCloud, 270 S.W. 599, 168 Ark. 352.

Cal.—Myers v. Southern Pac. Co., 58 P.2d 387, 14 Cal.App.2d 287, hearing denied 59 P.2d 1001, 14 Cal.App.2d 287—Dick v. Atchison, T. & S. F. Ry. Co., 287 P. 538, 105 Cal.App. 363.

Fla.—Gordon v. Gandy Bridge Co., 7 So.2d 350, 150 Fla. 28—Duncan v. Growers Equipment Co., 1 So.2d 458, 146 Fla. 516—City of Jacksonville Beach v. Jones, 131 So. 369, 101 Fla. 95, reversed on other grounds 133 So. 562, 101 Fla. 96, followed in City of Jacksonville Beach v. Keller, 135 So. 530, 102 Fla. 273—Cummer Lumber Co. v. Silas, 125 So. 372, 98 Fla. 1158.

Ga.—Kidd v. Williamson, 8 S.E.2d 590, 61 Ga.App. 890—Simowitz v. Register, 3 S.E.2d 231, 60 Ga.App. 180—Connell v. Fisher Body Corporation, 192 S.E. 484, 56 Ga.App. 203—Louisville & N. R. Co. v. Hicks, 176 S.E. 698, 49 Ga.App. 846, certiorari dismissed Hicks v. Louisville & N. R. Co., 186 S.E. 662, 182 Ga. 595.

Ill.—Lilly v. Grand Trunk Western R. Co., 37 N.E.2d 888, 312 Ill.App. 73, reversed on other grounds 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411.

Ind.—Widmer v. Hufnagel, 26 N.E.2d 557, 108 Ind.App. 267—Pennsylvania R. Co. v. Martin, 170 N.E. 554, 93 Ind.App. 258—New York, C. & St. L. R. Co. v. May, 164 N.E. 288, 95 Ind.App. 384.

Kan.—Parker v. City of Wichita, 92 P.2d 86, 150 Kan. 249—Luebken v. City of Hanover, 283 P. 501, 129 Kan. 443.

Ky.—Westinghouse Electric & Mfg. Co. v. Deakins, 204 S.W.2d 434, 305 Ky. 385—Chesapeake & O. Ry. Co. v. Lilly, 188 S.W.2d 105, 300 Ky. 100—Louisville & N. R. Co. v. Smith, 155 S.W.2d 28, 287 Ky. 671—Grigsby v. Louisville & N. R. Co., 114 S.W.2d 775, 272 Ky. 709—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603—Norfolk & W. Ry. Co. v. Robinette, 78 S.W.2d 802, 257 Ky. 558—High Splint Coal Co. v. Baker, 57 S.W.2d 60, 247 Ky. 426—McDonald v. Louisville & N. R. Co., 24 S.W.2d 585, 232 Ky. 734—Chesapeake & O. Ry. Co. v. Dixon, 280 S.W. 93, 212 Ky. 738.

La.—Weadock v. Eagle Indemnity Co., App., 15 So.2d 132—Devore v. Louisiana & Arkansas Ry. Co., App., 178 So. 706—Borde v. New Orleans & G. N. R. Co., App., 140 So. 810.

Me.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.

Mass.—Reidy v. Crompton & Knowles Loom Works, 60 N.E.2d 589, 318 Mass. 135—Engel v. Boston Ice Co., 4 N.E.2d 455, 295 Mass. 428—Pagano v. Worcester Consol. St. Ry. Co., 163 N.E. 764, 265 Mass. 89.

Mich.—Mathy v. Chicago & N. W. Ry. Co., 262 N.W. 917, 273 Mich. 301, certiorari denied 56 S.Ct. 385, 297 U.S. 702, 80 L.Ed. 991, rehearing denied 56 S.Ct. 499, 297 U.S. 727, 80 L.Ed. 1010—La Pointe v. Chevrette, 250 N.W. 272, 264 Mich. 482—Howe v. Michigan Cent. R. Co., 211 N.W. 111, 236 Mich. 577, certiorari denied 47 S.Ct. 576, 274 U.S. 738, 71 L.Ed. 1317.

Minn.—Rozinka v. Duluth & I. R. R. Co., 231 N.W. 404, 181 Minn. 20.

Miss.—Gulf, M. & N. R. Co. v. Walters, 134 So. 831, 161 Miss. 313.

Mo.—Walls v. Thompson, App., 119 S.W.2d 43—Sweeney v. Terminal R. Ass'n of St. Louis, App., 110 S.W.2d 852—Lugar v. Missouri Pac. R. Co., 283 S.W. 738, 221 Mo. App. 679, stating Arkansas law.

Neb.—Groat v. Claudsen, 298 N.W. 563, 139 Neb. 689—Chambers v. Chicago, B. & Q. R. Co., 293 N.W. 338, 138 Neb. 490—Corley v. Hubbard, 260 N.W. 551, 129 Neb. 38—Anderson v. Svehla, 253 N.W. 863, 126 Neb. 584—Campbell v. Chicago, R. I. & P. R. Co., 234 N.W. 395, 120 Neb. 499.

N.H.—Fasekis v. J. J. Newbury Co., 44 A.2d 817, 93 N.H. 468—Stone v. Johnson, 197 A. 713, 89 N.H. 329—Levesque v. American Box & Lumber Co., 153 A. 10, 84 N.H. 543—Sweeney v. Winebaum, 149 A. 77, 84 N.H. 217—Shurkus v. Gate City Foundry Co., 138 A. 302, 83 N.H. 43—Owen v. Elliot Hospital, 136 A. 133, 82 N.H. 497.

N.J.—Huels v. General Elec. Co., 46 A.2d 654, 134 N.J.Law 165—Clayton v. Ainsworth, 4 A.2d 274, 122 N.J.Law 160—Vinger v. Central R. Co. of New Jersey, 160 A. 575, 109 N.J.Law 93—Cichocki v. Geigy Co., 183 A. 463, 14 N.J.Misc. 232—Walz v. Public Service Electric & Gas Co., 147 A. 654, 7 N.J.Misc. 993.

N.Y.—Paquet v. Pictorial Review Holding Corporation, 223 N.Y.S. 686, 130 Misc. 389.

Ohio.—Patterson v. Cleveland Cliffs Iron Co., 174 N.E. 592, 37 Ohio App. 316.

Okl.—Oklahoma Pipe Line Co. v. Fallin, 56 P.2d 372, 176 Okl. 474.

Pa.—Casseday v. Baltimore & O. R. Co., 22 A.2d 663, 343 Pa. 342—Hartz v. Schafer, 154 A. 713, 303 Pa. 449.

S.C.—Williamson v. Southern Ry. Co., 191 S.E. 79, 183 S.C. 312.

Tenn.—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn.App. 213—Moon v. City of Chattanooga, 10 Tenn.App. 82.

Tex.—Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, error dismissed, judgment correct—Wichita Falls & S. R. Co. v. Lindley, Civ.App., 143 S.W.2d 428. Error dismissed, judgment correct—Fort Worth & D. C. Ry. Co. v. Mills, Civ.App., 140 S.W.2d 513, error dismissed, judgment correct—International-Great Northern R. R. v. Lowry, Civ.App., 98 S.W.2d 383, reversed on other grounds International-Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272—Hawthorne v. International-Great Northern R. Co., Civ.App., 63 S.W.2d 243, error refused.—**Corpus Juris cited in** Gulf, C. & S. F. R. Co. v. Spivey, Civ.App., 56 S.W.2d 655, 657—Texas & P. Ry. Co. v. Baldwin, Civ.App., 25 S.W.2d 969, affirmed, Com.App., 44 S.W.2d 909, certiorari denied 53 S.Ct. 11, 287 U.S. 606, 77 L.Ed. 527—Louisiana Ry. & Nav. Co. of Texas v. Disheroon, Civ.App., 295 S.W. 250—Louisiana Ry. & Nav. Co. of

A master has the right, it has been said, to presume that the servant will see and guard against obvious dangers.[43] Where the risks are obvious, the failure of an employee to make an inspection amounts to his taking his chances.[44]

Method of acquiring knowledge immaterial. If a servant appreciates the danger before he is injured, it is immaterial how he acquired his knowledge of the danger.[45]

Warning of danger. Where the state of facts on which the rule is predicated exists, no warning of the danger of the employment is necessary in order to charge the servant with an assumption of the risk.[46]

§ 383. —— Effect of Special Statutory Provisions

a. Federal Employers' Liability Act and similar state statutes
b. Other state statutes

a. Federal Employers' Liability Act and Similar State Statutes

In actions under the Federal Employers' Liability Act, prior to its amendment the rule that the servant assumed the risk of injury from such defects and dangers of which he had actual knowledge or which were so patent and obvious that he should have known of their existence was applied.

Prior to the amendment of August 11, 1939 chapter 685 § 1, 45 U.S.C.A. § 54, which, as discussed supra § 359, abolished the doctrine of assumption of risk as to a negligent employer in an action under the Federal Employers' Liability Act, the rule that the servant assumes the risk of injury from such defects or dangers of which he has actual knowledge or which are so patent and obvious that he should know of their existence, as considered supra § 382, was applied in actions under the act.[47] Furthermore, except where the master had violated

Texas v. Eldridge, Civ.App., 293 S.W. 901—Dell v. Lancaster, Civ. App., 285 S.W. 685.
Utah.—Miller v. Western Pac. R. Co., 274 P. 945, 73 Utah 442.
Va.—Knowles v. Southern Ry. Co., 12 S.E.2d 821, 177 Va. 88—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775—Norfolk & W. Ry. Co. v. Smith, 146 S.E. 268, 152 Va. 165—Roberts v. Southern Ry. Co., 145 S.E. 255, 151 Va. 815—Norfolk & W. Ry. Co. v. Lumpkins, 144 S.E. 485, 151 Va. 173.
Wash.—Cummins v. Dufault, 139 P. 2d 308, 18 Wash.2d 274—Peterson v. Tacoma-Ashford Transit Co., 17 P.2d 35, 170 Wash. 594—McGinn v. North Coast Stevedoring Co., 270 P. 113, 149 Wash. 1—Lander v. Shannon, 268 P. 145, 148 Wash. 93—Roalsen v. Oregon Stevedoring Co., 267 P. 433, 147 Wash. 672.
W.Va.—Rash v. Norfolk & W. Ry. Co., 12 S.E.2d 501, 122 W.Va. 688—Rash v. Norfolk & W. Ry. Co., 200 S.E. 583, 120 W.Va. 540, certiorari denied 59 S.Ct. 827, 307 U.S. 623, 83 L.Ed. 1502.
Wyo.—Chicago & N. W. Ry. Co. v. Ott, 237 P. 238, 33 Wyo. 200, rehearing denied 238 P. 287, 33 Wyo. 200.
39 C.J. p 726 note 3.
Assumption of risks arising from master's negligence generally see supra § 362.

Obvious dangers or defects

(1) "Obvious dangers" are those which are apparent in exercise of ordinary observation and disclosed by use of eyes and other senses.—Patterson v. Cleveland Cliffs Iron Co., 174 N.E. 592, 37 Ohio App. 316.

(2) "Obvious defect" is defect which one, by exercise of ordinary care, would discover.
Ga.—Atlanta v. Trussell, 94 S.E. 649, 21 Ga.App. 340.
Tex.—Missouri, K. & T. R. Co. v. Chambers, 43 S.W. 1090, 17 Tex. Civ.App. 487.

Risks not incident to service

Servant assumes all risks and hazards of service that are open and apparent to him, regardless of whether they are necessarily incident to service.—Gordon v. Gandy Bridge Co., 7 So.2d 350, 150 Fla. 28.

Where risk of disease could be discovered by employee in exercise of ordinary care and diligence, no liability for contraction of disease by employee results against employer.—Connell v. Fisher Body Corporation, 192 S.E. 484, 56 Ga.App. 203.

43. Me.—Monk v. Bangor Power Co., 92 A. 617, 112 Me. 492.
Vt.—Landing v. Town of Fairlee, 22 A.2d 179, 112 Vt. 127.

44. Mass.—Wood v. National Theatre Co., 42 N.E.2d 536, 311 Mass. 550.

45. N.H.—Upton v. Conway Lumber Co., 128 A. 802, 81 N.H. 489.
Tex.—Adams v. Consumers' Lignite Co., Civ.App., 138 S.W. 1178.

46. Tenn.—Tennessee Cent. Ry. Co. v. Williams, 9 Tenn.App. 529.
39 C.J. p 733 note 6.

47. U.S.—Northwestern Pac. R. Co. v. Bobo, Cal., 54 S.Ct. 263, 290 U.S. 499, 78 L.Ed. 462—New York, C. & St. L. R. Co. v. Kelly, C.C.A. Ind., 70 F.2d 548, certiorari denied Kelly v. New York, C. & St. L. R. Co., 55 S.Ct. 110, 293 U.S. 595, 79 L.Ed. 689—Grand Trunk Western Ry. Co. v. Reid, C.C.A. Mich., 42 F.2d 403—Gilmer v. Yazoo & M. V. R. Co., C.C.A.Miss., 4 F.2d 963, certiorari denied 45 S. Ct. 639, 268 U.S. 705, 69 L.Ed. 1167.
Ala.—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504—Birmingham Belt R. Co. v. Bennett, 146 So. 265, 226 Ala. 185, certiorari denied 54 S.Ct. 52, 290 U.S. 634, 78 L.Ed. 552.
Cal.—Crabtree v. Western Pac. R. Co., 90 P.2d 835, 33 Cal.App.2d 35—Myers v. Southern Pac. Co., 58 P.2d 387, 14 Cal.App.2d 287, hearing denied 59 P.2d 1001, 14 Cal. App.2d 287.
Ga.—Edwards v. Southern Ry. Co., 184 S.E. 370, 52 Ga.App. 557.
Ill.—Chestnut v. Chicago, B. & Q. R. Co., 1 N.E.2d 811, 284 Ill.App. 317.
Ind.—New York Cent. R. Co. v. Newton County State Bank of Kentland, 165 N.E. 325, 88 Ind.App. 661—New York, C. & St. L. R. Co. v. May, 164 N.E. 288, 95 Ind.App. 384.
Kan.—Schaefer v. Lowden, 78 P.2d 48, 147 Kan. 520—Pipkin v. Midland Valley R. Co., 19 P.2d 701, 137 Kan. 150.
Ky.—Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 274 Ky. 410—Louisville & N. R. Co. v. Davis' Adm'x, 51 S.W.2d 942, 245 Ky. 79.
La.—Snow v. Texas & P. Ry. Co., App., 166 So. 200.
Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R.

a federal statute enacted for the safety of the servant, in all cases brought under the Federal Employers' Liability Act, the rule applied prior to the 1939 amendment, although the master had been guilty of negligence;[48] and, where the action brought in a state court was based on this act, the defense of assumption of risk was available if the conditions mentioned existed although it was the settled doctrine of the state courts that the servant under no circumstances assumed the risk of injury from the master's negligence.[49]

As considered supra §§ 369, 370, where state leg-

Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434.
Minn.—Feurt v. Chicago, R. I. & P. Ry. Co., 227 N.W. 212, 178 Minn. 395.
Miss.—Kurn v. Denson, 10 So.2d 198, 193 Miss. 763—Louisville & N. R. Co. v. Russell, 144 So. 478, 164 Miss. 529.
Mo.—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876—Kelso v. St. Louis San Francisco Ry. Co., App., 39 S.W.2d 456.
Neb.—Sullivan v. Chicago & N. W. Ry. Co., 258 N.W. 38, 128 Neb. 92, certiorari denied 55 S.Ct. 831, 295 U.S. 749, 79 L.Ed. 1694.
N.J.—Loffler v. Delaware, L. & W. R. Co., 172 A. 497, 113 N.J.Law 113—Cyphers v. Erie R. Co., 166 A. 342, 110 N.J.Law 405—Vinger v. Central R. Co. of New Jersey, 149 A. 125, 106 N.J.Law 264.
N.Y.—Kawacz v. Delaware, L. & W. R. Co., 181 N.E. 87, 259 N.Y. 166, reargument denied 191 N.E. 513, 264 N.Y. 459, certiorari denied 53 S.Ct. 121, 287 U.S. 659, 77 L.Ed. 569—Negro v. Boston & M. R. R., 48 N.Y.S.2d 819, 268 App.Div. 59, affirmed 59 N.E.2d 31, 293 N.Y. 791, certiorari denied 65 S.Ct. 867, 324 U.S. 862, 89 L.Ed. 1419.
N.C.—Winfree v. Seaboard Air Line Ry. Co., 155 S.E. 259, 199 N.C. 590.
Ohio.—Baltimore & O. R. Co. v. Shober, 176 N.E. 88, 38 Ohio App. 216.
Okl.—Atchison, T. & S. F. Ry. Co. v. Myers, 69 P.2d 62, 179 Okl. 637, appeal dismissed Myers v. Atchison, T. & S. F. R. Co., 58 S.Ct. 29, 302 U.S. 636, 82 L.Ed. 495—Oklahoma City-Ada-Atoka Ry. Co. v. Kirkbride, 65 P.2d 1021, 179 Okl. 428.
Tenn.—Tennessee Cent. Ry. Co. v. Shacklett, 147 S.W.2d 1054, 24 Tenn.App. 563—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn.App. 213.
Tex.—Hamilton v. St. Louis, S. F. & T. Ry. Co., 283 S.W. 475, 115 Tex. 455—Missouri Pac. R. Co. v. Jones, Com.App., 24 S.W.2d 32—Pisano v. Texas & N. O. R. Co., Civ.App., 112 S.W.2d 316, error dismissed—Texas & N. O. R. Co. v. Hawthorne, Civ.App., 297 S.W. 321, certiorari denied Hawthorne v. Texas & N. O. R. Co., 48 S.Ct. 434, 277 U.S. 571, 584, 72 L.Ed. 993—Swann v. Texas & P. Ry. Co., Civ.App., 200 S.W. 1131.
Va.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.
W.Va.—Rash v. Norfolk & W. Ry. Co., 12 S.E.2d 501, 122 W.Va. 688—Rash v. Norfolk & W. Ry. Co., 200 S.E. 583, 120 W.Va. 540, certiorari denied 59 S.Ct. 827, 307 U.S. 623, 83 L.Ed. 1502.
39 C.J. p 733 note 10.

48. U.S.—Delaware, L. & W. R. Co. v. Koske, N. J., 49 S.Ct. 202, 279 U.S. 7, 73 L.Ed. 578—Toledo, St. L. & W. R. Co. v. Allen, Mo., 48 S.Ct. 215, 276 U.S. 165, 72 L.Ed. 513, conformed to Allen v. Toledo, St. Louis & Western Ry. Co., Mo., 12 S.W.2d 1116—Northern Pac. R. Co. v. Berven, C.C.A.Wash., 73 F.2d 687—Blackley v. Powell, C.C.A.N.C., 68 F.2d 457—Biernacki v. Pennsylvania R. Co., C.C.A.N.Y., 45 F.2d 677, certiorari denied 51 S.Ct. 488, 283 U.S. 841, 75 L.Ed. 1451.
Ala.—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504.
Ark.—St. Louis-San Francisco Ry. Co. v. Childers, 124 S.W.2d 964, 197 Ark. 527.
Cal.—Paulsen v. McDuffie, 47 P.2d 709, 4 Cal.2d 111.
Kan.—Schaefer v. Lowden, 78 P.2d 48, 147 Kan. 520.
Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434.
Mo.—Arnold v. Scandrett, 131 S.W.2d 542, 345 Mo. 115.
N.C.—Vest v. Atlantic Coast Line R. Co., 179 S.E. 607, 208 N.C. 80—Winfree v. Seaboard Air Line Ry. Co., 155 S.E. 259, 199 N.C. 590—Potter v. Atlantic Coast Line R. Co., 147 S.E. 698, 197 N.C. 17.
Ohio.—Baltimore & O. R. Co. v. Shober, 176 N.E. 88, 38 Ohio App. 216.
Okl.—Kansas, O. & G. Ry. Co. v. Dillon, 135 P.2d 498, 191 Okl. 671—Kansas City Southern Ry. Co. v. Hoyle, 90 P.2d 1042, 185 Okl. 211—St. Louis-San Francisco Ry. Co. v. Stuart, 47 P.2d 177, 173 Okl. 221.
Or.—Christie v. Great Northern Ry. Co., 20 P.2d 377, 142 Or. 321.
S.C.—Williamson v. Southern Ry. Co., 191 S.E. 79, 183 S.C. 312.
Tenn.—Peters v. Tennessee Cent. Ry., 167 S.W.2d 973, 179 Tenn. 509—Luck v. Louisville & N. R. Co., 69 S.W.2d 899, 167 Tenn. 350—Tennessee Cent. Ry. Co. v. Shacklett, 147 S.W.2d 1054, 24 Tenn.App. 563—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn.App. 213.
Va.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.
W.Va.—Rash v. Norfolk & W. Ry. Co., 12 S.E.2d 501, 122 W.Va. 688.
39 C.J. p 734 note 13.
Negligence of fellow servant see infra § 390.

49. Mo.—Smith v. Thompson, 182 S.W.2d 63—Finley v. St. Louis-San Francisco Ry. Co., 160 S.W.2d 735, 349 Mo. 330—Pritchard v. Thompson, 156 S.W.2d 652, 348 Mo. 832—Evans v. Atchison, T. & S. F. Ry. Co., 131 S.W.2d 604, 345 Mo. 147—Arnold v. Scandrett, 131 S.W.2d 542, 345 Mo. 115—McDaniel v. Chicago, R. I. & P. Ry. Co., 92 S.W.2d 118, 338 Mo. 481—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 335 Mo. 1148—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748—Webber v. Terminal R. Ass'n of St. Louis, 70 S.W.2d 863, 335 Mo. 11—Grange v. Chicago & E. I. Ry. Co., 69 S.W.2d 955, 334 Mo. 1040—York v. St. Louis-San Francisco Ry. Co., 62 S.W.2d 475, 333 Mo. 105—Armstrong v. Mobile & O. R. Co., 55 S.W.2d 460, 331 Mo. 1224, certiorari denied Mobile & O. R. Co. v. Armstrong, 53 S.Ct. 689, 289 U.S. 743, 77 L.Ed. 1490—Moran v. Atchison, T. & S. F. Ry. Co., 48 S.W.2d 881, 330 Mo. 278, certiorari denied Atchison, T. & S. F. Ry. Co v. Moran, 53 S.Ct. 21, 287 U.S. 621, 77 L.Ed. 539—State ex rel. St. Louis-San Francisco Ry. Co. v. Cox, 46 S.W.2d 849, 329 Mo. 292—Berry v. Baltimore & O. R. Co., 43 S.W.2d 782, reversed on other grounds 52 S.Ct. 510, 286 U.S. 272, 76 L.Ed. 1098—Martin v. Wabash Ry. Co., 30 S.W.2d 735—O'Donnell v. Baltimore & O. R. Co., 26 S.W.2d 929, 324 Mo. 1097—Norton v. Wheelock, 23 S.W.2d 142, 323 Mo. 913, certiorari denied Wheelock v. Norton, 50 S.Ct. 355, 281 U.S. 752, 74 L.Ed. 1162—Hoch v. St. Louis-San Francisco Ry. Co., 287 S.W. 1047, 315 Mo. 1199—Williams v.

islation requires employers to take designated precautions for the safety of servants, and prescribes a penalty for failure to do so, and in express terms abolishes the defense of assumption of risk, it is very generally held that this defense is not available, even though the danger caused by noncompliance with the statute was obvious or was actually known and appreciated by the servant; and, according to the general rule, such is also the case, although statutes of this character do not in express terms abolish the defense.

b. Other State Statutes

Where state statutes so provide, a servant having knowledge of defects or dangers does not assume the risk of injury.

In various states constitutional or statutory provisions have modified or abolished the rule that the servant assumes the risk of injury from defects or dangers of which he has knowledge.[50]

In Indiana, by statute, in actions against an employer of five or more persons, the defense of the hazards and dangers "apparent" in the employment contributing to the injury is taken away.[51] In other words, assumption of risk is not available as a defense, although the injured servant had actual or constructive knowledge of the dangers.[52] Under a further provision that such employee shall not be held to have assumed the risk of any defect in the place of work furnished to such employee, or in the tool, implement, or appliance furnished him by such employer, where such defect was, prior to such injury, known to such employer or by the exercise of ordinary care might have been known to him in time to have repaired the same or to have discontinued the use of such defective working place, tool, implement or appliance, when the facts bring the case within this provision, the defense of assumption of risk is not available;[53] and, even if it affirmatively appeared that the employer did not have knowledge of defects causing injury for a sufficient length of time prior to the injury to make repairs, the right to recover at common law would not be defeated if it appeared that the servant also was without knowledge actual or constructive of the defects.[54] However, where it is shown that the master had no knowledge of the defect actual or constructive, the question of assumption of risk has been held to be of no importance, since the evidence shows absence of negligence defeating the action.[55]

In South Carolina a provision of the constitution has eliminated assumption of risk by railroad employees based on knowledge on the part of the injured employee of the defects causing the injury.[56]

In Texas it has been provided by statute that the

St. Joseph & G. I. Ry. Co., App., 112 S.W.2d 118—Sweany v. Wabash R. Co., 80 S.W.2d 216, 229 Mo.App. 393—Grandstaff v. Wabash Ry. Co., App., 71 S.W.2d 174—Weber v. Terminal Railroad Ass'n of St. Louis, App., 20 S.W.2d 601—Hildebrand v. St. Louis-San Francisco Ry. Co., 298 S.W. 1069, 220 Mo.App. 1229—Woosley v. Wabash Ry. Co., App., 274 S.W. 871.
39 C.J. p 734 note 14.

50. **In Alabama**
A statute, providing that the employer is not liable if the employee knew of the defect causing the injury and failed within a reasonable time to give information to his superior "unless he was aware that the master or employer, or such superior, already knew of such defect," does not abolish doctrine of volenti non fit injuria.—Birmingham R. & Electric Co. v. Allen, 13 So. 8, 99 Ala. 359, 20 L.R.A. 457—39 C.J. p 734 note 18.

In Florida
By statute, defense of assumption of risk in enumerated hazardous operations, in actions for injuries sustained by servant by reason of master's negligence, has been abolished. —City of Sebring v. Avant, 117 So. 383, 95 Fla. 960—39 C.J. p 734 note 20.

In Massachusetts
A statute in substance the same as that of Alabama has been held not to abolish the common-law rule charging the servant with the assumption of known or obvious risks.—Cassady v. Boston & A. R. Co., 41 N.E. 129, 164 Mass. 168—39 C.J. p 734 note 30.

In Mississippi
Code 1942 § 1456, and similar statutes, providing that, in actions for personal injury to an employee or for his death, the employee shall not be held to have assumed the risks of his employment in any case where such injury or death results in whole or part from negligence of the master, except as to conductors or locomotive engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them, applies irrespective of the knowledge of the servant.—Eastman, Gardiner & Co. v. Caldwell, 172 So. 126, 177 Miss. 861—Texas Co. v. Jackson, 165 So. 546, 174 Miss. 737—Randolph Lumber Co. v. Minchew, 159 So. 849, 172 Miss. 535—Hercules Powder Co. v. Tyrone, 124 So. 475, 155 Miss. 75—Edward Hines Lumber Co. v. Harriel, 158 So. 146, 171 Miss. 670—39 C.J. p 734 note 33 p. 735 note 34.

In New York
Employee does not assume any risks by reason of knowledge of the employer's violation of the provisions of the labor laws.
U.S.—Michalek v. U. S. Gypsum Co., D.C.N.Y., 16 F.Supp. 708.
N.Y.—Griebsch v. B. T. Babbitt, Inc., 298 N.Y.S. 848, 164 Misc. 7, affirmed 2 N.Y.S.2d 848, 254 App. Div. 601.

51. Ind.—Vandalia R. Co. v. Stillwell, 104 N.E. 289, 181 Ind. 267, 271, Ann.Cas.1916D 258, affirmed 36 S.Ct. 445, 239 U.S. 637, 36 S. Ct. 445, 241 U.S. 638, 60 L.Ed. 480, 1215.
39 C.J. p 734 note 22.

52. Ind.—Standard Steel Car Co. v. Martinecz, 113 N.E. 244, 66 Ind. App. 672, rehearing denied 114 N.E. 94, 66 Ind.App. 672.
39 C.J. p 734 note 23.

53. Ind.—Showers Bros. Co. v. Davis, 118 N.E. 697, 68 Ind.App. 227.

54. Ind.—Standard Steel Car Co. v. Martinecz, 113 N.E. 244, 66 Ind. App. 672, rehearing denied 114 N.E. 94, 66 Ind.App. 672.

55. Ind.—Standard Steel Car Co. v. Martinecz, supra.

56. S.C.—Holmes v. Hamilton Ridge

plea of assumed risk is not available on the ground of knowledge or means of knowledge by the servant of a railroad company of the defect or danger where the employer or his foreman also knows of the defect[57] or where the employer has been guilty of negligence.[58]

§ 384. —— Effect of Negligence of Master

A servant generally assumes the risks attributable to his employer's negligence where he has knowledge of such risks or they are so patent and obvious that he should have known of their existence.

Unless otherwise provided by statute, as considered supra §§ 359, 383, and except in jurisdictions where the servant does not in any circumstances assume the risk of the master's negligence,[59] the general rule that the servant assumes the risk of injury from defects or dangers of which he has actual knowledge or which are so patent and obvious that he should know of their existence, as considered supra § 382, applies, although the risk is the result of the negligence of the master,[60] and although by reason thereof the risk is greater than

Lumber Corp., 112 S.E. 536, 120 S. C. 165.

39 C.J. p 735 note 36.

57. Tex.—Marshall & E. T. R. Co. v. Riden, Civ.App., 194 S.W. 1163.

39 C.J. p 735 note 38.

58. Tex.—Texas & P. Ry. Co. v. Presley, 152 S.W.2d 1105, 137 Tex. 232.

59. **In Missouri**

(1) There is no assumption of risk of injury caused by master's negligence, as considered supra § 362, although servant actually knows of and appreciates dangers arising therefrom.—Whittington v. Westport Hotel Operating Co., 33 S.W.2d 963, 326 Mo. 1117—Fischer v. M-K Express Co., App., 158 S.W.2d 458—39 C.J. p 735 note 41 [a] (1).

(2) In some decisions the court has held that such risks were assumed by servant if he knew of risks or in exercise of ordinary care should have known of them.—Davis v. City of Independence, 49 S.W.2d 95, 330 Mo. 201—Shey v. Central Coal & Coke Co., 21 S.W.2d 772, 323 Mo. 1058—Harff v. Green, 67 S.W. 576, 168 Mo. 308—39 C.J. p 735 note 41 [a] (5).

In North Carolina

(1) In various decisions it has been held that the servant does not assume risks caused or added to by the master's negligence, unless such risks were so obvious and threatening that a man of ordinary prudence would not continue to work.—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112—McCord v. Harrison-Wright Co., 153 S.E. 406, 198 N.C. 742—Street v. Erskine-Ramsey Coal Co., 145 S.E. 11, 196 N.C. 178—Holeman v. Pensacola Shipbuilding Co., 134 S.E. 647, 192 N.C. 236—39 C.J. p 735 note 41 [b] (2).

(2) However, as shown supra § 362, there have been numerous decisions announcing the rule that the servant does not assume the risk of injury growing out of the master's negligence and that such rule admits of no exceptions whatsoever.

60. U.S.—New York, C. & St. L. R. Co. v. Boulden, C.C.A.Ind., 63 F. 2d 917, certiorari denied 53 S.Ct. 785, 289 U.S. 753, 77 L.Ed. 1498—Chicago, M. & St. P. & P. R. Co. v. Busby, C.C.A.Mont., 41 F.2d 617—Voorhees v. Central R. Co. of New Jersey, C.C.A.N.J., 14 F.2d 899—Davis v. Crane, C.C.A.Mo., 12 F.2d 355.

Ala.—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U. S. 603, 84 L.Ed. 504.

Ark.—Kansas City Southern Ry. Co. v. Diggs, 167 S.W.2d 879, 205 Ark. 150—Everton v. Silica Sand Co., 125 S.W.2d 793, 197 Ark. 980—Missouri Pac. R. Co. v. Sullivan, 122 S.W.2d 947, 197 Ark. 360—Bruner Ivory Handle Co. v. West, 86 S.W.2d 919, 191 Ark. 479—Arkadelphia Sand & Gravel Co. v. Knight, 79 S.W.2d 71, 190 Ark. 386—Federal Compress & Warehouse Co. v. Parrott, 28 S.W.2d 728, 181 Ark. 946—Mississippi Valley Power Co. v. Hubbard, 26 S.W.2d 118, 181 Ark. 487—Wisconsin & Arkansas Lumber Co. v. Otis, 10 S.W.2d 364, 178 Ark. 283—Chicago, R. I. & P. Ry. Co. v. Allison, 287 S.W. 197, 171 Ark. 983.

Cal.—Dick v. Atchison, T. & S. F. Ry. Co., 287 P. 538, 105 Cal.App. 363.

Fla.—Gallespie v. Thornton, 117 So. 714, 95 Fla. 5.

Ill.—Werner v. Illinois Cent. R. Co., 33 N.E.2d 121, 309 Ill.App. 292, reversed on other grounds 42 N.E. 2d 82, 379 Ill. 559—Johnson v. Scandrett, 16 N.E.2d 171, 296 Ill. App. 198.

Ind.—New York, C. & St. L. R. Co. v. Peele, 164 N.E. 705, 88 Ind.App. 532, certiorari denied 49 S.Ct. 263, 279 U.S. 842, 73 L.Ed. 988.

Iowa.—McClary v. Great Northern Ry. Co., 227 N.W. 646, 209 Iowa 67.

Ky.—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603—Louisville & N. R. Co. v. Reverman's Adm'x, 15 S.W.2d 300, 228 Ky. 500.

Me.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.

Miss.—Lucius v. Harris, 153 So. 390, 169 Miss. 385, stating Louisiana law.

Mo.—Norton v. Wheelock, 23 S.W.2d 142, 323 Mo. 913, stating rule applied in federal courts, certiorari denied Wheelock v. Norton, 50 S. Ct. 355, 281 U.S. 752, 74 L.Ed. 1162.

Mont.—Leonidas v. Great Northern Ry. Co., 72 P.2d 1007, 105 Mont. 302, affirmed Great Northern Ry. Co. v. Leonidas, 59 S.Ct. 51, 305 U.S. 1, 83 L.Ed. 3.

N.J.—Huels v. General Elec. Co., 46 A.2d 654, 134 N.J.Law 165.

Or.—**Corpus Juris cited in** Freeman v. Wentworth & Irwin, 7 P.2d 796, 801, 139 Or. 1—Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 136 Or. 18, certiorari denied Oregon-Washington R. & Nav. Co. v. Bevin, 52 S.Ct. 21, 284 U.S. 639, 76 L.Ed. 543.

Pa.—Guerierro v. Reading Co., 29 A. 2d 510, 346 Pa. 187.

S.C.—Scott v. International Agr. Corporation, 184 S.E. 133, 180 S.C. 1—Tyner v. Atlantic Coast Line R. Co., 146 S.E. 663, 149 S.C. 89.

Tex.—International-Great Northern R. R. v. Lowry, Civ.App., 98 S.W. 2d 383, reversed on other grounds International-Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272—Houston & T. C. R. Co. v. Shepherd, Civ.App., 6 S.W.2d 410—Chicago, R. I. & G. Ry. Co. v. Bernnard, Civ.App., 275 S.W. 505.

Utah.—Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.

Va.—Colonna Shipyard v. Dunn, 145 S.E. 342, 151 Va. 740, certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986.

Wash.—Cummins v. Dufault, 139 P. 2d 308, 18 Wash.2d 274—Imbler v. Spokane, P. & S. Ry. Co., 2 P.2d 895, 164 Wash. 299.

39 C.J. p 735 note 43.

Assumption of risks arising from master's negligence generally see supra §§ 362–370.

Necessity of knowledge of master's negligence see supra § 379.

that ordinarily incident to the employment.[61] The servant, by working under these conditions, dispenses with the duty of the master to take reasonable precautions for his safety.[62] Where the servant has assumed the risk, the fact that he was himself free from contributory negligence does not make the master liable for an injury resulting from the risk assumed.[63]

§ 385. —— Effect of Temporary Forgetfulness of Dangers or Defects

The servant ordinarily assumes the risk of injury from known defects and dangers, although the injuries were sustained at a time when he had momentarily forgotten their existence.

The rule as to assumption of risk of injury from known defects and dangers, as considered supra § 382, ordinarily applies with full force and effect, although the injuries of which the servant complains were sustained at a time when he had momentarily forgotten their existence.[64] It has been held, however, that the rule does not apply where the temporary forgetfulness was caused by the engrossing nature of the work,[65] although this, of course, would not be true where the engrossing nature of the work fixed the servant's attention on the danger instead of diverting it therefrom.[66]

§ 386. —— Effect of Attempt to Save Master's Property

The servant ordinarily assumes the risk of injury from obvious and open defects and dangers, although they are encountered in an attempt to save the master's property.

Where the danger is obvious and open, the fact that the servant encountered it in an attempt to save the master's property will not deprive the master of the right to set up the defense of assumption of risk.[67] If the employee exposes himself to dangers rashly, solely to rescue the master's property, he cannot recover if he is injured in the attempt.[68] It is the same whether the danger to be encountered is regarded as a detail of the work or in the nature of a new employment.[69] On the other hand, it has also been held that a servant is under a general duty to conserve the property of the master;[70] and that a servant is not necessarily at fault in exposing himself to a risk which a volunteer would not be justified in assuming but the standard must be a proper balance between the risk to life or limb and that to the property, considering the question of imminence and gravity of possible injury and of value of property which might be damaged.[71]

§ 387. —— Effect of Risks Arising after Commencement of Service

The servant assumes the risk of injury from known defects or dangers which arise after the commencement of the service.

The doctrine of the assumption of known or obvious risks by the servant, as considered supra § 382, applies as well to those which arise during the service as to those in contemplation at the time of the original hiring.[72]

§ 388. —— Character of Knowledge Sufficient

The servant may be charged with assumption of risks where the defects and dangers were so open and obvious that he should have known of the risks.

61. Ky.—Jarboe v. Coleman, 182 S.W. 922, 168 Ky. 707.

62. Mass.—Leary v. Boston & A. R. Co., 2 N.E. 115, 139 Mass. 580, 52 Am.R. 733.

63. N.Y.—Garety v. King, 50 N.Y.S. 179, 27 App.Div. 114.
39 C.J. p 736 note 46.

64. U.S.—Blackley v. Powell, C.C.A. N.C., 68 F.2d 457—Grand Trunk Western Ry. Co. v. Reid, C.C.A. Mich., 42 F.2d 403—New York, C. & St. L. R. Co. v. McDougall, C.C.A.Ohio, 15 F.2d 283.
Cal.—Myers v. Southern Pac. Co., 58 P.2d 387, 14 Cal.App.2d 287, hearing denied 59 P.2d 1001, 14 Cal. App.2d 287.
Wash.—Stanke v. Spokane, C. D. & P. R. Co., 43 P.2d 961, 181 Wash. 472.
39 C.J. p 736 note 49.
Contributory negligence see infra § 436.

65. Colo.—Maydole v. Denver & R. G. R. Co., 62 P. 964, 15 Colo.App. 449.
39 C.J. p 736 note 50.
It must appear that injury was not caused by carelessness of servant and was not the result of a risk of danger assumed by him in the absence of any emergency which would authorize inference of self-forgetfulness.—Walton v. Georgia, F. & A. R. Co., 82 S.E. 815, 15 Ga.App. 191.

66. Ga.—Bogush v. Southeastern Mfg. & Specialty Co., 103 S.E. 41, 25 Ga.App. 268—Ryle v. Macon News Printing Co., 102 S.E. 835, 25 Ga.App. 106.

67. N.Y.—Maltbie v. Belden, 60 N.E. 645, 167 N.Y. 307, 54 L.R.A. 52.
39 C.J. p 736 note 53.
Contributory negligence see infra § 470.

68. N.C.—Pegram v. Seaboard Air Line R. Co., 51 S.E. 975, 139 N.C. 303, 4 Ann.Cas. 214.

69. N.Y.—Maltbie v. Belden, 60 N.E. 645, 167 N.Y. 307, 54 L.R.A. 52.

70. Ala.—Atlantic Coast Line R. Co. v. Russell, 111 So. 753, 215 Ala. 600.

71. U.S.—In re Lee Transit Corporation, C.C.A.N.Y., 37 F.2d 67.
Where danger of property damage was comparatively slight, switchman, attempting to board car to arrest speed and prevent injury to other cars, did not relieve himself from assumption of risk.—Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.

72. Wis.—Yezick v. Chicago Brass Co., 120 N.W. 247, 138 Wis. 342.
39 C.J. p 736 note 57.
Latent defects see infra § 392.
Risks caused by changing condition of place as work progresses see supra § 373.

In order to charge the servant with assumption of risks by reason of knowledge thereof, actual knowledge is not indispensable, but it is sufficient that the defects and dangers were so open and obvious that he should have known of the risks.[73] The law charges the servant with notice of the risks,[74] whether or not he was actually aware of them,[75] on the theory that one knows what it is one's duty to know,[76] and he will not be permitted to say that he did not appreciate the danger.[77]

Opportunity to acquire knowledge. The servant assumes, in addition to the risks actually known to him, such risks of injury from defects and dangers as in the exercise of ordinary care in the performance of his duties his opportunities to discover would have disclosed to him;[78] and, on the other hand, he is not charged with the assumption of risks which are not incidental to his employment, and of which he has had no opportunity to learn.[79] Before a master can be relieved of liability by the servant's assumption of risk incident to the service, the servant must have equal opportunity with the master to know the surroundings and be equally competent to judge of the risks and hazards.[80]

Knowledge of fellow servant. While a servant may assume an obvious risk of danger to himself, he cannot assume it for a fellow servant who does not know of the defect or danger.[81]

§ 389. —— Extent of Knowledge Necessary

A servant is not charged with assumption of risk unless he knows of and appreciates the dangers incident to the work.

In order to charge a servant with assumption of risk it is not sufficient that he should have knowledge of defects in the place of work, or in the machinery, tools, appliances, or instrumentalities for work, or in the methods of work, etc., but it is further necessary that he should know of and appreciate the dangers incident to the work under the existing conditions.[82] Assumption of risk implies

73. U.S.—Kane v. Federal Match Corporation, D.C.Pa., 5 F.Supp. 507.
Ark.—Long Bell Lumber Co. v. Tarver, 118 S.W.2d 282, 196 Ark. 275.
Ill.—Chestnut v. Chicago, B. & Q. R. Co., 1 N.E.2d 811, 284 Ill.App. 317.
Ky.—Louisville & N. R. Co. v. Gross, 272 S.W. 57, 209 Ky. 1.
Md.—Le Vonas v. Acme Paper Bd. Co., 40 A.2d 43, 184 Md. 16.
Mo.—O'Donnell v. Baltimore & O. R. Co., 26 S.W.2d 929, 324 Mo. 1097.
Neb.—Groat v. Clausen, 298 N.W. 563, 139 Neb. 689.
N.H.—Fortier v. Concord Electric Co., 33 A.2d 801, 92 N.H. 492.
N.Y.—Buffinton v. Boston & M. R. R., 226 N.Y.S. 302, 222 App.Div. 315, motion granted Buffington v. Boston & M. R. R., 164 N.E. 566, 249 N.Y. 514.
S.C.—McClain v. Charleston & W. C. Ry. Co., 4 S.E.2d 280, 191 S.C. 332.
Tex.—Fuller v. Texas Park Lot, Civ. App., 133 S.W.2d 605.
39 C.J. p 736 note 59.

74. Ky.—Louisville & N. R. Co. v. Gross, 272 S.W. 57, 209 Ky. 1.
Me.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.
39 C.J. p 737 note 61.
Constructive knowledge as sufficient to constitute contributory negligence see infra § 433.
Inexperienced or youthful employee see infra §§ 414, 415.
Constructive knowledge is that knowledge which an employee necessarily would have acquired in the exercise of ordinary care for his own safety.—Ft. Worth & R. G. R. Co. v. Robinson, 84 S.W. 410, 37 Tex.Civ. App. 465.

75. Philippine.—Tomayo v. Gsell, 35 Philippine 953.

76. Tex.—Lone Star Brewing Co. v. Willie, 114 S.W. 186, 52 Tex.Civ. App. 550.
39 C.J. p 737 note 63.

77. Ga.—Simowitz v. Register, 3 S.E.2d 231, 60 Ga.App. 180.
Wash.—Cummins v. Dufault, 139 P. 2d 308, 18 Wash.2d 274.
39 C.J. p 737 note 64.

78. Ark.—Choctaw, O. & G. R. Co. v. Thompson, 100 S.W. 83, 82 Ark. 11.
39 C.J. p 737 note 68.
Test is what ordinary men would have observed, using their faculties in usual way.—Southern Ry. Co. v. Wilmouth, 153 S.E. 874, 154 Va. 582, certiorari denied Wilmouth v. Southern Ry. Corporation, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.

79. Mass.—Bradley v. Central Vermont R. Co., 82 N.E. 44, 196 Mass. 360.
39 C.J. p 738 note 69.

80. Kan.—Murphy v. Edgar Zinc Co., 112 P. 109, 83 Kan. 627, adhered to 115 P. 551, 84 Kan. 891.

81. N.J.—Pushcart v. New York Shipbuilding Co., 81 A. 113, 81 N. J.Law 261.
39 C.J. p 738 note 71.
Fellow-servant doctrine generally see supra § 321 et seq.
Imputation of knowledge
Constructive knowledge of one employee is not imputed to a fellow employee, but the fellow employee must be charged only with such appreciation as should have come to him from his own experience and past observation and what he saw and heard, and should have seen and heard.—Glidden v. Public Service Co. of New Hampshire, 183 A. 865, 88 N.H. 4.

82. U.S.—Owens v. Union Pac. R. Co., Wash., 63 S.Ct. 1271, 319 U.S. 715, 87 L.Ed. 1683, conformed to, C.C.A., 142 F.2d 145, certiorari denied 65 S.Ct. 57, 323 U.S. 740, 89 L.Ed. 593—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531—Wagner Electric Corporation v. Snowden, C.C.A.Mo., 38 F.2d 599—Central of Georgia Ry. Co. v. Davis, C.C.A.Ala., 7 F.2d 269, certiorari denied 46 S.Ct. 104, 269 U.S. 578, 70 L.Ed. 422.
Ark.—Mercury Mining Co. v. Chambers, 102 S.W.2d 543, 193 Ark. 771—Gaster v. Hicks, 25 S.W.2d 760, 181 Ark. 299—Jewel Coal & Mining Co. v. Whitner, 279 S.W. 1031, 170 Ark. 393.
Ga.—Simowitz v. Register, 3 S.E.2d 231, 60 Ga.App. 180.
Ill.—Fox v. Beall, 41 N.E.2d 126, 314 Ill.App. 144—Benson v. Chicago, R. I. & P. Ry. Co., 267 Ill.App. 11, affirmed Chicago, R. I. & P. Ry. Co. v. Benson, 185 N.E. 244, 352 Ill. 195, certiorari denied 54 S.Ct. 53, 290 U.S. 636, 78 L.Ed. 553.
Mass.—Ryan v. Gray, 55 N.E.2d 700, 316 Mass. 259.
Mo.—Finley v. St. Louis-San Francisco Ry. Co., 160 S.W.2d 735, 349 Mo. 330—Jenkins v. Kurn, 156 S.W. 2d 668, 348 Mo. 942—Pritchard v. Thompson, 156 S.W.2d 652, 348 Mo. 832—Bird v. St. Louis-San Francisco Ry. Co., 78 S.W.2d 389, 336 Mo. 316—Jenkins v. Wabash Ry.

both knowledge or the means of knowledge, and an appreciation of danger.[83] As has been aptly stated, "a defect and the danger arising from it are not necessarily to be identified, and a person may know of one without appreciating the other."[84] Likewise, it is not sufficient that the servant should merely know that there is "some danger" attending the service, but it is further essential that there should be actual understanding and appreciation of its nature and extent,[85] unless it is so obvious that the servant should know of and appreciate it.[86]

Where the servant is injured by a known risk of the employment assumed by him, it is immaterial that he did not know the precise extent or character of the injury liable to be sustained,[87] or that he did not appreciate every particular of the risk or all the possible consequences thereof,[88] if as a reasonably prudent man he should have anticipated that some injury might result from the defect.[89] Where he has a general knowledge of defects sufficient to charge him with knowledge of danger, he assumes the risk, although he may not know of the particular defects which cause the injury;[90] but the servant by reason of knowledge of one defect or danger does not take the risk of another of which he has no knowledge;[91] and if both contribute to injure him, he is entitled to recover if the accident would not have happened but for the unknown defect.[92]

In order to constitute an assumption of risk, knowledge of the risk must come in time to be of use; if knowledge is not acquired until too late to avert the injury, there is no assumption of risk by reason thereof.[93]

Co., 73 S.W.2d 1002, 335 Mo. 748—York v. St. Louis-San Francisco Ry. Co., 62 S.W.2d 475, 333 Mo. 105—O'Donnell v. Baltimore & O. R. Co., 26 S.W.2d 929, 324 Mo. 1097—Clift v. St. Louis-San Francisco Ry. Co., 9 S.W.2d 972, 320 Mo. 791—Westover v. Wabash Ry. Co., 6 S.W.2d 843, certiorari denied Wabash Ry. Co. v. Westover, 49 S.Ct. 31, 278 U.S. 632, 73 L.Ed. 550.

Mont.—Boyd v. Great Northern Ry. Co., 274 P. 293, 84 Mont. 84.

N.H.—Blais v. Flanders Hardware Co., 42 A.2d 332, 93 N.H. 370—Boucher v. Namaskot Co., 17 A.2d 98, 91 N.H. 215—Perreault v. Allen Oil Co., 179 A. 365, 87 N.H. 306—Clairmont v. Cilley, 153 A. 465, 85 N.H. 1—Kruger v. Exeter Mfg. Co., 149 A. 872, 84 N.H. 290.

N.J.—Dailey v. Mutual Chemical Co. of America, 16 A.2d 557, 125 N.J. Law 465, affirmed 19 A.2d 778, 126 N.J.Law 426.

N.C.—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112.

S.C.—Lyons v. R. D. Cole Mfg. Co., 183 S.E. 466, 178 S.C. 520.

Tenn.—Holliston Mills of Tennessee v. McGuffin, 145 S.W.2d 1, 177 Tenn. 1, rehearing denied 146 S.W. 2d 357, 177 Tenn. 1.

Tex.—Chicago, R. I. & G. Ry. Co. v. Frederick, Civ.App., 74 S.W.2d 275, error refused, certiorari denied 55 S.Ct. 915, 295 U.S. 758, 79 L.Ed. 1701—Texas & P. Ry. Co. v. Baldwin, Civ.App., 25 S.W.2d 969, affirmed, Com.App., 44 S.W.2d 909, certiorari denied 53 S.Ct. 11, 287 U.S. 606, 77 L.Ed. 527.

Vt.—Tinney v. Crosby, 22 A.2d 145, 112 Vt. 95.

Wash.—Cummins v. Dufault, 139 P. 2d 308, 18 Wash.2d 274—Peterson v. Tacoma-Ashford Transit Co., 17 P.2d 35, 170 Wash. 594.

39 C.J. p 738 note 73.

Knowledge necessary to constitute contributory negligence see infra § 432.

Test of "appreciation of risk" is whether servant understood risk, or by exercise of ordinary care ought to have understood it.—McClain v. Charleston & W. C. Ry. Co., 4 S.E. 2d 280, 191 S.C. 332.

83. Ala.—Louisville & N. R. Co. v. Parker, 138 So. 231, 223 Ala. 626, certiorari granted 52 S.Ct. 496, 286 U.S. 535, 76 L.Ed. 1275, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501.

Ark.—Jewel Coal & Mining Co. v. Whitner, 279 S.W. 1031, 170 Ark. 393.

Minn.—Blume v. Ballis, 291 N.W. 906, 207 Minn. 393.

Mo.—Owen v. Kurn, 148 S.W.2d 519, 347 Mo. 516—Osborn v. Chicago, R. I. & P. Ry. Co., 1 S.W.2d 181—Oglesby v. St. Louis-San Francisco Ry. Co., 1 S.W.2d 172, 318 Mo. 79, certiorari denied St. Louis-San Francisco R. Co. v. Oglesby, 48 S. Ct. 434, 277 U.S. 587, 72 L.Ed. 1001.

Pa.—Verna v. Lopresti, 42 A.2d 170, 157 Pa.Super. 163.

S.C.—Veronee v. Charleston Consol. Ry. & Lighting Co., 149 S.E. 753, 152 S.C. 178.

Utah.—Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655—Miller v. Western Pac. R. Co., 274 P. 945, 73 Utah 442.

39 C.J. p 739 note 74.

84. U.S.—Errico v. Washburn Williams Co., C.C.Pa., 170 F. 852.

39 C.J. p 739 note 75.

85. Ill.—Wheeler v. Chicago & W. I. R. Co., 108 N.E. 330, 267 Ill. 306.

39 C.J. p 740 note 76.

Employee's realization of possibility of danger does not amount to realization of danger obvious and fully known or so plainly observable that he must be presumed to know of it, and hence does not bar recovery for injuries sustained by him on ground that he assumed risk.—McDaniel v. Chicago, R. I. & P. Ry. Co., 92 S.W.2d 118, 338 Mo. 481.

86. Mass.—Boyle v. Donovan, 94 N. E. 258, 208 Mass. 196.

39 C.J. p 740 note 77.

87. Ky.—Hubbard v. Louisville & N. R. Co., 273 S.W. 436, 209 Ky. 614.

Va.—Houston v. Seaboard Air Line R. Co., 96 S.E. 270, 123 Va. 290.

39 C.J. p 740 note 78.

88. Va.—Houston v. Seaboard Air Line R. Co., supra.

89. Wis.—Luebben v. Wisconsin Traction, Light, Heat & Power Co., 141 N.W. 214, 154 Wis. 378, 49 L. R.A.,N.S., 517—Coel v. Green Bay Tract. Co., 133 N.W. 23, 147 Wis. 229.

90. Tex.—Green v. Cross, 15 S.W. 220, 79 Tex. 130.

39 C.J. p 740 note 81.

91. Ark.—Bradley Lumber Co. of Arkansas v. Clanton, 147 S.W.2d 14, 201 Ark. 657.

N.H.—Kruger v. Exeter Mfg. Co., 149 A. 872, 84 N.H. 290.

S.C.—**Corpus Juris cited in** Stogner v. Great Atlantic & Pacific Tea Co., 192 S.E. 406, 409, 184 S.C. 406.

39 C.J. p 740 note 82.

92. N.H.—Pickett v. Norwood Calef & Co., 196 A. 627, 89 N.H. 244.

Tex.—Missouri Pac. R. Co. v. Somers, 14 S.W. 779, 78 Tex. 439—St. Louis, S. F. & T. Ry. Co. v. Barr, Civ.App., 67 S.W.2d 1063.

39 C.J. p 740 note 82.

93. U.S.—Sorenson v. Alaska S. S. Co., D.C.Wash., 243 F. 280.

39 C.J. p 740 note 84.

§ 390. —— Application of Foregoing Principles

a. Method of conducting business in general
b. Methods of work
c. Place of work
d. Machinery, tools, and appliances
e. Negligence or incompetency of fellow servant
f. Injuries sustained by servant's overexertion
g. Selection of more hazardous method of work
h. Selection of more hazardous ways of passage
i. Unnecessary occupation of dangerous position
j. Failure to give notice of dangerous position

a. Method of Conducting Business in General

A servant who knows or should know of the hazards of the employment as the business is conducted assumes the risks.

In accordance with the general rule and subject to its limitations and qualifications, considered supra §§ 382–389, it has generally been held that a master may conduct his business in his own way, and that the servant who either knows or, in the exercise of ordinary care, should know of the hazards of the employment as the business is conducted, assumes the risk incident thereto[94] even though a different method of conducting the business would have been less dangerous.[95] Among the obvious risks thus assumed are those attendant on the use of the ways, works, and machinery of a permanent character that are intended to be retained as part of the plant to which the contract for service relates.[96]

Subsequent alteration or improvements. Where a servant on accepting service understands the master's methods of conducting business and the risk attached thereto, he cannot call on the master to make alterations in order to provide greater safety for the servant;[97] and it has been held that this is true even though in some parts his ways and works would not be deemed reasonably safe and proper if he were starting to do the same kind of work under an arrangement with employees to serve in a business afterward to be established.[98]

Effect of constitutional and statutory provisions. The rule that the servant assumes the known hazards in the method by which the employer's business is conducted is not affected by constitutional or statutory provisions which abolish the doctrine of assumption of risk as far as it applies to knowledge by a servant of a railroad "of the defective or unsafe character or condition of any machinery, ways, appliances or structures,"[99] or by a statute giving a remedy to an injured servant for defects "which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition,"[1] or by a statute abolishing the defense of assumption of risk where the servant has sustained injury from a defect which was reported but not remedied.[2]

b. Methods of Work

(1) In general
(2) Failure to furnish sufficient force for work
(3) Failure to promulgate or enforce rules for conduct of work

(1) In General

The servant assumes the risk of injury from known defects or dangers in the methods of work as it is performed in the operation of the master's business.

In accordance with the general rule and subject to its limitations and qualifications, considered supra §§ 382–389, where defects or dangers in the methods of work as it is performed in the operation of the master's business exist, and the risk of injury therefrom is or, in the exercise of ordinary care by the servant, should be known and appreciated by him, he assumes the risk[3] even though there

94. Neb.—Large v. Johnson, 248 N. W. 400, 124 Neb. 821.
N.Y.—Healey v. Carter & Weeks Stevedoring Co., 210 N.Y.S. 75, 213 App.Div. 122.
Tex.—Texas & P. Ry. Co. v. Aaron, Civ.App., 19 S.W.2d 930, certiorari denied 50 S.Ct. 409, 281 U.S. 756, 74 L.Ed. 1166.
39 C.J. p 741 note 86.

95. U.S.—Bethlehem Iron Co. v. Weiss, C.C.A.Pa., 100 F. 45, 40 C. C.A. 270.
39 C.J. p 741 note 87.

96. Mass.—Murch v. Wilson, 47 N. E. 111, 168 Mass. 408, 411.
N.Y.—Healy v. Carter & Weeks Stevedoring Co., 210 N.Y.S. 75, 213 App.Div. 122.
39 C.J. p 741 note 88.

97. Mass.—Murch v. Wilson, 47 N.E. 111, 168 Mass. 408.
39 C.J. p 741 note 90.

98. Mass.—Murch v. Wilson, supra.

99. Va.—Southern R. Co. v. Foster, 69 S.E. 972, 111 Va. 763.
39 C.J. p 741 note 94.

Effect of constitutional and statutory provisions on assumption of risks generally see supra §§ 359, 360, 369, 370.

1. Mass.—O'Maley v. Southern Boston Gas Light Co., 32 N.E. 1119, 158 Mass. 135, 137, 47 L.R.A. 161.
39 C.J. p 741 note 95.

2. Mass.—Wood v. Danas, 120 N.E. 159, 230 Mass. 587, 592.
39 C.J. p 741 note 96.

3. U.S.—Southern Ry. Co. v. Edwards, C.C.A.Ala., 44 F.2d 526.

was a safer method of work which, had it been adopted, would have avoided the accident;[4] and especially is this rule applicable where the servant injured lent his aid to establish the method of work by which he was injured.[5] It has been held that it is the duty of the servant to quit where he knows that the work is being carried on in such a manner that an accident may occur.[6]

Where the methods of work are known to the servant on accepting service, he may make no claim on the employer to change them, but accepts them as they are and cannot recover for injuries sustained therefrom.[7]

Right of servant to rely on care of master. Under the rule discussed supra § 380, the servant is, in general, entitled to assume that the master has established and promulgated a reasonably safe system or method of work and that he will enforce it.[8]

Failure to furnish appliances for work. Where the master fails to furnish appliances essential to a reasonably safe performance of the work for which the servant is employed and the servant knows and appreciates or, in the exercise of ordinary care, should know and appreciate the danger of performing the work without such appliances, he assumes the risk of so doing.[9]

(2) Failure to Furnish Sufficient Force for Work

Where a servant knows or should know that the master has furnished an insufficient force for the reasonably safe prosecution of the work, he assumes the risks incident to working with insufficient assistance.

In the absence of any emergency,[10] where a servant knows or ought to know that the master has furnished too few servants for the reasonably safe prosecution of the work, he assumes the risks incident to working with insufficient assistance,[11] especially where the manner of doing the work is left to the servant, who is an expert.[12] Where a servant discovers that the force for work is insufficient, it has been held that it is his duty to quit the service.[13]

Ark.—Texas Pipe Line Co. v. Johnson, 275 S.W. 329, 169 Ark. 235.
N.Y.—Salisbury v. New York Cent. R. Co., 222 N.Y.S. 38, 220 App.Div. 491—Healy v. Carter & Weeks Stevedoring Co., 210 N.Y.S. 75, 213 App.Div. 122.
Tex.—Galveston, H. & S. A. Ry. Co. v. Contois, Com.App., 288 S.W. 154, certiorari denied 47 S.Ct. 659, 274 U.S. 747, 71 L.Ed. 1328—Tullos v. Texas Pipe Line Co., Civ.App., 145 S.W.2d 267, error dismissed, judgment correct.
39 C.J. p 742 note 99.
Methods of work generally see supra § 260 et seq.

4. Ky.—Louisville & N. R. Co. v. Stewart, 269 S.W. 555, 207 Ky. 516.
39 C.J. p 743 note 1.

5. Iowa.—Kroy v. Chicago, R. I. & P. R. Co., 32 Iowa 357.

6. Mich.—Murphy v. Great Lakes Dredge & Dock Co., 141 N.W. 564, 175 Mich. 216.

7. W.Va.—Seldomridge v. Chesapeake & O. R. Co., 33 S.E. 293, 46 W.Va. 569.

8. Ala.—Gulf, M. & N. R. Co. v. Williams, 119 So. 212, 218 Ala. 481, certiorari dismissed 50 S.Ct. 86, 280 U.S. 526, 74 L.Ed. 593.
39 C.J. p 743 note 6.

9. U.S.—Hallstein v. Pennsylvania R. Co., C.C.A.Ohio, 30 F.2d 594.
Ark.—Odenbaugh v. St. Louis Southwestern Ry. Co., 120 S.W.2d 713, 196 Ark. 1036.
Kan.—Parker v. City of Wichita, 92 P.2d 86, 150 Kan. 249.
Mo.—Osborn v. Chicago, R. I. & P. Ry. Co., 1 S.W.2d 181.
Tex.—**Corpus Juris cited in** Tullos v. Texas Pipe Line Co., Civ.App., 145 S.W.2d 267, 271.
39 C.J. p 744 note 8.
Knowledge that appliances furnished are defective see infra subdivision d of this section.

Safety belt
U.S.—Hallstein v. Pennsylvania R. Co., C.C.A.Ohio, 30 F.2d 594.

10. Pa.—Guerierro v. Reading Co., 29 A.2d 510, 346 Pa. 187.
R.I.—Mayott v. Norcross, 52 A. 894, 24 R.I. 187.
Tex.—Gulf, C. & S. F. R. Co. v. Spivey, Civ.App., 56 S.W.2d 655, certiorari denied Spivey v. Gulf, C. & S. F. R. Co., 54 S.Ct. 98, 290 U.S. 676, 78 L.Ed. 583.

11. U.S.—Lang v. U. S. Reduction Co., C.C.A.Ind., 110 F.2d 441.
Ga.—Moses v. Johnson, 22 S.E.2d 328, 68 Ga.App. 131.
Ill.—Chestnut v. Chicago, B. & Q. R. Co., 1 N.E.2d 811, 284 Ill.App. 317.
Ky.—Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 274 Ky. 410.
Miss.—Gulf & S. I. R. Co. v. Hales, 105 So. 458, 140 Miss. 829.
Mo.—Heath v. St. Louis-San Francisco Ry. Co., App., 286 S.W. 148.
N.Y.—De Gaetano v. Merritt & Chapman Derrick & Wrecking Co., 219 N.Y.S. 689, 219 App.Div. 242, affirmed 161 N.E. 188, 247 N.Y. 574.
Pa.—Guerierro v. Reading Co., 29 A. 2d 510, 346 Pa. 187—**Corpus Juris cited in** Fitzgerald v. Pennsylvania R. R., 184 A. 299, 303, 121 Pa.Super. 461.
Tenn.—Cincinnati, N. O. & T. P. Ry. Co. v. Steelman, 7 Tenn.App. 657.
Tex.—**Corpus Juris cited in** Gulf, C. & S. F. R. Co. v. Spivey, Civ.App., 56 S.W.2d 655, 657, certiorari denied Spivey v. Gulf, C. & S. F. R. Co., 54 S.Ct. 98, 290 U.S. 676, 78 L.Ed. 583—**Corpus Juris cited in** Louisiana Ry. & Nav. Co. of Texas v. Disheroon, Civ.App., 295 S.W. 250, 251.
Va.—Lloyd v. Norfolk & W. Ry. Co., 145 S.E. 372, 151 Va. 409.
39 C.J. p 744 note 12.
Acting under orders see infra §§ 398–403.
Injuries sustained by servant's overexertion see infra subdivision f of this section.

In Kentucky
(1) Where a servant knowingly continues to work with inadequate assistance or tools, there is an assumption of risk by servant, if he knows, or if it is plainly obvious to a person of ordinary prudence, that performing such work under similar circumstances will subject servant to severe strain and likely result in injury complained of.—Louisville & N. R. Co. v. Yett, 168 S.W.2d 556, 293 Ky. 71—39 C.J. p 744 note 12.
(2) However, it has been stated that, where master fails to furnish sufficient number of men with which to do work, servant injured in doing such work does not assume risk of injury.—Louisville & N. R. Co. v. Alexander, 127 S.W.2d 395, 277 Ky. 719.

12. Mo.—Blundell v. William A. Miller El. Mfg. Co., 88 S.W. 103, 189 Mo. 552.
Pa.—Fitzgerald v. Pennsylvania R. R., 184 A. 299, 121 Pa.Super. 461.

13. Pa.—Fitzgerald v. Pennsylvania R. R., supra.
39 C.J. p 745 note 13.

The assumption of risk of injury due to the failure of the master to furnish a sufficient force for work will not prevent a recovery where it was not the proximate cause of the injury;[14] nor will the rule apply where the servant acted under orders of a superior in an emergency for the purpose of preventing probable loss of life and property and where he acted as occasion demanded without deliberation and without time to consider the danger to himself.[15]

Prior to the amendment of August 11, 1939, chapter 685 § 1, to the Federal Employers' Liability Act, 45 U.S.C.A. § 54, it was held that the operation of the rule was not affected by the act.[16] The word "defect," as used under a statute materially limiting the doctrine of assumption of risk by employees of a railroad company, has been held to include a defective force of men, that is, a force less than is required for the work.[17]

Right to rely on care of master. In accordance with the rule and the limitations placed thereon, considered supra § 380, a servant is entitled to assume that the master has furnished a sufficient number of employees to do the work.[18]

(3) Failure to Promulgate or Enforce Rules for Conduct of Work

A servant assumes the risk of injury arising from the employer's failure to promulgate or enforce rules for the conduct of the work where he knows or should know of the employer's failure and appreciates or should appreciate the dangers resulting therefrom.

Where a servant knows or, in the exercise of reasonable care, should know that the master has failed to promulgate or to enforce proper rules for the conduct of the work, and also knows and appreciates or should know and appreciate the dangers arising therefrom, he has been held to have assumed the risk,[19] especially where, in addition, it does not appear that the rule, had it existed and been enforced, would have prevented the injury.[20]

The rule has been applied to risks of moving or operating machinery[21] or trains[22] without warnings or signals; but it has been held that, where warnings of the movements of cars were usually given and the servant had never seen cars moved without such warnings and did not know of the absence of a rule requiring warning, he did not assume the risk of injury of being struck by a car set in motion without warning.[23]

c. Place of Work

(1) In General

A servant ordinarily assumes the risk of injury from known defects or dangers existing at his place of employment.

Except as the rule may be otherwise as a result of statutory regulations,[24] in accordance with the general rule and subject to its limitations and qualifications, considered supra §§ 382–389, where a servant knows or, in the exercise of ordinary care, should know of the defects or inherent dangers in the premises or place of work where he is employed and appreciates or should, in the exercise of ordinary care, appreciate the risk of injury therefrom, he usually assumes the risk.[25] However, it has very generally been held in accordance with well

14. Tex.—Ft. Worth & D. C. R. Co. v. Wrenn, 50 S.W. 210, 20 Tex.Civ. App. 628.

15. Tex.—Missouri, K. & T. R. Co. v. Freeman, Civ.App., 168 S.W. 69.

16. Kan.—Lively v. Chicago, R. I. & P. R. Co., 225 P. 103, 115 Kan. 784.
Mo.—Heath v. St. Louis-San Francisco Ry. Co., App., 286 S.W. 148.

17. Tex.—Payne v. Harris, Commn. App., 241 S.W. 1008.

18. Mich.—Cristanelli v. Saginaw Min. Co., 117 N.W. 910, 154 Mich. 423.
Mont.—Cameron v. Judith Mercantile & Cattle Co., 201 P. 575, 61 Mont. 118.

19. Tex.—Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, error dismissed, judgment correct.
39 C.J. p 745 note 22.

Where negligence in failing to promulgate rules was not submitted, assumption of risk by injured brakeman could not be predicated on his knowledge of absence of rules.—Texas & N. O. R. Co. v. Tilley, Tex.Civ. App., 297 S.W. 1063, affirmed, Com. App., 6 S.W.2d 86, certiorari denied 49 S.Ct. 36, 278 U.S. 642, 73 L.Ed. 556.

20. N.Y.—Cole v. Rome, W. & O. R. Co., 25 N.Y.S. 276, 72 Hun 467.

21. Wis.—Kraczek v. Falk Co., 126 N.W. 30, 142 Wis. 570.
39 C.J. p 746 note 25.

22. Mich.—Ingersoll v. Detroit & M. R. Co., 134 N.W. 441, 168 Mich. 380.
39 C.J. p 746 note 26.

23. Wis.—Polaski v. Pittsburgh Coal Dock Co., 114 N.W. 437, 134 Wis. 259, 14 L.R.A.,N.S., 952.

24. Tex.—Texas & P. Ry. Co. v. Presley, 152 S.W.2d 1105, 137 Tex. 232.
Assumption of risks as affected by statutory regulations generally see supra §§ 359, 360, 369, 370.

Labor laws

Employee does not assume any risk by working in place and under conditions which he knows to be unsafe and in violation of labor laws, since duty on employer is absolute.
U.S.—Michalek v. United States Gypsum Co., D.C.N.Y., 16 F.Supp. 708.
N.Y.—Griebsch v. B. T. Babbitt, Inc., 298 N.Y.S. 848, 164 Misc. 7, affirmed 2 N.Y.S.2d 848, 254 App.Div. 601.

25. U.S.—Grant Storage Battery Co. v. De Lay, C.C.A.Neb., 87 F.2d 726 —Grammer v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 71 F.2d 38, certiorari denied 55 S.Ct.

established principles considered supra § 389, that it is not sufficient to charge the servant with assumption of risk that he has knowledge of defects in the place of work, but it is further necessary that he should know of and appreciate the dangers incident to the work under the existing conditions.[26]

Subsequent alterations and improvements. Having accepted the service under these circumstances,

82, 293 U.S. 571, 79 L.Ed. 670—James Baird Co. v. Boyd, C.C.A.N.C., 41 F.2d 578.

Ark.—McGeorge v. Henderson, 145 S.W.2d 31, 201 Ark. 492—Odenbaugh v. St. Louis Southwestern Ry. Co., 120 S.W.2d 713, 196 Ark. 1036—Long Bell Lumber Co. v. Tarver, 118 S.W.2d 282, 196 Ark. 275—Sandusky v. Warren, 6 S.W.2d 15, 177 Ark. 271.

D.C.—Martin v. Morrison, 32 F.2d 410, 59 App.D.C. 19.

Fla.—Moody v. Hanlon, 179 So. 164, 131 Fla. 129.

Ga.—Curry v. Atlantic Coast Line R. Co., 16 S.E.2d 609, 65 Ga.App. 845—Kidd v. Williamson, 8 S.E.2d 590, 61 Ga.App. 890—Pollard v. Weeks, 4 S.E.2d 722, 60 Ga.App. 664—Louisville & N. R. Co. v. Hicks, 176 S.E. 698, 49 Ga.App. 846, certiorari dismissed Hicks v. Louisville & N. R. Co., 186 S.E. 662, 182 Ga. 595.

Ind.—Widmer v. Hufnagel, 26 N.E.2d 557, 108 Ind.App. 267.

Kan.—Davis v. City of El Dorado, 267 P. 7, 126 Kan. 153.

Ky.—Nixon v. Raymond City Coal & Transportation Co., 134 S.W.2d 633, 280 Ky. 743—Tucker's Adm'r v. Louisville & N. R. Co., 127 S.W.2d 842, 277 Ky. 774—Poole v. Lutz & Schmidt, 117 S.W.2d 575, 273 Ky. 586—Grigsby v. Louisville & N. R. Co., 114 S.W.2d 775, 272 Ky. 709—Southern Mining Co. v. Saylor, 95 S.W.2d 236, 264 Ky. 655—Steely v. Great Atlantic & Pacific Tea Co., 76 S.W.2d 900, 256 Ky. 586—Leatherwood Lumber Co. v. Hall, 66 S.W.2d 76, 252 Ky. 119—Kentucky Utilities Co. v. Clayton's Adm'x, 28 S.W.2d 497, 234 Ky. 454.

Me.—Kimball v. Clark, 177 A. 183, 133 Me. 263—Blacker v. Oxford Paper Co., 142 A. 776, 127 Me. 228—McLaughlin v. Bangor & A. R. Co., 140 A. 827, 127 Me. 24.

Mass.—Ryan v. Gray, 55 N.E.2d 700, 316 Mass. 259—Burke v. Crimmins, 152 N.E. 43, 256 Mass. 14.

Miss.—Graham v. Goodwin, 156 So. 513, 170 Miss. 896—Gulf & S. I. R. Co. v. Hales, 105 So. 458, 140 Miss. 829.

Mo.—Martin v. Wabash Ry. Co., 30 S.W.2d 735, stating federal rule—Odell v. St. Louis-San Francisco Ry. Co., App., 281 S.W. 456, stating federal rule.

Neb.—Laf Ferry v. Chicago, B. & Q. R. Co., 206 N.W. 737, 114 Neb. 219.

N.H.—Meersman v. Davison, 184 A. 608, 88 N.H. 93.

Okl.—**Corpus Juris cited in** Oklahoma City-Ada-Atoka Ry. Co. v. Kirkbride, 65 P.2d 1021, 1025, 179 Okl. 428—Oklahoma Pipe Line Co. v. Fallin, 56 P.2d 372, 172 Okl. 474.

Pa.—Reilly v. Philadelphia Suburban Gas & Electric Co., 145 A. 576, 295 Pa. 402.

S.C.—Grier v. Winyah Lumber Co., 141 S.E. 685, 144 S.C. 10.

Tenn.—Tennessee Cent. Ry. Co. v. Shacklett, 147 S.W.2d 1054, 24 Tenn.App. 563—Moon v. City of Chattanooga, 10 Tenn.App. 82.

Tex.—Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, error dismissed, judgment correct—**Corpus Juris cited in** Tullos v. Texas Pipe Line Co., Civ.App., 145 S.W.2d 267, 271—Wichita Falls & S. R. Co. v. Lindley, Civ.App., 143 S.W.2d 428, error dismissed, judgment correct—Fort Worth & D. C. Ry. Co. v. Mills, Civ.App., 140 S.W.2d 513, error dismissed, judgment correct—Wichita Falls & S. R. Co. v. Wade, Civ.App., 57 S.W.2d 332, error refused—San Antonio & A. P. Ry. Co. v. Mason, Civ.App., 289 S.W. 1027.

Va.—Seaboard Air Line Ry. Co. v. De Loatch, 141 S.E. 121, 149 Va. 338.

Wash.—De Haas v. Cascade Frozen Foods, 162 P.2d 284, 23 Wash.2d 754—Jones v. Baker, 35 P.2d 1103, 179 Wash. 25—Saunders v. Longview, P. & N. Ry. Co., 296 P. 835, 161 Wash. 280—Gessner v. Ramwell, 248 P. 61, 140 Wash. 78.

39 C.J. p 746 note 29 [a], p 746 note 30.

Compliance with commands see infra §§ 398–403.

Negligence of master see supra §§ 362–368, 384.

Notice or complaint to master and promise to remedy defects see infra §§ 395, 396.

Risks outside scope of employment see infra §§ 407–409.

Dust

Employee who worked in woodshop where air was full of great amount of dust from electric saw could not recover from employer for tuberculosis resulting from inhalation of dust, since risk was obvious and employee assumed it.—Connell v. Fisher Body Corporation, 192 S.E. 484, 56 Ga.App. 203.

Runway of filling station

S.C.—Meyer v. Gulf Refining Co., 184 S.E. 796, 179 S.C. 324.

Sloping roof

Wash.—Scheiber v. Grigsby, 182 P.2d 745.

Unsanitary cellar

N.Y.—Wager v. White Star Candy Co., 217 N.Y.S. 173, 217 App.Div. 316.

Running of trains

(1) Employee assumes risk in going near tracks where he knows cars are likely to be shunted without warning.

U.S.—Toledo, St. L. & W. R. Co. v. Allen, 48 S.Ct. 215, 276 U.S. 165, 72 L.Ed. 513, conformed to Allen v. Toledo, St. Louis & Western Ry. Co., Mo., 12 S.W.2d 1116.

Minn.—Holz v. Chicago, M., St. P. & P. R. Co., 224 N.W. 241, 176 Minn. 575.

Mo.—O'Donnell v. Baltimore & O. R. Co., 26 S.W.2d 929, 324 Mo. 1097—Hoch v. St. Louis-San Francisco Ry. Co., 287 S.W. 1047, 315 Mo. 1199.

(2) Railroad employee does not assume risk of injury from failure to sound warning under rule or custom in switching movements, unless hazard was obvious or known and appreciated.

Mo.—Evans v. Atchison, T. & S. F. Ry. Co., 131 S.W.2d 604, 345 Mo. 147—O'Donnell v. Baltimore & O. R. Co., 26 S.W.2d 929, 324 Mo. 1097.

Tex.—Texas & N. O. R. Co. v. Neill, Civ.App., 97 S.W.2d 279, error refused 100 S.W.2d 348, 128 Tex. 580, certiorari granted 57 S.Ct. 791, 301 U.S. 674, 81 L.Ed. 1336, certiorari dismissed 58 S.Ct. 118, 302 U.S. 645, 82 L.Ed. 501, rehearing denied 58 S.Ct. 268, 302 U.S. 778, 82 L.Ed. 602.

(3) Effect of amendment of Aug. 11, 1939, c 685 § 1, to the Federal Employers' Liability Act, 45 U.S.C.A. § 54, see supra § 359.

Where employee is notified that place is unsafe and that he should avoid it he assumes the risk.—New York Cent. R. Co. v. Ambrose, N.J., 50 S.Ct. 198, 280 U.S. 486, 74 L.Ed. 562.

26. Kan.—Fritchman v. Chitwood Battery Co., 8 P.2d 368, 134 Kan. 727.

Ky.—Luton Mining Co. v. Louisville & N. R. Co., 123 S.W.2d 1055, 276 Ky. 321.

Mo.—Farley v. Lehrack, App., 272 S.W. 987.

Tex.—St. Louis Southwestern Ry. Co. of Texas v. Bishop, Civ.App., 291 S.W. 343—Lancaster v. Bradford, Civ.App., 279 S.W. 607.

39 C.J. p 748 note 32.

Scientific knowledge

An ordinary factory employee is not chargeable with scientific knowledge regarding danger of contracting silicosis by working in silica-laden air.—Rebel v. Standard Sanitary

the servant may not call on his employer to make alterations for the purpose of securing greater safety.[27]

Right to rely on care of master as to place for work. In accordance with the rule stated supra § 380, and subject to its limitations, the servant has the right to assume that the master has used due care and diligence to furnish him with a reasonably safe place for work,[28] except where he has actual knowledge to the contrary, or unless the circumstances are such as to charge him with knowledge,[29] or, as has been said, where the dangers are as apparent to him as to the master.[30] Where a servant has been put to work in a safe place, he is entitled to assume that the place will not thereafter be rendered unsafe by acts of the master or those representing him.[31]

The rule that the servant has the right to assume that the master has used due care to furnish him with a reasonably safe place to work has been applied in connection with various places of work.[32] A servant of a railroad company may assume that the track, roadbed, and bridges are kept in a reasonably safe condition,[33] and a miner may assume that the master has exercised due care to keep the mine in which he works in a reasonably safe condition,[34] as by proper inspection[35] or by proper timbering.[36]

Where one company uses another's newly constructed road, a brakeman of the former cannot rightfully assume that the frogs and guard rails of the new road are filled or blocked as required by statute and dismiss all thought of them from his mind.[37]

Unlighted or defectively lighted premises. A servant ordinarily assumes the obvious or known risks of injury due to a failure to light the place of work or to light it adequately.[38]

Mfg. Co., 16 A.2d 534, 340 Pa. 313—Price v. New Castle Refractories Co., 3 A.2d 418, 332 Pa. 507.

27. Mass.—Doherty v. Paul's For Tires, 49 N.E.2d 430, 314 Mass. 83—Engel v. Boston Ice Co., 4 N.E.2d 455, 295 Mass. 428.
39 C.J. p 748 note 33.

28. Ark.—Tucker Duck & Rubber Co. v. Harvey, 154 S.W.2d 828, 202 Ark. 1033—Safeway Stores v. Phelps, 145 S.W.2d 337, 201 Ark. 495—Clark v. Patterson, 77 S.W.2d 978, 190 Ark. 148—Mosley v. Raines, 37 S.W.2d 78, 183 Ark. 569—Wisconsin & Arkansas Lumber Co. v. McCloud, 270 S.W. 599, 168 Ark. 352.
Cal.—Metz v. Southern Pac. Co., 124 P.2d 670, 51 Cal.App.2d 260.
Fla.—Gallespie v. Thornton, 117 So. 714, 95 Fla. 5.
Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga. App. 620.
Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.
Ky.—Big Sandy & C. R. Co. v. Measell's Adm'r, 42 S.W.2d 747, 240 Ky. 571—Louisville & N. R. Co. v. Lewis, 278 S.W. 143, 211 Ky. 830.
Mo.—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748—Hoffman v. Peerless White Lime Co., 296 S.W. 764, 317 Mo. 86—Doody v. California Woolen Mills Co., 274 S.W. 692.
N.H.—Stone v. Howe, 32 A.2d 484, 92 N.H. 425.
S.C.—Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Barnaby, 167 S.W.2d 235, error refused—International-Great Northern R. R. v. Lowry, Civ.App., 98 S.W.2d 383, reversed on other grounds International Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272.
Wash.—Roalsen v. Oregon Stevedoring Co., 267 P. 433, 147 Wash. 672.
39 C.J. p 748 note 35.
Duty of master to furnish safe place for work see supra §§ 201, 219.

Stage

Theater dancer could rely to reasonable extent on assumption that reasonably safe stage had been provided although dancer assumed obvious risks even though they were unusual ones.—Wood v. National Theatre Co., 42 N.E.2d 536, 311 Mass. 550.

29. Wis.—Dolphin v. Peacock Min. Co., 144 N.W. 1112, 155 Wis. 439.
39 C.J. p 748 note 36.

30. Wash.—Feroglio v. Paulsen, 131 P. 1163, 73 Wash. 417, 46 L.R.A.,N.S., 629.

31. Ala.—Alabama Great Southern R. Co. v. Neal, 62 So. 554, 8 Ala. App. 591.

32. Mass.—Morley v. Union Cotton Mfg. Co., 96 N.E. 670, 210 Mass. 288.
39 C.J. p 748 note 39.

33. Ind.—New York, C. & St. L. R. Co. v. Peele, 164 N.E. 705, 88 Ind. App. 532, certiorari denied 49 S.Ct. 263, 279 U.S. 842, 73 L.Ed. 988.
Ky.—Louisville & N. R. Co. v. Lewis, 278 S.W. 143, 211 Ky. 830.
Tenn.—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn.App. 213.
39 C.J. p 749 note 41.

Clearance

Railroad yardman was not bound to know tracks in part of yard failed to provide clearance.—New York, C. & St. L. R. Co. v. Peele, 164 N.E. 705, 88 Ind.App. 532, certiorari denied 49 S.Ct. 263, 279 U.S. 842, 73 L.Ed. 988.

Tunnel

Transitman, supervising timbering of tunnel, had right to assume that superior employee made inspection of rock which fell causing transitman's death, in such way as would show no failure to exercise ordinary care.—Big Sandy & C. R. Co. v. Measell's Adm'r, 42 S.W.2d 747, 240 Ky. 571.

Notice given by carrier to employee

Carrier cannot abrogate duty to use due care in furnishing safe working place, by notice that it intends to continue negligence.—Davis v. Crane, C.C.A.Mo., 12 F.2d 355.

34. Ala.—Sloss-Sheffield Steel, etc., Co. v. Green, 49 So. 301, 159 Ala. 178.
39 C.J. p 749 note 42.

35. Kan.—Taylor v. Atchison Gravel, Sand & Rock Co., 135 P. 576, 90 Kan. 452.
39 C.J. p 749 note 43.

36. Ky.—Olive Hill Fire Brick Co. v. Stone, 155 S.W. 733, 153 Ky. 360.

37. Me.—Gillin v. Patten, etc., R. Co., 44 A. 361, 93 Me. 80.

38. Ky.—Steely v. Great Atlantic & Pacific Tea Co., 76 S.W.2d 900, 256 Ky. 586.
Wash.—Young v. International Stevedoring Co., 245 P. 9, 138 Wash. 665, affirmed 250 P. 469, 140 Wash. 385.
39 C.J. p 749 note 48.

Stairways

(1) In general.—Burke v. Crimmins, 152 N.E. 43, 256 Mass. 14.

(2) Practical nurse employed to care for defendant's husband assumed risk as matter of law and could not recover for injuries sustained in fall down unlighted stairs

(2) Uncovered or Unguarded Places; Defective or Dangerous Floors

A servant ordinarily assumes the risk of injury from uncovered or unguarded places or defective or dangerous floors at his place of employment where he knows thereof and appreciates the danger.

The general rule that the servant assumes the risk of injury from known defects or dangers existing at his place of work, considered supra subdivision c (1) of this section, has been held to apply in case of injuries sustained by the servant by reason of uncovered or unguarded places[39] such as air shafts,[40] cisterns,[41] culverts,[42] elevator shafts,[43] hatches,[44] uncovered holes in floors[45] or in railroad yards,[46] mine shafts,[47] pathways, walks, or runways,[48] pits,[49] platforms,[50] sewers,[51] stairways,[52] tanks,[53] trapdoors,[54] vats,[55] and walks on side of sidetrack.[56]

Defective or dangerous floors. The general rule stated supra subdivision c (1) of this section has been applied in the case of floors from which injuries were sustained by reason of their defective construction,[57] by reason of the floor being uncompleted,[58] by reason of the floor sloping,[59] by reason of the floor becoming unevenly worn,[60] by reason of the floor becoming worn and splintered by heavily loaded trucks driven over it,[61] by reason of the floor being wet or greasy and slippery,[62] or by reason of obstacles or obstructions being left on the floor.[63]

(3) Railroad Tracks, Roadbeds, and Yards

In the absence of statutory regulations to the contrary a servant ordinarily assumes the risk of injury from known defects or dangers in the railroad track or roadbed.

In accordance with the general rule stated supra subdivision c (1) of this section, a servant who knows or, in the exercise of ordinary care, should know of defects and dangers in the railroad track or roadbed and who understands and appreciates the risk of injury therefrom has been held to assume the risk,[64] although, as considered supra §

while going to inform defendant's daughter that husband had died, notwithstanding defendant's failure to keep promise to keep light burning in sitting room, where nurse was attempting to grope her way through dark hall knowing that stairs were dangerous.—Stone v. Johnson, 197 A. 713, 89 N.H. 329.

39. **Bridges**
Ga.—Curry v. Atlantic Coast Line R. Co., 16 S.E.2d 609, 65 Ga.App. 845.
Ky.—Moore v. Chesapeake & O. Ry. Co., 280 S.W. 482, 213 Ky. 69.
Mich.—Howe v. Michigan Cent. R. Co., 211 N.W. 111, 236 Mich. 577, certiorari denied 47 S.Ct. 576, 274 U.S. 738, 71 L.Ed. 1317.

40. N.Y.—Finney v. National Fire Proofing Co., 138 N.Y.S. 73, 153 App.Div. 1—Pulis v. Stewart, 135 N.Y.S. 155, 75 Misc. 268.

41. Ga.—Steele v. Georgia Iron & Coal Co., 49 S.E. 291, 121 Ga. 459.

42. U.S.—West v. Southern Pac. Co., Utah, 85 F. 392, 29 C.C.A. 219.
39 C.J. p 750 note 53.

43. Tex.—Swift v. Martine, 117 S.W. 209, 53 Tex.Civ.App. 475.
39 C.J. p 750 note 54.

44. Mass.—Murray v. Nantasket Beach Steamboat Co., 143 N.E. 623, 248 Mass. 587.
39 C.J. p 750 note 55.

45. Mass.—Keough v. E. M. Loew's, 21 N.E.2d 971, 303 Mass. 364.
39 C.J. p 750 note 56.

46. Mass.—Gleason v. New York & N. E. R. Co., 34 N.E. 79, 159 Mass. 68.
Utah.—Busse v. Murray Meat & Live Stock Co., 147 P. 626, 45 Utah 596.

47. Tex.—Mt. Marion Coal Min. Co. v. Holt, 118 S.W. 825, 54 Tex.Civ. App. 411.

48. Wash.—Mayer v. Queen City Lumber Co., 117 P. 392, 64 Wash. 567.
39 C.J. p 750 note 59.

49. U.S.—Blackley v. Powell, C.C.A. N.C., 68 F.2d 457.
39 C.J. p 750 note 60.

50. Pa.—McCosh v. Jones & Laughlin Steel Co., 96 A. 1091, 251 Pa. 494.
39 C.J. p 751 note 61.

51. Mo.—Robinson v. Hammond Packing Co., 171 S.W. 34, 184 Mo. App. 410.

52. Wis.—Sweet v. Ohio Coal Co., 47 N.W. 182, 78 Wis. 127, 9 L.R.A. 861.
39 C.J. p 751 note 63.

53. Mass.—McCafferty v. Lewando's French Dyeing & Cleansing Co., 80 N.E. 460, 194 Mass. 412, 120 Am.S. R. 562.

54. Mass.—Moses v. Sprague-Nugent Co., 106 N.E. 562, 219 Mass. 144.
39 C.J. p 751 note 65.

Trapdoor easily seen by employee
Fact that trapdoor in floor, which was kept closed except occasionally for short periods, could be easily seen by employee, did not create contractual assumption of risk of injury from door being left open by employer, when he should have known that employee was about to move backwards toward it.—Lukas v. Reece, 162 N.E. 344, 264 Mass. 312.

55. Mass.—Carrigan v. Washburn & Moen Mfg. Co., 48 N.E. 1079, 170 Mass. 79.
39 C.J. p 751 note 66.

56. N.Y.—Nugent v. Brooklyn Union El. R. Co., 72 N.Y.S. 67, 64 App. Div. 351.
39 C.J. p 751 note 67.

57. Ark.—Wisconsin & Arkansas Lumber Co. v. McCloud, 270 S.W. 599, 168 Ark. 352.
39 C.J. p 751 note 70.

58. **Building under construction**
N.Y.—Giardina v. Bricken Textile Corporation, 276 N.Y.S. 352, 243 App.Div. 608, affirmed 198 N.E. 410, 268 N.Y. 572.

59. **Filling station**
Tex.—Fuller v. Texas Park Lot, Civ. App., 133 S.W.2d 605.

60. R.I.—McLaughlin v. Atlantic Mills, 61 A. 42, 27 R.I. 158.

61. Me.—Mundle v. Hill Mfg. Co., 30 A. 16, 86 Me. 400.

62. Ark.—Tucker Duck & Rubber Co. v. Harvey, 154 S.W.2d 828, 202 Ark. 1033.
N.Y.—Yaconi v. Brady & Gioe, 158 N. E. 876, 246 N.Y. 300, certiorari denied 48 S.Ct. 421, 276 U.S. 636, 72 L.Ed. 744.
S.C.—Blalock v. Graniteville Mfg. Co., 190 S.E. 709, 183 S.C. 247.
39 C.J. p 751 note 73.

Oil on engine room floor
Ark.—Temple Cotton Oil Co. v. Brown, 132 S.W.2d 791, 198 Ark. 1076.

63. Mo.—Cross v. Chicago, B. & Q. R. Co., Mo., 186 S.W. 1130, 1131.

Metal cap of beer bottle
Neb.—Moriarty v. Miller, 157 N.W. 329, 99 Neb. 614.

64. U.S.—Chicago, B. & Q. R. Co. v. Kelley, C.C.A.Neb., 74 F.2d 80—Pennsylvania R. Co. v. Bourke, C.

359, the rule may be otherwise in cases under the amendment of August 11, 1939, chapter 685, § 1, to the Federal Employers' Liability Act, 45 U.S.C.A. § 54.

The rule that the servant assumes the risk of injury from known defects or dangers in the railroad tracks or roadbed has been applied in case of injuries sustained by reason of defective bridges,[65] decayed or defective ties or sleepers,[66] failure to maintain a block signal system,[67] hole in roadbed,[68] insufficiently ballasted tracks,[69] and various other defects or dangers.[70]

Obstructions on, over, or near track or roadbed. Where the risk of injury from obstructions on, over, or near a railroad track or roadbed is known to the servant or should be known and appreciated by him in the exercise of ordinary care, it has been held, in the absence of a statute to the contrary, that he assumes the risk of injury therefrom[71] even in case of a structure which is unusually near the track where the structure is of a permanent character.[72]

The rule that the servant assumes the risk of injury from known obstructions on, over, or near a railroad track or roadbed has been applied in the case of awnings[73] or a roof[74] projecting from the station platform, bridge pillars,[75] bridge trusses,[76] cars or locomotives standing on an adjacent track,[77] cattle chutes,[78] cattle guards,[79] overhead bridges,[80] and various other obstructions.[81]

C.A.Mich., 61 F.2d 719, certiorari denied Bourke v. Pennsylvania R. Co., 53 S.Ct. 402, 288 U.S. 607, 77 L.Ed. 982—Kreger v. Baltimore & O. R. Co., D.C.Pa., 25 F.2d 726, affirmed, C.C.A., 25 F.2d 728.
Ky.—Chesapeake & O. Ry. Co. v. Vanhoose, 270 S.W. 740, 208 Ky. 117.
La.—Miller v. Missouri Pac. R. Co., 121 So. 241, 9 La.App. 477.
Mich.—Thrall v. Pere Marquette Ry. Co., 236 N.W. 230, 254 Mich. 197.
Miss.—St. Louis & S. F. Ry. Co. v. Bridges, 125 So. 423, 156 Miss. 206.
Mo.—Odell v. St. Louis-San Francisco Ry. Co., App., 281 S.W. 456.
Tenn.—Peters v. Tennessee Cent. Ry., 167 S.W.2d 973, 179 Tenn. 509—Tennessee Cent. Ry. Co. v. Shacklett, 147 S.W.2d 1054, 24 Tenn.App. 563.
39 C.J. p 752 note 77.

Knowledge of one of several defects
By assuming risk of one defect or danger of which he has knowledge, servant does not assume risk of another defect or danger of which he has no knowledge.—Graham v. Chapman, 11 N.Y.S. 318, 58 Hun 602—39 C.J. p 753 note 2.

65. U.S.—Northwestern Pac. R. Co. v. Bobo, Cal., 54 S.Ct. 263, 290 U.S. 499, 78 L.Ed. 462.
39 C.J. p 752 note 78.

Unguarded bridge
Ga.—Curry v. Atlantic Coast Line R. Co., 16 S.E.2d 609, 65 Ga.App. 845.

66. Tex.—Louisiana Ry. & Nav. Co. of Texas v. Eldridge, Civ.App., 293 S.W. 901.
39 C.J. p 752 note 79.

67. Ky.—Louisville & N. R. Co. v. Heinig, 171 S.W. 853, 162 Ky. 14.

68. Mich.—Ragon v. Toledo, A. A. & N. M. R. Co., 56 N.W. 612, 97 Mich. 265, 37 Am.S.R. 336.
39 C.J. p 752 note 82.

69. Ind.—Louisville & N. R. Co. v. Kemper, 47 N.E. 214, 147 Ind. 561—Evansville & R. R. Co. v. Henderson, 42 N.E. 216, 142 Ind. 596.

70. **Particular defects or dangers**
(1) Roundhouse engine pit.—Fort Worth & D. C. Ry. Co. v. Goodfellow, Tex.Civ.App., 280 S.W. 619.
(2) Switches.
U.S.—Lehigh Valley R. Co. v. Hatmaker, C.C.A.Pa., 69 F.2d 282.
S.C.—Johnston v. Atlantic Coast Line R. Co., 190 S.E. 459, 183 S.C. 126.
39 C.J. p 752 note 88.
(3) Unblocked frogs.—Hudgins v. Kansas City, M. & O. R. Co., Tex. Civ.App., 2 S.W.2d 958, error refused—39 C.J. p 753 note 95.
(4) Other defects or dangers see 39 C.J. p 752 note 84–p 753 note 1.

71. U.S.—New York Cent. R. Co. v. Devine, C.C.A.N.Y., 23 F.2d 588—New York, C. & St. L. R. Co. v. McDougall, C.C.A.Ohio, 15 F.2d 283.
Tenn.—Tennessee Cent. Ry. Co. v. Shacklett, 147 S.W.2d 1054, 24 Tenn.App. 563.
39 C.J. p 753 note 4.

In Kentucky
It has been held that knowledge by servants of existence of obstructions near or over railroad tracks or roadbeds does not cause an assumption of risk of injury therefrom.—Louisville & N. R. Co. v. Roe, 134 S. W. 437, 142 Ky. 456—Louisville & N. R. Co. v. Hahn, 122 S.W. 142, 135 Ky. 251.

72. Mass.—McLeod v. New York, N. H. & H. R. Co., 77 N.E. 715, 191 Mass. 389, 114 Am.S.R. 628, overruling Scanlon v. Boston & A. R. Co., 18 N.E. 209, 147 Mass. 484, 9 Am.S.R. 733.

73. Mass.—Fisk v. Fitchburg R. Co., 33 N.E. 510, 158 Mass. 238.

74. Mass.—Quinn v. New York, N. H. & H. R. Co., 55 N.E. 891, 175 Mass. 150.
N.Y.—Gibson v. Erie R. Co., 63 N.Y. 449, 20 Am.R. 552.

75. Mass.—Bell v. New York, N. H. & H. R. Co., 47 N.E. 118, 168 Mass. 443.

76. Mich.—Illick v. Flint & P. M. R. Co., 35 N.W. 708, 67 Mich. 632.

77. Mass.—Vining v. New York & N. E. R. Co., 46 N.E. 117, 167 Mass. 539.
39 C.J. p 754 note 10.

78. Mich.—Carr v. Grand Trunk R. Co., 115 N.W. 1068, 152 Mich. 138.
Pa.—Boyd v. Harris, 35 A. 222, 176 Pa. 484.
39 C.J. p 754 note 11.

79. Iowa.—McKee v. Chicago, R. I. & P. R. Co., 50 N.W. 209, 83 Iowa 616, 13 L.R.A. 817.
Tex.—Missouri Pac. R. Co. v. Somers, 9 S.W. 741, 71 Tex. 700.

80. U.S.—Wolfe v. Pennsylvania R. Co., C.C.A.N.Y., 82 F.2d 164—New York, C. & St. L. R. Co. v. McDougall, C.C.A.Ohio, 15 F.2d 283.
N.Y.—Heck v. Lehigh Valley R. Co., 149 N.E. 835, 241 N.Y. 212.
39 C.J. p 754 note 20.

81. **Particular obstructions**
(1) Coal chutes.—McCully v. Monongahela Ry. Co., 137 A. 623, 289 Pa. 393, certiorari denied 48 S.Ct. 37, 275 U.S. 542, 72 L.Ed. 416—39 C.J. p 754 note 14.
(2) Grain slips.—Missouri Pac. R. Co. v. Martin, 57 S.W.2d 1047, 186 Ark. 1101.
(3) Mail cranes.—Chesapeake & O. Ry. Co. v. Leitch, W.Va., 48 S.Ct. 336, 276 U.S. 429, 72 L.Ed. 638.
(4) Piles of lumber or stone.
Mich.—Mathy v. Chicago & N. W. Ry. Co., 262 N.W. 917, 273 Mich. 301, certiorari denied 56 S.Ct. 385, 297 U.S. 702, 80 L.Ed. 991, rehearing denied 56 S.Ct. 499, 297 U.S. 727, 80 L.Ed. 1010.
Minn.—Smith v. Winona & St. P. R. Co., 43 N.W. 968, 42 Minn. 87.
39 C.J. p 754 note 21.

Nevertheless, in accordance with well-settled principles considered supra § 389, it is not sufficient that the servant had knowledge of the obstructions, but it is also necessary that he should have known and appreciated the risk of injury therefrom.[82]

(4) Mines and Quarries

Servants working in mines and quarries who know and appreciate the defects and dangers therein assume the risk of injury from such defects and dangers.

In accordance with the general rule, stated supra subdivision c (1) of this section, in the absence of a statute to the contrary servants working in mines[83] or quarries[84] who know and appreciate the defects and dangers of the place where they are working or, in the exercise of ordinary care, should know and appreciate such defects and dangers are held to assume the risk therefrom, and especially is this true where the work of the servant himself makes the place of work unsafe.[85]

The rule has been applied in case of injuries sustained by reason of absence of a derailing switch at the mouth of a mine,[86] absence of fire protection,[87] a defective manway and heading,[88] a defective ventilating fan,[89] defective ways for hauling coal[90] or crushed rock,[91] an entry too small to permit of alighting from car,[92] floors defective from failure to provide means for water to escape,[93] slanting pillars,[94] tracks from which coal is dumped,[95] unsafe mine roofs,[96] as, for instance, unpropped or defectively propped roofs[97] and unpropped ledges.[98]

(5) Excavations

Where the danger of caving caused by excavation and the likelihood of injury therefrom are known to the servant, he assumes the risk of such injury.

Under the general rule considered supra subdivision c (1) of this section, where the danger of caving caused by excavation and the likelihood of injury therefrom are known to the servant or are so open and obvious that in the exercise of ordinary care he should know thereof, he assumes the risk of such injury.[99] Where he has actual knowledge of the risk, the fact that he was not notified thereof by the master is of no consequence.[1] He is bound to take notice of the ordinary familiar laws of nature and to govern himself accordingly without any special instruction or knowledge.[2]

d. Machinery, Tools, and Appliances

(1) In general
(2) Uncovered or unguarded machinery or appliances
(3) Simple tools or appliances
(4) Cars, locomotives, cranes, derricks, ladders, platforms, etc.
(5) Electric appliances and equipment

(1) In General

A servant ordinarily assumes the risk of injury from defective or dangerous machinery, tools, or appliances furnished by the master where the servant knows of and appreciates the danger.

Under the rules considered supra §§ 382–389, and in the absence of statutory regulations to the contrary, where machinery, tools, or appliances furnished by the master are defective, imperfect, or inherently dangerous, the servant ordinarily assumes the risk of injury therefrom if he knows and

(5) Switching posts.
Ill.—Glass v. Chicago, R. I. & P. R. Co., 41 Ill.App. 87, affirmed 30 N. E. 446, 141 Ill. 160, 33 Am.S.R. 294, 21 L.R.A. 387.
N.J.—Vinger v. Central R. Co. of New Jersey, 160 A. 575, 109 N.J. Law 93.

(6) Other obstructions see 39 C.J. p 754 notes 13–34.

82. U.S.—Norfolk & W. R. Co. v. Beckett, W.Va., 163 F. 479, 90 C.C. A. 25.
39 C.J. p 754 note 36.

83. Ky.—Eutsler v. Huff, 299 S.W. 1070, 222 Ky. 48—Royal Collieries Co. v. Wells, 276 S.W. 515, 210 Ky. 600.
39 C.J. p 755 note 41.

84. Ind.—Lehigh Portland Cement Co. v. Bass, 103 N.E. 483, 180 Ind. 538.
39 C.J. p 755 note 42.

85. Ky.—Cooke-Jellico Coal Co. v. Richardson, 161 S.W. 537, 156 Ky. 617.
Uncovered or unguarded places see supra subdivision c (2) of this section.

86. Ala.—Connors-Weyman Steel Co. v. Kilgore, 66 So. 609, 189 Ala. 643.

87. Colo.—Harvey v. Mountain Pride Gold Min. Co., 70 P. 1001, 18 Colo.App. 234.

88. Md.—Harris v. Consolidated Coal Co., 73 A. 805, 111 Md. 209.

89. Ky.—Keyser Coal Co. v. Helvy, 271 S.W. 1088, 208 Ky. 772.

90. Iowa.—Collingwood v. Illinois & I. Fuel Co., 101 N.W. 283, 125 Iowa 537.

91. Ky.—Mowrey v. Frazier, 120 S. W. 289.

92. Ky.—Mahan Jellico Coal Co. v. Bird, 201 S.W. 306, 179 Ky. 767.

93. Colo.—Dickson v. Newhouse, 82 P. 537, 34 Colo. 228.

94. Ill.—Tustin v. Majestic Coal & Coke Co., 179 Ill.App. 525.

95. Pa.—Carroll v. Pennsylvania Coal Co., 15 A. 688.

96. Ky.—Eutsler v. Huff, 299 S.W. 1070, 222 Ky. 48.
39 C.J. p 755 note 53.

97. Va.—Addington v. Guests River Coal Co., 108 S.E. 695, 130 Va. 584.
39 C.J. p 755 note 54.

98. Ind.—Dickason Coal Co. v. Unverferth, 66 N.E. 759, 30 Ind.App. 546.

99. N.C.—Darden v. Robert G. Lassiter & Co., 152 S.E. 32, 198 N.C. 427.
Vt.—Landing v. Town of Fairlee, 22 A.2d 179, 112 Vt. 127.
39 C.J. p 755 note 57.
Gravel bank
Tenn.—Moon v. City of Chattanooga, 10 Tenn.App. 82.

1. U.S.—Anderson v. Winston, C.C. Minn., 31 F. 528.

2. Minn.—O'Neil v. Great Northern R. Co., 112 N.W. 625, 101 Minn. 467.

appreciates the danger or if the danger is so open and obvious that, in the exercise of ordinary care, the servant should know of and appreciate it;[3] and the fact that the servant is not negligent in the use of machinery, tools, or appliances furnished does not affect the operation of the rule.[4] Where the servant knows and appreciates the dangers, it has been held to be his duty to quit the service.[5] Where the machinery and appliances are known and understood by the employee on accepting service, he can make no claim on the employer to change them; he accepts them as they are, and if injured cannot recover damages.[6]

The general rule under consideration has been applied very frequently in respect of a great variety of machinery, tools, and appliances,[7] such as automobiles,[8] belts,[9] blasting appliances,[10] bulkheads,[11] chains,[12] chisel bars,[13] chisels,[14] claw bars,[15] cotton gin,[16] edgers,[17] hammers,[18] hooks,[19] jacks,[20] keelsons,[21] lamps or lanterns,[22] levers,[23] mangles,[24] meat grinders,[25] pile drivers,[26] punch-

3. U.S.—Holliday v. Fulton Band Mill, C.C.A.Miss., 142 F.2d 1006—King Cotton Mills v. Wilson, C.C. A.N.C., 61 F.2d 1004.
Ark.—Sims Oil Co. v. Durham, 21 S.W.2d 861, 180 Ark. 366—Missouri Pac. R. Co. v. Hendrix, 277 S.W. 837, 169 Ark. 825, certiorari denied 46 S.Ct. 351, 270 U.S. 651, 70 L.Ed. 781—Texas Pipe Line Co. v. Johnson, 275 S.W. 329, 169 Ark. 235.
Fla.—Moody v. Hanlon, 179 So. 164, 131 Fla. 129—Gallespie v. Thornton, 117 So. 714, 95 Fla. 5—Wilson & Toomer Fertilizer Co. v. Lee, 106 So. 462, 90 Fla. 632.
Ga.—Pollard v. Weeks, 4 S.E.2d 722, 60 Ga.App. 664—Louisville & N. R. Co. v. Hicks, 176 S.E. 698, 49 Ga. App. 846, certiorari dismissed Hicks v. Louisville & N. R. Co., 186 S.E. 662, 182 Ga. 595.
Ind.—Baltimore & O. S. W. R. Co. v. Carroll, 163 N.E. 99, 200 Ind. 589, set aside on other grounds 171 N.E. 923, 202 Ind. 37, reversed on other grounds 50 S.Ct. 182, 280 U. S. 491, 74 L.Ed. 566—Chicago, I. & L. Ry. Co. v. Younger, 175 N.E. 290, 93 Ind.App. 276.
Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.
Ky.—Nixon v. Raymond City Coal & Transportation Co., 134 S.W.2d 633, 280 Ky. 743—Steely v. Great Atlantic & Pacific Tea Co., 76 S.W.2d 900, 256 Ky. 586—Leatherwood Lumber Co. v. Hall, 66 S.W.2d 76, 252 Ky. 119.
La.—Clements v. Luby Oil Co., 130 So. 851, 15 La.App. 384.
Mass.—Currier v. Whitin Mach. Works, 154 N.E. 518, 258 Mass. 82.
Miss.—Eastman, Gardiner & Co. v. Caldwell, 172 So. 126, 177 Miss. 861.
Mo.—Lugar v. Missouri Pac. R. Co., 283 S.W. 738, 221 Mo.App. 679, stating Arkansas law.
Neb.—Large v. Johnson, 248 N.W. 400, 124 Neb. 821.
N.H.—Harvey v. Welch, 163 A. 417, 86 N.H. 72.
N.J.—Huels v. General Elec. Co., 46 A.2d 654, 134 N.J.Law 165—Vinger v. Central R. Co. of New Jersey, 160 A. 575, 109 N.J.Law 93.
Ohio.—New York, C. & St. L. Ry. Co. v. Wolf, 159 N.E. 861, 26 Ohio App. 292.
Pa.—Blair v. Baltimore & O. R. Co., 37 A.2d 736, 349 Pa. 436, reversed on other grounds 65 S.Ct. 545, 323 U.S. 600, 89 L.Ed. 490.
Tex.—Clayton v. Chicago, R. I. & G. Ry. Co., 154 S.W.2d 453, 137 Tex. 441—Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, error dismissed, judgment correct—City of Munday v. Shaw, Civ.App., 100 S.W.2d 765, error dismissed.
Wash.—Cummins v. Dufault, 139 P. 2d 308, 18 Wash.2d 274.
39 C.J. p 756 notes 61 [a], 62.

4. Ark.—Helena Hardwood Lumber Co. v. Maynard, 138 S.W. 469, 99 Ark. 377.

5. Ill.—Supple v. Agnew, 61 N.E. 392, 191 Ill. 439.

6. Mass.—Doherty v. Paul's For Tires, 49 N.E.2d 430, 314 Mass. 83—Engel v. Boston Ice Co., 4 N.E. 2d 455, 295 Mass. 428—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434—Lamberti v. Neal, 148 N.E. 463, 253 Mass. 99.
39 C.J. p 758 note 65.

7. N.J.—Vinger v. Central R. Co. of New Jersey, 160 A. 575, 109 N.J. Law 93.

Drift pins
Ill.—Barrett v. Chicago Bridge & Iron Co., 181 Ill.App. 204.

Gear of ship's pump
Mass.—McRae v. Gorton-Pew Vessels Co., 150 N.E. 847, 254 Mass. 548.

Plank used in loading ship
Wash.—Kahlstrom v. International Stevedoring Co., 250 P. 287, 141 Wash. 374, affirmed 256 P. 503, 141 Wash. 642, certiorari denied 48 S. Ct. 119, 275 U.S. 560, 72 L.Ed. 426.

8. Wash.—Wilkinson v. Tacoma Taxicab & Baggage Transfer Co., 293 P. 455, 159 Wash. 374.
39 C.J. p 758 note 68.

9. Mich.—Taylor v. Withington & Cooley Mfg. Co., 99 N.W. 873, 136 Mich. 652.
39 C.J. p 758 note 69.

10. Wis.—Brotzki v. Wisconsin Granite Co., 125 N.W. 916, 142 Wis. 380, 27 L.R.A.,N.S., 982.
39 C.J. p 758 note 70.

11. R.I.—Vartanian v. New York, N. H. & H. R. Co., 56 A. 184, 25 R.I. 398.

12. Mo.—Webber v. Terminal R. Ass'n of St. Louis, 70 S.W.2d 863, 335 Mo. 11.

13. Tex.—Gulf, W. T. & P. R. Co. v. Smith, 83 S.W. 719, 37 Tex.Civ. App. 188.

14. Ark.—Fordyce v. Stafford, 22 S. W. 161, 57 Ark. 503.
N.Y.—Buchanan v. Rome, W. & O. R. Co., 10 N.Y.St. 326, 45 Hun 593.
39 C.J. p 758 note 73.

15. U.S.—Pryor v. Williams, Mo., 41 S.Ct. 36, 254 U.S. 43, 65 L.Ed. 120.

16. Ark.—Bufkin v. McDaniel, 146 S.W.2d 157, 201 Ark. 552.

17. Wash.—Hogele v. Wilson, 31 P. 469, 5 Wash. 160.

18. Tex.—Hopkins Bridge Co. v. Burnett, 19 S.W. 886, 85 Tex. 16.

19. Wis.—Goltz v. Milwaukee, L. S. & W. R. Co., 44 N.W. 752, 76 Wis. 136.
39 C.J. p 758 note 77.

20. Ind.—Chicago, I. & L. Ry. Co. v. Younger, 175 N.E. 290, 93 Ind.App. 276.

21. N.Y.—Foley v. Brooklyn Gas Light Co., 41 N.Y.S. 66, 9 App.Div. 91.

22. Ind.—Pennsylvania Co. v. Congdon, 33 N.E. 795, 134 Ind. 226, 39 Am.S.R. 251.
39 C.J. p 758 note 79.

23. N.J.—Coyle v. Griffing Iron Co., 44 A. 665, 63 N.J.Law 609, 47 L.R. A. 147.
N.Y.—Meigel v. Crandall Oil & Putty Mfg. Co., 126 N.Y.S. 720, 141 App. Div. 828.

24. R.I.—Day v. Achron, 50 A. 654, 23 R.I. 627.
39 C.J. p 758 note 81.

25. Ohio.—Klotz v. Balmat, 171 N. E. 409, 34 Ohio App. 490.

26. U.S.—Kirkpatrick v. St. Louis & S. F. R. Co., Kan., 159 F. 855, 87 C.C.A. 35, certiorari denied 29 S. Ct. 695, 214 U.S. 513, 53 L.Ed. 1063.

es,[27] revolving shafts,[28] ropes,[29] saws,[30] scrapers,[31] skids,[32] sprags,[33] stepping boards,[34] switches,[35] tables,[36] trestles,[37] turntables,[38] wagons or trucks,[39] walks,[40] wheels,[41] and wrenches.[42] The rule has also been applied to animals furnished by the employer.[43]

In accordance with well established principles considered supra § 389, mere knowledge of defects in machinery, tools, appliances, and instrumentalities for work is not sufficient to charge the servant with assumption of risk, but it is further necessary that he should know of and appreciate the dangers incident to the work under the existing conditions.[44] Likewise, knowledge of a defect in appliances furnished will not bar a recovery where it was not acquired until too late to avert injury.[45]

Right to rely on care of master. In accordance with the rule stated supra § 380, and subject to its limitations, a servant has the right to assume that the master has exercised due care in furnishing reasonably safe tools, appliances, and instrumentalities for work,[46] and in subsequently inspecting and repairing them to keep them in their condition,[47] unless he has actual knowledge to the contrary or unless the circumstances are such as to charge him with knowledge.[48] It has been so held in respect of the master's duty to furnish reasonably safe cars,[49] chisels,[50] ladders,[51] locomotives,[52] saws,[53] scaffolds,[54] and sledge hammers.[55]

27. Ind.—Cincinnati, H. & D. R. Co. v. Phinney, 77 N.E. 296, 38 Ind. App. 546.

28. Mass.—Goulding v. Eastern Bridge & Structural Co., 96 N.E. 71, 210 Mass. 52.
39 C.J. p 758 note 84.

29. Mich.—Coleman v. Turnêr Cartage Co., 140 N.W. 539, 174 Mich. 231.
39 C.J. p 758 note 85.

Rope ladder on vessel
Tex.—La Fond v. Wm. Parr & Co., Civ.App., 18 S.W.2d 751, error refused.

30. Tex.—Worden v. Kroeger, Civ. App., 184 S.W. 583.
39 C.J. p 758 note 86.

31. Tex.—International & G. N. R. Co. v. Hall, 102 S.W. 740, 46 Tex. Civ.App. 493.

32. Mass.—Cuozzo v. Clyde SS. Co., 112 N.E. 215, 223 Mass. 521.
Wis.—Sladky v. Marinette Lumber Co., 83 N.W. 514, 107 Wis. 250.

33. N.J.—McGrath v. Delaware, L. & W. R. Co., 53 A. 207, 68 N.J. Law 425.

34. N.Y.—Cimmer v. Montgomery, 134 N.Y.S. 275, 149 App.Div. 388.

35. Colo.—Iowa Gold Min. Co. v. Diefenthaler, 76 P. 981, 32 Colo. 391.

36. U.S.—American Dredging Co. v. Walls, Pa., 84 F. 428, 28 C.C.A. 441.
39 C.J. p 759 note 92.

37. U.S.—Garnett v. Phœnix Bridge Co., C.C.Pa., 98 F. 192.

38. Tex.—Ft. Worth & D. C. R. Co. v. Miller, Tex.Civ.App., 201 S.W. 1049.

39. U.S.—Standard Oil Co. of Louisiana v. Martin, C.C.A.Ark., 21 F. 2d 912.
Fla.—Smoak v. City of Tampa, 167 So. 528, 123 Fla. 716.
Miss.—Lucius v. Harris, 153 So. 390, 169 Miss. 385, applying Louisiana law.
Mo.—Alexander v. Barnes Grocery Co., 7 S.W.2d 370, 223 Mo.App. 1.
39 C.J. p 759 note 95.

40. Ill.—Helvig v. Slatter, 96 Ill. App. 623.

41. Wash.—Columbia & P. S. R. Co. v. Hawthorne, 19 P. 25, 3 Wash.T. 353, reversed on other grounds 12 S.Ct. 591, 144 U.S. 202, 36 L.Ed. 405.

42. Tex.—Pruitt v. Frost-Johnson Lumber Co., Tex.Civ.App., 161 S.W. 421.

43. N.H.—Rosedoff v. Consolidated Rendering Co., 47 A.2d 674.
39 C.J. p 758 note 67.

Failure to warn of viciousness
Farm laborer did not assume risk of being placed in charge of vicious animal, where no warning was given and he was ignorant of the viciousness.—Lander v. Shannon, 268 P. 145, 148 Wash. 93.

44. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650.
Tex.—Lawson v. Hutcherson, Civ. App., 138 S.W.2d 131, error dismissed, judgment correct.
39 C.J. p 759 note 1.

45. U.S.—The Dredge No. 15, D.C. Va., 264 F. 135.
39 C.J. p 759 note 2.

46. Ark.—Norton & Wheeler Stave Co. v. Wright, 106 S.W.2d 178, 194 Ark. 115—McEachin & McEachin v. Hill, 97 S.W.2d 70, 192 Ark. 1139.
Cal.—Metz v. Southern Pac. Co., 124 P.2d 670, 51 Cal.App.2d 260.
Conn.—Schneider v. Raymond, 136 A. 874, 106 Conn. 72.
Fla.—Gallespie v. Thornton, 117 So. 714, 95 Fla. 5—Wilson & Toomer Fertilizer Co. v. Lee, 106 So. 462, 90 Fla. 632.
Kan.—Fishburn v. International Harvester Co., 138 P.2d 471, 157 Kan. 43.
Mo.—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748.
N.H.—Harvey v. Welch, 163 A. 417, 86 N.H. 72.
S.C.—Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259.
Tex.—Missouri-Kansas-Texas R. Co. of Texas v. Barnaby, Civ.App., 167 S.W.2d 235, error refused—International-Great Northern R. R. v. Lowry, Civ.App., 98 S.W.2d 383, reversed on other grounds International-Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272.
Va.—Colonna Shipyard v. Dunn, 145 S.E. 342, 151 Va. 740, certiorari denied 49 S.Ct. 253, 279 U.S. 840, 73 L.Ed. 986.
Wash.—Thornton v. Van De Kamp's Holland Dutch Bakers, 42 P.2d 799, 181 Wash. 213.
39 C.J. p 759 note 4.
Duty of master to furnish safe tools and appliances see supra § 201 et seq.

47. Tex.—Texas Cent. R. Co. v. Neill, Tex.Civ.App., 159 S.W. 1180.

48. Ark.—Hall v. Patterson, 166 S. W.2d 667, 205 Ark. 10.
39 C.J. p 759 note 6.

49. Ala.—Southern R. Co. v. McGowan, 43 So. 378, 149 Ala. 440.
39 C.J. p 759 note 7.

50. Ill.—Stankowski v. International Harvester Co., 180 Ill.App. 439.
Kan.—Steele v. St. Louis & S. F. R. Co., 124 P. 169, 87 Kan. 431.

51. Kan.—Allison v. Stivers, 106 P. 996, 81 Kan. 713.
Wash.—Campbell v. Winslow Lumber Co., 119 P. 832, 66 Wash. 507.

52. N.Y.—Pierson v. New York, N. H. & H. R. Co., 65 N.Y.S. 1039, 53 App.Div. 363.

53. Mass.—Lavartue v. Ely Lumber Co., 99 N.E. 469, 213 Mass. 65.

54. Va.—Trotter v. Du Pont de Nemours, 98 S.E. 621, 124 Va. 680.
39 C.J. p 760 note 12.

55. Ark.—Chicago, R. I. & P. R. Co. v. Smith, 156 S.W. 166, 107 Ark. 512.

(2) Uncovered or Unguarded Machinery or Appliances

A servant ordinarily assumes the risk of injury from unguarded or uncovered machinery or appliances where he knows of and appreciates the danger.

The general rule that the servant assumes the risk of injury resulting from defective or dangerous machinery, tools, or appliances furnished by the master where the servant knows of and appreciates the danger, considered supra subdivision d (1) of this section, has been applied in the case of unguarded or uncovered machinery or appliances,[56] such as belts and gearing,[57] cables,[58] cogwheels,[59] derrick gearing,[60] dough mixers,[61] elevator platforms,[62] elevators,[63] flywheels,[64] knives,[65] mangles,[66] pinions,[67] planers,[68] rollers,[69] saws,[70] set screws,[71] shafting,[72] shafts,[73] and trolley wires.[74]

Nevertheless, in accordance with principles considered supra § 389, where the servant, although having knowledge that the machinery or appliance was unguarded, did not appreciate the danger, he did not assume the risk.[75] Furthermore, a servant, although he may have known that machinery was unguarded, did not assume the risk of other defects or dangers of which he had no knowledge.[76]

(3) Simple Tools or Appliances

A servant generally assumes the risk of injury from defects and dangers in simple tools and appliances.

Except in a limited number of jurisdictions,[77] it is very generally held that a servant assumes the risk of injury from defects and dangers in what are commonly designated as simple tools and appliances,[78] especially if he has had experience in the use

Kan.—Steele v. St. Louis, etc., R. Co., 124 P. 169, 87 Kan. 431.

56. Ark.—Ward Furniture Mfg. Co. v. Weigand, 293 S.W. 1002, 173 Ark. 762.
39 C.J. p 760 note 15.

57. Ky.—Daniels v. Houston, Standwood & Gamble Co., 170 S.W. 1190, 161 Ky. 527.
39 C.J. p 760 note 16.

58. U.S.—Kyner v. Portland Gold Min. Co., Colo., 184 F. 43, 106 C.C.A. 245.

59. Ark.—Ward Furniture Mfg. Co. v. Weigand, 293 S.W. 1002, 173 Ark. 762.
39 C.J. p 760 note 18.

60. Ill.—Tyma v. Tarrant Fdy. Co., 144 Ill.App. 454.

61. Iowa.—Sutton v. Des Moines Bakery Co., 112 N.W. 836, 135 Iowa 390.

62. Mass.—McDonald v. Dutton, 84 N.E. 434, 198 Mass. 398.

63. Mass.—Anderson v. Wood Worsted Mills, 114 N.E. 729, 225 Mass. 519.

64. Tex.—Morgan v. Stillwell, Tex. Civ.App., 247 S.W. 580.

65. N.Y.—Crown v. Orr, 35 N.E. 648, 140 N.Y. 450.
39 C.J. p 760 note 24.

66. Iowa.—Hanson v. Hammell, 77 N.W. 839, 107 Iowa 171.
39 C.J. p 760 note 25.

67. Minn.—Scharenbroich v. St. Cloud Fiber-Ware Co., 60 N.W. 1093, 59 Minn. 116.

68. Mass.—Zoulalian v. New England Sanatorium & Benev. Assoc., 119 N.E. 686, 230 Mass. 102, L.R.A. 1918F 185.
Mich.—Schroeder v. Michigan Car Co., 22 N.W. 220, 56 Mich. 132.

69. Tex.—Maxwell Ginning Co. v. Wallan, 121 S.W. 182, 57 Tex.Civ. App. 42.
39 C.J. p 760 note 28.

70. Mont.—Cameron v. Judith Mercantile & Cattle Co., 201 P. 575, 61 Mont. 118.
39 C.J. p 761 note 29.

71. Me.—Podvin v. Pepperell Mfg. Co., 72 A. 618, 104 Me. 561, 129 Am.S.R. 411.
39 C.J. p 761 note 30.

72. Wash.—Brown v. Tabor Mill Co., 60 P. 1126, 22 Wash. 317.
39 C.J. p 761 note 32.

73. Ind.—Robertson v. Ford, 74 N.E. 1, 164 Ind. 538.

74. U.S.—Bingham Mines Co. v. Bianco, C.C.A.Utah, 276 F. 513.

75. N.H.—Owen v. Elliot Hospital, 136 A. 133, 82 N.H. 497.
39 C.J. p 761 note 35.

76. Wash.—Williams v. Ballard Lumber Co., 83 P. 323, 41 Wash. 338.
39 C.J. p 761 note 36.

77. Mo.—Fischer v. City of Cape Girardeau, 131 S.W.2d 521, 345 Mo. 122.
39 C.J. p 761 note 38.

78. Ind.—Pennsylvania R. Co. v. Martin, 170 N.E. 554, 93 Ind.App. 258.
Kan.—Darbe v. Crystal Ice & Fuel Co., 284 P. 596, 129 Kan. 727.
Ky.—Blackaby v. Louisville & N. R. Co., 280 S.W. 1093, 213 Ky. 368.
La.—Jennings v. Bolte, App., 168 So. 377.
Okl.—Oklahoma Pipe Line Co. v. Perrymore, 126 P.2d 518, 190 Okl. 518—St. Louis & S. F. Ry. Co. v. Sears, 49 P.2d 489, 173 Okl. 483.
S.C.—**Corpus Juris cited in** Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259.
Utah.—Proctor v. Town Club, 141 P. 2d 156, 105 Utah 72.
Va.—Colonna Shipyard v. Bland, 143 S.E. 729, 150 Va. 349, 59 A.L.R. 497.
Wash.—**Corpus Juris cited in** Etel v. Grubb, 288 P. 931, 932, 157 Wash. 311.
39 C.J. p 761 note 39.
Duty of master to furnish simple tools which are safe see supra § 216.
Effect of promise of master to repair see infra § 396.

Basis of doctrine

Simple tool doctrine is based on doctrine of assumed risk.—Ward v. Marshall, 168 S.W.2d 348, 293 Ky. 18—Nugent Sand Co. v. Howard, 11 S.W.2d 985, 227 Ky. 91.

Reasons for rule

(1) The defects and dangers inherent in the use of the defective tools and appliances are obvious.
Ga.—**Corpus Juris cited in** Southern R. Co. v. Cowan, 183 S.E. 331, 334, 52 Ga.App. 360.
Tenn.—Shepherd v. City of Chattanooga, 76 S.W.2d 322, 168 Tenn. 153.
39 C.J. p 762 note 41.

(2) The servant has an equal or better opportunity than the master to learn of such defects and to comprehend the risks of injury therefrom.
Ga.—Southern R. Co. v. Cowan, 183 S.E. 331, 52 Ga.App. 360.
S.C.—Tucker v. Holly Hill Lumber Co., 20 S.E.2d 704, 200 S.C. 259.
39 C.J. p 762 note 42.

In Arkansas

(1) Simple-tool doctrine does not apply absolutely but simplicity of tool and skill required in its use must be considered in determining degree of care to be used by master in selection of such tools for his servant; an employer's liability for defects in common tools is governed

of such tools.[79]

The "simple-tool doctrine" has no application where the tool inflicting the injury was being used by another than the injured servant,[80] especially where it was not being used in the ordinary way,[81] or where the master had actual knowledge of the defect and the employee had not,[82] or where a tool was furnished by the master for a purpose for which it was unfit, and the use of which in the business for which it was furnished is dangerous to the employee without his knowledge of the danger.[83] Further, it has been held that the simple-tool doctrine is inapplicable where the defect in the tool was not observable or discoverable by inspection such as a workman using it could reasonably be expected to make.[84]

Effect of statutory provisions. The rule that the servant assumes the risk of injury from defects and dangers in simple tools and appliances is not changed by an employers' liability act providing that, if the servant shall receive any injury by reason of any defect or unsafe condition in any tools "except simple tools" used in the business of the employer, the employer shall be deemed to have knowledge of such defect;[85] nor is it changed by a statute abolishing the doctrine of assumption of risk in case of the master's negligence.[86]

Particular tools. Various tools have been designated as simple tools within the rule,[87] such as axes,[88] blocks and tackles,[89] chisels,[90] clamps,[91] claw bars,[92] emery wheels,[93] hammers,[94] hatchets,[95] hooks,[96] iron rods,[97] paint brushes,[98] picks,[99] rail cutters,[1] shovels,[2] spike mauls,[3] spikes,[4] sticks with which windows are held open,[5] "T" rails,[6] tie picks,[7] tongs,[8] wagon seat springs,[9] and wrenches.[10]

On the other hand, various tools have been held not to be simple tools,[11] such as a scaffold not erected by the servant but under the direction of a gang

by particular facts.—Missouri Pac. R. Co. v. Spangler, C.C.A.Ark., 140 F. 2d 917.

(2) The simplicity of a tool ordinarily is but a circumstance to be considered by the jury in determining the duty resting on the master in furnishing it and of the servant in using it.—Norton & Wheeler Stave Co. v. Wright, 106 S.W.2d 178, 194 Ark. 115.

79. La.—Wiggins v. Louisiana Standard Oil Co., 75 So. 232, 141 La. 532.

80. Tenn.—Shepherd v. City of Chattanooga, 76 S.W.2d 322, 168 Tenn. 153.
39 C.J. p 763 note 70.

81. Ky.—Thomas v. National Concrete Constr. Co., 179 S.W. 439, 166 Ky. 512.

82. Ga.—**Corpus Juris cited in** Southern R. Co. v. Cowan, 183 S. E. 331, 334, 52 Ga.App. 360.
39 C.J. p 763 note 72.

83. Wis.—Karras v. Chicago & N. W. R. Co., 162 N.W. 923, 165 Wis. 578, L.R.A.1917E 677.

84. Mo.—Gately v. St. Louis-San Francisco Ry. Co., 56 S.W.2d 54, 332 Mo. 1.

85. Ohio.—Harner v. Johnson, 19 Ohio N.P.,N.S., 557.

86. Miss.—Allen Gravel Co. v. Yarbrough, 98 So. 117, 133 Miss. 652.
39 C.J. p 762 note 45.

87. Chains
U.S.—Spain v. Powell, C.C.A.Va., 90 F.2d 580.

88. Ky.—Consolidation Coal Co. v. Music, 199 S.W. 1074, 178 Ky. 790.

89. U.S.—New York, N. H. & H. R. Co. v. Vizvori, N.Y., 210 F. 118, 126 C.C.A. 632, L.R.A.1915C 9.
Idaho.—Goure v. Storey, 105 P. 794, 17 Idaho 352.

90. La.—**Corpus Juris cited in** Borde v. New Orleans & G. N. R. Co., App., 140 So. 810, 814.
39 C.J. p 762 note 48.

91. Wash.—Bougas v. Eschbach-Bruce Co., 137 P. 472, 77 Wash. 347.

92. Ky.—Chesapeake & O. Ry. Co. v. Ward, 299 S.W. 725, 221 Ky. 748.
39 C.J. p 762 note 50.

93. Ohio.—Knapp v. Holden, 15 Ohio Cir.Ct.,N.S., 222, 34 Ohio Cir.Ct. 415.

94. Okl.—Leirer v. Thompson, 122 P.2d 387, 190 Okl. 233.
39 C.J. p 762 note 52.

Hammer for driving railroad spikes
Ky.—York v. Rockcastle River Ry. Co., 284 S.W. 79, 215 Ky. 11.

95. Wis.—Karras v. Chicago & N. W. R. Co., 162 N.W. 923, 165 Wis. 578, L.R.A.1917E 677.

96. Mont.—Miller v. Granite County Power Co., 213 P. 604, 66 Mont. 368.

97. Ill.—Gearner v. American Car, etc., Co., 147 Ill.App. 76.
Ky.—Flaig v. Andrews Steel Co., 132 S.W. 1015, 141 Ky. 391.

98. S.C.—Richardson v. Union Seed & Fertilizer Co., 98 S.E. 134, 111 S. C. 387.

99. Ind.—Pennsylvania R. Co. v. Martin, 170 N.E. 554, 93 Ind.App. 258.

1. Ky.—Langhorn v. Wiley, 91 S.W. 255, 28 Ky.L. 1186.
39 C.J. p 762 note 58.

2. Ky.—Stirling Coal & Coke Co. v. Fork, 131 S.W. 1030, 141 Ky. 40, 40 L.R.A.,N.S., 837.

3. Ky.—Donahue v. Louisville, H. & St. L. R. Co., 210 S.W. 491, 183 Ky. 608.

4. Wash.—Paich v. Northern Pac. R. Co., 144 P. 919, 82 Wash. 581, reheard 150 P. 814, 86 Wash. 379.

5. Ohio.—Serafino v. Antinello, 18 Ohio Cir.Ct.,N.S., 474.
39 C.J. p 762 note 62.

6. Ky.—Tosh v. Illinois Cent. R. Co., 264 S.W. 754, 204 Ky. 363.

7. Ky.—Turkey Foot Lumber Co. v. Wilson, 206 S.W. 14, 182 Ky. 42.

8. Ice tongs
Kan.—Darbe v. Crystal Ice & Fuel Co., 284 P. 596, 129 Kan. 727.
Tie tongs
Ky.—Blackaby v. Louisville & N. R. Co., 280 S.W. 1093, 213 Ky. 368.

9. Wash.—Mattson v. Griffin Transfer Co., 155 P. 392, 90 Wash. 1.

10. U.S.—Hogan v. Baltimore & O. R. Co., C.C.A.Ohio, 15 F.2d 739.

11. Movable steps
Where greenhouse man was injured when he slipped while descending steps to boiler pit, which steps, although movable, had been adjusted so as to make them suitable for permanent placement in boiler pit, steps could not be held, as matter of law, to be a hand tool similar to ordinary ladder, so as to require application of rule that a servant assumes the risk of obvious imperfections when he uses such a tool.—Boettger v. Mauran, 12 A.2d 285, 64 R.I. 340.

Sixty-pound jack with latches, controlled by one employee while injured section hand operated lever was not simple tool.—Chicago, I. & L. Ry. Co. v. Younger, 175 N.E. 290, 93 Ind.App. 276.

boss[12] and a stool used in a shoe store to reach boxes of shoes on shelves, and containing a horizontal and slanting side with legs attached by concealed screws.[13]

Ladders have been frequently designated as simple tools,[14] although a ladder may be of such nature and used for such a purpose that it does not constitute a simple tool.[15]

(4) Cars, Locomotives, Cranes, Derricks, Ladders, Platforms, Etc.

In the absence of statutory regulations to the contrary, a servant assumes the risk of injury from defects in or on cars, locomotives, cranes, derricks, elevators, ladders, platforms, etc., where he knows of the defects and appreciates the dangers.

Under the rule considered supra subdivision d (1) of this section, at least in cases in which the amendment of August 11, 1939, chapter 685 § 1, to the Federal Employers' Liability Act, 45 U.S.C.A. § 54, is not applicable, where cars and hand or motor cars[16] or locomotives[17] are defective, imperfect, or inherently dangerous, the servant assumes the risk of injury therefrom if he knows and appreciates the danger, or if the danger is so open and obvious that, in the exercise of ordinary care, he should know of and appreciate it.

The fact that a servant knew of the defective condition of a hand car does not preclude his recovery for injuries sustained through a derailment of the car caused by excessive speed.[18]

Cars and hand cars. The rule has been applied in case of cars or hand cars equipped with defective brakes,[19] brake staffs,[20] couplings,[21] coupling levers,[22] coupling pin chains,[23] doors,[24] draw bars,[25] drawheads,[26] hand holds,[27] platforms,[28] running boards,[29] springs,[30] or steps,[31] or without necessary equipment such as bumpers[32] or check chains.[33] In addition, the servant assumes the risk of coupling cars with a coupling apparatus different from those apparatuses in ordinary use, the risk being open to the ordinary observation of any person using reasonable care and prudence,[34] or of

Spout hook, six or seven feet long, furnished by railroad company, and placed on tender of engine before it started on its trip, intended for use of fireman in pulling spout from standpipe in filling tank with water, is not within simple-tool or appliance rule.—Jackson v. Chicago-Great Western Ry. Co., 205 N.W. 689, 165 Minn. 58.

Tongs used in steel foundry for lifting ingots
Colo.—Colorado Fuel & Iron Co. v. Gardner, 121 P. 680, 21 Colo.App. 273.

12. Kan.—Smith v. Hines, 194 P. 318, 108 Kan. 151.

13. R.I.—Stimson v. Whitmore, 85 A. 113, 34 R.I. 581.

14. La.—Jennings v. Bolte, App., 168 So. 377.
S.C.—**Corpus Juris cited in** Roper v. Ware Shoals Mfg. Co., 137 S.E. 210, 139 S.C. 48.
Utah.—Proctor v. Town Club, 141 P. 2d 156, 105 Utah 72.
39 C.J. p 762 note 56.

15. **Ladders held not simple tools**
(1) Ten-foot stepladder supported by tongue used by fruit picker was not simple tool.—Etel v. Grubb, 288 P. 931, 157 Wash. 311.
(2) Ladder twenty-five feet long permanently fixed to side of building having rungs nailed in mortise in perpendicular side pieces was not a simple tool, but part of place to work.—Alaska Packers' Assoc. v. Gover, C.C.A.Alaska, 278 F. 927.
(3) Ladder which ship carpenter was directed to use to get to work in hold was not simple tool.—Colonna Shipyard v. Bland, 143 S.E. 729, 150 Va. 349, 59 A.L.R. 497.
(4) Other ladders see 39 C.J. p 762 note 66.

16. U.S.—New York, C. & St. L. R. Co. v. Kelly, C.C.A.Ind., 70 F.2d 548, certiorari denied Kelly v. New York, C. & St. L. R. Co., 55 S.Ct. 110, 293 U.S. 595, 79 L.Ed. 689.
Ark.—Missouri Pac. R. Co. v. Lane, 56 S.W.2d 175, 186 Ark. 807.
Me.—Morey v. Maine Cent. R. Co., 133 A. 92, 125 Me. 272.
Mich.—Thrall v. Pere Marquette Ry. Co., 236 N.W. 230, 254 Mich. 197.
Okl.—Midland Valley R. Co. v. Roberson, 109 P.2d 1086, 188 Okl. 432.
39 C.J. p 763 note 75.
Effect of Federal Employers' Liability Act on defense generally see supra § 359.

17. U.S.—Fredericks v. Erie R. Co., C.C.A.N.Y., 36 F.2d 716.
Mo.—Williams v. St. Joseph & G. I. Ry. Co., App., 112 S.W.2d 118.
Utah.—Elswood v. Oregon Short Line R. Co., 23 P.2d 925, 82 Utah 235.
39 C.J. p 763 note 76.

18. Tex.—Beck v. Texas Co., 148 S.W. 295, 105 Tex. 303.

19. Tenn.—Nashville, C. & St. L. R. Co. v. Gann, 47 S.W. 493, 101 Tenn. 380, 70 Am.S.R. 687.
39 C.J. p 763 note 78.

20. Tex.—Missouri, K. & T. R. Co. v. Hanson, Civ.App., 90 S.W. 1122.
39 C.J. p 763 note 79.

21. Va.—Norfolk & W. R. Co. v. McDonald, 13 S.E. 706, 88 Va. 352.
39 C.J. p 763 note 80.

22. Tex.—Trinity & B. V. Ry. Co. v. Perdue, 101 S.W. 485, 45 Tex. Civ.App. 659.

23. Tenn.—Norman v. Southern R. Co., 104 S.W. 1088, 119 Tenn. 401.

24. Mass.—Cassady v. Boston & A. R. R. Co., 41 N.E. 129, 164 Mass. 168.

25. Mich.—Secord v. Chicago & M. L. S. R. Co., 65 N.W. 550, 107 Mich. 540.

26. Tex.—Rio Grande & E. P. Ry. Co. v. Lynch, Civ.App., 66 S.W. 712—Louisiana Extension R. Co. v. Carstens, 47 S.W. 36, 19 Tex.Civ. App. 190.

27. Ky.—Young v. Norfolk & W. R. Co., 188 S.W. 621, 171 Ky. 510.

28. Tex.—Rogers v. Galveston City R. Co., 13 S.W. 540, 76 Tex. 502.

29. Ark.—Kansas City Southern R. Co. v. Henrie, 112 S.W. 967, 87 Ark. 443.

30. Ind.—Wallace v. Thompson, 97 N.E. 26, 49 Ind.App. 211.

31. Kan.—Jackson v. Kansas City, L. & S. K. Ry. Co., 3 P. 501, 31 Kan. 761.

32. Tex.—Houston & T. C. Ry. Co. v. Barrager, 14 S.W. 242.

33. N.Y.—Carr v. North River Constr. Co., 48 Hun 266.

34. Ala.—Boland v. Louisville & N. R. Co., 18 So. 99, 106 Ala. 641—Louisville & N. R. Co. v. Boland, 11 So. 667, 96 Ala. 626.

coupling cars of unequal heights, which fact is known to him.[35]

Nevertheless, in accordance with principles discussed supra § 389, the fact that an employee knew of the defective condition of a car, and consented to ride on it, will not of itself preclude a recovery for injuries received in consequence of such defect unless it was so glaring as to threaten immediate injury, or such that a person of ordinary prudence would not have used it to ride upon.[36] Furthermore, a servant does not, by the use of a hand car known to be defective, assume the risk of injury from other unknown negligence of the employer, coöperating with the known defect to cause the injury.[37]

Locomotives. The rule has been applied where a locomotive had defective brakes,[38] brake staffs,[39] brake wheels,[40] drawheads,[41] flues,[42] footboards,[43] headlights,[44] pilots,[45]steps,[46] valves,[47] or wheels,[48] or where it was without necessary equipment, such as a grip cock to let water out of pipes,[49] or driver brakes,[50] platforms, and grab irons,[51] screens for water gauges[52] or for lubricator feed glasses,[53] or where it was without a signal bell[54] or sockets.[55]

Cranes, derricks, elevators, hoists, winches, and windlasses. The rule has been applied in the case of cranes,[56] derricks,[57] elevators,[58] hoists,[59] winches,[60] and windlasses.[61]

Under a limitation of the rule stated supra § 389, mere knowledge of the defect in the instrumentality, without an appreciation of the danger incident to its use, will not charge the servant with an assumption of the risk.[62]

Ladders, platforms, scaffolds, and supports. The rule has been applied in the case of ladders,[63] platforms,[64] scaffolds,[65] and supports.[66]

Nevertheless, in accordance with the principle stated supra § 389, where a bricklayer has discov-

35. Va.—McDonald's Adm'r v. Norfolk & W. R. Co., 27 S.E. 821, 95 Va. 98.
39 C.J. p 763 note 94.

36. Mo.—Clippard v. St. Louis Transit Co., 101 S.W. 44, 202 Mo. 432.

37. Tex.—Texas & N. O. R. Co. v. Kelly, 80 S.W. 79, 98 Tex. 123.
39 C.J. p 764 note 97.

38. Ga.—Nelson v. Central R. & Banking Co., 14 S.E. 210, 88 Ga. 225.
N.Y.—Monaghan v. New York Cent. & Hudson River R. Co., 45 Hun 113.

39. Tex.—Missouri, K. & T. R. Co. v. Hanson, Civ.App., 90 S.W. 1122.

40. N.J.—Ahearn v. New Jersey Cent. R. Co., N.J.Sup., 45 A. 1032.

41. U.S.—Brooks v. Northern Pac. R. Co., C.C.Wash., 47 F. 687.

42. N.Y.—Monaghan v. New York Central & H. R. R. Co., 45 Hun 113.

43. **Bolt projecting above footboard**
Ill.—Glass v. Chicago, R. I. & P. R. Co., 41 Ill.App. 87, affirmed 30 N.E. 446, 141 Ill. 160, 33 Am.S.R. 294, 21 L.R.A. 387.

44. Ill.—Ross v. Chicago, R. I. & P. R. Co., 90 N.E. 701, 243 Ill. 440.

45. U.S.—Haugh v. Texas & P. R. Co., C.C.Tex., 11 F.Cas.No.6,221, reversed on other grounds 100 U. S. 213, 25 L.Ed. 612.
Ark.—Fordyce v. Edwards, 30 S.W. 758, 60 Ark. 438.

46. Tex.—Bookrum v. Galveston, H. & S. A. R. Co., Civ.App., 57 S.W. 919.
39 C.J. p 764 note 8.

47. S.D.—Lee v. Great Northern R. Co., 163 N.W. 560, 39 S.D. 127.

48. **Slivers on wheel**
U.S.—McCain v. Chicago, B. & Q. R. Co., Colo., 76 F. 125, 22 C.C.A. 99.

49. Mass.—Linch v. Sagamore Mfg. Co., 9 N.E. 728, 143 Mass. 206.

50. Colo.—Denver & R. G. R. Co. v. Scott, 81 P. 763, 34 Colo. 99.

51. Pa.—Wilson v. New York Central & H. R. R. Co., 71 A. 183, 222 Pa. 341.

52. U.S.—Chicago, B. & Q. R. Co. v. Griffin, Mo., 157 F. 912, 85 C.C.A. 240.
Ark.—Missouri & N. A. R. Co. v. Edwards, 154 S.W. 209, 106 Ark. 574.

53. Ark.—St. Louis, I. M. & S. R. Co. v. Wells, 124 S.W. 524, 93 Ark. 153.

54. U.S.—Dillon v. Union Pac. R. Co., C.C.Neb., 7 F.Cas.No.3,916, 3 Dill. 319.
Ind.—Cleveland, C. C. & St. L. R. Co. v. Morrey, 88 N.E. 932, 172 Ind. 513.

55. Va.—Norfolk & W. R. Co. v. Jackson, 8 S.E. 370, 85 Va. 489.

56. N.Y.—Parento v. Taylor, 50 N. Y.S. 518, 26 App.Div. 518.

57. Tex.—Day v. Houston & T. C. R. Co., 101 S.W. 1044, 46 Tex.Civ. App. 156.
39 C.J. p 764 note 21.

58. S.C.—McGuire v. Steinberg, 193 S.E. 205, 185 S.C. 97.
39 C.J. p 764 note 22.

59. Idaho.—Goure v. Storey, 105 P. 794, 17 Idaho 352.
Mich.—Bauer v. American Car & Foundry Co., 94 N.W. 9, 132 Mich. 537.

60. U.S.—The Maharajah, D.C.N.Y., 40 F. 784, affirmed 49 F. 111, 1 C.C.A. 181.
Mass.—Pingree v. Leyland, 135 Mass. 398.

61. Wash.—Raven v. Seattle Electric Co., 92 P. 451, 47 Wash. 637.
39 C.J. p 765 note 25.

62. Colo.—Rice v. Van Why, 111 P. 599, 49 Colo. 7.
39 C.J. p 765 note 27.

63. Wash.—Dahl v. Puget Sound Iron & Steel Works, 137 P. 315, 77 Wash. 126.
39 C.J. p 765 note 35.
Ladder as simple tool see supra subdivision d (3) of this section.

64. U.S.—Missouri Pac. R. Co. v. Aeby, 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, mandate conformed to Aeby v. Missouri Pac. R. Co., Mo., 6 S.W.2d 1115.
Tex.—Fort Worth & D. C. Ry. Co. v. Mills, Civ.App., 140 S.W.2d 513, error dismissed, judgment correct.
39 C.J. p 765 note 36.

65. D.C.—Martin v. Morrison, 32 F.2d 410, 59 App.D.C. 19.
39 C.J. p 765 note 37.
Employee of independent contractor
Where owner of scaffolding furnishes it for use of independent contractor, ordinarily owner owes same duty to employee of contractor that owner would to his own employee using scaffolding and employee in either case assumes all obvious risks in its use.—Barrett v. Building Patent Scaffolding Co., 40 N.E.2d 6, 311 Mass. 41.

66. Mass.—Maloney v. U. S. Rubber Co., 47 N.E. 1012, 169 Mass. 347.
39 C.J. p 765 note 38.

ered the danger that a scaffold would fall, and immediately after and before he can protect himself from injury by the use of ordinary care, the scaffold falls, he does not assume the risk of injury.[67]

(5) Electric Appliances and Equipment

A servant ordinarily assumes the risk of injury from defective or dangerous electric appliances and equipment where he knows of and appreciates the dangers.

The rule considered supra subdivision d (1) of this section, that the servant ordinarily assumes the risk of injury from defective or dangerous machinery, tools, and appliances where he knows of and appreciates the danger, has been applied in the case of electrical appliances and equipment,[68] such as lamps,[69] uninsulated wires,[70] and poles.[71]

e. Negligence or Incompetency of Fellow Servant

In the absence of contrary statutory regulations, the servant assumes the risks of injury from the incompetency or negligence of fellow servants when they are obvious or fully known and appreciated by the servant.

Under the rules considered supra §§ 382–389, and subject to their limitations, the servant assumes the risks of injury from the incompetency or negligence of fellow servants when they are obvious or fully known and appreciated by the servant.[72] In decisions prior to the amendment of August 11, 1939, chapter 685, § 1, 45 U.S.C.A. § 54, this rule was followed in actions brought under the Federal Employers' Liability Act.[73]

The rule is not applicable when the fellow servants have failed to observe a rule or practice established by the employer for the protection of the employees;[74] and there is no assumption of risk of injury from the negligence of a fellow servant by reason of knowledge thereof where knowledge was acquired too late to avert injury.[75]

Reliance on care of fellow servant. The servant has the right to assume that fellow servants are using due care and diligence in the performance of their duties.[76] He has a right to act on this as-

67. Tex.—Texas Co. v. Strange, 132 S.W. 370, 62 Tex.Civ.App. 642.

68. Pa.—Myers v. Edison Electrical Illum. Co., 74 A. 223, 225 Pa. 387.
39 C.J. p 765 note 29.

69. N.H.—Carr v. Manchester Electric Co., 48 A. 286, 70 N.H. 308.

70. Pa.—Myers v. Edison Electric Illum. Co., 74 A. 223, 225 Pa. 387.

71. Ind.—Walling v. Terre Haute, I. & E. Tract. Co., 111 N.E. 198, 60 Ind.App. 607.
39 C.J. p 765 note 32-33.

Lineman

(1) Experienced lineman assumes risk of breaking of any pole he is called on to climb in course of his employment, if defect which caused the pole to break was not of original construction, but this rule has reference to cases where the line is already constructed and in operation and where the lineman proceeds on his own responsibility to the performance of his duty; it has no application where the pole had only recently been set up by other employees of employer whose duty it was to inspect it, and there is no showing that the defect which caused the pole to break was latent and undiscoverable by any reasonable precaution.—City of Sebring v. Avant, 117 So. 383, 95 Fla. 960.

(2) Lineman, learning after climbing sound pole that another lineman was about to climb, and later was climbing, nearby defective pole, breaking of which resulted in both poles falling, was chargeable with such knowledge as he reasonably should have had of risk attendant on added strain.—Glidden v. Public Service Co. of New Hampshire, 183 A. 865, 88 N.H. 4.

(3) Other decisions with respect to linemen see 39 C.J. p 765 note 32-33 [a].

72. U.S.—Toledo, St. L. & W. R. Co. v. Allen, Mo., 48 S.Ct. 215, 276 U.S. 165, 72 L.Ed. 513—Baughman v. Pitchfork Land & Cattle Co., C. C.A.Tex., 86 F.2d 778—Chicago, M., St. P. & P. R. Co. v. Busby, C.C.A. Mont., 41 F.2d 617.
Ark.—Missouri Pac. R. Co. v. Hudson, 139 S.W.2d 29, 200 Ark. 404—Missouri Pac. R. Co. v. Sullivan, 122 S.W.2d 947, 197 Ark. 360—Union Saw Mill Co. v. Hayes, 90 S.W.2d 209, 192 Ark. 17—Arkadelphia Sand & Gravel Co. v. Knight, 79 S.W.2d 71, 190 Ark. 386.
Ga.—Strickland v. Foughner, 12 S.E. 2d 371, 63 Ga.App. 805—Gartrell v. Russell, 180 S.E. 860, 51 Ga.App. 519.
Ky.—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603.
Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434.
Mo.—Norton v. Wheelock, 23 S.W.2d 142, certiorari denied Wheelock v. Norton, 50 S.Ct. 355, 281 U.S. 752, 74 L.Ed. 1162, 323 Mo. 913.
Wash.—Jacobsen v. Defiance Lumber Co., 253 P. 1083, 142 Wash. 642.
W.Va.—Rash v. Norfolk & W. Ry. Co., 200 S.E. 583, 120 W.Va. 540, certiorari denied 59 S.Ct. 827, 307 U.S. 623, 83 L.Ed. 1502.
39 C.J. p 547 note 74.
Equal means of knowledge with master see infra § 391.

73. U.S.—Missouri Pac. R. Co. v. David, Mo., 52 S.Ct. 242, 284 U.S. 460, 76 L.Ed. 399—Delaware, L. & W. R. Co. v. Koske, N.J., 49 S.Ct. 202, 279 U.S. 7, 73 L.Ed. 578—Northern Pac. R. Co. v. Berven, C.C.A.Wash., 73 F.2d 687.
Ala.—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504—Birmingham Belt R. Co. v. Bennett, 146 So. 265, 226 Ala. 185, certiorari denied 54 S.Ct. 52, 290 U.S. 634, 78 L.Ed. 552.
Cal.—Crabtree v. Western Pac. R. Co., 90 P.2d 835, 33 Cal.App.2d 35.
Kan.—Schaefer v. Lowden, 78 P.2d 48, 147 Kan. 520—Blevins v. Union Pac. R. Co., 299 P. 593, 133 Kan. 185.
Mich.—Sumner v. Ann Arbor R. Co., 209 N.W. 184, 235 Mich. 293.
Mo.—Evans v. Atchison, T. & S. F. Ry. Co., 131 S.W.2d 604, 345 Mo. 147.
N.M.—Tillian v. Atchison, T. & S. F. Ry. Co., 55 P.2d 34, 40 N.M. 80.

74. U.S.—Wyatt v. New York, O. & W. R. Co., C.C.A.N.Y., 45 F.2d 705, certiorari denied New York, O. & W. R. Co. v. Wyatt, 51 S.Ct. 353, 283 U.S. 829, 75 L.Ed. 1442.
Mo.—Smith v. Thompson, 182 S.W. 2d 63.

75. Tex.—Cox v. St. Louis & S. F. R. Co., 222 S.W. 964, 111 Tex. 8.

76. Ark.—International Harvester Co. of America v. Hawkins, 24 S. W.2d 340, 180 Ark. 1056—E. L. Bruce Co. v. Leake, 3 S.W.2d 988, 176 Ark. 705—Chicago R. I. & P. Ry. Co. v. Daniel, 273 S.W. 15, 169 Ark. 23.

sumption unless he knows of their negligence.[77]

f. Injuries Sustained by Servant's Overexertion

A servant ordinarily assumes the risk of physical injury to himself as a result of overexertion in doing the work for which he is employed.

A servant ordinarily assumes the risk of physical injury to himself sustained by reason of his overtaxing his strength or powers of endurance in doing the work for which he is employed[78] when the occasion presents no emergency requiring hasty action.[79] The servant assumes the risk of injury whether or not he knew that the particular injury sustained might result.[80]

In actions brought prior to the amendment of August 11, 1939, chapter 685 § 1, to the Federal Employers' Liability Act, 45 U.S.C.A. § 54, it was held that the act did not affect the operation of this rule.[81] The word "defect" as used under a state statute materially limiting the doctrine of assumption of risk by employees of a railroad company has been held to include a "defective" force of men, that is, a force of men less than required for the work, and a recovery will be allowed to a railroad shop worker for injuries resulting from a strain in lifting a heavy weight by reason of the company's failure to furnish a sufficient force to do the work.[82]

g. Selection of More Hazardous Method of Work

Where there are two ways in which work may be done, one safe or reasonably safe and the other hazardous, and the servant knowingly adopts the hazardous method, he assumes the risk.

Except perhaps in a few jurisdictions,[83] the gen-

Ky.—Louisville & N. R. Co. v. Wingo's Adm'x, 281 S.W. 170, 213 Ky. 336.
Tenn.—Kurn v. Weaver, 161 S.W.2d 1005, 25 Tenn.App. 556.
Reliance on care of master in selection of fellow servants see supra § 380.
Under Federal Employers' Liability Act
Mich.—Sumner v. Ann Arbor R. Co., 209 N.W. 184, 235 Mich. 293.
Mo.—Owen v. Kurn, 148 S.W.2d 519, 347 Mo. 516.
N.M.—Tillian v. Atchison, T. & S. F. Ry. Co., 55 P.2d 34, 40 N.M. 80.
Tenn.—Kurn v. Weaver, 161 S.W.2d 1005, 25 Tenn.App. 556.
Warning of approach of train
Tenn.—Kurn v. Weaver, supra.

77. Ark.—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056.

78. Ark.—Kansas City Southern Ry. Co. v. Holder, 127 S.W.2d 807, 198 Ark. 127—St. Louis-San Francisco Ry. Co. v. Childers, 124 S.W.2d 964, 197 Ark. 527—J. L. Williams & Sons v. Tompkins, 114 S.W.2d 845, 195 Ark. 1146—Arkansas Western Gas Co. v. Bragg, 107 S.W.2d 528, 194 Ark. 402.
Fla.—Russell v. Atlantic Coast Line R. Co., 176 So. 778, 129 Fla. 535—Swanson v. Miami Home Milk Producers' Ass'n, 157 So. 415, 117 Fla. 110.
Ill.—Huff v. Illinois Cent. R. Co., 279 Ill.App. 323, affirmed 199 N.E. 116, 362 Ill. 95.
Iowa.—Kempe v. Illinois Cent. R. Co., 232 N.W. 657, 211 Iowa 812, 74 A.L.R. 148.
Ky.—Louisville & N. R. Co. v. Willhite, 187 S.W.2d 1010, 300 Ky. 75—Louisville & N. R. Co. v. Yett, 168 S.W.2d 556, 293 Ky. 71—Louisville & N. R. Co. v. Alexander, 127 S.W.2d 395, 277 Ky. 719—Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 274 Ky. 410—Ray v. United Elkhorn Coal Co., 51 S.W.2d 248, 244 Ky. 417—Chesapeake & O. Ry. Co. v. Music, 49 S.W.2d 311, 243 Ky. 491.
Mo.—McCormick v. W. L. Hutchison Electric Co., 31 S.W.2d 971, 326 Mo. 380—Lutgen v. Missouri Pac. R. Co., App., 294 S.W. 444—Stokes v. Springfield Wagon Co., App., 289 S.W. 987—Duval v. Brooklyn Cooperage Co., App., 275 S.W. 586.
Mont.—Cotton v. Osterberg, 292 P. 908, 88 Mont. 383—Boyd v. Great Northern Ry. Co., 274 P. 293, 84 Mont. 84.
Neb.—Chappell v. Chicago & N. W. Ry. Co., 239 N.W. 206, 122 Neb. 28.
Okl.—Warden-Pullen Coal Co. v. Wallace, 56 P.2d 802, 176 Okl. 604.
S.C.—Terry v. Atlantic Coast Line R. Co., 186 S.E. 159, 181 S.C. 151—Steinmeyer v. Marine Hotel Corporation, 140 S.E. 695, 142 S.C. 358.
Tex.—**Corpus Juris quoted in** Sloan v. Leger Mill Co., Civ.App., 161 S.W.2d 333, 337, error refused—**Corpus Juris quoted in** Robertson v. Texas & N. O. R. Co., Civ.App., 133 S.W.2d 819, 821, error dismissed, judgment correct—**Corpus Juris cited in** Gulf, C. & S. F. R. Co. v. Spivey, Civ.App., 56 S.W.2d 655, 657, certiorari denied Spivey v. Gulf, C. & S. F. R. Co., 54 S.Ct. 98, 290 U.S. 676, 78 L.Ed. 583—**Corpus Juris quoted in** St. Louis Southwestern Ry. Co. of Texas v. Johns, Civ.App., 286 S.W. 281, 282.
Va.—Lloyd v. Norfolk & W. Ry. Co., 145 S.E. 372, 151 Va. 409.
39 C.J. p 766 note 46.
Acting under command of master see infra § 401.
Failure of employer to furnish sufficient force for work see supra subdivision b (2) of this section.
Young and inexperienced servants see infra § 414.
"The lifting of a heavy object involves no peril that is not obvious to any person of common understanding. The employee is the best judge of his own lifting capacity, and the risk is upon him if he over-taxes it."—Robertson v. Texas & N. O. R. Co., Tex.Civ.App., 133 S.W.2d 819, 821, error dismissed, judgment correct.
Employee, suffering rupture, while lifting plow onto block to change lay assumed risk of overtaxing himself.—Cotton v. Osterberg, 292 P. 908, 88 Mont. 383.

79. Mo.—Duvall v. Brooklyn Cooperage Co., App., 275 S.W. 586.
Tex.—Sloan v. Leger Mill Co., Civ. App., 161 S.W.2d 333—Robertson v. Texas & N. O. R. Co., Civ.App., 133 S.W.2d 819, error dismissed, judgment correct—Gulf, C. & S. F. R. Co. v. Spivey, Civ.App., 56 S.W.2d 655, certiorari denied Spivey v. Gulf, C. & S. F. R. Co., 54 S.Ct. 98, 290 U.S. 676, 78 L.Ed. 583—St. Louis Southwestern Ry. Co. of Texas v. Johns, Civ.App., 286 S.W. 281.
39 C.J. p 766 note 47.

80. Tex.—Gulf, C. & S. F. R. Co. v. Spivey, Civ.App., 56 S.W.2d 655, certiorari denied Spivey v. Gulf, C. & S. F. R. Co., 54 S.Ct. 98, 290 U.S. 676, 78 L.Ed. 583.

81. U.S.—Lang v. U. S. Reduction Co., C.C.A.Ind., 110 F.2d 441.
Kan.—Lively v. Chicago, R. I. & P. Ry. Co., 225 P. 103, 115 Kan. 784.
Effect of Federal Employers' Liability Act generally see supra § 359.

82. Tex.—Payne v. Harris, Com. App., 241 S.W. 1008.

83. Mo.—Williams v. Pryor, 200 S.W. 53, 272 Mo. 613.
39 C.J. p 766 note 52.

eral rule is that, where there are two ways in which work may be done, one safe or reasonably safe and the other hazardous, and the servant knowingly adopts the hazardous method of doing the work, he is held to have assumed the risk of so doing and cannot recover for any injuries sustained thereby,[84] and the general rule has been held applicable although other employees of the master also adopt the dangerous method of doing the work.[85]

In order to constitute assumption of risk by the servant through choice of a more dangerous method, it is not enough that he knew of a safer way, but the safer way must have been reasonably available to him.[86] Further, where there are two ways in which a servant may do a particular thing, one of which is dangerous and the other not so dangerous, both, however, furnished by the master with the intention that the servant may at his discretion use either, the servant does not assume the risk of injury by choosing the more hazardous method of work.[87]

h. Selection of More Hazardous Ways of Passage

A servant assumes the risk of injury where he voluntarily chooses a dangerous, in lieu of an available safe, way of passage to or from or on the master's premises.

Where a servant has his choice of ways of going to and from or on the premises of the master, one of which is safe or reasonably so and the other dangerous, and he voluntarily selects the dangerous way, he assumes the risk of injury from so doing;[88] and this is true no matter how often the same risk has been taken by himself and others, including a superior servant in charge of the work.[89] Where there is more than one way that the employee might have gone to the place of work, each in some degree hazardous, but no passageway is specially provided by the master, and the servant goes the way usually taken by the servants, the master is charged with notice of the fact and the servant will not be charged under such circumstances with assumption of risk.[90]

i. Unnecessary Occupation of Dangerous Position

A servant assumes the risk of injury where he voluntarily and unnecessarily places himself in an obviously dangerous position in performing his work.

Where a servant voluntarily and unnecessarily places himself in an obviously dangerous position in performing his work, he assumes the risk incident to the dangerous position in which he places himself and cannot recover for injuries sustained thereby,[91] even though the same services have been performed at other times by other employees in the

84. Ark.—**Corpus Juris quoted in** Missouri Pac. Ry. Co. v. Guy, 157 S.W.2d 11, 203 Ark. 166, certiorari granted Guy v. Missouri Pac. R. Co., 62 S.Ct. 1046, 316 U.S. 655, 86 L.Ed. 1735, certiorari dismissed 63 S.Ct. 22, 317 U.S. 702, 87 L.Ed. 561—Orr v. Johnson, 9 S.W.2d 563, 177 Ark. 1165—Standard Oil Co. of Louisiana v. Gray, 300 S.W. 405, 175 Ark. 702.
Ky.—Chesapeake & O. Ry. Co. v. Vanhoose, 270 S.W. 740, 208 Ky. 117.
Miss.—**Corpus Juris quoted in** F. W. Woolworth Co. v. Freeman, 11 So. 2d 447, 449, 450, 193 Miss. 838—Louisville & N. R. Co. v. Russell, 144 So. 478, 164 Miss. 529.
Mo.—O'Donnell v. Baltimore & O. R. Co., 26 S.W.2d 929, 324 Mo. 1097, applying federal law.
Ohio.—New York, C. & St. L. Ry. Co. v. Wolf, 159 N.E. 861, 26 Ohio App. 292.
39 C.J. p 767 note 53.
Compliance with commands of master see infra §§ 401–403.
Effect of want of knowledge that method chosen is hazardous see infra § 392.
Rule as affected by nonobservance of master of statutory requirements for servant's safety see supra §§ 369, 370.

Servant who performs at night task which is dangerous when performed at night, but which could be done safely during daylight hours of employment, does so at his own risk.—Martin v. Beck, 171 So. 14, 177 Miss. 303.

85. Miss.—F. W. Woolworth Co. v. Freeman, 11 So.2d 447, 193 Miss. 838.
Puerto Rico.—Claudio v. Cortinez, 9 Puerto Rico 97.

86. Ala.—Bedgood v. T. R. Miller Mill Co., 80 So. 364, 202 Ala. 299.
Miss.—**Corpus Juris quoted in** F. W. Woolworth Co. v. Freeman, 11 So. 2d 447, 450, 193 Miss. 838.

87. Miss.—F. W. Woolworth Co. v. Freeman, supra.
Mo.—Hutchinson v. Richmond Safety Gate Co., 152 S.W. 52, 247 Mo. 71.

88. Ky.—Moore v. Chesapeake & O. Ry. Co., 280 S.W. 482, 213 Ky. 69.
La.—Williams v. Westdale Corporation, App., 3 So.2d 684.
Minn.—**Corpus Juris cited in** Donahue v. Chicago, M. St. P. & P. Ry. Co., 228 N.W. 556, 558, 179 Minn. 138.
39 C.J. p 768 note 63.
Contributory negligence see infra § 446.

Danger created by fellow employee
Where injury to switchman was caused by conductor's suddenly and without warning shifting his position on footboard into path of switchman attempting to board approaching engine from between rails, rule barring recovery where injured person chooses dangerous rather than safe way was without application.—Johnson v. Chicago & E. I. Ry. Co., 64 S.W.2d 674, 334 Mo. 22.

89. Mass.—Gillette v. General Electric Co., 72 N.E. 255, 187 Mass. 1.

90. Wash.—Smith v. Hewitt-Lea Lumber Co., 104 P. 651, 55 Wash. 357.

91. Ala.—Barger v. Oswalt, 194 So. 884, 239 Ala. 289.
Ark.—**Corpus Juris quoted in** Missouri Pac. Ry. Co. v. Guy, 157 S.W. 2d 11, 203 Ark. 166, certiorari granted Guy v. Missouri Pac. R. Co., 62 S.Ct. 1046, 316 U.S. 655, 86 L.Ed. 1735, certiorari dismissed 63 S.Ct. 22, 317 U.S. 702, 87 L.Ed. 561.
Ky.—Green v. Pennsylvania R. Co., 8 S.W.2d 418, 225 Ky. 243.
Minn.—Wickman v. Poliquin, 238 N. W. 888, 184 Minn. 431—**Corpus Juris cited in** Donahue v. Chicago, M., St. P. & P. Ry. Co., 228 N.W. 556, 558, 179 Minn. 138.
39 C.J. p 768 note 67.

same place,[92] and especially where the servant acts in disobedience of orders.[93] Nevertheless, it has been held that a servant is not precluded from recovering for injuries received in a hazardous position voluntarily and unnecessarily taken, when it is not the normal, but a new and unknown condition, that proximately results in injury.[94]

j. Failure to Give Notice of Dangerous Position

A servant assumes the risk of injury where in the discharge of his duties he places himself in a dangerous position and fails to give notice thereof.

A servant who, in the discharge of his duties, places himself in a dangerous position and fails to give notice thereof to the master or other servant assumes the risk of injury from his failure to do so, the danger being obvious.[95]

§ 391. Defects or Dangers of Which Servant Has Equal or Greater Means of Knowledge than Master

Where the servant accepts or continues in employment, knowing or having equal means of knowledge with the master of the defects and dangers inherent in employment, he assumes the risk of injury therefrom.

Except as statutory regulations may otherwise provide,[96] the general rule is that, where the servant accepts or continues in employment, knowing or having equal means of knowledge with the master of the defects and dangers inherent in the employment, he assumes the risk of injury therefrom,[97] even though the work might have been made safer by the master,[98] the reason being that, under the circumstances, master and servant stand on a footing of equality.[99] For even stronger reasons, the servant accepts the risk where, from the nature of the employment and his duty in connection therewith, he has better knowledge or means

Contributory negligence see infra § 446.

Placing hand near saw

Experienced sawmill employee knowing and appreciating danger incident to running saw assumed consequences resulting from his own reckless act when he voluntarily placed his hand in position to be thrown into saw.—Eastman Gardiner Hardwood Co. v. Chatham, 151 So. 556, 168 Miss. 471.

92. Wis.—Goff v. Chippewa River & M. Ry. Co., 56 N.W. 465, 86 Wis. 237.

93. Ohio.—Crawford v. New York, Chicago & St. Louis R. Co., 23 Ohio Cir.Ct. 207.

94. Vt.—Cross v. Passumpsic Fibre Leather Co., 98 A. 1010, 90 Vt. 397—Kiley v. Rutland R. Co., 68 A. 713, 80 Vt. 536, 13 Ann.Cas. 269.

95. Me.—Hart v. Bangor & A. R. Co., 87 A. 221, 110 Me. 540.
39 C.J. p 769 note 72.
Contributory negligence see infra § 447.

96. Miss.—Hercules Powder Co. v. Tyrone, 124 So. 475, 155 Miss. 75.

97. Ark.—Benedum-Trees Oil Co. v. Sutton, 130 S.W.2d 720, 198 Ark. 699—Arkansas Western Gas Co. v. Bragg, 107 S.W.2d 528, 194 Ark. 402—Baldwin v. Dickinson, 100 S.W.2d 968, 193 Ark. 1179—Union Saw Mill Co. v. Hayes, 90 S.W.2d 209, 192 Ark. 17—Stevenson v. Phillips, 86 S.W.2d 422, 191 Ark. 418—Kurn v. Faubus, 84 S.W.2d 602, 191 Ark. 232—McEachin v. Yarborough, 74 S.W.2d 228, 189 Ark. 434.
Ga.—Kidd v. Williamson, 8 S.E.2d 590, 61 Ga.App. 890—Haynesworth v. Hall Const. Co., 163 S.E. 273, 44 Ga.App. 807—Crawford v. Western & A. R. R., 151 S.E. 667, 40 Ga.App. 821—Bowers v. Louisville & N. R. Co., 127 S.E. 667, 33 Ga. App. 692.
La.—Jennings v. Bolte, App., 168 So. 377.
Mich.—Cheney v. Olender, 5 N.W.2d 692, 303 Mich. 129.
Minn.—Jurovich v. Interstate Iron Co., 233 N.W. 465, 181 Minn. 588.
N.H.—Owen v. Elliot Hospital, 136 A. 133, 82 N.H. 497.
Tex.—Fort Worth & D. C. Ry. Co. v. Mills, Civ.App., 140 S.W.2d 513, error dismissed, judgment correct—**Corpus Juris cited in** City of Munday v. Shaw, Civ.App., 100 S.W.2d 765, 769, error dismissed—Gilbert v. Mayer, Civ.App., 99 S.W.2d 1021—City of Panhandle v. Byrd, Civ.App., 77 S.W.2d 904, reversed on other grounds 106 S.W.2d 660, 130 Tex. 96—San Antonio & A. P. Ry. Co. v. Cook, Civ. App., 293 S.W. 193.
Wash.—Freeman v. Smit, 75 P.2d 575, 193 Wash. 346—Jones v. Baker, 35 P.2d 1103, 179 Wash. 25—Broughton v. Oregon-Washington R. & Nav. Co., 244 P. 558, 138 Wash. 298.
39 C.J. p 769 note 74.
Assurance of master as affected by equal opportunity to judge of safety see infra § 404.
Contributory negligence see infra § 435.
Simple tool doctrine see supra § 390 d (3).
However, it has also been held that the master and servant do not stand on equal privileges even when they have actual knowledge of the danger.—Missouri Pac. R. Co. v. Brown, 115 S.W.2d 1083, 195 Ark. 1060.

Defective machinery or appliances

Servant incurs risk of using defective machinery or appliances where defects are as well known and understood by him as by master.—Cheney v. Olender, 5 N.W.2d 692, 303 Mich. 129—39 C.J. p 769 note 74 [d].

Incompetency or negligence of fellow servant

Servant cannot recover for injuries resulting from incompetency or negligence of fellow servant if he had equal opportunity with master of discovering it, and in exercise of ordinary care should have known of it.
Ark.—McNeese v. Raines, 35 S.W.2d 1026, 183 Ark. 320.
Ga.—Gartrell v. Russell, 180 S.E. 860, 51 Ga.App. 519.
39 C.J. p 769 note 74 [h].

In Missouri

(1) In servant's action for injuries from collapse of ladder alleged to have been of improper type and weight for the work being done, an instruction that, if the ladder was comparatively new and reasonably inspected by defendant when purchased and its condition was as open and obvious to the servant as to the employer, then danger incident to its use was assumed by plaintiff, was erroneous.—Sheppard v. Robinson, Mo.App., 299 S.W. 842.

(2) Other particulars of Missouri rule see 39 C.J. 769 note 74.

98. Kan.—Morbach v. Home Min. Co., 37 P. 122, 53 Kan. 731.

99. Ind.—Griffin v. Ohio & M. R. Co., 24 N.E. 888, 124 Ind. 326.
Wash.—Brandon v. Globe Inv. Co., 184 P. 325, 108 Wash. 360, 10 A.L.R. 286.

of knowledge of the dangers of the employment than the master himself.[1] It has also been held that the servant assumes the risk of injury where he and the master are equally ignorant of the defects and dangers incident to the work, and where the defects or danger would not have been discovered by the master in the exercise of reasonable care for the servant's safety.[2]

Although the master and servant are equally ignorant of the defect which caused the injury, the servant does not assume the risk where the ignorance of the master is due to his negligent failure to discharge his duty for the safety of the servant.[3] So the doctrine that a servant, having equal or better means of knowledge of the defects and dangers of the employment than the employer, assumes the risk has no application unless the servant is of sufficient discretion, maturity, or experience to appreciate the dangers incident to the work.[4] It has also been held that, if the defects and dangers are latent only and discoverable by inspection, there can be no assumption of risk by the servant.[5]

Defects discoverable by inspector. Since a master must search for hidden defects in appliances furnished the servant, and since the servant need only take notice of such defects as are open to ordinary observation, as considered supra §§ 246, 381, the fact that a defect was discoverable by an inspector of the master did not show that it was equally open to the observation of the servant.[6]

Under the Federal Employers' Liability Act. In actions under the Federal Employers' Liability Act prior to the amendment of August 11, 1939, chapter 685 § 1, 45 U.S.C.A. § 54, an employee did not assume a risk created by the employer's negligence merely because he had as good an opportunity as the employer of knowing of its existence.[7]

§ 392. Latent Defects and Dangers

a. In general
b. Risks arising after commencement of service
c. Methods of work
d. Place for work
e. Machinery, tools, and appliances

a. In General

The servant ordinarily does not assume the risk of injury from latent defects and dangers.

Since, in the absence of knowledge, actual or constructive, to the contrary, the servant has the right to assume that the master has exercised due care for the servant's safety, and the servant, unless the contract so provides, is not charged with the duty of inspecting the place of work, tools, appliances, and instrumentalities furnished for work by the master for the purpose of discovering defects and dangers, as considered supra §§ 380, 381, it necessarily follows that the servant ordinarily does not assume the risk of injury from latent defects and dangers, that is to say, defects and dangers of which he had no knowledge and appreciation, and of which he could have acquired no knowledge by the exercise of ordinary care in performing the services for which he was employed,[8] but only by

1. U.S.—Grosscupp v. Chicago & N. W. Ry. Co., D.C.Wyo., 14 F.Supp. 276.
Ark.—Arkansas Western Gas Co. v. Bragg, 107 S.W.2d 528, 194 Ark. 402—Baldwin v. Dickinson, 100 S.W.2d 968, 193 Ark. 1179—Union Saw Mill Co. v. Hayes, 90 S.W.2d 209, 192 Ark. 17—Kurn v. Faubus, 84 S.W.2d 602, 191 Ark. 232—McEachin v. Yarborough, 74 S.W.2d 228, 189 Ark. 434.
Ky.—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603.
Pa.—Vasey v. McLean, 165 A. 241, 310 Pa. 282.
39 C.J. p 771 note 77.
Injury resulting from overexertion see supra § 390 f.

2. N.Y.—Hart v. Naumburg, 25 N. E. 385, 123 N.Y. 641.
39 C.J. p 771 note 78.

3. Kan.—King v. King, 100 P. 503, 79 Kan. 584.
39 C.J. p. 771 note 82.

4. W.Va.—Giebell v. Collins Co., 46 S.E. 569, 54 W.Va. 518.
39 C.J. p 771 note 83.

5. Tex.—City of Panhandle v. Byrd, Civ.App., 77 S.W.2d 904, reversed on other grounds 106 S.W.2d 660, 130 Tex. 96.
Va.—Houston v. Seaboard Air Line R. Co., 96 S.E. 270, 123 Va. 290.
39 C.J. p 771 note 85.
Latent defects and dangers generally see infra § 392.

6. Ark.—St. Louis, I. M. & S. R. Co. v. Rogers, 126 S.W. 375, 93 Ark. 564, dissenting opinion 126 S. W. 1199, 93 Ark. 564.

7. Miss.—Yazoo & M. V. R. Co. v. Dees, 83 So. 613, 121 Miss. 439.
Effect of Federal Employers' Liability Act on defense see supra § 359.

8. U.S.—Missouri Pac. R. Co. v. Siratt, C.C.A.Ark., 78 F.2d 253—Grammer v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 71 F. 2d 38, certiorari denied 55 S.Ct. 82, 293 U.S. 571, 79 L.Ed. 670.
Ark.—Capital City Casket Co. v. Szurgot, 54 S.W.2d 285, 186 Ark. 421.
Fla.—Gordon v. Gandy Bridge Co., 7 So.2d 350, 150 Fla. 28.
Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.
Mass.—Reidy v. Crompton & Knowles Loom Works, 60 N.E.2d 589, 318 Mass. 135—Tardiff v. Lynn Sand & Stone Co., 193 N.E. 55, 288 Mass. 472.
Mo.—Rose v. Missouri Dist. Telegraph Co., 43 S.W.2d 562, 328 Mo. 1009, 81 A.L.R. 400.
Utah.—Ward v. Denver & R. G. W. R. Co., 85 P.2d 837, 96 Utah. 564.
39 C.J. p 772 note 92.
Employee having equal or better means of knowledge than master see supra § 391.

Risks as ordinary risk

(1) Risks of injury from latent defects are not assumed by servant as risks ordinarily incident to employment.—Erickson v. Edward Rutledge Timber Co., 203 P. 1078, 34 Idaho 754—39 C.J. p 774 note 97, p 779 note 62.

investigation and inspection for the purpose of ascertaining whether danger existed.[9] The law does not charge a servant with knowledge of defects or dangers which are not open and obvious.[10] In other words, the servant assumes only such risks as are incident to open and obvious defects and dangers and which he either knows and appreciates or should know of.[11] The assumption of risk against hidden defects or dangers requires notice a reasonable time before the accident.[12]

A well established exception to the rule relating to assumption of risk of injury from latent defects is that the servant assumes the risk of injury from latent defects which the master does not know of and could not have discovered by the exercise of ordinary care.[13] This, it has been said, is "a misadventure falling among the casualties incident to the business, and for which no one could be blamed."[14] In other words, it is one of the ordinary risks of the employment.[15] Even in cases where the defects which caused the injury were not known to either master or servant, and were not discoverable by an ordinary inspection, the master is liable if the defects are such that they resulted from want of ordinary care and diligence on the part of the master in procuring the making of the instrumentalities used by the servant, or continuing them in use beyond the time when they could be safely used.[16]

b. Risks Arising after Commencement of Service

The servant does not assume the risks of injury from latent defects arising in, or changes made in, the place of work, machinery, tools, or appliances after the servant has entered on his employment and which increase the hazard of the service.

There is no assumption of risks of injury from defects arising in, or changes made in, the place of work, machinery, tools, or appliances, after the servant has entered on his employment, and which increase the hazard of the service, where he has no knowledge of such defects or changes, or where they are not so open and obvious as to charge him with knowledge of their existence and of the risk of injury therefrom.[17] In general, the servant has the right to presume that the hazards of the service will not be increased without warning either of the danger or of the existence of the newly created condition from which the danger would be obvious to one of ordinary intelligence.[18]

c. Methods of Work

The servant does not assume the risk of injury from unknown or latent dangers in the methods of work as it is performed in the operation of the master's business.

Where the master has adopted or permitted imperfect and dangerous methods of work, the servant does not assume the risk unless it appears that he knew of the custom to perform the work in that

(2) Ordinary risks generally see supra §§ 371–378.

Scientific knowledge

Risks which are obvious only to those possessing scientific knowledge are not chargeable to a servant, and the ordinary servant, in absence of a warning by the master, will not be presumed to have knowledge of such scientific principles.
U.S.—Kane v. Federal Match Corporation, D.C.Pa., 5 F.Supp. 507.
Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.
39 C.J. p 772 note 92 [a].

Federal Employers' Liability Act

(1) The act does not affect the operation of the general rule under consideration in suits based on its provisions.—Lock v. Chicago, B. & Q. R. Co., 219 S.W. 919, 281 Mo. 532
39 C.J. p 774 note 99.

(2) Effect of amendment of Aug. 11, 1939, c 685 § 1, 45 U.S.C.A. § 54, as abolishing defense of assumption of risk see supra § 359.

9. Ark.—Rice & Holiman v. Henderson, 35 S.W.2d 1016, 183 Ark. 355.
39 C.J. p 773 note 93.

10. Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.
Mass.—Lamberti v. Neal, 148 N.E. 463, 253 Mass. 99.
39 C.J. p 774 note 94.

11. U.S.—Michalek v. U. S. Gypsum Co., D.C.N.Y., 16 F.Supp. 708.
Ark.—Missouri Pac. R. Co. v. Sullivan, 122 S.W.2d 947, 197 Ark. 360—Kennedy v. Griffin, 112 S.W.2d 644, 195 Ark. 379.
Fla.—H & C Operating Co. v. Fossum, 176 So. 865, 129 Fla. 480—Gallespie v. Thornton, 117 So. 714, 95 Fla. 5.
Ga.—Middlebrooks v. Atlanta Metallic Casket Co., 11 S.E.2d 682, 63 Ga.App. 620.
La.—Weadock v. Eagle Indemnity Co., App., 15 So.2d 132—Roy v. Mutual Rice Co. of Louisiana, App., 143 So. 668, modified on other grounds 149 So. 508, 177 La. 883.
Mo.—Rose v. Missouri Dist. Telegraph Co., 43 S.W.2d 562, 328 Mo. 1009, 81 A.L.R. 400.
S.C.—Stogner v. Great Atlantic & Pacific Tea Co., 192 S.E. 406, 184 S.C. 406—Lyons v. R. D. Cole Mfg. Co., 183 S.E. 466, 178 S.C. 520.
Wash.—Cockerline v. Anderson, 52 P.2d 321, 184 Wash. 701.
39 C.J. p 774 note 95.
Defects or dangers of which servant has actual or constructive knowledge see supra §§ 382–390.

12. U.S.—Chicago Mill & Lumber Co. v. Jett, C.C.A.Ark., 32 F.2d 976.

13. Tex.—Texas & N. O. R. Co. v. Sarver, Civ.App., 113 S.W.2d 317, error refused—Southern Pac. Co. v. Green, Civ.App., 269 S.W. 877, reversed on other grounds Com. App., 280 S.W. 198.
39 C.J. p 774 note 1.

14. Ohio.—Mad River & Lake Erie R. Co. v. Barber, 5 Ohio St. 541, 565, 67 Am.D. 312.
39 C.J. p 774 note 2.

15. Pa.—O'Dowd v. Burnham, 19 Pa. Super. 464.

16. Ohio.—Mad River & Lake Erie R. Co. v. Barber, 5 Ohio St. 541, 67 Am.D. 312.

17. Idaho.—Kinzell v. Chicago, M. & St. P. R. Co., 190 P. 255, 33 Idaho 1.
39 C.J. p 774 note 6.
Known or obvious risks see supra § 387.

18. Ala.—Alabama Great Southern R. Co. v. Neal, 62 So. 554, 8 Ala. App. 591.

manner,[19] and unless the methods used are so obviously unsafe that a reasonably prudent man would not attempt to use them,[20] or as otherwise expressed, unless the danger is so obvious, imminent, and certain of disastrous results as to make it incumbent on the servant to quit work.[21]

Selection of more hazardous method. The fact that the master had furnished one way of doing the work which was reasonably safe does not establish the assumption of risk by a servant in doing the work in another way, unless the dangers of the way in which the servant attempted to do the work were known to him, or could have been ascertained by the exercise of reasonable care.[22]

d. Place for Work

(1) In general

(2) Railroad tracks or roadbeds and obstructions

(1) In General

A servant ordinarily does not assume the risk of injury from latent defects and dangers in his place of work.

In accordance with the general rule, as considered supra subdivision a of this section, a servant does not assume the risk of injury from latent defects and dangers in his place of work, that is to say, defects and dangers of which he has no knowledge and appreciation and of which he could have acquired no knowledge by the exercise of ordinary care in performing the services for which he was employed.[23]

Mining. Where a servant engaged in the work of mining has no actual knowledge of the defects or dangers in the place of work and could not, in the exercise of ordinary care, have discovered them and appreciated the risk of injury therefrom, he cannot be charged with an assumption of the risk.[24]

Excavations. Where the danger of injury from excavation work was not known by the servant or was not so open and obvious that the law would charge him with knowledge thereof, he does not assume the risk of injury therefrom.[25] The mere fact that the servant knew there was some danger will not bar a recovery if the danger was not imminent and not of such a character that a person of ordinary prudence would not have assumed the risk.[26]

(2) Railroad Tracks or Roadbeds and Obstructions

A servant does not assume the risk of injury from latent defects or dangers in a railroad track or roadbed.

Under the rule, as discussed supra subdivision d (1) of this section, unless defects or dangers in a railroad track or roadbed are known to the servant, or are so open and obvious that he should have known of them and understood and appreciated the risk of injury therefrom, he does not assume the risk,[27] and, as discussed supra § 359, it has been said that, under the amendment of August 11, 1939, chapter 685 § 1, 45 U.S.C.A. § 54, to the Federal Employers' Liability Act, the defense of assumption of risk has been abolished as to a negligent employer.

The rule that the servant does not assume the risk of injury from latent defects in a railroad track or roadbed has been applied where the injury was sustained by reason of the absence of a derailing or other safety device at a particularly dangerous point on the line,[28] bridges improperly con-

19. Mo.—Marsanick v. Luechtefeld, App., 157 S.W.2d 537.
N.C.—Thomas v. Lawrence, 127 S.E. 585, 189 N.C. 521.
39 C.J. p 775 note 9.
Known or obvious methods see supra § 390 b, g.

20. Mich.—McLean v. Pere Marquette R. Co., 100 N.W. 748, 137 Mich. 482.
39 C.J. p 775 note 10.

21. Wash.—Williams v. Spokane, 131 P. 833, 73 Wash. 237.

22. Wash.—Well v. Moran Bros. Co. 104 P. 172, 55 Wash. 102.
39 C.J. p 775 note 13.
Knowledge that method chosen is more hazardous see supra § 390 g.

23. U.S.—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 105 F.2d 371 —Missouri Pac. R. Co. v. Siratt, C.C.A.Ark., 78 F.2d 253.
Me.—Kimball v. Clark, 177 A. 183, 133 Me. 263.
Mass.—Doherty v. Paul's For Tires, 49 N.E.2d 430, 314 Mass. 83—Wood v. National Theatre Co., 42 N.E.2d 536, 311 Mass 550—Keough v. E. M. Loew's, 21 N.E.2d 971, 303 Mass. 364.
Mo.—Macklin v. Fogel Const. Co., 31 S.W.2d 14, 326 Mo. 38.
N.J.—Clayton v. Ainsworth, 4 A.2d 274, 122 N.J.Law 160.
39 C.J. p 775 note 16.

Exposure to gases

Dangers incident to exposure to gases in unventilated match testing room were not so obvious to female employee that she would assume risk of phosphorus poisoning as incident to her employment.—Kane v. Federal Match Corporation, D.C.Pa., 5 F. Supp. 507.

24. Va.—Stonega Coke & Coal Co. v. Williams, 80 S.E. 100, 115 Va. 657.
39 C.J. p 778 note 54.

Mine employee's negligence in riding on coal car on first trip did not preclude recovery on ground of assumption of risk for injuries on subsequent trip.—Jewel Coal & Mining Co. v. Whitner, 279 S.W. 1031, 170 Ark. 393.

25. Iowa.—Johnson v. Corn Products Refining Co., 138 N.W. 516, 157 Iowa 420.
39 C.J. p 778 note 57.

26. Wis.—Rankel v. Buckstaff-Edwards Co., 120 N.W. 269, 138 Wis. 442, 20 L.R.A.,N.S., 1180.
39 C.J. p 778 note 58.

27. Nev.—Southern Pac. Co. v. Huyck, 128 P.2d 849, 61 Nev. 365.
39 C.J. p 776 note 19.

28. Ark.—St. Louis, I. M. & S. R.

structed and in disrepair,[29] a defectively constructed fill,[30] a defective plank crossing over switch tracks,[31] a defectively constructed street railway curve, the defect in which was discernible only by measurement and technical calculation,[32] defective ties and rails,[33] defective turntables,[34] hole in track or right of way,[35] a sliver detached from a rail,[36] and unblocked switches.[37]

Obstruction on, over, or near track or roadbed. Where a servant does not know of obstructions on, over, or near a railroad track or roadbed or, knowing of such obstructions, does not know and appreciate the nature and extent of the danger therefrom, although acting in the exercise of ordinary care, he does not assume the risk of injury;[38] and this is so, although the structure causing the injury is of a permanent character.[39] In order to charge the servant with assumption of risk, it must be shown that the servant had either actual or constructive knowledge of the existence of the obstruction and also of the danger caused thereby.[40] Mere knowledge of the existence and general location of the obstruction will not be sufficient to charge the servant with assumption of risk.[41] It has also been held that the circumstances at the time of the injury must have been such as not to excuse a reasonably prudent person from having the memory of the peril within the immediate field of his consciousness.[42]

These principles have been applied where the injuries sustained were caused by awnings projecting from a station house,[43] bridge girders,[44] cars on adjacent tracks,[45] cattle chutes,[46] cattle guards,[47] cattle guard fences,[48] coal bins,[49] overhead bridges,[50] piles of lumber placed near a switch track contrary to custom,[51] piles of stones placed near the track,[52] rails concealed by grass and weeds,[53] signal posts,[54] switch stands,[55] telegraph poles,[56] and water tanks.[57]

e. Machinery, Tools, and Appliances

A servant does not assume the risk of injury from latent defects, and dangers in machinery, tools, or appliances furnished by the master.

In accordance with the general rules, as considered supra subdivision a of this section, the servant does not assume the risk of injury from latent defects in machinery, tools, or appliances furnished by the master, that is to say, he does not assume the risk of injury from defects in machinery, tools, or appliances where he has no knowledge of the defects or of the dangers arising therefrom, and could not have acquired such knowledge, although acting in the exercise of ordinary care in the performance

Co. v. Corman, 122 S.W. 116, 92 Ark. 102.

29. U.S.—Long Pole Lumber Co. v. Gross, Va., 180 F. 5, 103 C.C.A. 359.

30. U.S.—Baltimore & O. R. Co. v. Taylor, W.Va., 186 F. 828, 109 C.C.A. 172.

31. Iowa.—Hamilton v. Chicago, B. & Q. R. Co., 124 N.W. 363, 145 Iowa 431.

32. Va.—Jaeger v. City R. Co., 78 S.E. 59, 72 W.Va. 307.

33. Ind.—Pennsylvania Co. v. Brush, 28 N.E. 615, 130 Ind. 347.
39 C.J. p 776 note 25.

34. Tex.—Currie v. Missouri, K. & T. R. Co., 108 S.W. 1167, 101 Tex. 478.

35. Mo.—Winslow v. Missouri, K. & T. R. Co., App., 192 S.W. 121.
39 C.J. p 776 note 27.

36. Tex.—San Antonio & A. P. R. Co. v. Williams, Civ.App., 52 S.W. 89.

37. Iowa.—Pierson v. Chicago & N. W. R. Co., 102 N.W. 149, 127 Iowa 13.

38. U.S.—Emch v. Pennsylvania R. Co., C.C.A.Ohio, 37 F.2d 828.
39 C.J. p 777 note 32.

39. Tex.—Gulf, C. & S. F. R. Co. v. Darby, 67 S.W. 446, 28 Tex.Civ. App. 413.

40. U.S.—West v. Chicago, B. & Q. R. Co., Ill., 179 F. 801, 103 C.C.A. 293.
Mass.—Donahue v. Boston & M. R. Co., 59 N.E. 663, 178 Mass 251,
39 C.J. p 777 note 32.

41. U.S.—Chesapeake, etc., R. Co. v. Cowley, 166 F. 283, 92 C.C.A. 201.
Va.—Chesapeake, etc., R. Co. v. Rowsey, 62 S.E. 365, 108 Va. 632.

42. U.S.—West v. Chicago, B. & Q. R. Co., Ill., 179 F. 801, 103 C.C.A. 293.

43. Ill.—Illinois Cent. R. Co. v. Welch, 52 Ill. 183, 4 Am.R. 593.
39 C.J. p 777 note 37.

44. Kan.—Cloud v. Atchison, T. & S. F. R. Co., 109 P. 400, 82 Kan. 851.
39 C.J. p 777 note 38.

45. Vt.—Sanderson v. Boston & M. R. Co., 101 A. 40, 91 Vt. 419.
39 C.J. p 777 note 39.

46. Ind.—New York, C. & St. L. R. Co. v. Ostman, 41 N.E. 1037.
39 C.J. p 777 note 40.

47. Tex.—Atchison, T. & S. F. R. Co. v. Tack, 130 S.W. 596, 61 Tex. Civ.App., 551.

48. Mo.—Murphy v. Wabash R. Co., 21 S.W. 862, 115 Mo. 111.
39 C.J. p 777 note 42.

49. Tex.—Gulf, C. & S. F. R. Co. v. Gray, 63 S.W. 927, 25 Tex.Civ. App. 99.

50. Ind.—Louisville, N. A. & C. R. Co. v. Wright, 17 N.E. 584, 115 Ind. 378, 7 Am.S.R. 432.
39 C.J. p 777 note 44.

51. Mich.—Bradburn v. Wabash R. Co., 96 N.W. 929, 134 Mich. 575.

52. Mass.—Donahue v. Boston & M. R. Co., 59 N.E. 663, 178 Mass. 251.
39 C.J. p 777 note 46.

53. Tex.—Texas & P. R. Co. v. Tuck, Civ.App., 116 S.W. 620, affirmed 123 S.W. 406, 103 Tex. 72.
39 C.J. p 777 note 47.

54. Mass.—Scanlon v. Boston & A. R. Co., 18 N.E. 209, 147 Mass. 484. 9 Am.S.R. 733.
39 C.J. p 777 note 48.

55. U.S.—Emch v. Pennsylvania R. Co., C.C.A.Ohio, 37 F.2d 828.
Mo.—Westover v. Wabash Ry. Co., 6 S.W.2d 843, certiorari denied Wabash Ry. Co. v. Westover, 49 S.Ct. 31, 278 U.S. 632, 73 L.Ed. 550.
39 C.J. p 777 note 49.

56. R.I.—Crandall v. New York, N. H. & H. R. Co., 35 A. 307, 19 R.I. 594—Whipple v. New York, N. H. & H. R. Co., 35 A. 305, 19 R.I. 587, 61 Am.S.R. 796.

57. Vt.—McDuffee v. Boston & M. R. Co., 69 A. 124, 81 Vt. 52, 130 Am.S.R. 1019.

of the services for which he was employed.[58] Risks from latent defects are not risks ordinarily incident to the employment.[59]

The general rule under consideration has been applied in respect of a great variety of machinery, tools, or appliances,[60] such as animals,[61] barges,[62] belts,[63] bits,[64] boiler tubes,[65] cars and handcars,[66] chains,[67] chairs,[68] chisels,[69] cranes,[70] derricks,[71] elbow of steam pipe,[72] electrical appliances and equipment,[73] elevators,[74] gallows frames,[75] hammers,[76] ladders,[77] locomotives,[78] oil burners,[79] oil cups,[80] platforms,[81] pulleys,[82] ropes,[83] scaffolds,[84] self-starting machinery,[85] shafts,[86] telltales,[87] and unguarded machinery.[88]

4. Continuing Work after Knowledge of Danger

§ 393. Without Notice or Complaint

As a general rule a servant who, with knowledge of defects or dangers, voluntarily continues his work without complaint and without a promise by the master to remedy the defects or remove the dangers assumes the risk of injury.

Although, as discussed supra § 380, a servant has the right to rely on the performance by his master of the duties imposed on him by law for the protection of his servants, as a general rule, in the absence of a statute to the contrary, where a servant knows, or is charged with knowledge, of defects and dangers in prosecuting the master's work, and continues in the master's employment voluntarily and without complaint, and without any promise by the master that the defect will be remedied or the danger removed, he assumes the risk of any injuries which may result from such defect.[89] This rule has been held to apply notwithstanding the neg-

58. U.S.—King Cotton Mills v. Wilson, C.C.A.N.C., 61 F.2d 1004.
Ark.—Smith v. McEachin, 57 S.W.2d 1043, 186 Ark. 1132.
Ind.—Chicago, L. & L. Ry. Co. v. Younger, 175 N.E. 290, 93 Ind. App. 276.
Tenn.—Louisville & N. R. Co. v. Jackson, 3 Tenn.App. 463.
Wash.—Thornton v. Van De Kamp's Holland Dutch Bakers, 42 P.2d 799, 181 Wash. 213.
39 C.J. p 778 note 61.

59. Ark.—Oak Leaf Mill Co. v. Littleton, 151 S.W. 262, 105 Ark. 392.
39 C.J. p 779 note 62.

60. Tenn.—Louisville & N. R. Co. v. Jackson, 3 Tenn.App. 463.
Simple tool doctrine see supra § 390 d (3).
Piston of sawmill carriage
Ark.—Breece-White Mfg. Co. v. Green, 287 S.W. 173, 171 Ark. 968.

61. Wyo.—Boatman v. Miles, 199 P. 933, 27 Wyo. 481, 26 A.L.R. 864.
39 C.J. p 779 note 63.

62. U.S.—Oregon Round Lumber Co. v. Portland & Asiatic SS. Co., D.C. Or., 162 F. 912.

63. Ill.—Republic Iron & Steel Co. v. Lee, 81 N.E. 411, 227 Ill. 246.
39 C.J. p 779 note 65.

64. U.S.—The Erie Lighter 108, D. C.N.J., 250 F. 490.
39 C.J. p 779 note 66.

65. Mass.—Souden v. Fore River Ship Bldg. Co., 112 N.E. 82, 223 Mass. 509.

66. Kan.—Smith v. St. Louis & S. F. R. Co., 148 P. 759, 95 Kan. 451.
39 C.J. p 779 note 68.

67. Mo.—Nichols v. Crystal Plate-Glass Co., 27 S.W. 516.

68. Ark.—Capital City Casket Co. v. Szurgot, 54 S.W.2d 285, 186 Ark. 421.

69. Or.—Manning v. Portland Ship Bldg. Co., 96 P. 545, 52 Or. 101.
39 C.J. p 779 note 70.

70. Tex.—Missouri, K. & T. R. Co. v. Bush, 120 S.W. 224, 56 Tex.Civ. App. 69.

71. N.Y.—Jarvis v. Northern New York Marble Co., 67 N.Y.S. 78, 55 App.Div. 272.
39 C.J. p 779 note 72.

72. Cal.—De Witt v. Floriston Pulp & Paper Co., 96 P. 397, 7 Cal.App. 774.

73. Mass.—Lamberti v. Neal, 148 N. E. 463, 253 Mass. 99.
39 C.J. p 779 note 74.

74. N.C.—Womble v. Merchants' Grocery Co., 47 S.E. 493, 135 N.C. 474.
39 C.J. p 780 note 75.

75. Utah.—Farney v. Oregon Short Line R. Co., 87 P. 440, 31 Utah 194.

76. U.S.—Acme Harvesting Co. v. Atkinson, Ill., 208 F. 244, 125 C.C. A. 444.
Tex.—Hines v. Flinn, Civ.App., 222 S.W. 679.

77. Tex.—Gulf, C. & S. F. R. Co. v. Adams, Civ.App., 121 S.W. 876.
39 C.J. p 780 note 78.
Ladders as simple tools see supra § 390 d (3).
Fact that bolt securing tongue of stepladder was loose was not such obvious defect that fruit picker using stepladder would be chargeable with notice of its condition.—Etel v. Grubb, 288 P. 931, 157 Wash. 311.

78. Tenn.—Louisville & N. R. Co. v. Jackson, 3 Tenn.App. 463.
39 C.J. p 780 note 79.

79. Mass.—Roberts v. Frank's Inc., 49 N.E.2d 427, 314 Mass. 42.

80. Ark.—Missouri & N. A. R. Co. v. Collins, 153 S.W. 607, 106 Ark. 353.

81. Mass.—White v. William H. Perry Co., 76 N.E. 512, 190 Mass. 99.
39 C.J. p 780 note 81.

82. Conn.—Girard v. Grosvenordale Co., 73 A. 747, 82 Conn. 271.

83. U.S.—Earles v. Howard, 270 F. 225.
Ky.—McFarland v. Chesapeake & O. R. Co., 197 S.W. 944, 177 Ky. 551, rehearing denied 199 S.W. 66, 178 Ky. 530.

84. Iowa.—Garvey v. Boody-Holland, 155 N.W. 1027, 176 Iowa 273.
39 C.J. p 780 note 84.

85. Mass.—Donovan v. Chase Shawmut Co., 87 N.E. 580, 201 Mass. 357.
39 C.J. p 780 note 85.

86. Mass.—Flynn v. Prince, Collins & Marston Co., 84 N.E. 321, 198 Mass. 224, 17 L.R.A.,N.S., 568.
39 C.J. p 780 note 86.

87. N.Y.—Hines v. New York Cent., P. & B. R. Co., 28 N.Y.S. 829, 78 Hun 239.
R.I.—Darling v. New York, etc., R. Co., 24 A. 462, 17 R.I. 708, 16 L.R. A. 643.

88. Vt.—Duggan v. Heaphy, 83 A. 726, 85 Vt. 515.
39 C.J. p 780 note 88.

89. U.S.—Bonner v. Texas Co., C.C. A.Tex., 89 F.2d 291—Hallstein v. Pennsylvania R. Co., C.C.A.Ohio, 30 F.2d 594.
Ark.—Togo Gin Co. v. Hite, 79 S.W. 2d 262, 190 Ark. 454—Sandusky

ligence and breach of duty of the master;[90] but it has also been held that the servant does not assume the risks of injury of known defects, resulting from his master's negligence, unless they are so glaring and the danger so obvious that a man of common prudence would refuse to run them,[91] especially where he continues to work at the request of the master.[92] Knowledge in conjunction with the continuance in the service operates, it has been said, as a waiver of the right to make the master responsible.[93] The rule applies with the same force whether the servant acquired knowledge of the danger or defect before or after he entered the service,[94] and the fact that the servant continues to do the work by reason of fears or threats of discharge does not affect its operation.[95]

The rule has been applied in respect of dangerous methods of work;[96] defective dangerous places of work;[97] defective passageways maintained for

v. Warren, 6 S.W.2d 15, 177 Ark. 271.

Conn.—Reseigno v. Rosner, 198 A. 751, 121 Conn. 253.

Ky.—Westinghouse Elec. & Mfg. Co. v. Deakins, 204 S.W.2d 434, 305 Ky. 385—Louisville & N. R. Co. v. Yett, 168 S.W.2d 556, 293 Ky. 71—Eutsler v. Huff, 299 S.W. 1070, 222 Ky. 48.

Me.—Hatch v. Portland Terminal Co., 131 A. 5, 125 Me. 96.

Mass.—Engel v. Boston Ice Co., 4 N.E.2d 455, 295 Mass. 428—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434.

Minn.—**Corpus Juris cited in** Liptak v. Karsner, 293 N.W. 612, 614, 208 Minn. 168.

Miss.—Pearl River Valley R. Co. v. Moody, 171 So. 769, 178 Miss. 1.

N.C.—Ethridge v. Atlantic Coast Line R. Co., 183 S.E. 539, 209 N.C. 326—Hubbard v. Southern Ry. Co., 166 S.E. 802, 203 N.C. 675.

Okl.—Chicago, R. I. & P. Ry. Co. v. Clark, 51 P.2d 579, 175 Okl. 70—St. Louis-San Francisco Ry. Co. v. Henson, 247 P. 92, 118 Okl. 124.

Or.—Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 136 Or. 18, certiorari denied Oregon-Washington, R. & Nav. Co. v. Bevin, 52 S.Ct. 21, 284 U.S. 639, 76 L.Ed. 543.

Tex.—Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, error dismissed, judgment correct.

Utah.—Miller v. Western Pac. R. Co., 274 P. 945, 73 Utah 442.

Wyo.—Chicago & N. W. Ry. Co. v. Ott, 237 P. 238, 33 Wyo. 200, rehearing denied 238 P. 287, 33 Wyo. 200.

39 C.J. p 780 note 91.

Knowledge of danger as element in assumption of risk generally see supra §§ 379–392.

Open and obvious defects

Where the defects or danger are open and obvious so as to be discoverable by one of ordinary intelligence, an employee continuing to work therewith assumes the risk.—Temple Cotton Oil Co. v. Brown, 132 S.W.2d 791, 198 Ark. 1076—Missouri Pac. R. Co. v. Horner, 15 S.W.2d 994, 179 Ark. 321—Wisconsin & Arkansas Lumber Co. v. Otts, 10 S.W.2d 364, 178 Ark. 283.

Equal knowledge

Housekeeper having equal knowledge with employer of dangerous propensity of employer's dog to trip persons and voluntarily retaining position without any inducement by employer was held precluded, on theory of assumption of risk, from recovering damages for injuries caused by such a prank of dog.—Corley v. Hubbard, 260 N.W. 551, 129 Neb. 38.

90. U.S.—Kansas City Southern Ry. Co. v. Williford, C.C.A.La., 65 F.2d 223, certiorari denied Williford v. Kansas City Southern Ry. Co., 54 S.Ct. 87, 290 U.S. 666, 78 L.Ed. 576.

Ga.—Louisville & N. R. Co. v. Hicks, 176 S.E. 698, 49 Ga.App. 846, certiorari dismissed Hicks v. Louisville & N. R. Co., 186 S.E. 662, 182 Ga. 595—Gray v. Garrison, 176 S.E. 412, 49 Ga.App. 472.

Ind.—Baltimore & O. S. W. R. Co. v. Carroll, 163 N.E. 99, 200 Ind. 589, reversed on other grounds 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed. 566, mandate conformed to 171 N.E. 923, 202 Ind. 37.

Iowa.—Laws v. Richards, 231 N.W. 321, 210 Iowa 608—Martin v. Des Moines Edison Light Co., 106 N.W. 359, 131 Iowa 724—Worden v. Humeston & S. R. Co., 33 N.W. 629, 72 Iowa 201.

Me.—Hatch v. Portland Terminal Co., 131 A. 5, 125 Me. 96.

Mass.—Hietala v. Boston & A. R. R., 3 N.E.2d 377, 295 Mass. 186, certiorari denied Boston & Albany R. Co. v. Hietala, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 434.

Miss.—Pearl River Valley R. Co. v. Moody, 171 So. 769, 178 Miss. 1.

Mo.—Russell v. Missouri Pac. R. Co., 295 S.W. 102, 316 Mo. 1303, stating federal rule, and certiorari denied Missouri Pac. R. Co. v. Russell, 48 S.Ct. 114, 275 U.S. 551, 72 L.Ed. 421.

Okl.—Chicago, R. I. & P. Ry. Co. v. Murphy, 86 P.2d 629, 184 Okl. 240.

Vt.—Landing v. Town of Fairlee, 22 A.2d 179, 112 Vt. 127.

39 C.J. p 783 notes 91, 92.

91. Ark.—Fordyce v. Edwards, 30 S.W. 758, 60 Ark. 438.

39 C.J. p 784 note 14.

In Missouri

(1) Where a servant continues in a master's employment, knowing that such master is negligent, and is later injured because of such negligence, there is no assumption of risk; the question is whether the servant is guilty of contributory negligence in remaining in such employment.—Jewell v. Kansas City Bolt & Nut Co., 132 S.W. 703, 231 Mo. 176, 140 Am.S.R. 515—39 C.J. p 783 note 93.

(2) The text rule has also been applied in this jurisdiction.—Culver v. Minden Coal Co., Mo.App., 286 S.W. 745.

(3) General rule in Missouri that servant cannot assume risk of master's negligence see supra § 362.

92. Mo.—Flynn v. Kansas City, St. J. & C. B. R. Co., 78 Mo. 195, 47 Am.R. 99.

Va.—Richmond & D. R. Co. v. Norment, 4 S.E. 211, 84 Va. 167, 10 Am.S.R. 827.

Compliance with commands of master see infra §§ 399, 402.

93. Iowa.—Taylor v. Chicago, R. I. & P. R. Co., 170 N.W. 388, 186 Iowa 506.

39 C.J. p 783 note 94.

94. Ill.—Ciehowicz v. International Packing Co., 68 N.E. 1083, 206 Ill. 346—Winn v. Christian County Coal Co., 156 Ill.App. 179.

39 C.J. p 783 note 91.

95. Kan.—Southern Kansas R. Co. v. Moore, 31 P. 138, 49 Kan. 616.

39 C.J. p 783 note 97.

Failure of employee to object to performing work obviously dangerous because he had family to support and would have been discharged if he had objected would not remove bar of assumption of risk to recovery for his death.—Snow v. Texas & P. Ry. Co., La.App., 166 So. 200.

96. Ky.—Westinghouse Elec. & Mfg. Co. v. Deakins, 204 S.W.2d 434, 305 Ky. 385—Norfolk & W. Ry. Co. v. Robinette, 78 S.W.2d 802, 257 Ky. 558.

39 C.J. p 783 note 99.

97. Ark.—Missouri Pac. R. Co. v.

the use of servants in coming to and going from their work;[98] defective machinery;[99] defective tools and appliances or instrumentalities for work,[1] although there is also authority to the contrary of this proposition;[2] failure to furnish appliances essential to servants' safety;[3] insufficiency of force for work;[4] and unguarded machinery.[5]

Time for notice or complaint. It has frequently been held that a servant, after learning of the risks, is entitled to time and opportunity for making complaint.[6]

Hiring for limited time. It has been held that the employee's failure to complain does not necessarily charge him with assumption of risk, where his services are hired for a limited time and he has no right to terminate his contract at will.[7]

Work under emergency or necessity. As a general rule the doctrine of assumption of risk does not apply where the servant is met or confronted with an emergency which does not afford him the opportunity to exercise his option or election to remain in the employment and proceed with the work of the master, since the doctrine of assumption of risk is based on this principle.[8] In order to be absolved from the assumption of risk by reason of an emergency the danger must in fact be imminent and adequate to prevent the exercise of judgment by the employee.[9] It has also been held, however, that the operation of the rule is not affected by the fact that the servant continued in a place of danger to save fellow servants from injury.[10]

It has been held that if at the time of the injury the servant is so situated that he has no choice but continues the service from necessity, he does not assume the attendant risk.[11]

Defects or dangers known to master. Another limitation of the rule, particularly where a statute so provides, is that, where a defect or danger is caused by the master's negligence, and is known by him, or by some one representing him, he cannot rely on the servant's failure to make complaint after learning thereof.[12] Where the defect or danger is known to the master, the servant is relieved of giving notice, although he may not know that the master knew of the defect or danger.[13]

Horner, 15 S.W.2d 994, 179 Ark. 321.
Del.—Bowing v. Delaware Rayon Co., 192 A. 598, 8 W.W.Harr. 339.
Fla.—Moody v. Hanlon, 179 So. 164, 131 Fla. 129.
Kan.—Hunter v. Barnsdall Refining Co., 268 P. 86, 126 Kan. 277.
Me.—Hatch v. Portland Terminal Co., 131 A. 5, 125 Me. 96.
N.C.—Hemphill v. Standard Oil Co., 148 S.E. 443, 197 N.C. 339.
S.C.—Adcox v. Campbell Limestone Co., 188 S.E. 657, 182 S.C. 106.
39 C.J. p 783 note 1.

98. Me.—Buzzell v. Laconia Mfg. Co., 48 Me. 113, 77 Am.D. 212.

99. Okl.—St. Louis-San Francisco Ry. Co. v. Henson, 247 P. 92, 118 Okl. 124.
Tex.—Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, error dismissed, judgment correct—City of Teague v. Radford, Civ.App., 105 S.W.2d 336.
W.Va.—Ashley v. Tri-State Lumber Co., 91 S.E. 813, 815, 79 W.Va. 726.
39 C.J. p 783 note 3.

1. U.S.—Steele v. Erie R. Co., D.C. N.Y., 54 F.2d 688, affirmed, C.C.A., 54 F.2d 690, certiorari denied Erie R. Co. v. Steele, 52 S.Ct. 395, 285 U.S. 546, 76 L.Ed. 937.
Ark.—Hall v. Patterson, 166 S.W.2d 667, 205 Ark. 10—Missouri Pac. R. Co. v. Treece, 64 S.W.2d 561, 188 Ark. 68, certiorari denied 54 S.Ct. 630, 292 U.S. 626, 78 L.Ed. 1481.
Fla.—Wilson & Toomer Fertilizer Co. v. Lee, 106 So. 462, 90 Fla. 632.
Ky.—Louisville & N. R. Co. v. Yett, 168 S.W.2d 556, 293 Ky. 71—Watkins v. Louisville & N. R. Co., 291 S.W. 728, 218 Ky. 526.
Me.—Hatch v. Portland Terminal Co., 131 A. 5, 125 Me. 96.
39 C.J. p 784 note 4.

2. Va.—Richmond & D. R. Co. v. Norment, 4 S.E. 211, 84 Va. 167, 10 Am.S.R. 827.

3. Fla.—Moody v. Hanlon, 179 So. 164, 131 Fla. 129.
Ill.—Beard v. Baltimore & O. R. Co., 243 Ill.App. 537.
39 C.J. p 784 note 6.

4. U.S.—Lang v. U. S. Reduction Co., C.C.A.Ind., 110 F.2d 441.
Ky.—Louisville & N. R. Co. v. Willhite, 187 S.W.2d 1010, 300 Ky. 75—Louisville & N. R. Co. v. Yett, 168 S.W.2d 556, 293 Ky. 71.
N.C.—Hemphill v. Standard Oil Co., 148 S.E. 443, 197 N.C. 339.
39 C.J. p 784 note 7.
Duty to furnish sufficient force see supra § 307.

5. Ark.—Export Cooperage Co. v. Ramsey, 202 S.W. 468, 133 Ark. 336.

6. Ky.—Chesapeake & O. Ry. Co. v. Dixon, 280 S.W. 93, 212 Ky. 738.
39 C.J. p 784 note 12.

7. La.—Poirier v. Carroll, 35 La. Ann. 699.

8. S.C.—Hice v. Dobson Lumber Co., 185 S.E. 742, 180 S.C. 259—Scott v. International Agr. Corporation, 184 S.E. 133, 180 S.C. 1.
39 C.J. p 784 note 18.

Reason for rule

Servant is not expected to act with that degree of prudence which would otherwise be obligatory where confronted by serious danger without sufficient time to deliberate on comparative safety of alternative courses of action, and where alarm and nervous excitement produced by situation impair servant's reasoning faculties.—Hice v. Dobson Lumber Co., 185 S.E. 742, 180 S.C. 259.

What constitutes emergency

"Emergency" means an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency.—Hice v. Dobson Lumber Co., supra.

9. S.C.—Hice v. Dobson Lumber Co., supra.

10. Conn.—Girard v. Grosvenordale Co., 73 A. 747, 82 Conn. 271.
Effect of attempt to save master's property see supra § 386.

11. Mont.—Monson v. La France Copper Co., 114 P. 778, 43 Mont. 65.
39 C.J. p 784 note 20.

12. Ala.—Southern R. Co. v. McGowan, 43 So. 378, 149 Ala. 440.
39 C.J. p 785 notes 23, 25, 27 [a].

13. Ala.—Southern R. Co. v. McGowan, supra.

§ 394. —— Effect of Statutes

The rule which absolves a master of liability for injury to a servant who, with knowledge of defects or dangers, continues to work without complaint or a promise to remedy the defects has been changed or abrogated by some statutes.

The rule which absolves a master of liability for injury to a servant who, with knowledge of defects or dangers, continues to work without complaint or a promise to remedy the defects or remove the dangers has been changed or abrogated by some statutes.[14] The Federal Employers' Liability Act, at least in cases prior to the amendment of August 11, 1939, chapter 685 § 1, 45 U.S.C.A. § 54, which, as discussed supra § 359, is said to have abolished the doctrine of assumption of risk, did not affect the operation of the rule[15] except in case of a violation by a common carrier of a federal statute enacted for the safety of the employee which contributed to the injury complained of, in which circumstances the defense of assumption of risk was not available irrespective of the servant's knowledge and appreciation of the defects and dangers, and of his continuing in the employment without complaint and without any promise to remedy the defects.[16]

§ 395. After Notice or Complaint to Master

As a general rule the fact that a servant has complained of defects and dangers does not absolve him of the assumption of risk, in the absence of any assurance or promise by the master that the defects and dangers will be removed.

In the absence of statute providing otherwise,[17] the fact that a servant has complained of defects and dangers will not relieve him of the assumption of risk if he continues to work without any assurance or promise by the master that the defects and dangers will be removed,[18] and this is particularly true where the employee in continuing his work is not acting under compulsion or in any emergency[19] or where he is told that no change will be made.[20] It has been held, however, that, where the fact that machinery is unfit for use is brought to the attention of the master, the servant is absolved from increased risk if the danger is not such that none but a reckless person would continue to use the machinery.[21]

§ 396. —— Promise to Remedy Defect or Remove Danger

a. General rule

b. Limitations and exceptions to rule

14. Iowa.—Johnson v. Kinney, 7 N.W.2d 188, 232 Iowa 1016, 144 A.L.R. 997—Nodland v. Kreutzer, 168 N.W. 889, 184 Iowa 476.

39 C.J. p 785 note 27.

Absence of duty to report dangers

Under some statutes assumption of risk is no defense where it does not appear that by the terms of the employment it was the duty of the employee to report the unsafe condition and that he failed to do so, and the employer was not otherwise possessed of knowledge thereof.—McKee v. New Idea, Ohio App., 44 N.E.2d 697.

15. La.—Snow v. Texas & P. Ry. Co., App., 166 So. 200.

Mo.—Pope v. Terminal R. Ass'n, 254 S.W. 43.

N.C.—Ethridge v. Atlantic Coast Line R. Co., 183 S.E. 539, 209 N.C. 326.

Or.—Makino v. Spokane, P. & S. Ry. Co., 63 P.2d 1082, 155 Or. 317.

39 C.J. p 785 note 30.

Effect of state employers' liability acts on defense of assumption of risk see supra § 360.

16. U.S.—McCarthy v. Pennsylvania R. Co., C.C.A.Ind., 156 F.2d 877.

17. N.Y.—Bardelli v. Pittsburg Contracting Co., 148 N.Y.S. 389, 163 App.Div. 45.

39 C.J. p 786 note 34.

Defects which have been reported

(1) A statute providing that if a defect in the ways, works, and machinery has been reported to one whose duty it is to remedy it, and the defect is not remedied within a reasonable time, and by reason of the defect a servant is injured, he shall not be held to have assumed the risk of such injury, takes away absolutely the defense of assumption of risk arising from dangers or defects which came into existence subsequent to the contract of service, if reported as required by the statute, but it does not affect the assumption of risk of injury from defects or dangers existing at the time of entering the employment or require the adoption of safer methods or the installation of more improved machinery on complaint of the employer independently of the length of time the method or machinery had been in use.—Wood v. Danas, 120 N.E. 159, 230 Mass. 587.

(2) The statute deprives the employer of the defense of voluntary assumption of risk, where the employee has reported a defect which there was an existing duty to remedy, and which was not remedied within a reasonable time, but does not create a duty to remedy defects where no such duty previously existed.—Beggelman v. Romanow, 192 N.E. 159, 288 Mass. 14.

Written notice

Under some statutes the giving of written notice of defects absolves the employee of the assumption of risk arising from such defects.—Barber Asphalt Paving Co. v. Austin, Iowa, 186 F. 443, 108 C.C.A. 365.

18. U.S.—Hallstein v. Pennsylvania R. Co., C.C.A.Ohio, 30 F.2d 594.

Ark.—Barksdale v. Silica Products Co., 137 S.W.2d 901, 200 Ark. 32—Missouri Pac. R. Co. v. Bryan, 128 S.W.2d 268, 198 Ark. 193—Sinclair Refining Co. v. Duff, 88 S.W.2d 322, 191 Ark. 888—Togo Gin Co. v. Hite, 79 S.W.2d 262, 190 Ark. 454.

Kan.—McDaniel v. Myers, 131 P.2d 650, 156 Kan. 21.

Minn.—Liptak v. Karsner, 293 N.W. 612, 208 Minn. 168.

Miss.—Mobile & O. R. Co. v. Clay, 125 So. 819, 156 Miss. 463, certiorari denied Clay v. Mobile & O. R. Co., 51 S.Ct. 24, 282 U.S. 844, 75 L.Ed. 749.

N.J.—Ducjack v. New Jersey Zinc Co., 141 A. 791, 104 N.J.Law 575.

Wash.—Hansen v. Luckenbach S. S. Co., 249 P. 492, 140 Wash. 394.

39 C.J. p 786 note 35.

19. Pa.—Guerierro v. Reading Co., 29 A.2d 510, 346 Pa. 187.

Effect of command or threat of master see infra §§ 399, 402.

20. Ark.—Western Arkansas Telephone Co. v. Grantham, 139 S.W.2d 49, 200 Ark. 411.

39 C.J. p 786 note 36.

21. Ky.—Buey v. Chess & Wymond Co., 84 S.W. 563, 27 Ky.L. 198.

c. Form and sufficiency of notice or complaint
d. Form and sufficiency of promise
e. Necessity for reliance on promise
f. Duration of continuance in employment

a. General Rule

As a general rule, where the master promises to repair the defect complained of, the servant does not assume the risk by continuing to work for a reasonable time thereafter unless the danger is so patent that no prudent person would continue to work.

As a general rule, where the master or his representative promises to remedy the defect complained of, the servant by continuing in his employment for a reasonable time after such promise does not assume the risk of injury from the defect unless the danger is so patent that no person of ordinary prudence would continue to work,[22] and this is true even though the servant could make the repairs himself or dispense with the appliance which needs repairs.[23] The fact that the master had other reasons than the safety of employees for making the change will not render the promise to make the change ineffectual.[24] The rule is not superseded by a statute relieving the employee from risks incident to remaining in the employment, on his giving written notice of a defect causing the injury, but confers an additional right.[25] By reason of the promise to repair, the servant's implied contract to assume the risk of the danger is temporarily suspended,[26] and the master himself temporarily assumes the risk of injury to the servant,[27] unless, it has been held, the danger arising therefrom is so

22. U.S.—Bonner v. Texas Co., C.C.A.Tex., 89 F.2d 291.
Ark.—Louis B. Siegel & Co. v. Moore, 161 S.W.2d 387, 204 Ark. 50—Faulkner v. Big Rock Stone & Material Co., 143 S.W.2d 883, 201 Ark. 124—Missouri Pac. R. Co. v. Bryan, 128 S.W.2d 268, 198 Ark. 193—Neely v. Goldberg, 114 S.W. 2d 455, 195 Ark. 790—Reader R. R. v. Sanders, 90 S.W.2d 762, 192 Ark. 28—Trinity Farm Const. Co. v. Brannam, 82 S.W.2d 523, 190 Ark. 1032—Roach v. Haynes, 72 S.W.2d 532, 189 Ark. 399—Miller v. Harris, 281 S.W. 907, 170 Ark. 1193.
Cal.—Hoogbruin v. Atchison, T. & S. F. Ry. Co., 2 P.2d 992, 213 Cal. 582.
Ga.—Baker v. Augusta Veneer Co., 161 S.E. 676, 44 Ga.App. 383—Evans v. Central of Georgia Ry. Co., 135 S.E. 760, 36 Ga.App. 58.
Ind.—Pennsylvania R. Co. v. Martin, 170 N.E. 554, 93 Ind.App. 258.
Iowa.—Price v. McNeill, 24 N.W.2d 464, 237 Iowa 1120—Oestereich v. Leslie, 234 N.W. 229, 212 Iowa 105.
Kan.—Cheek v. Eyth, 89 P.2d 11, 149 Kan. 586.
Me.—Bubar v. Bernardo, 27 A.2d 593, 139 Me. 82.
Miss.—Pearl River Valley R. Co. v. Moody, 171 So. 769, 178 Miss. 1.
Mo.—Williams v. Terminal R. Ass'n of St. Louis, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876—Kepner v. Cleveland, C. C. & St. L. Ry. Co., 15 S.W.2d 825, 322 Mo. 299, certiorari denied Cleveland, C. C & St. L. Ry. Co. v. Kepner, 50 S.Ct. 24, 280 U.S. 564, 74 L.Ed. 618—Russell v. Missouri Pac. R. Co., 295 S.W. 102, 316 Mo. 1303, certiorari denied Missouri Pac. R. Co. v. Russell, 48 S.Ct. 114, 275 U.S. 551, 72 L.Ed. 421—Odell v. St. Louis-San Francisco Ry. Co., App., 281 S.W. 456.
N.H.—Nason v. Lord-Merrow Excelsior Co., 29 A.2d 464, 92 N.H. 251.
N.C.—Ethridge v. Atlantic Coast Line R. Co., 183 S.E. 539, 209 N.C. 326—Hubbard v. Southern Ry. Co., 166 S.E. 802, 203 N.C. 675, stating federal rule.
Okl.—Rudco Oil & Gas Co. v. Lofland, 135 P.2d 494, 192 Okl. 256—St. Louis & S. F. Ry. Co. v. Sears, 49 P.2d 489, 173 Okl. 483—Missouri-Kansas-Texas R. Co. v. Highfill, 293 P. 182, 146 Okl. 84, certiorari denied 51 S.Ct. 483, 283 U.S. 834, 75 L.Ed. 1446—St. Louis-San Francisco Ry. Co. v. Henson, 247 P. 92, 118 Okl. 124.
Or.—Hoffman v. Broadway Hazelwood, 10 P.2d 349, 139 Or. 519, 83 A.L.R. 1083, rehearing denied 11 P.2d 814, 139 Or. 519, 83 A.L.R. 1008—Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 136 Or. 18, certiorari denied Oregon-Washington, R. & Nav. Co. v. Bevin, 52 S.Ct. 21, 284 U.S. 639, 76 L.Ed. 543.
S.C.—Stogner v. Great Atlantic & Pacific Tea Co., 192 S.E. 406, 184 S. C. 406—Hice v. Dobson Lumber Co., 185 S.E. 742, 180 S.C. 259—Scott v. International Agr. Corporation, 184 S.E. 133, 180 S.C. 1.
Tex.—**Corpus Juris quoted in** Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, 1084, error dismissed, judgment correct.
Va.—Aronovitch v. Ayres, 193 S.E. 524, 169 Va. 308.
39 C.J. p 786 note 39.
Assurances or representations of master generally see infra §§ 404–406.

Under statute providing that employee shall not be held to have assumed risks of his employment where injury is caused by negligence of employer, employee was held not to have assumed risk of injury from cranking employer's truck where he relied on employer's promise to have truck repaired.—Mississippi Utilities Co. v. Smith, 145 So. 896, 166 Miss. 105.

Fact that danger was obvious did not of itself bar recovery for negligence of the employer if the employee relied on the promise.—Holeman v. Pensacola Shipbuilding Co., 134 S.E. 647, 192 N.C. 236.

23. Minn.—Gibson v. Minneapolis, St. P. & S. S. M. R. Co., 56 N.W. 686, 55 Minn. 177, 43 Am.S.R. 482.

24. Kan.—Lupher v. Atchison, T. & S. F. R. Co., 122 P. 106, 86 Kan. 712, Ann.Cas.1913C 498, reheard 127 P. 541, 88 Kan. 203.

25. U.S.—Barber Asphalt Paving Co. v. Austin, Iowa, 186 F. 443, 108 C.C.A. 365.

26. Ark.—A. L. Clark Lumber Co. v. Johns, 135 S.W. 892, 98 Ark. 211.
39 C.J. p 788 note 43.

The theory generally advanced in support of the rule is that the assumption of risk has been set aside for a reasonable period by a new contractual relationship arising out of the promise by the employer and compliance by the employee with the direction to go on working.—Cheek v. Eyth, 89 P.2d 11, 149 Kan. 586—39 C.J. p 788 note 43 [a].

27. Ark.—Roach v. Haynes, 72 S. W.2d 532, 189 Ark. 399—St. Louis, I. M. & S. R. Co. v. Holman, 120 S.W. 146, 90 Ark. 555.
39 C.J. p 788 note 44.

Employer waives defense by his promise.
Ark.—Trinity Farm Const. Co. v. Brannam, 82 S.W. 523, 190 Ark. 1032.
Or.—Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 136 Or. 18, certiorari denied Oregon-Washing-

glaringly obvious that no prudent man would undertake it even under the direction and promise of the employer.[28]

Even though a promise to repair is made by the master, the servant is still bound to exercise such care as a man of ordinary prudence, caution, and skill would exercise if placed in a similar position,[29] at least in the absence of an order by the employer to the employee to continue work.[30]

It has been said that the word "defect," as applied to a master's liability for injuries to a servant resulting from failure to remedy a defect on complaint by the servant, means any condition inconsistent with ordinary care,[31] and it has further been held that a master's promise to make additions or changes in a place of work or in a machine required by the accepted standards of prudence will be as efficacious to repel assumption of risk as a promise to repair.[32] Where the defect promised to be remedied was not the cause of the accident, and the fulfillment of his promise would not have prevented it, the master is not liable.[33]

The general rule applies whether the complaint is based on defects and dangerous conditions in the place of work[34] or ways[35] or in the tools, machinery, appliances, or instrumentalities for work,[36] on the insufficiency of the force for work,[37] on the failure to provide adequate regulations for carrying on the work,[38] or on the incompetency[39] or unfitness by reason of negligence[40] of a coemployee, or on the want of fitness of the appliances furnished for the work.[41]

b. Limitations and Exceptions to Rule

The rule under which a promise by the master to remove a defect or danger relieves the employee from the assumption of risks has been held not to apply where no increased danger from continued use of defective appliances is contemplated by either the master or the servant, where the defect relates to matters as to which the master is not obligated to act in the first instance, where the defective tool is a simple one, or where the danger is obvious and imminent.

It is not in all cases that the servant may relieve himself from the assumption of risk incident to defects and dangers of which he has full knowledge by exacting from the master a promise to repair.[42] The general rule has been held inapplicable where neither the master nor the servant contemplates any increased danger to the latter from the continued use of the defective appliance;[43] and, where the promise is to repair after the completion of the work on hand, the servant assumes the risk of injury until such time by continuing at work.[44]

ton R. & Nav. Co. v. Bevin, 52 S. Ct. 21, 284 U.S. 639, 76 L.Ed. 543.
39 C.J. p 788 note 44 [a].

Employer impliedly agrees to assume burden of risks incident to use of tools he promises to repair or replace.—Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 136 Or. 18, certiorari denied Oregon-Washington R. & Nav. Co. v. Bevin, 52 S.Ct. 21, 284 U.S. 639, 76 L.Ed. 543.

28. Ark.—Mama Coal Co. v. Dodson, 217 S.W. 475, 141 Ark. 438.
Cal.—La Fleur v. M. A. Burns Lumber Co., 176 P. 58, 38 Cal.App. 279.

29. Ark.—Trinity Farm Const. Co. v. Brannam, 82 S.W.2d 523, 190 Ark. 1032.
Ga.—Moses v. Johnson, 22 S.E.2d 328, 68 Ga.App. 131—Elliott v. Tifton Mill & Gin Co., 77 S.E. 667, 12 Ga. App. 498.
39 C.J. p 788 note 48.

30. Ga.—Moses v. Johnson, 22 S.E. 2d 328, 68 Ga.App. 131.

31. Kan.—Sappenfield v. National Zinc Co., 145 P. 862, 94 Kan. 22.

32. Mo.—**Corpus Juris cited in** Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 444, 336 Mo. 228.
Tex.—Lawson v. Hutcherson, Civ. App., 138 S.W.2d 131, error dismissed, judgment correct.
39 C.J. p 788 note 46.

33. Ark.—Trinity Farm Const. Co. v. Brannam, 82 S.W.2d 523, 190 Ark. 1032.
Wis.—Olson v. Doherty Lumber Co., 78 N.W. 572, 102 Wis. 264.

34. Ark.—Reader R. R. v. Sanders, 90 S.W.2d 762, 192 Ark. 28.
Conn.—Rescigno v. Rosner, 198 A. 751, 124 Conn. 253.
Tex.—Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, error dismissed, judgment correct.
39 C.J. p 788 note 51.

35. Wis.—Nelson v. Shaw, 78 N.W. 417, 102 Wis. 274.

36. Ark.—Faulkner v. Big Rock Stone & Material Co., 143 S.W.2d 883, 201 Ark. 124—Sims Oil Co. v. Durham, 21 S.W.2d 861, 180 Ark. 366.
Ill.—Cash v. Cleveland, C., C. & St. L. Ry. Co., 244 Ill.App. 1.
Mo.—Kepner v. Cleveland, C. C. & St. L. Ry. Co., 15 S.W.2d 825, 322 Mo. 299, certiorari denied Cleveland, C. C. & St. L. Ry. Co. v. Kepner, 50 S.Ct. 24, 280 U.S. 564, 74 L.Ed. 618—Russell v. Missouri Pac. R. Co., 295 S.W. 102, 316 Mo. 1303, certiorari denied Missouri Pac. R. Co. v. Russell, 48 S.Ct. 114, 275 U.S. 551, 72 L.Ed. 421.
N.H.—Nason v. Lord-Merrow Excelsior Co., 29 A.2d 464, 92 N.H. 251.
Okl.—Chicago, R. I. & P. Ry. Co. v. Murphy, 86 P.2d 629, 184 Okl. 240.
Tenn.—Sternberg v. Lanier, 3 Tenn. App. 383.
Tex.—City of Waco v. Thralls, Civ. App., 172 S.W.2d 142, error refused —Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, error dismissed, judgment correct.
Va.—Aronovitch v. Ayres, 193 S.E. 524, 169 Va. 308.
39 C.J. p 789 note 53.

37. Ill.—North Chicago, St. R. Co. v. Aufmann, 77 N.E. 1120, 221 Ill. 614, 112 Am.S.R. 207.

38. Ark.—St. Louis, A. & T. R. Co. v. Triplett, 15 S.W. 831, 54 Ark. 289, 11 L.R.A. 773, reheard 16 S.W. 266, 54 Ark. 289, 11 L.R.A. 773.

39. Wis.—Williams v. Kimberly & Clark Co., 111 N.W. 481, 131 Wis. 303, 120 Am.S.R. 1049, 10 L.R.A., N.S., 1043, 11 Ann.Cas. 622.
39 C.J. p 547 note 76.

40. Kan.—Delmore v. Kansas City Hardwood Flooring Co., 133 P. 151, 90 Kan. 29, 47 L.R.A.,N.S., 1220.
39 C.J. p 547 note 77.

41. Kan.—Sappenfield v. National Zinc Co., 145 P. 862, 94 Kan. 22.

42. Ill.—Gunning System v. Lapointe, 72 N.E. 393, 212 Ill. 274.

43. Ill.—Bowen v. Chicago & Northwestern R. Co., 117 Ill.App. 9—Tesmer v. Boehm, 58 Ill.App. 609.

44. Ind.—McFarlan Carriage Co. v.

The rule is likewise inapplicable to impose liability on the master where the promise relates to matters as to which the master is not obligated to act[45] unless a new contract of service, modifying the original contract, has been affected by which the employer agrees to remedy the defect;[46] nor does the rule apply where machinery or appliances are not in fact defective, as such a promise is without consideration and does not give rise to any duty not recognized by law,[47] or where the promise is not to repair a defect, but to substitute a safer appliance in the place of one which is not defective.[48] It has also been held that the promise creates liability only as to those risks which are created by the master's negligence and of which the servant has no knowledge, and it does not create liability as to risks inherently pertaining to the work and which remain after the master has fully performed his duty.[49]

A promise to remedy a defect has been held to relieve the servant from assumption of the risk only while engaged within the scope of the employment with reference to which the promise was made; if he undertakes other duties, under special order of the foreman, and with knowledge of the danger, he assumes the risk.[50]

Simple tools or appliances. There is a conflict of authority as to whether the rule applies to a promise to remedy defects in simple tools and appliances.[51] Some decisions have drawn a distinction between complex and simple tools and have held that the rule does not apply where the defective tools are ordinary or common tools or appliances with which the employee is entirely familiar and where he has as good or a better opportunity as the employer to know their condition.[52] Other decisions, however, have made no such distinction, and have applied the rule to simple as well as to complex tools.[53]

Imminence of danger. Notwithstanding the promise of the master, where the danger is so obvious and imminent that no prudent person would undertake to perform the service, the servant is not justified in continuing in the performance of his services and assumes the risk of any injury which he may sustain.[54]

c. Form and Sufficiency of Notice or Complaint

In order for a servant to be relieved from the assumption of risk arising from known defects by a complaint and a promise to remove such defects, the complaint must have been made to the master or to someone charged with the duty of remedying defects, and the servant must have made it known to the master that he was unwilling to continue with his work unless the defects were repaired.

Although it is necessary that a servant on discovering defects should intend to quit work unless the defects are remedied in order to relieve himself of the assumption of risk,[55] if by any act or expression the servant makes known to the master or one duly authorized to represent him the fact that he is unwilling to continue in the employment unless defects are repaired this will be sufficient;[56] there need be no formal statement that he apprehends danger to himself from the defects and that

Potter, 52 N.E. 209, 153 Ind. 107—Standard Oil Co. v. Helmick, 47 N. E. 14, 148 Ind. 457.

45. Mass.—Beggelman v. Romanow, 192 N.E. 159, 288 Mass. 14.
Mo.—Lutgen v. Missouri Pac. R. Co., App., 294 S.W. 444.

Promise to provide more help does not impose liability on the master for a rupture to the employee, where there was no negligence in the first place proximately causing the injury.—Lutgen v. Missouri Pac. R. Co., supra.

46. Mass.—Beggelman v. Romanow, 192 N.E. 159, 288 Mass. 14.

47. Mo.—Coin v. John H. Talge Lounge Co., 121 S.W. 1, 222 Mo. 488, 510, 25 L.R.A.,N.S., 1179, 17 Ann.Cas. 888.
39 C.J. p 789 note 63.

48. Miss.—Jones v. Yazoo & M. V. R. Co., 43 So. 813, 90 Miss. 547.

49. Mo.—Lutgen v. Missouri Pac. R. Co., App., 294 S.W. 444.

50. Tex.—Hillje v. Hettich, 67 S.W. 90, 95 Tex. 321.

Risks outside scope of employment generally see infra §§ 407–409.

51. Kan.—Check v. Eyth, 89 P.2d 11, 149 Kan. 586.

52. Ind.—Pennsylvania R. Co. v. Martin, 170 N.E. 554, 93 Ind.App. 258.
Ky.—York v. Rockcastle River Ry. Co., 284 S.W. 79, 215 Ky. 11—Turkey Foot Lumber Co. v. Wilson, 206 S.W. 14, 182 Ky. 42.
39 C.J. p 790 note 69.

Held simple tools or appliances

(1) Reins.—Woodman v. Stahl, 162 N.E. 705, 28 Ohio App. 464.

(2) Other tools or appliances see 39 C.J. p 790 note 69.

53. Cal.—Hoogbruin v. Atchison, T. & S. F. Ry. Co., 2 P.2d 992, 213 Cal. 582.
Kan.—Cheek v. Eyth, 89 P.2d 11, 149 Kan. 586.
Okl.—St. Louis & S. F. Ry. Co. v. Lears, 49 P.2d 489, 173 Okl. 483—Missouri-Kansas-Texas R. Co. v. Highfill, 293 P. 182, 146 Okl. 84, certiorari denied 51 S.Ct. 483, 283 U.S. 834, 75 L.Ed. 1446.
Or.—Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 136 Or. 18, certiorari denied Oregon-Washington R. & Nav. Co. v. Bevin, 52 S. Ct. 21, 284 U.S. 639, 76 L.Ed. 543.
39 C.J. p 790 note 68.

54. Ark.—Sims Oil Co. v. Durham, 21 S.W.2d 861, 180 Ark. 366.
Cal.—**Corpus Juris cited in** Hoogbruin v. Atchison, T. & S. F. Ry. Co., 2 P.2d 992, 996, 213 Cal. 582.
N.C.—Hubbard v. Southern Ry. Co., 166 S.E. 802, 203 N.C. 675.
Tex.—**Corpus Juris quoted in** Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, 1084, error dismissed, judgment correct.
39 C.J. p 790 note 70.

55. Ark.—Togo Gin Co. v. Hite, 79 S.W.2d 262, 190 Ark. 454.
Ill.—Morden Frog & Crossing Works v. Fries, 81 N.E. 862, 228 Ill. 246, 119 Am.S.R. 428.

56. Wash.—Johnson v. North Coast Stevedoring Co., 186 P. 663, 109 Wash. 236.
39 C.J. p 791 notes 73–75.

he will leave unless they are remedied;[57] but this at least is necessary.[58] Where the servant does not make the report in apprehension of any danger to himself, he assumes the risk.[59]

To whom made. In order to be sufficient, a complaint must be made to the master or his vice principal, or to some one charged with the duty of remedying defects, and not to a fellow servant.[60] The notice may be effectively given to one whom the employee has reasonable grounds to believe has authority to receive it.[61]

d. Form and Sufficiency of Promise

The promise to remedy defects must be definite and certain, and made with a view to inducing the servant to continue work.

The promise which it is necessary for the master to make with respect to remedying the defects or removing the danger complained of,[62] in order to be sufficient, must be definite and certain,[63] and must be made with a view to the servant's safety and as an inducement to him to continue work.[64] If it is for the purpose only of making the work less difficult to the employee, or more profitable to him, or of enabling him to do more work or better work, it would not have the effect of relieving the employee of an assumed risk.[65] The promise may, however, be implied as well as express,[66] general as well as individual;[67] it is not necessary that a definite time for making the repairs should be fixed, as a reasonable time will be implied, in the absence of an express agreement.[68]

A servant may not rely on a promise to repair made to a fellow servant unless he is informed of it,[69] and a promise to repair a certain defect will not relieve the servant from assuming the risk of injury from other defects which he knew were dangerous if he continues to work with such knowledge.[70]

Second promise. A servant has the same right to rely on a second promise to repair as he had a right to rely on the first.[71]

By whom made. The promise, in order to relieve the servant from the assumption of risk, must be generally made by the master or one authoritatively standing in his place.[72] A promise of a vice principal or duly authorized representative of the mas-

57. Mo.—Thorpe v. Missouri Pac. R. Co., 2 S.W. 3, 89 Mo. 650, 58 Am. R. 120.
39 C.J. p 791 note 73.
Express complaint of danger
Employee complaining of defective tool need not assert expressly that he makes complaint because of danger to himself; fact that he complains is sufficient, unless circumstances justify employer in believing that element of danger is waived.—St. Louis & S. F. Ry. Co. v. Sears, 49 P.2d 489, 173 Okl. 483.

58. Ark.—Togo Gin Co. v. Hite, 79 S.W.2d 262, 190 Ark. 454.
39 C.J. p 791 note 74.

59. Ark.—Missouri Pac. R. Co. v. Bryant, 128 S.W.2d 268, 198 Ark. 193—Togo Gin Co. v. Hite, 79 S. W.2d 262, 190 Ark. 454.
Ill.—O'Hare v. Commonwealth Steel Co., 173 Ill.App. 192.

60. Ky.—Consolidation Coal Co. v. Hamilton, 186 S.W. 197, 170 Ky. 393.
39 C.J. p 791 note 76.
Notice to superintendent who had authority to receive such notice was as effectual as though made to employer himself.—Roach v. Haynes, 72 S.W.2d 532, 189 Ark. 399.

61. **Corporate officer in charge of business**
N.H.—Nason v. Lord-Merrow Excelsior Co., 29 A.2d 464, 92 N.H. 251.

62. Ark.—Missouri Pac. R. Co. v. Bryant, 128 S.W.2d 268, 198 Ark. 193—Togo Gin Co. v. Hite, 79 S. W.2d 262, 190 Ark. 454.
39 C.J. p 791 note 77.

63. Ky.—Consolidation Coal Co. v. Hamilton, 186 S.W. 197, 199, 170 Ky. 393.
39 C.J. p 791 note 78.

64. Ark.—Missouri Pac. R. Co. v. Bryant, 128 S.W.2d 268, 198 Ark. 193.
39 C.J. p 792 note 79.
Subsequent work
If foreman's promise of additional help on remaining timbers induced employee to continue in the employment and in that particular work, he did not assume risk incident thereto, although promise was of no benefit in removing particular timber on which employee was working at time of injury.—Pearl River Valley R. Co. v. Moody, 171 So. 769, 178 Miss. 1.

65. Ark.—Missouri Pac. R. Co. v. Bryant, 128 S.W.2d 268, 198 Ark. 193—Togo Gin Co. v. Hite, 79 S. W.2d 262, 190 Ark. 454.
Ill.—Althardt v. Consolidated Coal Co., 155 Ill.App. 364.

66. N.H.—Coughlin v. Arms Textile Co., 46 A.2d 130, 132, 94 N.H. 57.
39 C.J. p 792 note 81.
"It is sufficient if the servant may reasonably infer that the matter will be attended to."—Coughlin v. Arms Textile Co., supra.

67. Ky.—Consolidation Coal Co. v. Hamilton, 186 S.W. 197, 170 Ky. 393.
39 C.J. p 792 note 82.
Promise to see what could be done
Statement after complaint by employees that a fellow servant had been throwing bobbins around the room, that he would see what could be done, was a sufficient promise to relieve employee of implied assumption of risk by remaining at work, notwithstanding the words promised nothing more than an investigation, since the words were uttered for purpose of satisfying the complaints and would be construed against the speaker as being an undertaking to do whatever investigation showed to be necessary to correct the danger.—Coughlin v. Arms Textile Co., 46 A. 2d 130, 94 N.H. 57.

68. U.S.—Burch v. Southern Pac. Co., C.C.Nev., 140 F. 270.

69. Ark.—Chicago Mill & Lumber Co. v. Wells, 142 S.W. 1131, 101 Ark. 537, 542.
39 C.J. p 792 note 84.

70. Ark.—Chicago Mill & Lumber Co. v. Wells, supra—Nashville Lumber Co. v. Thornton, 142 S.W. 152, 101 Ark. 283.

71. Ill.—Czajkowski v. Robinson, 124 Ill.App. 97.

72. N.Y.—Yaconi v. Brady & Gioe, 158 N.E. 876, 246 N.Y. 300, certiorari denied 48 S.Ct. 421, 276 U. S. 636, 72 L.Ed. 744.
39 C.J. p 792 note 87.
Promise by wife of master
Where domestic servant had complained of defect to her mistress, and the mistress promised to tell her husband and have him remove the

ter is as binding as the promise of the master himself.[73] Where the person who made the promise had apparent authority to do so, and the injured servant believed with good reason that he had such authority, the master will be bound by the promise.[74]

e. Necessity for Reliance on Promise

In order that a servant may be relieved from the operation of the doctrine of assumed risk from a defect complained of and the danger of which he was no longer willing to incur, it is essential that his remaining in the employment was induced by the promise of the master to remedy the defect.

Except as otherwise provided by statute,[75] in order that a servant may be relieved from the operation of the doctrine of assumed risk from a defect complained of and the danger of which he was no longer willing to incur, it is essential that his remaining in the employment was induced by the promise of the master to remedy the defect, when he would not otherwise have done so.[76] If for any other reason the servant continues in the employment the master is not liable for the injuries sustained in so doing,[77] because the promise would have no effect to create a new relation.[78]

f. Duration of Continuance in Employment

Where no time is fixed by the promise to make repairs, the servant may continue working for a reasonable time only if he is to be relieved of the assumption of risk. Ordinarily, where the master fixes a definite time within which a defect will be repaired, the servant may continue working for such time, but no longer, if he is to be relieved of the assumption of risk.

Where no definite time is fixed for making repairs the law implies a reasonable time, during which time the employee does not assume the risk.[79] If, however, the servant remains in the service longer than a reasonable time after the master's promise to repair the defect he will be held to have assumed the risk.[80] In some cases it has been held that what is a reasonable time is to be determined by the time which might reasonably be required by the master in which to make the repairs,[81] while in others it is held that the servant is entitled to remain for any period which will not preclude the reasonable expectation that the promise will be kept.[82]

Where the master fixes a definite time within which the repair is to be made, the servant may wait until the expiration of the time named.[83] Or-

defect, but there was no showing that the promise was brought home to the husband, he was not liable to servant for injuries thereafter sustained.—Liptak v. Karsner, 293 N.W. 612, 208 Minn. 168.

73. Va.—Aronovitch v. Ayres, 193 S.E. 524, 169 Va. 308.
39 C.J. p 792 note 88.

74. U.S.—Dells Lumber Co. v. Erickson, Wis., 80 F. 257, 25 C.C.A. 397.
N.H.—Nason v. Lord-Merrow Excelsior Co., 29 A.2d 464, 92 N.H. 251.

75. Mass.—Beggelman v. Romanow, 192 N.E. 159, 288 Mass. 14.
39 C.J. p 793 note 90.

76. Ark.—Missouri Pac. R. Co. v. Bryant, 128 S.W.2d 268, 198 Ark. 193—Togo Gin Co. v. Hite, 79 S.W.2d 262, 190 Ark. 454.
Mass.—Beggelman v. Romanow, 192 N.E. 159, 288 Mass. 14.
N.H.—Coughlin v. Arms Textile Co., 46 A.2d 130, 94 N.H. 57—Nason v. Lord-Merrow Excelsior Co., 29 A.2d 464, 92 N.H. 251.
Or.—Hoffman v. Broadway Hazelwood, 10 P.2d 349, 139 Or. 519, 83 A.L.R. 1008, rehearing denied 11 P.2d 814, 139 Or. 519, 83 A.L.R. 1008—Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 136 Or. 18, certiorari denied Oregon-Washington R. & Nav. Co. v. Bevin, 52 S.Ct. 21, 284 U.S. 639, 76 L.Ed. 543.
Tex.—Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, error dismissed, judgment correct.
39 C.J. p 793 note 91.

77. Wis.—Showalter v. Fairbanks, 60 N.W. 257, 88 Wis. 376.
39 C.J. p 793 note 92.

78. Ill.—Morden Frog & Crossing Works v. Fries, 81 N.E. 862, 228 Ill. 246, 119 Am.S.R. 428.

79. Ark.—Faulkner v. Big Rock Stone & Material Co., 143 S.W.2d 883, 201 Ark. 124—Roach v. Haynes, 72 S.W.2d 532, 189 Ark. 399—Sims Oil Co. v. Durham, 21 S.W.2d 861, 180 Ark. 366.
Kan.—Cheek v. Eyth, 89 P.2d 11, 149 Kan. 586.
Mass.—Beggelman v. Romanow, 192 N.E. 159, 288 Mass. 14.
Minn.—Liptak v. Karsner, 293 N.W. 612, 208 Minn. 168.
Mo.—Kepner v. Cleveland, C., C. & St. L. Ry. Co., 15 S.W.2d 825, 322 Mo. 299, certiorari denied Cleveland, C., C. & St. L. Ry. Co. v. Kepner, 50 S.Ct. 24, 280 U.S. 564, 74 L.Ed. 618.
N.H.—Nason v. Lord-Merrow Excelsior Co., 29 A.2d 464, 92 N.H. 251.
N.C.—Ethridge v. Atlantic Coast Line R. Co., 183 S.E. 539, 209 N.C. 326.
Okl.—Chicago, R. I. & P. Ry. Co. v. Murphy, 86 P.2d 629, 184 Okl. 240.
Or.—Hoffman v. Broadway Hazelwood, 10 P.2d 349, 139 Or. 519, 83 A.L.R. 1008, rehearing denied 11 P.2d 814, 139 Or. 519, 83 A.L.R. 1008—**Corpus Juris cited in** Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 208, 136 Or. 18, certiorari denied Oregon-Washington R. & Nav. Co. v. Bevin, 52 S.Ct. 21, 284 U.S. 639, 76 L.Ed. 543.

Time held reasonable
Ky.—Plowman Constr. Co. v. Garrison, 163 S.W. 486, 157 Ky. 462, 466.
39 C.J. p 794 note 97.

Time held unreasonable
(1) In general.—Toye v. United Dressed Beef Co., 125 N.Y.S. 1061, 141 App.Div. 332—39 C.J. p 794 note 98.
(2) One month.—Cheney v. Olender, 5 N.W.2d 692, 303 Mich. 129.

80. Ark.—Faulkner v. Big Rock Stone & Material Co., 143 S.W.2d 883, 201 Ark. 124—Sinclair Refining Co. v. Duff, 88 S.W.2d 322, 191 Ark. 888.
Or.—**Corpus Juris cited in** Bevin v. Oregon-Washington R. & N. Co., 298 P. 204, 208, 136 Or. 18.
Tex.—**Corpus Juris quoted in** Crews v. Texas & P. Ry. Co., Civ.App., 149 S.W.2d 1079, 1084, error dismissed, judgment correct.
39 C.J. p 793 note 94.

81. U.S.—Detroit Crude-Oil Co. v. Grable, Ohio, 94 F. 73, 36 C.C.A. 94.
39 C.J. p 794 note 95.

82. Ark.—Sims Oil Co. v. Durham, 21 S.W.2d 861, 180 Ark. 366.
N.C.—Ethridge v. Atlantic Coast Line R. Co., 183 S.E. 539, 209 N.C. 326.
39 C.J. p 794 note 96.

83. Ark.—Louis B. Siegel & Co. v. Moore, 161 S.W.2d 387, 204 Ark. 50.
Miss.—Pearl River Valley R. Co. v. Moody, 171 So. 769, 178 Miss. 1.
N.C.—Ethridge v. Atlantic Coast

dinarily, if he continues in the employment after the expiration of the time fixed without repairs being made, he assumes the risk,[84] since he can no longer be considered as relying on the promise.[85] There are decisions however, which recognize that under certain circumstances the "fixed time" may imply some grace beyond the day named.[86] The time specified for making repairs cannot be said to have expired, even though the hour fixed for making the repairs had passed where the injury occurred on the servant's use of the appliances after the time for repairs had expired, and before the servant could have known that the repairs had not been made.[87]

§ 397. Continuance in Employment in Consideration of Increase in Wages

If a servant continues working in consideration of an increase of wages, he assumes the risk of danger from known defects, notwithstanding a prior promise to remedy the defects.

Where a servant with knowledge of the danger arising from the use of defective instrumentalities for doing the work continues in the service in consideration of an increase of wages, he assumes the risk resulting from the defects notwithstanding a prior promise to remedy such defects.[88]

5. Compliance with Commands or Threats

§ 398. Absence of Knowledge and Appreciation of Danger

As a general rule a servant does not assume the risks incident to the performance of his work where he acts in compliance with the commands or threats of the master, without knowledge of the dangers.

It is a rule of very general application that a servant who is acting under the commands or threats of his master does not assume the risk of injury incident to the act,[89] and it has been held that especially is this true where the order of the master is repeated in an urgent manner and the servant is not given an opportunity to reflect.[90] The rule, however, does not apply where the act involves a violation of law,[91] or where, as discussed infra § 401, the servant knows and ap-

Line R. Co., 183 S.E. 539, 209 N.C. 326.
Okl.—Chicago, R. I. & P. Ry. Co. v. Murphy, 86 P.2d 629, 181 Okl. 240.
Or. **Corpus Juris cited in** Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 201, 208, 136 Or. 18, certiorari denied Oregon-Washington R. & Nav. Co. v. Bevin, 52 S.Ct. 21, 284 U.S. 639, 76 L.Ed. 543.
39 C.J. p 794 note 99.

Conditional promise

Where employer, instead of promising immediately to remedy defect in tool furnished employee, promises to do so on happening of certain event in future, employer assumes risk pending fulfillment of promise.—St. Louis & S. F. Ry. Co. v. Sears, 49 P.2d 489, 173 Okl. 483.

84. Or. **Corpus Juris cited in** Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 208, 136 Or. 18, certiorari denied Oregon-Washington R. & Nav. Co. v. Bevin, 52 S.Ct. 21, 284 U.S. 639, 76 L.Ed. 543.
39 C.J. p 794 note 1.

85. Wis.—Ferriss v. Berlin Mach. Works, 63 N.W. 234, 90 Wis. 541.

86. Ill.—Chicago, Rock Island & Pacific R. Co. v. Clark, 134 Ill.App. 161, affirmed 83 N.E. 286, 231 Ill. 548—Illinois Cent. R. Co. v. Creighton, 63 Ill.App. 165.

87. Ark.—St. Louis, I. M. & S. R. Co. v. Swaim, 150 S.W. 861, 105 Ark. 224.

88. Ala.—Southern Cotton Oil Co. v. Walker, 51 So. 169, 164 Ala. 33.

89. U.S.—Ramsouer v. Midland Valley R. Co., C.C.A.Ark., 135 F.2d 101—Chicago, M. St. P. & P. R. Co. v. Busby, C.C.A.Mont., 41 F.2d 617—Albright v. Pennsylvania R. Co., D.C.Pa., 16 F.Supp. 281.
Ark.—Missouri Pac. R. Co. v. Brown, 115 S.W.2d 1083, 195 Ark. 1060—McEachin & McEachin Const. Co. v. Burks, 75 S.W.2d 794, 189 Ark. 947—Standard Pipe Line Co. v. Gwaltney, 53 S.W.2d 597, 186 Ark. 230.
Cal.—Paulsen v. McDuffie, 47 P.2d 709, 4 Cal.2d 111.
Ga.—Louisville & N. R. Co. v. Crapps, 8 S.E.2d 413, 62 Ga.App. 437—Simowitz v. Register, 3 S.E.2d 231, 60 Ga.App. 180.
Ind.—Chicago, I. & L. Ry. Co. v. Younger, 175 N.E. 290, 93 Ind.App. 276.
Kan.—Rush v. Brown, 109 P.2d 84, 153 Kan. 59.
Ky.—**Corpus Juris cited in** Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 751, 274 Ky. 410.
Miss.—Hercules Powder Co. v. Tyrone, 124 So. 71, 155 Miss. 75, suggestion of error overruled 124 So. 475, 155 Miss. 75.
N.C.—Young v. E. A. Wood & Co., 146 S.E. 70, 196 N.C. 435.
39 C.J. p 794 note 7, p 771 note 84.

Risks incurred under coercion are not assumed.—Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 274 Ky. 410.

Coercion of legal penalty

Employee does not assume risk of employment where employee acts under coercion of legal penalties.—Hice v. Dobson Lumber Co., 185 S.E. 742, 180 S.C. 259—Scott v. International Agr. Corporation, 184 S.E. 133, 180 S.C. 1.

Statutory exception inapplicable

The provision of a statute absolving a servant from the assumption of risks in cases of negligence by the employer which excepts from its operation conductors and engineers voluntarily operating unsafe cars has been held to be inapplicable in a case where an engineer was directed against his own judgment to clean a locomotive with a defective hose, it being considered in such case that the engineer was not voluntarily operating the engine.—Hercules Powder Co. v. Tyrone, 124 So. 74, 155 Miss. 75, suggestion of error overruled 124 So. 475, 155 Miss. 75.

90. Ark.—National Refining Co. v. Wreyford, 74 S.W.2d 633, 189 Ark. 598.
Ky.—Wallis v. Illinois Cent. R. Co., 124 S.W.2d 481, 276 Ky. 436—Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 274 Ky. 410.
Miss.—Gow Co. v. Hunter, 168 So. 264, 175 Miss. 896.
Mo.—Bennett v. Crystal Carbonate Lime Co., 124 S.W. 608, 146 Mo. App. 565.

91. Ga.—Louisville & N. R. Co. v. Crapps, 8 S.E.2d 413, 62 Ga.App. 437—Central of Georgia Ry. Co. v.

preciates the danger, or where the danger is so obvious and imminent that no person of ordinary prudence would be willing to encounter it even under orders or threats from one having authority over him. The fact that the servant was in immediate charge of the work will not constitute an assumption of risk where his charge was subject to the direction of his superior.[92] The negligence of the master who directs the servant to do work need not be gross in order to authorize a recovery by the servant on the theory of nonassumption of risk.[93] On the other hand, it has been held that the fact that the servant acts under the master's direct orders is insufficient to excuse the servant from making a choice and assuming the risk if he continues to work,[94] but that if there is also an emergency which in a practical way shuts out the opportunity of choice the risk is not voluntarily incurred, at least if the emergency is due to the master's fault.[95]

Where, by virtue of statute or otherwise, an employee does not assume risks arising from the negligence of the employer, an employee does not assume the risk of injury from complying with a negligent order or command,[96] even though the employee may be as competent as the employer to judge the safety of doing the work as required.[97]

An exception to the general rule is recognized where the servant, although acting in obedience to a command of the master, selects his own method of doing the work.[98] However, the rule under which a servant is said to assume the risk of injury where he knowingly selects the more hazardous method of doing the work, as discussed supra § 390, has been held not to apply where the servant received specific directions from the master to employ the unsafe method.[99] Accordingly, if the servant is directed by his employer to perform his duties in the dangerous way, the master becomes liable for injuries due to any extraordinary or unusual dangers unknown to the servant.[1]

The general rule has been applied in respect of dangerous methods of work,[2] places for work,[3] passways,[4] and tools, machinery, and appliances;[5] and also in respect of a failure to enforce rules for the safety of the servant.[6]

Basis of rule. Ordinarily it is the duty of the servant to obey the commands of the master[7] unless

Lindsey, 110 S.E. 636, 28 Ga.App. 198.

92. U.S.—Cincinnati, N. O. & T. P. R. Co. v. McGuffey, Tenn., 252 F. 25, 164 C.C.A. 137.

93. Ky.—North East Coal Co. v. Hunley, 174 S.W. 732, 163 Ky. 817.

94. N.H.—Clairmont v. Cilley, 153 A. 465, 85 N.H. 1.

95. N.H.—Clairmont v. Cilley, supra.

Risk is not "assumed" or "voluntarily incurred," unless reasonable time for exercise of right to leave service is given, where servant acts in emergency, caused by master's fault, under master's orders immediately preceding.—Clairmont v. Cilley, supra.

Effect of contract

Although contract of service calls for action in emergency, servant, acting under master's direct orders, does not lose right to know danger of particular emergency caused by master's negligence.—Clairmont v. Cilley, supra.

96. Miss.—Goodyear Yellow Pine Co. v. Mitchell, 149 So. 792, 168 Miss. 152, suggestion of error overruled 150 So. 810, 168 Miss. 152.

Mo.—Macklin v. Fogel Const. Co., 31 S.W.2d 14, 326 Mo. 38—Vaccaro v. City of St. Louis, App., 123 S.W.2d 230.

Assumption of risks arising from the employer's negligence generally see supra §§ 362–370.

Defective equipment

Employee was held not to assume risk incident to operation of defective equipment if employer was negligent in requiring its use.—Aponaug Mfg. Co. v. Carroll, 184 So. 63, 183 Miss. 793.

Method of work

The servant does not assume the risk of injury from complying with a negligent order regarding the method of doing the work.

Miss.—Jefferson v. Virginia-Carolina Chemical Co., 185 So. 230, 184 Miss. 23.

Mo.—Vaccaro v. City of St. Louis, App., 123 S.W.2d 230.

97. Miss.—J. J. Newman Lumber Co. v. Cameron, 174 So. 571, 179 Miss. 217.

98. Ill.—Beard v. Baltimore & O. R. Co., 243 Ill.App. 537.

Ky.—Chesapeake & O. Ry. Co. v. Vanhoose, 270 S.W. 740, 208 Ky. 117.

N.Y.—O'Sullivan v. Flynn, 73 N.Y.S. 1108, 67 App.Div. 516.

Absence of care

An automobile mechanic whom bus driver requested in the dark to assist in finding defect in wiring system of bus, exposed himself to ordinary risk of his employment, so that bus company was not liable for injuries sustained when mechanic ran his hand along underside of bus and came in contact with moving mechanism, notwithstanding bus driver may have ordered mechanic so to use his hands.—Hulsey v. Southeastern Greyhound Lines, 20 S.E.2d 449, 67 Ga.App. 401.

99. Ky.—Louisville Water Co. v. Darnell, 225 S.W. 1057, 189 Ky. 771.

1. W.Va.—Mott v. Davis, 111 S.E. 603, 90 W.Va. 613.

2. Ky.—Wallis v. Illinois Cent. R. Co., 124 S.W.2d 481, 276 Ky. 436.

39 C.J. p 796 note 16.

3. N.C.—Young v. E. A. Wood & Co., 146 S.E. 70, 196 N.C. 435.

39 C.J. p 796 note 17.

4. Mo.—Glidewell v. Quincy, O. & K. C. R. Co., 236 S.W. 677, 208 Mo. App. 372.

39 C.J. p 797 note 18.

5. Ark.—Arkansas Quicksilver Co. v. McGhee, 63 S.W.2d 280, 187 Ark. 883.

Ind.—Chicago, I. & L. Ry. Co. v. Younger, 175 N.E. 290, 93 Ind.App. 276.

39 C.J. p 797 note 19.

6. Iowa.—Russell v. Chicago, R. I. & P. R. Co., 141 N.W. 1077, 160 Iowa 503.

Ky.—McKee v. Cincinnati, F. & S. E. R. R. Co., 152 S.W. 759, 151 Ky. 698.

7. Ark.—Bradley Lumber Co. of Arkansas v. Clanton, 147 S.W.2d 14, 201 Ark. 657—Missouri Pac. R. Co. v. Brown, 115 S.W.2d 1083, 195 Ark. 1060—National Refining Co. v. Wreyford, 74 S.W.2d 633, 189 Ark. 598—Woodley Petroleum Co. v. Willis, 290 S.W. 953, 172 Ark. 671.

39 C.J. p 797 note 21.

the danger in obeying is so obvious that no person in the exercise of ordinary care would undertake to do so,[8] and he is not required to set up his own judgment against that of the master,[9] or look out for latent defects[10] and make an inspection of the place of work before obeying the master's commands.[11] Where the command is sudden or the situation gives little time for reflection or deliberation, the employee need not weigh the degree of danger and decide for himself whether it is safe for him to act.[12] The master's command or direction constitutes an implied assurance that the servant will not be exposed to unnecessary peril and that the work which he is directed to do may be done with reasonable safety.[13] Unless the danger is so obvious that no prudent man would incur it under like circumstances,[14] in the absence of knowledge to the contrary the servant is entitled to rely on the superior knowledge and judgment of the master[15] and on the assurance so given,[16] from which the law implies a new agreement to have been made whereby the master relieves the servant of his former assumption.[17]

§ 399. —— Remaining in Service after Notice or Complaint

A servant ordered to proceed after complaining to the master of a defect or danger of which he has knowledge does not assume the risk unless he fully appreciates the dangers, or unless the danger is so manifest that a prudent person would not incur it.

Where a servant has knowledge of a defect or danger, and calls the attention of the master to it, but is ordered to proceed with the work, he will not be held to have assumed the risk of so doing,[18] particularly where the master has promised to make repairs,[19] unless as discussed infra § 402, he is fully aware of the dangers to be incurred in obeying the master's order, or unless the danger is so manifest, obvious, and imminent that a person of ordinary prudence and caution would not incur it.

Domestic servant

In the absence of knowledge of a defective condition which would warrant a definite choice, a domestic servant is bound to use household appliance, furnished by her mistress, as she is directed to do.—Adlam v. Konvalinka, 50 N.E.2d 535, 291 N.Y. 40.

8. Ark.—Missouri Pac. R. Co. v. Brown, 115 S.W.2d 1083, 195 Ark. 1060.

9. Ky.—**Corpus Juris cited in** Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 751, 274 Ky. 410.

Or.—Bevin v. Oregon-Washington R. & Nav. Co., 298 P. 204, 136 Or. 18, certiorari denied Oregon-Washington R. & Nav. Co. v. Bevin, 52 S. Ct. 21, 284 U.S. 639, 76 L.Ed. 543.

39 C.J. p 797 note 22.

On reasonable difference of opinion as to danger, the text rule applies.—Cross v. Siddall, 193 S.E. 124, 184 S. C. 508—Stephens v. Southern Railway-Carolina Division, 64 S.E. 601, 82 S.C. 542.

10. S.C.—Brown v. Piedmont Mfg. Co., 86 S.E. 814, 102 S.C. 223.

Duty to inspect for latent defects generally see supra § 381.

11. Tex.—Gulf States Tel. Co. v. Evetts, Civ.App., 188 S.W. 289.

12. Ark.—Bradley Lumber Co. of Arkansas v. Clanton, 147 S.W.2d 14, 201 Ark. 657—National Refining Co. v. Wreyford, 74 S.W.2d 633, 189 Ark. 598.

13. Ark.—National Refining Co. v. Wreyford, supra—Woodley Petroleum Co. v. Willis, 290 S.W. 953, 172 Ark. 671.

Ky.—**Corpus Juris cited in** Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 751, 274 Ky. 410.

Mo.—Macklin v. Fogel Const. Co., 31 S.W.2d 14, 326 Mo. 38.

39 C.J. p 797 note 25.

14. Ark.—Missouri Pac. R. Co. v. Brown, 115 S.W.2d 1083, 195 Ark. 1060—Owosso Mfg. Co. v. Drenman, 31 S.W.2d 762, 182 Ark. 389.

Ind.—Chicago, I. & L. Ry. Co. v. Younger, 175 N.E. 290, 93 Ind.App. 276.

15. Ark.—Missouri Pac. R. Co. v. Brown, 115 S.W.2d 1083, 195 Ark. 1060—National Refining Co. v. Wreyford, 74 S.W.2d 633, 189 Ark. 598—Owosso Mfg. Co. v. Drennan, 31 S.W.2d 762, 182 Ark. 389—Woodley Petroleum Co. v. Willis, 290 S. W. 953, 172 Ark. 671.

Ind.—Chicago, I. & L. Ry. Co. v. Younger, 175 N.E. 290, 93 Ind.App. 276.

Ky.—**Corpus Juris cited in** Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 751, 274 Ky. 410.

Mo.—Crowell v. St. Louis Screw Co., 293 S.W. 521, 220 Mo.App. 728.

39 C.J. p 797 note 26, p 771 note 84.

On reasonable difference of opinion as to danger, the text rule applies.—Cross v. Siddall, 193 S.E. 124, 184 S. C. 508—Stephens v. Southern Railway-Carolina Division, 64 S.E. 601, 82 S.C. 542.

Reliance on superiors

(1) An employee ordinarily has a right to assume that he may safely act under the direction of a foreman or other superior, notwithstanding his own misgivings.

U.S.—Great Northern Ry. Co. v. Wojtala, C.C.A.Mont., 112 F.2d 609.

Mont.—Palmer v. Great Northern Ry. Co., 170 P.2d 768—Leonidas v. Great Northern Ry. Co., 72 P.2d 1007, 105 Mont. 302, affirmed 59 S. Ct. 51, 305 U.S. 1, 83 L.Ed. 3.

(2) He is not barred from recovering for injuries received in obeying such commands because he could justify disobedience of the order.—Palmer v. Great Northern R. Co., supra—Leonidas v. Great Northern Ry. Co., supra.

16. Mont.—Palmer v. Great Northern Ry. Co., 170 P.2d 768—Leonidas v. Great Northern Ry. Co., 72 P.2d 1007, 105 Mont. 302, affirmed 59 S. Ct. 51, 305 U.S. 1, 83 L.Ed. 3.

39 C.J. p 797 notes 26, 27.

17. Ga.—Central of Georgia R. Co. v. Lindsey, 110 S.E. 636, 28 Ga. App. 198.

39 C.J. p 797 note 28.

18. Cal.—Maurice v. State, 110 P. 2d 706, 43 Cal.App.2d 270.

Ill.—Chicago Anderson Pressed-Brick Co. v. Sobkowiok, 36 N.E. 572, 148 Ill. 573.

Kan.—Fangmeier v. Missouri Pac. R. Co., 236 P. 660, 118 Kan. 701.

N.C.—Cherry v. Atlantic Coast Line R. Co., 93 S.E. 783, 174 N.C. 263—Pigford v. Norfolk Southern R. Co., 75 S.E. 860, 160 N.C. 93, 44 L. R.A.,N.S., 865.

39 C.J. p 797 note 30.

19. Ark.—Louis B. Siegel & Co. v. Moore, 161 S.W.2d 387, 204 Ark. 50.

Okl.—Missouri-Kansas-Texas R. Co. v. Highfill, 293 P. 182, 146 Okl. 84, certiorari denied 51 S.Ct. 483, 283 U.S. 834, 75 L.Ed. 1446.

§ 400. —— Requisites and Sufficiency of Command

In order for a command or order to relieve a servant from the assumption of risk, it must be given by the master or an authorized representative, and be clear, unequivocal, and specific.

The general rule, discussed supra § 398, under which a servant is absolved from the assumption of risk if he acts in compliance with commands or threats of the master, applies as well when the command, order, or threat is given by a vice principal or other authorized agent as when it is given by the master;[20] but where the order is given by a fellow servant, or other person without authority to do so, the servant is not thereby relieved of the assumption of risk in complying with the order,[21] especially where in obeying the order the servant disobeys rules for work promulgated by the master.[22]

The order must be clear and unequivocal[23] and specific.[24] If the order is merely to do work incident to the service, in the way usual to the servant, he is not relieved of the assumption of risk by the order.[25] Where an order is nothing more in effect than a general direction to perform certain work, without requiring the work to be done in any particular manner, but leaving the method to be pursued to the discretion of the servant, the order will not impose on the master any greater responsibility than he ordinarily incurs, or relieve the servant of the assumption of risk if the circumstances attending the performance of the work are such as, without the order, would impose on the servant the assumption of risk.[26] An ordinary administrative direction as to use a way given by one who is not so located as to know its condition has been held not to relieve the servant from assumption of risk in carrying out such direction.[27] A general order to hurry up the work does not relieve the employee from his assumption of risk.[28]

§ 401. Effect of Knowledge and Appreciation of Danger

a. In general
b. Servant's fear of losing employment
c. Overexertion on part of servant

a. In General

Where the servant knows and appreciates the danger of the work he undertakes or the danger incident thereto is so obvious and imminent that an ordinarily prudent man would not undertake the work, he assumes the risk although the work is undertaken by virtue of express commands or threats of the master.

Where the servant knows and appreciates the danger of the work he undertakes or the danger incident thereto is so obvious and imminent that an ordinarily prudent man would not undertake the work, he assumes the risk although the work is undertaken by virtue of express commands or threats of the master;[29] and especially is this true where the servant has been warned of the danger and given particular instructions how to do the work.[30] Having this knowledge and appreciation, the servant cannot be said to rely on the assurance that the

20. Ark.—Dickinson v. Mooneyham, 203 S.W. 840, 136 Ark. 606.
39 C.J. p 798 note 33.

21. Vt.—Cross v. Passumpsic Fibre Leather Co., 98 A. 1010, 90 Vt. 397.
39 C.J. p 798 note 35.

22. Miss.—Natchez Cotton Mill Co. v. McLain, 33 So. 723.

23. Ky.—Hazard Coal Co. v. Wallace, 205 S.W. 692, 181 Ky. 636.
39 C.J. p 798 note 37.

24. **"Special order"** has been defined as a command or instruction to a servant to do a specific thing in a particular way, pointing out the details as to time and manner of performance.—Standard Cement Co. v. Minor, 100 N.E. 767, 769, 54 Ind.App. 301.

25. Ill.—Kolp v. Decatur R. & Light Co., 145 Ill.App. 645—Linderman Box & Veneer Co. v. Thompson, 127 Ill.App. 134.

26. N.H.—Gelinas v. J. J. Newberry Co., 8 A.2d 753, 90 N.H. 312.
39 C.J. p 798 note 39.

General and special orders distinguished
Ind.—Standard Cement Co. v. Minor, 100 N.E. 766, 769, 54 Ind.App. 301.

27. Wis.—Kendzewski v. Wausau Sulphate Fibre Co., 146 N.W. 516, 156 Wis. 452.

28. U.S.—Chesapeake & Ohio R. Co. v. Kuhn, Ohio, 52 S.Ct. 45, 284 U.S. 44, 76 L.Ed. 157.
Neb.—Christenson v. Union Pac. R. Co., 290 N.W. 246, 137 Neb. 538, certiorari dismissed 61 S.Ct. 825, 312 U.S. 710, 85 L.Ed. 1142.

29. U.S.—Chicago, M. St. P. & P. R. Co. v. Busby, C.C.A.Mont., 41 F.2d 617.
Ark.—Benedum-Trees Oil Co. v. Sutton, 130 S.W.2d 720, 198 Ark. 699—McEachin & McEachin Const. Co. v. Burks, 75 S.W.2d 794, 189 Ark. 947—Standard Pipe Line Co. v. Gwaltney, 53 S.W.2d 597, 186 Ark. 230.
Del.—Derrickson v. Commissioners of Town of Harrington, 138 A. 645, 3 W.W.Harr. 412.
Ga.—Louisville & N. R. Co. v. Crapps, 8 S.E.2d 413, 62 Ga.App. 437—Abercrombie v. Ivey, 200 S.E. 551, 59 Ga.App. 296—Western & A. R. R. v. Edwards, 148 S.E. 628, 40 Ga.App. 66—Barrow County Cotton Mills v. Burton, 132 S.E. 128, 35 Ga.App. 90.
Ill.—Beard v. Baltimore & O. R. Co., 243 Ill.App. 537.
Ind.—Chicago, I. & L. Ry. Co. v. Younger, 175 N.E. 290, 93 Ind.App. 276.
Kan.—Rush v. Brown, 109 P.2d 84, 153 Kan. 59.
Ky.—Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 274 Ky. 410.
Mo.—McCormick v. W. L. Hutchison Electric Co., 31 S.W.2d 971, 326 Mo. 380.
S.C.—Hice v. Dobson Lumber Co., 185 S.E. 742, 180 S.C. 259.
39 C.J. p 798 note 41, p 794 note 7.
Temporary forgetfulness under hurry-up order does not relieve the servant from the assumption of risk.—Stanke v. Spokane, C. D. & P. R. Co., 43 P.2d 961, 181 Wash. 472.

30. Iowa.—Gorman v. Minneapolis & St. L. R. Co., 90 N.W. 79, 117 Iowa 720.

danger does not exist[31] and has no right to assume that in obeying orders he will not be subjected to unnecessary peril and that the work which he is commanded to do may be performed with reasonable safety.[32] On the other hand, the mere fact that the servant knows that there is some danger will not defeat his right to recover if in obeying he has acted with ordinary care under the circumstances.[33] It has also been said that in determining whether a servant assumed the risk of obeying his master's orders and continuing in service after knowledge of the danger in so doing, the degree of danger, the extent of the employer's appreciation thereof, and the necessity of doing the work are to be considered,[34] and that there is no absolute rule for determining the question,[35] although generally the servant does not assume the risk unless the danger is so obvious that one of ordinary prudence would not incur it.[36] When a servant continues to work with an appliance under a peremptory order of the employer, although knowing the dangers incident to its use, it has been held that the employer is estopped to assert the defense of assumption of risk,[37] whether or not such order was accompanied by an assurance of safety.[38]

The general rule has been applied frequently in respect of dangerous or defective machinery, tools, and appliances,[39] places of work,[40] insufficient force for work,[41] negligence of other servants,[42] and also in respect of dangerous methods of work.[43]

Use of physical force by master. Where actual or constructive physical force is used to compel a servant to do the work, he does not assume the risk although he fully knows and appreciates the dangers involved.[44]

b. Servant's Fear of Losing Employment

The general rule is that if the servant undertakes the performance of work, the danger of which he fully comprehends, the fact that he undertakes it unwillingly and for fear of losing his employment, or of incurring the displeasure of the master, will not relieve him of the assumption of risk incident thereto.

According to the weight of authority, if the servant undertakes the performance of work, the danger of which he fully comprehends, the fact that he undertakes it unwillingly and for fear of losing his employment[45] or of incurring the displeasure of the master[46] will not relieve him of the assumption of risk incident thereto; but there is also authority to the contrary.[47]

c. Overexertion on Part of Servant

A servant has been held to assume the risk of injury by overexertion although he does the work under the express order of the master.

The rule, discussed supra § 390, that a servant assumes the risk of injury to himself, sustained by

31. Ill.—Elgin, J. & E. R. Co. v. Myers, 80 N.E. 897, 226 Ill. 358.
Ind.—Chicago, I. & L. R. Co. v. Sanders, 86 N.E. 430, 42 Ind.App. 585.
Assurance of safety is immaterial
Ga.—Barrow County Cotton Mills v. Burton, 132 S.E. 128, 35 Ga.App. 90.

32. Ind.—Chicago, I. & L. R. Co. v. Sanders, 86 N.E. 430, 42 Ind.App. 585—Shaver v. Home Tel. Co., 75 N.E. 288, 36 Ind.App. 233, 114 Am. S.R. 373.

33. Ill.—Chicago Anderson Pressed-Brick Co. v. Sobkowiak, 36 N.E. 572, 148 Ill. 573—Worthey v. Cleveland, C., C. & St. L. Ry. Co., 251 Ill.App. 585.
39 C.J. p 796 note 10.

34. S.C.—Tuttle v. Hanckel, 183 S.E. 484, 179 S.C. 60—McBrayer v. Virginia-Caroline Chemical Company, 71 S.E. 980, 89 S.C. 387.

35. S.C.—Tuttle v. Hanckel, 183 S.E. 484, 179 S.C. 60—McBrayer v. Virginia-Caroline Chemical Company, 71 S.E. 980, 89 S.C. 387.

36. S.C.—Tuttle v. Hanckel, 183 S.E. 484, 179 S.C. 60—McBrayer v. Virginia-Caroline Chemical Company, 71 S.E. 980, 89 S.C. 387.

37. Ohio.—Maslek v. Pennsylvania R. Co., 160 N.E. 523, 26 Ohio App. 520, affirmed Pennsylvania R. Co. v. Maslek, 163 N.E. 302, 118 Ohio St. 644.

38. Ohio.—Maslek v. Pennsylvania R. Co., 160 N.E. 523, 26 Ohio App. 520, affirmed Pennsylvania R. Co. v. Maslek, 163 N.E. 302, 118 Ohio St. 644.

39. Mass.—Russell v. Tillotson, 4 N.E. 231, 140 Mass. 201.
39 C.J. p 799 note 46.

40. Ga.—Barrow County Cotton Mills v. Burton, 132 S.E. 128, 35 Ga.App. 90.
39 C.J. p 799 note 47.

41. Iowa.—Ehrenberger v. Chicago, R. I. & P. R. Co., 166 N.W. 735, 182 Iowa 1339, 10 A.L.R. 1388.
39 C.J. p 799 note 48.
Insufficient force for work in general see supra § 308.

42. Ga.—Southern R. Co. v. Simmons, 100 S.E. 5, 24 Ga.App. 96.

43. Ky.—Louisville & N. R. Co. v. Williams, 194 S.W. 920, 175 Ky. 679.
39 C.J. p 800 note 50.

44. N.Y.—Eldridge v. Atlas Steamship Co., 32 N.E. 66, 134 N.Y. 127.
39 C.J. p 800 note 53.

45. Miss.—Louisville & N. R. Co. v. Russell, 144 So. 478, 164 Miss. 529.
39 C.J. p 800 note 55.
Assurance of safety coupled with threat of dismissal see infra § 404.
Carrying pistol
The fact that, as a condition of employment, the employee is required to carry a pistol in his work does not constitute duress which relieves him of the assumption of risk with respect to the carrying of a pistol.—Newman v. Griffin Foundry & Machine Co., 144 S.E. 386, 38 Ga.App. 518.

46. Mo.—Ryan v. Lea, App., 249 S.W. 685.

47. Miss.—Gross v. Kurn, 193 So. 783, 187 Miss. 679—Everett Hardware Co. v. Shaw, 172 So. 337, 178 Miss. 476, suggestion of error denied 173 So. 411, 178 Miss. 476.
39 C.J. p 800 note 57.
Employee need not quit job
In applying the doctrine of assumption of risk, the court does not require that an employee quit his job rather than do something which he knows or ought to know is dangerous.—Blair v. Baltimore & O. R. Co., Pa., 65 S.Ct. 545, 323 U.S. 600, 89 L.Ed. 490.

reason of his overtaxing his strength or powers of endurance in doing the work for which he was employed, where the occasion presented no emergency requiring hasty action, has been held to apply notwithstanding the servant does the work under the express command of the master,[48] at least where no assurance of safety has been given and nothing has been said which is likely to mislead or misrepresent the situation.[49] It has also been held, however, that where the cause of the injury is the failure of the employer to furnish sufficient help, he is not relieved from liability for an injury resulting from overexertion on work done pursuant to orders, after protest by the employee or a request by him for additional help.[50] This has been held especially true where the command to do the work is accompanied by a threat of discharge on failure of the employee to obey the command.[51]

If the employee acts under orders in an emergency for the purpose of preventing loss of life or property[52] or otherwise without opportunity to deliberate or consider the danger to himself,[53] he has been held to be relieved from the assumption of risk from overexertion.

§ 402. —— Remaining in Service after Notice or Complaint

If a servant fully appreciates the dangers involved he assumes the risk of complying with the master's order after complaining of the defects or dangers.

Although the servant has given notice and complained of the defect or danger, he assumes the risk where he is fully aware of, and appreciates, the danger to be incurred in obeying the master's order,[54] or where the danger in obeying the master's order is so manifest, obvious, and imminent that a person of ordinary prudence and caution would not incur it;[55] and this is true although the servant does the work under protest[56] and although he was told that disobedience of the order would result in his discharge.[57] Even the direct and immediate order of the master will not justify a servant in rashly exposing himself to a known and obvious danger.[58]

48. Ark.—Kansas City Southern Ry. Co. v. Holder, 127 S.W.2d 807, 198 Ark. 127.
D.C.—Baker v. Sterrett Operating Service, 40 F.2d 790, 59 App.D.C. 278.
Ky.—**Corpus Juris cited in** Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 753, 274 Ky. 410.
S.C.—Weatherford v. Fiske-Carter Const. Co., 189 S.E. 224, 182 S.C. 294.
39 C.J. p 800 note 59.

49. Minn.—Stenvog v. Minnesota Transfer Co., 121 N.W. 903, 108 Minn. 199, 25 L.R.A.,N.S., 362, 17 Ann.Cas. 240.
Assurance of safety generally see infra §§ 404–406.
Servant, yielding up his own judgment as to whether his physical strength is sufficient to lift object not obviously impossible to lift in order to obey specific and emphatic command of his boss after having opportunity to consider, assumes all responsibility for resulting injury and suffers consequences, in absence of emergency.—Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 274 Ky. 410.

50. Miss.—Everett Hardware Co. v. Shaw, 172 So. 337, 178 Miss. 476, suggestion of error denied 173 So. 411, 178 Miss. 476.
Mo.—Johnson v. Boaz-Kiel Const. Co., App., 22 S.W.2d 881.
Negligence as basis for rule
(1) Regarding assumption of risk, it was duty of employer who ordered work done to know whether employee and help provided could safely do the work.—Macklin v. Fogel Const. Co., 31 S.W.2d 14, 326 Mo. 38.
(2) Employee does not assume risk of injury resulting from overexertion, when employer, on threat of discharge, ordered him to do work alone, for which assistance was needed, since injury resulted from foreman's negligence.—Goodyear Yellow Pine Co. v. Mitchell, 149 So. 792, 168 Miss. 152, suggestion of error overruled 150 So. 810, 168 Miss. 152.

51. Miss.—Everett Hardware Co. v. Shaw, 172 So. 337, 178 Miss. 476, suggestion of error denied 173 So. 411, 178 Miss. 476—Goodyear Yellow Pine Co. v. Mitchell, 149 So. 792, 168 Miss. 152, suggestion of error overruled 150 So. 810, 168 Miss. 152.

52. Ky.—Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 274 Ky. 410.

53. Ky.—Nashville, C. & St. L. Ry. Co. v. Cleaver, supra.

54. Tex.—Gilmartin v. Kilgore, Civ. App., 114 S.W. 398.
39 C.J. p 800 note 62.
Without full appreciation of danger see supra § 399.

55. Ark.—Louis B. Siegel & Co. v. Moore, 161 S.W.2d 387, 204 Ark. 50.
Ill.—Chicago Anderson Pressed-Brick Co. v. Sobkowiak, 36 N.E. 572, 148 Ill. 573.
N.C.—Cherry v. Atlantic Coast Line R. Co., 93 S.E. 783, 174 N.C. 263—Pigford v. Norfolk Southern R. Co., 75 S.E. 860, 160 N.C. 93, 44 L.R.A.,N.S., 865.
39 C.J. p 798 note 31, p 800 note 63.
Experienced employee
(1) Where experienced section laborer informed foreman that more men were needed to lift motor truck to get it on the rail and the foreman promised no additional assistance and told the men to raise the truck, the laborer in assisting in raising the truck without attempting to remove tools and equipment, assumed the risk involved.—Guerierro v. Reading Co., 29 A.2d 510, 346 Pa. 187.
(2) Employee who had been engaged for years in tightening or loosening caps on locomotive boilers was held, notwithstanding foreman's direction to employee, after examining wrench which employee complained was too large, to return to his work, to have assumed risk incidental to use of wrench.—Mohammed v. New York, N. H. & H. R. R., 195 N.E. 119, 290 Mass. 219.

56. Ky.—Nashville, C. & St. L. Ry. Co. v. Cleaver, 118 S.W.2d 748, 274 Ky. 410.
Tex.—Gilmartin v. Kilgore, 114 S.W. 398, 52 Tex.Civ.App. 177.

57. Pa.—Miller v. Standard Steel Car Co., 106 A. 82, 263 Pa. 9.

58. Ga.—International Cotton Mills v. Webb, 96 S.E. 16, 22 Ga.App. 309.

§ 403. Effect of Equal or Superior Knowledge of Servant

A servant has been held to assume the risk of obeying the master's orders if he has equal or better means of knowledge than the master of the danger of so doing.

It has been held that where the servant has equal or better means of knowledge than the master of the danger of obeying the master's order, he assumes the risk of so doing.[59] It is only where the servant is misled by the order that the exception to the doctrine of assumption of risk exists.[60]

6. ASSURANCES OR REPRESENTATIONS OF MASTER

§ 404. In General

As a general rule an assurance of safety by the master absolves the servant of the assumption of risk, unless the danger is so obvious and imminent that an ordinarily prudent person would not do the work.

A servant does not assume the risk of injury from dangers incident to his employment or from defects in the place of work, tools, machinery, or appliances where, with or without complaint by the servant, the master or his representative has assured him that the work may be done safely,[61] or has promised to take precautions to protect the servant from injury while working,[62] unless, as hereinafter discussed in this section, the danger of doing the work is so obvious and imminent that a person of ordinary prudence would not have attempted it, or unless there is a showing of a new condition following the assurance of the master that would bring the servant within the general rule governing assumption of risk.[63] The rule is not limited to youthful or inexperienced servants,[64] and it may apply where there is doubt in the servant's mind as to the safety of doing the work,[65] or even where he knows that there is some danger.[66] Where assurances of this

59. Ark.—Benedum-Trees Oil Co. v. Sutton, 130 S.W.2d 720, 198 Ark. 699—**Corpus Juris quoted in** Kansas City Southern Ry. Co. v. Holder, 127 S.W.2d 807, 809, 198 Ark. 127—National Refining Co. v. Wreyford, 74 S.W.2d 633, 189 Ark. 598.
Ga.—Abercrombie v. Ivey, 200 S.E. 551, 59 Ga.App. 296.
39 C.J. p 801 note 68.
Equal or superior knowledge generally see supra § 391.

Conflicting orders

When confronted with the conflicting orders of a superior and one who is merely temporarily acting as such, the employee must rely on the order of the superior, or assume the risks, when he is in as good a position as the acting superior for ascertaining or understanding the situation.—Lloyd v. Norfolk & W. Ry. Co., 145 S.E. 372, 151 Va. 409.

60. Ill.—Mynor v. Hammar Bros. White Lead Co., 173 Ill.App. 507.

61. Ark.—Neely v. Goldberg, 114 S. W.2d 455, 195 Ark. 790.
Ga.—Louisville & N. R. Co. v. Crapps, 8 S.E.2d 413, 62 Ga.App. 437—Atlanta, B. & C. R. Co. v. King, 189 S.E. 580, 55 Ga.App. 1.
Ky.—Helton v. Gunn Coal Mining Co., 79 S.W.2d 695, 258 Ky. 168.
Mo.—**Corpus Juris cited in** Schaum v. Southwestern Bell Telephone Co., 78 S.W.2d 439, 444, 336 Mo. 228.
Wash.—Jones v. Baker, 35 P.2d 1103, 179 Wash. 25.
39 C.J. p 801 note 71.

Reason for rule

(1) Servant has a right to rely on mature judgment of his superior. Ky.—Helton v. Gunn Coal Mining Co., 79 S.W.2d 695, 258 Ky. 168.
Mich.—Newell v. Detroit, T. & I. R. Co., 205 N.W. 579, 232 Mich. 528.
Pa.—Moseley v. Reading Co., 145 A. 293, 295 Pa. 342.

(2) An employer cannot lull his employee into a sense of security by an assurance of safety, and then escape liability for injuries resulting to employee because of relying on that assurance, and in such cases employee does not assume the risk.—Neely v. Goldberg, 114 S.W.2d 455, 195 Ark. 790.

Crossing bridge

Where an oil dealer's manager specified route to be taken by employee in delivering truckload of oil and assured employee that private bridge on route was safe and that employee could safely pass over bridge with truck loaded to its full capacity, employee did not assume the risk.—Neely v. Goldberg, supra.

Abrogation of contract

Servant's implied agreement to assume known risks of employment may be abrogated by express or implied agreement to contrary, as where servant complains to master that tool appears to be dangerous and master commands him to proceed with work and assures him there is no danger.—Atlanta, B. & C. R. Co. v. King, 189 S.E. 580, 55 Ga.App. 1.

62. U.S.—Odell Mfg. Co. v. Tibbetts, N.H., 212 F. 652, 129 C.C.A. 188.
39 C.J. p 802 note 72.
Promise to remove danger or remedy defects after complaint by servant see supra § 396.

63. Wash.—Beseloff v. Strandberg, 113 P. 250, 62 Wash. 36.
39 C.J. p 802 note 74.
Changing condition generally see supra §§ 373, 376.

64. Ky.—North East Coal Co. v. Hunley, 174 S.W. 732, 163 Ky. 817.
Assumption of risk by youthful or inexperienced servant generally see infra §§ 412–420.

65. Minn.—Blume v. Ballis, 291 N. W. 906, 207 Minn. 393.

Supposition of superior knowledge

Servant may rely on assurance of the master that it is safe for the servant to do the work, on the supposition that the master has superior knowledge.—Blume v. Ballis, supra.

Complaint of others

Where employee did not know condition, he was warranted in believing foreman's statement that it was safe to continue work when others complained, and he did not assume risk. —Pipal v. Grand Trunk Western Ry. Co., 173 N.E. 372, 341 Ill. 320, certiorari denied Grand Trunk Western Ry. Co. v. Pipal, 51 S.Ct. 486, 283 U.S. 838, 75 L.Ed. 1449.

Honest difference of opinion

Employee does not assume risk of employment where there is basis for honest difference of opinion as to safety of instrument furnished by master, or of manner of performing work and servant surrenders his judgment of unsafety in reliance on master's superior judgment.—Hice v. Dobson Lumber Co., 185 S.E. 742, 180 S.C. 259—Scott v. International Agr. Corporation, 184 S.E. 133, 180 S.C. 1.

66. Ark.—Mama Coal Co. v. Dodson, 217 S.W. 475, 141 Ark. 438.
Mo.—Burkard v. A. Leschen & Sons

character have been given, the servant is under no duty to make an inspection for the purpose of "checking up" thereon,[67] or for the purpose of discovering latent defects or dangers.[68]

On the other hand, if the servant is fully aware of the risk he runs in doing the work,[69] or if the work is so obviously dangerous that a person of ordinary prudence would not undertake it,[70] the servant assumes the risk in so doing regardless of any assurances of safety made by the master or his representative, notwithstanding he undertakes the work reluctantly and under a threat of dismissal for failure to do so.[71] It has also generally been held that the servant is not relieved of the assumption of risk by assurances of safety by the master or his representatives where the servant has equal[72] or better[73] means of knowledge than the master.

Reliance on assurances. In order to relieve the servant of assumption of risk, there must be reliance on the assurances.[74] It is not sufficient that the judgment of the master or his representative be merely in confirmation of that of the servant.[75] If the servant does not rely on the assurance, the action stands as if no assurance had been given.[76]

By whom assurances given. In order to have the effect of relieving the servant of assumption of risk, it is essential that the assurances should have been given by the master or by some one who authoritatively represented him.[77] He is not entitled to rely on a representation or assurance made by a fellow servant.[78] However, the assurance to an employee, by another employee having charge of an appliance, that it was all right may be relied on as the assurance of the master.[79]

Simple tools. If the tool and its uses are so simple that any defects in the tool or dangers in its use are equally and obviously apparent to the master and servant, it has been held that an assurance of safety does not relieve the employee of the assumption of risk.[80] It has been held, however, that a servant may rely on the master's assurance that an appliance is not defective, although it is a simple tool.[81]

§ 405. What Constitutes Assurance of Safety

In order to absolve the servant of the assumption of risk, the assurance of safety must be such as reasonably to allay the servant's fears and subordinate his judgment to the superior knowledge of the master.

An assurance of safety which will absolve the servant from the assumption of risk must be such that under the given circumstances it is reasonably calculated to allay his fears and subordinate his judgment to the superior knowledge of the master.[82] It is not necessary, however, that the master shall in terms assure the servant of the safety of the work, it being sufficient if, under the circumstances, his acts and words are in effect an assurance of safety.[83] An assurance of safety

Rope Co., 117 S.W. 35, 217 Mo. 466.

Knowledge of risk without appreciation of danger generally see supra § 389.

67. Ind.—United Coal Min. Co. v. Daugherty, 96 N.E. 477, 51 Ind. App. 165.

Ky.—Carter Coal Co. v. Filipeck, 201 S.W. 468, 180 Ky. 94.

68. S.C.—Stogner v. Great Atlantic & Pacific Tea Co., 192 S.E. 406, 184 S.C. 406.

69. Mich.—Burgess v. Humphrey Bookcase Co., 120 N.W. 790, 156 Mich. 345.

39 C.J. p 802 note 79.

Entry into boiler drum

Employee dying from heat stroke on entering boiler drum was held to have assumed the risk, notwithstanding superior's assurances.—Kentucky Utilities Co. v. Clayton's Adm'x, 28 S.W.2d 497, 234 Ky. 454.

70. Ky.—Helton v. Gunn Coal Mining Co., 79 S.W.2d 695, 258 Ky. 168—Louisville & N. R. Co. v. Gross, 272 S.W. 57, 209 Ky. 1.

Tenn.—Nashville Bridge Co. v. Hudgins, 137 S.W.2d 327, 23 Tenn.App. 677.

39 C.J. p 802 notes 73, 80.

71. Mass.—Burke v. Davis, 76 N.E. 1039, 191 Mass. 20, 114 Am.S.R. 591, 4 L.R.A.,N.S., 971.

Effect of fear of losing employment generally see supra § 401.

72. Ga.—Bowers v. Louisville & N. R. Co., 127 S.E. 667, 33 Ga.App. 692.

Tenn.—Nashville Bridge Co. v. Hudgins, 137 S.W.2d 327, 23 Tenn.App. 677.

39 C.J. p 802 note 82.

Equal or better knowledge generally see supra § 391.

73. U.S.—Republic Iron & Steel Co. v. Thomasino, Ala., 176 F. 49, 99 C.C.A. 523, 29 L.R.A.,N.S., 606.

Tenn.—Grey Eagle Marble Co. v. Perry, 197 S.W. 674, 138 Tenn. 231.

Equal or better knowledge in complying with master's commands see supra § 403.

74. Ind.—Inland Steel Co. v. Kiessling, 91 N.E. 1084, 174 Ind. 630.

39 C.J. p 803 note 84.

"An assurance of safety . . . is important only in so far as it induces the servant to act in reasonable reliance on the master's judgment as to the safety of doing the work rather than his own."—Blume v. Ballis, 291 N.W. 906, 908, 207 Minn. 393.

75. N.Y.—Tisdale v. Jackson, 144 N.Y.S. 326, 159 App.Div. 294.

76. Minn.—Blume v. Ballis, 291 N.W. 906, 207 Minn. 393.

77. Ky.—Little v. Consolidation Coal Co., 184 S.W. 873, 169 Ky. 514.

39 C.J. p 803 note 86.

Assurance by superior directing work is sufficient.—Breslin v. Blair, 60 S.W.2d 337, 249 Ky. 178.

78. Ill.—Mynor v. Hammar Bros. White Lead Co., 173 Ill.App. 507.

Tex.—Gulf, C. & S. F. R. Co. v. Clement, Civ.App., 220 S.W. 407, affirmed, Com.App., 236 S.W. 714.

79. Wash.—Benson v. English Lumber Co., 129 P. 403, 71 Wash. 616.

80. Ky.—York v. Rockcastle, 284 S.W. 79, 259 Ky. 11—Cincinnati, N. O. & T. P. Ry. Co. v. Burton, 211 S.W. 186, 184 Ky. 6—Turkey Foot Lumber Co. v. Wilson, 206 S.W. 14, 182 Ky. 42—Stirling Coal & Coke Co. v. Fork, 131 S.W. 103, 141 Ky. 40, 40 L.R.A.,N.S., 837.

81. Mo.—Wilson v. Marland Refining Co., App., 7 S.W.2d 442.

82. Wash.—Jones v. Baker, 35 P.2d 1103, 179 Wash. 25.

83. Miss.—New Orleans & N. E. R.

may be implied from the nature of the directions given by the master with regard to the work,[84] and it has been held that a failure to warn of danger may be a tacit assurance that no unusual danger is to be apprehended.[85] A mere expression of opinion does not amount to a direction which will absolve the servant from the assumption of risk otherwise assumed.[86]

§ 406. Assurances That Repairs Have Been Made

A servant has the right to rely on assurances that defects of which he has complained have been remedied.

A servant has the right to rely on assurances that defects of which he has complained have been remedied, and is entitled to recover for injuries caused by the failure properly to repair,[87] unless the defects are such as to be apparent to one in the use of ordinary care.[88]

7. Risks outside Scope of Employment

§ 407. In General

The determination of whether a servant assumes the risks of doing work outside the scope of his employment depends to some extent on whether in so working he acts voluntarily or in compliance with the orders of the master, as discussed infra §§ 408, 409. The assumption of such risks by an inexperienced or youthful employee is considered infra § 420.

Examine Pocket Parts for later cases.

§ 408. Voluntary Act of Servant

Where a servant voluntarily exposes himself to risks outside the scope of his regular employment, and is injured thereby, he assumes the risks involved.

Where a servant voluntarily and of his own motion exposes himself to risks outside of the scope of his regular employment, without or against the order of the master or vice principal, and is injured thereby, the master is not liable, since the servant assumes the risks involved[89] where he knows and appreciates the dangers.[90] Especially does this rule apply where the act which resulted in the injury complained of was done by the servant for his own benefit or convenience and not in furtherance of the master's business.[91] It also applies, even though the act done by the servant may result in benefit to the master.[92]

§ 409. Compliance with Commands of Master

As a general rule, a servant does not assume the risk of doing work outside the scope of his employment on order of the master unless he fully appreciates the dangers involved, or unless the dangers are so obvious that a reasonably prudent person would not obey the order.

Where a servant is ordered to perform work outside of the scope of his employment, he will not by obeying the order necessarily assume the risk incident to the work,[93] even, it has been held, if the risks are equally open to the observation of both master and servant.[94] There is no implied agreement that the servant will take on himself the risk incident to such service.[95] Conversely, the mere

Co. v. Benson, 183 So. 505, 183 Miss. 171.
39 C.J. p 803 note 89.

84. Wash.—Jones v. Baker, 35 P.2d 1103, 179 Wash. 25.
39 C.J. p 802 note 89 [a], [b].

Statements as to safety

Foreman's statement to miner, who had told foreman of dangerous condition of former place, that he would be given safe place to work, together with instructions as to how work should be performed was equivalent to assurance that new place, if directions were followed, would be safe place to work so as to render employer liable for miner's injuries.—Helton v. Gunn Coal Mining Co., 79 S.W.2d 695, 258 Ky. 168.

Directions held not assurances

Mass.—Beggelman v. Romanow, 192 N.E. 159, 288 Mass. 14.
Wash.—Jones v. Baker, 35 P.2d 1103, 179 Wash. 25.

85. Mo.—Marsanick v. Luechtefeld, App., 157 S.W.2d 537.

86. Ill.—Elgin, J. & E. R. Co. v. Myers, 80 N.E. 897, 226 Ill. 358.
39 C.J. p 803 note 90.

Opinion as to cause of pain

Mine foreman's statements that he did not think dampness of mine caused employee's pains was held not assurance that place was safe.—Ducjack v. New Jersey Zinc Co., 141 A. 791, 104 N.J.Law 575.

87. Ark.—Manhattan Const. Co. v. Atkisson, 88 S.W.2d 819, 191 Ark. 920.
S.C.—Watson v. Coxe Bros. Lumber Co., 26 S.E.2d 401, 203 S.C. 125.
39 C.J. p 803 note 91.

88. Ill.—Wheeler v. Chicago & W. I. R. Co., 108 N.E. 330, 267 Ill. 306.
39 C.J. p 803 note 91.

89. Ark.—Presley v. Actus Coal Co., 289 S.W. 474, 172 Ark. 498.
Wash.—Blair v. Kinema Theatres of Washington, 277 P. 398, 152 Wash. 122.
39 C.J. p 803 note 93.

90. Mass.—Engel v. Boston Ice Co., 4 N.E.2d 455, 295 Mass. 428.

91. Ky.—Illinois Cent. R. Co. v. Pierce, 194 S.W. 534, 175 Ky. 488.
39 C.J. p 804 note 94.

92. Tex.—Marshall & E. T. R. Co. v. Sirman, Civ.App., 153 S.W. 401.
39 C.J. p 805 note 93.

93. Ind.—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.
39 C.J. p 805 note 97.
Compliance with commands in general see supra §§ 398–403.

94. Ind.—Brazil Block Coal Co. v. Hoodlet, 27 N.E. 741, 129 Ind. 327—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.

95. Ind.—Cincinnati, H. & I. R. Co. v. Madden, 34 N.E. 227, 134 Ind. 462.

fact that the servant is injured while performing an act outside of the scope of his employment under the direction of the master or some one representing him will not necessarily give him a cause of action against the master.[96] It has been held that the material question is whether the servant had sufficient experience or knowledge to understand the hazards of the extra work required of him.[97]

As a general rule, where a servant is ordered to perform work outside the scope of his employment, he is absolved from the assumption of risk, and the master is responsible for injuries sustained by the servant while acting in obedience to the order,[98] notwithstanding the servant's obedience to the order is caused by fear of losing his employment,[99] unless the danger of performing the work ordered is known and appreciated by the servant,[1] or is so obvious and imminent that no reasonably prudent person would obey the order, the servant, in such case, being chargeable by operation of law with knowledge and appreciation thereof.[2] The servant has also been held to assume the risks incident to the work, where they are equally open to the observation of the servant and the master.[3] In any event, the servant is freed from the assumption of risk only during such time as is reasonable for him to learn and appreciate the hazards of his new employment.[4]

The servant has the right to assume that the master will be mindful of his duty and not wantonly subject him to peril.[5]

Working in other departments. A servant engaged in one branch of a business cannot be held to have assumed risks arising from other connected branches of the same business,[6] unless the danger is known and appreciated by the servant or should have been known and appreciated by him.[7]

8. Disobedience of Rules, Orders, Instructions, or Statutes, and Use of Appliances for Purposes Not Intended

§ 410. Disobedience of Rules, Orders, Instructions, or Statutes

As a general rule, a servant assumes the risks involved when he violates rules, orders, or instructions of the master of which he has knowledge.

As a general rule, where a servant is injured in consequence of the violation of rules, orders, or instructions of the master, he assumes all the risks incident thereto.[8] The rule does not apply, however, where it is shown that the rule violated by the servant has been waived or abandoned;[9] or in cases where the servant has disregarded rules or instructions which have not been communicated or made known to him.[10] It has also been held that

96. U.S.—Hogan v. Northern Pac. R. Co., C.C.Mont., 53 F. 519.
Kan.—Corpus Juris quoted in Carter v. Uhrich, 264 P. 31, 34, 125 Kan. 192.

97. Ill.—St. Louis Cons. Coal Co. v. Haenni, 35 N.E. 162, 146 Ill. 614.

98. Ind.—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.
Va.—Norfolk & W. Ry. Co. v. Lumpkins, 144 S.E. 485, 151 Va. 173.
39 C.J. p 805 note 2.

99. Mass.—Leary v. Boston & A. R. Co., 2 N.E. 115, 139 Mass. 580, 52 Am.S.R. 733.
39 C.J. p 806 note 4.
Fear of losing employment generally see supra § 401.

1. U.S.—Reed v. Stockmeyer, Ind., 74 F. 186, 20 C.C.A. 381.
Kan.—Corpus Juris quoted in Carter v. Uhrich, 264 P. 31, 125 Kan. 192.
39 C.J. p 805 notes 2, 3.

Experience in other employment
A logger who acceded to superintendent's command to render service of a wood sawyer assumed the ordinary risk of such employment, particularly in view of evidence that logger was an experienced wood sawyer.—Singleton v. McLeod, 8 S.E.2d 908, 193 S.C. 378.

2. Mass.—Goodnow v. Walpole Emery Mills, 15 N.E. 576, 146 Mass. 261.
39 C.J. p 806 notes 2, 5.

3. Ill.—Barrett Mfg. Co. v. Marsh, 137 Ill.App. 110—North Chicago St. R. Co. v. Conway, 76 Ill.App. 621.

4. Ind.—Green Engineering Co. v. Rosinski, 105 N.E. 938, 57 Ind. App. 602.

5. Ind.—Louisville, E. & St. L. Consol. R. Co. v. Hanning, 31 N.E. 187, 131 Ind. 528, 31 Am.S.R. 443.

6. Wis.—Mulcairns v. Janesville, 29 N.W. 565, 67 Wis. 24.
39 C.J. p 806 note 9.

7. Ind.—Avery v. Nordyke & Marmon Co., 70 N.E. 888, 34 Ind.App. 541.
39 C.J. p 806 note 10.

8. U.S.—Flannery v. New York, O. & W. R. Co., C.C.A.N.Y., 29 F.2d 18.
Ark.—Dozier v. Missouri Pac. R. Co., 3 S.W.2d 678, 176 Ark. 651.
39 C.J. p 806 note 12.

Injuries otherwise caused
Assumption of risk arising from a violation of a rule of the employer is not available as a defense to an action for injuries caused by negligence not related to the rule which the employee violated.—Southern Pac. Co. v. Clayton, Tex.Civ.App., 81 S.W.2d 788, error refused, certiorari denied 56 S.Ct. 155, 296 U.S. 631, 80 L.Ed. 448.

Negligence of other employee
Employee violating employer's rules does not necessarily assume risk of other employees' negligence.—Southern Ry. Co. v. Smith, 137 So. 398, 223 Ala. 583.

9. N.C.—Mason v. Richmond & D. R. Co., 16 S.E. 698, 111 N.C. 482, 32 Am.S.R. 814, 18 L.R.A. 845.
39 C.J. p 807 note 13.

10. Mont.—Alexander v. Great Northern R. Co., 154 P. 914, 51 Mont. 565, L.R.A.1918E 852, error dismissed 38 S.Ct. 237, 246 U.S. 276, 62 L.Ed. 713.
39 C.J. p 807 note 14.

Absence of knowledge
Employee cannot be held to have assumed risk in violating rule of which he had no knowledge.—Missouri Pac. R. Co. v. Harville, 46 S.W.2d 17, 185 Ark. 47, certiorari

the violation of a rule of the employer does not constitute an assumption of risk,[11] but rather, as discussed infra § 457, to constitute contributory negligence.

Disobedience of statutes. Where a servant is injured in consequence of violating statutory provisions enacted for his safety, he assumes the risk of so doing.[12]

§ 411. Use of Appliances for Purposes Not Intended

A servant assumes the risk of using appliances for purposes for which they were not intended.

Where a servant uses appliances furnished by the master for purposes to which they were not adapted and for which they were obviously not intended, he assumes the risk of injury from so doing.[13]

9. INEXPERIENCED OR YOUTHFUL SERVANT

§ 412. In General

As a general rule the youth or inexperience of a servant does not relieve him of the assumption of risks incident to his employment, if he has the capacity and discretion to comprehend and appreciate the dangers thereof.

While it has been held that the law does not charge a minor with the assumption of risks attendant on employment as a man of mature years,[14] the fact that a servant is a minor, or inexperienced, does not, as a general rule, of itself relieve him of an assumption of the risks incident to the employment which he undertakes.[15] Minors, it is said, like adults, assume the ordinary risks incident to the employment,[16] subject, of course, to the qualification that the servant, although a minor, must be possessed of sufficient capacity and discretion to comprehend and appreciate the dangers of the employment.[17] In determining the question of capacity it is proper and necessary to consider his age, intelligence, and experience,[18] and the nature of the dangers involved.[19] When a master has performed his duty by giving to a youthful or inexperienced servant such reasonable instructions and cautions regarding the dangers of his employment as are best calculated to enable him to avoid injury, as discussed supra § 306, the servant is usually considered to be on the same footing as any other servant, and will be deemed to have assumed the usual and ordinary risks incident to his employment,[20] unless he is too young to realize the danger of the work even after being fully instructed in regard thereto.[21]

§ 413. Master's Knowledge of Age or Inexperience

A master has the right to assume that an adult servant applying for work is qualified to perform the duties of his employment, and is not liable for injuries caused by the servant's inexperience, unless he has been informed thereof.

denied 53 S.Ct. 13, 287 U.S. 610, 77 L.Ed. 530.

11. Ala.—Louisville & N. R. Co. v. Parker, 138 So. 231, 223 Ala. 626, certiorari granted 52 S.Ct. 496, 286 U.S. 535, 76 L.Ed. 1275, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501.
39 C.J. p 883 note 12.

12. U.S.—Vagaszki v. Consolidation Coal Co., N.Y., 225 F. 913, 141 C.C.A. 37.

13. Ky.—Illinois Cent. R. Co. v. Mercer, 88 S.W. 1054, 28 Ky.L. 3.
39 C.J. p 807 note 17.

14. Or.—Hamilton v. Redeman, 97 P.2d 194, 163 Or. 324.

15. Ill.—Stahl v. Dow, 74 N.E.2d 907, 332 Ill.App. 233.
Mont.—Shaw v. Kendall, 136 P.2d 748, 114 Mont. 323.
Tex.—**Corpus Juris cited in** Clayton v. Chicago, R. I. & G. Ry. Co., Civ.App., 129 S.W.2d 693, 696, affirmed 154 S.W.2d 453, 137 Tex. 441.
Utah.—Cotelini v. Kearns, 11 P.2d 317, 79 Utah 470.
39 C.J. p 807 note 19.
Care required generally as to minor or inexperienced employees see supra §§ 304–306.

16. Ill.—Stahl v. Dow, 74 N.E.2d 907, 332 Ill.App. 233.
Tex.—**Corpus Juris cited in** Clayton v. Chicago, R. I. & G. Ry. Co., 154 S.W.2d 453, 454, 137 Tex. 441—Fuller v. Texas Park Lot, Civ. App., 133 S.W.2d 605.
39 C.J. p 807 note 21.

17. Ind.—Evansville & R. R. Co. v. Henderson, 33 N.E. 1021, 134 Ind. 636.
39 C.J. p 807 note 22.
Capacity to observe must be considered.—Fowler v. Carolina Cross Arm & Conduit Co., 133 S.E. 188, 192 N.C. 14.

18. Mich.—La Pointe v. Chevrette, 250 N.W. 272, 264 Mich. 482—Belmer v. Boyne City Tanning Co., 125 N.W. 726, 160 Mich. 669.
Mont.—Boyd v. Great Northern Ry. Co., 274 P. 293, 84 Mont. 84.
N.H.—Bilodeau v. Gale Bros., 140 A. 172, 83 N.H. 196.
N.C.—Fowler v. Carolina Cross Arm & Conduit Co., 133 S.E. 188, 192 N.C. 14.
39 C.J. p 807 note 23.
Child under fourteen
Child of tender years, under the age of fourteen, assumes only such ordinary risks of his employment as he is capable of appreciating and understanding.—Moore v. Ross, 153 S. E. 575, 41 Ga.App. 509.
Eighteen-year-old boy cannot be held without capacity reasonably to apprehend and appreciate danger incident to unloading cars of lumber.—Fowler v. Carolina Cross Arm & Conduit Co., 133 S.E. 188, 192 N.C. 14.

19. Iowa.—Murray v. Chicago, R. I. & P. R. Co., 133 N.W. 123, 152 Iowa 732—Harney v. Chicago, R. I. & P. R. Co., 115 N.W. 886, 139 Iowa 359.

20. Ky.—**Corpus Juris cited in** Christopher's Adm'r v. Blanton Stone Co., 80 S.W.2d 590, 591, 258 Ky. 587.
N.Y.—Lorenz v. Erie R. Co., 214 N.Y.S. 672, 216 App.Div. 246.
S.C.—Lyons v. R. D. Cole Mfg. Co., 183 S.E. 466, 178 S.C. 520.
39 C.J. p 808 note 26.

21. N.Y.—Hickey v. Taaffe, 12 N.E. 286, 105 N.Y. 26.

In the absence of actual knowledge to the contrary,[22] a master has the right to assume that an adult servant applying for work is qualified to perform the duties of his employment and has a knowledge of the risks of such work, and is not liable for injuries caused by the servant's inexperience, unless he has been informed thereof.[23] This is because the act of soliciting employment amounts to an assertion that the servant is competent to perform the service.[24] So, too, it has been held that a master is not liable for injuries to an infant, if the infant's age, intelligence, and experience were such as to induce a man of ordinary care and prudence to believe him qualified for his employment.[25] An inexperienced minor does not assume the risks involved in performing dangerous work, where, notwithstanding the master's knowledge that the minor has never before engaged in such work, he fails to inform the minor of the risks involved.[26]

§ 414. Servant's Knowledge of Defects or Dangers

As a general rule, where a servant by reason of his youth or inexperience is not acquainted with the dangers incident to his employment, he does not assume the risk thereof until the master apprises him of the dangers, and gives him reasonable instruction as to how they may be avoided.

As a general rule, where a servant by reason of his youth or inexperience is not acquainted with the dangers incident to his employment, he does not assume the risk thereof until the master apprises him of the dangers, and gives him reasonable instruction as to how they may be avoided.[27] The mere fact that the servant is willing to undertake the particular work does not relieve the master of the duty to give him proper instructions,[28] as his failure to perform his duty in this regard is not a danger ordinarily incident to the service.[29] Furthermore a young or inexperienced servant will not be held to have assumed the risks of his employment by reason of mere knowledge of the defect or danger, unless he is also aware of the nature and extent of the danger, and has sufficient discretion and capacity to comprehend the risk.[30] On the other hand his youth or inexperience will not excuse him, if he does, or ought to, know and appreciate the danger to which he is exposed;[31] and the lack of instruction or specific warning in regard to the dangers of the employment will not in these circumstances relieve the servant of the assumption of risk.[32]

§ 415. —— Obvious Dangers

A servant, although under age or inexperienced, assumes all patent and obvious risks of his employment

22. Okl.—Fisher v. Prairie, 109 P. 514, 26 Okl. 337.
Tenn.—Coalfield Coal Co. v. Mellhorn, 2 Tenn.App. 219.

23. Tenn.—Coalfield Coal Co. v. Mellhorn, supra.
39 C.J. p 808 note 29.

24. U.S.—Sunney v. Holt, C.C.Ohio, 15 F. 880.
Kan.—Union Pac. R. Co. v. Estes, 16 P. 131, 37 Kan. 715.

25. Ky.—De Lozier v. Kentucky Lumber Co., 18 S.W. 451, 13 Ky.L. 818.
39 C.J. p 808 note 31.

26. Tenn.—Coalfield Coal Co. v. Mellhorn, 2 Tenn.App. 219.

27. U.S.—Pieczonka v. Pullman Co., C.C.A.N.Y., 102 F.2d 432.
Ark.—Ideal Cement Co. v. Hardwick, 185 S.W.2d 266, 208 Ark. 163—Harmon v. Harrison, 147 S.W.2d 739, 201 Ark. 988—Perkins Oil Co. of Delaware v. Fitzgerald, 121 S.W.2d 877, 197 Ark. 14—Everton Silica Sand Co. v. Hicks, 125 S.W.2d 793, 197 Ark. 980—Ward Furniture Mfg. Co. v. Mounce, 31 S.W.2d 531, 182 Ark. 380.
Conn.—Schneider v. Raymond, 136 A. 874, 106 Conn. 72.
Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.
Kan.—**Corpus Juris quoted in** Foley v. Crawford, 264 P. 59, 62, 125 Kan. 252.
La.—Roy v. Mutual Rice Co. of Louisiana, App., 143 So. 668, modified on other grounds 149 So. 508, 177 La. 883.
Mass.—Cotoia v. Seale, 27 N.E.2d 706, 306 Mass. 101.
Mo.—Smiley v. Jessup, App., 282 S.W. 110.
Pa.—Verna v. Lopresti, 42 A.2d 170, 157 Pa.Super. 163.
Tex.—Beaumont. S. L. & W. Ry. Co. v. Schmidt, Civ.App., 45 S.W.2d 734, affirmed 72 S.W.2d 899, 123 Tex. 580—Galveston, H. & S. A. Ry. Co. v. Contois, Civ.App., 279 S.W. 929, affirmed, Com.App., 288 S.W. 154, certiorari denied 47 S.Ct. 659, 274 U.S. 747, 71 L.Ed. 1328.
39 C.J. p 808 note 33.
Duty to instruct see supra § 306.
Employer must take notice of the youth and inexperience of the employee.—Perkins Oil Co. of Delaware v. Fitzgerald, 121 S.W.2d 877, 197 Ark. 14.
Mother of boy operating defective elevator, consenting to employment, does not assume risk, where evidence does not show their knowledge of danger.—Foley v. Crawford, 264 P. 59, 125 Kan. 252.
Risk from overexertion
Exception to rule that risk is on employee not to overtax his muscular capacity exists when employee is immature or inexperienced in particular work he is doing.—Cotton v. Osterberg, 292 P. 908, 88 Mont. 383—Boyd v. Great Northern Ry. Co., 274 P. 293, 84 Mont. 84—Matson v. Hines, 207 P. 474, 63 Mont. 214—39 C.J. p 808 note 33 [j].

28. Ala.—Woodstock Iron Works v. Kline, 43 So. 362, 149 Ala. 391.

29. Ala.—Reeves v. Anniston Knitting Mills, 52 So. 142, 166 Ala. 645.

30. Kan.—**Corpus Juris quoted in** Foley v. Crawford, 264 P. 59, 62, 125 Kan. 252.
Or.—Hamilton v. Redeman, 97 P.2d 194, 163 Or. 324.
39 C.J. p 809 note 36.

31. Ill.—Stahl v. Dow, 74 N.E.2d 907, 332 Ill.App. 233.
Tex.—**Corpus Juris cited in** Clayton v. Chicago, R. I. & G. Ry. Co., 154 S.W.2d 453, 454, 137 Tex. 441.
Utah.—Cotelini v. Kearns, 11 P.2d 317, 79 Utah 470.
39 C.J. p 810 note 37.

32. Minn.—Gray v. Commutator Co., 89 N.W. 322, 85 Minn. 463.
N.H.—Fortier v. Concord Electric Co., 33 A.2d 801, 92 N.H. 492.
Tex.—Clayton v. Chicago, R. I. & G. Ry. Co., Civ.App., 129 S.W.2d 693, affirmed 154 S.W.2d 453, 137 Tex. 441.

which he has sufficient intelligence to understand and appreciate.

A servant, although under age or inexperienced, assumes all patent and obvious risks of his employment which he has sufficient intelligence to understand and appreciate.[33] Nevertheless, even though the risk is open and obvious, it is not assumed by a young or inexperienced servant unless he is of sufficient discretion and capacity to understand and appreciate it.[34]

§ 416. Comparative Knowledge of Master and Servant

An unskilled servant will not be as readily charged with knowledge of defects as the master, of which neither he nor the master has actual knowledge.

Where neither master nor servant has actual knowledge of a defect in machinery or appliances, but the servant is unskilled, and is not charged with the duty of inspection, knowledge of the defect will not be so readily imputed to him as to the master, on whom rests the duty of inspection.[35]

§ 417. Compliance with Commands or Threats

As a general rule, a youthful or inexperienced servant does not assume the risks where he acts in obedience to orders of the master.

As a general rule, where a young or inexperienced servant is injured while acting in obedience to the commands of, or under the compulsion of threats by, the master, he will not be held to have assumed the risks involved in doing so.[36] He has the right to assume superior knowledge of his employer and that the place and implements for the work directed are safe.[37] He does, however, assume the risk of obeying an order where he knows and appreciates the danger involved in so doing,[38] even though his obedience to the command was caused by fear of losing his employment.[39] The servant will be held to have assumed the risk where the command was given by one having no authority to do so.[40]

§ 418. Failure of Master to Provide Safe Place for Work

A servant whose youth and inexperience disqualify him from encountering the danger does not assume the risk of injury from failure to provide a reasonably safe place for work.

The rule that a servant does not assume the risk of injury due to the failure of the master to exercise reasonable care to furnish him with a reasonably safe place for work, as discussed supra § 363, is especially applicable when the servant by reason of his youth and inexperience is disqualified to encounter the danger.[41]

§ 419. Violation of Statutes Designed for Protection of Minors

As a general rule, assumption of risk as a defense is not available to a master as against a minor employed in violation of a statute prohibiting employment of such a minor.

As discussed supra § 14, in many jurisdictions statutes have been enacted which forbid the employment of minors under a designated age and make disobedience thereof an offense. Although there is some authority to the contrary,[42] the general rule is that, where a minor hired in violation of a statute of this character is injured in the service, the defense of assumption of risk is not open to the employer.[43] Any other rule, it has been said,

33. Del.—Derrickson v. Commissioners of Town of Harrington, 138 A. 645, 3 W.W.Harr. 412.
Ill.—Stahl v. Dow, 74 N.E.2d 907, 332 Ill.App. 233.
Tex.—**Corpus Juris cited in** Clayton v. Chicago, R. I. & G. Ry. Co., Civ.App., 129 S.W.2d 693, 696, affirmed 154 S.W.2d 453, 137 Tex. 441.
39 C.J. p 809 note 33 [a], p 810 note 40.
"Lack of experience will not . . . serve as an excuse for ignorance where the dangerous conditions were such as . . . were or should have been . . . obvious to any adult . . . of ordinary intelligence in the exercise of due care."—Derrickson v. Commissioners of Town of Harrington, 138 A. 645, 647, 3 W.W.Harr., Del., 412.

34. Wis.—Schumacher v. Tuttle Press Co., 126 N.W. 46, 142 Wis. 631.
39 C.J. p 811 note 41.

35. Ind.—Pennsylvania Co. v. Witte, 43 N.E. 319, 15 Ind.App. 583, 44 N.E. 377.

36. Conn.—Schneider v. Raymond, 136 A. 874, 106 Conn. 72.
Miss.—Gulf & S. I. R. Co. v. Bryant, 111 So. 451, 147 Miss. 421, 52 A.L.R. 901.
Tex.—Sherman v. Texas & N. O. R. Co., 91 S.W. 561, 99 Tex. 571.
39 C.J. p 811 note 45.

37. La.—Louviere v. Louisiana R. & Nav. Co., 83 So. 890, 146 La. 667.

38. Mass.—Ciriack v. Merchants' Woolen Co., 15 N.E. 579, 146 Mass. 182, 4 Am.S.R. 307.
39 C.J. p 812 note 47.

39. Conn.—Dickenson v. Vernon, 60 A. 270, 77 Conn. 537.

40. Tex.—Werner v. Trautwein, 61 S.W. 447, 25 Tex.Civ.App. 608.
39 C.J. p 812 note 49.

41. Ky.—Payne v. Henry, 24 S.W. 884, 196 Ky. 467.

42. La.—Darsam v. Kohlmann, 48 So. 781, 123 La. 164, 20 L.R.A., N.S., 881.
39 C.J. p 812 note 55.

43. Ill.—Gill v. Boston Store of Chicago, 168 N.E. 895, 337 Ill. 70—Rost v. F. H. Noble & Co., 147 N.E. 258, 316 Ill. 357.
Mass.—Berdos v. Tremont & Suffolk Mills, 95 N.E. 876, 209 Mass. 489, Ann.Cas.1912B 797.
Mich.—Kucinski v. City Laundry & Cleaning Works, 218 N.W. 773, 242 Mich. 352.
Mont.—Shaw v. Kendall, 136 P.2d 748, 114 Mont. 328.
Neb.—O'Neill v. Rovatsos, 206 N.W. 752, 114 Neb. 142.

would defeat the purpose of the law and render it absolutely futile,[44] and would permit the parties to accomplish by indirection that which is expressly prohibited by statute in furtherance of public policy.[45] The rule is applicable, although the infant or his parent misrepresented the infant's age.[46] The employer must ascertain at his peril that those employed by him may be lawfully employed.[47] A child by his false statement cannot be permitted to repeal a statute.[48]

§ 420. Risks outside Scope of Employment

A master is bound to a higher degree of care in the case of a child in seeing that he does not assume an unusual risk outside the scope of his employment.

The rules under which an adult assumes risks when doing work outside of the scope of the employment, as discussed supra §§ 407–409, have been held not to apply in the same degree to children employees.[49] The master is bound to a higher degree of care in the case of a child than would be required in the case of an adult in seeing that he does not assume an unusual risk not within the scope of his employment.[50] Where the child is directed to do work outside of the scope of his employment and receives no instructions or warning as to the danger of the work, he does not assume the risk of so doing.[51] Nevertheless he may assume the risk of unusual dangers outside of the scope of his employment in disobedience of orders, and, where he is injured before his action could in the exercise of proper care be discovered and prevented, the master is not liable.[52]

G. CONTRIBUTORY NEGLIGENCE

1. In General

§ 421. Definition and Nature

Contributory negligence by an employee is his failure to use such precautions for his own safety as ordinary prudence requires.

Contributory negligence of an employee is the omission on his part to use such precautions for his own safety as ordinary prudence requires.[53] It involves some fault or breach of duty on the part of the employee and his failure to use such care for his safety as ordinarily prudent employees in the same circumstances would use.[54] It has been held that to constitute contributory negligence, there must be some failure on the part of the employee, in addition to the ordinary risk imposed by the character of his work, which would amount to culpable negligence,[55] that contributory negligence on the part of an employee must involve some danger that is so glaring as to threaten immediate injury,[56] and that contributory negligence exists only where an employee with full knowledge of an existing

R.I.—**Corpus Juris cited in** Huling v. Finn, 24 A.2d 620, 622, 67 R.I. 369.
Tenn.—Knoxville News Co. v. Spitzer, 279 S.W. 1043, 152 Tenn. 614.
Vt.—Wlock v. Fort Dummer Mills, 129 A. 311, 98 Vt. 449.
39 C.J. p 812 note 56.
Liability of master for injuries to minor employed in violation of statute see supra § 194.

44. Pa.—Stehle v. Jaeger Automatic Mach. Co., 74 A. 215, 225 Pa. 348, 133 Am.S.R. 884.

45. Ky.—Sanitary Laundry Co. v. Adams, 208 S.W. 6, 183 Ky. 39.

46. Ill.—Beauchamp v. Sturges & Burn Mfg. Co., 95 N.E. 204, 250 Ill. 303.
39 C.J. p 812 note 59.

47. Wash.—Glucina v. F. H. Goss Brick Co., 115 P. 843, 63 Wash. 401, 42 L.R.A.,N.S., 624.

48. Ill.—Beauchamp v. Sturges & Burn Mfg. Co., 95 N.E. 204, 250 Ill. 303.

49. U.S.—Robertson v. Cornelson, C. C.S.C., 34 F. 716.
39 C.J. p 813 notes 64, 65.

50. U.S.—Robertson v. Cornelson, C. C.S.C., 34 F. 716.
Cal.—Elder v. Rose, 219 P. 74, 63 Cal.App. 545.

51. Ind.—Flickner v. Lambert, 74 N.E. 263, 36 Ind.App. 524.
Tex.—Fuller v. Texas Park Lot, Civ. App., 133 S.W.2d 605.

52. U.S.—Robertson v. Cornelson, C. C.S.C., 34 F. 716.

53. U.S.—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F. 2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531.
Fla.—Wilson & Toomer Fertilizer Co. v. Lee, 106 So. 462, 90 Fla. 632.
Ill.—Genzel v. New York, C. & St. L. R. Co., 261 Ill.App. 176.
Mo.—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748.
Tenn.—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn.App. 213.
39 C.J. p 813 note 2.
Contributory negligence defined generally see the C.J.S. title Negligence § 116, also 45 C.J. p 942 note 36 et seq.

Rule of due care is same for employer and employee.—Malcolm v. Mooresville Cotton Mills, 133 S.E. 7, 191 N.C. 727.

54. U.S.—Chesapeake & O. Ry. Co. v. Cochran, C.C.A.W.Va., 22 F.2d 22.
Ill.—Minters v. Mid-City Management Corp., 72 N.E.2d 729, 331 Ill. App. 64.
Okl.—St. Louis & S. F. Ry. Co. v. Sears, 49 P.2d 489, 173 Okl. 483.
39 C.J. p 813 note 3.

55. Ky.—Royal Collieries Co. v. Wells, 50 S.W.2d 948, 244 Ky. 303.

56. Mo.—Davis v. City of Independence, 49 S.W.2d 95, 330 Mo. 201—Bell v. Terminal Railroad Ass'n of St. Louis, 18 S.W.2d 40, 322 Mo. 886.

"Imminent danger" is such as must be instantly met—which cannot be guarded against by calling on others for assistance.—Palmer v. Midland Valley R. Co., 235 P. 853, 118 Kan. 507.

danger and with a free choice of avoiding or exposing himself to it deliberately or carelessly exposes himself.[57]

Contributory negligence may take the form of an affirmative act or of a failure to act.[58] It may consist in an act or in a failure to act that creates a new risk or that enhances or assumes an existing one.[59] It is a matter relating solely to torts and is governed by the principles peculiarly applicable to that branch of jurisprudence.[60] As discussed supra § 357, assumption of risk and contributory negligence are not the same, and an employee may be contributorily negligent, even though the cause of the injury was not a risk that he assumed.[61]

§ 422. As a Defense

Contributory negligence ordinarily is a defense to an action by an employee against his employer for injuries arising out of his employment.

Subject to certain common-law exceptions, as discussed infra §§ 423, 424, and except as modified by statute, as discussed infra § 425, as a general rule, contributory negligence on the part of the injured employee is a defense and defeats any recovery by him against the employer for injuries arising out of his employment.[62] It displaces a prima facie liability of the master.[63] It has been held that, when contributory negligence is set up as a defense by the master, by necessary implication it admits negligence on the part of the master,[64] by denying the right of the servant to recover damages for an injury which would not have occurred but for the servant's own negligence contributing thereto.[65]

§ 423. —— Injury Avoidable by Master Notwithstanding Contributory Negligence

Under the last clear chance doctrine, an employee may recover despite his contributory negligence if the employer, after discovering his peril, could have avoided the injury by the use of ordinary care.

The rule that contributory negligence is a defense, as discussed supra § 422, is subject to a limitation or exception variously called the "last clear chance doctrine" or "humanitarian doctrine," the effect of which is to give a right of recovery to the injured servant notwithstanding his contributory negligence, if the master, after discovering his peril, could by the use of ordinary care have avoided injuring him.[66] A master may not refuse to exer-

57. Wis.—Neitzke v. Kraft-Phenix Dairies, 253 N.W. 579, 214 Wis. 441.

58. Okl.—Chicago, R. I. & P. Ry. Co. v. King, 25 P.2d 304, 165 Okl. 169.
39 C.J. p 813 note 5.

59. Wis.—Fandek v. Barnett & Record Co., 150 N.W. 537, 161 Wis. 55.

60. Ga.—Gray v. Garrison, 176 S.E. 412, 49 Ga.App. 472—Brown v. Rome Mach. & Foundry Co., 62 S.E. 720, 5 Ga.App. 142.

61. Mo.—Macklin v. Fogel Const. Co., 31 S.W.2d 14, 326 Mo. 38.

62. Ariz.—Red Rover Copper Co. v. Industrial Commission, 118 P.2d 1102, 58 Ariz. 203, 137 A.L.R. 740—Robles v. Preciado, 79 P.2d 504, 52 Ariz. 113.
Ark.—Hall v. Patterson, 166 S.W.2d 667, 205 Ark. 10—McGeorge v. Henderson, 145 S.W.2d 31, 201 Ark. 492.
Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.
D.C.—Martin v. Morrison, 32 F.2d 410, 59 App.D.C. 19.
Fla.—Goethe-Howell Lumber Co. v. Stokes, 127 So. 862, 99 Fla. 911.
Kan.—Thoman v. Farmers & Bankers Life Ins. Co., 130 P.2d 551, 155 Kan. 806.
Ky.—McDonald v. Louisville & N. R. Co., 24 S.W.2d 585, 232 Ky. 734.
La.—Mitchell v. Travelers Indem. Co., App., 21 So.2d 198.
Me.—Boober v. Bicknell, 191 A. 275, 135 Me. 153—Moore v. Isenman, 143 A. 462, 127 Me. 370.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213.
Tex.—Galveston, H. & S. A. Ry. Co. v. Contois, Com.App., 288 S.W. 154, certiorari denied 47 S.Ct. 659, 274 U.S. 747, 71 L.Ed. 1328—Zurich General Accident & Liability Ins. Co. v. Fort Worth Laundry Co., Civ.App., 63 S.W.2d 236.
Va.—Knowles v. Southern Ry. Co., 12 S.E.2d 821, 177 Va. 88.
39 C.J. p 813 note 10, p 695 note 20.
Contributory negligence as proximate cause of injury see infra § 440.

Contributory negligence to any extent will defeat recovery from master.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213.

Servant is responsible for his own contributory negligence.—Royal Collieries Co. v. Wells, 50 S.W.2d 948, 244 Ky. 303.

Convict labor

(1) A contractor to whom a convict is hired out is not liable for injuries where by his own negligence the convict contributed to the accident by which he was injured.—Capital Gas & Electric Light Co. v. Davis, 128 S.W. 1062, 138 Ky. 628—13 C.J. p 922 note 58.

(2) The rule of contributory negligence does not apply to a convict whose movements are controlled by a guard placed over him by the contractor, with power to compel obedience, even though the convict is under the general charge of a state officer.
U.S.—Dalheim v. Lemon, C.C.Minn., 45 F. 225.
Ga.—Chattahoochee Brick Co. v. Braswell, 18 S.E. 1015, 92 Ga. 631.

63. Minn.—Rase v. Minneapolis, St. P. & S. S. M. R. Co., 120 N.W. 360, 107 Minn. 260, 21 L.R.A.,N.S., 138.

64. Ind.—Cleveland, C., C. & St. L. R. Co. v. Wolf, App., 114 N.E. 236.
39 C.J. p 815 note 11.

65. Ark.—Helena Hardwood Lumber Co. v. Maynard, 138 S.W. 469, 99 Ark. 377.

66. La.—Barnes v. Red River & G. R. R., 128 So. 724, 14 La.App. 188.
Mo.—Rose v. St. Louis-San Francisco Ry. Co., 289 S.W. 913, 315 Mo. 1181—Voorhees v. Chicago, R. I. & P. Ry. Co., App., 7 S.W.2d 740.
N.H.—Small v. Boston & M. R. R., 173 A. 381, 87 N.H. 25.
Okl.—Atchison, T. & S. F. Ry. Co. v. Myers, 69 P.2d 62, 179 Okl. 637, appeal dismissed Myers v. Atchison, T. & S. F. Ry. Co., 58 S.Ct. 29, 302 U.S. 636, 82 L.Ed. 495.
39 C.J. p 815 note 14, p 816 note 22.
Last clear chance doctrine generally see the C.J.S. title Negligence

cise ordinary care to save his servant from a perilous situation.[67] The basis of this doctrine is that, notwithstanding the servant's negligence, the master has the last opportunity of avoiding the injury[68] and that his negligence, and not the contributory negligence of the servant, is the proximate cause of the injury.[69] The servant must show that after knowledge of his peril the master failed to exercise due care to avoid injuring him and that, as a proximate consequence of this negligence, the servant sustained the injuries complained of.[70]

It has been held that the doctrine of the "last clear chance" applies only to a case where the master actually knew of the servant's peril and might have avoided the injury but failed to do so.[71] On the other hand there are decisions which either actually hold or tend to sustain the view that the "last clear chance doctrine" applies not only where the servant's peril was actually discovered, but also where in the exercise of reasonable care it would have been discovered,[72] unless, under the circumstances, the master was not under a duty to keep a lookout.[73]

It has also been held that it is essential to the applicability of the last clear chance doctrine that the peril be inescapable by action on the servant's part or that he be oblivious to it.[74] Where the negligence of the servant is subsequent to, and concurrent with, the negligence of the master in failing to use ordinary care to avoid injuring the servant, there can be no recovery.[75] This principle applies where the servant was negligent up to the very moment when he was hurt.[76]

Exercise of care to prevent injury. There can be no recovery for injuries sustained by the servant where, after discovering his peril, all reasonable means were used to prevent injuring him[77] or where every precaution was taken to avoid injuring him.[78] Also, there can be no recovery where, after discovery of the perilous situation of the servant, it is impossible to avoid the injury to him by the exercise of ordinary care.[79]

Reason to believe that servant would avoid injury. If the master at the time of the injury had valid grounds to believe that the servant himself would take care to protect himself and avoid injury, the

§ 136, also 45 C.J. p 984 note 82 et seq.

Volunteer assisting or taking place of regular employee in cotton oil mill, notwithstanding volunteer places himself in dangerous position, may hold employer liable if injury could have been avoided by exercise of ordinary care by employer or employee.—Southland Cotton Oil Co. v. Renshaw, 299 P. 425, 148 Okl. 107.

Doctrine held inapplicable

U.S.—Pennsylvania R. Co. v. Lutton, C.C.A.Ohio, 29 F.2d 689, certiorari denied 50 S.Ct. 29, 280 U.S. 574, 74 L.Ed. 626.

Ky.—Louisville & N. R. Co. v. Chapman's Adm'x, 190 S.W.2d 542, 300 Ky. 835.

N.C.—Sampson v. Jackson Bros. Co., 166 S.E. 181, 203 N.C. 413.

W.Va.—Hudson v. Norfolk & W. Ry. Co., 146 S.E. 525, 106 W.Va. 437, certiorari denied 49 S.Ct. 481, 279 U.S. 866, 73 L.Ed. 1004, rehearing denied 50 S.Ct. 79.

67. Mo.—Weed v. American Car & Foundry Co., 14 S.W.2d 652, 322 Mo. 137.
39 C.J. p 816 note 16.

68. N.C.—Hudson v. Seaboard Air Line R. Co., 97 S.E. 388, 176 N.C. 488.

69. Ala.—Louisville & N. R. Co. v. Brown, 25 So. 609, 121 Ala. 221.
39 C.J. p 816 note 18.
Contributory negligence as proximate cause of injury see infra § 440.

70. Ala.—Louisville & N. R. Co. v. Young, 45 So. 238, 153 Ala. 232, 16 L.R.A.,N.S., 301.

71. Tex.—Texas & P. R. Co. v. Breadow, 36 S.W. 410, 90 Tex. 26.
39 C.J. p 816 note 20.

72. Ky.—Southern Mining Co. v. Childers, 142 S.W.2d 995, 283 Ky. 687, 131 A.L.R. 315.
Mo.—Weed v. American Car & Foundry Co., 14 S.W.2d 652, 322 Mo. 137—Beal v. Chicago, B. & Q. R. Co., 285 S.W. 482.
39 C.J. p 816 note 21.

Employee lying on track

Engineer owes no duty to employee lying on track until discovering that he is a human being.—Voorhees v. Chicago, R. I. & P. Ry. Co., Mo.App., 7 S.W.2d 740.

Injury inflicted by fellow servant

(1) The doctrine does not apply to an action against the master to recover damages for an injury to one of two fellow servants by the negligence or willful act of the other, where the master had no such notice of plaintiff's supposed negligence, or of the alleged willfulness, that he could guard against them.—McPeck v. Central Vermont R. Co., Mass., 79 F. 590, 25 C.C.A. 110.

(2) Master's liability for negligent acts of fellow servant generally see supra § 307 et seq.

73. Ky.—Hollifield's Adm'x v. Louisville & N. R. Co., 16 S.W.2d 472, 229 Ky. 16.

74. U.S.—Deere v. Southern Pac. Co., C.C.A.Or., 123 F.2d 438, certiorari denied 62 S.Ct. 916, 315 U.S. 819, 86 L.Ed. 1217.

75. U.S.—Deere v. Southern Pac. Co., supra.
Ala.—Southern Ry. Co. v. Melton, 198 So. 588, 240 Ala. 244—Alabama Great Southern R. Co. v. McWhorter, 47 So. 84, 156 Ala. 269.
39 C.J. p 817 note 26.

76. Ala.—Southern Ry. Co. v. Melton, 198 So. 588, 240 Ala. 244.
39 C.J. p 817 note 27.

77. Ind.—Rush v. Coal Bluff Min. Co., 30 N.E. 904, 131 Ind. 135.
Mo.—Boles v. Hines, App., 226 S.W. 272.

Subordinate employees

Foreman in charge of switching crew could not recover for injuries due to his own negligent failure to act, merely on the ground that possibly it might have been prevented if the members of his crew in secondary relation to the movement had done more.—Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 147 Neb. 18.

78. Miss.—Meridian Light & Ry. Co. v. Dennis, 100 So. 581.
39 C.J. p 816 note 24.

79. Mich.—Watts v. Pere Marquette R. Co., 203 N.W. 859, 231 Mich. 40.
Vt.—Zuverino v. Boston & M. R. Co., 143 A. 308, 101 Vt. 261.
39 C.J. p 816 note 25.

master cannot be held liable under the last clear chance doctrine.[80]

Effect of statutory provisions. The right of the servant to recover under the last clear chance doctrine is not affected by the Federal Employers' Liability Act,[81] providing that contributory negligence shall not bar a recovery but that damages shall be diminished in proportion to his negligence,[82] or by state statutes containing similar provisions,[83] or by a state statute authorizing recovery for injuries to railroad employees while "in the exercise of due care and diligence."[84]

§ 424. —— Willful or Wanton Negligence of Master

Where the injury results from the willful or wanton negligence of the employer or one for whose conduct he is responsible, contributory negligence on the part of the servant will constitute no defense to an action for injuries sustained.

Where the injury resulted from the willful or wanton negligence of the employer or one for whose conduct he is responsible, contributory negligence on the part of the servant will constitute no defense to an action for injuries sustained.[85] In order to constitute willful negligence the act which produced it must have been intentional, or must have been done under such circumstances as evidenced a reckless disregard for the safety of others and a willingness to inflict the injury complained of.[86] When the danger is very great, and the care to prevent disaster is very slight or there is no care at all, the neglect of the party becomes a willful act in law.[87] A mere failure to use ordinary care gives no right of action since this does not involve the element of willfulness.[88] The willfulness must be the proximate cause of the injury.[89]

§ 425. —— Affected by Special Statutory Provisions

a. In general
b. Comparative negligence statutes

a. In General

With respect to an employer's liability for injuries to employees, statutes modifying the doctrine that contributory negligence is a defense apply only under the circumstances and to the extent prescribed.

Under statutes enacted in the various jurisdictions with respect to an employer's liability for injuries to its employees, it is generally held that the defense of contributory negligence is not affected by the statute unless it is so provided expressly or by necessary implication,[90] and then only under the circumstances and to the extent prescribed by the statute.[91] Thus, it has been held that the defense of contributory negligence is not affected by statutes abrogating the defense of assumption of risk[92] or the fellow-servant doctrine,[93] or by a statute rendering the master liable for injuries to his serv-

80. Ala.—Alabama Great Southern R. Co. v. Williams, 104 So. 682, 20 Ala.App. 635.
39 C.J. p 817 note 28.

81. Ark.—Missouri Pac. R. Co. v. Skipper, 298 S.W. 849, 174 Ark. 1083, certiorari denied 48 S.Ct. 322, 276 U.S. 629, 72 L.Ed. 740.
39 C.J. p 817 note 30.

82. Mo.—Mooney v. Terminal R. Ass'n of St. Louis, 176 S.W.2d 605, 352 Mo. 245.
39 C.J. p 817 note 30.

Application of doctrine
Under the Federal Employers' Liability Act the humanitarian rule does not necessarily apply in the sense that it is usually invoked under state law.—Owen v. Kurn, 148 S.W.2d 519, 347 Mo. 516.

83. Tex.—Pecos & N. T. R. Co. v. Rosenbloom, 173 S.W. 215, 107 Tex. 291, rehearing denied 177 S.W. 952, 107 Tex. 291, reversed on other grounds 36 S.Ct. 390, 240 U.S. 439, 60 L.Ed. 730.

84. Ind.—American Car & Foundry Co. v. Inzer, 101 N.E. 676, 53 Ind. App. 316.
39 C.J. p 817 note 32.

85. Ala.—Louisville & N. R. Co. v. York, 30 So. 676, 128 Ala. 305.
39 C.J. p 817 note 35.

86. Ala.—St. Louis & S. F. R. Co. v. Fancher, 55 So. 458, 1 Ala.App. 295.
39 C.J. p 818 note 36.

87. U.S.—Shumacher v. St. Louis & S. F. R. Co., C.C.Ark., 39 F. 174, 177.

88. Ill.—Girard Coal Co. v. Wiggins, 52 Ill.App. 69.
Ky.—Louisville & N. R. Co. v. Coniff, 14 S.W. 543, 90 Ky. 560, 12 Ky.L. 545.

89. Ky.—Jones v. Louisville & N. R. Co., 82 Ky. 610.

90. U.S.—Lang v. U. S. Reduction Co., C.C.A.Ind., 110 F.2d 441.
Tenn.—**Corpus Juris cited in** Steiner v. Spencer, 145 S.W.2d 547, 552, 24 Tenn.App. 389.
39 C.J. p 818 note 43.

Vice-principal
The statute providing that the rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under the Railroad Employers' Liability Act except in so far as they are modified or changed did not modify or change the law as to contributory negligence of a vice-principal as respects his right to recover from an employer for injuries.—Straub v. Oregon Electric Ry. Co., 94 P.2d 681, 163 Or. 93.

91. Fla.—Atlas Dredging Co. v. Mitchell, 77 So. 542, 74 Fla. 307, L.R.A.1918F 220.
39 C.J. p 818 note 44.

92. N.C.—Coley v. North Carolina R. Co., 39 S.E. 43, 128 N.C. 534, 57 L.R.A. 817.
39 C.J. p 819 note 45.

Assumed risk as contributory negligence
Where a statute expressly provides that assumption of risk shall not be available as a defense in an action for injuries arising from a violation of the statute, facts that could have been used under the common-law rule so as to defeat recovery under the rule of assumption of risk cannot be used under the name of contributory negligence.
U. S.—Chicago Junction R. Co. v. King, Ill., 169 F. 372.
Ill.—Illinois Collieries Co. v. Davis, 137 Ill.App. 15, affirmed 83 N.E. 836, 232 Ill. 284.

93. S.C.—Lowe v. Southern R. Co.,

ant caused by defects in the construction of ways, works, and machinery.[94] It has also been held that a statutory provision that knowledge by an employee of defective or unsafe machinery, ways, appliances, or structures shall be no defense to an action for an injury caused thereby does not destroy the defense of contributory negligence.[95]

Under a compensation type statute providing that an employee may recover in an action at law, even though the employer is not negligent, it has been held that contributory negligence is not a defense,[96] but recovery is defeated where the injury was due solely to the employee's negligence,[97] although to come within this exception the employee's negligence must consist of an affirmative act and not a mere failure to act.[98] Workmen's compensation statutes, as affecting the defense of contributory negligence in common-law actions, are discussed in the C.J.S. title Workmen's Compensation Acts § 940, also 71 C.J. p 1491 note 36–p 1495 note 60.

Statutes abrogating defense. Under some statutes, the defense of contributory negligence has been abolished in actions by employees for injuries suffered as a result of their employer's negligence;[99] and, where the legislative body has sought to eliminate the doctrine that an employee may be completely barred by his own negligence from recovery for an injury caused by his employer's negligence, the doctrine must not be allowed recrudescence under some other label in the common-law lexicon.[1] However, even where contributory negligence is out of the case by reason of a statutory provision, the fact that the employee's own act was the sole proximate cause of the injury may constitute a good defense since it negatives the complaint that the injury was caused by the employer's negligence.[2]

Statutory requirements for safety of servants. Contributory negligence is not a defense if the employee's injury resulted from the employer's failure to comply with a statute requiring it to take certain precautions for the safety of employees where the statute expressly or by necessary implication excludes the defense of contributory negligence,[3] but statutes excluding the defense of contributory negligence in case of breach by the master of some statutory duty imposed on him for the benefit of the servant have no application except in cases where the breach of the statute contributes to the injury.[4] By the express provisions of statutes, contributory negligence is held not a defense where the master has violated so-called safety appliance statutes[5] or statutes for the protection of miners,[6] or factory operatives,[7] or for the protection of railroad employees working on or about the track.[8]

It is generally held that, unless the statute ex-

67 S.E. 460, 85 S.C. 363, 137 Am. S.R. 904.

39 C.J. p 819 note 46.

94. Ga.—Southern R. Co. v. Harbin, 36 S.E. 218, 110 Ga. 808.

39 C.J. p 819 note 47.

95. Va.—Norfolk & W. R. Co. v. Cheatwood, 49 S.E. 489, 103 Va. 356.

39 C.J. p 819 note 48.

Unguarded elevator well

Statutory provision that it shall not be a defense to an action for injury due to a failure to guard an elevator well that the injured person knew of the violation of the statute does not allow recovery where employee walks deliberately into open, visible well.—Wojtyna v. Bazar Bros. & Co., 132 A. 384, 47 R.I. 221.

96. Ariz.—Grasty v. Sabin, 259 P. 1049, 32 Ariz. 463.

97. Ariz.—Grasty v. Sabin, supra.

98. Ariz.—Grasty v. Sabin, supra.

99. Wis.—Schuster v. Bridgeman, 275 N.W. 440, 225 Wis. 547.

Farm labor

A farmer, who was injured when his foot was caught in feed roller of silo filler, and owner of silo filler, who were assisting neighbor in filling silo pursuant to agreement of community of farmers for an exchange of work, where engaged in "farm labor" within statute exempting farm labor from operation of statute abrogating defense of contributory negligence in actions by employees against employers.—Schuster v. Bridgeman, supra.

1. U.S.—Tiller v. Atlantic Coast Line R. Co., 63 S.Ct. 444, 318 U.S. 54, 87 L.Ed. 610, 143 A.L.R. 967, certiorari granted 63 S.Ct. 58, 317 U.S. 610, 87 L.Ed. 495.

2. Tex.—Foster v. Carle, Civ.App., 160 S.W.2d 999, error refused.

3. Ark.—Brown v. Hames, 179 S.W. 2d 689, 207 Ark. 196.

Ind.—N. O. Nelson Mfg. Corporation v. Dickson, 53 N.E.2d 640, 114 Ind.App. 668.

Ky.—Louisville & N. R. Co. v. Chapman's Adm'x, 190 S.W.2d 542, 300 Ky. 835.

39 C.J. p 819 note 51, p 820 note 59, p 295 note 88.

Character of safety statute

Under a statute which provides that contributory negligence shall not be a defense where the employer has violated a statute enacted for the safety of employees, the violated statute must be one entailing specific duties on the employer and making specific and concrete requirements.—Weddle v. Heath, 295 P. 832, 211 Cal. 445.

"Kicking switch"

Under a statute providing that a railway company switching a car in the manner known as a "kicking switch" shall be liable, without regard to mere contributory negligence of the person injured, the right of a brakeman to recover for injuries received while engaged in coupling cars in consequence of a kicking switch is not defeated by mere contributory negligence.—Driver v. Southern R. Co., 46 So. 824, 93 Miss. 190.

4. U.S.—Atchison, T. & S. F. R. Co. v. Swearingen, Tex., 36 S.Ct. 121, 239 U.S. 339, 60 L.Ed. 317.

39 C.J. p 821 note 70.

5. Mo.—Coleman v. Himmelberger-Harrison Land & Lumber Co., 79 S.W. 981, 105 Mo.App. 254.

39 C.J. p 821 note 65.

6. Mo.—Maurizi v. Western Coal & Mining Co., 11 S.W.2d 268, 321 Mo. 378.

39 C.J. p 821 note 66.

7. Kan.—Myrick v. Great Western Mfg. Co., 149 P. 702, 96 Kan. 17.

39 C.J. p 821 note 67.

8. Ky.—Illinois Cent. R. Co. v. Jor-

pressly or by necessary implication abrogates the defense of contributory negligence, an employer, whose failure to comply with a statute requiring him to take designated precautions for the safety and protection of its employees causes injury to its employee, is not deprived of the defense of contributory negligence.[9] This principle has been applied in cases where the master failed to comply with statutes requiring dangerous machinery to be guarded,[10] requiring elevator wells to be guarded,[11] requiring mines to be kept free from gas,[12] requiring precautions to be taken to prevent coal from falling,[13] requiring frogs to be blocked,[14] or prohibiting the master from furnishing unsafe ladders or scaffolding.[15] On the other hand, there is some authority that, where the employer violates a statute for the safety and protection of employees, contributory negligence is not a defense,[16] at least where the purpose of the statute was to protect employees from the consequences of their own negligence.[17] Moreover, it has been broadly stated that, where the employee is seeking recovery not on the basis of the employer's negligence, but because of the employer's breach of a statutory duty, to the injury of the employee, the employee's contributory negligence does not constitute a defense,[18] although, where the statute is merely declaratory of the common law, it does not create a statutory cause of action, but merely gives statutory recognition to a common-law cause of action, and contributory negligence is a defense.[19]

Under the Federal Employers' Liability Act, the carrier is deprived of the defense of contributory negligence where the injury resulted from the failure to comply with a statute enacted for the safety and protection of railroad employees,[20] such as the Federal Safety Appliance Act,[21] the Federal Boiler

dan, 78 S.W. 426, 117 Ky. 512, 25 Ky.L. 1610.

39 C.J. p 821 note 68.

9. U.S.—Kolenko v. Certain-Teed Products Corporation, D.C.N.Y., 20 F.Supp. 920—Michalek v. U. S. Gypsum Co., D.C.N.Y., 16 F.Supp. 708.

Pa.—Price v. New Castle Refractories Co., 3 A.2d 418, 332 Pa. 507.

Tenn.—**Corpus Juris cited in** Steiner v. Spencer, 145 S.W.2d 547, 552, 24 Tenn.App. 389.

Vt.—Duggan v. Heaphy, 83 A. 726, 85 Vt. 515.

39 C.J. p 819 note 52, p 295 notes 87, 89 [a].

Noncompliance with safety statute as affecting defense of assumption of risk see supra § 369.

10. U.S.—Sustock v. Shenandoah Abattoir Co., D.C.Pa., 232 F. 900.

39 C.J. p 820 note 53.

11. Mass.—Taylor v. Carew Mfg. Co., 10 N.E. 308, 143 Mass. 470.

12. Ohio.—Krause v. Morgan, 40 N.E. 886, 53 Ohio St. 26.

13. Pa.—Christner v. Cumberland & E. L. Coal Co., 23 A. 221, 146 Pa. 67.

14. U.S.—Lake Erie & W. R. Co. v. Craig, Ohio, 73 F. 642, 19 C.C.A. 631.

39 C.J. p 820 note 57.

15. N.Y.—Shovan v. Lozier Motor Co., 143 N.Y.S. 501, 158 App.Div. 487.

Wis.—Madix v. Hochgreve Brewing Co., 143 N.W. 189, 154 Wis. 448.

16. Kan.—Thoman v. Farmers & Bankers Life Ins. Co., 130 P.2d 551, 155 Kan. 806.

17. N.Y.—Stern v. Great Island Corporation, 293 N.Y.S. 608, 250 App.Div. 115.

18. N.Y.—Stern v. Great Island Corporation, supra—Sgandurra v. 220 Estates, 56 N.Y.S.2d 684, 185 Misc. 283, affirmed 61 N.Y.S.2d 910, 270 App.Div. 834, appeal denied 61 N.Y.S.2d 920, 270 App.Div. 884.

Negligence and contributory negligence not involved

If employee's action against employer is based on violation of absolute and unqualified prohibition or direction in statute, negligence and contributory negligence have no part, rule being otherwise if statute is in regulation of work or dependent on some other fact.—Schmidt v. Merchants Despatch Transp. Co., 280 N.Y.S. 836, 244 App.Div. 606, motion granted Labieko v. American Piano Co., 198 N.E. 534, 268 N.Y. 639, modified on other grounds Schmidt v. Merchants Despatch Transp. Co., 200 N.E. 824, 270 N.Y. 287, reargument denied 2 N.E.2d 680, 271 N.Y. 531.

19. N.Y.—Sgandurra v. 220 Estates, 56 N.Y.S.2d 684, 185 Misc. 283, affirmed 61 N.Y.S.2d 910, 270 App. Div. 834, appeal denied 61 N.Y.S.2d 920, 270 App.Div. 884.

20. U.S.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515.

Ill.—Stott v. Thompson, 14 N.E.2d 246, 294 Ill.App. 450, certiorari denied Thompson v. Stott, 59 S.Ct. 106, 305 U.S. 639, 83 L.Ed. 411.

Ind.—Baltimore & O. S. W. R. Co. v. Carroll, 163 N.E. 99, 200 Ind. 589, set aside on other grounds 171 N.E. 923, 202 Ind. 37, reversed on other grounds 50 S.Ct. 182, 280 U.S. 491, 74 L.Ed. 566.

La.—Harris v. Yazoo & M. V. R. Co., App., 183 So. 108.

Mo.—Truesdale v. Wheelock, 74 S.W.2d 585, 335 Mo. 924.

Okl.—Missouri-Kansas-Texas R. Co. v. Herron, 55 P.2d 95, 176 Okl. 162.

S.C.—Barton v. Southern Ry. Co., 171 S.E. 5, 171 S.C. 46, certiorari denied Southern Ry. Co. v. Barton, 54 S.Ct. 51, 290 U.S. 632, 78 L.Ed. 550.

Tex.—International-Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272—Chicago, R. I. & G. Ry. Co. v. Harris, Civ.App., 28 S.W.2d 611, error dismissed—Texas & P. Ry. Co. v. Baldwin, Civ.App., 25 S.W.2d 969, affirmed, Com.App., 44 S.W.2d 909, certiorari denied 53 S.Ct. 11, 287 U.S. 606, 77 L.Ed. 527.

39 C.J. p 820 note 60.

Only where safety statute is involved

Defense of contributory negligence is eliminated in action under Federal Employers' Liability Act only where statute for safety of employees is violated.—Nashville, C. & St. L. Ry. v. Hines, 94 S.W.2d 397, 20 Tenn. App. 1.

Waiver of statute

Contributory negligence bars recovery for injuries to railroad employee waiving federal act.—High v. Quincy, O. & K. C. R. Co., 300 S.W. 1102, 318 Mo. 444.

21. U.S.—Chicago, St. P., M. & O. Ry. Co. v. Muldowney, C.C.A.Minn., 130 F.2d 971, certiorari denied 63 S.Ct. 526, 317 U.S. 700, 87 L.Ed. 560—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515.

Ala.—Alabama Great Southern R. Co. v. Cornett, 106 So. 242, 214 Ala. 23.

Cal.—Newkirk v. Los Angeles Junction Ry. Co., 131 P.2d 535, 21 Cal.

Inspector Act,[22] or the Hours of Service Act.[23] Under such statutes, the employer is liable regardless of contributory negligence,[24] which must be excluded from consideration;[25] the contributory negligence of the servant is not only not a defense, but does not go in reduction of damages,[26] but recovery may not be had where the employee's negligence was the sole cause of his injury.[27] Since the scope of the Federal Safety Appliance Act is wider than that of the Federal Employers' Liability Act, the case may be covered by the former, but not by the latter, as where a train is engaged in intra-state commerce, and in such case contributory negligence may be a defense.[28]

b. Comparative Negligence Statutes

Under statutes which prescribe a rule of comparative negligence it has generally been held that the employee's contributory negligence is not a defense in the sense that it will defeat recovery.

Under statutes which prescribe a rule of comparative negligence, as discussed in detail in the C.J.S. title Negligence §§ 169–173, also 39 C.J. p 822 note 80–p 824 note 39, and 45 C.J. p 1038 note 16 et seq, it has generally been held that the employee's contributory negligence is not a defense in the sense that it will defeat recovery[29] unless, under some

2d 308—Atchison, T. & S. F. Ry. Co. v. Superior Court in and for Contra Costa County, 86 P.2d 85, 12 Cal.2d 549, certiorari denied Atchison T. & S. F. R. Co. v. Superior Court of State of California, 59 S.Ct. 774, 306 U.S. 657, 83 L.Ed. 1055—Maurice v. State, 110 P.2d 706, 43 Cal.App.2d 270—Ballard v. Sacramento Northern Ry. Co., 14 P.2d 1045, 126 Cal.App. 486, rehearing denied 15 P.2d 793, 126 Cal. App. 486—Qualls v. Atchison, T. & S. F. Ry. Co., 296 P. 645, 112 Cal. App. 7.
Ga.—Seaboard Air Line Ry. Co. v. D'Avignon, 153 S.E. 96, 41 Ga. App. 263, certiorari denied 51 S.Ct. 351, 283 U.S. 827, 75 L.Ed. 1441.
Ind.—Chicago, I. & L. Ry. Co. v. Stierwalt, 153 N.E. 807, 87 Ind.App. 478, certiorari denied 49 S.Ct. 32, 278 U.S. 633, 73 L.Ed. 551.
Minn.—Holz v. Chicago, M., St. P. & P. R. Co., 224 N.W. 241, 176 Minn. 575.
Miss.—Gulf, M. & N. R. Co. v. Wood, 146 So. 298, 164 Miss. 765, motion sustained for stay of execution 147 So. 652, certiorari denied 53 S.Ct. 791, 289 U.S. 759, 77 L.Ed. 1502.
Mo.—Alcorn v. Missouri Pac. R. Co., 63 S.W.2d 55, 333 Mo. 828, certiorari denied Missouri Pac. Ry. Co. v. Alcorn, 54 S.Ct. 228, 290 U.S. 701, 78 L.Ed. 602—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005—Clark v. Chicago, R. I. & P. Ry. Co., 300 S.W. 758, 318 Mo. 453—Carter v. St. Louis, T. & E. R. Co., 271 S.W. 358, 307 Mo. 595.
N.Y.—Lierness v. Long Island R. Co., 216 N.Y.S. 656, 217 App.Div. 301.
Okl.—Essary v. Lowden, 116 P.2d 712, 189 Okl. 257, certiorari denied 62 S.Ct. 489, 315 U.S. 798, 86 L.Ed. 1199, rehearing denied 62 S.Ct. 638, 315 U.S. 828, 86 L.Ed. 1223.
S.C.—Link v. Seaboard Air Line Ry. Co., 156 S.E. 481, 159 S.C. 538, certiorari denied Seaboard Air Line Ry. Co. v. Link, 51 S.Ct. 212, 282 U.S. 900, 75 L.Ed. 792.
Tex.—Chicago, R. I. & G. Ry. Co. v. Harris, Civ.App., 28 S.W.2d 611, error dismissed.
39 C.J. p 820 note 60.

22. U.S.—Lilly v. Grand Trunk Western R. Co., Ill., 63 S.Ct. 347, 317 U.S. 481, 87 L.Ed. 411—McCarthy v. Pennsylvania R. Co., C.C.A.Ind., 156 F.2d 877—Erie R. Co. v. Lindquist, C.C.A.Pa., 27 F.2d 98—Lehigh Valley R. Co. v. Beltz, C.C.A.N.Y., 10 F.2d 74, certiorari denied 46 S.Ct. 205, 270 U.S. 641, 70 L.Ed. 775.
Ala.—Atlantic Coast Line R. Co. v. Wetherington, 16 So.2d 720, 245 Ala. 313.
Ky.—Louisville & N. R. Co. v. Stephens, 182 S.W.2d 447, 298 Ky. 328.
Mo.—Cantley v. Missouri-Kansas-Texas R. Co., 183 S.W.2d 123, 353 Mo. 605—Aly v. Terminal R. Ass'n of St. Louis, 119 S.W.2d 363, 342 Mo. 1116, certiorari denied Terminal R. Ass'n of St. Louis v. Aly, 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424.
N.C.—Gerow v. Seaboard Air Line Ry., 128 S.E. 345, 189 N.C. 813, certiorari denied Seaboard Air Line Ry. Co. v. Gerow, 46 S.Ct. 121, 269 U.S. 584, 70 L.Ed. 425.
Okl.—Carter v. Chicago, R. I. & P. Ry. Co., 65 P.2d 469, 179 Okl. 292.
Utah.—Ehalt v. McCarthy, 138 P.2d 639, 104 Utah 110.
Wyo.—Chicago, B. & Q. R. Co. v. Murray, 277 P. 703, 40 Wyo. 324.
39 C.J. p 820 note 60 [b].

23. U.S.—Atchison, T. & S. F. R. Co. v. Swearington, Tex., 36 S.Ct. 121, 239 U.S. 339, 60 L.Ed. 317.
Tenn.—Mitchell v. Southern Ry. Co., 12 Tenn.App. 523.

24. U.S.—Erie R. Co. v. Schleenbaker, Ohio, 257 F. 667, 168 C.C.A. 617, certiorari denied 40 S.Ct. 13, 250 U.S. 666, 63 L.Ed. 1197.
Mo.—Page v. Payne, 240 S.W. 156, 293 Mo. 600.

25. U.S.—Auchenbach v. Philadelphia & R. Ry. Co., C.C.A.N.J., 8 F.2d 350.
Colo.—Auslender v. Boettcher, 242 P. 672, 78 Colo. 427.
39 C.J. p 821 note 63.

26. Ga.—Western & A. R. R. v. Townsend, 135 S.E. 439, 36 Ga. App. 70.
Mo.—Wilson v. Thompson, 133 S.W. 2d 331, 345 Mo. 319.
Ohio.—Baltimore & O. R. Co. v. Shober, 176 N.E. 88, 38 Ohio App. 216.
39 C.J. p 821 note 64.
Comparative negligence see infra subdivision b of this section.

27. Cal.—Qualls v. Atchison, T. & S. F. Ry. Co., 296 P. 645, 112 Cal. App. 7.
Mo.—Robison v. Chicago & E. I. Ry. Co., 64 S.W.2d 660, certiorari denied 54 S.Ct. 558, 291 U.S. 682, 78 L.Ed. 1069, 334 Mo. 81—Peters v. Wabash Ry. Co., 42 S.W.2d 588, 328 Mo. 924, certiorari denied 52 S.Ct. 209, 284 U.S. 686, 76 L.Ed. 580.
Tex.—International-Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272.
W.Va.—Staton v. Virginian Ry. Co., 195 S.E. 601, 119 W.Va. 658.

28. U.S.—Tipton v. Atchison, T. & S. F. Ry. Co., 56 S.Ct. 715, 298 U.S. 141, 80 L.Ed. 1091, 104 A.L.R. 831.
Fla.—Atlantic Coast Line R. Co. v. Moore, 181 So. 374, 135 Fla. 485, modified on other grounds 186 So. 210, 135 Fla. 485.
N.H.—Grew v. Boston & M. R. R., 142 A. 707, 83 N.H. 383.

State law governs
U.S.—Tipton v. Atchison, T. & S. F. Ry. Co., Cal., 56 S.Ct. 715, 298 U.S. 141, 80 L.Ed. 1091, 104 A.L.R. 831.
Fla.—Atlantic Coast Line R. Co. v. Moore, 181 So. 374, 135 Fla. 485, modified on other grounds 186 So. 210, 135 Fla. 485.

29. U.S.—Tombigbee Mill & Lumber Co. v. Hollingsworth, C.C.A. Miss., 162 F.2d 763—Great Northern Ry. Co. v. Wojtala, C.C.A. Mont., 112 F.2d 609—Union Oil

statutes, the employee's negligence is as great or greater than the negligence of the employer,[30] or the injured employee's negligence was the sole proximate cause of the injury.[31] Thus, under the Federal Employers' Liability Act, an employee's contributory negligence is not a defense in the sense that it will defeat his action against his employer for injuries[32] unless such negligence was

Co. of California v. Hunt, C.C.A. Or., 111 F.2d 269—Montgomery Ward & Co. v. Lindsey, C.C.A. Miss., 104 F.2d 882—Southern Kraft Corporation v. Parnell, C. C.A.Miss., 65 F.2d 785.
Ark.—Dierks Lumber & Coal Co. v. Noles, 148 S.W.2d 650, 201 Ark. 1088—Goodin v. Boyd-Sicard Coal Co., 122 S.W.2d 548, 197 Ark. 175—W. P. Brown & Sons Lumber Co. v. Oaties, 72 S.W.2d 213, 189 Ark. 338—Ward Furniture Mfg. Co. v. Pickle, 295 S.W. 727, 174 Ark. 463.
Fla.—Winter Park Telephone Co. v. Strong, 179 So. 289, 130 Fla. 755, rehearing denied 182 So. 927—Goethe-Howell Lumber Co. v. Stokes, 127 So. 862, 99 Fla. 911.
Ill.—Humphreys v. East St. Louis & Suburban Ry. Co., 253 Ill.App. 450.
Ky.—Louisville & N. R. Co. v. Chapman's Adm'x, 190 S.W.2d 542, 300 Ky. 835.
Mont.—Palmer v. Great Northern Ry. Co., 170 P.2d 768.
N.C.—Brooks v. Suncrest Lumber Co., 138 S.E. 532, 194 N.C. 141.
Ohio.—Baltimore & O. R. Co. v. McTeer, 9 N.E.2d 627, 55 Ohio App. 217.
Or.—Chatfield v. Zeller, 147 P.2d 222, 174 Or. 59—Fitzgerald v. Oregon-Washington R. & Nav. Co., 16 P. 2d 27, 141 Or. 1—Peluck v. Pacific Machine & Blacksmith Co., 293 P. 417, 134 Or. 171.
39 C.J. p 822 notes 81, 82.

Employee's negligence, unless willful, was no defense in personal injury action against employer.—Hollopeter v. Palm, 291 P. 380, 134 Or. 546, modified on other grounds 294 P. 1056, 134 Or. 546, and appeal dismissed 52 S.Ct. 15, 284 U.S. 572, 76 L.Ed. 497.

30. Ohio.—Detroit & T. Shore Line R. Co. v. Seigel, App., 153 N.E. 870.
Wis.—Schuster v. Bridgemen, 275 N. W. 440, 225 Wis. 547.
39 C.J. p 824 notes 6, 8.

Employee's negligence slight

A brakeman's violation of railway company rule prohibiting employees from riding on running board of engines was contributory negligence but did not bar recovery under statutes for his death when he was impaled against piece of scrap iron which was thrust up from track as engine passed over it, where brakeman's negligence was slight in comparison with railway company's negligence.—Norfolk & W. Ry. Co. v. Riggs, C.C.A.Ohio, 98 F.2d 612.

31. Ky.—Louisville & N. R. Co. v. Chapman's Adm'x, 190 S.W.2d 542, 300 Ky. 835.
Minn.—Stritzke v. Chicago Great Western Ry. Co., 251 N.W. 532, 190 Minn. 323.
Tex.—Hunter v. Texas Elec. Ry. Co., Civ.App., 194 S.W.2d 281, error refused.
39 C.J. p 823 note 87, p 824 note 5.

32. U.S.—Owens v. Union Pac. R. Co., Wash., 63 S.Ct. 1271, 319 U.S. 715, 87 L.Ed. 1683, certiorari denied 65 S.Ct. 57, 323 U.S. 740, 89 L.Ed. 593—New York Cent. R. Co. v. Marcone, N.J., 50 S.Ct. 294, 281 U.S. 345, 74 L.Ed. 892—Thompson v. Camp, C.C.A.Tenn., 163 F.2d 396—Hutchins v. Akron, C. & Y. R. Co., C.C.A.Ohio, 162 F.2d 189—Chicago, St. P., M. & O. R. Co. v. Arnold, C.C.A.Minn., 160 F.2d 1002—Keith v. Wheeling & L. E. Ry. Co., C.C.A.Ohio, 160 F.2d 654—Bowser v. Baltimore & O. R. Co., C.C.A.Pa., 152 F.2d 436—Eiseman v. Pennsylvania R. Co., C.C.A.Pa., 151 F.2d 222—Boston & M. R. R. v. Cabana, C.C.A.Mass., 148 F.2d 150, certiorari denied 65 S.Ct. 1414, 325 U.S. 873, 89 L.Ed. 1991—Ramsouer v. Midland Valley R. Co., C.C.A. Ark., 135 F.2d 101—McGivern v. Northern Pac. Ry. Co., C.C.A. Minn., 132 F.2d 213—Underwood v. Louisville & N. R. Co., C.C.A.Ill., 131 F.2d 306, certiorari denied 63 S.Ct. 559, 318 U.S. 760, 87 L.Ed. 1133—Thomson v. Boles, C.C.A. Minn., 123 F.2d 487, certiorari denied 62 S.Ct. 632, 315 U.S. 804, 86 L.Ed. 1204—Wiggins v. Powell, C.C.A.Fla., 119 F.2d 751, certiorari denied Powell v. Wiggins, 62 S.Ct. 94, 314 U.S. 649, 86 L.Ed. 520—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531—Dudley v. Scandrett, C.C.A.Wash., 115 F.2d 728—Rader v. Baltimore & O. R. Co., C.C.A.Ill., 108 F.2d 980, certiorari denied Baltimore & O. R. Co. v. Rader, 60 S.Ct. 722, 309 U.S. 682, 84 L.Ed. 1026—Ballard v. Atchison, T. & S. F. R. Co., C.C.A.Tex., 100 F.2d 162—Halges v. Central R. Co. of New Jersey, C.C.A.N.Y., 58 F. 2d 169, certiorari denied Central R. Co. of New Jersey v. Halges, 53 S.Ct. 11, 287 U.S. 607, 77 L.Ed. 528—Lehigh Valley R. Co. v. McGranahan, C.C.A.N.Y., 6 F.2d 431—Tishar v. Nicodemus, D.C.Ill., 49 F.Supp. 145.
Ala.—Alabama Great Southern R. Co. v. Baum, 31 So.2d 366—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504—Southern Ry. Co. v. Glenn, 154 So. 792, 228 Ala. 563—Birmingham Belt R. Co. v. Bennett, 146 So. 265, 226 Ala. 185, certiorari denied 54 S.Ct. 52, 290 U.S. 634, 78 L.Ed. 552—Southern Ry. Co. v. Smith, 128 So. 228, 221 Ala. 273—Mobile & O. R. Co. v. Williams, 121 So. 722, 219 Ala. 238—Louisville & N. R. Co. v. Jacobson, 118 So. 565, 218 Ala. 384.
Ark.—St. Louis-San Francisco Ry. Co. v. Wacaster, 199 S.W.2d 948—Kansas City Southern Ry. Co. v. Hopson, 186 S.W.2d 946, 208 Ark. 548—Missouri Pac. R. Co. v. Keeton, 183 S.W.2d 505, 207 Ark. 793, reversed on other grounds 66 S.Ct. 135, 326 U.S. 689, 90 L.Ed. 405—Missouri Pac. R. Co. v. McKamey, 171 S.W.2d 932, 205 Ark. 907—Missouri Pac. R. Co. v. Haigler, 158 S.W.2d 703, 203 Ark. 804—Missouri Pac. R. Co. v. Sanders, 117 S.W.2d 720, 196 Ark. 269—St. Louis-San Francisco Ry. Co. v. Miller, 292 S. W. 986, 173 Ark. 597.
Cal.—Perrett v. Southern Pac. Co., 165 P.2d 751, 73 Cal.App.2d 30—Matthews v. Atchison, T. & S. F. Ry. Co., 129 P.2d 435, 54 Cal.App. 2d 549—Metz v. Southern Pac. Co., 124 P.2d 670, 51 Cal.App.2d 260—Myers v. Southern Pac. Co., 58 P. 2d 387, 14 Cal.App.2d 287, hearing denied 59 P.2d 1001, 14 Cal.App.2d 287—Hackley v. Southern Pac. Co., 45 P.2d 447, 6 Cal.App.2d 611, certiorari denied Southern Pac. Co. v. Hackley, 56 S.Ct. 153, 296 U.S. 630, 80 L.Ed. 447.
Conn.—Onofrio v. Palmer, 43 A.2d 454, 132 Conn. 257.
Fla.—Atlantic Coast Line R. Co. v. McIntosh, 198 So. 92, 144 Fla. 356.
Ga.—Southern Ry. Co. v. Newman, 199 S.E. 753, 187 Ga. 132, followed in Southern Ry. Co. v. Newman, 199 S.E. 755, 187 Ga. 136—Tankersley v. Southern Ry. Co., 35 S.E.2d 522, 73 Ga.App. 88—Pollard v. Gammon, 12 S.E.2d 624, 63 Ga.App. 852.
Ill.—Walaite v. Chicago, R. I. & P. Ry. Co., 33 N.E.2d 119, 376 Ill. 59—Armstrong v. Chicago & W. I. R. Co., 183 N.E. 478, 350 Ill. 426, certiorari denied Chicago & W. I. R. Co. v. Armstrong, 53 S.Ct. 523, 289 U.S. 724, 77 L.Ed. 1475—Howard v. Baltimore & O. C. T. R. Co., 63 N.E.2d 774, 327 Ill.App. 83—Avance v. Thompson, 51 N.E.2d 334, 320 Ill.App. 406, reversed on other grounds 55 N.E.2d 57, 387 Ill. 77, certiorari denied 65 S.Ct. 82, 323 U.S. 753, 89 L.Ed. 603—Patzn-

the sole cause of the injury,[33] or unless, according to the decisions on the question by the different

sky v. Lowden, 47 N.E.2d 338, 317 Ill.App. 613—Werner v. Illinois Cent. R. Co., 33 N.E.2d 121, 309 Ill. App. 292, reversed on other grounds 42 N.E.2d 82, 379 Ill. 559—Genzel v. New York, C. & St. L. R. Co., 261 Ill.App. 176—Beck v. Baltimore & O. R. Co., 244 Ill.App. 441.

Ind.—Illinois Steel Co. v. Fuller, 23 N.E.2d 259, 216 Ind. 180—New York Cent. R. Co. v. Verpleatse, 59 N.E.2d 916, 116 Ind.App. 1, rehearing denied 60 N.E.2d 784, 116 Ind.App. 1—Southern Ry. Co. v. Harpe, App., 53 N.E.2d 185.

Iowa.—Farwark v. Chicago, M. & St. P. Ry. Co., 211 N.W. 875, 202 Iowa 1229.

Ky.—Louisville & N. R. Co. v. Chapman's Adm'x, 190 S.W.2d 542, 300 Ky. 835.

La.—Harris v. Yazoo & M. V. R. Co., App., 183 So. 108.

Mass.—Rollins v. Boston & M. R. R., 74 N.E.2d 664.

Mich.—Thrall v. Pere Marquette Ry. Co., 241 N.W. 235, 257 Mich. 269—Thrall v. Pere Marquette Ry. Co., 236 N.W. 230, 254 Mich. 197—Thrall v. Pere Marquette Ry. Co., 229 N.W. 488, 249 Mich. 440—Sumner v. Ann Arbor R. Co., 209 N.W 184, 235 Mich. 293.

Minn.—Jacobson v. Chicago & N. W. Ry. Co., 22 N.W.2d 455, 221 Minn. 454.

Mo.—Francis v. Terminal R. Ass'n of St. Louis, 193 S.W.2d 909, 354 Mo. 1232—Joice v. Missouri-Kansas-Texas R. Co., 189 S.W.2d 568, 354 Mo. 439, 161 A.L.R. 383—Copeland v. Terminal R. Ass'n of St. Louis, 182 S.W.2d 600, 353 Mo. 433, certiorari denied 65 S.Ct. 554, 323 U.S. 799, 89 L.Ed. 637—Godsy v. Thompson, 179 S.W.2d 44, 352 Mo. 681, certiorari denied 65 S.Ct. 48, 323 U.S. 719, 87 L.Ed. 578—Mooney v. Terminal R. Ass'n of St. Louis, 176 S.W.2d 605, 352 Mo. 245—Owen v. Kurn, 148 S.W.2d 519, 347 Mo. 516—Evans v. Atchison, T. & S. F. Ry. Co., 131 S.W.2d 604, 345 Mo. 147—Hough v. Chicago, R. I. & P. Ry. Co., 100 S.W.2d 499, 339 Mo. 1169—Moran v. Atchison, T. & S. F. Ry. Co., 48 S.W.2d 881, 330 Mo. 278, certiorari denied Atchison, T. & S. F. R. Co. v. Moran, 53 S.Ct. 21, 287 U.S. 621, 77 L.Ed. 539.

Mont.—Burnett v. Northern Pac. Ry. Co., 124 P.2d 307, 113 Mont. 253.

Neb.—Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 147 Neb. 18.

N.Y.—Barry v. Boston & M. R. R., 229 N.Y.S. 378, 223 App.Div. 563—Henry v. Norton, 66 N.Y.S.2d 317.

N.C.—McCrowell v. Southern Ry. Co., 20 S.E.2d 352, 221 N.C. 366.

Or.—McCauley v. Pacific Atlantic S. S. Co., 115 P.2d 307, 167 Or. 80.

Pa.—Coleman v. Reading Co., 29 A.2d 499, 346 Pa. 289—Baumgartner v. Pennsylvania R. Co., 140 A. 622, 292 Pa. 106—Backes v. Pennsylvania R. Co., 200 A. 181, 132 Pa. Super. 29.

S.C.—McClain v. Charleston & W. C. Ry. Co., 4 S.E.2d 280, 191 S.C. 332—Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 158 S.C. 194, certiorari denied Atlantic Coast Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.

Tenn.—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn.App. 213.

Tex.—Missouri Pac. R. Co. v. Jones, 76 S.W.2d 1044, 124 Tex. 234, certiorari denied 55 S.Ct. 638, 294 U.S. 729, 79 L.Ed. 1259—Benson v. Missouri, K. & T. R. Co., Civ.App., 200 S.W.2d 233, error refused, no reversible error.

Wash.—Pierce v. Spokane International Ry. Co., 131 P.2d 139, 15 Wash.2d 431—McGinn v. North Coast Stevedoring Co., 270 P. 113, 149 Wash. 1—Colacci v. Chicago, M. & St. P. Ry. Co., 251 P. 880, 141 Wash. 587.

W.Va.—Rash v. Norfolk & W. Ry. Co., 12 S.E.2d 501, 122 W.Va. 688—Towns v. Monongahela Ry. Co., 144 S.E. 289, 105 W.Va. 572.

39 C.J. p 822 note 80.

Proximate cause

Employee's negligence, however late and however directly connected with injury, does not defeat cause of action if employer's negligence remains a proximate contributing cause.—Mooney v. Terminal R. Ass'n of St. Louis, 176 S.W.2d 605, 352 Mo. 245.

Negligence of fellow servant

(1) Fact that employee's negligence was contributing cause co-operating with negligence of other employees in causing injury is not complete defense to railway company sued by employee.—Hawthorne v. International-Great Northern R. Co., Tex.Civ.App., 63 S.W.2d 243, error refused.

(2) Fellow-servant rule under the Federal Employers' Liability Act see supra § 355.

Participation in negligent act

Fireman's death may be found to have resulted from other employee's negligence causing collision, although fireman participated in negligent act.—Western & A. R. R. v. Lockridge, 152 S.E. 474, 170 Ga. 208, certiorari denied 50 S.Ct. 461, 281 U. S. 762, 74 L.Ed. 1171.

33. U.S.—N. Y. Cent. R. Co. v. Marcone, N.J., 50 S.Ct. 294, 281 U.S. 345, 74 L.Ed. 892—Atlantic Coast Line R. Co. v. Davis, S.C., 49 S.Ct. 210, 279 U.S. 34, 73 L.Ed. 601—Chicago, St. P., M. & O. R. Co. v. Arnold, C.C.A.Minn., 160 F.2d 1002—Keith v. Wheeling & L. E. Ry. Co., C.C.A.Ohio, 160 F.2d 654—Mumma v. Reading Co., C.C.A.Pa., 146 F.2d 215—Willis v. Pennsylvania R. Co., C.C.A.N.Y., 122 F.2d 248, certiorari denied 62 S.Ct. 187, 314 U.S. 684, 86 L.Ed. 547—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531—Hylton v. Southern Ry. Co., C.C.A.Tenn., 87 F.2d 393, certiorari denied 57 S.Ct. 929, 301 U.S. 699, 81 L.Ed. 1354—Cooley v. New York Cent. R. Co., C.C.A.N.Y., 80 F.2d 816, certiorari denied New York Cent. R. Co. v. Cooley, 56 S. Ct. 599, 297 U.S. 721, 80 L.Ed. 1005—Erie R. Co. v. Irons, C.C.A.N.J., 48 F.2d 60, certiorari denied 51 S. Ct. 649, 283 U.S. 857, 75 L.Ed. 1463—Reynolds v. New York, O. & W. Ry. Co., C.C.A.N.Y., 42 F.2d 164.

Ala.—Atlantic Coast Line R. Co. v. Wetherington, 16 So.2d 720, 245 Ala. 313—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504—Southern Ry. Co. v. Glenn, 154 So. 792, 228 Ala. 563—Louisville & N. R. Co. v. Jacobson, 118 So. 565, 218 Ala. 384.

Ark.—Jones v. Kansas City Southern Ry. Co., 145 S.W.2d 969, 201 Ark. 523—Dozier v. Missouri Pac. R. Co., 3 S.W.2d 678, 176 Ark. 651.

Fla.—Atlantic Coast Line R. Co. v. McIntosh, 198 So. 92, 144 Fla. 356.

Ga.—Tankersley v. Southern Ry. Co., 35 S.E.2d 522, 73 Ga.App. 88.

Ill.—Helton v. Thomson, 36 N.E.2d 267, 311 Ill.App. 354, certiorari denied 62 S.Ct. 1280, 316 U.S. 688, 86 L.Ed. 1760, rehearing denied 63 S. Ct. 24, 317 U.S. 704, 87 L.Ed. 562.

Ky.—Louisville & N. R. Co. v. Chapman's Adm'x, 190 S.W.2d 542, 300 Ky. 835—Louisville & N. R. Co. v. Stewart, 142 S.W.2d 119, 283 Ky. 585—Louisville & N. R. Co. v. Jolly's Adm'x, 23 S.W.2d 564, 232 Ky. 702, certiorari denied Louisville & N. R. Co. v. Jolly, 51 S.Ct. 26, 282 U.S. 847, 75 L.Ed. 751.

Mich.—Thrall v. Pere Marquette Ry. Co., 236 N.W. 230, 254 Mich. 197.

Mo.—Hough v. Chicago, R. I. & P. Ry. Co., 100 S.W.2d 499, 339 Mo. 1169—Imboden v. St. Louis-San Francisco Ry. Co., App., 272 S.W. 1092.

Neb.—Ellis v. Union Pac. R. Co., 27 N.W.2d 921, 148 Neb. 515—Hayes v. Chicago, B. & Q. Ry. Co., 269 N. W. 623, 131 Neb. 687.

N.Y.—Lierness v. Long Island R. Co., 216 N.Y.S. 656, 217 App.Div. 301.

N.C.—Buie v. Powell, 1 S.E.2d 102, 215 N.C. 67.

Tex.—International-Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272—Missouri Pac. R. Co.

courts, the injured servant was primarily at | fault.[34]

v. Jones, 76 S.W.2d 1044, 124 Tex. 234, certiorari denied 55 S.Ct. 638, 294 U.S. 729, 79 L.Ed. 1259—Hawthorne v. International - Great Northern R. Co., Civ.App., 63 S.W. 2d 243.

Utah.—Miller v. Southern Pac. Co., 21 P.2d 865, 82 Utah 46, certiorari denied Southern Pac. Co. v. Miller, 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 600.

New and superseding cause of injury

Contributory negligence of employee seeking recovery under act does not preclude recovery in action based on violation of employer's statutory duty, unless contributory negligence can be deemed new and superseding cause of accident, and it is not considered as such when it is a normal reaction to situation created by employer's wrong.—Anderson v. Baltimore & O. R. Co., C.C.A.N.Y., 89 F.2d 629, certiorari denied Baltimore & O. R. Co. v. Anderson, 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 538.

Held sole proximate cause

(1) In general.

U.S.—Kansas City Southern Ry. Co. v. Williford, C.C.A.La., 65 F.2d 223, certiorari denied Williford v. Kansas City Southern Ry. Co., 54 S.Ct. 87, 290 U.S. 666, 78 L.Ed. 576.

Miss.—Gulf M. & N. R. Co. v. Madden, 200 So. 119, 190 Miss. 374.

Neb.—Hayes v. Chicago, B. & Q. Ry. Co., 269 N.W. 623, 131 Neb. 687.

Pa.—Fitzgerald v. Pennsylvania R. R., 184 A. 299, 121 Pa.Super. 461.

(2) Negligence of switchman, stepping off engine footboard was held sole cause of death from contact with side of engine on train passing along adjacent track.—Atlantic Coast Line R. Co. v. Driggers, S.C., 49 S.Ct. 490, 279 U.S. 787, 73 L. Ed. 957.

(3) Railroad switchman was held as matter of law guilty of contributory negligence constituting sole proximate cause of death where he violated rule and custom by going between cars to couple air hose before engine was coupled to cars.—Southern Ry. Co. v. Glenn, 154 So. 792, 228 Ala. 563.

(4) Engineer's disobedience of train dispatcher's order to run locomotive on pass track at certain station and wait until freight train passed on main track was held sole cause of his death in collision with such train, beyond such station.—Southern Ry. Co. v. Dantzler, S.C., 52 S.Ct. 520, 286 U.S. 318, 76 L.Ed. 1127.

(5) If brakeman who was riding on side of car, received notice from his superior that there was not sufficient clearance to permit him to ride past spotted cars on side track, his failure to heed the warning and leave the car was the sole cause of his injury when his hand was crushed on failure to clear the spotted cars and he could not recover from railroad.—Chicago, St. P., M. & O. R. Co. v. Arnold, C.C.A.Minn., 160 F.2d 1002.

(6) Engineer's disobedience of order to watch for steel gang and premature release of brakes was held sole cause of derailment causing his death.—Southern Ry. Co. v. Hylton, C.C.A.Tenn., 37 F.2d 843, certiorari denied Hylton v. Southern Ry. Co., 50 S.Ct. 351, 281 U.S. 745, 74 L.Ed. 1158.

Held not sole proximate cause

(1) In general.

U.S.—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531.

Ala.—Louisville & N. R. Co. v. Parker, 138 So. 231, 223 Ala. 626, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501—Louisville & N. R. Co. v. Jacobson, 118 So. 565, 218 Ala. 384.

Ill.—Armstrong v. Chicago & W. I. R. Co., 183 N.E. 478, 350 Ill. 426, certiorari denied Chicago & W. I. R. Co. v. Armstrong, 53 S.Ct. 523, 289 U.S. 724, 77 L.Ed. 1475.

Ky.—Southern Mining Co. v. Childers, 142 S.W.2d 995, 283 Ky. 687, 131 A.L.R. 315.

(2) Engineer, obeying conductor's order to proceed to next station without receiving copy of running order, was held not primarily responsible for collision with extra freight, so as to bar recovery for his death, question being one of contributory negligence only.—Miller v. Central R. Co. of New Jersey, C.C.A. N.Y., 58 F.2d 635, certiorari denied Central R. Co. of New Jersey v. Miller, 53 S.Ct. 18, 287 U.S. 617, 77 L.Ed. 536.

(3) Switchman's act in attempting to mount footboard of locomotive at time it was occupied by other employees was not the sole proximate cause of switchman's injury.—Texas & N. O. R. Co. v. Sturgeon, 177 S.W. 2d 264, 142 Tex. 222.

(4) Where railroad company is negligent in such a way as to bring about or contribute to employee's injury, fact that employee failed to exercise diligence when by the exercise thereof he might have avoided injury does not make his negligence the sole cause of the injury.—Mumma v. Reading Co., C.C.A.Pa., 146 F. 2d 215.

(5) A switchman's attempt to mount locomotive footboard occupied by two other employees was not sole proximate cause of injuries when switchman fell backward, so as to preclude recovery under act, where portion of footboard which switchman attempted to mount was vacant and he was called on to make an instant decision.—Texas & N. O. R. Co. v. Sturgeon, Tex.Civ.App., 177 S.W.2d 340, reversed 177 S.W.2d 264, 142 Tex. 222.

34. U.S.—Unadilla Valley R. Co. v. Caldine, N.Y., 49 S.Ct. 91, 278 U.S. 139, 73 L.Ed. 224—Frese v. C. B. & Q. Ry., Mo., 44 S.Ct. 1, 263 U.S. 1, 68 L.Ed. 131—Halges v. Central R. Co. of New Jersey, C.C.A.N.Y., 58 F.2d 169, certiorari denied Central R. Co. of New Jersey v. Halges, 53 S.Ct. 11, 287 U.S. 607, 77 L.Ed. 528.

Ala.—Davis v. Sorrell, 104 So. 397, 213 Ala. 191.

Ill.—Helton v. Thomson, 36 N.E.2d 267, 311 Ill.App. 354, certiorari denied 62 S.Ct. 1280, 316 U.S. 688, 86 L.Ed. 1760, rehearing denied 63 S. Ct. 24, 317 U.S. 704, 87 L.Ed. 562.

Ind.—Chicago & Erie R. Co. v. Patterson, 34 N.E.2d 960, 110 Ind.App. 94.

Minn.—McDonald v. Great Northern Ry. Co., 207 N.W. 174, 166 Minn. 87.

Mo.—Williamson v. Wabash R. Co., 196 S.W.2d 129, 355 Mo. 248.

Okl.—Kurn v. Reese, 133 P.2d 880, 192 Okl. 78.

Tenn.—Nashville, C. & St. L. Ry. v. Hines, 94 S.W.2d 397, 20 Tenn.App. 1.

Tex.—Missouri Pac. R. Co. v. Jones, 76 S.W.2d 1044, 124 Tex. 234, certiorari denied 55 S.Ct. 638, 294 U.S. 729, 79 L.Ed. 1259—Hawthorne v. International-Great Northern R. Co., Civ.App., 63 S.W.2d 243, error refused.

Primary duty

(1) If engineer's death was directly due to his failure to discharge his primary duty of proper control and management of engine, recovery could not be had under the act on ground that possibly death might have been prevented if those in secondary relation to engine's movement had done more.—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504.

(2) Primary duty rule abrogated by amendment to statute abolishing the defense of assumption of risk.—Leet v. Union Pac. R. Co., 142 P.2d 37, 60 Cal.App.2d 814.

(3) Assumption of risk as defense under Federal Employers' Liability Act see supra § 359.

Secondary negligence

Where section laborer left gauge on track, although ordered by foreman to remove it, negligence of in-

§ 426. —— What Law Governs

The law of the place where the injury was inflicted governs as to contributory negligence in an action by an employee for injuries arising out of his employment.

The law of the place where the injury is inflicted governs as to the defense of contributory negligence, although the suit is brought in another jurisdiction.[35] Statutes in force at the time of the injury complained of control the defense of contributory negligence.[36] Where the suit is based on the Federal Employers' Liability Act, the effect of contributory negligence when established is controlled by that statute,[37] the state law having no application;[38] but since the Federal Employers' Liability Act does not define contributory negligence and since there is no federal common law on this subject, the question as to the existence of contributory negligence is to be determined by the state law.[39]

§ 427. What Constitutes Contributory Negligence in General

An employee is bound to exercise reasonable and ordinary care for his own protection, and, in determining whether he has exercised such care, all the attendant circumstances must be taken into consideration.

An employee is bound to exercise ordinary and reasonable care for his own protection.[40] Furthermore, it has been held that the duty of the employee to use this degree of care is a continuing one,[41] and is not affected by the fact that the master may by his own negligence have exposed the servant to danger.[42] However gross the negligence of the master, the servant on discovering the danger must exercise ordinary care to avoid injury.[43] The law does not exact of the servant extraordinary care,[44] or the highest degree of care.[45] Ordinary and reasonable care is the measure of care required of the servant; nothing beyond this is required.[46] This is so notwithstanding a rule of the master imposing a higher degree of care; the courts will follow the law and not the rule.[47]

What is reasonable or ordinary care. The reasonable or ordinary care required of the servant is such care as would be used by persons of ordinary prudence under like circumstances,[48] and, in determining whether the servant has exercised reasonable or ordinary care in any given case, all the attendant circumstances must be taken into consideration,[49] such as the physical surroundings or environment in which the servant is placed,[50] the age,

jured foreman in failing to remove gauge in time was secondary.—Atlantic Coast Line R. Co. v. Jeffcoat, 107 So. 456, 214 Ala. 317, certiorari denied 46 S.Ct. 639, 271 U.S. 688, 70 L.Ed. 1152.

Contributory negligence may be so great as to bar recovery.—Boghich v. Louisville & N. R. Co., C.C.A.Fla., 26 F.2d 361.

35. Ark.—St. Louis-San Francisco Ry. Co. v. Rogers, 290 S.W. 74, 172 Ark. 508.
39 C.J. p 824 note 16.

36. Tex.—Ft. Worth Belt R. Co. v. McKinney, Civ.App., 145 S.W. 666.

37. Ind.—Baltimore & O. S. W. R. Co. v. Wheeler, 129 N.E. 40, 75 Ind. App. 191.
N.Y.—Sadowski v. Long Island R. Co., 55 N.E.2d 497, 292 N.Y. 448.

38. Ind.—Baltimore & O. S. W. R. Co. v. Wheeler, 129 N.E. 40, 75 Ind. App. 191.

39. Okl.—Missouri, K. & T. R. Co. v. Lenahan, 171 P. 455, 68 Okl. 73.
Determination of what constitutes negligence under Federal Employers' Liability Act see supra § 173.
State courts as bound by decisions of federal courts on federal questions see Courts § 206.

40. U.S.—Bernola v. Pennsylvania R. Co., C.C.A.Pa., 68 F.2d 172—Paster v. Pennsylvania R. R., C.C. A.N.Y., 43 F.2d 908.
Ark.—Hall v. Patterson, 166 S.W.2d 667, 205 Ark. 10—McGeorge v. Henderson, 145 S.W.2d 31, 201 Ark. 492—Jonesboro, Lake City & E. R. Co. v. Wright, 281 S.W. 374, 170 Ark. 815.
Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.
Fla.—Sutton v. Hancock, 141 So. 532, 105 Fla. 497.
Ga.—Southern Ry. Co. v. Bradshaw, 37 S.E.2d 150, 73 Ga.App. 438—Pollard v. Weeks, 4 S.E.2d 722, 60 Ga. App. 664—Louisville & N. R. Co. v. Hicks, 176 S.E. 698, 49 Ga.App. 846, certiorari dismissed Hicks v. Louisville & N. R. Co., 186 S.E. 662, 182 Ga. 595.
Miss.—Ross v. Louisville & N. R. Co., 172 So. 752, 178 Miss. 69—**Corpus Juris cited in** Newell Contracting Co. v. Flynt, 161 So. 298, 301, 172 Miss. 719, motion overruled 161 So. 743, 172 Miss. 719.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213.
39 C.J. p 824 note 24.

41. Utah.—Stone v. Union Pac. R. Co., 100 P. 362, 35 Utah 305.

42. Mass.—O'Toole v. Pruyn, 87 N. E. 608, 201 Mass. 126.
Utah.—Stone v. Union Pac. R. Co., 100 P. 362, 35 Utah 305, followed in 100 P. 390, 35 Utah 378.

43. Utah.—Stone v. Union Pac. R. Co., supra.

44. Mo.—Doss v. Missouri, K. & T. R. Co., 116 S.W. 458, 135 Mo.App. 643.
Nev.—Konig v. Nevada-California-Oregon R. Co., 135 P. 141, 36 Nev. 181.

45. Mo.—Hester v. Jacob Dold Packing Co., 75 S.W. 695, 95 Mo. App. 16.

46. Mo.—Jablonowski v. Modern Cap Mfg. Co., 279 S.W. 89, 312 Mo. 173.
39 C.J. p 826 note 28.

47. Ala.—Sloss-Sheffield Steel & Iron Co. v. Jones, 91 So. 808, 207 Ala. 7.

48. Fla.—Cook v. Lewis K. Liggett Co., 173 So. 159, 127 Fla. 369.
Wash.—Cummins v. Dufault, 139 P. 2d 308, 18 Wash.2d 274.
39 C.J. p 826 note 32.

49. Ala.—Louisville & N. R. Co. v. Grizzard, 189 So. 203, 238 Ala. 49, certiorari denied 60 S.Ct. 140, 308 U.S. 603, 84 L.Ed. 504.
39 C.J. p 826 note 33.

Reasonableness of conduct of each party in creation of danger to employee and in acting therein is to be considered; and in considering conduct of employee, opportunities to avoid dangerous situation and demand for action on his part are to be considered.—Hussey v. Boston & M. R. R., 133 A. 9, 82 N.H. 236.

50. Mass.—Letchworth v. Boston, etc., R. Co., 108 N.E. 500, 220 Mass. 560.
39 C.J. p 826 note 34.

capacity, and experience of the servant,[51] the demands of his duty,[52] the orders of his superior,[53] the facts which were known or which should have been known to the servant,[54] and the obviousness of the risk[55] or danger.[56] The degree of care which must be taken must be adjusted to the character of the work,[57] and must be commensurate with the hazards and dangers of the service in which the servant is engaged.[58]

§ 428. —— Reliance on Care of Master in General

A servant has the right to rely on the performance by the master of the duties imposed on the master for the protection of the servant.

A servant has the right to rely on the performance by the master or his authorized agents of the duties imposed on the master for the protection of his servants, to furnish suitable tools, appliances, reasonably safe places for work, etc., to inspect them from time to time, to see that they are in a reasonably safe condition, and to maintain them in that condition,[59] unless the servant has knowledge to the contrary,[60] or unless the danger is obvious and imminent.[61] The fact that the place of work is one of unusual danger does not affect the opera-

51. S.C.—McKain v. Camden Water, Light & Ice Co., 71 S.E. 949, 89 S.C. 378.
39 C.J. p 826 note 35.

52. Ark.—E. L. Bruce Co. v. Leake, 3 S.W.2d 988, 176 Ark. 705.
Cal.—Petersen v. California Cotton Mills Co., 130 P. 169, 20 Cal.App. 751.

53. Cal.—Petersen v. California Cotton Mills Co., supra.

54. Tenn.—Nashville, C. & St. L. Ry. v. Hines, 94 S.W.2d 397, 20 Tenn. App. 1.
39 C.J. p 826 note 38.

55. Cal.—Petersen v. California Cotton Mills Co., 130 P. 169, 20 Cal. App. 751.

56. Iowa.—Kerker v. Bettendorf Metal Wheel Co., 118 N.W. 306, 140 Iowa 209.

57. U.S.—Crew v. St. Louis, K. & N. W. R. Co., C.C.Mo., 20 F. 87.
39 C.J. p 827 note 41.

58. Ky.—West Kentucky Coal Co. v. Kuykendall, 151 S.W. 928, 151 Ky. 384.
39 C.J. p 827 note 42.

59. U.S.—Griswold v. Gardner, C.C. A.Ill., 155 F.2d 333, certiorari denied Gardner v. Griswold, 67 S.Ct. 74, 329 U.S. 725, 91 L.Ed. 628—Rhodes v. Dierks Lumber & Coal Co., C.C.A.Ark., 108 F.2d 846.
Ala.—Louisville & N. R. Co. v. Parker, 138 So. 231, 223 Ala. 626, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501.
Ark.—Aluminum Ore Co. v. George, 186 S.W.2d 656, 208 Ark. 419—Tucker Duck & Rubber Co. v. Harvey, 154 S.W.2d 828, 202 Ark. 1033—Safeway Stores v. Phelps, 145 S. W.2d 337, 201 Ark. 495—Arkadelphia Sand & Gravel Co. v. Knight, 79 S.W.2d 71, 190 Ark. 386—Gilliam v. Bradley Lumber Co. of Arkansas, 67 S.W.2d 595, 188 Ark. 615—Dixie Bauxite Co. v. Webb, 63 S.W.2d 634, 187 Ark. 1024—Burden v. Hughes, 55 S.W.2d 502, 186 Ark. 707—Long v. Ellis, 35 S. W.2d 66, 183 Ark. 137—Federal Compress & Warehouse Co. v. Parrott, 28 S.W.2d 728, 181 Ark. 946.
Cal.—Emery v. Pacific Telephone & Telegraph Co., 110 P.2d 1079, 43 Cal.App.2d 402—Weiand v. Southern Pac. Co., 93 P.2d 1023, 34 Cal. App.2d 500, certiorari denied Southern Pac. Co. v. Weiand, 60 S. Ct. 613, 309 U.S. 670, 84 L.Ed. 1016—Thomas v. Southern Pac. Co., 2 P.2d 544, 116 Cal.App. 126, certiorari denied Southern Pac. Co. v. Thomas, 52 S.Ct. 265, 284 U.S. 689, 76 L.Ed. 582.
Ga.—Simowitz v. Register, 3 S.E.2d 231, 60 Ga.App. 180—Nashville, C. & St. L. Ry. v. Hilderbrand, 172 S.E. 87, 48 Ga.App. 140.
Me.—Boober v. Bicknell, 191 A. 275, 135 Me. 153.
Minn.—Symons v. Great Northern Ry. Co., 293 N.W. 303, 208 Minn. 240—Moquin v. Minneapolis, St. P. & S. S. M. Ry. Co., 231 N.W. 829, 181 Minn. 56, reversed on other grounds 51 S.Ct. 501, 283 U.S. 520, 75 L.Ed. 1243, followed in 231 N. W. 920, 181 Minn. 626.
Mo.—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 335 Mo. 1148—Jablonowski v. Modern Cap Mfg. Co., 279 S.W. 89, 312 Mo. 173.
N.H.—Kruger v. Exeter Mfg. Co., 149 A. 872, 84 N.H. 290.
N.J.—Huels v. General Elec. Co., 46 A.2d 654, 134 N.J.Law 165.
N.Y.—Reed v. Davis, 162 N.E. 576, 249 N.Y. 35.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S. C. 213—Langston v Fiske-Carter Const. Co., 185 S.E. 62, 180 S.C. 113.
Tenn.—Memphis Power & Light Co. v. Teighman, 11 Tenn.App. 395.
Tex.—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580—City of Denton v. White, Civ. App., 179 S.W.2d 834, error refused.
W.Va.—Thomas v. Chesapeake & O. Ry. Co., 162 S.E. 169, 111 W.Va. 389, certiorari denied Chesapeake & O. Ry. Co. v. Thomas, 52 S.Ct. 645, 286 U.S. 564, 76 L.Ed. 1296.
39 C.J. p 827 note 44.

Employee wrecking building could assume that employer and foreman had taken reasonable precautions to provide safe place to work.—Killion v. King Lumber Co., Mo.App., 16 S. W.2d 730.

Obedience to instructions

Where plaintiff was requested by defendant to aid defendant in attempting to start stalled automobile, plaintiff who was experienced in making carburetor adjustments could to a reasonable extent rely on assumption that defendant would act in accordance with plaintiff's instructions, including instruction not to place foot on starter while air cleaner was removed from top of carburetor.—Kavigian v. Lonero, 45 N.E.2d 823, 312 Mass. 603.

60. Ark.—Aluminum Ore Co. v. George, 186 S.W.2d 656, 208 Ark. 419.
Cal.—Emery v. Pacific Telephone & Telegraph Co., 110 P.2d 1079, 43 Cal.App.2d 402—Weiand v. Southern Pac. Co., 93 P.2d 1023, 34 Cal. App.2d 500, certiorari denied Southern Pac. Co. v. Weiand, 60 S. Ct. 613, 309 U.S. 670, 84 L.Ed. 1016.
Ga.—Simowitz v. Register, 3 S.E.2d 231, 60 Ga.App. 180.
Mo.—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 335 Mo. 1148—Jablonowski v. Modern Cap Mfg. Co., 279 S.W. 89, 312 Mo. 173.
Tex.—City of Denton v. White, Civ. App., 179 S.W.2d 834, error refused.
39 C.J. p 828 note 45.

61. Cal.—Weiand v. Southern Pac. Co., 93 P.2d 1023, 34 Cal.App.2d 500, certiorari denied Southern Pac. Co. v. Weiand, 60 S.Ct. 613, 309 U.S. 670, 84 L.Ed. 1016.
Me.—Boober v. Bicknell, 191 A. 275, 135 Me. 153.
Mo.—Tash v. St. Louis-San Francisco Ry. Co., 76 S.W.2d 690, 335 Mo. 1148—Dixon v. Frazier-Davis

tion of the rule, and the servant is entitled to assume that it is as safe as ordinary care and diligence can make it.[62]

The employee has the right to believe that the employer will not unnecessarily jeopardize his person by avoidable risk,[63] or expose him to any hidden peril of which he had not been warned;[64] that reasonably safe methods of work will be followed;[65] and that rules for the safety and protection of the servant will be complied with and that nothing will be done in violation of these rules that will place the servant in peril.[66] Moreover, an employee has the right to assume that the employer will exercise ordinary care to prevent anything being done which will increase the dangers incident to his employment,[67] and he is not under a duty to exercise care to discover dangers arising through the negligence of his employer.[68]

An employee may assume that the employer will discharge its duty of warning him of known dangers;[69] that warning will be given when a perilous situation arises, where the right to such warning is established by custom;[70] that the methods of work will not be changed while he is at work without notice or warning to him;[71] and that dangerous conditions or work will not be created without due warning being given.[72] Also, where a servant is required to give his attention to the work in hand, while working in a dangerous place, he is entitled to rely on the fact that the master, knowing such to be the fact, will exercise due care and diligence to protect him from danger not directly arising from such work;[73] but he cannot, in the performance of a hazardous service, negligently omit to adopt the usual and proper precautions which have been previously required by the master, and which his own experience in the service has shown to be useful as tending to diminish the risks of the service, in a supposed reliance on the prudence and judgment of his master, whose suggestions and directions he willfully disregards.[74]

Reliance on master's superior knowledge and ability. Within reasonable limits,[75] the servant is entitled to rely on the superior knowledge, ability, and skill of the master or his representative,[76] and is not bound at his peril to set his own judgment above that of his superior.[77]

§ 429. —— Assurances or Representations as to Safety

An employee is not guilty of contributory negligence in performing his duties in reliance on the employer's assurances of safety.

Const. Co., 298 S.W. 827, 318 Mo. 50.
N.Y.—Reed v. Davis, 162 N.E. 576, 249 N.Y. 35.
Tex.—City of Denton v. White, Civ. App., 179 S.W.2d 834, error refused.
39 C.J. p 828 note 46.

62. Ga.—Neary v. Georgia Public Serv. Co., 107 S.E. 893, 27 Ga.App. 238.

63. La.—Carter v. Fred W. Dubach Lumber Co., 36 So. 952, 113 La. 239—Myhan v. Louisiana Electric Light & Power Co., 6 So. 799, 41 La.Ann. 964, 17 Am.S.R. 436, 7 L.R.A. 172.

64. Ill.—Offutt v. World's Columbian Exposition, 51 N.E. 651, 175 Ill. 472.
Iowa.—Jacobson v. U. S. Gypsum Co., 120 N.W. 651, 144 Iowa 1.

65. S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213.
39 C.J. p 829 note 73.

66. U.S.—Kurn v. Stanfield, C.C.A. Mo., 111 F.2d 469.
Tex.—City of Austin v. Johnson, Civ. App., 195 S.W.2d 222.
Wash.—Pierce v. Spokane International Ry. Co., 131 P.2d 139, 15 Wash.2d 431.
39 C.J. p 830 note 79.

67. Cal.—Foxe v. Southern Pac. Co., 9 P.2d 514, 121 Cal.App. 633—McComb v. Atchison, T. & S. F. Ry. Co., 294 P. 81, certiorari denied Atchison, T. & S. F. Ry. Co. v. McComb, 51 S.Ct. 486, 283 U.S. 838, 75 L.Ed. 1449.
Ky.—Chesapeake & O. Ry. Co. v. Dixon, 280 S.W. 93, 212 Ky. 738.

68. U.S.—The Norland, C.C.A.Alaska, 101 F.2d 967.
Cal.—Weiand v. Southern Pac. Co., 93 P.2d 1023, 34 Cal.App.2d 500, certiorari denied Southern Pac. Co. v. Weiand, 60 S.Ct. 613, 309 U.S. 670, 84 L.Ed. 1016.
Ill.—Williams v. Southern Ry. Co., 258 Ill.App. 34—Humphreys v. East St. Louis & Suburban Ry. Co., 253 Ill.App. 450—Beck v. Baltimore & O. R. Co., 244 Ill.App. 441.
Mo.—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748—Berry v. St. Louis-San Francisco Ry. Co., 26 S.W.2d 988, 324 Mo. 775, certiorari denied St. Louis-San Francisco Ry. Co. v. Berry, 50 S.Ct. 464, 281 U.S. 765, 74 L.Ed. 1173.
S.C.—Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 158 S.C. 194, certiorari denied Atlantic Coast Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.

69. Mo.—Cunningham v. Doe Run Lead Co., 285 S.W. 757, 220 Mo. App. 38.

Obvious danger

A workman cannot rely on failure of master to warn him of obvious danger in order to excuse himself of contributory negligence, and the servant must observe his surroundings and protect himself.—Cummins v. Dufault, 139 P.2d 308, 18 Wash.2d 274.

70. Utah.—Winegar v. Oregon Short Line R. Co., 298 P. 948, 77 Utah 594.
39 C.J. p 871 note 89.

71. Va.—Froman v. Chesapeake & O. Ry. Co., 138 S.E. 658, 148 Va. 148.
39 C.J. p 829 note 74.

72. Minn.—Symons v. Great Northern Ry. Co., 293 N.W. 303, 208 Minn. 240.
39 C.J. p 829 note 75.

73. U.S.—Holland v. Chicago, M. & St. P. R. Co., C.C.Minn., 18 F. 243, 15 McCrary 549.
39 C.J. p 830 note 80.

74. N.Y.—Jones v. Roach, 41 N.Y. Super. 248.

75. La.—Lutenbacher v. Mitchell-Borne Constr. Co., 67 So. 888, 136 La. 805, 19 A.L.R. 206.
39 C.J. p 828 note 48.

76. Ark.—Chapman v. Henderson, 67 S.W.2d 570, 188 Ark. 714.
39 C.J. p 828 note 49.

77. La.—Lutenbacher v. Mitchell-Borne Constr. Co., 67 So. 888, 136 La. 805, 19 A.L.R. 206.
39 C.J. p 829 note 50.

A servant is not guilty of contributory negligence where he relies on the assurances or representations of the master or his vice principal as to the safety of the place of work, tools, machinery, or appliances,[78] or on his promise to protect and guard the servant from danger,[79] or to warn him of peril,[80] unless the danger is so obvious and imminent that no ordinarily prudent person would undertake to perform the service.[81] The general rule applies even though the servant might have some misgiving as to the safety of the place,[82] since ordinarily he is entitled to rely on the master's knowledge and judgment.[83]

Assurances of safety by the master or his vice principal are important only in so far as they induce the employee to act in reasonable reliance on the assurances rather than in reliance on his own judgment,[84] and assurances are of no effect for the purpose of relieving the servant of the imputation of negligence where, as a matter of fact, he placed no reliance on them.[85] Where the dangers to be anticipated are as obvious to the servant as to the master,[86] or where the servant has better knowledge than his master,[87] he may not rely on assurances as to the absence of danger. In any event, assurances of safety by the master will not relieve the servant from exercising due care to avoid injury from defects in his place of work.[88]

What constitutes assurance of safety. With respect to the character of the assurance, it is not necessary that the master should use words which in terms expressly and directly assure the servant that the place where he is working is reasonably safe.[89] It is sufficient that the acts of the master, under all the circumstances, amount to an assurance that the place where he directs the servant to work is reasonably safe.[90] Where the work is done in the presence, and under the immediate direction, of the master or his representative, this is equivalent to an assurance that the servant may safely proceed with the work.[91] Orders to do the work,[92] especially to do a rush job with knowledge that the servant had no time or means for inspection,[93] are equivalent to an assurance of safety.

§ 430. —— Reliance on Care of Fellow Servants

An employee has the right to assume that other employees will perform their duties and will exercise due care.

78. U.S.—Los Angeles & S. L. R. Co. v. Shields, C.C.A.Utah, 33 F.2d 23.
Ky.—Louisville & N. R. Co. v. Gilliland, 295 S.W. 422, 220 Ky. 431, 53 A.L.R. 386.
Mo.—Ingram v. Prairie Block Coal Co., 5 S.W.2d 413, 319 Mo. 644.
N.C.—Overton v. Farmers' Mfg. Co., 146 S.E. 706, 196 N.C. 670.
Pa.—Rebel v. Standard Sanitary Mfg. Co., 16 A.2d 534, 340 Pa. 313—Plazak v. Allegheny Steel Co., 188 A. 130, 324 Pa. 422.
Va.—Ross v. Schneider, 27 S.E.2d 154, 181 Va. 931.
39 C.J. p 830 note 84.

79. Mo.—Reed v. Terminal R. Ass'n of St. Louis, 62 S.W.2d 747.
39 C.J. p 831 note 85.

80. Ark.—St. Louis-San Francisco Ry. Co. v. Fine, 44 S.W.2d 340, 184 Ark. 940, certiorari denied 52 S. Ct. 502, 286 U.S. 552, 76 L.Ed. 1287.
Ill.—Walaite v. Chicago, R. I. & P. Ry. Co., 33 N.E.2d 119, 376 Ill. 59.

81. Mo.—Russell v. Johnson, 160 S.W.2d 701, 349 Mo. 267—Ingram v. Prairie Block Coal Co., 5 S.W.2d 413, 319 Mo. 644—Braden v. Friederichsen Floor & Wall Tile Co., 15 S.W.2d 923, 223 Mo.App. 700.
39 C.J. p 831 notes 86, 92.

Right to rely on assurance

Right of employee to rely on any assurance of employer is not absolute and whether employee in relying on alleged assurance exercised proper care, is question of fact.—Klein v. Keresey, 29 N.E.2d 703, 307 Mass. 51.

Continuous use of defective tool

Where danger from continued use of defective tool is so obvious that ordinarily prudent person would not continue to use tool, servant cannot hold master liable for injuries resulting from use of tool, notwithstanding he may have received assurances of safety from master, since servant's use of obviously dangerous tool constituted contributory negligence.—Atlanta, B. & C. R. Co. v. King, 189 S.E. 580, 55 Ga.App. 1.

82. Ark.—Eudora Motor Co. v. Womack, 111 S.W.2d 530, 195 Ark. 74.
Minn.—Blume v. Ballis, 291 N.W. 906, 207 Minn. 393.
39 C.J. p 831 note 88.

83. Minn.—Blume v. Ballis, 291 N.W. 906, 207 Minn. 393.
Mo.—Clayton v. Wells, 26 S.W.2d 969, 324 Mo. 1176.
39 C.J. p 831 note 89.

84. Minn.—Blume v. Ballis, 291 N.W. 906, 207 Minn. 393.

85. Minn.—Blume v. Ballis, supra.
Mo.—Mosely v. Sum, 130 S.W.2d 465, 344 Mo. 969—Ingram v. Prairie Block Coal Co., 5 S.W.2d 413, 319 Mo. 644.
39 C.J. p 831 note 95.

86. N.Y.—Lewis v. Gehlen, 122 N.Y.S. 89, 136 App.Div. 855.

87. Ill.—Chicago Cons. Bottling Co. v. Mitton, 41 Ill.App. 154.

88. U.S.—Corpus Juris quoted in F. W. Woolworth Co. v. Davis, C.C.A.Okl., 41 F.2d 342, 350, certiorari denied 51 S.Ct. 33, 282 U.S. 859, 75 L.Ed. 760.
Vt.—Hartigan v. Deerfield Lumber Co., 81 A. 259, 85 Vt. 133.

89. Ky.—Interstate Coal Co. v. Garrard, 173 S.W. 767, 163 Ky. 235.

90. Ky.—Interstate Coal Co. v. Garrard, supra.

Statement held not assurance of safety

Foreman's statement that setting two or three timbers would make coal mine room safe was held not assurance of safety.—Perkins-Harlan Coal Co. v. Mercer, 32 S.W.2d 14, 235 Ky. 618.

91. Ill.—Grannon v. Donk Bros. Coal & Coke Co., 102 N.E. 769, 259 Ill. 350.
39 C.J. p 831 note 99.

92. Mo.—Crane v. Liberty Foundry Co., 17 S.W.2d 945, 322 Mo. 592—Johnson v. Boaz-Kiel Const. Co., App., 22 S.W.2d 881—Clayton v. Metalcrafts Corporation, App., 12 S.W.2d 938—Struckel v. Busch Sulzer Bros. Diesel Engine Co., App., 300 S.W. 993—Bramm v. Hydraulic Press Brick Co., App., 288 S.W. 941.
39 C.J. p 832 note 1.

93. Mo.—Rutledge v. Swinney, 156 S.W. 478, 170 Mo.App. 251.

An employee has the right to rely on the employer to exercise due care to furnish him competent employees with whom to work[94] and, subject to limitations which may be imposed by the fellow-servant doctrine discussed supra § 321 et seq, an employee has the right to assume that other employees of his employer will perform their duties,[95] observe the rules and instructions,[96] and exercise reasonable care.[97] An employee is not required to exercise care to discover a danger created by the negligence of other employees[98] or to assume that his fellow employees will disregard their duty to give a warning signal.[99] However, this does not absolve him from caring for his own safety, as an ordinarily prudent man would do under like circumstances,[1] and he cannot recover for an injury received by reason of the negligence of a fellow servant, if he knew or, by the exercise of ordinary care, might have known thereof.[2]

§ 431. —— Knowledge of Defects or Dangers in General

An employee is guilty of contributory negligence where he fails to exercise due care to avoid a danger of which he has knowledge.

Where a servant has actual or constructive knowledge of defects and dangers of such a character that a reasonably prudent man, under similar circumstances, would exercise due care to avoid the dangers, and is injured by reason of his failure to use ordinary care, he is guilty of contributory negligence.[3] The fact that the unknown negligence of

94. U.S.—Rhodes v. Dierks Lumber & Coal Co., C.C.A.Ark., 108 F.2d 846.
39 C.J. p 828 note 44 [a].

95. U.S.—Ballard v. Atchison, T. & S. F. R. Co., C.C.A.Tex., 100 F.2d 162.
Ark.—Gilliam v. Bradley Lumber Co. of Arkansas, 67 S.W.2d 595, 188 Ark. 615—Federal Compress & Warehouse Co. v. Parrott, 28 S.W. 2d 728, 181 Ark. 946.
Ill.—Taylor v. Atchison, T. & S. F. Ry. Co., 11 N.E.2d 610, 292 Ill. App. 457, certiorari denied Atchison, T. & S. F. Ry. Co. v. Taylor, 58 S.Ct. 942, 304 U.S. 560, 82 L. Ed. 1528.
Mo.—Miller v. Collins, 40 S.W.2d 1062, 328 Mo. 313.
N.C.—Kelly v. Raleigh Granite Co., 156 S.E. 517, 200 N.C. 326.

Where two servants are charged with the control and management of the same work, if one assumes to attend to an act within their common line of duties, which act may be performed by one, the other may rely on the presumption that it was properly performed.—Merritt v. Great Northern R. Co., 84 N.W. 321, 81 Minn. 496—39 C.J. p 830 note 81.

96. Minn.—Jacobson v. Chicago & N. W. Ry. Co., 22 N.W.2d 455, 221 Minn. 454.

97. Ga.—Southern Ry. Co. v. Heaton, 6 S.E.2d 339, 61 Ga.App. 386.
Miss.—Gulf, M. & N. R. Co. v. Walters, 134 So. 831, 161 Miss. 313.
Or.—Johnson v. Ladd, 5 P.2d 1062, 138 Or. 371.
39 C.J. p 832 note 4.

98. Ill.—Patznsky v. Lowden, 47 N.E.2d 338, 317 Ill.App. 613.

99. Utah.—Bruner v. McCarthy, 142 P.2d 649, 105 Utah 399, certiorari granted 64 S.Ct. 1047, 322 U.S. 718, 88 L.Ed. 1558, certiorari dismissed 65 S.Ct. 126, 323 U.S. 673, 89 L.Ed. 547.

1. Ark.—Aluminum Co. of North America v. Ramsey, 117 S.W. 568, 89 Ark. 522, affirmed 32 S.Ct. 76, 222 U.S. 251, 56 L.Ed. 185.
39 C.J. p 832 note 5.

2. Ark.—Aluminum Co. of North America v. Ramsey, 117 S.W. 568, 89 Ark. 522, affirmed 32 S.Ct. 76, 222 U.S. 251, 56 L.Ed. 185.
Iowa.—Nichols v. Chicago, R. I. & P. R. Co., 28 N.W. 571, 69 Iowa 154.

3. U.S.—Roberts v. Louisville & N. R. Co., C.C.A.Miss., 111 F.2d 826.
Ark.—St. Louis-San Francisco Ry. Co. v. Rogers, 290 S.W. 74, 172 Ark. 508.
Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.
Fla.—Winter Park Telephone Co. v. Strong, 179 So. 289, 130 Fla. 755, rehearing denied 182 So. 927.
Ky.—Poole v. Lutz & Schmidt, 117 S.W.2d 575, 273 Ky. 586—Helton v. Gunn Coal Mining Co., 79 S.W.2d 695, 258 Ky. 168—High Gravity Oil Co. v. Row's Adm'r, 270 S.W. 53, 207 Ky. 823.
Md.—Le Vonas v. Acme Paper Bd. Co., 40 A.2d 43, 184 Md. 16.
Miss.—Federal Compress Co. v. Craig, 7 So.2d 532, 192 Miss. 689—New Orleans & N. E. R. Co. v. Benson, 183 So. 505, 183 Miss. 171—McLemore & McArthur v. Rogers, 152 So. 883, 169 Miss. 650.
Mo.—Whittington v. Westport Hotel Operating Co., 33 S.W.2d 963, 326 Mo. 1117—Allen v. Missouri Pac. Ry. Co., 294 S.W. 80—Jablonowski v. Modern Cap Mfg. Co., 279 S.W. 89, 312 Mo. 173—Patton v. Jewel Tea Co., App., 15 S.W.2d 360—Ward v. American Car & Foundry Co., App., 293 S.W. 492.
N.Y.—Schmidt v. Carper, 61 N.Y.S.2d 185, 270 App.Div. 411.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S. C. 213.
Tenn.—Wind Rock Coal & Coke Co. v. Robbins, 1 Tenn.App. 734.
Tex.—Brigman v. Holt & Bowers, Civ.App., 32 S.W.2d 220, error refused.
Utah.—Buhler v. Madison, 140 P.2d 933, 105 Utah 39.
Wash.—Cummins v. Dufault, 139 P. 2d 308, 18 Wash.2d 274.
39 C.J. p 832 note 8.

Assumption of risk

(1) Assumption of risk by employee does not amount to contributory negligence precluding recovery unless danger is so obvious that no ordinarily prudent man would risk it.—Maulden v. High Point Bending & Chair Co., 144 S.E. 557, 196 N.C. 122.

(2) Assumption of risk generally see supra § 357 et seq.

Operation of natural forces

Where dangerous condition arises in course of work and occurs as result of well-known operations of natural forces, it is considered an open and obvious danger placing on servant duty of taking proper precautions for his own safety.—Cummins v. Dufault, 139 P.2d 308, 18 Wash.2d 274.

Estoppel to deny knowledge

An employee who has complained to the employer is precluded from claiming that he did not know of the danger.—Shoemaker v. Electric Auto-Lite Co., 41 N.E.2d 433, 68 Ohio App. 169.

Knowledge of fellow servant's incompetence

(1) Mere knowledge by employee of fellow servant's incompetency will not necessarily defeat right to recover for injuries sustained by reason thereof.—Reed v. Koch, 282 S. W. 515, 220 Mo.App. 175.

(2) Contributory negligence of employee continuing to work with intoxicated fellow servant is judged according to danger he should rea-

the master made the danger greater than the servant supposed it to be has been held not to authorize a recovery.[4] However, it is only when a servant has actual or constructive knowledge of defects or dangers that a recovery is precluded.[5]

If a servant had no actual knowledge of the danger which threatened him, and, in the exercise of ordinary care, would not have apprehended the danger in time to avoid it, he is not guilty of contributory negligence and can recover.[6] In order to charge an injured employee with contributory negligence, it must first be shown that he should reasonably have apprehended the danger which threatened him.[7] The knowledge of a fellow servant, who had charge of the work in hand, that a certain tool was defective, will not prevent a recovery from the master for an injury to a servant caused thereby, since contributory negligence, to defeat a cause of action, must be that of the party injured.[8]

Statutory modifications of rule. Under some statutes the fact that the danger which caused the injury was known or apparent to the injured employee does not render him guilty of contributory negligence where the hazard was created by the employer's noncompliance with a statute.[9]

§ 432. —— Extent of Knowledge

A servant is not chargeable with contributory negligence in failing to take due care to avoid a danger, where he knows of the defect but does not appreciate the danger.

There is a distinction between knowledge of defects and knowledge of the risks resulting from such defects, and a servant is not chargeable with contributory negligence in failure to take due care to avoid a danger if he knows that defects exist but does not know, or cannot know by the exercise of ordinary care, that there is danger,[10] or, knowing that there is danger, does not fully appreciate the risk of the dangerous situation in which he is placed in carrying on the work;[11] and it has been held that even the fact that a servant has performed work, knowing it to be dangerous, does not of itself make him guilty of contributory negligence, but it must appear that he did that which was dangerous in a negligent manner.[12] On the other hand, a servant's knowledge of danger need not amount to full information or to absolute certainty.[13] So if the servant knows that the danger is great, he cannot escape the charge of contributory negligence because the negligence of the master made the danger greater than he supposed it to be;[14] and a servant who has been advised of a certain danger, and how to avoid it, is not excused for exposing himself to it by the fact that he does not realize the magnitude of the possible injuries.[15]

§ 433. —— Constructive Knowledge

An employee is charged with contributory negligence where he fails to take due care to avoid obvious dangers.

An employee is chargeable with contributory negligence where he fails to take due care to avoid defects and dangers which are so open and obvious that anyone in the exercise of ordinary care and prudence would discover them.[16] The fact that the servant does not possess ordinary intelli-

sonably apprehend.—Reed v. Koch, supra.

4. Pa.—Haynes v. Penfield, 80 A. 565, 231 Pa. 329.

5. Tex.—Texas & Pac. Ry. Co. v. Roberts, Civ.App., 177 S.W.2d 77, reversed on other grounds 180 S.W.2d 330, 142 Tex. 550—City of Panhandle v. Byrd, Civ.App., 77 S.W.2d 904, reversed on other grounds 106 S.W.2d 660, 130 Tex. 96.
39 C.J. p 833 note 10.

Knowledge of another defect
The servant's knowledge of one defect will not exonerate the master from liability for injuries caused by another defect.—El Paso Northeastern R. Co. v. Ryan, 81 S.W. 563, 36 Tex.Civ.App. 190.

6. U.S.—Rowe v. Gatke Corporation, C.C.A.Ind., 126 F.2d 61, petition dismissed Gatke Corporation v. Rowe, 63 S.Ct. 81, 317 U.S. 702, 87 L.Ed. 561.
N.J.—Nestico v. Delaware, L. & W. R. Co., 133 A. 83, 4 N.J.Misc. 418.
N.Y.—Adlam v. Konvolenka, 50 N.E.2d 535, 291 N.Y. 40.
39 C.J. p 834 note 29.

7. La.—Cunningham v. Penn Bridge Co., 59 So. 119, 131 La. 196.
39 C.J. p 834 note 30.

8. W.Va.—Goshorn v. Wheeling Mold & Foundry Co., 64 S.E. 22, 65 W.Va. 250.
39 C.J. p 834 note 28.

9. Ind.—N. O. Nelson Mfg. Corporation v. Dickson, 53 N.E.2d 640, 114 Ind.App. 668.
39 C.J. p 819 note 48.

10. Ky.—Royal Collieries Co. v. Wells, 50 S.W.2d 948, 244 Ky. 303.
La.—Mitchell v. Travelers Indemnity Co., App., 21 So.2d 198.
Mo.—Allen v. Missouri Pac. Ry. Co., 294 S.W. 80.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213.
39 C.J. p 838 note 64.

11. Ark.—Mercury Mining Co. v. Chambers, 102 S.W.2d 543, 193 Ark. 771.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213.
Tex.—City of Denton v. White, Civ.App., 179 S.W.2d 834, error refused.
39 C.J. p 838 note 65.

12. Ala.—Mobile & B. R. Co. v. Holburn, 4 So. 146, 84 Ala. 133.
Miss.—Yazoo & M. V. R. Co. v. Scott, 48 So. 239, 95 Miss. 43.

13. U.S.—Burnett v. Amalgamated Phosphate Co., C.C.A.Fla., 96 F.2d 974, certiorari denied 59 S.Ct. 153, 305 U.S. 647, 83 L.Ed. 418.
Ill.—Illinois Cent. R. Co. v. Sanders, 58 Ill.App. 117.

14. U.S.—American Linseed Oil Co. v. Heins, Minn., 141 F. 45, 72 C.C.A. 533.

15. Minn.—Truntle v. North Star Woolen-Mill Co., 58 N.W. 832, 57 Minn. 52.

16. Ark.—Dixie Bauxite Co. v. Webb, 63 S.W.2d 634, 187 Ark. 1024—Lee v. Pate, 131 S.W.2d 8, 198 Ark. 723.

gence does not affect the operation of the rule unless the master knows or is chargeable with knowledge of such fact.[17] Nevertheless, in order to charge a servant with notice of defects and dangers, they must be so plain and clear that if he does not see them he is necessarily negligent.[18] Mere opportunity for knowledge is not the equivalent of imputed knowledge;[19] it is only when men of ordinary prudence and observation would have observed the danger under like circumstances that the servant is chargeable with negligence.[20] It is only ignorant negligence that can be chargeable as the equivalent of knowledge.[21]

§ 434. —— Continuing Work with Knowledge of Danger

A servant is chargeable with contributory negligence where he continues work with knowledge of dangers to which an ordinarily prudent person would not subject himself.

In the absence of any statutory regulation of the subject,[22] where a servant continues work with knowledge, actual or constructive, of dangers which an ordinarily prudent man would refuse to subject himself to, he is guilty of contributory negligence,[23] particularly where he has created the danger.[24]

On the other hand, the mere fact that the servant performs the work knowing that it is dangerous does not render him guilty of contributory negligence without regard to the degree of danger and risk involved;[25] and a servant is not guilty of contributory negligence in continuing work after knowledge of the defects and dangers incident to the work unless the danger is so obvious and imminent as to threaten immediate injury[26] so that a reasonably prudent man would abandon the work,[27] or unless the danger is so obvious that the chances of injury are greater than those of safety,[28] or so obvious that the servant may not hope to escape by the exercise of reasonable care;[29] nor is he guilty of contributory negligence in continuing the work where it may reasonably be supposed that the instrumentalities furnished, although dangerous, may be safely used in the exercise of great care and skill.[30] It has been held that these rules apply although there are other places where the servant might have worked.[31]

Notice or complaint to master. The fact that the servant complains to the master will not exonerate him of contributory negligence[32] unless he has reason to expect that, in consequence of his notifica-

Cal.—Emery v. Pacific Telephone & Telegraph Co., 110 P.2d 1079, 43 Cal.App.2d 402.
Ky.—Helton v. Gunn Coal Mining Co., 79 S.W.2d 695, 258 Ky. 168.
Me.—McBurnie v. Northrup, 27 A. 2d 823, 139 Me. 149.
Mo.—Mosely v. Sum, 130 S.W.2d 465, 344 Mo. 969.
N.Y.—Schmidt v. Carper, 61 N.Y.S.2d 185, 270 App.Div. 411.
39 C.J. p 835 note 32.

Proper instructions

Employee, properly shown how to unclog ripsaws by use of a stick, must be deemed to have known of the dangers arising therefrom.—Wisconsin & Arkansas Lumber Co. v. Smith, 271 S.W. 1, 168 Ark. 561.

17. Wis.—Deisenrieter v. Kraus-Merkel Malting Co., 72 N.W. 735, 97 Wis. 279.

18. Wash.—Ward v. National Lumber & Box Co., 103 P. 1, 54 Wash. 304.
39 C.J. p 835 note 33.

19. Va.—DuPont de Nemours v. Taylor, 98 S.E. 866, 124 Va. 750.

20. Ala.—City of Mobile v. Reeves, 31 So.2d 688, 249 Ala. 488.
Va.—DuPont de Nemours v. Taylor, 98 S.E. 866, 124 Va. 750.

21. Va.—DuPont de Nemours v. Taylor, supra.

22. Ala.—Kyzer v. Kaul Lumber Co., 76 So. 928, 200 Ala. 570.
39 C.J. p 819 note 48, p 835 note 37 —12 C.J. p 413 note 79 [d] (2), [f].

23. Kan.—Palmer v. Midland Valley R. Co., 235 P. 853, 118 Kan. 507.
Mo.—Clift v. St. Louis-San Francisco Ry. Co., 9 S.W.2d 972, 320 Mo. 791.
39 C.J. p 835 note 38, p 696 note 28.

24. Ky.—Horse Creek Mining Co. v. Frazier's Adm'x, 5 S.W.2d 1064, 224 Ky. 211.

25. Ala.—Stith Coal Co. v. Crayton, 86 So. 148, 17 Ala.App. 449.

26. Mo.—Morris v. Atlas Portland Cement Co., 19 S.W.2d 865, 323 Mo. 307—Sloan v. Polar Wave Ice & Fuel Co., 19 S.W.2d 476, 323 Mo. 363—Messing v. Judge & Dolph Drug Co., 18 S.W.2d 408, 322 Mo. 901—Compton v. Louis Rich Const. Co., 287 S.W. 474, 315 Mo. 1068—Fischer v. M-K Express Co., App., 158 S.W.2d 458—Whitehead v. Fogelman, App., 44 S.W.2d 261—Cento v. American Fruit Growers, App., 7 S.W.2d 304—Koonse v. Standard Steel Works Co., 300 S.W. 531, 221 Mo.App. 1231—De Bastiani v. Lesser-Goldman Cotton Co., App., 297 S.W. 174.

27. Ark.—Missouri Pac. R. Co. v. Hendrix, 277 S.W. 337, 169 Ark. 825, certiorari denied 46 S.Ct. 351, 270 U.S. 651, 70 L.Ed. 781.
Mo.—Warner v. Oriel Glass Co., 8 S.W.2d 846, 319 Mo. 1196, 60 A.L.R. 448—Eaton v. Wallace, 287 S.W. 614, 48 A.L.R. 1291—Head v. M. E. Leming Lumber Co., 281 S.W. 441—Fischer v. M-K Express Co., App., 158 S.W.2d 458—Craven v. Halpin-Boyle Const. Co., App., 15 S.W.2d 853—Struckel v. Busch Sulzer Bros. Diesel Engine Co., App., 300 S.W. 993—Davis v. National Refining Co., App., 294 S.W. 114—Crowell v. St. Louis Screw Co., 293 S.W. 521, 220 Mo.App. 728—Sanders v. Armour & Co. of Delaware, App., 292 S.W. 443—Walker v. Mitchell Clay Mfg. Co., App., 291 S.W. 180—McGowan v. American Mfg. Co., App., 270 S.W. 423.
39 C.J. p 836 note 40.

28. N.C.—Worley v. Laurel River Logging Co., 73 S.E. 107, 157 N.C. 490.

29. Mo.—Craven v. Halpin-Boyle Const. Co., App., 15 S.W.2d 853—Barnard v. Waverly Brick & Coal Co., 176 S.W. 1108, 189 Mo.App. 417.

30. Mo.—Lampe v. St. Louis Brewing Ass'n, 221 S.W. 447, 204 Mo. App. 373.

31. Ky.—Continental Coal Corp. v. York, 167 S.W. 131, 159 Ky. 334.

32. Me.—Moore v. Isenman, 143 A. 462, 127 Me. 370.
39 C.J. p 836 note 46.

tion to the master, the defect will be repaired before he will be subjected to danger from it.[33] It has been held that the mere continued use of a defective appliance after complaint is not necessarily contributory negligence, where the servant is injured in the hurry of business while in the discharge of his duty,[34] or where the risk was not so obvious that a reasonably prudent man would not have assumed it.[35] Where a servant is injured owing to the failure of the master to enforce a certain rule, there is no contributory negligence on the part of the servant in continuing in the service after the master was notified of the violation of the rule and had ordered its enforcement.[36]

Promise to remedy defect. Where a servant notifies his master of defects in the tools, machinery, appliances, or ways and places for work, and the master promises to remove them, it has been held that the servant is not guilty of contributory negligence by continuing at work for a reasonable time,[37] and the master is not relieved from liability for injuries from the defect unless the employee failed to use ordinary care.[38] On the other hand, notwithstanding a promise of the master to repair within a reasonable time, the servant will be held guilty of contributory negligence where a continuance in the employment to his knowledge exposes him to extraordinary danger,[39] or threatens immediate injury,[40] or where the danger is so obvious and imminent that no person of ordinary prudence would expose himself to it.[41] A servant is not required to make special investigation or inquiry as to whether or not the master had kept his promise after the time for its performance has passed,[42] but he may not rely on the promise where he continues work after a reasonable time with knowledge that the promise has not been performed.[43]

Where a servant calls attention to defects in an appliance and the employer repairs it in such a manner that the defects are hidden, but not cured, the employee is not guilty of contributory negligence in using it after it has been so repaired.[44] In any event a promise on the part of an employer to remedy a dangerous condition of which the employee has complained does not excuse the employee from exercising due care to prevent injury to himself pending repairs,[45] that is to say, care commensurate with the danger;[46] and if the servant, notwithstanding the defect, could have performed the work with comparative safety he cannot recover for injuries sustained by doing the work by a hazardous method.[47]

§ 435. —— Comparative Knowledge of Master and Servant

A servant injured because of a danger as open and obvious to him as to the master is chargeable with such negligence as will bar a recovery by him.

Where a danger is as open and obvious to the servant as to the master,[48] or where the servant has better means of knowledge than the master,[49] he will be charged with such negligence as to bar a recovery. So too where it does not appear that the master knew or with ordinary care ought to have known of the defect which caused the injury, and it does appear that the servant had equal means with the master of ascertaining its existence, the servant cannot recover.[50] It has been said by way of limitation of this rule that if it may be construed

33. Tex.—Galveston, H. & S. A. R. Co. v. Drew, 59 Tex. 10, 46 Am.R. 261.
39 C.J. p 836 note 47.

34. U.S.—Central Trust Co. v. Wabash, St. L. & P. R. Co., C.C.Mo., 26 F. 897.

35. N.C.—Walters v. Rocky Mount Sash & Blind Co., 70 S.E. 635, 154 N.C. 323.
39 C.J. p 836 note 49.

36. Ark.—St. Louis, A. & T. R. Co. v. Triplett, 15 S.W. 831, 54 Ark. 289, 11 L.R.A. 773, reheard 16 S.W. 266, 54 Ark. 289, 11 L.R.A. 773.

37. Mo.—Johnson v. Ingram, 178 S. W.2d 821, 238 Mo.App. 241—Nolen v. Halpin-Dwyer Const. Co., 29 S. W.2d 215, 225 Mo.App. 224—Culver v. Minden Coal Co., App., 286 S.W. 745.
N.H.—Nason v. Lord-Merrow Excelsior Co., 29 A.2d 464, 92 N.H. 251.
39 C.J. p 836 note 52.

38. Ky.—Smith v. Houston, Stanwood & Gamble Co., 163 S.W. 474, 157 Ky. 520.

39. Ill.—Wheeler v. Chicago & W. I. R. Co., 108 N.E. 330, 267 Ill. 306.

40. Pa.—Glass v. College Hill Borough, 82 A. 771, 233 Pa. 457.

41. Mo.—Johnson v. Ingram, 178 S. W.2d 821, 238 Mo.App. 241.
39 C.J. p 837 notes 53, 61.

42. Colo.—El Paso County Land & Fuel Co. v. Perdaris, 147 P. 675, 59 Colo. 216.

43. Mo.—Braden v. Friederichsen Floor & Wall Tile Co., 15 S.W.2d 923, 223 Mo.App. 700.

44. N.Y.—Cooper v. Fleischman, 147 N.Y.S. 65, 85 Misc. 1.

45. Me.—Moore v. Isenman, 143 A. 462, 127 Me. 370.
39 C.J. p 837 note 56.

46. Wash.—Trudeau v. American Mill Co., 83 P. 725, 41 Wash. 465.

47. U.S.—H. D. Williams Cooperage Co. v. Headrick, Ark., 159 F. 680, 86 C.C.A. 548.

48. Mo.—Nolen v. Halpin-Dwyer Const. Co., 29 S.W.2d 215, 225 Mo. App. 224.
Neb.—**Corpus Juris cited in** Grover v. Aaron Ferer & Sons, 241 N.W. 539, 541, 122 Neb. 755.
Tex.—**Corpus Juris cited in** City of Munday v. Shaw, Civ.App., 100 S. W.2d 765, 770.
Wash.—Freeman v. Smit, 75 P.2d 575, 193 Wash. 346—Jones v. Baker, 35 P.2d 1103, 179 Wash. 25.
39 C.J. p 838 note 70.

49. Mo.—Slagel v. Chas. H. Nold Lumber Co., 122 S.W. 321, 138 Mo. App. 432.
39 C.J. p 838 note 71.

50. Ga.—Threlkeld v. Anthony, 136 S.E. 285, 36 Ga.App. 227.
39 C.J. p 839 note 72.

to shift ascertainment of hidden dangers from the master to the servant it cannot be indorsed.[51]

§ 436. —— Mistake of Judgment, Temporary Forgetfulness, or Accident

As a general rule an employee injured by reason of a momentary forgetfulness of a known danger may not recover.

A mere mistake of judgment on the part of a servant does not necessarily constitute contributory negligence; it depends on the facts of the particular case.[52] So it has been held that a servant is not guilty of contributory negligence merely because he chanced to slip and came in contact with machinery which the master had failed to guard as required by statute.[53]

Forgetfulness of danger. As a general rule, one who sustains injuries by reason of momentary forgetfulness of a danger of which he has knowledge or of which he should have known in the exercise of ordinary care is not entitled to recover[54] in the absence of any circumstances producing hurry, excitement, or confusion;[55] and this is so although he called attention to the defects out of which the danger arose and although promises had been made by one in authority to remedy them.[56]

Nevertheless the rule must have a reasonable construction.[57] Momentary forgetfulness may in an emergency excuse negligence on the part of a servant.[58] To forget is not negligence unless it shows a want of reasonable care,[59] and circumstances may exist under which failure to remember a source of peril is excused and does not constitute negligence.[60] Such is the case where the servant is called on to execute in haste an order of the master requiring prompt attention,[61] where conditions arise suddenly in the discharge of his duties which are calculated to throw him off his guard and which momentarily, without fault on his part, divert his attention from the danger,[62] or where at the time the injuries were sustained his services required his full attention.[63] It has been held that, where the employer, without reason or necessity, subjects the servant to a danger which could have been easily guarded against, he has no right to expect a never-failing or superhuman watchfulness on the part of his servant to escape that danger.[64]

§ 437. —— Suggestions or Remonstrances by Servant

Failure to complain to the employer of the existence of a danger may constitute contributory negligence.

Failure to complain to the employer of the existence of a danger may under some circumstances constitute contributory negligence,[65] but it has been held that negligence cannot be imputed to a servant for failing to remonstrate with another servant over whom he has no control, and who represents the master with respect to the work in the performance of which the injury is sustained.[66] Where a servant participates in a dangerous course of action either by advising or instigating it, or by neglecting to expostulate, and is in a position to obviate the danger, he cannot recover;[67] and even

51. Iowa.—Warner v. Spalding, 172 N.W. 263, 186 Iowa 137.
39 C.J. p 839 note 74.

52. Ga.—Port Royal & W. C. R. Co. v. Davis, 22 S.E. 833, 95 Ga. 292.
39 C.J. p 839 note 76.

53. Pa.—Schwartz v. Caplan, 100 A. 800, 256 Pa. 239.

54. Cal.—Giraudi v. Electric Impr. Co., 40 P. 108, 107 Cal. 120, 48 Am. S.R. 114, 28 L.R.A. 596.
39 C.J. p 839 note 78.

55. N.Y.—Wallace v. Central Vermont R. Co., 18 N.Y.S. 280.
39 C.J. p 839 note 79.

56. Iowa.—Miller v. White Bronze Monument Co., 118 N.W. 518, 141 Iowa 701, 18 Ann.Cas. 957.

57. Cal.—Jacobson v. Oakland Meat & Packing Co., 119 P. 653, 161 Cal. 425, Ann.Cas.1913B 1194.

58. Miss.—Eagle Cotton Oil Co. v. Pickett, 166 So. 764, 175 Miss. 577.

59. Cal.—Jacobson v. Oakland Meat & Packing Co., 119 P. 653, 161 Cal. 425, Ann.Cas.1913B 1194.

60. N.Y.—Schultis v. Waterbury Co., 137 N.Y.S. 352, 152 App.Div. 416.
39 C.J. p 839 note 84.

61. Pa.—Reber v. Alsace Tp., 49 Pa. Super. 465.
39 C.J. p 840 note 85.

62. Iowa.—Wheeler v. Sioux Pav. Brick Co., 142 N.W. 400, 162 Iowa 414.
Ky.—Louisville & N. R. Co. v. Cooley, 49 S.W. 339, 20 Ky.L. 1372.

63. Ky.—Louisville & N. R. Co. v. Cooley, supra.
39 C.J. p 840 note 87.

64. La.—Underwood v. Louisiana Gulf Refining Co., 55 So. 641, 128 La. 968.
39 C.J. p 840 note 88.

65. N.C.—Hemphill v. Standard Oil Co., 148 S.E. 443, 197 N.C. 339.

No occasion for complaint

Complaint of railroad switchman of existing conditions was unnecessary in order to avail himself of promise to warn him of danger where there had been theretofore no occasion for complaint.—McComb v. Atchison, T. & S. F. Ry. Co., 294 P. 81, 110 Cal.App. 303, certiorari denied Atchison, T. & S. F. Ry. Co. v. McComb, 51 S.Ct. 486, 283 U.S. 838, 75 L.Ed. 1449.

Drunken driving

Where salesman, while being driven by his superior with other employees to employer's zone meeting, participated in drinking with others, knew that his superior was drunk and driving carelessly, and made no protest against such driving, but acquiesced therein, salesman was guilty of negligence, precluding recovery against employer for injuries sustained from collision with tree. —Sparks v. Chitwood Motor Co., 94 S.W.2d 359, 192 Ark. 743.

66. U.S.—New Jersey & N. Y. R. Co. v. Young, N.Y., 49 F. 723, 1 C.C.A. 428.
39 C.J. p 840 note 89.

67. U.S.—Smith v. Memphis & L. R. R. Co., C.C.Tenn., 18 F. 304, appeal dismissed 122 U.S. 643 mem, 30 L. Ed. 1245.
39 C.J. p 840 note 90.

where the injury results from the action of a superior officer the servant cannot recover if such action was induced by negligent statements on his part.[68] So too, where a servant fails to obey an order of his superior as first given and acquiesces in the adoption of a different course of action suggested by his fellow servants, and consented to by such superior, and by reason of which the injury is sustained, he is guilty of contributory negligence barring recovery.[69]

§ 438. —— Disease or Other Physical Condition

Where an injury results directly from a disease or defective physical condition it has been held that an employee may not recover for the injury.

Where a servant whose duty requires him to be in a position of danger becomes sick and unconscious, and is unable to get away, and injury results to him from such condition, he is not guilty of contributory negligence;[70] but if the injury results directly from a disease or defective physical condition it has been held that he may not recover for the injury.[71] If an employee negligently falls asleep in a dangerous position,[72] or becomes sick or unconscious while wrongfully in a position of danger,[73] and injury results he cannot recover unless the circumstances are such that the doctrine of "last clear chance," discussed supra § 423, applies. The voluntary intoxication of a servant at the time of a personal injury may be considered in determining whether he took reasonable care for his safety.[74]

§ 439. Scope of Employment

The doctrine of contributory negligence has been invoked to bar recovery where a servant sustains injuries while attempting without authority to do something not within the scope of his employment.

The doctrine of contributory negligence has been invoked to bar recovery where a servant sustains injuries while attempting without authority to do something not within the scope of his employment[75] unless there is a pressing emergency on him to do that work.[76] This rule applies although the servant is acting under the orders of another servant[77] unless the latter occupies the place of vice principal;[78] and the application of the rule is not affected by a statute which abolishes the defense of contributory negligence where the master has failed to comply with a statutory requirement for the protection of the servant.[79] So there can be no recovery where the injury is sustained while the employee is voluntarily and unnecessarily absent from his post of duty,[80] or where, not in the performance of his duty, he places himself in a perilous position and neglects to exercise ordinary care for his own safety.[81]

Where a servant is actually performing work which he has been hired to do, he cannot be said to be acting outside of the scope of his employment merely because in performing the particular act he was not acting under express directions of the master;[82] and, where a servant is directed by his master to help another servant in work which he designates, it cannot be said that he is a volunteer merely because he continues to do the work in the absence of the other servant.[83]

§ 440. Proximate Cause of Injury

An employee's contributory negligence is not a defense to an action for injuries sustained unless it was a proximate cause of the injury.

68. Wash.—Morgan v. Carbon Hill Coal Co., 34 P. 152, 772, 6 Wash. 577.

69. Ill.—Chicago & N. W. R. Co. v. Bliss, 6 Ill.App. 411.

70. Ala.—Helton v. Alabama Midland R. Co., 12 So. 276, 97 Ala. 275.

71. Tex.—Galveston, H. & S. A. R. Co. v. Bonn, 99 S.W. 413, 44 Tex. Civ.App. 631.
39 C.J. p 840 note 97.

Care required

A person having an impediment in his walk is not required to exercise more care in looking and listening than one not so afflicted.—Gulf, C. & S. F. R. Co. v. Melville, Tex.Civ.App., 87 S.W. 863.

72. Va.—Norfolk & W. R. Co. v. Sollenberger, 66 S.E. 726, 857, 110 Va. 606.
39 C.J. p 840 note 94.

Exhaustion

If employee's act in colliding with bridge while on his way home in his automobile after work for his employer was due entirely to his falling asleep, employee was not entitled to recover from employer for injuries and damage to automobile, even though he had allegedly exceeded his physical limitations while engaged in employer's business and became drowsy.—Evlo Refining & Marketing Co. v. Moore, 137 P.2d 911, 192 Okl. 576.

73. Ala.—Helton v. Alabama Midland R. Co., 12 So. 276, 97 Ala. 275.

74. Del.—Walls v. People's R. Co., 80 A. 355, 26 Del. 65.

75. La.—Baton v. Hammond Lumber Co., 2 La.App. 739.
39 C.J. p 840 note 4.

Acts held within scope of employment

Mo.—Schulte v. Carmichael-Cryder Co., App., 282 S.W. 181.
39 C.J. p 840 note 4 [b].

76. Ga.—Central R. & Banking Co. v. Sears, 59 Ga. 436.
39 C.J. p 841 note 5.

77. Tex.—Texas & N. O. R. Co. v. Skinner, 23 S.W. 1001, 4 Tex.Civ. App. 661.

78. Tex.—Texas & N. O. R. Co. v. Skinner, supra.

79. N.C.—Hairston v. U. S. Leather Co., 55 S.E. 847, 143 N.C. 512, 10 Ann.Cas. 698.
39 C.J. p 841 note 9.

80. W.Va.—Eastburn v. Norfolk & W. R. Co., 12 S.E. 819, 34 W.Va. 681.
39 C.J. p 841 note 10.

81. Va.—Moore v. Norfolk & W. R. Co., 12 S.E. 968, 87 Va. 489.
39 C.J. p 841 note 11.

82. Mo.—Schott v. Selden-Breck Constr. Co., App., 193 S.W. 959.

83. N.Y.—Fitzhenry v. Lamson, 45 N.Y.S. 875, 19 App.Div. 54.

In order for negligence of the servant to constitute a defense to an action for injuries sustained, it must have been the proximate cause of the injury, that is, it must have contributed to the injury in such a way that, if the servant had not been negligent, no injury would have resulted from the negligence of the master.[84] If the servant's negligence was only a condition on which the negligence of his superior operated as the proximate cause of the accident he may nevertheless recover.[85] Thus an employee's absence from his post will bar his recovery for injuries only if it was the proximate cause of the injuries.[86] On the other hand, if the servant's own negligence was the proximate cause of the injury, there can be no recovery,[87] and it is not essential that the negligence of the servant should be the sole proximate cause of the injury.[88]

Drunkenness in itself will not bar recovery unless it is shown that such condition caused the accident[89] or in a measure contributed to it.[90]

§ 441. —— Use of Defective Appliances

An employee may not recover for injuries where his contributory negligence in using defective appliances was the proximate cause of the injury.

Where the employee's contributory negligence in using defective appliances is the proximate cause of the injury he may not recover.[91] Thus recovery is barred where the proximate cause of the injury was the employee's negligent failure to inspect,[92] but where the inspection negligently omitted would not have revealed the defect it has been held not the proximate cause of the injury.[93] It has been held that where the servant, on the exigency of the oc-

84. U.S.—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531.
S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S. C. 213.
39 C.J. p 842 note 16.

Situation considered as a whole
Ga.—Atlantic Coast Line R. R. v. Anderson, 38 S.E.2d 610, 200 Ga. 801.

Employee's negligence held not proximate cause
Miss.—Hardaway Contracting Co. v. Rivers, 180 So. 800, 181 Miss. 727.

85. N.C.—Blackburn v. Cherokee Lumber Co., 67 S.E. 915, 152 N.C. 361.
39 C.J. p 843 note 17.

86. U.S.—Terre Haute & I. R. Co. v. Mansberger, Ill., 65 F. 196, 12 C.C.A. 574.
Wis.—Phillips v. Chicago, M. & St. P. R. Co., 25 N.W. 544, 64 Wis. 475.
39 C.J. p 841 note 10 [a].

87. U.S.—Young v. Louisiana Oil Refining Corporation, C.C.A.Miss., 112 F.2d 396—Burnett v. Amalgamated Phosphate Co., C.C.A.Fla., 96 F.2d 974, certiorari denied 59 S. Ct. 153, 305 U.S. 647, 83 L.Ed. 418—Stoffel v. W. J. McCahan Sugar Refining & Molasses Co., D.C.Pa., 35 F.2d 602, affirmed, C.C.A., W. J. McCahan Sugar Refining & Molasses Co. v. Stoffel, 41 F.2d 651.
Ark.—Wisconsin & Arkansas Lumber Co. v. Smith, 271 S.W. 1, 168 Ark. 561.
Ky.—Louisville & N. R. Co. v. Stewart, 142 S.W.2d 119, 283 Ky. 585.
Va.—Norfolk & W. Ry. Co. v. Smith, 146 S.E. 268, 152 Va. 165.
39 C.J. p 843 note 18.

Employee's negligence held proximate cause
(1) In general.—MacLean v. Neipris, 23 N.E.2d 85, 304 Mass. 237—39 C.J. p 843 note 18 [b]-[d].

(2) Bakery employee's negligence in moving backward pulling a truck without looking where he was going was sole proximate cause of injury to hand sustained in collision with open door between compartments of bakery and act of fellow servant in opening door in line of duty and leaving it open was not negligence proximately causing injury.—Great Atlantic & Pacific Tea Co. v. Najera, Tex.Civ.App., 203 S.W.2d 577.

(3) Independent act of employee while on way to parked automobile after quitting work in jumping five feet to ground from end of runway extending from oil derrick where no steps were provided held proximate cause of death of employee from ruptured abscess of brain caused by jump.—Munroe v. Schoenfeld & Hunter Drilling Co., 61 P.2d 1045, 178 Okl. 149.

(4) A bus driver was guilty of "proximate contributory negligence" when bus, negligently sent out with worn tires, collided with automobile, negligently parked without lights near center of street, during rainstorm, where driver saw automobile when two hundred feet from it, and could have discovered that automobile was parked when one hundred feet from it, and did not attempt to turn bus or apply its brakes until within thirty-five or forty feet from automobile, and street was otherwise clear of traffic at time of collision and driver had made previous stops under similar conditions without difficulty.—Fortune v. McGinn, 134 S.W.2d 898, 23 Tenn.App. 504, rehearing denied 139 S.W.2d 256, 24 Tenn.App. 36.

88. Tenn.—Nashville, C. & St. L. R. Co. v. Hayes, 99 S.W. 362, 117 Tenn. 680.

89. Colo.—Finding v. Gitzen, 131 P. 1042, 24 Colo.App. 38.

90. Colo.—Finding v. Gitzen, supra.

91. U.S.—Burnett v. Amalgamated Phosphate Co., C.C.A.Fla., 96 F.2d 974, certiorari denied 59 S.Ct. 153, 305 U.S. 647, 83 L.Ed. 418.
Ky.—Louisville & N. R. Co. v. Napier, 3 S.W.2d 1070, 223 Ky. 417, 64 A.L.R. 513.
Pa.—Hoke v. Edison Light & Power Co., 130 A. 309, 284 Pa. 112.
39 C.J. p 843 note 20.
Use of defective appliance as contributory negligence see infra § 446.

Causal relationship
Employee's failure to inspect stationary ladder in pit of pump house, which gave way as employee descended ladder to oil the pumps, would not constitute contributory negligence as matter of law unless such failure bore a causal relationship to the accident.—Missouri Pac. R. Co. v. Spangler, C.C.A.Ark., 140 F. 2d 917.

Employee's negligence held proximate cause
(1) Employee's voluntary attempt to move defective truck without assistance was held proximate cause of injury.—Batson Hatten Lumber Co. v. Thames, 114 So. 25, 147 Miss. 794.

(2) Where painting contractor's employee was injured when he fell from scaffold which he and a fellow workman had voluntarily constructed, employee himself created a dangerous place to work, and it was the creation of that unsafe place to work that contributed as a proximate cause to his injury.—Davis v. Fleming, 13 S.E.2d 434, 196 S.C. 343.

92. Ky.—City of Bellevue v. Hall, 174 S.W.2d 24, 295 Ky. 57.

93. U.S.—Missouri Pac. R. Co. v. Spangler, C.C.A.Ark., 140 F.2d 917,

casion, uses the appliances most convenient, and they fail to operate properly, then the defective appliance is the proximate cause of the injury, and the servant is entitled to recover.[94]

§ 442. —— Precautions against Known Dangers

An employee's contributory negligence in failing to take precautions against known dangers bars recovery for injury only if it was the proximate cause of the injury.

An employee's contributory negligence in failing to take precautions against known dangers bars recovery for injury if his failure to do so is the proximate cause of injuries sustained by him.[95] The rule is otherwise, however, where it is not the proximate cause of the injury.[96]

§ 443. —— Adopting Dangerous Methods of Work

An employee's contributory negligence in adopting dangerous methods of work bars recovery where it is the proximate cause of the injury, but not otherwise.

An employee's contributory negligence in adopting a dangerous method of work bars recovery where such negligence was the proximate cause of the injury,[97] but not otherwise.[98]

§ 444. —— Disobedience of Rules, Orders, or Statutes

An employee's contributory negligence in violating rules, orders, instructions, or statutes bars recovery where such violation is the proximate cause of his injury.

An employee's contributory negligence in disobeying rules, orders, or instructions bars recovery where such negligence is the proximate cause of his injury,[99] but in order to bar recovery it is essential that such disobedience should have been the

94. U.S.—Finley v. Richmond & D. R. Co., C.C.N.C., 59 F. 419, reversed on other grounds 63 F. 228, 12 C.C.A. 595.

95. U.S.—Harrison v. L. E. Myers Const. Co., C.C.A.Ark., 42 F.2d 950, certiorari denied 51 S.Ct. 103, 282 U.S. 887, 75 L.Ed. 782.

Ark.—Sinclair Refining Co. v. Duff, 88 S.W.2d 322, 191 Ark. 888—Trinity Farm Const. Co. v. Brannam, 82 S.W.2d 523, 190 Ark. 1032.

Mo.—Davis v. Brown-Cloughly Drug Co., App., 14 S.W.2d 533.

Tex.—**Corpus Juris cited in** City of Munday v. Shaw, Civ.App., 100 S.W.2d 765, 770.

39 C.J. p 843 note 22, p 874 note 15 [f].

Failure to take precautions against known dangers as contributory negligence see supra § 431.

Failure to jump

Section crew foreman's failure to jump from motorcar when other members of crew did, not failure to give earlier warning of locomotive's approach, held cause of his death in head-on collision with locomotive.—Sweeney v. Boston & M. R. R., 175 A. 243, 87 N.H. 90, certiorari denied 55 S.Ct. 638, 294 U.S. 728, 79 L.Ed. 1258.

Turning back to train

Negligence of bridge carpenter in standing on cross-tie and turning back to direction of approaching train proximately caused death when struck by train.—Feurt v. Chicago, R. I. & P. Ry. Co., 227 N.W. 212, 178 Minn. 395.

Open switch

Where engineer ran into open switch after receiving dispatcher's permission to proceed with train "under control" with notice that he might expect open switch, engineer's negligence held sole proximate cause of injury, notwithstanding railroad's alleged negligence in leaving switch open and fireman's failure to discover danger.—Pere Marquette Ry. Co. v. Haskins, C.C.A.Mich., 62 F.2d 806.

96. Tex.—El Paso Electric Co. v. Sawyer, Civ.App., 291 S.W. 667, affirmed, Com.App., 298 S.W. 267.

39 C.J. p 844 note 23.

Defective mask

If mask furnished sandblaster gave him less protection than it should have, even though he did not wear mask all the time, recovery might still be had for any injury he suffered while he did use it.—Pieczonka v. Pullman Co., C.C.A.N.Y., 102 F.2d 432.

97. U.S.—Wolfe v. Henwood, C.C.A. Ark., 162 F.2d 998.

Ky.—Grigsby v. Louisville & N. R. Co., 114 S.W.2d 775, 272 Ky. 709—Steely v. Great Atlantic & Pacific Tea Co., 76 S.W.2d 900, 256 Ky. 586—Crouch v. Noland, 38 S.W.2d 471, 238 Ky. 575.

Miss.—Stewart v. Kroger Grocery Etc., Co., 21 So.2d 912, 198 Miss. 371—Martin v. Beck, 171 So. 14, 177 Miss. 303.

Neb.—**Corpus Juris cited in** Albers v. Kipp, 263 N.W. 593, 595, 130 Neb. 46.

Tex.—Magnolia Petroleum Co. v. Ford, Civ.App., 14 S.W.2d 97, error denied Ford v. Magnolia Petroleum Co., 17 S.W.2d 36, 118 Tex. 461.

39 C.J. p 844 note 24.

Adoption of dangerous methods of work as contributory negligence see infra § 448.

Jumping from moving train

Tex.—International-Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272.

Repairing running machine

Employer held not liable for injury caused by act of employee voluntarily attempting to uncoil knot in steel rope winding on drum when machinery was running.—Rose v. Pace, 109 So. 861, 144 Miss. 375.

Signaling train

Switchman who held signal lanterns too near approaching train which he was attempting to flag and was struck could not recover from railroad employer because the proximate cause of switchman's injuries was switchman's contributory negligence.—Bird v. Lowden, 32 N.E.2d 650, 309 Ill.App. 139.

98. Mo.—Isaacs v. Smith, App., 275 S.W. 555—Tatum v. Crescent Laundry Co., 208 S.W. 139, 201 Mo.App. 97.

S.C.—Davis v. Atlantic Coast Line R. Co., 147 S.E. 834, 150 S.C. 130, reversed on other grounds Atlantic Coast Line R. Co. v. Davis, 49 S.Ct. 210, 279 U.S. 34, 73 L.Ed. 601.

99. N.C.—Byers v. Boice Hardwood Co., 159 S.E. 3, 201 N.C. 75.

Tex.—Hunter v. Texas Elec. Ry. Co., Civ.App., 194 S.W.2d 281, error refused—Bishop v. Texas & P. Ry. Co., Civ.App., 62 S.W.2d 247, error refused.

39 C.J. p 844 note 27.

Disobedience of rules as contributory negligence see infra § 457.

Railroad rules and orders

U.S.—Southern Ry. Co. v. Youngblood, S.C., 52 S.Ct. 518, 286 U.S. 313, 76 L.Ed. 1124—Norfolk & W. Ry. Co. v. Riggs, C.C.A.Ohio, 98 F.2d 612—Hylton v. Southern Ry. Co., C.C.A.Tenn., 87 F.2d 393, certiorari denied 57 S.Ct. 929, 301 U.S. 699, 81 L.Ed. 1354.

proximate cause of the injury.[1] It is not sufficient to bar a recovery that the disobedience was a mere condition of the injury.[2] Contributory negligence in failing to heed warnings or signals may bar recovery where it is the proximate cause of the injury.[3] An employee's failure to perform his duties bars recovery where, but only where, it is the proximate cause of the injury.[4]

Violation of statute. An employee's violation of a statute, where it constitutes contributory negligence, will bar a recovery for injuries of which such violation was the proximate cause.[5] On the other hand, a recovery is permissible if the violation of the statute was not the proximate cause of the injury.[6]

§ 445. —— Unnecessary Occupation of Dangerous Position

Where an employee unnecessarily places himself in a position of danger, such act bars recovery if it is the proximate cause of his injury.

Where a servant unnecessarily puts himself into a dangerous position where there are other positions which he might take in the performance of his duties, and his doing so is the proximate cause of the injury complained of, there can be no recovery.[7]

2. PARTICULAR APPLICATIONS OF DOCTRINE

§ 446. Tools, Machinery, Appliances, and Places

- a. Duty to use appliances furnished
- b. Duty to obtain appliances
- c. Choice of appliances or materials
- d. Unauthorized or improper use of machinery or appliances
- e. Choice of places for work
- f. Choice of ways of passage
- g. Unnecessary occupation of dangerous position

a. Duty to Use Appliances Furnished

A servant having actual or constructive knowledge that appliances have been furnished for his use, in the course of his work, is under a duty to use them; and if he is injured by reason of his failure to do so he is chargeable with contributory negligence.

In accordance with the general rules of contributory negligence, as well as their limitations and qualifications, discussed supra §§ 421–445, which operate as to the negligence of servants in respect of tools, machinery, appliances, and places of work, if a servant knows or is charged with knowledge of the fact that proper appliances have been fur-

Tex.—Hunter v. Texas Elec. Ry. Co., Civ.App., 194 S.W.2d 281, error refused.

1. Ark.—Kansas City Southern Ry. Co. v. Larsen, 114 S.W.2d 1081, 195 Ark. 808, certiorari denied 59 S.Ct. 82, 305 U.S. 621, 83 L.Ed. 397—Jewel Coal & Mining Co. v. Whitner, 279 S.W. 1031, 170 Ark. 393.
Mo.—Messing v. Judge & Dolph Drug Co., 18 S.W.2d 408, 322 Mo. 901.
Tex.—Texas & P. Ry. Co. v. Short, Civ.App., 62 S.W.2d 995, error refused.
39 C.J. p 845 note 29.

2. U.S.—Tullis v. Lake Erie & W. R. Co., Ind., 105 F. 554, 44 C.C.A. 597.

3. N.Y.—Wolf v. Baltimore & O. R. Co., 267 N.Y.S. 199, 239 App.Div. 95, reversed on other grounds 189 N.E. 780, 264 N.Y. 57.
Va.—Brickell v. Shawn, 9 S.E.2d 330, 175 Va. 373.

4. U.S.—Blunt v. Pennsylvania R. Co., C.C.A.Ohio, 9 F.2d 395.
Ky.—Nelson's Adm'x v. Southern Ry. Co., 194 S.W.2d 518, 302 Ky. 243—McGhee's Adm'r v. Elcomb Coal Co., 156 S.W.2d 868, 288 Ky. 540.
N.C.—McLean v. Andrews Hardwood Co., 156 S.E. 528, 200 N.C. 312.

Engineer's failure to blow crossing whistle held not proximate cause of collision with train, conductor of which discovered engine some time before.—Missouri Pac. R. Co. v. Jones, Tex.Civ.App., 12 S.W.2d 1050, reversed on other grounds, Com.App., 24 S.W.2d 32.

5. Ky.—Proctor Coal Co. v. Beaver, 152 S.W. 965, 151 Ky. 839.
Miss.—Downing v. City of Jackson, 24 So.2d 661, 199 Miss. 464.
39 C.J. p 821 note 71.
Violation of statute as contributory negligence see infra § 457.

6. Ind.—Louisville, N. A. & C. R. Co. v. Buck, 19 N.E. 453, 116 Ind. 566, 9 Am.S.R. 883, 2 L.R.A. 520.

Unlicensed chauffeur held not precluded from recovering from employer for injuries suffered while engaged in duties other than driving truck.—Hutchinson v. Sovrensky, 165 N.W. 698, 267 Mass. 5.

7. Ala.—Barger v. Oswalt, 194 So. 884, 239 Ala. 289.
Ky.—Faulkner v. Gatliff Coal Co., 15 S.W.2d 236, 228 Ky. 379.
Tenn.—Buckner v. Southern Ry. Co., 96 S.W.2d 600, 20 Tenn.App. 212.
Va.—Brickell v. Shawn, 9 S.E.2d 330, 175 Va. 373.
39 C.J. p 845 note 31.

Normal response to emergency

Whether conduct of freight conductor in rushing into zone of danger instead of remaining in position of safety constituted such a new, independent, and intervening cause as to supersede antecedent negligence of railroad as proximate cause of conductor's death depended on whether conductor's conduct was a normal response to the stimulus of a dangerous situation created by prior negligent conduct of the railroad.—Central Wisconsin Trust Co. v. Chicago & N. W. Ry. Co., 287 N.W. 699, 232 Wis. 536.

Removing obstacle from track

(1) Proximate cause of injury to section foreman removing gauge from track to prevent derailing of train was negligence of laborer who left gauge on track.—Atlantic Coast Line R. Co. v. Jeffcoat, 107 So. 456, 214 Ala. 317, certiorari denied 46 S.Ct. 639, 271 U.S. 688, 70 L.Ed. 1152.

(2) Employee's attempt to remove surveying rod from rail to prevent derailment of approaching train held sole proximate cause of his injury thereby.—Bobango v. Erie R. Co., C.C.A.Ohio, 57 F.2d 667.

nished for his use by his employer[8] it is the duty of the servant to use such appliances for the prosecution of his work; and if he is injured by reason of his failure to use them he is chargeable with contributory negligence precluding a recovery.[9] This rule applies although the use of the appliances furnished may be inconvenient[10] and although the servant is afraid he may not be able to get out enough work to satisfy the master if he uses the appliances.[11] It has been held that, where appliances for doing certain work can be picked up at any time around the place of work, the failure of the master to furnish them specially does not render him liable for an injury to a servant caused by his not using them.[12] However, a failure to use the appliances furnished is not contributory negligence where, under the circumstances, the servant is excused from using them,[13] as where he has knowledge of defects in the appliances;[14] and under some statutes the servant is not precluded from recovering because of his failure to use particular appliances if the master was negligent in failing to provide other safeguards and such negligence contributed to the injury.[15]

b. Duty to Obtain Appliances

A servant who knows, or is charged with knowledge, of defects or dangers is guilty of contributory negligence if he fails to demand or obtain appliances by which the danger might be avoided.

Where a servant knows, or is charged with knowledge, of defects or dangers, and is injured by reason of his failure to demand or obtain appliances by which the danger might have been avoided, he is guilty of such contributory negligence as to bar a recovery.[16] A failure, however, to use a particular appliance is not such contributory negligence where the threatened danger is not of a character that calls for the use of such appliance;[17] and where the servant is injured, while using an appliance furnished for that purpose, by reason of defects in the appliance his failure to obtain an appliance of other dimensions will not be held contributory negligence in the absence of proof that it could have been used.[18]

c. Choice of Appliances or Materials

If proper appliances or materials are furnished or may be procured by a servant, he may be guilty of contributory negligence in selecting and using an improper, defective, or dangerous appliance or improper materials.

Where proper appliances or materials are furnished or may be procured by a servant and he selects for use an improper, defective, or dangerous appliance or improper materials, in so doing he is not in the exercise of reasonable care and he cannot recover for injuries resulting therefrom,[19] as where he does not use ordinary judgment in select-

8. Neb.—**Corpus Juris quoted in** Albers v. Kipp, 263 N.W. 593, 595, 130 Neb. 46.
39 C.J. p 845 note 35.

9. U.S.—Petition of Langnes, D.C. Wash., 32 F.2d 284, reversed on other grounds C.C.A., The Aloha, 35 F.2d 447, reversed on other grounds 51 S.Ct. 243, 282 U.S. 531, 75 L.Ed. 520.
Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W.Harr. 564.
Neb.—**Corpus Juris quoted in** Albers v. Kipp, 263 N.W. 593, 595, 130 Neb. 46.
39 C.J. p 845 note 37.

Failure to use lantern

A railroad conductor suing for injuries sustained when he alighted in nighttime from caboose standing on bridge over creek for purpose of examining defective brake shoes and fell into creek bed was contributorily negligent in not using the lantern on his arm before leaving caboose.—Pauly v. McCarthy, 166 P.2d 501, 109 Utah 398, reversed on other grounds 67 S.Ct. 962, 330 U.S. 802, 91 L.Ed. 1261.

Failure to wear mask

An employee cannot recover for silicosis contracted in sandblasting operations where he refused to wear a mask.—Pieczonka v. Pullman Co., C.C.A.N.Y., 89 F.2d 353.

10. Neb.—Albers v. Kipp, Neb., 263 N.W. 593, 130 Neb. 46.
Pa.—Taylor v. Pennsylvania Steel Castings & Machine Co., 66 A. 353, 217 Pa. 269.

11. Ind.—Cincinnati Seating Co. v. Neiry, 81 N.E. 216, 40 Ind.App. 144.
Neb.—Albers v. Kipp, 263 N.W. 593, 130 Neb. 46.

12. Iowa.—Hathaway v. Illinois Cent. R. Co., 60 N.W. 651, 92 Iowa 337.

13. Ky.—Stearns Coal Co. v. King, 181 S.W. 329, 167 Ky. 719.
39 C.J. p 845 note 37 [d].

14. N.Y.—Adlam v. Konvalinka, 50 N.E.2d 535, 291 N.Y. 40.

Household appliance

In the absence of knowledge of a defective condition which would warrant a definite choice, a domestic servant is bound to use household appliance, furnished by her mistress, as she is directed to do.—Adlam v. Konvalinka, supra.

15. Ohio.—Larkins v. Ohio Electric R. Co., 22 Ohio Cir.Ct.,N.S., 241.
39 C.J. p 845 note 37 [e].
Comparative negligence see the C.J. S. title Negligence §§ 169–173, also 39 C.J. p. 822 note 75, p 824 note 13.
Contributory negligence as defense as affected by special statutory provisions generally see supra § 425.

16. Colo.—Victor Coal Co. v. Muir, 38 P. 378, 20 Colo. 320, 46 Am.S.R. 299, 26 L.R.A. 435.
39 C.J. p 846 note 42.

17. Va.—Jewell Ridge Coal Corp. v. Keen, 96 S.E. 767, 123 Va. 514.
39 C.J. p 846 note 42 [c].

18. Wash.—Shea v. Seattle Lumber Co., 91 P. 623, 47 Wash. 70.

19. Mo.—Hankins v. St. Louis-San Francisco Ry. Co., App., 14 S.W. 2d 674.
N.Y.—Hendrickson v. Rice, 217 N. Y.S. 35, 217 App.Div. 433.
Pa.—O'Dowd v. Burnham, 19 Pa. Super. 464.
Tex.—St. Louis Southwestern Ry. Co. of Texas v. Weatherly, Civ. App., 2 S.W.2d 555.
39 C.J. p 847 note 45.
Use of defective appliances as proximate cause see supra § 441.

Shoring material

Laborer, controlling sewer excavation and killed by cave-in, had duty

ing materials which prove to be inefficient.[20] He has, however, the right to use such of the appliances furnished as appear to him to be reasonably safe for the performance of his task,[21] or such appliances as a man of ordinary prudence would, under all the circumstances use,[22] and it has been held that, although the appliances or tools selected are insufficient or defective, the servant is not contributorily negligent if he selects the best appliances or tools which are available.[23] Moreover, if the master has furnished for use, or acquiesced in the use of, a particular appliance he cannot afterward contend that it was an improper or inefficient appliance.[24] If a servant is not chargeable with knowledge of the danger, he is not negligent in selecting a defective tool.[25]

d. Unauthorized or Improper Use of Machinery or Appliances

A servant who sustains injuries by reason of his unauthorized or improper use of appliances or machinery furnished for the work ordinarily cannot recover because of contributory negligence.

Ordinarily a servant who sustains injuries by reason of his unauthorized or improper use of machinery or appliances furnished for the work, cannot recover;[26] and this rule is applicable although the machinery or appliances were defective.[27] Where an appliance is used for a purpose for which it was not intended, there can be no recovery unless it was so used with the acquiescence, or at least with the knowledge, of the employer;[28] and, even if used with the acquiescence of the employer, there can be no recovery for injuries sustained in so doing if the danger was obvious and imminent.[29] Where, however, the act is done under the immediate direction of the master or his representative, the servant may recover notwithstanding the appliances were used in a manner different from that for which they were intended.[30]

e. Choice of Places for Work

The voluntary use of an unsafe place to work, when other and safer places are available, constitutes contributory negligence, precluding a recovery for injury, if the danger is obvious or of such a character that an ordinarily prudent person would not incur it under the circumstances.

Where a servant unnecessarily and of his own volition uses an unsafe place to do his work, when other and safer places are available, he cannot recover for injuries sustained by reason of his negligent action, if the danger is obvious or of such character that an ordinarily prudent person would not incur it under like circumstances,[31] especially where the servant at the time of the injury is acting in disobedience of orders.[32] It is the duty of the servant to select the safer of two places for work.[33] However, in order to bar a recovery, it is essential that the place chosen should be so dangerous that an ordinarily prudent person would not choose it,[34] and if the place is safe when he begins work, and it subsequently becomes unsafe because

to select from material master furnished for bracing and shoring that which was suitable.—King v. Terry, Mo.App., 14 S.W.2d 969.

20. Pa.—Hoke v. Edison Light & Power Co., 130 A. 309, 284 Pa. 112.

Best judgment required

Where a servant assumes the selection of materials for a job of work, he must examine them and exercise his best judgment in selecting such only as are fit for the purpose.—Lee v. Kansas City Gas Co., 91 Mo.App. 612.

21. Mo.—Cody v. Lusk, 171 S.W. 624, 187 Mo.App. 327.
39 C.J. p 847 note 46.

Support for scaffold

A servant is not necessarily guilty of negligence in selecting out of a large number, some good and some bad, a defective appliance with which to support a scaffold on which he was to work.—Cody v. Lusk, supra.

22. Tex.—Pope v. St. Louis Southwestern R. Co., 155 S.W. 1175, 106 Tex. 52.

23. Mo.—Nolen v. Halpin-Dwyer Const. Co., 29 S.W.2d 215, 225 Mo. App. 224.

24. Or.—Adskim v. Oregon-Washington R. & Nav. Co., 294 P. 605, 134 Or. 574.

25. N.H.—Kruger v. Exeter Mfg. Co., 149 A. 872, 84 N.H. 290.

26. Mass.—Bigos v. United Rayon Mill, 16 N.E.2d 44, 301 Mass. 76.
Neb.—Standard Distilling & Distributing Co. v. Harris, 106 N.W. 582, 75 Neb. 480.
Tex.—City of Panhandle v. Byrd, 106 S.W.2d 660, 130 Tex. 96.
39 C.J. p 847 note 50.

27. Mo.—Manche v. St. Louis Basket & Box Co., 262 S.W. 1021.
Use of defective appliances as proximate cause of injury see supra § 441.

28. D.C.—McCauley v. Southern R. Co., 10 App.D.C. 560.
Ind.—Lagler v. Roch, 104 N.E. 111, 57 Ind.App. 79.
Neb.—**Corpus Juris quoted in** Albers v. Kipp, 263 N.W. 593, 595, 130 Neb. 46.

29. Mo.—Whaley v. Coleman, 88 S. W. 119, 113 Mo.App. 594.

30. Tex.—Hugo v. Paiz, Civ.App., 128 S.W. 912, affirmed 141 S.W. 518, 104 Tex. 563.
39 C.J. p 848 note 54.
Compliance with command or order generally see infra §§ 463-467.

31. Minn.—Kivak v. Great Northern R. Co., 173 N.W. 421, 143 Minn. 196.
39 C.J. p. 848 note 56.

Caught between car and building

An engine foreman who was caught between railroad car and building during switching operations cannot recover on ground he had not been furnished safe place to work where foreman himself chose to stand in dangerous place.—Ellis v. Union Pac. R. Co., 19 N.W.2d 641, 146 Neb. 397, opinion adhered to 22 N.W.2d 305, 147 Neb. 18.

32. Mass.—Slade v. Beattie, 71 N. E. 540, 186 Mass. 267.
Disobedience of orders generally see infra §§ 457-459.

33. Mo.—Hirsch v. Freund Bros. Bread Co., 129 S.W. 1060, 150 Mo. App. 162.

34. Mo.—Boehm v. General Electric Co., 162 S.W. 723, 179 Mo.App. 663.
39 C.J. p 848 note 59.

Near blasting

An employee who is not in charge of blasting, and who does not know of the danger of unexploded charges,

of a changed condition, without any fault or knowledge on his part, he is not contributorily negligent.[35] If the servant at the time of the injury is at his regular place of work and where his ordinary duty requires him to be, he is not guilty of contributory negligence in failing to avail himself of permission to occupy a different and perhaps safer place;[36] and a servant is not necessarily negligent in occupying a position in doing the work at which he is injured where his superior takes the same position in doing the same work and the taking of any other position for doing the work is very difficult.[37]

f. Choice of Ways of Passage

The voluntary selection of an unsafe way of passage, when a safe or reasonably safe way is available, may constitute such contributory negligence as will bar a recovery for injuries sustained by a servant.

Where a servant has his choice of two ways of passage, one of which is safe or reasonably safe and the other of which is apparently or obviously dangerous, his voluntary selection of the latter constitutes such contributory negligence as will bar a recovery for injuries sustained,[38] and it has been held that this is so although he was so engrossed in his duty at the time of the accident that he did not realize the danger[39] or was ignorant of, or indifferent to, the danger,[40] or although the way was used by others with the master's knowledge[41] or consent.[42]

On the other hand, a servant is not guilty of contributory negligence in choosing the way which is apparently safe[43] or in accidentally choosing the dangerous way without his own fault;[44] and it has been held that he is not guilty of contributory negligence in using a way kept open as a common passage or thoroughfare by the master[45] or where there is only one way available to him.[46] Where there are different ways over which a servant can pass in the performance of his duties, and all of them are apparently equally safe, the act of choosing one in preference to the others will not preclude a recovery for injuries sustained while passing over it.[47]

g. Unnecessary Occupation of Dangerous Position

(1) In general
(2) Riding in dangerous position

(1) In General

A servant who voluntarily and unnecessarily puts himself into a dangerous position, when reasonably safe positions are available to him, is guilty of such contributory negligence as will preclude a recovery for injury.

If a servant voluntarily and unnecessarily puts himself into a dangerous position, when there are other positions which he may take, in connection

is not negligent in working near a place where a blast had been set off without ascertaining whether any charge had failed to explode.—Cogliano v. Ferguson, 117 N.E. 45, 228 Mass. 147.

35. Ala.—Alabama Great Southern R. Co. v. Neal, 62 So. 554, 8 Ala. App. 591.

36. U.S.—McCabe & Steen Constr. Co. v. Wilson, Okl., 28 S.Ct. 558, 209 U.S. 275, 52 L.Ed. 788.

37. Minn.—Skarpmoen v. Cloquet Box Co., 130 N.W. 1106, 114 Minn. 278.

38. U.S.—Harrison v. L. E. Myers Const. Co., C.C.A.Ark., 42 F.2d 950, certiorari denied 51 S.Ct. 103, 282 U.S. 887, 75 L.Ed. 782—Whatley v. Anderson-Tully Co., C.C.A.Miss., 12 F.2d 268—Hardie v. New York Harbor Dry Dock Corporation, C.C.A.N.Y., 9 F.2d 545.
Ark.—Missouri Pac. R. Co. v. Hathcock, 139 S.W.2d 35, 200 Ark. 294.
Iowa.—Hedberg v. Lester, 270 N.W. 447, 222 Iowa 1025.
N.J.—Macchia v. Pennsylvania R. Co., 156 A. 337, 9 N.J.Misc. 998, affirmed 162 A. 654, 109 N.J.Law 404.
N.C.—Williamson v. Old Dominion Box Co., 171 S.E. 335, 205 N.C. 350.
39 C.J. p 848 note 63.
Choice of ways or methods of work see infra § 450.

Experienced servant, using dark passage on main deck in preference to safe passage over bridge deck, is contributorily negligent.—Hardie v. New York Harbor Dry Dock Corporation, C.C.A.N.Y., 9 F.2d 545.

Crossing trestle
With respect to railroad's liability for injuries to brakeman who fell off unfamiliar trestle at night, ordinary prudence suggests that one engaged at night on unfamiliar premises should use the means at hand for observing his course when departing from zone of safety.—Missouri Pac. R. Co. v. Hathcock, 139 S.W.2d 35, 200 Ark. 294.

Employee descending from roof of building, under construction, by rope instead of by ladder furnished by employer cannot recover for injuries.—Fesperman v. Pratt, 153 S.E. 161, 198 N.C. 687.

39. Ga.—Knowles v. Western & A. R. Co., 100 S.E. 640, 24 Ga.App. 226.

40. N.J.—Macchia v. Pennsylvania R. Co., 156 A. 337, 9 N.J.Misc. 998, affirmed 162 A. 654, 109 N.J.Law 404.

41. Mass.—Papandrianos v. New York Cent. & H. R. Co., 138 N.E. 547, 244 Mass. 216.

42. W.Va.—Wilkin v. H. Koppers Co., 100 S.E. 300, 84 W.Va. 460.

43. Wash.—Rustan v. Southern Alaska Canning Co., 205 P. 369, 119 Wash. 350.
39 C.J. p 849 note 70.

44. Wash.—Well v. Moran Bros. Co., 104 P. 172, 55 Wash. 102.
39 C.J. p 850 note 73.

45. U.S.—Reynolds-West Lumber Co. v. Taylor, C.C.A.Miss., 23 F.2d 36.
La.—Moore v. W. R. Pickering Lumber Co., 29 So. 990, 105 La. 504.
39 C.J. p 849 note 67.

Leaving room for safe passage
Master, furnishing one passageway, cannot avoid liability for injury from defect by showing that enough room was left for safe passage.—Reynolds-West Lumber Co. v. Taylor, C.C.A.Miss., 23 F.2d 36.

46. Pa.—Carley v. Dexcar Coal Min. Co., 105 A. 651, 262 Pa. 405.

47. Or.—Moulton v. St. Johns Lumber Co., 120 P. 1057, 61 Or. 62.
39 C.J. p 849 note 69.

with the discharge of his duties, which are safe, or reasonably so, he cannot recover damages for an injury contributed to by his negligence in so doing.[48] His act is not justified or excused by the fact that it was acquiesced in by a superior servant[49] or by the fact that other servants adopted the same method of doing the same work.[50] In order to constitute contributory negligence, however, there must be reason to apprehend danger;[51] and the act causing the injury must be such as would not have been committed by a man of ordinary prudence.[52] The fact that, as between two apparently safe positions, a servant fails to choose the one which proves to be safe in fact cannot be ascribed to him as negligence.[53]

Under the last clear chance doctrine, discussed supra § 423, the fact that a servant has unnecessarily placed himself in a dangerous position will not bar a recovery where the master might, by the exercise of ordinary care, have discovered his danger and avoided injuring him.[54]

(2) Riding in Dangerous Position

Unnecessarily riding in a position known to be dangerous is such contributory negligence of a servant as will bar a recovery for injury to the servant.

An employee who unnecessarily rides in a dangerous position known by him to be such is guilty of such contributory negligence as will bar a recovery.[55] This principle has been applied where the servant unnecessarily rides on the pilot[56] or tender of an engine,[57] or where he places himself in a position on a motor where he is liable to sustain injury, in case of collision,[58] or where he rides on the top of a freight train voluntarily and not within the line of his employment,[59] or rides on a platform with his legs hanging over the side,[60] or rides on an engine instead of a shanty car provided for him.[61] However, riding from work on a flat car instead of in a caboose is not necessarily negligence;[62] and it has been held that an employee is not guilty of contributory negligence, precluding a recovery, in riding on the rear of a motor truck, with his legs dangling, where the cab is occupied and there are no seats on the bed of the truck.[63]

§ 447. —— Duty to Discover or Remedy Defects

a. Obvious defects and dangers
b. Latent defects and dangers
c. Opportunity to discover or remedy
d. Duty to notify master
e. Scope of employment

a. Obvious Defects and Dangers

A servant is bound to observe open and obvious defects and dangers which would be disclosed by the exercise of ordinary care, and may be guilty of contributory negligence, barring a recovery, if he fails to discharge such duty.

A servant is bound to observe open and obvious defects and dangers in tools, machinery, appliances, and places[64] such as would be disclosed or observed

48. Miss.—New Orleans Great Northern R. Co. v. Branton, 146 So. 870, 167 Miss. 52, certiorari denied 54 S.Ct. 88, 290 U.S. 667, 78 L.Ed. 577.
Mo.—Penny v. Southeastern Express Co., App., 35 S.W.2d 940.
Neb.—Ellis v. Union Pac. R. Co., 22 N.W.2d 305, 147 Neb. 18.
Tex.—Commerce Cotton Oil Co. v. Camp, Civ.App., 117 S.W. 451.
39 C.J. p 850 note 75.

Going to sleep on track
A railroad brakeman, sent to flag another train, is guilty of contributory negligence in sitting down and going to sleep on the track.—Louisville & N. R. Co. v. Hunt, 135 S.W. 288, 142 Ky. 778—39 C.J. p 840 note 94 [a].

49. U.S.—Tower Lumber Co. v. Branvold, Minn., 141 F. 919, 73 C.C.A. 153.

50. Me.—Perkins v. Oxford Paper Co., 71 A. 476, 104 Me. 109, 121.
39 C.J. p 851 note 77.

51. Ky.—Borderland Coal Co. v. Kerns, 177 S.W. 266, 165 Ky. 487.
39 C.J. p 851 note 78.

Position not dangerous except for employer's negligence
Ark.—Seaman Store Co. v. Bonner, 113 S.W.2d 1106, 195 Ark. 563.

52. N.C.—Redman v. Norfolk & W. R. Co., 64 S.E. 195, 150 N.C. 400.

53. Conn.—McElligott v. Randolph, 22 A. 1094, 61 Conn. 157, 29 Am.S. R. 181.
39 C.J. p 851 note 80.

54. Ky.—Louisville & N. R. Co. v. Hunt, 135 S.W. 288, 142 Ky. 778—Louisville & N. R. Co. v. Adams, 51 S.W. 577, 106 Ky. 859, 21 Ky. L. 498.
Tenn.—Buckner v. Southern Ry. Co., 96 S.W.2d 600, 20 Tenn.App. 212.

55. S.C.—Bouchillon v. Charleston & W. C. R. Co., 72 S.E. 634, 90 S.C. 42, Ann.Cas.1913D 1.
39 C.J. p 851 note 83.

56. Ark.—St. Louis, I. M. & S. R. Co. v. Fuller, 109 S.W. 1160, 86 Ark. 65.
39 C.J. p 851 note 84.

57. Tenn.—Buckner v. Southern Ry. Co., 96 S.W.2d 600, 20 Tenn.App. 212.

58. Pa.—Falduto v. Hastings Coal & Coke Co., 112 A. 51, 268 Pa. 375.

59. Pa.—Pittsburgh & C. R. Co. v. Sentmeyer, 92 Pa. 276, 37 Am.R. 684.

60. Ark.—St. Louis & S. F. R. Co. v. Marker, 41 Ark. 542.
39 C.J. p 852 note 87.

61. S.C.—Bouchillon v. Charleston & W. C. R. Co., 72 S.E. 634, 90 S. C. 2, Ann.Cas.1913D 1.

62. Ind.—Barley v. Southern Indiana R. Co., 66 N.E. 72, 30 Ind. App. 406.

63. Wash.—Buss v. Wachsmith, 70 P.2d 417, 190 Wash. 673, adhered to 74 P.2d 999, 193 Wash. 600.

64. U.S.—Missouri Pac. R. Co. v. Spangler, C.C.A.Ark., 140 F.2d 917.
Ark.—Lee v. Pate, 131 S.W.2d 8, 198 Ark. 723.
D.C.—Martin v. Morrison, 32 F.2d 410, 59 App.D.C. 19.
Ga.—Nashville, C. & St. L. Ry. v. Hilderbrand, 172 S.E. 87, 48 Ga. App. 140—Moody v. Hardeman, 162 S.E. 653, 44 Ga.App. 676.
Mo.—Watson v. Carthage Marble & White Lime Co., App., 290 S.W.

by the exercise of ordinary care,[65] and if he is injured by reason of a failure of his duty in this respect he is chargeable with contributory negligence which will preclude a recovery.[66] A servant's right to rely on an inspection by the master or his representative, discussed supra § 428, may excuse him from making a formal inspection, but it does not excuse him from exercising the usual and necessary care to observe obvious defects or dangers;[67] nor is his failure to exercise such care excused by the fact that he does not speak English[68] or by the fact that it is not the custom to make an inspection for the defect.[69]

b. Latent Defects and Dangers

(1) In general
(2) Where servant charged with duty of inspection and repair

(1) In General

Generally a servant is under no duty to discover latent defects or dangers not open to ordinary observation or to remedy such defects.

In accordance with the general rules, discussed supra §§ 428–430, that a servant has the right to rely on the performance by the master or his authorized agents of the duties imposed on the master for the protection of his servants to furnish suitable tools, appliances, places for work, etc., to inspect them from time to time to see that they are in a reasonably safe condition, and to maintain them in that condition, it follows, in the absence of contract or statute, or of requirements imposed by the method of work itself, discussed infra subdivision b (2) of this section, that in all cases where this doctrine is applicable the servant is under no obligation to inspect as to whether the master or his authorized agents have been negligent in this respect,[70] and therefore generally is under no obligation to examine the tools, appliances, places of work, etc., or to discover latent defects or dangers not open to ordinary observation,[71] nor is he under a duty to reme-

649—Johnson v. National Newspapers' Ass'n, App., 183 S.W. 1113.
N.H.—Ducas v. International Cotton Mills, 130 A. 156, 81 N.H. 543.
Tex.—City of Denton v. White, Civ. App., 179 S.W.2d 834, error refused.
Wash.—Cummins v. Dufault, 139 P. 2d 308, 18 Wash.2d 274.
39 C.J. p 852 note 91, p 835 note 32 [a].
Knowledge of defects or dangers as affecting contributory negligence generally see supra § 431.

65. Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650—C. F. Hamblen, Inc., v. Owens, 172 So. 694, 127 Fla. 91.
Ga.—Spivey v. Lovett & Brinson, 172 S.E. 658, 48 Ga.App. 335—Nashville, C. & St. L. Ry. Co. v. Hildebrand, 172 S.E. 87, 48 Ga.App. 140—Moody v. Hardeman, 162 S.E. 653, 44 Ga.App. 676—Payne v. Rivers, 110 S.E. 45, 46, 28 Ga.App. 28.
Ill.—Toledo, W. & W. Ry. Co. v. Moore, 77 Ill. 217.
Me.—Boober v. Bicknell, 191 A. 275, 135 Me. 153.
Mo.—Hankins v. St. Louis-San Francisco Ry. Co., App., 14 S.W. 2d 674.
N.C.—Kennedy v. Western Union Telegraph Co., 161 S.E. 396, 201 N.C. 756.
S.C.—Adcox v. Campbell Limestone Co., 188 S.E. 657, 182 S.C. 106.
Tex.—City of Denton v. White, Civ. App., 179 S.W.2d 834.
39 C.J. p 852 note 92.
Obvious to reasonably prudent person
Ark.—Missouri Pac. R. Co. v. Hendrix, 277 S.W. 337, 169 Ark. 825, certiorari denied 46 S.Ct. 351, 270 U.S. 651, 70 L.Ed. 781.
Mo.—Mosely v. Sum, 130 S.W.2d 465, 344 Mo. 969—Crowell v. St. Louis Screw Co., 293 S.W. 521, 220 Mo. App. 728.

66. Ark.—St. Louis, I. M. & S. R. Co. v. Howard, 188 S.W. 14, 124 Ark. 588.
Ky.—City of Bellevue v. Hall, 174 S.W.2d 24, 295 Ky. 57.
Mo.—Allen v. Missouri Pac. Ry. Co., 294 S.W. 80.
39 C.J. p 853 note 93.

67. Mo.—Watson v. Carthage Marble & White Lime Co., App., 290 S.W. 649.
Wis.—Lehman v. Chicago, St. P., M. & O. R. Co., 122 N.W. 1059, 140 Wis. 497.
39 C.J. p 853 note 94.
The negligence of a foreman as to making an inspection has been held not to entitle an employee to recover for an injury from a defective appliance where the employee's own knowledge should have disclosed the defect, and he was free to select another appliance.—Watson v. Carthage Marble & White Lime Co., Mo.App., 290 S.W. 649.

68. Wash.—Vianello v. Washington Iron Works, 104 P. 784, 55 Wash. 552.

69. Mass.—McIsaac v. Northampton Electric Lighting Co., 51 N.E. 524, 172 Mass. 89, 70 Am.S.R. 244.

70. Ark.—Federal Compress & Warehouse Co. v. Parrott, 28 S.W. 2d 728, 181 Ark. 946.
Ill.—Patznsky v. Lowden, 47 N.E.2d 338, 317 Ill.App. 613.
N.H.—Ducas v. International Cotton Mills, 130 A. 156, 81 N.H. 543.

71. U.S.—Missouri Pac. R. Co. v. Spangler, C.C.A.Ark., 140 F.2d 917—Kuptz v. Ralph Sollitt & Sons Const. Co., C.C.A.Tex., 88 F.2d 532, certiorari denied 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 534.
Ark.—Carson v. Dierks Lumber & Coal Co., 117 S.W.2d 39, 196 Ark. 163—Dixie Bauxite Co. v. Webb, 63 S.W.2d 634, 187 Ark. 1024—Bradley Lumber Co. v. Tarvin, 27 S.W.2d 520, 181 Ark. 1145.
Cal.—Miller v. Pacific Constructors, 157 P.2d 57, 68 Cal.App.2d 529.
Fla.—Tampa Shipbuilding & Engineering Co. v. Thomas, 179 So. 705, 131 Fla. 650—C. F. Hamblen, Inc. v. Owens, 172 So. 694, 127 Fla. 91.
Ga.—Spivey v. Lovett & Brinson, 172 S.E. 658, 48 Ga.App. 335—Nashville, C. & St. L. Ry. v. Hilderbrand, 172 S.E. 87, 48 Ga.App. 140—Moody v. Hardeman, 162 S.E. 653, 44 Ga.App. 676—Payne v. Rivers, 110 S.E. 45, 46, 28 Ga.App. 28.
Me.—Boober v. Bicknell, 191 A. 275, 135 Me. 153.
Miss.—Masonite Corporation v. Lochbridge, 140 So. 223, 163 Miss. 364, suggestion of error overruled 141 So. 758, 163 Miss. 364.
Mo.—Miller v. Collins, 40 S.W.2d 1062, 328 Mo. 313—Dixon v. Frazier-Davis Const. Co., 298 S.W. 827, 318 Mo. 50—Hankins v. St. Louis-San Francisco Ry. Co., App., 14 S. W.2d 674—Lewis v. Wabash R. Co., 121 S.W. 1090, 142 Mo.App. 585.
N.H.—Maltais v. City of Concord, 166 A. 267, 86 N.H. 211—Ducas v. International Cotton Mills, 130 A. 156, 81 N.H. 543.
N.C.—Batton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256

dy such defects.[72]

This rule is especially applicable where the servant has received assurances of safety from the master,[73] or has been directed to use the particular appliance or place,[74] or where there is a person specially employed to make repairs when necessary,[75] or where the appliance has been constantly used for the purpose for which the servant is using it.[76] It has been held that as far as the servant's rights and duties are concerned the question is, not whether he exercised care to discover the defects, but whether the defects and dangers were known to him or were so obvious that they were or should have been seen by him,[77] and the servant's means of knowledge of such defects are not to be considered as equal to those of the master.[78]

Particular applications. The doctrine that the servant may assume that the master has furnished him with a reasonably safe place to work and reasonably safe tools and appliances for the performance of the work, and that he is under no obligation to make an inspection for latent defects or dangers, has been applied with respect to the following tools, appliances, machinery, places of work, etc.: Automobiles,[79] barrels,[80] brakes,[81] bridges[82] or other overhead structures,[83] cable ties,[84] cant hooks,[85]

certiorari denied Atlantic Coast Line R. Co. v. Batton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112.

Pa.—Yeager v. Anthracite Brewing Co., 102 A. 418, 259 Pa. 123.

S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213—Stogner v. Great Atlantic & Pacific Tea Co., 192 S.E. 406, 184 S.C. 406—Hopkins v. Southern Cotton Oil Co., 142 S.E. 615, 144 S.C. 395.

Tex.—City of Austin v. Johnson, Civ.App., 195 S.W.2d 222—City of Panhandle v. Byrd, Civ.App., 77 S.W.2d 904, reversed on other grounds Com.App., 106 S.W.2d 660 —San Antonio & A. P. Ry. Co. v. Mason, Civ.App., 289 S.W. 1027.

Wash.—Young v. International Stevedoring Co., 245 P. 9, 138 Wash. 665, affirmed 250 P. 469, 141 Wash. 696.

39 C.J. p 831 note 91, p 853 note 97.

Under doctrine of assumption of risk see supra § 381.

Inequality exists, which would justify holding master guilty and servant blameless, if defect in tool could have been discovered by inspection which master should have made, but not by inspection which servant could be expected to make.—Nolen v. Halpin-Dwyer Const. Co., 29 S.W.2d 215, 225 Mo.App. 224.

Asbestos particles in unventilated room

An employee having no knowledge of danger from asbestos particles, present in unventilated room wherein he worked because of employer's negligent violation of statute is not chargeable with contributory negligence barring recovery of damages for resulting permanent disability from asbestosis.—Rowe v. Gatke Corporation, C.C.A.Ind., 126 F.2d 61, petition dismissed Gatke Corporation v. Rowe, 63 S.Ct. 81, 317 U.S. 702, 87 L.Ed. 561.

A rigger employed in a plant operated by electricity is entitled to rely on the superior knowledge of the engineer under whose immediate supervision he was inserting a fuse. —Earl v. San Francisco Bridge Co., 160 P. 570, 31 Cal.App. 339.

72. Mo.—Lilley v. Eberhardt, 37 S.W.2d 599—Cassin v. Lusk, 210 S.W. 902, 277 Mo. 663.

39 C.J. p 854 note 98.

73. Ark.—Eudora Motor Co. v. Womack, 111 S.W.2d 530, 195 Ark. 74.

Va.—Ross v. Schneider, 27 S.E.2d 154, 181 Va. 931.

Wash.—Cox v. Wilkeson Coal & Coke Co., 112 P. 231, 61 Wash. 343.

Assurance or representation as to safety generally see supra § 429.

Application to particular appliances, tools, and places

(1) Automobile.—Eudora Motor Co. v. Womack, 111 S.W.2d 530, 195 Ark. 74.

(2) Other applications see 39 C.J. p 830 note 84 [b], [c].

Effect of dust

An assurance by foreman, when employee complained of effect of dust, that "There is nothing in it. Take a drink of liquor now and again and it will be O. K.", rebutted charge of contributory negligence as affecting employee's right to recover damages for silicosis.—Rebel v. Standard Sanitary Mfg. Co., 16 A.2d 534, 340 Pa. 313.

74. U.S.—Eppinger & Russell Co. v. Sheely, C.C.A.Fla., 24 F.2d 153.

Ark.—Burden v. Hughes, 55 S.W.2d 502, 186 Ark. 707.

75. Cal.—Diehl v. Swett-Davenport Lumber Co., 112 P. 561, 14 Cal. App. 495.

76. Ark.—International Harvester Co. of America v. Hawkins, 24 S.W.2d 340, 180 Ark. 1056.

77. Ark.—Asher v. Brynes, 148 S.W. 1176, 101 Ark. 197—Ozan Lumber Co. v. Bryan, 119 S.W. 73, 90 Ark. 223.

N.H.—Maltais v. City of Concord, 166 A. 267, 86 N.H. 211.

Tex.—City of Panhandle v. Byrd, Civ.App., 77 S.W.2d 904, reversed on other grounds, Com.App., 106 S.W.2d 660.

"The test is not whether the servant could have learned of the danger, it is whether he should have learned of the danger."—City of Denton v. White, Tex.Civ.App., 179 S.W.2d 834, 838, error refused.

78. Ga.—Alford v. Zeigler, 16 S.E.2d 69, 65 Ga.App. 294.

79. Ark.—Eudora Motor Co. v. Womack, 111 S.W.2d 530, 195 Ark. 74.

Used car

Fact that salesman had had some experience in repairing automobiles and that he knew that there was something wrong with used automobile traded to his employers by former owner did not obligate him to inspect automobile or preclude him from recovering for injuries sustained while demonstrating automobile which had defective steering apparatus.—Eudora Motor Co. v. Womack, supra.

80. Mass.—Delaney v. Framingham Gas, Fuel & Power Co., 88 N.E. 773, 202 Mass. 359.

81. S.C.—Scott v. Atlantic Coast Line R. Co., 96 S.E. 305, 109 S.C. 471.

39 C.J. p 855 note 3.

82. Ind.—Louisville, N. A. & C. R. Co. v. Wright, 16 N.E. 145, 115 Ind. 378, 7 Am.S.R. 432, rehearing denied 17 N.E. 584, 115 Ind. 378, 7 Am.S.R. 432.

Tex.—Missouri, K. & T. R. Co. v. Cassady, Civ.App., 175 S.W. 796, error refused 184 S.W. 180, 108 Tex. 61, and affirmed 37 S.Ct. 18, 242 U.S. 611, 61 L.Ed. 526.

83. Ind.—Pennsylvania Co. v. Sears, 34 N.E. 15, 136 Ind. 460, rehearing denied 36 N.E. 353, 136 Ind. 460.

84. U.S.—Metropolitan Redwood Lumber Co., Cal., 205 F. 486, 123 C.C.A. 554.

85. Miss.—Parker v. W. C. Wood Lumber Co., 54 So. 252, 98 Miss. 750, 40 L.R.A.,N.S., 832.

chains,[86] cogwheels unguarded,[87] electrical machinery,[88] electric switches,[89] elevators,[90] fences along railroad right of way,[91] floors,[92] grab irons,[93] guy wires,[94] handholds,[95] harness,[96] hoisting apparatus,[97] hose used for wetting coal in tender,[98] jacks,[99] ladders,[1] lanterns,[2] locomotives,[3] mauls,[4] mining tracks,[5] and mooring lines.[6]

This doctrine has also been applied with respect to mules,[7] pinch bars,[8] platforms,[9] props or supports,[10] railings,[11] railroad cars,[12] railroad roadbeds and tracks,[13] railroad switches,[14] railroad yards,[15] riveters,[16] roofs of mines,[17] ropes,[18] running boards,[19] scaffolds or stagings,[20] set screws,[21]

86. Mo.—Hankins v. St. Louis-San Francisco Ry. Co., App., 14 S.W.2d 674.
Mont.—Schroder v. Montana Iron Works, 100 P. 619, 38 Mont. 474.
Vt.—Bilodeau v. Moose River Lumber Co., 97 A. 671, 90 Vt. 190.

87. Mo.—Lilley v. Eberhardt, 37 S.W.2d 599.
N.C.—Gordon v. Stehli Silks Corp., 100 S.E. 884, 178 N.C. 470.

88. Miss.—Masonite Corporation v. Lochridge, 140 So. 223, 163 Miss. 364, suggestion of error overruled 141 So. 758, 163 Miss. 364.

Grounding

Where member of electrical crew knew machine had been installed and turned over to operating department in his absence, he was not required, before changing switches, to ascertain whether machinery had been grounded.—Masonite Corporation v. Lochridge, supra.

89. Mo.—Foster v. Kansas City, C. C. & S. J. Ry. Co., 26 S.W.2d 770, 325 Mo. 18.

90. Mass.—Kleibaz v. Middleton Paper Co., 62 N.E. 371, 180 Mass. 363.

91. Tex.—Quill v. Houston & T. C. R. Co., 55 S.W. 1126, 57 S.W. 948, 93 Tex. 616.

92. N.C.—Shives v. Eno Cotton Mills, 66 S.E. 141, 151 N.C. 290.
39 C.J. p 855 note 11.

93. Ark.—St. Louis, I. M. & S. R. Co. v. Hempfling, 156 S.W. 171, 107 Ark. 476.

94. Ky.—Citizens' Tel. Co. v. Wakefield, 126 S.W. 127.
Or.—Schroeder v. Brown, 116 P. 335, 59 Or. 81.

95. Ark.—St. Louis, I. M. & S. R. Co. v. Hempfling, 156 S.W. 171, 107 Ark. 476.

96. Iowa.—Nickerson v. Walker, 162 N.W. 768, 179 Iowa 1281.
Mass.—Lundergan v. Graustein, 89 N.E. 1034, 203 Mass. 532.

97. Ill.—Novy v. Louis B. Rysdon Co., 195 Ill.App. 142—Pangburn v. Knickerbocker Ice Co., 193 Ill.App. 50.
Wyo.—Engen v. Rambler Copper & Platinum Co., 121 P. 867, 123 P. 413, 20 Wyo. 95, rehearing denied 20 Wyo. 95.

98. Ark.—Pine Bluff, S. & S. R. Co. v. Leatherwood, 175 S.W. 1184, 117 Ark. 524.

99. Tex.—Missouri, K. & T. R. Co. v. Odom, Civ.App., 152 S.W. 730.

1. Mass.—Drum v. New England Cotton Yarn Co., 61 N.E. 812, 180 Mass. 113.

2. Mo.—Koonse v. Standard Steel Works Co., 300 S.W. 531, 221 Mo. App. 1231.

New battery in lantern

Where a watchman had been in the practice of leaving his lantern with a note asking for a new battery, he was not guilty of negligence in failing to call for a new battery the day before being injured by falling over scrap iron pipe where the lantern was all right the night before.—Koonse v. Standard Steel Works Co., supra.

3. Ark.—St. Louis, I. M. & S. R. Co. v. Howard, 188 S.W. 14, 124 Ark. 588.
39 C.J. p 829 note 60, p 855 note 20.

4. Tenn.—Guthrie v. Louisville & N. R. Co., 11 Lea 372, 47 Am.R. 286.

5. Ky.—Central Coal & Iron Co. v. Walker, 99 S.W. 309, 30 Ky.L. 621.
39 C.J. p 855 note 22.

6. Wash.—Young v. International Stevedoring Co., 245 P. 9, 138 Wash. 665, affirmed 250 P. 469.

7. Ill.—Miller v. Kelly Coal Co., 145 Ill.App. 452, affirmed 88 N.E. 196, 239 Ill. 626, 130 Am.S.R. 245.

8. Tex.—St. Louis & Southwestern R. Co. v. Schuler, 102 S.W. 783, 46 Tex.Civ.App. 356.

9. N.C.—Yarborough v. F. C. Geer Co., 88 S.E. 474, 171 N.C. 334.
39 C.J. p 855 note 25.

10. Ga.—Moody v. Hardeman, 162 S.E. 653, 44 Ga.App. 676.

Plasterer was not chargeable with knowledge of latent defects in support of building collapsing and injuring him.—Moody v. Hardeman, supra.

11. U.S.—Thomson v. Boles, C.C.A. Minn., 123 F.2d 487, certiorari denied 62 S.Ct. 632, 315 U.S. 804, 86 L.Ed. 1204.

12. U.S.—Baltimore & O. R. Co. v. Brandenberger, C.C.A.Ohio, 74 F. 2d 593.
Mo.—Parsons v. Missouri Pac. R. Co., 6 S.W. 464, 94 Mo. 286.
39 C.J. p 855 note 6.

13. U.S.—Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., Ill., 87 F. 133, 32 C.C.A. 44.
39 C.J. p 829 note 62, p 855 note 26.

14. Tex.—International & G. N. R. Co. v. Johnson, 55 S.W. 772, 23 Tex.Civ.App. 160.

Signal at closed switch

Section hand operating hand car has been held not guilty of contributory negligence in failing to observe danger signal at closed switch.—Towns v. Monongahela Ry. Co., 153 S.E. 919, 109 W.Va. 204.

15. Tex.—Missouri, K. & T. R. Co. v. Beasley, 155 S.W. 183, 160 S.W. 471, 106 Tex. 160.

16. Wash.—Randall v. Gerrick, 176 P. 675, 104 Wash. 422.

17. Ky.—Duvin Coal Co. v. Fike, 38 S.W.2d 201, 238 Ky. 376.
39 C.J. p 855 note 29.

18. Ky.—Cumberland Tel. & Tel. Co. v. Metzger, 97 S.W. 35, 29 Ky.L. 1024.
39 C.J. p 855 note 30.

19. Tex.—Decatur Cotton Seed Oil Co. v. Taylor, Civ.App., 182 S.W. 401.

20. U.S.—Du Pont de Nemours v. Kelly, Va., 252 F. 523, 164 C.C.A. 439.
Me.—Elliott v. Sawyer, 77 A. 782, 107 Me. 195.
39 C.J. p 829 note 64, p 855 note 32.

Staging for barn

Carpenter of many years' experience hired to build barn, who was injured when staging on which he stood collapsed, has been held not negligent in not discovering peril, notwithstanding expert testimony indicated that experienced carpenter ought to have noticed defect, where carpenter had been on staging only once before and was then engaged in putting last boards on roof.—Lucas v. Pietkevich, 175 A. 234, 87 N.H. 148.

21. U.S.—Standard Portland Cement Co. v. Foley, C.C.A.Ala., 270 F. 203, certiorari denied 41 S.Ct. 534, 256 U.S. 693, 65 L.Ed. 1174.
Kan.—Pittsburg Vitrified Pav. & Bldg. Brick Co. v. Fisher, 100 P. 507, 79 Kan. 576.
Tex.—Farmers' Cotton Oil Co. v. Barnes, Civ.App., 134 S.W. 369.

shaft timbers,[22] sheds,[23] sledge hammers,[24] tanks,[25] telegraph, telephone, and electric light or power poles,[26] tenders,[27] tongs,[28] trap doors,[29] trestles,[30] trucks,[31] tunnels,[32] wagons,[33] walls,[34] winches,[35] and wrenches.[36]

The servant may assume that the master has furnished reasonably safe ways for going to and from work[37] and that he will continue to use care to keep them safe,[38] that the duty of keeping a track or road clear will be observed,[39] that dangerous machinery has been properly guarded as required,[40] and that an excavation in which a servant is at work will be made safe by bracing the walls as the work progresses.[41]

(2) Where Servant Charged with Duty of Inspection and Repair

A servant charged with the duty of inspecting machinery, appliances, or places of work which he is using, or with the duty of inspecting and repairing them, cannot recover for injuries sustained because of a neglect of such duty as to defects which might have been discovered or repaired by the exercise of reasonable care.

Where by statute, the terms of the employment, including the rules of the employer, or by reason of the nature of the work, the servant is charged with the duty of inspecting the machinery, appliances, or places of work which he is using, or with the duty of both inspecting and repairing them, he cannot recover for injuries sustained because of defects in such machinery or appliances or places of work if he neglects his duty in this respect, and if the defects are such as are discoverable by proper inspection.[42] This rule also applies if the omission of duty is that of other servants under him,

22. Ky.—Broadway Coal Min. Co. v. Southard, 139 S.W. 747, 144 Ky. 453.

23. Tex.—Ferris Press Brick Co. v. Thompson, 124 S.W. 499, 58 Tex. Civ.App. 633.

24. Kan.—Missouri, K. & T. R. Co. v. Quinlan, 93 P. 632, 77 Kan. 126.

25. Tex.—Houston & T. C. R. Co. v. Long, Civ.App., 219 S.W. 212.

26. U.S.—Jupollo Public Service Co. v. Grant, C.C.A.N.C., 42 F.2d 18.
Ind.—Citizens' Telephone Co. v. Prickett, 125 N.E. 193, 189 Ind. 141.
N.C.—Kennedy v. Western Union Telegraph Co., 161 S.E. 396, 201 N.C. 756.
39 C.J. p 829 note 69, p 855 note 38.

27. Tex.—Texas & Ft. S. R. Co. v. Hartnett, 75 S.W. 809, 33 Tex.Civ. App. 103.

28. Wis.—Bertulis v. Illinois Steel Co., 138 N.W. 613, 152 Wis. 49.

29. Or.—Whisler v. U. S. Nat. Bank of Portland, 82 P.2d 1079, 160 Or. 10.

30. Ark.—Clark County Lumber Co. v. Hannon, 186 S.W. 615, 124 Ark. 385.

31. Tex.—Wells v. Boyle, Civ.App., 98 S.W. 441, reversed on other grounds 102 S.W. 107, 100 Tex. 577.

32. U.S.—Los Angeles & S. L. R. Co. v. Shields, C.C.A.Utah, 33 F.2d 23.

33. Tex.—San Antonio Brewing Co. v. Gerlach, Civ.App., 185 S.W. 316.

34. Ark.—Burden v. Hughes, 55 S. W.2d 502, 186 Ark. 707.
A building wrecker's employee, injured by a falling wall, was under no duty to inspect the wall to determine whether there was danger, where the work was directed by the master and the injured employee had nothing to do with its direction and had no knowledge of any danger.—Burden v. Hughes, supra.

35. Or.—Miller v. Brown, 109 P. 753, 57 Or. 245.

36. Mo.—Allen v. Missouri Pac. Ry. Co., 294 S.W. 80.

37. U.S.—Thomson v. Boles, C.C.A. Minn., 123 F.2d 487, certiorari denied 62 S.Ct. 632, 315 U.S. 804, 86 L.Ed. 1204.
W.Va.—Schilling v. H. Koppers Co., 99 S.E. 75, 83 W.Va. 737.
Stairway
Or.—Hovedsgaard v. Grand Rapids Store Equipment Corporation, 5 P.2d 86, 138 Or. 39.

38. Neb.—Green v. Cudahy Packing Co., 161 N.W. 248, 100 Neb. 680.

39. Ky.—McDonald v. Wallsend Coal & Coke Co., 117 S.W. 349, 135 Ky. 624.
A coal mine employee entitled to use the track of an electric railway when leaving the mine at the close of the day's work may assume that the employer will not run cars into the mine while he is going out, and therefore he is not chargeable with contributory negligence for failing to anticipate that cars will be run into the mine.—Boney v. Atlantic Coast Line R. Co., 71 S.E. 87, 155 N.C. 95.

40. Kan.—Pittsburg Vitrified Pav., etc. Co. v. Fisher, 100 P. 507, 79 Kan. 576.
Mo.—Powell v. Walker, 185 S.W. 532, 195 Mo.App. 150.

41. Cal.—Ryan v. Oakland Gas, Light & Heat Co., 130 P. 693, 21 Cal.App. 14.
Mo.—Lawhon v. St. Joseph Veterinary Laboratories, 252 S.W. 44.
N.H.—Maltais v. City of Concord, 166 A. 267, 86 N.H. 211.

42. U.S.—Kuptz v. Ralph Sollitt & Sons Const. Co., C.C.A.Tex., 88 F. 2d 532, certiorari denied 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 537—Consolidated Textile Corporation v. Shipp, C.C.A.N.C., 41 F.2d 479.
Ark.—Bradley Lumber Co. v. Tarvin, 27 S.W.2d 520, 181 Ark. 1145.
D.C.—Martin v. Morrison, 32 F.2d 410, 59 App.D.C. 19.
Fla.—Peninsular Telephone Co. v. Dority, 174 So. 446, 128 Fla. 106—M. F. Comer Bridge & Foundation Co. v. Sheeran, 161 So. 60, 119 Fla. 543.
Ky.—McGhee's Adm'r v. Elcomb Coal Co., 156 S.W.2d 868, 288 Ky. 540—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603.
Minn.—Cedergren v. Minnesota Steel Co., 247 N.W. 235, 188 Minn. 331—Moquin v. Minneapolis, St. P. & S. S. M. Ry. Co., 231 N.W. 829, 181 Minn. 56, reversed on other grounds 51 S.Ct. 501, 283 U.S. 520, 75 L.Ed. 1243, followed in 231 N.Y. W. 920, 181 Minn. 626.
Mo.—Cunningham v. Doe Run Lead Co., 4 S.W.2d 802—Dixon v. Frazier-Davis Const. Co., 298 S.W. 827, 318 Mo. 50—Stahl v. St. Louis-San Francisco Ry. Co., 287 S.W. 628.
S.C.—Singleton v. McLeod, 8 S.E.2d 908, 193 S.C. 378.
Tex.—City of Teague v. Radford, Com.App., 63 S.W.2d 376—**Corpus Juris cited in** City of Teague v. Radford, Civ.App., 105 S.W.2d 336, 337.
39 C.J. p 856 note 44.

Air compressor
The duty of keeping an air compressor in safe condition includes the duty to oil it and determine the quantity of oil to be used, and also to determine whether the valves should be ground.—City of Teague v. Radford, Tex.Com.App., 63 S.W.2d 376.

whose acts in keeping the appliances in order he is charged with the duty to oversee.[43] This duty of making an inspection may arise from the servant's superior knowledge[44] or from the custom and practice of employees in the same work.[45] It has been held that a neglect of the duty under consideration will bar a recovery although the servant's superior expressed the opinion that the appliances were safe.[46]

The duty of making an inspection and repairing, however, does not apply where the servant has been directed by a superior not to make repairs[47] or where the servant, although he is the managing servant, was not in charge when the installation of machinery was completed,[48] nor does it apply to defects in complicated machinery which arise from the application of mechanical principles in its construction.[49]

Degree of care necessary. Ordinary and reasonable care and diligence is the degree of care required of the servant in the performance of the duty under consideration,[50] such care for his own safety as his own knowledge and skill in his employment make reasonably possible,[51] for, although the servant is charged with the duty of inspection and repair, this does not make him an insurer of his own safety.[52] Where inspection is required by rules of the employer, without prescribing specific acts of inspection, the duty of inspection is measured by the general standards of the law of the state.[53]

c. Opportunity to Discover or Remedy

A servant's failure to discover or remedy defects is contributory negligence only where he neglects to avail himself of an opportunity to discover them.

In order to charge a servant with contributory negligence for failure to observe or remedy defects it must appear that he had, and neglected to avail himself of, an opportunity to discover them;[54] and

Mines

(1) Under a statute requiring the inspection of a mine to be made by the mine foreman or his assistants, a miner who is acting as mine foreman has the duty to see that the mine is safe and that the roof of the mine is adequately propped, notwithstanding he has failed to pass an examination held by the department of mines and minerals for the purpose of obtaining a certificate of qualification to act as mine foreman in accordance with the statute; and accordingly, where such miner is killed by a rock falling from the roof of the mine, recovery cannot be had from the mine owner who is not operating under the workmen's compensation act.—McGhee's Adm'r v. Elcomb Coal Co., 156 S.W.2d 868, 288 Ky. 540.

(2) Other applications see 39 C.J. p 856 note 44 [g].

Poles of telegraph, telephone, or electric companies

(1) Lineman who was not alter ego of telephone company for which he worked had duty to make such reasonable inspection of each pole he climbed as was necessary to discover defects that would make it unsafe to climb and work on.—Peninsular Telephone Co. v. Dority, 174 So. 446, 128 Fla. 106.

(2) Where lineman was not acting as alter ego of telephone company, his duty of ascertaining safety of pole which broke and fell with him when he was working on it did not extend to the examination and inspection required of company by law in maintaining safe place for lineman to work. –Peninsular Telephone Co. v. Dority, supra.

(3) Other applications see 39 C.J. p 855 note 38 [a], p 856 note 44 [i].

43. Tex.—Maes v. Texas & N. O. R. Co., Civ.App., 23 S.W. 725.

44. Mo.—Stahl v. St. Louis-San Francisco Ry. Co., 287 S.W. 628.

45. Mo.—Stahl v. St. Louis-San Francisco Ry. Co., supra.

46. Conn.—McGorty v. Southern New England Tel. Co., 38 A. 359, 69 Conn. 635, 61 Am.S.R. 62.

Assurance or representation as to safety generally see supra § 429.

47. Iowa.—Miller v. White Bronze Monument Co., 118 N.W. 518, 141 Iowa 701, 18 Ann.Cas. 957.

48. N.H.—Wemyss v. Wyoming Valley Paper Co., 172 A. 438, 86 N.H. 587.

49. Tex.—Galveston, H. & S. A. R. Co. v. Smith, 57 S.W. 999, 24 Tex. Civ.App. 127.

39 C.J. p 857 note 51.

Heavy and intricate tool or device

A tool or device so heavy and intricate in design and so delicate in some respects and rugged in other respects in its operation as elevator, used in lifting rods from oil well, and hook attached to elevator ear, is not a simple tool which it is duty of particular employee using it to observe and keep in proper condition.—McCracken v. Franco-Dominion Development Corporation, 117 P.2d 135, 189 Okl. 354.

50. Ga.—Blair v. Fulton Bakery, 24 S.E.2d 598, 68 Ga.App. 879.

Ky.—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433, 270 Ky. 603.

Mo.—Smith v. Southern Illinois & Missouri Bridge Co., 30 S.W.2d 1077, 326 Mo. 109—Cunningham v. Doe Run Lead Co., 4 S.W.2d 802.

Ohio.—Mad River & Lake Erie R. Co. v. Barber, 5 Ohio St. 541, 67 Am.D. 312.

39 C.J. p 857 note 52.

Due care on ditcher's part to keep watch for possible cave-in due to changing character of soil through which ditch ran depended on extent to which he realized danger.—Maltais v. City of Concord, 166 A. 267, 86 N.H. 211.

Dangers in erecting building

Employee must exercise reasonable care to discover and avoid dangers incident to work of erecting building, except extraneous or concealed dangers which exercise of ordinary prudence would not reveal.—Kuptz v. Ralph Sollitt & Sons Const. Co., C.C.A.Tex., 88 F.2d 532, certiorari denied 58 S.Ct. 14, 302 U.S. 696, 82 L.Ed. 537.

51. Mo.—Watson v. Carthage Marble & White Lime Co., App., 290 S.W. 649.

52. Ark.—Central Coal & Coke Co. v. Barnes, 233 S.W. 683, 149 Ark. 533.

53. U.S.—Missouri Pac. R. Co. v. Spangler, C.C.A.Ark., 140 F.2d 917.

Inspection of ladder

Where railroad's rules requiring employees to inspect ladders before using them did not attempt to prescribe specific acts of inspection, employee who was injured when stationary ladder in pit of pump house gave way as employee descended ladder to oil the pumps was entitled to have his duty to inspect measured by general standards of law of state where accident occurred.—Missouri Pac. R. Co. v. Spangler, supra.

54. Mo.—Watson v. Carthage Marble & White Lime Co., App., 290 S. W. 649.

accordingly a servant is not chargeable with contributory negligence if his failure to inspect and repair a defect is caused by the master.[55] If the nature of a servant's duties or the exigencies of the occasion are such as to require his whole attention, he is not required to anticipate, look for, or expect danger,[56] especially where it arises from the discharge of a duty outside his usual routine.[57]

d. Duty to Notify Master

A servant who has actual or constructive knowledge of defects which render his work dangerous, and fails to report such defects to the master in order that they may be repaired, ordinarily is guilty of contributory negligence which will bar a recovery by him for injuries sustained by reason of such defects.

While there is some authority apparently to the contrary,[58] it is generally held that, where a servant has knowledge, or is chargeable with knowledge, of defects which render his work dangerous, and fails to report such defects to the master, or to his authorized agent, in order that they may be remedied, he is guilty of such contributory negligence as will bar his right of recovery for injuries sustained by him by reason of such defects.[59] However, there is no absolute duty resting on the servant to notify the master of defects, but the question depends on numerous considerations, such as the duty of the employee in other directions,[60] knowledge or absence of it on the part of the master,[61] the character of the defect, whether serious or trifling,[62] or the apparent imminence of danger from the defects, etc.;[63] and it has been held that the servant is only under obligation to report such defects as impress him as needing correction or which he is told to report.[64] If the master or one representing him knows of the defect, the servant is under no duty to report the defect;[65] nor is the servant under any duty to report the defect to another servant who is not his superior.[66] A servant's duty to report when machinery is found in a dangerous condition does not obtain where it is as originally constructed and arranged, but only where it has become dangerous by misplacement or accident.[67]

Defects after repair. If the master is guilty of negligence in making a repair, it has been held that no duty devolves on the servant to notify the master of the failure of a machine to operate properly thereafter.[68]

e. Scope of Employment

A servant generally is bound to discover defects and dangers only with respect to tools, appliances, and places which are within the scope of his employment.

The rule requiring inspection and repair applies only to tools and appliances with which the servant works directly, that is, tools and appliances intrusted to him by the master for the purpose of performing a particular duty assigned to him,[69] and does not apply to other tools and devices furnished by the master in connection with the work being done and used by other employees.[70] A servant is not bound to investigate for himself a department of

S.C.—Adcox v. Campbell Limestone Co., 188 S.E. 657, 182 S.C. 106.
Wash.—Cummins v. Dufault, 139 P.2d 308, 18 Wash.2d 274.
39 C.J. p 857 note 56.

55. Ky.—Jones v. Williams Coal Co., 130 S.W. 809, 140 Ky. 115.
39 C.J. p 857 note 56 [a].

56. Ala.—Maddox v. Chilton Warehouse & Mfg. Co., 55 So. 93, 171 Ala. 216.
39 C.J. p 858 note 57.

57. U.S.—Central Trust Co. v. East Tennessee, V. & G. R. Co., C.C.Ga., 73 F. 661.

58. Ala.—Lockhart v. Sloss-Sheffield Steel & I. Co., 51 So. 627, 165 Ala. 516.

59. U.S.—Burnett v. Amalgamated Phosphate Co., C.C.A.Fla., 96 F.2d 974, certiorari denied 59 S.Ct. 153, 305 U.S. 647, 83 L.Ed. 418.
Minn.—Cedergren v. Minnesota Steel Co., 247 N.W. 235, 188 Minn. 331.
N.C.—McCord v. Harrison-Wright Co., 153 S.E. 406, 198 N.C. 742.
39 C.J. p 858 note 61.
Continuing work after notice or complaint to master see supra § 434.

Tool

Employee is under duty to inform employer if simple tool becomes defective so that defect may be remedied or new tool furnished.—McCord v. Harrison-Wright Co., 153 S.E. 406, 198 N.C. 742.

A report to an officer actively in charge of the employer's business, which gives the reporting employee reasonable grounds for believing that the officer has authority to receive the report, has been held sufficient.—Nason v. Lord-Merrow Excelsior Co., 29 A.2d 464, 92 N.H. 251.

Disclosure of lack of knowledge

A chemist who was employed by a phosphate mining corporation and who was assisting the shop foreman in construction of a gasoline heating device and had held himself out as an expert, or as having technical knowledge of the subject, had the duty to know and appreciate the danger of explosion and warn the foreman or to have disclosed lack of knowledge of the principles involved and to have advised calling in an expert.—Burnett v. Amalgamated Phosphate Co., C.C.A.Fla., 96 F.2d 974, certiorari denied 59 S.Ct. 153, 305 U.S. 647, 83 L.Ed. 418.

60. Wis.—West v. Bayfield Mill Co., 135 N.W. 478, 149 Wis. 145.

61. N.C.—McAtee v. Branning Mfg. Co., 82 S.E. 857, 166 N.C. 448.

62. Wis.—West v. Bayfield Mill Co., 135 N.W. 478, 149 Wis. 145.

63. Wis.—West v. Bayfield Mill Co., supra.

64. Md.—Capitol Tract. Co. v. McKeon, 103 A. 314, 132 Md. 79.

65. Mo.—Messing v. Judge & Dolph Drug Co., 18 S.W.2d 408, 322 Mo. 901.
39 C.J. p 858 note 68.

66. Ala.—St. Louis & S. F. R. Co. v. Phillips, 51 So. 638, 165 Ala. 504.
39 C.J. p 858 note 69.

67. Wash.—Ward v. National Lumber & Box Co., 103 P. 1, 54 Wash. 304.

68. Mo.—Shimp v. Woods-Evertz Stove Co., 158 S.W. 864, 173 Mo. App. 423.
39 C.J. p 858 note 71.

69. Okl.—McCracken v. Franco-Dominion Development Corporation, 117 P.2d 135, 189 Okl. 354.

70. Okl.—McCracken v. Franco-Do-

work with which he has nothing to do, to determine the safety of the appliances and places furnished by the master;[71] and, where he is employed to operate a particular part of certain machinery, he need not, before beginning work, make himself familiar with all the machinery and the dangers he may incur in case he comes in contact therewith.[72] Where, however, a servant is acting in place of another, whose duty it is to inspect appliances before using them, he will be charged with contributory negligence if he fails to make such inspection.[73]

§ 448. Dangerous Operations and Methods of Work

The general rules of contributory negligence, with their limitations and qualifications, apply as to the negligence of a servant with respect to dangerous operations and methods of work.

The general rules of contributory negligence, as well as their limitations and qualifications, discussed supra §§ 421–445, including the last clear chance doctrine, apply as to the negligence of servants with respect to dangerous operations and methods of work.[74] Particular applications of this rule are discussed infra §§ 449–453.

§ 449. —— Undertaking Dangerous Work

a. In general
b. Control of, or connection with, cause or subject of danger

a. In General

A servant's undertaking of dangerous work, required by the nature of his employment, is not contributory negligence unless the danger is so obvious and imminent that an ordinarily prudent person would not undertake the work.

It is not contributory negligence for a servant to undertake dangerous work, where it is required by the nature of his employment,[75] unless he voluntarily and unnecessarily exposes himself to the danger,[76] or unless the danger is so obvious and imminent that an ordinarily prudent person would not consent to undertake such work;[77] and under a so-called "simple-tool doctrine" a servant is negligent if by using a simple tool he subjects himself to a glaring and obvious danger.[78] Nevertheless, where the work in which a servant is engaged is in itself dangerous, or where the servant knows, or ought to know, that the method of work adopted involves danger, he is bound to exercise ordinary care to avoid injury therefrom.[79]

b. Control of, or Connection with, Cause or Subject of Danger

A servant who has control of, or is connected with, the cause or subject of danger is chargeable with contributory negligence precluding a recovery for injury if he fails to exercise ordinary care with respect thereto.

Subject to the rules of proximate cause, discussed supra §§ 440–445, where the servant has control of, or is connected with, the cause or subject of danger he is chargeable with contributory negligence precluding a recovery for injury if he fails to exercise ordinary care with respect thereto.[80] This rule applies where the servant, as a part of his employ-

minion Development Corporation, supra.

71. Mo.—Devlin v. Wabash, St. L. & P. R. Co., 87 Mo. 545.
N.H.—Wemyss v. Wyoming Valley Paper Co., 172 A. 438, 86 N.H. 587.
39 C.J. p 858 note 73.
Scope of employment generally see supra § 439.

Sweeping floors
Lumber yard employee proceeding about duties in customary and correct way was not negligent in not sweeping floors so as to preclude recovery for injury from nail in trash pile, where sweeping was not one of his duties in regular course of employment, although employee had swept out several times at employer's special request.—Clark v. Patterson, 77 S.W.2d 978, 190 Ark. 148.

72. Mich.—Swoboda v. Ward, 40 Mich. 420.
39 C.J. p 858 note 74.

73. N.Y.—Lee v. Barrow SS. Co., 6 N.Y.S. 285, 14 Daly 230.

74. Ark.—Lewis v. Chitwood Motor Co., 115 S.W.2d 1072, 196 Ark. 86.
39 C.J. p 859 note 77 [a].
"Last clear chance" doctrine generally see supra § 423.
Proximate cause of injury see supra §§ 440–445.

75. Okl.—Oklahoma R. Co. v. Thomas, 164 P. 120, 63 Okl. 219, 222, L.R.A.1917E 405.
Tex.—Gulf, C. & S. F. R. Co. v. Smith, Civ.App., 148 S.W. 820.
Wis.—Berger v. Abel & Bach Co., 124 N.W. 410, 141 Wis. 321.
39 C.J. p 859 note 79.

76. Okl.—Oklahoma R. Co. v. Thomas, 164 P. 120, 63 Okl. 219, 222, L.R.A.1917E 405.

77. Ark.—St. Louis-San Francisco Ry. Co. v. Rogers, 290 S.W. 74, 172 Ark. 508.
Ky.—High Gravity Oil Co. v. Row's Adm'r, 270 S.W. 53, 207 Ky. 823.
Mo.—Ward v. American Car & Foundry Co., App., 293 S.W. 492.
N.C.—Whitfield v. Atlantic Coast Line R. Co., 60 S.E. 1126, 147 N.C. 236.
Wash.—Ward v. National Lumber & Box Co., 103 P. 1, 54 Wash. 304.
39 C.J. p 859 note 80.

A servant working in a cold office without complaint is contributorily negligent.—Hemphill v. Standard Oil Co., 148 S.E. 443, 197 N.C. 339.

78. Mo.—Nolen v. Halpin-Dwyer Const. Co., 29 S.W.2d 215, 225 Mo. App. 224.

Simple-tool doctrine arises only in connection with question of contributory negligence.—Neely v. Chicago Great Western R. Co., Mo.App., 14 S.W.2d 972, certiorari quashed State ex rel. Chicago Great Western R. Co. v. Trimble, Sup., 14 S.W.2d 978.

79. U.S.—Whitcomb v. McNulty, Wis., 105 F. 863, 45 C.C.A. 90.
Me.—Mott v. Packard, 80 A. 279, 108 Me. 247.
39 C.J. p 859 note 81.

80. Ark.—Wisconsin & Arkansas Lumber Co. v. Smith, 271 S.W. 1, 168 Ark. 561.
Ky.—Nugent Sand Co. v. Howard, 11 S.W.2d 985, 227 Ky. 91.
39 C.J. p 859 note 82.

ment, is required to make his place of work safe,[81] and it is particularly applicable where the duty of seeing that safety requirements are complied with is imposed on the servant by statute, such as by an employers' liability act.[82] This rule also applies where the place for work becomes unsafe through the fault of the servant, although it is the duty of the master to see that such places are kept safe.[83]

A superior servant may not recover for injuries due to the neglect of an employee hired by him and under his direction and control for defects in the construction and maintenance of appliances which it was his duty to construct and maintain;[84] but the employee may recover for injuries sustained by neglect in this respect, which is chargeable to the superior servant alone, although the employee assisted him in the work.[85]

§ 450. —— Selection of Unsafe Method Where Reasonably Safe Method Exists

a. In general

b. Degree of care required in selecting method of work

a. In General

A servant who knowingly adopts an unsafe method of doing his work, when a safe, or reasonably safe, method is available, is generally chargeable with contributory negligence precluding a recovery for injury if the danger is such as an ordinarily prudent man would not have incurred. A servant is not necessarily negligent in selecting one of two reasonably safe methods of work or in selecting the only method open to him.

The general rule is well settled that, where two ways of doing the work are open to the servant, one of which is unsafe and the other safe or reasonably so, he owes to his employer the duty of pursuing the safe, or reasonably safe, method,[86] and, subject to the rules of proximate cause discussed supra § 443, if he knowingly adopts the unsafe method and is injured he is chargeable with contributory negligence barring a recovery if the danger was such as an ordinarily prudent man would not have incurred.[87] It has been held that the adoption of the unsafe method of work under such circumstances in

Failing to give proper instructions
Superintendent in charge of work who had duty of directing all employees engaged with him and control of management of machinery used in operations could not recover from employer for injury resulting from his failure to give proper instructions to employee.—M. F. Comer Bridge & Foundation Co. v. Sheeran, 161 So. 60, 119 Fla. 543.

Improper building of scaffold
Mo.—State ex rel. Horspool v. Haid, 65 S.W.2d 923, 334 Mo. 196.
39 C.J. p 859 note 82 [c].

Lighting match in presence of gas
Where superintendent constructing air conditioning unit deemed it necessary to purchase pump and negotiated for used pump located in cistern and chose methods adopted in bringing pump to surface and while going into cistern and lighting match, knowing there was gas in cistern, an explosion occurred, and employer had given no directions, no recovery could be had for the superintendent's death.—Okmulgee Supply Corporation v. McFarland, 125 P.2d 972, 190 Okl. 581.

Participating in drinking and careless driving
Where salesman, while being driven by his superior with other employees to employer's zone meeting, participated in drinking with others, knew that his superior was drunk and driving carelessly, and made no protest against such driving, but acquiesced therein, salesman was so negligent as to preclude recovery for injuries sustained when the automobile left the road.—Lewis v. Chitwood Motor Co., 115 S.W.2d 1072, 196 Ark. 86.

81. Ark.—Goodin v. Boyd-Sicard Coal Co., 122 S.W.2d 548, 197 Ark. 175.
Miss.—Wade-Stevens Lumber Co. v. Addy, 194 So. 303, 187 Miss. 851.

Removal of accumulated material
An employee operating a planer near a cut-off saw could not recover for injuries sustained by being struck by one of the accumulated sawed-off board ends, where it was his duty to remove such ends; but might recover if it was not his duty to remove such ends.—Wade-Stevens Lumber Co. v. Addy, supra.

82. U.S.—Marks v. Bauers, C.C.A. Or., 3 F.2d 516, certiorari denied 45 S.Ct. 639, 268 U.S. 704, 69 L.Ed. 1167.
Or.—Robbins v. Irwin, 178 P.2d 935—Straub v. Oregon Electric Ry. Co., 94 P.2d 681, 163 Or. 93.
Contributory negligence as affected by employers' liability acts generally see supra § 425.

Felling timber
A timber faller in charge of felling tree, either alone or with head faller, owed duty under employers' liability act to see that safety requirements thereof were complied with, so as to bar recovery of damages from his employers for his death as result of being struck by flying branch from falling tree because of his failure to perform such duty.—Robbins v. Irwin, Or., 178 P.2d 935.

83. Mo.—Graczak v. City of St. Louis, 202 S.W.2d 775—Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 337 Mo. 202.
Duty of master to see that place for work is reasonably safe see supra §§ 206, 207.

84. Ill.—Sible v. Wells Bros. Co., 148 Ill.App. 109.

85. Tex.—City of Panhandle v. Byrd, Civ.App., 77 S.W.2d 904, reversed on other grounds 106 S.W. 2d 660, 130 Tex. 96.

Operating street grader
In action for injuries sustained by city employee operating street grader, pulled by tractor driven by employee's foreman, when chain dragging behind grader caught in end of pipe culvert and platform on which employee was standing was jerked loose, hooking of chain to platform was chargeable to foreman alone, although employee assisted him.—City of Panhandle v. Byrd, supra.

86. Ga.—Gay v. Osteen, 192 S.E. 539, 56 Ga.App. 224—Western & A. R. R. v. Michael, 157 S.E. 226, 42 Ga.App. 603.
N.C.—Smith v. Rowland Lumber Co., 152 S.E. 153, 198 N.C. 457.
39 C.J. p 861 note 86.

87. U.S.—Mid-Continent Petroleum Corporation v. Hane, C.C.A.Okl., 56 F.2d 989—Johns-Manville v. Pocker, C.C.A.Mo., 26 F.2d 204.
Ark.—St. Louis I. M. & S. Ry. Co., 162 S.W. 1103, 111 Ark. 5.
Ga.—Gay v. Osteen, 192 S.E. 539, 56 Ga.App. 224—Western & A. R. R. v. Michael, 157 S.E. 226, 42 Ga.App. 603.

itself constitutes contributory negligence or, as otherwise expressed, constitutes contributory negligence as a matter of law.[88] This rule has been held to apply irrespective of the degree of danger involved in the unsafe method of work,[89] and even though the servant's act in selecting such method may not have amounted to actual rashness.[90] It has also been held to apply although the employer may also have been negligent[91] except where the unsafe method is rendered so by the employer's negligence, and such fact is unknown to the employee when making his choice,[92] or where by statute, such as the Federal Employers' Liability Act, contributory negligence is not available as a defense in such a case.[93]

The rule has been held to be especially applicable where the method chosen was not only hazardous, but could, under no circumstances, have been effective in the performance of the work,[94] or where a reasonably safe method of doing the work had been provided by the master;[95] or where at the time of the injury the servant was acting in disobedience of the rules, orders, and instructions of the master,[96] unless the method he was directed to use was equally as dangerous as the method he employed.[97]

The mere fact alone, however, that a servant adopts a dangerous way to perform work when a safe or reasonably safe way is open to the servant does not necessarily constitute negligence.[98] Regard must be had to the circumstances of each particular case.[99] In order to render the rule operative against the servant it must appear that a safe or reasonably safe method of doing the work was available to the servant,[1] that he knew, or in the exercise of reasonable care should have known, of the existence of such method,[2] that the selection of the unsafe method was voluntary on his part,[3] that he knew or was chargeable with knowledge of the dan-

Ind.—F. Bimel Co. v. Harter, 98 N.E. 360, 51 Ind.App. 267.

Kan.—Tramel v. Armour Packing Co., 129 P. 1174, 88 Kan. 730.

Ky.—Phillips v. Keltner's Adm'r, 124 S.W.2d 71, 276 Ky. 254—Steely v. Great Atlantic & Pacific Tea Co., 76 S.W.2d 900, 256 Ky. 586—Kitchen v. Hillside Coal Co., 194 S.W. 791, 175 Ky. 650.

Miss.—Walley v. Williams, 28 So.2d 579—Brown v. Coley, 152 So. 61, 168 Miss. 778—Stokes v. Adams-Newell Lumber Co., 118 So. 441, 151 Miss. 711.

Mo.—Watkins v. Bird-Sykes-Bunker Co., 16 S.W.2d 38, 322 Mo. 830—Hunter v. Busy Bee Candy Co., 271 S.W. 800, 307 Mo. 656.

Mont.—Burnett v. Northern Pac. Ry. Co., 124 P.2d 307, 113 Mont. 253.

N.C.—Smith v. Rowland Lumber Co., 152 S.E. 153, 198 N.C. 457.

S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213.

Tex.—Smithers v. Fort Worth & D. C. Ry. Co., Com.App., 272 S.W. 764—Tullos v. Texas Pipe Line Co., Civ.App., 145 S.W.2d 267, error dismissed, judgment correct.

Utah.—Kaumans v. White Star Gas & Oil Co., 63 P.2d 231, 92 Utah 24.

39 C.J. p 861 note 86.

Automobile slipping off blocks

Where an automobile mechanic is injured by an automobile slipping off blocks placed under it by the mechanic, and he is not directed as to the method of doing the work, knows as much about a reasonably safe method as his foreman or manager, and chooses his own method of doing the work, his employer is not liable for the injuries regardless of what might cause the car to slip.—Watkins v. Bird-Sykes Bunker Co., 16 S.W.2d 38, 322 Mo. 830.

A skilled mechanic, using a ladder in a way he knows is dangerous unless it is equipped with spikes, cannot recover for injuries received because of the absence thereof.—Tramel v. Armour Packing Co., 129 P. 1174, 88 Kan. 730.

Placing self in front of moving truck to stop it constitutes contributory negligence.—Lunsford v. Asheville Mfg. Co., 146 S.E. 129, 196 N.C. 510.

88. Cal.—Hontz v. San Pedro, L. A. & S. L. R. Co., 161 P. 971, 173 Cal. 750—Matchette v. California Fruit Canners Ass'n, 164 P. 423, 33 Cal. App. 156.

S.C.—Whisenhunt v. Atlantic Coast Line R. Co., 10 S.E.2d 305, 195 S.C. 213.

Contributory negligence as question for court or jury see infra § 537.

89. Ga.—Gay v. Osteen, 192 S.E. 539, 56 Ga.App. 224.

90. Ga.—Western & A. R. R. v. Michael, 157 S.E. 226, 42 Ga.App. 603.

39 C.J. p 861 note 86 [b].

91. Ind.—F. Bimel Co. v. Harter, 98 N.E. 360, 51 Ind.App. 267.

39 C.J. p 861 note 86.

92. Ky.—Kitchen v. Hillside Coal Co., 194 S.W. 791, 175 Ky. 650.

93. U.S.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F.2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515.

Mo.—Truesdale v. Wheelock, 74 S.W. 2d 585, 335 Mo. 924.

39 C.J. p 861 note 86 [c].

Defense of contributory negligence as affected by special statutory provisions generally see supra § 425.

94. Wash.—Gordon v. Ballard Lumber Co., 128 P. 1053, 71 Wash. 430.

95. Miss.—Graham v. Brummett, 181 So. 721, 182 Miss. 580—Favre v. Louisville & N. R. Co., 178 So. 327, 180 Miss. 843—Stokes v. Adams-Newell Lumber Co., 118 So. 441, 151 Miss. 711—Buckeye Cotton Oil Co. v. Saffold, 87 So. 893, 125 Miss. 407.

96. U.S.—Powell v. Wisconsin Cent. R. Co., Minn., 159 F. 864, 87 C.C.A. 44.

39 C.J. p 862 note 88.

Disobedience of rules or orders generally see infra §§ 457–459.

97. Okl.—Lowden v. Larson, 102 P. 2d 144, 187 Okl. 226.

98. Ariz.—Tom Reed Gold Mines Co. v. Morrison, 224 P. 822, 26 Ariz. 281.

Ind.—Hawkins v. Johnson, 4 N.E. 172, 105 Ind. 29, 55 Am.R. 169.

39 C.J. p 862 note 92, p 1202 note 65.

99. Mont.—Daniels v. Granite Bi-Metallic Cons. Min. Co., 184 P. 836, 56 Mont. 284.

1. Mo.—Ernst v. Union Depot Bridge & Terminal R. Co., 256 S.W. 222.

Utah.—**Corpus Juris quoted in** Kaumans v. White Star Gas & Oil Co., 63 P.2d 231, 234, 92 Utah 24.

2. U.S.—Johns-Manville v. Pocker, C.C.A.Mo., 26 F.2d 204.

Utah.—Kaumans v. White Star Gas & Oil Co., 63 P.2d 231, 92 Utah 24.

39 C.J. p 862 note 97.

Where the hazard in the choice of one of two methods is not clear, the rule is not applicable.

Mont.—Burnett v. Northern Pac. Ry. Co., 124 P.2d 307, 113 Mont. 253.

3. Miss.—Walley v. Williams, 28 So.2d 579.

ger inhering in the method chosen,[4] and that the danger was so imminent and threatening that a man of ordinary prudence would not have taken the chances of encountering it.[5] It has been held that the servant is not chargeable with contributory negligence in choosing the more dangerous method if the work could not be done as well and efficiently by the safer method;[6] but the servant will not be excused for selecting the dangerous method of work by reason of the fact that it is easier or more convenient.[7]

Methods reasonably safe. Where there are two natural ways of performing work, each of which is reasonably safe and yet one is safer than the other, the servant is not necessarily guilty of negligence in not choosing the safer way.[8] Where two courses are open to an employee in the discharge of his duty, and each is attended, under normal conditions, with practically the same degree of safety, it is not negligence for him to take one course rather than the other.[9] A servant is not necessarily chargeable with negligence where, in the discharge of his duties, he adopts the less dangerous of two dangerous methods.[10]

Both methods intended for servant's use. Where there are two ways by which the servant may do a particular thing, one dangerous and the other not so hazardous, both, however, furnished by the master, with the intention that the employee may at his discretion use either, then it does not lie in the mouth of the former to say to the latter that he cannot recover because he chose the more hazardous way.[11]

Only one method open to servant. A servant ordinarily is not chargeable with negligence in adopting the only course open to him to do the work which he is employed to do,[12] especially where the course adopted is the one usually used,[13] unless it is so obviously dangerous that an ordinarily prudent man would not adopt it.[14]

b. Degree of Care Required in Selecting Method of Work

In choosing between dangerous methods and those which are safe or reasonably so, a servant is required to exercise only ordinary care.

In making a choice between dangerous methods and those which are safe or reasonably so, a servant is required to exercise only ordinary care,[15] that is to say, the care to be expected of a man of ordinary prudence and presence of mind.[16] In balancing ways for the purpose of making a choice between two ways of doing work, the servant is not required to make a choice unerring in the light of after events, but only such choice as, under the cir-

Utah.—Kaumans v. White Star Gas & Oil Co., 63 P.2d 231, 92 Utah 24.
39 C.J. p 862 note 98.

Choosing an unsafe method under the orders or directions of a foreman has been held not contributory negligence.—Sinclair Oil & Gas Co. v. Langley, 293 S.W. 1015, 173 Ark. 956—39 C.J. p 862 note 98 [a].

4. U.S.—Johns-Manville v. Pocker, C.C.A.Mo., 26 F.2d 204.
Ala.—Mascott Coal Co. v. Garrett, 47 So. 149, 156 Ala. 290.
Ga.—Western & A. R. R. v. Michael, 157 S.E. 226, 42 Ga.App. 603.
Miss.—Walley v. Williams, 28 So.2d 579.
Utah.—Kaumans v. White Star Gas & Oil Co., 63 P.2d 231, 92 Utah 24.
39 C.J. p 863 note 99.

Knowledge that a particular method is unsafe does not arise from the mere fact that the servant knows of two other methods which are safe.—Harkins v. J. A. Veness Lumber Co., 124 P. 492, 69 Wash. 196.

Subtle poison in air
Rule relieving servant of contributory negligence, unless he not only knows defect, but knows, or should know, danger, is peculiarly applicable to case of danger from subtle poison pervading air.—Royal Collieries Co. v. Wells, 50 S.W.2d 948, 244 Ky. 303.

5. Mont.—Burnett v. Northern Pac. Ry. Co., 124 P.2d 307, 113 Mont. 253.
Utah.—**Corpus Juris quoted in** Kaumans v. White Star Gas & Oil Co., 63 P.2d 231, 234, 92 Utah 24.
39 C.J. p 863 note 1.

Mere knowledge of the defective condition of an elevator, by the fall of which a servant was killed, without an appreciation of the risk of its use would not preclude a recovery.—Herlihy v. Little, 86 N.E. 294, 200 Mass. 284.

6. Ala.—Mobile, J. & K. C. R. Co. v. Bromberg, 37 So. 395, 141 Ala. 258—Highland Ave. & B. R. Co. v. Walters, 8 So. 357, 91 Ala. 435.

7. Cal.—Douglas v. Southern Pac. Co., 90 P. 538, 151 Cal. 242.
39 C.J. p 862 note 91.

8. Ark.—Sinclair Oil & Gas Co. v. Langley, 293 S.W. 1015, 173 Ark. 956—Haedrick v. H. D. Williams Cooperage Co., 134 S.W. 957, 97 Ark. 553.
Utah.—Condie v. Rio Grande Western R. Co., 97 P. 120, 34 Utah 237.

9. Ky.—Swann-Day Lumber Co. v. Thomas, 112 S.W. 907, 129 Ky. 799.
39 C.J. p 863 note 3.

10. Ill.—Elgin, J. & E. R. Co. v. Eselin, 68 Ill.App. 96.
39 C.J. p 863 note 5.

11. Mo.—Hutchinson v. Richmond Safety Gate Co., 152 S.W. 52, 247 Mo. 71—Brann v. Hydraulic Press Brick Co., App., 288 S.W. 941—Sbiglio v. St. Joseph Lead Co., App., 243 S.W. 204—Wolff v. Scullin Steel Co., App., 217 S.W. 571—Daniels v. Goeke, 176 S.W. 301, 303, 191 Mo.App. 1.

12. Ky.—Louisville Southern R. Co. v. Tucker, 49 S.W. 314, 105 Ky. 492, 20 Ky.L. 1303.
39 C.J. p 863 note 6.

13. N.Y.—Pullutro v. Delaware, L. & W. R. Co., 15 N.Y.S. 783.
39 C.J. p 863 note 7.
Adopting customary methods generally see infra § 452.

14. N.Y.—Pullutro v. Delaware, L. & W. R. Co., supra.

15. Mo.—Manuel v. American Car & Foundry Co., App., 23 S.W.2d 1073.
Ohio.—Cleveland Provision Co. v. Hague, 20 Ohio Cir.Ct.,N.S., 34.

16. U.S.—Mid-Continent Petroleum Corporation v. Hane, C.C.A.Okl., 56 F.2d 989.
Ark.—Sinclair Oil & Gas Co. v. Langley, 293 S.W. 1015, 173 Ark. 956.
S.C.—Lyon v. Charleston & W. C. R. Co., 66 S.E. 282, 84 S.C. 364.

cumstances, a reasonably prudent man might have made.[17]

§ 451. —— Attempting Work with Insufficient Help

A servant who attempts to do his work without, or with insufficient, help when help is available is generally chargeable with contributory negligence.

It is contributory negligence for a servant to attempt to do his work without, or with insufficient, help where sufficient help is available, and he fails to call for assistance.[18] On the other hand, where the servant's superior told him to get other help, but, by reason of the fact that the other help was not within his control, they refused to assist him and, by reason of insufficient help, he sustained the injuries complained of, he could not be held guilty of contributory negligence although he did not notify the superior that the men to whom he had been referred refused to assist him.[19] A servant is not chargeable with contributory negligence in proceeding without sufficient help, on his master's failure to furnish additional help, as promised,[20] unless the danger of so proceeding is so obvious and imminent that a man of ordinary prudence would refuse to proceed with the work without help.[21] It has also been held that if the servant is led to believe by his employer that he can do the assigned work without any immediate danger, he may recover for his injury if he exercised reasonable care, although without sufficient help and instruments.[22]

§ 452. —— Adopting Customary Methods

A servant is not chargeable with contributory negligence in adopting a customary method of work unless the danger therefrom is so obvious that an ordinarily prudent person would not follow the custom.

A servant is not chargeable with contributory negligence in adopting a method of work which is usual and customary[23] unless the danger therefrom is so obvious that an ordinarily prudent person would not consent to follow the custom.[24] Where there is a safe, or reasonably safe, way to do work, which to the servant's knowledge is the customary way, and he adopts another way, generally he is chargeable with contributory negligence.[25] However, it has been held that failure to adopt customary methods of work may be waived by the employer,[26] and is waived where the master assures the servant that the way adopted is safe.[27] A servant cannot offer the excuse that it was not his practice to perform a duty primarily cast on him when that failure is primarily the cause of his injury.[28]

§ 453. —— Application of Rules to Operation of Railroads, Machinery, and Mining

a. Operation of railroads
b. Operation of machinery
c. Mining

a. Operation of Railroads

(1) In general
(2) Coupling or uncoupling cars
(3) Switching cars
(4) Boarding or alighting from moving cars or locomotives

(1) In General

A railroad employee is not negligent in adopting a method for the performance of his work which is safe under ordinary circumstances. In the absence of statute, however, he may be chargeable with contributory negligence, precluding a recovery for injury, if he voluntarily

17. U.S.—Mid-Continent Petroleum Corporation v. Hane, C.C.A.Okl., 56 F.2d 989.
39 C.J. p 863 note 11.

18. La.—Williams v. Westdale Corporation, App., 3 So.2d 684.
N.C.—Crawford v. Michael & Bivens, 154 S.E. 58, 199 N.C. 224.
39 C.J. p 863 note 12.
Lifting heavy pump
N.C.—Hemphill v. Standard Oil Co., 148 S.E. 443, 197 N.C. 339.

19. Mo.—Levecke v. Curtis & Co. Mfg. Co., 193 S.W. 985, 197 Mo. App. 262.
39 C.J. p 864 note 13.

20. Mo.—Lutgen v. Missouri Pac. R. Co., App., 294 S.W. 444.

21. Mo.—Lutgen v. Missouri Pac. R. Co., supra.

22. N.C.—Clinard v. Clinard Electric Co., 136 S.E. 1, 192 N.C. 736.

23. La.—Mathews v. Kerlin, 48 So. 123, 122 La. 606.
Mass.—Coates v. Soley, 80 N.E. 464, 194 Mass. 386.
Mo.—Smith v. Southern Illinois & Missouri Bridge Co., 30 S.W.2d 1077, 326 Mo. 109.
N.C.—Mahaffey v. Forsyth Furniture Lines, 145 S.E. 237, 196 N.C. 810.
S.C.—Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 158 S.C. 194, certiorari denied Atlantic Coast Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.
Utah.—Bruner v. McCarthy, 142 P.2d 649, 105 Utah 399, certiorari dismissed 65 S.Ct. 126, 323 U.S. 673, 89 L.Ed. 547.
39 C.J. p 864 note 14.
Stool in elevator
The fact that the operator, when elevator fell, was injured by falling over stool which she kept in elevator, disclosed no contributory negligence.—Bartlett v. Pontiac Realty Co., 31 S.W.2d 279, 224 Mo.App. 1234.

24. U.S.—Clarke v. Chicago & N. W. Ry. Co., D.C.Minn., 63 F.Supp. 579.
N.Y.—Pollutro v. Delaware, L. & W. R. Co., 15 N.Y.S. 783.
39 C.J. p 864 note 15.

25. Ind.—Chamberlain v. Waymire, 68 N.E. 306, 70 N.E. 81, 32 Ind.App. 442.
Okl.—Graney v. Midland Valley Ry. Co., 238 P. 838, 111 Okl. 128.
39 C.J. p 864 note 16.

26. Ky.—Carter Coal Co. v. Filipeck, 201 S.W. 468, 180 Ky. 94.

27. Ky.—Carter Coal Co. v. Filipeck, supra.
39 C.J. p 864 note 18.

28. Mo.—Probst v. Heisinger Motor Co., App., 16 S.W.2d 1005.

adopts an unsafe method of work when a safe or reasonably safe method is available.

In accordance with the rules relating to dangerous operations and methods of work, discussed supra §§ 448–452, where, in the operation of a railroad or of its locomotives, cars, etc., the way adopted by the servant for the performance of his work is safe under ordinary circumstances, he cannot, in general, be charged with negligence in so doing,[29] as where the way adopted is the one customarily used and is not any more dangerous than another available way;[30] nor ordinarily is he chargeable with contributory negligence where the way adopted is necessary, or the only way, for doing the work.[31]

Adopting unsafe method of operation. In the absence of statute it has been generally held that, where there are two ways open to a servant for the performance of his duty, one unsafe and the other safe or reasonably so, if the servant voluntarily adopts the unsafe way and is injured by reason thereof, he is guilty of such contributory negligence as will bar a recovery,[32] and this rule is particularly applicable where the duty is performed in a manner which is neither authorized nor customary.[33] However, the fact that the work is done in the usual and customary manner may excuse the servant for using the more hazardous method of performing the service,[34] especially where the work has always been done that way to the knowledge of the employer,[35] although, as has been held, the test of negligence in such a case is not the custom, but what a reasonably prudent person would do under similar circumstances.[36] This principle has no application where the method adopted for performing the service is obviously and imminently dangerous, as under such circumstances the fact that another servant customarily did likewise will not relieve a servant injured in so doing from the charge of contributory negligence;[37] and a custom will not in any event excuse the servant from exercising ordinary care.[38]

Method safe except for violation of duty by another servant. Where the way adopted by the servant for the performance of his duty would not be dangerous except for violation of duty by another servant, he is not chargeable with contributory negligence in adopting such method,[39] particularly where he is not warned, or has no reason to anticipate such violation.[40]

If the servant has control of, or is connected with, the cause or subject of danger and his injury is caused by his failure to exercise ordinary care, he cannot recover,[41] as where a servant in charge of a locomotive or car operates it at an excessive speed.[42]

Under the Federal Employers' Liability Act, § 1 et seq, 45 U.S.C.A. § 51 et seq, a railroad employee is not necessarily precluded from recovering for injuries sustained through the railroad's negligence or violation of statutes by reason of the fact that he selected an unnecessarily dangerous method of performing his duties[43] or by the fact that he departed

29. La.—Williams v. W. R. Pickering Lumber Co., 52 So. 167, 125 La. 1087, 136 Am.S.R. 365, 19 Ann.Cas. 1224.

30. Utah.—Bruner v. McCarthy, 142 P.2d 649, 105 Utah 399, certiorari dismissed 65 S.Ct. 126, 323 U.S. 673, 89 L.Ed. 547.

31. Ky.—Southern R. Co. v. Barr, 55 S.W. 900, 21 Ky.L. 1615.
N.C.—Weldon v. Seaboard Air Line R. Co., 98 S.E. 375, 177 N.C. 179.

32. S.C.—Hilton v. Southern Ry. Co., 7 S.E.2d 161, 192 S.C. 476.
Tenn.—Buckner v. Southern Ry. Co., 96 S.W.2d 600, 20 Tenn.App. 212.
39 C.J. p 865 note 23.

33. Nev.—Smith v. Southern Pac. Co., 277 P. 609, 51 Nev. 390.

Delivery of clearance order

A railroad is not liable for injuries to a brakeman who attempted to deliver a clearance order by jumping on a moving car, after the fireman had failed to catch the hoop to which the card was attached, where there was no occasion to deliver the order except by the use of a hoop, as was authorized and customary.—Smith v. Southern Pac. Co., supra.

34. Ind.—Chesapeake & O. Ry. Co. v. Fultz, 161 N.E. 835, 91 Ind.App. 639, certiorari denied 51 S.Ct. 31, 282 U.S. 855, 75 L.Ed. 757.
39 C.J. p 865 note 27.

35. Ohio.—Wabash R. Co. v. Heeter, 14 Ohio Cir.Ct. 257, 7 Ohio Cir.Dec. 485.

36. U.S.—Clarke v. Chicago & N. W. Ry. Co., D.C.Minn., 63 F.Supp. 579.

37. Ala.—Andrews v. Birmingham Mineral R. Co., 12 So. 432, 99 Ala. 438.
Ohio.—Grant v. Pittsburgh & Western R. Co., 10 Ohio Cir.Ct. 362, 6 Ohio Cir.Dec. 516.
39 C.J. p 865 note 29.

38. Mo.—Anderson v. St. Louis, etc., R. Co., App., 184 S.W. 481.

39. Mo.—Reed v. Terminal R. Ass'n of St. Louis, 62 S.W.2d 747—Penney v. St. Joseph Stock Yards Co., 111 S.W. 79, 212 Mo. 309.
39 C.J. p 865 note 31.

40. Tex.—Gulf, B. & K. C. R. Co. v. Harrison, Civ.App., 104 S.W. 399.
39 C.J. p 865 note 23 [a].

41. Ark.—St. Louis, I. M. & S. R. Co. v. Davis, 124 S.W. 754, 93 Ark. 484.
Ga.—Georgia R. Banking Co. v. McDade, 59 Ga. 73.
39 C.J. p 865 note 32.

Overheating locomotive

Where locomotive engineer negligently permits water in boiler to get too low thereby allowing crown sheet to overheat and then explode when water is added, there can be no recovery for death of engineer caused by such explosion.—Atlantic Coast Line R. Co. v. Wetherington, 16 So.2d 720, 245 Ala. 313.

42. Va.—Williams v. Norfolk & W. R. Co., 15 S.E. 522, 89 Va. 165.
39 C.J. p 865 note 32 [a].

43. U.S.—Fort Street Union Depot Co. v. Hillen, C.C.A.Mich., 119 F. 2d 307, certiorari denied 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515.
Ala.—Southern Ry. Co. v. Smith, 128 So. 228, 221 Ala. 273.
Ill.—Taylor v. Atchison, T. & S. F. Ry. Co., 11 N.E.2d 610, 292 Ill.App. 457, certiorari denied Atchison, T. & S. F. R. Co. v. Taylor, 58 S.Ct. 942, 304 U.S. 560, 82 L.Ed. 1528.

from the customary practice of railroad employees in performing his duties.[44]

(2) Coupling or Uncoupling Cars

A railroad employee is generally chargeable with contributory negligence if he voluntarily and knowingly adopts an unsafe method in coupling or uncoupling cars when a safe method is available.

The terms "coupling" and "uncoupling" have been used to denote the acts of connecting and disconnecting the air hose between cars, if necessary in order to connect or disconnect the cars.[45] "Coupling automatically" means a coupling of cars by impact, which cars may be uncoupled without the necessity of the men going between them.[46] The preparation or alignment of the drawhead or coupler, preparatory to the impact of the cars, constitutes a part of coupling automatically.[47]

Where there is a safe method of coupling or uncoupling cars and the servant voluntarily and knowingly adopts an unsafe method of performing such duty,[48] as where he fails to use the appliances provided for such purpose,[49] generally he is chargeable with such contributory negligence as will bar a recovery for injuries sustained thereby except where such defense is barred by statute.[50] However, where the servant is doing the work in the usual and customary manner, the alternative of choosing a safer way in which to do the work is not presented,[51] especially where the work has always been done that way to the knowledge of the employer.[52] The servant is not chargeable with contributory negligence in not adopting the safer way, if he could not do the work as well by adopting that way,[53] or in making a coupling by the safer of one of two methods available;[54] nor is he chargeable with negligence in making a coupling by a method which would not have been dangerous except for a violation of duty by another servant.[55]

Going between cars to couple or uncouple them, where there is a safe method for doing this work, will as a general rule constitute negligence, barring a recovery for injuries sustained, in the absence of an emergency requiring a selection of the dangerous method.[56] Nevertheless, going between cars to uncouple them is not necessarily negligence;[57] the practice may be justified by showing that it was universally adopted in the master's yards and used with his knowledge and approval for years, without any rule to the contrary being promulgated.[58]

Coupling moving cars is not necessarily negligence, the question being whether the servant acted as an ordinarily prudent person would have act-

Ind.—Chesapeake & O. Ry. Co. v. Fultz, 161 N.E. 835, 191 Ind.App. 639, certiorari denied 51 S.Ct. 31, 282 U.S. 855, 75 L.Ed. 757.
Mo.—Truesdale v. Wheelock, 74 S.W. 2d 585, 335 Mo. 924.

44. U.S.—Thomson v. Boles, C.C.A. Minn., 123 F.2d 487, certiorari denied 62 S.Ct. 632, 315 U.S. 804, 86 L.Ed. 1204.

45. U.S.—U. S. v. Boston & M. R. Co., D.C.Mass., 168 F. 148.

46. U.S.—Johnson v. Southern Pac. R. Co., Utah, 25 S.Ct. 158, 196 U.S. 1, 49 L.Ed. 363.

The word "coupling" usually describes the operation which accompanies the approach of one car to the other; a crushing impact is the expected incident of the normal coupling.—McCalmont v. Pennsylvania R. Co., C.C.A.Ohio, 283 F. 736, 742.

The chaining together of detached cars which have stood for hours and may stand for hours longer on a side track used only for storage of crippled cars is not a coupling in connection with the movement or hauling of such cars.—McCalmont v. Pennsylvania R. Co., supra.

47. U.S.—Chicago, M. & St. P. Ry. Co. v. Voelker, Iowa, 129 F. 522, 65 C.C.A. 226, 70 L.R.A. 264.
Tex.—Kansas City M. & O. Ry. Co. of Texas v. Wood, Civ.App., 262 S.W. 520—Texas & P. Ry. Co. v. Sprole, Civ.App., 202 S.W. 985.
"Couplers" see supra § 228.

48. U.S.—Tuttle v. Detroit, G. H. & M. R. Co., Mich., 7 S.Ct. 1166, 122 U.S. 189, 30 L.Ed. 1114.
39 C.J. p 865 note 33.
Disobedience of rules of employer see infra § 457.
Disregard of warnings see infra § 461.

49. Ala.—Shorter v. Southern R. Co., 25 So. 853, 121 Ala. 158.
39 C.J. p 865 note 33 [b].
Duty to use appliances furnished generally see supra § 446 a.

50. U.S.—Chicago, St. P., M. & O. Ry. Co. v. Muldowney, C.C.A.Minn., 130 F.2d 971, certiorari denied 63 Ct. 526, 317 U.S. 700, 87 L.Ed. 560.
Mo.—Alcorn v. Missouri Pac. R. Co., 63 S.W.2d 55, 333 Mo. 828, certiorari denied Missouri Pac. Ry. Co. v. Alcorn, 54 S.Ct. 228, 290 U.S. 701, 78 L.Ed. 602.

51. Wis.—Curtis v. Chicago N. W. R. Co., 70 N.W. 665, 95 Wis. 460.
39 C.J. p 866 note 36.

52. Ohio.—Wabash R. Co. v. Heeter, 14 Ohio Cir.Ct. 257, 7 Ohio Cir. Dec. 485.
Wis.—Hennesey v. Chicago N. W. R. Co., 74 N.W. 554, 99 Wis. 109.

53. Ala.—Mobile, J. & K. C. R. Co. v. Bromberg, 37 So. 395, 141 Ala. 258.

54. Ill.—Elgin, J. & E. R. Co. v. Eselin, 68 Ill.App. 96.

55. Ga.—Rebb v. East Tennessee, etc., R. Co., 13 S.E. 566, 87 Ga. 631.
Mich.—Lyttle v. Chicago & W. M. R. Co., 47 N.W. 571, 84 Mich. 289.

Reliance on assurance of safety
Air couple-up man suing for injuries has been held not negligent in relying on yardmaster's assurance to look out for his safety, where yardmaster controlled switching crews and switching crews were obligated before moving cars to make sure no one was on tracks.—Reed v. Terminal R. Ass'n of St. Louis, Mo., 62 S.W.2d 747.

56. U.S.—Gilbert v. Chicago, R. I. & P. R. Co., C.C.Minn., 123 F. 832, affirmed 128 F. 529, 63 C.C.A. 27.
39 C.J. p 866 note 42.
Disobedience of rules of employer see infra § 457.

57. Mich.—Hewitt v. East Jordan Lumber Co., 98 N.W. 992, 136 Mich. 110.
N.Y.—Mahoney v. New York Cent. & H. R. Co., 15 N.Y.S. 501, 60 Hun 586, affirmed 30 N.E. 864, 131 N.Y. 623.
N.C.—Kelly v. Raleigh Granite Co., 156 S.E. 517, 200 N.C. 326.

58. Wis.—Hennesey v. Chicago & N. W. R. Co., 74 N.W. 554, 99 Wis. 109.

ed under the circumstances of the case.[59]

(3) Switching Cars

A servant who voluntarily adopts an unsafe method, when a safe or reasonably safe method is available, in switching cars is generally held chargeable with contributory negligence.

As a general rule, where two ways are open to a servant in the performance of his duty in switching cars or in assisting to do so, one of the ways being safe or reasonably so and the other dangerous, and the servant voluntarily adopts the unsafe way and is injured, he will be held guilty of such contributory negligence as will bar a recovery.[60] If the servant engaged in switching cars has control of, or is connected with, the cars or subject of danger and his injury is due to his failure to exercise ordinary care with respect thereto, he cannot recover.[61] A servant, however, is not negligent in assuming a position for making a switch, where he acts under the direct orders of his superiors and where the duty cannot be performed by him from any other position,[62] or where the position taken by him is not of itself dangerous and can become so only by the violation of duty on the part of a superior servant;[63] nor is he necessarily chargeable with contributory negligence in pursuing the more dangerous method if he acts in good faith in doing so and the method adopted is one which a reasonable and prudent person would ordinarily adopt under like circumstances.[64]

Flying switches. Making a "flying switch" is not negligence per se as to the servant performing it,[65] although it has been held to constitute negligence if the car has no brakeman on it, and is under no control, when the flying switch is attempted.[66]

(4) Boarding or Alighting from Moving Cars or Locomotives

Ordinarily it is not contributory negligence for a brakeman or other train hand to board or alight from a moving car or locomotive, in the discharge of his duties, unless he voluntarily adopts a dangerous method for so doing when a safe or reasonably safe method is available.

Ordinarily boarding or alighting from moving cars or locomotives, by brakemen or other train hands in the discharge of their duties, is not contributory negligence;[67] but where there is a safe or reasonably safe way to board[68] or alight from[69] a moving car or engine, and the servant voluntarily adopts a dangerous method of so doing and is injured in consequence thereof, he is guilty of such contributory negligence as will ordinarily bar a recovery, as where he attempts to board a moving car or engine while he is standing in the middle of the track.[70]

Where the method adopted is obviously and imminently dangerous, the fact that it is the custom of other servants to do likewise will not relieve the servant so doing from the charge of contributory negligence.[71] It is contributory negligence for a servant to attempt to board an engine or train which is moving at a high rate of speed.[72] However, in accordance with a well-settled principle considered supra § 423, the contributory negligence of the servant will not bar a recovery where the peril in which he had placed himself was discovered by the master in time to avoid injuring him.[73]

59. Iowa.—Lowe v. Chicago, St. P. M. & O. R. Co., 56 N.W. 519, 89 Iowa 420.
39 C.J. p 867 note 47.

60. U.S.—St. Louis, K. C. & C. R. Co. v. Conway, 156 F. 234, 86 C.C.A. 1.
39 C.J. p 867 note 48.

61. Mo.—Ingram v. Mobile & O. R. Co., 30 S.W.2d 989, 326 Mo. 163
Or.—Straub v. Oregon Electric Ry. Co., 94 P.2d 681, 163 Or. 93.
39 C.J. p 867 note 49.

62. Ky.—Louisville Southern R. Co. v. Tucker, 49 S.W. 314, 105 Ky. 492, 20 Ky.L. 1303.
S.C.—Gillis v. Atlantic Coast Line R. Co., 179 S.E. 62, 175 S.C. 223, certiorari denied Atlantic Coast Line R. Co. v. Gillis, 55 S.Ct. 545, 294 U.S. 718, 79 L.Ed. 1251.

Position for giving signals
Head brakeman, injured by moving train while on right side of engine, as was necessary to give proper signals to engineer, was not negligent in being on such side, even though switch, which he had started across tracks to change after signaling engineer to stop train, was on left side.—Gillis v. Atlantic Coast Line R. Co., 179 S.E. 62, 175 S.C. 223, certiorari denied Atlantic Coast Line R. Co. v. Gillis, 55 S.Ct. 545, 294 U.S. 718, 79 L.Ed. 1251.

63. Ind.—Chicago & E. R. Co. v. Lain, 103 N.E. 847, 181 Ind. 386.
39 C.J. p 867 note 51.

64. Fla.—Florida Cent. & P. R. Co. v. Mooney, 24 So. 148, 40 Fla. 17.

65. Fla.—Florida Cent. & P. R. Co. v. Mooney, supra.
N.C.—Allen v. Atlantic Coast Line R. Co., 58 S.E. 1081, 145 N.C. 214.
"Flying switch" defined see the C.J.S. title Railroads § 1, also 26 C.J. p 745 notes 61–63.

66. N.C.—Allen v. Atlantic Coast Line R. Co., 58 S.E. 1081, 145 N.C. 214.

67. U.S.—Kansas City Southern R. Co. v. Billingslea, Tex., 116 F. 335, 54 C.C.A. 109, certiorari dismissed 23 S.Ct. 850, 189 U.S. 515, 47 L.Ed. 925.
39 C.J. p 867 note 55.

68. Kan.—Union Pac. R. Co. v. Estes, 16 P. 131, 37 Kan. 715.
39 C.J. p 867 note 56.

69. Ala.—Andrews v. Birmingham Mineral R. Co., 12 So. 432, 99 Ala. 438.
39 C.J. p 867 note 57.

70. Iowa.—Ferguson v. Chicago, M. & St. P. Ry. Co., 69 N.W. 1026, 100 Iowa 733.
39 C.J. p 867 note 56 [b].

71. Ala.—Andrews v. Birmingham Mineral R. Co., 12 So. 432, 99 Ala. 438.
Ohio.—Grant v. Pittsburgh & Western R. Co., 10 Ohio Cir.Ct. 362, 6 Ohio Cir.Dec. 516.

72. Vt.—Kilpatrick v. Grand Trunk R. Co., 47 A. 827, 72 Vt. 263, 82 Am.S.R. 939.
39 C.J. p 868 note 59.

73. N.C.—Meacham v. Southern R. Co., 62 S.E. 879, 149 N.C. 147.

Moreover, the servant is not chargeable with contributory negligence, if he is involuntarily caused to alight from a moving car or engine.[74]

b. Operation of Machinery

The voluntary operation of machinery in an unsafe manner, when it is capable of being operated in a safe or reasonably safe manner, generally constitutes contributory negligence.

In accordance with the rules discussed supra §§ 446–452 as to dangerous operations and methods of work, where there is an unsafe way of starting, adjusting, operating, oiling, cleaning, repairing, or stopping machinery and a way that is safe or reasonably so, and the servant knowingly and voluntarily adopts the unsafe way and is injured in consequence, he will, as a general rule, be held guilty of contributory negligence barring a recovery.[75] This principle has been applied where the servant was injured while attempting to oil,[76] to clean,[77] or to make necessary adjustments of machinery[78] while in motion, or to remove obstructions or refuse from or near moving machinery,[79] or where a servant attempted to take hold of and pull off a piece of string or cloth from a revolving roller,[80] or where a servant used machinery known to him to be dangerous because of its erratic motion.[81] A custom of employees to remove with their hands matter which clogs machinery will not relieve a servant of the charge of contributory negligence where such method of work is obviously and imminently dangerous.[82]

c. Mining

Ordinarily a miner is not chargeable with contributory negligence if he pursues his work in the customary manner; but he is chargeable with negligence if he pursues a method which is obviously dangerous, or if he pursues an unsafe method of work when a safe method is available.

In accordance with the rules relating to dangerous operations and methods of work, discussed supra §§ 448–452, where a miner does his work in the customary manner or as he is expected to do, ordinarily he is not chargeable with contributory negligence,[83] although the method of doing the work is attended with some hazard.[84] On the other hand, he is chargeable with contributory negligence where he pursues a method of work which is obviously and imminently dangerous,[85] particularly where he has sole charge and control of the instrumentality by which he is injured,[86] or where there are two methods of doing work open to a miner, one of which is unsafe and the other safe or reasonably so, and he voluntarily with full knowledge of the facts and probable consequences uses the more dangerous method.[87] If a miner knowingly undertakes work with insufficient help and is injured, he cannot recover,[88] especially where he has been warned of the danger.[89]

§ 454. Precautions against Known or Apparent Dangers

As a general rule it is the duty of a servant to take such precautions against known or apparent dangers

74. Mo.—Bright v. Wheelock, 20 S.W.2d 684, 323 Mo. 840, 66 A.L.R. 263.

75. Ark.—Togo Gin Co. v. Hite, 79 S.W.2d 262, 190 Ark. 454.
Fla.—U. S. Phosphoric Products Corporation v. Lester, 156 So. 753, 116 Fla. 309.
Va.—Schlain v. Richardson, 12 S.E.2d 799, 177 Va. 25.
39 C.J. p 868 note 64.

76. Minn.—Bean v. Keller Mfg. Co., 119 N.W. 801, 107 Minn. 162.

77. Ark.—Bufkin v. McDaniel, 146 S.W.2d 157, 201 Ark. 552.
Fla.—U. S. Phosphoric Products Corporation v. Lester, 156 So. 753, 116 Fla. 309.
Pa.—Best v. Williamsport Staple Co., 67 A. 205, 218 Pa. 202.
39 C.J. p 868 note 66.

78. Ark.—Standard Oil Co. of Louisiana v. Gray, 300 S.W. 405, 175 Ark. 702.
39 C.J. p 868 note 67.

79. Ark.—Togo Gin Co. v. Hite, 79 S.W.2d 262, 190 Ark. 454.
39 C.J. p 868 note 68.
Sawdust
A sawmill yard employee, who was put to removing lumber as it came from planer and was injured when he attempted to clean accumulated sawdust away by putting his hand into opening and who had not been ordered to clear sawdust away and admittedly knew danger of getting his hand too near revolving knives of planer, was contributorily negligent, precluding recovery against employer for injuries.—Hopkins v. Turner, 111 S.W.2d 462, 195 Ark. 301.

80. Ill.—Kresmar v. Omaha Packing Co., 153 Ill.App. 338.

81. Mich.—Burgess v. Humphrey Bookcase Co., 120 N.W. 790, 156 Mich. 345.

82. Mo.—Smith v. Forrester-Nace Box Co., 92 S.W. 394, 193 Mo. 715.

83. Ala.—Brilliant Coal Co. v. Barton, 81 So. 828, 203 Ala. 38.
39 C.J. p 868 note 73.

84. Ala.—New Connellsville Coal & Coke Co. v. Kilgore, 58 So. 966, 4 Ala.App. 334.

85. Ky.—New Bell Jellico Coal Co. v. Sowders, 156 S.W. 1046, 154 Ky. 101.
Utah.—Buhler v. Maddison, 140 P.2d 933, 105 Utah 39.

86. Mont.—Maronen v. Anaconda Copper Mining Co., 136 P. 968, 48 Mont. 249.
39 C.J. p 869 note 78.

87. U.S.—Solt v. Canney, Mass., 162 F. 660, 89 C.C.A. 452, rehearing denied 166 F. 1021, 92 C.C.A. 667.
39 C.J. p 869 note 75.
Defect in roof of mine
Although a coal miner made the mine room in which he was killed by the falling of its roof, and thereby made the defect in roof which caused it to fall, and knew of the defect and voluntarily went under it, he was not guilty of contributory negligence unless he knew the defect was dangerous, it being the operator's duty to prop the roof or to maintain it in a reasonably safe condition.—Mascott Coal Co. v. Garrett, 47 So. 149, 156 Ala. 290.

88. U.S.—Dodd v. Pocahontas Cons. Collieries Co., Va., 244 F. 151, 156 C.C.A. 579.

89. U.S.—Dodd v. Pocahontas Cons. Collieries Co., supra.
Disregarding warnings generally see infra §§ 460–462.

arising from defective or dangerous machinery, appliances, tools, or places as an ordinarily prudent man would take under the same or similar circumstances, especially where the servant is in control of the cause or subject of danger.

In accordance with the general rules of contributory negligence, as well as their limitations and qualifications, as a general rule a servant is bound to take such precautions against known or apparent dangers arising from defective or dangerous machinery, appliances, tools, or places as an ordinarily prudent man would take under the same or similar circumstances, and if he fails to take such precautions he may not recover for the injuries thereby sustained;[90] and this is especially true where the servant is himself in control of the cause or subject of danger.[91] A reliance on custom or assurances of safety will not excuse a failure to take such precautions against known or apparent dangers.[92] This duty to take precautions is as obligatory on the servant as the duty of the master to provide a reasonably safe place to work and reasonably safe appliances and machinery[93] or as the master's duty to warn the servant of dangers.[94]

The general rule, however, does not apply to dangers which cannot be reasonably anticipated[95] or avoided;[96] nor does it apply where the nature of the servant's duties is such as to take up his whole attention[97] or where his knowledge is not sufficient to charge him with knowledge of the danger.[98] The fact that the servant had knowledge of one defect does not necessarily charge him with contributory negligence with respect to another defect unless it appears that, with the knowledge he had, under the circumstances he acted imprudently in using an ap-

90. U.S.—Roberts v. Louisville & N. R. Co., C.C.A.Miss., 111 F.2d 826—Burnett v. Amalgamated Phosphate Co., C.C.A.Fla., 96 F.2d 974, certiorari denied 59 S.Ct. 153, 305 U.S. 647, 83 L.Ed. 418.
Cal.—Pollard v. Valley Ice Co., 138 P. 699, 167 Cal. 11.
Ga.—Atlanta, B. & C. R. Co. v. King, 189 S.E. 580, 55 Ga.App. 1—Williams v. Georgia Southern & F. R. Co., 121 S.E. 700, 31 Ga.App. 688.
Kan.—Smith v. Beasley, 140 P. 892, 92 Kan. 390.
Ky.—Poole v. Lutz & Schmidt, 117 S.W.2d 575, 273 Ky. 586—Louisville & N. R. Co. v. Morgan's Adm'r, 9 S.W.2d 212, 225 Ky. 447—Pickergill v. Nelson Creek Coal Co., 160 S.W. 936, 156 Ky. 203.
La.—Mitchell v. Travelers Indemnity Co., App., 21 So.2d 198.
Mo.—Russell v. Johnson, 160 S.W.2d 701, 349 Mo. 267—Fischer v. City of Cape Girardeau, 131 S.W.2d 521, 345 Mo. 122—Mosely v. Sum, 130 S.W.2d 465, 344 Mo. 969—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748—Corby v. Missouri & Kansas Tel. Co., 132 S.W. 712, 231 Mo. 417—Higgins v. Medart Patent Pulley Co., App., 240 S.W. 252.
N.M.—Olguin v. Thygesen, 143 P.2d 585, 47 N.M. 377.
N.C.—Scott v. Western Union Telegraph Co., 153 S.E. 413, 198 N.C. 795.
Pa.—Bailey v. Alexander Realty Co., 20 A.2d 754, 342 Pa. 362.
Tenn.—Fortune v. McGinn, 134 S.W.2d 898, 23 Tenn.App. 504, rehearing denied 139 S.W.2d 256, 24 Tenn.App. 36.
Tex.—City of Munday v. Shaw, Civ.App., 100 S.W.2d 765, error dismissed—Brigman v. Holt & Bowers, Civ.App., 32 S.W.2d 220, error refused.
39 C.J. p 869 note 82.
Continuing work with knowledge of danger see supra § 434.

Cleaning glass
Porter directed to handle and clean glass with sharp edges must so handle the glass as to avoid injury to himself.—Davis v. Brown-Cloughly Drug Co., Mo.App., 14 S.W.2d 533.

91. Ark.—Trinity Farm Const. Co. v. Brannam, 82 S.W.2d 523, 190 Ark. 1032.
39 C.J. p 870 note 83.

92. Iowa.—Collins v. Burlington, C. R. & N. R. Co., 49 N.W. 848, 83 Iowa 346.
Ky.—Hough & Spradlin Co. v. Clark, 151 S.W. 28, 151 Ky. 61.
Mo.—Russell v. Johnson, 160 S.W.2d 701, 349 Mo. 267—Braden v. Friederichsen Floor & Wall Tile Co., 15 S.W.2d 923, 223 Mo.App. 700.
Vt.—Hartigan v. Deerfield Lumber Co., 81 A. 259, 85 Vt. 133.
39 C.J. p 871 note 84.

93. Pa.—Hoke v. Edison Light & Power Co., 130 A. 309, 284 Pa. 112.
Va.—Virginia Iron Coal & Coke Co. v. Munsey, 65 S.E. 478, 110 Va. 156.
Duty of master to provide reasonably safe appliances, machinery, and places for work see supra §§ 201-203.

94. Pa.—Hoke v. Edison Light & Power Co., 130 A. 309, 284 Pa. 112.
Duty of master to warn servant of dangers see supra §§ 262, 263.

95. U.S.—Wellington v. Pelletier, Mass., 173 F. 908, 97 C.C.A. 458, 26 L.R.A.,N.S., 719.
Ala.—City of Mobile v. Reeves, 31 So.2d 688, 249 Ala. 488.
Me.—Sylvia v. Etscovitz, 189 A. 419, 135 Me. 80.
Tex.—Galveston, H. & S. A. R. Co. v. Hynes, 50 S.W. 624, 21 Tex.Civ.App. 34.
39 C.J. p 871 note 86.

Requesting cigarette from chauffeur
The mere fact that an employee of an automobile owner, while riding in an automobile operated by the owner's chauffeur, requested a cigarette which the chauffeur handed her shortly before the accident, will not preclude a recovery by the employee, if the act were negligent, since a jury might conclude that the employee had a right to assume that an act such as the passing of a cigarette is commonly performed by experienced chauffeurs while engaged in the operation of a car and may be accomplished without hazard.—Sylvia v. Etscovitz, 189 A. 419, 135 Me. 80.

96. La.—Lewis v. A. Moresi Co., App., 196 So. 70.

Falling from wagon
A farm laborer who was transported in wagon hauled by motor tractor was not guilty of contributory negligence precluding recovery for injuries sustained when he fell from wagon by start of tractor because of failure to take proper precaution in holding himself in wagon where there was nothing for laborer to hold on to and he stood and balanced himself as well as he could.—Lewis v. A. Moresi Co., supra.

97. Mass.—Hannah v. Connecticut River R. Co., 28 N.E. 682, 154 Mass. 529.
39 C.J. p 871 note 87.

98. N.J.—Nestico v. Delaware, L. & W. R. Co., 133 A. 83, 4 N.J.Misc. 418.

Exploding bottle
Knowledge of employee, who was injured when bottle of carbonated beverage exploded and hit him in the eye while employed by manufacturer of carbonated beverage, that bottles might be broken by careless handling was not equivalent to knowledge that danger confronted him in the factory.—Wood v. Canadian Imperial Dry, 5 N.E.2d 8, 296 Mass. 80.

pliance.[99]

Rules and warnings for servant's protection. The general rule is subject to the limitation that the servant has the right to assume that rules formulated by the master for the protection of his servants in the performance of their duties will be observed,[1] and also that warnings will be given to him, when a perilous situation arises, where the right to such warning is established by custom.[2]

The general rule has been applied where an employee operated a grinding machine without a mask, at a time when a fan and exhaust pipes furnished to carry off dust were not functioning;[3] where an engineer placed his hand in an automatic stoker without fully shutting off the steam;[4] where an engine operator and foreman crossed a pit or plank which he knew to be loose and dangerous;[5] where an experienced chauffeur operated a machine, the brakes of which he knew to be defective;[6] where a motorman used a fuse furnished him which he knew to be defective and dangerous;[7] where a servant stepped upon a cover of a blow tank containing steam, hot water, and grease which cover went down with his weight;[8] where a servant took shelter under a car during a storm,[9] tripped over a foot scraper plainly visible outside the master's office,[10] used a defective ladder,[11] or went upon a scaffold apparently and obviously in process of dismantlement;[12] where a telephone lineman on descending a pole stepped on a grounded telegraph cable and grasped an iron brace with which the company's wire was in contact, the insulation of the wire being worn off at the place of contact and the dangerous condition being obvious to casual observation;[13] and where a window washer accustomed to the building and having had opportunity for inspection was precipitated to the ground and killed because the window sash to which he held pulled out.[14]

Blasting. An experienced member of a railroad construction crew engaged in blasting operations must protect himself from the dangers incident thereto,[15] including the manner of setting off a blast[16] and the seeking of a place of safety during such operations[17] unless his duties require him to remain at a dangerous place.[18]

Last clear chance. In accordance with the last clear chance doctrine, discussed supra § 423, recovery is not barred by the failure of the servant to take proper precautions for his safety where his position of peril was discovered in time to avoid injury to him by the use of ordinary care.[19]

§ 455. —— Duty of Servant to Give Warnings or Signals

A servant who in the course of his duties assumes a position of danger is under a duty to use all available means to give a warning or signal thereof to his master and other servants.

Where, in the performance of his duties, a servant assumes a position of danger he is bound to use all available means to give a warning or signal thereof to his master and other servants, and may not recover for injuries caused by his failure to do so[20] or by his failure to observe that his signals

99. Tex.—El Paso Northeastern R. Co. v. Ryan, 81 S.W. 563, 36 Tex. Civ.App. 190.

1. Mo.—Johnson v. Waverly Brick & Coal Co., 205 S.W. 615, 276 Mo. 42.
39 C.J. p 871 note 88.

2. Minn.—Magliani v. Minnesota Transfer R. Co., 121 N.W. 635, 108 Minn. 148.
39 C.J. p 871 note 89.

3. Pa.—Price v. New Castle Refractories Co., 3 A.2d 418, 332 Pa. 507.

4. Wis.—Hansen v. Campbell Laundry Co., 151 N.W. 262, 160 Wis. 221.

5. Ark.—Chicago, R. I. & P. R. Co. v. Hicks, 198 S.W. 529, 131 Ark. 593.

6. N.Y.—Marks v. Stolts, 150 N.Y. S. 952, 165 App.Div. 462.
Defective brakes and lights
Ark.—Trinity Farm Const. Co. v. Brannam, 82 S.W.2d 523, 190 Ark. 1032.

7. Ind.—Merica v. Ft. Wayne & W. V. Tract. Co., 97 N.E. 192, 49 Ind. App. 288.

8. Ill.—Nowakowski v. G. H. Hammond Co., 155 Ill.App. 533.

9. Kan.—Carey v. Chicago, R. I. & P. R. Co., 114 P. 197, 84 Kan. 274, 46 L.R.A.,N.S., 877.

10. Mo.—McGinnis v. Hydraulic Press Brick Co., 169 S.W. 30, 261 Mo. 287, L.R.A.1915F 583.

11. Ga.—Williams v. Georgia Southern & F. R. Co., 121 S.E. 700, 31 Ga.App. 700.
Mo.—Mosely v. Sum, 130 S.W.2d 465, 344 Mo. 969—Cristy v. Southwest Missouri R. Co., 110 S.W. 694, 131 Mo.App. 266.

12. Ill.—Swift v. Larson, 136 Ill. App. 93.

13. Tenn.—Memphis Cons. Gas & Electric Co. v. Simpson, 109 S.W. 1155.

14. Wash.—Brandon v. Globe Inv. Co., 184 P. 325, 108 Wash. 360, 10 A.L.R. 286.

15. Ky.—Louisville & N. R. Co. v. Morgan's Adm'r, 9 S.W.2d 212, 225 Ky. 447.

16. Ky.—Hough & Spradlin Co. v. Clark, 151 S.W. 28, 151 Ky. 61.
39 C.J. p 831 note 92 [a].

17. Ky.—Louisville & N. R. Co. v. Morgan's Adm'r, 9 S.W.2d 212, 225 Ky. 447.

18. Ky.—Louisville & N. R. Co. v. Morgan's Adm'r, supra.

19. Mo.—Beal v. Chicago, B. & Q. R. Co., 285 S.W. 482—Rashall v. St. Louis, I. M. & S. R. Co., 155 S.W. 426, 249 Mo. 509.
W.Va.—Hudson v. Norfolk & W. Ry. Co., 146 S.E. 525, 106 W.Va. 437, certiorari denied 49 S.Ct. 481, 279 U.S. 866, 73 L.Ed. 1004, rehearing denied 50 S.Ct. 79.
39 C.J. p 871 note 91.

20. Ill.—Illinois Cent. R. Co. v. Braden, 128 Ill.App. 265.
Mo.—Rittenhouse v. St. Louis-San Francisco R. Co., 252 S.W. 945, 299 Mo. 199.
S.C.—Hilton v. Southern Ry. Co., 7 S.E.2d 161, 192 S.C. 476.
39 C.J. p 871 note 93.
Disobedience of rules or orders requiring servant to give warnings or signals see infra § 459.

were not noticed.[21] The fact that the employee does not realize his peril does not relieve him from the duty of giving such notice.[22] Where, however, the servant has given due notice that he has assumed a position of danger, he has the right to assume that no movement which might result in injury to him will be made without giving him timely notice;[23] and where a servant is injured through the negligence of another servant in disobeying instructions given by the servant who was injured, and the instructions given were plain, the injured servant is not necessarily guilty of contributory negligence in failing to make the other servant understand or comprehend the instructions.[24]

§ 456. —— Application of Rules

a. Servants on or about cars or locomotives
b. Servants operating hand cars, velocipedes, tricycles, or speeders
c. Servants working on or near railroad tracks
d. Servants crossing tracks or yards
e. Servants working on or about elevators
f. Servants working in or about mines
g. Servants working about unguarded holes

a. Servants on or about Cars or Locomotives

(1) In general
(2) Going between or under cars or engines
(3) Guarding against obstructions on or near track

(1) In General

A servant on or about a car or locomotive must take such precautions against known or obvious dangers inherent in the work in which he is engaged as an ordinarily prudent man would take under the same or similar circumstances.

In accordance with the general rules discussed supra § 454, a servant on or about a car or locomotive must take such precautions against known or obvious dangers inherent in the work in which he is engaged as an ordinarily prudent man would take under the same or similar circumstances, and if injuries result from a neglect of this duty, there may be no recovery,[25] especially where the servant has placed himself in a position where his peril may not be easily discovered,[26] and the duty of taking such care is a continuing one.[27] Nevertheless, in the performance of his duties such a servant is entitled to assume that rules or directions for the performance of the work by others engaged in the service will be complied with, and he is under no obligation to take precautions which are unnecessary if the rules or directions have been complied with,[28] or to guard against unanticipated dangers,[29]

21. Mo.—Giatio v. St. Louis & S. F. R. Co., 111 S.W. 1183, 132 Mo. App. 363.
39 C.J. p 872 note 94.

22. Mo.—Rittenhouse v. St. Louis-San Francisco Ry. Co., 252 S.W. 945, 299 Mo. 199.

23. La.—Cross v. Lee Lumber Co., 57 So. 631, 130 La. 66.
Mo.—Nelson v. Heine Boiler Co., 20 S.W.2d 906, 323 Mo. 826.

24. Ill.—Casey v. Siegel, 174 Ill. App. 566.

25. U.S.—Baltimore & O. R. Co. v. Berry, Mo., 52 S.Ct. 510, 286 U.S. 272, 76 L.Ed. 1098—New York, C & St. L. R. Co. v. Boulden, C.C.A. Ind., 63 F.2d 917, certiorari denied 53 S.Ct. 785, 289 U.S. 753, 77 L.Ed. 1498.
39 C.J. p 872 note 1.

A conductor standing on the stirrup of a box car, preparatory to alighting at a station, is chargeable with knowledge of what he saw or could have seen, although he is not required to look in any particular direction at any particular time or to keep his eyes riveted on any particular spot.—New York, C. & St. L. R. Co. v. Boulden, supra.

Guard chains
Engineer and fireman have joint duty of keeping in place guard chains between locomotive and tender.—Erie R. Co. v. Lindquist, C.C. A.Pa., 27 F.2d 98.

Precautions at crossing
(1) A train conductor standing on the running board of the tender, in the daytime, at a highway crossing being used by steady stream of traffic, to protect train and warn others of its approach, was guilty of contributory negligence in failing to see that engineer gave crossing signals or stopped train and to signal engineer or fireman to reduce speed, if train was traveling too rapidly, or in voluntarily placing himself in such position that he could not give such signals.—Hilton v. Southern Ry. Co., 7 S.E.2d 161, 192 S.C. 476.

(2) A railroad employee riding in an automobile in the course of his duties was bound, at a crossing, to watch out for and avoid trains operated in the usual way, regardless of whether he had actual knowledge of his imminent danger or the alleged negligence of the engineer, of the train with which the automobile collides.—Southern Ry. Co. v. Melton, 198 So. 588, 240 Ala. 244.

Watching switched cars
Switch engine crew and foreman were required in exercise of care to watch switched cars to avoid injuries from a collision.—Atlantic Coast Line R. Co. v. Russell, 111 So. 753, 215 Ala. 600.

26. Ark.—Mitchell v. Chicago, R. I. & P. R. Co., 151 S.W. 520, 105 Ark. 364.

27. Ala.—Southern Ry. Co. v. Melton, 198 So. 588, 240 Ala. 244.

28. U.S.—Ballard v. Atchison, T. & S. F. R. Co., C.C.A.Tex., 100 F.2d 162.
Ala.—Southern Ry. Co. v. Fisher, 74 So. 580, 199 Ala. 377.
Mo.—Lewis v. Wabash R. Co., 121 S.W. 1090, 142 Mo.App. 585.
Utah.—Miller v. Southern Pac. Co., 21 P.2d 865, 82 Utah 46, certiorari denied Southern Pac. Co. v. Miller, 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 600.
39 C.J. p 873 note 3.

Brakeman riding on top of car had right to presume engineer would exercise reasonable care for his safety.—Gulf, M. & N. R. Co. v. Walters 134 So. 831, 161 Miss. 313.

29. Cal.—Hackley v. Southern Pac. Co., 45 P.2d 447, 6 Cal.App.2d 611,

or to do an act to prevent or minimize his injuries, if his efforts will be unavailing.[30]

(2) Going between or under Cars or Engines

A railroad employee is bound to exercise such care as a reasonably prudent man would exercise under the same or like circumstances in the performance of duties which require him to go between or under cars or engines, as by giving notice of his position.

Employees of railroad companies, whose duties require them to go between or under cars or engines, are bound to exercise such care as reasonably prudent men would exercise under the same or similar circumstances.[31] An employee is chargeable with such contributory negligence as will bar a recovery for injuries sustained where, without giving notice to other proper employees of the dangerous position he has assumed, he goes between cars to make couplings or to uncouple them or to make repairs or to discharge other duties,[32] or where he goes under cars[33] or engines[34] to inspect or repair them,[35] or to clean out ash pans,[36] unless it is actually known by such other employees that he is in such a position of danger,[37] and in such a case he has a right to rely on the assurance of a foreman or superior employee that a proper signal or warning of his dangerous position has been given.[38]

Nevertheless, the servant has the right to assume that the company will conduct its business with reasonable regard to its rules and with reasonable care for his safety while in the performance of his duties in coupling and uncoupling cars;[39] and, where the servant has given due notice that he has assumed a position of danger, he has the right to assume that no movement will be made of the car under which he is working without notice to him, and he is not guilty of contributory negligence in assuming any position which is necessary or convenient for the doing of the work in which he is engaged,[40] and it has been held that a brakeman is not under an absolute duty to stop, look, and listen before crossing between cars to another track merely because the track is a place of danger.[41] It has also been held that it is not contributory negligence for a car repairer to go under cars while standing on sidetracks where they are repaired, without stationing anyone to watch for approaching trains, if it is known to the yardmaster that repairs are to be made there.[42] A car repairer who properly places signal flags before going under cars to make repairs cannot be held guilty of contributory negligence where he is injured by a train on another track striking the cars under which he was working, they being too close to the switch to be clear.[43]

(3) Guarding against Obstructions on or near Track

Railroad employees engaged in the operation of cars or trains, such as engineers, firemen, motormen, conductors, brakemen, and others, are bound to look out for, and guard against, obstructions or erections on, near, or over the track.

certiorari denied Southern Pac. Co. v. Hackley, 56 S.Ct. 153, 296 U.S. 630, 80 L.Ed. 447.
La.—Williams v. W. R. Pickering Lumber Co., 52 So. 167, 125 La. 1087, 136 Am.S.R. 365, 19 Ann. Cas. 1224.
Mo.—Missouri, K. & T. R. Co. v. Gray, 120 S.W. 527, 56 Tex.Civ. App. 61.

Danger caused by accident
Although a rule requires trains to aproach time-table stations under control, "expecting to find the main track occupied," the engineer of the second section of a train is not chargeable with knowledge that the front section is there, when, but for an accident, unknown to him, it would have passed on before his arrival.—Louisville & N. R. Co. v. Mothershed, 26 So. 10, 121 Ala. 650.

Unexpected emergency stop of train
La.—Williams v. W. R. Pickering Lumber Co., 52 So. 167, 125 La. 1087, 136 Am.S.R. 365, 19 Ann.Cas. 1224.

30. U.S.—Searfoss v. Lehigh Valley R. Co., C.C.A.N.Y., 76 F.2d 762.

Protesting speed of motor car
Track repairman riding on railroad motor car when it struck stationary train has been held under no duty to protest against excessive speed if driver of motor car would not have heeded protest, with respect to contributory negligence, it being ability to act to prevent or minimize injuries that imposes duty on plaintiff to give warning or make protest.—Searfoss v. Lehigh Valley R. Co., supra.

31. Mich.—McCauley v. Michigan Cent. R. Co., 132 N.W. 510, 167 Mich. 230.
Va.—Southern R. Co. v. Simmons, 55 S.E. 459, 105 Va. 651.
39 C.J. p 873 note 4.

32. Mo.—Rittenhouse v. St. Louis-San Francisco R. Co., 252 S.W. 945, 299 Mo. 199.
39 C.J. p 873 note 5.

33. Ark.—St. Louis, I. M. & S. R. Co. v. Dupree, 105 S.W. 878, 84 Ark. 377, 120 Am.S.R. 74.
39 C.J. p 873 note 6.

34. Iowa.—Gibson v. Burlington, C. R. & N. R. Co., 78 N.W. 190, 107 Iowa 596.
39 C.J. p 873 note 7.

35. W.Va.—Seldomridge v. Chesapeake & O. R. Co., 33 S.E. 293, 46 W.Va. 569.

36. W.Va.—Seldomridge v. Chesapeake & O. R. Co., supra.

37. Ark.—St. Louis, I. M. & S. R. Co. v. Dupree, 105 S.W. 878, 84 Ark. 377, 120 Am.S.R. 74.

Railroad bound by brakeman's knowledge of employee's peril between cars.—Rose v. St. Louis-San Francisco Ry. Co., 289 S.W. 913, 315 Mo. 1181.

38. Ill.—Walaite v. Chicago, R. I. & P. Ry. Co., 33 N.E.2d 119, 376 Ill. 59.

39. Va.—Southern R. Co. v. Simmons, 55 S.E. 459, 105 Va. 651.
39 C.J. p 873 note 11.

40. La.—Cross v. Lee Lumber Co., 57 So. 631, 130 La. 66.
39 C.J. p 873 note 12.

41. N.C.—Rigsbee v. Atlantic Coast Line R. Co., 129 S.E. 580, 190 N.C. 231.

42. Iowa.—Berry v. Central R. Co., 40 Iowa 564.

43. U.S.—Chicago Terminal R. Co. v. Stone, Ind., 118 F. 19, 55 C.C.A. 187.
39 C.J. p 873 note 14.

Railroad employees engaged in the operation of cars or trains, such as engineers, firemen, motormen, conductors, brakemen, and others, are bound to look out for, and guard against, obstructions or erections on, near, or over the track, the existence and the dangerous nature of which are known to or should be known to them in the exercise of ordinary care, and if such an employee neglects his duty in this regard he is chargeable with contributory negligence, barring a recovery for injuries sustained,[44] as where by reason of his failure to exercise such care a brakeman riding on the top of a freight car is injured by an overhead bridge,[45] or where an employee fails to look out for signals for the safety of the train as well as for himself, and is injured by an obstruction near the track.[46]

On the other hand, if the employee makes a reasonable effort to avoid injury from an obstruction over the track which he knew to be dangerous he is not chargeable with contributory negligence.[47] So also, if the employee is injured by an obstruction negligently placed too near the track, a recovery for the injury so sustained is authorized where he had no knowledge of the obstruction or the danger incident thereto and was not chargeable with such knowledge under the circumstances and surroundings;[48] and he is not chargeable with such knowledge unless the defect or danger is so obvious that reasonable observation would have brought it to his notice[49] or unless he has been warned of it.[50] Where a motorman fails to see a car standing on the track by reason of the confusing effect of the headlight of a car coming on a parallel track, and is injured in consequence, he is not chargeable with negligence in failing to slacken speed because of the effect of the headlight of the other car.[51]

b. Servants Operating Hand Cars, Velocipedes, Tricycles, or Speeders

Railroad employees who operate hand cars, velocipedes, tricycles, or speeders must take such precautions against the obvious hazards of the work in hand as an ordinarily prudent man would take under the same or similar circumstances, and generally are chargeable with contributory negligence if they fail to do so.

Railroad employees who operate hand cars, velocipedes, tricycles, or speeders in the course of their duties for the railroad are bound to take such precautions against the obvious hazards of the work in hand as would be taken by ordinarily prudent men under the same or similar circumstances, and generally are chargeable with contributory negligence if they fail to take such precautions.[52] It is their duty to keep a lookout for trains or cars[53] and to get their cars or vehicles and themselves out of the way.[54] It is also their duty to keep a lookout for other vehicles at a crossing.[55] In the absence of statute, such an employee is chargeable with contributory negligence, barring a recovery for injuries sustained, if, after seeing an approaching train, he has sufficient time and opportunity to leave a hand car on which he is riding and go to a place of safety,[56] or to remove the hand car from the

44. Ala.—Louisville & N. R. Co. v. Fitzgerald, 49 So. 860, 161 Ala. 397.
Iowa.—Bruckshaw v. Chicago, R. I. & P. Ry. Co., 155 N.W. 273, 173 Iowa 207.
39 C.J. p 873 note 15.

45. Ala.—Schlaff v. Louisville & N. R. Co., 14 So. 105, 100 Ala. 377.
N.Y.—Wallace v. Central Vermont R. Co., 18 N.Y.S. 280.
Va.—Haffner v. Chesapeake & O. Ry. Co., 31 S.E. 899, 96 Va. 528.
39 C.J. p 873 note 15 [a].

46. Md.—Northern Cent. R. Co. v. State, 83 A. 396, 117 Md. 482.

47. Ky.—Louisville & N. R. Co. v. Cooley, 49 S.W. 339, 20 Ky.L. 1372.
39 C.J. p 874 note 17.

48. R.I.—Whipple v. New York, N. H. & H. R. Co., 35 A. 305, 19 R. I. 587, 61 Am.S.R. 796.
39 C.J. p 874 note 18.

49. R.I.—Whipple v. New York, N. H. & H. R. Co., supra.
39 C.J. p 874 note 19.

50. R.I.—Whipple v. New York, N. H. & H. R. Co., supra.

51. Mo.—Kinney v. Metropolitan St. R. Co., 169 S.W. 23, 261 Mo. 97.
39 C.J. p 875 note 21.

52. Kan.—Palmer v. Midland Valley R. Co., 235 P. 853, 118 Kan. 507.
Va.—Southern Ry. Co. v. Chadwick, 132 S.E. 191, 144 Va. 443.
39 C.J. p 875 note 24.

Imminence of danger

Fact that hand car was out of repair, and that wheels were out of alignment and that one was bent, and that wheels sometimes had tendency to climb rails and leave track, did not make danger confronting employee so obvious, imminent, and immediately threatening as to make it imprudent for him to continue work, defeating recovery for injury.—Palmer v. Midland Valley R. Co., 235 P. 853, 118 Kan. 507.

53. N.Y.—Rocco v. Lehigh Valley R. Co., 181 N.E. 11, 259 N.Y. 51, reversed on other grounds 53 S.Ct. 343, 288 U.S. 275, 77 L.Ed. 743.
39 C.J. p 875 note 25.

A person in charge of railroad motor car is required to take notice of and anticipate running of trains on same track.—Nelson's Adm'x v. Southern Ry. Co., 194 S.W.2d 518, 302 Ky. 243.

Duty of foreman

A railroad section foreman who is riding on a motor car, operated by another member of the crew, and who is riding in a position near the front of the car and ahead of the operator, is under a duty to keep a lookout, and he is not relieved of this duty even though the operator is rightfully operating the car.—Wiggins v. Powell, C.C.A.Fla., 119 F.2d 751, certiorari denied Powell v. Wiggins, 62 S.Ct. 94, 314 U.S. 649, 86 L.Ed. 520.

54. U.S.—Deere v. Southern Pac. Co., C.C.A.Or., 123 F.2d 438, certiorari denied 62 S.Ct. 916, 315 U. S. 819, 86 L.Ed. 1217.
39 C.J. p 875 note 26.

55. Minn.—Westover v. Chicago, M., St. P. & P. Ry. Co., 266 N.W. 741, opinion supplemented 267 N.W. 427, 197 Minn. 194.

56. Mo.—Williamson v. Wabash R. Co., 122 S.W. 1113, 139 Mo.App. 481.
39 C.J. p 875 note 27.

track,[57] and fails to do so, or if he runs a hand car into a deep cut without sending a man ahead to warn a train about due,[58] or runs a railroad motor car around a curve without sending a member of the crew ahead to ascertain whether the track is clear, as required by a rule of the company.[59] It has also been held contributory negligence to start out on a speeder before an engine which the employee knows is only two miles behind.[60] However, under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, et seq, the act of such a servant in exposing himself to injury by attempting to remove a motorcar from in front of an approaching train does not necessarily defeat a recovery, but it may reduce the amount of damages.[61]

Reliance on care of railroad or other servants. Employees operating hand cars and other similar vehicles have the right to assume that fellow employees will exercise care in the performance of their duties connected with the operation of such cars or vehicles[62] and that the operators of an approaching train or car will exercise reasonable care to avoid injuring them.[63] A section foreman riding on a hand car may assume that trainmen will obey a rule requiring that, when torpedoes are placed on the track, a flagman be stationed on the track to warn those approaching, and may assume that there are no torpedoes on the track, when he sees no flagman, regardless of the object of the rule.[64] A section hand, who is traveling on a hand car which is in charge of the foreman, and who looks and listens for an approaching train but does not see one, is not negligent in continuing on the car.[65]

Applying the last clear chance doctrine, discussed supra § 423, if the company could, by the exercise of ordinary care, have discovered the servant in time to avoid injuring him,[66] or could, by the exercise of ordinary care, have avoided the injury after discovering the servant's position of peril,[67] the servant may recover notwithstanding his own negligence unless he was not in a position from which he could not extricate himself and was negligent after becoming aware of his danger.[68]

c. Servants Working on or near Railroad Tracks

(1) In general
(2) Section hands, trackmen, etc.
(3) Watchmen, flagmen, or gatemen

(1) In General

An employee working at his post of duty on or near a railroad track must exercise such care for his safety as the danger of the surroundings would suggest to a man of ordinary prudence and as the proper attention to his duties will permit.

An employee working at his post of duty on or near a railroad track is not held to the same measure of diligence in looking out for, and taking precautions against, approaching trains as a traveler about to cross the track,[69] but he must exercise such care for his safety as the danger of the sur-

57. Wash.—Cooney v. Great Northern R. Co., 37 P. 438, 9 Wash. 292, 39 C.J. p 875 note 28.

58. U.S.—Goodlett v. Louisville & N. R. Co., Tenn., 7 S.Ct. 1254, 122 U.S. 391, 30 L.Ed. 123.
39 C.J. p 875 note 29.

59. Ky.—Nelson's Adm'x v. Southern Ry. Co., 194 S.W.2d 518, 302 Ky. 243.

60. Ark.—St. Louis, I. M. & S. R. Co. v. Lawrence, 152 S.W. 1002, 106 Ark. 32.

61. Ga.—Southern Ry. Co. v. Newman, 199 S.E. 753, 187 Ga. 132, followed in Southern Ry. Co. v. Newman, 199 S.E. 755, 187 Ga. 136.

62. Ga.—Southern Ry. Co. v. Heaton, 6 S.E.2d 339, 61 Ga.App. 386.
Tex.—Texas & P. Ry. Co. v. Lewis, Civ.App., 26 S.W. 873.

Opening switch

If a fellow employee was negligent in opening switch for motor car on which plaintiff employee was riding and signaling it to proceed and in continuing to maintain that signal in effect when gondola car was rapidly approaching from near distance, negligent failure of plaintiff to observe the rapid approach of the gondola car would not bar recovery.—Hutchins v. Akron, C. & Y. R. Co., C.C.A.Ohio, 162 F.2d 189.

Reliance on subordinate to keep lookout

Operator of track car who was foreman of mowing crew which together with conductor pilot occupied track car which collided with automobile at highway crossing has been held not guilty of primary negligence in failing to observe approaching automobile so as to preclude his recovery for injuries sustained, where railroad's rules required subordinates as well as foreman to keep lookout, and foreman could reasonably rely on subordinate to keep lookout for approaching vehicles.—Westover v. Chicago, M., St. P. & P. Ry. Co., 266 N.W. 741, opinion supplemented 267 N.W. 427, 197 Minn. 194.

63. S.C.—Covington v. Atlantic Coast Line R. Co., 155 S.E. 438, 158 S.C. 194, certiorari denied Atlantic Coast Line R. Co. v. Covington, 51 S.Ct. 33, 282 U.S. 858, 75 L.Ed. 759.

64. Tex.—Galveston, H. & N. R. Co. v. Murphy, 114 S.W. 443, 52 Tex. Civ.App. 420.

65. Iowa.—Canfield v. Chicago, R. I. & P. R. Co., 121 N.W. 186, 142 Iowa 658.
39 C.J. p 875 note 31.

66. Mo.—Payne v. Missouri Pac. R. Co., 79 S.W. 719, 105 Mo.App. 155.
39 C.J. p 875 note 34.

67. Mo.—Lynch v. Chicago & A. Ry. Co., 106 S.W. 68, 208 Mo. 1.
39 C.J. p 875 note 35.

68. U.S.—Deere v. Southern Pac. Co., C.C.A.Or., 123 F.2d 438, certiorari denied 62 S.Ct. 916, 315 U.S. 819, 86 L.Ed. 1217.

Railroad employee's error of judgment in attempting to remove motor car from path of approaching train would not convict him of such recklessness as to preclude a recovery.—Moran v. Atchison, T. & S. F. Ry. Co., 48 S.W.2d 881, 330 Mo. 278, certiorari denied Atchison, T. & S. F. R. Co. v. Moran, 53 S.Ct. 21, 287 U.S. 621, 77 L.Ed. 539.

69. Ark.—St. Louis, I. M. & S. Ry. Co. v. Jackson, 93 S.W. 746, 78 Ark. 100, 6 L.R.A.,N.S., 646, 8 Ann. Cas. 328.
Mont.—Neary v. Northern Pac. Ry. Co., 97 P. 944, 37 Mont. 461, 19 L.R.A.,N.S., 446.
39 C.J. p 876 note 39.

roundings would suggest to a man of ordinary prudence and as the proper attention to his duties will permit, and, as a general rule, if he fails in this duty by reason of which he sustains injuries, there can be no recovery therefor.[70] However, this principle applies only when the action causing the injury is one naturally to be expected and not one of such an unusual character as to deprive the servant of the opportunity to protect himself,[71] although it has been held that a custom of certain trains to use the main line on all occasions does not excuse an employee for failing to exercise ordinary care in walking on a side track on the approach of such a train.[72]

In exercising such care the employee is entitled to act on the assumption that rules provided by the master for the protection of his servants in the performance of their duties will be observed[73] and also that warning will be given where a perilous situation arises, where it is customary to give such warning.[74] Where he is given to understand expressly or by custom that he may depend on being warned, he may then relax the vigilance which otherwise he must exercise;[75] but it has been held that the duty to warn the servant does not justify him in relying wholly thereon and that he is not relieved, as a general rule, from a reasonable use of his senses to ascertain the approach of an engine or cars.[76]

(2) Section Hands, Trackmen, Etc.

Section hands, trackmen, and yardmen working on or near the railroad tracks are bound to exercise such care in looking out for, and taking precautions for their own safety against, approaching trains, cars, or engines as the danger of the surroundings would suggest to an ordinarily prudent man and as the proper attention to their duties will permit.

While it has been held that section hands, trackmen, and yardmen working on or near the tracks or in the yards of a railroad company are not chargeable with the same measure of diligence in looking out for, and taking precautions against, approaching trains, cars, or engines, as travelers about to cross the track,[77] they are nevertheless bound to exercise such care for their own safety as the danger of the surroundings would suggest to an ordinarily prudent person and as the proper attention to their duties will permit; if they fail in this duty they will, in general, be barred from a recovery for injuries resulting therefrom.[78] The degree of care to be observed must be determined by the facts and circumstances of the particular case.[79]

Except in so far as the rule may be modified or limited by a custom of the company to give signals or warnings of approaching trains,[80] it has generally been held to be the duty of this class of employees to keep a lookout for trains, cars, or locomotives, and to keep out of their way,[81] whether the trains

70. Mass.—Hanley v. Boston & M. R. R., 190 N.E. 501, 286 Mass. 390, certiorari denied Boston & M. R. R. v. Hanley, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690—Murphy v. Boston & M. R. R., 190 N.E. 501, 286 Mass. 390, certiorari denied Boston & M. R. R. v. Murphy, 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690.
Mo.—Karr v. Chicago, R. I. & P. Ry. Co., 108 S.W.2d 44, 341 Mo. 536—Landes v. Thompson, 148 S.W.2d 78, 235 Mo.App. 772.
Mont.—Neary v. Northern Pac. Ry. Co., 97 P. 944, 37 Mont. 461, 19 L. R.A.,N.S., 446.
Ohio.—Hill v. Pere Marquette R. Co., 20 Ohio Cir.Ct., N.S., 236.
39 C.J. p 876 note 40.

A strike guard whose employment requires him to attend to other duties not connected with the track or moving trains, is required to exercise only ordinary care to keep out of the way of trains.—Louisville & N. R. Co. v. Bryant's Adm'r, 285 S. W. 245, 215 Ky. 401.

71. Mo.—Kippenbrock v. Wabash R. Co., 194 S.W. 50, 270 Mo. 479.
39 C.J. p 877 note 41.

72. Miss.—Morehead v. Yazoo & M. V. R. Co., 36 So. 151, 84 Miss. 112.

73. Minn.—Floan v. Chicago, M. & St. P. R. Co., 111 N.W. 957, 101 Minn. 113.
Tex.—Galveston, H. & S. A. R. Co. v. Conuteson, 111 S.W. 187, 51 Tex. Civ.App. 1.

74. Tex.—Galveston, H. & S. A. R. Co. v. Hynes, 50 S.W. 624, 21 Tex. Civ.App. 34.
39 C.J. p 877 note 43.

75. Ark.—St. Louis-San Francisco Ry. Co. v. Fine, 44 S.W.2d 340, 184 Ark. 940, certiorari denied 52 S. Ct. 502, 286 U.S. 552, 76 L.Ed. 1287.
Mass.—Heaney v. Boston El. R. Co., 98 N.E. 89, 211 Mass. 467.

76. Mass.—Santore v. New York Cent. & H. R. R. Co., 89 N.E. 619, 203 Mass. 437.

77. Minn.—Floan v. Chicago, M. & St. P. R. Co., 111 N.W. 957, 101 Minn. 113.
39 C.J. p 877 note 46.

78. U.S.—Kurn v. Stanfield, C.C.A. Mo., 111 F.2d 469—Jacobson v. Chicago, M., St. P. & P. R. Co., C. C.A.Minn., 66 F.2d 688.
Colo.—Denver & S. L. Ry. Co. v. Bedard, 36 P.2d 770, 95 Colo. 364.
N.H.—Sweeney v. Boston & M. R. R., 175 A. 243, 87 N.H. 90, certiorari denied 55 S.Ct. 638, 294 U.S. 728, 79 L.Ed. 1258.
Pa.—Magyar v. Pennsylvania R. Co., 144 A. 765, 294 Pa. 585.
39 C.J. p 877 note 47.

Car checker stepping on brake shoe
Ga.—Gay v. Osteen, 192 S.E. 539, 56 Ga.App. 224.

79. Colo.—Sagara v. Chicago, R. I. & P. R. Co., 144 P. 881, 58 Colo. 236.
La.—Barnes v. Red River & G. R. R., 128 So. 724, 14 La.App. 188.
39 C.J. p 878 note 48.

80. Mass.—Heaney v. Boston El. R. Co., 98 N.E. 89, 211 Mass. 467.

81. U.S.—Jacobson v. Chicago, M., St. P. & P. R. Co., C.C.A.Minn., 66 F.2d 688—Reynolds v. New York, O. & W. Ry. Co., C.C.A.N.Y., 42 F.2d 164.
Iowa.—Hamilton v. Chicago, B. & Q. R. Co., 234 N.W. 810, 211 Iowa 924.
Mo.—Freeman v. Terminal R. Ass'n of St. Louis, 107 S.W.2d 36, 341 Mo. 288—Goodwin v. Missouri Pac. R. Co., 72 S.W.2d 988, 335 Mo. 398—Martin v. Wabash Ry. Co., 30 S. W.2d 735—Voorhees v. Chicago, R. I. & P. Ry. Co., 30 S.W.2d 22, 325 Mo. 835, 70 A.L.R. 1106.
N.H.—Sweeney v. Boston & M. R. R., 174 A. 676, 87 N.H. 90, certiorari denied 55 S.Ct. 638, 294 U.S. 728, 79 L.Ed. 1258.

are extras or on scheduled runs[82] or whether they are reported on time or are not immediately expected.[83] The character of the work itself, it has been said, is a warning to be on the lookout.[84] An employee engaged in this line of work should not place himself in a position where he cannot see an approaching train or permit himself to become so engrossed in his work as to prevent him from protecting himself.[85]

Right to warnings or signals as affected by rule, custom or statute. Section hands, trackmen, and yardmen at work on or near the tracks or in the yard of a railroad company are entitled to assume that signals or warnings of the approach of trains, engines, or cars will be given where it is the rule or custom of the company to give such signals or warnings;[86] and in default of a compliance by the company with the duty so imposed they should be notified that for the time being they must rely on their own senses for protection.[87]

Nevertheless actual knowledge on the part of the servant will excuse a failure to give a warning or signal;[88] and the right to warnings or signals may be waived by knowledge that the customary duty of giving them is not being performed and by acceptance of the risk without objection.[89] Moreover, a section hand cannot rely on a warning signal being given where he is not in a position to avail himself of it.[90] Section hands are not entitled to rely on statutory crossing signals as the statute imposes this duty only in favor of persons crossing or intending to cross a public highway;[91] nor are they entitled to rely on other warning signals which are not intended for the class of employees to which they belong.[92]

Last clear chance or humanitarian doctrine. It has been held that the last clear chance or humanitarian doctrine discussed supra § 423, cannot be applied with as much strictness to section hands or trackmen as to passengers and strangers[93] and that the doctrine does not apply where the trainmen could not have averted the accident at any time before its occurrence, the negligence of the employee being operative up to the very instant of the accident.[94] If an engineer sees a section hand or trackman and has reason to believe that he will step off the track there is nothing, in his remaining until the last moment, to suggest to the engineer that he is oblivious of danger,[95] since an engineer approaching employees working on the track may rely on the fact that they often remain on the track until the train is dangerously close and then by a quick step put themselves out of danger,[96] and may assume that they will do so;[97] and he is not required to stop his train until the workman is discovered in

Pa.—Magyar v. Pennsylvania R. Co., 144 A. 765, 294 Pa. 585.
Vt.—Zuverino v. Boston & M. R. Co., 143 A. 308, 101 Vt. 261.
39 C.J. p 878 note 50.

Rule not applicable

Federal rule that railroad yard and track employees must look out for trains would not apply in action under Federal Employers' Liability Act for injuries sustained by freight check clerk when freight truck, being pulled by tractor through tunnel connecting railroad station and freight room, collided with parked freight trucks between which clerk was standing, since clerk was in place where tractor and trucks pulled by it should not have gone.—Mrazek v. Terminal R. Ass'n of St. Louis, 111 S.W.2d 26, 341 Mo. 1054, certiorari denied Terminal R. Ass'n of St. Louis v. Mrazek, 58 S.Ct. 760, 303 U.S. 656, 82 L.Ed. 1116.

82. Iowa.—Hamilton v. Chicago, B. & Q. R. Co., 234 N.W. 810, 211 Iowa 924.
N.H.—Sweeney v. Boston & M. R. R., 174 A. 676, 87 N.H. 90, certiorari denied 55 S.Ct. 638, 294 U.S. 728, 79 L.Ed. 1258.

83. Iowa.—Hamilton v. Chicago, B. & Q. R. Co., 234 N.W. 810, 211 Iowa 924.

84. Mo.—Degonia v. St. Louis, I. M. & S. R. Co., 123 S.W. 807, 224 Mo. 564.

85. Mo.—Degonia v. St. Louis, I. M. & S. R. Co., supra—Cahill v. Chicago & A. R. Co., 103 S.W. 532, 205 Mo. 393—Kelly v. Union R. & Transit Co., 11 Mo.App. 1.
39 C.J. p 878 note 52.

86. Mo.—Freeman v. Terminal R. Ass'n of St. Louis, 107 S.W.2d 36, 341 Mo. 288—Goodwin v. Missouri Pac. R. Co., 72 S.W.2d 988, 335 Mo. 398.
39 C.J. p 878 note 53.

87. Neb.—Swanson v. Union Stock Yards Co., 131 N.W. 594, 89 Neb. 361.

88. Ark.—Tyler v. St. Louis, I. M. & S. R. R. Co., 198 S.W. 128, 130 Ark. 583.
N.Y.—Dangelo v. Lake Shore & M. S. R. Co., 111 N.Y.S. 800, 127 App. Div. 835.

89. Mo.—Harris v. Missouri Pac. R. Co., 40 Mo.App. 255.

90. Mass.—Blute v. New York, N. H. & H. R. Co., 81 N.E. 188, 195 Mass. 395.

Some distance away from rest of the employees

A section hand working on a track cannot rely on warning being given him of the approach of trains by the foreman, where for half an hour he had been separated from the rest of the employees at work under the foreman at a place at least a hundred yards from where he was struck by the train; in these circumstances it was his duty to look out for himself.—Blute v. New York, N. H. & H. R. Co., supra.

91. Mo.—Degonia v. St. Louis, I. M. & S. R. Co., 123 S.W. 807, 224 Mo. 564.

92. Ky.—Cincinnati, N. O. & T. P. R. Co. v. Swann, 169 S.W. 886, 160 Ky. 458, L.R.A.1915C 27.
39 C.J. p 871 note 88 [a].

93. Mo.—Degonia v. St. Louis, I. M. & S. R. Co., 123 S.W. 807, 224 Mo. 564.
39 C.J. p 878 note 60.

Doctrine held not applicable

N.C.—Sampson v. Jackson Bros. Co., 166 S.E. 181, 203 N.C. 413.

94. Vt.—Zuverino v. Boston & M. R. Co., 143 A. 308, 101 Vt. 261.

95. Mo.—Atkins v. Chicago & A. R. Co., 132 S.W. 1186, 152 Mo.App. 291—Williamson v. Wabash R. Co., 122 S.W. 1113, 139 Mo.App. 481.

96. Mo.—Degonia v. St. Louis, I. M. & S. R. Co., 123 S.W. 807, 224 Mo. 564.

97. Mo.—Gabal v. St. Louis & S. F. R. Co., 158 S.W. 12, 251 Mo. 257.

a perilous position.[98] However, if it appears that the employee is in danger, the engineer must use the same care to protect him that he would for anyone else, regardless of the fact that he is an employee of the company.[99]

(3) Watchmen, Flagmen, or Gatemen

A watchman, flagman, or gateman, in the course of his duty to ascertain the approach of trains and give signals, must take proper precautions against being injured by such trains.

A watchman, flagman, or gateman whose duty it is to ascertain the approach of trains and to give signals stands on a different footing from that occupied by other servants whose duty requires them to work on or near the track, and where he is injured by reason of his failure to see a train which it was his duty to observe he cannot recover therefor[1] except where the last clear chance doctrine may be invoked.[2] His duty, it has been said, is to look and listen continuously, and his failure to do so is contributory negligence.[3] A flagman running ahead of a slowly moving train is not excused from taking precautions for his own safety by his expectation that the engineer or motorman will protect him.[4]

It has been held, however, that, where after an engine had passed a crossing the flagman waved a flag showing that it was open to travel by the public and continued to wave it, it was not per se negligence for him to step on the track without looking to see whether the engine which had crossed the track was backing,[5] since he had good reason to infer that the engine would not move over the crossing while he was waving the flag, announcing that it was open to the public.[6] A bridge watchman walking along a track on which a train is approaching is not necessarily guilty of contributory negligence in crossing to the opposite track according to instructions and custom.[7]

d. Servants Crossing Tracks or Yards

A servant who is not engaged in any work which demands his attention at a time when he is crossing a track or yard is bound to see or hear approaching trains and to give his undivided attention to what is taking place about him, and he may be chargeable with contributory negligence for a nonobservance of this duty.

Except where the last clear chance doctrine may be invoked,[8] where a servant when crossing a track or yard is not engaged in the performance of any work which demands his attention, it is his duty to see and hear approaching trains and to give his undivided attention to what is taking place about him, and if he is injured by reason of a nonobservance of this requirement he may not be entitled to recover,[9] and the fact that he once looked and listened will not excuse him if he allows sufficient time to elapse for an engine or train to come into dangerous proximity and then attempts to cross without looking or listening.[10] In these circumstances the servant is held to the same measure of care in looking and listening for approaching trains as any other person lawfully passing over the track.[11] He has no right to rely on a custom to give warnings and signals given only to those servants actively engaged in the performance of services.[12] Nevertheless, a servant crossing railroad yards may rely on the observance of a rule forbidding a flying switch, and is not required to look and listen for the approach of cars cut loose from an engine in a flying switch on the track he was about to cross.[13]

e. Servants Working on or about Elevators

A servant working on or about an elevator must take

98. Ark.—Missouri Pac. R. Co. v. Beard, 39 S.W.2d 292, 183 Ark. 877.

99. U.S.—Jacobson v. Chicago, M., St. P. & P. R. Co., C.C.A.Minn., 66 F.2d 688—Chicago, M., St. P. & P. R. Co. v. Kane, C.C.A.Mont., 33 F. 2d 866, certiorari denied 50 S.Ct. 37, 280 U.S. 588, 74 L.Ed. 637.
La.—Barnes v. Red River & G. R. R., 128 So. 724, 14 La.App. 188.
N.H.—Sweeney v. Boston & M. R. R., 174 A. 676, 87 N.H. 90, certiorari denied 55 S.Ct. 638, 294 U.S. 728, 79 L.Ed. 1258.
39 C.J. p 879 note 64.

Realization that employee might not save self

Doctrine applies when railroad should have realized that trackwalker might not save self.—Small v. Boston & M. R. R., 173 A. 381, 87 N. H. 25.

1. U.S.—Reynolds v. New York, O. & W. Ry. Co., C.C.A.N.Y., 42 F.2d 164.
Mo.—Karr v. Chicago, R. I. & P. Ry. Co., 108 S.W.2d 44, 341 Mo. 536.
39 C.J. p 879 note 65.

2. N.C.—Raines v. Southern R. Co., 66 S.E. 726, 857, 110 Va. 606.
39 C.J. p 879 note 70.

3. Tenn.—St. Louis & S. F. R. Co. v. Finley, 118 S.W. 692, 122 Tenn. 127, 18 Ann.Cas. 1141.

4. Va.—Washington & O. D. R. Co. v. Weakley, 125 S.E. 672, 140 Va. 796.

5. U.S.—St. Louis-San Francisco R. Co. v. Maynord, Ala., 246 F. 115, 158 C.C.A. 341.

6. U.S.—St. Louis-San Francisco R. Co. v. Maynord, supra.

7. Mo.—Smith v. Southern Illinois & Missouri Bridge Co., 30 S.W.2d 1077, 326 Mo. 109.

8. Mo.—Rashall v. St. Louis, I. M. & S. R. Co., 155 S.W. 426, 249 Mo. 509.
39 C.J. p 880 note 78.

9. U.S.—Elliott v. Chicago, M. & St. P. R. Co., Dak., 14 S.Ct. 85, 150 U. S. 245, 37 L.Ed. 1068.
39 C.J. p 879 note 73.

10. Ohio.—Pennsylvania Co. v. Mahoney, 22 Ohio Cir.Ct. 469, 12 Ohio Cir.Dec. 366.
39 C.J. p 879 note 73 [b].

11. Ohio.—Pennsylvania Co. v. Mahoney, supra.
39 C.J. p 879 note 74.

12. Minn.—Magliani v. Minnesota Transfer R. Co., 121 N.W. 635, 108 Minn. 148.

13. Tex.—Galveston, H. & S. A. R. Co. v. Conuteson, 111 S.W. 187, 51 Tex.Civ.App. 1.

such precautions against known or obvious dangers as an ordinarily prudent man would take under the same or similar circumstances.

Servants working on or about elevators must take such precautions against known or obvious dangers arising therefrom as an ordinarily prudent man would take under the same or similar circumstances, and, if injury results from a failure to do so, ordinarily there can be no recovery[14] unless the accident results from a danger which he had no reason to anticipate.[15]

f. Servants Working in or about Mines

A servant working in or about a mine must take such precautions against known or obvious dangers growing out of his employment as an ordinarily prudent man would take under the same or similar circumstances.

A servant working in or about a mine must take such precautions against known or obvious dangers growing out of his employment as an ordinarily prudent man would take under the same or similar circumstances, and there can be no recovery for injuries sustained by reason of his failure to do so,[16] especially where the servant is himself in control of the cause or subject of danger.[17] However, he has the right to assume that rules promulgated for the protection of the servants in their employment will be observed.[18]

g. Servants Working about Unguarded Holes

A servant who knows there are unguarded holes about premises where he is at work may be chargeable with contributory negligence where he falls into an unguarded hole.

A servant who knows or who is chargeable with knowledge that there are unguarded holes in and about the premises where he is at work is bound to use his faculties to prevent falling into them, and if he fails to exercise ordinary care in this respect he cannot recover for injuries sustained by falling into an unguarded hole,[19] as where a longshoreman or employee of a stevedoring company, by not taking the proper precautions, falls through an open hatchway.[20] This rule, however, does not apply where, under the circumstances, no duty is imposed on the servant of anticipating such a dangerous situation.[21]

§ 457. Disobedience of Rules, Orders, or Statutes

a. In general
b. Disobedience of statute

a. In General

A servant who is injured as a consequence of his disobedience of the rules, orders, or instructions of his master is generally chargeable with such contributory negligence as will bar a recovery except to the extent that the rule has been changed by statute.

A servant who is injured as a consequence of his disobedience of the rules, orders, or instructions of his master is generally chargeable with such con-

14. N.C.—Scott v. Western Union Telegraph Co., 153 S.E. 413, 198 N.C. 795.
Pa.—Bailey v. Alexander Realty Co., 20 A.2d 754, 342 Pa. 362.
Wash.—Miller v. National Furniture Co., 269 P. 1038, 148 Wash. 694.
39 C.J. p 880 note 81.

Acts held contributory negligence

(1) Experienced elevator operator returning from lunch room and jumping into elevator shaft, where another had moved elevator leaving door open.—Scott v. Western Union Telegraph Co., 153 S.E. 413, 198 N.C. 795.

(2) Employee moving from one hoist where he was observed by fellow servants and placing himself without warning in shaft of another hoist which was known to him to be in constant operation.—Sweeney v. Thompson Starrett Co., 285 N.Y.S. 246, 246 App.Div. 224, affirmed 3 N.E.2d 881, 272 N.Y. 485.

Janitor cleaning elevator pit, if injured by neglecting to stop elevator or remaining directly under counterweight after elevator was started by another, has been held contributorily negligent as a matter of law.—Miller v. National Furniture Co., 269 P. 1038, 148 Wash. 694.

Walking into elevator shaft in the dark

Pa.—Bailey v. Alexander Realty Co., 20 A.2d 754, 342 Pa. 362.
39 C.J. p 880 note 81 [a], [c].

15. Wash.—Remnsnyder v. Lowman, 159 P. 107, 92 Wash. 95.

Foot catching in an inset or recess

An employee is not guilty of contributory negligence where his injury occurred by reason of his foot catching in an inset or recess in the wall of an open elevator shaft, he having no reason to anticipate the dangerous defect.—Remnsnyder v. Lowman, supra.

16. Ala.—Burnwell Coal Co. v. Setzer, 67 So. 604, 191 Ala. 398—Lookout Fuel Co. v. Phillips, 66 So. 946, 11 Ala.App. 657.
Ky.—West Kentucky Coal Co. v. Heady, 190 S.W. 475, 173 Ky. 41.
39 C.J. p 880 note 85.

Tamping cap with iron bar

A drillman in a mine was guilty of contributory negligence where, with knowledge that a cap would not fit into the drilled hole, he attempted to tamp the cap into the hole with an iron bar.—Trainer v. Sphalerite Min. Co., 148 S.W. 70, 243 Mo. 359, Ann.Cas.1913C 949.

17. Ala.—Clinton Min. Co. v. Bradford, 69 So. 4, 192 Ala. 576—Lookout Fuel Co. v. Phillips, 66 So. 946, 11 Ala.App. 657.
39 C.J. p 880 note 86.

18. Mo.—Johnson v. Waverly Brick & Coal Co., 205 S.W. 615, 276 Mo. 42.

An employee engaged in trimming cars standing on a siding, a dangerous operation, has the right to assume that the cars will not be moved without warning.—Johnson v. Waverly Brick & Coal Co., supra.

19. Cal.—Brett v. Frank, 94 P. 1051, 153 Cal. 267.
Pa.—Hurley v. Lukens Iron & Steel Co., 40 A. 321, 186 Pa. 187.
39 C.J. p 881 note 91.

20. U.S.—The Kongosan Maru, C.C.A.Or., 292 F. 801.
N.Y.—Williams v. Precartin, 152 N.Y.S. 340, 166 App.Div. 745.
39 C.J. p 881 note 91 [b].

21. N.Y.—Glennon v. Star Co., 114 N.Y.S. 1044, 130 App.Div. 491, affirmed 91 N.E. 1113, 197 N.Y. 597.
39 C.J. p 829 note 75 [a].

tributory negligence as will bar a recovery,[22] subject to the well-established limitation that the servant either knew, or was charged by operation of law with knowledge, of the particular rule or order involved.[23] In observing the rules and orders of the master promulgated for the safety of the servant, only reasonable care is required;[24] but it is the duty of the servant to acquaint himself with all necessary rules and, in case of injury from failure to obey them, ignorance of the rules is no excuse unless his failure to know them was not due to his want of care.[25] It also is generally necessary to the application of this doctrine that the rules or orders shall have been properly promulgated.[26]

Limitations of rule. In order for disobedience of rules, orders, or instructions to bar a recovery, it is essential that they shall be applicable to the facts of the particular case,[27] that they shall not have been abrogated by other inconsistent orders or instructions,[28] and that there has been a plain and manifestly negligent violation of the rule or order, according to its plain and obvious meaning.[29] Such rules or orders are inoperative as far as they contravene the principle which requires an employer to furnish and maintain suitable appliances and the right of employees to assume that this has been done.[30] Also the doctrine does not apply where the master learns of the danger in which the servant had placed himself in time to avoid injuring him.[31]

Contributory negligence or assumption of risk. A violation of the rules of the employer, according to some decisions, is contributory negligence and not an assumption of risk.[32] Other decisions, however, have held that a servant assumes the risk of injury from a disobedience of orders or rules of the employer, as discussed supra § 410.

Under liability acts. In accordance with the principles discussed supra § 425, under the Federal Employers' Liability Act, and also under some state statutes, a servant's violation of general cautionary rules or instructions, although amounting to contributory negligence, does not preclude a recovery for injuries sustained.[33] Where, however, he disobeys or disregards specific orders or standing rules promulgated for his safety, he may not be entitled to recover for injuries thereby sustained,[34] even

22. Ala.—Louisville & N. R. Co. v. Gray, 67 So. 687, 191 Ala. 514.
Mo.—Dobson v. Otis Elevator Co., 26 S.W.2d 942, 324 Mo. 1147—Patton v. Jewel Tea Co., App., 15 S.W.2d 360.
N.Y.—Grassmann v. Fromm, 41 N.Y.S.2d 74, 266 App.Div. 745, reversed on other grounds 56 N.E.2d 114, 292 N.Y. 699.
Wash.—Richardson v. Pacific Power & Light Co., 118 P.2d 985, 11 Wash. 2d 288—Schmidt v. Pelz, 87 P.2d 278, 198 Wash. 80.
39 C.J. p 881 note 95.
Proximate cause of injury see supra § 444.

23. N.Y.—Grassmann v. Fromm, 41 N.Y.S.2d 74, 266 App.Div. 745, reversed on other grounds 56 N.E.2d 114, 292 N.Y. 699.
39 C.J. p 883 note 96.
Knowledge, however acquired, will be sufficient.—Richmond & D. R. Co. v. Thomason, 12 So. 273, 99 Ala. 471.

24. U.S.—Pennsylvania R. Co. v. Schafer, C.C.A.Ohio, 290 F. 140.
Utah.—Pauly v. McCarthy, 166 P.2d 501, 109 Utah 398, reversed on other grounds 67 S.Ct. 962, 330 U.S. 802, 91 L.Ed. 1261.
39 C.J. p 883 note 14.

25. Ark.—Fordyce v. Briney, 24 S. W. 250, 58 Ark. 206.
Mass.—Foley v. Boston & N. St. R. Co., 84 N.E. 846, 198 Mass. 532.
39 C.J. p 883 note 1.

26. Mont.—Pascoe v. Nelson, 158 P. 317, 52 Mont. 405.
N.C.—Hinnant v. Tidewater Power Co., 121 S.E. 540, 187 N.C. 288.
39 C.J. p 883 note 99.
Sufficiency as order
Employee did not disobey superior's orders unless ordinarily prudent man in same situation would have understood what was said as an order not to do what he did.—Powers v. Gatliff Coal Co., 14 S.W.2d 216, 228 Ky. 5.

27. Conn.—Cavanaugh v. Windsor Cut Stone Corp., 69 A. 345, 80 Conn. 585.
39 C.J. p 883 note 3.

28. Ill.—Goodman v. Chicago, B. & Q. R. Co., 7 N.E.2d 393, 289 Ill. App. 320, certiorari denied Chicago, B. & Q. R. Co. v. Goodman, 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.
N.C.—Hinnant v. Tidewater Power Co., 121 S.E. 540, 187 N.C. 288.
Violation of rule or order by command of superior see infra § 466.

29. Ga.—Western & A. R. Co. v. Bussey, 23 S.E. 207, 95 Ga. 584.

30. Ala.—Louisville & N. R. Co. v. Pearson, 12 So. 176, 97 Ala. 211.
Kan.—Karns v. Atchison, T. & S. F. R. Co., 123 P. 758, 87 Kan. 154, L.R.A.1916D 1042.

31. Ky.—West Kentucky Coal Co. v. Kuykendall, 151 S.W. 928, 151 Ky. 384.
Mo.—Neas v. Chicago, B. & Q. R. Co., 120 S.W. 120, 138 Mo.App. 484.
Last clear chance doctrine generally see supra § 423.

32. Ala.—Louisville & N. R. Co. v. Parker, 138 So. 231, 223 Ala. 626, certiorari granted 52 S.Ct. 496, 286 U.S. 535, 76 L.Ed. 1275, certiorari dismissed 53 S.Ct. 94, 287 U.S. 569, 77 L.Ed. 501.
Or.—Oberlin v. Oregon-Washington R. & Nav. Co., 142 P. 554, 71 Or. 177.
39 C.J. p 883 note 12.

33. U.S.—Chicago Great Western R. Co. v. Schendel, Minn., 45 S.Ct. 303, 267 U.S. 287, 69 L.Ed. 614—Gildner v. Baltimore & O. R. Co., C.C.A. N.Y., 90 F.2d 635—Miller v. Central R. Co. of New Jersey, C.C.A.N. Y., 58 F.2d 635, certiorari denied Central R. Co. of New Jersey v. Miller, 53 S.Ct. 18, 287 U.S. 617, 77 L.Ed. 536.
Instruction to use ladder
Failure of carman, injured by fall, to obtain scaffold rather than ladder, which assistant foreman allegedly directed him to use when replacing siding of freight car in repair shop, would not be more than contributory negligence, which does not bar recovery under the employers' liability act.—Great Northern Ry. Co. v. Wojtala, C.C.A.Mont., 112 F.2d 609.
Repair of safety appliance
The primary duty rule has been held not to apply to a case in which the employee was engaged at the time of his injury in repairing a safety appliance, although his act was in violation of a company rule. —Leet v. Union Pac. R. Co., 142 P.2d 37, 60 Cal.App.2d 814.

34. U.S.—Unadilla Valley Ry. Co. v.

though the fault or negligence of the master or other servants may have contributed to the injury.[35] If an employee willfully disobeys his orders or instructions he is chargeable with "willful negligence" under a statutory provision which precludes him from recovering in such a case.[36]

b. Disobedience of Statute

A servant ordinarily may not recover for injuries [redacted]

sustained thereby;[39] but this does not prevent a recovery by another employee who is not so in charge.[40] It has also been held that the fact the employee has violated a statute designed for the protection of employees does not preclude him from recovering for the negligence of his employer or a third person;[41] nor is an employee precluded from recovering where the master has violated a statute for the protection of employees, which statute [redacted]

Rules or orders of the character under consideration are subject to a reasonable interpretation, as discussed supra § 276, and a servant is not, under all circumstances and at all hazards, bound to obey them,[44] and their violation is not negligence per se[45] unless the act constituting a violation is so opposed to prudence that no careful person would commit it.[46] Disobedience thereof will be excused where the rule or order is unreasonable,[47] or was of a temporary nature and had been annulled prior to the injury complained of,[48] or where obedience thereto was not practicable[49] or was impossible,[50] unsafe,[51] ineffectual to prevent injury,[52] or likely to accomplish disaster,[53] or where no opportunity was given to comply with the rule,[54] or where failure to comply with the rule was caused by sickness.[55] It is also an excuse for disobedience of a rule that it is susceptible of two constructions and that the servant in good faith adopts one of these constructions[56] or that a compliance with the rule would have placed the servant in a position as dangerous as that which he assumed by disobeying the rule.[57]

Generally, however, the violation of a rule by a superior servant does not excuse its violation by his inferior[58] unless he has reason to rely on the superior's acts;[59] and the act of one servant unauthorized or contrary to the rule does not justify another servant in disregarding the rule.[60] A servant also is not excused for disobedience because he thinks compliance with a rule or order unnecessary,[61] because others whose business is well regulated are in the habit of conducting it in a manner contrary to his master's rules,[62] or because his violation of the rule was caused by the fault of other servants.[63] The law that disobedience to the employer's rule in situations inherently dangerous is negligence does not apply where the situation was made dangerous by the employer's negligence.[64]

b. Customary Violation of Rules

The customary violation of rules or orders, with the knowledge and acquiescence of the master or his representative, will generally excuse a servant's disobedience of such rules or orders.

Where a rule or order is habitually violated with the knowledge and acquiescence, either actual or imputed, on the part of the master or those who are acting as his representatives, a servant generally will not be charged with contributory negligence in acting in disregard of such rule or order.[65] Under these circumstances the rule is abrogated or an observance thereof waived.[66]

However, rules and orders for the protection of the servant will not be considered as abrogated unless that conclusion is plainly warranted by the facts and necessary for the servant's protection.[67] In order to relieve the servant from the imputation

44. Mo.—Patton v. Jewel Tea Co., App., 15 S.W.2d 360.

45. Tex.—Galveston, H. & S. A. Ry. Co. v. Cherry, 98 S.W. 898, 44 Tex. Civ.App. 344.
39 C.J. p 884 note 17.

46. Tex.—St. Louis, S. F. & T. R. Co. v. Wilson, Civ.App., 262 S.W. 1074—Galveston, H. & S. A. R. Co. v. Cherry, 98 S.W. 898, 44 Tex.Civ. App. 344.

47. S.C.—Keels v. Atlantic Coast Line R. Co., 78 S.E. 168, 94 S.C. 462.
Tex.—Bonner v. Moore, 22 S.W. 272, 3 Tex.Civ.App. 416.

48. Ky.—Louisville & N. R. Co. v. Murphy, 150 S.W. 79, 150 Ky. 176.
39 C.J. p 884 note 20.

49. Cal.—McComb v. Atchison, T. & S. F. Ry. Co., 294 P. 81, 110 Cal. App. 303, certiorari denied Atchison, T. & S. F. Ry. Co. v. McComb, 51 S.Ct. 486, 283 U.S. 838, 75 L.Ed. 1449.
Minn.—Popplar v. Minneapolis, St. P. & S. S. M. Ry. Co., 141 N.W. 798, 121 Minn. 413.
39 C.J. p 884 note 21.

50. Ill.—Goodman v. Chicago, B. & Q. R. Co., 7 N.E.2d 393, 289 Ill.App. 320, certiorari denied Chicago, B. & Q. R. Co. v. Goodman, 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.
39 C.J. p 884 note 22.

51. Mo.—Patton v. Jewel Tea Co., App., 15 S.W.2d 360.
39 C.J. p 884 note 23.

52. U.S.—Illinois Cent. R. Co. v. Stewart, Neb., 223 F. 30, 138 C.C.A. 444.

53. S.C.—Howell v. Southern R. Co., 102 S.E. 856, 114 S.C. 21.

54. Ind.—Chicago, St. L. & P. R. Co. v. Fry, 28 N.E. 989, 131 Ind. 319.
N.Y.—Myers v. Erie R. Co., 60 N.Y.S. 422, 44 App.Div. 11.

55. Ill.—Junction Min. Co. v. Ench, 111 Ill.App. 346.

56. Utah.—Shepard v. Payne, 206 P. 1098, 60 Utah 140.

57. La.—Henderson v. American Lumber Co., 70 So. 620, 138 La. 709.

58. Tenn.—American Zinc Co. v. Smith, 161 S.W. 494, 128 Tenn. 447, L.R.A.1916F 907.
39 C.J. p 884 note 30.

59. Mo.—Dobson v. Otis Elevator Co., 26 S.W.2d 942, 324 Mo. 1147.

60. U.S.—Missouri, K. & T. R. Co. v. Collier, C.C.A.Mo., 157 F. 347, 88 C.C.A. 127, certiorari denied 28 S. Ct. 571, 209 U.S. 545, 52 L.Ed. 920.

61. Utah.—Gilbourne v. Oregon Short Line R. Co., 114 P. 532, 39 Utah 80.
39 C.J. p 884 note 32.

62. Ala.—Louisville & N. R. Co. v. Davis, 12 So. 786, 99 Ala. 593.

63. Ga.—Georgia R. & Banking Co. v. Oaks, 52 Ga. 410.

64. N.Y.—Larkin v. New York Tel. Co., 114 N.E. 1043, 220 N.Y. 27.

65. Cal.—Myers v. Southern Pac. Co., 58 P.2d 387, 14 Cal.App.2d 287, hearing denied 59 P.2d 1001, 14 Cal.App.2d 287.
Ky.—Fluhart Collieries Co. v. Meek, 183 S.W. 469, 169 Ky. 138.
Mo.—Dobson v. Otis Elevator Co., 26 S.W.2d 942, 324 Mo. 1147.
N.H.—McAllister v. Suncook Valley R. R. Co., 42 A.2d 733, 93 N.H. 400.
39 C.J. p 884 note 37.

66. N.C.—Biles v. Seaboard Air-Line R. Co., 52 S.E. 129, 139 N.C. 528.
Utah.—Lasagna v. McCarthy, 177 P. 2d 734.
39 C.J. p 885 note 38.
Waiver and customary violation of rules generally see supra § 275.

67. Va.—Shumaker v. Atlantic Coast Line R. Co., 99 S.E. 739, 125 Va. 393.

of contributory negligence in failing to observe rules and orders on the ground that they had been habitually disregarded by the company's employees, it must clearly appear that such disregard of the rules and orders was actually known to, and acquiesced in by, the master or those representing him,[68] or that the custom of disregarding the rules and orders had been so open and long continued that the employer was chargeable with notice thereof.[69]

It has been held that, where the danger in violating the rule is so obvious and imminent that no prudent person would violate it, the servant is not excused in so doing, notwithstanding the rule is customarily violated with the knowledge of the master;[70] nor will he be excused for violating the rule, notwithstanding a customary violation thereof by other servants, where he has been given specific and repeated instructions not to do so, since in view of specific instructions no question of abrogation of a rule can arise.[71] Furthermore, it has been held that, where a servant enters into an express written contract to observe a rule and is injured in consequence of a violation thereof, no proof of any custom theretofore existing to the contrary will relieve the servant from the imputation of contributory negligence[72] although a customary violation of the rule subsequent to the making of the contract known to, and acquiesced in by, the master would have such effect.[73]

§ 459. —— Application of Rules

a. Operation of locomotives, trains, or cars
b. Mining
c. Handling of machinery, tools, or appliances
d. Inspection or repair
e. Giving of warning or signal by servant occupying dangerous position

a. Operation of Locomotives, Trains, or Cars

(1) In general
(2) Coupling or uncoupling cars
(3) Riding on cars or locomotives
(4) Boarding or alighting from moving cars or locomotives

(1) In General

A railroad employee who is injured while acting in disobedience of the rules or orders of the railroad company relating to the operation of locomotives, trains, or cars is generally chargeable with contributory negligence barring a recovery except to the extent that the rule has been changed by statute.

Where a railroad employee is injured while acting in disobedience of rules or orders of the company relating to the operation of locomotives, trains, or cars, he is, in general, barred by contributory negligence from a recovery for his injuries;[74] and this rule is particularly applicable where the adoption of the unsafe method of operation, in disobedience of a rule or order, is voluntary and unnecessary.[75] A recovery, however, may be had where the rules or orders have been habitually violated with the knowledge and assent of the company,[76] as in such a case the employer cannot set up a violation as a defense to an action by a servant injured in consequence of a disobedience thereof.[77] The safety rules of a railroad company, however, ordinarily are not absolute, but must be applied according to the circumstances.[78] A failure to comply with a rule or order will not be regarded as contributory negligence, precluding a recovery, if, under the circumstances of the particular case, it is impossible to comply therewith[79] or if an observance of the rule or order renders it impossible to do the work.[80]

Under the express provisions of the Federal Em-

68. Ky.—Anderson v. Granville Coal Co., 265 S.W. 472, 205 Ky. 111.
39 C.J. p 885 note 40.

69. N.C.—Haynes v. North Carolina R. Co., 55 S.E. 516, 143 N.C. 154, 9 L.R.A.,N.S., 972.
39 C.J. p 885 note 41.

70. Ala.—Warden v. Louisville & N. R. Co., 10 So. 276, 94 Ala. 277, 14 L.R.A. 552.
39 C.J. p 885 note 42.

71. N.C.—Crawford v. Southern R. Co., 64 S.E. 589, 150 N.C. 619.

72. Ala.—Louisville & N. R. Co. v. Mothershed, 20 So. 67, 110 Ala. 143.
39 C.J. p 885 note 44.

73. Ala.—Louisville & N. R. Co. v. Mothershed, supra.

74. Ga.—Tidwell v. Georgia Cent. R. Co., 78 S.E. 898, 140 Ga. 250.
Va.—Norfolk & W. Ry. Co. v. Smith, 146 S.E. 268, 152 Va. 165.
39 C.J. p 886 note 48.

75. U.S.—Powell v. Wisconsin Cent. R. Co., Minn., 159 F. 864, 87 C.C. A. 44.
W.Va.—Hudson v. Norfolk & W. Ry. Co., 146 S.E. 525, 106 W.Va. 437, certiorari denied 49 S.Ct. 481, 279 U.S. 866, 73 L.Ed. 1004, rehearing denied 50 S.Ct. 79.

76. Mich.—Jones v. Pere Marquette R. Co., 133 N.W. 993, 168 Mich. 1.
Tex.—Missouri, K. & T. R. Co. v. Mayfield, 68 S.W. 807, 29 Tex.Civ. App. 477.
39 C.J. p 886 note 49 [a].

77. N.C.—Strunks v. Payne, 114 S. E. 840, 184 N.C. 582.
39 C.J. p 887 note 65.

78. Utah.—Pauly v. McCarthy, 166 P.2d 501, 109 Utah 398, reversed on other grounds 67 S.Ct. 962, 330 U.S. 802, 91 L.Ed. 1261.

79. Ill.—Goodman v. Chicago, B. & Q. R. Co., 7 N.E.2d 393, 289 Ill. App. 320, certiorari denied Chicago, B. & Q. R. Co. v. Goodman, 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.
Utah.—Miller v. Southern Pac. Co., 21 P.2d 865, 82 Utah 46, certiorari denied Southern Pac. Co. v. Miller, 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 600.

80. Tex.—Galveston, H. & S. A. R.

ployers' Liability Act, and also under some state acts, such an employee is not barred from recovering for injuries sustained as a consequence of his violation of a general cautionary rule or order;[81] but he may be barred from recovering if he is injured as a consequence of his disobedience of a specific rule or standing order of the company,[82] although the negligence of other employees has contributed to the injury[83] unless, under some statutes, the railroad company or its representatives have failed to comply with the statutory safety requirements.[84]

Particular applications. The rule precluding a recovery where the employee has disobeyed the rules or orders of the company has been applied to engineers, motormen, or firemen injured while failing to approach stations with trains under control,[85] operating engines carrying more steam than is permissible under the rules of the company, and failing to keep sufficient water in the boiler,[86] running their locomotives or cars at a rate of speed in excess of that prescribed by rules or specific orders of the company,[87] running a train ahead of schedule time,[88] running an engine or train along a track on which another train has the right of way under the rules of the railroad company,[89] running a train past a station before the arrival of another train, without a written order therefor,[90] running a train in violation of a rule prohibiting the starting of trains within a designated time after the departure of another train,[91] running a train onto a single track without orders,[92] running a train standing on a sidetrack onto the main track in disobedience of orders,[93] starting a train without receiving proper signals,[94] or violating a rule or specific order given for passing trains.[95]

The rule has also been applied to a brakeman who failed to lock a switch in accordance with rules of the company and particular instructions of the con-

Co. v. Worth, 116 S.W. 365, 53 Tex. Civ.App. 351.
39 C.J. p 887 note 63.

81. U.S.—Chicago Great Western R. Co. v. Schendel, Minn., 45 S.Ct. 303, 267 U.S. 287, 69 L.Ed. 614—Gildner v. Baltimore & O. R. Co., C.C.A.N.Y., 90 F.2d 635—Bocook v. Louisville & N. R. Co., D.C.Ky., 67 F. Supp. 154.
Ala.—Southern Ry. Co. v. Glenn, 154 So. 792, 228 Ala. 563.

82. U.S.—Unadilla Valley Ry. Co. v. Caldine, N.Y., 49 S.Ct. 91, 278 U.S. 139, 73 L.Ed. 224—Atchison, T. & S. F. Ry. Co. v. Ballard, C.C.A. Tex., 108 F.2d 768, rehearing denied 109 F.2d 1012, certiorari denied Ballard v. Atchison, T. & S. F. R. Co., 60 S.Ct. 1096, 310 U.S. 646, 84 L.Ed. 1413—Norfolk & W. Ry. Co. v. Riggs, C.C.A.Ohio, 98 F. 2d 612—Gildner v. Baltimore & O. R. Co., C.C.A.N.Y., 90 F.2d 635—Hylton v. Southern Ry. Co., C.C.A. Tenn., 87 F.2d 393, certiorari denied 57 S.Ct. 929, 301 U.S. 699, 81 L.Ed. 1354.
Ark.—Missouri Pac. R. Co. v. Guy, 157 S.W.2d 11, 203 Ark. 166, certiorari granted Guy v. Missouri Pac. R. Co., 62 S.Ct. 1046, 316 U.S. 655, 86 L.Ed. 1735, certiorari dismissed 63 S.Ct. 22, 317 U.S. 702, 87 L.Ed. 561—Dozier v. Missouri Pac. R. Co., 3 S.W.2d 678, 176 Ark. 651.
Minn.—McDonald v. Great Northern Ry. Co., 207 N.W. 194, 166 Minn. 87.
N.H.—McAllister v. Suncook Val. R. R., 42 A.2d 733, 93 N.H. 400.
Okl.—Kurn v. Reese, 133 P.2d 880, 192 Okl. 78—Hanson v. Atchison, T. & S. F. Ry. Co., 88 P.2d 348, 184 Okl. 480.
Utah.—Miller v. Southern Pac. Co., 21 P.2d 865, 82 Utah 46, certiorari denied Southern Pac. Co. v. Miller, 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 600.

83. U.S.—Unadilla Valley Ry. Co. v. Dibble, C.C.A.N.Y., 31 F.2d 239, certiorari denied Dibble v. Unadilla Valley Ry. Co., 50 S.Ct. 25, 280 U. S. 565, 74 L.Ed. 618.
Minn.—McDonald v. Great Northern Ry. Co., 207 N.W. 194, 166 Minn. 87.
Okl.—Kurn v. Reese, 133 P.2d 880, 192 Okl. 78.
Utah.—Lasagna v. McCarthy, 177 P. 2d 734—Miller v. Southern Pac. Co., 21 P.2d 865, 82 Utah 46, certiorari denied Southern Pac. Co. v. Miller, 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 600.

Negligence of fellow servants in also violating railroad's safety rule does not authorize recovery for injury to engineer.—Hudson v. Norfolk & W. Ry. Co., 146 S.E. 525, 106 W. Va. 437, certiorari denied 49 S.Ct. 481, 279 U.S. 866, 73 L.Ed. 1004, rehearing denied 50 S.Ct. 79.

84. Mo.—Joice v. Missouri-Kansas-Texas R. Co., 189 S.W.2d 568, 354 Mo. 439, 161 A.L.R. 383.
S.C.—Barton v. Southern Ry. Co., 171 S.E. 5, 171 S.C. 46, certiorari denied Southern Ry. Co. v. Barton, 54 S.Ct. 51, 290 U.S. 632, 78 L.Ed. 550.

Defective locomotive

In action for death of engineer because of defective locomotive furnished by railroad, facts that engineer continued to use locomotive after he knew of defective condition and failed to report it as was his duty under the rules constituted no defense where engineer's acts were all concurring acts with act of railroad in violation of the statute, and were acts of contributory negligence from the results of which the engineer was relieved of liability by the statute.—McCarthy v. Pennsylvania R. Co., C.C.A.Ind., 156 F.2d 877.

85. Minn.—Merritt v. Great Northern R. Co., 84 N.W. 321, 81 Minn. 496.
39 C.J. p 886 note 49.

86. Ill.—Illinois Cent. R. Co. v. Houck, 72 Ill. 285.

87. W.Va.—Robinson v. West Virginia & P. R. Co., 21 S.E. 727, 40 W.Va. 583.
39 C.J. p 886 note 51.

88. Pa.—Sittig v. Pennsylvania R. Co., 77 A. 1097, 229 Pa. 15.
39 C.J. p 886 note 52.

89. Okl.—Hanson v. Atchison, T. & S. F. Ry. Co., 88 P.2d 348, 184 Okl. 480.

90. U.S.—Unadilla Valley Ry. Co. v. Dibble, C.C.A.N.Y., 31 F.2d 239, certiorari denied 50 S.Ct. 25, 280 U.S. 565, 74 L.Ed. 618.

91. Ky.—Louisville & N. R. Co. v. Hiltner, 60 S.W. 2, 22 Ky.L. 1141.
Tex.—International & G. N. R. Co. v. Brice, 97 S.W. 461, 100 Tex. 203.
39 C.J. p 886 note 53.

92. Ala.—Cogbill v. Louisville & N. R. Co., 44 So. 683, 152 Ala. 154.

93. Tex.—Freeman v. Jamison, Civ. App., 138 S.W. 1097.

94. Ky.—Cincinnati, N. O. & T. P. Co. v. Silvers, 126 S.W. 120.
39 C.J. p 887 note 56.

95. Ga.—Savannah, F. & W. R. Co. v. Folks, 76 Ga. 527.
Mont.—Lynes v. Northern Pac. R. Co., 117 P. 81, 43 Mont. 317, Ann. Cas.1912C 183.

ductor,[96] or one who violated a rule of the company in going upon the pilot of the engine with which he was working,[97] or one who was ordered by the conductor of a train to go to a switch and set it for a certain track and remain there until the front of his train had passed, but instead, after setting the switch, walked back to his train, and was killed in a collision which would have been prevented had he remained at the switch,[98] and also to servants making flying switches in violation of rules or orders.[99]

(2) Coupling or Uncoupling Cars

A servant who violates a rule or order of the railroad company as to the method of coupling or uncoupling cars is generally chargeable with such contributory negligence as will preclude a recovery for injuries sustained thereby.

The violation of rules or orders in which the method of coupling or uncoupling cars is prescribed by the company will constitute contributory negligence such as will generally bar a servant from recovering for injuries sustained by reason of such disobedience,[1] as where he violates a rule which forbids him from going between moving cars to couple or uncouple them[2] or which requires the use of a coupling stick;[3] and this rule is particularly applicable where the servant's act in going between moving cars is voluntary and unnecessary.[4] A recovery is not precluded, however, where the railroad company's rule as to coupling or uncoupling has been habitually violated with its knowledge,[5] where a violation of the rule is in effect encouraged by letting it be known that brakemen who do not couple cars promptly are likely to lose their positions,[6] where it would be impossible to do the work without violating the rule,[7] or where a reasonable necessity exists for doing the work in the manner which is in violation of the rule.[8]

(3) Riding on Cars or Locomotives

A railroad employee who is injured by reason of his disobedience of a rule of the company which forbids its employees to ride on its locomotives or on certain parts thereof, or on certain parts of its cars, is generally chargeable with such contributory negligence as will prevent a recovery.

Where the rules of a railroad company forbid its employees to ride on its locomotives or on certain parts thereof, a servant who is injured by reason of his disobedience of such rules is generally chargeable with such contributory negligence as will prevent a recovery.[9] An employee who rides on the side of a car next to an obstruction in violation of a rule forbidding it, when he might have ridden on the other side of the car where the track was free from obstructions, has been held guilty of contributory negligence.[10] Nevertheless, rules of this character may be waived or abrogated by customary violation thereof with the knowledge and assent of the company;[11] but a general custom, tolerated by an employer or consented to by its foreman, under which members of a crew rode on flat cars instead of in the dining car of a work train, is not decisive in all cases of the question whether an employee was careless in taking a position on a flat car,[12] and, moreover, a rule designated to protect the train and people on the track does not apply to accidents caused by inadequate clearance

96. N.C.—Holland v. Seaboard Air-Line R. Co., 55 S.E. 835, 143 N.C. 435.

97. Utah.—Bunker v. Union Pac. R. Co., 114 P. 764, 38 Utah 575.

98. Va.—Washington Southern R. Co. v. Grove, 74 S.E. 148, 113 Va. 411.

99. Mont.—Thompson v. Montana Cent. R. Co., 43 P. 496, 17 Mont. 426.
Tex.—Pilkinton v. Gulf, C. & S. F. R. Co., 7 S.W. 805, 70 Tex. 226.
39 C.J. p 887 note 61.

1. Ala.—Southern Ry. Co. v. Glenn, 154 So. 792, 228 Ala. 563.
Mich.—Coke v. Michigan Cent. R. Co., 143 N.W. 1, 177 Mich. 260.
39 C.J. p 887 note 68.

2. U.S.—Powell v. Wisconsin Cent. R. Co., Minn., 159 F. 864, 87 C.C.A. 44.
W.Va.—Johnson v. Chesapeake & O. R. Co., 18 S.E. 573, 38 W.Va. 206.
39 C.J. p 887 note 68 [f].

3. Ind.—Pennsylvania Co. v. Whitcomb, 12 N.E. 380, 111 Ind. 212.
39 C.J. p 887 note 68 [c].

4. U.S.—Powell v. Wisconsin Cent. R. Co., Minn., 159 F. 864, 87 C.C.A. 44.

5. Tex.—Texas & N. O. R. Co. v. Conway, 98 S.W. 1070, 44 Tex.Civ. App. 68.
39 C.J. p 887 note 69.

6. La.—Blackburn v. Louisiana R. & Nav. Co., 54 So. 865, 128 La. 319.

7. Mich.—Eastman v. Lake Shore & M. S. R. Co., 60 N.W. 309, 101 Mich. 597.
39 C.J. p 888 note 71.

8. Minn.—Slaughter v. Illinois Cent. R. Co., 145 N.W. 790, 125 Minn. 96.
39 C.J. p 888 note 72.

9. S.C.—Bouchillon v. Charleston & W. C. R. Co., 72 S.E. 634, 90 S.C. 42, Ann.Cas.1913D 1.
39 C.J. p 888 note 74.

Failure to get off gondola car when notified
Ky.—Patrick's Adm'x v. Louisville & N. R. Co., 132 S.W.2d 758, 280 Ky. 181.

Riding on the front footboard of an engine has been held not a violation of rule prohibiting employee from riding on footboard between engine and car.—Terminal R. Ass'n of St. Louis v. Farris, C.C.A.Mo., 69 F.2d 779.

10. Wis.—Collins v. Mineral Point & N. R. Co., 117 N.W. 1014, 136 Wis. 421.

11. Ky.—Southern Mining Co. v. Childers, 142 S.W.2d 995, 283 Ky. 687, 131 A.L.R. 315.
N.H.—McAllister v. Suncook Val. R. R., 42 A.2d 733, 93 N.H. 400.
39 C.J. p 888 note 77.
Waiver or abrogation of rule generally see supra § 458.

12. Mo.—Gibler v. Quincy, O. & K. C. R. Co., 107 S.W. 1021, 129 Mo. App. 93.

from an adjacent track.[13] Where the danger of violating the rule is so obvious and imminent that no prudent person would violate it, the fact that other employees were in the habit of violating the rule will not excuse the employee injured while violating it for so doing.[14] It has been held that an employee who is thrown from a weed-burning machine after leaving his seat thereon and going onto the platform alongside the machine to oil it while in motion violates both a rule that no repairs or adjustments may be made to a car or machine while in motion and a rule forbidding the changing of position on a car while it is in motion.[15]

(4) Boarding or Alighting from Moving Cars or Locomotives

A railroad servant injured by boarding or alighting from a moving train, car, or locomotive, in violation of a rule or order of the railroad company, generally may not recover for the injury so sustained.

A railroad servant who is injured by reason of his boarding or alighting from a moving train, car, or locomotive, in violation of a rule or order of the railroad company forbidding it, or forbidding it to be done in a certain manner, generally may not recover for the injury so sustained.[16] Such a servant, however, may not be chargeable with contributory negligence where the rule is habitually violated with the company's knowledge and assent.[17] A rule prohibiting employees from getting on or off trains while in "too rapid motion" implies that the employees may get on or off trains that are moving under conditions and circumstances that are apparently safe,[18] so that such a rule is not violated by an employee getting off a moving engine unless an ordinarily prudent man would not have done as he did.[19]

b. Mining

A miner who is injured in consequence of a violation of the rules or orders promulgated by his employer is generally chargeable with such contributory negligence as will bar a recovery.

A miner is required to exercise reasonable care in an observance of the rules promulgated by his employer,[20] and if he is injured in consequence of a violation of rules or orders he is in general, barred from a recovery for the injuries so sustained.[21] Such violation of a rule by a servant, however, will not bar a recovery for injuries sustained while so doing, where the rule has been customarily violated by other employees so as to warrant the inference that this violation was authorized and sanctioned by the employer;[22] but it must appear that the employer either had actual knowledge of its violation or by the exercise of ordinary care should have known thereof;[23] and it has been held that a customary violation of the rule to the knowledge of the company will not excuse a violation thereof by the injured servant where the act done in violation of the rule is extremely and imminently dangerous.[24]

Under some statutes a miner, workman, or other person riding on a loaded car or wagon in a mine in violation of a provision of the statute may not recover for injuries sustained thereby;[25] but this rule does not apply to an employee who, as a necessary duty, must accompany the car on its trip.[26]

c. Handling of Machinery, Tools, or Appliances

Disobedience of the rules or orders of the master as to the method of using machinery, tools, or appliances generally constitutes such contributory negligence as will bar a recovery for injuries sustained thereby.

A servant who is injured in consequence of his disobeying rules, orders, or instructions of the master as to the method of using machinery, tools, or appliances is generally chargeable with such con-

13. N.H.—McAllister v. Suncook Val. R. R., 42 A.2d 733, 93 N.H. 400.

14. Ark.—El Dorado, B. R. Co. v. Whatley, 114 S.W. 234, 88 Ark. 20, 129 Am.S.R. 93.

15. Ark.—Missouri Pac. R. Co. v. Guy, 157 S.W.2d 11, 203 Ark. 166, certiorari granted Guy v. Missouri Pac. R. Co., 62 S.Ct. 1046, 316 U.S. 655, 86 L.Ed. 1735, certiorari dismissed 63 S.Ct. 22, 317 U.S. 702, 87 L.Ed. 561.

16. N.C.—Crawford v. Southern R. Co., 64 S.E. 589, 150 N.C. 619.
S.C.—Campbell v. Thayer Mfg. Co., 130 S.E. 880, 133 S.C. 219.
39 C.J. p 888 note 81.

17. Mo.—Francis v. Kansas City, St. J. & C. B. R. Co., 28 S.W. 842, 30 S.W. 129, 127 Mo. 658.
39 C.J. p 889 note 83.

18. Mo.—Rhea v. Missouri Pac. R. Co., 156 S.W. 4, 171 Mo.App. 160.

19. Mo.—Rhea v. Missouri Pac. R. Co., supra.

20. Va.—Clinchfield Coal Corp. v. Hawkins, 108 S.E. 704, 130 Va. 698.

21. Ala.—Cassiatore v. DeBardelaben Coal Co., 85 So. 429, 204 Ala. 209.
39 C.J. p 889 note 86.
Rule applied to convict laborer
Ala.—Red Feather Coal Co. v. Murchison, 80 So. 354, 202 Ala. 289.

22. U.S.—Pocahontas Cons. Collieries Co. v. Johnson, Va., 244 F. 368, 156 C.C.A. 654, certiorari denied 38 S.Ct. 14, 245 U.S. 658, 62 L.Ed. 535.
Ky.—Southern Mining Co. v. Childers, 142 S.W.2d 995, 283 Ky. 687, 131 A.L.R. 315.

23. Ill.—Himrod Coal Co. v. Clingan, 114 Ill.App. 568.
39 C.J. p 889 note 88.

24. Va.—Williams v. Norton Coal Co., 62 S.E. 342, 108 Va. 603.

25. Iowa.—Crabell v. Wapello Coal Co., 28 N.W. 56, 68 Iowa 751.

26. Iowa.—Crabell v. Wapello Coal Co., 28 N.W. 56, 68 Iowa 751.
39 C.J. p 859 note 79 [b].
Statutory exception allowing those to ride "whose duty compels them to do so" applies to an employee riding on the trip for the purpose of helping to unload certain equipment that had been loaded, since he has a duty to perform.—Coalfield Coal Co. v. Mellhorn, 2 Tenn.App. 219.

tributory negligence as will bar a recovery,[27] especially where the danger of so doing is obvious and could easily be avoided by the servant without any instructions with reference thereto.[28] It has been held, however, that, where an employee operates a machine as it has been operated for years and as other employees operate similar machines, the employer cannot escape liability for injuries to the employee on the ground that he has violated a rule of the employment,[29] especially where it does not appear that the work could be done by any other practical method.[30]

d. Inspection or Repair

A servant who is injured as a consequence of his disobedience of a rule or order requiring him to inspect or repair is generally chargeable with such contributory negligence as will preclude a recovery.

While rules imposing the duty of inspection on servants only hold them to reasonable care in that respect,[31] where the servant is injured in consequence of his disobedience of a rule or order he generally is chargeable with such contributory negligence as will preclude a recovery.[32] This also is the rule where the servant is injured in consequence of disobedience of a rule which forbids inspection to be made in a designated way;[33] and, where a rule of the master imposes the duty of inspection on the servant, he is not excused from using reasonable care to comply with the rule although the master also has hired an inspector to examine the appliances.[34] A rule requiring inspection has no application where the servant is given neither tools nor opportunity to comply therewith.[35] A rule requiring an employee to inspect his engine before using it has no reference to defects in the mechanical construction of an engine.[36] It has been held that a failure to observe the rule requiring inspection will not bar a recovery where the rule was customarily disregarded.[37]

e. Giving of Warning or Signal by Servant Occupying Dangerous Position

A servant who disobeys a rule requiring him to give notice by warning, signal, or otherwise to the master or other servants that he has assumed, or is about to assume, a dangerous position ordinarily may not recover for injuries sustained as a consequence thereof.

As a general rule, where a servant disobeys a rule requiring him to give notice by warning, signal, or otherwise to the master or to other servants that he has assumed, or is about to assume, a dangerous position, he will not be entitled to recover for injuries sustained in consequence thereof[38] unless the master or those representing him might, by the exercise of ordinary care, have discovered his position of peril in time to avoid injuring him[39] or unless the rule has been abrogated by disuse.[40]

Inspection or repair of cars. Violation of a rule requiring servants engaged in inspecting or repair-

27. U.S.—Petition of Langnes, D.C. Wash., 32 F.2d 284, reversed on other grounds, C.C.A., The Aloha, 35 F.2d 447, reversed on other grounds Langnes v. Green, 51 S.Ct. 243, 282 U.S. 531, 75 L.Ed. 520.
Ky.—Neal's Adm'r v. Louisville & N. R. Co., 284 S.W. 429, 215 Ky. 102.
N.C.—Brady v. Standard Oil Co. of New Jersey, 174 S.E. 456, 206 N. C. 596.
39 C.J. p 889 note 93.

28. Ohio.—Diamond Rubber Co. v. McClurg, 26 Ohio Cir.Ct. 481.

29. Mo.—Shimp v. Woods-Evertz Stove Co., 158 S.W. 864, 173 Mo. App. 423.
Customary violation of rules as excuse for disobedience generally see supra § 458.

30. Mo.—Shimp v. Woods-Evertz Stove Co., 158 S.W. 864, 173 Mo. App. 423.

31. U.S.—Pennsylvania R. Co. v. Schafer, C.C.A.Ohio, 290 F. 140.
39 C.J. p 891 note 7.

32. La.—Borell v. Cumberland Telegraph & Telephone Co., 63 So. 247, 133 La. 630, L.R.A.1916D 1064.
39 C.J. p 890 note 99.
Duty to discover and remedy defects generally see supra § 447.

Electric wires

Where the wires of an electric light company come into contact with those of a telephone company as the result of a storm, and a well-informed trouble man of the telephone company is instructed to locate the trouble and report thereon but not to attempt to clear the wires, the telephone company is not liable for injuries resulting from his taking hold of a wire.—Borell v. Cumberland Telegraph & Telephone Co., supra.

Where rules do not require station agent to inspect or repair station yard, and he is injured by a fall in railroad yard, allegedly caused by defective condition of roadbed, railroad cannot avoid liability on theory that company rules charged plaintiff with duty of maintaining yard in reasonably safe condition.—McClain v. Charleston & W. C. Ry. Co., 4 S.E.2d 280, 191 S.C. 332.

33. U.S.—Louisville & N. R. Co. v. Woodward, Ala., 176 F. 5, 99 C.C. A. 479.
39 C.J. p 890 note 1.

34. S.C.—Jones v. Postal Tel. Cable Co., 74 S.E. 492, 91 S.C. 273.

35. Ind.—Chicago, St. L. & P. R. Co. v. Fry, 28 N.E. 989, 131 Ind. 319.
39 C.J. p 890 note 3.

36. Tex.—Galveston, H. & S. A. R. Co. v. Smith, 57 S.W. 999, 24 Tex. Civ.App. 127.

37. Minn.—Le Duc v. Northern Pac. R. Co., 100 N.W. 108, 92 Minn. 287.
Customary violation of rules as excuse for disobedience generally see supra § 458.

38. Ark.—Young v. St. Louis, I. M. & S. R. Co., 140 S.W. 584, 100 Ark. 380.
Ill.—Illinois Cent. R. Co. v. Braden, 128 Ill.App. 265.
39 C.J. p 891 note 11.
Duty to give warning or signal of dangerous position see supra § 455.
Section foreman, who operated motor car in violation of rules by not putting out flag or getting lineup on extra trains or keeping lookout, was as matter of law negligent.—Dozier v. Missouri Pac. R. Co., 3 S.W.2d 678, 176 Ark. 651.

39. Mo.—Neas v. Chicago, B. & Q. R. Co., 120 S.W. 120, 138 Mo.App. 484.
Last clear chance doctrine generally see supra § 423.

40. Ark.—St. Louis, I. M. & S. R.

ing cars to put out flags or other signals in order to notify the master or other servants that the servant engaged in such work has assumed a position of danger ordinarily will prevent a recovery for injuries sustained by reason of a noncompliance with the rule.[41] It has been held, however, that for a violation of the rule to have this effect, it is necessary that the servant should have been instructed with respect thereto.[42] It has also been held that a disobedience of the rule will not prevent a recovery where the master promises to protect the servant while at work,[43] or where the rule has been abrogated by disuse[44] or waived by the railroad company.[45]

Operation of velocipede or hand car. Where a railroad employee operating a velocipede knowingly and willfully violates a rule of the company to carry lights and run against the traffic, and is injured while so doing, he cannot recover.[46] So also a servant operating a hand car, who knowingly violates a rule requiring him to keep lights on the hand car when operating it at night, and is killed by a train, his negligence will preclude a recovery[47] unless the engineer and fireman saw, or in the exercise of ordinary diligence should have seen, him in time to avoid the injury.[48] A section foreman in charge of a hand car who fails to send a flag around a curve in accordance with rules of the road is guilty of negligence which will prevent a recovery where he sustains injuries in consequence of his disobedience of the rule.[49]

Operation of trains. A conductor of a train, injured by a rear end collision through his failure to take steps to protect the rear of his train by placing torpedoes on the rail as required by rules of the company when he knew his train was being delayed and might be overtaken, is precluded by his negligence from recovery for injuries sustained.[50]

Entering mining shaft. Where a servant fails to comply with a rule forbidding anyone to come into a mining shaft without giving notice by signal, such negligence will defeat any recovery for injury received by reason of a block falling in the shaft.[51]

§ 460. Disregarding Warnings or Signals

An employee who is injured while disregarding a proper warning or signal is generally chargeable with such contributory negligence as will preclude a recovery for injuries thereby sustained.

An employee who is injured while disregarding a proper warning or signal is generally chargeable with such contributory negligence as will bar a recovery for injuries sustained in consequence thereof,[52] especially where the warning or signal has been repeatedly given.[53] His disregard of the warning or signal cannot be justified by the fact that he has been directed to hurry with his work[54] or that his mind was absorbed in his work at the time;[55] and the fact that he does not realize the magnitude of the possible injuries does not excuse

Co. v. Sharp, 171 S.W. 95, 115 Ark. 308.
S.C.—Bussey v. Charleston & W. C. R. Co., 58 S.E. 1015, 78 S.C. 352.

41. Utah.—Lasagna v. McCarthy, 177 P.2d 734.
39 C.J. p 891 note 14.

Rule held not violated
Car inspector stepping between standing cars, believing approaching cars would be shunted upon adjoining track instead of being wrongfully shunted against standing cars, did not violate employer's rule respecting working about cars without blue light placed at either end, so as to preclude recovery for death.—Halges v. Central R. Co. of New Jersey, C.C.A.N.Y., 58 F.2d 169, certiorari denied Central R. Co. of New Jersey v. Halges, 53 S.Ct. 11, 287 U.S. 607, 77 L.Ed. 528.

Combined rules of railroad and navy
Railroad was not liable for injury to car inspector working in United States naval supply depot not under control of railroad and caused when inspector was run over while inspecting cars, where injury was caused by inspector's own violation of a published safety rule of both the navy and railroad requiring a blue flag to be placed on track when men are working around cars.—Lasagna v. McCarthy, Utah, 177 P.2d 734.

42. Conn.—Campbell v. New York, N. H. & H. R. Co., 102 A. 597, 92 Conn. 322.
39 C.J. p 891 note 15.

43. Mo.—Moore v. Wabash, St. L. & P. R. Co., 85 Mo. 588.
39 C.J. p 891 note 16.

44. Ark.—St. Louis, I. M. & S. R. Co. v. Sharp, 171 S.W. 95, 115 Ark. 308.
Customary violation of rules as excusing disobedience generally see supra § 458.

45. Utah.—Lasagna v. McCarthy, 177 P.2d 734.

Notice as element of waiver
Notice by car inspector to railroad that inspector's blue flag, furnished for purpose of complying with published safety rule, had been wrecked was notice that the rule was being complied with and was not notice that the flag was not being used, so as to constitute actual knowledge by railroad of violations of the rule as an element of waiver by railroad so as to relieve inspector of binding effect of rule.—Lasagna v. McCarthy, supra.

46. Ill.—Young v. Chicago & N. W. R. Co., 180 Ill.App. 498.

47. Mo.—Neas v. Chicago, B. & Q. R. Co., 120 S.W. 120, 138 Mo.App. 484.

48. Mo.—Neas v. Chicago, B. & Q. R. Co., supra.

49. Tex.—Southern Pac. Co. v. Ryan, Civ.App., 29 S.W. 527.

50. Wash.—Boucher v. Oregon R. & Nav. Co., 97 P. 661, 50 Wash. 627.
39 C.J. p 892 note 22.

51. Tenn.—American Zinc Co. v. Smith, 161 S.W. 494, 128 Tenn. 447, L.R.A.1916F 907.

52. U.S.—Pere Marquette Ry. Co. v. Haskins, C.C.A.Mich., 62 F.2d 806.
39 C.J. p 892 note 27.

53. N.Y.—Moeller v. Brewster, 30 N.E. 124, 131 N.Y. 606.

54. U.S.—Baltimore & P. R. Co. v. Jones, D.C., 95 U.S. 439, 24 L.Ed. 506.

55. Tex.—Ft. Worth & R. G. R. Co. v. Robinson, 84 S.W. 410, 37 Tex. Civ.App. 465, affirmed 87 S.W. 667, 99 Tex. 110.

him for exposing himself to the risk consequent on a disregard of such warning or signal.[56] An injured servant is not entitled to recover where he fails to call the signal to the attention of another servant on whose acts his own safety depends,[57] or where, after calling attention of the other servant to the signal and seeing that he has failed to observe it, he does nothing further,[58] nor is he entitled to recover where he disregards a warning which he himself has given to other servants;[59] and, moreover, it has been held that he may be precluded from recovering where he relies on a signal which has been improperly given.[60] It has also been held that, where the servant's disregard of the warning puts him in a place where he has no right to be and he sustains injuries at such place, he cannot recover even though the defense of contributory negligence is not available by reason of the master's willful violation of a statutory provision for the servant's safety.[61] The master, however, is not relieved from liability where the warning had no reference to the particular work at which the servant was employed when injured.[62]

Where contradictory signals are given simultaneously, thus leaving it in doubt whether the servant may proceed with safety, he is not justified in proceeding with his work and, if he does so and is injured in consequence, he cannot recover[63] unless, under the circumstances, he has a right to assume that it is safe and proper to proceed.[64]

§ 461. —— Dangerous Operations or Methods of Work

A servant who is injured while attempting dangerous operations or methods of work in disobedience of warnings or signals generally cannot recover therefor.

A servant who is injured while attempting dangerous operations or methods of work in disobedience of warnings, signals, or instructions generally cannot recover for the injuries thereby sustained,[65] as where in disregard of warnings or signals he adopts an unsafe method of performing his work with respect to the operation of a railroad,[66] such as in coupling or uncoupling cars.[67]

§ 462. —— Defective Appliances or Places of Work

A servant who is injured while working with defective or dangerous tools or appliances, or in a dangerous place, in disregard of warnings or signals, generally cannot recover for the injuries so sustained.

A servant who is working with defective or dangerous tools or appliances or in a dangerous place, and who fails to heed signals, warnings, or instructions for his safety, and is injured in consequence, is not entitled to recover.[68]

56. Minn.—Truntle v. North Star Woolen-Mill Co., 58 N.W. 832, 57 Minn. 52.
Tex.—Ft. Worth & R. G. R. Co. v. Robinson, 84 S.W. 410, 37 Tex.Civ. App. 465, affirmed 87 S.W. 667, 99 Tex. 110.

57. Minn.—Elmgren v. Chicago, M. & St. P. R. Co., 112 N.W. 1067, 102 Minn. 41, 12 L.R.A.,N.S., 754.
39 C.J. p 893 note 32.

58. U.S.—Pennsylvania Co. v. Sheeley, Ohio, 221 F. 901, 137 C.C.A. 471.

59. Ky.—Moreland v. Indian Refining Co., 143 S.W. 395, 146 Ky. 760.
39 C.J. p 892 note 27 [a].

60. Ala.—Columbus & W. R. Co. v. Bridges, 5 So. 864, 86 Ala. 448, 11 Am.S.R. 58.
39 C.J. p 892 note 27 [c].

61. Ill.—Randall v. Crescent Coal Co., 203 Ill.App. 534, affirmed 117 N.E. 773, 280 Ill. 517.
39 C.J. p 893 note 34.

62. U.S.—McDowell v. The France, D.C.N.Y., 53 F. 843, reversed on other grounds 59 F. 479, 8 C.C.A. 185.

Repair work

Railroad cannot relieve itself from liability under Federal Employers' Liability Act for injuries sustained by mechanic's helper when his hand was caught in screw of locomotive stoker while removing an obstruction therefrom on ground that helper had disregarded warning stamped on cleanout plate to keep hands out, since it would be reasonable to assume that warning was not intended for one engaged to repair interior of the stoker.—Edwards v. Baltimore & O. R. Co., C.C.A.Ill., 131 F.2d 366.

63. Ga.—Devine v. Savannah, F. & W. R. Co., 15 S.E. 781, 89 Ga. 541.

64. Utah.—Miller v. Southern Pac. Co., 21 P.2d 865, 82 Utah 46, certiorari denied Southern Pac. Co. v. Miller, 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 600.

"Caution," "stop," and "clear" signals

Locomotive engineer and fireman were not negligent in failing to observe stop signal in time to halt train before reaching open derail switch if previous signal showed "clear" when train passed it and should have showed "caution" if following signal showed "stop."—Miller v. Southern Pac. Co., 21 P.2d 865, 82 Utah 46, certiorari denied Southern Pac. Co. v. Miller, 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 600.

65. Ky.—Gibson's Adm'r v. Ohio Valley Electric Ry. Co., 283 S.W. 415, 214 Ky. 256.
N.J.—Macchia v. Pennsylvania R. Co., 156 A. 337, 9 N.J.Misc. 998, affirmed 162 A. 654, 109 N.J.Law 404.
39 C.J. p 893 note 39.

Direction to hurry as no justification

U.S.—Baltimore & P. R. Co. v. Jones, D.C., 95 U.S. 439, 24 L.Ed. 506.

66. Pa.—Schlemmer v. Buffalo, R. & P. R. Co., 71 A. 1053, 222 Pa. 470.
39 C.J. p 865 note 25.

67. La.—Nugent v. W. R. Pickering Lumber Co., 60 So. 606, 131 La. 891.
Pa.—Schlemmer v. Buffalo, R. & P. R. Co., 71 A. 1053, 222 Pa. 470.

68. La.—Mitchell v. Travelers Indemnity Co., App., 21 So.2d 198.
Va.—Brickell v. Shawn, 9 S.E.2d 330, 175 Va. 373.
39 C.J. p 894 note 43.

Defective stairway

Contributory negligence of domestic servant in using back stairway of apartment building of which her employer was a tenant, although expressly warned not to do so, precluded recovery against employer for injuries sustained by servant in fall on broken step.—Mitchell v. Travelers Indemnity Co., La.App., 21 So. 2d 198.

§ 463. Compliance with Commands or Orders

A servant who is injured while complying with a command or order of his master is generally not chargeable with contributory negligence.

Subject to the limitations discussed infra §§ 464–467, a servant is generally not chargeable with contributory negligence, precluding a recovery for injuries sustained, where he acts in compliance with the command or order of the master or his authorized representative,[69] even though such command or order was given negligently.[70]

§ 464. —— Where Danger Not Obvious and Imminent

A servant generally is not chargeable with contributory negligence in obeying a command or order given by the master, or by his authorized representative, if the danger to be incurred by such obedience is not so obvious and imminent that an ordinarily prudent person would refuse obedience.

Even though a servant may know that some danger is involved,[71] he is not chargeable with contributory negligence in obeying commands or orders in or about the master's business when such orders or commands are given by the master or by one in authority over the servant as a representative of the master, if the danger to be incurred by obedience thereto is not so obvious and imminent that an ordinarily prudent person would refuse obedience,[72] or, as otherwise stated, if the danger is not so obvious and imminent as to show almost inevitable injury.[73] This well-settled principle applies with full force and effect although the work might have been accomplished by a different method;[74] and especially is the rule applicable where a servant knowing, or having reason to suspect, that the work is dangerous, complains thereof, and is assured that it is safe.[75]

This general rule has been applied in cases where the servant was ordered to work with dangerous machinery, tools, or appliances,[76] or in dangerous places,[77] or to attempt dangerous operations or methods of work.[78]

An employee, leaving safe place on flat roof, where his duties required him to be, catching hold of structure, which he was assisting employer to erect on such roof to support electric sign, and pulling himself up to top of narrow wall, from which he was knocked or fell to street pavement below when structure collapsed, where he was warned by employer not to get on wall and to stay clear of structure, was chargeable with contributory negligence precluding a recovery for his death from his employer.—Brickell v. Shawn, 9 S.E.2d 330, 175 Va. 373.

69. N.H.—Tremblay v. J. Rudnick & Sons, 13 A.2d 153, 91 N.H. 24.
N.C.—Overton v. Farmers' Mfg. Co., 146 S.E. 706, 196 N.C. 670—Mason v. Richmond & D. R. Co., 19 S.E. 362, 114 N.C. 718.
Or.—Peluck v. Pacific Machine & Blacksmith Co., 293 P. 417, 134 Or. 171.
S.C.—Tuttle v. Hanckel, 183 S.E. 484, 179 S.C. 60.
39 C.J. p 894 note 48.

70. Or.—Peluck v. Pacific Machine & Blacksmith Co., 293 P. 417, 134 Or. 171.

71. Mo.—Ingram v. Prairie Block Coal Co., 5 S.W.2d 413, 319 Mo. 644—Storey v. Williams, App., 50 S.W. 2d 698.
Utah.—Kaumans v. White Star Gas & Oil Co., 63 P.2d 231, 92 Utah 24.
Wis.—Neitzke v. Kraft-Phenix Dairies, 253 N.W. 579, 214 Wis. 441.
39 C.J. p 894 note 47.
An employee's mere awareness in obeying employer's directions that he is exposing himself to danger does not of itself make employee contributorily negligent.
Utah.—Kaumans v. White Star Gas & Oil Co., 63 P.2d 231, 92 Utah 24.
Wis.—Neitzke v. Kraft-Phenix Dairies, 253 N.W. 579, 214 Wis. 441.

72. Ark.—Missouri Pac. R. Co. v. Brown, 115 S.W.2d 1083, 195 Ark. 1060—Pine Bluff Heading Co. v. McMorris, 31 S.W.2d 962, 182 Ark. 445.
Kan.—Rush v. Brown, 109 P.2d 84, 153 Kan. 59—St. Louis & S. F. R. Co. v. Morris, 93 P. 153, 76 Kan. 836.
Minn.—James v. Chicago, St. P., M. & O. R. Co., 16 N.W.2d 188, 218 Minn. 333.
Mo.—Ingram v. Prairie Block Coal Co., 5 S.W.2d 413, 319 Mo. 644—Storey v. Williams Bros., App., 50 S.W.2d 698—Brann v. Hydraulic Press Brick Co., App., 288 S.W. 941.
Ohio.—Van Duzen Gas & Gasoline Engine Co. v. Schelies, 55 N.E. 998, 61 Ohio St. 298.
Okl.—**Corpus Juris cited in** Baker v. J. H. Hudson Drilling Co., 300 P. 386, 388, 149 Okl. 180.
39 C.J. p 894 note 48.

73. Mo.—Senter v. Hammond Packing Co., App., 274 S.W. 493.
Or.—Cave v. Brown & McCabe, Stevedores, 274 P. 505, 128 Or. 286.

74. Mo.—McNairy v. Pulitzer Pub. Co., App., 274 S.W. 849—Davis v. Metropolitan St. R. Co., 176 S.W. 1067, 188 Mo.App. 128.

75. Minn.—Dimetre v. Red Wing Sewer Pipe Co., 148 N.W. 1078, 127 Minn. 132.
Mo.—Spinnell v. Goldberg, 275 S.W. 775, 219 Mo.App. 471.
39 C.J. p 896 note 50.
Assurance of safety generally see supra § 429.

76. Kan.—St. Louis & S. F. R. Co. v. Morris, 93 P. 153, 76 Kan. 836.
Mo.—Nolen v. Halpin-Dwyer Const. Co., 29 S.W.2d 215, 225 Mo.App. 224—Spinnell v. Goldberg, 275 S. W. 775, 219 Mo.App. 471.
39 C.J. p 896 note 53.

77. Ark.—Chapman v. Henderson, 67 S.W.2d 570, 188 Ark. 714—Pine Bluff Heading Co. v. McMorris, 31 S.W.2d 962, 182 Ark. 445.
Ga.—Simowitz v. Register, 3 S.E.2d 231, 60 Ga.App. 180.
Mo.—Berry v. Baltimore & O. R. Co., 43 S.W.2d 782, reversed on other grounds Baltimore & O. R. Co. v. Berry, 52 S.Ct. 510, 286 U.S. 272, 76 L.Ed. 1098.
39 C.J. p 896 note 54.
Place of alighting
It was brakeman's duty to obey conductor's order to alight from caboose unless so unreasonable and dangerous that no reasonable person with brakeman's experience would do so.—Berry v. Baltimore & O. R. Co., Mo., 43 S.W.2d 782, reversed on other grounds Baltimore & O. R. Co. v. Berry, 52 S.Ct. 510, 286 U.S. 272, 76 L.Ed. 1098.

78. Ark.—Missouri Pac. R. Co. v. Brown, 115 S.W.2d 1083, 195 Ark. 1060—St. Louis-San Francisco Ry. Co. v. McCommon, 62 S.W.2d 954, 187 Ark. 824, certiorari denied 54 S.Ct. 438, 291 U.S. 661, 78 L.Ed. 1053.

Basis of rule. The considerations on which the rule is based may be briefly stated as follows: The primary duty of the servant is obedience, and he does not stand on the same footing as the master;[79] since the position of the servant is one of subordination and obedience, he has the right to rely on the superior knowledge, judgment, and skill of the master or of the superior under whom the servant is working,[80] and is not bound to set up his own judgment against that of his master or superior,[81] at the peril of being discharged,[82] even where he may question the safety of the undertaking,[83] unless his own judgment is so clearly opposed to that of the master that in fact he does not rely on his master's opinion.[84] He is not altogether free to act on his own suspicion of danger[85] but may rely on the orders of the master notwithstanding many misgivings of his own.[86] He has the right to rely on the exercise of due care on the part of the master,[87] and may assume that the master, or superior under whom the servant is working, will not direct him to do the work unless it is reasonably safe to do so or direct him to do it in a dangerous manner[88] or will not give him an order which will expose him to unusual danger not already assumed by him in his regular and normal employment.[89]

§ 465. —— Where Danger Obvious and Imminent

A servant who is injured while performing an act which he is ordered to perform, and which is so obviously and imminently dangerous that no person of ordinary prudence would obey the order, is chargeable with such contributory negligence as will bar a recovery.

A servant is not under all circumstances and at all hazards bound to obey the orders of the master.[90] He cannot shut his eyes to danger that would be apparent to a reasonably prudent person and proceed merely because directed by the master;[91] and hence where the servant knows, or by the exercise of ordinary care should know, of the peril involved in a compliance with the command or order,[92] or where the act which the servant is ordered to perform is so obviously and imminently dangerous that no person of ordinary prudence would obey the order,[93] the servant, if injured while so doing, is chargeable with such contributory negligence as

Kan.—Rush v Brown, 109 P.2d 84, 153 Kan. 59.
Minn.—James v. Chicago, St. P., M. & O. Ry. Co., 16 N.W.2d 188, 218 Minn. 333.
Mo.—McNairy v. Pulitzer Pub. Co., App., 274 S.W. 849.
39 C.J. p 896 note 55.

Climbing electric line pole
U.S.—Jupollo Public Service Co. v. Grant, C.C.A.N.C., 42 F.2d 18.

79. Ark.—Missouri Pac. R. Co. v. Brown, 115 S.W.2d 1083, 195 Ark. 1060—Chapman v. Henderson, 67 S.W.2d 570, 188 Ark. 714—Pine Bluff Heading Co. v. McMorris, 31 S.W.2d 962, 182 Ark. 445.
Me.—Jensen v. Kyer, 63 A. 389, 101 Me. 106.
Mo.—Stephens v. Hannibal & St. J. R. Co., 9 S.W. 589, 96 Mo. 207, 9 Am.S.R. 336—Nolen v. Halpin-Dwyer Const. Co., 29 S.W.2d 215, 225 Mo.App. 224.
N.C.—Ellis v. Durham Herald Co., 145 S.E. 283, 196 N.C. 262.
39 C.J. p 896 note 58.

80. Ark.—Missouri Pac. R. Co. v. Brown, 115 S.W.2d 1083, 195 Ark. 1060—Pine Bluff Heading Co. v. McMorris, 31 S.W.2d 962, 182 Ark. 445.
Ky.—Sinclair's Adm'r v. Illinois Cent. R. Co., 100 S.W. 236, 30 Ky. L. 1040.
Me.—Jensen v. Kyer, 63 A. 389, 101 Me. 106.
Mo.—Clayton v. Wells, 26 S.W.2d 969, 324 Mo. 1176—Ingram v. Prairie Block Coal Co., 5 S.W.2d 413, 319 Mo. 644—Clayton v. Hydraulic Press Brick Co., App., 27 S.W.2d 52—Atkins v. Torson, App., 12 S.W.2d 930—Brann v. Hydraulic Press Brick Co., App., 288 S.W. 941.
S.C.—Tuttle v. Hanckel, 183 S.E. 484, 179 S.C. 60.
39 C.J. p 896 note 59.

81. Me.—Jensen v. Kyer, 63 A. 389, 101 Me. 106.
Pa.—Moleskey v. South Fork Coal Mining Co., 93 A. 485, 247 Pa. 434.
S.C.—Tuttle v. Hanckel, 183 S.E. 484, 179 S.C. 60.
39 C.J. p 896 note 60.

82. Mo.—Stephens v. Hannibal & St. J. R. Co., 9 S.W. 589, 96 Mo. 207, 9 Am.S.R. 336.

83. Pa.—Rauhauser v. York Mfg. Co., 50 Pa.Super. 506.

84. U.S.—Fillippon v. Albion Vein Slate Co., Pa., 39 S.Ct. 435, 250 U.S. 76, 63 L.Ed. 853.
Mo.—Ingram v. Prairie Block Coal Co., 5 S.W.2d 413, 319 Mo. 644.
Pa.—Williams v. Clark, 54 A. 315, 204 Pa. 416.

85. Mo.—Shortel v. City of St. Joseph, 16 S.W. 397, 104 Mo. 114, 24 Am.S.R. 317.
N.D.—Umsted v. Colgate Farmers' El. Co., 122 N.W. 390, 18 N.D. 309.

86. Pa.—Moleskey v. South Fork Coal Min. Co., 93 A. 485, 247 Pa. 434.
39 C.J. p 897 note 65.

87. Pa.—Powell v. S. Morgan Smith Co., 85 A. 416, 237 Pa. 272.
39 C.J. p 897 note 66.

88. Miss.—Odom v. Walker, 11 So. 2d 452, 193 Miss. 862.
39 C.J. p 897 note 67.

89. Ga.—Simowitz v. Register, 3 S.E.2d 231, 60 Ga.App. 180.
Ill.—Illinois Steel Co. v. Schymanowski, 44 N.E. 876, 162 Ill. 876.
Me.—Le Blanc v. Sturgis, 147 A. 701, 128 Me. 374.
Mo.—Clayton v. Wells, 26 S.W.2d 969, 324 Mo. 1176—Clayton v. Hydraulic Press Brick Co., App., 27 S.W. 2d 52.

90. N.D.—Umsted v. Colgate Farmers' El. Co., 122 N.W. 390, 18 N.D. 309.

91. Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W. Harr. 564.
Mo.—Gunn v. Hemphill Lumber Co., App., 218 S.W. 978.

92. Ark.—St. Louis-San Francisco Ry. Co. v. McCommon, 62 S.W.2d 954, 187 Ark. 824, certiorari denied 54 S.Ct. 438, 291 U.S. 661, 78 L.Ed. 1053.
Ky.—Steely v. Great Atlantic & Pacific Tea Co., 76 S.W.2d 900, 256 Ky. 586.
Mo.—Berry v. Baltimore & O. R. Co., 43 S.W.2d 782, reversed on other grounds Baltimore & O. R. Co. v. Berry, 52 S.Ct. 510, 286 U.S. 272, 76 L.Ed. 1098.

93. Ark.—Missouri Pac. R. Co. v. Brown, 115 S.W.2d 1083, 195 Ark. 1060—Chapman v. Henderson, 67 S.W.2d 570, 188 Ark. 714—St. Louis-San Francisco Ry. Co. v. McCommon, 62 S.W.2d 954, 187 Ark. 824, certiorari denied 54 S.Ct. 438,

will bar a recovery, even though his superior assures him of the safety of the act,[94] unless he acts under duress or coercion.[95]

Fear of discharge. According to some decisions, where the act which the servant is commanded to do is obviously and imminently dangerous, he will not be justified in obeying the command by reason of fear that disobedience of the command will result in his discharge;[96] but there is also authority to the contrary.[97]

§ 466. —— Character of Commands or Orders Servant Justified in Obeying

A command or order which should be obeyed, as affecting liability for injury while executing it, need not be given in any set words but may be inferred from any words or acts which reasonably justify such an inference.

An order to an employee, as affecting liability for his injury while executing it, need not be in set words but may be inferred from any words or acts reasonably justifying an inference of such order.[98] If, by a fair construction of an order given by a superior to a servant, a person acting with ordinary prudence and exercising ordinary care would, under the circumstances, have considered it an unequivocal specific order to do a certain thing, the master cannot escape liability for the consequences by showing that the order was open to other constructions, and was not in fact intended to be understood as the servant understood it in acting, as he supposed, in obedience thereto.[99] So an order given by a superior and transmitted by fellow servants to the servant injured is the order of the superior, and it is immaterial that the communication or the order was not direct.[1]

On the other hand, if, by the form of the order, a discretion is left with the servant as to whether he obey it or not and the servant is injured in consequence of obeying the order, he is not entitled to recover.[2] A direction to a servant to do work by a certain method when it could be done otherwise does not justify the servant in doing the work several months later by that method when under the control of a different superior who gave no such order.[3]

Authority to give orders. Ordinarily commands or orders given to a servant by one having no authority to give them furnish no protection to the servant if injured while obeying them,[4] especially where the servant in obeying the commands is acting outside the scope of his employment and is not engaged in the performance of any duty which is owing to the master,[5] and where he has received specific instructions from the master not to obey commands or orders of the character under consideration.[6]

Commands involving violation of rules or orders. Unless the danger is known and obvious,[7] a servant will not be charged with contributory negligence in obeying an authorized command of his superior even though it involves the violation of a rule or order of his master;[8] but this rule does not apply

291 U.S. 661, 78 L.Ed. 1053—Pine Bluff Heading Co. v. McMorris, 31 S.W.2d 962, 182 Ark. 445.
Kan.—Rush v. Brown, 109 P.2d 84, 153 Kan. 59—St. Louis & S. F. R. Co. v. Morris, 93 P. 153, 76 Kan. 836.
Ky.—Steely v. Great Atlantic & Pacific Tea Co., 76 S.W.2d 900, 256 Ky. 586.
Minn.—James v. Chicago, St. P., M. & O. Ry. Co., 16 N.W.2d 188, 218 Minn. 333—Dimetre v. Red Wing Sewer Pipe Co., 148 N.W. 1078, 127 Minn. 132.
Mo.—Rouchene v. Gamble Const. Co., 89 S.W.2d 58, 338 Mo. 123—Berry v. Baltimore & O. R. Co., 43 S.W.2d 782, reversed on other grounds Baltimore & O. R. Co. v. Berry, 52 S.Ct. 510, 286 U.S. 272, 76 L.Ed. 1098—Ingram v. Prairie Block Coal Co., 5 S.W.2d 413, 319 Mo. 644—Storey v. Williams Bros., App., 50 S.W.2d 698—Penny v. Southeastern Express Co., App., 35 S.W.2d 940—Nolen v. Halpin-Dwyer Const. Co., 29 S.W.2d 215, 225 Mo.App. 224—Brann v. Hydraulic Press Brick Co., App., 288 S.W. 941—McNairy v. Pulitzer Pub. Co., App., 274 S.W. 849.
Okl.—Baker v. J. H. Hudson Drilling Co., 300 P. 386, 149 Okl. 180.
S.C.—Tuttle v. Hanckel, 183 S.E. 484, 179 S.C. 60.
Utah.—Kaumans v. White Star Gas & Oil Co., 63 P.2d 231, 92 Utah 24.
39 C.J. p 897 note 70.

The danger must have been so manifest and glaring that it must have been known to the servant that he could not do work without injury.—Tuttle v. Hanckel, 183 S.E. 484, 179 S.C. 60.

94. Mo.—Penny v. Southeastern Express Co., App., 35 S.W.2d 940.

95. Cal.—Hall v. Clark, 125 P. 1047, 163 Cal. 392—Lemmermann v. Pope, 183 P. 467, 42 Cal.App. 192.

96. Mass.—Haley v. Case, 7 N.E. 877, 142 Mass. 316.
39 C.J. p 898 note 73.

97. N.C.—Shadd v. Georgia, C. & N. R. Co., 21 S.E. 554, 116 N.C. 968—Mason v. Richmond & D. R. Co., 19 S.E. 362, 114 N.C. 718—Mason v. Richmond & D. R. Co., 16 S.E. 698, 111 N.C. 482.
39 C.J. p 898 note 74.

98. Ala.—Republic Iron & Steel Co. v. Williams, 53 So. 76, 168 Ala. 612.
39 C.J. p 898 note 75.

99. Ohio.—Strang v. Toledo Tract. Co., 14 Ohio Cir.Ct.,N.S., 298.

1. Ohio.—Stubbins v. Buckeye Steel Castings Co., 33 Ohio Cir.Ct. 597.

2. Tenn.—Louisville & N. R. Co. v. Pitt, 18 S.W. 118, 91 Tenn. 86.

3. N.C.—Mason v. Richmond & D. R. Co., 19 S.E. 362, 114 N.C. 718.

4. Vt.—Cross v. Passumpsic Fibre Leather Co., 98 A. 1010, 90 Vt. 397.
39 C.J. p 898 note 81.

5. Vt.—Cross v. Passumpsic Fibre Leather Co., 98 A. 1010, 90 Vt. 397.
39 C.J. p 898 note 82.
Scope of employment generally see supra § 439.

6. R.I.—Mann v. Oriental Print Works, 11 R.I. 152.

7. Iowa.—York v. Chicago, M. & St. P. R. Co., 67 N.W. 574, 98 Iowa 544.
39 C.J. p 898 note 85.

8. Kan.—Forbes v. Atchison, T. & S. F. R. Co., 168 P. 314, 101 Kan. 477.
39 C.J. p 898 note 86.

with respect to the obedience of the order of one who has no authority to give it.[9] The mere assent of a superior to the violation of a rule by another servant will not excuse the latter.[10]

Commands involving violation of statute. The fact that a servant's obedience of an authorized order involves the violation of a statute does not necessarily constitute contributory negligence.[11] It has been held, however, that a servant cannot, by disregarding the judgment of a foreman that the place in which he is working has become unsafe, and also the statute forbidding the foreman from permitting him to work there, and obeying the order of his superintendent to work in the forbidden place, render the operator liable at common law for the injuries sustained.[12]

§ 467. —— Method of Compliance; Ordinary Care

A servant must exercise ordinary care in obeying the command or order of the master, or of a superior, in order to be relieved of the charge of contributory negligence.

The fact that a servant was injured while acting in obedience to orders will not relieve him of the charge of contributory negligence, unless he exercised ordinary care for his own safety,[13] even though the command or order is accompanied by an assurance of safety,[14] especially where, in obeying the command, he was doing nothing more than a regular part of his ordinary duties and had done the particular act frequently without specific directions.[15] The servant generally will be deemed to have exercised ordinary care in acting under the express command or advice of the master, even though but for that circumstance his conduct would be considered negligent.[16]

§ 468. Acts in Emergencies

A servant who, through the negligence of the master, is suddenly placed in a position of imminent peril is generally not chargeable with such contributory negligence as will prevent a recovery for injuries sustained by reason of the fact that he adopts the more dangerous course, or that he might or would have avoided injury by pursuing another course, provided the danger is real or reasonably apparent, and the servant exercises reasonable care and diligence under the circumstances.

Servants who are placed in a position of sudden peril through the negligence of others are not expected or required to act with the same deliberation, care, and foresight as servants who have time to reflect and deliberately determine what is necessary to be done in order to protect themselves from danger;[17] and hence, where a servant without fault on his part and by reason of the master's negligence is suddenly placed in a position of peril requiring immediate action and preventing deliberation as to the proper course to pursue, the fact that he adopts the more dangerous course, or that he might or

9. Ga.—Georgia R. & Banking Co. v. Rhodes, 56 Ga. 645.
N.Y.—Keenan v. New York, L. E. & W. R. Co., 39 N.E. 711, 145 N.Y. 190, 45 Am.S.R. 604.

Order by third person

Fact that railroad car inspector sent by railroad to work in naval supply depot was told to take his orders from inspectors on the job, who were not employees of the railroad, did not permit inspector to take orders from other inspectors contrary to a long-established safety rule of railroad known to inspector, without notifying railroad, and then permit inspector to assert liability of railroad for injuries occasioned by inspector's disregard of safety rule on ground that working conditions were unsafe.—Lasagna v. McCarthy, Utah, 177 P.2d 734.

10. N.Y.—Keenan v. New York, L. E. & W. R. Co., 39 N.E. 711, 145 N.Y. 190, 45 Am.S.R. 604.
39 C.J. p 899 note 88.

11. U.S.—Delaware, L. & W. R. Co. v. Petrowsky, N.Y., 250 F. 554, 162 C.C.A. 570, certiorari denied 38 S. Ct. 508, 247 U.S. 508, 62 L.Ed. 1241.

Where a mining company fails to post copies of the mining statute required by law, a servant who obeyed an order given him by one in authority, although acting in violation of the statute, cannot be considered guilty of contributory negligence.—Delaware, L. & W. R. Co. v. Petrowsky, supra.

12. W.Va.—Dwyer v. Raleigh Coal & Coke Co., 70 S.E. 716, 68 W.Va. 741.

13. Del.—Hendrickson v. Continental Fibre Co., 140 A. 659, 3 W.W. Harr. 564.
Ga.—Southern Co-op. Foundry Co. v. Elliott, 131 S.E. 180, 34 Ga.App. 746.
Ill.—Illinois Steel Co. v. Schymanowski, 44 N.E. 876, 162 Ill. 447.
Kan.—Rush v. Brown, 109 P.2d 84, 153 Kan. 59.
Mo.—Harrison v. American Car & Foundry Co., App., 280 S.W. 60, quashed on other grounds State ex rel. American Car & Foundry Co. v. Daues, 288 S.W. 13, 315 Mo. 1229, and reversed on other grounds Harrison v. American Car & Foundry Co., App., 296 S.W. 214.
Ohio.—Van Duzen Gas & Gasoline Engine Co. v. Schelies, 55 N.E. 998, 61 Ohio St. 298.
39 C.J. p 899 note 91.

14. Ga.—Southern Co-op. Foundry Co. v. Elliott, 131 S.E. 180, 34 Ga. App. 746—Central of Georgia Ry. Co. v. Lindsey, 110 S.E. 636, 28 Ga.App. 198.

15. Ky.—P. Bannon Pipe Co. v. Moorman, 199 S.W. 802, 178 Ky. 637.

16. Iowa.—Hardy v. Chicago, R. I. & P. R. Co., 127 N.W. 1093, 149 Iowa 41.
39 C.J. p 896 note 51.

17. U.S.—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F. 2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531.
Miss.—Legan & McClure Lumber Co. v. Fairchild, 124 So. 336, 155 Miss. 271.
N.C.—Riggs v. Empire Mfg. Co., 129 S.E. 595, 190 N.C. 256.
Utah.—**Corpus Juris cited in** Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 1060, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.
39 C.J. p 899 note 96.
Emergencies affecting youthful or inexperienced servant see infra § 479.

would avoid the injury by pursuing another course, will not render him guilty of such contributory negligence as will deprive him of his remedy against the master for the injuries sustained.[18] This rule applies where a servant is confronted with a sudden emergency in the course of his work in the operation of a railroad or of its locomotives or cars,[19] such as in coupling or uncoupling cars[20] or in going between the cars for such purpose.[21]

However, while there are some decisions apparently to the contrary,[22] it has generally been held that, even where an emergency of this character exists, the servant, in order to be free from the charge of contributory negligence, must exercise as much care and diligence in preserving himself from injury as would be exercised under the same or similar circumstances by an ordinarily prudent and careful man,[23] but this is the limit of care which can be required of the servant.[24] The law does not require of him infallible judgment[25] or that he shall act on the wisest course to escape the threatened danger;[26] nor is he required to exercise the same amount of care as an ordinarily prudent and careful man would exercise under ordinary circumstances.[27]

Necessity for real or apparent danger. In order to bring a case within the rule exempting the servant from contributory negligence for acts done in an emergency caused by the master's negligence, the acts must be done under a sense of impending danger,[28] and the danger must be a real one,[29] or the circumstances must be such as to create in the mind of the servant a reasonable apprehension of danger.[30]

Emergency created by servant. If the emergency in which the servant acts is of his own making, the master cannot be held liable on the theory that it had by its negligence placed him in such a position as to relieve the servant of the duty of exercising ordinary care for his own safety.[31] The rule presupposes that the party who invokes it is himself

18. U.S.—Sandri v. Byram, C.C.A. Mich., 30 F.2d 784.
Cal.—Qualls v. Atchison, T. & S. F. Ry. Co., 296 P. 645, 112 Cal.App. 7.
Ga.—Gray v. Garrison, 176 S.E. 412, 49 Ga.App. 472.
Ky.—Louisville & N. R. Co. v. Stephens, 182 S.W.2d 447, 298 Ky. 328.
Mont.—Burnett v. Northern Pac. Ry. Co., 124 P.2d 307, 113 Mont. 253.
N.C.—Riggs v. Empire Mfg. Co., 129 S.E. 595, 190 N.C. 256.
Utah.—**Corpus Juris cited in** Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 1060, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U. S. 613, 74 L.Ed. 655.
39 C.J. p 900 note 97.

"Emergencies," as used in cases permitting employee to recover where he has performed some act in an emergency, have been interpreted as unforeseen events happening in and about the premises which threaten or menace life, limb, or destruction of property.—Davis v. North State Veneer Corporation, 156 S.E. 859, 861, 200 N.C. 263.

19. Miss.—Graves v. Gulf & S. I. R. Co., 110 So. 234, 146 Miss. 130.
Mo.—Brannock v. St. Louis & S. F. R. Co., 126 S.W. 552, 147 Mo.App. 301.
Tex.—Texas & N. O. R. Co. v. Conway, 98 S.W. 1070, 44 Tex.Civ.App. 68.
39 C.J. p 900 note 97 [b]–[d].

20. Mo.—Brannock v. St. Louis & S. F. R. Co., 126 S.W. 552, 147 Mo. App. 301.
Tex.—Texas & N. O. R. Co. v. Conway, 98 S.W. 1070, 44 Tex.Civ.App. 68.

21. Mo.—Brannock v. St. Louis & S. F. R. Co., 126 S.W. 552, 147 Mo. App. 301.
Tex.—Texas & N. O. R. Co. v. Conway, 98 S.W. 1070, 44 Tex.Civ.App. 68.
39 C.J. p 866 notes 42, 45.

22. Tex.—International & G. N. R. Co. v. Neff, 28 S.W. 283, 87 Tex. 303.
39 C.J. p 901 note 98.

23. Cal.—Qualls v. Atchison, T. & S. F. Ry. Co., 296 P. 645, 112 Cal. App. 7.
39 C.J. p 901 note 99.

24. Iowa.—Murphy v. Chicago Great Western R. Co., 118 N.W. 390, 140 Iowa 332.
39 C.J. p 901 note 1.

25. N.C.—Dortch v. Atlantic Coast Line R. Co., 62 S.E. 616, 148 N.C. 575.

26. Ga.—Gray v. Garrison, 176 S.E. 412, 49 Ga.App. 472.
Pa.—Neilson v. Hillside Coal & Iron Co., 31 A. 1091, 168 Pa. 256, 47 Am. S.R. 886.

Jumping to escape scalding by steam

A locomotive fireman, confronted with necessity of choosing instantly between remaining at his post and being scalded by steam from burst locomotive boiler or jumping from engine cab while train was running relatively slow, was not guilty of contributory negligence, barring recovery from railroad company for his death, in jumping, instead of remaining in cab as hindsight showed would have been safer course.—Louisville & N. R. Co. v. Stephens, 182 S.W.2d 447, 298 Ky. 328.

Employee stopping engine before explosion was not required to exercise same judgment in selecting route that person not confronted with emergency would exercise.—Legan & McClure Lumber Co. v. Fairchild, 124 So. 336, 155 Miss. 271.

27. Ill.—Illinois Steel Co. v. Paige, 136 Ill.App. 410, affirmed 84 N.E. 239, 233 Ill. 313.
39 C.J. p 901 note 4.

28. Ky.—Courier-Journal Job Printing Co. v. Haag, 159 S.W. 789, 155 Ky. 248.
Tex.—International-Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272.

29. Ky.—Courier-Journal Job Printing Co. v. Haag, 159 S.W. 789, 155 Ky. 248.
Or.—Brady v. Oregon Lumber Co., 243 P. 96, 117 Or. 188, 45 A.L.R. 812, rehearing denied 245 P. 732, 118 Or. 15, 45 A.L.R. 812.

30. U.S.—Bobango v. Erie R. Co., C. C.A.Ohio, 57 F.2d 667—Sandri v. Byram, C.C.A.Mich., 30 F.2d 784.
Ga.—Gray v. Garrison, 176 S.E. 412, 49 Ga.App. 472.
Miss.—Graves v. Gulf & S. I. R. Co., 110 So. 234, 146 Miss. 130.
Tex.—Fort Worth & D. C. Ry. Co. v. Westrup, Com.App., 285 S.W. 1053.
39 C.J. p 901 note 8.

Facts which justify a reasonable fear that the danger is impending are sufficient.—Self v. Adel Lumber Co., 64 S.E. 112, 5 Ga.App. 846.

31. U.S.—Bobango v. Erie R. Co., C.C.A.Ohio, 57 F.2d 667.
Ky.—Louisa Coal Co. v. Hammond, 169 S.W. 709, 160 Ky. 271.
39 C.J. p 901 note 10.

free from fault in creating the emergency.[32]

Concurrent negligence of master and servant. If the servant's negligence combines with that of the master in putting the servant in the place of peril, and he is injured, he cannot recover.[33]

Repetition of previous occurrence. A servant cannot rely on the exception of sudden peril as excusing his failure to exercise ordinary care where the occurrence which alarmed him was a repetition of that which he had theretofore observed and should have anticipated.[34]

Act done in furtherance of work. If the act which caused the injury was not done for the purpose of saving the servant from injury, but merely in furtherance of his work, he cannot claim absence of contributory negligence on the ground that he made a mistake of judgment.[35]

Obeying orders in an emergency is not, in general, contributory negligence which will bar a recovery, although it is apparent that to do so is attended with danger.[36]

§ 469. —— Effort to Save Life or Prevent Injury to Others

Contributory negligence ordinarily will not be imputed to a servant who, while acting within the scope of his duties, attempts, in the face of imminent danger, to protect others from death or personal injury.

As a general rule contributory negligence will not be imputed to a servant who, while acting within the scope of his duties, attempts, in the face of imminent danger, to protect others from death or personal injury.[37] The law has so great a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons;[38] all that is required of the servant is that he should act with such care as might be expected of a person of ordinary prudence under similar circumstances,[39] but at least this degree of care is required of him.[40] He is not charged with the consequences of error in judgment resulting from the excitement and confusion of the moment.[41]

If the master was not negligent, the fact that the servant sustained injuries or was killed while attempting to save human life under circumstances of imminent danger will not authorize a recovery.[42]

§ 470. —— Effort to Save Master's Property

One who, in the exercise of reasonable care and prudence, makes an attempt to save the master's property in an emergency and is injured while so doing is generally not chargeable with contributory negligence.

One who, in the exercise of reasonable care and prudence, makes an attempt to save the master's property in an emergency and is injured while so doing is generally not chargeable with contributory negligence.[43] Nevertheless, the mere fact that a servant attempts to save the master's property in an emergency does not necessarily secure him immunity from the charge of contributory negligence.[44] The question in every case of this character is whether the acts of the servant measure up to the standard of ordinary care and prudence.[45]

32. Va.—Virginia & S. W. R. Co. v. Hill, 89 S.E. 895, 119 Va. 837.

33. Wis.—Baltzer v. Chicago, M. & N. R. Co., 53 N.W. 885, 93 Wis. 459.

34. Tenn.—Louisville & N. R. Co. v. Hensley, 7 Tenn.Civ.A. 610.

35. Ky.—Mahan Jellico Coal Co. v. Bird, 181 S.W. 339, 167 Ky. 697.

36. N.C.—Allison v. Southern R. Co., 40 S.E. 91, 129 N.C. 336.
39 C.J. p 901 note 15.

37. U.S.—Green v. Standard Wholesale Phosphate & Acid Works, D.C. Md., 29 F.2d 746.
Ala.—Atlantic Coast Line R. Co. v. Russell, 111 So. 753, 215 Ala. 600.
Utah.—**Corpus Juris quoted in** Roach v. Los Angeles & S. L. R. Co., 280 P. 1053, 1060, 74 Utah 545, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.
39 C.J. p 902 note 16.

Attempt to rescue fellow employee
U.S.—Green v. Standard Wholesale Phosphate & Acid Works, D.C.Md., 29 F.2d 746.

38. Kan.—Condiff v. Kansas City, Ft. S. & G. R. Co., 25 P. 562, 45 Kan. 256.
La.—Walker v. Shreveport Gas, Electric Light & Power Co., 44 So. 925, 120 La. 68.
39 C.J. p 902 note 17.

39. Ky.—Chesapeake & O. R. Co. v. Brown, 153 S.W. 753, 152 Ky. 479.
39 C.J. p 902 note 18.

40. Iowa.—Nelling v. Chicago, St. P. & K. C. R. Co., 63 N.W. 568, 67 N. W. 404, 98 Iowa 554.
39 C.J. p 902 note 19.

41. Pa.—Smith v. Standard Steel Car Co., 106 A. 102, 262 Pa. 550—Corbin v. Philadelphia, 45 A. 1070, 195 Pa. 461, 78 Am.S.R. 825, 49 L. R.A. 715.

42. La.—Walker v. Shreveport Gas, Electric Light & Power Co., 44 So. 925, 120 La. 68.
39 C.J. p 902 note 21.

43. Ala.—Atlantic Coast Line R. Co. v. Russell, 111 So. 753, 215 Ala. 600.
Ill.—Pullman Palace Car Co. v. Laack, 32 N.E. 285, 143 Ill. 242, 18 L.R.A. 215.
39 C.J. p 902 note 22.

Extinguishing fire on master's property
Ark.—Booth & Flynn v. Price, 39 S.W.2d 717, 183 Ark. 975, 76 A.L.R. 957.

44. La.—Mathis v. Kansas City Southern R. Co., 74 So. 172, 140 La. 855.
Mont.—Hollenback v. Stone & Webster Engineering Corp., 129 P. 1058, 46 Mont. 559.

45. La.—Mathis v. Kansas City Southern R. Co., 74 So. 172, 140 La. 855.
Mont.—Hollenback v. Stone & Webster, Engineering Corp., 129 P. 1058, 46 Mont. 559.

Remaining on track to extricate car
A signalman who was killed when train collided with inspection car which signalman was attempting to remove from track was not required to remain on track merely to prevent damage to car.—Deere v. South-

A mere error of judgment will not charge the servant with contributory negligence or preclude a recovery for injuries sustained while acting in an emergency to save the property of the master;[46] and it has been held that the fact that an employee's acts, in connection with others, occasioned threatened dangers to the employer's property does not preclude a recovery for death caused by his attempt to ward off the danger, where his acts were not culpable.[47] In some states it has been held that the "imminent peril doctrine" does not protect a servant where mere property damage resulting from the master's negligence is involved.[48]

Compliance with orders. If an employer calls on an employee suddenly to extricate his property from peril under circumstances allowing no time for consideration, and the employee acting in compliance with the positive orders is injured, he may recover for such injuries received because of the emergency[49] unless the act to be done is obviously so dangerous that a man of ordinary prudence would not have obeyed the order.[50] This rule applies only where there is imminent danger or hazard to the master's property.[51]

3. Inexperienced or Youthful Servants

§ 471. In General

The youth or inexperience of a servant does not of itself relieve him from the effects of contributory negligence; he is bound to exercise such care and prudence as may reasonably be expected of a person of his age, capacity, and experience in the same circumstances.

Except in so far as controlled by statute, as discussed infra § 480, the youth or inexperience of a servant does not of itself relieve him from the effect of contributory negligence.[52] Nevertheless, his age, intelligence, physical attainments, and experience are matters which may and should be considered in determining his contributory negligence;[53] and he is only bound to exercise such care and prudence as may reasonably be expected of a person of his age, capacity, and experience in the same circumstances,[54] and not as high a degree of care as would ordinarily be required of a prudent person of maturity and experience.[55] He is, however, required to exercise such a degree of care as may be expected from a person of his age, knowledge, experience, and capacity;[56] and notwithstanding his minority, if he has sufficient intelligence to appreciate the danger of a situation, the rules applicable to adults, discussed supra § 427, et seq, may be applied in his case.[57]

§ 472. Representation as to Age and Experience

A servant who misrepresents or conceals the facts as to his age or experience generally may not recover for injuries caused by his negligence or inexperience.

A minor servant who misrepresents or conceals the facts as to his age generally may not recover for injuries caused by his negligence.[58] So also

ern Pac. Co., C.C.A.Or., 123 F.2d 438, certiorari denied 62 S.Ct. 916, 315 U.S. 819, 86 L.Ed. 1217.

46. Pa.—Schall v. Cole, 107 Pa. 1.

47. Tex.—Houston & T. C. R. Co. v. Smith, Tex.Civ.App., 51 S.W. 506.

48. Mo.—Johnson v. Terminal R. Ass'n of St. Louis, 8 S.W.2d 891, 320 Mo. 884, certiorari denied 49 S.Ct. 80, 278 U.S. 644, 73 L.Ed. 558, 61 A.L.R. 572—Hill v. East St. Louis Cotton Oil Co., 214 S.W. 419, 202 Mo.App. 478.

The doctrine has been held not applicable to switchman voluntarily passing in front of moving freight car to avoid probable property damage.—Johnson v. Terminal R. Ass'n of St. Louis, 8 S.W.2d 891, 320 Mo. 884, certiorari denied 49 S.Ct. 80, 278 U.S. 644, 73 L.Ed. 558, 61 A.L.R. 572.

49. Tex.—Robins v. Connolly, Tex. Civ.App., 241 S.W. 244.

50. Tex.—Robins v. Connolly, supra.

51. Tex.—International-Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272.

Danger from oil dripping from tank car

A car repairman who received instructions to proceed to designated station to repair tank car was not excused from effect of his negligence, with respect to injuries sustained, in jumping from freight train which failed to stop because of conductor's failure so to direct engineer, by fact that instructions directed repairman to proceed on "the first thing available" and that repairman and helper on approaching station allegedly saw oil dripping from tank car, since no such imminent danger or hazard to railroad property was presented as would have caused a reasonably prudent person to jump from the train.—International-Great Northern R. Co. v. Lowry, supra.

52. Ky.—Jarboe v. Coleman, 182 S. W. 922, 168 Ky. 707.

Mich.—Meloche v. Flowers, Inc., 265 N.W. 309, 274 Mich. 385.

39 C.J. p 903 note 31.

53. Ga.—Moore v. Ross, 153 S.E. 575, 41 Ga.App. 509.

Mich.—La Pointe v. Chevrette, 250 N.W. 272, 264 Mich. 482.

39 C.J. p 903 note 32.

54. Ga.—Moore v. Ross, 153 S.E. 575, 41 Ga.App. 509.

39 C.J. p 903 note 33.

55. Ga.—Moore v. Ross, supra.

39 C.J. p 903 note 33.

Employee nineteen years of age should not necessarily be held to full accountability of adult on question of care.—Smiley v. Jessup, Mo.App., 282 S.W. 110.

56. Me.—Moore v. Isenman, 143 A. 462, 127 Me. 370—Dame v. Skillin, 88 A. 408, 111 Me. 156.

Mo.—Pietraschke v. Pollnow, App., 147 S.W.2d 167.

39 C.J. p 903 note 34.

57. Ky.—Interstate Coal Co. v. Deaton, 146 S.W. 396, 148 Ky. 160.

39 C.J. p 903 note 35.

58. Miss.—Anderson Mfg. Co. v. Wade, 119 So. 313, 151 Miss. 820.

39 C.J. p 904 note 38.

Care required of master as to inexperienced or minor servants see supra § 185.

an inexperienced person who has obtained employment by pretending to an experience which he has not had cannot recover for an injury caused by his inexperience;[59] and this has also been held to be true although the servant made known the fact that he was wholly inexperienced in the occupation which he solicited.[60] However, a representation as to experience will not impute to the servant knowledge of dangers arising from the gross negligence of the master, but only those incident to the work when conducted with ordinary care and prudence.[61]

§ 473. Scope of Employment

A minor or inexperienced servant who voluntarily places himself in a position of danger, outside the scope of his employment, is chargeable with contributory negligence.

Where a minor or inexperienced servant voluntarily places himself in a position of danger, not called for by the nature of his employment, he is guilty of contributory negligence barring recovery for injuries received by him.[62]

§ 474. Knowledge of Danger

A young and inexperienced servant who is aware of the danger involved may be chargeable with such contributory negligence as will preclude a recovery for injuries sustained.

If a young and inexperienced servant is aware of the danger, his negligence will defeat recovery for an injury to which it directly contributed,[63] especially where the act resulting in the injury is in direct disobedience of orders.[64] However, in order to charge a minor or inexperienced adult with contributory negligence, he must have actual or constructive knowledge of the danger, and not merely of the defects which cause it.[65] A fortiori, an inexperienced servant is not chargeable with contributory negligence where he has no knowledge of the defects or danger,[66] especially where he is assured by the master or a superior servant that there is no danger.[67]

§ 475. Duty to Discover or Remedy Defects

A young or inexperienced servant is generally not chargeable with contributory negligence in failing to discover latent defects or dangers; and where he is placed at work in a dangerous situation, without being given due caution and instruction, the fact that the danger might have been discovered is not in itself sufficient to charge him with contributory negligence.

An inexperienced servant is not chargeable with contributory negligence in failing to make examination for latent defects or dangers,[68] especially where he is acting under orders of the master.[69] Where a master places a young or inexperienced person at work in an exposed and dangerous situation, he is bound to give him due caution and instruction, and if he fails to do so the fact that the servant might have seen the danger is not in itself sufficient to charge him with contributory negligence,[70] and he should not be charged with such negligence if he exercises reasonable care as far as the facts appear to him.[71] So also if an employer, without giving due caution and instructions, places a young and inexperienced servant at work, the dangers and risks of which the servant does not

59. Mich.—Stanley v. Chicago & W. M. R. Co., 59 N.W. 393, 101 Mich. 202.

60. Kan.—McDermott v. Atchison, T. & S. F. R. Co., 43 P. 248, 56 Kan. 319.

61. U.S.—Portland Gold Min. Co. v. Flaherty, Colo., 111 F. 312, 49 C.C.A. 361.

62. Miss.—Forbus v. Cobb Bros. Const. Co., 185 So. 243, 184 Miss. 647, suggestion of error overruled 186 So. 643, 184 Miss. 647.
39 C.J. p 904 note 42.

63. Cal.—Whalen v. Streshley, 269 P. 928, 205 Cal. 78, 60 A.L.R. 445.
Mo.—Pietraschke v. Pollnow, App., 147 S.W.2d 167.
N.C.—Boswell v. Whitehead Hosiery Mills, 132 S.E. 598, 191 N.C. 549.
39 C.J. p 904 note 45.

Experienced housemaid running needle into hand

The employers of a minor housemaid were not liable for injuries allegedly received when housemaid ran needle into her hand while brushing ashes from top of bridge table where housemaid was experienced and knew that a pin or needle might be found on a table which she was required to clean, and housemaid claimed to have looked at table when wiping it, and there was no direct evidence as to how needle happened to be upon table.—Pietraschke v. Pollnow, Mo. App., 147 S.W.2d 167.

64. N.Y.—Fortune v. Hall, 106 N.Y. S. 787, 122 App.Div. 250, affirmed 89 N.E. 1100, 195 N.Y. 578.
39 C.J. p 904 note 46.

65. Ky.—Kentucky Distilleries & Warehouse Co. v. Johnson, 237 S. W. 3, 193 Ky. 669.
39 C.J. p 904 note 47.

66. Iowa.—Looney v. Garfield Coal Co., 147 N.W. 129, 166 Iowa 136.
Mo.—Nolen v. Halpin-Dwyer Const. Co., 29 S.W.2d 215, 225 Mo.App. 224—Lally v. Morris, App., 26 S. W.2d 52.

Minor employee is not presumed aware of danger in use of tool or instrument merely because he had seen it used and tried to use it in same manner.—Smiley v. Jessup, Mo. App., 282 S.W. 110.

67. Mo.—Lally v. Morris, App., 26 S.W.2d 52.

Poisonous fumigants

Illiterate employee has been held not contributorily negligent in continuing to work with fumigants after assurance by foreman they were not poisonous.—Louisville & N. R. Co. v. Gilliland, 295 S.W. 422, 220 Ky. 431, 53 A.L.R. 386.

68. Tex.—Howard Oil Co. v. Farmer, 56 Tex. 301.
39 C.J. p 904 note 50.

69. Tex.—Howard Oil Co. v. Farmer, supra.

70. Ind.—Hill v. Gust, 55 Ind. 45—Haynes v. Erk, 33 N.E. 637, 6 Ind. App. 332.

71. Ala.—City of Dothan v. Hardy, 188 So. 264, 237 Ala. 603, 122 A.L. R. 637.

Assumption of safety

Inexperienced laborer working on scaffold may be entitled to assume that it is safe.—Sutton v. Hancock, 141 So. 532, 105 Fla. 497.

appreciate, and the servant is injured because of the dangers of the work, the employer is liable although the servant may not be free entirely from fault at the time of the injury,[72] especially where he does as others have been accustomed to do, with the master's knowledge.[73]

§ 476. Precautions against Known Dangers

A servant of sufficient age and experience to appreciate the risks of his work cannot recover for injuries caused by his failure to take due precautions against known or obvious dangers.

A servant of such age and experience as to be capable of exercising discretion, and of appreciating the risks of the work in which he is engaged, cannot recover for injuries caused by his inattention to his surroundings, and failure to take due precautions against known or obvious dangers,[74] especially where the employee having knowledge of the danger puts himself in a position not required by his duties.[75]

§ 477. Disobedience of Rules or Orders

A youthful or inexperienced servant who acts in disobedience of orders, rules, or warnings is generally chargeable with contributory negligence.

As a general rule, where a youthful servant is injured while acting in disobedience of orders, rules, or warnings, he is chargeable with such contributory negligence as will bar a recovery[76] unless the order or rule has been habitually disobeyed, and the work cannot well be done without disregarding it.[77]

§ 478. Compliance with Commands or Orders

A young or inexperienced servant who undertakes dangerous work in obedience to the command or order of the master or his authorized agent is not chargeable with contributory negligence unless the danger is obvious.

Where a young or inexperienced servant undertakes dangerous work in obedience to the command or order of the master or his authorized agent he is not chargeable with contributory negligence[78] unless the danger is so manifest and glaring that it must be known to one of his age and experience that he cannot do it without injury;[79] and this rule applies although the order given is in violation of a rule of the master.[80]

§ 479. Acts in Emergencies

A young and inexperienced servant is not chargeable with contributory negligence by reason of the fact that in an emergency, caused by his master's negligence, he does an act which contributes to his injury.

Where a young and inexperienced servant is injured while acting in an emergency caused by the master's negligence, he may recover, although, in the excitement of the moment, he loses his presence of mind and does an act which contributes to his injury.[81]

§ 480. Violation of Statutes for Protection of Minors

a. By master
b. By servant

a. By Master

Under some statutes the defense of contributory negligence is not available to the master where the injured minor was employed in violation of a statute enacted for his protection, as where at the time of his employment he was under a designated age or was employed without a required certificate of his age or capacity.

Under some statutes the defense of contributory negligence is not available where a minor is employed in violation of any law of the state or of the United States[82] unless there was fraud or misrep-

72. Ark.—Everton Silica Sand Co. v. Hicks, 125 S.W.2d 793, 197 Ark. 980.
39 C.J. p 904 note 53.

Danger from wet concrete

An inexperienced employee, suffering injuries to his feet from concrete burns as result of wet concrete slushing over his boot tops while he was spreading it without having been cautioned or warned by employer about dangers incident to working in wet concrete, was not guilty of contributory negligence barring recovery of damages from employer.—Harmon v. Harrison, 147 S.W.2d 739, 201 Ark. 988.

73. La.—White v. Nutriline Milling Co., 63 So. 385, 133 La. 870.
39 C.J. p 864 note 14 [a].

74. Ala.—City of Dothan v. Hardy, 188 So. 264, 237 Ala. 603.
39 C.J. p 905 note 55.

75. Mont.—Therriault v. England, 116 P. 581, 43 Mont. 376.

76. Miss.—Forbus v. Cobb Bros. Const. Co., 185 So. 243, 184 Miss. 647, suggestion of error overruled 186 So. 643, 184 Miss. 647.
39 C.J. p 905 note 58.

77. N.Y.—Hayes v. Bush & Denslow Mfg. Co., 41 Hun 407.
39 C.J. p 905 note 59.

78. N.Y.—Schmitt v. City of New York, 55 N.Y.S.2d 865.
S.C.—Lowe v. Southern R. Co., 67 S.E. 460, 85 S.C. 363, 137 Am.S.R. 904.
39 C.J. p 905 note 61.

79. S.C.—Lowe v. Southern R. Co., supra.
39 C.J. p 905 note 62.

80. Pa.—Dougherty v. Dobson, 63 A. 748, 214 Pa. 252, 8 L.R.A.,N.S., 90.

81. Tenn.—McMillan Marble Co. v. Black, 14 S.W. 479, 89 Tenn. 118.
39 C.J. p 906 note 65.

82. Ill.—Gill v. Boston Store of Chicago, 168 N.E. 895, 337 Ill. 70—Kowalczyk v. Swift & Co., 160 N.E. 588, 329 Ill. 308.
Ky.—Chesapeake & O. Ry. Co. v. Stapleton's Guardian, 3 S.W.2d 209, 223 Ky. 154, reversed on other grounds Chesapeake & O. R. Co. v. Stapleton, 49 S.Ct. 442, 279 U.S. 587, 73 L.Ed. 861.
39 C.J. p 906 note 67.

resentation by the minor as to his age.[83]

Hiring under prohibited age. Under statutes which forbid the employment of minors under a designated age and make disobedience thereof an offense, discussed generally in Infants § 12, where a minor hired in violation of such statute is injured in the service the defense of contributory negligence is generally not available to the employer.[84] It is immaterial that, at the time of the injury, the child was acting outside the scope of his employment and was doing work he was not authorized to perform[85] or which he had in fact been forbidden to do.[86] The construction placed on these statutes makes the employer an insurer of the safety of the child.[87] However, there is authority to the effect that such a statute has no application where a servant employed in violation of its provisions was at the time of the injury of such age that he might be employed without violating the statute[88] or that, where the statute specifies certain employments in which the minor may not be employed, contributory negligence may be available as a defense where he is injured in an employment not so specified.[89]

In some states statutes making it an offense to employ minors under a designated age do not abrogate the defense of contributory negligence or affect it in any way[90] unless the contributory negligence is of the kind that must reasonably be anticipated as a probable consequence of the violation of the statute.[91] It has been held, in order for contributory negligence to be a defense, that the minor must not only have the capacity to understand and appreciate his instructions and warnings against the dangers incident to his unlawful employment but he must in fact understand them, and his negligent act must not be such as the statute was intended to provide against,[92] and furthermore the minor must possess such unusual intelligence as to take him out of the class which the statute was intended to protect.[93]

Employment without required certificate. It has been held that noncompliance of the master with a statute forbidding the employment of a minor without obtaining a certificate of his age or capacity precludes the defense of contributory negligence;[94] but there is also authority to the contrary.[95]

b. By Servant

A minor employee who violates a statute intended for his protection is chargeable with contributory negligence.

A violation by a minor servant of a statute intended for his protection constitutes contributory negligence which will bar a recovery.[96]

§ 481. Violation of Agreement with Parent

The fact that the master, in violation of an agreement with the minor employee's father, assigns the minor dangerous work does not estop the master to set up contributory negligence of the minor.

The fact that, after the father of a minor consents to his employment on the understanding that

83. Ohio.—Acklin Stamping Co. v. Kutz, 120 N.E. 229, 98 Ohio St. 61.
Misrepresentation as to age as not defense generally see supra § 194.

84. Fla.—Tampa Shipbuilding & Engineering v. Adams, 181 So. 403, 132 Fla. 419, rehearing denied Tampa Shipbuilding & Engineering Co. v. Adams, 181 So. 893, 132 Fla. 419.
Ill.—Rost v. F. H. Noble & Co., 147 N.E. 258, 316 Ill. 357.
Minn.—Weber v. J. E. Barr Packing Corporation, 234 N.W. 682, 182 Minn. 486.
Mont.—Shaw v. Kendall, 136 P.2d 748, 114 Mont. 323.
Neb.—O'Neill v. Rovatsos, 206 N.W. 752, 114 Neb. 142.
Tenn.—Schilly v. Baker, 202 S.W.2d 348.
Vt.—Wlock v. Fort Dummer Mills, 129 A. 311, 98 Vt. 449.
39 C.J. p 906 note 71.

The rule does not apply where the minor was in fact over the prohibited age at the time of his employment and injury.—Clark v. Wells-Elkhorn Coal Co., 284 S.W. 91, 215 Ky. 128.

85. Tex.—Langston v. Degelia, Civ. App., 186 S.W.2d 738.
39 C.J. p 906 note 72.

86. Ill.—Strafford v. Republic Iron & Steel Co., 87 N.E. 358, 238 Ill. 371, 128 Am.S.R. 129, 20 L.R.A.,N.S., 876.
N.C.—Starnes v. Albion Mfg. Co., 61 S.E. 525, 147 N.C. 556, 17 L.R.A.,N.S., 602, 15 Ann.Cas. 470.

87. Ky.—Sanitary Laundry Co. v. Adams, 208 S.W. 6, 183 Ky. 39—Louisville, H. & St. L. R. Co. v. Lyons, 159 S.W. 971, 155 Ky. 396, 48 L.R.A.,N.S., 667.

88. N.Y.—Fortune v. Hall, 106 N.Y.S. 787, 122 App.Div. 250, affirmed 89 N.E. 1100, 195 N.Y. 578.

89. Mont.—Shaw v. Kendall, 136 P.2d 748, 114 Mont. 323.

90. Mich.—Besonen v. Campbell, 220 N.W. 301, 243 Mich. 209—Sundstrom v. Fruit Growers' Package Co., 219 N.W. 617, 242 Mich. 442—Gwitt v. Foss, 203 N.W. 151, 230 Mich. 8.
39 C.J. p 907 note 76.

91. W.Va.—Griffith v. American Coal Co., 88 S.E. 595, 78 W.Va. 34—Norman v. Virginia-Pocahontas Coal Co., 69 S.E. 857, 68 W.Va. 405, 31 L.R.A.,N.S., 504.

92. W.Va.—Griffith v. American Coal Co., 84 S.E. 621, 75 W.Va. 686, L.R.A.1915F 803.

93. W.Va.—Griffith v. American Coal Co., 88 S.E. 595, 78 W.Va. 34.
39 C.J. p 907 note 76 [b] (4).

94. Fla.—Tampa Shipbuilding & Engineering v. Adams, 181 So. 403, 132 Fla. 419, rehearing denied 181 So. 893, 132 Fla. 419.
Ill.—Gill v. Boston Store of Chicago, 168 N.E. 895, 337 Ill. 70.
Mo.—Buffum v. F. W. Woolworth Co., 273 S.W. 176, 221 Mo.App. 345.
39 C.J. p 907 note 78.

95. La.—Flores v. Steeg Printing, etc., Co., 78 So. 119, 142 La. 1068, affirmed Dalberni v. New Orleans Can Co., 71 So. 214, 139 La. 49.
N.Y.—Fortune v. Hall, 106 N.Y.S. 787, 122 App.Div. 250, affirmed 89 N.E. 1100, 195 N.Y. 578.
39 C.J. p 907 note 77.

96. Pa.—Riley v. Pittston Coal Min. Co., 73 A. 944, 224 Pa. 633.

he should not do work of a dangerous character, the master assigns him to dangerous work does not estop the master to set up the defense of contributory negligence to defeat a recovery.[97]

Oiling dangerous parts of machinery while in motion
Pa.—Riley v. Pittston Coal Min. Co., supra.

97. Va.—Powhatan Lime Co. v. Affleck, 79 S.E. 1054, 115 Va. 643.

See Vol. 57 for §§ 482 to End

INDEX TO

MASTER AND SERVANT

See Volume Containing End of Text
For Complete Index

End of Volume

CORPUS JURIS SECUNDUM

1986
Cumulative
Annual Pocket Part

Volume 56

Insert this Pocket Part in back of volume
It replaces prior pocket part

NOTICE

Consult General Index pocket parts for references to new matter.

ST. PAUL, MINN.
WEST PUBLISHING CO.

CITE BY TITLE AND SECTION

Thus

56 C.J.S. Master and Servant § 3(1)

This Cumulative Annual Pocket Part contains selective supplementary material derived from decisions closing with cases reported in:

Supreme Court Reporter	105 S.Ct. 3552
United States Reports	468 U.S. (part)
Lawyers' Edition, Second Series	88 L.Ed.2d (part)
Federal Reporter, Second Series	771 F.2d 1503
Federal Supplement	615 F.Supp. 95
Federal Rules Decisions	106 F.R.D. 597
Bankruptcy Reporter	52 B.R. 80
Atlantic Reporter, Second Series	497 A.2d 757
California Reporter	218 Cal.Rptr. 292
Illinois Decisions	90 Ill.Dec. 721
Military Justice Reporter	20 M.J. 1001
New York Supplement, Second Series	493 N.Y.S.2d 287
North Eastern Reporter, Second Series	482 N.E.2d 1004
North Western Reporter, Second Series	373 N.W.2d 692
Pacific Reporter, Second Series	705 P.2d 865
South Eastern Reporter, Second Series	334 S.E.2d 299
Southern Reporter, Second Series	475 So.2d 167
South Western Reporter, Second Series	695 S.W.2d 825
United States Claims Court Reporter	8 Cl.Ct. 638
American Law Reports, Fourth Series	43 A.L.R.4th

MASTER AND SERVANT

For discussion concerning the federal pension reform law see Master and Servant § 169.1.

§ 1. Definitions

page 24

1. U.S.—**C.J.S. black letter summary quoted in** Fruco Const. Co. v. McClelland, C.A.Mo., 192 F.2d 241, 244, cert. den. 72 S.Ct. 558, 342 U.S. 945, 96 L.Ed. 703—**C.J.S. black letter summary quoted in** Sabbagha v. Celebrezze, D.C.S.C., 231 F.Supp. 440, 444, revd. on oth. grds., C.A., 345 F.2d 509.

Ark.—**C.J.S. cited in** Jackson v. Petit Jean Elec. Co-op., App., 599 S.W. 402, 404, 268 Ark. 1076, affd., 606 S.W.2d 66, 270 Ark. 506.

2. Ind.—Miller v. State, 285 N.E.2d 843, 153 Ind. App. 54.

Mo.—**C.J.S. cited in** Wilkins v. City of St. Louis, App., 404 S.W.2d 783, 788.

Ohio—American Ins. Group v. McCowin, 218 N.E.2d 746, 7 Ohio App.2d 62.

W.Va.—**C.J.S. cited in** Davis v. Fire Creek Fuel Co., 109 S.E.2d 144, 150, 144 W.Va. 537.

Volunteer defined

Colo.—Heckman v. Warren, 238 P.2d 854, 124 Colo. 497.

Ga.—Callaham v. Carlson, 67 S.E.2d 726, 85 Ga.App. 4—Early v. Hauser & Hauser, 109 S.E. 914, 28 Ga.App. 24.

Other definitions

Mo.—Frank Horton & Co., Inc. v. Diggs, App., 544 S.W.2d 313.

Ohio—L. C. Dortch, Inc. v. Goldstein, 200 N.E.2d 828.

3. U.S.—**C.J.S. cited in** Weaver v. Weinberger, D.C. W.Va., 392 F.Supp. 721, 723.

6. U.S.—**C.J.S. quoted in** Santa Rosa Island Authority v. F. Rust Smith & Sons, Inc., C.A.Fla., 303 F.2d 576, 579—**C.J.S. black letter summary quoted in** Sabbagha v. Celebrezze, D.C.S.C., 231 F.Supp. 440, 444, revd. on oth. grds., C.A., 345 F.2d 509.

Mo.—**C.J.S. black letter summary quoted in** Kansas City v. Schifman Sales, Inc., 421 S.W.2d 535, 538.

page 25

7. U.S.—Matonti v. Research-Cottrell, Inc., D.C.Pa., 202 F.Supp. 527.

Kan.—Atwell v. Maxwell Bridge Co., 409 P.2d 994, 196 Kan. 219.

Mo.—Rider v. Julian, 282 S.W.2d 484, 365 Mo. 313—Talley v. Bowen Const. Co., 340 S.W.2d 701—Madsen v. Lawrence, 366 S.W.2d 413.

Pa.—Smalich v. Westfall, 269 A.2d 476, 440 Pa. 409.

Other definitions

U.S.—Brown v. Moore, D.C.Pa., 143 F.Supp. 816, revd. on oth. grds., C.A., 247 F.2d 711, cert. den. 78 S.Ct. 148, 355 U.S. 882, 2 L.Ed.2d 112.

Ga.—Farmer v. Ryder Truck Lines, Inc., 266 S.E.2d 922, 245 Ga. 734, cert. den. 101 S.Ct. 239, 449 U.S. 885, 66 L.Ed.2d 111.

8. U.S.—Still v. Union Circulation Co., C.C.A.N.Y., 101 F.2d 11, cert. den. 60 S.Ct. 78, 308 U.S. 565, 84 L.Ed. 474.

9. Ga.—Redd v. Brisbon, 147 S.E.2d 15, 113 Ga.App. 23—Southeastern Fidelity Ins. Co. v. Heard, 182 S.E.2d 153, 123 Ga.App. 635.

10. Tex.—Ackley v. State, Cr.App., 592 S.W.2d 606.

11. Tex.—Ackley v. State, Cr.App., 592 S.W.2d 606.

12. U.S.—Matonti v. Research Cottrell, Inc., D.C.Pa., 202 F.Supp. 527.

Ga.—Griffin v. Hardware Mut. Ins. Co., 92 S.E.2d 871, 93 Ga.App. 801, transf. 91 S.E.2d 10, 212 Ga. 130.

La.—Florence v. Clinique Laboratories, Inc., App., 347 So.2d 1232.

Pa.—Juarbe v. City of Philadelphia, 431 A.2d 1073, 288 Pa.Super. 330.

Similar definitions

(5) U.S.—Brown v. Moore, D.C.Pa., 143 F.Supp. 816, revd. on oth. grds., C.A., 247 F.2d 711, cert. den. 78 S.Ct. 148, 355 U.S. 882, 2 L.Ed.2d 112.

Ariz.—Larsen v. Arizona Brewing Co., 325 P.2d 829, 84 Ariz. 191.

Ark.—Hinson v. Culberson-Stowers Chevrolet, Inc., 427 S.W.2d 539, 244 Ark. 853.

Iowa—Bengford v. Carlem, Corp, 156 N.W.2d 855.

La.—Blanchard v. Ogima, 215 So.2d 902, 253 La. 34.

Pa.—Smalich v. Westfall, 269 A.2d 476, 440 Pa. 409.

page 26

Ark.—Southern Nat. Ins. Co. v. Williams, 277 S.W.2d 487, 224 Ark. 938.

Pa.—McCracken v. Slemmer, 170 A. 453, 454, 112 Pa.Super. 135.

Wash.—Elder v. Cisco Const. Co., 324 P.2d 1082, 52 Wash.2d 241.

13. U.S.—Orenstein v. Bond, D.C.Mo., 528 F.Supp 513.

Kan.—Evans v. Board of Ed. of Hays, 284 P.2d 1068, 178 Kan. 275—Atwell v. Maxwell Bridge Co., 409 P.2d 994, 196 Kan. 219.

Mich.—People v. Kirstein, 148 N.W.2d 539, 6 Mich. App. 107.

Minn.—Frankle v. Twedt, 47 N.W.2d 482, 234 Minn. 42.

Miss.—Wade v. Traxler Gravel Co., 100 So.2d 103, 232 Miss. 592.

Mo.—Rider v. Julian, 282 S.W.2d 484, 365 Mo. 313—Madsen v. Lawrence, 366 S.W.2d 413—Dean v. Young, 396 S.W.2d 549.

N.M.—Roybal v. Bates Lumber Co., 412 P.2d 555, 76 N.M. 127.

Tex.—Harris v. Cochran, Civ.App., 288 S.W.2d 814, err. ref. no rev. err.

Wash.—**C.J.S. cited in** Hollingbery v. Dunn, 411 P.2d 431, 435, 68 Wash.2d 75.

Wis.—Heims v. Hanke, 93 N.W.2d 455, 5 Wis.2d 465.

14. Ky.—City of Louisville, v. Sebree, 214 S.W.2d 248, 308 Ky. 420.

18. Physician not servant of anyone

Mass.—McMurdo v. Getter, 10 N.E.2d 139, 298 Mass. 363.

21. Mo.—**C.J.S. quoted at length in** St. Francois County Sav. & Loan Ass'n v. Industrial Commission, 395 S.W.2d 311, 314.

Cannot be employer and employee at same time

Ill.—Brown v. Village of Shipman, 411 N.E.2d 569, 44 Ill.Dec. 447, 89 Ill.App.3d 162.

La.—Carney v. Liberty Mut. Ins. Co., App., 277 So.2d 175.

Tex.—Northwestern Nat. Life Ins. Co. v. Black, Civ. App., 383 S.W.2d 806, err. ref. no rev. err.

22. Tex.—Harris v. Cochran, Civ.App., 288 S.W.2d 814, err. ref. no rev. err.

23. Ariz.—Kilpatrick v. Superior Court In and For Maricopa County, 466 P.2d 18, 105 Ariz. 413.

page 27

26. Kan.—**C.J.S. quoted in** Bean v. Gibbens, 265 P.2d 1023, 1025, 175 Kan. 639.

29. U.S.—**C.J.S. cited in** Rauser v. LTV Electrosystems, Inc., C.A.Ind., 437 F.2d 800, 803.

Cal.—Anderson v. Badger, 191 P.2d 768, 84 Cal.App.2d 736.

La.—Traders & General Ins. Co. v. Robison, App., 289 So.2d 178.

Similar definitions

(2) Conn.—Bieluczyk v. Crown Petroleum Corp., 58 A.2d 380, 134 Conn. 461.

(4) Additional definitions.

U.S.—Taylor v. Local No. 7, Intern. Union of Journeymen Horseshoers of U.S. and Canada (AFL-CIO), D.C.Md., 222 F.Supp. 812, revd. on oth. grds., C.A., 353 F.2d 593, cert. den. 86 S.Ct. 1859, 384 U.S. 969, 16 L.Ed.2d 681—Corkin v. U.S. Life Ins. Co., D.C.Mass., 260 F.Supp. 205.

Cal.—Gipson v. Davis Realty Co., 30 Cal.Rptr. 253, 215 C.A.2d 190.

Mich.—People v. Kirstein, 148 N.W.2d 539, 6 Mich. App. 107.

City as employer

U.S.—Sherman v. City of Pasadena, D.C.Cal., 367 F.Supp. 1115.

30. Ariz.—Kilpatrick v. Superior Court In and For Maricopa County, 466 P.2d 18, 105 Ariz. 413.

Similar definitions

Ohio—International Union, United Auto., Aircraft, Agr. Implement Workers of America (UAW-CIO) v. L. T. Patterson Co., 159 N.E.2d 923, affd., App., 159 N.E.2d 917, app. dism. 140 N.E.2d 318, 166 Ohio St. 148

31. Tex.—Northwestern Nat. Life Ins. Co. v. Black, Civ.App., 383 S.W.2d 806, err. ref. no rev. err.

33. U.S.—Rosell v. Barcus, D.C.Mo., 89 F.Supp. 234—Blassie v. Kroger Co., C.A.Mo., 345 F.2d 58.

Similar definition

Tenn.—American Sur. Co. of N.Y. v. City of Clarksville, 315 S.W.2d 509, 204 Tenn. 67.

34. Tex.—Ackley v. State, Cr.App., 592 S.W.2d 606.

35. Similar definitions

(5) Other definitions.—Safeway Stores v. Wilcox, C.A.N.M., 220 F.2d 661—Westover v. Stockholders Pub. Co., C.A.Cal., 237 F.2d 948.

Conn.—Tedesco v. Turner & Seymour Mfg. Co., 110 A.2d 650, 19 Conn.Sup. 192.

Fla.—City of Boca Raton v. Mattef, 91 So.2d 644.

Wyo.—C.M. & W. Drilling Co. v. Schieck, 284 P.2d 390, 74 Wyo. 64.

A legal employment is not essential to the status.[35.5]

35.5. Tenn.—American Sur. Co. of N.Y. v. City of Clarksville, 315 S.W.2d 509, 204 Tenn. 67.

37. U.S.—Weaver v. Weinberger, D.C.W.Va., 392 F.Supp. 721.

page 28

40. Same rules as governing at common law and under statutes

Tex.—Northwestern Nat. Life Ins. Co. v. Black, Civ. App, 383 S.W.2d 806, err. ref. no rev. err.

41. Former or ex-employees

Ohio—International Union, United Auto., Aircraft, Agr. Implement Workers of America (UAW-CIO v. L. T. Patterson Co., 159 N.E.2d 923, affd., App., 159 N.E.2d 917, app. dism. 140 N.E.2d 318, 166 Ohio St. 148.

43. Tex.—Northwestern Nat. Life Ins. Co. v. Black, Civ.App., 383 S.W.2d 806, err. ref. no rev. err.

44. U.S.—Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co., C.A.Md., 427 F.2d 862.

45. Mo.—**C.J.S. quoted in** Durant v. Industrial Products Mfg. Co., 235 S.W.2d 574, 576, 241 Mo.App. 266.

Page 28

46. U.S.—Corkin v. U.S. Life Ins. Co., D.C.Mass., 260 F.Supp. 205—Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co., C.A.Md., 427 F.2d 862.

Cal.—Knight v. Board of Administration of State Emp. Retirement System, 196 P.2d 547, 32 Cal.2d 400, 5 A.L.R.2d 410.

47. Alaska—Fjeldahl v. Homer Co-op. Ass'n, 11 Alaska 112.

Other definitions

Cal.—Holtzendorff v. Housing Authority of City of Los Angeles, App., 58 Cal.Rptr. 886, 250 C.A.2d 596, cert. den. 88 S.Ct. 775, 389 U.S. 1038, 19 L.Ed.2d 827.

48. Neb.—Newberry v. Youngs, 80 N.W.2d 165, 163 Neb. 397.

50. U.S.—Gerald v. American Cas. Co. of Reading, Pa., D.C.N.C., 249 F.Supp. 355, affd., C.A., 369 F.2d 829.

51. Iowa—Powers v. Fisher Controls Co., Inc., 246 N.W.2d 279.

Additional terms have been defined.[57.1]

57.1. Closed shop

U.S.—Irving v. Joint Dist. Council of New York and Vicinity of United Brotherhood of Carpenters and Joiners of America, and Amalgamated Society of Carpenters and Joiners of America, C.C.N.Y., 180 F. 896, 897, 899.

Mo.—American Hotel Co. of Mo. v. Bartenders' Intern. League of America, Local No. 422, 297 S.W.2d 411.

Tex.—Texas State Federation of Labor v. Brown & Root, Civ.App., 246 S.W.2d 938, err. ref. no rev. err.

W.Va.—Miners in General Group v. Hix, 17 S.E.2d 810, 813, 123 W.Va. 637.

11 C.J. p. 919 note 53.

Open shop

Mo.—Crescent Planing Mill Co. v. Mueller, 123 S.W.2d 193, 194, 234 Mo.App. 1243, transf. 117 S.W.2d 247, 118 A.L.R. 709.

Casual employment

N.J.—Ludwig v. Kirby, 80 A.2d 239, 13 N.J.Super. 116.

Agency shop

Nev.—Painter's Local Union No. 567 of Broth. of Painters, Decorators and Paperhangers of America v. Tom Joyce Floors, Inc., 398 P.2d 245, 81 Nev. 1.

Union shop

Nev.—Painter's Local Union No. 567 of Broth. of Painters, Decorators and Paperhangers of America v. Tom Joyce Floors, Inc., 398 P.2d 245, 81 Nev. 1.

Employment relationships in area of music

U.S.—Ames v. Associated Musicians of Greater New York, Local 802, AFM, D.C.N.Y., 251 F.Supp. 80, affd., C.A., 359 F.2d 777.

58. Tex.—Northwestern Nat. Life Ins. Co. v. Black, Civ.App., 383 S.W.2d 806, err. ref. no rev. err.

page 29

59. Neb.—Shamburg v. Shamburg, 45 N.W.2d 446, 153 Neb. 495.

Additional terms have been compared or distinguished.[67.1]

67.1. "Employee" and "partner"

Ill.—Cook v. Lauten, 80 N.E.2d 280, 335 Ill.App. 92.

La.—Little v. Caterpillar Tractor Co., App., 169 So.2d 654.

"Servant" and "Agent"

Cal.—Gipson v. Davis Realty Co., 30 Cal.Rptr. 253, 215 C.A.2d 190.

N.Y.—People v. Izzo, 409 N.Y.S.2d 623, 96 Misc.2d 634.

"Gratuitous employee" and "employee"

Mich.—People v. Kirstein, 148 N.W.2d 539, 6 Mich. App. 107.

§ 2. Essentials of Relation

Library References

Master and Servant ⚷1 et seq.

68. U.S.—Edmonds v. Fehler & Feinauer Const. Co., C.A.Ky., 252 F.2d 639—Meister v. U.S., 319 F.2d 875, 162 Ct.Cl. 667—Petition of Read, D.C.Fla., 224 F.Supp. 241—**C.J.S. black letter summary quoted in** Sabbagha v. Celebrezze, D.C.S.C., 231 F.Supp. 440, 444, revd. on oth. grds., C.A., 345 F.2d 509—American Cas. Co. of Reading, Pa. v. Wypior, C.A.Ill., 365 F.2d 164—U.S. v. Myra Foundation, C.A.N.D., 382 F.2d 107.

Del.—Lester C. Newton Trucking Co. v. Neal, 204 A.2d 393, 8 Storey 55.

D.C.—Dovell v. Arundel Supply Corp., C.A., 361 F.2d 543, 124 U.S.App.D.C. 89, cert. den. 87 S.Ct. 93, 385 U.S. 841, 17 L.Ed.2d 74 stating Maryland law—LeGrand v. Insurance Co. of North America, App., 241 A.2d 734.

Idaho—**C.J.S. cited in** In re Pacific Nat. Life Assur. Co., 212 P.2d 397, 403, 70 Idaho 98.

Ill.—Tansey v. Robinson, 164 N.E.2d 272, 24 Ill.App.2d 227.

La.—Sicard v. City of New Orleans, 176 So.2d 672, revd. on oth. grds. 184 So.2d 21, 248 La. 1090.

Ohio—L. C. Dortch, Inc. v. Goldstein, 200 N.E.2d 828.

Wyo.—**C.J.S. black letter summary quoted in** Robinson Transp. Co. v. Hawkeye-Security Ins. Co., 385 P.2d 203, 206.

Designation by parties

(2) Other matters.

U.S.—Smith v. Lancer Pools Corp., D.C.Tenn., 200 F.Supp. 199.

N.M.—Chevron Oil Co. v. Sutton, 515 P.2d 1283, 85 N.M. 679.

Furnishing transportation

(2) Other cases.

Cal.—Moeller v. De Rose, 222 P.2d 107, hearing dism.

Rulings respecting tort liability as test

Ga.—J. W. Starr & Sons Lumber Co. v. York, 78 S.E.2d 429, 89 Ga.App. 22.

page 30

69. U.S.—Westover v. Stockholders Pub. Co., C.A. Cal., 237 F.2d 948—Azad v. U.S., C.A.Minn., 388 F.2d 74—Sharpe v. Bradley Lumber Co., C.A. N.C., 446 F.2d 152, cert. den. 92 S.Ct. 946, 405 U.S. 919, 30 L.Ed.2d 789—Dow v. Connell, C.A. Colo., 448 F.2d 763, cert. den. 92 S.Ct. 957, 405 U.S. 921, 30 L.Ed.2d 792—Hayes v. Morse, D.C. Mo., 347 F.Supp. 1081, stating Illinois law, affd., C.A., 474 F.2d 1265.

Ill.—Martin v. Kralis Poultry Co., Inc., 297 N.E.2d 610, 12 Ill.App.3d 453.

Kan.—Bendure v. Great Lakes Pipe Line Co., 433 P.2d 558, 199 Kan. 696.

Minn.—Boland v. Morrill, 132 N.W.2d 711, 270 Minn. 86.

Mo.—Talley v. Bowen Const. Co., 340 S.W.2d 701.

Benefit, etc.

U.S.—Ranger Ins. Co. v. Mercantile Trust Co., D.C. Mo., 363 F.Supp. 795.

70. U.S.—Smith v. Lancer Pools Corp., D.C.Tenn., 200 F.Supp. 199—McGuire v. U.S., C.A.Wash., 349 F.2d 644—R & H Corp. v. U.S., D.C.Pa., 255 F.Supp. 870.

Cal.—Borello v. Eichler Homes, Inc., 34 Cal.Rptr. 648, 221 C.A.2d 487.

D.C.—Local 777, Democratic Union Organizing Committee, Seafarers Intern. Union of North America, AFL-CIO v. N.L.R.B., C.A., 603 F.2d 862.

Ill.—Lilly v. Cook County, 377 N.E.2d 136, 17 Ill.Dec. 946, 60 Ill.App.3d 573.

La.—Hudson v. Allstate Ins. Co., App., 169 So.2d 598.

Md.—Farrell Lines, Inc. v. Devlin, 127 A.2d 640, 211 Md. 404.

Okl.—Mistletoe Exp. Service, Inc. v. Culp, 353 P.2d 9—Agee v. Gant, 412 P.2d 155.

Va.—Sinclair Refining Co. v. Unemployment Compensation Commission, 54 S.E.2d 72, 189 Va. 692.

71. U.S.—Lumber Mut. Cas. Ins. Co. of N.Y. v. Stukes, C.C.A.S.C., 164 F.2d 571—Ringling Bros.-Barnum & Bailey Combined Shows v. Higgins, C.A.N.Y., 189 F.2d 865—Thurston v. Hobby, D.C.Mo., 133 F.Supp. 205—Byrne v. Pennsylvania R. Co., C.A.Pa., 262 F.2d 906, cert. den. 79 S.Ct. 798, 359 U.S. 960, 3 L.Ed.2d 766—Meister v. U.S., 319 F.2d 875, 162 Ct.Cl. 667—Kirkconnell v. U.S., 347 F.2d 260, 171 Ct.Cl. 43.

Cal.—Johnson v. Banducci, 27 Cal.Rptr. 764, 212 C.A.2d 254—Stewart v. Workmen's Compensation Appeals Bd., 71 Cal.Rptr. 20, 264 C.A.2d 947.

Fla.—Higgins v. Investors Acceptance Co. of Miami, App., 287 So.2d 724.

Ga.—Griffin v. Hardware Mut. Ins. Co., 92 S.E.2d 871, 93 Ga.App. 801, transf. 91 S.E.2d 10, 212 Ga. 130—Newsome v. Dunn, 120 S.E.2d 205, 103 Ga. App 656.

Ill.—Taber v. Defenbaugh, 132 N.E.2d 454, 9 Ill. App.2d 169.

Kan.—Bright v. Bragg, 264 P.2d 494, 175 Kan. 404—Bendure v. Great Lakes Pipe Line Co., 433 P.2d 558, 199 Kan. 696.

Mich.—Falkner v. Falkner, 180 N.W.2d 491, 24 Mich. App. 633.

Miss.—Mississippi Employment Sec. Commission v. Heidelberg Hotel Co., 51 So.2d 47, 211 Miss. 104.

Mo.—Wigger v. Consumers Co-op. Ass'n, App., 301 S.W.2d 56.

Neb.—Meyer v. State Farm Mutl. Auto. Ins. Co., 224 N.W.2d 770, 192 Neb. 831, 89 A.L.R.3d 824.

N.J.—Sarner v. Sarner, 162 A.2d 117, 62 N.J.Super. 41.

N.Y.—In re Hoppl, 137 N.Y.S.2d 522, 285 App.Div. 920.

Okl.—McReynolds v. Oklahoma Turnpike Authority, 291 P.2d 341.

Pa.—Daily Exp., Inc. v. Workmen's Compensation Appeal Bd., 406 A.2d 600, 46 Pa.Cmwlth. 434.

Tex.—Harris v. Cochran, Civ.App., 288 S.W.2d 814, err. ref. no rev. err.

Utah—Foster v. Steed, 432 P.2d 60, 19 Utah 2d 435.

Persons held servants or employees

(1) Minn.—Gackstetter v. Dart Transit Co., 130 N.W.2d 326, 269 Minn. 146.

(6) U.S.—Nelson v. Radio Corp. of America, D.C. Fla., 148 F.Supp. 1—Citizens Mut. Auto. Ins. Co. v. Fireman's Fund Ins. Co., D.C.Mich., 234 F.Supp. 931—Edwards v. Southern Ry Co., D.C.N.C., 258 F.Supp. 212.

Cal.—Brockman v. Lane, 230 P.2d 369, 103 Cal.App.2d 802.

Fla.—Campbell v. Bellman, App., 293 So.2d 795.

Ky.—Fisher Equipment Co. v. West, 365 S.W.2d 319.

La.—Whitmeyer v. Poche, 49 So.2d 69—Walker v. Delahoussaye, App., 116 So.2d 884.

N.M.—Clem v. Bowman Lumber Co., App., 495 P.2d 1106, 83 N.M. 659.

S.C.—Pleasant v. Mathias, 145 S.E.2d 680, 247 S.C. 124.

Tex.—Eaton v. R. B. George Investments, Civ.App., 254 S.W.2d 189, revd. on oth. grds., 260 S.W.2d 587, 152 Tex. 523.

Persons held not servants or employees

(8) U.S.—Maryland Cas. Co. v. Pacific Emp. Ins. Co., C.A.Colo., 227 F.2d 485—Farm Bureau Co-op. Mill & Supply, Inc. v. Blue Star Foods, D.C.Mo., 137 F.Supp. 486, affd., C.A., 238 F.2d 326—George Bohannon Transp., Inc. v. Davis, C.A.Wyo., 323 F.2d 755—Western Cas. & Sur. Co. v. Teel, C.A.Okl., 391 F.2d 764, 34 A.L.R.3d 1387—U.S. v. Musgrave, C.A.Tex., 444 F.2d 755, app. after remand 483 F.2d 327. Cert. den. 94 S.Ct. 447, 414 U.S. 1023, 38 L.Ed.2d 315.

Ill.—Bangert v. Nolan, 265 N.E.2d 199, 130 Ill.App.2d 860—Wolverine Ins. Co. v. Jockish, 403 N.E.2d 1290, 38 Ill.Dec. 686, 83 Ill.App.3d 411.

Ky.—Ball v. Beatrice Foods Co., 395 S.W.2d 594.

N.J.—Claus v. Brodhead, 116 A.2d 725, 36 N.J.Super. 598.

Ohio—Bishop v. Penn Central Transp. Co., 316 N.E.2d 907, 39 Ohio App.2d 185.

Pa.—Schuster v. Pennsylvania Turnpike Commission, 149 A.2d 447, 395 Pa. 441.

Wis.—Kirchoff v. City of Janesville, 38 N.W.2d 698, 255 Wis. 202—Bellart v. Martell, 137 N.W.2d 729, 28 Wis.2d 686, reh. den. 139 N.W.2d 473, 28 Wis.2d 686.

72. Neb.—Rasmussen v. Trico Feed Mills, 29 N.W.2d 641, 148 Neb. 855.

Partners as employees of another

U.S.—Birmingham Fire Ins. Co. of Pa. v. Adolph, C.A.La., 379 F.2d 948.

La.—Little v. Caterpillar Tractor Co, App., 169 So.2d 654.

page 31

73. U.S.—Dixon v. U.S., C.A.Ark., 296 F.2d 556.

Minn.—Boland v. Morrill, 132 N.W.2d 711, 270 Minn. 86.

Pa.—Rugh v. Keystone-Lawrence Transfer & Storage Co., 179 A.2d 242, 197 Pa.Super. 526.

74. U.S.—U.S. v. Bernstein, C.A.Va., 179 F.2d 105.

Ky.—**C.J.S. cited in** Mahan v. Litton, 321 S.W.2d 243, 245.

Wyo.—McKenzie v. Neale Const. Co., 294 P.2d 355, 75 Wyo. 175.

75. U.S.—New Amsterdam Cas. Co. v. Soileau, C.C. A.La., 167 F.2d 767, 6 A.L.R.2d 128, cert. den. 69 S.Ct. 45, 335 U.S. 822, 93 L.Ed. 376—Bartle v. Travelers Ins. Co., C.A.Tex., 171 F.2d 469—Shipley v. Pittsburgh & L.E.R. Co., D.C.Pa., 83 F.Supp. 722—Rosell v. Barcus, D.C.Mo., 89 F.Supp. 234—Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp. of America, Division 1326 v. Greyhound Corp., C.A.Fla., 231 F.2d 585, 57 A.L.R.2d 1394—Watson v. North Shore Supply Co., D.C.Pa., 147 F.Supp. 385—St. Claire v. Minnesota Harbor Service, Inc., D.C.Minn., 211 F.Supp. 521—Holland v. Celebrezze, D.C.Tenn., 223 F.Supp. 347—**C.J.S. black letter summary quoted in** Sabbagha v. Celebrezze, D.C.S.C., 231 F.Supp. 440, 444, revd. on oth. grds., C.A., 345 F.2d 509—Birmingham Fire Ins. Co. of Pa. v. Adolph, C.A.La., 379 F.2d 948—Carter v. Seaboard Coast Line R. Co., D.C.Ga., 392 F.Supp. 494.

Alaska—Selid Const. Co. v. Guarantee Ins. Co., 355 P.2d 389.

Cal.—Holtzendorff v. Housing Authority of City of Los Angeles, App., 58 Cal.Rptr. 886, 250 C.A.2d 596, cert. den. 88 S.Ct. 775, 389 U.S. 1038, 19 L.Ed.2d 827.

Ga.—Undercofler v. Scott, 139 S.E.2d 299, 220 Ga. 406.

Ill.—Evaskus v. Neff, Kohlbusch & Bissell, Inc., 189 N.E.2d 542, 40 Ill.App.2d 416—Anderson v. Poray, Inc., 191 N.E.2d 417, 42 Ill.App.2d 1.

Ind.—Michel v. Forde, 191 N.E.2d 507, 135 Ind.App. 360.

Kan.—Robinson v. Muller, 309 P.2d 651, 181 Kan. 150.

La.—Hudson v. Allstate Ins. Co., App., 169 So.2d 598.

Minn.—Petschow v. Scheid, 108 N.W.2d 1, 259 Minn. 474—Stream v. Continental Machines, Inc., 111 N.W.2d 785, 261 Minn. 289.

Miss.—Landry v. Moody Grishman Agency, Inc., 181 So.2d 134, 254 Miss. 363.

Mo.—Brown v. Anthony Mfg. Co., 311 S.W.2d 23.

Neb.—Barton v. Hobbs, 151 N.W.2d 331, 181 Neb. 763—Meyer v. State Farm Mut. Auto. Ins. Co., 224 N.W.2d 770, 192 Neb. 831, 89 A.L.R.3d 824.

N.J.—Montclair Distributing Co. v. Arnold Bakers', Inc., 62 A.2d 491, 1 N.J.Super. 568.

N.Y.—O'Brien v. Cuno Engineering Corp., 87 N.Y.S.2d 497, affd. 93 N.Y.S.2d 704, 276 App.Div. 816.

N.C.—Alliance Co. v. State Hospital at Butner, 85 S.E.2d 386, 241 N.C. 329.

Okl.—Denton v. Young, 226 P.2d 406, 203 Okl. 688.

Or.—Snow v. West, 440 P.2d 864, 250 Or. 114.

Pa.—Gadd v. Barone, 75 A.2d 620, 167 Pa.Super. 477.

S.D.—Roush v. Town of Esmond, 43 N.W.2d 547, 73 S.D. 406.

Tenn.—Hamby v. Genesco, Inc., App., 627 S.W.2d 373.

Tex.—Mercury Life & Health Co. v. De Leon, Civ. App., 314 S.W.2d 402, err. ref. no rev. err.—Newspapers, Inc. v. Love, 380 S.W.2d 582—Pioneer Cas. Co. v. Bush, Civ.App., 457 S.W.2d 165, err. ref. no rev. err.

Vt.—Stevens v. Nurenburg, 97 A.2d 250, 117 Vt. 525.

Wash.—Haugen v. Central Lutheran Church, 361 P.2d 637, 58 Wash.2d 166.

Whether general or special

Kan.—Lewis v. Confer, 365 P.2d 1103, 188 Kan. 779.

78. Idaho—Bowden v. Robert V. Burggraf Const. Co., 375 P.2d 532, 85 Idaho 44.

Mo.—**C.J.S. cited in** Krueger v. Elder Mfg. Co., App., 260 S.W.2d 349, 353.

Pa.—Muroski v. Hnath, 139 A.2d 902, 392 Pa. 233.

Vt.—Stevens v. Nurenburg, supra, n. 75—Young v. Lamson, 160 A.2d 873, 121 Vt. 474.

81. Alaska—Selid Const. Co. v. Guarantee Ins. Co., 355 P.2d 389.

page 32

82. U.S.—**C.J.S. black letter summary quoted in** Sabbagha v. Celebrezze, D.C.S.C., 231 F.Supp. 440, 444, revd. on oth. grds., C.A., 345 F.2d 509—Tatum v. C.I.R., C.A.Tex., 400 F.2d 242.

83. N.Y.—Gardens v. Guevara, 439 N.Y.S.2d 77, 108 Misc.2d 817.

84. Mass.—Boylston Housing Corp. v. O'Toole, 74 N.E.2d 288, 321 Mass. 538, 172 A.L.R. 1251.

Mo.—**C.J.S. cited in** Wilkins v. City of St. Louis, App., 404 S.W.2d 783, 788.

N.J.—Kingston Trap Rock Co. v. International Union of Operating Engineers, Local No. 825, 825–A and 825—B, 19 A.2d 661, 129 N.J.Eq. 570.

Ohio—Scott Burr Stores Corp. v. Specter, 1 Ohio Supp. 148, 14 O.O. 105, 28 O.L.A. 449.

Pa.—Mische v. Kaminski, 193 A. 410, 127 Pa.Super. 66.

85. U.S.—Carter v. Seaboard Coast Line R. Co., D.C. Ga., 392 F.Supp. 494.

88. U.S.—N.L.R.B. v. Columbus Iron Works Co., C.A., 217 F.2d 208—Friendly Soc. of Engravers and Sketchmakers v. Calico Engraving Co., C.A. S.C., 238 F.2d 521, cert. den. 77 S.Ct. 810, 353 U.S. 935, 1 L.Ed.2d 758—Carter v. Seaboard Coast Line R. Co., D.C.Ga., 392 F.Supp. 494.

D.C.—Nelson v. General Elec. Co., Mun.App., 145 A.2d 576.

Md.—Dillon v. Great Atlantic and Pac. Tea Co., Inc., 403 A.2d 406, 43 Md.App. 161.

N.J.—Jordan's Wearing Apparel v. Retail Sales Clerks Union of New Jersey, Newark Local, 193 A. 806.

Tex.—Lunsford v. City of Bryan, 297 S.W.2d 115.

Open shop

(2) Other cases.

N.D.—Minor v. Building and Const. Trades Council, 75 N.W.2d 139.

Statute as statement of public policy

Ga.—Sandt v. Mason, 67 S.E.2d 767, 208 Ga. 541.

89. Pa.—Winward v. Rhodewalt, 11 Chest. 294, revd. 182 A.2d 111, 198 Pa.Super. 591, revd. on oth. grds. 198 A.2d 623, 203 Pa.Super. 369.

90. La.—Kennedy v. Johnson Lumber Co., App., 33 So.2d 558.

page 33

91. U.S.—Dimmitt-Rickhoff-Bayer Real Estate Co. v. Finnegan, C.A.Mo., 179 F.2d 882, cert. den. 71 S.Ct. 57, 340 U.S. 823, 95 L.Ed. 605—Schenstrom v. Continental Machines, D.C.Minn., 85 F.Supp. 374—N.L.R.B. v. Steinberg, C.A., 182 F.2d 850—**C.J.S. black letter summary quoted in** Fruco Const. Co. v. McClelland, C.A.Mo., 192 F.2d 241, 244, cert. den. 72 S.Ct. 558, 342 U.S. 945, 96 L.Ed. 703—Rambin v. Ewing, D.C.La., 106 F.Supp. 268—Long v. Valley Steel Products Co., C.A.Okl., 207 F.2d 505—Ben v. U.S., D.C.N.Y., 139 F.Supp. 883, affd., C.A., 241 F.2d 127—Knight v. Cameron Joyce & Co., C.A.Mo., 252 F.2d 103—Edwards v. U.S., 168 F.Supp. 955, 144 Ct.Cl. 158—American Homes of New England, Inc. v. U.S., D.C.Mass., 173 F.Supp. 857—**C.J.S. cited in** Binsau v. Garstin, Del., 177 A.2d 636, 641—Loeb v. U.S., D.C.La., 209 F.Supp. 22—Continental Bus System, Inc. v. N.L.R.B., C.A. Colo., 325 F.2d 267—N.L.R.B. v. A. S. Abell Co., C.A.Md., 327 F.2d 1—Holland v. Celebrezze, D.C.Tenn., 223 F.Supp. 347—**C.J.S. black letter summary quoted in** Porter v. St. Louis-San Francisco Railway Company, C.A.Miss., 354 F.2d 840, 843—Gudgel v. Southern Shippers, Inc., C.A.Ill., 387 F.2d 723—Tarboro v. Reading Co., C.A.Pa., 396 F.2d 941, cert. den. 89 S.Ct. 637, 393 U.S. 1027, 21 L.Ed.2d 569—Sharpe v. Bradley Lumber Co., C.A.N.C., 446 F.2d 152, cert. den. 92 S.Ct. 946, 405 U.S. 919, 30 L.Ed.2d 789.

Ala.—Odess v. Taylor, 211 So.2d 805, 282 Ala. 389—Solmica of Gulf Coast, Inc. v. Braggs, 232 So.2d 638, 285 Ala. 396.

Cal.—Pierson v. Industrial Acc. Commission, 220 P.2d 794, 98 Cal.App.2d 598—Skelton v. Fekete, 261 P.2d 339, 120 C.A.2d 401—Crooks v. Glens Falls Indem. Co., 268 P.2d 203, 124 C.A.2d 113—McVicar v. Union Oil Co., 292 P.2d 48, 138 C.A.2d 370—People v. Miller, 300 P.2d 760, 143 C.A.2d Supp. 843—Shoopman v. Pacific Greyhound Lines, 338 P.2d 3, 169 C.A.2d 848—Gipson v. Davis Realty Co., 30 Cal.Rptr. 253, 215 C.A.2d 190.

Del.—Loden v. Getty Oil Co., Super., 316 A.2d 214, affd. 326 A.2d 868.

Fla.—City of Boca Raton v. Mattef, 91 So.2d 644—Collins v. Federated Mut. Implement & Hardware Ins. Co., App., 247 So.2d 461.

Ga.—Metropolitan Life Ins. Co. v. Forsyth, 177 S.E.2d 505, 122 Ga.App. 463.

Idaho—In re Pacific Nat. Life Assur. Co., 212 P.2d 397, 70 Idaho 98—**C.J.S. cited in** Kock v. Elkins, 225 P.2d 457, 462, 71 Idaho 50—Cloughley v. Orange Transp. Co., 327 P.2d 369, 80 Idaho 226.

Ill.—Jones v. Atteberry, 396 N.E.2d 104, 33 Ill.Dec. 28, 77 Ill.App.3d 463.

Iowa—Erickson v. Erickson, 94 N.W.2d 728, 250 Iowa 491.

Ky.—**C.J.S. black letter summary quoted in** Com. ex rel. Division of Unemployment Ins. v. Kendall, 233 S.W.2d 511, 513, 313 Ky. 735—**C.J.S. cited in** Mahan v. Litton, 321 S.W.2d 243, 245.

La.—Lisonbee v. Chicago Mill & Lumber Co., 278 So.2d 5.

Me.—Poulette v. Herbert C. Haynes, Inc., 347 A.2d 596.

Mass.—Marino v. Trawler Emil C, Inc., 213 N.E.2d 238, 350 Mass. 88, cert. den. 86 S.Ct. 1587, 384 U.S. 960, 16 L.Ed.2d 673.

Minn.—Frankle v. Twedt, supra, n. 13.

Miss.—**C.J.S. cited in** Green Lumber Co. v. Sullivan, 45 So.2d 243, 246, 208 Miss. 651.

Mo.—Wigger v. Consumers Co-op. Ass'n, App., 301 S.W.2d 56—**C.J.S. cited in** Coble v. Economy Forms Corp., App., 304 S.W.2d 47, 51.

N.J.—Outdoor Sports Corp. v. American Federation of Labor, Local 23132, 78 A.2d 69, 6 N.J. 217, 29 A.L.R.2d 313—Johnson v. U.S. Life Ins. Co. in City of New York, 181 A.2d 380, 74 N.J.Super. 343.

N.M.—Latta v. Harvey, 352 P.2d 649, 67 N.M. 72—Campbell v. Smith, 362 P.2d 523, 68 N.M. 373—Candelaria v. Board of County Com'rs of Valencia County, 423 P.2d 982, 77 N.M. 458.

N.Y.—People ex rel. Feinberg v. Chapman, 87 N.Y.S.2d 41, 274 App.Div. 715—Duffy v. Kedenburg, 103 N.Y.S.2d 457, 278 A.D. 31—Zimmerman v. City of New York, 276 N.Y.S.2d 711, 52 Misc.2d 797—Villa Maria Institute of Music v. Ross, 426 N.E.2d 466, 54 N.Y.2d 691, 442 N.Y.S.2d 972.

N.C.—**C.J.S. cited in** Hodge v. McGuire, 69 S.E.2d 227, 229, 235 N.C. 132.

Ohio—McGregor v. Heitzman, 129 N.E.2d 845, 98 Ohio App. 473—Duke v. Sanymetal Products Co., 286 N.E.2d 324, 31 Ohio App.2d 78.

Pa.—Jones v. Unemployment Compensation Bd. of Review, 60 A.2d 568, 163 Pa.Super. 271—Gadd v. Barone, supra, n. 75—Bistran v. Noone, 51 Lack. Jur. 221—Murrin v. Rifugiato, 96 A.2d 865, 373 Pa. 561—Ragano v. Socony Vacuum Oil Co., 101 A.2d 686, 376 Pa. 271—Lehigh Nav. Coal Co. v. Unemployment Compensation Bd. of Review, 106 A.2d 919, 176 Pa.Super. 69—Burgard v. York City Retirement Bd., 69 York 182—Yorston v. Pennell,

Page 33

153 A.2d 255, 397 Pa. 28, 85 A.L.R.2d 872—Purks v. Phoenix Coal Co., 51 Sch.L.R. 17—Clark v. Stambaugh, 58 Lanc.Rev. 295—Giannetta v. City of Allentown, 32 Leh.L.J. 211—Smalich v. Westfall, 269 A.2d 476, 440 Pa. 409—Sweet v. Pennsylvania Labor Relations Bd., Washington County, Super., 322 A.2d 362, 457 Pa. 456.

Tex.—Elder v. Aetna Casualty & Surety Co., Civ.App., 230 S.W.2d 1018, revd. on oth. grds. 236 S.W.2d 611, 149 Tex. 620—Farmers' Gin Coop. Ass'n v. Mitchell, Civ.App., 233 S.W.2d 948—Gulfcraft, Inc. v. Henderson, Civ.App., 300 S.W.2d 768—Texas Real Estate & Ins. Co. v. Tyler, Civ.App., 464 S.W.2d 723.

Utah—Oberhansly v Travelers Ins. Co., 295 P.2d 1093, 5 Utah 2d 15.

Vt.—Minogue v. Rutland Hospital, Inc., 125 A.2d 796, 119 Vt. 336.

Wash.—Cassidy v. Peters, 309 P.2d 767, 50 Wash 2d 115.

W.Va.—Bethlehem Mines Corp. v. Haden, 172 S.E.2d 126, 153 W.Va. 721.

Matters evidentiary of right to control

U.S.—Jackson v. Phinney, D.C.Tex., 266 F.Supp. 835.

Tex.—Continental Ins. Co. v. Clark, Civ.App., 450 S.W.2d 684, err. ref. no rev. err.

Right to control employer's minor child employee as flowing from contract

Tex.—Pioneer Cas. Co. v. Bush, Civ.App., 457 S.W.2d 165, err. ref. no rev. err.

page 34

92. U.S.—Ewing v. Vaughan, C.A.Va., 169 F.2d 837—Party Cab Co. v. U.S., C.A.Ill., 172 F.2d 87, 10 A.L.R.2d 358, cert. den. 70 S.Ct. 62, 338 U.S. 818, 94 L.Ed. 496—Fruco Const. Co. v. McClelland, C.A.Mo., 192 F.2d 241, cert. den. 72 S.Ct. 558, 342 U.S. 945, 96 L.Ed. 703—Dougall v. Spokane, P. & S. Ry. Co., C.A.Or., 207 F.2d 843, cert. den. 74 S.Ct. 429, 347 U.S. 904, 98 L.Ed. 1063—Brown v. Moore, D.C.Pa., 143 F.Supp. 816, revd. on oth. grds., C.A., 247 F.2d 711, cert. den. 78 S.Ct. 148, 355 U.S. 882, 2 L.Ed.2d 112—De Paola v. New York, N.H. & H.R. Co., D.C.Conn., 198 F.Supp. 12—Bates v. Atkins, D.C.La., 216 F.Supp. 588—Cape Shore Fish Co. v. U.S., 330 F.2d 961, 165 Ct.Cl. 630—In re F. H. Donovan Painting Co., D.C.Mo., 220 F.Supp. 811, affd. in part and revd. in part on oth. grds., C.A., 325 F.2d 870—R & H Corp. v. U.S., D.C.Pa., 255 F.Supp. 870—Azad v. U.S., C.A.Minn., 388 F.2d 74—Scholz v. U.S., D.C.Conn., 271 F.Supp. 111—Raasch v. Dulany, D.C.Wis., 273 F.Supp. 1015—Azad v. U.S., D.C. Minn., 277 F.Supp. 258, affd., C.A., 388 F.2d 74—Weaver v. Weinberger, D.C.W.Va., 392 F.Supp. 721.

Ala.—Ford v. Mitcham, Civ., 298 So.2d 34, 53 Ala. App. 102.

Ariz.—Scottsdale Jaycees v. Superior Court of Maricopa County, 499 P.2d 185, 17 Ariz.App. 571.

Cal.—Villanazul v. City of Los Angeles, 235 P.2d 16, 37 C.2d 718—Davis v. Milligan, 333 P.2d 167, 166 C.A.2d 404.

D.C.—Dovell v. Arundel Supply Corp., C.A., 361 F.2d 543, 124 U.S.App.D.C. 89, cert. den. 87 S.Ct. 93, 385 U.S. 841, 17 L.Ed.2d 74, stating Maryland law.

Ga.—Griffin v. Hardware Mut. Ins. Co., 92 S.E.2d 871, 93 Ga.App. 801, transf. 91 S.E.2d 10, 212 Ga. 130.

Idaho—National Trailer Convoy, Inc. v. Employment Sec. Agency of Idaho, 360 P.2d 994, 83 Idaho 247.

Ill.—Circle Sec. Agency, Inc. v. Ross, 437 N.E.2d 667, 63 Ill.Dec. 18, 107 Ill.App.3d 195.

Ind.—Gibbs v. Miller, 283 N.E.2d 592, 152 Ind.App. 327.

Iowa—Duffy v. Harden, 179 N.W.2d 496.

Ky.—Blair v. Boggs, 265 S.W.2d 795.

La.—Kamm v. Morgan, App., 157 So.2d 118—Sicard v. City of New Orleans, App., 176 So.2d 672, revd. on oth. grds. 184 So.2d 21, 248 La. 1090.

Md.—Globe Indem. Co. v. Victill Corp., 119 A.2d 423, 208 Md. 573—Keitz v. National Paving & Contracting Co., 134 A.2d 296, 214 Md. 479.

Mass.—Marrone v. Rand-Whitney Corp., 234 N.E.2d 294, 353 Mass. 766—Silvia v. Woodhouse, 248 N.E.2d 260, 356 Mass. 119.

Minn.—Tschida v. Dorle, 51 N.W.2d 561, 235 Minn. 461.

Miss.—Mozingo v. Mississippi Employment Sec. Commission, 80 So.2d 75, 224 Miss. 375.

Mo.—C.J.S. cited in Glynn v. M.F.A Mut. Ins. Co., 254 S.W.2d 623, 624, 363 Mo. 896, 36 A.L.R.2d 256—Hammonds v. Haven, 280 S.W.2d 814, 53 A.L.R.2d 992—C.J.S. cited in Usrey v. Dr. Pepper Bottling Co., Poplar Bluff, App., 385 S.W.2d 335, 339—St. Francois County Sav. & Loan Ass'n v. Industrial Commission, App., 395 S.W.2d 311—Cloninger v. Wolfe, App., 477 S.W.2d 440.

N.J.—Ford v. Fox, 73 A.2d 270, 8 N.J.Super. 80—Roberts v. Geo. M. Brewster & Son, 80 A.2d 638, 13 N.J.Super. 462.

N M.—Burton v. Crawford & Co., App., 553 P.2d 716, 89 N.M. 436, cert. den. 558 P.2d 619, 90 N.M. 7.

N.Y.—Carborundum Co. v. Swisher, 134 N.Y.S.2d 661, 17 Misc.2d 231—Jones v. Crawford, 148 N.Y.S.2d 335, revd. on oth. grds., 162 N.Y.S.2d 41, 3 A.D.2d 479, rearg. and app. den. 164 N.Y.S.2d 988, 4 A.D.2d 826—Hardy v Murphy, 289 N.Y.S.2d 694, 29 A.D.2d 1038—Erie County v. Board of Trustees of Buffalo and Erie County Public Library, 308 N.Y.S.2d 515, 62 Misc.2d 396—Binghamton Public Library Unit of Broome County Chapter of Civil Service Emp. Ass'n v. City of Binghamton, 331 N.Y.S.2d 515, 69 Misc.2d 1005.

N.C.—Rollison v. Hicks, 63 S.E.2d 190, 233 N.C. 99.

Or.—Jenkins v. AAA Heating & Cooling, Inc., 421 P.2d 971, 245 Or. 382.

Pa.—Wall v. Penn Lumber & Mill Works, 67 Montg.Co. 245, affd. 90 A.2d 273, 171 Pa.Super. 512—George v. Nemeth, 233 A.2d 231, 426 Pa. 551.

Tex.—Newspapers Inc. v. Love, 380 S.W.2d 582.

Vt.—Minogue v. Rutland Hospital, Inc., 125 A.2d 796, 119 Vt. 336

Va.—Sinclair Refining Co. v. Unemployment Compensation Commission, supra, n. 70—Coker v. Gunter, 63 S.E.2d 15, 191 Va. 747—Ashworth v. Baker, 90 S.E.2d 860, 197 Va. 582.

Wash.—Skrivanich v. Davis, 186 P.2d S.E.2d 144, 150—Pichler v. Pacific Mechanical Constructors, 462 P.2d 960, 1 Wash.App. 447.

W.Va.—Ferguson v. Pinson, 50 S.E.2d 476, 131 W.Va. 691—C.J.S. cited in Davis v. Fire Creek Fuel Co., 109 S.E.2d 144, 150, 144 W.Va. 537.

Control held not necessarily determinative

U.S.—Byrne v. Pennsylvania R. Co., C.A.Pa., 262 F.2d 906, cert. den. 79 S.Ct. 798, 359 U.S. 960, 3 L.Ed.2d 766—Hoosier Home Imp. Co. v. U.S., C.A.Ind., 350 F.2d 640.

N.J.—Johnson v. U.S. Life Ins. Co. in City of New York, 174 A.2d 265, 69 N.J.Super. 317, affd. 181 A.2d 380, 74 N.J.Super. 343.

Okl.—U.S. Fidelity & Guaranty Co. v. Dawson Produce Co., 197 P.2d 978, 200 Okl. 540.

What one authorized to do as determining status rather than what status called

U.S.—Founders' Ins. Co. v. Rogers, C.A.Cal., 281 F.2d 332.

page 35

93. U.S.—Metropolitan Roofing & Modernizing Co. v. U.S., D.C.Mass., 125 F.Supp. 670—De Maree v. Pennsylvania R. Co., D.C.Del., 147 F.Supp. 656—American Transit Lines v. Smith, C.A.Ohio, 246 F.2d 86, cert. den. 78 S.Ct. 261, 355 U.S. 889, 2 L.Ed.2d 188—Thor Co. v. U.S., D.C.Mass., 173 F.Supp. 65—Loeb v. U.S. D.C.La., 209 F.Supp. 22—Continental Bus System, Inc. v. N.L.R.B., C.A.Colo., 325 F.2d 267—N.L.R.B. v. A. S. Abell Co., C.A.Md., 327 F.2d 1—American Cas. Co. of Reading, Pa. v. Wypior, C.A.Ill., 365 F.2d 164—Allstate Ins. Co. v. Stuart, D.C.S.C., 266 F.Supp. 494, affd., C.A., 376 F.2d 263—Raasch v. Dulany, D.C.Wis., 273 F.Supp. 1015—Clifford v. U.S., D.C.S.D., 308 F.Supp. 957—Sharpe v. Bradley Lumber Co., C.A.N.C., 446 F.2d 152, cert. den. 92 S.Ct. 946, 405 U.S. 919, 30 L.Ed.2d 789—Avis Rent A Car System, Inc., v. U.S., C.A.N.Y., 503 F.2d 423.

Ark.—Deam v. O. L. Puryear & Sons, Inc., 423 S.W.2d 554, 244 Ark. 18.

Cal.—Manchester Ave. Co. v. Stewart, 325 P.2d 457, 50 C.2d 307—City of Los Angeles v. Vaughn, 10 Cal.Rptr. 457, 358 P.2d 913, 55 C.2d 198—Atchison, T. & S.F.R. Co. v. Flintkote Co., 64 Cal.Rptr. 675, 256 C.A.2d 764—Pacific Indem. Co. v. Workmen's Compensation Appeals Bd., 65 Cal.Rptr. 429, 258 C.A.2d 35.

Ga.—Cash v. American Sur. Co., 114 S.E.2d 57, 101 Ga.App. 379—Redd v. Brisbon, 147 S.E.2d 15, 113 Ga.App. 23.

Ill.—State Farm Mut. Auto. Ins. Co. v. Staff, 325 N.E.2d 1, 26 Ill.App.3d 217—Gunterberg v. B & M Transp. Co., Inc., 327 N.E.2d 528, 27 Ill.App.3d 732.

Iowa—Bengford v. Carlem Corp., 156 N.W.2d 855.

La.—Blackburn v. Chenet, App., 42 So.2d 288.

Md.—Keitz v. National Paving & Contracting Co., 134 A.2d 296, 214 Md. 479—Clemons v. E. & O. Bullock, Inc., 244 A.2d 240, 250 Md. 586.

Minn.—Graalum v. Radisson Ramp, Inc., 71 N.W.2d 904, 245 Minn. 54—Burman Co. v. Zahler, 178 N.W.2d 234, 286 Minn. 400.

Mo.—Jokisch v. Life & Cas. Ins. Co. of Tenn., App., 424 S.W.2d 111.

N.J.—C.J.S. cited in Andryishyn v. Ballinger, 160 A.2d 867, 869, 61 N.J.Super. 386.

Or.—Great Am. Ins. Co. v. General Ins. Co. of America, 475 P.2d 415, 257 Or. 62.

Pa.—Mature v. Angelo, 97 A.2d 59, 373 Pa. 593—Ragano v. Socony Vacuum Oil Co., 101 A.2d 686, 376 Pa. 271—Yorston v. Pennell, 153 A.2d 255, 397 Pa. 28, 85 A.L.R.2d 872—Duttera v. Pitzer, 1 Adams L.J. 37.

S.C.—Bates v. Legette, 121 S.E.2d 289, 239 S.C. 25—Hutson v. Herndon, 133 S.E.2d 753, 243 S.C. 257.

Tenn.—D. M. Rose & Co. v. Snyder, 206 S.W.2d 897, 185 Tenn. 499.

Tex.—Great Western Drilling Co. v. Simmons, 302 S.W.2d 400, 157 Tex. 268—Continental Ins. Co. v. Clark, 450 S.W.2d 684, err. ref. no rev. err.

Utah—Bambrough v. Bethers, 552 P.2d 1286.

Va.—C.J.S. cited in Lassiter v. Jones, 105 S.E.2d 849, 851, 200 Va. 294—Smith v. Grenadier, 127 S.E.2d 107, 203 Va. 740.

Wash.—James v. Ellis, 269 P.2d 573, 44 Wash.2d 599.

W.Va.—Brewer v. Appalachian Constructors, Inc., 76 S.E.2d 916, 138 W.Va. 437—Walls v. McKinney, 81 S.E.2d 901, 139 W.Va. 866—West Virginia Water Service Co. v. Cunningham, 98 S.W.2d 891, 143 W.Va. 1—Spangler v. Fisher, 159 S.E.2d 903, 152 W.Va. 141.

Wyo.—Brubaker v. Glenrock Lodge Intern. Order of Odd Fellows, 526 P.2d 52.

Want of ability to control, etc.

(2) Other statements.

Mass.—Marino v. Trawler Emil C, Inc., 213 N.E.2d 238, 350 Mass. 88, cert. den. 86 S.Ct. 1587, 384 U.S. 960, 16 L.Ed.2d 673.

Little supervision required

(2) Other cases.

Ala.—Hudson v. DuraWear Corp., Civ., 344 So.2d 182.

Minn.—Frankle v. Twedt, Supra, n. 13.

N.Y.—Piester v. Traver, 261 N.Y.S.2d 333, 24 A.2d 688.

Pa.—Yorston v. Pennell, 153 A.2d 255, 397 Pa. 28, 85 A.L.R.2d 872.

94. U.S.—Fruco Const. Co. v. McClelland, supra, n. 92.

Cal.—Villanazul v. City of Los Angeles, supra, n. 92—Bonetti v. Double Play Tavern, 274 P.2d 751, 126 C.A.2d Supp. 848.

Ill.—Gundich v. Emerson-Comstock Co., 171 N.E.2d 60, 21 Ill.2d 117—Emma v. Norris, 264 N.E.2d 573, 130 Ill.App.2d 653.

La.—Adams v. Times-Picayune Pub. Corp., App. 4 Cir., 418 So.2d 685.

Me.—Harlow v. Agway, Inc., 327 A.2d 856.

Mo.—**C.J.S. cited in** Coble v. Economy Forms Corp., App., 304 S.W.2d 47, 52.

N.J.—Geary v. Simon Dairy Products Co., 72 A.2d 214, 7 N.J.Super. 88—Johnson v. U.S. Life Ins. Co. in City of New York, 181 A.2d 380, 74 N.J.Super. 343.

N.M.—Burton v. Crawford & Co., App., 553 P.2d 716, 89 N.M. 436, cert. den. 558 P.2d 619, 90 N.M. 7.

Pa.—Bistran v. Noone, supra, n. 91.

Utah—Oberkansly v. Travelers Ins. Co., 295 P.2d 1093, 5 Utah 2d 15.

Va.—Southern Stevedoring Corp. v. Harris, 58 S.E.2d 302, 190 Va. 628—Thaxton v. Com., 175 S.E.2d 264, 211 Va. 38.

Wyo.—Brubaker v. Glenrock Lodge Intern. Order of Odd Fellows, 526 P.2d 52.

95. U.S.—Tapager v. Birmingham, D.C.Iowa, 75 F.Supp. 375—Bush Bros. & Co. v. Hickey, C.A. Tenn., 223 F.2d 425—Petition of Read, D.C.Fla., 224 F.Supp. 241.

Cal.—Anderson v. Badger, 191 P.2d 768, 84 Cal.App.2d 736—K. King & G. Shuler Corp. v. King, 66 Cal.Rptr. 330, 259 C.A.2d 383—Key Ins. Exchange v. Washington, 86 Cal.Rptr. 542, 7 C.A.3d 209.

La.—Kamm v. Morgan, App., 157 So.2d 118—Sicard v. City of New Orleans, 176 So.2d 672, revd. on oth. grds. 184 So.2d 21, 248 La. 1090.

page 36

96. Cal.—City of Los Angeles v. Vaughn, 10 Cal. Rptr. 457, 358 P.2d 913, 55 C.2d 198—Cahill Bros., Inc. v. Clementina Co., Cal.App., 25 Cal. Rptr. 301, 208 C.A.2d 367—Housewright v. Pacific Far East Line, Inc., 40 Cal.Rptr. 208, 229 C.A.2d 259.

98. U.S.—King v. Grimm, C.A.Ill., 300 F.2d 658.

Idaho—In re Pacific Nat. Life Assur. Co., supra, n. 91.

Mich.—Goodchild v. Erickson, 134 N.W.2d 191, 375 Mich. 289.

N.J.—**C.J.S. cited in** Galler v. Slurzberg, 106 A.2d 312, 314, 31 N.J.Super. 314, affd. 114 A.2d 260, 18 N.J. 466.

99. Idaho—Bowden v. Robert V. Burggraf Const. Co., 375 P.2d 532, 85 Idaho 44.

1. U.S.—Albaum v. Carey, D.C.N.Y., 283 F.Supp. 3.

Ark.—Sullivant v. Pennsylvania Fire Ins. Co., 268 S.W.2d 372, 223 Ark. 721.

2. Fla.—Collins v. Federated Mut. Implement & Hardware Ins. Co., App., 247 So.2d 461.

Minn.—State by Spannaus v. Mecca Enterprises, Inc., 262 N.W.2d 152.

N.Y.—Hardy v. Murphy, 289 N.Y.S.2d 694, 29 A.D.2d 1038.

Tex.—Roy L. Jones Truck Line v. Johnson, Civ.App., 225 S.W.2d 888, err. ref. no rev. err.—Riverbend Country Club v. Patterson, Civ.App., 399 S.W.2d 382, err. ref. nö rev. err.—Tunnell v. Otis Elevator Co., Civ.App., 400 S.W.2d 781, err. ref. no rev. err.

page 37

5. Pa.—Turley v. Kotter, 398 A.2d 699, 263 Pa.Super. 523.

Tex.—Gulfcraft, Inc. v. Henderson, Civ.App., 300 S.W.2d 768.

Requiring reports to be rendered

Md.—Globe Indem. Co. v. Victill Corp., 119 A.2d 423, 208 Md. 573.

6. Pa.—Yorston v. Pennell, 153 A.2d 255, 397 Pa. 28, 85 A.L.R.2d 872.

S.C.—Chatman v. Johnny J. Jones Exposition, 47 S.E.2d 302, 212 S.C. 215.

9. U.S.—**C.J.S. black letter summary quoted in** Allen v. United States, D.C.Pa., 178 F.Supp. 21, 28—**C.J.S. black letter summary quoted in** Porter v. St. Louis-San Francisco Ry. Co., C.A.Miss., 354 F.2d 840, 843.

Joint work

Cal.—Woodall v. Wayne Steffner Productions, Inc., 20 Cal.Rptr. 572, 201 C.A.2d 800.

10. U.S.—**C.J.S. quoted at length in** Allen v. United States, D.C.Pa., 178 F.Supp. 21, 28.

11. U.S.—**C.J.S. quoted in** Carriers Ins. Exchange v. Truck Ins. Exchange, D.C.Va., 203 F.Supp. 764, 768, affd., C.A., 310 F.2d 653—Mazer v. Lipshutz, C.A.Pa., 360 F.2d 275, cert. den. 87 S.Ct. 72, 385 U.S. 833, 17 L.Ed.2d 68—State of Or. By and Through State Highway Commission v. Tug Go-Getter, D.C.Or., 299 F.Supp. 269, mod. in part on oth. grds., affd. in part, revd. in part, C.A., 468 F.2d 1270—Beaver v. Jacuzzi Bros., Inc., C.A. Ark., 454 F.2d 284.

Del.—**C.J.S. cited in** Binsau v. Garstin, 177 A.2d 636, 641, 4 Storey 423.

N.Y.—In re Fulton Ship Operators P & I Service, 78 N.Y.S.2d 885, 273 App.Div. 614.

Or.—State v. Rice, 291 P.2d 1019, 206 Or. 237.

Pa.—Girard Trust Corn Exchange Bank v. Philadelphia Transp. Co., 190 A.2d 293, 410 Pa. 530.

Different aspects of transaction

Ind.—Jones v. Furlong, 97 N.E.2d 369, 121 Ind.App. 279.

12. U.S.—**C.J.S. quoted in** Carriers Ins. Exchange v. Truck Ins. Exchange, D.C.Va., 203 F.Supp. 764, 768, affd., C.A., 310 F.2d 653.

Ga.—Ed Smith & Sons, Inc. v. Mathis, 120 S.E.2d 646, 103 Ga.App. 661, revd. on oth. grds., 122 S.E.2d 97, 217 Ga. 354, conf. to 122 S.E.2d 593, 104 Ga.App. 774.

Ky.—City of Somerset v. Hart, 549 S.W.2d 814.

Md.—Keitz v. National Paving & Contracting Co., 134 A.2d 296, 214 Md. 479.

page 38

13. U.S.—Central Sur. & Ins. Corp. v. Hampton C.A. Tex., 179 F.2d 261—Shenker v. Baltimore & O.R. Co., Pa., 83 S.Ct. 1667, 374 U.S. 1, 10 L.Ed.2d 709.

Colo.—**C.J.S. quoted in** Jacobson v. Dean, 319 P.2d 975, 978.

Del.—**C.J.S. cited in** Binsau v. Garstin, 177 A.2d 636, 641, 4 Storey 423.

Kan.—Hotel Kansan Operating Co. v. Olson, 232 P.2d 417, 171 Kan. 295—Kleppe v. Prawl, 313 P.2d 227, 181 Kan. 590, 63 A.L.R.2d 175.

Ky.—Smith v. Gennett, 385 S.W.2d 957.

La.—**C.J.S. quoted at length in** Finch v. Jordano, App., 284 So.2d 641, 647, writ ref., Sup., 286 So.2d 662, 663.

Minn.—Danek v. Meldrum Mfg. & Engineering Co., Inc., 252 N.W.2d 255, 312 Minn. 404.

Miss.—**C.J.S. cited in** Runnels v. Burdine, 106 So.2d 49, 51, 234 Miss. 272—St. Louis-San Francisco Ry. Co. v. Porter, 211 So.2d 530, cert. den. 89 S.Ct. 483, 393 U.S. 999, 21 L.Ed.2d 463.

N.J.—Roberts v. Geo. M. Brewster & Son, 80 A.2d 638, 13 N.J.Super. 462.

N.Y.—Szczepkowicz v. Khelshek Realty Corp., 113 N.Y.S.2d 870, 280 App.Div. 524, rearg. den. 115 N.Y.S.2d 818, 280 App.Div. 915.

Okl.—Hodges v. Holding, 229 P.2d 555, 204 Okl. 327—Smith v. Hall, 418 P.2d 665.

Or.—**C.J.S. cited in** Nordling v. Johnston, 287 P.2d 420, 422, 205 Or. 315, 48 A.L.R.2d 1369.

Tex.—Mercury Life & Health Co. v. De Leon, Civ. App., 314 S.W.2d 402, err. ref. no rev. err.

Wash.—**C.J.S. quoted at length in** Fisher v. City of Seattle, 384 P.2d 852, 855, 62 Wash.2d 800.

14. Okl.—Leach v. Hall, 418 P.2d 650.

15. Ala.—Jeffrey Mfg. Co. v. Hannah, 105 So.2d 672, 768 Ala. 262—State Farm Mut. Auto. Ins. Co. v. Vails, 177 So.2d 821, 278 Ala. 266.

Kan.—Beitz v. Hereford, 220 P.2d 135, 169 Kan. 556.

Miss.—**C.J.S. cited in** Runnels v. Burdine, 106 So.2d 49, 51, 234 Miss. 272.

Ohio—Home Ins. Co. v. Board of County Com'rs, 97 N.E.2d 231, 88 Ohio App. 91, app. dism. 92 N.E.2d 609, 153 Ohio St. 538.

Wash.—Wiest v. Coal Creek R. Co., 84 C. 725, 42 Wash. 176—Nyman v. MacRae Bros. Const. Co., 418 P.2d 253, 69 Wash.2d 285.

16. Ala.—Jeffrey Mfg. Co. v. Hannah, 105 So.2d 672, 268 Ala. 262—State Farm Mut. Auto. Ins. Co. v. Vails, 177 So.2d 821, 278 Ala. 266.

Alaska—Selid Const. Co. v. Guarantee Ins. Co., 355 P.2d 389.

17. Minn.—Danek v. Meldrum Mfg. & Engineering Co., Inc., 252 N.W.2d 255, 312 Minn. 404.

Pa.—Duttera v. Pitzer, 1 Adams L.J. 37.

18. Okl.—Hodges v. Holding, supra, n. 13.

Tex.—Mercury Life & Health Co. v. De Leon, Civ. App., 314 S.W.2d 402, err. ref. no rev. err.

19. Neb.—Vontress v. Ready Mixed Concrete Co., 104 N.W.2d 331, 170 Neb. 789.

20. U.S.—**C.J.S. cited in** Vance Trucking Co. v. Canal Ins. Co., D.C.S.C., 249 F.Supp. 33, 38, affd., C.A., 395 F.2d 391, cert. den. 89 S.Ct. 129, 393 U.S. 841, 21 L.Ed.2d 116.

Colo.—**C.J.S. quoted in** Jacobson v. Dean, 319 P.2d 975, 978.

Kan.—Beitz v. Hereford, supra, n. 15.

Ky.—Smith v. Gennett, 385 S.W.2d 957.

Pa.—Collins v. Hand, 246 A.2d 398, 431 Pa. 378.

page 39

23. U.S.—Holland v. Celebrezze, D.C.Tenn., 223 F.Supp. 347—**C.J.S. black letter summary quoted in** Sabbagha v. Celebrezze, D.C.S.C., 231 F.Supp. 440, 444, revd. on oth. grds., C.A., 345 F.2d 509—Birmingham Fire Ins. Co. of Pa. v. Adolph, C.A.La., 379 F.2d 948.

Cal.—Malvich v. Rockwell, 205 P.2d 389, 91 Cal. App.2d 463.

Iowa—Uhe v. Central States Theatre Corp., 139 N.W.2d 538, 258 Iowa 580.

La.—Sicard v. City of New Orleans, App., 176 So.2d 672, revd. on oth. grds. 184 So.2d 21, 248 La. 1090.

N.J.—Outdoor Sports Corp. v. American Federation of Labor, Local 23132, 78 A.2d 69, 6 N.J. 217, 29 A.L.R.2d 313.

S.C.—**C.J.S. quoted at length in** Pleasant v. Mathias, 145 S.E.2d 680, 682, 247 S.C. 124.

Wages, salary, overtime

(1) Usually defines compensation paid to worker in master and servant relationship.

Del.—Aero Service Corp. v. Gordy, Super., 109 A.2d 393, 10 Terry 59.

(2) Other statements.

Wis.—Casey v. Trecker, 66 N.W.2d 724, 268 Wis. 87.

24. U.S.—Petition of Read, D.C.Fla., 224 F.Supp. 241.

Cal.—**C.J.S. cited in** Case v. Kadota Fig Ass'n of Producers, 207 P.2d 86, 95, subs. op. 220 P.2d 912—Bonetti v. Double Play Tavern, 274 P.2d 751, 126 C.A.2d Supp. 848.

Idaho—Mathauser v. Hellyer, 560 P.2d 1325, 98 Idaho 235.

Iowa—Crum v. Walker, 44 N.W.2d 701, 241 Iowa 1173.

La.—Blackburn v. Chenet, App., 42 So.2d 288—Smith v. Foucha, App., 172 So.2d 318, writ ref. 173 So.2d 542, 247 La. 678.

Minn.—Frankle v. Twedt, 47 N.W.2d 482, 234 Minn. 42.

Mo.—Bollman v. Kark Rendering Plant, 418 S.W.2d 39.

Or.—General Ins. Co. v. Saskatchewan Government Ins. Office, 391 P.2d 616, 238 Or. 8.

Wis.—Harry Crow & Son, Inc. v. Industrial Commission, 118 N.W.2d 841, 18 Wis.2d 436.

25. U.S.—Thurston v. Hobby, D.C.Mo., 133 F.Supp. 205.

Cal.—Key Ins. Exchange v. Washington, 86 Cal.Rptr. 542, 7 C.A.3d 209.

Idaho—Cloughley v. Orange Transp. Co., 327 P.2d 369, 80 Idaho 226.

N.Y.—Carroll v. Kay, 219 N.Y.S.2d 892, 30 Misc.2d 526.

Pa.—Sweet v. Pennsylvania Labor Relations Bd., Washington County, Super., 322 A.2d 362, 457 Pa. 456.

26. U.S.—State of Or. By and Through State Highway Commission v. Tug Go-getter, D.C.Or., 299 F.Supp. 269. Mod. in part on oth. grds., affd. in part, revd. in part, C.A., 468 F.2d 1270.

Page 39

Ariz.—Bond v. Cartwright Little League, Inc., 536 P.2d 697, 112 Ariz. 9.

Cal.—Chavez v. Sprague, 25 Cal.Rptr. 603, 209 C.A.2d 101—In re Pelletier's Estate, 34 Cal.Rptr. 413, 221 C.A.2d 347.

Mo.—**C.J.S. cited** in Lawson v. Lawson, App., 415 S.W.2d 313, 319.

N.Y.—General Acc. Group v. Frintzilas, 443 N.Y.S.2d 989, 111 Misc.2d 306.

Or.—Kowaleski v. Kowaleski, 385 P.2d 611, 235 Or. 454.

Pa.—Biedenbach v. Teague, 166 A.2d 320, 194 Pa.Super. 245.

Wash.—Baxter v. Morningside, Inc., 521 P.2d 946, 10 Wash.App. 893, 82 A.L.R.3d 1206

Wis.—Heims v. Hanke, 93 N.W.2d 455, 5 Wis.2d 465.

Gratuitous undertaking

Ill.—Wolverine Ins. Co. v. Jockish, 403 N.E.2d 1290, 30 Ill.Dec. 686, 83 Ill.App.3d 411.

30. Wis.—Kirchoff v. City of Janesville, 38 N.W.2d 698, 255 Wis. 202.

31. La.—Blackburn v. Chenet, supra, n. 24.

Minn.—**C.J.S. cited** in Lowry v. Kneeland, Minn., 117 N.W.2d 207, 211, 263 Minn. 537.

Payment in dollars not essential

Cal.—Eye v. Kafer, Inc., 20 Cal.Rptr 841, 202 C.A.2d 449.

32. U.S.—Hayes v. Jansen, D.C.Iowa, 89 F.Supp. 1—Doane Agr. Service, Inc. v. Coleman, C.A.Tenn., 254 F.2d 40, cert. den. 79 S.Ct. 29, 358 U.S. 818, 3 L.Ed.2d 60—American Cas. Co. of Reading, Pa. v. Wypior, C.A.Ill., 365 F.2d 164.

Ky.—Blair v. Boggs, 265 S.W.2d 795.

La.—Blackburn v. Chenet, supra, n. 24.

Minn.—**C.J.S. cited** in Lowry v. Kneeland, Minn., 117 N.W.2d 207, 211, 263 Minn. 537.

Okl.—C & H Transp. Co. v. McLaughlin, 434 P.2d 229.

Pa.—Jones v. Unemployment Compensation Bd. of Review, 60 A.2d 568, 163 Pa.Super. 271.

Tenn.—D. M. Rose & Co. v. Snyder, 206 S.W.2d 897, 185 Tenn. 499.

Wash.—Cassidy v. Peters, 309 P.2d 767, 50 Wash.2d 115.

Withholding or social security taxes

Neb.—Gardner v. Kothe, 109 N.W.2d 405, 172 Neb. 364.

Piecework payment

Ohio—L. C. Dortch, Inc. v. Goldstein, 200 N.E.2d 828.

33. Pa.—Culp v. Weiss, 17 Som. 261, 37 West. 155.

34. U.S.—Wyles v. Campbell, D.C.Del., 77 F.Supp. 343—Kirkconnell v. U.S., 347 F.2d 260, 171 Ct.Cl. 43.

page 40

36. Iowa—Erickson v. Erickson, 94 N.W.2d 728, 250 Iowa 491.

38. U.S.—Thurston v. Hobby, D.C.Mo., 133 F.Supp. 205—Holland v. Celebrezze, D.C.Tenn., 223 F.Supp. 347—**C.J.S. black letter summary quoted in** Sabbagha v. Celebrezze, D.C.S.C., 231 F.Supp. 440, 444, revd. on oth. grds., C.A., 345 F.2d 509—Martin v. Wood, C.A.Pa., 400 F.2d 310.

Minn.—Graalum v. Radisson Ramp, Inc., 71 N.W.2d 904, 245 Minn. 54.

Pa.—Com. v. Minds Coal Min, Corp., 60 A.2d 14, 160 Pa. 7.

Tex.—Rowson v. Fuller, Civ.App., 230 S.W.2d 355, err. ref. no rev. err.

Personal service, etc.

Mo.—Talley v. Bowen Const. Co., 340 S.W.2d 701.

39. U.S.—Tow v. Miners Memorial Hospital Ass'n, Inc., D.C.W.Va., 199 F.Supp., 926, affd., C.A., 305 F.2d 73.

Neb.—Meyer v. State Farm Mut. Auto. Ins. Co., 224 N.W.2d 770, 192 Neb. 831, 89 A.L.R.3d 824.

Pa.—Culp v. Weiss, 17 Som. 261, 37 West. 155.

40. N.Y.—Goldfarb v. Herman, 85 N.Y.S.2d 156, 193 Misc. 302.

41. U.S.—Huntley v. Gunn Furniture Co., D.C.Mich., 79 F.Supp. 110.

45. U.S.—Tapager v. Birmingham, D.C.Iowa, 75 F.Supp. 375.

46. Mass.—Smith's Case, 93 N.E.2d 531, 326 Mass. 160.

N.J.—Kennedy v. Westinghouse Elec. Corp., 101 A.2d 592, 29 N.J.Super. 68, affd. 108 A.2d 409, 16 N.J. 280, 47 A.L.R.2d 1025.

Status as employee not lost by going on strike

Conn.—Tedesco v. Turner & Seymour Mfg. Co., 110 A.2d 650, 19 Conn.Sup. 192.

47. Wis.—Harry Crow & Son, Inc. v. Industrial Commission, 118 N.W.2d 841, 18 Wis.2d 436.

50. Ohio—L. C. Dortch, Inc. v. Goldstein, 300 N.E.2d 828.

§ 3(1). Independent Contractors and Their Employees

Library References

Master and Servant ⚷5.

page 41

U.S.—**C.J.S. black letter summary quoted** in Porter v. St. Louis-San Francisco Railway Company, C.C.A. Miss., 354 F.2d 840, 843.

La.—**C.J.S. black letter summary quoted** in Averetto v. Travelers Ins. Co., App., 174 So.2d 881, 888.

S.C.—**C.J.S. black letter summary quoted** in Cooper v. Graham, 98 S.E.2d 843, 846, 231 S.C. 404—**C.J.S. black letter summary quoted** in Bates v. Legette, 121 S.E.2d 289, 293, 239 S.C. 25—**C.J.S. black letter summary quoted in** Gomillion v. Forsythe, 62 S.E.2d 297, 304, 218 S.C. 211, 53 A.L.R.2d 169.

Tex.—**C.J.S. black letter summary quoted** in Henderson v. Couch, Civ.App., 274 S.W.2d 844, 851.

55. Idaho—**C.J.S. cited** in In re Pacific Nat. Life Assur. Co., 212 P.2d 397, 403, 70 Idaho 98.

N.Y.—**C.J.S. cited** in Ketcham v. Hall Syndicate, Inc., Sup., 236 N.Y.S.2d 206, 211, 37 Misc.2d 693, affd. 242 N.Y.S.2d 182, 19 A.D.2d 611.

The same reasons which impel a definition of employee rather than an independent contractor for the protection of employees as a class is entitled to serious consideration with relation to the protection of the public generally.[57.5]

57.5. La.—Malloy v. Buckner-Harmon Wood Contractors, App., 100 So.2d 242.

58. U.S.—**C.J.S. cited** in Sabbagha v. Celebrezze, D.C.S.C., 231 F.Supp. 440, 444, revd. on oth. grds., C.A., 345 F.2d 509.

Minn.—Derrick v. Drolson Co., 69 N.W.2d 124, 244 Minn. 144.

N.J.—Montclair Distributing Co. v. Arnold Bakers, 62 A.2d 491, 1 N.J.Super. 568.

59. U.S.—Illinois Tri-Seal Products, Inc. v. U.S., 353 F.2d 216, 173 Ct.Cl. 499—Sharpe v. Grindstaff, D.C.N.C., 329 F.Supp. 405—Pitts v. Shell Oil Co., C.A.Miss., 463 F.2d 331—Weaver v. Weinberger, D.C.W.Va., 392 F.Supp. 721.

Cal.—Skelton v. Fekete, 261 P.2d 339, 120 C.A.2d 401—Coyle v. Alland & Co., 323 P.2d 102, 158 C.A.2d 664—Housewright v. Pacific Far East Line, Inc. 40 Cal.Rptr. 208, 229 C.A.2d 259.

D.C.—Local 777, Democratic Union Organizing Committee, Seafarers Intern. Union of North America, AFL-CIO v. N.L.R.B., C.A., 603 F.2d 862.

Ill.—Hamilton v. Family Record Plan, Inc., 217 N.E.2d 113, 71 Ill.App.2d 39.

Iowa—Hassebroch v. Weaver Const. Co., 67 N.W.2d 549, 246 Iowa 622.

Ky.—Lewis v. Morgan, 252 S.W.2d 691—City of Winchester v. King, 266 S.W.2d 343—Decker v. Glasscock Trucking Service, Inc., 397 S.W.2d 773, app. after remand 403 S.W.2d 275.

La.—Dowling v. Mutual Life Ins. Co. of New York, App., 168 So.2d 107, writ ref. 170 So.2d 508, 247 La. 248—Johnson v. Dabbs, App., 194 So.2d 816—Odom v. Eaves, App., 311 So.2d 575.

Mo.—**C.J.S. cited** in Montgomery v. Mine La Motte Corp., 304 S.W.2d 885, 889—**C.J.S. cited** in Gerry Elson Agency, Inc. v. Muck, 509 S.W.2d 750, 755.

Mont.—Standard Chemical Mfg. Co. v. Employment Sec. Division of Montana State Dept. of Labor and Industry, 605 F.2d 610, 185 Mont. 241.

Neb.—Pearson v. Schuler, 109 N.W.2d 537, 172 Neb. 353

N.M.—Jaramillo v. Thomas, 409 P.2d 131, 75 N.M. 612.

N.Y.—Duffy v. Kedenburg, 103 N.Y.S.2d 457, 278 App.Div. 31.

N.C.—**C.J.S. cited** in Davis v. Wilson, 143 S.E.2d 107, 113, 265 N.C. 139.

Okl.—Swyden Const. Co. v. White, 383 P.2d 674.

Or.—**C.J.S. cited** in Sloan v. Journal Pub. Co., 324 P.2d 449, 457, 213 Or. 324.

Pa.—Johnson v. Angretti, 73 A.2d 666, 364 Pa. 602.

Tenn.—Jolly Motor Livery Corp. v. Allenberg, 221 S.W.2d 513, 188 Tenn. 452.

Wash.—Hanks v. Landert, 223 P.2d 443, 37 Wash.2d 293, 30 A.L.R.2d 1012—Cassidy v. Peters, 309 P.2d 767, 50 Wash.2d 115.

Wyo.—Lichty v. Model Homes, 211 P.2d 958, 66 Wyo. 347.

Similar definitions

(2) Cal.—Sparks v. L D. Folsom Co., 31 Cal.Rptr. 640, 217 C.A.2d 279.

(3) U.S.—Beatty v. Halpin, C.A.Iowa, 267 F.2d 561.

Cal.—McDonald v. Shell Oil Co., 285 P.2d 902, 44 C.2d 785—People v Miller, 300 P.2d 760, 143 C.A.2d Supp. 843.

Kan.—Aspelin v. Mounkes, 476 P.2d 620, 206 Kan. 132.

Ky.—Marcum v. Hedger, 303 S.W.2d 558.

Miss.—Brown v. E. L. Bruce Co., 175 So.2d 151, 253 Miss. 1.

Wis.—Cordova v. Gutierrez, 128 N.W.2d 62, 23 Wis.2d 598.

page 42

60. U.S.—Creel v. Lone Star Defense Corp., C.A. Tex., 171 F.2d 964, revd. on oth. grds. 70 S.Ct. 755, 339 U.S. 497, 94 L.Ed. 1017—Johnson v. Royal Indem. Co., C.A.La., 206 F.2d 561—Traders & General Ins. Co. v. Edwards, C.A.Okl., 216 F.2d 441, cert. den. 75 S.Ct. 441, 348 U.S. 953, 99 L.Ed. 744—Donroy, Limited v. U.S., C.A.Cal., 301 F.2d 200—Donroy, Limited v. U.S., D.C.Cal., 196 F.Supp. 54, affd., C.A., 301 F.2d 200—Albina Engine & Mach. Works, Inc. v. Abel, C.A.Okl., 305 F.2d 77—Trussell v. Bear Mfg. Co., D.C. Tenn., 215 F.Supp. 802—Kushner v. Legette, C.A. S.C., 330 F.2d 447—Etherton v. U.S., D.C.Tenn., 278 F.Supp. 568, affd., C.A., 394 F.2d 6—In re Cooper, Bkrtcy.Tex., 2 B.R. 188.

Ariz.—Barker v. Petroleum Corp., 232 P.2d 390, 72 Ariz. 187, mod. on oth. grds. 233 P.2d 449, 72 Ariz. 238.

Ark.—Capitol City Lumber Co. v. Cash, 214 S.W.2d 363, 214 Ark. 35.

Iowa—Banks v. Carrell, 43 N.W.2d 142, 241 Iowa 786.

Me.—Lewiston Daily Sun v. Hanover Ins. Co., 407 A.2d 288.

Mo.—Benham v. McCoy, 213 S.W.2d 914—**C.J.S. cited** in Montgomery v. Mine La Motte Corp., 304 S.W.2d 885, 890—Talley v. Bowen Const. Co., 340 S.W.2d 701—Handley v. State, Division of Employment Sec., App., 387 S.W.2d 247.

Neb.—Gardner v. Kothe, 109 N.W.2d 405, 172 Neb. 364—Pearson v. Schuler, 109 N.W.2d 537, 172 Neb. 353.

N.J.—Falk v. Unger, 111 A.2d 283, 33 N.J.Super. 589.

N.Y.—Ostrander v. Billie Holm's Village Travel, Inc., 386 N.Y.S.2d 597, 87 Misc.2d 1049.

N.C.—Cooper v. Asheville Citizen-Times Pub. Co., 129 S.E.2d 107, 258 N.C. 578.

Okl.—Keeling v. Schuman Bros. Lumber Co., 229 P.2d 193, 204 Okl. 277—Continental Oil Co. v. Elias,

307 P.2d 849—Smith Bros. Road Const. Co. v. Palmer, 389 P.2d 495.

Pa.—Giannetta v. City of Allentown, 32 Leh.L.J. 211.

Tenn.—D. M. Rose & Co. v. Snyder, supra, n. 32.

Tex.—Henderson v. Couch, Civ.App., 274 S.W.2d 844—Keith v. Blanscett, Civ.App., 450 S.W.2d 124

Wis.—Mueller v. Luther, 142 N.W.2d 848, 31 Wis.2d 220.

Similar definitions

(2) Ky.—Setzer v. Whitehurst, 339 S.W.2d 454.

(3) U.S.—Williamson v. Daspit Bros. Marine Divers, Inc., D.C.La., 219 F.Supp. 370, affd., C.A., 337 F.2d 337—Continental Bus System, Inc. v. N.L.R.B., C.A. Colo., 325 F.2d 267.

Ark.—Jackson v. Petit Jean Elec. Co-op., App., 599 S.W.2d 402, 268 Ark. 1076, affd., 606 S.W.2d 66, 270 Ark. 506.

Ind.—Crabill v. Livengood, 231 N.E.2d 854, 142 Ind. App. 624.

La.—Gresham v. Speights, App., 133 So.2d 846.

N.C.—Askew v. Leonard Tire Co., 141 S.E.2d 280, 264 N.C. 168.

Okl.—Commonwealth Life Ins. Co. v. Gay, 365 P.2d 149.

Wash.—Murray v. Corson Corp., 350 P.2d 468, 55 Wash.2d 733.

page 43

61. U.S.—Long v. Valley Steel Products Co., C.A. Okl., 207 F.2d 505—Kelly v. Eclipse Motor Line, D.C.Md., 305 F.Supp. 191, affd., C.A., 432 F.2d 1009.

La.—Hickman v. Southern Pac. Transport Co., 262 So.2d 385, 262 La. 102.

Minn.—State by Spannaus v. Mecca Enterprises, Inc., 262 N.W.2d 152.

Okl.—Keith v. Mid-Continent Petroleum Corp., 272 P.2d 371—Cook v. Knox, 273 P.2d 865—Smith v. Crotts, 336 P.2d 1102—Mistletoe Exp. Service, Inc. v. Culp, 353 P.2d 9—Morain v. Lollis, 371 P.2d 473—Hunter Const. Co. v. Marris, 388 P.2d 5—Flick v. Crouch, 434 P.2d 256—C & H Transp. Co. v. McLaughlin, 434 P.2d 229—Miller Const. Co. v. Wenthold, 458 P.2d 637.

Tex.—General Motors Corp. v. Brady, Civ.App., 477 S.W.2d 385.

62. U.S.—Springs Cotton Mills v. Machinecraft, Inc., D.C.S.C., 156 F.Supp. 372.

Miss.—Wade v. Traxler Gravel Co., 100 So.2d 103, 232 Miss. 592.

Mo.—Williamson v. Southwestern Bell Tel. Co., 265 S.W.2d 354—Talley v. Bowen Const. Co., 340 S.W.2d 701—Madsen v. Lawrence, 366 S.W.2d 413.

Neb.—Meyer v. State Farm Mut. Auto. Ins. Co., 224 N.W.2d 770, 192 Neb. 831, 89 A.L.R.3d 824.

Okl.—Cities Service Oil Co. v. Kindt, 190 P.2d 1007, 200 Okl. 64.

Pa.—George v. Nemeth, 233 A.2d 231, 426 Pa. 551.

Tex.—Harris v. Cochran, Civ.App., 288 S.W.2d 814, err. ref. no rev. err.—Johnson v. Claiborne, Civ. App., 328 S.W.2d 215, err. ref. no rev. err.

Wash.—Hollingbery v. Dunn, 411 P.2d 431, 68 Wash.2d 75.

page 44

63. Tex.—Rowson v. Fuller, supra, n. 38—Farmers' Gin Co-op. Ass'n v. Mitchell, Civ.App., 233 S.W.2d 948.

65. R.I.—Markham v. State, 210 A.2d 146, 99 R.I. 650.

Tex.—Houston Pipe Line Co. v. Peddy, Civ.App., 292 S.W.2d 364, err. ref. no rev. err.

Independent contractor status terminated by completion of transaction

Neb.—Weichel v. Lojka, 179 N.W.2d 112, 185 Neb. 819.

67. Tex.—Houston Pipe Line Co. v. Peddy, Civ.App., 292 S.W.2d 364, err. ref. no rev. err.

Other definitions

N.J.—Gaydos v. Packanack Woods Development Co., 166 A.2d 181, 64 N.J.Super. 395.

68. Tex.—Houston Pipe Line Co. v. Peddy, Div.App., 292 S W.2d 364, err. ref. no rev. err.

69. Tex.—Houston Pipe Line Co. v. Peddy, Civ.App., 292 S.W.2d 364, err. ref. no rev. err.

Wash.—Nawrocki v. Cole, 249 P.2d 969, 41 Wash.2d 474, 35 A.L.R.2d 799.

70. U.S.—N.L.R.B. v. Steinberg, C.A., 182 F.2d 850—McCarley v. Foster-Milburn Co., D.C.N.Y., 93 F.Supp. 421.

Cal.—First Trust & Sav. Bank of Pasadena v. Costa, 188 P 2d 778, 83 Cal.App.2d 368—Automatic Canteen Co. of America v. State Bd. of Equalization, 47 Cal.Rptr. 848, 238 C.A.2d 372.

N.Y.—Fisher v. Cattani, 278 N.Y.S.2d 420, 53 Misc.2d 221.

71. Causal relation between misrepresentations and injury

Ill.—Taylor v. Elgin, J. & E. Ry. Co., 178 N.E.2d 704, 33 Ill.App.2d 64.

73. U.S.—Kushner v. Legette, C.A.S.C., 330 F.2d 447.

Ariz.—Barker v. Petroleum Corp., supra, n. 60.

Mich.—Scott v. Alsar Co., 58 N.W.2d 910, 336 Mich. 532.

Tex.—Bridwell v. Bernard, Civ.App., 159 S.W.2d 981, err. ref.

Law governing master-servant relationship

(2) Ky.—Lewis v. Morgan, supra, n. 59.

page 45

S.D.—C.J.S. black letter summary cited in Dumire v. Martin, 174 N.W.2d 215, 217, 84 S.D. 572.

76. U.S.—Corban v. Skelly Oil Co., C.A.Miss., 256 F.2d 775—Terry v. A. P. Green Fire Brick Co., D.C.Ark., 164 F.Supp. 184—Kushner v. Legette, C.A.S.C., 330 F.2d 447—Olds v. Pennsalt Chemicals Corp., C.A.Ky., 432 F.2d 1033, cert. den. 91 S.Ct. 1257, 401 U.S. 1010, 28 L.Ed.2d 546.

Ill.—C.J.S. cited in Downs v. Baltimore & O.R. Co., 102 N.E.2d 537, 539, 345 Ill.App. 118, 30 A.L. R.2d 503.

Mo.—C.J.S. quoted in Hulen v. American Oil Co., 360 S.W.2d 726, 729—Boulch v. John B. Gutmann Const. Co., App., 366 S.W.2d 21.

S.C.—Benbow v. Edmunds High School, 67 S.E.2d 680, 220 S.C. 363.

Tex.—Associated Indem. Corp. v. Walnut Hill Corp., Civ.App., 220 S.W.2d 301—State v. LeBlanc, Inc., Civ.App., 399 S.W.2d 919.

Wyo.—Barlow v. Makeeff, 284 P.2d 1093, 74 Wyo. 171.

77. Ill.—Downs v. Baltimore & O.R. Co., 102 N.E.2d 537, 345 Ill.App. 118, 30 A.L.R.2d 503.

78. Ill.—Downs v. Baltimore & O.R. Co., supra, n. 77.

79. U.S.—Hargis v. Wabash R. Co., C.C.A.Ill., 163 F.2d 608—Del Vecchio v. Pennsylvania R. Co., C.A.Pa., 233 F.2d 2, cert. den. 77 S.Ct. 146, 352 U.S. 909, 1 L.Ed.2d 117.

80. Definition of "independent contractor" in workmen's compensation acts to be considered

La.—Malloy v. Buckner-Harmon Wood Contractors, App., 100 So.2d 242.

§ 3(2). Tests of Independent Contractor Relationship

Library References

Master and Servant ⚖5, 316, 318.

S.D.—C.J.S. black letter summary quoted in Steen v. Potts, 61 N.W.2d 825, 826, 75 S.D. 184.

81. U.S.—U.S. v. Richfield Oil Corp., D.C.Cal., 99 F.Supp. 280, affd. 72 S.Ct. 665, 343 U.S. 922, 96 L.Ed. 1334, reh. den. 72 S.Ct. 1049, 343 U.S. 958, 96 L.Ed. 1358.

Ga.—Sloan v. Hobbs Sporting Goods Shop, 243 S.E.2d 673, 145 Ga.App. 255.

Idaho—C.J.S. quoted at length in National Trailer Convoy, Inc. v. Employment Sec. Agency of Idaho, 360 P.2d 994, 997, 83 Idaho 247.

Tenn.—C.J.S. quoted at length in General Shale Products Corp. v. Reese, 245 S.W.2d 788, 793, 35 Tenn.App. 423.

Tex.—Carruth v. Valley Ready-Mix Concrete Co., Civ. App., 221 S.W.2d 584, 593, err. ref.

Wash.—Franklin v. Puget Sound Tug & Barge Co., 586 P.2d 489, 21 Wash.App. 517.

82. U.S.—Continental Bus System, Inc. v. N.L.R.B., C.A.Colo., 325 F.2d 267—C.J.S. cited in Sabbagha v. Celebrezze, D.C.S.C., 231 F.Supp. 440, 445, revd. on oth. grds., C.A., 345 F.2d 509—C.J.S. cited in Mav Freight Serv., Inc. v. U.S., D.C.N.Y., 462 F.Supp. 503, 507.

Ga.—Helms v. Young, 203 S.E.2d 253, 130 Ga.App. 344.

La.—Amyx v. Henry & Hall, 79 So.2d 483, 227 La. 364—Hardware Dealers Mut. Fire Ins. Co. v. Willis, App., 179 So.2d 441.

Mo.—Barkley v. Mitchell, App., 411 S.W.2d 817.

N.J.—Miklos v. Liberty Coach Co., 138 A.2d 762, 48 N.J.Super. 591.

Pa.—Penguin Ice Cream v. Shiner, 27 Leh.L.J. 342.

Motives immaterial

Wis.—Bond v. Harrel, 108 N.W.2d 552, 13 Wis.2d 369, 98 A.L.R.2d 330.

Courts incline to classify party as employee unless certain requirements are met

La.—Suckle v. Hartford Acc. & Indem, Co., App., 163 So.2d 564, writ ref. 165 So.2d 481, 246 La. 582.

83. U.S.—Strangi v. U.S., C.A.Tex., 211 F.2d 305—Buchanan v. U.S., C.A.Minn., 305 F.2d 738—C.J.S. cited in Texas Carbonate Co. v. Phinney, C.A., 307 F.2d 289, 292, cert. den. 83 S.Ct. 318, 371 U.S. 940, 9 L.Ed.2d 275, reh. den. 83 S.Ct. 550, 371 U.S. 970, 9 L.Ed.2d 540—C.J.S. cited in Bonney Motor Exp., Inc. v. U.S., D.C.Va., 206 F.Supp. 22, 26—Taylor v. Local No. 7, Intern. Union of Journeymen Horseshoers of U.S. and Canada (AFL-CIO), C.A.Md., 353 F.2d 593, cert. den. 86 S.Ct. 1859, 384 U.S. 969, 16 L.Ed.2d 681.

Del.—C.J.S. cited in E. I. Du Pont De Nemours & Co. v. I. D. Griffith, Inc., 130 A.2d 783, 11 Terry 348.

Ill.—Anderson v. Poray, Inc., 191 N.E.2d 417, 42 Ill. App.2d 1.

Mont.—Barovich v. City of Miles City, 340 P.2d 819, 135 Mont. 394.

Okl.—Elick v. Crouch, 434 P.2d 256.

page 46

84. U.S.—Creel v. Lone Star Defense Corp., supra, n. 60—Dixon v. U.S., C.A.Ark., 296 F.2d 556—Buchanan v. U.S., C.A.Minn., 305 F.2d 738—C.J.S. cited in Texas Carbonate Co. v. Phinney, C.A., 307 F.2d 789, 292, cert. den. 83 S.Ct. 318, 371 U.S. 940, 9 L.Ed.2d 275, reh. den. 83 S.Ct. 550, 371 U.S. 970, 9 L.Ed.2d 540—Minnesota Milk Co. v. N.L.R.B., C.A.Minn., 314 F.2d 761—Swartz v. Eberly, D.C.Pa., 212 F.Supp. 32—Site Oil Co. of Mo. v. N.L.R.B., C.A.Mo., 319 F.2d 86—McGuire v. U.S., C.A.Wash., 349 F.2d 644—Taylor v. Local No. 7, Intern. Union of Journeymen Horseshoers of U.S., and Canada (AFL-CIO), C.A.Md., 353 F.2d 593, cert. den. 86 S.Ct. 1859, 384 U.S. 969, 16 L.Ed.2d 681—C.J.S. cited in Clifford v. U.S., D.C.S.D., 308 F.Supp. 957, 958.

Ala.—Burbic Contracting Co., Inc. v. Willis, 386 So.2d 419.

Cal.—Frugoli v. Conway, 213 P.2d 76, 95 Cal.App.2d 518—Bemis v. People, 240 P.2d 638, 109 C.A.2d 253—Sparks v. L. D. Folsom Co., 31 Cal.Rptr. 640, 217 C.A.2d 279—Rogers v. Whitson, 39 Cal. Rptr. 849, 228 C.A.2d 662.

Colo.—Harris v. Bybee, App., 527 P.2d 894.

Del.—E. I. Du Pont De Nemours & Co. v. I. D. Griffith, Inc., 130 A.2d 783, 11 Terry 348.

D.C.—Quijada Corp. v. General Motors Corp., Detroit Diesel Engine Division, App., 253 A.2d 538.

Page 46

Idaho—Link's School of Business, Inc. v. Employment Sec. Agency, 380 P.2d 506, 85 Idaho 519.
Ill.—Anderson v. Poray, Inc., 191 N.E.2d 417, 42 Ill. App.2d 1—Hedrich v. Borden Co., 241 N.E.2d 546, 100 Ill.App.2d 237—Bangert v. Nolan, 265 N.E.2d 199, 130 Ill.App.2d 860.
Ind.—Yuhasz v. Mohr, 307 N.E.2d 516, 159 Ind.App. 478.
La.—Yates v. KTBS, Inc., App., 197 So.2d 368.
Md.—Greer Lines Co. v. Roberts, 139 A.2d 235, 216 Md. 69.
Minn.—**C.J.S. cited in** Gill v. Northwest Airlines, 36 N.W.2d 785, 788, 228 Minn. 164.
Mo.—Benham v. McCoy, supra, n. 60.
Mont.—Barovich v. City of Miles City, 340 P.2d 819, 135 Mont. 394.
Ohio—L. C. Dortch, Inc. v. Goldstein, 200 N.E.2d 828.
Okl.—Mistletoe Exp. Service, Inc. v. Culp, 353 P.2d 9—Sinor v. Hart, 383 A.2d 669—Dodd v. Rush, 406 P.2d 261—Flick v. Crouch, 434 P.2d 256—**C.J.S. cited in** Harting v. Benham Engineering Co., App., 519 P.2d 932, 934.
Tenn.—Carbide & Carbon Chemicals Corp. v. Carson, 239 S.W.2d 27, 192 Tenn. 150, affd. 72 S.Ct. 257, 342 U.S. 232, 96 L.Ed. 257.
Tex.—Harris v. Cochran, Civ.App., 288 S.W.2d 814, err. ref. no rev. err.—W. D. Haden Co. v. Ryman, Civ.App., 362 S.W.2d 133, err. ref.
Utah—Truck Ins. Exchange v. Yardley, 556 P.2d 494.
Wash.—Hollingbery v. Dunn, 411 P.2d 431, 68 Wash.2d 75.

Both servant and independent contractor

Ga.—McBroom v. Zevallos, 244 S.E.2d 19, 145 Ga. App. 375.

85. U.S.—Pitts v. Shell Oil Co., C.A.Miss., 463 F.2d 331—In re Dearborn Marine Service, Inc., C.A. Tex., 499 F.2d 263, reh. den. 512 F.2d 1061, cert. dism. 96 S.Ct. 163, 423 U.S. 886, 46 L.Ed.2d 118—**C.J.S. cited in** Kippen v. Jewkes, C.A.Utah, 258 F.2d 869, 873.
Ariz.—Rendall v. Pioneer Hotel, 222 P.2d 986, 71 Ariz. 10—Barker v. General Petroleum Corp., 232 P.2d 390, 72 Ariz. 187, mod. on oth. grds. 233 P.2d 449, 72 Ariz. 238—Smith v. Goodman, 430 P.2d 922, 6 Ariz.App. 168.
Cal.—**C.J.S. cited in** Malvich v. Rockwell, 205 P.2d 389, 392, 91 Cal.App.2d 463—Housewright v. Pacific Far East Line, Inc., 40 Cal.Rptr. 208, 229 C.A.2d 259.
D.C.—Quijada Corp. v. General Motors Corp., Detroit Diesel Engine Division, App., 253 A.2d 538.
Ga.—Moss v. Central of Georgia R. Co., 219 S.E.2d 593, 135 Ga.App. 904, cert. den. 96 S.Ct. 1501, 425 U.S. 907, 47 L.Ed.2d 758.
Idaho—National Trailer Convoy, Inc. v. Employment Sec. Agency of Idaho, 360 P.2d 994, 83 Idaho 247.
Ill.—Tansey v. Robinson, 164 N.E.2d 272, 24 Ill.App.2d 227—Hindle v. Dillbeck, 274 N.E.2d 594, 1 Ill. App.3d 1021, app. after remand 370 N.E.2d 165, 12 Ill.Dec. 542, 68 Ill.2d 309.
Iowa—**C.J.S. cited in** Hassebroch v. Weaver Const. Co., 67 N.W.2d 549, 553, 246 Iowa 622—Schlotter v. Leudt, 123 N.W.2d 434, 255 Iowa 640—Prokop v. Frank's Plastering Co., 133 N.W.2d 878, 257 Iowa 766.
Ky.—Sam Horne Motor & Implement Co. v. Gregg, 279 S.W.2d 755, 53 A.L.R.2d 626.
La.—Poche v. Frazier, App., 232 So.2d 851, application den. 236 So.2d 36, 256 La. 266.
Md.—L.M.T. Steel Products, Inc. v. Peirson, 425 A.2d 242, 47 Md.App. 633.
Mich.—Hyslop v. Klein, 270 N.W.2d 540, 85 Mich. App. 149.
Miss.—Mississippi Employment Sec. Commission v. Plumbing Wholesale Co., 69 So.2d 814, 219 Miss. 724.
Mo.—Handley v. State, Division of Employment Sec., App., 387 S.W.2d 247.
Nev.—Peck v. Woomack, 192 P.2d 874, 65 Nev. 184.
N.J.—Dee v. Excel Wood Products Co., 207 A.2d 203, 86 N.J.Super. 453.
Okl.—Mistletoe Exp. Service, Inc. v. Culp, 353 P.2d 9.
Pa.—George v. Nemeth, 233 A.2d 231, 426 Pa. 551—Hammermill Paper Co. v. Rust Engineering Co., 243 A.2d 389, 430 Pa. 365.
S.D.—Steen v. Potts, 61 N.W.2d 825, 75 S.D. 184.
Utah—Whyte v. Christensen, 550 P.2d 1289.
Wash.—Hollingbery v. Dunn, 411 P.2d 431, 68 Wash.2d 75.
W.Va.—Walls v. McKinney, 81 S.E.2d 901, 139 W.Va. 866.

Payment of social security tax

(2) Nonpayment by company inconclusive whether person employee or independent contractor.
U.S.—Scheuer v. Central States Pension Fund, D.C. Wis., 358 F.Supp. 1332.

page 47

86. U.S.—Thomas v. U.S., D.C.Vt., 204 F.Supp. 896—Cape Shore Fish Co. v. U.S., 330 F.2d 961, 165 Ct.Cl. 630.
Minn.—Duetsch v. E. L. Murphy Trucking Co., 239 N.W.2d 462, 307 Minn. 271.
Tex.—Keith v. Blanscett, Civ.App., 450 S.W.2d 124.
Wash.—Hollingbery v. Dunn, 411 P.2d 431, 68 Wash.2d 75.

Designation as independent contractor

U.S.—Smith v. Lancer Pools Corp., D.C.Tenn., 200 F.Supp. 199—Swartz v. Eberly, D.C.Pa., 212 F.Supp. 32.
N.M.—Chevron Oil Co. v. Sutton, 515 P.2d 1283, 85 N.M. 679.

87. U.S.—Thomas v. U.S., D.C.Vt., 204 F.Supp. 896—Kirkconnell v. U.S., 347 F.2d 260, 171 Ct.Cl. 43.
Cal.—Housewright v. Pacific Far East Line, Inc., 40 Cal.Rptr. 208, 229 C.A.2d 259.
Idaho—National Trailer Convoy Inc. v. Employment Sec. Agency of Idaho, 360 P.2d 994, 83 Idaho 247.
Mo.—Madsen v. Lawrence, 366 S.W.2d 413.
W.Va.—Spencer v. Travelers Ins. Co., 133 S.E.2d 735, 148 W.Va. 111.

88. U.S.—Mustang Transp. Co. v. Ryder Truck Lines, Inc., D.C.Pa., 523 F.Supp. 1097, affd. C.A., 688 F.2d 823, cert. den. 103 S.Ct. 763, 459 U.S. 1127, 74 L.Ed.2d 978.
Ark.—Sinclair Refining Co. v. Piles, 221 S.W.2d 12, 215 Ark. 469.
Colo.—Crepeau of Renewal Guaranty Corp., 478 P.2d 698, 29 Colo.App. 23.
Ga.—American Family Life Assur. Co. v. Welch, 170 S.E.2d 703, 120 Ga.App. 334.
La.—Guilbeau v. Liberty Mut. Ins. Co., App., 324 So.2d 571, affd. in part, revd. in part on oth. grds. 338 So.2d 600, on remand, App., 345 So.2d 79, writ den., Sup., 346 So.2d 716.
Mont.—**C.J.S. cited in** Barovich v. City of Miles City, 340 P.2d 819, 823, 135 Mont. 394.
Neb.—In re Bingaman's Estate, 50 N.W.2d 523, 155 Neb. 24.
N.Y.—Felice v. St. Agnes Hospital, 411 N.Y.S.2d 901, 65 A.D.2d 388.
N.D.—Metcalf v. Security Intern. Ins. Co., 261 N.W.2d 795.
Okl.—**C.J.S. quoted at length in** Continental Oil Co. v. Elias, 307 P.2d 849, 855.
Pa.—Smith-Faris Co., for Use of Keasbey & Mattison, v. Jameson Memorial Hospital Ass'n, 169 A. 233, 313 Pa. 254.
S.C.—Young v. Warr, 165 S.E.2d 797, 252 S.C. 179.
Tex.—Elder v. Aetna Casualty & Surety Co., Civ.App., 230 S.W.2d 1018, revd. on oth. grds. 236 S.W.2d 611, 149 Tex. 620—Humphreys v. Texas Power & Light Co., Civ.App., 427 S.W.2d 324, err. ref. no rev. err.
W.Va.—Brewer v. Appalachian Constructors, Inc., 76 S.E.2d 916, 138 W.Va. 437.

Agreement as whole

U.S.—Security Roofing & Const. Co. v. U.S., D.C. Mass., 163 F.Supp. 794.
Ind.—Hale v. Peabody Coal Co., 343 N.E.2d 316, 168 Ind.App. 336.

Label placed on relationship by contract

(1) Wis.—Bond v. Harrel, 108 N.W.2d 552, 13 Wis.2d 369, 98 A.L.R.2d 330.
(5) Other statements.
U.S.—Mueller v. Cities Service Oil Co., C.A.Ill., 339 F.2d 303.
Fla.—Padilla v. Gulf Power Co., App., 401 So.2d 1375.
Or.—Jenkins v. AAA Heating & Cooling, Inc., 421 P.2d 971, 245 Or. 382.
Wash.—Daniel v. Pacific Northwest Bell Tel. Co., 580 P.2d 652, 20 Wash.App. 444.

Contract must embody definite period of time for performance.
La.—Malloy v. Buckner-Harmon Wood Contractors, App., 100 So.2d 242.

Contract provision for cancellation by owners without notice is not incompatible with independent contractor relation.
Ohio—Newcomb v. Dredge, 152 N.W.2d 801, 105 Ohio App. 417.

Wording of contract as controlling rather than allegations of its effect when the wording does not justify the conclusion asserted in the allegation.
Mont.—Barovich v. City of Miles City, 340 P.2d 819, 135 Mont. 394.

Absence of agreement for fixed services not decisive

Idaho—Link's School of Business, Inc. v. Employment Sec. Agency, Idaho, 380 P.2d 506, 85 Idaho 519.

Relation of general contractor to subcontractors

Ohio—New York, C. & St. L.R. Co. v. Heffner Const. Co., 223 N.E.2d 649, 9 Ohio App.2d 174.

page 48

89. Ill.—Manahan v. Dailey News-Tribune, 365 N.E.2d 1045, 8 Ill.Dec. 659, 50 Ill.App.3d 9.
La.—Amyx v. Henry & Hall, App., 69 So.2d 69, affd. in part and revd. in part on oth. grds. 79 So.2d 483, 227 La. 364.
Mont.—**C.J.S. cited in** Barovich v. City of Miles City, 340 P.2d 819, 823, 135 Mont. 394.
Pa.—George v. Nemeth, 233 A.2d 231, 426 Pa. 551.

90. Mo.—**C.J.S. cited in** Jokisch v. Life & Cas. Ins. Co. of Tenn., App., 424 S.W.2d 111, 114.
S.D.—**C.J.S. cited in** Steen v. Potts, 61 N.W.2d 825, 828, 75 S.D. 184.
W.Va.—Walls v. McKinney, 81 S.E.2d 901, 139 W.Va. 866.

91. Cal.—Smith v. California Dept. of Employment, 132 Cal.Rptr. 874, 62 C.A.3d 206.
Ill.—**C.J.S. quoted in** Hamilton v. Family Record Plan, Inc., 217 N.E.2d 113, 118, 71 Ill.App.2d 39.
Ky.—Coleman v. Baker, 382 S.W.2d 843.
Minn.—Ossenfort v. Associated Milk Producers, Inc., 254 N.W.2d 672.
N.M.—Ulibarri Landscaping Material, Inc. v. Colony Materials, Inc., App., 639 P.2d 75, 97 N.M. 266, cert. den. 644 P.2d 1039, 98 N.M. 50.
Okl.—Texaco, Inc. v. Layton, 395 P.2d 393.
Tenn.—Hendrix v. City of Maryville, App., 431 S.W.2d 292, 58 Tenn.App. 457.

Contract provision not controlling

(2) Other provisions.
U.S.—Jones v. International Inventors Inc. East, D.C. Ga., 429 F.Supp. 119.
Mo.—Talley v. Bowen Const. Co., 340 S.W.2d 701.

92. U.S.—Bartle v. Travelers Ins. Co., C.A.Tex., 171 F.2d 469.

93. Tex.—McMahan v. Herring, Civ.App., 348 S.W.2d 679, err. dism.
Vt.—**C.J.S. cited in** Williams v. Carter, 285 A.2d 735, 738, 129 Vt. 619.

page 49

96. U.S.—Tapager v. Birmingham, supra, n. 45.
La.—**C.J.S. cited in** Amyx v. Henry & Hall, 79 So.2d 483, 486, 227 La. 364.
Tex.—Pitchfork Land & Cattle Co. v. King, 346 S.W.2d 598, 162 Tex. 331.

2. W.Va.—Sanders v. Georgia Pacific Corp., 225 S.E.2d 218, 159 W.Va. 621, disapproving Chenoweth v. Settle Engineers, 151 W.Va. 830, 156 S.E.2d 297.

5. **Retention by owners of right of re-entry** is not incompatible with independent contractor relation.

Ohio—Newcomb v. Dredge, 152 N.E.2d 801, 105 Ohio App. 417.

6. N.J.—Fitzpatrick v. Haberman, 85 A.2d 7, 16 N.J. Super. 490.

§ 3(3). —— Control

Miss.—C.J.S. black letter summary quoted in Havens v. Natchez Times Pub. Co., 117 So.2d 706, 709, 238 Miss. 121.

7. U.S.—C.J.S. cited in Shreveport Laundries v. U.S., D.C.La., 84 F.Supp. 435, 440—N.L.R.B. v. Nu-Car Carriers, C.A., 189 F.2d 756, cert. den. 72 S.Ct. 367, 342 U.S. 919. 96 L.Ed. 687—U.S. v. Richfield Oil Corp., D.C.Cal., 99 F.Supp. 280, affd. 72 S.Ct. 665, 343 U.S. 922, 96 L.Ed. 1334, reh. den. 72 S.Ct. 1049, 343 U.S. 958, 96 L.Ed. 1358—C.J.S. black letter summary quoted in Sabbagha v. Celebrezze, D.C.S.C., 231 F.Supp. 440, 445, revd. on oth. grds., C.A., 345 F.2d. 509.

Ga.—Sloan v. Hobbs Sporting Goods Shop, 243 S.E.2d 673, 145 Ga.App. 255.

Idaho—Van Vranken v. Fence-Craft, 430 P.2d 488, 91 Idaho 742.

La.—Amyx v. Henry & Hall, 79 So.2d 483, 227 La. 364.

Minn.—Corbin v. Commissioner of Revenue, 240 N.W.2d 809, 307 Minn. 237.

Miss.—Carr v. Crabtree, 55 So.2d 408, 212 Miss. 656.

Mo.—C.J.S. cited in Glynn v. M.F.A. Mut. Ins. Co., 254 S.W.2d 623, 624, 363 Mo. 896, 36 A.L.R.2d 256.

Mont.—Elkins v. Husky Oil Co., 455 P.2d 329, 153 Mont. 159.

N.Y.—Cool v. Ross, 396 N.Y.S.2d 76, 57 A.D.2d 450, affd. 376 N.E.2d 1331, 44 N.Y.2d 750, 405 N.Y. S.2d 686.

Pa.—Com v. Minds Coal Min. Corp., 60 A.2d 14, 160 Pa. 7.

Tex.—C.J.S. black letter summary quoted in Elder v. Aetna Casualty & Surety Co., Civ.App., 230 S.W.2d 1018, 1019, revd. on oth. grds 236 S.W.2d 611, 149 Tex. 620.

Wis.—Saunders v. DEC Intern., Inc., 270 N.W.2d 176, 85 Wis.2d 70.

Wyo.—Combined Ins. Co. of America v. Sinclair, 584 P.2d 1034.

Various forms of control enumerated as factors

U.S.—Buchanan v. U.S., C.A.Minn., 305 F.2d 738—Avis Rent A Car System, Inc. v. U.S., C.A.N.Y., 503 F.2d 423.

8. U.S.—Dockens v. La Caze, D.C.La., 78 F.Supp. 515—American Cas. Co. v. Harrison, D.C.Ark., 96 F.Supp. 537—Marcum v. U.S., C.A.Ky., 324 F.2d 787—Trent v. Atlantic City Elec. Co., C.A. N.J., 334 F.2d 847—Maloof v. U.S., D.C.Md., 242 F.Supp. 175—Irzyk v. U.S., C.A.N.M., 412 F.2d 749—Mustang Transp. Co. v. Ryder Truck Lines, Inc., D.C.Pa., 523 F.Supp. 1097, affd., C.A., 688 F.2d 823, cert. den. 103 S.Ct. 763, 459 U.S. 1127, 74 L.Ed.2d 978, stating Georgia law.

Ala.—Thompson v. City of Bayou La Batre, 399 So.2d 292.

Ark.—Carter v. Ward Body Works, Inc., 439 S.W.2d 286, 246 Ark. 515.

Del.—E. I. Du Pont De Nemours & Co. v. I. D. Griffith, Inc., 130 A.2d 783, 11 Terry 348.

D.C.—Knight v. Handley Motor Co., App., 198 A.2d 747.

Fla.—Cawthon v. Phillips Petroleum Co., App., 124 So.2d 517, 83 A.L.R.2d 1276.

Ga.—Alexander-Bland Lumber Co. v. Jenkins, 75 S.E.2d 355, 87 Ga.App. 678—Peabody Mfg. Co. v. Smith, 94 S.E.2d 156, 94 Ga.App. 240—Asbury v. Public Service Mut. Ins. Co., 114 S.E.2d 40, 101 Ga.App. 283—Cash v. American Sur. Co., 114 S.E.2d 57, 101 Ga.App. 379.

Idaho—Link's School of Business, Inc. v. Employment Sec. Agency, 380 P.2d 506, 85 Idaho 519.

Ill.—Dumas v. Lloyd, 286 N.E.2d 566, 6 Ill.App.3d 1026.

Iowa—Schlotter v. Leudt, 123 N.W.2d 434, 255 Iowa 640.

Kan.—Chasteen v. Childers, 546 P.2d 935, 218 Kan. 519.

La.—Kamm v. Morgan, App., 157 So.2d 118.

Md.—Baird v. Chesapeake & Potomac Tel. Co. of Baltimore City, 117 A.2d 873, 208 Md. 245—Gallagher's Estate v. Battle, 122 A.2d 93, 209 Md. 592, cert. den. 77 S.Ct. 133, 352 U.S. 894, 1 L.Ed.2d 87.

Mich.—Stratton v. Maine, 57 N.W.2d 480, 336 Mich. 163.

Miss.—Louis A. Gily & Sons v. Shankle's Dependents, 149 So.2d 480, 246 Miss. 384.

Mo.—Wills v. Belger, 212 S.W.2d 736, 357 Mo. 1177.

Neb.—In re Bingaman's Estate, 50 N.W.2d 523, 155 Neb. 24.

N.M.—Shipman v. Macco Corp., 392 P.2d 9, 74 N.M. 174—Shaver v. Bell, 397 P.2d 723, 74 N.M. 700.

N.Y.—Friend v. Audits & Surveys Co., Inc., 407 N.Y. S.2d 924, 64 A.D.2d 800.

N.C.—State ex rel. Graham v. Nash Johnson & Sons' Farms, Inc., 138 S.E.2d 773, 263 N.C. 66.

Ohio—Mularski v. Brzuchalski, 192 N.E.2d 669, 117 Ohio App. 480.

Or.—Great Am. Ins. Co. v. General Ins. Co. of America, 475 P.2d 415, 257 Or. 62.

Pa.—Green v. Independent Oil Co., 201 A.2d 207, 414 Pa. 477.

Tenn.—D. M. Rose & Co. v. Snyder, 206 S.W.2d 897, 185 Tenn. 499—Jarratt v. Clinton, 241 S.W.2d 941, 34 Tenn.App. 670—East Vollentine Courts, Inc. v. Foust, 376 S.W.2d 320, 52 Tenn.App. 449.

Tex.—Elder v. Ætna Cas. & Sur. Co., 236 S.W.2d 611, 149 Tex. 620—Mid-Continent Freight Lines, Inc. v. Carter Publications, Inc., Civ.App., 336 S.W.2d 885, err. ref.—Newspapers, Inc. v. Love, 380 S.W.2d 582.

Utah—Thiokol Chemical Corp. v. Peterson, 393 P.2d 391, 15 Utah 2d 355—Harry L. Young & Sons, Inc. v. Ashton, 538 P.2d 316.

W.Va.—Brewer v. Appalachian Constructors, Inc., 76 S.E.2d 916, 138 W.Va. 437—Spencer v. Travelers Ins. Co., 133 S.E.2d 735, 148 W.Va. 111.

page 50

9. U.S.—C.J.S. cited in Kippen v. Jewkes, C.A.Utah, 258 F.2d 869, 873—Beatty v. Halpin, C.A.Iowa, 267 F.2d 561—Miller v. Sinclair Refining Co., C.A.Fla., 268 F.2d 114—Fisher v. U.S., C.A.Ohio, 356 F.2d 706, cert. den. 87 S.Ct. 41, 385 U.S. 819, 17 L.Ed.2d 57—Williams v. Celebrezze, D.C.Ark., 243 F.Supp. 103—Hicks v. Ocean Drilling & Exploration Co., C.A.La., 512 F.2d 817, cert. den. 96 S.Ct. 777, 423 U.S. 1050, 46 L.Ed.2d 639.

Ala.—Philabert v. Frazier, App., 51 So.2d 381, cert. den. 51 So.2d 388, 255 Ala. 336.

Ariz.—Hovatter v. Shell Oil Co., 529 P.2d 224, 111 Ariz. 325.

Ark.—Hinson v. Culberson-Stowers Chevrolet, Inc., 427 S.W.2d 539, 244 Ark. 853.

Cal.—Anderson v. Badger, 191 P.2d 768, 84 Cal.App.2d 736.

Colo.—Sevit, Inc. v. Western Stock Center, Inc., 559 P.2d 1118, 38 Colo.App. 401, affd., 578 P.2d 1045, 195 Colo. 372.

Conn.—Darling v. Burrone Bros., Inc., 292 A.2d 912, 162 Conn. 187.

Fla.—Cawthon v. Phillips Petroleum Co., App., 124 So.2d 517, 83 A.L.R.2d 1276—Collins v. Federated Mut. Implement & Hardware Ins. Co., App., 247 So.2d 461.

Ga.—Alexander-Bland Lumber Co. v. Jenkins, supra, n. 8—Employers Mut. Liability Ins. Co. of Wausau v. Johnson, 122 S.E.2d 308, 104 Ga.App. 617.

Ill.—Taber v. Defenbaugh, 132 N.E.2d 454, 9 Ill. App.2d 169—State Farm Mut. Auto. Ins. Co. v. Staff, 325 N.E.2d 1, 26 Ill.App.3d 217.

Ind.—Nash v. Meguschar, 91 N.E.2d 361, 228 Ind. 216.

Iowa—Schlotter v. Leudt, 123 N.W.2d 434, 255 Iowa 640.

Ky.—C.J.S. cited in King v. Shelby Rural Electric Cooperative Corp., 502 S.W.2d 659, 664, cert. den. 94 S.Ct. 2644, 417 U.S. 932, 41 L.Ed.2d 235.

La.—Monnerjahn v. Times Picayune Pub. Co., App., 67 So.2d 756—C.J.S. cited in Amyx v. Henry & Hall, 79 So.2d 483, 227 La. 364—Malloy v. Buckner-Harmon Wood Contractors, App., 100 So.2d 242—Kamm v Morgan, App., 157 So.2d 118.

Me.—Lewiston Daily Sun v. Hanover Ins. Co., 407 A.2d 288.

Md.—Greer Lines Co. v. Roberts, 139 A.2d 235, 216 Md. 69.

Mass.—Cowan v. Eastern Racing Ass'n, 111 N.E.2d 752, 330 Mass. 135.

Mich.—Stratton v. Maine, supra, n. 8.

Miss.—Brown v. E. L. Bruce Co., 175 So.2d 151, 253 Miss. 1.

Mo.—Williamson v. Southwestern Bell Tel. Co., 265 S.W.2d 354.

N.J.—Montclair Distributing Co. v. Arnold Bakers, 62 A.2d 491, 1 N.J.Super. 568.

N.M.—Shipman v. Macco Corp., 392 P.2d 9, 74 N.M. 174—Shaver v. Bell, 397 P.2d 723, 74 N.M. 700—Roybal v. Bates Lumber Co., 412 P.2d 555, 76 N.M. 127.

N.Y.—Blackwood v. Chemical Corn Exchange Bank, 168 N.Y.S.2d 335, 4 A.D.2d 656, rearg. and app. den. 170 N.Y.S.2d 504, 5 A.D.2d 768, app. dism. 173 N.Y.S.2d 33, 4 N.Y. 802, 149 N.E.2d 532.

N.C.—Economy Pumps v. F. W. Woolworth Co., 17 S.E.2d 639, 220 N.C. 499—State ex rel. Graham v. Nash Johnson & Sons' Farms, Inc., 138 S.E.2d 773, 263 N.C. 66.

Ohio—Mularski v. Brzuchalski, 192 N.E.2d 669, 117 Ohio App. 480—New York, C. & St. L.R. Co. v. Heffner Const. Co., 223 N.E.2d 649, 9 Ohio App.2d 174.

Okl.—Flick v. Crouch, 434 P.2d 256.

Or.—Great Am. Ins. Co. v. General Ins. Co. of America, 475 P.2d 415, 257 Or. 62.

Pa.—Smith-Faris Co., for Use of Keasbey & Mattison, v. Jameson Memorial Hospital Ass'n, 169 A. 233, 313 Pa. 254—Feller v. New Amsterdam Cas. Co., 70 A.2d 299, 363 Pa. 483—Murrin v. Rifugiato, 96 A.2d 865, 373 Pa. 561—Burgard v. York City Retirement Bd., Com.Pl., 69 York 182—Green v. Independent Oil Co., 201 A.2d 207, 414 Pa. 477—Funari v. Valentino, 257 A.2d 259, 435 Pa. 363—J. Miller Co. v. Mixter, 277 A.2d 867, 2 Pa.Cmwlth. 229.

R.I.—Vandal v. Conrad Mfg. Co., 138 A.2d 816, 87 R.I. 112.

S.C.—Chatman v. Johnny J. Jones Exposition, 47 S.E.2d 302, 212 S.C. 215—Young v. Warr, 165 S.E.2d 797, 252 S.C. 179.

S.D.—Mortiz v. C & R Transfer Co., 266 N.W.2d 568.

Tenn.—East Vollentine Courts, Inc. v. Foust, 376 S.W.2d 320, 52 Tenn.App. 449—Baker v. Riverside Church of God, 453 S.W.2d 801, 61 Tenn.App. 270.

Tex.—Texas Elec. Service Co. v. Holt, Civ.App., 249 S.W.2d 662, err. ref. no rev. err.—Great Western Drilling Co. v. Simmons, 302 S.W.2d 400, 157 Tex. 268—Mummert v. Stekoll Drilling Co., Civ.App., 352 S.W.2d 526, err. ref. no rev. err.

Utah—Foster v. Steed, 432 P.2d 60, 19 Utah 2d 435.

Wis.—Thurn v. La Cross Liquor Co., 46 N.W.2d 212, 258 Wis. 448.

Complete control over results

U.S.—U.S. v. Olympia Provision & Baking Co., D.C. N.Y., 282 F.Supp. 819. Motion den. 290 F.Supp. 407, affd. 89 S.Ct. 708, 393 U.S. 480, 21 L.Ed.2d 688, reh. den. 89 S.Ct. 989, 393 U.S. 1124, 22 L.Ed.2d 132.

page 51

10. Cal.—Moeller v. De Rose, App., 222 P.2d 107, hearing dism.

Or.—Jenkins v. AAA Heating & Cooling, Inc., 421 P.2d 971, 245 Or. 382—Great Am Ins. Co. v. General Ins. Co. of America, 475 P.2d 415, 257 Or. 62.

Page 51

11. N.J.—Galler v. Slurzberg, 106 A.2d 312, 31 N.J. Super. 314, affd. 114 A.2d 260, 18 N.J. 466.

12. U.S.—Tapager v. Birmingham, D.C.Iowa, 75 F.Supp. 375—Karnowski v. Skelly Oil Co., C.A. Kan., 174 F.2d 770—C.J.S. cited Kippen v. Jewkes, C.A.Utah, 258 F.2d 869, 873—U.S. v. Hunt, C.A.Tex., 505 F.2d 931, cert. den. 95 S.Ct. 1974, 421 U.S. 975, 44 L.Ed.2d 466.

Ala.—Payne v. Alabama Cemetery Ass'n, Inc., 413 So.2d 1067.

Ark.—Barr v. Matlock, 258 S.W.2d 540, 222 Ark. 260.

Cal.—Skelton v. Fekete, 261 P.2d 339, 120 C.A.2d 401—Smith v. Union Oil Co., 50 Cal.Rptr. 499, 241 C.A.2d 338, cert. den. 87 S.Ct. 291, 385 U.S. 931, 17 L.Ed.2d 213—Muth v. Urricelqui, 60 Cal. Rptr. 166, 251 C.A.2d 901.

Colo.—Dumont v. Teets, 262 P.2d 734, 128 Colo. 395—Harris v. Bybee, App., 527 P.2d 894.

Del.—C.J.S. cited in Melson v. Allman, 244 A.2d 85, 87.

D.C.—Joint Council of Teamsters No. 42 v. N.L.R.B., C.A., 450 F.2d 1322, 146 U.S.App.D.C. 275.

Fla.—Farmers and Merchants Bank v. Vocelle, App., 106 So.2d 92—Cawthon v. Phillips Petroleum Co., App., 124 So.2d 517, 83 A.L.R.2d 1276.

Ga.—St. Paul-Mercury Indem. Co. v. Alexander, 65 S.E.2d 694, 84 Ga.App. 207—Hamilton v. Pulaski County, 72 S.E.2d 487, 86 Ga.App. 705—Federated Mut. Implement & Hardware Ins. Co. v. Elliott, 76 S.E.2d 568, 88 Ga.App. 266—Weiss v. Kling, 101 S.E.2d 178, 96 Ga.App. 618—Savannah Elec. & Power Co. v. Edenfield, 164 S.E.2d 366, 118 Ga.App. 531.

Ill.—Mernick v. Chiodini, 139 N.E.2d 784, 12 Ill. App.2d 249—Gunterberg v. B & M Transp. Co., Inc., 327 N.E.2d 528, 27 Ill.App.3d 732.

Iowa—Greenwell v. Meredith Corp., 189 N.W.2d 901.

Kan.—Chasteen v. Childers, 546 P.2d 935, 218 Kan. 519.

Ky.—Shedd Brown Mfg. Co. v. Tichenor, 257 S.W.2d 894.

La.—Monnerjahn v. Times Picayune Pub. Co., App., 67 So.2d 756—Hickman v. Southern Pac. Transport Co., 262 So.2d 385, 262 La. 102.

Me.—Jenkins v. Hardware Mut. Cas. Co., 128 A.2d 852.

Mass.—Shea v. Bryant Chucking & Grinder Co., 145 N.E.2d 692, 336 Mass. 312.

Minn.—Ossenfort v. Associated Milk Producers, Inc., 254 N.W.2d 672.

Miss.—Louis A. Gily & Sons v. Shankle's Dependents, 149 So.2d 480, 246 Miss. 384.

Mo.—Sharp v. W. & W. Trucking Co., 421 S.W.2d 213—Jokisch v. Life & Cas. Ins. Co. of Tenn., App., 424 S.W.2d 111—Bonenberger v. Sears Roebuck & Co., App., 449 S.W.2d 385.

Mont.—Barovich v. City of Miles City, 340 P.2d 819, 135 Mont. 394.

Neb.—Gardner v. Kothe, 109 N.W.2d 405, 172 Neb. 364—Sandrock v. Taylor, 174 N.W.2d 186, 185 Neb. 106.

Nev.—Dixon v. Simpson, 332 P.2d 656 74 Nev. 358.

N.M.—Roybal v. Bates Lumber Co., 412 P.2d 555, 76 N.M. 127.

N.J.—Galler v. Slurzberg, 92 A.2d 89, 22 N.J.Super. 477—Andryishyn v. Ballinger. 160 A.2d 867, 61 N.J.Super. 386.

N.Y.—People ex rel. Feinberg v. Chapman, 87 N.Y.S.2d 41, 274 App.Div. 715—Susan Messer Associates, Inc. v. Catherwood, 306 N.Y.S.2d 842, 33 A.D.2d 952.

N.C.—Economy Pumps v. F. W. Woolworth Co., supra, n. 9—Cooper v. Asheville Citizen-Times Pub. Co., 129 S.E.2d 107, 258 N.C. 578.

N.D.—Newman v. Sears, Roebuck & Co., 43 N.W.2d 411, 77 N.D. 466, 17 A.L.R.2d 694.

Ohio—In re Bower, 206 N.E.2d 595, 2 Ohio Misc. 35.

Or.—Herff Jones Co. v. State Tax Commission, 430 P.2d 998, 247 Or. 404.

Pa.—Smith-Faris Co., for Use of Keasbey & Mattison v. Jameson Memorial Hospital Ass'n, supra, n. 9—Di Gregorio v. Berg, 59 A.2d 80, 359 Pa. 376—Mohler v. Johnston, 51 Lanc.Rev. 395, 63 York Leg.Rec. 115, 15 Som.Leg.J. 14.

S.C.—Young v. Warr, 165 S.E.2d 797, 252 S.C. 179.

S.D.—Steen v. Potts, 61 N.W.2d 825, 75 S.D. 184.

Tex.—Magnolia Petroleum Co. v. Mitchell, Civ.App., 215 S.W.2d 263—W. D. Haden Co. v. Ryman, Civ.App., 362 S.W.2d 133, err. ref.

Utah—Dowsett v. Dowsett, 207 P.2d 809, 116 Utah 12.

Vt.—Crawford v. Lumbermen's Mut. Cas. Co., 220 A.2d 480, 126 Vt. 12.

Va.—Thaxton v. Com., 175 S.E.2d 264, 211 Va. 38.

Wash.—Langness v. Ketonen, 255 P.2d 551, 42 Wash.2d 394—Fardig v. Reynolds, 348 P.2d 661, 55 Wash.2d 540.

W.Va.—Moore v. Burriss, 54 S.E.2d 23, 132 W.Va. 757—West Virginia Water Service Co. v. Cunningham, 98 S.E.2d 891, 143 W.Va. 1—Bethlehem Mines Corp. v. Haden, 172 S.E.2d 126, 153 W.Va. 721.

Wis.—Swedowski v. Westgor, 109 N.W.2d 549, 14 Wis.2d 47.

Wyo.—Brubaker v. Glenrock Lodge Intern. Order of Odd Fellows, 529 P.2d 52.

Test for tort liability

(2) Other statements.

U.S.—Schenk v. Packaging Corp. of America, D.C. Mich., 267 F.Supp. 439, affd., C.A., 378 F.2d 367.

The distinction, etc.—Long v. Valley Steel Products Co., C.A.Okl., 207 F.2d 505—Strangi v. U.S., C.A.Tex., 211 F.2d 305.

Conn.—Darling v. Burrone Bros., Inc., 292 A.2d 912, 162 Conn. 187.

Fla.—Collins v. Federated Mut. Implement & Hardware Ins. Co., App., 247 So.2d 461.

Neb.—Todd v. Boals, 187 N.W.2d 284, 187 Neb. 51.

Nature of work as additional factor

U.S.—Pitts v. Shell Oil Co., C.A.Miss. 463 F.2d 331.

page 53

13. Cal.—Sparks v. L. D. Folsom Co., 31 Cal.Rptr. 640, 217 C.A.2d 279.

Del.—E. I. Du Pont De Nemours & Co. v. I. D. Griffith, Inc., 130 A.2d 783, 11 Terry 348.

Fla.—Collins v. Federated Mut. Implement & Hardware Ins. Co., App., 247 So.2d 461.

Ga.—Weiss v. Kling, 101 S.E.2d 178, 96 Ga.App. 618.

N.C.—Little v. Poole, 182 S.E.2d 206, 11 N.C.App. 597.

Pa.—Lehigh Nav. Coal Co. v. Unemployment Compensation Bd. of Review, 106 A.2d 919, 176 Pa.Super. 69.

14. U.S.—Thomas v. U.S., D.C.Vt., 204 F.Supp. 896.

Or.—Great Am. Ins. Co. of General Ins. Co. of America, 475 P.2d 415, 257 Or. 62.

Major importance

U.S.—Marcum v. U.S., D.C.Ky., 208 F.Supp. 929, affd., C.A., 324 F.2d 787.

15. U.S.—Hayes v. Morse, C.A.Mo., 474 F.2d 1265.

S.C.—South Carolina Indus. Commission v. Progressive Life Ins. Co., 131 S.E.2d 694, 242 S.C. 547.

Tex.—C.J.S. cited in Dillard's Inc. v. Gentry, Civ.App., 265 S.W.2d 222, 224, err. ref. no rev. err.

16. U.S.—Bartle v. Travelers Ins. Co., C.A.Tex., 171 F.2d 469.

Md.—Greer Lines Co. v. Roberts, 139 A.2d 235, 216 Md. 69.

Okl.—Major Leasing Service Co. v. Cross, 394 P.2d 487—Dodd v. Rush, 406 P.2d 261.

17. Ariz.—Sobel v. Jones, 394 P.2d 415, 96 Ariz. 297.

Cal.—Rogers v. Whitson, 39 Cal.Rptr. 849, 228 C.A.2d 662.

18. Cal.—Automatic Canteen Co. of America v. State Bd. of Equalization, 47 Cal.Rptr. 848, 238 C.A.2d 372.

Fla.—Collins v. Federated Mut. Implement & Hardware Ins. Co., App., 247 So.2d 461.

20. Wash.—Larner v. Torgerson, 613 P.2d 780, 93 Wash.2d 801.

21. Ky.—Turner v. Lewis, 282 S.W.2d 624.

Me.—Poulette v. Herbert C. Haynes, Inc., 347 A.2d 596.

22. U.S.—Corban v. Skelly Oil Co., C.A.Miss., 256 F.2d 775—Rhodes v. Flemming, D.C.Md., 180 F.Supp. 664—Shapiro v. Ribicoff, C.A.N.Y., 316 F.2d 262—Eagle Star Ins. Co., Ltd. v. Deal, C.A. Ark., 474 F.2d 1216.

Cal.—Courtell v. McEachen, 334 P.2d 870, 51 C.2d 448—Shoopman v. Pacific Greyhound Lines, App., 338 P.2d 3, 169 C.A.2d 848—Cahill Bros., Inc. v. Clementina Co., 25 Cal.Rptr. 301, 208 C.A.2d 367—Sparks v. L. D. Folsom Co., 31 Cal.Rptr. 640, 217 C.A.2d 279—Housewright v. Pacific Far East Line, Inc., 40 Cal.Rptr. 208, 229 C.A.2d 259.

Ill.—Taber v. Defenbaugh, 132 N.E.2d 454, 9 Ill. App.2d 169—Hamilton v. Family Record Plan, Inc., 217 N.E.2d 113, 71 Ill.App.2d 39—Hindle v. Dillbeck, 274 N.E.2d 594, 1 Ill.App.3d 1021, app. after remand 370 N.E.2d 165, 12 Ill.Dec. 542, 68 Ill.2d 309.

Iowa—Schlotter v. Leudt, 123 N.W.2d 434, 255 Iowa 640.

La.—Amyx v. Henry & Hall, 79 So.2d 483, 227 La. 364—Malloy v. Buckner-Harmon Wood Contractors, App., 100 So.2d 242—Hardware Dealers Mut. Fire Ins. Co. v. Willis, App., 179 So.2d 441.

Minn.—Guhlke v. Roberts Truck Lines, 128 N.W.2d 324, 268 Minn. 141.

W.Va.—Spencer v. Travelers Ins. Co., 133 S.E.2d 735, 148 W.Va. 111.

23. Fla.—Collins v. Federated Mut. Implement & Hardware Ins. Co., App., 247 So.2d 461.

26. U.S.—C.J.S. cited in Kippen v. Jewkes, C.A.Utah, 258 F.2d 869, 873—Buchanan v. U.S., C.A.Minn., 305 F.2d 738.

Minn.—Nicholas v. Hennepin Wheel Goods Co., 58 N.W.2d 572, 239 Minn. 269.

Tex.—Clark v. Texaco, Inc., Civ.App., 382 S.W.2d 953, err. ref. no rev. err.

page 54

27. N.M.—Shaver v. Bell, 397 P.2d 723, 74 N.M. 700.

28. La.—Bryant v. U.S. Fidelity & Guaranty Co., App., 163 So.2d 95, writ ref. 164 So.2d 360, 246 La. 375.

Va.—C.J.S. cited in Tidewater Stevedoring Corp. v. McCormick, 52 S.E.2d 61, 65, 189 Va. 158.

29. U.S.—Zimmer v. California Co., D.C.Mont., 174 F.Supp. 757.

Fla.—Cawthon v. Phillips Petroleum Co., App., 124 So.2d 517, 83 A.L.R.2d 1276.

Iowa—C.J.S. cited in Hassebroch v. Weaver Const. Co., 67 N.W.2d 549, 553, 246 Iowa 622.

Wis.—Thurn v. La Crosse Liquor Co., 46 N.W.2d 212, 258 Wis. 448—Jahns v. Milwaukee Mut. Ins. Co., 155 N.W.2d 674, 37 Wis.2d 524.

30. U.S.—Conasauga River Lumber Co. v. Wade, C.A.Tenn., 221 F.2d 312, cert. den. 76 S.Ct. 324, 350 U.S. 949, 100 L.Ed. 827—Kropp v. Douglas Aircraft Co., D.C.N.Y., 329 F.Supp. 447.

Cal.—Housewright v. Pacific Far East Line, Inc., 40 Cal.Rptr. 208, 229 C.A.2d 259.

Mass.—Cowan v. Eastern Racing Ass'n, supra, n. 9.

Miss.—Brown v. E. L. Bruce Co., 175 So.2d 151, 253 Miss. 1.

Okl.—Swyden Const. Co. v. White, 383 P.2d 674.

31. U.S.—Central New York Insulating Co. v. U.S., D.C.N.Y., 138 F.Supp. 236.

Fla.—Maldonado v. Jack M. Berry Grove Corp., App., 322 So.2d 608, quashed and revd., Sup., 351 So.2d 967.

Ky.—Coleman v. Baker, 382 S.W.2d 843.

Mo.—Benham v. McCoy, 213 S.W.2d 914—Gardner v. Simmons, 370 S.W.2d 359—Price v. Seidler, 408 S.W.2d 815.

32. U.S.—N.L.R.B. v. A. S. Abell Co., C.A.Md., 327 F.2d 1.

Neb.—Meyer v. State Farm Mut. Auto. Ins. Co., 224 N.W.2d 770, 192 Neb. 831, 89 A.L.R.3d 824.

Pa.—Green v. Independent Oil Co., 201 A.2d 207, 414 Pa. 477.

33. U.S.—Gassaway v. Barry, D.C.N.C., 123 F.Supp. 670.

34. Tex.—Dillard's Inc. v. Gentry, Civ.App., 265 S.W.2d 222, err. ref. no rev. err.—Pan Am. Ins. Co. v. Stokes, Civ.App., 370 S.W.2d 955—Newspapers, Inc. v. Love, 380 N.W.2d 582—Truck Ins. Exchange v. Cartmill, Civ.App., 385 S.W.2d 277, err. ref. no rev. err.

35. U.S.—Swartz v. Eberly, D.C.Pa., 212 F.Supp. 32—Butler v. Bunge Corp., D.C.Miss., 329 F.Supp. 47.

Md.—Criminal Injuries Compensation Bd. v. Gould, 331 A.2d 55, 273 Md. 486.

Okl.—C & H Transp. Co. v. McLaughlin, 434 P.2d 229.

36. Ark.—Meek v. Brooks, 375 S.W 2d 671, 237 Ark. 717.

37. U.S.—N.L.R.B. v. Nu-Car Carriers, supra, n. 7—Canadian Universal Ins. Co. v. Sims, D.C.N C., 235 F.Supp. 476.

Ala.—Solmica of Gulf Coast, Inc. v. Braggs, 232 So.2d 638, 285 Ala. 396—Hodges & Co. v. Albrecht, 259 So.2d 829, 288 Ala. 281.

Del.—Lester C. Newton Trucking Co. v. Neal, 204 A.2d 393, 8 Storey 55.

Fla.—Farmers and Merchants Bank v. Vocelle, App., 106 So.2d 92.

Ga.—American Auto. Ins. Co. v. Tanner, 101 S.E.2d 875, 97 Ga.App. 122—Moon v. Georgia Power Co., 194 S.E.2d 348, 127 Ga.App. 524.

Kan.—Atwell v. Maxwell Bridge Co., 409 P.2d 994, 196 Kan. 219.

La.—Amyx v. Henry & Hall, 79 So.2d 483, 227 La. 364.

N.C.—Pressley v. Turner, 105 S.E.2d 289, 249 N.C. 102.

Or.—Great Am. Ins. Co. v. General Ins. Co. of America, 475 P.2d 415, 257 Or. 62.

Pa.—Feller v. New Amsterdam Cas. Co., supra, n. 9—Gadd v. Barone, 75 A.2d 620, 167 Pa.Super. 477.

S.C.—South Carolina Indus. Commission v. Progressive Life Ins. Co., 131 S.E.2d 694, 242 S.C. 547.

Tenn.—D. M. Rose & Co. v. Snyder, supra, n. 8.

Tex.—Keith v. Blanscett, Civ.App., 450 S.W.2d 124.

Utah—Thorley v. Kolob Fish and Game Club, 373 P.2d 574, 13 Utah 2d 294.

W.Va.—Spencer v. Travelers Ins. Co., 133 S.E.2d 735, 148 W.Va. 111.

38. U.S.—Security Roofing & Const. Co. v. U.S., D.C.Mass., 163 F.Supp. 794.

Cal.—Skelton v. Fekete, 261 P.2d 339, 120 C.A.2d 401.

D.C.—Joint Council of Teamsters No. 42 v. N.L.R.B., C.A., 450 F.2d 1322, 146 U.S.App.D.C. 275.

Fla.—National Sur. Corp. v. Windham, 74 So.2d 549.

Mass.—Cowan v. Eastern Racing Ass'n, supra, n. 9.

Mich.—Van Pelt v. Paull, 150 N.W.2d 185, 6 Mich. 618.

Mo.—Gardner v. Simmons, 370 S.W.2d 359.

Or.—Nordling v. Johnston, 283 P.2d 994, 205 Or. 315, 48 A.L.R.2d 1369, reh. den. 287 P.2d 420, 205 Or. 315, 48 A.L.R.2d 1369.

R.I.—Pasetti v. Brusa, 98 A.2d 833, 81 R.I. 88.

Tex.—Texas Emp. Ins. Ass'n v. Elam, Civ.App., 376 S.W.2d 780, err. ref. no rev. err.

W.Va.—Roush v. Johnson, 80 S.E.2d 857, 139 W.Va. 607.

39. D.C.—Joint Council of Teamsters No. 42 v. N.L.R.B., C.A., 450 F.2d 1322, 146 U.S.App.D.C. 275.

Ky.—Decker v. Glasscock Trucking Service, Inc., 397 S.W.2d 773, app. after remand. 403 S.W.2d 275.

La.—Arledge v. Royal-Globe Ins. Co., App., 401 So.2d 615.

Mass.—Quigley v. Wilson Line of Mass., Inc., 154 N.E.2d 77, 338 Mass. 125, 77 A.L.R.2d 499.

N.C.—Cooper v. Asheville Citizen-Times Pub. Co., 129 S.E.2d 107, 258 N.C. 578.

Okl.—Keith v. Mid-Continent Petroleum Corp., 272 P.2d 371.

Pa.—Rugh v. Keystone-Lawrence Transfer & Storage Co., 179 A.2d 242, 197 Pa.Super. 526.

Wash.—Cassidy v. Peters, 309 P.2d 767, 50 Wash.2d 115.

Wis.—Bond v. Harrel, 108 N.W.2d 552, 13 Wis.2d 369, 98 A.L.R.2d 330.

page 55

40. Tex.—Great Western Drilling Co. v. Simmons, 302 S.W.2d 400, 157 Tex. 268—Gulfcraft, Inc. v. Henderson, Civ.App., 300 S.W.2d 768—Humphreys v. Texas Power & Light Co., Civ.App., 427 S.W.2d 324, err. ref. no rev. err.

43. Mich.—Judis v. Borg-Warner Corp. (Norge Division), 63 N W.2d 647, 339 Mich. 313.

§ 3(4). —— Right of Supervision

Library References

Master and Servant ⟹5, 318(2).

46. U.S.—Conasauga River Lumber Co. v. Wade, C.A.Tenn., 221 F.2d 312, cert. den. 76 S.Ct. 324, 350 U.S. 949, 100 L.Ed. 827—Sword, Houston Fire & Cas. Ins. Co., Intervener v. Gulf Oil Corp., C.A.Tex., 251 F.2d 829, cert. den. 79 S.Ct. 41, 358 U.S. 824, 3 L.Ed.2d 65—C.J.S. cited in Sabbagha v. Celebrezze, D.C.S.C., 231 F.Supp. 440, 445, revd. on oth. grds., C.A., 345 F.2d 509—Taylor v. Local No. 7, Intern. Union of Journeymen Horseshoers v. U.S. and Canada (AFL-CIO), C.A.Md., 353 F.2d 593, cert. den. 86 S.Ct. 1859, 384 U.S. 969, 16 L.Ed.2d 681.

Ill.—Brown v. Village of Shipman, 411 N.E.2d 569, 44 Ill.Dec. 447, 89 Ill.App.3d 162.

Ky.—Sturgill v. Barnes, 300 S.W.2d 574.

Mo.—C.J.S. cited in Adams Dairy Co. v. Dairy Emp. Union, Local 207, of Intern. Broth. of Teamsters, etc., A.F. of L., 250 S.W.2d 481, 484, 363 Mo. 182.

Ohio—New York, C. & St. L.R. Co. v. Heffner Const. Co., 223 N.E.2d 649, 9 Ohio App.2d 174.

W.Va.—McCoy v. Cohen, 140 S.E.2d 427, 149 W.Va. 197.

Repairs

(2) Other statements.

Mo.—Dean v. Young, 396 S.W.2d 549.

47. U.S.—N.L.R.B. v. Steinberg, C.A., 182 F.2d 850.

Md.—Globe Indem. Co. v. Victill Corp., 119 A.2d 423, 208 Md. 573.

Mo.—Handley v. State, Division of Employment Sec., App., 387 S.W.2d 247.

Ohio—New York, C. & St. L.R. Co. v. Heffner Const. Co., 223 N.E.2d 649, 9 Ohio App.2d 174.

Tex.—Texas Emp. Ins. Ass'n v. Elam, Civ.App., 376 S.W.2d 780, err. ref. no rev. err.—Texas Emp. Ins. Ass'n v. Bewley, Civ.App., 560 S.W.2d 147.

page 56

48. U.S.—C.J.S. cited in Public Service Co. of N.M. v. U.S., C.A.N.M., 431 F.2d 980, 983.

Ga.—Weiss v. Kling, 101 S.E.2d 178, 96 Ga.App. 618.

N.M.—Scott v. Murphy Corp., 448 P.2d 803, 79 N.M. 697.

N.Y.—Moriarty v. W. T. Grant Co., 155 N.Y.S.2d 218.

Tex.—Magnolia Petroleum Co. v. Mitchell, supra, n. 12.

Va.—Wells v. Whitaker, 151 S.E.2d 422, 207 Va. 616.

W.Va.—Atkinson v. Jennings, 139 S.E.2d 119, 149 W.Va. 101.

49. U.S.—Bartle v. Travelers Ins. Co., C.A.Tex., 171 F.2d 469—Lipka v. U.S., C.A.N.Y., 369 F.2d 288, cert. den. 87 S.Ct. 2061, 387 U.S. 935, 18 L.Ed.2d 997, reh. den. 87 S.Ct. 2129, 388 U.S. 925, 18 L.Ed.2d 1381.

Cal.—Rogers v. Whitson, 39 Cal.Rptr. 849, 228 C.A.2d 662.

Mo.—C.J.S. cited in Tinsley v. Massman Const. Co., 270 S.W.2d 835, 841.

N.M.—Roybal v. Bates Lumber Co., 412 P.2d 555, 76 N.M. 127.

N.Y.—Broderick v. Cauldwell-Wingate Co., 93 N.E.2d 629, 301 N.Y. 182—C.O. Falter, Inc. v. Crum & Forster Ins. Companies, 361 N.Y.S.2d 968, 79 Misc.2d 981.

Wash.—Fardig v. Reynolds, 348 P.2d 661, 55 Wash.2d 540.

50. U.S.—Taylor v. Local No. 7, Intern. Union of Journeymen Horseshoers of U.S. and Canada (AFL-CIO), C.A.Md., 353 F.2d 593, cert. den. 86 S.Ct. 1859, 384 U.S. 969, 16 L.Ed.2d 681.

S.C.—Young v. Warr, 165 S.E.2d 797, 252 S.C. 179.

§ 3(5). —— Power to Terminate Relationship

U.S.—C.J.S. black letter summary quoted in Sabbagha v. Celebrezze, D.C.S.C., 231 F.Supp. 440, 445, revd. on oth. grds., C.A., 345 F.2d 509.

page 57

58. Cal.—Sparks v. L. D. Folsom Co., 31 Cal.Rptr. 640, 217 C.A.2d 279.

Idaho—Beutler v. MacGregor Triangle Co., 380 P.2d 1, 85 Idaho 415.

Kan.—Jones v. Dodge City, 402 P.2d 108, 194 Kan. 777.

La.—Odom v. Eaves, App., 311 So.2d 575.

Minn.—Pettis v. Harken, Inc., 116 N.W.2d 565, 263 Minn. 289.

Okl.—Brewer v. Bama Pie, Inc., 390 P.2d 500.

Pa.—Jones v. Unemployment Compensation Bd. of Review, 60 A.2d 568, 163 Pa.Super. 271—Feller v. New Amsterdam Cas. Co., supra, n. 9—Gadd v. Barone, supra, n. 37.

Tenn.—Owens v. Turner, 362 S.W.2d 793, 211 Tenn. 121.

Utah—Thorley v. Kolob Fish and Game Club, 373 P.2d 574, 13 Utah 2d 294.

59. Ga.—Peabody Mfg. Co. v. Smith, 94 S.E.2d 156, 94 Ga.App. 240.

Idaho—National Trailer Convoy, Inc. v. Employment Sec. Agency of Idaho, 360 P.2d 994, 83 Idaho 247.

Kan.—Jones v. Dodge City, 402 P.2d 108, 194 Kan. 777.

Miss.—Brown v. E. L. Bruce Co., 175 So.2d 151, 253 Miss. 1.

Mo.—Jokisch v. Life & Cas. Ins. Co. of Tenn., App., 424 S.W.2d 111.

Ohio—L. C. Dortch, Inc. v. Goldstein, 200 N.E.2d 828.

Or.—Nordling v. Johnston, 283 P.2d 994, 205 Or. 315, 48 A.L.R.2d 1369, reh. den. 287 P.2d 420, 205 Or. 315, 48 A.L.R.2d 1369.

Pa.—Burgard v. York City Retirement Bd., 69 York, 182.

Tenn.—Jarratt v. Clinton, 241 S.W.2d 941, 34 Tenn. App. 670.

Wyo.—Brubaker v. Glenrock Lodge Intern, Order of Odd Fellows, 526 P.2d 52.

60. Tex.—Roy L. Jones Truck Line v. Johnson, Civ. App., 225 S.W.2d 888, err. ref. no rev. err.

61. Ala.—Philabert v. Frazier, supra, n. 9.

Cal.—Fleming v. Foothill-Montrose Ledger, 139 Cal. Rptr. 579, 71 C.A.3d 681.

Idaho—C.J.S. cited in In re Pacific Nat. Life Assur. Co., 212 P.2d 397, 401, 70 Idaho 98.

N.M.—Jaramillo v. Thomas, 409 P.2d 131, 75 N.M. 612.

Pa.—Green v. Independent Oil Co., 201 A.2d 207, 414 Pa. 477.

62. Mo.—Dean v. Young, 396 S.W.2d 549.

§ 3(6). —— Control of Contractor's Servants

63. U.S.—Pure Oil Co. v. Lassing, C.A.Tenn., 222 F.2d 886.

D.C.—Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, v. N.L.R.B., C.A., 669 F.2d 759, 215 U.S.App.D.C. 373, affd. 103 S.Ct. 665, 459 U.S. 344, 74 L.Ed.2d 523.

Ga.—Morris v. Constitution Pub. Co., 67 S.E.2d 407, 84 Ga.App. 816—Weiss v. Kling, 101 S.E.2d 178, 96 Ga.App. 618.

64. U.S.—Bush Bros. & Co. v. Hickey, C.A.Tenn., 223 F.2d 425.

65. N.Y.—Karnik v. Hutton, 85 N.Y.S.2d 152, 193 Misc. 909.

page 58

66. Mo.—Talley v. Bowen Const. Co., 340 S.W.2d 701.

Page 58

Tex.—Horn v. Atchison, T. & S.F. Ry Co., Civ.App., 519 S.W.2d 894.

67. Ark.—C & L Rural Elec. Co-op. Corp. v. McEntire, 225 S.W 2d 941, 216 Ark. 276.

Okl.—Smith v. Crotts, 336 P.2d 1102.

Requirement of use of union labor

Mich.—Utley, for Use and Benefit of Travelers Ins. Co v. Taylor & Gaskin, 9 N W.2d 842, 305 Mich. 561.

§ 3(7). —— Materials and Appliances

72. U.S.—McComb v. Homeworkers' Handicraft Cooperative, C.A.N.C., 176 F.2d 633, cert den 70 S.Ct. 250, 338 U.S. 900, 94 L.Ed. 553.

Minn.—Iverson v. Independent School Dist. No. 547, 257 N.W.2d 572.

Mo.—R. J. Hurley Lumber Co. v. Cummings, App., 264 S.W.2d 379.

73. U.S.—Tapager v. Birmingham, supra, n. 12—Pure Oil Co. v. Lassing, C.A.Tenn., 222 F.2d 886.

Mo.—Williamson v. Southwestern Bell Tel. Co., 265 S.W.2d 354.

N.Y.—Ontario County Artificial Breeders Co-op. v. Shappee, 127 N.Y S.2d 888, 205 Misc. 175.

77. **Allegations not constituting concession that plaintiff was engaged by defendant as employee.**

N.Y.—Bellask v. Coronation Homes, Inc., 171 N.Y.S.2d 693, 5 A.D.2d 873, affd. 184 N.Y.S.2d 834, 5 N.Y.2d 956, 157 N.E.2d 712.

Reservation by employer of right to inspect and reject materials does not prevent employee from being independent contractor.[77.5]

77.5. Mich.—Utley, for Use and Benefit of Travelers Ins. Co. v. Taylor & Gaskin, 9 N.W.2d 842, 305 Mich. 561.

§ 3(8). —— Mode of Payment

page 59

78. **Idaho—C.J.S. quoted at length in National Trailer Convoy Inc. v. Employment Sec. Agency of Idaho, 360 P.2d 994, 998, 83 Idaho 247.**

Minn.—Iverson v. Independent School Dist. No. 547, 257 N.W.2d 572.

N.Y.—Karnik v. Hutton, supra, n. 65.

Failure to withhold income or social security taxes

U.S.—Mueller v. Cities Service Oil Co., C.A.Ill., 339 F.2d 303.

80. U.S.—Gullett v. Best Shell Homes, Inc. of Tenn., C.A.Miss., 312 F.2d 58.

Conn.—Darling v. Burrone Bros., Inc., 292 A.2d 912, 162 Conn. 187.

Idaho—Link's School of Business, Inc. v. Employment Sec. Agency, 380 P.2d 506, 85 Idaho 519.

Kan.—Jones v. Dodge City, 402 P.2d 108, 194 Kan. 777.

Mich.—Hyslop v. Klein, 270 N.W.2d 540, 85 Mich. App. 149.

N.Y.—Bertino v. Equitable Fire & Marine Ins. Co., 214 N.Y.S.2d 155.

Okl.—Swyden Const. Co. v. White, 383 P.2d 674.

Pa.—Feller v. New Amsterdam Cas. Co., supra, n. 9—Rugh v. Keystone-Lawrence Transfer & Storage Co., 179 A.2d 242, 197 Pa.Super. 526.

Tenn.—D. M. Rose & Co. v. Snyder, supra, n. 8.

Tex.—Cotton v. Henger, Civ.App., 312 S.W.2d 299, revd. on oth. grds., Sup., 316 S.W.2d 719, 159 Tex. 139.

Wash.—Cassidy v. Peters, 309 P.2d 767, 50 Wash.2d 115.

Piece Worker, etc.

(2) Usually servant where payment by piece.

Va.—Smith v. Grenadier, 127 S.E.2d 107, 203 Va. 740.

Payment on commission basis, etc.

.C.—Little v. Poole, 182 S.E.2d 206, 11 N.C.App. 597.

81. Miss.—Biggart v. Texas Eastern Transmission Corp., 235 So.2d 443.

82. **Idaho—C.J.S. quoted in Department of Employment v. Brown Bros. Const., 600 P.2d 783, 786, 100 Idaho 479.**

Iowa—C.J.S. cited in Schlotter v. Leudt, 123 N.W.2d 434, 438, 255 Iowa 640.

Neb.—Gardner v. Kothe, 109 N.W 2d 405, 172 Neb. 364.

Tex.—Pitchfork Land & Cattle Co. v King, 346 S.W.2d 598, 162 Tex. 331.

Va.—Smith v. Grenadier, 127 S.E.2d 107, 203 Va. 740.

83. N.C.—North Carolina Lumber Co. v. Spear Motor Co., 135 S.E. 115, 192 N.C. 377.

85. Cal.—Rogers v. Whitson, 39 Cal.Rptr. 849, 228 C.A.2d 662.

87. **Hourly rate**

Kan.—Phillips Pipe Line Co. v Kansas Cold Storage, Inc., 389 P.2d 766, 192 Kan. 480.

N.J.—Dee v. Excel Wood Products Co., 207 A.2d 203, 86 N.J.Super. 453.

89. Neb.—Grothe Erickson, 59 N.W.2d 368, 157 Neb. 248.

N.C.—Economy Pumps v F. W. Woolworth Co., supra. n. 9.

Tex.—Henderson v. Couch, Civ.App., 274 S.W.2d 844.

page 60

93. **U.S.—C.J.S. cited in Mav Freight Serv., Inc. v. U.S., D.C.N.Y., 462 F.Supp. 503, 509.**

Neb.—Gardner v. Kothe, 109 N.W.2d 405, 172 Neb. 364.

98. La.—Amyx v. Henry & Hall, 79 So.2d 483, 227 La. 364—Malloy v. Buckner-Harmon Wood Contractors, App., 100 So.2d 242.

§ 3(9). —— Particular Applications

99. U.S.—Cline v. U.S., D.C.Ariz., 273 F.Supp. 890, affd., C.A., 410 F.2d 1337.

Cal.—Doty v. Lacey, 249 P.2d 550, 114 C.A.2d 73.

Ga.—Oxford v. Tom Huston Peanut Co., 118 S.E.2d 204, 102 Ga.App. 714.

Hawaii—Burrows v. Hawaiian Trust Co., 417 P.2d 816.

Idaho—Gowen v. Davis, 377 P.2d 950, 85 Idaho 221.

Kan.—Phillips Pipe Line Co. v. Kansas Cold Storage, Inc., 389 P.2d 766, 192 Kan. 480.

Ky.—Lewis v. Morgan, 252 S.W.2d 691.

La.—Washington v. Harvey, App., 164 So.2d 379, writ ref. 165 So.2d 487, 246 La. 600.

Mass.—Wilson v. Conlin, 154 N.E.2d 894, 338 Mass. 295—Luz v. Stop & Shop, Inc. of Peabody, 202 N.E.2d 771, 348 Mass. 198.

Miss.—Brown v. E. L. Bruce Co., 175 So.2d 151, 253 Miss. 1.

N.J.—McComish v. DeSoi, 200 A.2d 511, 83 N.J.Super. 505, affd. in part and revd. in part on oth. grds. 200 A 2d 116, 42 N.J. 274.

N.Y.—Ketcham v. Hall Syndicate, Inc., 236 N.Y.S.2d 206, 37 Misc.2d 693, affd. 242 N.Y.S.2d 182, 19 A.D.2d 611.

N.C.—Henry v. White, 130 S.E.2d 412, 259 N.C. 283.

N.D.—Newman v. Sears, Roebuck & Co., supra, n. 12.

Or.—Sloan v. Journal Pub. Co., 324 P.2d 449, 213 Or. 324.

Pa.—Cecere v. Ohringer Home Furniture Co., Division of Tilmore Corp., 220 A.2d 350, 208 Pa.Super. 138.

Tex.—Pitchfork Land & Cattle Co. v. King, 346 S.W.2d 598, 162 Tex. 331—Mummert v. Stekoll Drilling Co., Civ.App., 352 S.W.2d 526, err. ref. no rev. err.—Olson v. B. W. Merchandise, Inc., Civ.App., 388 S.W.2d 737—Smith v. Fireman's Ins. Co. of Newark, N.J., Civ.App., 398 S.W.2d 435.

Va.—Wells v. Whitaker, 151 S.E.2d 422, 207 Va. 616.

Wis.—Bond v. Harrel, 108 N.W.2d 552, 13 Wis.2d 369, 98 A.L.R.2d 330—Carothers v. Bauer, 126 N.W.2d 758, 23 Wis.2d 15.

2. **Okl.—C.J.S. cited in Harting v. Benham Engineering Company, 519 P.2d 932, 934.**

7. N.Y.—Carroll v. Kay, 219 N.Y.S.2d 892, 30 Misc.2d 526.

9. U.S.—Haughton v. Columbia River Dist. Council No. 5, Intern. Woodworkers of America, Local Union 5—40, C.A.Or., 294 F.2d 766—Gardner v. National Dairy Products Corp., C.A.Ky., 330 F.2d 507.

Ga.—Newsome v. Dunn, 120 S.E.2d 205, 103 Ga.App. 656.

Ky.—Smith v. Gennett, 385 S.W.2d 957.

Miss.—Hercules Powder Co. v. Westmoreland, 164 So.2d 471, 249 Miss. 849.

Okl.—Smith Bros. Road Const. Co. v. Palmer, 389 P.2d 495.

page 61

10. N.C.—Little v. Poole, 182 S.E.2d 206, 11 N.C. App. 597.

13. Mo.—Vandeventer v. Shields, App., 241 S.W.2d 53.

18. La.—Dowling v. Mutual Life Ins. Co. of New York, App., 168 So.2d 107, writ ref. 170 So.2d 508, 247 La. 248.

21. Idaho—Link's School of Business, Inc. v. Employment Sec. Agency, 380 P.2d 506, 85 Idaho 519.

Mass.—American Flexible Conduit Co. v. State Tax Commission, 186 N.E.2d 445, 345 Mass. 146.

29. La.—Lehigh Nav. Coal Co. v. Unemployment Compensation Bd. of Review, 106 A.2d 919, 176 Pa.Super. 69.

31. Mont.—Kosmerl v. Barbour, 589 P.2d 1017, 180 Mont. 208.

Tex.—Okan Pipeline Co. v. Eiland, Civ.App., 394 S.W.2d 548, err. ref. no rev. err.—Humphreys v. Texas Power & Light Co., Civ.App., 427 S.W.2d 324, err. ref. no rev. err.

32. U.S.—Hase v. Aetna Cas. & Sur. Co., D.C.Mo., 266 F.Supp. 952, affd., C.A., 390 F.2d 151.

Fla.—Bialkowicz v. Pan Am. Condominium No. 3, Inc., App., 215 So.2d 767.

Principal contractor and subcontractor

Ga.—Webb v. Wright, 120 S.E.2d 806, 103 Ga.App. 776.

35. La.—Johnson v. Dabbs, App., 194 So.2d 816.

Ohio—Shears v. Von Tulganburg, App., 148 N.E.2d 926.

page 62

42. Cal.—Fleming v. Foothill-Montrose Ledger, 139 Cal.Rptr. 579, 71 C.A.3d 681.

Fla.—Peairs v. Florida Pub. Co., App., 132 So.2d 561.

N.Y.—Long Island Daily Press Pub. Co. v. Tomitz, 176 N.Y.S.2d 215, 12 Misc.2d 480.

Tex.—Newspapers, Inc. v. Love, 405 S.W.2d 300.

54. Tex.—Clark v. Texaco, Inc., Civ.App., 382 S.W.2d 953, err. ref. no rev. err.

56. U.S.—Insurance Co. of North America v. Prieto, C.A.Tenn., 442 F.2d 1033, cert. den. 92 S.Ct. 100, 404 U.S. 856, 30 L.Ed.2d 96.

La.—Crutti v. Frank, App., 146 So.2d 474—Hardware Dealers Mut. Fire Ins. Co. v. Willis, App., 179 So.2d 441.

Mass.—Findlay v. Rubin Glass & Mirror Co., 213 N.E.2d 858, 350 Mass. 169.

Minn.—Greenlee v. Drees, 144 N.W.2d 774, 274 Minn. 538.

Miss.—Biggart v. Texas Eastern Transmission Corp., 235 So.2d 443.

N.J.—Dee v. Excel Wood Products Co., 207 A.2d 203, 86 N.J.Super. 453

N.M.—Latta v. Harvey, 352 P.2d 649, 67 N.M. 72.

Okl.—Parkhill Truck Co. v. Brewer, 354 P.2d 774.

Or.—Herff Jones Co. v. State Tax Commission, 430 P.2d 998, 247 Or. 404.

Pa.—Bistran v. Noone, 51 Lack.Jur. 221—Plankinton v. Schurr, 137 A.2d 803, 185 Pa.Super. 41—Review Bd. v. Lou Green, Inc., 187 A.2d 572, 409 Pa. 448.

Wash.—Cassidy v. Peters, 309 P.2d 767, 50 Wash.2d 115.

W.Va.—Spencer v. Travelers Ins. Co., 133 S.E.2d 735, 148 W.Va. 111.

Dealer held to be neither employee nor independent contractor

Va.—Wells v. Whitaker, 151 S.E.2d 422, 207 Va. 616.

Travel agents

N.Y.—Bucholtz v. Sirotkin Travel Ltd., 343 N.Y.S.2d 438, 74 Misc.2d 180, affd. 363 N.Y.S.2d 415, 80 Misc.2d 333.

58. Mich.—Lynn v. Roberts, 241 N.W. 214 257 Mich. 116.

62. Miss.—Powell v. Masonite Corp., 214 So.2d 469.

64. Alaska—Calvo v. Calhoon, 559 P.2d 111.

Utah—Phillips v. JCM Development Corp., 666 P.2d 876.

Commission salesmen

La.—Gresham v. Speights, App., 133 So.2d 846.

68. La.—Landry v. American Sur. Co. of New York, App., 149 So.2d 738.

Tex.—Johnston v. State, Civ.App., 303 S.W.2d 520, err. ref. no rev. err.

75. Tenn.—D. M. Rose & Co. v. Snyder, 206 S.W.2d 897, 185 Tenn. 499.

§ 4. Substitutes

page 63

83. La.—Williams v. Homco Intern., Inc., App., 402 So.2d 182.

84. Tenn.—D. M. Rose & Co. v. Snyder, supra, n. 75.

§ 5. Contracts of Employment

Library References

Master and Servant ⚩3(1) et seq.

88. Colo.—St. Germain v. Boshouwers, App., 646 P.2d 952, affd. in part, revd. in part on oth. grds., Sup., 670 P.2d 764.

Ga.—Welsch v. Wilson, 131 S.E.2d 194, 218 Ga. 843.

La.—West v. State Through State Superintendent of Public Ed., App., 324 So.2d 579.

Mass.—Nutting v. Kneeland, 105 N.E.2d 199, 328 Mass. 497.

Ohio—L. C. Dortch, Inc. v. Goldstein, 200 N.E.2d 828.

Contract or trade agreement

(1) U.S.—Retail Clerks Intern. Ass'n, Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc., Ohio, 82 S.Ct. 541, 369 U.S. 17, 7 L.Ed.2d 503.

Right to control one's own labor

Ill.—Bond v. Decatur Garment Co., 182 N.E.2d 909, 35 Ill.App.2d 164.

Contract between physicians

La.—Gauthier v. Magee, App., 141 So.2d 837.

Statutory lease of labor

La.—Long v. Foster & Associates, Inc., 136 So.2d 48, 242 La. 295.

89. Substitution of another employer

Alaska—Selid Const. Co. v. Guarantee Ins. Co., 355 P.2d 389.

Apprenticeship program

Del.—Vassallo v. Haber Elec. Co., Super., 435 A.2d 1046.

90. U.S.—Mitchell v. Stanolind Pipe Line Co., C.A. Kan., 184 F.2d 837.

Idaho—In re Sines Estate, 356 P.2d 226, 82 Idaho 527.

Ill.—McHugh-Brighton v. Industrial Commission, 245 N.E.2d 480, 42 Ill.2d 52.

Minn.—Barnes v. Northwest Airlines, 47 N.W.2d 180, 233 Minn. 410.

Mo.—C.J.S. cited in Wilkins v. City of St. Louis, App., 404 S.W.2d 783, 788.

Pa.—Morley v. Workmen's Compensation Appeal Bd., 410 A.2d 110, 49 Pa.Cmwlth. 98.

91. Mo.—Donahoo v. Thompson, 291 S.W.2d 70, 61 A.L.R.2d 911, cert. den. 77 S.Ct. 261, 352 U.S. 941, 1 L.Ed.2d 237.

N.J.—Filson v. Bell Tel. Laboratories, Inc., 197 A.2d 196, 82 N.J.Super. 185.

93. U.S.—Hablas v. Armour & Co., C.A.N.D., 270 F.2d 71—C.J.S. cited in Bonney Motor Exp. v. U.S., D.C.Va., 206 F.Supp. 22, 26—Jackman v. Military Publications, Inc., D.C.Pa., 234 F.Supp. 217, affd., C.A., 350 F.2d 383—Lucas v. Whittaker Corp., D.C.Colo., 335 F.Supp. 889, affd., C.A., 470 F.2d 326—Dailey v. Transitron Overseas Corp., D.C.Tex., 349 F.Supp. 797, affd., C.A., 475 F.2d 12.

page 64

95. Change of employer from partnership to corporation immaterial

Colo.—Employers' Liability Assur. Corp. v. Industrial Commission, 363 P.2d 646, 147 Colo. 309.

96. U.S.—Bachmann v. Blaw-Knox Co., D.C.Pa., 198 F.Supp. 617—Universal Elec. Corp. v. Golden Shield Corp., C.A.Puerto Rico, 316 F.2d 568.

La.—World Wide Health Studios, Inc. v. Desmond, App., 222 So.2d 517—Wright v. Round the Corner Restaurants of La., Inc., App., 252 So.2d 341.

Pa.—Ben F. Levis, Inc. v. Axe's Department Store, 61 Pa.Dist. & Co. 243, 39 West.Co. 267.

Wash.—Stone Machinery Co. v. Kessler, 463 P.2d 651, 1 Wash.App. 750.

Right of seniority. Seniority rights of employees are discussed in Labor Relations § 14.

§ 6. —— Form and Validity

Library References

Master and Servant ⚩3(1), 4.
Corbin on Contracts §§ 96, 267, 446, 682.
Modern Legal Forms Ch. 41, Labor Agreements; Ch. 62, Service and Agency Contracts.

2. U.S.—Caster v. Coppock, C.A.Mo., 211 F.2d 136—Winand v. Case, D.C.Md., 154 F.Supp. 529.

Cal.—Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 100 Cal.Rptr. 791, 24 C.A.3d 35, affd. 94 S.Ct. 383, 414 U.S. 117, 38 L.Ed.2d 348.

D.C.—Maloney v. E. I. Du Pont de Nemours & Co., C.A., 352 F.2d 936, 122 U.S.App.D.C. 268, cert. den. 86 S.Ct. 1201, 1211, 383 U.S. 948, 16 L.Ed.2d 210.

Ill.—Evaskus v. Neff, Kohlbusch & Bissell, Inc., 189 N.E.2d 542, 40 Ill.App.2d 416—Anderson v. Poray, 191 N.E.2d 417, 42 Ill.App.2d 1.

N.J.—Filson v. Bell Tel. Laboratories, Inc., 197 A.2d 196, 82 N.J.Super. 185.

Tex.—C & H Transp. Co. v. Wright, Civ.App., 396 S.W.2d 443, err. ref. no rev. err.

Wash.—Sandeman v. Sayres, 314 P.2d 428, 50 Wash.2d 539.

Agreement to arbitrate held binding

N.Y.—Acadia Co. v. Edlitz, 197 N.Y.S.2d 457, 7 N.Y.2d 348, 165 N.E.2d 411—Epstein Grover, 197 N.Y.S.2d 880, 21 Misc.2d 948.

Agreement to make contract of employment

La.—North Am. Sales Alliance, Inc. v. Carrtone Laboratories, Inc., App., 214 So.2d 167, writ ref. 216 So.2d 306, 253 La. 57.

Failure to read as not affecting validity

Cal.—Frame v. Merrill Lynch, Pierce, Fenner & Smith Inc., 97 Cal.Rptr. 811, 20 C.A.3d 668.

Unilateral publication of handbook not binding

Pa.—Richardson v. Charles Cole Memorial Hosp., 466 A.2d 1084, 320 Pa.Super. 106.

page 65

3. Ariz.—Pauley v. Industrial Commission, 508 P.2d 1160, 109 Ariz. 298.

Cal.—Commercial Cas. Ins. Co. v. Industrial Acc. Commission, 254 P.2d 954, 116 C.A.2d 901—Reynolds Elec. & Engineering Co. v. Workmen's Compensation Appeals Bd., 55 Cal.Rptr. 248, 421 P.2d 96, 65 C.2d 429.

Iowa—Kitchen v. Stockman Nat. Life Ins. Co., 192 N.W.2d 796.

La.—Cobb v. International Paper Co., App., 76 So.2d 460—Mattel v. Pittman Const. Co., 180 So.2d 696, 248 La. 540.

Minn.—Hartung v. Billmeier, 66 N.W.2d 784, 243 Minn. 148—Houle v. Stearns-Rogers Mfg. Co., 157 N.W.2d 362, 279 Minn. 345.

Mo.—Thacker v. Massman Const. Co., 247 S.W.2d 623.

Ohio—Jacot v. Secrest, 93 N.E.2d 1, 153 Ohio St. 553.

Wash.—Edwards v. Morrison-Knudsen Co., 379 P.2d 735.

Time, place, and mode of acceptance

(2) Other cases.

U.S.—Joseph v. Krull Wholesale Drug Co., D.C.Pa., 147 F.Supp. 250, affd., C.A., 245 F.2d 231.

La.—Willis v. Allied Insulation Co., App., 174 So.2d 858.

N.J.—Filson v. Bell Tel. Laboratories Inc., 186 A.2d 320, 77 N.J.Super. 320, affd. 197 A.2d 196, 82 N.J.Super. 185.

Acceptance conditionally or on terms varying from offer

(3) U.S.—Bender v. Hearst Corp., 263 F.2d 360.

Matters held not to constitute offer

U.S.—Laseter v. Pet Dairy Products Co., C.A.S.C., 246 F.2d 747.

Del.—Keene Corp. v. Hoofe, Ch., 267 A.2d 618, affd. 276 A.2d 269.

Held to constitute acceptance

Ill.—Hillman v. Hodag Chemical Corp., 238 N.E.2d 145, 96 Ill.App.2d 204.

Mo.—Ragsdale v. Tom-Boy, Inc., App., 317 S.W.2d 679.

N.Y.—Novack v. Bilnor Corp., 271 N.Y.S.2d 117, 26 A.D.2d 572.

Upon compliance with terms of offer employer cannot exercise discretionary power over offer

Conn.—Borden v. Skinner Chuck Co., 150 A.2d 607, 21 Conn.Sup. 184.

Thing, price, and consent as necessary elements

La.—Hudson v. Allstate Ins. Co., App., 169 So.2d 598.

Continuing offer

U.S.—Raybestos-Manhattan, Inc. v. Rowland, C.A. S.C., 460 F.2d 697.

4. N.Y.—Kopf v. Electrolux Corp., 156 N.Y.S.2d 172, mod. on oth. grds., 164 N.Y.S.2d 757.

5. U.S.—Fujimoto v. Rio Grande Pickle Co., C.A. Tex., 414 F.2d 648.

Iowa—Sheahan v. Plagge, 121 N.W.2d 120, 255 Iowa 182—Prokop v. Frank's Plastering Co., 133 N.W.2d 878, 257 Iowa 766.

N.J.—Gomez v. Federal Stevedoring Co., 68 A.2d 482, 5 N.J.Super. 100.

N.M.—Roan v. D. W. Falls, Inc., 384 P.2d 896, 72 N.M. 464.

Employment at job site

La.—Mattel v. Pittman Const. Co., App., 174 So.2d 141, revd. on oth. grds. 180 So.2d 696, 248 La. 540.

page 66

6. Tex.—Ingle Bros. Pac., Inc. v. Scott, Civ.App., 478 S.W.2d 210, affd. in part, revd. in part on oth. grds., Sup., 489 S.W.2d 554.

Written agreement not consummated

Kan.—Short v. Sunflower Plastic Pipe, Inc., 500 P.2d 39, 210 Kan. 68.

Nev.—Loma Linda University v. Eckenweiler, 469 P.2d 54, 86 Nev. 381.

Tex.—Scott v. Ingle Bros., Pac., Inc., 489 S.W.2d 554.

7. U.S.—Shipley v. Pittsburgh & L.E.R. Co., D.C.Pa., 83 F.Supp. 722—Fisher Const. Co. v. Lerche, C.A. Guam, 232 F.2d 508.

Ariz.—Young v. Border Broadcasting Co., 255 P.2d 888, 75 Ariz. 298.

Ill.—Heuvelman v. Triplett Elec. Instrument Co., 161 N.E.2d 875, 23 Ill.App.2d 231.

Page 66

Nev.—Air Service Co. v. Sheehan, 594 P.2d 1155, 95 Nev. 528.

Tex.—Northwestern Nat. Life Ins. Co. v. Black, Civ. App., 383 S.W.2d 806, err. ref. no rev. err.

Written provision for arbitration may be orally renewed

N.Y.—Acadia Co. v. Edlitz, 197 N.Y.S.2d 457, 7 N.Y.2d 348, 165 N.E.2d 411.

Stay of action pending arbitration

N.Y.—Application of Lebanon Sales Co., 221 N.Y.S.2d 765, 15 A.D.2d 452.

Partial invalidity as not creating different legal relationship

Tex.—Newspapers, Inc. v. Love, 380 S.W.2d 582.

Form as not precluding existence of master-servant relation

Tex.—Newspapers, Inc. v. Love, 380 S.W.2d 582.

8. U.S.—Inland Mut. Ins. Co. v. Ellzey, D.C.Fla., 119 F.Supp. 748—Sears v. Pauly, C.A.Mass., 261 F.2d 304—St. Claire v. Minnesota Harbor Service, Inc., D.C.Minn., 211 F.Supp. 521—American Cas. Co. of Reading, Pa. v. Wypior, C.A.Ill., 365 F.2d 164.

Alaska—Selid Const. Co. v. Guarantee Ins. Co., 355 P.2d 389.

Ga.—Thomas v. Lomax, 61 S.E.2d 790, 82 Ga.App. 592—Watkins v. Avnet, Inc., 177 S.E.2d 582, 122 Ga.App. 474.

Iowa—Prokop v. Frank's Plastering Co., 133 N.W.2d 878, 257 Iowa 766.

La.—Bates v. Lagars, App., 193 So.2d 375, writ ref. 195 So.2d 146, 250 La. 267.

Me.—Bragdon v. Shapiro, 77 A.2d 598, 146 Me. 83.

Mo.—Wilkins v. City of St. Louis, App., 404 S.W.2d 783.

Ohio—Drexler v. Labay, 98 N.E.2d 410, 155 Ohio St. 244—American Ins. Group v. McCowin, 218 N.E.2d 746, 7 Ohio App.2d 62.

Pa.—McManus v. Kuhn, 168 A.2d 618, 194 Pa.Super. 544.

Tenn.—Taylor v. Meeks, 236 S.W.2d 969, 191 Tenn. 695—Seals v. Zollo, 327 S.W.2d 41, 205 Tenn. 463.

Tex.—Northwestern Nat. Life Ins. Co. v. Black, Civ. App., 383 S.W.2d 806.

Wis.—Marlin Elec. Co. v. Industrial Commission, 148 N.W.2d 74, 33 Wis.2d 651.

Facts insufficient to create implied contract

(2) N.Y.—Arkin v. Fogarty, 247 N.Y.S.2d 234, 20 A.D.2d 701.

W.Va.—Davis v. Fire Creek Fuel Co., 109 S.E.2d 144, 144 W.Va. 537.

Implied from acts or words

Minn.—Stream v. Continental Machines, Inc., 111 N.W.2d 785, 261 Minn. 289—Dybvig v. Minneapolis Sanatorium, 150 N.W. 905, 128 Minn. 292.

N.M.—Roan v. D. W. Falls, Inc., 384 P.2d 896, 72 N.M. 464.

Partly express and partly implied

Minn.—Stream v. Continental Machines, Inc., 111 N.W.2d 785, 261 Minn. 289.

Express contract as precluding implied contract

Ill.—Salvati v. Streator Tp. High School Dist. No. 40, 200 N.E.2d 122, 51 Ill.App.2d 1.

Consideration held sufficient

(4) Ariz.—Bevins v. Dickson Electronics Corp., 491 P.2d 494, 16 Ariz.App. 105.

9. U.S.—Fujimoto v. Rio Grande Pickle Co., C.A. Tex., 414 F.2d 648.

10. U.S.—Fish v. Air-O-Fan Products Corp., C.A. Cal., 285 F.2d 208—Manufacturer's Nat. Bank of Detroit v. Hartmeister, C.A.Colo., 411 F.2d 173.

Ill.—Evaskus v. Neff, Kohlbusch & Bissell, Inc., 189 N.E.2d 542, 40 Ill.App.2d 416.

Mich.—Bruno v. Detroit Institute of Technology, 193 N.W.2d 322, 36 Mich.App. 61, app. after remand 215 N.W.2d 745, 51 Mich.App. 593, 66 A.L.R.3d 1011.

N.J.—Shiddell v. Electro Rust-Proofing Corp., N.J., 112 A.2d 290, 34 N.J.Super. 278.

Pa.—Markson Bros. v. Redick, 66 A.2d 218, 164 Pa.Super. 499—Lubrecht v. Laurel Stripping Co., 42 Luz.Leg.Reg. 203—Musser v Brimmer, 54 Lanc.L. Rev. 227, exceptions dism. 54 Lanc.L.Rev. 293.

Consideration beyond services

(3) However, it has been held that something in addition to services is required.

U.S.—Tow v. Miners Memorial Hospital Ass'n, Inc., D.C.W.Va., 199 F.Supp. 926, affd., C.A. 305 F.2d 73.

Consideration held sufficient

(1) Miss.—Producers Gin Ass'n (AAL) v. Beck, 60 So.2d 642, 215 Miss. 263.

N.C.—James C. Greene Co. v. Kelley, 134 S.E.2d 166, 261 N.C. 166.

Va.—Norfolk Southern Ry. Co v. Harris, 59 S.E.2d 110, 190 Va. 966.

(4) U.S.—Eckhart v. Plastic Film Corp., D.C.Conn., 129 F.Supp. 277—De Pova v. Camden Forge Co., C.A. N.J., 254 F.2d 248, cert. den. 79 S.Ct. 26, 358 U.S. 816, 3 L.Ed.2d 59—Grombach v. Oerlikon Tool & Arms Corp. of America, C.A.N.C., 276 F.2d 155—Fish v. Air-O-Fan Products Corp., C.A.Cal., 285 F.2d 208.

Ark.—Nance v. Eiland, 214 S.W.2d 217, 213 Ark. 1019.

Conn.—Borden v. Skinner Chuck Co., 150 A.2d 607, 21 Conn.Sup. 184.

D.C.—Muse v. Boyd, Mun.App., 61 A.2d 724.

Ga.—New Amsterdam Cas. Co. v. Thompson, 112 S.E.2d 273, 100 Ga.App. 677.

Ill.—Anthony Co. v. Johnson, 155 N.E.2d 361, 20 Ill.App.2d 128—Rosenthal v. Hyland Builders Corp., 166 N.E.2d 463, 25 Ill.App.2d 229.

Iowa—Holden v. Construction Machinery Co., 202 N.W.2d 348, 67 A.L.R.3d 324

La.—Fidelity Bank & Trust Co. v. Peace, App., 243 So.2d 335.

Or.—Mail-Well Envelope Co. v. Saley, 497 P.2d 364, 262 Or. 143.

Pa.—Beneficial Finance Co. of Lebanon v. Becker, 222 A.2d 873, 422 Pa. 531.

S.C.—Evatt v. Campbell, 106 S.E.2d 447, 234 S.C. 1.

Va.—Twohy v. Harris, 72 S.E.2d 329, 194 Va. 69.

Wis.—Reliable Pharmacy v. Hall, 194 N.W.2d 596, 54 Wis.2d 191.

Consideration held lacking or insufficient

(2) Other considerations.

U.S.—Tow v. Miners Memorial Hospital Ass'n, Inc., D.C.W.Va., 199 F.Supp. 926, affd., C.A., 305 F.2d 73—Pearson v. Youngstown Sheet & Tube Co., C.A.Ind., 332 F.2d 439, cert. den. 85 S.Ct. 262, 379 U.S. 914, 13 L.Ed.2d 185—Haag v. International Tel. & Tel. Corp., C.A.Ind., 342 F.2d 566—Grayson v. Pride Golf Tee Co., C.A.Mass., 433 F.2d 572.

Cal.—Levy v. Bellmar Enterprises, 50 Cal.Rptr. 842, 241 C.A.2d 686.

Ill.—Heuvelman v. Triplett Elec. Instrument Co., 161 N.E.2d 875, 23 Ill.App.2d 231—Schoen v. Caterpillar Tractor Co., 243 N.E.2d 31, 103 Ill.App.2d 197.

Iowa—Hanson v. Central Show Printing Co., 130 N.W.2d 654, 256 Iowa 1221.

Pa.—Voss Machinery v. Norris, 82 Pa. Dist. & Co. 368, 100 Pittsb.Leg.J. 339—Norway Service Cleaners, Inc. v. Blair, 41 Del.Co.Leg.J. 289.

S.C.—Gainey v. Coker's Pedigreed Seed Co., 87 S.E.2d 486, 227 S.C. 200.

Resignation from job upon employer's promise to employ her in other position.

Va.—Sea-Land Service, Inc. v. O'Neal, 297 S.E.2d 647, 224 Va. 343.

11. U.S.—Olsen v. Arabian Am. Oil Co., C.A.N.Y., 194 F.2d 477, foll. C.A., 194 F.2d 479, cert. den. 73 S.Ct. 12, two cases, 344 U.S. 817, 97 L.Ed. 636—Smithey v. St. Louis Southwestern Ry. Co., D.C.Ark., 127 F.Supp. 210. Affd., C.A., 237 F.2d 637.

Conn.—Stapleton v. Administrator, Unemployment Compensation Act, 112 A.2d 211, 142 Conn. 160.

Ill.—Heuvelman v. Triplett Elec. Instrument Co., 161 N.E.2d 875, 23 Ill.App.2d 231—Evaskus v. Neff, Kohlbusch & Bissell, Inc., 189 N.E.2d 542, 40 Ill.App.2d 416.

Iowa—C.J.S. cited in Drake v. Block, 74 N.W.2d 577, 580, 247 Iowa 517.

La.—Sewell v. Sharp, App., 102 So.2d 259.

N.J.—Summer v. Fabregas, 145 A.2d 659, 52 N.J.Super. 399.

Ohio—Krueger v. Schoenling Brewing Co., 79 N.E.2d 366, 82 Ohio App. 57.

R.I.—Lamoureux v. Burrillville Racing Ass'n, 161 A.2d 213, 91 R.I. 94.

Tenn.—Fulton v. Tennessee Walking Horse Breeders' Ass'n of America, 476 S.W.2d 644, 63 Tenn.App. 569.

Contract held not lacking in mutuality

U.S.—Bender v. Hearst Corp., 263 F.2d 360, applying Wisconsin law—Readmond v. Matsushita Elec. Corp. of America, D.C.Pa., 355 F.Supp. 1073.

N.Y.—Duro-Test Corp. v. Donaghy, 189 N.Y.S.2d 20, 17 Misc.2d 1085, affd. in part and revd. in part on oth. grds. 193 N.Y.S.2d 121, 9 A.D.2d 860.

Tenn.—Rodgers v. Southern Newspapers, Inc., 379 S.W.2d 797, 214 Tenn. 335.

page 67

12. U.S.—Vines v. General Outdoor Advertising Co., C.A.N.Y., 171 F.2d 487—Brekken v. Reader's Digest Special Products, Inc., C.A.Ill., 353 F.2d 505.

Tex.—C.J.S. cited in Dallas County Water Control and Imp. Dist. No. 7 v. Ingram, Civ.App., 395 S.W.2d 834, 838, err. ref. no rev. err., app. after remand 425 S.W.2d 366.

13. U.S.—Wyles v. Campbell, D.C.Del., 77 F.Supp. 343.

Mo.—Middleton v. Holecroft, App., 270 S.W.2d 90.

N.Y.—Harris v. Beauty Laboratory, 142 N.Y.S.2d 576.

Va.—Norfolk Southern Ry. Co. v. Harris, supra, n. 10.

14. Neb.—C.J.S. cited in De Los Santos v. Great Western Sugar Co., 348 N.W.2d 842, 845, 217 Neb. 282.

15. Mo.—Middleton v. Holecroft, supra, n. 13.

N.Y.—Feibish v. Kaliner, 75 N.Y.S.2d 78, 273 App. Div. 17.

18. Cal.—Warner Bros. Pictures v. Brodel, 192 P.2d 949, 31 Cal.2d 766, 3 A.L.R.2d 691, cert. den. 69 S.Ct. 67, 335 U.S. 844, 93 L.Ed. 394, reh. den. 69 S.Ct. 165, 335 U.S. 873, 93 L.Ed. 417.

D.C.—Maloney v. E. I. Du Pont de Nemours & Co., C.A., 352 F.2d 936, 122 U.S.App.D.C. 268, cert. den. 86 S.Ct. 1201, 1211, 383 U.S. 948, 16 L.Ed.2d 210.

19. U.S.—Bender v. Hearst Corp., 263 F.2d 360, applying Wisconsin law.

20. La.—Martin-Parry Corp. v. New Orleans Fire Detection Service, 60 So.2d 83, 221 La. 677.

Duress by an employer may avoid a contract of employment.[22.5]

22.5. Test

U.S.—Rust v. Drexel Firestone Inc., D.C.N.Y., 352 F.Supp. 715.

Arbitration clause held not duress

U.S.—Rust v. Drexel Firestone Inc., D.C.N.Y., 352 F.Supp. 715.

23. Ill.—Taylor v. Elgin, J. & E. Ry. Co., 178 N.E.2d 704, 33 Ill.App.2d 604.

Okl.—H. J. Jeffries Truck Line v. Grisham, 397 P.2d 637.

S.C.—Cooper v. McDevitt & St. Co., 196 S.E.2d 833, 260 S.C. 463.

page 68

28. Ark.—Hanson Motor Co. v. Young, 265 S.W.2d 501, 223 Ark. 191.

29. Ark.—Hanson Motor Co. v. Young, supra, n. 28.

N.Y.—Ribakove v. Rich, 172 N.Y.S.2d 902, 16 Misc.2d 339.

Misrepresentation by employer may constitute fraud avoiding the contract.[30]

30. Mo.—Hartley Realty Co. v. Casady, App., 332 S.W.2d 291.

Evidence held not to establish fraud by employer inducing contract

Va.—Culmore Realty Co. v. Caputi, 124 S.E.2d 7, 203 Va. 403.

31. U.S.—Britt v. Trailmobile Co., C.A.Ohio, 179 F.2d 569, cert. den. 71 S Ct. 52, 340 U.S. 820, 95 L.Ed. 603—Loew's, Inc. v. Cole, C.A.Cal, 185 F.2d 641, cert. den. 71 S.Ct. 570, 340 U.S. 954, 95 L.Ed. 688—Bernhardt v. Polygraphic Co. of America, D.C.Vt., 122 F.Supp. 733, revd. on oth. grds., C.A., 218 F.2d 948, revd. on oth. grds. 76 S.Ct. 273—Spencer v General Elec. Co., 243 F.2d 934.

Ariz.—Daniel v. Magma Copper Co., App., 620 P.2d 699, 127 Ariz. 320.

Neb.—**C.J.S. black letter summary quoted in** Greer v. Chelewski, 76 N.W.2d 438, 443, 162 Neb. 450.

N.J.—Walker v. Pennsylvania-Reading Seashore Lines, 61 A.2d 453, 142 N.J.Eq. 588.

N.Y.—Corcoran v. John F. Trommer, Inc., 113 N.Y. S.2d 627, 203 Misc. 37 affd. 126 N.Y.S.2d 895, 282 App.Div. 1041—Knapp v. Atlantic Basin Iron Works, 116 N.Y.S.2d 456.

N.C.—In re Port Pub. Co., 57 S.E.2d 366, 231 N.C. 395, 14 A.L.R.2d 842.

Provision held void

U.S.—Roloff v. Arabian Am. Oil Co., C.A.N.Y., 421 F.2d 240.

Fla.—Department of Labor and Employment Sec., Div. of Labor v. Florida Home Builders Ass'n, App. 1 Dist., 417 So.2d 746.

32. Alaska—Inman v. Clyde Hall Drilling Co., 369 P.2d 498, 4 A.L.R.3d 430.

Ill.—Evaskus v. Neff, Kohlbusch & Bissell, Inc., 189 N.E.2d 542, 40 Ill.App.2d 416.

Mass.—Itek Corp. v. McEnness, 164 N.E.2d 636, 340 Mass. 409.

Mich.—Greene v. General Motors Corp., 196 N.W.2d 9, 38 Mich.App. 237.

N.J.—Sonotone Corp. v. Hall, 64 A.2d 473, 2 N.J.Super. 482.

Pa.—Taylor v. Southern Pennsylvania Bus Co., 199 A.2d 745, 203 Pa.Super. 229, affd. 209 A.2d 807, 418 Pa. 82.

Tex.—American Trust Life Ins. Co. v. Dominguez, Civ.App., 329 S.W.2d 897, err. ref. no rev. err.

Contract conditioned on security clearance

Cal.—Chicago Bridge Iron Co. v. Industrial Acc. Commission, 38 Cal.Rptr. 57, 226 C.A.2d 309.

Validity of arbitration provision

U.S.—Dickstein v. duPont, C.A.Mass., 443 F.2d 783.

33. U.S.—McCamy v. General Elec. Supply Corp., C.A.Tex., 185 F.2d 944.

Ariz.—Yeazell v. Copins, 402 P.2d 541, 98 Ariz. 109.

Ark.—Monticello Cotton Mills v. Powell, 221 S.W.2d 33, 215 Ark. 492.

D.C.—National Chemsearch Corp. of New York v. Hanker, D.C., 309 F.Supp. 1278.

Ga.—Fisher v. J. A. Jones Const. Co., 73 S.E.2d 587, 87 Ga.App. 317.

N.Y.—Costaro v. Simons, 96 N.Y.S.2d 884, 277 App. Div. 773—Wholesale Laundry Bd. of Trade v. Tarrullo, 103 N.Y.S.2d 23.

Okl.—Frazer & Torbett, CPA's v. Kunkel, 401 P.2d 476.

Pa.—National Industrial Laundries v. McGreevy, 63 Pa.Dist. & Co. 513, 50 Lack.Jur. 83.

Contract held void

Mich.—Farm Bureau Ins. Co. of Mich. v. Pedlow, 142 N.W.2d 877, 3 Mich.App. 478.

34. U.S.—Klekamp v. Blaw-Knox Co., D.C.Cal., 179 F.Supp. 328—Batchelor v. Sears, Roebuck & Co., D.C.Mich., 574 F.Supp. 1480.

N.J.—A. Hollander & Son v. Imperial Fur Blending Corp., 66 A.2d 319, 2 N.J. 235.

Tex.—Lone Star Cotton Mills v. Thomas, Civ.App., 227 S.W.2d 300

37. Vacation pay

N.Y.—Knapp v. Atlantic Basin Iron Works, 116 N.Y. S.2d 456.

Other terms and conditions have been held not to be so unreasonable and harsh as to be unenforceable.[37.5]

37.5. Professional football player's contract

Tex.—Dallas Cowboys Football Club, Inc. v. Harris, Civ.App, 348 S W.2d 37

Inventions

Pa.—AMP, Inc. v. McCaughey, 38 D. & C.2d 109.

38. U S.—Bell v. Ralston Purina Co., C A.Okl., 257 F.2d 31.

Iowa—Leffingwell v. Lake City, 135 N.W.2d 536, 257 Iowa 1022.

Minn.—Jimmerson v. Troy Seed Co., 53 N.W.2d 273.

N.J.—Shiddell v. Electro Rust-Proofing Corp., N J., 112 A.2d 290, 34 N.J.Super. 278.

N.Y.—Towns & James, Inc., v. Barasch, 96 N.Y.S.2d 32, 197 Misc. 1022, affd. 98 N.Y.S.2d 212, 277 App.Div. 857.

Pa.—Bamford Bros. v. Street Railways Employees, 69 Pa.Dist. & Co. 549, 97 Pittsb.Leg.J. 340—F.M. Reps, Inc., v. Penn Allen Broadcasting Co., 24 Lehigh Co.Leg.J. 126.

Tenn.—**C.J.S. quoted at length in** Fulton v. Tennessee Walking Horse Breeders' Ass'n, 476 S.W.2d 644, 652, 63 Tenn.App. 569.

Contracts held sufficiently definite

(1) U.S.—Castor v. Coppock, C.A.Mo., 211 F 2d 136—Bender v. Hearst Corp., C.A.Conn. 263 F.2d 360—Metropolitan Co. v. U.S., D.C.Ohio, 176 F.Supp. 195.

Cal.—Gordon v. Wasserman, App., 314 P.2d 759, 153 C.A.2d 328.

Ga.—Farr v. Barnes Freight Lines, Inc., 101 S.E.2d 906, 97 Ga.App. 36—Schaffer v. Wolbe, 148 S.E.2d 437, 113 Ga.App. 448—Bennett v. Georgia Indus, Catering Co., 149 S.E.2d 81, 222 Ga. 127.

Iowa—LaFontaine v. Developers & Builders, Inc., 156 N.W.2d 651, 261 Iowa 1177.

Mo.—Wood v. James B. Nutter & Co., 416 S.W.2d 635.

N.Y.—Crabtree v. Elizabeth Arden Sales Corp., 105 N.Y.S.2d 40, affd. 112 N.Y.S.2d 494, affd. 110 N.E.2d 551, 305 N.Y. 48—Duro-Test Corp. v. Donaghy, 189 N.Y.S.2d 20, 17 Misc.2d 1085, affd. in part and revd. in part on oth. grds. 193 N.Y.S.2d 121, 9 A.D.2d 860.

Pa.—Sebring v. Seaboard Finance Co., 53 Lack.Jur. 25.

Tex.—Dallas County Water Control and Imp. Dist. No. 7 v. Ingram, Civ.App., 395 S.W.2d 834, err. ref. no rev. err. App. after remand 425 S.W.2d 366.

39. Ariz.—Allen D. Shadron, Inc. v. Cole, 416 P.2d 555, 101 Ariz. 122, op. supp. 419 P.2d 520, 101 Ariz. 341.

Cal.—Travelers Ins. Co. v. Workmen's Compensation Appeals Bd, 64 Cal.Rptr. 440, 434 P.2d 992, 68 C.2d 7.

Minn.—Jimmerson v. Troy Seed Co., supra, n. 38.

Commencement date

N.Y.—Failla v. Mandell, 200 N.Y.S.2d 652.

40. N.Y.—Failla v. Mandell, 200 N.Y.S.2d 652.

page 69

41. U.S.—Vines v. General Outdoor Advertising Co., supra, n. 12.

Cal.—Travelers Ins. Co. v. Workmen's Compensation Appeals Bd., 64 Cal.Rptr. 440, 434 P.2d 992, 68 C.2d 7.

42. U.S.—Kassab v. Ragnar Benson, Inc., D.C.Pa., 254 F.Supp. 830.

Ga.—McMurray v. Bateman, 144 S.E.2d 345, 221 Ga. 240.

Iowa—Drake v. Block, 74 N.W.2d 577, 247 Iowa 517.

43. N.Y.—Warrin v. Charm Fashions, 82 N.Y.S.2d 476, 193 Misc. 229, affd. 89 N.Y.S.2d 704, 275 App.Div. 815.

44. Cal.—Gordon v. Wasserman, 314 P.2d 759, 153 C A 2d 328.

46. Provision as to payment for overtime

N.Y.—Klein Institute for Aptitude Testing, Inc. v. Kestin, 231 N.Y.S.2d 149, 34 Misc.2d 967.

49. N.Y.—Knox v. Ffoulke, 73 N.Y.S.2d 650.

50. U.S.—Smithey v. St. Louis Southwestern Ry. Co., D.C.Ark., 127 F.Supp. 210, affd., C.A., 237 F.2d 637.

N.Y.—Valentini v. San Carlo Opera Co., 95 N.Y.S.2d 103.

S.C.—Furbeck v Crest Mfg. Co., 103 S.E.2d 920, 233 S.C. 169.

52. U.S —Boeing Airplane Co. v. Aeronautical Indus. Dist. Lodge No. 751 of Intern. Ass'n of Machinists, D.C.Wash., 91 F.Supp. 596, affd. C.A., 188 F.2d 356, cert. den. 72 S.Ct. 39, 342 U.S. 821, 96 L.Ed. 621.

Pa.—Sebring v. Seaboard Finance Co., supra, n. 38.

Wis.—Klug v Flambeau Plastics Corp. (Flambeau Prods. Corp.), 214 N.W.2d 281, 62 Wis.2d 141.

If an employment contract is supported by adequate independent consideration other than the employee's promise to render services, it may be enforced even though it does not establish a definite term of employment.[56.5]

56.6 U.S.—Ryan v. J.C. Penney Co., Inc., C.A.Ind., 627 F.2d 836—Stack v. Allstate Ins. Co., D.C. Ind., 606 F.Supp. 472.

Ind.—Ohio Table Pad Co. of Indiana, Inc. v. Hogan, App., 424 N.E.2d 144.

57. Colo.—Beeler v. H & R Block of Colo., Inc., App., 487 P 2d 569, app. after remand 515 P.2d 638.

Tex.—Ward v. Consolidated Foods Corp., Civ.App., 480 S.W.2d 483, err. ref. no rev. err.

page 70

58. U.S.—Abbott v. Arkansas Utilities Co., C.C.A. Ark., 165 F.2d 339.

N.J.—**C.J.S. quoted in** Savarese v. Pyrene Mfg. Co., 89 A.2d 237, 240, 9 N.J. 595—**C.J.S. quoted in** Eilen v. Tappin's Inc., 83 A.2d 817, 819, 16 N.J.Super. 53.

N.Y.—Exercycle Corp. v. Maratta, 201 N.Y.S.2d 885, 11 A.D.2d 677, affd. 214 N.Y.S.2d 353, 9 N.Y.2d 329, 174 N.E.2d 463.

61. Ala.—United Sec. Life Ins. Co. v. Gregory, 201 So.2d 853, 281 Ala. 264.

Cal.—Stone v. Burke, 244 P.2d 51, 110 C.A.2d 748.

La.—Pechon v. National Corp. Service, Inc., 100 So.2d 213, 234 La. 397—Smith v. Sohio Petroleum Co., App., 163 So.2d 124.

N.J.—Savarese v. Pyrene Mfg. Co., 89 A.2d 237, 9 N.J. 595—Eilen v. Tappin's Inc., 83 A.2d 817, 16 N.J. Super. 53.

Pa.—Roth v. Page's Pittsburgh Milk Co., 100 Pittsb. Leg.J. 246.

62. U.S.—Eckhart v. Plastic Film Corp., D.C.Conn., 129 F.Supp. 277, stating New York law.

66. Md.—Pullman Co. v. Ray, 94 A.2d 266, 201 Md. 268.

page 71

73. Conn.—Fisher v. Jackson, 118 A.2d 316, 142 Conn. 734.

Iowa—**C.J.S. cited in** Collins v. Parsons College, 203 N.W.2d 594, 599, 60 A.L.R.3d 218.

67. Waiver agreement unenforceable as prohibited by statute

Tex.—James v. Vernon Calhoun Packing Co., 498 S.W.2d 160.

§ 7. —— Construction in General

Library References

Master and Servant ⚷3(2).

76. U.S.—Loew's, Inc. v. Cole, supra, n. 31—Bullock v. Sterling Drug, D.C.Pa., 93 F.Supp. 371, affd. C.A., 187 F.2d 145—Wade v. Southern Pac. Co., D.C.Tex., 248 F.Supp. 493.

Ariz.—Yeazell v. Copins, 402 P.2d 541, 98 Ariz. 109.

Colo.—Denver Truck Exchange v. Perryman, 307 P.2d 805, 134 Colo. 586.

Fla.—McCoy v. Florida-Georgia Tractor Co., App., 265 So.2d 710.

Ga.—Watkins v. Avnet, Inc., 177 S.E.2d 582, 122 Ga. App. 474.

Ill.—Evaskus v. Neff, Kohlbusch & Bissell, Inc., 189 N.E.2d 542, 40 Ill.App.2d 416.

Mass.—Rhine v. International Young Men's Christian Ass'n College, 162 N.E.2d 56, 339 Mass. 610.

N.Y.—Buyes v. Fifth Ave. Coach Co., 97 N.Y.S.2d 84—Staklinski v. Pyramid Elec. Co., 172 N.Y.S.2d 224, 10 Misc.2d 706, affd. 180 N.Y.S.2d 20, 6 A.D.2d 565, affd. 188 N.Y.S.2d 541, 6 N.Y.2d 159, 160 N.E.2d 78.

Wash.—Walling v. S. Birch & Sons Const. Co., 213 P.2d 478, 35 Wash.2d 435—Cornelius Apartment Hotel Corp. v. Alabaster, 460 P.2d 312, 1 Wash. App. 242.

Matters held arbitrable

U.S.—Printing Pressman's Union No. 135, Intern. Printing Pressmen and Assistant's Union of North America v. Cello-Foil Products, Inc., C.A.Mich., 459 F.2d 754.

Cal.—Frame v. Merrill Lynch, Pierce, Fenner & Smith Inc., 97 Cal.Rptr. 811, 20 C.A.3d 668—Ware v. Merrill Lynch, Pierce, Fenner & Smith Inc., 100 Cal.Rptr. 791, 24 C.A.3d 35, affd. 94 S.Ct. 383, 414 U.S. 117, 38 L.Ed.2d 348.

La.—Wright v. Round the Corner Restaurants of La., Inc., App., 252 So.2d 341.

N.Y.—Katich v. Smith, 316 N.Y.S.2d 376, 35 A.D.2d 930—Bravo Knits, Inc. v. DeYoung, 316 N.Y.S.2d 405, 35 A.D.2d 932.

Matters held not arbitrable

N.Y.—Application of H. D. Baskind & Co., 203 N.Y. S.2d 701, 26 Misc.2d 776.

77. U.S.—McCamy v. General Elec. Supply Corp., supra, n. 33—Textile Workers Union of America, CIO v. Aleo Mfg. Co., D.C.N.C., 94 F.Supp. 626—Stevens v. G. L. Rugo & Sons, Inc., C.A. Mass., 209 F.2d 135—Carver v. Tanner, C.A. Iowa, 252 F.2d 26—Boos v. Railway Exp. Agency, Inc., D.C.S.D., 153 F.Supp. 14, affd., C.A., 253 F.2d 896.

Ala.—Walter v. State, 38 So.2d 609, 34 Ala.App. 268.

Ariz.—Kirchoff v. Friedman, 457 P.2d 760, 10 Ariz. App. 220.

Cal.—Garfein v. Garfein, 93 Cal.Rptr. 714, 16 C.A.3d 155—Drzewiecki v. H & R Block, Inc., 101 Cal. Rptr. 169, 24 C.A.3d 695.

Conn.—Dillon v. American Brass Co., 60 A.2d 661, 135 Conn. 10.

D.C.—Edwards v. Capital Airlines, 176 F.2d 755, 84 U.S.App.D.C. 346, cert. den. 70 S.Ct. 186, 188, 338 U.S. 885, 94 L.Ed. 543.

Fla.—Chatelier v. Robertson, App., 118 So.2d 241.

Ill.—Rosenthal v. Hyland Builders Corp., 166 N.E.2d 463, 25 Ill.App.2d 229—Evaskus v. Neff, Kohlbusch & Bissell, Inc., 189 N.E.2d 542, 40 Ill. App.2d 416.

Ky.—International Union of Operating Engineers v. J. A. Jones Const. Co., 240 S.W.2d 49—Eline Realty Co. v. Foeman, 252 S.W.2d 15—Webb v. Welcome Wagon, Inc., 255 S.W.2d 459—Robbins v. Frank Fehr Brewing Co., 284 S.W.2d 680, 55 A.L.R.2d 943.

La.—Pennington v. Drews, 49 So.2d 5, 218 La. 258—Willis v. Allied Insulation Co., App., 174 So.2d 858.

Me.—G. H. Bass & Co. v. Maine Employment Sec. Commission, 250 A.2d 492.

Mass.—Itek Corp. v. McEnness, 164 N.E.2d 636, 340 Mass. 409.

Mich.—Hubbard v. Michigan Unemployment Compensation Commission, 44 N.W.2d 4, 328 Mich. 444.

Minn.—Bryngelson v. Minnesota Val. Breeders Ass'n, 114 N.W.2d 748, 262 Minn. 275.

N.J.—Sonotone Corp. v. Ellis, 64 A.2d 255, 2 N.J.Super. 419, affd 67 A.2d 186, 4 N.J.Super. 331—Shiddell v. Electro Rust-Proofing Corp., N.J., 112 A.2d 290, 34 N.J.Super. 278.

N.Y.—Greenwald v. Waldburger & Co., 275 N.Y.S 2d 133, 26 A.D.2d 928, affd. 237 N.E.2d 455, 21 N.Y.2d 685, 287 N.Y.S 2d 417—Rudman v. Cowles Communications, Inc., 280 N.E.2d 867, 30 N.Y.2d 1, 330 N.Y.S.2d 33, 63 A.L.R.3d 527.

N.C.—Hudson v. Atlantic Coast Line R. Co., 89 S.E.2d 441, 242 N C. 650, cert. den. 76 S.Ct. 844, 351 U.S. 949, 100 L.Ed 1473.

Ohio—West v. Ankney, 134 N.E.2d 185.

Okl.—Porter v. Mid-America Paving Co., 301 P.2d 1005.

Or.—Shepard & Morse Lumber Co. v. Collins, 256 P.2d 500, 198 Or. 290—Thompson v. Burr, 490 P.2d 157, 260 Or. 329.

Pa.—Lux v. Unemployment Compensation Bd. of Review, 118 A.2d 231, 180 Pa.Super. 90—Taylor v. Southern Pennsylvania Bus Co., 199 A.2d 745, 203 Pa.Super. 229, affd. 209 A.2d 807, 418 Pa. 82—Swank v. AMP, Inc., 78 Dauph. 224, exceptions overr. 80 Dauph. 82.

Tex.—Culkin v. Neiman-Marcus Co., Civ.App., 354 S.W.2d 397.

Wis.—Liquor Salesmen, Bottle & Beverage Employees' Union, Local No. 80, v. Yahr-Lange Liquor, 33 N.W.2d 218, 253 Wis. 60—Belanger v. Local Division No. 1128, Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Emp. of America, 36 N.W.2d 414, 254 Wis. 344—Young v. Oak Electro-Netics Corp., 172 N.W.2d 685, 45 Wis.2d 197.

Wyo.—Arizona v. City of Sheridan, 408 P.2d 704.

Application of arbitration act

U.S.—Bernhardt v. Polygraphic Co. of America, Vt., 76 S.Ct. 273, 350 U.S. 198, 100 L.Ed.2d 199—Dickstein v. duPont, C.A.Mass., 443 F.2d 783.

Alaska—Nizinski v. Golden Val. Elec. Ass'n, Inc., 509 P.2d 280.

Unqualified denial of liability by employer as waiver of arbitration provisions

Minn.—Anderson v. Twin City Rapid Transit Co., 84 N.W.2d 593, 250 Minn. 167.

Effect of arbitration

U.S.—Ferrick v. Baltimore & O.R. Co., C.A.Pa., 447 F.2d 89.

N.Y.—Staklinski v. Pyramid Elec. Co., 188 N.Y.S.2d 541, 6 N.Y.2d 159, 160 N.E.2d 78.

Dispute subject to arbitration under arbitration provision

U.S.—Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., D.C.Pa., 353 F.Supp. 1084.

N.J.—Shribman v. Miller, 158 A.2d 432, 60 N.J.Super. 182—Waldman v. Alcan Aluminum Corp., 278 A.2d 215, 115 N.J.Super. 58.

N.Y.—Weintraub v. Vigilant Protective Systems, Inc., 317 N.Y.S.2d 953, 36 A.D.2d 529.

Notifying employee of employer's change in policy

La.—Krizan v. Storz Broadcasting Co., App., 145 So.2d 636.

Waiver of right to arbitration

Cal.—Bertero v. Superior Court for Los Angeles County, 30 Cal.Rptr. 719, 216 C.A.2d 213.

Contract as not divisible

U.S.—Heyman v. Kline, D.C.Conn., 344 F.Supp. 1088, revd. in part on oth. grds., C.A., 456 F.2d 123, cert. den. 93 S.Ct. 53, 409 U.S. 847, 34 L.Ed.2d 88.

Utah—Reliance Nat. Life Ins. Co. v. Hansen, 393 P.2d 793, 15 Utah 2d 400.

Failure to raise defense before arbitrator

D.C.—Washington-Baltimore Newspaper Guild Local 35 of Am. Newspaper Guild AFL-CIO v. Washington Post Co., D.C., 367 F.Supp. 917.

78. U.S.—Fredericks v. Georgia-Pacific Corp., D.C. Pa., 331 F.Supp. 422, dism., C.A., 474 F.2d 1338.

Cal.—Hyatt v. Eckel Valve Co., 336 P.2d 551, 169 C.A.2d 35.

Colo.—Nu-Tone Products Co. v. Markham, 481 P.2d 719, 173 Colo. 559.

Ill.—Kobus v. Jefferson Ice Co., 276 N.E.2d 725, 2 Ill.App.3d 458.

La.—Krison v. Texas Industries, Inc., App., 253 So.2d 614.

Mich.—I.M. Dach Underwear Co. v. Michigan Employment Sec. Commission, 80 N.W.2d 193, 347 Mich. 465.

Minn.—Moritz v. Francis I. duPont & Co., 189 N.W.2d 487, 291 Minn. 523.

Mo.—Lusk v. Lyon Metal Products, 247 S.W.2d 617.

N.H.—Brampton Woolen Co. v. Local Union 112, 61 A.2d 796, 95 N.H. 255—Amory Worsted Mills v. Riley, 71 A.2d 788, 96 N.H. 162.

N.J.—Hudson Wholesale Grocery Co. v. Allied Trades Council of American Federation of Labor, 65 A.2d 557, 3 N.J.Super. 327—Shribman v. Miller, 158 A.2d 432, 60 N.J.Super. 182.

N.M.—Swift v. Shop Rite Food Stores, Inc., 489 P.2d 881, 83 N.M. 168—Clem v. Bowman Lumber Co., App., 495 P.2d 1106, 83 N.M. 659.

N.Y.—Application of Pfitzner, 208 N.Y.S.2d 103, 27 Misc.2d 715.

Okl.—Bartlett v. Sterling Const. Co., 499 P.2d 425.

Tex.—Lone Star Cotton Mills v. Thomas, supra, n. 34—Padre Island Inv. Corp. v. Miller, App. 13. Dist., 669 S.W.2d 167, err. ref. no rev. err.

Wash.—Central Credit Collection Control Corp. v. Grayson, 499 P.2d 57, 7 Wash.App. 56.

79. U.S.—Bullock v. Sterling Drug, C.A.Pa., 187 F.2d 145—Stevens v. G. L. Rugo & Sons, Inc., C.A. Mass., 209 F.2d 135.

Miss.—Winborn v. R. B. Tyler Co., 94 So.2d 340, 231 Miss. 166.

Neb.—Nebraska Panhandle Community Action Agency, Inc. v. Strange, 200 N.W.2d 23, 189 Neb. 83.

N.H.—Brampton Woolen Co. v. Local Union 112, supra, n. 78.

N.Y.—Sasmor v. V. Vivaudou, Inc., supra, n. 77.

Utah—Ryan v. American Nat. Inv. Co., 318 P.2d 1105, 7 Utah 2d 95.

Wyo.—Arizona v. City of Sheridan, 408 P.2d 704.

80. U.S.—Wilson v. Homestead Valve Mfg. Co., C.A. Pa., 217 F.2d 792, cert. den. 75 S.Ct. 606, 349 U.S. 916, 99 L.Ed. 1250—B. F. Gladding & Co. v. Scientific Anglers, Inc., C.A.Mich., 248 F.2d 483—Alonso v. Kaiser Aluminum & Chemical Corp., D.C.W.Va., 345 F.Supp. 1356.

Ariz.—Equitable Life & Cas. Ins. Co. v. Rutledge, 454 P.2d 869, 9 Ariz.App. 551.

Ga.—Seckinger v. Riley, 108 S.E.2d 761, 99 Ga.App. 442.

Ky.—Hamilton Carhartt Overall Co. v. Short, 197 S.W.2d 792, 303 Ky. 423.

La.—Pechon v. National Corp. Service, Inc., 100 So.2d 213, 234 La. 397.

Me.—Talberth v. Guy Gannett Pub. Co., 100 A.2d 726, 149 Me. 286, 40 A.L.R.2d 1036.

N.Y.—Yazujian v. J. Rich Steers, Inc., 89 N.Y.S.2d 551, 195 Misc. 694—Jones v. Crawford, 162 N.Y. S.2d 41, 3 A.D.2d 479, rearg. and app. den. 164 N.Y.S.2d 988, 4 A.D.2d 826—Lewis v. Wise Shops, Inc., 164 N.Y.S.2d 348, 9 Misc.2d 337.

81. Colo.—C.J.S. cited in Badger v. Nu-Tone Products Co., 425 P.2d 698, 699, 162 Colo. 216.

82. Cal.—Stevens v. National Broadcasting Co., 76 Cal.Rptr. 106, 270 C.A.2d 886.

Mass.—Nutting v. Kneeland, 105 N.E.2d 199, 328 Mass. 497.

83. Ga.—General Gas Corp. v. Carn, 120 S.E.2d 156, 103 Ga.App. 542.

N.Y.—W.U. Tel. Co. v. American Communications Ass'n, C.I.O., supra, n. 78.

Ohio—Angell v. City of Toledo, 88 N.E.2d 595, affd. 91 N.E.2d 250, 153 Ohio St. 179.

84. U.S.—Prudential Ins. Co. of America v. Gray Mfg. Co., D.C Conn., 220 F.Supp. 644, affd, C.A., 328 F.2d 438.

Pa.—Gretz v. Esslinger's, Inc., 204 A.2d 754, 416 Pa. 111.

page 73

86. U.S.—Hunter v. Atchison, T. & S.F. Ry. Co., C.A.Ill., 171 F.2d 594, cert den. 69 S.Ct. 1157, 387 U.S. 916, 93 L.Ed. 1726.

N.Y.—Louis Cooper Hats v. Kadis, 138 N.Y.S.2d 839, 285 App.Div. 937, affd. 128 N.E.2d 415, 309 N.Y. 705.

87. Tenn.—Bartlett v. Philip-Carey Mfg. Co., 392 S.W.2d 325, 216 Tenn. 323.

88. U.S—De Jur-Amsco Corp. v. Fogle, D.C.N.J., 119 F.Supp. 262, affd., C.A, 233 F.2d 141

Ill.—Miller v. Community Discount Centers, Inc., 228 N.E.2d 113, 83 Ill.App.2d 439.

La.—Willis v. Allied Insulation Co., App., 174 So.2d 858.

Tex.—Castle v. Lloyds Cas. Insurer, Civ.App., 244 S.W.2d 359, err. ref. no rev err.

Prepared by employee

U.S.—Shapiro v. Stahl, D.C.Pa., 195 F.Supp. 822.

89. U.S.—Gromacki v. Armour & Co., D.C.Mo., 76 F.Supp. 752—De Jur-Amsco Corp. v. Fogle, C.A. N.J., 233 F.2d 141—Barton v. Bechtel Corp., D.C. C.al., 253 F.Supp. 288—Marcin v. Darling Valve & Mfg. Co., D.C.Pa., 259 F.Supp. 720—National Memorial Park, Inc. v. Geller, D.C.Md., 312 F.Supp. 707.

Colo.—Montgomery Ward & Co. v. Reich, 282 P.2d 1091, 131 Colo. 407—National Cash Register Co. v. Lightner, 388 P.2d 781, 154 Colo. 98.

Ill.—Lipton v. Pennsylvania Rubber Co., 116 N.E.2d 923, 1 Ill.App.2d 223.

Mo.—Hinkeldey v. Cities Service Oil Co., 470 S.W.2d 494.

N.Y.—L. M. Rabinowitz & Co. v. Dasher, 82 N.Y.S.2d 431—Yazujian v. J. Rich Steers, Inc., supra, n. 80.

R.I.—Armfield v. Frank N. McClure, Inc., 75 A.2d 196, 77 R.I. 390.

Wis.—Schiller v. Keuffel & Esser Co., 124 N.W.2d 646, 21 Wis.2d 545.

Broker and salesman

Ala.—Taylor v. Riley, 133 So.2d 869, 272 Ala. 690.

91. Cal.—Hamilton v. Stockton Unified School Dist., 54 Cal.Rptr. 463, 245 C.A.2d 944.

96. U.S.—Wyles v. Campbell, supra, n. 13—Shipley v. Pittsburgh & L.E.R. Co., supra, n. 7.

Colo.—**C.J.S. quoted at length in** Badger v. Nu-Tone Products Co., 425 P.2d 698, 700, 162 Colo. 216.

Ky.—Eline Realty Co. v. Foeman, 252 S.W.2d 15.

Me.—G. H. Bass & Co. v. Maine Employment Sec. Commission, 250 A.2d 492.

Mass.—Smith v. Graham Refrigeration Products Co., 129 N.E.2d 884, 333 Mass. 181.

N.Y.—Mandelbaum v. Silberfeld, 77 N.Y.S.2d 465—Weinstein v. Primrose Blouse Co., 108 N.Y.S.2d 780, 279 App.Div. 764.

Good faith and fair dealing by employer

U.S.—Zimmer v. Wells Management Corp., D.C.N.Y., 348 F.Supp. 540.

Alaska—Mitford v. de Lasala, 666 P.2d 1000.

97. U.S.—Barone v. Schick, Inc., C.A.Conn., 181 F.2d 47—Stevens v. G. L. Rugo & Sons, Inc., C.A.Mass., 209 F.2d 135.

Ky.—Beech Creek Coal Co. v. Jones, 262 S.W.2d 174.

Miss.—Greer v. Crawford Corp., 70 So.2d 69, 220 Miss. 97.

Pa.—Gordon v. Braeburn Alloy Steel Corp., 73 A.2d 367, 364 Pa. 586.

99. Cal.—Anders v. State Bd. of Equalization, 185 P.2d 883, 82 Cal.App.2d 88—Ballarini, in Behalf of Lodge 1327, Intern. Ass'n of Machinists, Production & Aeronautical Workers v. Schlage Lock Co., 226 P.2d 771, 100 Cal.App.2d Supp. 859.

Conn.—Farnham v. Labutis, 160 A.2d 120, 147 Conn. 267.

Mo.—New v. Kansas City School of Watchmaking, App, 222 S.W.2d 966.

1. Diligent and reasonably skillful workmanlike manner

Mich—Nash v. Sears, Roebuck & Co., 174 N.W.2d 818, 383 Mich. 136.

2. U.S.—Twentieth Century-Fox Film Corp. v. Lardner, C.A.Cal., 216 F.2d 844, 51 A.L.R.2d 728, cert. den. 75 S.Ct. 365, 348 U.S. 944, 99 L.Ed. 739, reh. den. 75 S.Ct. 522, 348 U S. 965, 99 L.Ed. 753—Kassab v. Ragnar Benson, Inc., D.C.Pa., 254 F.Supp. 830.

Ohio—American Ins. Group v. McCowin, 218 N.E.2d 746, 7 Ohio App.2d 62.

page 74

3. U.S.—Scott v. RKO Radio Pictures, Inc., C.A.Cal., 240 F 2d 87, cert. den. 77 S.Ct. 816, 353 U.S. 939, 1 L.Ed.2d 761, reh. den. 77 S.Ct. 1056, 353 U S. 978, 1 L.Ed.2d 1139.

Cal—Foley v. U.S. Paving Co., 68 Cal.Rptr. 780, 262 C.A.2d 499.

Iowa—LaFontaine v. Developers & Builders, Inc, 156 N.W.2d 651, 261 Iowa 1177.

Ky.—**C.J.S. cited in** Davies v. Mansbach, Ky., 338 S.W.2d 210, 212.

N.Y.—Strader v. Collins, 116 N.Y.S.2d 318, 280 App. Div. 582.

Payment after service performed

Ariz.—Knack v. Industrial Commission, 503 P.2d 373, 108 Ariz. 545.

4. U.S.—Hansen v. Arabian Am. Oil Co., C.A.N.Y., 195 F.2d 682, cert. den. 73 S.Ct. 31, 344 U.S. 828, 97 L.Ed. 645.

Cal.—Poles v. Glass, 288 P.2d 986, 136 C.A.2d 508.

Conn.—Berger v. Shanahan, 118 A.2d 311, 142 Conn. 726.

D.C.—Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, C.A., 284 F.2d 173, 109 U.S.App.D.C. 39, affd. 81 S.Ct. 1743, 367 U.S. 886, 6 L.Ed.2d 1230, motion den. 81 S.Ct. 1912, 366 U.S. 956, 6 L.Ed.2d 1251, reh. den. 82 S.Ct. 22, 368 U.S. 869, 7 L.Ed.2d 70.

Ind.—Wills v Gaff, 191 N.E.2d 41, 136 Ind.App. 21.

Mo.—National Corp. v. Allan, App., 280 S.W.2d 428.

9. Cal.—Cardenas v. Ellston, 66 Cal.Rptr. 128, 259 C.A.2d 232.

Union contract as member's contract

Pa.—Duquesne Brewing Co. of Pittsburgh v. Unemployment Compensation Bd. of Review, 59 A.2d 913, 359 Pa. 535.

Stockholder of corporation held corporate employee

Iowa—Holden v. Construction Machinery Co., 202 N.W.2d 348, 67 A.L.R.3d 324.

12. U.S.—Britt v. Trailmobile Co., C.A.Ohio, 179 F.2d 569, 29 A.L.R.2d 1272, cert. den. 71 S.Ct. 52, 340 U.S. 820, 95 L.Ed. 603.

§ 8. —— Commencement and Duration of Employment

Library References

Master and Servant ⚷8.
Corbin on Contracts § 684.
Modern Legal Forms Ch. 46, Motion Pictures.

page 75

16. Fla.—Division No. 1344 of Amalgamated Ass'n of St., Elec. Ry., and Motor Coach Emp. of America v. Tampa Elec. Co., 47 So.2d 13.

Mo.—**C.J.S. cited in** Nola v. Merollis Kansas City, Inc., 537 S.W.2d 627, 632.

N.Y.—Suderman v. Integrated Display Systems, Inc., 410 N.Y.S.2d 821, 66 A.D.2d 655.

N.D.—**C.J.S. cited in** Smith v. Knutson, 36 N.W.2d 323, 328, 76 N.D. 375.

Pa.—Gillian v. Consolidated Foods Corp., 227 A.2d 858, 424 Pa. 407.

Tenn.—Union Planters Corp. v. Harwell, App., 578 S.W.2d 87.

17. Cal.—Silva v. McCoy, 66 Cal.Rptr. 364, 259 C.A.2d 256.

Minn.—Bryngelson v. Minnesota Val. Breeders Ass'n, 114 N.W.2d 748, 262 Minn. 275.

Mo.—Leick v. Missouri Plating Co., 211 S.W.2d 77, 240 Mo.App. 565

Ohio—Krueger v. Schoenling Brewing Co., 79 N.E.2d 366, 82 Ohio App. 57—Frederick C. Smith Clinic v. Lastrapes, 170 N.E.2d 497, 111 Ohio App. 42.

S.D.—Drake v. Geochemistry and Environmental Chemistry Research, Inc., 336 N.W.2d 666.

Period implied

(2) Reasonable time.

Cal.—Glassell v. Prentiss, 346 P.2d 895, 175 C.A.2d 599.

(3) Other statement.

U.S.—Barton v. Bechtel Corp., D.C.Cal., 253 F.Supp. 288.

Provision for stock purchase

(2) Other statements.

Fla.—Hoffman v. Robinson, App., 213 So.2d 267.

Employment at yearly salary as evidence of employment for one year

U.S.—Testard v. Penn-Jersey Auto Stores, Inc., D.C. Pa., 154 F.Supp. 160.

Operations carried on at profit

Cal.—Kanner v. National Phoenix Industries, Inc., 21 Cal.Rptr. 857, 203 C.A.2d 757.

At least one-year period

Ill.—Miller v. Community Discount Centers, Inc., 228 N.E.2d 113, 83 Ill.App.2d 439.

N.Y.—Whatham v. Precision Boring Co., 220 N.Y.S.2d 134.

Tenn.—Ward v. Berry & Associates, Inc., App., 614 S.W.2d 372.

18. Iowa—McManigal v. Hiatt, 36 N.W.2d 651, 240 Iowa 541.

Md.—Sperling v. Terry, 135 A.2d 309, 214 Md. 367.

Mich.—Paxson v. Cass County Road Commission, 38 N.W.2d 315, 325 Mich. 276.

N.Y.—Yazujian v. J. Rich Steers, Inc., 89 N.Y.S.2d 551, 195 Misc. 694—Klein Institute for Aptitude Testing, Inc. v. Kestin, 231 N.Y.S.2d 149, 34 Misc.2d 967.

Pa.—Gillian v. Consolidated Foods Corp., 227 A.2d 858, 424 Pa. 407.

Tex.—Templeton v. Nocona Hills Owners Assn., Inc., Civ.App., 555 S.W.2d 534.

20. Nev.—Cladianos v. Friedhoff, 240 P.2d 208, 69 Nev. 41.

22. Wyo.—Willis v. Asbury Transp. Co., 386 P.2d 934.

Generally interruptions are excluded in computing period of employee's probation.

Pa.—Bonanno v. Murray Corp. of America, 137 A.2d 833, 185 Pa.Super. 230.

Purpose of probationary employment stated

Pa.—Bonanno v. Murray Corp. of America, 137 A.2d 833, 185 Pa.Super. 230.

23. Ga.—Spalding v. Southeastern Personnel of Atlanta, Inc., 149 S.E.2d 794, 222 Ga. 339.

24. Tex.—Culkin v. Neiman-Marcus Co., Civ.App., 354 S.W.2d 397.

25. Until wages paid

Md.—Nails v. Market Tire Co., Inc., 347 A.2d 564, 29 Md.App. 154.

26. Mich.—Paxson v. Cass County Road Commission, supra, n. 18.

page 76

28. Wash.—**C.J.S. cited in** Edwards v. Morrison-Knudsen Co., 379 P.2d 735, 738.

Page 76

31. U.S.—Dwellingham v. Thompson, D.C.Mo., 91 F.Supp. 787, affd., C.A., 198 F.2d 591.

Del.—Drake v. Hercules Powder Co., Super., 55 A.2d 630, 5 Terry 69.

Tenn.—**C.J.S. quoted in** Garrison v. Lannom Mfg. Co., 402 S.W.2d 462, 467, 55 Tenn. 419.

Wis.—Forrer v. Sears, Roebuck & Co., 153 N.W.2d 587, 36 Wis.2d 388.

32. U.S.—Beeler v. Chicago, R.I. & P. Ry. Co., C.A. Kan., 169 F.2d 557, cert. den. 69 S.Ct. 407, two cases, 335 U.S. 903, 93 L.Ed. 437—Weir v. Hudson Coal Co., D.C.Pa., 99 F.Supp. 423—Woodward Iron Co. v. Ware, C.A.Ala., 261 F.2d 138—Farmer v. Arabian Am. Oil Co., D.C.N.Y., 176 F.Supp. 45, revd. on oth. grds., C.A., 277 F.2d 46, cert. den. 81 S.Ct. 60, 364 U.S. 824, 5 L.Ed.2d 53—Brown v. Safeway Stores, Inc., D.C.N.Y., 190 F.Supp. 295—Carlson v. Viacom Intern. Inc., D.C. N.Y., 566 F.Supp. 289.

Ga.—Lowe v. Royal Crown Cola Co., 207 S.E.2d 620, 132 Ga.App. 37.

Ill.—Novack v. Casual-Craft, Inc., 88 N.E.2d 335, 338 Ill.App. 659—Atwood v. Curtiss Candy Co., 161 N.E.2d 355, 22 Ill.App.2d 369—Miller v. Community Discount Centers, Inc., 228 N.E.2d 113, 83 Ill.App.2d 439—Donahue v. Rockford Showcase & Fixture Co., 230 N.E.2d 278, 87 Ill.App.2d 47.

Iowa—McManigal v. Hiatt, supra, n. 18.

La.—United Credit Co. v. Croswell Co., 54 So.2d 425, 219 La. 993.

Mo.—Smith v. Geo. H. Weyer, Inc., App., 224 S.W.2d 543.

N.J.—Savarese v. Pyrene Mfg. Co., 89 A.2d 237, 9 N.J. 595—Hindle v. Morrison Steel Co., 223 A.2d 193, 92 N.J.Super. 75.

N.Y.—Horowitz v. La France Industries, 79 N.Y.S.2d 794, 274 App.Div. 46—Johnson v. Cheney Bros., 102 N.Y.S.2d 302, 278 App.Div. 656—Hanlon v. Macfadden Publications, 99 N.E.2d 546, 302 N.Y. 502, 24 A.L.R.2d 733.

N.C.—Smith v. Ford Motor Co., 221 S.E.2d 282, 289 N.C. 71, 79 A.L.R.3d 651.

Pa.—Markson Bros. v. Redick, 66 A.2d 218, 164 Pa.Super. 499—Maloney v. Madrid Motor Corp., 122 A.2d 694, 385 Pa. 224—Shives v. Best Feeds & Farm Supplies, Inc., 110 P.L.J. 256—Anderson v. Peirson, 111 P.L.J. 155.

Tenn.—Savage v. Spur Distributing Co., 228 S.W.2d 122, 33 Tenn.App. 27—**C.J.S. quoted in** Garrison v. Lannom Mfg. Co., App., 402 S.W.2d 462, 467, 55 Tenn.App. 419.

Tex.—Advance Aluminum Castings Corp. v. Schulkins, Civ.App., 267 S.W.2d 174.

Utah—Bullock v. Deseret Dodge Truck Center, Inc., 354 P.2d 559, 11 Utah 2d 1.

Wis.—Nelson v. La Crosse Trailer Corp., 37 N.W.2d 63, 254 Wis. 414—Forrer v. Sears, Roebuck & Co., 153 N.W.2d 587, 36 Wis.2d 388.

No liability for damages

Colo.—Justice v. Stanley Aviation Corp., 530 P.2d 984, 35 Colo.App. 1.

33. Minn.—Bussard v. College of St. Thomas, Inc., 200 N.W.2d 155, 294 Minn. 215.

34. Idaho—Thomas v. Ballou-Latimer Drug Co., 442 P.2d 747, 92 Idaho 337.

Va.—Norfolk Southern Ry. Co. v. Harris, 59 S.E.2d 110, 190 Va. 966.

35. N.Y.—Rapid-American Corp. v. Quinn, 188 N.Y. S.2d 279, 8 A.D.2d 802, affd. 197 N.Y.S.2d 201, 7 N.Y.2d 891, 165 N.E.2d 205.

Pa.—Anderson v. Peirson, 111 P.L.J. 155.

36. Idaho—Thomas v. Ballou-Latimer Drug Co., 442 P.2d 747, 92 Idaho 337.

Ill.—Donahue v. Rockford Showcase & Fixture Co., 230 N.E.2d 278, 87 Ill.App.2d 47.

Pa.—Anderson v. Peirson, Pa.Com.Pl., 111 P.L.J. 155.

Wash.—Lasser v. Grunbaum Bros. Furniture Co., 281 P.2d 832, 46 Wash.2d 408—Edwards v. Morrison-Knudsen Co., 379 P.2d 735.

Yearly contract not shown

Colo.—Justice v. Stanley Aviation Corp., 530 P.2d 984, 35 Colo.App. 1.

Fla.—Russell & Axon v. Handshoe, App., 176 So.2d 909.

Question of fact

U.S.—Mercer v. C. A. Roberts Co., C.A.Tex , 570 F.2d 1232

page 77

37. Tenn —Garrison v. Lannom Mfg. Co., App., 402 S.W.2d 462, 55 Tenn.App. 419.

39. U.S.—Geib v. Alan Wood Steel Co., D.C.Pa., 419 F.Supp. 1205.

40. Mass.—Mahoney v. Hildreth & Rogers Co., 125 N.E.2d 788, 332 Mass. 496.

N.J.—Hindle v. Morrison Steel Co., 223 A.2d 193, 92 N.J.Super. 75.

Tenn.—Garrison v. Lannom Mfg. Co., App., 402 S.W.2d 462, 55 Tenn App. 419.

Three months subject to termination on certain notice

N.Y.—Klein Institute for Aptitude Testing, Inc. v. Kestin, 231 N.Y.S.2d 149, 34 Misc.2d 967.

Period held reasonable

U.S.—Entis v. Atlantic Wire & Cable Corp., C.A.N.Y., 335 F.2d 759.

41. U.S.—**C.J.S. cited in** Fish v. Richfield Oil Corporation, D.C.Cal., 178 F.Supp. 750, 755.

Cal.—Swaffield v. Universal Ecsco Corp., 76 Cal.Rptr. 680, 271 C.A.2d 147.

Miss.—Masonite Corp. v. Handshoe, 44 So.2d 41, 208 Miss. 166.

N.Y.—Shenn v. Fair-Tex Mills, Inc., 273 N.Y.S.2d 876, 26 A.D.2d 282.

Ohio—Henkel v. Educational Research Council of America, 344 N.E.2d 118, 45 Ohio St.2d 249, 74 O.O.2d 415.

Tenn.—Savage v. Spur Distributing Co., supra, n. 32—Delzell v. Pope, 294 S.W.2d 690, 200 Tenn. 641.

Tex.—**C.J.S. cited in** City of San Antonio v. Condie, Civ.App., 329 S.W.2d 947, 948, err. dism.

42. Ga.—Sandt v. Mason, 67 S.E.2d 767, 208 Ga. 541.

In Tennessee

(2) Tenn.—Garrison v. Lannom Mfg. Co., App., 402 S.W.2d 462, 55 Tenn.App. 419.

44. D.C.—Sullivan v. Heritage Foundation, App., 399 A.2d 856.

Fla.—Russell & Axon v. Handshoe, App., 176 So.2d 909.

Ill.—Grauer v. Valve & Primer Corp., 361 N.E.2d 863, 5 Ill.Dec. 540, 47 Ill.App.3d 152.

La.—United Credit Co. v. Croswell Co., supra, n. 32.

N.J.—Hindle v. Morrison Steel Co., 223 A.2d 193, 92 N.J.Super. 75.

N.Y.—Winslow v. Roberts Numbering Mach. Co., 183 N.Y.S.2d 817, 17 Misc.2d 18, motion den. 200 N.Y.S.2d 320, 10 A.D.2d 608, app. dism. conditionally 200 N.Y.S.2d 320, 10 A.D.2d 608.

N.C.—Freeman v. Hardee's Food Systems, Inc., 165 S.E.2d 39, 3 N.C.App. 435.

Pa.—In re Williams' Estate, 35 Del.Co. 101.

Hiring at will presumed

Colo.—Justice v. Stanley Aviation Corp., 530 P.2d 984, 35 Colo.App. 1.

Ohio—Henkel v. Educational Research Council of America, 344 N.E.2d 118, 45 Ohio St.2d 249, 74 O.O.2d 415.

page 78

46. Pa.—Roth v. Page's Pittsburgh Milk Co., 100 Pittsb.Leg.J. 246.

S.C.—Orsini v. Trojan Steel Corp., 64 S.E.2d 878, 219 S.C. 272.

Wis.—Smith v. Beloit Corp., 162 N.W.2d 585, 40 Wis.2d 550.

Permanent employment intended

N.J.—Rogozinski v. Airstream By Angell, 377 A.2d 807, 152 N.J.Super. 133, mod. on oth. grds. 397 A.2d 334, 164 N.J.Super. 465.

47. Mo.—Insurance, Inc. v. Sanders, App., 378 S.W.2d 249.

48. Cal.—Marin v. Jacuzzi, 36 Cal.Rptr. 880, 224 C.A.2d 549.

Colo.—Justice v. Stanley Aviation Corp., 530 P.2d 984, 35 Colo.App. 1.

49. Minn.—Degen v. Investors Diversified Services, Inc., 110 N.W.2d 863, 260 Minn. 424.

S.C.—Orsini v. Trojan Steel Corp., supra, n. 46.

50. N.J.—Shiddell v. Electro Rust-Proofing Corp., N.J., 112 A.2d 290, 34 N.J.Super. 278.

S.C.—Gainey v. Coker's Pedigreed Seed Co., 87 S.E.2d 486, 227 S.C. 200.

51. U.S.—Bixby v. Wilson & Co., D.C.Iowa., 196 F.Supp. 889.

Colo.—**C.J.S. cited in** Justice v. Stanley Aviation Corp., 530 P.2d 984, 986, 35 Colo.App. 1.

Ill.—Long v. Arthur Rubloff & Co., 327 N.E.2d 346, 27 Ill.App.3d 1013.

Mo.—Insurance, Inc. v. Sanders, App., 378 S.W.2d 249.

N.J.—Shiddell v. Electro Rust-Proofing Corp., N.J., supra, n. 50.

52. U.S.—Albers v. Wilson & Co., D.C.Minn., 184 F.Supp. 812—Brown v. Safeway Stores, Inc., D.C. N.Y., 190 F.Supp. 295—**C.J.S. quoted in** Bixby v. Wilson & Co., D.C.Iowa, 196 F.Supp. 889, 898.

Cal.—Marin v. Jacuzzi, 36 Cal.Rptr. 880, 224 C.A.2d 549.

Fla.—Russell & Axon v. Handshoe, App., 176 So.2d 909.

Mo.—Insurance, Inc. v. Sanders, App., 378 S.W.2d 249.

Wis.—Forrer v. Sears, Roebuck & Co., 153 N.W.2d 587, 36 Wis.2d 388—**C.J.S. cited in** Smith v. Beloit Corp., 162 N.W.2d 585, 587, 40 Wis.2d 550.

53. U.S.—Adkins v. Kelly's Creek R. Co., C.A.W.Va., 458 F.2d 26, cert. den. 93 S.Ct. 224, 409 U.S. 926, 34 L.Ed.2d 184.

Ark.—Miller v. Missouri Pac. Transp. Co., 283 S.W.2d 158, 225 Ark. 425.

N.J.—**C.J.S. cited in** Eilen v. Tappin's Inc., 83 A.2d 817, 819, 16 N.J.Super. 53.

N.Y.—Carfizzi v. United Transp. Co. of R.I., 247 N.Y. S.2d 162, 20 A.D.2d 707.

page 79

55. N.J.—Savarese v. Pyrene Mfg. Co., supra, n. 32—Shiddell v. Electro Rust-Proofing Corp., N.J., supra, n. 50.

Wis.—Forrer v. Sears, Roebuck & Co., 153 N.W.2d 587, 36 Wis.2d 388.

56. N.J.—Piechowski v. Matarese, 148 A.2d 872, 54 N.J.Super. 333.

59. U.S.—Winand v. Case, D.C.Md., 154 F.Supp. 529.

60. U.S.—Winand v. Case, D.C.Md., 154 F.Supp. 529.

Md.—Chesapeake & Potomac Tel. Co. of Baltimore City v. Murray, 84 A.2d 870, 198 Md. 526, 28 A.L.R.2d 920.

Wis.—Forrer v. Sears, Roebuck & Co., 153 N.W.2d 587, 36 Wis.2d 388.

§ 9. —— Modification or Rescission

Library References

Master and Servant ⇐7.

Modern Legal Forms Ch. 46, Motion Pictures.

61. U.S.—Raybestos-Manhattan, Inc. v. Rowland, C.A.S.C., 460 F.2d 697—Green v. Edward J. Bettinger Co., D.C.Pa., 608 F.Supp. 35.

Ala.—Langdon v. Romano, Civ.App., 394 So.2d 36.

Cal.—Travelers Ins. Co. v. Workmen's Compensation Appeals Bd., 64 Cal.Rptr. 440, 434 P.2d 992, 68 C.2d 7.

Del.—Drake v. Hercules Powder Co., supra, n. 31.

Ga.—Basic Four Corp. v. Parker, 279 S.E.2d 241, 158 Ga.App. 117.

Ky.—**C.J.S. cited in** Roshong v. American Saw & Tool Co., 244 S.W.2d 974, 975.

N.J.—Walker v. Pennsylvania-Reading Seashore Lines, 61 A.2d 453, 142 N.J.Eq. 588.

N.Y.—Gray v. Lurie, 162 N.Y.S.2d 278, 3 A.D.2d 956.

The burden of proving a modification, etc.

La.—Griffin v. Cambridge Const. Co., App., 236 So.2d 539, application not considered 238 So.2d 748, 256 La. 766.

Tex.—Stowers v. Harper, Civ.App., 376 S.W.2d 34, err. ref. no rev. err.

Evidence held insufficient etc.

U.S.—Goodwyn v. Sencore, Inc., D.C.S.D., 389 F.Supp. 824.

Miss.—Matheney v. McClain, 161 So.2d 516, 248 Miss. 842.

Tex.—Stowers v. Harper, Civ.App., 376 S.W.2d 34, err. ref. no rev. err.

Evidence sufficient to show agreement to modify

Cal.—Eluschuk v. Chemical Engineers Termite Control, Inc., 54 Cal.Rptr. 711, 246 C.A.2d 463.

Tex.—Adams v. Can-Dee Oil Corp., Civ.App., 357 S.W.2d 808, err. ref. no rev. err.

Performance

Cal.—Eluschuk v. Chemical Engineers Termite Control, Inc., 54 Cal.Rptr. 711, 246 C.A.2d 463.

62. U.S.—Dwyer v. Tracey, D.C.Ill., 118 F.Supp. 289.

D.C.—Hauser v. Watson, Mun.App., 60 A.2d 698.

Ill.—Carter v. Kaskaskia Community Action Agency, 322 N.E.2d 574, 24 Ill.App.3d 1056.

Ind.—Ross v. Tavel, App., 418 N.E.2d 297.

Mass.—Gishen v. Dura Corp., 285 N.E.2d 117, 362 Mass. 177.

N.C.—Bennett v. Eastern Rebuilders, Inc., 279 S.E.2d 46, 52 N.C.App. 579.

Under statute change or modification in writing does not require consideration.

N.Y.—Vernon v. Vernon, 163 N.Y.S.2d 877, 4 A.D.2d 698.

page 80

63. U.S.—Vines v. General Outdoor Advertising Co., C.A.N.Y., 171 F.2d 487—Shipley v. Pittsburgh & L.E.R. Co., D.C.Pa., 83 F.Supp. 722—Lanier v. Alenco, C.A.La., 459 F.2d 689—Goodwyn v. Sencore, Inc., D.C.S.D., 389 F.Supp. 824.

Del.—Drake v. Hercules Powder Co., supra, n. 31.

Ill.—People ex rel. Sterba v. Blaser, 337 N.E.2d 410, 33 Ill.App.3d 1.

Mich.—Ferries v. Copco Steel & Engineering Co., 73 N.W.2d 850, 344 Mich. 345.

Minn.—Urban v. Continental Convention & Show Management, 68 N.W.2d 633, 244 Minn. 44.

Miss.—Reading & Bates, Inc. v. Whittington, 208 So.2d 437.

N.J.—Walker v. Pennsylvania-Reading Seashore Lines, supra, n. 61.

Pa.—Mendelson v. Shrager, 248 A.2d 234, 432 Pa. 383.

Tex.—Lone Star Cotton Mills v. Thomas, Civ.App., 227 S.W.2d 300—Stowers v. Harper, Civ.App., 376 S.W.2d 34, err. ref. no rev. err.

Signature of employee missing

U.S.—Olsten Corp. v. Sommers, D.C.Or., 534 F.Supp. 395.

64. Ind.—Clark Mut. Life Ins. Co. v. Lewis, 217 N.E.2d 853, 139 Ind.App. 230.

W.Va.—Gaston v. Wolfe, 53 S.E.2d 632, 132 W.Va. 791.

Waiver of notice to terminate

R.I.—Scotto v. Zifcak, 425 A.2d 512.

65. U.S.—Willock v. Downtown Airpark, D.C.Okl., 130 F.Supp. 704—Gebhard v. Royce Aluminum Corp., C.A.Mass., 296 F.2d 17.

Del.—Haney v. Laub, Super., 312 A.2d 330.

Mich.—Ledl v. Quik Pik Food Stores, Inc., 349 N.W.2d 529, 123 Mich.App. 583.

N.Y.—Hanlon v. Macfadden Publications, supra, n. 32.

N.C.—C.J.S. cited in Fraver v. North Carolina Farm Bureau Mut. Ins., 318 S.E.2d 340, 344, 69 N.C. App. 733, review den. 322 S.E.2d 555, 312 N.C. 492.

67. D.C.—Hauser v. Watson, supra, n. 62.

Ind.—Nationwide Mut. Ins. Co. v. Pomeroy, 227 N.E.2d 448, 141 Ind.App. 288.

N.Y.—Horowitz v. La France Industries, supra, n. 32—Aarons v. Local 32-E, Bldg. Service Emp. Intern. Union, 82 N.Y.S.2d 262.

68. Ill.—Carter v. Kaskaskia Community Action Agency, 322 N.E.2d 574, 24 Ill.App.3d 1056.

Iowa—C.J.S. cited in Moody v. Bogue, App., 310 N.W.2d 655, 661.

Or.—Mail-Well Envelope Co. v. Saley, 497 P.2d 364, 262 Or. 143.

Protest ineffective, etc.

Tenn.—Balderacchi v. Ruth, 256 S.W.2d 390, 36 Tenn. App. 421.

(2) Other cases.

U.S.—Weiss v. Duro Chrome Corp., C.A.Mo., 207 F.2d 298.

Del.—Wolf v. Globe Liquor Co., 96 A.2d 236, 33 Del.Ch. 487, affd., Sup., 103 A.2d 774, 34 Del.Ch. 312.

69. Duress

U.S.—Mayerson v. Washington Mfg. Co., D.C.Pa., 58 F.R.D. 377.

page 81

71. D.C.—Hauser v. Watson, supra, n. 62.

Ind.—Nationwide Mut. Ins. Co. v. Pomeroy, 227 N.E.2d 448, 141 Ind.App. 288.

Mass.—Smith v. Graham Refrigeration Products Co., 129 N.E.2d 884, 333 Mass. 181.

Mich.—Nelson v. Witte, 79 N.W.2d 906, 347 Mich. 411.

Degree of proof

(2) Other statements.

Idaho—Thomas v. Ballou-Latimer Drug Co., 442 P.2d 747, 92 Idaho 337.

Evidence held insufficient to show modification

Mont.—Laughnan v. Sorenson, 366 P.2d 433, 139 Mont. 531.

Evidence held sufficient to show modification

Idaho—Thomas v. Ballou-Latimer Drug Co., 442 P.2d 747, 92 Idaho 337.

75. Ill.—Parenti v. Wytmar & Co., Inc., 364 N.E.2d 909, 7 Ill.Dec. 618, 49 Ill.App.3d 860.

76. Cal.—Beggerly v. Gbur, 169 Cal.Rptr. 166, 112 C.A.3d 180.

N.Y.—Green v. Doniger, 84 N.Y.S.2d 587, 274 App. Div. 476, app. den. 86 N.Y.S.2d 463, 274 App.Div. 1056, revd. on oth. grds. 90 N.E.2d 56, 300 N.Y. 238—Singer v. Slatex, Inc., 163 N.Y.S.2d 465, 6 Misc.2d 635, revd. on oth. grds., 166 N.Y.S.2d 108.

78. U.S.—Brewer v. National Sur. Corp., C.A.Okl., 169 F.2d 926.

Fla.—Aly Handbags, Inc. v. Rosenfeld, App., 334 So.2d 124.

N.Y.—Schoenfeld v. Modern Silver Linen Supply Co., 107 N.Y.S.2d 861, 279 App.Div. 49.

Pa.—Personal Finance Co. of New Kensington v. Shukis, 31 West.Co. 327.

Merger clause not conclusive

N.Y.—Weistrop v. Necchi Sewing Mach. Sales Corp., 168 N.Y.S.2d 387, 11 Misc.2d 642.

82. U.S.—Roach-Reid Co. v. Hill, D.C.Pa., 76 F.Supp. 749—Vines v. General Outdoor Advertising Co., supra, n. 63—Telex Corp. v. Balch, C.A. Minn., 382 F.2d 211.

Ariz.—Evans v. Valley Radiologists, Ltd., App., 619 P.2d 5, 127 Ariz. 177.

Minn.—Stream v. Continental Machines, Inc., 111 N.W.2d 785, 261 Minn. 289.

83. Del.—Drake v. Hercules Powder Co., supra. n. 31.

N.J.—Crawford v. Trans World Airline, 99 A.2d 673, 27 N.J.Super. 567.

Tex.—Coiffure Continental, Inc. v. Allert, Civ.App., 518 S.W.2d 942, err. ref. no rev. err., motion dism. 521 S.W.2d 665.

Wis.—Meyers v. Wells, 31 N.W.2d 512, 252 Wis. 352.

Temporary modification

N.Y.—Reiburn v. Roseman, 239 N.E.2d 174, 22 N.Y.2d 143, 292 N.Y.S.2d 65.

Void portion

N.Y.—Reiburn v. Roseman, 239 N.E.2d 174, 22 N.Y.2d 143, 292 N.Y.S.2d 65.

page 82

84. U.S.—James v. Shell Am. Petroleum Co. D.C. Ind., 125 F.Supp. 562—Hazelton v. Luckenbach S.S. Co., D.C.Mass., 134 F.Supp. 525.

Colo.—Delta Products, Inc. v. Van Houten, App., 490 P.2d 306.

Ill.—Ditis v. Ahlvin Const. Co., 90 N.E.2d 280, 339 Ill.App. 378, app. transf. 79 N.E.2d 31, 400 Ill. 77, affd. in part and revd. in part on oth. grds., 97 N.E.2d 244, 408 Ill. 416.

N.J.—Walker v. Pennsylvania-Reading Seashore Line, supra, n. 61.

W.Va.—Gaston v. Wolfe, supra, n. 64.

Contract abrogated by mutual rescission

La.—Duncan v. Paragon Resources, Inc., App. 3 Cir., 417 So.2d 850.

Rescission by implication or inference

Md.—Buchholtz v. Bert Goodman Signs, Inc., 199 A.2d 915, 234 Md. 471.

86. U.S.—Gallon v. Lloyd-Thomas Co., C.A.Mo., 264 F.2d 821, 77 A.L.R.2d 417.

Conduct held not to constitute election to rescind

Wash.—Snowflake Laundry Co. v. MacDowell, 328 P.2d 684, 52 Wash.2d 662.

93. Mo.—Sayers v. Bagcraft Corp. of America, Inc., 597 S.W.2d 280.

§ 10. —— Renewal or Continuance

Library References

Master and Servant ⇐9.

Modern Legal Forms Ch. 46, Motion Pictures.

97. U.S.—Patent & Licensing Corp. v. Olsen, C.A. N.Y., 188 F.2d 522—Spencer v. General Elec. Co., C.A.Mo., 243 F.2d 934—In re Naramore, D.C. N.Y., 3 B.R. 709.

Cal.—Pugh v. See's Candies, Inc., 171 Cal.Rptr. 917, 116 C.A.3d 311.

Fla.—Rothman v. Gold Master Corp., App., 287 So.2d 735, app. after remand 323 So.2d 586.

Ga.—Empire Box, Inc. v. Moore, 73 S.E.2d 63, 87 Ga.App. 57.

Ill.—Chambers v. John T. Shayne & Co., 176 N.E.2d 645, 32 Ill.App.2d 16.

Mass.—Steranko v. Inforex, Inc., 362 N.E.2d 222, 5 Mass.App. 253, app. after remand 395 N.E.2d 1303, 8 Mass.App. 523.

Mich.—C.J.S. cited in Smiley v. Grand Blanc Bd. of Educ., 330 N.W.2d 416, 423, 416 Mich. 316.

Minn.—Hartung v. Billmeier, 66 N.W.2d 784, 243 Minn. 148.

N.J.—Art Wire & Stamping Co. v. Johnson, 56 A.2d 11, 141 N.J.Eq. 101, affd. 61 A.2d 240, 142 N.J. Eq., 723—Art Wire & Stamping Co. v. Johnson, 72 A.2d 523, 7 N.J.Super. 173—Savarese v. Pyrene Mfg. Co., supra, n. 32—Bowers v. American Bridge Co., 127 A.2d 580, 43 N.Y.Super. 48, affd. 132 A.2d 28, 24 N.J. 390.

N.Y.—Mott v. Good Roads Machinery Co. of N.Y., 102 N.Y.S.2d 781, 277 App.Div. 677, affd. 100 N.E.2d 186 302 N.Y. 918—Mason v. Lory Dress Co., 104 N.Y.S.2d 906, mod. on oth. grds. 110 N.Y.S.2d 904, 279 App.Div. 863, affd. 111 N.E.2d 649, 305 N.Y. 600—Shenn v. Fair-Tex Mills, Inc., 273 N.Y.S.2d 876, 26 A.D.2d 282.

Pa.—Ben F. Levis, Inc., v. Axe's Department Store, 61 Pa.Dist. & Co. 243, 39 West.Co. 267—C.J.S. cited in Smith v. Shallcross, 69 A.2d 156, 158, 165 Pa.Super. 472.

Page 82

Tex.—Stowers v. Harper, Civ.App., 376 S.W.2d 34, err. ref. no rev. err.—C.J.S. cited in Fenno v. Jacobe, App., 657 S.W.2d 844, 846, err. ref. no rev. err.

Wis.—Meyers v. Wells, supra, n. 83—Borg-Warner Corp., Ingersoll Kalamazoo Division v. Ostertag, 118 N.W.2d 900, 18 Wis.2d 484.

page 83

98. U.S.—Spencer v. General Elec. Co., C.A.Mo., 243 F.2d 934.

N.J.—Art Wire & Stamping Co. v. Johnson, 56 A.2d 11, 141 N.J.Eq. 101, affd. 61 A.2d 240, 142 N.J.Eq. 723.

Tex.—C.J.S. cited in Fenno v. Jacobe, App., 657 S.W.2d 844, 846, err. ref. no rev. err.

99. Implied novation

U.S.—Weir v. Hudson Coal Co., D.C.Pa., 99 F.Supp. 423.

3. N.Y.—C.J.S. cited in Hollister v. Fiedler, 86 A.2d 809, 811, 18 N.J.Super. 171, revd. on oth. grds. 92 A.2d 52, 22 N.J.Super. 439.

5. Ga.—American Standard, Inc. v. Jessee, 258 S.E.2d 240, 150 Ga.App. 663.

In New York

(3) Other matters.

N.Y.—Shenn v. Fair-Tex Mills, Inc., 273 N.Y.S.2d 876, 26 A.D.2d 282.

page 84

8. S.C.—Hudson v. Zenith Engraving Co., Inc., 259 S.E.2d 812, 273 S.C. 766.

10. Ind.—Moore v. Review Bd. of Indiana Employment Sec. Division, App., 406 N.E.2d 325.

Other matters with respect to renewal or continuance of employment have been adjudicated by the courts.[12.5]

12.5. Duty to re-employ man injured

Utah—Wilstead v. Industrial Commission, 407 P.2d 692, 17 Utah 2d 214.

Court cannot compel employer to retain employee

Ill.—Kurle v. Evangelical Hospital Ass'n, 411 N.E.2d 326, 44 Ill.Dec. 357, 89 Ill.App.3d 45.

Severance pay

Neb.—Feola v. Valmont Industries, Inc., 304 N.W.2d 377, 208 Neb. 527.

13. N.H.—Liberty v. Bourque Shoe Co., 208 A.2d 665, 106 N.H. 162.

14. Effect of option clause in renewal contract

Tex.—Dallas Cowboys Football Club, Inc. v. Harris, Civ.App., 348 S.W.2d 37.

Running of time on option

Tex.—Dallas Cowboys Football Club, Inc. v. Harris, Civ.App., 348 S.W.2d 37.

15. Notice

Ariz.—Dumes v. Harold Laz Advertising Co., 409 P.2d 307, 2 Ariz.App. 387.

§ 11. —— Actions for Breach of Contract

Library References

Master and Servant ⚡9.5, 36, 37, 39(1, 2), 40(1–3), 41(1–6).
Corbin on Contracts §§ 958, 1095.

19. U.S.—Lewis v. Quality Coal Corp., C.A.Ind., 243 F.2d 769, cert. den. 78 S.Ct. 149, 355 U.S. 882, 2 L.Ed.2d 113—Engineers Ass'n v. Sperry Gyroscope Co., D.C.N.Y., 148 F.Supp. 521, affd., C.A., 251 F.2d 133, cert. den. 78 S.Ct. 774, 336 U.S. 932, 2 L.Ed.2d 762—Patrick v. Esso Standard Oil Co., D.C.N.J., 156 F.Supp. 336—Henry v. U.S. Trucking Corp., D.C.N.J., 161 F.Supp. 67.

Cal.—Colvig v. RKO General, Inc., 42 Cal.Rptr. 473, 232 C.A.2d 56.

Fla.—Bacon v. Karr, App., 139 So.2d 166, 7 A.L.R.3d 889

Ga.—Mitchell v Southern Dairies, 49 S.E.2d 912, 77 Ga.App. 771.

Ill.—Palmateer v. International Harvester Co., 406 N.E.2d 595, 40 Ill.Dec. 589, 85 Ill.App.3d 50, affd. in part, revd. in part on oth. grds. 421 N.E.2d 876, 52 Ill Dec. 13, 85 Ill.2d 124

Mich —Bercaw v Allied Paper Corp., 141 N.W.2d 64, 377 Mich 499.

Mo —Bomson v. Electra Mfg. Co., App., 402 S.W.2d 7—Wright v. MGK, Inc., App., 565 S W.2d 199.

N.C.—Bennett v. Eastern Rebuilders, Inc., 279 S E.2d 46, 52 N.C.App. 579.

Okl —Scrivner-Stevens Co. v. Bolians, 385 P.2d 911.

Pa.—Savitz v. Gallaccio, 118 A 2d 282, 179 Pa.Super. 589.

Utah—Cornwall v. Willow Creek Country Club, 369 P.2d 928, 13 Utah 2d 160.

Conditions precedent

U.S.—Loundon v. Morrison-Knudsen Co, D.C N.Y., 137 F.Supp. 642.

Alaska—Inman v. Clyde Hall Drilling Co., 369 P.2d 498, 4 A.L.R.3d 430.

Cal.—Wise v. Southern Pac. Co., 35 Cal.Rptr. 652, 223 C.A.2d 50.

Colo.—National Cash Register Co. v. Lightner, 388 P.2d 781, 154 Colo. 98.

Ill.—Payne v. Pullman Co., 141 N.E.2d 83, 13 Ill. App.2d 105.

Held not indispensable party

U.S.—Sandobal v. Armour & Co., C.A.Neb., 429 F.2d 249.

Suit held not barred by laches

U.S.—Sandobal v. Armour & Co., C.A.Neb., 429 F.2d 249.

page 85

22. Ariz.—Young v. Border Broadcasting Co., 255 P.2d 888, 75 Ariz. 298.

N.J.—Roselle v. La Fera Contracting Co., 86 A.2d 449, 18 N.J.Super. 19.

26. Ill.—Claeson v. Hennessey, 156 N.E.2d 234, 20 Ill.App.2d 437.

32. U.S.—O'Leary v. Sterling Extruder Corp., D.C. Wis., 533 F.Supp. 1205.

Ill.—Washington Photo Engraving Co. v. Pike, 175 N.E.2d 629, 31 Ill.App.2d 113.

Mich.—Pietrzykowski v. Safie, 137 N.W.2d 734, 1 Mich.App. 644.

N.Y.—Nadai v. Schwartzman, 187 N.Y.S.2d 195, 17 Misc.2d 974.

page 86

33. Mich.—Goldstein v. Kern, 267 N.W.2d 165, 82 Mich.App. 723.

The parol evidence rule has been held not to prevent application of various defenses.[34.5]

34.5. N.Y.—Weistrop v. Necchi Sewing Mach. Sales Corp., 168 N.Y.S.2d 387, 11 Misc.2d 642.

35. U.S.—Diffenderfer v. Heublein, Inc., C.A.Minn., 412 F.2d 184.

Cal.—Billetter v. Posell, 211 P.2d 621, 94 Cal.App.2d 858.

La.—Parker v. T. Smith & Son, Inc., App., 70 So.2d 893, transf. 64 So.2d 432, 222 La. 1061.

Tenn.—Tennessee Adjustment Service, Inc. v. Miller, 390 S.W.2d 696, 54 Tenn.App. 313.

36. Tenn.—Tennessee Adjustment Service, Inc. v. Miller, 390 S.W.2d 696, 54 Tenn.App. 313.

38. N.Y.—Roth v. Embotelladora Nacional, Inc., 150 N.Y.S 2d 887, 1 A.D.2d 403, resettlement den. 158 N.Y.S.2d 761, 3 A.D. 651, affd. 161 N.Y.S.2d 128, 2 N.Y.2d 864, 141 N.E.2d 617.

Tex.—Martin v. Texas & N.O.R. Co., Civ.App., 267 S.W.2d 581, err. ref. no rev. err.

Wis.—Schiller v. Keuffel & Esser Co., 124 N.W.2d 646, 21 Wis.2d 545.

Evidence held sufficient to take question to jury

U.S.—McAleer v. McNally Pittsburg Mfg Corp., C.A. Pa., 307 F.2d 220.

39. Cal.—Wise v. Southern Pac. Co., 35 Cal.Rptr. 652, 223 C.A.2d 50.

Ga.—R. L. Bass, Inc. v. Brown, 141 S.E.2d 200, 111 Ga.App. 250.

Pa.—Cuffaro v. Planetary Linen Supply, Inc., 78 York 189.

Wis.—Schiller v. Keuffel & Esser Co., 124 N.W.2d 646, 21 Wis.2d 545.

Dismissal

N.Y.—Levy v. J. H. Thorp & Co., 193 N.Y.S.2d 772, 22 Misc.2d 538.

Conditions subsequent

Or.—Bailey v. Allied Properties, Inc., 500 P.2d 700, 262 Or. 584.

40. Cal —Wise v. Southern Pac. Co., 35 Cal.Rptr. 652, 223 C.A.2d 50.

41. Cal.—Oppenheimer v. General Cable Corp., 300 P.2d 151, 143 C.A.2d 293, cert. den. 77 S.Ct. 578, 352 U.S. 1010, 1 L.Ed.2d 555.

43. Tex.—Martin v. Texas & N.O.R. Co., supra, n. 38—Parker v. Rolls, Civ.App., 338 S.W.2d 523.

Demurrer

(1) Sufficiency.

S.C.—Gainey v. Coker's Pedigreed Seed Co., 87 S.E.2d 486, 227 S.C. 200.

(2) Conclusions of law not admitted.

S.C.—Gainey v. Coker's Pedigreed Seed Co., supra.

Pleading held insufficient

U.S.—Gass v. National Container Corp., D.C.Ill., 171 F.Supp. 441, app. dism., C.A., 271 F.2d 231.

Fla.—Hope v. National Airlines, Inc., App., 99 So.2d 244.

Mass.—Query v. Boston & M.R.R., 203 N.E.2d 545, 348 Mass. 294.

Mich.—Cortez v. Ford Motor Co., 84 N.W.2d 523, 349 Mich. 108.

N.Y.—Quinlan v. Consolidated Edison Co. of New York, 237 N.Y.S.2d 745, 38 Misc.2d 342—Carfizzi v. United Transp. Co. of R.I., 247 N.W.2d 162, 20 A.D.2d 707.

Pa.—Cuffaro v. Planetary Linen Supply, Inc., 78 York 63.

Tex.—C & H Transp. Co. v. Wright, Civ.App., 396 S.W.2d 443, err. ref. no rev. err.

Wis.—Markham v. American Motors Corp., 126 N.W.2d 753, 22 Wis.2d 680.

44. U.S.—Powell v. Fuller Brush Co., D.C.N.J., 15 F.R.D. 239—Mandel v. Highway and Local Motor Freight Drivers, Dockmen and Helpers, Local Union No. 707, D.C.N.Y., 246 F.Supp. 805.

Ga.—Fisher v. J. A. Jones Const. Co., 73 S.E.2d 587, 87 Ga.App. 317.

S.C.—Raley v. Darling Shop of Greenville, 59 S.E.2d 148, 216 S.C. 536.

Preliminary objections overruled

Pa.—Matthews v. Pennsylvania Perlite Corp. of York, 38 D. & C.2d 95, 79 York 180.

49. Ind.—Clark Mut. Life Ins. Co. v. Lewis, 217 N.E.2d 853, 139 Ind.App. 230.

page 87

54. U.S.—MacKay v. Loew's, Inc., C.A.Cal., 182 F.2d 170, 18 A.L.R.2d 348, cert. den. 71 S.Ct. 65, 340 U.S. 828, 95 L.Ed. 608, reh. den. 71 S.Ct. 194, 340 U.S. 885, 95 L.Ed. 643—Anson v. Hiram Walker & Sons, Inc., D.C.Ill., 148 F.Supp. 745, affd., C.A., 248 F.2d 380.

Alaska—Inman v. Clyde Hall Drilling Co., 369 P.2d 498, 4 A.L.R.3d 430.

N.C.—Howell v. Commercial Credit Corp., 78 S.E.2d 146, 238 N.C. 442.

Complaints held sufficient

U.S.—Francis v. Hartford Transp. Co., D.C.Mass., 132 F.Supp. 857—Samsing v. S & P Co., C.A.Cal., 325 F.2d 718.

Ga.—R. L. Bass, Inc. v. Brown, 141 S.E.2d 200, 111 Ga.App. 250—Beavers v. Johnson, 145 S.E.2d 776, 112 Ga.App. 677.

Md.—Pullman Co. v. Ray, 94 A.2d 266, 201 Md. 268.

N.Y.—Turner v. Payne, 183 N.Y.S.2d 459, 7 A.D.2d 972—Bess v. Ghana Philatelic Agency, Limited, 199 N.Y.S.2d 90, 22 Misc.2d 175.

Or.—Bailey v. Allied Properties, Inc., 500 P.2d 700, 262 Or. 584.

Pa.—Yarnall v. Rudy, 73 York 193.

Tex.—Hardison v. A. H. Belo Corp., Civ.App., 247 S.W.2d 167.

55. U.S.—Anson v. Hiram Walker & Sons, Inc., D.C. Ill., 148 F.Supp. 745, affd, C.A., 248 F.2d 380.

56. Conn.—Breen v. Larson College, 75 A.2d 39, 137 Conn. 152.

Or.—Bailey v. Allied Properties, Inc., 500 P.2d 700, 262 Or. 584.

Evidence admissible under pleadings

Cal.—Erler v. Five Points Motors, 57 Cal.Rptr. 516, 249 C.A.2d 560.

Ohio—Kenney v. Spicer Furniture Co., App., 131 N.E.2d 265.

Affirmative defense not available unless pleaded

Ill.—Alonso v. Hyland Builders Corp., 197 N.E.2d 609, 46 Ill.App.2d 446.

62. Cal.—Mannion v. Campbell Soup Co., 52 Cal. Rptr. 246, 243 C.A.2d 317—Erler v. Five Points Motors, 57 Cal.Rptr. 516, 249 C.A.2d 560.

Colo.—Nelson v. Centennial Cas. Co., 273 P.2d 121, 130 Colo. 66.

Ind.—Clark Mut. Life Ins. Co. v. Lewis, 217 N.E.2d 853, 139 Ind.App. 230.

Mo.—**C.J.S. quoted in** Johnson v. Thompson, 236 S.W.2d 1, 7, 241 Mo.App. 1008—Bomson v. Electra Mfg. Co., App., 402 S.W.2d 7.

N.Y.—Strader v. Collins, 116 N.Y.S.2d 318, 280 App. Div. 582—Di Mino v. Old Town Corp., 157 N.Y. S.2d 649, 4 Misc.2d 962.

Pa.—Berliner v. Bee Em Mfg. Co., 119 A.2d 65, 383 Pa. 458.

Vt.—**C.J.S. cited in** Lambert v. Equinox House, Inc., 227 A.2d 403, 404, 126 Vt. 229.

Joint plaintiffs

Mich.—Pennington v. Whiting Tubular Products, Inc., 122 N.W.2d 692, 370 Mich. 590.

page 88

63. Ky.—Gambrel v. United Mine Workers of America, 249 S.W.2d 158.

Permanent employment

(2) Other matters.

U.S.—Langendorf United Bakeries, Inc. v. Moore, C.A. Or., 327 F.2d 592.

Acceptance according to letter need not be shown.

Mo.—Fredericks v. Red-E-Gas Co., App., 307 S.W.2d 709.

64. Mich.—Johnson v. Jessop, 51 N.W.2d 915, 332 Mich. 501.

65. N.C.—Freeman v. Hardee's Food Systems, Inc., 165 S.E.2d 39, 3 N.C.App. 435.

Pa.—Maloney v. Madrid Motor Corp., 122 A.2d 694, 385 Pa. 224—Lubrecht v. Laurel Stripping Co., 127 A.2d 687, 387 Pa. 393.

66. Cal.—Downs v. Sherry, 202 P.2d 101, 90 Cal. App.2d 1.

Iowa—LaFontaine v. Developers & Builders, Inc., 156 N.W.2d 651, 261 Iowa 1177.

Kan.—Krehbiel v. Goering, 293 P.2d 255, 179 Kan. 55.

Ky.—Davies v. Mansbach. 338 S.W.2d 210.

Md.—Food Fair Stores, Inc. v. Raynor, 154 A.2d 814, 220 Md. 501.

Mich.—Johnson v. Jessop, supra, n. 64.

Miss.—Frederick Smith Enterprise Co. v. Lucas, 36 So.2d 812, 204 Miss. 43.

Pa.—In re Williams' Estate, 35 Del.Co. 101.

Wis.—Johnson v. Green Bay Packers, 74 N.W.2d 784, 272 Wis. 149.

Duty to obtain other employment

U.S.—Sheridan v. United Broth. of Carpenters and Joiners, Local 626, D.C.Del., 194 F.Supp. 664, revd. on oth. grds., C.A., 306 F.2d 152.

68. U.S.—Alaska Airlines v. Stephenson, C.A.Alaska, 217 F.2d 295, 15 Alaska 272.

Cal.—Crillo v. Curtola, 204 P.2d 941, 91 Cal.App.2d 263—Erler v. Five Points Motors, 57 Cal.Rptr. 516, 249 C.A.2d 560.

Kan.—Krehbiel v. Goering, 293 P.2d 255, 179 Kan. 55.

Minn.—Spurck v. Civil Service Bd., 42 N.W.2d 720, 231 Minn. 183.

N.J.—Roselle v. La Fera Contracting Co., supra, n. 22.

The employer has the duty of going forward, etc.

(2) Other cases.

N.Y.—Crabtree v. Elizabeth Arden Sales Corp., 105 N.Y.S.2d 40, affd. 112 N.Y.S.2d 494, affd. 110 N.E.2d 551, 305 N.Y. 48.

Other inferences or presumptions have been considered.[69.1]

69.1. U.S.—Smithey v. St. Louis Southwestern 210, affd., C.A., 237 F.2d 637.

Wis.—Schiller v. Keuffel & Esser Co., 124 N.W.2d 646, 21 Wis.2d 545.

Loss of business due to manager's mismanagement

Cal.—Braverman v. Rosenthal, 226 P.2d 617, 102 Cal. App.2d 30.

Termination or rescission by inference or implication

Md.—Buchholtz v. Bert Goodman Signs, Inc., 199 A.2d 915, 234 Md. 471.

70. U.S.—Telex Corp. v. Balch, C.A.Minn., 382 F.2d 211.

Cal.—Billetter v. Posell, 211 P.2d 621, 94 Cal.App.2d 858.

Ill.—Schaffer v. Park City Bowl, Inc., 116 N.E.2d 90, 1 Ill.App.2d 84.

Mass.—Growers Outlet v. Stone, 131 N.E.2d 210, 333 Mass. 437.

N.Y.—Slater v. Kane, 92 N.Y.S.2d 640, 275 App.Div. 648, rearg. den. 93 N.Y.S.2d 725, 276 App.Div. 835.

Pa.—Savitz v. Gallaccio, 118 A.2d 282, 179 Pa.Super. 589.

Utah—Chiodo v. General Waterworks Corp., 413 P.2d 891, 17 Utah 2d 425.

Wash.—Sommerfeldt v. Union Painting Co, 356 P.2d 601, 57 Wash.2d 250.

71. Ga.—Guy F. Atkinson Co. v. Fimian, 68 S.E.2d 236, 85 Ga.App. 200, revd. on oth. grds. 70 S.E.2d 762, 209 Ga. 113.

Mo.—Bomson v. Electra Mfg. Co., App., 402 S.W.2d 7.

Tex.—Leyendecker v. Strange, Civ.App., 204 S.W.2d 845, err. ref. no rev. err.

Wash.—Lasser v. Grunbaum Bros. Furniture Co., 281 P.2d 832, 46 Wash.2d 408.

72. U.S.—Telex Corp. v. Balch, C.A.Minn., 382 F.2d 211.

page 89

76. Va.—Norfolk Southern Ry. Co. v. Harris, 59 S.E.2d 110, 190 Va. 966.

Evidence held sufficient

(1) Kan.—Krehbiel v. Goering, 293 P.2d 255, 179 Kan. 55.

Mich.—Johnson v. Jessop, supra, n. 64.

Nev.—Bates v. Cottonwood Cove Corp., 441 P.2d 622, 84 Nev. 388, app. after remand 476 P.2d 171, 86 Nev. 751.

(2) Ill.—Borrowdale v. Sugarman, 123 N.E.2d 854, 4 Ill.App.2d 164.

(3) U.S.—Barton v. Bechtel Corp., D.C.Cal., 253 F.Supp. 288.

Mo.—Bomson v. Electra Mfg. Co., App., 402 S.W.2d 7.

(5) U.S.—Sears v. Pauly, C.A.Mass., 261 F.2d 304.

Cal.—Cripe v. Riley, 199 P.2d 734, 88 Cal.App.2d 864.

D.C.—Cavalier v. Weinstein, Mun.App., 80 A.2d 918

(6) U.S.—Joseph v. Krull Wholesale Drug Co, D.C. Pa., 147 F.Supp. 250, affd., C.A., 245 F.2d 231—McAleer v. McNally Pittsburg Mfg. Co., C.A.Pa., 329 F.2d 273—Barton v. Bechtel Corp., D.C.Cal., 253 F.Supp. 288—Green v. Kaynar Mfg. Co., C.A.Cal., 369 F.2d 375.

Ariz.—Bentson Contracting Co. v. Lewis, 317 P.2d 545, 83 Ariz. 110—Shun v. Hospital Ben. Ass'n, 357 P.2d 603, 89 Ariz. 12.

Cal.—Braverman v. Rosenthal, supra, n. 69.1—Goad v. Rogers, 229 P.2d 791, 103 Cal.App.2d 294—Kane v. Sklar, 265 P.2d 29, 122 C.A.2d 480—Reich v. Watsonville Meat Co., 292 P.2d 85, 138 C.A.2d 482—Glassell v. Prentiss, 346 P.2d 895, 175 C.A.2d 599—De Angeles v. Roos Bros., Inc., 52 Cal.Rptr. 783, 244 C.A.2d 434.

D.C.—Uline Co. v. Schnittker, C.A., 218 F.2d 373, 95 U.S.App.D.C. 39.

Ga.—Ross & Ross Auctioneers, Inc. v. Testa, 101 S.E.2d 767, 96 Ga.App. 821.

Idaho—Thomas v. Ballou-Latimer Drug Co., 442 P.2d 747, 92 Idaho 337.

Ill.—Cummings v. Chicago, A. & E.R. Co., 109 N.E.2d 378, 348 Ill.App. 537.

Ind.—Clark Mut. Life Ins. Co. v. Lewis, 217 N.E.2d 853, 139 Ind.App. 230.

Ky.—Elizabethtown Lincoln-Mercury v. Tecker, 240 S.W.2d 847—Wilson v. Haughton, 266 S.W.2d 115, 41 A.L.R.2d 950.

La.—Carlson v. Ewing, 54 So.2d 414, 219 La. 961—Gottschalk v. Houston Fire & Cas. Ins. Co., 109 So.2d 53, 236 La. 675.

Md.—Pullman Co. v. Ray, supra, n. 54—Food Fair Stores, Inc. v. Raynor, 154 A.2d 814, 220 Md. 501.

Mich.—Leadon v. Detroit Lumber Co., 64 N.W.2d 681, 340 Mich. 74—Pietrzykowski v. Safie, 137 N.W.2d 734, 1 Mich.App. 644.

N.Y.—Sasmor v. V. Vivaudou, Inc., 103 N.Y.S.2d 640, 200 Misc. 1020—Levy v. J. H. Thorp & Co., 193 N.Y.S.2d 772, 22 Misc.2d 538—Solowe v. Kordell Sportswear, Inc., 207 N.Y.S.2d 486, 12 A.D.2d 474, affd. 216 N.Y.S.2d 96, 9 N.Y.2d 852, 175 N.E.2d 462.

Ohio—Hawkins v. Crosby, App., 130 N.E.2d 356—Alfrejd v. Fox Paper Co., App., 147 N.E.2d 865.

Okl.—Scrivner-Stevens Co. v. Boliaris, 385 P.2d 911.

Pa.—Maloney v. Madrid Motor Corp., 122 A.2d 694, 385 Pa. 224—Savitz v. Gallaccio, 118 A.2d 282, 179 Pa.Super. 589—Lubrecht v. Laurel Stripping Co., 127 A.2d 687, 387 Pa. 393.

Tenn.—Akers v. J. B. Sedberry, Inc., 286 S.W.2d 617, 39 Tenn.App. 633.

Tex.—Advance Aluminum Castings Corp. v. Schulkins, Civ.App., 267 S.W.2d 174—Maurice Angly Lumber Co. v. Converse, Civ.App., 341 S.W.2d 510.

Utah—Chiodo v. General Waterworks Corp., 413 P.2d 891, 17 Utah 2d 425.

Wis.—Larson v. Fisher, 48 N.W.2d 502, 259 Wis. 355.

Wyo.—Willis v. Asbury Transp. Co., 386 P.2d 934.

Evidence held insufficient

(1) Cal.—Spivey v. Fabricated Steel Service, Inc., 4 Cal.Rptr. 884, 181 C.A.2d 115.

(4) U.S.—Kaylor v. Crown Zellerbach, Inc., C.A. Cal., 643 F.2d 1362.

(5) U.S.—Jackman v. Military Publications, Inc., C.A.Pa., 350 F.2d 383—Tolchester Lines, Inc. v. Dowd, D.C.N.Y., 253 F.Supp. 643.

Ark.—Miller v. Missouri Pac. Transp. Co., 283 S.W.2d 158, 225 Ark. 475.

Cal.—Jensen v. Western Pioneer Ins. Co., 312 P.2d 285, 151 C.A.2d 570.

D.C.—Cavalier v. Weinstein, supra.

Ill.—Claeson v. Hennessey, 156 N.E.2d 234, 20 Ill. App.2d 437.

Mich.—Johnson v. Jessop, supra, n. 64.

Minn.—Bryngelson v. Minnesota Val. Breeders Ass'n, 114 N.W.2d 748, 262 Minn. 275.

N.Y.—Cusumano v. Espey Mfg. Co., 128 N.Y.S.2d 820, 283 App.Div. 787—Sturiale v. Clifford Answering Service, Inc., 254 N.Y.S.2d 859, 22 A.D.2d 819.

N.C.—Freeman v. Hardee's Food Systems, Inc., 165 S.E.2d 39, 3 N.C.App. 435.

Page 89

Or.—Bonnevier v. Dairy Co-op. Ass'n, 361 P.2d 262, 227 Or. 123—Kruse v. Coos Head Timber Co., 432 P.2d 1009, 248 Or. 294.

77. Utah—Chiodo v. General Waterworks Corp, 413 P.2d 891, 17 Utah 2d 425.

The right of a plaintiff to recover damages for breach of a contract of employment is dependent on the contractual concepts of the state whose law is applicable.[77.5]

77.5. Contract for permanent employment

U.S.—Bixby v. Wilson & Co., D.C.Iowa, 196 F.Supp. 889.

78. D.C.—Stern Co. of Washington, D C. v. Munniks, Mun.App., 101 A.2d 846.

Ga.—Sandt v. Mason, 67 S.E.2d 767, 208 Ga. 541.

Minn.—Bryngelson v. Minnesota Val. Breeders Ass'n, 114 N.W.2d 748, 262 Minn. 275.

Mo.—Dingman v. Elizabeth Arden Sales Corp., App., 284 S.W.2d 16.

N.H.—McLaughlin v. Union-Leader Corp., 127 A.2d 269, 100 N.H. 367, cert. den. 77 S.Ct. 663, 353 U.S. 909, 1 L.Ed.2d 663, reh. den. 77 S.Ct. 810, 353 U.S 943, 1 L.Ed.2d 764.

Tex.—Dixie Glass Co. v. Pollak, Civ.App., 341 S.W.2d 530, 91 A.L.R.2d 662, err. ref. no rev. err., 347 S.W.2d 596, 162 Tex. 440—Dallas County Water Control and Imp. Dist. No. 7 v. Ingram, Civ.App., 395 S.W.2d 834, err. ref. no rev. err., app. after remand 425 S.W.2d 366.

79. U.S.—Stern Co. of Washington D.C. v. Munniks, supra, n. 78.

Cal.—Erler v. Five Points Motors, 57 Cal.Rptr. 516, 249 C.A.2d 560.

Ga.—Sandt v. Mason, supra, n. 78.

Ill.—Keel v. Illinois Terminal R. Co., 104 N.E.2d 659, 346 Ill.App. 169.

Kan.—Krehbiel v. Goering, 293 P.2d 255, 179 Kan. 55.

La.—Carlson v. Ewing, supra, n. 76.

Mass.—Growers Outlet v. Stone, 131 N.E.2d 210, 333 Mass. 437.

N.J.—Roselle v. La Fera Contracting Co., supra, n. 22.

Tenn.—Akers v. J. B. Sedberry, Inc., 286 S.W.2d 617, 39 Tenn.App. 633.

Tex.—Duncan Coffee Co. v. Clement, Civ.App., 246 S.W.2d 509—Dixie Glass Co. v. Pollak, Civ.App., 341 S.W.2d 530, 91 A.L.R.2d 662, err. ref. no rev. err., 347 S.W.2d 596, 162 Tex. 440.

Wis.—Dehnart v. Waukesha Brewing Co., 124 N.W.2d 664, 21 Wis.2d 583.

Damages discounted to present worth

Tex.—Mayhew v. Vanway, Civ.App., 371 S.W.2d 90.

Back pay as element of damages

U.S.—Walker v. Southern Ry. Co., D.C.N.C., 237 F.Supp. 278, vac. 354 F.2d 950, revd. on oth. grds., 87 S.Ct. 365, 385 U.S. 196, 17 L.Ed.2d 294, reh. den. 87 S.Ct. 699, 385 U.S. 1020, 17 L.Ed.2d 559, am. on oth. grds. and remd. 87 S.Ct. 1300, 386 U.S. 988, 18 L.Ed.2d 332.

80. Cal.—Erler v. Five Points Motors, 57 Cal.Rptr. 516, 249 C.A.2d 560.

Ill.—Keel v. Illinois Terminal R. Co., supra, n. 79—Claeson v. Hennessey, 156 N.E.2d 234, 20 Ill. App.2d 437.

Ky.—Elizabethtown Lincoln-Mercury v. Tucker, supra, n. 76.

Mo.—C.J.S. cited in Phipps v. School Dist. of Kansas City, App., 645 S.W.2d 91, 105.

Mont.—Eversole v. LaCombe, 231 P.2d 945, 125 Mont. 87.

Neb.—Sullivan v. David City Bank, 148 N.W.2d 844, 181 Neb. 395.

N.J.—Roselle v. La Fera Contracting Co., supra, n. 22.

N.Y.—Crabtree v. Elizabeth Arden Sales Corp., supra, n. 68—Goldman v. City Specialty Stores, 137 N.Y. S.2d 693, 285 App.Div. 880—McNeill v. Hacker, 21 N.Y.S.2d 432—Cornell v. T.V. Development Corp., 268 N.Y.S.2d 29, 17 N.Y.2d 69, 215 N.E.2d 349, on remand 270 N.Y.S.2d 45, 50 Misc.2d 422.

Tex.—Lone Star Cotton Mills v. Thomas, Civ.App., 227 S.W.2d 300—Dixie Glass Co. v. Pollak, Civ App., 341 S.W.2d 530, 91 A.L.R.2d 662, err ref. no rev. err., 347 S.W 2d 596, 162 Tex. 440.

Wis.—Dehnart v. Waukesha Brewing Co., 124 N.W.2d 664, 21 Wis.2d 583.

page 90

81. Ill.—Claeson v. Hennessey, 156 N.E.2d 234, 20 Ill.App.2d 437.

83. U.S.—Witte v. Brasington, D.C.S.C., 125 F.Supp. 784.

N.H.—McLaughlin v. Union-Leader Corp., 127 A 2d 269, 100 N.H. 367, cert. den. 77 S.Ct. 663, 353 U.S. 909, 1 L.Ed.2d 663, reh. den. 77 S.Ct. 810, 353 U.S. 943, 1 L.Ed.2d 764.

84. Anticipatory breach of contract terminable by employer

N.Y.—Songer v. Mack Trucks, Inc., 256 N.Y.S.2d 313, 23 A.D.2d 544.

§ 12. Evidence of Employment

Library References

Master and Servant ⟹6.

88. Ala.—Foster Wheeler Corp. v. Zell, 33 So.2d 255, 250 Ala. 146.

Mich.—Hyslop v. Klein, 270 N.W.2d 540, 85 Mich. App. 149.

Miss.—Runnels v. Burdine, 106 So.2d 49, 234 Miss. 272.

N.D.—Smith v. Knutson, 36 N.W.2d 323, 76 N.D. 375.

Tex.—Hudiburgh v. Palvic, Civ.App., 274 S.W.2d 94, err. ref. no rev. err.—Horn v. Builders Supply Co. of Longview, Civ.App., 401 S.W.2d 143, err. ref. no rev. err.—Missouri Pac. R. Co. v. Sparks, Civ. App., 424 S.W.2d 12, err. ref. no rev. err.

89. Iowa—C.J.S. cited in Parks v. Firgard, 163 N.W.2d 385, 390.

90. Pa.—Duttera v. Pitzer, 1 Adams L.J. 37.

91. Cal.—Pierson v. Holly Sugar Corp., 237 P.2d 28, 107 C.A.2d 298.

Ill.—S & F Corp. v. Bilandic, 378 N.E.2d 1137, 19 Ill.Dec. 262, 62 Ill.App.3d 193.

Iowa—Burr v. Apex Concrete Co., 242 N.W.2d 272.

Mich.—Hyslop v. Klein, 270 N.W.2d 540, 85 Mich. App. 149.

Pa.—Keller v. Blandon Sportsmen's Ass'n, 43 Berks 166.

93. Ill.—Margaret's Restaurant & Lounge, Inc. v. Daley, 377 N.E.2d 155, 18 Ill.Dec. 2, 60 Ill.App.3d 521.

Tex.—Ford Motor Credit Co. v. Draper, Civ.App., 401 S.W.2d 848.

94. Del.—E. I. Du Pont De Nemours & Co. v. J. D. Griffith, Inc., Super., 122 A.2d 423, 11 Terry 19, affd. 130 A.2d 783, 11 Terry 348.

Tex.—Ford Motor Credit Co. v. Draper, Civ.App., 401 S.W.2d 848.

95. La.—Joseph Rathborne Land & Lumber Co. v. Delta Materials Corp., App., 120 So.2d 668.

page 91

96. Evidence held inadmissible

U.S.—Taylor v. Local No. 7, Intern. Union of Journeymen Horseshoers of U.S. and Canada (AFL-CIO), C.A.Md., 353 F.2d 593, cert. den. 86 S.Ct. 1859, 384 U.S. 969, 16 L.Ed.2d 681.

97. U.S.—Gullett v. Best Shell Homes, Inc. of Tenn., C.A.Miss., 312 F.2d 58—Canadian Universal Ins. Co. v. Sims, D.C.N.C., 235 F.Supp. 476.

Del.—Stewart In-Fra-Red Commissary of Wilmington, Inc. v. Conner, Ch., 205 A.2d 3, 42 Del.Ch. 118.

Ill.—Paley v. Darlene Juniors, 89 N.E.2d 194, 339 Ill.App. 167.

Mo.—State ex rel. Cummings v. Witthaus, 219 S.W.2d 383, 358 Mo. 1088, 8 A.L.R.2d 1124.

N.M.—Shaver v. Bell, 397 P.2d 723, 74 N.M. 700.

Okl.—Highway Ins. Underwriters v. Nichols, 255 P.2d 263, 208 Okl. 244.

Either formal contract or conduct of parties

Okl.—Major Leasing Service Co. v. Cross, 394 P.2d 487.

99. Ill.—Paley v. Darlene Juniors, supra, n. 97.

3. N.M.—Cherry v. Stockton, 406 P 2d 358, 75 N.M. 488.

8. Minn.—Boland v. Morrill, 132 N.W.2d 711, 270 Minn. 86.

10. U.S.—O'Leary v. James & Wunder lich, D.C. Mont., 192 F.Supp. 462, affd., C.A., 288 F.2d 462.

Neb.—Frisch v. Svoboda, 157 N.W.2d 774, 182 Neb. 825.

W.Va.—Atkinson v. Jennings, 139 S.E.2d 119, 149 W.Va. 101.

Evidence held sufficient

(1) U.S.—Toner v. Sobelman, D.C.Pa., 86 F.Supp. 369—Cedillo v. Standard Oil Co. of Tex., C.A.Tex., 291 F.2d 246, cert. den. 82 S.Ct. 397, 368 U.S. 955, 7 L.Ed.2d 387—Canadian Universal Ins. Co. v. Sims, D.C.N.C., 235 F.Supp. 476.

Ariz.—Young v. Border Broadcasting Co., 255 P.2d 888, 75 Ariz. 298—Jackson v. Clintsman, 372 P.2d 204, 91 Ariz. 314.

Cal.—Columbia Pictures Corp. v. De Toth, 197 P.2d 580, 87 Cal.App.2d 620—Case v. Kadota Fig Ass'n of Producers, 220 P.2d 912, 35 Cal.2d 596—Dorsk v. Spivack, 236 P.2d 840, 107 C.A.2d 206—Nikolaus v. Howe, 265 P.2d 99, 122 C.A.2d 422—People v. Keefer, 304 P.2d 243, 146 C.A.2d 726—Blase v. Pedlow, 6 Cal.Rptr. 635, 183 C.A.2d 367—Eye v. Kafer, Inc., 20 Cal.Rptr. 841, 202 C.A.2d 449—Guntert & Zimmerman, Sales Division, Inc. v. Thermoid Co., 31 Cal.Rptr. 99, 216 C.A.2d 771—Housewright v. Pacific Far East Line, Inc., 40 Cal.Rptr. 208, 229 C.A.2d 259.

Colo.—Hunter v. Hayes, App., 533 P.2d 952.

Conn.—Johnson v. Robertson Bleachery & Dye Works, 74 A.2d 196, 136 Conn. 698.

D.C.—Smallwood v. Ray's Automatic Transmission Service, Inc., App., 328 A.2d 87.

Fla.—Mead v. Pan Am. Airways, 44 So.2d 283—Brenner v. Barco Chemicals Division, Inc., App., 209 So.2d 277.

Hawaii—Michely v. Honolulu, Ltd., 567 P.2d 824, 59 Haw. 257.

Ill.—Novack v. Casual-Craft, Inc., 88 N.E.2d 335, 338 Ill.App. 659—Chambers v. John T. Shayne & Co., 176 N.E.2d 645, 32 Ill.App.2d 16—Abt v. Department of Revenue, 215 N.E.2d 243, 34 Ill.2d 324.

Ind.—Palmer v. Stockberger, 193 N.E.2d 384, 135 Ind. App. 263.

Iowa—Turner v. Zip Motors, 65 N.W.2d 427, 245 Iowa 1091.

Kan.—Jones v. Dodge City, 402 P.2d 108, 194 Kan. 777.

La.—Shaw v. Walker, App., 43 So.2d 700—Steedley v. Winbarg, App., 44 So.2d 193—Roberson v. Smith's Pharmacy, App., 130 So.2d 475.

Miss.—Frederick Smith Enterprise Co. v. Lucas, 36 So.2d 812, 204 Miss. 43.

Mo.—Smith v. Geo. H. Weyer, Inc., App., 224 S.W.2d 543—Bollman v. Kark Rendering Plant, 418 S.W.2d 39.

Mont.—Gilbert v. Bostona Mines Co., 195 P.2d 378, 121 Mont. 397.

N.J.—Foster v. Till, 71 A.2d 146, 6 N.J.Super. 259.

N.Y.—Griffin v. Corporation of Church of Assumption of Mechanicville, 218 N.Y.S.2d 141, 14 A.D.2d 620.

Okl.—Magnolia Petroleum Co. v. Angelly, 306 P.2d 309.

R.I.—Schiano v. McCarthy, Freight System, 53 A.2d 527, 72 R.I. 455.

Tex.—McMahan v. Herring, Civ.App., 348 S.W.2d 679, err. dism.—Sullivan v. Brininstool, Civ.App., 358 S.W.2d 898, err. ref. no rev. err.—Riverbend Country Club v. Patterson, Civ.App., 399 S.W.2d 382, err. ref. no rev. err.—Lunsford v. Sage, Inc. of Dallas, Civ.App., 438 S.W.2d 615, err. ref. no rev. err.—Texas Real Estate & Ins. Co. v. Tyler, Civ. App., 464 S.W.2d 723.

Wash.—Ostroff v. Laundry & Dye Works Drivers' Local No. 566, 225 P.2d 419, 37 Wash.2d 595—Anderson v. Petridge, 274 P.2d 352, 45 Wash.2d 299.

W.Va.—Green v. Henderson, 67 S.E.2d 554, 136 W.Va. 329—Levine v. Peoples Broadcasting Corp., 140 S.E.2d 438, 149 W.Va. 256.

Wis.—Schoenfeldt v. Babcock, 133 N.W.2d 262, 26 Wis.2d 569.

(2) U.S.—Butte Copper & Zinc Co. v. Poague, C.C. A.Mont., 164 F.2d 201, cert. den. 68 S.Ct. 661, 333 U.S. 843, 92 L.Ed. 1127—Owens v. Curtiss Candy Co., C.A.Mo., 169 F.2d 179, cert. den. 69 S.Ct. 168, 335 U.S. 871, 93 L.Ed. 416—U.S. v. Standard Oil Co. of Cal., D.C.Cal., 78 F.Supp. 850, affd. 69 S.Ct. 1051, 337 U.S. 293, 93 L.Ed. 1371, foll. 72 S.Ct. 665, 343 U.S. 922, 96 L.Ed. 1334, reh. den. 72 S.Ct. 1049, 343 U.S. 958, 96 L.Ed. 1358—Local 36 of Intern. Fishermen & Allied Workers of America v. U.S., C.A.Cal., 177 F.2d 320, cert. den. 70 S.Ct. 801, 339 U.S. 947, 94 L Ed. 1361—Koehler v. Ellison, C.A.Ill., 226 F.2d 682—Minnesota Amusement Co. v. Larkin, C.A.S.D., 299 F.2d 142—Western Cas. & Sur. Co. v. Teel, C.A.Okl., 391 F.2d 764, 34 A.L.R.3d 1387.

Cal.—Mead v. Smith, 234 P.2d 705, 106 C.A.2d 1—Corrigan v. Cox, 62 Cal.Rptr. 733, 254 C.A.2d 919.

La.—Neal v. Daniels, 47 So.2d 44, 217 La. 679—Standard Tile & Marble Co. v. Gray, App., 85 So.2d 356.

Mich.—Fullwood v. Catsman, 44 N.W.2d 898, 329 Mich. 120.

N.J.—Sarner v. Sarner, 162 A.2d 117, 62 N.J.Super. 41.

Okl.—Brown v. Saylor, 228 P.2d 187, 204 Okl. 154.

Tex.—Callihan Interest, Inc. v. Halepeska, Civ.App., 376 S.W.2d 932—Home Indem. Co. v. Martin, Civ.App., 399 S.W.2d 941, err. ref. no rev. err.

(3) U.S.—Dixon v. U.S., C.A.Ark., 296 F.2d 556—U.S. v. Olympia Provision & Baking Co., D.C.N.Y., 282 F.Supp. 819, motion den. 290 F.Supp. 407, affd. 89 S.Ct. 708, 393 U.S. 480, 21 L.Ed.2d 688, reh. den. 89 S.Ct. 989, 393 U.S. 1124, 22 L.Ed.2d 132.

Cal.—Thompson v. Robinson-Roberts Co., 56 P.2d 599, 13 Cal.App.2d 166—Sparks v. L. D. Folsom Co., 31 Cal.Rptr. 640, 217 C.A.2d 279.

La.—Kamm v. Morgan, App., 157 So.2d 118—Trapani v. Jefferson Parish, App., 180 So.2d 850.

Or.—Loe v. Lenhardt, 362 P.2d 312, 227 Or. 242.

Wash.—Hollingbery v. Dunn, 411 P.2d 431, 68 Wash.2d 75.

(4) Iowa—LaFontaine v. Developers & Builders, Inc., 156 N.W.2d 651, 261 Iowa 1177.

S.C.—Mixson v. Rossiter, 74 S.E.2d 46, 223 S.C. 47.

(5) Ill.—Paley v. Darlene Juniors, 89 N.E.2d 194, 339 Ill.App. 167.

La.—Williams v. Berger Foods, Co., App., 34 So.2d 628.

(9) U.S.—I.C.C. v. Moore, D.C.Fla., 236 F.Supp. 168—Emmons v. Ingebretson, D.C.Iowa, 279 F.Supp. 558.

Ala.—James A. Head & Co. v. Rolling, 90 So.2d 828, 265 Ala. 328.

Ark.—Magness v. Madden, 207 S.W.2d 714, 212 Ark. 646.

Cal.—Atherley v. MacDonald, Young & Nelson, Inc., 298 P.2d 700, 142 C.A.2d 575.

Ga.—Cahoon v. Kubatzky, 226 S.E.2d 467, 138 Ga App. 393.

Ill.—Crawford v. Peabody Coal Co., 181 N.E.2d 369, 34 Ill.App.2d 388.

Iowa—Prokop v. Frank's Plastering Co., 133 N.W.2d 878, 257 Iowa 766.

Kan.—Muse v. Baker, 533 P.2d 1234, 216 Kan. 788.

La.—Griffin v. Cambridge Const. Co., App., 236 So.2d 539, application not considered 238 So.2d 748, 256 La. 766.

Okl.—Armstrong v. Guy H. James Const. Co., 402 P.2d 275.

Tex.—Newspapers, Inc. v. Love, 380 S.W.2d 582—Sanchez v. Leggett, Civ.App., 463 S.W.2d 517, Sup., 468 S.W.2d 63, app. after remand 489 S.W.2d 383.

Wis.—Borg-Warner Corp., Ingersoll Kalamazoo Division v. Ostertag, 118 N.W.2d 900, 18 Wis.2d 484.

Evidence held insufficient

(1) U.S.—Traders & General Ins. Co. v. Edwards, C.A.Okl., 216 F.2d 441, cert. den. 75 S.Ct. 441, 348 U S. 953, 99 L.Ed. 744—Stainbrook v. Berry, C.A.Ill., 227 F.2d 536—Mooney v. Stainless, Inc., C.A.Tenn., 338 F.2d 127, cert. den. 85 S.Ct. 1561, 381 U.S. 925, 14 L.Ed 2d 684.

Ala.—Foster Wheeler Corp. v. Zell, 33 So.2d 255, 250 Ala. 146.

Ark.—Miller v. Missouri Pac. Transp. Co., 283 S.W.2d 158, 225 Ark. 475.

Cal.—Mann v. Nutrilite, Inc., 289 P.2d 282, 136 C.A.2d 729.

Del.—Hammond & Taylor, Inc. v. Duffy Tingue Co., 161 A.2d 238, 39 Del.Ch. 174.

D.C.—Dmitrieff v. Campbell, App., 234 A.2d 808

Iowa—Bengford v. Carlem Corp., 156 N.W.2d 855.

Ky.—Myers v. Walker, 322 S.W.2d 109.

La.—Cragg v. Hankins, App., 41 So.2d 739—Kohlear v Singer, 51 So.2d 307, 218 La. 879.

Miss.—Runnels v. Burdine, 106 So.2d 49, 234 Miss. 272.

Mo.—Brown v Childers, App., 254 S.W.2d 275—Brophy v. Clisaris, App., 368 S.W.2d 553.

N.Y.—In re Jamestown Lodge No. 1681 Loyal Order of Moose, 137 N.Y.S.2d 608, 285 App.Div. 919.

Ohio—Cruikshank v. Frank Sherman Co., App., 153 N.E.2d 525.

Okl.—Coe v. Esau, 377 P.2d 815.

Pa.—Ragano v. Socony Vacuum Oil Co., 101 A.2d 686, 376 Pa. 271.

Tex.—Sharp v. J. R. Watkins Co., Civ.App., 250 S.W.2d 739.

W.Va.—Atkinson v. Jennings, 139 S.E.2d 119, 149 W.Va. 101—McCoy v. Cohen, 140 S.E.2d 427, 149 W.Va. 197.

(3) Md.—Chesapeake & Potomac Tel. Co. of Baltimore City v. Murray, 84 A.2d 870, 198 Md. 526, 28 A.L.R.2d 920.

(8) Del.—E. I. Du Pont De Nemours & Co. v. J. D. Griffith, Inc., Super., 122 A.2d 423, 11 Terry 19, affd. 130 A.2d 783, 11 Terry 348.

D.C.—Palmer v. Garves, Mun.App., 123 A.2d 611.

Iowa—Merrick v. Delavan Engineering Co., 50 N.W.2d 586, 243 Iowa 39.

Md.—Chesapeake & Potomac Tel. Co. of Baltimore City v. Murray, 84 A.2d 870, 198 Md. 526, 28 A.L.R.2d 920.

Pa.—Markson Bros. v. Redick, 66 A.2d 218, 164 Pa.Super. 499.

Wash.—Hammerbeck v. Hubbard, 254 P.2d 479, 42 Wash.2d 204.

Same rules as those relating to agency

Cal.—People v. Frangadakis, 7 Cal.Rptr. 776, 184 C.A.2d 540.

Evidence outside contract providing for independent contract relationship held required to show contract necessary for master and servant relation.

Tex.—Newspapers, Inc. v. Love, 380 S.W.2d 582.

Circumstantial evidence

Mo.—Smoot v. Marks, App., 564 S.W.2d 231.

§ 13. Questions of Law and Fact

Library References

Master and Servant ⚷43.

page 92

12. U.S.—Coleman v. Graybar Elec. Co., C.A.Tex., 195 F.2d 374.

Ala.—Alabama Credit Corp. v. Higgins, 36 So.2d 227, 251 Ala. 17.

Cal.—Nemanick v. Christensen, 197 P.2d 785, 87 C.A.2d 844—Rodoni v. Harbor Engineers, 12 Cal. Rptr. 924, 191 C.A.2d 560.

Hawaii—McIntosh v. Murphy, 469 P.2d 177, 52 Haw. 29, 112, 54 A.L.R.3d 707.

Ill.—Donovan v. Raschke, 246 N.E.2d 110, 106 Ill. App.2d 366.

Ind.—**C.J.S. quoted in** Bradford v. Chism, 186 N.E.2d 432, 435 ,134 Ind.App. 501.

Iowa—**C.J.S. cited in** Pribyl v. Standard Electric Co., 67 N.W.2d 438, 441, 246 Iowa 333.

Ky.—Davies v. Mansbach, 338 S.W.2d 210—**C.J.S. cited in** Coleman v. Baker, 382 S.W.2d 843, 846—**C.J.S. cited in** Roberts v. Davis, 422 S.W.2d 890, 895.

Mich.—Hall v City of Detroit, 177 N.W.2d 161, 383 Mich. 571.

Minn—Wild v Rarig, 234 N.W.2d 775, 302 Minn. 419, app. dism. cert. den. 96 S.Ct. 1093, 424 U.S. 902, 47 L.Ed.2d 307, reh. den. 96 S.Ct. 1689, 425 U.S. 945, 48 L Ed.2d 190.

Mo.—Craig v. Thompson, 244 S.W.2d 37.

N.J.—Shiddell v. Electro Rust-Proofing Corp., N.J., 112 A.2d 290, 34 N.J.Super. 278.

N.C.—Goeckel v. Stokely, 73 S.E.2d 618, 236 N.C. 604.

Okl—Ross v. Stricker, 275 P.2d 991—Continental Oil Co. v. Elias, 307 P.2d 849.

Pa.—Exner v. Gangewere, 152 A.2d 458, 397 Pa. 58—Lazarus v. Goodman, 195 A.2d 90, 412 Pa. 442.

Tex.—Hardison v. A. H. Belo Corp., Civ.App., 247 S.W.2d 167.

W.Va.—**C.J.S. cited in** Spencer v. Travelers Ins. Co., 133 S.E.2d 735, 740, 148 W.Va. 111.

Particular questions held for jury

(2) Wash.—Lasser v. Grunbaum Bros. Furniture Co., 281 P.2d 832, 46 Wash.2d 408.

(7) U.S.—Stevens v. G. L. Rugo & Sons, Inc., C.A. Mass., 209 F.2d 135—Carver v. Tanner, C.A.Iowa, 252 F.2d 26—Langendorf United Bakeries, Inc. v. Moore, C.A.Or., 327 F.2d 592—Green v. Kaynar Mfg. Co., C.A.Cal., 369 F.2d 375.

D.C.—Wright v. Disabled Am. Veterans, C.A., 271 F.2d 827, 106 U.S.App.D.C. 244.

Idaho—Thomas v. Ballou-Latimer Drug Co., 442 P.2d 747, 92 Idaho 337.

Mass.—Morse v Fall River Line Pier, Inc., 189 N.E.2d 512, 345 Mass. 681.

Minn.—Bryngelson v. Minnesota Val. Breeders Ass'n, 114 N.W.2d 748, 262 Minn. 275.

Miss.—Collins v Ellzey Gin & Feed Co., 125 So.2d 76, 239 Miss. 662.

Mo.—Fredericks v. Red-E-Gas Co., App., 307 S.W.2d 709.

N.Y.—Jones v. Crawford, 162 N.Y.S.2d 41, 3 A.D.2d 479, rearg. and app. den. 164 N.Y.S.2d 988, 4 A.D.2d 826.

N.C.—Hagan v. Jenkins, 67 S.E.2d 380, 234 N.C. 425.

Pa.—Savitz v. Gallaccio, 118 A.2d 282, 179 Pa.Super. 589—Stack v Tizer, 203 A.2d 403, 204 Pa.Super. 203.

Tex.—Dixie Glass Co. v. Pollak, Civ.App., 341 S.W.2d 530, 91 A.L.R.2d 662, err. ref. no rev. err., 347 S.W.2d 596, 162 Tex. 440.

Arbitration

N.Y.—Exercycle Corp. v. Maratta, 214 N.Y.S.2d 353, 9 N.Y.2d 329, 174 N.E.2d 463.

page 93

13. U.S.—Goldinger v. Boron Oil Co., D.C.Pa., 375 F.Supp. 400—**C.J.S. cited in** Kraft v. Phillis, 457 F.Supp. 1002, 1003.

Ala.—Zell v. Foster Wheeler Corp., 54 So.2d 553, 256 Ala. 367.

Conn.—Fisher v. Jackson, 118 A.2d 316, 142 Conn. 734

Ind.—**C.J.S. quoted in** Bradford v. Chism, 186 N.E.2d 432, 435, 134 Ind.App. 501.

Mo.—Craig v Thompson, supra, n. 12.

Okl.—Continental Oil Co. v. Elias, 307 P.2d 849.

S.D.—Steen v. Potts, 61 N.W.2d 825, 75 S.D. 184.

Vt.—Lambert v. Equinox House, Inc., 227 A.2d 403, 126 Vt. 229.

W.Va.—**C.J.S. cited in** Spencer v. Travelers Ins. Co., 133 S.E.2d 735, 740, 148 W.Va. 111.

Evidence held insufficient for jury

Or.—Benson v. Stenger, 337 P.2d 338 216 Or. 318.

14. Cal.—Bonetti v. Double Play Tavern, 274 P.2d 751, 126 C.A.2d Supp. 848.

Ind.—Musgrave v. Madonna, 341 N.E.2d 789, 168 Ind. App. 145.

Page 93

Iowa—C.J.S. quoted in Hassebroch v. Weaver Const. Co., 67 N.W.2d 549, 552, 246 Iowa 622.

N.Y.—Hawley v. Catherwood, 294 N.Y.S.2d 203, 30 A.D.2d 1002.

N.C.—Little v. Poole, 182 S.E.2d 206, 11 N.C.App., 597.

Members of partnership as employees

La.—Little v. Caterpillar Tractor Co., App., 169 So.2d 654.

15. U.S.—Conasauga River Lumber Co. v. Wade, C.A.Tenn., 221 F.2d 312, cert. den. 76 S.Ct. 324, 350 U.S. 949, 100 L.Ed. 827.

Iowa—C.J.S. quoted in Hassebroch v. Weaver Const. Co., 67 N.W.2d 549, 552, 246 Iowa 622.

N.C.—Little v. Poole, 182 S.E.2d 206, 11 N.C App. 597.

Evidence insufficient to establish employer–employee relation as matter of law

Minn.—Ulrich v. Minneapolis Boxing & Wrestling Club, Inc., 129 N.W.2d 288, 268 Minn. 328, 14 A.L.R.3d 982.

16. N.M.—Latta v. Harvey, 352 P.2d 649, 67 N.M. 72.

17. Okl.—Cooper v. Steele, 274 P.2d 551.

§§ 14–23.

Statutes relating to labor relations are discussed in Labor Relations. Thus, statutes relating to offenses and prosecutions and hours of service are discussed in Labor Relations § 1007 et seq.

page 94

23. Mich.—Jones v. Bouza, 152 N.W.2d 393, 7 Mich. App. 561, affd. 160 N.W.2d 881, 381 Mich. 299

27. Iowa—Bewley v. Villisca, Iowa Community School Dist., 299 N.W.2d 904.

La.—Thaxton v. Roberson, App., 224 So.2d 183.

No constitutional violation

Me.—Shapiro Bros. Shoe Co., Inc. v. Lewiston–Auburn Shoeworkers Protective Ass'n, 320 A.2d 247.

§§ 24–27.

Statutes relating to a safe place to work, such as statutes relating to machinery, appliances, and safe-guards or statutes relating to employment agencies and coercion of employees, are discussed in Labor Relations §§ 9, 11, 12, 19.

§§ 28(1)–28(144).

Rules relating to collective bargaining, labor contracts, unfair labor practices, etc., are discussed in Labor Relations § 148 et seq.

§ 28(36). Duration and Termination of Authority of Representative

page 187

19. Kan.—C.J.S. cited in Liberal-NEA v. Board of Ed. of Unified Sch. D. No. 480, 505 P.2d 651, 658, 211 Kan. 219.

21. Kan.—C.J.S. cited in Liberal-NEA v. Board of Ed. of Unified Sch. D. No. 480, 505 P.2d 651, 658, 211 Kan. 219.

§ 29. In General

Library References

Master and Servant ⇐8.

page 411

Tenn.—C.J.S. black letter summary cited in Little v. Federal Container Corp., App., 452 S.W.2d 875, 878.

81. Not terminable at will

Ill.—Stein v. Isse Koch & Co., Chicago, 112 N.E.2d 491, 350 Ill.App. 171.

82. U.S.—Alpern v. Hurwitz, C.A.N.Y., 644 F.2d 943.

Iowa—LaFontaine v. Developers & Builders, Inc., 156 N.W.2d 651, 261 Iowa 1177.

La.—Ingram v. Kaiser Aluminum & Chemical Corp. (Gramercy Works), App., 323 So.2d 921.

N.Y.—Yazujian v. J. Rich Steers, Inc., 89 N.Y.S.2d 551, 195 Misc. 694—Whatham v. Precision Boring Co., 220 N.Y.S.2d 134.

83. U.S.—Brekken v. Reader's Digest Special Products, Inc., C.A.Ill., 353 F.2d 505.

85. W.Va.—State ex rel. Lippert v. Sims, 103 S.E.2d 533, 143 W.Va. 542.

88. Ariz.—Phelps Dodge Corp. v. Brown, 540 P.2d 651, 112 Ariz. 179.

Kan.—C.J.S. cited in Goodyear Tire & Rub. Co. v. Employment Sec. Bd. of Rev., 469 P.2d 263, 268, 205 Kan. 279.

Minn.—Anderson v. Twin City Rapid Transit Co., 84 N.W.2d 593, 250 Minn. 167.

Mo.—C.J.S. quoted in Irwin v. Globe-Democrat Pub. Co., 368 S.W.2d 452, 455, cert. den. 84 S.Ct. 198, 375 U.S. 908, 11 L.Ed.2d 147.

Other definition

Mo.—Irwin v. Globe-Democrat Pub. Co., 368 S.W.2d 452, cert. den. 84 S.Ct. 198, 375 U.S. 908, 11 L.Ed.2d 147.

Furlough defined

Mo.—Bevins v. Harris, 380 S.W.2d 345.

§ 30. Expiration of Term

89. U.S.—C.J.S. cited in Northrop v. Kirby, D.C. Ala., 454 F.Supp. 698, 701.

Ga.—Nikas v. Hindley, 108 S.E.2d 98, 99 Ga.App. 194.

Ill.—Katz v. Diabetes Ass'n of Greater Chicago, 333 N.E.2d 293, 31 Ill.App.3d 240.

Iowa—Kitchen v. Stockman Nat. Life Ins. Co., 192 N.W.2d 796.

N.Y.—Bradley v. New York University, 124 N.Y.S.2d 238, affd. 127 N.Y.S.2d 845, 283 App.Div. 671, rearg. and app. den. 128 N.Y.S.2d 553, 283 App. Div. 724, affd. 120 N.E.2d 828, 307 N.Y. 620, rearg. den. 121 N.E.2d 624, 307 N.Y. 802.

Wash.—Mollett v. City of Tacoma, 337 P.2d 48, 53 Wash.2d 729.

90. U.S.—Stanton v. Larsh, C.A.Fla., 239 F.2d 104.

Iowa—Orkin Exterminating Co. (Arwell Division) v. Burnett, 146 N.W.2d 320.

N.C.—Moye v. Eure, 204 S.E.2d 221, 21 N.C.App. 261, cert. den. 205 S.E.2d 723, 285 N.C. 590.

page 412

91. La.—Carter v. Lanzetta, App., 185 So.2d 331, revd. on oth. grds. 193 So.2d 259, 249 La. 1098.

95. Tenn.—McDade v. McDade, 325 S.W.2d 575, 45 Tenn.App. 487, app. after remand 447 S.W.2d 22, 60 Tenn.App. 335, app. after remand 447 S.W.2d 29, 60 Tenn.App. 351.

97. Miss.—Magnolia Miss Dress Co. v. Zorn, 36 So.2d 795, 204 Miss. 1.

99. Cal.—Mannion v. Campbell Soup Co., 52 Cal. Rptr. 246, 243 C.A.2d 317.

1. Cal.—Mannion v. Campbell Soup Co., 52 Cal.Rptr. 246, 243 C.A.2d 317.

§ 31. Indefinite Term

Library References

Master and Servant ⇐20.

4. U.S.—N.L.R.B. v. Hoisting and Portable Engineers, Local No. 4 and Its Branches of Intern. Union of Operating Engineers, C.A., 456 F.2d 242—Hanna v. R.C.A. Service Co., D.C.Pa., 336 F.Supp. 62—Alonso v. Kaiser Aluminum & Chemical Corp., D.C.W.Va., 345 F.Supp. 1356—Bishop v. Wood, D.C.N.C., 377 F.Supp. 501, affd., C.A., 498 F.2d 1341, affd. 96 S.Ct. 2074, 426 U.S. 341, 48 L.Ed.2d 684—C.J.S. quoted at length in Witte v. Brasington, D.C.S.C., 125 F.Supp. 784, 787—Kavanagh v. KLM Royal Dutch Airlines, D.C.Ill., 566 F.Supp. 242—C.J.S. cited in Stancil v. Mergenthaler Linotype Co., D.C.Hawaii, 589 F.Supp. 78, 83.

Ala.—Summers v. Ralston Purina Co., 69 So.2d 858, 260 Ala. 166—C.J.S. cited in Hinrichs v. Tranquilaire Hospital, 352 So.2d 1130, 1131—C.J.S. cited in Johnson v. Gary, 443 So.2d 924, 926.

Ariz.—Daniel v. Magma Copper Co, App., 620 P.2d 699, 127 Ariz. 320.

Ark.—Miller v. Missouri Pac. Transp. Co., 283 S.W.2d 158, 225 Ark. 475.

Cal.—Aronowicz v. Nalley's, Inc., 106 Cal.Rptr. 424, 30 C.A.3d 27.

Colo.—Lampe v. Presbyterian Medical Center, 590 P.2d 513, 41 Colo.App. 465.

Conn.—Somers v. Cooley Chevrolet Co., 153 A.2d 426, 146 Conn. 627.

D.C.—Hauser v. Watson, Mun.App., 60 A.2d 698—Lyons v. Capital Transit Co., Mun.App. 62 A.2d 312—Pfeffer v. Ernst, Mun.App., 82 A.2d 763.

Fla.—Critchlow v. WFC Mortg. Co., Inc., App., 315 So.2d 483.

Ga.—Elliott v. Delta Air Lines, Inc., 156 S.E.2d 656, 116 Ga.App. 36—Ely v. Stratoflex, Inc., 208 S.E.2d 583, 132 Ga.App. 569—Shannon v. Huntley's Jiffy Stores, Inc., 329 S.E.2d 208, 174 Ga.App. 125.

Idaho—Jackson v. Minidoka Irrigation Dist., 563 P.2d 54, 98 Idaho 330.

Ill.—Atwood v. Curtiss Candy Co., 161 N.E.2d 355, 22 Ill.App.2d 369.

Ind.—Moore v. Review Bd. of Indiana Employment Sec Division, App., 406 N.E.2d 325.

Iowa—Drake v. Block, 74 N.W.2d 577, 247 Iowa 517.

Kan.—Lorson v. Falcon Coach, Inc., 522 P.2d 449, 214 Kan. 670—C.J.S. cited in Allegri v. Providence-St. Margaret Health Center, 684 P.2d 1031, 1035, 9 Kan.App. 659.

Ky.—Gambrel v. United Mine Workers of America, 249 S.W.2d 158—Wilson v. Haughton, 266 S.W.2d 115, 41 A.L.R.2d 950—Production Oil Co. v. Johnson, 313 S.W.2d 411.

La.—Hodges v. Decoteau, App., 314 So.2d 500, writ den., Sup., 320 So.2d 551.

Md.—Chesapeake & Potomac Tel. Co. of Baltimore City v. Murray, 84 A.2d 870, 198 Md. 526, 28 A.L.R.2d 920.

Mass.—Askinas v. Westinghouse Elec. Corp., 111 N.E.2d 740, 330 Mass. 103.

Minn.—Jimmerson v. Troy Seed Co., 53 N.W.2d 273—Cederstrand v. Lutheran Brotherhood, 117 N.W.2d 213, 263 Minn. 520—Lundeen v. Cozy Cab Mfg. Co., 179 N.W.2d 73, 288 Minn. 98.

Mo.—Forsyth v. Board of Trustees of Park College, 212 S.W.2d 82, 240 Mo.App. 622—Smith v. Geo. H. Weyer, Inc., App., 224 S.W.2d 543—Williams v. Kansas City Public Service Co., 294 S.W.2d 36—Christy v. Petrus, 295 S.W.2d 122, 365 Mo. 1187—C.J.S. quoted at length in Morsinhoff v. DeLuxe Laundry & Dry Cleaning Co., 344 S.W.2d 639, 642—Maddock v. Lewis, 386 S.W.2d 406, cert. den. 85 S.Ct. 1569, 381 U.S. 929, 14 L.Ed.2d 688.

Mont.—Myhre v. Myhre, 554 P.2d 276, 170 Mont. 410.

Neb.—Feola v. Valmont Industries, Inc., 304 N.W.2d 377, 208 Neb. 527.

N.H.—Monge v. Beebe Rubber Co., 316 A.2d 549, 114 N.H. 130, 62 A.L.R.3d 264.

N.J.—Schlenk v. Lehigh Valley R. Co., 62 A.2d 380, 1 N.J. 131.

N.M.—Bottijliso v. Hutchison Fruit Co., App., 635 P.2d 992, 96 N.M. 789.

N.Y.—Reale v. International Business Machines Corp., 311 N.Y.S.2d 767, 34 A.D.2d 936, affd. 271 N.E.2d 565, 28 N.Y.2d 912, 322 N.Y.S.2d 735.

N.C.—Long v. Gilliam, 94 S.E.2d 585, 244 N.C. 548—Wilkinson v. Erwin Mills, Inc., 108 S.E.2d 673, 250 N.C. 370—Wilson v. McClenny, 136 S.E.2d 569,

262 N.C. 121, after remand, 152 S.E.2d 529, 269 N.C. 399—Still v. Lance, 182 S.E.2d 403, 279 N.C. 254.

Ohio—Coey v. Burwell Nurseries, 206 N.E.2d 577, 2 Ohio App.2d 102

Okl.—Sooner Broadcasting Co. v. Grotkop, 280 P.2d 457.

Or.—Densen v. Edmunds, 537 P.2d 77, 272 Or. 345.

Pa.—Goodfriend v. Diamond Chemical Co., 175 A.2d 537, 196 Pa.Super. 319.

R.I.—Lamoureux v. Burrillville Racing Ass'n, 161 A.2d 213, 91 R.I. 94.

Tenn.—McCall v. Oldenburg, 382 S.W.2d 537, 53 Tenn. App. 300—Garrison v. Lannom Mfg. Co, 402 S.W.2d 462, 55 Tenn.App. 419—Little v. Federal Container Corp., 452 S.W.2d 875, 61 Tenn.App. 26.

Tex.—T.E. Moor & Co. v. Hardcastle, Civ.App., 421 S.W.2d 126, err. ref. no rev. err—Sylvania Elec. Products, Inc. v. Curry, Civ.App., 479 S.W.2d 777, err. ref. no rev. err.—NHA, Inc. v. Jones, Civ. App., 500 S.W.2d 940, err. ref. no rev. err.

Utah—Crane Co. v. Dahle, 576 P.2d 870.

Vt.—Jones v. Keogh, 409 A.2d 581, 137 Vt. 562.

Va.—Plaskitt v. Black Diamond Trailer Co., 164 S.E.2d 645, 209 Va. 460.

Wash.—Springer v. Rosauer, 641 P.2d 1216, 31 Wash. App. 418.

W.Va.—**C.J.S. cited in** Bell v. South Penn Natural Gas Co., 62 S.E.2d 285, 288, 135 W.Va. 25—Resener v. Watts, Ritter & Co., 80 S.E. 839, 73 W.Va. 342, 51 L.R.A.,N.S., 629—Wright v. Standard Ultramarine & Color Co., 90 S.E.2d 459, 141 W.Va. 368—**C.J.S. cited in** Shanholtz v. Monongahela Power Co., 270 S.E.2d 178, 181, 165 W.Va. 305.

Wis.—Kovachik v. American Auto. Ass'n, 92 N.W.2d 254, 5 Wis.2d 188.

Wyo.—Lukens v. Goit, 430 P.2d 607.

Employments within rule

(3) Other employments.

U.S.—Adler v. American Standard Corp., D.C.Md., 538 F.Supp. 572.

Mich.—Drummey v. Henry, 320 N.W.2d 309, 115 Mich.App. 107, app. den., 330 N.W.2d 691, 417 Mich. 895.

N.J.—Jorgensen v. Pennsylvania R. Co., 138 A.2d 24, 25 N.J. 541, 72 A.L.R.2d 1415.

Tex.—Texas Emp. Ins. Ass'n v. Hale, Civ.App., 237 S.W.2d 769, revd. on oth. grds. 239 S.W.2d 608, 150 Tex. 215.

Person hired as "permanent replacements" for striking workers

Ga.—Jacobs v. Georgia-Pacific Corp., 323 S.E.2d 238, 172 Ga.App. 319.

Intention of parties

U.S.—Geib v. Alan Wood Steel Co., D.C.Pa., 419 F.Supp. 1205.

Kan.—Johnson v. National Beef Packing Co., 551 P.2d 779, 220 Kan. 52.

Pa.—Lubrecht v. Laurel Stripping Co., 127 A.2d 687, 387 Pa. 393.

Effect of collective bargaining contract

U.S.—Tinnon v. Missouri Pac. R. Co., C.A.Ark., 282 F.2d 773.

N.H.—Cloutier v. Great Atlantic & Pac. Tea Co., 436 A.2d 1140, 121 N.H. 915.

Animosity of employer immaterial

Cal.—Lesperance v. North Am. Aviation, Inc., 31 Cal. Rptr. 873, 217 C.A.2d 336.

Employee acquiring stock in employer

Cal.—Becket v. Welton Becket and Associates, 114 Cal.Rptr. 531, 39 C.A.3d 815.

Share option agreement

U.S.—Motorola, Inc. v. Fairchild Camera & Instrument Corp., D.C.Ariz., 366 F.Supp. 1173.

Oral contract where no provision as to term

Ala.—Bates v. Jim Walter Resources, Inc., 418 So.2d 903.

Exceptions to doctrine

U.S.—Scholtes v. Signal Delivery Service, Inc, 548 F.Supp. 487.

page 413

5. U.S.—Bakery and Confectionery Workers' Intern. Union Local No. 492, v. National Biscuit Co., D.C.Pa., 78 F.Supp. 517, affd., C.A., 177 F.2d 684.

Mo.—ACF Industries, Inc. v. Industrial Commission, 320 S.W.2d 484—Carr v. Montgomery Ward & Co., 363 S.W.2d 571.

6. U.S.—Tow v. Miners Memorial Hospital Ass'n, Inc., D.C.W.Va., 199 F.Supp 926, affd., C.A., 305 F.2d 73—E.W. Bliss Co. v. Struthers-Dunn, Inc., C.A.Iowa, 408 F.2d 1108—Martinez v. Behring's Bearings Service, Inc., C.A.La., 501 F.2d 104—Percival v. General Motors Corp., C.A.Mo., 539 F.2d 1126, applying Michigan law—Merkel v. Scovill, Inc., D.C.Ohio, 570 F.Supp. 133.

Ala.—**C.J.S. cited in** Hinrichs v. Tranquilaire Hospital, 352 So.2d 1130, 1131—**C.J.S. cited in** Johnson v. Gary, 443 So.2d 924, 926.

Ariz.—Larsen v. Motor Supply Co., App., 573 P.2d 907, 117 Ariz. 507.

Ark.—**C.J.S. cited in** Griffin v. Erickson, 642 S.W.2d 308, 310, 277 Ark. 433.

Cal.—Roberts v. Western Pac. R. Co., 298 P.2d 120, 142 C.A.2d 317, cert. den. 77 S.Ct. 237, 352 U.S. 937, 1 L.Ed.2d 168—Mallard v. Boring, 6 Cal.Rptr. 171, 182 C.A.2d 390—Mann v. Jacuzzi, 36 Cal. Rptr. 880, 224 C.A.2d 549—Wilson v. Red Bluff Daily News, 46 Cal.Rptr. 591, 237 C.A.2d 87.

D.C.—Washington v. Clark, 84 F.Supp. 964, affd. 182 F.2d 375, 86 U.S.App.D.C. 343, affd. 71 S.Ct. 795, 341 U.S. 923, 95 L.Ed. 1356.

Fla.—Russell & Axon v. Handshoe, App., 176 So.2d 909.

Ga.—Clark v. Prentice-Hall, Inc., 233 S.E.2d 496, 141 Ga.App. 419.

Ill.—Urnest v. Forged Tooth Gear Co., 243 N.E.2d 596, 102 Ill.App.2d 178.

Ind.—Martin v. Platt, 386 N.E.2d 1026, 179 Ind.App. 688.

Iowa—Harper v. Cedar Rapids Television Co., Inc., 244 N.W.2d 782.

La.—Baker v. Union Tank·Car Co., App., 140 So.2d 397—Garner v. Louisiana State Bd. of Ed., App., 277 So.2d 492, writ den., Sup., 279 So.2d 696.

Mass.—Fortune v. National Cash Register Co., 364 N.E.2d 1251, 373 Mass. 96.

Mich.—Carry v. Consumers Power Co., 235 N.W.2d 765, 64 Mich.App. 292.

Miss.—Kelly v. Mississippi Valley Gas Co., 397 So.2d 874, 32 A.L.R. 4th 1214.

Mo.—Quinn v. Buchanan, 298 S.W.2d 413—Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co., App., 344 S.W.2d 639—Smith v. Arthur C. Baue Funeral Home, 370 S.W.2d 249—Maxey v. General Elec. Co., App., 382 S.W.2d 67—Howe v. St. Louis Union Trust Co., 392 S.W.2d 625.

N.J.—Piechowski v. Matarese, 148 A.2d 872, 54 N.J.Super. 333—Hindle v. Morrison, 223 A.2d 193, 92 N.J.Super. 75.

N.Y.—Harris v. Home Indem. Co., 185 N.Y.S.2d 287, 16 Misc.2d 702—Weiss v. Opportunities for Cortland County, Inc., 337 N.Y.S.2d 409, 40 A.D.2d 45—Williams v. Byron, 359 N.Y.S.2d 140, 78 Misc.2d 873.

N.C.—Howell v. Commercial Credit Corp., 78 S.E.2d 146, 238 N.C. 442.

N.D.—Sand v. Queen City Packing Co., 108 N.W.2d 448.

Tex.—Texas Emp. Ins. Ass'n v. Hale, Civ.App., 237 S.W.2d 769, revd. on oth. grds. 239 S.W.2d 608, 150 Tex. 215—Scruggs v. George A. Hormel & Co., Civ.App., 464 S.W.2d 730, err. ref. no rev. err.

Wash.—Krystad v. Lau, 400 P.2d 72, 65 Wash.2d 827—Webster v. Schauble, 400 P.2d 292, 65 Wash.2d 849.

W.Va.—**C.J.S. cited in** Wright v. Standard Ultramarine & Color Co., 90 S.E.S.E.2d 459, 468, 141 W.Va. 368.

Wis.—Smith v. Beloit Corp., 162 N.W.2d 585, 40 Wis.2d 550—Goff v. Massachusetts Protective Ass'n Inc., of Worcester, Mass., 176 N.W.2d 576, 46 Wis.2d 712.

Right to discharge as limited by statute, public policy or other considerations see infra § 42.

Cause of action for wrongful discharge of employee at will see infra § 48.

7. U.S.—Hanson v. Chicago, B. & Q.R. Co., C.A. Wis., 282 F.2d 758, cert. den. 81 S.Ct. 813, 365 U.S. 850, 5 L.Ed.2d 814—Union News Co. v. Hildreth, C.A.Mich., 295 F.2d 658.

Ala.—**C.J.S. cited in** Johnson v. Gary, 443 So.2d 924, 926.

Ill.—Long v. Illinois Cent. R. Co., App., 176 N.E.2d 812, 32 Ill.App.2d 103, cert. den 82 S.Ct. 369 U.S. 858, 8 L.Ed.2d 17, reh. den. 82 S.Ct. 1248, 370 U.S 906, 8 L.Ed.2d 402.

Kan.—Mildfelt v. Lair, 561 P.2d 805, 221 Kan. 557.

Mich.—Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, 408 Mich 579.

N.J.—English v. College of Medicine and Dentistry of New Jersey, 372 A.2d 295, 73 N.J. 20—**C.J.S. cited in** Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 520, 84 N.J. 58, 12 A.L.R. 4th 520.

N.M.—Jones v. International Union of Operating Engineers, 383 P.2d 571, 72 N.M. 322.

N.Y.—Wernham v. Moore, 432 N.Y.S.2d 711, 77 A.D.2d 262.

Pa.—Lubrecht v Laurel Stripping Co., 42 Luz.L.Reg. 203.

Tex.—Lone Star Cotton Mills v. Thomas, Civ.App., 227 S.W.2d 300.

Termination not limited by contract

U.S.—Entis v. Atlantic Wire & Cable Corp., C.A.N.Y., 335 F.2d 759.

Mass.—Maddaloni v. Western Mass. Bus Lines, Inc., 438 N.E.2d 351, 386 Mass. 877.

Mo.—Eib v. Federal Reserve Bank of Kansas City, App., 633 S.W.2d 432.

Reasonable period

U.S.—Mayerson v. Washington Mfg. Co., D.C.Pa., 58 F.R.D. 377.

Provision construed

Fla.—Treasure Lake of Georgia, Inc. v. Harold Miller Marketeer, Inc., App., 358 So.2d 111.

Absent clear and prominent disclaimer, an implied promise in an employment manual that an employee will be fired only for cause was enforceable against an employer even where employment is for an indefinite term and would otherwise be terminable at will.[7.5]

7.5 N.J.—Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 99 N.J. 284, mod. on oth. grds. 499 A.2d 515, 101 N.J. 10.

8. U.S.—Pearson v. Youngstown Sheet & Tube Co., C.A.Ind., 332 F.2d 439, cert. den. 85 S.Ct. 262, 379 U.S. 914, 13 L.Ed.2d 185.

Ala.—Summers v. Ralston Purina Co., 69 So.2d 858, 260 Ala. 166.

Ga.—Snyder v. Savannah Union Station Co., 70 S.E.2d 382, 85 Ga.App. 851—Darlington Corp. v. Evans, 76 S.E.2d 72, 88 Ga.App. 84.

Ky.—Gambrel v. United Mine Workers of America, supra, n. 4.

N.Y.—Winslow v. Roberts Numbering Mach. Co., 183 N.Y.S.2d 817, 17 Misc.2d 18, motion den. 200 N.Y.S.2d 320, 10 A.D.2d 608, app. dism. conditionally 200 N.Y.S.2d 320, 10 A.D.2d 608.

Ohio—Henkel v. Educational Research Council of America, 344 N.E.2d 118, 45 Ohio St.2d 249, 74 O.O.2d 415.

Okl.—Singh v. Cities Service Oil Co., 554 P.2d 1367, 93 A.L.R.3d 654.

Pa.—Polk v. Steel Workers Organizing Committee, 62 A.2d 850, 360 Pa. 631.

Tex.—Dallas Hotel Co. v. Lackey, supra, n. 4.

Page 413

Wash.—Davidson v. Mackall-Paine Veneer Co., 271 P. 878, 149 Wash. 685—Rohda v. Boen, 276 P.2d 586, 45 Wash.2d 553.

W.Va.—C.J.S. cited in Wright v. Standard Ultramarine & Color Co., 90 S.E.2d 459, 468, 141 W.Va. 368.

page 414

9. Fla.—C.J.S. cited in Sher v. Shower Door Co. of America, Limited, App., 197 So.2d 333, 334.

Pa.—Westlake v. Perfection Plastic Engineering Co., 79 Pa.Dist. & Co. 126.

10. N.C.—Tuttle v. Kernersville Lumber Co., 139 S.E.2d 249, 263 N.C. 216.

11. U.S.—Davis v. Guy F. Atkinson Co., C.A.Cal., 222 F.2d 824.

Fla.—DeMarco v. Publix Super Markets, Inc., App., 360 So.2d 134, affd., Sup., 384 So.2d 1253.

Mich.—Schwartz v. Michigan Sugar Co., 308 N.W.2d 459, 106 Mich.App. 471.

12. Ala.—Martin v. Tapley, 360 So.2d 708.

Ga.—McClure v. Leasco Computer, Inc., 216 S.E.2d 689, 134 Ga.App. 871.

Ky.—Louisville Cycle & Supply Co., Inc. v. Baach, 535 S.W.2d 230.

Mass.—Siles v. Travenol Laboratories, Inc., 433 N.E.2d 103, 13 Mass.App. 354, review den. 440 N.E.2d 1176, 386 Mass. 1103.

Pa.—Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Division, 422 A.2d 611, 281 Pa.Super. 560.

Tex.—Krueger, Hutchinson and Overton Clinic v. Lewis, Civ.App., 266 S.W.2d 885, affd., 269 S.W.2d 798, 153 Tex. 363.

An exception exists under the rule, stated in Customs and Usages & 19 i, that customs as to the term of hiring have been recognized.[12.1]

12.1. Wash.—Rohda v. Boen, supra, n. 8.

13. U.S.—Maple Island Farm, Inc. v. Bitterling, C.A. Minn., 209 F.2d 867, cert. den. 75 S.Ct. 123 348 U.S. 882, 99 L.Ed. 694, reh. den. 75 S.Ct. 290, 348 U.S. 921, 99 L.Ed. 722—Meadows v. Radio Industries, C.A.Ill., 222 F.2d 347—Hablas v. Armour & Co., C.A.N.D., 270 F.2d 71, stating Illinois law—Hanson v. Chicago, B. & Q.R. Co., C.A.Wis., 282 F.2d 758, cert. den. 81 S.Ct. 813, 365 U.S. 850, 5 L.Ed.2d 814.

Cal.—Shannon v. Civil Service Emp. Ins. Union, 337 P.2d 136, 169 C.A.2d 79—Gressley v. Williams, 14 Cal.Rptr. 496, 193 C.A.2d 636—Drzewiecki v. H & R Block, Inc., 101 Cal.Rptr. 169, 24 C.A.3d 695.

Conn.—Carter v. Bartek, 114 A.2d 923, 142 Conn. 448.

Fla.—Russell & Axon v. Handshoe, App., 176 So.2d 909.

Ga.—Alterman Foods, Inc. v. Ingram, 282 S.E.2d 186, 158 Ga.App. 715.

Iowa—Hanson v. Central Show Printing Co., 130 N.W.2d 654, 256 Iowa 1221—Stauter v. Walnut Grove Products, 188 N.W.2d 305.

Kan.—Johnson v. National Beef Packing Co., 551 P.2d 779, 220 Kan. 52.

Mich.—Salisbury v. McLouth Steel Corp., 287 N.W.2d 195, 93 Mich.App. 248.

Minn.—Degen v. Investors Diversified Services, Inc., 110 N.W.2d 863, 260 Minn. 424.

Neb.—Mau v. Omaha Nat. Bank, 299 N.W.2d 147, 207 Neb. 308.

N.J.—Shiddell v. Electro Rust-Proofing Corp. (N.J.), 112 A.2d 290, 34 N.J.Super. 278.

S.C.—Hudson v. Zenith Engraving Co., Inc., 259 S.E.2d 812, 273 S.C. 766.

N.C.—Howell v. Commercial Credit Corp., supra, n. 6—C.J.S. quoted at length in Tuttle v. Kernersville Lumber Co., 139 S.E.2d 249, 251, 263 N.C. 216.

S.C.—Orsini v. Trojan Steel Corp., 64 S.E.2d 878, 219 S.C. 272—Gainey v. Coker's Pedigreed Seed Co., 87 S.E.2d 486, 227 S.C. 200.

Wis.—Smith v. Beloit Corp., 162 N.W.2d 585, 40 Wis.2d 550.

14. U.S.—Fibreboard Products, Inc. v. Townsend, C.A.Cal., 202 F.2d 180.

Ariz.—Horizon Corp. v. Weinberg, 531 P.2d 1153, 23 Ariz.App. 215.

Conn.—Fisher v. Jackson, 118 A.2d 316, 142 Conn. 734.

N.M.—Garza v. United Child Care, Inc., App., 536 P.2d 1086, 88 N.M. 30.

15. U.S.—An-Ti Chai v. Michigan Technological University, D.C.Mich., 493 F.Supp. 1137.

Ga.—American Standard, Inc. v. Jessee, 258 S.E.2d 240, 150 Ga.App. 663.

La.—Griffith v. Sollay Foundation Drilling, Inc., App., 373 So.2d 979.

N.M.—Gonzales v. United Southwest Nat. Bank of Santa Fe, 602 P.2d 619, 93 N.M. 522.

Mich.—Milligan v. Union Corp., 274 N.W.2d 10, 87 Mich.App. 179.

18. Iowa—Hanson v. Central Show Printing Co., 130 N.W.2d 654, 256 Iowa 1221.

19. U.S.—Sartin v. City of Columbus Utilities Commission, D.C.Miss., 421 F.Supp. 393, affd., C.A., 573 F.2d 84—C.J.S. cited in Stancil v. Mergenthaler Linotype Co., D.C.Hawaii, 589 F.Supp. 78, 83.

S.C.—Orsini v. Trojan Steel Corp., supra, n. 13.

W.Va.—C.J.S. cited in Wright v. Standard Ultramarine & Color Co., 90 S.E.2d 459, 467, 141 W.Va. 368.

20. U.S.—Fibreboard Products, Inc. v. Townsend, supra, n. 14.

Fla.—Chatelier v. Robertson, App., 118 So.2d 241.

Iowa—Stauter v. Walnut Grove Products, 188 N.W.2d 305.

Minn.—Bussard v. College of St. Thomas, Inc., 200 N.W.2d 155, 294 Minn. 215.

Mo.—Lopp v. Peerless Serum Co., 382 S.W.2d 620.

Pa.—Lubrecht v. Laurel Stripping Co., supra, n. 7.

Wash.—Roberts v. Atlantic Richfield Co., 568 P.2d 764, 88 Wash.2d 887.

Additional consideration not shown

(4) Other cases.

Mich.—Milligan v. Union Corp., 274 N.W.2d 10, 87 Mich.App. 179.

N.C.—Burkhimer v. Gealy, 250 S.E.2d 678, 39 N.C. App. 450, cert. den. 254 S.E.2d 918, 297 N.C. 298.

S.C.—Orsini v. Trojan Steel Corp., supra, n. 13.

page 415

22. U.S.—Pred v. Board of Public Instruction of Dade County, Fla., C.A.Fla., 415 F.2d 851.

Kan.—Sullivan v. Sproule, 269 P.2d 1015, 176 Kan. 274.

Contract construed

Wis.—Klug v. Flambeau Plastics Corp. (Flambeau Prods. Corp.), 214 N.W.2d 281, 62 Wis.2d 141.

24. Cal.—Rabago-Alvarez v. Dart Industries, Inc., 127 Cal.Rptr. 222, 55 C.A.3d 91.

25. U.S.—McGrath v. Zenith Radio Corp., C.A.Ill., 651 F.2d 458, cert. den. 102 S.Ct. 136, 454 U.S. 835, 70 L.Ed.2d 114.

27. Cal.—Babago-Alvarez v. Dart Industries, Inc., 127 Cal.Rptr. 222, 55 C.A.3d 91.

Mass.—Maddaloni v. Western Mass. Bus Lines, Inc., 422 N.E.2d 1379, 12 Mass.App. 236, app. decided 438 N.E.2d 351, 386 Mass. 877.

Good faith required

U.S.—Zimmer v. Wells Management Corp., D.C.N.Y., 348 F.Supp. 540.

28. U.S.—Shaitelman v. Phoenix Mut. Life Ins. Co., D.C.N.Y., 517 F.Supp. 21.

D.C.—Taylor v. Greenway Restaurant, Inc., Mun.App., 173 A.2d 211.

Mont.—Gates v. Life of Montana Ins. Co., 638 P.2d 1063, 196 Mont. 178, app. after remand 668 P.2d 213.

N.Y.—Grozek v. Ragu Foods, Inc., 406 N.Y.S.2d 213, 63 A.D.2d 858.

Tex.—Texas Emp. Ass'n v. Hale, Civ.App., 237 S.W.2d 769, revd. on oth. grds. 239 S.W.2d 608, 150 Tex. 215.

Legal question

Mich.—Boyd v. Chrysler Corp., 190 N.W.2d 272, 33 Mich.App. 650.

29. U.S.—Griffith v. Electrolux Corp., D.C.Va., 454 F.Supp. 29.

30. U.S.—Entis v. Atlantic Wire & Cable Corp., C.A. N.Y., 335 F.2d 759.

N.J.—Shiddell v. Electro Rust-Proofing Corp. (N.J.), supra, n. 13.

31. **Severance pay in lieu of notice**

N.Y.—Bravin v. Fashion Week, Inc., 342 N.Y.S.2d 971, 73 Misc.2d 974, mod. on oth. grds. 348 N.Y.S.2d 681, 75 Misc.2d 753.

§ 32. Termination under Provisions of Contract

Library References

Master and Servant ⟹21.
Modern Legal Forms Ch. 46, Motion Pictures.

32. U.S.—Beeler v. Chicago, R.I. & R. Ry. Co., supra, n. 4—Olsen v. Arabian Am. Oil Co., C.A.N.Y., 194 F.2d 477, foll. 194 F.2d 479, cert. den. 73 S.Ct. 12, two cases, 344 U.S. 817, 97 L.Ed. 636—Spencer v. General Elec. Co., C.A.Mo., 243 F.2d 934.

Cal.—Bishop v. Kelley, 224 P.2d 814, 100 Cal.App.2d 775.

Fla.—Division No. 1344 of Amalgamated Ass'n of St. Elec. Ry., and Motor Coach Emp. of America v. Tampa Elec. Co., 47 So.2d 13.

Ga.—Snyder v. Savannah Union Station Co., supra, n. 8.

Ill.—Sabelli v. Curtis 1000, Inc., 335 N.E.2d 538, 31 Ill.App.3d 1030.

Ind.—Standard Oil Co. v. Review Bd. of Ind. Employment Sec. Division, 88 N.E.2d 567, 119 Ind.App. 576—C.J.S. cited in Rochester Capital Leasing Corp. v. McCracken, 295 N.E.2d 375, 378, 156 Ind.App. 128.

Ky.—Jackson v. International Union of Operating Engineers, 211 S.W.2d 138, 307 Ky. 485.

Mass.—Dickson v. Riverside Iron Works, Inc., App., 372 N.E.2d 1302, 6 Mass.App. 53.

Mich.—Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, 408 Mich. 579.

N.J.—Walker v. Pennsylvania-Reading Seashore Lines, 61 A.2d 453, 142 N.J.Eq. 588.

N.Y.—Reiss v. Arabian Am. Oil Co., 109 N.Y.S.2d 625, 279 App.Div. 805, motion den. 107 N.E.2d 167, 304 N.Y. 644, affd. 110 N.E.2d 888, 304 N.Y. 953.

N.C.—Rhodes v. Board of Educ. of Person County School Administrative Unit, 293 S.E.2d 295, 58 N.C.App. 130, review den., 295 S.E.2d 479, 306 N.C. 744.

Pa.—O'Farrell v. Steel City Piping Co., 403 A.2d 1319, 266 Pa.Super. 219.

R.I.—Armfield v. Frank N. McClure, Inc., 75 A.2d 196, 77 R.I. 390.

Wash.—Edgar v. State, 595 P.2d 534, 92 Wash.2d 217, cert. den. 100 S.Ct. 1026, 444 U.S. 1077, 62 L.Ed.2d 760.

Mutuality of termination provision

(2) Other matters.

U.S.—Murray v. Kaiser Aluminum & Chemical Corp., D.C.W.Va., 591 F.Supp. 1550, affd. 767 F.2d 912.

Provisions held not to justify termination

(2) Cal.—Nattini v. Dewey, 216 P.2d 46, 96 Cal. App.2d 545.

Miss.—Masonite Corp. v. Handshoe, 44 So.2d 41, 208 Miss. 166.

Mo.—Leick v. Missouri Plating Co., 211 S.W.2d 77, 240 Mo.App. 565.

Pa.—Aldrich v. Geahry, 80 A.2d 59, 367 Pa. 252.

Executory agreements

N.Y.—Joy v. Heidrick & Struggles, Inc., 403 N.Y.S.2d 613, 93 Misc.2d 818.

page 416

34. N.Y.—Yazujian v. J. Rich Steers, Inc., supra, n. 4.

35. Fla.—Critchlow v. WFC Mortg. Co., Inc., App., 315 So.2d 483.

Ga.—Wood v. Metropolitan Atlanta Girls' Club, Inc., 233 S.E.2d 862, 141 Ga.App. 473.

Iowa—Allen v. Highway Equipment Co., 239 N.W.2d 135.

N.Y.—Laskey v. Ruhel Corp., 100 N.Y.S.2d 877, 277 App.Div. 1119, rearg. den. 102 N.Y.S.2d 458, 278 App.Div. 577, affd. 100 N.E.2d 140, 303 N.Y. 69—Johnson v. Cheney Bros., 102 N.Y.S.2d 302, 278 App.Div. 656.

N.C.—Hudson v. Atlantic Coast Line R. Co., 89 S.E.2d 441, 242 N.C. 650, cert. den. 76 S.Ct. 844, 351 U.S. 949, 100 L.Ed. 1473.

38. U.S.—Brooks v. Chicago, R.I. & P.R. Co., C.A Iowa, 177 F.2d 385.

39. U.S.—Olsen v. Arabian Am. Oil Co., supra, n. 32.

41. Fla.—Edwards v. Doherty, 74 So.2d 686—Paddock v. Bay Concrete Industries, Inc., App., 154 So.2d 313.

Md.—C.J.S. cited in Volos, Ltd. v. Sotera, 286 A.2d 101, 110, 264 Md. 155—Chai Management, Inc. v. Leibowitz, 439 A.2d 34, 50 Md.App. 504.

42. U.S.—Colgate-Palmolive Co. v. Tullos, C.A.Ga., 219 F.2d 617—Gunther v. San Diego & A.E. Ry. Co., D.C.Cal., 198 F.Supp. 402.

Fla.—Edwards v. Doherty, supra, n. 41—Paddock v. Bay Concrete Industries, Inc., App., 154 So.2d 313.

N.Y.—Reiss v. Arabian Am. Oil Co., 109 N.Y.S.2d 625, 279 App.Div. 805, motion den. 107 N.E.2d 167, 304 N.Y. 644, affd. 110 N.E.2d 888, 304 N.Y. 953.

44. Cal.—Nattini v. Dewey, supra, n. 32.

page 417

50. N.Y.—Willow v. New York State Elec. & Gas Corp., 194 N.Y.S.2d 572, 9 A.D.2d 999.

Arbitration agreement construed

N.Y.—Twentieth Century-Fox Film Corp. v. Screen Publicists' Guild, Local No. 114, U.O.P.W.A., C.I.O., 78 N.Y.S.2d 178, 17 Misc.2d 233.

Finding held conclusive

N.Y.—Staklinski v. Pyramid Elec. Co., 172 N.Y.S.2d 224, 10 Misc.2d 706, affd. 180 N.Y.S.2d 20, 6 A.D.2d 565, affd. 188 N.Y.S.2d 541, 6 N.Y.2d 159, 160 N.E.2d 78.

Power of arbitrator

N.Y.—Staklinski v. Pyramid Elec. Co., 172 N.Y.S.2d 224, 10 Misc.2d 706, affd. 180 N.Y.S.2d 20, 6 A.D.2d 565, affd. 188 N.Y.S.2d 541, 6 N.Y.2d 159, 160 N.E.2d 78.

Question of fact and law for arbitrator

N.Y.—Friedstrass Co. v. Livingston, 185 N.Y.S.2d 39, 16 Misc.2d 121, affd. 187 N.Y.S.2d 977, 8 A.D.2d 612, 780.

Assent for arbitration held not provided

N.Y.—Application of Drachman & Co., 195 N.Y.S.2d 399, 20 Misc.2d 912.

52. Cal.—Crillo v. Curtola, 204 P.2d 941, 91 Cal. App.2d 263.

Fla.—Paddock v. Bay Concrete Industries, Inc., App., 154 So.2d 313.

Md.—Ferris v. Polansky, 59 A.2d 749, 191 Md. 79.

53. Fla.—Edwards v. Doherty, 74 So.2d 686—Paddock v. Bay Concrete Industries, Inc., App., 154 So.2d 313.

N.Y.—Brill v. Brenner, 308 N.Y.S.2d 218, 62 Misc.2d 102.

Or.—C.J.S. cited in Johnson v. School District No. 12, Wallowa County, 312 P.2d 591, 594, 210 Or. 585.

page 418

64. Ala.—Shelton v. Shelton, 192 So. 55, 238 Ala. 489.

Md.—C.J.S. cited in Volos, Ltd. v. Sotera, 286 A.2d 101, 110, 264 Md. 155.

N.M.—Clem v. Bowman Lumber Co., App., 495 P.2d 1106, 83 N.M. 659.

Tex.—Dallas Hotel Co. v. Lackey, supra, n. 4—C.J.S. cited in Hardison v. A. H. Belo Corp., Civ.App., 247 S.W.2d 167, 168—Kree Institute of Electrolysis, Inc. v. Fageros, Civ.App., 478 S.W.2d 569.

Dissatisfaction held shown

Tex.—Coker v. Wesco Materials Corp., Civ.App., 368 S.W.2d 883.

Real or substantial ground for dissatisfaction unnecessary

Fla.—Edwards v. Doherty, supra, n. 53—Paddock v. Bay Concrete Industries, Inc., App., 154 So.2d 313.

72. U.S.—Klekamp v. Blaw-Knox Co., D.C.Cal., 179 F.Supp. 328—Westchester Plastics of Ohio, Inc. v. N.L.R.B., C.A.Ohio, 401 F.2d 903—Raynor v. Burroughs Corp., D.C.Va., 294 F.Supp. 238.

Ariz.—C.J.S. cited in Thermo-Kinetic Corporation v. Allen, 493 P.2d 508, 512, 16 Ariz.App. 341.

Colo.—Gulick v. A. Robert Strawn & Associates, Inc., App., 477 P.2d 489.

Ga.—Kingsbury v. Exxon Co., U.S.A., 220 S.E.2d 481, 136 Ga.App. 146.

Minn.—Fischer v. Pinske, 243 N.W.2d 733, 309 Minn. 202.

N.J.—Coyle v. Erie R. Co., 63 A.2d 702, 1 N.J. 350.

Ohio—Edwards v. Steel, 160 N.E.2d 18, 110 Ohio St. 177.

Okl.—Van Horn Drug Co. v. Noland, 323 P.2d 366.

Tenn.—Ring v. Jehl, 421 S.W.2d 375, 57 Tenn.App. 557.

Tex.—Parker v. Slayter, Civ.App., 238 S.W.2d 814, err. ref. no rev. err.

Wis.—Kovachik v. American Auto. Ass'n, 92 N.W.2d 254, 5 Wis.2d 188.

U.S.—Mozier v. Board of Ed. of Cherry Hill Tp., Camden County, 450 F.Supp. 742.

page 419

76. U.S.—In re Petroleum Carriers Co., D.C.Minn., 121 F.Supp. 520—Holt v. Seversky Electronatom Corp., C.A.N.Y., 452 F.2d 31.

Ariz.—Thermo-Kinetic Corp. v. Allen, 493 P.2d 508, 16 Ariz.App. 341.

N.Y.—Feinsod v. Freidberg, 155 N.Y.S.2d 190.

Payment of wages

(3) Additional statements.

U.S.—Raynor v. Burroughs Corp., D.C.Va., 294 F.Supp. 238.

77. U.S.—Howard v. Thompson, D.C.Mo., 72 F.Supp. 695, affd. in part and revd. in part on oth. grds., C.A., 191 F.2d 442, affd. 72 S.Ct. 1022, 343 U.S. 768, 96 L.Ed. 1283.

84. **Waiver held shown**

La.—Tillman v. New Orleans Saints Football Club, App., 265 So.2d 284, 57 A.L.R.3d 251.

Minn.—Edelstein v. Duluth, M. & I.R. Ry. Co., 31 N.W.2d 465, 225 Minn. 508.

N.Y.—Dunn v. Mack Motor Truck Corp., 120 N.Y. S.2d 719.

Tex.—Allen v. Dempster Mill Mfg. Co., Civ App., 402 S.W.2d 809, err. ref. no rev. err.

§ 33. Termination by Mutual Agreement

Library References

Master and Servant ⇐22.

88. Ind.—C.J.S. cited in Rochester Capital Leasing Corp. v. McCracken, 295 N.E.2d 375, 378, 156 Ind.App. 128.

Pa.—Jordan v. Sun Life Assur. Co. of Canada, 77 A.2d 631, 366 Pa. 495—Studio of Elegance v. McCutcheon, 112 P.L.J. 421.

Tex.—Mutual Life Ins. Co. of New York v. Presbyterian Hospital of Dallas, Civ.App., 503 S.W.2d 870, err. ref. no rev. err.

Mo.—Mullin v. St. Louis-San Francisco Ry. Co., App., 254 S.W.2d 438.

Consent

(2) "Retirement" includes some consent on the part of the employee.

Ohio—International Ass'n of Machinists v. Electric Vacuum Cleaner Division, General Elec. Co., 136 N.E.2d 167.

"Forced resignation" and "voluntary termination" not synonymous

U.S.—Fredericks v. Georgia-Pacific Corp., D.C.Pa., 331 F.Supp. 422, dism., C.A., 474 F.2d 1338.

page 420

95. Tenn.—Balderacchi v. Ruth, 256 S.W.2d 390, 36 Tenn.App. 421.

96. Tenn.—Akers v. J. B. Sedberry, Inc., App., 286 S.W.2d 617, 39 Tenn.App. 633.

Acceptance unnecessary

Ga.—Young v. Minton, 176 S.E. 662, 49 Ga.App. 545.

§ 34. Change in Business of Master

4. U.S.—Flintkote Co. v. Textile Workers Union of America, D.C.N.J., 243 F.Supp. 205—Donovan v. UMIC, Inc., D.C.N.Y., 580 F.Supp. 1455.

Lifetime employment contract

U.S.—Phillips v. Amoco Oil Co., D.C.Ala., 614 F.Supp. 694.

page 421

6. Cal.—C.J.S. cited in O. Miller Associates v. GCA Corp., 138 Cal.Rptr. 437, 441, 69 C.A.3d 966.

22. Del.—Martin v. Star Pub. Co., 126 A.2d 238, 11 Terry 181.

§ 37. Death or Disability of Master

Library References

Corbin on Contracts § 1335.

page 422

41. Cal.—Henigson v. Bank of America Trust & Sav. Ass'n, 195 P.2d 777, 32 Cal.2d 240.

Mo.—C.J.S. cited in Brunner v. Gorley, App., 227 S.W.2d 81, 85.

Mont.—Heintz v. Vestal, 605 P.2d 606, 185 Mont. 233.

N.Y.—Minevitch v. Puleo, 193 N.Y.S.2d 833, 9 A.D.2d 285.

page 423

42. Cal.—Farnon v. Cole, 66 Cal.Rptr. 673, 259 C.A.2d 855.

N.Y.—Minevitch v. Puleo, 193 N.Y.S.2d 833, 9 A.D.2d 285.

§ 38. Death or Disability of Servant

Library References

Corbin on Contracts § 1335.

47. U.S.—McKinney v. National Dairy Council, D.C. Mass., 491 F.Supp. 1108.

Cal.—Rench v. Watsonville Meat Co., 292 P.2d 85, 138 C.A.2d 482.

Ind.—Jones v. Servel, Inc., 186 N.E.2d 689, 135 Ind. App. 171.

Mass.—Nutting v. Kneeland, 105 N.E.2d 199, 328 Mass. 497—Kowal v. Sportswear by Revere, Inc., 222 N.E.2d 778, 351 Mass. 541.

N.Y.—Minevitch v. Puleo, 193 N.Y.S.2d 833, 9 A.D.2d 285—Kipe v. U.S. Banknote Corp., 284 N.Y.S.2d 745, 55 Misc.2d 245, affd. 285 N.Y.S.2d 262, 28 A.D.2d 1209.

N.C.—C.J.S. quoted at length in Haynes v. Winston-Salem Southbound Railway Co., 113 S.E.2d 906, 911, 252 N.C. 391.

Pa.—C.J.S. quoted at length in Powell v. Retirement Bd. of Allegheny County, 246 A.2d 110, 113, 431 Pa. 396.

Tex.—Nutt v. Members Mut. Ins. Co., Civ.App., 474 S.W.2d 575, err. ref. no rev. err.

Va.—Hickman v. Melson, 107 S.E.2d 387, 200 Va. 693.

Wash.—C.J.S. cited in Wong v. Boeing Co., 613 P.2d 788, 791, 26 Wash.App. 557.

Page 423

Contract providing for continuance during illness

N.Y.—Van Werth v. Twentieth Century Fox Film Corp., 182 N.Y.S.2d 157, 16 Misc.2d 870, affd. 196 N.Y.S.2d 563, 9 A.D.2d 931, app. den. 197 N.Y. S.2d 439, 10 A.D.2d 631.

49. U.S.—Munhollon v. Pennsylvania R.R., D.C. Ohio, 180 F.Supp. 669.

Kan.—Cussimanio v. Kansas City Southern Ry. Co., 617 P.2d 107, 5 Kan.App.2d 379.

La.—Freeman v. Elbilco, Inc., App., 338 So.2d 967.

Mo.—Rodriguez v. Civil Service Commission, App., 582 S.W.2d 354.

N.Y.—Halpin v. State Human Rights Appeal Bd., 410 N.Y.S.2d 914, 65 A.D.2d 898.

Tex.—Salter v. Jones, Civ.App., 348 S.W.2d 381.

Va.—Citizens Home Ins. Co. v. Glisson, 61 S.E.2d 859, 191 Va. 582, 21 A.L.R.2d 1241.

51. Fla.—LaMelle v. Bel-Air Conditioning Co., Inc., App., 380 So.2d 520.

N.Y.—Yazujian v. J. Rich Steers, Inc., 89 N.Y.S 2d 551, 195 Misc. 694.

Tenn.—**C.J.S. cited in** Cameron v. J. C. Lawrence Leather Co., 342 S.W.2d 65, 66, 47 Tenn.App. 671—Rodgers v. Southern Newspapers, Inc., 379 S.W.2d 797, 214 Tenn. 335.

Contract held not to prevent termination, etc.

(2) Other reasons.

Mo.—Jones v. Joy Mfg. Co., 381 S.W.2d 860

52. Tenn.—**C.J.S. cited in** Cameron v. J. C. Lawrence Leather Co., 342 S.W.2d 65, 66, 47 Tenn.App. 671.

54. Va.—Citizens Home Ins. Co. v. Glisson, supra, n. 49.

55. Va.—Citizens Home Ins. Co. v. Glisson, supra, n. 49.

Wyo.—Fisher v. Church of St. Mary, 497 P.2d 882.

page 424

56. Cal.—Rench v. Watsonville Meat Co., 292 P.2d 85, 138 C.A.2d 482.

57. Va.—Citizens Home Ins. Co. v. Glisson, supra, n. 49.

59. Absence

Pa.—Powell v. Retirement Bd. of Allegheny County, 246 A.2d 110, 431 Pa. 396.

§ 39. Military Service of Servant

61. U.S.—Dacey v. Trust Funds, D.C.Mass., 66 F.Supp. 321, vac. on oth. grds. C.C.A., 160 F.2d 413.

§ 40. Abandonment of Employment by Servant

Library References

Corbin on Contracts § 677.

62. N.C.—**C.J.S. black letter summary quoted in** Thompson v. ALD, New York, Inc., 121 S.E.2d 554, 557, 255 N.C. 321.

63. D.C.—In re Certain Carriers Represented by Eastern, Western, and Southeastern Carriers' Conference Commitees, D.C., 229 F.Supp. 259.

Ill.—Evaskus v. Neff, Kohlbusch & Bissell, Inc., 189 N.E.2d 542, 40 Ill.App.2d 416.

Ind.—Standard Oil Co. v. Review Bd. of Ind. Employment Sec. Division, 88 N.E.2d 567, 119 Ind.App. 576.

Mass.—Galluccio v. Commissioner of Labor and Industries, 357 N.E.2d 783, 4 Mass.App. 864.

N.Y.—Burns v. Merritt Engineering Co., 96 N.E.2d 739, 302 N.Y. 131.

Or.—Simpson v. Western Graphics Corp., 643 P.2d 1276, 293 Or. 96.

Pa.—Powell v. Retirement Bd. of Allegheny County, 246 A.2d 110, 431 Pa. 396.

S.C.—**C.J.S. cited in** Berry v. Goodyear Tire & Rubber Co., 242 S.E.2d 551, 552, 270 S.C. 489.

Declaration of intent

(3) Other matters.

N.J.—McAleer v. Jersey City Incinerator Authority, 190 A.2d 891, 79 N.J.Super. 142.

Evidence held to show abandonment

S.C.—Tindal v. Atlantic Coast Line R. Co., 71 S.E.2d 505, 222 S.C. 62.

Leave of absence

(2) Purpose.

Ill.—Callahan v. Board of Trustees of Fireman's Pension Fund, 226 N.E.2d 63, 83 Ill.App.2d 11.

(3) Other statements.

U.S.—Trailmobile Division, Pullman Inc. v. N.L.R.B., C.A.Tex., 379 F.2d 419.

Resignation

(1) Defined.

Ga.—Young v. Minton, 176 S.E. 662, 49 Ga.App. 545.

(2) Mode.

U S.—Republic Systems & Programming, Inc. v. Computer Assistance, Inc., D.C Conn., 322 F.Supp. 619, affd., C.A., 440 F.2d 996—Berry v. Michigan Bell Tel. Co., D.C.Mich., 319 F.Supp. 401.

Ga.—Young v. Minton, 176 S.E. 662, 49 Ga.App. 545.

(3) Other matters.

Ill.—Nogee v. Neisner Bros., Inc., 114 N.E.2d 463, 351 Ill.App. 166.

Md.—Lemlich v. Board of Trustees of Harford Community College, 385 A.2d 1185, 282 Md. 495.

64. Ariz.—**C.J.S. cited in** Thermo-Kinetic Corp. v. Allen, 493 P 2d 508, 512, 16 Ariz.App. 341.

Employee not entitled to notification of status

Pa.—Powell v. Retirement Bd. of Allegheny County, 246 A.2d 110, 431 Pa. 396

65. Iowa—Local Lodge No. 1426, Intern. Ass'n of Machinists and Aerospace Workers, AFL–CIO v. Wilson Trailer Co. of Sioux City, 289 N.W.2d 608.

Pa.—Powell v. Retirement Bd. of Allegheny County, 246 A.2d 110, 431 Pa. 396.

page 425

67. Tex.—International Union of Operating Engineers, Local No. 564, v. Cox, 219 S.W.2d 787, 148 Tex. 42.

There can be no abandonment of a contract of employment for an indefinite term.[70.5]

70.5. Conn.—Somers v. Cooley Chevrolet Co., 153 A.2d 426, 146 Conn. 627.

71. Wash.—**C.J.S. cited in** Barrett v. Weyerhaeuser Co., 700 P.2d 338, 343, 40 Wash.App. 630.

72. U.S.—Van Arsdel v. Texas A&M University, C.A. Tex., 628 F.2d 344.

Mo.—**C.J.S. quoted in** State ex rel. State Dept. of Public Health and Welfare, Division of Welfare v. Luster, App., 456 S.W.2d 600, 604.

N.Y.—Jones v. Crawford, 148 N.Y.S.2d 335, revd. on oth. grds. 162 N.Y.S.2d 41, 3 A.D.2d 479, rearg. and app. den. 164 N.Y.S.2d 988, 4 A.D.2d 826.

No justification

U.S.—McNamara v. Jones & Guerrero Co., C.A.Guam, 417 F.2d 1188.

73. U.S.—Milton E Rayfield & Co. v. Watson Seafood & Poultry Co., D.C.N.C., 268 F.Supp. 97.

N.D.—Blomquist v. Clague, 290 N.W.2d 235.

74. U.S.—Sarkes Tarzian, Inc. v. Audio Devices, Inc., D.C.Cal., 166 F.Supp. 250, affd., C.A., 283 F.2d 695, cert. den. 81 S.Ct. 903, 365 U.S. 869, 5 L.Ed.2d 859—Allis-Chalmers Mfg. Co. v. Continental Aviation & Engineering Corp., D.C.Mich., 255 F.Supp. 645—Republic Systems & Programming, Inc v. Computer Assistance, Inc., D.C. Conn., 322 F.Supp. 619, affd., C.A., 440 F.2d 996—Louisville & N.R. Co., v. Bass, D.C.Ky., 328 F.Supp. 732.

Mo.—National Rejectors, Inc. v. Trieman, 409 S.W.2d 1.

No notice required

U.S.—Republic Systems & Programming, Inc. v. Computer Assistance, Inc., D.C.Conn., 322 F.Supp. 619, affd., C.A., 440 F.2d 996.

Tex.—Mutual Life Ins. Co. of New York v. Presbyterian Hospital of Dallas, Civ.App., 503 S.W.2d 870, err. ref. no rev. err.

75. Or.—Nees v. Hocks, 536 P.2d 512, 272 Or. 210.

76. Mo.—Medical West Bldg. Corp. v. E. L Zoernig & Co., 440 S.W.2d 744—**C.J.S. quoted in** State ex rel. State Dept. of Public Health and Welfare, Division of Welfare v. Luster, App., 456 S.W.2d 600, 604.

Constructive discharge

U.S—Young v. Southwestern Sav. and Loan Ass'n, C.A.Tex., 509 F.2d 140.

page 426

87. U.S.—Universal Pictures Co. v. Cummings, 150 F.2d 986.

88. Mo.—Medical West Bldg. Corp. v. E. L. Zoernig & Co., 440 S.W.2d 744—**C.J.S. quoted in** State ex rel State Dept. of Public Health and Welfare, Division of Welfare v. Luster, App., 456 S.W.2d 600, 604.

Duress in obtaining resignation not present

N.Y.—Fiance v. United Jewish Appeal of Greater N.Y., 122 N.Y.S.2d 254, 204 Misc. 19, affd. 134 N.Y.S.2d 629, 206 Misc. 171.

89. Mo.—**C.J.S. quoted in** State ex rel. State Dept. of Public Health and Welfare, Division of Welfare v. Luster, App., 456 S.W.2d 600, 604.

§ 41. Discharge

Library References

Master and Servant ⚿31(1–3).

92. U.S.—Richardson v. Permacel Tape Corp., C.A., 244 F.2d 80.

Cal.—Kanner v. National Phoenix Industries, Inc., 21 Cal.Rptr. 857, 203 C.A.2d 757.

D.C.—Cafeteria and Restaurant Workers Union, Local 473, AFL–CIO v. McElroy, C.A., 284 F.2d 173, 109 U.S.App.D.C. 39, affd. 81 S.Ct. 1743, 367 U.S. 886, 6 L.Ed.2d 1230, motion den. 81 S.Ct. 1912, 366 U.S. 956, 6 L.Ed.2d 1251, reh. den. 82 S Ct. 22, 368 U.S. 869, 7 L.Ed.2d 70.

Mont.—Brown v. Stauffer Chemical Co., 539 P.2d 374, 167 Mont. 418.

93. U.S.—Munhollon v. Pennsylvania R.R., D.C. Ohio, 180 F.Supp. 669—Elders v. Consolidated Freightways Corp. of Del., D.C.Minn., 289 F.Supp. 630.

Minn.—Rensch v. General Drivers, Helpers and Truck Terminal Emp. Local No. 120, 129 N.W.2d 341, 268 Minn. 307.

N.C.—George v. Wake County Opportunities, Inc., 217 S.E.2d 128, 26 N.C.App. 732, cert. den. 218 S.E.2d 466, 288 N.C. 393, cert. den. 96 S.Ct. 2176, 425 U.S. 975, 48 L.Ed.2d 800.

Statutory prohibition of exemption from liability

U.S.—Greenwood v Atchison, T. & S.F. Ry. Co, D.C.Cal., 129 F.Supp. 105.

94. Investigation warranted

Mich—Earp v. City of Detroit, 167 N.W.2d 841, 16 Mich.App. 271.

95. N.Y.—Sauer v. Century Federal Sav. & Loan Ass'n of Long Island, 418 N.Y.S.2d 464, 69 A.D.2d 495.

Wis.—Larson v. Fisher, 48 N.W.2d 502, 259 Wis. 355.

Other definitions

(5) Additional definitions.

Del.—Conner v. Phoenix Steel Corp., 249 A.2d 866.

Minn.—Anderson v. Twin City Rapid Transit Co., 84 N.W.2d 593, 250 Minn. 167.

Employer's action held not to constitute a discharge

Cal.—Rotter v. Stationers Corp., 8 Cal.Rptr. 690, 186 C.A.2d 170.

Mo.—Mullin v. St. Louis-San Francisco Ry. Co., App., 254 S.W.2d 438.

"Forced resignation" and "discharge" not synonymous

U.S.—Fredericks v. Georgia-Pacific Corp., D.C.Pa., 331 F.Supp. 422, dism., C.A., 474 F.2d 1338.

96. U.S.—Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61.

Md.—Dahl v. Brunswick Corp., 356 A.2d 221, 277 Md. 471.

N.C.—Briggs v. American & Efird Mills, Inc., 111 S.E.2d 841, 251 N.C. 642.

Utah—Bihlmaier v. Carson, 603 P.2d 790.

99. U.S.—N.L.R.B. v. Cement Masons Local No. 555, C.A., 225 F.2d 168—Putnam v. Lower, C.A. Wash., 236 F.2d 561—Monroe v. Penn-Dixie Cement Corp., D.C.Ga., 335 F.Supp. 231.

Ga.—Salvatori Corp. v. Rubin, 283 S.E.2d 326, 159 Ga.App. 369.

Idaho—Jackson v. Minidoka Irrigation Dist., 563 P.2d 54, 98 Idaho 330.

N.H.—Monge v. Beebe Rubber Co., 316 A.2d 549, 114 N.H. 130, 62 A.L.R.3d 264.

N.J.—**C.J.S. cited in** Adams v. Jersey Central Power & Light Co., 114 A.2d 776, 784, 36 N.J.Super. 53, affd. 120 A.2d 737, 21 N.J. 8.

Pa.—Chinn v. Com., Unemployment Compensation Bd. of Review, 426 A.2d 1250, 57 Pa.Cmwlth. 582.

Matters constituting discharge

(3) Colo.—Peterson v. Colorado Engraving Co., App., 476 P.2d 1009.

Ga.—Seckinger v. Riley, 108 S.E.2d 761, 99 Ga.App. 442.

Mo.—Maxey v. General Elec. Co., App., 382 S.W.2d 67.

N.J.—Adams v. Jersey Central Power & Light Co., 114 A.2d 776, 36 N.J.Super. 53, affd. 120 A.2d 737, 21 N.J. 8.

N.Y.—Sarle v. Sperry Gyroscope Co., 167 N.Y.S.2d 553, 12 Misc.2d 747, mod. on oth. grds. 168 N.Y.S.2d 228, 4 A.D.2d 638, motion gr. 173 N.Y.S.2d 805, 4 N.Y.2d 829, 150 N.E.2d 234, affd. 174 N.Y.S.2d 665, 4 N.Y.2d 917, 151 N.E.2d 95.

Or.—McGinnis v. Keen, 221 P.2d 907, 189 Or. 445.

Constructive discharge

U.S.—Johnson v. Nordstrom-Larpenteur Agency, Inc., C.A.Minn., 623 F.2d 1279, cert. den. 101 S.Ct. 622, 449 U.S. 1042, 66 L.Ed.2d 504.

Colo.—Colorado Civil Rights Commission v. State By and Through School Dist. No. 1, Bent County, 488 P.2d 83, 30 Colo.App. 10.

Minn.—Continental Can Co., Inc. v. State, 297 N.W.2d 241, 18 A.L.R.4th 312.

page 427

1. Ky.—Humana, Inc. v. Fairchild, App., 603 S.W.2d 918.

2. Test

Mont.—Hannifin v. Retail Clerks Intern. Ass'n, 511 P.2d 982, 162 Mont. 170.

Resigning under pressure at employer's request not discharge

Ga.—Wilkinson v. Trust Co. of Georgia Associates, 197 S.E.2d 146, 128 Ga.App. 473.

4. Cal.—Warner Bros. Pictures, Inc. v. Bumgarner, 17 Cal.Rptr. 171, 197 C.A.2d 331.

7. Mich.—Ferries v. Copco Steel & Engineering Co., 73 N.W.2d 850, 344 Mich. 345.

8. Neb.—Schlueter v. School Dist. No. 42 of Madison County, 96 N.W.2d 203, 168 Neb. 443—Lee v. Ralston School Dist., Douglas County, 145 N.W.2d 919, 180 Neb. 784.

9. Reduction in rank

Mass.—Miller v. Winshall, 400 N.E.2d 1306, 9 Mass. App. 312.

§ 42. Grounds

Library References

Master and Servant ⇐30(1–6.35).

Corbin on Contracts § 677 et seq.

page 428

13. U.S.—Coleman v. Graybar Elec. Co., C.A.Tex., 195 F.2d 374—Conrad v. Delta Air Lines, Inc., C.A.Ill., 494 F.2d 914.

Cal.—Becket v. Welton Becket and Associates, 114 Cal.Rptr. 531, 39 C.A.3d 815.

D.C.—Nelson v. General Elec. Co., Mun.App., 145 A.2d 576

Miss.—Masonite Corp. v. Handshoe, 44 So.2d 41, 208 Miss. 166.

Discharge as not prima facie illegal

Fla.—Stringfellow v. Breidegam, App., 138 So.2d 75.

Not affected by Unemployment Compensation Act

La.—Ciufo v. Brown, App., 148 So.2d 459.

Employment not supported by consideration

N.M.—Garza v United Child Care, Inc., App., 536 P.2d 1086, 88 N.M. 30.

14. U.S.—Abele v. A.L. Dougherty Overseas, Inc., D.C.Ind., 192 F.Supp. 955, stating New York rule—Helsby v. St. Paul Hospital & Cas. Co., D.C.Minn., 195 F.Supp. 385, affd., C.A., 304 F.2d 758—Gasbarra v. Park-Ohio Inc., D.C.Ill., 382 F.Supp. 399, affd., C A., 529 F.2d 529.

Ala.—Duff v. American Cast Iron Pipe Co., 362 So.2d 886.

Cal.—Patterson v. Philco Corp., 60 Cal.Rptr. 110, 252 C.A.2d 63.

Ind.—Seco Chemicals, Inc., Division of Stan Sax Corp. v. Stewart, 349 N.E.2d 733, 169 Ind.App. 624.

Mich.—Brown v. Chris Nelsen & Son, Inc., 158 N.W.2d 818, 10 Mich.App. 95.

Mo.—Eaton v. Aid for Victims of Crime, Inc., App., 536 S.W.2d 176.

N.Y.—Cornell v. T.V. Development Corp., 245 N.Y.S.2d 918, 41 Misc.2d 628, affd. 260 N.Y.S.2d 865, 24 A.D.2d 471, revd. on oth. grds. 215 N.E.2d 349, 17 N.Y.2d 69, 268 N.Y.S.2d 29, on remand 270 N.Y.S.2d 45, 50 Misc.2d 422.

Ohio—Opportunity Consultants, Inc. v. Tugrul, 354 N.E.2d 698, 47 Ohio App.2d 346, 1 O.O.3d 403.

Tex.—Johnson v. American Can Co., Civ.App., 361 S.W.2d 451.

W.Va.—Shanholtz v. Monongahela Power Co., 270 S.E.2d 178, 165 W.Va. 305.

Breach of contract

U.S.—Hillin v. Herff Jones Co., C.A.Tex., 443 F.2d 363.

Subject only to limitations provided by National Labor Relations Act

U.S.—Schwob Mfg. Co. v. N.L.R.B., C.A., 297 F.2d 864.

However, it has been held that an employee may be discharged for good reason, bad reason, or no reason at all.

U.S.—N.L.R.B. v. Condenser Corp. of America, C.C.A., 128 F.2d 67—N.L.R.B. v. Electric City Dyeing Co., C.A., 178 F.2d 980—Cusano v. N.L.R.B., C.A., 190 F.2d 898—N.L.R.B. v. United Parcel Service, Inc., C.A.R.I., 317 F.2d 912.

15. U.S.—N.L.R.B. v. Lowell Sun Pub. Co., C.A. Mass., 320 F.2d 835—Harrison v. Jack Eckerd Corp., D.C.Fla., 342 F.Supp. 348, affd., C.A., 468 F.2d 951—Moore v. Home Ins. Co., C.A.Ariz., 601 F.2d 1072.

Cal.—Crillo v. Curtola, 204 P.2d 941, 91 Cal.App.2d 263—Drzewiecki v. H & R Block, Inc., 101 Cal. Rptr. 169, 24 C.A.3d 695.

Del.—Haney v. Laub, Super., 312 A.2d 330.

D.C.—Seldin v. Sande, Mun.App., 163 A.2d 572.

Ill.—Schaffer v. Park City Bowl, 102 N.E.2d 665, 345 Ill.App. 279.

Ind.—Wills v. Gaff, 191 N.E.2d 41, 136 Ind.App. 21

N.Y.—Crane v. Perfect Film & Chemical Corp., 329 N.Y.S.2d 32, 38 A.D.2d 288.

Ohio—Taint v. Kroger Co., 247 N.E.2d 794, 20 Ohio Misc. 29.

Pa.—Lavin v. Goldwater, 79 A.2d 266, 366 Pa. 599.

Tex.—Porter v. United Motels, Inc., Civ.App., 315 S.W.2d 340—Hoffrichter v. Brookhaven Country Club Corp., Civ.App., 448 S.W.2d 843, err. ref. no rev. err.—Ward v. Consolidated Foods Corp, Civ App., 480 S.W.2d 483, err. ref. no rev. err.

Utah—Chiodo v. General Waterworks Corp., 413 P.2d 891, 17 Utah 2d 425.

Wis.—Tollefson v. Green Bay Packers, 41 N.W.2d 201, 256 Wis. 318—Georgiades v. Glickman, 75 N.W.2d 573, 272 Wis. 257

Causes held insufficient

(3) Other causes.

U.S.—Holt v. Southern Ry. Co., D.C.Tenn., 320 F.Supp. 864—Lanier v. Alenco, C.A.La., 459 F.2d 689.

Ala.—Duff v. American Cast Iron Pipe Co., 362 So.2d 886.

Cal.—Kouff v. Bethlehem-Alameda Shipyard, 202 P.2d 1059, 90 Cal.App.2d 322—Wise v. Southern Pac. Co, 83 Cal.Rptr. 202, 463 P.2d 426, 1 C.3d 600.

La.—Stephens v. Justiss-Mears Oil Co., App., 300 So.2d 510.

N.Y.—Papaioannou v. Sirocco Supper Club, Inc., 349 N.Y.S.2d 590, 75 Misc.2d 1001.

Tex.—Lone Star Cotton Mills v. Thomas, Civ.App., 227 S.W.2d 300.

Wis.—Klug v Flambeau Plastics Corp. (Flambeau Prods. Corp.), 214 N.W.2d 281, 62 Wis.2d 141.

Statutory reasons

U.S.—Nuelsen v. Sorensen, C.A.Cal., 293 F.2d 454.

Tardiness

La.—Krizan v. Storz Broadcasting Co., App., 145 So.2d 636.

Termination for good cause shown

Tex.—Turner v. Byers, Civ.App., 562 S.W.2d 507, err. ref. n.r.e.

Termination in absence of good cause does not establish bad faith

Mass.—Gram v. Liberty Mut. Ins. Co., 429 N.E.2d 21, 384 Mass. 659, app. after remand 461 N.E.2d 796, 391 Mass. 333.

Generally, while an employer may discharge an at-will employee for a good reason, a bad reason, or no reason at all,[15.5] the mere fact that an employment contract is terminable at will does not give an employer the absolute or unfettered right to discharge an at will employee in all cases,[15.10] but the right to discharge such an employee may be limited by considerations of public policy.[15.15] Stated differently, an employer's right to discharge an employee at will carries a correlative duty not to discharge an employee who declines to perform an act that would require a violation of a clear mandate of public policy.[15.20] The sources of public policy include legislation;[15.25] administrative rules, regulations, or decisions;[15.30] and judicial decisions.[15.35] However, even when an important public policy is involved an employer may discharge an at-will employee if he has a separate, plausible and legitimate reason for doing so.[15.40]

15.5. U.S.—N.L.R.B. v. Condenser Corp. of America, C.C.A., 128 F.2d 67—N.L.R.B. v. Electric City Dyeing Co., C.A., 178 F.2d 980—Cusano v. N.L R.B., C.A., 190 F.2d 898—N.L.R.B. v. United Parcel Service, Inc., C.A.R.I., 317 F.2d 912—Smith v. Atlas Off-Shore Boat Service, Inc., C.A. Miss., 653 F.2d 1057, on remand, D.C., 552 F.Supp. 128.—Shaitelman v. Phoenix Mut. Life Ins. Co., D.C.N.Y., 517 F.Supp. 21.

Neb.—Mau v. Omaha Nat. Bank, 299 N.W.2d 147, 207 Neb. 308.

Or.—Nees v. Hocks, 536 P.2d 512, 272 Or. 210.

S.C.—Hudson v. Zenith Engraving Co., Inc., 259 S.E.2d 812, 273 S.C. 766.

Wash.—Roberts v. Atlantic Richfield Co., 568 P.2d 764, 88 Wash.2d 887.

Union activity

(1) Generally, employer may dismiss employee for good cause, no cause, or for any reason he chooses except the employee's union activity.

U.S.—Torrington Co. v. N.L.R.B., C.A., 506 F.2d 1042

(2) Discharge for union activity generally see C.J.S. Labor Relations § 363.

In absence of statute or agreement

U.S.—Russ v. Southern Ry. Co., C.A.Tenn., 334 F.2d 224, cert. den. 85 S.Ct. 699, 379 U.S. 991, 13 L.Ed.2d 611, reh. den. 85 S.Ct. 935, 380 U.S. 938, 13 L.Ed.2d 826.

S.C.—Todd v. South Carolina Farm Bureau Mut. Ins. Co., App., 321 S.E.2d 602, 283 S.C. 155, quashed 336 S.E.2d 472.

Refusal to cooperate in employer investigation

Mo.—Ising v. Barnes Hosp., App., 674 S.W.2d 623.

Filing bankruptcy petition

Ga.—West v. First Nat. Bank of Atlanta, 245 S.E.2d 46, 145 Ga.App. 808.

Discharge for failure to withdraw workmen's compensation claim

S.C.—Raley v. Darling Shop of Greenville, 59 S.E.2d 148, 216 S.C. 536.

Discharge for filing workmen's compensation claim as contrary to public policy see infra this section.

15.10. Cal.—Tameny v. Atlantic Richfield Co., 164 Cal.Rptr. 839, 610 P.2d 1330, 27 Cal.3d 175, 9 A.L.R.4th 314—Cleary v. American Airlines, Inc., 168 Cal.Rptr. 722, 111 C.A.3d 443.

Idaho—Jackson v. Minidoka Irrigation Dist., 563 P.2d 54, 98 Idaho 330.

Ill.—Leach v. Lauhoff Grain Co., 366 N.E.2d 1145, 9 Ill.Dec. 634, 51 Ill.App.3d 1022.

Mich.—Sventko v. Kroger Co., 245 N.W.2d 151, 69 Mich.App. 644.

Employee's exercise of constitutional rights

Md.—De Bleecker v. Montgomery County, 438 A.2d 1348, 292 Md. 498.

15.15. Cal.—Cleary v. American Airlines, Inc., 168 Cal.Rptr. 722, 111 C.A.3d 443—Petermann v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396, 344 P.2d 25, 174 C.A.2d 184.

Conn.—Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 179 Conn. 471.

Idaho—Jackson v. Minidoka Irrigation Dist., 563 P.2d 54, 98 Idaho 330.

Ill.—Criscione v. Sears, Roebuck & Co., 384 N.E.2d 91, 23 Ill.Dec. 455, 66 Ill.App.3d 664—Kelsay v. Motorola, Inc., 384 N.E.2d 353, 23 Ill.Dec. 559, 74 Ill.2d 172—Palmateer v. International Harvester Co., 421 N.E.2d 876, 52 Ill.Dec. 13, 85 Ill.2d 124.

Md.—Adler v. American Standard Corp., 432 A.2d 464, 291 Md. 31.

Mich.—Sventko v. Kroger Co., 245 N.W.2d 151, 69 Mich.App. 644.

N.H.—Monge v. Beebe Rubber Co., 316 A.2d 549, 114 N.H. 130, 62 A.L.R.3d 264.

N.J.—Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 84 N.J. 58, 12 A.L.R. 4th 520.

Pa.—Geary v. U.S. Steel Corp., 319 A.2d 174, 456 Pa. 171—Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 255 Pa.Super. 28.

W.Va.—Harless v. First Nat. Bank in Fairmont, 246 S.E.2d 270.

Wis.—Ward v. Frito-Lay, Inc., 290 N.W.2d 536, 95 Wis.2d 372.

Discharge for not concealing employer's theft

Ariz.—Vermillion v. AAA Pro Moving & Storage, App., 704 P.2d 1360, 146 Ariz. 215.

Public policy not violated

Cal.—Shapiro v. Wells Fargo Realty Advisors, 2 Dist., 199 Cal.Rptr. 613, 152 C.A.3d 467, declining to follow Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 164 Cal.Rptr. 839, 610 P.2d 1330.

Iowa—Abrisz v. Pulley Freight Lines, Inc., Iowa, 270 N.W.2d 454.

Mont.—Keneally v. Orgain, 606 P.2d 127, 186 Mont. 1.

"Public policy" too nebulous an underpinning to justify adoption of rule

Ala.—Hinrichs v. Tranquilaire Hospital, 352 So.2d 1130.

Rule of text expressly rejected

Fla.—Catania v. Eastern Airlines, Inc., App., 381 So.2d 265.

Rationale not applicable to facts of case

Ariz.—Larsen v. Motor Supply Co., App., 573 P.2d 907, 117 Ariz. 507.

"Public policy" exception not recognized

U.S.—Taylor v. Foremost-McKesson, Inc., C.A.Ga., 656 F.2d 1029.

Public policy embodied in antipolygraph statute

U.S.—Molush v. Orkin Exterminating Co., Inc., D.C. Pa., 547 F.Supp. 54.

Narrow public policy exception adopted

Wis.—Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 113 Wis.2d 561.

Proof of specific hazards necessary

U.S.—Adams v. Budd Co., D.C.Pa., 583 F.Supp. 711.

15.20 U.S.—Forman v. BRI Corp., D.C.Pa., 532 F.Supp. 49—McNulty v. Borden, Inc., D.C.Pa., 542 F.Supp. 655—Shaw v. Russell Trucking Line, Inc., D.C.Pa., 542 F.Supp. 776.

Mich.—Suchodolski v. Michigan Consol. Gas Co., 316 N.W.2d 710, 412 Mich. 692.

N.J.—Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 84 N.J. 58, 12 A.L.R. 4th 520.

Discharge for jury service

Pa.—Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 255 Pa.Super. 28.

Or.—Nees v. Hocks, 536 P.2d 512, 272 Or. 210.

Discharge for refusal to commit perjury

Cal.—Petermann v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396, 344 P.2d 25, 174 C.A.2d 184.

Discharge for refusal to participate in illegal scheme to fix retail gasoline prices

Cal.—Tameny v. Atlantic Richfield Co., 164 Cal.Rptr. 839, 610 P.2d 1330, 27 Cal.3d 175, 9 A.L.R.4th 314.

Discharge for refusal to take polygraph examination

U.S.—Perks v. Firestone Tire & Rubber Co., C.A.Pa., 611 F.2d 1363—Molush v. Orkin Exterminating Co., Inc., D.C.Pa., 547 F.Supp. 54.

Discharge for refusal to alter pollution control reports

Mich.—Trombetta v. Detroit, Toledo & Ironton R. Co., 265 N.W.2d 385, 81 Mich.App. 489.

15.25. Cal.—Cleary v. American Airlines, Inc., 168 Cal.Rptr. 722, 111 C.A.3d 443.

Ky.—Scroghan v. Kraftco Corp., App., 551 S.W.2d 811.

N.J.—Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 84 N.J. 58, 12 A.L.R. 4th 520.

Wash.—Roberts v. Atlantic Richfield Co., 568 P.2d 764, 88 Wash.2d 887.

Discharge of employee at will for absence from work while serving as election officer see C.J.S. Elections § 334(2).

Workmen's compensation statute

(1) Cause of action in employee only if discharged discriminatorily by reason of exercising rights under workmen's compensation law.

Mo.—Mitchell v. St. Louis County, App., 575 S.W.2d 813—Henderson v. St. Louis Housing Authority, App., 605 S.W.2d 800.

(2) Discriminatory or retaliatory discharge for filing workmen's compensation claim shown.

Ill.—Kelsay v. Motorola, Inc., 384 N.E.2d 353, 23 Ill.Dec. 559, 74 Ill.2d 172—Leach v. Lauhoff Grain Co., 366 N.E.2d 1145, 9 Ill.Dec. 634, 51 Ill.App.3d 1022.

Ind.—Frampton v. Central Indiana Gas Co., 297 N.E.2d 425, 260 Ind. 249, 63 A.L.R.3d 973.

Mich.—Sventko v. Kroger Co., 245 N.W.2d 151, 69 Mich.App. 644.

Nev.—Hansen v. Harrah's, 675 P.2d 394.

Or.—Brown v. Transcon Lines, 588 P.2d 1087, 284 Or. 597.

Tex.—Texas Steel Co. v. Douglas, Tex.Civ.App., 533 S.W.2d 111.

(3) Discriminatory discharge for filing workmen's compensation claim not shown.

N.Y.—Axel v. Duffy-Mott Co., Inc., 406 N.Y.S.2d 155, 62 A.D.2d 651.

Ohio—Bryant v. Dayton Casket Co., 433 N.E.2d 142, 69 Ohio St.2d 367, 23 O.O.3d 341.

Tex.—Swanson v. American Manufacturing Co., Civ. App., 511 S.W.2d 561.

(4) Employer as guilty of offense for discharging employee for exercising any of his rights under workmen's compensation statutes see C.J.S. Workmen's Compensation § 913.

(5) No cause of action in favor of discharged employee against employer who discharged him because of employee's assertion of claim under Act.

U.S.—Thurston v. Macke Co., C.A.Va., 716 F.2d 255.

Garnishment statutes

U.S.—Donovan v. Southern California Gas Co., C.A. Cal., 715 F.2d 1405.

15.30. N.J.—Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 84 N.J. 58, 12 A.L.R. 4th 520.

15.35. N.J.—Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 84 N.J. 58, 12 A.L.R. 4th 520.

Abuse, bad faith, malice or retaliation

(1) Doctrine of abusive discharge places upon employee burden of persuasion that there is public policy of the state violated by employer that would restrict right of private employer to discharge an employee at will due to employee's political beliefs, activities and associations.

N.Y.—Chin v. American Tel. & Tel. Co., 410 N.Y.S.2d 737, 96 Misc.2d 1070.

(2) There is no cause of action recognized in New York for abusive or wrongful discharge of an employee.

N.Y.—Murphy v. American Home Products Corp., 448 N.E.2d 86, 58 N.Y.2d 298, 461 N.Y.S.2d 232.

(3) Discharge of employee at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good.

N.H.—Monge v. Beebe Rubber Co., 316 A.2d 549, 114 N.H. 130, 62 A.L.R.3d 264

(4) Bank employee may not be discharged in retaliation for his efforts to bring to attention of and require bank to operate in compliance with state and federal consumer credit protection laws.

W.Va.—Harless v. First Nat. Bank in Fairmont, 246 S.E.2d 270.

(5) Discharge of seaman in retaliation for seaman's exercise of his legal right to file personal injury action against employer.

U.S.—Smith v. Atlas Off-Shore Boat Service, Inc., C.A. Miss., 653 F.2d 1057, on remand, D.C., 552 F.Supp. 128—Donovan v. Texaco, Inc., C.A.Tex., 720 F.2d 825.

Discharge of seamen generally see C.J.S. Seamen § 33.

(6) Rule stated in (3) above held not to represent law in Arizona.

Ariz.—Larsen v. Motor Supply Co., App., 573 P.2d 907, 117 Ariz. 507.

(7) Rule recognized in Kelsay v. Motorola (384 N.E.2d 353, 74 Ill.2d 172, 23 Ill.Dec. 599), limited to discharge in retaliation for employee's exercise of his rights under Workmen's Compensation Act, and not extended to claim for retaliatory discharge for leaking information to newspaper regarding alleged abuses and improprieties at former place of employment.

Ill.—Rozier v. St. Mary's Hospital, 411 N.E.2d 50, 44 Ill.Dec. 144, 88 Ill.App.3d 994.

(8) Tort of retaliatory discharge not applicable to employment discrimination cases.

U.S.—Carrillo v. Illinois Bell Telephone Co., D.C.Ill., 538 F.Supp. 793

(9) Discharge not retaliatory.

U.S.—Talley v. U.S. Postal Service, C.A Mo., 720 F 2d 505, cert.den. 104 S.Ct. 2155, 466 U.S. 952, 80 L.Ed.2d 541.

Judicially sanctioned change not warranted

Wyo.—Bottijliso v. Hutchison Fruit Co., App., 635 P.2d 992, 96 N.M. 789.

15.40. Pa.—Geary v. U.S. Steel Corp., 319 A.2d 174, 456 Pa. 171—Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 255 Pa.Super. 28.

A contract of employment at will may contain an implied covenant of good faith and fair dealing such that a discharge not made in good faith constitutes a breach of the contract,[15.45] as where the employee is engaged contractually to serve as long as he performs to the satisfaction of the employer.[15.50] The latter provision may become part of the contract either by express agreement, oral or written,[15.55] or as a result of an employee's legitimate expectations grounded in an employer's policy statements as set forth in a company manual,[15.60] although as to the latter there is also authority to the contrary.[15.65]

15.45. U.S.—McKinney v. National Dairy Council, D.C.Mass., 491 F.Supp. 1108.

Mass.—Fortune v. National Cash Register Co., 364 N.E.2d 1251, 373 Mass. 96.

Employee on probation

Mont.—Crenshaw v. Bozeman Deaconess Hosp., 693 P.2d 487.

Implied-in-law covenants of good faith and fair dealing

Cal.—Cleary v. American Airlines, Inc., 168 Cal.Rptr 722, 111 C.A.3d 443.

Not predicated solely upon absence of good cause

Conn.—Magnan v. Anaconda Industries, Inc., 479 A.2d 781, 193 Conn. 558.

15.50. Mich.—Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 408 Mich. 579.

Tex.—Hardison v. A. H. Belo Corp., Civ.App., 247 S.W.2d 167—Porter v. United Motels, Inc., Civ. App., 315 S.W.2d 340—Southwestern Bell Tel. Co. v. Dixon, Civ.App., 575 S.W.2d 596, err. ref., Sup., 607 S.W.2d 240.

Good faith of employer in such case as question for jury see infra § 54.

15.55 Mich.—Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 408 Mich. 579.

15.60. Mich.—Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 408 Mich. 579.

15.65. Ill.—Sargent v. Illinois Institute of Technology, 397 N.E.2d 443, 33 Ill.Dec. 937, 78 Ill.App.3d 117.

Ind.—Shaw v. S. S. Kresge Company, 328 N.E.2d 775, 167 Ind.App. 1.

Kan.—Johnson v. National Beef Packing Company, 551 P.2d 779, 220 Kan. 52.

N.Y.—Chin v. American Tel. & Tel. Co., 410 N.Y.S.2d 737, 96 Misc.2d 1070.

16. U.S.—Portable Elec. Tools, Inc. v. N.L.R.B., C.A., 309 F.2d 423—McKinney v. Armco Steel Corp., D.C.Pa., 270 F.Supp. 360—Gasbarra v. Park-Ohio Inc, D.C.Ill., 382 F.Supp. 399, affd., C.A., 529 F.2d 529.

Ga—Wood v. Metropolitan Atlanta Girls' Club, Inc., 233 S.E.2d 862, 141 Ga.App. 473.

Ky.—Davies v. Mansbach, 338 S.W.2d 210.

Mass.—Steranko v. Inforex, Inc., 362 N.E.2d 222, 5 Mass.App. 253, app. after remand 395 N.E.2d 1303, 8 Mass.App. 523.

N.C.—Haynes v. Winston-Salem Southbound Ry. Co., 113 S.E.2d 906, 252 N.C 391—Wilson v. McClenny, 136 S.E.2d 569, 262 N.C. 121, after remand, 152 S.E.2d 529, 269 N.C. 399.

Ohio—Hosking v. Hollaender Mfg. Co., 175 N.E.2d 201, 114 Ohio App. 70.

Or.—Nees v. Hocks, 536 P.2d 512, 272 Or. 210.

Pa.—McMonigle v. City of Philadelphia, 127 A.2d 675, 387 Pa. 341—Fawcett v. Monongahela Ry. Co., 137 A.2d 768, 391 Pa. 134.

Tex.—Dallas County Water Control and Imp. Dist. No. 7 v. Ingram, Civ.App., 395 S.W.2d 834, err. ref. no rev. err. app. after remand 425 S.W.2d 366.

Utah—Anderson v. Utah County, 368 P.2d 912, 13 Utah 2d 99.

Wash.—McIntyre v. Fort Vancouver Plywood Co., Inc., 600 P.2d 619, 24 Wash.App. 120.

An employee covered by a collective bargaining agreement prohibiting termination without just cause may not maintain a tort action against his employer for a retaliatory discharge.[16.5]

16.5. Ill.—Mouser v. Granite City Steel Div. of Nat. Steel Corp., 5 Dist, 460 N.E.2d 115, 77 Ill.Dec. 256, 121 Ill.App.3d 834, declining to follow Wyatt v. Jewel Companies, Inc., 108 Ill.App.3d 840, 64 Ill.Dec. 388, 439 N.E.2d 1053, and Midgett v. Sackett-Chicago, Inc., 118 Ill.App.3d 7, 73 Ill.Dec. 843, 454 N.E.2d 1092.

17. U.S.—Arauz v. Canal Zone Bus Service, Inc., D.C.Canal Zone, 239 F.Supp. 355, affd., C.A., 359 F.2d 855.

Ky.—Davies v. Mansbach, 338 S.W.2d 210.

Mich.—Earp v. City of Detroit, 167 N.W.2d 841, 16 Mich.App. 271.

N.Y.—Hadden v. Consolidated Edison Co. of New York, Inc., 382 N.E.2d 1136, 45 N.Y.2d 466, 410 N.Y.S.2d 274.

Vt.—In re Brooks, 382 A.2d 204, 135 Vt. 563.

18. Conn.—Breen v. Larson College, 75 A.2d 39, 137 Conn. 152.

20. U.S.—Twentieth Century-Fox Film Corp. v. Lardner, C.A.Cal., 216 F.2d 844, 51 A.L.R.2d 728, cert. den. 75 S.Ct. 365, 348 U.S. 944, 99 L.Ed. 739, reh. den. 75 S.Ct. 522, 348 U.S. 965, 99 L.Ed. 753.

21. N.M.—Chavez v. Lectrosonics, Inc., App., 601 P.2d 728, 93 N.M. 495.

N.Y.—Robitzek v. Reliance Intercontinental Corp., 183 N.Y.S.2d 870, 7 A.D.2d 407, motion den. 197 N.Y.S.2d 472, 7 N.Y.2d 905, 165 N.E.2d 422, affd. 200 N.Y.S.2d 424, 7 N.Y.2d 1041, 167 N.E.2d 74.

S.C.—Cooper v. McDevitt & St. Co., 196 S.E.2d 833, 260 S.C. 463.

Tex.—Swanson v. American Mfg. Co., Civ.App., 511 S.W.2d 561, err. ref. no rev. err.

Wash.—Setzer v. South Columbia Basin Irr. Dist., 576 P.2d 82, 19 Wash.App. 502.

22. U.S.—Loew's, Inc. v. Cole, C.A.Cal., 185 F.2d 641, cert. den. 71 S.Ct. 570, 340 U.S. 954, 95 L.Ed. 688—Hooser v. Baltimore & O.R. Co., D.C. Ind., 177 F.Supp. 186, affd., C.A., 279 F.2d 197—Munhollon v. Pennsylvania R.R., D.C.Ohio, 180 F.Supp. 669—Franklin v. Texas Intern. Petroleum Corp., D.C.La., 324 F.Supp. 808—Walter v. Netherlands Mead N.V., C.A.Virgin Islands, 514 F.2d 1130, cert. den. 96 S.Ct. 133, 423 U.S. 869, 46 L.Ed.2d 99.

Cal.—Haas v. Hodge, 340 P.2d 632, 171 C.A.2d 478.

Conn.—Breen v. Larson College, 75 A.2d 39, 137 Conn. 152.

D C.—In re Certain Carriers Represented by Eastern, Western, and Southeastern Carriers' Conference Committees, D.C., 229 F.Supp. 259.

Idaho—Rosecrans v. Intermountain Soap & Chemical Co., Inc., 605 P.2d 963, 100 Idaho 785.

Ky.—C.J.S. cited in Davies v. Mansbach, 338 S.W.2d 210, 212.

Mass.—Anderson Corp. v. Blanch, 162 N.E 2d 825, 340 Mass. 43.

N.M.—Clem v. Bowman Lumber Co., App., 495 P.2d 1106, 83 N.M. 659.

N Y.—Grozek v. Ragu Foods, Inc., 406 N.Y.S.2d 213, 63 A.D.2d 858.

Ohio—Chalker v. First Federal Sav. & Loan Ass'n, 126 N.E.2d 475—Mathieu v Dudley, 226 N.E.2d 763, 10 Ohio App.2d 169.

Tex.—Associated Milk Producers v. Nelson, Civ App., 624 S.W.2d 920, err. ref. no rev. error.

Wash.—Cornelius Apartment Hotel Corp. v. Alabaster, 460 P.2d 312, 1 Wash.App. 242.

Absence from, or abandonment of, service

Mo.—Craig v. Thompson, 244 S.W.2d 37.

Ohio—Shunk v. Shunk Mfg. Co., 93 N.E.2d 321, 86 Ohio App. 467—Ohio Ferro-Alloys Corp. v. Tichnor, 168 N.E.2d 334.

Refusal to perform services contemplated by contract

Wis.—Schiller v. Keuffel & Esser Co, 124 N.W.2d 646, 21 Wis.2d 545.

Particular facts held not to show breach of contract

U.S.—Cashner v. U.S. Steel Corp., C.A.Ohio, 327 F.2d 533.

Cal.—Mason v. Lyl Productions, 69 Cal.Rptr. 769, 443 P.2d 193, 69 C.2d 79.

Material breach of contract

Alaska—Central Alaska Broadcasting, Inc. v. Bracale, 637 P.2d 711.

page 429

24. Ind.—Seco Chemicals, Inc., Division of Stan Sax Corp. v. Stewart, 349 N.E.2d 733, 169 Ind.App. 624.

Tex.—Dallas Hotel Co. v. Lackey, Civ.App., 203 S.W.2d 557, err. ref. no rev. err.

26. N.Y.—Jones v. Crawford, 148 N.Y.S.2d 335, revd. on oth. grds. 162 N.Y.S.2d 41, 3 A.D.2d 479, rearg. and app. den. 164 N.Y.S.2d 988, 4 A.D.2d 826.

28. U.S.—Shell Oil Co. v. N.L.R.B., C.A., 196 F.2d 637—Sawyer v. E. F. Drew & Co., D.C.N.J., 111 F.Supp. 1, am., D.C., 113 F.Supp. 527, affd., C.A., 209 F.2d 566—Farmers Co-op, Co. v. N.L.R.B., C.A., 208 F.2d 296—Twentieth Century-Fox Film Corp. v. Lardner, supra, n. 20—Helsby v. St. Paul Hospital & Cas. Co., D.C.Minn., 195 F.Supp. 385, affd., C.A., 304 F.2d 758—Feamster v. Southern Ry. Co., D.C.N.C., 49 F.R.D. 26.

Ala.—Duff v. American Cast Iron Pipe Co., 362 So.2d 886.

Del.—Barisa v. Charitable Research Foundation, Inc., Super., 287 A.2d 679, affd. 299 A.2d 430—Coleman v. Department of Labor, Super., 288 A.2d 285.

Iowa—Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454.

La.—Clements v. Ryan, 382 So.2d 279.

Mich.—Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, 408 Mich. 579.

N.Y.—Hadden v. Consolidated Edison Co. of New York, Inc., 382 N.E.2d 1136, 45 N.Y.2d 466, 410 N.Y.S.2d 274.

Okl.—McEvers v. Oklahoma Dept. of Corrections, Appointing Authority, App., 615 P.2d 307.

Pa.—Lux v. Unemployment Compensation Bd. of Review, 118 A.2d 231, 180 Pa.Super. 90.

Tex.—Lone Star Cotton Mills v. Thomas, supra, n. 15—Reagan v. Bichsel, Civ.App., 284 S.W.2d 935, err. ref. no rev. err.—Wildman v. Ritter, Civ.App.,

Page 429

469 S.W.2d 446, err. ref. no rev. err.—Advance Ross Electronics Corp. v. Green, App., 624 S.W.2d 316, err. ref. no rev. err., cert. den. 102 S.Ct. 3488, 458 U.S. 1108, 73 L.Ed.2d 1370.

Wash.—McIntyre v. Fort Vancouver Plywood Co., Inc., 600 P.2d 619, 24 Wash.App. 120.

Vt.—In re Brooks, 382 A.2d 204, 135 Vt. 563.

Dishonesty warranting discharge

(1) U.S.—Robison v. Wichita Falls & North Texas Community Action Corp., C.A.Tex., 507 F.2d 245.

Neb.—Mau v. Omaha Nat. Bank, 299 N.W 2d 147, 207 Neb. 308.

(3) U.S.—Lewis v. Magna American Corp., C.A. Ohio, 472 F.2d 560.

Tex.—Texas Employment Commission v. Ryan, Civ. App., 481 S.W.2d 172.

Conviction of contempt of Congress

U.S.—Scott v. RKO Radio Pictures, Inc., C.A.Cal., 240 F.2d 87, cert. den. 77 S.Ct. 816, 353 U.S. 939, 1 L.Ed.2d 761, reh. den. 77 S.Ct. 1056, 353 U.S. 978, 1 L.Ed.2d 1139.

Refusal to answer questions before congressional committee

N.Y.—Carey v. Westinghouse Elec. Corp., 178 N.Y. S.2d 846, 14 Misc.2d 237, mod. on oth. grds. 180 N.Y.S.2d 203, 6 A.D.2d 582, affd. 190 N.Y.S.2d 1003, 6 N.Y.2d 934, 161 N.E.2d 216.

Commission of crime on employer's premises

U.S.—Local 453, Intern. Union of Elec. Radio and Mach. Workers, AFL-CIO v. Otis Elevator Co., D.C.N.Y., 201 F.Supp. 213.

Depending on nature of employment

Cal.—Waymire v. Placer Joint Union High School Dist., 29 Cal.Rptr. 459, 214 C.A.2d 372.

Willful misconduct

Cal.—Holtzendorff v. Housing Authority of City of Los Angeles, App., 58 Cal.Rptr. 886, 250 C.A.2d 596, cert. den. 88 S.Ct. 775, 389 U.S. 1038, 19 L.Ed.2d 827.

Particular matters not warranting discharge

U.S.—Gasbarra v. Park-Ohio Inc., D.C.Ill., 382 F.Supp. 399, affd., C.A., 529 F.2d 529.

"Academic expertise" irrelevant

U.S.—Robison v. Wichita Falls & North Texas Community Action Corp., C.A.Tex., 507 F.2d 245.

Factors considered

U.S.—Jackson v. City of Akron, Ohio, D.C.Ohio, 411 F.Supp. 680.

29. Ill.—Chicago-Allis Mfg. Corp. v. Illinois Fair Employment Practices Commission, 336 N.E.2d 40, 32 Ill.App.3d 392.

Mass.—Siles v. Travenol Laboratories, Inc., 433 N.E.2d 103, 13 Mass.App. 354, review den. 440 N.E.2d 1176, 386 Mass. 1103.

Tex.—C.J.S. cited in Wildman v. Ritter, Civ.App., 469 S.W.2d 446, 448, err. ref. no rev. err.

page 430

31. D.C.—Vogel v. Washington Metropolitan Area Transit Authority, C.A., 533 F.2d 13, 174 U.S. App.D.C. 345.

Accumulative conduct may warrant dismissal

Vt.—In re Brooks, 382 A.2d 204, 135 Vt. 563.

35. Alaska—Conway, Inc. v. Ross, 627 P.2d 1029.

Falsification of an employment application is a proper ground for dismissal.[38.5]

38.5. Ill.—Roundtree v. Board of Review, 281 N.E.2d 360, 4 Ill.App.3d 695.

However, it has been held that an employee may be discharged during the extended term of an employment agreement for misconduct which occurred during the original contract period.[38.10]

38.10. U.S.—Beall v. Kearney & Trecker Corp., D.C. Md., 350 F.Supp. 978.

39. N.C.—In re Burris, 140 S.E.2d 408, 263 N.C. 793.

S.C.—C.J.S. cited in Berry v. Goodyear Tire & Rubber Co., 242 S.E.2d 551, 552, 270 S.C. 489.

Use of employer's property in manner bringing criticism on him

Pa.—Cadden v. Unemployment Compensation Bd. of Review, 169 A.2d 334, 195 Pa.Super. 159.

40. Mass.—Swaney v. Clark-Wilcox Co., 120 N.E.2d 281, 331 Mass. 471.

Unfaithfulness to employer's interest, etc.

(2) Other cases.

U.S.—Sawyer v. E. F Drew & Co., supra, n. 28.

41. N.Y.—Feiger v. Iral Jewelry, Ltd., 382 N.Y.S.2d 216, 85 Misc.2d 994, affd. 382 N.Y.S.2d 221, 52 A.D.2d 524, affd. 363 N.E.2d 350, 41 N.Y.2d 928, 394 N.Y.S.2d 626.

Particular matters held to warrant discharge

Colo.—Dawson v. Clark, 358 P.2d 591, 145 Colo. 278.

Particular matters held not to warrant discharge

Iowa—LaFontaine v. Developers & Builders, Inc., 156 N.W.2d 651, 261 Iowa 1177.

42. Cal.—Darcy v. H. E. Murray Co., Super., 284 P.2d 583, 133 C.A.2d Supp. 795.

43. Misappropriation of funds

La.—Sim v. Beauregard Elec. Co-op., Inc., App., 322 So.2d 410.

page 431

47. U.S.—Georesearch, Inc. v. Morriss, D.C.La., 193 F.Supp. 163, affd., C.A., 298 F.2d 442—Lowenstein v. President and Fellows of Harvard College, D.C.Mass., 319 F.Supp. 1096—Schroeder v. Dayton-Hudson Corp., D.C.Mich., 448 F.Supp. 910, am. on oth. grds. 456 F.Supp. 650.

La.—Morgan v. Avondale Shipyards, App., 376 So.2d 516.

Md.—H & R Block, Inc. v. Garland, 359 A.2d 130, 278 Md. 91.

Mich.—Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880, 408 Mich. 579.

N.Y.—Freehold Management Corp. v. Kelley, 79 N.Y. S.2d 447.

N.C.—Haynes v. Winston-Salem Southbound Ry. Co., 113 S.E.2d 906, 252 N.C. 391.

Tenn.—Little v. Federal Container Corp., 452 S.W.2d 875, 61 Tenn.App. 26.

Wis.—Schiller v. Keuffel & Esser Co., 124 N.W.2d 646, 21 Wis.2d 545.

"Incompetency" defined

Iowa—Collins v. Iowa Liquor Control Commission, 110 N.W.2d 548, 252 Iowa 1359.

49. U.S.—U.S. for Use and Benefit of Western Steel Erectors, Inc. v. Woerfel Corp., D.C.N.D., 337 F.Supp. 895.

Particular employees

(2) Tex.—Dallas Hotel Co. v. Lackey, supra, n. 24.

53. D.C.—Brock v. Mutual Reports, Inc., App., 397 A.2d 149.

Ky.—C.J.S. cited in Davies v. Mansbach, 338 S.W.2d 210, 212.

La.—Gibson v. South Broadmoor Service Co., App., 168 So.2d 869.

Tenn.—Nelson Trabue, Inc. v. Professional Management-Automotive, Inc., 589 S.W.2d 661.

Wis.—Schiller v. Keuffel & Esser Co., 124 N.W.2d 646, 21 Wis.2d 545.

Deviation from duty

N.J.—Motorlease Corp. v. Mulroony, 81 A.2d 25, 13 N.J.Super. 556, affd. 86 A.2d 765, 9 N.J. 82.

Mishandling of merchandise and money

U.S.—Union News Co. v. Hildreth, C.A.Mich., 295 F.2d 658.

54. U.S.—Sedule v. Capital School Dist., D.C.Del., 425 F.Supp. 552, affd., C.A., 565 F.2d 153, cert. den. 98 S.Ct. 780, 434 U.S. 1039, 54 L.Ed.2d 789.

Ohio—Hosking v. Hollaender Mfg. Co., 175 N.E.2d 201, 114 Ohio App. 70.

55. D.C.—Brock v. Mutual Reports, Inc., App., 397 A.2d 149.

Ky.—Davies v. Mansbach, 338 S.W.2d 210.

page 432

57. U.S.—Albrecht v. N.L.R.B., C.A., 181 F.2d 652—Joseph E. Seagram & Sons v. Bynum, C.A.Ark., 191 F.2d 5—Tinnon v. Missouri Pac. R. Co., D.C.Ark., 167 F.Supp. 675, stating Missouri law, affd 282 F.2d 773.

Ala.—Avondale Mills v. Burnett, 106 So.2d 885, 268 Ala. 82.

Ariz.—Kirchof v. Friedman, 457 P.2d 760, 10 Ariz. App. 220.

Del.—Barisa v. Charitable Research Foundation, Inc., Super., 287 A.2d 679, affd. 299 A.2d 430.

Miss.—Fields v. Johnson, 173 So.2d 428, 252 Miss. 705.

Mo.—Craig v. Thompson, 244 S.W.2d 37.

N.C.—Haynes v. Winston-Salem Southbound Ry. Co., 113 S.E.2d 906, 252 N.C. 391.

Or.—Thomas v. Bourdette, 608 P.2d 178, 45 Or.App. 195.

S.C.—C.J.S. cited in Freeman v. King Pontiac Co., 114 S.E.2d 478, 483, 236 S.C. 335.

Wis.—C.J.S. cited in Millar v. Joint School District No. 2, 86 N.W.2d 455, 461, 2 Wis.2d 303.

What constitutes insubordination as ground for discharge

(2) S.C.—Porter v. Pepsi-Cola Bottling Co. of Columbia, 147 S.E.2d 620—247 S.C. 370, cert. den. 87 S.Ct. 61, 385 U.S. 827, 17 L.Ed.2d 63.

(3) Disobedience or insubordination not shown.

La.—Krizan v. Storz Broadcasting Co., App., 145 So.2d 636.

N.Y.—Rudman v. Cowles Communications, Inc., 280 N.E.2d 867, 30 N.Y.2d 1, 330 N.Y.S.2d 33, 63 A.L.R.3d 527.

58. U.S.—Seymore v. Reader's Digest Ass'n, Inc., D.C.N.Y., 493 F.Supp. 257.

Cal.—Holtzendorff v. Housing Authority of City of Los Angeles, App., 58 Cal.Rptr. 886, 250 C.A.2d 596, cert. den. 88 S.Ct. 775, 389 U.S. 1038, 19 L.Ed.2d 827.

59. U.S.—Keserich v. Carnegie-Illinois Steel Corp., C.C.A.Ind., 163 F.2d 889—Thomas v. New York, C. & St. L.R. Co., D.C.Ohio, 97 F.Supp. 687—Joseph E. Seagram & Sons v. Bynum, supra, n. 57—Sawyer v. E. F. Drew & Co., D.C.N.J., 111 F.Supp. 1, am., D.C., 113 F.Supp. 527, affd., C.A., 209 F.2d 566—N.L.R.B. v. Finesilver Mfg. Co., C.A.Tex., 400 F.2d 644—Walter v. Netherlands Mead N.V., C.A.Virgin Islands, 514 F.2d 1130, cert. den. 96 S.Ct. 133.

Alaska—Central Alaska Broadcasting, Inc. v. Bracale, 637 P.2d 711.

Ariz.—Kirchof v. Friedman, 457 P.2d 760, 10 Ariz. App. 220.

Cal.—Rowe v. Hansen, 116 Cal.Rptr. 16, 41 C.A.3d 512.

La.—Southern Pac. Transport Co. v. Doyal, App., 289 So.2d 882.

Minn.—Mair v. Southern Minn. Broadcasting Co., 32 N.W.2d 177, 226 Minn. 137, 4 A.L.R.2d 273.

Mo.—Craig v. Thompson, App., 240 S.W.2d 163, affd., Sup., 244 S.W.2d 37—Lee v. Missouri Pac. R. Co., 335 S.W.2d 92.

N.J.—Jorgensen v. Pennsylvania R. Co., 118 A.2d 854, 38 N.J.Super. 317.

N.Y.—C.J.S. cited in Fitz v. Dullzell, 102 N.Y.S.2d 308, 315.

Or.—Ashman v. Children's Services Division, 588 P.2d 665, 37 Or.App. 865. App. after remand 622 P.2d 1126, 50 Or.App. 161, and 648 P.2d 400, 58 Or. App. 273.

S.C.—Porter v. Pepsi-Cola Bottling Co. of Columbia, 147 S.E.2d 620, 247 S.C. 370, cert. den. 87 S.Ct. 61, 385 U.S. 827, 17 L.Ed.2d 63.

Facts held insufficient to show insubordination or disobedience

U.S.—Sheppard v. Southern Ry. Co., D.C.N.C., 258 F.Supp. 217, affd., C.A., 376 F.2d 665.

Cal.—De Angeles v. Roos Bros., Inc., 52 Cal.Rptr. 783, 244 C.A.2d 434.

61. U.S.—**C.J.S. quoted at length in** Bynum v. Jos. E. Seagram & Sons, D.C.Ark., 89 F.Supp. 780, 786.

Ill.—Circle Sec. Agency, Inc. v. Ross, 437 N.E.2d 667, 63 Ill.Dec. 18, 107 Ill.App.3d 195.

64. U.S.—Walter v. Netherlands Mead N.V., C.A.Virgin Islands, 514 F.2d 1130, cert. den., 96 S.Ct. 133, 423 U.S. 869, 46 L.Ed.2d 99.

Years of service considered

U.S.—Resilient Floor and Decorative Covering Workers, Local Union 1179 v. Welco Mfg. Co., Inc., C.A.Mo., 542 F.2d 1029.

page 433

67. U.S.—Crisler v. Illinois Cent. R. Co., C.A.Miss., 196 F.2d 941.

73. D.C.—Carter v. U.S., C.A., 407 F.2d 1238, 132 U.S.App.D.C. 303.

Changes, alterations, revisions, or restrictions in existing policy

La.—Krizan v. Storz Broadcasting Co., App., 145 So.2d 636.

76. Ind.—**C.J.S. cited in** Osojnick v. Review Bd. of Ind. Employ. Security Div., 158 N.E.2d 656, 659, 129 Ind.App. 515.

78. U.S.—Kippen v. American Automatic Typewriter Co., C.A.Cal., 324 F.2d 742—Feamster v. Southern Ry. Co., D.C.N.C., 49 F.R.D. 26.

N.C.—**C.J.S. quoted at length in** Wilson v. McClenny, 136 S.E.2d 569, 577, 262 N.C. 121, after remand, 152 S.E.2d 529, 269 N.C. 399.

§ 43. —— Condonation of Breach of Contract and Effect of Reparation

84. U.S.—Johnson v. Long Corp. of Puerto Rico, C.A.Puerto Rico, 244 F.2d 284.

Minn.—Bautch v. Red Owl Stores, Inc., 278 N.W.2d 328.

Mo.—**C.J.S. cited in** Willett v. Reorganized School Dist. No. 2 of Osage County, App., 602 S.W.2d 44, 48.

Waiver held not shown

W.Va.—Homer Laughlin China Co. v. Hix, W.Va., 37 S.E.2d 649.

Wis.—Goff v. Massachusetts Protective Ass'n, Inc., of Worcester, Mass., 176 N.W.2d 576, 46 Wis.2d 712.

Condonation not shown

U.S.—W. T. Rawleigh Co. v. N.L.R.B., C.A., 190 F.2d 832.

Employer held not estopped

Ky.—Davies v. Mansbach, 338 S.W.2d 210.

Suspension

Ind.—Mead Johnson and Co. v. Review Bd. of Indiana Employment Sec. Div., App. 3 Dist., 463 N.E.2d 537.

page 434

85. U.S.—Loew's, Inc. v. Cole, C.A.Cal., 185 F.2d 641, cert. den. 71 S.Ct. 570, 340 U.S. 954, 95 L.Ed. 688.

Ill.—Foster v. Springfield Clinic, 410 N.E.2d 604, 43 Ill.Dec. 604, 88 Ill.App.3d 459.

Tenn.—Fulton v. Tennessee Walking Horse Breeders' Ass'n of America, 476 S.W.2d 644, 63 Tenn.App. 569.

90. Ill.—Schaffer v. Park City Bowl, supra, n. 15.

91. Fla.—Austin's Rack, Inc. v. Austin, App., 396 So.2d 1161.

92. U.S.—Heyman v. Kline, D.C.Conn., 344 F.Supp. 1088, revd. in part on oth. grds., C.A., 456 F.2d 123, cert. den. 93 S.Ct. 53, 409 U.S. 847, 34 L.Ed.2d 88.

93. Ga.—Holmes Mfg. Co. v. Fraker, 68 S.E.2d 172, 85 Ga.App. 83

96. Tenn.—Little v. Federal Container Corp., 452 S.W.2d 875, 61 Tenn.App 26

§ 44. Cause for Termination and Statement Thereof

The giving of a service letter or statement of the cause for discharge is discussed in Labor Relations § 15.

page 435

4. U.S.—Heyman v. Kline, D.C.Conn., 344 F.Supp. 1088, revd. in part on oth. grds., C.A., 456 F 2d 123, cert. den 93 S.Ct. 53, 409 U.S. 847, 34 L.Ed.2d 88.

Cal.—Swaffield v. Universal Ecsco Corp., 76 Cal.Rptr. 680, 271 C.A.2d 147.

Ga.—Andress v. Augusta Nursing Facilities, Inc., 275 S.E.2d 368, 156 Ga.App. 775.

6. Cal.—Patterson v. Philco Corp., 60 Cal Rptr. 110, 252 C.A.2d 63.

Ohio—Harp v. Administrator, Bureau of Unemployment Compensation, 230 N.E.2d 376, 12 Ohio Misc. 34.

Wis.—Goff v. Massachusetts Protective Ass'n, Inc., of Worcester, Mass., 176 N.W.2d 576, 46 Wis.2d 712

page 437

Actions for failure to furnish a service letter are discussed in Labor Relations § 779 et seq.[27–50]

§ 45. Testimonials as to Character

Testimonials as to character are discussed in Labor Relations § 15 and actions in relation thereto are discussed in Labor Relations § 775 et seq.[51–64]

§ 46. Operation and Effect of Discharge

Library References

Master and Servant ⇐33½.

page 440

65. Fla.—Webster v. South Florida Water Management Dist., App., 367 So.2d 734.

66. Mont.—Wyatt v. School Dist. No. 104, Fergus County, 417 P.2d 221, 148 Mont. 83, 22 A.L.R.3d 1039.

page 441

70. Retention after notice as temporary employee.

U.S.—Marcin v. Darling Valve & Mfg. Co., D.C.Pa., 259 F.Supp. 720.

Receipt of mailed discharge

U.S.—United Steelworkers of America, AFL–CIO v. Bell Foundry Co., C.A.Cal., 626 F.2d 139.

71. U.S.—Odell v. Humble Oil & Refining Co., C.A. N.M., 201 F.2d 123, cert. den. 73 S.Ct. 833, 345 U.S. 941, 97 L.Ed. 1367—Eckhart v. Plastic Film Corp., D.C.Conn., 129 F.Supp. 277—Larsen v. Air California D.C.Cal., 313 F.Supp. 218, affd., C.A., 459 F.2d 52, cert. den. 93 S.Ct. 116, 409 U.S. 895, 34 L.Ed.2d 151, reh. den. 93 S.Ct. 511, 409 U.S. 1051, 34 L.Ed.2d 505.

Ark.—Mason v. Funderburk, 446 S.W.2d 543, 247 Ark. 521.

Ill.—Aristocrat Window Co. v. Randell, 206 N.E.2d 545, 56 Ill.App.2d 413.

Md.—Chesapeake & Potomac Tel. Co. of Baltimore City v. Murray, 84 A.2d 870, 198 Md. 526, 28 A.L.R.2d 920.

Minn.—Bussard v. College of St. Thomas, Inc., 200 N.W.2d 155, 294 Minn. 215.

Tex.—Miller v. Puritan Fashions Corp., Civ.App., 516 S.W.2d 234, err. ref. no rev. err.

Obligation of employee to accept re-employment

U.S.—Dahl v. The Amigo, D.C.Ala., 202 F.Supp. 890, affd., C.A., 315 F.2d 370, cert. den. 84 S.Ct. 76, 375 U.S. 831, 11 L.Ed.2d 62.

72. D.C.—Lyons v. Capital Transit Co., Mun.App., 62 A.2d 312.

La.—Quality Materials of Tangipahoa, Inc. v. Labarama, Inc., App., 361 So 2d 1285, writ den., Sup., 363 So.2d 922, 923.

N.J.—Coyle v. Erie R. Co., 63 A.2d 702, 1 N.J. 350.

Tex.—Lone Star Cotton Mills v. Thomas, Civ.App., 227 S.W.2d 300.

No discrimination in reinstatement of one of two employees properly discharged

U.S.—Russ v. Southern Ry. Co., C.A.Tenn., 334 F.2d 224, cert. den. 85 S.Ct. 699, 379 U.S. 991, 13 L.Ed.2d 611, reh. den. 85 S.Ct. 935, 380 U.S. 938, 13 L.Ed.2d 826.

Moreover, the discharge of an employee has been held to foreclose his rights to certain benefits provided by a contract during his term of employment.[72.5]

72.5. Percentage of profit from sale of hotel

Cal.—Goldner v. Jaffe, 341 P.2d 354, 171 C.A.2d 751.

The Fair Labor Standards Act makes no provision for reinstatement of an employee who is discharged in violation of the Act.[72.10]

72.10. D.C.—Powell v. Washington Post Co., C.A., 267 F.2d 651, 105 U.S.App.D.C. 374, cert. den. 79 S.Ct. 1449, 360 U.S. 930, 4 L.Ed.2d 1544.

74. Discharge nullifies written contract

U.S.—Coco v. Winston Industries, Inc., D.C.La., 383 F.Supp. 405.

Pa.—Norway Service Cleaners, Inc. v. Blair, 41 Del.Co. Leg.J. 242, exceptions dism. 41 Del.Co.Leg.J. 289.

§ 47. Actions for Wrongful Discharge

§ 48. —— Right of Action

Library References

Master and Servant ⇐18.5, 34, 36.

76. U.S.—Bakery & Confectionery Workers' Intern. Union, Local No. 492 v. National Biscuit Co., C.A.Pa., 177 F.2d 684—Woodward Iron Co. v. Ware, C.A.Ala., 261 F.2d 138—Rossa v. Flying Tiger Line, Inc., D.C.Ill., 187 F.Supp. 386.

Cal.—Tameny v. Atlantic Richfield Co., 164 Cal.Rptr. 839, 610 P.2d 1330, 27 C.3d 167, 9 A.L.R.4th 314.

D.C.—Pfeffer v. Ernst, Mun.App., 82 A.2d 763.

Fla.—Catania v. Eastern Airlines, Inc., App., 381 So.2d 265.

Kan.—May v. Santa Fe Trail Transp. Co., 370 P.2d 390, 189 Kan. 419.

La.—McDaniel v. Union Tank Car Co., App., 162 So.2d 133, writ ref. 164 So.2d 351, 246 La. 346, cert. den. 85 S.Ct. 203, 379 U.S. 908, 13 L.Ed.2d 180.

Mass.—Steranko v. Inforex, Inc., 362 N.E.2d 222, 5 Mass.App. 253, app. after remand 395 N.E.2d 1303, 8 Mass.App. 523.

Miss.—Kelly v. Mississippi Valley Gas Co., 397 So.2d 874, 32 A.L.R. 4th 1214.

Mo.—**C.J.S. cited in** Craig v. Thompson, 244 S.W.2d 37, 41—Jenkins v. Thompson, 251 S.W.2d 325—Williams v. Kansas City Public Service Co., 294 S.W.2d 36—Williams v. Jones, App., 562 S.W.2d 391.

N.M.—Garza v. United Child Care, Inc., App., 536 P.2d 1086, 88 N.M. 30.

S.C.—Young v. Independent Pub. Co., 254 S.E.2d 681, 273 S.C. 107.

Page 441

Wis.—Ward v. Frito-Lay, Inc., App., 290 N.W.2d 536, 95 Wis.2d 372.

Statute providing for penalties inapplicable

U.S.—Greenwood v. Atchison, T. & S.F. Ry. Co., D.C.Cal., 129 F.Supp. 105.

Change in seniority rights held not to constitute "discharge" so as to give rise to cause of action for wrongful discharge.

U.S.—Crusen v. United Air Lines, Inc., D.C.Colo., 141 F.Supp. 347, affd., C.A., 239 F.2d 863.

Collective bargaining agreement

Mo.—Narens v. Campbell Sixty-Six Exp., Inc., 347 S.W.2d 204.

What law governs

U.S.—Franklin v. Texas Intern. Petroleum Corp., D.C. La., 324 F.Supp. 808—Dailey v. Transitron Overseas Corp., D.C.Tex., 349 F.Supp. 797, affd., C.A., 475 F.2d 12—Bowen v. Wohl Shoe Co., D.C.Tex., 389 F.Supp. 572.

Fla.—Scott v. National Airlines, Inc., App., 142 So.2d 313, cert. discharged, Sup., 150 So.2d 237.

N.J.—Donnelly v. United Fruit Co., 183 A.2d 415, 75 N.J.Super. 383, affd. 190 A.2d 825, 40 N.J. 61.

Collective bargaining agreement precluding action

Cal.—Cortez v. California Motor Exp. Co., 38 Cal.Rptr. 29, 226 C.A.2d 257.

Jurisdiction

U.S.—Falsetti v. Local Union No. 2026, United Mine Workers of America, C.A.Pa., 355 F.2d 658.

Under Railway Labor Act

U.S.—Flight Engineers' Intern. Ass'n, EAL Chapter, AFL-CIO v. Eastern Air Lines, Inc., D.C.N.Y., 243 F.Supp. 701 affd., C.A., 359 F.2d 303.

Factors considered

U.S.—Stark v. Burlington Northern, Inc., D.C.Colo., 538 F.Supp. 1061.

Pa.—Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Division, 422 A.2d 611, 281 Pa.Super. 560.

Consumer Credit Protection Act

U.S.—McCabe v. City of Eureka, Mo., C.A.Mo., 664 F.2d 680—Ellis v. Glover & Gardner Const. Co., D.C.Tenn., 562 F.Supp. 1054.

page 442

77. U.S.—Mitchell v. Stanolind Pipe Line Co., C.A. Kan., 184 F.2d 837—Tinnon v. Missouri Pac. R. Co., D.C.Ark., 167 F.Supp. 675, affd. 282 F.2d 773—Freeman v. Chicago, R.I. & P.R. Co., D.C. Okl., 239 F.Supp. 661—McKinney v. Armco Steel Corp., D.C.Pa., 270 F.Supp. 360—Blackhurst v. E. I. du Pont de Nemours & Co., D.C.W.Va., 294 F.Supp. 128, affd. 405 F.2d 499—Pavlov v. Martin, D.C.Del., 381 F.Supp. 707, affd., C.A., 515 F.2d 507.

Fla.—Segal v. Arrow Industries Corp., App., 364 So.2d 89.

Ga.—Thomas v. Henkin, 246 S.E.2d 501, 146 Ga.App. 508—Shannon v. Huntley's Jiffy Stores, Inc., 329 S.E.2d 208, 174 Ga.App. 125.

Ill.—Roemer v. Zurich Ins. Co., 323 N.E.2d 582, 25 Ill.App.3d 606.

Ind.—Campbell v. Eli Lilly and Co., App., 413 N.E.2d 1054, transfer den., Sup., 421 N.E.2d 1099.

Kan.—Lorson v. Falcon Coach, Inc., 522 P.2d 449, 214 Kan. 670.

Mich.—Schipani v. Ford Motor Co., 302 N.W.2d 307, 102 Mich.App. 606.

Mo.—C.J.S. cited in Williams v. Kansas City Public Service Co., 294 S.W.2d 36, 39—C.J.S. quoted at length in Morsinhoff v. DeLuxe Laundry & Dry Cleaning Co., 344 S.W.2d 639, 642—Smith v. Arthur C. Baue Funeral Home, 370 S.W.2d 249—Tolliver v. Standard Oil Co., 431 S.W.2d 159—Williams v. Jones, App., 562 S.W.2d 391.

Mont.—Keneally v. Orgain, 606 P.2d 127, 186 Mont. 1.

N.H.—Howard v. Dorr Woolen Co., 414 A.2d 1273, 120 N.H. 295, clarified 480 A.2d 42, 125 N.H. 107.

N.J.—Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 84 N.J. 58, 12 A.L.R. 4th 520.

N.Y.—Slater v. Kane, 92 N.Y.S.2d 640, 275 App.Div. 648, rearg. den. 93 N.Y.S.2d 725, 276 App.Div. 835.

Ohio—Fox v. Churngold Corp., 136 N.E.2d 754, 101 Ohio App. 368.

Pa.—Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Division, 422 A.2d 611, 281 Pa.Super. 560.

Tex.—Lunsford v. City of Bryan, Civ.App., 292 S.W.2d 852, revd. on oth. grds. 297 S.W.2d 115, 156 Tex. 520—NHA, Inc. v. Jones, Civ.App., 500 S.W.2d 940, err. ref. no rev. err.

Wis.—C.J.S. cited in Ward v. Frito-Lay, Inc., App., 290 N.W.2d 536, 537, 95 Wis.2d 372.

Motive of discharge

U.S.—Loucks v. Star City Glass Co., C.A.Ill., 551 F.2d 745.

Ind.—Martin v. Platt, 386 N.E.2d 1026, 179 Ind.App. 688.

Mass.—Siles v. Travenol Laboratories, Inc., 433 N.E.2d 103, 13 Mass.App. 354, review den. 440 N.E.2d 1176, 386 Mass. 1103.

W.Va.—Stanley v. Sewell Coal Co., 285 S.E.2d 679.

Wrongful discharge as a "device"

U.S.—Greenwood v. Atchison, T. & S.F. Ry. Co., D.C.Cal., 129 F.Supp. 105—Koch Industries, Inc. v. Vosko, C.A.Kan., 494 F.2d 713.

No right given by statute prohibiting discharge based on age

Mass.—Johnson v. U.S. Steel Corp., 202 N.E.2d 816, 348 Mass. 168.

Discharge without good cause may authorize recovery under circumstances

U.S.—Buysse v. Paine, Webber, Jackson & Curtis, Inc., C.A.Minn., 623 F.2d 1244.

Neb.—Sinnett v. Hie Food Products, Inc., 174 N.W.2d 720, 185 Neb. 221.

N.J.—Lally v. Copygraphics, 413 A.2d 960, 173 N.J.Super. 162, affd. 428 A.2d 1317, 85 N.J. 668.

Discharge for threatening to sue for nonjob related injury

Ariz.—Daniel v. Magma Copper Co., App., 620 P.2d 699, 127 Ariz. 320.

No right of action under consumer Credit Protection Act

U.S.—McCabe v. City of Eureka, Mo., D.C.Mo., 500 F.Supp. 59, affd., C.A., 664 F.2d 680—LeVick v. Skaggs Companies, Inc., C.A.Ariz., 701 F.2d 777.

Implied right render statute

U.S.—Rawson v. Sears Roebuck & Co., D.C.Colo., 530 F.Supp. 776.

Specific intent not shown

U.S.—Harrison v. Fred S. James, P.A., Inc., D.C.Pa., 558 F.Supp. 438.

Action for abusive discharge not recognized

N.Y.—Murphy v. American Home Products Corp., 448 N.E.2d 86, 58 N.Y.2d 293, 461 N.Y.S.2d 232.

Right of action under worker's compensation statute

Fla.—Smith v. Piezo Technology and Professional Administrators, 427 So.2d 182.

Tenn.—Clanton v. Cain-Sloan Co., 677 S.W.2d 441.

No right of action under worker's compensation statute

Me.—MacDonald v. Eastern Fine Paper, Inc., 485 A.2d 228.

Discharge by carrier for reporting aviation safety violations

U.S.—Rachford v. Evergreen Intern. Airlines, Inc., D.C.Ill., 596 F.Supp. 384.

Discharge pretextual to avoid payment of benefits

U.S.—Folz v. Marriott Corp., D.C.Mo., 594 F.Supp. 1007.

No action for retaliatory discharge under OSHA

U.S.—Taylor v. Brighton Corp., C.A.Ohio, 616 F.2d 256—George v. Aztec Rental Center Inc., C.A. 5(Tex.), 763 F.2d 184.

78. U.S.—Goldstein v. Doft, D.C.N.Y., 236 F.Supp. 730, affd., C.A., 353 F.2d 484, cert. den. 86 S.Ct. 1226, 383 U.S. 960, 16 L.Ed.2d 302—Freeman v. Chicago, R.I. & P.R. Co., D.C.Okl., 239 F.Supp. 661.

Conn.—McCullough v. Crown Sheet Metal & Roofing Co., 249 A.2d 404, 28 Conn.Sup. 63.

Ga.—Hill v. Delta Air Lines, Inc., 237 S.E.2d 597, 143 Ga.App. 103.

Kan.—Johnson v. National Beef Packing Co., 551 P.2d 779, 220 Kan. 52.

La.—Wright v. Round the Corner Restaurants of La., Inc., App., 252 So.2d 341.

Mo.—Morsinkhoff v. DeLuxe Laundry & Dry Cleaning Co., App., 344 S.W.2d 639.

N.Y.—Chin v. American Tel. & Tel. Co., 410 N.Y.S.2d 737, 96 Misc.2d 1070.

79. **Settlement for personal injuries precluding right to recover damages for wrongful discharge**

U.S.—Chavira v. Southern Pac. Co., D.C.Cal., 187 F.Supp. 251.

80. U.S.—Newman v. Baltimore & O.R. Co., C.A.Pa., 191 F.2d 560—Rose v. Great Northern Ry. Co., C.A.N.D., 268 F.2d 674.

La.—Morse v. J. Ray McDermott & Co. Inc., 344 So.2d 1353.

Minn.—Rensch v. General Drivers, Helpers and Truck Terminal Emp. Local No. 120, 129 N.W.2d 341, 268 Minn. 307.

Tex.—McFaull v. Collins, Civ.App., 208 S.W.2d 142, err. ref.

Utah—Held v. American Linen Supply Co., 307 P.2d 210, 6 Utah 2d 106—Russell v. Ogden Union Ry. & Depot Co., 328 P.2d 306, 8 Utah 2d 63.

81. Del.—Davidge, Van Cleef, Jordan & Wood, Inc. v. Baker, 290 A.2d 319.

Under a contract providing that the employer may terminate the contract if it considers the employee has violated certain specified rules of conduct or procedure, if the employer exercises its rights under those provisions improperly or unjustly the employee has a remedy for damages for wrongful discharge.[81.5]

81.5. N.Y.—Duro-Test Corp. v. Donaghy, 189 N.Y.S.2d 20, 17 Misc.2d 1085, affd. in part and revd. in part on oth. grds. 193 N.Y.S.2d 121, 9 A.D.2d 860.

Tex.—Santex, Inc. v. Cunningham, Civ.App., 618 S.W.2d 557.

Where a state constitutional provision gives employees the right to organize and bargain collectively, an employee discharged because of his exercise of such rights may maintain an action for damages.[82.5]

82.5. U.S.—Hodges v. Tomberlin, D.C.Ga., 510 F.Supp. 1287.

Employee without contract for definite term

Mo.—Smith v. Arthur C. Baue Funeral Home, 370 S.W.2d 249.

No right of action for reinstatement and lost wages

Mo.—Smith v. Arthur C. Baue Funeral Home, 370 S.W.2d 249.

Right of action for reinstatement and lost wages

N.J.—Cooper v. Nutley Sun Printing Co., Inc., 175 A.2d 639, 36 N.J. 189.

83. U.S.—Tinnon v. Missouri Pac. R. Co., C.A.Ark., 282 F.2d 773—Pearson v. Youngstown Sheet & Tube Co., C.A.Ind., 332 F.2d 439, cert. den. 85 S.Ct. 262, 379 U.S. 914, 13 L.Ed.2d 185.
Fla.—Days v. Florida East Coast Ry. Co., App., 165 So.2d 434.
Ga.—Rhodes v. Levitz Furniture Co., 221 S.E.2d 687, 136 Ga.App. 514.
Miss.—Masonite Corp. v. Handshoe, 44 So.2d 41, 208 Miss. 166.
Mo.—C.J.S. cited in Craig v. Thompson, 244 S.W.2d 37, 41—Parks v. Thompson, 253 S.W.2d 796.
N.Y.—Panzarella v. New York Cent. System, Inc., 207 N.Y.S.2d 933, 27 Misc.2d 57.

84. Colo.—Gulick v. A. Robert Strawn & Associates, Inc., App., 477 P.2d 489.
Mo.—Quinn v. Buchanan, 298 S.W.2d 413—Baue v. Embalmers Federal Labor Union No. 21301 AFL-CIO, 376 S.W.2d 230.

Whether or not a cause of action has been stated for a wrongful discharge of an at-will employee under the theory that the motivation for the discharge contravenes public policy has been adjudicated by the courts.[84.1]

84.1. Right to discharge at will employee as limited by public policy or other considerations see supra § 42.
U.S.—Shanahan v. WITI-TV, Inc., D.C.Wis., 565 F.Supp. 219.

Cause of action stated
U.S.—Perks v. Firestone Tire & Rubber Co., C.A.Pa., 611 F.2d 1363.
Conn.—Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 179 Conn. 471.
Md.—Adler v. American Standard Corp., 432 A.2d 464, 291 Md. 31.
Va.—Bowman v. State Bank of Keysville, 331 S.E.2d 797.

Refusing to perform illegal act
Tex.—Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733.

Cause of action not stated
Cal.—Pugh v. See's Candies, Inc., 171 Cal.Rptr. 917, 116 C.A.3d 311.
Ind.—Campbell v. Eli Lilly & Co., App., 413 N.E.2d 1054, transfer den., Sup., 421 N.E.2d 1099.
Pa.—Geary v. U.S. Steel Corp., 319 A.2d 174, 456 Pa. 171.
Wis.—Ward v. Frito-Lay, Inc., 290 N.W.2d 536, 95 Wis.2d 372.

In addition, other matters involving actions for wrongful discharge in violation of public policy have been adjudicated.[84.2]

84.2. **Age discrimination**
U.S.—Crews v. Memorex Corp., D.C.Mass., 588 F.Supp. 27—Deramo v. Consolidated Rail Corp., D.C.Pa., 607 F.Supp. 100.

Whistleblowers' protection act exclusive remedy
Mich.—Covell v. Spengler, 366 N.W.2d 76, 141 Mich. App. 76.

Violation of statute
Md.—Moniodis v. Cook, 494 A.2d 212, 64 Md.App. 1, cert. den. 500 A.2d 649, 304 Md. 631.

Failure to conceal employer's theft
Ariz.—Vermillion v. AAA Pro Moving & Storage, App., 704 P.2d 1360, 146 Ariz. 215.

Tort liability
Thompson v. St. Regis Paper Co., 685 P.2d 1081, 102 Wash.2d 219.

The Fair Labor Standards Act makes no provision for a civil action by an employee to recover damages for a discharge in violation of the Act.[84.5]

84.5. D.C.—Powell v. Washington Post Co., C.A., 267 F.2d 651, 105 U.S.App.D.C. 374, cert. den. 79 S.Ct. 1449, 360 U.S. 930, 3 L.Ed.2d 1544.
Pa.—Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 255 Pa.Super. 28.

Rules applied under Landrum-Griffin Act
U.S.—Woody v. Sterling Aluminum Products, Inc., D.C.Mo., 244 F.Supp. 84, affd C.A., 365 F 2d 448, cert. den. 87 S.Ct. 1026, 386 U.S. 957, 18 L.Ed.2d 105, reh. den. 87 S.Ct. 1371, 386 U.S. 1027, 18 L.Ed.2d 471.

An employer may be liable to an employee in damages for terminating the employee because of time lost from the job due to jury service by the employee.[84.10]

84.10. Or.—Nees v. Hocks, 536 P.2d 512, 272 Or. 210.

86. U.S.—Molinar v. Western Elec. Co., C.A.Mass., 525 F.2d 521, cert. den. 96 S.Ct. 1485, 424 U.S. 978, 47 L.Ed.2d 748.

Termination by discharge essential
U.S.—Ferro v. Railway Exp. Agency, Inc., C.A.N.Y., 296 F.2d 847.
N.Y.—Laiken v. American Bank & Trust Co., 308 N.Y.S.2d 111, 34 A.D.2d 514.

87. D.C.—Wright v. Disabled Am. Veterans, C.A., 271 F.2d 827, 106 U.S.App.D.C. 244.
N.Y.—Yazujian v. J. Rich Steers, Inc., 89 N.Y.S.2d 551, 195 Misc. 694.

88. Hawaii—Low v. Honolulu Rapid Transit Co., 445 P.2d 372, 50 Haw. 582.

89. Pa.—Guttridge v. A. F. Rees, Inc., 67 York Leg. Rec. 56.

page 443

90. Ga.—Johnson v. General Motors Corp., App., 241 S.E.2d 30, 144 Ga.App. 305, cert. den. 98 S.Ct. 3092, 437 U.S. 905, 57 L.Ed.2d 1135.

There are other adjudications with respect to conditions precedent in this type of action.[97.1]

97.1. U.S.—Theiss v. John Fabick Tractor Co., D.C. Mo., 532 F.Supp. 453.

Exhaustion of remedies provided for in collective bargaining contract held condition precedent
U.S.—Barker v. Southern Pac. Co., C.A.Cal., 214 F.2d 918.
Mich.—Spencer v. Wall Wire Products Co., 98 N.W.2d 615, 357 Mich. 296.
Wis.—Widuk v. John Oster Mfg. Co., 117 N.W.2d 245, 17 Wis.2d 367.

Written notice of claim
U.S.—Loundon v. Morrison-Knudsen Co., D.C.N.Y., 137 F.Supp. 642.

Exhaustion of administrative remedies required
U.S.—Majors v. Thompson, C.A.La., 235 F.2d 449.
Cal.—Stroman v. Atchison, T. & S.F. Ry. Co., 326 P.2d 155, 161 C.A.2d 151.
Mich.—Schwartz v. Michigan Sugar Co., 308 N.W.2d 459, 106 Mich.App. 471.
Mo.—Ware v. St. Louis Car Co., App., 384 S.W.2d 287.
Or.—Walsh v. Consolidated Freightways, Inc., 563 P.2d 1205, 278 Or. 347.

Breach of contract
U.S.—Coleco Industries, Inc. v. Berman, D.C.Pa., 423 F.Supp. 275, affd. in part, remd. in part, C.A., 567 F.2d 569, cert. den. 99 S.Ct. 106, 439 U.S. 830, 58 L.Ed.2d 124, reh. den. 99 S.Ct. 601, 439 U.S. 998, 58 L.Ed.2d 671.
Ill.—Long v. Illinois Cent. R. Co., App., 176 N.E.2d 812, 32 Ill.App.2d 103, cert. den. 82 S.Ct. 948, 369 U.S. 858, 8 L.Ed.2d 17, reh. den. 82 S.Ct. 1248, 370 U.S. 906, 8 L.Ed.2d 402.
N.C.—Williams v. Biscuitville, Inc., 253 S.E.2d 18, 40 N.C.App. 405, cert. den. 256 S.E.2d 810, 297 N.C. 457.

Exhaustion of contractual remedies generally
U.S.—Sutton v. Pennsylvania R. Co., D.C.Md., 227 F.Supp. 827.
Md.—Hendthorn v. Western Md. Ry. Co., 174 A.2d 175, 226 Md. 499.

Pursuance of grievance procedures not required
Fla.—Scott v. National Airlines, Inc., 150 So.2d 237.

The existence of a contractual remedy for wrongful discharge does not preclude an action in tort for retaliatory discharge;[97.2] such action is barred only where an employee raises the retaliatory discharge issue in grievance procedures provided by a collective bargaining agreement.[97.3]

97.2. Ill.—Elia v. Industrial Personnel Corp., 1 Dist., 466 N.E.2d 1054, 81 Ill.Dec. 252, 125 Ill.App.3d 1026—Wyatt v. Jewel Companies, Inc., 439 N.E.2d 1053, 64 Ill.Dec 388, 108 Ill.App.3d 840, 32 A.L.R. 4th 346—Midgett by and through Midgett v. Sackett-Chicago, Inc., 454 N.E.2d 1092, 73 Ill.Dec. 843, 118 Ill.App.3d 7, affd. 473 N.E.2d 1280, 85 Ill.Dec. 475, 105 Ill.2d 143, cert. den. 105 S.Ct. 3513, 87 L.Ed.2d 642 and 106 S.Ct. 278, 88 L.Ed.2d 243.

97.3. Ill.—Elia v. Industrial Personnel Corp., 466 N.E.2d 1054, 81 Ill.Dec. 252, 125 Ill.App.3d 1026.

§ 49. —— Accrual of Right

98. U.S.—C.J.S. cited in An-Ti Chai v. Michigan Technological University, D.C.Mich., 493 F.Supp. 1137, 1144.
Ga.—Sandt v. Mason, 67 S.E.2d 767, 208 Ga. 541.
Kan.—Crouch v. McDonald, 229 P.2d 766, 171 Kan. 29.
Mich.—Reinardy v. Bruzzese, 118 N.W.2d 952, 368 Mich. 688.
N.Y.—Yazujian v. J. Rich Steers, Inc., supra, n. 87.

99. Tex.—Dixie Glass Co. v. Pollak, Civ.App., 341 S.W.2d 530, 91 A.L.R.2d 662, err. ref. no rev. err., 347 S.W.2d 596, 162 Tex. 440.

Suit must be brought within the time specified in a collective bargaining agreement.[2.5]

2.5. U.S.—Hilton v. Norfolk & W. Ry. Co., D.C.W. Va., 194 F.Supp. 915—Rocha v. Missouri Pac. R. Co., D.C.Tex., 224 F.Supp. 566—Hubicki v. United Steelworkers of America, D.C.Pa., 344 F.Supp. 1247, affd., 484 F.2d 519.

3. U.S.—Spence v. Utah Const. Co., C.A.Cal., 293 F.2d 34—Falsetti v. Local Union No. 2026, United Mine Workers of America, C.A.Pa., 355 F.2d 658.

page 444

N.Y.—Matter of Griffin's Claim, 436 N.Y.S.2d 441, 80 A.D.2d 689, app. dism. 425 N.E.2d 885, 53 N.Y.2d 1028, 442 N.Y.S.2d 497.

§ 50. —— Nature and Form of Remedy

Library References

Master and Servant ⇐18.5.

9. U.S.—Cales v. Chesapeake & O. Ry. Co., D.C.Va., 300 F.Supp. 155.
Ala.—City of Anniston v. Douglas, 34 So.2d 467, 250 Ala. 367—Slovensky v. Birmingham News Co., Inc., Civ., 358 So.2d 474.
Cal.—Tameny v. Atlantic Richfield Co., 164 Cal.Rptr. 839, 610 P.2d 1330, 27 C.3d 167, 9 A.L.R.4th 314.
Ga.—Henry v. Moss, 109 S.E.2d 313, 99 Ga.App. 623.

Page 444

N.J.—Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 84 N.J. 58, 12 A.L.R. 4th 520

N.Y.—Carvatt v. Lippner, 439 N.Y.S.2d 681, 82 A.D.2d 818.

W.Va.—Harless v. First Nat. Bank in Fairmont, 289 S.E.2d 692.

Wis.—McDonald v. Chicago, M., St. P. & P.R. Co., 157 N.W.2d 553, 38 Wis.2d 526.

Complaint procedures provided in handbook

N.Y.—Grozek v. Ragu Foods, Inc., 406 N.Y.S.2d 213, 63 A.D.2d 858.

What law governs. In an action for damages for tortious discharge the law of the place of hiring and firing and where a pension fund is administered, governs.[9.5]

9.5. U.S.—Hablas v. Armour & Co, C.A.N.D., 270 F.2d 71, applying Illinois law.

What law governs

U.S.—Bachmann v. Blaw-Knox Co., D.C.Pa., 198 F.Supp. 617.

15. Neb.—**C.J.S. cited in** Lee v. Ralston School Dist., Douglas County, 145 N.W.2d 919, 920, 180 Neb. 784.

page 445

16. Ala.—City of Anniston v. Douglas, supra, n. 9.

19. Ala.—City of Anniston v. Douglas, supra, n. 9.

Ga.—Hubert v. Luden's, Inc., 88 S.E.2d 481, 92 Ga. App. 427, transf. 87 S.E.2d 74, 211 Ga. 544—Henry v. Moss, 109 S.E.2d 313, 99 Ga.App. 623—Rosenstock v. Congregation Agudath Achim, 164 S.E.2d 283, 118 Ga.App. 443.

N.Y.—Wegman v. Dairylea Co-op. Inc., 376 N.Y.S.2d 728, 50 A.D.2d 108, app. dism. 346 N.E.2d 817, 38 N.Y.2d 918, 382 N.Y.S.2d 979.

21. U.S.—Roberts v. Lehigh & N.E. Ry. Co., C.A.Pa., 323 F.2d 219—Cales v. Chesapeake & O. Ry. Co., D.C.Va., 300 F.Supp. 155.

Cal.—Downs v. Sherry, 202 P.2d 101, 90 Cal.App.2d 1—Wise v. Southern Pac. Co., 35 Cal.Rptr. 652, 223 C.A.2d 50.

Fla.—Local Union No. 519 of United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada v. Robertson, 44 So.2d 899.

Ga.—Sandt v. Mason, 67 S.E.2d 767, 208 Ga. 541—Hubert v. Luden's, Inc., 88 S.E.2d 481, 92 Ga.App. 427, transf. 87 S.E.2d 74, 211 Ga. 544—Rosenstock v. Congregation Agudath Achim, 164 S.E.2d 283, 118 Ga.App. 443.

Ill.—Keel v. Illinois Terminal R. Co., 104 N.E.2d 659, 346 Ill.App. 169.

Ind.—Faultless Caster Corp. v. United Elec., Radio & Mach. Workers of America, CIO, Local 813, 86 N.E.2d 703, 119 Ind.App. 330.

La.—Giron v. Housing Authority of City of Opelousas, 393 So.2d 1267.

Neb.—Lee v. Ralston School Dist., Douglas County, 145 N.W.2d 919, 180 Neb. 784—Sullivan v. David City Bank, 148 N.W.2d 844, 181 Neb. 395.

N.M.—Hernandez v. Home Educ. Livelihood Program, Inc., App., 645 P.2d 1381, 98 N.M. 125, cert. den. 648 P.2d 794, 98 N.M. 336.

N.Y.—Cornell v. T.V. Development Corp., 268 N.Y.S.2d 29, 17 N.Y.2d 69, 215 N.E.2d 349, on remand 270 N.Y.S.2d 45, 50 Misc.2d 422.

Ohio—Shunk v. Shunk Mfg. Co., 93 N.E.2d 321, 86 Ohio App. 467.

Pa.—Welker v. Unemployment Compensation Bd. of Review, 119 A.2d 658, 180 Pa.Super. 534.

Tex.—Tigrett v. Heritage Bldg. Co., Civ.App., 533 S.W.2d 65, err. ref. no rev. err.

Right to court trial applying common law principles

Utah—Russell v. Ogden Union Ry. & Depot Co., 247 P.2d 257, 122 Utah 107.

Personal common-law action

U.S.—Dimeco v Fisher, D.C.N.J., 185 F.Supp. 213.

22. Fla.—Dania Jai Alai Intern., Inc. v. Murua, App., 375 So.2d 57.

N.Y.—Songer v. Mack Trucks, Inc., 256 N.Y.S.2d 313, 23 A.D.2d 544.

page 446

24. D.C.—Keller v. Marvins Credit, Inc., Mun.App., 147 A.2d 872.

N.Y.—Rudman v. Cowles Communications, Inc., 280 N.E.2d 867, 30 N.Y.2d 1, 330 N.Y.S.2d 33, 63 A.L.R.3d 527.

N.C.—MacDonald v. University of North Carolina at Chapel Hill, 263 S.E.2d 578, 299 N.C. 457.

Tenn.—Fulton v. Tennessee Walking Horse Breeders' Ass'n of America, 476 S.W.2d 644, 63 Tenn.App 569.

25. Ariz.—Shun v. Hospital Ben. Ass'n, 357 P.2d 603, 89 Ariz. 12.

§ 51. —— Defenses

29. U.S.—McBride v. Tennessee Val. Authority, D.C. Tenn., 395 F.Supp. 1181, affd., C.A., 513 F.2d 632—In re Terry, Bkrtcy.Va, 7 B.R 880.

Ariz.—Chapin v. Klein, App., 623 P.2d 1250, 128 Ariz. 94.

Del.—Barisa v. Charitable Research Foundation, Inc., Super., 287 A.2d 679, affd. 299 A.2d 430.

N.Y.—Bender v. Candee Smith & Howland Co., 136 N.Y.S.2d 425—McNamar v. Baltimore & O.C.T.R. Co., D.C.Ind., 153 F.Supp. 835, affd., C.A., 254 F.2d 717.

Or.—Carney v. Guard Pub. Co., 616 P.2d 548, 48 Or.App. 147, mod. on oth. grds. 630 P.2d 867, 48 Or.App. 927.

Tex.—Lone Star Steel Co. v. Wahl, App. 6 Dist., 636 S.W.2d 217.

Utah—Russell v. Ogden Union Ry. & Depot Co., supra, n. 21.

Refusal to work immaterial

N.Y.—Jones v. Crawford, 148 N.Y.S.2d 335, revd. on oth. grds. 162 N.Y.S.2d 41, 3 A.D.2d 479, rearg. and app. den. 164 N.Y.S.2d 988, 4 A.D.2d 826.

Particular matters held to be matter of affirmative defense

Ga.—Vulcan Materials Co. v. Douglas, 205 S.E.2d 84, 131 Ga.App. 21—Ely v. Stratoflex, Inc., 208 S.E.2d 583, 132 Ga.App. 569.

Or.—Millsap v. Eugene Care Center, Inc., 682 P.2d 795, 68 Or.App. 223, review den. 685 P.2d 997, 97 Or. 547.

Wis.—McDonald v. Chicago, M., St. P. & P.R. Co., 130 N.W.2d 794, 25 Wis.2d 205—Cheese v. Afram Bros. Co., 145 N.W.2d 716, 32 Wis.2d 320.

Entitlement to rights or defenses not shown

N.Y.—West v. Technical Aid Corp., 443 N.Y.S.2d 318, 111 Misc.2d 23.

Tex.—Zuider Zee Oyster Bar, Inc. v. Martin, Civ.App., 503 S.W.2d 292, err. ref. no rev. err.

Estoppel

D.C.—Vogel v. Washington Metropolitan Area Transit Authority, C.A., 533 F.2d 13, 174 U.S.App.D.C. 345.

N.C.—Tatum v. Brown, 224 S.E.2d 698, 29 N.C.App. 504.

32. Tex.—Lone Star Cotton Mills v. Thomas, Civ. App., 227 S.W.2d 300.

33. Return in different capacity

Cal.—Rotter v. Stationers Corp., 8 Cal.Rptr. 690, 186 C.A.2d 170.

36. U.S.—Molinar v. Western Elec. Co., C.A.Mass., 525 F.2d 521, cert. den. 96 S.Ct. 1485, 424 U.S. 978, 47 L.Ed.2d 748.

N.J.—Donnelly v. United Fruit Co. 183 A.2d 415, 75 N.J.Super. 383, affd. 190 A.2d 825, 40 N.J. 61, stating New Jersey and New York Law.

N.Y.—Laiken v. American Bank & Trust Co., 308 N.Y.S.2d 111, 34 A.D.2d 514.

page 447

43. Cal.—Billetter v. Posell, 211 P.2d 621, 94 Cal. App.2d 858.

44. Cal.—Billetter v. Posell, supra, 211 P.2d 621, 94 Cal.App.2d 858.

Rights not waived

Cal.—Rabago-Alvarez v. Dart Industries, Inc., 127 Cal. Rptr. 222, 55 C.A.3d 91.

Mass.—Steranko v. Inforex, Inc., 362 N.E.2d 222, 5 Mass.App. 253, app. after remand 395 N.E.2d 1303, 8 Mass.App. 523.

53. U.S.—Adkins v. Kelly's Creek R. Co., D.C.W. Va., 338 F.Supp. 888, affd., C.A., 458 F.2d 26, cert. den. 93 S.Ct. 224, 409 U.S. 926, 34 L.Ed.2d 184.

§ 52. —— Pleading

Library References

Master and Servant ⟹39.

56. Cal.—Parrott v. Bank of America Nat. Trust & Sav. Ass'n, 217 P.2d 89, 97 Cal.App.2d 14, 35 A.L.R.2d 263.

Kan.—Lorson v. Falcon Coach, Inc., 522 P.2d 449, 214 Kan. 670.

Tex.—Smith v. Hamilton, Civ.App., 237 S.W.2d 774.

page 448

57. N.M.—Jones v. International Union of Operating Engineers, 383 P.2d 571, 72 N.M. 322.

Tenn.—Delzell v. Pope, 294 S.W.2d 690, 200 Tenn. 641.

Tex.—Atkinson v. Thompson, Civ.App., 311 S.W.2d 250, err. ref. no rev. err.

Complaint under Federal Rules of Civil Procedure

(2) Other statements.

U.S.—Lemmon v. Cedar Point, Inc., C.A.Ohio, 406 F.2d 94.

Complaint held insufficient

U.S.—Cales v. Chesapeake & O. Ry. Co., D.C.Va., 300 F.Supp. 155.

Cal.—Pratt v. Local 683, Film Technicians of Motion Picture and Television Industries of Intern. Alliance of Theatrical Stage Emp. and Moving Picture Mach. Operators of U.S. and Canada, 67 Cal.Rptr. 483, 260 C.A.2d 545.

D.C.—Marranzano v. Riggs Nat. Bank of Washington, D.C., 184 F.2d 349, 87 U.S.App.D.C. 195.

Ill.—Coulton v. L. R. Nelson Mfg. Co., 196 N.E.2d 377, 46 Ill.App.2d 24—Roemer v. Zurich Ins. Co., 323 N.E.2d 582, 25 Ill.App.3d 606.

Kan.—May v. Santa Fe Trail Transp. Co., 370 P.2d 390, 189 Kan. 419.

N.Y.—Sultan v. Lamport Co., 207 N.Y.S.2d 786, 12 A.D.2d 583, rearg. den. and app. gr. 211 N.Y.S.2d 1013, 12 A.D.2d 907.

Or.—Campbell v. Ford Industries, Inc., 546 P.2d 141, 274 Or. 243, 84 A.L.R.3d 1093.

Pa.—Geary v. U.S. Steel Corp., 319 A.2d 174, 456 Pa. 171.

Complaint held sufficient

Fla.—Rothman v. Gold Master Corp., App., 287 So.2d 735, app. after remand 323 So.2d 586.

N.H.—Cloutier v. Great Atlantic & Pac. Tea Co., 436 A.2d 1140, 121 N.H. 915.

N.Y.—Sultan v. Lamport Co., 207 N.Y.S.2d 786, 12 A.D.2d 583, rearg. den. and app. gr. 211 N.Y.S.2d 1013, 12 A.D.2d 907—Zisman v. Leasing Consultants Inc., 314 N.Y.S.2d 603, 35 A.D.2d 726.

N.C.—Glover v. Brotherhood of Ry. and S.S. Clerks, Freight Handlers, Exp. and Station Emp., 108 S.E.2d 78, 250 N.C. 35.

Wis.—McDonald v. Chicago, M., St. P. & P.R. Co., 130 N.W.2d 794, 25 Wis.2d 205.

62. U.S.—Taylor v. Atchison, T. & S.F. Ry. Co., D.C.Mo., 92 F.Supp. 968.

Complaints held insufficient

(2) Other cases.

Cal.—Tyco Industries, Inc. v. Superior Court (Richards), 211 Cal.Rptr. 540, 164 C.A.3d 148.

Ga.—Hogan v. Young Men's Christian Ass'n of Greater Atlanta, 61 S.E.2d 161, 82 Ga.App. 372.

Ill.—Cipov v. International Harvester Co., 1 Dist., 481 N.E.2d 22, 89 Ill.Dec. 670, 134 Ill.App.3d 522.

W.Va.—Wright v. Standard Ultramarine & Color Co., 90 S.E.2d 459, 141 W.Va. 368.

Cause of action for retaliatory discharge stated

Ill.—Darnell v. Impact Industries, Inc., 473 N.E.2d 935, 85 Ill.Dec. 336, 105 Ill.2d 158.

66. La.—West v. State Through State Superintendent of Public Ed., App., 324 So.2d 579.

Mo.—**C.J.S. quoted at length in** Mullin v. St. Louis-San Francisco Ry. Co., App., 254 S.W.2d 438, 441—Williams v. Kansas City Public Service Co., 294 S.W.2d 36.

Pa.—Lubrecht v. Laurel Stripping Co., 42 Luz.Leg.Reg. 203.

Written contract

(2) Other matters.

Ga.—Rosenstock v. Congregation Agudath Achim, 164 S.E.2d 283, 118 Ga.App. 443.

page 449

67. Mo.—Williams v. Kansas City Public Service Co., 294 S.W.2d 36—Howe v. St. Louis Union Trust Co., 392 S.W.2d 625.

Allegations of wrongful discharge insufficient

(2) Other allegations.

U.S.—Rossa v. Flying Tiger Line, Inc., D.C.Ill., 187 F.Supp. 386—Jenkins v. United Steel Workers of America, D.C.Pa., 522 F.Supp. 80.

N.C.—Scott v. Burlington Mills Corp., 95 S.E.2d 273, 245 N.C. 100.

68. Cal.—Swaffield v. Universal Ecsco Corp., 76 Cal. Rptr. 680, 271 C.A.2d 147.

(2) Other allegations.

Insufficient allegations

U.S.—Hanson v. Chicago, B. & Q.R. Co., C.A.Wis., 282 F.2d 758, cert. den. 81 S.Ct. 813, 365 U.S. 850, 5 L.Ed.2d 814—Thoma v. Wolverine World Wide, Inc., D.C.Pa., 352 F.Supp. 580.

Mo.—Maddock v. Lewis, 386 S.W.2d 406, cert. den. 85 S.Ct. 1569, 381 U.S. 929, 14 L.Ed.2d 688.

69. Wis.—Nelson v. La Crosse Trailer Corp., 37 N.W.2d 63, 254 Wis. 414.

70. U.S.—Ferro v. Railway Exp. Agency, Inc., C.A. N.Y., 296 F.2d 847.

Ga.—Snyder v. Savannah Union Station Co., 70 S.E.2d 382, 85 Ga.App. 851.

N.J.—Miller v. U.S. Rubber Co., 61 A.2d 241, 137 N.J. Law 682.

Tex.—Smith v. Coffee's Shop for Boys & Men, Inc., Civ.App., 536 S.W.2d 83.

Sufficiency of allegation

(3) Other cases.

U.S.—Hahn v. Woodmen Acc. & Life Co., C.A.Ohio, 474 F.2d 1237—Gasbarra v. Park-Ohio Inc., D.C. Ill., 382 F.Supp. 399, affd., C.A., 529 F.2d 529.

Alaska—Skagway City School Bd. v. Davis, 543 P.2d 218.

Mo.—Mullin v. St. Louis-San Francisco Ry. Co., supra, n. 66—Narens v. Campbell Sixty-Six Exp., Inc., 347 S.W.2d 204.

Pleading held sufficient

Cal.—Wise v. Southern Pac. Co., 35 Cal.Rptr. 652, 223 C.A.2d 50.

Fla.—Goldsmith v. Sorrento Holding Corp., App., 119 So.2d 808.

Federal Employers' Liability Act

U.S.—Greenwood v. Atchison, T. & S.F. Ry. Co., D.C.Cal., 129 F.Supp. 105.

Pleading held insufficient

Fla.—Scott v. National Airlines, Inc., App., 142 So.2d 313, cert. discharged, Sup., 150 So.2d 237.

Ga.—Land v. Delta Air Lines, Inc., 203 S.E.2d 316, 130 Ga.App. 231.

77. Pa.—Pitt v. Reliable Trunk & Bag Co., 16 Law. L.J. 10.

page 450

81. N.Y.—Bender v. Candee Smith & Howland Co., 136 N.Y.S.2d 425.

86. Neb.—Schlueter v. School Dist No. 42 of Madison County, 96 N.W.2d 203, 168 Neb. 443.

90. U.S.—Brotherhood of R.R. Trainmen v. Central of Ga. Ry. Co., D.C.Ga., 202 F.Supp. 324, affd. in part, C.A., 305 F.2d 605.

Ariz.—McClanahan v. Cochise College, 540 P.2d 744, 25 Ariz.App. 13, reh. den. 542 P.2d 426, 25 Ariz. App. 233.

Ga.—Sandt v. Mason, supra, n. 21.

page 451

92. Cal.—Kouff v. Bethlehem Alameda Shipyard, 202 P.2d 1059, 90 Cal.App.2d 322.

Allegations insufficient

Mo.—Williams v. Kansas City Public Service Co., 294 S.W.2d 36.

93. Ga.—Elliott v. Delta Air Lines, Inc., 156 S.E.2d 656, 156 Ga.App. 656.

4. Mich.—Johnson v. Jessop, 51 N.W.2d 915, 332 Mich. 501.

5. N.Y.—Strader v. Collins, 116 N.Y.S.2d 318, 280 App.Div. 582.

page 452

10. N.Y.—Mason v. Lory Dress Co., 104 N.Y.S.2d 906, mod. on oth. grds. 110 N.Y.S.2d 904, 279 App.Div. 863, affd. 111 N.E.2d 649, 305 N.Y. 600.

Tex.—Smith v. Hamilton, Civ.App., 237 S.W.2d 774.

11. Cal.—Erler v. Five Points Motors, 57 Cal.Rptr. 516, 249 C.A.2d 560.

Tex.—Niles v. Parsons, Civ.App., 239 S.W.2d 740.

14. U.S.—Niccum v. Farmers Co-op Elevator Co. of Giltner, Neb., C.A.Neb., 457 F.2d 453.

Mich.—Ogden v. George F. Alger Co., 91 N.W.2d 288, 353 Mich. 402.

N.Y.—Levitz v. Robbins Music Corp., 178 N.Y.S.2d 221, 6 A.D.2d 1027.

N.C.—McCrillis v. A & W Enterprises, Inc., 155 S.E.2d 281, 270 N.C. 637.

Breach of work rule in issue

Cal.—Wise v. Southern Pac. Co., 35 Cal.Rptr. 652, 223 C.A.2d 50.

Consideration by equity court of right not claimed

N.Y.—Cornell v. T.V. Development Corp., 245 N.Y. S.2d 918, 41 Misc.2d 628, affd. 260 N.Y.S.2d 865, 24 A.D.2d 471, revd. on oth. grds. 215 N.E.2d 349, 17 N.Y.2d 69, 268 N.Y.S.2d 29, on remand 270 N.Y.S.2d 45, 50 Misc.2d 422.

16. U.S.—Moore v. Missouri Pac. R. Co., C.A.Tex., 264 F.2d 754, cert. den. 80 S.Ct. 119, 361 U.S. 861, 4 L.Ed.2d 103.

20. Ga.—Guy F. Atkinson Co. v. Fimian, 68 S.E.2d 236, 85 Ga.App. 200, revd. on oth. grds. 70 S.E.2d 762, 209 Ga. 113.

Mo.—Johnson v. Thompson, 236 S.W.2d 1, 241 Mo. App. 1008.

Pa.—Solomon v. Luria, 246 A.2d 435, 213 Pa.Super. 87.

page 453

23. Ark.—Andrews v. Victor Metal Products Corp., 411 S.W.2d 515, 241 Ark. 889.

24. Or.—Gaswint v. Case, 509 P.2d 19, 265 Or. 248.

36. Cal.—Darcy v. H. E. Murray Co., Super., 284 P.2d 583, 133 C.A.2d Supp. 795.

38. N.Y.—Belfert v. Peoples Planning Corp. of America, 199 N.Y.S.2d 839, 22 Misc.2d 753, affd. 202 N.Y.S.2d 101, 11 A.D.2d 760, app. dism. conditionally 202 N.Y.S.2d 193, 10 A.D.2d 700, app. dism. 207 N.Y.S.2d 267, 8 N.Y.2d 1054, 170 N.E.2d 403, motion den. 212 N.Y.S.2d 413, 9 N.Y.2d 678, 173 N.E.2d 235.

§ 53. —— Evidence

Library References

Master and Servant ⇐40(1–4).

page 454

45. U.S.—Edwards v. Southern Ry. Co., D.C.N.C., 258 F.Supp. 212.

Mo.—**C.J.S. cited in** Craig v. Thompson, 244 S.W.2d 37, 42.

N.Y.—Sasmor v. V. Vivaudou, Inc., 103 N.Y.S.2d 640, 200 Misc. 1020.

Violation of public policy

N.H.—Bergeron v. Travelers Ins. Co., 480 A.2d 42, 125 N.H. 107.

Presumption as to law applicable

U.S.—Grant v. Atlas Powder Co., C.A.Tenn., 241 F.2d 715.

46. U.S.—Cales v. Chesapeake & O. Ry. Co., D.C. Va., 300 F.Supp. 155.

Colo.—Schweizer v. Amalgamated Butcher Workmen of North America, Local No. 641, 347 P.2d 516, 141 Colo. 211.

La.—Teague v. Ashy, App., 278 So.2d 516.

N.C.—Hagan v. Jenkins, 67 S.E.2d 380, 234 N.C. 425.

47. U.S.—Lucas v. Whittaker Corp., C.A.Colo., 470 F.2d 326.

Colo.—Schweizer v. Amalgamated Butcher Workmen of North America, Local No. 641, 347 P.2d 516, 141 Colo. 211.

La.—Baker v. Union Tank Car Co., App., 140 So.2d 397.

Mo.—Craig v. Thompson, 244 S.W.2d 37—Mullin v. St. Louis-San Francisco Ry. Co., App., 254 S.W.2d 438.

N.J.—DeMarco v. Thatcher Furnace Co., 245 A.2d 773, 102 N.J.Super. 258.

Tex.—Coker v. Wesco Materials Corp., Civ.App., 368 S.W.2d 883.

48. N.J.—Hindle v. Morrison Steel Co., 223 A.2d 193, 92 N.J.Super. 75.

Mich.—Rasch v. City of East Jordan, 367 N.W.2d 856, 141 Mich.App. 336.

Mo.—**C.J.S. quoted in** Johnson v. Thompson, 236 S.W.2d 1, 13, 241 Mo.App. 1008.

Utah—**C.J.S. cited in** Russell v. Ogden Union Ry. & Depot Co., 247 P.2d 257, 260, 122 Utah 107.

Prima facie case for retaliatory discharge under whistleblowers' act

U.S.—Melchi v. Burns Intern. Sec. Services, Inc., D.C. Mich., 597 F.Supp. 575.

Where the employer asserts the affirmative defense of impossibility of reinstatement, the burden of establishing it rests on the employer.[51.5]

51.5. Or.—Millsap v. Eugene Care Center, Inc., 682 P.2d 795, 68 Or.App. 223, review den. 685 P.2d 997, 297 Or. 547.

53. S.C.—**C.J.S. quoted at length in** Martin v. Southern Ry. Co., 126 S.E.2d 365, 370, 240 S.C. 460.

54. Mo.—**C.J.S. quoted at length in** Johnson v. Thompson, 236 S.W.2d 1, 13, 241 Mo.App. 1008.

Wash.—Morris v. Rosenberg, 391 P.2d 975, 64 Wash.2d 404.

page 455

55. U.S.—Cole v. Loew's Incorporated, D.C.Cal., 8 F.R.D. 508, revd. on oth. grds., C.A., 185 F.2d 641, cert. den. 71 S.Ct. 570, 340 U.S. 954, 95 L.Ed. 688—Sawyer v. E. F. Drew & Co., D.C. N.J., 111 F.Supp. 1, am., D.C., 113 F.Supp. 527, affd., C.A., 209 F.2d 566—Moore v. Missouri Pac. R. Co., C.A.Tex., 264 F.2d 754, cert. den. 80 S.Ct. 119, 361 U.S. 861, 4 L.Ed.2d 103—Farmer v. Arabian Am. Oil Co., C.A.N.Y., 285 F.2d 720—Lucas v. Whittaker Corp., C.A.Colo., 470 F.2d 326.

Page 455

Ill.—Schaffer v. Park City Bowl, 102 N.E.2d 665, 345 Ill.App. 279.

Ky.—Davies v. Mansbach, 338 S.W.2d 210.

Mass.—Chaplain v. Dugas, 80 N E.2d 9, 323 Mass. 91.

Mo.—Johnson v. Thompson, supra, n. 20.

S.C.—Martin v. Southern Ry. Co., 126 S.E.2d 365, 240 S.C. 460.

Tex.—Lone Star Cotton Mills v. Thomas, Civ.App., 227 S.W.2d 300.

Utah—Russell v Ogden Union Ry. & Depot Co., 247 P.2d 257, 122 Utah 107

Wash.—Morris v. Rosenberg, 391 P.2d 975, 64 Wash.2d 404.

56. U.S.—Beall v. Kearney & Trecker Corp., D.C Md., 350 F.Supp. 978.

Iowa—Holden v. Construction Machinery Co., 202 N.W.2d 348, 67 A.L.R.3d 324.

58. Ill.—Schaffer v. Park City Bowl, supra, n. 55.

Tex.—Kree Institute of Electrolysis, Inc. v. Fageros, Civ.App., 478 S.W.2d 569.

59. Iowa—LaFontaine v. Developers & Builders, Inc., 156 N.W.2d 651, 261 Iowa 1177.

Miss.—Frederick Smith Enterprise Co. v. Lucas, 36 So.2d 812, 204 Miss. 43.

Wash.—Frazier v. Bowmar, 255 P 2d 906, 42 Wash.2d 383.

Corroboration by vouchers and receipts as not required

U.S.—Beggs v. Dougherty Overseas, Inc., C.A.N.Y., 287 F.2d 80.

page 456

63. Cal.—Carroll v. Civil Service Commission of Kern County, 107 Cal.Rptr. 557, 31 C.A.3d 561.

Conn.—Carter v. Bartek, 114 A.2d 923, 142 Conn. 448.

N.Y.—Reiss v. Arabian Am. Oil Co., 107 N.Y.S.2d 907, revd. on oth. grds. 109 N.Y.S.2d 625, 279 App.Div. 805, motion den. 107 N.E.2d 167, 304 N.Y. 644, affd. 110 N.E.2d 888, 304 N.Y. 953—Ribakove v. Rich, 172 N.Y.S.2d 902, 16 Misc.2d 339.

Tex.—Smith v. Hamilton, Civ.App., 237 S.W.2d 774.

Wis.—State ex rel. Schilling v. Baird, 222 N.W.2d 666, 65 Wis.2d 394.

64. Ark.—Runkle v. Fuess, 290 S.W.2d 433, 226 Ark. 447.

Cal.—Parker v. Twentieth Century-Fox Film Corp., 89 Cal.Rptr. 737, 474 P.2d 689, 3 C.3d 176, 44 A.L.R.3d 615—California School Emp Ass'n v. Personnel Commission of Pajaro Val. Unified School Dist. of Santa Cruz County, 106 Cal.Rptr. 283, 30 C.A.3d 241.

Ill.—People ex rel. Bourne v. Johnson, 205 N.E.2d 470, 32 Ill.2d 324.

Mass.—McKenna v. Commissioner of Mental Health, 199 N.E.2d 686, 347 Mass. 674.

Mich.—Ogden v. George F. Alger Co., 91 N.W.2d 288, 353 Mich. 402—Reinardy v. Bruzzese, 118 N.W.2d 952, 368 Mich. 688.

Neb.—Schlueter v. School Dist. No. 42 of Madison County, 96 N.W.2d 203, 168 Neb. 443—Sullivan v. David City Bank, 148 N.W.2d 844, 181 Neb. 395.

N.H.—McLaughlin v. Union-Leader Corp., 127 A.2d 269, 100 N.H. 367, cert. den. 77 S.Ct. 663, 353 U.S. 909, 1 L.Ed.2d 663, reh. den. 77 S.Ct. 810, 353 U.S. 943, 1 L.Ed.2d 764.

N.Y.—Crabtree v. Elizabeth Arden Sales Corp., 105 N.Y.S.2d 40, affd. 112 N.Y.S.2d 494, affd. 110 N.E.2d 551, 305 N.Y. 48.

Okl.—Independent School Dist. No. 65, Wagoner County v. Stafford, 257 P.2d 1092, 208 Okl. 542.

Pa.—Savitz v. Gallaccio, 118 A.2d 282, 179 Pa.Super. 589—Haefele v. Davis, 49 Luz.L.Reg. 223.

Tenn.—Jeffers v. Stanley, 486 S.W.2d 737.

Tex.—Niles v. Parsons, Civ.App., 239 S.W.2d 740—Call of Houston, Inc. v. Mulvey, Civ.App., 343 S.W.2d 522—Mr. Eddie, Inc. v. Ginsberg, Civ.App., 430 S.W.2d 5, err. ref. no rev. err.

Wis.—Klug v. Flambeau Plastics Corp. (Flambeau Prods. Corp.), 214 N.W.2d 281, 62 Wis.2d 141.

When Employer relieved of burden

U.S.—Fisher Const. Co v. Lerche, C.A.Guam, 232 F.2d 508.

Tex.—Smith v Hamilton, supra, n. 63.

It has been held that the burden of proving that the employee could have earned or did earn compensation in mitigation of damages rests on the party whose wrongful actions caused the breach.[64.5]

64.5. Minn.—Zeller v. Prior Lake Public Schools, Independent School Dist., No. 719, Scott County, 108 N.W.2d 602, 259 Minn. 487, 89 A.L.R.2d 1012.

65. Evidence held admissible or improperly excluded

(1) U.S.—Dailey v. Transitron Overseas Corp., D.C. Tex., 349 F.Supp. 797, affd. C.A , 475 F.2d 12.

Cal.—Gross v. Maytex Knitting Mills of Cal., 254 P.2d 163, 116 C.A.2d 705.

Mass.—Morse v. Fall River Line Pier, Inc., 189 N.E.2d 512, 345 Mass. 681.

Miss.—Masonite Corp. v. Handshoe, 44 So.2d 41, 208 Miss. 166.

Mo.—Mullin v. St. Louis-San Francisco Ry. Co., supra, n. 47—Lee v. Missouri Pac. R. Co., 335 S.W.2d 92.

S.C.—Martin v. Southern Ry. Co., 136 S.E.2d 907, 244 S.C. 315.

Tex.—Porter v. United Motels, Inc., Civ.App., 315 S.W.2d 340.

Utah—Russell v. Ogden Union Ry. & Depot Co., supra, n. 55.

(2) Ala.—Green v. American Cast Iron Pipe Co., 446 So.2d 16.

Evidence held inadmissible

Ark.—Cloud Oak Flooring Co. v. Fulks, 272 S.W 2d 677, 224 Ark. 263.

Ga.—Rhodes v. Levitz Furniture Co., 221 S.E.2d 687, 136 Ga.App. 514.

Mo.—Tennison v. St. Louis-San Francisco Ry. Co., 228 S.W.2d 718.

page 457

67. Evidence of dissatisfaction

(1) Cal.—Crillo v. Curtola, 204 P.2d 941, 91 Cal. App.2d 263.

73. Fla.—Paddock v. Bay Concrete Industries, Inc., App., 154 So.2d 313.

Particular evidence held admissible

U.S.—Beall v. Kearney & Trecker Corp., D.C.Md., 350 F.Supp. 978.

Mo.—Mullin v. St. Louis-San Francisco Ry. Co., supra, n. 47.

77. Tex.—Lone Star Cotton Mills v. Thomas, supra, n. 55.

Wash.—Frazier v. Bowmar, supra, n. 59.

79. Wis.—McDonald v Chicago, M , St. P. & P R. Co., 157 N.W.2d 553, 38 Wis.2d 526.

Salary received

Minn.—Rensch v. General Drivers, Helpers and Truck Terminal Emp. Local No. 120, 129 N.W.2d 341, 268 Minn. 307.

page 458

84. Wis.—McDonald v. Chicago, M., St. P. & P.R. Co., 157 N.W.2d 553, 38 Wis.2d 526.

86. Cal.—Crillo v. Curtola, supra, n. 67.

Utah—Russell v. Ogden Union Ry. & Depot Co., supra, n. 55.

87. Ala.—Alabama Credit Corp. v. Higgins, 36 So.2d 227, 251 Ala. 17.

page 459

98. Damages generally

Wash.—Frazier v. Bowmar, supra, n. 59.

99. Cal.—Mason v. Lyl Productions, 69 Cal.Rptr. 769, 443 P.2d 193, 69 C.2d 79.

1. Evidence held sufficient

U.S.—De Pova v. Camden Forge Co., C.A.N.J., 254 F.2d 248, cert. den. 79 S Ct. 26, 358 U.S. 816, 3 L.Ed.2d 59.

Cal.—Goad v. Rogers, 229 P.2d 791, 103 Cal.App.2d 294.

Ill.—Balstad v. Solem Mach. Co., 168 N.E.2d 732, 26 Ill.App.2d 419.

N.J.—Broth. of R. Trainmen v. Hill Bus Co., 44 A.2d 904, 137 N.J.Eq. 408, affd. 51 A.2d 116, 139 N.J.Eq. 304.

Tex.—Lone Star Cotton Mills v. Thomas, Civ.App., 227 S.W.2d 300.

Evidence held insufficient

Ill.—Thorsen v. Hansen, 151 N.E.2d 421, 18 Ill.App.2d 1.

2. Evidence held sufficient

(1) N.Y.—Mason v. Lory Dress Co., 104 N.Y.S.2d 906, mod. on oth. grds. 110 N.Y.S.2d 904, 279 App.Div. 863, affd. 111 N.E.2d 649, 305 N.Y. 600.

(2) Conn.—Carter v. Bartek, 114 A.2d 923, 142 Conn. 448.

D.C.—Seldin v. Sande, Mun.App., 163 A.2d 572.

Ill.—Miller v. Community Discount Centers, Inc., 228 N.E.2d 113, 83 Ill.App.2d 439.

Minn.—Fountain v. Oreck's, Inc., 71 N.W.2d 646, 245 Minn. 202.

Tex.—Jay-Kay Paint Mfg. Co. v. Carter, Civ.App., 281 S.W.2d 453, err. ref. no rev. err.

(3) Wis.—Smith v. Beloit Corp., 162 N.W.2d 585, 40 Wis.2d 550.

(4) To sustain finding of absence of contract provision against discharge except for cause.

Minn.—Cederstrand v. Lutheran Brotherhood, 117 N.W.2d 213, 263 Minn. 520.

(5) To show employment was not a hiring at will.

Pa.—Solomon v. Luria, 246 A.2d 435, 213 Pa.Super. 87.

(6) Other matters.

Mo.—Nola v. Merollis Chevrolet Kansas City, Inc., App., 537 S.W.2d 627.

Tex.—Barron v. Farah, Civ.App., 466 S.W.2d 434, err. ref. no rev. err.

Evidence held insufficient

(1) Md.—Gill v. Computer Equipment Corp., 292 A.2d 54, 266 Md. 170.

(2) N.Y.—Lohak v. Woodmere Club Inc., 190 N.Y. S.2d 174, 21 Misc.2d 320.

3. Ark.—Ben F. Levis, Inc., v. Collins, 219 S.W.2d 762, 215 Ark. 172.

Evidence held sufficient

U S.—McAleer v. McNally Pittsburg Mfg. Corp., C.A. Pa., 329 F.2d 273.

Kan.—Crouch v. McDonald, 229 P.2d 766, 171 Kan. 29.

N.Y.—Lohak v. Woodmere Club, Inc., 190 N.Y.S.2d 174, 21 Misc.2d 320.

4. Ala.—Alabama Credit Corp. v. Higgins, 36 So.2d 227, 251 Ala. 17.

Evidence held sufficient

Cal.—Darcy v. H E. Murray Co., 284 P.2d 583, 133 C.A.2d Supp. 795.

Hawaii—Low v. Honolulu Rapid Transit Co., 445 P.2d 372, 50 Haw. 582.

5. Cal.—Nemanick v. Christensen, 197 P.2d 785, 87 Cal.App.2d 844.

Evidence held sufficient

Ariz.—Kolberg v. McKean's Model Laundry & Dry Cleaning Co., 454 P.2d 867, 9 Ariz.App. 549.

Mont.—Fox v. Fifth West, Inc., 454 P.2d 612, 153 Mont. 95.

N.Y.—White v. Ammann, 253 N.Y.S.2d 331, 22 A.D.2d 674.

Evidence held insufficient

N.Y.—White v. Ammann, 253 N.Y.S.2d 331, 22 A.D.2d 674.

7. Cal.—Billetter v. Posell, 211 P.2d 621, 94 Cal. App.2d 858.

Ind.—Nationwide Mut. Ins. Co. v. Pomeroy, 227 N.E.2d 448, 141 Ind.App. 288.

N.Y.—Mason v. Lory Dress Co., supra, n. 2.
Okl.—Groendyke Transport, Inc. v. Merchant, 380 P.2d 682.
Utah—Russell v. Ogden Union Ry. & Depot Co., 328 P.2d 306, 8 Utah 2d 63.

Prima facie case

Colo.—Peterson v. Colorado Engraving Co., App., 476 P.2d 1009.

8. U.S.—Brooks v. Chicago, R.I. & P.R. Co., C.A. Iowa, 177 F.2d 385.
Miss.—Frederick Smith Enterprise Co. v. Lucas, 36 So.2d 812, 204 Miss. 43.
N.Y.—Yazujian v. J. Rich Steers, Inc., 89 N.Y.S.2d 551, 195 Misc. 694.

Evidence held sufficient

(1) Fla.—Goldman v. Bodner, App., 272 So.2d 13.
Mich.—Brooks v. Flint Furniture Mart, 70 N.W.2d 700, 342 Mich. 419.
(2) U.S.—Reynolds v. Denver & Rio Grande Western R. Co., C.A.Utah, 174 F.2d 673—Sawyer v. E. F. Drew & Co., C.A.N.J., 209 F.2d 566—United Protective Workers of America, Local No. 2 v. Ford Motor Co., C.A.Ill., 223 F.2d 49—Entis v. Atlantic Wire & Cable Corp., C.A.N.Y., 335 F.2d 759—Walls v. Southern Ry. Co., C.A.Ga., 351 F.2d 948.
Ark.—Cloud Oak Flooring Co. v. Fulks, 272 S.W.2d 677, 224 Ark. 263.
Cal.—Downs v. Sherry, 202 P.2d 101, 90 Cal.App.2d 1—Nattini v. Dewey, 216 P.2d 46, 96 Cal.App.2d 545—Silva v. McCoy, 66 Cal.Rptr. 364, 259 C.A.2d 256.
Fla.—Reed Const. Corp. v. Zimmerman, App., 133 So.2d 579.
Ill.—Gauthier v. Fairies Lamp Works, 97 N.E.2d 587, 342 Ill.App. 714—Aristocrat Window Co. v. Randell, 206 N.E.2d 545, 56 Ill.App.2d 413.
Iowa—LaFontaine v. Developers & Builders, Inc., 156 N.W.2d 651, 261 Iowa 1177.
Mich.—Horetski v. American Sandblast Co., 65 N.W.2d 702, 340 Mich. 323—Brown v. Chris Nelsen & Son, Inc., 158 N.W.2d 818, 10 Mich.App. 95.
N.J.—Cook v. John H. Mathis Co., 61 A.2d 585, 1 N.J.Super. 335.
Pa.—Lavin v. Goldwater, 79 A.2d 266, 366 Pa. 599.
Tex.—Jay-Kay Paint Mfg. Co. v. Carter, Civ.App., 281 S.W.2d 453, err. ref. no rev. err.—Mr. Eddie, Inc. v. Ginsberg, Civ.App., 430 S.W.2d 5, err. ref. no rev. err.
Va.—Norfolk Southern Ry. Co. v. Harris, 59 S.E.2d 110, 190 Va. 966.
(3) Cal.—Oldenkott v. American Elec., Inc., 92 Cal. Rptr. 127, 14 C.A.3d 198, cert. den. 91 S.Ct. 1668, 402 U.S. 975, 29 L.Ed.2d 140.
(4) U.S.—Meredith v. Lewis, C.A.Alaska, 203 F.2d 714, 14 Alaska 281—Johnson v. Long Corp. of Puerto Rico, C.A.Puerto Rico, 244 F.2d 284—Diffenderfer v. Heublein, Inc., D.C.Minn., 285 F.Supp. 9, affd., C.A., 412 F.2d 184.
Cal.—Braverman v. Rosenthal, 226 P.2d 617, 102 Cal. App.2d 30.
Colo.—Schweizer v. Amalgamated Butcher Workmen of North America, Local No. 641, 347 P.2d 516, 141 Colo. 211.
Ill.—Long v. Illinois Cent. R. Co., 176 N.E.2d 812, 32 Ill.App.2d 103, cert. den. 82 S.Ct. 948, 369 U.S. 858, 8 L.Ed.2d 17, reh. den. 82 S.Ct. 1248, 370 U.S. 906, 8 L.Ed.2d 402.
La.—Evans v. Delta By-Products, App., 52 So.2d 593.
Mo.—Craig v. Thompson, 244 S.W.2d 37.
N.Y.—Joseph v. Pennsylvania R.R., 227 N.Y.S.2d 995, 16 A.D.2d 332, affd. 190 N.E.2d 242, 12 N.Y.2d 1056, 239 N.Y.S.2d 882.
(5) U.S.—Transcontinental & Western Air v. Koppal, Mo., 73 S.Ct. 906, 345 U.S. 653, 97 L.Ed. 1325—Sawyer v. E. F. Drew & Co., D.C.N.J., 111 F.Supp. 1, am., D.C., 113 F.Supp. 527, affd., C.A., 209 F.2d 566—Nichols v. National Tube Co., D.C.Ohio, 122 F.Supp. 726—Marec v. U.S. Steel Corp., D.C.Ohio, 195 F.Supp. 137—Cashner v. U.S. Steel Corp., C.A.Ohio, 327 F.2d 533—Cunningham v. Erie R. Co., C.A.N.Y., 358 F.2d 640.
Ariz.—Dumes v. Harold Laz Advertising Co., 409 P.2d 307, 2 Ariz.App. 387.
Ark.—Clark v. Farnsworth & Chambers Co., 262 S.W.2d 458, 222 Ark. 765.
Cal.—Lewis v. Protective Sec. Life Ins. Co., 25 Cal. Rptr. 213, 208 C.A.2d 582.
Mo.—Johnson v. Thompson, 236 S.W.2d 1, 241 Mo. App. 1008—Howe v. St. Louis Union Trust Co., 392 S.W.2d 625.
N.Y.—Lohak v. Woodmere Club, Inc., 190 N.Y.S.2d 174, 21 Misc.2d 320.
Utah—Reliance Nat. Life Ins. Co. v. Hansen, 393 P.2d 793, 15 Utah 2d 400.
Wash.—Frazier v. Bowmar, 255 P.2d 906, 42 Wash.2d 383.

Evidence held insufficient

(2) U.S.—International Broth. of Tel. Workers v. New England Tel., & Tel. Co., D.C.Mass., 240 F.Supp. 426.
Mont—Ameline v. Pack & Co., 485 P.2d 689, 157 Mont. 301.
Neb.—Sinnett v. Hie Food Products, Inc., 174 N.W.2d 720, 185 Neb. 221.
N.Y.—Felsen v. Sol Cafe Mfg. Corp., 249 N.E.2d 459, 24 N.Y.2d 682, 301 N.Y.S.2d 610.
(3) N.J.—DeMarco v. Thatcher Furnace Co., 245 A 2d 773, 102 N.J.Super. 258.
N.Y.—Risio v. Cornwall Paper Mills Co., 98 N.Y.S.2d 437, 277 App.Div. 933, rearg. den. 99 N.Y.S.2d 757, 277 App.Div. 951.
Wis.—Cheese v. Afram Bros. Co., 145 N.W.2d 716, 32 Wis.2d 320.
(4) Other matters.
N.C.—Wilkinson v. Erwin Mills, Inc., 108 S.E.2d 673, 250 N.C. 370.

Retaliatory discharge

Ill.—Gould v. Campbell's Ambulance Service, Inc., 3 Dist., 474 N.E.2d 740, 85 Ill.Dec. 780, 130 Ill. App.3d 598.

page 460

9. U.S.—Thompson v. Moore, C.A.Tex., 223 F.2d 91, cert. den. 76 S.Ct. 116, 118, 350 U.S. 873, 100 L.Ed. 771.
Or.—Nees v. Hocks, 536 P.2d 512, 272 Or. 210.

Evidence held sufficient

U.S.—Rees v. Bank Bldg. & Equipment Corp. of America, C.A.Ill., 332 F.2d 548, cert. den. 85 S.Ct. 332, 379 U.S. 932, 13 L.Ed.2d 344.
Cal.—Oldenkott v. American Elec., Inc., 92 Cal.Rptr. 127, 14 C.A.3d 198, cert. den. 91 S.Ct. 1668, 402 U.S. 975, 29 L.Ed.2d 140.
Ind.—Nationwide Mut. Ins. Co. v. Pomeroy, 227 N.E.2d 448, 141 Ind.App. 288.
Mich.—Ogden v. George F. Alger Co., 91 N.W.2d 288, 353 Mich. 402.
Pa.—Levine v. Giant, Inc., 178 A.2d 802, 197 Pa.Super. 339.

Evidence held insufficient

U.S.—Diffenderfer v. Heublein, Inc., D.C.Minn., 285 F.Supp. 9, affd., C.A., 412 F.2d 184.
Mo.—Severs v. Williamson, App., 209 S.W.2d 572.

10. Ark.—Ben F. Levis, Inc., v. Collins, supra, n. 3.
Ill.—Schaffer v. Park City Bowl, Inc., 116 N.E.2d 90, 1 Ill.App.2d 84.

Evidence held sufficient

U.S.—Tiedman v. American Pigment Corp., C.A.Va., 253 F.2d 803—Miroyiannis v. Wyeth, Inc., C.A. Pa., 253 F.2d 849.

11. Neb.—Bitler v. Terri Lee, Inc., 81 N.W.2d 318, 163 Neb. 833.

Evidence held sufficient

(2) Atchison, T. & S.F.R. Co. v. Andrews, C.A. N.M., 211 F.2d 264.
Ariz.—Co-op Dairy, Inc. v. Dean, 435 P.2d 470, 102 Ariz. 573.
Ark.—Runkle v. Fuess, 290 S.W.2d 433, 226 Ark. 447.
Cal.—Bertero v. National General Corp., 62 Cal.Rptr 714, 254 C.A.2d 126.
Ill.—Hillman v. Hodag Chemical Corp., 238 N.E.2d 145, 96 Ill.App.2d 204.
(3) To show other matters.
U.S.—United Protective Workers of America, Local No. 2 v. Ford Motor Co., C.A.Ill., 223 F.2d 49.
Tex.—Mr. Eddie, Inc. v. Ginsberg, Civ.App., 430 S.W.2d 5, err. ref. no rev. err.
Wash.—Frazier v. Bowmar, supra, n. 8.

Evidence held insufficient

Utah—Reliance Nat. Life Ins. Co. v. Hansen, 393 P.2d 793, 15 Utah 2d 400.

12. **Evidence held sufficient**

U.S.—Schlenk v. Lehigh Val. R. Co., D.C.N.J., 74 F.Supp. 569—United Protective Workers of America, Local No. 2 v Ford Motor Co., C.A.Ill., 223 F.2d 49.
Ill.—Miller v. Community Discount Centers, Inc., 228 N.E.2d 113, 83 Ill.App.2d 439.
Mass.—Chaplain v. Dugas, 80 N.E.2d 9, 323 Mass. 91.
Tex.—Mr. Eddie, Inc. v. Ginsberg, Civ.App., 430 S.W.2d 5, err. ref. no rev. err.

Evidence held insufficient

(3) Ark.—Runkle v. Fuess, 290 S.W.2d 433, 226 Ark. 447.
(4) Other statements.
Cal.—Pichignau v. City of Paris, 70 Cal.Rptr. 147, 264 C.A.2d 138.

§ 54. —— Questions of Law and Fact

Library References

Master and Servant ⇐43.

13. U.S.—Winand v. Case, D.C.Md., 154 F.Supp. 529—Niccum v. Farmers Co-op. Elevator Co. of Giltner, Neb., C.A.Neb., 457 F.2d 453.
Fla.—Russell & Axon v. Handshoe, App., 176 So.2d 909.
Ga.—Nikas v. Hindley, 108 S.E.2d 98, 99 Ga.App. 194.
Mo.—Lee v. Missouri Pac. R. Co., 335 S.W.2d 92.

14. Colo.—Nelson v. Centennial Cas. Co., 273 P.2d 121, 130 Colo. 66.
Tex.—Maxwell v. Cardinal Petroleum Corp., 471 S.W.2d 785.

15. U.S.—De Pova v. Camden Forge Co., C.A.N.J., 254 F.2d 248, cert. den. 79 S.Ct. 26, 358 U.S. 816, 3 L.Ed.2d 59—Cranston v. Baltimore & O.R. Co., C.A.Pa., 258 F.2d 630, cert. den. 79 S.Ct. 731, 359 U.S. 946, 3 L.Ed.2d 678.
Fla.—Jimarye, Inc. v. Pipkin, App., 181 So.2d 669.
Ill.—Alonso v. Hyland Builders Corp., 197 N.E.2d 609, 46 Ill.App.2d 446.
Ind.—Rochester Capital Leasing Corp. v. McCracken, 295 N.E.2d 375, 156 Ind.App. 128.
Mo.—Lee v. Missouri Pac. R. Co., 335 S.W.2d 92—Medical West Bldg. Corp. v. E. L. Zoernig & Co., 440 S.W.2d 744.
N.C.—McMichael v. Borough Motors, Inc., 188 S.E.2d 721, 14 N.C.App. 441.
N.Y.—Bonwit v. Protective Lining Corp., 336 N.Y.S.2d 177, 40 A.D.2d 683.
Pa.—Montgomery v. Greene County Clay Products Co., 210 A.2d 911, 205 Pa.Super. 515—Solomon v. Luria, 246 A.2d 435, 213 Pa.Super. 87.
Tex.—Hoffrichter v. Brookhaven Country Club Corp., Civ.App., 448 S.W.2d 843, err. ref. no rev. err.

Existence of contract of employment, etc.

Ill.—Evans v. Paul F. Beich Co., 85 N.E.2d 202, 337 Ill.App. 98.

Renewal of contract

N.Y.—Sasmor v. V. Vivaudou, Inc., 103 N.Y.S.2d 640, 200 Misc. 1020.

Terms of contract

(1) Neb.—Ridenour v. Kuker, 175 N.W.2d 287, 185 Neb. 321.
(2) Hawaii—McIntosh v. Murphy, 469 P.2d 177, 52 Haw. 29, 112, 54 A.L.R.3d 707.
(5) Other matters.
Cal.—Brawthen v. H & R Block, Inc., 104 Cal.Rptr. 486, 28 C.A.3d 131.
N.J.—Hindle v. Morrison Steel Co., 223 A.2d 193, 92 N.J.Super. 75.

Page 460

Breach of contract

N.H.—McLaughlin v. Union-Leader Corp., 116 A.2d 489, 99 N.H. 492.

page 461

19. U.S.—C.J.S. cited in Hensley v. E. R. Carpenter Co., Inc., C.A.Miss., 633 F.2d 1106, 1109.

Mich.—Leadon v. Detroit Lumber Co, 64 N.W.2d 681, 340 Mich. 74.

Question for court where facts are undisputed

Mo.—Mullin v. St. Louis-San Francisco Ry. Co., App., 254 S.W.2d 438.

21. U.S.—Haegele v. Southwest Research Institute, C.A.Tex., 409 F.2d 1353.

Iowa—LaFontaine v. Developers & Builders, Inc., 156 N.W.2d 651, 261 Iowa 1177.

Mo.—C.J.S. quoted at length in Johnson v. Thompson, 236 S.W.2d 1, 11, 241 Mo.App. 1008.

Old embezzlement conviction held no justification for discharge as matter of law.

Cal.—Rench v. Watsonville Meat Co., 292 P.2d 85, 138 C.A.2d 482.

22. U.S.—Gregg v. Atlantic Coast Line R. Co., D.C. S.C., 143 F.Supp. 677—Helsby v. St. Paul Hospital & Cas. Co., D.C.Minn., 195 F.Supp. 385, affd., C.A., 304 F.2d 758—Labry v. Southern Pac. Co., D.C.La., 213 F.Supp. 400.

Ky.—Davies v. Mansbach, 338 S.W.2d 210.

N.C.—McCrillis v. A & W Enterprises, Inc., 155 S.E.2d 281, 270 N.C. 637.

Reasonableness of order

(1) Cal.—Mason v. Lyl Productions, 69 Cal.Rptr. 769, 443 P.2d 193, 69 C.2d 79.

(2) Cal.—Mason v. Lyl Productions, 69 Cal.Rptr. 769, 443 P.2d 193, 69 C.2d 79.

page 462

23. U.S.—Sawyer v. E. F. Drew & Co., D.C.N.J., 111 F.Supp. 1, am., D.C., 113 F.Supp. 527, affd., C.A., 209 F.2d 566—Moore v. Missouri Pac. R. Co., C.A.Tex., 264 F.2d 754, cert. den. 80 S.Ct. 119, 361 U.S. 861, 4 L.Ed.2d 103.

Cal.—Stroman v. Atchison, T. & S.F. Ry. Co., 326 P.2d 155, 161 C.A.2d 151—Waymire v. Placer Joint Union High School Dist., 29 Cal.Rptr. 459, 214 C.A.2d 372—Bondi v. Jewels by Edwar, Limited, 73 Cal.Rptr. 494, 267 C.A.2d 672.

Fla.—Jimarye, Inc. v. Pipkin, App., 181 So.2d 669.

Ky.—Davies v. Mansbach, 338 S.W.2d 210.

Mass.—Growers Outlet v. Stone, 131 N.E.2d 210, 333 Mass. 437.

Mich.—Horetski v. American Sandblast Co., 65 N.W.2d 702, 340 Mich. 323—Brown v. Chris Nelsen & Son, Inc., 158 N.W.2d 818, 10 Mich.App. 95.

Mo.—Mash v. Missouri Pac. R. Co., 341 S.W.2d 822.

Mont.—Fox v. Fifth West, Inc., 454 P.2d 612, 153 Mont. 95.

N.J.—Jorgensen v. Pennsylvania R. Co., 118 A.2d 854, 38 N.J.Super. 317.

Pa.—Reading Tube Corp. v. Steel Workers Federation, 98 A.2d 472, 173 Pa.Super. 274.

Tex.—Lone Star Cotton Mills v. Thomas, supra, n. 1.

Utah—Russell v. Ogden Union Ry. & Depot Co., 247 P.2d 257, 122 Utah 107.

Va.—Citizens Home Ins. Co. v. Glisson, 61 S.E.2d 859, 191 Va. 582, 21 A.L.R.2d 1241.

Whether certain acts constituted misconduct, etc.

Ind.—Rochester Capital Leasing Corp. v. McCracken, 295 N.E.2d 375, 156 Ind.App. 128.

Claimed inconsistencies as not requiring as matter of law that court discredit plaintiff's testimony

U.S.—Beggs v. Dougherty Overseas, Inc., C.A.N.Y., 287 F.2d 80.

24. Mass.—Chaplain v. Dugas, supra, n. 12.

Mich.—Ogden v. George F. Alger Co., 91 N.W.2d 288, 353 Mich. 402.

Whether employee violated rule

S.C.—Martin v. Southern Ry. Co., 126 S.E.2d 365, 240 S.C. 460—Martin v. Southern Ry. Co., 136 S.E.2d 907, 244 S.C. 315.

27. Mo.—C.J.S. quoted in Johnson v. Thompson, 236 S.W.2d 1, 11, 241 Mo.App. 1008.

28. Iowa—C.J.S. quoted at length in Stauter v. Walnut Grove Products, 18 N.W.2d 305, 309.

29. Cal.—Brawthen v. H & R Block, Inc., 104 Cal. Rptr. 486, 28 C.A.3d 131.

Tenn.—Little v. Federal Container Corp., 452 S.W.2d 875, 61 Tenn.App. 26.

Tex.—Kree Institute of Electrolysis, Inc. v. Fageros, Civ.App., 478 S.W.2d 569—Ward v. Consolidated Foods Corp., Civ.App., 480 S.W.2d 483, err. ref. no rev. err.

30. Cal.—C.J.S. cited in Petermann v. International Brotherhood, Etc., 344 P.2d 25, 28, 174 C.A.2d 184—Bondi v. Jewels by Edwar, Limited, 73 Cal. Rptr. 494, 267 C.A.2d 672.

31. U.S.—Oswald v. Chicago, B. Q.R. Co., C.A.Iowa, 200 F.2d 549.

N.Y.—Slater v. Kane, 92 N.Y.S.2d 640, 275 App.Div. 648, rearg. den. 93 N.Y.S.2d 725, 276 App.Div. 835.

33. Tex.—Murray v. Brazzel, Civ.App., 438 S.W.2d 382, err. ref. no rev. err.

page 463

34. Tex.—Smith v. Hamilton, Civ.App., 237 S.W.2d 774.

35. U.S.—Alaska Airlines v. Stephenson, C.A.Alaska, 217 F.2d 295, 15 Alaska 272.

S.C.—Mixon v. Rossiter, 74 S.E.2d 46, 223 S.C. 47.

36. U.S.—United Protective Workers of America, Local No. 2 v. Ford Motor Co., C.A.Ill., 223 F.2d 49.

§ 55. —— Instructions

Library References

Master and Servant ⚖44.

41. Mo.—C.J.S. quoted at length in Johnson v. Thompson, 236 S.W.2d 1, 11, 241 Mo.App. 1008—Mullin v. St. Louis-San Francisco Ry. Co., supra, n. 19.

Instructions held not erroneous

U.S.—Langendorf United Bakeries, Inc. v. Moore, C.A. Or., 327 F.2d 592.

D.C.—Heflin v. Silverstein, C.A., 405 F.2d 1075, 132 U.S.App.D.C. 7.

Mich.—Leadon v. Detroit Lumber Co. 64 N.W.2d 681, 340 Mich. 74.

Mo.—Mash v. Missouri Pac. R. Co., 341 S.W.2d 822.

N.H.—McLaughlin v. Union-Leader Corp., 116 A.2d 489, 99 N.H. 492.

Pa.—Lubrecht v. Laurel Stripping Co., 127 A.2d 687, 387 Pa. 393.

42. U.S.—Carver v. Tanner, C.A.Iowa, 252 F.2d 26—Moore v. Missouri Pac. R. Co., C.A.Tex., 264 F.2d 754, cert. den. 80 S.Ct. 119, 361 U.S. 861, 4 L.Ed.2d 103.

Cal.—Downs v. Sherry, supra, n. 8.

N.J.—Jorgensen v. Pennsylvania R. Co., 118 A.2d 854, 38 N.J.Super. 317.

Pa.—Levine v. Giant, Inc., 178 A.2d 802, 197 Pa.Super. 339.

Vt.—Lambert v. Equinox House, Inc., 227 A.2d 403, 126 Vt. 229.

Wash.—Lasser v. Grunbaum Bros. Furniture Co., 281 P.2d 832, 46 Wash.2d 408.

Instructions contrary to established or admitted facts etc.

D.C.—Cavalier v. Weinstein, Mun.App., 80 A.2d 918.

43. U.S.—Owens v. Curtiss Candy Co., C.A.Mo., 169 F.2d 179, cert. den. 69 S.Ct. 168, 335 U.S. 871, 93 L.Ed. 416.

Cal.—Gross v. Maytex Knitting Mills of Cal., 254 P.2d 163, 116 C.A.2d 705.

Colo.—Neilson v. Bowles, 236 P.2d 286, 124 Colo. 274.

Ga.—Holmes Mfg. Co. v. Fraker, 68 S.E.2d 172, 85 Ga.App. 83.

Ill.—Keel v. Illinois Terminal R. Co., 104 N.E.2d 659, 346 Ill.App. 169.

Mo.—Woods v. Kansas City Club, 386 S.W.2d 62.

N.J.—Jorgensen v. Pennsylvania R. Co., 118 A.2d 854, 38 N.J.Super. 317.

N.C.—Hagan v. Jenkins, 67 S.E.2d 380, 234 N.C. 425.

page 464

45. Miss.—Masonite Corp. v. Handshoe, 44 So.2d 41, 208 Miss. 166.

Tex.—Pan Am. College v. Rojas, Civ.App., 392 S.W.2d 707.

Instruction held erroneous

Tex.—Dixie Glass Co. v. Pollak, Civ.App., 341 S.W.2d 530, 91 A.L.R.2d 662, err. ref. no rev. err., 347 S.W.2d 596, 162 Tex. 440.

Instruction held not improper

Tex.—Mr. Eddie, Inc. v. Ginsberg, Civ.App., 430 S.W.2d 5, err. ref. no rev. err.

48. Ga.—Whitley v. Whitley Const. Co., 192 S.E.2d 563, 127 Ga.App. 68.

Instructions held not misleading

Mo.—Bomson v. Electra Mfg. Co., App., 402 S.W.2d 7.

53. Minn.—Bryngelson v. Minnesota Val. Breeders Ass'n, 114 N.W.2d 748, 262 Minn. 275.

Mo.—Johnson v. Thompson, supra, n. 8.

N.Y.—Maddaus v. New York Law School 96 N.Y.S.2d 349, 276 App.Div. 1099, rearg. and app. den. 97 N.Y.S.2d 398, 277 App.Div. 783.

Instructions held proper or not erroneous

Cal.—Oldenkott v. American Elec., Inc., 92 Cal.Rptr. 127, 14 C.A.3d 198, cert. den. 91 S.Ct. 1668, 402 U.S. 975, 29 L.Ed.2d 140.

Ga.—American Associated Companies v. Vaughan, 97 S.E.2d 144, 213 Ga. 119.

54. S.C.—Mixson v. Rossiter, supra, n. 35.

59. **Instructions held proper or not erroneous**

Tex.—Mr. Eddie, Inc. v. Ginsberg, Civ.App., 430 S.W.2d 5, err. ref. no rev. err.

page 465

63. D.C.—Cavalier v. Weinstein, Mun.App., 80 A.2d 918.

67. U.S.—Lanier v. Alenco, C.A.La., 459 F.2d 689.

§ 58. —— Damages in General

Library References

Master and Servant ⚖41.

68. U.S.—Odell v. Humble Oil & Refining Co., C.A. N.M., 201 F.2d 123, cert. den. 73 S.Ct. 833, 345 U.S. 941, 97 L.Ed. 1367—Nichols v. National Tube Co., D.C.Ohio, 122 F.Supp. 726—Gass v. National Container Corp., D.C.Ill., 171 F.Supp. 441, app. dism., C.A., 271 F.2d 231—Haag v. International Tel. & Tel. Corp., C.A.Ind., 324 F.2d 205—C.J.S. cited in Martin v. Ethyl Corp., D.C.La., 218 F.Supp. 416, 418, revd. on oth. grds., C.A., 341 F.2d 1—Brady v. Trans World Airlines, Inc., D.C.Del., 223 F.Supp. 361, affd., C.A., 401 F.2d 87, cert. den. 89 S.Ct. 680, 681, 684, 393 U.S. 1048, 21 L.Ed.2d 691, reh. den. 89 S.Ct. 1272, 394 U.S. 955, 22 L.Ed.2d 492—Mackey v. Union Terminal Co., C.A.Tex., 321 F.2d 901—Brady v. Trans World Airlines, Inc., D.C.Del., 244 F.Supp. 820, affd., C.A., 401 F.2d 87, cert. den. 89 S.Ct. 680, 681, 684, 393 U.S. 1048, 21 L.Ed.2d 691, reh. den. 89 S.Ct. 1272, 394 U.S. 955, 22 L.Ed.2d 492.

Cal.—Billetter v. Posell, supra, n. 7.

D.C.—Maloney v. E. I. Du Pont de Nemours & Co., C.A., 352 F.2d 936, 122 U.S.App.D.C. 268, cert. den. 86 S.Ct. 1201, 1211, 383 U.S. 948, 16 L.Ed.2d 210.

Idaho—Haggerty v. Western Barge, Inc., 492 P.2d 48, 94 Idaho 509.

Iowa—Stauter v. Walnut Grove Products, 188 N.W.2d 305—Holden v. Construction Machinery Co., 202 N.W.2d 348, 67 A.L.R.3d 324.

Minn.—Zeller v. Prior Lake Public Schools, Independent School Dist., No. 719, Scott County, 108 N.W.2d 602, 259 Minn. 487, 89 A.L.R.2d 1012.

Miss.—Frederick Smith Enterprise Co. v. Lucas, supra, n. 8.

Mo.—Nola v. Merollis Chevrolet Kansas City, Inc., App., 537 S.W.2d 627.

N.Y.—Teich v. Aetna Indus. Corp., 174 N.Y.S.2d 743, 11 Misc.2d 530, revd. on oth. grds. 184 N.Y.S.2d 556, 8 A.D.2d 596, rearg. den. and app. gr. 187 N.Y.S.2d 978, 8 A.D.2d 782, affd. 201 N.Y.S.2d 780, 8 N.Y.2d 766, 168 N.E.2d 114—Cornell v. T.V. Development Corp., 245 N.Y.S.2d 918, 41 Misc.2d 628, affd. 260 N.Y.S.2d 865, 24 A.D.2d 471, revd. on oth. grds. 215 N.E.2d 349, 17 N.Y.2d 69, 268 N.Y.S.2d 29, on remand 270 N.Y.S.2d 45, 50 Misc.2d 422.

N.C.—Hagan v. Jenkins, supra, n. 43.

Tex.—Lone Star Cotton Mills v. Thomas, supra, n. 1—Smith v. Hamilton, supra, n. 34—U.S. Life Ins. Co. v. Hamilton, Civ.App., 238 S.W.2d 289, err. ref. no rev. err.

Wis.—McDonald v. Chicago, M., St. P. & P.R. Co., 157 N.W.2d 553, 38 Wis.2d 526.

Pension rights

Ill.—Midgett v. Sackett-Chicago, Inc., 473 N.E.2d 1280, 85 Ill.Dec. 475, 105 Ill.2d 143, cert. den. 105 S.Ct. 3513, 87 L.Ed.2d 642, cert. den. 106 S.Ct. 278, 88 L.Ed.2d 243.

N.Y.—Sulyok v. Penzintezeti Kozpont Budapest, 107 N.E.2d 604, 304 N.Y. 704.

Front pay

U.S.—Folz v. Marriott Corp., D.C.Mo., 594 F.Supp. 1007.

Severance pay

U.S.—Cunningham v. Erie R. Co., D.C.N.Y., 243 F.Supp. 571, affd., C.A., 358 F.2d 640—Franklin v. Texas Intern. Petroleum Corp., D.C.La., 324 F.Supp. 808.

D.C.—Marranzano v. Riggs Nat. Bank of Washington, D.C., C.A., 213 F.2d 196, 94 U.S.App.D.C. 182.

Damages not recoverable beyond date of judgment

U.S.—Shiels v. Baltimore & O.R. Co., D.C.Ind., 154 F.Supp. 917, affd., C.A., 254 F.2d 863, cert. den. 79 S.Ct. 71, 358 U.S. 846, 3 L.Ed.2d 80, reh. den. 79 S.Ct. 155, 358 U.S. 896, 3 L.Ed.2d 123.

Particular award held not excessive

Mich.—Ogden v. George F. Alger Co., 91 N.W.2d 288, 353 Mich. 402.

Verdict supported by evidence

R.I.—Geary v. Hoffman, 204 A.2d 302, 98 R.I. 413.

Waiver of right to compensation not shown

D.C.—In re Certain Carriers Represented by Eastern, Western and Southeastern Carriers' Conference Committees, D.C., 241 F.Supp. 1004.

69. Cal.—Pecarovich v. Becker, 248 P.2d 123, 113 C.A.2d 309.

Ga.—Sandt v. Mason, 67 S.E.2d 767, 208 Ga. 541.

Ill.—People ex rel. Bourne v. Johnson, 205 N.E.2d 470, 32 Ill.2d 324.

N.Y.—Yazujian v. J. Rich Steers, Inc., supra, n. 8—Cornell v. T.V. Development Corp., 245 N.Y.S.2d 918, 41 Misc.2d 628, affd. 260 N.Y.S.2d 865, 24 A.D.2d 471, revd. on oth. grds. 215 N.E.2d 349, 17 N.Y.2d 69, 268 N.Y.S.2d 29, on remand 270 N.Y. S.2d 45, 50 Misc.2d 422.

Tex.—Smith v. Hamilton, supra, n. 34.

page 466

70. U.S.—McAleer v. McNally Pittsburg Mfg. Co., C.A.Pa., 329 F.2d 273—Quinn v. Straus Broadcasting Group, Inc., D.C.N.Y., 309 F.Supp. 1208.

Ala.—Ware v. Woodward Iron Co., 124 So.2d 84, 271 Ala. 462.

Cal.—Oldenkott v. American Elec., Inc., 92 Cal.Rptr. 127, 14 C.A.3d 198, cert. den. 91 S.Ct. 1668, 402 U.S. 975, 29 L.Ed.2d 140—Carroll v. Civil Service Commission of Kern County, 107 Cal.Rptr. 557, 31 C.A.3d 561.

Conn.—Carter v. Bartek, 114 A.2d 923, 142 Conn. 448.

Neb.—Ridenour v. Kuker, 175 N.W.2d 287, 185 Neb. 321.

N.Y.—Mason v. Lory Dress Co., 104 N.Y.S.2d 906, mod. on oth. grds. 110 N.Y.S.2d 904, 279 App.Div. 863. Affd. 111 N.E.2d 649, 305 N.Y. 600—Ribakove v. Rich, 172 N.Y.S.2d 902, 16 Misc.2d 339—Amaducci v. Metropolitan Opera Ass'n, 304 N.Y. S.2d 322, 33 A.D.2d 542.

Tenn.—Polk v. Torrence, 405 S.W.2d 575, 218 Tenn. 680.

Utah—Russell v. Ogden Union Ry. & Depot Co., supra, n. 23.

Contract price is limit of recovery

Minn.—Rensch v. General Drivers, Helpers and Truck Terminal Emp. Local No. 120, 129 N.W.2d 341, 268 Minn. 307.

Neb.—Schlueter v. School Dist. No. 42 of Madison County, 96 N.W.2d 203, 168 Neb. 443.

Prima facie measure

(1) Cal.—Downs v. Sherry, supra, n. 8.

Ordinary contract rather than tort measure held applicable

U.S.—United Protective Workers of America, Local No. 2 v. Ford Motor Co., C.A.Ill., 223 F.2d 49.

Earnings of employee directly lower in seniority

U.S.—Raabe v. Florida East Coast Ry. Co., D.C.Fla., 259 F.Supp. 351.

71. N.Y.—Slater v. Kane, supra, n. 31.

Wash.—Frazier v. Bowmar, 255 P.2d 906, 42 Wash.2d 383.

72. Tenn.—Jeffers v. Stanley, 486 S.W.2d 737.

73. U.S.—Quinn v. Straus Broadcasting Group, Inc., D.C.N.Y., 309 F.Supp. 1208.

Cal.—Downs v. Sherry, supra, n. 8.

Ill.—Thorsen v. Hansen, 151 N.E.2d 421, 18 Ill.App.2d 1—Claeson v. Hennessey, 156 N.E.2d 234, 20 Ill. App.2d 437.

N.Y.—Reiss v. Arabian Am. Oil Co., 107 N.Y.S.2d 907, revd. on oth. grds. 109 N.Y.S.2d 625, 279 App.Div. 805, motion den. 107 N.E.2d 167, 304 N.Y. 644, affd. 110 N.E.2d 888, 304 N.Y. 953.

Tex.—Smith v. Hamilton, supra, n. 34.

Employee is under duty, etc.

U.S.—Sheridan v. United Broth. of Carpenters and Joiners, Local 626, D.C.Del., 194 F.Supp. 664, revd. on oth. grds., C.A., 306 F.2d 152—McAleer v. McNally Pittsburg Mfg. Corp., D.C.Pa., 198 F.Supp. 606, revd. on oth. grds., C.A., 307 F.2d 220—Turzillo v. C.I.R., C.A.Ohio, 346 F.2d 884.

Wis.—Tetzlaff v. Pilot Press, Inc., 70 N.W.2d 678, 270 Wis. 214.

page 467

82. U.S.—Enterprise Wheel & Car Corp. v. United Steelworkers of America, C.A.W.Va., 269 F.2d 327, revd. in part on oth. grds. 80 S.Ct. 1358, 363 U.S. 593, 4 L.Ed.2d 1424.

83. U.S.—United Protective Workers of America, Local No. 2 v. Ford Motor Co., C.A.Ill., 223 F.2d 49.

85. U.S.—Odell v. Humble Oil & Refining Co., supra, n. 68—C.J.S. cited in In re Petroleum Carriers Co., D.C.Minn., 121 F.Supp. 520, 525.

N.Y.—Burg v. ARCS Industries, Inc., 318 N.Y.S.2d 906, 36 A.D.2d 695—C.J.S. cited in De Graffenreidt v. Neighborhood Health Center of Provident Clinical Soc., Inc., 346 N.Y.S.2d 469, 471, 42 A.D.2d 773.

page 468

When an employee's employment is terminated by a late notice of termination or without notice, the employer must pay the employee's salary for the full notice period.[86.5]

86.5. U.S.—Holt v. Seversky Electronatom Corp., C.A.N.Y., 452 F.2d 31.

94. Fla.—C.J.S. cited in National Service Industries, Inc. v. Malloy, 266 So.2d 370, 371.

Transportation expenses

(3) Unpaid moving expenses are recoverable.

Iowa—Kitchen v. Stockman Nat. Life Ins. Co., 192 N.W.2d 796.

Utah—Holley v. Sullivan, 497 P.2d 630, 28 Utah 2d 3.

Expense allowance held not recoverable

Neb.—Bitler v. Terri Lee, Inc., 81 N.W.2d 318, 163 Neb. 833.

N.Y.—Crabtree v. Elizabeth Arden Sales Corp., 105 N.Y.S.2d 40, affd. 112 N.Y.S.2d 494, affd. 110 N.E.2d 551, 305 N.Y. 48.

Expenses not constituting cost of performing contract are not recoverable

N.H.—McLaughlin v. Union-Leader Corp., 116 A.2d 489, 99 N.H. 492.

95. U.S.—Beggs v. Dougherty Overseas, Inc., C.A. N.Y., 287 F.2d 80.

Fla.—National Service Industries, Inc. v. Malloy, App., 266 So.2d 370.

Or.—Gaswint v. Case, 509 P.2d 19, 265 Or. 248.

page 469

96. Wis.—Smith v. Beloit Corp., 162 N.W.2d 585, 40 Wis.2d 550.

Other elements of damages have been recognized by the courts.[3.1]

3.1. Loss of benefits under profit sharing and group-insurance plans

N.H.—McLaughlin v. Union-Leader Corp., 116 A.2d 489, 99 N.H. 492.

Tax benefits accruing from foreign employment

U.S.—Beggs v. Dougherty Overseas, Inc., C.A.N.Y., 287 F.2d 80.

Cash surrender value of group policy

U.S.—McAleer v. McNally Pittsburg Mfg. Co., C.A. Pa., 329 F.2d 273.

Termination of interest in stock

Iowa—LaFontaine v. Developers & Builders, Inc., 156 N.W.2d 651, 261 Iowa 1177.

Vacation, sick pay, and pay increases

Cal.—California School Emp. Ass'n v. Personnel Commission of Pajaro Val. Unified School Dist. of Santa Cruz County, 106 Cal.Rptr. 283, 30 C.A.3d 241.

5. U.S.—Volkswagen Interamericana, S.A., v. Rohlsen, C.A.Puerto Rico, 360 F.2d 437, cert. den. 87 S.Ct. 230, 385 U.S. 919, 17 L.Ed.2d 143—Brady v. Trans World Airlines, Inc., D.C.Del., 244 F.Supp. 820, affd., C.A., 401 F.2d 87, cert. den. 89 S.Ct. 680, 681, 684, 393 U.S. 1048, 21 L.Ed.2d 691, reh. den. 89 S.Ct. 1272, 394 U.S. 955, 22 L.Ed.2d 492.

N.Y.—Amaducci v. Metropolitan Opera Ass'n, 304 N.Y.S.2d 322, 33 A.D.2d 542.

10. N.Y.—Amaducci v. Metropolitan Opera Ass'n, 304 N.Y.S.2d 322, 33 A.D.2d 542.

Humiliation, indignity, and shame

(1) U.S.—Brady v. Trans World Airlines, Inc., D.C. Del., 244 F.Supp. 820, affd., C.A., 401 F.2d 87, cert. den. 89 S.Ct. 680, 681, 684, 393 U.S. 1048, 21 L.Ed.2d 691, reh. den. 89 S.Ct. 1272, 394 U.S. 955, 22 L.Ed.2d 492.

Wis.—Smith v. Beloit Corp., 162 N.W.2d 585, 40 Wis.2d 550.

11. Loss of retirement benefits

Tenn.—Delzell v. Pope, 294 S.W.2d 690, 200 Tenn. 641.

Wis.—McDonald v. Chicago, M., St. P. & P.R. Co., 157 N.W.2d 553, 38 Wis.2d 526.

12. Ga.—Darlington Corp. v. Evans, 76 S.E.2d 72, 88 Ga.App. 84.

page 470

Other items have been held not recoverable as damages.[13.5]

Page 470

13.5. Advertising costs for new employment
N.Y.—Van Raas v. Rosenbaum-Grinell, Inc., 206 N.Y.S.2d 235, 23 Misc.2d 919.

Wife's claim for loss of consortium
U.S.—Brady v. Trans World Airlines, Inc., D.C.Del., 244 F.Supp. 820, affd., C.A., 401 F.2d 87, cert. den. 89 S.Ct. 680, 681, 684, 393 U.S. 1048, 21 L.Ed.2d 691, reh. den. 89 S.Ct. 1272, 394 U.S. 955, 22 L.Ed.2d 492.

Patents and inventions
D.C.—Maloney v. E. I. Du Pont de Nemours & Co., C.A., 352 F.2d 936, 122 U.S.App.D.C. 268, cert. den. 86 S.Ct. 1201, 1211, 383 U.S. 948, 16 L.Ed.2d 210.

14. U.S.—Lodge 743, Intern. Ass'n of Machinists, AFL-CIO v. United Aircraft Corp., D.C.Conn., 336 F.Supp. 811—International Ass'n of Machinists, Lodge 917 v. Air Products & Chemicals, Inc., D.C.Pa., 341 F.Supp. 874.

N.H.—McLaughlin v. Union-Leader Corp., 127 A.2d 269, 100 N.H. 367, cert. den. 77 S.Ct. 663, 353 U.S. 909, 1 L.Ed.2d 663, reh. den. 77 S.Ct. 810, 353 U.S. 943, 1 L.Ed.2d 764.

16. Matters considered
U.S.—Sawyer v. E. F. Drew & Co., D.C.N.J., 113 F.Supp. 527.

Rate
U.S.—Sawyer v. E. F. Drew & Co., supra.

18. U.S.—Entis v. Atlantic Wire & Cable Corp., C.A. N.Y., 335 F.2d 759.

Md.—John B. Robeson Associates, Inc. v. Gardens of Faith, Inc., 172 A.2d 529, 220 Md. 215.

N.Y.—Mason v. Lory Dress Co., Sup., 104 N.Y.S.2d 906, mod. on oth. grds. 110 N.Y.S.2d 904, 279 App.Div. 863, affd. 111 N.E.2d 649, 305 N.Y. 600.

Tex.—Cessac v. Leger, Civ.App., 214 S.W.2d 860, err. ref. no rev. err.

Method of computation held improper
N.Y.—Fisher v. Lober, 201 N.Y.S.2d 270, 11 A.D.2d 645.

page 471

31. U.S.—Brady v. Trans World Airlines, Inc., D.C. Del., 196 F.Supp. 504—Brady v. Trans World Airlines, Inc., D.C.Del., 244 F.Supp. 820, affd., C.A., 401 F.2d 87, cert. den. 89 S.Ct. 680, 681, 684, 393 U.S. 1048, 21 L.Ed.2d 691, reh. den. 89 S.Ct. 1272, 394 U.S. 955, 22 L.Ed.2d 492—Holt v. Southern Ry. Co., D.C.Tenn., 320 F.Supp. 864.

Ill.—C.J.S. cited in Kelsay v. Motorola, Inc., 384 N.E.2d 353, 360, 23 Ill.Dec. 559, 74 Ill.2d 172.

N.Y.—Cangemi v. Acton, 328 N.Y.S.2d 882, 38 A.D.2d 806.

Fraud
U.S.—Odell v. Humble Oil & Refining Co., C.A.N.M., 201 F.2d 123, cert. den. 73 S.Ct. 833, 345 U.S. 941, 97 L.Ed. 1367.

Retaliatory discharge
Okl.—Hicks v. Tulsa Dynaspan, Inc., App., 695 P.2d 17.

Tenn.—Clanton v. Cain-Sloan Co., 677 S.W.2d 441.

Shortages of money
Wis.—State v. Schwarze, 355 N.W.2d 842, 120 Wis.2d 453.

33. Circumstances held not to limit recovery to nominal damages only
U.S.—Brady v. Trans World Airlines, Inc., D.C.Del., 244 F.Supp. 820, affd., C.A., 401 F.2d 87, cert. den. 89 S.Ct. 680, 681, 684, 393 U.S. 1048, 21 L.Ed.2d 691, reh. den. 89 S.Ct. 1272, 394 U.S. 955, 22 L.Ed.2d 492.

37. U.S.—Gass v. National Container Corp., D.C.Ill., 171 F.Supp. 441, app. dism., C.A., 271 F.2d 231.

38. U.S.—Pasquel v. Owen, C.A.Mo., 186 F.2d 263.

Damages to date of institution of action, etc.
(2) The cases of Smith v. Cashie & Chowan R. & Lumber Co., 54 S.E. 788, 142 N.C. 226, Robinson v. McAlhaney, 6 S.E.2d 517, 216 N.C. 674, and Robinson v. McAlhaney, 199 S.E. 26, 214 N.C. 263 have been overruled, the court holding that an employee suing for wrongful discharge prior to the end of the contract term is not limited to the amount due when the action was commenced.

N.C.—Freeman v. Hardee's Food Systems, Inc., 147 S.E.2d 590, 267 N.C. 56.

In Texas
(1) Tex.—Niles v. Parsons, Civ.App., 239 S.W.2d 740—C.J.S. cited in Dixie Glass Co. v. Pollak, Civ. App., 341 S.W.2d 530, 537, 91 A.L.R.2d 662, err. ref. no rev. err., 347 S.W.2d 596, 162 Tex. 440.

page 472

39. Cal.—Oldenkott v. American Elec., Inc., 92 Cal. Rptr. 127, 14 C.A.3d 198, cert. den. 91 S.Ct. 1668, 402 U.S. 975, 29 L.Ed.2d 140.

Neb.—Sullivan v. David City Bank, 148 N.W.2d 844, 181 Neb. 395.

N.Y.—Gross v. Joan Iris Corp., 89 N.Y.S.2d 145.

Tex.—Dixie Glass Co. of Houston v. Pollak, 347 S.W.2d 596, 162 Tex. 440.

44. Colo.—Colorado School of Mines v. Neighbors, 203 P.2d 904, 119 Colo. 399.

Tex.—Lone Star Cotton Mills v. Thomas, Civ.App., 227 S.W.2d 300.

§ 59. —— Other Employment as Ground for Reduction of Damages

Library References

Master and Servant ⇐42.

page 473

45. U.S.—Alaska Airlines v. Stephenson, C.A.Alaska, 217 F.2d 295, 15 Alaska 272—Beggs v. Dougherty Overseas, Inc., C.A.N.Y., 287 F.2d 80.

Ala.—Alabama Credit Corp. v. Higgins, 36 So.2d 227, 251 Ala. 17.

Cal.—Gonzales v. International Ass'n of Machinists, 29 Cal.Rptr. 190, 213 C.A.2d 817—Carroll v. Civil Service Commission of Kern County, 107 Cal.Rptr. 557, 31 C.A.3d 561.

Ind.—Albert Johann & Sons Co. v. Echols, 238 N.E.2d 685, 141 Ind.App. 122.

Mass.—McKenna v. Commissioner of Mental Health, 199 N.E.2d 686, 347 Mass. 674.

Mich.—Reinardy v. Bruzzese, 118 N.W.2d 952, 368 Mich. 688.

Tenn.—Polk v. Torrence, 405 S.W.2d 575, 218 Tenn. 680.

Tex.—Cessac v. Leger, Civ.App., 214 S.W.2d 860, err. ref. no rev. err.—Cole v. City of Houston, Civ. App., 442 S.W.2d 445.

Wis.—Klug v. Flambeau Plastics Corp. (Flambeau Prods. Corp.), 214 N.W.2d 281, 62 Wis.2d 141.

Absence of neat mathematical computation not fatal to mitigation
U.S.—McAleer v. McNally Pittsburg Mfg. Co., C.A. Pa., 329 F.2d 273.

46. U.S.—St. Clair v. Local Union No. 515 of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, C.A.Tenn., 422 F.2d 128.

Ariz.—Dumes v. Harold Laz Advertising Co., 409 P.2d 307, 2 Ariz.App. 387.

Cal.—Crillo v. Curtola, 204 P.2d 941, 91 Cal.App.2d 263—De Angeles v. Roos Bros., Inc., 52 Cal.Rptr. 783, 244 C.A.2d 434—Silva v. McCoy, 66 Cal. Rptr. 364, 259 C.A.2d 256—Parker v. Twentieth Century-Fox Film Corp., 89 Cal.Rptr. 737, 474 P.2d 689, 3 C.3d 176, 44 A.L.R.3d 615.

Fla.—Reed Const. Corp. v. Zimmerman, App., 133 So.2d 579.

Ill.—People ex rel. Bourne v. Johnson, 205 N.E.2d 470, 32 Ill.2d 324.

Ind.—Rochester Capital Leasing Corp. v. McCracken, 295 N.E.2d 375, 156 Ind.App. 128.

Iowa—LaFontaine v. Developers & Builders, Inc., 156 N.W.2d 651, 261 Iowa 1177.

La.—Carlson v. Ewing, 54 So.2d 414, 219 La. 961.

Mo.—C.J.S. cited in Sides v. Contemporary Homes, Inc., App., 311 S.W.2d 117, 120.

Neb.—Schlueter v School Dist. No. 42 of Madison County, 96 N.W.2d 203, 168 Neb. 443—Lee v. Ralston School Dist., Douglas County, 145 N.W.2d 919, 180 Neb. 784.

N.Y.—Mason v. Lory Dress Co., supra, n. 18, mod. on oth. grds. 110 N.Y.S.2d 904, 279 App.Div. 863—Reiss v. Arabian Am. Oil Co., 107 N.Y.S.2d 907, revd. on oth. grds. 109 N.Y.S.2d 625, 279 App.Div. 805, motion den. 107 N.E.2d 167, 304 N.Y. 644, affd. 110 N.E.2d 888, 304 N.Y. 953—Cornell v. T.V. Development Corp., 268 N.Y.S.2d 29, 17 N.Y.2d 69, 215 N.E.2d 349, on remand 270 N.Y. S.2d 45, 50 Misc.2d 422.

N.C.—C.J.S. cited in Thomas v. Catawba College, 104 S.E.2d 175, 180, 248 N.C. 609.

Okl.—Independent School Dist. No. 65, Wagoner County v. Stafford, 257 P.2d 1092, 208 Okl. 542.

Or.—Elizaga v. Kaiser Foundation Hospitals, Inc., 487 P.2d 870, 259 Or. 542.

Pa.—Coble v. Metal Tp. School Dist., 3 Cumb. 43.

Tex.—Cessac v. Leger, supra, n. 18—Texas Technological College v. Fry, Civ.App., 288 S.W.2d 799.

Wis.—Larson v. Fisher, 48 N.W.2d 502, 259 Wis. 355—Tetzlaff v. Pilot Press, Inc., 70 N.W.2d 678, 270 Wis. 214.

Unemployment insurance receipts
Vt.—Lambert v. Equinox House, Inc., 227 A.2d 403, 126 Vt. 229.

47. U.S.—United Protective Workers of America, Local No. 2 v. Ford Motor Co., C.A.Ill., 223 F.2d 49—Gass v. National Container Corp., D.C.Ill., 171 F.Supp. 441, app. dism., C.A., 271 F.2d 231—McAleer v. McNally Pittsburg Mfg. Co., C.A.Pa., 329 F.2d 273—C.J.S. cited in Ochoa v. American Oil Company, 338 F.Supp. 914, 919.

Ala.—Alabama Credit Corp. v. Higgins, supra, n. 45.

Cal.—Parker v. Twentieth Century-Fox Film Corp., 89 Cal.Rptr. 737, 474 P.2d 689, 3 C.3d 176, 44 A.L. R.3d 615.

Conn.—Carter v. Bartek, 114 A.2d 923, 142 Conn. 448.

Fla.—Southern Keswick, Inc. v. Whetherholt, App., 293 So.2d 109.

Ill.—Keel v. Illinois Terminal R. Co., 104 N.E.2d 659, 346 Ill.App. 169—Claeson v. Hennessey, 156 N.E.2d 234, 20 Ill.App.2d 437.

Minn.—Spurck v. Civil Service Bd., 42 N.W.2d 720, 231 Minn. 183.

Mo.—C.J.S. cited in Wessler v. City of St. Louis, 242 S.W.2d 289, 291—C.J.S. cited in Wolf v. Missouri State Training School For Boys, 517 S.W. 138, 143.

Neb.—Schlueter v. School Dist. No. 42 of Madison County, 96 N.W.2d 203, 168 Neb. 443—C.J.S. cited in Ridenour v. Kuker, 175 N.W.2d 287, 291, 185 Neb. 321.

N.Y.—Mason v. Lory Dress Co., supra, n. 18—Crabtree v. Elizabeth Arden Sales Corp., 105 N.Y.S.2d 40, affd. 112 N.Y.S.2d 494, affd. 110 N.E.2d 551, 305 N.Y. 48—Goldman v. City Specialty Stores, 137 N.Y.S.2d 693, 285 App.Div. 880—Teich v. Aetna Indus. Corp., 174 N.Y.S.2d 743, 11 Misc.2d 530, revd. on oth. grds. 184 N.Y.S.2d 556, 8 A.D.2d 596, rearg. Co., 86 A.2d 449, 18 N.J.Super. 19.

N.J.—Roselle v. La Fera Contracting den. and app. gr. 187 N.Y.S.2d 978, 8 A.D.2d 782, affd. 201 N.Y. S.2d 780, 8 N.Y.2d 766, 168 N.E.2d 114.

N.C.—C.J.S. cited in Thomas v. Catawba College, 104 S.E.2d 175, 180, 248 N.C. 609.

Tenn.—Akers v. J. B. Sedberry, Inc., 286 S.W.2d 617, 39 Tenn.App. 633—Jeffers v. Stanley, 486 S.W.2d 737.

Tex.—Smith v. Hamilton, Civ.App., 237 S.W.2d 774—Dixie Glass Co. v. Pollak, Civ.App., 341 S.W.2d 530, 91 A.L.R.2d 662, err. ref. no rev. err., 347 S.W.2d 596, 162 Tex. 440—Mr. Eddie, Inc. v. Ginsberg, Civ.App., 430 S.W.2d 5, err. ref. no rev. err.

Utah—Russell v. Ogden Union Ry. & Depot Co., 247 P.2d 257, 122 Utah 107.

Va.—Paddock v. Mason, 48 S.E.2d 199, 187 Va. 809.

Wis.—McDonald v. Chicago, M., St. P. & P.R. Co., 157 N.W.2d 553, 38 Wis.2d 526—State ex rel. Schilling v. Baird, 222 N.W.2d 666, 65 Wis.2d 394.

Unemployment insurance receipts

Cal.—Billetter v. Posell, 211 P.2d 621, 94 Cal.App.2d 858.

Evidence held to show greater earning in other employment

Ill.—Thorsen v. Hansen, 151 N.E.2d 421, 18 Ill.App.2d 1.

Burden on employer

Tex.—Call of Houston, Inc. v. Mulvey, Civ.App., 343 S.W.2d 522.

Prospective and actual earnings

N.Y.—Rudman v. Cowles Communications, Inc., 280 N.E.2d 867, 30 N.Y.2d 1, 330 N.Y.S.2d 33, 63 A.L.R.3d 527.

page 474

49. U.S.—Gass v. National Container Corp., D.C.Ill., 171 F.Supp. 441, app. dism. 271 F.2d 231.

Wis.—Tetzlaff v. Pilot Press, Inc., supra, n. 46.

50. **Earnings by wrongfully discharged employee**

Fla.—Southern Keswick, Inc. v. Whetherholt, App., 293 So.2d 109.

51. Ill.—C.J.S. cited in People ex rel. Bourne v. Johnson, 205 N.E.2d 470, 473, 32 Ill.2d 324.

N.J.—C.J.S. cited in Roselle v. La Fera Contracting Co., 86 A.2d 449, 453, 18 N.J.Super. 19.

Pa.—Ritz v. Music, Inc., 150 A.2d 160, 189 Pa.Super. 106.

Tex.—Smith v. Hamilton, supra, n. 47.

52. Ill.—People ex rel. Bourne v. Johnson, 205 N.E.2d 470, 32 Ill.2d 324.

53. Ind.—Rochester Capital Leasing Corp. v. McCracken, 295 N.E.2d 375, 156 Ind.App. 128.

page 475

60. Ark.—Runkle v. Fuess, 290 S.W.2d 433, 226 Ark. 447.

Ill.—Grauer v. Valve & Primer Corp., 361 N.E.2d 863, 5 Ill.Dec. 540, 47 Ill.App.3d 152.

Mich.—Fothergill v. McKay Press, 132 N.W.2d 144, 374 Mich. 138.

Pa.—Savitz v. Gallaccio, 118 A.2d 282, 179 Pa.Super. 589.

Tex.—Dixie Glass Co. v. Pollak, Civ.App., 341 S.W.2d 530, 91 A.L.R.2d 662, err. ref. no rev. err., 347 S.W.2d 596, 162 Tex. 440.

Wis.—Tetzlaff v. Pilot Press, Inc., supra, n. 46.

Reemployment by former employer

(2) Other statements.

Tex.—Mr. Eddie, Inc. v. Ginsberg, Civ.App., 430 S.W.2d 5, err. ref. no rev. err.

61. Cal.—Harris v. National Union of Marine Cooks & Stewards, 254 P.2d 673, 116 C.A.2d 759—Gonzales v. International Ass'n of Machinists, 29 Cal. Rptr. 190, 213 C.A.2d 817.

Tex.—Mr. Eddie, Inc. v. Ginsberg, Civ.App., 430 S.W.2d 5, err. ref. no rev. err.

Wis.—Smith v. Beloit Corp., 162 N.W.2d 585, 40 Wis.2d 550.

Dissimilar or incompatible employment

(1) Cal.—California School Emp. Ass'n v. Personnel Commission of Pajaro Val. Unified School Dist. of Santa Cruz County, 106 Cal.Rptr. 283, 30 C.A.3d 241.

(4) Other cases.

U.S.—Canning v. Star Pub. Co., D.C.Del., 130 F.Supp. 697.

Cal.—Parker v. Twentieth Century-Fox Film Corp., 89 Cal.Rptr. 737, 474 P.2d 689, 3 C.3d 176, 44 A.L. R.3d 615.

N.Y.—Crabtree v. Elizabeth Arden Sales Corp., supra, n. 47.

Wis.—Schiller v. Keuffel & Esser Co., 124 N.W.2d 646, 21 Wis.2d 545.

Evidence held sufficient to show honest effort to find similar employment.

Cal.—Lewis v. Protective Sec. Life Ins. Co., 25 Cal. Rptr. 213, 208 C.A.2d 582.

62. Utah—Chiodo v. General Waterworks Corp., 413 P.2d 891, 17 Utah 2d 425.

64. Utah—Chiodo v General Waterworks Corp., 413 P.2d 891, 17 Utah 2d 425.

67. U.S.—Fisher Const. Co. v. Lerche, C.A.Guam, 232 F.2d 508.

page 476

69. U.S.—Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO v. American Dredging Co., D.C.Pa., 202 F.Supp. 940.

Cal.—Billetter v. Posell, supra, n. 47.

N.Y.—Teich v. Aetna Indus. Corp., 174 N.Y.S.2d 743, 11 Misc.2d 530, revd. on oth. grds. 184 N.Y.S.2d 556, 8 A.D.2d 596, rearg. den. and app. gr. 187 N.Y.S.2d 978, 8 A.D.2d 782, affd. 201 N.Y.S.2d 780, 8 N.Y.2d 766, 168 N.E.2d 114.

Wis.—Larson v. Fisher, supra, n. 46.

Subsequent discharge by employer

U.S.—Sheppard v. Southern Ry. Co., D.C.N.C., 258 F.Supp. 217, affd., C.A., 376 F.2d 665.

Offer to reemploy insufficient

Cal.—Pichignau v. City of Paris, 70 Cal.Rptr. 147, 264 C.A.2d 138.

71. Cal.—Crillo v. Curtola, supra, n. 46.

N.Y.—Mason v. Lory Dress Co., supra, n. 18.

Wis.—Larson v. Fisher, supra, n. 46.

72. Cal.—Billetter v. Posell, supra, n. 47.

Ill.—Schwarze v. Solo Cup Co., 445 N.E.2d 872, 68 Ill.Dec. 228, 112 Ill.App.3d 632.

74. Cal.—Crillo v. Curtola, supra, n. 46.

Neb.—Ridenour v. Kuker, 175 N.W.2d 287, 185 Neb. 321.

N.Y.—Cornell v. T.V. Development Corp., 268 N.Y. S.2d 29, 17 N.Y.2d 69, 215 N.E.2d 349, on remand 270 N.Y.S.2d 45, 50 Misc.2d 422.

Pa.—Gillian v. Consolidated Foods Corp., 227 A.2d 858, 424 Pa. 407.

Active competition with former employer

N.Y.—Cornell v. T.V. Development Corp., 260 N.Y. S.2d 865, 24 A.D.2d 471, revd. on oth. grds. 215 N.E.2d 349, 17 N.Y.2d 69, 268 N.Y.S.2d 29, on remand 270 N.Y.S.2d 45, 50 Misc.2d 422.

75. N.Y.—Crabtree v. Elizabeth Arden Sales Corp., supra, n. 47.

76. Pa.—Ritz v. Music, Inc., 150 A.2d 160, 189 Pa. Super. 106.

§ 61. —— Duty to Furnish Work and Appliances

Library References

Corbin on Contracts § 683.

77. Cal.—Colvig v. RKO General, Inc., 42 Cal.Rptr. 473, 232 C.A.2d 56.

N.M.—Gibbs v. Whelan, 239 P.2d 727, 56 N.M. 38.

N.Y.—Rudman v. Cowles Communications, Inc., 280 N.E.2d 867, 30 N.Y.2d 1, 330 N.Y.S.2d 33, 63 A.L.R.3d 527.

Fairness and good faith required

Cal.—Governing Bd. of Fullerton Jr. College Dist. of Orange County v. Phillips, 41 Cal.Rptr. 608, 231 C.A.2d 94.

page 477

78. **Right to designate place of work**

D.C.—Local Division 1098, Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp. of America, AFL-CIO v. Eastern Greyhound Lines, D.C., 225 F.Supp. 28.

80. U.S.—Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp. of America, Division 1326, v. Greyhound Corp., C.A.Fla., 231 F.2d 585, 57 A.L.R.2d 1394.

Colo.—Berenbeim v. The Maccabees, 392 P.2d 172, 154 Colo. 582.

88. Del.—Martin v. Star Pub. Co., 126 A.2d 238, 11 Terry 181.

Mass.—Phelps v. Shawprint, Inc., 103 N.E.2d 687, 328 Mass. 352.

§ 62. —— Duty of Employee to Render Services

Library References

Master and Servant ⇐50, 58, 59.

90. U.S.—Rhode Island Hospital Trust Nat. Bank v. Swartz, Bresenoff, Yavner and Jacobs, C.A.Va., 455 F.2d 847, app. after remand 482 F.2d 1000.

Ind.—Osborn v. Review Bd. of Indiana Employment Sec. Division, 381 N.E.2d 495, 178 Ind.App. 22.

Mich.—General Motors Corp. v. Michigan Unemployment Compensation Commission, 49 N.W.2d 305, 331 Mich. 303.

Mo.—State v. Division 1287 of Amalgamated Ass'n of St., Elec. Ry., and Motor Coach Emp. of America, 361 S.W.2d 33, revd. on oth. grds. 83 S.Ct. 1657, 374 U.S. 74, 10 L Ed.2d 763, reh. den. 84 S.Ct. 29, 375 U.S. 870, 11 L.Ed.2d 100.

N.J.—Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 84 N.J. 58, 12 A.L.R. 4th 520.

Wash.—C.J.S. cited in Lynch v. Higley, 510 P.2d 663, 672, 8 Wash.App. 903.

91. Mo.—Stokes v. Enmark Collaborative, App., 634 S.W.2d 571.

92. Pa.—Food Fair Stores, Inc. v. Com., Unemployment Compensation Bd. of Review, 314 A.2d 528, 11 Pa.Cmwlth. 535.

93. U.S.—C.J.S. cited in Merchandise Warehouse Co. v. A.B.C. Freight Forwarding Corp., D.C.Ind., 165 F.Supp. 67, 75.

Ill.—C.J.S. cited in Circle Sec. Agency, Inc. v. Ross, 437 N.E.2d 667, 673, 63 Ill.Dec. 18, 107 Ill.App.3d 195.

Pa.—Howard v. Com., Unemployment Compensation Bd. of Review, 379 A.2d 1085, 32 Pa.Cmwlth. 512.

page 478

95. Ill.—Burke v. Martin, 82 N.E.2d 510, 335 Ill.App. 642.

96. La.—Carlson v. Ewing, supra, n. 46.

97. **Illegal act**

Cal.—Tameny v. Atlantic Richfield Co., 164 Cal.Rptr. 839, 610 P.2d 1330, 27 C.3d 167, 9 A.L.R.4th 314.

§ 63. —— Nature and Extent of Services

99. U.S.—Heyman v. Kline, D.C.Conn., 344 F.Supp. 1088, revd. in part on oth. grds., C.A., 456 F.2d 123, cert. den. 93 S.Ct. 53, 409 U.S. 847, 34 L.Ed.2d 88—In re Adams Laboratories, Inc., Bkrtcy.Va., 3 B.R. 495.

Ariz.—Thermo-Kinetic Corp. v. Allen, 493 P.2d 508, 16 Ariz.App. 341.

Ill.—Mullaney, Wells & Co. v. Savage, 402 N.E.2d 574, 37 Ill.Dec. 572, 78 Ill.2d 534.

La.—Young Oil Co. of Louisiana, Inc. v. Durbin, App. 2 Cir., 412 So.2d 620.

Mo.—Nicklas v. Lincoln Liberty Life Ins. Co., App., 518 S.W.2d 106.

N.J.—Kennedy v. Westinghouse Elec. Corp., 101 A.2d 592, 29 N.J.Super. 68, affd. 108 A.2d 409, 16 N.J. 280, 47 A.L.R.2d 1025.

Or.—Thomas v. Bourdette, 608 P.2d 178, 45 Or.App. 195.

Wash.—C.J.S. cited in Lynch v. Higley, 510 P.2d 663, 672, 8 Wash.App. 903.

1. **Custom and usage**

La.—Southern Pac. Transport Co. v. Doyal, App., 289 So.2d 882.

N.Y.—Mandel v. Liebman, 100 N.E.2d 149, 303 N.Y. 88.

Contract not extinguished

N.H.—Moore v. Dover Veterinary Hospital, Inc., 367 A.2d 1044, 116 N.H. 680.

Page 478

What law governs

U.S.—B. J. McAdams, Inc. v. Boggs, D.C.Pa., 439 F.Supp. 738.

2. Va.—Johnson v. Com., 211 S.E.2d 71, 215 Va. 495.

3. N.J.—United Board & Carton Corp. v. Britting, 164 A.2d 824, 63 N.J.Super. 517, affd. 160 A.2d 660, 61 N.J.Super. 340.

S.C.—Fennell v. South Carolina Tax Commission, 103 S.E.2d 424, 233 S.C. 43.

4. Conn.—Hayes v. Resource Control, Inc., 365 A.2d 399, 170 Conn. 102.

Mass.—Fortune v. National Cash Register Co., 364 N.E.2d 1251, 273 Mass. 96

5. N.Y.—Karas v. H. R. Laboratories, 67 N.Y.S.2d 15, 271 App.Div. 530, affd. 74 N.E.2d 192, 297 N.Y. 494.

Pa.—Howard v. Com., Unemployment Compensation Bd. of Review, 379 A.2d 1085, 32 Pa.Cmwlth. 512.

8. Wash.—Appeal of Board of Directors of Kennewick School Dist. No. 17 of Benton County, 287 P.2d 105, 47 Wash.2d 56.

page 479

12. **Breach of fiduciary duty not committed**

U.S.—Motorola, Inc. v. Fairchild Camera & Instrument Corp., D.C.Ariz., 366 F.Supp. 1173.

Utah—Crane Co. v. Dahle, 576 P.2d 870.

17. La.—Lingo v. State, Dept. of Employment Sec., App., 364 So.2d 1367.

18. La.—Lingo v. State, Dept. of Employment Sec., App., 364 So.2d 1367.

§ 64. —— Substitution of Parties

21. Ind.—Indianapolis Machinery Co., Inc. v. Bollman, 347 N.E.2d 518, 169 Ind.App. 195, app. after remand 378 N.E.2d 931, 177 Ind.App. 208.

Consent may be express or implied

Wis.—MacPherson v. Strand, 55 N.W.2d 354, 262 Wis. 360.

§ 65. —— Tender of Performance

24. Ariz.—C.J.S. cited in Thermo-Kinetic Corp. v. Allen, 493 P.2d 508, 512, 16 Ariz.App. 341.

§ 66. —— Sufficiency of Performance

Library References

Corbin on Contracts § 675.

page 480

29. U.S.—Salomon v. Crown Life Ins. Co., C.A.Mo., 536 F.2d 1233, cert. den. 97 S.Ct. 387, 429 U.S. 961, 50 L.Ed.2d 329.

Ill.—Schoneberg v. Grundy County Special Ed. Co-op. & Bd. of Ed. Dist. No. 54, 385 N.E.2d 351, 24 Ill.Dec. 439, 67 Ill.App.3d 899.

N.Y.—Mandle v. Afield, 95 N.Y.S.2d 75, 196 Misc. 791.

Tex.—Dallas Hotel Co. v. Lackey, Civ.App., 203 S.W.2d 557, 562, err. ref. no rev. err.

Satisfaction of employer

(2) Other cases.

Mich.—Brown v. Chris Nelsen & Son, Inc., 158 N.W.2d 818, 10 Mich.App. 95.

Pa.—Kramer v. Philadelphia Leather Goods Corp., 73 A.2d 385, 364 Pa. 531.

R.I.—Freeman v. Danal Jewelry Co., 397 A.2d 1323, 121 R.I. 321.

Tex.—Porter v. United Motels, Inc., Civ.App., 315 S.W.2d 340.

30. Tex.—Dallas Hotel Co. v. Lackey, supra, n. 29.

Failure to meet quota

Tex.—Salter v. Jones, Civ.App., 348 S.W.2d 381.

§ 67. —— Honesty and Faithfulness

31. U.S.—McDonald v O'Meara, C.A.La., 473 F.2d 799, cert den. 93 S.Ct. 2293, 412 U.S. 906, 36 L.Ed.2d 971.

Cal.—Paramount Mfg. Co. v. Mohan, 16 Cal.Rptr. 417, 196 C.A.2d 372—Governing Bd. of Fullerton Jr. College Dist. of Orange County v. Phillips, 41 Cal.Rptr. 608, 231 C.A.2d 94.

Fla.—Insurance Field Services, Inc. v. White & White Inspection and Audit Service, Inc., App., 384 So.2d 303.

Ill.—ABC Trans Nat. Transport, Inc. v. Aeronautics Forwarders, Inc., 379 N.E.2d 1228, 20 Ill.Dec. 160, 62 Ill.App.3d 671.

Ky.—Brown Hotel Co. v. White, 365 S.W.2d 306.

La.—Neal v. Daniels, 47 So.2d 44, 217 La. 679—Robinson v. Commercial Cattle Co., App., 82 So.2d 108.

Mich.—Brown v. Chris Nelsen & Son, Inc., 158 N.W.2d 818, 10 Mich.App. 95.

Minn.—Marsh v. Minneapolis Herald, Inc., 134 N.W.2d 18, 270 Minn. 443.

N.J.—Auxton Computer Enterprises, Inc. v. Parker, 416 A.2d 952, 174 N.J.Super. 418.

N.M.—Las Luminarias of the New Mexico Council of the Blind v. Isengard, App., 587 P.2d 444, 92 N.M. 297.

N.Y.—Micro Precision Corp. v. Brochi, 156 N.Y.S.2d 501—McLean v. Hubbard, 194 N.Y.S.2d 644, 24 Misc.2d 92, app. dism. 202 N.Y.S.2d 1015, 11 A.D.2d 625, order dismissing appeal vac. conditionally 205 N.Y.S.2d 1013, 11 A.D.2d 911, affd. 208 N.Y.S.2d 443, 11 A.D.2d 1084—E. W. Bruno Co. v. Friedberg, 250 N.Y.S.2d 187, 21 A.D.2d 336.

Ohio—Gillam v. Roadway Exp., Inc., 206 N.E.2d 34, 1 Ohio App.2d 548.

Pa.—Allen v. Unemployment Compensation Bd. of Review, 77 A.2d 889, 168 Pa.Super. 295—Sopko v. Unemployment Compensation Bd. of Review, 82 A.2d 598, 168 Pa.Super. 625.

S.C.—Lowndes Products, Inc. v. Brower, 191 S.E.2d 761, 259 S.C. 322, app. after remand 205 S.E.2d 184, 262 S.C. 431.

Tex.—Herider Farms-El Paso, Inc. v. Criswell, Civ. App., 519 S.W.2d 473, err. ref. no rev. err.

Utah—Chiodo v. General Waterworks Corp., 413 P.2d 891, 17 Utah 2d 425.

Wash.—C.J.S. cited in Lynch v. Higley, 510 P.2d 663, 672, 8 Wash.App. 903.

Rake-off

Minn.—Nord v. Gray, 82 N.W. 1082, 1083, 80 Minn. 143.

Qualities which employer rightfully expects

Conn.—Wilber v. Walsh, 160 A.2d 755, 147 Conn. 317.

Ill.—Stanulus v. Budd, 117 N.E.2d 655 1 Ill.App.2d 334.

52 C.J. p. 795 note 70[a].

Breach of duties of loyalty and fidelity by former employee

U.S.—Sperry Rand Corp. v. Rothlein, D.C.Conn., 241 F.Supp. 549.

Ariz.—Evans v. Valley Radiologists, Ltd., App., 619 P.2d 5, 127 Ariz. 177.

Breach of trust

U.S.—Tolchester Lines, Inc. v. Dowd, D.C.N.Y., 253 F.Supp. 643.

Duty to refrain from dishonoring employer

Idaho—O'Neal v. Employment Sec. Agency, 404 P.2d 600, 89 Idaho 313.

Soliciting employer's customers after termination

N.Y.—Catalogue Service of Westchester, Inc. v. Wise, 405 N.Y.S.2d 723, 63 A.D.2d 895.

Fiduciary duty

Wis.—Hartford Elevator, Inc. v. Lauer, 289 N.W.2d 280, 94 Wis.2d 571.

32. U.S.—United Aircraft Corp. v. Boreen, D.C.Pa., 284 F.Supp. 428, affd., C.A., 413 F.2d 694.

N.Y.—E. W. Bruno Co. v. Friedberg, 250 N.Y.S.2d 187, 21 A.D.2d 336.

Or.—Williams v. Pilgrim Turkey Packers, Inc., 503 P.2d 710, 264 Or. 36.

§ 69. Skill and Care Required of Employee

Library References

Master and Servant ⟹53.

34. **Employer's right to set job qualifications**

U.S.—Montessori Children's House and School, Inc. v. Secretary of Labor of U.S., D.C.Tex., 443 F.Supp. 599.

D.C.—Brock v. Mutual Reports, Inc., App., 397 A.2d 149.

Fla.—City of St. Petersburg v. Pfeiffer, 52 So.2d 796—Miriam Mascheck, Inc. v. Mausner, App., 264 So.2d 859.

Mich.—Brown v. Chris Nelsen & Son, Inc., 158 N.W.2d 818, 10 Mich.App. 95.

Miss.—Masonite Corp. v. Handshoe, 44 So.2d 41, 208 Miss. 166.

N.Y.—Edmond Weil, Inc. v. Pintow, 245 N.Y.S.2d 53, 20 A.D.2d 537.

Or.—Fireman's Fund Am. Ins. Companies v. Turner, 488 P.2d 429, 26 Or. 30, 53 A.L.R.3d 620.

Tex.—Ingram v. Dallas County Water Control and Imp. Dist. No. 7, Civ.App., 425 S.W.2d 366, err. ref. no rev. err.

Wash.—C.J.S. cited in Lynch v. Higley, 510 P.2d 663, 672, 8 Wash.App. 903.

Best efforts

Md.—C-E-I-R, Inc. v. Computer Dynamics Corp., 183 A.2d 374, 229 Md. 357.

Utmost good faith and loyalty

U.S.—AGA Aktiebolag v. ABA Optical Corp., D.C. N.Y., 441 F.Supp. 747.

35. Wash.—McIntyre v. Fort Vancouver Plywood Co., Inc, 600 P.2d 619, 24 Wash.App. 120.

page 481

37. U.S.—C.J.S. cited in Gaines v. Jones, C.A.Mo., 486 F.2d 39, 42, cert. den. 94 S.Ct. 1418, 415 U.S. 919, 39 L.Ed.2d 474.

Cal.—Dahl-Beck Elec. Co. v. Rogge, 80 Cal.Rptr. 440, 275 C.A.2d 893.

N.M.—Meyer v. Williams, 203 P.2d 368, 53 N.M. 134.

N.C.—Hagan v. Jenkins, 67 S.E.2d 380, 234 N.C. 425—C.J.S. cited in Ahoskie Production Credit Association v. Whedbee, 110 S.E.2d 795, 800, 251 N.C. 24.

Pa.—Sopko v. Unemployment Compensation Bd. of Review, 82 A.2d 598, 168 Pa.Super. 625.

41. Pa.—Allen v. Unemployment Compensation Bd. of Review, 77 A.2d 889, 168 Pa.Super. 295.

43. N.Y.—Mandle v. Afield, 95 N.Y.S.2d 74, 196 Misc. 791.

44. Pa.—Allen v. Unemployment Compensation Bd. of Review, supra, n. 31.

48. See C.J.S. Property § 14 note 20.

§ 70. Duty to Serve Employer Exclusively

Idaho—C.J.S. black letter summary quoted in Holders Mfrs., Inc. v. Cudd, 335 P.2d 890, 893, 80 Idaho 557.

page 482

49. U.S.—Walter v. Netherlands Mead N.V., C.A.Virgin Islands, 514 F.2d 1130, cert. den. 96 S.Ct. 133, 423 U.S. 869, 46 L.Ed.2d 99.

Colo.—Kennedy v. Leo Payne Broadcasting, App., 648 P.2d 673.

Ill.—Board of Educ. of Berwyn School Dist. No. 100, Cook County v. Metskas, 436 N.E.2d 587, 62 Ill.Dec. 561, 106 Ill.App.3d 943.

La.—Neal v. Daniels, supra, n. 31.

Mo.—Durwood v. Dubinsky, 361 S.W.2d 779.

N.M.—C.J.S. cited in Las Luminarias of the N.M. Council v. Isengard, 587 P.2d 444, 449, 92 N.M. 297.

N.Y.—Burnett Process, Inc. v. Richlar Industries, Inc., 390 N.Y.S.2d 282, 55 A.D.2d 812—Utica Mut. Ins. Co. v. C. Haines Mfg. Co., Inc., 390 N.Y.S.2d 320, 55 A.D.2d 834.

Pa.—Ritz v. Music, Inc., 150 A.2d 160, 189 Pa.Super. 106.

Wash.—Organon, Inc. v. Hepler, 595 P.2d 1314, 23 Wash.App. 432.

50. U.S.—United Aircraft Corp. v. Boreen, D.C.Pa., 284 F.Supp. 428, affd., C.A., 413 F.2d 694.

N.M.—Las Luminarias of the New Mexico Council of the Blind v. Isengard, App., 587 P.2d 444, 92 N.M. 297.

51. Mo.—Durwood v. Dubinsky, 361 S.W.2d 779.

N.J.—Art Wire & Stamping Co. v. Johnson, 72 A.2d 523, 7 N.J.Super. 173.

53. Ill.—Cross Wood Products, Inc. v. Suter, 422 N.E.2d 953, 52 Ill.Dec. 744, 97 Ill.App.3d 282.

59. U.S.—Universal Elec. Corp. v. Golden Shield Corp., C.A.Puerto Rico, 316 F.2d 568.

Conn.—Town & Country House Homes Service, Inc. v. Evans, 189 A.2d 390, 150 Conn. 314.

Ill.—Cooper v. National Newspaper Syndicate, 120 N.E.2d 658, 3 Ill.App.2d 129.

La.—Robinson v. Commercial Cattle Co., App., 82 So.2d 108.

Mich.—Fred Striffler, Inc. v. General Motors Corp., 73 N.W.2d 526, 344 Mich. 193.

Minn.—Sanitary Farm Dairies, Inc. v. Wolf, 112 N.W.2d 42, 261 Minn. 166.

Mo.—Durwood v. Dubinsky, 361 S.W.2d 779.

N.Y.—Hercules Packing Corp. v. Steinbruckner, 280 N.Y.S.2d 423, 28 A.D.2d 635, app. dism. 229 N.E.2d 842, 20 N.Y.2d 757, 283 N.Y.S.2d 174.

Competition with employer

(2) Other matters.

U.S.—Purolator Products, Inc. v. Torite Industries, Inc., C.A.Cal., 413 F.2d 989—Arnold's Ice Cream Co. v. Carlson, D.C.N.Y., 330 F.Supp. 1185.

Ill.—Vendo Co. v. Stoner, 321 N.E.2d 1, 58 Ill.2d 289, cert. den. 95 S.Ct. 1398, 420 U.S. 975, 43 L.Ed.2d 655.

N.Y.—Robert N. Brown Associates, Inc. v. Fileppo, 327 N.Y.S.2d 133, 38 A.D.2d 515.

Law imposes an implied condition of loyalty to an employer.

U.S.—Dana Perfumes, Inc. v. Mullica, C.A.Cal., 268 F.2d 936.

S.C.—Berry v. Goodyear Tire & Rubber Co., 242 S.E.2d 551, 270 S.C. 489.

Hiring away other employees of employer held actionable

U.S.—American Republic Ins. Co. v. Union Fidelity Life Ins. Co., C.A.Or., 470 F.2d 820.

Duty to former employer and freedom to compete not inconsistent

D.C.—Group Ass'n Plans, Inc. v. Colquhoun, C.A., 466 F.2d 469, 151 U.S.App.D.C. 298.

61. U.S.—Mideland-Ross Corp. v. Yokana, C.A.N.J., 293 F.2d 411—Credit Bureau Management Co. v. Huie, D.C.Ark., 254 F.Supp. 547—United Aircraft Corp. v. Boreen, D.C.Pa., 284 F.Supp. 428, affd., C.A., 413 F.2d 694.

Md.—Maryland Metals, Inc. v. Metzner, 382 A.2d 564, 282 Md. 31.

Mo.—National Rejectors, Inc. v. Trieman, 409 S.W.2d 1.

Organization of new competing company, etc.

(2) Other statements.

U.S.—United Aircraft Corp. v. Boreen, C.A.Pa., 413 F.2d 694—Walter v. Netherlands Mead N.V., C.A. Virgin Islands, 514 F.2d 1130, cert. den. 96 S.Ct. 133, 423 U.S. 869, 46 L.Ed.2d 99.

Fla.—Fish v. Adams, App., 401 So.2d 843.

Ill.—James C. Wilborn & Sons, Inc. v. Heniff, 237 N.E.2d 781, 95 Ill.App.2d 155.

Not required to account to employer

Del.—H. & S. Mfg. Co. v. Benjamin F. Rich Co., 181 A.2d 431, 40 Del Ch. 304.

Duty not to do disloyal acts looking to future competition

S.C.—Lowndes Products, Inc. v. Brower, 191 S.E.2d 761, 259 S.C. 322, app. after remand 205 S.E.2d 184, 262 S.C. 431.

§ 71. —— Earnings from Third Persons

62. U.S.—Storer Broadcasting Co. v. Jack the Bellboy, Inc., D.C.Mich., 107 F.Supp. 988.

Fla.—Bratter v. Halperin, 62 So.2d 412.

N.J.—Marcalus Mfg. Co. v. Sullivan, 60 A.2d 330, 142 N.J.Eq. 434.

N.C.—C.J.S. cited in Samples v. Maxson-Betts Co., 197 S.E.2d 71, 74, 18 N.C.App. 359.

63. U.S.—Nelson v. Radio Corp. of America, D.C. Fla., 148 F.Supp. 1.

N.Y.—Helmsley-Spear, Inc. v. Winter, 420 N.Y.S.2d 599, 101 Misc.2d 17.

N.C.—Clyde Rudd & Associates, Inc. v. Taylor, 225 S.E.2d 602, 29 N.C.App. 679, cert. den. 228 S.E.2d 451, 290 N.C. 659.

page 483

68. Cal.—Anders v. State Bd. of Equalization, 185 P.2d 883, 82 Cal.App.2d 88.

N.Y.—Alaia v. Roberts, 112 N.Y.S.2d 251.

Wis.—Sheaffer v. Industrial Commission, 139 N.W.2d 106, 29 Wis.2d 292, reh. den. 140 N.W.2d 800, 29 Wis.2d 292.

69. Cal.—Anders v. State Bd. of Equalization, supra, n. 68.

Wis.—Sheaffer v. Industrial Commission, 139 N.W.2d 106, 29 Wis.2d 292, reh. den. 140 N.W.2d 300, 29 Wis.2d 292.

70. N.Y.—Alaia v. Roberts, supra, n. 68.

Wis.—Sheaffer v. Industrial Commission, 139 N.W.2d 106, 29 Wis.2d 292, reh. den. 140 N.W.2d 300, 29 Wis.2d 292.

§ 72. Trade Secrets

Library References

Master and Servant ⚷60.

Modern Legal Forms Ch. 62, Service and Agency Contracts.

71. U.S.—Frederick Chusid & Co. v. Marshall Leeman & Co., D.C.N.Y., 279 F.Supp. 913.

Del.—E. I. duPont de Nemours & Co. v. American Potash & Chemical Corp., 200 A.2d 428, 41 Del.Ch. 533.

Mass.—Eastern Marble Products Corp. v. Roman Marble, Inc., 364 N.E.2d 799, 372 Mass. 835.

Minn.—Jostens, Inc. v. National Computer Systems, Inc., 318 N.W.2d 691, 30 A.L.R. 4th 1229.

N.Y.—National Starch Products v. Polymer Industries, 79 N.Y.S.2d 357, 273 App.Div. 732, rearg. and app. den. 81 N.Y.S.2d 278, 274 App.Div. 822—Extrin Foods, Inc. v. Leighton, 115 N.Y.S.2d 429, 202 Misc. 592.

Ohio—B. F. Goodrich Co. v. Wohlgemuth, 192 N.E.2d 99, 117 Ohio App. 493.

Or.—Stimson Lumber Co. v. Laurence-David, Inc., 356 P.2d 84, 224 Or. 447.

Pa.—Diamond Furnishing Co. v. Krant, 52 Lack.Jur. 233.

Tex.—Thermotics, Inc. v. Bat-Jac Tool Co., Inc., Civ. App., 541 S.W.2d 255.

Fiduciary

U.S.—Bull v. Logetronics, Inc., D.C.Va., 323 F.Supp. 115.

72. U.S.—Forest Laboratories, Inc. v. Formulations, Inc., D.C.Wis., 299 F.Supp. 202, affd. in part, revd. in part on oth. grds., C.A., 452 F.2d 621—Raybestos-Manhattan, Inc. v. Rowland, D.C.S.C., 310 F.Supp. 993—Crocan Corp. v. Sheller-Globe Corp., D.C.Ill., 385 F.Supp. 251—Lear Siegler, Inc. v. Ark-Ell Springs, Inc., C.A.Miss., 569 F.2d 286.

Cal.—Reid v. Mass Co., 318 P.2d 54, 155 C.A.2d 293—Fortna v. Martin, 323 P.2d 146, 158 C.A.2d 634—By-Buk Co. v. Printed Cellophane Tape Co., 329 P.2d 147, 163 C.A.2d 157—Ungar Elec. Tools, Inc. v. Sid Ungar Co., 13 Cal.Rptr. 268, 192 C.A.2d 398—American Loan Corp. v. California Commercial Corp., 27 Cal.Rptr. 243, 211 C.A.2d 515—Diodes, Inc. v. Franzen, 67 Cal.Rptr. 19, 260 C.A.2d 244.

Colo.—Julius Hyman & Co. v. Velsicol Corp., 233 P.2d 977, 123 Colo. 563, cert. den. 72 S.Ct. 113, 342 U.S. 870, 96 L.Ed. 654, reh. den. 72 S.Ct. 199, 342 U.S. 895, 96 L.Ed. 671.

Conn.—Allen Mfg. Co. v. Loika, 144 A.2d 306, 145 Conn. 509—Town & Country House & Homes Service, Inc., v. Evans, 189 A.2d 390, 150 Conn. 314.

Fla.—Bert Lane Co. v. International Industries, 84 So.2d 5—Inland Rubber Corp. v. Helman, App., 237 So.2d 291.

Ga.—Thomas v. Best Mfg. Corp., Division of Tillotson Corp., 218 S.E.2d 68, 234 Ga. 787.

Ill.—Lind v. Carson, 148 N.E.2d 814, 16 Ill.App.2d 542—James C. Wilborn & Sons, Inc. v. Heniff, 237 N.E.2d 781, 95 Ill.App.2d 155—Bimba Mfg. Co. v. Starz Cylinder Co., 256 N.E.2d 357, 119 Ill.App.2d 251.

Md.—Ritterpusch v. Lithographic Plate Service, 119 A.2d 392, 208 Md. 592.

Mass.—USM Corp. v. Marson Fastener Corp., 393 N.E.2d 895, 379 Mass. 90, app. after remand 467 N.E.2d 1271, 392 Mass. 334.

Mich.—Insealator, Inc. v. Wallace, 98 N.W.2d 643, 357 Mich. 233.

Minn.—Cherne Indus., Inc. v. Grounds & Associates, Inc., 278 N.W.2d 81.

Mo.—National Rejectors, Inc. v. Trieman, 409 S.W.2d 1.

Neb.—Seculities Acceptance Corp. v. Brown, 107 N.W.2d 540, 171 Neb. 701.

N.J.—Consolidated Boiler Corp. v. Bogue Elec. Co., 58 A.2d 759, 141 N.J.Eq. 550—Sun Dial Corp. v. Rideout, 102 A.2d 90, 29 N.J.Super. 361, affd. 108 4 A.2d 442, 16 N.J. 252—Adolph Gottscho, Inc. v. American Marking Corp., 114 A.2d 19, 35 N.J.Super. 333, affd. 114 A.2d 438, 18 N.J. 467, cert. den. 76 S.Ct. 69, 350 U.S. 834, 100 L.Ed. 744.

N.Y.—Cupid Diaper Service v. Adelman, 211 N.Y.S.2d 813, 27 Misc.2d 1095—Gulf Oil Corp. v. Rapp, 226 N.Y.S.2d 562, 33 Misc.2d 1011.

Ohio—C.J.S. cited in Perfect Measuring Tape Co. v. Notheis, 114 N.E.2d 149, 153, 93 Ohio App. 507—Fremont Oil Co. v. Marathon Oil Co., 192 N.E.2d 123.

Pa.—Carl A. Colteryahn Dairy, Inc. v. Schneider Dairy, 203 A.2d 469, 415 Pa. 276—Dozor Agency, Inc. v. Rosenberg, 52 Del.Co. 172, affd. 169 A.2d 771, 403 Pa. 237, affd. in part and revd. in part on oth. grds. 218 A.2d 583—Van Products Co. v. General Welding & Fabricating Co., 213 A.2d 769, 419 Pa. 248, 30 A.L.R.3d 612.

Tex.—Texas Shop Towel v. Haire, Civ.App., 246 S.W.2d 482—Welex Jet Services, Inc. v. Owen, Civ.App., 325 S.W.2d 856, err. ref. no rev. err.—Lamons Metal Gasket Co. v. Traylor, Civ.App., 361 S.W.2d 211, err. ref. no rev. err.

Confidential relationship

La.—Engineered Mechanical Services, Inc. v. Langlois, App. 1 Cir., 464 So.2d 329, writ den. 467 So.2d 531.

Jointly developed secrets

U.S.—B.F. Gladding & Co. v. Scientific Anglers, Inc., C.A.Mich., 245 F.2d 722, reh. den. 248 F.2d 483—Sperry Rand Corp. v. Rothlein, D.C.Conn., 241 F.Supp. 549.

Basis for recovery

Or.—Stimson Lumber Co. v. Laurence-David, Inc., 356 P.2d 84, 224 Or. 447.

Page 483

Balancing of conflicting interests

U.S.—GTI Corp. v. Calhoon, D C.Ohio, 309 F.Supp. 762—In re Uniservices, Inc., C.A Ind., 517 F.2d 492.

Md.—Space Aero Products Co. v. R.E Darling Co., 208 A.2d 74, 238 Md. 93, rearg. den. 208 A.2d 699, 238 Md. 93, cert. den 86 S.Ct 77, 382 U.S. 843, 15 L.Ed.2d 83.

N.C.—Travenol Laboratories, Inc v. Turner, 228 S.E.2d 478, 30 N.C.App. 686.

73. U.S.—Hunter v. Shell Oil Co., C.A.Tex., 198 F.2d 485—Tlapek v. Chevron Oil Co., C.A.Ark., 407 F.2d 1129—Republic Systems & Programming, Inc. v. Computer Assistance, Inc., D.C.Conn., 322 F.Supp. 619, affd., C.A., 440 F.2d 996.

Conn.—Town & Country House & Homes Service, Inc. v. Evans, 189 A.2d 390, 150 Conn. 314.

Md.—Space Aero Products Co. v. R.E. Darling Co., 208 A.2d 74, 238 Md. 93, rearg. den. 208 A.2d 699, 238 Md. 93, cert. den. 86 S.Ct. 77, 382 U.S. 843, 15 L.Ed.2d 83.

Mass.—Eastern Marble Products Corp. v. Roman Marble, Inc., 364 N.E.2d 799, 372 Mass. 835.

N.Y.—Burnett Process, Inc. v. Richlar Industries, Inc., 390 N.Y.S.2d 282, 55 A.D.2d 812.

Rights of purchaser of company

Pa.—Morgan's Home Equipment Corp. v. Martucci, 136 A.2d 838, 390 Pa. 618.

Employee who misappropriates his employer's confidential ideas and inventions may not retain the fruits of his wrong.

U.S.—DeLong Corp. v. Lucas, D.C.N.Y., 176 F.Supp. 104, affd., C.A., 278 F.2d 804, cert. den. 81 S.Ct. 71, 364 U.S. 833, 5 L.Ed.2d 58.

Employer is entitled to protection against competitive use of information acquired by employee as result of positions of trust.

Pa.—Robinson Electronic Supervisory Co. v. Johnson, 154 A.2d 494, 397 Pa. 268.

74. U.S.—Dollac Corp. v. Margon Corp., D.C N.J., 164 F.Supp. 41, affd., C.A., 275 F.2d 202—Koehring Co. v. National Automatic Tool Co., D.C.Ind., 257 F.Supp. 282, affd., C.A., 385 F.2d 414—General Bronze Corp. v. Ward Products Corp., D.C. N.Y., 262 F.Supp. 936—Cataphote Corp. v. Hudson, C.A.Miss., 44 F.2d 1313.

Cal.—Futurecraft Corp. v. Clary Corp., 23 Cal.Rptr. 198, 205 C.A.2d 279

Mass.—Dynamics Research Corp. v. Analytic Sciences Corp., 400 N.E.2d 1274, 9 Mass.App. 254.

N.H.—Dunfey Realty Co. v. Enwright, 138 A.2d 80, 101 N.H. 195.

75. Ill.—Midwest Micro Media, Inc. v. Machotka, 395 N.E.2d 188, 32 Ill.Dec. 241, 76 Ill.App.3d 698.

N.Y.—Rand Tea & Coffee Stores, Inc. v. Lebowitz, 118 N.Y.S.2d 51.

A confidential relationship is not created by the mere employer-employee relationship,[75.5] but there must be an express understanding as to the confidential nature of the information,[75.10] or the circumstances must be such that the employee is aware of confidence placed in him by the employer.[75.15]

75.5. U.S.—Future Plastics, Inc. v. Ware Shoals Plastics, Inc., D.C.S.C., 340 F.Supp. 1376.

75.10. U.S.—Future Plastics, Inc. v. Ware Shoals Plastics, Inc., D.C.S.C., 340 F.Supp. 1376.

75.15. U.S.—Future Plastics, Inc. v. Ware Shoals Plastics, Inc., D.C.S.C., 340 F.Supp. 1376.

page 484

76. U.S.—Tlapek v. Chevron Oil Co., C.A.Ark., 407 F.2d 1129—E. W. Bliss Co. v. Struthers-Dunn, Inc., C.A.Iowa, 408 F.2d 1108—United Aircraft Corp. v. Boreen, D.C.Pa., 284 F.Supp. 428, affd., C.A., 413 F.2d 694—Metal Lubricants Co. v. Engineered Lubricants Co., D.C.Mo., 284 F.Supp. 483, affd., C.A., 411 F.2d 426—Republic Systems & Programming, Inc. v. Computer Assistance, Inc., D.C.Conn., 322 F.Supp. 619, affd., C A., 440 F.2d 996—Bull v. Logetronics, Inc, D.C.Va, 323 F.Supp. 115—Erie Technological Products, Inc. v. Centre Engineering, Inc., D C Pa., 52 F.R.D. 524—**C.J.S. cited** in Hulsenbusch v. Davidson Rubber Co., C.A.Iowa, 344 F.2d 730, 736, cert. den. 86 S.Ct. 545, 382 U.S. 977, 15 L.Ed 2d 468

Cal.—Mathews Paint Co. v. Seaside Paint & Lacquer Co., 306 P.2d 113, 148 C.A 2d 168—American Alloy Steel Corp. v. Ross, 308 P.2d 494, 149 C.A.2d 215—Fortna v. Martin, 323 P.2d 146, 158 C.A.2d 634—Ungar Elec. Tools, Inc. v. Sid Ungar Co., 13 Cal.Rptr. 268, 192 C.A.2d 398.

Colo.—Suburban Gas of Grand Junction, Inc. v. Bockelman, 401 P.2d 268, 157 Colo. 78

Conn.—Triangle Sheet Metal Works, Inc v. Silver, 222 A.2d 220, 154 Conn. 116.

Ga.—Southeast Consultants, Inc. v. McCrary Engineering Corp., 273 S.E.2d 112, 246 Ga. 503, 17 A.L.R. 4th 470.

Ill.—Cooper v. National Newspaper Syndicate, 120 N.E.2d 658, 3 Ill.App.2d 129—Solar Textiles Co. v. Fortino, 196 N.E.2d 719, 46 Ill.App.2d 436—Schulenburg v. Signatrol, Inc., 212 N.E.2d 865, 33 Ill.2d 379, cert. den. 86 S.Ct. 1225, 383 U.S. 959, 16 L.Ed.2d 302.

Ind.—Donahue v. Permacel Tape Corp., 127 N.E.2d 235, 234 Ind. 398.

Ky.—Stewart v. Kentucky Paving Co., Inc., App., 557 S.W.2d 435.

La.—Lamb v. Quality Inspection Services, Inc., App., 398 So.2d 643.

Md.—Ritterpusch v. Lithographic Plate Service, 119 A.2d 392, 208 Md. 592.

Mass.—Abramson v. Blackman, 166 N.E.2d 729, 340 Mass. 714—Angell Elevator Lock Co. v. Manning, 205 N.E.2d 245, 348 Mass. 623.

Mich.—Shwayder Chemical Metallurgy Corp. v. Baum, 206 N.W.2d 484, 45 Mich.App. 220.

Mo.—Thau-Nolde, Inc. v. Krause Dental Supply & Gold Co., Inc., 518 S.W.2d 5.

N.J.—Boost Co. v. Faunce, 86 A.2d 283, 17 N.J.Super. 458—Sun Dial Corp. v. Rideout, 108 A.2d 442, 16 N.J. 252—Adolph Gottscho, Inc. v. Bell-Mark Corp., 191 A.2d 67, 79 N.J.Super. 156—Hudson Foam Latex Products, Inc. v. Aiken, 198 A.2d 136, 82 N.J.Super. 508.

N.M.—Las Luminarias of the New Mexico Council of the Blind v. Isengard, App., 587 P.2d 444, 92 N M 297.

N.Y.—Harry R. Defler Corp. v. Kleeman, 243 N.Y.S.2d 930, 19 A.D.2d 396, app. dism. 197 N.E.2d 540, 13 N.Y.2d 1174, 248 N.Y.S.2d 53.

Ohio—B. F. Goodrich Co. v. Wohlgemuth, 192 N.E.2d 99, 117 Ohio App. 493.

Or.—Stimson Lumber Co. v. Laurence-David, Inc., 356 P.2d 84, 224 Or. 447.

Pa.—Wexler v. Greenberg, 160 A.2d 430, 399 Pa. 509—F. G. Okie, Inc. v. Attaway, 31 D. & C.2d 173—Van Products Co. v. General Welding & Fabricating Co., 213 A.2d 769, 419 Pa. 248, 30 A.L.R.3d 612.

Tex.—Ventura Mfg. Co. v. Locke, Civ.App., 454 S.W.2d 431.

Utah—Microbiological Research Corp. v. Muna, 625 P.2d 690.

Janitor

Cal.—Morris v. Harris, 274 P.2d 22, 127 C.A.2d 476.

Whether trade secrets are memorized of copied immaterial

Ill.—Schulenburg v. Signatrol Inc., 200 N.E.2d 615, 50 Ill.App.2d 402, affd. in part and revd. in part on oth. grds. 212 N.E.2d 865, 33 Ill.2d 379, cert. den. 86 S.Ct. 1225, 383 U.S. 959, 16 L.Ed.2d 302.

Business energy and initiative not synonymous with treachery

Md.—Operations Research, Inc. v. Davidson & Talbird, Inc., 217 A.2d 375, 241 Md. 550.

Employee's mere entering into competition with former employer not actionable wrong

U.S.—Cudahy Co. v American Laboratories, Inc., D.C. Neb., 313 F.Supp. 1339.

Confidence not breached

U.S.—Great Lakes Carbon Corp. v. Koch Industries, Inc., D C.N.Y., 497 F.Supp. 462.

77. U.S.—Thiberg v. Bach, D.C.N.J., 107 F.Supp. 639, affd , C.A., 203 F.2d 956—Chevron Oil Co v. Tlapek, D.C.Ark., 265 F.Supp. 598, affd. in part and revd. in part on oth. grds., C.A., 407 F.2d 1129—A. H. Emery Co. v. Marchan Products Corp., D C.N.Y., 268 F.Supp. 289, affd., C.A., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106.

Cal.—Aetna Bldg. Maintenance Co. v. West, 246 P.2d 11, 39 C.2d 198

Conn.—Town & Country House & Homes Service, Inc., v. Evans, 189 A 2d 390, 150 Conn. 314.

Ill.—Affiliated Hospital Products, Inc. v. Baldwin, 373 N.E.2d 1000, 15 Ill.Dec. 528, 57 Ill.App.3d 800, app. after remand 398 N.E.2d 290, 34 Ill.Dec. 615, 79 Ill.App.3d 74.

N.Y.—State Export Co. v. Mol Shipping & Trading, Inc., 155 N.Y.S.2d 188, app. dism. 158 N.Y.S.2d 765, 2 A.D.2d 837—Gulf Oil Corp. v. Rapp, 226 N.Y.S.2d 562, 33 Misc.2d 1011—Harry R. Defler Corp. v. Kleeman, 243 N.Y.S 2d 930, 19 A.D.2d 396, app. dism. 197 N.E.2d 540, 13 N.Y.2d 1174, 248 N.Y.S.2d 53.

Or.—McCombs v McClelland, 354 P.2d 311, 233 Or. 475.

Pa.—Agra Enterprises, Inc. v. Brunozzi, 448 A.2d 579, 302 Pa Super. 166.

Tex.—Johnston v. American Speedreading Academy, Inc., Civ.App., 526 S.W.2d 163.

Contractual limitation of duty permitted

Neb.—Securities Acceptance Corp. v. Brown, 107 N.W.2d 540, 171 Neb. 701.

78. U.S.—Mixing Equipment Co. v. Philadelphia Gear, Inc., D.C.Pa., 312 F.Supp. 1269, mod. on oth. grds., C.A., 436 F.2d 1308.

Ark.—McLeod v. Meyer, 372 S.W.2d 220, 237 Ark. 173.

Cal.—American Alloy Steel Corp. v. Ross, 308 P.2d 494, 149 C.A.2d 215.

Conn.—Allen Mfg. Co. v. Loika, 144 A.2d 306, 145 Conn. 509.

Ill.—Mid-States Vending Service, Inc. v. Rosen, 222 N.E.2d 99, 77 Ill.App.2d 83.

La.—National Motor Club of La., Inc. v. Conque, App., 173 So.2d 238, cert. den. 175 So.2d 110, 247 La. 875—**C.J.S. cited** in Lamb v. Quality Inspection Serv., Inc., App., 398 So.2d 643, 648.

Mo.—National Rejectors, Inc. v. Trieman, 409 S.W.2d 1.

Neb.—Rambo v. Galley, 199 N.W.2d 14, 188 Neb. 672.

Ohio—Perfect Measuring Tape Co. v. Notheis, 114 N.E.2d 149, 93 Ohio App. 507.

Or.—McCombs v. McClelland, 354 P.2d 311, 223 Or. 475

Tex.—Johnston v. American Speedreading Academy, Inc., Civ.App., 526 S.W.2d 163.

Obligation of departing employee to disclose acts preparatory to entering into competition with former employer

U.S.—Cudahy Co. v. American Laboratories, Inc., D.C. Neb., 313 F.Supp. 1339.

79. U.S.—Hahn & Clay v. A. O. Smith Corp., C.A. Tex., 320 F.2d 166, cert. den. 84 S.Ct. 351, 375 U.S. 944, 11 L.Ed.2d 274—Fedco, Inc. v. U.S. ex rel. Jones, C.A.Wash., 337 F.2d 712—Sperry Rand Corp. v. Rothlein, D.C.Conn., 241 F.Supp. 549—Koehring Co. v. E. D. Etnyre & Co., D.C.Ill., 254 F.Supp. 334—Standard Brands, Inc. v. Zumpe, D.C.La., 264 F.Supp. 254—Theatre Time Clock, Inc. v. Stewart, D.C.La., 276 F.Supp. 593—Metal Lubricants Co. v. Engineered Lubricants Co., D.C. Mo., 284 F.Supp. 483, affd., C.A., 411 F.2d 426.

Ark.—McLeod v. Meyer, 372 S.W.2d 220, 237 Ark. 173.

Cal.—American Alloy Steel Corp v. Ross, 308 P.2d 494, 149 C.A.2d 215—King v. Pacific Vitamin Corp., 64 Cal.Rptr. 486, 256 C.A.2d 841.

D.C.—U.S. Travel Agency, Inc. v. World-Wide Travel Service Corp., App., 235 A.2d 788.

Ga.—**C.J.S. cited in** Outside Carpets, Inc. v. Industrial Rug Co., 185 S.E.2d 65, 68, 228 Ga. 263.

Ill.—Revcor, Inc. v. Fame, Inc., 228 N.E.2d 742, 85 Ill.App.2d 350.

Iowa—Baker v. Starkey, 144 N.W.2d 889, 259 Iowa 480.

Mass.—Dynamics Research Corp. v Analytic Sciences Corp., 400 N.E.2d 1274, 9 Mass.App 254.

N.Y.—L. M. Rabinowitz & Co. v. Dasher, supra, n. 76.

N.C.—Engineering Associates, Inc. v. Pankow, 150 S.E.2d 56, 268 N.C. 137.

Pa.—Spring Steels, Inc. v. Molloy, 162 A.2d 370, 400 Pa. 354—Van Products Co. v. General Welding & Fabricating Co., 213 A.2d 769, 419 Pa. 248, 30 A.L.R.3d 612.

Wis.—Gary Van Zeeland Talent, Inc. v. Sandas, 267 N.W.2d 242, 84 Wis.2d 202.

"A man's aptitude," etc.

U.S.—United Aircraft Corp. v. Boreen, D.C.Pa., 284 F.Supp. 428, 446, affd., C.A., 413 F.2d 694.

80. U.S.—GTI Corp. v. Calhoon, D.C.Ohio, 309 F.Supp. 762.

Ill.—Revcor, Inc. v. Fame, Inc., 228 N.E.2d 742, 85 Ill.App.2d 350.

Mass.—J. T. Healy & Son, Inc. v. James A. Murphy & Son, Inc., 260 N.E.2d 723, 357 Mass. 728.

Pa.—Van Products Co. v. General Welding & Fabricating Co., 213 A.2d 769, 419 Pa. 248, 30 A.L.R.3d 612.

Utah—Robbins v. Finlay, 645 P.2d 623.

Wis.—Abbott Laboratories v. Norse Chemical Corp., 147 N.W.2d 529, 33 Wis.2d 445.

Secrecy by one who claims it as essential

Cal.—By-Buk Co. v. Printed Cellophane Tape Co., 329 P.2d 147, 163 C.A.2d 157.

Conn.—Allen Mfg. Co. v. Loika, 144 A.2d 306, 145 Conn. 509.

Reproduction from memory of trade secrets as breach of confidence

U.S.—A. H. Emery Co. v. Marcan Products Corp., D.C.N.Y., 268 F.Supp. 289, affd., C.A., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106.

82. U.S.—Franke v. Wiltschek, D.C.N.Y., 115 F.Supp. 28, affd., C.A., 209 F.2d 493—Head Ski Co. v. Kam Ski Co., D.C.Md., 158 F.Supp. 919—**C.J.S. quoted in** Sarkes Tarzian, Inc. v. Audio Devices, Inc., D.C.Cal., 166 F.Supp. 250, 265, affd., C.A., 283 F.2d 695, cert. den. 81 S.Ct. 903, 365 U.S. 869, 5 L.Ed.2d 859—Gaye v. Gillis, D.C.Mass., 167 F.Supp. 416.

Cal.—Aetna Bldg. Maintenance Co. v. West, supra, n. 77.

Conn.—Town & Country House & Homes Service, Inc. v. Evans, 189 A.2d 390, 150 Conn. 314.

Ill.—Louis Milani Foods v. Scharf, 82 N.E.2d 75, 335 Ill.App. 569.

La.—**C.J.S. quoted in** Lamb v. Quality Inspection Services, Inc., App., 398 So.2d 643, 645.

Mass.—Dynamics Research Corp. v. Analytic Sciences Corp., 400 N.E.2d 1274, 9 Mass.App. 254.

Mich.—Insealator, Inc. v. Wallace, 98 N.W.2d 643, 357 Mich. 233.

Mo.—Continental Research Corp. v. Scholz, App., 595 S.W.2d 396.

N.J.—Boost Co. v. Faunce, supra, n. 76—National Tile Bd. Corp. v. Panelboard Mfg. Co., 99 A.2d 440, 27 N.J.Super. 348—Sun Dial Corp. v. Rideout, 108 A.2d 442, 16 N.J. 252—Whitmyer Bros., Inc. v. Doyle, 274 A.2d 577, 58 N.J. 25.

N.Y.—Monroe Coverall Service, Inc., v. Bosner, 128 N.Y.S.2d 476, 283 App.Div., 451, am. 130 N.Y.S.2d 911, 283 App.Div. 998—Apollo Stationery Co. v. Pilmar, 173 N.Y.S.2d 854, 11 Misc.2d 263, 265, 268—Ferranti Elec. Inc. v. Harwood, 251 N.Y.S.2d 612, 43 Misc.2d 533—S. Tepfer & Sons, Inc. v. Zschaler, 269 N.Y.S.2d 552, 25 A.D. 786.

Ohio—**C.J.S. cited in** Arthur Murray Dance Studios of Cleveland v. Witter, 105 N.W.2d 685, 709.

Or.—Stimson Lumber Co. v. Laurence-David, Inc., 356 P.2d 84, 224 Or. 447.

Pa.—Greystone Upholstery Corp. v. Lehigh Shops, Inc., 30 Leh.L.J. 106.

Tex.—Lamons Metal Gasket Co. v. Traylor, Civ.App., 361 S.W.2d 211, err. ref. no rev. err.

"Trade secret" defined

U.S.—Harris Mfg. Co. v. Williams, D.C.Ark., 157 F.Supp. 779—Hulsenbusch v. Davidson Rubber Co., C.A.Iowa, 344 F.2d 730, cert. den. 86 S.Ct 545, 382 U.S. 977, 15 L.Ed.2d 468—Sperry Rand Corp. v. Rothlein, D.C.Conn., 241 F.Supp. 549—Schmidinger v. Welsh, D.C.N.J., 243 F.Supp. 852, affd. in part, revd. in part on oth. grds, C.A., 383 F.2d 455, cert. den. 88 S.Ct. 1031, 1040, 390 U.S. 946, 19 L.Ed.2d 1134.

Cal.—Ungar Elec. Tools, Inc. v. Sid Ungar Co., 13 Cal.Rptr. 268, 192 C.A.2d 398—Futurecraft Corp. v. Clary Corp., 23 Cal.Rptr. 198, 205 C.A.2d 279.

Ill.—Schulenburg v. Signatrol, Inc., 212 N.E.2d 865, 33 Ill.2d 379, cert. den. 86 S.Ct. 1225, 383 U.S. 959, 16 L.Ed.2d 302—James C. Wilborn & Sons, Inc. v. Heniff, 237 N.E.2d 781, 95 Ill.App.2d 155—Heatbath Corp. v. Ifkovits, 254 N.E.2d 139, 117 Ill. App.2d 158—Bimba Mfg. Co. v. Starz Cylinder Co., 256 N.E.2d 357, 119 Ill.App.2d 251.

Ky.—Mid-States Enterprises, Inc. v. House, 403 S.W.2d 48.

Mass.—Kroeger v. Stop & Shop Companies, Inc., 432 N.E.2d 566, 13 Mass.App. 310, review den. 440 N.E.2d 1175, 386 Mass. 1102.

Ohio—Albert B. Cord Co. v. S & P Management Services, Inc., 194 N.E.2d 173, revd. on oth. grds. 207 N.W.2d 247, 2 Ohio App.2d 148.

Okl.—Central Plastics Co. v. Goodson, 537 P.2d 330.

S.D.—1st American Systems, Inc. v. Rezatto, 311 N.W.2d 51.

That every ingredient is known to trade does not preclude trade secret in combining them.

Conn.—Allen Mfg. Co. v. Loika, 144 A.2d 306, 145 Conn. 509.

Matters completely disclosed by goods as not protected

U.S.—Schmidinger v. Welsh, D.C.N.J., 243 F.Supp. 852, affd. in part, revd. in part on oth. grds., C.A., 383 F.2d 455, cert. den. 88 S.Ct. 1031, 1040, 390 U.S. 946, 19 L.Ed.2d 1134.

Cal.—Futurecraft Corp. v. Clary Corp., 23 Cal.Rptr. 198, 205 C.A.2d 279.

Pa.—Van Products Co. v. General Welding & Fabricating Co., 213 A.2d 769, 419 Pa. 248, 30 A.L.R.3d 612.

Marketing of finished product immaterial

Ill.—Schulenburg v. Signatrol Inc., 200 N.E.2d 615, 50 Ill.App.2d 402, affd. in part and revd. in part on oth. grds. 212 N.E.2d 865, 33 Ill.2d 379, Cert. den. 86 S.Ct. 1225, 383 U.S. 959, 16 L.Ed.2d 302.

That trade secret was spied out does not affect its status.

Ill.—Schulenburg v. Signatrol Inc., 200 N.E.2d 615, 50 Ill.App.2d 402, affd. in part and revd. in part on oth. grds. 212 N.E.2d 865, 33 Ill.2d 379. Cert. Den. 86 S.Ct. 1225, 383 U.S. 959, 16 L.Ed.2d 302.

Information available elsewhere

U.S.—Standard Brands, Inc. v. Zumpe, D.C.La., 264 F.Supp. 254—Mixing Equipment Co. v. Philadelphia Gear, Inc., C.A.Pa., 436 F.2d 1308.

Degree of secrecy required

U.S.—A. H. Emery Co. v. Marcan Products Corp., C.A.N.Y., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106.

N.Y.—General Aniline & Film Corp. v. Frantz, 272 N.Y.S.2d 600, 50 Misc.2d 994, modification den. 274 N.Y.S.2d 634, 52 Misc.2d 197.

Okl.—Central Plastics Co. v. Goodson, 537 P.2d 330.

Utah—J & K Computer Systems, Inc. v. Parrish, 642 P.2d 732.

83. U.S.—Head Ski Co. v. Kam Ski Co., D.C.Md., 158 F.Supp. 919—Walters v. Shari Music Pub. Corp., D.C.N.Y., 185 F.Supp. 408—Hulsenbusch v. Davidson Rubber Co., C.A.Iowa, 344 F.2d 730, cert. den. 86 S.Ct. 545, 382 U.S. 977, 15 L.Ed.2d 468—Standard Brands, Inc. v. Zumpe, D.C.La., 264 F.Supp. 254.

Cal.—Ungar Elec. Tools, Inc. v. Sid Ungar Co., 13 Cal.Rptr. 268, 192 C.A.2d 398—Cal Francisco Inv. Corp v. Vrionis, 92 Cal.Rptr. 201, 14 C.A.3d 318.

Conn.—Allen Mfg. Co. v. Loika, 144 A 2d 306, 145 Conn. 509.

Ga.—Thomas v. Best Mfg. Corp., Division of Tillotson Corp., 218 S.E.2d 68, 234 Ga. 787.

Ill—Revcor, Inc. v. Fame, Inc., 228 N.E.2d 742, 85 Ill.App.2d 350.

Mass.—Jet Spray Cooler, Inc. v. Crampton, 282 N.E.2d 921, 361 Mass. 835, app. after remand 385 N.E.2d 1349, 377 Mass. 159.

Pa.—Van Products Co. v. General Welding & Fabricating Co., 213 A.2d 769, 419 Pa. 248, 30 A.L.R.3d 612.

Communication to others within privilege

Wis.—Abbott Laboratories v. Norse Chemical Corp., 147 N.W.2d 529, 33 419 Pa. 248.

page 485

84. U.S.—Allis-Chalmers Mfg. Co. v. Continental Aviation & Engineering Corp., D.C.Mich., 255 F.Supp. 645—Frederick Chusid & Co. v. Marshall Leeman & Co., D.C.N.Y., 279 F.Supp. 913—Future Plastics, Inc. v. Ware Shoals Plastics, Inc., D.C.S.C., 340 F.Supp. 1376.

Cal.—State Farm Mut. Auto. Ins. Co. v. Dempster, 344 P.2d 821, 174 C.A.2d 418.

Colo.—Julius Hyman & Co. v. Velsicol Corp., supra, n. 72.

D.C.—U.S. Travel Agency, Inc. v. World-Wide Travel Service Corp., App., 235 A.2d 788.

Ill.—Tad, Inc. v. Siebert, 380 N.E.2d 963, 20 Ill.Dec. 754, 63 Ill.App.3d 1001.

Ky.—Mid-States Enterprises, Inc. v. House, 403 S.W.2d 48.

Mass.—Com. v. Robinson, 388 N.E.2d 705, 7 Mass. App. 470.

N.J.—Sun Dial Corp. v. Rideout, 108 A.2d 442, 16 N.J. 252.

Pa.—Morgan's Home Equipment Corp. v. Martucci, 136 A.2d 838, 390 Pa. 618.

Factors for consideration

U.S.—Republic Systems & Programming, Inc. v. Computer Assistance, Inc., D.C.Conn., 322 F.Supp. 619, affd., C.A., 440 F.2d 996—International Election Systems Corp. v. Shoup, D.C.Pa., 452 F.Supp. 684, affd. C.A., 595 F.2d 1212.

Conn.—Town & Country House & Homes Service, Inc. v. Evans, 189 A.2d 390, 150 Conn. 314.

Mich.—Kubik, Inc. v. Hull, App., 224 N.W.2d 80, 56 Mich.App. 335.

N.Y.—Ferranti Elec. Inc. v. Harwood, 251 N.Y.S.2d 612, 43 Misc.2d 533.

Pa.—Bettinger v. Carl Berke Ass'n, Inc., 314 A.2d 296, 455 Pa. 100.

89. U.S.—Structural Dynamics Research Corp. v. Engineering Mechanics Research Corp., D.C.Mich., 401 F.Supp. 1102.

Mass.—Chomerics, Inc. v. Ehrreich, App., 421 N.E.2d 453.

N.J.—Sun Dial Corp. v. Rideout, supra, n. 84—National Tile Bd. Corp. v. Panelboard Mfg. Co., 99 A.2d 440, 27 N.J.Super. 348.

Information held not confidential

U.S.—Mercer v. C. A. Roberts Co., C.A.Tex., 570 F.2d 1232.

Mass.—Angell Elevator Lock Co. v. Manning, 205 N.E.2d 245, 348 Mass. 623—J. T. Healy & Son, Inc. v. James A. Murphy & Son, Inc., 260 N.E.2d 723, 357 Mass. 728.

Mich.—Kubik, Inc. v. Hull, App., 224 N.W.2d 80, 56 Mich.App. 335.

Pa.—Bettinger v. Carl Berke Ass'n, Inc., 314 A.2d 296, 455 Pa. 100.

90. U.S.—Franke v. Wiltschek, D.C.N.Y., 115 F.Supp. 28, affd., C.A., 209 F.2d 493—Metal Lubricants Co. v. Engineered Lubricants Co., D.C.

Page 485

Mo., 284 F.Supp. 483, affd., C.A., 411 F.2d 426—Lear Siegler, Inc. v. Ark-Ell Springs, Inc., C.A. Miss., 569 F.2d 286.

Mich.—Insealator, Inc. v. Wallace, 98 N.W.2d 643, 357 Mich. 233.

N.Y.—L. M. Rabinowitz & Co. v. Dasher, supra, n. 76.

Tex.—Lamons Metal Gasket Co v. Traylor, Civ.App., 361 S.W.2d 211, err. ref. no rev. err.

An employer and employees have the right by contract to prevent disclosure of the employer's materials, even though they are not secret or confidential and may indeed be a matter of public knowledge.[92.5]

92.5. U.S.—Krisel v. Durand, D.C.N.Y., 258 F.Supp. 845, affd., C.A., 386 F.2d 179, cert. den. 88 S.Ct. 1635, 390 U.S. 1042, 20 L.Ed.2d 303—Frederick Chusid & Co. v. Marshall Leeman & Co., D.C. N.Y., 279 F.Supp. 913.

Cal.—Blaustein v. Burton, 88 Cal.Rptr. 319, 9 C.A.3d 161 stating New York law.

N.Y.—High v. Trade Union Courier Pub. Corp., 69 N.Y.S.2d 526, 31 Misc.2d 7, affd. 89 N.Y.S.2d 527, 275 A.D. 803, rearg. and app. den. 90 N.Y.S.2d 681, 275 A.D. 922.

93. U.S.—Thiberg v. Bach, supra, n. 77—Harris Mfg. Co. v. Williams, D.C.Ark., 157 F.Supp. 779—Head Ski Co. v. Kam Ski Co., D.C.Md., 15, F.Supp. 919—Sperry Rand Corp. v. Rothlein, D.C.Conn., 241 F.Supp. 549—A.H. Emery Co. v. Marcan Products Corp., C.A.N.Y., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106—GTI Corp. v. Calhoon, D.C.Ohio, 309 F.Supp. 762.

Ill.—Schulenburg v. Signatrol Inc., 200 N.E.2d 615, 50 Ill.App.2d 402, affd. in part and revd. in part on oth. grds. 212 N.E.2d 865, 33 Ill.2d 379. Cert. den. 86 S.Ct. 1225, 383 U.S. 959, 16 L.Ed.2d 302—Revcor, Inc. v. Fame, Inc., 228 N.E.2d 742, 85 Ill.App.2d 350.

Minn.—Cherne Indus., Inc. v. Grounds & Associates, Inc., 278 N.W.2d 81.

N.J.—C.J.S. cited in Adolph Gottscho, Inc. v. American Marking Corp., 114 A.2d 438, 442, 18 N.J. 467, cert. den. 76 S.Ct. 69, 350 U.S. 834, 100 L.Ed. 744.

N.Y.—Continental Dynamics Corp. v. Kanter, 408 N.Y.S.2d 801, 64 A.D.2d 975.

Or.—Mainland Industries, Inc. v. Timberland Machines and Engineering Corp., 649 P.2d 613, 58 Or.App. 585, cert. den. 103 S.Ct. 1498, 460 U.S. 1051, 75 L.Ed.2d 930.

Patentability held immaterial

U.S.—Thiberg v. Bach, C.A.N.J., 203 F.2d 956—Franke v. Wiltschek, C.A.N.Y., 209 F.2d 493—Schmidinger v. Welsh, C.A.N.J., 383 F.2d 455, cert. den. 88 S.Ct. 1031, 1040, 390 U.S. 946, 19 L.Ed.2d 1134.

Cal.—By-Buk Co. v. Printed Cellophane Tape Co., 329 P.2d 147, 163 C.A.2d 157.

N.Y.—Cornale v. Stewart Stamping Corp., 129 N.Y. S.2d 808.

94. U.S.—Head Ski Co. v. Kam Ski Co., D.C.Md., 158 F.Supp. 919—Standard Brands Inc. v. U.S. Partition & Packaging Corp., D.C.Wis., 199 F.Supp. 161.

Cal.—By-Buk Co. v. Printed Cellophane Tape Co., 329 P.2d 147, 163 C.A.2d 157.

N.Y.—L. M. Rabinowitz & Co. v. Dasher, supra, n. 76.

Pa.—Dozor Agency, Inc. v. Rosenberg, 52 Del.Co. 172, affd. 169 A.2d 771, 403 Pa. 237, affd. in part and revd. in part on oth. grds. 218 A.2d 583.

99. U.S.—Bickley v. Frutchey Bean Co., D.C.Mich., 173 F.Supp. 516.

Pa.—Van Products Co. v. General Welding & Fabricating Co., 213 A.2d 769, 419 Pa. 248, 30 A.L.R.3d 612.

Mere filing of application held not abandonment of secrecy

U.S.—Raybestos-Manhattan, Inc v. Rowland, D.C. S.C., 310 F.Supp. 993.

1. U.S.—Jad Corp. of America v. Hico Corp. of America, D.C.N.Y., 335 F Supp. 66—In re Power Swing Partners, Bkrtcy.Cal., 9 B.R. 512.

Ala.—James A. Head & Co. v. Rolling, 90 So.2d 828, 265 Ala. 328.

Cal.—Matzen v. Horwitz, 228 P.2d 841, 102 Cal. App.2d 884—Aetna Bldg. Maintenance Co. v. West, 246 P.2d 11, 39 C.2d 198—Alex Foods, Inc. v. Metcalfe, 290 P.2d 646, 137 C.A.2d 415—Mathews Paint Co. v. Seaside Paint & Lacquer Co, 306 P.2d 113, 148 C.A.2d 168—American Alloy Steel Corp. v. Ross, 308 P.2d 494, 149 C.A.2d 215—A.B.C. Distributing Co. v. Distillers Distributing Corp., 316 P.2d 71, 154 C.A.2d 175—Whitted v. Williams, 37 Cal.Rptr. 692, 226 C.A.2d 52.

Colo.—Suburban Gas of Grand Junction, Inc. v. Bockelman, 401 P.2d 268, 157 Colo. 78.

Conn.—Nesko Corp. v. Fontaine, Com.Pl., 110 A.2d 631, 19 Conn.Sup. 160—Town & Country House & Homes Service, Inc. v. Evans, 189 A.2d 390, 150 Conn. 314.

D.C.—Aetna Cas. & Sur. Co. v. Lee, C.A., 229 F.2d 787, 97 U.S.App.D.C. 213, cert. den. 76 S.Ct. 1027, 351 U.S. 973, 100 L.Ed. 1491.

Fla.—Pure Foods v. Sir Sirloin, Inc., 84 So.2d 51.

Ga.—Durham v. Stand-By Labor of Georgia, Inc., 198 S.E.2d 145, 230 Ga. 558.

Ill.—Kalnitz v. Ion Exchange Products, Inc., 276 N.E.2d 60, 2 Ill.App.3d 158.

La.—Pearce v. Austin, App. 2 Cir., 465 So.2d 868.

Mass.—American Window Cleaning Co. of Springfield v. Cohen, 178 N.E.2d 5, 343 Mass. 195.

Mich.—Kubik, Inc. v. Hull, 224 N.W.2d 80, 56 Mich. App. 335.

Mont.—Best Dairy Farms, Inc. v. Houchen, 448 P.2d 158, 152 Mont 194.

N.J.—National Tile Bd. Corp. v. Panelboard Mfg. Co., 99 A.2d 440, 27 N.J.Super. 348.

N.Y.—State Export Co. v. Mol Shipping & Trading, Inc., 155 N.Y.S.2d 188, app. dism. 158 N.Y.S.2d 765, 2 A.D.2d 837—Apollo Stationery Co. v. Pilmar, 173 N.Y.S.2d 854, 11 Misc.2d 263, 265, 268—Leo Silfen, Inc. v. Cream, 278 N.E.2d 636, 29 N.Y.2d 387, 328 N.Y.S.2d 423.

Ohio—Fremont Oil Co. v. Marathon Oil Co., 192 N.E.2d 123.

Okl.—Central Plastics Co. v. Goodson, 537 P.2d 330.

R.I.—Callahan v. Rhode Island Oil Co., 240 A.2d 411, 103 R.I. 656.

Tex.—Texas Shop Towel v. Haire, Civ.App., 246 S.W.2d 482.

Wash.—National School Studios v. Superior School Photo Service, 242 P.2d 756, 40 Wash.2d 263—C.J.S. cited in Lewis Pacific Dairymen's Ass'n v. Turner, 314 P.2d 625, 634, 50 Wash.2d 762—Jewett-Gorrie Ins. Agency, Inc. v. Visser, 531 P.2d 817, 12 Wash.App. 707.

Informing customers of intention prior to termination of employment

Cal.—Southern California Disinfecting Co. v. Lomkin, App., 7 Cal.Rptr. 43, 183 C.A.2d 431.

Competition for previous employer's customers not always prohibited

U.S.—Burroughs Corp. v. Cimakasky, D.C.Pa., 346 F.Supp. 1398.

page 486

2. Cal.—Levine v. E. A. Johnson & Co., 237 P.2d 309, 107 C.A.2d 322—American Alloy Steel Corp. v. Ross, 308 P.2d 494, 149 C.A.2d 215.

Md.—Operations Research, Inc. v. Davidson & Talbird, Inc., 217 A.2d 375, 241 Md. 550.

Mass.—American Window Cleaning Co. of Springfield v. Cohen, 178 N.E.2d 5, 343 Mass. 195.

N.Y.—Anchor Alloys, Inc. v. Non-Ferrous Processing Corp., 336 N.Y.S.2d 944, 39 A.D.2d 504.

3. U.S.—Inland Rubber Corp. v. Triple A Tire Service, Inc., D.C.N.Y., 210 F.Supp. 880—Haggerty v. Burkey Mills, Inc., D.C.N.Y., 211 F.Supp. 835—Certified Laboratories of Tex., Inc. v. Rubinson, D.C.Pa., 303 F.Supp. 1014—Republic Systems & Programming, Inc. v. Computer Assistance, Inc., D.C.Conn., 322 F.Supp. 619, affd., C.A., 440 F.2d 996.

Cal.—Alex Foods, Inc. v. Metcalfe, 290 P.2d 646, 137 C.A.2d 415—Reid v. Mass Co., 318 P.2d 54, 155 C.A.2d 293—Peerless Oakland Laundry Co. v. Hickman, 23 Cal.Rptr. 105, 205 C.A.2d 556—Whitted v. Williams, 37 Cal.Rptr. 692, 226 C.A.2d 52.

Conn.—Town & Country House & Homes Service, Inc. v. Evans, 189 A.2d 390, 150 Conn. 314—Triangle Sheet Metal Works, Inc. v. Silver, 222 A.2d 220, 154 Conn. 116.

D.C.—National Chemsearch Corp. of New York v. Hanker, D.C., 309 F.Supp. 1278.

Fla.—Unistar Corp. v. Child, App. 3 Dist., 415 So.2d 733.

Ill.—Bimba Mfg. Co. v. Starz Cylinder Co., 256 N.E.2d 357, 119 Ill.App.2d 251.

Ind.—Woodward Ins., Inc. v. White, 437 N.E.2d 59.

Md.—C-E-I-R, Inc. v. Computer Dynamics Corp., 183 A.2d 374, 229 Md. 357.

Mass.—American Window Cleaning Co. of Springfield v. Cohen, 178 N.E.2d 5, 343 Mass. 195.

Minn.—Sanitary Farm Dairies Inc. v. Wolf, 112 N.W.2d 42, 261 Minn. 166.

Mo.—Ibur & Associates Adjustments Co., Inc. v. Walsh, App., 595 S.W.2d 33.

N.J.—Auxton Computer Enterprises, Inc. v. Parker, 416 A.2d 952, 174 N.J.Super. 418.

N.Y.—David Fox & Sons, Inc. v. King Poultry Co., 262 N.Y.S.2d 983, 47 Misc.2d 672, affd. 259 N.Y.S.2d 1012, 23 A.D.2d 966.

Pa.—Avery v. Hinkel, 3 Lycoming Co. L.R. 173—C.J.S. cited in Morgan's Home Equipment Corp. v. Martucci, 136 A.2d 838, 843, 390 Pa. 618—O'Reilly and White, Inc. v. Ferguson, 10 Chest. 556—Serval Vendors, Inc. v. Kipp, 33 D. & C.2d 727, 14 Cumb. 158—Serval Vendors, Inc. v. Kipp, 33 D. & C.2d 727, 14 Cumb. 158—Franklin Electronics, Inc. v. Dell'Angelo, 82 Montg. 259—Van Products Co. v. General Welding & Fabricating Co., 213 A 2d 769, 419 Pa. 248, 30 A.L.R.3d 612.

Tex.—West v. Pennyrich Intern., Inc., Civ.App., 447 S.W.2d 771.

Solicitation before termination of employment improper

U.S.—Midland-Ross Corp. v. Yokana, D.C.N.J., 185 F.Supp. 594, affd., C.A., 293 F.2d 411—Servisco v. Morreale, D.C.La., 312 F.Supp. 103.

Md.—Becker v. Bailey, 299 A.2d 835, 268 Md. 93.

N.J.—United Board & Carton Corp. v. Britting, 164 A.2d 824, 63 N.J.Super. 517, affd. 160 A.2d 660, 61 N.J.Super. 340.

Route lists held confidential

U.S.—NCH Corp. v. Broyles, C.A.La., 749 F.2d 247.

Ohio—Fremont Oil Co. v. Marathon Oil Co., 192 N.E.2d 123.

Rule not applicable

U.S.—Motorola, Inc. v. Fairchild Camera & Instrument Corp., D.C.Ariz., 366 F.Supp. 1173.

Me.—Maine Gas & Appliances, Inc. v. Morse Bors. Co., 259 A.2d 367.

4. U.S.—Alexander & Alexander, Inc. v. Drayton, D.C.Pa., 378 F.Supp. 824, affd., C.A., 505 F.2d 729.

Ill.—James C. Wilborn & Sons, Inc. v. Heniff, 237 N.E.2d 781, 95 Ill.App.2d 155—B. R. Paulsen & Co. v. Lee, 237 N.E.2d 793, 95 Ill.App.2d 146—Long v. Arthur Rubloff & Co., 327 N.E.2d 346, 27 Ill.App.3d 1013.

N.Y.—Town & Country House & Home Service, Inc. v. Newbery, 124 N.Y.S.2d 605, 1 Misc.2d 294, revd. on oth. grds. 147 N.Y.S.2d 550, 1 A.D.2d 702, affd. 170 N.Y.S.2d 328, 3 N.Y.2d 554, 147 N.E.2d 724—Halpern v. Bernstein, 138 N.Y.S.2d 433.

Pa.—Morgan's Home Equipment Corp. v. Martucci, 136 A.2d 838, 390 Pa. 618.

List existing in memory of employee

U.S.—American Republic Ins. Co. v. Union Fidelity Life Ins. Co., D.C.Or., 295 F.Supp. 553, op. supp. 315 F.Supp. 311, remd. 470 F.2d 820.

Cal.—Whitted v. Williams, 37 Cal.Rptr. 692, 226 C.A.2d 52.

N.Y.—Hecht Foods, Inc. v. Sherman, 351 N.Y.S.2d 711, 43 A.D.2d 850.

5. U.S.—Republic Systems & Programming, Inc. v. Computer Assistance, Inc., D.C.Conn., 322 F.Supp. 619, affd., C.A., 440 F.2d 996—Arnold's Ice Cream Co. v. Carlson, D.C.N.Y., 330 F.Supp. 1185.

Ark.—Borden, Inc. v. Smith, 478 S.W.2d 744, 252 Ark. 295.

Cal.—American Alloy Steel Corp. v. Ross, 308 P.2d 494, 149 C.A.2d 215—Reid v. Mass Co., 318 P.2d 54, 155 C.A.2d 293.

Fla.—Renpak, Inc. v. Oppenheimer, App., 104 So.2d 642.

Ill.—Heatbath Corp. v. Ifkovits, 254 N.E.2d 139, 117 Ill.App.2d 158.

Minn.—Sanitary Farm Dairies, Inc. v. Wolf, 112 N.W.2d 42, 261 Minn. 166.

N.Y.—Apollo Stationery Co. v. Pilmar, 173 N.Y.S.2d 854, 11 Misc.2d 263, 265, 268—Eisenstaedt v. Schweitzer, 177 N.Y.S.2d 277, 13 Misc.2d 703—Ferranti Elec., Inc. v. Harwood, 251 N.Y.S.2d 612, 43 Misc.2d 533—David Fox & Sons, Inc. v. King Poultry Co., 262 N.Y.S.2d 983, 47 Misc.2d 672, affd. 259 N.Y.S.2d 1012, 23 A.D.2d 966.

Ohio—Commonwealth Sanitation Co. of Cleveland, Inc. v. Commonwealth Pest Control Co., App., 178 N.E.2d 518.

Okl.—Central Plastics Co. v. Goodson, 537 P.2d 330.

Pa.—O'Reilly and White, Inc. v. Ferguson, 10 Chest. 556—Carl A. Colteryahn Dairy, Inc. v. Schneider Dairy, 203 A.2d 469, 415 Pa. 276—Pennsylvania Linen Rental Service, Corp. v. Kercher, 56 Berks 157—Van Products Co. v. General Welding & Fabricating Co., 213 A.2d 769, 419 Pa. 248, 30 A.L.R.3d 612—L & H Store Inc. v. Delco Sporting Goods Inc., 52 Del.Co. 399.

Tex.—SCM Corp. v. Triplett Co., Civ.App., 399 S.W.2d 583.

Names few in number or easily available

Cal.—Whitted v. Williams, 37 Cal.Rptr. 692, 226 C.A.2d 52.

N.Y.—Legal Recording and Research Bureau Ltd. v. Wicka, 405 N.Y.S.2d 526, 62 A.D.2d 486.

§ 73. Inventions and Discoveries of Employee

Library References

Master and Servant ⇐62.
Corbin on Contracts § 1394A.
Modern Legal Forms Ch. 62, Service and Agency Contracts.

Idaho—**C.J.S. black letter summary quoted in** Holders Mfrs., Inc. v. Cudd, 335 P.2d 890, 893, 80 Idaho 557.

6. U.S.—Marshall v. Colgate-Palmolive-Peet Co., C.A.Del., 175 F.2d 215—De Jur-Amsco Corp. v. Fogle, C.A.N.J., 233 F.2d 141—Dorr-Oliver, Inc. v. U.S., 432 F.2d 447, 93 Ct.Cl. 187—Jamesbury Corp. v. Worcester Valve Co., D.C.Mass., 318 F.Supp. 1, affd., C.A., 443 F.2d 205.

Iowa—**C.J.S. quoted at length in** Bandag, Inc. v. Morenings, 146 N.W.2d 916, 919, 259 Iowa 998.

N.J.—Marcalus Mfg. Co. v. Sullivan, 60 A.2d 330, 142 N.J.Eq. 434.

N.Y.—**C.J.S. cited in** Cahill v. Regan, 153 N.Y.S.2d 768, 770, 2 Misc.2d 455, mod. on oth. grds. 165 N.Y.S.2d 125, 4 A.D.2d 328, affd. 184 N.Y.S.2d 348, 5 N.Y.2d 292, 157 N.E.2d 505.

Rejection by employer as impractical

Cal.—Banner Metals, Inc. v. Lockwood, 3 Cal.Rptr. 421, 178 C.A.2d 643.

7. U.S.—Marshall v. Colgate-Palmolive-Peet Co., D.C.Del., 76 F.Supp. 378, affd., C.A., 175 F.2d 215—Kober v. U.S., C.A.Va., 170 F.2d 590, cert. den. 69 S.Ct. 812, 336 U.S. 945, 93 L.Ed. 1101—Marshall v. Colgate-Palmolive-Peet Co., supra, n. 6—Blum v. C.I.R., C.A., 183 F.2d 281—De Jur-Amsco Corp. v. Fogle, C.A.N.J., 233 F.2d 141—B.F. Gladding & Co. v. Scientific Anglers, Inc., D.C.Mich., 139 F.Supp. 236, am. on oth grds. 141 F.Supp. 630, revd. on oth. grds., C.A., 245 F.2d 722, reh. den. 248 F.2d 483—Grepke v. General Elec. Co., C.A.Ind., 280 F.2d 508, cert. den. 81 S.Ct. 232, 364 U.S. 890, 5 L.Ed.2d 193—Wellington Print Works, Inc v Magid, D.C.Pa., 242 F.Supp. 614.

Cal.—Banner Metals, Inc. v. Lockwood, 3 Cal.Rptr. 421, 178 C.A.2d 643.

Colo.—Hewett v. Samsonite Corp, 507 P.2d 1119, 32 Colo.App. 150.

Del.—Science Accessories Corp. v. Summagraphics Corp., 425 A.2d 957, 16 A.L.R.4th 170.

Ill.—Howe v. Floodmaster Mfg. Corp., 195 N.E.2d 278, 45 Ill.App.2d 203.

Mich.—A & C Engineering Co. v. Atherholt, 95 N.W.2d 871, 355 Mich. 677, cert. den. 80 S.Ct. 71.

Mo.—National Rejectors, Inc. v. Trieman, 409 S.W.2d 1.

N.J.—Clerke v. Beck, 80 A.2d 252, 13 N.J.Super. 73—**C.J.S. cited in** Kinkade v. New York Shipbuilding Corp., 122 A.2d 360, 364, 21 N.J. 362, 61 A.L.R.2d 348.

N.Y.—Cahill v. Regan, 153 N.Y.S.2d 768, 2 Misc.2d 455, mod. on oth. grds. 165 N.Y.S.2d 125, 4 A.D.2d 328, affd. 184 N.Y.S.2d 348, 5 N.Y.2d 292, 157 N.E.2d 505—Oliver v. Lockport Mills, Inc., 163 N.Y.S.2d 317, 6 Misc.2d 356, app. dism. 163 N.Y.S.2d 356, 3 A.D.2d 971—Cahill v. Regan, 165 N.Y.S.2d 125, 4 A.D.2d 328, affd. 184 N.Y.S.2d 348, 5 N.Y.2d 292, 157 N.E.2d 505—Back v. Bergstein, 199 N.Y.S.2d 844, revd. on oth. grds. 208 N.Y.S.2d 895, 12 A.D.2d 636, app. den. 211 N.Y.S.2d 1016, 12 A.D.2d 929.

Pa.—Wexler v. Greenberg, 160 A.2d 430, 399 Pa. 569.

Tex.—Hallmark Personnel of Texas, Inc. v. Franks, Civ.App., 562 S.W.2d 933.

page 487

8. U.S.—Wellington Print Works, Inc. v. Magid, D.C. Pa., 242 F.Supp. 614.

Cal.—Banner Metals, Inc. v. Lockwood, 3 Cal.Rptr. 421, 178 C.A.2d 643.

10. U.S.—Wellington Print Works, Inc. v. Magid, D.C.Pa., 242 F.Supp. 614.

11. N.Y.—**C.J.S. cited in** Cahill v. Regan, 153 N.Y.S.2d 768, 770, 2 Misc.2d 455, mod. on oth. grds. 165 N.Y.S.2d 125, 4 A.D.2d 328, affd. 184 N.Y.S.2d 348, 5 N.Y.2d 292, 157 N.E.2d 505.

Tex.—Welex Jet Services, Inc. v. Owen, Civ.App., 325 S.W.2d 856, err. ref. no rev. err

12. U.S.—LeFiell v. U.S., 162 Ct.Cl. 865.

13. U.S.—De Jur-Amsco Corp. v. Fogle, C.A.N.J., 233 F.2d 141—Tripp v. U.S., 406 F.2d 1066, 186 Ct.Cl. 872.

Colo.—Hewett v Samsonite Corp., 507 P.2d 1119, 32 Colo.App. 150.

N.Y.—Cahill v. Regan, 165 N.Y.S.2d 125, 4 A.D.2d 328 affd. 184 N.Y.S.2d 348, 5 N.Y.2d 292, 157 N.E.2d 505—Cahill v. Regan, 184 N.Y.S.2d 348, 5 N.Y.2d 292, 157 N.E.2d 505—Howe v. Floodmaster Mfg. Corp., 195 N.E.2d 278, 45 Ill.App.2d 203.

page 488

15. U.S.—Daily v. Universal Oil Products Co., D.C. Ill., 76 F.Supp. 349—Le Fiell v. U.S., 162 Ct.Cl. 865.

18. "Alter ego" status of inventor-officer controlled by time of invention

U.S.—Melin v. U.S., Ct.Cl., 478 F.2d 1210, 201 Ct.Cl. 748.

Development of computer program. An employer has a property interest in computer programs developed by an employee.[18.5]

18.5. Ala.—National Surety Corp. v. Applied Systems, Inc., 418 So.2d 847.

19. U.S.—Hebbard v. American Zinc, Lead & Smelting Co., D.C.Mo., 66 F.Supp. 113, 116, affd. C.C.A., 161 F.2d 339—Suni-Citrus Products Co. v. Vincent, D.C.Fla., 72 F.Supp. 740, revd. on oth. grds., C.A., 170 F.2d 850.

N.J.—International Pulverizing Corp. v. Kidweil, 71 A.2d 151, 7 N.J.Super. 345.

N.Y.—Fessler v. Permachem Corp., 144 N.Y.S.2d 232, affd., A.D., 161 N.Y.S.2d 566, 3 A.D.2d 741—Aerial Products, Inc. v. Anzalone, 163 N.Y.S.2d 287, 6 Misc.2d 349, affd. 173 N.Y.S.2d 1006, 5 A.D.2d 997.

Pa.—Met-Pro, Inc., v. Judson Bros. Co., 71 Pa.Dist. & Co. 454, 66 Montg.Co. 278.

As "property right"

U.S.—Nelson v. Ferguson, C.C.A.N.J., 56 F.2d 121, cert. den. 52 S.Ct. 646, 286 U.S. 565, 76 L.Ed. 1297.

Oral modification not established

Cal.—Grove v. Grove Valve & Regulator Co., 84 Cal. Rptr. 300, 4 C.A.3d 299.

20. U.S.—Preis v. Eversharp, Inc., D.C.N.Y., 154 F.Supp. 98.

Ga.—Landrum v. J. F. Pritchard & Co., 228 S.E.2d 290, 139 Ga.App. 393.

Okl.—Amoco Production Co. v. Lindley, 609 P.2d 733.

21. U.S.—E. F. Drew & Co. v. Reinhard, C.A.N.Y., 170 F.2d 679—Marshall v. Colgate-Palmolive-Peet Co., supra, n. 6—Preis v. Eversharp, Inc., D.C.N.Y., 154 F.Supp. 98—Raybestos-Manhattan, Inc. v. Rowland, C.A.S.C., 460 F.2d 697.

Iowa—Bandag, Inc. v. Morenings, 146 N.W.2d 916, 259 Iowa 998.

Tex.—Davis v. Alwac Intern., Inc., Civ.App., 369 S.W.2d 797, err. ref. no rev. err.

22. Iowa—**C.J.S. cited in** Bandag, Inc. v. Morenings, 146 N.W.2d 916, 920, 259 Iowa 998.

page 489

24. U.S.—Patent & Licensing Corp. v. Olsen, C.A. N.Y., 188 F.2d 522.

26. Inchoate right to apply for patent held assignable

U.S.—Universal Winding Co. v. Clarke, D.C.Conn., 108 F.Supp. 329.

30. U.S.—Kober v. U.S., supra, n. 7—Hebbard v. American Zinc, Lead & Smelting Co., supra, n. 19—Patent & Licensing Corp. v. Olsen, C.A.N.Y., 188 F.2d 522—Universal Winding Co. v. Clarke, D.C.Conn., 108 F.Supp. 329, applying Rhode Island law.

N.J.—Misani v. Ortho Pharmaceutical Corp., 210 A.2d 609, 44 N.J. 552, app. dism., cert. den. 86 S.Ct. 398, 382 U.S. 203, 15 L.Ed.2d 270, reh. den. 86 S.Ct. 1363, 384 U.S. 923, 16 L.Ed.2d 444.

Contract not invalid

N.J.—Misani v. Ortho Pharmaceutical Corp., 198 A.2d 791, 83 N.J.Super. 1. Revd. on oth. grds. 210 A.2d 609, 44 N.J. 552, app. dism., cert. den. 86 S.Ct. 398, 382 U.S. 203, 15 L.Ed.2d 270, reh. den. 86 S.Ct. 1363, 384 U.S. 923, 16 L.Ed.2d 444.

31. U.S.—GTI Corp. v. Calhoon, D.C.Ohio, 309 F.Supp. 762—Armorlite Lens Co. v. Campbell, D.C.Cal., 340 F.Supp. 273.

33. U.S.—Carter Products v. Colgate-Palmolive Co., D.C.Md., 130 F.Supp. 557, affd., C.A., 230 F.2d 855, cert. den. 77 S.Ct. 43, 352 U.S. 843, 1 L.Ed.2d 59, reh. den. 77 S.Ct. 152, 352 U.S. 913, 1 L.Ed.2d 120.

Mass.—Steranko v. Inforex, Inc., 362 N.E.2d 222, 5 Mass.App. 253, app. after remand 395 N.E.2d 1303, 8 Mass.App. 523.

N.Y.—Cahill v. Regan, 184 N.Y.S.2d 348, 5 N.Y.2d 292, 157 N.E.2d 505.

Tex.—Davis v. Alwac Intern., Inc., Civ.App., 369 S.W.2d 797, err. ref. no rev. err.

Page 489

Effect of termination of employment

U.S.—Patent & Licensing Corp. v. Olsen, supra, n. 24.

Resort to extrinsic evidence

Cal.—Grove v. Grove Valve & Regulator Co., 84 Cal. Rptr. 300, 4 C.A.3d 299.

Agreement not violated

Okl.—Amoco Production Co. v. Lindley, 609 P.2d 733.

34. N.Y.—Cahill v. Regan, 184 N.Y.S.2d 348, 5 N.Y.2d 292, 157 N.E.2d 505.

35. U.S.—Hirshhorn v. Mine Safety Appliances Co., D.C.Pa., 106 F.Supp. 594, affd., C.A., 203 F.2d 279, cert. den. 74 S.Ct. 105, 346 U.S. 866, 98 L.Ed. 376.

Cal.—Banner Metals, Inc. v. Lockwood, 3 Cal.Rptr. 421, 178 C.A.2d 643.

37. U.S.—Patent & Licensing Corp. v. Olsen, supra, n. 24—Hirshhorn v. Mine Safety Appliances Co., supra, n. 35—B. F Gladding & Co. v. Scientific Anglers, Inc., C.A.Mich., 248 F.2d 483.

N.J.—Misani v. Ortho Pharmaceutical Corp., 210 A.2d 609, 44 N.J. 552, app. dism., cert. den. 86 S.Ct. 398, 382 U.S. 203, 15 L.Ed.2d 270, reh. den. 86 S.Ct. 1363, 384 U.S. 923, 16 L.Ed.2d 444.

Matters held not inventive

U.S.—Koehring Co. v. National Automatic Tool Co., D.C.Ind., 257 F.Supp. 282, affd., C.A., 385 F.2d 414.

page 490

40. U.S.—Universal Winding Co. v. Clarke, supra, n. 26.

45. Cal.—Daniel Orifice Fitting Co. v. Whalen, 18 Cal.Rptr. 659, 198 C.A.2d 791.

46. Tex.—Lone Star Steel Co. v. Wahl, App. 6 Dist., 636 S.W.2d 217.

page 491

47. U.S.—Hebbard v. American Zinc, Lead & Smelting Co., D.C.Mo., 66 F.Supp. 113, affd. C.C.A., 161 F.2d 339—Marshall v. Colgate-Palmolive-Peet Co., supra, n. 6—Blum v. C.I.R., C.A., 183 F.2d 281—Reddi-Wip, Inc. v. Knapp-Monarch Co., D.C.Mo., 104 F.Supp. 204—North Am. Philips Co. v. Brownshield, D.C.N.Y., 111 F.Supp. 762—B.F. Gladding & Co. v. Scientific Anglers, Inc., D.C.Mich., 139 F.Supp. 236, am. on oth. grds. 141 F.Supp. 630, revd. on oth. grds., C.A., 245 F.2d 722, reh. den. 248 F.2d 583—Shook v. U.S., C.A.Ohio, 238 F.2d 952, cert. den. 77 S.Ct. 684, 353 U.S. 924, 1 L.Ed.2d 721—U.S. v. Slutsky, D.C.N.Y., 352 F.Supp. 1105.

Cal.—Banner Metals, Inc. v. Lockwood, 3 Cal.Rptr. 421, 178 C.A.2d 643—Daniel Orifice Fitting Co. v. Whalen, 18 Cal.Rptr. 659, 198 C.A.2d 791—Treu v. Garrett Corp., 70 Cal.Rptr. 284, 264 C.A.2d 432.

Ill.—Muencer v. W.E. & John Barnes Co., 133 N.E.2d 312, 9 Ill.App.2d 391.

Iowa—Bandag, Inc. v. Morenings, 146 N.W.2d 916, 259 Iowa 998.

N.J.—International Pulverizing Corp. v. Kidwell, supra, n. 19—Clerke v. Beck, 80 A.2d 252, 13 N.J.Super. 73—Misani v. Ortho Pharmaceutical Corp., 198 A.2d 791, 83 N.J.Super. 1. Revd. on oth. grds. 210 A.2d 609, 44 N.J. 552, app. dism., cert. den. 86 S.Ct. 398, 382 U.S. 203, 15 L.Ed.2d 270, reh. den. 86 S.Ct. 1363, 384 U.S. 923, 16 L.Ed.2d 444.

N.Y.—Oliver v. Lockport Mills, Inc., 163 N.Y.S.2d 317, 6 Misc.2d 356, app. dism. 163 N.Y.S.2d 356, 3 A.D.2d 971—Cahill v. Regan, 165 N.Y.S.2d 125, 4 A.D.2d 328, affd. 184 N.Y.S.2d 348, 5 N.Y.2d 292, 157 N.E.2d 505—Cahill v. Regan, 184 N.Y.S.2d 348, 5 N.Y.2d 292, 157 N.E.2d 505—Howe v. Floodmaster Mfg. Corp., 195 N.E.2d 278, 45 Ill. App.2d 203.

Pa.—Met-Pro, Inc., v. Judson Bros. Co., 71 Pa.Dist. & Co. 454, 66 Montg.Co. 278—Koolvent Metal Awning Corp. v. Vamco Mach. Co., 99 Pittsb.Leg.J. 345.

Burden of proof as to specific agreement abrogating text rule

Ill.—Muencer v. W.E. & John Barnes Co., 133 N.E.2d 312, 9 Ill.App.2d 391.

Literary property

Cal.—Zahler v. Columbia Pictures Corp., 4 Cal.Rptr. 612, 180 C.A.2d 582—Stevens v. National Broadcasting Co., 76 Cal.Rptr. 106, 270 C.A.2d 886.

Not treated as protected trade secret

U.S.—Structural Dynamics Research Corp. v Engineering Mechanics Research Corp., D.C.Mich., 401 F.Supp. 1102.

48. U.S.—Hebbard v. American Zinc, Lead & Smelting Co., supra, n. 47—Hirshhorn v. Mine Safety Appliances Co., 106 F.Supp. 594, affd., C.A., 203 F.2d 279, cert. den. 74 S.Ct. 105, 346 U.S. 866, 98 L.Ed. 376.

D.C.—Maloney v. E. I. Du Pont de Nemours & Co., C.A., 352 F.2d 936, 122 U.S.App.D.C. 268, cert. den. 86 S.Ct. 1201, 1211, 383 U.S. 948, 16 L.Ed.2d 210.

Ill.—Muencer v. W.E. & John Barnes Co., 133 N.E.2d 312, 9 Ill.App.2d 391.

N.J.—C.J.S. cited in Kinkade v. New York Shipbuilding Corp., 122 A.2d 360, 364, 21 N.J. 362, 61 A.L.R.2d 348.

49. U.S.—E.F. Drew & Co. v. Reinhard, D.C.N.Y., 74 F.Supp. 574, revd. on oth. grds., C.A., 170 F.2d 679—Livers v. Faries Mfg. Co., D.C.Ill., 82 F.Supp. 564—Belanger v. Alton Box Bd. Co., C.A.Ill., 180 F.2d 87—Forberg v. Servel, Inc., D.C.N.Y., 88 F.Supp. 503.

Cal.—Aero Bolt & Screw Co. of Cal., v. Iaia, 5 Cal. Rptr. 53, 180 C.A.2d 728—Treu v. Garrett Corp., 70 Cal.Rptr. 284, 264 C.A.2d 432.

Ill.—Velsicol Corp. v. Hyman, 90 N.E.2d 717, 405 Ill. 352, cert. den. 70 S.Ct. 1002, 339 U.S. 966, 94 L.Ed. 1374.

Mass.—Steranko v. Inforex, Inc., 362 N.E.2d 222, 5 Mass.App. 253, app. after remand 395 N.E.2d 1303, 8 Mass.App. 523.

Or.—Mainland Industries, Inc. v. Timberland Machines and Engineering Corp., 649 P.2d 613, 58 Or.App. 585, cert. den. 103 S.Ct. 1498, 460 U.S. 1051, 75 L.Ed.2d 930.

50. U.S.—Shook v. U.S., C.A.Ohio, 238 F.2d 952, cert. den. 77 S.Ct. 684, 353 U.S. 924, 1 L.Ed.2d 721.

53. Cal.—Banner Metals, Inc. v. Lockwood, 3 Cal. Rptr. 421, 178 C.A.2d 643.

N.Y.—Oliver v. Lockport Mills, Inc., 163 N.Y.S.2d 317, 6 Misc.2d 356, app. dism. 163 N.Y.S.2d 356, 3 A.D.2d 971.

page 492

54. U.S.—De Jur-Amsco Corp. v. Fogle, D.C.N.J., 119 F.Supp. 262, affd., C.A., 233 F.2d 141—Rotary Lift Co. v. Clayton, D.C.Mass., 127 F.Supp. 176.

D.C.—Fox v. Kingsland, D.C., 81 F.Supp. 433, affd. 180 F.2d 45, 86 U.S.App.D.C. 135.

55. U.S.—Gas Tool Patents Corp. v. Mould, C.C.A. Wis., 133 F.2d 815—Universal Winding Co. v. Clarke, D.C.Conn., 108 F.Supp. 329—Koehring Co. v. National Automatic Tool Co., D.C.Ind., 257 F.Supp. 282, affd., C.A., 385 F.2d 414—Jamesbury Corp. v. Worcester Valve Co., C.A. Mass., 443 F.2d 205.

Iowa—Bandag, Inc. v. Morenings, 146 N.W.2d 916, 259 Iowa 998.

N.J.—International Pulverizing Corp. v. Kidwell, supra, n. 19.

Tenn.—Hickory Specialties, Inc. v. B & L Laboratories, Inc., App., 592 S.W.2d 583.

Wis.—John Mohr & Sons, Inc. v. Jahnke, 198 N.W.2d 363, 55 Wis.2d 402.

Injunction by employer

U.S.—N.J. Lewis Products Co. v. Lewis, D.C.Pa., 57 F.2d 886.

Settlement agreement as not including future "improvements"

U.S.—DeLong Corp. v. Lucas, D.C.N.Y., 176 F.Supp. 104, affd., C.A., 278 F.2d 804, cert. den. 81 S.Ct. 71, 364 U.S. 833, 5 L.Ed.2d 58.

58. U.S.—Gas Tool Patents Corp. v. Mould, supra, n. 55.

59. N.J.—Andreaggi v. Relis, 408 A.2d 455, 171 N.J. Super. 203.

63. U.S.—Toner v. Sobelman, D.C.Pa., 86 F.Supp. 369—Consolidated Vultee Aircraft Corp. v. Maurice A. Garbell, Inc., C.A.Cal., 204 F.2d 946, cert. den. 74 S.Ct. 122, 346 U.S. 873, 98 L.Ed. 381—Wiles v. Union Wire Rope Corp., D.C.Mo., 134 F.Supp. 299, app. dism., C.A., 257 F.2d 813—B. F. Gladding & Co. v. Scientific Anglers, Inc., C.A.Mich., 248 F.2d 483.

Cal.—Banner Metals, Inc. v. Lockwood, 3 Cal.Rptr. 421, 178 C.A.2d 643.

Ohio—Deye v. Quality Engraving & Electrotype Co., 100 N.E.2d 310, revd. on oth. grds. 106 N.E.2d 584, 90 Ohio App. 324, app. dism. 105 N.E.2d 873, 157 Ohio St. 514.

Shop right regarded as form of implied license

N.Y.—Cahill v. Regan, 165 N.Y.S.2d 125, 4 A.D.2d 328, affd. 184 N.Y.S.2d 348, 5 N.Y.2d 292, 157 N.E.2d 505.

64. U.S.—Marshall v. Colgate-Palmolive-Peet Co., supra, n. 7—Toner v. Sobelman, D.C.Pa., 86 F.Supp. 369.

Cal.—Banner Metals, Inc. v. Lockwood, 3 Cal.Rptr. 421, 178 C.A.2d 643.

N.J.—International Pulverizing Corp. v. Kidwell, supra, n. 19.

Right as passing to companies into which employer is merged

U.S.—Papazian v. American Steel & Wire Co. of N.J., D.C.Ohio, 155 F.Supp. 111—Hobbs v. U.S., C.A. Fla., 376 F.2d 488, app. after remand 451 F.2d 849.

Shop right as limited to nonexclusive right or license

U.S.—U.S. v. Dubilier Condenser Corporation, Del., 53 S.Ct. 554, 289 U.S. 178, 77 L.Ed. 1114, 85 A.L.R. 1488, am. on oth. grds. 53 S.Ct. 687, 289 U.S. 706, 77 L.Ed. 1462—Wellington Print Works, Inc. v. Magid, D.C.Pa., 242 F.Supp. 614.

Mo.—Dewey v. American Stair Glide Corp., App., 557 S.W.2d 643.

65. U.S.—Marshall v. Colgate-Palmolive-Peet Co., supra, n. 7—Kober v. U.S., supra, n. 7—Thompson v. American Tobacco Co., C.A.N.C., 174 F.2d 773—Standard Brands Inc. v. U.S. Partition & Packaging Corp., D.C.Wis., 199 F.Supp. 161—Davis Harvester Co. v. Long Mfg. Co., D.C.N.C., 252 F.Supp. 989, affd., C.A., 373 F.2d 513.

Ill.—Velsicol Corp. v. Hyman, 87 N.E.2d 35, 338 Ill. App. 52, revd. on oth. grds. 90 N.E.2d 717, 405 Ill. 352, cert. den. 70 S.Ct. 1002, 339 U.S. 966, 94 L.Ed. 1374.

Mich.—A & C Engineering Co. v. Atherholt, 95 N.W.2d 871, 355 Mich. 677, cert. den. 80 S.Ct. 71.

N.J.—Clerke v. Beck, supra, n. 47—C.J.S. cited in Kinkade v. New York Shipbuilding Corp., 122 A.2d 360, 364, 21 N.J. 362, 61 A.L.R.2d 348.

N.Y.—Aerial Products, Inc. v. Anzalone, 163 N.Y.S.2d 287, 6 Misc.2d 349, affd. 173 N.Y.S.2d 1006, 5 A.D.2d 997—Cahill v. Regan, 184 N.Y.S.2d 348, 5 N.Y.2d 292, 157 N.E.2d 505—Howe v. Floodmaster Mfg. Corp., 195 N.E.2d 278, 45 Ill.App.2d 203.

Ohio—Deye v. Quality Engraving & Electrotype Co., supra, n. 63.

page 493

66. U.S.—Kober v. U.S., supra, n. 65.

Existence of relationship held question of fact

U.S.—LeFiell v. U.S., 162 Ct.Cl. 865.

Matters considered

U.S.—Hobbs v. U.S., C.A.Fla., 376 F.2d 488, app. after remand 451 F.2d 849.

67. U.S.—Marshall v. Colgate-Palmolive-Peet Co., supra, n. 7.

Cal.—Aero Bolt & Screw Co. of Cal., v. Iaia, 5 Cal. Rptr. 53, 180 C.A.2d 728.

Ill.—Howe v. Floodmaster Mfg. Corp., 195 N.E.2d 278, 45 Ill.App.2d 203.

N.J.—Kinkade v. New York Shipbuilding Corp., 122 A.2d 360, 21 N.J. 362, 61 A.L.R.2d 348.

Ohio—Gemco Engineering & Mfg. Co. v. Henderson, supra, n. 64—Gemco Engineering & Mfg. Co. v. Henderson, 84 N.E.2d 596, 151 Ohio St. 95.

Pa.—Koolvent Metal Awning Corp. v. Vamco Mach. Co., 99 Pittsb.Leg.J. 345.

68. U.S.—Toner v. Sobelman, supra, n. 63—Toner v. Sobelman, supra, n. 63.

Cal.—Aero Bolt & Screw Co. of Cal., v. Iaia, 5 Cal. Rptr. 53, 180 C.A.2d 728.

Ohio—Deye v. Quality Engraving & Electrotype Co., supra, n. 63.

69. Cal.—Banner Metals, Inc. v. Lockwood, 3 Cal. Rptr. 421, 178 C.A.2d 643.

Ohio—Gemco Engineering & Mfg. Co. v. Henderson, supra, n. 67—Deye v. Quality Engraving & Electrotype Co., supra, n. 63.

70. Cal.—Aero Bolt & Screw Co., of Cal., v. Iaia, 5 Cal.Rptr. 53, 180 C.A.2d 728.

71. U.S.—Hobbs v. U.S., C.A.Fla., 376 F.2d 488, app. after remand 451 F.2d 849.

Use of employer's time and materials alone insufficient

N.Y.—Cahill v. Regan, 165 N.Y.S.2d 125, 4 A.D.2d 328, affd. 184 N.Y.S.2d 348, 5 N.Y.2d 292, 157 N.E.2d 505.

The doctrine of "shop right" is superseded where inventive rights are allocated by contract.[72.5]

72.5. U.S.—Jamesbury Corp. v. Worcester Valve Co., C.A.Mass., 443 F.2d 205.

page 494

73. U.S.—Toner v. Sobelman, supra, n. 63.

N.Y.—Aerial Products, Inc. v. Anzalone, 163 N.Y.S.2d 287, 6 Misc.2d 349, affd. 173 N.Y.S.2d 1006, 5 A.D.2d 997.

Ohio—Gemco Engineering & Mfg. Co. v. Henderson, supra, n. 64.

Employer's license as nonexclusive

U.S.—LeFiell v. U.S., 162 Ct.Cl. 865.

N.Y.—Cahill v. Regan, 165 N.Y.S.2d 125, 4 A.D.2d 328, affd. 184 N.Y.S.2d 348, 5 N.Y.2d 292, 157 N.E.2d 505.

74. U.S.—LeFiell v. U.S., 162 Ct.Cl. 865.

75. Ohio—Deye v. Quality Engraving & Electrotype Co., supra, n. 63.

78. Increase in compensation held not necessarily to establish ownership of invention by employee

Ill.—Muencer v. W.E. & John Barnes Co., 133 N.E.2d 312, 9 Ill.App.2d 391.

Conversation between employee and corporate director not creating contract

U.S.—Hyman v. Regenstein, C.A.Fla., 258 F.2d 502, cert. den. 79 S.Ct. 589, 359 U.S. 913, 3 L.Ed.2d 575.

79. Property right

U.S.—Nelson v. Ferguson, supra, n. 19.

page 495

81. U.S.—Toner v. Sobelman, supra, n. 63.

85. U.S.—Woodruff v. New State Ice Co., C.A.Okl., 197 F.2d 36.

88. Cal.—Reid v. Mass Co., 318 P.2d 54, 155 C.A.2d 293.

Tort action for deprivation of credit as inventor

N.J.—Misani v. Ortho Pharmaceutical Corp., 198 A.2d 791, 83 N.J.Super. 1. Revd. on oth. grds. 210 A.2d 609, 44 N.J. 552, app. dism., cert. den. 86 S.Ct. 398, 382 U.S. 203, 15 L.Ed.2d 270, reh. den. 86 S.Ct. 1363, 384 U.S. 923, 16 L.Ed.2d 444.

89. Evidence

(2) Other evidence.—Consolidated Vultee Aircraft Corp. v. Maurice A. Garbell, Inc., C.A.Cal., 204 F.2d 946, cert. den. 74 S.Ct. 122, 346 U.S. 873, 98 L.Ed. 381.

Pleading

U.S.—Vanadium-Alloys Steel Co v. McKenna, D.C Pa., 27 F.Supp. 535.

Reliance on fraudulent inducement of assignment as precluding action

U.S.—Papazian v. American Steel & Wire Co. of N.J., D.C.Ohio, 155 F.Supp. 111.

page 496

94. Mo.—Dewey v. American Stair Glide Corp., App., 557 S.W.2d 643.

95. Ga.—Landrum v. J. F. Pritchard & Co., 228 S.E.2d 290, 139 Ga.App. 393.

98. Complaint held insufficient

U.S.—Wiles v. Union Wire Rope Corp., D.C.Mo., 134 F.Supp. 299, app. dism., C.A., 257 F.2d 813.

99. Burden of proof

Ill.—Muencer v. W.E. & John Barnes Co., 133 N.E.2d 312, 9 Ill.App.2d 391.

N.Y.—Cornell v. T.V. Development Corp., 245 N.Y.S.2d 918, 41 Misc.2d 628, affd. 260 N.Y.S.2d 865, 24 A.D.2d 471, revd. on oth. grds. 215 N.E.2d 349, 17 N.Y.2d 69, 268 N.Y.S.2d 29, on remand 270 N.Y.S.2d 45, 50 Misc.2d 422.

Evidence held sufficient

(1) N.J.—Clerke v. Beck, 80 A.2d 252, 13 N.J.Super. 73.

(4) U.S.—Belanger v. Alton Box Bd. Co., C.A.Ill., 180 F.2d 87—Grepke v. General Elec. Co., C.A.Ind., 280 F.2d 508, cert. den. 81 S.Ct. 232, 364 U.S. 899, 5 L.Ed.2d 193.

Ill.—Velsicol Corp. v. Hyman, 90 N.E.2d 717, 405 Ill. 352, cert. den. 70 S.Ct. 1002, 339 U.S. 966, 94 L.Ed. 1374—Muencer v. W.E. & John Barnes Co., 133 N.E.2d 312, 9 Ill.App.2d 391.

Evidence held insufficient

(6) Other evidence.

U.S.—Woodruff v. New State Ice Co., C.A.Okl., 197 F.2d 36.

page 497

3. Questions of law and fact

U.S.—Forberg v. Servel, Inc., D.C.N.Y., 88 F.Supp. 503—Grepke v. General Elec. Co., C.A.Ind., 280 F.2d 508, cert. den. 81 S.Ct. 232, 364 U.S. 899, 5 L.Ed.2d 193.

6. U.S.—De Long Corp. v. Lucas, D.C.N.Y., 176 F.Supp. 104, affd., C.A., 278 F.2d 804, cert. den. 81 S.Ct. 71. 364 U.S. 833, 5 L.Ed.2d 58.

Motion to dismiss

U.S.—Vanadium-Alloys Steel Co. v. McKenna, D.C. Pa., 27 F.Supp. 535.

Complaint held sufficient

Mich.—A & C Engineering Co. v. Atherholt, 95 N.W.2d 871, 355 Mich. 677, cert. den. 80 S.Ct. 71.

8. Estoppel not shown

Cal.—Grove v. Grove Valve & Regulator Co., 84 Cal. Rptr. 300, 4 C.A.3d 299.

9. Del.—Church of Religious Science v. Fox, 266 A.2d 881.

Or.—Phillips Screw Co. v. Givnan, 265 P.2d 1084, 200 Or. 279.

page 498

12. Presumptions

(2) Other presumptions.

U.S.—Shook v. U.S., C.A.Ohio, 238 F.2d 952, cert. den. 77 S.Ct. 684, 353 U.S. 924, 1 L.Ed.2d 721.

Burden of proof

(3) Other matters.

Iowa—Bandag, Inc. v. Morenings, 146 N.W.2d 916, 259 Iowa 998.

14. Evidence held sufficient

(1) Kober v. U.S., C.A.Va., 170 F.2d 590, cert. den. 69 S.Ct. 812, 336 U.S. 945, 93 L.Ed. 1101—E. F. Drew & Co. v. Reinhard, C.A.N.Y., 170 F.2d 679—Shook v. U.S., C.A.Ohio, 238 F.2d 952, cert. den. 77 S.Ct. 684, 353 U.S. 924, 1 L.Ed.2d 721.

Mich.—A & C Engineering Co. v. Atherholt, 95 N.W.2d 871, 355 Mich. 677, cert. den. 80 S.Ct. 71.

(3) U.S.—Shook v. U.S., C.A.Ohio, 238 F.2d 952, cert. den. 77 S.Ct. 684, 353 U.S. 924, 1 L.Ed.2d 721.

(4) U.S.—Fish v. Air-O-Fan Products Corp., C.A. Cal, 285 F.2d 208—Raybestos-Manhattan, Inc. v. Rowland, D.C.S.C., 310 F.Supp. 993.

Cal.—Grove v. Grove Valve & Regulator Co., 84 Cal. Rptr. 300, 4 C.A.3d 299.

(5) Cal.—Aero Bolt & Screw Co., of Cal., v. Iaia, 5 Cal.Rptr. 53, 180 C.A.2d 728.

Idaho—Holders Mfrs., Inc. v. Cudd, 335 P.2d 890, 80 Idaho 557.

Ohio—Gemco Engineering & Mfg. Co. v. Henderson, 84 N.E.2d 596, 151 Ohio St. 95.

Evidence held insufficient

(1) U.S.—Kober v. U.S., supra—De Long Corp. v. Lucas, D.C.N.Y., 176 F.Supp. 104, affd., C.A., 278 F.2d 804, cert. den. 81 S.Ct. 71, 364 U.S. 833, 5 L.Ed.2d 58.

Cal.—Aero Bolt & Screw Co., of Cal., v. Iaia, 5 Cal. Rptr. 53, 180 C.A.2d 728.

(2) Gemco Engineering & Mfg. Co. v. Henderson, supra, n. 12.

page 499

15. Questions of law or fact

U.S.—E. F. Drew & Co. v. Reinhard, supra, n. 14.

Review

U.S.—Kober v. U.S., supra, n. 14.

§ 75. Rules, Regulations, and Usages

Library References

Master and Servant ⚷54.

17. U.S.—Cole v. Loew's Incorporated, D.C.Cal., 8 F.R.D. 508, revd. on oth. grds., C.A., 185 F.2d 641, cert. den. 71 S.Ct. 570, 340 U.S. 954, 95 L.Ed. 688—Rollax v. Atlantic Coast Line R. Co., C.A.Va., 186 F.2d 473.

Ga.—Snyder v. Savannah Union Station Co., 70 S.E.2d 382, 85 Ga.App. 851.

Ind.—Jones v. Review Bd. of Indiana Employment Sec. Division, App., 399 N.E.2d 844.

Ky.—Kentucky Unemployment Ins. Commission v. Murphy, 539 S.W.2d 293.

La.—Deason v. Mobil Oil Corp., App., 407 So.2d 486.

Miss.—Dufour v. Continental Southern Lines, 68 So.2d 489, 219 Miss. 296.

Mo.—Craig v. Thompson, 244 S.W.2d 37—Parks v. Thompson, 253 S.W.2d 796.

N.Y.—Rudman v. Cowles Communications, Inc., 315 N.Y.S.2d 409, 35 A.D.2d 213, 63 A.L.R.3d 527, mod. on oth. grds., 280 N.E.2d 867, 30 N.Y.2d 1, 330 N.Y.S.2d 33.

Pa.—Gonzales v. Com., Dept. of Public Welfare, 408 A.2d 893, 47 Pa.Cmwlth. 588.

Public policy against polygraphs

W.Va.—Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111.

Neat appearance

N.Y.—Gladstone v. Catherwood, 319 N.Y.S.2d 664, 36 A.D.2d 204, affd. 281 N.E.2d 842, 30 N.Y.2d 576, 330 N.Y.S.2d 793.

No vested right to continuance of rules

D.C.—Marshall v. District Unemployment Compensation Bd., App., 377 A.2d 429.

18. Del.—Barisa v. Charitable Research Foundation, Inc., Super., 287 A.2d 679, affd. 299 A.2d 430.

Or.—Thomas v. Bourdette, 608 P.2d 178, 45 Or.App. 195.

Punctuality

Ind.—Indiana Bell Tel. Co. v. Review Bd. of Indiana Employment Sec. Division, 250 N.E.2d 24, 145 Ind.App. 144.

19. N.Y.—C.J.S. cited in DeVita v. Rand McNally & Co., 256 N.Y.S.2d 9, 11, 44 Misc.2d 906.

Page 499

20. Cal.—Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 100 Cal.Rptr. 791, 24 C.A.3d 35, affd. 94 S.Ct. 383, 414 U.S. 117, 38 L.Ed.2d 348.

Ill.—C.J.S. cited in Olson v. Mall Tool Co., 104 N.E.2d 665, 346 Ill.App. 9.

Although an employer of migrant farm workers owns the living quarters of the workers, he may not deny a worker the opportunity to receive visitors in privacy at his living quarters, so long as there is no behavior hurtful to others,[23.5] and, accordingly, the employer may not deny members of the press or representatives of governmental or social agencies reasonable access to workers who do not object to seeing them.[23.10]

23.5. U.S.—Folgueras v. Hassle, D.C.Mich., 331 F.Supp. 615.

N.J.—State v. Shack, 277 A.2d 369, 58 N.J. 297.

23.10. U.S.—Folgueras v. Hassle, D.C.Mich., 331 F.Supp. 615.

N.J.—State v. Shack, 277 A.2d 369, 58 N.J. 297.

§ 77. Breach of Contract by Employee and Actions Therefor

Library References

Master and Servant ⚷63, 65.
Corbin on Contracts § 1096.
Modern Legal Forms Ch. 35, Good Will and Trade-Marks.

page 500

36. U.S.—Franke v. Wiltschek, C.A.N.Y., 209 F.2d 493.

Conn.—W. K. Robinson, Inc. v. Friedrich, Cir.A.D., 197 A.2d 96, 2 Conn.Cir. 174.

Fla.—C.J.S. cited in Bacon v. Karr, App., 139 So.2d 166, 170, 7 A.L.R.3d 889.

Mass.—Catania v. Hallisey, 225 N.E.2d 368, 352 Mass. 327.

Mo.—Stokes v. Enmark Collaborative, App., 634 S.W.2d 571.

N.J.—United Board & Carton Corp. v. Britting, 164 A.2d 824, 63 N.J.Super. 517, affd. 160 A.2d 660, 61 N.J.Super. 340.

Tex.—Pines California, Inc. v. Miller, Civ.App., 446 S.W.2d 91.

Vt.—Vreeland v. Essex Lock & Mfg. Co., Inc., 370 A.2d 1294, 135 Vt. 1.

Right not terminated by discharge for misconduct

Ill.—Anthony Co. v. Johnson, 155 N.E.2d 361, 20 Ill.App.2d 128.

Stay

N.J.—Pyramid Elec. Co. v. Staklinski, 160 A.2d 505, 61 N.J. 278.

Solicitation of employer's customers

D.C.—Meeker v. Stuart, D.C., 188 F.Supp. 272, affd., C.A., 289 F.2d 902, 110 U.S.App.D.C. 161, affd. 289 F.2d 902, 110 U.S.App.D.C. 161.

Technical violation

Mo.—Durwood v. Dubinsky, 361 S.W.2d 779.

Accounting for profits received

Conn.—Town & Country House & Homes Service, Inc. v. Evans, 189 A.2d 390, 150 Conn. 314.

Demonstrated disloyalty although objective not achieved

U.S.—Haggerty v. Burkey Mills, Inc., D.C.N.Y., 211 F.Supp. 835.

Doubts resolved against employee wrongdoer

N.Y.—E. W. Bruno Co. v. Friedberg, 250 N.Y.S.2d 187, 21 A.D.2d 336.

Breach held not material

U.S.—Richer v. Khoury Bros., Inc., C.A.Ill., 341 F.2d 34.

Matters not constituting breach

U.S.—Frederick Chusid & Co. v. Marshall Leeman & Co., D.C.N.Y., 326 F.Supp. 1043—Mastrom, Inc. v. Professional Management, Inc., C.A.S.C., 459 F.2d 172.

Ariz.—Equitable Life & Cas. Ins. Co. v. Rutledge, 454 P.2d 869, 9 Ariz.App. 551.

Cal.—Paramount Pictures Corp v. Davis, 39 Cal.Rptr. 791, 228 C.A.2d 827.

Del.—Davidge, Van Cleef, Jordan & Wood, Inc. v. Baker, 290 A.2d 319.

Ill.—Harris v. Faultfinders, Inc., 431 N.E.2d 1205, 59 Ill.Dec. 448, 103 Ill.App.3d 785.

N.Y.—Rifkind v. Web IV Music, Inc., 323 N.Y.S.2d 326, 67 Misc.2d 26.

Contracts mutually abandoned

Wash.—Jewett-Gorrie Ins. Agency, Inc. v. Visser, 531 P.2d 817, 12 Wash.App. 707.

38. **Protesting working conditions not a breach of contract**

Vt.—Albin v. Department of Employment Sec., 352 A.2d 678, 134 Vt. 120.

page 501

39. U.S.—Frederick Chusid & Co. v. Marshall Leeman & Co., D.C.N.Y., 279 F.Supp. 913.

Motion for more specific statement

U.S.—Conmar Products Corp. v. Tibony, D.C.N.Y., 2 F.R.D. 169.

Pleading

U.S.—Haggerty v. Burkey Mills, Inc., D.C.N.Y., 211 F.Supp. 835.

N.Y.—A. S. Rampell, Inc. v. Hyster Co., 165 N.Y.S.2d 475, 3 N.Y.2d 369, 144 N.E.2d 371—Acoustic Chemical Corp. v. Gottlob, 197 N.Y.S.2d 225, 22 Misc.2d 438.

Sufficiency of evidence

(4) U.S.—B. F. Gladding & Co. v. Scientific Anglers, Inc., C.A.Mich., 245 F.2d 722, reh. den. 248 F.2d 483—United Aircraft Corp. v. Boreen, D.C.Pa., 284 F.Supp. 428, affd., C.A., 413 F.2d 694—Chemithon Corp. v. Procter & Gamble Co., D.C.Md., 287 F.Supp. 291, affd., C.A., 427 F.2d 893, cert. den. 91 S.Ct. 186, 400 U.S. 925, 27 L.Ed.2d 185—Frederick Chusid & Co. v. Marshall Leeman & Co., D.C.N.Y., 326 F.Supp. 1043.

Colo.—Mountain States Mixed Feed Co. v. Ford, 343 P.2d 828, 140 Colo. 224.

Mo.—Vondras v. Titanium Research & Development Co., App., 511 S.W.2d 883.

Nev.—Enloe v. Blain, 577 P.2d 60, 94 Nev. 198.

N.H.—Collins v. F. A. Bartlett Tree Expert Co., 291 A.2d 614, 112 N.H. 197.

N.J.—Rubel & Jensen Corp. v. Rubel, 203 A.2d 625, 85 N.J.Super. 27.

Tenn.—McCall v. Oldenburg, 382 S.W.2d 537, 53 Tenn. App. 300.

Damages

U.S.—United Aircraft Corp. v. Boreen, D.C.Pa., 284 F.Supp. 428, affd. C.A., 413 F.2d 694—Frederick Chusid & Co. v. Marshall Leeman & Co, D.C. N.Y., 326 F.Supp. 1043.

N.J.—Rubel & Jensen Corp. v. Rubel, 203 A.2d 625, 85 N.J.Super. 27.

40. U.S.—Bowser, Inc. v. Filters, Inc., C.A.Cal., 398 F.2d 7.

Mass.—Snelling & Snelling of Mass., Inc. v. Wall, 189 N.E.2d 231, 345 Mass. 634—Lufkin's Real Estate, Inc. v. Aseph, 208 N.E.2d 209, 349 Mass. 343.

Question of law or fact

(2) Other questions.

Mo.—Vondras v. Titanium Research & Development Co., App., 511 S.W.2d 883.

41. U.S.—Structural Dynamics Research Corp. v. Engineering Mechanics Research Corp., D.C.Mich., 401 F.Supp. 1102.

Accounting

N.J.—Art Wire & Stamping Co. v. Johnson, 72 A.2d 523, 7 N.J.Super. 173.

N.Y.—Micro Precision Corp. v. Brochi, 156 N.Y.S.2d 501.

43. Nev.—Enloe v. Blain, 577 P.2d 60, 94 Nev. 198.

§ 78. —— Action for Leaving Employment

Library References

Corbin on Contracts §§ 958, 1096.

47. Conn.—Berger v. Shanahan, 118 A.2d 311, 142 Conn. 726.

For violation of no strike agreement

U.S.—Sinclair Refining Co. v. Atkinson, C.A.Ind., 290 F.2d 312, remd. 82 S.Ct. 1318, 370 U.S. 238, 8 L.Ed.2d 462, affd. 82 S.Ct. 1328, 370 U.S. 195, 8 L.Ed.2d 440.

48. N.Y.—Com. Sanitation Co. of N.Y. v. Fox, 107 N.Y.S.2d 935.

52. Colo.—Karras v. Trione, 310 P.2d 560, 135 Colo. 229.

Terminating contract of defaulting employee

Fla.—Leghorn v. Wieland, App., 289 So.2d 745.

53. Pa.—Morefield v. Hassman, 74 Dauph. 241.

Other defenses

Idaho—Insurance Center, Inc. v. Taylor, 499 P.2d 1252, 94 Idaho 896.

Ill.—Burke v. Martin, 82 N.E.2d 510, 335 Ill.App. 642.

page 502

55. **Questions for court and not jury**

Mo.—National Corp. v. Allan, App., 280 S.W.2d 428.

Pleadings

N.Y.—Paramount Pad Co. v. Baumrind, 158 N.Y.S.2d 687, 3 A.D.2d 655.

What law governs

U.S.—Certified Laboratories of Tex., Inc. v. Rubinson, D.C.Pa., 303 F.Supp. 1014.

Credibility of witnesses held for jury

Mo.—State ex rel. State Dept. of Public Health and Welfare, Division of Welfare v. Luster, App., 456 S.W.2d 600.

Instructions held not erroneous

Mo.—State ex rel. State Dept. of Public Health and Welfare, Division of Welfare v. Luster, App., 456 S.W.2d 600.

56. Colo.—Willis v. Chase, 240 P.2d 912, 125 Colo. 115.

D.C.—Roth v. Speck, Mun.App., 126 A.2d 153, 61 A.L.R.2d 1004.

Ky.—Hoaglin v. Carr's Adm'x, 294 S.W.2d 935.

La.—Gauthier v. Magee, App., 141 So.2d 837.

N.Y.—Dorville Corp. v. Jackson, 104 N.Y.S.2d 161, 278 App.Div. 796, affd. 112 N.E.2d 764, 305 N.Y. 665.

Evidence held admissible

Mo.—State ex rel. State Dept. of Public Health and Welfare, Division of Welfare v. Luster, App., 456 S.W.2d 600.

Evidence held insufficient to show employees breach of contract

Idaho—Brainard v. Equity Metals, Inc., 477 P.2d 502, 93 Idaho 879.

59. U.S.—Heyman v. Kline, D.C.Conn., 344 F.Supp. 1088, revd. in part on oth. grds., C.A., 456 F.2d 123, cert. den. 93 S.Ct. 53, 409 U.S. 847, 34 L.Ed.2d 88.

Mo.—Vondras v. Titanium Research & Development Co., App., 511 S.W.2d 883.

N.Y.—Bates Chevrolet Corp. v. Haven Chevrolet, Inc., 229 N.Y.S.2d 168, 16 A.D.2d 917, affd. 191 N.E.2d 290, 13 N.Y.2d 644, 240 N.Y.S.2d 759.

Profits on business solicited by salesman

U.S.—Certified Laboratories of Tex., Inc. v. Rubinson, D.C.Pa., 303 F.Supp. 1014.

N.Y.—Dorville Corp. v. Jackson, supra, n. 56.

Punitive damages held not recoverable

La.—Martin-Parry Corp. v. New Orleans Fire Detection Service, 60 So.2d 83, 221 La. 677.

Not accountable for profits in absence of breach of fiduciary duty

U.S.—Richer v. Khoury Bros., Inc., C.A.Ill., 341 F.2d 34.

Speculative damages not recoverable

U.S.—Richer v. Khoury Bros., Inc., C.A.Ill., 341 F.2d 34.

Loss of prospective sales not recoverable

U.S.—Certified Laboratories of Tex., Inc. v. Rubinson, D.C.Pa., 303 F.Supp. 1014.

61. U.S.—Frederick Chusid & Co. v. Marshall Leeman & Co., D.C.N.Y., 326 F.Supp. 1043.

D.C.—Roth v. Speck, Mun.App., 126 A.2d 153, 61 A.L.R.2d 1004.

Damages limited to cost of replacement

N.D.—Bowbells Public School Dist. No. 14, Bowbells, v. Walker, 231 N.W.2d 173.

§ 79. —— Action for Negligence or Wrongful Act

Library References

Master and Servant ⚖66.

65. U.S.—Sears, Roebuck & Co. v. Metropolitan Engravers, Limited, C.A.Cal., 245 F.2d 67—Standard Brands Inc. v. U.S. Partition & Packaging Corp., D.C.Wis., 199 F.Supp. 161—Douglas-Guardian Warehouse Corp. v. Nickell, D.C.Ark., 236 F.Supp. 842—A. H. Emery Co. v. Marcan Products Corp., D.C.N.Y., 268 F.Supp. 289, affd., C.A., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106.

Ala.—Hiller v. Goodwin, 65 So.2d 152, 258 Ala. 700.

Cal.—C.J.S. cited in Continental Cas. Co. v. Phoenix Construction Co., 296 P.2d 801, 804, 46 C.2d 423, 57 A.L.R.2d 914—C.J.S. cited in Davidson v. Welch, 75 Cal.Rptr. 676, 680, 270 C.A.2d 220—Grove v. Grove Valve & Regulator Co., 84 Cal. Rptr. 300, 4 C.A.3d 299.

Ill.—Stawasz v. Aetna Ins. Co., 240 N.E.2d 702, 99 Ill.App.2d 131—C.J.S. cited in Perimeter Exhibits v. Glenbard Molded Binder, Inc., 461 N.E.2d 44, 51, 77 Ill.Dec. 657, 122 Ill.App.3d 504.

La.—Aetna Cas. & Sur. Co. v. Allen, App., 132 So.2d 240—W. H. Hodges & Co., Inc. v. Hartford Acc. & Indem. Co., App., 262 So.2d 542, writ den. 266 So.2d 223, 262 La. 1095.

N.J.—Male v. Acme Markets, Inc., 264 A.2d 245, 110 N.J.Super. 9.

N.Y.—Urquhart v. McEvoy, 126 N.Y.S.2d 539, 204 Misc. 426—Town and Country House & Home Service v. Newberry, 147 N.Y.S.2d 550, 1 A.D.2d 702, affd. 170 N.Y.S.2d 328, 3 N.Y.2d 554, 147 N.E.2d 724.

Or.—Kowaleski v. Kowaleski, 361 P.2d 64, 227 Or. 45, 1 A.L.R.3d 666.

Tex.—Gulf States Equipment Co. v. Toombs, Civ.App., 288 S.W.2d 203, err. ref. no rev. err.

Breach of confidential relation

U.S.—Innersprings, Inc. v. Joseph Aronauer, Inc., D.C. N.Y., 27 F.R.D. 32.

Del.—Hughes Tool Co. v. Fawcett Publications, Inc., Ch., 325 A.2d 621, affd. 350 A.2d 341.

Mass.—All Stainless, Inc. v. Colby, 308 N.E.2d 481, 364 Mass. 773.

N.Y.—Harry R. Defler Corp. v. Kleeman, 243 N.Y.S.2d 930, 19 A.D.2d 396, app. dism. 197 N.E.2d 540, 13 N.Y.2d 1174, 248 N.Y.S.2d 53.

Pa.—Morgan's Home Equipment Corp. v. Martucci, 136 A.2d 838, 390 Pa. 618.

Counterclaim

Colo.—Parent v. Kopanos, 368 P.2d 784, 149 Colo. 246.

Culpable negligence

Cal.—Division of Labor Law Enforcement v. Barnes, 23 Cal.Rptr. 55, 205 C.A.2d 337.

No liability absent benefits or enrichment

U.S.—Security-First Nat. Bank of Los Angeles v. Lutz, C.A.Cal., 322 F.2d 348.

Proximate cause

Wash.—U.S. Fidelity & Guaranty Co. v. Dohner, 429 P.2d 883, 71 Wash.2d 544.

Joint and several liability of benefiting corporation and individuals

S.C.—Lowndes Products, Inc. v. Brower, 191 S.E.2d 761, 259 S.C. 322, app. after remand 205 S.E.2d 184, 262 S.C. 431.

Nature of preparation

Tex.—Herider Farms-El Paso, Inc. v. Criswell, Civ App., 519 S.W.2d 473, err. ref. no rev. err.

Action not barred

U.S.—Sprague v. Boston and Maine Corp., C.A. 1(Mass.), 769 F.2d 26.

Tex.—Herider Farms-El Paso, Inc. v. Criswell, Civ. App., 519 S.W.2d 473, err. ref. no rev. err.

page 503

68. Bad business judgment

Cal.—Liberio v. Vidal, 49 Cal.Rptr. 520, 240 C.A.2d 273.

On the breach of a fiduciary relationship by employees the employer may be entitled to an accounting.[69.5]

69.5. Cal.—Paramount Mfg. Co. v. Mohan, 16 Cal. Rptr. 417, 196 C.A.2d 372.

Md.—C-E-I-R, Inc. v. Computer Dynamics Corp., 183 A.2d 374, 229 Md. 357.

Surreptitious and fraudulent theft and sale of employer's property

N.Y.—Majestic Loose Leaf, Inc. v. Cannizzaro, 169 N.Y.S.2d 566, 10 Misc.2d 1040.

Right of action for conversion held not to preclude accounting.

N.Y.—Majestic Loose Leaf, Inc. v. Cannizzaro, 169 N.Y.S.2d 566, 10 Misc.2d 1040.

Accounting to determine former employer's lost profits

N.Y.—Harry R. Defler Corp. v. Kleeman, 243 N.Y.S.2d 930, 19 A.D.2d 396, app. dism. 197 N.E.2d 540, 13 N.Y.2d 1174, 248 N.Y.S.2d 53.

70. U.S.—Jerrold-Stephens Co. v. Gustaveson, Inc., D.C.Mo., 138 F.Supp. 11.

Prior art as defense to wrongful disclosure of trade secrets

Cal.—Futurecraft Corp. v. Clary Corp., 23 Cal.Rptr. 198, 205 C.A.2d 279.

Estoppel

U.S.—Chevron Oil Co. v. Tlapek, D.C.Ark., 265 F.Supp. 598, affd. in part and revd. in part on oth. grds., C.A., 407 F.2d 1129.

Laches

U.S.—Chevron Oil Co. v. Tlapek, D.C.Ark., 265 F.Supp. 598, affd. in part and revd. in part on oth. grds., C.A., 407 F.2d 1129.

N.Y.—General Aniline & Film Corp. v. Frantz, 272 N.Y.S.2d 600, 50 Misc.2d 994, modification den. 274 N.Y.S.2d 634, 52 Misc.2d 197.

71. Idaho—Insurance Co. of North America v. Anderson, 438 P.2d 265, 92 Idaho 114.

Ky.—Kentucky & I.T.R. Co. v. Martin, 437 S.W.2d 944.

Minn.—Capitola v. Minneapolis, St. P. & S.S.M.R. Co., 103 N.W.2d 867, 258 Minn. 206.

72. Idaho—Insurance Co. of North America v. Anderson, 438 P.2d 265, 92 Idaho 114.

74. U.S.—Shapiro v. Glekel, D.C.N.Y., 380 F.Supp. 1053.

77. However, the contributing negligence of a coemployee may be attributed to the employer so as to bar the action on the ground of contributory negligence.

Minn.—Capitola v. Minneapolis, St. P. & S.S.M.R. Co., 103 N.W.2d 867, 258 Minn. 206.

N.Y.—Brown v. Poritzky, A.D., 318 N.Y.S.2d 551, 35 A.D.2d 1007, affd. 283 N.E.2d 751, 30 N.Y.2d 289, 332 N.Y.S.2d 872.

79. Cal.—Butler Bros. v. Connolly, 22 Cal.Rptr. 175, 204 C.A.2d 22.

Ohio—Doll v. Gladys Fuller Hair Stylists, Inc., 227 N.E.2d 602, 11 Ohio St.2d 69.

Action against chauffeur

(2) Other cases.—Darman v. Zilch, 186 A. 21, 56 R.I. 413, 110 A.L.R. 826.

Pleadings held sufficient

N.Y.—A. S. Rampbell, Inc. v. Hyster Co., 148 N.Y.S.2d 102, 1 Misc.2d 788, mod. on oth. grds. 153 N.Y.S.2d 176, 2 A.D.2d 739, app. den. 159 N.Y.S.2d 961, 2 N.Y.2d 828, 140 N.E.2d 860, affd. in part and revd. in part on oth. grds. 165 N.Y.S.2d 475, 3 N.Y.2d 369, 144 N.E.2d 371.

Complaint held sufficient

Ga.—Preferred Risk Mut. Ins Co. v. Jones, 211 S.E.2d 720, 233 Ga. 423.

Mass.—BBF Group, Inc. v. Kontrols, Inc., 326 N.E.2d 18, 3 Mass.App. 735.

N.Y.—Micro Precision Corp. v. Brochi, 156 N.Y.S.2d 501—Jerry v. Borden Co., 358 N.Y.S.2d 426, 45 A.D.2d 344.

Complaint held insufficient

Cal.—Cal Francisco Inv. Corp. v. Vrionis, 92 Cal.Rptr. 201, 14 C.A.3d 318.

N.Y.—Joan Iris Corp. v. Lafer, 169 N.Y.S.2d 969, 5 A.D.2d 767.

page 504

81. U.S.—General Bronze Corp. v. Cupples Products Corp., D.C.Mo., 99 F.Supp. 924, affd., C.A., 189 F.2d 154.

Mich.—Insealator, Inc. v. Wallace, 98 N.W.2d 643, 357 Mich. 233.

N.J.—Newmark v. Gimbel's Inc., 258 A.2d 697, 54 N.J. 585.

S.C.—Lowndes Products, Inc. v. Brower, 191 S.E.2d 761, 259 S.C. 322, app. after remand 205 S.E.2d 184, 262 S.C. 431.

Applicability of res ipsa loquitur doctrine

La.—Tarbox v. Eason, App., 179 So.2d 916.

83. Cal.—Futurecraft Corp. v. Clary Corp., 23 Cal. Rptr. 198, 205 C.A.2d 279.

Idaho—Kingsford v. Bennion, 199 P.2d 625, 68 Idaho 501.

Ky.—Arrowood v. Lyon, 279 S.W.2d 801.

La.—Chas. A. Kaufman Co. v. Gregory, App., 178 So.2d 300, writ ref. 179 So.2d 273, 248 La. 431.

Mo.—Browder v. Milla, App., 296 S.W.2d 502.

N.Y.—E. W. Bruno Co. v. Friedberg, 281 N.Y.S.2d 504, 28 A.D.2d 91—Jerry v. Borden Co., 358 N.Y.S.2d 426, 45 A.D.2d 344.

Or.—Stimson Lumber Co. v. Laurence-David, Inc., 356 P.2d 84, 224 Or. 447.

Wis.—Lind v. Allen, 74 N.W.2d 188, 271 Wis. 491.

84. Ky.—Shatz v. American Sur. Co. of N.Y., 295 S.W.2d 809.

Md.—Space Aero Products Co. v. R. E. Darling Co., 208 A.2d 74, 238 Md. 93, rearg. den. 208 A.2d 699, 238 Md. 93, cert. den. 86 S.Ct. 77, 382 U.S. 843, 15 L.Ed.2d 83.

N.Y.—General Aniline & Film Corp. v. Frantz, 272 N.Y.S.2d 600, 50 Misc.2d 994, modification den. 274 N.Y.S.2d 634, 52 Misc.2d 197.

85. U.S.—Tlapek v. Chevron Oil Co., C.A.Ark., 407 F.2d 1129—Harbridge v. Greyhound Lines, Inc., D.C.Pa., 294 F.Supp. 1059—Elliott Mach. Corp. v. Wiley Mfg. Co., D.C.Md., 297 F.Supp. 1044.

Fla.—Anker v. Dobbs, 57 So.2d 432.

Ga.—Smith v. Burks, 79 S.E.2d 52, 89 Ga.App. 278.

Ill.—Vendo Co. v. Stoner, 245 N.E.2d 263, 105 Ill. App.2d 261, app. after remand 300 N.E.2d 632, 13 Ill.App.3d 291, revd. on oth. grds. 321 N.E.2d 1, 58

Page 504

Ill.2d 289, cert. den. 1398, 420 U.S. 975, 43 L.Ed.2d 655.

Ky.—Arrowood v. Lyon, supra, n. 83.

Miss.—International Order of Twelve, Knights and Daughters of Tabor v. Marshall, 195 So.2d 66.

Mo.—Carboline Co. v. Jarboe, 454 S.W.2d 540.

N.Y.—General Aniline & Film Corp. v. Frantz, 272 N.Y.S.2d 600, 50 Misc.2d 994, modification den. 274 N.Y.S.2d 634, 52 Misc.2d 197.

Ohio—Morrison v. Steppe's Beauticians, Inc., 115 N.E.2d 868, 95 Ohio App. 1.

Evidence held sufficient

U.S.—Sperry Rand Corp. v. Pentronix, Inc., D.C.Pa., 311 F.Supp. 910.

Ala.—James A. Head & Co. v. Rolling, 90 So.2d 828, 265 Ala. 328—Mason Corp. v. Kennedy, 244 So.2d 585, 286 Ala. 639.

Ariz.—Goldwaters, Inc. v. Medar, 313 P.2d 410, 82 Ariz. 344.

Cal.—Whitted v. Williams, 37 Cal.Rptr. 692, 226 C.A.2d 52.

D.C.—Keefe v. Moskin Stores, Inc., Mun.App., 95 A.2d 336.

Fla.—Martin Co. v. Commercial Chemists, Inc., App., 213 So.2d 477.

Idaho—O'Harrow v. Salmon River Uranium Development, Inc., 373 P.2d 336, 84 Idaho 427.

Ill.—Heatbath Corp. v. Ifkovits, 254 N.E.2d 139, 117 Ill.App.2d 158.

Ky.—Shatz v. American Sur. Co. of N.Y., 295 S.W.2d 809.

Md.—Operations Research v. Davidson & Talbird, Inc., 217 A.2d 375, 241 Md. 550.

Mo.—National Rejectors, Inc. v. Trieman, 409 S.W.2d 1.

N.Y.—Lincoln Steel Products, Inc. v. Schuster, 371 N.Y.S.2d 157, 49 A.D.2d 618, motion dism. 343 N.E.2d 759, 38 N.Y.2d 738, 381 N.Y.S.2d 41.

Ohio—Fremont Oil Co. v. Marathon Oil Co., 192 N.E.2d 123.

Tex.—Lamons Metal Gasket Co. v. Traylor, Civ.App., 361 S.W.2d 211, err. ref. no rev. err.

Wash.—Frazier v. Bowmar, 255 P.2d 906, 42 Wash.2d 383—Opsal v. Lockhart, 267 P.2d 1061, 44 Wash.2d 415—Snowflake Laundry Co. v. MacDowell, 328 P.2d 684, 52 Wash.2d 662.

Wis.—Lind v. Allen, 74 N.W.2d 188, 271 Wis. 491.

Evidence held insufficient

U.S.—Cudahy Co. v. American Laboratories, Inc., D.C. Neb., 313 F.Supp. 1339—Shapiro v. Glekel, D.C. N.Y., 380 F.Supp. 1053.

Cal.—Futurecraft Corp. v. Clary Corp., 23 Cal.Rptr. 198, 205 C.A.2d 279.

Del.—H. & S. Mfg. Co. v. Benjamin F.Rich Co., 181 A.2d 431, 40 Del.Ch. 304.

Fla.—Pure Foods v. Sir Sirloin, Inc., 84 So.2d 51—Hammett v. Lyte Lyne, Inc., App., 142 So.2d 745, judgm. quashed 150 So.2d 235.

Ill.—James C. Wilborn & Sons, Inc. v. Heniff, 237 N.E.2d 781, 95 Ill.App.2d 155.

La.—Chas A. Kaufman Co. v. Gregory, App., 178 So.2d 300, writ ref. 179 So.2d 273, 248 La. 431—Tarbox v. Eason, App., 179 So.2d 916.

Md.—Operations Research, Inc. v. Davidson & Talbird, Inc., 217 A.2d 375, 241 Md. 550.

Mass.—American Window Cleaning Co. of Springfield v. Cohen, 178 N.E.2d 5, 343 Mass. 195.

Miss.—International Order of Twelve, Knights and Daughters of Tabor v. Marshall, 195 So.2d 66.

Mo.—Carboline Co. v. Jarboe, 454 S.W.2d 540.

N.H.—Elliott v. Lachance, 256 A.2d 153, 109 N.H. 481.

N.J.—Newmark v. Gimbel's Inc., 258 A.2d 697, 54 N.J. 585.

Ohio—Fremont Oil Co. v. Marathon Oil Co., 192 N.E.2d 123.

Or.—Stimson Lumber Co. v. Laurence-David, Inc., 356 P.2d 84, 224 Or. 447.

Tex.—Chantly v. Chrystal, Civ.App., 274 S.W.2d 765, err. dism.

Dismissal of counterclaim sustained by evidence

N.Y.—E. W. Bruno Co. v. Friedberg, 250 N.Y.S.2d 187, 21 A.D.2d 336.

87. Ky.—Kentucky & I.T.R. Co. v. Martin, 437 S.W.2d 944.

N.J.—Newmark v. Gimbel's Inc., 258 A.2d 697, 54 N.J. 585

N.M.—Meyer v. Williams, 203 P.2d 368, 53 N.M. 134.

Questions of fact for trial court generally

U.S.—Hulsenbusch v. Davidson Rubber Co., C.A.Iowa, 344 F.2d 730, cert. den. 86 S.Ct. 545, 382 U.S. 977, 15 L.Ed.2d 468.

Conn.—Allen Mfg. Co. v. Loika, 144 A.2d 306, 145 Conn. 509.

Breach of fiduciary relationship as question of fact

Md.—Operations Research, Inc. v. Davidson & Talbird, Inc., 217 A.2d 375, 241 Md. 550.

Trade secret as conclusion of law

Md.—Operations Research, Inc. v. Davidson & Talbird, Inc., 217 A.2d 375, 241 Md. 550.

Holding in contempt not warranted

U.S.—Cataphote Corp. v. Hudson, C.A.Miss., 422 F.2d 1290, on remand 316 F.Supp. 1122, affd. 444 F.2d 1313.

Question improperly submitted to jury

N.Y.—Jerry v. Borden Co., 358 N.Y.S.2d 426, 45 A.D.2d 344.

88. Ga.—Smith v. Burks, 79 S.E.2d 52, 89 Ga.App. 278.

Ohio—Morrison v. Steppe's Beauticians, Inc., supra, n. 85

Wash.—Mason v. Bon Marche Corp., 390 P.2d 997, 64 Wash.2d 177.

90. Md.—Ritterpusch v. Lithographic Plate Service, 119 A.2d 392, 208 Md. 592.

Improper solicitation

Md.—Operations Research, Inc. v. Davidson & Talbird, Inc., 217 A.2d 375.

94. U.S.—Funchion v. Somerset Knitting Co., D.C. N.C., 158 F.Supp. 57—Mid-land-Ross Corp. v. Yokana, C.A.N.J., 293 F.2d 411.

Ala.—James A. Head & Co. v. Rolling, 90 So.2d 828, 265 Ala. 328.

Ark.—H. & P. Mfg. Co. v. Hanson, 261 S.W.2d 800, 222 Ark. 566.

Cal.—Gage v. Kern, 261 P.2d 541, 120 C.A.2d 653—Gordon v. Schwartz, 305 P.2d 117, 147 C.A.2d 213.

Mo.—Carboline Co. v. Jarboe, 454 S.W.2d 540.

N.J.—Adolph Gottscho, Inc. v. American Marking Corp., 139 A.2d 281, 26 N.J. 229, 67 A.L.R.2d 816.

N.Y.—Duane Jones Co. v. Burke, 117 N.E.2d 237, 306 N.Y. 172—McLean v. Hubbard, 194 N.Y.S.2d 644, 24 Misc.2d 92, app. dism. 202 N.Y.S.2d 1015, 11 A.D.2d 625, order dismissing appeal vac. conditionally 205 N.Y.S.2d 1013, 11 A.D.2d 911, affd. 208 N.Y.S.2d 443, 11 A.D.2d 1084—E. W. Bruno Co. v. Friedberg, 250 N.Y.S.2d 187, 21 A.D.2d 336.

S.C.—Lowndes Products, Inc. v. Brower, 191 S.E.2d 761, 259 S.C. 322, app. after remand 205 S.E.2d 184, 262 S.C. 431.

Breach of confidential relation

U.S.—American Visuals Corp. v. Holland, C.A.N.Y., 261 F.2d 652—Tolchester Lines, Inc. v. Dowd, D.C.N.Y., 253 F.Supp. 643.

Colo.—Julius Hyman & Co. v. Velsicol Corp., 233 P.2d 977, 123 Colo. 563, cert. den. 72 S.Ct. 113, 342 U.S. 870, 96 L.Ed. 654, reh. den. 72 S.Ct. 199, 342 U.S. 895, 96 L.Ed. 671.

N.Y.—E. W. Bruno Co. v. Friedberg, 281 N.Y.S.2d 504, 28 A.D.2d 91.

Attorney's fees

U.S.—American Visuals Corp. v. Holland, C.A.N.Y., 261 F.2d 652.

Recovery of amount expended in mitigating damages not allowed

Wash.—Snowflake Laundry Co. v. MacDowell, 328 P.2d 684, 52 Wash.2d 662.

Profits

U.S.—Sperry Rand Corp. v. A-T-O, Inc., C.A.Va., 447 F.2d 1387, cert. den. 92 S.Ct. 1292, 405 U.S. 1017, 31 L.Ed.2d 479, reh. den., 459 F.2d 19, cert. den. 93 S.Ct. 117, 119, 409 U.S. 892, 34 L.Ed.2d 150.

Ill.—Henry's Drive-In, Inc. v. Anderson, 185 N.E.2d 103, 37 Ill.App.2d 113.

Mich.—Hayes-Albion v. Kuberski, 364 N.W.2d 609, 421 Mich. 170.

N.Y.—E. W. Bruno Co. v. Friedberg, 250 N.Y.S.2d 187, 21 A.D.2d 336—Hercules Packing Corp. v. Steinbruckner, 280 N.Y.S.2d 423, 28 A.D.2d 635, app. dism. 229 N.E.2d 842, 20 N.Y.2d 757, 283 N.Y.S.2d 174.

Punitive damages not allowed absent malice

Ohio—Fremont Oil Co. v. Marathon Oil Co., 192 N.E.2d 123.

Abuse of discretion

Pa.—Dozor Agency, Inc. v. Rosenberg, 218 A.2d 583.

Possible measures of damages

U.S.—Tolchester Lines, Inc. v. Dowd, D.C.N.Y., 253 F.Supp. 643—Sperry Rand Corp. v. A-T-O, Inc., C.A.Va., 447 F.2d 1387, cert. den. 92 S.Ct. 1292, 405 U.S. 1017, 31 L.Ed.2d 479, reh. den. 459 F.2d 19, cert. den. 93 S.Ct. 117, 119, 409 U.S. 892, 34 L.Ed.2d 150.

Lost business

U.S.—Tolchester Lines, Inc. v. Dowd, D.C.N.Y., 253 F.Supp. 643.

N.Y.—Hercules Packing Corp. v. Steinbruckner, 289 N.Y.S.2d 423, 28 A.D.2d 635, app. dism. 229 N.E.2d 842, 20 N.Y.2d 757, 283 N.Y.S.2d 174.

Wages paid to employees

N.Y.—S. Tepfer & Sons, Inc. v. Zschaler, 269 N.Y.S.2d 552, 25 A.D. 786.

Award of damages not warranted

U.S.—Cudahy Co. v. American Laboratories, Inc., D.C. Neb., 313 F.Supp. 1339—Future Plastics, Inc. v. Ware Shoals Plastics, Inc., D.C.S.C., 340 F.Supp. 1376.

Mass.—Jet Spray Cooler, Inc. v. Crampton, 282 N.E.2d 921, 361 Mass. 835, app. after remand 385 N.E.2d 1349, 377 Mass. 159.

Punitive damages allowed

U.S.—Sperry Rand Corp. v. A-T-O, Inc., C.A.Va., 459 F.2d 19, cert. den. 93 S.Ct. 117, 119, 409 U.S. 892, 34 L.Ed.2d 150.

Misappropriation of trade secrets

U.S.—Sperry Rand Corp. v. A-T-O, Inc., C.A.Va., 447 F.2d 1387, cert. den. 92 S.Ct. 1292, 405 U.S. 1017, 31 L.Ed.2d 479, reh. den. 459 F.2d 19, cert. den. 93 S.Ct. 117, 119, 409 U.S. 892, 34 L.Ed.2d 150.

Breach of covenant not to compete

Ill.—Vendo Co. v. Stoner, 321 N.E.2d 1, 58 Ill.2d 289, cert. den. 95 S.Ct. 1398, 420 U.S. 975, 43 L.Ed. 655.

page 505

97. U.S.—Bull v. Logetronics, Inc., D.C.Va., 323 F.Supp. 115.

Interest

Ark.—Reep v. Reep, 241 S.W.2d 262, 219 Ark. 270.

§ 81. In General

Library References

Master and Servant ⇐68.

Corbin on Contracts §§ 49, 676.

page 511

33. U.S.—Hennessey v. Federal Sec. Adm'r, D.C. Conn., 88 F.Supp. 664—Rubin v. Equitable Life Assur. Soc. of U.S., D.C.Pa., 194 F.Supp. 195, affd., C.A., 297 F.2d 167.

33. Alaska—Skagway City School Bd. v. Davis, 543 P.2d 218.

Cal.—Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 100 Cal.Rptr. 791, 24 C.A.3d 35, affd. 94 S.Ct. 383, 414 U.S. 117, 38 L.Ed.2d 348.

La.—Thaxton v. Roberson, App., 224 So.2d 183.

Mich.—General Motors Corp. v. Michigan Unemployment Compensation Commission, 49 N.W.2d 305, 331 Mich. 303.

Mont.—Gilbert v. Bostona Mines Co., 195 P.2d 376, 121 Mont. 397.

N.J.—Rothman Realty Corp. v. MacLain, 91 A.2d 101, 21 N.J.Super. 172—Mossberg v. Standard Oil Co. of N.J., 237 A.2d 508, 98 N.J.Super. 393.

N.Y.—Diaz v. Ulster Vegetable Growers Co-op., 123 N.Y.S.2d 321, 282 App.Div. 426, affd. 118 N.E.2d 916, 306 N.Y. 859—Maloney v. Jarco Metal Products Corp., 144 N.Y.S.2d 128—Vaccaro v. Board of Ed. of City of New York, 282 N.Y.S.2d 881, 54 Misc.2d 206.

Pa.—Fulton v. General Elec. Supply Corp., 76 Pa.Dist. & Co. 401.

Tenn.—Mid-South Engineering Co. v. Buchanan, 440 S.W.2d 600, 59 Tenn.App. 289.

Wis.—Schiller v. Keuffel & Esser Co., 124 N.W.2d 646, 21 Wis.2d 545.

Whether business operates at profit or loss immaterial

La.—Trappey v. Lumbermen's Mut. Cas. Co., 86 So.2d 515, 229 La. 632.

"Earned compensation"

Md.—MacIntosh v. Brunswick Corp., 215 A.2d 222, 241 Md. 24.

34. U.S.—Jernigan v. Lay Barge Delta Five, D.C. Tex., 296 F.Supp. 127, affd., C.A., 423 F.2d 1327 —Goodyear Tire & Rubber Co. v. Jones, D.C. Kan., 317 F.Supp. 1285, affd., C.A., 433 F.2d 629.

Cal.—Stone v. Burke, 244 P.2d 51, 110 C.A.2d 748.

Fla.—Ivy Jay Corp. v. Davis, App., 160 So.2d 715.

Nev.—Rocky Mountain Powder Co. v. Hamlin, 310 P.2d 404, 73 Nev. 87.

Contract one of credit

N.Y.—Ketchum v. Buffalo, 14 N.Y. 356, 364, 4 Kern. 356.

Driver procured by lessor of tractor-trailer with lessee's approval

Okl.—Parkhill Truck Co. v. Reynolds, 359 P.2d 1064.

Stay Pending arbitration

N.Y.—Fisher v. Arch-Bilt Container Corp., 219 N.Y. S.2d 669, 30 Misc.2d 524.

36. Colo.—Ladwig v. Shaffer, 390 P.2d 67, 154 Colo. 261.

Ill.—Grey v. A. Stein & Co., 108 N.E.2d 502, 348 Ill.App. 156.

La.—McLellan v. F. N. Johnston, Inc., 62 So.2d 504, 222 La. 338.

Pa.—Mickshaw v. Coca Cola Bottling Co of Sharon, Pa., 70 A.2d 467, 166 Pa.Super. 148.

37. Cal.—**C.J.S. cited in** Sheehan v. City and County of San Francisco, 269 P.2d 678, 681, 124 C.A.2d 769.

Mich.—General Motors Corp. v. Michigan Unemployment Compensation Commission, supra, n. 33.

page 512

40. Del.—State ex rel. Hirst v. Black, Super., 83 A.2d 678, 7 Terry 295.

"Salary" is a fixed compensation which is paid at stated times for services rendered.[40.5]

40.5. Del.—Kolcum v. Board of Ed. of Woodbridge School Dist., Super., 335 A.2d 618.

La.—Brasher v. Chenille, Inc., App., 251 So.2d 824.

Ohio—Pleasants v. Pleasants, 273 N.E.2d 339, 27 Ohio App.2d 191.

41. U.S.—Telex Corp. v. Balch, C.A.Minn., 382 F.2d 211.

Cal.—Horacek v. Smith, 199 P.2d 929, 33 Cal.2d 186.

La.—Krizan v. Storz Broadcasting Co., App., 145 So.2d 636—Thaxton v. Roberson, App., 224 So.2d 183.

N.Y.—Corrigan v. Joseph, 106 N.E.2d 593, 304 N.Y. 172—Guerra v. Richard G. Krueger, Inc., 151 N.Y.S.2d 182.

Construction

Ga.—McMurray v. Bateman, 144 S.E.2d 345, 221 Ga 240.

42. N.Y.—Gerber v. Jarold Shops, 102 N.Y.S.2d 616, 278 App.Div. 634

43. Consideration held sufficient

U.S.—Ulmann v. Sunset-McKee Co., C.A Cal., 221 F.2d 128.

Pa.—Mickshaw v. Coca Cola Bottling Co. of Sharon, Pa., supra, n. 36.

51. N.J.—**C.J.S. cited in** Joseph Toker, Inc. v. Cohen, 169 A.2d 838, 844, 67 N.J.Super. 68.

page 513

56. La.—Conner v. Lake, 82 So.2d 324, 228 La. 385—Bristol v. Koral, App., 295 So 2d 520.

61. Mass.—Cheney v. Automatic Sprinkler Corp. of America, 385 N.E.2d 961, 377 Mass. 141.

62. N.J.—Cameron v. International Alliance of Theatrical Stage Employees and Moving Picture Operators of U.S. and Canada, Local Union No. 384, of Hudson County, 176 A. 692, 118 N.J.Eq. 11, 97 A.L.R. 594.

Pa.—Kirmse v. Adler, 166 A. 566, 311 Pa. 78.

64. Ariz.—Truax v. Bisbee Local, No. 380, Cooks' and Waiters' Union, 171 P. 121, 19 Ariz. 379.

Me.—Keith Theatre v. Vachon, 187 A. 692, 134 Me. 392.

National Industrial Recovery Act did not deprive employees of right to strike where their demand for wage increase was not complied with.—Bayonne Textile Corp. v. American Federation of Silk Workers, 172 A. 551, 116 N.J.Eq. 146, 92 A.L.R. 1450.

§ 82. Part Performance, Abandonment, or Discharge

Library References

Master and Servant ⇐48, 73(2) et seq.

65. N.Y.—Vin Clair v. Kall & Kall, Inc., 196 N.Y. S.2d 237, 23 Misc.2d 568.

Tex.—Ingram v. Dallas County Water Control and Imp. Dist. No. 7, Civ.App., 425 S.W.2d 366, err. ref. no rev. err.

page 514

69. La.—Vanacor v. St. Amant, App., 379 So.2d 769.

Pa.—Cuffaro v. Planetary Linen Supply, Inc., 78 York 189.

§ 83. —— Abandonment of Service

Library References

Corbin on Contracts § 677.

72. Mo.—Boyle v. Higman Equipment Co., Inc., 597 S.W.2d 205.

N.Y.—Maloney v. Jarco Metal Products Corp., 144 N.Y.S.2d 128—Pellett v. Tom Tex Corp., 77 N.Y. S.2d 900.

74. D.C.—Winkler v. Frank-Cunningham Stores Corp., App., 256 A.2d 905.

76. D.C.—Winkler v. Frank-Cunningham Stores Corp., App., 256 A.2d 905.

77. U.S.—Martin v. Lincoln Park West Corp., C.A. Ill., 219 F.2d 622.

81. U.S.—Morris v. Federated Mut. Ins. Co., C.A. Fla., 497 F.2d 538.

D.C.—Winkler v. Frank-Cunningham Stores Corp., App., 256 A.2d 905.

82. U.S.—Bird v. Computer Technology, Inc., D.C. N.Y., 364 F.Supp. 1336.

Wash.—Sullivan v. Boeing Aircraft Co., 187 P.2d 312, 174 A.L.R. 566.

§ 84. —— Temporary Absences in General

page 515

86. Ind.—American Central Mfg. Corp. v. Review Bd. of Ind. Employment Sec. Division, 88 N.E.2d 256, 119 Ind.App. 98.

Wash.—In re Buffelen Lumber & Mfg. Co., 201 P.2d 194, 32 Wash.2d 205.

87. Me.—G. H. Bass & Co. v. Maine Employment Sec. Commission, 250 A.2d 492.

88. U.S.—MacLaughlin v. Union Switch & Signal Company, C.C.A.Pa., 166 F.2d 46.

Del.—State ex rel. Hirst v. Black, supra, n. 40.

Ind.—American Central Mfg. Corp. v. Review Bd. of Ind. Employment Sec. Division, supra, n. 86.

N.J.—Botany Mills, Inc. v. Textile Workers Union of America, AFL-CIO, 141 A.2d 107, 50 N.J.Super. 18.

Pa.—United Mine Workers of America v. Monheim, 11 Fay.Co.Leg.J. 17.

Wis.—Darling v. Electric Auto-Lite Co., 90 N.W.2d 597, 4 Wis.2d 345.

Continuous work held required

U.S.—In re Pringle Engineering & Mfg. Co., C.C.A.Ill., 164 F.2d 299.

N.Y.—Pellett v. Tom Tex Corp., supra, n. 74.

Liability wholly contractual

U.S.—Local 7-644, Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Mobil Oil Co., C.A. Ill., 350 F.2d 708, cert. den. 86 S.Ct. 563, 382 U.S. 986, 15 L.Ed.2d 474—Woody v. Sterling Aluminum Products, Inc., D.C.Mo., 243 F.Supp. 755, affd. C.A., 365 F.2d 448, cert. den. 87 S.Ct. 1026, 386 U.S. 957, 18 L.Ed.2d 105, reh. den. 87 S.Ct. 1371, 386 U.S. 1027, 18 L.Ed.2d 471.

Minn.—Tynan v. KSTP, Inc., 77 N.W.2d 200, 247 Minn. 168.

Mo.—Brackett v. Easton Boot & Shoe Co., 388 S.W.2d 842.

Tex.—Interstate Hosts, Inc. v. Thompson, Civ.App., 435 S.W.2d 957.

Seniority

Mich.—Treloar v. Steggeman, 52 N.W.2d 647, 333 Mich. 166.

Paid holiday during contractual vacation period

Or.—Massey v. Oregon-Washington Plywood Co., 353 P.2d 1039, 223 Or. 139.

"Vacation pay" as deferred compensation in lieu of wages

U.S.—In re Wil-Low Cafeterias, C.C.A.N.Y., 111 F.2d 429—General Tire & Rubber Co. v. Local No. 512, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, D.C.R.I., 191 F.Supp. 911, affd., C.A., 294 F.2d 957.

N.J.—Botany Mills, Inc. v. Textile Workers Union, 141 A.2d 107, 50 N.J.Super. 18.

Pa.—Department of Labor and Industry, Bureau of Employment Sec. v. Unemployment Compensation Bd. of Review, 218 A.2d 847, 207 Pa.Super. 506.

Requirements

Wis.—Briggs v. Electric Auto-Lite Co., 155 N.W.2d 32, 37 Wis.2d 275.

89. Ark.—Southwestern Bell Tel. Co. v. Thronbrough, 341 S.W.2d 1, 232 Ark. 929.

90. N.Y.—In re Brooklyn Citizen, 90 N.Y.S.2d 99, 1 Misc.2d 162.

§ 85. —— Sickness, Death, or Other Disability

96. Mass.—Kowal v. Sportswear by Revere, Inc., 222 N.E.2d 778, 351 Mass. 541.

N.Y.—Augusta v. John Hancock Mut. Life Ins. Co., 170 N.Y.S.2d 908, 11 Misc.2d 111.

N.C.—Briggs v. American & Efird Mills, Inc., 111 S.E.2d 841, 251 N.C. 642.

Page 515

Recovery permitted

N.Y.—Kipe v. Banknote Corp., 284 N.Y.S.2d 745, 55 Misc.2d 245, affd. 285 N.Y.S.2d 262, 28 A.D.2d 1209.

98. Neb.—Oehlrich v. Gateway Realty of Columbus, Inc., 308 N.W.2d 327, 209 Neb. 417.

Right of widow of employee

U.S.—Mitchell v. Lancaster Milk Co., D.C.Pa., 185 F.Supp. 66.

page 516

2. Del.—State ex rel. Hirst v. Black, Super., 83 A 2d 678, 7 Terry 295.

§ 87. —— Discharge for Cause

Library References

Master and Servant ⇐73(5).

8. U.S.—Nuelsen v. Sorensen, C.A.Cal., 293 F.2d 454 —Union News Co v. Hildreth, C.A.Mich., 295 F.2d 658.

Ariz.—Bentson Contracting Co. v. Lewis, 317 P.2d 545, 83 Ariz. 110.

Cal.—Glassell v. Prentiss, 346 P.2d 895, 175 C.A.2d 599.

Pa.—Awner v. Halpern, 65 Pa.Dist. & Co. 580.

Wis.—Georgiades v. Glickman, 75 N.W.2d 573, 272 Wis. 257.

Employee held not entitled to severance pay in lieu of notice

D.C.—Taylor v. Greenway Restaurant, Inc., Mun.App., 173 A.2d 211.

9. N.Y.—Pictorial Films v. Salzburg, 106 N.Y.S.2d 626.

10. Ohio—Hosking v. Hollaender Mfg. Co., 175 N.E.2d 201, 114 Ohio App. 70.

S.C.—C.J.S. cited in Berry v. Goodyear Tire & Rubber Co., 242 S.E.2d 551, 553, 270 S.C. 489.

11. La.—Steedley v. Winbarg, App., 44 So.2d 193—Aymond v. Haas Inv. Co., App., 59 So.2d 479.

Mass.—Mahoney v. Hildreth & Rogers Co., 125 N.E.2d 788, 332 Mass. 496.

N.C.—Briggs v. American & Efird Mills, Inc., 111 S.E.2d 841, 251 N.C. 642.

Tex.—C.J.S. cited in Martin v. Mann Merchandising, Inc., 570 S.W.2d 208, 211, err. ref. no rev. err., Sup., 576 S.W.2d 781.

Wyo.—Willis v. Asbury Transp. Co., 386 P.2d 934.

Rule under statute

U.S.—Standard Fruit & S.S. Co. v. Hampton, C.A.La., 233 F.2d 782.

Recovery allowed up to date of new employment

Ohio—Schnee v. Klug Trucking Co., 185 N.E.2d 661.

12. Okl.—Sooner Broadcasting Co. v. Grotkop, 280 P.2d 457.

Tex.—C.J.S. cited in Rubin v. Skurka, Civ.App., 355 S.W.2d 555.

Wis.—Georgiades v. Glickman, 75 N.W.2d 573, 272 Wis. 257.

page 517

13. Ga.—Hosea v. Sohio Petroleum Co., 230 S.E.2d 138, 140 Ga.App. 177.

Minn.—Mair v. Southern Minn. Broadcasting Co., 32 N.W.2d 177, 226 Minn. 137, 4 A.L.R.2d 273.

18. U.S.—Harbridge v. Greyhound Lines, Inc., D.C. Pa., 294 F.Supp. 1059.

Cal.—Division of Labor Law Enforcement v. Standard Coil Products Co., 288 P.2d 637, 136 C.A.2d Supp. 919.

Miss.—Livestock Feeds v. Local Union No. 1634 of Congress of Indus. Workers, 73 So.2d 128, 221 Miss. 492.

N.J.—Kidde Mfg. Co. v. United Elec. Radio & Mach. Workers of America, Local 437, 99 A.2d 210, 27 N.J.Super. 183.

N.C.—Calvine Cotton Mills, Inc. v. Textile Workers Union of America, 79 S.E.2d 181, 238 N.C. 719.

19. Minn—Edelstein v Duluth, M. & I.R. Ry. Co., 31 N.W.2d 465, 225 Minn 508.

Discharge for cause held not to preclude earned vacation pay rights in absence of agreement

D.C.—Jones v. District Parking Management Co., App., 268 A.2d 860.

20. U.S.—Patent & Licensing Corp. v. Olsen, C.A. N.Y., 188 F.2d 522—Bullock v. Sterling Drug, D.C.Pa., 93 F.Supp. 371, affd. C.A., 187 F.2d 145.

Cal.—Chinn v. China Nat. Aviation Corp., 291 P.2d 91, 138 C.A.2d 98.

Ga.—McCoy v. Buckhead Clinic Professional Ass'n, 182 S.E 2d 798, 123 Ga.App. 853—Salvatori Corp. v. Rubin, 283 S.E.2d 326, 159 Ga.App. 369.

Idaho—Kingsford v. Bennion, 199 P.2d 625, 68 Idaho 501.

La.—Krison v. Texas Industries, Inc., App., 253 So.2d 614.

Me.—Talberth v. Guy Gannett Pub. Co., 100 A.2d 726, 149 Me 286, 40 A.L.R.2d 1036.

Mich.—Cain v. Allen Elec. & Equipment Co., 78 N.W.2d 296, 346 Mich. 568.

Mo.—Hinkeldey v. Cities Service Oil Co., 470 S.W.2d 494.

N.J.—Owens v. Press Pub. Co., 120 A.2d 442, 20 N.J. 537—Adams v. Jersey Central Power & Light Co., 120 A.2d 737, 21 N.J. 8.

N.Y.—In re Brooklyn Citizen, 90 N.Y.S.2d 99, 1 Misc.2d 162—Hirsch v. Associated Amusement Machine Operators of N.Y., 127 N.Y S.2d 82, 205 Misc. 105.

Va.—Hercules Powder Co. v. Brookfield, 53 S.E.2d 804, 189 Va. 531.

Lack of notice of discharge

(2) Other statements.

Ill.—Bircher v. Goedde Lumber Co., App., 159 N.E.2d 21, 22 Ill.App.2d 141.

Sale of plant with re-hiring by new owner

Wis.—Demerath v. Nestle Co., Inc., App., 358 N.W.2d 541, 121 Wis.2d 194.

Representations by employer's agent as commitment to pay severance

Ohio—Helle v. Landmark, Inc., 472 N.E.2d 765, 15 Ohio App.3d 1, 15 O.B.R. 22.

Defined

U.S.—Gayner v. The New Orleans, D.C.Cal., 54 F.Supp. 25, 28.

Conn.—Mace v. Conde Nast Publications, Inc., 237 A.2d 360, 155 Conn. 680.

Purpose

N.J.—Owens v. Press Pub. Co., 111 A.2d 796, 34 N.J.Super. 203, affd. 120 A.2d 442, 20 N.J. 537.

Individual or collective bargaining contract as basis

Ala.—U.S. Pipe & Foundry Co. v. Nettles, 96 So.2d 186, 39 Ala.App. 115, cert. den. 96 So.2d 195, 266 Ala. 700.

Right held not forfeited

Ark.—Kerr v. Walker, 321 S.W.2d 220, 229 Ark. 1054.

Right held forfeited

La.—White v. Crane Co., App., 147 So.2d 32.

Mich.—Kolka v. Atlas Chemical Industries, 164 N.W.2d 755, 13 Mich.App. 580.

N.Y.—Bravin v. Fashion Week, Inc., 348 N.Y.S.2d 681, 75 Misc.2d 753.

Pro rata vacation pay

Ala.—Woodward Iron Co. v. Ramey, 175 So.2d 748, 42 Ala.App. 637, cert. den. 175 So.2d 749, 278 Ala. 713.

Nature of "separation pay" stated

Conn.—Willets v. Emhart Mfg. Co., 208 A.2d 546, 152 Conn. 487.

Kan.—Commodore v. Armour & Co., 441 P.2d 815, 201 Kan. 412.

Not recoverable in absence of agreement

Nev.—Loma Linda University v. Eckenweiler, 469 P.2d 54, 86 Nev. 381.

Tex—Mason v. Babin, Civ.App., 474 S.W.2d 809, err. ref. no rev. err.

No right to severance pay in absence of contract provision

Minn.—Lundeen v. Cozy Cab Mfg. Co., 179 N.W.2d 73, 288 Minn. 98.

Buyer of plant as payor of severance benefits

U.S.—Hall v. Simkins Industries, Inc., D.C.Ga., 584 F.Supp. 955, affd. 732 F.2d 132.

21. Me.—Talberth v. Guy Gannett Pub. Co., supra, n. 20.

Conditions imposed by contract

Ark.—Griffith v. Melbourn, 430 S.W.2d 862, 245 Ark. 40.

22. Mass.—Kroeger v. Stop & Shop Companies, Inc., 432 N.E.2d 566, 13 Mass.App. 310, review den. 440 N.E.2d 1175, 386 Mass. 1102.

§ 88. —— Consent or Option to Terminate

32. Cal.—Chapin v. Fairchild Camera & Instrument Corp., 107 Cal.Rptr. 111, 31 C.A.3d 192.

27. U.S.—Raynor v. Burroughs Corp., D.C.Va., 294 F.Supp. 238.

Notice condition precedent

Kan.—Sweet v. Stormont Vail Regional Medical Center, 647 P.2d 1274, 231 Kan. 604, disapproving Richardson v. St. Mary Hospital, 6 Kan.App.2d 238, 627 P.2d 1143, and Lindstrom v. St. Francis Hosp. & Med. Center, Inc., 6 Kan.App.2d 948, 636 P.2d 231.

page 518

29. La.—Hebert v. Mayeur & Co., Inc., App., 296 So.2d 446.

§ 89. —— Indefinite Term

33. N.C.—Long v. Gilliam, 94 S.E.2d 585, 244 N.C. 548.

34. Tex.—C.J.S. cited in Rubin v. Skurka, Civ.App., 355 S.W.2d 555.

§ 90. Commissions

Library References

Master and Servant ⇐70(2).

36. U.S.—Burnham v. Louis Meyers & Son, C.A. N.Y., 172 F.2d 84—Wilson v. Homestead Valve Mfg. Co., C.A.Pa., 217 F.2d 792, cert. den. 75 S.Ct. 606, 349 U.S. 916, 99 L.Ed. 1250—Gunderson v. Friden, Inc., C.A.Ky., 372 F.2d 303, stating California law—Cody v. Beckman Instruments, Inc., C.A.Mass., 433 F.2d 1260.

Cal.—Henigson v. Bank of America Nat. Trust & Sav. Ass'n, 195 P.2d 777, 32 Cal.2d 240.

Colo.—National Cash Register Co. v. Lightner, 388 P.2d 781, 154 Colo. 98—Brad Wolff & Associates, Inc. v. Perrin, App., 470 P.2d 887—Barocas v. Bohemia Import Co., Inc., 518 P.2d 850, 33 Colo. App. 263.

Ga.—Alexander-Seewald Co. v. Questa, 175 S.E.2d 92, 121 Ga.App. 611.

Ill.—Milligan v. Calumet Flexicore Corp., 171 N.E.2d 232, 28 Ill.App.2d 242—Powell v. R. J. Anderson, Inc., 260 N.E.2d 103, 124 Ill.App.2d 1.

La.—Eastman v. Gamble, App., 39 So.2d 642—Mitchell v. Alamis Co., App., 48 So.2d 278.

Mass.—Nutting v. Kneeland, 105 N.E.2d 199, 328 Mass. 497—Kowal v. Sportswear by Revere, Inc., 222 N.E.2d 778, 351 Mass. 541.

N.J.—Rothman Realty Corp. v. MacLain, 84 A.2d 482, 16 N.J.Super. 280, affd. 91 A.2d 101, 21 N.J.Super. 172.

N.Y.—Richard M. Krause, Inc. v. Gardner, 99 N.Y. S.2d 592—Corris v. White, 289 N.Y.S.2d 371, 29 A.D.2d 470.

Okl.—Sooner Broadcasting Co. v. Grotkop, 280 P.2d 457.

Or.—Flaherty v. Bookhultz, 297 P.2d 856, 207 Or. 462.

Pa.—Stein v. Arjay Machine Co., 10 D. & C.2d 755, affd. 137 A.2d 460, 391 Pa. 50.

R.I.—Oken v. National Chain Co., 424 A.2d 234.

Commissions accruing after termination of employment

U.S.—Richer v. Khoury Bros., Inc., C.A.Ill., 341 F.2d 34—Marcin v. Darling Valve & Mfg. Co., D.C.Pa., 259 F.Supp. 720.

Fla.—Linton v. Pension Services Corp., App., 389 So.2d 247—Mitchell v. Frederich, App. 3 Dist., 431 So.2d 727, review den. 441 So.2d 631.

La.—Bacon v. Scofield's Quality Printers, Inc., App., 212 So.2d 724.

Minn.—Lundeen v. Cozy Cab Mfg. Co., 179 N.W.2d 73, 288 Minn. 98.

N.H.—Elliott v. Clyde Garfield Oldsmobile-Cadillac, Inc., 222 A.2d 215, 107 N.H. 363.

N.Y.—Mackie v. La Salle Industries, Inc., 460 N.Y.S.2d 313, 92 A.D.2d 821, app. dism. in part 450 N.E.2d 248, 59 N.Y.2d 750, 463 N.Y.S.2d 442—Parisi v. Swift, 468 N.Y.S.2d 841, 121 Misc.2d 787, affd. 494 N.Y.S.2d 90, 128 Misc.2d 388.

37. Wash.—Sandeman v. Sayres, 314 P.2d 428, 50 Wash.2d 539.

38. Fla.—Bretthauer v. Walton, App., 156 So.2d 771.

Ill.—Gorenz v. Truax-Traer Coal Co., 358 N.E.2d 1352, 3 Ill.Dec. 667, 45 Ill.App.3d 17.

N.Y.—Jennings v. Burlington Industries, Inc., 233 N.Y.S.2d 643, 17 A.D.2d 188.

Tex.—Guardian Financial Corp. of Beaumont v. Rollins, Civ.App., 312 S.W.2d 553, err. ref. no rev. err.

Commission on purchase by employee for personal benefit

N.C.—Thompson v. ALD, New York, Inc., 121 S.E.2d 554, 255 N.C. 321.

page 519

39. Ariz.—Richard H. Huff Realty, Inc. v. Andrews, App., 564 P.2d 93, 115 Ariz. 142.

Nev.—Shuler v. Kraft, 337 P.2d 277, 75 Nev. 196.

40. Ill.—Heuvelman v. Triplett Elec. Instrument Co., 161 N.E.2d 875, 23 Ill.App.2d 231—Evaskus v. Neff, Kohlbusch & Bissell, Inc., 189 N.E.2d 542, 40 Ill.App.2d 416.

Tex.—Panhandle Broadcasting Co. v. Cercy, Civ App., 363 S.W.2d 792.

Wis.—Rath v. Doerfler, 151 N.W.2d 151, 35 Wis.2d 494.

Necessity of writing. Under a statute providing that oral contracts for commissions for the sale of real estate shall be unenforceable, recovery of such commissions on any theory of oral contract of employment will be denied.[40.5]

40.5. Tex.—Casebolt v. Olivier, Civ.App., 298 S.W.2d 841, err. dism.

47. U.S.—Marcin v. Darling Valve & Mfg. Co., D.C. Pa., 259 F.Supp. 720—Diaz v. Indian Head, Inc., C.A.Ill., 686 F.2d 558.

Colo.—Weick v. Richenbaugh Cadillac Co., 303 P.2d 685, 134 Colo. 283.

Ill.—Evaskus v. Neff, Kohlbusch & Bissell, Inc., 189 N.E.2d 542, 40 Ill.App.2d 416.

Mass.—Kowal v. Sportswear by Revere, Inc., 222 N.E.2d 778, 351 Mass. 541.

Mo.—Mathews v. Knoll Associates, Inc., App., 388 S.W.2d 529.

N.Y.—Sommer v. Edward Ermold Co., 92 N.Y.S.2d 326, 275 App.Div. 629—Mott v. Godd Roads Machinery Co. of N.Y., 102 N.Y.S.2d 781, 277 App. Div. 677, affd. 100 N.E.2d 186, 302 N.Y. 918.

On shipments or orders received before time employment ends

U.S.—Dana Perfumes, Inc. v. Mullica, C.A.Cal., 268 F.2d 936.

Fla.—Abbott v. Tec-Mill & Supply, Inc., App., 178 So.2d 881.

N.Y.—Bruce v. Langtry Limited, 223 N.Y.S.2d 713, affd. 239 N.Y.S.2d 655, 18 A.D.2d 1138.

48. Ind.—Vector Engineering and Mfg. Corp. v. Pequet, App., 431 N.E.2d 503.

Or.—Lenchitsky v. H. J. Sandberg Co., 343 P.2d 523, 217 Or. 483.

49. Cal.—Gantner & Mattern Co. v. Hawkins, 201 P.2d 847, 89 Cal.App.2d 783.

New salary basis before filing of orders

N.Y.—Bayer v. Oxford University Press, 61 N.Y.S.2d 209, 270 App.Div 586, rearg. den. 62 N.Y.S.2d 843, 270 App.Div. 929, affd. 71 N.E.2d 215, 296 N.Y. 780.

Promotional allowances paid to dealer

Mo.—Mater v. Hupp Corp., 326 S.W.2d 99.

50. U.S.—Jacobi v. International Business Machines Corp., D.C.S.C., 277 F.Supp. 709, affd., C.A., 404 F.2d 354.

Ga.—Vulcan Materials Co. v. Douglas, 205 S.E.2d 84, 131 Ga.App. 21.

Ohio—Johnson v. McKinney, 103 N.E.2d 825, 90 Ohio App. 111.

52. U.S.—Pulcir, Inc. v. Artronix, Inc., D.C.Tenn., 457 F.Supp. 93.

Cal.—Meadows v. Emett & Chandler, 193 P.2d 785, 86 Cal.App.2d 1—Commeford v. Baker, 273 P.2d 321, 127 C.A.2d 911—Inglis v. Humphries, 4 Cal Rptr. 838, 180 C.A.2d Supp. 928.

Colo.—National Cash Register Co. v. Lightner, 388 P.2d 781, 154 Colo. 98.

Ga.—Schaffer v. Wolbe, 159 S.E.2d 924, 117 Ga.App. 118.

Ill.—Evaskus v. Neff, Kohlbusch & Bissell, Inc., 189 N.E.2d 542, 40 Ill.App.2d 416—Leon v. Max E. Miller & Son, Inc., 320 N.E.2d 256, 23 Ill.App 3d 694.

Mo.—Lusk v. Lyon Metal Products, 247 S.W.2d 617.

N.C.—Turner v. Atlantic Mortg. & Inv. Co., 233 S.E.2d 80, 32 N.C.App. 565, cert. den. 235 S.E.2d 788, 292 N.C. 735.

page 520

53. La.—Aymond v. Haas Inv. Co., App., 59 So.2d 479.

Retroactivity of modification

U.S.—Newcomb v. Commonwealth Life Ins. Co., C.A. Ind., 289 F.2d 740.

Provisions held ambiguous

Ala.—Taylor v. Riley, 133 So.2d 869, 272 Ala. 690.

54. N.Y.—Sommer v. Edward Ermold Co., 92 N.Y.S.2d 326, 275 App.Div. 629.

S.C.—Kitchens v. Lee, 69 S.E.2d 67, 221 S.C. 59.

Industry-accepted customs

N.Y.—Anderocci v. Wolf Sales & Service Corp., 433 N.Y.S.2d 799, 79 A.D.2d 559.

55. Ohio—Rottensteiner v. Cleveland Coca Cola Bottling Co., App., 78 N.E.2d 773.

56. U.S.—Shandor v. Wells Nat. Service Corp., D.C. Ga., 478 F.Supp. 12.

Cal.—Stark v. Kilgore, 197 P.2d 795, 87 Cal.App.2d 799.

Mich.—Moulton v. Lobdell-Emery Mfg. Co., 33 N.W.2d 804, 322 Mich. 307.

N.Y.—Horowitz v. La France Industries, 79 N.Y.S.2d 794, 274 App.Div. 46.

57. Ariz.—Allen v. Shadron, Inc. v. Cole, 416 P.2d 555, 101 Ariz. 122, op. supp. 419 P.2d 520, 101 Ariz. 341.

Ill.—Murray v. Fletcher, 417 N.E.2d 195, 48 Ill.Dec. 793, 93 Ill.App.3d 289.

Mo.—Burg v. Bonne Terre Foundry Co., App., 354 S.W.2d 303.

N.Y.—Bram v. Oppenheimer & Co., 170 N.Y.S.2d 146, 10 Misc.2d 944.

Tex.—Murray v. Brazzel, Civ.App., 438 S.W.2d 382, err. ref. no rev. err.

Utah—Bennett v. Robinson's Medical Mart, Inc., 417 P.2d 761, 18 Utah 2d 186.

Employee not entitled to recover

U.S.—Diaz v. Indian Head, Inc., C.A.Ill., 686 F.2d 558.

Ga.—Cramer v. Coastal States Life Ins. Co., 292 S.E.2d 112, 162 Ga.App. 519.

N.Y.—Wolkstein v. Beth Israel Medical Center, 427 N.Y.S.2d 547, 103 Misc 2d 1095.

58. La.—Franco v Kar Products, Inc, App. 4. Cir., 409 So.2d 1238.

63. **"Enrollment" of insurance clients**

Fla.—AV-MED, Inc. v. French, App. 3 Dist., 458 So 2d 67.

67. Ohio—Schoch v. Bloom, 212 N.E.2d 428, 5 Ohio Misc. 155.

77. U.S.—Marcin v. Darling Valve & Mfg. Co., D.C. Pa., 259 F.Supp. 720.

Ind.—Vector Engineering and Mfg. Corp. v. Pequet, App., 431 N.E.2d 503.

78. Colo.—Moorman Mfg. Co. v. Rivera, 395 P.2d 4, 155 Colo. 413.

80. Ala.—Taylor v. Riley, 133 So.2d 869, 272 Ala. 690.

Tex.—Metal Structures Corp. v. Bigham, Civ.App., 347 S.W.2d 270, err. ref. no rev. err.

Other terms have been construed.[82.5]

82.5. **"Gross profit"**

Tex.—J. R. Gray Co. v. Jacobs, Civ.App., 362 S.W.2d 167, err. ref. no rev. err.

"Benefit"

La.—Peltier v. Hebert, App., 245 So.2d 511.

"Projects"

Ga.—Wofac Corp. v. Hanson, 206 S.E.2d 614, 131 Ga.App. 725.

"50% of net"

U.S.—Silver v. Gene K. Kolber Advertising, Inc., D.C. Pa., 518 F.Supp. 939.

page 521

83. U.S.—Gunderson v. Friden, Inc., C.A.Ky., 372 F.2d 303, stating California law.

Ga.—Williamson v. Bank Bldg. and Equipment Corp. of America, 291 S.E.2d 124, 162 Ga.App. 295.

Ill.—Evaskus v. Neff, Kohlbusch & Bissell, Inc., 189 N.E.2d 542, 40 Ill.App.2d 416.

Mass.—Swaney v. Clark-Wilcox Co., 120 N.E.2d 281, 331 Mass. 471.

Minn.—Forseth v. J. F. Quest Foundry Co., 127 N.W.2d 699, 268 Minn. 16.

N.M.—Morris v. Miller & Smith Mfg. Co., 365 P.2d 664, 69 N.M. 238.

N.Y.—Maloney v. Jarco Metal Products Corp., 144 N.Y.S.2d 128.

Ohio—Wolf v. Hyman, 143 N.E.2d 633, 104 Ohio App. 32.

Tex.—Baca v. Weldon, Civ.App., 230 S.W.2d 552, err. ref. no rev. err.

Employment at "applicable time"

Tex.—Mitsubishi Aircraft Intern., Inc. v. Maurer, App., 675 S.W.2d 286.

85. Ariz.—Allen D. Shadron, Inc. v. Cole, 416 P.2d 555, 101 Ariz. 122, op. supp. 419 P.2d 520, 101 Ariz. 341.

86. Md.—Harris v. Wye Tree Experts, Inc., 330 A.2d 189, 273 Md. 454.

"Discretion" defined

Ariz.—Allen v. Shadron, Inc. v. Cole, 416 P.2d 555, 101 Ariz. 122, op. supp. 419 P.2d 520, 101 Ariz. 341.

§ 91. —— Advances

88. Ga.—Roxy Furniture & Novelty Co. v. Brand, 126 S.E.2d 295, 106 Ga.App. 104.

Ill.—Lannert v. Greyhound Computer Corp., 393 N.E.2d 70, 30 Ill.Dec. 415, 74 Ill.App.3d 495.

N.Y.—Royal Distributors Co. v. Friedman, 141 N.Y.S.2d 786.

Ohio—Harold Furnace Co. v. Junglas, 88 N.E.2d 586.

R.I.—Armfield v. Frank N. McClure, Inc., 75 A.2d 196, 77 R.I. 390.

Page 521

Tex.—Denton v. Berset, Civ.App., 212 S.W.2d 196.

Drawing account

(2) Iowa—Hubbard v. Marsh, 40 N.W.2d 488, 241 Iowa 163.

(5) Other matters.

La.—M & D Simon Co. v. Blanchard, App., 389 So.2d 401.

N.Y.—Bell-Hi Co., Inc. v. Pratt, 353 N.Y.S.2d 76, 77 Misc.2d 356.

Advance held not loan

N.Y.—Amos Parrish & Co. v. Kriegel, 219 N.Y.S.2d 443, 28 Misc.2d 501.

89. La.—Karno's v. Schneider, App., 39 So.2d 851.

Ohio—Harold Furnace Co. v. Junglas, supra, n. 88.

Tex.—Denton v. Berset, supra, n. 88.

page 522

93. N.Y.—Gray v. Lurie, 162 N.Y.S.2d 278, 3 A.D.2d 956.

94. U.S.—National Memorial Park, Inc. v. Geller, D.C.Md., 312 F.Supp. 707.

Pa.—Mersel v. Alper Blouse Co., 84 A.2d 382, 170 Pa.Super. 1.

96. U.S.—Sanger Bros. v. Smith, C.A.Tex., 211 F.2d 471.

99. Ga.—Foster v. Union Cent. Life Ins. Co., 119 S.E.2d 289, 103 Ga.App. 420.

La.—C.J.S. cited in Landry v. Huber, App., 138 So.2d 449, 451, 95 A.L.R.2d 499.

1. La.—Alco-Columbia Paper Service, Inc. v. Nash, App., 273 So.2d 630.

§ 92. —— Forfeiture of Right

Library References

Master and Servant ⇐73.

3. Ala.—James A. Head & Co. v Rolling, 90 So.2d 828, 265 Ala. 328.

Alaska—Calvo v. Calhoon, 559 P.2d 111.

Ariz.—Allen D. Shadron, Inc. v. Cole, 419 P.2d 520, 101 Ariz. 341.

Ark.—Miller v. Fairfield Bay, Inc., 446 S.W.2d 660, 247 Ark. 565.

Cal.—Willson v. Turner Resilient Floors, 201 P.2d 406, 89 Cal.App.2d 589.

Del.—Hyman Reiver & Co. v. Rose, 147 A.2d 500, 1 Storey 397.

Ga.—Peach State Ford Truck Sales, Inc. v. Davis, 258 S.E.2d 678, 151 Ga.App. 7.

Ill.—Smith v. Johnston, 391 N.E.2d 1092, 29 Ill.Dec. 409, 73 Ill.App.3d 601.

La.—Thibodeaux v. Dudley Downing and Associates, App., 340 So.2d 1000.

Mont.—Keneally v. Orgain, 606 P.2d 127, 186 Mont. 1.

Or.—C.J.S. quoted at length in Flaherty v. Bookhultz, 297 P.2d 856, 862, 207 Or. 462.

Pa.—Fulton v. General Elec. Supply Corp., 76 Pa.Dist. & Co. 401.

Tex.—Mead v. Johnson Group, Inc., 615 S.W.2d 685.

4. Cal.—Gantner & Mattern Co. v. Hawkins, 201 P.2d 847, 89 Cal.App.2d 783.

La.—Berteau v. Wiener Corp., App., 362 So.2d 806, writ den. 365 So.2d 242.

N.Y.—Bendevena v. Richard Fuchs Real Estate, Inc., 391 N.Y.S.2d 939, 89 Misc.2d 466.

Okl.—Sooner Broadcasting Co. v. Grotkop, 280 P.2d 457.

Tex.—C.J.S. cited in Rubin v. Skurka, Civ.App., 355 S.W.2d 555.

In a hiring at will, etc.

Mont.—Keneally v. Orgain, 606 P.2d 127, 186 Mont. 1.

5. Ala.—James A. Head & Co. v. Rolling, 90 So.2d 828, 265 Ala. 328.

Ga.—Basic Four Corp. v. Parker, 279 S.E.2d 241, 158 Ga.App. 117.

Ohio—Toulmin v. Becker, App., 124 N.E.2d 778.

Tex.—TM Productions, Inc. v. Nichols, Civ.App., 542 S.W.2d 704.

Provision held unconscionable, arbitrary, and unreasonable

Colo.—Moorman Mfg. Co. v. Rivera, 395 P.2d 4, 155 Colo. 413.

Absence of vested right in commissions

Tenn.—Bartlett v. Philip-Carey Mfg. Co., 392 S.W.2d 325, 216 Tenn. 323.

Employee's silence as waiver of breach

Mo.—Chemical Fireproofing Corp. v. Bronska, App., 542 S.W.2d 74.

6. Pa.—Malta v. Houck, 89 Pa.Dist. & Co. 82.

page 523

9. Pa.—Levan v. Royal Paper Products, Inc., 185 A.2d 801, 199 Pa.Super. 505.

Wash.—Ekman v. United Film Service, Inc., 335 P.2d 813, 53 Wash.2d 652.

11. U.S.—Entis v. Atlantic Wire & Cable Corp., C.A. N.Y., 335 F.2d 759.

14. Cal.—Gibbons v. Brewster, 186 P.2d 459, 82 Cal. App.2d 435.

§ 93. Profits or Products of Business

Library References

Modern Legal Forms Ch. 52A, Pension and Profit-Sharing Plans.

19. U.S.—H. B. Zachry Co. v. Terry, C.A.Tex., 195 F.2d 185, cert. den. 73 S.Ct. 14, 344 U.S. 819, 97 L.Ed. 637, reh den. 73 S.Ct. 163, 344 U.S. 882, 97 L.Ed. 683.

Cal.—Bishop v. Kelley, 224 P.2d 814, 100 Cal.App.2d 775.

Colo.—Helzer v. Mountain States Motors, Inc., App., 535 P.2d 517.

Ill.—Rudolph v. O.D. Jennings & Co., 186 N.E.2d 80, 38 Ill.App.2d 92—Finazzo v. Mid-States Finance Co., 211 N.E.2d 290, 63 Ill.App.2d 161.

Iowa—Moody v. Bogue, App., 310 N.W.2d 655.

Mo.—First Bank of Commerce v. Labor and Indus. Relations Commission of Missouri, App., 612 S.W.2d 39.

N.Y.—Turski v. Chiesa, 391 N.Y.S.2d 803, 89 Misc.2d 443, revd. on oth. grds. 396 N.Y.S.2d 667, 58 A.D.2d 828.

S.C.—Porter v. Pepsi-Cola Bottling Co. of Columbia, 147 S.E.2d 620, 247 S.C. 370, cert. den. 87 S.Ct. 61, 385 U.S. 827, 17 L.Ed.2d 63.

Tex.—Johnson v. Herren, Civ.App., 374 S.W.2d 253.

Elements of agreement

U.S.—Durkee v. Welch, D.C.Cal., 49 F.2d 339, 341.

Obligation to return advance given as guaranty in lieu of share of profits

N.J.—Joseph Toker, Inc. v. Cohen, 169 A.2d 838, 67 N.J.Super. 68.

Internal Revenue Code regulations not controlling

U.S.—Cowan v. Keystone Emp. Profit Sharing Fund, D.C.Mass., 449 F.Supp. 235, affd., C.A., 586 F.2d 888.

N.Y.—Barca v. Stein, 252 N.Y.S.2d 938, 44 Misc.2d 68, affd. 265 N.Y.S.2d 606, 24 A.D.2d 1080.

Discharge for participation in lawful strike held not voluntary termination of employment

Fla.—Goodman v. Winn-Dixie Stores, Inc., App., 240 So.2d 496.

20. Ga.—Brown Stove Works Inc. v. Kimsey, 167 S.E.2d 693, 119 Ga.App. 453.

21. Fla.—Marx v. Redd, App., 368 So.2d 101.

Mont.—McNulty v. Bewley Corp., 596 P.2d 474, 182 Mont. 260.

Agreements held not ambiguous

U.S.—Pollack v. Carlye Dress Corp., D.C.Mo., 76 F.Supp. 755.

Mo.—Schmidt v. Morival Farms, Sup., 240 S.W.2d 952, app. transf., App., 232 S.W.2d 215.

22. Fla.—Goodman v. Winn-Dixie Stores, Inc., App., 240 So.2d 496.

Ind.—Morton v. E-Z Rake, Inc., App., 397 N.E.2d 609.

Mass.—Epstein v. Felisway Motors, 80 N.E.2d 285, 323 Mass. 113.

page 524

23. U.S.—H. B. Zachry Co. v. Terry, C.A.Tex., 195 F.2d 185, cert. den. 73 S.Ct. 14, 344 U.S. 819, 97 L.Ed. 637, reh. den. 73 S.Ct. 163, 344 U.S. 882, 97 L.Ed. 683.

Mass.—Nutting v. Kneeland, 105 N.E.2d 199, 328 Mass. 497.

Termination from employment

N.H.—Brulotte v. Cormier Hosiery Mills, Inc., 387 A.2d 1162, 118 N.H. 432.

24. U.S.—H. B. Zachry Co. v. Terry, supra, n. 23.

Agreement construed

Cal.—Hyman v. Hyman, 220 P.2d 623, 98 Cal.App.2d 463—Foley v. U.S. Paving Co., 68 Cal.Rptr. 780, 262 C.A.2d 499.

Ga.—Jones v. Vulcan Maferials Co., 145 S.E.2d 268, 112 Ga.App. 402.

Ill.—Finazzo v. Mid-States Finance Co., 211 N.E.2d 290, 63 Ill.App.2d 161.

Ind.—Bollman v. Indianapolis Machinery Co., 276 N.E.2d 606, 150 Ind.App. 465.

Mo.—Thurman v. K. L. Koenig Realty Co., App., 423 S.W.2d 196.

Neb.—Lane v. Ogallala Livestock Commission Co., 147 N.W.2d 518, 181 Neb. 172.

N.J.—Evo v. Jomac, Inc., 289 A.2d 551, 119 N.J.Super. 7.

Pa.—Maloney v. Glosser, 235 A.2d 607, 427 Pa. 548—Levitt v. Billy Penn Corp., 283 A.2d 873, 219 Pa.Super. 499.

S.C.—Porter v. Pepsi-Cola Bottling Co. of Columbia, 147 S.E.2d 620, 247 S.C. 370, cert. den. 87 S.Ct. 61, 385 U.S. 827, 17 L.Ed.2d 63.

Tex.—Johnson v. Herren, Civ.App., 374 S.W.2d 253.

Wis.—Ruditys v. Wing, 260 N.W.2d 794, 81 Wis.2d 667.

What law governs

N.J.—Evo v. Jomac, Inc., 289 A.2d 551, 119 N.J.Super. 7.

25. U.S.—ITT Community Development Corp. v. Barton, D.C.Fla., 457 F.Supp. 224.

N.J.—Evo v. Jomac, Inc., 289 A.2d 551, 119 N.J.Super. 7.

Tex.—Frost v. Wells, Civ.App., 388 S.W.2d 235, err. dism.—Haggar Co. v. Rutkiewicz, Civ.App., 405 S.W.2d 462, err. ref. no rev. err.

Voluntarily leaving employment

U.S.—Kassab v. Ragnar Benson, Inc., D.C.Pa., 254 F.Supp. 830.

26. Tex.—Lloyds Cas. Insurer v. Castle, Civ.App., 268 S.W.2d 498, err. ref. no rev. err.

27. Ohio—Banks v. Canton Hardware Co., 103 N.E.2d 568, 156 Ohio St. 453.

30. N.C.—Moore v. Moore, 221 S.E.2d 384, 28 N.C. App. 381.

32. Mass.—Nutting v. Kneeland, 105 N.E.2d 199, 328 Mass. 497.

Tex.—Frost v. Wells, Civ.App., 388 S.W.2d 235, err. dism.

Forfeiture of rights

U.S.—Heublein v. C.I.R., C.A., 233 F.2d 426.

Cal.—Computer Sciences Corp. v. Ferguson, App., 74 Cal.Rptr. 86.

Colo.—Collister v. Board of Trustees of McGee Co. Profit Sharing Plan, 531 P.2d 989, 35 Colo.App. 241.

N.J—Evo v. Jomac, Inc., 289 A.2d 551, 119 N.J.Super. 7.

N.Y.—Friedman v. Romaine, 352 N.Y.S.2d 351, 77 Misc.2d 134.

Right held not vested

N.Y.—Barca v. Stein, 252 N.Y.S.2d 938, 44 Misc.2d 68, affd. 265 N.Y.S.2d 606, 24 A.D.2d 1080.

Utah—Pugh v. Stockdale & Co., 570 P.2d 1027.

Terms of agreement control

Colo.—Helzer v. Mountain States Motors, Inc., App., 535 P.2d 517.

Ga.—Hudgins & Co., Inc. v. Cole, 274 S.E.2d 462, 247 Ga. 182.

33. Cal.—Foley v. U.S. Paving Co., 68 Cal.Rptr. 780, 262 C.A.2d 499.

35. U.S.—Pollack v. Carlye Dress Corp., supra, n. 21.

Cal.—Foley v. U.S. Paving Co., 68 Cal.Rptr. 780, 262 C.A.2d 499.

36. U.S.—Pollack v. Carlye Dress Corp., supra, n. 21.

Ark.—Camfield Tires, Inc. v. Moseley, 487 S.W.2d 268, 253 Ark. 585.

38. U.S.—Pollack v. Carlye Dress Corp., supra, n. 21.

Va.—Safway Steel Scaffolds of Va., Inc. v. Coulter, 94 S.E.2d 541, 198 Va. 469.

Mo.—Schmidt v. Morival Farms, Sup., 240 S.W.2d 952, app. transf., App., 232 S.W.2d 215.

39. N.H.—Liberty v. Bourque Shoe Co., 208 A.2d 665, 106 N.H. 162.

N.J.—Smith v. Peninsula House, Inc., 167 A.2d 807, 65 N.J.Super. 341.

page 525

Ark.—**C.J.S. black letter summary quoted in** Carter Construction Co. v. Sims, 491 S.W.2d 50, 55, 253 Ark. 868.

40. Gross profits as including accounts receivable

Fla.—Ennis v. Warm Mineral Springs, Inc., App., 203 So.2d 514.

45. U.S.—Durkee v. Welch, supra, n. 19.

46. Colo.—Moorman Mfg. Co. v. Rivera, 395 P.2d 4, 155 Colo. 413.

Mo.—Thurman v. K. L. Koenig Realty Co., App., 423 S.W.2d 196.

48. Mo.—Sidney Smith, Inc. v. Steinberg, App., 316 S.W.2d 243.

49. Pa.—Vollet v. Pechenik, 67 York Leg.Rec. 35, affd. 380 Pa. 342, 110 A.2d 221.

§ 95. —— Drawing Account and Advances

page 526

56. La.—**C.J.S. cited in** Landry v. Huber, App., 138 So.2d 449, 451, 95 A.L.R.2d 499.

N.J.—**C.J.S. cited in** Joseph Toker, Inc. v. Cohen, 169 A.2d 838, 842, 67 N.J.Super. 68.

As not loans

La.—Grace v. Morales, App., 210 So.2d 60.

§ 96. Additional Compensation and Charges

Library References

Master and Servant ⟹72.

57. U.S.—McLanghlin v. Ford Motor Co., C.A.Mich., 269 F.2d 120.

Ala.—Webb v. Pioneer Ins. Co., Civ., 323 So.2d 373, 56 Ala.App. 484.

Cal.—Lisec v. United Air Lines, 149 Cal.Rptr. 847, 85 C.A.3d 969.

Ill.—Long v. Arthur Rubloff & Co., 327 N.E.2d 346, 27 Ill.App.3d 1013.

Ind.—Alfaro v. Stauffer Chemical Co., 362 N.E.2d 500, 173 Ind.App. 89.

N.Y.—Downing v. Hunt, Hill & Betts, 153 N.Y.S.2d 513, 1 Misc.2d 729, app. dism. 153 N.Y.S.2d 515, 2 A.D.2d 706.

Pa.—Guter v. Donaldson Iron Co., 69 Pa.Dist. & Co. 150, 23 Lehigh Co. L.J. 174.

58. U.S.—Gronlund v. Church & Dwight Co., Inc., D.C.N.Y., 514 F.Supp. 1304.

Cal.—Hill v. Aetna, 181 Cal.Rptr. 564, 130 C.A.3d 188.

La.—Goble v. E. S. Upton Printing Co., Inc., App., 377 So.2d 461, writ den., Sup., 380 So.2d 100.

Contracts for payment of additional compensation resulting from a so-called Employee Suggestion System will be given effect in accordance with the terms of the contract.[58.5]

58.5. U.S.—Raybestos-Manhattan, Inc. v. Rowland, C.A.S.C., 460 F.2d 697.

Mo.—Moore v. General Motors Corp., App., 558 S.W.2d 720.

Pa.—Schott v. Westinghouse Elec. Corp., 259 A.2d 443, 436 Pa. 279, 40 A.L.R.3d 1404.

Additional compensation based on "additional profit"

Wash.—Samuelsen v. Merry Mfg. Co., 314 P.2d 634, 50 Wash.2d 819.

Wis.—Rosploch v. Alumatic Corp. of America, 251 N.W.2d 838, 77 Wis.2d 76.

Employee held not entitled to recover

U.S.—Merrill v. Nat. Cash Register Co., C.A.Ariz., 492 F.2d 1037.

Ill.—Anderson v. Equitable Life Assur. Soc. of U.S., 308 N.E.2d 387, 17 Ill.App.3d 489.

Mich.—Rogensues v. Chrysler Corp., 180 N.W.2d 473, 24 Mich.App. 590.

Wash.—Calkins v. Boeing Co., 506 P.2d 329, 8 Wash. App. 347.

Fringe benefits are not a gift from the employer but are earned by the employee as part of the compensation for his services.[58.10]

Severance pay is a vested right incapable of retroactive modification.[58.15]

58.15. Ill.—Kulins v. Malco, a Microdot Co., Inc., 1 Dist., 459 N.E.2d 1038, 76 Ill.Dec. 903, 121 Ill App.3d 520.

59. U.S.-Textile Workers Union of America, C I O v. Williamsport-Textile Corp., D.C.Pa., 136 F.Supp. 407—In re Capital Service, D.C.Cal., 136 F.Supp. 430.

Cal.—Division of Labor Law Enforcement, Dept. of Indus. Relations v. Ryan Aeronautical Co., Super., 236 P.2d 236, 106 C.A.2d Supp. 833, 30 A.L.R.2d 347.

La.—Sewell v. Sharp, App., 102 So.2d 259.

Miss.—Livestock Feeds v. Local Union No. 1634 of Congress of Indus. Workers, 73 So.2d 128, 221 Miss. 492.

N.J.—Owens v. Press Pub. Co., 120 A.2d 442, 20 N.J. 537—Botany Mills, Inc. v. Textile Workers Union of America, AFL-CIO, 141 A.2d 107, 50 N.J.Super. 18.

N.Y.—**C.J.S. cited in** McKay v. Stewart, 298 N.Y.S.2d 829, 832, 59 Misc.2d 380, affd. 313 N.Y.S.2d 545, 35 A.D.2d 556, revd. on oth. grds. 272 N.E.2d 887, 29 N.Y.2d 563, 324 N.Y.S.2d 302, rearg. den. 326 N.Y.S.2d 398, 29 N.Y.2d 746, 276 N.E.2d 233, cert. den. 92 S.Ct. 1311, 405 U.S. 1040, 31 L.Ed.2d 581.

Wis.—Pattenge v. Wagner Iron Works, 82 N.W.2d 172, 275 Wis. 495—Valeo v. J.I. Case Co., 119 N.W.2d 384, 18 Wis.2d 578—Briggs v. Electric Auto-Lite Co., 155 N.W.2d 32, 37 Wis.2d 275.

Employer held liable for vacation pay

Cal.—Computer Sciences Corp. v. Ferguson, App., 74 Cal.Rptr. 86.

Tenn.—Textile Workers Union v. Brookside Mills, Inc., 341 S.W.2d 758, 47 Tenn.App. 663.

Definite time element as to period of employment held necessary

U.S.—In re Mid-West Metal Products, Inc., Bkrtcy. Kan., 13 B.R. 562.

Iowa—Drake v. Block, 74 N.W.2d 577, 247 Iowa 517.

Employer held not liable for vacation pay

Cal.—Division of Labor Law Enforcement v. Anaconda Copper Min. Co., 291 P.2d 169, 138 C.A.2d 92.

Mo.—Brackett v. Easton Boot & Shoe Co., 388 S.W.2d 842.

Work actually done

U.S.—Siaskiewicz v. General Elec. Co., C.C.A.N.Y., 166 F.2d 463.

On good faith termination of business

Cal.—Division of Labor Law Enforcement, Dept. of Indus. Relations v. Mayfair Markets, 227 P.2d 463, 102 Cal.App.2d Supp. 943.

Right arising from employment contract

U.S.—International Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW-AFL-CIO v. Hoosier Cardinal Corp., D.C.Ind., 235 F.Supp. 183, affd., C.A., 346 F.2d 242, affd. 86 S.Ct. 1107, 383 U.S. 696, 16 L.Ed.2d 192.

Right arising from employment control

Mo.—City of Webster Groves v. Institutional and Public Emp. Union, App., 524 S.W.2d 162.

60. U.S.—Tanaka v. Richard K. W. Tom, Inc., D.C. Hawaii, 299 F.Supp. 732.

61. U.S.—Harmon v. Martin Bros. Container & Timber Products Corp., D.C.Or., 227 F.Supp. 9.

§ 97. —— Extra Work

62. U.S.—De Pova v. Camden Forge Co., C.A.N.J., 254 F.2d 248, cert. den. 79 S.Ct. 26, 358 U.S. 816, 3 L.Ed.2d 59.

La.—Nassauer v. Marine Offshore Catering Co., Inc., App. 1 Cir., 413 So.2d 946.

Va.—Dulany Foods, Inc. v. Ayers, 260 S.E.2d 196, 220 Va. 502.

Election

Del.—Wolf v. Globe Liquor Co., Ch., 96 A.2d 236, 33 Del.Ch. 487, affd., Sup., 103 A.2d 774, 34 Del.Ch. 312.

63. Wis.—Pabst Brewing Co. v. Wisconsin Employment Relations Bd., 31 N.W.2d 515, 252 Wis. 346.

page 527

66. U.S.—Shipley v. Pittsburgh & L.E.R. Co., D.C. Pa., 83 F.Supp. 722.

Tex.—Marine Inspection Service, Inc. v. Alexander, Civ.App., 553 S.W.2d 185.

67. U.S.—Aird v. U.S., D.C.Pa., 116 F.Supp. 281, affd., C.A., 216 F.2d 149.

Wash.—Heasley v. Riblet Tramway Co., 416 P.2d 331, 68 Wash.2d 927.

"Overtime" defined

U.S.—Bay Ridge Operating Co. v. Aaron, N.Y., 68 S.Ct. 1186, 334 U.S. 446, 92 L.Ed. 1502, reh. den. 69 S.Ct. 10, 335 U.S. 838, 93 L.Ed. 389, reh. den. 69 S.Ct. 11, 335 U.S. 838, 93 L.Ed. 390.

Pa.—Kusner v. Pennsylvania Turnpike Commission, 61 Dauph.Co. 140.

Overtime habitually or customarily required

U.S.—Aviles v. U.S., 151 Ct.Cl. 1.

69. Or.—Henderson-Rubio v. May Dept. Stores Co., 632 P.2d 1289, 53 Or.App. 575.

71. U.S.—Baca v. U.S., 150 Ct.Cl. 70.

72. Hawaii—**C.J.S. cited in** Lim v. Motor Supply, Limited, 364 P.2d 38, 44, 45 Haw. 111, 198, 9 A.L.R.2d 1067.

Iowa—Drake v. Block, 74 N.W.2d 577, 247 Iowa 517.

La.—Duncan v. Paragon Resources, Inc., App. 3. Cir., 417 So.2d 850.

74. Iowa—Drake v. Block, 74 N.W.2d 577, 247 Iowa 517.

La.—Nassauer v. Marine Offshore Catering Co., Inc., App. 1 Cir., 413 So.2d 946.

75. Cal.—Sharpe v. Arabian Am. Oil Co., 244 P.2d 83, 111 C.A.2d 99.

Iowa—Drake v. Block, 74 N.W.2d 577, 247 Iowa 517.

N.Y.—Baron v. M. Lowenstein & Sons, 89 N.Y.S.2d 96, 275 App.Div. 805, affd. 89 N.E.2d 252, 300 N.Y. 530.

76. U.S.—Abbott v. American Mach. & Foundry Co., D.C.N.Y., 9 F.R.D. 310.

Cal.—Sharpe v. Arabian Am. Oil Co., supra, n. 75.

Iowa—Drake v. Block, 74 N.W.2d 577, 247 Iowa 517.

Page 527

N.C.—Brooks v. Carolina Tel. & Tel. Co., 290 S.E.2d 370, 56 N.C.App. 801.

Refusal of compensating time off

Mass.—Fraser v. Franzen, 156 N.E.2d 797, 338 Mass. 798.

79. Hawaii—Lim v. Motor Supply, Limited, 364 P.2d 38, 45 Haw. 111, 198, 9 A.L.R.2d 1067.

page 528

81. Mo.—Henderson v. Brown Elec. Supply Co., App., 555 S.W.2d 635.

84. Minn.—Chatfield v. Henderson, 90 N.W 2d 227, 252 Minn. 404.

Mo.—Henderson v. Brown Elec. Supply Co., App., 555 S.W.2d 635.

86. U.S.—Shipley v. Pittsburgh & L.E.R. Co., supra, n. 66.

§ 98. —— Bonus

88. U.S.—Chester v. Schleisner Co., D.C.Md, 167 F.Supp. 697.

Cal.—Division of Labor Law Enforcement Dept. of Indus. Relations v. Safeway Stores, 215 P.2d 773, 96 Cal.App.2d 481.

Ill.—Gustafson v. Lindquist, 351 N.E.2d 280, 40 Ill. App.3d 152.

Iowa—Drake v. Block, 74 N.W.2d 577, 247 Iowa 517.

Or.—Olson v. GAF Corp., 630 P.2d 921, 53 Or.App. 71.

Pa.—Specker v. Sun Ray Drug Co., 60 A.2d 400, 163 Pa.Super. 39.

S.D.—C.J.S. cited in Bushman v. Pure Plant Food Intern., Ltd., 330 N.W.2d 762, 766.

Tenn.—Ward v. Berry & Associates, Inc., App., 614 S.W.2d 372.

Tex.—Toch v. Eric Schuster Corp., Civ.App., 490 S.W.2d 618, err. ref. no rev. err.

Wash.—Sandeman v. Sayres, 314 P.2d 428, 50 Wash.2d 539.

Bonus as part of salary

(2) Bonuses becoming contractual term of employment.

S.D.—Bushman v. Pure Plant Food Intern., Ltd., 330 N.W.2d 762.

(3) Other matters.

U.S.—Hobson v. Eaton, C.A.Ohio, 399 F.2d 781, cert. den. 89 S.Ct. 1189, 394 U.S. 928, 22 L.Ed.2d 459.

Cal.—Lucian v. All States Trucking Co., 171 Cal.Rptr. 262, 116 C.A.3d 972.

Md.—MacIntosh v. Brunswick Corp., 215 A.2d 222, 241 Md. 24.

Tenn.—Garrison v. Lannom Mfg. Co., 402 S.W.2d 462, 55 Tenn.App. 419.

Va.—American Aircraft Engineering Corp. v. Melton, 179 S.E.2d 465, 211 Va. 562.

Bonus defined

Cal.—J. C. Peacock, Inc. v. Hasko, 16 Cal.Rptr 518, 196 C.A.2d 353, 88 A.L.R.2d 1430.

N.J.—Matter of Gregariou's Estate, 361 A.2d 636, 142 N.J.Super. 465, revd. on oth. grds. 378 A.2d 1168, 153 N.J.Super. 44.

Ohio—Kenney v. Spicer Furniture Co., App., 131 N.E.2d 265.

Contracts held sufficiently definite

Cal.—Sabatini v. Hensley, App., 326 P.2d 622, 161 C.A.2d 172.

Ind.—Colonial Mortg. Co. of Indiana, Inc. v. Windmiller, 376 N.E.2d 529, 176 Ind. App. 535.

Promise not established

U.S.—Newnam v. Remedial Ed. and Diagnostic Services, Inc., D.C.Pa., 519 F.Supp. 717.

Colo.—Arrow Mfg. Co. v. Ross, 346 P.2d 305, 141 Colo. 1.

Tex.—Douglass v. Panama, Inc., Civ.App., 487 S.W.2d 228, affd., Sup., 504 S.W.2d 776—Douglass v. Panama, Inc., 504 S.W.2d 776.

Wyo.—Day's Stores, Inc. v. Hopkins, 573 P.2d 1366.

89. Alaska—Orsini v. Lathrop Co., 12 Alaska 641.

Ind.—Spickelmier Industries, Inc. v. Passander, 359 N.E.2d 563, 172 Ind.App. 49.

Iowa—Hilgenberg v. Iowa Beef Packers, Inc., 175 N.W.2d 353

La.—Griffin v. Cambridge Const. Co., App., 236 So.2d 539, application not considered 238 So.2d 748, 256 La. 766.

N.C—Chew v Leonard, 44 S.E.2d 869, 228 N.C. 181.

Pa.—Tucker v. Tucker, 87 A.2d 650, 370 Pa. 8.

Consideration held sufficient

(1) Ariz.—Leone v. Precision Plumbing and Heating of Southern Arizona, Inc., 591 P.2d 1002, 121 Ariz 514.

Ill.—Gustafson v. Lindquist, 351 N.E.2d 280, 40 Ill. App.3d 152.

Minn.—Hartung v. Billmeier, 66 N.W.2d 784, 243 Minn. 148.

N.Y.—Sarama v John Mee, Inc., 422 N.Y.S.2d 582, 102 Misc.2d 132.

Pa.—Landvater v. Pennsylvania Scale Co., 58 Lanc.Rev. 107.

Va.—Hercules Powder Co. v. Brook-Field, 53 S.E.2d 804, 189 Va. 531—Twohy v. Harris, 72 S.E.2d 329, 194 Va. 69.

Wash.—Brydges v. Coast Wide Land, Inc., 467 P.2d 209, 2 Wash.App. 223, 43 A.L.R.3d 496.

(2) Ga.—Management Search, Inc. v. Morgan, 222 S.E.2d 154, 136 Ga.App. 648.

Gratuity

(5) Other statements.

U.S.—Stone v. Moore, C.A.Tex, 375 F.2d 110—Hobson v. Eaton, C.A.Ohio, 399 F.2d 781, cert. den. 89 S.Ct. 1189, 394 U.S. 928, 22 L.Ed.2d 459.

Conn.—Borden v. Skinner Chuck Co., 150 A.2d 607, 21 Conn.Sup. 184.

Fla.—Parrish v. General Motors Corp., App., 137 So.2d 255.

Md.—MacIntosh v. Brunswick Corp., 215 A.2d 222, 241 Md. 24.

Tenn.—Garrison v. Lannom Mfg. Co., App., 402 S.W.2d 462, 55 Tenn.App. 419.

page 529

90. Ala.—Mutual Sav. Life Ins. Co. v. Montgomery, 347 So.2d 1327.

Ill.—Gustafson v. Lindquist, 351 N.E.2d 280, 40 Ill. App.3d 152.

Ky.—Roshong v. American Saw & Tool Co., 244 S.W.2d 974.

N.Y.—Mott v. Good Roads Machinery Co. of N.Y., 102 N.Y.S.2d 781, 277 App.Div. 677, affd. 100 N.E.2d 186, 302 N.Y. 918.

Ohio—Ellis v. Victor Elec. Products, 88 N.E.2d 275, 85 Ohio App. 170.

Or.—Walker v. American Optical Corp., 509 P.2d 439, 265 Or. 327.

Utah—Thatcher v. Wasatch Chemical Co., 507 P.2d 365, 29 Utah 2d 189.

W.Va.—Magruder v. Hagen-Ratcliff & Co., 50 S.E.2d 488, 131 W.Va. 679.

Bonuses for past services akin to wages

La.—Langford v. Cahn Elec. Co., Inc., App., 403 So.2d 833.

91. Ala.—Smith v. Dunlap, 111 So.2d 269 Ala. 97.

Conn.—Borden v. Skinner Chuck Co., 150 A.2d 607, 21 Conn.Sup. 184.

Iowa—Merrick v. Delavan Engineering Co., 50 N.W.2d 586, 243 Iowa 39.

Mass.—Fortune v. National Cash Register Co., 349 N.E.2d 350, 4 Mass.App. 386, revd. on oth. grds., 364 N.E.2d 1251, 373 Mass. 96.

Mo.—Croskey v. Kroger Co., App., 259 S.W.2d 408.

Wis.—Marek v. Knab Co., 103 N.W.2d 31, 10 Wis.2d 390.

Computation

Ark.—Kerr v. Walker, 321 S.W.2d 220, 229 Ark. 1054.

Fla.—Francoeur v. Howell, App., 250 So.2d 305.

Idaho—Chick v. Tomlinson, 531 P.2d 573, 96 Idaho 483.

Wash.—Brydges v. Coast Wide Land, Inc., 467 P.2d 209, 2 Wash App. 223, 43 A.L.R.3d 496.

92. Ala.—Summers v. Ralston Purina Co., 69 So.2d 858, 260 Ala. 166.

N.C.—Chew v. Leonard, supra, n. 89.

Payment in cash or stock

U.S.—Fujimoto v. Rio Grande Pickle Co., C.A.Tex., 414 F.2d 648.

93. Ill.—Skalski v. Encyclopaedia Britannica, Inc., 113 N.E.2d 80, 350 Ill.App. 320.

95. U.S.—Hainline v. General Motors Corp., C.A. Mich., 444 F.2d 1250.

Ill—Lipton v. Pennsylvania Rubber Co., 116 N.E.2d 923, 1 Ill.App.2d 223.

Md.—MacIntosh v. Bunswick Corp., 215 A.2d 222, 241 Md. 24.

Ohio—Ellis v. Victor Elec. Products, supra, n. 90.

Or.—Thompson v. Burr, 490 P.2d 157, 260 Or. 329.

R.I.—Peloquin v. Arden Engineering Co., 248 A.2d 316, 104 R.I. 671.

Va.—C.J.S. quoted at length in Hercules Powder Co. v. Brookfield, 53 S.E.2d 804, 809, 189 Va. 531.

Wash.—Spooner v Reserve Life Ins. Co., 287 P.2d 735, 47 Wash.2d 454.

Bonus provision held not subject to cancellation provision

Cal.—Computer Sciences Corp v. Ferguson, App., 74 Cal.Rptr. 86.

Bonus held subject to cancellation

N.Y.—Gilsey v. Wm. Hengerer Co., 147 N.Y.S.2d 210, 1 A.D.2d 758.

Implied contract renewal

Tex.—Miller v. Riata Cadillac Co., 517 S.W.2d 773.

96. Ala.—Patterson v. Brooks, 232 So.2d 598, 285 Ala. 349.

98. Ala.—American Sec. Life Ins. Co. v. Moore, 72 So.2d 132, 37 Ala.App. 552.

Cal.—Foley v. U.S. Paving Co., 68 Cal.Rptr. 780, 262 C.A.2d 499.

Mass.—Fortune v. National Cash Register Co., 364 N.E.2d 1251, 373 Mass. 96.

Mo.—C.J.S. cited in Hinkeldey v. Cities Service Oil Co., 470 S.W.2d 494, 501.

99. Mo.—C.J.S. cited in Croskey v. Kroger Co., App., 259 S.W.2d 408, 412.

Neb.—Feola v. Valmont Industries, Inc., 304 N.W.2d 377, 208 Neb. 527.

1. Ala.—Summers v. Ralston Purina Co., 69 So.2d 858, 260 Ala. 166.

Ill.—Mosow v. National Lock Co., 255 N.E.2d 500, 119 Ill.App.2d 232.

Tex.—Cactus Feeders, Inc. v. Wittler, Civ.App., 509 S.W.2d 934.

2. U.S.—Fujimoto v. Rio Grande Pickle Co., C.A. Tex., 414 F.2d 648.

Colo.—Steidtmann v. Koelbel & Co., 506 P.2d 1247, 32 Colo.App. 94.

La—Griffin v Cambridge Const. Co., App., 236 So.2d 539, application not considered 238 So.2d 748, 256 La. 766.

N.Y.—Rifkind v. Web IV Music, Inc., 323 N.Y.S.2d 326, 67 Misc.2d 26.

3. U.S.—Judd v. Wasie, C.A.Minn., 211 F.2d 826—Kassab v. Ragnar Benson, Inc., D.C.Pa., 254 F.Supp. 830.

Mo.—Burns v. Lewis-Howe Co., App., 266 S.W.2d 14.

N.Y.—Teich v. Aetna Indus. Corp., 174 N.Y.S.2d 743, 11 Misc.2d 530, revd. on oth. grds. 184 N.Y.S.2d 556, 8 A.D.2d 596, rearg. den. and app. gr. 187 N.Y.S.2d 978, 8 A.D.2d 782, affd. 201 N.Y.S.2d 780, 8 N.Y.2d 766, 168 N.E.2d 114.

Christmas bonus

Okl.—Frazer & Torbett, CPA's v. Kunkel, 401 P.2d 476.

page 530

4. Conn.—Borden v. Skinner Chuck Co., 150 A.2d 607, 21 Conn.Sup. 184.

Ill.—Mapes v. Kalva Crop., 386 N.E.2d 148, 24 Ill.Dec. 944, 68 Ill.App.3d 362.

Minn.—Hartung v. Billmeier, 66 N.W.2d 784, 243 Minn. 148.

N.Y.—Fisher v. Textron American, Inc., 158 N.Y.S.2d 974.

Pa.—Widmer v. Widmer, 106 A.2d 875, 176 Pa.Super. 264.

Incentive pay inducement

Ala.—W. B. Davis Hosiery Mill v. Wilson, 74 So.2d 532, 37 Ala.App. 675.

Regularly paid bonus for lengthy period

U.S.—Lincoln Elec. Co. v. C.I.R., C.A. Ohio, 444 F.2d 491.

6. U.S.—Kassab v. Ragnar Benson, Inc., D.C.Pa., 254 F.Supp. 830.

Ohio—Doberrer v. A. M. Harris Industries, Inc., 274 N.E.2d 575, 28 Ohio App.2d 71.

Or.—Walker v. American Optical Corp., 509 P.2d 439, 265 Or. 327.

7. D.C.—Schwartz Tailouring Co. v. Petty, Mun. App., 140 A.2d 63.

Ill.—Wilson v. LaSalle Mfg. & Mach. Co., 374 N.E.2d 30, 15 Ill.Dec. 737, 58 Ill.App.3d 219.

Wash.—Brydges v. Coast Wide Land, Inc., 467 P.2d 209, 2 Wash.App. 223, 43 A.L.R.3d 496.

10. Iowa—C.J.S. quoted in Hilgenberg v. Iowa Beef Packers, Inc., 175 N.W.2d 353, 356.

La.—Pizzeck v. Executone Systems Co. of Louisiana, Inc., App. 4 Cir., 411 So.2d 1202, writ den., Sup., 415 So.2d 944.

Mo.—Croskey v. Kroger Co., App., 259 S.W.2d 408—Swetnam v. U.S. By-Products Corp., App., 510 S.W.2d 829.

Neb.—Sinnett v. Hie Food Products, Inc., 174 N.W.2d 720, 185 Neb. 221.

N.C.—Chew v. Leonard, 44 S.E.2d 869, 228 N.C. 181.

Or.—Detrick v. Ranch Wholesale Supply of Redmond, Inc., 643 P.2d 1293, 57 Or.App. 28.

Wis.—Borg-Warner Corp., Ingersoll Kalamazoo Division v. Ostertag, 118 N.W.2d 900, 18 Wis.2d 484.

11. La.—Griffin v. Cambridge Const. Co., App., 236 So.2d 539, application not considered 238 So.2d 748, 256 La. 766.

12. Ind.—**C.J.S. quoted at length** in Dove v. Rose Acre Farms, Inc., App., 434 N.E.2d 931, 934.

N.M.—Pyeatt v. El Paso Natural Gas Co., 213 P.2d 436, 54 N.M. 70.

Wis.—Compton v. Shopko Stores, Inc., 287 N.W.2d 720, 93 Wis.2d 613.

Employee's winning of sales contest

N.Y.—Milich v. Schenley Industries, Inc., 387 N.Y.S.2d 641, 54 A.D.2d 659, affd. 367 N.E.2d 651, 42 N.Y.2d 952, 398 N.Y.S.2d 145.

13. U.S.—Wilson v. Homestead Valve Mfg. Co., C.A. Pa., 217 F.2d 792, cert. den. 75 S.Ct. 606, 349 U.S. 916, 99 L.Ed. 1250—Tiedman v. American Pigment Corp., C.A.Va., 253 F.2d 803—O'Madigan v. General Motors Corp., C.A.Mo., 312 F.2d 250—Kassab v. Ragnar Benson, Inc., D.C.Pa., 254 F.Supp. 830.

Ala.—American Sec. Life Ins. Co. v. Moore, 72 So.2d 132, 37 Ala.App. 552—Smith v. Dunlap, 111 So.2d 1, 269 Ala. 97.

Colo.—Ingwersen Mfg. Co. v. Maddocks, 195 P.2d 730, 118 Colo. 281.

Ga.—Williamson v. Bank Bldg. and Equipment Corp. of America, 291 S.E.2d 124, 162 Ga.App. 295.

Ill.—Mosow v. National Lock Co., 255 N.E.2d 500, 119 Ill.App.2d 232.

La.—Frazier v. Slumberline, Inc., App., 319 So.2d 453, writ ref., Sup., 323 So.2d 132.

N.Y.—Bayer v. Oxford University Press, 61 N.Y.S.2d 209, 270 App.Div. 586, rearg. den. 62 N.Y.S.2d 843, 270 App.Div. 929, affd. 71 N.E.2d 215, 298 N.Y. 780—Gilsey v. Wm. Hengerer Co., 139 N.Y. S.2d 1, 285 App.Div. 1007.

Okl.—McGraw v. Bill Hodges Truck Co., Inc., App., 629 P.2d 792.

Tex.—Kosberg v. Brown, Civ.App., 601 S.W.2d 414.

Utah—Pacific States Cast Iron Pipe Co. v. Harsh Utah Corp., 300 P.2d 610, 5 Utah 2d 244.

Subsequent conditions

W.Va.—Magruder v. Hagen-Ratcliff & Co., 50 S.E.2d 488, 131 W.Va. 679.

Voluntary termination of employment

La.—Comet v. Cahn Elec. Co., Inc., 434 So.2d 1052, overruling Langford v. Cahn Electric Co., Inc., 403 So.2d 833.

15. N.M.—Woods v. Collins, App., 533 P.2d 759, 87 N.M. 370, cert. den. 533 P.2d 758, 87 N.M. 369.

Ohio—Ellis v. Victor Elec. Products, 88 N.E.2d 275, 85 Ohio App. 170.

18. N.Y.—Squadrito v. Credito Italiano, 83 N.Y.S.2d 334, 193 Misc. 34.

W.Va.—Magruder v. Hagen-Ratcliff & Co., supra, n. 13.

Equitable estoppel

U.S.—Langenderfer v. Midrex Corp., C.A.N.C., 660 F.2d 523.

20. Cal.—Foley v. U.S. Paving Co., 68 Cal.Rptr. 780, 262 C.A.2d 499.

Iowa—Moody v. Bogue, App., 310 N.W.2d 655.

Discharged employee held entitled to bonus under circumstances.

Tex.—Marvin Turner Engineers v. Allen, Civ.App., 326 S.W.2d 200.

21. Ill.—Keefner v. Super X Drugs of Illinois, Inc., 315 N.E.2d 35, 21 Ill.App.3d 394.

La.—Seifert v. General Tire & Rubber Co., App., 381 So.2d 1262.

page 531

24. U.S.—O'Madigan v. General Motors Corp., D.C. Mo., 202 F.Supp 190, affd., C.A., 312 F.2d 250.

Cal.—Sabatini v. Hensley, 326 P.2d 622, 161 C.A.2d 172.

Iowa—Kollman v. McGregor, 39 N.W.2d 302, 240 Iowa 1331.

Minn.—Hartung v. Billmeier, 66 N.W.2d 784, 243 Minn. 148.

Mo.—Croskey v. Kroger Co., supra, n. 10.

25. Ill.—Tidwell v. Toyota Auto Mart, Inc., 375 N.E.2d 540, 16 Ill.Dec. 667, 59 Ill.App.3d 378.

Iowa—Kollman v. McGregor, 39 N.W.2d 302, 240 Iowa 1331.

27. Ala.—American Sec. Life Ins. Co. v. Moore, 72 So.2d 132, 37 Ala.App. 552.

Cal.—Computer Sciences Corp. v. Ferguson, App., 74 Cal.Rptr. 86.

Neb.—C.J.S. cited in Sinnett v. Hie Food Products, Inc., 174 N.W.2d 720, 722, 185 Neb. 221.

Remaining in position for one year

Ill.—Bartels v. Denler, 333 N.E.2d 640, 30 Ill.App.3d 499.

28. Iowa—C.J.S. cited in Kollman v. McGregor, 39 N.W.2d 302, 304, 240 Iowa 1331.

Mo.—Croskey v. Kroger Co., supra, n. 10.

Neb.—C.J.S. cited in Sinnett v. Hie Food Products, Inc., 174 N.W.2d 720, 722, 185 Neb. 221.

§ 99. Food, Clothing, Lodging, and Education

29. Ariz.—Jackson v. Clintsman, 372 P.2d 204, 91 Ariz. 314.

Kan.—Conboy v. Crofoot, 397 P.2d 326, 194 Kan. 46.

Wash.—Edwards v. Morrison-Knudsen Co., 379 P.2d 735.

Governmental regulations requiring clean clothing to be worn by employees handling certain food products does not change the rule.

U.S.—Markert v. Swift & Co., C.A.N.Y., 187 F.2d 104.

31. La.—Vidrine v. Evangeline Gravel Co., 6 La.App. 468.

Miss.—Hotel Markham, Inc. v. Stone, 59 So.2d 308, 214 Miss. 666.

35. Neb.—Sparks v. Cater Elec. Const. Co., 39 N.W.2d 274, 151 Neb. 675.

37. N.J.—Freedman v. New Jersey State Police, 343 A.2d 148, 135 N.J.Super. 297.

39. Cal.—Eichhorn v. De La Cantera, 255 P.2d 70, 117 C.A.2d 50.

Iowa—Wernet v. Jurgensen, 43 N.W.2d 194, 241 Iowa 833.

N.Y.—Neuman v. Namposa Realty Corp., 119 N.Y. S.2d 835.

Pa.—Jackson v. Troop, 82 Pa.Dist. & Co. 230, 53 Lanc.L.Rev. 71—Shreiner's v. Imperial Asphalt Corp. of Pa., 53 Lanc.L.Rev. 107—Jackson v. Troop, 82 Pa.Dist. & Co. 230, 53 Lanc.L.Rev. 71.

§ 100. Reimbursement of Expenditures

Library References

Master and Servant ⇐72½.

page 532

42. U.S.—Blankenship v. Rowntree, C.A.Okl., 238 F.2d 500.

Ill.—Bekins Moving & Storage Co. v. Morrell, 360 N.E.2d 503, 4 Ill.Dec. 567, 46 Ill.App.3d 1.

Depreciation of automobile attributable to business use recoverable.

Va.—Safway Steel Scaffolds of Va., Inc. v. Coulter, 94 S.E.2d 541, 198 Va. 469.

44. Losses suffered from property damage

Cal.—Earll v. McCoy, 253 P.2d 86, 116 C.A.2d 44.

Losses suffered from theft

Cal.—Machinists Automotive Trades Dist. Lodge No. 190 of Northern California v. Utility Trailer Sales Co., 190 Cal.Rptr. 98, 141 C.A.3d 80, app. dism. 104 S.Ct. 520, 464 U.S. 1005, 78 L.Ed.2d 705.

47. Del.—Clark v. Brooks, Super., 377 A.2d 365, affd., Sup., 391 A.2d 747.

Pa.—Shulman v. Savitz, 84 Pa.Dist. & Co. 141.

51. No right to sue employer for tax liability

N.C.—Tyson v. Carolina Tel. & Tel. Co., 320 S.E.2d 326, 70 N.C.App. 593.

page 533

55. Meaning of "traveling expenses"

Ill.—Knockaert v. Studebaker Corp., 228 N.E.2d 101, 84 Ill.App.2d 16.

56. Iowa—Janda v. Iowa Indus. Hydraulics, Inc., 326 N.W.2d 339.

§ 101. Interest

Library References

Master and Servant ⇐71.

59. Mass.—Roberts v. Eastland Food Products Co., 82 N.E.2d 798, 323 Mass. 466.

61. U.S.—Wilson v. Homestead Valve Mfg. Co., C.A. Pa., 217 F.2d 792, cert. den. 75 S.Ct. 606, 349 U.S. 916, 99 L.Ed. 1250.

La.—Irving v. E. Sondheimer Co., App., 126 So.2d 401.

On vacation pay

N.Y.—Knapp v. Atlantic Basin Iron Works, 116 N.Y. S.2d 456.

66. Ill.—Swanson v. Chester Johnson Elec. Co., 106 N.E.2d 157, 347 Ill.App. 182.

Failure in good faith to pay vacation pay to discharged employees prevents awarding interest.[66.5]

66.5. Tenn.—Textile Workers Union of America, Local No. 513 v. Brookside Mills, Inc., 326 S.W.2d 671, 205 Tenn. 394.

§ 102. Deductions, Forfeitures, and Fines

Library References

Master and Servant ⇐73.

Page 533

67. D.C.—Jones v. Marriott Corp., D.C., 609 F.Supp. 577.

Ga.—Stephens v. Parrino and Ware, 226 S.E.2d 809, 138 Ga.App. 634.

N.Y.—DeVita v. Rae McNally & Co., 256 N.Y.S.2d 9, 44 Misc.2d 906.

Ohio—Gillam v. Roadway Exp., Inc., 206 N.E.2d 34, 1 Ohio App.2d 548.

Tex.—NHA, Inc. v. Jones, Civ.App., 500 S.W.2d 940, err. ref. no rev. err.

Utah—Chatterley v. Omnico, Inc., 485 P.2d 667, 26 Utah 2d 88.

Statutory forfeiture provision

Tenn.—McCall v. Oldenburg, 382 S.W.2d 537, 53 Tenn. App. 300.

68. Ga.—Empire Box, Inc. v. Moore, 73 S.E.2d 63, 87 Ga.App. 57.

§ 103. —— Contractual Provisions for Deductions or Forfeitures

Library References

Modern Legal Forms Ch. 41, Labor Agreements.

page 534

69. N.J.—Rownd v. New York State Guernsey Breeders' Co-op., 87 N.Y.S.2d 272, 194 Misc. 701.

76. Wis.—Skibb v. J.I. Case Co., 39 N.W.2d 367, 255 Wis. 447.

The check-off of union dues under a contract is discussed in Labor Relations § 253.

82. Ill.—Grey v. A. Stein & Co., 108 N.E.2d 502, 348 Ill.App. 156.

La.—Poirier v. Alexander, App., 234 So.2d 79.

83. U.S.—Alexander & Alexander, Inc. v. Drayton, D.C.Pa., 378 F.Supp. 824, affd., C.A., 505 F.2d 729.

Fla.—McCann Plumbing Co. v. Plumbing Industry Program, Inc., App., 105 So.2d 26.

Ill.—Evaskus v. Neff, Kohlbusch & Bissell, Inc., 189 N.E.2d 542, 40 Ill.App.2d 416.

Mo.—McLaurin v. Frisella Moving & Storage Co., App., 355 S.W.2d 360.

W.Va.—Magnus v. Halltown Paper Board Co., 100 S.E.2d 201, 143 W.Va. 122.

Wis.—Borg-Warner Corp., Ingersoll Kalamazoo Division v. Ostertag, 118 N.W.2d 900, 18 Wis.2d 484.

page 535

87. Cal.—Computer Sciences Corp. v. Ferguson, App., 74 Cal.Rptr. 86.

La.—Dubois v. Hand, App., 342 So.2d 1207.

Deductions

N.Y.—Levine v. Golub Corp., 248 N.Y.S.2d 422, 21 A.D.2d 38, affd. 203 N.E.2d 914, 15 N.Y.2d 615, 255 N.Y.S.2d 660.

Or.—Sabin v. Willamette-Western Corp., 557 P.2d 1344, 276 Or. 1083.

Tex.—Gutierrez v. Hachar's Dept. Store, Civ.App., 484 S.W.2d 433, err. ref. no rev. err.

90. U.S.—Miller v. Associated Pension Trusts, Inc., C.A.Mo., 541 F.2d 726.

91. Ala.—Task Consultants, Inc. v. Finerty, Civ., 339 So.2d 87.

Construction of check-off provisions is discussed elsewhere in this work.[96-99]

96-99. See Labor Relations § 229.

§ 104. —— Deductions in Case of Nonperformance

1. **U.S.—C.J.S. cited in Hodgson v. Lakewood Broadcasting Service, Inc., D.C.Colo., 330 F.Supp. 670, 672.**

Conn.—Chase Brass & Copper Co. v. Chase Brass & Copper Workers Union Local 1565, 96 A.2d 209, 139 Conn. 591.

D.C.—Dornan v. Royal Motors, Inc., App., 271 A.2d 402.

La.—Krison v. Texas Industries, Inc., App., 253 So.2d 614.

Applicability of penalty statute

Tenn.—Garrison v. Lannom Mfg. Co., App., 402 S.W.2d 462, 55 Tenn.App. 419.

page 536

2. La.—Quality Materials of Tangipahoa, Inc. v. Labarama, Inc., App., 361 So.2d 1285, writ den., Sup., 363 So.2d 922, 923.

N.Y.—In re Brooklyn Citizen, 90 N.Y.S.2d 99, 1 Misc.2d 162.

3. La.—Meek v. River Parishes Co, Inc., App., 365 So.2d 878, writ den., Sup., 369 So.2d 141.

N.Y.—**C.J.S. quoted at length in** Fischoff v. Adels-Loeb, Inc., 83 N.Y.S.2d 548, 192 Misc. 221.

Tex.—Nutt v. Members Mut. Ins. Co., Civ.App., 474 S.W.2d 575, err. ref. no rev. err.

4. La.—King v American Rice Growers Exchange, App. 3 Cir., 417 So.2d 904, writ den., Sup., 421 So 2d 909.

N.Y.—Fischhoff v. Adels-Loeb, Inc., 83 N.Y.S.2d 548, 192 Misc. 221.

Employer may limit and restrict payment

La.—Basco v. State Through Dept. of Corrections, 335 So.2d 457, writ den., Sup., 338 So.2d 701.

11. Wis.—Skibb v. J.I. Case Co., 39 N.W.2d 367, 255 Wis. 447.

18. N.Y.—**C.J.S. cited in** DeVita v. Rae McNally & Co., 256 N.Y.S.2d 9, 12, 44 Misc.2d 906.

page 537

22. La.—Vanacor v. St. Amant, App., 379 So.2d 769.

§ 105. —— Negligence or Misconduct

26. Kan.—Bessman v. Bessman, 520 P.2d 1210, 214 Kan. 510—EVCO Distributing, Inc. v. Brandau, 626 P.2d 1192, 6 Kan.App.2d 53.

N Y.—Helmsley-Spear, Inc. v. Winter, 420 N.Y.S.2d 599, 101 Misc.2d 17.

27. U.S.—Grace v. E. J. Kozin Co., C.A.Ill., 538 F.2d 170—In re O.P.M. Leasing Services, Inc., Bkrtcy. N.Y., 21 B.R. 986.

Conn.—Breen v. Larson College, 75 A.2d 39, 137 Conn. 152.

Ill.—Boock v. Napier, 120 N.E.2d 244, 3 Ill.App.2d 19.

Pa.—Doyle McClurkin, 70 Dauph. 376, affd. 143 A.2d 398, 393 Pa. 444.

Utah—Rasbury v. Bainum, 387 P.2d 239, 15 Utah 2d 62.

Dishonesty

Minn.—Marsh v. Minneapolis Herald, Inc., 134 N.W.2d 18, 270 Minn. 443.

Wages payable weekly

Minn.—Marsh v. Minneapolis Herald, Inc., 134 N.W.2d 18, 270 Minn. 443.

28. Minn.—Marsh v. Minneapolis Herald, Inc., 134 N.W.2d 18, 270 Minn. 443.

N.Y.—Pictorial Films v. Salzburg, 106 N.Y.S.2d 626.

29. U.S.—Frederick Chusid & Co. v. Marshall Leeman & Co., D.C.N.Y., 326 F.Supp. 1043.

Ill.—Vendo Co. v. Stoner, 245 N.E.2d 263, 105 Ill. App.2d 261, app. after remand 300 N.E.2d 632, 13 Ill.App.3d 291, revd. on oth. grds. 321 N.E.2d 1, 58 Ill.2d 289, cert. den. 95 S.Ct. 1398, 420 U.S. 975, 43 L.Ed.2d 655.

Kan.—Bessman v. Bessman, 520 P.2d 1210, 214 Kan. 510.

Mass.—Swaney v. Clark-Wilcox Co., 120 N.E.2d 281, 331 Mass. 471.

Minn.—Marsh v. Minneapolis Herald, Inc., 134 N.W.2d 18, 270 Minn. 443.

N.Y.—Pictorial Films v. Salzburg, supra, n. 28—Harry R. Defler Corp. v. Kleeman, 243 N.Y.S.2d 930, 19 A.D.2d 396, app. dism. 197 N.E.2d 540, 13 N.Y.2d 1174, 248 N.Y.S 2d 53—Herman v. Branch Motor Exp. Co., 323 N.Y.S.2d 794, 67 Misc.2d 444.

Disloyalty not such as to bar recovery

Md.—Shipley v. Meadowbrook Club, Inc., 126 A.2d 288, 211 Md. 142.

Ill.—Lamphere v. Old Second Nat. Bank of Aurora, 350 N.E.2d 272, 39 Ill.App.3d 610.

35. Kan —Bessman v. Bessman, 520 P.2d 1210, 214 Kan. 510.

page 538

46. Disloyalty

N.J.—Joseph Toker, Inc. v. Cohen, 169 A.2d 838, 67 N.J.Super. 68.

49. Tenn.—Balderacchi v. Ruth, 256 S.W.2d 390, 36 Tenn.App. 421.

§ 106. —— Waiver by Employer of Right to Deductions or Forfeitures

54. Tex.—Kosberg v. Brown, Civ.App., 601 S.W.2d 414.

Offers of payment

U.S.—Berryhill v. Marshall Exploration, Inc., D.C.La., 420 F.Supp. 198, affd., C.A., 602 F.2d 990.

§ 108. Waiver by, or Estoppel of, Employee

page 539

75. Wash.—Heasley v. Riblet Tramway Co., 416 P.2d 331, 68 Wash.2d 927.

Waiver shown

Fla.—Arbogast v. Bryan, App., 393 So.2d 606.

77. U.S.—Martin v. Campanaro, C.C.A.N.Y., 156 F.2d 127, cert. den. 67 S.Ct. 112, 329 U.S. 759, 91 L.Ed. 654.

N.Y.—Crabtree v. Elizabeth Arden Sales Corp., 105 N.Y.S.2d 40, affd. 112 N.Y.S.2d 494, affd. 110 N.E.2d 551, 305 N.Y. 48.

Wis.—Davies v. J. D. Wilson Co., 85 N.W.2d 459, 471, 1 Wis.2d 443.

page 540

81. Tex.—Turners, Inc. v. Klaus, Civ.App., 341 S.W.2d 182, err. ref. no rev. err.—Allen v. Dempster Mill Mfg. Co., Civ.App., 402 S.W.2d 809, err. ref. no rev. err.

Wis.—**C.J.S. cited in** Davies v. J. D. Wilson Co., 85 N.W.2d 459, 471, 1 Wis.2d 443.

83. Pa.—Malta v. Houck, 89 Pa.Dist. & Co. 82.

Other conduct as effecting waiver of overtime pay has been considered by the courts.[98.5]

98.5. Overtime pay held not waived

Wash.—Heasley v. Riblet Tramway Co., 416 P.2d 331, 68 Wash.2d 927.

§ 109. Where Not Fixed by Contract

page 541

99. U.S.—Shipley v. Pittsburgh & L.E.R. Co., D.C. Pa., 83 F.Supp. 722—U.S. Controls Corp. v. Windle, C.A.Ind., 509 F.2d 909.

Colo.—Aerospace Realty Co. v. Tooth, Ltd., App., 539 P.2d 1314.

D.C.—Kilian v. Better Boxes, Inc., Mun.App., 121 A.2d 726.

Ga.—Parker & Co. v. Glenn, 83 S.E.2d 263, 90 Ga. App. 500.

Ky.—Floyd County Bd. of Ed. v. Slone, 307 S.W.2d 912.

Md.—Dialist Co. v. Pulford, 399 A.2d 1374, 42 Md. App. 173.